

Fiqh of Riba

Part 2

Riba al-Fadhl

What is the difference between *riba al-fadhl* and *riba an-nasi'ah*?

- “Riba al-Fadhl involves an exchange of unequal qualities or quantities of same commodity simultaneously whilst *riba al-nisa* involves the non-simultaneous exchange of equal qualities and quantities of the same commodity.” [Hassan K & Lewis M, *Handbook of Islamic Finance*, p. 43]

Riba Al-Fadhli

- *Muslim* narrated in his *Sahih* from ‘Ubadah bin Saamit (may Allah be pleased with him) that the Prophet (peace be upon him) said:
 - **“Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt. Like for like, equal for equal, hand to hand. If these goods defer, then sell however you like, so long as it is hand to hand.”**
- This was similarly narrated by Abu Saeed al-Khudri from the Prophet (peace be upon him) without the statement:
 - **“If these good defer...”**
- But instead:
 - **“He who made an addition to it, or asked for an addition, has in fact dealt in ribaa.”**

The Six Commodities

- Thus these six goods which are subject to *riba* are:
 - Gold
 - Silver
 - Wheat
 - Barley
 - Dates
 - Salt
- **When selling items of the same genus, there are two conditions:**
 - 1) That there be equal weight in gold or dates.
 - 2) That the transaction be 'hand in hand' (i.e. on spot) so that each of the two parties have possession of the item of exchange before parting.

Proof for the 1st Condition (Equal Amount)

- Fadala bin Ubaid al-Ansari (may Allah be pleased with him) reported:
 - “A necklace with gold and gems in it was brought to the Messenger of Allah (peace be upon him) in Khaibar. It was one of the spoils of war and was put to sale. Allah's Messenger (peace be upon him) said: The gold used in it should be separated, and then the Messenger of Allah (peace be upon him) further said: “Gold for gold with equal weight.” [Muslim]
- Abu Sa'id (may Allah be pleased with him) narrated that:
 - “Dates were brought to the Messenger of Allah (peace be upon him) and he said: ‘These dates are not like our dates’, a man said: ‘We sold two sa's of our dates (in order to get) one sa' of these (fine dates). The Messenger of Allah (peace be upon him) said: ‘This is *riba*, so return (these dates of fine quality), then sell our dates (for money) and buy for us (using money) these (fine dates).’ [Muslim (1216/3)]

- In Sahih Muslim (3/1209), it was narrated that Abu Sa'eed Al-Khudri (may Allah be pleased with him) pointed towards his eyes and his ears with his fingers and said:
 - **My eyes have seen and my ears have heard the Messenger of Allah (peace be upon him) say: “Do not sell gold for gold unless equivalent in weight, and do not sell less amount for greater amount or vice versa; and do not sell silver for silver unless equivalent in weight, and do not sell less amount for greater amount or vice versa and do not sell gold or silver that is not present at the moment of exchange for gold or silver that is present.”**
- In Sahih al-Bukhari (Fathul Bari 4/377), it was reported on the authority of Malik ibn Aws (may Allah be pleased with him), that he sought change for one-hundred dinars. He said:
 - “Talhah ibn ‘Ubaidillah called me and we discussed the matter, he agreed to change (my dinars). He took the gold coins in his hands and fidgeted with them and then said: “Wait until my storekeeper comes from the forest.” Umar (may Allah be pleased with him) was listening to that and said: **“By Allah! Do not part from him until you have taken (the money) from him, for the Messenger of Allah (peace be upon him) said: “Exchange of gold for gold is *riba* except if the exchange is hand to hand and equal in amount. The selling of barley for barley is *riba* unless it is from hand to hand and equal in amount, and dates for dates is *riba* unless it is from hand to hand in equal amount.”**

What is the Status of Riba Contracts?

- The majority of scholars (*jamhur*) hold that a contract which contains *riba is*:
 - void (*baatil*) and annulled (*mafsukh*).
- This is even the case if one is ignorant regarding the presence of *riba*.
- **As For the Hanafis:**
 - They differentiate between a *faasid* and *baatil* contract.
 - If possession takes place, they regard the contract as *faasid*, obligating the return of any increase.

- Amongst the scholars, there are those who say there is no *riba* in anything but these:
 - **Gold**
 - **Silver**
 - **Wheat**
 - **Barley**
 - **Dates**
 - **Salt**
- The majority of scholars have however included them and whatever is similar as an ***illah muqtadiyah* (leading cause)**.
- There is some difference of opinion regarding the derivation of this ***illah* (cause)**.

According to the madhabs

- **Hanafi**
 - Weight and genus [الوزن مع الجنس] (gold & silver)
 - Volume and genus [الكيل مع الجنس] (wheat, barley, dates & salt)
- **Shafi'ee**
 - Medium of exchange and genus [الثمنية مع الجنس] (gold & silver)
 - Edible and genus [الطعم مع الجنس] (wheat, barley, dates & salt)
- **Maaliki**
 - Medium of exchange and genus [الثمنية مع الجنس] (gold & silver)
 - Preservable and genus [الادخار مع الجنس] (also edible [الاقتيت] according to some)
- **Hanbali**
 - Same as Hanafi
 - Same as Shafi'ee
 - Edible, weight and volume

CLASSIFICATION OF RIBA

– Imam Abu Hanifa on Riba-al-Fadl

- commodities must have two common characteristics
 - Weight
 - Volume
- includes all commodities having weight or volume and are being exchanged

CLASSIFICATION OF RIBA

– Imam Shafi on Riba-al-Fadl

- commodities must have two common characteristics
 - be a medium of exchange
 - be edible
- includes all commodities that are edible or can be used as a medium of exchange(currency)

CLASSIFICATION OF RIBA

– Imam Maalik on Riba-al-Fadl

- commodities must have two common characteristics
 - can be preserved
 - be edible
- includes all commodities that are edible and can be preserved

CLASSIFICATION OF RIBA

- Imam Ahmad Bin Hanbal on Riba-al-Fadl
 - first citation conforms to the opinion of Imam Abu Hanifa
 - second citation conforms to the opinion of Imam Shafi
 - third citation includes three characteristics at the same time i.e. edible, weight and volume

Q: What is the wisdom behind *Riba al-Fadhl*?

- “Regarding *riba al-fadhl*, it’s prohibition is based on *sad adharaih*.”
- The Prophet (peace be upon him) said:
 - **Let a dinar be exchanged for dinar, with no addition on either side and dirham be exchanged for dirham with no addition on either side.** [Muslim]
- “The wisdom underlying the disapproval of *riba* as already pointed out, is plugging the loopholes to real interest...” [Pakistan Federal Court Shariat judgement on interest, p. 254]
- This is done in two ways:
 - 1) Spot-trading can be easily combined with credit sales to bring about the same effect as deferment *riba*.
 - 2) Such trading includes excessive *gharar* (uncertainty) since it is not clear whether the transaction was beneficial or harmful. [El-Gamal, MA, *Islamic Finance: Law and Economics*, p. 51]

Other Reasons

- According to Dr. 'Abd al-Razzaq al-Sanhuri, there are three reasons:
 - 1) To prevent the hoarding of commodities.
 - 2) To prevent speculating on currency, so that currency does not itself become a commodity.
 - 3) To avoid unfairness and exploitation when the deal is related to a single commodity.

Late Payments

Late Payment (Case Study)

- **Zayd** owes 'Amr \$100,000 US Dollars.
- At the time of borrowing, the US Dollar was equal to 250 Japanese Yen.
- He is supposed to deliver this amount before the 3rd of Shawwal.
- **The Japanese Yen decreases to 220 by the 3rd of Shawwal.**
- 'Amr demands that Zayd pay, but Zayd waits until the Yen falls to 150 Yen.
- The value of the Yen has declined by 30 Yen per Dollar.

- It is debatable whether or not this decline should be charged Zayd as he did not cause the decline.
- **HOWEVER:** Zayd must pay the required amount between the due date and the delay which is 70 Yen per Dollar.

Handling debts

- In best case scenario, one should either:
 - Give the debtor more time.
 - Forgive the debt completely.

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ وَأَنْ تَصَدَّقُوا خَيْرٌ لَّكُمْ
إِنْ كُنْتُمْ تَعْلَمُونَ

- And if he is one who has a family, then look towards that which is easier for him, and if you give in charity, it is better for you.” [al-Baqarah 2:280]
- **Q: How would you handle late payments?**

Nonperforming Assets

- **A nonperforming asset is:**
 - “A debt obligation where the borrower has not paid any previously agreed payments to the designated lender for an extended period of time.”
- **What is the danger of nonperforming assets?**
 - “Non-performing assets are problematic for financial institutions **since they depend on interest payments for income**. Troublesome pressure from the economy can lead to a sharp increase in non-performing loans and often results in massive write-downs.”
- **Practical Example:**
 - In 1993, a report given to the Auditor General of South Australia found that the main reason for the **State Bank of South Australia’s** collapse in 1991 was non-performing assets. [Source: <http://www.audit.sa.gov.au/sbsa93/chapter16.html>]
- **Q: Do you think this was an issue in the Prophet’s time?**

“However, in order to avoid the **adverse consequences** resulting from the misuse of this prohibition, another alternative may be resorted to. The lessee may be asked to undertake that, if he fails to pay rent on its due date, he will pay certain amount to a charity.”

- Mufti Taqi Usmani (An Introduction to Islamic Finance, p. 120)

Q: What did the Prophet say about those who can pay their debts, but simply don't?

Procrastination of the ‘Wealthy Lender’

- The Prophet (peace be upon him) said:
 - **“Procrastination in repaying debts by a wealthy person is injustice.”** [Bukhari]
- Commenting on this hadith, Ibn Taymiyyah (may Allah be pleased with him) said:
 - **“An oppressor deserves to be punished. It is reported in *al-Sunan*: ‘If one who can afford to pay delays payment, his reputation and punishment become permissible.’ The Prophet (peace be upon him) made it lawful to attack the reputation of a procrastinator who can afford to repay his debt. Scholars agreed that penalties are permitted in every type of offence for which there is neither a *hadd* punishment nor atonement (*kaffarah*).”** [*Majmu’ al-Fatawa*, vol. 30, p. 23] (2)

Financial Penalties

- Ibn Taymiyyah (may Allah have mercy on him) explained that financial penalties are of three kinds:
 - 1) Destruction: Such as the destruction of evil items (i.e. breaking idols, breaking musical instruments, smashing wine vessels)
 - **Example: The Prophet (peace be upon him) ordered the destruction of Masjid ad-Dhiraar.**
 - 2) Changing: Such as making pillows out of curtains on which there are images.
 - 3) Confiscation: Such as confiscating stolen foodstuffs and giving them to charity.

[Source: *Tawdhee al-Ahkaam min Bulugh al-Maram*, p. 31.]

- As-Sa'di said in *al-Fatawah as-Sa'diyah*, p.451:
 - “The Hanbali scholars explicitly stated, regarding usurpation, that the usurper must return the usurped item and [make good] any deficiency, except if the deficiency is depreciation in the value; then it will not be returned. I say: This view is exceedingly weak; **the right opinion is what Shaykh al-Islam Ibn Taymiyyah chose, that the usurper is liable for every aspect of deficiency, even depreciation of cost.**”

What is a Conventional Late Payment Fee?

- *According to the Commonwealth Bank Website:*
 - “A Late Payment Fee of \$20 may be charged to partially cover the banks costs of managing late payments. Late Payment Fees are charged 5 business days after the repayment due date where a loan is arrears by more than one month, and will continued to charged for each month after until the account is no longer in arrears.”

Islamic Position

- Scholars differ about determining the punishment that procrastinator deserves.
- Classically, the majority were of the view that punishment should not be more than the actual amount due.
 - VIEW 1: The government is to impose a punishment (such as imprisonment or whipping).
 - VIEW 2: The debtor is liable for depreciation also.

Second View: In Greater Detail...

- Shaykh Abdur Rahman As-Sa'di: (may Allah have mercy upon him) (d. 1956) said in *al-Fatawah as-Sa'diyah*, p.451:
 - **“Some scholars are of the view that the procrastinator is not liable for depreciation of the price. I say: That is dubious; the correct view is that he is liable for depreciation of the price. How can it be that someone usurps an item worth a thousand, and its owner could have sold it; then the price depreciates drastically, decreasing to five hundred; [how can] he not be liable for the decrease and just return it as it is?”**
- Likewise, As-Sa'di reports from Shaykh Abdullah ibn Bassam, in his book *al-Ikhtiyaraat al-Jaliyah min al-Masail al-Khilafiyah*, vol. 3, p. 172:
 - **“The correct opinion is that the usurper is liable for the depreciation of the usurped item under any circumstance, even it is depreciation of the price for a decline in price is a quality external to the item that resembles its internal qualities.”**

Penalty Clause (al-shart al-jaza'i) Reviewed

- The Board of Senior Scholars in its fourth session, held between (28/10/1393-14/11/1393) studied the subject of *al-shart al-jaza'i*, among the topics discussed:
 - “O you who believe, be true to your covenants” [al-Ma'idah 5:1] and to the hadith: “Muslims are bound by the conditions they agree to, except a condition that makes lawful what [Allah has] prohibited or prohibits what is lawful.”
 - The statement of Umar (may Allah be pleased with him): “*Maqqati al-Huquq Inda as-Shurut*” (“Rights are limited by stipulations”).

Penalty Clause (al-shart al-jaza'i) Reviewed (Cont.)

- This is a:
 - Stipulation that makes the contract contingent and pending.
 - **EXAMPLE:** Like the seller saying: “I have sold it to you contingent upon the arrival of so-and-so.”
- The penalty clause was examined in light it's problematic nature:
 - “It became apparent that it is among the conditions involving a [legitimate] interest of the contract, because it is an incentive to complete the contract within its limited time.” [Abd Allah ibn Sulayman Al-Mani', *The Problem of Late Payments in Islamic Banks*, p. 20]

Consideration for Penalty Clauses

- There following reported in Bukhari from Ibn Sireen was also considered. It reported that a man said to Kurayh:
 - **“Put away your stirrups [i.e., delay your journey]; if I do not travel with you on such-and-such day, I will pay you a hundred dirhams,” but he did not travel. [Judge] Shurayí said: “Whoever stipulates on himself to do something willingly without compulsion, it is incumbent on him to fulfill it.”**
 - **Ayyub reported from Ibn Sireen that a man bought food, and said [to the seller]: “If I do not come to you on Wednesday, it means the deal is terminated between you and me,” and he did not come. [Ibn Sireenn] said to the buyer, “You failed to fulfill [your own condition],” so he judged against the buyer.**
- Shaykh Abd Allah ibn Sulayman Al-Mani’ said:
 - The view that the penalty clause is valid closes the doors of chaos and playing around with the rights of Allah’s slaves.
 - Moreover, it is an incentive for fulfilling promises and contracts, abiding by the commandment of Allah:
 - **“O you who believe, be true to your covenants” [al-Ma’idah 5:1].**

This Ruling was Presided by the Following Scholars:

The Board of Senior Scholars

‘Abd al-‘Azīz ibn ‘Abd Allāh ibn Bāz

‘Abd Allāh ibn Ḥumayd

‘Abd Allāh al-Khayyāt

‘Abd al-Razzāq ‘Afīfī

Muḥammad al-Ḥarkān

‘Abd al-Majīd Ḥasan

‘Abd al-‘Azīz ibn Ṣāliḥ

Ṣāliḥ ibn Ghuṣūn

Ibrāhīm ibn Muḥammad Āl al-Shaykh

Sulaymān ibn ‘Ubayd

Muḥammad ibn Jubayr

‘Abd Allāh al-Manī‘

Rāshid ibn Khunayn

Ṣāliḥ al-Luḥaydān

‘Abd Allāh ibn Ghadayān

Arbun (Deposits)

- In order to understand this issue, it is worthwhile understanding the ruling regarding deposits.
- **Ibn Qudamah (may Allah be pleased with him) said:**
 - **“Arbun in selling means the buyer purchases the commodity and gives a dirham or more to the seller on the condition that the deposit will be deducted from the cost, but if he gives up the deal then the seller will keep it.”** [Al-Mughni, vol 2, p. 738]
- The issue of “arbun” is similar as the buyer gives an extra amount in advance.
- **Ibn Qudamah (may Allah be pleased with him) said:**
 - **“Ahmed said there is no problem with *Arbun*, as ‘Umar practiced it, and it is also reported that Ibn ‘Umar allowed it. Ibn Sireen and Sa’d ibn al-Musayyib stated: If [the buyer] dislikes the commodity, there is no problem in returning it and something with it.”** [Al-Mughni, vol 2, p. 738]

Explaining the Legitimacy of Arbun

- “It is possible to respond to the argument of those who invalidate *bay al-arbun* on the basis that ‘*arbun* is stipulated in exchange for nothing; [in fact] it is compensation for waiting for the buyer to decide whether he will buy the sold item. This causes the loss of opportunities to sell it to some other party during that stipulated period of time. Also, *bay al-arbun* is not equivalent to an uncertain option because the buyer stipulates the option to undo the deal by mentioning a certain period; if he does not exercise the option during that period the transaction is concluded and the option lapses.” [Dr. ‘Abd al-Razzaq al-Sanhuri, *Masadir al-Haqq*, vol. 2, p. 101]

Supporting Argument

- Ibn 'Ajlan narrated from Amar that the Prophet (peace be upon him) was asked about fruit on the tree; he replied:
 - **“If a needy man eats it and does not use his clothes as a pouch to carry it out, there is no punishment. If he takes something out, he will be charged double the price along with punishment, and if he steals something from it after it has been taken to the drying area, if the amount of the stolen item reaches the price of a shield, then he deserves amputation.”**
- Reported by Abu Dawud (4390, 1710), al-Nasa'i (Vol. 2, p. 260), al-Tirmidhi (Vol. 1, 242-243) [with slight variation].
- Shaykh Albani approved all nine chains of this *hadith*.

“In some agreements of financial leases, a penalty is imposed on the lessee in case he delays the payment of rent after the due date. This penalty, **if meant to add to the income of the lessor**, is not warranted by the Shari‘ah.

- Mufti Taqi Usmani (An Introduction to Islamic Finance, p. 120)

Late Payment Guidelines

- **1) The bank should not benefit:**

“The **prevalent position**, however, seems to be that creditors may impose penalties for late payments, which have to be donated by the client, to a charity, but a flat fee to be paid to the creditor as a recompense for the costs of collection is also acceptable to many *fuqaha*.” (Hans Visser, Islamic Finance: Principles and Practice, p. 96)

- **2) The condition must be made prior:**

- “If the buyer is late in making a payment it is not permissible to oblige him to pay anything in addition to his debt with or without a prior condition, because that is *haram* riba.” [Source: *Fiqh al-Mu'aamalaat al-Hadeethah* by Dr. 'Abd al-Wahhaab Abu Sulaymaan (p. 571).]

- **3) The late fee must not be excessive:**

- “The right opinion is what Shaykh al-Islam Ibn Taymiyyah chose, that the usurper is liable for every aspect of deficiency, even depreciation of cost.” [As-Sa'di said in *al-Fatawah as-Sa'diyah*, p.451]

- **4) No Compounding:**

- “There may not be any compounding of the fee: It is assesable one time per instance of delaying.” [Ahmad, Abu Umar Faruq, *Theory and Practice of Modern Islamic Finance: The Case Analysis from Australia*, p. 155]