Islamic Banking in Pakistan: A Critical Review

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Abstract

The research paper examines the ideological contestation between Opponents and Proponents of Islamic Banking in Pakistan. Major part of the research is based on Sharīʿah and jurisprudential study of Modes of Financing in Islamic Banks. This explores the agreements and similarities between Conventional and Islamic Banking. This also analyze that the existing system in Islamic Banks is based on illegal tricks and subterfuges while there is some superficial fractional support to this system from Islamic Law, but the real Sharīʿah objectives for implementation of these laws has been severely trampled. Whether there are interest-free banks or conventional interest banks, in fact, they are not involved in trade or any kind of business, they only deal in money. This is the opinion of Ahl al-Ḥadīth and Majority scholars of Ḥanafī schools of thought in Pakistan, although foundation of such business institutions is the need of the Islamic society wherein on genuine basis and in the light of Sharīʿah principles, Mushārakah and Muḍārabah could be undertaken.

Key Words: Islamic Banking, Interest-free Banking, Islamic Banks, Banking, Islamic Economics, Pakistan

1. History of Modern Banking

'BANCO', which means a shop counter in Italian, is the base from which the word Bank is derived (Martim1855). In early days, people engaged in money business would use a bench covered with green cloth for talking to their customers. The first state deposit bank, The Bank of St. George was established in the year 1407 in Republic of Genoa (Macesich 2000). A modern day bank is functionally described as; "A bank deals in loans. It receives deposits from people and gives loans to the needy. Securities issued by a bank are accepted by the people without any doubt and suspicion. A bank in this way creates money as well." ('Abd al-Ḥamīd et al. 1995)

Securities like currency notes, bonds, and bank cheques do not represent real money. Real money is the equivalent gold which backs up these currency notes, bonds or cheques, which are in a way, various forms of receipts for this gold devised for tackling the commercial needs of the people. In early days, currency notes were issued when the equivalent amount of back up gold was available, but now this condition has been withdrawn. Now every country could print currency without any gold backup.

How the modern banking got started? Mawlānā Mawdūdī has given, in his book, *'Sūd'* (Interest) an excellent account of this. Mawdūdī has divided the history of modern banking into three phases (Mawdūdī 1987). A brief description of this, in our words is that;

1.1 First Stage

In Europe, in early days, before the advent of currency notes, people used to put their valuables, gold and silver etcetera in the custody of goldsmiths. A gold smith would issue a receipt, referencing the quantity of gold held by him in safe deposit in the name of nominated depositor. With passage of time these deposit receipts were being used for in selling and buying as also for loan settlements.

People had due trust in these receipts and there was little need for withdrawing the gold from the goldsmith. The goldsmiths found through experience over a period of time that out of the gold in their custody people usually withdrew one tenth of their deposits and nine tenth of it remained lying with them unutilized. Thus, the jewellers now started to loan out this depositors′ gold on interest to other people. They did not stop here. They also started issuing receipts for this nine tenth gold on interest.

The gold was lying with them and they were earning interest on the receipts. This was, in a way deceit, fraud, and misuse of others people′s deposits.

1.2 Second Stage

In the second phase the goldsmiths, in order to expand their business, turned their attention towards the well to do and middle classes asking them to deposit their capital with them rather than investing it in business and they would pay them interest on it. In this way, the goldsmiths would get gold on lower rate of interest from the people and loan it on higher rates of interest to others. Many people thought that in business there was always the risk of loss. It also involved time and hard work. Then there was the need for book keeping and the variations in profits. Pondering over all these aspects, there developed the trend to deposit gold with the goldsmiths and to get a fixed rate of interest ensuring safety of the capital, time saving, evading hard work and above all, risk of loss. In this way around 2/3 of the capital from society went into the hands of goldsmiths.

1.3 Third Stage

In the third phase the jewellers started transforming their businesses cooperatively. Previously, what they used to do individually, now they were doing the same in groups. In this phase the modern banks started come into existence. Although a bank deals in a variety of business activities but even today its real business is to get deposits from people at lower interest rates and to lend at higher rates to different individuals, companies and institutions. A bank has two types of capital. First is the principal amount from the people who joined hands to establish a bank and the second is the capital from the account holders, who put their money as deposits. The second type is the real capital of the bank and which is more than 2/3 of the total.

2. Various Views Regarding Interest Free Banking

The history of Interest Free or Islamic Banking is not very old. The first interest free bank under the name ‘Mit Ghamr Social Bank’ was established in 1963 in Egypt. This bank started the business of collecting funds for and providing loans to agriculture. In 1975, ‘Dubai Islamic Bank’ was established and in the same year, under O.I.C. Foundation for ‘Islamic Development Bank’ was laid. In 1983 with the establishment of ‘Islamic Bank of Bangladesh’, a worldwide race for Islamic banks commenced. The Accounting and Auditing Organization for Islamic Financial Institutions has 206 members Islamic Banks as declared by their official website (http://www.aaoifi.com). Authors of *Islāmī Maʿāshiyāt* (Islamic Economics) have given the names of about 260 Islamic Banks in 51 Muslim and Non-Muslim countries of the world, a figure which has so for increased in Pakistan and some other countries. In Pakistan a number of interest-free banks which include, Bank al-Islāmī, Dubai Islamic Bank, Dāwūd Islamic Bank and Meezān Bank etc. are operating. There are currently 5 full fledge Islamic banks and 13 conventional banks having Islamic banking branches with a network of 977 branches across the country and presently constitutes above 8 percent of the overall banking system in Pakistan (Islamic Banking Bulletin October-December 2012).

Contemporary scholars are divided into three groups on the question of co-operation and participation in the present day interest free banking

2.1 First Group

There is a group of scholars who consider the existing interest free banking not only as acceptable, but rather a majority of them, working as *Sharīʿah* advisors to these innovative banks, have become a part of their system. Muftī Muhammad Taqī ʿUthmānī is patron of this group and he has explained in his book ‘An Introduction to Islamic Finance’ the basic fundamentals of interest free banking. Later a translation of this book under the name *Islāmī Bankārī kī Bunyādayn’* (Foundations of Islamic Banking) was done by Mawlānā Muhammad Zāhid.

When other opinions on interest free banking from the contemporary scholars, wherein the whole system was said to be unfair and a subterfuge, came to light, Muftī Taqī ʿUthmānī in defense of interest free banking wrote a book under the name *'Ghayr Sūdī Bankārī: Mutaʿalliqah Fiqhī Masāʾil kī Taḥqīq awr Ashkālāt kā Jāʾizah'* (Interest Free Banking: A Review of Related Jurisprudential Issues and Objections). In Muftī Taqīʿs institution, Jāmiʿah Dār al-ʿUlūm Karachi under the 'Centre For Islamic Economics', there is an academy with the name 'An authentic Institute of Islamic Banking and Insurance' who are conducting a number of courses on interest free banking under his guidance. Muftī Taqī ʿUthmānīʿs son, Dr. Ashraf ʿUthmānī, also wrote the book 'Meezān Banks Guide to Islamic Banking'.

Similarly, Jāmiʿah Dār al-ʿUlūmʿs Muftī ʿIjāz Aḥmad Ṣamdānī also wrote *'Islāmī Bankun mayn Rāʾij Muḍārabah kā Ṭarīq kār'* (Procedure of Prevalent *Muḍārabah* in Islamic Banks) in justification of interest free banking and wrote *'Islāmī Bankārī: Ayk Ḥaqīqat Pasandānah Jāʾizah'* (Islamic Banking: A Realistic Review) in defense of this. He also authored a book with the title of *'Takāful: Insurance kā Islāmī Ṭarīqah'* (Takāul: An Islamic Alternate to Insurance). According to this group, Islamic banking is correct both in its objectives and practice even though its current practice can't be considered as ideal. It is Islamic to the extent that the earnings from it are Halal.

2.2 Second Group

Scholars from this group are of the view that the existing Islamic Banking is, as per Islamic Jurisprudence and Law, wrong or Haram and is based on such Non *Sharīʿah Ḥiyal* (Illegal Tricks or Subterfuges) which makes it equivalent to or even more respectful than the conventional banking. Under the patronage of president of Wifāq al-Madāris al-ʿArabiyyah (Board of Secondary, Higher Secondary and Graduate Studies for Islamic *Madāris*) and Muftī Taqī ʿUthmānīʿs mentor, Shaykh Salīmullāh Khān, on 28Th August 2008 in Jāmiʿah Fārūqiyyah Karachi, a two day conference of jurists and scholars from all over the country took place wherein through an unanimous *Fatwa* (Legal Verdict), the existing Islamic Banking was declared as illegal in Islamic *Sharīʿah*. Later in the Fatwa Centre of the Jāmiʿah Binawrī Town Karachi, a book under the name *'Murawwajah Islāmī Bankārī: Tajziyātī Muṭāliʿah, Sharʿī Jāʾizah, Naqd wa Tabṣirah*' (Contemporary Islamic Banking: Analytical Study, Legal Review, Criticism and Commentary) has been compiled in which the jurisprudential and legal basis of Islamic Banking have been criticized.

Muftī Dr. ʿAbd al-Wāḥid from Jāmiʿah Madaniyyah Lahore has also compiled a book under the title '*Murawwajah Islāmī Bankārī kī chand Kharābiyān'* (Vices of Contemporary Islamic Banking) wherein the economic ideals of Muftī Taqī ʿUthmānī and his son Dr. Ashraf ʿUthmānī have been commented upon and criticized. A book by Muftī Ḥamīdullāh Jān entitled *'Islāmī Niẓam Maʿīshat kay Tanāẓur mayn Mawjūdah Islamic Banking par ayk Taḥqīqī Fatwa'* (In the Background of Islamic Economic System; A Research Fatwa against Islamic Banking) has also been published in 2009. A collective fatwa by scholars of Ahl al-Ḥadīth school of thought in Pakistan has also been published against current Islamic Banking (*Islāmī Bankārī Sharīʿat kay Meezān mayn* 2013). Two books by Shaykh al-Ḥadīth Zulfiqār ʿAlī of Abū Hurayrah Academy Lahore *'Dawr Ḥāḍir kay Mālī Muʿāmlāt kā Sharʿī Ḥukm'* (*Sharīʿah* Ruling about Present day Financial Transactions) and *'Maʿīshat wa Tijārat kay Islāmī Aḥkām'* (*Sharīʿah* Rulings regarding Economics and Business) also give an outstanding academic critique on Islamic Banking in the light of Qurʾān, Sunnah and Islamic Jurisprudence. According to this group, the objectives of Islamic Banking are correct, but the procedure and practices are wrong. Thus, these scholars usually criticize the system and procedures of existing Islamic Banking and as such appear to be conducting an academic evaluation of the different subterfuges and jurisprudential disagreements.

2.3 Third Group

The third group of scholars is comprised of those who consider Islamic Banking an altogether incorrect, invalid and impracticable proposition. From their point of view, Islamic Banking is a Non-Islamic thing both in its objectives and practices and its being Islamic is an impossible idea. The well-known economic expert Jāvayd Akbar Anṣārī is the sponsor of this point of view. One of his students, Zāhid Ṣiddique Mughal has compiled a book in support of this point of view under the name *'Islāmī Bankārī wa Jamhūriyyat: Fikrī Pass Manẓar awr Tanqīdī Jāʾizah'* (Islamic Banking and Democracy: Rational Background and Critical Analysis).These scholars,

instead of the partial or jurisprudential criticism, look at Islamic Banking in the total objectivity of macroeconomics, western economic ideas, global capitalism and the objectives of Islamic *Sharīʿah*.

They explore the case that a bank is not merely an organization. It is the basic unit of the global capitalism, which is the economic vision of the democratic political system. In this background scenario, a bank should not be viewed as a building constructed out of bricks and mortar, rather it is a symbol of Western mentality, philosophy, culture and civilization. Such institutions should not be accepted with closed eyes merely as the development of culture, because included in these are their thoughts and civilization as well. As it happens with the teaching of English language, it is not restricted to merely the teaching of a language; it also transfers in the name of literature, the western thought, philosophy and culture. That is precisely the reason, the Thinker of Pakistan ʿAllāmah Iqbāl RA had said about the banking system: "These banks are the idea of clever Jews and they had stolen the light of Truth from manʾs chest. Until you do not throw out this system from his roots, your religion, your culture and your intellect is like crude (Bāl Jibrīl 2006)."

3. Contemporary Islamic Banking: A Sharīʿah and Jurisprudential Review

A conventional bank gets money from the public as deposits and offers a large part of it as loans on interest and distributes the interest received on its loans amongst its account holders. In contrast to this, an Islamic Bank in Pakistan gets money from public on *Muḍārabah* (It is a contract in which a party provides capital to the other party who offers his labor based on risk and profit sharing) and a large part of it, invests in lease purchase of vehicles or housing financing schemes and a fixed percentage of the profits earned out of it, are distributed amongst those who had put their money in saving accounts, business profit accounts, income certificate and certificates of Islamic Investments etc. Is the profit earned from such saving schemes and certificates Halal or Haram? This would be determined on the basis of where the bank invests the money it has received from its account holders.

We have already explained that an Islamic Bank in Pakistan invests a large part of its deposits through *Ijārah wa Iqtināʿ* (Lease and Purchase), *Mushārikah Mutanāqiṣah* (Diminishing Partnership) and *Murābaḥah* (Cost plus Profits) schemes. During Quarter end 2012, 43.8% of the investment was made in *Murābaḥah*, 32% in *Mushārikah Mutanāqiṣah* and 10.4% in *Ijārah wa Iqtināʿ*. (Islamic Banking Bulletin September-December 2012) We shall now do an analytical study of these business types of an Islamic Bank. After a study of the various types of the business practices of the Islamic Banks, we assess that the Islamic Banks have adopted the path of unfair subterfuges to convert a wrongful thing into allowed.

According to the Qurʾān, in a Jewish town on the seaside, Allah SWT disallowed fishing on Saturdays so that they could worship on that day. With this Allah STW put them in a trial as on Saturdays the fish would, by coming on the surface, provided them with big temptation for fishing whereas on other days these used to go in deeper waters. One group of Jews did not fare well in this trial and devised a subterfuge to fish on Saturdays. They dug small ditches near the sea and linked these to the sea through small channels. On Saturdays this group would push the fish to these ditches and catch these on Sundays. Apparently they were obeying Allahʾs command by not fishing on Saturday, whereas the real objective of Allahʾs order of reserving Saturdays for worship was not being fulfilled. A second group asked the first to refrain from such subterfuges but the first group declined. The third group consisted of people who told the people of the second group that there was no use counselling the first group on this issue. These people neither fish with such subterfuges like the first group, nor did they restrain them from this act. Thus Allah SWT, for adopting this subterfuge to circumvent the *Sharīʿah* command by the first group, levied punishment on them, which is described in the Qurʾān as under. Allah SWT says:

"Ask these Jews about the people living in the settlement on the sea side while they were committing excess on Saturdays when the fish would appear on surface of the water on Saturdays and when it was not Saturday these would not appear before them. This way I was giving them a trial because they were disobedient. When one group from this settlement said to the other why do you guide the group whom Allah SWT is about to destroy or give severe punishment, they replied, "so that we could offer a justification to our Lord [that we had counseled them] and may be some of them get alarmed] and refrain from such subterfuges]. Thus when they ignored the advice which was conveyed to them, we saved those people who forebode them from vice and those who had committed excess We put them to sever punishment for their disobedience." (Qurʾān: 7: 163-165)

Similarly, Prophet (PBUH) said: "Let there be the curse of Allah upon the Jews that fat was declared forbidden for them, but they melted it and then sold it." (Bukhārī 1997) There is a consensus among the jurists that all

subterfuges by which Sharīʿah laws are made void or a Haram could be made Halal are unlawful (Jāmiʿ al-Uṣūl n.d.).

As an example, if one million rupees are lying for last 11 months with some body, and in order to avoid zakat, two weeks before the end of the year, he gifts this money to his wife, there would be no Zakāh on this, since one full year has not been completed on this money. Similarly, his wife, in the next year, before the completion of full year, gifts this back to her husband, this money is again excluded from zakat.

Some subterfuges are such that on surface there seems to be no violation of any *Fard* (Obligatory) or *Wājib* (Mandatory) ruling, but the real *Sharīʿah* aims of such command are not fulfilled. Some contemporary scholars do believe in such subterfuges.

One form of such subterfuges which is commonly practiced by some present day experts involves, for anyone who wants to avoid paying zakat, to find first a Zakāh deserving person, then a deal is struck with this person that out of the Zakāh to be paid to him, he would keep a small amount with himself and gift the balance back to him. Thus if somebodyʹs Zakāh assessment is Rs50,000., the Zakāh deserving person, would keep 2-3 thousand with himself and return the balance amount to the assesse as gift.

As a result of such subterfuges, the basic purpose of Zakāh in *Sharīʿah* of helping the poor, the destitute and the deprived or the self-cleansing of the rich is lost. It is the Sunnah of the Messenger of Allah that Zakāh should be collected from the rich and paid back to the poor of the same settlement (Bukhārī 1997). If any scholar adopts such subterfuges as would return back the Zakāh collected to the rich, such subterfuges would be Haram and unjust as per *Sharīʿah*. Such tricks being Haram is proved by the tenets of *Sharīʿah*, as has been described above. Dr. Aḥmad Ḥasan writes, "It is accepted by all jurists that for the negation of *Sharīʿah* law or principles, use of such subterfuges is incorrect. With some Ḥanafīs we however find the justifications for use of such tricks. There is also a book on this topic attributed to Imām Muhammad bin al-Ḥasan and there is a book of Imām Khaṣṣāf on tricks. By these subterfuges, these Ḥanafī scholars do not mean trick which would negate *Sharīʿah* laws and ruin the public interests for which these subterfuges were devised, rather the objective of these tricks is to find ways and means by which these public interests are realized and not the negation of *Sharīʿah* laws (Jāmiʿ al-Uṣūl n.d.)."

This was the position on subterfuges of the former Ḥanafī jurists, but some of the present day scholars adopted a softer position. Since with the cotemporary scholars there is a full chapter on the usage of subterfuges and these tricks are commonly used. These tricks are also used to sort out economic problems of people as well. There is no doubt that any subterfuge which annuls a Sharīʿah law or by which a Haram is described as Halal is considered wrong by all the Muslim jurists. However with the present day scholars many such subterfuges have been accepted as correct, by which even the Sharīʿah objectives of the Divine law are compromised and these are the ones which form the basis of Islamic Banking. We are of the view that till such time that a critical research in the validity of basic principals involved for such subterfuges, is not carried out, it is not possible to carry out any meaningful evaluation of Islamic Banking.

Some proponents of Islamic Banking sometimes quote such precedents as would justify use of such tricks, e.g.; The prophet Ayyūbʹs AS hitting of his wife with a broom in place of the sworn lashes (Qurʾān 38:44) or The Prophet Yousafʹs AS tactful hiring of his brother (Qurʾān 12:70-76) or Holy Prophetʹs PBUH advice to the companion Bilāl RA not to sell inferior quality of dates in exchange of superior kind with some price adjustments and if at all, it was necessary, to first sell the inferior quality and then buy superior dates (Bukhārī 1997) or again Holy Prophetʹs PBUH sentencing of an old and sick person on adultery charges by hitting him with date palm twig with hundred offshoots in place of hundred lashes (Sunan Abū Dāwūd 2006). The reason for all such instances was that a trick is lawful or acceptable in Islamic *Sharīʿah* if its objective is to secure ones right or it is for elimination of some excess or it is for removal of some such pain which had the possibility of inflicting death, provided fair means and methods are used in such subterfuge. Some scholars like Imām Shāṭbī does not include such tricks even in the definition of a subterfuge since for them a prohibited trick is some subterfuge which is unlawful and illegal. In contrast to this some other scholars like Imām Ibn al-Qayyim have divided subterfuges in to two types, i.e., valid and void subterfuges (Jāmiʿ al-Uṣūl n.d.). The prophet Ayyūbʹs AS once swore during his illness that he would give one hundred lashes to her wife for her ungratefulness, once he recovers from his sickness.

The offence committed by Ayyūʹs AS wife was not that serious as to warrant such a punishment, but then there was the question of Prophet Ayyūbʹs oath, so to save Ayyūbʹs AS wife from this punishment, for which she had

no capacity, Allah SWT brought about a trick in his mind. So, a subterfuge which is employed to ward off a suffering is a valid subterfuge.

Similarly, holding back of his brother by Prophet Yūsuf was his moral and legal right. Additionally he wanted to save his brother from further fury of his step brothers as described in the Qur'ān (12:69). And the Holy Prophet PBUH did not award the punishment of hundred lashes to an old and sick person because there was a very strong possibility of his death, so to save him from a possible fatal punishment, a subterfuge was employed. In the tradition involving Bilāl RA, the Holy Prophet PBUH guided him to right and proper subterfuge to meet a personal situation i.e. as per the normal practice in selling, to first sell the inferior kind of dates and then buy the superior quality. In this case the Holy Prophet PBUH is persuading him to follow the commonly used practice in buying and selling to get the quality dates in exchange for inferior dates and not coaching him in devising a subterfuge to make a Haram into a Halal.

Even if it is accepted as a subterfuge, with this kind of trick neither any *Sharīʿah* Law or provision has been annulled nor any objective or public interest has been lost whereas the subterfuges which form the basis of Islamic banks, not only destroy the objectives of the, these also annul the *Sharīʿah* rulings. According to a group of Pakistani scholars, subterfuges being used in Islamic Banking are the same back door tricks the Jews had been using to change a Haram into Halal. Recently a group of Ḥanafī scholars have issued a unanimous Fatwa from Karachi on the existing Islamic Banking, which says: "Since the unreal and temporary grounds of Islamic Banking are *Murābaḥah* and *Ijārah* (Leasing), banking with such provisional basis and making these short lived subterfuge a permanent means of earning, it becomes rather difficult, both morally and as per *Sharīʿah*, to call and consider it as Islamic Banking. Some of the reasons for this are:

1) The unreal foundations (*Murābaḥah* and *Ijārah*) are mere subterfuges and making a permanent system out of these tricks is not lawful. Any Business settled by employing such subterfuges would also be invalid. As the subterfuge of *'Bayʿ Īnah'* (It means to sell something for a price to be paid at a later date, then to buy it back for a lower price to be paid immediately) according to Imām Muhammad is wrong, similarly the subterfuges regarding *Murābaḥah* and *Ijārah* and making money using these tricks is also inappropriate.
2) These subterfuges were devised by the former scholars for an interim period for particular circumstances.
3) These are very delicate and dangerous subterfuges. A slight carelessness would make these a part of 'interest system'.
4) Using these subterfuges as permanent system is not only wrong but unfair as well.
5) In Islamic Banking the volume of *Murābaḥah* and *Ijārah* must be abolished, otherwise no Islamic Bank would be justified in calling itself 'Islamic Bank'; instead these would best be called as *'Ḥīlah Bank'*. (The Unanimous Fatwa 2008)

Later a press release on eight pages containing this detailed Fatwa was issued. It is said in this publication that the existing Islamic Banking is absolutely unlawful and illegal. The ruling is the same for banks characterized as Islamic banks as is for other normal conventional interest banks. Participants of this session included Muftī Ḥamīdullāh Jān from Jāmiʿah Ashrafiyyah, Lahore, Mawlānā Muftī ʿAbd al-Majīd Dīnpūrī, Mawlānā Muftī Rafīq Aḥmad and Mawlānā Muftī Shuʿayb ʿĀlam all from Jāmiʿah Binawrī Town, Karachi, Mawlānā Salīmullāh Khān, Mawlānā Dr. Manṣūr Aḥmad Mangal, Mawlānā Muftī Samīʿullah and Mawlānā Muftī Aḥmad Khān from Jāmiʿah Fārūqiyyah, Muftī Ḥabībullāh Shaykh from Jāmiʿah Islāmiyyah Clifton, Muftī Mawlānā ʿAbdullāh from Khayr al-Madāris Multan, Muftī Ghulām Qādir from Dār al-ʿUlūm Ḥaqqāniyyah Akura Khatak, Muftī Aḥmad Mumtāz from Jāmiʿah Khulafā Rāshidīn Karachi, Muftī Zar Walī Khān from Jāmiʿah Aḥsan al-ʿUlūm Karachi, Mawlānā Muftī Ihtishām al-Ḥaqq Āsiyā Ābādī from Baluchistan. After an explanation of the basics, we now give a somewhat detailed review of the conventional and existing operational business practices of the Islamic Banks.

3.1 *Mushārakah Mutanāqiṣah* (Diminishing Partnership)

In this type of business, as an example, an individual, by the name X, approaches the bank saying to the bank that he needed a house and that he hasn't got the money either to buy or build a house. The Islamic Bank proposes to X to build or buy a house in collaboration with the bank.

Now let us suppose that the bank and X jointly undertake to build the house .The bank takes up the responsibility of providing 80% of the expenses, while X provides 20% of the money. X does all the efforts about for the

construction of the house. He does all the supervision since he has to live in this house. The bank provides 80% money to X but does not practically participate in the construction of the house.

After the construction of the house, when X takes up the residence, the bank demands from X the rent of 80% share since he was residing in the house. X pays to bank the rent of 80% bank share and also all along continues buying back, in instalments, the bank's share. With the payback instalments by X, the banks share continues declining and proportionately, the rent charged by bank also gets reduced and ultimately X buys the entire share of the bank. In this way X has been paying instalments for house and the rent separately.

4.1.1 A Review of Diminishing *Mushārakah*

Following objections have been raised on this bank business by various literary circles and eminent economists.
3.1.1.1: There is no doubting the fact that the Islamic Bank starts charging the rent from X when the house is complete and X starts living there.

While the house was still under construction and the bank started providing the money during this construction period, the bank starts the calculation of rent from the day the first instalment was paid to X to buy construction material for the house. It must be remembered that the bank does not pay in lump sum money required for construction, it is paid in instalments. Let us suppose X has got to build a house costing 5 million, in which 4 million are from bank and 1 million from X. Now as X starts the construction work, the bank pays him 1 million and the day 1 million is paid to him, the bank starts calculating the rent on this money. Similarly, if after two months, another million is disbursed, the bank would start charging rent for 2 million from this day and if after four months again 1 million more is paid, the bank would now start charging rent on 3 million when actually the situation is that the house is under construction and X has not even used it. We can say that the Islamic bank is taking rent for a house of which only the walls are available without the roof on it. It should be made clear that during all this period of construction the bank has not been actually taking the rent, neither the bank tells X that they have been charging the rent for this period; instead the bank keeps this amount posted in its accounts. And when X takes up residence in this house after its completion, the bank instead of charging the rent on this accomplished house at prevailing market rates, they would add up the rent for the construction period to the rent of the house.

3.1.1.2: The Islamic Bank fixes the rent of the construction period on the basis of interest rate of the conventional banks. Muftī Dr. ʿAbd al-Wāḥid writes; "The existing Islamic Banks fix the price or rent on anything based on, what they call a floating rate and which basically is the rate of interest used for inter-bank dealing and is commonly known as KIBOR (Karachi Inter-Bank Offer Rate). What it really means is that prices or rents are fixed based on this rate of interest and with any change in this rate, the prices or rents continue varying. There are two flaws in this; 1: for the purpose of fixing the prices or rents, making rate of interest as the basis has no connection with Islam's interest free economic system." (*Murawwajah Islāmī Bankārī* 1429 AH) As an example, it took one year for the construction of X's house wherein the bank had put in 4 million and X one million. If for the one year construction period the bank charges the rent, when the house had not yet been fully constructed and X had not used it, actually it is not rent but the bank is charging interest on the money contributed by the bank on the pretext of partnership with X.

It is very clear that the Islamic bank couldn't charge interest during the construction period. Here they devised a tactic and the trick was that they didn't charge rent from X during construction, but calculating on the basis on conventional bank interest rate he included this amount in his account and after the completion of the house, this was added in the rent to be charged to X and because of this, the rent for this house was very different from market rates. As an example, say there are fifty, one thousand square yards houses of almost equal value each, in the same area of, say, Defence Housing Society, Lahore. Now the rent for each one of the 49 houses would have some commonality, but 50th house that has been built using bank house leasing scheme, the rent for this house would be much different from the rents of 49 houses. The objective of highlighting this difference in rents in not to say that rent of bank houses is higher than the other houses, in fact it could sometimes be lesser as well. The real objective of the debate is to establish that the bank rent is not market related but is KIBOR related and its yardstick or benchmark is KIBOR.

3.1.1.3: The third point which reinforces further the second is that when a bank decides the rent for such a house, it focuses on its total investment involved. For example, for 4 million, it would work out the interest as per the conventional bank rate of 13-14% on this amount and would recover it from its partner in the name of rent. For

example somebody has an agreement with the bank that he would pay back the total loan of 4 million in five years.

Now the bank would split the amount of 4 million into small units and would recover back its principal amount in instalments in five years. Along with it, 13-14 % interest on 4 million would also be recovered in the name of rent and, with the gradual payback of instalments, the principal gets reduced to, say 3 or 2 million and the 13-14% interest on this is also reduced and so the bank would get lesser rent. By recording interest in registers as rent does not make it a rent. One would take it as rent only when this house is rented out at the natural prevailing market rates and not based on KIBOR i.e. unreal and artificial rent.

3.1.1.4: For the recovery of 4 million from its partner, the bank splits it into smaller portions. For example, if 4 million are to be recovered in five years, the bank would split 4 million in such a way that its recovery in instalments is completed in five years. If somebody at some stage wants to vouch for more than one unit at a time or to put it in simpler words, wants to pay back more than one instalment in a period, he would have to pay 3% more on combined total of these instalments, which is definitely interest.

3.1.1.5: To recover 4 million from an individual in five years, a bank divides it into instalments. It is, for example, agreed that X would return 0.2 million in the first three months and in case X fails to return this amount in this time, the bank does not suffer any loss because of the fact that still X has to pay the larger amount and as a result of this he is paying more rent for the shared house.

4.1.1.6: When a bank participate with somebody to build a house, it concludes an agreement with the person even before the start of the construction, that after completion that person would hire this house on rent from the bank, and fixes the rent at that stage. How could the rent of a house be fixed when the house does not even exist? This rent is according to interest rate of conventional banks and not as per the market rate.

3.1.1.7: Similarly, in house financing one has to get insurance or *Takāful* (Islamic insurance concept) which is not allowed according to majority of Muslim scholars. Muftī Dr. ʿAbd al-Wāḥid writes; "According to Islam, Insurance is surely forbidden and it contains elements of interest, gambling and uncertainty. These three elements are also included in *Takāful* as I have persistently written on this issue, and so the existing *Takāful* is also a non-Islamic business. In car leasing case it is the bank which gets the insurance, and in case of house the bank and the customer both get in proportion to their respective shares. The following points can't be ignored in this: 1- the customer who gets car leasing or home financing becomes the reason for the bank to get involved in insurance or *Takāful* business. He knows fully well that the bank for sure would do this business and would do this simply because of him, thus becomes a part of this sin (Murawwajah Islāmī Bankārī 1429 AH)."

3.1.1.8: The simple and straightforward method for justifying house financing is that X and bank jointly build a house wherein bank has put in four and X one million. After building the house, X and the bank together put this house on rent to some third party. If this third party, for example, pays fifty thousand as rent, then the bank gets 40 thousands and X 10 thousands and X besides this would continue paying back the bank in easy instalments. The fact of the matter was that the banks have, taking advantage of the "book of tactics", have given to the 'bank interest', the name 'rent' and this is no secret for any sane person. If it was rent it should have been as per market rates or something around it. If it was rent then while calculating it, the bank shouldn't have included the construction period in the rent calculations and if it was rent, then the bank shouldn't have based it on KIBOR or LIBOR (Lahore Inter-Bank Offer Rate).

3.1.1.9: It is sometimes argued in this regard, that *Sharīʿah* has not fixed any rate for selling anything or for putting it on rent. A bank has the right to charge rent from its partner at whatever rate it wants. The idea behind explaining this difference in rents is not to say that the bank rents are much higher than market rents, rather in certain situations it could be much less than normal rents, the objective is to say that, this, in fact, is not rent at all. It is only in documents that it is described as rent. By describing a police station as hospital in papers does not make it a hospital since the basic structure, needs and the environment in both cases is much different. The rent of a house is based on its location, its structure and furnishing, its value and total land area etc. As an example, if there is 1000 square yards house in DHA Lahore and there is 1000 square yards house in Township Lahore, there would mark difference in their rents. Similarly, in DHA Lahore 1000 square yards house and a 500 square yards house would have visible difference in their rents. In Wapdatown Lahore, two houses of 1000 square yards each in the same lane, one with a sale value of 10 million and the other of 5 million would have a marked variance in

their rents. In Gulberg Lahore there are two houses of 500 square yards each, one is a corner plot and the other is located in a lane, this would give difference in rents.

So the factors which are important to consider while defining the rent of a house and when without taking due care of these factors the rent cannot be determined, fixing the rent disregarding these considerations, on conventional interest yardstick, does not make it a rent even if it be much lower than the market. A delegation of the tribe of ʿAbd al-Qays came to the Holy Prophet and they asked about the dinks, The Messenger of Allah said, "And do not drink in containers called *al-Ḥantam* (green pitcher), *al-Dubbāʾ* (varnished jar), *al-Naqīr* (gourd), and *al-Muzaffat* (hollow stump). These were the names of pots in which alcoholic drinks used to be prepared (Bukhārī 1997). Thus, the Messenger of Allah forbade not only the alcoholic drinks but also blocked the scales were being used for these. When Ḥāṭib bin Abī Baltaʿa RA while selling grapes, did not keep in view the market rate, the second Caliph ʿUmar RA ordered him to sell either at the market rate or leave the place. Saʿīd bin Musayyab RA said that ʿUmar bin al-Khaṭṭāb RA passed by Ḥāṭib bin Abī Baltaʿa RA who was underselling some of his raisins in the market. ʿUmar bin al-Khaṭṭāb RA said to him, "Either increase the price or leave our market (Muwaṭṭaʾ 2004)."

Another tradition narrates that ʿUmar RA explained Ḥāṭib later on that his order was for public interest and not an obligatory judgment. When during the period of the Holy Prophet PBUH there was a big increase in the prices of things, some Prophetʺs companions requested him to fix market rates. The Holy Prophet PBUH replied, "This is Allah who increases the prices. He alone is the curtailer of sustenance, the enlarger of sustenance and the provider of enormous sustenance. And I am hopeful that I meet my Lord and none of you are seeking recompense from me for an injustice involving blood or wealth (Sunan Abī Dāwūd 2006)." This Hadith shows that not the state has the authority to fix market prices, as is given in the Qurʾān; "O you who have believed, do not consume one anotherʺs wealth unjustly but only [in lawful] business by mutual consent (4:29)." Thus when the market rates get fixed by people in free trading, opposing these gives rise to a lot of social and economic disasters. It was for this reason that ʿUmar RA had ordered Ḥāṭib RA to leave the market for his selling against market rate.

3.2 *Ijārah wa Iqtināʿ* (Lease purchase Scheme)

In this form of business, a person goes to a bank telling them that he needed a car or a machine but he has not got the money to buy. The bank makes him its agent and buys the item. For example a person expresses the desire to buy a Toyota Corolla to the bank. Now the bank would make him their agent and ask him to buy the Toyota Corolla of his choice on behalf of bank. Suppose the person buys that vehicle in 2 million for the bank. The bank in turn hands over that car on rent to him for, say, five years and at the end of five years the same person buys back the same car on a nominal price from the bank.

3.2.1 Objections on Lease Purchase Scheme

Following objections are raised on this business of the bank.

3.2.1.1: When a bank buys a car on somebodyʺs demand, for example, it buys a Toyota Corolla in 2 million. The Bank, to the actual price of the car, which is 2 million, adds the interest on 2 million, calling it rent, adds car insurance expenses etc. And it calculates the total as, say 2.5 million. The bank would now divide this 2.5 million into instalments payable over five years and give the car on rent for five years, to the same very person on whoʺs demand it had bought the car in the first place and the rent, instead of the market rate, would be fixed in a way that it ensures the recovery of 2.5 million in five years. In this way, using the tactic of rent, it would recover 2.5 million from this person which includes the actual car price, the insurance expenses and the bank interest in the name of rent. After five year, the bank would sell this car to the person in exchange for the normal security amount. In this way a business initiated as rent results in a sale. It should be clear that it was agreed between the bank and its customer on the very first day that after the receipt of rent of five years the bank would sell this car on a nominal price to this person.

It becomes clear from all these details that the bank had not purchased this car to sell to X, and to sell this car at price higher than its purchase price to X, it devised the trick of rent. In all this X had the advantage of returning the entire bank money along with the profit in the name of rent in easy instalments, while the bank had the benefit that it made the interest allowed by giving it the name of rent. If what the bank receives is really rent for the car then it should be as per market rates. If it is rent, then the bank should not have contracted in the beginning to sell the car to the same person after five years. If it is rent, then the bank should have sold that car after five years to that person not on nominal price but on market rate. And finally if it is a rent, then bank should not have

determined that rent keeping in view the car insurance, the principal amount and conventional bank interest rate linked with KIBOR.

3.2.1.2: The bank is not the actual buyer in this deal. Its actual position is that of an investor for buying a certain item. The car was located by that person, he chose the model, the color etc., he did all the running about for its purchase, and the bank provided only the money and got the car in their name. So the bank is not the real buyer even though in papers it is being shown as such. The bank, thus, is not in the business of purchase and sale of cars; rather it provides the money for purchase and has devised the tactic of lease to sell the same on interest. The unanimous fatwa of Ḥanafī scholars states: "The basic objective of the parties is not the leasing business but to do purchasing. As per law and practice, the ruling would apply to real objective i.e. sales and not on word "leasing" .This sale is subject to leasing and that is against *Sharīʿah* (The Unanimous Fatwa, 2008)."

3.2.1.3: Even if we accept the bank as a buyer, its purchase is not genuine because the bank has purchased this car to sell to X on his request and the Holy Prophet PBUH has restrained from such buying and selling. Narrated Ḥakīm bin Ḥizām RA: Ḥakīm asked (the Prophet): Messenger of Allah, a man comes to me and wants me to sell him something which is not in my possession.

Should I buy it for him from the market? He replied: Do not sell what you do not possess (SunanAbīDāwūd). Imām Ibn al-ʿArabī (ʿĀridah al-Aḥwadhī 1415 AH), Imām Nawavī (al-Majmūʿ), Imām Ibn Qudāmah (al-Kāfī 1399 AH), Imām Ibn Daqīq al-ʿĪd (al-Iqtiraḥ 1406 AH), Imām Ibn al-Mulqin (al-Badr al-Munīr 1425 AH) and ʿAllāmah Albānī (Irwāʾ al-Ghalīl 1399 AH) have affirmed it as *Ṣaḥīḥ* (Sound) hadith. Imām Ibn al-Qayyim (Zād al-Maʿād 1418 AH) and Imām Ibn Ḥajar (Tahdhīb al-Tahdhīb 1416 AH) has established it as *Maḥfūẓ* (Preferred). The wording of another Hadith is: Yaḥyā related to me from Mālik that he had heard that a man wanted to buy food from a man in advance. The man who wanted to sell the food to him went with him to the market, and he began to show him heaps, saying, "Which one would you like me to buy for you." The buyer said to him, "Are you selling me what you do not have?" So they came to Abdullah bin ʿUmar and mentioned that to him. Abdullah bin ʿUmar said to the buyer, "Do not buy from him what he does not have." He said to the seller, "Do not sell what you do not have." The situation in this case was that somebody was going by himself to market to make a purchase to later make a sale to someone else wherein the buyer did not have anything by himself except the money and this arrangement was stopped by a companion of the Holy Prophet PBUH. As against this, the Islamic bank does not go to market to bargain. It makes an invalid purchase to do a real sale to X in future i.e. he is doing an artificial transaction today and this is not fair and allowed.

3.2.1.4: If somebody expresses his intention of buying a car to the bank, the bank gets a car booked in his name, and if let suppose it takes 2 months to get the delivery of this by the bank, the bank would charge to this customer, the opportunity cost by adding it to the rent in an appropriate way. The longer the delivery time, the higher would be this opportunity cost and higher the rent proportionately. The rental calculations are initially based on the prices on the day the bank books the car, not the day when it is delivered to the customer. Any price movement in between the two dates goes to customers account in the form of rent increase.

3.2.1.5: If anybody gets a car on lease from bank, say a Toyota Corolla for five years on rental and after paying of rent for three years, he wants to buy this car from the bank, the bank should sell this car to the customer on the prevailing market price, but the bank would not do this. Instead the bank would examine in the first place, how much did it pay to buy this car? Say, it is 1.5 million; secondly, how much of the principal amount is paid? Say, it is 1.2 million leaving 0.8 million in balance. It is important to understand that during these three years the bank has not received only 1.2 million but he has been paid back 0.3 million as rent during the last three years. Similarly, to sell this car to the customer at the termination of the five year lease agreement, the bank would charge termination penalty of 5% on the balance of 0.8 million. This method of selling the car to its customer by an Islamic Bank is exactly like that of a normal conventional bank. Thus the bank, to sell the car to its customer at any stage during the currency of the five year lease agreement, would keep in view the principal amount and the remaining amount to fix the price of the car. From all this it becomes very obvious that from the very beginning, the bank and its customer were set on a sale/purchase transaction and this sale/purchase deal was already settled between the two. This lease strategy was adopted as a cover up so that the bank could earn its interest and customer in the name of rental could buy a car on easy instalments.

3.2.1.6: When the bank buys the car, it acquires its ownership and as such is responsible to bear all its expenses. The bank bears all these expenses, but charges these to the customer by including the same in the rent. As an example, if the bank determined forty thousand as normal monthly rent, the first month rent will be charged at

eighty thousands, so that it could recover the additional expenses it had incurred while acquiring the ownership of the car.

Thus the rent is eighty thousands in one month and forty thousand in the next month. This wide variation in the rent in a limited period of one month is not justifiable. Writes Muftī Dr. ʿAbd al-Wāḥid: "In the car leasing scheme of Meezān Bank, it is mentioned in their tentative monthly rent schedule that the first month rent includes the registration and transportation expenses and the rent of remaining months includes *Takāful* (Islamic Insurance) payments (Jadīd Maʿāshī Masā'il 2008)."

3.2.1.7: When a bank purchases a car for leasing out to someone, it has to get it insured, which is forbidden according to all present day fatwa committees. The Islamic Banks usual answer to this objection was that in case of car financing, State Bank of Pakistan's permission is not granted till such time that insurance is secured and as such they are constrained to do it. The answer to this objection was that why an Islamic Bank gets involved in a mode of business wherein it has to adopt a forbidden practice. The solution devised by the Islamic Banks to the insurance problem was the introduction of *Takāful* in the name of Islamic Insurance whereas naming *Takāful* as real Islamic Insurance is by itself debatable and questionable (Jadīd Maʿāshī Masā'il 2008).

3.2.1.8: If a customer does not pay the car instalment in time, the bank imposes a fine which continues to increase with time. This is unfair. According to Islamic banks, this fine is donated to a charity fund working under the bank. Writes Mawlānā Muftī Zulfiqār: "Like the conventional banks, The Islamic Bank also charges fine on any delay in payments which later are, deposited in the charity fund working under the Islamic Bank. Here again the conventional thinking is adopted i.e., first the fine is imposed proportionate to the outstanding amount and secondly with increase in delay period the amount of fine continues to increase (Dawr Ḥāḍir kay Mālī Muʿāmlāt 2008)." The proponent of Islamic Banking fined the justification for this fine from a verdict assertion of IbnDīnār al-Mālikī. The unanimous fatwa of Ḥanafī scholars says, "For those who trust Ibn Dīnār al-Mālikī weak, obsolete like non-existent verdict of providing justification for imposing monetary fines by the banks, it is expected from the scholars that they would, accepting the reported stance and observations of Imām Muhammad, announce the investments employing the tactics of interest bearing system of trading and leasing, as forbidden (The Unanimous Fatwa)." Mawlānā Muftī Zulfiqār has given a detailed and critical view to this verdict of Ibn Dīnār al-Mālikī in his book.

3.2.1.9: In bank leasing if the car gets damaged, the bigger damage is to bank's side and the smaller damage is to lessee account. It is stated in unanimous fatwa: "In the prevailing leasing practices the bigger damages are taken by the bank and the minor losses are booked to the lessee even though these may have been because of normal usage. Be it may the matter of leasing (in theory) or of trading (in practice), this division of losses is absolutely unfair because in leasing (including all the Islamic Banks' agreements on *Mushārakah*, *Muḍārabah* and trading etc.), the investor's capital and material is in the custody of the owner and the users as *Amānah* (Deposit). Except for intentional carelessness and negligence there could be no fine on *Amānah* whereas in this case, responsibility for some form of losses during usage by the renter has been put on the user in the prior agreement. If this was leasing based on valid principals, then putting any additional burden on the lessee other than the rent, is totally unfair and invalid. If we treat this as sales then transferring the bigger damages to the seller (bank) is a bigger evil than the first. So, such a sale is unfair (The Unanimous Fatwa)."

3.2.1.10: In leasing the Islamic Bank decides the rent according to the interest rate of the normal conventional banks which continues varying according to the circumstances (Dawr Ḥāḍir kay Mālī Muʿāmlāt 2008) and this is unfair (Jadīd Maʿāshī Masā'il 2008). It is stated in unanimous fatwa: "In leasing, standardizing the traditional bank interest rate as the yardstick for fixing the rate of rents is basically invalid because of, firstly, its similarity with conventional banking and secondly the doubts about its interest related nature. Additionally the traditional bank interest rate continues to change with time or due to inflation, it moves up or down. Any lease wherein the rent rate in not for sure predetermined, is not allowed (The Unanimous Fatwa).

3.3 *Bayʿ Murābaḥah* (Cost plus Profit)

The word *Murābaḥah* is derived from *'Ribḥ'* which means profit. According to classical Muslim jurists *Bayʿ Murābaḥah* means a sale wherein a person buys something and then sells the same thing to somebody else at an increased price. The difference between this sales and an ordinary sale was that in *Murābaḥah*, the seller has to tell his customer his real purchase price and then demand a fair profit on its purchasing cost. For example when a

businessman tells his customer that he had bought this thing in 100 dollars and was selling to him at 110, this would a *Bayʿ Murābaḥah*.

But if the seller does not disclose to his customer his purchase price and through on the spot bargaining, is able to sell his sales at some profit, this would not be *Murābaḥah*, this is known as *Bayʿ Musāwamah*. Explaining the meaning and the essence of *Bayʿ Murābaḥah* as seen by the famous four schools of Islamic Jurisprudence, writes Dr. Wahbah al-Zuḥaylī: "This means a sale wherein some increase is made to the cost price. And the Mālikī school of thought explain *Murābaḥah* with the example that the seller has to explain that at what price did he buy the material and in addition to his purchase price has put in some profit. In brief the merchant would say to customer that he has purchased the item in ten dinars, would you give me one or two dinars on top of it or the seller negotiates details of the profit with the customer saying for example, that for every dinar of the purchase price, the shopkeeper would charge one dirham as profit. This means he has to indicate his profit in definite figures or in multiples of ten. With Ḥanafīs *Murābaḥah* is defined as selling something on profit after its ownership has been obtained by the person through a prior sales agreement. According to Shāfaʿī and Ḥanbalī school of jurisprudence this means a sale wherein the seller, in addition to the purchase price and procurement expenses obtains some profit on it, for example, one Dirham on every ten dirhams, provided both the buyer and the seller know the actual price (al-Fiqh al-Islāmī 1985)."

Now this is the concept of *Murābaḥah* which has been given by predecessor. The Islamic Banks have introduced their own self fabricated definition as given below. Writes Dr. Muhammad ʿImrān Ashraf ʿUthmānī; "The term is 'however' now used to refer to a sale agreement whereby the seller purchases the goods desired by the buyer and sells them at an agreed marked-up price, the payment being settled within an agreed time frame, either in instalments or lump sum (Meezān Bank's Guide 2002)."

3.3.1 A Critical Analysis of *Bayʿ Murābaḥah*

Following objections are raised on this businessas conducted through Islamic Banks.

3.3.1.1: The use of the word *Bayʿ Murābaḥah*by the Islamic banks is a misuse of this term. The concept of *Bayʿ Murābaḥah* which the traditional Jurists have declared as correct following some narrations is very different from what the Islamic Banks are introducing these days in the name of *Murābaḥah*. The Islamic Banks have named a sale as *Bayʿ Murābaḥah* which is not a *Bayʿ Murābaḥah* but is actually a *Bayʿ* (Sale and Purchase) totally against *Sharīʿah* directions as we have already described in Ḥakīm bin Ḥizām RA tradition. There is a great difference in the definitions of *Bayʿ Murābaḥah* given by Dr. ʿImrān Ashraf ʿUthmānī and that of the four school of jurisprudence, which becomes very obvious to anyone doing comparative analysis of the same. Take the example of a person going to a market, buying machinery for 1000 dollars, stocks the machine in his storehouse, after sometimes a customer comes to buy the same, the seller tells the customer his cost price and offers him to sell this one in 1100 dollars. Now this businessman has worked, spent his time in purchasing and stocking the machinery in his store. This is the actual trade practice.

The same job if handled through an Islamic bank, the sequence would be something like this. Anybody requiring machinery would go the bank and tell them that he was looking for that. The bank would buy this in one 1000 dollars for him. In fact this person would himself go to the market to buy the machine; the bank becomes the owner of this machinery and in papers only, by simply supplying financing for this purchase. Now the bank sells this machinery to the person in 1100 dollars on instalments. In this sequence the bank has not done any real endeavor. The bank is providing merely the capital and is earning profit through processing of paperwork. The Messenger of Allah PBUH has disallowed this type of sale wherein the seller has not got the material he wants to sell as we have found it from the tradition narrated by Ḥakīm bin Ḥizām RA. The unanimous fatwa states: "There is no similarity between Islamic banks' *Murābaḥah* and jurisprudential *Murābaḥah*. In jurisprudential *Murābaḥah*, from the very beginning, agreement on settlement of price and order, and firm information on cost of the item are very necessary, where as in Islamic banks'*Murābaḥah* the bank does not make prior payment for the order or there is no cost figure available. That is the reason why this *Murābaḥah*, leaving aside a terminological *Murābaḥah*, is not included even in any common type of *Bay* (The Unanimous Fatwa)."

3.3.1.2: The second objection was that the profit that a bank charges from its customers in *Murābaḥah* is not as per market rates, instead the Islamic Bank adds 4-5% to the interbank exchange rate of conventional banks i.e. KIBOR + 4-5 % and calculates the rate accordingly to charge its customers.

3.3.1.3: The third objection was that when somebody approaches the bank for buying something, say, a machinery for industry, the bank, to ascertain the price of machinery, adds KIBOR + 4-5% to the real market price, and signs a sale agreement with the customer that he would buy that machinery at this price from the bank. The fact is that the bank has still to buy something, neither there is anything in its possession, yet it is signing an agreement to sell it at a predetermined profit. The Islamic Bank′s reply to this objection is that it is just an agreement; they have not made any sale. The fact however is that the Islamic Bank, playing a tact, has declared it as just an agreement whereas the bank is actually doing a sale of something which it does not own and it has yet to buy the same. If, as the bank claims, it is not a sale at this stage and it is an agreement between the bank and its agent for the agent to buy from the bank a certain thing at the specified price. In such a case the agent has the right to break such an agreement. When a bank buys something on some one′s demand with an agreement with the person that he would buy the same thing on a higher price from the bank and according to the Islamic Bank no sale has been made so far and as such the person can break this agreement. However, if as a result of this breach of such agreement, if some *Kaffārah* (Expiation) as per his school becomes due, he should pay the same. But the Islamic bank would never accept such a happening. If a customer does not live by his promise of buying, and the bank is obliged to it sell to somebody else on lower price, the bank is going to cover up its loss from this customer (Dawr Ḥāḍir kay Mālī Muʿāmlāt 2008). Thus this was not an agreement since the bank was treating itself as a seller instead of a contractor to his customer in this deal.

Secondly the bank had no intention of buying this thing in the first place; it was because of the assurance of the customer of buying the same at a higher price from the bank that the bank bought it. Thus in reality the bank did no actual buying or selling, but invented a tactic to earn interest.

Thirdly the bank, before any *Murābaḥah*, demands 10% as token money from the customer so that it could cover up any loss in case the customer breaks the contract to buy the agreed thing. Getting money and using it, prior to any sale from the customer is also not valid. Writes Mawlānā Zulfiqār ʿAlī: "Like the conventional interest banks, Islamic Banks are also non-risk banks, a very obvious example of this was that whenever someone approaches an Islamic Bank for some kind of *Murābaḥah* or Leasing, the bank charges a good amount of money which is about 10% of the price of the item involved, as token money, so that if the customer at any time refuses to buy that item and the bank is forced to sell the same at a price lower than the self-cost to someone else, the bank could cover up its possible losses with this token money. The question arises whether taking this peril is not included in Islamic Banks RISKS? It is possible that proponents of Islamic Banks may testify that this type of risk taking was not included in the Risk. In that case the question arises that if by selling the same item elsewhere the bank makes a profit, would the bank be willing to share that profit with the first customer? Obviously the bank would not be willing for this. The real question now is that if the bank is not prepared to own the loss, what the justifications for accepting the profit are?"

3.3.1.4: The fourth objection is that when someone in need of something approaches a bank, the bank appointing that person as its agent or attorney, buys that item, through him, say, in 1000 dollars and then sells back the same item to the same person in 1100 on instalments. Now if the bank had provided the money to buy the item to this agent on 1st of May and the delivery of the item to the bank is made on 1st June and the bank in turn sells this item to its agent on 2nd June, the bank is going to calculate its profit starting 1st of May i.e. the day the money was paid to the agent. The bank had not got the items in its possession, neither the thing was yet sold to the customer but the profit was being charged from 1st May!

3.3.1.5: The fifth point is that anyone buying anything through bank likes land, car, machinery, jewellery, clothing etc., would pay the same rate of profit, which is 4-5% plus KIBOR in addition to the basic price of the item. What sort of trade is this wherein the rate of profit on a car, fabric, land and jewellery including an assortment of big and small items is same? Obviously this is not the real profit. Had this been real profit, the bank would have charged different rate of profit on different items as was the normal practice in open market. The profit a goldsmith earns on the sale 1000 dollars′ worth of gold is never the same as the profit which the owner of a car or a plot of land worth 1000 dollars makes on the sale of these items.

3.3.1.6: The sixth issue is that in normal interest transactions money is charged against money like somebody borrowed 1000 dollars and returned 1100. In this sale the bank is doing the same thing. The bank is charging 1100 on a sale of 1000.The Islamic Bank would say that it had received 1100 through sale.

Our contention is that the bank has made it a sale through a trick and in actual fact it was not a sale because the bank finances, doing only the paper work, 1000 dollars and gets back 100 and all the running about to procure the item from the market is done by the customer himself. What makes it more significant is that the bank has not gained profit on this as per market rates but adds KIBOR + 4-5% to the actual market price to charge its customer.

3.3.1.7: Even if we accept this as a sale, it is *Murābaḥah* of currency and *Murābaḥah* of Currency is unanimously declared as not allowed by all the jurists. It simply means take 1000 dollars from the bank, buy something of your choice and then in exchange of 1000 returns 1100 to the bank. Thus this is a sale of 1000 in exchange of 1100 and this is forbidden.

3.3.1.8: The eighth point is that if any customer of *Murābaḥah* does not pay the price to the bank in time, the bank imposes some fine on the customer and this is wrong. Mawlānā Zulfiqār ʿAlī writes; "There is no concept of fines on delays in the Qurʾān and Sunnah and neither the jurists permit it. Imām Mālik says: "no sin including murder makes a personʿs wealth Halal." Imam Shāfaʿī say: "a punishment is only physical and not financial." Ḥanbalīʿs well-known book *'al-Mughnī'* states: "punishment is by lashing, prisoning and scolding. Cutting off of any part or inflicting injury or taking of money is wrong because nothing to this effect has been prescribed in *Sharīʿah* by those whom we follow." According to Ḥanafī jurists, financial fine is not permitted. Thus, writes ʿAllāmah Ibn Nujaym "the gist of the matter is that according to Ḥanafī code financial punishment is wrong. With reference to *'al-Durr al-Mukhtār'* it is written in *'Fatāwā Dār al-ʿUlūm Dauband'* that "in Ḥanafī code financial punishment is not correct (Dawr Ḥāḍir kay Mālī Muʿāmlāt 2008)."

3.3.1.9: When someone approaches the bank for some *Murābaḥah*, the bank, for the purchase of his required item makes him its agent and buys the required item through the same very customer to whom it would sell that item in future. Besides this, before the purchase of the item or sometimes even before making the customer its agent, the bank enters into a contract with this customer agent to the effect that when as an attorney of the bank he buys the item from some market, then after the bank has become its owner, this agent customer would be contract bound to buy this item. This authorization by the bank is void. The unanimous Fatwa say: "In Islamic Banksʼ *Murābaḥah* the prior signed paper agreement by the bank is firm and final. After issuing of any power of attorney at different stages can't be advocacy as per *Sharīʿah*, rather, because of the entire responsibility of transaction revolving round one person only, it is a void authorization. Thus this way of advocacy, in *Sharīʿah*, is simply like drawing lines on a paper and playing with words. In actual fact the same person is both buyer and seller which are absolutely against *Sharīʿah*. Islamic Banksʼ*Murābaḥah* is a purely a tactic of interest. This *Murābaḥah* has no concern with the *Sharīʿah* terminological *Murābaḥah*(The Unanimous Fatwa)."

3.3.1.10: It has already been explained that when a bank makes a customer his lawyer in a *Murābaḥah*, it concludes a prior agreement of buying with him. As per this agreement when anyone as an agent of the bank buys something on behalf of the bank, he is bound to immediately take possession of the item and to take it into his ownership and this is wrong. The unanimous Fatwa says: "In Islamic Banksʼ*Murābaḥah,* as given in the annexure to the order form, under the terms of the prior agreement the customer is bound to take possession and ownership of the items immediately, otherwise the customer would responsible for any loss. Again this is wrong (Ibid)."

3.4 *Muḍārabah*

We have already explained that a bank has two basic and major functions. The first is to collect money from people as deposit or loan and the second to advance this money on interest bearing loans. The Islamic Banks receive money from their depositors on the basis of *Muḍārabah* and *Mushārakah* and invest it in business. The major part of the business of Islamic Banks consists of Diminishing *Mushārakah* i.e. Lease Purchase Schemes and *Bayʿ Murābaḥah*.

3.4.1 A Review of *Muḍārabah*

3.4.1.1: We have already explained in detail *Mushārakah* and *Murābaḥah* position according to Sharīʿah. We have also made it clear that these transactions of the Islamic banks are based on illegal tactics and so profits earned through these transactions are also wrong. Therefore, earning profits by opening an account with any Islamic Bank is not correct.

3.4.1.2: Another very important point was that the banks in addition to their agreed upon rates of profits, take out money for their personal expenses, various fees and allowances etc., from those of its depositors who do *Muḍārabah* with it, and that is wrong.

The unanimous fatwa explains: "In *Muḍārabah* the account holder is the owner and the bank is the operator. The bankʼs share in the revenues from the *Muḍārabah*, according to *Sharīʿah*, is only from out of the profit made and as per the agreed upon rates. Apart from this, according to *Sharīʿah*, it is not allowed for the bank to charge anything for its administrative expenses, different types of fees or compensations and allowances and deductions of any sort, but the Islamic Banks do it (Ibid)."

3.4.1.3: The third point is that in *Muḍārabah*, it is the principle of weightage that is given the real importance by the Islamic Banks. Mawlānā Zulfiqār ʿAlī writes: "In Islamic banks for the distribution of profits, weightage is assigned to the big and small of the deposits separately for each depositor. Big deposit would get a higher weightage and the smaller, lower weightage. For example, based on the information given by Meezān Bank for the month of April, 2008, weightage assigned are as follows: For a deposit between ten thousand (10,000) and hundred thousand (100,000) the weightage assigned is 0.31 and for deposits of above hundred thousand (100,000) but below 0.99 million, the weightage assigned could be up to 0.36. This means that keeping smaller deposits in an Islamic Bank is a crime and the punishment for this is lower weightage. To tag the weightage assigned with the big and small of the deposit is unfair. In 1987, the State Bank by itself has declared it wrong. There is another excess in this and that is that in this *Muḍārabah* the bank puts its own money as well and the bank assigns it a different weightage. For example, in this month of April, the Meezān Bank assigned a weightage of 1.7 for its own money. This is against its own principles and this is how it is.

If, for example the bank puts in 10 billion in the *Muḍārabah*, this has 9 billion customers' money and one billion bankʼs own money, so according to this principle the weightage assigned to customers money should be higher than of the bank money, since in totality, the depositors money is more than the banks', but the bank to the contrary assigns higher weightage to its share of the money (Dawr Ḥāḍir kay Mālī Muʿāmlāt 2008)."

3.4.1.4: The fourth point is that for partnership, the Islamic Banks open a current account wherein various people continue drawing money at different times and also deposit their surplus capital. For example, if a bank has to start work on a project of one year, a current account would be opened wherein people would continue depositing and withdrawing money during the year. After one year the bank distributes the profit earned during the year after first of all ascertaining how much money on average was used per day. With this method the bank calculates the profit on the basis of per day per rupee and then as per the amount of money that anyone has kept in the account, per day figure is multiplied by the number of days to calculate the profit to be paid. It is very obvious that, this way of ascertaining the profit is based on guess and estimation. As an example, take the case of person who has put in one million at the start of a project with a bank and after ten days withdraws the entire amount while the bank had made no profit in those ten days. Now from the profit that the bank makes in the remaining twenty days of the month, it works out the per day per rupee average and pays to this customer as well, some share in this profit which it actually did not justify. The unanimous fatwa states, "In *Mushārakah* and *Muḍārabah* the proposed method of profit distribution does not fulfill the Sharīʿah requirements. Instead of the real rate of profit, an estimated and fictitious rate based on weightage or daily production, is employed for payment of profit. This is absolutely against the basic principles of *Mushārakah* and *Muḍārabah*(The Unanimous Fatwa 2008)."

4. Conclusion

The existing Islamic Banking is based on illegal subterfuges while there is some superficial fractional support to this system from the Islamic Law, but the real Sharīʿah objectives for implementation of these laws has been severely trampled. Thus the present day Islamic Banking consists of such tricks which are a hindrance in the attainment of Sharīʿah objects similar to tactics employed by the people of Book. Whether there are interest free banks or conventional interest banks, in fact, they are not involved in trade or any kind of business, they only deal in money. According to majority of religious scholars in Pakistan, the case of Islamic Banks is the same as is of conventional banks. For working in Islamic Banks the directions are the same as for working in conventional interest banks. Those services of the interest free banks which are fair and just and could be utilized under the principle of necessity, same could also be utilized from the Islamic Banks.

Here we must mention that the foundation of such business institutions is the need of the Islamic society wherein on genuine basis and in the light of *Sharīʿah* principles, trade, *Mushārakah*, *Muḍārabah* could be undertaken. It is a common observation of the general public that the religious scholars criticized on everything, but do not come out with any solutions.

The facts however were that solutions were there but the materialistic ideology, moral values and the desires of leading lives of luxury and pleasure in the name of people's needs by the capitalist class has given rise to such a thinking that such solutions were not found acceptable to them. A very simple rule was that in *Mushārakah* or *Muḍārabah* the possibility of loss was always there, even though with help and assistance from modern management sciences and knowledge the risk of the expected loss could be reduced but it can never be totally be eliminated. How many investors there are today who would be prepared to invest accepting the risk of loss from such a possibility? This simple example is to focus that business or trade is after all business and trade with its own requisites and demands, for example the apprehension of a loss etc., If we try to eliminate these requisites, it would no longer remain business, it would transform itself into something else and this has practically happened in Islamic Banks. Thus if the responsibility of creating commercial institutions to look after the economic needs of the people lies with the religious scholars, then the society is many times more responsible for bringing about the needed mental change for the acceptance of the principles of Islamic Economics. In any case, for the Islamic Economic System, the establishment of a truly commercial institution rooted in the Islamic spiritual values, to do research and technical work, its need and importance is well established and this issue needs to be further debated.

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