The recent Azhar *fatwā*: Its logic, and historical background

Mahmoud A. El-Gamal

Rice University

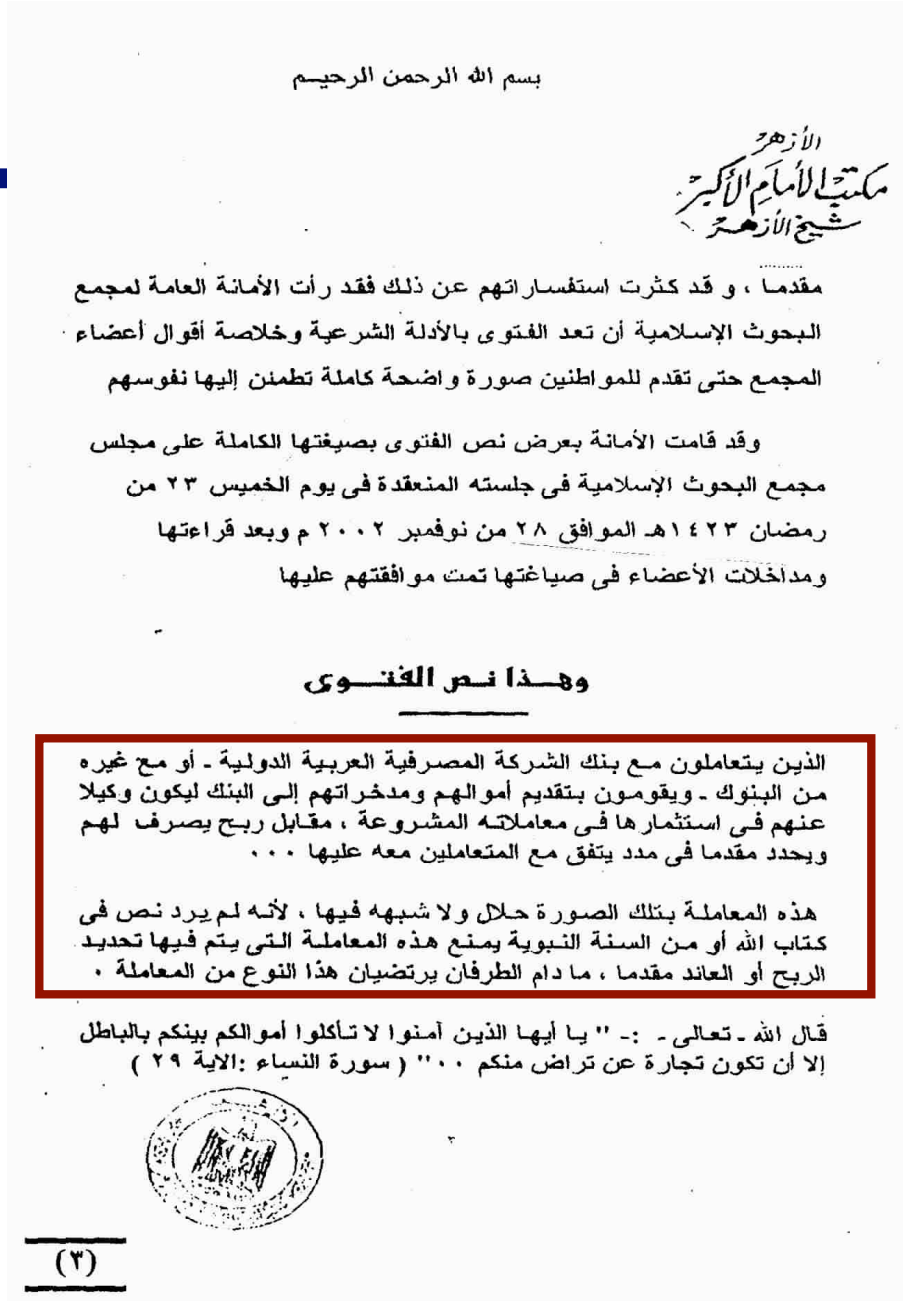
IMPORTANT DISCLAIMER

- I, the writer of this presentation, am **not a jurist** (*faqīh*). I am an academic researcher.
- Therefore, I am not qualified to endorse or reject this *fatwā*, or its predecessors.
- The objectives of writing this presentation are:
  - To summarize the *fatwā*,
  - Explain what it says and what it does not say,
  - Explain the objections of the majority of jurists, and their legal proof (*dalīl sharʿī*),
  - And summarize the responses of those endorsing the *fatwā*'s line of thought, now and in the past.

What the *fatwā* said

Those who deal with […] or any other banks, thus forwarding their funds to a bank to act as their agent in permissible investments, in exchange for profit distributions that are pre-specified by mutual consent …

This transaction in this form is permissible without any suspicion, since no Canonical Text in the Book of Allāh, or the Prophetic Sunnah forbids such a transaction in which profits or returns are pre-determined, so long as both parties consent to this transaction form.



بسم الله الرحمن الرحيم

الأزهر
مكتب الإمام الأكبر
شيخ الأزهر

مقدما ، و قد كثرت استفساراتهم عن ذلك فقد رأت الأمانة العامة لمجمع البحوث الإسلامية أن تعد الفتوى بالأدلة الشرعية وخلاصة أقوال أعضاء المجمع حتى تقدم للمواطنين صورة واضحة كاملة تطمئن إليها نفوسهم

وقد قامت الأمانة بعرض نص الفتوى بصيغتها الكاملة على مجلس مجمع البحوث الإسلامية فى جلسته المنعقدة فى يوم الخميس ٢٣ من رمضان ١٤٢٣هـ الموافق ٢٨ من نوفمبر ٢٠٠٢ م وبعد قراءتها ومداخلات الأعضاء فى صياغتها تمت موافقتهم عليها

وهـذا نـص الفتـوى

الذين يتعاملون مع بنك الشركة المصرفية العربية الدولية - أو مع غيره من البنوك - ويقومون بتقديم أموالهم ومدخراتهم إلى البنك ليكون وكيلا عنهم فى استثمارها فى معاملاته المشروعة ، مقابل ربح يصرف لهم ويحدد مقدما فى مدد يتفق مع المتعاملين معه عليها ...

هذه المعاملة بتلك الصورة حلال ولا شبهه فيها ، لأنه لم يرد نص فى كتاب الله أو من السنة النبوية يمنع هذه المعاملة التى يتم فيها تحديد الربح أو العائد مقدما ، ما دام الطرفان يرتضيان هذا النوع من المعاملة .

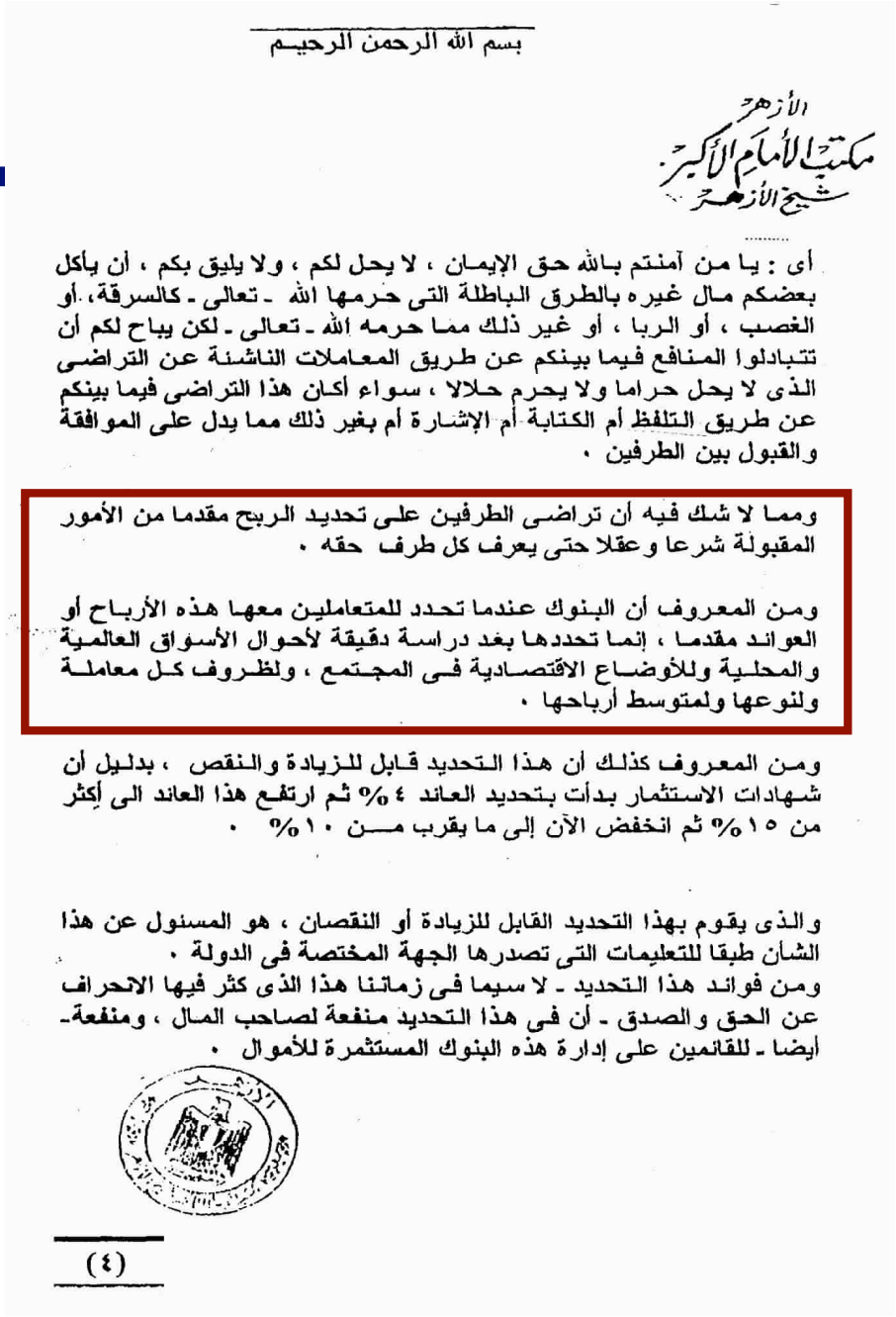
قال الله - تعالى - :- " يا أيها الذين آمنوا لا تأكلوا أموالكم بينكم بالباطل إلا أن تكون تجارة عن تراض منكم ... " (سورة النساء :الاية ٢٩)

(٣)

What the *fatwā* said

There is no doubt that mutual consent of the two parties to pre-determine profits is permissible both in Islamic Law (*Shar'*), as well as logically, in order for each party to know its rightful share.

In this regard, it is well known that banks pre-determine those profits or returns for their customers only after careful and detailed study of global and domestic market and economic conditions, the specific circumstances of each dealing, its type, and its average anticipated profitability.



بسم الله الرحمن الرحيم

الأزهر
مكتب الإمام الأكبر
شيخ الأزهر

أى : يا من آمنتم بالله حق الإيمان ، لا يحل لكم ، ولا يليق بكم ، أن يأكل بعضكم مال غيره بالطرق الباطلة التى حرمها الله - تعالى - كالسرقة ، أو الغصب ، أو الربا ، أو غير ذلك مما حرمه الله - تعالى - لكن يباح لكم أن تتبادلوا المنافع فيما بينكم عن طريق المعاملات الناشئة عن التراضى الذى لا يحل حراما ولا يحرم حلالا ، سواء أكان هذا التراضى فيما بينكم عن طريق التلفظ أم الكتابة أم الإشارة أم بغير ذلك مما يدل على الموافقة والقبول بين الطرفين .

ومما لا شك فيه أن تراضى الطرفين على تحديد الربح مقدما من الأمور المقبولة شرعا وعقلا حتى يعرف كل طرف حقه .

ومن المعروف أن البنوك عندما تحدد للمتعاملين معها هذه الأرباح أو العوائد مقدما ، إنما تحددها بعد دراسة دقيقة لأحوال الأسواق العالمية والمحلية وللأوضاع الاقتصادية فى المجتمع ، ولظروف كل معاملة ولنوعها ولمتوسط أرباحها .

ومن المعروف كذلك أن هذا التحديد قابل للزيادة والنقص ، بدليل أن شهادات الاستثمار بدأت بتحديد العائد ٤ % ثم ارتفع هذا العائد الى أكثر من ١٥ % ثم انخفض الآن إلى ما يقرب من ١٠ % .

والذى يقوم بهذا التحديد القابل للزيادة أو النقصان ، هو المسئول عن هذا الشأن طبقا للتعليمات التى تصدرها الجهة المختصة فى الدولة .
ومن فوائد هذا التحديد - لا سيما فى زماننا هذا الذى كثر فيها الانحراف عن الحق والصدق - أن فى هذا التحديد منفعة لصاحب المال ، ومنفعة - أيضا - للقائمين على إدارة هذه البنوك المستثمرة للأموال .

(٤)

What the *fatwā* said

It is also well known that this pre-specified profit rate may increase or decrease over time. For instance, investment certificates were initially paying a 4% return, which increased to more than 15%, and now, it has recently come back down to near 10%.

Those who determine such profit rates and their changes must abide by government regulations.
One virtue of pre-specification – especially in this time when honesty is lacking – is the benefits that accrue to investors, as well as bank-management.

بسم الله الرحمن الرحيم

الأزهر
مكتب الإمام الأكبر
شيخ الأزهر

أى : يا من آمنتم بالله حق الإيمان ، لا يحل لكم ، ولا يليق بكم ، أن يأكل بعضكم مال غيره بالطرق الباطلة التى حرمها الله - تعالى - كالسرقة ، أو الغصب ، أو الربا ، أو غير ذلك مما حرمه الله - تعالى - لكن يباح لكم أن تتبادلوا المنافع فيما بينكم عن طريق المعاملات الناشئة عن التراضى الذى لا يحل حراما ولا يحرم حلالا ، سواء أكان هذا التراضى فيما بينكم عن طريق التلفظ أم الكتابة أم الإشارة أم بغير ذلك مما يدل على الموافقة والقبول بين الطرفين .

ومما لا شك فيه أن تراضى الطرفين على تحديد الربح مقدما من الأمور المقبولة شرعا وعقلا حتى يعرف كل طرف حقه .

ومن المعروف أن البنوك عندما تحدد للمتعاملين معها هذه الأرباح أو العوائد مقدما ، إنما تحددها بعد دراسة دقيقة لأحوال الأسواق العالمية والمحلية وللأوضاع الاقتصادية فى المجتمع ، ولظروف كل معاملة ولنوعها ولمتوسط أرباحها .

ومن المعروف كذلك أن هذا التحديد قابل للزيادة والنقص ، بدليل أن شهادات الاستثمار بدأت بتحديد العائد ٤ % ثم ارتفع هذا العائد الى أكثر من ١٥ % ثم انخفض الآن إلى ما يقرب من ١٠ % .

والذى يقوم بهذا التحديد القابل للزيادة أو النقصان ، هو المسئول عن هذا الشأن طبقا للتعليمات التى تصدرها الجهة المختصة فى الدولة .
ومن فوائد هذا التحديد - لا سيما فى زماننا هذا الذى كثر فيها الانحراف عن الحق والصدق - أن فى هذا التحديد منفعة لصاحب المال ، ومنفعة - أيضا - للقائمين على إدارة هذه البنوك المستثمرة للأموال .

(٤)

What the *fatwā* said

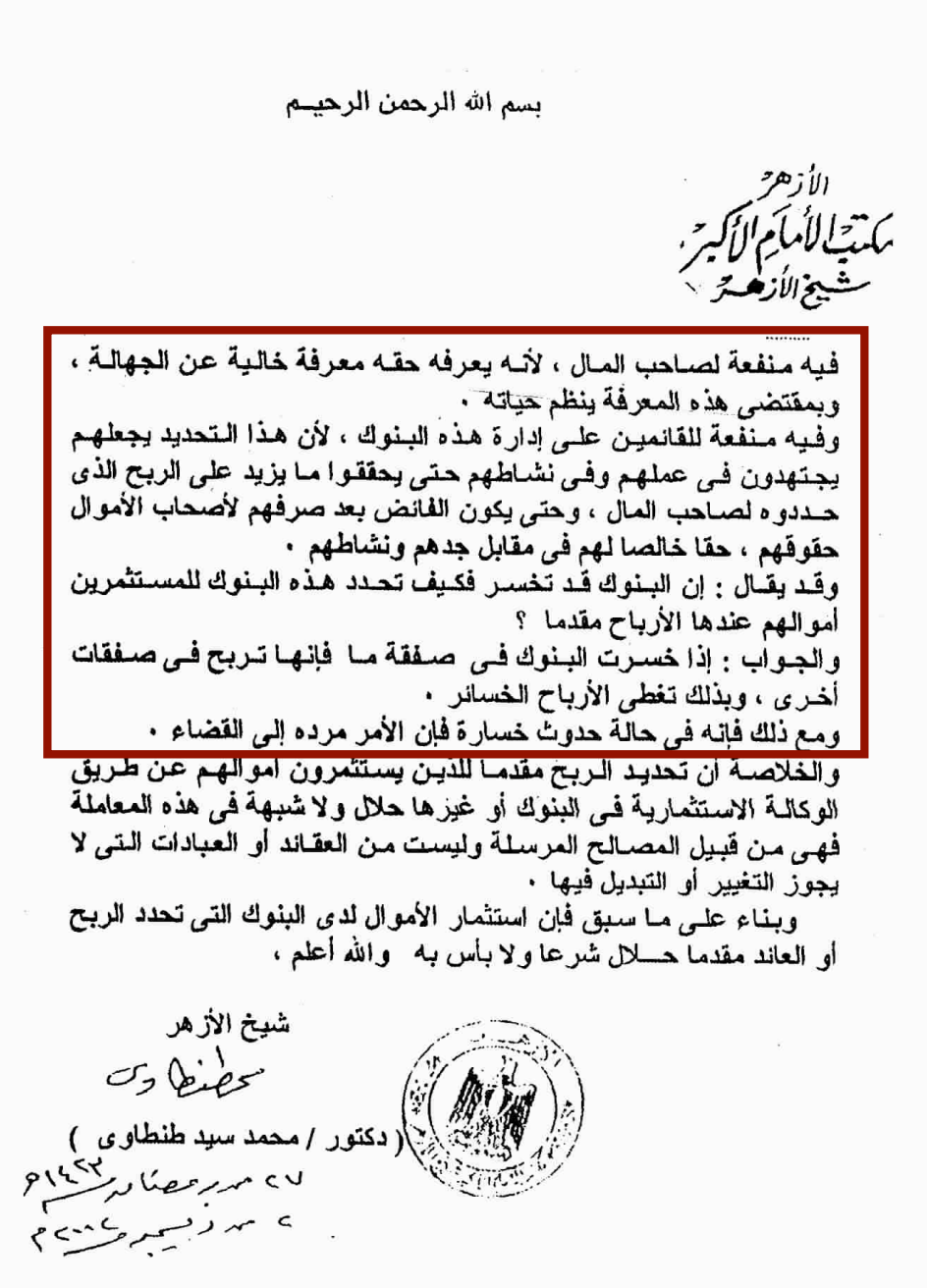
Investors benefit from lower uncertainty, and thus may plan their lives accordingly.

Bank managers benefit from the incentive to work harder to maximize profits, and keep net profits after paying investors their pre-determined profits.

It may be said that banks may incur losses, and how then can they pre-specify profits?

The answer is that banks may lose in one investment, but make profits on many others, thus covering the losses

In any case, the court-system can rule in [rare] cases of actual loss-realization.



بسم الله الرحمن الرحيم

الأزهر
مكتب الإمام الأكبر
شيخ الأزهر

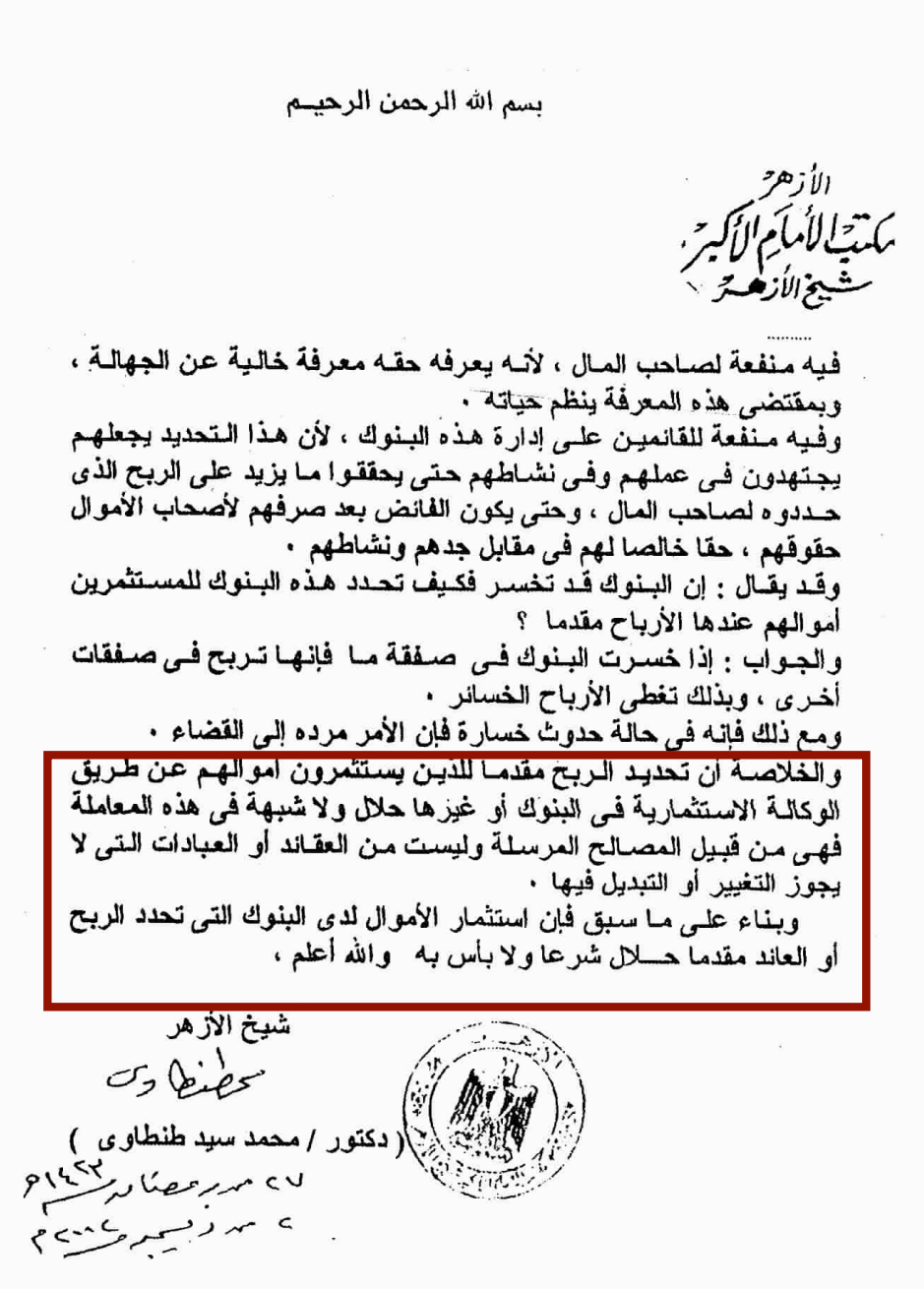
فيه منفعة لصاحب المال ، لأنه يعرفه حقه معرفة خالية عن الجهالة ، وبمقتضى هذه المعرفة ينظم حياته .
وفيه منفعة للقائمين على إدارة هذه البنوك ، لأن هذا التحديد يجعلهم يجتهدون فى عملهم وفى نشاطهم حتى يحققوا ما يزيد على الربح الذى حددوه لصاحب المال ، وحتى يكون الفائض بعد صرفهم لأصحاب الأموال حقوقهم ، حقا خالصا لهم فى مقابل جدهم ونشاطهم .
وقد يقال : إن البنوك قد تخسر فكيف تحدد هذه البنوك للمستثمرين أموالهم عندها الأرباح مقدما ؟
والجواب : إذا خسرت البنوك فى صفقة ما فإنها تربح فى صفقات أخرى ، وبذلك تغطى الأرباح الخسائر .
ومع ذلك فإنه فى حالة حدوث خسارة فإن الأمر مرده إلى القضاء .
والخلاصة أن تحديد الربح مقدما للذين يستثمرون أموالهم عن طريق الوكالة الاستثمارية فى البنوك أو غيرها حلال ولا شبهة فى هذه المعاملة فهى من قبيل المصالح المرسلة وليست من العقائد أو العبادات التى لا يجوز التغيير أو التبديل فيها .
وبناء على ما سبق فإن استثمار الأموال لدى البنوك التى تحدد الربح أو العائد مقدما حلال شرعا ولا بأس به والله أعلم ،

شيخ الأزهر
(دكتور / محمد سيد طنطاوى)

What the *fatwā* said

In summary: Pre-specification of profits for those who invest their funds with banks or other financial institutions through investment agency is permissible without any suspicion. This type of transaction is judged based on its benefit, and does not belong to the areas of creed and acts of worship, wherein change is not permissible.

Consequently, investing funds with banks that pre-specify profits or returns is permissible, and there is no harm therein, and Allāh knows best.



بسم الله الرحمن الرحيم

الأزهر
مكتب الإمام الأكبر
شيخ الأزهر

فيه منفعة لصاحب المال ، لأنه يعرفه حقه معرفة خالية عن الجهالة ، وبمقتضى هذه المعرفة ينظم حياته .
وفيه منفعة للقائمين على إدارة هذه البنوك ، لأن هذا التحديد يجعلهم يجتهدون فى عملهم وفى نشاطهم حتى يحققوا ما يزيد على الربح الذى حددوه لصاحب المال ، وحتى يكون الفائض بعد صرفهم لأصحاب الأموال حقوقهم ، حقا خالصا لهم فى مقابل جدهم ونشاطهم .
وقد يقال : إن البنوك قد تخسر فكيف تحدد هذه البنوك للمستثمرين أموالهم عندها الأرباح مقدما ؟
والجواب : إذا خسرت البنوك فى صفقة ما فإنها تربح فى صفقات أخرى ، وبذلك تغطى الأرباح الخسائر .
ومع ذلك فإنه فى حالة حدوث خسارة فإن الأمر مرده إلى القضاء .
والخلاصة أن تحديد الربح مقدما للذين يستثمرون أموالهم عن طريق الوكالة الاستثمارية فى البنوك أو غيرها حلال ولا شبهة فى هذه المعاملة فهى من قبيل المصالح المرسلة وليست من العقائد أو العبادات التى لا يجوز التغيير أو التبديل فيها .
وبناء على ما سبق فإن استثمار الأموال لدى البنوك التى تحدد الربح أو العائد مقدما حلال شرعا ولا بأس به والله أعلم ،

شيخ الأزهر
(دكتور / محمد سيد طنطاوى)

What the *fatwā* did not say

- Notice, the fatwa **did not say categorically** that all bank interest is permissible
- Indeed, Dr. Ṭanṭāwī has made it clear elsewhere that interest on bank deposits is forbidden Ribā, and interest on bank loans is forbidden Ribā (see his *Muʿāmalāt al-Bunūk* …, 2001, pp. 139-142).
- The debate is regarding three issues:
  - Are "investment deposits" a form of *wadīʿah*?
  - Are "investment loans" a form of *qarḍ*?
  - In an investment relationship, is pre-specification of profits for one party forbidden?

What the *fatwā* did not say

- On "deposits", there is little disagreement.
- On "loans", there is substantial disagreement. In private correspondence, Dr. ᶜAbdullāh Al-Najjār explained Dr. Ṭanṭāwī's position as follows:
  - Funds given to a bank cannot be considered a form of loans (*qarḍ*), since the bank is not in need, and loans are only requested by those in need. Anas narrated that the Prophet (P) said: "I saw on the night of *'isrā'* written on the door of paradise: *charity is multiplied 10-fold, and loans 18-fold*. I asked Gabriel, why is a loan better than charity? He said: one may ask for charity while having property, **but the borrower only borrows out of need**" (narrated by ibn Mājah and Al-Bayhaqī).
  - Thus, if the transaction is not a loan, the bank-customer must be viewed as an investor who intentionally goes to the bank seeking profits (banks advertise rates of return that they pay, and customers choose to go to the one they like).

Rebuttals

- Jurists made the argument that once deposited funds are used, they are thus guaranteed, and since possession of guaranty (as in loans) is stronger than possession of trust (as in deposits), the contract becomes a loan and all increase is the forbidden Ribā.
- Moreover, the issue of pre-specification of profits in *Muḍāraba* is central for those rejecting the *fatwā*:
  - Al-Qaradāwī and many others argued that Hadīths regarding *Muzāraʿah* (sharecropping) provide a Canonical Text prohibition,
  - The Islamic Fiqh Council referred to claims of consensus made by ibn Qudāmah in *Al-Mughnī*, and affirmed that consensus is as binding as a Canonical text.

14th meeting of the Islamic Jurisprudence Council, January 2003, Decision #133 (7/14), pp. 20-24.

"The religious-law and secular-law characterization of the relationship between depositors and banks is one of loans, not agency. This is how general and banking laws characterize the relationship. In contrast, investment agency is a contract according to which an agent invests funds on behalf of a principal, in exchange for a fixed wage or a share in profits. In this regard, there is a consensus [of religious scholars] that the principal owns the invested funds, and is therefore entitled to the profits of investment and liable for its losses, while the agent is entitled to a fixed wage if the agency stipulated that. Consequently, conventional banks are not investment-agents for depositors. Banks receive funds from depositors and use them, thus guaranteeing said funds and rendering the contract a loan. In this regard, loans must be repaid at face value, with no stipulated increase."

14th meeting of the Islamic Jurisprudence Council, January 2003, Decision #133 (7/14), pp. 20-24.

"Thus, jurists of all schools have reached a consensus over the centuries that pre-specification of investment profits in any form of partnership is not allowed, be it pre-specified in amount, or as a percentage of the capital. This ruling is based on the view that such a pre-specification guarantees the principal capital, thus violating the essence of partnerships (silent or otherwise), which is sharing in profits and losses. This consensus is well established, and no dissent has been reported. In this regard, ibn Qudāmah wrote in *Al-Mughnī* (vol.3, p.34): 'All scholars whose opinions were preserved are in consensus that silent partnership (*qirāḍ*, or *muḍāraba*) is invalidated if one or both partners stipulate a known amount of money as profit'. In this regard, consensus of religious scholars is a legal proof on its own."

Pre-specification of profits

- The "loan" issue was dismissed by Dr. Ṭanṭāwī and his supporters

- The issue of pre-specification of profits was discussed at great length. Dr. Ṭanṭāwī cited Drs. ᶜAbdul-Wahhāb Khallāf and ᶜAli Al-Khafīf, among others to support his view that the restriction of investment agency to classical *muḍāraba* (with profit sharing, and no specified profits) is not appropriate.

Major argument for fixing profits

- Tanṭāwī (2001, p. 131), citing – *verbatim* – similar statements by Khallāf (pp.94-104), Al-Khafīf (pp. 165-204), and others (pp. 204-211), said:
  - "Non-fixity of profits [as a percentage of capital] in this time of corruption, dishonesty and greed would put the principal under the mercy of the agent investing the funds, be it a bank or otherwise".
- Thus, he and the previous scholars appealed to the well known **moral hazard problem** associated with profit-sharing silent partnership. The grounds for updating *Heter 'Iska* doctrine (previously identical to *muḍāraba*) for avoiding *Ribit* in Jewish *Halachah* (analog of Islamic *Sharīᶜa*).

Remaining dispute points

- Once the "loan/deposit" argument is rejected, the remaining issue is dealing with the consensus report in *Al-Mughnī*, and the share-cropping Hadīths upon which it is based:
  - Is the claim of consensus accepted? Is it binding?
  - Is there a Textual basis for the decision, or can it be overruled?

- If pre-determining the profit rate deems the silent partnership defective, does that make it the forbidden *Ribā*, or a permissible *'Ijāra* at a mutually agreed-upon (though uncertain) wage?

The Ḥadīths of Rāfiᶜ ibn Khadīj

- The Canonical Text basis for forbidding pre-specification of profits for either party is based on the many narrations of Rāfiᶜ ibn Khadīj regarding pre-Islamic sharecropping arrangements:
  - "We used to lease land with the produce of one part earmarked for the landlord. Sometimes, one part will produce and the other won't. The Prophet (P) forbade us from doing so. We did not rent land for gold and silver at that time" (narrated by Al-Bukhārī).
  - Other narrations of Rāfiᶜ indicate the prohibition of any geographical, temporal, or quantitative pre-specification of the return to either party of sharecropping.

Implications of the Ḥadīth of Rāfiʿ

- Thus, jurists concluded, the Prophet (P) forbade sharecropping with a known compensation for either party, due to *Gharar* and uncertainty (as the Ḥadīth of Rāfiʿ explicitly stated the nature of that uncertainty).
- This ruling for sharecropping applies to other partnerships, including silent partnership (*muḍāraba*).
- Thus, pre-specification of profits for either party is antithetical to partnership, and deems it invalid.
- Consequently, ibn Qudāmah argued, jurists have reached a consensus that pre-specification of profits in *muḍāraba* is not allowed.

Discussion of the Hadīth of Rāfiᶜ

- Dr. ᶜAbdullah Al-Najjār wrote a lengthy discussion of the Hadīth of Rāfiᶜ and the resulting conclusions, in which he argued that:
  - The prohibition does not follow from the [profit pre-specification] condition itself, but from the resulting *gharar* (uncertainty) that may lead to disputation (citing the narration and analysis in Al-Shawkānī's *Nayl Al-Awṭār*) . On the other hand, he argued, the partnership itself is a hiring contract for an unknown compensation, thus full of *gharar*. However, a consensus ruling is in effect allowing this contract (with profit-sharing), despite that *gharar* (as stated by ibn Qudāmah). Hence, such partnerships belong to a class of contracts in which the *gharar* [including that induced by pre-specification of profits] is ignored, provided that it does not lead to legal disputation.

Discussion of the Hadīth of Rāfiᶜ

- Dr. Al-Najjār made many other arguments based on Al-Shawkānī's and ibn Qudāmah's analyses, saying that:
  - This may be Rāfiᶜ's own non-binding conclusion,
  - It maybe restricted to a particular type of sharecropping,
  - Zayd ibn Thābit disputed the Hadīth of Rāfiᶜ, claiming that it pertained to a specific incident where one man killed another (narrated by Abū Dāwūd)
  - Hadīths of ibn ᶜUmar suggest that leasing land is allowed (narrated by Al-Bukhārī), and dispute the Hadīth of Rāfiᶜ
  - Other companions of the Prophet (P), including ibn ᶜAbbās and others disagreed with Rāfiᶜ's opinion, and ibn Qudāmah reported that some of Rāfiᶜ's narrations disagreed with the consensus of the companions, and must therefore be discarded
- In our meeting at Al-'Azhar, Dr. Muhammad Rifᶜat ᶜUthmān made a counter-argument that according to Al-Nawawī, the Hadīth of Rāfiᶜ does not forbid leasing land for fixed rent (which is the point of previous disputes), but does forbid pre-specification of profits.
- The argument turned to one of "specification without a specifier".

Defective *Muḍāraba*

- The majority of jurists argue that it is not permissible to commence a *muḍāraba* that is known to be defective/invalid at its inception.
- Dr. Ṭanṭāwī concentrates on the consensus view that when a *muḍāraba* is deemed defective (e.g. due to pre-specification of the investor's profits), the contract becomes one of hiring (*'ijara*), whereby the entrepreneur/worker is entitled to market wages (c.f. ibn al-Humām in *Fatḥ Al-Qadīr*, and Al-Shafiᶜī in *Al-'Umm*). He concluded (2001, p.133):
  - "Thus, we say that the bank investing money for a pre-specified profit becomes a hired worker for the investors, who thus accept the amount the bank gives them as their profits, and any excess profits (whatever they may be) are deemed the bank's wages. Therefore, this dealing is devoid of Ribā.

    In summary: we do not find any Canonical Text, or convincing analogy, that forbids pre-specification of profits, as long as there is mutual consent."

Quotations of earlier jurists

- Dr. Ṭanṭāwī (2001, p.95) quoted Dr. Khallāf, who in turn quoted Muhammad ᶜAbduh's 1906 *Manār* (#9, p.332) article:
  - "When one gives his money to another for investment and payment of a known profit, this does not constitute the definitively forbidden Ribā, regardless of the pre-specified profit rate. This follows from the fact that disagreeing with the juristic rule that forbids pre-specification of profits does not constitute the clear type of Ribā which ruins households. This type of transaction is beneficial both to the investor and the entrepreneur. In contrast, Riba harms one for no fault other than being in need, and benefits another for no reason except greed and hardness of heart. The two types of dealings cannot possibly have the same legal status (*ḥukm*)".
- Dr. Khallāf, *Liwā' Al-'Islām* (1951, #4(11)) proceeded to say (quoted in ibid., pp. 95-6):
  - "The juristic condition for validity [of *muḍāraba*] that profits are not pre-specified is a condition without proof (*dalīl*). Just as profits may be shared between the two parties, the profits of one party may be pre-specified… Such a condition may disagree with jurists' opinions, but it does not contradict any Canonical Text in the Qur'ān and Sunnah".

The core argument

- In a second article (ibid., 1951, #4(12)), Dr. Khallāf summarized the current 'Azhar ruling's basis as follows:
  - "The only objection for this dealing is the condition of validity of *muḍāraba* that profits must be specified as percentage shares, rather than specified amounts or percentages of capital. I reply to this objection as follows:
    - First: This condition has no proof (*dalīl*) from the Qur'ān and Sunnah. Silent partnerships follow the conditions stipulated by the partners. We now live in a time of great dishonesty, and if we do not specify a fixed profit for the investor, his partner will devour his wealth.
    - Second: If the *muḍāraba* is deemed defective due to violation of one of its conditions, the entrepreneur thus becomes a hired worker, and what he takes is considered wages. Let that be as it may, for there is no difference in calling it a *muḍāraba* or an *'ijāra*: It is a valid transaction that benefits the investor who cannot directly invest his funds, and benefits the entrepreneur who gets capital with which to work. Thus, it is a transaction that benefits both parties, without harming either party or anyone else. Forbidding this beneficial transaction would result in harm, and the Prophet (P) forbade that by saying: "No harm is allowed لا ضرر و لا ضرار."

A Non-Jurist's Conclusions

- The recent 'Azhar *fatwā* does not permit all bank interest, but it does permit certain types of bank interest as investment profits
- The basis for this *fatwā* is at least a century old
- The majority of jurists are opposed to this *fatwā*
- The minority opinion contests the authority, relevance, and applicability of the Ḥadīths of Rāfiᶜ ibn Khadīj regarding profit pre-specification in sharecropping
- The minority opinion also questions the consequences of invalidity of *muḍāraba* with pre-specified profits
- Can we still claim the existence of a "consensus"?
- If the issue is controversial, should we err on the side of caution? Should we follow the majority view?