

**REVIEW OF FATWAS ISSUED DURING THE ALBARAKA BANKING GROUP
SYMPOSIUMS (THE FIRST COLLECTION)**

Prepared by

Al-Shaikh Mohamad Al Mukhtar Al-Sulami

29th Al-Baraka Symposium on Islamic Economics

Hilton, Jeddah

6 - 7 Ramadan 1429 H.D (according to Ummu al-Qura), corresponding to 6 - 7

September 2008

Islamic banks in non-Muslim countries

Sheikh Salih Abdullah Kamel, may Allah reward him, has established a commendable path through this annual symposium. This symposium is a distinctive contribution in assisting the Islamic banks to successfully penetrate the financial market. Historically, the Al-Baraka Symposium on Islamic Economics was inaugurated in Madinah Al-Munawwarah in the year 1401H, followed by Jeddah and its suburbs Durratul 'Aruus and Makkah. This is the 29th year of its establishment.

These symposiums have seen the contributions of the great scholars from the field of *Shari'ah* and economics. These symposiums have been of great help to the bankers, in terms of expanding their activities and at the same time, complying with the principles of the *Shari'ah*.

These resolutions that were made by majority of the scholars recognize the situation that the Islamic financial institutions are facing; they are facing many challenges. Apart from trying to harmonize between Islamic and conventional practices, so as to realize a *Shari'ah*-compliant financial system, the players in the Islamic financial system are also facing rejections from most economists and facing a fierce resistance from the market.

As mentioned earlier, the players are also facing the challenge of harmonizing between Islamic and conventional practices, where they would have to develop their own operational models gradually, until the time comes when Islamic financial institutions' way of doing things are distinct from the operational mechanisms of conventional financial institutions. The aforementioned issues were mentioned in the symposiums, as there are conventional practices that do not comply with the *Shari'ah*. Nevertheless, the players can adopt those practices that do not contravene the principles of the *Shari'ah*. With regard to this, the players must continuously improve themselves and evaluate their position in the global Islamic financial system. That is why the 28th Al-Baraka Symposium on Islamic Economics reviewed the resolutions that were passed in the previous symposiums. However, due to several reasons, the resolutions issued cannot be mentioned.

This year, the focus of attention is to review certain *fatwas* that were issued based on exceptions. Did the reality and the current happenings in the world lead to the stability of Islamic economic system which imposes itself within the international banking scene? Did that result in a situation that is in line with mainstream thinking and did the jurists themselves held accountable in this world before they will be held accountable before the Lord of the lords, who descended His *Shari'ah* to be the ruler not ruled, to be followed not to the subordinate? Was the resolutions firm or flexible and do they need to undergo a review process, without the negligence of the scholar about the practical picture on the basis of transactions, according to those resolutions?

I was requested by Dr. Abdul Sattar Abu Ghuddah to review the following resolutions:

Decision (1-6): Guaranteeing capital deposited as part of the requirements of the law

Situation – Islamic banks are established in non-Muslim countries, where according to the local laws, a bank must guarantee the capital that is deposited with it.

So, what is the Islamic ruling on this?

The resolution is divided into sections, as follows:

1. It is permissible for the Al-Baraka Banking Group to establish Islamic banking activities in London (United Kingdom), and adhere to the laws and system of the United Kingdom.

This section is not jurisprudentially scrutinized. It was done in a rush without going through a thorough thinking process.

In my view, the methodology requires an explanation on:

1. The ruling on migrating to a non-Muslim country;
2. The ruling regarding someone who embraces Islam while remaining in his present locality, which is not Islamic;
3. The need to establish Islamic banks;
4. The local laws (e.g. as per the above) that contravene the *Shari'ah*;
5. Is this interest (*maslahah*, not *riba*) illusory or falls under a benefit that is recognized by Islam (*maslahah muktabaroh*)?

For 1 and 2, indeed, according to the texts before me, the scholars of the Maliki School of Thought had carefully studied this issue. And the Mudawwanah (one of the books of the Maliki School of Law) had specified a book on trading in an enemy country. As far as I know, this was not discussed in the books of the other Schools of Thought.

Imam Malik said in the Madawwanah, "I told Ibn Qosim, 'Did Malik dislike someone who conducts business in an enemy state? He said, 'Yes, Malik dislikes it strongly, he says: He should not go to countries where the rulings of infidelity prevail.'" (Mudawwanah, vol. 7, p. 253).

The text of Mudawwanah is based on a certain general principle that is the consequences of faith is to enter under the rules of Islamic law and being a 'total Muslim', i.e. one that realizes the necessary commitments of a Muslim (But nay, by thy Lord, they will not believe (in truth) until they make thee judge of what is in dispute between them and find within themselves no dislike of that which thou decidest, and submit with full submission; An-Nisaa, verse 65).

Ibn Rusd says, "Malik was strongly disgusted on the notion of going to an enemy country to trade by land and by air. According to Ibn Qosim while he was asked, he once said, "Allah has provided for every soul an appointed time that will be reached by it (time of death), and a livelihood. The rulings are based on things which I could not see (one cannot predict the time of death and the amount of sustenance that will be gained). The basis of this is that Allah makes migration from a non-Muslim country to a Muslim country compulsory, with the goal of enabling Muslims to practice Islam in its entirety. Allah says, "... As to those who believed, but did not emigrate, you owe no duty of protection to them until they emigrate..." (Al-Anfaal, verse 72). And He said, "Lo! as for those whom the angels take (in death) while they wrong themselves, (the angels) will ask: In what were ye engaged ? They will say: We were oppressed in the land. (The angels) will say: Was not Allah's earth spacious that ye could have migrated therein ? As for such, their habitation will be hell, an evil journey's end; Except the feeble among men, and the women, and the children, who are unable to devise a plan and are not shown a way. As for such, it may be that Allah will pardon them. Allah is ever Clement, Forgiving (an-Nisaa, verse 97 - 99).

After Ibn Rusd had explained the rulings regarding the emigration or *hijrah* to Medinah before the opening of Makkah, he made it clear that *hijrah* still remains obligatory till the Day of Judgement. He said, "It is unanimously agreed that whoever that embraces Islam from the land of infidelity, he/she must not stay there, as the rulings of the unbelievers will be made compulsory on him/her. It is better for him/her to emigrate to where Muslims live, where the rulings of Islam are practised. The Prophet s.a.w. said, "I am free from any Muslim living together with the Mushrikin (unbelievers). However, with this migration, is not forbidden for the emigrant to return to his country, provided that his country has been transformed into a country of iman and Islam, as it was forbidden upon the Companions of the Prophet s.a.w. to return to Mekkah which was preserved as a virtue for them."

Then, he further says, "If an evidence is found in the Quran, Sunnah and the Muslims have unanimously agreed upon it, that whoever accepts Islam while he/she is in enemy's territory (in a country that disbelieves Islam) he/she must emigrate to a country of believers, then he should not stay among the unbelievers and live together with them, so that he will not be subjected to their rulings in trading or other things. Imam Malik dislikes it when someone stays in a country where those who follow the path of Allah and His Rasul are mocked. How could one stay in a country where Allah is disbelieved and the idols are worshipped besides Him? No one can tolerate this, except a Muslim with a weak faith."

He further says, "It is not allowed for any Muslim to enter a country of *shirk* for the purpose of trading or other than for *jihad* (sacrifice of the Muslim). If he enters it with other intentions willingly, i.e. not under duress, then doing so decreases his *shahadah* and his leadership. (Al-Mukkadimmah wal Mummahidat, Vol. 2, page 151/54).

Ar-Rajajih based his statement on Ibn Rusd's stance. He starts with a summary, which goes thus, "There are two types of buying and selling with the unbelievers;

one are with unbelievers who are the enemies of the Muslims; second are *Ahl dhimmah* (those who are secured under Muslim territory with an agreement). For the first type, the transactions may be done in their territory or in the territory of the Muslims. All Schools of Thought agreed that the former is not allowed.” Then, Ar-Rajajih summarized the statement of Ibn Rushd and based his judgement on it (Manahij Tahsil, Vol. 7, page 75).

The statement mentioned by Ibn Rushd was extracted by Abu Dawood: Reported Jarir Ibn Abdullah he said, “The Prophet s.a.w. sent a troop of army to Khath’am, some people among them quickly hold to *sujuud*. But eventually, they were all killed. He said, when the Prophet s.a.w. was informed about this, he ordered for them to be paid half blood money. Then, he said, ‘I am free from any Muslim residing between the *mushrikin*. They said, ‘Oh you Prophet of Allah, why? He replied, ‘Their fire is hidden cannot be seen. (Mukhtasar Munthir, Vol. 3, page 436).

Tirmizi also extracted it with the same word and ascription. He commented that Imam Bukhari said that this hadith is *mursal* (a hadith reported by the *tabi'i*). It was reported by Ismaeel bin Abi Khaleed from Qais bin Abu Hazeem from the Prophet s.a.w. Munthir accepted it as *irsal* (a hadith reported by the *tabi'i*). An-Nasai also extracted it as being *mursal* (sunan Nasai bi sharhi Suyuti wa Sindi, Vol. 8, page 76).

Abu Sulayman Al-Khattabi mentioned three meanings for the hadith. Firstly, “their Fire is hidden cannot be seen”. The second one that he mentioned is, “Allah has separated between the countries of Islam and Kufr. So, it is not allowed for a Muslim to stay with the *kuffar* in their countries. So, if they kindle the fire, he (the Muslim that remains with the unbelievers) will also be with them where he sees it. The same meaning very close to this was also mentioned by Suyuuti, according to Nihayah.

Then, Abu Sulayman said, “This denotes that it is disliked/unfavourable for a Muslim to enter Dar Harb (enemy’s land) for trading and staying there for more than four months (Vol. 3, page 437).

The aforementioned proof indicates clearly that it is impermissible for a Muslim to stay in the land where Islam has no authority. However, of course it does not mention about the ruling on opening a bank. This *fiqh* is related to the situation that the Islamic world found itself in. Surely, it actualizes the independence of the Islamic world and realizes unity and boosts the power of Muslims.

And I summarized it, after looking at the facts and the Quranic texts, I would like to mention here what the great scholar of Islam, Ibn ‘Ashoor said regarding the meaning of the verse in surah an-Nisaa, “Indeed, the analogical deduction regarding the ruling of this verse will open up a view for the *mujtahidin* concerning the rulings on the obligation to leave a country where **Mukmin is being troubled to practice his religion**, these rulings are contained by six cases.

Case 1: If a Muslim lives in a country where he is disturbed in the course of practising his faith and compelled to *kufr*, **and he is able to get away from the situation**, then the ruling on this person is similar to the Muslims whom the verse was intended. For example, the Muslims migrated from Spain when the Christians forced them to Christianity. They left their wealth and homes behind for the safety of their lives. A few of them even perished on the way.

Case 2: If a Muslim is not disturbed in the course of practising his faith, but is susceptible to afflictions to himself or to his properties; susceptible to being killed or his properties confiscated, then, in this case, this person has exposed himself to harm and **this is indisputably impermissible**. This is what is termed as staying in the *balad harb*, i.e. **enemy’s land**.

Case 3: A Muslim is in a country where the non-Muslims are the rulers. However, those rulers do not prohibit the Muslims from practising their faith. Furthermore, their lives, properties and honour are also safeguarded. Nevertheless, by being in that country, the Muslims are subjected to the rulings of those Non-Muslim rulers. Nowadays, this situation is akin to someone residing in Europe, where the majority are Christians. Regarding this, Imam Malik clearly said that staying in this kind of environment is strongly disgusted **because the rulings of those non-Muslims will apply on that person**. This is also the clear statement of Mudawwanah, in the chapter of trading to the land of *harb*. And this is the interpretation of Malik's statement by the scholars of Qairawan, as it is in Risalah. The statement of Lakhami, Ibn Muhriz and Abdul Haqq are also consistent with it. Sahnun, Ibn Habeeb, Abdul Hameed, Sohiq and Maziri interpreted it as being tantamount to prohibition.

Case 4: The *kuffar* occupies a Muslim country and rule the Muslims by force. However, they do not disturb the Muslims with respect to the practice of Islam and do not seize their properties. In addition, the Muslims are allowed to practise Islamic law, as the case was in Bulgaria when Roger Normanda occupied the country. It also happened in Spain when a tyrant ruler among the people of Damascus conquered the country, with the stipulation that he would respect the citizens' religion. In that particular situation, most of the citizens of that country stayed and among them were scholars, who were judges.

Case 5: Non-Muslims have absolute power and authority over the Islamic countries, where the Muslim rulers are allowed to continue to rule, i.e. the rulers will also be chosen among the Muslims. In addition, their religion and religious rites will be respected. The only thing is that in this case, with their consensus, the Muslims are under the authority of the non-Muslims. This is what is called *himayah* (protection); *wisayah*; (guardianship); *intidaab* (mandate) in the past two centuries.

Case 6: A Muslim lives in the country where abominable actions and heresies are too rampant, and there are many rulings that run contrary to Islam. However, they are not forced to do something that contravenes the *Shari'ah*. In such a situation, a Muslim can only try to reform the said country verbally, and not by way of concrete actions (refer to the hadith on the levels of faith, i.e. action, then verbal and finally, by way of intention). Malik was reported to have said that it is better for that person to leave that country, as was mentioned by Ibn Qosim. However, in Qairawan, during the days of Banu 'Abiid, there is no evidence that the scholars of those days called on people to leave the country. Even scholars like Muhammad Ibn Abu Zaid remained in that country. This same occurred in Egypt, i.e. in the period of the Fatimis.

Other than the above six, there are many other cases that allow Muslims to stay in their countries. These cases characterize the stages in the Islamic civilization. Indeed, the stay of the Muslims in their countries has most greatest advantage for Islamic confederation, provided that they will not be troubled of their religion (at-Tahrir wa Tanwir vol 5 p. 178/180).

Thus, Muslims should continue to reside in a particular country, except when the environment in that country prevents him from practising Islam.

Being consistent and in line with reality

A person who ponders over the situation of Muslims nowadays and their situation in the previous centuries will not deny the present. He would rather look into the subject matter meticulously and consider the reality, so that the prestige of the Muslims would be brought forth and their full potential would be realized, without neglecting the responsibility of spreading Islam worldwide.

First: Those juristic points of view pronounced by the jurists was made during the time when the Islamic world was venerated, powerful and not in need (generally) of the non-Islamic countries, with its riches, sciences, and its level of civilization. This is what made the *faqih* (jurist) say that only a person with weak faith will deal with non-Islamic countries, as said by Ibn Rushd.

Second: The situation of the world today has changed. Eventhough it has not reached the zenith of perfection, there are many international humanitarian organizations that would ensure that the rights of Muslims are safeguarded, even if they are in non-Islamic countries. Rather, they have facilitated Muslims to practice his religion and to carry out what his creed makes compulsory on him to do, all these have been mandatorily respected by the world treaty and the internal laws.

Third: The verse of Surah Al-Anfal, as it was pointed to by the hadith (no *hijrah* after the opening (of Makkah)) is a verse directed to the Mukminin before the opening (of Makkah). It summons them to join Rasullullah s.a.w. in Medinah, in order to bolster the distinguished group of Mukminin whom Allah has first given the priority to Islam and as Allah pointed it out in the Honorable Quran. This is a support for this religion. The Prophet s.a.w. did not permit any one of those people to return to Makkah until after the conquest.

However, regarding the verse of Surah An-Nisaa, the global system does not permit someone to move freely between countries, without a known complicated process for a limited period. So, for instance, he who embraces Islam in Holland cannot migrate to an Islamic country. If he enters any Islamic country and overstays, he will be forced to leave, that is if a punishment has not been descended on him.

Fourth: Indeed, the Quran consists of general principles that can never change. These principles are the rules of Allah for Its creatures and it is the task of human beings to practise Islam. Allah the Highest said, "It is He Who has made the earth

manageable for you, so traverse through its tracts and enjoy of the Sustenance which He furnishes, but unto Him is the resurrection (Al-Mulk: verse 16).

The above verse is a permission from the Lord of the Earth to His creatures to move onto the Earth that which He made tractable as the balky beast lowers itself for its rider to ride it to anywhere he wishes. This verse is general in nature. It includes all the places on earth where mankind can thrive and actualize the *khilafah*. This verse does not restrict traveling to places of the same religion, as he is not facing hardship to practise his religion, and his honour, property and rights are not compromised. So, based on this principle, I prefer the view that the righteous Mukmin can go anywhere, so far he is safe with his religion, property and honour, and he is summoned to travel on all the surface of earth, not a mere movement, but, it is a movement that brings along the concept of good khilafah that is considered by Lord, the Owner of the great Throne in the creation of mankind, and commissioned them with it, so that they can benefit from what Allah has created (and eat from His sustenance) (He is the One who creates for you all things on the earth) (Surah Baqarah: verse 29).

The hadith that was reported, “I am free from any Muslim who lives together with the Mushrikin.” It has been said by us that the hadith is *mursal* (a hadith narrated by the *tabi'i*). The meaning of the hadith, according to the story that was mentioned in it is that a Muslim army was sent to an enemy country. There, the Muslim army encountered a group of Muslims that have been staying in that country, i.e. among the unbelievers. Consequently, in the heat of battle, the local Muslims were killed by the army, although during the battle, the local Muslims prostrated to show that they are of the same faith as the soldiers. The army commander justified his actions by saying that anyone can prostrate; even non-Muslims can pretend to prostrate; it is not the sign of faith. So, in this case, the local Muslims were mistakenly killed, as their faith was not known to the army.

It is known that if the ruler or his deputy did a mistake, he will be held responsible to pay the blood money for the mistake done. The Prophet s.a.w. informed that he is free from the blood of those that continue to mingle with the unbelievers and is subsequently killed in the battle with the unbelievers of whom they stayed with. There is no indication in the hadith that that person has left the religion of Islam to stay with the unbelievers. If Allah and His Rasul disowned certain people, it is because of their weak faith that made them stay in non-Islamic countries, as in the word of Allah the Highest, “And an announcement from Allah and His Messenger, to the people on the day of the Great Pilgrimage, that Allah and His Messenger dissolve (treaty) obligations with the Pagans (Surat At-Tauba: verse 3)

Fifth: The level of knowledge and the economic status of the Islamic world today compel Muslims to go beyond the borders of the Islamic world. If Muslims remains isolated from the world that has is far more advanced, in terms of scientific knowledge and technology, Muslims will lag behind. So, Muslims must acquire the science and technology from the non-Muslim world. If they do not do it, they would not have the capability to innovate and market their products effectively. In relation to this, many Muslims have had to migrate due to lack of employment opportunities in their country. They are forced to migrate to secure a source of sustenance that is not available in their country. Most of them support themselves and their relatives that they left behind. Furthermore, the income earned overseas contributes to the budget of their country. Thus, there are people from every country of the Islamic world that are compelled to stay in non-Islamic countries, either for the short-run or long-run, with the purpose being knowledge acquisition , medical treatment, trading, working and others.

Sixth: Indeed, Allah obligated a general continuous obligation, that is for the Muslims to propagate Islam to mankind. During the past, circumstances prevented Muslims from doing this. They strived in the path of religious freedom in the world and they did not compel anyone to enter into Islam.

If we look at the history of the propagation of Islam, we would notice that Islam spread to many countries by the virtue of determination and the character of the Muslim merchants. In terms of Muslim population, the biggest country today is Indonesia. Islam was conveyed to Indonesia with the virtue of Muslim merchants who stayed there and did business with the inhabitants. Due to their character, Allah assisted them to guide Indonesia, Malaysia and Burma, and those countries became Islamic countries.

Islam was also propagated peacefully in China, Thailand and India. As another example, in the Korean War, the participation of Muslims Turkish army personnel in South Korea made it possible for Islam to expand into the Korean Peninsular. The Muslims' unity augmented the presence of Islam there. Thereafter, most of the commanders in the South Korean army got excited with Islam and promised to spread it. Furthermore, Islam has become the second or third religion in many European countries and in America. Some of those who embraced Islam have even been elevated to positions of leadership, and command an influence in organizations within the society.

Seventh: The obligation of the Muslims' solidarity among themselves makes it necessary to help their brothers preserve the five necessities in these countries. They can also safeguard the religion by inviting scholars to the country, so that the scholars would help in their quest for knowledge and assist in the propagation of Islam, and protection of wealth by purifying it from usury and from unlawful dealings. And help in the process of establishing Islamic banks and enable Muslims to deal with lawful things in saving their monies and transferring them; this is a perfect necessary way to preserve the money.

Eighth: Some of the minor rulings that were imposed in the non-Islamic countries, which are not deemed acceptable by the Muslim jurists must be solved one by one.

For example, the issue of guaranteeing the capital in an investment venture, whereby the investment manager is the trustee. However, he cannot be the trustee and the guarantor at the same time, if losses are not due to his transgression and negligence. This issue can be overcome by convincing the authority that this investment is a partnership between the bank and the investor, or to call upon the investors to create a cooperative fund between them that will act as a safety net against losses.

However, I do not see the analogy between cooperative investment and cooperative employee, because the analogical deduction here is between two things that are not the same. The only similarity is the word 'cooperative'. It is important to note that a cooperative employee is entitled to receive his wages (**guaranteed**) regardless of whether his actions led to profit or loss. However, cooperative investment is a speculative activity, in which losses are possible, notwithstanding the fact that the investment manager tried his best to realize a profit. Secondly, the employee is just that; he is just an 'employee' of the investment vehicle. So, he does not have the full information on the performance of the investment company, i.e. whether it is making a profit or loss. Hence, guaranteeing the cooperative employee cannot be done.

Ninth: Indeed, the Islamic world should focus on the immigrants from non-Islamic countries, so that those immigrants can be trained on Islamic behavior of integrity, truthfulness in dealing, trustworthiness, how to give advice, and keeping promises and being punctual. This is so that the immigrant will be instilled with the value that the quest of life does not only concern the acquisition of sustenance alone, but also the attainment of spiritual success. One must remember that Allah takes care of His righteous servants, by giving them love and casts the feeling of admiration in the hearts of His creatures.

Acceptance of shares as mortgage for the shareholders in a *riba*-based bank (11/7)

Money does not become *haram* just because it is deposited into an unlawful entity. According to the word of Allah, the Exalted, “If you repent, your principal money (capital) is yours, you should not oppress and you would not be oppressed.” (Al-Baqarah: verse 279). Eventhough the money is used usuriously, the money will remain *halal*, in contrast to the status of the consequential activities arising from the utilization of the money, which is *haram*. For this reason, I legalize the *fatwa*. I do not see any flaw in it for specific circumstances.

The use of the expression ‘interest’ as an alternative to ‘profit’ or ‘returns’ (6/2)

I paused while reading the text in the paragraph. In a situation where the activities of a financial institution are not revealed, does the term ‘interest’ carry a negative connotation?

If it has a negative indication, how would the owner of the account benefit from altering the term ‘**interest**’ to ‘**profit**’?

On the other hand, in Islamic jurisprudence, there is a ruling on the prohibition of being in a place that resembles a bar, i.e. liquor is consumed and etc., even if the drinks served are lawful. What I see is that priority has been given to the like of these *fatwa* upon the precise rulings regarding the connection of prohibition and imaginary negativities.

Indeed, imaginary *haram* cannot be converted into something that is *halal* and vice versa. As an illustration, the people of Makkah used copper bowls to drink zamzam water. At the same time, copper bowls are also commonly used by some people to consume liquor. So, the similarity here is the utensil used. Hence, can we then say the status of zamzam water is changed from *halal* to *haram* just because of the

utensil used? Of course not. When Allah made liquor *haram*, He said it is filth of the work of Satan. He also said regarding the water, “He sends down from the sky water to cleanse you with it.”

The matter is connected with the distinguished concept of usury that is correlated with time and the increase in the amount of money. If this does not happen (time-value correlation), then there is no way to pass a ruling that the transaction is usurious. That is why I issued this *fatwa*. Unless if the specialists in this field think that this *fatwa* needs some modification due to certain aspects that I have overlooked, my *fatwa* remains.

Buying the shares of companies that sometimes deal with *riba*-based banks (lending and borrowing) (6/5)

There is an answer for this, which is obviously not consistent with the view of the majority:

Legalizing the participation in these companies with the intention to reform the companies, with the end game of Islamizing they way they conduct their business, provided that the core business of the companies are lawful. This ruling does not include a reasonable time frame for the execution the aforementioned intention. Doing so would mean that the goal of Islamizing the companies would not be achieved at all.

It is a must to tell the shareholders that they need to do away with the forbidden aspects of unlawful transactions for the benefit of the public (*maslahah ‘ammah*). All kinds of usurious interest must also be avoided, including transactions that are based on interest-based loans. Furthermore, the profit generated from those transactions must not be taken. In this matter, one must remember that for clear cut

elements, the ruling are either it is allowed (*halal* elements) or it is prohibited (*haram* elements). For unclear elements (*syubhah*), it is better to avoid it.

The *fatwa* regarding the legality of buying the shares of companies in non-Islamic countries: it is legal, with one condition: if they have no other alternatives. My comments on this answer are:

1. I am not aware of any ruling by any Muslim jurist, which legalizes the partnership between Muslims and non-Muslims, on the basis that the company will be fully controlled by the non-Muslims;
 2. I am not aware of any ruling by any Muslim jurist, which legalizes the act of investing in companies that deal with unlawful transactions, if there is no other alternative;
 3. This *fatwa* may lead to unfavourable consequences upon the Islamic economic system, because it will open the door for the expatriation of Islamic capital into other countries, while the capitalists (the owner of the capital) do not exert effort to create *Shari'ah*-compliant projects in their countries. So, such a *fatwa* will be used by them to justify their action of investing in non-Islamic countries, where there is no *halal* investment avenue;
 4. This *fatwa* has closed the door for the discussion on the ruling of profits resulting from these shares, i.e. whether they are *halal* or *haram*. So, we cannot conclude by saying that it is legal to do so. We must remember that those who are in charge of the said companies do not consider Islamic rulings in their operations and they do not regard it as being important.
- However, what was found in (j) its detail meaning is unclear to me, so it is impracticable.

The procrastinating debtor

The answer to this issue involves three aspects:

The first one is on the permissibility of making it binding for the procrastinating debtor to pay compensation to the creditor, i.e. for the damage that is caused to the creditor, due to delayed payment. This is based on the Hadith reported by Imam Bukhari, Muslim, Tirmidhi, Nasaai, Ibn Maajah, Imam Ahmad and Shafi'I, "The procrastination of the rich person is injustice and it is authorized for his honour to be relegated and subject him to be punished."

However, I observe that the Hadith does not indicate that the debtor is to be fined for delayed payment. With regard to 'subject him to be punished', there are many types of punishments, e.g. disciplinary action, imprisonment and of course, fine. The inference that the punishment mentioned in the Hadith refers to fine is an act of generalizing the meaning of the Hadith.

Imam al-Baaji gave a comment on the phrase 'his punishment' when some scholars opine that it means 'jail him until he pays his debt'. (al-Muntaqa, Vol.5/26). It seems that Imam al-Baaji has referred to what has been reported by Imam Bukhari, i.e. that the Prophet said, "The procrastination of the rich person is injustice and it is authorized for his honour to be relegated and subject him to be punished." The chain of narration for this Hadith is under the category of good transmission. Imam Sufyaan said that 'his punishment' means that the debtor is to be jailed, in order to punish him as being an unjust person, and the injustice that he has done is prohibited, even if is very small (the comments of al-Qastalaani, vol.223, and Fayd al-Qadir, vol.5/400).

And what is also important is to remind ourselves that one cannot be punished, except through a judge. So, only a judge can decide whether the debtor is to be punished through a fine or through other methods. In this regard, the creditor has no right to impose such a fine upon the debtor.

My opinion on this issue and its proof:

The Islamic banking industry needs funds and calls upon devoted Muslims to support it, in order for it to be strong, developed and used by more and more quarters within the global landscape.

It has been noticed that there are some people who just get themselves involved in the financial system for the sole purpose of generating profit. Some of them take loan from conventional banks, in which the payments to be made are related to time, i.e. positive time preference/time value of money. At the same time, they also procure financing from Islamic banks. With regard to the obligation of servicing the loan/financing, the said parties will religiously service the loans taken from conventional banks, making sure that they pay on time. On the other hand, for financing obtained from Islamic banks, they tend to delay the payments, because they know that there is no penalty for late payment. This attitude leads to the reduction of profit for Islamic banks, as well as causing liquidity problems for the concerned banks. Because of this, the issue of solving this problem has come to our attention.

The question raised is, "Is it lawful to impose penalty on delayed payment, not to get profit but to punish the procrastinating debtors?" The legal opinion put forth is unanimous on fining. However, the views herein are divided into two directions, i.e. the creditor and the general public, in the sense that which party will benefit from the fine?

Based on the second view, by fining the debtor, indeed, it serves as a deterrent to prevent blatant abuse of the financial facilities offered by Islamic banks. However, the investors are not compensated. Furthermore, while the first view allows for the debtor to be fined, it did not specify the quantum of the fine, which could later be formulated to be in correlation with time (may lead to *riba*). The fine has to be calculated accurately and we need to determine the differences between an extorter and aggressor, because of the ambiguities related to the clear dichotomy of both

terms. This confusion has compelled Shaykh Ibn ‘Arafah to separate the two. So, he defines *al-ghasb* (extortion) as, “Taking other people’s property and/or benefit unjustly and forcibly, not due to enmity; not valid seizure of properties, like the seizure (*istiila*) of a slave’s property by his master; not a situation where a master takes his slave’s property with the consent of the said slave; not a situation of seizing the property (or its usefulness) of the slave by force. So, in jurisprudential terminologies, all the aforementioned acts are not called ghasb. Even properties taken forcibly by *harbii* (enemy) are not considered as ghasb, because it has been exempted by the statement, ‘not due to enmity’. In the case of *harbi*, it is due to enmity.

Then, he defined *at-ta’addii* (aggression) as, “The utilization of something without the prior permission of the owner, and without the intention to possess the object.” So, he confined *at-ta’addii* on the seizure of the usufruct of something without the intention to possess it. Ar-Rassaa’ mentioned in his commentary that Shaykh Ibn ‘Arafah realized that the following are considered as *at-ta’addii*:

1. Unintentional utilization of other people’s property and without lawful right;
2. Intentional utilization of other people’s property; and
3. Utilization of other people’s property without their permission or the permission of a judge/someone that acts on the owner’s behalf (e.g. agent).

Therefore, the aggression of lenders, employees and strangers will be included in *at-ta’addii* (Sharikh Hudud Ibn ‘Arafah, page 350-352).

The origin of this realization came from Imam Al-Maziriyy. During his explanation on *at-telqiin* he (may Allah be pleased with him) raised a contradiction, stating therein that, “The statement on unjust appropriation of properties, using the word *at-ta’addii* and *ghasb* has been circulated among the scholars. The scholars’ way of segregating between *ghasb* and *at-ta’addii* is different. The best elucidation on this segregation is that a *muta’addii* (aggressor) has the following attributes:

1. Uses another person's property without the said person's prior permission;
2. Does not intend to own the property; and
3. Does not cause the property to be non-usable by the owner, i.e. the owner can still use the property in the manner that he usually employs.

Imaam Sahnun is of the view, "In the case where a person has no right to the profit generated through the disposal of the property taken, he would be considered as *ghasib* (extorter). However, the following are considered as *muta'addii* (aggressor), if they transgress upon the authority given to them, as follows:

1. Leaseholder (*muktarii*);
2. Borrower (*musta'ir*);
3. Half slave (*mubdi'*); and
4. Business operator (*mudharib*)."

According to Ibn al-Mawaaz, he opined that those who cannot guarantee the subject matter of something, due to the small defects that he caused to it, is an aggressor but not an extorter. On the other hand, those who can totally guarantee the value of a subject that suffer from small defects that he caused to that it is an extorter. (Manuscript (Makhtuut) of commentary on at-Talqiin, the National Public Library (Dar al-Kutub al-watoniyyah) of Tunisia, 167 pages).

Through studying the sayings of earlier scholars, it can be said that for an aggressor, he acquired something lawfully at the beginning. Then, he exceeded the limits that have been prescribed by the owner. Examples of this are as follows:

1. A *mudharib* who invests the *mudharabah* capital and exceeds the limits specified by the capital provider;
2. A borrower who does not pay on time;
3. A trustee who utilizes the asset that has been entrusted to him, like as if he is the owner (even if he does not intend to possess the asset); and
4. A debtor who delays the payment of his debt.

Initially, all the above enter into a lawful arrangement with the principal. However, their subsequent attitude deprives the owner from utilizing his asset, without his consent. This attitude constitutes aggression.

What concerns us here is with regard to the ruling to be applied on the procrastinating debtor. Will he be fined for the duration that constitutes depriving the lender of the use of money that is still owed by him?

Imaam Maaziri said that, "In the case of money, if the extorter only used the money for consumptive spending purposes and not for trading, then he will not be liable for the profit that might be generated by trading with that money. This is based on a famous opinion in the Maliki School of Law. This is because since the profit is non-existent, he cannot be made responsible for it."

However, it is compulsory for him to be responsible for the amount of profit that the owner may have possibly earned if he traded with the capital. In this regard, the debtor must replace the amount that the lender may probably earn if he transacted with the capital. This is the view of Abdul-Malik bin Maajishuun, which is based on an earlier ruling that makes it compulsory for a person who seizes a house and closed it (i.e. not staying in the house) to pay the rental that the owner might have earned from renting out the house.

From the ruling issued by the scholars, it is clear that that the earlier scholars have estimated the right of the owner of the property in utilizing his property. If someone intervenes between him and his property, the extorter will be responsible for the probable gains that he could have earned.

With the utilization of accurate mathematical method, there is no hindrance in charging a fine on the financially capable procrastinating debtor, i.e. a fine that is in

proportion to the profit realized by them during the period of delay. As this is legitimate money, it is not necessary to spend it for charity.

It is Allah alone who Knows and is Perfect. There is neither deceit nor power, except by Allah, the Most High and Great. May Allah bless our Imam and our Prophet Muhammad s.a.w. and his Household, and his Companions.

Translated and edited by:

Sa'id Adekunle Mikail and Mohammad Ashadi Mohd. Zaini (ashadi@isra.my)