"PENALTY OF DEFAULT"

CAN RIBA BE LEGALIZED TO PUNISH A MAN FOR LATE PAYMENT OF INSTALMENTS?

A RESPONSE BY
MUJLISUL ULAMA OF SOUTH AFRICA

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THE TOUCH OF SHAITAAN

"Those who devour riba do not stand except as one whom the Shaitaan has driven to insanity with (his) touch. That is so because they say: 'Trade is only like riba', whereas Allah has made lawful trade and has made riba haraam."
(Qur'aan, Surah Baqarah, Aayat 275)

THE BARAKAAT OF SADQAH AND THE RUIN OF RIBA

"Allah eliminates riba and He increases (the barakaat of) Sadaqaat (Charities). And Allah does not love any ingrate sinner."
(Qur'aan, Surah Baqarah, Aayat 276)

SHUN RIBA !

"O People of Imaan! Fear Allah (in the matter of riba), and shun (waive) what remains of riba (charges), if indeed you are Mu'mineen."
(Qur'aan, Surah Baqarah, Aayat 277)

ULTIMATUM OF WAR

"And, if you do not (shun riba), then take notice (of an ultimatum of) war from Allah and His Rasool. Then, if you repent (and desist), then for you is the capital amounts of your wealth. You shall not oppress (the hard-pressed with interest), and you will not be dealt with oppressively (with Allah's Punishment)."
(Qur'aan, Surah Baqarah, Aayat 279)

INTRODUCTION

The Cover Question:

Is it permissible to charge riba (interest) on a late-payment made by a debtor? The debtor is unable to pay his instalment on due date. The standard practice of the kuffaar capitalist system of banks and business enterprises is to charge a percentage of the instalment as a penalty for late payment. Is this riba (interest) lawful in the divine immutable Shariah of the Qur'aan and Sunnah?

The Reply:

The four Qur'aanic aayaat appearing on page 2 constitute an adequate response to this question. Further elucidation for the prohibition of this form and all forms of riba is really superfluous. The Sunnah and the 14 century Ijma' (Consensus) of the Ummah on the prohibition of all forms of riba make it unnecessary for elaborating what is obvious and self-evident in terms of the Shariah of the Qur'aan. The straightforward answer is that it is haraam to charge any riba on late payments of instalments.

THIS DISCUSSION

The present discussion in this booklet has been prompted by the view of permissibility of riba on late payments —the view which Hadhrat Mufti Taqi Uthmaani Saheb had published in his book, *An Introduction to ISLAMIC FINANCE*.

In his article captioned: *Penalty of Default*, Hadhrat Mufti Saheb propounded the view of permissibility. For this permissibility, Hadhrat Mufti Taqi Saheb resorted to a labirynthal discussion in which he presented extremely far-fetched arguments to render such riba permissible. In view of the gravity of the error of Hadhrat Mufti Taqi Uthmaani Saheb pertaining to the exceptionally grave crime

and sin of riba, we deem it necessary to respond and to state the correct view of the Shariah.

Pork, wine, fornication, shirk and riba are such evils on whose prohibition the Ummah never differed. Every Muslim, be he illiterate, as long as he is not a lost modernist, knows and understands the prohibition of these evils. It is only the influence of the western capitalist system which has induced modernist Muslims and those who consort with them to soften the attitude against Islam's harshness in prohibiting riba. Muslim modernists who have acquired credentials in western secular institutions have set themselves up as 'authorities' of the Shariah which they subject to their whimsical interpretations which are invariably devoid of Shar'i substance. They are perennially engaged in the baseless pursuit of finding Qur'aanic and Sunnah credibility and acceptance for *all* practices of the capitalist economic system.

This pernicious exercise of the modernists has gained some momentum in recent years by virtue of the association and support of some Ulama. This is a destructive trend which threatens to scuttle the immutable Shariah of Allah Ta'ala. The process of erosion of the Shariah has been subtly initiated and is being subtly pursued by highlighting the names of prominent Ulama who we believe have failed to understand and detect the plot which has been organized to dig the foundations of Islam. The plot envisages the effecting of gradual change by abrogating the *Ahkaam* of Islam while retaining the technical names or by labelling the new *haraam* mutants with terms which are designed to lull unwary Muslims into acceptance.

This short treatise is an attempt in the endeavour to stop the process of erosion of the Deen of Allah Ta'ala. By the *fadhl* of Allah and the *taufeeq* He bestows, we present here the Shar'i arguments in refutation of the view of permissibility of the riba penalty which Hadhrat Mufti Taqi Uthmaani Saheb has erroneously expounded. And, *hidaayat* comes from only Allah Azza Wa Jal.

" PENALTY OF DEFAULT"

Presenting his argument in favour of charging riba for late payment of instalments, Hadhrat Mufti Saheb says in his book:

> *"Another problem in murabahah financing is that if the client defaults in payment of the price at the due date, the price cannot be increased. In interest based-loans, the amount of loan keeps on increasing according to the period of default. But in murabahah financing, once the price is fixed, it cannot be increased. This restriction is sometimes exploited by dishonest clients who deliberately avoid to pay the price at its due date, because they know that they will not have to pay any additional amount on account of default."*

In the light of the Shariah there are several, objections to this view expressed by the venerable Mufti Saheb.

(1) The fixation of the price is not a "problem" as the view of Hadhrat Mufti Saheb suggests because this fixing of the price which may not be increased if payment is not made on due date is the decree of Allah Ta'ala. If this is indeed a "problem", then it had existed since the very inception of Islam. It is not a new development or an expediency which requires a new Shar'i ruling.

The problem of payment default existed in all times. The problem of deliberate default by 'dishonest' persons also existed since the inception of the Shariah during the time of Rasulullah (sallallahu alayhi wasallam), hence he said in castigation of such dishonest people: *"The procrastination of the wealthy is zulm."*
In other words, a man commits *zulm* (injustice and oppression) if he deliberately withholds payment on due date inspite of having the means to pay.

This problem was known to Rasulullah (sallallahu alayhi wasallam), by the Sahaabah and by all the authorities of the *Khairul Quroon* era, and by all the Fuqaha and Ulama of Islam right down to the present age. Yet, despite this knowledge of the problem, no authority of Is-

lam, from Rasulullah (sallallahu alayhi wasallam) down the long corridor of fourteen centuries, had ever deemed it appropriate to legalize riba on late payments as a penalty and as a reward for the capitalist or as a benefit to the poor.

Hadhrat Mufti Taqi Saheb, to the best of our knowledge, is the first one to break ranks with the Guardians of the Shariah and with the fourteen century *Ijma'* on prohibition of this form of riba. While the problem of procrastination in payments existed in all times, the Shariah had never devised a penalty for such default because such a penalty of riba is repugnant to the Qur'aanic concept of *Qardh-e-Hasnah* (Beautiful Loan), a concept which the Muslim bankers of today highlight in their advertising campaigns to promote their banks.

This riba penalty militates against the Qur'aanic exhortation to grant the debtor wholehearted extension to pay. There is no stratagem in the Shariah to legalize the riba penalty of a 'dishonest' defaulter or a debtor who does not deliberately pay on due date. Everything in this ephemeral world has advantages and disadvantages. Islam, by its prohibition of riba and by the evidence of the Authorities of the Shariah refraining from levying the riba penalty, implies that Muslims should accept this problem with understanding, patience and hope for the *thawaab* of the Aakhirah. We are not allowed nor expected to react like the capitalist Yahood and Nasaaraa who summarily slap on interest on late payments. The economic life too of the Muslim is regulated by the moral precepts of the Qur'aan and Sunnah. He has to look at the colossal advantage of the reward in the Aakhirah and the increased *barkat* in his *Rizq* which patience brings in its wake.

The fruits of patience in the matter of delayed payment by the debtor is nothing but goodness. Just look at the list of benefits:

- The Pleasure of Allah Ta'ala, which is the Goal of Life.
- The obtainal of *thawaab* 16 times more than the *thawaab of Qardh-e-Hasanah.*
- Acting in compliance with the Qur'aanic exhortation to grant

the debtor an extension.

- Increased *barkat* in earnings as expressly stated in the Qur'aan.
- Safety from the destructive effects of riba as stated in the Qur'aan.
- Granting relief to a debtor is an ibaadat of high merit, not merely a mundane act.

On the contrary, if riba is charged on late payments, all the evil effects of riba are acquired, the ultimate of which is the Ultimatum of War from Allah and His Rasool (sallallahu alayhi wasallam).

When inspite of the perennial existence of the element of *procrastination* (*matl)* since the very inception of the Shariah, no attempt was ever made by the Authorities of this Deen to introduce a riba penalty, then it is indeed surprising and most lamentable for an Aalim, especially of the calibre of Hadhrat Mufti Saheb, to consider it appropriate to break ranks and legalize such a dangerous practice as riba which is in total refutation of the *Ijma'* of the Ummah. We reiterate that this problem of default existed in all times and was known to all Authorities of the Shariah, yet no attempt was ever made to introduce a riba penalty inspite of Rasulullah (sallallahu alayhi wasallam) having stated with great clarity: *"The procrastination of the wealthy is zulm."*

This explanation should suffice to show that while the Shariah concedes the problem, it abstains from penalizing the defaulter who may be dishonest or not. If he is dishonest and defaults by design, the punishment of the Aakhirah awaits him. And, besides the punishment of the Aakhirah, he will not escape the detriment which either his earnings or his life in general will suffer here on earth as a consequence of the *zulm* of his deliberate *procrastination.*

While the fixed price may not be increased according to the Shariah, the *thawaab* perpetually increases. Lest people of deficient Imaan as are the capitalist entrepreneurs in general, frown in askance with our admixture of the moral precepts of Islam in this cold and dry discus-

sion pertaining to economics and finance, we say that *Islamic Akhlaaq, Allah's Pleasure and Thawaab* are inseparable constituents of the Muslim's life on earth. No sphere of the Muslim's life, and no aspect in any domain of his life, can be viewed in isolation of the Moral Code of Islam. Hence the introduction of morality in a discussion of this nature is unavoidable. This treatise is addressed to Muslims, not to the kuffaar capitalists.

THE COMPARISON

The comparison which Hadhrat Mufti Saheb draws between the capitalist riba system and the system of the Shariah in his attempt to provide grounds for the legalization of the riba penalty implies a vote of no confidence for the system of the Shariah, hence his argument seeks to highlight a perceived disadvantage of the *muraabahah* system. The capitalist system in this regard operates freely to increase the "price" in case of late payment of instalments. The whole exercise of Hadhrat Mufti Saheb is to bring the *muraabaha* system on par with the capitalist system so that what the capitalist entrepreneur gains by the riba penalty on late payments, the Muslim creditor too will gain in *exactly* the same manner, albeit with some cosmetic changes effected to the riba penalty to make it appear not to be riba when in actual fact it is nothing but pure riba for which the Qur'aan sounds the War Drum of Allah and His Rasool (sallallahu alayhi wasallam).

It is manifest beyond the slightest vestige of doubt that Islam does not allow such a riba penalty. Islam is averse to it. It is a charge exclusive with the capitalist system. It may not be incorporated into Islam by fanciful and fallacious argumentation. Insha'Allah, the fallacy of the arguments in favour of this riba penalty will be discussed and neutralized further on in this treatise.

While Hadhrat Mufti Saheb has asserted that *the amount of the loan keeps on increasing in proportion to the period of default or late payment, i.e. interest plied on interest*, he has forgotten that Allah Ta'ala says in the Qur'aan Majeed: "*Allah destroys (not increases)*

riba, and He increases Sadaqaat."

The act of granting extension for payment is a meritorious deed of *Sadqah.* According to the Qur'aan, *Sadqah* increases, not the product of riba. The product of riba, decreases like a burning candle while *Sadqah* is like the *Wholesome Tree* (Shajrah Tayyibah) spoken of in the Qur'aan. Thus the conclusion of 'increase' in relation to riba and the implication of deprivation for the Muslim creditor in view of the Shariah's fixation of the price and prohibition of riba, are unfounded and bereft of any Shar'i basis.

DISHONEST CLIENTS

The issue of 'dishonest clients' is an extremely weak premises for the drastic move to legalize such a grave crime and sin as riba. Hadhrat Sayyiduna Umar (radhiyallahu anhu) said:

"*We abstained from nine tenths of all lawful transactions for fear of falling into riba."*

In violation of this spirit of extreme caution against riba, Hadhrat Mufti Saheb has vaulted to the extreme opposite pole of being at great pains in his meandering discussion to legalize the riba penalty in the bid to bring compliance between the Muslim banks and the kuffaar banks.

Rasulullah's (sallallahu alayhi wasallam) warning on *procrastination* is in fact directed to dishonest clients. But neither he nor any other Authority of the Shariah ordered the riba penalty to be imposed on dishonest clients for their haraam act of *procrastination.* It is clear that Muslim traders have to accept the small percentage of 'dishonest clients' as part of the trading activity. It is an acceptable development in trade and commerce. The capitalist counterpart seeks the immediate increase and miserable gain of this world in whatever way he can. Thus interest is perfectly in order for him. But the Muslim trader is not expected to seek increase and gain in any ways which are in conflict with not only the juridical rulings of the Shariah, but also in conflict with the Code of Islam's Morality. The Muslim's increase in his

wealth is by the instrument of *Barakat* and *Thawaab* which he gains in both worlds for having patience with not only genuine strugglers, but with the *procrastination* of even dishonest defaulters. In both cases, he gains and his wealth increases. It is therefore, despicable and entirely unexpected of the Muslim to stretch his gaze in the direction of the haraam methods which the kuffaar employ to 'increase' their wealth.

Hadhrat Mufti Saheb claims that the Shariah's restriction on riba is 'sometimes exploited by dishonest clients'. Did the Shariah not know this at the time when the Divine Law was enacted? Was the Nabi (sallallahu alayhi wasallam) and the illustrious Aimmah Mujtahideen and the Fuqaha of Islam not aware of this attitude of exploitation of "some dishonest clients"? Inspite of their awareness, they did not seek to introduce the riba penalty on late instalments.

The factor of 'dishonesty' has been utilized as a pretext for justifying a kuffaar economic rule, i.e. charging interest on late payments. But in presenting this factor as the rationale for justifying the riba penalty, which is the act of only "some dishonest clients", the following *zulm* is committed:

- Riba is legalized.
- The rule is to be introduced with uniform application to cover dishonest as well as honest clients. The banks do not distinguish between dishonest and honest clients. In fact it has no means for making any such differentiation between clients. Regardless of honesty and dishonesty, the law of riba penalty applies equally to all defaulters.

Now regardless of the dishonesty of any clients, the irrefutable Shar'i fact is that riba is haraam, and the dishonesty of clients is not a basis for abrogating the prohibition and legalizing the *haraam* act. Even if a way can be found to determine who exactly are the dishonest defaulters, riba cannot be legalized. While the ostensible stated motive for embarking on the exercise to justify the capitalist riba penalty is

the ‘dishonesty of some clients’, the veneer concealing the true design is too flimsy for according any credence to this motive which we discern to be simply to accommodate the riba practice of the capitalist banks which the so-called Muslim banks are emulating. The ‘dishonesty’ argument has no credibility and no validity in terms of the Shariah and cannot be cited as a basis for accepting the capitalist haraam riba penalty on late payments.

THE QUR’AAN AND LATE PAYMENT

The Qur’aan Majeed states:

“And when the debtor is in difficult straits, then (he should be granted) an extension until (it becomes) easy (for him to pay).”

The teaching and exhortation of the Qur’aan are to show kindness to the debtor and to grant him adequate time until he is by the means to pay. It is in diametric conflict with this Qur’aanic exhortation and command to penalize the defaulting debtor with *haraam* riba. The view which promotes the riba penalty cannever be reconciled with the Qur’aan by presentation of the ‘dishonesty’ argument. Firstly, because dishonesty is not grounds for legalizing riba. Secondly, the banks cannot claim with certitude that certain clients are deliberately procrastinating in their payments inspite of having the means. There is absolutely no way of determining the attitude and motive of the defaulting clients. Thirdly, the application of the riba penalty is and will be uniform, for all and sundry. The computer churning out its monthly statements is insensitive to the straits and attitudes of defaulters for the simple reason that the financiers themselves are insensitive to the plight of debtors. It cannot distinguish between the two types of defaulters.

Fourthly, the banks cannot and will not institute elaborate, costly and time-consuming investigations to ascertain if the many defaulters of any particular month are dishonest or honest. Such exercises will deplete whatever extra funds the riba penalties had generated. In fact, the banks will have to bear additional expenses should they embark

on such senseless inquiries and impractical exercises.

In the light of what we have explained, the following statement of Hadhrat Mufti Saheb is meaningless and does not mitigate the crime of legalizing riba:

"If it appears his default is due to poverty, no compensation can be claimed from him. Indeed he must be given respite until he is able to pay,……"

It has already been pointed out earlier that establishing the 'dishonesty' of a defaulter is merely theoretical. In practice it is hardly possible to gain certitude in this regard. Furthermore, banks, whether non-Muslim or Muslim, have a uniform policy and rule on money-matters. In the domain of finance, they behave like aliens, not like *Insaan.* They conduct themselves like the Yahood. If necessary they will squeeze blood out of a stone to acquire the extra riba. That is because the Qur'aan says: *"Those who devour riba do not stand except like one whom Shaitaan has driven to insanity with (his) touch."*

And assuming that the dishonesty of a client can be established with certitude, then too it is haraam to charge haraam riba on the pretext of preventing 'exploitation' by debtors. The real exploitation is by those who devour riba and who stand like insane men —driven to insanity by the touch of Shaitaan. Even if the riba charge is diverted to 'charity', the act of exploiting the debtor with haraam riba is motivated by an inordinate and an insatiable greed for money, hence the financier cannot exercise a little patience for Allah's Sake to ease the pressure from the servants of Allah Ta'ala.

Rarely does a man default in his payments on the basis of:

"...because they know that they will not have to pay any additional amount on account of default."

People are averse to despoiling their credit-worthiness. In this age people survive on credit. To continue to gain the benefits of credit, even dishonest people endeavour to meet their commitments. How-

ever, circumstances compel default in payments. The claim made in the aforementioned statement of Hadhrat Mufti Saheb is furthest from the minds of those who are unable to meet their commitments on due date. It is difficult circumstances, rather than dishonesty which compel default in payments. Be it as it may. The fundamental consideration in negation of riba penalty is that riba is haraam and the element of dishonesty or any other factor cannot be presented as a basis for justifying riba.

LOSS BY DEFAULT?

Hadhrat Mufti Taqi Saheb, proceeding to justify the riba penalty, states in his book:

"In order to solve this problem, some contemporary scholars have suggested that the dishonest clients who default in payment deliberately should be made liable for the loss it may have suffered on account of default."

This view of "some contemporary scholars" is devoid of Shar'i substance. It is baseless personal opinion. It cannot be substantiated on any principle or particular of the Shariah. Regardless of the status and names of the contemporary scholars, their personal views lack Shar'i validity and force. A scholar cannot claim that his personal opinion unsubstantiated on a Shar'i premise, carries the force of the Shariah. The personal opinions of "contemporary scholars" are of no significance as far as the Shariah is concerned. Our concern is with Shar'i substantiation for a view. If the opinion is devoid of such a basis, it will simply be dismissed as a fallacy and as a figment of the imagination of the contemporary scholar.

On what Shar'i premise do these contemporary scholars justify the riba penalty? Mufti Saheb has not presented their grounds for this opinion which is palpably baseless and bereft of Shar'i support. They have to first prove that it is lawful in Islam to impose a riba penalty on a dishonest defaulter. Where and when did the Shariah condone a riba penalty on the basis of the dishonesty—in fact, assumed dishonesty — of one who defaults in his payments? The opinion of these

"contemporary scholars" cannot be cited as grounds for abrogating the prohibition of riba and making lawful the riba penalty.

Besides the question of riba, the claim that the bank suffers a loss in consequence of payment defaults is baseless. What precisely is the loss which the bank suffers as a result of late payment of instalments by clients? If it is alleged that the money which had to be paid on due date would have been profitably invested, then we respond: Assumed loss of future profit is not a loss in Shar'i terms. Future profit is a fiction. It is not wealth in possession which one loses. In actual fact, there is no loss which the bank or the creditor suffers in consequence of late payment.

On the contrary, Allah Ta'ala has exhorted extension of time for the debtor, and there is great reward in the Aakhirah and much *barkat* in this world for patiently accepting the delay in the acquisition of payment. The patient wait is rewarded with 16 times more *thawaab* than the reward for giving *Qardh-e-Hasanah (Beautiful Loan).* The loss is more imagined than real.

This 16 fold *thawaab* for patiently waiting in expectation of payment from the defaulter, purely for Allah's Pleasure, is inscribed on the Portals of Jannat. Rasulullah (sallallahu alayhi wasallam) reported that he saw this inscription on the Night of Mi'raaj. Can the Muslim trader, creditor or banker not locate sufficient enthusiasm in his Imaan to pursue this colossal treasure of the Aakhirah in exchange for the simple sacrifice of waiting patiently for payment? When the return for waiting is so huge and wonderful, does it behove any Muslim to desire justification and legalization of the vice of riba for the paltry gain of a little extra money squeezed from a suffering debtor— and all this vice on the flimsiest pretext of the imagined 'dishonesty' of the Muslim debtor!!!

Surely the Muslim banker/financer/trader/entrepreneur does pay Zakaat and does give Sadqah to a variety of Islamic institutions. Is there no niche in his heart for accommodating the hard-pressed debtor for

gaining Allah's Pleasure and the tremendous *thawaab* of the Aakhirah by means of the very simple 'sacrifice' of waiting for payment from a defaulting debtor? Can he not treat his waiting as an extension of his *Sadqah* programme? Is there an imperative need for him to pursue the 'carrion of this world' by insisting on the riba penalty thereby excluding himself from the special rewards in store for those who enthusiastically respond to the Call of the Qur'aan to grant extension to the debtor, and not to regard him as a man of dishonesty on the pretext of gratifying the inordinate craving for money.

The two considerations —the vice of riba and the Call of the Qur'aan to be lenient on debtors — overshadow and dispatch into oblivion every argument which the Fiqh academies and the liberal Ulama tender in justification and for legalization of the capitalist practice of penalizing the debtor with riba.

In the same way that Rasulullah (sallallahu alayhi wasallam), his Sahaabah and the Aimmah and Mashaaikh applied the moral code to deter deliberate defaulters, so too are the Ulama —*the Warathatul Ambiyaa*— expected to apply the moral precept of this Deen to deter the dishonest debtor from perpetrating his injustice of deliberate procrastination in effecting payments on due date.

The endeavour to water down the clarity of the Shariah on issues and to cloak the commands of Islam in an aura of ambiguity in a bid to forge a latitude for accommodating alien and kufr concepts and theories is most contemptible. This contemptibility becomes more repulsive when the exercise emanates from the Ulama.

This digression was necessary to indicate the inseparability of the *Akhlaaqi* (Moral) dimension from any topic and discussion pertaining to this Deen because Rasulullah (sallallahu alayhi wasallam) said: *"Verily, this world has been created for you, while you have been created for the Aakhirah."* Thus, the theme of the *Aakhirah* necessarily dominates or should dominate every attitude of the Mu'min.

CONCEPT OF COMPENSATION

Although Hadhrat Mufti Taqi Saheb disagrees with the view of these "contemporary scholars", in the final analysis he concludes the permissibility of the riba penalty on the basis of his own arguments. Thus, while the "some contemporary scholars" on the one side, and Hadhrat Mufti Saheb on the other, argue in different avenues, they reach the same conclusion, viz., the permissibility of the riba penalty. Distancing himself from the argument of the "contemporary scholars", Hadhrat Mufti Taqi Saheb says:

"*The concept of compensation, however, is not acceptable by the majority of the present day scholars (including the author). It is the considered opinion of such scholars that this suggestion neither conforms to the principles of Shariah nor is it able to solve the problem of default.*"

The view of "some contemporary scholars" has been rejected by Hadhrat Mufti Saheb since it is in conflict with the principles of the Shariah. In the same way we say that the view of Hadhrat Mufti Saheb also does not conform with the principles of the Shariah. In fact, it is in diametric conflict with the categorical prohibition of riba — a prohibition based on the Qur'aan and the highest category of Ahaadith.

The "contemporary scholars" referred to by Hadhrat Mufti Saheb have not even bothered to obtain some Shar'i basis — a principle or a particular *mas'alah* on which to base their view. They resorted to pure opinion which they attempt to pass off as a valid verdict of the Shariah. On the other hand, Hadhrat Mufti Taqi Saheb has endeavoured to extract a basis in the Shariah for his view. But his basis too has no validity and cannot constitute a valid basis for the justification of the riba penalty as we shall soon show, Insha'Allah.

WHAT IS RIBA?

According to the Shariah, the definition of riba is:

"Every excess which does not have a tangible item (of exchange) as

its equivalent." Hence, if a loan of R100 yields a return of R110, the excess of R10 has no tangible or material commodity as its equivalent. The R100 repayment is in lieu of the R100 loan, but the R10 has no material commodity to offset it, hence this *excess* in the Shariah is riba. Conceding this basic principle, Hadhrat Mufti Saheb says: *"First of all, any additional amount charged from a debtor is riba."*

Making a startling concession which knocks out the very bottom of his opinion of the permissibility of the riba penalty, Hadhrat Mufti Saheb says:

"In the days of jahiliyyah (before Islam) the people used to charge additional amounts from their debtors when they were not able to pay at the due date.

The aforementioned suggestion of paying compensation to the creditor/seller resembles the same attitude."

HADHRAT MUFTI SAHEB'S ARGUMENT

After dismissing the *payment of compensation* idea of "some contemporary scholars", Hadhrat Mufti Saheb presents his view as follows: *"The question now arises as to how the banks and financial institutions may solve this problem (i.e. the problem of defaulters). If nothing is charged from the defaulters, it may be a greater incentive for a dishonest person to default continuously."*

In practice, continuous default is not allowed by the banks. They are very quick to resort to legal steps to claim their rights. It is, therefore, not at all in the interests of the debtor to unnecessarily default in payment. He will unnecessarily bring upon himself the yoke of exorbitant legal costs.

This question had arisen 14 centuries ago while the Shariah was being revealed to Rasulullah (sallallahu alayhi wasallam). It is not a new question. It is not a new situation for which Islam has no answer. It is not a question, the solution of which requires the operation of principles of the Shariah for the formulation of a *hukm*. The solu-

tion for this problem is nothing other than the pressure of Islam's moral precepts. While acknowledging the existence of this problem, Rasulullah (sallallahu alayhi wasallam) addressed it by saying: *"The procrastination of the wealthy (i.e. the one who can afford to pay) is zulm."*

The very fact that the Aimmah-e-Mujtahideen and the Fuqaha of the Ummah throughout the history of Islam never employed this Hadith or any other similar narration as a principle on which to base permissibility for a monetary penalty should be ample indication for us to understand that there is no scope in the Shariah for a monetary penalty to punish the debtor for his act of procrastination. In fact, the Fuqaha did not invoke any principle of the Shariah to acquire a *hukm* of monetary penalty. The simple and straightforward reason for this is that a monetary penalty is riba, plain and simple. In addition it is in conflict with the moral exhortation of the Qur'aan and Sunnah.

Neither did Rasulullah (sallallahu alayhi wasallam) nor the Sahaabaha nor the Aimmah-e-Mujtahideen nor the Fuqaha-e-Mutaqaddimeen nor the Fuqaha-e-Muta-akh-khireen impose a monetary penalty to solve this problem. In other words, Islam deemed the moral code an adequate solution for this problem.

The attempt in this belated century to 'solve' this problem in a way which conflicts with the *Ijma' of the Ummah*, and in a way which legalizes riba is the arrogation to oneself of the right to 're-interpret' the Immutable Shariah. This is a curse which has settled on modernist, westernised Muslims. Its tentacles are being spread towards even the Ulama who are becoming ensnared in its grip. In view of the fact that the Shariah has not imposed any monetary penalty for even deliberate *procrastination*, it is highly improper to transgress the limit of Allah Ta'ala by attempting to supersede the Shariah in the matter of providing a solution for a problem which had already existed during the time of Rasulullah (sallallahu alayhi wasallam) but for which neither he nor the entire Ummah had considered proper to transgress beyond the confines of the moral code of Islam in a pursuit for a so-

lution.

GREATER INCENTIVE?

The averment, *"If nothing is charged from the defaulters, it may be a greater incentive for a dishonest person to default continuously"*, is tantamount to implying that Allah and His Rasool (sallallahu alayhi wasallam) did not foresee such a development, hence the divine Shariah contented itself with its moral code to solve the problem — *Nauthubillaah!* The averment implies that the Shariah by not charging anything for the act of default in payments, has provided "dishonest defaulters with greater incentive to default continuously." Islamically these conclusions are absurd and of an exceptionally grave nature.

The charge which Hadhrat Mufti Saheb's question gives rise to is directed at the Shariah of Islam which by implication has provided *"greater incentive"* to dishonest defaulters to default because it does not impose any charge on such defaulters.

The attempt to supersede the Shariah by augmenting its tenets with mutative rules is fraught with the gravest perils. The mind of the Mu'min should operate parallel with the methodology and spirit of the Shariah. It should not formulate arguments which lead to the conclusion that there is some deficiency in the Shariah of Allah Ta'ala. This is precisely the conclusion which stems from the aforegoing averment of Hadhrat Mufti Taqi Saheb. Since Islam has not ordered any monetary fine or riba for even deliberate defaulters, Muslim creditors should tolerate the incidence of delayed payments and consider their patience to be an act of *Sadqah* which will not go unrewarded, neither in the Hereafter nor in this world. The proclaimed 'loss' which banks are said to suffer in consequence of late payments, is a figment of imagination. It exists in only theory, not in practice. Furthermore, banks are not entitled to any monetary compensation for such imagined 'loss', nor do they have the right to impose monetary penalties (riba) on defaulters irrespective of any imagined designs of altruism which the bankers are urged to have in

mind for such haraam monies which they exploit from defaulters.

Since the act of levying a monetary charge for late payments runs contrary to the teachings and spirit of the Shariah, Hadhrat Mufti Saheb's entire argument to justify the riba penalty, to put it mildly, is redundant, uncalled for and superfluous. In other words, it is *baatil.* Nevertheless, we shall present the venerable Mufti Saheb's argument to further highlight the discrepancies and the conflict with the Shariah.

HADHRAT MUFTI SAHEB'S ANSWER

Answering his question, Hadhrat Mufti Saheb says:
"Here is the answer to this question. We have already mentioned that the real solution to this problem is to develop a system where the defaulters are duly punished by depriving them from enjoying a financial facility in future."

In his aforementioned answer, Hadhrat Mufti Saheb proposes that the "real solution" is "to develop a system" for the "punishment of the defaulters". His proposal implies that the Shariah has not offered such a system, hence the need to "develop" such a system. The endeavour to supersede the Shariah should thus be manifest. Inspite of the problem having existed since time immemorial, the Shariah did not devise a system of punishment for the defaulters other than its sacred code of morality which warns them of dire consequences in both this world and the Aakhirah for deliberate procrastination in effecting payment.

The system to punish defaulters by depriving them of future credit facilities already exists. Hadhrat Mufti Saheb has simply suggested that the blacklisting system of the capitalists be incorporated into the Shariah.

Since the Shariah has deemed it adequate to restrict the solution to its Moral Code, no Muslim has the right to arrogate to himself the task of developing a system of monetary imposition to punish those who

find themselves unable to pay on due date. The claim of 'deliberate defaulting' is a flimsy pretext cited for justifying the endeavour to create a system of monetary punishment which is no better from and not different to the capitalist system of charging interest on late payments.

We have earlier (on page 11) explained the practical impossibility of ascertaining with certitude who the honest and the dishonest defaulters are. In fact, Hadhrat Mufti Saheb has forgotten this reality which he himself has stated with clarity in his refutation of the view of "some contemporary scholars". Stating this reality, Hadhrat Mufti Taqi Saheb says in his book:
"But in practical application of the concept, these conditions are hardly fulfilled, because every debtor may claim that his default is due to his financial inability at the due date, and it is very difficult for a financial institution to hold an inquiry about the financial position of each client and to verify whether or not he was able to pay. What the banks normally do is that they presume that every client was able to pay unless he has been declared as bankrupt or insolvent……Therefore, the suggestion leaves no practical and meaningful difference between an interest based financing and an Islamic financing."

When the position concerning the detection of dishonest defaulters is one of practical impossibility—a position which Hadhrat Mufti Saheb utilizes in refutation of the interest charge suggested by "some contemporary scholars"—what makes it practically possible in the proposal put forward by Hadhrat Mufti Taqi Saheb? How will his system of punishment be practically effected against dishonest defaulters when such defaulters cannot be detected with any certitude? In effect, the end result of his system of punishment is the same as the result of the view of "some contemporary scholars" whose opinion the venerable Mufti Saheb has dismissed as baseless. This end result is stated by Hadhrat Mufti Saheb as follows:

"*What the banks normally do is that they presume that*

every client is able to pay.……"

This is the usual presumption of all banks and traders. In other words, all defaulters are 'dishonest' in the bank's estimation, hence the applicability of the riba penalty to all those who are unable to pay on due date. Hadhrat Mufti Saheb has made the element of 'dishonesty' pivotal in his opinion to legalize the riba penalty although he concedes the practical impossibility of ascertaining the dishonesty of the defaulters. Just as he has cited this practical impossibility in negation of the view of "some contemporary scholars", so too do we present this factor in refutation of his opinion which has no Shar'i basis.

When on his own admission "every debtor may claim inability to pay" and not accept the charge of dishonesty, how does he propose to apply his system of punishment?

It is clear that any system to punish the defaulters is not workable in view of the inability of the system to establish the dishonesty of defaulters with certitude. Thus, while in theory the system will exist, in practice the financers will apply the 'punishment' of riba to all defaulters regardless of the element of 'dishonesty' for whose eradication the system was ostensibly initiated.

Assuming that a method for easy detection is devised whereby it could be established if a defaulter is honest or dishonest, then too, the 'punishment' proposed by Hadhrat Mufti Saheb is unacceptable because it is haraam riba. It is as simple as that!

THE PUNISHMENT

Part of the 'punishment' for defaulters, besides the monetary penalty, is explained by Hadhrat Mufti Taqi Saheb as:

"...the defaulters are duly punished by depriving them from enjoying a financial facility in future."

This proposal betrays the capitalist attitude underlying the move to

introduce into the Shariah ‘punishment’ for late-payers. Hadhrat Mufti Saheb has not presented anything original or new in his suggestion of developing a system to penalize those who are unable to meet their commitments on due date. He has simply borrowed from the capitalist ideology and has presented it for acceptance without providing any valid Shar’i basis for his endeavour to justify the riba penalty.

Relative to those who fail to pay on due date, the ‘punishment’ consists of two elements:
(1) An interest charge.
(2) Blacklisting the debtor.

These two factors are precisely the constituents of the capitalist system pertaining to ‘bad debtors’. Whenever a debtor is unable to meet payment on due date, interest is summarily charged. If the debtor’s financial position deteriorates, legal action is instituted against him. This culminates in his name being blacklisted, published in court and other records which are used by traders to determine the creditworthiness of clients. Once a debtor’s name has been blacklisted, Hadhrat Mufti Saheb’s proposal, viz. *punishing defaulters by “depriving them from enjoying a financial facility in future”,* is fulfilled.

However, as mentioned earlier, Hadhrat Mufti Taqi Saheb has produced nothing new. He has merely introduced the capitalist system for incorporation into the Shariah. The proposal of ‘developing a system to punish the defaulters’ is, therefore, superfluous, to say the least. It already exists. It is not an original proposal. It is an old haraam measure of the capitalist system. It is an old hat presented in a different garb.

Although punishing a debtor by depriving him of enjoying future credit facilities is not riba, it is nevertheless, the product of capitalist riba attitude which in turn is the way in which operates the mental process of men driven to madness by the touch of Shaitaan. And that

is because they devour riba.

Neither does Islam permit riba nor does it allow the unjust, hard-hearted capitalist attitude of depriving people from enjoying future credit facilities. Late payment does not necessarily mean that a man is a crook or a fraud. Great men such as Ambiyaa, Sahaabah and Auliyaa also at times found themselves unable to pay their debts. The safety of Muslims against the curse and scourge of riba is to restrict themselves to the plain and simple *Ahkaam*, norms and attitudes of the Shariah and Islaami *Akhlaaq.*

The endeavour to 'upgrade' the Shariah by borrowing from kuffaar economic systems primarily to satisfy the demands of westernised Muslim entrepreneurs is most unbecoming of Ulama whose foremost obligation is to ensure that kufr and its attitudes make no inroads into any domain of Islam.

THE SELF-IMPOSED FINE

Hadhrat Mufti Taqi Saheb presents the following suggestion as a stratagem for legalizing the haraam riba penalty:
"For this purpose it was suggested that the client, when entering into a murabahah transaction, should undertake that in case he defaults in payment at the due date, he will pay a specified amount to a charitable fund maintained by the bank. It must be ensured that no part of this amount shall form part of the income of the bank"

The first part of this proposal is not original. It has been borrowed from the capitalist system. This is precisely what all standard hiring, leasing, hire-purchase, etc. contracts incorporate. There is a clause in all these capitalist contracts to the effect that the debtor undertakes to pay interest on late payments. This part of the capitalist contract has been borrowed by Hadhrat Mufti Taqi Saheb and offered to the Ummah for incorporation into the Immutable Shariah of Allah —the Shariah which views riba with an abhorrence worse than the abhorrence for a man who fornicates with his mother.

The second part, viz. the altruistic proposal of using this riba for charity, does not detract from the *hurmat* (prohibition—being haraam) of the riba charge. The end of altruism does not legalize the haraam act of riba.

Regardless of the purpose for which the riba will be used, it remains haraam, and its diversion towards charity is also haraam in view of the fact that the owner of the money from whom it was extracted under duress, usurped and then expended in charity, remains a living claimant of the money. The owner is known, hence his property may not be given in charity. The money remains his property since it was not obtained with his wholehearted and happy consent.

The poor debtor, desirous of enjoying the credit facility, is pressurized to enter into this dubious self-imposition of charity. *Sadqah* is not *Sadqah* when it is not accompanied by a happy heart. It is haraam to extract money from a man by even the application of indirect pressure. Hadhrat Hakimul Ummat Maulana Ashraf Ali Thaanvi (rahmatullah alayh) has stated the law of the Shariah in this regard without any ambiguity. Stating the Shar'i position in this regard, Hakimul Ummat said:
"If there is pressure of whatever kind, then I do not consider such contributions to be halaal because the Hadith Shareef very clearly sounds the command: 'The wealth of a Muslim is not halaal (for anyone) except with (his) wholehearted happiness.' Look! Rasulullah (sallallahu alayhi wasallam) said, 'Laa yahillo' (i.e. it is not halaal). How then can such contributions be halaal?

The condition for contributions being halaal is that there should be no detestation (in the heart of the contributor)."

Can it be honestly and sincerely said that a man will unnecessarily and with a happy heart impose on himself a payment should he fail to meet his commitments on due date? Yes, it can be claimed without the slightest fear of any contradiction that the debtor who agrees to this stipulation of self-imposed penalty, accepts the burden of this

riba under duress. He is in need of the credit facility, hence he agrees to pay riba on any late payment.

The first haraam act is the unlawful pressure which this system applies to the prospective debtor in indirectly compelling him to agree to pay riba. The second haraam act is the irrefutable fact that this charge is pure riba since it is not *a valid Sadqah* due to the absence of the essential condition of *Sadqah*, and that condition according to the Hadith is *Teeb-e-Nafs* (wholehearted happy consent). The third haraam act is not to return the money to its owner who is present. The fourth haraam act is to use the usurped money for charity when the owner is present as a claimant of his property.

A mitigating factor would have been to use the debtor's money as a payment on his debt. Although this mitigating factor is not a licence for the 'charge' even if the motive is to deduct it from the debt, we have nevertheless, presented it here to highlight the oppression and injustice of the system which takes from a debtor who is unable to pay his debt on due date, and then divert his money elsewhere in the name of 'charity'. However, instead of using the usurped money to alleviate the difficulty of its owner by deducting it from his debt, it is diverted to charity. Which principle of the Shariah justifies this warped logic and misdirection of another man's property usurped under the flimsiest of pretexts?

Even the courts of Islam are not allowed to impose monetary fines on criminals. There is *Ijma'* on this fact. However, in the view of Imaam Abu Yusuf (rahmatullah alayh), at times a monetary fine by the court may be imposed as a deterrent. However, Imaam Abu Yusuf (rahmatullah alayh) clarifies that the money should be held in trust for the owner, and returned to him after some time. The money may not be distributed to charity because it was extracted from the criminal without his *Teeb-e-Nafs* —without his wholehearted consent. In even this rare view which is in conflict with the *Jamhur Fuqaha*, the imperative requisite is a properly constituted Shar'i Court. And then too, the money cannot be diverted to charity.

What now can we conclude about the capitalist system of riba penalty on late payments which do not require an Islamic Court for enforcement — a contract being sufficient — and which will be diverted to 'charity'?

Sadqah is a voluntary act which is undertaken for gaining Allah's Pleasure and *thawaab.* It is not an act which may be imposed on a man by applying indirect pressure such as the almost certain probability of credit facilities being denied if the debtor refuses to comply with the supposedly self-imposition of *Sadqah.* This stipulation in the contract or application for credit facilities is *baatil* and unlawful in the Shariah. The penalty thus remains riba. The rest of the stipulation suggested by Hadhrat Mufti Taqi Saheb is superfluous in view of the charge being riba without any doubt.

The assurance that no part of this charge will form part of the bank's income is of no substance. It does not legalize riba. Whether it forms part or not of the bank's income is irrelevant in relation to the primary argument of the nature of the charge. What exactly is this charge? The Shar'i definition of riba applies aptly to this penalty for late payments.

The stipulation that *"all amounts credited therein shall be exclusively used for purely charitable purpose approved by the Shariah"*, is of no avail. It in no way whatever facilitates the attempt to legalize haraam riba. An altruistic aim never justifies a forbidden or haraam practice. The proceeds of prostitution if used for charity do not legalize prostitution. The income acquired from gambling if used for works of charity approved by the Shariah does not legalize the practice of gambling. In precisely the same way, riba will not be legalized by means of charity.

LOANS?

Another incongruous suggestion of Hadhrat Mufti Saheb's proposal is: *"The banks may also advance interest-fee loans to the needy per-*

sons from this charitable fund."

The fund in the first instance consists of the proceeds of exploitation and usurpation. It has rightful claimants, namely, the respective owners who were unlawfully penalized with the riba charge. It belongs to them. If the money is genuine *Sadqah* as Hadhrat Mufti Saheb believes, the discharge of the obligation demands that the money be given to the poor, not given as loans. If the so-called Sadqah is given as a loan and the 'debtor' defaults or cannot pay, the bank has no right to demand payment since it is not the owner of the money nor is the bank the validly appointed *Wakeel* of the owners of the money. It has no mandate to give this money as loans. In the first place, the bank in terms of the logical conclusion of the proposal posited by Hadhrat Mufti Saheb, does not become the owner of the money nor are the original owners any longer the owners (according to Hadhrat Mufti Saheb). So, just what and who entitles the bank to utilize the money for interest-free loans and gain for itself advertisement value from money termed *Sadqah?*

The whole proposal offered by Hadhrat Mufti Taqi Saheb is beset with the misfortunes of incongruity and the curse of the Shariah which has declared the Divine Ultimatum of War for those who devour riba and stand like men driven to madness by the evil touch of Shaitaan.

HADHRAT MUFTI SAHEB'S FIQHI BASIS

The view which "some contemporary scholars" had presented in justification of the riba penalty on late payments, and which was rejected by Hadhrat Mufti Saheb, had no basis in the Shariah. The "contemporary scholars" had not claimed any basis in Fiqh for their view or so it appears from the book of Hadhrat Mufti Saheb. They had presented something which was a figment of their pure opinion. They simply could not venture any Shar'i basis.

However, Hadhrat Mufti Saheb for the same conclusion of riba permissibility has endeavoured to present a Shar'i basis for the capitalist

practice of charging interest on late payments. We shall now proceed to analyse his basis, Insha'Allah.

In his substantiation for the riba penalty view of permissibility, Hadhrat Mufti Taqi Saheb states:
"This proposal is based on a ruling given by some Maliki jurists who say that if a debtor is asked to pay an additional amount in case of default, it is not allowed by Shariah, because it amounts to charging interest. However, in order to assure the creditor of prompt payment, the debtor may undertake to give some amount in charity in case of default. This is, in fact, a sort of Yamin (vow) which is a self-imposed penalty to keep oneself away from default. Normally, such 'vows' create a moral or religious obligation and are not enforceable through courts. However, some Maliki jurists allow to make it justiceable, and there is nothing in the Holy Qur'aan and in the Sunnah of the Holy Prophet (sallallahu alayhi wasallam) which forbids making this 'vow' enforceable through the courts of law. Therefore, in cases of genuine need, this view can be acted upon."

THE RESPONSE:

(1) Assuming that this ruling of *"some Maliki jurists"* can constitute a valid basis for the capitalist practice of charging interest on late payments, it will still be in conflict with the *Ijma'* of the Hanafi, Shaafi and Hambali Math-habs. It will also be in conflict with the consensus of the *Jamhur* (the overwhelming majority) Maaliki Fuqaha. It is in conflict with the Qur'aanic prohibition of riba. It is in conflict with all the Ahaadith prohibiting interest. It is in conflict with the fourteen century *Ijmaa-ee* prohibition which has been the accepted view of the entire Ummah.

(2) An isolated minority view is presented as a basis for justifying the essentially capitalist practice of riba.

(3) Such isolated and minority views may be accepted where a dire necessity (*Dhuroorah)* truly exists. Relative to the Muslim capitalist

orientated bankers and financiers, there exists no *Dhuroorah* for diversion from the Ruling of the *Jamhur* Fuqaha of all Math-habs, especially on such a grave matter as legalizing the haraam act of riba.

Banks are institutions which earn billions. The comparatively small number of payment defaulters (i.e. those who make late payments) will not dent the huge income which banks earn. There is no 'genuine' need for this extreme measure as Hadhrat Mufti Saheb theorizes. The *'need'* about which Hadhrat Mufti Taqi Saheb speaks of does not fall within the Shar'i definition of *"Dhuroorah Shadeedah"* (a real and true need without which life becomes extremely difficult). The *'need'* in this context is merely to provide more revenue for the bank owners who swim in wealth and whose business enterprises operate within the spirit of the western capitalist riba system. The comparatively speaking 'little' which the banks will earn by charging interest on late payments will not adversely affect them if denied to them.

Far from there existing a Shar'i *Dhuroorah* for legalizing riba on the basis of an extremely remote, minority view of some Fuqaha of another Math-hab, the measure is in fact exploitation and usurpation of the money of hard pressed debtors —of people who seek to acquire the good things of life by way of credit because they cannot afford to pay cash. The argument of 'dishonesty' has no validity in the endeavour to legalize interest on the basis of an obscure view of the Maaliki Fuqaah which, anyhow, the majority of Maaliki Fuqaha themselves reject.

(4) Even this minority of Maliki Jurists agree that charging the debtor an additional amount for default is riba. Hadhrat Mufti Saheb concedes this position of the minority of Maaliki Jurists whose support he takes, in the attempt to provide a Shar'i basis for the riba penalty view. Inspite of this admission, Hadhrat Mufti Taqi Saheb says: *"However, in order to assure the creditor of prompt payment, the debtor may undertake to give some amount in charity in case of default."*

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This statement as it appears in the context of the full passage (quoted on page 24) conveys the impression that *some Maaliki Fuqahaa basing the interest question on self-imposed Yameen (Vow), have issued the verdict of permissibility for the imposition of a monetary penalty on a late-payer.* However, this is misleading. Neither Al-Hattaab nor any other Maaliki Fuqaha have cited the example of 'interest on late payments'. The Maaliki Fuqaha, not even the minority to whom Hadhrat Mufti Taqi Saheb has made reference, claimed that the interest penalty can be legalized on the basis of a self-imposed *Yameen.*

Hadhrat Mufti Taqi Saheb has incorrectly fitted his personal view into a context which leads readers to the conclusion that this specific example of interest penalty has been legalized by some Maaliki Jurists when in reality it is not so. The view of the interest penalty becoming lawful on the basis of a self-imposed vow is the opinion of only Hadhrat Mufti Taqi Saheb. This example is not given by Al-Hattaab. All the Maaliki Fuqaha unanimously condemn and ban interest on late payments.

To avoid confusing the view of permissibility with the Maaliki Fuqaha, Hadhrat Mufti Taqi Saheb should have clarified that the issue of permissibility of a monetary penalty (which is nothing but riba) is the product of his own *istidlaal* (deduction) which he had extracted on the basis of a *qiyaas* (analogical reasoning process) utilizing the basis of self-imposed vows which is a view held by a 'small' minority of Maaliki Fuqahaa — a view which is rejected by the *Jamhur* Maaliki Fuqaha and unanimously by all the other Math-habs.

The official and popular ruling of the Maaliki Math-hab as stated in all their *kutub* on the issue of self-imposed vows is:

> *"The Mash-hoor view of the Math-hab is that there shall be no court ruling (to enforce) it regardless of whether the institution (or the beneficiary) is stipulated or unstipulated. Thus, it appears in Kitaabul Hibaat of Al-Mudawwanah that if a man says: 'My house is Sadqah for the masaakeen or for a specific man*

(whom he names)", then he violates his vow, there shall be no court ruling against him (to enforce the self-imposed Sadqah)." (Tahreerul Kalaam fi Masaailil Iltizaam of Allaamah Al-Hattaab)

Although examples of differences are given, i.e. the minority Maaliki position is stated, regarding the enforcement by courts of self-imposed vows, the Maaliki Fuqaha, not even the minority, have not employed *Shar'i Qiyaas* (the Shariah's process of Analogical Reasoning) to legalize a monetary penalty on those who make late payments. At no stage in its history, from its inception until now, did the Shariah ever legalize interest on the basis of any legal *Fiqhi* stratagem or principle. To the best of our knowledge, Hadhrat Mufti Taqi Saheb is the first in the ranks of our Ulama who has embarked on such a drastic step.

On the assumption that it does transpire that it is in fact a minority view of "some Maliki jurists", then too, it has to be refuted since it is in flagrant conflict with the Qur'aan, the Sunnah, the views of all other Math-habs as well as in conflict with the Ruling of the *Jamhur* Maaliki Fuqaha. As such it may not be presented as a Shar'i basis for legalization of the capitalist riba penalty for late payments. This assumed isolated view cannot and should not be presented in negation of the *Ijma'* of the Ummah on the issue of the prohibition of the riba penalty.

(5) The averment that *"This is a sort of Yamin"* or vow is untenable. Either it is a vow or not. It can't be *'a sort of a vow'*, There is no in-between category in the Shariah regarding vows. Furthermore, a vow is a voluntary act which should not be extracted by the application of pressure. Even if according to some opinion such a vow may be valid, the money extracted in this manner is not halaal since it is in conflict with the unequivocal prohibition stated in the following Hadith:

"The wealth of a Muslim is not lawful (for anyone) except with the happiness of his heart."

The rationale of Hadhrat Mufti Taqi Saheb's proposal envisages that:

According to some Maaliki Jurists the courts are entitled to enforce payment of *Sadqah* which a man has made incumbent on himself by means of a vow. The banks should stipulate that the debtor makes such a vow whereby he undertakes to give to charity a sum of money in the event he defaults in his instalments. This is like the vow which is enforceable by the courts in the event the debtor is unable to pay on due date.

The fundamental difference which has been overlooked is that the vow about which some Maliki jurists have ruled is a voluntary vow. It is a vow which pertains to acts of piety and goodness. It is not a vow to legalize a haraam act, viz., riba. It is a vow which is not a stipulation of a contract to acquire credit facilities. On the other hand, the 'vow' which the debtor is constrained to make is extracted from him under duress. Secondly, the charge the debtor is obliged to agree to is a riba penalty which cannever be legalized. All the Mathhabs categorically and emphatically prohibit this riba charge on late payments. Hence, the stratagems resorted to in the endeavour to circumvent this prohibition are not permissible. There is no goodness in this circumvention.

The circumvention only serves to entrench a cruel practice of the Yahood capitalist system. This practice as mentioned earlier comprises two constituents:

(1) Exploiting the debtor by slapping riba on him.
(2) Blacklisting him as a punishment to deprive him from future credit facilities.

Both these acts run counter to the benign commands of the Qur'aan which in this regard are also twofold:

(i) Grant the debtor an extension of time or even write off the debt.

(ii) Protect his name and honour.

Banks and financiers, be they Muslims, arbitrarily presume all payment defaulters to be crooks and dishonest. This capitalist attitude is adopted to justify the blanket ruling of the riba penalty on all defaulters. This arbitrary presumption is conceded by Hadhrat Mufti Taqi Saheb inspite of him postulating the theory of only punishing dishonest defaulters, an attainment which is not practical by his own admission.

There is a vast difference between a self-imposed vow and a 'vow' which a man is constrained to impose on himself as a consequence of external factors, the primary one being the pressure exercised by the creditor on whom the debtor considers himself to be dependent for the procurement of his need. It is highly improper to utilize a legal procedure as a stratagem to negate the spirit and teaching of the Qur'aan and Sunnah. The reprehensibility of a legal stratagem is not cancelled by its legal effect, e.g. three talaaqs issued in a single session remain reprehensible notwithstanding the legal validity of the talaaqs.

Stratagems for circumvention of Shar'i restraints may be employed for only the aims and purposes of the Deen, not for worldly and nafsaani goals as is the case with the endeavour to legalize the riba penalty on the basis of a self-imposed *yameen* (vow) stratagem, and that too a view held by a small minority of Maaliki Fuqaha in opposition to the *Jamhur* Maaliki Fuqaha and the *Ijma'* of all the other Mathhabs on the Qur'aanic and Sunnah prohibition of riba. Lest it be forgotten, we reiterate that the minority Maaliki view pertains to enforcement by courts of self-imposed vows on issues of piety, not on the question of legalizing the interest monetary penalty.

(6) There is absolutely no such need to invoke the Shar'i principle of *Dhuroorah*. The 'genuine need' is a figment of the capitalist economic theory. There will have to develop a truly dire and severe need for the invocation of the Shar'i principle of *Dhuroorah* to legalize

the grave crime and sin of riba.

PRESSURIZING THE DEBTOR

Hadhrat Mufti Taqi Saheb avers:

"The proposal is meant only to pressurize the debtors on paying their dues promptly…"

Hadhrat Mufti Saheb has admitted with clarity that his proposal of riba penalty is a device for the application of pressure on the debtor. It is this pressurization which is haraam. It negates the basis of *Teeb-e-Nafs* (Happiness of the Heart) which the Hadith says is the only basis for taking the wealth of a man. In the absence of *Teeb-e-Nafs*, Rasulullah (sallallahu alayhi wasallam) said that the wealth of a man is "not lawful".

In view of this categoric prohibition declared by Rasulullah (sallallahu alayhi wasallam), the following suggestion of Hadhrat Mufti Taqi Saheb is improper and unacceptable to the Shariah:
"Since the penalty undertaken by the client is originally a self-undertaken vow, and not a penalty charged by the financier, the agreement should reflect this concept. Therefore, the proper wording of the penalty clause would be on the following lines….."

The wording of the 'penalty clause' does not restore the element of *Teeb-e-Nafs.* Regardless of the riba concept being reflected in the wording and the debtor's signature gained under duress, the riba is not legalized. The stratagem is baseless and does not achieve the goal of transforming the riba into the effect of a vow. Whereas the motive for the true Vow is the Pleasure of Allah Ta'ala and the obtainal of *thawaab,* the 'vow' employed as a stratagem in this context is underlined by a sinister agenda which is the obtainal of monetary gain—a gain which the Shariah has made haraam — a gain which is acquired by exploitating the debtors and usurping their wealth. It is a stratagem to introduce into the Shariah a practice of the capitalist economic theory— the practice of charging interest on late payments.

The proposal is nothing other than this, and the procedure outlined by Hadhrat Mufti Saheb does not confer Shar'i credibility to it, for it remains haraam riba.

THE INCONGRUITY OF THE 'VOW'

Hadhrat Mufti Taqi Saheb says:
"Being a vow of charitable act, it was originally permissible for the client, to give the stipulated amount to any charity of his choice, but in order to ensure that he will pay, the charitable account or fund maintained by the financier/bank is specified in the proposed undertaking. This specific undertaking does not violate and principle of the Shariah."

What has cancelled this original permissibility? Which factor has the force to abrogate the Shar'i permissibility? Does the Shariah classify this permissibility into *'original permissibility'* and *'ultimate permissibility'* or a permissibility of any other kind? Hadhrat Mufti Saheb has not stated the grounds for restricting the unrestricted Shar'i permissibility which a man enjoys in relation to the distribution of his wealth in any avenue of charity allowed by the Shariah.

The only cause Hadhrat Mufti Saheb advances for fettering the unrestricted permissibility allowed by the Shariah is *"to ensure that he will pay"*. This presupposes that the debtor will not pay the penalty of riba which he has undertaken to pay by way of the stratagem of a vow. In this presupposition is further confirmation for our claim that the 'vow' is not self-imposed. Rather it is imposed on the debtor by the bank/financier, hence the avenue of expenditure is specified to ensure that the money is extracted from the debtor, be it against his wishes. Thus the essential requisite of *Teeb-e-Nafs* for the lawfulness of the wealth of a person is lacking in the supposedly self-imposed vow.

Hadhrat Mufti Saheb has further restricted the 'original' permissibility of the owner to divert his charity to whichever channel he desires, on the basis of his supposition. The fear that the debtor will not vol-

untarily pay the riba penalty which he has been induced to agree to by means of the fallacious 'vow' has led Hadhrat Mufti Taqi Saheb to curtail the unrestricted permissibility the Shariah gives a man in the choice of charitable institutions to which he wishes to contribute his *Sadqah*. Yet, for this restriction Hadhrat Mufti Saheb has not produced any Shar'i basis. His basis is pure opinion—opinion unbacked by any Shar'i principle or tenet.

An individual's opinion, be he an Aalim of the Deen, is devoid of Shar'i force and substance if it is not substantiated on the basis of Shariah principles or even a teaching of the Shariah. When the Shariah allows a man to divert his charity to any valid charitable institution, it is highly improper to restrict this general permission and shackle it with restrictions based on personal opinion for the sake of a riba penalty.

Hadhrat Mufti Taqi Saheb contends that *"this specific undertaking does not violate any principle of the Shariah"*.

In fact, it does violate the Shar'i principle that what the Shariah has left unrestricted may not be restricted by personal opinion. For example, the Shariah regards as valid the marriage of a 15 year old adult (male or female) who had entered into the Nikah without parental consent. It is not permissible to restrict this general permission of the Shariah with a personal opinion which lacks a Shar'i basis in the way the so-called Muslim Personal Law clique perpetrates.

Another example, is that the Shariah grants unfettered legal permission for a man to marry four wives. This unrestricted permission may not be curtailed by personal opinion to regulate polygamy as the deviated liberals are guilty of. In the same way, the permission which the Shariah gives for distribution of *Nafl Sadqah* is unfettered. There is no specified avenue of charity which is obligatory on the contributor. Hadhrat Mufti Saheb's restriction on this unfettered permission by specifying the charitable institution (the bank in this case), is an excess committed against the Shariah, hence invalid.

Besides all this, the *qiyaas* of Hadhrat Mufti Taqi Saheb is decidedly *faasid* (corrupt and baseless) both morally and juridically. Morally it is *faasid* because it is exploitation and runs in diametric conflict with the Qur'aan's exhortation to grant the debtor extension of time and/ or to waive the entire or part of the debts. Juridically (from the *Fiqhi point of view)*, the *qiyaas* is *faasid* because it violates fundamental conditions for the validity of *Qiyaas.* That fundamental condition *(Shart)* is that the expediency for which the ruling is required (*the Maqees or the Fara')* **must not be a mansoos alayh hukm of the Shariah.** Riba is haraam by such *Nusoos* which are of the *Qat'i* class, i.e. the proofs are absolute in certitude, being of the highest category of Shar' proof (Qur'aanic aayaat and Mutawaatir Ahaadith).

(7) Another grave error of exceptional proportion committed by Hadhrat Mufti Taqi Saheb is the unjustified exercise of *Udool Anil Maslak* (Diversion from the Maslak or Math-hab) without valid Shar'i reason. The Fuqaha of all Math-habs unanimously stipulate that the validity of *Udool (Diversion)* is dependent on *Dhuroorah Shadeedah* (an extreme and a real need which necessitates *Udool Anil Maslak*), without which life will become most difficult. No one's life will cave in if the bankers are not allowed to charge interest on late payments.

(8) Another grave error which Hadhrat Mufti Saheb has committed is to resort to *Udool Anil Maslak* without even taking into consideration the conditions which render this *Diversion* valid. The one such condition has already been mentioned in No.7 above. The other condition which Hadhrat Mufti Taqi Saheb ignores in his endeavour to incorporate a Maaliki view, albeit erroneously, into the Hanafi Math-hab on this particular issue of enforcement by courts of self-imposed vows —the view of the minority Maaliki Fuqaha— is that such court enforcement will be valid only if the *Haakim* (the Qaadhi/Judge) had ruled that the self-imposed liability by way of a vow was valid in the Shariah. If the Islamic court had ruled initially that the self-imposition is valid, then it will have the right to enforce the self-

imposed liability, otherwise not.

However, in the case of the monetary penalty, the very vow will be in conflict with the Shariah since it undertakes to legalize what the Shariah has made haraam, viz. interest. The prospects of the court thus enforcing such a vow which is in violation of every aspect of this Deen of Islam are therefore nil.

(9) Another important consideration in the discussion of the validity of the self-imposed oath/vow is the issue of enforcement by the court. Purely for the sake of pursuing this argument a bit further, the question arises: What type of court in this age will enforce the execution of the demands of a Shar'i act? A *Yameen* is an act of ibaadat. It is a Shar'i act and a decision has to be given against a Muslim. In this age for which Hadhrat Mufti Taqi Saheb proposes the monetary penalty and other issues, there are no Shar'i courts. There are no Islamic Qaadhis who have the necessary jurisdiction and authority to administer the Shariah. The only courts existing all over the world are kuffaar courts. Even if the judge happens to be some faasiq and faajir judge, it remains a court of the kuffaar.

The presence of a Muslim judge does not transform the court into a Shar'i court. The judge, even if he is a born Muslim, is under compulsion to interpret and to issue verdicts in terms of the laws of the kuffaar government which he is serving. The judge has no relationship with the Shariah. We need say no further than this for everyone to understand the invalidity of the present-day courts. There is no true Islamic or Shar'i court to administer in accordance with the Shariah.

THE FINAL NAIL

The invalidity and prohibition of the riba penalty will be better understood by analogy with the criminal act of *ghasab* (usurpation or taking wilfully someone's property without his consent).

The usurped item is termed *maghsoob* and the usurper is called

ghaasib. The Shariah's law regarding *ghasab* does not reward the owner of the *maghsoob* for his suffering in consequence of the *ghaasib's* criminal act of having usurped the item/property. Even if the *ghaasib* derives benefit from the *maghsoob*, a monetary penalty cannot be imposed on him. Thus, if a man usurps the vehicle of another person, uses it as a taxi, earns income from it and later returns the vehicle or the owner repossesses it, no monetary penalty may be imposed on the *ghaasib.*

A man usurps the house of someone. He occupies it without the consent of the owner or in flagrant violation of the owner's refusal and demand for the property to be returned. By some stratagem, legal or otherwise, the *ghaasib* thwarts the owner and rents out the house for a whole year, deriving substantial haraam income. Finally the owner manages to evict the *ghaasib*. But, the Shariah does not allow a monetary penalty to be imposed on the *ghaasib* for his act of *ghasab* nor is the owner entitled to the benefit allowed by the capitalist system, viz., occupational rent.

A man by force seizes a large amount of money from someone. The *ghaasib* invests the *maghsoob money* in a lucrative business enterprise and earns substantial income. After a considerable time the owner manages to gain the return of his usurped money. The Shariah does not allow a monetary penalty to be imposed on the *ghaasib*. The owner of the money cannot claim any monetary compensation for the *ghasab* and the misuse of his wealth.

Hadhrat Mufti Taqi Uthmaani Saheb accepts this position of the Shariah and even makes reference to it in his book. Let us now examine the riba penalty on late payment of debt in the light of the Shariah's attitude and ruling pertaining to the act of *ghasab.*

In the act of usurpation *(ghasab)* the possession of the usurped item by the *ghaasib* is without the consent of the owner. The *ghaasib* derives substantial benefit from the *maghsoob* (usurped item). But the Shariah disallows the imposition of a monetary penalty on the

ghaasib. The Shariah also disallows monetary compensation for the owner of the *maghsoob.* Allah's Wrath settles on the *ghaasib* for his criminal act of *ghasab.* The *ghaasib* has the *Waajib* obligation of restoring the *maghsoob* to its rightful owner immediately, without the slightest delay. Every moment of *procrastination (matl)* in restoration of the usurped item is sinful for the *ghaasib.*

In response to this grave crime, Islam heavily applies the Moral code. Thus Rasulullah (sallallahu alayhi wasallam), warning the *ghaasib* of the dire consequences in the Aakhirah of his act of *ghasab,* said:

"*He who usurps one cubit (the size of a hand) of ground (belonging to another person, will find that) on the Day of Qiyaamah the size of the ground right down into the bowels of the seven earths, will be strung around his neck."*

"The person who usurps (i.e. takes unjustly and by oppression) a cubit of (someone's) land, will be swallowed in consequence by the earth until he reaches the dregs of the seven earths (i.e. the earth will suck him down until he reaches the very last point in the bowels of the seven earths)."

"He who usurps (anything) is not of us (of this Ummah of Islam)."

Note the severity of the warnings and the threat of the punishment for *ghasab. Ghasab* was a problem since time immemorial. The Shariah took cognisance of it, but sought to combat this crime with only its Moral Code. Allah's Law does not allow the imposition of a monetary penalty on the *ghaasib* nor compensation for the aggrieved and wronged owner of the *maghsoob.*

On the contrary, we see that debt is incurred with the happy consent and agreement of the owner of the item. A valid lawful agreement is entered into by the parties. When the creditor find's that his debtor

failed to pay on due date, he hears Allah Ta'ala exhorting him in the Qur'aan: "*If he (the debtor) is in difficult straits, then grant (him) time until he is able to pay.*"

The creditor also hears the Voice of Allah Azza Wa Jala, saying: *"And if you (O Creditor!) (write off the debt) as Sadqah, then that is best for you." (Qur'aan)*

Rasulullah (sallallahu alayhi wasallam) further assures the creditor that he will gain 16 times more reward than *Sadqah* if he patiently waits for payment of the money owed to him. Then to crown all this, the Shariah categorically prohibits a monetary penalty on late payments, describing it as riba for which Allah has issued an Ultimatum of War.

Despite the Shariah's emphatic prohibition of the imposition of any monetary penalty on the *ghaasib* irrespective of the benefits he has gained from the usurped property, and inspite of the emphasis Allah Ta'ala and His Rasool placed on leniency with the debtor and granting extension of time and the wonderful rewards for such extension, Hadhrat Mufti Taqi Uthmaani Saheb deems it appropriate to saddle the Shariah and burden the debtors with a monetary penalty acquired from the capitalist economic system which is a system of *men who stand only like those who have been driven to insanity by the touch of Shaitaan because they devour riba, and they say: "Bay' (trade) is like riba."*

This analogy is the final nail to seal the coffin of riba penalty for late payments — a practice spawned by the capitalist theory of economics.

SUMMARY

Hadhrat Mufti Taqi Uthmaani Saheb has opined that interest on late payments should be paid and that such payment is permissible. For his opinion Hadhrat Mufti Saheb has been able to cite only a rare

Maaliki view of some Maaliki jurists. This view does not claim that interest on late payments is permissible. The rare view pertains to a voluntary, self-imposed vow to give *Sadqah.*

According to some Maaliki jurists payment of this type of *Sadqah* in certain cases only is enforceable by the courts of law (i.e. by truly Islamic courts of law), not by kuffaar courts.

Hadhrat Mufti Saheb has attempted to liken the interest penalty to this type of self-imposed *Sadqah.* But this attempt is palpably erroneous.

There is no difference of opinion in the Ummah regarding the prohibition of interest (riba). The penalty charged on late payments is without any doubt interest, pure and simple.

The system of punishment for payment defaulters which Hadhrat Mufti Taqi Saheb proposes is not new. It is the capitalist system as has been explained earlier on.

The interest penalty is in diametric conflict with the teaching and spirit of the Qur'aan and Hadith which instruct that the debtor be given time to pay, and better than extension of time is to waive the entire debt.

There is absolutely no scope in the Shariah for the permissibility of interest on late payments. Interest in all aspects and forms is haraam.

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“Those who devour riba do not stand
except as one whom Shaitaan has
driven to madness with (his) touch.”
(Qur’aan)