

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

The ALL PAKISTAN LEGAL DECISIONS

FEDERAL SHARIAT COURT

P L D 1992 Federal Shariat Court 1

*Before Tanzil-ur-Rahman; CJ. Fida Muhammad Khan
and Abaid Ullah Khan JJ*

Dr. MAHMOOD-DR-RAHMAN FAISAL and others--Petitioners

Versus

SECRETARY, MINISTRY OF LAW, JUSTICE AND
PARLIAMANTARY AFFAIRS, GOVERNMENT OF PAKISTAN
ISLAMABAD and others---Respondents

Shariat Petitions Nos 30/I, 21/L, 27/L, 8/K, 31/I, 21/L, 27/L, 16/I, 16/L, 17/I, 14/I, 19/I, 17/L, 68/I, 72/I, 33/L, 18/L, 18/I, 21/I, 20/I, 12/L, 7/K, 27/L, 73/I, 13/L of 1990, 1/K, 4/K, 32/I, 48/L, 68/L, 71/L, 56/I, 16-C/I, 17-C/I, 74/I, 33/I, 42/I, 69/L, 70/L, 35/I; 16-A/I, 17-A/I, 2/I, 2/L, 24/L, 25/L, 17/I, 31/I, 45/I, 16/I, 72/L, 74/L, 57/I, 3/I, 1/L, 27/I, 28/I, 30/I, 85/L, 51/I, 64/I, 65/I, 66/I, 67/I, 13/L, 27/L, 34/L, 36/L, 39/L, 22/L, 39/I, 33/L, 41/L, 44/I, 60/L, 46/I, 46/L, 47/I, 48/I, 62/L, 54/I, 79/L, 69/I, 68/I, 102/L, 17/L, 18/L, 26/L, 29/L, 30/L, 31/L, 32/L, 26/I, 28/L, 43/I, 42/L, 21/L, 49/L, 67/L, 73/L, 76/L, 50/I, 89/L, 90/L, 66/L, 91/L, 93/L, 58/I, 16-B/I, 17-B/I, 101/L, 73/I of 1991 and Shariat Suo Motu No 4/I of 1991, heard on 9th June, 1991.

(a) Islamic Jurisprudence- -

--Riba---Underlying philosophy of 'ZuIm' 'ظلم' in the context of riba.

By the word 'ظلم' in Verse 279 of Surah Al-Baqarah it means to take anything in 'excess or' give less than the capital (with reference to the context of the 'three Verses on the subject of' Riba taken together). This is 'ظلم' injustice which is prohibited. The Holy Qur'an permits receiving back of the capital sums but forbids any addition or deduction there from. The word 'رؤوس أموالكم' do not denote then purchasing power but their actual quantity if they are in circulation. So far as the addition on the amount borrowed in case of inflation or deduction from the same, in case of deflation, is concerned the lenders or the borrowers, as the case may be, can in no way be

held responsible for the same because the conditions related to that situation are beyond their control and in itself will amount to injustice 'ظلم' if they are penalized for the same. [p. 42] A

Holy Qur'an Surah Al-Baqarah, Verse No. 279 ref.

(b) Islamic Jurisprudence--

---Riba--- Literal meaning and Shariah meaning of , riba' with illustrations from the Holy Qur'an and Sunnah and its prohibition in relation to the present day practice of Banks and other financial institutions stated. [pp. 60, 61, 66, 71, 72, 74, 77, 78, 81, 84, 85, 89, 90, 91, 95, 96, 97, 98, 103] B, C, D, E, F, G, H, I, J, K, L, M; N, O, P, Q, R, S, T, U, V, W, X & y

[Verses from Holy Qur'an, Ahadith and other authoritative books on Fiqh referred].

(c) Interpretation of Holy Qur'an--

--- Principles.

It is one of the accepted principles of interpretation of the Holy Qur'an that firstly the Holy Qur'an should be interpreted by 'the Holy Qur'an itself. Therefore, for the correct interpretation of a verse in the Holy Qur'an, the other verses of the Holy Qur'an, on the subject, must be looked into and taken together to find out the real intention of the Holy Qur'an and, then, the Sunnah of the Holy Prophet viz. his word, (قول), act (فعل) and maintaining silence on one's words spoken or act done in his presence by the Holy Prophet (تقریر), be called in aid for its interpretation. [p. 72] F

(d) Islamic Jurisprudence—

---Riba---Riba forbidden in the Qur'an and Sunnah includes interest due on the loans taken or given for commercial and productive purposes by Banks or other financial institutions as well as interest on consumptional loans.

[pp. 74, 81] I & L

(e) Islamic Jurisprudence---

--- Riba--- Bank performs the function of getting capital on interest from the people and supplying loans on interest to the individuals as well as merchants---Bank interest thus comes under the category of riba prohibited by the Holy Qur'an and Sunnah--- Prohibition of interest as laid down in the Holy Qur'an and Sunnah is general in its extent and application irrespective whether it is given or taken by the Bank or any other institution or an individual [p. 84] M

(1) Interpretation of statutes---

--- If a provision of a statute makes some exception, only that exception is to be

taken into consideration while interpreting the main provision of law---If there is no exception the provision of law will be read absolute in terms and without any exception...Exception in a statute can be made by the-same authority who is competent to make law. [p. 84] N

(g) Islamic Jurisprudence--

---Riba---Verses of Qur'an prohibiting riba, taken as a whole, and particularly the last ones which declare the interest as prohibited are absolute in terms. [p. 85] O

(h) Islamic Jurisprudence---

---Riba---Absolute prohibition on riba would not be relaxed unless it was done so in the Qur'an or by the Holy Prophet (p.b.u.h.) himself. [p. 85] P

(i) Islamic Jurisprudence---

---Riba ---"Bank's interest" comes within the definition of riba and is forbidden by the Holy Qur'an and Sunnah of the Holy Prophet (p:b.u.h.). [p. 89] Q

(j) Islamic Jurisprudence---

---Riba---Interest charged on loans and given on deposits by the Banks falls within the definition of riba and it makes no difference whether the loan is taken for consumption purpose or for productive purpose i.e. for trade, commerce and industry. [p. 90] R

(K) Words and phrases---

--- "Muhkamat" and "Mutashabihat" -----Connotation. [p. 91] S

(I) Islamic Jurisprudence---

---Riba---Riba al-Nasiah means interest charged on the money lent or the addition over and above the principal sum advanced on loan and includes all kinds of interest irrespective of the fact whether the rate stipulated is high or low and whether the interest is or is not added to the principal sum after fixed periods and whether the sum lent is for production or consumption purposes--- Such kind of riba is prohibited in Islam. [pp. 96, 97] V & W

(m) Islamic Jurisprudence---

---"Maslaha"---- Definition and concept, its kinds and characteristics---Three categories and three characteristics of Maslaha---Four factors to control Maslaha...Rule of Maslaha or Ijtihad is applicable only when there is no direct text of the Holy Qur'an or Sunnah of Holy Prophet on a matter---Rule of Maslaha cannot be invoked in aid of permissibility of "Bank interest'.'. [p. 98] X

Al-Shawkani en Irshadul Fuhul, p.242; Al-Mustasfa, Vo1.2, p.286; Muhammad Khalid Masud : Islamic Legal Philosophy, p. 153; Dawabit-al- Maslaba, pp.14-15, 18 to 252 and Al-Our'an-al-Sharif, 28 : 77 ref.

(n) Islamic Jurisprudence--

---Riba---Rule of Maslaha---Application---Rule of Maslaha cannot be invoked in aid to permissibility of "bank interest". [p. 98] X

Al-Shawkani : Irshadul Fuhul, p.242; Al-Mustasfa, Vol.2, p.286; Muhammad Khalid Masud : Islamic Legal Philosophy, p. 153; Dawabit-al-Maslaha, pp.14-15, 18 to 252 and Holy Qur'an, 28: 77 ref.

(o) Islamic Jurisprudence--

--- Riba--- Theory of Indexation based on inflation--- Financial contribution in the form of a loan or a debt is to be rewarded exactly in the same kind and quantity; and excess over and above the sum lent would become interest which is strictly prohibited---Concept and analysis of the theory of indexation discussed. -[pp. 103, 105, 112]Y, DO & GG

(p) Islamic Jurisprudence--

--- Riba--- Excess over and above the sum lent in transactions where deferred transfer of commodity or money is involved is prohibited in Islam...Purview of such prohibition covers not only loans and debts but also credit, barter, deferred exchange of currency, demonetization, delayed payment of remuneration after devaluation or revaluation, indemnity, and change in the unit of currency at the time of redemption of loan. [p. 104] Z

(q) Islamic Jurisprudence--

---Riba---In case of loan of a fungible goods the creditor will be paid the same quantity of identical goods irrespective of whether the value of such goods increases, decreases, or remains unchanged during the period of loan--Any excess paid or charged will be riba which is forbidden. [p. 105] AA

(r) Islamic Jurisprudence--

---Riba---Usurper (Ghasib) is called upon to return the goods or, in the case of destruction of goods, its price whenever the Court orders him to do so--- Usurper will not be required to indemnify the loss caused to the value of the property as a result of a fall in its price--- Violation of such principle would be a violation of the Qur'anic prohibition of riba. [p. 105] BB

(s) Islamic Jurisprudence--

---Riba---Liability of deferred payment arising not as a result of a transaction of loan but even when it arises as a result of barter, demonetization, debasement, devaluation or revaluation, remuneration and compensation and indemnity, in all such situations, a loan is to be returned in the same unit of currency and the same amount, irrespective of any change in its relative value in terms of other goods, or currency...Any violation of said principle would be a violation of Qur'anic prohibition of riba. [p. 105) CC

(t) Islamic Jurisprudence-

---Riba---Return on service is governed by a different rule than loan---Any increase in return on service is increase in remuneration while increase in the amount of loan is interest, former being permissible, latter was prohibited. [p. 105] DD

(u) Islamic Jurisprudence---

---- Riba--- Proposition of indexation based on inflation to be adopted as substitute or alternate to the institution of "interest" examined critically.

[pp. 103, 105, 107, 112, 116, 129, 130] Y, AA, BB, CC, DD, EE, II, MM, PP & QQ

(v) Islamic Jurisprudence-

----Riba---Any advantage drawn through loan is not permissible. [p. 111] FF

(w) Islamic Jurisprudence-

---Riba---If someone borrows Rs.100 from the Bank which have to be paid back after one year, and this amount after indexation becomes Rs.120 or so, it would fall into the category of riba, which comes within the ambit of Riba-al- Nasiah as well as Riba-al-Fadl. [p. 112] GG

(x) Islamic Jurisprudence---

---Riba---Currency transactions, in Shariah, are not treated differently from commodity transactions in so far as lending and borrowing are concerned--- No allowance, thus, could be made for the change in the value of the money. [pp. 112, 115] HH & JJ.

(y) Islamic Jurisprudence---

---Riba---Payment of outstanding wages or remuneration---Worker has to be paid his contracted amount of remuneration even though the value of this money has changed before he is paid his dues. [p. 115] KK

(z) Islamic Jurisprudence---

---Riba---Redemption of the liability of dower to wife...Amount fixed for dower has to be paid to wife without any regard to increase or decrease in the value of currency on the date of payment. [p. 115] LL

(aa) Islamic Jurisprudence---

---Riba---If currency in which loan has been taken is totally demonetized and is out of the transaction among the people, then the loan taken in it will be paid in its equivalent value but if the currency is not totally demonetized and is still current in the' currency market or its value has increased or decreased, the loan taken in it shall be paid in the same quantity m which it was borrowed. [p. 123] NN

(bb) Islamic Jurisprudence---

---Contract---Purchase of something for the currency which before making payment is changed--Effect.

In case a person purchases something for the currency which, before making payment, is changed would have either of two effects:

(1) In case this money is not in circulation the contract would be voidable. The reason is that in a contract of sale both nature and amount of goods and money should be specified indisputably. In the event of destruction of goods before it is delivered or of money before it is paid the contract of sale will become ineffective. Thus in the event of non-circulation of the contracted unit of money the contract of sale would become voidable because money is destroyed.

(2) In case this money is in circulation but is depreciated in value the contract will not be invalid because money is not destroyed. As a result the seller will have to accept the same money. [p. 127] OO

(cc) Islamic Jurisprudence---

---Riba---Indexation of financial liabilities in itself is fraught with injustice. [p. 129] PP

(dd) Islamic Jurisprudence---

---Riba---If a loan is taken in a currency for some time, it will be repaid in the same quantity in which it was borrowed irrespective of decrease or increase in its value provided the same currency is in vogue and has not been banned by the Government...If the same currency has either been banned by the Government or has become out of the transactions among the people, then the loans taken will be repaid in the equivalent value of the currency at the time of borrowing. [p. 133] RR

Messrs Bank of Oman Ltd. v, Messrs East Trading Co, Ltd. and others PLD 1987 Kar. 404; Irshad H: Khan v. Mrs. Parveen Ajaz PLD 1987 Kar. 466 and Habib Bank Ltd. v. Muhammad Hussain and others PLD 1987 Kar. 612 approved.

Aijaz Haroon v, Imam Durrani PLD 1989 Kar. 304 and Tyeb v. Messrs Alpha Insurance Co. Ltd. and others 1990 CLC 428 dissented to the extent of allowing an additional amount on loan based on indexation on account of inflation.

(ee) Interest Act (XXXII of 1839) ---

---Preamble---Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam---Interest Act, 1839 is repugnant to Injunctions of Islam and will cease to have effect as on and from 1st July, 1992. [pp. 136, 188] SS & ZZZ

Habib Bank Limited v, Muhammad Hussain and another PLD 1987 Kar. 612 ref.

(ff) Government Savings Banks Act (V of 1873)---

---S. 10---Constitution of Pakistan (1973), Art. 203- D--- Repugnancy to Injunctions of Islam--- Provision of S.10 providing for payment of deposit together with interest accrued thereon is repugnant to Injunctions of Islam and will cease to have effect as on and from Ist July, 1992. [pp.137, 188] IT & ZZZ

(gg) Negotiable Instruments Act (XXVI of 1881) ---

---Ss. 79 & 80---Constitution of Pakistan (1973), Art. 203-D---Mark-up--- Riba---Settled mark-up resembles riba as it refers to an excess on the principal amount which is prohibited---Mark-up system as in vogue is thus repugnant to Injunctions of Islam and word "mark-up" has to be deleted from the provisions of Ss. 79 & 80 of the Negotiable Instruments Act, 1881 and will stand so deleted as on and from 1st July, 1992. [pp. 142, 150, 188] VV, CCC & ZZZ

(hh) Negotiable Instruments Act (U"VI of 1881) ---

Ss. 79 & 80--- Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam---Provisions of 5s.79 & 80 of the Negotiable Instruments Act, 1881 so far as they relate to awarding interest on money claims are repugnant to Injunctions of Islam and will cease to have effect as on and from 1st July, 1992.

[pp. 139, 142, 145, 147, 148, 150, 188] UU, VV, WW, ZZ, AAA, CCC & ZZZ

(ii) Negotiable Instruments Act (XXVI of 1881) ---

---So 79, proviso, cl. (i)---Constitution of Pakistan (1973), Art. 203..D--- Repugnancy to Injunctions of Islam---Settled mark-up resembles riba as it refers to an excess on the principal amount---Provisions of proviso, cl. (i) of S. 79, Negotiable Instruments Act, 1881 wherein the term "mark-up" has- been used is repugnant to Injunctions of Islam and will cease to have effect as on and from 1st July, 1992. [pp. 142, 158, 188] VV, CCC & ZZZ

(jj), Negotiable Instruments Act (XXVI of 1881)---

S. 79(b)(i)---Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam...Leasing and term hire-purchase in banking---Provisions. of S. 79(b)(i), Negotiable Instruments Act, 1881 which mentions leasing in banking and hire-purchase are not repugnant to Injunctions of Islam---Care and caution needed in exercise of these modes of banking in accordance with the dictates of Shariah emphasized, [p. 145] WW

(kk) Negotiable Instruments Act (XXVI of 1881) ---

---Ss.79 & 80---Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam---"Service charges" by Banks...Provisions of Ss. 79 &80, Negotiable Instruments Act,

1881 to the extent of service charges by Bank are not repugnant to Injunctions of Islam. [p. 146] YY

(II) Negotiable Instruments Act (XXVI of 1881) ---

---Ss. 114 & 117(c) ---Constitution of Pakistan (1973), Art. 203- D---Repugnancy to Injunctions of Islam---Both Ss. 114 & 117(c), Negotiable Instruments Act, 1881 involve payment of interest and as such are repugnant to Injunctions of Islam and will cease to have effect as on and from 1st July, 1992. [pp. 149, 188] BBB & ZZZ

(mm) Land Acquisition Act (I of 1894)--

---Ss. 28 & 34---Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam...Increase or addition in the form of interest under Ss. 28 & 34, Land Acquisition Act, 1894 over the debt payable in the form of compensation by Inquiring Authority to the land owners falls in the category of riba and thus said provisions are repugnant to Injunctions of Islam and will cease to have effect as on and from 1st July, 1992.

(pp. 156, 157, 188] DDD, FFF & ZZZ

Islamic University, Bahawalpur through its Vice-Chairman v. Khadim Hussain and 5 others 1990 MLD 2158 **dissented from.**

Behari Lal Bhargava v. Commissioner of Income-tax AIR 1941 All. 135; Commissioner of Income-tax, Behar and Orisa v. Rani Prayag Kumari Debi AIR 1939 Pat. 662 and Revenue Divisional Officer v. Venkatarama Ayyar AIR 1932 Mad. 199 **distinguished.**

(nn) Land Acquisition Act (I of 1894) ---

---Ss. '28, 32, 33 & 34---Constitution of Pakistan (1973), Art. 203- D--- Repugnancy to Injunctions of Islam-v-Section 32 relates to the investment by the Government in respect of acquired land of a person who had, then, no alienable right in respect of the said land and Government is empowered to invest the said amount either in the purchase of land or other approved securities as the court deems fit---No objection thus could be taken regarding investment in land, but so far as securities were concerned they must be non-interest-bearing--- Held, word, "interest" wherever occurring in Ss. 28, 32, 33 & 34 of the Land Acquisition Act, 1894 be deleted as repugnant to the Injunctions of Islam and will cease to have effect as on and from the 1st July, 1992. [pp. 156, 157, 188] EEE, FFF & ZZZ

(oo) Civil Procedure Code (V of (1908) ---

---Ss. 34, 34-A, 34-B & O. XXXVII, R. 2(a) ---Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam---Provisions of Ss. 34, 34-A, 34-B & O. XXXVII; R. 2(a), Civil Procedure Code, 1908 relating to interest, mark-up, lease, hire-purchase and service charges are repugnant to Injunctions of Islam and will cease to have effect as on and from the 1st July, 1992. [pp. 159,188] GGG & ZZZ

(pp) Civil Procedure Code (V of 1908) ---

---Ss. 2(12), 35(3), 144(1); O.XXI, R. 11(2)(g); OXXI, R. 38; O.XXI, R. 79(3); O.XXI, R. 80(3); O.XXI, R. 93; O.XXXIV, R. 2(1)(a)(i) & (iii), (c); OXXXIV, R. 2(2); O.XXXIV, R4(1) & (2); O.XXXIV, R.7(1)(a)(c) & (2); O XXXIV, R. 11; O.XXXIV, R.13(1) & (2); O.XXXIX, R. 9--- Provisions of Ss. 2(12), 35(3) & 144(1), O.XXI, Rr.11(2)(g), 38, 79(3), 80(3) & 93; O. XXXIV, Rr.2(1)(a)(i) & (iii), (c), 2(2), 4(1)& (2), 7(1)(a), (c) & (2), 11, 13(1) & (2) and O.XXXIX, R.9, C.P.C. regarding interest are repugnant to Injunctions of Islam and will cease to have effect as on and from 1st July, 1992. [pp. 161, 188] HHH & ZZZ

(qq) Cooperative Societies Act (VII of 1925)---

---S. 59 [as adapted by Sindh, Baluchistan, N.W.F.P. and Punjab Provinces] --- Constitution of Pakistan (1973), Art.' 203-D---Repugnancy to Injunctions of Islam---Words "interest "or "return" in S.59 Cooperative Societies Act, 1925 being repugnant' to Injunctions of Islam, Provincial Governments ,were directed to delete the phrase "interest (or return)", if any, due on such amount--- Provisions relating to interest will cease to have effect as on and from 1st July, 1992. [pp. 167, 188] III & ZZZ

(rr) Cooperative Societies Rules, 1927---

--Rr. 14(r)(h), 22 & 41---Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam...Provisions of interest in. Rr. 14(1) (h), 22 & 41, Cooperative Societies Rules, 1927 alongwith four appendices 1 to 4 are repugnant to Injunctions of Islam and will cease to have effect as on and from 1st July, 1992. [pp. 169, 188] JJJ & ZZZ .

(ss) Insurance Act (IV of 1938) ---

---Ss. 3-BB(1)(b), 27(3), 29(8)(b); c(iii), 47-H & 81(2)(d)---Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam---Provisions of Ss.3-BB(I)(b), 27(3), 29(8)(b), c(iii), 47-B & 81(2)(d), Insurance Act; 1938 providing for a range of rates of interest, guarantee as to the principal amount and Interest thereon, payment of interest on installments of capital, besides other conditions' as to interest and time allowed for its payment as may be prescribed are repugnant to Injunctions, of Islam and will cease to have effect as on and from 1st July, 1992. [pp. 171, 188] KKK & ZZZ

(tt) State Bank of Pakistan Act (XXXIII of 1956) ---

---S 22(1) ---Constitution of Pakistan, (1973,; Art. 203-D---Repugnancy to Injunctions of Islam--Purchase of Bills and other commercial instruments like Debentures, Bonds etc. on the basis of interest as provided in S. 22(1), State Bank of, Pakistan Act, 1956 is repugnant to Injunctions of Islam and relevant provision will cease to have effect as on and from 1st July, 1992. [pp. 171, 188] LLL & ZZZ

(uu) West Pakistan Money Lenders Ordinance (XXIV of 1960)--

---West Pakistan Money Lenders Rules, 1965---Punjab Money Lenders Ordinance (XXIV of 1960)---Sindh Money Lenders Ordinance (XXIV of 1960)---N.W.F.P. Money Lenders Ordinance (XXIV of 1960)---Baluchistan Money Lenders Ordinance (XXIV of 1960)---Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam---All said statutes in their entirety as prevalent in Punjab, Sindh, N.W.F.P. and Baluchistan are repugnant to Injunctions of Islam and will cease to have effect as on and from 1st July, 1992. [pp. 172, 188] MMM & ZZZ

(vv) Agricultural Development Bank Rides, 1961---

---R. 17(1)(2)(3)---Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam---Rule 17(1) & (2), Agricultural Development Bank Rules, 1961, inter alia, empowering the Bank to charge interest as specified by the Bank constituted under the Ordinance is repugnant to Injunctions of Islam and words "in addition to interest" in R.17(3) be also deleted---Relevant provisions win "cease to have effect as on and from 1st July, 1992.

[pp. 173~ 188] NNN & ZZZ

(ww) Banking Companies Ordinance (LVII of 1962) ---

---S. 25(2) (a) & (b)---Constitution of Pakistan (1973), Art. 203-D---

Repugnancy to Injunctions of Islam-v-Provisions of S.25(2)(a), Banking Companies Ordinance, 1962 relating to giving of directions by the State 'Bank of Pakistan to Banking Companies touching rates of interest or mark-up to be , applied on advances and prohibiting the giving of loans, advances and credit to any borrower or group of borrowers on the basis of interest are repugnant to Injunctions of Islam and will cease to have effect as on and from 1st July, 1992.

[pp. 173, 188] OOO& ZZZ

(xx) Banking Companies Rules, 1963---

--- R. 9(2) & (3) ---Constitution of Pakistan (1973), Art. 203-D--- Repugnancy to Injunctions of Islam-e-Provisions of R. 9.(2) &(3),-Banking Companies Rules, 1963 in so far as they pertain to interest are repugnant to Injunctions of Islam and will cease to have effect as on and from 1st July, 1992. [pp. 174; 188] PPP & ZZZ

(yy) Banks (Nationalization) Payment of Compensation Rules, 1974----

---R.9----Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam---Provisions of R.9, Banks (Nationalization) Payment of Compensation Rules, 1974 referring to interest are repugnant to the Injunctions of Islam and will cease to have effect as on and from 1st July, 1992. [pp. 175, 188] QQQ & ZZZ

Mahmood-ur Rahman Faisal v, Secy; Min. mof Law

(Tanzil –ur-Rehman)

(zz) Banking Companies (Recovery of Loans) Ordinance (XIX of 1079) ---

---S. 8(2)(a) & (b)-v-Constitution of Pakistan (1973), Art. 203-D---Repugnancy to Injunctions of Islam-v-Provisions of S. 8(2)(a) & (b), Banking Companies (Recovery of Loans) Ordinance, 1979 relating to interest and mark-up are repugnant to Injunctions of Islam and will cease to have effect as on and from Ist July, 1992. [pp. 177, 188] SSS & zzz

Habib Bank Limited v. Muhammad Hussain and others PLD 1987 Kar. 612 refs.

(aaa) Constitution of Pakistan (1973)--

---Arts. 203-A to 203-J & 270-A---Federal Shariat Court while exercising its jurisdiction under Chap. 3-A, Constitution of Pakistan has no constraint to strike down a provision of law as repugnant to the Injunctions of Islam whether promulgated before, during or after imposition of Martial Law as provided in Art. 270-A, Constitution of Pakistan (1973). [p. 177] RRR

Muhammad Bachal Memon v. Government of Sindh PLD 1987 Kar. 296 distinguished.

(bbb) Constitution of Pakistan (1973) ---

Art. 203-D (1) ---Jurisdiction of Federal Shariat Court, as conferred under Art. 203- D (1) of the Constitution of Pakistan (1973), is limited to examine and decide the question whether or not any law or provision of law, custom or usage is repugnant to Injunctions of Islam, and does not extend independently to the question of determining individual's right or liability, relating to the validity or continuance of an agreement between the parties. [pp. 177,178] TTT, UUU& VVV

Government of Punjab through Secretary, Finance, Lahore v. Sakhi Muhammad, Assistant Professor, College of Education for Science and another Shariat Appeal No. 6 of 1989 (unreported) ref.

(ccc) Islamic Jurisprudence---

--- Riba---Contract---Enforcement of --- While a trading contract is enforceable, a contract of interest or based on interest is not enforceable to the extent of interest. [p. 179] WWW

Al-Mominoon 7: 23; Holy Our'an 17: 34; Abu Dawud, Sunan, Kar. Vol. II, p.150; Jami' Tirmizi, Kar. Vo. I, p.251; Sahih'al Bukhari Istanbul, Vol. III, p.29 and Surah Al-Baqarah Verse 275 ref.

(ddd) Constitution of Pakistan (1973)---

---Art. 203-D---Federal Shariat Court has a limited jurisdiction as to declare whether a law or provision of law is or is not repugnant to the Injunctions of

Islam and has no jurisdiction to grant any relief by issuing injunctions or staying proceedings pending before a Court of law. [p. 180] XXX

(eee) Islamic Jurisprudence--

---Riba---Contention that as the universal economic system is based on interest, any departure from it would amount to economic collapse was repelled giving logic and evidence by Federal Shariat Court.

[p. 180] YYY et seq

Messrs Bank of Oman Limited v, Messrs East Trading Company Limited and others PLD 1987 Kar. 404; Irshad H. Khan v. Parveen Ajaz P L D 1987 Kar, 466; Habib Bank Limited v. Muhammad Hussain and others P L D 1987 Kar. 612 at p. 629.; Shahbazud Din Chaudhary and 27 others v. Messrs Services Industries Textiles Limited and 4 others P L D 1988 Lah. 1; Aijaz Haroon v. Inam Durrani P L D. 1989 Kar. 304; Tyeb v. Messrs Alpha Insurance Co. Limited and others 1990 C L C 428; Daily Jang, Karachi of 28-11-78 & 29-11-78; Daily Jang Karachi of 9-12-78, 10-12-78, 13-12-78 & 16-12-78;

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Hafiz SA. Rahman and Iftikhar Hussain Ch. for Federal Government and S.M. .Zafar with All Zafar for other Respondents (in Shariat Petition No.30/I of 1990--Re: The Interest Act, 1839).

Nemo for Petitioner (in Shariat Petition No.21/L of 1990--Re: The. Interest Act, 1839).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government and S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.21/L of 1990--Re: The Interest Act, 1839).

Petitioner in person with Muhammad Amin Shaikh (in Shariat Petition No. 27/L of 1990--Re: The Interest Act, 1839).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government, S.M Zafar with Ali Zafar for other Respondents and Kh. Muhammad Farooq for National Bank of Pakistan (in Shariat Petition No. 27/L of 1990--Re: The Interest Act, 1839).

G .M. Saleem for Petitioner (in Shariat Petition No.8/K of 1990-- Re: The Interest Act, 1839).

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S.M Saeed for Petitioner (in Shariat Petition No.1/K of 1991--Re: The Interest Act, 1839).

Nizarn Ahmad, Deputy Attorney-General and Hafiz S.A. Rahman for Respondents and Iftikhar Hussain Ch. for Federal Government (in Shariat Petition No .1/K of 1991--Re: The Interest Act, 1839).

Ghulam Mujtaba Saleem for Petitioner (in Shariat Petition No. 4/K of 1991--Re: The Interest Act, 1839).

Iftikhar Hussain Ch., Standing Counsel for the Federation (in Shariat Petition No. 4/K of 1991--Re: The Interest Act, 1839).

Ch, Rashid Ahmad Vehniwal for Petitioner (in Shariat Petition No. 32/I of 1991--Re: The Interest Act, 1839).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government, (in Shariat Petition No.32/I of 1991--Re: The Interest Act, 1839).

Malik Allah Yar for Petitioner (in Shariat Petition No. 48/L of 1991-- Re: The Interest Act, 1839).

G. M. Saleem and Qazi Wajid Ali, Law Officer for H.B.F.C. (in Shariat Petition No. 48/L of 1991--Re: The Interest Act, 1839).

Petitioner in person with Muhammad Amin Sheikh (in Shariat Petition No. 68/L of 1991--Re: The Interest Act, 1839).

S.M. Zafar with All Zafar for Respondents (in Shariat Petition No. 68/L of 1991--Re: The Interest Act, 1839).

Naveed Asif for Petitioner (in Shariat Petition No. 71/L of 1991--Re: The Interest Act, 1839).

S.M. Zafar and Ali Zafar for Respondents (in Shariat Petition No. 71/L of 1991--Re: The Interest Act, 1839).

Petitioner in person (in Shariat Petition No. 56/1 of 1991--Re: The Interest Act, 1839).

S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.56/I of 1991--Re: The Interest Act, 1839).

Raja Muhammad Akram for Petitioner (in Shariat Petition No. 16-C/I of 1991--Re: The Interest Act, 1839).

Hafiz S.A. Rahman for Federation of Pakistan and Abdul Ghafoor Mangi, Addl, A G., Sindh, Raja Muhammad Afsar, A. G. Balochistan and

Khalid M. Ishaq for Respondents (in Shariat Petition No. 16-C/I of 1991-- Re: The Interest Act, 1839).

Raja Muhammad Akram for Petitioner (in Shariat Petition No. 17-C/I of 1991--Re: The Interest Act, 1839).

Hafiz S.A. Rahman and Iftikhar Hussain Ch, for Federal Government, S.M. Zafar with Ali Zafar for other Respondents and Abdul Ghafoor Mangi, Addl. A .G. Sindh, Raja Muhammad Afsar, A.-G. Balochistan and Khalid M. Ishaq for Respondents (in Shariat Petition No.17-C/I of 1991--Re: The Interest Act, 1839).

Shaukat Ali Khan for Petitioner (in Shariat Petition No.74/1 of 1991-- Re: The Interest Act, 1839).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government (in Shariat Petition No.74/1 of 1991--Re: The Interest Act, 1839).

Petitioner in person (in Shariat Petition No.31/I of 1990--Re: The Savings Act, 1873).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government (in Shariat Petition No.31/1 of 1990--Re: The Savings Act, 1839).

Nemo for Petitioner (in Shariat Petition No. 21JL of 1990 -- Re: The Negotiable Instruments Act, 1881).

Hafiz SA. Rahman and Iftikhar Hussain Ch. for Federal Government and S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.21/L of 1990--Re: The Negotiable Instruments Act, 1881).

Petitioner in person with Muhammad Amin Shaikh (in Shariat Petition No. 27/L of 1990--Re: The Negotiable Instruments Act, 1881).

Hafiz SA. Rahman and Iftikhar Hussain Ch. for Federal Government, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.27/L of 1990;-Re: The Negotiable Instruments Act, 1881).

Ch. Rashid Ahmad Vehniwal for Petitioner (in Shariat Petition No. 33/I of 1991--Re: The Negotiable Instruments Act, 1881).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government (in Shariat Petition No. 33/I of 1991--Re: The Negotiable Instruments Act, 1881).

Petitioner in person (in Shariat Petition No.42/1 of 1991--Re: The Negotiable Instruments Act, 1881).

Iftikhar Hussain Ch., Standing Counsel for Federal Government (in Shariat Petition No.42/1 of 1991--Re: The Negotiable Instruments Act, 1881).

Petitioner in person with Muhammad Amin Sheikh (in Shariat Petition No. 69/L of 1991--Re: The Negotiable Instruments Act, 1881).

S.M. Zafar with All Zafar for other Respondents (in Shariat Petition No. 69/L of 1991--Re: The Negotiable Instruments Act, 1881).

Muhammad Amin Shaikh for Petitioner (in Shariat Petition No. 70/L of 1991--Re: The Negotiable Instruments Act, 1881).

S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No. 70/L of 1991--Re: The Negotiable Instruments Act, 1881).

Petitioner in person (in Shariat Petition No. 35/1 of 1991--Re: The Negotiable Instruments Act, 1881).

S.M. Zafar with All Zafar for other Respondents (in Shariat Petition No. 35/1 of 1991--Re: The Negotiable Instruments Act, 1881).

Raja Muhammad Akram for Petitioner (in Shariat Petition No. 16-A/I of 1991--Re: The Negotiable Instruments Act, 1881).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government and Abdul Ghafoor Mangi, Addl. A G. Sindh, Raja Muhammad Afsar, A.-G. Balochistan and Khalid M. Ishaq for Respondents (in Shariat Petition No. 16- A/I of 1991-- Re: Negotiable Instruments Act, 1881).

Raja Muhammad Akram for Petitioner (in Shariat Petition No. 17-A/I of 1991--Re: The Negotiable Instruments Act, 1881).

Hafiz SA. Rahman and Iftikhar Hussain Ch. for Federal Government and Abdul Ghafoor Mangi, Addl, A.-G. Sindh, Raja Muhammad Afsar, A.G. Baluchistan and Khalid M. Ishaq for Respondents (in Shariat Petition No. 17-A/I of 1991--Re: Negotiable Instruments Act, 1881).

Iftikhar Hussain Chaudhry, Standing Counsel, Raja Muhammad Afsar, A G, Baluchistan, Abdul Ghafoor Mangi, Addl. AG., Sindh, Shahabuddin Barq, Law Officer on behalf of A G., N.W.F.P. and Javed Aziz Sindhu on behalf of A G., Punjab for Respondents (in Shariat Suo Motu No.2/I of 1991--Re: The Negotiable Instrument Act, 1881).

Petitioner in - person (in Shariat Petition No.2/L of 1991-- Re: The Land Acquisition Act, 1894).

Iftikhat Hussain Ch. for Federal Government, Muhammad Nawaz Abbasi, A A G., Punjab with Muhammad Aslam Uns, Shahabuddin Barq, Law Officer for A.-G., N.-W.F.P., S.A. Rahman for A A.-G. Sindh and Iftikhar Hussain Chaudhary on behalf of A.-G., Baluchistan for Respondents (in Shariat Petition No.2/L of 1991--Re: The Land Acquisition Act, 1894).

Hafiz S.A. Rahman and Iftikhar Hussain Ch., Standing Counsel for Federation of Pakistan, Muhammad Nawaz Abbasi, A.A.-G., Punjab with Muhammad Aslam Uns, Hafiz S.A. Rahman

for A.-G., Sindh, Shahabuddin Barq, Law Officer, N.- W.F.P. and Iftikhar Hussain Chaudhary for A.-G., Balochistan for Respondents (in Shariat Suo Motu No.4/1 of 1991--Re: The Land Acquisition Act, 1894).

Nemo for Petitioner (in Shariat Petition No.21/L of 1990--Re: The Civil Procedure Code, 1908).

Hafiz S.A. Rahman and Iftikhar Hussain, Ch. for Federal Government and S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No. 21/L of 1990--Re: The Civil Procedure Code, 1908).

Petitioner in person with Muhammad Amin Shaikh (in Shariat Petition No.27/L of 1990--Re: The Civil Procedure Code, 1908).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. For Federal Government, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.27/L of 1990)--Re: The Civil Procedure Code, 1908).

G.M. Saleem for Petitioner (in Shariat Petition No.8/K of 1990--Re: The Civil Procedure Code, 1908).

Hafiz SA. Rahman and Iftikhar Hussain, Ch. for Federal Government and S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.8/K of 1990--Re: The Civil Procedure Code, 1908).

Nemo for Petitioner (in Shariat Petition No.I/K of 1991--Re: The Civil Procedure .Code, 1908).

Nemo for Respondents (in Shariat Petition No.1/K of 1991--Re: The Civil Procedure Code 1908).

Ghulam Mujtaba Saleem for Petitioner (in Shariat Petition No.4/K of 1991--Re: Civil Procedure Code, 1908).

Iftikhar Hussain Ch.; Standing Counsel for Respondent and for Federation (in Shariat Petition No. 4/K. of 1991--Re: The Civil Procedure Code, 1908).

Muhammad Iqbal, Mukhtar Ahmad Tarar and Sultan Khan for NIFC (in Shariat Petition No.24/L of 1991--Re: The Civil Procedure Code, 1908). (Checked 24-03-17)

Hafiz S.A. Rahman and Iftikhar Hussain Ch. Standing Counsel for Federal Government (in Shariat Petition No-24/L of 1991)--Re: The Civil Procedure Code 1908).

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Muhammad Iqbal for Petitioner (in Shariat Petition No.25/L of 1991)--Re: The Civil Procedure Code, 1908).

Mukhtar Ahmad Tarar and M. Sultan Khan for NIFC and Iftikhar Hussain Ch., Standing Counsel for Federal Government (in Shariat Petition No.25/L of 1991--Re: The Civil Procedure Code, 1908).

Raja Muhammad Akram for Petitioner (in Shairat Petition No.17/I of 1991--Re: The Civil Procedure Code, 1908).

Iftikhar Hussain Ch. and Hafiz S.A. Rahman for Federal Government (in Shariat Petition No.17/I of 1991--Re: The Civil Procedure Code, 1908).

Ghous Muhammad Ch. and Ch. Rashid Ahmad Vehniwal for Petitioner (in Shairat Petition No.31/I of 1991--Re: The Civil Procedure Code, 1908).

Hafiz S.A.Rahman and Iftikhar Hussain Ch. for Federal Government (in Shariat Petition No.31/1 of 1991--Re: The Civil Procedure Code,1908).

Petitioner in person (in Shariat Petition No.45/I of 1991--Re: The Civil Procedure Code, 1908).

Iftikhar Hussain Ch., Standing Counsel for Federal Government (in Shariat Petition No.45/I of 1991--Re: The Civil Procedure Code, 1908).

Raja Muhammad Akram for Petitioner (in Shariat Petition No. 16/1 of 1991---Re: The Civil Procedure Code 1908).

Iftikhar Hussain Ch, and Hafiz S.A. Rahman for Federal Government, Hassan Zaman, Chief of Islamic Bank, State Bank of Pakistan, Abdul Ghafoor Mangi, AddI.A.-G., Sindh, Raja Muhammad Afsar, A.-G., Balochistan and Jaffar Hussain Siddiqui, Asstt. General Manager, State Life Insurance Corporation for Respondents (in Shariat Petition No.16/I of 1991--Re: The Civil Procedure Code, 1908).

Naveed Asif and Muhammad Amin Sheikh. for Petitioner (in Shariat Petition No.72/L of 1991---Re: The Civil Procedure Code, 1908).

S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.72/Lof 1991--Re: The Civil Procedure Code, 1908).

Petitioner in person with MuhammadAdmin Sheikh for Petitioner (in Shariat Petition No.14/L of 1991--Re: The Civil Procedure Code, 1908).

S.M. Zafar with AliZafar for other Respondents (in Shariat Petition No.74/L of 1991--Re: The Civil Procedure Code; 1908).

Petitioner in person (in Shariat Petition No.57/I of 1991--Re: The Civil Procedure Code, 1908).

S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.57/I of 1991--Re: The Civil Procedure Code, 1908).

Iftikhar Hussain Ch, for Federal Government Raja Muhammad Afsar, A.-G., Balochistan, Abdul Ghafoor A.-G. Sindh, JavedAziz Sindhu, on behalf of A.-G., Punjab and Shahabuddin Barq, Law Officer on behalf of A.G., N.-W.F.P. for Respondents (in Shariat Suo Motu No.3/I of 1991--Re: The Civil Procedure Code, 1908).

Muhammad Aqeel Mirza for Petitioner (in Shariat Petition No.1/L of 1991-- Re: The Cooperative Societies Act, 1925).

Malik Hamid Saeed, Addl. A.-G., N.-:W.F.P., Muhammad Nawaz (for Respondent No.2), Muhammad Nawaz Abbasi, A.A.-G. with M. Aslam Uns, Hafiz S.A.Rahman for A.-G., Sindh and Iftikhar Hussain Ch. for A.-G., Balochistan for Respondent (in Shariat Petition No.1/L of 1991--Re: The Cooperative Societies Act, 1925).

Nemo for Petitioner (in Shariat Petition No.27/I of 1991--Re: The Cooperative Societies Act, 1925).

Malik Hamid Saeed, Addl.A.-G.,N.-W.F.P., Tariq Oazi (for Respondent No.2), Muhammad Nawaz Abbasi, AA.-G., Punjab with Muhammad Aslam Uns, Hafiz S.A.Rahman for A.-G., Sindh and Iftikhar Hussain Ch. for A.-G., Balochistan for Respondents (in Shariat Petition No.27/I of 1991--Re: The Cooperative Societies Act, 1925).

Nemo for Petitioner (in Shariat Petition No.28/1 of 1991--Re: The Cooperative Societies Act, 1925).

Malik Hamid Saeed, Addl, A.-G. N.-W.F.P., Muhammad Nawaz Abbasi, AA.-G., Punjab with Muhammad Aslam Uns, Hafiz S.A. Rahman for A.-G., Sindh and Iftikhar Hussain Ch. for A.-G., Balochistan for Respondents (in Shariat Petition No.28/I of 1991--Re: The Cooperative Societies Act, 1925).

Mian Ghulam Hussain for Petitioner (in Shariat Petition No.30/1 of 1991--Re: The Cooperative Societies Act, 1925).

Malik Hamid Saeed, Addl. A.,-G.,N.-W.F.P., Muhammad Nawaz Abbasi, A.A.-G. Punjab with Muhammad Aslam Uns, Hafiz S.A. Rahman for A.-G., Sindh and Iftikhar Hussain Ch. for A.-G., Balochistan for Respondents (in Shariat Petition No.30/I of 1991--Re: The Cooperative Societies Act, 1925).

M.D. Tahir for Petitioner (in Shariat Petition No.85/L of 1991--Re: The Cooperative Societies Act, 1925).

Shahab-ud-Dia, Law Officer, on behalf of A.-G., N.-W.F.P., Muhammad Nawaz Abbasi, A.A.-G., Punjab with Muhammad Aslam Uns, Hafiz S.A. Rahman for A.-G., Sindh and Iftikhar Hussain Ch. for A.-G.,

(Tanzil-ur- Rahman, Balochistan for Respondent (in Shariat Petition Cooperative Societies Act, 1925).

Petitioner in person (in Shariat Petition No.16/I of 1990)--Re: The Insurance Act, 1938).

Khalid M. Ishaque for State Life Insurance Corporation of Pakistan, S.M. Zafar and Ali Zafar for Finance Division and Hafiz SA. Rahman for Federal Government and Hassan Zaman Chief of Islamic Bank, State Bank of Pakistan for Respondents (in Shariat Petition No.16/1 of 1990--Re: The Insurance Act, 1938).

Petitioner in person (in Shariat Petition No.17/I of 1990--Re: The State Bank of Pakistan Act, 1956).

Hafiz S.A. Rahman, Iftikhar Hussain Ch. for Federal Government and S.M.Zafar with Ali Zafar for other Respondents (in.Shariat Petition No.17/I of 1990--Re: The State Bank of Pakistan Act, 1956).

Petitioner in person (in Shariat Petition No.51/1 of 1991--Re: The West Pakistan Money Lenders Ordinance, 1960).

Muhammad Nawaz Abbasi; AA.-G. Punjab with Muhammad Aslam Uns, Hafiz S. A. Rahman for A.-G., Sindh, Shahabuddin, Law Officer, N.-W.F.P. and Iftikhar Hussain Ch. for A.-G., Balochistan for Respondents (in Shariat Petition No.51/1 of 1991--Re: The West Pakistan Money Lenders Ordinance, 1960).

Petitioner in person (in Shariat Petition No.64/I of 1991--Re: The West Pakistan Money Lenders Ordinance, 1960).

Hafiz SA. Rahman for A.G., Sindh for Respondents (in Shariat Petition No.64/1 of 1991--Re: The West Pakistan Money Lenders Ordinance, 1960).

Petitioner in person (in Shariat Petition No.65/1 of 1991--Re: The West Pakistan Money Lenders Ordinance, 1960).

Iftikhar Hussain Chaudhary for A.G., Balochistan for Respondents (in Shariat Petition No.66/I of 1991--Re: The West Pakistan Money Lenders Ordinance, 1960).

Petitioner in person (in Shariat Petition No.66/1 of 1991--Re: The West Pakistan Money Lenders Ordinance, 1960).

Shahabuddin Barq, Law Officer, N.- W.F.P. for Respondent (in Shariat Petition No.66/I of 1991--Re; The West Pakistan Money Lenders Ordinance, 1960).

Petitioner in person (in Shariat Petition No. 67/I of 1991—Re: The West Pakistan Money Lenders Ordinance, 1960).

Muhammad Aslarn Uns for A.-G. Respondent (in Shariat Petition No.67/I of 1991--Re: The West Pakistan Money Lenders Ordinance, 1960).

Petitioner in person (in Shariat Petition No.14/1 of 1990--Re: The Agricultural Development Bank of Pakistan Rules, 11).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government, S.M. Zafar with All Zafar for other Respondents, Hafiz SA. Rahman for A.D.B.P. (in Shariat Petition No.14/1 of 1990--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition No.19/1 of 1990--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman and Tariq Asad, Law Officer on behalf of A.D.B.P., Hafiz SA. Rahman and Iftikhar Hussain Ch. for Federal Government for Respondents (in Shariat Petition No.19/I of 1990--Re: The Agricultural Development Bank of Pakistan, Rules, 1961).

Petitioner in person with Subah Sadiq (in Shariat Petition No. 17/L of 1990--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government; S.M. Zafar with Ali Zafar for other respondents; Hafiz SA. Rahman; for A.D.B.P. (in -Shariat Petition No. 17/L of 1990 ... -Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Nemo for Petitioner (in Shariat Petition No.68/I of 1990--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman for Federal Government and on behalf of A.D.B.P. (in Shariat Petition No.68/1 of 1990--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition. No:72/I of 1990-- Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz SA. Rahman and Iftikhar Hussain Ch. for Federal Government; S.M. Zafar with Ali Zafar for other Respondents; Hafiz S.A. Rahman for A.D.B.P. (in Shariat petition No.72/I of 1990--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Pettiea No.1.}/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz SA. Rahman for A.D.B.P., Iftikhar Hussain Ch. for Federal Government, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No. 13/L of 1991—Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition No. 27/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz SA. Rahman and Iftikhar Hussain Ch. for Federal Government, Hafiz S.A. Rahman for A.D.E.P. (in Shariat Petition No.27/L of 1991--Re: The Agricultural Development Bank of Pakistan, Rules, 1961).

Petitioner in person (in Shariat Petition No.34/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government, Hafiz S.A. Rahman for A.D.B.P. (in Shariat Petition No.34jL of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Muhammad Iqbal for Petitioner (in Shariat Petition No.36/L of 1991-- Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Iftikhar Hussain Ch., Standing Counsel for Federal Government (in Shariat Petition No.36/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition No.39/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government, Hafiz SA. Rahman for A.D.B.P. (in Shari at Petition No.39/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

S.M. Zamir Zaidi for Petitioner (in Shariat Petition No.22/L of 1991-- Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government Shariat Petition No.22/L of 1991--Re: The Agricultural Development Bank-Pakistan Rules, 1961.

SyedZafar Abbas for Petitioner (in Shariat Petition No39/1 of 1991--The Agricultural Development Bankef Pakistan Rules, 1961).

Iftikhar Hussain Ch. for Federal Government and HafIZ SA. Rahman A.D.B.P. (in Shariat Petition No.39/1 of 1991--Re: The Agricultural Development of Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition No.33/L of 1991--Re: The Development Bank of Pakistan Rules, 1961).

Iftikhar Hussain Ch. for Federal Governmentc.Hafiz SA. Rahman and

Tariq Asad for A.D.P. (in Shariat Petition No. 23/L of 1991—Re: The Agricultural Development Bank of Pakistan Rules, 1961).

M.D. Tahir for Petitioner (in Shariat Petition, No.41/L of 1991—Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Iftikhar Hussain Ch. Advocate for Federal Government and Hafiz SA. Rahman for A.D.B.P. for Respondents (in Shariat Petition No.41/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition No.44/1 of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Iftikhar Hussain Ch., Standing Counsel for Federal Government and Hafiz SA. Rahman for A.D.B.P. (in Shariat Petition No.44/1 of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition No.60/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman for A,D.B.P. and. Federal Government (in Shariat Petition No.60/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Anwar-ul-Haq for Petitioner (in SbariatPetition No.46/1 of 1991--Re:The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman for Federal Government (in Shariat Petition No.46/1 of 1991--Re; The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition No.46/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman for A.D.B.P. and Federal Government (in Shariat Petition No.46/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Sbariat Petition No.47/I of 1991-- Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman for A.D.B.P. and Federal Government (in Shariat Petition No.47/1 of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person: (in Shariat Petition No.48/1 of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz SA. Rahman for A.D.B.P. and Federal Government, S.M.

Zafar with Ali Zafar for other Respondents (in Shariat Petition No.48/1 of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Mian Ghulam Hussain for Petitioner (in Shariat Petition No.62/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman for A.D.B.P. and Federal Government, S.M. Zafar with All Zafar for other Respondents (in Shariat Petition No.62/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition No.54/I of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman for A.D.B.P. and Federal Government (in Shariat Petition No.54/I of 1991-- Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition No.79/L of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz S.A. Rahman for A.D.B.P. and Federal Government for Respondent (in Shariat Petition No.79/L of 1991--Re: File Agricultural Development Bank of Pakistan Rules, 1961).

Nemo for Petitioner (in Shariat Petition No.69/I of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Hafiz SA. Rahman for A.D.B.P. and Federal Government (in Shariat Petition No.69/1 of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Nemo for Petitioner (in Shariat Petition No.6S/I of 1991--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Iftikhar Hussain Ch. for Federal Government (in Shariat Petition No.68 /1 of 1991-- Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Syed Afzal Haider for Petitioner (in Shariat Petition No.33/L of 1990--Re: The Agricultural Development Bank of Pakistan Rules; 1961).

Iftikhar Hussain Ch. for Federal Government and Hafiz SA. Rahman for A.D.B.P. (in Shariat Petition No.33/L of 1990--Re: The Agricultural Development Bank of Pakistan Rules, 1961).

Muhammad Rashid Akhtar for Petitioner (in Shariat Petition No.102/L of 1991--Re: The -Agricultural Development Bank of Pakistan Rules, 1961).

Iftikhar Hussain Chaudhary and Hafiz S.A. Rahman for Federal

Government (Shariat Petition No.102/L of 1991—Re: Development Bank of Pakistan Rules, 1961).

Petitioner in person (in Shariat Petition No.IS/I of 1990--Re: The Banking Companies Ordinance, 1962).

Hafiz S.A. Rahman and Iftikhar Hussain Ch, for Federal Government, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.18/I of 1990--Re: The Banking Companies Ordinance, 1962).

Petitioner in person (in Shariat Petition No.21/I of 1990)-- Re: The Banking Companies Rules, 1963).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.21/I of 1990--Re: The Banking Companies Rules, 1963).

Petitioner in person (in Shariat Petition No.20 /1 of 1990-- Re: The Banks (Payment of Compensation) Rules, 1974).

Hafiz S.A. Rahman and Iftikhar Hussain Ch, for Federal Government, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.20/I of 1990--Re: The Banks (Payment of Compensation) Rules, 1974).

Muhammad Ismail Qureshi for Petitioner (in Shariat Petition No.12/L of 1990--Re: The Banking Companies (Recovery of Loans) Ordinance,1979).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government and S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.12/L of 1990--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Nemo for Petitioner (in Shariat Petition No.21/L of 1990--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz SA. Rahman and Iftikhar Hussain Ch. for Federal Government, S.M. Zafar with Ali Zafar other Respondents (in Shariat Petition No.21/L of 1990--Re:--Banking Companies Recovery of Loans) Ordinance, 1979).

Petitioner in person (in Shariat Petition No.7/K of 1990--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Nizam Ahmad, Deputy Attorney General for Federal Government, Hafiz, S.A, Rahman and Iftikhar Hussain Ch. For Federal Government, S.M. Zafar with Ali Zafar for other Respondents, Mansoor Ahamd Khan: Amicus curiae (in Shariat Petition No.7/K of 1990--Re: The Banking Companies (Recovery of Loans Ordinance, 1979).

Petitioner in person with Muhammad Shariat Petition No.27/L of 1990--Re: The Banking Loans) Ordinance, 1979).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.27 /L of 1990--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Petitioner in person (in Shariat Petition No.73/I of 1990--Re; The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz SA. Rahman and Iftikhar Hussain Ch., Standing Counsel for Federation, Khawaja Muhammad Farooq for National Bank of Pakistan, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.73/1 of 1990--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

S.M. Saeed for Petitioner (in Shariat Petition No.I/K of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Nizam Ahmad, Deputy Attorney-General for Federal Government, Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Respondents (in Shariat Petition No.I/K of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Nemo for Petitioner (in Shariat Petition No.17 /L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman and Iftikhar Hussain Ch, for Federal Government, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No. 17/Lof 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Mukhtar Ahmad Farani for Petitioner (in Shariat Petition No.18/L 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.18//L of 1991--Re: The Banking Companies (Recoveryof Loans) Ordinance, 1979).

Rashid Murtaza Qureshi for Petitioner (in Shariat Petition No.16/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Iftikhar Hussain Ch. and Hafiz S.A. Rahrnan, Standing Counsel for Federal Government, S.M. Zafar with AliZafar for other Respondents (in Shariat Petition No.26/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Rashid Ahmad for Petitioner (in Shariat Petition No.29/L of 1991-- Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz SA. Rahman and Iftikhar Hussain Ch. for Federal Government,

S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.29/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Syed Samar Hussain Shah for Petitioner (in Shariat Petition No.30/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federation of Pakistan (in Shariat Petition No.30/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Zafar Iqbal for Petitioner (in Shariat Petition No.31fL of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federation of Pakistan S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.31/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Petitioner in person with Mian Subah Sadiq (in Shariat Petition No.32/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government, S.M Zafar with Ali Zafar for other Respondents (in Shariat Petition No.32/L of 1991 Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Petitioner in person (in Shariat Petition No.26/1 of 1991 Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

S.M. Zafar with Ali Zafar for Respondents (in Shariat Petition No. 28/L of 1991—Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Petitioner in person (in Shariat Petition No.28/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

S.M Zafar with All Zafar for other Respondents (in Shariat Petition No.28/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Muhammad Arshad for Petitioner (in Shariat Petition No.43/I of 1991—Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Muhammad Azam Chatta for Muslim Commercial Bank, Iftikhar Hussain Ch, Standing Counsel for Federal Government (in Shariat Petition No.43/I of 1991—Re: The Banking Companies (Recovery of Loans) Ordinance 1979).

Petitioner in person (Shariat Petition No. 42/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Iftikhar Hussain Ch. for Federal Government, S.M. Zafar with .Ali Zalar for other Respondents (in Shariat Petition NoA2jL of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

M.D. Tahir for Petitioner (in Shariat Petition No.13/L of 1990--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz SA. Rahman for Federal Government, Ali Sibtain Fazli and Tariq Oazi for Respondents (in Shariat Petition No.13/L of 1990--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Muhammad Sharif Khan for. Petitioner (in Shariat Petition No.21/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A.Rahman for Federal Government (in Shariat Petition No.21/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

M.M.Salim Kureja for Petitioner (in Shariat Petition No.49/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz SA. Rahman for Federal Government (in Shariat Petition NoA9/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Petitioner in person with Muhammad Amin Sheikh (in Shariat Petition No.67/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman for Federal Government, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.67/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Muhammad Amin Sheikh and Naveed Asif for Petitioner (in Shariat Petition No.73/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A.vRahman for Federal Government, S.M. Zafar with Ali Zafar for other Respondents (inShariat Petition No.73/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Muhammad Arnin Sheikh and Naveed Asif for Petitioner (in Shariat Petition No.76/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance; 1979).

Hafiz SA. Rahman. for Federal. Government, S.l't1. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.76/L of 1991--Re: The . Banking Companies (Recovery of Loans) Ordinance, 1979).

Muhammad Ismail Qureshi for Petitioner (in Shariat Petition No.50/1 of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman for Federal Government (in Shariat Petition No.50/1 of 1991--Re: The Banking Ordinance, 1979).

Muhammad Iqbal for Petitioner (in Shariat Petition No.89/L of 1991-- Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

S.M. Zafar and Hafiz S.A. Rahman for Federal Government, Sh. Muhammad Shafi for other Respondents (in Shariat Petition No.89/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Muhammad Iqbal for Petitioner (in Shariat Petition No.90/L of 1991-- Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

S.M. Zafar and Hafiz SA. Rahman for Federal Government, Sh. Muhammad Shafi for other Respondents (in Shariat Petition No.90 /L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Aftab Ahmad Javed for Petitioner (in Shariat Petition No.66/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman for Federal Government (in Shariat Petition No.66/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Nemo for Petitioner (in Shariat Petition No.91/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman for Federal Government (in Shariat Petition No.91/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979) .

Ghous Muhammad for Petitioner (in Shariat Petition No.93/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman for Federal. Government S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.93/L. of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Petitioner in person (in Shariat Petition No.58/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman for Federal Government, S.M. Zafar with Ali Zafar for other Respondents (in Shariat Petition No.58/1 of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Raja Muhammad Akram for Petitioner (in Shariat Petition No.16-B/I of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government, Abdul Ghafoor Mangi, Addl. A.-G. Sindh, Muhammad Afsar, A.-G., Balochistan and Khalid M. Ishaq for Respondents (in Shariat Petition No.16-H/I of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Raja Muhammad Akram for Petitioner (in Shariat Petition No.17-B/I of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Hafiz S.A. Rahman and Iftikhar Hussain Ch. for Federal Government Abdul Ghafoor Mangi, Addl. A.-G., Sindh, Raja Muhammad Afsar, A.-G., Balochistan and Khalid M. Ishaq for Respondents (in Shariat Petition No.17- B/I of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Kh. Saeed-uz-Zafar for Petitioner (in Shariat Petition No.101/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Iftikhar Hussain Chaudhry for Federal Government (in Shariat Petition No.101/L of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Shaukat All Khan for Petitioner (in Shariat Petition No.73/1 of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Iftikhar Hussain Chaudhary for Federal Government (in Shariat Petition No.73/I of 1991--Re: The Banking Companies (Recovery of Loans) Ordinance, 1979).

Dates of hearing: 7th, 26th, 27th February, 28th; 29th, 30th May, 9th, 10th June; 1st, 2nd, 3rd July; 13th, 14th, 15th, 16th, 17th, 22nd and 24th October, 1991.

نحمدہ و نصلی علی رسولہ الکریم
اللھم ارنا الحق حق وارزقنا اتباعہ وارنا الباطل باطلا وارزقنا اجتنابہ

JUDGMENT

TANZIL-UR-RAHMAN, C J .---These are 115 Shariat Petitions and three Suo Motu Shariat Notice Cases challenging the various provisions of "interest" provided in several statutes, namely:--

The Interest Act, 1839; The Government Savings Banks Act, 1873; The Negotiable Instruments Act, 1881; The Land Acquisition Act, 1894; The Code of Civil Procedure, 1908; The Cooperative Societies Act, 1925; The Co-operative Societies Rules, 1927; The Insurance Act, 1938; The State Bank of Pakistan Act, 1956; The West Pakistan Money-Lenders Ordinance) 1960; The West Pakistan Money-Lenders Rules, 1965; The Punjab Money-Lenders Ordinance, 1960; The Sindh Money-Lenders Ordinance, 1960; The N.W.F.P., Money-Lenders Ordinance, 1960; The Balochistan Money Lenders Ordinance, 1960; The Agricultural Development Bank of Pakistan Rules, 1961; The Banking Companies Ordinance, 1962; The Banking Companies Rules, 1963; The Banks (Nationalization) (Payment- of Compensation) Rules, 1974; The Banking Companies (Recovery of Loans), Ordinance, 1979.

2. By Shariat Petitions Nos. 30/I, 21/L, 27/L, 8/K of 1990, 1K, 4/K, 32/1, 48/L, 68/L, 71/L, 56/1, 16- C/I and 17-C/I of 1991, the Interest Act, 1839, which contains only one section, has been challenged.

3. By Shariat Petition No. 31/1 of 1990, section 8 of the Government Savings Banks Act, 1873, has been challenged.

4. By Shariat Petitions Nos. 21/L, 27/ L of 1990, 33/1; 42/1, 69/L, 70/L, 35/1, 16-A/I, 17-A/I of 1991 and S.S.M. No.2/I of 1991, sections 78, 79 and 80 of the Negotiable Instruments Act, 1881, have been challenged.

5. By Shariat Petition No. 2/L of 1991, section 34 of the Land Acquisition Act, 1894, has been challenged.

6. By Shariat Petitions Nos. 21/L, 27/L, 8/K of 1990, 1/K, 4/K, 24/L, 25/L, 16/1, 17/1, 31/I, 45/1, 72/L, 74/L, 57/1 and S.S.M. No. 3/I of 1991, sections 34, 34-A and 34-B and rule 2 (a) and (b) of Order XXXVII of the Code of Civil Procedure, 1908, have been challenged.

7. By Shariat Petitions Nos. 27/I, 28/I, 1/L, 85/L, 30/I of 1991, section 59 (2) of the Cooperative Societies Act, 1925, has been challenged.

8. By Shariat Petition No. 16/I of 1990, section 3BB (1), clause (b) of subsection (3) of section 27, sub-clause (iv) of clause (b) and sub-clause (iv) of clause (d) of subsection (8) of section 29, 47B and clause (d) of subsection (2) of section 81 of the Insurance Act, 1938, have been challenged.

9. By Shariat Petition No.17/1 of 1990, section 22 (1) of The State Bank of Pakistan 1956, has been challenged. .

10. By Shariat Petitions Nos.51/I, 64/I,65/I,66/I, 67/I of 1991, sections 2(k) , 2(1), 16 and 20 and Rule 27 of The West Pakistan Money Lenders Ordinance, 1960; have been challenged.

11. By Shariat Petitions Nos.14/I, 19/I, 17/L 33/L, 68/I, 72/I of 1990, 13/L,27/L, 34/L, 36/L, 39/L, 22/L, 39/I, 33/L, 41/L, 44/I, 60/L, 46/I, 47/I, 46/L, 48/I, 54/I, 62/L, 79/L, 69/1, 68/I of 1991, rule 17 (1) (2) of The Agricultural Development Bank of Pakistan Rules, 1961, has been challenged.

12. By Shariat Petition No.18/1 1990, section 25 (2) of The Banking Companies Ordinance, 1962, has been challenged.

13. By Shariat Petition No.21/I of 1990, rule 9 (2) and (3) of The Banking Companies Rules, 1963, has been challenged.

14. By Shariat Petition No.20/I of 1990, rule 9 of the Banks Nationalization (Payment of Compensation) Rules, 1974, has been challenged.

15. By Shariat Petitions Nos. 12/L, 21/L, 7/K, 27/L, 73/I, 13/L of 1990, I/K 17/L, 18/L, 26/L, 29/L, 30/L, 31/L 32/L, 26/1, 28/L, 43/I, 42/L, 21/L, 49/L, 50/I, 67/L, 73/L, 76/L, 66/L, 89/L, 90/L, 91/L, 93/L, 58/I, 16-B/I, 17-B/I of 1991, sections 8 (1), 8(2)(a), 2(d), 7(2), 13, 25(2), 26-A of The Banking Companies (Recovery of Loans) Ordinance, 1979 have been challenged.

Since a common question relating to 'Interest' is involved in all these matters we intend to decide them all by this judgment.

16. When the jurisdiction of this Court got restored to examine the fiscal laws since June 26, 1990, a number of Shariat Petitions were filed in. this Court, challenging various fiscal laws containing provisions regarding interest therein.

17. This Court on 11th December, 1990, 6th January, 1991, 13th January, 1991, 23rd January, 1991 and 24th February, 1991, admitted to regular hearing the several Shariat Petitions, challenging a number of provisions of the fiscal Laws relating to interest filed by that time. Further Shariat Petitions of similar nature continued being filed in this Court challenging the provisions of several laws relating to interest, which were admitted from, time to time, Hearing of the last petition on interest concluded on 2440-1991.

18. In order to decide these Shariat Petitions, the Court prepared a questionnaire relating to the impugned fiscal laws and sent it to distinguished 'ulema, scholars, economists and bankers of the country and abroad for their opinions to the said questions. The questionnaire reads as under:-

- (1) What is the definition of Riba (ربا) according to the Holy Qur'an and Sunnah of the-Holy Prophet (p.b.u.h.). Does it cover the simple and compound interest existing in the present day financial transactions?
- (2) If banking is based on interest -free transactions, what would be its basic practical shape in conformity with the Injunctions of Islam?
- (3) (i) Does, the interest on loans floated by the Government to meet national requirements come under Riba (ربا)?
- (ii) What alternatives can be suggested for the banks in case they grant loans without interest for various requirements?
- (4) Can, in the light of the Injunctions 'of Islam, any differentiation be made between private and public banking in respect of charging of interest on banking facilities or services rendered?
- (5) (i) Can the capital, according to the Injunctions of Islam, be regarded as an agent of production thus requiring remuneration of its use?
- (ii) Does devaluation of the currency affect the payment of loans taken before such devaluation?
- (iii) Can inflation causing rise in the cost/value of gold and consumer goods in terms of currency have any effect on the sum borrowed?
- (6) What would be the alternatives in the context of present day economic conditions to carry on domestic and foreign trade efficiently without availing of banking facilities based on interest?
- (7) Is interest permissible or otherwise on the transactions between two Muslim States or a Muslim and non-Muslim State?
- (8) Is it possible to carry on insurance business otherwise than on the basis of interest?
- (9) Does interest accruing the Provident Fund come under Riba (ربا)?
- (10) Can the payment of prize money on Prize Bond or Saving Bank Account or other similar Schemes be regarded as Riba (ربا)?
- (11) Would it be lawful under Islamic Law to differentiate between business loans on which interest may be charged and consumption loans which should be free of interest?

(12) If interest is fully abolished, what would be the Inducements in an Islamic Economic System to provide incentives for saving and for economizing the use of capital?

(13) Can an Islamic State impose any tax on its subject other than Zakat and Ushr?

19. The following scholars, economists, ulema and bankers sent their written answers to the above questionnaire issued by this Court:-

(1) Dr. S.M. Hasanuzzaman, Chief, Islamic Banking Division, State Bank of Pakistan, Karachi.

(2) Dr. Ramzan Akhtar, Assistant Professor, International Institute of Islamic Economics, International Islamic University, Islamabad.

(3) Mr. Zia-ul-Haq, Chief of Research, Pakistan Institute of Development Economics, Quaid-i-Azam' University, Islamabad.

(4) Dr. Saeedullah Qazi; Director; Shaikh Za'id Islamic Centre, University of Peshawar, Peshawar.

(5) Mr. Arshad Javid, Vice-President, Non-Interest Banking Department, Habib Bank Limited, Head Office 16-Habib Bank Plaza, Karachi-Pakistan.

(6) Prof. Dr. Sayyid Tahir, International Institute of Islamic Economics, International Islamic University, Islamabad.

(7) Mr. Nawazish Ali Zaidi, Consultant on Islamic Banking, International Institute of Islamic Economics, International Islamic University, Islamabad.

(8) Maulana Gohar Rahman, Shaikhul Hadith/ Muhtamim, Darul Ulum Tafhimul Our'an, Malakand Road, Mardan.

(9) Maulana Muhammad Rafi Usmani, Shaikhul Our'an wal Hadith and Muhtamim, Darul Ulum, Karachi-14.

(10) Syed Maroof Shah Shirazi, Advocate, Village and Post Office Chinar Kot, Mansehra.

(11) Prof. Dr. Ala'eddin Kharofa, International Islamic University, Selangore, Malaysia.

(12) Prof. Dr. Najatullah Siddiqui, International Islamic Economics Centre, Malik Abdul Aziz University, Jeddah,

20. A consolidated statement of their question-wise opinions has been prepared in this Court and is appended to this judgment as Appendix 'A'. It may be read as further reference material to

the issues under examination by this Court. This Appendix has been compiled by our Research Section.

21. The following scholars and economists/bankers, on request of this Court appeared and made their submissions:-

- (1) Mr. Mansoor Ahmad Khan, Advocate, Karachi.
- (2) Mr. Khadim Hussain Siddiqui, Former President, Allied Bank Limited Karachi.
- (3) Dr. Hasanuzzaman, Chief of Islamic Banking Division, State Bank of Pakistan, Karachi.
- (4) Dr. Muhammad Uzair, Economic Advisor, National Development Finance Corporation of Pakistan, Karachi.
- (5) Dr. Muhammad Hussain, Director, International Islamic University, Islamabad.
- (6) Dr. Faiz Muhammad, Director-General, International Institute of Islamic Economics, International Islamic University, Islamabad.

22. The Court during its sitting at Karachi heard Mr. Mansoor Ahmad Khan, a well-known Advocate, as *amicus curiae*, who happened to be a member of the Banking Delegation, sent abroad by the Government in 1987, He stated that bank interest is banned in Islam. The banks may, however, run their business on profit/loss sharing or Mudarabah system. He proposed that merchant banking system may be established in Pakistan and the banks may enter into business and earn profit on the money deposited with them and share it with the depositors.

23. He submitted a copy of the Report of the Pakistan Banking Delegation¹, which was sent to certain Muslim countries to examine their banking system and other modes of financing. Being a member of that delegation he stated that almost all the Muslim economists and scholars whom the delegation met were of the view that "time related fixed monetary return on a loan, however, conceived or planned, falls to be considered as *riba* prohibited in Islam." They unanimously proposed that banking system must be based on profit/loss sharing. Relevant extracts from his Report as referred to by the learned counsel have been incorporated in Appendix 'A'.

24. The Court also heard a highly experienced banker, Mr. Khadim Hussain Siddiqui of Karachi, who has been President of the Allied Bank Limited. He was also member of the Panel

of Experts formed by the Council of Islamic Ideology, in 1978 for eradication of interest from the country's economy. He categorically stated that bank interest comes within the definition of Riba and is banned in Islam in whatever form or whatever purpose it may be. There is no difference between the consumption loans and productive loans so far as the prohibition of interest in Islam is concerned; He suggested that Merchant Banking is the alternate for the interest-free banking system. He further submitted that Musharakah and Mudarabah are workable systems for interest-free banking. He was of the firm view that the Interest should be abolished in one-go, not only from the Banks and other financial institutions but the Government also. No difference should be made between private Banking and the Government Banking. Partial or half-hearted measures for abolition of interest will prove abortive as is evident from the experience of the history of past ten years. He suggested that the Banks have to act as 'Holding Companies' and for that purpose structural changes will have to be made in the present banking system.

25. Regarding effect of inflation resulting in decrease in the value of money, he submitted that it should have no effect on repayment of the loans. He also referred to the Report of the Council of Islamic Ideology in this respect. He negated the impression that abolition of interest will adversely affect the savings. In his view savings have always been income-related and will have no adverse effect, if interest is abolished, and interest-free alternatives are made available to the public.

.....

¹ Other Members included Mr. S. Nasim Ahmad, Director National Bank of Pakistan as Convener and Co-coordinator, Dr. Syed Riaz-ul-Hassan Gillani, Deputy Attorney General, Government of Pakistan, Mr. Abdul Latif, Joint Secretary, Company Law, Government of Pakistan and Mr. S. Safwan Ullah, Senior Executive Vice-President, Bankers Equity Limited.

.....

26. The Court also heard Dr. Hasanuzzaman, Chief of Islamic Banking Division, State Bank of Pakistan, Karachi; He submitted that *riba* (interest) is prohibited in Islam in all its forms or purposes. Interest-free banking can be established on the basis of Musharakah and Mudarabah. He further stated that depreciation in the value of the currency should not affect the repayment of the loans. He further stated that *riba* (interest) is prohibited between a Muslim and non-Muslim even in a non-Islamic country. He stated that the eradication of *riba* (interest) will not affect the motives of saving among the people.

27. Dr. Hasanuzzaman, stressed on the fact that the present structure of banking cannot bring any ideological change. The whole structure is to be changed and reconstructed according to Islamic concepts. His views in some detail have also been incorporated in the consolidated statement of opinions vide Appendix 'A'.

28. The Court also heard Dr. Muhammad Uzair, Economic Advisor, National Development Finance Corporation of Pakistan. He clearly stated that the interest whether simple or compound is unlawful (haram). There is Ijma' (consensus of the opinion) of the Ummah. In his view, an attempt to make difference between usury and interest is the result of the misgivings created by western scholars. As an alternate to the present banking system he expressed his view that Musharakah and Mudarabah are the two alternate modes of the present banking. There will be a partnership between the bank and the depositors on the one hand and the bank and its customers on the other, who would like to transact business with the banks. He stated that there may be, for example, an arrangement that the entrepreneur (or the borrower in the present day banking system) and the bank would share the profit in a ratio of 50 per cent each, or 60% per cent, for the entrepreneur and 40 percent, for the bank, or any such ratio which may be agreed upon between themselves. It may be regulated by the Government or Central Bank which in the case of Pakistan will be the State Bank. Similarly, there will be an arrangement between the bank and the supplier of capital (depositors in the present banking system) for sharing the profit in the ratio of 50 percent, each or 60 percent for the bank and 40 percent for the supplier of capital funds or the depositors. This may seem at first sight to be a complex arrangement, but once the system is introduced and begins to operate in our economy it will become as mechanical and routine as the present-day system wherein banks pay higher rate of interest on certain categories of deposits while paying nothing to some types of depositors, e.g. Current-Account Holders. The source of profit for the bank is the difference between the interest it receives and the interest it has to pay to the depositors. Similarly, in the changed framework required for interest-free banking, the entrepreneurs would share the profit on an agreed percentage or ratio, a higher proportion going to the entrepreneur vis-a-vis the banks; and the depositors would share a smaller proportion of what comes to the bank. Variation in ratios may reflect different tiers of the system.

29. The percentage or the ratio for sharing the profit between the entrepreneurs (borrowers) and the banks on the one hand, and that between the banks and the depositors on the other, should be determined in the normal course of business activities and bargaining should be regulated by the Government or the State Bank as a policy variable or a political decision by the Government, either arrangement would serve the purpose as far as the conceptual framework is concerned. Thus, contract of Mudarabah will be two- fold: One between the depositor and the Bank and the other between Bank and the entrepreneur and the customer and Bank will share the profit/loss on the ratio agreed in the contract. He was of the view that interest is prohibited whether it is transacted by the Government or the Bank or individuals. In his view, indexation caused due to inflation in the cost/value of some goods cannot be adopted as an alternate to interest for ideological as well as practical reasons. The abolition of interest in his view will have little bearing on saving as the saving has always been income-related.

30. He further submitted that devaluation in the currency shall not affect the return of loan taken before such devaluation and the loans shall be re-payable in such quantity in which they have been taken irrespective of the value of the currency in the market. He also contended

that Prize Bond and other saving schemes come under *riba* and are thus prohibited. Regarding insurance he contended that it can be based on non-interest system as has been in practice in some Muslim countries like Malaysia and Sudan.

31. The Court during its sitting at Islamabad heard Dr. Muhammad Hussain, Director, International Institute of Islamic Economics, International Islamic University Islamabad. He submitted that *riba* (interest) is prohibited in Islam in all its forms. He explained the definition of *riba* (interest) and relied upon the definition of a Hanafi jurist, Abu Bakar Al-Jassas who defines *riba* as “time-related fixed monetary return on a loan”. He thus submitted that bank interest comes under the prohibited *riba*. He stated that banking system in an Islamic economy can be based on Musharakah and Mudarabah. He referred to the Report of the Council of Islamic Ideology on the elimination of interest and of other Seminars arranged by their Institute on the elimination of interest and indexation and pointed out that there are alternates available in the field of interest-free banking, if the Government really intends to eliminate *riba* (interest). He further submitted that depreciation in the value of the currency shall not affect the recovery of loan taken before such depreciation. He explained that all Bond Schemes come under the category of the prohibited *riba*.

32. The Court also heard Dr. Faiz Muhammad, Director-General, International Institute of Islamic Economics, International Islamic University, Islamabad. He submitted that interest is prohibited in all its forms and usury and interest are one and the same thing. He related the history of Jew merchants who first started charging interest in the western countries in sixteenth century and developed the modern interest-bearing capitalistic system. He further enunciated that *riba*, in any form it may be, is prohibited and all Bond Schemes come under *riba*. He, however, submitted that some 'Ulema' of Pakistan were in favour of Prize Bond Scheme but when their function was explained to them, they retracted from their earlier view. He also referred to the Seminars arranged by the International Institute of Islamic Economics, International Islamic University, Islamabad; on the elimination of interest and stated that all the participants of the Seminars were unanimous that bank interest comes under the category of the *riba* prohibited in Islam and that any form of profit-loss sharing like Mudarabah and Musharakah be established in banking system and interest should be eliminated.

33. The Court heard the petitioners who were not represented by their counsel. All the petitioners and their Advocates contended that bank interest is prohibited in Islam. Most of them relied upon Verses 2:275-278 of the **Holy Qur'an and three judgments of one of us, Dr. Tanzil-ur-Rahman, Judge, High Court of Sindh (as he then was)** reported as Messrs Bank of Oman Limited v. Messrs East Trading Company Limited and others (PLD 1987 Kar, 404), Irshad H. Khan v. Parveen Ajaz (PLD 1987 Kar.466), and Habib Bank Limited v, Muhammad Hussain and others (PLD 1987 Kar, 612 at 629) wherein Bank interest and the interest contracted on Promissory Note was refused to be decreed and the provisions containing in a number of enactments relating to interest were held as repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h.). Some of the counsel also referred to

a judgment of Mr. Justice Khalilur Rebman, of the Lahore High Court, reported as Shahbazud Din Chaudhary and 27 others v. Messrs Services Industries Textiles Limited and 4 others (PLD 1988 Lah. 1), wherein the learned Judge, inter alia, observed that in view of the clear and unequivocal Injunctions of the Holy Our'an and Sunnah of the Holy Prophet {p.b.u.h.}, the respondent company is required to take Corrective measures and the mode of investment will have to be changed, whereas some others referred to two judgments of Mr. Justice Wajihuddin Ahmad, reported as Aijaz Haroon v. Inam Durrani (PLD 1989 Karachi 304) wherein the learned Judge in view of the Constitutional provisions read with Objectives Resolution came to the conclusion that the interest as such was prohibited, but the creditor can be compensated on the basis of indexation due to inflation and Tyeb v. Messrs Alpha Insurance Co. Limited and others (1990 CLC 428) wherein the above view was adopted by the learned Judge.

34. Mr. Rashid Murtaza Qureshi, Advocate, referred to the Jewish Encyclopedia Britannica and a book titled "Pawns in the Game" by William Guy and submitted that Jews had dominated the Western world by accumulation of wealth through charging interest on loans and other financial transactions.

35. Malik Allah Yar, Advocate, referring to several Verses of the Holy Our'an on interest submitted photostat copies of a number of commentaries (تفاسیر) on the Holy Our'an and several books on Ahadith.

36. Syed Afzal Haider, Advocate, appearing for one of the petitioners relying on Karachi judgment reported as Messrs Bank of Oman Limited v. Messrs East Trading Company Limited and others (PLD 1987 Kar. 404) on the question of *riba*; referred to the concept of Suunah.

37. Mr. Muhammad Ismail Qureshi, Advocate, appearing for one of the petitioners referred to two Ahadith from Mu'tta Imam Malik and Bukhari, on the question of *riba*, besides referring to the Our'anic verses.

38. Mr. Khalid M. Ishaq, Advocate, who appeared on 10-06-1991 on behalf of National Bank of Pakistan and State Life Insurance Corporation, filed interim written reply on behalf of his clients and raised the following pleas:-

- (i) The Banks in Pakistan are working within the framework of Banking instruments prescribed by the State Bank, with the approval of Council of Islamic Ideology, as valid Islamic instruments.
- (ii) There is a considerable juristic opinion available to the fact that an increase to offset the inflation would have legal justification and would not be counted as *riba*; and
- (iii) There is juristic opinion available to the fact that Bank interest does not fall in the category of prohibited *riba* (interest). According to his opinion, Banks participate in the productive processes of the Society/Community, make productive labour

possible, increase social wealth, and take only a fraction of the profit that accrues to them which is not *riba*.

39. As regards first plea that the Banks in Pakistan are working within the framework of Banking instruments prescribed by the State Bank, "with the approval of the Council of Islamic Ideology, the learned counsel referred to page 67 and onwards' of the Council's Report on "Consolidated" Recommendations on the Islamic Economic System" which, in fact, was the comment of Ministry of Finance on interest-free Banking system. He was, therefore, pointed out that it was the stand of the Government. For the Council's view his attention was invited by the Court to page 73 onwards, wherein the reply appears to have been given by the Council of Islamic Ideology to the said Ministry, which he regretted to refer and stated that he did not have the complete report with him. The learned counsel did not pursue the matter any further giving an impression to this Court that he did not want to press the same before us. In any case, the learned counsel failed to substantiate his plea. However, we have dealt with the point, but in another context, which will falsify the plea of the learned counsel.

40. So far as the other two pleas are concerned, the learned counsel referred to an article written by Mr. Justice (Retd.) Qadeeruddin Ahmad, former Chief Justice of the erstwhile High Court of the West Pakistan published in two installments in the issues of 28-11-1978 and 29-11-1978 of Daily Jang, Karachi, under the heading:

"ربو قطعى حرام ہے
تاہم علماء کرام نے بعض حالات میں اس کو رد اقرار دیا ہے"

Learned counsel's attention was drawn to the reply written by one of us (Dr. Tanzil-ur-Rahman, Advocate and Honorary Law Advisor to the Islamic Research Institute, Islamabad, as he then was) and published in four installments in the issues of 9-12-1978, 10-12-1978, 13-12-1978 and 16-12-1978 of Daily Jang Karachi, under the heading:

"ربو قطعى حرام ہے
اس میں رخصت (اجازت) کی کوئی گنجائش نہیں۔
حالات خود ساختہ ہیں۔ شریعت کے نفاذ میں تعاون کیجیے"

Since the arguments of Mr. Justice (Retd.) Oadeeruddin Ahmad were all repelled in the reply given by Dr. Tanzil-ur-Rahman, we do not feel inclined to encumber this judgment by repeating the same arguments and counter arguments. (Also published in (قرآن حکیم اور ہماری (زندگی Siddiqui Trust, Karachi).

41. The Court, then asked the learned counsel to place Our'anic Verses or Ahadith or juristic view on the two pleas for which he requested us to grant time, as he was not ready with the material. The said petitions were, therefore, adjourned to 1-7-1991, as requested. On that day

counsel did not appear but sent a lengthy Note through his client with a request for a long adjournment after Summer Vacations which we accordingly granted.

42. In this Note, we found that about 68 pages were devoted to the concept of private property which has no relevance to the plea under consideration. In the latter part of the Note, in support of the proposition with regard to offset the inflation and thus giving legal justification for interest he has failed to quote any Hadith of the Holy Prophet (p.b.u.h.) or Athar (اثر) of any of the Companions of the Holy Prophet (p.b.u.h.) or any single opinion of the jurist, worth the name, of the past or present. He has, however, relied on a part of Verse No. 279 of Surah Al-Baqarah (لا تظلمون ولا تظلمون) (Deal not unjustly and ye shall not be dealt with unjustly). It appears that the learnt counsel has not understood the underlying philosophy of 'Zulm'(ظلم) in the context of Riba. By the word (ظلم) here it means to take anything excess or give less than capital (with reference to, the context of three Verses on the subject of Riba taken together). This is (ظلم) injustice which is prohibited. The Holy Our'an permits receiving back of the capital sums but forbids any addition or deduction there from. The words (رؤوس اموالكم) do not denote their purchasing power but their actual quantity if they are in circulation. So far as the addition on the amount borrowed in case of inflation or deduction from the same, in case of deflation, is concerned the lenders or the borrowers, as the case may be, can in no way be held responsible for the same because the conditions related to that situation are beyond their control and in itself will amount to injustice (ظلم) if they are penalized for the same. That is why no Commentator of the Holy Our'an or Hadith or a Jurist worth the name has ever approved it, in spite of the element of price variation in their times which has been the constant phenomenon. For example, as pointed out by Dr. Muhammad Hussain, Director, International Institute of Islamic Economics, International Islamic University, Islamabad, the inflation rate during the days of Imam Abu Yusuf, as compared to the period of Khulafa-e-Rashideen, had increased by fifteen per cent. We will be dealing further with this issue in some detail at an appropriate place.

43. On the next date of hearing i.e., 13-4-1991, the learned counsel submitted another written Note in support of the plea that the Bank interest does not come within the definition of Riba. By a cursory glance it appeared that he had referred to the names of original authors but had used only the secondary source in the- .said Note. As he had not brought the original source material, he was directed to send photostat copies of the original texts of the material written by the several authors which have been named in the said Note. On 23-10-1991 photostat copies of some of them were received in the office. They are as under.-

- (i) Three pages including title page of the book titled "Unlawful gain and legitimate Profit in Islamic law" by Nabil A. Saleh.
- (ii) Seven pages including title page of the book titled (الفقه الاسلامى وادلته) volume-IV by (الدكتور وهبة الزحيلي).
- (iii) Four pages including title page of book titled (ترجمان القرآن) by (ابوالكلام احمد) Lahore.
- (iv) Five pages including title page of book title (سود) by Syed Abul

Aala Maudoodi, Lahore.

(v) Four pages including title of (ضمیمہ نمبر 1) appended (سود)

(ibid).

(vi) Seven pages including title page of (مسئلہ سود) by Hazrat Maulana Mufti Mohammad Shafi, Mufti-e-Azarn Pakistan, Karachi.

(vii) Three pages including title 'The Holy Our'an' by Abdullah Yusuf Ali, Lebanon.

44. We have gone through the aforesaid Note wherein the opinions **of Ibnal Qayyim**, Muhammad Abduhu, Rashid Raza, Sanhuri, Daoualibi, Shaikh Draz, Maulana Abul Kalam Azad, Maulana Abul Aala Maudoodi, Maulana Mufti Mohammad Shafi and Dr. Wahba Al-Zuhaili are alleged to be in favour of the plea about Bank interest, as raised by the counsel. In so far as Ibn Qayyim is concerned although the learned counsel has referred to his book I'lam al-muwaqqin, Vol. 2 page 135 but he has not taken the trouble of sending the original text. He simply referred to a secondary source as quoted by one Nabil in his book at page 27. He has also not supplied the extract of the Arabic text of Ibn Qayyim's book, though named in the very first line after citing authority of **Ibn Qayyim**. Same is the case with Sanhuri, Daoualibi, Sheikh Daraz, Shaikh Abduhu and Rashid Raza. No texts were sent. He has not even referred to the names of the books of these learned authors. In fact, he has taken down most of the Notes from Nabil's book listed at number one above. The credentials of Mr. Nabil are not known, as the learned counsel has not taken care to send the said book, as the same, he was told, is not available in our library. Therefore, unless and until the exact writings of the great Imams or jurists are laid before us by the counsel we are unable to place any reliance on the secondary source of the said Nabil.

45. As regards Maulana Abul Kalam Azad the pages sent by him, we regret, did neither refer to the point raised by the. Learned counsel nor support the view that interest on loan taken for commercial is justified by Maulana Abul Kalam Azad, So far as the views of Mohammad Abduhu and Rashid Raza, as referred-to by the learned counsel in his Note, -are concerned they are not supported by their texts, The lecture of Daoualibi as referred to by him has also not been supplied. In any case we do not subscribe to the view of Daoualibi said to have been stated by him in a lecture, alleged, to have been delivered by him in 1951, as stated by Nabil.

46. Dr. Asad Gillani, a petitioner, appeared in Courtland submitted his written arguments which were endorsed by 57 Ulema, most of them were also present in Court. In his written arguments Dr. Asad Gillani, inter alia, stated that:-

”سود کے حرام ہونے میں کوئی شبہ نہیں عالم اسلام کا ایک بھی مستند معتمد علیہ عالم دین ایسا نہیں ہے جس نے مروجہ ”سودی نظام“ کو حرام نہ سمجھا ہو۔ دنیا بھر کے عابد المسلمین بھی اسے حرام سمجھتے ہیں اس کی حرمت واضح ہے اور ”الحرام بین“ کا مصداق ہے پاک و ہند کے اہل

فتویٰ اور عالم اسلام کے اصحاب افتاء نے تو شروع سے اسے حرام قرار دیا ہوا ہے۔ اور اس کے تمام پہلوؤں کے بارے میں بے شمار لٹریچر وجود میں آچکا ہے۔ لیکن اس سے ایک قدم آگے بڑھ کر ہم عرض کریں گے کہ 1963 سے لے کر 1983ء تک اسلامی نظریاتی کونسل نے اس ملک کے جید اور معتمد علیہ علماء، ماہرین اقتصادیات، بنگلگ کونسل اور وزارت خزانہ کے نمائندوں کے ساتھ مذاکرات مباحثوں اور عملی تحقیقات کے نتیجے میں سود بینک کاری اور مالیاتی قوانین کے بارے میں جائزہ مکمل کر لیا ہے کہ ان میں سے کون سی شکل "ربا" کے زمر میں آتی ہیں اور کون سی نہیں۔ دسمبر 1963 کو وزارت خزانہ حکومت پاکستان کے ایک استفسار کے جواب میں موجودہ بینک کاری نظام کے تحت افراد، اداروں یا حکومت کے درمیان تجارت یا قرضوں کے لین دین میں اصلی سرمائے پر جو زائد رقم وصول یا ادا کی جاتی ہے اس کے متعلق قرار دیا کہ وہ ربا میں شامل ہیں اسی طرح درج ذیل صورتوں کو بھی ربا میں شامل قرار دیا:-

۲- مختصر مدت کے لیے جاری کی گئی مالیاتی ہنڈیوں پر جو ڈسکاؤنٹ ادا کیا جاتا ہے۔

۳- سیونگ سرٹیفیکیٹس پر جو قرضے دیے جاتے ہیں ان پر ادا کیا جانے والا سود۔

۴- پرائز بانڈز پر دیے جانے والے انعامات۔

۵- پروویڈنٹ فنڈ اور پوسٹل لائف انشورنس میں جمع کی جانے والی رقموں پر ادا کیا جانے والا سود۔

۶- صوبوں، مقامی ہیئت ہائے مقننہ اور سرکاری ملازمین کو دیے جانے والے قرضوں پر وصول کیے جانے والا سود، اور 1977 سے جنرل محمد ضیاء الحق کی دعوت اور ترمیم پر سودی نظام کے بدلے کے طور پر شرکت و مضاربت کے اصولوں پر مبنی تفصیلی نظام بنا کر پیش کیا اور پھر مسلسل اس کے نفاذ کی سفارشات پیش کرتی رہی ان مساعی میں چیف جسٹس ڈاکٹر تنزیل الرحمن کا بڑا حصہ ہے۔ ان سفارشات کے چند اقتباسات پیش خدمت ہیں۔

"پاکستانی بینکوں کے اندرونی لین دین سے سودی عناصر کا بالکل استعصال کر دینے کیلئے درکار جرائمنہ اقدام جو آج سے بہت پہلے کیا جانا چاہیے تھا اب اس میں مزید تاخیر نہ ہونی چاہیے" (مجموعی سفارشات اسلامی نظام معیشت، ص 115 مطبوعہ 1983ء)

وزارت خزانہ حکومت پاکستان کا استفسار بابت "ربا" کے جواب میں ملک کے اندرونی لین دین سے سود کا عنصر بالکل ختم کر دینے کے لیے جو جرات

مندانہ اقدام آج سے پہلے اٹھایا جانا چاہیے تھا۔ اس میں اب مزید تاخیر کرنا مناسب نہیں ہوگا" (ایضاً، ص 135)

مندرجہ بالا حقائق کے پیش نظر کونسل اپنے آپ کو اس امر کے لیے مجبور محسوس کرتی ہے کہ وہ پورے زور کے ساتھ اس امر کی سفارش کرے کہ زیادہ سے زیادہ یکم جولائی 1984ء تک ہر قسم کا سودی لین دین قطعی طور پر ممنوع قرار دے دیا جائے۔ اس مقصد کے لیے ایک آرڈیننس کا مسودہ ارسال خدمت ہے۔ جناب صدر مملکت کی ذات گرامی سے امید کی جاتی ہے وہ ان کے نفاذ کو عمل میں لا کر عند اللہ ماجور ہوں گے۔ کونسل اپنی اس تجویز کے ساتھ کہ زیر نظر آرڈیننس کا نفاذ عمل میں آنا چاہیے یہ سفارش کرنا بھی ضروری سمجھتی ہے کہ بینکوں اور دیگر اداروں کو اس امر کی ہدایت کی جائے کہ تیس جون 1984ء تک جو مہلت انہیں دی گئی ہے اس میں وہ اپنے گاہکوں سے اسلامی خطوط پر لین دین کی بات چیت مکمل کر لیں تاکہ جب یہ آرڈیننس عمل نافذ ہو تو اس وقت سود کا لین دین کسی صورت میں باقی نہ رہے اور بینکوں کی جانب سے سرمایہ کاری کا عمل شریعت اسلامیہ کی حدود کے اندر متبادل بنیادوں پر بروئے کار لایا جاسکے (ص 136)۔

غیر ممالک سے بینکوں کا سودی لین دین:-

”کو نسل نے اس مسئلے پر دوبارہ غور کیا ہے اور سمجھتی ہے کہ پاکستانی بنکوں کی غیر ممالک میں قائم شاخوں کو چاہیے کہ وہ بھی سودی بنیادوں پر ہر قسم کا لین دین بالکل ترک کر دیں۔ اسی طرح پاکستانی بنکوں میں جو رقمیں غیر ملکی کرنسی کی صورت میں جمع ہوں انہیں بھی سود سے پاک ذرائع سے کاروبار میں لگایا جانا چاہیے۔ کو نسل کی رائے ہے کہ جہاں تک پاکستانی بنکوں کی شاخوں کا تعلق ہے جو مسلم ممالک میں قائم ہیں ان کی حد تک اس سفارش پر عمل درآمد میں کوئی مشکل محسوس نہ کی جانی چاہیے البتہ غیر مسلم ممالک کے معاملے میں وہاں کے بنکاروں اور متعلقہ حکام سے سرکاری سطح پر بات چیت کے ذریعے لین دین کے غیر سودی ذرائع تلاش کر کے انہیں زیر استعمال لایا جانا چاہیے۔ غیر ممالک کے اسلامی بنک جو اپنے اپنے ملکوں میں اپنی کاروباری صلاحیت ثابت کر کے ضروری اعتماد و اعتبار قائم کر چکے ہیں ان کی حوصلہ افزائی کی جانی چاہیے تاکہ وہ پاکستان میں بھی اپنی شاخیں قائم کریں۔ سودی کاروبار کرنے والے غیر ملکی بنکوں کو اس امر کی کھلی چھٹی دینا کہ وہ پاکستان میں اپنی شاخیں جب چاہیں قائم کریں لیکن سود سے پاک لین دین کرنے والے اسلامی بنکوں کو اپنی شاخیں کھولنے سے روکنا ایک ایسا امتیازی طرز عمل ہے جو ہماری اعلان کردہ پالیسی سے قطعاً کوئی مطابقت نہیں رکھتا کہ ہم اپنا مالی نظام اسلام کے طے کردہ اصول و خطوط پر چلائیں گے۔

چونکہ اسلام کی رو سے ربکا لینا اور دینا دونوں حرام ہیں لہذا ہماری حکومت کو چاہیے کہ وہ مذہبی بنیادوں پر غیر ملکی حکومتوں اور مالی اداروں کے سربراہوں کو اس امر کا قائل کرے کہ وہ پاکستان کے ساتھ لین دین ایسے طریقوں اور ایسی بنیادوں پر کریں جو احکام شریعت سے ہم آہنگ ہوں۔ (مجموعی سفارشات اسلامی نظام معیشت، دسمبر 1983ء، ص 104)

اسلامی نظریاتی کو نسل نے اپنے بیسویں اجلاس منعقدہ کراچی مورخہ دسمبر 1983ء تا 2 جنوری 1984ء بصدارت چیئرمین کو نسل جسٹس ڈاکٹر تنزیل الرحمن اس پیش رفت کا جائزہ لیا جو ملک میں سود سے پاک بنک کاری کے میدان میں 1980ء میں خاتمہ سود کے موضوع پر کو نسل کی رپورٹ پیش ہونے کے بعد عمل میں آیا ہے۔ کو نسل نے یاد دلایا کہ مذکورہ بالا رپورٹ میں متعدد سفارشات کا مقصد یہ تھا کہ سودی بنیاد پر قائم پاکستانی معیشت کو بتدریج ترک کر کے سود سے پاک نظام کے قیام میں سہولت اور آسانی پیدا کی جائے اسی مقصد کے لیے کو نسل نے ایک عملی نقشہ کار تجویز کرتے ہوئے طے کیا کہ دسمبر 1981ء کے آخر تک چند واضح مرحلوں میں سود کو اس کی تمام اقسام اور صورتوں کے ساتھ کلیہً ختم کر دیا جائے۔ (ص 100) <<<<<<<

فتح مکہ کے موقع پر نبی کریم صلی اللہ علیہ وسلم نے سود کا لین دین اس کی ہر صورت میں ختم کر دیا تھا۔ نجران کے عیسائیوں سے حضور صلی اللہ علیہ وسلم کا جو معاہدہ ہوا اس میں بھی یہ شرط واضح طور پر شامل کی گئی تھی کہ اگر معاہدے میں عیسائیوں نے کسی صورت میں سود کا لین دین کیا تو یہ معاہدہ کا لعمدہ ہو جائے گا اور مسلمان ان کے خلاف ہتھیار اٹھالیں گے۔ عرب کے قبیلہ بنو مغیرہ کے لوگ سود پر رقیمیں قرض دینے کے لیے مشہور تھے۔ چنانچہ فتح مکہ کے بعد حضور نبی کریم صلی اللہ علیہ وسلم نے ان کا پورا سود منسوخ کر دیا اور مکہ میں اپنے عامل کو یہ ہدایت کی کہ اگر یہ لوگ سودی لین دین سے باز نہ آئیں تو ان کے خلاف جنگ کر کے انہیں اس فعل شنیع سے روک دیا جائے۔ خود حضور صلی اللہ علیہ وسلم کے چچا حضرت عباس رضی اللہ عنہما دور جاہلیت کے بڑے مہاجن تھے جو سود لے کر لوگوں کو قرضے دیا کرتے تھے، ان کے متعلق حضور صلی اللہ علیہ وسلم نے حجۃ الوداع کے موقع پر صاف صاف اعلان فرمایا کہ دور جاہلیت کا پورا سود کا لعمدہ ہو گیا ہے اور سب سے پہلے میں اس سود کو منسوخ ٹھہراتا ہوں جو میرے چچا عباس بن عبدالمطلب کا لوگوں کی طرف نکلتا ہے۔

ان گزارشات کی روشنی میں ہم درخواست کرتے ہیں کہ حکومت اولاً کسی سہولت کی مستحق نہیں ہے۔ لیکن انتظامی لحاظ سے اگر بعض معاملات کے لیے ضروری ہو جائے تو وہ مہلت دی جائیگی۔ جنرل محمد ضیاء الحق صاحب نے 1979ء میں تین سال کی قطعی مدت کا وعدہ کیا تھا۔”

47. Maulana Gauhar Rahman, also appeared in the said petition as jurisconsult for the petitioner and made oral arguments in support of the petition. He, in fact, referred to certain passages of his Reply submitted by him to the Questionnaire issued by this Court, which forms part of the Appendix 'A'.

48. Mr. S.M. Zafar, Advocate, who appeared on 9-6-1991 with Hafiz S.A. Rahman and Ali Zafar, on behalf of the Federation of Pakistan and Banking Council in 16 Shariat Petitions, submitted that the stand of the Federation of Pakistan is that riba (interest) as such is prohibited in Islam and that it is the duty of the State of Pakistan to eliminate riba (interest) in all its forms from the financial institutions and the fiscal system of Pakistan. He referred to section 8 of the Shariat Act, 1991, which pertains to Islamization of Economy and the taking of steps to ensure that the economic system of Pakistan is reconstructed on the basis of Islamic economic objectives, principles and priorities, and submitted that it would require some time. He thus, prayed that the Government of Pakistan be given due time to fulfill the objectives. Subsequently on 15-10-1991, he filed his **power** in 27 other Shariat Petitions on behalf of the Federation and while adopting his earlier arguments, raised the following issues. In his own words:- (Check power).....

- (1) Some modern scholars opine that interest chargeable on productive 'loans does not fall in the category of riba prohibited in Islam. It is only the interest charged on consumptional loans which is prohibited in Islam because it does not bring any increase in the loaned money.
- (2) Some scholars link interest with inflation meaning thereby that depreciation in the value of currency should be compensated in deferred payments even in loans.
- (3) The previous contracts, under which the loans have been taken on interest and the borrowers have taken benefits from these loans, are liable to be continued.
- (4) As the universal economic system is based on interest, any departure from it would amount to economic collapse.
- (5) The Federation; as provided in Shariat Bill, has formed a Commission to suggest means and ways for the elimination of interest. This Commission is hopefully to discharge its duties, and its findings and recommendations should be awaited.

He, however, requested for some days' time to send some articles and books in support of his submissions.

49. The learned counsel on 23-10-1991 sent photostat copies of some articles and extracts from some books along with a written Note which were received at the principal seat on 29-10-1991.

50. Learned counsel, in the said Note, reiterated the earlier stand taken by the Federation vide its preliminary written statement filed by him on 9-6-1991 that "the Federation considered riba as prohibited in Islam and it is the duty of the State of Pakistan to eliminate riba from the Financial and fiscal system of Pakistan", as already referred to by us in the preceding paragraph No. 48. The learned counsel, however, reformulated the main issues, with some modifications, which were raised by him earlier on 15-10-1991. They are reproduced as under.-

- (i) Whether productive loans fall within the definition of the word 'Riba' because at the time when prohibition was ordained there was no concept of productive loan and it was merely loan lent for consumptive purposes.
- (ii) That as the word 'Riba' has not been defined either in Our'an or Hadith would it not fall within the area of 'Mutashabahat' and, therefore, the present system can be allowed to function till a properly considered substituted system is announced by the Commission appointed under the Shari'at Act.
- (iii) That based on the Maslahah' of the Ummat a silent consensus on Bank interest was adopted in the conference of NahgatuI Ulama in East Javwa, Indonesia which classified the bank interest under the category of 'Mutashabahat' .
- (iv) That those contracts which have been entered into- and under which benefits have been received by various applicants need to be enforced on ground of equity and at least to the extent that any benefit has been received by the applicants they should be made to return it and/or the depreciation of money suffered by various banks on account of the inflation be compensated for.
- (v) That the Federation recommends that till the Commission appointed under the Shariat Act has completed its study and given its final decision the issue of interest be deferred as it has very close and deep links with the total economic system. The entire fiscal system of Pakistanis is so integrated that taking a decision only about the system without co-relating the - other issues like inflation, paper currency, concept of banking, advancing loans voluntarily, it shall be liable to create problems and chaos, resulting in more disadvantage than benefit to the Nation.

51. The learned counsel in support of the above points or issues, annexed with his Note the following materials-

- (i) A photostat copy of an article titled as "A Study of Commercial Interest in Islam" by Fazlur-Rahman, M.A. Institute of Islamic Studies, Muslim University, Aligarh---22 pages.
- (ii) A photostat copy of a printed article titled as "What is Riba exactly?" by Bro Jamari Mohtar - 4 pages.
- (iii) Typed article titled as "Ijmae Sukuti on Bank Interest" (Silent Consensus on Bank Interest) Translation- 6 pages.
- (iv) Photostat copy of an article titled as "Reflections on title Concept and the law of Riba" by Syed Ahmad, Professor of Economics McMaster University Hamilton, Ont.,Canada--- 11 pages.

- (v) Photostat copy of an article titled as "Islamic Banking and Finance" Prospects for the 1990s, by Andrew Cunningham, Middle East Economic Digest, 21 John Street, London, WCIN 2BP, England---3 pages.
- (vi) Photostat copy of an article titled as "The case for Ijtehad in respect of Interest on Productive loans N.A. Jafarey--- 3 sheets.
- (vii) Photostat copy of an article titled as "Islam and Productive Credit" by Syed Yaqub Shah—4 pages.

52.-- (i) The first article "A Study of Commercial Interest in Islam" by Fazlur-Rehman, Muslim University, Aligarh is, in fact, against the proposition or the issue raised by Mr. S.M. Zafar. The learned author has categorically stated that interest on commercial loans falls within the ambit of *riba* prohibited in Islam. The learned author has in detail opposed the view of Sir Syed Ahmad Khan and others belonging to his school of thought like Nazir Ahmed, Syed Tufail Ahmed Manghori etc. who had earlier opined that interest on commercial loans is not *riba* as prohibited in Islam. In fact, the learned author has written a book in Urdu titled as

"تجارتی سود۔ تاریخی اور فقہی نقطہ نظر سے"

wherein he has elaborated his arguments in support of the opinion that interest on commercial loans is *riba*. We will be referring to said book in the forthcoming pages.

(ii) In the second article by Bro Jamari Mohtar the learned author appears to have discussed the arguments of both sides, viz.

- (i) Interest on commercial loans falls under *riba*; and
- (ii) Interest on commercial loans does not come under *riba*.

A perusal of the article will, however, show that he has not preferred any of these opinions. He has just narrated views of both the sides.

- (iii) The third article, perhaps in Indonesian language, translated into English as "Silent Consensus on the permissibility of Bank Interest" appears to have referred to an opinion by Nahgatul Ulema; East Jawa, Indonesia, wherein the Ulama of the Advisory Council have been stated to have given verdict in favour of the permissibility of bank interest on the basis of *Maslahah*, But the opinion or verdict lacks in giving arguments based on the Holy Qur'an and the Sunnah of the Holy Prophet (p.b.u.h.) in its support. Moreover, the alleged *Ijma'* falls short of its requirements in *Shari'ah*.
- (vi) (See *AI-Mustasfa* by Imam Ghizali, Vol. 1 pp. 173-81).

As regards the concept of *Maslahah* for giving permissibility to bank interest, we will deal with it separately at an appropriate place.

The forth article "Reflections on the Concept and the Law of Riba by Syed Ahmad, Professor of Economics, McMaster University, Hamilton, Canada. In this article the learned writer has discussed whether *riba* is identical to interest and has tried to exclude some forms of modern interest from the ambit of *riba*, but he has not given any argument based on the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h).

- (v) It contains a fatwa of Shaikh Tantawi of Egypt issued on September, 1989 saying that interest on Government saving certificates is permissible in Islam. But in the same, document it has been written that in 1990 most of the Egyptian Ulama have opposed this *fatwa* so there remains solitary opinion of Shaikh Tantavi of Egypt.
- (vi) Another article titled as "The case of *Ijtehad* in respect of interest on Productive Loans" by N.A. Jafarey, Advocate for making *Ijtehad* relating to matters such as *Riba*. His view and argument is largely misconceived. *Ijtehad* is to be exercised in those matters about which the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h.) do not ordain any specific Injunctions and the matter falls within the domain of juristic analogy (قياس). He has, however, at the end of his paper, left the matter open to the conscience of the *Ummah*, which has hitherto been against the validity of Bank interest.
- (vii) The last document is the Article written by Sayed Yaqub Shah, titled as "Islam and Productive Credit", in which he has tried to prove that interest on commercial loans was not in vogue in the period of n Holy Prophet (p.b.u.h.), This opinion has been seriously questioned by Mr. Fazlur-Rahman of Muslim University, Aligarh, in his book (تجارتی سود) and the Article produced by Mr. Zafar himself.

53. Our overall assessment and view about the above material submitted by Mr. S. M. Zafar except the article listed at No.1, which straightaway goes against his proposition, to say the least, is scanty, unconvincing and rudimentary in substance and carries no weight in the face of the Injunctions of the Holy Qur'an and the Sunnah of the Holy Prophet (p.b.u.h.) and the consensus (اجماع) of *Ummah* in so far as the *Riba* at *Nasiyah* is concerned.

54. These are our short comments on the material submitted by Mr. S.M. Zafar. We would, however, deal in detail, with the points raised by Mr. Khalid M. Ishaque and Mr. S.M. Zafar, Advocates, two of them being similar in some respects in the forthcoming pages of this judgment, but before embarking on them, we feel it pertinent to give some historical background of the question of *Riba* (interest) with reference to the Constitutions of Pakistan and steps taken by the Government during last so many years with particular reference to the period of General Muhammad Zia ul Haq (late), the then President.

55. As to interest, Pakistan's Constitution, 1956 provides that the State shall endeavour to eliminate *Riba* as early as possible (Art, 28-F), but no effort was made to realize that objective.

In 1962 Constitution, it was, again, provided in the principles of policy (No. 18) that *Riba* (usury) should be eliminated. Similar provision was again made in the Constitution of 1973, (Art. 38- F).

56. The Council of Islamic Ideology established for the first time in 1962, in order to make, inter alia, recommendations; as to the measures for enabling Muslims to order their lives in accordance with the teachings of Islam, formulated its opinion as long back as in 1964-1966, that '*Riba* is forbidden and the present banking system is fundamentally based on '*Riba*', and lastly, in its meeting held on 3rd December, 1969, it was unanimously resolved that.-

"اسلامی مشاورتی کونسل اس امر پر متفق ہے کہ ربوا اپنی ہر سورت میں حرام ہے اور شرح سود کی پیشی اور کمی سود کی حرمت پر اثر انداز نہیں ہوتی۔ افراد اور اداروں کے لین دین کی مندرجہ ذیل صورتوں پر کامل غور و فکر کرنے کے بعد کونسل اس نتیجہ پر پہنچی ہے کہ:

(الف)۔ موجودہ بنکاری نظام کے تحت افراد، اداروں اور حکومتوں کے درمیان کاروباری لین دین اور قرضہ جات میں اصل رقم پر جو بڑھوتی لی جاتی ہے وہ داخل ربوا ہے۔

(ب) خزانے کی طرف سے تھوڑی مدت کے قرضہ پر جو چھوٹ دی جاتی ہے وہ بھی داخل ربوا ہے۔

(ج) سیونگ سرٹیفکیٹ پر جو سود دیا جاتا ہے۔ وہ ربوا میں شامل ہے۔

(د) انعامی بانڈز پر جو انعام دیا جاتا ہے۔ وہ ربوا میں شامل ہے۔

(ه)۔ پروویڈنٹ فنڈ اور پوسٹل بیمہ زندگی وغیرہ میں جو سود دیا جاتا ہے۔ وہ بھی ربوا میں شامل ہے۔

(و)۔ صوبوں، مقامی اداروں اور سرکاری ملازمین کو دیے گئے قرضوں پر بڑھوتری ربوا میں شامل ہے۔

(Report on Consolidated Recommendations on the "Islamic Economic System)", Council of Islamic Ideology, 1983, pp. 9 and 10). But the Government turned deaf year and gave no attention to these recommendations.

57. The matter also engaged the attention of the Council during its subsequent meeting in the year 1970 and after prolonged discussions on its various aspects, a Blue-print of Islamic Social Order was finally approved. It was sent to the Government in 1971 (p. 10 of the Report op. Cit.), but no Legislative measures were taken for elimination of interest from the country's economy, as provided in the Constitution (See Art. 230 of 1971 Constitution).

58. In July 1977, after General Muhammad Zia-ul-Haq took reins of powers in his hands as Chief Martial Law Administrator, addressing the Council of Islamic Ideology, reconstituted by him, on 29th September, 1977, asked the Council to give its best thought to it and submit its detailed report on the subject, as to how the curse (لعنت) of the interest could be eradicated. The

Council of Islamic Ideology appointed a panel of Economists and Bankers². An interim report was submitted by the Council to General Muhammad Zia-ul- Haq

Haq, who, in the meantime, had also assumed the office of President to himself. In the light of that report some interim measures were taken by the President for the abolition of interest, whereby the House Building Finance Corporation, National Investment Trust (NIT) and Investment Corporation of Pakistan (ICP) were made to run on interest-free basis on profit and loss sharing. On 12th Rabi-al-Awwal, 1399 A.H. == 10th February, 1979, as announced by the President, a time-limit of three years was set in by him for the complete abolition of interest from the country's economy. The Council of Islamic Ideology³ approved the Final Report on 15-6-1980 and its Chairman submitted the same to the President on June 25, 1980 (p. 420p.cit), wherein a framework was provided so as to enable the Government to eliminate interest from the Country's economy by the end of February, 1982 (see Council's Report on 'Elimination of Interest from Country's Economy' annexed with the consolidated Report on recommendations of the Council of Islamic Ideology on 'Islamic Economic System' (اسلامی نظام معیشت), Part V, Appendix, pp. 1- 114; also published separately). The said report came up for discussion at the International Seminar of Economists on "Fiscal System of Islam" held at Islamabad during March 7-11, 1981. The Seminar, in its Communiqué (اعلامیہ), at the close of Seminar paid its tribute to the Council for the said Report on interest in the following words:--

"The seminar complimented the Government of Pakistan and the Council of Islamic Ideology for the intensive work done to find ways and means of eliminating *Riba*. It regarded the Report of the Council of "Islamic Ideology on the Elimination of Interest as

²² Dr. Ehan Rashid-Chairman, Professor of Economics and Director, Applied Economics Research Centre, University of Karachi, 2. Dr. Rafiq Ahmad, Pro-Vice-Chancellor, University of the Punjab, Lahore, 3. Sheikh Mahmood Ahmad, Lahore, 4. Mr. Abdul Jabbar Khan, President, Habib Bank Limited, Karachi, 5. Dr. Syed Nawab Haider Naqvi, Director, Pakistan Institute of Development, Economics, Islamabad, 7. Dr. Mian Nazeer, Professor of Economics, University of Peshawar, Peshawar 8. Mr. D.M.Qureshi, Man aging Director, Bankers' Equity Ltd., Karachi 9. Professor Shakrullah, Head of Economics Department, Baluchistan University, Quetta, 10. Dr. A.H. Siddiqui, Director of Studies, Administrative Staff College, Lahore. 11. Mr. Khadim Hosain Siddiqui, Member, Pakistan Banking Council, Karachi, 12. Mr. A.K. Sumar, Karachi, 13. Mr. Abdul Wasay, Bank of Credit and Commerce International, Karachi, 14. Dr. S.M Hasan-uz-Zaman, Chief, Islamic Economics Division, Research Department, State Bank of Pakistan, Karachi **Members and 15**. Dr. Ziauddin Ahmad, Deputy Governor, State Bank of Pakistan and Member, Council of Islamic Ideology, Convener.

³ 1. Justice Dr. Tanzil-ur-Rehman, Chairman, 2. Maulana Zafar Ahmad Ansari, 3. Mr. Khalid M. Ishaque, 4. Mufti Sayyahuiddin Kakakhel, 5. Khawaja Qamruddin Siyalvi, 6. Maulana Muhammad Taqi Usmani, 7. Maulana Muhammad Hanif Nadvi, 8. Dr. Ziauddin Ahmad, 9. Allama Syed Muhammad Razi, 10. Maulana Shamsul Haq Afghani, 11. Dr. Mrs. Khawar Khan Chishti—Members and (12) Mr. Fazlur Rahman Khan, Ex-Officio Member (as on 15-6-1980).

a historic document and a pioneering effort which would be of great use to other Muslim countries in their efforts to transform their banking system, in accordance with Islam. It was recommended that to ensure its widest possible readership it should be translated in Arabic and other languages. "

(Council's Report on the Islamic Economic System, December 1983, p. 45)

An Arabic translation of the said Report was published by Malik Abdul Aziz University of Jeddah, entitled as

”تقریر مجلس الفکر الاسلامی بشأن الفاء الفائدہ من اقتصاد پاکستان۔“

A summary of conclusions and recommendations in the said Report of the Council (93-114) is appended herewith and marked as Appendix 'B'. This summary is, however, to be read subject to the observations of this Court made herein this judgment.

59. The Government of Pakistan on receipt of the Council's Final Report on elimination of interest took some further steps in the direction by first allowing the public, the option of opening Profit and Loss Accounts in all the five nationalized Banks and, later on, reverting of interest-bearing Savings Accounts to PLS Accounts. After some time, the Government also introduced Mudarabah and Musharakah, as a step towards right direction of Islamic Financing System, as alternate to the prevailing Banking System, but on a very limited and restricted scale. The option, however, remained open with the Banks and the public to either go in for Islamic System or stick to the non- Islamic system, hitherto maintained, based on interest.

60. It may, however, be mentioned that the Council had been against the opening of separate Interest-free counters, but the Government in manifest opposition of the Council's recommendations opened simultaneously the "interest-free counters". Soon after the Council, after re-constitution on 31- 5-1981, again protested against it. Relevant extracts from the Council's consolidated Report on "Islamic Economic System" ((اسلامی نظام معیشت)) are reproduced as under:--

"کو نسل نے 1980-81ء میں کیے جانے والے ان اقدامات کا جائزہ لیا جو حکومت نے اسلامی نظام معیشت کے نفاذ کے سلسلے میں انجام دیے ہیں۔ ان میں خاتمہ سود کیلئے کیے جانے والے اقدامات، ان سفارشات کے بالکل برعکس ہیں، جو کو نسل نے تجویز کیے تھے۔ کو نسل نے اپنی رپورٹ میں سود کے خاتمے کے ہر مرحلے کو منطقی ترتیب دے کر واضح کر دیا تھا اور ان خطرات سے آگاہ کر دیا تھا جو اس تجربے کی ناکامی پر منتج ہو سکتے ہیں۔

حکومت کی طرف سے اس وضاحت اور تنبیہ کو مسترد کر دیا گیا اور وہ طریقہ اختیار کیا گیا جو مقصد کو فوت کرنے کا باعث بن گیا" کو نسل نے شراکت و مضاربت اور قرض حسنہ کو بھی سودی نظام کا اصل اور حقیقی بدل قرار دیا تھا۔ البتہ عبوری دور کیلئے اور ناگزیر حالات میں بعض دیگر طریقوں کی سفارش بھی کی تھی۔ حکومت نے اپنی اسکیم میں مارک اپ اور مارک ڈاؤن کا جو طریقہ اختیار کیا ہے وہ سود کے سوا کچھ نہیں۔

اس طرح ہنڈیوں کی کٹوتی کے سلسلے میں حکومت نے سود کی اضافی قیمت کے نام کو اور بعض جگہ کمی قیمت کے نام کو استعمال کر کے سود کو برقرار رکھا۔ کونسل کی طرف سے تعزیری سود کے طریقے کی مخالفت کے باوجود اسے برقرار رکھا گیا۔ اس کے بجائے تعزیری جرمانہ عائد کیا جانا چاہیے جو متعلقہ حکومت کے خزانہ میں جمع ہو۔ (مجموعی سفارشات، اسلامی نظام معیشت، اسلامی نظریاتی کونسل صفحات 50-51، دسمبر 1983ء)۔

کونسل نے واضح الفاظ میں مثالی بینک کے قیام اور غیر سودی کاؤنٹرز کھولنے کی شدت سے مخالفت کی تھی اور ماہرین معاشیات اور بنکاری کے قومی دلائل کے پیش نظر ایسے کسی بھی اقدام کو حصول مقصد کے لیے نقصان دہ قرار دیا تھا۔ (پیر 1:32 تا 1:34)۔ کونسل کو یہ دیکھ کر مایوسی ہوئی کہ حکومت نے وہی لائحہ عمل اختیار کیا جو کونسل کے نزدیک غیر سودی نظام کو ناکام بنانے اور سودی نظام کو ہمیشہ جاری و ساری رکھنے میں معاون ہو سکتا ہے۔ اس پر مستزاد یہ کہ لائحہ عمل میں بھی وہ طریق کار اختیار کیا گیا ہے جس سے کونسل نے اپنی سفارشات میں جگہ جگہ محتاط رہنے یا باز رہنے کی تاکید کی تھی۔ (صفحہ 54)

اسلام اور غیر سودی نظام کے نام سے سود کی موجودگی اور اس پر اصرار نہ صرف اللہ تعالیٰ کے نزدیک ناپسندیدہ ہے بلکہ اس سے حکومت کی کوششوں پر بھی حرف آتا ہے۔ پاکستان میں اسلام کے نام پر لائی جانے والی تبدیلیوں سے دوسرے مسلم اور غیر مسلم ممالک کی بڑھتی ہوئی دلچسپی کے پیش نظر یہ طریق کار ہمارے خلاف الزام تراشیوں اور بدگمانیوں کا مواد فراہم کرے گا اور اس سے زیادہ خطرناک نتیجہ یہ نکلے گا کہ خاتمہ سود کے نام پر سود کو برقرار رکھنے والوں کو پاکستان کی مثال ڈھال فراہم کرے گی۔

کونسل شروع سے غیر سودی کاؤنٹر کے خلاف رہی ہے، لیکن موجودہ غیر سودی کاؤنٹر کی اسکیم مکمل طور پر نہ غیر سودی ہے نہ اسلامی اور نہ عملی۔ یہ عین ممکن تھا کہ اگر یہ اسکیم واقعی غیر سودی اور اسلامی ہوتی تو عوام میں آہستہ آہستہ اس سے دلچسپی بڑھتی لیکن سرکاری ذرائع ابلاغ کی کوشش کے باوجود ایسی کوئی صورت دیکھنے میں نہ آئی بلکہ جوں جوں وقت گزرتا گیا لوگوں کی سرد مہری اور بے اعتنائی بڑھتی گئی۔

"صدر مملکت کی دینداری اور ان کی طرف سے سرکاری طور پر اسلام کی سرپرستی کے علی الرغم غیر سودی کاؤنٹر کی اسکیم وہی تاثیر پیدا کرتی ہے جو کسی سیکولر حکومت میں اقلیتوں کو بعض نجی معاملات میں مذہبی آزادی، جس میں حکومت خود کو مذہب سے بے نیاز رکھتی ہے۔ اسی طرح ہماری حکومت نے عوام کے لیے غیر سودی کاؤنٹر کے نام سے ایک ادارہ قائم کر کے خود اپنے آپ کو سود کے معاملے میں احکام شریعت سے بے نیاز سمجھ لیا ہے گویا سود کی حرمت کچھ افراد کا انفرادی معاملہ ہے اور حکومت خود اس معاملے میں غیر جانبدار ہے۔ حالانکہ واقعہ یہ ہے کہ پاکستان اور اسلام لازم و ملزوم ہیں اور حکومت اور اس کا کوئی ادارہ اس سے مستثنیٰ نہیں ہے چنانچہ حکومت کو اپنے عزم اور خلوص اور اسلام سے وفاداری کا مظاہرہ کرنے کے لیے پہلے اپنے معاملات سے سود کا خاتمہ کرنا چاہیے تھا۔ حکومت کی اس بے نیازی نے عام آدمی میں کوئی جوش اور ولولہ پیدا نہ ہونے دیا۔ (مجموعی سفارشات، اسلامی نظام معیشت، اسلامی نظریاتی کونسل، صفحہ 57)۔

"اسکیم شروع ہوتے ہی حکومت کی طرف سے اس کے حق میں ذرائع ابلاغ کے بھرپور استعمال کے باوجود اخبارات نے پہلے ہفتہ سے ہی ان بلا سودی کاؤنٹرز کی افادیت اور صلاحیت پر کلام کرنا شروع کر دیا۔ بعض اخبارات نے سودی اور غیر سودی نظام کے ایک ساتھ قائم رہنے پر تبصرہ کرتے ہوئے دو عملی کو ختم کرنے پر زور دیا اور بعض نے سود کے مکمل خاتمے کی کوشش کی تاہم کی جب کہ بعض اخبارات اور رسائل نے اس ساری اسکیم کو بھی سودی نظام کی بدلی ہوئی شکل قرار دیا" (ملاحظہ ہو ادارہ برنس ریکارڈ، مورخہ 12 جنوری 1981ء و پاکستان اکانومسٹ، شمارہ فروری 1981ء)

غیر سودی کاؤنٹرز میں دلچسپی لینے سے پہلے عام آدمی حکومت میں اصلاح احوال یا اخلاص کے دوسرے مشاہد میں بھی دیکھنا چاہتا ہے اور ان مشاہد کے پیش نظر حکومت کی پالیسی کے بارے میں رائے قائم کرتا ہے۔ ایک طرف غیر سودی کاؤنٹر کا چرچا دوسری طرف شرح سود کو شرح منافع قرار دینا اور پھر شرح کو لوگوں کے لیے زیادہ سے زیادہ پرکشش بنا کر ذرائع ابلاغ کے ذریعے مسلسل ان کا پروپیگنڈہ کرنا لوگوں کو فکر اصلاح اور اخلاص کی تائید میں شہادت فراہم نہیں کرتا۔

شاید یہی وہ عوامل ہیں جن کی وجہ سے غیر سودی کاؤنٹرز جو پہلے پہل لوگوں کی بھرپور دلچسپی کا باعث بنے تھے، دھیرے دھیرے غیر مقبول ہوتے گئے، تا آنکہ چھ ماہ گزرنے کے باوجود یہ کھاتے بنک کی جملہ امانات کا پانچ فیصد سے زیادہ نہ ہو سکے۔ اس ناکامی کو اسلام سے عناد رکھنے والے مبصرین عوام میں سود کی مقبولیت اور اسلامی احکام کے عدم دلچسپی پر محمول کرتے ہیں۔ (ملاحظہ ہو نوٹ لندن اکاؤنٹسٹ، مورخہ 21 مارچ 1981ء)

حکومت کی جاری کردہ مارک اپ، مارک ڈاؤن اسکیم پر جو رد عمل ملک میں ظاہر ہوا ہے اس سے صدر مملکت کو وقتاً فوقتاً آگاہ کیا جاتا رہا ہے۔ توقع تھی کہ اس سال کے بجٹ کے موقع پر ضروری اصلاحات رو بہ عمل لائی جائیں گی۔ لیکن یہ دیکھ کر کونسل کے اراکین کو سخت مایوسی ہوئی کہ اس طرح کے کوئی اقدامات نہیں کیے گئے بلکہ حکومت کی جاری کردہ اسکیم کو غیر سودی اقدام کہا گیا ہے، جو نہ صرف حقیقت کے بالکل خلاف ہے بلکہ اس سے اندرون ملک و بیرون ملک یہ تاثر قائم ہو گا کہ پاکستان میں ایسی اسکیموں کو جو واضح طور پر سودی ہیں غیر سودی اقدام کہا گیا ہے۔ ظاہر ہے کہ یہ صورت حال ملک یا حکومت کے لیے انجام کار بدنامی ہی کا موجب ہو سکتی ہے جس سے بہر صورت احتراز کیا جانا چاہیے۔ نیز آخرت کے مواخذہ سے بھی ڈرنے کی ضرورت ہے۔ (صفحہ 58)

سود کے خاتمے کے سلسلے میں جو تجاویز کونسل کی رپورٹ میں شامل ہیں وہ کونسل کی نظر میں پوری طرح قابل عمل ہیں۔ کونسل کے نزدیک معیشت اور بنکاری کے نظام کو اسلام کے مطابق ڈھالنے کا عملی خاکہ نہ تو علماء تہمتار کر سکتے ہیں نہ نظری معاشیات کے ماہرین، نہ انتظامیہ کے افسران اور نہ تہمتار۔ اس مقصد کے لیے ان تمام طبقات کی مشترکہ سعی ہی کارگر ہو سکتی ہے۔ کونسل نے اسی طریقہ کار کو اختیار کیا تھا اور کام کے مختلف مراحل میں علماء ماہرین، بنکاری، ماہرین معاشیات اور کاروباری طبقوں کے نمائندوں نے کونسل کا ہاتھ بٹایا تھا، لیکن حیرت کی بات یہ ہے کہ حکومت نے ان تمام طبقات کی مشترکہ مساعی پر اپنی انفرادی حکمت عملی کو ترجیح دی ہے۔ (صفحہ 58-59)

61. In

this respect, we would also like to refer to the observations of a well-known Economist, Prof. Dr. Najibullah Siddiqui' of Malik Abdul Aziz University, Jeddah, In his book “Islamic Publications, Lahore 1969) he writes:

بنکاری

”اسلام نے سود کو حرام قرار دے کر انسانی زندگی سے ظلم اور بے انصافی کی ایک بہت بڑی شکل کو ختم کرنا چاہا ہے اور عملی اعتبار سے دور جدید میں اسلامی زندگی کی تنظیم نو کے سلسلے میں یہ ایک بہت بڑا چیلنج ہے۔ جدید معیشت میں سود اور سودی کاروبار کلیدی اہمیت کا حامل ہے بینکنگ کا پورا نظام سود پر قائم ہے معاشی زندگی کی اسلامی تعمیر نو کے لیے ضروری ہے کہ سود کے بغیر بینکنگ کا نظام قائم کیا جائے، اور کامیابی کے ساتھ چلایا جائے۔“

”اسلامی معاشیات کے موضوع پر لکھنے والے اس بات پر متفق ہیں کہ سود کے بغیر بھی بینکنگ کا کام اس طرح چلایا جاسکتا ہے کہ وہ اپنے معروف و خائف انجام دے سکیں۔ یہ مفکرین اس بات پر بھی متفق ہیں کہ بینکنگ کی اسلامی تنظیم نو شرکت اور مضاربت کے شرعی اصولوں کی بنیاد پر کی جانی چاہیے۔“ (ص 11)

”یہ واضح کر دینا بھی مناسب ہو گا کہ ہم اسلام میں سود کی حرمت کو ایک مسلمہ امر تسلیم کرتے ہوئے گفتگو کر رہے ہیں اور تجارتی سود یا بینک کے سود کو حرام سود کی تعریف میں داخل سمجھتے ہیں۔“

”اس کتاب میں صرف یہ واضح کیا جائے گا کہ شرکت اور مضاربت کے اصولوں پر بینکوں کا قیام کس طرح عمل میں لایا جاسکتا ہے اور وہ اپنے معروف و خائف کس طرح انجام دے سکتا ہے۔“ (ص 12)

”غیر سودی بینکاری کا مطالعہ کرتے وقت یہ حقیقت بھی سامنے رہنی چاہیے کہ اس نظام کو کامیابی کے ساتھ چلانے کے لیے ضروری ہے کہ جس ملک میں اسے نافذ کیا جائے وہاں سود قانوناً ممنوع ہو اور سودی لین دین کو قابل سزا جرم قرار دیا جائے جہاں اس قانون کو سختی کے ساتھ نافذ نہیں کیا جائے گا وہاں اس کا امکان باقی

رہے گا، کہ بعض اصحاب سرمایہ انفرادی اغراض کے تحت اجتماعی مفاد کو نقصان پہنچائیں وہاں سودی لین دین کا "چور بازار" (Black Market) وجود میں آکر غیر سودی نظام کی کارکردگی کو متاثر کر سکتا ہے۔ اس ناگزیر شرط کے علاوہ بعض ایسے حالات بھی ہیں جن کو پیدا کیے بغیر اس بات کی توقع نہیں کی جاسکتی کہ غیر سودی معیشت میں توازن پیدا ہو سکے، مثلاً حاجت مند صارفین کے لیے اجتماعی کفالت کا معقول انتظام اور سرمایہ کی ذخیرہ اندوزی کی حاصل کے ذریعہ ہمت شکنی۔ یہ اور ان جیسے دوسرے سازگار حالات ایک ایسے اسلامی نظام میں بدرجہ اولیٰ پیدا کیے جاسکیں گے جو سود کو قانوناً ممنوع قرار دینے کے ساتھ دوسرے شرعی قوانین کو بھی نافذ کرے اور شرعاً مطلوب مقاصد کو حاصل کرنے کا پورا اہتمام کرے" (ص 13)

(Let it be noted that the Council in 1983 had also prepared a Draft Ordinance of Prohibition of Interest). (See. P. 117 Council's Report on Islamic Economic System, December, 1983).

62. Most probably, due to the rigors of Income-tax and Excise laws, and for other-reasons, as the Council was already apprehensive, the practice of granting and receiving loans and other credit facilities on the basis of interest continued unhampered. Let us quote here from the Council's Report on 'Elimination of Interest from the Country's Economy'--

"The Council wishes to stress that with a view to ensuring the success of the new system of banking, it is of paramount importance that the Government should carry out a thorough reappraisal of the tax system, focusing in particular on the need for greatly simplifying the system of income-tax. The need for this measure was earlier underscored by the Council while submitting its Report on the introduction of Zakat and it was pointed out in this context that proper collection of Zakat would be difficult to achieve so long as the Income-tax system was not simplified and made sufficiently easy for the assesseees, Regrettably, however, this recommendation of the Council has yet to be given effect. In submitting its present Report the Council wishes to express its deep concern in this regard once again, particularly in view of the fact that a thorough-going reform of the income-tax system is a sine qua non for the success of an interest-free banking system. This is because of the fact that under the new system, the income of the bank would crucially depend upon the profits of the business firms which receive financial assistance from them. If the existing system of income-tax remains as it is the business firms would continue the malpractice of concealing their profits and maintaining multiple sets of accounts which would deprive the banks from their rightful share in the profits of these concerns and would thus adversely affect the earnings of the banks (Introduction, p. 4, para. 4)."

63. It is also noticeable that the President, General Muhammad Zia-ul-Haq, while constituting Federal Shari'at Court on 26th June, 1980, and empowering the said Court to declare a law as void if found repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet' (pbuh) excluded from the jurisdiction of the said Court the consideration of all questions relating to financial matters, including Riba (Refer Chapter III- A, Article 203- B (c) of the Constitution of 1973), until the expiration of three years from the commencement of the said Chapter. With the result that the question of interest was to remain

outside the jurisdiction 'of the Federal Shari'at Court up to 25th June, 1983 (See definition of the word "law which includes 'any custom or usage having the force of law but does not include the Constitution, Muslim Personal Law, any law relating to the procedure of any Court or Tribunal or; until the expiration of three years from the commencement of this Chapter any fiscal law or any law relating to the levy and collection of taxes and fees or banking, insurance practice and procedure). It is also noticeable that the said period of 'three' years was substituted by 'four' for the word 'three' by the Constitution (Second Amendment) Order, 1983 (P.O. No. 7 of 1983) section 2 (with effect from May 19, 1983), which was again substituted by the Constitution (Second Amendment) Order, 1984 P.O. No. 2 of 1984) section 2 (with effect from April 26, 1984) by the word 'five' which was again substituted by '10 years' by P.O. No. 14 of 1985, Art. 2 and Schedule item 42 (with effect from March 2, 1985), that is, the bar to continue till 25th June, 1990. The said period having expired the bar stood removed and the jurisdiction with regard to examining any provision of any fiscal law or any law relating to the levy and collection of taxes and fees or banking, insurance practice and procedure now vests in this Court.

64. It is further noticeable that ... despite repeated demands and recommendations for removing the said ban, made by almost all the Ulema and Mashaikh Conferences" held during 1981-88, under the auspices of the Ministry of Religious Affairs and presided over by late General Zia-ul-Haq, the period of exclusion of jurisdiction of this Court to examine Fiscal Laws was extended from time to time, as stated above, even after the late President got a mandate for enforcement of Islam through the Referendum held in 1984, as is evident from the preceding paragraph.

65. Now, to deal with the subject of 'Interest' which is a common question in all these petitions it is intended to give first its literal meaning and then its Shar'iah meaning with illustrations from the Holy Our'an and Sunnah of the Holy Prophet (p.b.u.h.) and its prohibition in relation to the present day practice of our Banks and other financial institutions as raised in the petitions before this Court.

66. In the Our'an the word riba literally means:

(i) to grow, e.g.

وترى الارض هامدة فاذا انزلنا عليها الماء اهتزت وربت (الرح: 5)

"And thou beholdest the earth barren, then when We send down water upon it, it quickens and grows " (XXII: 5);

(ii) to increase; to prosper;

يمحق الله الربوا ويربى الصدقات (البقره: 276)

"God destroys *riba*, but makes alms prosper ;(II : 276)

وما آتيتم من ربا ليربوا في اموال الناس فلا يربوا عند الله (الروم : 39)

"And whatever you invest in *riba* so that it may increase upon the people's wealth, it increases not with God;" (XXX: 39);
(iii) to rise (for example of a hill), as

و آوينا هما بربوة (المومنون: 50)

"And we gave them refuge upon a height.. " (XXIII: 50);

كمثل جنة بربوة. (البقرة: 265)

"As the likeness of a garden upon a hill....." (II: 265);

[iv] to swell (for example, foam), as

فاحتتمل السيل زبدا رابيا. (الرعد: 17)

"Then the torrent carried a swelling scum;" (XIII: 17);

(iv) to nurture; to raise (a child); as

ار حمهما كما ربياني صغيرا .(بنى اسرائيل : 24)

"My Lord, have mercy upon them (i.e. my parents) as they raised me up when I was little; (XVII: 24);

الم نربك فينا وليدا (الشعراء: 18)

"Did we 'not raise thee amongst us as a child?" (XXVI: 18):

(vi) augmentation, increase in power, etc., as

فاخذهم اخذة رابية (الحاقة: 10)

"He seized them with a surpassing grip.... " (LXIX: 10);

ان تكون امة هي اربى من امة (النحل: 92)

"That one nation be more powerful than another nation " (XVI: 92).

67. According to the above Our'anic illustrations, the literal meaning of *riba* is, 'increase'. In Shari'ah it means "an addition, however slight, over and above the principal", and thus includes both usury and interest. (See: *Lanes's Arabic--English Lexicon*). This finds support from the best authorities on Arabic language like Imam Raghīb Isfahani (امام راغب اصفهانی) and Zubaydi

(زبيدي). Refer their Encyclopaedic works: *Mufradat al_Qur'an* (مفردات القرآن) and *Taj al-Arus* (تاج العروس).

68. The word "interest", by and large, has now been accepted and is understood as *Riba* (ربا) (See *Stiengass English--Arabic Dictionary*, Lahore, 1979 ~ the word "interest").

69. *Riba* (ربا) Usury, as defined in "A Dictionary of Islam" by Thomas Patrick Hughes, Lahore, 1964, page 544 means "A term in Muslim law defined as "an excess according to a legal standard of measurement or weight, in one or two homogeneous articles opposed to each other in a contract of exchange, and in which such excess is stipulated as an obligatory condition on one of the parties without any return".

70. The word riba appears to have the same meaning as the Hebrew *neshec*, which included gain, whether from the loan of money, or goods, or property of any kind. In the Mosaic law, conditions of gain for the loan of money or goods were rigorously prohibited. See Exold, xxii. 25; Lev. xxv, 36 (USURI).

71. Therefore, *Riba* includes both 'usury' and 'interest' as known in English terminology. In legal sense, it is that excess amount which a "Creditor" settles to receive/or recover from his "Debtor" in consideration of giving time to the said debtor for re-payment of his loan. Imam Tabri (d.310 A.H.) in *Tafseer Tabri* (Vol. III, p. 64) commenting on the Our'anic verse (احل الله البيع و حرم الربا) writes that.-

"الربا ببعض الزيادة التي يزداد رب المال بسبب زياده غريمة في الاجل و تاخير دينه عليه"

That is, Riba is that increase (financial) which an owner of valuable property (Mal) receives from his debtor for giving him time to repay his debt.

72. Ibn al-Athir, in his famous work *Kitab al-Nihayah fi-Gharib al-Hadith wa'l-Athar* Cairo, 1322 A.H. Vol II. p. 66 says:-

"الربوا الاصل فيه الزيادة. و في الشرع الزيادة على اصل المال من غير عقد تباع"

(The original meaning of riba is excess and in the terminology of the Shari'ah, it means increase in the principal without any contract of sale having taken place).

73. Ibn 'Arabi in his noted work, *Ahkam al Qur'an*, Cairo, 1957, Vol. 1, p. 242 has defined riba to be the name of every increase in lieu of which there is no consideration viz. property, (Mal):

"الربا في اللغة و الزيادة والمراد به في الاية كل زيادة لم يقبلها عوض"

This is the definition of which Allama Burhanuddin al-Marginani (d. 593 A.H.) has also stated in his famous book, Al-Hidayah (See Al_Hidayah, Qur'an Mahal, Karachi, Kitab-al-Buu' (كتاب البيوع) Sing. Bai (بيع) (Sale) Chapter on Riba (Vol. III, p. 78), which reads as under:-

"الربا هو الفضل المستحق لاحد المتعاقدين فى المعامضة الخالى عن عوض شرط فيه"

Riba in law, signifies an excess (increase) in (loan) contract in which such excess is stipulated as on obligatory condition on one of the parties, without any return, i.e. without any property (Mal), in exchange. (See book XIV on Sale Chapter VIII on Riba or usury. Hidayah, English Translation by Hamilton, Lahore, page 289), Imam Fakhru-Din Al-Razi (d. 606 A.H.) in his well-known Tafsir Al Kabir writes that the meaning of the word Riba is increase but it does not mean that to recover every kind of increase is Riba and is unlawful (حرام). The forbiddance of Riba relates to a special kind of contract which was known amongst the Arabs as Riba al Nasiyah (ربا النسبه) i.e. increase on debt. (The other kind of riba is called "Riba al-Fadl" (ربا الفضل) is outside scope of the present discussion).

74. Al-Jassas in Ahkam al-Qur'an (Istanbul, 1335 A.H. Vol 1, p. 469) defines the term 'riba' as follows:

"هو القرض المشروط بغير الاجل وزيادة مال على المستقرض"

(Riba is the loan given for a specified period on condition that on the expiry of the period, the borrower will repay it with some excess)

75. Maulana Mawdudi has stated the definition of riba as follows:

"پس سود کی تعریف یہ قرار پائی کہ قرض میں دیے ہوئے اس المال پر جو زائد رقم مدت کے مقابلے میں شرط اور تعین کے ساتھ لی جائے وہ سود ہے" (سود لاہور 1967ء، ص

(139)

76. Even in common law parlance "interest" has been held as "The excess over the original advance is certainly the compensation which the creditor gets for lending his money for the particular period. The fact that it is not described in so many words as interest will not alter its character". (A I R 1944 Mad. 243).

77. Halsbury's Laws of England, Vol. 23, S. 253 defines interest as follows:--

"Interest when considered in relation to money denotes the return of consideration or compensation for the use of retention by one party of a sum of money or other property belonging to another."

78. It can thus be concluded that interest is not increase simpliciter but in the Sari'ah it is a special kind of increase, otherwise in Bai (Sale) there is an increase which is termed as profit, whereas Riba is the consideration or compensation for the period of re-payment of loan. Since this 'period' is not a valuable property (Mal), its return has been declared as unlawful, whether it be-money or any other thing. In other words, wherever there is money from the One Part and there is only grace period or deferment of the repayment of loan on the other, and for that a

'return' is stipulated it is Riba. On a careful study of several forms of commercial activities and credit transactions, prevalent among Arabs during the period of Holy Prophet (pbuh) a transaction which contains excess or addition over and above the principal amount of loan, which is pre-determined in relation to time or period to be conditional on the payment of that pre-determined excess or addition, payable to the creditor (such a transaction containing the said elements) constitutes Riba and any sale, transaction or credit facility, in money or in kind, has been considered to be a transaction of *Riba*, which is unlawful, Haram (حرام) in territory of Islam, (Dar al Islam ((دار الاسلام)), in Muslim society. There is consensus (Ijma' (اجماع)) of the Muslim jurists on it.

79. The word Riba in its various linguistic forms has been used at about 20 places (See: S.II-265, 275, 276, 278, III: 130, IV: 161, XIII: 17, XVI, 92, XV11 24, XXII: 5, XXVI: 18, XXX: 39, XLI: 39, LXIX: 10) in the Holy Qur'an. The relevant for the present discussion are the following verses:-

"الذين ياكلون الربوا لا يقومون الا كما يقوم الذي يتخبط الشيطان من لمس ذلك بانهم قالوا انما البيع مثل الربوا واصل الله البيع وحرّم الربوا لمن جاء، موعظة من ربه فانتهى فله ما سلف وامره الى الله ومن عاد فانك اصحاب النار هم فيها خالدون۔

يُحَقِّقُ اللَّهُ الرَّبْوِ او يَرِي الصَّدَقَاتِ وَاللَّهُ لِيَجْزِيَ كُلَّ كَفَّارٍ شِيمٍ" (البقرة: 275-276)

"يا ايها الذين آمنوا اتقوا الله وذروا ما بقى من الربوا ان كنتم مؤمنين۔ فان لم تفعلوا فاذنوا بحرب من الله ورسوله وان تبتم فلكم رؤس امواكم لا تظلمون ولا تظلمون"

وان كان ذو عسرة فنظرة الى ميسرة وان تصدقوا خير لكم ان كنتم تعلمون واتقوا يوما ترجعون فيه الى الله ثم توفى كل نفس ما كسبت وهم لا يظلمون" (البقرة: 278)

(281-

"Those who live on usury will not rise (at Resurrection) but like a man possessed of the devil and demented. This because they said that trading is like usury. But trade has been sanctioned and usury forbidden by Allah. Those who are wanted by their Lord and desist will keep (what they have taken of interest) already and those who revert to it again are the residents of Hell where they will abide forever.

80. Allah takes away (gain) from usury, but adds (profits) to charity: and God does not love the ungrateful and unjust. O believers, fear Allah and forego the interest that is owing if you really believe.

If you do not, beware of war on the part of Allah and His Apostle.

But if you repent, you shall keep your principal.

Oppress none and no one win oppress you.

If a debtor is in want, give him time until his circumstances improve, but if you forego (the debt) as charity, that will be to your good, if you really understand.

Have fear of the day when you go back to Allah. Then each will be paid back in full his reward and no one will be wronged."

"يا ايها الذين آمنوا لا تاكلوا الربوا اضعافا مضاعفة واتقوا الله لعلمكم تفلحون" (العمران 3:130)

O you, who believe, do not practice usury, charging doubled and redoubled (interest): but have fear of Allah: you may well attain your goal. (Al-Imran 3: 130)

"وما تبيتم من ربا ليربوا في اموال الناس فلا يربوا عند الله وما تبيتم من زكوة تزيدون وجه الله فاولئك هم المضعفون۔ (الروم ٣٠:٣٩)

What you invest at usury ill order to increase your capital on other people's wealth, does not find increase-with Allah; yet what you give in alms and charity, seeking Allah, will be doubled. (Al-Rum 30:39)

"فبظلم من الذين هادوا حرمنا عليهم طيبات احلت لهم وبصد هم عن سبيل الله كثيرا" (النساء ٣:١٦٠)

"واخذهم الربوا وقد هوعنه واكاهم اموال الناس بالباطل واعتمدنا للكاكفرين منحهم عذابا اليمما" (النساء ٣:١٦١)

(Because of the wickedness of some among the Jews and because they obstructed people from the way of Allah, We forbade them many things which were lawful for them; And because they practiced usury although it had been forbidden to them, and for usurping others' wealth unjustly. For those who are unbelievers among them we have reserved a painful punishment (Al-Nisa'. 4:160-161) (Translation of the above verse has been reproduced from (Prof.) Ahmad Ali's "Al-Qur'an" a contemporary translation" (with the only substitution by Allah for God).

81. It is stated in Al-Muntakhab fi Tafseer Al-Qur'an Al-Karim (المنتخب في تفسير القرآن الكريم) written by a Committee of the Qur'an & Sunnah (لجنة القرآن والسنة) of the Supreme Council of Islamic Affairs (المجلس الاعلى لشئون الاسلاميه) Ministry of Arab Republic of Egypt, that:

"الربا المذكور في الآية هو ربا بالجاهلية وهو الزيادة في الدين في نظير الاجل وهو حرام في قليله وكثيره" (underlined to be ckeced)

"Riba stated in the Verse (11-275) is a Riba prevalent among Arabs in the pre-Islamic era and that is the increase in loans in lieu of period of time (granted to the debtor for repayment of loan), and that is unlawful (حرام) whether it (riba) be less or more.

Reference may also be made to Alkashshaf An Haqa'iq Ghawamid al-Tanzil (الكشاف عن حقائق) by Imam Jarullah Mahmood bin Umar al-Zamkhshari (امام جار الله محمود بن عمر) (غوامض التنزيل) (d. 528 A.H.) Vol.1, pp. 319 - 323).

82. Muhammad Ali al-Sabuni (now based in Sa'udi Arabia) in his Tafsir Ayat al Ahkam (تفسير آيات الاحكام) Damascus, 1397 A.H. - 1977 A.C., Vol. 1, page 383 writes that the dictionary meaning of Riba is (الزيادة مطلقا) i.e. an absolute increase (without any attribute or qualification) "and in Sbariah it means (المقرض من المستقرض مقابل الاجل زيادة باخذها) the increase or excess which the creditor takes from his debtor in lieu of the deferred period (for repayment of loan).

83. Syed Outub Shaheed (may Allah have His infinite Mercy on him) of Egypt, in his notable work, Tafsir fi Zilal al-Our'an (Verses 275-81, Surah AI- Baqarah), has dealt with the question of Riba elaborately. In short, as stated by him "interest and Islam cannot remain together in a (Muslim) Society". An extract from the translation of the above Tafsir reads:

"اولین حقیقت یہ ہے کہ جس سماج میں سودی نظام کے زیر سایہ اپنی زندگیاں گزار رہے ہیں۔ وہاں اسلام کا کوئی وجود قائم نہیں رہ سکتا۔ کیونکہ اسلام اپنی اساس ہی کے لحاظ سے سودی نظام سے براہ راست متصادم ہے اور یہ دونوں نظام ایک وقت میں اور ایک معاشرے میں نہیں رہ سکتے۔ بلکہ سود کے وسیع تر اثرات اسلام کو لوگوں کی اخلاقی اور اعتقادی زندگی میں بھی پینپنے نہیں دیتے اور دلوں کی گہرائیوں سے بھی اسلام کو کھرچ کھرچ کر نکال دیتے ہیں۔ دوسری حقیقت یہ ہے کہ سود انسانیت کے اخلاق، ایمان اور تصور حیات ہی کے لیے مصیبت نہیں ہے بلکہ سود خالص اقتصادی اور عملی لحاظ سے بھی ایک زبردست لعنت ہے، سودی نظام انسانی سعادت پر ڈاکہ ڈالتا اور انسان کے معتدل نشوونما میں بگاڑ پیدا کرتا ہے، حالانکہ سودی نظام کی ظاہری چمک دمک سے ایسا لگتا ہے، جیسے یہ انسانی نشوونما میں مدد دینے میں معاون اور مددگار ہو۔

تیسری حقیقت یہ ہے کہ اسلام میں اخلاقی اور عملی نظام باہم، مگر مربوط اور پوپوست ہیں۔ اسلام میں انسان کا ہر عمل شرط خلافت کے ساتھ مشروط ہے اور یوم آخرت میں ہر عمل کی جو ابدھی کرنا ہے اور اسلام کا اقتصادی نظام بغیر اخلاق کے قائم نہیں ہو سکتا۔

چوتھی حقیقت یہ ہے کہ سودی معاملات فرد کے ضمیر۔ اخلاق اور شعور کو تباہ اور جماعتی زندگی کو ختم کر کے رکھ دیتے ہیں۔ کیونکہ سودی کاروبار سے لوگوں کے دلوں میں طمع، حسد، لالچ، کینہ، دھوکے بازی اور فریب کاری جیسے امراض پیدا ہو جاتے ہیں۔ جو اجتماعی زندگی کو گھن کی طرح کھا جاتے ہیں۔ سود سرمائے کو بہا کر ہر اس جگہ لے جاتا ہے، جہاں سے سرمایہ دار کو زیادہ سے زیادہ فائدے کی امید ہو، اسی وجہ سے دور جدید میں سرمائے کا بہاؤ عریاں فلموں، گندی صحافت، رقص گاہوں، کلبوں اور ان تمام چیزوں کی جانب ہو چکا ہے جو انسانی اخلاق کے لیے تباہ کن ہیں، کیونکہ سودی سرمایہ کاری کا مقصد زیادہ نفع کمانا ہے۔ اس لیے وہ انہی کاموں میں کھپتا ہے۔ جہاں انسان کی پست خواہشات بھڑکتی ہوں اور سفلی جذبات تسکین پاتے ہیں۔

پانچویں حقیقت یہ ہے کہ اسلام ایک مکمل اور جامع نظام حیات ہے جب سودی تعامل کو حرام قرار دیتا ہے تو ایک ایسا اقتصادی نظام بھی پیش کرتا ہے، جس میں سرے سے سود کی کوئی ضرورت ہی پیش نہیں آتی، اسلام انسان کی اجتماعی زندگی کے مختلف پہلوؤں کی اس طرح تشکیل کرتا ہے کہ ان کا نشوونما بھی جاری رہے اور سود کا بھی کہیں گزرنہ ہو سکے۔

چھٹی حقیقت یہ ہے کہ اگر کسی وقت اسلامی نظام زندگی عملی شکل میں برتاؤ، تو سودی لین دین کی بندش کے ساتھ جدید تہذیبی، اقتصادی ادواروں کو ختم نہیں کیا جائے گا۔ بلکہ ان کی تطہیر کر کے انہیں اسلامی اصولوں کی روشنی میں از سر نو مرتب کیا جائے گا۔

ساتویں حقیقت یہ ہے جو شخص بھی مسلمان ہے اور مسلمان رہنا چاہتا ہے اسے بہر حال یہ یقین کامل رکھنا چاہیے کہ یہ امر محال ہے کہ اللہ سبحانہ کسی ایسی شے کو حرام قرار دیں، جو حیات انسانی کی نشوونما کے لیے ضروری ہو اور اسی طرح یہ بھی ممکن نہیں ہے کہ کوئی بات برائی ہو اور اس کے باوجود بھی وہ انسانی زندگی کے لیے ناگزیر ہو۔ اللہ سبحانہ نے انسان کو پیدا کیا اور زندگی کی تخلیق فرمائی۔ انہوں نے ہی نے انسان کو زندگی کی نشوونما اور فروغ کا حکم دیا۔ اس لیے خدا کسی ایسی شے کو حرام نہیں قرار دے سکتا جو انسانی زندگی کے تقدم اور نشوونما کے لیے ضروری ہو اور نہ ہی یہ ہو سکتا ہے کہ کوئی خبیث اور بری شے انسانی زندگی کے لیے ناگزیر بن جائے۔ یہ تصور کہ سود اقتصادی نشوونما کے لیے ناگزیر ہے ایک انتہائی غلط اور خبیث پراپیگنڈا کا نتیجہ ہے۔ اس تصور کو ساری دنیا میں خوب خوب اچھالا گیا ہے، اسے تعلیمی اور ثقافتی مراکز میں جاگرا کیا گیا ہے اور سود خوروں کی کوششوں سے لوگوں کے ذہنوں میں یہ بات اتار دی گئی ہے کہ معاشی زندگی بغیر سود کے استوار نہیں ہو سکتی اور اس تصور کے تمام ذہنوں میں سرایت کر جانے کی دو جہات ہیں:-

ایک وجہ تو لوگوں کے دلوں کا ایمان سے خالی ہونا ہے اور دوسری وجہ ان کے ذہنوں کا کسی غیر سودی نظام کے سوچنے سے عاجز ہونا ہے۔۔ کیونکہ سود خوروں نے اس تصور کو خوب اچھی طرح پھیلا دیا ہے اور وہ تمام دنیا کی حکومتوں اور ذرائع ابلاغ کے دروبست پر کلیتہً قابض ہو چکے ہیں۔

آٹھویں حقیقت یہ ہے کہ اگر امت مسلمہ پاک و صاف اور سچے ارادے اور حقیقی عزم کے ساتھ اٹھ کھڑی ہو اور عالمی سود خوروں کی ٹولیوں سے آزادی حاصل کر لے تو وہ اب بھی اسلام کا غیر سودی اقتصادی نظام برپا کر سکتی ہے، جو عملاً ایک عرصے تک قائم رہ چکا ہے اور جس کے تحت انسانیت نشوونما اور فروغ پا چکی ہے اور اب بھی انسانیت کی فلاح اسلامی نظام ہی میں مضمر ہے، بشرطیکہ انسانیت اس حقیقت کو سمجھ لے۔ (تفسیر فی ظلال القرآن اردو، پارہ 3، اسلامی اکیڈمی لاہور، صفحہ 70)

84. Late Syed Abul A'la Maudoodi in his famous book "سود", Sud, Islamic. Publications. Lahore, 1961, pp. 148-49 writes that:-

"سود کے مسئلہ میں ابتدائی حکم صرف یہ تھا کہ قرض کے معاملات میں جو سودی لین دین ہوتا ہے وہ قطعاً حرام ہے، لیکن بعد میں آنحضرت صلی اللہ علیہ وسلم نے اللہ تعالیٰ کی اس وحی کے ارد گرد بند شیش لگانا ضروری سمجھا تا کہ لوگ اس کے قریب بھی نہ پھٹک سکیں۔ اس قبیل سے وہ فرمان نبوی ہے جس میں سود کھانے اور کھلانے کے بعد سود کی دستاویز لکھنے اور اس پر گواہی دینے کو بھی حرام کیا گیا ہے، اور اس سے قبل وہ احادیث ہیں جن میں ربوا الفضل کی تحریم کا حکم دیا گیا ہے"

Reference may also be made to late Syed Abul A'la Mawdudi's "Tafhirm al-Qur'an ((تفہیم القرآن)) Vol. 1) pp.210-18, 287-88 and 422. Also see Ma'arif al Qur'an (معارف القرآن) by Grand Mufti of Pakistan, Mufti Muhammad Shafi, Vol, pp. 585-622.

85. There are also a number of traditions of the Holy Prophet (p.b.u.h.) which, forbid Riba. These traditions have been narrated by Imam Malik, Bukhari, Muslim, Abu Daud, Tirmizi, Nasa'i, Ibn Majah, Ahmed ibn Hanbal; Dar Outni and several other Traditionalists (Muhaddithin) (محدثین) in their Collections of Ahadith (احادیث) through various chains of authorities. Here we may refer to few of them:

(i) Muwatta, Imam Malik (موطا امام مالک) (Arabic-Urdu), Karkhana- i- Tijarat Kutub, Karachi, p.575. Trans. by Professor Rahimuddin, published by Sh. Muhammad Ahsraf, Lahore, 1980, page 303 states the following Traditions:

”عن زید بن اسلم انه، قال كان الربا في الجاهلية ان يكون للرجل على الرجل الحق الى اجل فاذا حل الاجل قال اتقضى ام تربي فان قضى اخذ والا زاده في حقه و اخر عنه في الاجل.“

(Zaid b. Aslam reported that interest in pagan times was of this nature: When a person owed money to another man for a certain period and the period expired, the creditor would say: You pay me the amount or pay the interest. If he paid the amount, it was well and good; otherwise the creditor increased the loan amount and extended the period for payment again).

(ii) AI-Tarteeb wal-Bayan by Muhammad Zaki Saleh, Vol. II, Egypt 1374 A.H .. = 1957 A.C. P .234: states that:

”روى مسلم و ابو داود والترمذى عن جابر قال لعن رسول الله صلى الله عليه وسلم اكل الربا و موكله وكاتبه و شاهديه وقال هم سواء”

(According to Jabir, the Holy Prophet cursed those who receive and pay interest and the scribe of the deed and those who bear witness to it and said they are equal). (Muslim).

- (iii) Muslim has also reported from Abdullah Ibn Masud that the Holy Prophet cursed the receiver of interest as well as its giver, the scribe of the interest deed and the witnesses to it: and further said that they all are equal (in the act of committing sin). (Muslim).

86. Al-Bayhaqi (d. 458 A.H.) in his Sunan has a chapter titled as:

”كل قرض جر منفعة فهو ربا”

(Every loan from which some profit accrues is riba). In this chapter there occurs the following hadith.

عن فضالة بن عبيد صاحب النبي صلى الله عليه وسلم انه قال كل قرض جر منفعة فهو وجه من وجوه الربا. (موقوف)

(A Companion of the Prophet, Fudalah b. Ubayd, said that every loan from which some profit accrues to the creditor is one of the forms of riba).

87. It is also stated by Al-Suyuti (d. 911 A.H.) in his work al-Jami' al- Saghir, Cairo, 1954, p. 94, as:

فهو قرض جر منفعة فهو ربا.

(Every loan from which a profit accrues is riba) But this is not all, (Traditionist 'Ali al-Muttaqi of Burhanpur (d. 975 A.H.) has quoted this very hadith in Kanz al-'Ummal of Vol. IV, p. 665.

88. Abu Dawud in his Sunan narrates:

”عن محارب قال سمعت جابر بن عبد الله يقول كان لى على النبي صلى الله عليه وسلم دين فقضاني وزادنى (مسند حنبل) (٣١٩/٣)

(Muharib reported that he heard Jabir b. 'Abd Allah saying that the Prophet owed him (Jabir) some money and at the time of the repayment of the loan the Prophet added (some money)' in excess of the principal borrowed). This furnishes an example of an unstipulated and voluntary increase.

89. For further Hadith material on the prohibition of riba, see (مسئله سود) by late Maulana Mufti Muhammad Shafi, Karachi, 1979, pp. 68-99, wherein 47 ahadith have been stated).

90. Let us also refer to the last Sermon of the Holy Prophet (p.b.u.h.), in the presence of about a lac of his revered Companions (صحابه كرام). The following words of the Holy Prophet are very significant:

الا كل شئ من امر الجاهلية تحت قدمي موضوع و ربا الجاهلية موضوع و اول ربا اضعه ربا العباس بن عبدالمطلب فانه موضوع كله" (تفسير الخازن، الجزء الاول، ص ٣٠١)

(The Holy Messenger of Allah, on his last Pilgrimage and in his last address, declared the prohibition of interest in these words: "Every form of interest (Riba) is cancelled; capital indeed is yours which you shall have; wrong not and you shall not be wronged. Allah has given His Commandment totally prohibiting interest (Riba). I start with the amount of interest which people owe to Abbas and declare it all cancelled. "He then, on behalf of his uncle, Abbas, cancelled the total amount of interest due to his loan capital from his debtor").

91. Dr. Hameedullah, based at Paris and widely respected his piety and scholarship, in his book "Muhammad RasuluHah (Sallallahualaihi wa Sallam) Karachi, paragraph 34, tracing the history of Ka'ba (كعبه) and writing about its repairs/construction/reconstruction at one point of time, somewhere in 605 A.C -when on a tempestuous day sparks of fire were thrown by the wind on the curtains of the Ka'ba, which caught fire and the building was burnt out, and tempest was followed by torrential rains, and these dealt the final blow, so that the building of the Ka'ba crumbled down in heaps, writes that "Contributions were asked from everybody in the town, and it was solemnly announced that for the sacred building only honest money should be offered; prostitutes and usurious peoples were asked not to contribute anything" (underlining is mine). This implies that even among the pagans of Arabia, in those dark days of human civilization, usury (interest) was considered to be the money earned by dishonest means. We may also refer to paragraphs 144 and 226 of the same book. In a general meeting of all the population, both Muslim and non-Muslim, convened by the Holy Prophet, a Constitution for the State in Madina with Buffer states around, was reduced into writing, constituting the earliest written Constitution of a State, promulgated by its Head, in the world. The Christians of Najran who were highly organized religious people and were more fanatically attached to their faith, sent a delegation to Madina consisting, among others, of a bishop and a vicar (second Priest). They voluntarily acceded to the said Muslim State of Madina, as non-Muslim subjects, and obtained a Charter which conferred on them autonomy, both religious and administrative. It was covenanted that "they need no more pay the interest to their creditors, but only the capital of the loans. Naturally he (the Prophet) asked them not to take interest themselves either in future. All was reduced to writing, and the document has come down to us".

92. Analyzing the material of the Holy Qur'an and Sunnah of the Holy Prophet, referred to above, forbidding Muslims to devour interest, it is noticed that as the interest -bearing transactions were prevalent among the Arabs for a long time and it had taken roots in their economic and social life, the prohibition of interest came gradually. The injunction as contained in S.XXX: 39 of the Holy Qur'an is of an advisory nature, on moral plane, that interest, in reality, does not increase the wealth, but it is the charity, seeking Allah's pleasure, that increases manifold. The other injunction (S.II1 : 12) forbids Muslims to take compound interest (usury), in order to be dutiful to Allah the Almighty, so that real prosperity may come to them. Some people thought 'trade' and 'interest' alike. Then came the admonition that whoever devours interest will stand like the one whom Satan has bewildered and maddened by his touch. Then they were ordered to desist from taking interest and he who abstains from taking interest shall be pardoned past actions, but he who repeats the same shall go to Hell, where he shall abide forever. Then came an absolute injunction to Muslims to forego interest, if they really believe in Him and then came the warning, that if you do not forego interest, which has already accrued to you, and do not desist from taking it any further, beware of war on the part of Allah and His Apostle. This warning, in fact, implies that whoever wants to be in peace with Allah and his Apostle he is to desist from taking interest, otherwise state of war with Allah and His Prophet continues. Then came another injunction to be content with receiving back the principal amount followed by an advice that if the debtor is in difficulty, time be given to him (S.II:277-80). At the end (S.II:281), there is a reminder to have fear of Allah and that when they will go back to Allah, on the day of resurrection, each one will be paid back for what he has earned in this world.

93. Those who are of the view that it is the interest doubled and redoubled (اضعافاً مضاعفةً) only, which is prohibited (Verse 130 of Surah Al-i-Imran) fail to take into consideration the other verses on the subject. It is one of the accepted principles of interpretation of the Holy Qur'an that firstly the Holy Qur'an should be interpreted by the Holy Qur'an itself. Therefore, for the correct interpretation of a verse in the Holy Qur'an, the other verses of the Holy Qur'an, on the subject, must be looked into and taken together to find out the real intention of the Holy Qur'an and, then, the Sunnah of the Holy Prophet viz. his word (قول), act (فعل) and maintaining silence on one's words spoken or act done in his presence by the Holy Prophet (تقرير), be called in-aid for its interpretation. Therefore, some of the writers on interest who have expressed their view that it is only the 'usury' (compound or excessive interest) which is prohibited or, in other words, it is the excessive rate of interest, which is prohibited and not a small percentage, to say the least, are entirely mistaken. We may here quote a passage from a notable work of late Dr. Fazl-ur-Rahman Ansari "The Qur'anic Foundations and Structure of Muslim Society", Begum Aisha Bawany Wakf, Karachi Vol, II, p. 327, which reads that:

"Because Riba is generally translated as usury, and because in modern parlance 'usury' signifies only an 'exorbitant rate of interest' some people have fallen into the error that, what the Holy Qur'an has really forbidden is an excessive rate of interest. In truth, it is only a misinterpretation of the term Riba, and a perversion of the Qur'anic teaching. That the Holy Book does not distinguish

between 'exorbitant' and 'reasonable' rates of interest is clear from the Our'anic Verse 2:278-80."

In this respect, we may also refer to the verse of the Holy Qur'an (ولا تشتروا باياتى ثمنا قليلا) (Surah Al-Maidah, 5:44) that is "Barter not my signs for a paltry grain". Does it mean that, only the barter for a "small" gain/price is prohibited and if the price is "high", there is no prohibition. Only a literalist, unaware of the style and manner of expression of the Holy Qur'an will so contend. In fact, the verse implies that if the entire world is offered to a Muslim in lieu of His one "Sign", the price offered is still small and one should not sell his religion (Din) in consideration thereof. Therefore, the words (اضعافا مضاعفة) are to pinpoint the aggravated situation then prevailing in certain parts of Arabia, which is highly deprecated.

94. If the meaning, extent and application of riba ordinance of the Holy Qur'an is restricted to its being doubled and redoubled (اضعافا مضاعفة) it goes directly against the historical evidence existed throughout the Muslim, civilization that the whole interest system was banned and declared unlawful. The illat al-hukm (علة الحكم), the cause of prohibition of interest is not that of its being doubled and re-doubled, as some modernists contend, but exploitation of poor and needy as evidenced by the Our'an itself: (لا تظلمون و لا تظلمون) (S. Al-Baqra 11:80) and the unequivocal command in the express words: (وذروا ما بقى من الربوا) (remit what remains of riba,) leaves no room for doubt that whatever is involved by way of interest, whether big or small, simple or compound; doubled or re-doubled, in whatever form or kind, is ordered to be remitted; let alone the principal amount to return with moral tone to give the debtor time, if he stands in need for it: (وان كان ذو عسرة فنظرة الى ميسره) (if, however, anyone is in difficulties, let there be a delay till he is able to pay even the principal amount, and: (وان تصدقوا) (خير لكم), although it is better for you to give it up).

95. The case is, therefore, not that only exorbitant or excessive rate of interest is prohibited but it includes a small percentage also. The word Riba as used in the Our'an is absolute in terms, and no attribute or qualification) (وصف) as to its quantity is to govern it, nor it has any credence (Refer: (المنتخب فى تفسير القرآن الكريم) (Op. cit).

96. Some modernists, including Yaqoob Shah, Ex-Auditor-General of Pakistan and Jafar Shah Phulwarvi⁴ have presented a view that the riba which is prohibited the Holy Our'an is that kind of riba which was prevalent among the Arabs at the time of the revelation of the verses relating to the prohibition of riba, because the word al-riba (الربا) has been particularized with (الف لام) (alif and lam) and as such will be relatable to the kind of riba which was then prevalent among the Arabs, and since the commercial loan for productive purposes was not in practice, the interest charged by the Banks for commercial purposes does not come within the ambit of 'al-riba', prohibited by the Qur'an as, then, there was no banking system. The argument is not tenable for two reasons.

⁴ كمرشل انٹرسٹ کی فقہی حیثیت، ادارہ ثقافت اسلامیہ، لاہور

97. Firstly, for the sake of argument, if it is accepted that the word *al-riba*, being a proper noun is relatable only to the *riba* prevalent among the Arabs, the Qur'anic address to "The Believers, (يا ايها الذين آمنوا) may also be contended to be relatable to the people who had by then entered into the fold of Islam or the word *al-khamr*, which is unlawful will also be restricted in its scope and its application to the kind of liquor used by the Arabs at the time of revelation of the verses prohibiting "*khamr*' (خمر) or for that matter '*al-Fahsha*' (الفحشاء) used in the Qur'an will also be deemed to be restricted in its application and scope to the forms of immorality which were then prevalent among the Arabs. Such examples can be multiplied, but only an ignorant man will say so.

98. It will be interesting to note that even in English law the word "interest" has a basic meaning of advantage or profit. When used with reference to a loan, interest means the profit or advantage of the creditor which he gets by giving to another the use of his money. If the contract stipulates that for the use of the creditor's money a certain profit shall be repayable to the creditor that profit is interest, by whatever name it is called, or if it is called by no name at all." (United Bank Ltd. v, Rubber Industry, 1982 CLC 2522).

99. Secondly, it is belying the history that there was no commercial loan for productive purposes during the period of the Holy Prophet. It is, however, admitted by them that there are few instances of agricultural loan. The argument is fallacious. A loan may be obtained for commerce or trade or agriculture or even for that matter industry but it remains a loan for productive purpose which is, the ultimate end.

100. It may, therefore, be stated that Riba forbidden in the Qur'an and Sunnah includes interest due on loans taken or given for commercial and productive purposes by banks or other financial institutions. This is obvious from the fact that at the time of the revelation of the Holy Qur'an, the Arabs used to take/give loans for commercial purposes on fixed rates of interest. Reference may be made to the following traditions: -

(i) In pre-Islamic period taking loans on interest for commercial and productive purposes was in practice. Makkah, Taif and Najran were known as famous commercial centers. As there was no agriculture and industry in that period, the Arabs to a large extent had to depend on such loans for maintaining their social life and for growth in their trade. The capitalists used to give loans on interest to the merchants and entrepreneurs. (See Jawad Ali: *Al-Mufassal fi'l Tarikah al-Arab qabal al-Islam*, Beirut, Volume VII, pages 219-227).

(ii) The inhabitants of Taif who belonged to Thaqif (ثقيف) tribe were famous for running business on interest. It is for this reason that when Holy Prophet made pact with the people of Taif, a condition was laid therein that the interest bearing business will be totally abolished and all the interest due from either side will also be wiped off. Some people of Taif gave loans to some traders of Makkah on fixed interest. (See Fazal-ur-Rahman Tijarati Sud, *Tarikhi ovr Fiqhi nuqtai nazar sai*, Aligarh, page 10).

(iii) When the Holy Quran prohibited the due interest in the verse:

يا ايها الذين آمنوا اتقوا الله و ذروا ما بقى من الربوا ان كنتم

("O ye who believe! Fear God, and give up what remains of your demand for usury, if ye are indeed believers" (2:278), a prolific writer, on Ouran Hadith and fiqh Jalaluddin Suyuti in Al-Durr-al-Manthur (الدر المنثور) Beirut, Vol, I, p. 366 explaining the above verse writes:

”نزلت هذا الآية في العباس و رجل من بنى مغيرة كانا شريكين في الجاهلية يسلفان في الربا الى ناس من ثقيف ... فجاء الاسلام ولهما اموال عظيمة في الربا فانزل الله ...”

(This verse revealed about Hazrat Abbas and a man from Banu Mughirah who were partners in pre-Islamic period and gave commercial loans on interest to the people of Thaqif belonging to Banu Zamrarah i.e. Banu Amar Bin Umair, When they embraced Islam, they had a great amount of interest due on the people. So this verse was revealed and they were ordered to give up the interest due on the people).

He further writes in this regard:--

عن ابن جرير في قوله تعالى يا ايها الذين آمنوا اتقوا الله الآية قال كانت ثقيف قد صالحت النبي صلى الله عليه وسلم على ان ما لهم من ربا على الناس وما كان للناس عليهم من ربا فهو موضوع فلما جاء الفتح استعمل عتاب بن اسيد على مكة وكانت بنو عمرو بن عوف ياخذون الربا من المغيرة يربون لهم في الجاهلية فجاء الاسلام ولهم عليهم مال كثير فاتاهم بنو عمرو ويظلمون ربا هم فابى بنو المغيرة ان يعطوهم في الاسلام ورفعوا ذلك الى عتاب بن اسيد فكتب الى رسول الله صلى الله عليه وسلم فنزلت يا ايها الذين آمنوا اتقوا الله و ذروا ما بقى من الربا الى قوله ولا تظلمون فكتب بهار رسول الله صلى الله عليه وسلم الى عتاب وقال ان رضوا والا فاذا نهم بحرب-

(It has been related on the authority of Ibn al-Juraij about this verse who said that the tribe of Thaqif made a pact with the Holy Prophet wherein they ordained that they will give up all the dues of the people regarding interest as well as that which they had to pay to the people as interest. After the conquest of Makkah, the Prophet appointed Attab Ibn Usaid as Governor of Makkah and Banu Amr Ibn Auf used to take interest from Banu Mughirah and they provided them loans on interest in pre-Islamic period. When they embraced Islam, they had a great amount of interest due to Banu Mughirah and Banu Amr demanded it from them. But Banu Mughirah refused to pay them the interest and the matter was referred to Attab who wrote to the Holy Prophet about it. On this above verse was revealed and the Prophet wrote to Attab that they should “give up” the due interest failing which we will be at war against them). He continues to say:-

”عن الضحاك في قوله اتقوا الله و ذروا ما بقى من الربا قال ربا يتبايعون به في الجاهلية فلما اسلموا امروا ان ياخذوا ربا من اموالهم”

(It has been related on the authority of Dahak who, while explaining the above verse, said that Arabs in pre-Islamic period took/gave loans on interest for commercial purposes. When Islam came, they were ordered to take/give their principal only).

101. It is pertinent to mention that Zubair- Ibn al-Awwam used to keep the savings of the people as trust so that he may invest them in a productive business and get benefits. It is for this reason that when he died, he had to pay five lacs to the people and left five crore and two lacs of dirhams. (Al-Bukhari, Muhammad Ibn Ismail, Delhi, Vol. 1, page 331).

102. In the period of Hazrat Umar, Abu Musa al-Asha'ary, the Governor of Iraq gave loan to the two sons of Hazrat Umar namely Abdullah and Ubaidullah and they invested that amount in a productive business:

"خرج عبد الله وعبيد الله ابنا عمر بن الخطاب في جيش الى العراق فلما تفقه مر ا على ابي موسى الاشعري وهو امير البصره -- اسلفهما المال للقراض -- فجعله عمر قراضا"

(Imam Malik al-Muawatta, Cairo, page 186).

103. Similarly, in the period of Hazrat Umar, Hind Bint Utbah took a loan from Baitul Mal for investment in a trade:

"كان عمر بن الخطاب قد استلف من بيت المال"

(Al-Tabari Ibn Jarir, Carro, Vol. III, page 87).

104. Hazrat Umar had taken loan from *Baitul Mal* on *mudarabah* and when he was near this death, he instructed his son Abdullah to return the said amount to *Baitul Mal*. (*Takmilah Fath al-Mulhim*, Karachi Vol. I, page 573).

105. Abdur Rahman Ibn Yaqub took a loan from Hazrat Usman for commercial purposes on the basis of mutual profit sharing:

"عن العلاء بن عبد الرحمن بن يعقوب عن ابيه انه عمل في مال لعثمان بن عفان على ان الربح بينهما"

(Al-Baihaqi, al-Sunan al-Kubra, Multan, Vol, VI, page 11).

106. A contemporary Muslim economist, M. Umar Chapra, Financial, Adviser to the Government of Saudi Arabia, writes in this regard:--

"On the occasion of his Farewell pilgrimage, the Prophet, while declaring the abolition of interest, announced the remission of interest accumulated in favour of his uncle 'Abbas Ibn Abd Al-Muttalib, this was interest on business loans extended to the Banu Thaqif tribe. This tribe had not taken the loan from Abbas and others for fulfilling the consumption needs but for expanding their business. This was not an isolated case but a prevalent form of business financing in those days. Several tribe members having skill in trading acted essentially like large partnerships, borrowing finance from members of their

own tribe or from other friend tribes, to carry on large-scale business which their own resources would not permit. This is because they could not undertake too many business trips abroad from east to west. The slow means of communication, the difficult terrain and the harsh climate confined them to mainly two caravan trips during the year, one in summer and one in winter (al·Our'an 106:2). Accordingly they collected all the finance they could muster to purchase the local produce, sell it abroad and bring back what was necessary to satisfy the entire needs of their society for imports during a specific period. Most of the interest based transactions mentioned in the classical commentaries in relation to the prohibition of *riba* are loans taken by tribes from each other, each tribe acting like a large partnership company. Islam abolished the interest-based nature of these relationships but reorganized them on a profit-and-loss-basis. "The financier got a just and the entrepreneur did not get crushed under adverse condition, one of which was the caravan being waylaid on the journey". (M.Umar Chapra, Towards a Just Monetary System. Wiltshire, pages 63-64).

107. An eminent Muslim Scholar, Shaikh Muhammad Abu Zahra of Egypt writes:----

"If the word "*Riba*" is interpreted as *riba* prevailing in pre-Islamic period then there is no argument for the fact that it was only charged on consumptional loans and was not charged on loans for productive and commercial purposes, but what is available for a reader from the authentic history is that it was mostly charged on loans for productive purposes. The circumstances of Arabs, the position of Makkah and the trade of Quraish all support the proposition that loans taken or given at the time were for productive purposes and not for consumptional purposes only" (Muhammad Abu Zahrah, *Buhus fi al-riba*, page 52, Beirut Edition.

108. An orientalist, Abraham Udovitch states that: -

"Any assertion that medieval credit was for consumption only and not for production is just untenable with reference to the medieval Near East." (Abraham Udovitch "Partnership and Profit in Medieval Islam", Precisceton, page 86).

109. It is pertinent to mention here that the difference between interest on consumptional loans and interest on productive loans is a difference of degree and not of kind since interest is nothing but an addition to the borrowed capital on deferred payment basis.

110. Mr. Fazfur Rahman, Lecturer, Faculty of Sunny Theology, Muslim. University, Aligarh, in his book

"تجارتی سود۔ تاریخی اور فقہی نقطہ نظر سے"

has undertaken an analytical study on the question of *riba*. The book, in fact, has two parts. The first part deals with the question as to whether in the pre Islamic Arabia the commercial interest

was prevalent or not and whether the system of borrowing loan for productive purposes was then existing? In the second part, he has undertaken a juristic study whether commercial interest falls within the definition of riba or not? The book, as a whole, is, in fact, a detailed criticism on the book (کمرشل انٹرسٹ کا فقہی جائزہ) published by Idara-e-Thaqafat Islamiya, Lahore. It may be stated that criticism on the said book of Ja'afar Shah Phulwari (which includes an article by Yaqub Shah) was previously published in eight installments in the well-known Urdu monthly journal *Burhan*, Delhi. It seems that the said Articles, later on, were compiled in the form of aforesaid book by Mr. Fazlur Rahman.

111. The learned author (Mr. Fazlur Rahman) writes under heading
"انٹرسٹ کا تاریخی جائزہ" as under:-

"

سترہویں صدی عیسوی میں ایک منظم ادارے کے وجود میں آنے کے ساتھ ساتھ، جس کا نام بینک کاری کا نظام پڑا،
دونوں اصلاحات بھی ابھریں

انٹرسٹ (interest) اور یوٹری (Interest)

وجہ امتیاز صرف مقصد استقراض کو قرار دیا گیا۔ قرض اگر ذاتی اور صرفی مقاصد کیلئے لیا گیا ہو تو اس پر اضافہ
"یوٹری" کہلایا، اور پیداواری مقاصد کی صورت میں اسے انٹرسٹ کا نام دیا گیا۔۔۔۔۔ جب مسلم ممالک سیاسی طور سے
مغرب کے زیر نگیں ہو گئے اور ساتھ ہی معاشی

میدان میں ان کے دست نگر اور محکوم، تو انیسویں صدی کے بعض مغرب زدہ مسلمانوں نے ایک طرف تو مغرب کی روز افزوں ترقیات کو دیکھا جو صنعت و تجارت کے میدان
میں انہیں حاصل ہو رہی تھیں اور دوسری طرف ان کی نگاہ اپنی ہم مذہب قوم کی معاشی پستی اور اقتصادی زبوں حالی پر بھی پڑی۔۔۔ اس چیز نے انہیں یہ کہنے پر آمادہ کیا کہ حرام
صرف "یوٹری" ہے نہ کہ "انٹرسٹ" کیونکہ انٹرسٹ کو حرام سمجھنے سے صنعت و تجارت کی راہ میں ناقابل عبور دشواریاں حائل ہو جائیں گی۔۔۔ یہ پریشان کن مسئلہ کہ قرآن
و سنت نے ربا پر مبنی سارے معاملات کو بالتصریح حرام کیا ہے، اس طرح حل کیا گیا کہ ربا کے لفظ کا ترجمہ "یوٹری" کر دیا گیا، اس طرح یہ سمجھا گیا کہ قرآن کا ربا جو حرام قرار
دیا گیا تھا وہ یوٹری تھا انٹرسٹ کی حرمت سے اسے کوئی سرور کار نہ تھا۔ (ص ۱، ۲)

"ان سب حضرات کے استدلال کی بنیاد یہ دعویٰ تھا کہ قرآن و سنت نے "ربا" کو حرام قرار دیا ہے اور "ربا" کے لفظ کا اطلاق صرف "یوٹری" پر ہوتا ہے جو اس اضافے کا نام
ہے جو قرض خواہ اس رقم پر لیتا ہے جسے صرفی و ذاتی حوائج کے لیے قرض لیا گیا ہے۔ ان کی رائے میں "ربا" کے لفظ کا اطلاق انٹرسٹ پر ہوتا ہی نہیں، کیونکہ ان حضرات کی
اطلاع کے مطابق جناب نبی کریم صلی اللہ علیہ وآلہ وسلم کے مبارک دور میں یا اس سے پہلے کمرشل انٹرسٹ عرب میں رائج تھا نہ وہ اس سے واقف تھے۔ (ص ۳)

"یوٹری" اور انٹرسٹ کا باہمی فرق صنعتی انقلاب کی پیداوار ہے جب صنعت اور تجارت کے میدان میں سرمایہ کو اولیٰ اہمیت حاصل ہوئی۔ چنانچہ یوٹری کا مطلب یہ سمجھا
جانے لگا کہ یہ قرض کا وہ قدامت پرستانہ معاملہ ہے جب روپیہ صرفی اغراض کے لیے لیا جاتا تھا۔ اس کے برخلاف انٹرسٹ کا مفہوم یہ بتایا گیا کہ یہ اسی قرض لیے ہوئے
روپے کا معقول معاوضہ ہے جو پیداواری کاموں یعنی صنعت یا تجارت میں لگانے کے لیے لیا گیا ہے۔ (ص ۴)

"جہاں تک قرآن، حدیث اور عربی زبان کے استعمال کا تعلق ہے، سب سے معلوم ہوتا ہے کہ نبی کریم صلی اللہ علیہ وسلم کے عہد مبارک میں عربوں کے ذہن میں اس طرح کا کوئی فرق دونوں طرح کے قرضوں میں قرض لینے کے مقاصد کے اعتبار سے نہیں تھا۔ قرض لیے ہوئے سرمایہ پر اضافہ، جس (اضافے) کا کوئی بدل موجود نہ ہو، عربی زبان میں "ربا" کہلاتا ہے خواہ وہ کسی مقصد اور غرض کے لیے لیا گیا ہو" (ص ۵)

فاضل مصنف نے قرآن و حدیث میں لفظ "ربا" کی لغوی شرعی حیثیت پر گفتگو کرتے ہوئے لکھا ہے کہ:

"اوپر دیے گئے حوالوں سے یہ بات صاف ظاہر ہوتی ہے کہ قرآن، حدیث، کتب فقہ، اور عربوں کا عرف و رواج سب کے نزدیک اس اضافے کا نام جو اصل رقم پر اس کے انتظار اور استعمال کے معاوضہ کے بطور لیا دیا جاتا تھا "ربا" تھا۔ اس سے کوئی مطلب نہ تھا کہ قرض کی نوعیت کیا ہے، اور قرض لینے کی غرض کیا ہے؟ وہ قرآن ہو یا حدیث، یا عربوں کے رسم و رواج، سب کو صرف اس "اضافے" سے سروکار ہے، اس کا نام "یوٹری" رکھ لیجیے یا اسے انٹرسٹ کہہ لیجیے اس سے کوئی فرق نہیں پڑتا۔ قرض پیداواری ہو یا صرفی، قرض لینے کا مقصد ذاتی اور صرفی حاجات کی تکمیل ہو یا کاروبار چلانا، ہر صورت میں اضافے کو "ربا" کہا جائے گا جو قرض کی رقم کے استعمال کے عوض لی جائے۔ لیکن "یوٹری اور انٹرسٹ" کا مذکورہ فرق موجود نہ ہونے کا مطلب ہرگز یہ نہیں کہ عرب پیداواری اغراض کے لیے قرض نہ لیتے تھے، جیسا کہ آئندہ اوراق سے معلوم ہو گا۔ اس سے مقصد صرف یہ ظاہر کرنا ہے کہ "ربا" کے مفہوم کی تعیین میں "مقصد استقراض" ایک قطعی غیر موثر عامل ہے" (ص ۷، ۸، ۹)

"چنانچہ یہ ایک حقیقت ہے کہ "وقت کی تحدید اور سود کی ادائیگی کی پیشگی شرطوں پر مشتمل لین دین اور ہر قسم کے سٹے کا کاروبار مکہ کی انتہائی ترقی یافتہ تجارتی تنظیم کا بنیادی عنصر تھا۔ ربوی کاروبار بھی ان کے نزدیک ایک تجارتی کاروبار تھا اور ربا بیع و شری کی طرح مبادلے کا ایک ذریعہ تھا۔ قریش نے اس سودی کاروبار کو بہت اونچے معیار تک ترقی دی تھی، وہ صرف اپنے قبیلے والوں کو ہی نہیں حجاز کے دوسرے شہروں کے باشندوں کو بھی سودی قرض دیتے تھے۔ سود کی حرمت سے پہلے حضرت عباس بن عبدالمطلب رضی اللہ عنہ اور خالد بن ولید رضی اللہ عنہ نے باہم مشترکہ سرمائے سے ایک کمپنی سی قائم کر رکھی تھی جس کا خاص کاروبار سود پر روپیہ چلانا تھا۔ ان حضرات کا کاروبار کئی تک محدود نہ تھا۔ طائف کے باشندوں کو وہ مستقل قرضے دیا کرتے تھے، خاص کر بنو عمرو بن عمیر کو جو قبیلہ بنو عوف کی ایک شاخ تھے۔ حضرت عثمان بھی ان مالدار تاجروں میں سے تھے جو زبردست پیمانے پر سودی کاروبار کرتے تھے۔ بدر کے تجارتی کارواں کے منتظمین خصوصی وہ لکھ پتی تھے جنہوں نے کارواں میں ہزاروں دینار تجارت میں لگانے کے علاوہ اپنا سرمایہ مختلف سودی کاروبار میں پھیلا رکھا تھا۔"

فاضل مصنف نے عرب اور دوسرے ممالک میں سود کے نظام کا نہایت تفصیل سے تاریخی جائزہ لیتے ہوئے لکھا ہے کہ:

"مذکورہ بالا حقائق کے پیش نظر اس دعوے کا کلی اطلاق ہو جاتا ہے کہ عہد نبوی کے عرب تجارتی اور پیدا آور قرضوں سے واقف نہ تھے اور نہ یہاں ایسے قرضوں کا رواج تھا اس لیے ربا کے لفظ کا اطلاق صرف صرفی نوعیت کے قرضوں تک محدود رہنا چاہیے اور ساتھ ہی ان اوراق کے شروع میں پیش کیے ہوئے عربوں کے کاروباری رسم و رواج اور سودی لین دین کے بارے میں پیش کردہ مواد کو سامنے رکھے کر یہ ثابت ہو جاتا ہے کہ عرب زمانہ قدیم سے تجارتی اور پیدا آور قرضوں سے نہ صرف واقف تھے بلکہ یہ قرضے اور ان پر مشروط اضافوں کا مطالبہ اور ادائیگی ان کے نظم معیشت کا ایک بنیادی پتھر تھی۔ لہذا "ربا" کے لفظ کا اطلاق صرفی اور پیدا آور دونوں نوعیتوں کے قرضوں پر ہو گا اور حقیقت ربا کے تعیین میں مقصد استقراض کو غیر متعلق (Irrelevant) اور لغو قرار دیا جائے گا۔" (ص ۶۳، ۶۴)

112. All the above quotations provided ample evidence that loans on interest or on mudarabah for commercial purposes were in practice among the Arabs at the time of revelation of the Holy Qur'an and when the Holy Qur'an prohibited interest, it applied to the interest on commercial loans for productive purposes as well as to the interest on consumption loans.

(1)۔ یہاں اس طرف اشارہ کرنا دلچسپی سے خالی نہ ہو گا کہ یہود جن کے بارے میں قرآن مجید میں کہا گیا ہے "واکلمہم الربوا وقد نہوا عنہ" ان کی مذہبی کتب شناہ اور تالمود وغیرہ بھی انٹرنسٹ اور یوٹری میں باہم کوئی فرق نہیں کرتی اور اس طرح مقصد استنقراض کو لغو قرار دیتی ہیں۔ اس حقیقت اور یہود کے حق میں مذکورہ بالا آیت سے مجموعی طور پر یہی نتیجہ نکلتا ہے کہ "ربا" کا لفظ پیداواری اور غیر پیداواری دونوں قسم کے قرضوں پر اضافے کو شامل ہے، دیکھیے۔

Encyclopedia of Religion and Ethics, (ED.) James Hastings, New York, 1954,
Articles on Usury (Hebrew) and Usury (Jews).

113. In this respect it will be advantageous Egyptian Alim Abu Zahra (d. 1974 A.D.). He writes:

"وان فسرت كلمته الربابان المراد بھاربا الجاہلیہ، فلا لادلیل مطلقاً علی ان ربا الجاہلیہ كان للاستھلاك، ولم یکن للاستعلاء بل القرض الذی یجد الباحث مستند الہ من التاریخ ہوان القصد كان للاستعلاء، فان احوال العرب ومكان مکہ، والتجار قریش کل زالك یسند هذا القرض۔ وھوان القرض كان للاستعلاء ولم یکن للاستھلاك۔"

(For translation of the above quotation, see para. 107)

114. In this connection Maulana Maudoodi writes in his famous book "Lahore. pp, 240-41:-

"یہ بات کسی صراحت کے ساتھ تو نہیں لکھی گئی ہے کہ عرب جاہلیت میں "تجارتی سود" رائج تھا، ☆ لیکن اس امر کا ذکر ضرور ملتا ہے کہ مدینہ کے زراعت پر پیشہ لوگ یہودیوں سرمایہ داروں سے سود پر قرض لیا کرتے تھے اور خود یہودیوں میں باہم بھی سودی لین دین ہوتا تھا، نیز قریش کے لوگ جو زیادہ تر تجارت پر پیشہ تھے سود پر قرض لیتے دیتے تھے۔ قرض کی ضرورت لازماً صرف نادار آدمیوں ہی کو اپنی ذاتی ضروریات پوری کرنے کے لیے پیش نہیں آتی، بلکہ زراعت پر پیشہ افراد کو اپنے زرعی کاموں کے لیے اور سوداگر لوگوں کو اپنے کاروبار کے لیے بھی پیش آتی ہے اور یہ آج کوئی نئی صورت نہیں ہے بلکہ قدیم زمانے سے چلی آرہی ہے۔ اسی چیز نے رفتہ رفتہ ترقی کر کے وہ شکل اختیار کی ہے جو زمانہ جدید میں پائی جاتی ہے۔ قدیم صورت زیادہ تر انفرادی لین دین تک محدود تھی، جدید صورت میں فرق صرف یہ ہو گیا کہ بڑے پیمانے پر قرض سے سرمایہ اکٹھا کرنے اور اسے کاروبار میں لگانے کا طریقہ رائج ہو گیا۔"

مولانا مودودی نے اپنی کتاب معاشیات اسلام، اسلامک پبلیکیشنز لاہور کے صفحہ ۲۳۵ پر سود کی علت تحریم کے عنوان کے تحت لکھتے ہیں کہ "وہ سود سوسائٹی میں دولت کی آزادانہ گردش کو روکتا ہے، بلکہ دولت کی گردش کا رخ الٹ کر ناداروں سے مال داروں کی طرف پھیر دیتا ہے۔ اس کی وجہ سے جمہور کی دولت سمٹ کر ایک طبقہ کے پاس اکٹھی ہوتی چلی جاتی ہے، اور یہ چیز آخر کار پوری سوسائٹی کے لیے بربادی کی موجب ہوتی ہے، جیسا کہ معاشیات میں بصیرت رکھنے والوں سے پوشیدہ نہیں۔"

یہی بات مولانا محمد شفیع رحمۃ اللہ علیہ اپنی کتاب "مسئلہ سود" ادارۃ المعارف، کراچی صفحہ ۳۹ پر لکھتے ہیں کہ "سود کے سارے کاروبار اور اس کی حقیقت پر ذرا بھی غور کیا جائے تو معلوم ہو گا کہ سودی کاروبار کا لازمی نتیجہ عام ملت کی غربت و افلاس اور چند سرمایہ داروں کے سرمایہ میں ناقابل قیاس اضافہ ہے اور یہی معاشی بے اعتدالی پرورے ملک کی تباہی کا سبب بنتی ہے اسی لیے اسلام نے اس پر قدغن لگایا ہے۔"

* مولانا رحمۃ اللہ کو یہاں مغالطہ ہوا ہے۔ تجارتی سود کی اصطلاح مروج نہ ہو، لیکن کتب تاریخ و سیر میں تجارت کی غرض سے قرض لینا اور اس پر سود دینے کی متعدد شہادتیں موجود ہیں۔ جیسا کہ خود مولانا کی کتاب سے واضح ہے۔

115. Maulana Maudoodi further writes about the function of a modern Bank as under:--

اس جدید تنظیم کا طریقہ مختصر الفاظ میں یہ ہے کہ چند صاحب سرمایہ لوگ مل کر ایک ادارہ ساھوکاری قائم کرتے ہیں جس کا نام بینک ہے۔ اس ادارے میں دو طرح کا سرمایہ استعمال ہوتا ہے۔ ایک حصہ داروں کا سرمایہ جس سے کام کی ابتداء کی جاتی ہے، دوسرا امانت داروں یا کھاتا داروں کا سرمایہ جو بینک کا کام اور نام پڑھنے کے ساتھ زیادہ تعداد میں ملتا جاتا ہے اور اسی کی بدولت بینک کے اثر اور اس کی طاقت میں اضافہ ہوتا چلا جاتا ہے۔ ایک بینک کی کامیابی کا اصل معیار یہ ہے کہ اس کے پاس اس کا اپنا ذاتی سرمایہ (یعنی حصہ داروں کا لگایا ہوا سرمایہ) کم سے کم ہو اور لوگوں کی رکھوائی ہوئی رقمیں زیادہ سے زیادہ ہوں۔

"بینک اپنا سارا کام تو چلاتا ہے امانت داروں کے روپے سے، جن کا دیا ہوا سرمایہ بینک کے مجموعی سرمائے میں ۹۵-۹۰ فیصد تک ہوتا ہے۔ لیکن اس کے نظم و نسق اور اس کی پالیسی میں ان کا کوئی دخل نہیں ہوتا۔ یہ چیز بالکل ان حصہ داروں کے ہاتھ میں ہوتی ہے جو بینک کے مالک ہوتے ہیں اور جن کا سرمایہ مجموعی سرمائے کا صرف دو تین یا چار پانچ فیصدی ہو کر رہتا ہے۔ امانت داروں کا کام صرف یہ ہے کہ اپنا روپیہ بینک کے حوالے کریں اور اس سے ایک خاص شرح کے مطابق سود لیتے رہیں، رہی یہ بات کہ بینک اس روپے کو استعمال کس طرح کرتا ہے اس معاملہ میں وہ کچھ نہیں بول سکتے۔ اس کا تعلق صرف حصہ داروں سے ہے وہی منتظمین کا انتخاب کرتے ہیں وہی پالیسی کا تعین کرتے ہیں وہی نظم و نسق اور حساب کتاب کی نگرانی کرتے ہیں اور انہی کے منشاء پر اس امر کا فیصلہ مختصر ہوتا ہے کہ سرمایہ کدھر جائے اور کدھر نہ جائے۔ پھر حصہ داروں میں سب یکساں نہیں ہوتے، متفرق چھوٹے بڑے حصہ داروں کا اثر بینک کے نظام میں برائے نام ہوتا ہے، دراصل چند بڑے اور بھاری حصہ دار ہی سرمائے کی اس جھیل پر قابض ہوتے ہیں اور وہی اس پر تصرف کرتے رہتے ہیں۔"

"بینک اگرچہ بہت چھوٹے بڑے کام کرتا ہے جن میں سے بعض یقیناً مفید ضروری اور جائز بھی ہیں، لیکن اس کا اصل کام سرمائے کو سود پر چلانا ہوتا ہے تجارتی بینک ہو یا صنعتی یا زراعتی یا کسی اور نوعیت کا، بہر حال وہ خود کوئی تجارت یا صنعت یا زراعت نہیں کرتا بلکہ کاروباری لوگوں کو سرمایہ دیتا ہے اور ان سے سود وصول کرتا ہے۔ اس کے منافع کا اصلی اور سب سے بڑا ذریعہ یہ ہوتا ہے کہ امانت داروں سے کم شرح سود پر سرمایہ حاصل کرے اور کاروباری لوگوں کو زیادہ شرح پر قرض دے۔ اس طریقے سے جو آمدنی ہوتی ہے وہ حصہ داروں میں اسی طرح تقسیم ہو جاتی ہے جس طرح تمام تجارتی اداروں کی آمدنیاں ان کے حصہ داروں میں مناسب طریقہ سے تقسیم ہو آ کرتی ہیں۔"

(دیکھیے "سود" مولانا مودودی، ص ۲۴۰-۲۴۱)

116. It is thus obvious that a bank performs the same function as that of the Jews and Arab tribes in pre-Islamic period who got capital on interest from the people and supplied loans on interest to the individuals as well as merchants. It is thus beyond any doubt that Bank interest comes under the category of riba prohibited by the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h.). Moreover, the prohibition of interest as laid down in the Holy Qur'an and Sunnah of the Holy Prophet is general in its extent and application irrespective whether it is given or taken

by the Bank or any other institution or an individual.

117. It is an accepted principle of interpretation as also recognized in the modern jurisprudence that if a provision of statute makes some exception, only that exception is to be taken into consideration while interpreting the main provision of law. In the case of there being no exception the provision of law will be read absolute in terms and without any exception. It is also a recognized rule of modern jurisprudence that in a provision of law if an exception is made it is to be made by the same authority who is competent to make law who shall so provide in the existing provision of law. In the instant case, the Verses of the Holy Qur'an prohibiting *riba*, taken as a whole, and particularly the last ones which declare the interest as prohibited are absolute in term. This prohibition has been clarified by the several Ahadith of the Holy Prophet (p.b.u.h.). If someone claims that the provision of *riba* is restricted to a particular class of loan or to a particular class of institutions that can only be provided by the law-maker Himself, *the* Almighty Allah and His Holy Prophet Muhammad (p.b.u.h.). We cannot read into the provisions of the Holy Qur'an and the Sunnah of the Holy Prophet anything while interpreting *riba*, which is extraneous and repugnant to the very spirit of the provision of law itself.

118. Let us now refer to the answer to question No. 1 given by Dr. S.M. Hasanuz Zaman, Chief of Islamic Banking Division, State Bank of Pakistan, Karachi. He writes as to the definition of *Riba*:

"The inferred meaning (isharat al-nass) of the Quranic verse "And if ye repent then ye have your principal" (2:279) is suggestive of the Qur'anic definition of interest. This implies that anything chargeable in addition to amount comes in purview of prohibited *riba* which is the Arabic word for interest."

119. The Holy Prophet was more concerned with the plugging the loopholes towards charging interest and eliminating inequities appearing in barter transactions. Thus whatever he disallowed as interest explained the scope of application of Qur'anic interest rather than suggesting any new definition. The well-known narration: (كل قرض رج منفعة فهو ربا) (Al-Suyuti Al-Jami al-Saghair, Cairo, Vol. II p. 94, made by Hasan Basri on the authority of Hadrat Ali and understood by some other commentators as Hadith has generally been treated to be the standard definition of interest that provides us with a touchstone of determining the nature of transaction of debt or credit. The definition as inferred from the Qur'anic verse and the direct definition as given in the reported Hadith cover simple increase on loan. The Qur'anic ban on simple interest followed a ban on exorbitant or compound interest in the verse (لا تأكلوا الربا اضعافا مضاعفة) (3:130). This policy is inspired by the mode of prohibition in the Qur'an that warns (فأذنوا بحرب من الله) (ورسوله- (2:279). The question if the ban on interest as imposed by the Qur'an and detailed out in the Hadith would be equally applicable in the present day financial transactions would be decided on the basis of the well-known *fiqhi* rule which provides that (العبرة بعموم الحكم لا لخصوص) (السبب). Thus the absolute prohibition as pointed out above would not be relaxed unless it is done so in the Qur'an or by the Holy Prophet himself.... because the rule is that

”المطلق يجرى على اطلاقه مالم يكن دليل التقييد نصابا ولا له”

Al- Mujallah, Article 64).

120. We may, now, refer to, on the question of prohibition of Riba both for consumption and productive loans, the "Report of the Council of Islamic Ideology on the Elimination of Interest from Economy", Islamabad, 1980, then headed by one of us (Dr. Tanzil-ur-Rahman), a consensus of Pakistani scholars in fiqh, economics and banking (اجماع). The relevant paragraphs read as under:--

"The Holy Our'an explicitly and emphatically prohibits riba. There is complete unanimity among all schools of thought in Islam that the term *riba* stands for interest in all its types and forms. The phraseology of the verses in which people are instructed to shun interest and the severity of the admonition administered to those who do not abide by the divine injunction in this regard leave no doubt in one's mind that the institution of riba is wholly repugnant to the spirit of Islam." (page 7).

"The rationale for prohibition of charging of interest on loans taken for consumption purposes are obvious. Such loans are usually taken by people of small means to meet urgent personal requirements as they have hardly any cushion of savings with which to meet such requirements. Prohibition of interest in so far as loans of this type are concerned rests mainly on humane consideration. The main rationale for prohibition of interest in the case of loans for production purposes stems from concept of justice between man and man which is the cornerstone of the Islamic philosophy of social life. Uncertainty is inherent in a business enterprise irrespective of the time and space dimensions. The opening results of the enterprise cannot be foreseen and the occurrence of profit or loss and their magnitudes cannot be fully determined in advance. It is, therefore, a sheer injustice if the party providing money capital is guaranteed a fixed and predetermined return while the party providing enterprise is made to bear the uncertainty all alone. On the other hand, a fixed interest rate can also be unjust to the lender of money in case the entrepreneur using this money earns a profit quite out of proportion to what he pays by the way of interest."

(Report of the Council of Islamic Ideology on the Elimination of interest from the Economy, Government of Pakistan, Islamabad. (page 8).

121. The Second Seminar on fiqh, under the auspices of Islamic Fiqh Academy of India (مجمع الفقہ الاسلامی الہند), was held at New Delhi, during December 8-11, 1989. This Seminar was, attended by the 'Ulema from all over India, besides two Ulema from Pakistan and Nepal. In this Seminar, an item on the agenda relating to "Commercial interest and Islamic Shari'ah" was discussed and after deliberations the following resolution was passed:--

"سود کے سلسلے میں بحث و مباحثہ اور غور و فکر کے بعد اس ایوان کی متفقہ رائے حسب ذیل قائم ہوئی۔
سود خواہ ذاتی مصارف کے قرضوں پر لیا دیا جائے یا تجارتی و کاروباری قرضوں پر، شریعت اسلامیہ کی نظر میں بہر حال حرام ہے۔ یہ سمجھنا کہ سود کی حرمت کا اطلاق تجارتی و کاروباری قرضوں پر نہیں ہوتا قطعاً غلط ہے۔ نیز یہ خیال کہ تجارتی و کاروباری قرضوں کا وجود زمانہ نزول قرآن میں نہیں پایا جاتا اس لیے حرمت ربوا کا اطلاق ان پر نہیں ہوگا،

کسی طرح درست نہیں یہ بات تاریخی طور پر ثابت ہے کہ تجارتی و کاروباری مقاصد کے لیے سودی لین دین صرف جاہلیت نیز ان قوموں میں جن سے جاہلی عربوں کے تجارتی روابط تھے رائج اور شائع تھے۔ چنانچہ تجارتی و کاروباری مقاصد کے لیے سودی لین دین تحریم ربوا کا اولین مورد ہے۔ اس کے علاوہ بالفرض اگر تجارتی و کاروباری مقاصد کے لیے سودی لین دین کا وجود زمانہ نزول قرآن میں نہ بھی پایا جاتا تب بھی مستقل شرعی دلائل دونوں قسم کے قرضوں (ذاتی و شخصی اور تجارتی و کاروباری) پر اضافے یعنی سودی حرمت کے بارے میں قائم ہیں۔ قرآن و سنت، اجماع و قیاس اور امت محمدیہ کا عمل متواتر سب یہی بتاتے ہیں کہ حرمت ربوا کے بارے میں اس کا کوئی اعتبار نہیں کیا جاسکتا کہ قرض لینے کا مقصد اور محرک کیا ہے؟

سودی حرمت پر اس کا بھی کوئی اثر نہیں پڑتا کہ شرح سود کم ہے یا زیادہ، مناسب حد تک کم ہے یا مناسب حد تک زیادہ، شریعت اسلامیہ میں اس بات کو تسلیم کرنے کی کوئی گنجائش نہیں ہے کہ شرح سود اگر مناسب حد تک کم ہے تو سودی لین دین جائز ہو اور اگر نامناسب حد تک زیادہ ہے تو ناجائز۔ دونوں صورتوں میں کوئی فرق نہیں کیا جاسکتا، دونوں صورتیں بہر حال حرام ہیں۔ دلائل شرعیہ اس طرح کی کسی تفریق کی اجازت نہیں دیتے۔ (سہ ماہی "بحث و نظر" پھلوانی شریف پٹنہ، جلد ۲، شمارہ ۸، جنوری تا مارچ ۱۹۹۰ء، ص ۱۳)

122. Now it needs to mention that the Islamic Fiqh Academy, constituted in 1983, under the auspices of the Organization of Islamic Countries (OIC) represented by all its member countries in its Second Session held at Jeddah during December 22-28, 1985, which was also attended by one of us. (Dr. Tanzil-ur-Rahman) as an expert, on special invitation by the Academy) has declared Bank interest as Riba prohibited in the Holy Qur'an. The resolution is reproduced as under:--

ترار تم ۳

بشان

حکم التعامل المصرفی بالفوائد
وحکم التعامل بالمصارف الاسلامیہ

اما بعد:

فان مجلس مجمع الفقه الاسلامی المنبثق عن منظمة المؤتمر الاسلامی فی دورة انعقاد فان مجلس الثانی بجدہ من ۱۶-۱۰ ربیع الثانی ۱۴۰۶ھ، الموافق ۲۸-۲۲ دسمبر ۱۹۸۵ء۔

بعد ان عرضت عليه بحوث مختلفة في التعامل المصرفي في المعاصر. و بعد التامل فيما قدم و مناقشته مركزة ابرذت الا آثار السببية لهذا التعامل على النظام الاقتصادي العالمي، وعلى استقراره خاصة في دول العلم الثاك. و بعد ال التعامل فيما جره هذا النظام من خراب نتيجة اعراضة عما جاء في كتاب الله من تحريم الربا جزئيا و كليا تحريما واضحا بدعوته الى التوبة منه، الى الاقتصار على استعادته رؤوس اموال القروض دون زيادة ولا نقصان قل او كثر، و مجاء من تهديد، بحرب مدرمرة من الله ورسوله للمرابين.

قرر:

۱- ان كل زيادة او فائدة على الدين الذي حل اجله و عجز المدين عن الوفاء به مقابل تاجيله، وكذلك الزيادة (او الفائدة) على

القرض منذ بدایة العقد: هاتان الصورتان ربا محرم شرعاً.

٢- ان البديل الذى يضمن السيولة المالية والمساعدة على النشاط الاقتصادى حسب الصورة التى يرتضيها الاسلام. هو التعامل وفقا لاحكام الشرعية.

٣- قرر المجمع التاكيد على دعوة الحكومات الاسلامية الى تشجيع المصرف التى تعمل بمقتضى الشريعة الاسلامية، والتمكين لاقامتها فى كل بلد اسلامى لتغضى حاجة المسلمين كيلا يعيش المسلم فى تناقض بين واقعه و مقتضيات عقيدته

RESOLUTION NO. 3 CONCERNING

123. The order of modern banks and the order to adopt Islamic principles therein.

124. The Academy having noticed different discussions on modern Banks and keeping in view their bad effects on the international economic system particularly the countries of third world, and that this system has developed interest which has been expressly banned by the Holy Qur'an whether wholly or partially with clear instructions to be

given up and to return the principal amount in loans without any increase or decrease whether more or less, and to regard the declaration of war against those who take or give interest;

RESOLVES

- (1) Any excess or profit on a loan for a deferred payment when the borrower is unable to repay it after the fixed period and similarly any excess or profit on a loan at the time of contract, both are *riba* forbidden in Shari'ah.
- (2) The alternate banks should be established according to the injunctions of Islam to provide economic facilities.
- (3) The Academy resolved to request all the Islamic countries to establish banks based on Shari'ah principles to fulfill all the requirements of a Muslim according to his beliefs so that he may not face any repugnancy."

125. After the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h.) which are the two primary sources of Shari'ah, Al-Ijma' (الاجماع) the consensus, is the third source of Shari'ah, though secondary in nature. By the above-said Resolutions, we have just seen the consensus of the opinions of the jurists, economists and bankers of Pakistan represented through the Reports of the Panel of Experts and the Members of the Council of Islamic Ideology in 1978, which was discussed and finally adopted in its Session of 15 June, 1980, with certain additions and alternations by the council of Islamic Ideology (then headed by one of us (Dr. Tanzil-ur-Rahman). The Council is a constitutional body set up under Article 228 of the constitution of Pakistan, 1973 to advise the Government on Islamic matters and whose Reports are to be laid manually before the National Assembly under Article 230(4) of the Constitution and laws are to be enacted accordingly.

126. All the Jurists, ulema economists and bankers of Pakistan, who appeared in this Court or sent their written opinions on the subject are unanimous that the Bank's interest comes within the definition of *riba* and is forbidden by the Holy Qur'an and Sunnah of the Holy Prophet (pbuh). (was missing altogether)

127. We have also seen the consensus of the opinions of the 'Ulema' of India, as per unanimous Resolution passed at the Second Seminar of the Islamic Fiqh Academy of India (مجمع الفقہ الاسلامی الہند). Refer quarterly journal ' (بحث و نظر) Phulwari Sharif Patna, Vol; II, issue No. 8, January-March, 1990, pages 12 and 13.

128. And finally we have also seen the consensus of the 'Ulema of the entire Muslim 'Umrnah' represented through Islamic Fiqh Academy set up under the auspices of the Organization of Islamic Countries, wherein some 43 Member Muslim Countries are represented. They have given their unanimous verdict on the point at issue. Thus, there is an '*Ijma*' consensus

of the Ummah. The question, therefore, stands foreclosed.

129. In view of the above discussion, we are of the firm view that the interest charged on loans and given on deposits by the Banks falls within the definition of *Riba* and that it makes no difference whether the loan is taken for consumptional purpose or for productive purpose, i.e., for trade, and industry.

130. Another point raised by Mr. S.M. Zafar is that the word "*Riba*" has not been defined either in Qur'an or Hadith and it would, therefore, fall within the area of "Mutashabahat". The learned counsel seems to be impressed by the last two paragraphs of paper "Silent Consensus on Permissibility of Bank Interest" There learned writer of the paper, with due respect, is probably unaware of the actual connotation that the word "Mutashabahat" carries. Therefore, it seems necessary to interpret and give the real meaning of the word "Mutashabahat" in the light of Holy Qur'an and Sunnah. This word has been used in Verse No. 7 of Surah Al-Imran (III: 7) and it is reproduced as under:--

"هو الذي انزل عليك الكتاب منه آيات محكمات هن ام الكتاب واخر متشابهات فاما الذين في قلوبهم زيغ فيتبعون ما تشابه منه ابتغاء الفتنة وابتغاء تاويله وما يعلم تاويله الا الله والراستخون في العلم يقولون امنا به كل من عند ربنا وما يذكر الا اولو الالباب" - (آل عمران: ٧)

"He it is Who has sent down
To thee the Book;
In it are verses
Basic or fundamental
(Of established meaning);
They are the foundation
Of the Book; others
Are allegorical. But those
In whose hearts is perversity follow

The part thereof that is allegorical,
Seeking discord, and searching
For its hidden meanings,
But no one knows
Its hidden meaning except Allah.
And those who are firmly grounded
In knowledge say: "We believe
In the Book; the whole of it
Is from our Lord: "and none
Will grasp the Message

Except men of understanding."

"This verse refers to categorical orders of the Shari'ah (or the law), which are of established meaning, (*muhkam*) plain to everyone's understanding which includes very foundation on which the whole edifice of Law rests, as distinguished from the various illustrative allegories..... The commandments and prohibitions (*Awamir wa Nawahi*) based on *nusus* (clear texts) of the Holy Qur'an and Sunnah are eternally binding. Such provisions of Holy Qur'an and Sunnah read as together are self-contained in their very nature. They are to be obeyed and acted upon in all ages and by all Muslims. These *nusus*, of the Holy Qur'an and Sunnah are immutable and in no circumstance and changeable". (Essays on Islam, by Justice Dr. Tanzil-ur-Rahman, published by Islamic Publication (Pvt.) Lahore pp-.389-90).

131. The word "Mutashabihat" (متشابهات) as used here is derived from its literal root 'Shibh' (شبه), which means "resemblance". It refers to the "verses of the Holy Qur'an' that are figurative, "metaphorical or allegorical as 5 distinguished from verses that are basic, fundamental and very explicit in their meaning. The Commentators of the Holy Qur'an have elaborately discussed the two categories and have referred to both of them as mentioned in the Holy Qur'an from all angles i.e. purely from linguistic point of view as well as the meanings they stand for. Since the Holy Qur'an is a book of guidance, its Injunctions relating to the permissible or prohibition of certain acts are crystal clear and are considered as verses of the first category i.e. "Muhkamat" (محکمت) while those concerning the Attributes of Allah, the nature of Hell, Heaven etc. considered as 'Mutashabihat (متشابهات). In other words the verses relating to Ahkam (احکام) are 'Muhkamat' (محکمت) and they have been made clear in their meaning, with no doubt whatsoever by the Holy, Qur'an and Sunnah of the Holy Prophet (p.b.u.h.) who implemented them at the individual and collective level of the Muslim *Ummah* as that was the mission assigned to him by Allah. Other verses that mostly relate to the metaphysical or supernatural matters or things beyond the normal perception of the human beings are categorized as 'Mutashabihat'. They have been described in words nearest in sense to human understanding; however, their exact comprehension in the true sense is not possible for human mind in this world.

132. Allama Jalaluddin Suyuti in his well-known book 'AI-Itiqan fi Ulum al Our'an' (التقان فى علوم القرآن) while discussing the various categories of the Verses of the Our'an has written a separate chapter on 'Muhkam and Mutashabah' (محکم اور متشابه). The relevant part of its translation in Urdu published by Noor Muhammad Assah al-Matabi' wa Karkhana Tijarat Kutub Aaram Bagh, Karachi, Vol. II, p. 1, is reproduced below:--

قال اللہ تعالیٰ "هو الذی انزل علیک الکتاب منہ ایت محکمات حسن ام الکتاب فاخر متشابہات" (اسی نے تجھ پر کتاب نازل کی۔ اس میں بعض آیتیں پکی ہیں اور وہی کتاب کی جڑ ہیں اور دوسری مختلف المعانی ہیں"۔ (۷:۳)۔ ابن حبیب نیشاپوری نے اس مسئلہ میں تین قول ذکر کیے ہیں اور وہ حسب ذیل ہیں:-
(۱)۔ قولہ تعالیٰ "کتاب حکمت آیاتہ" کے لحاظ سے تمام قرآن محکم ہے۔

(۲)۔ قولہ تعالیٰ "کتبا بتنا ہما مثانی" کے مفہوم کو پیش نظر رکھتے ہوئے سارا قرآن متشابہ ہے اور (۳)۔ صحیح قول یہ ہے کہ اس آیت کے بموجب قرآن کی تقسیم محکم اور متشابہ ان دو قسموں کی طرف کی جاتی ہے۔ پہلے اور دوسرے دونوں قولوں میں جن آیتوں سے استدلال کیا گیا ہے ان کا جواب یہ دیا جاسکتا ہے کہ پہلی آیت میں قرآن کا محکم ہونا اور اس کا اس طرح سے استوار ہونا مراد ہے کہ اس میں کوئی خرابی اور اختلاف راہ نہیں پاتا اور دوسری آیت میں قرآن کے متشابہ کہنے کا یہ مدعا ہے کہ قرآن (کی آیتیں) حق و صداقت اور اعجاز میں باہم ایک دوسرے کے متشابہ ہیں "بعض علماء کا قول ہے" مذکورہ بالا آیت اس بات پر دلالت نہیں کرتی کہ قرآن کا حصر انہی دو چیزوں میں ہو گیا ہے اس لیے کہ اس میں کوئی طریقہ حصر کو ثابت کرنے کا نہیں پایا جاتا۔ اللہ تعالیٰ فرماتا ہے "لتبین للناس ما نزل الیہم" اور اس آیت کے مفہوم پر غور کر کے جب یہ دیکھا جاتا ہے کہ محکم کی شناخت بیان پر موقوف نہیں رہتی اور متشابہ کا بیان ہی ایک خلاف توقع امر ہے تو پھر یہ تقسیم اور بھی ناقابل تسلیم ہو جاتی ہے۔"

محکم اور متشابہ کی تعیین کے متعلق مختلف قول آئے ہیں:-

"اول یہ کہ جس امر کی مراد صاف طور پر یا تاویل کے ذریعہ سے معلوم ہو جائے، وہ محکم ہے اور جس چیز کا علم اللہ تعالیٰ نے اپنے ہی لیے خاص کیا ہے، جیسے قیامت کا قائم ہونا اور دجال کا خروج اور سورتوں کے اوائل کے حروف مقطوعہ یہ سب متشابہ ہیں۔ دوم یہ کہ جس چیز کے معنی واضح اور کھلے ہیں وہ محکم ہے اور جو اس کے برعکس ہے وہ متشابہ ہے، سوم یہ کہ جس امر کی ایک ہی وجہ پر تاویل ہو سکے وہ محکم ہے اور جس کی تاویل کئی وجوہ کا احتمال رکھتی ہو وہ متشابہ ہے۔ چہاں یہ کہ جس بات کے معنی عقل میں آتے ہیں (یعنی ان کو عقل قبول کرتی ہے) وہ محکم ہے۔ اور جو امر اس کے خلاف ہو وہ متشابہ ہے، مثلاً نمازوں کی تعداد اور روزوں کا ماہ رمضان ہی کے لیے خاص ہونا اور شعبان میں نہ ہونا۔"

133. It seems appropriate to refer here to the commentary on the Verse by Abdullah Yusuf Ali who writes in this connection that:--

"This passage gives us an important clue to the interpretation of the Holy Qur'an. Broadly speaking, it may be divided into two portions, not given separately, but intermingled, viz.; (1) the nucleus or foundation of the Book, literally "the mother of the Book, and (2) the part which is figurative, metaphorical or allegorical. It is very fascinating to take up the latter, and exercise our ingenuity about its inner meaning, but it refers to such profound spiritual matters that human language is inadequate to it, and though people of wisdom may get some light from it, no one should, dogmatic, as final meaning is known to God alone. The commentator usually understand the verses of established meaning" (muhkam) to refer to the categorical orders of the Shari'at (or the Law), which are plain to everyone's understanding. But perhaps the meaning is wider the "mother of the Book" must include the very foundation on which all Law rests, the essence of God's Message as distinguished from the various illustrative parables, allegories, and ordinances.

If we refer to xi, 1 and xxxix 23, we shall find that in a sense the whole of the Qur'an has both "establish meaning" and allegorical meaning. The division is not between the verses, but between the meaning to be attached to them; each verse is but a Sign or Symbol: what it represents is something immediately applicable, and something eternal and independent of time and space-, ---the

“Forms of Ideas” in Plato's Philosophy. The wise man will understand that there is an "essence" and illustrative clothing given to the essence, throughout the Book. We must try to understand it as best as we can, but not waste our energies in disputing about matters beyond our depth”.

(The Holy Qur'an, Text, Translation and Commentary, published by Shaikh Muhammad Ashraf, Lahore, VoL 1, page 123).

Sayyid Abul A'la Maudoodi writes:-

"This implies to two important things here:

- (1) Allah knows your nature better than yourself or anybody else: therefore, there is no other alternative for you but to trust in the Guidance sent down by Him.
- (2) The Benevolent Allah Who has been providing for all your needs, great and small, throughout all the stages of your life, ever since your mothers conceived you, could not possibly have neglected to provide for your guidance, which is after all the greatest need of your life. "Muhkam" is that which is precise, exact, clean and decisive. Muhkamat are those verses of the Qur'an which have been so couched as to make their meaning quite plain without any shade of ambiguity. They have been purposely so worded as to make their meaning definite and precise leaving little room for misinterpretation. These verses constitute the fundamental principles of the Book, i.e., they and they alone determine the aim and object for which the Qur'an has been sent down. They invite the world to Islam, teach morals and give warnings. They refute wrong beliefs and practices, and lay down the way of right living. They expound the fundamentals of religion and state beliefs and practices, morals and duties, commandments and prohibitions. Therefore a seeker Truth should turn to these verses as these alone can satisfy his needs. Naturally such a person will concentrate on these verses and endeavor to derive the greatest benefit from them.

“Mutashabihah” are those verses in which there is a possibility of more than one meaning. Their object is to give a certain minimum knowledge about the universe, its beginning and end, the position of man therein, for these things are essential for the formation of any system of life. It is obvious that no human language possesses words, expressions, idiom etc., to depict clearly those supernatural things, which have never yet been grasped by human senses, nor seen, nor heard nor smelt nor touched nor tasted by human beings. That is why such supernatural things have to be described in terms of human life. That is why the Qur'an uses ambiguous verses in human language which are liable to give rise to more than one meaning. Thus it is clear that the main benefit of such verses is that they help one approach the Reality and form a conception of it. Hence the more one tries to determine their precise meanings; the more one gets involved in doubts and ambiguities. As a result of this, one will not be able to find the Reality but will be led further away from it and cause mischief. Therefore those, who seek after the Truth and do not hanker after superfluities, rest content with the simple idea of Reality they get from the ambiguous verses, which suffices them for an understanding of the Qur'an; they concentrate their whole attention on a fuller comprehension of the

Verses which are precise in meaning. On the other hand, those who love superfluities or seek after mischief, spend their time and energies in giving arbitrary interpretations to the ambiguous verses." (The Meaning of The Qur'an, Pub. Islamic Publication Limited, Lahore, Vol. II, pp.14-5).

134. So far as the definition of Riba is concerned, it is not correct to say that riba (interest) prohibited has not been defined in Qur'an and Sunnah and as such it falls within the area of mutashabihat. Actually riba was well-known to Arabs in pre-Islamic period and they charged it on the loans. According to the commentators of, the Holy Qur'an, the riba in the pre-Islamic period was that when a loan was extended by an Arab matured, he would ask the borrower for the return of the, principal or for an increase in return for the postponement. If the borrower was unable to repay the principal when the loan matured, he would be allowed an extension in the time of repayment with the continuation of the riba he (lender) has been receiving from the borrower. According to the Imam Fakhruddin al_Razi the Arabs in pre-Islamic period used to give loans on the condition that every month they will receive stipulated amount over and above the principal amount. When the time of settlement came, the principal amount lent was demanded and if the debtor was unable to pay, the lender increased the amount in his own favour and granted extension of time. (Tafsir al-Kabir Volume II, Teheran edition, 85).

135. The Holy Prophet said (لا ربا الى فى النسبة) "There is no, riba except in the nasiah" (Bukhari, Volume II, page 138, Beirut edition). Riba at- nasia signifies fixing in advance of a positive return on a loan as a reward for time. It is riba al-nasia which has been prohibited in Verse 2:275) (Allah has forbidden interest). There is consensus of opinion among the Ummah that riba al-nasia is riba prohibited in Islam as stated by Ibn Abdul Bar in Al-Tamhid. The jurists has defined riba al-nasia as,

"هو القرض المشروط فيه الاجل وزيادة مال على المستقرض"

(Any lending arrangement that obligates the borrower to pay a certain extra amount over and above the principal amount against the specified deferment. "(Al-Jasas, Abu Bakar, Ahkam al-Quran, Vol. I, page 557), Beirut edition). Thus riba does not fall in the category of mutashabihat in so far as riba al-nasia is concerned. The opinion of an individual scholar or even a group of scholars in any' part of the world shall not affect the consensus of the opinion on this point. Islami Fiqh Academy, Jeddah which is, a representative body of the Muslim world has declared bank interest in all forms and on all accounts as riba prohibited in Islam.

136. It may further be added that as far as word "Riba" and its definition is concerned it has been explained both by the speech (قول) and act (فعل) of the Holy Prophet himself, without any room for doubt because the Injunction was implemented

in the practical life and the element of "Riba" declared unlawful (حرام) and was totally abolished from the Islamic economic system once for all and this could only be possible after clarifying its meaning. The Holy Prophet (p.b.u.h.) has said:

"الحلال بين والحرام بين وبينهما مشتبهات لا يعلمها كثير من الناس----

"Both legal and illegal things are evident but in between them there are doubtful- (suspicious) things and most of the people have no knowledge about them. So whoever saves himself from these suspicious things saves his religion and his honour. And whoever indulges in these suspicious things is like a shepherd who grazes (his animals) near the Hima (private pasture) of someone else and at any moment he is liable to get in it. (O people Beware! Every king has a Hima and Hima of Allah on the earth is His illegal (forbidden) things. Beware! There is a piece of flesh in the body if it becomes good (reformed) the whole body become good but if it gets spoilt the whole body gets spoilt and that is the heart."

137. As it has been explained in the earlier part of the judgment there are two type of Riba: (1) Riba-al-Nasiah and (2) Riba al-Fadal. Presently in these petitions we are concerned with Ribaal-Nasih i.e., the interest charged on the money lent or in other words addition over and above the principal sum advanced on loan. It includes all kinds of interest irrespective of the fact whether the rate stipulated is high or low and whether the interest is or is not added to the principal sum after fixed periods and whether the sum lent is for production or consumption purposes. So far as this kind of Riba is concerned we have not come across any difference of opinion regarding its prohibition. There is no Commentator of the Holy Qur'an, no narrator of Ahadith, and no Jurist of Islamic Fiqh worth the name who has even expressed or even mentioned any doubt regarding obscurity or ambiguity in its meaning. The difference of opinion whatever is found is regarding 'Riba al-fadal' and that is out of discussion in the context of Bank interest which is under our consideration.

138. Usually it is narrated from Hazrat Umar (رضى الله تعالى عنه) he said:

"ان آخر ما نزلت آية الربو اوان رسول الله صلى الله عليه وسلم قبض ولم يفسرها لنا" - (مشكوة المصابيح عن ابن ماجه، دارمي)

"The last of what was revealed was verse of Riba and the Messenger of Allah expired, he did not elaborate it to us."

However, some of the people forget to read further that Hadrat ‘Umar (رضى الله تعالى عنه) also added thereafter:-

”فذرُوا الربا والريبة“

“So give up Riba and the doubt” (Musnad Ahmad, Vol. I p.36)

Dr. Muhammad Rawwas Qalaji, in his famous books entitled (موسوعة فقه عمر) published by (دار النعاس)

"The word 'Reeba' as uttered by Hazrat Umar alongwith "Riba" is derived from original root (ريب) which means doubt and herein is meant everything that creates doubt in the mind about its permissibility. For this reason Hazrat Umar was extremely cautious in connection with "Riba" and he used to say: We have left.9/10 of the permissible things due to fear of Riba (Refer to Al-Musannaf Abdur Razzaq, Vol. VIII, p. 152). One day he stood up for address and said:

The last of the revealed verses is the verse of Riba. The Holy Prophet (p.b.u.h.) expired before he could elaborate it to us. So leave what creates doubt in your minds and do what is absolutely free from doubt.”

The stand taken from Hazrat Umar, in fact, shows that whatever he said was in respect of Riba al-fadal and not Riba al-Nasihah. The Holy Prophet (p.b.u.h.) had explained ‘Riba’ with regard to some six defined things (in case of Riba-al-Fadal) but with regard to other things the explanation about (ربوا لفضل) being applicable to them could not be found and that caused slight difference of opinions in respect of Riba Al-Fadal in certain other things not mentioned specifically. Some of the Fuqaha kept Riba Al-Fadal restricted while other did not confine it to be the six commodities but on their analogy extended the same to other things that contained certain inherent characteristics of the six commodities mentioned in the hadith. But so far as ‘Riba al-Nasihah’ is concerned, that was made absolutely clear with no difference whatsoever among the Jurists. It does not appeal to sound reason to even presume that on one hand the Holy Qur’an declares war in such emphatic words and says: “Believers”! Be careful of your duty to Allah; relinquish what remains of Riba, if you are true Believers. But if you do it not, then be informed of war from Allah and His Messenger (2:278)”; and on the other hand may leave the matter of Riba undefined and unexplained.

139. In view of the above the only need of the time for all of us is to firmly believe and instead of resorting to various alibis reconsider our position in the light of latter portion of the same verse reproduced as under:-

”والر اسخون في العلم يقولون امانا به كل من عند ربنا وما يذكر الا اولو الاباب۔ ربنا لاترغ قلوبنا بعد اذ هديتنا وهب لنا من لدن رحمتك انك انت الوهاب۔“ (آل عمران 3: ٨۔)

"And those who are firmly grounded In knowledge say: We believe In the

Book; the whole of it Is from our Lord": and none Will grasp the Message Except men of understanding.

"Our Lord!" (they say), "Let not our hearts deviate Now after Thou hast guided us, But grant us mercy From Thine own Presence; For Thou art the Grantor Of bounties without measure". (III: 7, 8).

140. Now we refer to the concept of Maslaha on the basis of which the Advisory Council of the Ulema of East Jawa is stated to have given its verdict in favour of the permissibility of bank interest, mentioned in the Article titled as "Silent Consensus of the Permissibility of Bank Interest" produced by Mr. S. M. Zafar.

141. Maslaha is an important principle of Islamic Law. The definition given by Al-Khawarazimi of Al-Maslaha is as follows:-

"المراد بالمصلحة المحاظفة على مقصود الشرع برفع المفاسد عن الخلق"

(Maslaha) means protection of the objective of Shari'ah which is to ward off the evils from the mankind). (Al-Shawknai : Irshadul fuhul (ارشاد الفحول), p. 242).

142. Imam Gazali defines more elaborately the legal principle of (Maslahah). The definition given by him was followed by a number of jurists. In the works on usul that are known to us, Ghazali's influence, particularly with reference to Maslahah is very strong is very. As Ibn-e-Khaldun noticed that Basri's Al-Mu'tamad (المعتمد) and Ghazali's Al-Mustafa (المستصفي) remained a major source of influence for later writers on usul, until the appearance of Razi's word al-Mahsul.

143. Ghazali's definition is as follows:

"المصلحة فهي عبارة في الاصل عن جلب منفعة او دفع مضرة ولنا معنى به ذلك فان جلب المنفعة ودفع المضرة مقاصد الخلق وصلاح الخلق في تحصيل مقاصد هم لكننا نعني بالمصلحة المحاظفة على مقصود الشرع ومقصود الشرع من الخلق خمسة وهو ان يحفظ عيضم دينهم ونفسهم وعقلهم وتسليمهم والهم فكل ما تضمن حفظ هذه الاصول الخمسة فهو مفيدة ودفعه مصلحة"

144. In its essential meaning (aslan) it (Maslahah) is an expression seeking useful (munafa'ah) or removing something harmful (madarrah). But this is not what we mean because seeking utility and removing harm are the purposes (maqasid) which by the creation is aimed at and the goodness (Salah) of creation consists in realizing their goals

(Maqasid). What we mean by maslaha is the preservation of the maqsud (objective) of the law (Shar') which consists of five things: preservation of religion, of life, of reason, of descendants and property. What assures the preservation of the five principles (usul) is maslaha and whatever fails to preserve them is mafsada and its removal is maslaha. (AI-Mustasfa, Volume-2, 286).

145. Maslaha as understood by the above definition is then divided into the three categories. First, the kind of maslaha which has a textual evidence in favour of its consideration. Second is the kind which is denied by textual manifestation. The third is the kind where there is neither a textual evidence in favour, nor in contradiction. The first category is valid and can be basis of Qiyas. The second is obviously forbidden. It is the third category which needs further consideration. Accordingly, the element of maslaha contained in the third category further examined from the view point of its strength (quwwa). From this angle there are three grades of maslaha: darurat, hajat, tahsin or tazin. The preservation of the above-mentioned five principles is covered in the grade of darurat. This is the strongest kind of maslaha. The second grade consists of those masalih and munasabat which are not essential in themselves but are necessary to realize in general. The third grade is neither of the above but exists only for the refinements of things.

146. Keeping this classification in view only that al-maslaha al-mursala will be accepted which has three qualities: darura, qat'iyya, khliyya. Ghazali illustrates the point with an example.

147. If unbelievers shield themselves with a group of Muslim captives, to attack this shield means killing innocent Muslims - a case which is not supported by textual evidence. If Muslims' attack is withheld, the unbelievers advance and conquer the territory of Islam. In this case it is permissible to argue that if even Muslims do not attack, the lives of the Muslim captives are not safe. The unbelievers, once they conquer the territory, will root out all Muslims. If such is the case, then it is necessary to save the whole of Muslims community rather than to save a part of it. This would be the reasoning which is acceptable, as it refers to the above three qualifications. It is daruri because it consists of preserving one of the five principles; i.e. protection of life. It is qat'i because it is definitely known that this way the lives of the Muslim community will be saved. It is kulli, because it takes into consideration the whole of the community, not a part of it (Muhammad Khalid Masud: Islamic Legal Philosophy, page 153).

148. Muhammad Sa'id Ramdan Al-Buti presented his doctoral dissertation, Dawabit al-maslaha fil-Shari'at al-Islamia, at Azhar University 1965. He discussed the subject Maslaha at length and established the fact with valuable arguments that Maslaha in Islamic Shari'ah does not mean only utility and pleasure of this world without restrictions and qualifications.

He writes that:

It is an established fact that Maslaha acknowledged and accepted by the Islamic Law is that which should be in total conformity with the fundamental principles and basic concepts of Islamic Shari'ah. (Al-Buti: Dawabit-al-Maslaha, page 121).

149. The most important principle of Islamic Shari'ah which is always to be kept in mind is that the concept of Maslaha (Weal) is regulated, limited and clarified in such a way that

nothing remained obscure and unclear in the concept of Maslaha. Man is created only for the obedience of Allah and his all actions in this life are regulated and streamlined by the revealed law, so as nothing remained beyond the Holy guidance of Allah and His Prophet (p.b.u.h.). As the Islamic Shari'ah has laid down detailed guiding principles for all worldly actions of a Believer, it is also established, regulated, limited and clarified in all the four corners of the concept of Maslaha, and did not leave the concept on the speculations, worldly interest and whims of someone. Dawabit-al-Maslaha, pages 14-15).

150. We can say in the light of principle of Islamic Shari'ah that Maslaha has three most pertinent characteristics, which are as under: -

- i) The concept of Maslaha is not merely related to this world. It must cover the life of mankind, the weal of this world and the weal of life Hereafter because the life of man is well connected with the life Hereafter. The life of this world has very strong relation to the the worldly success and happiness. On the other hand, Islam considers such people life Hereafter which is a cause and effect relation. The happiness and success of man is not merely successful who would be declared successful in the life Hereafter. For this reason the life of this world is only means to obtain the success and happiness of the life Hereafter. As the Holy Qur'an says:

"واتبع فيما آتاك الله الدار الآخرة" -

“But seek, with the (wealth) which Allah has bestowed on thee for the Home of the Hereafter. (28:77).

In the face of the above discussion it will not be considered proper for any scholar to interpret the concept of Maslaha, keeping in view merely the problems and affairs of this life. (Dawabit-al-Maslaha, pages 45-48).

- ii) Maslaha in the light of Islam is not based on the utility and pleasure of this life alone Ibid, page 54).

- (iii) The requirements and the weal of the religion of Islam is on the forefront of everything. Thus the Injunctions as laid down in the Holy Qur'an and Sunnah of the Holy (p.b.u.h.) should be protected first and nothing contrary to the said Injunctions of Islam could in any way be considered Maslaha acceptable to Islam.

151. Further discussing the subject, Al-Buti said that there are four (4) controlling factors to

control Maslaha so that this should remain within the parameter of Islamic Shari'ah, viz:

- (i) The Maslaha should be in complete conformity with basic principles of Islamic Shari'ah and help to provide facilities for man so that he may become an, obedient servant of Allah in his all actions of life.
- (ii) Maslaha should naturally be in accordance with the Injunctions of Islam laid down in the Holy Qur'an and Sunnah of Holy Prophet (p.b.u.h.). There was a consensus of opinion among the companions of the Holy Prophet (p.b.u.h) that Maslaha repugnant to the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h) is liable to be repulsed.
- (iii) Maslaha should-not be in contradiction with some correct analogy.
- (iv) It must not damage some other greater and more effective Maslaha. (Dawabit-al-Maslaha, pp. 18-252).

Thus, the rule of Maslaha (مصلحة) or Ijtihad is applicable only when there is no direct text of the Holy Qur'an or Sunnah of the Holy Prophet in a matter. We have just witnessed that there are several Verses of the Holy Qur'an and Ahadith of the Holy Prophet which throw sufficient light on the definition of interest and its other aspects and the Ummah is unanimous on the definition and prohibition of riba al-nasia.

152. In view of the above discussion the rule of Maslaha can't be invoked in aid to permissibility of "Bank Interest."

153. For consideration of the other point, whether an increase to offset the depreciation in the value of currency can be justified and considered as an alternate and substitute of interest, in the eye of Shari'ah, we may quote first from the well-known works on Economics as to the theory of inflation and indexation, purely from the economic point of view, and then we should examine the same on the anvil of the Qur'an and Sunnah.

154. "Inflation is a persistent tendency for the prices of most of the goods and services of rise over time. Inflation has been a world-wide problem throughout, much of the 20th century. Nonetheless, inflation has proved to be extremely difficult for economists to define or to distinguish from related problems.

All Pakistan Legal Decisions

155. It is often heard to determine whether a rise in the price of one product is part of an inflationary trend in the economy as a whole or simply reflects consumer's willingness, at some point, to spend more of their incomes on that particular product", (Collier's Encyclopaedia, Vol. 13, p.7 USA).

156. "By inflation, in ordinary language, is meant a process of rising prices. A situation is

described as inflationary when either the prices or the supply of money are rising, because both will rise together..... It can be said that when money supply increases it results partly in the increase of output (GNP) and it partly feeds the rise in prices. And when the supply of output lags far behind, the rise in prices is described as inflationary. In Coulborn's words, it is a case of too much money-chasing to a few goods; thus, inflation is generally associated with an abnormal increase in the quantity of money resulting in abnormal rise in prices"(K.K.D. Modern Economic Theory, Lahore, P.435).

157. J.L. Hanson describing the term of inflation says that "there are three senses in which this term is used:

- (1) Inflation on the Gold Standard, where a moderate and controlled expansion of bank credit is encouraged by the Central bank whenever there is an inflow of gold, the extent of an inflation in such circumstances is rigidly controlled since it is dependent on the amount of gold the country concerned has acquired.
- (2) Persistent (or Creeping) Inflation, is a condition where the volume of purchasing power is persistently running ahead of the output of goods and services available to consumers and producers; with the result that there is persistent tendency for prices and wages to rise, that is for the value of money to fall..... Since 1939 all countries have experienced varying degrees of persistent inflation.
- (3) Hyper-inflation, (alternatively known as a galloping' or 'runaway' inflation) occurs when a persistent inflation gets out of control and the value of money declines rapidly to a tiny fraction of its former value and eventually to almost nothing, so that a new currency unit has to be adopted". (J.L.Hanson: A Dictionary of Economics and Commerce, 5th Ed., London p.262).

158. Inflation is a very complex phenomenon. There is no sovereign remedy to combat it. Measures have to be taken on several fronts, monetary and non-monetary, to fight it. An effective supplementary device for controlling inflation is what has been called 'Indexation'.

159. J.L. Hanson defines 'indexation' as follows:

"A system of relating income, especially from investment, to retail price index in a time of inflation in order to offset the fall in the value of money," (Ibid, p.255).

160. "Economic variables are indexed to maintain the real value of variables which are measured in money units. The technique is to link a variable with a selected index e.g. wages may be linked to retail price index. The object is to prevent the erosion of real wages irrespective of changes in the price level. Similarly, the rate of interest can be indexed so that positive rate of return on money can be protected in real terms. Tax system constitutes an important area of indexation so that the proportion of deducted earnings can be kept relatively constant over time".(K.K. Dewett: Modern Economic Theory, ed. 83, Karachi, p.448).

161. Economists have considerably elaborated the merits and demerits of indexation and it clearly appears from the study of the relevant material that the demerits of the theory surpass greatly than that of its merits. Anyhow, indexation has not been considered a cure for inflation, rather it tends to perpetuate and accelerate inflation and to be self-defeating.

162. Indexation may be feasible in respect of wages, salaries and pensions to a mild extent as a temporary sedative for the pain of inflation. But "it is difficult to see how a just case could be built for the indexation of financial assets. Since investors (who not only save but also take the risk of investment) are not assured of a stable real value of their investments why should savers and cash holders be so assured when they don't even take the risk. Instead of introducing inequities through indexation it would be just to ask the holders of cash to seek protection through investment. Indexation would tend to induce savers to shy away from risk capital which has been emphasized in the Islamic value system and which is necessary for a growing economy. It would hence be desirable to induce savers to offset any erosion in the real value of their savings through investment". (M. Umar Chapra, *Towards a Just Monetary System*, Leicester Edition, p.40).

163. We have heard a number of Economists and Bankers in answer to the Questionnaire, reproduced earlier, issued by this Court. Each one of them opposed in clear terms, though briefly, the proposition of indexation based on the inflation to be adopted as substitute or alternate to the institution of "Interest". Dr. S.M. Hasanuz Zaman, Chief of the Islamic Banking Division of the State Bank of Pakistan whom we also heard on the Questionnaire, made a request at the conclusion of his submission on the Questionnaire that he may be given one full day to speak on indexation based on inflation as a compensation payable by the borrower to the lender/Bank for the use of loan, borrowed by him, to be adopted as a substitute or alternate to the "Interest", as he has been doing intensive research on the subject for about five years. We, therefore, specially invited him to Islamabad and heard him one full day. His mastery over the subject and his learned exposition was excellent and was of immense help to us. We would, therefore like to reproduce, from the learned paper, which he sent to us, later on, on our request wherein he has summarised the said discussion on the subject which is not only new but important as well in his own words.

164. "About twenty-one countries of world have introduced indexation but the coverage of indexation is not similar in different countries. A large number of countries have indexed wages, pensions and social security payments. Some other countries have indexed a single bond while many countries have indexed different forms of investments. Brazil is the only country to adopt this practice comprehensively. It is because of these differences that the technique of indexation and the choice of index differ in different countries. The most common technique of indexation is linking wage or investment to consumer prices or cost of living. Some countries make advance adjustments with prices while most countries practice ex post facto adjustments. The period of adjustment ranges from one month to one year; in some cases even three years."

165. The merits attributed to indexation are generally theoretical. As against it the contestants of this approach have based their arguments partly on theory and largely on the basis

of experience gained in different countries of the world.

166. In ultimate analysis indexation would mean that some one has to compensate the sufferer for the damage caused to the purchasing power of money or for decrease in its value. It may be payable by the Government, the employer, the borrower or the banker. In order to examine if the Sharia justifies such a payment by any of these parties we shall have to apply the Islamic law of compensation to these transactions after we have determined the person or the institution responsible for inflation.

167. In the Sharia return on physical human contribution and on financial contribution is governed by two different sets of rules. The former is assigned a fixed remuneration. The government may, if necessary, fix a minimum rate of remuneration and leave the maximum to market forces. On the other hand financial contribution in the form of a loan or a debt is to be rewarded exactly in the same kind and quantity; and excess over and above the sum lent would become interest and is treated to be strictly prohibited. This fact is borne out in the Qur'an, the Holy Prophet's tradition and the detailed discussion by all the fuqaha of all the schools of thought without any exception.

168. The Muslim jurists are so particular about this Quranic prohibition that they have disapproved this practice in all these transactions where deferred transfer of commodity or money is involved. Thus the purview of this prohibition covers not only loans and debts but also credit, barter, deferred exchange of currency; demonetization, delayed payment of remuneration after devaluation or revaluation; indemnity and change in the unit of currency at the time of redemption of loan.

169. Guided by the hadith the fuqaha have opined that in case dirhams or dinars are lent out by counting, they will be paid back by counting not by weight. Similarly in case these are lent out by weight they will be returned by weight not by counting. In respect of the loan of a commodity it is further provided by the fuqaha that it should be returned in the same kind and quantity irrespective of any change in its price at the time of return of the loan.

170. In case the amount of loan is in terms of fulus or smaller pieces of dirhams which the Government has banned and which has become out of currency the creditor will take its price. He will not be bound to accept this coin... because the defect has occurred when the coin was in the borrower's possession.... The price of the fulus will be fixed as current on the date of borrowing and the creditor will take it irrespective of the degree of defect in its value. But in case the coin, in spite of demonetization, is still in currency and popular, the creditor shall accept the fulus. This approach is based on a general principle that in the case of loan of fugible goods the creditor 'will be paid the same quantity of identical goods irrespective of whether the value of such goods increases, decreases, or remains unchanged during the period of loan. The same approach has been made by them in the case of payment of outstanding wage remuneration.

171. Another situation that causes liability is unlawful occupation of some body's

property (ghasb, usurpation). The usurper (ghasib) is called upon to return the goods or, in the case of destruction of goods, its price whenever the Court orders him to do so. The usurper will not be required to indemnify the loss caused to the value of the property as a result of a fall in its price.

172. The approach to lineage as made by our fuqaha is very dear and consistent. The same consistency exists in case liability of deferred payment arises not as a result of a transaction of loan but even when it arises as a result of barter, demonetization, debasement, devaluation or revaluation, remuneration and compensation and indemnity. In all these situations a loan is to be returned in the same unit of currency and the same amount, irrespective of any change in its relative value in terms of other goods or currency. Any violation of this principle would be a violation of the Quranic prohibition of riba and of the Holy Prophet's, injunctions. The fuqaha are so rigid in this principle that they do not relax it even in the case of redemption of the liability of dower to a wife. According to Alamgiri the amount fixed for dower will be payable to wife without any regard to increase or decrease in the value of currency on the date of payment.

173. Another objectionable point from the Shari'i angle is the element of ignorance and uncertainty that is observable in indexation. In the Sharia one of the conditions of a contract of deferred payment is precisely determining the liability at the time of making contract. Ignorance from this liability makes the contract void. In indexation the liability is known on the date it is due. In order to solve the problem of time lag between the period for which a change in the price level is observable and the period in which the price level adjustment is applied to the transaction, some countries have accommodated projected inflation also in the index. While ex post indexation involves an element of ignorance (jahl), projected inflation involves the 'element of uncertainty (gharar) too that makes a contract null and void.

174. While the principle of linking loans and debts to purchasing power cannot be justified on textual grounds there may yet be some arguments to adduce for indexation on rational and logical plane. We may examine these arguments in the following lines.-

- (1) The phenomenon of worldwide inflation causing hazards in economic life of man was never experienced before. It is, therefore, necessary to do ijtiḥad and not stick to the opinions of the early fuqaha. The answer to this argument is that the rule is that ijtiḥad is done only where textual argument, nass does not exist. And because this problem is guided by a nass, ijtiḥad is invalid.
- (2) The Holy Prophet has said that no damage should be done nor any should be borne. Inflation is a damage to the purchasing power of money. Indexation is a redress against this damage. In order to answer this question we shall have to examine the applicability of the Islamic law of indemnity in context of indexation. The law provides that a person responsible for inflicting a damage should indemnify the sufferer. The question will arise as to who of a multitude of factors responsible for inflation will be made to indemnify the sufferer. In case trade unions are responsible for a cost-push inflation how a bank can be justified in

making the entrepreneur indemnify the fall in value of its loan money? Will it not be a double punishment to the entrepreneur through paying higher wages to the labour and higher cost of loan to the bank? Why a borrower should be made to pay for a fall in value of money that occurs due to demand-pull inflation caused by receivers of foreign remittances or the recipients of high salaries and those charging fabulous profits. In some countries indexation is limited to Government bonds. It means the Government indemnifies only the bond-holders. The question would arise as to on whose expense bond-holders are being indemnified. Public treasury is mostly financed by public taxes. In other words it is the entire society which indemnifying the bond-holder only, although every body in the society is equally the sufferer.

- (3) It can be advocated that the Government being guardian of interest of the people (wali al'am) may indemnify the people of their loss in the purchasing power of money whether or not it is responsible for it. In this respect the guiding principle is that a damage is to be redressed. The answer to this plea is that the rule is applied only when one is sure that a damage will not be replaced by a bigger damage or a similar damage. Another condition is that mild damage will be endured to get rid of a serious damage. The third condition is that a particular damage may be tolerated to redress a general damage. Contrary to it indexation according to observers is a mechanism which is very much complicated to devise and operate and is a recipe for built-in inflation. The question will arise if we would like to resort to a more complicated mechanism in place of a simple routine without expecting any check on inflation. There is no doubt that monetary expansion brought about by rising public expenditure through deficit financing is treated to be a policy that causes inflation even if no other factors responsible for this situation are combined. But the question will arise why the Government resorts to money expansion. The answer is that the Government does so for overall development of the community, the whole country and the posterity. Confining the Government expenditure to regular budget and neglecting the major development programmes involving huge expenditure can save the people from the hardships of inflation. But at which cost? In the present day world, at the cost of economic and political survival. This means protection from a minor damage at the cost of a serious damage to the community. Moreover, development programmes and defence preparations may be withdrawn in favour of the purchasing power of the present generation but this may be done only at the expense of the existence of freedom and of the economic prosperity of the posterity. Thus a particular damage will be avoided by exposing the country to a general damage.
- (4) Another argument that may be adduced in support of indexation is that during inflation trade unions succeed in increasing their wages. If such increase is permissible in the Sharia on the ground of increase in prices how indexation, can be treated to be unjustifiable. It is a fallacious analogy because in the Sharia return on service is governed by a different rule than loan. Any increase in return

on service is increase in remuneration while increase in the amount of loan is interest. The former is permissible; the latter prohibited.

175. The following further points discard the idea-of indexation on rational grounds. He states.-

- (a) Value of money is a relative term. It does not represent the intrinsic characteristics of money which are its being a medium of exchange and a unit of account. During inflation it is the relative characteristic..... future value in terms of exchange -- that is affected. This latter characteristic has never remained constant since the day money was introduced. This has been so even when full-bodied money was in currency. Now the question is: Has any weakness crept within money itself that has reduced its purchasing power? Or there is something wrong with the seller of the commodity who is claiming more money for the same commodity. It is surely the latter factor that is responsible for increase in price because supply of goods and services is not matching the existing quantity of money. The intrinsic characteristics of money are intact. The fact that the rate of increase of prices is not generally identical is also a proof to suggest that the defect does not lie in money; it is the difference in demand for or supply of different goods and services that causes this distortion.
- (b) The basic idea behind indexation is indemnifying the owner / creditor for the loss incurred in future purchasing power of money. And this future is not the moment when a loan is redeemed; it begins from this moment. Thus it is not only the purchasing power of money that should be guaranteed but also the prospective potential of money that should be ensured. And this is an impossible condition to follow. This means that indexation alone will never fulfil the standard of justice.
- (c) Another aspect of this injustice is the choice of index itself which represents the basket of consumer goods and their weights that are included in price index. The index represents the consumption habit of an 'average person', which does not represent the overwhelming majority of actual persons. This will be unjust for many and unjustifiable favour for others. Moreover the basket will either represent the expenditure in the whole country/region or a fresh basket will have to be devised for each locality representing a different mode of living, price structure, substitutions, traditions, habits and such other factors. Another distinction will have to be made classwise.
- (d) Apart from this spatial injustice the index also involves temporal injustice. Index can be made on the basis of prices on some particular date or on the basis of average prices during a particular period, once, twice, thrice or four times a year. Unlike it savings, lendings and redemptions are an every day business. Thus average prices will never be precisely factual and fair.
- (e) Another aspect of injustice of the index lies in its macro-approach. It can be accepted that the loss in purchasing power of money should be made up. But the question is for whom? It is the savers individually, not collectively, whose purchasing power is to be made up. The question then arises: Is the loss in purchasing power of all the individual

savers according to the consumer basket which is the index? It will be found that nobody saves for the purchase of index basket and linking anybody's savings to any sort of basket will be unrealistic and unjust. If the loss in purchasing is really to be compensated it should be done according to loss suffered by individual saver. And this is impossible. Compensating the loss in purchasing power of money is a micro-economic phenomenon. Dealing with it on macro-level will always be unjust.

- (f) In addition to all these injustices the point is that, it is not the act of lending that erodes purchasing power of money; it is the act of saving that is responsible for decline in its value whether or not it is advanced as a loan. As such compensation for this loss from the borrower is unjust.
- (g) Stability in prices is an ideal. It can be achieved and maintained in a primitive, stationary society for a very long period but in a dynamic society for a very short period. Stable prices in the face of fast changing habits, modes of production, consumption patterns, standards of living, inventions and defence technology is an inaccessible ideal.
- (h) While arguing for indexation the entire discussion seems to assume a permanent inflationary situation in the future. Wisdom demands for also assuming the fate of indexation in a reverse situation. If indexation is applied during high rate of deflation or during recession also, the ruin that its psychological reaction will bring about can be easily visualized.
- (i) Indexation is prescribed by some economists to remedy the two failings of money viz. a store of value and a standard of deferred payment which appear due to inflation. But the interesting point is that by this remedy money loses one more characteristic viz. a measure of value, without restoring the lost characteristics.
- (j) There is also an argument which rejects the odium that has been attached with inflation. According to this approach the protest against inflation is by and large a "psychological reaction because the rate of increase in savings of the people is not commensurate with the rate of increase in incomes, due to simultaneous increase in the rate of expenditure on ever increasing consumer items. The opinion rejects overemphasis on the need for maintaining price stability at all costs which-in the Sharia is not an end itself but is intended to-achieve some other object. The opinion relies upon Schultze's sectoral demand shift theory therefrom concluding that price stability in developing countries is a far cry.
- (k) As most of the interest-free loans are non-productive, compensation will be unjustifiable from borrowers' point of view.
- (l) In case the rate of inflation is higher than the rate of profits, it will discourage the banks to accept loan accounts and to advance funds on equity basis.
- (m) Indexation by banks would have serious repercussions on voluntary private lending in

the Islamic society. If individuals also are tempted to adopt this scheme, it will open the floodgates to interest.

- (n) It is also claimed that indexation would bring about confusion in the entire currency system by attributing different values to the same money according to its repository. Thus the same money in imprest, in bank, and in business will bear three different values. During inflation value of money in imprest will continue to fall; value of money in business will depend on its productivity and the value of money in bank which is advanced as indexed loan will remain constant. This will take away the basic characteristic of money which makes it a unit of account.
- (o) In indexation the index-basket as presently known and practiced determines the standard of settlement of money debts in the future. In Islamic law it is mal that can be lent and borrowed and that is the standard of deferred payment. It is the quantity of this mal that is contracted to be returned. Mal has a value and has a want. Basket of commodities is an accounting concept. It has no value because it has no want and is not demanded, nor supplied. Thus it is doubtful if determining this basket as a standard of value in future payments would be acceptable in Islamic law.

176. There is no doubt that if inflation is allowed to grow beyond a reasonable limit, this may dry up investment in public utilities; encourage hoarding and speculation by discouraging interest in socially desirable channels. It may lead to flight of domestic capital. It may cause a decline in the overall real income in the economy. It may adversely affect the distribution of real incomes in different groups of the society mainly to the detriment of the fixed income groups. All these factors create a situation that is not desirable in Islam. There should be a means of redressing these evils and indexation is claimed to be one such technique. But an evil, as already discussed above, should not be redressed by a similar or a bigger evil. Muslim economists should try to explore the ways of fighting inflation within the sanctions provided by the Sharia. If Chile; for example, can succeed in devising a non- monetarist formula for fighting inflation there is no reason why our economists should insist on a device that apart from violating the rules of the Sharia, has failed to cure the evils of inflation, Dr. Zaman concludes.

177. The arguments given in support of indexation are mostly based on some economic principles and do not relate to Shari'ah.

178. A clear and distinct principle has been laid down by the Sunnah of the Holy Prophet:

"كل قرض بر منفعة فهو ربا من وجوه الربا"

(The benefit derived from any loan is one of the different aspects of riba). (Bayhaqi: Sunan-al-Kubr'a, Vol. V, p. 350).

179. There are several Ahadith which show that any advantage drawn through loan is not permissible:--

It is narrated from Anas Bin Malik that the Holy Prophet said that when one of you grants a loan and the borrower offers him a dish, he should not accept it; and if the borrower offers a ride on an animal, he should not ride, unless the two of them have been previously accustomed to exchanging such favours mutually. (Bayhaqi: Sunan-al-Kubra, Vol.V, p.350).

180. Imam Malik says that there is complete agreement among the Muslim jurists (and economists) regarding the prohibition of all credit transactions, where someone gives a loan to another person for a fixed period but the borrower repays (or promises to repay) the sum due before the specified date when the creditor reduces the time of loan due; or when the creditor, increases the time of repayment after the expiry of the period of loan and the debtor (promises) to increase the amount of his debt by a fixed additional sum. According to Imam Malik, it is pure' interest and there is no doubt about it. (Al-Muatta: Imam Malik (Ch. Buy'). Beirut, Vol 2, p.672. Also see Afzalur Rahman: Economic Doctrines of Islam) VQL II, p.73 Lahore).

181. The Muslim jurists have been of the view that if the currency became depreciated at the time of the repayment of loan the borrower will have to repay the same number (quantity) of coin, and he will not be liable to pay anything more.

12-04-17

Imam Malik says:

"كل شيء اعطيت الى اجل فرد اليك مثله وزياده فهو ربا"

(Whatever thing you give to person on the condition that it will be returned to you after a fixed time, and the borrower returns it to you alongwithsome addition, it will be riba.

(Al-Mudwawanah al-Kubrah Vol. 4, p. 25).

Ibn Abidin says:

"ولو استقرض فلوسا قلدت عليه مثلها"

(If some one borrowed some coins, the value of which became depreciated at the time of its payment, he will pay the same).

(Ibn Abidin: Tanbeeh-al-Ruqood, Vol. 2, p. 62).

He further stated that:

"واجمعوا ان الفلوس اذا لم يتكسد و لكن غلت قيمتها اور خصت فعليه مثل ما قبض من العدد"

(The jurists are unanimous on the point that (in case of loan) if the value of the coins, without its being stagnant, increased or decreased, the borrower have to pay the same number which he borrowed). (Ibid)

Ubadah Ibn Samit reported that the Holy Prophet (s.a.w.s.) said:

"الذهب بالذهب والفضة بالبر والشعير بالشعير والتمر بالتمر والملح بالملح مثلًا بمثل سواء بسواء يد ابدا فاذا اختلفت هذه الاصناف فبيعوا كيف شئتم اذا كان يد ابدا۔"

(Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt--like for like, equal for equal and hand-to-hand; if the commodities differ, then you may sell as you wish, provided that the exchange is hand-to-hand. (Sahih Muslim: Beirut, Baba-al-Sarfe wa bay' dhabi bit waraqi nagdan:

"باب الصرف وبيع ذهي بالورق نقدان"

182. Gold and silver (currency) have been counted among the six commodities about which it has been ordained that the transactions among these commodities must be like for like, equal for equal and hand to hand. If someone borrows Rs.100 from the bank which have to be paid back after one year, and this amount after indexation becomes Rs.120 or so, it would fall into the category of Riba, as enunciated in the aforesaid Hadith and comes within the ambit of *Riba-al-Nasia'h as well as Riba-al-Fadl*.

183. In fact, currency transactions, in Shariah, are not treated differently from commodity transactions in so far as lending and borrowing are concerned. As such no allowance can be made for the change in the value the money. (Ziaud Din Ahmad: Money and Banking in Islam, Islamabad, p.184)

184. Referring to the abovementioned Hadith, Umar Chapra, Economic Adviser to Saudi Arabia, has observed that:

The rationale for the objection is that if gold (or any other commodity) is used as a denominator, then the lender can reclaim the loan only in terms of the same denominator irrespective of whether its price rises or falls. The lender cannot be given the right to use money or the specified commodity as a denominator at his own option if he does not wish to indulge in *Riba-al-Fadl*. (Towards a Just Monetary System, p.41).

185. Supporting the arguments of M. Umar Chapra, Dr. Najatullah Siddiqui stated that Chapra has rightly argued that indexation is no cure for inflation. It may even accelerate it. Besides that: 'even though it is proposed with the innocent objective of doing justice to the riba-free lender, it has the potential of doing gross injustice to the borrower. As Kahf observes, 'the attempt to compensate one party for erosion in money is unfair and unjust, and it will be redundant' every body were to be compensated for the sake of justice.' (*Manzer Khafin* his discussion on Chapra's paper. Proceedings of the Makka Seminar, 1987). According to him indexation would also violate the Islamic prohibition of Riba '*I-Fadl*. Zubair also finds indexation to be against Islamic principles and without any basis in Shari'ah.

186. We will soon revert, with some more details, to the proceedings of the Seminar held

at Jeddah on the question of "Indexation and its application in the Islamic Economy". Refer to para. 227 infra.

187. As far as the loan transactions in commodities are concerned, Abdul Rahman Al-Jaziri writes:

"مسائل متعلقہ قرض کے مجملہ یہ ہے کہ اس میں لین دین برابر ہوتا ہے، چنانچہ اگر پیمانے والی کوئی شے قرض دی گئی، مثلاً گندم تو یہ لازم ہو گا کہ جو شے لی ہے وہ اسی قدر واپس کرے قطع نظر اس کے کہ وہ سستی ہو یا مہنگی۔ یہی حکم ان اشیاء کا ہے جن کا سودا گنتی سے یا وزن سے کیا جاتا ہے۔ (کتاب الفقہ علی المذہب الاربعہ، تالیف عبدالرحمن الجزیری، اردو ترجمہ، شائع کردہ محکمہ اوقاف پنجاب لاہور، جلد ۲ صفحہ ۶۸۰)

188. Allama Kasani elaborating the point says that if someone borrowed loan on the condition that he will repay some benefit over and above the loan or some one borrowed depreciated coins on the condition that he will repay the correct ones, the transaction will not be considered as legal. The relevant text of Al-Kasani is as under:--

"وما الذي يرجع الى نفس القرض فهو ان لا يكون، فيه جر منفعة فانه كان لم يجز نحو ما اقرضه دراهم غلظ على ان يرد عليه مما جا او اقرضه و شرط طال فيه منفعة لما روي عن رسول الله صلى الله عليه وسلم انه نهي عن قرض بر نفع او ان الزيادة المشروطة تشبه الربا لانها فضل لا يقابله عوض والتحرز عن حقيقة الربا وشبهه الربا واجب۔" (الکاسانی: بدائع الصنائع ۷/ ۳۹۵)

(As far as loan is concerned it is pertinent to mention here that it should not consist upon any kind of benefit, if it be so it will not be legal, for example, if someone gave stagnant coins as a loan on the condition that the borrower will pay correct coins or give anything of benefit at the time of the payment of loan. This kind of transaction will not be considered as legal because the Holy Prophet (p.b.u.h.) prohibited such kind of loan which brings any kind of benefit. The principle in this is that any stipulated benefit in the transaction is Riba, for the reason that this benefit is not in compensation of any thing. It is obligatory on every Muslim to prevent himself from actual *Riba* and the doubt of *Riba*).

189. Zaila'i also discussed the subject and elaborated the point that if a person borrows some coins or currency as loan and on the time of repayment these coins become stagnant and the currency becomes devaluated, he will be liable to pay the same according to the opinion of Imam Abu Hanifa, and according to the Abu Yousaf he will be liable to pay the value of the time of borrowing. He says:-

"ولو كسدت افس القرض برب رد مثلها وهذا عند ابي حنيفة وقاله برب رد قيمتها لانه تعذر رددها كما قبضها لان المقبوس ثمن والمرود ليس بتمن ففاتت الماثلة فتجب القيمة كما لو استقرض مثليا فاقطع عن ايدي الناس لكن عند ابي يوسف تعتبر قيمة يوم القبس وعنه محمد يوم الكساد۔" (تبيين الحقائق، جلد ۳، ص ۱۴۳)

(In case loan coins become stagnant these will be returned as they were borrowed according to Imam Abu Hanifa, while Imam Abu Yousaf and Imam Muhammad are of the opinion that the price of these coins will be returned back. Their argument is that the coins do not maintain their value and borrower is obliged to repay the same value. Imam

Abu Yousuf is of the opinion that the coins to be returned will be of the value of the time of borrowing, while Imam Muhammad is of the opinion that these coins will be of the value when they become stagnant).

190. Shamsul Aimmah Imam Shamsuddin Al-Sarakhsi says:--

"الواجب في ذمته مثل ما قبض من الفلوس۔" (المبسوط، ج ۱۳، ص ۳۰)

(The borrower is liable to pay only the same coins).

Al-Sarkhsi further says that similarity must be observed in transaction of loan, He says:--

"لان المقبوس بحكم القرض مشمول بالمثل من غير احتمال الزيادة والنقصان۔" (المبسوط، ج ۱۳، ص ۳۱)

(Under loan transaction that the same amount should be returned without any increase or decrease).

191. Imam Ibn Oudama al-Maqdisi has also discussed the question elaborately and stated that the borrower should return the same as he borrowed whether there may be an increase in the value or there may be devaluation.

"ان المستقرض برد المثل في المثليات سواء رخص سعره او غلا۔" (المغني: مكتبة الرياض الحديثية، ج ۴، ص ۳۶۰)

(The borrower should pay the same coins or currency irrespective of any increase or decrease occurred in the currency).

192, There is no difference of opinion among jurists that any increase stipulated to be paid on the amount originally lent out is *riba* (interest) prohibited. The jurists have also applied this principle in case of loan taken dirhams and dinars. In this connection Ibn Qudamah writes:

"وان كانت الدراهم يتعامل بها عدد افاستقرض عدد دار عدد او ان استقرض وزنار دوزنا۔"

(If dirhams are lent out by counting, they will be paid back by counting and not by weight. Similarly in case they are lent out by weight they will be returned by weight and not by counting. (Ibn Qudamah, Al-Mughni, Beirut, Lahore, Vol. IV, pages 356-357).

193. The jurists further concur that currency transactions are treated like commodity transactions in matter of lending and borrowing and, that is, the same quantity should be returned as was borrowed even though the value of the currency may have changed at the time of the return. In this connection a famous Hanafi jurist, Allama Ibn Abidin, writes:

"واجبوا ان الفلوس اذا لم تكسروا ولكن غلت قيمتها اور خصت فغليها مثل ما قبض من العدد۔"

There is consensus among the jurists that in case of loan taken in currency (فلوس) which has not been demonetized but either it has evaluated or devaluated, the borrower will pay the same quantity (in number) as he has borrowed." (Ibn Abidin, Rasail, Lahore, Vol. II, page 62).

194. The same approach has been extended by the jurists in case of payment of outstanding wages or remuneration. In this connection it is stated in Fatawa Alamgiri that the worker will be paid his contracted amount of remuneration even though the value of this money has changed before he is paid his due.

195. The jurists' are so strict in this matter that they do not relax this principle even in the case of redemption of the liability of dower to a wife. The amount fixed for dower will be payable to wife without any regard to increase or decrease in the value of currency on the date of payment:

"قلولم تكسد ولم تتقطع ولكن رخصت او غلت لا يعتبر۔"

(Fatawa Alamgiri, Vol. II, p.205).

196. The jurists have further applied this principle in the case of usurpation. The same amount and kind of money as usurped will be payable to the owner without any consideration to its value at the time of payment. The usurper will not be required to indemnify property or money as a result of a fall in its price:

"وان نقصت القيمة لتغير الاشعار لم يضمن الغاصب۔"

(Ibn Oudama AI-Mughni~ Riyadh, Vol. V, pp. 288-289).

197. Moreover, it seems unjust and exploitative for a lender to insist on getting a compensation for the erosion in the value of money post facto, while he is not prepared to accept a lower amount in case the value of money appreciates. It poses a question: why should a lender be protected against inflation while the borrower is not similarly protected against deflation?

198. Indexation is done due to inflation and inflation is caused either by Government, or by the society itself, or by consumer, or by natural constraints or by trade unions or traders or by international factors. In a large number of cases all the factors taken together are responsible. In case trade unions are responsible for a cost-push inflation how a bank can be justified in making the entrepreneur indemnify the fall in value of its loan money? Will it not be a double punishment to the entrepreneur through paying higher wages to the labour and higher cost of loan to the bank? In the same way, why a borrower should be made responsible to pay for a fall in value of money that occurs due to demand-pull inflation?

199. According to Islamic Law a person responsible for inflicting a damage should indemnify the sufferer and no other person will be held responsible for that. The Holy Qur'an says:

"ولا تكسب كل نفس الا عليها ولا توزر اوزر اخرى۔"

(Every soul draws the need of its acts on none but itself: no bearer of burdens can bear the burden of another." (6:164).

200. The Council of Islamic Ideology in 1980 has also considered the issue of indexation in its

Report of the Elimination of Interest from the Economy. The observation of the Council at p.12 is as follows:--

“Under the Shari'ah, currency transactions are not treated differently from commodity transactions in so far as lending and borrowing are concerned. The basic principle is that the same quantity (units) should be returned as was borrowed even though the price of the commodity may have changed in the meantime. For example, if one maund of wheat has been borrowed, the borrower will have to return one maund of wheat even though the price of one maund wheat may have risen from Rs.30 to Rs. 50 per maund or fallen to Rs. 15. Similarly, if the borrowing consisted of a specified amount of money, say Rs. 1,000 the borrower will have to repay the same amount of money even if the value of rupee in terms of other good and services may have changed during the period.”

201. Mawlana Muhammad Taqi Usmani, in his paper presented at a Seminar held at Jeddah under the auspices of Islamic Development Bank, Urdu translation whereof published in the two issues for the months of March and April, 1989 of his Urdu monthly journal Al-Balagh ((البلاغ)), Karachi, under the caption

کرنسی کی قوت خرید اور ادائیگیوں پر اس کے شرعی اثرات

after referring to several Ahadith of the Holy Prophet (p.b.u.h.) observed that---

"مندرجہ بالا تمام احادیث اس بات کو واضح طور پر بیان کر رہی ہیں کہ شریعت میں جو متماثل اور برابری معتبر ہے، وہ مقدار میں برابری ہے، اموال رُبو یہ میں قیمت کے تفاوت کا بالکل اعتبار نہیں یہ احکام اس صورت میں ہیں جب بیع نقد ہو رہی ہو، اور اگر معاملہ قرض کا ہو جس میں اصل سود جاری ہوتا ہے، اور جس میں ہر قسم کی زیادتی کے شبہ سے بھی بچنا ضروری ہے تو پھر اس میں قیمت کے تفاوت کا لحاظ کرنے کا سوال ہی پیدا نہیں ہوتا۔"

202. The learned writer thus opined at the end of his paper that-

"بہر حال، مندرجہ بالا بحث سے یہ بات ثابت ہو گئی ہے کہ "اشاریہ" (Indexation) اپنے تمام مراحل میں اندازہ اور تخمین پر مبنی ہے اور اگر کسی جگہ پر حساب باریک بینی اور پوری احتیاط سے بھی کیا جائے تو بھی اس کے نتیجے کو زیادہ سے زیادہ تقریبی تو کہہ سکتے ہیں، یقینی اور واقعی پھر بھی نہیں کہہ سکتے۔ جب کہ اوپر احادیث کی روشنی میں یہ واضح کیا جا چکا ہے کہ قرضوں کی واپسی میں انکل اور اندازہ کی شرط لگانا شرعاً جائز نہیں لہذا قرضوں کی ادائیگی کو قیمتوں کے اشاریہ سے وابستہ کر دینا کسی صورت میں بھی جائز نہیں۔"

i

203. We may refer to 'Maqalat-e-Saeed' (مقالات سعیدی) by Allam Ghulam Rasool Saeedi, Lahore 1982, pages 470-71. He state :-

"ایک سوال یہ ہے کہ افراط زر کی وجہ سے گرانی ہوتی ہے یہ افراط بعض اوقات قومی مفاد کے حق میں پالیسی کی وجہ سے ہوتا ہے۔ بعض اوقات بیرونی اثرات کی وجہ سے اور بعض اوقات غلط پالیسی کی وجہ سے افراط زر میں لوگوں کی قوت خرید گھٹ جاتی ہے۔"

مندرجہ بالا صورتوں میں سے کیا کسی صورت میں حکومت کے لیے یہ شرعی فرض ہے کہ وہ قوت خرید میں کمی واقع ہونے پر لوگوں کے نقصان کی تلافی کر دے۔ دوسرے الفاظ میں ان کے سکہ کے قدر کی ضامن ہو۔ یاد رہے کہ کبھی کبھی مندرجہ بالا عوامل کی بناء پر تفریط زر کی کیفیت بھی پیدا ہو سکتی ہے، جس کا نتیجہ بالکل برعکس ہوتا ہے۔

قوت خرید میں کمی بیشی کے تعین کے لیے مختلف اشیاء کی قیمتوں کا نمائندہ اشاریہ استعمال کیا جاسکتا ہے، کیا اس اشاریے کو مستقبل کی ادائیگیوں کے معاہدے کی بنیاد بنایا جاسکتا ہے۔ گویا اس طرح مستقبل کی ادائیگیوں کے لیے سکہ کی ثمنیت بعینہ نہیں رہے گی بلکہ اضافی ہو جائے گی، جس کا انحصار سال بہ سال بدلتی ہوئی مجموعی قیمتوں کے اوسط پر ہو گا۔ اس کی مثال یہ ہے کہ زید نے آج سو روپے دیے جس سے چار من غلہ کی قیمت ایک سو بیس روپے ہو تو اس کو بجائے سو روپے کے ایک سو بیس روپے دیے جائیں لیکن اگر یہ قیمت اسی (۸۰) روپے رہ جائے تو اس کو اسی (۸۰) روپے دیے جائیں؟

اس سوال کا جواب یہ ہے کہ ملکی پالیسی اور بیرونی اثرات کی وجہ سے جو سکہ کی قیمت (Market value) پر اثر پڑتا ہے اس کی تلافی کی حکومت ذمہ دار نہیں۔ ورنہ اس کے رد عمل میں سینکڑوں الجھاوے لاحق ہوں گے اور ملک میں اقتصادی بحران پیدا ہو سکتا ہے۔ اشاریہ کے طریق کار کی جو مثال دی گئی ہے وہ شرعاً صحیح نہیں ہے۔ مثلاً زید نے تین سال کیلئے عمر کو ایک سو روپے قرض دیا اور اس وقت اس سے چار من غلہ اور آتا ہے اور تین سال بعد افراط زر کی وجہ سے چار من غلہ کی قیمت ۲۰ روپے ہو اور وہ عمر سے سو کی بجائے ایک سو بیس روپے وصول کرے تو یہ صریحاً بواالنبیہ ہے جو حرام قطعی ہے اور اگر تفریط زر (جو تقریباً محال عادی ہے) کی وجہ سے چار من غلہ اسی (۸۰) روپے کا رہ جائے تو قرض خواہ کو اس کی مرضی کے خلاف بیس روپے کم لینے پر شرعاً مجبور نہیں کیا جاسکتا۔"

204. And, now, it needs to mention that the Islamic Fiqh Academy (مجمع الفقہ الاسلامی)، formed in 1983 under the auspices of the Organization of Islamic Countries (OIC) represented by some 45 Muslim countries in its session held at Kuwait in 1988 has also disapproved indexation. The resolution of the Academy is reproduced as under: -

قرار رقم ۸۸/۰۹/۵۵(۴)

بشان تغییر قیمتہ العملہ

ان مجلس مجمع الفقہ الاسلامی السنخدر فی دورۃ موتمرہ الخامس بالکویت من الی ۶ جمادی الاول ۱۴۰۹ مطابق ۱۱۰ الی ۱۵ سمبر ۱۹۸۸ء۔ بعد اطلاع علی الجھوت المقدمۃ من الاعضاء والخبراء فی موضوع (تغییر قیمتہ العملہ)

وبعد الاطلاع علی قرار الصحیح رقم (۹) فی الدورۃ الثانیۃ بان العملات الورقیۃ نقور اعتباراً بنضاضۃ الثمنیۃ کاملۃ ولھا الاحکام الشرعیۃ المقدر الذھب والفضۃ من حیث احکام الربا والذکوۃ والسلام وسائر احکامھا۔

قرمائی

الجرۃ فی وفا الدیون الثانیۃ بعملمہ ماھی بالشل و لیس بالقیمۃ لان الدیون تقضی بامثالھا فلا یجوز ربط الدیون فی الذمۃ آیا کان مصدرھا بمستوی الاسمار۔ واللہ اعلم۔

RESOLUTION NO. 4/5 (09/88)
CONCERNING
CURRENCIES VALUES FLUCTUATIONS

The Islamic Fiqh Academy (Jeddah) in its 5th Session held in Kuwait from 10 to 15 December, 1988; Having taken cognizance of the papers presented by the members and experts, on currencies values fluctuations, and listened to the discussions on this issue; Having taken cognizance of the Resolution No.9 adopted by the Academy Council during its 3rd session, in which, it is spelt out that Bank Notes, being legal currencies, having full value, are governed by Shari'ah provisions applied on gold silver in particular, for rules relating to *Riba* and *Zakat* and advance payment in general.

RESOLVES

The major custom in the reimbursement of consolidated debt incurred in a given currency is to make the reimbursement in the same quantity of that currency and not in its exchange value. It is not permissible, in fact, to gear debt, whatever the origin, to the price level. God is more Omniscient. (See Resolutions and Recommendations of the fifth Session of the Islamic Fiqh Academy held at Kuwait, 1988).

205. In the Second Seminar held at New Delhi of the Islamic Fiqh Academy of India مجمع الفقہ during December, 8-11, 1989, issue of currency notes was also considered and it was, inter alia, resolved that –

"موجودہ دور میں سونا چاندی ذریعہ تبادلہ نہیں رہا اور کاغذی نوٹوں نے ذریعہ تبادلہ ہونے میں سونے چاندی کی جگہ لے لی ہے۔ حکومت کے قوانین بھی کاغذی نوٹوں کو مکمل طور پر شمن کی حیثیت دیتے ہیں اور بحیثیت شمن نوٹوں کو قبول کرنا لازم قرار دیتے ہیں۔ غرضیکہ کاغذی نوٹوں کی حیثیت عرف اور رواج میں زر قانونی کی ہو گئی ہے۔ کرنسی کے اس ہمہ گیر رواج نے جو شرعی اور فقہی مسائل پیدا کیے ہیں ان کے مختلف پہلوؤں کا جائزہ لینے اور غور و خوض کرنے کے بعد شرکاء درج ذیل نکات پر متفق ہوئے:

۱۔ کرنسی نوٹ سند و حوالہ نہیں ہے بلکہ شمن ہے، اور اسلامی شریعت کی نظر میں کرنسی نوٹ کی حیثیت زر اصطلاحی و قانونی کی ہے۔

۲۔ عصر حاضر میں نوٹوں نے ذریعہ تبادلہ ہونے میں مکمل طور پر زر خلقی (سونا، چاندی) کی جگہ لے لی ہے اور باہمی لین دین نوٹوں کے ذریعہ انجام پاتا ہے اس لیے کرنسی نوٹ بھی احکام میں شمن حقیقی کے مشابہ ہے، لہذا ایک ملک کی کرنسی کا تبادلہ اسی ملک کی کرنسی سے کمی و بیشی کے ساتھ نہ تو نقد جائز ہے نہ ادھار۔" (سہ ماہی "بحث و نظر" پھلواری شریف پبشہ، جنوری تا مارچ ۱۹۹۰ء، ص ۱۲)

206. An objection may, perhaps, be raised that in the days when Islam was ruling, gold and silver were exchanged as commodity and the official coins made of gold and silver were used as currency, while in our days only paper currency is used in the entire world and, therefore, the argument based on hadith may not perhaps be available. The reply to this objection is to be found in another article of Maulana Taqi Usmani entitled as کاغذی نوٹ اور کرنسی کا حکم۔

The relevant portion appears

) of November, 1988. It read as under:---البلاغ at the page 31 of the issue of Urdu Monthly

"نوٹوں کے بارے میں یہ مسئلہ یعنی فلوس کے سکوں کی طرح ہے، سکے اصلاً دھات کے ہونے کی وجہ سے وزنی ہیں۔ لیکن فقہاء نے ان کو عددی قرار دیا ہے۔ اس کی وجہ یہی ہے کہ ان فلوس کے حصول ان کی ذات یا دھات یا تعداد مقصود نہیں ہوتی، بلکہ وہ قیمت مقصود ہوتی ہے جس کی وہ نمائندگی کرتے ہیں۔ لہذا اگر کوئی بڑا سکہ جس کی قیمت دس فلس ہو، اس کا تبادلہ ایسے دس چھوٹے سکوں سے کرنا جائز ہے جن میں سے ہر ایک کی قیمت ایک فلس ہے، اور اس کے وہ فقہاء بھی جواز کے

تافل ہیں جو ایک سکے کا دو سکوں سے تبادلہ کرنا جائز کہتے ہیں۔ اس لیے کہ اس صورت میں ایک سکے کی قیمت بعینہ وہی ہے جو دس سکوں کی ہے، یا دوسرے الفاظ میں یوں کہہ سکتے ہیں کہ دس فلس کا سکہ اگرچہ بظاہر ایک ہے، لیکن حکماً وہ ایک ایک فلس کے دس سکے ہیں۔ لہذا وہ دس واقعی سکوں کے مساوی ہے، بعینہ یہی حکم ان کرنسی نوٹوں کا ہے، کہ ان میں بھی ظاہری عدد کا اعتبار نہیں، اس عدد حکمی کا اعتبار ہے، جو ان کی قیمت (Face value) سے ظاہر ہوتا ہے۔ لہذا اس میں مساوات ضروری ہے۔"

207. It now seems pertinent to refer to the view expressed by our learned brother Mr. Justice Wajihuddin Ahmad in his judgment reported as Aijaz Haroon v. Inam Durrani PLD 1989 Kar. 304 (relevant page 334) with respect to the repayment of loan on the basis of indexation due to inflation in equal value of the money borrowed in case the value of currency has decreased. He observed:--

"----it, humbly, appears to me that while a borrower or a purchaser as aforementioned, cannot be forced to return anything more than the amount due, he may not, at the same time and by the same token, be permitted to pay anything less than that which he, in the first instance borrowed or agreed to pay. There is authority, dating back from the days of our earliest Doctors, to the fact that where a contract of sale is concluded but payment is deferred and, subsequently, the legal tender loses its value, wholly or in part, the buyer is obliged, according to preponderance of view, to pay on the date when payment becomes due, such amount, in 'terms of the current legal tender or in terms of gold and silver, which is equivalent to the real worth of the currency, which was the subject-matter of or for which the contract was concluded. Similar principle is applicable in relation to loans. Thus, if a person had borrowed money at a time when the value of money was at a particular level, in terms of purchasing power, and that value, discernibly, diminished at the time of return, the borrower is liable to pay at least equivalent of the real worth of the currency loaned out to him. In this behalf reference is made and reliance is placed on "Tambih Al-Raqood Ale Masail Al-Naqood" by Al-Syed Muhammad Amin Abidin Shami, compiled in 1230 A.H."

208. With all respect to learned Judge for his legal acumen, as there arose a difficult case of first impression in our Courts in applying the principle of indexation to repayment of loans, we would like to observe that the learned Judge, while placing his reliance on Ibn 'Abidin's work, has not referred to any specific text or its translation, of the most renowned jurist of thirteenth century Hijra. It is, in fact, an essay included in his book in two volumes popularly known as Rasail Ibn 'Abidin (رسائل ابن عابدین). In view of the importance of subject we deem it proper to give a resume of the said essay (تنبيه الرقود على مسائل النقود) which is as follows:-

If a person purchases cloth from another person in a prevailing currency and before paying the price thereof that currency is changed i.e. either it is demonetized and does not remain currency exchangeable in the market or its value is decreased or increased. In the first case the contract of sale becomes void because the price mutually agreed upon at the time of contract stood abolished. And in the second case the contract is valid and the

purchaser will have to pay the same quantity of currency as was at the time of purchase, irrespective of its value at the time of payment. Similarly, if a person takes loan from another person in prevailing currency on deferred payment and then that currency is either demonetized and does not remain currency exchangeable in the market or its value is decreased or increased, in the first case the borrower will have to pay the value of the currency prevailing at the time of borrowing, and in the second case the borrower will pay the same quantity of that currency as was at the time of the borrowing, irrespective of its value at the time of payment. This is the view of Imam Abu Hanifah and the first view of Imam Abu Yusuf. But according to the second and the later view of Imam Abu Yusuf the purchaser/ borrower will have to pay the value of the currency prevailing at the time of purchasing/ borrowing in currency prevailing at the time of payment. According to Qazi (Al-Zahidi) the verdict will be given according to the view of Imam Yusuf in the matter of loan and dower and according to the view Imam Abu Hanifah in other matters (فی ما سوى ذالك) . Imam Isbijabi has stated in Sharh al-Tahawi that there is consensus of opinion that in case of Increase or decrease in the value, the same quantity will be-paid as was at the time of borrowing.

“واجمعوا ان الفلوس اذا لم تكسروا لكن قيمتها اور خصت فعليه مثل ما قبض من العود۔”

This has also been quoted in Fatawah Qazi Khan and is supported by Qazi Zaheeruddin. Allamah Ghazi al-Tamartashi has stated that in most of the authentic books of the Jurists

the verdict has been given on opinion of Imam Abu Yusuf. The same has been related in al-zakhirah and al-Khulasah.

This difference of opinion between Imam Abu Hanaifah and Abu Yusuf arises in case the loan has been taken in token coins like fulus (فلوس) which were usually debased or demonetized. But if the loan has been taken in pure gold dinar or silver dirham which were full-bodied money and were rarely debased or demonetized, then there is consensus of opinion that the same quantity will be paid as was at the time of borrowing irrespective whether its value is decreased or increased at the time of payment. Imam Abu Yusuf also agrees with the opinion of Imam Abu Hanifah in this respect.

If the Government orders any decrease in the value of any currency, then, the loan taken in that currency before devaluation will be paid in the same quantity of currency as was at the time of contract of borrowing/purchase, provided the currency is fixed and known, and if the currency is not fixed and known then the value of currency prevailing at the time of contract will be paid, and if the contract of loan has not been made on any specific kind of the currency and there are several currencies of that name prevailing in the market, then its payment will be made in such a currency which will not be more harmful to any of the contracting parties or according to custom. Some jurists opine that in this case payment should be made by mutual consultation and compromise so that

none of them may bear any damage because the Holy Prophet (p.b.u.h.) said "no one should bear damage nor anyone should cause damage to another." (Tanbih al-Ruqud 'ala Masa'il al-Nuqud, published in Rasa'il Ibn Abidin, Lahore, Vol. II, pp. 66-67).

209. We have given the above, resume so that there should remain no ambiguity as to the view of Ibn 'Abidin attributed to him and followed by the learned Judge in his abovementioned judgment.

210. The above mentioned book on which the Hon'ble Judge has relied for his conclusion does not seem to support his contention in so far it relates to loans. It will be appropriate to reproduce the relevant text of the book which is as under:

”ولو استقرض فلوسا فكسدت عليه مثلها واجمعوا ان الفلوس اذا لم تكسدو لكن غلت قيمتها فعليه مثل ما قبض من العدد.“

(If a person has taken loan in currency then it is demonetized, the borrower will pay the equivalent of the real worth of currency loaned out to him. But the jurist concurs that if the currency is not demonetized but its value is either increased or decreased, the borrower will have to pay the same quantity as was borrowed by him).
(Ibn 'Abidin, Rasail, Lahore, Vol. II; page 62).

211. The word 'Kasid' (كاسد) means to become stagnant, dull, of no use. (E.W. Lane Arabic English Lexicon Book, Lahore, Part-7, page 2610). The word "kasid" generally means demonetization or unpopularity. Thus if the currency in which loan has been taken is totally demonetized and is out of the transaction among the people, then the loan taken in it will be paid in its equivalent value but if the currency is not totally demonetized and is still current in the currency market or its value has increased or decreased, the loan taken in it shall be paid in the same quantity in which it was borrowed. In this connection Ibn Qudamah writes:-

”و ان كان القرض فلوسا او مكسرة فحرمها السلطان و تركت المعاملة بها كان على المقرض قيمتها ولم يلزمه قبولها سواء كانت قائمة في يده او استهلكها لانها تعيب في ملكه. و قال يقومها كم تساوى يوم اخذها ثم يعطيه سواء نقصت قيمتها قليلا او كثيرا قال القاضى هذا اذا اتفق الناس على تركها فاما ان تعاملوا بها مع تحريم السلطان لها لزمه اخذها.“

(In case the amount of loan is in terms of fulus or smaller pieces of a dirham (mukassarah) which the Government (sultan) has banned and which have become out of currency, the creditor will take its price. He will not be compelled to accept this coin.... because the defect has occurred when the coin was in the borrower's possession.

.... The price of the fulus will be fixed as was prevailing on the date of borrowing and the creditor- will take it irrespective of the degree of decrease in its value. But in case the

coin (fulus), in spite of demonetization, is still in currency and popular, the creditor shall accept the same." (Ibn Oudamah, Vol. IV, page 325).

212. Continuing our discussion on the above-cited judgment (PLD 1989 Kar. 304), we would like to refer to the observations on the said judgment by Dr. S.M. Hasanuz Zaman, Chief of the Islamic Banking Division of the State Bank of Pakistan, presented by him in his learned monograph "INDEXATION OF FINANCIAL ASSETS"----An Islamic Evaluation", which he has very kindly submitted to this Court. In fact, the learned author has added his observations on the said judgment as "EPILOGUE" to the said monograph which seems to be part of a book, perhaps, ready for Press. We cannot do better than reproduce the same as under:--

"As pointed out in the Preface a learned Judge of the High Court of Sindh has decreed for indexing a financial liability in terms of purchasing power of money that was advanced to a Finance Company a few years ago. The Decree published in 33 pages touches upon delicate constitutional and legal issues and religious injunction to disallow the payment of interest on deposits and grants relief to the depositor by way of compensation for a fall in real value of money that has occurred during the period of deposit. Constitutional discussions are outside the scope of the book. We, however, reproduce here the relevant portions of the decree that contains the main arguments. This will be followed by an examination of the main points:--

"Para. 59. It is manifest that grant of interest is directly prohibited under the injunctions of Quran itself. However, a modern society beset with the evils or ill-effects of the prevalence of an economic order where paper currency happens to be in vogue and holds the field as correct legal tender. This has given rise to violent changes in the value of such legal tender and a common ailment of such a monetary system in its being constantly subject to what has been termed by economists as "inflation" or erosion in the buying power of the paper currency from time to time and, on occasions also "Deflation", as was experienced during the great depression of the thirties. Question, therefore, arises whether, in such circumstances, a borrower or for that matter, a purchaser in a sale, subject to deferred payment, is liable to return or pay only that count in terms of the paper currency which he borrowed or agreed to pay when such a deferred payment, as aforesaid, fell due. It would be appropriate now to quote Verse 7, Surah Al-'Imran, relating to the interpretation of the Holy Qur'an which ordains:

"For its (Qur'an's) hidden meanings, but no one knows its hidden meanings except Allah and those who are firmly rooted in knowledge....."

To Hazrat Ali~ as reproduced in Nahajul Balagh, (Khutba 194, page 248), is attributed the under-noted golden saying:

"Our philosophy and our preaching could only be understood by superior minds and sincere hearts."

Guided by the quoted verse in Surah 'Al-Imran' and the above mentioned dictum of Hazrat Ali, it humbly, appears to me that while a borrower or a purchaser, as aforementioned, cannot be forced to return anything more than the amount due, he may not, at the same time and by same token, be permitted to pay anything less than that which he, in the first instance borrowed or agreed to pay. There is authority, dating back from the days of our earliest Doctors, to the fact that where a contract of sale is concluded but payment is deferred and, subsequently, the legal tender loses its value wholly or in part, the buyer is obliged, according to preponderance of view, to pay on the date, when payment become due, such amount, in terms of the current legal tender or in terms of gold and silver, which is equivalent to the real worth of the currency, which was the subject-matter of or for which the contract was concluded⁵. Similar principle is applicable in relation to loans. Thus, if a person had borrowed money at a time when the value of money was at a particular level, in terms of purchasing power, and that value, discernibly, diminished at the time of return the borrower is liable to pay at least the equivalent of the real worth of the currency loaned out to him. In this behalf reference is made and reliance is placed on "Tanbih Al-Ruqud Ala Masail Al-Nuqud" by Muhammad Amin ibn Abidin Shami, compiled in 1230A.H. (see pp. 58-68 of Majrnua Rasa'li ibn 'Abidin, Vol. II, Reprint Lahore, 1976).

"Para. 61. Viewed in the foregoing light it is obvious that in their official pronouncements the Federal Government of Pakistan and its various agencies and the State Bank of Pakistan have neither been wanting nor slow in acknowledging, officially, in instruments, as sacrosanct as budgetary provisions and official publications, that inflation is rampant in the country. All efforts to keep it in check and to maintain the intrinsic value of the rupee have failed. Thus what was borrowed some years back if it is ordered to be returned on the basis of the same count would result in manifest injustice to the creditors inasmuch as that which will thus be returned would not have the same intrinsic value and buying power as it possessed, at the time of grant of loan.

"The law of Allah does not brook injustice of any kind and, therefore, whenever a case for payment, for refund of , return of money, comes before a Court of Law in Pakistan it has to be the endeavour of that Court to order the payment, refund or return as the case may be, of so much of current legal tender to the person entitled as is equal, in terms of buying power or other intrinsic value, to the amount initially loaned out, contracted to be paid , or deposited.

"Para 63. This brings me to the crucial question as to how equity is to be done between the parties. For obvious reason no rule of thumb is available to determine the extent of erosion, which the principal sum due, and earlier decreed in this case, has suffered till the date of payment, if any, or the decree. Such matter as a rule involves application of detailed accounting procedures based on official data on the subject. Simple decree on the

⁵ The remark seems to refer to the case involving the payment of fulus or nay currency that is not a legal tender. For examination of this argument see infra.

basis of the aforequoted statistics may not do. The case, therefore, in principle, calls for a Preliminary Decree, if one can be passed under law. This, however, does not imply that where smaller amounts or periods are involved a given case cannot be disposed of on approximations.

“Para. 65. I would, therefore, grant in this case to the plaintiff a decree of preliminary nature for assessment as to what was the equivalent real worth of the money which was initially borrowed, that is to say, of the sum of Rs. 5,00,000 as payable on 20-5-1984, the amount and date reflected, as they are, in the Promissory Note in suit. For this purpose and in order to make accurate assessment I would appoint a Commissioner to do the needful and for that purpose the Commissioner would be entitled to seek assistance from the relevant functionaries of the State Bank of Pakistan.....

Examination of Sharia arguments:-

213. The paragraphs reproduced in the above lines adduce a Our'anic Verse, a saying by Pious Ali (Allah be pleased with him) and reference to a booklet written by a celebrated jurist of 13th Hijra century, generally known as Ibn Abidin Shami.

214. Before examining the Sharia interpretation of the above passages it would be worthwhile to reproduce a summary of the points discussed in the booklet referred to in the Decree. The booklet discusses the liability of payment under situations of demonetization, debasement, fluctuation in value of the coin monometallism and bimetallism and reproduces the opinions of earlier Ulema on the issue some of which we have already given in the foregoing pages.

The case of demonetization.

215. In case a person purchases something for the currency which, before making payment, is changed would have either of two effects:

- (1) In case this money is not in circulation the contract would be voidable. The reason is that in a contract of sale both nature and amount of goods and money should be specified undisputedly. In the event of destruction of goods before it is delivered or of money before it is paid the contract of sale will become ineffective. Thus in the event of non-circulation of the contracted unit of money the contract of sale would become voidable because⁶ money is destroyed.
- (2) In case this money is in circulation but is depreciated in value, the contract will not be invalid because money is not destroyed. As a result the seller will have to accept the same money.

⁶ PLD 1989, Vol XII, pp-334-336, Aijaz Haroon v Inam Durrani, decreed by Mr. Justice Wajihuddin Ahmad, Sindh High Court (Reproduction of relevant portions only)

216. According to Zahidi in case a person sells something for a specific amount of money in circulation but afterwards that money is demonetized the contract of sale will become invalid. Therefore, the purchaser shall return the goods if it is intact. But in case the goods is consumed or is transformed into a different form he will return the like of it if the goods are fungible for if otherwise, the price of the goods in terms of current money equivalent to the value of that prevailed on the day goods was delivered to him.

217. The above legal opinion is found in respect of trading. In case it is a contract of hire the contract would become invalid and hirer will have to pay standard rent (ajr mithl).

In case of loan or dower the liable party shall pay the like of the amount payable.

218. The above opinion represents Imam Abu Hanifa's views. According to Abu Yusuf the liable party shall pay equivalent value in terms of other currency as circulating on the day of the contract. According to Imam Muhammad he will be liable to pay the demonetized currency which was contracted upon. According to Al- Ghazali if a person borrows currently legal fulus which are later on demonetized he will be liable to pay the like of it but not their value.

219. According to Hidayat sale for debased dirhams which are later on demonetized and become out of currency, is void, according to Abu Hanifa. But according to Abu Yusuf the purchaser shall be liable to pay the value that prevailed on the day of sale whereas according to Imam Muhammad he shall pay the equivalent of the value of debased money in terms of current money,

The case of fulus:--

220. According to Sharh Tahavi the opinion that in case the fulus are not demonetized but they increase or decrease in their value the borrower will be liable to return the exact sum borrowed by him, enjoys ijma (consensus).

The case of bimetallic standard:--

221. Presently (early thirteenth century) we have a multi-currency system in which the different currencies are equivalent in value and acceptability. As a result the purchaser has the option to pay in any currency of his choice. Along with it official decrees sometimes devalue one of these currencies. This is a situation in which the legal opinion is divided. It was ultimately decided that if the unit of currency was specified in the contract, it would be payable as such. In case the Unit of currency was not specified then the purchaser would pay the equivalent value of currency, that he would choose. This opinion is adopted with a view to protect the buyer and the seller from

loss arising out of arbitrary discretion of either party in view of revaluation or devaluation of the currency.

Examination of arguments:--

222. The Decree, in making out the case for 'paying the purchasing power of the amount of loan, claims to have been guided by the Qur'anic verse 3:7 which is reproduced below:

"هو الذي انزل عليك الكتاب منه آيات محكمات هن آيات آمين - وآخرون غوامض ان الحمد لله رب العالمين - الكتاب واخر

تشابهات فاما الذين في قلوبهم زيغ فيتبعون ما تشابه منه ابتغاء الفتنة وابتغاء تاويلها يعلمون ماويلها لا الله والراستخون في العلم يقولون آمنة كل من عند ربنا وما يذكر الا اولوا الالباب -"

(To be corrected)

(He it is Who hath revealed unto thee the Scriptures wherein are dear revelations -- They are the substance of the book -- and others which are allegorical (متشابهات). But those in whose hearts is doubt pursue, farsooth that which is allegorical seeking to cause dissension by seeking to explain it. None knoweth its explanation save Allah. And those who are of sound instruction say: We believe therein; the whole is from our Lord; but only men of understanding really heed) (English rendering: Marmaduke Pickthall).

223. It is not clear in what way the above-quoted verse leads to provide the argument in favour of the decree. It may be submitted that the Verses 2:278-79 deal directly with the subject and support the argument contained in the decree that "while a borrower or a purchaser cannot be forced to return anything more than the amount due, he may not, at the same time and by the same token, be permitted to pay anything less than that which he, in the first instance borrowed or agreed to pay". The verses read as under.-

يا ايها الذين آمنوا اتقوا الله و ذروا ما بقى من الربوا ان كنتم مومنين- فان لم تفعلوا فاذنوا بحرب من الله ورسوله وان تبتم فلکم رؤوس اموالکم لاتظلمون ولا تظلمون-

("O ye who believe! Observe your duty to Allah; and give up what remaineth (due to you) from interest, if ye are (in truth) believers. And if ye do not, then be warned of war from Allah and His messenger. And if ye repent, then ye have your principal (without interest) Wrong not and ye shall not be wronged". (2:278-79).

224. The emphasis placed in the decree on protecting the interest of both and restraining them from doing injustice is admirable but, as we have argued in the above chapters indexation of financial liabilities in itself is fraught with injustice.

225. The decree, places reliance on Ibn Abidin Shami's booklet but does not quote the passage which guides it to conclude in favour of indexation. A summary of the booklet has been

reproduced above. It will be found that the thirteenth century (A.H.) work is a good compilation of earlier opinions on discharge of financial liabilities under situations of demonetization, debasement, official devaluation of one monetary unit in relation to another unit circulating within a country, of counterfeit money and money not treated to be legal tender (fulus). The point to note is that the opinions of early fuqaha as quoted by Ibn Abidin provide argument against the concept of indexation. The spirit of all the opinions, though applied to entirely different monetary setup, disfavors the concept of indexation.”

226. We may now refer to the answer of the Council of Islamic Ideology to the above question as asked by the Panel of Economists and Bankers and the Council gave its answers in the following words:-

سوال نمبر 4۔ روپے کی قوت خرید میں کمی بیشی اور قرض

جواب:

قرض کے بارے میں اسلامی اصول یہ ہے کہ جو چیز قرض لی گئی ہے، اس کی اتنی ہی مقدار کی واپسی معاہدے میں طے کی جائے جتنی مقدار قرض میں دی گئی ہے، اس دوران اگر اس چیز کی قیمت میں کمی یا زیادتی واقع ہو جائے تو اس سے ادائیگی کی مقدار میں کوئی فرق واقع نہیں ہوگا مثلاً اگر ایک من گندم قرض لی گئی ہے تو ایک من گندم کی واپسی ہی واجب ہوگی خواہ قرض لیتے وقت اس کی قیمت تیس روپے ہو اور ادائیگی کے وقت پندرہ روپے رہ گئی ہو۔ قیمت کے گھٹ جانے کی وجہ سے گندم کی مقدار ادائیگی میں کوئی فرق واقع نہیں ہوگا۔ بعینہ یہی معاملہ روپے کا بھی ہے کہ دوسری اشیاء کی طرح اس کی قدر میں بھی قوت خرید کے لحاظ سے کمی بیشی ہوتی رہتی ہے، لیکن اس کی وجہ سے قرض کی ادائیگی میں کمی بیشی کرنا درست نہیں ہوگا اور جس طرح گندم کی مذکورہ بالا صورت میں ایک من گندم کی ادائیگی دو من گندم سے نہیں ہو سکتی اسی طرح روپے کی قوت خرید گھٹ جانے کی بناء پر روپے کی زیادہ مقدار کی ادائیگی جائز نہیں ہوگی۔

روپے کی قدر کے گھٹنے یا بڑھنے کا مسئلہ نیا نہیں ہے بلکہ ابتداء ہی سے چلا آتا ہے، چنانچہ اس پر پہلی اور دوسری صدی ہجری کے فقہاء نے بھی بحثیں کی ہیں اور ان مباحث کا حاصل یہی ہے کہ دیگر اجناس کی طرح کرنسی کی قیمت یا اس کی قوت خرید میں بھی کمی بیشی کا قرض کی ادائیگی میں کوئی اعتبار نہیں۔ علامہ ابن عابدین شامی نے اس مسئلے پر ایک مستقل رسالہ لکھا ہے جس کا نام ”تنبیہ الرقود علی مسائل التقدیر“ اس میں وہ لکھتے ہیں۔

لان الامام الاسیحابی فی شرح الطحاوی قال: واجمعوا ان الفلوس ادا لم تکسدوا لکن غلت قیمتھا او رخصت فعلیہ مثل ما قبض من العدد۔ (رسائل ابن عابدین جلد 2 صفحہ 62 مطبوعہ لاہور۔)

سوال نمبر 5۔ قرض اور شرح مبادلہ میں تبدیلی

جواب:

اس سوال کا جواب بھی سابقہ جواب کی طرح ہے، یعنی اصول یہی ہے کہ جس نوع کی کرنسی میں جتنی مقدار قرض دی گئی ہے اس نوع کی کرنسی کی اتنی ہی مقدار واپس کی جائے گی، خواہ اس کی شرح مبادلہ بدل گئی ہو۔ لہذا اگر قرض میں پاکستانی روپیہ دیا گیا تھا تو واپسی کے وقت اتنی ہی پاکستانی روپیہ لوٹایا جائے گا، خواہ ڈالر سے اس کی شرح مبادلہ میں کمی بیشی واقع ہو گئی ہو۔

لہذا اگر ڈالر کو معیار قرار دینے میں کوئی عملی سہولت ہے تو اس کا طریقہ یہ ہو سکتا ہے کہ جن صنعت کاروں کو بیرونی مشینری درآمد کرنے کے لیے قرض دیا جا رہا ہے، انہیں پاکستانی روپے کے بجائے ڈالر قرض دیے جائیں۔ اس صورت میں ان پر اتنے ہی ڈالروں کی ادائیگی واجب ہوگی اور اگر وہ ادائیگی پاکستانی روپے میں کرنا چاہیں گے تو ادائیگی کے روز اتنے ڈالروں کی جو قیمت ہوگی اس کے حساب سے پاکستانی روپے وصول کیے جا سکیں گے، بلکہ اگر ڈالر قرض دینے کے بعد انہی سے اس وقت کی شرح سے پاکستانی روپے کے عوض میں وہ ڈالر خرید لیے جائیں تب بھی ادائیگی ڈالر کے حساب سے واجب ہوگی۔

مثلاً کسی نے دس ہزار ڈالر اس وقت قرض لیے جب کہ ڈالر کی قیمت دس روپے تھی اس کے بعد فرض کیجیے کہ ادائیگی کے وقت ڈالر کی قیمت بارہ روپے ہو گئی۔ تو مقرض یا تودس

ہزار ڈالر بینک کو ادا کرے گا یا اگر وہ پاکستانی روپے میں ادائیگی کرنا چاہتا ہے، تو ایک لاکھ بیس ہزار پاکستانی روپے میں انہیں خرید لیا ہو تب بھی مذکورہ حکم میں کوئی فرق واقع نہ ہو گا، مقروض بہر صورت دس ہزار ڈالر یا ایک لاکھ بیس ہزار پاکستانی روپے بینک کو ادا کرے گا۔ (مجموعی سفارشات، اسلامی نظام معیشت، اسلامی نظریاتی کونسل، دسمبر 1983، صفحات 38، 39)

227. It now seems pertinent to mention that a seminar on Shariah position on indication and its application in an Islamic Economy jointly sponsored by the International Institute of Islamic Economics, International Islamic University, Islamabad and Islamic Development Bank, Jeddah was held in April 1987 at Jeddah. A number of prominent ulama and economists participated in this Seminar and read out their papers. Among others the following Scholars and Economists read their research articles in this Seminar:-

- 1) Dr. Ali Muhiyuddin Al-Qardaghi
- 2) Dr. Ajil Jasim al-Nashmi, Assistant Proffessor, College of Shari'ah and Islamic Studies, University of Kuwait.
- 3) Shaikh Muhammad Ali Abdullah, Standing Counsel for State, Dawa Court, Egypt.
- 4) Dr. M. Sulaiman Ashqar
- 5) Dr. Yusuf Mahmud Qasim, Head of Shariah Islami'ah, Kulliyyah al-Huquq, University of Cairo.
- 6) Dr. Hasanuzzaman, Chief of the Islamic Research Section, State Bank of Pakistan, Karachi.
- 7) Dr. Munawar Iqbal, International Institute of Islamic Economics, International Islamic University, Islamabad.
- 8) Mr. Muhammad Abdul Manan, Islamic Development Bank, Jeddah, Saudi Arabia.
- 9) Prof. Dr. Sayyid Muhammad Tahir, Institute of International Islamic Economics, International Islamic University, Islamabad.

228. Majority of the participants were of the view that loans taken on deferred payment will be paid in the same quantity in which they were taken irrespective of any decrease or increase in the value of currency at the time of payment. But some of them like Dr. Muhammad Sulaiman Ashqar, Dr. Ali Muhiyuddin al-Qardahi and Dr. Ajil jasim al-Nashmi and Mr. Muhammad Abdul Manan after discussing the opinions of the jurists have preferred the view of Imam Abu Yusuf who opines that if a payment is due in a currency whose value is either

increased or decreased, the same will be paid in the currency prevailing at the time of payment. But so far loans are concerned, the believed that it should be paid in the same quantity in which they were taken. Mr. Munwar Iqbal in his article, observed as under:-

“After a careful examination of the arguments against indexation from the Shari’ah point of view, I have come to the conclusion that there are two valid reasons for rejecting the schemes of indexation of loans suggested so far:-

Firstly, Islamic jurists unanimously hold that a fungible good must be returned by its like (mithl). This view is based on the authentic Hadith:

From 'Ubada ibn al-Sarnit: The Prophet (peace be upon him) said:

"Gold for gold, silver for silver, wheat for wheat, barley for barley, and dates for dates, and salt for salt-like for like, equal for equal, and hand-to-hand; if the commodities differ, then you may sell as you wish, provided that the exchange is hand-to-hand." (Muslim, Kitab al-Musaqat, Bab al-Sarfi wa bay'i al Dhahai bi al-waraqi naqdan).

Therefore, any scheme which involves .payment of a greater amount of the commodity lent amounts to paying Riba and is hence unacceptable in an Islamic economy.

Secondly, it is unjust and exploitative for lender to insist on getting compensation for the erosion in the value of money post facto, while he is not prepared to accept a lower amount in case the value of money appreciates. In other words, why should a lender be protected against inflation while the borrower is not similarly protected against deflation?"

229. In the end a resolution was unanimously passed by the participants which reads as under.-

- (i) Paper currency notes being principal amount in matter of determination of interest, liability of zakat, bai'a salam, mudarabah, shirkah etc. are like dirhams and dinars and the opinion of Imam Abu Yusuf that if a loan is taken in coins on deferred payment and then their value either decreases or increases, it will be paid in value of the coins in proportion to the dirhams and dinars prevailing at the time of payment, cannot be applied to paper currency notes. The paper currency notes are the substitute of dirhams and dinars and there is consensus of opinion that any change in their value will not be considered in deferred payments.
- (ii) All the ulema who participated in the Seminar verified that the similarity and equality mentioned in the ahadith of riba and loan mean equality in weight, measurement and quantity and not in value. It is obvious from the relevant ahadith which do not give any consideration to the quality in the interest-bearing transactions of these commodities and the ummah is united on this point and it has been acted upon.
- (iii) Indexation is not permissible in any kind of loan granted on deferred payment in the way that the parties who make the contract of sale or loan in a prevailing currency may connect it to some commodities and impose on the borrower/

purchaser to pay the value of those commodities in the currency prevailing at the time of payment. (Monthly al –Balagh, Karachi August 1987).

230. From the above dissertation it would thus be clear that so far as lending and borrowing is concerned, Ibn Abidin and other jurists concur that if a loan is taken in a currency for some time, it will be repaid in the same quantity in which it was borrowed irrespective of decrease or increase in its value provided the same currency is in vogue and has not been banned by the Government. But if the same currency has either been banned by the Government or has become out of the transactions among the people, then the loan taken will be repaid in the equivalent value of the currency at the time of borrowing.

231. For the above discussion, we would approve the three decisions reported as Messrs Bank of Oman Ltd. v. Messrs East Trading Co. Ltd. and others, Irshad H. Khan v. Mrs. Parveen Ajaz and Habib Bank Ltd. v. Muhammad Hussain and others (PLD 1987 Kar. 404, 466 and 612) and respectfully dissent with the above-cited judgment reported as Aijaz Haroon v. Imam Durrani (PLD) 1989 Kar. 304) as also adopted by the learned Judge in Tyeb v. Messrs Alpha Insurance Co. Ltd. and others (1990 C L C 428) to the extent of allowing an additional amount on loan based on indexation on account of inflation.

232. Professor Nijatullah Siddiqui, an eminent Economist of Indo-Pak sub-continent based at Jeddah as Professor of Economics in the Islamic Economics Centre, Malik Abdul Aziz University, Jeddah, answers about devaluation and its effect on repayment of loan to a questionnaire sent by this Court to him. His answer reads as under:-

“Devaluation of the currency would not affect the payment of loans taken before such devaluation, in so far as the loan was transacted in that currency specifically. When the parties to the loan transactions are private person in the same currency area, the rationale of the above opinion is clear. Devaluation of a currency is directed at its value in foreign currencies, though this may and often does affect its purchasing power at home, especially with reference to imported goods. It is generally done to serve the best interest of the people of a country by promoting exports and discouraging imports. To the extent some people are 'harmed' by it, not only the lender but the borrower could also have been affected (depending on which did he actually use the sum borrowed). Then, if we assume that the lender does deserve compensation whom shall we hold responsible for compensating him? It can only be the authority which devalued not the borrower who had little say in devaluation. If we ask the devaluing authority, the State, to pay the compensation, it will have to collect this amount (and as such amounts) through taxation, and the administrative cost of compensating all lenders will be great. Hence we are obliged to say that the lenders should better take the risk of devaluation into consideration while lending. If they want to hedge against this risk it is open to them either to refuse to lend or lend gold or any other commodity not vulnerable to such risks.”

233. We may conclude this discussion with the quotation from M. Umer Chapra's book "Towards a Just Monetary System", who is a well-known Pakistani Economist, author of several books and attached with the Government of Saudi Arabia as its Financial Adviser for many years. He writes.-

“Indexation of Qard Hasanah in terms of a price index may also not be defensible on

economic grounds because even though it is proposed with the innocent objective of doing justice to the lender of Qard Hasanah, it has the potential of initiating gross injustice to the borrower, particularly in years when the rate of inflation is higher than the rate of interest. Indexation essentially implies a zero real rate of interest. In the real world, however, this has rarely been the case; the real rate of interest has fluctuated. In fact, in certain years it has also been negative, when it has been positive it has tended to drain real profits and decelerated investment growth thus exacerbating the long run problems of economic growth. Hence when lenders have not always been assured a zero real rate of interest even in capitalist economics, would it be wise to do so in Muslim countries,”(M. Umar Chapra. Towards a Just Monetary System, Wiltshire, page 41)

234. Afzalur Rahman in his Encyclopedia of Seerah, London, 1982, Vol. II. P. 418, states:-

“To sum up: ‘Islam recognizes the right of man to seek his livelihood on God’s earth according to his capacity, ability and natural endowments. But it does not concede him the right to adopt such means in the acquisition of wealth as could lead to his moral degradation or upset the social order. Islam sets the distinction of Halal (lawful) and Haram (unlawful) in respect of the different means of earning, and imposes the ban of illegality on all those methods which are morally or socially injurious. For this purpose, it has clearly specified those methods which it regards as injurious. Under the Islamic Law, wine and other intoxicants and drinks which spread evil and immorality are not only unlawful (Haram) in themselves but even their manufactures, sale, purchase and possession have been declared to be unlawful. Islam does not recognize adultery, intoxicating music, dancing etc., as lawful means of livelihood. It declares all such dealings as unlawful in which the gain of one individual is secured by the loss and injury to some other person or persons or society as a whole. Bribery, stealing, gambling, speculation, business based on fraud and deceit, hoarding and holding back the necessities of life with the object of raising prices, monopolies of the means of production by one or several persons which narrow down the field for others, all these methods have been declared unlawful. It has picked out carefully and branded as illegal all such forms of business as are by their nature capable of causing dispute, or in which the loss or gain depends on mere luck or accident, or wherein the rights of the parties are not distinguishable.”

235. Now we take up the different fiscal laws or provisions thereof, challenged before us through the above petitions. First of such laws is the Interest Act, 1839.

I. THE INTEREST ACT, 1839.

“An Act concerning the allowance of Interest in certain Cases.”

Whereas it is expedient to extend to the territories under the Government of the East India Company, as well within the jurisdiction of Her Majesty's Courts as elsewhere, the provisions of the Statute 3rd and 4th William IV, Chapter 42, section 28, concerning the allowance of interest in certain cases; It is, therefore, hereby enacted that, upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be

recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the 'current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: provided that interest shall be payable in all cases in which it is now payable by law."

236. The Council of Islamic Ideology appears to have recommended to the Government the repeal of the said enactment. Refer to the 'first Report of the Council on 'Islamization of Laws', December, 1981. Relevant extracts there from is reproduced below:--

"This Act (The Interest Act, 1839 (XXXII of 1839) was considered by the Council in its session held on the 27th September, 1966, and after brief discussion by the members, it was decided that consideration of the Act may be kept pending till decision of the Council on the question of Riba The Act was reconsidered by the Council in its session held on the 11th November, 1981 (then headed by one of us, Dr. Tanzil-ur- Rahman) and its repeal was recommended with the following Comments:--

"اس قانون کے تحت عدالتیں قرض خواہوں کو ایسی رقوم یا قرضوں پر جو ان کے روبرو ادا کیے جائیں، سود کی ڈگری دینے کی مجاز ہیں۔ یہ قانون قرآن و سنت کے احکام کے منافی ہے۔ کونسل ربا کے مسئلہ پر اپنا حتمی فیصلہ دے چکی ہے کہ ربا (سود) اپنی تمام صورتوں میں حرام ہے۔ اس لیے کونسل اس قانون کی منسوختی سفارش کرتی ہے۔"

237. The above Act was also considered by one of us (Dr. Tanzil-ur- Rahman, J., as he then was) in the case reported as *Habib Bank Limited v, Muhammad Hussain* and another P L D 1987 Kar. 612 and it was held repugnant to the Injunctions of Islam.

238. For the reasons already discussed in detail we would hold that the Interest Act, 1839 is repugnant to the injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h)

II. THE GOVERNMENT SAVINGS BANKS ACT, 1873 (Act NO. V OF 1873)

An Act to amend the law relating to Government Savings Banks Act,

1873.

239. This Act Provides for nomination and payment of deposit on death of the depositor and such payment to be a full discharge However, it provides for the savings of rights of executor and creditor etc.

240. Section 10, as challenged, reads as under:-

"S.10. any deposit made by, or on behalf of, any minor may be paid to him personally if he made the deposit, or to his guardian for his use if the deposit was made by any person other than the minor, together with the interest accrued thereon."

241. The above provision of law provides for payment of deposit together with interest accrued thereon. The provision relating to interest in the above said section is held as repugnant

to the Injunctions of Islam.

III. NEGOTIABLE INSTRUMENTS ACT, 1881.

242. The above Act relates to promissory notes, bills of exchange and cheques. Chapter I is preliminary. Chapter II relates to notes, bills and cheques and defines various negotiable instruments. Chapter III relates to parties to notes, bills and cheques. Chapter IV provides for negotiation of the instruments. Chapter V relates to the presentment of negotiable instrument. Chapter VI provides, inter alia, for payment of interest. Chapter VII deals with the discharge from liability on notes, bills and cheques. Chapters VIII and IX provide for notes of dishonor and of noting and protest. Chapter X makes provision as to what is reasonable time for presentment for acceptance or payment, for giving notice of dishonor and for noting. Chapter XI relates to the acceptance and payment for honour and reference in case of need. Chapter XII provides for compensation. Chapters XIII, XIV and XV make special rules of evidence, special provisions relating to cheques and special provisions relating to bills of exchange. Chapter XVI makes provision of international law and Chapter XVII, which is the last, provides for notary public. Sections 79 and 80, as challenged before us, read as under:--

"S 79. Subject to the provisions of any law for the time being in force relating to the relief of debtors, and without prejudice to the provisions of section 34 of the Code of Civil Procedure, 1908:--

(a) When interest or return in any other form at a specified rate is expressly made payable on a promissory note or bill of exchange and no date is fixed from which interest or return in any other form is to be paid, interest or return in any other form shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the note, or, in the case of a bill, from the date on which the amount becomes payable, until tender or realization of such amount, or until the date of the institution of a suit to recover such amount.

(b) when a promissory note or bill of exchange is silent as regards interest or does not specify the rate of interest, interest on the amount of the principal money due thereon shall, notwithstanding any collateral agreement relating to interest between any parties to the instrument, be allowed and calculated at the rate of six per centum per annum from the date of the note, or, in the case of a bill, from the date on which the amount becomes payable until tender or realization of the amount due thereon, or until the date of the institution of a suit to recover such amount:

Provided that in the case of an amount due on an instrument where the return is on basis other than interest, the return on the amount due, when no rate of return is specified in the instrument, shall be calculated at the following rate—

i. in the case of return on the basis of mark-up in price, lease, hire, purchase or

service charges, at the contracted rate of mark-up, rental, hire or service charges, as the case may be; and

- ii. in the case of return on the basis of participation in profit and loss, at such rate as the Court may consider just and reasonable in circumstances of the case, keeping in view the profit-sharing agreement entered into between the banking company and the judgment-debtor when the loan was contracted;

- © Notwithstanding the provisions of clauses (a) and (b), return on an amount on an instrument where the return is on basis other than interest shall be allowed from the date it becomes due till the date it is actually paid.

S.80. When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of six per centum per annum from the date at which the same ought to have been paid by the party charged until tender or realization of the amount due thereon or until such date after the institution of a suit to recover such amount as the court directs:

Provided that in the case of an amount due on an instrument where the return is on basis other than interest return on the amount due, when no rate of return is specified in the instrument, shall be calculated at the following rate, and shall be allowed from the date it becomes due till the date it is actually paid:.

- (a) In the case of return on the basis of mark-up in price, lease hire purchase or service charges, at the contracted rate of mark-up, rental, hire or service charges, as the case may be: and
- (b) In the case of return on the basis of participation in profit and loss, at such rate as the court may consider just and reasonable in the circumstances of the case, keeping in view the profit-sharing agreement entered into between the banking company and the Judgment-debtor when the loan was contracted.

Explanation – When the party charged is the indorser of and instrument dishonoured by non-payment, he is liable to pay interest or return in any other form, as the case may be, only from the time that he receives notice of the dishonor.

243. Section 79 (a) makes provision for interest or return in any other form at a specified rate. The word “return” used in the context of this section conveys no other meaning except that of interest at a specified rate, and falls within the definition of the word Riba, as discussed earlier. Subsection (b) of section 79 contemplates a situation where the rate of interest is unspecified. In such a situation, it prescribes that the rate of interest on the principal money due shall be allowed and calculated at the rate of six per centum per annum from the date on which the amount becomes payable until tender or realization of the amount due thereon, or until the date of the institution of a suit to recover such amount: viz. the amount of interest on the principal amount, which we have already held to be prohibited by Islam, and be deleted from these provisions.

244. In so far as clause (i) to the proviso is concerned a number of other terms have been used. The first of them is "mark-up".

245. Maulana Muhammad Taqi Usmani, Later on, appointed as Judge of this court, now Member, (Shariat Appellate Bench of the Supreme Court), has stated that Mark-up System of banking is not allowed as it obviously amounts to Riba (interest) prohibited in Islam. He states:

" بلا سود بنکاری پر اب تک جو علمی اور تحقیقی کام سامنے آیا ہے، ان میں احقر کی معلومات کی حد تک سب سے زیادہ جامع، مفصل اور تحقیقی رپورٹ وہ ہے جو اسلامی نظریات کونسل نے علماء کرام اور ماہرین معاشیات و بنکاری کی مدد سے مرتب کی ہے اور اب منظر عام پر آچکی ہے۔ اس رپورٹ کا حاصل بھی یہی ہے کہ بلا سود بنکاری کی اصل بنیاد نفع و نقصان کی تقسیم پر قائم ہوگی، اور بینک کا بیشتر کاروبار شرکت یا مضاربت پر مبنی ہوگا، البتہ جن کاموں میں شرکت یا مضاربت کارآمد نہیں ہو سکتی، وہاں کے لیے اس رپورٹ کا حاصل بھی یہی ہے کہ بلا سود بنکاری کی اصل کی بنیاد نفع و نقصان کی تقسیم پر قائم ہوگی، اور بینک کا بیشتر کاروبار شرکت یا مضاربت پر مبنی ہوگا، البتہ جن کاموں میں شرکت یا مضاربت کارآمد نہیں ہو سکتی، وہاں کے لیے اس رپورٹ میں کچھ اور متبادل راستے بھی تجویز کیے گئے ہیں جنہیں بوقت ضرورت عبوری دور میں اختیار کیا جاسکتا انہی متبادل راستوں میں ایک متبادل راستہ وہ ہے جسے اس رپورٹ میں "بیج موبل" کا نام دیا گیا ہے۔"

"اس طریق کار کا خلاصہ اس طرح سمجھئے کہ مثلاً ایک کاشتکار ٹریڈر خریدنا چاہتا ہے لیکن اس کے پاس رقم نہیں ہے، بحالات موجودہ ایسے شخص کو بینک سوڈ پر قرض دیتا ہے، یہاں سوڈ کے بجائے شرکت یا مضاربت اس لیے نہیں چھل سکتی کہ کاشتکار ٹریڈر تجارت کی غرض سے نہیں بلکہ اپنے کھیت میں استعمال کے لیے خریدنا چاہتا ہے۔ چنانچہ یہ تجویز پیش کی گئی ہے کہ بینک کاشتکار کو روپیہ دینے کے بجائے ٹریڈر خرید کر ادھار قیمت پر دے دے، اور اس کی قیمت اپنا کچھ منافع رکھ کر متعین کرے اور کاشتکار کو اس بات کی مہلت دے کہ وہ بینک کو ٹریڈر کی مقررہ قیمت کچھ عرصہ کے بعد ادا کر دے۔ اس طریقہ کو اسلامی کونسل کی رپورٹ میں "بیج موبل" کا نام دیا گیا ہے اور اس میں بینک نے ٹریڈر کی بازاری قیمت پر جو منافع رکھا ہے اسے معاشی اصطلاح میں مارک اپ کہا جاتا ہے۔"

اس پس منظر کو ذہن میں رکھتے ہوئے جب ہم یکم جنوری 1981 سے نافذ ہونے والی اسکیم کا جائزہ لیتے ہیں تو نقشہ بالکل برعکس نظر آتا ہے۔ اس اسکیم میں نہ صرف یہ کہ "مارک اپ" ہی کو غیر سوڈی کاؤنٹرز کے کاروبار کی اصل بنیاد قرار دے دیا گیا۔ بلکہ "مارک اپ" کے طریق کار میں ان شرائط کا بھی لحاظ نظر نہیں آتا جو اس مارک اپ کو محدود فقہی جواز عطا کر سکتی تھیں، چنانچہ اس میں مندرجہ ذیل سنگین خرابیاں نظر آتی ہیں۔

"بیج موبل" کے جواز کے لیے لازمی شرط یہ ہے کہ بائع جو چیز فروخت کر رہا ہے وہ اس کے قبضے میں آچکی ہو، اسلامی شریعت کا یہ معروف اصول ہے کہ جو چیز کسی انسان کے قبضے میں نہ آئی ہو اور جس کا کوئی خطرہ (Risk) انسان نے قبول نہ کیا ہو اسے آگے فروخت کر کے اس پر نفع حاصل کرنا جائز نہیں اور زیر نظر اسکیم میں "فروخت شدہ" چیز کے بینک کے قبضے میں آنے کا کوئی تذکرہ نہیں بلکہ یہ صراحت کی گئی ہے کہ بینک "مارک اپ اسکیم" کے تحت کوئی چیز مثلاً چاول اپنے گاہک کو فراہم نہیں کرے گا بلکہ اس کو چاول کی بازاری قیمت دے گا جس کے ذریعے وہ بازار سے چاول خرید لے گا اور اس اسکیم کے الفاظ میں :-

"جن اشیاء کے حصول کے لیے بینک کی طرف سے رقم فراہم کی گئی ہے ان کے بارے میں سمجھا جائے گا کہ وہ بینک نے اپنی فراہم کردہ رقم کے معاوضے میں بازار سے خرید لی ہیں، اور پھر انہیں نوے دن کے بعد واجب الادا زائد قیمت پر ان اداروں کے ہاتھ فروخت کر دیا ہے (جو اس سے رقم لینے آئے ہیں) (اسٹیٹ

بینک نیوز یکم جنوری 1981ء صفحہ 9)

اس میں اس بات کا کوئی تذکرہ نہیں ہے کہ وہ اشیاء بینک کی ملکیت اور اس کے قبضے میں کب اور کس طرح آئیں گی؟ اور محض کسی شخص کو کوئی رقم دے دینے سے یہ کیسے سمجھ لیا جائے کہ جو چیز وہ خریدنا چاہ رہا ہے وہ پہلے بینک نے خریدی اور پھر اس کے ہاتھ بیچ دی ہے؟ صرف کاغذ پر کوئی بات فرض کر لینے سے وہ حقیقت کیسے بن سکتی ہے، جب تک اس کا صحیح طریق کار اختیار نہ کیا جائے۔ بلکہ یہ کہا گیا ہے کہ 28 مارچ کو چاول وغیرہ کی خریداری کے لیے بینکوں نے جو رقمیں راکس کارپوریشن کو پہلے سے دی ہوئی تھیں، 28 مارچ کو یہ سمجھا جائے گا کہ کارپوریشن کو مارک اپ کی بنیاد پر رقم دی ہیں، اور جس جس کی خریداری کے لیے وہ قرضے دیے گئے تھے، یہ سمجھا جائے گا کہ وہ بینک نے خرید لی ہے اور پھر کارپوریشن کو مارک اپ کی بنیاد پر بیچ دی ہے، اب سوال یہ ہے کہ جن رقموں سے کارپوریشن پہلے چاول وغیرہ خرید چکی ہے اور شاید خرید کر آگے فروخت بھی کر چکی ہے اس کے بارے میں کون سی منطق کی رو سے یہ سمجھا جاسکتا ہے کہ وہ بینک نے خرید کر دوبارہ کارپوریشن کو بھیجی ہے؟

”اس سے یہ بات واضح طور پر مترشح ہوتی ہے کہ ”بیع موبجل“ کا حقیقی طور پر اپنانا نام پیش نظر نہیں بلکہ فرضی طور پر اس کا صرف نام لینا پیش نظر ہے اور انتہا یہ ہے کہ اس جگہ یہ نام بھی برقرار نہیں رہ سکا۔ بلکہ بینک کی دی ہوئی رقم کو قرض (advance) اور اس عمل کو قرض دینے (Lend) سے تعبیر کیا گیا ہے۔ (اسٹیٹ بینک نیوز کیم جنوری 1981ء، ص 7)

”اس اسکیم کی ایک سنگین ترین غلطی اور ہے۔ ”بیع موبجل“ کے لیے ایک لازمی شرط یہ ہے کہ معاہدے کے وقت فروخت شدہ شے کی قیمت بھی واضح طور پر متعین ہو جائے اور یہ بات بھی کہ یہ قیمت کتنی مدت میں ادا کی جائے گی؟ پھر اگر خریدنے والا وہ قیمت معینہ مدت پر ادا نہ کرے تو اس سے وصول کرنے کے لیے تمام قانونی طریقے استعمال کیے جاسکتے ہیں، لیکن ادائیگی تاخیر کی بنیاد پر معینہ قیمت میں اضافہ کرنے کا شرعاً کوئی جواز نہیں ہے کیونکہ تاخیر کی بنیاد پر قیمت میں اضافہ کرتے چلے جائیں تو اسی کا دوسرا نام سود ہے، لیکن زیر نظر اسکیم میں اس اہم اور بنیادی شرط کی بھی یہ کہ پابندی نہیں کی گئی بلکہ بعض معاملات میں وضاحت کے ساتھ اس کی خلاف ورزی کی گئی ہے، چنانچہ اس میں کہا گیا ہے کہ اپورٹ بلوں کی ادائیگی میں بینک جو رقم خرچ کرے گا، اس پر ابتداءً بیس دن کی مدت کے لیے اعشاریہ 87 فیصد مارک اپ وصول کرے گا، اور اگر یہ رقم بیس دن میں ادا نہ ہوئی تو مزید چودہ دن کے لیے اعشاریہ 58 فیصد مارک اپ کا مزید اضافہ ہوگا اور اگر 34 دن گزر جانے پر بھی قیمت کی ادائیگی نہ ہوئی تو اس قیمت پر مزید اعشاریہ 62 فیصد مارک اپ کا اضافہ ہوگا اور اگر 48 دن گزر جانے پر بھی قیمت کی ادائیگی نہ ہوئی تو آئندہ ہر پندرہ دن کی تاخیر پر مزید اعشاریہ 79 فیصد کے مارک اپ کا اضافہ ہوتا چلا جائے گا۔

اندازہ فرمائیے کہ یہ طریق کار واضح طور پر سود کے سوا اور کیا ہے؟ اگر ”انٹرسٹ“ کے بجائے نام ”مارک اپ“ رکھ دیا جائے اور باقی تمام خصوصیات وہی رہیں تو اس سے ”غیر سودی نظام“ کیسے قائم ہو جائے گا۔

واقعہ یہ ہے کہ اسلام کو جس قسم کا نظام سرمایہ کاری مطلوب ہے وہ ”مارک اپ“ کے میک اپ سے حاصل نہیں ہوگا، اس کے محض قانونی لیپ پوت کی نہیں، انقلابی فکر کی ضرورت ہے۔

246. It may be stated that one of the permissible contracts of sale in Islam is bai’ mu’ajjal which is a contract of sale where in the price of the commodity involved is payable on a deferred basis either in lump sum or in installments reference may be made to section 245 of the Majallah which is reproduced as under:-

“section 245: it is permissible to sell a commodity on the condition that its price is payable on deferred basis either in lump sum or in installments. (Majallah, section, 245)

247. The jurists have laid down some condition for the validity of this sale. Some of these conditions are as under:

- (i) The time of payment must be known.
- (ii) The seller has to possess the commodity involved and it be delivered to the purchaser. (Al-Atasi: Sharah al-Majalla, vol.11. Quetta Edn. Page 166).

248. The jurists, however, differ whether any excess in price of the commodity involved in consideration of the deferred payment is allowed or not. A Hanbali jurist, ibn Qudama relating from Taus, Hakam and Hamma writes:

”لا باس ان يقول بعث بكذا نقدا وبكثانث“ (to be cheked)

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La bas an iqwl bet bkZa nqda wbkZa nsuto

(“it is permissible if the seller of a commodity says that he sells it by such amount if the payment is on the spot and by such (excess) amount if the payment is after a certain time”) (Ibn Qudama Al Mughni, Vol. IV, pages 234-235, Beirut Edition).

249. Some modern Muslim economists have suggested that bai'mu'ajjal may be practiced in banking system and the Government has started it in the name of Mark-up and Mark-down in 1981. They opine that this system could be of considerable use in financing current input requirements of industry and agriculture as well as in the financing of domestic and import trade. For instance, if the current cost of a bag of fertilizer of the bank is Rs.50, the bank may sell it through its agent to farmers needing bank finance at Rs.55 subject to actual payment of this price after an agreed period. The bank would, however, pay Rs. 50 to its agent prior to or immediately after the supply of the fertilizer by the agent under its instructions. The possible mechanism in the case of domestic and import trade may be on the following pattern: A business firm needs finance from a bank to purchase/import an item from a domestic seller/manufacturer or foreign exporter. Instead of discounting a bill or making an advance, the bank under an agreement with the firm concerned may purchase/import the commodity on its own account and sell it to the firm at a price, to be settled in advance, which includes a mark-up over the cost price for a reasonable profit margin for the bank. Payment from the firm would be receivable by the bank after the agreed period.

250. But this does not seem to be in conformity with the injunctions of Islam because in practice it will become a cover for continuing the present interest based transactions. Those needing finance for purchase or import of inputs would approach the banks to buy it for them with the commitment to buy if from the bank at a higher but deferred price. The mark-up will naturally tend to be higher, the longer the period of time involved. The banks will have guarantee of receiving back the price they actually pay plus a predetermined return as “mark-up”. For all practical purposes it will be as good for the bank as lending on a fixed rate of interest.

251. Hazrat Umar has said about Riba:

دعوا الربوا والريبة

(Give up Riba (Interest) and Reebah (the doubtful) (Ibn Majah Al-Sunnan), (page 242, Beirut Edition).

252. The settled mark-up resembles to Riba as it refers to an excess on the principal amount, which is prohibited.

253. The council of Islamic Ideology in its Annual Report for the year 1978-79 observed about bai'mu'ajjal as under:

“اس پر یہ شبہ ہو سکتا ہے کہ ادھار کی صورت میں بائع جو زیادہ قیمت وصول کر رہا ہے وہ صرف مدت کی قیمت ہے اور مدت پر قیمت لینا سود کے مشابہہ ہے، چنانچہ اسی بناء پر بعض فقہاء مثلاً قاضی خان نے اس صورت کو ناجائز قرار دیا ہے۔”

(Annual Report of Council of Islamic Ideology for 1978-79, pages 207, 208, Islamabad)

254. It would be relevant to mention here that the Council in its Report on the Elimination of Interest had suggested that use of the device of “Mark-up” (bai’Muajjal) be limited to unavoidable cases in the process of switch over to the interest-free system and had warned that “it would not be advisable to use it widely or indiscriminately in view of the danger attached to it of opening a back door for dealing on the basis of interest”. It is unfortunate that this warning was disregarded and the mark-up system has been made the pivot of the new arrangements. It is even more unfortunate that the system of mark-up as adopted in January, 1981 did not conform to the standard stipulations of ba’i-Muajjal and contains many features which are patently un-Islamic and involve the charging of compound interest mark-up, over mark-up which was, however, later on, withdrawn.

255. The fact of the matter is that “Mark-up” is a crude trading practice which has been permitted by certain religious scholars under specified conditions. Its permissibility is questioned by other scholars. In any case, it is a device which is relevant in the contract of transactions between a seller and buyer of goods. Banks are not trading organizations. They are essentially financial institutions which mobilize funds from the general public and make them available to productive undertakings. It should, therefore, be abundantly clear that if the banking system is to be Islamized, “mark-up” is no solution and some way has to be found which preserves the financial character of the banking institutions and steers clear of interest which is prohibited by Islam.

(See Council’s Report on ‘The Islamic Economic System’, Pub. December, 1983, p.118)

256. It would be appropriate to mention here that the Council of Islamic Ideology while reviewing in December, 1983, the progress made in the field of Interest-Free Banking in Pakistan since the submission of its report on the elimination of interest in June, 1980, observed, inter alia, that the Council had approved the sparing use of certain practices like Bai’ Muajjal in the interim period to facilitate the transition but had at the same time emphasized that resort should not be taken to these modes indefinitely, as this will not only open a back door for interest but in fact perpetuate the interest system. The Council thus observed that the period has passed but the progress in the direction of eliminating interest has not at all been satisfactory. The system of Bai’ Muajjal which was permitted as transitional device in certain transaction has become the mainstay of the so-called interest free operations by the Commercial Banks. The Council expressed its view that as sufficient experience in the field of interest-free banking has now been gained both in this country and in other countries, it is necessary that the operations of the banking and financial system should now be converted completely in accordance with the ideals of an Islamic banking and financial system should now be converted completely in accordance with the ideals of an Islamic banking and financial system.

257. The Council had suggested that Bai’ Muajjal (بيع موجدل) should be used sparingly in inescapable cases. However, this has been made as an instrument of policy in the PLS operations.

258. There is a genuine fear among Islamic circles that if interest is largely substituted by “mark-up” under the PLS operations, it would represent a change just in name, rather than in substance. PLS under the mark-up system is in fact the perpetuation of the old system of interest under a new name. The concept of (Bai’ Mu’ajjal) i.e. sale on deferred payment is of this technique, though not prohibited according to Hanafi and Hanbali Schools of Fiqh and that too in exceptional circumstances, it is being misused in its wide-spread use which is not permissible as the mark-up does not differ, in essence, from the interest system.

259. There is a real and grave danger that PLS (savings and term deposits) in its present form would continue to be misused as a means of opening a back door for dealing on the basis of interest. It cannot be denied the elimination of interest from banking and financial system, in principle, is a bold step. Problems and difficulties are bound to arise in the initial period. However, once the new arrangements are put into practice on straight lines with sincerity of purposes and devotion to Allah’s Command and worked in right earnest, the impediments would be overcome with the help of Allah as promised in the Holy Qur’an *ولينصرن الله من ينصره* “Verily helpeth one who helpeth Him” (22:40)

260. The blessings of Islamic Economic System can only be felt if riba is completely eliminated in the real sense of the term. It is, therefore, essential that the errors of omission and commission which have crept into the PLS operations should be corrected expeditiously so that the nation is freed from the scourge of Riba (interest) which is responsible for our innumerable misfortunes. Said the Messenger of Allah:

عن عبد الله بن مسعود قال، قال رسول الله صلى الله عليه وسلم ما طهرني قوم الزنى والربا الا اسلوا با نفسم عقاب الله (رواه ابو يعلى وانه جيد)

“When Zina and Riba become prevalent in any place it becomes fit for Allah’s Chastisement to descent upon the people of that habitation.”
(Narrated by Abu Ya’la and its chains of authorities are excellent).

261. A prominent Muslim Economist, Dr. Nijatullah Siddiqui while commenting on “Mark-Up” system writes as under:-

“I would prefer that Bai’ Mu’ajjal is removed from the list of permissible method altogether. Even if we concede its permissibility in legal form we have the overriding legal maxim that anything leading to something prohibited stands prohibited. It will be advisable to apply this maxim to Bai’ Mu’ajjal in order to save interest-free banking from being sabotaged from within.” (Money and Banking in Islam by Ziauddin Ahmad, page 227)

262. Thus, Mark-up system, as in vogue, is held to be repugnant to the injunctions of Islam and the word ‘mark-up’ be deleted from the provisions of sections 79 and 80 of the Negotiable Instruments Act, 1881.

263. Another term used in section 79 (b). (i) is lease. In this system the bank purchases machinery for its customer and gives it to him on hire. This method has been allowed by the

jurists. However, the jurists have laid down certain conditions for its validity. The Islamic Fiqh Academy, Jeddah under the auspices of OIC in its 3rd Session held at Amman, Jordan on October, 11-16-1986 has approved leasing in banking system. The resolution passed at that Session reads as under:-

- (i) The promise of the Bank with its customer that the machinery which is likely to be purchased by the Bank shall be given to him on hire after taking it into possession; this sort of promise shall be considered as valid and permissible.
- (ii) Islamic Development Bank can also appoint its customer as its agent for the purpose of purchasing such machinery, which is required by the customer and the quality and price of it has already been determined in the contract, so that the customer after purchasing that machinery may hire it from the Bank. However, it is more appropriate to appoint a person other than the customer as agent for the purpose of purchasing machinery.
- (iii) The transaction of leasing should be conducted at such time when the machinery is taken completely into possession and it should be conducted through a separate contract regardless of processes of elementary promise and agency.
- (iv) It is permissible (in Shari'ah) to promise with the customer that after expiry of leasing period, the machinery shall be gifted to him, provided that it is promised independently without linking it with contract of leasing and agency.
- (v) If machinery is destroyed during lease period or it is damaged, the liability shall lie on the Bank as being owner of the machinery. However, if machinery is destroyed as a result of lessee's negligence or misuse, in such circumstances, he will be responsible for damages.

264. Although 'the leasing' is permissible in Shari'ah, we may advise its minimum use in banking system because the best of modes in Islamic system as alternate to the present system, are mudarabah (مضاربه) and Musharakah, (مشاركه) on the basis of the ratio of profit and loss sharing settled between the parties according to Shari'ah.

265. Another term used in this provision is hire-purchase. Under this system banks may finance the purchase of these items under a joint-ownership arrangement with or without security. They would receive, in addition to repayment of the principal, a share in the net rental value (after allowing for depreciation) of these items in proportion to their outstanding share in total investment. However, unforeseen repairs may be entirely the responsibility of the user of the equipment.

266. There seems to be no repugnancy in it from Shari'ah point of view. However this mode should be applied in accordance with the dictates of Shari'ah, details whereof can be found in any authentic book of fiqh like Hidayah, Fatawa-e-Alamgiri and Durr al-Mukhtar whose Urdu translations, among others, are available in the market.

267. Another term used in these provisions is that of 'service charges'. Under this system the banks charge some amount for the service rendered for providing loan etc. This does not, in principle, seem to be objectionable from Shari'ah point of view. The Islamic Fiqh Academy, Jeddah in its 3rd session held at Amman during October 11-16, 1986, has approved the service charges in the banking system. The resolution passed at that session reads as under:-

- (i) The Bank is entitled to receive its expenditure incurred on the process of providing loans in the form of service charges.
- (ii) Service charges must be limited to actual expenditure
- (iii) Any excess charged by the Bank over and above the actual expenditure would amount to Riba (ربوا) prohibited in Shari'ah."

268. In so far as section 80 of the Negotiable Instruments Act, 1881 is concerned it provides that if no rate of interest is specified in the instrument, interest on the amount due thereon, notwithstanding any agreement relating to interest between the parties to the instrument, shall be calculated at the rate of six per centum per annum from the date at which the same ought to have been paid by the party charged until tender or realization of the amount due thereon or until such date after the institution of a suit to recover such amount as the Court directs.

269. The words "notwithstanding... as the Court directs were added by Ordinance 61 of 1980. The above provision with the above addition comes in direct conflict with the dictates of the Holy Qur'an and Sunnah and as such it is declared to be repugnant to the Injunctions of Islam.

270. A proviso to the above section has also been added by the same Ordinance which, inter alia, provides that in case of an amount due on an instrument where the return is on the basis other than interest, the return on the amount due, when no rate of interest is specified in the instrument, shall be calculated at the rate as specified in this proviso and shall be allowed from the date it becomes due till the date it is actually paid. The rate will be in the case of return on the basis of mark-up in price, lease, hire-purchase or service charges, at the contracted rate of mark-up, rental, hire or service charges, as the case may be. In the foregoing section 79, we have already held mark-up, as prevalent in practice, to be repugnant to the Injunctions of Islam, as such the word, mark-up, be deleted from this proviso. Regarding the lease, hire-purchase or service charges, we have already observed while examining the foregoing section, and due regard be paid to the observations made therein. In clause (b) to the said proviso it has been stated that in case of return on the basis of participation in profit and loss, at such rate as the Court may consider just and reasonable in the circumstances of the case, keeping in view the profit sharing agreement entered into between the banking company and the judgment-debtor when the loan was contracted. This clause does not appear to be repugnant to the Injunctions of Islam as it provides for profit and loss sharing which is not only permissible in Islam but has been considered to be one of the two best modes of interest-free banking vis. Mudarabah and Musharaka.

271. In the explanation to the above section, it has been provided that when the party charged is the endorser of an instrument dishonored by non-payment, he is liable to pay interest or return in any other form as the case may be, only from the time that he receives notice of dishonor. The words “or return in any other form, as the case may be” have been added by Ordinance No. 61 of 1980. In so far as the payment of an interest is concerned, it has already been discussed to be prohibited in Islam and as such to be deleted from this section. The word ‘return’ added by Ordinance No. 61 of 1980, with reference to the context, amounts to interest and as such is also declared to be repugnant to the Injunctions of Islam. The whole explanation should, therefore, be deleted from the above section.

272. It is pertinent to note the Negotiable Instruments Act had also come up for consideration before the Council of Islamic Ideology in its meeting held on 8th March, 1982 under the Chairmanship of one of us (Dr. Tanzil-ur-Rahman, J., as he then was). The Council passed the following resolution:-

“خاتمہ سود کے سلسلے میں کونسل اپنی سفارشات تقریباً دو سال قبل حکومت کو پیش کر چکی ہے۔ قانون دستاویزات قابل انتقال بحریہ 1881 کو شریعت سے ہم آہنگ کرنے میں اہم ترین نکتہ سودی کاروبار کو ختم کرنا ہے اور اس کے بعد ایک غیر سودی نظام کی دستاویزات کی رعایت سے قانونی اصلاحات اور تکنیک کی گنجائش پیدا کرنا ہے۔“

”کونسل نے مزید سفارش کی کہ قانون ہذا کی دفعہ 80 (ترمیم شدہ بذریعہ ترمیم آرڈیننس 1980)

(The Negotiable Instruments (Amendment) Ordinance, 1980)

جس میں حکومت نے اس میں ترمیم کر کے سودی کاروبار کے پہلو پہ پہلو غیر سودی المدنی کی گنجائش پیدا کیے۔ اسے ختم کیا جائے۔ نیز اسی طرح قانون خدا کی دفعات 114 اور 117 میں بھی سود سے متعلق احکام کو حذف کیا جائے۔ کونسل کا مقصود یہ ہے کہ قانون دستاویزات قابل انتقال بحریہ 1881 میں جہاں جہاں سود کا ذکر ہے اس کو حذف کیا جائے“

17—04—18

(See Second Report on Islamization of Laws, Islamabad, March, 1982)

273. The provisions of Sections 79 and 80 of Negotiable Instruments Act, 1881, also came up for consideration in the case of *Irshad H. Khan v. Mrs. Parveen Ajaz* (PLD 1987 Kar. 466) wherein one of us (Dr. Tanzil-ur-Rahman, J., as he then was) observed at page 486 of the report:-

“So, it is the Constitutional command for the State (Islamic Republic of Pakistan) to take such steps as would “enable” the Muslims of Pakistan to live as Muslims. Therefore, any law which not only disregards such a commandment but positively violates it, is to be disregarded in view of Article 2-A. The provisions of sections 79 and 80 of the Negotiable Instruments Act, 1881.... so far as they relate to awarding interest on money claims are clear violations of the Constitutional mandate, as provided in Article 2-A read with clause (3) Of the Objectives Resolution, referred to above. The aforesaid provisions of law and Rules, on the other hand, ‘disable’ Muslims of Pakistan from leading their lives as a Muslims, according to the requirements of Islam as set out in the Holy Qur’an and Sunnah in relation to Riba (Interest) and, therefore, for the obvious repugnancy to the Injunctions of Islam, contained in the Holy Qur’an and Sunnah, extensively quoted by me in the foregoing paragraphs, the aforesaid provisions relating to interest (Riba) cannot be enforced by this Court, due to their repugnancy to the mandatory provisions of the

Qur'an and Sunnah relating to interest (Riba).

274. The provisions of section 79 of the Negotiable Instruments Act again came up for consideration in the case of Habib Bank Ltd. v. Muhammad Hussain and other (P L D 1987 Kar. 612) by one of us (Dr. Tanzil-ur-Rahman, J., as he then was). The relevant observations appear at page 687 of the report which is as under:-

“Section 79 of the Negotiable Instruments Act, 1881 provides for the calculation of interest payable under a Negotiable Instrument until tender or realization before institution of suit and the Court may also award interest under section 34, C.P.C for any period prior to the institution of the suit. The Court is also empowered to award interest, in certain eventualities, under the Interest Act, 1839. Previously the power to award interest was “also exercisable under the Usury Laws Repeal Act, 1855, but the same has now been repealed by Ordinance No. XXVII of 1981. So far as sections 79, 80 of the Negotiable Instruments Act, 1881 are concerned, I have already held, in *Irshad H. Khan v. Parveen Aijaz* (Suit No. 162/80), (PLD) 1987 Kar. 465 (that the said provisions of law are in conflict with Article 2-A of the Constitution, and likewise it is now held that the Interest Act, 1839 is void for the same reasons.

275. Now we take up under Shariat S.M. Notice No. 2 of 1991, the other two provisions of sections 114 and 117 (C.) which also relate to interest and are reproduced as under:-

“114. Any person so paying is entitled to all the rights, in respect of the bill, of the holder at the time of such payment, and may recover from the party for whose honor he pays all sums so paid, with interest thereon and with all expenses properly incurred in making such payment.

117(c). An indorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at six per centum per annum from the date of payment until tender or realization thereof, together with all expenses caused by the dishonor and payment.”

276. A bare perusal of the above said two provisions will show that a right has been conferred on the payer for honour to recover from the party for whose honour he pays all sums so paid with interest thereon (section 114).

Likewise, an indorser who, being liable, has paid the amount due is also entitled to amount so paid with interest at six per centum per annum from the date of payment until tender or realization thereof (section 117(c)). Both these provisions involve payment of interest and as such we hold repugnant to the Injunctions of Islam as laid down in the Qur'an and Sunnah of the Holy Prophet (p.b.u.h) and as such are declared void.

277. Lastly, it may be mentioned that this Court had earlier examined suo motu by its judgment dated 5-11-1983, the above Act but had restricted itself to the examination of the provisions of this Act, excepting those falling within the ambit of fiscal law, which have been

challenged before us and have now been duly examined by us.

278. Before parting with the discus on mark-up in price, it may be observed that the State Bank of Pakistan in order to encourage industrialization in the country devised a scheme for granting loans on the basis of mark-up at the concessional rate of three per centum per annum only, as against the usual mark-up rate of 16 per centum per annum. A number of suits came up before the author of this judgment while he was judge in the High Court of Sindh (1980-1990) wherein the Banks filed a number of suits against the borrowers, claiming repayment of the principal amount with the interest (or, mark-up) at the rate of 16 per centum per annum because the said borrows instead of importing machinery and installing factory, utilized the money borrowed by them for purposes other than that it was granted to them. The facts of those cases revealed that the transactions “in the garb of mark-up resulted in the interest as neither the commodity was in existence nor it has passed through the bank to the borrowers. The details may be had from the Registrar, High Court of Sindh, if the Government is interested.

IV. THE LAND ACQUISITION ACT, 1894

279. Section 34 of the above Act has been challenged before us as repugnant to the Injunctions of Islam. While examining the above section, we came across section 28, 32 and 33 of the said Act as objectionable from Shari’ah point of view. We, therefore, issued Suo Motu Notice No.4 of 1991 for examination thereof to the Federation and Provincial Governments. Sections 28, 32, 33 and 34 are reproduced as under:-

“S.28—if the sum which in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court.”

“S.32. If any money shall be deposited in Court under subsection (2) of the last preceding section and it appears that the land in respect whereof the same was awarded belonged to any person who had no power to alienate the same, the Court shall...

- (a). order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held or
- (b). if such purchase cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit;

and shall direct the payment of the interest or other proceeds arising from such investment to the person or persons who would for the time being have been entitled to the possession of the said land, and such moneys shall remain so deposited and invested until the same be applied –

- (i) In the purchase of such other lands as aforesaid; or
 - (ii) In payment to any person or persons becoming absolutely entitled thereto.
- (2) In all the cases of moneys deposited to which this section applies the Court shall

order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the Collector, namely:--

- (a) the costs of such investments as aforesaid;
- (b) the costs of orders for the payment of interest or other proceeds, of the securities upon which such money are for the time being invested, and for the payment out of Court of the principal of, except such as may be occasioned by litigation between adverse claimants.

S.33.—When any money shall have been deposited in Court under this Act for any cause other than that mentioned in the last preceding section, the Court may, on the application of any party interested or claiming an interest in such money, order the same to be invested in such Government or other approved securities as it may think proper, and may direct the interest or other proceeds of any such investment to be accumulated and paid in such manner as it may consider will give the parties interested therein the same benefit therefrom as they might have had from the land in respect whereof such money shall have been deposited or as near thereto as may be.

S.34.—Payment of interest.—When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with⁷ compound interest thereon at the rate of eight per centum per annum from the time of so taking possession until it shall have been so paid or deposited:

⁸Provided that any waiver of the above right by the land-owner shall be void and he shall be entitled to the said interest notwithstanding any agreement to the contrary.

280. The above Act was considered by the Council of Islamic ideology in its meeting held on 19th October, 1976. The Council observed as under:--

"قانون ہذا کے تحت حکومت کو اختیار دیا گیا ہے کہ وہ معاوضہ ادا کرنے کے بعد مفاد عامہ کے لیے ایسی اراضی حاصل کر سکتی ہے جو نجی ملکیت میں ہو نیز اس قانون میں سودی معاملات کا بھی ذکر ہے کونسل کی یہ رائے وہی کہ حکومت کو حصول اراضی کا ایسا اختیار حاصل ہے اور قرآن و سنت کا کوئی حکم اس میں مانع نہیں، نیز ربوا کے ضمن میں کونسل جو سفارش کرے گی وہ ان تمام قوانین کو متاثر کے گی جن میں سود کا ذکر ہو چنانچہ طے پایا کہ اس قانون میں کوئی چیز قرآن و سنت کے احکام سے متصادم نہیں ہے البتہ سود سے متعلق دفعات ربوا کے مسئلہ پر کونسل کی سفارش کے تابع ہوں گی۔"

281. The said Act was reconsidered in the meeting of the Council held on March 14, 1982, The following opinion of Justice Dr. Tanzil-ur-Rahman, Chairman, Council, was also considered in the meeting:--

"This Act contains 55 sections divided into 8 parts. Section 3 gives definitions of certain terms used in the Act. Surprisingly, the definition of the term "public purpose" has not

⁷ Subs. By W.P.Act III of 1969

⁸ Ins. Ibid. Both these amendments are not applicable to the Province of Sindh vide Land Act West Pakistan Amendment Repeal (Ordinance/Sindh Ordinance, VI of 1971)

been defined in the Act. Since the “public purpose” should fall within the frame of Islam, it is expedient that it be defined in the Act in accordance with the principles of

Section 4 of the Act gives the power to the Provincial Government to acquire the land in any locality if it is needed or is likely to be needed for any public purpose. The “public purpose” having not been defined in the Act, it may lead to misuse of the power. To define “Public purpose” in the Act is, therefore, all the more necessary.

The acquisition of land is against awarding compensation to the land-owners or persons holding interest therein. The various steps taken in this direction, being procedural, do not seem to offend any provision of Islamic Law. The provisions regarding “interest” as contained in sections 28, 32 and 34 are in conflict with Shari’ah.

Section 46 deals with penalty for obstruction to acquisition of land and describes imprisonment not exceeding one month, or to fine not exceeding Rs. 50 or to both. So far as the provision for fine not exceeding Rs. 50 is concerned, Islamic Law levies *zaman* on such person causing injury to the property to the extent of actual loss suffered besides *ta’zir*, as fixed by the Court looking to the facts of each case.

282. The Council agreeing with the above opinion of Dr. Tanzil-ur-Rahman resolved that the Act should be amended accordingly.

283. The above Act was also considered by this Court in SSM No. 14/P of 1983 and delivered its judgment on 27-3-1984. The said judgment was assailed in appeal before the Appellate Bench of the Supreme Court. The said Bench in Shariat Appeal No. 22 of 1984, while allowing the appeal, set aside the judgment and the matter was remanded to this Court by its judgment, dated 13-1-1988 for decision afresh.

284. Assistant Registrar (Judicial) informs us (vide office note dated 5-10-1991) that the said SSM No/P of 1983 was then re-heard on 24-4-1988 to 27-4-1988 and thereafter on 2-5-1988 and 8-5-1988 by the Full Court and again on 13th and 14th November, 1988 and reserved for judgment, but as no judgment could be written, the matter was again fixed for re-hearing on 27-4-1989 before the Full Court but was adjourned a date in office and is still pending.

285. Be that as it may, the provisions relating to fiscal law were outside the pale of the jurisdiction of this Court and as such earlier decision of the Federal Shariat Court which was set aside by the Shariat Appellate Bench of the Supreme Court related to provisions other than sections 28, 32 and 34 which fall within the ambit of fiscal law and are now under examination by us.

286. Mr. S.M Zafar, learned counsel for Federation, during his general submissions in various petitions involving the question of interest, relied on the decision in the case of Islamia University, Bahawalpur through its Vice Chancellor appellant v. Khadim Hussain and 5 other respondents, reported in 1990 MLD 2158, delivered by a Division Bench of the Lahore High Court. The said judgment equates compound interest at the rate of 8 per centum per annum

required under section 28 of the Land Acquisition Act, 1894 (I of 1894), to be paid on the amount of compensation adjudged by the Court in excess of the sum awarded by the Collector and under section 34 of the Land Acquisition Act to be paid on the amount of compensation, which is not paid or deposited on or before taking possession of the land, from the time of taking possession till the payment or deposit, with the compensation on account of deprivation of land under compulsory acquisition proceedings under the Act and does not accept it as Riba as laid down by the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h) The judgment, after taking into consideration the pertinent Verses of the Holy Qur'an, Sunnah of the Holy Prophet (p.b.u.h.) and opinions of religious scholars on the subject of Riba states that Riba means increase, addition, additional amount on the principal which is loan that the transaction of Riba is made between lender and borrower. After noticing the definition of interest and compensation given in a few dictionaries the judgment proceeds to draw heavily upon the observations occurring and conclusions reached in Behari Lal Bhargava v. Commissioner of Income Tax (AIR 1941 Allahabad 135), Commissioner of Income Tax, Behar and Orissa v. Rani Prayag Kumari Debi (AIR 1939 Patna 662) and Revenue Divisional Officer v. Venkatarama Ayyar (AIR 1932 Madras 199) to formulate the above view.

287. It may be advantageous to have a glance at the aforementioned judgments which the decision of Lahore High Court banks upon. In Behari Lal Bhargava's case (AIR 1941 Allahabad 135) the Land Acquisition Officer awarded Rs. 13,225.00 as compensation for compulsory acquisition of two houses belonging to one Ramji Das Bhargava under Land Acquisition Act by the Improvement Trust. Rajmji Das Bhargava did not accept the amount awarded by the Land Acquisition Officer to be adequate and referred his claim to the Tribunal which increased the amount of compensation to Rs. 97640.00 and directed the improvement Trust under section 28 of the Land acquisition Act to pay interest at 6 per cent. Per annum from the date taking possession of the property to the date of payment of Rs. 97640.00. The appeal preferred by the Improvement Trust before the High Court having failed, a sum of Rs. 97,640.00 plus Rs. 49,660.00 as interest was paid to the four sons of Ramji Das Bhargava who had meanwhile died. The share of one of his sons namely, Behari Lal Bhargava, in the interest money came to Rs. 12,415.00. The Income Tax Officer was of the opinion that the aforesaid amount of interest was taxable and was accordingly taxed upon. The assessee appealed to the Assistant Commissioner but his appeal was dismissed. The interest received by the assessee was taken to be income liable to be taxed under the provisions of the Income Tax Act, 1922. On the application of the assessee the Commissioner referred the following question for decision of the High Court of Allahabad:--

“Whether the sum of Rs. 12,415.0 received by the Petitioner as interest from the Improvement Trust was part of his income, profits or gains within the meaning of the Act?”

288. After surveying the various cases pertaining to Income Tax Law the High Court came to the conclusion that the sum of Rs. 12,415.00 was not income within the meaning of section 6 of the Income Tax Act nor could it be treated as profits under the aforesaid section and consequently was not assessable to tax. The high Court observed that it was not without considerable doubt and hesitation that it had arrived at this decision for, there was much to be

said; but upon the whole matter it thought that it was the correct view and it bore in mind that where the interpretation of fiscal enactment was open to doubt it should be construed favourable to the subject. The high Court treated the interest as compensation on damages for loss of the right to retaining possession of the property and thought that section 28 was designed as convenient method of measuring such damages in terms of interest.

289. In the *Commissioner of Income Tax, Bihar and Orissa v. Rani Prayag Kumari Debi* AIR 1939 Patna 662, on the death of the Raja of Jharia in 1916 one of his collaterals, Raja Shiva Prasad Singh, took possession of the properties as owner of the Jharia Raj. In 1919 the three widows of late Raja of Jharia instituted suit for recovery of possession of the whole of impartible Raj including movable and immovable properties thereof against Raja Shiva Parsad Singh. The decree granted by the Court in favour of Rani Prayag Kumari Debi, one of the widows, awarded her a number of movable properties, cash in till or deposits in the banks or money lent out to various debtors. In case the movables could not be returned in specie the Court fixed a valuation thereof. The total of the movables including arrears of maintenance came to Rs. 25,40,401.00. The Court also awarded sums as damages for each item of movables which were ordered to returned, the damages being damages for detention. The total of such damages was Rs. 22,34,031.00. After the decree was passed by the trial Court Raja Shiva Parsad Singh agreed to pay certain sums in part liquidation of decretal dues. He paid Rs. 18,28,626.00 towards the principal amount and Rs.8,47,611.00 towards damages. The principal amount was to carry interest at 6 per cent. per annum but no interest was fixed on the damages. Subsequently there was a compromise between the parties by which the claim of Rani Prayag Kumari Debi was adjusted by fixing the total dues which then remained payable at a sum of Rs. 18,00,000.00. Rani Prayag Kumari Debi receiving Rs. 2,00,000.00 in cash and Raja Shiva Parsad Singh taking over the liability to pay Rs. 4,40,000.00 to the creditors thus leaving the balance to be paid to the Rani of a total of Rs. 11,60,000.00. It was provided in the paid to the Rani of a total of Rs. 11,60,000.00. It was provided in the compromise that all payments which would be made by the judgment-debtor in future would be credited in the proportion of six annas and ten annas, that is to say, six annas would be set off towards the principal amount which was fixed at Rs. 7,16,463-1-9 and the remaining 10 annas would be set off against the damages balance amounting to Rs. 10,83,536-14-3.

290. In the year 1936-37 Rani Prayag Kumari Debi received a sum of Rs. 1,00,000.00 which according to the terms of compromise was credited in the proportion of six annas towards the capital (Rs. 37,500.00) and the balance (Rs. 62,500.00) towards damages. The Income Tax Department taxed the Rani on, among other items, this sum of Rs. 62,500.00 which was asserted as being income received by the assessee during the year. The contention of the assessee that this amount was not income but merely an amount received by her on account of damages awarded to her for the detention of her properties was overruled. The question whether Rs. 62,500.00 received by the assessee by way of damages awarded to her by a decree in the circumstances stated above was assessable to income-tax, referred for decision to the High Court, was answered in the negative. The amount received by the assessee by way of damages was not considered to be income amenable to assessment under the Income Tax Act, 1922.

291. In Revenue Divisional Officer, Trichinopoly v. Venkatarvama Ayyar (AIR 1932 Madras 199), the High Court observed that right to receive interest under section 34 of the Land Acquisition Act took the place of the right to retain possession. The Court noticed that the foundation of the Act was that when compensation was payable and had not been paid, interest for non-payment must be given from the date of taking possession. Therefore the award of interest by the trial Court was upheld.

292. In the cases of Behari Lal Bhargaava v. Commissioner of Income Tax and Commissioner of Income Tax, Bihar and Orissa v. Rani Prayag Kumari Debi, the considerations which weighed with the Courts to determine whether interest or damages could be classified as taxable income within the purview of Income Tax Act were different from the criteria to be employed for ascertaining whether interest payable under section 28 and 34 is Riba. Therefore, it would appear inappropriate to apply the tests of finding out a sum to be income under the Income Tax Act for judging it to be Riba or otherwise. The true tests for adjudicating the real nature of an amount in the domain of Riba can come from the Holy Qur'an, Sunnah of the Holy Prophet (p.b.u.h) and time tested opinions of the jurists and scholars well versed in Islamic Law and Shari'ah. Consequently, the process of reasoning employed in the judgments for dubbing the interest payable under sections 28 and 34 to be something else than Riba is difficult to justify in Shari'ah. The increase or addition in the form of interest under sections 28 and 34 over the debt payable in the form of compensation by acquiring authority to the land-owners obviously falls in the category of Riba.

293. So far as section 32 is concerned it relates to the investment by the Government in respect of acquired land of a person who had, then, no alienable right in respect of the said land. The Government is empowered to invest the said amount either in the purchase of land or other approved securities as the Court deems fit. There can be no objection regarding investment in land, but so far as securities are concerned they must be non-interest bearing.

294. In view of the judgment of Shahbazud Din Chaudhry and 27 others v. Messrs Services Industries Textiles Limited and 4 others PLD 1988 Lah. 1, the Government should invest the amount in non-interest bearing securities. The word 'interest' wherever occurred in these sections be deleted as repugnant to the injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h).

295. We may, in the end, observe that there should be no delay in the case of payment of compensation to the land-owners whose land or property has been acquired compulsorily under the Land Acquisition Act. A reference may be made to the following observation of the Shariat Appellate bench of the Supreme Court in the case of Qazalbash Waqf and others v. Chief Land Commissioner PLD 1990 SC 99. Relevant observation appears at page 283, which reads as under:--

”جبری خریداری کی تیسری شرط یہ ہے کہ معاوضہ یا توقیف سے پہلے یا اس کے ساتھ ساتھ ادا کر دیا جائے، یا اتنی دیر میں کہ اسے قابل عمل ذکر تاخیر نہ سمجھا جاتا ہو، لیکن دفعہ نمبر 13 کے تحت یہ ادائیگی سودی بانڈز کے ذریعے کرنے کا حکم دیا گیا ہے۔“

296. Consequently, the provisions of sections 28, 32, 33 and 34 of the above Act, to the extent discussed hereinabove, are held repugnant to the injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy prophet (p.b.u.h).

V. THE CODE OF CIVIL PROCEDURE, 1908 (act v of 1908)

297. The following provisions of the Code of Civil Procedure, 1908 have been challenged before us, which read as under:--

“S.34. Interest.—(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment of other earlier date, the Court shall be deemed to have refused such interest, and a separate suit thereon shall not lie.

S. 34-A. Interest on public dues.—(1) Where the Court is of opinion that a suit was instituted with intent to avoid the payment of any public dues payable by the plaintiff or on his behalf, the Court may, while dismissing such suit, make an order for payment of interest on such public dues at the rate of two per cent., above the prevailing bank rate.

(2) Where the Court is of opinion that the recovery of any public dues from the plaintiff was unjustified, the Court may, while disposing of the suit, make an order for payment of interest on the amount recovered at the rate of two per cent., above the prevailing bank rate.

Explanation.—In this section, --

- (a) “bank rate means the bank rate determined and made public under the provisions of the State Bank of Pakistan Act, 1956 (XXXIII of 1956); and
- (b) “public dues” includes the dues of any bank owned by the Federal Government or of any corporation or undertaking owned or controlled by the Federal Government or a Provincial Government or of any local authority.

S. 34B. Interest etc., on dues of banking company. – Where and in so far as a decree is for payment of money due to a banking company in repayment of a loan advanced by it, the Court shall, in the decree, provide for interest or return, as the case may be, on the judgment debt from the date of decree till payment—

- (a) In the case of interest-bearing loans, for interest at the contracted rate or at the rate of two per cent above the bank rate, whichever is the higher;
- (b) In the case of loans given on the basis of mark-up in price, lease, hire purchase or service charges, for the contracted rate of mark-up rental, hire or service charges, as the case may be, or at the latest rate of the banking company for similar loans, whichever is the higher; and
- (c) In the case of loans given on the basis of participation in profit and loss, for return at such rate, not being less than the annual rate of profit for the preceding six months paid by the banking company on term deposits of six months accepted by it on the basis of participation in profit and loss, as the Court may consider just and reasonable in the circumstances of the case, keeping in view the profit sharing agreement entered into between the banking company and the judgment-debtor when the loan was contracted.

Explanation.—In this section in clause (a), “bank rate” has the same meaning as in section 34A.

⁹ORDER XXXVII:--

Rule 2-(1).....

(2)

2 (a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80 as the case may be, of the Negotiable instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and

(b) for such subsequent interest, if any, as the Court may order under section 34 of this Code; and

(c)”

298. Section 34, as above, provides that where a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal amount adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate amount so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

299. Section 34-A has been newly added by Ordinance X of 1980. It deals with interest on public dues. It provides that where the Court is of opinion that a suit was instituted with intent

⁹ Rules 2 to 8 were subs. By the Transfer of Property (Amendment) Supplementary Act, 1929 (21 of 1929), S.4, for the original rules

to avoid the payment of any public dues payable by the plaintiff or on his behalf, the Court may, while dismissing such suit, make an order for payment of interest on such public dues at the rate of two per cent., above the bank rate.

300. Sub section (2) of section 34-A deals with a different situation. It provides that if the Court is of opinion that the recovery of any public dues from the plaintiff was unjustified, the Court may, while disposing of the suit, make an order for payment of interest on the amount recovered at the rate of two per cent, above the bank rate.

301. Section 34-B has been newly added by Ordinance LXIII of 1980. It deals with interest on dues of banking company. It provides that where a decree is for payment of money due to a banking company in repayment of a loan advanced by it, the Court shall, in the decree, provide for interest or return, as the case may be, on the judgment debt from the date of decree till payment. It further provides that in case of interest-bearing loans, the Court shall award a decree for interest at the contracted rate or at the rate of two per cent above the bank rate, whichever is the higher.

302. Clause (b) of the said section provides that in the case of loans given on the basis of mark-up in price, lease, hire-purchase or service charges for the contracted rate of mark-up, rental, hire or service charges, as the case may be, the Government shall provide for interest or return at the contracted rate or at the latest rate of the banking company for similar loans, whichever is the higher.

303. Clause (c) of section 34-B provides that in the case of loans given on the basis of participation in profit and loss, for return at such rate, not being less than the annual rate of profit for the preceding six months paid by the banking company on term deposits of six months accepted by it on the basis of participation in profit and loss, the Court shall in the decree provide for such return and at such rate, not less than the annual rate of profit for the preceding six months as stated above, which the Court may consider just and reasonable in the circumstances of the case.

304. We have already dealt with the Shari'ah position in relation to interest, mark-up lease, hire-purchase and service charges while examining the provisions of the Negotiable Instruments Act, 1881 and the same observations do equally apply to the above-stated provisions. It is, however, noticeable that in a recent Karachi judgment reported as *Irshad H. Khan v. Parveen Aijaz* (PLD 1987 Kar 466) one of us as Judge of the High Court (Dr. Tanzil-ur-Rahman, J., as he then was) refused to award interest, on account of it being in contravention of the constitutional dictates and provisions. It is further noticeable that prior to the amendment by Ordinance LXIII of 1980, which was promulgated into the name of so-called Islamization of economy, the Courts had the power to grant interest which they may or may not award in the circumstances of each case, but by this Ordinance the Courts have now been bound by inserting the word "shall" to award interest at the contracted rate or at the rate of two per cent above the bank rate, whichever is the higher. These provisions, for the reasons and to the extent stated as

discussed by us under to the Negotiable Instruments Act, 1881 are held repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h)

305. As regards the provision of Rule 2 (a) of Order XXXVII which relates to the interest, for reasons already discussed under sections 79 and 80 of the Negotiable Instruments Act, is declared repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h)

306. Only the above said few provisions of the Code of Civil Procedure, 1908, relating to interest, were challenged before us, but it seems pertinent to examine other provisions relating to interest as also contained in the Code of Civil Procedure, 1908, under our Shari'ah Suo Moto Notice No.3 of 1991, given to the Federation and all the four Provinces, which are as under:-

“S.2 (12).—‘mesne profits’ of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession.”

“S.35 (3).—The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

“S. 144 (1). – Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders, for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

Order XXI, Rule 11 (2) (g).—The amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed.

Order XXI, Rule 38.—Every warrant for the arrest of a judgment debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the cost (if any) to which he is liable, be sooner paid.

Order XXI, Rule 79 (3).—Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person the except the purchaser, or receiving payment of any

dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

Order XXI, Rule 80 (3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

Order XXI, Rule 93.—Where a sale of immovable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

XXXIV. Rule 2.- (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall Order XXI, Rule 80 (3).— Order pass a preliminary decree—

(a)

(i) Principal and interest on the mortgage,

(ii)

(iii) Other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon;

(b)

(c) Directing-

(i) That, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, or, and shall, if so required, retransfer the property to the defendant at his cost free from the mortgage and from all encumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and

(ii) That, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the Defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses

and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

Order XXXIV, Rule 2.... (2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges expenses and interest.

Order XXXIV, Rule 4...(1) in a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub-rul (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

Order XXXIV, Rule 7(1)....In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree

(a) Ordering that an account be taken of what was due to the defendant at the date of such decree for

(i) Principal and interest on the mortgage,

(ii)

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon;

(b)

(c) Directing....

(d)

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix, within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10 together with subsequent interest on such sums respectively as provided in

rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage and from all of encumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

- (ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the defendant shall be entitled to apply for a final decree—
- (a) In the case of a mortgage other than usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or
- (b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all of right to redeem the property.
- (2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

Order XXXIV, Rule 11.—any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:-

- (a) Interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage....
- (i) On the principal amount found or declared due on the mortgage,— at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,
- (ii) On the amount of the costs of the suit awarded to the mortgagee—at such rate as the Court deems reasonable from the date of the preliminary decree, and

- (iii) On the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage money, -- at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum; and
- (b) Subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable.....
 - (i) On the aggregate of the principal sums specified in clause (a) and of the thereon as calculated in accordance with that clause; and
 - (ii) On the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10.

Order XXXIV, Rule 13.:(1) Such proceeds shall be brought into court and applied as follows:-

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

Secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;

Thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of property Act, 1882.

Order XXXIX, Rule 9. ... Where land paying revenue to Government,

or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any

other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

307. Raja Muhammad Afsar learned Advocate-General Balochistan, referring to the provisions of Civil Procedure Code, 1908, submitted that these are pure and simple provisions regarding interest, about which there can be no two opinions that charging of the same would be un-Islamic according to Qur'an and Sunnah of the Holy Prophet (p.b.u.h). He further submitted that these provisions presuppose charging of interest as an incident of civil proceedings since the framers of Civil Procedure Code, 1908, were not framing law in the light of Qur'an and Sunnah of the Holy Prophet (p.b.u.h) Therefore, the very basic philosophy on which the law was enacted, was not drawing inspiration from Islamic Jurisprudence, These provisions are purely based on western concept of law and that is why these provisions were enacted regardless of their connotation in Islamic Jurisprudence. The learned Advocate-General, Balochistan stated that, in his view, interest chargeable under these provisions is entirely un-Islamic and will have to be struck down.

308. Mr. Abdul Ghafoor Mangi, learned Additional Advocate-General Sindh, did not dispute that the interest as contained in the several provisions of Civil Procedure Code, 1908, is repugnant to the Injunctions of Islam. He, however, submitted that the value of rupee diminishes by laps of time and when it is recoverable it should be repaid equivalent to the real worth of money comparing with the prevailing prices of commodity. Mr. Shahabuddin Burq, Law officer, N.-W.F.P., and Mr. Javed Aziz Sindhu for Advocate –General, Punjab, adopted the same argument as advanced by learned Additional Advocate-General Sindh. The question of indexation in relation to inflation has already been dealt with by us in the foregoing pages and need not be repeated here.

309. For the full discussion on the question of prohibition (تحریم) of the interest we will, accordingly, hold that the several provisions of the Code of Civil Procedure, 1908, referred to hereinabove are also declared repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h) and they be deleted from the Code of Civil Procedure, 1908.

310. Before parting with the above discussion pertaining to the repugnancy of a number of provisions of the Code of Civil Procedure, 1908, it may be clarified that this Court is conscious of the fact that it is not empowered to examine any law or provision of law relating to procedure of any Court or Tribunal but every provision does not become procedural simply because it is contained in a Code of Procedure. The Code of Civil Procedure has been

enacted to regulate the trial of a civil suit, appeal and application. But we are not interfered with the procedure laid down in the Code. We have examined those provisions only which create rights in and liabilities on the litigants to receive and pay interest which fall within the domain of substantive law.

311. in any case, this Court is now empowered as on and from 26th June, 1990, to examine any fiscal law including the banking practice and procedure and thus no exception can be taken to our exercise of jurisdiction now conferred on us on expiry of ten years as provided under Article 203 B (c) of the Constitution.

VI. COOPERATIVE SOCIETIES ACT, 1925.

312. The provision of section 59(2) (e) of the Cooperative Societies Act, 1925, has been challenged before us. It seems appropriate to reproduce the whole section which reads as under:--

“59.—(1) Every order passed by a liquidator under section 50, or by the Registrar under section 50-A, or by the Registrar or his nominee or arbitrators on disputes referred to him or them under clause (g) of section 50 or under section 54 or under subsection (3) of section 54-A, every order passed in appeal, under section 56, every order passed by the Provincial Government in appeal against orders under section 50, 50-A, 54 or subsection (3) of section 54-A and every order passed under section 64-A shall, if not carried out:--

- (a) on a certificate signed by the Registrar or a liquidator, be deemed to be a decree of a Civil Court and shall be executed in the same manner as a decree of such Court; or
 - (b) (be executed) according to the law and under the rules for the time being in force for the recovery of arrears of land revenue, provided that any application for the recovery in such manner of any such sum shall be made to the Collector and shall be accompanied by a certificate signed by the Registrar or by an Assistant Registrar to whom the said power has been delegated by the Registrar.
- (2) The Registrar or any person subordinate to him empowered by the Registrar in this behalf may, subject to such rules as may be prescribed by the provincial Government and without prejudice to any other mode of recovery provided by or under this Act, recover by exercising powers of the Collector under the (Sindh) Land Revenue Code, 1879 (or the relevant provisions of any other law relating to land revenue in force in the area), and the Rules thereunder—
- (a) Any amount due under a decree or order of a Civil Court, a decision or an award of the Registrar, obtained by a registered society including a financing bank or liquidator; or
 - (b) Any sum awarded by way of costs under sections 44-B and 45; or
 - (c) Damages assessed in section 22-A and 50-A; or
 - (d) Penalty provided for in sections 61 and 62; or

(e) Sums due to (Government) under section 65, together with the interest (or return), if any, due on such amount or sum and the cost of process, by the attachment and sale or by the sale without attachment of property of the person against whom such decree, decision, award or order has been obtained or passed.

(3)

313. The Cooperative Societies Act (VII of 1925) along with the Sindh Cooperative Societies Act (VII of 1925), were considered by Full Bench of this Court in SSM No. 37/P/83 and SSM No.10/S/83, vide its judgment dated 24th of March, 1984.

314. Since, this Court had no jurisdiction to examine the provisions relation to interest which fall within the ambit of fiscal law, it did not make any observation to the provision of section 59(2) (e) quoted above which is now under examination by us.

315. For the reasons already discussed in detail about the prohibition of interest in Islam, the word “interest” or “return”¹⁰ are declared to be repugnant to the Injunctions of Islam as laid down in the Holy Qur’an and Sunnah of the Holy Prophet (p.b.u.h), and as such all the four Provincial Governments i.e. the Government of Punjab, Sindh, N.W.F.P and Balochistan are directed accordingly to delete the phrase “interest (or return)”, if any, due on such amount.

VII. THE COOPERATIVE SOCIETIES RULES, 1927

316. The above Rules, have been framed by the Government as empowered under the Co-operative Societies Act, 1925, to regulate the proceedings etc. under the Act.

317. Rules 141 (h), 22 and 41 along with appendices 1 to 4 have been challenged before us, which read as under:--

Rule 14.—(1)

(h) Interest account;

“Rule 22. Distribution of profits.—In calculating the profit of a society for the year, all accrued interest which is overdue shall be deducted from the gross profits of the year before the net profits are arrived at. All accrued interest, that has been so deducted from the profits of the year and is actually recovered during the subsequent year.

Rule 41. Interest in liquidation proceedings.—On any debt which is due from a society that is being wound up, the creditor may prove for interest up to the date of the Registrar’s order for winding up at a rate which, in the case of the Provincial Cooperative Bank or Cooperative Bank or a District Cooperative Bank or other Co-operative Bank permitted by the Registrar to finance societies. Shall be the contract rate, and in other cases shall be a rate to be fixed by the Registrar and not exceeding the contract rate:

¹⁰ Ins. And subs. By Punjab Ordinance No.XL of 1984, dated 31-12-1984

Provided that, if any surplus assets remain after all liabilities, including liabilities on shares, have been paid off, further interest on such debts at a rate to be fixed by the Registrar and not exceeding the contract rate may be allowed to creditors from the date mentioned above up to the date of the repayment of the principal.

318. Clause (h) of sub-rule (1) of rule 14 the Cooperative Societies Rules, 1927, inter alia, provides for maintaining register of interest account.

319. Rule 22 relates to the deduction of all accrued interest which is overdue from the gross profits of the year before the net profits are arrived at and further it provides that all accrued interest, that has been so deducted from the profits of the year and is actually recovered during the subsequent year may be added to the profit of the subsequent year.

320. Rule 41, inter alia, provides proving of interest by a creditor up to the date of the Registrar's order for winding up and fixation of the rate of interest by the Registrar in liquidation proceedings. Appendices 1 to 4 set out certain forms containing mention of interest.

321. In view of the detailed discussion above, the provisions of interest, challenged before us, as quoted above, along with four appendices are held to be repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h).

VIII. THE INSURANCE ACT, 1938

322. The following provisions of the Insurance Act, 1938, have been challenged before us:-

¹¹S.3BB(1)(b).—Prepare statement of yield indicating the range of rates of interest or yield on the investment of the insurer's funds.

Subsection (3) of section 27.—In computing the assets required by this section to be kept invested by an insurer, a sum equal to the amount of his liabilities to persons who are not citizens of Pakistan in respect of life insurance policies issued in Pakistan in favour of such persons but expressed in a currency other than the Pakistani rupee may, if such sum is invested in securities of, and guaranteed as to principal and interest, by the Government of the county in whose currency such policies are expressed, be taken into account.

¹¹ S.3BB ins. By the Insurance (Amendment) Ordinance, 1970 (XXV of 1970), S.5 (w.e.f 21st December, 1970

S.29(8)(b)--- The loan is of such amount that the installment of capital and interest does not exceed one-fourth of the basic salary of the employee or one-fourth of the renewal commission or over-riding commission of an agent or an employer of agents, as the case may be, during a year;

¹²(c) (iii). – The loan does not exceed such amount as may be prescribed and is subject to such conditions, including conditions as to interest and the time allowed for its payment, as may be prescribed.

¹³S.47B.—(1). Where payment on a policy issued by an insurer becomes due and the person entitled thereto has complied with all the requirements, including the filing of complete papers, for claiming the payment, the insurer shall, if he fails to make the payment within a period of ninety days from the date on which the payment becomes due or the claimant complies with the requirement, whichever is later, pay interest as specified in subsection (2) on the amount so payable unless he proves that such failure was due to circumstances beyond his control.

(2) The interest under subsection (1) shall be payable for the period during which the failure continues and shall be calculated at monthly rests at the rate five per cent higher than the prevailing bank rate.

S.81 (2) (d):-- The report of the actuary shall containing an abstract in which shall be stated....

(d) the rate of interest assumed.

323. The Insurance Act, 1938, relates to the business of insurance. We are, at the moment, required to deal with the provisions relating to interest quoted above, as challenged before us. The Insurance Act, 1938 will be examined separately, as the same has not been challenged before us as a whole.

324. Merely a glance through the provisions, quoted above, is sufficient to convince us that the several provisions provide for a range of rates of interest, guarantee as to the principal amount and interest thereon, payment of interest on installments of capital, besides other conditions as to interest and time allowed for its payment as may be prescribed. All these provisions, for reasons discussed earlier, are repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h) and be deleted in so far as they relate to the levy, charge and payment of interest.

IX. THE STATE BANK OF PAKISTAN ACT, 1956

¹² Subs. By the Insurance (Amendment) Act, 1975(54 of 1975) S.3 (w.e.f 16th May 1975), for sub-clause (iii)

¹³ Ss.47B to 47 Lins. By the Insurance (Amendment) Ordinance, 1970 (XXV of 1970). S.27 (with effect from 21st December, 1970)

325.¹⁴2.22 (1) – The bank shall make public from time to time the standard rate at which it is prepared to buy or re-discount bills of exchange or other commercial papers eligible for purchase on the basis of interest under this Act.

(2)

326. Subsection (1) of section 22 of the State Bank of Pakistan Act, 1956, as challenged, empowers the State Bank of Pakistan, to notify the standard rate showing its readiness to buy or re-discount bills of exchange or other commercial papers for purchase on the basis of interest under the aforesaid Act.

327. The treasury bills are easily discountable with the State Bank and they are purchased mainly by commercial banks to earn some income on short term funds pending their utilization in more remunerative and higher yielding assets.

328. The purchase of bills and other commercial instruments like Debentures, Bonds etc. on the basis of interest is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h).

X. THE WEST PAKISTAN MONEY-LENDERS ORDINANCE, 1960

XI. THE WEST PAKISTAN MONEY-LENDERS RULES, 1965

XII THE PUNJAB MONEY-LENDERS ORDINANCE, 1960

XIII THE SINDH MONEY-LENDERS ORDINANCE, 1960

XIV. THE N.W.F.P. MONEY-LENDERS ORDINANCE, 1960.

XV. THE BALOCHISTAN MONEY-LENDERS ORDINANCE, 1960

329. A number of provisions of the West Pakistan Money-Lenders Ordinance, 1960, have been challenged before us besides a number of provisions of the West Pakistan Money-Lenders Rules, 1965, the Punjab/Sindh/N.W.F.P. and Balochistan Money-Lenders Ordinance, 1960, have also been challenged before us. All the five enactments are similar to each other. In fact, after the break-up of One-Unit, the four Provinces promulgated the same Ordinance. We would, therefore, examine them together.

330. On examination of the said Ordinances it appears that the entire statute as prevalent in Punjab, Sindh, N.W.F.P. and Balochistan, is repugnant to the Injunctions of Islam. Those Ordinances provide law relating to money-lenders, their registration and the regulations for their charging amount of interest to be charged from the borrowers and to charge a higher

¹⁴substituted and shall be deemed always to have been so substituted by act number XXIII of 1972, section 5

rate than what has been prescribed therein, has been made punishable with imprisonment for a term not exceeding six months or with fine, or with both.

331. Since the very concept of money-lending on interest is alien to the Islamic Injunctions and the concept of Islamic social justice, we declare all the above five enactments and the West Pakistan Money-Lenders Rules, 1965, repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h).

XVI. THE AGRICULTURAL DEVELOPMENT BANK RULES, 1961

332. The provisions of Rule 17 of the Agricultural Development Bank Rules, 1961, as challenged read as under:--

“Rule 17 Interest, fees, commission and incidentals – (1) Loans shall be granted by the Bank at such rate or rates of interest as the Board may from time to time specify.

(2) In specifying the rate or rates of interest under sub-rule (1), the Board may also specify a higher rate of interest which the Bank shall charge in the event of default of repayment of loan or any installment thereof, not being a default due to any natural calamity.

(3) In addition to interest, the Bank may also charge such commission and incidental charges as the Board may from time to time specify.

333. The Agricultural Development Bank Rules, 1961, have been framed under the Industrial Development Bank Ordinance IV of 1961. The Agricultural Development Bank is constituted for the development of agriculture and cottage industries in rural areas.

334. Rule 17, as quoted above, inter alia, empowers the Bank to charge interest as specified by the Board constituted under the Ordinance. The said Board has got powers to specify a higher rate of interest which the Board shall charge in the event of default of repayment of loan or any installment thereof.

335. For the reasons discussed earlier on the question of interest, the provisions of sub-rules (1) and (2) are declared repugnant to the Injunctions of Islam and be deleted.

336. The words “in addition to interest” in sub-rule (3) be also deleted.

XVII. THE BANKING COMPANIES ORDINANCE, 1962

337. The provision of the said Ordinance, as challenged before us, reads as under:-

25 (1).....

25(2). Without prejudice to the generality of the power conferred by subsection (1), the State Bank may give directions to banking companies either generally or to any banking company or group of banking companies in particular,----

- (a) As to the credit ceilings to be maintained, credit targets to be achieved for different purposes, sectors and regions, the purposes for which advances may or may not be made, the margins to be maintained in respect of advances, the rates of interest, charges or mark-up to be applied on advances and the maximum or minimum profit sharing ratios; and
- (b) Prohibiting the giving of loans, advances and credit to any borrower or group of borrowers on the basis of interest either for a specific purpose or for any purpose whatsoever; and each banking company shall be bound to comply with any direction so given.

338. Clause (a) of subsection (2) of section 25 relates to giving of directions by the State bank of Pakistan to banking companies touching rates of interest or mark-up to be applied on advances and prohibiting the giving of loans, advances and credit to any borrower or group of borrowers on the basis of interest.

339. For the foregoing detailed discussion, the above provisions in respect of interest and mark-up are held to be repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h).

XVIII. THE BANKING COMPANIES RULES, 1963

340. The provision of the said Rules, as challenged before us, reads as under:--

“R.9. Interest on deposits.—(1)

(2) Interest on foreign approved securities shall on realization be credited, if so desired by the banking company concerned, as soon as possible, to an account at the place where the office of the National Bank of Pakistan holding the securities under sub-rule (1) of rule 5 is located, subject to the usual charges; and, in other cases, such interest shall be remitted by the office of the National Bank of Pakistan to the principal office of the State Bank at the prevailing rate of exchange, after deducting the usual charges.

(3) The principal office of the State Bank shall credit, as soon as possible, the current account of the banking company maintained with it with the interest realized on rupee securities, subject to the usual charges, and with the amounts, if any, remitted from abroad by the office of the National Bank of Pakistan under sub-rule(2).

341. Sub-rule (2) of rule 9 of the said Rules provides for crediting of interest on foreign approved securities on realization and sub-rule (3) relates to crediting of interest realized on rupee securities.

342. In face of the detailed discussion held above, sub-rules (2) and (3) of rule 9 in so far as they pertain to interest are held to be repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h).

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XIX. THE BANKS (NATIONALIZATION) PAYMENT OF COMPENSATION RULES, 1974.

343. The provisions of the said Rules, as challenged before us, read as under:--

9. Payment of interest.—(1) Interest will be reckoned from the date of acquisition of the shares and will be payable be-annually and such interest will be liable to taxation under the Income-tax Act, 1922 (XI of 1922).

(2) The bonds shall be enfaced for payment of interest and principal at Karachi and Lahore offices of the banks.

(3) Payment of interest on the bonds will be made by means of interest warrants in Form ‘B’ appended to these rules and the date of issue of Interest warrant will be recorded over the initials of the authorized officer in the interest cages provided on the back of the bonds.

(4) For payment of interest and principal, a holder of the bond will submit his bond to the bank each time such payments are required and no payment will be made unless the bond is physically presented for the purpose.

(4-A) Notwithstanding anything contained in sub-rules (2) and (4), bonds deposited with the State Bank of Pakistan for satisfying the requirement of –

(a) Subsection (4) of section 17 of the State Bank of Pakistan Act, 1956 (XXXIII of 1956);
or

(b) Section 13 of the Banking Companies Ordinance, 1962 (LVII of 1962) may be re-enfaced at the Public Debt office for the purpose of credit to the subsidiary General Ledger Account.

(5) While paying interest the Bank will pay the net amount of interest after deducting the amount of income-tax from the gross amount of interest and will issue to the holder an Income-Tax Deduction Certificate in Form ‘C’ appended to these rules.

(6) In case the holder of the bond is exempted from income-tax, he shall whenever he presents the bond for payment of interest, furnish the exemption certificate granted by the Income-tax Authorities in the form prescribed in paragraph 27 of the Government Securities Manual and on the production of such certificate, no Income-tax will be deducted and the particulars of the exemption certificate will be noted on the Interest Warrant as well as in the Interest Warrant Issue Register.

344. Sub-rule (1) of rule 9 makes provision for reckoning of interest from the date of acquisition of the shares and its bi-annual payment and makes it liable to taxation under the Income-tax Act, 1962.

345. Sub-rule (2) states that the bonds shall be enforced for payment of interest and principal at Karachi and Lahore offices of the banks.

346. Sub-rule (3) lays down the mode of payment of interest by means of interest warrants and recording of the date of issue of interest warrant over the initials of the authorized officer on the back of the bonds.

347. Sub-rule (4) enjoins the holder of the bond to submit his bond to the bank each time for payment of interest and principal.

348. Sub-rule (4-A) relates to re-enforcement of the bonds at the Public Debt Office for the purpose of credit to the subsidiary General Ledger Account.

349. Sub-rule (5) is in respect of the deduction of income-tax from the gross amount of interest payable on the bond and sub-rule (6), deals with the exemption enjoyed by holder of the bond for paying income-tax on the interest payable on the bond.

350. In view of the detailed discussion regarding interest, already made above, the provisions of rule 9 referring to interest are held to be repugnant to the Injunctions of Islam.

XX. THE BANKING COMPANIES (RECOVERY OF LOANS ORDINANCE, 1979)

351. The provisions of section 8 of the Banking Companies (Recovery of Loans) Ordinance, 1979, as challenged before us, read as under:---

“S.8-(1)

(2) The decree shall provide for interest on the judgment debt from the date of institution of the suit till payment at the contracted rate or at date of institution of the suit till payment at the contracted rate or at the rate of two per cent above the bank rate, whichever is the higher.

(2-A)

(2) The decree shall provide for interest or return, as the case may be, on the judgment-debt from the date of decree till payment ----

(a) in the case of interest-bearing loans, for interest at the contracted rate or at the rate of two per cent above the bank rate whichever is the higher;

(b) in the case of loans given on the basis of mark-up in price, lease, hire purchase or service charges, for the contracted rate of mark-up, rental, hire or service charges, as the case may be, or at the latest rate of the banking company for similar loans, whichever is the higher; or

(c)

352. The Banking Companies (Recovery of Loans) Ordinance XIX of 1979, was considered in *Habib Bank Limited v. Muhammad Hussain and others* PLD 1987 Kar. 612 by one of us, Dr. Tanzil-ur-Rahman, J. (as he then was), wherein it was, inter alia, observed that the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h) blocks the road of the monopoly capitalism through its ant-monopolistic laws in general and the abolition of all forms and all rates of interest in particular. Having tested the validity of the vires of the provisions of interest contained in the said statute, it was observed that section 8 of the Ordinance regulates the rate of interest payable under the decree from the date of institution of the suit till payment. Prior to the aforesaid Ordinance, the court was not bound to allow the interest at two per cent. above the Bank rate or at the contracted rate whichever is higher, but it has now been so provided expressly in section 8 (2) of the Ordinance.

353. It may, however, be noted that the jurisdiction of the High Court to declare a provision of law made subsequent to the promulgation of Martial Law during 5th July, 1977, and 29th December, 1985, was saved by Article 270-A of the Constitution and the Full Bench Judgment of the Sindh High Court in a Constitution Petition reported as *Muhammad Bachal Memon v. Government of Sindh* PLD 1987 kar. 296 was a block as the said Article 270-A of the Constitution had provided a blanket protection to all such laws. But this Court while exercising its jurisdiction under Chapter 3-A of the Constitution has no such constraint to strike down a provision of law as repugnant to the Injunctions of Islam whether promulgated before, during or after imposition of Martial Law.

354. For the reasons discussed in detail in the foregoing pages, the whole section 8(2) (a) relating to interest, section 8(2) (b) relating to mark-up are held repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h).

355. Now reverting to the other submission of Mr. S.M Zafar regarding loan agreement entered into between a Bank or a financial institution on the one hand, and a borrower on the other. It will suffice to say that our jurisdiction, as conferred under Article 203-D (1) of the Constitution is limited to examine and decide the question whether or not any law or provision of law, custom or usage is repugnant to the Injunctions of Islam. It does not extend independently to the question of determining individual's right or liability, relating to the validity or continuance of an agreement between the parties. Reference may also be made to the following observation of the Shari'at Appellate Bench of the Supreme Court in an unreported Shariat Appeal No. 6 of 1989 *Government of the Punjab through Secretary, Finance, Lahroe v. Sakhi Muhammad, Assistant Professor, College of Education for Science and another* against the judgment of this Court dated 20-10-1988 in Shariat petition No.4/I of 1985.

356. Reciting briefly the facts, Mr. Justice Dr. Nasim Hasan Shah, as Chairman, Shariat Appellate Bench of the Supreme Court, observed that the grievance of the respondent seems to be that discrimination is being practiced between civil servants who are promotees and direct recruits and are similarly situated in their rank and such discrimination is repugnant to

the Injunctions of Islam. This plea found favour with the Federal Shariat Court and in the impugned judgment dated 20-10-1988, it was declared that the respondent herein was also entitled to all benefits to which the promotees of the department are eligible.

It was thus observed that:-

“Unfortunately we are at a loss to see how such a relief could have been given by the Federal Shariat Court in exercise of its powers and jurisdiction under Article 203-D of the Constitution.”

It was further observed that:-

“Under the above provisions of the Constitution, the Federal Shariat Court may examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam and if it comes to the conclusion that the provision is repugnant to the Injunctions of Islam it shall, while so doing, give reasons for this decision and also indicate the extent to which the impugned law is so repugnant and further more proceed to specify the date on which its decision shall take effect.

The impugned judgment does not indicate what law or provision of law has been found repugnant to the Injunctions of Islam nor contains any reasons for coming to this conclusion nor indicates the extent to which the repugnancy extended, nor specifies the date from which its decision shall take effect.

It was further observed that:-

“The declaration made is based on the agreement of the parties and not for any other reason. Furthermore no date has been specified from which its decision is to take effect. To the contrary, retrospective effect appears to have been given to the decision. Hence the impugned judgment does not appear to be in accordance with law.

357. This Court, therefore, has no jurisdiction to examine the question relating to agreements as stated above. Mr. Khalid M. Ishaq has also stated the same thing in his Note.

358. Since Mr. S.M. Zafar, has called upon us to consider this question, perhaps, unmindful of the fact that we have no jurisdiction to adjudicate upon rights and liabilities arising out of an agreement between parties, it may be observed that Islam lays great stress on the fulfillment of agreements. The Holy Quran enjoins upon Muslims:

“O’ Ye who believe, Fulfill your Covenants.”

يا ايها الذين آمنوا اوفوا بالعقود

In Surah Al-Mominun, while defining the questions or qualities (اوصاف) of Muslims, it is declared:

والذين هم لاماناهم وعهدهم راعون (المؤمنون- 8:23)

(Arabic content to be checked)

“And who shepherds of their pledge and their covenants”

The other Verse of the Holy Qur’an (17:34 sys: اوفوا بالعهد ان العهد كان مسؤولاً)

i.e. keep your covenant. Lo! Of the covenant it will be asked.

359. The Holy Prophet (p.b.u.h) is also reported to have said.

“The Muslims are to abide by their terms and conditions”

(Abu Dawud, Sunan, Karachi, Vol.II, p.150)

Imam Tirmizi has, however, added to the above:

الا شرطا حرم حلالا او احل هراما

“Except the condition that forbids any thing lawful or makes permissible anything prohibited. (Jami’ Tirmizi, Karachi, Vol. I.p. 251(

360. Imam Baihaqqi has further added in his al-Sunan al-Kubra:

That which is in consonance with what is right.”

ما وافق الحق منها

361. The Holy Prophet (p.b.u.h) has clearly stated in another Hadith:

“Any condition that is not in the Book of Allah is void. (Sahih’al-Bukhari Istanbul, Vol.III,p.29)

ما كان من شرط ليس في كتاب الله فهو باطل

362. As a consequence of the above verses of the Holy Qur’an and traditions of the Holy Prophet (p.b.u.h) an agreement or condition which is contrary to the Injunctions of Islam is not permitted in Islam.

363. There are contracts which being against the Injunctions of the Holy Qur’an are void and cannot be enforced. See Surah Al-Baqarah, Verse 275 wherein Almighty Allah permitted trading and has forbidden interest (ربا) - احل الله البيع وحرم الربا (ربا). As for him who returneth (to riba, interest), such are rightful owners of the Hell-fire. They will abide there. It, therefore, follows that while a trading contract is enforceable in law, a contract of interest or based on interest is not enforceable to the extent of interest.

364. We would like to add here that all the petitioners, except few, are the borrowers of some Banks and Financial Institutions or of Co-operative Finance Corporations or Societies. They being Muslims are expected to know it fully well that Islam has forbidden the interest, as they have themselves so expressly stated in their petitions. It is manifest that the Holy Qur’an was not revealed today. The Qur’anic mandate prohibiting Riba is in existence since fourteen

hundred years ago. This Court does not make the Law; it only expresses it, which already exists in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h).

365. There have been made prayers invariably in the petitions that the interest be wiped off, or the interest paid already be counted towards payment of capital or that directions be issued to the banks and other financial institutions restraining them from claiming or recovering from the petitioners the amount of interest due against them on the loans borrowed by them. In this connection, we would like to make it clear that this Court has a limited jurisdiction as to declaring a law or provision of law whether or not it is repugnant to the Injunctions of Islam. It has no jurisdiction to grant any relief by way of issuing Injunctions or staying proceedings pending before a Court of Law. All such prayers are thus misconceived and stand rejected.

366. Now referring to another submission of Mr. S.M. Zafar that as the universal economic system is based on interest, any departure from it will amount to economic collapse. There seems to be a misgiving in this proposition.

367. Prof. Dr. Sayyid Muhammad Tahir of International Institute of Economics, International Islamic University, Islamabad has submitted his note on the said issue on a short notice of one day only on the personal request of Chief Justice. He has been recently re-called from the Faculty of Economics, International Islamic University, Malaysia after serving there for about four years on deputation. In the said note he stated that "Departure from interest does not mean abolition of profitable opportunities. Rather these are going to take a new shape. As long as profits will be there and "interests" (not necessarily 'the rate of interest') of the concerned parties properly safeguarded, international transactions will take place normally. There is no reason to think otherwise.

One may at this stage raise the following objections:-

The alternative system for the present interest-based system may have the following problems:

- (1) Operationally, it may be too complex to be welcomed by the economic agents on the international scene.
- (2) Uncertainties in profits, coupled with the problem of moral hazard would cause the system to bog down in operation.

Again these are unfounded reasons....based on some apprehensions rather than concrete logic or practical proof. To clear the thinking on the subject, the following points should help.

I. Main international transactions are as follows:--

- (a) Financing of trade (exports and imports).
- (b) International capital flows whereby residents of one country simply move their funds from one country to another in order to earn interest.
- (c) Direct foreign investment—In principle, this is different from (b).
- (d) Transfer of funds in lieu of foreign remittances

- (e) Borrowing and lending at the government level with other governments, international financial institutions (Such as, the World Bank and the IMF and commercial banks).
- (f) Borrowing and lending by private businesses (individuals and corporations) in the international financial markets in the form of loans or bonds....in the case of Pakistan, the scale of this thing is most likely negligible; in most cases the Government provides the guarantee and de facto the so-called project-related borrowings by private and semi-Government bodies (such as WAPDA) become borrowing at the Government level.
- (g) Buying and selling of foreign exchange (both spot and forward) to facilitate the above transactions, as well as to seek profit through the foreign exchange transactions per se.

Now picture should be clear. We note the issue point-wise;

A. Financing of exports can be done by banks acting as traders rather than financiers in the same transactions. That is, banks make recourse to murabaha. This is already being done by Islamic banks the world over; effectively, all of them are generating at least the same “profit margins” as the “interest margins” as per old loaning transactions in lieu of trade. There is no reason as to why foreign banks would resist this new contractual arrangement with exporters and importers. On the other hand, in recent times the international banking system has become extremely competitive. Now we look forward to there being more banks willing to finance exports and imports on a trading (murabaha) basis than the entire volume of Pakistan’s exports and imports.

B + C. International capital flows are welcome, but not critical. When export and import financing is already arranged, these are of secondary importance. Such inflows do affect liquidity position in a country; but outflows, which are beyond the control of domestic economy, work otherwise. In present times, Pakistan stands no chance of competing with the U.S.A Germany, Japan and other developed countries on this score.

What is important for practical purpose is director foreign investment. In this regard, we have to provide proper ownership safeguards to foreign investors and guarantees for repatriation of their profits. Foreign investment has nothing to do with “interest”; it is guided by “profits”.

D. Again this has nothing to do with interest. The system will work as it does at present.

E. This is the sore point. Government has to stop borrowing from international capital markets for meeting its current (administrative) expenditures needs. Funding can be arranged for economically profitable projects on a profit-loss sharing basis. So far, we have not done our homework on this subject; in fact, this stems from a clear unwillingness by bureaucracy to try fresh ideas.

F. Right now, there is no significant borrowing and lending by private quarters in Pakistan. So this is not an issue.

G. Foreign exchange market will continue to operate as usual. There will be spot and forward markets (the latter along the lines on bai' salam contracts).

- II. It would be in order to point out that the system of interest has shown seeds of its own destruction. The third world debt problem and consequential losses for international banks prove this point. In the face of easily available credit on an interest-basis, Pakistan too has compounded serious indebtedness internationally. A closure of this door will result in fiscal discipline and healthy Pakistani economy, and not vice versa. So the sooner we close this door of interest in international transactions, the better it will be.
- III. The argument for not banning interest from international transactions might have some weight 15 years ago. Now internationally there is awareness about Islamic financing and banking. There is also growing international acceptance of the Islamic options of financing. There are a host of Islamic banks in Muslim countries as well as non-Muslim countries. –Darul Mal of Switzerland is an example of the latter category. Now even non-Islamic Banks and financial institutions are offering Islamic financing options in Pakistan. For example, 1st Modaraba by the Grindlay's Banks. The prudential Insurance Company has even initiated its 2nd Prudential Modaraba.

To sum up, the case of banning of interest leading to a collapse of the international system has no merit. The logic and evidence both prove otherwise.

268. We would now like to refer a passage from Anwar Iqbal Qureshi's book on Islam and the Theory of Interest'. It reads as under:-

“These people realize that the fixed rates of interest are exercising a very sinister influence on economic development and instead of openly proclaiming that the society should abolish the bonds and debentures (interest-bearing debts) and allow only “shares” (partnership in which they share profit and losses), they beat about the bush by wanting interest bearing bonds and other complicated measures and not facing the single real problem of abolishing interest. “ (P.214).

369. So far as the banking system in Pakistan is concerned, it has to undergo a change on the basis of profit-loss-sharing in its several forms like Mudarabah, Mausharakah etc. With the possible exception of current accounts, the nature of bank deposits will have to be changed from loan to investment. Authorizing the Banks to make investments in purchase of shares of the companies on equity basis may also be helpful. During last few years there has been deregulation of the banks in some of the European countries. As a result, the Banks are involved in investment on equity basis.

370. It is worthwhile to mention here that a Workshop was arranged in 1984 by the International Institute of Islamic Economics, Islamabad on the elimination of interest from Government transactions. This Workshop in its report, after discussing the matter in detail, has given its recommendations for meeting the situation likely to arise from abolition of interest from Government transactions. The suggestions are reproduced as under:-

- (i) “Recognizing that though the elimination of interest is not likely to affect the overall level of savings in the economy, and may in fact favourably affect the efficiency in the use of savings, the participants felt that due attention should be given to the adjustment

problems that the Government would be faced with on account of the likely decline in Government receipts from various schemes. In this respect the participants suggested the following multi-pronged approach:

- (a) A thorough scrutiny should be carried out of all public expenditures with a view to eliminating all waste in such expenditure and cutting down relatively less essential expenditure.
 - (b) Government requirements for funds should be reduced by bringing about greater participation of the private sector in both productive and social sectors. Though it is true that the present Government has recognized the vital role private sector can play in developing the productive capacity of the economy and has provided to it a lot of concessions, there is still vast scope for tapping the real potential of the private sector through further reduction in controls and bureaucratic procedures governing private investment. In addition, Government should divest of all such public undertakings which can be operated by the private sector, except justified by overall public interest. Measures should also be taken to increase the efficiency and profitability of public sector enterprises through induction of professional management, among others. Considerable scope also exists for enhancing the participation of the private sector in the social welfare field.
 - (c) The institution of awaqf, which played a very prominent role in social welfare activities in early Islamic period, should be revitalized.
 - (d) Efforts should be made to mobilize resources by offering Mudaraba Bonds to finance such activities of the Government as promise a reasonable return to savers from such Mudaraba Bonds.
 - (e) Interest-free Government Bonds may be floated by the Government and suitable tax incentives may be provided to induce people to invest in them.
 - (f) Additional resources may be raised by the Government by widening the tax base and reducing tax evasion through appropriate reform in the tax system.
 - (g) People should be motivated to cultivate the spirit of self-sacrifice for noble causes, such as strengthening the defense capability of the country by offering a part of their savings to Government on interest-free basis.
- (ii) The above-mentioned measures can assist the Government in offsetting the decline in resource flow from the saving schemes after the elimination of interest. Utmost efforts should be made to so manage the situation that increased resort to borrowing from the banking system is avoided. Excessive borrowing from the banking system leads to inflation which militates against the Islamic objective of justice and equity. The participants recognized that despite best efforts on the part of the Government to reduce expenditure and mobilize additional resources a somewhat increased resort to borrowing from the banking system may be necessary as the adjustment measures suggested above will take some time to yield desired results. Since increased resort to the banking system by the Government will tend to push up the rate of monetary expansion, it would be advisable to scrutinize the use that is currently being made of the bank resources by the private sector and public sector enterprises and to reduce their reliance on the banking system for relatively less essential uses. Presently, a good deal of borrowings from the banks is for financing of inventories and there is scope for reduction of bank credit against inventories. Again, the dependence of big firms on bank

credit can be reduced by encouraging them to find larger resources by increases in their equity capital. (Report of Workshop on Elimination of Interest on Government Transactions, pages 13-15, Islamabad).

371. It is noticeable that interest-free banks are also functioning in Iran, Egypt, Jordan, Malaysia and some other countries. The Islamic Development Bank, Jeddah, is also reported to be functioning on interest-free basis.

372. In Iran a bill on interest-free banking was laid before the Islamic Consultative Assembly of the Islamic Republic of Iran (the Majlis) on August 30, 1983, when the Majlis finally approved the bill on interest-free banking. The bill was ratified by the Guardian Council (شورائے نگهبان) two days later, on September 1. The above law, inter alia, includes a provision that all contravening laws and regulations shall be null and void. It was further provided that bye-laws shall be drawn by the ministry of Economic Affairs and Finance at the recommendation of the Central Bank of Islamic Republic of Iran and put into effect after approval by the Council of Ministers. For the drafting and approval of the said bye-laws, the law provided a time limit of four months.

373. The law for Riba-free-banking together with bye-laws drawn under it have had the involvement of the following:-

- (a) Council of Protectors.
- (b) Majlis Shoaraye Islami (Islamic Consultative Assembly),
- (C) Council of Ministers,
- (d) Ministry of Economic Affairs and Finance,
- (e) Central Bank of the Islamic Republic of Iran.

The high level involvement is indicative of the importance and seriousness which has been attached to elimination of Riba from the banking system in Iran.

374. The Law for Riba-free Banking in Iran, besides describing the technical functions of a banking system, gives top priority to the establishment of a monetary and credit system based on righteousness and justice (as delineated by Islamic Jurisprudence) and also for creation of necessary facilities for the extension of cooperation and Qard-e-Hasana (interest-free loan) among the general public through mobilization of surplus funds and its utilization for creation of opportunities for gainful employment and investment as stipulated in Article 43 of the Constitution of the Islamic Republic of Iran.

375. To promote the concept of Qard-e-Hasana as an instrument for the realization of the aims of Article 43 of the Constitution, banks are obliged to earmark a portion of their resources for providing Qard-e-Hasana (interest-free loans) which shall be provided in accordance with rules adopted by the money and Credit Council and endorsed by the Prime Minister. Qard-e-Hasana shall be provided for the following purposes:-

- (i). to provide equipment, tools and other necessary resources so as to enable for creation of employment, in the form of cooperative bodies, for those who lack the necessary means; enable for creation of employment, in the form of cooperative bodies, for those who lack the necessary means;
- (ii) to enable expansion in production with particular emphasis on agricultural, livestock and industrial products;
- (iii) To meet essential needs.

376. Expenses incurred by banks on providing Qard-e-Hasana shall be collected from the borrowers and the basis for the calculation of their expenses shall be laid down by the Central Bank.

377. In Jordan a Bank named as “Jordan Islamic Bank” was established in Amman and was registered on 28th November, 1978 which operates according to a pioneering banking concept based on the profit-sharing system permissible under Shari’ah. The modes of financing in this Bank include Joint as well as Individual Mudarabah. This Bank operates for meeting the economic and social needs in the field of banking services, financing and investment operations on interest-free basis, which includes providing loans without interest both for productive and consumptional purposes. (See Jordan Islamic Bank Eighth Annual Report, Al-Sharq Printing Press, Amman, 1986, page 9)

378. We are, however, fully conscious of the fact that the re-structuring of the Commercial Banks’ operations on Islamic lines would represent a radical departure from the traditional British Bank system as current in Pakistan. It may, however, be noted that some features of the proposed Islamic system have recently been adopted in the Banking system of other countries. For instance, the German banks have from the very beginning been engaged in equity financing on a considerable scale. In France, the *banques d’affaires*, which represent an important part of the banking system, undertake investment financing on participation bases. In recent years, commercial banks in a number of countries have increasingly adopted new financing technique such as leasing, hire-purchased and the exercise of “convertibility option” which shift loans into equity.

379. The last submission of Mr. S. M. Zafar, to wait for Commission’s Report is, in fact, based on the earlier submission dealt with already. In this respect, we would like to observe that the Government had sufficient time to switch over from the existing economic system based on capitalism, to Islamic economic system. The time started when the Objectives Resolution was passed by the first Constituent Assembly of Pakistan on 12th March, 1949, which has now become a substantive part of the Constitution since March 2, 1985. In the very first Constitution of 1956 the nation was assured of endeavours to be made by the Government for elimination of interest. The said assurance was re-affirmed in all the subsequent Constitutions of 1962, 1972 and 1973, the present one. As provided under Article 230 (4) of the Constitution of 1973, the Council of Islamic Ideology, (then headed by one of us, Dr. Tanzil-ur-Rahman) submitted its Final Report on ‘Elimination of Interest from

Country's Economy in June, 1980 (Its interim Report on Interest was submitted in 1978). The Final Report on Interest was to be laid before both Houses of the Parliament within six months of its receipt, and after considering that Report the Parliament was to enact the law within a period of two years. Since it was Martial Law period, it might have been laid before the National Assembly and Senate during 1985-91. The necessary enactment must have been ready by now. Particularly when Shari'at has been declared to be "the Supreme Law" of Pakistan on 10th April, 1991. In any case this Court is not supposed to wait for the report of the Commission set up by the Government under the Shariat Enforcement Act, 1991. It goes without saying that the Council of Islamic Ideology has a Constitutional status much higher than a Commission set up under a law.

380. It may not, perhaps, be out of place to mention here that late General Muhammad Zia-ul-Haq as President of Pakistan had appointed an Economic Commission in pursuance of Shariat Ordinance, 1988, promulgated on June 15, 1988 which just on its expiry day was again promulgated by the President Ghulam Ishaque Khan as Shariat Ordinance (Revised), on October 15, 1988. This Ordinance having not been placed before the National Assembly died its own death on February 15, 1989. Anyhow, the said Commission worked for about eight months and did some work. On inquiry by this Court to the Standing Counsel for Federation Mr. Iftikhar Hussain Chaudhary, it was revealed by him that the interim Report of the said Commission was not traceable in the Ministry of Finance; hence he was unable to say anything about the Commission's view on the subject. In fact, the impression we gathered from his submission was something like that of a Persian proverb:-

آن دفتر را گاؤ خرد و گاؤ را قصاب برد

It is, however, pertinent to note that the Chairman of the said Commission Dr. Ehsan Rashid was the same Economic Expert who was appointed by the Council of Islamic Ideology as Chairman of the Panel of Experts.

381. Council of Islamic Ideology was greatly benefited by the Report of Panel of Experts headed by Dr. Ehsan Rashid. In fact, it formed basis of the various formulations and recommendations of the Council of Islamic Ideology as contained in the Council's Report on 'Elimination of the Interest from Country's Economy'.

382. We are called upon, in fact, duty-bound, to discharge our Constitutional function to examine the provisions of fiscal law challenged before us, after expiry of the period of ten years fixed in the Constitution, and decide the question raised in the above petitions, whether or not the said provisions relating to interest are repugnant to the Injunctions of Islam? The Government is on notice for about a year and the matter relation to interest is being heard by this Court during last eight months, of course, with certain intervals. The Federation as well as the Provincial Government, though represented by Senior Counsel rendered no assistance to the Court except raising issues. In fact, in most of the notices issued to them it was specifically stated that in case they desire to rely upon the views of some outstanding Scholars or Economists as expert witnesses they may produce them, but they did neither produce nor even show any desire to produce any of them either from Pakistan or abroad.

383. However, we have given our anxious thought to the request of Mr. S.M. Zafar and would still give some time more to the Federation and the four Provincial Governments to bring such laws or provisions thereof in conformity with the Injunctions of Islam. We would specify the 30th day of June, 1992, on which the decision shall take effect. The various provisions of the laws discussed in the judgment and held repugnant to the Injunctions of Islam will cease to have effect as on and from 1st July, 1992.

384. The petitions, to the extent stated above, are accepted and disposed of accordingly, along with SSM Nos. 2,3 and 4/1 Of 1991.

M.B.A/654/S

Petition accepted