Studies and Recommendations

International Islamic Scholars Forum (1)

Sponsored by Bank Rakyat Malaysia

Held at the Sama–Sama Hotel

17 Muharram 1437H corresponding to 30 October 2015 CE

First Edition

1438H – 2017 CE

Keynote Address

Bank Rakyat's International Shariah Scholar Roundtable (iSHAR)

Sama-Sama Hotel, KLIA

30th and 31st October 2015

PREFACE

In the name of Allah, the Beneficent, the Merciful

All praise is for Allah, and peace and blessings be upon the Messenger of Allah and upon his family and companions and those who follow him.

By a hospitable invitation from the Chairman of the Board of Directors of Bank Rakyat Malaysia, the First Fiqh Symposium of Bank Rakyat was convened. The Symposium was attended by a number of scholars specialized in the jurisprudence of transactions and Islamic banking. Their invitations from the Chairman of Bank Rakyat's Board of Directors mentioned that the objectives of the Symposium include:

1. Deepening the discussion in order to issue unified resolutions on contemporary issues in Islamic banking.
2. Issuing recommendations that will serve as a reference for practitioners, researchers and stakeholders in the Islamic banking world.
3. Trying to coordinate between theoretical understanding of Shariah and the applications of theory in Islamic banking at an international level.
4. Implementing the social responsibility of the Bank towards the society by developing the knowledge base regarding the applications of Islamic banking.

The forum included knowledge-sharing sessions to which specialists were invited to discuss topics related to the development of Islamic banking. The researchers and scholars who participated in the forum include:

1. Shaykh Walīd ibn Hādī, Chairman of the Forum.
2. Shaykh Dr. Hussein Hamid Hassan.
3. Shaykh Dr. Abdul Sattār Abu Ghuddah.
4. Shaykh Niẓām ibn Muhammad al-Yaqūbī.
5. Shaykh Dr. Muhammad ʿAbdul Raḥīm Sultan al-ʿUlamāʾ.
6. Shaykh Dr. ʿAbdullah ibn Yūsuf al-Judayʿ.
7. Shaykh Dr. Yūsuf ibn ʿAbdullah al-Shubaylī.
8. Shaykh Dr. ʿIṣām al-ʿAnzī.

9. Shaykh Dr. Usayd al-Kīlānī.
10. Shaykh Dr. Ḥāmid al-Mīrah.
11. Shaykh Dr. ʿAbdul-Sattār al-Qaṭṭān.
12. Shaykh Dr. Musa Mustafā al-Quḍāh.
13. Shaykh Datuk Dr. Muhammad Daud Bakar.
14. Shaykh Dr. Aznan Hasan.
15. Shaykh Dr. Muhammad Ikramul-Deen.
16. Shaykh Datuk Tamyiz Abdul Wahid.
17. Shaykh Datuk Abu Hasan Deen.
18. Shaykh Dr. Azman Muhammad Noor.
19. Shaykh Burhanuddin Lokman.
20. Shaykh Dr. Ashraf Muhammad Hashim.
21. Shaykh Dr. Asmadi Muhammad Naeem.
22. Shaykh Wan Rumaizi Wan Hussein.
23. Shaykh Abdullah Jalil.
24. Shaykh Muhammad Yunus Abdul Aziz.
25. Shaykhah Dr Salwani Razali.
26. Shaykh Muhammad Zumairi Abdul Razzaq.

The Forum was held as follows:

16 Muharram, 1437 H, corresponding to 30-31 October, 2015, starting at 8:30 a.m.

At the Sama Sama Hotel, Kuala Lumpur, Malaysia, (next to Kuala Lumpur International Airport).

The theme of the Forum was: Coordination of Sharīʿah Opinions on Contemporary Financial Transactions.

The Chairman of the Forum prepared ten topics for discussion. He explained the title of each topic, the issues contained therein, and summarized the opinions of scholars and what they based them on. The General Secretariat of the symposium enlisted one of the participating scholars [to deliver a research paper] on each area of discussion. After extensive discussions among the eminent scholars, the symposium adopted resolutions [on certain issues] while some resolutions were deferred.

The Symposium Topics

1. Combination of a loan and a sale
2. Tier 1 *ṣukūk*
3. Debt rollover (*qalb al-dayn*)
4. The *fiqh* classification of interest-based loans
5. Islamic banks' management of funds donated for waqf (charitable endowments) [the researcher did not submit the research]
6. Practical applications of the distinction between ownership and an exclusive non-ownership right (*ikhtiṣāṣ*) (waiver of the right to subscribe to a security offering)
7. *Tawarruq* in Bursa Suq as-Sila Malaysia
8. Banking applications of the maxim "What is forbidden because it will lead to the unlawful is permitted in case of need."
9. Zakat of income-generating property (*mustaghallāt*) and its applications in Islamic financial market products.
10. Promise and bilateral promise in *ṣukūk*

Bank Rakyat is pleased to present to researchers and seekers of knowledge the research papers presented by the Chairman of the Forum and the eminent scholars, in addition to the resolutions issued at the Forum.

On behalf of the eminent scholars, we extend our sincere thanks to Bank Rakyat for sponsoring the Forum. We thank the organizers and, in particular, Shaykh Muhammad Zumairi Bin Abdul Razzaq, the Audit Manager of the Bank, for his efforts to ensure the success of the Forum. The appreciation is also extended to all those who worked with him. We ask Allah to accept from all of us.

Chairman of the Forum
Walid ibn Hadi
Doha
8 Safar, 1438H

(1)

THE COMBINATION OF A LOAN AND A SALE

Prepared by

His Eminence Shaykh Walīd ibn Hādī

His Eminence Dr. Hussein Hamid Hassan

The First Topic

The Combination of a Loan and a Sale

Chairman of the Forum: Walīd ibn Hādī

It has been authentically reported that the Prophet (ρ) said: "It is not permissible [to combine] a loan and a sale." It was narrated by the Five (Abū Dāwūd, Tirmidhī, Nasāʾī, Ibn Mājah and Aḥmad) and authenticated by Tirmidhī, Ibn Khuzaymah and Ḥākim. The word *salaf* means loan, and *bayʿ* (sale) includes *ijārah* (lease). If this fee is stipulated in the actual loan contract, it is not permissible by consensus. Qarāfī said:

> The Ummah unanimously agreed on the permissibility of sale and loan contracts independent of one another and their impermissibility when combined. That is because [the combination] is considered an expedient to usury.

Ḥaṭṭāb said, "You should know that there is no difference of opinion that an explicit [combination of] sale and loan contracts is prohibited."

If [the combination] is not stipulated and the rental is commensurate with the market price, it is permissible. However, if it is more than the market price, it is not permissible according to the majority of Islamic scholars, based on the *ḥadīth* and because it incurs the suspicion of being a loan contract that accrues benefit [for the lender]. The Shāfiʿīs approved it based on their methodology regarding legal stratagems and their consideration of contracts based on their outer forms. Thus, every contract that is forbidden due to a stipulated condition is not forbidden if the contract is devoid of the stipulation. Based on this, they consider contracts such *bayʿ al-ʿīnah* (sale and buy-back) and the marriage contract that facilitates the return of a thrice-divorced wife to her husband, and other contracts permissible. This is contrary to what Ibn Qayyim and some contemporary *fiqh* scholars understood [their methodology to be, claiming] they approve contracts based on their outer forms not on the intent [of the contracting parties]. Ibn Ḥajar said in *al-Tuḥfah*:

> It is not permissible to borrow cash or other things if it comes with the condition that unclipped [coins] be returned for clipped ones or that more be repaid than the amount borrowed, or that the superior be returned for the inferior, or other stipulations that accrue benefit to the lender, such as a stipulation that settlement be made in another country or that it be given as a pledge for another debt. If [such stipulation] is made, the contract becomes invalid, based on the *ḥadīth*: "Every loan of accrued benefit [to the lender] amounts to usury (*ribā*)."

> The weakness of the *ḥadīth* is strengthened by the corroboration of its meaning by narrations from a number of Companions. Included in this is granting a loan to the person who rented [the lender's] property—for example—for more than its market value because of the loan. If this happens by stipulation, it is unanimously considered impermissible [by *fiqh* scholars]. If it is not [by stipulation], our view is that it is disliked; however, it is forbidden in the opinion of many *fiqh* scholars, as stated by Subkī. Sharwānī said: "The statement 'giving it as pledge for another debt' means the borrower pledges the borrowed item for another debt owed to the lender." [The author] of *al-Minhāj*, and Maḥallī in his commentary on it, said: "It is not permissible to lend money or anything else with the stipulation to return an unbroken item for a broken one or to return more than what was given." Qalyūbī said: the statement: "It is not permissible…" means that it is not permissible to say this, and it is forbidden by consensus and invalidates [the contract]. As for having that intention, it is disliked, even if the counterparty is known for returning more than what was given. Many scholars said that it is forbidden.

Ḥāfiẓ [Ibn Ḥajar] said in *Fatḥ al-Bārī*:

> What counts [for the ruling] is the presence or absence of the stipulation in the contract itself. If the two [contracting parties] agree to this stipulation in the contract itself, it is invalid. [If they agree] prior to it but the contract is concluded without the stipulation, it is valid. Obviously, scrupulousness [would dictate a different behaviour].

Shāṭibī said:

> It is not correct to say that whoever approves of legal stratagems in some juristic issues acknowledges that he has violated thereby the intention of the Lawgiver. Rather, he permitted it on the basis of his investigation of [the Lawgiver's] intention and [his belief that] the issue is of the category in which legal stratagems are permissible and in line with the Lawgiver's intention. That is because acting with the knowledge or belief that one is clearly conflicting with the will of the Lawgiver is not expected from common Muslims, let alone the imams of guidance and leading scholars of Islam. Likewise, those who disapproved of them did so on the basis that they are contrary to the intention of the Lawgiver and to the realization of the benefits placed in Sharīʿah rulings.

Shāṭibī then mentioned the evidence cited by the Shāfiʿīs regarding the permissibility of a marriage concluded to facilitate the legal return of a divorced wife to her former husband, and also of deferred sale contracts. He also explained their approach in dealing with those issues due to the scarcity of Ḥanafī and Shāfiʿī books in the western Muslim lands at that time. He mentioned that becoming accustomed to a particular school's method of arguing from evidence may make a young scholar averse to other schools of *fiqh* without understanding their methodology. This may give rise to a poor opinion of great scholars whose reputation and leadership in Islam are unanimously

recognized by the Muslims [and are known for] their expertise regarding the objectives of the Lawgiver and understanding of His purposes.

This issue has many forms:

In the category of *ijārah* (leasing), it has various forms:

One of these forms is that some Islamic banks lend to the clients without interest but require them to pledge jewellery to be kept in the banks' safe deposit boxes, and they charge a fee for the service.

Another form is lending with the requirement to pledge money in a current account for the benefit of the bank.

Another form is the extension of the lease contract with an increase in the rental due to a delay in payment by the debtor.

In the category of [bank] cards, it has various forms:

One of these forms is a fee for issuing the credit card.

Another form is high recurring credit card fees. The lack of correlation between the loan and the rental may be indicated by the fact that the cardholder may pay high fees without using the card to borrow at all. This indicates that the rentals are charged for services provided by the card, not for the lending.

Another form is revolving cards based on service fees (*ijārah*); the customer pays a monthly fee for the work done by the bank such as accounting entries and others. The claim of actual cost in these cards is a plain lie because the cards are a profit resource. I have discovered in some Islamic banks that the "actual cost" of these cards is twenty million riyals!

Another form is fees for cash withdrawal on a credit card, whether a flat fee or a percentage of the amount; it is consideration for the effort involved: the costs of card manufacturing, communications, electricity, personnel costs, rental of ATM sites, printing and mail.

In the category of facilities, it has various forms:

One of these forms is charging a fee for a covered letter of guarantee, which is considered the customer's authorization of the bank to pay.

Another form is the rental charged on an uncovered letter of guarantee, which is considered to be not for the guarantee but for the effort involved.

Another form is the rental charged on a current letter of credit or covered letter of credit.

Another form is the fee for settling a bill of exchange by fee-based agency. The recipient of the bill of exchange entrusts the bank to collect his debt from the issuer of the bill, for which he has to pay it a fee. He then asks the bank for a loan equivalent to the amount of the bill, and he then authorizes the bank to collect the loan from the issuer of the bill. This implies that there are two independent transactions: the first: agency for a fee, and the second: taking a loan from the bank.

In the category of sale contracts, it has various forms:

One of these forms is a profit increase in debt rollover (*qalb al-dayn*) in revolving *murābaḥah*.

Another form is postponement of debt without increase provided the debtor deposits [money] as a pledge that the creditor can use.

Another form is an overdraft.

Another form is the postponement of an instalment or two in exchange for a commission for the service of recording it.

Another form is an advance withdrawal of salary with a fee charged for the service of recording it.

Another form is *bayʿ al-ʿīnah* (buyback sale) and its opposite.

Another form is *bayʿ al-wafāʾ* (fulfilment sale). If it is with stipulation it has been approved by the Shāfiʿīs, who dubbed it *bayʿ al-ʿuhdah* (sale with pledge).

Another form is the permissibility of debt rollover if it is without coercion.

Another form is the gift offered by the debtor; if it is after the debt settlement, it is either customary or not. If it is customary, it is prohibited by the Mālikīs, based on the legal maxim: "What is customarily expected is the same as a contractual stipulation." It is not forbidden by others because the Prophet (peace be upon him) would always pay more than what he borrowed, so it is permissible if it is not customary because it is benevolence in debt settlement. If [the gift] occurs before the repayment, it is forbidden by the Mālikīs and the Ḥanbalīs on the suspicion of being a loan with accrued benefit, but it is permissible in the opinion of the Ḥanafīs and the Shāfiʿīs. Based on this opinion, debtors pay an amount before the deadline as a stratagem so that the creditor will allow them to delay the rest.

Another form is offering of gifts for current accounts. It is forbidden if it is a stipulated condition in the contract for opening the account or is announced by the bank before the opening of the account and the announcement is binding. If the announcement is not binding or the bank usually

grants such awards without obligation, it is still prohibited by the majority of scholars if it is awarded before the debt settlement. In the opinion of the Ḥanafīs and Shāfiʿīs, it is permissible even before the debt settlement. Some banks give gifts as a marketing strategy irrespective of the type of account. These gifts are permissible even for current accounts. Some banks observe distinctions between one account and the other in giving these awards for current accounts, giving them only to the owners of large accounts. This is a subject of the same controversy as the previous issue.

No doubt, it would be more scrupulous to avoid these transactions, as Ibn Ḥajar observed. However, scrupulousness differs from one age to another. The more appropriate in our time is to reject what is certainly *ḥarām* (prohibited). As for the controversial, no one is free from it. ʿAbādī's expansive position was quoted in *al-Manthūr*: "I was asked about doubtful matters in this time. I said: This is not the time for doubtful matters; avoid what you know is certainly forbidden."

The *Ḥadīth* of the Prophet Prohibiting a Sale and a Loan

(Combining Sale and Loan Contracts)

Dr. Hussein Hamid Hassan

What Is Meant by Prohibiting *Bayʿ* (Sale) and *Salaf* (Loan)

1. *Bayʿ* refers to all transactions involving an exchange of counter-values such as a lease (*ijārah*) of property, hiring of human services (also *ijārah*), *salam* (sale with advance payment and deferred delivery), *istiṣnāʿ* (manufacturing contract), *nikāḥ* (marriage) and other contracts involving an exchange of counter-values. The term *bayʿ* does not include benevolent contracts (*tabarruʿāt*), security contracts or partnerships, such as *muḍārabah* and *mushārakah*, or agency for investment, based on the opinion that they are not exchange contracts.
2. *Salaf* refers to the loan contract, and likewise to any benefit accruing to the lender and implicitly included in an exchange contract so that the benefit is hidden or implicitly presumed as explained below:

   The following is stated in the draft law of Egyptian civil transactions in accordance with the provisions of the Islamic Sharīʿah, which I was honored to participate in drafting along with the late Dr. Abd al-Munʿim Faraj Ṣaddah:

   > Article 235: (1) Any agreement to charge interest for the use of cash or for a delay in its use shall be null and void. (2) Any commission or benefit of any kind shall be deemed to be hidden interest if such commission or benefit is proved not to be in exchange for a real service rendered by the creditor and not a lawful expense.

3. Combination of sale and loan contracts: what is meant by the prohibition or impermissibility of sale and loan contracts mentioned in the *ḥadīth* is the combination of the two in one contract. This means that both are included in a single offer-and-acceptance, such that one of them is a stated or explicit condition for the other. This is because it is unanimously agreed by *fiqh* scholars that the *ḥadīth* "prohibiting a sale and loan" or [that states:] "a sale and loan are not permitted," cannot be taken literally. This is because a sale contract on its own is permissible, a loan contract on its own is permissible, and an unconditional combination of the two is permissible. Thus, the prohibition applies to the stipulated combination of the two. As the general principle concerning contracts and dispositions is permissibility and validity, the

prohibition has to be limited to the subject of the text. Some scholars have explicitly stated that reaching agreement to conduct a sale with a loan before the contract makes the contract null and void even if the condition of combining the loan with the sale is not included in the terms of the contract, as will be mentioned.

Second: Formats of Combining a Sale and a Loan

Fiqh scholars have mentioned many forms of stipulated combination of sale and loan. They are all united by the stipulation of a loan in the sale contract, i.e., any exchange contract. This is irrespective of whether the stipulation of the loan contract comes from the seller or the buyer or the lessor or the lessee. Abu ʿUmar ibn ʿAbd al-Barr said:

> Mālik said: The explanation for it is that a man says to another man: "I hereby purchase your goods for such-and-such amount on the condition that you lend me such-and-such amount." If they concluded their sale contract on this [condition], it is not permissible.[1]

This is Mālik's view. He disagreed with the majority, comprised of the Shāfiʿīs, Ḥanafīs and other scholars, who ruled that the sale contract is null and void even if the stipulation is retracted by the one who suggested it, as is to be explained. [Ibn ʿAbd al-Barr] also said:

> There is no difference in opinion between the *fiqh* scholars of the Hijaz and Iraq that if the sale contract is concluded on the basis that the buyer shall grant the seller a loan along with the stated price of the commodity, or that the seller shall grant the buyer a loan along with the sold commodity, and the contract is concluded between them on that basis, the sale contract is invalid.[2]

Sarakhsī said in *al-Mabsūt*:

> If he buys it on the condition that [the seller] grant him a loan, give him a gift or charity, or sell to him at such and such a price, then the sale contract in all of this is null and void, based on the Prophet's prohibition of a sale [combined] with a loan.[3]

Ibn Qudāmah said:

> If he sold it on the condition that he should grant him a loan, or the purchaser stipulates that condition on [the seller], it is forbidden and the sale contract is invalid. This is the view of

[1] Ibn ʿAbd al-Barr, *Al-Istidhkār* (Dār al-Kutub al-ʿIlmiyyah, Beirut), 6:432.
[2] Ibid.
[3] Sarakhsī, *Al-Mabsūṭ* (Dār al-Maʿrifah, Beirut), 13:16.

> Mālik and Shāfiʿī. I am not aware of any difference in opinion on this, only that Mālik said: if the condition of granting the loan is dropped by its stipulator, the contract is valid.…[It is forbidden and invalid] because he stipulated a contract in an invalid contract, like two sales in one sale contract, and because if he stipulates granting a loan as a condition, the price is increased as result. The increase in the price becomes a consideration and profit for the loan. This is *ribā*, which is forbidden and renders the contract invalid, just as if it were stated.[4]

Based on these quotations, we know that there is consensus of opinion on the prohibition of combining sale and loan contracts. The same goes for other exchange contracts when a loan contract is stipulated with them. The same also goes for all types of benefit that accrue to the stipulator. Both the sale and loan contracts are forbidden, null and void (*bāṭil*), or voidable (*fāsid*), even if the issuer of the condition drops it and does not collect the loan. This is the opinion of the majority of *fiqh* scholars: the Shāfiʿīs, Ḥanafīs and Ḥanbalīs, as opposed to the Mālikīs, who approved the sale contract if the stipulator of the loan contract drops the loan condition. This prohibition includes the stipulation of the loan by either the seller or the buyer. Some jurists have observed that if the loan stipulator is the seller, he usually reduces the price as consideration for the loan received from the buyer, but if the loan stipulator is the buyer, the seller usually increases the price as consideration for the loan received from the seller. In each case, the increase or decrease in the price is consideration for the benefit of the loan and falls under the prohibition of joining a loan with a sale, and this benefit is considered to be hidden interest.

Third: The Effective Cause (*ʿIllah*) for the Prohibition of Combining a Sale with a Loan

Fiqh scholars differed regarding the *ratio legis* (*ʿillah*) for the prohibition of combining a sale and a loan as follows:

1. The *ratio legis* (*ʿillah*) is that it is a "pretext for usury". Qarāfī said: "The consensus of the Muslim *ummah* is that sale and loan contracts are permissible independent of one another and are prohibited when combined due to it being a pretext for usury."
2. The *ratio legis* (*ʿillah*) is ignorance about the price. Ibn ʿAbd al-Barr said:

> There is no difference in opinion between the *fiqh* scholars of Hijaz and Iraq that if the sale contract is concluded on the basis that the buyer shall grant the seller a loan along with the stated price of the commodity, or the seller shall grant the buyer a loan along with his sold commodity, and the contract is concluded between them on that basis, the sale contract is invalid. That is because, when the loan is included, the price becomes

[4] Ibn Qudāmah, *Al-Mughnī*, 4:177.

> unknown, whereas the unanimously agreed-upon Sunnah is that the price must be known. Do you not see that if he buys a commodity from him for ten on the condition that he grants him a loan of five or ten, the price is no longer considered to be ten because of the benefit accrued from the loan, which is not known. Thus, the entire price becomes unknown.[5]

It is stated by Māwardī in *al-Ḥāwī al-Kabīr*:

> Shāfiʿī said that the Prophet (ρ) prohibited a sale [combined] with a loan. This is because it is part of the Sunnah that the price and the object of sale must be known. Therefore, if I buy a house from you for one hundred with the stipulation that I grant you a loan of one hundred, I have neither bought it for one hundred nor for two hundred. The hundred that is a loan is like a borrowed item of undetermined benefit; therefore, the price becomes unknown….The apparent meaning of this *ḥadīth* is not meant here because a sale contract by itself is permissible, a loan contract by itself is permissible, and their unconditional combination is also permissible. Rather, what is meant by the prohibition is any sale contract in which a loan contract is made a condition. For instance, when one says: "I hereby sell this slave of mine to you for one hundred on the condition that you lend me one hundred," the sale contract is invalid and the loan is invalid for a number of reasons. These include its prohibition by the Prophet (ρ), his prohibition of a sale with a condition, his prohibition of a loan that accrues benefit [for the lender] and what Shāfiʿī mentioned, that it causes the price to become unknown. This is because if the seller stipulates a loan contract for himself, he becomes a seller of his commodity at the said price along with the benefit of the stipulated loan. As the condition is not binding, its benefit drops from the price. As the benefit is unknown, if it is dropped from the price it leads to an invalidating ignorance as ignorance about the price invalidates the contract. For the same reason, combining a purchase with a loan is not permissible. It would occur by saying: "I have bought this slave of yours for one hundred on the condition that you grant me a loan." That is an invalid condition and an invalid loan contract because of the explanation we have given. Likewise, it is not permissible to conclude a lease on the condition of granting a loan.[6]

The following conclusions can be drawn from this quotation from *al-Ḥāwī*:

a. Both the sale and the loan contracts independent of one another are permissible. They are not covered by the prohibition of the [combined] sale and loan.
b. If the sale and loan contracts are jointly concluded without one being a condition for the other, neither is covered by the prohibition. An example would be when the seller says to the buyer: "I have sold you my house for such-and-such amount, and I grant you a loan of one thousand," and the buyer accepts both [offers] together. Likewise, if the sale contract is concluded and then the loan contract, or the loan contract is concluded and

[5] Ibn ʿAbd al-Barr, *Al-Istidhkār*, (Dār al-Kutub al-ʿIlmiyyah, Beirut), 6:432.
[6] Māwardī, *Al-Ḥāwī al-Kabīr*, (Dār al-Kutub al-ʿIlmiyyah, Beirut), 5:351.

then the sale contract; none of these is covered by the prohibition. The prohibition is only limited to their combination in such a manner that one is explicitly a condition for the other; for example, the lessor saying to the lessee, "I have rented my house to you for one hundred on the condition that you lend me one hundred." This is called an explicit condition. Even collusion—which is to agree with one another before a sale or lease contract that the loan will be the condition for concluding the sale or lease—is not covered by the prohibition if the contract is concluded without mention of the condition. As for intentions and purposes, it is left to Almighty Allah. This is in accord with Shāfiʿī's approach of considering the outer form as opposed to the approach of those who investigate forbidden intent and invalidate the contract due to it, even if it is undeclared, if that intent is proven by contextual clues, societal custom, personal habit, or what people usually intend, even if it is not proven to be the intent of the two parties. The latter is the approach of the Mālikīs and Ḥanbalīs in general.

Some have narrated that, according to the Shāfiʿīs, the intention by itself without the stipulated combination makes the transaction legally disliked but does not invalidate the contract. Many scholars believe that this intention is forbidden. They are those who rely in their ruling on the forbidden intention and the illicit motive, which invalidate the contract, based on circumstantial evidence and what is frequently intended among people, which they consider to be intended by the contracting parties, even if that is not what they actually intended. (See our book *Al-Madkhal li Dirāsat al-Fiqh al-Islāmī.*)

c. Both the sale and the loan are null and void when the combination is stipulated.

d. The *ratio legis* (*ʿillah*) for the prohibition in the opinion of the Shāfiʿīs is not just ignorance about the consideration, i.e., the price or the rental; rather, there are other legal causes for invalidity. These include that it is a sale with a condition, which has been prohibited by the Prophet (peace be upon him), and that it is a loan which accrues benefit [for the lender], which has been prohibited by the Prophet (peace be upon him). There many causes for the invalidity of a sale combined with a stipulated loan, each of which is sufficient to be the legal cause for the prohibition.

3. [The *ratio legis* (*ʿillah*) is that] the loan contract has departed from its essential nature. Abu Walīd Bājī said:

> The scholars unanimously agreed that it is forbidden to [combine a sale and a loan]. The conceptual basis for this is that the loan contract is not an exchange contract; rather, it is a contract of charity and magnanimity; therefore, it is not valid to be done for compensation. If it is joined [to an exchange contract], it of necessity becomes an exchange contract by having a share of the compensation. It thereby loses its essential nature and becomes invalid, along with the exchange contract to which it has been joined.[7]

4. [The *ratio legis* (ʿ*illah*) is that] the juristic rulings of a sale and a loan are contradictory. Abu Walīd Bājī said:

> Another basis for the rationale of prohibiting the combination of a sale and a loan is that if the loan has no stipulated payment date then it is not binding on the lender; and any contract whose enforceability is not binding on the lender is also not binding upon the lender if it has no stipulated payment date. It is not permissible to combine a sale contract or other binding contracts, such as *ijārah* (lease) and marriage, with a non-binding contract due to the incompatibility of their juristic rulings.[8]

5. The legal cause for the prohibition of combining a sale and a loan is that they are two contracts combined in one contract. Also, if the loan is stipulated, the price of the sale becomes higher due to the loan, and that is *ribā*, which is forbidden. Ibn Qudāmah said:

> If he sold it on the condition that he should grant him a loan, or the purchaser stipulates that condition on [the seller], it is forbidden and the sale contract is invalid. This is the view of Mālik and Shāfiʿī. I am not aware of any difference in opinion on this, only that Mālik said: if the condition of granting the loan is dropped by its stipulator, the contract is valid.…[It is forbidden and invalid] because he stipulated a contract in an invalid contract like two sales in one sale contract, and because if he stipulates granting a loan as a condition, the price increases as result. The increase in the price becomes a consideration and profit for the loan. This is *ribā*, which is forbidden and renders the contract invalid, just as if it were stated in the contract. Also, it is a void sale contract which cannot be rectified to become a valid contract, like someone who exchanges one dirham for two and then forgoes one of them.[9]

It is understood from Ibn Qudāmah's statement that the legal cause for the prohibition of a stipulated combination of a sale and stipulated loan contract is:

a. It is a combination of two sales in one sale contract, or two transactions in one transaction.

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[7] Bājī, *Al-Muntaqā: Sharḥ al-Muwaṭṭaʾ*, (Maṭbaʿat al-Saʿādah 1332 AH), 5:29.
[8] Ibid.
[9] Ibn Qudāmah, *Al-Mughnī*, 4:177.

b. It is a hidden or implicit usurious increase imposed in such a way that any proof to the contrary is unacceptable. That is, there is an indication that usury was intended by the combination; it is thus equivalent to stating this intention. This means that the mere combination of sale and loan contracts indicates a pretext; it can be presumed that the price increased and that this increase is compensation for the lending. This shows that it is irrefutable evidence that will not accept proof to the contrary. It is similar to the rest of the pretexts and indicators of forbidden intent, such as the explicit proposal of marriage to a widow during her waiting period, conclusion of a marriage contact while in *ihrām* [for hajj or *ʿumrah*], and meeting in seclusion with a marriageable woman. Therefore, a stipulated combination of a sale and loan in one contract implies that the price has been increased when it is the buyer who stipulated the loan contract.

   For instance if the buyer said to the seller, "Sell me this house of yours for one thousand on the condition that you grant me a loan of one thousand," it is assumed in this case that one thousand is not the market price. The market price is just nine hundred, and the one hundred increase in price is compensation for the one thousand granted to the buyer by the seller as a loan. On the other hand, if it is the seller who stipulates the loan—for instance, if he says to the buyer, "I have sold my house to you for one thousand on the condition that you grant me a loan of one thousand,"—it is assumed here that the market value of the house is fifteen hundred. The seller only gave the buyer a discount of five hundred as compensation for the loan granted by the buyer to the seller.

c. A sale contract with a stipulation of a loan is a void contract; therefore, it cannot become valid by dropping the stipulation of the loan contract. This is contrary to Imām Mālik in the most well-known of his two opinions, that the contract becomes valid by dropping the stipulation of the loan.

   Ibn Rushd is of the view that the prohibition of combining sale and loan contracts may be purely religious and cannot be rationalized. He said:

> The *fiqh* scholars are unanimously agreed that [the combination of a sale and loan] is one of the void sale contracts, but they differed if the condition was dropped before receipt [of the loan]. It was prohibited by Abu Ḥanīfah, Shāfiʿī and other *fiqh* scholars. It was approved by Mālik and the scholars of his school except Muḥammad ibn ʿAbd al-Ḥakam. A similar opinion to that of the majority is also narrated from Imam Mālik. The argument of the majority is that the prohibition implies the invalidity of what has

> been prohibited, coupled with the fact that the price of the subject matter becomes unknown by being combined with a loan contract. According to Imam Mālik, there is a difference between combining a sale and a loan in which the stipulation of the loan is dropped, making the contract valid, and selling at a price fixed in wine. The latter would be annulled by the consensus of *fiqh* scholars, including Imam Mālik, even if the stipulation of wine is dropped. [The difference is that] the prohibition in the combination of a sale and loan is not due to something that is forbidden in its essence. The loan contract is permissible; the prohibition only occurred because of the combination [of the two contracts]. Similarly, the sale contract is also permissible on its own, but it was disapproved because of the condition attached to it. As for the other (stipulating wine with the price), the sale contract is refused because something whose substance is forbidden is attached to it, not that it is forbidden by simply stipulating a condition….
>
> The genesis of the [controversy] is whether a sale contract that has become null and void as a result of the attached condition can be rectified if the condition is withdrawn; or is it like the invalidation of a legitimate sale contract due to its linkage to something essentially forbidden, which cannot be rectified? This also calls attention to another fundamental question: does this invalidity have a rationally discernible basis or not?
>
> If we say it is not rationally discernible, the invalidity would not be rectified by mere withdrawal of the condition. If, however, we say it is rationally discernible, the invalidity would be rectified by the withdrawal of the condition. According to Imam Mālik, it is rationally discernible whereas, according to the majority of *fiqh* scholars, it is not. According to them, most of the invalidity found in contracts involving *ribā* and *gharar* is not rationally discernible; therefore, such contracts never come into effect, even if the *ribā* is withdrawn and the *gharar* is removed after the sale.[10]

In summary, *fiqh* scholars differed regarding the legal cause for the prohibition of a sale contract in which a loan is stipulated. Some believe the cause to be that it is a pretext for *ribā*; some believe it is ignorance about the price; a third group believes it is due to the prohibition of two contracts in one contact. A fourth group believes that the price of the sale contract usually includes an increase that is the benefit that accrues to the loan, i.e. hidden benefit. There is no objection to having several legal causes for one issue, as, for example, the invalidators of ablution and [the penalty of] execution. [The latter] has a number of legal causes including retaliation for murder, adultery and apostasy.

Fourth: Conditions for Prohibition of Contracts Involving Combination of a Sale and a Loan

It can be inferred from the aggregate of juristic opinions that there are conditions for prohibiting the combination of sale and loan contracts.

[10] Ibn Rushd, *Bidāyat al-Mujtahid*, (Dār al-Ḥadīth, Cairo, 1423H), 3:180.

1. That the loan contract is stipulated as a condition in the sale contract as mentioned before. Both the sale and the loan contract if independent of the other are permissible. It is also permissible if they are combined without stipulation as mentioned earlier.
2. That the price in the sale in which the loan is stipulated or the rental in the lease contract in which the loan is stipulated is higher than the par price or market value.
3. That the increase in the price or the rental is due to the loan; i.e., there is a causal relationship between the increase in the price or rental and the loan; i.e. without the loan there would have been no increase in the rental.

The first condition is that the loan contract should be an explicit condition in the sale contract; this has been stated by all *fiqh* scholars. If the loan contract is not a condition in the sale contract itself, then the sale contract is not forbidden or invalidated. This is in cases such as when one precedes the other or when both are unconditionally combined; for example: if the seller said to the buyer: I hereby sell you this house of mine for one hundred and grant you an unconditional loan of one hundred, and the buyer accepts the two offers together. Ḥāfiẓ Ibn Ḥajar said:

> What counts [for the ruling] is the presence or absence of the stipulation in the contract itself. If the two [contracting parties] agree to this stipulation in the contract itself, it is invalid. [If they agree] prior to it but the contract is concluded without the stipulation, it is valid. Obviously, scrupulousness [would dictate a different behaviour].[11]

Maḥallī said:

> It is not permissible to grant a loan with a stipulation of benefit such as payment of more than what was given. Qalyūbī said: the statement: "It is not permissible…" means that it is not permissible to say it. It is forbidden by consensus and invalidates [the contract]. As for having that intention, it is disliked, even if the counterparty is known for returning more than what was given. Many scholars said that it is forbidden and that the combination of a sale with a loan by stipulation is of this kind, because the sale contains a hidden increase as a result of the loan contract even if it is not stated in the sale. Shāfiʿīs are of the opinion that the sale contract is not forbidden nor invalidated, but it is disliked (*makrūh*). It means that the intention of this hidden increase in the sale contract when it is combined with the loan contract without being explicitly stipulated in the sale contract does not make the sale contract forbidden or invalidate it; it only makes it disliked (*makrūh*). That is the Shāfiʿī view. However, [according to other *fiqh* schools,] this intention, which is known by clues and by being frequently intended by people, makes a sale forbidden and void, even if it is

[11] Ibn Ḥajar, *Fatḥ al-Bārī*,

> not explicitly stipulated in the sale contract but is stipulated or agreed by the contracting parties before the contract and without the condition being mentioned [in it].[12]

We choose the opinion of Shāfiʿī and those who also adopt the theory of manifest intention. We believe that explicit stipulation of a loan contract in a sale contract is the cause of prohibition and invalidation of the contract. However, if the sale contract is devoid of the stipulation and the loan contract is concluded independently before, after or with it, but without being stipulated as a condition, the contract is considered valid, but the intention is disliked; i.e., the intention to increase [the price of] the sale due to the loan. This means that the Shāfiʿī judgment that the contract is disliked and the judgment of others that it is prohibited is the religious judgment, not the legal judgement in a court. According to [both groups,] the legal judgement in a court would only be established by the stipulation of the loan in the sale contract.

Ibn Ḥajar stated in *al-Tuhfah* that it is not permissible to grant a loan on the condition that repayment be a larger amount or of better quality. Then he said:

> Similar to that is any condition accruing benefit to the lender such as a stipulation of repayment in another country, or of pledging the loan for another debt owed to the lender by the borrower. If this is done, the contract is null and void because of the *ḥadīth*: "Any loan that accrues benefit [to the lender] is *ribā*."…This includes granting a loan to the one who rents [the lender's] property for more than its market value due to the loan. That is if it is stipulated as a condition as it would then be forbidden by the consensus of *fiqh* scholars; if not [stipulated as a condition], it is disliked in our opinion, and it is forbidden in the opinion of many *fiqh* scholars. This was stated by Subkī.[13]

Also included in this is granting a loan to the one who buys the lender's house for more than its value or granting a loan to the one who sells his house to the lender for less than its value, if it is stipulated as a condition. That is because the difference in value in both cases is a hidden benefit which is *ribā*. If it is not stipulated as a condition, it is the subject of debate between Shāfiʿī, who considered it disliked, and others who considered it forbidden.

The following may be inferred from Ibn Ḥajar's statement:

1. The condition for the prohibition and invalidity of the sale contract is that the loan contract is an explicit condition in the sale (or lease) contract.
2. The price or the rental is more than the market price or rental.

[12] *Al-Minhāj wa Sharḥuh*,

[13] Ibn Ḥajar Haytamī, *Tuḥfat al-Muḥtāj fī Sharḥ al-Minhāj*, (Al-Maktabah al-Tijāriyyah, Egypt, 1357H), 5:47.

3. The increase is due to the loan.
4. The prohibition of stipulating a loan as a condition of a sale is because it is a kind of loan that accrues benefit.
5. This benefit is not limited to the loan but is also applicable if repayment of the loan in another country is stipulated as a condition. It would also apply to the pledge of the sold item to the lender for a debt the borrower owes him. Selling to the lender as a condition of granting the loan is a hidden benefit or a strong suspicion [of one].
6. If the loan is not a condition in the sale contract, the contract is not void in the opinion of Shāfiʿī, but is disliked if the intention exists without being stipulated, and it is forbidden in the opinion of others.

The first condition: is that the loan must be a condition, i.e., stipulation of the loan contract as a condition in the sale or lease contract or any other exchange contract. If the loan is not stipulated as a condition in the contract, then there is no prohibition or nullity. Rather, it is disliked in the opinion of the Shāfiʿīs and those who agree with them in adopting the theory of manifest intention. They hold that, for any condition that invalidates the contract if stated in it, the contract is not invalidated if the condition is not present. The scholars of other schools hold that the contract is prohibited if the forbidden intention and illicit motive are established by clues and circumstances. Some of them invalidate the contract by granting to assumption the status of evidence, based on the principle of blocking the means. They equate such a contract with a marriage proposal to a woman observing *ʿiddah* (the waiting period after divorce or the death of her husband), marriage to a woman too closely related to be permissible, meeting in seclusion with a marriageable woman, and the punishment for consuming alcohol.

The second condition: that the price or the rental is more than the market price or rental.

It is apparent that this is a definitive clue or presumption and that no opposing proof will be considered when it is realized. The mere combination of the stipulated loan in the sale or lease contract is considered to be a pretext and a presumption or an accusation of two issues: first, that the price or rental is more than the market price or rental; second, that this increase in price or rental is a consideration for the loan, meaning that the contracts of sale and lease are both concealing a hidden benefit. In this case, it is not permissible for anyone contending that the sale or lease contract is valid to prove the contrary; that is, to prove that there is no increase in the price or rental, and that if there is an increase, it is not as a result of the loan. Likewise, those who

contend that the sale contract combined with conditional lease contract is invalid do not need to prove that there is an increase in the price or the rental; for this increase is a result of the loan. In the law, this presumption is known as a definitive presumption in favour of its contenders which will not allow the opponents to prove otherwise. This is unlike a simple presumption, the contrary of which is permissible to prove.

In our view, evidence takes precedence over presumption here. It is presumed in the stipulated combination of sale with a loan that the price was increased because of the loan. However, it is allowed for the one who claims the validity of the sale contract to prove that the price was not increased or reduced because of the loan. If he succeeds in proving that, both the sale and the loan contract will be considered valid.

The following results proceed from this:

1. If the commodity has a regulated market or is sold at an auction, it is permissible to conditionally combine the sale contract with the loan contract. That is because the price of the commodity is regulated in the market or is determined in the auction; thus, the presumption is negated that the price was increased because of the loan.
2. If the prices in the sale contract and the charges in the lease contract of services or assets are determined by the decisions and regulations of an official authority for everyone, borrowers and non-borrowers alike; in this case, evidence is given priority over presumption. Thus, the suspicion of *ribā* is negated, as is the presumption that the seller increased the price of the commodity because of the loan stipulated by the buyer, or that the price of the commodity was reduced in return for the loan received by the seller from the buyer.
3. If it is proven based on the clues that the price of the commodity or service is equal to or less than the market price, and the party that claims the validity of the sale or lease can prove it [this evidence will be accepted].

The third condition: that the increase in the price or the rental is due to the loan. Ibn Ḥajar put it thus: "This includes granting a loan to the one who rents one's property for more than its market value due to the loan." The loan here involves an increase in the price or the rental, which is due to the loan. The proof of this intention and aim is subject to the principles of proof in Sharīʿah, including clues and customs and what is usually intended by people. These clues are in favour of the one who claims the invalidity of the sale contract; i.e., who claims that the increase is due to

the loan. In the tradition of the Sharīʿah, he is known as the respondent, and the one who claims the validity of the sale is the plaintiff who is saddled with the responsibility to prove that there is no increase in the price or in the rent, and that if it exists, it is not because of the loan. This is based on the *ḥadīth* "The proof is mandatory for the plaintiff while the oath [on denial] is mandatory for the defendant." The plaintiff is the one who claims what is unusual and contrary to the general and common state of affairs that is evidenced by custom. For the respondent, the reverse is the case.

In summary, the stipulated combination of sale and loan contracts, based on this interpretation, is not by itself sufficient to prove the increase and that it is due to the loan; rather, the aim and intention must be proven as earlier prescribed.

It has been previously mentioned that the statements of some Islamic jurists indicate that the mere conditional combination of sale and loan contracts is considered a conclusive presumption that does not allow for proving the contrary, thereby favoring those who claim invalidity of the sale contract. We favour the view that the conditional combination is a simple presumption that allows proof to the contrary. Its benefit in that case is that the claimant of invalidity and prohibition of the sale contract is not obliged to prove it, but it still enables those who claim the validity of the contract to prove the validity of the sale contract. This would be similar to [the debate] about holding manufacturers and contractors liable [for customers' property damaged in their possession]. There are those who maintained that they are liable for what was destroyed in their possession in every case. This was on the basis that the presumption—that lying, treachery and transgression have become widespread—is conclusive evidence.

There are others who held that widespread lying and treachery among manufacturers is simple evidence of infringement and treachery. There is no objection to a manufacturer proving the opposite of this presumption by proving that the loss was not as a result of his infringement or negligence but was due to a cause beyond his control. If he is able to prove this, he would be exonerated from liability. It means that the effect of this evidence (the frequency of infringement and negligence by manufacturers) is to exempt the owner of the property from providing proof of infringement or negligence in order to hold the manufacturer responsible for the loss. It is enough simply to prove the loss, and it will then be concluded that the loss was as a result of infringement and negligence on the part of the manufacturer.

At a conference of Islamic financial institutions held in Kuwait under the auspices of Shūrā Society, a decision was issued that the entrusted partner such as the *muḍārib* [active partner in a

muḍārabah contract], the partner [in a *mushārakah* contract] and the investment agent must guarantee the funds of the *muḍārabah* or the investment agency, or the share of the partner in cases of loss and damage. That is if he is unable to provide evidence that there was no transgression or negligence on his part. It means that he will be saddled with the burden of proof on the basis that there is reason to believe that lying and treachery are rampant among trustees. This is strengthened by the principle that the capital and profit of trading and of partnership enterprises are assumed to remain as they are and that their trustee remains responsible for them until he discharges them. Moreover, *muḍārabah* assets are subject to concealment, and this presumption places the active partner [in the *muḍārabah* contract], the partner [in *mushārakah*] and the agent [in investment agency] in the position of the claimant who is required to provide evidence for the claim that destruction occurred without infringement or negligence. On the other hand, the capital provider [in *muḍārabah*], the principal [in the agency contract] and the partner [in *mushārakah*] are only required to prove the destruction because they are the respondents who are supported by the default rule and the predominant state of affairs. Nothing more than an oath is required of them in accordance with the *ḥadīth* of the Prophet (peace and blessing of Allah be upon him): "Evidence is required of the claimant, and the oath is required of the respondent." The jurists have agreed that the claimant is the one who is not supported by the default presumption and the predominant state of affairs while the opposite is the case for the respondent.

In fact, it is not certainly and decisively concluded, that the conditional combination of sale and loan contracts has increased the price or rent as a result of the loan contract; rather, it is a mere presumption or allegation, as claimed by some. It also does not fall under the rubric of the means that must be blocked in all circumstances, in case the prohibition is based either on ignorance of the price—because the benefit of the loan is part of the price—or is based on it being a benefit provided by the lender to the borrower in the form of a hidden increase in the price or the service charge.

Article 235 of the draft law of Egyptian civil transactions in accordance with the provisions of the Islamic Sharīʿah, which I had the honour to participate in drafting along with the late Dr. Abd al-Munʿim Faraj Ṣaddah, states:

> (1) Any agreement to charge interest for the use of cash or for a delay in its use shall be null and void. (2) Any commission or benefit of any kind shall be deemed to be hidden interest

if such commission or benefit is proved not to be in exchange for a real service rendered by the creditor and not to be a lawful expense.

It is clear from this text that:

1. Hidden interest invalidates the contract or the agreement that contains it, just like a clearly pronounced benefit without any difference.
2. The hidden interest contained in the agreement includes every commission or benefit of any kind. Also, the invalidity of the agreement that contains it does not differentiate between one commission or another and one benefit or another, as long as this commission or benefit accrues to the creditor and does not correspond to a real service or legitimate benefit provided by the creditor to the debtor.
3. One who claims the invalidity of the agreement must prove that the commission or benefit is hidden interest.

In our opinion, the stipulation of a loan as a condition in any exchange contract is considered sufficient evidence to prove this. Thus, those who argue that the agreement is valid must prove that the agreement does not include a commission or benefit; or if it does, that it is not because of the loan contract and that it is not hidden interest but is for a real service performed by the creditor to his debtor.

The text of Article 235 is explicit that the debtor who claims the agreement is invalid must prove that the commission or benefit is hidden interest and that it is not matched by a real service provided by the creditor to the debtor. The statement, "Any commission or benefit of any kind shall be deemed to be hidden interest if such commission or benefit is proved not to be in exchange for a real service rendered by the creditor and not to be a lawful expense," indicates that it is necessary to prove that this commission or the benefit is not matched by a real service. This shall be in accordance with the rules of evidentiary proof, and a deal cannot be considered void unless the claimant of invalidity is able to prove it. The evidence of a stipulated combination of a sale and loan is suitable to prove that. In accordance with the rules of evidentiary proof, it is allowed for the one who claims validity to prove that the rental, the commission or the benefit is not hidden interest and is, in fact, in return for a real service provided by the creditor to the debtor.

The fourth condition: the combination of sale and loan contracts is a form of loan that accrues benefit for the lender. This is by increasing the price as a result of this benefit if he is a seller and lender at the same time. However, if he is a seller and a borrower from the buyer, the price will be

reduced for him in return for the benefit realized from the loan. The increase or deduction from the compensation is the hidden interest, be it an increase or a decrease.

Based on this reasoning for the prohibition of the conditional combination of sale and loan contracts, it must be proved that the price in the sale or lease has been increased or reduced due to the benefit of the loan. However, the stipulation of a loan as a condition in the sale contract is considered to be sufficient evidence to prove the invalidity of the contract. It is a simple presumption which—in our view—allows proof of the contrary by all means of proof such as clues, the reality of the situation and prevailing customs and practice. If the one who claims the validity of the contract proves that the price was not inflated or reduced as a result the loan, but is the market price or less, or that the price is determined by the decisions and regulations of the competent authority, the contract is valid. The rule of [blocking] means [to unlawful ends] with its conditions and parameters is also applicable here.

These parameters are objective in the opinion of the Mālikīs, who consider it sufficient to rule that the contract is invalid when the benefit of the stipulated loan in the sale is what people usually intend, although it may not be intended by the contracting parties. In the opinion of the majority of *fiqh* scholars, these parameters are personal; each person's aim and intent must be considered, and these are to be discerned from the circumstances of each case individually. If forbidden intent is discerned, the contract or the disposition becomes generally null and void due to the illicit motive.

The fifth condition: the loan must be expressly stipulated as a condition in the sale contract, but if the loan is not expressly stipulated then the contract is valid and is not forbidden. If the two contracting parties negotiated the stipulation or colluded that the agreed price is on the condition of a loan from the seller or the buyer, but this condition is not pronounced when they conclude the contract and [is not] stated in its terms, but remains hidden and not clearly stated in the contract, in Shāfiʿī's opinion this intention is disliked (*makrūh*) in accordance with the theory of manifest intent. It is forbidden in the opinion of others, who are supporters of the theory of internal intent once this intention is known and the aim becomes apparent from circumstances, concomitants, clues and customs. Ḥāfiẓ Ibn Ḥajar said:

> What counts [for the ruling] is the presence or absence of the stipulation in the contract itself. If the two [contracting parties] agree to this stipulation in the contract itself, it is invalid. [If

they agree] prior to it but the contract is concluded without the stipulation, it is valid. Obviously, scrupulousness [would dictate a different behaviour].

The [AAOIFI] *Shari'a Standards* state that the agent's guarantee is void and that it is not permissible for the guarantee of the agent to those he deals with to be stipulated in the agency contract. This is due to the difference in the rules applicable to each of the two contracts. The agency contract is a trust-based contract in which the trustee cannot be made liable. However, the *Standards* state that it is permissible for the agent to provide a guarantee for those who are dealing with him in a separate document. This is the practice accepted by many Malikī scholars; they do not allow making trustees liable in trust-based contracts such as *muḍārabah*, *mushārakah* and investment agency. However, they allow such a guarantee if the trustee voluntarily provides it after the conclusion of the contract, and they do not consider it a pretext to a guarantee.

Similarly, the sale contract should be issued without a loan contract being stipulated as a condition. Then the seller grants the buyer a loan in a separate loan contract, even if the two contracts occur at the same time, one after the other, and both of them (the two contracts) constitute a single set agreed upon in a non-binding pre-contract memorandum of understanding. Then each contract in it is signed separately and in a certain order. That is because, when one of the contracts is signed, the parties to the contract are not obliged to sign the other contract; they can revoke it and the condition would no longer hold.

Shāṭibī and others discussed this topic when deliberating on the effect of intention and objective on the validity/invalidity and permissibility/impermissibility of a disposition. He stated that the action may be legitimate (*ḥalāl*) and the intention illegitimate (*ḥarām*); for example, a man who had sexual intercourse with his wife, believing that she is not his wife. Alternatively, the action may be illegitimate (*ḥarām*) while the intent is correct; for example, a man who had sexual intercourse with a woman who is not his wife believing her to be his wife. He then drew a difference between the ruling from the religious and legal perspectives, on the one hand, and between the *taklīfī* (duty) and *waḍʿī* (declaratory) perspectives on the other. The Shāfiʿīs applied this to the *ḥadīth* of the Prophet (ρ) in which he prohibited the combination of sale and loan contracts. They said if they are combined by stipulation it is *ḥarām* and invalid, while it is legitimate (*ḥalāl*) and valid if they are not combined by stipulation.

This is the ruling from the legal perspective; but from the ethical/religious perspective, they said it is disliked and to abstain from it would be more scrupulous. Thus, if someone sold and lent, or

bought and borrowed, from the buyer without a stipulated condition, but he intended to increase or deduct from the price in return for the loan; or if the seller and the buyer colluded to do so and intended it without mentioning it in the contract, the ethical judgment in their opinion is that it is *makrūh* (disliked). This intent is considered *ḥarām* by many *fiqh* scholars; in fact, some of them even considered the contract or disposition to be invalid based on the prohibited intent and unlawful motive if proven by clues, customs and practices.

Fifth: Presentation of *Fiqh* Scholars' Views Concerning the Combination of a Sale and a Loan

In *Bidāyat al-Mujtahid*, Ibn Rushd summarized the views of *fiqh* scholars concerning the combination of sale and loan contracts; i.e., when stipulated as a condition. He said:

> *Fiqh* scholars agreed that it is one of the void contracts of sale, but they differed regarding the condition if it is dropped before the exchange of the counter-values. Abu Ḥanīfah, Shāfiʿī and other *fiqh* scholars considered it to be unlawful while Mālik and his disciples approved it, except for Muḥammad ibn ʿAbd al-Ḥakam. An opinion similar to that of the majority is also narrated from Mālik. The argument of the majority is that prohibition entails the nullity of what is forbidden, in addition to the fact that the price in the sale contract is unknown by being combined with the loan.

The difference between this sale contract and a sale contract at a certain price plus a bottle of wine is that the prohibition concerning the combination of a sale and loan is not due to something that is forbidden in its essence, which is the loan contract. Loan contracts are permissible, and the prohibition is only due to the combination. Likewise, the sale contract is permissible and is only forbidden due to its linkage to the stipulation. On the other hand, when the price includes a bottle of alcohol, the sale contract is forbidden for being combined with something that is forbidden in its essence, not something forbidden because of the condition.

Some *fiqh* scholars have declared the *taklīfī* (duty-related) ruling for a sale contract combined with loan to be that it is forbidden (*ḥarām*) when the loan is stipulated in the transaction. Furthermore, they declared the declaratory (*waḍʿī*) ruling for the sale contract is that it is null and void. The majority of *fiqh* scholars are of the opinion that the void status here cannot be corrected even if the condition is dropped by the one who stipulated it and the loan is not collected. This is on the basis that the cause of the contract being void is the stipulation of the loan in the sale contract. If the sale contract is concluded on that nullity, the contract cannot be made valid by dropping the cause of

its nullity. This is the opinion of the majority of *fiqh* scholars. The Mālikīs believe that the cause for the invalidity of the sale is the stipulation of the loan as a condition in the contract; therefore if the stipulation of the loan is dropped by its stipulator after the contract is concluded, the cause no longer exists and thus the contract becomes valid. Ibn ʿAbd al-Barr said:

> There is no difference in opinion between the *fiqh* scholars of the Hijaz and Iraq that if the sale contract is concluded on the basis that the buyer grants the seller a loan, the sale contract is null and void. That is because the price becomes unknown due to the loan, and the unanimously agreed Sunnah is that it is not permissible for the price to be unknown. Take for example, if he buys a commodity from him for ten on the condition that he grants him a loan of five or ten, the price is no longer considered to be ten due to the benefit accrued from the loan, which is not known. As a result, the price becomes unknown.

Then he mentioned the opinion of the Mālikīs:

> As for Mālik's statement that if he drops the loan which he stipulated the sale contract will be permissible, this is a subject of debate among *fiqh* scholars. Sahnūn said: the sale contract is valid only if the loan is not received and is dropped, but if the loan is received a usurious contract has been concluded between them. The sale contract would be annulled in any case….Some have narrated from Ibn Qāsim that Mālik said: "If he returns the loan…" This [narration from Mālik] is not accurate; the accurate [narration] is what is stated in *al-Muwaṭṭaʾ*: "…and drops the loan…" That is because returning the loan is only possible after it has been collected, and if the loan has been collected, then the rule is as stated by Sahnūn. Muḥammad ibn Maslamah said: Whoever sells a slave for a hundred, stipulating that he grants [the buyer] a loan, the contract is revoked unless the buyer says he does not need the loan before he collects it; then the contract is permissible. Muḥammad ibn ʿAbd al-Ḥakam held that even if the one who stipulated the condition agrees to drop it, the contract is not permissible. This is the view of Shāfiʿī, Abu Ḥanīfah, their disciples, and all other scholars; because if the sale contract is concluded in an invalid format it will not be permissible; even if it is approved, it must be revoked and another contract concluded anew. The value (if the object of sale is destroyed in the buyer's custody and he is unable to return it) must be paid whatever the value and irrespective of whether the lender is the seller or the buyer. Abharī said: Some Madinah scholars narrated from Mālik that it is not permissible even if the loan contract is dropped. He said: This is in line with *qiyās* (the consistent principle) that the sale contract should be void if combined with a loan just like a sale contract involving wine or pork. That is because the sale contract has been concluded in a void format; therefore, it must be terminated.

Māwardī expressed his opinion about the invalidity of both the sale and the loan thus:

> This *ḥadīth* cannot be construed according to its apparent meaning. That is because an independent sale contract is permissible, and an independent loan contract is permissible, and having both contracts together without prior condition is also permissible. What is actually prohibited in the *ḥadīth* is a sale contract with a stipulation of a loan. For instance,

> when one says, "I sold this slave of mine to you for one hundred on the condition that you lend me one hundred," the sale contract is invalid as well as the loan contract. There are a number of reasons for this, including: one, that the Prophet (ρ) prohibited it; two, that he (ρ) prohibited a conditional sale contract; three, that he (ρ) prohibited a loan with accrued benefit. Also, as Shāfiʿī stated, it leads to the price becoming unknown. This is based on the fact that if the seller stipulates a loan for himself, he becomes a seller of his commodity at the said price together with the benefit of the conditional loan contract. As the condition is not binding, its benefit is dropped from the price. The benefit being unknown, if it is dropped from the price it leads to an invalidating ignorance, and ignorance about the price invalidates the contract. Based on this meaning, combining a purchase with a loan is not permissible; for instance, to say, "I have bought this slave of yours for one hundred on the condition that you grant me a loan." This is an invalid condition and an invalid loan contract, based on the explanation we have given. Likewise, it is not permissible to conclude a lease contract on the condition of granting a loan.[14]

As for Ibn Qudāmah, he explicitly stated the *taklīfī* and declaratory (*waḍʿī*) ruling concerning the combination of sale and loan contracts, saying:

> If he sells on the condition that [the buyer] grants him a loan, or the buyer stipulates that upon him, it is forbidden (*ḥarām*) and the sale contract is invalid. That is also the opinion of Mālik and Shāfiʿī, and I do not know of any disagreement about this. However, Mālik said: if the one who stipulates the loan contract drops the condition, the sale contract is valid. Our argument is based on the *ḥadīth* which states that the Prophet (ρ) prohibited the combination of a sale and a loan. Another narration [quotes him]: "It is not permissible to combine a sale and a loan." That is because he stipulated a contract as a condition in a void contract, like combining two sale contracts in one transaction. It is also because if he stipulates the loan he increases the price due to the loan, and the increase in price becomes a return and profit for the loan. This is considered to be usury, which is forbidden, so the contract is void, just the same as if he had clearly stated it. Additionally, it is a void sale contract and thus cannot be rectified, as in the case of selling one dirham for two silver dirhams and then dropping the demand for one of them.[15]

Ibn Qudāmah has clearly declared the *taklīfī* ruling, which is that the act is prohibited, and the declaratory ruling, which is that the contract is invalid. He based that on the principle of *ribā*, i.e., that the sale contract entails a hidden increase which is the return and profit for the loan. This is considered to be forbidden usury, just as if the increase is explicitly stated. I have explained that Article 235 of the Egyptian Civil Draft Law in accordance with the provisions of Sharīʿah states that any agreement that includes receipt of benefit or service in excess of the loan amount shall be

[14] Māwardī, *Al-Ḥāwī al-Kabīr*, (Dār al-Kutub al-ʿIlmiyyah, Beirut), 5:531-2.
[15] Ibn Qudāmah, *Al-Mughnī*, (Maktabat al-Qāhirah, Cairo, 1388H), 4:177.

null and void unless it is for a real service provided by the creditor to his debtor if it is proven by the debtor.

It has been earlier stated that Ibn Rushd sufficed by saying that conditional combination of sale and loan contracts is a form of void contract, and in the Māliki view there is no difference between *fāsid* (voidable) and *bāṭil* (void).

In general, some *fiqh* scholars declare prohibition or impermissibility to be the *taklīfī* ruling for a sale contract combined with a loan, and they identify its declaratory ruling to be *fāsid* or *bāṭil* (void), and there is no difference between *fāsid* and *bāṭil* in this context.

It has been stated that the ruling on the validity or invalidity of the sale with a stipulated loan is from the judiciary perspective, and that it is based on an explicit condition, or as stated by some scholars, "a pronounced condition". However mere intention without being a condition in the contract itself does not invalidate the contract in the opinion of Shāfiʿī, which is based on his belief that every condition that invalidates the contract if explicitly mentioned in the contract does not invalidate it if it is not included in the contract. As for the majority of *fiqh* scholars, comprising the Mālikis and Ḥanbalīs, they believe that the contract can be invalidated by unlawful intention and illegal motive, even if it is not mentioned in the contract, if it can be proven by clues, the reality of the situation, circumstances, customs, traditions, and the motives of most people. They do not consider the intention of the two contracting parties, and proof of it is not required. However, their apparent position on stipulation of a loan in a sale contract is that they do not invalidate the sale contract if the condition is not explicitly pronounced.

As for the ethical ruling, I believe that Shāfiʿī agrees with other *fiqh* scholars that intending something *ḥarām* is forbidden, whether it is stated in the contract or hidden. That is because the general decisive principle derived from numerous texts and the overall evidence decisively indicates that acts are judged according to intentions, and that objectives are given consideration in all acts, whether related to custom or worship. But since Allah is the only one who is aware of intentions and objectives, Shāfiʿī is of the opinion that the declaratory ruling, which is nullity, cannot be the result of intention. Other [*fiqh* scholars] have declared the *taklīfī* ruling for dispositions based on these intentions and purposes if they are proven by clues, as if they were mentioned in the contract. Shāfiʿī sufficed with *makrūh* (reprehensible) as the *taklīfī* ruling while others maintained that it is *ḥarām* (forbidden).

Sixth: Applications of the *Ḥadīth* Forbidding the Combination of Sale and Loan Contracts, and the Legal Causes of [the Ruling] According to the *Fiqh* Scholars

There are forms of application related to *ijārah* (lease):

1. One of these forms is that some Islamic banks lend to the customer without interest but require him to pledge jewellery to be deposited in the bank's vault, and they charge a fee in return for the service.
    - There is no objection if the deposit fee is prescribed in advance with regulations and is applicable to each and every one, the borrower and others alike, without any increase with respect to the borrower, at the rental fee prescribed by the regulations.
2. One of these forms is lending with the requirement of pledging cash in the current account to benefit the bank.
    - Lending is permissible with the condition of pledging the money in the current account because it is not a newly initiated benefit. The bank benefits from the money in the current account before the extension of the loan [to the customer] in exchange for guaranteeing it; therefore, the causative link between the new loan and the benefit is negated.
3. One of these forms is the extension of the *ijārah* contract and an increase in the rental upon late payment by the debtor.
    - There is no objection to the permissibility of increasing the rental initially or when extending the sale contract when there is no loan, on the basis that the new fee shall be applied from the date of the extension with its increase. However, it is not permissible to state—in the extension of the *ijārah* contract with a new fee in excess of the previous fee—that this increase is in return for the outstanding rental that the lessee has not yet paid.

Forms related to bank cards:

4. These forms include the issuance fees associated with a credit card.
    - Here the bank shall not make a pronouncement such as, "We issue this card to you and will charge you the service fee in return for your use of it to borrow." The combination should only be without an explicitly stated condition. There is no objection if it is in return for a real service, which is the case here. To grant a loan in itself is permissible; it is even a form

of charity; and the service would be provided even if there was no loan. Also, there can be no objection to granting a loan because of a service done for a fee, and being a lender to the customer does not prevent [the lender from] providing a service at the market rate or maybe even less. Mere provision of a service for a fee is not a definitive indicator that the bank has increased [the fee] in return for possibly granting a loan. It is not [legally] similar to the presumption in prohibiting seclusion with a marriageable woman, or prohibiting an explicit marriage proposal to a widow who is observing *ʿiddah*, or the invalidity of marriage during the hajj pilgrimage, all of which the Lawgiver has ruled void such that the contrary cannot be proven and has considered them as paving the way for corruption.

5. These forms include the high fees associated with credit cards. The fact that the cardholder pays the high fees while possibly not using the card to borrow may indicate the lack of linkage between the loan and the service fee. This indicates that the fee is meant for the services provided by the card and not for the loan.
    - The condition for the permissibility of the service contract is that the service be real and the fee be at par with the market rate. If the permissible loan and permissible service lease are combined without either being an explicit condition for the other, and it is proved that this fee is at par with the market rate, then something lawful cannot be prohibited. That is because [prohibition of something lawful] is not less [grievous] than legalizing what is unlawful (*ḥarām*). This service costs the bank direct and indirect expenses, and it does not have to provide it free of charge when people need it. In addition, there is a possibility that the customer will not make use of the credit facility at all; they may not take a loan or may waive it. The condition is to ascertain or strongly believe that the cardholder took the loan with the condition of paying the par market fee for a real service, because the benefit is not purposely because of the loan.
6. These forms include revolving cards based on *ijārah*, in which the customer pays a monthly fee in return for services provided by the bank that include keeping the account records and other services. The claim of actual cost for these cards is totally false; the cards are actually a source of profit. I have discovered in some Islamic banks that the "actual cost" of these cards is up to twenty million riyals!
    - There is no objection if the fee is in return for the service, and the cost of the service is calculated in a scientific manner. It is not necessary to strictly observe the actual cost; i.e.,

the amounts actually paid by the bank; it can have a profit margin for the risks and investment involved in the costs of performing the service.

7. These forms also include charges for cash withdrawal using the credit card, whether the charge is a lump sum or a percentage of the amount withdrawn. That is because it is in return for the effort expended and the costs represented in the production of the card, and costs for communications, electricity, staff, rental of ATM premises, printing and mail.
   - Every benefit that no one grants for free and which costs its provider a certain amount is considered a collective responsibility for which the provider deserves the market fee or the cost plus a profit margin for the risk, the effort expended and the management. Otherwise, people would refrain from discharging these collective responsibilities and fulfilling public interests. There are many instances with regard to this, such as one who settles a debt for another or the maintenance expenses of his wife. Moreover, the principle of transactions entails the possibility of gain and loss and the bearing of risk. Is it conceivable that anyone would provide these services by spending his money on the administrative system, hiring premises and personnel and paying their salaries and then offer them free of charge? The opinion that he does not deserve the actual cost means that he would waste his time, his effort and the return on his money in vain.

Forms related to facilities:

8. One of these forms is to charge a fee on a secured letter of guarantee on the basis that it is the customer's appointment of the bank as a payment agent.
   - This is a real service, and agency for a fee is permissible in Sharīʿah, and being a letter of guarantee does not prevent it from being permissible in Sharīʿah. Being an act that benefits [the customer] does not prevent entering into a contract of agency with an agreed-upon fee. The bank has a department that manages letters of guarantee and recovers any payments made. There is no individual that will provide these services free of charge, so charging fees is not purposely for the guarantee but, rather, for a real service that costs the service provider expenses.
9. One of these forms is the fee charged for an unsecured letter of guarantee on the basis that the fee for the letter of guarantee is not for the guarantee itself but for the effort expended.

- Yes, it is permissible, and the applicant for a secured letter of guarantee is not different from others because there is an actual service. The important thing is that the fee should be the same as the market fee or market price, not higher, so that there is no suspicion that it is because of the loan and that the bank raised the fee for the letter of guarantee because of the guarantee. Banks have departments that specialize in analyzing risk, determining the creditworthiness of the applicants for letters of guarantee, issuing letters of guarantee, lawyers and other specialized offices. There is no one to provide this service other than banking institutions. This benefit is considered to be in the category of collective responsibility, which is related to preservation of money, the speed and ease of its circulation, and the facilitation of international trade. This is a real benefit that does not contain any harm, and it is inconceivable that a philanthropist would spend millions on it voluntarily.

10. One of these forms is the fee charged on a commercial letter of credit or covered letter of credit.
    - It is permissible if it is in return for a real service, and for the par market fee. Without doubt it is a real service, even a Sharīʿah *maṣlaḥah* (benefit) classified under the preservation of wealth as a matter of necessity, which is the development and facilitation of trade between [nations] as mentioned earlier.
11. One of these forms is the fee for discounting a bill of exchange by way of agency for a fee, in which the owner of the bill of exchange authorizes the bank to collect the debt from the issuer of the bill, pays him a fee for that, then borrows from him the amount of the bill, and authorizes him to collect this loan from the issuer of the bill. With this there will be two independent transactions: first, agency for a fee, second: borrowing from the bank.
    - The rule in this is the permissibility of charging a fee for any service needed by a person which will not be performed by others on a voluntary basis and which will be of benefit and advantage for the one applying for it. [Further conditions of permissibility are that the service provider] shall accept providing the service for remuneration at par with the market price; thus, the service provider should not be the sole provider of the service; rather, the circumstances enable unrestricted competition. That is because the service is not materially estimated by its cost as a material but by what is spent on preparing the service provider and the expenses of training him to provide it, and not only what he needs in terms of living conditions in order to earn an income from it.

If these regulations are put in place, it is not prohibited for the provider of the service and its recipient to engage in charitable contracts for fear of interest being concealed in the service contract. Care should be taken that nothing related to letters of guarantee, letters of credit, withdrawals from ATMs and credit card issuances has any explicit condition stating that the service charge has been increased in consideration of the benefit realized from the loan. This is in line with what was earlier stated regarding the legal cause of the prohibition of combining a sale with a loan. The majority of jurists agreed that the transaction shall not be considered invalid unless the loan or the benefit in excess of the amount of the loan is an explicit condition in the agreement.

Forms related to sales:

12. One of these forms is the profit increase in debt rollover (*qalb al-dayn*) in revolving *murābaḥah*.
    - *Qalb al-dayn*: it means delaying the debt repayment with an explicit or hidden increase. This occurs in any transaction that results in a profit—an increase—on the debt—the cost—in the new transaction, even if it is less than the profit resulting from the old transaction that the debtor did not pay. This is because the existing debt is considered to have been renewed with an increase using a legal stratagem. It is as if he sold him the existing debt for a new debt with an increase, which is not permissible. Some contemporary scholars differentiate between debt rollover with a solvent debtor and rollover with an insolvent, which is not permissible. Some believe that coercing [a debtor] to roll over a debt is not permissible; but if no coercion is involved, rollover is permissible with a solvent debtor, not with an insolvent. This is the opinion we support.
13. One of these forms is the postponement of a debt without any increase on the condition that [the debtor] provides collateral for [the creditor's] benefit.
    - There is no objection to postponing a debt with the condition that a security such as a pledge be provided, but it is not permissible to use it without the payment of a par fee. A pledge is permissible, and the relationship between the pledgor and the pledgee does not preclude one of them from entering into a contract of compensation [with the other] such as deferment of debt. Usually it is not clearly stated that deferment is due to the benefit of

the pledge. It has been previously mentioned that the majority of *fiqh* scholars hold that the combination of a loan and a sale without a stipulated condition is permissible.

14. One of these forms is an overdraft.
    - An overdraft is a loan; thus, taking an increase is not permissible, unless it is in return for a real service which is of benefit to the client and for the par market fee. And there are alternatives.
15. One of these forms is to defer an instalment or two for a commission for the service of recording it in the accounts.
    - There is no objection based on the regulations previously mentioned, which are that the commission shall be in return for a real service and shall be prescribed in a previous regulation.
16. One of these forms is withdrawal of an advance overdraft in return for a commission for the service of recording it in the accounts.
    - There is no objection if the service is real and within the limits of the rules and regulations and under the supervision of the Sharīʿah committee and the central bank.
17. These forms include *bayʿ al-ʿīnah* (buyback sale) and its opposite.
    - It is a trick to obtain a loan with interest, but that is with a stated or implicit condition.
18. These forms include *bayʿ al-wafāʾ*. If it is not stipulated, the Shāfiʿīs have approved it and named it *bayʿ al-ʿuhdah.*
    - There is no objection to it if it is not a condition in the contract of sale itself and as long as the buyer has the option to return the good when the seller returns the money. It is possible for the buyer to promise the seller that he can buy the good back in accordance with the Sharīʿah parameters.
19. One of these forms is the permissibility of debt rollover if no coercion is applied.
    - It is forbidden to roll over the debt of an insolvent debtor, even without coercion because it involves an increase in return for more time using an obvious legal trick whereas an insolvent debtor must be given a respite [without increase].
20. One of these forms is a gift by the debtor. If it is [given] after settlement [of the debt], it is either customary or not. If it is customary, it is forbidden, according to the Mālikīs, because a well-known custom is similar to a stipulated condition. But it is not forbidden by others because the Prophet use to pay more when he borrowed. If it is not customary, it is permissible as a

kind gesture in settlement. If it is offered before the settlement it is forbidden in the opinion of the Mālikīs and Ḥanbalīs due to the suspicion of being a loan that accrues benefit, but it is permissible in the opinion of the Ḥanafīs and Shāfiʿīs. Based on this opinion, debtors adopt the trick of paying an amount before the due date so that the creditor will give them more time.

- This is a good clarification and acceptable explanation, which I agree with. I believe that it is permissible for the debtor to offer a gift [to the creditor] before the settlement of the debt. The suspicion of being a loan that accrues benefit is contradicted by the fact that the basic principle is the unconditional permissibility of a gift. I do not agree with the Mālikīs and the Ḥanbalīs about this suspicion, especially if it is not a custom. I agree with the majority of *fiqh* scholars if the gift is offered after the debt settlement, even if it is customary to do so, because custom does not make it binding on the debtor. This is contrary to the Mālikī opinion. Also, there was no stipulation [to this effect] when the debt was incurred; therefore the debtor is not under any obligation to offer a gift.

21. These forms include offering gifts [for opening a] current account. It is forbidden if it is stipulated as a condition in the account-opening contract or is announced by the bank before the account is opened if the announcement is binding. However, if the announcement is not binding, or the bank usually grants these prizes without them being binding, the majority of *fiqh* scholars opine the gifts to be forbidden if they are offered before the debt settlement. The Ḥanafīs and Shāfiʿīs consider them permissible even before the debt settlement. Some banks give gifts for marketing without any discrimination between accounts. These gifts are lawful even for current accounts, and some give them for current accounts with discrimination by giving only to the large account holders. The previous controversy applies to this practice as well.

- The parameter here is stipulation of a condition in the contract such that the beneficiary of the condition can claim it by litigation if the offeror of the gift does not voluntarily give it. If, however, the stipulator of the condition drops the condition, the transaction is valid.

  The detail offered in the question is good, which is the impermissibility of stipulating a gift either explicitly, or what is customarily known, through a binding declaration. I believe it includes even the owners of investment accounts because it is a condition that may lead to a reduction in the company's profit, as the bank may not have earned any profit other than the gift [it offers], and the bank is a *muḍārib* (active partner) [who deserves a portion of the

profit]. As for [the gift being offered] without a customary condition, either explicit or implicit, I do not see anything wrong with it with respect to all types of current and investment accounts in accordance with [the opinion of] the Shāfiʿīs and Ḥanafīs. The distinction between [different] account holders in granting gifts is prohibited in cases of prohibition and permitted in cases of permissibility. No consideration is to be given to the amount of the balance in the current account.

(2)

TIER 1 ṢUKŪK

Prepared by

His Eminence Shaykh Walīd ibn Hādī

and

His Eminence Dr. Usayd Kīlānī

The Second Topic

Tier 1 Sukuk

Chairman of the Forum: Walīd ibn Hādī

-The Definition of Tier 1 *Ṣukūk*

-The Purpose of Tier 1 *Ṣukūk*

-The Sharīʿah Solution for the Bank and *Ṣukūk* Holders Providing a Guarantee to Fund Depositors

As it is known that *fiqh* symposiums have allowed the burden of proof to be transferred to the *muḍārib* (the bank), the central bank will often accept this solution. This is because it is a kind of insurance from the bank to the depositors, which achieves the goal of the central bank. As for tier 1 *ṣukūk* holders, is it valid that the burden of proof be transferred to them when they are not playing the role of the *muḍārib* vis-à-vis the depositors? Rather, the relationship between them is that of *shirkat ʿinān* (limited partnership).

The answer:

Ṣukūk holders and shareholders are partners, and their joint funds are tantamount to one fund with respect to the depositors. In this respect, there is no difference between them. Hence, we can lump *ṣukūk* holders and shareholders together, since the *ṣukūk* funds of the former are very similar to those of the shareholders, such that central banks consider *ṣukūk* holders' funds as part of the banks' equity.

Since that is so, the same rule applies to *ṣukūk* holders as to shareholders regarding transferring the burden of proof onto them, and thereby the goal of having *ṣukūk* holders guarantee the depositors' funds is attained.

A Brief Comment on the Subordination of Tier 1 *Ṣukūk* Holders to Depositors

The 10th Symposium

Dirasat Company for Research and Islamic Banking Consultancy

Sharīʿah Scholars International Forum

Under the auspices of Bank Rakyat Malaysia on the 30th and 31th of October, 2015,

in Kuala Lumpur

His Eminence Dr. Usayd al-Kilani

The Head of the Sharīʿah Department

Abu Dhabi Islamic Bank Group

All praise is due to Allah, Lord of the Worlds; and may Allah's peace and blessings be upon his last Messenger, his family, his noble Companions, and all those who follow them with righteousness until the Day of Judgment.

His eminence, brother Dr. Shaykh Walīd ibn Hādī (may Allah preserve him), requested me to comment on the subordination of tier 1 *ṣukūk* holders' claims to those of depositors in case of liquidation, and how this can be accommodated and explained in *fiqhī* terms.

In the correspondence letter it is written:

> As it is known that *fiqh* symposiums have allowed the burden of proof to be transferred to the *muḍārib* (the bank), the central bank will often accept this solution. This is because it is a kind of insurance from the bank to depositors, which achieves the goal of the central bank. As for tier 1 *ṣukūk* holders, is it valid that the burden of proof be transferred to them when they are not playing the role of the *muḍārib* vis-à-vis the depositors? Rather, the relationship between them is that of *shirkat ʿinān* (limited partnership).
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> Since that is so, the same rule applies to *ṣukūk* holders as to shareholders regarding transferring the burden of proof onto them, and thereby the goal of having *ṣukūk* holders guarantee the depositors' funds is attained.

To begin with, we emphasize that transferring the burden of proof onto the *muḍārib* that he did not transgress or act negligently does not make him, in the correct jurisprudential understanding, absolutely liable for loss.

Some supervisory bodies accept this transfer and consider it a replacement of the Sharīʿah non-compliant guarantee. This is a commendable initiative.

Introduction

Tier 1 *ṣukūk* capital is counted the latest generation of *ṣukūk*, which have been developed to meet the Basel III requirements that aim at enhancing the solvency of banks and enabling them to fulfil their obligations. They are considered the strongest measures for enabling banks to bear financial problems and avoid a repetition of the recent global financial crisis.

According to these requirements, regulatory capital consists of tier 1 and tier 2. Tier 1 comprises the original capital, represented by the common equity, and the additional capital. Tier 2 comprises the secondary capital. The additional capital is provided by tier 1 *ṣukūk*.

Thus, these *ṣukūk* are not a product of the natural or autonomous evolution of Islamic banking. Instead, they are a response to a situation whose requirements are dictated by bodies that regulate conventional banks. These regulations are in line with the nature of those banks and consistent with the structures of their interest-based instruments.

The requirements of these *ṣukūk* raise several Sharīʿah issues. We shall refer to the most important issue as stated above from the assignment letter.

Requirements of the Tier 1 Additional Capital Instruments

For a liquidity-providing financial instrument to qualify as an additional tier 1 capital instrument, it is necessary to meet certain requirements. This endows it with some of the hallmarks of the original capital provided by the shareholders. These requirements give it

a hybrid nature; it has features of the original capital as well as features of regular liabilities of the bank.

Among the requirements that make it like the original capital:

1- The instrument is perpetual; i.e., there is no maturity date and the holders do not have the right to demand its redemption (although the bank has the right to liquidate it after five years under certain conditions).

2- For the purpose of redemption (due to insolvency or bankruptcy), the instrument is subordinated to ordinary liabilities or more senior liabilities, having a rank similar to bank shares.

The instrument is described in Basel III as "subordinated to depositors and general creditors of the bank and subordinated debt of the bank". This is to say that holders of this instrument are subordinated to depositors and general creditors and also to the other debt of the bank, which is in turn subordinated to depositors and general creditors. This [other] debt refers to the secondary capital; i.e., the tier 2 capital instruments.

Definition of Depositors and Their Seniority

Basel III did not define depositors nor clarify the nature of their relationship with the bank. No doubt, however, it means the established process of traditional banking. Depositors in this type of banking are the holders of various types of accounts, and their relationship with the bank—in every type of account—is that they are lenders, with or without interest.

What we need to clarify (which is the basis of the Sharīʿah perspective on redemption priority) is that what is paid to depositors (lenders) at the time of liquidation is limited to their established rights under the contract concluded between them and the bank. The contract's conditions and provisions must be applied to determine the amount the bank is liable for. This amount must be paid before anything is paid to the holders of additional tier 1 capital instruments. This is the legal requirement.

For example, a person opens an account in a conventional bank and deposits a cash amount (AED 1000). In the contract, he asks the bank to pay AED 100 one year after the date of the account opening to a specific beneficiary, which is done by the bank. After that, the

bank goes into liquidation. The right of the account holder (lender) under the contract is only AED 900.

Basel III does not consider the deposited amount to be guaranteed by the bank and treated as senior to the additional tier 1 capital no matter what the contract's conditions and rules may be. All it says is that depositors are senior to holders of additional tier 1 capital instruments in the redemption of established rights under the terms and conditions of the deposit contract.

These rights are the obligations whose fulfillment it seeks to ensure while protecting the bank from their consequences without interference in their terms and conditions.

To claim otherwise and say that the terms and conditions are null or have no consideration in defining the established rights of the account holder which are given precedence has no basis in law or logic or actual practice.

The Main Features and Sharīʿah Requirements of the Contractual Form Used in Additional Tier 1 Capital *Ṣukūk*

1) The contractual form used by Abu Dhabi Islamic Bank when issuing these instruments for the first time, which was accepted by law and by the central bank, is the *muḍārabah* formula in which the *muḍārib* is allowed to mix the investor's capital with his own capital, with the stipulation that the *muḍārabah* capital be invested in the general pool of the bank along with the equity.

Mixing *muḍārabah* capital with equity creates partnership by which the *muḍārabah* capital shares with the equity in rights and obligations in the general fund. Furthermore, the *muḍārabah* capital has the equity features in relation to other components in the fund. For example, it shares the same rule regarding the growth of the original capital.

The formula can be, from the start, *mushārakah* in equity, as stated in the Revised Capital Adequacy Standard for Institutions offering Islamic Financial Services, issued by the Islamic Financial Services Board (IFSB) in December 2013:

> Subject to Sharī'ah approval, an IIFS may issue *mushārakah ṣukūk* (with the

> underlying assets as the whole business of the bank) that are able to absorb losses so as to qualify for inclusion in AT1 [additional tier 1 capital]. In these *mushārakah ṣukūk*, the *ṣukūk* holders are partners with the common shareholders in the equity capital of the IIFS, as per the terms of the *mushārakah* contract and thus fully share the risks and rewards of the IIFS's operations.

Although the formula has not been legally studied, the use of either formula ensures that *ṣukūk* are perpetual.

2) *Muḍārabah* capital is not guaranteed by the *muḍārib* (the bank) if the loss is not due to negligence or transgression or breach of terms or stipulations of the contract.

3) Depositors, according to Basel III, are all account holders—while in Islamic banks, they include current account holders and all kinds of investment account holders (including investment deposits)—without making any distinction between them in their priority over tier 1 *ṣukūk.*

What must be done—and this is the Sharīʿah requirement we referred to—is that the terms and conditions of the contracts for the opening of these accounts must be in accordance with the parameters and requirements of these contracts in the Sharīʿah.

Current accounts are based on lending with no return. The lender is the account holder and the borrower is [collectively] the shareholders. However, investment accounts are based on *muḍārabah* (this is what is common, although they could be based on agency for investment) in which the account holder is the capital provider and the shareholders are the *muḍārib*. The *muḍārib* is not liable if the loss does not occur out of negligence or transgression or violation of the contract terms and conditions. If the *muḍārib* is made absolutely liable by the contract terms, law, or regulatory instructions, then this is clearly a Sharīʿah issue, but tier 1 *ṣukūk* are not responsible for this since it pre-dates *ṣukūk*. However, this issue should have been dealt with before their issuance.

The Structure of the Formula Used in Tier 1 *Ṣukūk*

These *ṣukūk* have been issued on the basis of *muḍārabah* that meets the Sharīʿah requirements. It comes with permission for the *muḍārib* to mix the *muḍārabah* capital with

his capital and with a stipulation that the *muḍārabah* capital be invested in the general fund, being deposited there along with the equity.

To clarify the structure of this formula, it is useful to present the parties and relationships of the components of the Islamic bank's general fund (according to actual practice) in a simplified way before and after issuing the tier 1 *ṣukūk*.

First, the Parties and Relationships of the Components of the General Fund before Issuance of the Tier 1 *Ṣukūk:*

The parties of the general fund before issuance of the tier 1 *ṣukūk:*

- shareholders: the bank's shareholders, who own the original capital or the common equity;
- current account holders (who are lenders to the shareholders);
- (*muḍārabah*) investment account holders, who are the capital owners while the shareholders are [collectively] the *muḍārib* authorized by the capital owners to mix their funds with the holders' accounts.

The relationships of the components of the general fund in this case are:

1. A loan relationship between the current account holders and the shareholders. These accounts' balances are guaranteed by the shareholders, who have taken possession of them via a loan.
2. A *muḍārabah* relationship between the investment account holders and the shareholders. These account balances (assets) are not guaranteed, and hence the loss is borne by account holders unless it is due to violation, negligence or breach of the terms of the contract by the shareholders (the bank).
3. A *mushārakah* relationship between the investment account balances and what shareholders own in the general fund. They own the equity and the loaned current account balances. This *mushārakah* is created by the mixing authorized by the investment account holders.

Second, the Parties and Relationships of the Components of the General Fund after Issuance of the Tier 1 *Ṣukūk:*

Upon the issuance of these *ṣukūk* with the previous formula, the parties and relationships of the components of the general fund are affected by changes that enable implementation of the redemption priority and that clarify its reality.

The parties of the general fund in this case are:

- Shareholders: the bank's shareholders, who own the original capital or the common equity.
- Tier 1 *ṣukūk* holders: they are the capital owners of the new *muḍārabah* represented by these *ṣukūk*, and the shareholders are the *muḍārib*s authorized by the capital owners to mix the *ṣukūk* capital with their funds.
- Current account holders: they are the lenders to the shareholders.
- (*Muḍārabah*) investment account holders: they are the capital owners of the old *muḍārabah* that already existed in the general fund, and the shareholders are [collectively] the *muḍārib* (in their new status, which will be explained shortly). The capital owners have authorized them to mix their funds with the holders' accounts.

The relations of the components of the general fund:

1. A (new) *muḍārabah* relationship between the tier 1 *ṣukūk* holders and the shareholders. This *muḍārabah* capital is not guaranteed, and hence the loss is borne by the *ṣukūk* holders unless it is due to violation, negligence or breach of the terms of the contract by the shareholders.
2. A (new) *mushārakah* relationship between the *ṣukūk* capital and the equity (owned by the shareholders). This is because the *ṣukūk* capital becomes part of the general fund side-by-side with the equity, and it shares with it in its rights and obligations. Therefore the *ṣukūk* capital shares in the normal growth of the bank's original capital, as we mentioned before.
3. A loan relationship between the current account holders and the shareholders as representatives of the new *mushārakah*, which becomes the borrower and the guarantor of these account balances, which are owned by *mushārakah* via the loan.

4. A *muḍārabah* relationship between the investment account holders and the shareholders as representatives of the new *mushārakah*. These account balances (assets) are not guaranteed, and hence the loss is borne by the account holders unless it is due to violation, negligence or breach of the terms of the contract by the shareholders (the bank). In this case, the balances are guaranteed by the assets of the new *mushārakah*.
5. A *mushārakah* relationship between the investment account balances and the funds (assets) of the new *mushārakah* comprised of equity, tier 1 *ṣukūk* capital and the loaned current account balances. This *mushārakah* is created by the mixing authorized by the investment account holders.

Application of Redemption Priority during Liquidation

Upon the bank's liquidation because of loss leading to its insolvency or bankruptcy, the loss is either due to a situation out of the bank's control (without violation, negligence or breach of terms contract) or a situation for which the bank is held liable.

First, Liquidation if the Loss Is out of the Bank's Control:

In this case, the investment account holders and tier 1 *ṣukūk* holders bear the loss from their shares. The amount that remains after the loss and the potential liabilities is their right. (The potential liabilities include the share of the investment account holders from the general fund's liabilities as a result of the financing (if any), and the share of tier 1 *ṣukūk* holders from these liabilities, if any, and their share in the current account balances).

Redemption runs as follows:

- Payment is made first to depositors (to use Basel III's expression), who are the account holders, in the light of the terms and rules of their deposits at the bank in the general fund. What is available in the general fund is distributed among them to the extent that they get their full rights if it is sufficient. Current account holders

are paid all their balances while investment account holders are paid their balances after deduction of the losses that pertain to them. If the available funds of the new *mushārakah* are not sufficient to cover current account balances, then the shortage is not compensated for from the right of the investment account holders. That is because the current account balances are loaned to the shareholders (or the new *mushārakah*) and the investment account holders have nothing to do with those loans.

- After paying the current account balances, the amount that remains in the general fund is paid to the tier 1 *ṣukūk* holders after defining their right on the basis of the terms and rules of the *muḍārabah* contract they concluded with the shareholders. This right is defined according to the residual amount of the *ṣukūk* capital after deducting their share of the loss as well as their share of the current account balances. That is because they are considered borrowers of those balances along with the shareholders in their capacity as parties in the new *mushārakah* that borrowed those balances.
- What remains after the tier 1 *ṣukūk* holders get paid is given to the shareholders. What remains is the residual amount of the original capital (equity) after deducting their share of the losses as well as their share in the current account balances. Their case vis-à-vis these balances is similar to that of the *ṣukūk* holders.

Example:

-The general fund's total assets = 600, distributed as follows:

100 current account balances

100 investment account balances

200 tier 1 *ṣukūk* capital

200 original capital

Upon liquidation, if the loss is 50% of the general fund's assets and the residual amount is 300 out of 600, then the parties receive the following:

100 current account holders (current account balances are guaranteed)

50 investment account holders (after bearing their share of the loss)

75 tier 1 *ṣukūk* holders (after bearing their share of the loss and their share in the current account balances)

75 shareholders (after bearing their share of the loss and their share in the current account balances).

Remarks:

1- In this distribution, payment priority rather than redemption priority is considered.

The difference between the two is that in payment priority there is no compensation for loss to the investment account holders or the tier 1 *ṣukūk* holders. This loss must be borne by them according to the terms and rules of their contract with the bank. If the loss is compensated, it is redemption priority, which is a Sharīʿah issue.

The Sharīʿah resolution (1/3/2012-2) of the Executive Committee of the Fatwa and Sharīʿah Supervisory Board of Abu Dhabi Islamic Bank states:

> The conclusion on this case is that redemption priority does not lead to guarantee of that which cannot be legally guaranteed. It is merely payment redemption of the right left after the loss, not redemption priority of the general fund's total assets so that the *muḍārabah* capital is recovered (whether related to the *muḍārabah* account holders or the *ṣukūk* holders). What remains in the general fund after the loss is distributed among all parties in proportion to their participation, without preference to one party over another. What is meant by "all parties" here is: the *muḍārabah* account holders, *ṣukūk* holders, and shareholders. It is thus priority acceptable in Sharīʿah and entails no difficulty.

2- If the assets of the general fund belonging to the new *mushārakah* (the borrower) are not sufficient for all the current account balances, then this is in line with the rule of a limited liability company, which does not raise a Sharīʿah issue.

3- One cannot claim that this distribution is against Basel III. That is because Basel gives priority to depositors' established rights as per the terms and rules of their contract with the bank. And this is what happens in the abovementioned distribution.

If someone claims that Basel posits that depositors are lenders, the reply is that Basel is not in a position to change the contractual formula of the Sharīʿah-legal relationship between

those depositors and the bank, as long as this relation with its Sharīʿah formula is accepted by the law. The law does not consider it as a loan.

Second, Liquidation if the Bank Is Liable for the Loss:

The bank guarantees the loss to the investment account holders in the new *mushārakah* fund because it is the *muḍārib*. It also guarantees it for the tier 1*ṣukūk* holders in its funds because the bank is the *muḍārib*.

Redemption runs as follows:

- Payment is first paid to the depositors (current account holders as well as investment account holders) after their rights in the balances are defined. Loss is compensated from the funds (assets) of the new *mushārakah*. That is because the *mushārakah* is the borrower of the current account balances and the *muḍārib* in the investment account balances, as mentioned above.
- If any amount of the general fund remains, it is paid to the tier 1 *ṣukūk* holders after their right in the *ṣukūk* capital is defined.
- In case any amount of the general fund remains, it is for the shareholders.

Example

- The general fund's total assets = 600. They are distributed as follows:

100 current account balances

100 investment account balances

200 tier 1 *ṣukūk* capital

200 original capital

Upon liquidation, if the loss is 50% of the general fund's assets and the residual amount is 300 out of 600, then the parties receive the following:

100 current account holders (as these current account balances are guaranteed).

100 investment account holders (as the current account balances became guaranteed).

100 tier 1 *ṣukūk* holders (the residual amount of the general fund, though their right is the full capital).

0 shareholders (because nothing remains in the general fund).

Remarks:

1. This distribution was done according to redemption priority as per the Basel III requirements. This is because the banks' violation, negligence or breach of the terms of the contract turned the investment account balances into a debt on the new *mushārakah*, and it turned the tier 1*ṣukūk* capital into a debt on the bank.
2. If general funds' assets (particularly the shareholders' funds) are not sufficient for all the above, then this is in line with the rule of the limited liability company.

Concluding Remarks

- Bearing loss by the investment account holders if the bank committed no transgression, neglect or breach of the contractual terms is stipulated in the unified terms and conditions prepared and circulated by the Central Bank of the UAE. They have been adopted by the Sharīʿah Coordinating Committee of Fatwa and Sharīʿah Supervisory Boards of Islamic Financial Institutions in the UAE.
- Federal Civil Transaction Law No. 1985 of the UAE states that the *muḍārib* or partner is not liable except in case of negligence. Every condition contrary to this is considered invalid. It is a rule of the public code, and it is not permissible to make an agreement to the contrary. Article 696 of the transaction law stipulates, "The *muḍārib*'s liability for the capital cannot be stipulated in case of loss or damage not due to his negligence." Article 704 of the transaction law stipulates that "The capital owner bears the loss alone. Any condition contrary to this is considered invalid…" Regarding *mushārakah*, Clause 3 of Article 659 of the Civil Transaction Law states, "Losses are distributed among the partners according to their share in the company's capital. Any condition contrary to this is considered invalid." The Federal Commercial Transactions Act No. 18 of 1993 does not

consider the deposit for investment as a debt. Article 373 states, "Cash deposits, apart from deposit for investment, are considered a debt."

- The bankruptcy rules of the Federal Commercial Transactions Act do not accept giving priority to one common creditor over another. All common creditors are subject to creditors' division without priority or preference. It is known that bankruptcy rules belong to the public code. As such, it is not permissible to agree to the contrary, and the court is not authorized to issue a judgment opposing them, and the regulators have no power to issue resolutions contrary to them. This helps in applying the Sharīʿah rules which we explained about the liquidation procedure. However, it does not allow for a redemption priority agreement if applied in the case of a conventional bank.
- We affirm that what is paid to the investment account holders is their established right under the terms and rules of their contract with the bank according to the *muḍārabah* rules, not *muḍārabah* capital. It has been stipulated in the *ṣukūk* documents that depositors take priority in "their eligible claims". Lawyers have accepted this added phrase, and the central bank did not object either. These claims and their amounts are defined according to the terms and rules of the contract concluded between the depositors and the bank.
- All the foregoing discussion is not based on legal precedents. It is based on Sharīʿah-legal understanding of the current situation. It is unlikely to be the understanding of the experts who allowed the structuring and documentation of *ṣukūk* at the UAE Central Bank. If what we have explained is violated and not followed during liquidation, then what is adopted rests with the judiciary, and the Islamic bank is not responsible for it. Islamic banks are obliged to review the terms and rules of the contracts by which accounts are opened and deposits accepted in order to ensure that the principles we referred to are intact. They should also clarify the structure of the general fund, name its parties and define the relationships between them. This will help prevent misinterpretation and block the means leading to violation of Sharīʿah requirements.
- What is stated in the correspondence letter about transferring the burden of proof to the *ṣukūk* holders that there was no violation or negligence is possible in the

> structure we explained if it helps to solve the Sharīʿah issue and give assurance to regulators. In investment accounts, the shareholders, as representatives of the *mushārakah* between them and the tier 1 *ṣukūk* holders, are [collectively] the *muḍārib*. They must (on behalf of themselves and the *ṣukūk* holders) prove the absence of transgression and negligence to negate liability from this *mushārakah*. If they do not do that, the *mushārakah* bears liability. However, this transfer requires amendment of the terms and rules of investment account contracts. The transfer has to be stipulated in these terms as it is a transfer by agreement of the concerned parties.

The transfer of the burden of proof has been accepted by the third Fiqh Conference of Islamic Financial Institutions, organized by Shūrā Company for Sharīʿah Consultancy from 3-4 November, 2009. The Conference resolution cited detailed Sharīʿah evidence for the transfer:

> Public interest (*maṣlaḥah*) is a legal determinant for the transfer of the burden of proof to those trustees. This is to protect investors' funds from deceit and loss upon the claim of the *muḍārib* or the agent that the funds were destroyed or lost. [Such a claim would be likely] if they knew it would be accepted without having to bring supporting evidence.

This resolution is supported by the third Fiqh Symposium of Abu Dhabi Islamic Bank held on 19-20 January, 2000. This transfer, as we stated before, does not mean that the *muḍārib* is absolutely liable for the loss. This is confirmed by the third Fiqh Conference, which stated:

> Transfer of the burden [of proof] is totally different from making the *muḍārib* or agent liable for destruction and loss, let alone being liable for missing the expected profit. This is absolutely forbidden as it contradicts Islamic investment based on the principle of *al-ghunm bi al-ghurm* (whoever receives the benefit must bear the cost).

(3)

QALB AL-DAYN (DEBT ROLLOVER)

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The Third Topic

Qalb al-Dayn (Debt Rollover)

Conference Chairman: Walīd ibn Hādī

Qalb al-dayn is when a person owes a debt that has in most cases matured, but he is unwilling or unable to pay it back, so the creditor releases the indebted person from this obligation and makes him liable for another deferred debt of higher value than the original debt. Al-Rajrājī said:

"وفسخ الدين في الدين عبارة عن إشغال ذمة واحدة".

"The termination of debt through debt involves the engagement of one person's liability."

If *qalb al-dayn* is performed without any transaction, then it is the *ribā* that was practiced during the pre-Islamic era. Ibn Rushd said:

> وكان ربا الجاهلية أن يكون للرجل على الرجل الدين، فإذا حل قال له: أتقضي أم تربي؟ فإن قضاه أخذه، وإلا زاده في الحق وزاده في الأجل
>
> *Ribā* in the pre-Islamic era happened when one man was indebted to another. When the debt matured the creditor would tell the debtor: 'Will you settle or increase [the amount of the debt]?' If the debtor paid, the creditor would accept it. However, if he did not, the creditor would increase the debt and prolong the payback period.

However, if *qalb al-dayn* is performed through a transaction, then the debtor is either forced into it or not. If he is forced into it, it is not permissible. Shaykh al-Islam [Ibn Taymiyyah] reported consensus about that. The bases of the prohibition are two:

The first is that *qalb al-dayn* is a trick to extract benefit from a loan.

The second is that granting an extension to the insolvent debtor is compulsory.

Shaykh al-Islam [Ibn Taymiyyah] said:

> وأما إذا حل الدين وكان الغريم معسراً لم يجز بإجماع المسلمين أن يقلب بالقلب لا بمعاملة ولا غيرها، بل يجب إنظاره.

If a debt matures and the debtor is insolvent, there is consensus among the Muslims that it is not permissible to perform *qalb al-dayn* regardless of whether it is done through a transaction or not. The debtor must be granted a respite.

It is apparent from his view that it is compulsory to grant a respite to the insolvent whether he is experiencing financial hardship or is totally insolvent. This view is different than that of the Mālikīs. Ibn ʿĀshūr said:

فإن أريد بالعسرة العدم، أي: نفاد ماله كله فالطلب للوجوب، وإن أريد بالعسرة ضيق الحال وإضرار المدين بتعجيل القضاء فالطلب يحتمل الوجوب، وقد قال به بعض الفقهاء، ويحتمل الندب وهو قول مالك والجمهور، فمن لم يشأ لم ينظره ولو ببيع جميع ماله؛ لأن هذا حق يمكن استيفاؤه، والإنظار معروف والمعروف لا يجب. غير أن المتأخرين بقرطبة كانوا لا يقضون عليه بتعجيل الدفع، ويؤجلونه بالاجتهاد لئلا يدخل عليه مضرة بتعجيل بيع ما به الخلاص.

If what is meant by straitened circumstances is insolvency, i.e. all his money is gone, then granting an extension is compulsory. However, if straitened circumstances are in the form of financial difficulty in which demanding payment would cause harm to the debtor, then the request to grant extension could be compulsory, and this is the view of some scholars. It is also possible that it is recommended, which is the view of Mālik and the majority of scholars. However, if the creditor does not choose to, he has the option not to grant him an extension even if it forces [the debtor] to sell all his property. This is because [the debt] is an obligation that is possible to discharge whereas granting extension is a favor, and a favor cannot be made compulsory. Nevertheless, the latter-day scholars in Cordoba used not to rule for the settlement of the debt. Rather, they ruled for deferring it so that [the debtor] is not harmed by rushing to sell in order to clear [the obligation].

If he is not forced into performing *qalb al-dayn*, the debtor might be solvent or insolvent. If the debtor is solvent, then it is permissible to preform *qalb al-dayn* according to the majority of scholars and contrary to the opinion of Mālik. The commentator on *Al-Ghāyah* said:

"(وحرم قلب دين) مؤجل على معسر لأجل (آخر اتفاقاً) قال الشيخ تقي الدين: ويحرم على صاحب الدين أن يمتنع من إنظار المعسر حتى يقلب عليه الدين، ومتى قال رب الدين: إما أن تقلب الدين، وإما أن تقوم معي إلى عند الحاكم، وخاف أن يحبسه الحاكم، لعدم ثبوت إعساره عنده، وهو معسر، فقل على هذا الوجه، كانت هذه المعاملة حراماً غير لازمة باتفاق المسلمين، فإن الغريم مكره عليها بغير حق، ومن نسب جواز القلب على المعسر بحيلة من الحيل إلى مذهب بعض الأئمة فقط أخطأ في ذلك وغلط، وإنما تنازع الناس في المعاملات الاختيارية مثل التورق والعينة

It is impermissible to perform *qalb al-dayn* on the debt of an insolvent person to another deferred date. Shaykh Taqī al-Dīn said: "It is impermissible for the creditor to refrain from granting an extension to the insolvent debtor unless he performs *qalb al-dayn* with him. Additionally, when the creditor says: 'Either you perform *qalb al-dayn* or you will go with me to the judge,' and [the debtor] is afraid that the judge will imprison him because he will not be convinced that he is insolvent, even though

> he is insolvent, and therefore he accepts performance of *qalb al-dayn*, the transaction is forbidden and not binding by the consensus of the Muslims. This is because the insolvent debtor has been forced to do it without any right. He who attributes the permissibility of performing *qalb al-dayn* with an insolvent debtor to the legal subterfuge of some imams is making a mistake. This because the disagreement among the people is regarding voluntary transactions such as *tawarruq* and *ʿīnah*." Restriction [of the discussion] to the insolvent is indicative of the permissibility of performing *qalb al-dayn* with a solvent debtor. However, Abābaṭīn mentioned that performing *qalb al-dayn* upon a solvent debtor is impermissible because it increases the debt obligation upon the debtor just because of the transaction, which has the same meaning as the *ribā* that was practiced during the pre-Islamic era: either pay now or increase the amount. The disagreement on this issue is related to the presence or absence of the cause of the prohibition [of pre-Islamic *ribā* in the transaction]. Those who consider it to raise the suspicion of a loan that yields benefit [to the lender] deem it impermissible, while those who do not [consider it so], allow it.

If the debtor is insolvent, performing *qalb al-dayn* is impermissible according to the Mālikīs and Ḥanbalīs. However, it is not prohibited according to the Shāfiʿīs and the apparent view of the Ḥanafīs. Abābaṭīn said:

> فشيخ الإسلام رحمه الله ذكر حكم القلب على المعسر في الصورة التي لا خلاف فيها، أي عدم جوازها، وعلله بالإكراه، وأما غيرها من صور القلب التي لا إكراه فيها، وربما يجوزها من لا يمنع بعض الحيل من الحنفية والشافعية، فلم يصرح بها في الموضع وكلامه معروف في إبطال الحيل.
>
> Shaykh al-Islam (may Allah have mercy upon him) mentioned the ruling of performing *qalb al-dayn* upon the insolvent debtor in the case that involves no disagreement [among scholars], which is that it is impermissible. He explained that the reason is due to coercion [of the debtor]. As for the other forms of *qalb al-dayn* that do not involve coercion, which might be allowable by those who do not prohibit some legal stratagems amongst the Ḥanafīs and Shāfiʿīs, he did not talk about them in this text. Nonetheless, his view regarding disallowing legal stratagems is well known.

The basis for prohibiting *qalb al-dayn* upon the insolvent debtor is the obligation to give him time, which was discussed earlier.

There is one more issue that needs to be mentioned. If the debtor claims to be insolvent, he is either known to have had wealth before that or not. If he is known to have had wealth, his claim should not be accepted without evidence of his insolvency, and he also needs to swear an oath. However, if he is not known to have had wealth, the Ḥanbalīs opined that he is required to swear an oath and then he will be released. This is because the original state is insolvency. The Mālikīs, on the other hand, view that his claim should not be accepted because people are inclined to acquire wealth. This is thus one of those cases in

which the apparent or most likely situation is given preference over the original state. The original state of a human being is that he is born poor and without wealth. However, the most likely case is that he will seek earnings. Thus, the most likely case is what is considered. This was said by al-Khurashī and others. Therefore, if the debtor proves his insolvency through evidence he will be released.

Some respected scholars have put forward three conditions to allow performing *qalb al-dayn* using *tawarruq*:

The first condition: not linking the contract of the bad debt with the new financing contract. This condition is meant to negate the essence of the *qalb al-dayn* transaction so that the debtor would have the ability to use the proceedings of the *tawarruq* transaction for purposes other than paying back the debt. However, stipulating this condition is still theoretical. This is because the reality of the situation is that the customer has signed the terms and conditions [for the original debt] which allow the bank to retrieve its debt from any account.

The second condition: the customer needs to be solvent. We have illustrated earlier that the Shāfiʿīs allow performing *qalb al-dayn* on the insolvent as well. We also discussed that those who deal with banks are usually solvent. Thus, it is allowed to perform *qalb al-dayn* with all customers according to the majority of scholars and contrary to the opinion of Imam Mālik.

The third condition: the profit of the new financing should not exceed that of the first one. This is so the increase is not used as a means to impose interest on arrears from the first debt. This is according to the view of the majority that it is prohibited to combine a sale and a loan. The Shāfiʿīs opined that it is permissible. This condition might render revolving *murābaḥah* void.

Working Paper on

Debt Rollover

or

Terminating a Debt with Another Debt

by

Shaykh Dr. Nizam Yaqubi

1- The term *qalb al-dayn* was spread by Shaykh al-Islam Ibn Taymiyyah (may Allah have mercy upon him). It was picked up by his student Ibn Qayyim al-Jawziyyah, who mentioned it in his publications. It is referred to in the books of the various *fiqh* schools–especially those of the Mālikīs–by the name *faskh al-dayn bi al-dayn* (terminating a debt with another debt).

2- The permissibility of performing *qalb al-dayn* on a solvent debtor has been attributed to Shaykh al-Islam [Ibn Taymiyyah] on the condition that it is done without coercion. It seems that those who attributed this position to him took it from his statement, "If the debtor is solvent, he has to pay, and thus there is no need to perform *qalb al-dayn.*"[16] They said: limiting it to the "insolvent" indicates that it is permissible to perform *qalb al-dayn* upon the solvent (by use of *mafhūm al-mukhālafah* [the inverse implication]).

   I believe this requires investigation. I reach out to my brothers among the respected scholars to enrich this research by examining the attribution of this view to [Ibn Taymiyyah], especially since his discussion in *Mukhtaṣar al-Fatāwā al-Miṣriyyah* is clear in prohibiting [*qalb al-dayn*].

3- It can also be said that he—Shaykh al-Islam Ibn Taymiyyah—approved the creditor exchanging his matured debt by making it the capital for a *salam* contract with the debtor in exchange for his obligation to deliver a subject matter of defined specifications at a specified date. If he permitted that—while the majority of scholars did not—then he should, *a fortiori*, be more willing to allow *qalb al-dayn*

[16] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 29:419.

in this form. He and his student Ibn Qayyim called it *bayʿ al-wājib bi al-sāqiṭ* (i.e., he is now liable for a new debt while the old debt is terminated).

He said:

"وهذا لا محذور فيه، وليس من بيع الكالئ بالكالئ"

"There is nothing prohibited in this. It does not qualify as the sale of debt for debt (*bayʿ al-kāliʾ bi al-kāliʾ*)."

Therefore, it could be said that if this is permissible, performing *qalb al-dayn* with the solvent debtor is less serious than it.

4- However, Shaykh al-Islam Ibn Taymiyyah only permitted the sale of a matured debt for another (*bayʿ al-wājib bi al-sāqiṭ*) under two conditions:

   a. No profit should be attained from the transaction.
   b. The debt should not be sold in exchange for a subject matter that is not permitted to be sold on a deferred basis.

   Thus, it is not correct to attribute [the ruling of permissibility] to him without qualification by these two important conditions.

5- With regards to his stipulation that there should be no coercion [into entering the transaction], it can be understood from his statement:

"فإن الغريم مكره عليها بغير حق"

"the debtor is coerced into it without any justification"

6- It may be noted that the rulings of the *fiqh* academies appear to prohibit it absolutely, especially the ruling of the Muslim World League. However, the actual application in many products globally seems to be contrary to those rulings. Thus, I suggest that if this forum leans towards permissibility, it should stipulate conditions such as:

   1) That the customer not be coerced into the transaction; rather, it should be done of his free will.
   2) That the first transaction not be linked to the second. This is done by not stipulating that he should settle the first debt in the contract and that he should have the choice to withdraw the amount or settle his debt. Whether his previous signature allowing settlement through his different accounts is considered prohibited or not is subject to research.

3) That he should be solvent. It should be noted here that we must define the boundaries that separate “insolvency” from “solvency” in modern transactions in order to prevent controversy and confusion in fatwas.
4) The profit from the new financing should not exceed the profit of the previous financing if the prevailing market price or the price of the particular bank is still at the same level as the previous profit rate. For example, if the average return in the market is 5%, but the profit rate in the new contract is 8%, this raises the suspicion of taking advantage and of an increase in consideration of the loan.

Allah knows best. God bless our Prophet Muhammad and his family and companions.

The Third Topic: *Qalb al-Dayn* (The Termination of Debt through Debt)

Dr. Hussein Hamid Hassan

The objective of this research is:

First: To illustrate the relation between the termination of debt through debt or the means for executing it—i.e. delaying the debt while increasing its amount—and the prohibition of combining a sale and a loan; i.e., a sale in which an accompanying loan is stipulated, which makes it a pretext for a loan that accrues benefit [to the lender].

Each of them contains [combining] a sale and a loan, with stipulation and without. They also have the same reason (*ʿillah*), which is an expedient for *ribā* even if the expedient in the case of combining a sale and a loan is the increase in the price of the sale. The same goes for other exchange contracts for the purpose of a loan and for other benefits which go to the creditor that cause them to qualify as a loan that accrues benefit [to the lender]. As for the expedient in performing *qalb al-dayn*, it is embodied in the increase of the debt in exchange for deferring it, which makes it fall under the rubric of *ribā al-nasīʾah* ("Defer the debt and I will increase the amount"). They both have the same general *ʿillah*: both the combination of a sale with a loan and *qalb al-dayn* exemplify pretexts for *ribā*.

Second: Do the prohibition of a sale with stipulation of a loan and [the prohibition] of *qalb al-dayn* only apply in cases of contractual stipulation, or do they also apply in cases of *ʿurf* [customary practice] and *muwāṭaʾah* (agreement reached before the contract and not mentioned in it)? In other words, [is it only prohibited] when the loan is stipulated as a condition for execution of the sale contract or the sale is stipulated as a condition for execution of the loan contract, and otherwise it is not prohibited, even if both exist in reality? Similarly, is *qalb al-dayn* [only prohibited when] it is stipulated when performing a new transaction, or in the agreement that created the debt, that the debtor should settle the mature debt from the price of the commodity that he bought in the new transaction, and not prohibited if there was no agreement, condition or the like? Or does the prohibition of both of them still apply when there is no agreement or precondition but merely due to the combination of a sale and a loan; i.e., the mere sale of a commodity by the creditor to the debtor having a mature debt and the debtor's spot sale of that commodity to settle his

mature debt from its value? In other words, are both prohibited if they happen without any agreement, stipulation, customary practice (*ʿurf*) or collusion (*muwāṭaʾah*) but simply because the nature of the operation of the financial institution with its customers requires it?

Also, is it the same when the agreement or the stipulation to perform *qalb al-dayn* is mentioned in the contract that created the debt, or is done after it, or is mentioned in the new transaction? Or is it sufficient that there are contextual indicators, customary practice (*ʿurf*) and tradition; for example, when someone sells goods to his debtor in order for him to sell it for a spot value to settle the mature debt arising from the previous transaction?

As for the combination of a sale and a loan, is the contextual clue of the combination of a sale and a loan [sufficient for the prohibition] or [are other] contextual clues, traditions and customary practice (*ʿurf*) [necessary]? Are these two arrangements both similar in this respect?

Third: [A further question arises] from the opinion that the agreement or the explicit stipulation is not a requirement for prohibiting both of them (i.e. the combination of a sale with a loan, and *qalb al-dayn*) and that contextual clues are enough. I mean the clue of the existence of a stipulated combination between a sale and a loan, and the occurrence of the transaction between the creditor and the debtor with a mature unpaid debt whereby the debtor sells the commodity bought from the creditor and settles his mature debt from its value. Is this contextual clue, expedient or cause for suspicion considered definitive such that it cannot be challenged by evidence that proves the opposite, similar to the case of the evidence of a clearly worded proposal to a woman who is observing her *ʿiddah* (waiting period after the death of her husband), or marriage in a state of *iḥrām* (consecration for pilgrimage), or being alone with a woman whom one could potentially marry? Or is it non-definitive circumstantial evidence—also called simple circumstantial evidence—or a suspicion that is possible to challenge with counter-evidence? An example of the latter is the position that a manufacturer is liable for the materials provided by the customer due to the suspicion [of moral hazard], but he has the right to prove that the destruction of the good was not due to his negligence but due to other reasons. If he manages to prove that, he is not liable.

Is there is a difference in the ruling of these two cases between the ethical ruling [for which one is liable on the Day of Judgment] and the legal ruling [in a court of law]? Also, is there a difference between permissibility and prohibition [on the one hand] and validity and invalidity [on the other]? Or are they linked in both the case of combining a sale and a loan and the termination of debt through another debt using a clear trick (*ḥīlah*); i.e. performing *qalb al-dayn* through a contract or contracts for the purpose of settling outstanding mature debt?

Fourth: To compare the legal cause (*ʿillah*) of the prohibition of debt rollover and the means for doing so with the *ʿillah* for the combination of a sale and a loan. It was said that the *ʿillah* with regard to termination of debt rollover is that it is a means to increase the debt in exchange for deferring it. However, many effective causes have been offered for [the prohibition of] combining a sale and a loan. Some say it is a loan that accrues benefit [to the lender] while some say the reason is that the price is unknown. Some say it is because it is a sale with a condition or because of the prohibition of performing two sales in one transaction. It is also said that [the reason for] the prohibition of debt rollover is beyond rational comprehension.

My research will be limited to briefly addressing these five questions. Particular focus is given to the issue of a contextual clue or suspicion [of *ribā*] or the means to it in these two transactions.

The Relationship between Combining a Sale with a Loan and *Qalb al-Dayn*

Qalb al-dayn has a close relationship with the issue of prohibition of [combining] a sale and a loan, which I was assigned by the Dirāsāt Association to write about. I did indeed write a small research about it. I did not, however, discuss the relationship between the prohibition of [combining] a sale and a loan with the topic of *qalb al-dayn* or the termination of one debt by means of another. Shaykh Walīd ibn Hādī—may Allah protect him—called my attention to that relationship and asked me to link them in order to increase the benefit. This is in order for the results of the research in the two topics to be consistent. I will discuss in this brief research the following points:

1- The definition of *qalb al-dayn* and its various forms.
2- The relationship between *qalb al-dayn* and the prohibition of [combining] a sale and a loan.
3- The ruling of *qalb al-dayn* and the legal cause for the ruling.

First: The Definition of *Qalb al-Dayn* and Its Forms:

The Mālikī term for *qalb al-dayn* is *faskh al-dayn bi al-dayn* (terminating a debt with another debt). Shaykh al-Islam Ibn Taymiyyah calls it "*bayʿ al-wājib bi al-sāqiṭ*".

Performing *qalb al-dayn* has many definitions and many forms. The Mālikīs defined it as:

"فسخ ما في الذمة في مؤخر، ولو معيناً بتأخر قبضه"

"the termination of what is owed in exchange for a deferred [obligation], even if it is a tangible asset for deferred delivery".[17]

This means that [the creditor] terminates the debt obligation of his debtor in exchange for [getting] more of the same type, deferred; or he terminates the debt obligation of his debtor in exchange for a different type, deferred. For example, ten in exchange for fifteen, deferred, or in exchange for a commodity, deferred. However, if he defers the ten, or if he discounts one dirham and defers the remaining nine, these are not [examples of *qalb al-dayn*]. They are in fact a loan or a loan with a discount. They do not qualify as "termination" because the deferment of a mature liability or part of it is not a termination. The essence of termination is to move from one liability to another liability.[18]

Abū al-Walīd al-Bājī says:

"بيع ثوب إلى أجل بحيوان على بائعه إلى أجل أدخل في بيع الكالئ بالكالئ"

"The sale of a dress, deferred, in exchange for an animal, deferred, qualifies as a sale of debt for debt (*bayʿ al-kāliʾ bi al-kāliʾ*)."[19]

[17] ʿUlaysh, *Minaḥ al-Jalīl*, 5:43.
[18] Al-Kharashī, *Sharḥ Mukhtaṣar Khalīl*, 5:76.
[19] Al-Bājī, *Al-Muntaqā: Sharḥ al-Muwaṭṭa'*, 5:33.

It was called *qalb al-dayn* by the Ḥanbalīs and *bayʿ al-wājib bi al-sāqiṭ* by Shaykh al-Islam Ibn Taymiyyah. Others include it under the concept of the sale of debt for debt, which is the meaning of *bayʿ al-kāliʾ bi al-kāliʾ* according to them.

The Shāfiʿī scholar al-Subkī said:

> تفسير بيع الدين بالدين المجمع على منعه يعني: أن يكون للرجل على الرجل دين فيجعله عليه في دين آخر مخالف له في الصفة أو في القدر، فهذا هو الذي وقع الإجماع على امتناعه وهو في الحقيقة بيع دين بما يصير ديناً.
>
> The explanation of the sale of debt for debt, whose prohibition is agreed upon, is that the man who is owed a debt by another man changes the debt into another debt that differs from the first in type or amount. This is the kind whose prohibition is agreed upon. It is in reality the sale of debt in exchange for what becomes a debt.[20]

Al-Qāsim ibn Salām said:

> النسيئة بالنسيئة يقع في وجوه كثيرة من البيع منها: أن يسلم الرجل إلى الرجل مائة درهم إلى سنة في كرّ طعام، فإذا انقضت السنة وحل الطعام عليه قال الذي عليه الطعام للدافع: ليس عندي طعام، ولكن بعني هذا الكر بمائتي درهم إلى شهر، فهذه نسيئة انتقلت إلى نسيئة، وكل ما أشبه ذلك. ولو كان قبض الطعام منه، ثم باعه منه أو من غيره بنسيئة لم يكن كالئاً بكالئ.
>
> Deferral for deferral can occur in many forms of sale. One of them is that a man enters into a *salam* contract with another, selling one *kur* (a volume measure) of grain to be delivered in a year in exchange for one hundred dirhams. When the year is over and the delivery day arrives, the man who has to give the grain says to the man who paid the money: I do not have grain. However, you can sell me the grain [I owe you] for two hundred dirhams to be paid in a month. This is one deferral (*nasīʾah*) that was transformed into another. So too is anything similar to it. Had he taken delivery of the grain from him and then sold it back to him or to another on deferred payment basis, it would not have been considered a sale of debt for debt (*bayʿ al-kāliʾ bi al-kāliʾ*).[21]

Al-Dardīr, of the Māliki School, said:

> "ومعلوم أن فسخ الدين في الدين إنما يمتنع في غير جنسه أو جنسه بأكثر، فإن سلم من ذلك جاز".
>
> It is known that the termination of debt through another debt is prohibited if it is done through another type of subject matter or if it is done through the same subject matter but for more. If it does not involve either of these, it is permissible.[22]

It appears from the definitions and the cases above that *qalb al-dayn* is the termination of a debt for another debt (*faskh dayn fī dayn*) as expressed by the Māliki scholars. It is also

[20] Al-Nawawī, *Al-Majmūʿ, Sharḥ al-Muhadhdhab,* 10:108.
[21] Ibn Salām, *Gharīb al-Ḥadīth*, 1:21.
[22] Al-Dardīr, *Al-Sharh al-Kabīr maʿ Ḥāshiyat al-Dusūqī*, 2:323.

(*bayʿ al-wājib bi al-sāqiṭ*) as per Ibn Taymiyyah and his student, who say that it is permissible and that it is not included under the *ḥadīth* prohibiting *bayʿ al-kāliʾ bi al-kāliʾ*, which deals with one kind of sale of debt for debt, which is the sale of one due debt (*wājib*) for another due debt. They give an example of it as the deferment of receiving the *salam* capital as we shall see. However, the majority of scholars include the concept of *qalb al-dayn* under the concept of the sale of debt for debt and deem it prohibited just like the rest of the forms of the sale of debt for debt. Thus, this transaction can be expressed in four phrases: *qalb al-dayn* (debt rollover), *faskh dayn fī dayn* (the termination of a debt for another debt), *bayʿ al-wājib bi al-sāqiṭ* (the sale of a mature debt for a new debt) or any kind of sale of one debt for another debt.

Second: The Relationship between *Qalb al-Dayn* and the Prohibition of [Combining] a Sale and a Loan

In the research on "the prohibition of a sale and a loan" we mentioned that the prohibition applies to the combination of a sale and a loan by a stipulated condition. This means that one of them is made conditional upon the other. We also mentioned that what is meant is the condition that is declared and announced in the contract and that either a sale or a loan by itself is permissible. Furthermore, even having them together without a condition is permissible. It is apparent from the researches about *qalb al-dayn* and the rulings of the *fiqh* academies that *qalb al-dayn* refers to the [arrangement] that is stipulated in the contract that created the debt, or is stipulated after it, or in the new transaction that is used to settle the debt.

Qalb al-dayn has two types. The first is explicit, which is an agreement between the creditor and the debtor in the contract that created the debt, or at debt maturity, that they will terminate it in lieu of something other than its original subject matter or for an increase of the same subject matter. The other type is implicit, which is when the creditor and the debtor whose debt has matured arrive at this objective by entering into a transaction with each other. For example, the debtor buys a commodity from the creditor on a deferred basis and then sells it in the market for a spot price in order to settle his mature debt from its value. This transaction that occurred between the debtor with a mature debt and the creditor

happened after the contract that created the mature debt, and it was not stipulated as a condition in it, but it entails an increase [of the debt amount] in exchange for the extension of the payback period; however, this increase is not explicit. It is implicit in the new transaction. This is because it includes a profit, and the end result is that the debtor who has a mature debt will enjoy an extension of the payback period in exchange for an increase [in the value of the debt] that the creditor will have from the new transaction that he entered into with the debtor. It is as if what the debtor gave to the creditor is the cost of the commodity that he bought from the creditor, not the mature debt itself. The increase is in exchange for deferring it. Thus the new transaction between the creditor and the debtor is used as a pretext for explicit *ribā al-nasīʾah* ("Extend the payback period and I will increase the value of the debt"). In summary, there might be an agreement, a condition, customary practice (*ʿurf*) or collusion external to the contract that the purpose of the new transaction is to pay back the debt that has matured. This makes the *qalb al-dayn* explicit. On the other hand, there might be nothing of that sort, and this happened by chance, or the debtor may have paid the mature debt before the new transaction or settled it by offsetting his debt against a debt that the creditor owed to the debtor.

The combination of a sale and a loan by stipulation is a clear form of *qalb al-dayn* (the termination of a debt for another debt) using a legal trick, even if the mechanism of the trick is not the same. This is because, even if interest is not mentioned in the loan contract, it is hidden under the sale contract that was stipulated in the loan contract. That is because the commodity that the creditor sells to the debtor is usually sold for a profit while the debtor might sell it for a lower spot price in order to settle the mature debt. The profit is, therefore, in exchange for the extension of the debt. Thus, the sale transaction would become a means to *ribā* even if it is not mentioned that the profit is in exchange for the loan. The buyer might not even sell the commodity he bought at all, or he might sell it without using its value to settle the debt.

If the loan is explicitly stipulated in the sale contract, then the controversy we mentioned earlier would apply: would their combination via a condition be considered as definitive evidence of a trick to engage in *ribā* that cannot be challenged with counterevidence? If so, the person who claims that the transaction is valid would not be allowed to try to refute that evidence by using other contextual clues that indicate there was no intention to use

legal tricks to engage in *ribā*. Or is it a simple contextual clue that can be refuted with counterevidence? [If it is the latter,] it would benefit one who claims that the sale contract is invalid and is a means to *ribā* or *ʿīnah* in that he would not need any other proof besides the mere combination of a sale and a loan by a stipulated condition. It would, however, grant the one who claims the validity of the transaction the chance to prove that he did not mean to use a legal trick to engage in *ribā* and earn concealed interest.

Is it possible to have a disagreement about the nature of the stipulation in this case that we mentioned, as to what kind of evidence it is? Further, is it evidence if the sale price is more or less than the fair market value—in exchange for the loan that the seller extended to the buyer bundled with the commodity in case the price is more than the market value; or in exchange for the loan extended by the buyer to the seller in case the price is less than the market value?

In other words, is it possible for one who claims that the sale transaction is correct to prove that there is no increment, and even if there is, that it is there not because of the debt but for other reasons, and therefore it would not be subject to any disagreement and would thus be valid? Or does this disagreement regarding the evidence apply in the case of the stipulated combination even if there is no increment; i.e.: the mere stipulation of a loan in a sale [contract]?

If the effective cause for the prohibition of a sale with a stipulated loan is the suspicion that the buyer and seller intend *ribā* thereby, this suspicion is apparent in cases of price increase when the seller is lending to the buyer and in price decrease when the buyer is lending to the seller. However, in cases in which there is no increase or decrease of the price compared to the fair market value, there is no suspicion of that sort.

However, if the effective cause is ignorance of the price as per the saying of the Shāfiʿīs, then it is not allowed for one who claims the validity of the sale to defend it by the lack of intention to engage in *ribā*.

All of that is when there is a combination of a debt and a sale through an explicit declared condition in the following two cases: in case there is an increase or decrease of the price compared to the market value, and in case there is nothing of the sort. In the first case, the sale [contract] is void while in the second it is not. The issue that remains is to prove the

existence of an increase or decrease [in the price of the commodity] in case the evidence of the combination with a condition is considered simple.

If the one who claims the validity of the transaction proves that there is no increase or decrease [in the price of the commodity] compared to the market price, then the suspicion of *ribā* and evidence of the stipulated combination for it would be of no effect. In other words, if he who claims the validity of the transaction manages to prove that it does not involve *ribā* or hidden interest, or that the price is equivalent to or less than the market value in case the seller is lending to the buyer, or that the price is equivalent to or more than the market value in case the buyer is lending to the seller, then the claim that the transaction is valid would be deemed acceptable. This is because evidence for something is preferred over uncertainty, based on the maxim:

اليقين لا يزول بالشك

[What is known with] certainty cannot be displaced by doubt[ful evidence].

However, if the evidence of the stipulated combination of a sale with a loan is considered definitive and cannot be challenged by counterevidence, then the mere stipulation of a combination is enough to rule for voiding the sale.

The issue that requires further research, deliberation and discussion is when there is no link between the sale and the loan; i.e. the loan is not a condition in the sale contract at all. However, it was confirmed that the buyer and the seller entered into a loan contract without interest before the sale, or after it or with it, without stipulating a condition [of linkage] in the sale contract or in the loan contract. For example, if the seller told the buyer: "I sold this to you for a hundred, and I lent you a hundred along with the commodity." Or if the buyer told the seller: "I bought your commodity for a hundred, and I lent you a hundred along with the price [of the commodity]," without stipulating one contract as a condition for the other. That is because this is what happens in the case of *qalb al-dayn* with a new transaction between the creditor and the debtor if there is no condition in the contract that created the mature debt—or after it or in the new transaction—that the debtor who bought [the commodity] is required to sell the commodity and settle the mature debt from its value.

If we apply the *ḥadīth* of the prohibition of a sale and a loan, we would find that the majority of scholars do not prohibit the sale or the loan and that they do not void either of them if

they were executed separately or even if they were combined together without a stipulation. Those who consider only the outer forms [of contracts] such as Imam Shāfiʿī and his followers suggest that the sale and the loan are absolutely valid and that if the intention of using legal trickery to engage in *ribā* is assumed, the sale—according to him—is disliked but not prohibited; nor is it void. However, according to many scholars, the deal is prohibited and becomes void if there are strong clues to the existence of an impermissible motive. These are theoretically committed to the consideration of intentions and objectives; they look for them and render contracts void if strong contextual clues indicate unlawful motivation, even if the contract does not contain a stipulated condition of a loan in a sale [contract].

I mentioned in the research on the *ḥadīth* prohibiting a sale and a loan that it means there is a religious ruling and a legal ruling. Imam Shāfiʿī and his followers distinguish between them while some Mālikīs and Ḥanbalīs do not do so with regard to the validity or invalidity of the contract or the ruling on its prohibition or permissibility.

Does this disagreement apply when *qalb al-dayn* is unstipulated and undeclared in the contract that created the debt as well as the new transaction that the defaulted debtor enters into with the creditor? This is done when the debtor buys from the creditor a commodity for deferred payment with its value equivalent to the amount of the mature debt with a determined profit and maturity date. Then he sells it at its usual par value in the market for cash and utilizes the cash to settle the mature debt which he could not repay. All this is done without any agreement, condition, customary practice (*ʿurf*) or extra-contractual collusion. Alternatively, when *qalb al-dayn* is unstipulated, does the disagreement not apply that occurred regarding the prohibition of the combination of a sale and a loan? That is, [does the disagreement not apply] regarding permissibility in case the loan is not stipulated as a condition in the sale contract, and regarding the validity of the debt contract and the sale contract, and regarding the unstipulated intention in combining a sale and a debt?

My view is that the majority of scholars should rule with the same ruling in case there is no stipulation of *qalb al-dayn* as a condition, neither in the transaction that created the debt nor in the new transaction, and that they should not rule that it is impermissible and void.

However, if there was an agreement, or a condition in the contract that created the debt, or after it, or in the new transaction, or if the seller made it a condition upon the buyer that the commodity of the new transaction should be sold for a spot price and be used to settle his mature debt, then the ruling should be prohibition. This is because it is proven by the agreement, or the condition, or customary practice (*ʿurf*) that this new transaction was entered into for the purpose of settling the mature debt and that the increment in the new deal is only due to the deferment. Thus, the suspicion is well founded and the means to hidden interest is confirmed; i.e., when there is an agreement or a stipulated condition, there is no ambiguity. If the seller and the buyer agreed in the transaction that created the debt, or in the new transaction, or if the seller stipulated that the buyer must sell the commodity for cash and use the proceeds to settle all or part of the mature debt, then those who rule for the impermissibility of *qalb al-dayn* and the invalidity of the transaction do not have any disagreement about this case being one of the forms of *qalb al-dayn*.

To sum up: does the disagreement about the ruling of *qalb al-dayn* via a new transaction between the creditor and the debtor apply to all cases—i.e. in cases when it happened by coincident and without an agreement—or just to the case where an agreement exists between the creditor and the debtor that the latter will sell the commodity which he bought from the creditor for the spot price and use it to settle the mature debt, or the case where the creditor makes it a condition upon him in the new transaction? It appears from the statements of the researchers that the prohibition of *qalb al-dayn* does not apply except in cases of an agreement and a condition. Some expanded the ruling to cases of an implicit agreement or customary practice (*ʿurf*); however, if it was done without a prior agreement or a declared or understood condition, then it is not void.

Further, is the condition for the disagreement that the creditor should enter into [an advantageous] transaction with the debtor; for example, selling him a commodity for a price greater than the mature debt that the debtor has not paid, or for a price greater than its market value, or for a price that has an imbedded profit; whereas if he sells it to him for a price equivalent to the outstanding mature debt without any increase for a profit, then it would not be considered as *qalb al-dayn* by a legal trick? The reason is that [in the latter case] the creditor does not increase [the new debt] over the outstanding amount. Although

such a case does not occur in actual practice, my view is that it would not be considered a forbidden form of *qalb al-dayn*.

Third: The Ruling of *Qalb al-Dayn* (Termination of One Debt for Another Debt)

There is no disagreement among the scholars of the four major *fiqh* schools regarding the impermissibility of the termination of debt through another debt or performing explicit *qalb al-dayn*; i.e. terminating the [mature] debt [and replacing it] with another subject matter on deferred payment or terminating the [mature] debt [and replacing it] with another debt of the same subject matter but a higher amount. This is because this form falls under the prohibition of *bayʿ al-kāliʾ bi al-kāliʾ* or of selling one debt for another debt. Subkī mentioned that there is consensus regarding its impermissibility:

> تفسير بيع الدين بالدين المجمع على منعه: هو أن يكون للرجل على الرجل دين، فيجعله عليه في دين آخر مخالف له في الصفة أو في القدر، فهذا هو الذي وقع الإجماع على امتناعه وهو في الحقيقة بيع دين بما يصير ديناً"
>
> The explanation of the sale of debt for debt, whose prohibition is agreed upon, is that the man who is owed a debt by another man changes the debt into another debt that differs from the first in type or amount. This is the kind whose prohibition is agreed upon. It is in reality the sale of debt in exchange for what becomes a debt.[23]

Abū ʿUbayd Qāsim ibn Salām said:

> وقوله: النسيئة بالنسيئة هو أن يسلم: الرجل إلى الرجل مائة درهم إلى سنة في كر طعام، فإذا انقضت السنة وحل الطعام عليه، قال الذي عليه الطعام للدافع: لس عندي طعام، ولكن بعني هذا الكر بمائتي درهم إلى شهر، فهذه نسيئة انقلبت إلى نسيئة، ولو كان قبض الطعام منه ثم باعه منه أو من غيره بنسيئة لم يكن كالئاً بكالئ.
>
> Deferral for deferral can occur in many forms of sale. One of them is that a man enters into a *salam* contract with another, selling one *kur* (a volume measure) of grain to be delivered in a year in exchange for one hundred dirhams. When the year is over and the delivery day arrives, the man who has to give the grain says to the man who paid the money: I do not have grain. However, you can sell me the grain [I owe you] for two hundred dirhams to be paid in a month. This is one deferral (*nasīʾah*) that was transformed into another. So is anything similar to that. Had he taken delivery of the grain from him and then sold it back to him or to another on deferred payment basis, it would not have been considered a sale of debt for debt (*bayʿ al-kāliʾ bi al-kāliʾ*).[24]

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[23] Al-Nawawī, *Al-Majmūʿ, Sharḥ al-Muhadhdhab*, 10:108.
[24] Ibn Salām, *Gharīb al-Ḥadīth*, 1:21.

In addition, ʿAdawī from the Mālikī School said:

> "وكان فسخ الدين أشد حرمة؛ لأنه من ربا الجاهلية والربا محرم بالكتاب والسنة والإجماع، وأما الآخران (بيع الدين بالدين وابتداء الدين بالدين) فتحريمهما بالسنة".
>
> The prohibition of the termination of debt is more emphatic. This is because it qualifies as the *ribā* of the pre-Islamic era, which is prohibited by the Qurʾān, the Sunnah and the consensus of scholars. As for the other two (the sale of debt for debt, and the initiation of a debt via another debt), these are prohibited by the Sunnah.[25]

However, Shaykh al-Islam Ibn Taymiyyah held a contrary view; he allowed the termination of debt through debt, which he called *bayʿ al-wājib bi al-sāqiṭ*, and he did not include it under the prohibition of the sale of debt for debt. He opined that [the classification as] *bayʿ al-kāliʾ bi al-kāliʾ* can only be applied to one form of the sale of a debt for another debt, which is the sale of one mature debt for another mature debt.

The Ruling of the Means Used to Perform *Qalb al-Dayn* (Termination of One Debt for Another Debt)

Contemporary scholars have differed in their opinions with regards to the ruling of the means used to terminate one debt through another debt (*qalb al-dayn*). Ibn Taymiyyah and the majority of scholars report the existence of consensus among scholars regarding any form of *qalb al-dayn*. He says:

> فأما إذا حل الدين وكان الغريم معسراً: لم يجز بإجماع المسلمين أن يقلب عليه الدين لا بمعاملة ولا غيرها، بل يجب إنظاره، وإن كان عليه الوفاء فلا حاجة إلى القلب لا مع يساره ولا مع إعساره".
>
> If a debt matures and the debtor is insolvent, then there is consensus among the Muslims that it is not permissible to perform *qalb al-dayn* regardless of whether it is done through a transaction or not. The debtor must be granted a respite. Since he has to pay back, there is no need to perform *qalb al-dayn*, neither if he is solvent nor insolvent.[26]

Some contemporary scholars opine that a distinction should be made between the insolvent debtor—with whom it is impermissible to perform *qalb al-dayn* and who should be granted an extension—and the solvent debtor, with whom it is permissible to perform *qalb al-dayn*. An example of the latter is when the creditor and debtor want to make the profit from the

[25] ʿAdawī, *Ḥāshiyat al-ʿAdawī ʿalā Sharḥ Kifāyah al-Ṭālib al-Rabbānī*, 2:182.
[26] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 29:419.

financing variable. This is done by entering into a short-term *murābaḥah* transaction with a fixed profit rate. When the maturity date for this transaction comes, [the customer] enters into yet another short-term *murābaḥah* transaction with a fixed profit rate and uses it to settle the outstanding value of the previous matured *murābaḥah*. In this case, there will be no suspicion that an expedient is being used to engage in *ribā* because the debtor is solvent and his intention is not to defer [payment] in exchange for a hidden increase. Rather, he has another objective, which is to make the financing profit variable, since this mechanism is considered a means of hedging. It is also from the perspective of preferring certainty over uncertainty, and thus the suspicion of intent to engage in *ribā* is nullified.

Ibn Taymiyyah reported consensus that it is prohibited to force the debtor into performing *qalb al-dayn*. The reason he did so was to stress its impermissibility and that it is more intensely prohibited and more unjust. It was not to suggest the permissibility of performing *qalb al-dayn* with the solvent debtor.

Dr. ʿAbd al-Rahmān Aṭram—in his valuable research which he presented to al-Shūrā Company in Kuwait in its Conference of Islamic Financial Institutions—stressed the correctness and validity of the opinion of those who say that *qalb al-dayn* is absolutely prohibited for both solvent and insolvent debtors. He also refuted the specious counterarguments.

The Reasons for the Prohibition of This Form:

First: the lack of any benefit from this contract. There is also the harm it could lead to, which is manifested in creating liability for each of the contracting parties without realizing any value or attaining any benefit. It is fitting for the blessed Sharīʿah to prohibit anything of this nature because it does not permit contracts expect those which generate benefits.
In this regard, Ibn Taymiyyah (may Allah have mercy upon him) says:

> بخلاف ما إذا باع دينا يجب في الذمة ويشغلها بدين يجب في الذمة؛ كالمسلم إذا أسلم في سلعةٍ ولم يقبض رأس المال، فإنه يثبت فِي ذِمَّةِ الْمُسْتَسْلِفِ دَيْنَ السَّلَمِ وَفِي ذِمَّةِ الْمُسْلِفِ رَأْسَ الْمَالِ، ولم ينتفع واحدٌ منهما بشيء، ففيه شغل ذمة كل واحد منهما بالعقود التي هي وسائل إلى القبض وهو المقصود بالعقد، كما أن السلع هي المقصودة بالأثمان، فلا يباع ثمنٌ بثمنٍ إلى أجلٍ، كما لا يباع كالئٌ بكالئٍ؛ لما في ذلك من الفساد والظلم المنافي لمقصود الثمنية ومقصود العقود.

[This is] contrary to the case of selling a debt that is currently owed in exchange for another debt that creates a liability. For example, a person enters into a *salam* contract, selling a commodity for deferred delivery without receiving spot payment. Thus, the seller of the commodity has a liability to deliver the commodity and the buyer has a liability to pay the price, and neither of them would have benefited from this contract. Each party would only be incurring a liability thereby, whereas contracts are means for taking delivery, and that is their objective. Likewise, commodities are what is [ultimately] intended from money. Thus, money should not be sold for money by deferred payment, and there shall be no sale of *al-kāliʾ bi al-kāliʾ* (deferral of both counter-values) because of the corruption and injustice each entails. [The first] is contrary to the purpose of money, and [the second is contrary] to the objectives of contracts.[27]

Second: it is a means to *ribā al-nasīʾah* when either of them is unable to settle his debt at maturity. In this regards, the scholar Ibn Qayyim says:

ونهى عن بيع الكالئ، وهو الدين المؤخر بالدين المؤخر؛ لأنه ذريعة إلى ربا النسيئة، فلو كان الدينان حالين لم يمتنع؛ لأنهما يسقطان جميعاً من ذمتيهما، وفي الصورة المنهي عنها ذريعة إلى تضاعف الدين في ذمة كل واحد منهما في مقابلة تأجيله، وهذه مفسدة ربا النسيئة بعينها.

And he forbade *bayʿ al-kāliʾ* which is the sale of one deferred debt for another deferred debt because it leads to *ribā al-nasīʾah*. If both debts were immediately due, then it would not be prohibited because they would both have their liabilities waived. In the prohibited form it leads to increasing the debt in the liabilities of each of them in exchange for deferment. This is the exact harm that comes from *ribā al-nasīʾah*.[28]

Third: it leads to discord, conflict and dispute. Anything of this nature is prohibited by the blessed Sharīʿah to prevent the means that create enmity among people. This is similar to the prohibition of [a person] underselling his brother [in Islam] and the prohibition of proposing to a woman when another Muslim has already done so. This is one of the very important fundamentals of the Sharīʿah. The scholars of *uṣūl al-fiqh* call it blocking the means (*sadd al-dharīʿah*).

Ibn Qayyim (may Allah have mercy on him) says:

ومن ذلك: نهيه صلى الله عليه وآله وسلم عن الذرائع التي توجب الاختلاف والتفرق والعداوة والبغضاء، كخطبة الرجل على خطبة أخيه، وسومه على سومه، وبيعه على بيعه، وسؤال المرأة طلاق ضرتها، وقال: "إذا بويع لخليفتين فاقتلوا الآخر منهما"؛ سداً لذريعة الفتنة والفرقة. ونهى عن قتال الأمراء والخروج على الأئمة وإن ظلموا وجاروا ما أقاموا الصلاة؛ سداً لذريعة الفساد العظيم والشر الكبير بقتالهم، كما هو الواقع،

[27] See: Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 29:472.
[28] See: Ibn Qayyim, *Ighāthat al-Lahfān min Maṣāyid al-Shayṭān*, 1:364.

فإنه حصل بسبب قتالهم والخروج عليهم من الشرور أضعاف أضعاف ما هم عليه، والأمة في بقايا تلك الشرور إلى الآن.

An example of that is the prohibition by the Prophet (ρ) of behavior that leads to disagreement, separation, hostility and hatred, such as proposing to a woman when one's brother [in Islam] has already done so, offering a higher price for something that one's brother has already offered to buy, and trying to undersell him. It is also prohibited for a woman to ask her husband to divorce her fellow wife. [The Prophet (ρ)] also said: "When the oath of allegiance has been taken for two caliphs, kill the one for whom the oath was taken later." This is to block the means that lead to civil strife and division. He also prohibited rebellion against rulers even if they are unjust and unfair as long as they establish *ṣalāh* (prayer). This is to avoid the means to the great destruction and huge evil that would come from fighting them, as is happening. The evils that result from fighting them and rebelling against them are many times greater than the evils they are responsible for. The *ummah* is suffering from the lingering effects of those evils until now.[29]

There is no doubt that this form of *qalb al-dayn* would lead to dispute between the contracting parties. The Māliki scholar Qarāfī says:

الحذر من بيع الدين بالدين، وأصله: "نهيه عليه السلام عن بيع الكالئ بالكالئ" وها هنا قاعدةٌ، وهي أن مطلوب صاحب الشرع صلاح ذات البين وحسم مادة الفساد والفتن حتى بالغ في ذلك بقوله عليه السلام: "لن تدخلوا الجنة حتى تحابوا"، وإذا اشتغلت المعاملة على شغل الذمتين توجهت المطالبة من الجهتين، فكان ذلك سبباً لكثرة الخصومات والعداوات، فمنع الشرع ما يفضي لذلك، وهو بيع الدين بالدين.

Caution against the sale of one debt for another debt. The basis for this is the prohibition [by the Prophet (ρ)] of *bayʿ al-kāliʾ bi al-kāliʾ*. This is the manifestation of a basic principle, which is that the objective of the Lawgiver is to maintain good relations between people and prevent corruption and civil strife. He (ρ) went so far as to say: "You will not enter paradise until you love one another." If a transaction creates a liability for both parties, each will direct a claim [against the other], which will become a cause for much conflict and enmity. As a result, the Lawgiver prohibited what leads to it, which is the sale of debt for debt.[30]

Fourth: It leads to massive uncertainty (*gharar*), which the Sharīʿah does not permit. The explanation of this is that the *salam* contract includes an acceptable level of uncertainty (*gharar*) which the Sharīʿah allows and considers negligible. However, if a delay in the payment of the capital is added to it, the uncertainty would become greater and the risk would intensify. Therefore, it becomes appropriate to prohibit the transaction.

[29] Ibid., 1:369.

[30] See: Al-Qarāfī, *Al-Furūq*, 3:290.

In this regards, Ibn Qayyim (may Allah have mercy on him) says:

> فثبت أن إباحة السلم على وفق القياس والمصلحة، وشرع على أكمل الوجوه وأعدلها، فشرط فيه قبض الثمن في الحال؛ إذ لو تأخر لحصل شغل الذمتين بغير فائدة، ولهذا سمي سلماً لتسليم الثمن، فإذا أخر الثمن دخل في حكم الكالئ بالكالئ بل هو نفسه، وكثرت المخاطرة، ودخلت المعاملة في حد الغرر، ولذلك منع الشارع أن يشترط فيه كونه من حائط معين؛ لأنه قد يتخلف فيمتنع التسليم. والذين شرطوا أن يكون دائم الجنس غير منقطع قصدوا به إبعاده من الغرر بإمكان التسليم، لكن ضيقوا ما وسع اللهن وشرطوا ما لم يشرطه، وخرجوا عن موجب القياس والمصلحة. أما القياس فإنه أخذ العوضين، فلم يشترط دوامه ووجوده كالثمن، وأما المصلحة فإن في اشتراط ذلك تعطيل مصالح الناس؛ إذ الحاجة التي لأجلها شرع الله ورسوله السلم: الارتفاق من الجانبين، هذا يرتفق بتعجيل الثمن، وهذا يرتفق برخص الثمن، وهذا قد يكون في منقطع الجنس كما قد يكون في متصله، فالذي جاءت به الشريعة أكمل شيء وأقومه بمصالح العباد.

> It is confirmed that the permissibility of *salam* is consistent with *qiyās* (analogy) and *maṣlaḥah* (public interest) and that it has been legislated in the most complete and most just form. Receiving the *salam* price on the spot is required because if it were delayed there would be two liabilities without any benefit. That is why it was called *salam*; because the price is paid up-front. If the price were delayed, it would take the ruling of *bayʿ al-kāliʾ bi al-kāliʾ* (the sale of one debt for another). It would in fact be the same as it. Additionally, the risk would become higher and the transaction would enter the boundaries of uncertainty (*gharar*). Thus, the Lawgiver prohibited stipulating a condition [in the *salam* contract] that [the commodity] should come from a particular place. That is because it might be delayed and therefore the delivery might be obstructed. Further, those who required [in a *salam* contract] that the subject matter should be available at all times and not seasonal did so to avoid uncertainty with regards to the possibility of delivery. However, those who did so narrowed what Allah has made wide and stipulated what He did not. They also went against *qiyās* and *maṣlaḥah* (public interest). In terms of *qiyās*, it is one of the two counter-values; therefore, it is not required that it always be available, like the price. As for *maṣlaḥah* (public interest), stipulating [constant availability] would obstruct people's interests. This is because the reason that Allah and His Messenger permitted *salam* is for the convenience of both parties. One of them gets the convenience of receiving the price on the spot and the other gets the convenience of a discounted price. This can be done for subject matter that is always available and also for subject matter that isn't. What the Sharīʿah prescribed is the most perfect and the most suitable for the interests of the worshipers.[31]

The Rulings of the *Fiqh* Academies

First: The Ruling of the Islamic Fiqh Council of the Muslim World League

The ruling of the Islamic Fiqh Council of the Muslim World League indicates that *qalb al-dayn* is entirely forbidden. The ruling states:

[31] See: Ibn Qayyim, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, 1:302.

أولاً: يعد من فسخ الدين في الدين الممنوع شرعاً كل ما يفضي إلى زيادة الدين على المدين مقابل الزيادة في الأجل أو يكون ذريعة إليه ويدخل في ذلك الصور التالية:
1- فسخ الدين بالدين عن طريق معاملة بين الدائن والمدين تنشأ بموجبها مديونية جديدة على المدين من أجل سداد المديونية الأولى كلها أو بعضها، ومن أمثلتها: شراء المدين سلعة من الدائن بثمن مؤجل ثم بيعها بثمن حال من أجل سداد الدين الأول كله أو بعضه. فلا يجوز ذلك ما دامت المديونية الجديدة من أجل وفاء المديونية الأولى بشرط أو عرف أو مواطأة أو إجراء منظم، وسواء في ذلك أكان المدين موسراً أو معسراً وسواء أكان الدين الأول حالاً أم مؤجلاً يراد تعجيل سداده من المديونية الجديدة، وسواء اتفق الدائن والمدين على ذلك في عقد المديونية الأول أم كان اتفاقاً بعد ذلك، وسواء أكان ذلك بطلب من المدين أم بطلب من الدائن، ويدخل في المنع ما لو كان إجراء تلك المعاملة بين المدين وطرف آخر غير الدائن إذا كان بترتيب من الدائن نفسه أو ضمان منه للمدين من أجل وفاء مديونيته.

Firstly: anything that leads to the increase of the debt amount for the debtor in exchange for the time extension, or serves as a means towards that, is considered a type of prohibited termination of one debt through another debt. This includes the following forms:
The termination of debt for another debt through a transaction between the creditor and the debtor that creates a new debt obligation upon the debtor for the purpose of settling the first debt in full or in part. An example of this is when the debtor buys a commodity from the creditor for a deferred price and then sells it for a spot price for the purpose of paying back the first outstanding debt in part or in full. This is not permissible as long as the new debt obligation is created to settle the first one based on a stipulation, customary practice (*ʿurf*), *muwāṭaʾah* (extra-contractual agreement) or an organized procedure. [This applies] regardless of whether the debtor is solvent or not, and whether the first debt is mature or immature, the intent [in the latter] being to pay it early from the new indebtedness. [It applies] whether the creditor and the debtor agreed to it in the first debt obligation or after it and regardless of whether it was at the request of the debtor or the creditor. The prohibition also applies when the transaction is performed between the debtor and a third party other than the creditor if it is arranged by the creditor himself or if he guarantees that the debtor will settle his debt.

This ruling shows that the prohibited *qalb al-dayn* happens by an agreement between the creditor and the debtor regardless of whether the agreement was declared or by customary practice (*ʿurf*), or tradition, or *muwāṭaʾah* (extra-contractual agreement) that the new debt obligation is for the purpose of settling the first debt obligation. There is no difference whether the debtor is solvent or not.

Second: The Rulings of the International Islamic Fiqh Academy

Resolution No. 151 (4/11) [1] states:

> It is not permissible to sell a deferred debt to [a party] other than the debtor for spot value, neither of the same kind nor another kind, because it leads to *ribā*. Likewise, it is not permissible to sell it for a deferred value, neither of the same kind nor another kind, because it is the sale of debt for debt (*bayʿ al-kāliʾ bi al-kāliʾ*), which is forbidden by the Sharīʿah. It makes no difference whether the debt originates from a loan or from a deferred sale.

As such, the Fiqh Academy has adopted the view of the majority with regards to forbidding the sale of debt in its entirety, for the reasons mentioned in the ruling.

Then, the Fiqh Academy, in its Resolution No. (7/17), decided the following

> **Firstly:** Anything that leads to an increase in the debt amount in exchange for deferring it, or serves as a means towards that, is considered part of the forbidden termination of a debt through another debt. This includes the termination of debt for another debt by a transaction between the creditor and the debtor that leads to the creation of a new debt obligation upon the debtor for the purpose of settling the first debt obligation in full or in part, whether the debtor is solvent or not. An example is when the debtor buys a commodity from the creditor for a deferred price and then sells it for a spot price for the purpose of settling the [original] debt in part or in full.

This is the view of the majority of scholars with regards to the termination of one debt through another debt (also known as *bayʿ al-wājib bi al-sāqiṭ*), contrary to the view of Ibn Taymiyyah and Ibn Qayyim. The apparent meaning is that what is prohibited is *qalb al-dayn* by an agreement or a stipulated condition. This is because [the above ruling] mentions that the new transaction is done for the purpose of settling the first debt obligation. It thus makes it a condition for the prohibition. [The resolution continues:]

> **Secondly:** amongst the forms of the permitted sale of debt:
>
> 1- When the creditor sells the debt to [a party] other than the debtor in one of the following forms:
>
> a. The sale of the outstanding debt for a spot value in a different currency other than the currency of the debt calculated based on the exchange price of the day of the sale transaction.
> b. The sale of the debt for a specified commodity.

(The Fiqh Academy is following in this the view of the Ḥanafīs and Mālikīs and going against the views of the Shāfiʿīs and Ḥanbalīs.)

> c. The sale of the debt for the usufruct of a specified asset.
> d. The sale of debt as part of an amalgam, the majority of which is comprised of assets and usufructs that are the objective of the sale.

Prohibiting the forms mentioned in the two rulings is what I prefer. I do not consider it permissible to perform *qalb al-dayn* with a solvent debtor unless it is absolutely clear that the purpose of the new transaction is not merely the settlement of the outstanding transaction. This is because there is nothing to prevent the debtor from settling the debt. The only purpose is to adjust to the market cost of financing, especially in mid-term and long-term financing. That is because long-term financing, for example, might carry rate-of-return risk if the rate of return is a fixed part of the price.

In order to hedge against these risks, the financier and the fund recipient enter into contracts that generate debt obligations upon the fund recipient. An example is entering into multiple *murābaḥah* contracts for short periods of time whereby the revenue is determined according to a fixed profit rate. This profit rate would increase in each new *murābaḥah* contract. In this case, the suspicion that this is *ribā al-nasīʾah*, or a means toward it, would be eliminated. Certainty would be preferred over uncertainty.

What remains are cases in which there is no agreement, stipulation, customary practice (*ʿurf*), organized procedure or extra-contractual agreement (*muwāṭaʾah*) between the creditor and the debtor. Rather, the debt of the debtor matures, but he does not pay it and the creditor does not ask him to do so, and they enter into a new transaction. This is done due to prior ongoing transactions with each other because the debtor is a customer of the financier, and this has happened by chance. My view is that there is no objection in this case for the debtor to sell the goods that he bought in a new transaction and pay, from the proceeds of its value, his outstanding debt from previous transactions. This [scenario] can be imagined [to happen] in reality.

We mentioned before that combining a sale and a loan without a condition does not affect the permissibility and validity of either the sale or the loan according to the majority of scholars. This means that multiple transactions may occur between the bank and a customer, some of which create a debt obligation on the debtor (loans) while others are exchange contracts that occur at market value without those contracts being linked or made conditional upon one another. The creditor's dealing with his debtor may appear like *qalb al-dayn*; however, there is no intention to use the new transaction as a means for *ribā al-nasīʾah*.

Third: The Ruling of the Fiqh Conference of Islamic Financial Institutions:

This conference produced a ruling on *qalb al-dayn* as follows:

> **The Third Ruling:** *Qalb al-Dayn*: Its Forms, Rulings and Its Sharīʿah-Compliant Alternatives in the Transactions of Islamic Banks
> **First:** *Qalb al-dayn* in *fiqh* terminology means: creating a new deferred debt obligation which takes the place of a previous debt obligation that has matured, even if the subject matter differs, with an increase in the amount or attribute.
> **Second:** With regard to its ruling, *qalb al-dayn* is of two types, one of which is prohibited by the Sharīʿah. The main [prohibited] forms include the following:
>
> > The first: the mature debt is deferred for the debtor in exchange for an increase in its amount or attribute, regardless of whether it originated from a *salam* contract, the price of a sale contract, a loan installment, compensation for destruction, or other causes. There is consensus among scholars that this is considered a form of the *ribā* of the pre-Islamic era ("Defer the debt and I will increase the amount").
> > The second: the mature debt is deferred for the debtor in exchange for an increase in its amount that is reached through a clear legal trick in the form of entering into a contract or contracts that are not intended for their own sake. Rather, those contracts have no objective other than subterfuge to achieve that purpose. They are prohibited and invalid in the Sharīʿah, regardless of whether the debtor is solvent or not. This is considered similar to the prohibited *ʿīnah* contract. However, it is even worse, more sinful and more unjust when the creditor forces his insolvent debtor to do that. This is because he has been ordered [by the Sharīʿah] to grant him an extension. Thus he is not allowed to force him into that.
>
> The other is permissible from a *fiqh* point of view. It has five forms as follows:
> > The first: when the creditor sells the mature debt obligation to the debtor himself using another deferred debt obligation involving a different subject matter provided that such subject matter is permissible to sell on a deferred basis.
> > Second: when the creditor uses the mature debt as *salam* capital with the same debtor in exchange for a predetermined *salam* subject matter to be delivered at a certain maturity date.
> > Third: when the creditor exchanges the mature debt for the usufruct [of an asset] owned by the debtor; for example, a house, shop, car or the like, for a determined duration such as a year, five years, etc.
> > Fourth: the creditor sells his mature debt to the debtor himself in exchange for an asset with a delayed delivery such as a real estate property, a commodity absent [from the contract session] or fruit ripe enough to harvest but not harvested yet.
> > Fifth: the debtor acquires cash financing from a third party using a Sharīʿah-compliant format for the purpose of settling his mature debt. This is allowed

> even if it costs the debtor more than what he receives to settle his [original] debt. This is on the condition that the increase does not go to the creditor (the Islamic financial institution) by any means and that the mechanism of achieving the objective is free of the suspicion of being a means to *ribā* or a trick to engage in *ribā al-nasīʾah* ("Defer the debt and I will increase the amount").

It is noted in the second prohibited form above that it is not a condition of prohibition that there be an agreement between the creditor and the debtor to delay the debt in exchange for increasing it through the new transaction. Rather, it is enough to reach this increase through a clear trick in the form of a contract or contracts that are not intended to be entered into for their own sake and have no meaning but to achieve that purpose.

In such case, one who claims that this form is included in the forbidden *qalb al-dayn* must prove that there is a **clear trick** and that it is embodied in the contract that is not intended for its own sake and which has no meaning other than manipulation to defer the debt in exchange for an increase in its amount. There is no need to have an explicit agreement, a declared or implicit condition, customary practice (*ʿurf*) or collusion (*muwāṭaʾah*) as per the ruling of the Fiqh Council of the Muslim World League. If the claimant of invalidity and impermissibility [of the contract] is unable to prove that, then the original state is that those contracts are permissible and valid. This reminds us of the combination of a sale and loan without stipulation and the disagreement of scholars about its ruling: whether it is evidence of an impermissible intention or should remain on the original ruling of permissibility.

Doctor Hussein Hamid Hassan

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27 October, 2015

The Third Topic: *Qalb al-Dayn* (The Termination of Debt through Debt)

Dr. Hussein Hamid Hassan

The objective of this research is:

1. To explain the relationship between *qalb al-dayn* (debt rollover) and the combination of a sale and a loan.
2. Is the effective cause (*ʿillah*) of their prohibition one [and the same] *ʿillah*?
3. Is an agreement [during the contract session] or a stipulation in the contract a requirement for their prohibition?
4. Do custom and an agreement before the contract session (*muwāṭaʾah*) take the ruling of an agreement [during the contract session] or of contractual stipulation?
5. Have they both been prohibited for their own sakes or because they raise the suspicion of being a means to the corruption and harm of *ribā*? [If so,] what type of means are they, and what is the degree of their prohibition? Are they considered definitive or modest evidence [of the intention to engage in *ribā*]; i.e., is it possible to provide evidence for the opposite [intention]?

<u>First:</u> The Relationship between Debt Rollover and the Combination of a Sale and a Loan

1. Both of them involve a sale—and the other exchange contracts are similar [in this regard—and a loan, and other charitable contracts are similar [in this regard].
    a. It is clear that the combination of a sale and a loan involves two contracts: a sale contract and a loan contract, whether they are combined in one contract, or one of them is the contract and the other is a condition in it, or one is in the midst of the other or precedes it.
    b. Debt rollover (*qalb al-dayn*) comprises a loan that created a debt which has come due on the debtor, but he has not paid it, and a sale (or some similar transaction like it). The intent of the sale is to settle the outstanding debt from the loan. The contract that created the debt must, of necessity, have preceded the creditor's sale of the commodity to his debtor whose debt has

come due. [The sale] is to settle the debt from the price of the commodity that the debtor buys from him. This is something that actually occurs.

Each of them may occur by an agreement [during the contract session] or a stipulation [in the contract], or they may occur without an agreement or a stipulation. A sale and a loan may occur together without stipulation, as we mentioned in the research on the prohibition of [combining] a sale and a loan, or one of them could be stipulated as a condition in the terms of the contract for the other. Debt rollover could be by an agreement or condition in the terms of the contract that created the debt, or after it, or in the new transaction between the creditor and debtor to settle the debt that has matured upon the debtor. The apparent meaning of the wordings of the resolutions of the *fiqh* academies is that the prohibition is only when there is an agreement or stipulation. If there is no agreement or stipulation, then there is no prohibition. What is meant by an agreement or stipulation is an explicit [statement] in the terms of the contract; i.e., the sale contract or the loan contract in case the sale and loan are combined, and an explicit agreement or stipulation in the terms of the contract that created the debt in debt rollover, or after it, or in the new sale contract concluded between the creditor and debtor to settle the debt that has matured upon the debtor and which he has not paid. Thus, if there is nothing resembling such an agreement or condition, and [a later transaction] occurs between the creditor and the debtor, the effective cause of the prohibition has not been realized in the [new] agreement.

When reading the resolutions of the *fiqh* academies, one finds that some of them refer to the agreement being a stipulated condition while others do not. It is difficult to know what was intended by those who mention agreement as a condition for the prohibition of debt rollover; do they mean agreement in the terms of the contract, or after it, or before it? As for the combination of a sale and a loan, those who say the prohibition only applies to a stipulated condition have explicitly stated that this stipulated condition must be expressly stated in the terms of the contract.

However, for those who require the existence of a condition to prohibit performing *qalb al-dayn*, is the condition that the debtor—whose debt has matured or is going to mature—should sell the commodity bought from the creditor and use its value to

settle the debt and that this should be mentioned in the contract that led to the debt, or in a subsequent independent agreement, or in the new transaction between the creditor and the debtor who has completely settled his current debt? Or is the meaning of the condition or agreement the existence of an agreement or condition that such transactions are intended for the purpose of increasing the debt in exchange for delaying it? In other words, must these procedures be with the intention [just mentioned], and are they not considered unless they are so, because they are contracts and agreements, or is the intended meaning of the aim agreed upon the aim of these procedures?

My opinion on this is that the condition that must be realized in order for the prohibition to apply is an explicit agreement and a condition stipulated in the contract. It is a stipulation of a loan in the sale contract and a stipulation that the sale price from the new transaction must be used to settle the [outstanding debt]. The objective should not be to increase the price in consideration of the loan in the case of combining a sale and a loan.

2. Both the combination of a sale and a loan and debt rollover share in the same effective cause of prohibition. It is that both of them are means that lead to *ribā*. The means in the case of combining a sale and a loan is an increase in the price of the sold item, and the same applies for [the object of contract in] other exchange contracts, as consideration for initiating the loan. The same holds for all other benefits that accrue to the loan, which bring it under the rubric of a loan that brings added benefit [to the lender]. The means in a debt rollover, it is embodied in an increase of the debt amount in consideration of a deferral of the payment date, which makes it fall under the rubric of *ribā al-nasīʾah* ("Defer the debt and I will increase the amount"). They both have the same general *ʿillah*: both the combination of a sale with a loan and *qalb al-dayn* exemplify pretexts for *ribā*.
3. The type of evidence that [these arrangements] are means that lead to *ribā*

   Based on the opinion that an explicit agreement or condition is not a requirement for the prohibition of either of them (the combination of a sale and a loan or debt rollover) and that circumstantial evidence is sufficient, is this circumstantial evidence or suspicion that it is a means [leading to *ribā*] considered definitive

evidence that precludes the possibility of offering evidence to prove the opposite? [That is, is it] like the circumstantial evidence or suspicion of an explicit proposal of marriage to a widow during her waiting period (*ʿiddah*), or marriage in a state of *iḥrām* (consecration for pilgrimage), or being alone with a woman whom one could potentially marry? Or is it non-definitive circumstantial evidence—also called simple circumstantial evidence—or a suspicion that is possible to challenge with counter-evidence? An example of the latter is the position that manufacturers are liable for the materials provided by the customer due to the suspicion [of moral hazard], but they have the right to prove that the destruction of the goods was not due to their negligence or transgression but for a reason they had no control over. If they manage to prove that, they are not liable.

4. Does the ruling in each of these cases differ between the ruling in a court of law and the moral/religious ruling? Also is there a distinction between permissibility and impermissibility on the one hand and validity and invalidity on the other hand, or are they inextricably linked in the case of combining a sale and a loan as well as the case of debt rollover by an obvious legal trick; i.e., debt rollover by means of a contract or contracts for the purpose of settling the outstanding debt that has come due?

   My opinion on this is that in the case of an explicit stipulation the transaction is prohibited and invalid; i.e., the ruling is both the ruling in a court of law and the moral/religious ruling. As for the case of combining a sale and a loan or of debt rollover without an explicit stipulation in the contract, the contract is not invalid and is either [morally] disliked or prohibited as per the differing opinions of scholars about the combination of a sale and a loan.

   Comparison of the effective cause (*ʿillah*) of the prohibition of debt rollover and of combining a sale and a loan [reveals that] the effective cause (*ʿillah*) of the prohibition of debt rollover is that it is a means of increasing the debt amount in return for postponing its payment whereas numerous effective causes have been proposed for the prohibition of combining a sale and a loan. Some said it is a loan that accrues benefit [to the lender] while some said the reason is that the price is unknown. Some said it is because it is a sale with a condition or because of the

prohibition of performing two sales in one transaction. It is also said that [the reason for] the prohibition of debt rollover is beyond rational comprehension.

5. Is *qalb al-dayn* the same as *faskh al-dayn fi al-dayn* (terminating a debt with another debt) or is it a means that leads to it?

   Some researchers have mentioned that the two terms have the same meaning, which is to have a new debt take the place of a previous debt that is already the liability [of the debtor] after it has fallen due. It is the same whether the liability is of a different category or of the same category with an increase in the amount or the workmanship. They mentioned as examples of it postponement of the debt that has fallen due on the debtor in exchange for an increase in the amount by means of an obvious legal trick; for example, concluding a contract that is not intended for its own sake and which makes no sense except to provide legal cover for achieving that end. A better [conceptualization] is that *faskh al-dayn fi al-dayn* refers to every increase in debt on [an original] debt in exchange for a deferment of the payment date. This is explicit debt rollover. As for *qalb al-dayn*, it refers to the means or the legal trick used to achieve that. That means *qalb al-dayn* could be explicit or non-explicit.

6. Do all those who prohibit *faskh al-dayn fi al-dayn* also prohibit the means that leads to it by a new transaction (*qalb al-dayn*)? And did those who permitted *qalb al-dayn* and called it *bayʿ al-wājib bi al-sāqiṭ*—for example, Shaykh al-Islam Ibn Taymiyyah—permit the means to it, which is *qalb al-dayn*, using a contract that is not intended for its own sake, the intention of it being to achieve *ribā*?

   It appears from the research and the resolutions of the *fiqh* academies that those who prohibit explicit *faskh al-dayn fi al-dayn* also prohibit the means that leads to it by a new transaction between the creditor and debtor, the purpose of which is to have the debtor pay the money. The *fiqh* academies mentioned that *qalb al-dayn* is one of the forms of *faskh al-dayn fi al-dayn.*

   As for Shaykh al-Islam, he does not apply the *ḥadīth* [prohibiting] *bayʿ al-kāliʾ bi al-kāliʾ* (sale of one debt for another debt) to *faskh al-dayn fi al-dayn*, which he

considers permissible. Whoever, he strictly prohibits what he calls *qalb al-dayn*, prohibiting its use with both an insolvent and solvent debtor without distinction.

(4)

THE FIQH CHARACTERISATION OF THE *RIBĀ* OF A LOAN

Prepared by:

Conference Chairman: Walīd ibn Hādī

Dr. ʿAbdullah Yūsuf Al-Judayʿ

The Fourth Topic

The Fiqh Characterisation of the *Ribā* of a Loan

Conference Chairman: Walīd ibn Hādī

The jurists divided *ribā* (usury) into *ribā* of sales and *ribā* of debts. The *ribā* of debts is divided into two types. One is at the beginning of the contract, which is called the *ribā* of a loan (*ribā al-qarḍ*). The second type occurs at a second stage, and that is the *ribā* of Jāhiliyyah (the pre-Islamic era of ignorance). Ibn al Qayyim explained it and mentioned its ruling:

> When the usurer considers debt rollover to be lawful, saying to the debtor: "You will either pay [now] or increase the amount and the duration," then he is an infidel (*kāfir*). He must be asked to repent; if he doesn't, he should be killed.…Zayd ibn Aslam said: "The *ribā* of Jāhiliyyah was that a man would have a right on another man, due on a certain date. When the debt came due, the creditor would say to him: 'Will you settle [now] or increase [the amount]?' If he paid up, he would take it; if not, he would increase the amount and postpone the settlement date." It was collected by Imam Mālik. [About] this type of *ribā*, there is consensus on its prohibition and invalidity, and its prohibition is known in Islam just as the prohibition of adultery, sodomy and stealing are known....*Ribā* is of two types: *jalī* (clear) and *khafī* (hidden). Clear *ribā* is prohibited because it entails great harm, and hidden *ribā* is prohibited because it is a means to clear *ribā*. The prohibition of the first is intended [in itself] while the prohibition of the second is because it is a means [to the other]. The clear *ribā* is *ribā al-nasīʾah* (increase due to deferment) that was practised in the pre-Islamic era. Imam Aḥmad was asked about the *ribā* about which there is no doubt. He replied: "[It is] if a person is a debtor and he is asked: 'Will you settle [now] or increase?' If he does not settle, he increases the amount while the [creditor] defers the date."

Shaykh al-Islam [Ibn Taymiyyah] said:

> In the pre-Islamic era, if a man was owed a debt, he would come at the maturity date and say: "Either settle [now] or increase [the amount]." If he didn't pay, the debtor would increase the amount and the creditor would give him more time. It means [the creditor] sold the money for a larger amount with deferred payment. Allah ordered them, if they repented, that they not demand anything but the original capital.

Ibn ʿAbd al-Barr said:

> All early and later scholars have agreed that the *ribā* which has been prohibited by the Qurʾān is that the creditor takes compensation in money or in kind for deferring the payment of a debt that has come due. This is what is meant by the Arab saying, "Either settle [now or pay more]."

He also said in *al-Istidhkār*, "They had no dispute about the statement, 'Either settle now or pay more,' that it is the *ribā* that is agreed by all and is prohibited by the Qurʾān." In *al-Durar al-Saniyyah,* it is written:

> You should know that the *ribā* of Jāhiliyyah which Islam has invalidated occurred when the loan came due on the debtor, whereupon the creditor would say: "Either settle now or pay more." [The debtor] would have to either pay in full on the spot or increase the amount of the debt and defer it for a particular period. This is the very practice of those who work corruption.

These statements make it clear that the *ribā* of Jāhiliyyah was [the increase] at the second stage [of indebtedness] and that those who deny its prohibition are disbelievers.

An indication that *ribā al-qarḍ* (the increase stipulated when the loan is given) does not come under the *ribā* of Jāhiliyyah is that the Sharīʿah scholars did not mention the latter as evidence of the prohibition of *ribā al-qarḍ*. They only stated that [*ribā al-qarḍ*] is one of the conditions that invalidate the contract by removing the loan from the [category of] benevolent contracts. If it had come under the rubric of the *ribā* of Jāhiliyyah, there would have been no need to cite the *ḥadīth* of Fuḍālah, "Every loan that accrues benefit is *ribā*." Also, when they discussed the prohibition of "*Ḍaʿ wa taʿajjal*" ("Discount [what is owed] and take it sooner"), they said it bears a similarity to the *ribā* of Jāhiliyyah and takes the same rule by analogy. Bujayrimī said:

> [Regarding the] statement that it is similar to the *ribā* of Jāhiliyyah; that is in terms of accrued benefit. If not for that, [they are not the same] for in this case it is in return for a reduction of the obligation while in the *ribā* of Jāhiliyyah it is in return for an increase.

Regarding *ribā al-qarḍ*, they did not invoke the *ribā* of Jāhiliyyahh as evidence, although *ribā al-qarḍ* is prohibited, and some have reported consensus about it. As for "*Ḍaʿ wa taʿajjal*," it is disputed.

One item of evidence that *ribā al-qarḍ* does not fall under the category of the *ribā* of Jāhiliyyah is that [many] Sharīʿah scholars prohibited the bill of exchange, whereas Shaykh al-Islam [Ibn Taymiyyah] allowed it, arguing that it is beneficial for both sides. If it was a

type of the *ribā* of Jāhiliyyah, he would not have allowed it. This is something which is very clear, and there is no doubt about it.

Ibn Rushd's division indicates that. He said:

> All ulema have agreed that *ribā* exists in two things: in sales and in the liability arising from a sale or loan or something else. As for *ribā* in a liability, it is of two kinds. The first is agreed upon, which is the *ribā* of Jāhiliyyah that was prohibited. They would lend for extra and give respite. They would say, 'Give me more time; I will give you more [money].'' This is what the Prophet (ρ) meant when he said during the Farewell Pilgrimage: "Lo! The *ribā* of Jāhiliyyah is abolished, and the first *ribā* that I cancel is the *ribā* of ʿAbbās ibn ʿAbd al-Muṭṭalib." The second [type] is "*Ḍaʿ wa taʿajjal*," about which there is a difference of opinion. We will discuss it later. So far as *ribā* in sales is concerned, all ulema agreed that it is of two kinds: *nasīʾah* (delayed exchange of the counter-values) and *tafāḍul* (unequal exchange of counter-values of the same type).

He restricted *ribā* of debt to two forms only: the *ribā* of Jāhiliyyah and "*Ḍaʿ wa taʿajjal*". Rashīd Riḍā said:

> He explicitly stated that the *ribā* of Jāhiliyyah is specifically the delay in payment of what is owed—whatever the cause [of debt] may be—to a later time with an addition in the amount, and that this is what the Prophet (ρ) abolished on the occasion of the Farewell Pilgrimage after Almighty Allah had prohibited it.

As for Jaṣṣāṣ's statement, "It is known that the *ribā* of Jāhiliyyahh was only a loan for a fixed period with a stipulated increase, such that the increase was consideration for the period; and Allah abolished it and prohibited it," this opinion is opposed to what has been reported by all the imams of the major schools of jurisprudence and others beside them. It is also opposed to the opinions of the interpreters of Qurʾān and *ḥadīth*. Hence, the increase stipulated in the contract at the beginning is *ribā al-faḍl*. The Shāfiʿīs have stated that *ribā al-qarḍ* is a type of *ribā al-faḍl*, which comes under the [rubric of] *ribā* of sales. That is because—and Allah knows best—a loan does not become established in liability and also does not become postponed according to the majority of ulema. The author of *Asnā al-Maṭālīb* said:

> (The Chapter on *Ribā*:) It is of three kinds:
> *ribā al-faḍl*, which is a sale with an increase in one of the counter-values;
> *ribā al-yad*, which is a sale with a delay in possession of one or both of the counter-values; and *ribā al-nasāʾ*, which is a sale with deferral [of payment] for a fixed period.

> Mutawallī adds one more type, *ribā al-qarḍ*, which is a loan with a stipulation of accrued benefit [to the lender]. This can be referred back to *ribā al-faḍl*, as Zarkashī said. All of them are prohibited, and the evidence for the prohibition, even before consensus (*ijmāʿ*), is Allah's statement "[Allah has allowed trade] and forbidden *ribā*," [2:275] and His statement, "…give up any outstanding dues from *ribā*" [2:278].

Shibrāmalsī says in his *Ḥāshiyah* (Commentary) on Ramlī's *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*:

> His statement: "One category of it is *ribā al-qarḍ*." He only placed *ribā al-qarḍ* under [the rubric of] *ribā al-faḍl*, even though it is not part of this category, because when the lender stipulated a benefit for himself, it became as if he sold what he lent for more of the same type; it is thus part of it as far as the ruling.

Bujayramī says in his commentary on Khaṭīb [Sharbīnī's book]:

> Some have added *ribā al-qarḍ* [as a category]; for example, to lend one type of dirham on the condition that [the borrower] will return a better type. The Prophet (ρ) said, "Every loan that accrues benefit is *ribā*." It could be referred back to [the category of] *ribā al-faḍl*, as Zarkashī mentioned.

Bakri said in his commentary on Mulaybārī:

> [Regarding] his statement, "*Ribā al-qarḍ* comes under *ribā al-faḍl*"; that is, one type of *ribā al-faḍl* is *ribā al-qarḍ*, which is every loan that accrues benefit for the lender, excluding a pledge and the like. However, we [Shāfiʿīs] do not consider it unlawful unless it is stipulated in the contract itself, as can be apprehended from the following depiction. Also, it is not restricted to *ribawī* (fungible) items; rather, it also applies to other things like animals and merchandise. *Ribā al-qarḍ* is only categorized under *ribā al-faḍl*, though it does not [properly] belong to it, because when a benefit is stipulated in it for the lender, it became as if he sold what he lent for more of the same type; it is thus part of it as far as the ruling. It is also said that it is a separate type.

His statement, "…because when a benefit is stipulated in it for the lender, it became as if he sold what he lent for more of the same type; it is thus part of it as far as the ruling," indicates that the condition of an increase on the loan invalidates the contract. When the contract becomes invalid, it is necessary to return it to the closest contract to it, and the closest contract to a loan with added benefit is *ribā al-faḍl*. That is why he said, "…it is thus part of it as far as the ruling"…"because when a benefit is stipulated in it for the lender, it became as if he sold what he lent for more of the same type."

Baghawī said, "Anyone who lends something with the condition that [the debtor] will return more than that, it will be considered a loan that accrues benefit, and every loan that accrues benefit [to the lender] is *ribā*." He called it a loan that accrues benefit, not the *ribā* of Jāhiliyyah. Manāwī said:

> Every loan that accrues benefit for the lender is *ribā*; i.e., it takes the ruling of *ribā*; hence, the loan contract will be invalidated. Whenever a condition is stipulated in the contract that accrues benefit for the lender, whether in quantity or quality, it becomes invalid.

He said that it takes the ruling of *ribā* and did not call it the *ribā* of Jāhiliyyah. They formed these opinions based upon what Bayhaqī narrated in *Al-Sunan al-Kubrā* from Fuḍālah ibn ʿUbayd, the Companion of the Prophet (ρ), that he said, "Every loan that accrues benefit is one of the many aspects of *ribā*." (It is Fuḍālah's statement.) "…one of the many aspects of *ribā*" indicates that it is not the *ribā* of Jāhiliyyah.

These statements make it clear that *ribā al-qarḍ* comes under the rubric of *ribā al-faḍl*.

Also, the opinions of the jurists of the other major schools, and others besides, are not different from those of the Shāfiʿī scholars.

The Ḥanafī scholar Kāsānī said:

> That which pertains to the loan itself: that it shall not contain [a stipulation of] accrued benefit. If it does, it is not lawful; for example, lending counterfeit coins on the condition that [the borrower] will return real coins, or lending with the stipulation of any condition that contains benefit for [the lender]. This is based on what was narrated that the Prophet (ρ) prohibited a loan that accrues benefit. That is because a stipulated increase is similar to *ribā* in that the increase is not in lieu of any counter-value; it is obligatory to avoid actual *ribā* and that which resembles *ribā*.

He said the stipulated increase is similar to *ribā*, and he did not explicitly call it the *ribā* of Jāhiliyyah.

It is strange that the Māliki scholars, who held the opinion that settlement of a loan becomes postponed by postponement to a fixed later date, did not state that it comes under the rubric of the *ribā* of Jāhiliyyah. They only said that the loan is invalidated thereby. Dardīr said, "The loan is invalidated when it brings any benefit for the lender." They gave the same

reason which was given by the Imams that it is a loan which accrues benefit. Dardīr also said:

> It is permissible for the pledgee to stipulate a benefit from the pledge such as residence, riding or any service, with two conditions. [The author] alluded to them by the term "identified"; i.e., the period or the labor. This is to avoid the lack of information in a lease. [His statement] "from a sale" means: in the debt from a sale only, not in a loan, which is not permissible. [The difference] is because a sale [may] include a sale and a lease, which is allowed, while in the loan it is a loan with added benefit.

[Ibn Rushd] said in *al-Muqaddimāt:* "The Prophet (ρ) prohibited the loan that accrues benefit. It also resembles the *ribā* of Jāhiliyyah that is prohibited by the Qurʾān: 'Either settle [now] or increase [the amount]'." Thus, they compared it to the *ribā* of Jāhiliyyah but did not consider it a type of it. Qarāfī said:

> Issue: Do not accept a gift from your debtor unless he used to give you presents before taking the loan and you know that his gift is not due to the loan (in contrast to the opinions of the Shāfiʿīs and Ḥanafīs). That is because he is giving you the gift in the hope that he can delay the payment, so it is a means to the *ribā* of Jāhiliyyah.

Stranger still is that Ibn Qayyim did not state that it comes under the *ribā* of Jāhiliyyah. He said:

> [Imam Aḥmad] prohibited the lender from accepting the gift, as did his companions, as he would consider it part of the loan. That is only so he does not take it as a means for delaying the payment of the debt due to the gift; hence, it would be *ribā*. That is because he would be taking back his capital and taking the additional amount that he gained because of the loan.

This is *ribā al-faḍl*. Ibn Rushd stated that *ribā al-qarḍ* does not qualify as the *ribā* of Jāhiliyyah; it only takes its rule by analogy. He says in *al-Muqaddimāt*:

> One who extends a loan shall not stipulate any increase, not even a handful of hay, for it would be *ribā*. The explanation of this is that it is by analogy with the *ribā* prohibited by the Qurʾān; i.e., the *ribā* of Jāhiliyyah: "Either settle [now] or increase [the amount]." That is because delaying the payment of the debt after it comes due on the condition of increase is a loan that accrues benefit. It is only lawful to take more than what one gave in a loan if it is without any prior condition.

Now that we know *ribā al-qarḍ* comes under the rubric of *ribā al-faḍl,* Sharīʿah scholars have two differing opinions on *ribā al-faḍl*:

The first opinion: it is allowed. This was the opinion of a number of the Ṣaḥābah and Tābiʿīn. Shaykh al-Islam [Ibn Taymiyyah] says in *Rafʿ al-Malām*:

> Those who were aware of the statement of the Prophet (ρ), "*Ribā* only occurs in deferral," legalized the sale of two *ṣāʿs* for one *ṣāʿ* by spot delivery. For example, Ibn ʿAbbās (RA) and his followers like Abū Shaʿthāʾ, ʿAṭāʾ, Tāwūs, Saʿīd ibn Jubayr, ʿIkrimah and others from among the notables of Makkah who were among the best of the *ummah* in knowledge and deeds. It is not allowed for any Muslim to believe that any of them in particular, or anyone who followed one of them—in a matter in which it is permissible to follow him—is subject to the curse of consuming *ribā*. That is because they did it on the basis of an interpretation that was acceptable overall.

Subkī said:

> The *ummah* agreed to the prohibition of unequal exchange [of the same type of fungible commodity] when delivery is deferred. But when delivery is spot, there was, of old, a controversy about this issue. It has been confirmed that Ibn ʿAbbās and Ibn Masʿūd (may Allah be pleased with them) considered it allowable, as did Ibn ʿUmar (RA), but he later retracted that view. The same is also narrated from ʿAbd Allāh ibn Zubayr and Usāmah ibn Zayd (RA). There is also an opinion from Muʿāwiyah (RA) that could be interpreted [to be in agreement] as well as from Zayd ibn Arqam and Barāʾ ibn ʿĀzib (RA). All of these were companions of the Prophet (ρ). As for the Tābiʿīn (the next generation), this view has been authentically reported from ʿAṭāʾ ibn Abi Rabbāḥ (RA) and other jurists of Makkah. It is also narrated from Saʿīd and ʿUrwah [from Madīnah]. Then there was a narration from Ibn ʿAbbās which implies that he later retracted that opinion. The same goes for Ibn Masʿūd (RA).

Rashīd Riḍā said:

> Among those who made *ribā al-faḍl* completely lawful from among the Companions of the Prophet (ρ) and their followers were:
> ʿAbd Allāh ibn ʿUmar (RA), but it is narrated that he retracted this view later;
> Ibn ʿAbbās, about whom there is disagreement as to whether he retracted;
> Usāmah ibn Zayd, Ibn Zubayr, Zayd ibn Arqam, Saʿīd ibn Musayyib, and Urwah ibn Zubayr (RA).
> They supported this view with the abovementioned *ḥadīth* reported by Bukhārī and Muslim: "*Ribā* only occurs in a deferred [exchange]." If *ribā al-faḍl* (an unequal spot exchange of the same type of fungible commodity) were the same as *ribā al-nasīʾah* (a deferred unequal exchange of the same type of fungible commodity), this disagreement would not have taken place among the Ṣaḥābah (RA) and the next generation [of scholars].

The second opinion: it is impermissible. The supporters of this view cited scholarly consensus (*ijmāʿ*) regarding its prohibition, and they gave no consideration to the dissent of those who said that it is allowable. Muwaffaq [Ibn Qudāmah] said, "Every loan with a

stipulation that it be [repaid] with an increase is unlawful without any dispute." Ibn Mundhir said:

> They agreed that if the lender stipulates the borrower must pay an increase or give a gift, and the loan is extended on that basis, taking the increase would be considered *ribā*. It is narrated from Ubay ibn Kaʿb, Ibn ʿAbbās and Ibn Masʿūd (RA) that they prohibited a loan which accrues benefit. That is because it is a contract of kindness done to draw close [to Allah]; so if a stipulation of increase is made, it removes it from its nature.

ʿAynī said, "The Muslims have agreed, based upon what was reported from the Prophet (ρ), that a stipulated increase in a loan is *ribā*."

Subkī said:

> Based on what we have said from the statements of the majority of our [Shāfiʿī] scholars, the claim of consensus on the prohibition of *ribā al-faḍl* may not hold for any reasons. This is the implication of Abū Ḥusayn Muḥāmilī's treatment of the issue of *ribā al-faḍl* in *Kitāb al-Awsaṭ*, which he composed regarding the issues about which Shāfiʿī disagreed with the other jurists. If there had been *ijmāʿ* about it, he would not have mentioned it. However, by the grace of Allah, we are not in need of *ijmāʿ* about it due to the multiple clear, authentic texts that I mentioned earlier and which I agree with, God willing. Consensus is only needed in an issue for which the supporting evidence is obscure, either an analogy or a subtle deduction.

Those who consider *ribā al-faḍl* to be prohibited disagreed whether it is classified as a major sin or a minor sin.

The first opinion: It is a major sin. It means that it is prohibited for its own sake. That is the dominant opinion of all the major *fiqh* schools, and some contemporaries have also chosen it. The authors of *al-Iqnāʿ* and its commentary said, "*Ribā* is prohibited, and it is of two kinds: *ribā al-faḍl* and *ribā al-nasīʾah*." Ibn Ḥajar says in *al-Tuḥfah*:

> The evidence that it is prohibited and one of the worst of the major sins is found in the Qurʾān, the Sunnah and *ijmāʿ*. It is said that it has never been lawful in the legal code of any prophet and that Allah did not declare war on any sinner in His book except one who consumes *ribā*. Hence it is said that it is a harbinger of a bad ending.

Jamal said:

> This is only with regard to one of its types, which is *ribā al-ziyādah* (increase). As for *ribā* due to deferment or delay without any increase in either of two counter-values, the apparent ruling is that it is a minor sin. That is because all it is, is an

> invalid contract; and they have clearly stated that invalid contracts are regarded as minor sins.

Those who say that *ribā al-faḍl* is a major sin do not allow engaging in it even at the time of need (*ḥājah*). They only allow it when facing dire need (*ḍarūrah*) as per its specific [*fiqh*] meaning. Subkī says in *Takmilat al-Majmūʿ*:

> The correct [view] is that it is not lawful except when one fears for one's life, similar to a situation where one is allowed to eat carrion. Mālik and his followers only excuse it in case of the urgent need which allows one to eat carrion. That is the basic rule; however, the more apparent rule is that it is permissible in case of [less pressing] urgent need which does not allow one to eat carrion. That is in consideration of the view of those who say there is no *ribā* except with deferment.

The second opinion: it is a minor sin. It means that it is prohibited because it is a means [to what is prohibited for its own sake]. That is the view of Shaykh al-Islam [Ibn Taymiyyah] and Ibn Qayyim. Shaykh al-Islam said, "The prohibition of *ribā al-faḍl* is only to prevent the means that will most probably lead to what is clearly prohibited (*sadd al-dharīʿah*), and what is prohibited due to *sadd al-dharīʿah* becomes lawful when there is a benefit weightier [than the probable harm]." Ibn Qayyim said:

> As for *ribā al-faḍl*, some of it is allowable when need calls for it; for example, *ʿarāyā* (the sale of a limited amount of dry dates for fresh dates on the tree; [which is allowed in order for poor families to be able to eat fresh dates]). What is prohibited because it is a means is less serious than what is prohibited for its own sake….Likewise, it is appropriate to sell jewellery which entails workmanship at a cost more than its weight because need calls for it. The prohibition of an increase [in one of the two counter-values] is due to *sadd al-dharīʿah* (blocking the means) [to unlawful ends]. This is pure *qiyās* and the requirement of the Sharīʿah principles. People's needs will not be fulfilled except by this or by legal tricks, and legal tricks are invalid in the Sharīʿah.

However, the apparent meaning of the statement of Shaykh al-Islam [Ibn Taymiyyah] is that it is prohibited because it is a means, on the condition that the increase is not combined with deferment.

The Consequences of *Ribā al-Qarḍ* Being Classified as the *Ribā* of Sales

1. The conventional banking practice of restructuring loans by increasing the amount in return for deferring the payment is exactly the *ribā* of Jāhiliyyah. And one who

considers it lawful is a disbeliever, unless he is excused on the basis of the controversy as to whether fiat currencies qualify as currency in the Sharīʿah. As for an increase at the beginning without any stipulation, it is *ribā al-faḍl*, which the Muslim *ummah* has agreed is prohibited, after an initial controversy in the early Islamic era. Attention should be called to the fact that the interest of banks is *ribā al-faḍl* at the beginning of the contract. However, as soon as there is a delay [in payment], it becomes the *ribā* of Jāhiliyyah. It is an inescapable feature [of their business model].

2. It is permissible to borrow when needed because the prohibition of *ribā al-faḍl* is a prohibition of means according to Shaykh al-Islam [Ibn Taymiyyah]. As for the *ribā* of Jāhiliyyah, it is prohibited for its own sake. Therefore, it is unlawful except in case of extreme necessity (*ḍarūrah*) according to its technical [*fiqh*] meaning.
3. It is permissible to own shares in joint stock companies with mixed [activities] when the company needs a loan, but it must not get involved in the *ribā* of Jāhiliyyah.

Note: after the discussion of this research in the seminar, it has become clear that the issue requires further research and refinement. I have written a paper about it. A point became clear in it about the view attributed to Shaykh al-Islam [Ibn Taymiyyah] regarding *ribā al-faḍl* when it is not combined with deferment, that the narrations to that effect are not authentic.

The Fiqh Classification of the Ribā of Loans

Dr. ʿAbdullah Yūsuf Judayʿ

In the name of Allah, Most Gracious, Most Merciful

All praise is due to Allah, the Lord of the worlds. I testify that there is none worthy of worship except Allah. He is one, without partner. I also testify that surely Muhammad (ﷺ) is the servant and Messenger of Allah.

Ribā (usury) is generally classified into two classes:

1. Debt-based interest
2. Sale-based interest

Classical scholars extensively discussed these two classes but with more emphasis on the second class than the first. This is because of the clarity of the concept of debt-based interest, as it was the *ribā* of the time of Ignorance which the Qurʾān has fundamentally prohibited. It was of public knowledge due to its prevalence in customary transactions.

Another reason for the greater commentary on sale-based *ribā* is that the Sunnah explained it in a form that gives room for wide interpretation.

Based on inferences from the descriptions of sale-based *ribā* in the *ḥadīths*, Shāfiʿīs have further categorised it into three categories:[32]

1. *Ribā al-faḍl*: an exchange of different quantities of the same fungible commodity, such as sale of one dirham (silver coin) for two dirhams;
2. *Ribā al-yad*: an exchange of the same fungible commodity in which the two parties separate before the delivery of one or both of the counter-values.
3. *Ribā al-nasāʾ* (also called *ribā al-nasīʾah* by some): an exchange of the same fungible commodity or two fungible commodities having a common *ʿillah* (attribute linked to the ruling) with delivery deferred to a certain future date. An

[32] Rāfiʿī, *Fatḥ al-ʿAzīz Sharḥ al-Wajīz* 8:162; Ibn Rafʿah, *Kifāyat al-Nabīh*, 99:124-125; Sharbīnī, *Mughnī al-Muḥtāj*, 92:363.

example is the sale of a certain amount of gold or silver coins now for another amount of gold or silver coins due at a certain future date.

Imam al-Ḥaramayn made a clear call for reclassifying the three classes as one in terms of the core principle. He says "The original category is *ribā al-faḍl*, and the mutual transfer and possession [in the contract session] and the prohibition of deferment derive from it. [33]

Ḥanafīs and Mālikīs reclassify the three into only two: *ribā al-faḍl* and *ribā al-nasīʾah*,[34] but Hanbalis consider all as *ribā al-faḍl*. [35]

A leading Shāfiʿī scholar, Abu Saʿd Mutawallī (died 478AH), added a fourth class to the three earlier mentioned. He said:

> The fourth category is a loan with a stipulation of added benefit [for the lender] such as giving a loan of poor-quality [coins] to be repaid with good-quality [coins], or lending clipped coins to be repaid with intact coins, or lending [an amount] with a condition that the same shall be repaid in another city when the road to it is unsafe. [The lender] would benefit by securing safe passage [of his money]. It could also take the form of lending with a condition that the borrower sells [the lender] some of his properties or advances a loan of a different currency to the initial lender. [36]

EXPLANATION OF THE *RIBĀ* MENTIONED IN THE QURʾĀN

This which was mentioned by Mutawallī is the primary focus of this research. It is necessary that I present a brief introduction to it by explaining the *ribā* of the Qurʾān, which is referred to as the *ribā* of Jāhiliyyah (the pre-Islamic Era of Ignorance). This name is based on the Prophet's reference to it in his sermon during the Farewell Pilgrimage: "Lo! The *ribā* of Jāhiliyyah is abolished, and the first *ribā* that I cancel is the *ribā* of ʿAbbās ibn ʿAbd al-Muṭṭalib. All of it is abolished."[37]

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[33] Juwaynī, *Nihāyat al-Maṭlab fi Dirāyat al-Madhhab*, 5:94; Ghazālī, *Wasīṭ fī al-Madhhab*, 3:49.

[34] Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:183; Kharashī, *Sharḥ Mukhtaṣar Khalīl*, 3:419.

[35] Ibn Qudāmah, *al-Mughni* 4:123, Ibn Mufliḥ, *Al-Mubdiʿ*, 4:125. They incorporated *al-nasāʾ* in their discussion of *ribā al-faḍl* at the level of a subsidiary category. (See: Mardāwī, *Al-Inṣāf*, 5:12, 42.) As for *ribā al-nasīʾah*, which they mentioned as a category separate from *ribā al-faḍl*, they meant the *ribā* of debt, which is the same as the *ribā* mentioned in the Qurʾān; i.e., the *ribā* of Jāhiliyyah. The classifications of some Mālikīs give a similar idea.

[36] Mutawallī, *Tatimmat al-Ibānah*, 5:129a.

[37] Collected by Aḥmad, *ḥadīth* no. 14440; Muslim, *ḥadīth* no. 1218; Abū Dāwūd, *ḥadīth* no. 1905; Nasāʾī, *al-Sunan al-Kubrā*, *ḥadīth* no. 3987; Ibn Mājah, *ḥadīth* no. 3074.

The early exegetes used several expressions to explain the nature of the *ribā* of Jāhiliyyah, but they all agreed that the *ribā* of Jāhiliyyah was on debt and that it was the kind prohibited by the Qurʾān and abolished by Islam.

Among the most reliable narrations on the *ribā* of Jāhiliyyah are the following:

1. Mujāhid Makkī said, regarding the *ribā* which Allah has prohibited: "In Jāhiliyyah, a man would be indebted to another, and the debtor would say, 'Give me respite, and such and such will be for you,' and the debtor would be given more time"[38]
2. Zayd ibn Aslam said, "The *ribā* of Jāhiliyyah was that a man would have a right on another man, due on a certain date. When the debt came due, the creditor would say to him: 'Will you settle [now] or increase [the amount]?' If he paid up, he would take it; if not, he would increase the amount and postpone the settlement date."[39]
3. Qatādah ibn Diʿāmah Sadūsī said: "Indeed, the *ribā* of Jāhiliyyah was that a man would sell a commodity for deferred payment to a stipulated time. When it came due and the debtor could not pay, the seller would increase the amount and give him more time."[40]

These narrations from these prominent classical scholars, who were leaders in *tafsīr* of the Qurʾān among the Tābiʿīn, and narrations of similar meaning from others agree that the *ribā* referred to in the Qurʾān is the increase on the original debt amount upon maturity in return for giving the debtor more time to pay. The mention of sale was not to restrict the cause of debt to it; rather, it only seems to indicate the most prevalent situation. That is why the generalization in naming this type of *ribā* as the *ribā* of debts is proper.

Ibn Jarīr Ṭabarī said:

> Those who consumed *ribā* among the people of Ignorance, when a debt fell due, the debtor would tell the creditor, "Give me more time and I will increase the amount due you." The two would be told: "This is *ribā*, and it is not permissible," but they

[38] Reported in *Tafsīr al-Ṭabarī*, 5:38; and by Ibn Mundhir, no. 46; Ibn Abi Ḥātim, no. 2912; Bayhaqī, 5:275 with a good *isnād* (chain).
[39] Reported by Mālik, *ḥadīth* no. 1960. Ibn Naṣr reported it from him in *Al-Sunnah*, *ḥadīth* no. 170, Bayhaqī, 5:270. The *isnād* is *ṣaḥīḥ*.
[40] Reported by Ibn Jarīr 5:38 with a good chain (*ṣaḥīḥ isnād*).

> would respond, "It is the same for us whether we increase the price at the time of the sale or at the time of maturity." Allah refuted their claim by saying "Allah has made sale permissible."[41]

Similarly, the scholars who come after that would quote these explanations of the *ribā* of the Qurʾān. Here are some examples of statements by classical scholars from the various major *fiqh* schools:

Ibn ʿAbd al-Barr said

> The *ribā* mentioned in the Qurʾān entails a respite in the payment time in exchange for an increase in the amount to be repaid. This is because they would transact debts for a definite period. When the time came due, the owner of the money would say: "Either pay now or pay more." Allah then prohibited that in His book and by the statement of His Messenger, and the Muslim nation unanimously agrees to that.[42]

Ibn ʿAbd al-Barr also said:

> All early and later scholars have agreed that the *ribā* which has been prohibited by the Qurʾān is that the creditor takes compensation in money or in kind for deferring the payment of a debt that has come due. This is what is meant by the Arab saying, "Either settle now or pay more."[43]

He further said: "They do not disagree on the meaning of their statement, "Either settle now or pay more," that it is the *ribā* which is unanimously agreed upon and which the Qurʾān has prohibited."[44]

Abu Walīd Ibn Rushd said:

> The *ribā* of Jāhiliyyah entailed that a man would be indebted to another, and when the debt fell due, the creditor would say, "Will you pay [now] or increase [the amount?" If he paid up, the creditor would take his due amount; if not, he would increase the amount due and extend the period of payment. Allah then sent down His revelation about this.[45]

Abu ʿAbdullah Qurṭubī said, "The Arabs did not know any other *ribā* than that. When the debt fell due, they would tell the debtor, 'Either pay [now] or add interest.'"[46]

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[41] *Tafsīr al-Ṭabarī*, 5:43.
[42] Ibn ʿAbd al-Barr, *Al-Tamhīd*, 4:91.
[43] Ibn ʿAbd al-Barr, *al-Kāfī* 2:233
[44] Ibn ʿAbd al-Barr, *Al-Istidhkār*, 6:488
[45] Ibn Rushd, *Al-Muqaddimāt al-Mumahhidāt*, 2:8.
[46] Qurṭubī, *Al-Jāmiʿ li Aḥkām al-Qurʾān*, 3:356.

Māwardī, while explaining the *ribā* mentioned in the Qurʾān, said, "It is the increase on the principal amount of debt in return for deferment."[47]

Imam Aḥmad was asked about the *ribā* about which there is no doubt. He replied: "If a person is a debtor and he is asked: 'Will you settle [now] or increase?' If he does not settle, he increases the amount while the [creditor] defers the date."[48]

Ibn Taymiyyah said:

> In the pre-Islamic era, if a man was owed a debt, he would come at the maturity date and say: "Either settle [now] or increase [the amount]." If he didn't pay, the debtor would increase the amount and the creditor would give him more time. It means [the creditor] sold the money for a larger amount with deferred payment. Allah ordered them, if they repented, that they not demand anything but the original capital.[49]

Ibn Taymiyyah further said:

> Similarly, *ribā al-nasāʾ*; the Thaqīf Tribe, about whom the Qurʾān was revealed, a creditor would go to his debtor when the debt was due, saying "Will you settle [now] or add interest?" If he couldn't settle, the debtor would add to the amount and the creditor would extend the payment period. The debt would then increase manifold over a period of time in exchange for deferment. This is undoubtedly *ribā* as agreed upon unanimously by the predecessors of this *ummah*. The Qurʾān was revealed about this *ribā*, and the oppression and harm in it are glaring.[50]

Ibn Qayyim gave a similar explanation and explicitly stated the ruling on one who declares *ribā* permissible:

> When a creditor declares debt rollover to be permissible by telling the debtor, "Either settle [now] or increase the amount and extend the payment period," he becomes a disbeliever. He must be requested to repent, failing which, he shall be executed and his properties confiscated and granted to the public treasury.[51]

Ibn Qayyim also said:

> Zayd ibn Aslam said: "The *ribā* of Jāhiliyyah was that a man would have a right on another man, due on a certain date. When the debt came due, the creditor would say to him: 'Will you settle [now] or increase [the amount]?' If he paid up, he would take

[47] Māwardī, *al-Nukut wa al-ʿUyūn,* 1:34.
[48] Ibn Qayyim, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, 3:397.
[49] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 29:440.
[50] Ibid., 20:349.
[51] Ibn Qayyim, *al-Ṭuruq al-Ḥukmiyyah fi al-Siyāsat al-Sharʿiyyah,* p. 633.

> it; if not, he would increase the amount and postpone the settlement date." It was collected by Imam Mālik. This type of *ribā*, there is consensus on its prohibition and invalidity, and its prohibition is known in Islam just as the prohibition of adultery, sodomy and stealing are known.[52]

Ibn Qayyim called this clear *ribā*. It is also *ribā al-nasīʾah*. He differentiated this kind of *ribā* from *ribā al-faḍl*, saying:

> *Ribā* is of two types: *jalī* (clear) and *khafī* (hidden). Clear *ribā* is prohibited because it entails great harm, and hidden *ribā* is prohibited because it is a means to clear *ribā*. The prohibition of the first is intended [in itself] while the prohibition of the second is because it is a means [to the other]. The clear *ribā* is *ribā al-nasīʾah* (increase due to deferment) that was practised in the pre-Islamic era. The creditor would offer deferment of payment and increase the amount. Each time he deferred, he would add more interest such that a hundred would multiply into thousands.[53]

He then quoted the previously mentioned text from Imam Aḥmad.

Al-Durar al-Saniyyah quotes Shaykh Ḥamad ibn ʿAtīq:

> You should know that the *ribā* of Jāhiliyyah which Islam has invalidated occurred when the loan came due on the debtor, whereupon the creditor would say: "Either settle now or pay more." [The debtor] would have to either pay in full on the spot or increase the amount of the debt and defer it for a particular period. This is the very practice of those who work corruption.[54]

These texts from the prominent classical scholars from the various *fiqh* schools agree with the explanation of the early scholars of the *ribā* that was originally and unequivocally intended for prohibition in the Qurʾān. It is also the kind of *ribā* for which Almighty Allah has severely threatened to punish whoever allows it, and whoever declares it permissible becomes a disbeliever. This is the *ribā* of debt or delay in payment, and they restricted its description to [the increase] that occurs when a debt has come due in exchange for deferment. It is not the increase that occurs during the formation of the contract.

[52] Ibn Qayyim, *Ighāthat al-Aḥlām fī Maṣāʾid as-Shaytān*, 2:679
[53] Ibn Qayyim, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, 2:679.
[54] Ibn Qāsim, *Al-Durar al-Saniyah fī al-Ajwibah al-Najdiyyah*, 14:234.

This means they restricted the meaning of the major *ribā* to an increase on what is already owed. That would not occur except in two things as mentioned by Ibn Rushd (the grandson):[55]

1. An increase when the debt comes due. This was already mentioned as the *ribā* of Jāhiliyyah, and there was no difference of opinion on its ruling.
2. A rebate on early payment. Scholars had differing opinions on this.

What remains [to be discussed] is inequality [in the amounts exchanged] by itself or unequal exchange along with deferment, which are among the characteristics of the *ribā* of sales. This encompasses the *ribā* of loans, as was earlier noted by some Shāfiʿī scholars. This will be further explained later.

It could be inferred from this that the prohibition of *ribā* at the point of contract formation is secondary and not fundamental. This may be due to it being a means leading to *ribā al-nasīʾah*, which is the *ribā al-faḍl* in sale without deferment, as explained by Ibn Taymiyyah and his student Ibn Qayyim. It may also be as a result of it not being customarily associated with deferment in their practice, such as sale of one dirham for two dirhams. This is the *ribā* of loans, since a loan at the time of revelation was only recognized in popular custom as a benevolent act without any stipulation of benefit [for the lender].

Ibn Qayyim supported the argument that *ribā al-faḍl* is a means [leading to the *ribā* of Jāhiliyyah] with the *ḥadīth*, "Do not sell a dinar (gold currency/coin) for two dinars, or a dirham for two dirhams, or a *ṣāʿ* (a volume measure) for two *ṣāʿs* because I fear *ramāʾ* for you." *Ramāʾ* refers to *ribā*.[56]

Similarly, Ibn Qayyim's teacher, Ibn Taymiyyah said,

> *Ribā al-faḍl* was only prohibited because it leads to *ribā*. For this reason, it was narrated from the Prophet (ﷺ) that he said, "Do not sell a dirham for two dirhams nor a dinar for two dinars. I fear *ramāʾ* for you." *Ramāʾ* refers to *ribā*. Imam Aḥmad reported this *ḥadīth* and the addition "I fear *ramāʾ* for you" is reliably reported from ʿUmar ibn Khaṭṭāb by more than one chain of narration. [57]

[55] Ibn Rushd, *Bidāyat al-Mujtahid*, 3:1166; Muhammad Rashīd Riḍā, *Majallat al-Manār*, 30:773.
[56] Ibn Qayyim, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, 3:399.
[57] Ibn Taymiyyah, *Bayān al-Dalīl ʿalā Buṭlān at-Taḥlīl*, p. 250.
"The statement 'I fear *ramāʾ* for you,' was attributed to the Prophet (ρ) in the narration of ʿAbdullah ibn ʿUmar. It was collected by Aḥmad, no. 5885. However, the chain of narration is weak, being a narration of

This interpretation from them is with regard to *ribā al-faḍl*, meaning an increase [in one of the two counter-values] in the sale of the same *ribāwi* (fungible) item if it is on the spot. This was clarified by Ibn Qayyim in the course of explaining disparate exchange (*faḍl*) and deferred delivery (*nasīʾah*) in the *ribā* of sale. He said:

> The wisdom behind the prohibition of *ribā al-nasīʾah* in [exchanges of] one genus or two genuses and *ribā al-faḍl* in only one genus has become apparent. The first is a fundamental prohibition while the other is an auxiliary prohibition blocking the means (*sadd al-dharīʿah*) [to what is prohibited for its own sake]. For this reason, nothing of *ribā al-nasīʾah* is allowed.[58]

The Explanation of the *Ribā* of Jāhiliyyah by the Classical *Fiqh* Scholar Abū Bakr Jaṣṣāṣ

Classical scholars did not put forward any explanation of the *ribā* of Jāhiliyyah apart from the one previously mentioned until the advent of the Ḥanafī scholar, Abū Bakr Rāzī, popularly known as Jaṣṣāṣ (d. 370AH). He said—after establishing that the word '*ribā*' in the Qurʾān encompasses a number of possible meanings—that understanding it requires explanation from the Messenger (ﷺ):

Abu Janāb Yahyā ibn Ḥayyah Kalbī, who was a weak narrator, from his father, an unknown narrator. However, the narration from Nāfiʿ, the freed slave of Ibn ʿUmar, is reliable: "Do not sell gold for gold, or silver for silver except in the same quantity. Do not exchange a larger quantity for a lesser quantity, and do not exchange [these commodities] with immediate delivery [by one side] and delayed delivery [by the other], for I fear *ramāʾ* for you." *Ramāʾ* is *ribā*. Nāfiʿ said: A man reported a similar *ḥadīth* to Ibn ʿUmar on the authority of Abū Saʿīd Khudrī. He had barely finished when [Ibn ʿUmar] took him to Abū Saʿīd, and I was with him. He said, 'This man reported a *ḥadīth* on your authority and claimed that you heard it from the Messenger of Allah (ρ); did you hear it from him?' Abū Saʿīd replied, 'My eyes saw and my ears heard the Messenger of Allah (ρ) when he said, "Do not sell gold for gold or silver for silver except in the same quantity. Do not exchange a larger quantity for a lesser quantity, and do not exchange [these commodities] with immediate delivery [by one side] and delayed delivery [by the other]."'" Collected by Aḥmad, no. 11006. The *isnād* is *ṣaḥīḥ*.

As for the narration from Ibn ʿUmar, it was collected by Mālik in *al-Muwattaʾ*, *ḥadīth* nos. 1849 & 1850 by two authentic *isnād*s to him, that he said, "Do not sell gold for gold, except in the same quantity. Do not exchange a larger quantity for a lesser quantity. And don't sell silver for silver except in the same quantity. Do not exchange a larger quantity for a lesser quantity, and do not exchange silver for gold with immediate delivery of one of them and delayed delivery of the other. If he asks you to give him time until he goes inside his house, do not give him time, for I fear *ramāʾ* for you, and *ramāʾ* is *ribā*."

[58] Ibn Qayyim, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, 2:404-405.

> The *ribā* known and practised by the Arabs was the loaning of dinars or dirhams for a stipulated time with an increase on the amount borrowed based on mutual agreement, and they did not practise sales of unequal amounts of the same type of cash. This was the practice they were familiar with.[59]

He went even further than that, restricting the meaning of the *ribā* of Jāhiliyyah to this description: "They did not practise *ribā* except from the perspective we mentioned: a loan of dinars or dirhams for a stipulated time with a stipulated increase."[60]

He said, "It is well known that the *ribā* of Jāhiliyyah was a deferred loan with a stipulated increase. The increase is in exchange for the deferment."[61] He also said, "It is a loan for a stipulated period and [stipulated] increase in the amount to be paid by the debtor."[62]

This explanation that Jaṣṣāṣ described as well-known is not supported by any narrations, whether authentic or not. It is an issue that must be based on transmission since centuries had passed between the Era of Jāhiliyyah and Jaṣṣāṣ's era. For something like this, even if there were narrations to support it, the authenticity of the chain of narration would still have to be verified before it could be relied upon. What about when there are no chains of narration at all?

This view of Jaṣṣāṣ contradicts the positions of the early classical scholars of *tafsīr* and reports from the imams of the major *fiqh* schools and others. They asserted that the *ribā* which is stipulated at the time of contract formation is *ribā al-faḍl* irrespective of whether it is deferred or not.

Despite this, Jaṣṣāṣ's view was adopted by some *tafsīr* scholars who came after him and by many contemporary scholars. Although they justify their position by referring to scholars before them, you do not see them mentioning anyone earlier than Jaṣṣāṣ.

The point is that clarifying the time that this opinion appeared is important in defining the development of the concept of *ribā* and its impact on loans, especially when it comes to modern perspectives on it.

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[59] Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 2:184.
[60] Ibid.
[61] Ibid., 2:186.
[62] Ibid., 2:189.

Juristic Opinions on the *Ribā* of Loans

It was earlier mentioned that the prominent Shāfiʿī scholar Abū Saʿd Mutawallī regarded an interest-bearing loan (*ribā al-qarḍ*) to be part of the *ribā* of sales and that he based its classification as *ribā* on the consideration that such a loan accrues benefit [to the lender]. This argument was also supported by some other scholars.

One who studies the terms used by [classical] jurists will not find any indication that they regarded the *ribā* stipulated in initiating a loan to be part of the *ribā* of Jāhiliyyah. This is consistent with the unanimous explanation of the *ribā* of Jāhiliyyah before Jaṣṣāṣ that it was in debts not in sales. This is the import of the statement of the Prophet (ﷺ), "*Ribā* is only in deferment."[63]

One indicator of the validity of this opinion is that the increase in a loan at the initiation of the contract is explicitly a sale of one dirham for two, or the like. This is *ribā al-faḍl* as it is included in the *ḥadīth* that expressly prohibits [unequal exchanges of] six items.

Also, some scholars, while discussing the *ribā* of loans consider the increase involved as one of the invalid conditions that removes the loan contract from its nature as a contract to help [the recipient]. They did not say because it is the same as the *ribā* of Jāhiliyyah.

Another item of supporting evidence is that some scholars prohibited the bill of exchange (*saftajah*) as they considered it *ribā* for being a stipulation that confers benefit [to the lender] in a loan but not for being the *ribā* of Jāhiliyyah.[64] Bear in mind that other scholars, such as Ibn Taymiyyah and Ibn Qayyim, consider it permissible with the justification that it has benefit for both parties. [65]

In fact, the proof of scholars who prohibited rebates for early payment of loans, an issue on which there was a difference of opinion, was by drawing an analogy between the rebate and the *ribā* of Jāhiliyyah. They did not do the same for an interest-bearing loan even though some of them reported juristic consensus on its prohibition.[66]

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[63] *Ṣaḥīḥ al-Bukhārī*, *ḥadīth* no. 2179; *Ṣaḥīḥ Muslim*, *ḥadīth* no. 1596
[64] Ibn ʿĀbidīn, *Radd al-Muḥtār*, 5:166; Kharashī, *Sharḥ Mukhtaṣar Khalīl*, 94:149; Māwardī, *Al-Ḥāwī al-Kabīr*, 6:467; Mardāwī, *Al-Inṣāf*, 5:415.
[65] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 20:515; Ibn Qayyim; *Tahdhīb Sunan Abi Dāwūd*, 5:152.
[66] Haytamī, *Tuḥfat al-Muḥtāj fī Sharḥ al-Minhāj*, 5:47.

Haytamī explained that the Shāfiʿīs' prohibition of a rebate for early payment of a loan is because it is an invalid condition. He said, "…[B]ecause it is similar to the *ribā* of Jāhiliyyah; when a debt came due, the lender would tell the debtor, 'Pay [now] or pay more.' If he could not pay, his debt amount would be increased."[67]

Some Shāfiʿīs explained the statement "It is similar to the *ribā* of Jāhiliyyah" from the angle of it securing a benefit, or from the angle that it links the increase in the payment period to an amount of money. Bujayrimī mentioned the difference and the imperfect comparability, even if there is some similarity, saying, "In this case, there is compensation for a reduction in the obligatory [period] while in [the practice of] Jāhiliyyah there was compensation for an increase."[68]

Consider how they linked a rebate for early payment to the *ribā* of Jāhiliyyah based on some similarities, although they differed about its ruling. They did not take a similar approach in the case of an interest-bearing loan despite their consensus on its prohibition. Instead, the Shāfiʿīs explicitly stated that an interest-bearing loan is under the rubric of *ribā al-faḍl*, which comes under *ribā* in sales. That is apparently from the angle that a loan does not become an established liability nor can its payment be deferred for a fixed period, as per the view of the majority of scholars.

At the beginning of this study, it was mentioned that jurists classified *ribā* into three categories and that Mutawallī added interest-bearing loans. However, most of those who discussed it after him held that there was no need for a separate classification of interest-bearing loans. This is because an interest-bearing loan is included in *ribā al-faḍl*.

Zakariyā Anṣārī, while explaining *ribā* under the chapter of sales, said, "And it is of three types," which he then enumerated. He further said "Mutawallī added the *ribā* of a loan with a stipulation of benefit [for the lender], but this could be referred back to *ribā al-faḍl*, as Zarkashī said. All its types are prohibited."[69]

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[67] Ibid., 10:406. This was mentioned while discussing the rebate of some instalments for early payment of an outstanding debt. Zakariyā Ansāri had mentioned it earlier in Anṣārī, *Fatḥ al-Wahhāb bi Sharḥ Minhāj al-Ṭulāb*, 2:246.
[68] Bujayrimī, *Ḥāshiyat Bujayrimī ʿalā al-Khaṭīb*, 5:455.
[69] Anṣārī, *Asnā al-Maṭālib*, 92:21; Sharbīnī mentioned something similar in *Mughnī al-Muḥtāj*, 2:363.

The express support of Zarkashī was reported thus: Haytamī said in the Chapter of *Ribā*:

> It will either be *ribā al-faḍl*, in which one of the two counter-values is increased—and that includes the *ribā* of a loan in which a condition is stipulated that benefits the lender…"[70]

He said in explaining the reasoning for that:

> He only placed *ribā al-qarḍ* under [the rubric of] *ribā al-faḍl*, even though it is not part of this category, because when the lender stipulated a benefit for himself, it became as if he sold what he lent for more of the same type; it is thus part of it as far as the ruling.[71]

Bujayrimī said:

> Some scholars added *ribā al-qarḍ* (as a separate class); for instance, loaning inferior coins on the condition that repayment shall be in standard coins. The Messenger of Allah (ﷺ) said, "Any loan that brings benefit (to the lender) is *ribā.*" This [category] could be regarded as *ribā al-faḍl*, as Zarkashī said.[72]

Bakrī said in *Fatḥ al-Muʿīn:*

> [Regarding] his statement, "*Ribā al-qarḍ* comes under *ribā al-faḍl*"; that is, one type of *ribā al-faḍl* is *ribā al-qarḍ*, which is every loan that accrues benefit for the lender, excluding a pledge and the like. However, we [Shāfiʿīs] do not consider it unlawful unless it is stipulated in the contract itself, as can be apprehended from the following depiction. Also, it is not restricted to *ribawī* (fungible) items; rather, it also applies to other things like animals and merchandise. *Ribā al-qarḍ* is only categorized under *ribā al-faḍl*, though it does not [properly] belong to it, because when a benefit is stipulated in it for the lender, it became as if he sold what he lent for more of the same type; it is thus part of it as far as the ruling. It is also said that it is a separate type.[73]

This proves that stipulating an increase in a loan renders the contract void. When this happens, the ruling of the closest contract to it would be applied to it. The closest contract to a loan that results in benefit [to the lender] is *ribā al-faḍl*. Based on this, he said, "…it is thus part of it as far as the ruling." He supported this by his statement ""…"because when

[70] Haytamī, *Tuḥfat al-Muḥtāj fī Sharḥ al-Minhāj*, 4:272, Ramlī, *Nihāyat al-Muḥtāj*, 3:424.
[71] Shabramālisī, *Ḥāshiyat al-Shabramālisī ʿalā Nihāyat al-Muḥtāj*, by Ramlī, 3:424; Sharwānī, *Ḥawāshī al-Sharwānī wa al-ʿAbbādī ʿalā Tuḥfat al-Muḥtāj*, 4:272.
[72] Bujayrimī, *Ḥāshiyat Bujayrimī ʿalā al-Khaṭīb*, 3:296.
[73] Bakrī, *Iʿānat al-Ṭālibīn*, 3:20.

a benefit is stipulated in it for the lender, it became as if he sold what he lent for more of the same type."

Bujayrimī, in *al-Ḥāshiyah ʿalā Minhaj al-Ṭulāb*, commented on the literal definition of *ribā* as 'increase', saying:

> …with or without a contract. This is more comprehensive than the Sharīʿah definition. However, this is only suitable for *ribā al-faḍl*. Regarding use of the word 'contract', what happens today of paying more money for deferment without a contract is not considered *ribā*. It is rather an unjust consumption of people's wealth according to ʿAzīzī.[74] Some scholars, however, said it entails the sin of *ribā* according to the Sharīʿah.[75]

Baghawī said, "Anyone who lends something with the condition that [the debtor] will return more than that, it will be considered a loan that accrues benefit, and every loan that accrues benefit [to the lender] is *ribā.*"[76] He said this in his *tafsīr*, calling it a loan that accrues benefit. He did not count it as the *ribā* of Jāhiliyyah despite having occasion to do so since he made the statement in the context of the Qurʾānic verses on *ribā*.

Manāwī says "Every loan that accrues benefit for the lender is *ribā*; i.e., it takes the ruling of *ribā*; hence, the loan contract will be invalidated. Whenever a condition is stipulated in the contract that accrues benefit for the lender, whether in quantity or quality, it becomes invalid."[77] He considered it as having the ruling of *ribā* by way of being a subsidiary.

The most prominent evidence that they adhered to in prohibiting a loan with benefit and in giving it the ruling of *ribā* is the report from Fuḍālah ibn ʿUbayd, a companion of the Prophet (ﷺ), that [Fuḍālah] said, "Any loan that accrues benefit is one of the aspects of *ribā.*"[78] He did not expressly say, "It is *ribā*;" rather, he appended it to it because it brings benefit [to the lender].

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[74] An eminent scholar and teacher of Bujayrimī, Muṣṭafā ibn Aḥmad ʿAzīzī.
[75] Bujayrimī, *al-Tajrīd fī Nafʿ al-ʿAbīd*, 2:189.
[76] Baghawī, *Maʿālim al-Tanzīl*, 1:387.
[77] Manāwī, *Fayḍ al-Qadīr*, 5:28.
[78] Bayhaqī, 5:350, but its chain of narration is weak. The chain contains ʿAbdullāh ibn ʿAyyāsh is *sadūq* (truthful) but not reliable. There is also a break in the chain at Faḍālah. Ibn Ḥajar, therefore, said in *Bulūgh Marām*, no. 882, that the *ḥadīth* is weak.

These quotations, and other similar ones, from the Shāfiʿī books clearly state that an interest-bearing loan (*ribā al-qarḍ*) is a part of *ribā al-faḍl*, but none of these references mention that *ribā al-qarḍ* is a part of the *ribā* of Jāhiliyyah.

The statements of scholars from the other major *fiqh* schools, as well as other scholars, do not contradict the statements of the Shāfiʿīs; rather, they agree with them with the exception of what was earlier discussed regarding Jaṣṣāṣ.

The Ḥanafī scholar Kāsānī said:

> That which pertains to the loan itself: that it shall not contain [a stipulation of] accrued benefit. If it does, it is not lawful; for example, lending counterfeit coins on the condition that [the borrower] will return real coins, or lending with the stipulation of any condition that contains benefit for [the lender]. This is based on what was narrated that the Prophet (ρ) prohibited a loan that accrues benefit. That is because a stipulated increase is similar to *ribā* in that the increase is not in lieu of any counter-value; it is obligatory to avoid actual *ribā* and that which resembles *ribā*.[79]

Consider how he said, "a stipulated increase is similar to *ribā*." If it had been a form of the *ribā* of Jāhiliyyah, he would have expressly stated it, as it would be stronger in indicating the ruling than the description given.

Similarly, the utmost that the Māliki scholars stated is that such a loan contract is defective. They used the same reasoning for that as the Shāfiʿīs: it is a loan that brings benefit [to the lender]. However, they did not consider it a form of the *ribā* of Jāhiliyyah.

Dardīr said, "The loan is invalidated when it brings any benefit for the lender."[80] He also said:

> It is permissible for the pledgee to stipulate a benefit from the pledge such as residence, riding or any service, with two conditions. [The author] alluded to them by the term "identified"; i.e., the period or the labor. This is to avoid lack of information in a lease. [His statement] "from a sale" means: in the debt from a sale only, not in a loan, which is not permissible. [The difference] is because the sale includes a sale and a lease, which is allowed, while in the loan it is a loan with added benefit, which is not permissible.[81]

[79] Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:395.
[80] Dardīr, *Al-Sharḥ al-Ṣaghīr*, 3:295.
[81] Ibid., 3:325.

Ibn Rushd, the grandfather, said, "The Prophet (ρ) prohibited the loan that accrues benefit. It also resembles the *ribā* of Jāhiliyyah that is prohibited by the Qurʾān: 'Either settle [now] or increase [the amount]'."[82]

Consider how he compared an interest-bearing loan with the *ribā* of Jāhiliyyah, but he did not consider them same. Rather, he was very clear in stating that it is not from the *ribā* of Jāhiliyyah. He only made an analogy between them. He mentioned the prohibition of a loan with accrued benefit and followed it up with reports from the Companions of the Prophet (ﷺ). An example is the statement of Ibn Masʿūd: "Whoever gives a loan should not stipulate what is better than it [in return]. Even if it is a handful of animal feed, it is *ribā*. "

Ibn Rushd further said:

> The explanation of this is that it is by analogy with the *ribā* prohibited by the Qurʾān; i.e., the *ribā* of Jāhiliyyah: "Either settle [now] or increase [the amount]." That is because delaying the payment of the debt after it comes due on the condition of increase is a loan that accrues benefit. It is only lawful to take more than what one gave in a loan if it is without any prior condition.[83]

Shihāb Qarāfī considers an interest-bearing loan as a means leading to the *ribā* of Jāhiliyyah but not the same as it. He says:

> Do not accept a gift from your debtor unless he used to give you presents before taking the loan and you know that his gift is not due to the loan (in contrast to the opinions of the Shāfiʿīs and Ḥanafīs). That is because he is giving you the gift in the hope that he can delay the payment, so it is a means to the *ribā* of Jāhiliyyah.[84]

Ibn Taymiyyah takes a similar position on a gift. He says:

> It was previously mentioned that the Prophet (ﷺ) and his Companions prohibited a lender from taking a gift from the debtor unless he calculates it [as part of the payment] or if giving gifts was already a practice between them before the loan. That is only so the gift is not taken as a means to defer the payment. It becomes *ribā* if [the lender] recovers his money after collecting an increase.[85]

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[82] Ibn Rushd, *Al-Muqaddimāt al-Mumahhidāt*, 2:46.
[83] Ibid., 2:31.
[84] Qarāfī, *Al-Dhakhīrah*, 5:294; Ibn Rushd, *Al-Muqaddimāt*, 1:37.
[85] Ibn Taymiyyah, *Bayān al-Dalīl ʿalā Buṭlān at-Taḥlīl*, p. 262. A narration from the Prophet (ﷺ) is reported by Ibn Mājah, *ḥadīth* no. 2432, and Bayhaqī, 5:350. The *ḥadīth* is reported by Anas ibn Mālik, but the chain of narration is weak.

This is tantamount to an explicit statement from him that an increase on a loan comes under the rubric of *ribā al-faḍl* and that it is a means leading to interest-bearing debt but is not so, however, by its mere occurrence.

Ibn Taymiyyah was followed on this issue by his student Ibn Qayyim, who said:

> The Prophet (ﷺ) prohibited a lender from taking a gift from his debtor, as did his Companions, unless it is factored into his debt. This is so the gift will not be taken as a means to defer payment of the debt and thus become *ribā*. This is because the lender will get back his money and the increase that he gained due to the loan.[86]

This is buttressed by the argument of Ibn Taymiyyah in prohibiting *ribā al-qarḍ* based on the general linguistic indication [of the evidence]. He says in calling attention to some of the indications of general wordings:

> An example of this is the word '*ribā*', which encompasses all forms of forbidden *ribā* including *ribā al-nasīʾah*, *ribā al-faḍl*, a loan that accrues benefit, and so on. The word *ribā* covers all these; however, knowledge that [particular] kinds and types are included in the text requires proof. This is referred to as *taḥqīq al-manāṭ* (determination that the effective cause of the rule is present in a particular case).[87]

The view that a loan that includes interest at the time of contract formation is a form of *ribā* of sales (*ribā al-faḍl*), but not the same as *ribā al-jāhiliyyah*, is also the view of Ibn Ḥazm, who says:

> *Ribā* does not enter into a loan except from one source: stipulation to receive more than what was loaned, or less than what was loaned, or better than what was loaned, or of lesser quality than what was loaned. Scholars are unanimous on this. This is with regard to the six forms of *ribā* specifically mentioned in the revealed sources as *ribā*. Anything beside them is a stipulation not contained in the Qurʾān, and so it is invalid.[88]

Muhammad Rashīd Ridā, a latter-day scholar, also holds this opinion. He says:

> Know that the initial increase in deferred debt is *ribā al-faḍl* even if it is due to deferment. As for the *ribā al-nasīʾah* that is familiar [in the Sharīʿah context], it occurs due to deferment after the due date as consideration for the deferment. When

[86] Ibn Qayyim, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, 5:19-20.
[87] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 19:283-284.
[88] Ibn Hazm, *al-Muḥallā*, 8:494.

> this is repeated, it becomes the compound *ribā* that was rampant during the pre-Islamic Age of Ignorance.[89]

In summary, scholars do not consider *ribā* at the time of a loan as a form of *ribā al-jāhiliyyah*. This position agrees with what was earlier mentioned from the scholars of *tafsīr*. They classified the *ribā* of loans under the *ribā* of sales, which is *ribā al-faḍl*, even though it is accompanied by deferral. It is clear that this is the express statement of the Shāfiʿīs and was also supported by some others.

The Rank of the Ruling on the *Ribā* of a Loan

It is clear from the foregoing that scholars do not consider the *ribā* [stipulated upfront] in a loan to be a form of the original *ribā al-jāhiliyyah*. Rather, they expressly stated—especially the Shāfiʿīs—that it is a form of *ribā al-faḍl*. This does not mean it is permissible. The Shāfiʿīs and all other scholars have no disagreement on the prohibition of *ribā al-faḍl* if it involves deferment. The view of permissibility is narrated from a group of early scholars if the *ribā al-faḍl* occurs in a spot sale of a dirham for two dirhams or similar [unequal exchanges].

Ibn Taymiyyah says:

> There are those who heard the statement of the Prophet that '*ribā* is only in deferment' and made permissible the spot sale of two *ṣāʿ*s for one *ṣāʿ*. They include Ibn ʿAbbās and his students like Abū Shaʿthāʾ, ʿAṭāʾ, Ṭāwūs, Saʿīd ibn Jubayr, ʿIkrimah and others from among the notables of Makkah, who were among the best of the *ummah* in knowledge and deeds. It is not allowed for any Muslim to believe that any of them in particular, or anyone who followed one of them—in a matter in which it is permissible to follow him—is subject to the curse of consuming *ribā*. That is because they did it on the basis of an interpretation that was acceptable overall.[90]

Taqi al-Dīn Subkī said:

> The *ummah* agreed to the prohibition of unequal exchange [of the same type of fungible commodity] when delivery is deferred. But when delivery is spot, there was, of old, a controversy about this issue. It has been confirmed that Ibn ʿAbbās and Ibn Masʿūd (may Allah be pleased with them) considered it allowable, as did Ibn ʿUmar

[89] *Majallat al-Manār*, 10:439, section six, 10 August, 1907.
[90] Ibn Taymiyyah, *Rafʿ al-Malām ʿan al-Aʾimmah al-Aʿlām*, p. 54.

(RA), but he later retracted that view. The same is also narrated from ʿAbd Allāh ibn Zubayr and Usāmah ibn Zayd (RA). There is also an opinion from Muʿāwiyah (RA) that could be interpreted [to be in agreement] as well as from Zayd ibn Arqam and Barāʾ ibn ʿĀzib (RA). All of these were companions of the Prophet (ρ). As for the Tābiʿīn (the next generation), this view has been authentically reported from ʿAṭāʾ ibn Abi Rabbāḥ (RA) and other jurists of Makkah. It is also narrated from Saʿīd and ʿUrwah [from Madīnah]. Then there was a narration from Ibn ʿAbbās which implies that he later retracted that opinion. The same goes for Ibn Masʿūd (RA).[91]

As for the statement of Shaykh Muhammad Rashīd Ridā:

> Among those who made *ribā al-faḍl* completely lawful from among the companions of the Prophet (ρ) and their followers were:
> ʿAbd Allāh ibn ʿUmar (RA), but it is narrated that he retracted this view later;
> Ibn ʿAbbās, about whom there is disagreement as to whether he retracted;
> Usāmah ibn Zayd, Ibn Zubayr, Zayd ibn Arqam, Saʿīd ibn Musayyib, and Urwah ibn Zubayr (RA).
> They supported this view with the abovementioned *ḥadīth* reported by Bukhārī and Muslim: "*Ribā* only occurs in a deferred [exchange]." If *ribā al-faḍl* (an unequal spot exchange of the same type of fungible commodity) were the same as *ribā al-nasīʾah* (a deferred unequal exchange of the same type of fungible commodity), this disagreement would not have taken place among the Ṣaḥābah (RA) and the next generation [of scholars].[92]

The issue is not as he said. The reports from them were either detailed or vague. An example of the detailed is the narration from Ibn ʿAbbās which was clear about an unequal exchange in the sale of a *ribawī* item for its kind with immediate delivery of both items. If the disparity occurs along with deferment, the apparent view of those scholars is that it is prohibited. This is the way the vague reports must be understood.

Ibn Mundhir says: "The scholars agreed that, if a lender stipulates the condition of a gift or increase while giving a loan, taking such an increase is *ribā*."[93]

Ibn ʿAbd al-Barr said: "Muslims unanimously agree, based on the reports from their Prophet (ﷺ), that stipulation of an increase in a loan is *ribā*."[94]

Ibn Ḥazm said:

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[91] Subkī, *Takmilat al-Majmūʿ*, 10:26. The summary of all these has been mentioned by Ibn Qaṭṭān in *Al-Iqnāʿ fī Masāʾil al-Ijmāʿ*, 2:226.
[92] Muhammad Rashīd Ridā, *Tafsīr al-Manār*, 3:116-117.
[93] Ibn Mundhir, *Al-Ijmāʿ*, p. 54, *Al-Ishrāfʿ alā Madhāhib al-ʿUlamāʾ*, 6:142.
[94] Ibn ʿAbd al-Bārr, *Al-Tamhīd*, 4:68; ʿAynī also narrated it in *ʿUmdat al-Qāriʾ*, 12:45, 142.

> It is not permissible to give a loan so that it will be repaid in lesser or greater quantity, or by a different kind of item. It should be repaid in the same form as the loan in kind and quantity…This consensus is conclusive.[95]

Ibn Qudāmah says: "Any loan with a stipulation of increase is prohibited, without any difference of opinion." He further says: "This is because a loan is a contract of compassion that is done to seek Allah's pleasure. If an increase is stipulated, it removes it from its nature."[96]

Ibrahīm ibn Mufliḥ follows Ibn Qudāmah on this by saying:

> A loan with a stipulation of increase is prohibited by consensus. This is because a loan is a contract of compassion that is done to seek Allah's pleasure. If an increase is stipulated, it removes it from its nature.[97]

Ibn Taymiyyah says: "Sale of gold for silver on deferment is prohibited by the consensus of the Muslims. The same holds for the sale of wheat for barley on deferment."[98] This encompasses whether or not there is disparity in the counter-values.

Subkī also claimed there is a consensus on the prohibition of *ribā al-faḍl*. He discussed it at length, finally saying:

> Based on what we have said from the statements of the majority of our companions, the claim of consensus on the prohibition of *ribā al-faḍl* may not hold for any reasons. This is the implication of Abū Ḥusayn Muḥāmilī's treatment of the issue of *ribā al-faḍl* in *Kitāb al-Awsaṭ*, which he composed regarding the issues about which Shāfiʿī disagreed with the other jurists. If there had been *ijmāʿ* about it, he would not have mentioned it. However, by the grace of Allah, we are not in need of *ijmāʿ* about it due to the multiple clear, authentic texts that I mentioned earlier and which I agree with, God willing. Consensus is only needed in an issue for which the supporting evidence is obscure, either an analogy or a subtle deduction.[99]

Is *Ribā al-Faḍl* a Major or Minor Sin?

[95] Ibn Ḥazm, *Al-Muḥallā*, 7:467-468.
[96] Ibn Qudāmah, *Al-Mughnī*, 4:360.
[97] Ibn Mufliḥ, *Al-Mubdiʿ fi Sharh al-Muqniʿ*, 4:199.
[98] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 21:64.
[99] Subkī, *Takmilat al-Majmūʿ*, 10:50. For Imam Shāfiʿī's view regarding consensus, see Shāfiʿī, *Al-Umm*, 9:31.

The conflict of opinions on this issue does not impact the prohibition of either *ribā al-faḍl* or the *ribā* of a loan even though *ribā al-faḍl* is lesser compared to *ribā al-jāhiliyyah* which the Qurʾān prohibits. [*Ḥadīth*] texts state that *ribā* is a major sin without distinguishing between its forms, whatever may have been said about the difference in degree of severity between those various forms. There is also no difference of opinions among the scholars that taking *ribā* is, as a category, a major sin. They stated this explicitly in uncountable instances.

Ibn Ḥazm says: "If someone said, 'Sell me this dinar for a dinar in a month,' without specifying the period [exactly], it is *ribā*, a sin, prohibited, and one of the major sins."[100] He considered it a major sin solely because of the deferment.

Ibn Taymiyyah says:

> It is reliably reported that the Prophet (ﷺ) said: "Allah (ﷻ) cursed the one who takes *ribā*, the one who pays it, the two witnesses, and one who records it." Many reports on good authority were reported that the Prophet (ﷺ) told someone who sold two *ṣāʿs* for one *ṣāʿ* in a spot transaction that it is *ribā* in essence. Similarly, he (ﷺ) said, "Exchange of wheat for wheat is *ribā* unless both are handed over on the spot." This requires the inclusion of both kinds of *ribā—ribā al-faḍl* and *ribā al-nasāʾ*—in the *ḥadīth*.[101]

Haytamī mentioned the four types of *ribā* identified by the Shāfiʿīs, as previously discussed, as being among the major sins. He said:

> All four of these types are prohibited by consensus and the texts of the [relevant] Qur'anic verses and *ḥadīths*, and all of the threats mentioned about *ribā* apply to all four types.[102]

A Ḥanbalī scholar, Ḥajāwī, says:

> *Ribā* is prohibited, and it is among the major sins. It involves disparity between things [exchanged] and delay of things [exchanged], and it is particular to certain things. It is of two kinds: *ribā al-faḍl* and *ribā al-nasīʾah*.[103]

[100] Ibn Ḥazm, *Al-Muḥallā*, 8:351.
[101] Ibn Taymiyyah, *Rafʿ al-Malām ʿan al-Aʾimmah al-Aʿlām*, p. 53-54.
[102] Haytamī, *Al-Zawājir ʿan Iqtirāf al-Kabāʾir*, 2:222.
[103] Ḥajāwī, *Al-Iqnāʿ*, 2:114.

However, there remains a point for discussion here regarding the degree of the ruling, not the basic ruling. It is well known that there is a form of *ribā* that is definitively prohibited with no difference of opinion. This is *ribā al-jāhiliyyah*. There are also forms whose prohibition elicits differences of opinions among the scholars, such as *ribā* without deferment or formats such as *bayʿ al-ʿīnah* and an agreement to give rebate for early payment, and others.

Based on the view that every form of *ribā* is a major sin—including *ribā al-faḍl* and loans with stipulated increase at the time of the contract and not [a stipulation] upon maturity—it is not permissible for a person in need to take on such a loan unless it is a dire necessity (*ḍarūrah*) or a need (*ḥājah*) that is treated like necessity.

Subkī says:

> The correct view is that it is not permissible unless one entertains fears for life like that of the person for whom eating carrion is made permissible. Mālik and his followers only gave this concession when one faces a similar necessity to that which makes it lawful to eat carrion. This is based on consideration of the view of those who held that *ribā* only occurs with deferment.[104]

A Shāfiʿī scholar, Mulaybārī, says:

> Our teacher Ibn Ziyād said the sin of paying *ribā* on a loan is not justified by necessity, such that if he does not pay *ribā* he would not get the loan. That is because he has a way to pay the increase by making a vow or transferring ownership, especially if we say that a vow does not require acceptance of the term to be valid. Another teacher of ours [Ibn Ḥajar Haytamī][105] said that the sin of paying *ribā* on a loan could be justified by necessity.[106]

Based on the foregoing, Sulaymān ibn ʿUmar Jamal, a Shāfiʿī scholar, made an exception to what is included in *ribā al-faḍl*. He said while explaining their statement that *ribā* is one of the major sins:[107]

> This is apparently only with regard to one of its types, which is *ribā al-ziyādah* [increase]. As for *ribā* due to deferment or delay without any increase in either of two counter-values, the apparent ruling is that it is a minor sin. That is because all it

[104] Subkī, *Takmilat al-Majmūʿ*, 10:85.
[105] Bakrī, *Iʿānat al-Ṭālibīn*, 3:21.
[106] Mulaybārī, *Fatḥ al-Muʿīn Sharḥ Qurrat al-ʿAyn*, p. 120.
[107] Nawawī, *Al-Majmūʿ*, 9:391; Haytamī, *Tuḥfat al-Muḥtāj*, 4:272; Sharbīnī, *Mughnī al-Muḥtāj*, 2:363.

> is, is an invalid contract; and they have clearly stated that invalid contracts are regarded as minor sins.[108]

He considered the sale of a *ribawī* item for its kind with deferment but without increase a minor sin despite its being accurately described as *ribawī*.

Similarly, it could be inferred from Ibn Qayyim's statement that *ribā al-faḍl* without deferment is a secondary prohibition (*taḥrīm wasāil*) and not a prohibition for its own sake *tahrīm maqāṣid* that it is not a major sin. In fact, Ibn Qayyim is explicit that *ribā al-faḍl* is permissible under need. He says:

> Regarding *ribā al-faḍl*, some types of it are permissible when need calls for it such as sale of fresh dates on the palm in exchange for dried ones (*ʿarāyā*). This is because whatever is prohibited to block the means [to what is prohibited for its own sake] is lesser than what is itself the target of prohibition.[109]

He further says:

> The prohibition of *ribā al-faḍl* is to block the means…and what has been prohibited to block the means is permitted for a prevailing *maṣlaḥah*, as *ʿarāyā* has been made permissible from among [the types of] *ribā al-faḍl*. Similarly, it is permitted to pray voluntary *ṣalāh* for [recognized] causes after *fajr* and *ʿaṣr*. Also, it is permissible for a suitor or a witness or a medical doctor or a man conducting a business transaction with her to look at an unrelated woman as exceptions to the general prohibition of gazing at opposite sex. Similarly, the prohibition of gold and silk for Muslim men is to block the means to imitating women, as a man who does so is cursed. Both are permissible for men in case of need. Likewise, the sale of jewellery that entails lawful workmanship for more than its weight in the same metal should be permissible because there is need for it, and the prohibition of disparity [in quantity] is in order to block the means. This is pure analogy and a requisite Sharīʿah principle without which the general benefit of the people cannot be achieved. The other option is to adopt a legal trick, but it is invalid in the Sharīʿah.[110]

Overall, this refers back to what was earlier mentioned that the difference in the ruling for different kinds of *ribā* should be considered even along with view that it is a major sin.

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[108] Jamal, *Ḥāshiyat al-Jamal ʿalā al-Minhāj*, 4:355; cf. Bujayramī, *Ḥāshiyat al-Bujayramī ʿalā al-Khaṭīb*, 3:296; and Bujayramī, *Al-Tajrīd fī Nafʿ al-ʿAbīd*, 2:189.
[109] Ibn Qayyim, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, 3:405.
[110] Ibid., 3:408.

What Is Gained by Considering the *Ribā* of Loans as *Ribā al-Faḍl*?

Without doubt, none of the foregoing makes the *ribā* of loans permissible as far as the basic ruling goes. Rather, all forms of *ribā* are prohibited, and the view that all forms of *ribā* should be described as major sin is the basic rule. However, classifying the *ribā* of loans as *ribā al-faḍl* and not *ribā al-jāhiliyyah*, which is clearly prohibited by the Qurʾān, gives a lesser ruling. This would be beneficial in weighing considerations during hardship and difficulty.

In my opinion, in the current reality dominated by conventional banking, this ruling provides exceptions in critical situations with no legitimate alternatives. This is due to its being of lower degree to those who resort to it than *ribā al-jāhiliyyah*, which cannot be resorted to except in dire necessity.

Nothing in this discussion justifies even the least form of present-day *ribā*, not to mention the worst form, especially the practices of conventional banks. The debts these banks demand payment for are all subject to interest, which is *ribā*. This is true for simple interest, which is included in the *ribā* of loans, as previously discussed, and for compound interest, which is applied if a debtor fails to pay on the settlement date. The contractual terms stipulate this up-front, and both parties agree to them. This is *ribā al-jāhiliyyah* for which there is a great threat of punishment. A Muslim cannot consider it lawful [and remain a Muslim].

This is what I was able to prepare and explain. I ask Allah to make it beneficial. May He forgive me for any mistake I made in it. He is the One from whom help is sought, and on Him alone we rely. Glory and praise be to You, O Allah. None is worthy of worship except You. I seek forgiveness and repentance from You. All praise is due to the Lord of the worlds.

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Pinpointing Ibn Taymiyyah's View on the *Ribā* of Loans

Shaykh Walīd ibn Hādī

Your Eminence, Shaykh Dr. ʿAbdullah Yūsuf Judayʿ, *al-Salām ʿalaykum wa ramatullāhi wa barakātuhu* (May the peace and blessings of Allah be upon you).

I would like to start by thanking you greatly for your participation in the 10th symposium of Dirasat Company and for your contributions on the topic of the *fiqh* classification of the *ribā* of loans.

Surely, the discussion among the scholars has impacted on the research. The issue is to reconcile the position of the major *fiqh* schools that the *ribā* of loans is a type of *ribā al-faḍl* with Ibn Taymiyyah's view that *ribā al-faḍl* is a minor sin. This calls for determining the correctness of the attribution to Shaykh al-Islam Ibn Taymiyyah of the ruling that *ribā al-faḍl* is a minor sin.

After careful consideration of the issue, I realised that determining the point of difference rests in the explanation of the forms of *ribā* and their gradations as stated below:

1. *Ribā al-faḍl* without deferment

The Shāfiʿīs said that the *ribā* of loans is part of *ribā al-faḍl*. This is also the apparent meaning of the statements of others. It is known that *ribā al-faḍl* is a major sin from the statements of the leading *fiqh* schools. Based on that, it is not permissible to take a loan on interest without pressing necessity according to the specific [*fiqh*] meaning of *ḍarūrah*. However, Ibn Taymiyyah opines that *ribā al-faḍl* is a minor sin and is permissible when there is need.

2. *Ribā al-jāhiliyyah*

This is an increase in the debt after the initial agreement that creates the debt liability. This is the clear *ribā* without doubt. Whoever declares it permissible is a *kāfir* (unbeliever).

3. Combination of *ribā al-faḍl* and *ribā al-nasīʾah* at the beginning of the contract.

It is the same whether it a sale or a deferred loan. It could be further explained as follows:

   a. The is undoubtedly a major sin according to the leading *fiqh* schools

b. Contemporary scholars have differences of opinions about the classification of this form. The majority consider it a part of *ribā al-jāhiliyyah*. The Islamic Fiqh Academy of the Muslim World League explicitly stated that, as did Zuhailī, Abu Bakr Jazāʾirī and Qaraḍāwī, who said about one symposium: "The orientation of those in attendance—who were more than a hundred—was that all forms of interest are prohibited. They considered it clear *ribā al-jāhiliyyah.*" Others are of the view that it is not *ribā al-jāhiliyyah*. This was the view of Rashīd Ridā. Sāliḥ Āl al-Shaykh also shares this opinion, saying:

> Issues of interest, industrial loans and others are not the *ribā* about which scholars have reached consensus. The belief that they are permissible, issuing fatwas to that effect, and allowing them do not amount to declaring *ribā* to be permissible. That is because declaring permissible [what is recognized to be] *ribā* by consensus is disbelief (*kufr*). It is *ribā al-jāhiliyyah* that scholars unanimously declare to be prohibited. As for the *ribā* of interest, the *ribā* of loans and the like, these are prohibited and must be objected to, but they do not enter into the *ribā* about which there is consensus.

This is anchored on the basis that, although the *ribā* of a loan involves a legally binding maturity date, it is still *ribā al-faḍl*, about which there is a difference of opinion. However, it remains to examine the view of Ibn Taymiyyah on this issue. The closest parallel to it is *bayʿ al-ʿīnah* (buyback sale). We must trace his statements on it to know his view:

1) In one discussion of *bayʿ al-ʿīnah*, Ibn Taymiyyah endorsed Abū Yaʿlā's view that *ijtihād* is permissible regarding *bayʿ al-ʿīnah* and, thus, a person who sells by *ʿīnah* does not become a *fāsiq* (sinner) by doing so. This indicates it is a minor sin. However, in other places, Ibn Taymiyyah did not make any justification for this *ijtihād* and clearly stated that it is a major sin, saying:

> Imām Abū Wafā Ibn ʿAqīl stated that Imam Aḥmad prohibited narrating the *hadīths* of a narrator who deals in *ʿīnah*. This is to be understood as involving deferment, which is *ribā*. In the narration of Sanadī Khawātimī, he said: I do not like to report *hadīths* from anyone who sells by *ʿīnah*. In the narrations of Ḥubaysh and Salamah ibn Shabīb, he said: We do not report from those who take money for reporting *ḥadīth* and thus narrate without integrity. Qādi [Abū

> Yaʿlā] said: "This is scrupulousness because *ʿīnah* sale and collecting payment for reporting *ḥadīth* are issues about which *ijtihād* is permissible." Whoever allows *ijtihād* on this issue would not consider the doer a *fāsiq* (sinner).

This is an affirmation from Ibn Taymiyyah of the statement of Abū Yaʿlā. Ibn Taymiyyah also says:

> [Regarding] the narration of ʿĀʾishah: "Inform Zayd that he has rendered futile his jihad with the Messenger of Allah (ﷺ) unless he repents," this clearly indicates definitive prohibition, and it does so harshly. If the Mother of the Believers (ʿĀʾishah) did not have knowledge from the Messenger of Allah (ﷺ) and thus had no doubt that it was prohibited, she would not have been so bold as to make such a statement based on *ijtihād*, especially if she meant that deeds are rendered futile by apostasy and that declaring something like *ribā* permissible is disbelief (*kufr*). Zayd, however, had the excuse of not knowing that it was prohibited and for that reason she gave an order that he should be informed. The ruling given [by ʿĀʾishah] would be applicable to anyone who attains knowledge of the prohibition and it becomes clear to them yet they remain adamant. If this was not what she meant, then she meant it was a major sin that would neutralize the rewards of jihad; thus, he would become like someone who did a good deed and a bad deed of the same magnitude, so it would be as if he had done nothing. It is known that if *ijtihād* was justified in this issue, it would not be a misdeed, let alone a minor sin, let alone a major sin. When she asserted that it was a major sin and instructed that he be informed, it provides knowledge that she believed there was no justification for *ijtihād* in this issue as certainty takes precedence over affirmation.

2) Ibn Taymiyyah stated that *bayʿ al-ʿīnah* is a means leading to *ribā.* This was also said by other Ḥanbalī scholars. Buhūtī said: "The means leading to a prohibited act is in itself prohibited; for example, *bayʿ al-ʿīnah*.

Ibn Taymiyyah's principle is that whatever is prohibited because it is a means is a minor sin. While explaining that *ʿīnah* is a means, he said:

> The point here is that Allah has prohibited the means—even if there is no intent to do what is prohibited—for fear that it will lead to a prohibited act. If the intention in doing an act is a prohibited end, then it is more appropriate that it be prohibited than the [innocent] means. This explanation reveals the reason for the prohibition of *ʿīnah* and similar issues even if the seller does not intend *ribā*. It is because the objective behind the majority of such transactions is *ribā*, so it becomes a means [to it]. Therefore, this door is closed so that people do not use it as a means to *ribā* and then say "I did not intend that."

Ibn Taymiyyah declared that *ʿīnah* comprises both *ribā al-faḍl* and *ribā al-nasīʾah*. He says: "In the issue of *ʿīnah*, the sold product returns back to the seller, and this leads to both *ribā al-faḍl* and *ribā al-nasīʾah*." He states further:

> Any loan that accrues increase by a stipulated condition is impermissible by the consensus of scholars. It is *ribā* that encompasses *ribā al-faḍl* and *ribā al-nasīʾah*; for example, sale of dirhams for a greater number of dirhams with deferred delivery. This is undoubtedly prohibited. Notwithstanding any trick adopted, when the objective is to get more than the initial amount after a certain period, it is *ribā*.

This is based on the requirement of deferral according to Ibn Taymiyyah. Many scholars agree with him on this. Ibn ʿUthaymīn says:

> The explanation given by Ibn ʿAbbās when Ṭāwūs ibn Kaysān asked him "Why the prohibition?" was clear. He said, "Because it is dirhams for dirhams, but the possession is deferred." The explanation of that is that if I bought from this man a commodity for one hundred dinars and left it in his custody, and then I sold it for one hundred and ten dinars. It is as if I sold a hundred dinars for a one hundred and ten dinars. The commodity is merely a pathway. This deduction of Ibn ʿAbbās is very close [to correct] because in this case it is similar to *ʿīnah* in some ways. If Ibn ʿAbbās (τ), a very knowledgeable Companion, gave this explanation, it indicates how repulsive many of today's popular transactions are, which they call instalment sales. This involves a buyer choosing a particular commodity and then going to a seller and saying, "Buy it for me and then sell it to me with an additional profit." It is very evident that this is *ribā*. It is not hidden except to a person who has not given it due consideration. The reality is that he has loaned him the price with an increase. Instead of saying, for instance, "Give me the price of this commodity and I will pay you back with a profit," he says, "Buy it for me and thereafter sell it to me." The trader ordinarily would not buy the commodity for a penny if not for this [arrangement]. It is clear that the objective is *ribā*. This would not be difficult for people to understand if they gave it deeper consideration. If Ibn ʿAbbās considered the reason for prohibiting the sale of a commodity before taking ownership to be that it is similar to a sale of dirhams for dirhams with delayed possession, then this has a greater right [to be prohibited] and is graver. This is exceedingly clear. Unfortunately, people today are busily engaged in it, and such people express great disapproval of those transacting in open *ribā* such as conventional banks. A bank tells the customer explicitly, "Take this one thousand for one thousand and hundred." This other says, "Take this one thousand for one thousand and hundred," with twists and detours. It is known that whoever does something frankly is less [sinful] than one who does it deceitfully. That is because, by doing it deceitfully, the person falls into the sin of *ribā* and the sin of deceit. A deceitful person does his act as if it is permissible and has no fear of Allah. He may not consider himself a sinner and feels no embarrassment before Allah that would make him seek repentance.

> Rather, he considers his act permissible and will continue doing it. But one who commits it frankly would have some awe of Allah in his heart, fear of punishment, and hope of returning back to Allah.

Thus, Ibn ʿUthaymīn does not differentiate between Islamic banks and interest-based banks.

3) It is also evident from the statement of Ibn Taymiyyah that he considered *ʿīnah* to be a form of *ribā al-jāhiliyyah* as it is a trick to achieve it. He says:

> I have pondered upon *ribā* repeatedly, re-examining the texts about it and their meanings as well as the narrations [from the Companions and their Successors]. It then became clear to me—to Allah belongs all powers—after seeking Allah's guidance, that the root of *ribā* is deferment. For instance, selling dirhams [now] for a greater amount at a later time. It could also be by deferring debt payment for an increase, which was the practice during *jāhiliyyah*. Aḥmad ibn Ḥanbal was asked regarding the *ribā* about which there is no doubt. He answered that it is when a lender tells his debtor, when payment is due, "Will you pay [now] or pay more?" If he fails to pay at that time, the amount is increased and the payment is delayed. He makes more money off the needy without [the needy] getting any benefit from it. Allah prohibits this as it puts hardship on the poor. It is also an unjust consumption of the wealth of others. There are some famous contemporary scholars who say, "We do not know the ruling of *ribā* to be prohibition." This is because they looked at the aggregate of what has been declared *ḥarām* and did not perceive a clear negative impact. In reality, *ribā* is of two kinds: clear and hidden. Clear *ribā* is prohibited due to the harm and injustice it contains. The hidden *ribā* is prohibited because it is a means to the clear *ribā*. *Ribā al-nasāʾ* is a form of clear *ribā* as it puts great and obvious hardship on the poor, and this is [repeatedly] experienced….It is prohibited to sell a commodity for more of the same type with deferred delivery. This is part of *ribā al-nasīʾah*, and it is the root of *ribā*.

This is a clear statement that he categorized deferment as part of *ribā al-nasīʾah*, which is *ribā al-jāhiliyyah*.

It is evident from these reports that it is possible to consider the ruling on *ʿīnah* sales to be the prohibition of means and therefore a minor sin. Similarly, there is the possibility that *ʿīnah* sales have been prohibited for their own sake (*taḥrīm al-maqāṣid*) and are, as such, a major sin. This is evident in the statements and explanations of Ibn Taymiyyah. In fact, he explicitly states it in one passage; i.e., that he considers the *ribā* of loans to be a major sin. The problem that applies to

this is that the two parties may conduct a spot sale contract and then [the payment] gets deferred; this would be a minor sin based on the statement of Ibn Taymiyyah. Although this situation is very unlikely, it could occur. All this supports the view of the leading *fiqh* schools that *ribā al-faḍl* is a major sin.

Shaykh Dr ʿAbdullah Yūsuf Judayʿ: I place before you these texts to help reach a correct opinion on this issue. If you find other statements of Ibn Taymiyyah contrary to what is apparent from these, I hope you will add them to your research and send it to the General Secretariat of the symposium to be distributed to the scholars. If you do not, then what is attributed to Shaykh al-Islam ibn Taymiyyah that the *ribā* of loans is *ribā al-faḍl* is not correct. It is obligatory on all of us to return to the truth, which is better than being adamant on falsehood. Arrogance is disregard for the truth, and disputing and rejecting it.

I thank you greatly. Kindly accept my sincere greetings and appreciation.

Walīd Hādī
Doha
22 Muharram 1437 H.

In the name of Allah, Most Gracious, Most Merciful.
Dr Walīd Hādī

As Salam Alaykum wa rahmatullahi wabarakātuhu

I pray to Almighty Allah that my reply reaches you while you and those you love are in the most excellent state. I wish to thank you again for your gracious invitation to attend the International Sharīʿah Scholars' Forum of which you were the chairman. This marvelous symposium, held in Kuala Lumpur and organised by Bank Rakyat Malaysia, was a blessed opportunity to be in attendance with great scholars and to benefit from their wealth of knowledge and learn from them kind qualities and good characteristics. After gratitude to Allah, my sincere thanks, commendation and appreciation go to you. May Allah reward you abundantly and accept your efforts.

Regarding the paper I presented, I thank you for enabling me to do so. I similarly thank other scholars who participated in the symposium for their useful contributions and criticism. I also thank you for your research, analysis and concern for the correct position. I am happy about your review of the statements of Shaykh al-Islam Ibn Taymiyyah on his consideration of *ribā al-faḍl* as a major sin as well as your explanation and analysis of it. I benefitted from it. I was very fortunate to meet Shaykh Dr Aḥmad Ḥaddād to discuss with him regarding his follow up. He later sent me a copy. From my side, after returning home, I have expended some efforts to scrutinize the statements of Shaykh Ibn Taymiyyah and his student, Ibn Qayyim. I realised from the research the same thing that Shaykh Dr Yusuf Shubaylī called my attention to when we met. He said the statements of both Ibn Taymiyyah and Ibn Qayyim relate to *ribā al-faḍl* and not deferment. Similarly, I came across a statement of Ibn Taymiyyah where he mentioned what is closer to declaring that *ribā al-faḍl* is a major sin. I mentioned it in the research after appraisal.

I have taken into consideration all that was said regarding the appraisal of the research. I have rephrased what is necessary, and I have enclosed a final version of it.

May Allah make us consistent as seekers of truth and guide us to the correct views in our efforts. May He bless us all with beneficial knowledge and good deeds and preserve us in goodness and sound health.

Your brother in Islam,
ʿAbdullah Yūsuf Judayʿ
Leeds
6 Safar 1437 H

(5)

PRACTICAL APPLICATIONS OF THE DISTINCTION BETWEEN OWNERSHIP AND AN EXCLUSIVE NON-OWNERSHIP RIGHT (*IKHTIṢĀṢ*)

Prepared by:

Shaykh Walīd ibn Hādī

Shaykh ʿAbd al-Sattār Abū Ghuddah

The Fifth Topic:

Practical Applications of the Distinction Between Ownership and an Exclusive Non-ownership Right (*Ikhtiṣāṣ*)

Conference Chairman: Dr. Walīd ibn Hādī

The author of the book *Zād* [*al-Mustaqniʿ*] defined the revival of economically unproductive land (*iḥyāʾ al-mawāt*) as: the revival of land to which no ownership rights or other exclusive personal rights pertain. The Ḥanbalīs said that one who demarcates dead land by encircling it with stones does not become its owner by doing so. This is because ownership only occurs by making it productive [literally: "reviving it"], which did not happen in that case. However, he who does so has a better claim to [the land] than others. This is based on the statement of the Prophet (ρ):

"من سبق إلى ما لم يسبق إليه مسلم فهو له."

"If anyone reaches something which has not been approached before by any Muslim, he has a right to it." Narrated by Abū Dāwūd.

Similarly, his heirs after him have a better claim to the land than others. This is based on the statement of the Prophet (ρ):

"من ترك حقاً أو مالاً فهو لورثته."

"Whoever leaves behind wealth or a right, it is for his heirs."

Since it is a right for the deceased, the heirs will assume his place similar to other kinds of rights. Nonetheless, neither the person who encircled the land with stones nor his heirs has the right to sell it because he never owned it, and one of the conditions of sale is ownership. However, it is permissible to surrender, not sell, the right in exchange for a consideration, as mentioned by Ibn Naṣr Allāh, by analogy (*qiyās*) with *khulʿ* (a woman asking for divorce). He said in *al-Mubdiʿ*:

ومما يشبه النزول عن الوظائف: النزول عن الإقطاع، فإنه نزول عن استحقاق يختص به، لتخصيص الإمام له استغلاله أشبه مستحق الوظيفة، ومتحجر الموات، وقد يستدل بجواز أخذ العوض في ذلك كله بالخلع، فإنه يجوز أخذ العوض مع أن الزوج لم يملك البضع، وإنما ملك الاستمتاع به، فأشبه المتحجر.

Similar to surrendering [the right to] a job is surrendering *iqṭāʿ* (a public-land utilization grant) because it is the surrender of a right that exclusively pertains to him since the ruler authorised him in particular to utilise it. This is similar to an employee [having the right to do a particular job]. Also, one who encircles land having no owner with stones [is in a similar position]. The evidence of the permissibility of taking compensation in all that is *khulʿ*. This is because it is permissible [in *khulʿ*] to take compensation even though the husband does not own the wife but, rather, possesses the exclusive right to intercourse [with her]. This is similar to [the right of] one who demarcates land having no owner.

The author of *al-Zād* defined usurpation as: "seizing control of another's right". His statement "of another's right" covers ownership and *ikhtiṣāṣ*. Zarkashī in his book *al-Manthūr* stated:

The difference between ownership and *ikhtiṣāṣ* is that ownership pertains to [both] physical items and usufructs while *ikhtiṣāṣ* is only in usufructs. The scope of *ikhtiṣāṣ* is wider. There is evidence for that in examples; it can apply to what cannot be owned such as impurities (*najāsāt*) like dogs, impure oil, the skin of animals that died without being properly slaughtered, and the like.

A subsidiary of this issue is that destruction of wealth creates liability, but that is not so for *ikhtiṣāṣ*, to which liability does not apply. The author of *al-Zād* and its explanation said:

"(وإتلاف الثلاثة) أي: الكلب والخمر المحرمة وجلد الميتة (هدر)، سواء كان المتلف مسلماً أو ذمياً؛ لأنه ليس لها عوض شرعي لأنه؛ لا يجوز بيعها"

The destruction of three types [of wealth]—i.e.: a dog, forbidden intoxicants and the skin of an animal that died without being properly slaughtered—creates no liability [to reimburse the owner], regardless of whether the destroyer is a Muslim or a non-Muslim living in a Muslim state. This is because there is no legitimate compensation for them since it is not allowed to sell them.

Other subsidiaries of the issue of *ikhtiṣāṣ* are that returning it due to a defect does not apply, nor does the right of preemption.

The Differences between Ownership and *Ikhtiṣāṣ*

Dr. ʿAbd al-Sattār Abū Ghuddah

(And What Is Considered a Sale and What Is Considered a Waiver)

Ownership is known. What is known does not need to be defined.

***Ikhtiṣāṣ*:**

It is defined by Ibn Rajab in his *Qawāʿid*, page 192, thus: "the right to derive benefit reserved for the right holder, with no one having the right to share with him, and it is not subject to *shumūl* (inclusion) or exchanges." They explained *shumūl* as the inclusion of all types of deriving benefit. Not being subject to exchange means that its owner does not have the right to sell it; however; he does have the right to surrender it for compensation as mentioned by Ibn Naṣr Allāh.

Among the forms of *ikhtiṣāṣ*:

(a) The surrender of jobs.
(b) The surrender of demarcated wilderness land (*mawāt*).
(c) The surrender of *iqṭāʿ* [land granted by the ruler to someone for the purpose of utilising it].
(d) The surrender of that whose ownership cannot be transferred; i.e., because it is forbidden to own it, such as the skin of an animal that died without being properly slaughtered, a dog, or oil contaminated with filth.

All these forms are not subject to sale due to the lack of ownership, which is a condition for the subject matter. The transaction is, therefore, a surrender (or waiver of right).

Taking compensation for the surrender

It is permissible to earn a compensation in exchange for a surrender by analogy (*qiyās*) with *khulʿ* [a woman asking for divorce]. Since the divorcing husband surrenders his right

to intercourse (while he does not own his wife). As such, this is considered as a surrender, not a sale, because ownership is a condition of sale.

The Differences between Ownership, Which Is Subject to a Sale Contract, and *Ikhtiṣāṣ*, Which Is Subject to a Surrender:

The following differences were extracted from the sayings of jurists:

1- Ownership is applicable to physical items while *ikhtiṣāṣ* is applicable only to usufructs.
2- The destruction of what is owned creates liability for reimbursement, unlike the destruction of the subject matter of *ikhtiṣāṣ*.
3- The surrendered *ikhtiṣāṣ* cannot be returned back by a claim of defect.
4- The right of preemption is not applicable.
5- [The scope of] *ikhtiṣāṣ* is wider than that of ownership due to the wide scope of its applications, unlike in ownership.

When Is It Required to Resort to Surrender Rather than Sale?

In other words: to what extent does need apply to *ikhtiṣāṣ* and the application of surrender.

It appears, and Allah knows best, that surrender is resorted to when it becomes customary among people to exchange what does not fulfill the conditions of the subject matter of a sale contract, most importantly, ownership. This is due to the prohibition of selling that which one cannot own such as a dog, etc., provided that such surrender does not lead to something prohibited in Sharīʿah and that people have such a pressing need (*ḥājah*) for it that it can be treated like necessity (*ḍarūrah*).

With relation to the conditions of ownership, I hereby include the conditions for the validity of the subject matter:

1- It is in existence. It is not valid to sell that which is not in existence unless a *salam* contract is used (payment in the contract session for delivery at a specified later date).
2- It is defined (determined by gesture or description).
3- It is deliverable. It is not allowed to sell a stray horse or a stolen car.
4- It is *mutaqawwim*; i.e., it has value in the Sharīʿah. This excludes forbidden items and impurities, etc.
5- It is owned by the seller. It is not allowed to sell what one does not own.

Note:

Some of the conditions are essential; thus, they cannot be neglected, and the sale contract cannot be made into a surrender without them. They are: the condition that the subject matter be existent, known and valuable. That is because such conditions are concerned with the essence of the subject matter, which is, along with the price, a pillar of the sale contract. This is contrary to the condition of ownership, for example, because agency is allowed in selling what is owned by others. Likewise, the condition of deliverability because, if it happens later, the sale is valid.

Application

The sale/purchase of the right to underwrite without buying the share itself. The trade of such a right fulfills the conditions of a valid sale. This is different than an option in the sense that the latter does not entail anything that can be sold. It is only an intention. Similarly, it does not entail specifying the subject matter unlike the sale of the underwriting right, which is related to specific shares.

Trading Underwriting Rights

Trading can be done right after the sale, whereby the buyer can sell what he just bought. Some regimes require the lapse of a certain period so that rapid trading does not lead to market manipulation. This is a matter of public interest [and thus allowed].

(6)

BANKING APPLICATIONS OF THE MAXIM "WHAT IS FORBIDDEN BECAUSE IT WILL LEAD TO THE UNLAWFUL IS PERMITTED IN CASE OF NEED"

His Eminence Shaykh Walīd ibn Hādī

His Eminence Dr. ʿIṣām al-ʿAnzī

The Sixth Topic

Banking Applications of the Maxim "What is Forbidden Because It Will Lead to the Unlawful is Permitted in Case of Need"

His Eminence Shaykh Walīd ibn Hādī

Before discussing the rule, it is better to first distinguish between *ḍarūrah* (extreme necessity), *ḥājah* (need), and *maṣlaḥah* (interest).

1-*Ḍarūrah* and *Ḥājah*

Ḍarūrah has two meanings: specific and general. As for the latter, Zarkashī says in his book *al-Manthūr:*

> *Ḍarūrah* is to reach an extent that if you do not make use of the forbidden thing you will perish or come close to perishing. For example, someone under the compulsion of *ḍarūrah* has to eat forbidden food or wear forbidden clothes because, if he remains hungry or naked, he will die or lose a limb. Thus, this situation gives license to use what is forbidden.

It is stated in *al-Minhāj* and its commentary by Damīrī:

> (Whoever fears death or serious sickness and finds only forbidden substances) like carrion, blood, pork and the like (has to eat from them) in the same way as avoiding death by eating the lawful. And the fear of prolonged sickness is like the fear of death. The same goes for the fear of being too weary to walk or ride or of being separated from traveling companions. Also, he is allowed to eat [the forbidden] if he runs out of patience or hunger has weakened him. And one does not have to be quite certain of the occurrence of the potential fear if he does not eat; the probability is enough. It is acknowledged that one does not have to reach the degree of impending death as eating at this stage would of no avail.

Dardīr says:

> [T]he allowed quantity is (that which is enough to maintain life by) eating from any (forbidden substance) carrion and the like (due to *ḍarūrah*,) which is to maintain souls from perishing or extreme harm. Necessity dictates exceptions to prohibitions.

In his book *Aḍwāʾ al-Bayān*, Shinqīṭī says:

> The parameter of *ḍarūrah* that allows eating carrion is the fear of perishing on the basis of certainty or probability. Zurqānī, while explaining Mālik's statement in the *Muwaṭṭaʾ* about those who are obliged to eat carrion, notes, "The parameter of *ḍarūrah* is the fear of perishing on the basis of certainty or probability. He does not have to reach the degree of imminent death as eating at this stage would be of no avail."

Nawawī in his book *al-Majmūʿ* notes:

> Jurists agree that a person facing *ḍarūrah*, if he finds what is pure and owns it, has to eat it. There is no disagreement that feeling very hungry is not enough to [allow a person] to eat carrion and the like. There is also no disagreement that abstention [from eating what is forbidden] until reaching the point of imminent death is not compulsory because eating at this stage would be of no avail. If a person does reach this stage, he is not allowed to eat, as eating would be useless. Jurists also agree on the permissibility of eating if he fears hunger or fears becoming too weak to walk or ride and thus falling behind his traveling companions, and the like.

***Ḥājah*:** it is, for example, when one is hungry, but has not yet reached the stage of perishing, but experiences difficulty and hardship. This state does not make the forbidden lawful. In *ḍarūrah*, [the prohibited] is indispensable while in [a state of] *ḥājah* one can get by without it.

Sometime scholars use *ḍarūrah* and *ḥājah* interchangeably. Bannānī notes, "Māzirī refers to '*ḥājah*' using '*ḍarūrah*' while the latter is more specific than the former, but there is no harm in this."

When a *ḥājah* becomes common, anyone may resort to it even though they are not actually in a state of *ḥājah*; however, for *ḍarūrah* to be considered, it must be realized for each individual [who avails of it].

Referring to this, Juwaynī says in *al-Burhān*:

> The Lawgiver has an approach to *ḍarūrāt* (necessities) by which the goal of the first two sections is attained. Whatever is only permitted due to *ḍarūrah* because it is indecent or remote from lawfulness, the Lawgiver's consideration of it hinges on the [actual] presence of *ḍarūrah* in it, and it is not sufficient for it to be perceivable at the collective level. An example of this is the permissibility of carrion.
> Sometimes a thing is deemed extremely evil in the sight of the Lawgiver and is never permitted under the force of *ḍarūrah*; rather, the Lawgiver obliges abstention from it and resigning oneself to dying, like when someone is forced to kill or commit adultery.

> *Ḍarūrāt* are thus of three categories: *ḍarūrah* that does not permit something which is deemed extremely evil; *ḍarūrah* that permits something; however, the ruling is not established collectively; rather, the [ruling] requires the presence [of extreme need] in every person, like eating carrion and other people's food. The third category: what basically relates [to *ḍarūrah*] but the Lawgiver does not look at [its presence in] each individual, like in sales and so on. That is because reasoning has no effect in considering selling and the exchange of counter-values as evil. Therefore, it suffices to perceive *ḍarūrah* in principle, and no attention is paid to individuals. It is based on a comprehensive principle. Selling is not evil in itself, neither in Sharīʿah nor in custom.

The Ḥanbalī School explicitly allows combining two prayers at home due to rain. In this regard, it is stated in the book *Sharḥ al-Ghāyah*:

> What is required is the existence of hardship in general; not everyone who performs the prayer has to face hardship. That is because the presence or absence of hardship is the same in the case of a general concession, such as travelling.

Al-Sharḥ al-Kabīr provides another example: the permissibility of concluding a *salam* contract for those who are not in need of it.

2-*Maṣlaḥah*

Maṣāliḥ and *maqāṣid* (objectives) are united in entity, different in consideration. *Maqāṣid* are the province of the Lawgiver while *maṣāliḥ* are the province of people. The distinction between *maṣāliḥ* and *mafāsid* is the jurisdiction of the Sharīʿah and is not subject to peoples' wishes and whims. In this regard, Ghazālī says:

> *Maṣlaḥah* basically refers to realizing benefit and averting harm, but this is not what we mean; because realizing benefit and averting harm are the objectives of people, and people's welfare lies in attaining their objectives. What we mean by *maṣlaḥah* is to maintain the objective of the Lawgiver, which consists of five principles regarding people: the preservation of their religion, lives, minds, offspring and property. Everything that preserves these principles is *maṣlaḥah* and everything that negates them is *mafsadah*; and to avert this *mafsadah* is also *maṣlaḥah*.

Taftāzānī in his book *al-Talwīḥ* defines *maṣlaḥah* as "the preservation of the objective of the Lawgiver by preservation of the five essentials. Everything that strengthens these five essentials is *maṣlaḥah*, while eliminating them is *mafsadah*."

Subkī in his *Fatāwā* refers to the difference between *ḥājah* and *maṣlaḥah*:

> As for [the trustee] buying a bondwoman for service and spending on her from the money of an interdicted person beyond what is required; if this [expenditure] is for the need of the interdicted person, it is allowed and [the trustee] is not liable because of it. However, if there is no need, it is not allowed, and [the trustee] is liable. *Maṣlaḥah* does not suffice. One should understand the difference between *ḥājah* and *maṣlaḥah*.

Juwaynī in his book *Nihāyat al-Maṭlab* notes:

> One matter based on the *ḥājah-maṣlaḥah* rule is the number of wives. Our scholars say that a father should marry his insane son to only one wife on the basis that his son's marriage is because of *ḥājah*, and this *ḥājah* is met by one wife. It is not fitting to burden the son with more expenses when having one wife is enough. The apparent inferred rule of the School is that a father may marry his minor son who has reached the age of discrimination to four wives in case the father finds benefit [for him] in this marriage. That is because the marriage of a minor is based on benefit (*ṣalāḥ*) rather than *ḥājah*.

After these preliminaries, we explain that what is forbidden in the Sharīʿah is of two kinds: [the first is] *ḥarām li dhātihi* (unlawful per se), also called *taḥrīm al-maqāṣid* (unlawful as to objectives). These consist of major sins that are never permitted except in [cases of] *ḍarūrah*. [The second is] *ḥarām li ghayrihi* (unlawful because of an extrinsic reason), also called *taḥrīm al-wasāʾil* [unlawful because they are means to more serious prohibitions]. These consist of minor sins that are permitted in [cases of] *ḥājah*.

Saʿdī says, "Major sins are forbidden on the basis of *maqāṣid*. Minor sins are forbidden on the basis of *wasāʾil*."

ʿUthaymīn says:

> The forbidden is allowed in case of *ḍarūrah* while the disapproved is allowed in case of *ḥājah*. What is forbidden because it is a means [to what is prohibited for its own sake] is permitted due to *ḥājah*; for example, *ʿariyyah*.[111] Sometimes jurists differ about some forbidden things; some consider them prohibited for their own sake while others consider them prohibited because they lead [to what is prohibited for its own sake], like *ribā al-faḍl*. The subsidiaries of this rule are plentiful and can be found in various chapters of jurisprudence.

Shaykh al-Islam says:

[111] The exchange of dry dates for fresh dates that are still on the trees. The Prophet (ρ) legitimated the contract for poor people due to their need for fresh dates.

Ribā al-nasīʾah is forbidden due to the corruption and injustice it entails while *ribā al-faḍl* is only forbidden in order to block the means [leading to what is prohibited for its own sake]. The most fitting opinion is that *ribā al-faḍl* is only forbidden in foodstuffs of the same type measured by volume or weight. That was the opinion of Saʿīd ibn Musayyib, Shāfiʿī (in a narration), and Aḥmad in a narration chosen by Abu Muḥammad. Mālik's *madhhab* is similar to this one. Actually, it is even better in *ribā al-faḍl* and *ribā al-nasīʾah*, and in considering *maqāṣid*; yet [Mālikʾs *madhhab*] exaggerates in blocking the means to the extent that he disallows it even when the intent is good and there is a preponderant benefit. Aḥmad is in line with Mālik in invalidating legal tricks (*ḥiyal*) and blocking the means—unless *maṣlaḥah* prevails. And this is the most balanced opinion. The difference between *ḥiyal* and blocking the means (*sadd al-dharāʾiʿ*) is that in *ḥiyal* the person doing the act intends something forbidden in Sharīʿah, and this corrupt intent must be blocked. However, *sadd al-dharāʾiʿ* is invoked, even when the intent is good, for fear that it may lead to legal trickery. The Lawgiver does block lawful means in particular situations, as I pointed out in my book *Bayān al-Dalīl ʿalā Buṭlān al-Taḥlīl*; however, this is on the condition that the blocking does not cause the loss of a preponderant benefit. Hence, the prohibition is of things that involve *mafsadah* (harm) and contain no weightier benefit. If something has a prevailing benefit, it is permitted since this benefit outweighs the potential harm. Therefore, it is permitted, for the purpose of engagement, to look at an unrelated woman since *maṣlaḥah* prevails. If, however, the look serves no purpose, it is not permitted.

Similarly, as a rule, it is not permitted for a woman to travel in the company of a man who is not her husband nor a relative; yet when *maṣlaḥah* prevails, it is permitted, like when ʿĀʾishah travelled with Ṣafwān ibn Muʿaṭṭal. As ʿĀʾishah had been left alone, it was better to accompany him than to remain lost.

As for travelling for ḥajj, jurists hold different opinions. The strongest opinion holds that if a woman cannot travel with *maḥram* (near relative), she may travel with people in whose company she feels secure. That is because it is better than missing *ḥajj*. Concerning the *ḥadīth* "Perform ḥajj with your wife," it indicates that if she can travel with a *maḥram*, she should not travel alone, in order to combine the two *maṣlaḥahs*. But if there is no choice but to either miss ḥajj or travel safely without a *maḥram*, the latter is better for her. [The probability] of corruption in her religion when travelling alone is rare during the ḥajj journey, and with people she feels secure around it is zero. This is different from her traveling with no *maḥram* for business or a visit; corruption then is probable, similar to being in privacy with an unrelated man. This privacy is permitted when *maṣlaḥah* prevails. Aḥmad, according to Marwadhi's narration from him, permitted an aged woman who has no *maḥram* and no hope of getting married to travel. That is because she belongs to the category of elderly women.

One of the applications of this rule is with regard to contracts that involve *jahālah* (missing information), on the basis of the majority's opinion that such a contract is a minor sin, as opposed to Ibn Ḥajar Haytamī, who considered it a major sin.

Kashmīrī argues that contracts banned to [protect] the rights of the contracting parties are not made unlawful unless they have a clash of opinion. And this a third opinion on this issue.

Banking Applications of the Rule "What is Forbidden Due to *Dharīʿah* Is Permitted for *Ḥājah*"

His Eminence Dr. ʿIṣām al-ʿAnzī

In the Name of Allah, the Most Compassionate, the Most Merciful

All praise is due to Allah, Lord of the Worlds; and may Allah's peace and blessings be upon his last Messenger, his family, and his noble Companions.

Upon the kind request from His eminence Shaykh Walīd ibn Hādī and Bank Rakyat in Malaysia, I present my paper, "What is forbidden due to *dharīʿah* is permitted for a prevailing *maṣlaḥah* and *ḥājah*." It is an important and perilous rule. It is important because people need it and it removes hardship by considering peoples' welfare and needs. Moreover, it requires monitoring of the realities of their lives; thus, what is forbidden in order to block the means will not remain so forever. Such means would be unblocked if the suspicion fades and no justification remains to maintain the prohibition.

As for the rule being perilous, it lies in its misuse. The rule might make the *ḥarām* lawful if it is applied without parameters and rules. For example, *ribā*, intermingling of the two sexes and other forbidden matters might be rendered permitted on the pretext of *ḥājah* and *maṣlaḥah*. Therefore, it is imperative to clarify this rule, its evidence, those who advocate it, its parameters, as well as the difference between what is prohibited in and of itself and what is prohibited due to other reasons.

I pray to the Allah, the Almighty, to make straight our words and deeds and guide us to the truth. He is the Guardian.

All praise is due to Allah

"Our Lord, take us not to task if we forget and lapse into error inadvertently. Lord, lay not on us the kind of burdens that You laid on the people before us. Lord, lay not on us the

kind of burden that we have not the strength to bear. Be kind to us, forgive us and show mercy to us. You are our Protector: help us against the disbelievers." (Qurʾān, 2:286)

Dr. ʿIṣām Khalaf al-ʿAnzī

What Is Unlawful Due to *Dharīʿah* Is Permitted for Prevailing *Maṣlaḥah* and *Ḥājah*

The Sharīʿah is based on preventing everything that leads to corruption; it prevents the lawful for fear that it will lead to the unlawful or to neglecting the obligations prescribed by Allah. Therefore, the scale for weighing *maṣlaḥah* and *mafsadah* is one of the most important scales on which the Sharīʿah is established. In fact, ʿIzz ibn ʿAbd al-Salām commented that the Sharīʿah in its totality is based on realizing benefit and averting harm. If these actions entail benefits that outweigh the harm they may possibly lead to, then they are permitted by the Lawgiver for fear that people will face difficulties. "This rule represents an aspect of the equilibrium of benefit and harm. Averting harm does not always take priority over bringing benefit. Rather, benefits sometimes takes priority, even though some harm is associated with them, if the benefit outweighs the harm."[112]

Therefore, I will deal with this rule from various points:

First, Those Who Adopt the Rule

Some researchers attribute this rule to Shaykh Ibn Taymiyyah and his student, Ibn Qayyim. One might get the impression that scholars before Ibn Taymiyyah and Ibn Qayyim did not adopt this rule, as it was not recorded in the books of Islamic legal maxims. I believe this rule has been accepted by all scholars, as can be seen from the evidence upon which the rule is based, as well as the related examples stated by jurists in their books.

Probably the reason for the above exclusive reference to Ibn Taymiyyah and Ibn Qayyim is that they were the first to mention this rule by this wording.

Shaykh al-Islam Ibn Taymiyyah notes:

> The prohibition of prayer during certain times is due to *sadd al-dharāʾiʿ* and…not because it is harm in itself. It is accepted if it contains a prevailing benefit as benefit should not be lost if there is no prevailing harm. Prayer [at certain times] does not comprise harm, but it leads to it. If benefit is only obtained through the [possible] means [to harm], it is accepted…This is a principle recognized by Imam Aḥmad and

[112] ʿAbd al-Salām Ḥusayn, *Al-Qawāʿid wa al-Ḍawābiṭ al-Fiqhiyyah li al-Muʿāmalāt al-Māliyyah ʿInda Ibn Taymiyyah*, 1:86.

> others; i.e. what is prohibited to block the means [to the unlawful] is prohibited as long as it is not needed…if, however, it is needed, it is not prohibited.[113]

Further, Ibn Taymiyyah says:

> The Lawgiver blocks means in particular situations provided this blocking does not cause the loss of a weightier benefit. Hence, the prohibition goes to things that involve harm and do not include a prevailing benefit. If something entails a prevailing benefit, it is permitted, since this benefit outweighs the potential harm.[114]

He also says:

> What has been prohibited due to *dharīʿah* is permitted for a prevailing benefit, such as the permissibility of looking at an unrelated woman for the purpose of engagement. Also, it is permitted for a woman to travel [alone or with the company of non-*maḥram* when benefit prevails], such as travelling to escape a hostile land as Umm Kulthūm did, and when ʿĀʾishah travelled with Ṣafwān ibn Muʿaṭṭal. As ʿĀʾishah had been left alone, it was better to accompany him than to remain lost. [A woman traveling without a *maḥram*] has only been permitted because it leads to harm. In case it entails a prevailing benefit, then it does not result in harm.[115]

Referring to this rule, Ibn Qayyim states:

> Since lowering the gaze is a basic prerequisite for protecting the private parts [from illegal intercourse], the Qurʾān mentions it first. And since the prohibition of [looking at an unrelated woman] relates to means, it is permitted when there is a prevailing benefit and is prohibited if harm is feared and is not countered by a benefit weightier than that harm. Because of this, Allah does not order Muslims to lower their gaze completely; rather, He orders its lowering in some situations. As for the order to protect their private parts, it must be maintained in all circumstances.[116]

Ibn Qayyim refers to this rule again in his book *Zād al-Maʿād*.[117]

Imam Ibn al-ʿArabī is another scholar who refers to the rule: "When a thing is prohibited in and of itself, *ḥājah* has no effect regarding it, but when the prohibition is for an extrinsic reason, *ḥājah* has an effect in removing the problematic element."

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[113] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 22:201.
[114] Ibid., 5:354.
[115] Ibid.
[116] *Rawḍat al-Muḥibīn*, 92.
[117] *Zād al-Maʿād*, 2:242.

One of the examples which indicates that jurists take this rule into consideration is what Imam Muḥammad ibn Ḥasan says, "When Muslims gain spoils of war in hostile territory, none of them may benefit from them."[118] They can neither eat nor drink from the spoils before *khums* (one-fifth) is deducted. That is because it is a *dharīʿah* that leads to injustice, inequality and conflict. However, the preventive measure is lifted when there exists a prevailing benefit related to need. Regarding this, Muḥammad ibn Ḥasan says immediately after the above-quoted statement:

> Unless they have to feed themselves and their animals. Also, they may slaughter cows and sheep to eat, which is not considered as part of the *khums* because of their pressing need for food and fodder, which they cannot bring from the House of Islam or purchase from the House of War. What they take in war is booty. Hence, and due to the existing need, what they eat or drink is exempted from [the rest of] the spoils.[119]

One may note that Imam Muḥammad ibn Ḥasan does not allow taking from the spoils before the *khums* is deducted. However, he lifts the prohibition of the means here for a prevailing benefit, which is the soldiers' need for eat and drink. If they were not to feed themselves, they would suffer hardship.

Elucidating this point, Ibn Qudāmah writes:

> [A]nd because the need entails this. Abstention from food would harm the army and their animals. It would be difficult for them to bring along food and fodder from the House of Islam, and they would not find in the House of War what could be purchased. Even if they could, they wouldn't be able to afford it. It would not be possible to distribute what one of them could acquire [directly], and if it were to be done, none of them would acquire enough to benefit from it or satisfy their needs. Therefore, Almighty Allah has allowed them [to take food from the spoils].[120]

Ibn Qudāmah's observation on benefit related to need is relied on for allowing what was prohibited to block the means [to harm]. Further explanation will be offered that jurists adopted this rule while citing the evidence for it.

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[118] *Al-Mabsūṭ*, 3:1017.
[119] Ibid., 10:34.
[120] *Al-Mughnī*, 13:127.

Second, Evidence for the Rule

One indication for the validity of this principle is that it stems from two legal maxims that are agreed upon:

1- "The greater harm is to be averted by the lesser one."
2- "If a harm and a prevailing benefit conflict, the prevailing benefit takes priority."

These two rules are more general and comprehensive than the rule in question because they encompass essentials (*ḍarūriyāt*) and what has been prohibited in and of itself (*muḥarram li dhātihi*), while this rule relates only to needs (*ḥājiyyāt*) and what has been prohibited for an extrinsic reason (*muḥarram li ghayrihi*).

The rule's evidence

1- Umm Kulthūm bint ʿUqbah ibn Abi Muʿayt migrated alone [from Makkah to Madinah] to meet the Messenger.[121] This was after she had accepted Islam.

2- ʿĀʾishah travelled with Ṣafwān ibn Muʿaṭṭal.[122]

The reason why a woman is prohibited from travelling without a *maḥram* is to block any potential harm, but if there is a *ḥājah* or a prevailing benefit for such a journey, she can.

3- Jābir narrated: "The Messenger of Allah forbade the use of [certain] containers, but the Anṣār said, 'We cannot dispense with them.' The Prophet then said, 'If so, then use them.'"[123]

Ibn Baṭṭāl comments, "The prohibition of certain containers was to block a means [leading to corruption] If there is a necessity, there is no prohibition. The same goes for similar kinds of prohibition."[124]

Likewise, Ibn al-ʿArabī says:

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[121] *Ṣaḥīḥ al-Bukhārī, Kitāb al-Shurūṭ*: *Bāb Mā Yajūz min al-Shurūṭ fī al-Islām wa al-Aḥkām, ḥadīth* no. 2564.
[122] *Ṣaḥīḥ al-Bukhārī, Kitāb al-Maghāzī: Bāb Ḥadīth al-Ifk, ḥadīth* no. 4141.
[123] *Ṣaḥīḥ al-Bukhārī* and *Fatḥ al-Bārī*, 11:182.
[124] *Sharḥ Ibn Baṭṭāl li Ṣaḥīḥ al-Bukhārī* (Maktabat al-Rushd, 1420 H), 7:56.

> It is confirmed that *intibādh* (leaving dates or grapes in water to make a sweet drink) in the [aforementioned] containers is forbidden. It is said the reason is that they cause rapid fermentation and are therefore prohibited. However, they became allowed when the Ansār mentioned their need for such containers. If a thing is forbidden per se, *ḥājah* has no effect regarding it. If prohibition relates to an external factor, then *ḥājah* has an effect, as the problematic element is removed thereby.[125]

What concerns us here is that the Lawgiver exempted from the prohibition of *intibādh* in those containers the case of necessity or need, and this exemption is based on the text "If so, then use them."

4- Looking at an unrelated woman and being with her in privacy are not allowed. Muslims are ordered to lower their gaze, as the Qurʾān says, "Say to the believing men that they should lower their gaze and guard their modesty."[126] The look guides to adultery. A man is, however, allowed to look at an unrelated woman for the purpose of engagement. The Prophet said, "Look at her, because it is more likely that love and compatibility be established between you."[127]

5- Looking at the *ʿawrah* (areas of the body to be covered) of a man or woman is not allowed because this leads to illegal intercourse, but such looking is permitted in case a physician needs to examine this area.

6- The prohibition of gold and silk for men is for fear they will resemble women. However, this prohibition is lifted if *ḥājah* is involved, such as having a gold tooth or wearing clothes made of silk due to an ailment.

Third, the Meaning of the Rule

Shaykh Muhammad ibn Ibrahim says:

> As for Ibn Qayyim's statement, "What is forbidden in order to block the means is permitted in case of a prevailing benefit," it is not intended to open the door for everyone to make permissible, on the basis of need, what has been forbidden in order to block the means. What he meant, instead, is that it is the Sharīʿah alone which

[125] Ibn al-ʿArabī, *ʿĀridat al-Aḥwadhī bi Sharḥ Ṣaḥiḥ al-Tirmidhī* (Dār al-Kutub al-ʿIlmiyyah, Beirut), 8:48.
[126] Sūrah Al-Nūr:30
[127] Narrated by Tirmidhi, *Abwāb al-Nikāh, Bāb Mā Jāʾ fī al-Naẓar ilā al-Makhṭūbah, ḥadīth* no. 1087.

handles this permissibility. This is according to what he said in *Zād al-Maʿād* (while discussing the points to be learned from the Battle of Hawāzin), "What is forbidden in order to block the means is permitted in case of a prevailing benefit," for example, [The Prophet] exempted *ʿarāyā*[128] from the prohibition of *muzābanah*.[129] The Sharīʿah does not suspend a prevailing benefit for the sake of a weak benefit."[130]

To elucidate the meaning of this rule requires the definition of terms:

A. **Sadd al-*dharīʿah***. Scholars have defined it variously.

1- Ibn ʿArafah says, "*Sadd al-dharīʿah* is [for] every contract that is apparently permissible but leads to the forbidden or can be used to achieve it."[131]

2- Qurṭubī says, "*Dharīʿah* is something that is not prohibited per se but it is feared that doing it will result in the forbidden."[132]

3- Shāṭibī says, "The reality of *dharāʾiʿ* is to reach harm by means of a benefit."[133]

B. *Maṣlaḥah*

Maṣāliḥ and *maqāṣid* (objectives) are united in entity, different in consideration. *Maqāṣid* are the province of the Lawgiver while *maṣāliḥ* are the province of people. The distinction between *maṣāliḥ* and *mafāsid* is a Sharīʿah scale and is not left to peoples' whims and desires. In this regard, Ghazālī says,

> Benefit basically refers to realizing benefit and averting harm, but this is not what we mean; because realizing benefit and averting harm are the objectives of people, and people's welfare lies in attaining their objectives. What we mean by benefit is to maintain the objective of the Lawgiver, which consists of five principles regarding people: the preservation of their religion, lives, minds, offspring and property. Everything that preserves these principles is benefit and everything that negates them is harm; and to avert this harm is also benefit.

[128] Plural of *ʿariyyah*, the sale of fresh dates on palm trees against an agreed quantity of dry dates. It is permitted in small amounts to enable poor households to eat fresh dates in season.
[129] *Muzābanah* is a transaction in which the owner of fruit trees agrees to sell his fruit for an estimated equivalent amount of the dried fruit, such as palm fruit for dates or grapes for raisins.
[130] Muhammad ibn Ibrahim's *Fatāwā wa Rasāʾil* 7:123.
[131] Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, 2:266.
[132] Qurṭubī, *al-Jāmiʿ li-Aḥkām al-Qurʾān*, 2:5.
[133] Shāṭibī, *al-Muwāfaqāt*, 4:198.

Taftāzānī in his book *al-Talwīḥ* defines benefit as "the preservation of the objective of the Lawgiver by preservation of the five essentials. Everything that strengthens these five essentials is benefit, while eliminating them is harm."[134]

C. *Ḥājah*

It is, for example, when a person is hungry but has not reached the stage of perishing if he doesn't find food, but he would experience discomfort and difficulty; this does not make it lawful to eat the forbidden. *Ḍarūrah* is indispensable while *ḥājah* is dispensable.

Sometime scholars use *ḍarūrah* and *ḥājah* interchangeably. Bannāni notes, "Māzirī refers to '*ḥājah*' using '*ḍarūrah*' while the latter is more specific than the former, but there is no harm in this."

When a *ḥājah* becomes common, anyone may resort to it even though they are not actually in a state of *ḥājah*; however, for *ḍarūrah* to be considered, it must be realized for each individual [who avails of it].

Referring to this, Juwaynī says in *al-Burhān*:

> The Lawgiver has an approach to *ḍarūrāt* (necessities) by which the goal of the first two sections is attained. Whatever is only permitted due to *ḍarūrah* because it is indecent or remote from lawfulness, the Lawgiver's consideration of it hinges on the [actual] presence of *ḍarūrah* in it, and it is not sufficient for it to be perceivable at the collective level. An example of this is the permissibility of carrion.
> Sometimes a thing is deemed extremely evil in the sight of the Lawgiver and is never permitted under the force of *ḍarūrah*; rather, the Lawgiver obliges abstention from it and resigning oneself to dying, like when someone is forced to kill or commit adultery.
> *Ḍarūrāt* are thus of three categories: *ḍarūrah* that does not permit something which is deemed extremely evil; *ḍarūrah* that permits something; however, the ruling is not established collectively; rather, the [ruling] requires the presence [of extreme need] in every person, like eating carrion and other people's food. The third category: what basically relates [to *ḍarūrah*] but the Lawgiver does not look at [its presence in] each individual, like in sales and so on. That is because reasoning has no effect in considering selling and the exchange of counter-values as evil. Therefore, it suffices to perceive *ḍarūrah* in principle, and no attention is paid to individuals. It is based

[134] Taftāzānī, *Sharḥ al-Talwīḥ ʿalā al-Tawḍīḥ*, 2:143.

> on a comprehensive principle. Selling is not evil in itself, neither in Sharīʿah nor custom.

The Ḥanbalī School explicitly allows combining two prayers at home due to rain. In this regard, it is stated in the book *Sharḥ al-Ghāyah*:

> What is required is the existence of hardship in general; not everyone who performs the prayer has to face hardship. That is because the presence or absence of hardship is the same in the case of a general concession, such as travelling.

Al-Sharḥ al-Kabīr provides another example: the permissibility of concluding a *salam* contract for those who are not in need of it.

Subkī in his *Fatāwā* refers to the difference between *ḥājah* and benefit:

> As for [the trustee] buying a bondwoman for service and spending on her from the money of an interdicted person beyond what is required; if this [expenditure] is for the need of the interdicted person, it is allowed and [the trustee] is not liable because of it. However, if there is no need, it is not allowed, and [the trustee] is liable. Benefit does not suffice. One should understand the difference between *ḥājah* and benefit.

Juwaynī in his book *Nihāyat al-Maṭlab* notes:

> One matter based on the *ḥājah*-benefit rule is the number of wives. Our scholars say that a father should marry his insane son to only one wife on the basis that his son's marriage is because of *ḥājah*, and this *ḥājah* is met by one wife. It is not fitting to burden the son with more expenses when having one wife is enough. The apparent inferred rule of the School is that a father may marry his minor son who has reached the age of discrimination to four wives in case the father finds *ṣalāḥ* (benefit) in this marriage. That is because the marriage of a minor is based on *ṣalāḥ* rather than *ḥājah*.

Fourth, the Rule's Parameters

As I said earlier, the rule is perilous because it may legitimize the forbidden in the name of *ḥājah* or of prevailing benefit. Therefore, it is necessary to set parameters for the rule to serve its purpose, which is to avoid putting people into situations of hardship and suffering with regard to their transactions.

Shaykh ʿAbd al-Raḥmān ibn Ṣāliḥ ʿAbd al-Laṭīf notes:

The rule is not to be understood in an absolute sense; scholars set conditions for the *ḥājah* that makes a prohibited act lawful:

1- The hardship that impels contravention of a Sharīʿah ruling must reach an extraordinary degree.
2- The parameter for assessing *ḥājah* is the totality of common people if the *ḥājah* is general, and the average members of a certain group if the *ḥājah* is specific.
3- *Ḥājah* must be inevitable, in the sense that there is no other way to achieve the objective but by departing from the general ruling.
4- *Ḥājah* is to be treated in proportion to its magnitude, as is the case with *ḍarūrah*.
5- The *ḥājah*-based rule must not contradict a text from the Qurʾān or Sunnah.[135]

I do not agree with [Shaykh ʿAbd al-Raḥmān ibn Ṣāliḥ] regarding point no. 5 because the rule is instituted for this particular purpose; i.e., if a text prohibits an act because it is a means to a prohibited end, then allowing the act for a person [in a particular circumstance] would contradict that text. For example, it is narrated by Anas ibn Mālik:

> The people said, "Messenger of Allah, prices have become too high; fix prices for us." The Messenger of Allah (ρ) said: "Allah is the One Who decrees prices, Who takes and gives, and He is the Provider. I hope that I will meet Allah with no one among you making any claim against me concerning issues of blood or wealth."[136]

Thus, the Lawgiver forbids governmental price control because it is a means leading to injustice and favoritism, yet this means is allowed when a prevailing benefit exists. Therefore, some Ḥanbalī scholars allowed price controls in order to stop greed in the market and prevent a particular group from exploiting the public by manipulating prices to increase their profits. To permit price controls (for *ḥājah* or prevailing benefit) is against the text. Likewise, a woman travelling without a *maḥram* for *ḥājah* or benefit is also against the text.

I add here a few more parameters:

1- The rule should be used in *ʿādāt* (customary acts) not *ʿibādāt* (ritual acts of worship).
2- The application of the rule should not cause harm to other people or create a greater harm.

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[135] ʿAbd al-Raḥmān ibn Ṣāliḥ ʿAbd al-Laṭīf, *Al-Qawāʿid wa al-Ḍawābit al-Fiqhiyyah al-Mutaḍamminah li al-Taysīr*, 1:247.
[136] Ahmad, *Al-Musnad*, 4:204, and *Sunan al-Tirmidhī*, 4:448. Tirmidhī said the narration is "*ḥasan ṣaḥīḥ*".

3- The license is specific rather than general. For example, if a student is obliged to study at a university where the study system mixes the two sexes together, the license is for him/her and is not extended to other people.

Fifth, the Distinction between *Ḥājah* and *Ḍarūrah*

The forbidden thing is either *muḥarram li dhātihi* (unlawful per se) or *muḥarram li ghayrihi* (unlawful for an extrinsic reason). What is prohibited for its own sake is only permitted by *ḍarūrah*, whereas what is prohibited for an extrinsic reason is permitted by *ḥājah*.

Ḥājah is a circumstance that besets a person such that, if it is not taken into consideration, they would suffer difficulty and discomfort but not great harm. *Ḍarūrah*, however, if not taken into consideration, would result in great damage and harm. For example, eating carrion is only allowed in case of *ḍarūrah* (fear of perishing), not of *ḥājah*, because it is *muḥarram li dhātihi*.

Likewise, *ribā al-nasīʾah* is forbidden per se and therefore can be allowed only under the compulsion of *ḍarūrah*. The Prophet says, "There is no *ribā* except in *nasīʾah*."[137] Therefore, it is not allowed to purchase a house by an interest-based loan since it is part of *ribā al-nasīʾah*, whose prohibition is related to objectives and is only allowed by *ḍarūrah*. If purchasing a house by an interest-based loan were allowed, this would open the door for others to take a similar loan for purchasing cars (to some people, a car is more important than a house) or for marriage, or for financing for development and establishing utilities such as electricity, water and telephone, (a general need). This would enable *ribā* to pervade the economic sector.

One may ask why this distinction is suggested when jurists have coined another legal maxim: "*Ḥājah,* whether general or specific, is treated like *ḍarūrah*."[138] The answer is

[137] *Ṣaḥīḥ al-Bukhārī, ḥadīth*, no. 2179; *Ṣaḥīḥ Muslim, ḥadīth* no. 1596.
[138] Ibn Nujaym, *al-Ashbāh wa al-Naẓāʾir*, 93; Suyūṭī , *al-Ashbāh wa al-Naẓāʾir*, 88; Zarkashī, *Al-Manthūr fī al-Qawāʿid*, 2:317; *Majallat al-Aḥkām al-ʿAdliyyah*, article 22.

that *ḥājah* can play the role of *ḍarūrah* in terms of making the forbidden allowable.[139] In other words, *ḥājah* resembles *ḍarūrah* from this particular aspect but not from all aspects. The force of *ḍarūrah* makes the two kinds of the forbidden (*muḥarram li dhātihi* and *muḥarram li ghayrihi*) allowed, yet *ḥājah* can do this as to *muḥarram li ghayrihi* only.

Jurists disagree whether *ribā al-faḍl* is *muḥarram li dhātihi* or *li ghayrihi*. Ibn Taymiyyah says, "*Ribā al-nasīʾah* is forbidden because of the corruption and injustice it entails while *ribā al-faḍl* is forbidden due to *sadd al-dharīʿah*."

Ibn Qayyim says, "The prohibition of *ribā al-faḍl* is due to *sadd al-dharīʿah*, as previously mentioned, and what is forbidden due to *dharīʿah* is permitted for a prevailing benefit; e.g., *ʿarāyā* is exempted from the general prohibition of *ribā al-faḍl*."[140]

ʿArāyā (the sale of fresh dates on palm trees against an agreed quantity of dry dates) is made permitted for household consumption, provided the quantity is less than five *wasqs*.[141]

All praise is due to Allah, at the beginning and at the end; and Allah's peace and blessings be upon his last Messenger, his family, and his noble Companions.

"Our Lord, take us not to task if we forget and lapse into error inadvertently. Lord, lay not on us the kind of burdens that You laid on the people before us. Lord, lay not on us the kind of burden that we have not the strength to bear. Be kind to us, forgive us and show mercy to us. You are our Protector: help us against the disbelievers." (The Qurʾān, 2:286)

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[139] Nadwī, *Al-Mawsūʿah* 1:141.
[140] Ibn Qayyim, *Iʿlām al-Muwaqqiʿīn*, 3:143.
[141] Five *wasqs* are equal to approximately 653 kg.

(7)

ZAKAT OF INCOME-GENERATING PROPERTY (*MUSTAGHALLĀT*) AND ITS APPLICATIONS IN ISLAMIC FINANCIAL MARKET PRODUCTS

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The Seventh Topic

Zakat of Income-generating Property (*Mustaghallāt*) and Its Applications in Islamic Financial Markets

Associate Professor Dr. Azman ibn Mohd Noor

ABSTRACT

The topic of financial markets and the ruling of zakat on their products is considered one of the topics that emerges in a new form from time to time throughout the ages. This is because of [arising] differences in types and features; [some of] the stocks traded in the equity market have new aspects. These include corporate equity shares that do not pay out dividends at all, and the focus is rather on capital gains. It is not possible to conceive of them—for those who own them for purposes of investment and expectation of return—as being subject to the rule of zakat of *mustaghallāt* (income-generating properties), for which zakat is not due except on the income accrued from them. That is the view of a few zakat bodies and institutions in Malaysia, especially with regards to zakat on long-term investment products such as stocks and *ṣukūk*. [They say] zakat is payable only on the revenue after passage of a lunar year (*ḥawl*). This treatment is also consistent with the tax system. This research aims at exploring these new aspects and reviewing the validity of considering them similar to the zakat of *mustaghallāt*.

As for *ṣukūk*, they are considered an alternative to interest-based bonds. That is because *ṣukūk* resemble stocks from one aspect in that they represent assets. From another aspect, *ṣukūk* are similar to bonds in the sense that they have a defined maturity date as well as offering a guarantee of the principal and regular returns, and they are liquefiable. If the structure of the *ṣukūk* is based on *mushārakah* or *ijārah*, it can be liquidated quickly, which makes it akin to money. Additionally, the relationship between the *ṣukūk* issuer and the *ṣukūk* holders might be debt-based, such as *murābaḥah ṣukūk*, or debt-like by virtue of the issuer's binding promise to buy [the outstanding *ṣukūk*] at the maturity date. The question that this research raises is: is the zakat on *ṣukūk* considered similar to the zakat of *mustaghallāt*, which is only payable on their revenue?

Section One: The New Aspects of Stocks Traded in the Equity Market and Their Impact on the Zakat Rulings

Most of the research and fatwas on stocks have not generally distinguished between private joint stock companies and publicly listed companies that are traded in the financial markets. Contemporary scholars have decided that zakat is compulsory on the stocks of shareholding companies. We do not aim to discuss this topic in full; however, we want to handle one particular detail of it. From this perspective, the focus is concentrated on raising the question of revaluating the issue of the applicability of the zakat of *mustaghallāt* to stocks that are not intended to be held for trade. The ruling of the International Islamic Fiqh Academy was as follows:[142]

> **Resolution No. 121 (3/13) concerning the topic of: <u>Payment of zakat for stocks held for revenue:</u>**
>
> The Council of the Islamic Fiqh Academy of the Organization of Islamic Cooperation (OIC), in its thirteenth session, held in Kuwait from 7 to 12 Shawal 1422 H (December, 22 to 27, 2001) has considered the papers submitted to the Academy concerning "Payment of zakat for stocks held for revenue" and has listened to the discussion about this topic by the members and experts of this Academy. It has also reviewed its Resolution No. 28 (3/4) regarding payment of zakat on company shares, which mentioned in its third paragraph the following:
>
> > If, for any reason, the company did not pay zakat on its assets, each shareholder liable to pay zakat must do so on the shares they own. If the shareholder can calculate the amount the company would have paid on his behalf if it had done so, he/she should then pay the same, since that is the basis for calculating zakat on shares.
> >
> > If the shareholder has no means of knowing these elements of information for calculating the amount due, then:
> >
> > If he had invested in the company to benefit from the annual dividends of his shares, and not for trading purposes, then the owner of such shares will not pay zakat on the market value of shares, but only on the basis of the dividends, at the rate of 2.5% after the elapse of one lunar year from the date of the actual receipt of the dividends, provided that all other conditions are met and no impediment exists.

[142] *Majallat Majmaʿ al-Fiqh al-Islāmī*, No. 4, Resolution No. 28 (3/4), vol. 1, p. 705.

[After having done that,] the Council resolves the following:

If the company has wealth that is subject to zakat such as cash, commercial goods and debts owed to it by solvent debtors, and if such company did not pay the due zakat, and the shareholder was not able to calculate his share of the zakat from the company's accounts, then the shareholder needs to try his best [to calculate] and pay zakat on the assets subject to zakat that are represented in his shares. This is under the premise that the company is not in a major deficit state in which its liabilities exceed its assets.

If, however, the company does not own assets that are subject to zakat, then Resolution No. 28 (3/4) would apply, and zakat is only payable on the dividends, not on the share itself. Allah knows best.

The Issue

The Islamic Fiqh Academy's Resolution No. 28 distinguishes between the shares obtained for trading, which are considered commercial goods, and the shares obtained for their annual revenue, which are considered subject to the zakat of *mustaghallāt*. This is without considering the real activity of the company. In Resolution No. 121, the Academy retracted its view on the issue of zakat on shares that are obtained for their revenue. The ruling states that zakat is not only payable on the revenue after the elapse of a lunar year but is also payable on the assets owned by the company that are subject to zakat, except in case of liabilities exceeding [total assets] or when there are no assets subject to zakat. The procedure applied by some zakat bodies and institutions is to consider the zakat of long-term investment products as the zakat of *mustaghallāt*, which is applicable only on the revenue after passage of a lunar year. This is also consistent with the tax system, which is levied on after-sale profit and on revenue. It seems that Resolution No. 28 was referred to rather than Resolution No. 121.

The issue here is the emergence of new aspects that have accompanied new developments due to the nature of the stocks being traded in the financial markets. This state of affairs requires us to reconsider applying the concept of zakat of *mustaghallāt*. The reconsideration leads to new aspects, the most important ones of which are as follows:

First: The Nature of the Stocks Traded in the Financial Markets

Publicly listed companies differ from private joint stock companies from the capital underwriting perspective. Companies that are traded in the stock exchange get their new working capital from the primary market through an initial public offering. Thereafter, the company does not pay attention to who owns the stocks in the secondary market. Such stocks are available for trade and are therefore considered as commodities and commercial goods. On the other hand, the shares of private joint companies are not available for trade, although selling them is possible. This is because their owners earn profit and bear losses without sharing with others.

As such, stocks are considered independent and have no relationship with the activities and success of the company. This causes their market value to not reflect the true value of the company. Nonetheless, the reality is that the market value is the value of the stocks although such stocks are not valued based on the true value of the company nor based on the stocks' face value. Most investors who own stocks are not interested in knowing about the management and organisation of the company. Their objective is capital gains from the capital market. This confirms that stocks are not traded based on the assets and profits of the underlying company.

This also proves that stocks are commercial goods and do not represent ownership of the company's assets. This is because shareholders do not have full authority over such assets nor do they have the right to rent, sell, or gift them to others or use them as collateral and other kinds of actions.[143]

If a court imposed a penalty against the company, the shareholders would not be affected, due to limited liability. This clearly indicates that shareholders do not have a relationship with the ownership of the company. For example, if a certain party sues the company, the shareholders would not be sued. This does not mean that the ownership of the shareholders does not exist. From this perspective, it is clear that the core activity of the company is trade and stocks.

[143] Ghufaylī.

Second: Investment mechanisms have developed through mutual funds of various structures, such that the main objective of buying stocks in the stock exchange is to obtain profit from capital gains and not just to obtain dividends. If there are dividends, they can be considered secondary not primary.

It is important to mention that some big modern companies do not pay dividends to the shareholders because they focus on investment to expand. This is because such companies are certain that their shares are always in demand due to the continuous increase in their prices. Therefore, those companies take advantage of retained earnings to expand their activities, investments and to increase reserves. Those sums are also used for new projects or to buy stocks of other companies. Examples of such companies are Facebook, Google, Amazon, Ebay, Yahoo and others.[144]

Additionally, normal companies may also not pay any dividends since distributing profit happens only after the approval of the board of directors or the general assembly. This raises the question regarding the validity of applying [the concept of] zakat of *mustaghallāt* on shareholding companies.

This research is of the view that the stocks of publicly listed companies that are traded in the stock exchange assume the ruling of commercial goods regardless of the activities of the company; the intention of the shareholders is to obtain the savings and wait for the revenue in order to speculate on capital gains.

Evidence

First: Analogy (*qiyās*) on commercial goods. The main characteristic of stocks is that they are available for trade at any time the stockholder wishes. They are considered liquid assets in the sense that stockholders are able to sell them whenever they want. The investor chooses stocks as opposed to fixed assets such as real estate, land and buildings because stocks are more liquid than other [options]. We are not against those who buy stocks for their revenues because most of them wait for the price to increase so they can sell them in the market for a higher price. Herein lies the condition of "the intention to trade" as

[144] http://finance.yahoo.com/news/biggest-companies-dont-pay-dividends

explained by jurists in the course of proving the purchase of commercial stocks from the stock market.

Second: Stocks are not merchandise like clothes nor are they for personal use. Merchandise bought for purposes other than trade is called *qinyah*. It is a characteristic that differs according to the ownership of the wealth and is a reason for zakat being due or not.

Qinyah in *fiqh* terminology means to retain wealth to use it and not for trade.[145]

Examples of *qinyah* are furniture, transportation, clothes and similar merchandise. Scholars have agreed that commodities that are purchased for personal use and not for trade are not subject to zakat. It is not imaginable that anyone would buy stocks for purposes of beautification or as clothing.

Third: If we consider that a stock pertains to a company and is not an independent object, all commercial companies are established for the purpose of trade. Therefore, the stocks issued by the company are intended to collect the working capital for the commercial process to attain profit. This cannot be achieved without trade. Therefore, we can say that shareholders know the intention in buying the stocks which is through the commercial transactions of the company. In short, the stocks of a company represent the commerce of that company.

No one denies that the objective of establishing the company is to attain profit. If there are certain institutions or entities that do not seek profit, they are considered non-profit organisations. By nature, non-profit organisations do not issue stocks for investment.

Jurists have discussed the issue of requiring the existence of intention with regards to the zakat of commercial goods. Ibn Mundhīr said:

> There is a consensus among the scholars that zakat is applicable on goods that are intended for trade if a lunar year has elapsed. This is narrated from ʿUmar, Ibn ʿUmar and Ibn ʿAbbās. It is also the opinion of the seven jurists [of Madinah], and of Ḥasan [Basrī], Jābir ibn Zayd, Maymūn ibn Mahrān, Tāwūs, Nakhaʿi, Thawrī, Awzāʿī, Shāfiʿī, Abū ʿUbayd, Is·ḥāq and the people of opinion [Ḥanafīs]. It is also the opinion of Mālik and Aḥmad…[146]

[145] See: Rāghib Isfahāni, *Al-Mufradāt fī Gharīb al-Qurʾān*, p. 686; Ibn Manẓūr, *Lisān al-ʿArab*, 15:202; *Mughnī al-Muhtāj*, 1:398.
[146] Ibn Qudāmah, *Al-Mughnī*, 3:3; Abū ʿUbayd, *Al-Amwāl* (Qatar), p. 459.

Abū ʿUbayd also narrated such consensus. He said: "… as such, the Muslims are of consensus that zakat is compulsory upon them; i.e., upon commercial goods."[147] According to some Shāfiʿīs such as Qalyūbī and others, the intention is not necessary. He said, "The stronger opinion is that the intention is not needed."[148]

What counts is to look into the activities of the shareholding companies, which are not expected to be established for reasons other than for trade. Profit can only be achieved through sale and purchase. Thus, the stocks of commercial companies follow them with regards to the ruling of commercial goods.

Fourth: usually, acquiring stocks is not considered among the necessities. It is an effort to increase wealth. The poor cannot buy stocks. One who can buy stocks is considered among those with abundance [of financial resources]. Therefore, the Ḥanafī School opines that one of the conditions to require zakat on wealth is to exceed the basic necessities.[149]

Fifth: Commerce in our current days includes the purchase and sale of commodities, agricultural products or animals as well as services such as transportation, properties and others. The tax regime is applied on the purchase of products and services. The financial report for a commercial company does not distinguish between the sale of products and services. This does not contradict the main condition for zakat, which indicates that it is payable on the net assets of the company after deducting all liabilities.

There is a difference among the jurists as to a distinction between the zakat of commercial goods and the zakat of *mustaghallāt*. Ibn ʿĀqīl of the Ḥanbali School opines that the zakat of commercial goods—Assets for rent such as buildings and jewellery—consists of both values: the value of the rental and the value of the commodity.[150] This view is also the view of Imam Mālik as reported by Ibn Rushd.[151] The majority of scholars distinguish between

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[147] Abū ʿUbayd, *Al-Amwāl*, p. 463; cf. Ibn ʿĀbidīn, *Radd al-Muḥtār*, 2:10, 13; Ibn Humām, *Fatḥ al-Qadīr*, 1:527; Dardīr, *Al-Sharh al-Kabīr maʿ Ḥāshiyat al-Dusūqī*, 1:472, 476; Qalyūbī, *Sharḥ al-Minhāj*, 2:28; Ibn Qudāmah, *Al-Mughnī*, 3:31.

[148] Qalyūbī, *Sharḥ al-Minhāj*, 2:29.

[149] Marghīnānī, *al-Hidāyah* with Ibn Humām, *Fatḥ al-Qadīr*, 1:487; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 2:6.

[150] Ibn Qayyim, *Badāʾiʿ al-Fawāʾid*, 3:143.

[151] Ibn Rushd, *Bidāyat al-Mujtahid*, 1:237; Qaraḍawī, *Fiqh al-Zakāh*, p. 394.

commercial goods and *mustaghallāt*. They opine that the zakat on *mustaghallāt* is payable on the fee or the rental only.

Based on the above, this research supports the view of Ibn ʿAqīl and the Mālikī School. This is because of the expansion of the commercial activities based on services, and rental of assets in this age, especially what is coordinated by registered commercial companies. That is because they own assets that are not for personal use but rather for generating exponential profits. This is the kind of growth that is considered a condition for the wealth that is subject to zakat. It is also has the greatest effect on stocks traded in the stock market.

Recommendation

This researcher suggests that it is important to distinguish between the stocks of publicly traded companies in the stock exchange and private joint stock companies. The researcher also suggests that stocks of publicly traded companies in the stock exchange be treated as subject to zakat on commercial merchandise. As such, they should be valued based on their market value without considering the underlying commercial activity [of the company], and regardless of the motive of owning the stocks, and regardless of whether the investment is for the short or the long run. This is the default ruling. On the other hand, there is an exceptional case where it can be proven that owning the stocks is aimed at attaining dividends and the stocks cannot be sold due to legal restrictions. In that case, the zakat payable for this company is similar to the zakat of a normal commercial company, which is payable on the net assets, calculated by subtracting the total liabilities from the total assets. Therefore, it is not considered subject to the zakat of *mustaghallāt*. As such, the zakat calculation on this kind of stocks needs to include: the revenue, the value of the commercial goods, the company's assets, cash and repayable debts. The debts payable by the company need to be excluded.

This is in line with the Sharīʿah standard published by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) with regards to zakat (4/2/4), which says:

> Investments in shares with the aim of retaining them (Nama'): If it is possible to know through the company what is the exact amount of Zakatable assets (cash, articles of trade and repayable debts) per share, Zakah can be levied on the amount; otherwise, Zakah is to be levied on the portion of Zakatable assets per share which has to be reached through estimation. If the company has no Zakatable assets, Zakah is obligatory on the remaining part of the net income at the end of the year.[152]

In cases where the shareholder is unable to know the information of the company, he has to do his best to use projections as much as he can. After attaining the ratio of the wealth that is subject to zakat, he should pay the zakat of his stocks, which is 2.5% of the percentage of the current market value of the stock subject to zakat.[153]

Section Two: *Ṣukūk* Structures and Their Impact on Zakat

The definition of *ṣukūk*: *ṣukūk* are considered one of the most important modern financial products as an alternative for bonds, which are forbidden according to the Sharīʿah.

The literal meaning of *ṣukūk* is: the plural of *ṣakk*, which means a document that represents rights, properties and the like.[154]

However, *ṣukūk* as a technical term is defined by the International Islamic Fiqh Academy as: "the issuance of a financial security that is tradable and based on an investment project that generates income".[155]

The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) defines *ṣukūk* as:

> certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or [in ownership of] the assets of particular projects or a special investment activity; however, this is true after receipt of the value of the *ṣukūk* and the closing of subscription.[156]

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[152] AAOIFI, *Shari'ah Standards* (2010), Zakat Standard, Section 4/2/4

[153] This is consistent with the fatwa of the Sharīʿah committee of Zakat House in Kuwait. See: *Aḥkām wa Fatāwā al-Zakāh wa al-Ṣadaqah wa al-Nudhūr wa al-Kaffārāt*, p. 59.

[154] Fayyūmī, *Al-Miṣbāḥ al-Munīr*, p. 345.

[155] *Majallat Majmaʿ al-Fiqh al-Islāmī* (2004) No. 15, vol. 2, p. 309.

[156] The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), *Shariah Standards*, 2010, p. 238.

Therefore, *ṣukūk* are certificates or financial securities that represent undivided shares in ownership of money that is intended to be invested in a commercial project to generate profit. *Ṣukūk* are designed to be tradable through buying and selling in the international exchange markets. As such, they are a Sharīʿah-compliant alternative to bonds, which entail interest-based lending. The predominant purpose in creating *ṣukūk* is financing on the one hand and, at the same time, investing on the other hand.

Features of *Ṣukūk*

1- The capital of the *ṣukūk* project is comprised of certificates of equal value that grant their holders an undivided share of ownership of the project's assets. Said ownership is proportionate according to the shares owned compared to the total value of the *ṣukūk.* It also represents an undivided share of the profits and losses. The assets of the *ṣukūk* can be tangible assets, current assets, intangible assets or the like based on the wording of the usufructuary right to fixed assets or the wording of the right to dispose of the title with regards to current assets.

2- *Ṣukūk* are similar to interest-based bonds with regards to the guarantee on the capital and the disbursement of fixed periodic returns or of the profits generated from the project or the transaction that the *ṣukūk* value is invested in between the issuer and the *ṣukūk* holders. All of that is according to a pre-agreed share.

3- *Ṣukūk* are considered liquefiable assets. This is because *ṣukūk* are tradable and liquefiable in any trading way that is permissible in Sharīʿah and by law. The owner of the *ṣukūk* has the right to transfer his ownership [over the *ṣukūk*], use it as collateral, grant it as a gift and other similar financial transactions that are allowable by law. It is an instrument that is similar to cash. This is why they are called financial securities.

4- In essence, the structures of investment and Islamic finance are applied on investment *ṣukūk.* These include: *mushārakah, muḍārabah, murābaḥah*, *salam*, *istiṣnāʿ* and *ijārah.* Additionally, *ṣukūk* structures can be comprised of a number of combined contracts.

5- The parties to the investment *ṣukūk* comprise the *ṣukūk* issuer, the *ṣukūk* subscribers—who are the *ṣukūk* holders—and the guarantor (if applicable).

Views of Contemporary Scholars about Zakat of *Ṣukūk*

There are three opinions about zakat of *ṣukūk*, which are as follows:

The first opinion: zakat of *ṣukūk* is considered like [the zakat on] commercial goods whereby zakat is applicable on the assets and the profits. This is the fatwa issued by the Sharīʿah Committee of Zakat House in Kuwait.

"Zakat is payable upon bonds and on *ṣukūk* that are represented by a collection of assets or usufructs or others such as *muqāraḍah ṣukūk, ijārah ṣukūk, salam ṣukūk* and the like."[157]

This view is in line with the resolution issued by the Conference on Contemporary Zakat Issues in its thirteenth session, held in Kuwait.

The second opinion: some contemporary scholars and researchers such as Doctor Ḥusayn Ḥusayn Shaḥātaḥ, Shaykh Muḥammad Sāliḥ Munajjid and some fatwa institutions are of the opinion that the ruling of the Fiqh Academy regarding zakat on stocks should be applied to the zakat of *ṣukūk.* This is despite the nature of *ṣukūk* being different from that of stocks. An example of that is the fatwa of Shaykh Muḥammad Sāliḥ Munajjid regarding a question about the zakat of *ṣukūk:*

> If *ṣukūk* were purchased for trading purposes when the price increases, zakat is applicable to their value and the profit from them. Therefore, *ṣukūk* shall be valued at the end of a year of possessing them, according to the market value. The zakat amount of 2.5% is payable on the total value. Additionally, zakat should be payable also on any profits received. However, if the *ṣukūk* are bought and intended to be kept for the dividends only, zakat is payable upon the dividends but not on the *ṣukūk* themselves. However, if there are cash amounts remaining with the issuer of the *ṣukūk* that were not utilized in structures or the like, the share of such cash per each *ṣukūk* certificate should be estimated, and zakat is applicable on its holder.[158]

The resolution of the Islamic Fiqh Academy in its fourth meeting, held in Jeddah, Saudi Arabia, from 18 to 23 Jumada al-Akhira 1409 H (6-11 February 1988) regarding zakat shares is also applicable on *ṣukūk.*

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[157] *Aḥkām wa Fatāwā al-Zakāh wa al-Ṣadaqah wa al-Nudhūr wa al-Kaffārāt*, p. 59 http://www.dorar.net/enc/feqhia/2280 last accessed: 13/10/2015.

[158] http://islamqa.info/ar/131229 last accessed: 25/10/2015.

It can be noticed that Islamic Fiqh Academy resolved that zakat on commercial goods can be applied to the issue of zakat of traded stocks. As for items used to generate profits without selling them, zakat is calculated based on the zakat of *mustaghallāt*.

However, the problem with this opinion is that it does not consider the features of *ṣukūk* which distinguish them from stocks in the existence of a binding promise and fixed revenues. Additionally, they entail a debt relationship in most cases. It can be noticed that stock companies sometimes pay zakat on behalf of stockholders. This is contrary to the case of *ṣukūk* holders where the *ṣukūk* issuer does not pay any zakat [on behalf of] the *ṣukūk* holders because the relationship completely differs from the relationship with the stockholders. As such, this research suggests distinguishing between *ṣukūk* and stocks in terms of zakat calculations.

The third opinion: Some contemporary scholars have a similar opinion to that of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) where zakat is calculated based on the type of the underlying asset. Therefore, if the structure used is *ijārah ṣukūk*, the tangible and immovable fixed assets are not subject to zakat since zakat is only applicable on the revenue.

However, this view was challenged in that *ṣukūk* can be based on *ijārah*, *mushārakah* or other [contracts] and generally pay out fixed dividends. Therefore, the relationship between the *ṣukūk* issuer and *ṣukūk* holders is akin to a debt relationship. If a debt relationship was not assumed, why is the [potential of] event of default assumed?

The New Aspects of *Ṣukūk* and the Issue of Applying Zakat of Commercial Goods to the Case of Investing and Expecting Revenue

It is known that *ṣukūk* are an alternative to interest-based bonds. Among their main features and advantages is that they offer periodic fixed returns and guarantee of the invested capital and offer a priority right over the mature debt in case of liquidation. Additionally, among their features is that they are liquefiable and tradable in the financial markets, which make them akin to money since the owner of the *ṣukūk* can sell them in the market at any time if he wants to attain cash or liquidity. One of the most important new features is that the

Islamic financial markets have witnessed [the issuance of] many *murābaḥah ṣukūk* structures, especially in Malaysia.

Moreover, jurists have agreed that zakat is payable on gold and silver and on commercial goods. Therefore, if *ṣukūk* cannot be considered as commercial goods, it is not farfetched to consider them as analogous to money.

There are various types of *ṣukūk*, based on their structure:

Asset-based *Ṣukūk*

It is noticed that most studies that have dealt with the issue of zakat of *ṣukūk* that are based on tangible assets tend to view their zakat to be similar to that of corporate stocks. This is because the *ṣukūk* holders have ownership rights over the assets of the company similar to the case of a joint-stock company. However, the *ṣukūk* holders do not have voting rights in the general assembly despite their receipt of fixed revenue and their enjoyment of a priority ranking feature in case the company defaults. According to this structure, *ṣukūk* are similar to preference shares. In a nutshell, it can be said that the contractual relationship between the issuer of the *ṣukūk* and the *ṣukūk* holders is similar to a debt contract. This is confirmed in *mushārakah ṣukūk, wakālah ṣukūk, ijārah ṣukūk* and *istiṣnāʿ ṣukūk* because they are initiated using a binding promise to buy the *ṣukūk* assets upon amortisation. There is also an undertaking to waive a right whereby the *ṣukūk* holders will not demand more than the face value [of the *ṣukūk*]

It is important to mention that in contemporary applications we can find a new *ṣukūk* structure that is special as it does not include a purchase undertaking and is perpetual. Therefore, its form is similar to investment units whereby the invested sums are used to purchase a number of *ṣukūk.* Although a change might occur to the *ṣukūk* portfolio from time to time, still, in the end it is similar to a conventional bond with regards to the payment of fixed revenue and the debt relationship between the *ṣukūk* issuer and the investors.

Additionally, *ṣukūk* holders do not enjoy complete ownership over the *ṣukūk* assets. In fact, the assets of *ijārah* and *mushārakah ṣukūk* are considered to be collateral for the debt relationship. As such, in case of default [of the *ṣukūk* issuer], the *ṣukūk* holders enjoy a

priority rank over the *ṣukūk* assets to receive the mature debt regardless of the *ṣukūk* structure used.

From the above discussion, the researcher suggests that tangible-asset *ṣukūk* (equity *ṣukūk*) take the ruling of the zakat of commercial goods or the ruling of zakat of debt that is payable at any time. Therefore, [zakat] is payable on the value of the assets, or the capital and revenue together. This is the view of the Sharīʿah committee of Zakat House in Kuwait. This ruling is based on the following evidence:

First: Ownership of the *ṣukūk* is for a certain period and limited until the determined maturity date only. They differ from stocks as the latter are not limited in time. It is known that full ownership cannot be restricted to a certain time; rather, it needs to be perpetual.

Additionally, *ṣukūk* are also similar to stocks in the sense that they are liquefiable through a sale undertaking from the *ṣukūk* issuer. We can further consider that there is a similarity with commercial goods from the beginning. This is because investors buy and sell *ṣukūk*, choosing the right timing to obtain profit.

Second: The *ṣukūk* owner does not have an effective right over the underlying assets. For example, if a [payment] denial happens from the *ṣukūk* issuer, the *ṣukūk* holders do not have the right to seek their shares from the existing assets even though they are supposed to be the original owners of such assets. As such, [they can be considered] as commercial goods or a debt relationship.

Third: all *ṣukūk* contain a purchase undertaking. It means that the *ṣukūk* issuer undertakes to buy the *ṣukūk* assets to liquidate the *ṣukūk* either at maturity or in case of early settlement by the *ṣukūk* issuer. However, the put option means that the *ṣukūk* holders have the right to liquidate them by forcing the *ṣukūk* issuer to buy back all the *ṣukūk* assets. It can be noticed that in this case the tangible assets of the *ṣukūk* have transformed from being tangible to being debt-based. Therefore, the zakat would be similar to zakat on debt-based *ṣukūk* whereby zakat is payable on both the capital and the profit.

Fourth: The difference between *ṣukūk* and stocks can be clear in terms of the fixed income guarantee without considering whether the investment project has succeeded or failed. This stems from the main objective of *ṣukūk* issuance which is not to own the *ṣukūk* assets

themselves such as the plane, the power station, the airport, the corniche or the buildings. Rather, the objective is to receive a fixed revenue by owning the portfolio of limited assets. As such, *ṣukūk* from this perspective can be considered similar to commercial papers.

Fifth: If it could be proven—although it is impossible—that some *ṣukūk* structures entail a full ownership right over the underlying assets, the ruling of zakat on them would be similar to the ruling of zakat on stocks. However, it would be limited to the type of stocks suggested by the researcher in this paper. Nevertheless, even when considering the ruling of zakat on *ṣukūk* to be similar to that on stocks with regards to tangible assets, consideration of the *ṣukūk* as commercial goods would still be valid unless proven otherwise.

Sixth: If *ṣukūk* were structured based on the concept of *ijārah muntahiyah bi al-bayʿ* (a lease agreement that ends through sale at maturity) and it is not possible to trade them, the zakat applicable would be similar to that of *mustaghallāt* (i.e., zakat on the dividends). However, the zakat of commercial goods would also be applicable when they are liquidated. Thereafter, they would be considered like commercial goods.

Debt-based *Ṣukūk*

Debt-based *ṣukūk* are *ṣukūk* that are issued on a debt-based contract; for example, *murābaḥah ṣukūk, tawarruq ṣukūk, salam ṣukūk* and others. The Malaysian experience indicates that most debt-based *ṣukūk* use *tawarruq* in their application.

The research problem is exemplified here in the way to calculate the zakat of this kind of *ṣukūk.* After research and consideration, our view, which is closer to reality, is that the zakat of debt-based *ṣukūk* takes the ruling of the zakat of debt for the following reasons:

First: Being Established Using a Deferred Sale Contract:

Murābaḥah ṣukūk or *tawarruq ṣukūk* are issued through deferred sale contracts; in other words, purchasing a tangible asset such as a plane and then selling it for deferred payment. In this case, the debt relationship is established between the *ṣukūk*-issuing company and the investors through the deferred sale contract.

Second: Establishing the Debt Relationship and Payment Guarantee by the *Ṣukūk* Issuer:

This is because the *ṣukūk* issuer is bound to settle the full amount of the debt at maturity. This is similar to the debt obligation in the normal deferred sale contract. However, it comes in the form of a debt certificate that can be bought or sold to third parties at an agreed upon price without having to wait till maturity. In this way, *ṣukūk* are similar to the payable debt that can be settled before maturity.

Types of Debt and the Rulings of Their Zakat According to Jurists

In fact, debt is owned by the creditor; however, since it is not possessed by its owner, there is a difference in opinions among jurists. Ibn ʿUmar, ʿĀʾishah and ʿIkrimah, the freed slave of Ibn ʿAbbās, (may Allah be pleased with them) were of the opinion that there is no zakat on debt. The reason is because it does not grow and therefore no zakat is required, similar to goods acquired for personal use.

However, the majority of the scholars are of the opinion that mature debt is of two types: good debt that is expected to be paid, and bad debt that is not expected to be paid.

The good debt is the debt that is payable upon [a person] who acknowledges it and is able to pay it back. There are different opinions in this regard: The view of the Ḥanafī and Ḥanbalī Schools, which is also the view of Thawrī, is that zakat [on good debt] is payable by its owner each year because it is under his ownership. However, zakat is not required to be paid until the debt is paid back. Once [the creditor] gets it back, zakat should be paid on all of the previous years. The rationale behind this opinion is that [the debt] is a confirmed financial claim. Therefore, payment of zakat is not required before [the debt] is paid back. It is also because [the value of the debt] cannot be currently utilised. It is not considered fair to pay zakat over wealth that cannot be utilised. Still, the deposit which the owner can take back at any time is not considered of this type; rather, zakat should be paid after the elapse of a lunar year (*ḥawl*). The dominant view of the Shāfiʿī School and of Ḥammād ibn Abū Sulaymān, Is-ḥāq and Abū ʿUbayd is that zakat should be paid for the good debt at the end of each *ḥawl* similar to the wealth at hand since [the creditor] can take it back and use it.

The View of the Shāfiʿī School with Regards to the Requirement of Zakat on Debt and Its Applications on Debt-based *Ṣukūk*

Imam Nawawī reported the following:

> If [debt] is deferred, there are two well-known alternatives mentioned by the writer along with the evidence for each. The soundest alternative according to the writer and the major scholars of the School is that it should be according to the two views mentioned regarding usurped property. The soundest of them is that zakat is required. The second is that it is not. This is the view of Abū Isḥāq Marwazī.
>
> The second view is that of Abū Hurayrah that there is definitely no zakat, similar to the case of absent money that can be easily brought. If we say that zakat is compulsory, should it be paid immediately? There are two opinions mentioned by Imam al-Ḥaramayn and others. The soundest of them is that it is not compulsory. This is the opinion of the majority of the scholars. This is similar to the case of usurped money. Imam al-Ḥaramayn said: because five in cash is equal to six deferred, and it is impossible to pay four now that would be equal to five deferred. Therefore, it is required to delay payment [of zakat] until [the debt] is received back.

> He said: If [the creditor] wants to waive a debt from a poor person who is indebted to him and consider the waived amount as part of the zakat, there is no doubt that the waived amount would not be considered as part of the zakat. This is because the condition of paying zakat is that it must comprise an actual transfer of ownership. Allah knows best.[159]

The Chosen Opinion:

Based on the above, after tracing the views of the jurists and their evidence for this issue, the researcher is of the view that the opinion of some scholars of the Shāfiʿī School with regards to deferred debt seems more appropriate. Their view is that zakat should be payable each year even if the debt has not been paid back yet. This view is applicable to the case of debt-based *ṣukūk.*

[159] Nawawī, *Al-Majmūʿ*, *Sharḥ al-Muhadhdhab*, 5:506-7.

(8)

PROMISE AND BILATERAL PROMISE IN *ṢUKŪK*

Prepared by

His Eminence Shaykh Walīd ibn Hādī

The Eighth Topic

Promise and Bilateral Promise in *Ṣukūk*

Chairman of the Forum: Walīd ibn Hādī

1. The Lessee/Originator's Promise to Buy the Leased Property at Face Value along with the Maintenance Cost

The lessee/originator undertakes to purchase the leased assets when the *ṣukūk* is amortized at nominal value in addition to the value of the basic maintenance cost.

This issue is based on making the lessee responsible for basic maintenance, about which contemporary scholars have disagreed, taking two views:

The first view prohibits the stipulation that the lessee shall be responsible for the fundamental maintenance. This is the position of most scholars. They base this view on two matters: first: the rental fee is consideration for the usufruct, and the usufruct has not been made available if the asset is not in working order. Second: making the lessee responsible for the fundamental maintenance makes the rental fee unknown.

The second view is that it is permissible to stipulate that the lessee shall be responsible for the fundamental maintenance. An authentic report from Imam Aḥmad indicates that. Ibn Qudāmah said in *al-Mughnī*:

> It was reported that Imam Aḥmad was asked about it and said, "Muslims abide by their terms." This indicates the negation of the responsibility when it is stipulated and its obligation when it is stipulated, based on the statement of the Prophet (ρ): "Muslims abide by their terms."

This is also the implication of Shaykh al-Islam [Ibn Taymiyyah]'s view. That is because the reason for the prohibition is either ignorance of the rental fee—and Shaykh al-Islam does not prohibit that—or it is contrary to the *muqtaḍā al-ʿaqd* (the requirements of the contract)—and Shaykh al-Islam does not prohibit conditions contrary to the *muqtaḍā al-ʿaqd* if they do not violate the intended purpose of the contract and the intent of the Lawgiver. This view is strengthened by the fact that maintenance in this era has become almost known because of studies, scientific advancement and equipment guides, which reduce or remove ignorance. Thus, the lessee will be

aware of what will be paid for the usufruct. Aḥmad's statement does not apply to cases where the usufruct is totally unavailable because then the subject of the lease would be non-existent, and in this case the lease would be annulled. However, if most of the intended usufruct is lost, the lessee has the right of annulment. Ibn Qudāmah said in *al-Mughnī*:

> If something happens to the asset that prevents it from providing benefit; for example, a house collapses, or land is flooded, or the water is cut off—this calls for further investigation. If no benefit remains at all, it is just the same as if it had been totally destroyed. If some benefit remains, but it is different from what he rented it for, such as being able to use the floor of the house or the land for storing firewood, or erecting a tent on the land he rented for planting, or fishing on the land that was flooded, the lease is annulled in this case too. That is because the usufruct that was the subject matter of the lease has been destroyed; therefore, the lease is dissolved, as it would be if he rented an animal to ride and it turns out to be so old that it is only fit to turn a millstone.

2- The Agent Replacing the Portfolio's Assets and Selling to Himself

Replacement is often mentioned in the [contractual] terms. If it is not mentioned, custom and preserving the interests of the *ṣukūk* holders shall be observed. That is because the acts of the *muḍārib* and the agent must be based on the interest [of those for whom they act]. Replacement is not an investment process; therefore, a service agent can do it. As for sale by the originator to itself, some schools allowed it on the condition that the price is determined. The par market rate is observed here due to the difficulty of consulting the *ṣukūk* holders to determine the price.

It is preferable to resort to the agent's appointment of a third party, called a hired agent, to act for the *ṣukūk* holders in their interests. The books of the *fiqh* schools have explicitly mentioned it, and some institutions have applied it by stipulating it in the terms.

It is essential to maintain the percentage of assets that prevent the [arrangement from being a] sale of debt.

If the debtor in *murābaḥah* (a mark-up sale) engages in settlement of the *murābaḥah* debt, it is permissible to purchase an asset with [the debt], and it may be financed by *murābaḥah*. It is also permitted for the portfolio to purchase another debt with a commodity.

3. The Agent/Originator's Promise to Purchase the Assets of the *Ṣukūk* Portfolio Even If They Have Been Changed

This issue is related to the specification of what was promised and whether a change in it affects the continuation of the agreement. This is because changing the *ṣukūk* assets alters the subject matter of the promise.

There is a difference between the specification of the subject matter of a sale, which is a condition for the validity of the sale, and a change in the subject matter of a promise. The sale is a contract, and the conditions of its validity include the subject matter being known and specified. If it changes, the requirement of the contract would change, and it would be a breach of the fulfilment that is ordered for contracts, as in the Qurʾānic verse: "Fulfill contracts." The subject matter of the sale can only be changed by release from the original contract and initiation of a new contract, or by cancellation or dissolution, or by entering into a barter contract exchanging the sold item for the substitute.

As for the promise, it is not a contract. It is an established rule that both parties to a promise, the promisor and the beneficiary, have the right to change the promise without any procedure regarding the subject of the promise. Moreover, the justification for changing the assets for which there is a purchase undertaking is stipulation in the terms that the promisor or the beneficiary or both of them together have the right to do so. The right could be absolute or qualified by the realization of a certain matter on the condition of parity between the original and the substitute.

4. The Agent/Originator's Promise to Buy the Agency/*Muḍārabah* Assets at Their Nominal Value

The originator sells to the *ṣukūk* holders a portfolio of assets represented by a special purpose vehicle at a specific price and then manages them as an agent; the originator/agent undertakes to buy the portfolio at nominal value when the *ṣukūk* is amortized.

This issue has variant scenarios as follows:

1 - If the portfolio consists of *ijārah* assets, there is no objection to the originator buying it at face value.

2 - If the originator who promises to buy is a service agent, there is no objection to buying at face value, as stated in the second symposium organized by Dirāsāt Company.

3 - If the buyer is a *muḍārib* or investment agent, and the portfolio does not consist of leased assets, contemporary scholars have two points of view about it:

The first: it is prohibited because the binding promise of the originator agent to purchase the *ṣukūk* assets at face value is a guarantee to the *ṣukūk* holders to bear the loss if the value of the assets falls below the face value, and a guarantee by the *muḍārib* is not allowed. If the promise is to buy at market value, or what they agree on at the time of the sale, or if the promise is from a third party, then there is no objection.

The second view is that an undertaking to purchase the assets at their nominal value is permissible. Many contemporary scholars hold this view, making a distinction between a guarantee by the *muḍārib* and an undertaking. The guarantee creates a liability by an absolute assumption of obligation. As for an undertaking to purchase the assets, it only applies if the assets remain. Jurists have differentiated between a guarantee (*ḍamān*) and a pledge (*rahn*): a guarantee is [security by means of] a personal liability while a pledge is [security by means of] an asset. Likewise, here there is a difference between a guarantee and a promise to buy the asset. Some of those who say it is permissible permit an undertaking even if [only] a small part of the asset remains for which compensation (*muʿāwaḍah*) is valid. Some of them qualified [the permissibility] to [a state where there is] no decrease in the value of the assets from the [nominal] value; otherwise, the purchase price shall decrease by the amount of the decrease.

5 – The Originator/Agent's Promise to Provide a Loan and a Donation to Cover the Deficit for Distributions

The revenue may be insufficient to distribute to *ṣukūk* holders, so the *ṣukūk* originator promises to make a donation covering the expected profit deficit. If the donation is non-refundable, whether stipulated as such or stipulated as a waiver in case of inability to repay, scholars agreed it is prohibited because it is a guarantee from the manager to the *ṣukūk* holders. Thus, the process becomes usury (guarantee of capital + a return). If the pledge is to be refunded, contemporary scholars differed on the ruling of this undertaking, having two views:

The first view: the *ṣukūk* manager's offer of the refundable loan is prohibited.

The second view: it is permissible for the *ṣukūk* manager to provide a refundable loan; this has counterparts in banking applications:

1. The *takāful* operator's undertaking to provide a refundable loan in case the Participants' Risk Fund is insufficient to pay all the claims for damages.
2. The formation of a reserve fund to equalize profit distribution from the gross profits of the *muḍārabah* fund, which protects against fluctuations of the return; this reserve is based on the undertaking of both parties to donate (lend) to the fund.

It seems that the issue is based on the realization of the effective cause (*taḥqīq al-manāṭ*) in practice. Those who prohibit it consider non-recovery to be the practical reality when the expected profit is not realized, while those who permit it considered the issue in a purely theoretical light. Therefore, differentiation between different scenarios is necessary.

If it is stipulated that the amount of the refundable loan be added to the price of the portfolio at amortization, there must be a reference to the entry of the loan into it and the occurrence of a setoff. This would be in line with the Shāfiʿī opinion requiring the independence of the two contracts; however, it would not be permissible according to the majority of scholars because it creates the suspicion of a loan that accrues benefit [to the creditor].

6. The Originator's Undertaking to Convert the *Ṣukūk* into Equity (Shares):\

The originator undertakes to exchange the *ṣukūk* for shares it owns. This promise is part of a package agreement that includes:

1. Indebtedness of the *ṣukūk* originator by amortizing [the *ṣukūk*] and converting it into a debt that must be paid;
2. A promise from the originator to sell shares at a fixed price; indebtedness results from this promise in the form of buying those shares to execute the promise.
3. Offsetting of the two debts: the debt owed to the *ṣukūk* holders by the originator, and the debt owed to the originator by the *ṣukūk* holders.

There is no objection to this because it consists of the fulfilment of the debt and transfer of ownership of shares to fulfil the mutual obligations between both parties.

7. The *Ṣukūk* Holders' Promise to Sell Only to the *Ṣukūk* Originator (Asset Seller)

As the assets will return to the seller, the practice is to leave them on the [seller's] balance sheet; therefore, the *ṣukūk* holders promise to sell only to the *ṣukūk* originator (the [original] seller of the assets) by activating the originator's promise to buy. This method is consistent with the explicitly stated Mālikī view that it is permissible for the seller to stipulate that the buyer is not allowed to sell what he bought except to the seller, and at the same price. This is also the view of Shaykh al-Islam Ibn Taymiyyah regarding conditions.

This stipulation is linked to a binding promise by the originator to the *ṣukūk* holders to purchase the assets from them or their representative. This promise obliges the originator to purchase. As for a stipulation not to sell to anyone but the seller and a stipulation to liquidate at the due date, the combination compels the *ṣukūk* holders to sell at the same price as the originator's promise to buy. These two undertakings of obligation do not constitute a bilateral promise (*muwāʿadah*) due to the difference in the nature of the obligation on each party. They are not an explicit bilateral promise, even though these undertakings of obligation lead to [the same effect as] a bilateral promise.

Moreover, a bilateral promise is permissible in case of need, as stated in the resolution of the International Islamic Fiqh Academy after it initially issued a ban on it with respect to *murābaḥah* (mark-up sale). It seems to be particular to *murābaḥah* in order to avoid the sale of what one does not possess, although a promise is not a sale, and the same holds for a bilateral promise. That is because these are two promises exchanged between the two parties, and they do not cause the transfer of ownership or of liability [for the asset to be sold]; and after the promise or bilateral promise, a contract with its resulting effects is not deemed to have been concluded.

8. Keeping the Assets on the Originator's Balance Sheet

The nature of the *ṣukūk* structure requires that the *ṣukūk* holders resell to the originator. We mentioned in the previous point that the *ṣukūk* holders promise not to sell to anyone but the *ṣukūk* originator. Keeping assets on the originator's balance sheet does not negate not transfer of ownership. That is because the consideration is given to the contract. As for the nominal transfer, it is related to the establishment of [the *ṣukūk* holders'] rights.

9. The Bank's and *Ṣukūk* Holders' Guarantee of Depositors' Funds

The promise here is a guarantee by the agent to the (tier1) *ṣukūk* holders in case of failure to abide by the contract conditions such as amortization at the time of losses. This is affirmation of an established Sharīʿah provision that the agent or *muḍārib* shall bear liability in case of infringement (doing what is not permissible). This is because amortization of the *ṣukūk* at a time of loss is harmful to the *ṣukūk* holders, and the default procedure would be to wait for a favourable opportunity to avoid the loss as much as possible.

Accordingly, the prescribed Sharīʿah provision of having the director bear liability in case of infringement or violation of the conditions is sufficient as a guarantee, and issuing the promise confirms this provision.

As for the guarantee of the depositors' funds by the bank and the *ṣukūk* holders, the jurisprudential forums have allowed shifting the burden of proof [of lack of transgression] to the *muḍārib* (the bank). Central banks will often accept this stratagem because it is a type of guarantee by the bank to the deposit holders, which achieves the objective of the central [banks]. The remaining [issue] is the tier-1 *ṣukūk* holders' guarantee to the deposit holders. Is it right to transfer the burden of proof on them when they are not *muḍāribs* vis-à-vis the deposit account holders but, rather, their partners in *shirkat al-ʿinān* (limited partnership)?

The answer is that the *ṣukūk* holders have become the partner of the shareholders, so their funds and the shareholders' funds have become one fund with respect to the depositors. There is thus no difference between them and the shareholders in this regard. That is why we can consider the *ṣukūk* holders with the shareholders as one party, because their funds in the *ṣukūk* bear a strong

resemblance to the shareholders' funds, to the point that the central banks consider them to be part of the bank's equity obligations. If that is so, the ruling of the shareholders applies to them in transferring the burden of proof onto them, and the purpose is achieved in having the *ṣukūk* holders guarantee the depositors' funds.

RESULTS AND RECOMMENDATIONS

17 Muharram 1437 H, corresponding to 30 October 2015

Under the auspices of Bank Rakyat Malaysia

Kuala Lumpur -Malaysia

First: The Combination of a Loan and a Sale

1. It is forbidden to combine a sale and loan by an explicitly stipulated condition in the contract itself or during the contract session.
2. If it is proved that the price in the sale is not higher than the market price when the seller lends to the buyer, the suspicion [of *ribā*] will be negated. And if the price does not fall below the market price in case the buyer lends to the seller, here as well the suspicion [of *ribā*] will be negated.
3. The borrower shall bear actual direct expenses of the lending procedures and the collection and repayment of the loan. This does not include the cost of borrowing, inflation, opportunity cost, the expected return and lost profit. The Sharīʿah committee shall approve the determination of actual expenses.

Forms of combination of a loan and a sale in *ijārah* (leases) include:

If the client is late in paying a fixed or variable rental instalment, it will be a debt upon him, and it is not permissible to take an increase on it. (It is not to be capitalized.)

However, if both parties agreed to renew the *ijārah* contract with a new rate, or to sign an *ijārah* contract on a new property, there is no objection to the lessor taking into consideration in the agreement on the rental payment what was lost in the previous *ijārah*. There shall be no obligation nor any condition [stating it] in the terms of the contract or during the contract session. This is based on the view of the Shāfiʿī School.

It has been decided in *fiqh* that the terms of the lease contract may be amended for the future period in which the property has not yet been used, by mutual agreement.

The rest of the forms have been postponed to a future seminar, *inshāʾ* Allah.

Second: Tier 1 *Ṣukūk*

1) The purpose of tier 1 *ṣukūk* is to support the capital sufficiency of an Islamic bank by enhancing its ability to increase its assets and face the attendant risks. The rulings that apply to the shareholders; i.e., the equity-right holders, shall apply to the *ṣukūk* holders; however, the Islamic bank has the right to amortize this *ṣukūk* after a period of time, whereas the shareholders' partnership is permanent. Also, the Sharīʿah classification of the tier 1 *ṣukūk* is that they are subject to the same rule as shares as far as rewards and liabilities but without partnership in the ownership of the joint-stock company. The relationship between the *ṣukūk* holders and the shareholders is *mushārakah* (partnership); both will be considered as the *muḍārib* (managing entrepreneur) with regard to the depositors' funds.

2) For the tier 1 *ṣukūk* issuance to be Sharīʿah compliant, the terms and conditions of the *ṣukūk* whose funds are added to the investment accounts in the general investment fund must be in accordance with the Sharīʿah parameters. Thus, the current account balances will be secured loans guaranteed by the shareholders, and the investment account balances (on the basis of *muḍārabah* or investment agency) will not be guaranteed by the shareholders except in case of infringement, negligence or breach of terms in their capacity as the *muḍārib* or investment agent.

3) The [funds collected from the] *ṣukūk* issued for investment by *muḍārabah* end up in the general investment fund, for which the *muḍārib* (Islamic bank) has permission to mix the *ṣukūk* capital with its own funds (equity). The bank shall be considered as a *muḍārib* with regard to the *ṣukūk* holders' funds. It shall not guarantee the *ṣukūk* capital except in case of infringement, negligence or violation of the conditions. The relationship between the bank and the *ṣukūk* holders shall be an investment partnership (*shirkat amwāl*). That entity will have the status of the *muḍārib* or the borrower (regarding the current accounts) in relation to the other components of the general investment fund, according to the circumstance.

(4) At the time of liquidation, the rights that will be paid to the deposit account holders and the *ṣukūk* holders will be determined by the terms and conditions of the contracts concluded with each of them.

5) What is stated in Basel 3 that the tier 1 *ṣukūk* holders have a lower priority than depositors does not necessarily mean that the depositors' funds will be absolutely guaranteed by the Islamic bank without reference to the terms and conditions of the deposit and the application of its provisions.

6) In the investment partnership established between the *ṣukūk* holders and the shareholders, it is possible to agree to transfer the burden of proof of non-infringement and non-negligence to the Islamic bank (in its capacity as the representative of the investment partnership to the depositors). If any loss is reported, the Islamic bank must prove there was no infringement and no negligence; otherwise, it will be liable for the loss (as a *muḍārib*) in the depositors' money. The *ṣukūk* holders will then demand their money from it in its capacity as a *muḍārib* with their funds.

7) Based on the previous details, there is no objection to issuing financial instruments that meet the Sharīʿah parameters for incorporation into tier 1 capital. The funds gathered from these financial instruments shall be combined with shareholders' equity and invested along with the investment deposits which the Islamic bank has accepted in a single investment fund. The funds invested in that fund are eligible to share in the profits and shall bear liability for the investment losses in proportion to their share of the total. In case of liquidation, the current account holders and investment account holders will have priority in the distribution [of assets], each according to their rights established by the terms and conditions of their deposits, and then the *ṣukūk* holders [come next].

Third: *Qalb al-Dayn* (Debt Rescheduling)

There are many forms of debt rescheduling; one of them is prohibited by consensus, one of them is permissible by consensus, and one of them is subject to investigation and *ijtihād* (legal reasoning).

a. The form that is prohibited by *ijmāʿ* (consensus) includes:-

- Deferring debt with an addition [to the amount owed] without any new transaction (debt scheduling).
- Forcing the debtor to reschedule the debt.

b. The form that is permissible by *ijmāʿ* (consensus) includes:-

- Agreeing on deferral of the debt by a new transaction that results in settlement of the current debt without increment.
- The entry of a creditor with the debtor whose debt to him has matured into a recurring set of transactions to hedge against a fixed rate of interest (in a series of *murābaḥah* sales to hedge against the rate of return, not for financing purposes).

c. The disputed forms include:

The creditor enters with the debtor whose debt has not matured into a new transaction before the maturity date, if it is within the limit granted to him, and the client is enabled even for a moment to dispose of it. It is also a condition in this form that the first and second debts not be linked, i.e., by a stipulation in the second *murābaḥah* that the customer is required to pay the first *murābaḥah* with its proceeds. It is not considered to be linkage what is stated in the general terms and conditions that the institution has the right to refer to all the client's accounts to offset what the client owes with what is owed to him.

Accordingly:

1. An increase in the debt due to its deferral via a transaction between the creditor and the debtor, if it is with a debt increase and an explicit agreement between the creditor and the debtor, is forbidden by the Sharīʿah.
2. A stipulation to reschedule the debt when it is first incurred, with a new transaction between the creditor and the debtor whose debt is matured, is forbidden by the Sharīʿah.

3. Debt rescheduling by a new transaction for a purpose other than increasing the current debt, such as the creditor and the debtor intending to hedge against a fixed rate of return, not financing, is permissible in Sharīʿah.

d. The use of revolving *murābaḥah* between the financing institution and the client is permissible, with the following conditions:

1) The purpose is to achieve a variable return in long-term finance rather than to schedule mature debts; therefore, it is obligatory to conduct the new *murābaḥah* before the maturity date of the existing *murābaḥah*.

2) A clause stipulating a new *murābaḥah* in the general agreement or in the existing *murābaḥah* is forbidden. It is also prohibited to link the two *murābaḥahs,* and the customer should have the absolute choice to either pay off his existing *murābaḥah* debt himself or enter into a new *murābaḥah*.

3) After entering into the new *murābaḥah,* the customer should have the absolute choice between keeping the purchased goods and selling them. If he chooses to sell, he will have the right to use the proceeds of the sale to pay the existing *murābaḥah* debt or not to pay. In order to confirm this, credit approval must be issued for the new *murābaḥah* in consideration of it being a new independent financing for the customer that can remain alongside the previous *murābaḥah.*

4) It is preferable that the profit rate in the new *murābaḥah* be equal to or less than the profit rate of the existing *murābaḥah* if the prevailing rate in the market or the institution is still at the level of the profit rate of that *murābaḥah.*

5) The customer should be solvent when making the new *murābaḥah*. That is because his insolvency would compel him to enter into the new *murābaḥah,* to sell the goods purchased thereby and use the sale price to pay the existing *murābaḥah* indebtedness. That would negate the condition of choice. The basic state of the client shall be considered solvency unless he proves the opposite.

6) There should be no stipulation to consider the period of late payment of the existing *murābaḥah* profit in the profit calculation of any new *murābaḥah*.

7) The application of this formula should be exceptional, due to inability to finance by another form, not just for ease of implementation. Special Sharīʿah approval must be obtained in each case.

Fourth: The *Fiqhi* Classification of the *Ribā* of Loans

Ribā is of various types:

1- The *ribā* of Jāhiliyyah (the pre-Islamic era of ignorance): it is the increase [of the amount owed by] the debtor after his liability for the debt has been established, without any [new] transaction, in consideration of deferral [of payment]. It is called the *ribā* of debt, or *ribā al-nasīʾah*, or *ribā* of the Qurʾān or clear *ribā*. It is *ḥarām* by the consensus of Muslim scholars, and declaring it permissible makes one a disbeliever.

2. *Ribā al-faḍl*: It is an increment in the exchange of *ribawī* commodities that are sold by measure or weight. It is one of the major sins according to the majority of scholars. Shaykh al-Islam Ibn Taymiyah held that it is a minor sin that may be permissible if needed.

3. Combining *ribā al-faḍl* and *ribā al-nasīʾah* at the beginning of the contract: It is a major sin by consensus, even in the opinion of Shaykh al-Islam Ibn Taymiyyah. It includes the *ribā* of loans as practiced by conventional banks. It is not permissible due to need (*ḥājah*) but is permissible due to necessity (*ḍarūrah*) as per its special meaning, and the sin is on the lender. As for owning shares in companies that are a mix [of *ḥalāl* and *ḥarām*]—which is authorized in the Sharīʿah Standards—which take interest-based loans, the sin is on the one who borrowed, which is the administration, not the shareholder. That is because he has no power to change [the policy].

Fifth: Islamic Banks' Management of Waqf Funds

1. It is permissible to make waqf (endowment) of money for investment and give its returns as charity.

2. It is permissible to establish waqf companies with capital earmarked as waqf, and what is gained from the yield of the waqf, or donated to it, or purchased from the proceeds is the property of the waqf and does not take the rule of waqf.

3. It is permissible for the bank, which acts as an intermediary between the waqf donor and the waqf company, to take a commission for that on the condition that the waqf donor is informed about it. This commission does not take the rule of a waqf asset.

4. The Forum recommends further studies of waqf companies and their problems that offer proposals which take into account the specificities of waqf companies with regard to existing laws.

5. The Forum recommends precisely defining what is considered yield and what is considered to be the original waqf as well as the provision for replacement of the waqf capital with other assets.

Sixth: Practical Applications of the Distinction between Ownership and Exclusive Non-ownership Right (Waiver of Underwriting Rights):

It is permissible to trade an underwriting right for compensation; this may be through waiver of the exclusive non-ownership right (*ikhtiṣāṣ*) and compensation for it. It is not permissible to take compensation for it by a sale.

Seventh: *Tawarruq* in the Commodity Exchange (Palm-oil Exchange) in Malaysia:

1. There is no objection to Islamic banks and financial institutions dealing in Bursa Suq al-Sila (Commodity Exchange) in Malaysia in accordance with Sharīʿah parameters.

2. The Forum recommends arranging a joint working group of scholars and experts in the commodity market to study the steps and procedures of the market and propose what is necessary to develop it and improve its performance.

3. The Forum recommends that banks and financial institutions deal with this exchange market as a substitute for the London Metals Exchange.

Eighth: Banking Applications of the rule "What is Forbidden Because It Will Lead to the Unlawful is Permitted in Case of Need"

(It was postponed).

Ninth: Zakat of Exploited Items and Their Applications in Financial Market Products:

(It was postponed).

Tenth: Promise and Bilateral Promise in *Ṣukūk*:

(It was postponed).