



Cases of Preventing Conflict Between the Provisions of Sharia and Positive laws

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Abstract

There are some cases in which the fatwa in the financial institution conflicts with positive law, and the legal rule may not be contrary to Islamic jurisprudence in all its schools, as there is no problem in the obligation to adhere to the Sharia ruling and to reject the legal ruling if it contradicts the Sharia and its texts.

This Article came to study the possibility of obligating judges and financial institutions to a ruling that differs between the schools of jurisprudence and the basis for this obligation. We reached the conclusion that the state obligating the general public and financial institutions in the country to legislation is an acceptable matter and produces its effect in the obligation, whether the subject of the ruling is a choice between juristic opinions or sectarian opinions, or it was a restriction on what is permissible or a formal regulation required by the prevailing interest, and that positive legislation may create permissibility, so it does not prevent Islamic banks from choosing between rulings or differing in fatwas on issues in which the difference does not conflict with the general rules or is not subject to criminalization in penal legislation.

Keywords – regulation , possibility, produces , legislation , acceptable

Received: 08 May 2024 **Revised:** 10 June 2024 **Accepted:** 25 June 2024

Introduction

Resolving the conflict between Islamic jurisprudence and positive laws and regulations is an important study related to the extent of the impact of these positive laws on the obligation to abide by their provisions in the field of Islamic banking. The following question or problem is usually raised: Is the legal ruling binding as a judiciary and fatwa in all cases in Islamic banking cases? If the provisions of Islamic banking are generally a matter of fatwa and not a matter of judiciary, do the codifications remove the possibility of disagreement with them such that they must be consistent with the laws in their systems and provisions, even in controversial doctrinal issues?

To clarify the subject of the dispute, we say that, in view of the nature of the legal rule, it is of three types according to its relationship to the Sharia. There is a type of rule that contradicts the Sharia and may be imperative or complementary, such as that which permits usurious interest and legislates betting and gambling contracts and the sale of forbidden items... These are not the subject of the discussion because prohibitions require avoidance and abandonment.

There are several rules that are consistent with Sharia and do not contradict all schools of jurisprudence. This is prevalent in positive legislation, whether in substantive rules or in formal procedures and

regulatory legislation. These are also not the subject of research because adherence to them is identical to adherence to the Sharia ruling.

There is a third type in which the jurisprudential legislation may be consistent with a doctrinal or contemporary interpretation, and the issue is not subject to consensus in requesting or abandoning, and it may be of the type of restricting the permissible with controls and conditions that reduce its prevalence or specify some of those charged with it and not others, and this ruling is made a law by which obligation is achieved, and it is ruled upon during the judicial dispute, determining what is right and what is not.

Previous studies:

In many studies, some researchers have addressed aspects of the subject that we aim to complete in this paper:

1. Study by Abdullah Al-Mazrou', *The Obligation of the Ruler and Its Impact on Controversial Issues* (Al-Mazrou', 1434 AH, pp. 34-60): The researcher addressed the principle of whether the ruler's decision resolves disputes, clarifying the views of jurists on this matter. He concluded that in cases where there are clear religious texts and strong disagreement, the ruler should not impose a single opinion unless a public interest emerges, and no undue hardship is caused. Our study examines whether legal texts in banking issues represent a doctrinal opinion, a legislative stance, or a regulatory action, and whether these texts can be imposed, and what the religious justification is for such imposition.
2. Study by Al-Hussein Al-Mous, *Restricting Permissible Actions: A Fundamental Study with Jurisprudential Applications* (Al-Mous, 2018, p. 29): In this work, the author explored the meaning of restricting what is permissible and diverting it from permissibility to other rulings, such as the obligation to act or abstain. Despite the importance of this topic, the author did not address the issue of the state adopting a legal opinion that contradicts the prevailing school of thought, and whether the state has the right to enforce it.
3. Study by Boujemaa Mohammed, *The Impact of Comparative Legislative Studies in Highlighting the Richness of Islamic Jurisprudence* (Boujemaa, 2023, p. 11): Although the researcher focused on description and historical presentation without delving into the essence of the issues, his recommendations highlighted the necessity of considering comparative studies in jurisprudential research to showcase the influence of Islamic law on European and Arab laws. He argued that advancing well-crafted jurisprudential theories could show how statutory laws are not entirely detached from jurisprudential deductions and the reliance on Islamic schools of thought in determining their legal obligations.

To reach the problem and the study questions related to it, the following structural flowchart was constructed:

Section One: Positive legislation and the extent to which it is derived from Islamic law

Section Two: The extent to which it is valid to obligate judges and the nation to a specific school of thought

First requirement: The extent to which it is valid to obligate a judge to a specific school of thought:

Second requirement: The extent to which it is valid to obligate the nation to the royal orders

A study of the cases of the problems of obligation mentioned in the paper:

Conclusion

- **The first section:** Positive legislation and the extent to which it is derived from Islamic law :Law (is a set of binding general rules that make these relationships proceed in a single manner and according to a fixed system. In this sense, it is said that a certain matter is contrary to the law or in accordance with it. What is meant by positive law is the law prevailing in Egypt, for example, or France at the present time. It means the law applied in a country at a certain time, such that the positive quality of its rules is

available through what accompanies and supports them in application from a certain material compulsion possessed by a public authority in the community) (Al-Rafai, 2007, p. 9).

Based on the above, emphasis can be placed on the element of obligation in legal rules, as it directs behavior towards compliance with the content and imposes penalties or punishments for violating or disregarding it.

Many studies have addressed the influence of Islamic jurisprudence on statutory laws. In Dr. Muhammad Siraj's research on the impact of Islamic jurisprudence on English law, he notes that many Hanafi jurisprudence books were translated in the Indian subcontinent starting in the late 18th century. The main goal of these translations was to facilitate access for British judges appointed by the East India Company to manage judicial work in India. This enabled English law scholars to study Islamic jurisprudential rulings in their native language" (Abdul Hadi, 1984, p. 11).

The author pointed to the transfer of some Islamic legal concepts into English law, including terms like *sakk* (check), *hawala* (transfer), *safatija* (bill of exchange), *gharar* (risk), *samsara* (brokerage). Additionally, distinctions were made between different levels of minors in contracts, as non-discerning and discerning minors were not treated the same. Furthermore, the stage of puberty was defined to differentiate legal positions on contractual and criminal responsibility for minors (Abdul Hadi, 1984, pp. 11-13).

The law has sources from which it derives its rules, and the legislation of countries often stipulates these sources. Most Arab legislations stipulate in their civil laws: the legislative text - as the original, and if it does not exist, then according to the principles of Islamic law, and if it does not exist, then according to custom, and if it does not exist, then according to the principles of natural law and the rules of justice (Algerian Civil Law, 1975).

One researcher believes that the legal texts referred to Islamic law without Islamic jurisprudence, so that the judge would not be preoccupied with the branches of jurisprudence, since the law includes the general rules and general principles that accommodate contemporary incidents, and so that there would be room for the custom considered by the law and for customs to be applied and to go beyond the public interest (Al-Barawi, 2013, p. 6).

-Obligation by law that includes the doctrine of a particular Imam does not deviate from the general principle regarding the source of Islamic law in statutory legislation and the pursuit of unifying state rulings (Abd al-Bar, 1986, p. 49). This is crucial for the stability of transactions and helps reduce the burden on judges, as researching Islamic jurisprudence to reach a ruling is not a trivial matter and requires qualities that are often not found in most judges, who are typically adherents of specific schools (Abd al-Bar, 1986, p. 37).

The influence of Islamic jurisprudence on laws results from this interaction and codification, and its impact can be seen in Arab family laws and contract rules in civil legislation. "Anyone familiar with Western jurisprudence will recognize that its twentieth-century theories, such as the theory of abuse of rights, the theory of unforeseen circumstances, the theory of bearing risk, and the liability of those without discernment, all have significant foundations in Islamic law, requiring only formulation and development" (Sanhuri, 1998, p. 1/7).

The second section: The extent of the validity of obligating judges and the nation to adhere to a specific doctrine:

Can the guardian be obligated to follow a ruling that is disputed among jurists? The issue is related to choosing between the jurists and obligating them to follow it.

We examine the issue in two points, the first of which relates to the extent to which the guardian of the matter can oblige judges to follow a specific school of thought, and the second relates to the extent to which it is valid to oblige the nation absolutely to follow a specific school of thought or to an opinion that he favours.

The first requirement: The extent of the validity of obligating the judge to follow a specific doctrine: The jurists of old discussed the issue of the relationship between the judge and the school of thought of the imam, and whether the ruler could compel the judges to rule according to one school of thought, as happened in Andalusia with the ruling according to the school of thought of Malik, or in Iraq with the ruling according to the school of thought of Abu Hanifa during the Abbasid Caliphate. This is the same issue of codifying rulings that contemporaries discussed and described :

The question addresses whether a Muslim judge, who adjudicates according to Islamic law, can be obligated to rule according to a statutory code even if it conflicts with their own opinion. The principle is that the judge's rank should be considered—whether they are an *ijtihad* (scholar) or not. If the judge is an *ijtihad* and a case or dispute is presented to them, they are bound by their own *ijtihad*, which is equivalent to the *ijtihad* of a scholar issuing fatwas and conducting scientific research. Historical judicial texts have indicated that it is not permissible to impose a particular opinion from a ruler that contradicts the judge's *ijtihad*. As Ibn Farhoun stated: "In the case of a judge appointed by the ruler, it is stipulated that they should not rule except according to the doctrine of a specific Imam, such as being Maliki, Shafi'i, Hanafi, or Hanbali. If the ruler appoints the judge on the condition that they only rule according to, for example, the Maliki school, whether or not this is in line with the doctrine of the ruler who appointed them—if this condition is generally stipulated for all judgments—the contract is invalid and the condition is void, regardless of whether the condition accompanied the appointment or preceded it" (Ibn Farhoun, 2008, p. 1/22).

Ibn Qudamah said: "It is not necessary to decide the judiciary for one person, on the condition that he rules with a specific amount of gold. This is the Shafi'i school of thought, and there is a difference of opinion regarding it, because God said: 'So judge between people with truth', and truth is not binding in one school of thought, and truth has been made clear to him in another school of thought. If he follows him in this, the heroic martyred policeman, and there are two views regarding the corruption of the appointment, based on multiple conditions in the sale" (Ibn Laden). Qudamah, 2008, 6/233).

If the judge is not a *mujtahid* but rather an imitator of one of the followed schools of thought, then there is evidence that indicates the validity of obligating him to imitate a specific school of thought, either because it is in effect in the state and people follow it, or for the benefit of controlling rulings and the ruler's keenness to prevent judges from following their whims in deviating from the school of thought. The author of *Fath al-Qadir* from the Hanafis explained that if the imam appoints the imitator "to rule according to the school of thought of Abu Hanifa, for example, then he does not have the right to dissent and is thus dismissed with respect to that ruling." Ibn Abidin further clarified the matter by saying: "If the sultan restricts him to the correct school of thought, as in our time, he is restricted without dispute because he is dismissed from it, and if he rules other than what he is restricted to, then his ruling according to al-Sharnbalali is not valid because he is dismissed from it" (Ibn Abidin, 1992, 5/408).

The second requirement: The extent of the validity of obligating the nation to abide by the royal orders

The issue is whether the obligation is a restriction on something permissible, in which case the ruler chooses to impose it or prohibit it. And whether the matter is one in which the fatwa is undecided between permissibility and prohibition, in which case the ruler chooses to impose one of the two aspects and prohibit the other.

The first section: The authority of the Imam to restrict what is permissible:

Jurists have discussed the issue of the ruler's actions in the chapter on restricting what is permissible. What is meant by restricting what is permissible is diverting it from permissibility to other rulings by applying the principles of jurisprudence and jurisprudence (Al-Mous, 2018, p. 29). What is permissible may be diverted during restriction to prohibition, as it can be diverted to obligation.

The state's restriction of what is permissible is (that the state places legislative or practical restrictions and controls on what is permissible that is related to the rights of others or prohibits it or obliges it in consideration of the interest (Al-Maws, 2018, p. 202).

Many scholars have stated that the ruler has the right to “set restrictions on what is permissible in a way that he deems to be in the public interest, and he has the right to order and compel it, and all that stems from the powers granted to the imam. However, the ruler’s restriction of what is permissible falls within what he has the right to do in principle, such that he has the right to dispose of it according to his policy and his own reasoning” (Dar al-Iftaa al-Misriyyah, 2013). The state’s restriction of what is permissible is derived from a matter in which the Shari’a has made the choice for the person obligated, and the balance required the preference of one of the two parties, so it obligated or prevented the person obligated from doing so, for reasons that necessitated that, such as considering the interests and outcomes in time and place, until if the reason is removed, the restriction and prohibition are removed.

Al-Qarafi explains that the ruler has the right to create rulings, saying: “If it is established that God Almighty has given every responsible person the right to create rulings in the Sharia without necessity, then it is more appropriate that the creation be given to the rulers, with their knowledge and majesty, for the necessity of warding off corruption, quelling revolt, and nullifying disputes...and the ruling of God Almighty is what the ruler has ruled in matters of *ijtihad*, and that ruling must be followed by the entire nation, and it is forbidden for anyone to overturn it (Al-Qarafi, 1995, p. 12).

The jurists have affirmed the reliance on custom (*Al urf*) when considering the basis for restricting what is permissible. The ruler has the authority to consider people’s customs when instituting deterrent punishments to prevent injustice. Ibn Farhoun stated: “A punishment in one region may be considered an honor in another, such as cutting the *ṭaylasān* (a type of cloak), which is not a punishment in Syria as it is seen as an honor, while uncovering the head is not seen as disgraceful among Andalusians, but it is a disgrace in Egypt and Iraq” (Ibn Farhoun, 2008, 1/33). Thus, it is essential to take customs into account when formulating new laws. This can serve to restrict what is permissible and change its ruling based on the nature of the custom. Ibn Ashur said: “When customs include a necessary or essential benefit for the entire nation, or a recognized harm for its people becomes apparent, these customs must be aligned with general legislative principles of obligation or prohibition” (Ibn Ashur, 2002, p. 235).

Al-Darini differentiated between what is permissible and what is right. In his view, what is permissible is the ability to control the beneficiary, but not by way of exclusivity. What is permissible is not owned by mere permission, but rather is benefited from by way of general partnership. He cited as evidence what Abu Dawud narrated on the authority of Ali on the authority of a man from the emigrants from the companions of the Prophet, may God bless him and grant him peace, who said: I went on three expeditions with the Prophet, and I heard him say: Muslims are partners in three things: pasture and water (Sunan Abi Dawud, 2/665). Partnership in benefit does not mean absolute permissibility, but rather it is restricted by the legal controls that the imam determines. Thus, permissibility is a path to right and ownership and is not the right (Al-Maws, 2018, p. 54). This strengthens the external consideration that the state monopolizes in determining rights and restricting aspects of benefit or persons benefiting from what befalls them of aspects of agreement, conflict, and crowding.

The principle of blocking means (*sadd al-dharā’i*) is one of the external considerations that plays a role in restricting what is permissible. It aligns with state actions that prioritize external considerations over permissibility. According to Al-Baji, *sadd al-dharā’i* is defined as: “a matter that appears permissible but leads to a forbidden act” (Al-Mous, 2018, p. 41). Ibn al-Qayyim adds that it is “the prevention of what is allowed for fear of falling into what is forbidden” (Ibn al-Qayyim, 1991, 5/5). This concept is exemplified in the hadith: “May Allah curse the Jews, for they were forbidden from using animal fat, so they melted it and sold it” (Sahih al-Bukhari, 2110). They were prohibited from consuming or trading fat, yet they devised a way to melt it and sell it in a new form.

The Shari’ah blocked this means to prevent the circulation of forbidden items and nullify financial rulings, and Ibn al-Qayyim notes: “This is a clear indication that permissible acts may be prohibited if they lead to what is not allowed” (Ibn al-Qayyim, 1991, 5/5).

This restriction of the permissible, or one of its forms, by changing its ruling to general prohibition or obligation can be either for blocking or opening means. Al-Qarafi states: “Know that the means (*dharā’a*)

should be blocked or opened, it can be disliked, recommended, or permissible" (Al-Qarafi, 2002, 2/42). Such restrictions are tied to the higher interests of the nation, which, according to uṣūl scholars, must be general, comprehensive, necessary, and decisive. The authority to impose these restrictions and determine the higher interests lies with the ruler or the central institutions authorized by him.

Considering partial and general perspectives is one of the external factors that play a role in restricting what is permissible. This means that permissibility cannot be viewed in isolation from considerations of time, place, and the parties involved in benefiting from it (Al-Mous, 2018, p. 44-45).

There is no absolute permissibility, as we have established, because actions that ignore these considerations undermine the objectives of both the state and the Shariah. Therefore, uṣūl scholars have determined that the ruling on what is permissible can change depending on whether it is considered in part or in whole. A particular act may be permissible when considered in isolation but become obligatory or prohibited when viewed in a broader context. Absolute permissibility, without regard to the state's interests, is inconceivable.

Al-Shatibi states: "In summary, it falls into four categories: first, that which serves a purpose that is required to be done; second, that which serves a purpose that is required to be avoided; third, that which serves a purpose that is optional; and fourth, that which does not serve any of these purposes. The first is what is permissible in part but required in whole, the second is permissible in part but prohibited in whole, meaning it should not be done continuously. The third and fourth return to the second category" (Al-Shatibi, 1995, 1/90).

Al-Shatibi gave an example of this case of the permissible part being the forbidden part in the whole message: (If we look at the permissibility of leaving the killing of every muezzin for the people, the matter becomes lighter. If we assume that all the people agreed to leave it, and there is hardship inside them for several reasons, and a seeker began to seek hardship for sure, then leaving it became) ending the prohibition of his dislike, it could not be represented by Duba by the whole, if we do not say it is obligatory (Al-Shatibi, 1995, 1/98).

Al-Zarkashi stated: "The ruling on what is permissible changes by considering something else. It becomes obligatory if leaving it would lead to death, and it becomes forbidden if doing it would lead to missing an obligation or causing corruption, such as selling at the time of the call to prayer. It becomes disliked if it is accompanied by a disliked intention, and it becomes recommended if it is intended to help with obedience" (Al-Zarkashi, 2013, 1/264). Absolute permissibility is only conceivable for the type of permissible, but in actions it is tainted with restrictions and what is considered of excuses, consequences, and purposes .

One of the pieces of evidence for the state's restriction of permissible actions for the sake of public interest is found in the realm of political jurisprudence, which is under the state's authority. This is illustrated by the narration of Abu Dawood about Qayla bint Makhramah, who said: The Messenger of Allah (peace be upon him) said, "Write, O boy, concerning the land of Al-Dahna." When I saw that he had granted it to someone, I spoke up, as it was my homeland and dwelling.

I said, "O Messenger of Allah, he did not ask you for a fair portion of the land. Rather, what he requested is this piece of land near you where camels are tied, sheep graze, and the women and children of Banu Tamim are behind it." The Prophet then said, "Stop, O boy, the poor woman is right. A Muslim is a brother to another Muslim, and they both share water and trees" (Abu Dawood, 3070). The Prophet retracted the allocation of land to one of the Companions upon realizing the harm it would cause to the public in the area. Al-Shatibi highlights the connection between individual actions to acquire benefits and the importance of considering the public interest and the rights of the community when conflicts arise in the application.

He states: "When a person seeks their benefit where they are permitted, it must take into account the rights of Allah and the rights of the creation. If the pursuit of personal benefit is constrained by the existence of legal conditions, the absence of legal impediments, and the presence of lawful causes

Generally, this pursuit is not solely for the benefit of the individual but aligns with a broader purpose” (Al-Shatibi, 1995, 2/177).

-And what is supported by what came in Al-Muwatta’, he said, peace be upon him: “You will come tomorrow, God willing, to the spring of Tabuk, and you will not come to it until the day is at noon, so whoever comes to it should not touch anything until I come” (Imam Malik, 1/143). Al-Baji said: “And in it is that the imam has the right to prevent public matters such as Catholic water and other privileges that Muslims share in, because it is included in the Sharia” (Al-Baji, 2010, 2/238).

The second section: The permissibility of the ruler obligating the nation to abide by a law in matters of ijtiḥad

There is a viewpoint that argues the ruler has no authority to compel people to follow a specific school of thought that he deems correct, nor to enforce a legal opinion that seems preferable to him. According to this view, the resolution of disputes can only be achieved through the ruling of a judge on the specific matter of contention (Al-Mazrou, 1434 AH, pp. 34-60).

However, the second and more widely accepted opinion is that the ruler does indeed have the authority to compel people in public matters where scholars have differed, adopting one of the various opinions. This enforcement may even affect the fatwas issued by scholars, potentially prohibiting any that contradict the ruler's decision on the matter. There remains a debate regarding the extent of this prohibition — whether it applies to acts of worship and financial transactions, or if it is limited to official state institutions, or even extends to the broader affairs of the people (Al-Azhar Fatwas, 9/440/315).

Al-Qarafi elaborated extensively on the issue of issuing fatwas that contradict the ruler's judgment. He concluded that in any case where the ruler has issued a decision, it is not permissible for anyone to issue a fatwa that opposes it. This is because the binding nature of the judgment and the prohibition of overturning it prevent the issuance of conflicting fatwas .

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This report, in which the Prophet, may God bless him and grant him peace, was cited as evidence: “O you who have believed, obey God and obey the Messenger and those in authority among you” (An-Nisaa’ 59). And those in authority are to be obeyed, so it indicates that the place of obedience is from what is known, so what is obligatory and not prescribed is obligatory to obey according to the verse.

It is well-known that there is no obligatory obedience to anyone other than God, His Messenger, or a just Imam, and God has commanded obedience to them: “Obey God and obey the Messenger and those in authority among you” by obeying those in authority over us, it is known that those whom He commanded to obey, as He mentioned from those in authority over us, are the Imams and those whom the Muslims have appointed, without anyone else from among the people. If it is assumed that everything that commands to abandon disobedience to God and calls to obedience to God is accepted, because there is no

obedience that is obligatory to anyone in what he commands in what is not obligatory, except for the Imams whom God has obligated His servants to obey in what they commanded their subjects to do that is in the interest of the subjects, then obedience to them is obligatory for those who command them, and likewise in everything that is not disobedience to God (Al-Tabari, 2014, 7/131).

They argued that saying that the ruler's ruling does not resolve the dispute leads to division and discord among Muslims, and to usurping the authority of the ruler. The interest dictates that his ruling should resolve the dispute and be binding on the nation (Al-Mazrou', 1434 AH, p. 71).

Among the contemporaries, this doctrine has been preferred. Al-Zarqa says: Islamic ijtiḥad has approved for the general ruler, whether a caliph or someone else, to limit the scope of the legal rulings and their application, or to order the implementation of a weak and weak opinion if the temporal interest requires that, so it becomes the preferred opinion that must be implemented. Our jurists have stated this, in accordance with the rule: (the sent interests), and the rule (the rulings change with the change of time), and the texts of the jurists in various chapters indicate that if the sultan orders something in a subject of ijtiḥad - that is: subject to ijtiḥad, not conflicting with the definitive texts in the Sharia - then his order must be respected and implemented according to the Sharia.

So, if he prohibits some contracts for an urgent interest that must be taken care of, and those contracts were permissible and valid according to the Sharia, then they become invalid by virtue of his prohibition, and suspended according to the order (Al-Zarqa, 2011, 1/215).

Al-Mazrou' researched this issue and mentioned good controls for it, the gist of which is that the legal issues in which there are legal texts, but the disagreement is strong: the guardian of the matter does not have the right to force people to follow any of the statements except under certain:

1. That the legitimate interest requires obligating people to one of the opinions, and their situation will not be right except with that.
2. Issues in which there is no legal text, but rather they are the efforts of the jurists based on interests, blocking the means, and the like, then the imam may oblige people with what he sees, and this is based on the rule: Rulings change with the change of time and place, and this is restricted to what is in the interest of the Muslims, not according to the whims of the ruler and his personal interests.
3. It is stipulated in what was mentioned above that the imam be a knowledgeable, just mujtahid, and if he is not like that, then he gathers the scholars of his country, and the people of solution and contract, and consults them, and acts according to their opinion.
4. That this be from the practical aspect, but from the scientific aspect, the ruling of the ruler and his obligation do not change the legal rulings nor give preference to one opinion over another (Al-Mazrou', 1434 AH, p. 77). There is no doubt that this obligation results in the punishment of the violator.

Conclusion

At the end of the research, we reach the conclusion that the imam's obligation on the general public and financial institutions in the country to legislate is a correct matter and produces its effect in the obligation with its conditions that were determined by the fundamentalists, whether the subject of the ruling is a choice between ijtiḥad or sectarian opinions, or it is a restriction on what is permissible, or a formal regulation required by the prevailing interest, and that positive legislation may create permissibility and does not prevent Islamic banks from choosing between rulings or differing in fatwa in matters in which the difference does not conflict with the general rules, or is not the subject of criminalization in punitive legislation.

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