"Interest" and the Paradox of Contemporary Islamic Law and Finance

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Often, the true grounds of legal decision are concealed rather than illuminated by the characteristic rhetoric of opinions. Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find those grounds, many of which may turn out to have an economic character.

Richard Posner (1992, p.23)

... [T]he manner in which an act was qualified as morally good or bad in the spiritual domain of Islamic religion was quite different from the manner in which that same act was qualified as legally valid or invalid in the temporal domain of Islamic law. Islamic law was secular, not canonical... Thus, it was a system focused on ensuring that an individual received justice, not that one be a good person.

John Makdisi (1999, p.1704)

I tell you, truthfully and without pretense, … that we went beyond choosing the "bank" label [in "Islamic Banking"], to the point of adopting its central essence… Consequently, we failed to give our financial institutions any characteristics beyond simple financial intermediation. This is accomplished through Islamic banks' favorite investment modes that are essentially a hybrid between loans and investment; which hybrid carries most of the characteristics of usurious loans…

Saleh Kamel (1996)

(founder of Dallah al-Baraka group, acceptance speech for the Islamic Development Bank prize in Islamic Banking)

1. Introduction

Almost all contemporary writings in Islamic Law and/or Islamic finance proclaim that Islamic Law (*Sharīʿa*) forbids interest. This statement is paradoxical in light of the actual practices of Islamic financial providers over the past three decades. In fact, the bulk of Islamic financial practices formally base rates of return or costs of capital on a benchmark interest rate such as LIBOR, and would easily be classified by any MBA student as interest-based debt-finance. Nevertheless, jurists on the payrolls of Islamic financial providers continue to proclaim all forms of interest as *ribā*, which is subject to the severest

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Qur'anic prohibition. As quotations later in this article will illustrate, this dual role of jurists (condemning conventional interest-based financing, while supporting and personally profiting from its "Islamic" twin) is supported through excessively formalistic interpretation of the letter of the Law.

Minority opinions permitting modern forms of interest have surfaced from time to time, and they were occasionally championed by holders of highly respectable (though, often politically appointed) religious posts. Perhaps the oldest such pronouncement was made by Ebusuud Efendi, the Mufti of Istanbul between 1545 and 1574 C.E., and holder of the title *Şeyhülislam* towards the end of his tenure. Ebusuud defended the act of interest-taking, especially by *awqāf* (pious foundations), as a practical matter of necessity.[1] As expected, this minority opinion, while sanctioned by the Ottoman Sultan Suleyman, was rejected by the majority of Muslim scholars around the Arab world, who continued to favor interest-free lending and traditional partnership forms of finance. Consequently, European modes of banking only became commonly practiced in the Islamic world in the eighteenth century. Even then, this widespread adoption of "western" banking practices appears to have been driven by external forces.[2]

Most recently, *Sheikh-al-Azhar* Muhammad Sayyid Tantawi re-iterated a *fatwā* (issued opinion in response to a question regarding Islamic Law) that he had issued in 1989, and published in the semi-official newspaper *Al-Ahram*, when he was the Mufti of Egypt.[3] This most recent *fatwā*, carrying the support of the Azhar Islamic Research Institute (IRI) (*Majmaʿ al-Buḥūth al-Islamiyyah*) as well as Tantawi's own, differed little from its predecessors in terms of substance. Indeed, parts of its text seem to be copied verbatim from a book on banking operations published by Tantawi well before the elicitation of this recent *fatwā* by a member of the IRI, who is also chairman of the board of directors of a bank.

One interesting aspect of the two opinions of Tantawi and the IRI is that they deal exclusively with the relationship between bank depositors and the bank, without addressing the nature of banks' assets.[4] The essence of the *fatwā* is that bank depositors should be viewed as passive investors, and banks should be viewed as their investment agents. The problem of interest on bank deposits is thus reduced to one of permissibility of pre-specifying the "profits" to which depositors are entitled as a percentage of the capital, instead of specification as a percentage of actually realized profits. This constitutes a violation of the classical rules of the silent partnership contracts known as *muḍāraba* or *qirāḍ* (and analogous to the Medieval European *commenda* contract and the Jewish *heter isqa*).

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[1] MacColl (1881).

[2] Pamuk (2000, pp.78-82)

[3] See Mallat (1996) for a discussion of the 1989 *fatwā*. Numerous Islamic writers attacked Tantawi for this *fatwā*, which was dismissed by the Pakistani SharÊ#a a Appellate Court as "the solitary opinion of Dr. Tantawi of Egypt". Numerous personal attacks against Tantawi questioned his knowledge, piety, and incentives. For instance, see Al-Salus (1998, vol.1, pp. 356-410).

[4] Many have noted – correctly – that both opinions were issued during periods when the Egyptian government was worried about lack of savings mobilization. However, this article focuses on the concepts and methods invoked by the opinions' proponents and opponents, rather than the incentives of the two.

Semi-official Egyptian press hailed the *fatwā* as "declaring bank interest licit",[5] even though the authors of the *fatwā* clearly exerted effort in its wording and conceptualization to avoid using the term "interest" (*fā'ida*, pl. *fawā'id*). Supporters of Islamic finance were outraged by the *fatwā* and, despite numerous earlier rejections of its substance, demanded a prompt official rebuttal by the largest possible juristic body. A month later, in January 2003, the Council of the Islamic Jurisprudence Academy (IJA; *Majmaʿ al-Fiqh al-Islamī*) issued a rebuttal, reiterating many of the points its members and numerous other jurists had made to reject the Islamic legitimacy of all forms of bank interest.

Such scholarly/scholastic debates abound in every religious tradition. What is puzzling in this instance, however, is the very nature of the "Islamic finance" that the majority of jurists support as an alternative to the forbidden interest-based financial model. In fact, the IJA arguments correctly illustrate the incoherence of the IRI's *fatwā*, which focuses on the liabilities (deposit) side of banks, and ignores the fact that the bulk of conventional banks' assets (or, in their language, investments) take the form of interest bearing loans, which all jurists – including Tantawi and others at *Al-Azhar* who supported the *fatwā* – denounce as the forbidden *ribā*. On the other hand, the IJA's own position, and that of the majority of jurists who denounce conventional interest-based finance but support contemporary "Islamic" alternative, also seems incoherent upon examination of the practice of Islamic financial institutions on both sides of their balance sheets.

In Sections 2 and 3, I shall provide a brief introduction to various notions of "Islamic Law" as they exist today, as well as the common-law nature of Islamic Jurisprudence, thus establishing the possibility of finding a compromise that renders minor modifications of the existing juristic positions coherent. In Sections 4 and 5, I provide translations of the entire Azhar IRI *fatwā*, and large excerpts from the IJA's Council rebuttal, together with discussions of the juristic backgrounds of both opinions. In Section 6, I discuss the ideological roots of contemporary Islamic finance, which continue to shape Muslim views – both for jurists and laypeople – regarding interest and permissible profit. In Section 7, I provide a brief survey of the most prominent Islamic financial instruments, illustrating the incoherence of juristic views that denounce "interest" and maintain that Islamic finance is "interest free". In Section 8, I conclude by proposing a possible compromise between the two extreme views espoused by the IRI *fatwā* and the IJA rebuttal, which would allow for a coherent juristic/financial nexus in Islamic finance.

2. Questions of Authority: A Hierarchy of Islamic Laws

In contemporary Muslim societies, one may speak of a number of different Islamic Laws. The lack of a widely accepted contemporary legal codification based on Islamic jurisprudence makes it difficult to speak with any authority regarding the Islamic permissibility or prohibition of any given transaction. Perversely, it is precisely this legal vacuum that allows many individuals to speak with authority regarding those subjects.

[5] For instance, see "A slap to the face of extremists and peddlers of religion: Finally, bank interest is permissible", in the Egyptian magazine *Rose al-Yusuf*, December 13, 2002, 18-21, and "Now, shall we cancel Islamic banking?", ibid, p. 22.

The source of this authority may be a post to which the speaker was politically appointed, academic credentials sanctioned by a community of scholars, or public support from the "laity".

In officially "Islamized" states, such as Iran, Pakistan and Sudan, a codified variant of Islamic law continues to play a central role in the legitimacy of ruling regimes. In the area of Finance, this issue has been most prominent in Pakistan, which has witnessed in the past two decades a series of banking laws, and Sharīʿa Appellate Court rulings (most recently overruled by the supreme court), all aiming to "eradicate interest". The financial systems in those states are therefore politically mandated to operate on an interest free basis, despite the lack of a coherent demarcation between what is "interest-based" and what is "interest-free". Many of the early innovations in Islamic finance (e.g. alternatives to government bonds) were advanced in those countries. However, the recent growth of Islamic finance has been mostly driven by advances made in Malaysia and the GCC countries, most recently with the assistance of multinational financial behemoths such as Citigroup and HSBC.

Second in the hierarchy is the Islamic Law of Muslim states (e.g. Saudi Arabia, Egypt, Syria, Jordan, etc.), some of which have long declared Islamic Law as their source of legislation. In the area of finance, the Islamic sources of transaction law continue to rely heavily on *Majallat al-Aḥkām al-ʿAdliyyah*, the latest available codification of Islamic Jurisprudence, commissioned and imposed by the Ottoman empire in its final days 1869-1926 C.E., and based on Ḥanafī jurisprudence. Even in countries (e.g. Egypt), where the *Majallah* was never enforced, its general juristic rules continue to be quoted alike by official judges and jurists of all schools. Of course, the actual civil codes in most Muslim countries owe less to Islamic Jurisprudence than to European civil codes: Swiss in the case of the Turkish republic (1926), French in the cases of Egypt (1949), Syria (1949) and Iraq (1953).[6]

Paralleling increased general levels of religiosity in Muslim societies, the late Twentieth Century witnessed a revival of Islamic Law at the official level. The Egyptian Constitution's Article 2, amended in May 1980, stated that all subsequent laws and legislations must be derived from Islamic Law. This constitutional requirement was further strengthened through the following Egyptian Constitutional Court's ruling:[7]

> It is therefore not permitted that a legislative text contradict those rules of *Sharīʿa* whose origin and interpretation are definitive, since these rules are the only ones regarding which new interpretive effort (*ijtihād*) is impossible, as they represent, in Islamic *Sharīʿa*, the supreme principles and fixed foundations that admit neither allegorical interpretation, nor modification. In addition, we should not contemplate that their meaning would change with changes in time and place, from which it follows that they are impermeable to any amendment, and that it is not permitted to go beyond them or change their meaning. The authority of the High Constitutional Court in this regard is limited to safeguarding their implementation and overruling any other legal rule that contradicts them.

[6] Arabi (2001, pp.21,39-42,63-5).
[7] As quoted in Arabi (2001, p.196).

In Saudi Arabia, there have been a number of lawsuits whereby one counterparty refused to pay interest or delay of payment penalties on the basis of the prohibition of *ribā*, sometimes despite the fact that such payments were stipulated in a contract. A number of lawsuits between non-Saudi and Saudi counterparties are currently underway, and revolve precisely around the issue of whether or not payment of interest or late payment penalties is forbidden under Islamic Law.[8]

The revival of manifested (if not real) desire to implement Islamic Law at the official level gave rise to international juristic councils, most notable among which are the following:

- The Institute of Islamic Research (*Majmaʿ Al-Buḥūth Al-Islamiyyah*) at Al-Azhar University, established in Cairo in 1961.
- The Islamic Jurisprudence Institute (*Al-Majmaʿ Al-Fiqhi Al-Islami*) of the Islamic League (*Rabiṭat Al-ʿAlam Al-Islami*), established in Makkah in 1979.
- The Fiqh Institute or Academy (*Majmaʿ Al-Fiqh Al-Islami*) of the Organization of Islamic Conference (OIC: *Munaẓammat Al-Mu'tamar Al-Islami*), established in 1984 with a home in Jeddah, Saudi Arabia. This is currently the most widely cited jurisprudential council, which is comprised of representatives from Islamic member of the OIC.

Members of those institutes are appointed by their governments. Consequently, Islamic Law pronouncements of those institutes inherit some official status.

The Islamic Law pronouncements at the three official levels (Islamized national level, Islamic law within Muslim nations, and international institute level) often contradict one another. For instance, the Malaysian Islamic banking laws allowed for trading in debt (*bayʿ al-dayn*), which allowed them to evolve a relatively sophisticated "Islamic Money Market". In contrast, the Muslim states' and Jurisprudence Institutes' jurists (mostly from the Arab world and Pakistan) rejected this type of debt trading. Consequently, Malaysian Islamic finance has recently moved in the direction of increased conservatism (if only in formalistic terms), to assist in building an international Islamic money market for its bonds and other financial instruments. Simultaneously, innovations in the Arab world permitted so called *ijāra* and *salam ṣukūk* (bonds), which can serve as an alternative basis for Islamic money market.

Another level of complexity affecting Islamic finance is added by a fourth category of "Islamic Law": that endorsed by popular jurists, whose influence has increased exponentially in recent years through satellite television channels and internet forums. Those jurists tend to rely heavily on the medieval literature in Islamic jurisprudence, with frequent quotations of Canonical Texts to support those earlier opinions. Their following accept the maxim that "Islam is for all times and places",[9] thus giving those medieval

[8] Since those cases are still underway, it is premature to disclose their counterparties or document the arguments used by each side.

[9] With sufficient flexibility in the definition of what constitutes Islam, this statement would be rendered tautological. With sufficient rigidity, it would be rendered patently false. Champions of this slogan span the entire spectrum of degrees of flexibility between those two extremes. In the arena of Islamic finance, that allows for profitable market segmentation according to the degree of conservatism of its adherents. El-

texts, which were mostly driven by the contemporary concerns of their authors, current authoritativeness.[10] Some of the "fathers" of Islamic Economics, the ideological dogma that gave rise to contemporary Islamic Finance, belonged to this class of popular religious figures who had a significant following during their lifetimes, and continued to have a stronger following posthumously (e.g. Abu al-Aʿla al-Mawdudi, Baqir al-Sadr, and Sayyid Qutb, who also – perhaps unsurprisingly – fathered contemporary political Islam in their respective countries and beyond). Contemporary popular jurists (e.g. Taqi Usmani in Pakistan, with close ties to Mawdudi's *Jamat-i-Islami*, Yusuf al-Qaradawi in Qatar, with close ties to Qutb's Muslim Brotherhood in his native Egypt, etc.) mostly follow in the footsteps of those founders of the populist view of "Islam as a way of life", and its manifestation in Islamic finance.

A fifth and final category of Islamic Law is responsible for the existence and growth of Islamic finance: that of amateur jurists. Despite the clergy-like status granted popular jurists, and in certain circles also granted official and semi-official jurists, Islamic Jurisprudence does require the questioner to seek knowledge directly. While large portions of the Muslim populations of various countries are willing to accept the opinions of a particular jurist or institute blindly, a growing number of laypeople seek to educate themselves about the various opinions and their basis in classical Islamic Law. This is facilitated in large part by the affordable availability of printed copies of the classical texts, as well as the availability of such texts in electronic form on various media. In fact, many of the "scholars" serving on "Sharīʿa boards" of various providers of Islamic financial instruments have no formal degrees in Islamic Transactions Law. Rather, they are mostly self-educated laypeople and generalist jurists who have helped facilitate a difficult discourse between bankers on the one hand, and religious Law texts on the other. The bridges now built by those amateur jurists may assist formally trained Islamic Legal scholars to understand the basics of contemporary finance, and help them to build the much needed transition from classical books of jurisprudence to a contemporary, relevant and coherent jurisprudence of financial transactions.[11] Unfortunately, as the recent episode discussed in this article illustrates, the rhetoric used by amateur and professional jurists continues to obscure the relevant facts, and keep that much desired goal beyond reach.

3. Islamic Transactions Law as Common Law

Even though contemporary writings on Islamic transactions law always cite Canonical Texts (The Qurʾān and the Prophetic Sunnah) to support their opinions, Islamic

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Gamal (2002) provides a formal model of this phenomenon, which also explains some of the paradoxical behavior of jurists discussed in this article.

[10] Claims, like those of the Egyptian Constitutional Court quoted above, professing that the Canonical Texts are immutable and applicable for all time can easily morph into claims that classical interpretations of those texts, or majority interpretations thereof, are equally authoritative. See Abou El Fadl (2001) for an analysis of the contemporary problems of authoritativeness in Islamic discourse.

[11] The current context of an Islamic law and finance, which evolves through *fatāwa* instead of formal codification, is particularly problematic for the desired coherence of opinions. It is the nature of a *fatwā* that it is given for a specific time and specific set of circumstances, and therefore a collection of *fatāwa* is highly unlikely to exhibit any degree of internal consistency and coherence.

transactions law is at heart a common-law system. Indeed, contemporary developments in Islamic finance owe more to contemporary juristic understandings of the Canonical Texts, and previous juristic analyses, than they owe to the Canon itself, by the admission of the very jurists working in this field:[12]

> It must be understood that when we claim that Islam has a satisfactory solution for every problem emerging in any situation in all times to come, we do not mean that the Holy Quran and Sunnah of the Holy Prophet or the rulings of Islamic scholars provide a specific answer to each and every minute detail of our socio-economic life. What we mean is that the Holy Quran and the Holy Sunnah of the Prophet have laid down the broad principles in the light of which the scholars of every time have deduced specific answers to the new situations arising in their age. Therefore, in order to reach a definite answer about a new situation the scholars of Shariah have to play a very important role. They have to analyze every question in light of the principles laid down by the Holy Quran and Sunnah as well as in the light of the standards set by earlier jurists enumerated in the books of Islamic jurisprudence. This exercise is called *Istinbat* or *Ijtihad*... [T]he ongoing process of *Istinbat* keeps injecting new ideas, concepts and rulings into the heritage of Islamic jurisprudence...

In other words, Islamic jurists, by "injecting new ideas, concepts and rulings" make law in a manner very similar to common law judges presiding over cases that lack common-law precedents. In addition, it is worthwhile noting that the process of *ijtihād* discussed above is restricted mainly to reasoning by analogy (juristic, rather than logical), following the rules of Islamic Legal Theory as established by Al-Shāfiʿī and widely followed in all juristic schools:[13]

> 1323- He said: What is analogy (*qiyās*)? Is it the same as *ijtihād*, or are they two separate notions?
> 1324- I (Al-Shāfiʿī) said: they are synonyms.
> 1325- He said: So what is in common between them?
> 1326- I said: Everything which was revealed for the Muslims contains either a binding command, or a legal proof upon which future rulings can be based to uphold Truth and Justice. Thus, if revelation gave us a direct ruling [regarding the matter at hand], Muslims must follow that ruling; and if revelation did not make a ruling on this specific matter, then a proof for the just and true ruling must be sought via *ijtihād*. And, *ijtihād* is *qiyās*.

This emphasis on precedent and reasoning by juristic analogy gave rise to a body of transactions law that is very similar to contemporary common law traditions:[14]

> In the course of studying Islamic law in its everyday practice I have been increasingly struck with its similarities to the common law form in which I have also been trained in the United States.

[12] Usmani (1998, p.237).
[13] Al-Shafiʿī (1939, p.477).
[14] Rosen (2000, p.39).

Misunderstandings this common law feature of Islamic transactions law has caused significant problems in recently Islamized states:[15]

> ... in Pakistan and Sudan the simple use of Islamic law as an arm of the state has slipped through the fingers of those at the center. The reason, I believe is that these regimes have been trying to apply a common law variant as if it were a civil law system...

Thus, while Islamic jurisprudence has in fact evolved as a common-law system, the rhetoric of opinions utilized by jurists suggests a civil/canon law procedure of interpreting Legal Texts. I shall now illustrate this tension through an analysis of a *fatwā* issued by the Azhar's Islamic Research Institute in December 2002, and the reaction it has elicited. Of particular interest is the fact that both the text of the *fatwā* (and its supporting arguments in other sources) on the one hand, and the rejection by the IJA jurists on the other, focus on the Canonical nature of the Law, even when the application of a particular Text to the practical issue-at-hand is very far-fetched.

4. The Azhar Islamic Research Institute Fatwā (December 2002)

The official *fatwā* (in Arabic) is reproduced in the Appendix, since the author has received many requests by email from readers who wished to read the Arabic original and study its specific wording. A translation of its full text follows:[16]

> Office of the Grand Imam, Rector of *Al-Azhar*
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> **Investing funds with banks that pre-specify profits**
>
> Dr. Hasan Abbas Zaki, Chairman of the Board of Directors of the Arab Banking Corporation, sent a letter dated 22/10/2002 to H.E. the Grand Imam Dr. Muhammad Sayyid Tantawi, Rector of Al-Azhar. Its text follows:
>
> "H.E. Dr. Muhammad Sayyid Tantawi,
> Rector of *Al-Azhar*:
> Greetings and prayers for Peace, Mercy, and blessings of Allah
> Customers of the International Arab Banking Corporation forward their funds and savings to the Bank to use and invest them in its permissible dealings, in exchange for profit distributions that are pre-determined, and the distribution times are likewise agreed-upon with the customer. We respectfully ask you for the [Islamic] legal status of this dealing.
> [Signature]
>
> He has also attached a sample documentation of the dealing between an investor and the bank. The sample reads as follows:

[15] ibid, p.64.
[16] I am grateful to Dr. Anas Al-Zarqa for sharing a scanned version of the official *fatwā*.

The International Arab Banking Corp.
Bank

Date / / 2000 A.D.
Mr/________________ Account number ____________
Kind Greetings

This is to inform you that your account with us, in the amount of L.E. 100,000 (only one hundred thousand Egyptian Pounds) has been renewed. For the period 1/1/2002 until 31/12/2002 A.D.

Rate of return 10% resulting in a return of	L.E. 10,000
Total of deposit + return on distribution date	L.E.110,000
New amount, including return as of 31/12/2002	L.E.110,000

His Excellency, the Grand Imam, has forwarded the letter and its attachment for consideration by the Council of the Islamic Research Institute in its subsequent session.

The Council met on Thursday, 25 Shaʿban, 1423 A.H., corresponding to 31 October, 2002 A.D., at which time the above mentioned subject was presented. After the members' discussions and analysis, the Council determined that investing funds in banks that pre-specify profits is permissible under Islamic Law, and there is no harm therein.

Due to the special importance of this topic for the public, who wish to know the Islamic Legal ruling regarding investing their funds with banks that pre-specify profits (as shown by their numerous questions in this matter), the Secretariat General of the Islamic Research Institute decided to prepare an official *fatwā*, supported by the Islamic Legal proofs and a summary of the Institute members' statements. This should give the public a clear understanding of the issue, thus giving them confidence in the opinion.

The General Secretariat presented the full *fatwā* text to the Islamic Research Institute Council during its session on Thursday, 23 Ramadan 1423, corresponding to 28 November 2002 A.D. Following the reading of the *fatwā*, and noting members' comments on its text, they approved it.

This is the text of the *fatwā*

Those who deal with the International Arab Banking Corporation Bank – or any other bank – forward their funds and savings to the bank as an agent who invests the funds on their behalf in its permissible dealings, in exchange for a profit distribution that is pre-determined, and at distribution times that are mutually agreed-upon …

This dealing, in this form, is permissible, without any doubt of impermissibility. This follows from the fact that no Canonical Text in the Book of Allah or the

Prophetic Sunnah forbids this type of transaction within which profits or returns are pre-specified, as long as the transaction is concluded with mutual consent.

Allah, transcendent is He, said: "Oh people of faith, do not devour your properties among yourselves unjustly, the exception being trade conducted by mutual consent…" (Al-Nisā':29)

The verse means: Oh people with true faith, it is not permissible for you, and unseemly, that any of you devour the wealth of another in impermissible ways (e.g. theft, usurpation, or usury, and other forbidden means). In contrast, you are permitted to exchange benefits through dealings conducted by mutual consent, provided that no forbidden transaction is thus made permissible or vice versa. This applies regardless of whether the mutual consent is established verbally, in written form, or in any other form that indicates mutual agreement and acceptance.

There is no doubt that mutual agreement on pre-specified profits is Legally and logically permissible, so that each party will know his rights.

It is well known that banks only pre-specify profits or returns based on precise studies of international and domestic markets, and economic conditions in the society. In addition, returns are customized for each specific transaction type, given its average profitability.

Moreover, it is well known that pre-specified profits vary from time period to another. For instance, investment certificates initially specified a return of 4%, which increased subsequently to more than 15%, now returning to near 10%.

The parties that specify those changing rates of returns are required to obey the regulations issued by the relevant government agencies.

This pre-specification of profits is beneficial, especially in this age, when deviations from truth and fair dealing have become rampant. Thus, pre-specification of profits provides benefits both to the providers of funds, as well as to the banks that invest those funds.

It is beneficial to the provider of funds since it allows him to know his rights without any uncertainty. Thus, he may arrange the affairs of his life accordingly.

It is also beneficial to those who manage those banks, since the pre-specification of profits gives them the incentive for working hard, since they keep all excess profits above what they promised the provider of funds. This excess profit compensation is justified by their hard work.

It may be said that banks may lose, thus wondering how they can pre-specify profits for the investors.

In reply, we say that if banks lose on one transaction, they win on many others, thus profits can cover losses.

> In addition, if losses are indeed incurred, the dispute will have to be resolved in court.[17]
>
> In summary, pre-specification of profits to those who forward their funds to banks and similar institutions through an investment agency is Legally permissible. There is no doubt regarding the Islamic Legality of this transaction, since it belongs to the general area judged according to benefits, i.e. wherein there are no explicit Texts. In addition, this type of transaction does not belong to the areas of creed and ritual acts of worship, wherein changes and other innovations are not permitted.
>
> Based on the preceding, investing funds with banks that pre-specify profits or returns is Islamically Legal, and there is no harm therein, and Allah knows best,
>
> [signed]
> Rector of *Al-Azhar*
>
> Dr. Muhammad Sayyid Tantawi
> 27 Ramadan 1423 A.H.
> 2 December 2002 A.D.

The second and penultimate paragraphs of the *fatwā* hinted to the common objection to fixing profits in the Islamic silent partnership contract (*muḍāraba*). As we shall see below, jurists often claim that there is a consensus that the principal's profit share must be specified as a percentage of total profits -- rather than a fixed percentage of the capital. The text of the *fatwā* hints at the view that this opinion was only an artifact of the historical thought of Islamic jurists who developed the principle, and does not rely on any direct injunction in Canonical Islamic Texts.

Elsewhere, Tantawi elaborated on the *fatwā*'s justification of fixing the profit share as a percentage of the partnership's capital on moral hazard considerations: [18]

> Non-fixity of profits [as a percentage of capital] in this age of corruption, dishonesty and greed would put the principal under the mercy of the agent investing the funds, be it a bank or otherwise.

In his book, Tantawi also cited similar opinions by highly respected earlier jurists, including Abdul-Wahhab Khallaf[19], Ali Al-Khafif[20], and others.[21] Most notable among those quotations are the following:

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[17] In other words: regardless of whether or not profits are pre-specified, such cases of realized losses will have to be settled in court.
[18] Tantawi (2001, p.131).
[19] ibid., pp. 94-104.
[20] ibid., pp.165-204.
[21] ibid., pp. 204-211.

> 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, *ribā* 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 (*ḫukm*).[22]

> 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.[23]

> 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 *muḏāraba* 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 *muḏāraba* 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".[24]

We now note again that this fatwa is focused on the liabilities side of banking, and even then addresses the issue from the point of view of depositors. Indeed Tantawi (2001) argued that the depositor/bank relationship should neither be viewed as one of depositor/depositary nor one of lender/borrower. Either characterization of the relationship, he admits, would render any interest payment a form of the forbidden *ribā*. In contrast, he argued, savers take their funds to banks to invest on their behalf. Therefore, he argued, the relationship is one of principal/agent in an investment agency, and the juristic problem discussed above is only regarding the permissibility of fixing

[22] Quoted by Tantawi (2001, p.95), attributed to Khallaf, who in turn attributed the quote to Muhammad Abduh's article in *Al-Manār* (#9, 1906, p.332). Similar arguments were made by Rashid Reda, Al-Dawalibi, and Al-Sanhuri, in various forms. Their arguments were based, respectively, on restricting the strict Qur'anic prohibition to post hoc charging of interest, charging interest on consumption (as opposed to production) loans, and charging compound interest. The current opinion of Tantawi is quite different, in that it takes the issue away from one of interest-bearing loans to one of investment with pre-specified profits.
[23] Quoted by Tantawi (2001, p.95-6), and attributed to Khallaf, *Liwā' Al-'Islām* (1951, #4(11)).
[24] Quoted by Tantawi (2001, p.95-6), and attributed to Khallaf, *Liwā' Al-'Islām* (1951, #4(12)).

profits as a percentage of capital in such investment agency. As we shall see shortly, the rebuttal, representing the views of most jurists around the world, insists that the relationship is initially one of deposit. Once the depositary uses the funds deposited therein, classical jurisprudence suggests that the depositary has thus violated the simple safekeeping duties of a fiduciary deposit, and must thus guarantee the funds for the depositor. The deposit contract is one of trust rather than guaranty, i.e. the depositary only guarantees funds against its own negligence and transgression, not unconditionally. Therefore, the classical juristic argument concludes, the contract can no longer be viewed as a deposit, and must be viewed as a loan, the latter being a contract of guaranty. Indeed, Tantawi (2001) spends much of the book arguing that deposits at banks do not fit the classical jurisprudence definition of "deposits" (*wadīʿah*), and rejects their characterization as loans.

5. Rebuttal by the Islamic Fiqh Institute in Qatar (January 2003)

In the conclusions of the Fourteenth Session of *Majlis Majmaʿ Al-Fiqh Al- Islami* in Dūḥa, Qatar, January 11-16, 2003, the Azhar IRI's characterization of dealings with conventional banks as a legitimate investment vehicle was rejected. The following lengthy quotation from the official conclusions of the meeting summarizes the contemporary overwhelming-majority view on conventional banking among jurists:[25]

> **A. Conventional Bank functions:**
>
> Banking laws forbid banks from dealing through profit and loss-sharing investment. Banks receive loans from the public in the form of deposits, and restrict their activities − according to lawyers and economists − to lending and borrowing with interest, thus creating credit through lending deposited funds with interest.
>
> **B. Conventional Bank relationship with depositors:**
>
> The religious-law (*sharʿi*) and secular-law characterizations 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.
>
> **C. Conventional Bank interest is a form of forbidden *ribā***

[25] *Qarārāt wa Tawṣiyāt Al-Dawrah Al-Rabiʿat ʿAshr li-Majlis Al-Fiqh Al- Islami* (Decisions and conclusions of the fourteenth session of the Islamic Jurisprudence Council), Decision #133 (7/14), pp. 20-24.

> Banks' interest on deposits is a form of *ribā* that is forbidden in the Qurʾan and Sunna, as previous decisions and *fatāwā* have concurred since the second meeting of the Islamic Research Institute in Cairo, Muharram 1385 A.H., May 1965 A.D., attended by eighty-five of the greatest Muslim scholars and representatives of thirty-five Islamic countries. The first decision of that conference stated: "Interest on any type of loan is forbidden *ribā*". The same decision was affirmed by later decisions of numerous conferences, including:
> ... [List of conferences and Institute opinions prohibiting bank interest]
>
> **D. Pre-specification of investment profits in amount, or as a percentage of the invested capital**
>
> It is universally accepted that interest-bearing loans differ from legal silent partnership (*muḍāraba*). In loans, the borrower is entitled to profits and bears all losses. In contrast, *muḍāraba* is a partnership in profits, and the principal bears financial losses if they occur, as per the Prophet's (P) saying: "*Al-kharāju bi-l-ḍamān*) profits are justified for the one bearing liability for losses" (narrated by Ahmad and the authors of *Sunan*, with a valid chain of narration)...
>
> 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 Qudamah wrote in *Al-Mughni* (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.
>
> The council urges Muslims, as it declares this unanimous decision, to earn money only through permissible means, and to avoid forbidden sources of income in obedience to Allah (S) and his Messenger (P).

This opinion contains four main arguments against the correctness and the relevance of the IRI *fatwā*, and it would be helpful at this point to summarize those arguments:

1. The *fatwā* refers to banks with permissible investments, but banks are forbidden from investing in any instruments other than interest-bearing loans and financial instruments.

2. Characterizing the depositor/bank relationship as one of investment agency is incorrect. The correct classical characterization is one of lender/borrower.

3. There is a consensus that all forms of bank interest are forbidden *ribā*.

4. Even if the relationship was to be considered one of investment agency (silent partnership), pre-specification of profits in such partnerships must be in terms of a percentage of total profits, not a percentage of capital. The moral hazard

argument is ignored, and the principle of return being justified by risk is highlighted.

The first point is clearly valid. One can easily see that by focusing on the liabilities side of banking, the IRI *fatwā*, and its predecessors, ignored the nature of bank assets, which are legally interest-bearing loans, forbidden by all jurists as a form of *ribā.* This renders the IRI *fatwā* not relevant for conventional banks, the investments of which are not deemed permissible.

On the other hand, as we shall see in Section 7, and noted in the third opening quote by Saleh Kamel, Islamic financial institutions have managed to find permissible alternatives to bank loans that are functionally equivalent to interest-bearing loans. On the other hand, "depositors" at those institutions are not entitled to any rate of return, and "investment account" holders are exposed to unnecessary levels of moral hazard and adverse selection due to their exposure to losses. This problem has been solved practically in Islamic finance by selling shares in closed-end "*Murābaḥa* funds", which are essentially securitized claims to the stream of fixed payments of principal plus interest (mark-up), in which the only real source of risk is default risk, as in the case of interest-bearing loans. While this solution provides some of the banking functions of pooling the resources of many savers and diversifying the portfolio by financing multiple projects/purchases, it falls well short of addressing all the prudential regulation standards to which banks are subjected.

We shall return to those issues in Section 8, arguing that a combination of the lax opinions Islamic bank jurists have adopted and the IRI opinion on pre-specification of profits as a percentage of capital can provide a coherent framework for Islamic financial intermediation, and reduce current agency costs in the industry. Before turning to that issue, however, we need to review briefly the background and practice of Islamic finance.

6. Ideological Roots of Islamic Finance: Islamic Economics

Islamic finance was conceived in the 1970s as the brain-child of contemporary "Islamic Economics". The latter began to take shape in the 1950s, based primarily on the writings of Muhammad Iqbal and Abu Al-Aʿla Al-Maududi in the India and Pakistan, and Baqir Al-Sadr and Sayyid Qutb in the Arab world.[26] Timur Kuran noted the importance for that field of the concurrent emergence of a political independence movement, with accompanying emphasis on national and religious identities.[27] He argued convincingly that the ideology that gave rise to Islamic Economics, and – he argued – sustains it to this day, is socio-politically (and not scientifically) based on religion.

Over the course of three decades, Islamic Economics morphed into a sub-field of economics as suggested by contemporary leaders of the field:

[26] See the survey of Haneef (1995) for summaries of the early Islamic Economics writers' views and contributions to the field.
[27] Kuran (1995, 1996, 1997).

> Islamic economics ... has the advantage of benefiting from the tools of analysis developed by conventional economics. These tools along with a consistent world-view for both microeconomics and macroeconomics, and empirical data about the extent of deviation from [normative] goal realization may help…[28]

> [Islamic Economics] is the Muslim thinkers' response to the economic challenges of their times. In this endeavor they were aided by the Qur'an and the Sunnah as well as by reason and experience. [29]

Therefore, while "Islamic Economics" was initially conceived as an independent Islamic social science, it quickly lost that emphasis on independence and identity:

> [Islamic economics] failed to escape the centripetal pull of western economic thought, and has in many regards been caught in the intellectual web of the very system it set out to replace. [30]

Similar to that convergence of Islamic Economics with mainstream economic thought, Islamic finance quickly turned to mimicking the (interest-based) conventional finance it set out to replace. However, writings in Islamic Jurisprudence, Islamic Economics, and Islamic finance continued to assert that conventional interest based banking and finance is the forbidden *ribā*. Thus, popular Islamic discourse continues to refer to conventional banks as "*ribawi* banks",[31] and to assert that the Islamic alternative is "interest free". It is this divergence between the fiction of Islamic finance and its facts that gave rise to the paradox addressed in this article.

At its inception, Islamic banking was theoretically conceived on the principle of profit and loss sharing through two-tier silent partnership (*muḍāraba*), in place of the *ribawi* deposit/loan-based commercial banking. Providers of funds would be viewed as principals/silent-partners extending their funds to an Islamic bank, which is viewed as an entrepreneur or investment agent. The Islamic bank would thus invest funds on the principals' behalf, in exchange for a share in profits. If investments were not profitable, the bank/agent would lose only its effort, and the principals would bear all financial losses. In turn, the bank would invest the funds by acting as a principal in other investment agency contracts (silent partnerships), with its various customers.

This two-tier profit-sharing form of financial intermediation, potentially supplemented with legal stratagems (*hiyal*) to fix profits as a percentage of capital, was hardly new. Indeed, Avram Udovich has dubbed this practice in medieval Mediterranean trade as

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[28] Chapra (1996, pp.53-4).
[29] M.N. Siddiqi in Ahmad and Awan (1992, p.69).
[30] Nasr (1991, p.388).
[31] One of the earliest distinctions between conventional banks and their perceived Islamic counterparts was Sadr's *Al-Bank Al-la-Ribawi fi Al-Islam* (*The No-Riba Bank in Islam*, 1977), which followed on the heels of his 1961 publication of *Iqtisaduna* (*Our Economics*, 1961).. The early vision of Islamic banking is best illustrated in Siddiqi (1983, 1983a). The earliest writing on this view of Islamic banking is currently attributed to Uzair (1955), c.f. Vogel and Hayes (1996, p.130), Lewis and Algaoud (2001, p.40).

"bankers without banks".[32] The basic profit-sharing principle also bears very close resemblance to the Jewish legal concept of the *heter isqa* (partnership clause) contract, a silent partnership profit-sharing arrangement, to avoid the Biblical prohibition of *ribit*.[33] Like *heter isqa* documents,[34] Islamic bank documents avoid the use of any terms that may result in a charge of violating the prohibition of *ribā*, such as "loan", "interest", "borrower", "lender", etc.[35]

Later refinements of the *heter isqa* allowed profits received by the principal to be a fixed percentage of the partnership's capital, as a solution to the inherent moral hazard problem in silent partnerships. The fundamental argument underlying the December 2002 ruling of Al-Azhar's Islamic Research Institute revolves around the same issue of fixing the silent-partner's profit percentage to solve moral hazard problems. However, we have seen that this attempt to justify interest as a fixed profit rate in an investment relationship has met violent opposition by the Islamic juristic community. The paradox, however, is that this same juristic community has been supportive of an Islamic finance movement that is at best an economically inefficient replication of the conventional finance for which it purports to be a substitute.

7. The Paradox of Contemporary Islamic Finance

Scanning any news article on Islamic Finance, one is almost certain to read that "Muslims are forbidden to pay or receive interest".[36] On the other hand, one need not read much further before facing our paradox. For instance, in a recent *Fortune* magazine article dealing with Islamic auto-finance, the author cited a case study wherein a customer of one Islamic bank chose a car that he wished to purchase on credit, and negotiated its price with the dealer. The customer then asked the Islamic bank to purchase the car at its cash price from the dealer, and then to sell it to him on credit. The credit prices charged by Islamic banks include a pre-specified profit-margin (mark-up) that parallels the market interest-rates for auto-loans with similar characteristics. Reflecting on the transaction, the author of the article exclaimed:[37]

> The result looked a lot like interest, and some argue that murabaha is simply a thinly veiled version of it; the markup [bank's name] charges is very close to the prevailing interest rate. But bank officials argue that God is in the details.

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[32] Udovich (1981).

[33] Most commonly understood within Jewish Law as a prohibition of charging interest on loans to fellow-Jews, c.f. Stern (1982).

[34] Often spelled *heter iska* (with a *k*), for sample forms, see: http://www.jlaw.com/Forms/iska_d.html.

[35] In an interesting *fatwā* for HSBC Amana Finance in New York, two active Islamic bank jurists signed a document that stated that such language ("borrower", "interest", "loan", etc.) was only mandated in HSBC documents by the state of New York, but – essentially – that the contract was interest-free nonetheless.

[36] Interestingly, Qur'anic translations historically translated "*ribā*" as "usury". With the advent of Islamic economics, translations substituted "interest" for "usury". See El-Gamal (2000) for a full discussion of the similarities and differences between the three concepts.

[37] Useem, J. "Banking on Allah", *Fortune*, June 10, 2002. The cynical "God is in the details" is particularly distasteful in light of those formalistic "details" documented later in this section.

The bulk of Islamic finance operations today involve this type of mark-up credit sales, or more sophisticated lease-to-purchase transactions with similar built-in mark-ups designated as rent. Moreover, as we shall see shortly, the mark-up is explicitly based on a market interest rate such as LIBOR, and jurists have defended this practice on the basis of LIBOR serving "only as a benchmark".

The same paradox can also be observed at the macroeconomic level. In June 2002, Bank Negara Malaysia issued $500 million in "Global *Sukūk*",[38] described as an "Islamic Treasury Bond", which operates on "Islamic interest-free financial and investment principles". The current Islamic bond market in Malaysia is estimated to be worth $20 billion.[39] In August 2002, the Bahrain Monetary Agency announced its third issuance of Islamic leasing *Ṣukūk* worth $80 million, and paying a "four percent annual profit".[40] Thus, such news articles paradoxically report on "interest free" financial instruments, and shortly proceeded to report their interest rate. Calling such instruments "interest free" is particularly problematic in light of attached government guarantees. Bahrain's "Islamic Leasing *Ṣukūk*" issue of $80 million in August 2002, which was 2.1 times over-subscribed, was declared (along with earlier issues in September 2001) to be "directly and unconditionally guaranteed by the government".[41]

Islamic banks have kept to the generally accepted principle of profit and loss sharing on their liabilities-side, at least in principle if not in practice. Thus, depositors in Islamic banks do not earn any return on their deposits, while those holding "investment accounts" earn a profit-share and are exposed to potential losses. In practice, Islamic banks use special accounts to smooth the profit distribution to their investment account holders (thus keeping profit distributions close to market interest rates).[42]

On the assets-side, Islamic banks avoid the risks of profit and loss sharing investment arrangements by engaging mostly in cost-plus trading and lease financing. As noted by Saleh Kamel in the opening quotes, both forms of finance mimic conventional bank financing to a very high degree, with few technical details. One of the most active jurists in the area of Islamic finance is Justice Muhammad Taqi Usmani, who has served on

[38] The singular of *ṣukūk* is *ṣakk*, meaning a written documentation of financial liability. Most historians maintain that the Arabic term *ṣakk* is the root of the French/English 'cheque' or 'check', c.f. ibn Manzur's *Lisan al-Arab* (1992), Qal`aji(1996). Indeed, one of the most popular English-Arabic dictionaries translates the English 'bond' as both *sanad* (the conventional Arabic word for government and corporate bonds, plural: *sanadat*), and *ṣakk*, c.f. Ba`albaki and Ba`albaki (1998). Earlier attempts to provide bond alternatives through jurist-approved issues profit-sharing alternatives in Jordan and Turkey were limited in success and scope due to the principal not being guaranteed, c.f. Vogel and Hayes (1998, pp.169-170, 191-193). Pakistani 'participation certificates' and earlier experiments in Malaysia with 'government investment certificates', in which the principal was guaranteed, failed to gain acceptance among jurists in other countries, esp. in the Arab world. See El-Gamal (1999) for a full discussion of Islamic alternatives to government bonds, and strategies for involving Islamic banks in open market operations.

[39] *Arab News*, June 9, 2002.

[40] Reuters, August 13, 2002

[41] c.f. Reuters, August 28, 2002

[42] C.f. AAOIFI (2000a, 2000b, 2000c).

numerous Sharīʿa boards of Islamic banks. He summarized the general reluctant toleration attitude towards cost-plus financing as follows:[43]

> Murabahah is not a mode of financing in its origin. It is a simple sale on cost-plus basis. However, after adding the concept of deferred payment, it has been devised to be used as a mode of financing only in cases where the client intends to purchase a commodity. Therefore, it should neither be taken as an ideal Islamic mode of financing, nor a universal instrument for all sorts of financing. It should be taken as a transitory step towards the ideal Islamic system of financing based on musharakah or mudarabah. Otherwise its use should be restricted to areas where musharakah or mudarabah cannot work.

Nostalgic references to the ideological roots of Islamic finance aside, Usmani explains the formalist-legalistic nature of the distinction between interest-based loan-financing and cost-plus based financing as practiced by Islamic banks in the following passage:[44]

> If in cases of genuine need, the financier appoints the client his agent to purchase the commodity on his behalf, his different capacities (i.e. as agent and as ultimate purchaser) should be clearly distinguished. As an agent, he is a trustee...
> After he purchases the commodity in his capacity as agent, he must inform the financier that, in fulfilling his obligation as his agent, he has taken delivery of the purchased commodity and now he extends his offer to purchase it from him. When, in response to this offer, the financier conveys his acceptance to this offer, the sale will be deemed to be complete, and the risk of the property will be passed on to the client as purchaser. At this point he will become a debtor...

Justice Usmani's conclusion of this long passage highlights the unease with which this mode of financing has been widely adopted in Islamic finance:

> It should be noted with care that *murabahah* is a border-line transaction and a slight departure from the prescribed procedure makes it step ion the prohibited are of interest-based financing. Therefore this transaction must be carried out with due diligence and no requirement of Shari`ah should be taken lightly.

However, the same formulaic development is maintained in the official *murābaḥa* formula endorsed by the Accounting and Auditing Organization for Islamic Financial Institutions.[45] If Islamic bank jurists declare certain transactions to be permissible, it seems at best naïve, and at worst disingenuous, to call for the restriction of use of those instruments. A more realistic approach would be to conclude that Islamic products differ from their conventional counterparts in the same manner that Kosher water bottles differ from most other bottled water: certification by certain religious figures.

Coming under attack as mere window-dressing for conventional bank interest-based financing, Islamic banks shifted some of their assets from *murābaḥa* (cost-plus sale) modes to *ijāra* (lease) financing modes. In cost-plus sale financing, the fixed rate of return earned

[43] Usmani (1998, pp.151-2).
[44] Ibid, p. 152.
[45] AAOIFI (2000a, b, c).

by the Islamic bank was designated as a mark-up of the deferred price over the spot price of the financed property. In lease financing, the fixed rate of return is designated as rental payment for the underlying property. Hence, the property must have a legitimate usufruct, which is an easy to meet requirement for financing real estate, auto, and equipment purchases.[46] Needless to say, the rent component of lease financing is used by Islamic banks to mimic market interest rates. Again, the formalist-legalistic approach to this issue is evident from Justice Usmani's discussion of the matter:[47]

> ... these contracts use the interest rate of a particular country (like LIBOR) as a benchmark for determining the periodical increase in the rent.
>
> This arrangement has been criticized on two grounds:
>
> The first objection raised against it is that, by subjecting the rental payments to the rate of interest, the transaction is rendered akin to an interest based financing. This objection can be overcome by saying that, as fully discussed in the case of murabahah, the rate of interest is used as a benchmark only.

In both Islamic cost-plus and lease financing, the distinction jurists make is that the Islamic bank bears the direct risk associated with the financed property: throughout the life of the lease in the case of leasing, and during the period between purchasing the property and re-selling it to the customer in the case of cost-plus financing. Thus, jurists can accommodate (with unease) those fixed rate-of-return forms of finance, while maintaining the prohibition of conventional interest-based financing. Traditionally, their argument rested on two main distinctions:

1. There must exist a physical asset that is the subject of financing. In the case of lease financing, that asset must be sufficiently durable, and must have legitimate usufruct. Thus, many jurists affirmed in the past that Islamic finance is "asset-based" or that it is based on "money for assets" exchanges, as opposed to the supposed "money for money" nature of conventional finance.

2. The financier must bear risks associated with this asset for some period of time, thus justifying a rate of return on the basis of this risk exposure.

The first distinction is easily rendered vacuous. Some Islamic banks (e.g. Kuwait Finance House) have long engaged in the transaction known as *tawarruq* (lit: monetization) to accommodate their large customers' liquidity needs. They would identify a commodity (asset) with stable historical price behavior, buy the commodity from a third party at its spot price, sell it to the customer at a higher deferred price, and the customer then sells the commodity to the third party (or any other) at the spot price. The net result is that the customer receives the needed cash immediately, and has a debt to pay the larger deferred price to the bank. This three-way exchange bypasses the two-party sale re-sale procedure

[46] Surprisingly, however, education loan alternatives were recently proposed on the basis of lease financing, "education" being seen as the usufruct of a college or university. It is not yet clear how well this innovation will be received.
[47] Ibid., pp. 169-70.

known as bay al-`ina, and forbidden explicitly in a Prophetic tradition. *Tawarruq* is permitted by a minority opinion in the Ḥanbalī school. Recently, National Commercial Bank in Saudi Arabia, and Al-Shamil bank in Bahrain, have offered *tawarruq*-based consumer loans under the names of *al-taysīr* and *tamwīl al-shāmil*, respectively. Consequently, the "asset based" distinction seems inconsequential.

The second distinction listed above addresses the risk or guaranty/*ḍamān* issue that played a central role in classical jurisprudence. It does so in a trivializing and highly formulaic manner.[48] Consider for instance a cost-plus financing arrangement wherein the customer is appointed as purchasing agent of the Islamic bank, as described by Usmani. The actual time-period during which the bank is exposed to ownership-risk can be made infinitesimal, while the fixed rate of return it earns for extending credit to the customer is set equal to the market-determined price of credit (interest rate). In this regard, the credit-risk component of the financing is clearly infinitely more important than the formulaic risk borne between the time the agent purchases the item on behalf of the bank and the time he sells it to himself, also on behalf of the bank. However, as we have seen from Usmani's statement above, it is the latter risk that is deemed to distinguish between Islamic and conventional finance.

Starting in the late 1980s, Islamic finance moved beyond the simple Islamic banking model of paying investment account holders a variable profit or loss share (which nonetheless tended to mimic market interest on deposits). This procedure does remain the core-business of Islamic banks, but deposit alternatives have ceased to be an important source of funds for the latter. With the advent of securitization technology in the mid 1980s, market-oriented Islamic finance models were quickly devised. Devising what one may call "*Sharīʿa* arbitrage" methods along the lines of the regulatory arbitrage methods of contemporary structured finance, "Islamic financial engineers" marketed securitized products to *Sharīʿa* scholars as legitimate investments in physical assets, which thus entitle owners to collect rent. Simultaneously, the actual legal structures employed by this movement in structured Islamic finance had to meet local (e.g. U.S. or U.K.) regulators' requirements, which often render the security a mere claim to the accounts receivable. Thus, a bankruptcy-remote "Special Purpose Vehicle" (SPV) or "Entity" (SPE) is created, and Islamic investors buy shares thereof. The SPV may be a subsidiary of a conventional bank, receiving a credit line thereof, for which it pays conventional interest. The role of the SPV is to insulate the Muslim investor, through a single degree of separation, from the interest bearing debt transaction. Islamic finance jurists have concluded that what matters for juristic purposes is the relationship between Muslim investors and the financial provider, regardless of the source of funds, and the provider's other transactions. Needless to say, this has created a lucrative structured Islamic finance industry, wherein *Sharīʿa* arbitrage profits can be collected in various forms by banks, lawyers, and jurists.

[48] Despite thousands of references to the legal maxim "*al-kharāju bi-l-ḍamān*" (return must be justified by guaranty/risk) in the Islamic Jurisprudence and Finance literature, I have yet to read a single satisfactory explanation of what it means. If we include credit risk in the formula, then the statement is merely tautological, saying basically that there is no arbitrage opportunity (or free lunch). If we insist that *ḍamān* must refer to commodity or asset risk, then we are inviting the legal stratagems described in this section. In either case, it is difficult to understand the substance of this oft quoted maxim.

The "one degree of separation" principle of contemporary Islamic finance allows conventional banks and others to use conventional banking funds, provide "Islamic" products that cost the same as conventional ones, and in some cases securitize the latter to provide investors with a fixed rate of return alternative to banking interest. The ability of conventional financial providers to market essentially conventional products as Islamic was summarized very clearly in a "frequently asked questions" release from HSBC following its launching of an Islamic vehicle finance program:[49]

> 2. How can a conventional (interest-based) bank offer a Shariah compliant financial service?
>
> **Answer:** Islamic law (Shariah) does not require that the seller of a product be Muslim, or that its other services be Shariah compliant as well. This is the considered opinion of our Shariah Supervisory Committee.
>
> Conventional banks charge and pay interest, and the HSBC Group, or which we are a part, is a conventional bank. But we are also a customer-driven institution, and we provide Shariah compliant products to serve a genuine financial need among Muslims. Of course, our Shariah compliant products are available for Muslims and non-Muslims alike.
>
> 3. Since HSBC is an interest-based bank, what would be an acceptable source of funding for HSBC MEFCO? Are you going to mix conventional and Shariah compliant funds?
>
> **Answer:** The Shariah (Islamic law) does not require that the seller of a product be Muslim or that his/her own income be halal (permitted). We will therefore, initially use funds from conventional sources to finance Amanah Vehicle Finance.
>
> Muslims may be understandably concerned about mixing conventional funds with Shariah compliant funds. It is important, however, to understand where the two can and cannot meet according to Islamic law (Shariah). To open an account or invest money, funds must be segregated from interest-based funds so that returns are halal (permitted). To buy something or obtain financing, however, funds do not have to be from a halal source. The relationship with the seller must be in line with the Shariah-the seller's relationship with other parties, however, is not the purchaser's responsibility. This is the opinion of HSBC's Shariah Supervisory Committee.
>
> 4. How do you calculate the price of Amanah Vehicle Finance? Are the payments similar to a conventional vehicle loan? If so, is this acceptable under the Shariah (Islamic law)?
>
> **Answer:** HSBC MEFCO determines the rates on Amanah Vehicle Finance using a fixed payment scheme that is competitive with conventional vehicle loans

[49] Published in the Islamic Finance section of www.zawya.com on February 03, 2003. This constitutes a very clear, though perhaps unintentional, admission of the "one degree of separation" principle as I described it in the previous paragraphs.

> available in the market. As determined by our Shariah Supervisory Committee, Shariah permits using the conventional market as a benchmark.
>
> According to the Shariah, the profit rate in a Murabahah transaction can be set at any value agreed between the buyer and seller. Also under Murabahah financing, HSBC MEFCO is acting as a vehicle seller and not a moneylender. There is no particular reason why a vehicle financed Islamically should be any more or less expensive than a vehicle financed using a conventional vehicle loan. The criterion for acceptability by the Shariah is that the transaction be compliant with Shariah, regardless of the price of the good or how that price is determined.

Together with the one degree of separation principle, *Sharīʿa* arbitrage requires a dual characterization of simple debt-finance structures to jurists and regulators to obtain simultaneously: (i) approval from regulators that the proposed transaction falls within the broad categories of conventional finance, and (ii) approval from jurists and the Muslim public that the proposed transaction is Islamic in nature, in the sense of being similar to medieval transactions described in classical books of Islamic jurisprudence. In this regard, the U.S. Treasury Department's Office of the Controller of the Currency (which regulates all national banks in the U.S.) issued two letters of understanding on *murābaḥa* and *ijāra* financing as practiced by Islamic banks (attention was initially paid to those contracts as practiced by United Bank of Kuwait in New York):[50]

> **OCC #867, 1999:** ... lending takes many forms ... Murabaha financing proposals are functionally equivalent to, or a logical outgrowth of secured real estate lending and inventory and equipment financing, activities that are part of the business of banking.
>
> **OCC #806, 1997:** Today, banks structure leases so that they are equivalent to lending secured by private property ... a lease that has the economic attributes of a loan is within the business of banking. ... Here it is clear that United Bank of Kuwait's net lease is functionally equivalent to a financing transaction in which the Branch occupies the position of a secured lender ...

This allows "Islamic finance" providers to replace interest bearing loans on the asset side of their balance sheets with *murābaḥa* or *ijāra* -based contracts, which can be conjoined with other investment or commission to manufacture contracts. On the liabilities side, Islamic finance providers need to replace paying interest on loans and money market instruments with an Islamic securitization fiction. For instance, jurists profess that there is a fundamental difference between an Islamic securitized lease and an interest-bearing instrument by viewing the investors' interest as (direct?) ownership of the underlying asset:[51]

> It should be remembered, however, that the [lease] certificate must represent ownership of an undivided part of the asset with all its rights and obligations. Misunderstanding this basic concept, some quarters tried to issue *Ijarah* certificates representing the holder's right to claim certain amount of rental only

[50] Both documents are available on www.occ.treas.gov. Simply search for "murabaha" or "ijrara".
[51] Usmani (1998, p.179).

> without assigning him any kind of ownership in the asset... This type of securitization is not allowed in Shari`ah…

In Islamic equity investment, a similar fiction is required for the marketing of Islamic mutual funds. Jurists have long maintained that ownership of common stocks in companies that engage in permissible activities is permissible, provided that the companies do not earn or pay substantial amounts of interest. This led to the creation of a universe of listed company stocks that qualify as "*Sharīʿa* compliant". The screening criteria imposed by the Dow Jones Islamic Index have gained near-universal acceptance. Those screening criteria exclude companies whose primary business is unacceptable (so-called sin industries such as breweries, tobacco, etc., as well as a number of other industries deemed un-Islamic), companies with a debt-to-market-capitalization ratios greater than one-third, and companies with accounts receivable exceeding 45% of total assets.[52] In addition many screens put a limit on the interest-income to total income, usually in the 5 to 10 percent range. Islamic mutual funds usually start with the Islamic equity universe created by the DJII or similar set of screens, and then apply standard portfolio management criteria for creating mutual funds. Similar to their understanding of securitized leases, surprisingly many jurists who are active in this field continue to view ownership of shares in such mutual funds as direct ownership of the underlying assets (common shares), and allow ownership thereof based on that understanding.[53]

In summary, Islamic finance has thrived based on *Sharīʿa* arbitrage, by creating an environment wherein jurists on the industry's payroll denounce conventional financial products as subjects of the severest prohibition in Islam, while facilitating the creation of twin-products. This is accomplished through the two factors allowing for *Sharīʿa* arbitrage: (i) the one degree of separation principle, and (ii) juristic fiction about the nature of structured Islamic finance products. In the meantime, traditional Islamic banks are forced to continue to deal with their investment account holders on a profit/loss sharing basis.

8. Concluding Remarks: A Compromise Resolution?

We now return to the main topic of this paper: interest. We have seen that the fatwa of the IRI does not in fact apply to conventional banks, as long as the latter continue to accumulate assets in the form of interest-bearing loans. On the other hand, the principal

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[52] Those screens change occasionally. For instance, the debt ratio screen was originally constructed as a debts-to-assets ratio not exceeding 33%. The criterion was later changed to using market capitalization in the denominator. For the latest screening criteria, see www.djindexes.com/jsp/imiMethod.jsp.

[53] Needless to say, the entire point of securitization is that the security is a share in the SPV or Mutual Fund and not the underlying assets themselves (be they real estate properties or publicly traded company shares). I am not aware of any cases brought to court regarding the legitimacy of claims of pass-through-ownership of underlying assets. In the meantime, it seems clear that Islamic debt instruments (e.g. lease-backed securities sold to Fannie Mae and Freddie Mac, as well as those placed privately in GCC countries by specialized Islamic finance outfits) are virtually identical to interest-bearing debt instruments. In theory, there may be some differences in risk allocation between Islamic instruments and their conventional counterparts. However, until a few cases are brought to court to test possible discrepancies between the juristic and the regulatory understandings of Islamic finance instruments, it is difficult to say whether or not those differences are substantive.

point of the fatwa – allowing for pre-specified profits as a percentage of capital in investment agency contracts – can in fact apply rather naturally to the framework of Islamic banking.

We have seen in the previous section that Islamic banks invest most of their funds in fixed-interest cost-plus and lease financing, thus mimicking the assets side of conventional banks almost perfectly, as admitted in the opening quote by Saleh Kamel. On the other hand, Islamic banks have not been able to mimic conventional banks' interest-bearing deposit accounts, insisting instead on the profit/loss sharing formula for investment account holders. This has led to the securitization-based *Sharīʿa* arbitrage opportunities discussed in the previous section, which allow Islamic financial institutions to pay disguised interest to providers of funds who are characterized as buyers of lease certificates, *murābaḥa* fund shares, etc. Needless to say, this is an inefficient solution, due to additional legal costs as well as the fees paid to Islamic bank jurists, that ultimately produces approximations of conventional products at a higher cost.

In the meantime, investment account holders in Islamic banks are exposed to significantly higher agency costs than their counterparts (depositors) in conventional banks. This is the case since Islamic bank investment account holders lack the protection of being primary claimants as creditors of the bank, and lack protection from moral hazard through representation on the board of directors of the bank. The latter represent the relatively wealthier owners of the Islamic bank, who in essence own a call option on the bank's portfolio. In this regard, investment account holders absorb some of the portfolio risk, and give the bank owners, and the bank management that answers to them, an incentive to take even greater risks. This is clearly an unacceptable situation from a prudential viewpoint that aims to protect the interests of small savers who are seeking a low-risk low-return means of investing their funds.

It appears from Sections 4 and 5 that the argument against pre-specification of profits as a percentage of the capital in an acceptable investment agency is weaker than objections to other aspects of the *fatwā*, which as I have argued relate more to its relevancy to conventional banks. The quotations in Tantawi (2001) suggest that there is no textual basis for the classical consensus on profit and loss sharing rules. Indeed, some have argued for a basis in Canonical Texts, but that point was not raised in the IJA rebuttal.[54] The latter relied on the claimed consensus in Ibn Qudamah's *Al-Mughni*, which in turn is based on the view that pre-specifying profits to the principal in an investment agency may result in legal disputation, since realized profits may be less than the specified amount,

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[54] On the website www.islamonline.net, Yusuf al-Qaradawi cited Prophetic traditions on the authority of Rafi` ibn Khadij that report a Prophetic prohibition of pre-assignment of part of leased land's produce for the owner. Al-Qaradawi argued by analogy that silent partnership profits should not be fixed as a percentage of the capital. I requested a meeting at Al-Azhar in January 2003, in the Saleh Kamel Center for Islamic Economics, at which the Center Director Dr. M. Abdulhalim Umar was present, as well as Dr. Mabid Al-Jarhi (director of IRTI at the Islamic Development Bank), Dr. M. Umar al-Zubair, and two faculty from Al-Azhar: Dr. Abdullah al-Najjar and Dr. M. Ra'fat Uthman. The latter two provided a debate over the authenticity and relevance of the Prophetic tradition to this case, but that discussion was too technical to report in this article. A summary of the discussion is provided in a powerpoint presentation on the Azhar fatwa on my website.

and may indeed be negative, in which case fixed profit distribution would violate the rules of investment. Tantawi and the scholars he quoted argue against that view by invoking the law of large numbers that can be utilized through diversification, and meticulous feasibility studies by banks to ensure that specified profits (interest) can be paid with a very high probability. If the agent claims that losses were realized, Tantawi argued in the text of the *fatwā*, the matter would be settled in courts in any case. On the other hand, the argument goes, in the vast majority of instances, the larger concern pertains to moral hazard – the agent's incentive not to disclose the true profitability of his investments.

Some of the quoted authors in Tantawi (2001) also argued that there is no need to classify contemporary transactions under the classical/medieval headings. Thus, even if the consensus on *muḍāraba* is to be upheld, the current contract may be given a different name. Claims that this would amount to a legal stratagem to circumvent a prohibition may be tolerated from an industry that holds itself to the highest standards of avoiding such stratagems. However, we have seen quite clearly that Islamic banks have no trouble replicating interest-bearing debt instruments on the asset side of their balance sheets. Moreover, as we have seen in the HSBC auto finance example, when interest-bearing deposits from Islamic banks are insufficient to finance interest (LIBOR)-based debt instruments on the asset side, banks are allowed to use interest-bearing sources that are not marketed as Islamic. It would seem only natural *prima facie* for the Islamic finance industry to accept a variant of the IRI *fatwā* as a first step towards mimicking conventional banks' liabilities in the same manner that they have mimicked the latter's assets. In contrast, the vehement rejection with which the IRI *fatwā* was greeted has only contributed further to the incoherence of Islamic bank jurists' statements, and makes the paradox of contemporary Islamic Law and Finance all the more impenetrable.

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Appendix: **Official *Azhar Fatwā***

بسم الله الرحمن الرحيم

الأزهر
مكتب الإمام الأكبر
شيخ الأزهر

(استثمار الأموال فى البنوك التى تحدد الربح مقدما)

أرسل الأستاذ الدكتور / حسن عباس زكى رئيس مجلس إدارة بنك الشركة المصرفية العربية الدولية كتابا بتاريخ ٢٢/١٠/٢٠٠٢ إلى فضيلة الإمام الأكبر الدكتور / محمد سيد طنطاوى شيخ الأزهر وهذا نصه :

" حضرة صاحب الفضيلة الدكتور / محمد سيد طنطاوى

ـ شيخ الجامع الأزهر

السلام عليكم ورحمة الله وبركاته وبعد :

فإن عملاء بنك الشركة المصرفية العربية الدولية يقدمون أموالهم ومدخراتهم للبنك الذى يستخدمها ويستثمرها فى معاملاته المشروعة مقابل ربح يصرف لهم ويحدد مقدما فى مدد يتفق مع العميل عليها ، ونرجو الافاده عن الحكم الشرعى لهذه المعاملة .

رئيس مجلس الادارة

توقيع

(دكتور / حسن عباس زكى)

وقد ارفق سيادته مع الخطاب نموذجا لمستند التعامل الذى يتم بين المستثمر والبنك ــ ونص هذا النموذج كالأتى :

بسم الله الرحمن الرحيـم

الأزهر
مكتب الإمام الأكبر
شيخ الأزهر
....

بنــك
الشركة المصرفية العربية الدولية

التاريخ / / ٢٠٠٠م

السيد / ________________ حساب رقم ________________

تحية طيبة وبعد:

نحيط سيادتكم علما بانه قد تم تجديد رصيدكم طرفنا وقدره ١٠٠٠٠٠جم (فقط مائه الف جنيهً مصري لاغير) عن الفترة من ٢٠٠٢/١/١ حتى ٢٠٠٢/١٢/٣١م

بعائد ١٠% سنويا والعائد قدره	١٠٠٠٠ جنيها مصريا
اجمالى المبلغ + العائد فى تاريخ الاستحقاق	١١٠٠٠٠ جنيها مصريا
المبلغ الجديد مضافا اليه العائد حتى ٢٠٠٢/١٢/٣١	١١٠٠٠٠ جنيها مصريا

وقد أحـال فضيلة الإمـام الأكبر الكتاب ومرفقه للعرض على مجلس مجمع البحوث الإسلامية فى جلسته القادمة ،

وعقد المجلس جلسته في يوم الخميس ٢٥ من شعبان سنة ١٤٢٣ هـ الموافق ٣١ من أكتوبر سنة ٢٠٠٢م وعُرض عليه الموضوع المذكور وبعد مناقشات الأعضاء ودراستهم قـرر المجلس: الموافقة علـى أن استثمار الأموال فى البنوك التى تحدد الربح مقدما حلال شرعا ولا بأس به ،

ولما لهذا الموضوع من أهميه خاصة لدى المواطنين الذين يريدون معرفة الحكم الشرعى فى استثمار أموالهم لدى البنوك التى تحدد الربح

(٢)

بسم الله الرحمن الرحيم

الأزهر
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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 شبهة 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)

بسم الله الرحمن الرحيم

الأزهر
مكتب الإمام الأكبر
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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)

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 ٠

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 ٠

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 ٠

ومع ذلك فإنه فى حالة حدوث خسارة فإن الأمر مرده إلى القضاء ٠

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 ٠

وبناء على ما سبق فإن استثمار الأموال لدى البنوك التى تحدد الربح أو العائد مقدما حلال شرعا ولا بأس به والله أعلم ،

شيخ الأزهر

محمد طنطاوى

(دكتور / محمد سيد طنطاوى)

٢٧ من رمضان ١٤٢٣هـ

٢ من ديسمبر ٢٠٠٢م