

IN THE SUPREME COURT OF PAKISTAN
(Shariat Appellate Jurisdiction)

Present:

Mr. Justice Khalil-ur-Rehman Khan,
Mr. Justice Munir A. Sheikh,
Mr. Justice Wajihuddin Ahmed,
Mr. Justice Maulana Muhammad Taqi Usmani,
Mr. Justice Dr. Mahmood A. Ghazi.

Civil Shariat Appeals No.1 of 1992 to 23 of 1992, 36 of 1992 to 58 of 1992, 73 of 1992 & 91 of 1992.

[On appeal from the judgment of Federal Shariat Court dated 14-11-1991 passed in Shariat Petitions No. 42-I + 45-I/91, 14-I/90, 42-L/91, 67-L/91, 74-L/91, 69-L/91, 68-L/91, 28-L/91, Suo Motu Case No.3-I/91, Shariat Petitions No.4-I/91, 30-L/91, 31-L/91, 32-L/91, 17-L/91, 18-L/91, 49-L/91, 73-I/91, 76-L/91, 89-L/91, 30-I/90, 17-A/I/91, 16-C/I/91, 16-A/I/91, 21-L/90, 29-L/91, 26-L/91, 31-I/91, 32-I/91, 33-I/91, 70-L/91, 71-L/91, 72-L/91, 73-L/91, 27-L/90 (in four cases), 16-I/91, 42-I/91, 45-I/91, 73-I/90, 72-L/91, 17-I/91, 16-B/I/91, 17-B/I/91, 17-C/I/91, 30-I/90 & 16-I/90 respectively]

Shariat Appeals No. 96 of 1992, 99 of 1992, 100 of 1992 & 101 of 1992.

[On appeal from the judgment of Federal Shariat Court dated 22-6-1992 passed in Shariat Petitions No.84-I/91, 78-I/91, 79-I/91 & 83-I/91 respectively]

Civil Shariat Appeals No. 97 of 1992, 98 of 1992 & 102 of 1992.

[On appeal from the judgment of Federal Shariat Court dated 30-6-1992 passed in Shariat Petitions No.1-I/92, 80-I/91 & 82-I/91 respectively]

Civil Shariat Appeal No.1 of 1992

Dr.M.Asalam Khaki.

... Appellant

Versus

1. Syed Muhammad Hashim
2. National Bank of Pakistan.
3. Federation of Pakistan,
through Ministry of Justice and Parliamentary Affairs, Islamabad.
... Respondents

Civil Shariat Appeal No.2 of 1992

The Agricultural Development Bank of Pakistan, Islamabad.
...Appellant

Versus

1. Federal Government of Pakistan, through Secretary, Ministry of Finance, Islamabad.
2. Sheikh Aziz-ur-Rahman
3. Khawaja Muhammad Zahid
4. Dr.Mahmoodur Rahman Faisal
5. Secretary to Government of Pakistan, Ministry of Justice and Parliamentary Affairs, Islamabad.
6. Attorney General of Pakistan
7. Baqir
8. Said Muhammad
9. Allah Yar
10. Shahzada Abdul Hadi
11. Rehm Dil
12. Banking Council of Pakistan
13. Amanat Ali
14. Muhammad Nawaz
15. Lal Din
16. Secretary to Government of Punjab, Law Department, Lahore.
17. Mumtaz Ali
18. Sheikh Abdul Majid
19. Sheikh Abdul Haneed
20. Sheikh Abdul Qadeer
21. Sheikh Yar
22. Mst.Hashmat Ara
23. Mst.Wakeelan
24. Mst.Hafeezan
25. Amir Alam Nutkani
26. Sardar Khan
27. Noor Ahmad

28. Provincial Government through Secretary Finance, Govt. of Punjab, Civil Secretariat, Lahore.
29. Mst.Mazhar Jan
30. Muhammad Ikram
31. Nadeem Ul Islam
32. Jawad Zaheer
33. Khurram Zaheer
34. Humayun Zaheer
35. Aslam Zaheer
36. Mst.Lubna Zaheer
37. Mst.Uzma Zaheer
38. Mst.Rashida Sheikh
39. Mst.Naeema Tabassum
40. Sajjad Asghar
41. Mst.Nighat Sultana
42. Muhammad Yousaf
43. Fateh Muhammad
44. Farman Ali Shah
45. Zafar Hayat Khan
46. Nawab Mansoor Ali Khan
47. Baqir
48. Said Muhammad
49. Muhammad Anees
50. Muhammad Arshad Khan
51. Malik Bashir Ahmad Awan
52. Farooq Ahmed Manaka
53. Muhammad Anwar
54. Prof. Dr.Muhammad Yahya. ... Respondents

Civil Shariat Appeal No.3 of 1992

1. The Manager, Allied Bank Limited, B/O. Baghanpura, Lahore.
2. The Manager, Allied Bank Limited, B/O.Brandreth Road, Lahore.
3. The Manager, Allied Bank Limited, B/O. Shahalam Mkt, LHR.
... Appellants

Versus

1. Malik Munir Ahmed
2. Banking Court through the Presiding Officer State Bank of India Building, Shahr-e-Quaid-e-Azam, Lahore.
3. Federation of Pakistan through Secretary Ministry of Finance, Govt. of Pakistan, Islamabad. ... Respondents

Civil Shariat Appeal No.4 of 1992

Allied Bank of Pakistan Limited through its President Head Office,
Jubilee Insurance House, Karachi. ... Appellant

Versus

1. Naveed Asif
 2. Federation of Pakistan through Secretary Ministry of Finance,
Govt. of Pakistan, Islamabad.
- ... Respondents

Civil Shariat Appeal No.5 of 1992

Allied Bank of Pakistan Limited through its President Head Office,
Jubilee Insurance House, Karachi. ... Appellant

Versus

1. Naveed Asif
 2. Federation of Pakistan through Secretary Ministry of Finance,
Govt. of Pakistan, Islamabad.
- ... Respondents

Civil Shariat Appeal No.6 of 1992

Allied Bank of Pakistan Limited through its President Head Office,
Jubilee Insurance House, Karachi. ... Appellant

Versus

1. Naveed Asif
2. Federation of Pakistan through Secretary Ministry of Finance,
Govt. of Pakistan, Islamabad. ... Respondents

Civil Shariat Appeal No.7 of 1992

Allied Bank of Pakistan Limited through its President Head Office,
Jubilee Insurance House, Karachi. ... Appellant

Versus

1. Naveed Asif
2. Federation of Pakistan through Secretary Ministry of Finance,
Govt. of Pakistan, Islamabad. ... Respondents

Civil Shariat Appeal No.8 of 1992

Allied Bank of Pakistan Limited through its President Head Office,
Jubilee Insurance House, Karachi. ... Appellant

Versus

1. Ch.Noor Ahmed
2. Federation of Pakistan through Secretary Ministry of Finance,
Govt. of Pakistan, Islamabad. ... Respondents

Civil Shariat Appeal No.9 of 1992

Allied Bank of Pakistan Limited through its President Head Office,
Jubilee Insurance House, Karachi. ... Appellant

Versus

Federation of Pakistan through Secretary Ministry of Finance, Govt. of
Pakistan, Islamabad. ... Respondent

Civil Shariat Appeal No.10 of 1992

Allied Bank of Pakistan Limited. ... Appellant

Versus

1. Govt. of Punjab through Secretary Finance Department Govt. of
Punjab, Lahore.
2. Govt. of N.W.F.P. through Secretary Finance Department, Govt. of
N.W.F.P., Peshawar.
3. Govt. of Sind through Secretary Finance Department, Govt. of
Sind, Karachi.
4. Govt. of Baluchistan through Secretary Finance Department, Govt.
of Baluchistan, Quetta.
5. Federation of Pakistan through Secretary Ministry of Finance,
Govt. of Pakistan, Islamabad. ... Respondents

Civil Shariat Appeal No.11 of 1992

United Bank Limited. ... Appellant

Versus

1. M/s Farooq Brothers through its sole proprietor Zafar Alam Chaudhry.
2. Zafar Alam Chaudhry.
3. Ch.Muhammad Ali
4. Ch.Muhammad Ali & Co. through Zafar Alam Chaudhry.
5. M/s Ch.Zafar Alam and Co. through Zafar Alam.
6. Deputy Attorney General, Lahore. ... Respondents

Civil Shariat Appeal No.12 of 1992

United Bank Limited. ... Appellant

Versus

1. Chaudhry Sharif Ahmed
2. The State through Secretary Finance, Government of Pakistan, Islamabad. ... Respondents

Civil Shariat Appeal No.13 of 1992

United Bank Limited. ... Appellant

Versus

1. Muhammad Amin
2. The State, Ministry of Finance, Government of Pakistan, Islamabad ... Respondents

Civil Shariat Appeal No.14 of 1992

United Bank Limited. ... Appellant

Versus

1. M/s Kamran Ice Factory
2. Mian Nazir Ahmad
3. Mian Faqir Ahmad
4. Mian Bashir Ahmad
5. Mian Muhammad Nawaz
6. Muhammad Nawaz ... Respondents

Civil Shariat Appeal No.15 of 1992

United Bank Limited. ... Appellant

Versus

1. Muhammad Iqbal Zahid
 2. President of Pakistan, Islamabad
 3. Federal Government through Finance Secretary, Islamabad.
 4. Pakistan Banking Council through its Chairman Habib Bank Plaza,
I.I. Chundrigar Road, Karachi.
- ... Respondents

Civil Shariat Appeal No.16 of 1992

United Bank Limited. ... Appellant

Versus

1. M/s Hajisons Angolo Cinema through Ch.Talib Hussain,
Managing Partner.
2. Ch.Talib Hussain.
3. Muhammad Tufail
4. Shahbaz Ahmad
5. Tahir Hussain
6. Mst.Mufahza
7. Ahmed
8. Miss Lachhi
9. Federation of Pakistan through Ministry of Finance and Commerce
Division, Islamabad. ... Respondents

Civil Shariat Appeal No.17 of 1992

United Bank Limited. ... Appellant

Versus

1. Abdul Qayyum Qureshi
2. Federation of Pakistan through Secretary Finance Division,
Islamabad. ... Respondents

Civil Shariat Appeal No.18 of 1992

United Bank Limited. ... Appellant

Versus

1. Abdul Rashid
2. M/s Ditt Sen Coy, Capital Road, Sialkot.
5. Federation of Pakistan through Finance Secretary, Ministry of Finance, Islamabad. ... Respondents

Civil Shariat Appeal No.19 of 1992

United Bank Limited. ... Appellant

Versus

1. Shaikh Masood Ellahi
2. The Government of Pakistan through Secretary, Ministry of Law, Islamabad. ... Respondents

Civil Shariat Appeal No.20 of 1992

Muslim Commercial Bank ... Appellant

Versus

1. Allied Paper Industries Ltd.
2. M.Rafiq Saigol
3. Afsar M.Khan
4. S.I.H.Zaidi
5. K.A. Ghaffar
6. S.H.Gardezi
7. N.G.Currim Bhoy
8. Abdul Qayyum
9. Pakistan through Secretary, Ministry of Finance, Central Secretariat, Islamabad. ... Respondents

Civil Shariat Appeal No.21 of 1992

National Bank of Pakistan ... Appellant

Versus

1. Allied Paper Industries Ltd.
2. M.Rafiq Saigol
3. S.I.H. Zaidi
4. Afsar M.Khan

5. Zia Sheikh
6. K.A. Ghaffar
7. A.N.Zubairi
8. Shaukat H.Qureshi
9. Muhammad Abdul Moid
10. Riffat Ali
11. S.H.Gardezi
12. N.G.Currim Bhoy
13. Abdul Qayyum
14. Pakistan through Secretary, Ministry of Finance, Central
Secretariat, Islamabad. ... Respondents

Civil Shariat Appeal No.22 of 1992

National Bank of Pakistan ... Appellant

Versus

1. Allied Paper Industries Ltd.
2. M.Rafiq Saigol
3. Afsar M.Khan
4. S.I.H.Zaidi
5. K.A. Ghaffar
6. S.H.Gardezi
7. N.G.Currim Bhoy
8. Abdul Qayyum
9. Pakistan through Secretary, Ministry of Finance, Central
Secretariat, Islamabad. ... Respondents

Civil Shariat Appeal No.23 of 1992

National Bank of Pakistan ... Appellant

Versus

1. Allied Paper Industries Ltd.
2. M.Rafiq Saigol
3. Afsar M.Khan
4. S.I.H.Zaidi
5. K.A. Ghaffar
6. S.H.Gardezi
7. N.G.Currim Bhoy
8. Abdul Qayyum

9. Pakistan through Secretary, Ministry of Finance, Central Secretariat, Islamabad. ... Respondents

Civil Shariat Appeal No.36 of 1992

M/s Habib Bank Limited. ... Appellant

Versus

1. Syed Musharaf Alam
2. Syed Mansur Alam
3. Syed Mubasher Alam
4. Federation of Pakistan through the Secretary, Ministry of Finance, Islamabad.
5. Pakistan Banking Council ... Respondents

Civil Shariat Appeal No.37 of 1992

M/s Habib Bank Limited. ... Appellant

Versus

1. Faiz Ahmad
2. Riaz Ahmad
3. Zahoor Ahmad
4. Saeed Ahmad
5. Mst.Rashidan
6. Mst.Shukran Bibi
7. Mst.Saleeman Bibi
8. M/s Bodhla Cotton Ginning and Pressing Factory.
9. M/s Bodhla Ice Factory
10. Special Judge(Banking) Punjab
11. Federation of Pakistan through the Secretary Ministry of Finance, Islamabad.
12. Pakistan Banking Council. ... Respondents

Civil Shariat Appeal No.38 of 1992

M/s Habib Bank Limited. ... Appellant

Versus

1. M/s Kashmir Fabrics through Haji Sh.Karamat Ali, Managing Partner.
2. Federation of Pakistan through the Secretary, Ministry of Finance, Islamabad.
3. Pakistan Banking Council ... Respondents

Civil Shariat Appeal No.39 of 1992

M/s Habib Bank Limited. ... Appellant

Versus

1. Faiz Ahmad
2. Riaz Ahmad
3. Zahoor Ahmad
4. Saeed Ahmad
5. Mst.Rashidan
6. Mst.Shukran Bibi
7. Mst.Saleeman Bibi
8. M/s Bodhla Cotton Ginning and Pressing Factory.
9. M/s Bodhla Ice Factory, through Fiaz Ahmad, Managing Director
10. Special Judge(Banking) Punjab
11. Federation of Pakistan through the Secretary Ministry of Finance, Islamabad.
12. Pakistan Banking Council. ... Respondents

Civil Shariat Appeal No.40 of 1992

M/s Habib Bank Limited. ... Appellant

Versus

1. Faiz Ahmad
2. Riaz Ahmad
3. Zahoor Ahmad
4. Saeed Ahmad
5. Mst.Rashidan
6. Mst.Shukran Bibi
7. Mst.Saleeman Bibi
8. M/s Bodhla Cotton Ginning and Pressing Factory.
9. M/s Bodhla Ice Factory, through Fiaz Ahmad, Managing Director
10. Special Judge(Banking) Punjab
11. Federation of Pakistan through the Secretary Ministry of Finance, Islamabad.

12. Pakistan Banking Council. ... Respondents

Civil Shariat Appeal No.41 of 1992

M/s Habib Bank Limited. ... Appellant

Versus

1. Faiz Ahmad
2. Riaz Ahmad
3. Zahoor Ahmad
4. Saeed Ahmad
5. Mst.Rashidan
6. Mst.Shukran Bibi
7. Mst.Saleeman Bibi
8. M/s Bodhla Cotton Ginning and Pressing Factory.
9. M/s Bodhla Ice Factory, through Fiaz Ahmad, Managing Director
10. Special Judge(Banking) Punjab
11. Federation of Pakistan through the Secretary Ministry of Finance, Islamabad.
12. Pakistan Banking Council. ... Respondents

Civil Shariat Appeal No.42 of 1992

National Bank of Pakistan ... Appellant

Versus

1. M/s Alcos (Pak), Lahore
2. Nasir Ahmed Qureshi
3. Mr.Pervaiz Qureshi ... Respondents

Civil Shariat Appeal No.43 of 1992

National Bank of Pakistan ... Appellant

Versus

1. M/s Alcos (Pak), Lahore
2. Nasir Ahmed Qureshi
3. Mr.Pervaiz Qureshi ... Respondents

Civil Shariat Appeal No.44 of 1992

National Bank of Pakistan ... Appellant

Versus

1. M/s Alcos (Pak), Lahore
2. Nasir Ahmed Qureshi
3. Mr.Pervaiz Qureshi ... Respondents

Civil Shariat Appeal No.45 of 1992

National Bank of Pakistan ... Appellant

Versus

1. M/s Alcos (Pak), Lahore
2. Nasir Ahmed Qureshi
3. Mr.Pervaiz Qureshi ... Respondents

Civil Shariat Appeal No.46 of 1992

National Bank of Pakistan ... Appellant

Versus

1. M/s M.A.Qureshi and Sons through its proprietor Muhammad Ashraf
2. Muhammad Ashraf
3. Mr.Pervaiz Afzal ... Respondents

Civil Shariat Appeal No.47 of 1992

National Bank of Pakistan ... Appellant

Versus

1. M/s M.A.Qureshi and Sons through its proprietor Muhammad Ashraf
2. Muhammad Ashraf
3. Mr.Pervaiz Afzal ... Respondents

Civil Shariat Appeal No.48 of 1992

National Bank of Pakistan ... Appellant

Versus

1. M/s M.A.Qureshi and Sons through its proprietor Muhammad Ashraf
2. Muhammad Ashraf
3. Mr.Pervaiz Afzal ... Respondents

Civil Shariat Appeal No.49 of 1992

National Bank of Pakistan ... Appellant

Versus

1. M/s M.A.Qureshi and Sons through its proprietor Muhammad Ashraf
2. Muhammad Ashraf
3. Mr.Pervaiz Afzal ... Respondents

Civil Shariat Appeal No.50 of 1992

National Bank of Pakistan ... Appellant

Versus

1. Allied Paper Industries Ltd.
2. M.Rafiq Saigol
3. S.I.H. Zaidi
4. Zia Sheikh
5. K.A. Ghafoor
6. N.G.Currim Bhoy
7. A.Qayyum
8. A.N.Zubairi
9. Shaukat H.Qureshi
10. S.H.Gardezi
11. Muhammad Abdul Moid
12. Riffat Ali ... Respondents

Civil Shariat Appeal No.51 of 1992

National Bank of Pakistan ... Appellant

Versus

Muhammad Hashim ... Respondent

Civil Shariat Appeal No.52 of 1992

National Bank of Pakistan ... Appellant

Versus

Muhammad Hashim ... Respondent

Civil Shariat Appeal No.53 of 1992

National Bank of Pakistan ... Appellant

Versus

1. Mian Saleemuddin
2. Maqsooda Bano
3. Saleem Raza Qureshi
4. Shehr Yar Iqbal Qazi
5. Federation of Pakistan ... Respondents

Civil Shariat Appeal No.54 of 1992

1. Messrs. ABN Amro Bank through its authorised officer.
2. Messrs. American Express Bank through its authorised officer.
3. Messrs ANZ Grindlays Bank PLC, through its authorised officer
4. Messrs Bank of America through its authorised officer.
5. Messrs Bank of Oman Ltd., through its authorised officer.
6. Messrs Banque Indosuez through its authorised officer.
7. Messrs Bank of Tokyo Ltd., through its authorised officer.
8. Messrs Chase Manhattan Bank N.A., through its authorised officer.
9. Messrs Citibank N.A., through its authorised officer.
10. Messrs Deutsche Bank A.G., through its authorised officer.
11. Messrs Doha Bank Ltd., through its authorised officer.
12. Messrs Emirates Bank International Ltd., through its authorised officer.
13. Messrs Habib Bank A.G.Zurich, through its authorised officer.
14. Messrs Hong Kong & Shanghai Banking Corporation, through its authorised officer.
15. Messrs International Finance Investment and Commerce Bank Ltd., through its authorised officer.
16. Messrs Middle East Bank Ltd., through its authorised officer.
17. Messrs Pan African Bank Ltd., through its authorised officer.
18. Messrs Rupali Bank Ltd., through its authorised officer.

19. Messrs Societe Generale, through its authorized officer
20. Messrs Standard Chartered Bank, through its authorised officer.
... Appellants

Versus

1. The Federation of Pakistan through the Secretary Ministry of Finance, Islamabad.
2. National Bank of Pakistan.
3. M/s Alcos (Pak), Lahore
4. Nasir Ahmed Qureshi
5. Mr.Pervaiz Afzal

Civil Shariat Appeal No.55 of 1992

National Bank of Pakistan ... Appellant

Versus

1. Allied Paper Industries Ltd.
2. M.Rafiq Saigol
3. Afsar M.Khan
4. S.I.H. Zaidi
5. K.A. Ghafoor
6. S.H.Gardezi
7. N.G.Currim Bhoy
8. A.Qayyum ... Respondents

Civil Shariat Appeal No.56 of 1992

National Bank of Pakistan ... Appellant

Versus

1. Allied Paper Industries Ltd.
2. M.Rafiq Saigol
3. Afsar M.Khan
4. S.I.H. Zaidi
5. K.A. Ghafoor
6. S.H.Gardezi
7. N.G.Currim Bhoy
8. A.Qayyum
9. Pakistan through Secretary Ministry of Finance, Central Secretariat, Islamabad ... Respondents

Civil Shariat Appeal No.57 of 1992

National Bank of Pakistan

... Appellant

Versus

1. Allied Paper Industries Ltd.
2. M.Rafiq Saigol
3. S.I.H. Zaidi
4. Zia Sheikh
5. K.A. Ghafoor
6. N.G.Currim Bhoy
7. A.Qayyum
8. A.N.Zubairi
9. Shaukat H.Qureshi
10. S.H.Gardezi
11. Muhammad Abdul Moid
12. Riffat Ali

... Respondents

Civil Shariat Appeal No.58 of 1992

National Bank of Pakistan

... Appellant

Versus

1. Allied Paper Industries Ltd.
2. M.Rafiq Saigol
3. S.I.H. Zaidi
4. Zia Sheikh
5. K.A. Ghafoor
6. N.G.Currim Bhoy
7. A.Qayyum
8. A.N.Zubairi
9. Shaukat H.Qureshi
10. S.H.Gardezi
11. Muhammad Abdul Moid
12. Riffat Ali

... Respondents

Civil Shariat Appeal No.73 of 1992

Federation of Pakistan

... Appellant

Versus

Dr.Mahmood-ur-Rehman Faisal

... Respondent

Civil Shariat Appeal No.96 of 1992

1. Province of Punjab, through Secretary Co-operative, Government of Punjab, Lahore.
2. The Deputy Registrar, Co-operative Societies, Lahore Region.
... Appellants

Versus

1. Ch.Sarwar Hayat
2. National Industrial Co-operative Finance Corporation Ltd. through Chairman Co-operative Board for Liquidation, Punjab, Lahore.
... Respondents

Civil Shariat Appeal No.97 of 1992

1. Province of Punjab, through Secretary Co-operative, Government of Punjab, Lahore.
2. The Deputy Registrar, Co-operative Societies, Lahore Region.
3. The Advocate-General, Punjab, Lahore. ... Appellants

Versus

1. Mst.Mumtaz Begum.
2. National Industrial Co-operative Finance Corporation Ltd. through Chairman Co-operative Board for Liquidation, Punjab, Lahore.
... Respondents

Civil Shariat Appeal No.98 of 1992

1. Province of Punjab, through Secretary Co-operative, Government of Punjab, Lahore.
2. The Deputy Registrar, Co-operative Societies, Lahore Region.
... Appellants

Versus

1. Gulzar Ahmad Khan Senator.

2. National Industrial Co-operative Finance Corporation Ltd. through Chairman Co-operative Board for Liquidation, Punjab, Lahore.
... Respondents

Civil Shariat Appeal No.99 of 1992

1. Province of Punjab, through Secretary Co-operative, Government of Punjab, Lahore.
2. The Deputy Registrar, Co-operative Societies, Lahore Region.
... Appellants

Versus

1. Gulzar Ahmad Khan Senator.
2. National Industrial Co-operative Finance Corporation Ltd. through Chairman Co-operative Board for Liquidation, Punjab, Lahore.
... Respondents

Civil Shariat Appeal No.100 of 1992

1. Province of Punjab, through Secretary Co-operative, Government of Punjab, Lahore.
2. The Deputy Registrar, Co-operative Societies, Lahore Region.
... Appellants

Versus

1. Gulzar Ahmad Khan Senator.
2. National Industrial Co-operative Finance Corporation Ltd. through Chairman Co-operative Board for Liquidation, Punjab, Lahore.
... Respondents

Civil Shariat Appeal No.101 of 1992

1. Province of Punjab, through Secretary Co-operative, Government of Punjab, Lahore.
2. The Deputy Registrar, Co-operative Societies, Lahore Region.
... Appellants

Versus

1. Ch.Sarwar Hayat.

2. National Industrial Co-operative Finance Corporation Ltd. through Chairman Co-operative Board for Liquidation, Punjab, Lahore.
... Respondents

Civil Shariat Appeal No.102 of 1992

1. Province of Punjab, through Secretary Co-operative, Government of Punjab, Lahore.
2. The Deputy Registrar, Co-operative Societies, Lahore Region.
... Appellants

Versus

1. Ch.Sarwar Hayat.
2. National Industrial Co-operative Finance Corporation Ltd. through Chairman Co-operative Board for Liquidation, Punjab, Lahore.
... Respondents

For the Appellants

In C.Sh.Appeal No.1/92: Dr.M.Asalam Khaki, In Person.

For ADBP Hafiz S.A.Rahman, Sr.ASC.,
Mr.Ejaz Muhammad Khan,AOR.

For ABL Syed Riazul Hasan Gilani, ASC.
Kh.Mushtaq Ahmad,AOR.

For UBL Mr.Noorul Arfin ASC &
Mr.Mansoorul Arfin,ASC
Mr.Abdul Saeed Khan Ghauri, AOR.

For MCB,
National Bank of Pak.,&
State Life Insurance
Corporation of Pakistan. Mr.Khalid M. Ishaque, Sr.ASC.

For HBL Mr.Abu Bakar Chundrigar,ASC
Mr.M.S.Ghauri, AOR.

For Federation of Pakistan Ch.Muhammad Farooq,
Attorney General for Pakistan
(On notice, but did not argue);

- Maulvi Anwarul Haq,
Deputy Attorney General
(at initial stage);
Syed Riazul Hassan Gilani, ASC,
(appeared from 28-6-1999 to 2-7-
1999 and thereafter did not
appear despite notice to him);
Ch.Zafar Iqbal, ASC appeared on
behalf of the Federal
Government but not argued.
Ch.Akhtar Ali, AOR.
Mr.Mehr Khan Malik,AOR.
For State/NWFP Govt. Mr.Ejaz Muhammad Khan,
Additional Advocate General,
Mr.M.A.Qayyum Mazhar,AOR.
- For State/Punjab Govt. Mr.Altaf Elahi Sheikh,
Addl. Advocate General Punjab,
Rao Muhammad Yousaf Khan, AOR.
- For Nawab Industries etc. Mr.Muhammad Iqbal Vehniwal, ASC;
Ch.Mehdi Khan Mehtab, AOR.
- Respondent No.1
Muhammad Hashim
(in SA.1/92) In Person.
- Muhammad Ismail
Qureshy In Person, with
Syed Abul Aasim Jaferi,AOR.
- In SA 96 to 102/92 Syed Afzal Haider,ASC.
- Experts on Court notice: Dr.Waqar Masood Khan
Director General (Planning),
International Islamic University,
Islamabad;
Dr.Syed Muhammad Tahir,
International Islamic University;
Mr.Abdul Jabbar Khan, former President
National Bank of Pakistan;
Dr.Umar Chapra, Mr.Ibrahim Sidat,
Dr.S.Muhammad Hussain, Dr.Irshad Zaman,
Chartered Accountants/Economists; Mr.

Maqbool Soomro, Dr.Shahid Hussain and Mr.Abdul Wadood Khan, Hafiz Abdur Rehman Madni Chairman Islamic Research Council, Dr.Aslam Khaki, Prof.Khurshid Ahmad, Mr.H.U.Beg (Retired Finance Secretary, Government of Pakistan), Prof. Syed Nawaz Haider Naqvi, Mr. Muhammad Yahya (Deputy Secretary General, Mutahida Ulema Council of Pakistan), Maulana Gauhar Rehman, Mr. Iqbal Khan (Foreign Expert – Managing Director Global Islamic Finance; HSBC Investment Bank Plc, United Kingdom), Dr.Ahmad Muhammad Ali (President, Islamic Development Bank, Jeddah) alongwith his delegation namely, Mr.Muad Ali Umar (Vice President, IDB) Dr.M.Alfatah (Legal Adviser IDB) Mr.D.M.Qureshi (Adviser Treasury, IDB) Mr.Muhaad Al- Jehri (Director, IDB) Dr.Hussain Hassan (Head of Shariah Board, Dubai Islamic Bank) and Mr.Adnan Al Bahr, Managing Director and Chairman, International Investment Company Kawet); Mr.Ismail Qureshi, ASC, Mr.Faheem Ahmad (Marketing Coordinator, Financial Research & Analysis , Credit Rating Company Ltd., Pakistan, Karachi), Maulana Abdul Sattar Niazi,

Dates of hearing : 22-2-1999 to 26-2-1999,
1-3-1999 to 5-3-1999, 8-3-1999, 9-3-1999 (Islamabad);
17-3-1999 to 19-3-1999,
22-3-1999 to 26-3-1999(Karachi)
3-5-1999 to 7-5-1999; 17-5-1999 to 21-5-1999; 24-5-1999 to 28-5-1999; 14-6-1999 to 18-6-1999; 28-6-1999, 29-6-1999, 1-7-1999, 2-7-1999, 5-7-1999 and 6-7-1999.

JUDGMENT

KHALIL-UR-REHMAN KHAN, J.- This judgment will dispose of 55 appeals filed as of right under Article 203-F of the Constitution of the Islamic Republic of Pakistan, 1973 against a number of judgments of the Federal Shariat Court, detail of which is given in the title of this judgment, whereby certain provisions relating to “interest” as contained in various laws, have been declared to be repugnant to the injunctions of Islam as contained in the Holy Quran and Sunnah of the Holy Prophet (Peace be upon him), with direction to delete the said provisions by amending the said laws. The first of these judgments rendered on 14-11-1991, reported as PLD 1992 FSC 1, has been assailed in Shariat Appeals Nos.1/92 to 23/92, 36/92 to 58/92 and 91/92 whereby findings with regard to some of the impugned Acts/Rules have been particularly challenged while in Shariat Appeal No.73/92, the appeal filed by Federation of Pakistan, all the findings on all the laws recorded by the learned Judges of the Federal Shariat Court have been brought under challenge. The laws containing provisions as to “interest”, “return” or “mark up” subject matter of the impugned judgment are as under:-

1. The Interest Act, 1839.
2. The Government Savings Banks Act, 1873.
3. The Negotiable Instruments Act, 1881.
4. The Land Acquisition Act, 1894.

5. The Code of Civil Procedure, 1908.
6. The Co-operative Societies Act, 1925.
7. The Co-operative Societies Rules, 1927.
8. The Insurance Act, 1938.
9. The State Bank of Pakistan Act, 1956.
10. The West Pakistan Money Lenders Ordinance, 1960.
11. The West Pakistan Money Lenders Rules, 1965.
12. The Punjab Money Lenders Ordinance, 1960.
13. The Sind Money Lenders Ordinance, 1960.
14. The N.W.F.P. Money Lenders Ordinance, 1960.
15. The Baluchistan Money Lenders Ordinance, 1960.
16. The Agricultural Development Bank of Pakistan, Rules, 1961.
17. The Banking Companies Ordinance, 1962.
18. The Banking Companies Rules, 1963.
19. The Banks (Nationalization) (Payment of Compensation) Rules, 1974.
20. The Banking Companies (Recovery of Loans) Ordinance, 1979.

Shariat Appeal No.96/92 and 100/92.

In these Shariat Appeals, judgments dated 22-6-1992 of the Federal Shariat Court (PLD 1992 FSC 538), whereby two circulars bearing Nos.603-22-RCS dated 31-2-1969 and RCS/B&C/4869-5018 dated 5-12-1979 issued by the Registrar Cooperative Societies, Punjab Lahore, Punjab Lahore, to the extent they provide for charging interest have been declared repugnant to the Injunctions of Islam, have been challenged.

Shariat Appeals No. 99/92 and 101/92.

In these Shariat Appeals judgments dated 22-6-1992 of the Federal Shariat Court (PLD 1992 FSC 537), whereby clause (ee) of sub-section (2) of section 71 of the Co-operative Societies Act, 1925 in so far as it relates to the provision of “interest” was declared repugnant to the Injunctions of Islam, has been challenged.

Shariat Appeals No.97/92, 98/92 and 102/92.

In these Shariat Appeals judgment of Federal Shariat Court dated 30-6-1992 (PLD 1992 FSC 535), whereby sub-bye-law (6) of Bye-Law 3 of the National Industrial Cooperative Finance Corporation Limited, to the extent that it provides for “interest” was declared repugnant to the injunctions of Islam, has been challenged.

It is pertinent to note that the Federal Shariat Court with a view to elicit views/opinions of the distinguished Ulema, Scholars and Economists issued a Questionnaire relating to the impugned fiscal laws and the issues arising for consideration. 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 (PBUH). 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 for 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 on 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 economising the use of capital?
13. Can an Islamic State impose any tax on its subjects other than Zakat and Ushr?"

A consolidated statement of the question-wise opinion prepared and compiled by Research Section of the Federal Shariat Court has been appended as Appendix 'A' to the main impugned judgment delivered by the Federal Shariat Court. The Scholars, Ulema, Economists and Bankers, who had submitted replies to the Questionnaire have been listed in paragraph 19 of the impugned judgment.

This Court also prepared a Questionnaire highlighting the issues requiring determination and sent it to distinguished Ulema,

Scholars, Bankers, and Economists of the country and abroad for their opinions. The Questionnaire reads as under:-

- “Q.1. The Holy Quran has prohibited ‘Riba’. What is meant by this term? What is its true definition and connotation in the light of the Holy Quran and Sunnah of the Holy Prophet (PBUH)?
- Q.2. What is the true scope of the transactions to which the bar of Riba is applicable? Can the term Riba be also applied to the commercial or productive loans advanced by the banking and financial institutions and to the interest charged thereon?
- Q.3. The Pakistani banks and some financial institution finance their clients on the basis of buy back on mark up agreements. According to this method the client of the Bank purports to sell a particular commodity to the bank, and simultaneously buys it back on a high price on deferred payment basis. A certain rate of mark-up (percent per annum) is applied to the second sale. Does this arrangement fall within the ambit of Riba?
- Q.4. Is there any difference between a Muslim and a non-Muslim in the matter of prohibition of Riba? Can the prohibition of Riba be extended to the loans obtained from non-Muslim, or for that matter, from Muslim foreign countries whose laws and national policies, together with international monetary laws and policies, are not within the control of the State of Pakistan?
- Q.5. The Government of Pakistan and some institutions under its control acquire loans by issuing bonds and certificates etc. and pay a fixed period-wise ‘profit’ to the holders of such securities. Does this profit fall within the definition of Riba?
- Q.6. It is evident that the value of the paper currency has a trend of decrease in the inflationary situation. If a debtor who has borrowed a particular amount of paper currency repays the same amount to his

creditor after a substantial time, the creditor can suffer the effects of inflation. If he demands his debtor to pay more in order to compensate him for loss of value he has suffered, can this demand be treated as a demand of Riba?

- Q.7. If all the forms of interest or mark-up are held to be repugnant to the Islamic injunctions, what modes of financing do you suggest for: (a) financing trade and industry; (b) financing the budget deficit; (c) acquiring the foreign loans; and (d) similar other needs and purposes?
- Q.8. If you are of the view that all the forms of interest are prohibited by Shariah, then what procedure will you suggest for eliminating it from the economy? If you prefer a gradual process, what strategy do you suggest for the purpose which may fulfill the requirements of the Holy Quran and Sunnah?
- Q.9. If all the transactions based on interest are held to be violative of the Islamic injunctions, what will be the treatment of the past transactions and agreements? Especially what procedure should the government adopt with regard to the previous foreign loans?
- Q.10. Whether a creditor can fix time and rate of profit while the debtor saying Insha Allah, he will be liable to earn and pay the same in time; failing which the guarantor may give profit asked for plus also a bonus or compensation for delayed payment, if any, also according to other arrangements regarding the loan. What will be the position if the system of insurance for the said profit is introduced?"

Following Ulema, Scholars and Economists, amongst others, submitted written answers to the Questionnaire issued by this Court:-

- (1) Mr.Sartaj Aziz, the then (at the time of submission of replies) Minister for Finance & Economic Affairs, Government of Pakistan, answering the Questionnaire in his capacity as an expert and not in his official capacity as

Finance Minister, as it was stated that the response of the Government of Pakistan on the Questionnaire involved is to be submitted to the Court by the Attorney General.

- (2) Islamic Development Bank, Jeddah.
- (3) Prof. Khurshid Ahmad, Institute of Policy Studies.
- (4) Dr.Ziauddin Ahmed, Karachi.
- (5) Mr.Zafar Ishaque Ansari, Director General Islamic Research Institute, International Islamic University, Islamabad.
- (6) Dr.Nawazish Ali Zaidi, Rawalpindi.
- (7) Dr.Arshad Zaman, Karachi.
- (8) Mr.Abdur Rauf Sheikh, Lahore.
- (9) Prof. Dr.Muhammad Najatullah Siddiqui, International Islamic Economics Centre, Malik Abdul Aziz University, Jeddah.
- (10) Mr.Alsiddique Muhammad al-Amin, Teacher, Al-Shariah Al-Islamia Law Department, Khartoom University, Sudan.
- (11) Report containing answers prepared under supervision of Prof. Dr.Jamila Shaukat, Dean, Faculty of Islamic and Oriental Learning, University of the Punjab, Lahore.

In addition to the above answers/opinions, different individuals and organizations addressed letters and sent material containing their views on the question of 'Riba' which shows keen interest of the people in the matter. It is neither possible nor appropriate to mention the views so expressed by every-one of them. However, material sent and the views expressed by the prominent scholars and writers have been thoroughly examined. They have, in the material sent

by them, dealt with the issues relevant to the question of elimination of 'Riba'. The follow scholars have sent the material, books or copies of their published articles:-

- (1) Syed Maroof Shah Shirazi, Shariah Academy, International Islamic University, Islamabad.
- (2) Mr.Anwar Ahmad Minai, Karachi.
- (3) Syed Naseeb Ali Shah, Nazim Majlis-e-Fiqhi, Jamiat Ulami Pakistan.
- (4) Mr.G.M. Saleem, Advocate, Karachi.
- (5) Mr.Mehmood Ashraf, Chartered Management Accountant, Karachi.
- (6) Mr.Abdul Moin Ansari, Latifabad, Hyderabad.
- (7) Prof. Dr.Muhammad Tahir ul Qadri, Lahore.
- (8) Dr. Attaullah Khan Niazi, Economic Expert.
- (9) Mr.Abdul Hafeez Khokhar, Advocate.
- (10) Mr. Aqdas Ali Kazmi, Chief/Director Tax Policy, Central Board of Revenue.
- (11) Mr.Aurangzeb Haque.
- (12) Prof. Ziauddin Ahmad.

Besides learned counsel for the parties, the following Scholars, Economists and Bankers appeared and made their submissions:-

- (1) Dr.Syed Muhammad Tahir, International Islamic University;

- (2) Dr.Waqar Masood Khan
Director General (Planning),
International Islamic University, Islamabad;
- (3) Mr.Abdul Jabbar Khan, former President National Bank of
Pakistan;
- (4) Dr.Umar Chapra,
- (4) Mr.Ibrahim Sidat,
- (5) Dr.S.Muhammad Hussain,
- (6) Dr.Irshad Zaman, Chartered
Accountants/Economists;
- (7) Mr. Maqbool Soomro,
- (8) Dr.Shahid Hasan Siddiqui, economist,
- (9) Mr.Abdul Wadood Khan,
- (10) Hafiz Abdul Rehman Madni, Chairman, Islamic Research
Council, Lahore,
- (11) Dr.Aslam Khaki, Advocate, Islamabad,
- (12) Prof.Khurshid Ahmad,
- (13) Mr.H.U.Beg (Retired Finance Secretary, Government of
Pakistan),
- (14) Prof. Syed Nawaz Haider Naqvi,
- (15) Mr. Muhammad Yahya (Deputy Secretary General, Mutahida
Ulema Council of Pakistan),
- (16) Maulana Gauhar Rehman,
- (17) Mr. Iqbal Khan (Foreign Expert – Managing Director Global
Islamic Finance; HSBC Investment Bank Plc, United
Kingdom),

- (18) Dr.Ahmad Muhammad Ali (President, Islamic Development Bank, Jeddah) alongwith his delegation namely, Mr.Muad Ali Umar (Vice President, IDB) Dr.M.Alfatah (Legal Adviser IDB) Mr.D.M.Qureshi (Adviser Treasury, IDB) Mr.Muhaad Al- Jehri (Director, IDB) Dr.Hussain Hassan (Head of Shariah Board, Dubai Islamic Bank) and Mr.Adnan Al Bahr, Managing Director and Chairman, International Investment Company Kawet);
- (19) Mr.Ismail Qureshi, ASC,
- (20) Mr.Faheem Ahmad (Marketing Coordinator, Financial Research & Analysis , Credit Rating Company Ltd., Pakistan, Karachi),
- (21) Maulana Abdul Sattar Niazi,
- (22) Mr. Khalid M. Ishaque, Sr.Advocate, Karachi.

The impugned judgments were examined with the assistance of the then learned Deputy Attorney General Maulvi Anwarul Haque. A scrutiny of the main impugned judgment would show that opinions of experts, bankers and ulema as expressed before the learned Federal Shariat Court are contained in paras 22 to 32 thereof. In their view, time related fixed monetary return on a loan, however, conceived or planned, is to be considered as riba prohibited in Islam; that there is no difference between the consumption loans and productive loans so far as the prohibition of interest in Islam is concerned; that the bank interest comes within the definition of ‘Riba’; and that Musharakah and Mudarabah are workable systems for interest-free banking. Two former Vice Presidents of United Bank Limited and Habib Bank Limited appearing before the learned Federal Shariat Court expressed the opinion

that there is no distinction whether the addition on the capital sum of loan is based on simple interest or on compound interest, as any increment in money capital in respect of nothing but time is 'Riba'. They and the other experts were further of the view that Mudarabah and Musharakah are viable alternatives to the banking system. They suggested restructuring of the banking system according to the Report submitted by the Council of Islamic Ideology on the Elimination of Interest from the National Economy in 1980 as well as the Reports of the Permanent Commission for the Islamization of Economy submitted in 1988 and in the later years. They are further of the view that the interest on loans floated by the Government to meet the national requirements also falls under 'Riba' and is prohibited. These experts expressed the opinion that the devaluation or inflation of currency would not affect the payment of loans taken before such devaluation or inflation as long as the loan was repaid in that very currency particularly when the parties to the loan transactions operate in the same currency area. Devaluation of a currency is generally directed at its value in relation to foreign currency, though this may and often does affect its purchasing power at home, especially with reference to imported goods. Experts were clear that in domestic borrowing the borrower, whether an individual or the Government shall pay back the same amount which was borrowed with no increase on any pretext because the inflation causing rise in cost and

value of gold and consumer goods in terms of currency is the result of circumstances beyond the control of the borrower and he cannot be held to be personally responsible for the loss of purchasing power to the lender. These experts were also of the view that interest-based transactions between two Muslim countries or between a Muslim and a non-Muslim country is not permissible because the Quranic prohibition of Riba is absolute and does not permit any such exception. Some of the experts, however, conceded that in cases of extreme necessity recourse to interest-based borrowing or dealings may be permissible as far as international transactions with non-Muslim countries are concerned. Most of the experts were of the view that insurance business can be easily Islamized as, according to Dr. Hasanuzzaman, Islamizing insurance business is much easier to Islamize than the banking system. In this context reference was made by several experts to the Takaful system developed in Malaysia and Islamization of insurance experience in Sudan. The experts, however, differed in their opinion whether the interest accruing on the Provident Fund comes under Riba or not. Some ulema and scholars, relying on the views of late Mulana Mufti Kifayataullah and late Maulana Ashraf Ali Thanvi and Maulana Ahmad Raza Khan Bareilvi, held that the interest on Provident Fund was not Riba. On the other hand, according to most of the bankers and economists such interest absolutely falls under the category of Riba.

There was no dispute among the scholars, experts and ulema that the payment of prizes on Prize Bonds and saving bank accounts and other schemes falls under the category of Riba. There appears also a unanimity of the view that in Shariah there is no difference between interest charged on personal loans and the interest charged on consumption loans. Some scholars provided historical evidence in their respective answers to show that commercial and productive loans were not only known in pre-Islamic Arabia but the Riba prohibited by the Qur'an was charged mostly on commercial and productive loans. There was also unanimity of views that interest is no incentive for saving as people save for many reasons other than the desire to make more money. They save for their children; they save for their own old age; they save to meet possible contingencies; they save for many other reasons. Savings were made when the banks did not exist. Savings are made by those who do not take interest on their savings and do not accept any return on their holdings. However, the Shariah modes of financing will replace the interest and will continue to serve as an inducement for saving.

The contentions of the learned Advocates for the parties have been summarized in paragraphs 34 to 54 of the main impugned judgment. The contentions of Mr.Khalid M. Ishaque, noted in paragraph 38, inter alia, are that there is considerable juristic opinion available to

the fact that an increase to offset the inflation has legal justification and cannot be counted as riba; and that there is juristic opinion available to meet the fact that Bank interest does not fall in the category of prohibited riba as the Banks participate in the productive process, make productive labour possible, increase social wealth and take only a fraction of the profit that accrues to them which is not riba.

The contentions urged and the issues raised by Mr. S.M.Zafar, appearing for the Banking Council and the Federation were noticed in paragraphs 48 to 53 and 130 to 133 of the main impugned judgment. As regards contention that 'Riba' falls within the area of 'mutshabehat', learned Judges of the Federal Shariat Court discussed the meaning of 'mutshabehat' in the Quran and concluded that 'Riba' did not fall under the area of 'mutshabehat' and its prohibition was clear and expressed. The literal and technical meaning of 'Riba' in paragraphs 65 to 129 was discussed and elaborated. A number of definitions of 'Riba' given by the earlier writers on Islamic Law as well as the relevant Quranic verses (Ayats) and Ahadis of the Holy Prophet (Peace Be Upon Him) have been noticed in the impugned judgment to answer the question whether the interest on commercial loans falls under the category of Riba and the view recorded is that the purpose for which a loan is advanced does not create any distinction as far as the prohibition of 'Riba' is concerned. The misgivings expressed by certain quarters

have been dealt with in paragraphs 134 to 139 of the main impugned judgment. The concept of public policy (Maslaha) and its impact on the legality or otherwise of the bank interest has been discussed in paragraphs 140 to 152 of the main impugned judgment and it was concluded, after quoting the well-known authorities on Islamic Law and Jurisprudence such as Imam Ghazali that the rule of public policy (maslaha) cannot be invoked in support of the plea that bank interest should be permissible. The questions of inflation and indexation have been examined in detail in paragraphs 153 to 168, 174 to 177, 198 to 205, 212 to 221, 226 to 234 of the main impugned judgment. It is pertinent to note that while discussing the question of indexation the question of coins or fulus and their legal status and allied questions have been dealt with in paragraphs 169 to 173, 189 to 196, 206 to 211, 225 and 226 of the main impugned judgment. Important rules governing loans and credit and the fact of coins becoming stagnant or the value of the currency getting depreciated or devalued have been discussed in paragraphs 178 to 197 of the main impugned judgment. The examination of the laws impugned before the Federal Shariat Court is to be found in paragraphs 234 to 354. The subject of previous and existing contracts and obligations has been dealt with in paragraphs 355 to 365 and the discussion on the excuses/reasons advanced on the basis of

international situation is contained in paragraphs 366 to 378. This completes the survey of the main impugned judgment in these appeals.

At this stage it would be appropriate to give a comparative statement quoting question-wise opinion/answers submitted by Mr.Sartaj Aziz who was, at the time of filing of replies, Finance Minister, though the said opinion was given in his personal capacity, but as it is representative of the view point of the opinions expressed by one shade of Economists/Scholars, as well as the answers/opinion submitted by Islamic Development Bank, Jeddah, which represents the views/opinions of the opposite group of scholars/economists, are being reproduced hereunder:-

Question No.1

The Holy Quran has prohibited 'Riba'. What is meant by this term? What is its true definition and connotation in the light of the Holy Quran and Sunnah of the Holy Prophet (PBUH)?

Reply of Mr.Sartaj Aziz

RIBA: There is no doubt that the Holy Quran has prohibited Riba. The term Riba has been variously defined by different schools of thoughts. There is need for an authoritative definition of the term 'Riba'.

In Arabic Language 'Riba' means an increase but every increase, on money lent does not automatically become Riba. In order to come within the term Riba, such return would have to reflect exploitation of the borrower by the lender.

Any form of exploitation is repugnant to teachings of Islam and that includes exploitation of the lender by the borrower. The lender has been permitted in Quran to receive back the principal sum (Ras-al-Mal). The introduction of paper currency has made it difficult to protect the real value or purchasing power of money. Inflation systematically and

continuously erodes the purchasing power of paper currency and, therefore, it would be unfair to the lender if the borrower were to return the same amount of money, with reduced purchasing power, to the lender after a period of time. This would amount to exploitation of the lender by the borrower. If the principle of protecting the value or purchasing power of money is accepted, then any payment which is made in addition to the principal amount, in order to compensate for the fall in value, cannot be termed excess or 'Riba'.

Reply of Islamic Development Bank.

In its decision No.3 for 1406H, the OIC *Fiqh* Academy defined the Sharia'h prohibited Riba.

Question No.2

What is the true scope of the transactions to which the bar of Riba is applicable? Can the term Riba be also applied to the commercial or productive loans advanced by the banking and financial institutions and to the interest charged thereon?

Reply of Mr.Sartaj Aziz

Interest charged by banks and financial institutions has three main elements:

- (a) Compensation for the loss of purchasing power in the value of money. In most countries, the rates of interest prevalent for banking transactions closely follow the rates of inflation;
- (b) Charges for services rendered. In addition to providing loans, the Banks generally render a wide range of services to their clients; and
- (c) Some return or profit on the amount lent. A portion of this, in turn, is passed on to depositors who keep their money in Banks.

Each of these components can be estimated and charged separately but in practice these are averaged in the light of prevailing trend and revised periodically in response to the demand and supply of money in the market.

If the principle of protecting over time, the real value of money advanced by a bank as loan, is accepted, then interest charged by banking and financial institutions in Pakistan to that extent should not come within the definition of Riba.

Interest charged by Banks is also controlled directly or indirectly by the Central Bank. In Pakistan, this function is performed through State Bank of Pakistan which takes into account several factors of national importance i.e. need to control inflation, sustained economic growth and orderly monetary expansion. If the principles are judiciously observed, there will be no element of exploitation of the borrower by banks and financial institutions.

Reply of Islamic Development Bank.

For an answer to this question, Decision No.3 for 1406H of the OIC *Fiqh* Academy should be consulted.

Question No.3.

The Pakistani banks and some financial institution finance their clients on the basis of buy back on mark up agreements. According to this method the client of the Bank purports to sell a particular commodity to the bank, and simultaneously buys it back on a higher price on deferred payment basis. A certain rate of mark-up (percent per annum) is applied to the second sale. Does this arrangement fall within the ambit of Riba?

Reply of Mr.Sartaj Aziz.

As regards buy-back and mark-up, the Federal Shariat Court has ruled that the system of mark-up, as in vogue in Pakistan, is repugnant to the Injunctions of Islam (Para 262 of the Judgment)

The mark-up system is based on the well known Islamic concept of Bai Maujjal which is accepted by all Fiqahs as permissible. After the Federal Shariat Court Judgment, and, taking into account the observations of the Shariat Court, the Commission for Islamization of Economy appointed a Working Group to review the existing practices. They have now come up with recommendations for modifying the system. Under the revised system, banks will not buy the goods from the customer and sell them back to him. The bank will finance transactions where the customer intends to buy goods from the market (including import from foreign countries). He will provide a list of the required goods to the bank and the bank will purchase and supply them to the customer on deferred payment (Bai Maujjal) basis. The price at which

the bank sells the goods to the customer on deferred payment will be worked out on cost-plus or marked up basis. Under the proposed system the objections raised by the Shariat Court will be rectified as there will be no sale of goods by the customer to the bank and its buy-back from the bank by the customer as in the present practice.

Reply of Islamic Development Bank.

In a similar transaction, the OIC *Fiqh* Academy put as a condition on the legitimacy of the second sale transaction that it should be concluded with a party other than the party in the first sale transaction. As an example, if a person sold a specific commodity in cash, then he happened to have found the same commodity with another person and brought it from him on credit, both contracts are legitimate and correct.

Question No.4

Is there any difference between a Muslim and a non-Muslim in the matter of prohibition of Riba? Can the prohibition of Riba be extended to the loans obtained from non-Muslim, or for that matter, from Muslim foreign countries whose laws and national policies, together with international monetary laws and policies, are not within the control of the State Bank of Pakistan?

Reply of Mr.Sartaj Aziz.

This is a matter which needs discussion with religious Scholars. However, Injunctions of Islam cannot be imposed on non-Muslims. If a Muslim has to borrow from a non-Muslim, he must accept the lender's terms and in the present-day-world, all money lending transactions are interest based. Even in the times of Holy Prophet (Peace be upon him), there were instances of interest having been paid to non-Muslim lenders. This supports the view that in case a Muslim (or an organization in an Islamic country) has to borrow, out of necessity, from a non-Muslim person or organization, the terms of the transactions should be governed by the agreement entered into by the parties.

Reply of Islamic Development Bank.

Regarding interest-based borrowing from other foreign countries, we mentioned earlier the cases in respect of which the prohibition is waived under the general juristic rule of "Necessity".

Question No.5

The Government of Pakistan and some institutions under its control acquire loans by issuing bonds and certificates etc. and pay a fixed period-wise 'profit' to the holders of such securities. Does this profit fall within the definition of Riba?

Reply of Mr.Sartaj Aziz

A "fixed period wise profit" does not automatically fall within the definition of 'Riba' if it does not share other characteristics of 'Riba', the most important of which is its exploitative nature. Government, as the borrower, cannot be exploited by the lender (public) as Government is more powerful. All the Government borrowings are at a rate fixed by the Government i.e. the borrower. Lender i.e. the public is in no position to dictate or impose its terms on the Government. It would be difficult for the Government to borrow on Musharika or other Islamic modes because most citizens who want to invest their savings in Government Savings schemes or bonds want a predetermined and fixed return.

Reply of Islamic Development Bank.

The answer to this question has been given in the Decision of the OIC *Fiqh* Academy No.60 (5/11) for 1410H.

Question No.6

It is evident that the value of the paper currency has a trend of decrease in the inflationary situation. If a debtor who has borrowed a particular amount of paper currency repays the same amount to his credit after a substantial time, the creditor can suffer the effects of inflation. If he demands his debtor to pay more in order to compensate him for loss of value he has suffered, can this demand be treated as a demand of Riba?

Reply of Mr.Sartaj Aziz

As explained in answer to Q-1, the introduction of paper currency has led to persistent inflation in the modern world, thereby continuously eroding the real value or purchasing form of money. There are other causes of inflation also. In an inflationary situation, compensation for depreciation of money over time in a period of inflation would be justified. If compensation is not given in such a situation it would

tantamount to penalizing creditors or savers, including those with small means. A clear consensus on the subject of indexation is, therefore, necessary to clarify that any compensation paid for the loss of value is not 'Riba'. The concept of compensatory cost as provided in Section 35 of CPC has not been held by the Federal Shariat Court to be contrary to Injunctions of Islam.

Reply of Islamic Development Bank.

For an answer to this question, please refer to the answer of the Fifth Question addressed to the Islamic Development Bank.

Question No.7

If all the forms of interest or mark-up are held to be repugnant to the Islamic injunctions, what modes of financing do you suggest for: (a) financing trade and industry; (b) financing the budget deficit; (c) acquiring the foreign loans; and (d) similar other needs and purposes?

Reply of Mr.Sartaj Aziz

- (a) As far as trade and industry are concerned, Pakistani banks have already introduced non-interest based modes of financing which are being constantly modified and improved to meet the objections of Shariah experts. The latest modifications being introduced at the instance of the Commission for Islamization of Economy will bring about further improvements.
- (b) Budget deficit is financed by Government borrowings in the shape of various instruments floated by the State Bank of Pakistan and under the Savings Schemes. As discussed in reply to question No.5 above borrowings by the Government on interest or fixed pre-determined rate of return should not come within the definition of Riba.
- (c) As far as foreign loans are concerned, we are in no position to dictate terms to the foreign lender and have to accept loans on their terms or go without them. These foreign loans are always interest based and it is not possible for Pakistan to insist that they give us loans without interest. Pakistan has total outstanding foreign loans of about \$17 billion on which the annual debt servicing liability is about \$1.6 billion. This is expected to increase to over \$2.0 billion in the next 3 years. Pakistan has to borrow at least \$2 billion a year in the next few years to service these loans since it is not in a position to become a capital exporting country.

- (d) Pakistan has already made good progress in introducing various Islamic modes of financing for different financing transactions. Further improvements will be introduced on the basis of the Report of the Commission for Islamization of the Economy referred to above. However, a clearer and more flexible definition of 'Riba', on the lines suggested in answers to Question Nos.1,2,4, and 5 is necessary to maintain a viable financial system which can co-exist with and do business with the rest of the World.

Reply of Islamic Development Bank.

Distinction should be made between interest-based transactions on the one hand, for which Decision of the OIC *Fiqh* Academy No.3 for the year 1410H should be consulted, and those based on mark up added to the actual cost of the commodity sold, on the other. This second category of transaction is one of the Sharia'h-complaint modes of financing; it is embodied in a legitimate murabaha contract, in addition to istisna', Salam, leasing, musharaka and mudharaba contracts, as we explained in our previous answers.

Essentially, all Islamic modes of financing are, by definition, interest-free. Thus the door is open for utilizing legitimate modes of financing, whether to finance trade, industry, budget deficit or to obtain foreign financing. These modes are based on one of three principles: partnerships, leasing contracts and installment sale contracts. In the following paragraphs, we intend to recommend particular modes for financing particular transactions, although the door is wide open to select, without any restrictions, any of these modes. For more details, please refer to our response to the second question of the questions addressed to the Islamic Development Bank.

A. MODES FOR FINANCING COMMERCE AND INDUSTRY

1. Murabaha

Under this mode, the financier buys, at a specific cash price, a certain commodity, which is then purchased by the bank's client at a higher price (i.e. at a profit markup), but on credit.

2. Salam

A sale contract between two parties, in which the payment in respect of a fully described commodity is advanced against a specific future delivery date of such commodity.

3. Installment Sale

A sale contract between two parties, the subject-matter of which is a fully described commodity, in which the commodity is delivered immediately at the time of contracting and the price is deferred until a specific future date.

4. Istisna'

This is a contract of manufacture between two parties, where one requests the other to deliver him a manufactured commodity according to agreed-on description/specifications, delivery date, price and date of payment. In this contract, the price may be deferred.

B. MODES FOR FINANCING BUDGET DEFICIT

1. Mudharaba

A contract in which the capital extended is given a pre-agreed and specific share in the profits; such share is expressed in proportional terms, such as one-third, half or one-quarter. This modes could also be realized through the issue of mudharaba (investment) certificates.

2. Musharaka

This is the same as a mudharaba contract, with the difference that in musharaka both parties participate in management and the provision of capital.

3. Leasing

In this mode of financing the financier purchases equipment or fixed assets that generate services in order to lease them to his client.

4. Murabaha, Salam, Installment Sale and Istisna'

As it is the case in private companies, government-owned enterprises can be financed by way of mudharaba or musharaka certificates.

In addition to the above, certificates could be issued to purchase equipment or service-generating assets in order to lease them to clients.

Certificates could also be issued to finance installment sale, either on the basis of murabaha, salam or istisna'.

As joint stock companies obtain financing, the government could do the same, utilizing the same modes. Government could also finance its purchases on the basis installment sale.

C. ALTERNATIVE TO FOREIGN LOANS

To provide an alternative to foreign loans, arrangements could be made to issue musharaka and ijara certificates to finance projects, especially development projects.

D. MODES OF FINANCING FOR OTHER PURPOSES

Any of the above modes of financing could be utilized to suit the purpose.

Question No.8

If you are of the view that all the forms of interest are prohibited by Shariah, then what procedure will you suggest to eliminate it from the economy? If you prefer a gradual process, what strategy do you suggest for the purpose which may fulfill the requirements of the Holy Quran and Sunnah?

Reply of Mr.Sartaj Aziz.

It is my considered opinion that all forms of interest is not 'Riba' and only interest with an element of exploitation of the borrower by the lender is 'Riba'. However, even if the Court were to accept a broader definition of 'Riba', its elimination would have to be gradual process. The financial system of country in the modern world is one a large and complex scale and would not be able to withstand drastic changes that violate the basic laws of economics. Also the financial system can not be evolved in isolation from the world and also in deviation from prevailing political, economic and moral values and norms in a society. For example, a bank will find it difficult to expand its lending on the basis of Musharaka, in the absence of proper Islamic business ethics and correct

accounting procedures. The switch over from conventional to Islamic Banking would have to be pursued gradually keeping in view the positive response of the society to Islamic modes of financing and the costs of transactions and of monitoring. Simultaneously greater flexibility in the definition of Riba on the lines indicated above would make the task more manageable.

Reply of Islamic Development Bank.

For the various types of interest and the Sharia'h rules regarding them, please refer to the Decision of the OIC *Fiqh* Academy No.3 for the year 1406H.

Graduation in implementing Sharia'h injunctions is well recognized in Sharia'h for the general juristic rule on the matter states that "What cannot be entirely attained should not be entirely left". Such graduation, however, requires the existence of a well-conceived plan and successive or parallel steps, without disturbing the country's economic system. Also, it requires exerting special efforts to protect the integrity of this economic system, its institutions and structure in accordance with the conditions of each country.

Any proposed strategic plan for gradual and safe transformation should consist of the following phases:

1. The first phase would involve examination and modification of those laws related to the future of building an interest-free economy. It also involved establishing the institutions necessary for developing Islamic banking in an integrated manner, assimilating its modes of financing and building an Islamic capital market. During this phase, dealings would be based on the old and the new interest-free system. Sharia'h-based transactions should be given incentives. Orientation seminars should be held, at all levels, to familiarize people with the Islamic modes of financing.
2. The second phase involves a gradual and balanced cessation of interest-based transactions at the national levels (i.e within the State's territory). Islamic banks and financial institutions would start to find alternatives for investing their surplus liquidity, and for companies and other organizations in need of financing to find alternatives in the market for exchanging their debts with interest-free modes. This would be undertaken while honoring past obligations embodied in repayment of the principal amounts and the interest charged thereon, for Muslims must honor their

contractual obligations, as pointed out in our answers to sixth question addressed to the Islamic Development Bank.

3. The third phase involved encouragement of the utilization of Islamic modes of financing in all foreign transactions, cessation of new interest-based financing (unless in cases of absolute necessity, as said earlier), honoring past obligations and commencing application of an interest-free financing system to replace the old interest-based one.

More details on this issue could be found in IDB's response to the fourth question addressed to it.

Question No.9

If all the transactions based on interest are held to be violative of the Islamic injunctions, what will be the treatment of the past transactions and agreements? Especially what procedure should the government adopt with regard to the previous foreign loans?

Reply of Mr.Sartaj Aziz.

All the past transactions were based on agreements voluntarily entered into between the banks and their customers which provided for payment of interest. The customer had the choice of taking the money or not and, having chosen to do so and agreed to pay interest, cannot now go back on his agreement and refuse to pay interest having already availed the facility and taken full advantage of the resources provided by the bank. It is also an Injunction of Islam that people who made commitments and entered into agreements must honour them.

Accordingly, if people who try to avoid their obligation to pay interest are themselves committing breach of Islamic Injunctions.

Accordingly, with due respect it is suggested that all the past transactions must be honoured as enjoined by the Holy Quran. Banks have been working on the basis of earned income and not recovered income. Thus, all the interest earned by the bank on advances, whether recovered or not, is accounted for in the books of the bank and on that basis returns have been paid to depositors whose money was involved in advances. Thus banks having already paid to their depositors interest on their deposits need to recover interest on advances and if they are prevented from doing so, no bank in Pakistan will be able to survive and the entire economy of the country will risk a total collapse.

As regards foreign loans, this involves not only the sanctity of the agreements made but also the credibility of the country. If Pakistan defaults in payment of interest to its foreign lenders, no further assistance or investment will be forthcoming. Almost every development programme undertaken by Pakistan in public or private depends on foreign loans and assistance which will not be forthcoming if we do not honour our past commitments.

Reply of Islamic Development Bank.

Negotiating with creditors may be considered regarding previous interest-based debts; it would be fine if they accept exchanging such debts with new project musharaka or ijara certificates. If such swaps are not acceptable to those creditors, then the principals and interest charged thereon should be paid as this is dictated by the interests of the debtor countries; this would enable them to avoid economic shocks or losing their credibility. The necessity of honoring all previous outstanding financial obligations has been made earlier in our response to the fourth question addressed to the Islamic Development Bank.

Question No.10.

Whether a creditor can fix time and rate of profit while the debtor saying Insha Allah, he will be liable to earn and pay the same in time; failing which the guarantor may give profit asked for plus also a bonus or compensation for delayed payment, if any, and also according to other arrangements regarding the loan. What will be the position if the system of insurance for the said profit is introduced?

Reply of Mr.Sartaj Aziz.

Reply of this question was given by Mr.Sartaj Aziz in two parts describing the portion *Whether a creditor can fix time and rate of profit while the debtor saying Insha Allah, he will be liable to earn and pay the same in time; failing which the guarantor may give profit asked for plus also a bonus or compensation for delayed payment, if any,* and also according to other arrangements regarding the loan to be Question No.10 and portion *What will be the position if the system of*

insurance for the said profit is introduced to be Question No.10-A. His Reply to Question No.10 reads as under:-

“In Musharika transactions the sleeping-investing partner can fix a share from the income of the joint-venture and a period at the end whereof accounts would be made and mutual rights and liabilities settled. Third party guarantees, depending on circumstances, are permissible provided elements of ghemar () and Gharar () are not present in such agreements.”

Reply to Question No.10-A reads as under:-

The question pertains to the possibility of insuring the losses. If the banks were to work as Baitul-Ma’l in partnership with the borrowers after examination of the business that the borrower had decided to set-up, then it is quite likely that in ordinary times 70% of the businesses would prosper, 20% might suffer losses and 10% might break-even. The banks would receive their share from each. But to secure themselves against losses the idea of insurance of business losses could be initiated. However, the procedures could be difficult. There has been some thinking about insuring the banks against bad loans but no system has yet been developed. However, insurance against losses would appear lawful according to Shariat.

Reply of Islamic Development Bank.

Although this question is not quite clear, two issues might be deduced from it, if our interpretation of it is correct:

1. If the debtor of a legally contracted debt resulting from murabaha, for example, delayed repayment of his debt and requested its rescheduling, is it legal in this case to recalculate the amount of profit based on a longer repayment period?
2. In case there is a guarantor for the debt contracted, when the debtor fails to repay on maturity day, leading the creditor to claim his dues from the guarantor, who requests rescheduling the debt amount, is it possible to extend the repayment period in return for increasing the debt amount?

Answer to these two questions was stated in the Decision of the OIC *Fiqh* Academy No. 10 (2/10), which was mentioned earlier.

Regarding the practice of the Islamic Development Bank, in case of murabaha and installment sale operations, no additional amount is charged for delay in repayment by the debt or according to the

repayment schedule agreed upon. The Bank is currently studying the means through which it could face the losses incurred as a result of such delays in repayment. Regarding leasing operations, the lessee is obliged to pay rent in respect of the entire period during which he benefited from the lease property.

At this stage, it is pertinent to mention that after completion of the reading of the judgment of the Federal Shariat Court, Maulvi Anwarul Haq, learned Deputy Attorney General, requested that arguments on behalf of the Federation may be allowed to be addressed after hearing the contentions and views of the Economists, Jurisconsults and Religious Scholars as well as the learned counsel for the respondents so that all such pleas and contentions could altogether be replied. This request was not opposed and as such we proceeded to hear the scholars, jurisconsults and economists who choose to attend the hearing.

The contentions urged by the scholars may now be noticed.

Dr.Sayyid Tahir of Institute of Islamic Economy, International Islamic University, Islamabad contended that interest in every form is 'Riba' and a lender is entitled to the exact amount he has advanced as loan, under the Shariah, no matter whatever expenses was made in advancing a loan or its recovery. Regarding the loan contracts which had already been executed on the basis of interest, he contended that those should be treated as past and closed chapter. He contended that under the Islamic injunctions, the contract already executed had to

be honoured minus Riba; that contract for debt between two individuals must be based on equality.

Dr. Waqar Masood, Director General (Planning) International Islamic University, an Economic Expert of the Government contended that the new system has to conform with the change through tremendous redocumentation of the present arrangements in the private sector, but in the public sector it would require many changes in the fiscal system; referring to the banking sector, it was contended that the profit and loss savings were closest to the Islamic banking system and there was a consensus that the bankers need not inform the depositors where their funds were being invested; that Mudarbas and Musharkas (finance and partnership) fell into the Islamic concept of investment. Talking about three kinds of coins at the time of revelation of Islam, he said the existing system of coinage was accepted by the Holy Prophet (Peace Be Upon Him) and besides gold and silver coins, copper coins were also in use at that time which was later named as “fulus”, and the ultimate survivor was the “fulus”. He narrated the brief history of different coins and its origins and usages between different people. He said that there were four aspects which affected the currency and this includes inadequacy in backing up commodity (gold, silver); Trust (credibility of the issuing institution); Social, political and economic circumstances; and Risk of forgery. He referred to the situation during

British-French war, to state that the people had started withdrawing the gold they had deposited against the currency issued to them and that was the first time when conversion was denied by the government. According to him indexation is basically motivated to combat the adverse effects of inflation and it (indexation) is no answer to inflation, rather it amplifies inflation. He pointed out that besides the laws noticed in the impugned judgment there are other laws containing provisions as to charging of “interest” and examination of the same is necessary for eliminating Riba and for seeking compliance of Shariah in all facets of economy. Dr.Waqar Masood also referred to the provisions of Constitution e.g. Article 78, 79 and 166, to point out the necessity to enact law with a view to regulate the borrowing by the Government. The written submissions later filed elaborating various aspects of the issues involved will be dealt with while discussing these matters.

Mr.Abu Bakar Chundrigar, Advocate, learned counsel for the Habib Bank Limited, while assisting the Court on the question of Riba argued that the research carried out by the Muslim Scholars showed that interest does not fall within the connotation of ‘Riba’. According to him, there is prohibition of Riba in Quran but the detailed view on the issue has not been expressed there. He requested the Court to keep in mind all

the complexities of the system which affected the economic system and the banks should be compensated against rise in inflation.

Mr. Abdul Jabbar Khan, a banking expert (former President of the National Bank of Pakistan), addressing the Court contended that interest was illegal and forbidden in all forms and the Holy Prophet (Peace Be Upon Him) had waged a Jihad against interest or Riba and proposed a 16-Point action Plan for dealing with the issue of Riba. He informed the Bench that Commission of Islamization of Economy in its report on banks and financial institutions had even drafted circular instructions to be issued by the State Bank to the banks and financial institutions, along with formats of legal documents to be executed by the clients financed under non-interest Banking system. He added that the report of the Commission had also identified how financial needs could be better met within Sharia parameters. Mr. Khalid M.

Ishaque, Senior Advocate, contended that all the forms of interest were not prohibited in Islam and only “Riba al Nasie” or form of interest which was made compulsory/mandatory or taken by force was prohibited. He contended that the present banking system as a whole could not be termed un-Islamic and learned Federal Shariat Court has

erred in declaring all forms of interest un-Islamic and it would be in the interest of justice if the case is remanded to the Federal Shariat Court so that the Court can review its decision in view of injunctions of Quran and Sunnah and current banking system. It was contended that current banking system is not above Constitution and its adoption is a compulsion; that a mid way will have to be found as Quran's teachings can control the economy of the world; that if a compromise way is not found then our economy would be destroyed like those of Korea, Indonesia, Malaysia and Thailand.

Dr. Muhammad Omer Chhapra, an Economist and Expert on Islamic Banking System, and Senior Economic Advisor at Saudi Arabian Monitoring Agency, dealt at length with the Islamic modes of financing and whether or not the existing banking system fulfilled the requirements of Shariah. He further submitted that Quran has used the word "Riba" for "interest" whereas there are about 70 different shapes of Riba; that the laws given by the Allah Almighty in Quran are final and explicit and there is no other way for Muslims but to subscribe to such injunctions without any hesitation; that it is possible that human mind does not comprehend the benefits hidden in following Islamic system of finance which totally prohibit "Riba" (interest in its all forms) but as the humanity develops these benefits will be felt and surface as bounties of Allah Almighty; that the biggest handicap of the banking system in vogue is that only the people having valued assets or lands which can be

mortgaged avail facility of loan and these individuals in general do not pay interest and mostly usurp the principal amount and in such a scenario the possibility of national development diminishes; that Pakistan should try to attain self-sufficiency to end crucial dependence on loans from World Bank or IMF as these loans are giving rise to financial instability; that declaring interest as un-Islamic is not the real issue instead question of doing away with the interest system is a big question which warrants solution; that transactions and profit where risk is not involved come under the definition of interest; that a country can get loans on interest from non-Muslims in acute emergency, but such loans are devastating for economy of that country; that Islam allows use of Haram for existence. He pointed out that Turkey got loans of about 6.5 billion dollars on interest to improve its economy but the economy did not improve; Pakistan has taken credit of over 30 billion dollars, which would be harmful for economy; that instead of investing reasonable amount in social sector and development projects, the Pakistan Government is allocating only 15 percent of its total annual budget; that for elimination of interest based system, the Government should implement a judicious economic system, in which the people should be provided equal opportunities in employment, education and health; that charging of interest was prohibited mainly because of the injustice it inflicted upon the poor. Emphasising that in a Muslim society all measures were needed to reduce luxury expenditure both by the people as well as the Government, he dealt with various connotations of investment which, according to him, could be productive, unproductive and speculative. Turning to the interest based banking

system, he contended that the element of speculation in international market caused diversion of resources from essential investment which was against the principles of Islam, and when consumption rose the rate of savings decreased which in turn limited the Government's ability to provide full employment. He, referring to the United States, where according to him, were negative savings, contended

that this was because the dollar was an international currency and a sizable amount was brought back into the United States and in Pakistan's case it was not possible so the rate of savings has to be increased. Giving comparative statistics of the rate of savings, he stated that Pakistan's savings at 13 per cent were very low as compared to 35 per cent in Malaysia and Taiwan, and 42 percent in China. He added that for the past 100 years the rate of return on equity in the United States was 7 per cent whereas on treasury it was 1 per cent and in case of Germany and Japan it was 5.9 and 4 per cent respectively on equity whereas in the case of T-Bills the return was wiped out during the world war. According to him it was possible to get a higher rate of return on equities. He dealt with the equitable distribution of resources and contended that despite progressive taxation in the Western countries it was no longer possible to continue with welfare spending such as health, education etc., and maintained that the modern banking system has failed to finance smaller companies because they could not furnish collaterals; that 56 per cent of the resources provided by over 28 million depositors went to borrowers who did not pay back. In respect of problems being faced by Japan and the Asian tigers, he contended that

too much money was doled out by the banks to the stock market and when the banks stopped lending, it had a domino effect. The Asian Tigers collapsed because over 50 per cent of the money had been got from the outside on short term and the banks were lending it on medium or long terms, which created problems especially in view of hedge financing and, therefore, \$30.3 billion out of a total of \$1,490 billion in April, 1998 were transacted for speculate trading.

Dealing with prohibition of interest, Mr.Chhapra referred to the alternatives suggested by Shariah i.e. the primary and more risky modes of Modaraba (passive partnership between the financier and the entrepreneur), Musharakah (active partnerhsip) and shares of joint stock companies, wherein the rate of return is based on the ultimate outcome of a business and not determined in advance and the depositor participates in the risk; and the secondary and less risky modes of Murabaha (cost plus service charge), Ijarah (Leasing), Ijra wa Iqtina (hire-purchase), Salam (forward delivery contract), and Istisna (contractual production) wherein rate of return is stipulated in advance and the depositor is free from the risks of the business. According to Mr.Chhapra, the bank is a modaraba and it could lend to a sub-modaraba and there is no permission required from the depositor for further lending, and the bank has the right to lend because it is providing the service of keeping the depositors' money in safe custody. Narrating the major problems to be faced by an Islamic Bank he stated that Islamic

bank has to compete with other agencies as it would be very difficult to operate if harsh measures are taken. According to him a person might be imprisoned but no financial burden should be imposed, and the liberal view supported imprisonment and financial penalties as a deterrent by a Court of law to recover the actual damages which include compensatory cost. It was suggested that the law should be changed enabling the publication/circulation of names of defaulters by the bank. On rescheduling of loans Mr.Chhapra urged that it was possible in an interest based economy but in Islamic banking it could be done only for genuine reasons. He asserted that lease contracts must be different from the contracts for the purchase of residual assets.

As regards establishment of banks, Mr.Chhapra urged that 1,400 years ago banks did not exist and people knew each other personally and performed trade and transactions among themselves during the period of Holy Prophet; that banks were formed in 15th and 16th centuries and first Islamic bank was established in 1975 in Dubai and in 1996 there were 166 Islamic banks in 34 Muslim and non-Muslim countries of the world.

Summing up arguments, he contended that a Central Shariat Board should be established; that the current constitutional system of transactions is against teachings of Quran and Sunnah of the Holy Prophet (Peace Be Upon Him) and it is the Court's responsibility to fix

date for gradual Islamisation of system. He contended that new banking system should be started along with old system and later the non-Islamic banking system should be eliminated.

Mr.Ebrahim Sidat, a Chartered Accountant by profession, appeared to make his submissions against the continuation of interest-based banking system and urged that the banking system of the country could be switched over to the Islamic mode within three to six months. According to him, there are no technical difficulties in introducing Islamic modes, it is just the lack of will and determination on the part of the government. He contended that in order to bring the banking system strictly in accordance with the Islamic framework, Riba-based investments should be a cognizable offence as unless the Riba-based investments are made cognizable offences, many people will continue to circumvent it. He, however, added that the existing contracts must be honoured and after a cutoff date option must be given for switching over to either of the Islamic modes. It was further contended that certain provisions of the Partnership Act should be amended to get rid of interest, in accordance with the judgment of the Federal Shariat Court; that revaluation of assets should not be done on the basis of book value but on the basis of its real value; that there could be no doubt about the need of doing away with Riba after what had been clearly spelt out in the Quran; that Riba is a matter which does not need to be dilated and

fears and apprehensions that it cannot be replaced are misplaced; that Riba in all its manifestations was deplorable and the Federal Shariat Court's judgment in this regard was a valid document and it is a matter of regret that after the initial steps in the early 80's the process was reversed and ultimately put on the back-burner. He referred to State Bank of Pakistan's report in which there is no mention of interest-free economy. He contended that one of the difficulties being faced in the Islamization of the banking system is that instead of treating murabaha as a trading device people consider it as a financing instrument; that Modarabas and Musharikas are compatible with venture certificates and the venture certificates are influenced by the Islamic modes and its propriety under Shariah has to be looked into; that private Musharikas are operating successfully and no one is talking about its credibility. According to him modarabas have become popular because some tax evaders use it as a shelter; and whole export funds are not subjected to tax on profits which provide strong motivation for playing with the figures e.g. presumptive tax. In reply to a question about the format of the accounting procedure under Islamic mode of financing he stated that it would not be different but requires expanding the scope of corporate law for carrying out Shariah audit and since every audit firm would not be having the Shariah experts, it could fall back upon others who possessed the expertise.

Mr. Ebrahim Sidat, like Mr. Chhapra, also recommended that the State Bank of Pakistan should have Central Shariat Supervisory Board to monitor the Islamic modes. He also suggested that not only corporate but private modarabas should also be allowed to harness the funds available with individuals who lack the expertise but could make profit with the help of some experts citing the case of funds available with the employees relieved of the jobs through golden handshake.

Syed Muhammd Hussain, Chartered Accountant, contended that an authoritative pronouncement in respect of all types of interest, and with whatever name it is called, is required which could legally be implemented without scope for loopholes or misinterpretation; that interest be made a cognizable offence and investment companies should not accept interest-based funding; that the economic order based on the Holy Quran and Sunnah of the Holy Prophet (Peace Be Upon Him) is for all times to come and the elimination of interest occupied a key position in the establishment of that order and centuries of colonisation have created doubts among the Muslims about the matter; that all loans taken by the Government from the public by issuing domestic debt instruments with a fixed rate of return/profit as well as the loans taken by the public from the Government-controlled banks should either be retired or be converted into an interest free liability, such as equity; that the Government could request the foreign lenders to change the forms of

contracts by replacing the existing interest-based contracts with those equivalent to riba-free contracts as foreign loans contracted with foreign governments or international financial institutions could not be terminated unilaterally, and if the foreign lenders refuse to do so, the contracts should be honoured but without creating any further delay in meeting the payment obligations giving the quantum of uncertainty involved in settling the matter with foreign lenders; that the Federal Government should be directed to form a working group with a specific time-frame to chalk out an action plan for settling the matter with foreign creditors; that mark-up and interest in the present form levied by the financial institutions on accommodation, bill discounting charges, profit and interest payable on majority of leasing contracts, profit and interest payable on majority of PLS and interest bearing deposits and profit and interest payable on majority of Term Finance Certificates (TFC) and National Savings, fell within the ambit of riba prohibited by Islam; that interest payable on all present treasury bills and bonds, the interest levied on money due to government on various accounts and the interest and penalties levied by the utilities and other business concerns on amount overdue also fell under the same category. He suggested structural and legal reforms and in this context mentioned Shariat audit, auditing and accounting standards, risk mitigation, trade finance and mark-up and Murabaha transactions.

Mr. Maqbool Hussain, Chairman Small Group of Companies, in his submissions stated that only paper work was done in Pakistan with regard to Islamization whereas the situation warrants a non-political autonomous body which not only makes laws in conformity with basic principles of Islam but also supervise the implementation of legislation regarding Islamization. He proposed creation of an Islamic Banking (Planning and Implementation) Board with a mandate to reform the whole system and suggested that this Board or Commission should comprise jurists, ulema, bankers and chartered accountants with a time span of two to five years. He contended modarba is the only system through which the economy of Pakistan could be transformed into a viable and credible economic order.

Dr. Shahid Hasan Siddiqui, an Economic Expert and Chairman of the Karachi-based Research Institute of Islamic Banking and Finance, appeared to state that present banking system is at the verge of collapse while the nationalized banks are facing bankruptcy. Relying on various circulars and reports issued by the State Bank of Pakistan which is regulatory body for all banking institutions including Development Finance Institutions, he urged that the successive Presidents of nationalized Banks had issued false and fictitious balance sheets showing increase in profits while in fact the banks have sustained record loss during the last ten years which even exceed the losses

sustained during 41 years after independence, and these losses also exceed total profits by the banks in our whole life as a new nation; that interest based banking system has failed due to corruption by the bankers and the interest-free banking system may also face the same fate at their (bankers') hand and in the circumstances the Islamic Banking System may not prove successful; that the auditors who had been certifying false balance sheets of banks/DFIs including those who had certified higher value of assets for rescheduling of advances to sick units should be blacklisted and revaluation of assets should not be used for allowing new finances against the revalued assets. According to him in view of the documentation and declaration of correct profits by entrepreneurs the tax collection would be enhanced while the cost of production would go down as profits would be shared with the banks after the profits were declared. Referring to the Banking Companies Amendment Act, 1997 it was stated that incentives given under this amendment are "un-islamic, unjust and harsh for investors". A high powered commission was also recommended by him to be established for looking into the cases of written off loans involving billions of rupees. He proposed that all modes of deposits, mobilization and utilization thereof must be based, as far as possible on profit and loss sharing system and the Government must restore its credibility by resolving the issue of imposing curbs on withdrawals from foreign

currency accounts; that kissan bank and a model Islamic bank which should operate on 100 per cent profit and loss sharing basis have to be established which would be able to offer much higher rates of return to the depositors even in the first year of their operation; that all major banks and DFIs should have an Islamic banking division and the same should be upgraded in the State Bank. Dealing with bank advances with up to date mark up the economic expert said that no new loan on mark up or interest should be allowed with immediate effect and at least 75 percent of new financing should be on Musharika, while for old advances he proposed that by January 1, 2000 all mark up or interest-based advances should be converted preferably into Musharika, if feasible; that in case of old debts there should be gradual reduction, optional conversion to second line techniques of financing and debt-equity swap, no renewal of existing products and optional transfer to new products on PLS basis as and when these products are developed, while in the context of external debts there should be no interest based loans for new financing; and for old debts negotiations for conversion to second line technique of financing and for debt equity swap should be followed; that no interest-deposits should be accepted, including where, on the instrument, expected rate of profit was mentioned or announced in advance, whether formally or informally; that existing deposits should be brought under the new system irrespective of the maturity and for

foreign currency deposits, the depositor should be given the option to convert it at the average of prevailing open market rates on the date of encashment and the maximum rate in the open market after 1998. He called for establishment of a high powered Commission headed by a Judge of the superior Court to examine all cases of rescheduling/restructuring/written off/remissions etc. in the advances portfolio after January 1, 1985 and losses under these heads, according to him, could be as high as over Rs.100 billion; that the commission should be empowered to examine the State Bank's Incentive Scheme to loan defaulters and decide whether it was un-islamic, unjust and detrimental to the depositors' interest; the Commission should also fix the responsibility of bankers/directors and of the State Bank in respect of 869 cases of loan defaulters, where a sum of Rs.111 billion was involved and examine higher assignments given during the last five years in the government departments and autonomous corporations to those who had been or were still a defaulter or had committed a fraud.

Abdul Wadood Khan, Economic Expert reappeared to contend that inflation would reduce by 42 percent if interest system is abolished and TMCL based interest-free banking system is introduced, and there will be more amount available in money market which might be used to repay the loans. He claimed that level of bank deposit would

rise with the elimination of interest and referred to Keynes's philosophy of lowering the rate of interest, the higher the level of investment. According to him the elimination of interest would also increase government's earnings. He also dealt with encashment of premature commercial and treasury bills, liquidity agreement and profit earning by banks. He argued that both Islamic and non-Islamic banking systems should be run parallel so that people can choose the system of their liking. According to him counter loan scheme is not against Shariah and it is according to the Hanafi school of thought, and under the Counter Loan Scheme replacement of interest with Time Multiple Counter Loan (TMCL) would convert existing banking system into interest-free banking system without any disruption, and upon banning of interest, the existing banks would stop giving loans on interest or mark up and would commence providing loans on TMCL basis and would start negotiations for converting existing interest-based or mark up based loans into TMCL based interest free loans. In the context of conversion of depositors accounts he argued that the depositors would be given the option to keep their money in demand-deposit or investment deposit.

Demand deposit, according to him, would not get any profit or incur any loss but in investment deposit the bank would share the profit and loss with the account holders.

Maulana Hafiz Abdur Rahman Madani, a religious scholar argued on prohibition of Riba in Islam by the Holy Prophet (Peace Be Upon Him) narrating the background and time of prohibition of Riba. According to him Riba was evolutioned in four stages as four different verses of the Holy Quran were revealed at different times and one of the last verses of Quran revealed on Holy Prophet (P.B.U.H.) includes the prohibition of Riba strictly. It was contended that all the verses related to prohibition of interest (Riba) are incumbent upon Muslims; that it would be wrong to say that the Holy Prophet (P.B.U.H.) had left anything unexplained while teaching the people about prohibition of all kinds of Riba. Talking about the definition of Riba, Maulana Hafiz Abdur Rahman Madani referred to Imam Sarakhsi's definition of Riba to the effect that Riba is a conditional increase in sale agreement which has no counter value and proposed certain amendments in the same. According to him Riba is the agreement where conditional increase is without matter of right. He argued that time and currency have wrongly been defined as means of productivity as currency will become asset when it will be changed into commodity and that it only represents

value. He insisted on promoting “Ijtehad” in Islam which is an essential part of Shariah but it needs a big effort and brain storming. According to him there are few aspects which were not properly addressed by the Federal Shariat Court and it is now the duty of the Supreme Court to take care of them while resolving the issue. He was of the view that existence of Western laws besides Islamic laws is creating problems.

Prof. Khurszhid Ahmed of Jamate Islami who is heading Institute of Policy Studies and Islamic Foundation in UK appeared to state that Europe was considering the interest-free banking system, given by Islam, as an alternative for a number of credit-related problems. He referred to a French Nobel Laureate who had given a new concept of banking system specializing only in three sectors, including banks accepting deposits, investment banks and banks for business purpose, whereby the credit problem created throughout the world could be overcome. He argued that it is the foremost duty of the parliament to Islamize the existing financial system of the country; that the governments in Pakistan lacked political will and neglected the work already done for the transformation of the existing banking transactions into interest-free system; that the plea of the government against the Federal Shariat Court judgment to suggest alternative banking and financial system without usury was unconstitutional and by filing an

application in the Federal Shariat Court for suggesting measures to implement its judgment, the Government did try to unload its burden; that the Council of Islamic Ideology and different institutions had done a lot of work in this regard and the efforts by these institutions were appreciated abroad and many awards were given by the Islamic Banks to them but the government was paying no heed to it; that Islam approved profit or loss sharing on any investment for the purpose of production as it ensured growth, distribution of justice and stability, but the present interest-based economic system had only encouraged exploitation; that the IPS chief insisted that the authority to create credits should be with the central bank and the government only, and not with other banks and interest system had created a havoc in the world specially in the third world. He cited the example of Brazil and Pakistan. In 1985, according to him, Brazil's total debt was \$80 billion out of which it had already payed back \$21 billion but still indebted to \$221 billion and Pakistan, which owed a total foreign debt of \$6 billion in 1978 and had paid \$22 billion but still indebted to \$35 billion. According to him 40 percent of the total loans in the world was non-performing and in Europe 97 per cent money in circulation was the bank created money because of which rich had become richer while poor dipped to new lows. He also cited the example of 200 banks practicing interest-free banking in 40 countries having assets of \$600 billion with \$80 billion of deposits and asset

transaction of \$200 billion. It was urged that 15 per cent of Kuwait and 5 per cent of Malaysia's economy was based on interest-free banking; and that it was wrong to suggest that our economy would collapse if we adopt the interest free system instead it would collapse if we fail to adopt the transition phase. As Pakistan is normally bound to honour the international commitments, he was, therefore, not in favour of cancelling the same. He was of the view that it would take a year to completely transform the domestic debt into the new system while two to three years in respect of international agreements. He suggested that we should endeavour for debt restructuring with the World Bank with open minds as the World Bank has already been dealing with 31 countries on debt restructuring because the loan giving agencies benefited 70 percent by the loans they advanced, while the countries which received loans benefited only to 30 per cent. Besides, these loans were also used for corruption purpose.

Prof. Nawab Haider Naqvi, an Economist, argued that we do need an Islamic economic system if only to end the current schizophrenic confusion between what we believe in and what we practice; that it is possible to construct an Islamic system, complete with its own ethical values, policy objectives and policy instruments, which alone can satisfactorily explain the economic and social behaviour of Muslims but it has to be kept in view that the Islamic system to be

constructed will be as man-made as any other system and as such the task of translating the timeless, institution-free Divine ethical and economic principles into a workable economic system will have reference to specific time and applicable within the matrix of specific institutions and will have infirmities as it will be made by men/women themselves and naturally the end-product of these efforts will bear the mark of human imperfection. This necessitates the gradual approach as Islamic economic system will emerge gradually out of a prolonged interaction between the Islamic ideal and

the reality in the Muslim countries. Professor Naqvi argued that the two issues which arise before this Court are (i) equivalence of Riba and the bank interest in modern times and (ii) the optimal replacement of interest-based banking by profit-based banking i.e. by a banking system raised on the principle of universal Profit and Loss Sharing (PLS), unsupported by any guaranteed return on bank deposits or bank advances. He added that both these questions are very difficult to answer as interest free banking is a property of a full-fledged Islamic economic system but not of capitalism, where interest and profits are inter-linked like the Siamese twins and economic studies show that changes in the profit rates have been caused by changes in the interest rates, speculative trading, and in productivity. Separating the two would require nothing less than an intricate surgical operation upon the economic structure, of which the consequences are not known with

certainty. He explained that once fixed rate of return instruments are altogether abolished in a capitalist economy, we do not know the outcome of such a step; so that the new profit-based system may as well take us nearer to, or farther from the Islamic ideal of *adl-o-ihsan*. He posed himself the question: "Does the PLS system offer a ready-made workable Islamic alternative to the modern-day banking interest?" His answer was that contrary to the widely held opinion which is also reflected in the impugned judgment, the PLS alternative alone does not necessarily guarantee an Islamically acceptable outcome in terms of its efficiency and equity. The theoretical reason in support of the answer that a negative outcome is more likely when profits are substituted for interest is the empirical evidence on the working of the Islamic Banks in the last 15 years or so. According to him a shift from the present interest-and-profit financial system to an all-profit financial system will, in general, lead to a worse equity outcome. It may increase, rather than decrease, the size of the perverse flow from the poor to the rich, even more than the present capitalist system does. He maintained that in the new system the risk averse savers/investors will be crowded out of the market unless, of course, they can anticipate with complete confidence that they will always get a higher reward in such a system which has a contradiction. So the reform of the banking system in the name of Islam may take us from one capitalist hell to an even hotter hell, and that too without interest. Professor Naqvi was also of the view that a system based on profits i.e. variable rate of return is

not likely to be more efficient than the one based on interest-cum-profits in view of the following prevailing circumstances:-

- (i) In monopolistic/oligopolistic market structures, which also characterise Pakistan, profits impose an “excess burden” on the society in the form of lower production and higher product prices than would be the case in the text-book capitalist world of free and perfect competition.
- (ii) The Islamic Banks will tend to under-invest in a large number of projects where social profitability is higher than private profitability i.e. public infrastructure, education and public health etc., for the reason that investment in them does not yield immediate and large profits. So, more investment will be made in high profit-yielding projects whose social profitability is very low or negative e.g. investment in wasteful luxuries. Such high-profit investments may not be sanctioned by Islam because they come in the category of Tabzeer.
- (iii) The moral hazard problem i.e. when due to information asymmetry, the mudharib cheats the Raul-mal is large in a banking system based on the PLS principle.

Professor Naqvi pointed out that without finding a reasonable solution of the fore-noted problems, the PLS based system will neither be efficient nor equitable. Moreover, PLS system will not be preferred by the public

unless perfect honesty prevails – a condition which is observed more in the breach than in the observance in the real world and the situation where the investors almost never share true information about their profits with the banks, as is the case of Pakistan, a universal PLS banking would almost certainly face a complete break-down. Mr. Naqvi further stated that in the Survey conducted by Islamic Research and Training Institute of Islamic Development Bank, 29 major problems which are being faced by the Islamic Banks have been listed. The essence of these findings/problems are ---

- (a) The rate of return offered by the Islamic Banks has been generally lower than the interest based banks where they coexist with the interest based banks; as well as in Pakistan, Iran and Sudan, where they have completely replaced the interest based Banks.
- (b) The loan defaults have increased dramatically since the introduction of the Islamic Banks which appears to be powerless in dealing with such cases as effectively as the interest based Banks used to do and the size of the involuntary resource transfer from the poor to the rich is much bigger in a PLS system than in an interest based system.

- (c) The incidence of the moral-hazard problem is pervasive. Indeed, it threatens the very fabric of Islamic Banking, especially in Pakistan. In Iran, the banks have not been able to invest more than 38% of their total assets after the introduction of Islamic Banking.
- (d) Due to moral hazard phenomenon, the Islamic Banks have generally favoured fixed rate of return type financial instruments like Murabaha and leasing. According to the 1996 issue of “the Directory of Islamic Banks (Jeddah)”, the sale of lease based financing account for more than 80% of total financing of the Islamic Banks, and the PLS type financing represents only 20%. His conclusion was that notwithstanding the optimality of these modes from Shariah point of view, the PLS financing has not been preferred by the public and the banks so far.
- (e) Heavy concentration of the Islamic Banks’ portfolios has made their asset structure highly unstable, as they cannot minimize their risks.
- (f) The investment portfolios held by the Islamic Banks are typically loaded by trade-related activities. As of 1996, agriculture and manufacturing together accounted for only 26% of their lending activities, while 74% was accounted

for by Trading (31%), Services (13.12%), Real Estate (11.67%), and others (17.62%). Also, the investments made by the Islamic Banks are of even shorter duration than is the case with the interest-based banks. The longer-term investments have generally suffered.

Professor Naqvi submitted that despite the fore-noted empirical evidence about the working of the Islamic Banks he is not claiming that the Islamic Banking should be scuttled as his point of view is that we should do everything feasible to improve its efficiency and equity, but it is important that undue haste is avoided in making it perfectly acceptable from an Islamic point of view. So, no precipitate steps should be taken to further Islamize the Islamic Banks until the relevant information on their actual working has been fully analysed and that it should be accepted that the PLS based financial instruments, like Mudhariba and Musharika are totally inadequate to meet all the financial needs of a modern society and minimum element of fixity is essential for modern financial institutions, including the Islamic ones; and that the present mark up and other sale related instruments should be treated as essential aspects of Islamic Banks, at least for now. According to him these are presumably second-best options for the Islamic Banks to safeguard the depositor's money in view of the widespread moral hazard problem, and to meet the borrower's preferences. He argued that if as decreed in the

impugned judgment, the mark-up system is abolished forthwith and replaced by the PLS principle, then it will seriously destabilise the banking system. Mr.Naqvi was of the opinion that the guiding principles of Islamic Banking should be ---

- (a) to safeguard the interests of the depositors as opposed to those of the borrowers of the loanable funds;
- (b) to minimize the information cost of its operations by not relying excessively on the borrower's honesty, which is a scarce resource in any society, but especially so in Pakistan;
- (c) to do risk minimization and perform such essential functions as financial intermediation, increasing private saving etc.

On the question of indexation of public borrowing Professor Naqvi criticized the observation made in paragraph 42 of the impugned judgment that inflation did exist in the early Islamic period as prices rose by 15% during the period of Khulafa-e-Rashideen and Imam Yusuf. He pointed out that such an observation could not have been recorded had any Economist pointed out that 15% increase in the price level over a period of more than 100 years comes to less than 0.145 per cent per annum, which is really a zero inflation rate. He referred to page 136 of his book titled "Islam, Economics, and Society" wherein the Scheme proposed to meet the problem is that the rate of indexation should be equal to the current or expected rate of inflation plus an amount equal to

the increase in the Gross Domestic Product due to the contribution of capital. The results of the calculation on the basis of this formula are given in the following Table:-

“Table – I

Calculation of Rate of Indexation (Return)@
%

Year	Inflation Rate	GDP Growth Rate	K Share in GDP**	Rate of Indexation
1990-91	12.66	5.57	0.69	16.50
1991-92	10.58	7.71	0.69	15.90
1992-93	9.83	2.27	0.69	11.40
1993-94	11.27	4.54	0.69	14.40
1994-95	13.02	5.24	0.69	16.63
1995-96	10.79	5.19	0.69	14.37
1996-97	11.8	1.30	0.69	12.7
1997-98	7.81	5.44	0.69	11.57
Averages	10.97	4.66	0.69	14.18

@ Estimated by the World Bank

** Rate of Indexation = Inflation Rate + (GDP * K share in GDP”

This Table shows:

- (i) The rate of indexation does not necessarily increase with time alone so it is not true that the longer the period the higher the rate of indexation. It was pointed out that the rate of indexation would have been 16.50% in 1990/91 when the GDP and the inflation rate were higher, but only 11.57% in 1997/98 when both were lower.
- (ii) The rate of return due to indexation is not pre-determined in any way nor can it be predicted with complete certainty.

- (iii) The rate of indexation is related to the increase in the flow of goods and services in the economy.

So, the proposed indexation formula does not satisfy any of the features of riba identified by the Fuqaha.

On the question of equivalence of interest and Riba, Mr. Naqvi maintained that in view of the clear Quranic injunction there is not much room left for intellection or debate if we accept that interest, including bank interest, is riba but it can still be asserted, as it is his case, that riba is not just interest, much less only bank interest; but that it signifies all exploitative relationships which have the effect of transferring resources from the poor to the rich. He added that there may be an identification problem here because bank interest does not satisfy at least some of the basic criteria of riba. Professor Naqvi though seemed reluctant to enter this controversy as to the meaning and scope of the term riba but after dealing with the characteristics of riba noted in paragraphs 94 and 113 of the impugned judgment which are –

- (i) the amount to be repaid in excess of the principal amount at the end of the contract period is fixed in advance in relation to time by the lender as an essential condition of the loan;
- (ii) the amount so stipulated is risk-free;
- (iii) it involves no uncertainty; and

- (iv) it causes a net transfer of resources from the poor to the rich, which is considered as the *raison de etre* for the prohibition of riba in Islam,

made the following comments:-

- (i) Contrary to popular conception, the interest rate need not always be fixed in advance and be risk-free. Such is the case only if the investor makes decisions under conditions of perfect certainty, which is seldom the case; but will not be so if uncertainty prevails, which is almost always the case. In the latter case, the interest rate will consist of a risk-free rate plus a risk premium, which will be variable depending on the degree of uncertainty at a given time and on the changes in it over a period of time. Indeed, Euro-dollar syndicated borrowing, which includes a risk premium over the London Inter-Bank Offer Rate (LIBOR), is both variable and risky; which makes it worse than the borrowing done at a fixed rate, on a government-to-government basis.
- (ii) Risk and uncertainty do not necessarily constitute an Islamically legitimate characteristic of interest in the meaning of riba. Indeed, if these were desirable characteristics of an Islamic instrument then these would

have to be maximized. But this is not the case, because Islam has declared gambling, betting, speculation as haram (Just think of the State of Monaco and the city of Las Vegas shining examples of an Islamic economy).

- (iii) While fixing of the rate of return in advance may attract Shariah's prohibition, it is not generally true that bank interest causes a perverse transfer of resources from the poor to the rich. This is difficult to establish one way or the other; but whatever evidence exists shows that, because of an initial unequal distribution of income and wealth, both the profit and interest incomes accrue more to the rich than to the middle and lower middle-income groups. More shall be given to those who have more! However, Table-2 makes clear that, relatively speaking, interest income is more important for the low income group than profit income; the reverse is the case for the high income group.

Table-2

Distribution of Income from Interest and Profit among Households in Pakistan (1996-97)

<u>% of Total @</u>		Income Group	Interest Income	Profit
<u>Income</u>	<u>Household</u>			
26.57	54.65	Lowest	7.53	6.91
24.33	24.26	Low	18.55	16.85

49.10	21.09	Middle+High	73.91	76.28
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Source: Computed from the Income and Household Survey 1996-97.
 @ Column based on the 1990-91 Survey

It was contended that the point is that Islamic reform does not aim at abolishing interest income but to convert it into profit income; which reform, if implemented, would then leave the distribution of income between income classes unchanged. To reverse the perverse flow of income the remedy is a more equitable distribution of wealth holdings, through an effective tax-cum-subsidy scheme in which the interest and profit incomes are taxed, the former at a higher rate than the latter; and the tax proceeds used to compensate the losers in the market place.

Mr.Naqvi concluded that Musharika and Mudhariba instruments should be sparingly used on rational grounds, both by the consumers and the banks and that it would do incalculable harm, if modern banking were made to fit in the Procrustean bed of anachronistic ideas and practices. He pleaded that nothing should be done to do away with the present mark-up system, which is Islamically legitimate. The small saving schemes must be left as they are till a more satisfactory solution is found, and government borrowing from the banking system on a fixed return basis may be declared as not interest, as in Iran, alternatively, the indexation system as is proposed by him may be tried. He added that this Court may focus attention on building fences around the present Islamic banking system by punishing dishonesty, by making

loan default a social crime, by making honouring of voluntarily agreed contracts mandatory, by promoting respect for private property rights where their exercise does not conflict with similar rights of others only then Islamic values are effectively internalized that Islamic Banking, based on the PLS principle, will have any chance of becoming operational, even on a restricted basis.

Mr. Iqbal Ahmed Khan, Managing Director, Global Islamic Finance HSBC Investment Bank Plc, London, a foreign expert, appeared to express his views. He provided a global perspective on the ethical, indigenous and equitable form of finance, which stands around US \$90 billion and is growing at the rate of 15 per cent per annum. According to him Islamic Finance Industry is spread across 65 countries with the total population with around 1.3 billion; that it is a trend, which is broadening the ownership base, creating more stakeholders and therefore bringing the hope of stability in the Muslim countries; that in a broad sense Islamic finance today provides a moral version of modern capitalism. In order to create a macro economic context he provided the Bench with World Bank statistics which measured the world economy in terms of the goods and services for the year 1997 to be around \$7 trillion while the financial flows were well in excess of \$500 trillion. He clarified that the Islamic finance industry was embedded in the commercial value producing real economy; that the rise of financial,

capitalism is pinning Wall Street against main street; that today 80% of the wealth is concentrated in the hands of 20% of the world's people. Commenting on this disparity of wealth distribution, he said that the invisible hand has not worked very well and quoting a reverend Bishop he urged that the rich seem to be getting richer, the poor poorer and we are not getting any holier. Looking at the world with a detached view from another world one can find majority of economic and social activity to be creating pockets of affluence in the sea of ever-increasing poverty. On the increasing polarization in the world economy he quoted Larry Summers the US Assistant Treasury Secretary who said that the world economy is linked with the US economy; that the health of the US economy is dependent on the consumer spending in the USA; that consumer spending is reliant upon the performance of the US stock market; the stock market fate is linked to the performance of around 50 blue chip companies listed in New York Stock Exchange, which according to him is an evidence of the polarization in the world economy. On philosophical foundation and core concept of Islamic finance he pointed out that the foundation of the Islamic finance is firmly rooted in the principles derived from the Holy Quran and the Sunnah of the Holy Prophet (PBUH), the two original sources, which have been kept intact for more than 14 centuries; and when taken together the Quran and Sunnah of the Holy Prophet (PBUH) or the basis

of Shariah law, which govern the Islamic finance, the Shariah law wants to ensure that Muslims invest their funds in a socially responsible manner; and at the center of Shariah law are concepts of man's vicegerency and trusteeship, concept of Amanah (fiduciary trust) and Adl (fairness). Addressing the Bench he said that this indigenous and equitable form of finance has gained increasing relevance in the last two decades in its home market – the OIC world; that Islamic finance is an emerging product in emerging market, which is gradually evolving along with the market in which it operates. He deliberated on the value creation potential of Islamic finance, the value paradigm of Islamic finance was outlined in the Shariah code which talks about the moral transparency, individual responsibility, corporate governance, reliance on market mechanism, a commitment to economic and social justice, a partnership of capital and enterprise, a care for environment as some of the core values. He gave the Bench a brief historical overview of the evolution of Islamic finance, stating that the first modern experiment with Islamic banking was undertaken in Egypt in early 1960s, the pioneering in Egypt took the form of savings banks based on the principle of profit sharing in the town of Mit ghamar; and it was not until the mid 1970s that the industry gained its initial momentum which fact was evidenced by the launching/establishment of Islamic Development Bank in 1975 by the Organization of the Islamic Countries

and Pakistan has played an important role in the creation thereof as a founder member. In fact, according to him, Pakistan's finance Minister chairs the Board of Governors of the Islamic Development Bank and the Bank is primarily inter governmental bank which primarily provides fund and infrastructure and developmental projects in member countries. The launching of Islamic Development Bank led to the creation of Islamic financial institutions in the Gulf cooperation council countries which include Dubai Islamic Bank 1976, Kuwait Finance House 1977, Faysal Islamic Bank in Egypt and Bahrain Islamic Bank in 1979. It was pointed out that in Far East, Malaysia, the Muslims Pilgrims Saving Cooperation was set up in 1963 which later became the well known Tabong Haji 1969 which in turn led to the creation of Bank Islam Malaysia Bhd in 1982. Since then a number of Islamic financial institutions have emerged in Muslim countries such as Saudi Arabia, UAE, Qatar, Turkey, Pakistan, Indonesia, and Brunei which institutions have taken the form of commercial banks, investment banks, investment companies, Takaful companies (Insurance). Amongst the major Islamic financial institutions there are Al-Rajehi, Kuwait Finance House, DMI Group, Al Barakah, Abu Dhabi Islamic Bank, Dubai Islamic Bank etc. Summing up the history and evolution of Islamic Finance, he informed the Bench that the industry today stands at 90 billion dollars and is growing at 15 per cent per annum; that the biggest growths are taking

place in countries where there are large vibrant middle classes. Taking Kuwait and Saudi Arabia as a case in point, he stated that Kuwait today has an estimated share of around 40 to 45 per cent while in Saudi Arabia, admittedly a larger market, the share of Islamic finance was around 20 per cent. According to him most of new institutions being created today are predominantly focused on investment banking; that during the 1990s Islamic financial institutions have become increasingly innovative as more complex instruments and structures have been developed to meet the demand of modern day business; that the use of instruments such as Istesnaa', Ijarah, Bai Salam, are becoming more wide spread and we are witnessing tenure starching as Islamic financial institutions moved towards cash flow based project finance with average life extending seven years and Islamic trenches being created in big ticket deal such as the Equate project in Kuwait and a number of infrastructure project in Turkey. These activities have already landed the Islamic financial institutions in the league tables of Euro money as arrangers and providers of finance. He added that there has been a tremendous improvement in the documentation capabilities of Islamic project finance issues being addressed much more clearly; that equity has also opened up as an asset class and they are fortifying the portfolios of Islamic financial institutions while we are seeing the promise of private equity being fulfilled through international Musharakas. He

emphasized that the trend of Islamic finance is broadening owner base, creating more stake holders and therefore bringing the hope of stability to Muslim countries. He went on to talk about the manner in which the Islamic finance as an industry was evolving along with the framework in the countries in which it operated. He also emphasized the importance of the supporting Macro economic and legal framework. In order to take Islamic finance forward it was important that comprehensive reforms are brought about in the monetary, fiscal and judicial framework of Muslim countries and that the importance of establishing of 'missing links' such Islamic common market and Islamic Dinar. He referred to the Islamic Dinar to state that today it exists only as a translation currency linked to the SDRs.

Mr.Siddiqui Farooq, Chairman House Building Finance Corporation (HBFC) appeared to state that the society is not well settled to adopt the Islamic Banking system at this juncture, the implementation of which would only create negative impression about Islam than bringing positive results; that all segments of the society and institutions, including the Courts, politicians, religious scholars and bureaucracy have to play their role to establish a true Islamic society in Pakistan; that till now we could not even create a proper lunar calendar due to which we celebrate three Eids every year. According to him loan under the Modaraba could not be effective at this stage where society has lost most

of the Islamic moral values and every person who would get loan under Modaraba would never admit about the profit and would always come with a loss. He suggested to adopt the Islamic values in letter and spirit but for the time being also keep in view the exceptions which Islam had allowed in certain circumstances. He referred to the famine during Hazrat Umar Farooq (RA)'s time where the punishment for theft had been suspended. He argued that Pakistan was facing an exceptional situation in the shape of inflation and the HBFC has reduced the interest rate almost by two per cent on the loans it extended as the inflation rate fell and would keep doing the same gradually if inflation rate further declines. He submitted the documents before the Court relating to amendments effected in the laws of the corporation in the light of the HBFC cases in Courts and profits earned by it before 1979 and from 1979 to 1987, 1988-89 and thereafter. The documents produced also included details of the credit lines payable to State Bank, profit paid to State Bank and balance sheet of the Corporation besides relevant record from 1979 to December 31, 1997. He implored that harvesting was not possible without proper cultivation of land as seeds sown in water cannot yield, legislation without a solid base would bear no fruit rather it would be counter productive. He pleaded that Holy Prophet (PBUH) first raised a team of his companions and enforced Islamic laws after spade work for acceptability of Islamic system in the society. The other

submissions made by him with respect to the specific provisions of the House Building Finance Act, 1952, will be dealt with while dealing with Shariat Appeals No.24 of 1992 to 35 of 1992 under the aforesaid Act of 1952.

Syed Riazul Hassan Gilani, representing the Government argued that Riba-al-Fazal was covered by the Muslim Personal Law and therefore, Article 203 of the Constitution has excluded the jurisdiction of the Shariat Court. He stated that the term “Islamic Banking” was misnomer as bank had no religion; that in spite of all sympathies with the sentiment behind Islamic Banking, the term Islamic Banking was a misnomer; that Bank is an instrument which can neither be Muslim nor non Muslim. Neither all the transactions or modern banking are un-Islamic nor all the transactions of Islamic banks were purely Islamic. He categorised the Riba into categories as: Riba al Jahilia (pre-Islamic system of usury) which he said was extremely oppressive; Riba al Quran, the compound interest based system which was prohibited by the Holy Quran; riba Al Nasiya (profit motivated lending) and Riba al-Fadl (soft-interest loans). He argued that the system of Riba al Jahilia and Riba al Nasiya are not relevant in the present case and he would confine himself to Riba al Quran and Riba al-Fadl in his arguments. It was asserted that definition of Riba al Quran was definite and undisputed among the Muslim jurists and Muslim sects and it should not remain

part of our banking and legal system even for a moment as the prohibition of Riba al Quran is applicable to the Muslims and non-Muslims of an Islamic State. He stated that Riba al-Fadl was Makrooh (reprehensible) but not Haram (prohibited) and that some other kinds of Riba like “Najsh” are also Makrooh. It was introduced by Shariah so that the doors of Riba al Quran be closed. It is applicable to Muslim citizens of an Islamic State and not to non-Muslim citizens. He was of the view that if Riba al-Fadl was prohibited at the State level, it would allow the non-Muslims to monopolise the banking system of the country. Riba al-Fadl, according to him, did not strike down the established practice of the society and required the government to regulate it in public interest. It was argued that Islamic jurisprudence provided for punishment of defaulters and if he could be jailed for breaking his promises why he could not be fined; that a defaulter with bona fide reasons could expect a lenient treatment under injunctions of Riba al Quran; that Indexation in public interest did not fall under the mischief of Riba and he had precedents to show that it was not repugnant to Islamic injunctions; that overall rationale and objective of prohibition of Riba was to eliminate practice of loans and money lending from the Islamic society as far as possible; that money lending with or without pre-determined profits fell under the category of Riba al-Fadl. It was contended that Riba was not only applicable on loans but also

purchases; that there was similarity in the prohibition of alcohol and Riba as use of alcohol in the society was prohibited gradually and same was the case of Riba. He produced a chart of Quranic verses showing a comparison of prohibition of Riba and ban on alcohol. It was stated that it was wrongly attributed to Hazrat Umer Farooq (SA) that he had said that verses banning Riba were the last and the Holy Prophet (PBUH) could not explain it due to early death. It was urged that at least two years before the death of Holy Prophet (PBUH) the verses banning Riba had been revealed and Riba had been enforced in 8 Hijra and the Holy Prophet (PBUH) died in 10 Hijra. It was further urged that Holy Prophet (PBUH) had declared "Muzarbat" as one kind of Riba, and recommending some body for some post with the intent to get something for the recommendation was another kind of Riba. Syed Riazul Hassan Gilani further contended that Holy Prophet (PBUH) had established loan free society with the idea that debt leads to servitude; that the fate of those countries which took loans for development is before us; that Riba al Quran (compound interest based system) was Haram and should not be kept for a moment in Islamic State; that the definition of both forms of Riba al Quran and Riba al-Fadl have separate mechanism of enforcement; that any transaction which had an element of "Zulm" was contrary to the injunctions of Islam; that saying of the Holy Prophet (PBUH) was no less than Quran as the matters of Shariat were equally

binding on us as of Quran; that Riba al Jahilia (pre-Islamic system of usury) was started at the time of default of the loan and if lender and the lendeer agreed on a time frame for the payment of loan and if the deadline for the repayment was not met, the lender would fix Riba. According to him when the Riba al Quran was enforced, the Riba al Jahilia would automatically be eliminated and the same remained enforced in all the Muslim States. Rib al Quran remains abolished by the State decree of the Holy Prophet (PBUH) and it remained abolished throughout the Muslim history till the time of Aurangzeb Alamgir, the last powerful Mughal emperor and when the subcontinent was subjugated by the Britain, it allowed advancement of loans on the basis of interest. The permission led to perpetuation of Zulm and people were under virtual slavery of the Hindu Banyias. According to him loan of Banyia fell both in the category of Riba al Quran and Riba al-Fadl. He asserted that the propositions of law derived from the text relating to Riba al-Fadl are from the very beginning disputed amongst the Muslim jurists and the Muslim sects because the Holy Prophet (PBUH), to save the Ummah from hardship, did not enforce Riba al-Fadl in the form of a definite ruling and only the mode of exchange of six commodities was illustrated; that the enforcement of prohibition of Riba al-Fadl is not the obligation of the State as its implementation is responsibility of individual Muslim and this was not enforced in the form of a State

decree/a proposition of law by the Holy Prophet, Khulfai Rashedeen and the Muslim Rulers in the Muslim History; that Riba al-Fadl does not strike down “Masla-al-Tarajeeh” i.e. the established practice of the society; that only Hajat (facility/need) rather than Zaroorat (necessity) is entitled to exception in the domain of Riba al-Fadl; that the State may in the public interest regulate Riba al-Fadl; that the saying “

كل قرض جر نفعًا فهو ربا is not a Hadith but a principle derived from the provision of Riba al-Fadl; that the predetermined profit on loan was considered Makrooh by Imam Abu Hanifah and other great jurists as it falls under Riba al-Fadl; that the penalty or fine imposed on wilful defaulter is not Riba and a defaulter can also be put behind the bar till he pays the debt while only a bona fide defaulter is/should be entitled to lenient treatment contemplated in Riba al Quran; that the over all rationale and objective of prohibition of Riba is to eliminate loan in the muslim society as far as possible and a loan with or without predetermined profit falls under Riba al-Fadl while bona fide need (Hajat) is exception to the Rule; that Riba al-Fadl is covered by the term Muslim Personal Law used in Article 203 of the Constitution – thus subject of Riba al-Fadl is not within the jurisdiction of Federal Shariat Court; that in spite of all the sympathies with the sentiments behind Islamic Banking, the term Islamic Banking is a misnomer, Bank is an instrument which can neither be muslim nor non-muslim, neither all

transactions of modern Banking are un-Islamic nor all the transactions of Islamic Banking are Islamic and all the attention of Islamic Banking is diverted towards Riba al-Fadl, whereas due attention is not paid to Riba al Quran.

Arguing his case, it was asserted by Syed Riazul Hassan Gilani that in Islam the real meaning of “Qarz” was lending money to someone without any interest. He also quoted a Hadith of the Holy Prophet (PBUH) in which the Holy Prophet (PBUH) had stated that he saw in the heavens written that who lends qarz receives 18 times more “sawab” as compared to the Sawab blessed on one who pay “Sadqa” and gets 10 times of it only. He also told the Court the views of Ulema of the Sub-continent about the banking institutions established by the British. One requirement for getting correct “fatwa” from the ulema should be to ask questions by the persons seeking fatwa, in clear terms since ulema were not experts of sciences. He added that there were three kinds of Ijtehad including Tehrir-e-Munaja, Tanqia –e-Munaqa and Tehrik-e-Munaja. He referred to the fatwa of Hazrat Ahmad Raza Bareilvi about the banking system which he had given to a specific question by a man about the profit being offered to him by the bank on his deposits. The Maulana in response said though interest was Haram but he could receive the enhanced money believing that he was not getting interest. This fatwa was given in the background, Gillani explained, when banks were not

national institutions rather British institutions and the Maulana had no sympathy with the banks. He said except Sir Syed Ahmed Khan, no scholar of the Sub-continent gave any importance to the British institutions. Sir Syed was of the view that if the Muslims distanced themselves from the banking system, it would only benefit the Hindus.

At this stage Syed Riaz ul Hassan Gilani, learned counsel for the Federal Government sought adjournment of the case after summer vacation since he could not close his arguments and he had only covered one-fourth of it, besides he had to go to Lahore to look after his ailing father and was also planning to proceed on Umra. The Court rejected his plea reminding the assurance he gave to the Court to conclude the arguments as well as the professional duty that he owes to the Court to appear and assist the Court irrespective of amount of fee that he claims from the Government. The hearing was, however, adjourned to the following week. Syed Riazul Hassan Gillani did not appear to conclude his arguments despite specific order of the Court. The Court after waiting for an hour adjourned the matter to the ensuing day in order to give him another chance to appear and complete his submissions. The Federation's counsel, however, did not turn up on such day as well. Attorney General, Chaudhry Muhammad Farooq who was also asked to appear on the next day did not appear. Chaudhry Akhtar Ali, Federation's Advocate-on-Record, however, made a statement

before the Court that the Attorney General had nothing to say in the case. The Advocate-on-Record for the federation said that Mr. Gillani was not available and the Attorney General had no submission to make in the case. The Court, in the circumstances was constrained to conclude the hearing. It was observed that the Federation's counsel is at liberty to file his submissions in writing within fifteen days. Learned Additional Advocate General Punjab, Rana Muhammad Arif, who was present in the Court room stated that he intended to argue the matter after the completion of arguments by the counsel of the federation and when the Court asked him to start his arguments, he showed his inability to start his arguments immediately stating that he was of the view that the counsel for the federation would get some time for the completion of his arguments. In the circumstances, the learned Additional Advocates General of the NWFP and Punjab were directed to submit their arguments, if they wanted to, in writing. The representative of the Government of NWFP latter submitted a brief note reiterating the pleas noted above.

Before proceeding to examine the aforementioned submission on crucial issues of definition of Riba, the concepts, connotation and scope thereof, it is appropriate to deal with the question of scope of jurisdiction of the Federal Shariat Court and the Shariat Appellate Bench.

The question of scope of jurisdiction of the Federal Shariat Court and the Shariat Appellate Bench of this Court, was raised by some jurisconsults and the scholars who appeared before us. This question was raised mainly in view of the representation of the Government made in the application for withdrawal of the appeal from this Court and to seek parameters and guidelines from the Federal Shariat Court as to the modalities of enforcing and implementing its judgment on *Riba*. The Government needed such guidelines within which the Government wanted to move the necessary legislation for the compliance of its constitutional duty and obligation to enforce a truly Islamic economic system. The Federal government in the said application had also contended that some serious issues of utmost importance have come up which have a close and intimate bearing on Pakistan's obligations both to foreign lenders as well as in relation to the functioning of the banking system within the country including lending for the payment of foreign debts, inflation, indexation etc are involved and that the Government seeks guidelines of the Court (Federal Shariat Court) in the shape of laying down guidelines on the basis of which the Government can comply with its solemn commitments within the framework of Islamic injunctions. These specific parameters and guidelines, it was urged,

were to be sought so as to enable banking and other related laws to be recast in such a manner that they conform strictly to the stipulations of Islam.

Prof. Khurshid Ahmad, Maulana Abdul Sattar Niazi and Maulana Gauhar Rehman, the religious scholars as well as Mr. Muhammad Ismail Qureshi, Advocate, argued that neither the Federal Shariat Court nor the Shariat Appellate Bench of the Supreme Court has jurisdiction or power to provide guidelines or the parameters in compliance of which the Government is to provide the legal framework of Islamic injunctions by enacting appropriate laws, nor economic financial or banking policies or the system is to be charted out by the Court. According to them the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court, in view of the provisions contained in Chapter 3-A of the Constitution and more particularly under Article 203-D of the Constitution, are empowered only to examine and decide one question i.e. whether or not any law or provision of law is repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (Peace Be Upon Him). According to them it is only vires of any law or the provisions of law on the touchstone of injunctions of Islam as to their repugnancy or otherwise which is to be examined and decided by the Court i.e. the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court.

Neither the framing of any law nor the economic or financial policies or the banking system itself can be examined by the Federal Shariat Court as these are concerns of the other organs of the State under the relevant provisions of the Constitution and the law. It is unfortunate that these contentions so emphatically urged by the religious scholars were not at all adverted to by the learned counsel for the Federation. Learned Attorney General also, despite being conscious of the questions raised in the application moved by the Federation and the viewpoint of the religious scholars on this question, did not enter appearance to render assistance to the Bench on the important constitutional and legal questions in his capacity of highest law officer of the country, what to say of presenting and elaborating the point of view of the Federal Government. We have, therefore, surveyed the provisions of the Constitution and the relevant legal provisions on our own. Article 203-D of the Constitution which provides for the powers, jurisdiction and functions of the Federal Shariat Court constituted in pursuance of Article 203-C of the Constitution reads as under:-

“203D. **Powers, jurisdiction and functions of the Court.** -

(1) The Court may, [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.

(1A) Where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the Court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or to the Provincial Government in the case of a law with respect to a matter not enumerated in the either of those Lists, a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court.

(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision:-

- (a) the reasons for its holding that opinion; and
- (b) the extent to which such law or provision is so repugnant;

and specify the day on which the decision shall take effect:

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.

- (3) If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam, -
 - (a) the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and
 - (b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.”

The revisional and other jurisdiction of the Federal Shariat Court is contained in Article 203-DD while Article 203-E details the powers and the procedure of the Court. The next Article i.e. Article 203-F provides for appeal to the Shariat Appellate Bench of the Supreme Court against the final decision of the Court rendered in the proceedings under Article 203-D of the Constitution. At this juncture it will be appropriate to reproduce the definition of the term “law” given in clause (c) of Article 203-B in Chapter-3 of the Constitution which reads.-

“law” 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 ten 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 or insurance practice and procedure.

It is pertinent to note that the period of ten years of moratorium has expired and as such the vires of any fiscal law or any law relating to the levy and collection of taxes or fees and banking or insurance practice and procedure can now be tested on the touchstone of Islamic injunctions. It is also pertinent to note that the provisions of the Constitution, Muslim Personal Law and any law relating to the procedure of any Court or Tribunal are still outside the purview or jurisdiction of the Court i.e. the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court. The jurisdiction is thus limited to the examination of the question whether any law or provision of law

is or is not repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet and the term “law” also includes any custom or usage having the force of law or any law relating to banking or insurance practice and procedure. The authors of Chapter 3-A consciously included within the definition of term “law” for the purposes of Chapter 3-A, “any custom or usage having the force of law” as the Supreme Court in its judgment in Federation of Pakistan through the Secretary, Ministry of Finance, Government of Pakistan, Islamabad etc. versus United Sugar Mills Limited, Karachi (PLD 1977 SC 397) had held that “the term “law” as used in Article 4 has also been used in Article 8 of the Constitution, in contradistinction with any “custom or usage having the force of law” and must therefore, be given the same limited connotation in Article 4 as well.” The Shariat Appellate Bench of the Supreme Court in the case of Wasi Ahmed Rizvi Vs. Federation of Pakistan (PLD 1982 SC 20) commenting on the term law appearing in Article 203-B observed:-

“13. Coming back to Article 203-B which confers jurisdiction, which defines the limits thereof and which prescribed exclusions thereto, we find that it provides an inclusive definition of law. On the force of that definition itself any usage having the force of law shall qualify as law. Such a usage may relate to the nation or group as a whole or may relate to practise and procedure of the Court. The former has been included in the definition of law but the latter has been expressly excluded by providing that law includes any

custom or usage having the force of law but does not include “any law relating to the procedure of any Court or tribunal”. Law here does not mean only the enacted law but includes usage having the force of law. Such usage or law may relate to procedure of Court or to matters not expressly excluded from the jurisdiction of the Court. If usage or law does not relate to matters excluded from jurisdiction, a petition attacking it would be competent. On the other hand, if it concerns any of the matters excluded then it would be incompetent.”

But the question is whether the Federal Shariat Court or the Shariat Appellate Bench of the Supreme Court can be called upon to lay down parameters and guidelines of financial policies or the banking system and the legal framework needed for complying with the requirements of Shariah. The mandate of the Constitution as is apparent from the Objectives Resolution under Article 2-A is that the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah; and that adequate provision shall be made for the minorities to profess and practise their religions and develop their cultures; and also that fundamental rights including equality of status, of opportunity and before law, social economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality, shall be guaranteed.

The framing of laws is the prerogative of the Parliament or the Provincial Assemblies according to their respective spheres allotted to them under the Constitution. A reference to Article 227 of the Constitution is relevant as it provides that all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah, and that no law shall be enacted which is repugnant to such injunctions. Clause (2) of this very Article provides that effect shall be given to the provisions of clause (1) only in the manner provided in Part-IX of the Constitution. This has a reference to the next Article 228 which provides for composition of Council of Islamic Ideology to which a reference may be made by the Parliament, the President or the Governor of a Province on a question whether a proposed law is or is not repugnant to the injunctions of Islam. On receipt of such a question so referred under Article 229 the Council has to inform within 15 days of the receipt of reference, the period within which the Council expects to be able to furnish the reply/advice. Article 230 further provides that if the Council advises that the law is repugnant to the injunctions of Islam, the Parliament, the Provincial Assembly, the President or the Governor, as the case may be, shall reconsider the law so made. This is how the law which is to be framed or enacted can be made to conform to the injunctions of Islam and the mandate of Article 227 that no law shall be enacted which is repugnant to such injunctions

is to be complied with. If any enacted law is considered by anyone to be repugnant to the injunctions of Islam, the course to be adopted, as provided by the Constitution, is to challenge the said law before the Federal Shariat Court under Article 203-D of the constitution. This power can also be exercised suo motu by the Federal Shariat Court.

The manner of framing of laws by the Parliament or the Provincial Assembly as to who is to introduce a law in the shape of the bill in the Parliament or the Provincial Assembly is contained in the Constitution and need not be dilated upon here. The framing of the economic and financial policies including banking is prerogative of the Government which is composed of the majority party in the Parliament or in the Provincial Assemblies. The parameters, the limits and the scope of these policies have been provided in the Constitution itself and the laws framed under the Constitution. Some of the constitutional provisions having important bearing on the fiscal policies may now be noticed.

Article 73 of the Constitution provides that a Bill or amendment shall be deemed to be a Money Bill if it contains provisions dealing with all or any of the following matters:-

- (a) the imposition, abolition, remission, alteration or regulation of any tax;

- (b) the borrowing of money, or the giving of any guarantee, by the Federal Government, or the amendment of the law relating to the financial obligations of that Government;
- (c) the custody of the Federal Consolidated Fund, the payment of moneys into, or the issue of moneys from, that Fund;
- (d) the imposition of a charge upon the Federal Consolidated Fund, or the abolition or alteration of any such charge;
- (e) the receipt of moneys on account of the Public Account of the Federation, the custody or issue of such moneys;
- (f) the audit of the accounts of the Federal Government for a Provincial Government; and
- (g) any matter incidental to any of the matters specified in the preceding paragraphs.

A Money Bill is to originate in the National Assembly and if passed is to be presented, without being transmitted to the Senate, to the President for assent. Article 74 then provides as under:-

“A Money Bill, or a Bill or amendment which if enacted and brought into operation would involve expenditure from the Federal Consolidated Fund or withdrawal from the Public Account of the Federation or affect the coinage or currency of Pakistan or the constitution or functions of the State Bank of Pakistan shall not be introduced or moved in Majlis-e-Shoora (Parliament) except by or with the consent of the Federal Government.”

The other provisions which provide for financial procedure and also borrowing powers of the Government may now be noticed. These are reproduced hereunder:-

“78. Federal Consolidated Fund and Public Account. (1)

All revenues received by the Federal Government, all loans raised by that Government, and all moneys received by it in repayment of any loan, shall form part of a consolidated fund, to be known as the Federal Consolidated Fund.

(2) All other moneys –

(a) received by or on behalf of the Federal Government; or

(b) received by or deposited with the Supreme Court or any other court established under the authority of the Federation;

shall be credited to the Public Account of the Federation.

79. Custody, etc. of Federal Consolidated Fund and Public Account. The custody of the Federal Consolidated Fund, the payment of moneys into that Fund, the withdrawal of moneys therefrom, the custody of other moneys received by or on behalf of the Federal Government, their payment into, and withdrawal from, the Public Account of the Federation, and all matters connected with or ancillary to the matters aforesaid shall be regulated by Act of Majlis-e-Shoora (Parliament) or, until provision in that behalf is so made, by rules made by the President.

80. Annual Budget. (1) The Federal Government shall, in respect of every financial year, cause to be laid before the National Assembly a statement of the estimated receipts and expenditure of the Federal Government for that year, in this Part referred to as the Annual Budget Statement.

(2) The Annual Budget Statement shall show separately -

(a) the sums required to meet expenditure described by the Constitution as expenditure charged upon the Federal Consolidated Fund; and

(b) the sums required to meet other expenditure proposed to be made from the Federal Consolidated Fund;

and shall distinguish expenditure on revenue account from other expenditures.

81. Expenditure charged upon Federal Consolidated Fund. The following expenditure shall be expenditure charged upon the Federal Consolidated Fund:-

- (a) the remuneration payable to the president and other expenditure relating to his office and the remuneration payable to-
 - (i) the Judges of the Supreme Court;
 - (ii) the Chief Election Commissioner;
 - (iii) the Chairman and the Deputy Chairman;
 - (iv) the Speaker and the Deputy Speaker of the National Assembly.
 - (v) The Auditor-General;
- (b) the administrative expenses, including the remuneration payable to officers and servants, of the Supreme Court, the department of the Auditor-General and the Office of the Chief Election Commissioner and the Secretariats of the Senate and the National Assembly;
- (c) all debt charges for which the Federal Government is liable, including interest, sinking fund charges, the repayment or amortisation of capital, and other expenditure in connection with the raising of loans, and the service and redemption of debt on the security of the Federal Consolidated Fund;
- (d) any sums required to satisfy any judgment, decree or award against Pakistan by any court or tribunal; and
- (e) any other sums declared by the Constitution or by Act of Majlis-e-Shoora (Parliament) to be so charged.

82. Procedure relating to Annual Budget Statement. (1) So much of the Annual Budget Statement as relates to expenditure charged upon the Federal Consolidated Fund may be discussed in, but shall not be submitted to the vote of, the National Assembly.

(2) So much of the Annual Budget Statement as relates to other expenditure shall be submitted to the National Assembly in the form of demand for grants, and the Assembly shall have power to assent to, or to refuse to assent to, any demand, or to assent to any demand subject to a reduction of the amount specified therein;

Provided that, for a period of ten years from the commencing day or the holding of the second general

election to the National Assembly, whichever occurs later, a demand shall be deemed to have been assented to without any reduction of the amount specified therein, unless, by the votes of a majority of the total membership of the Assembly, it is refused or assented to subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the Federal Government.”

A study of these Articles shows that the Federal Government has the power to frame the financial, economic and fiscal policies of the State and also to provide necessary legal framework to execute such policies. It is the Federal Government which has the authority under the Constitution to operate and issue guarantees on the security of the Federal Consolidated Fund under such limits as may be fixed by an Act of the Parliament. However, no such law framed by the Parliament was referred to us. In the absence of such a law, the Government exercises unrestricted powers to borrow against the security of the Federal Consolidated Fund as no law has yet been framed to regulate the custody of Federal Consolidated Fund or the Public Account of the Federation. Though variety of rules such as Treasury Rules exist but in the absence of specific laws and rules pertaining to borrowing, it is practically and ultimately the Rules of Business which are resorted to regulate the business of the Federal Government. Rules of Business [Schedule II, specified in Rule 3(3)] indicate at entry No.13 ‘Finance Division’ and

the functions assigned to the said Division. In sub-entries 6 and 7 thereof, following items have been mentioned:-

- Public debt of the Federation both internal and external; borrowing money on the security of the Federal Consolidated Fund;
- Loans and advances by the Federal Government.

It follows from these provisions of the Rules of Business that the lending and borrowing operations of the Federation are performed by the Ministry of Finance within the framework provided in the Rules of Business. No specific guidelines appear to have been provided to regulate and streamline such functions. It may, therefore, be inferred that the Secretary Finance or at best the Minister for Finance are free to make decisions on these subjects though they may consult the Prime Minister if the matter is considered, in the discretion of the Secretary Finance or the Minister for Finance, to be an important policy matter. Rule 16 which specifies the cases required to be brought before the Cabinet does not contain borrowing proposals and as such even the Cabinet is not required to be taken into confidence. It will, therefore, be seen that neither the borrowings are restricted for specific uses nor the expediency of the situation necessitating borrowings has been spelled out. This situation of wide flexibility confers on the Finance Division unique and unlimited powers to borrow without at all being bothered about the productivity of the uses to which borrowed resources are

applied or even without there being any limitation to the extent to which the nation is to be burdened with borrowings.

As regards the revenues and loans credited to Federal Consolidated Fund and to Public Account, expenditures are incurred without regard to the sources of funds. It appears that no accounting is done for identifying the liabilities created by certain expenditures as revenues are mixed up with proceeds of loans and both are treated at par. This situation prevails as regards the borrowings both from foreign lenders as well as domestic lenders, as no distinction is made whether the borrowing in rupee or in foreign exchange or from local and foreign markets. It is only the Government in power which is to decide freely the mix between the foreign and local borrowings or in rupee or in foreign exchange. Under the Federal Legislative List, entries No. 9 and 10, make the subjects of foreign loans and foreign aid Federal subjects.

At this stage the views of Dr. Waqar Masood Khan, Vice President, International Islamic University with regard to the implications emerging from the legal provisions on the subject may be dealt with. He contended that -

- “(1) The Federal Government enjoys borrowing powers which are constitutionally sanctioned and no limits have been placed by any Act of the Parliament on these powers.
- (2) The borrowing transactions, are protected by their inclusion within the list of expenditure charged to the Federal Consolidated Fund; according to the interpretation of Dr.

Waqar Masood Khan, these transactions include both the principal money as well as the interest.

- (3) Charged Expenditure enjoys the protection of complete insulation from Parliamentary control or scrutiny. Although such expenditure can be debated but cannot be put to vote, and hence no cut motions can be moved in respect of such expenditure; More importantly, since these are charged expenditure, they take precedence over all other expenditures. Apparently, such obligations will have to be discharged prior to incurring any other expenditure.
- (4) Together with the absence of any Act to regulate the custody of the FCF and PA, the Federal Government has complete freedom to manage the finances of the Federation.”

The other important aspects to be noticed, considering overall effect of the judgments rendered by the Federal Shariat Court, it was contended, are --

- (a) That the Federal Shariat Court has examined only the laws enlisted above and not the other laws having bearing on the common finances or containing provisions pertaining to levy or charging of interest. An illustrative list of these laws provided by Dr.Waqar Masood details the enactments as follows:-

1. Contract Act 1872 (Act IX of 1872) Section 73, illustration (n)
2. Trusts Act, 1882 (Act II of 1882) Section 20, 20A.
3. Transfer of Property Act, 1882 (Act IV of 19882) Sections 58 to 104.
4. The Land Improvement Loans Act, 1883 (Act XIX of 1883) Sections 6,7 and 10.

5. The Agricultural Loan Act, 1884 (Act XII of 1884) Section 5.
6. The Local Authorities Loan Act, 1914 (Act IX of 1914) Sections 3 and 4.
7. The Usurious Loans Act, 1918 (Act X of 1918) Sections 2 and 3.
8. The Securities Act, 1920 (Act X of 1920) Section 13(2) [many other parts implying that securities bear interest]
9. The Provident Funds Act, 1925 (Act XIX of 1925) Section 2 [many other parts implying that interest is payable]
10. The Public Debt Act, 1944 (Act XVIII of 1944) Section 18 [many other parts implying that interest is payable]
11. The Foreign Exchange Regulation Act, 1947 (Act VII of 1947) Sections 13 [many other parts implying that interest is payable]
12. The National Bank of Pakistan Ordinance, 1949 (Ordinance XIX of 1949) Section 25 and many other parts which imply interest based business.
13. The House Building Finance Corporation Act, 1952 (Act XVIII of 1952) Section 21 and 24 [many other parts implying dealings in interest]
14. The Industrial Development Bank of Pakistan Ordinance, 1961 (Ordinance XXXI of 1961) Section 5 and 27 [many other parts implying dealings in interest]
15. The Investment Corporation of Pakistan Act, 1966 (Ordinance IV of 1966) Section 23 [many other parts implying dealings in interest]
16. The Peoples' Finance Corporation Act, 1972 (Act XXIX of 1972) Section 20 [and many other parts implying dealings in interest]

17. The National Development Finance Corporation Act, 1973 (Act VIII of 1973) Section 18 [and many other parts implying dealings in interest]
 18. The Establishment of the Federal Bank for Cooperatives and Regulation of Cooperative Banking Act, 1977 (Act IX of 1977) Section 17 [many other parts implying dealings in interest]
 19. The Income Tax Ordinance, 1979 (Ordinance XXXI of 1979) Section 17 and numerous other provisions dealing with interest income.”
 20. The Companies Ordinance, 1984 (Ordinance XLVII of 1984) Numerous provisions dealing with debentures and other fixed income securities.
- (b) That the treasury rules and other rules regulating Government finances have also not been examined by the Federal Shariat Court. Thus at present Government finances may not be directly and fully hit by the decision of the Federal Shariat Court. These finances may be hit only partially.
- (c) That the borrowing powers of the Government emanate directly from the Constitution and the provisions of the Constitution are beyond the scrutiny or examination of the Federal Shariat Court and hence it is to be seen and decided whether the laws authorizing the Government to borrow can be struck down disabling the Government from borrowing on the basis of interest.

It was for these reasons that it was contended that, in view of the above constitutional provisions, the Government finances seem to be

outside the purview of the Federal Shariat Court because it is not competent to examine the provisions of the Constitution, and since borrowing powers are protected under the Constitution together with the transactions carried out in pursuance of such powers the process of prohibition apparently cannot be extended to the Government finances under the existing scheme of judicial review of laws with regard to their consistency with the injunctions of Islam. Following the above noted line of argument, Dr. Waqar Masood expressed the view that within the existing constitutional framework the prohibition can effectively be applied to private transactions and not to the Government finances unless of course the Constitution is amended.

We have given serious considerations to the above noted aspects and are of the view that as regards the laws which have not yet been scrutinized by the Federal Shariat Court, it will be appropriate to have the said laws/enactments/provisions scrutinized by moving appropriate petitions by the Government itself or by taking suo motu notice by the Federal Shariat Court. As regards implications emerging from the legal provisions on the subject, the Federal Government enjoys borrowing powers under Article 78 of the Constitution. The mandate of Article 79 of the Constitution, however, is that an Act of the Parliament has to regulate –

- (a) the custody of the Federal Consolidated Fund;

- (b) the payment of moneys into that Fund;
- (c) the withdrawal of moneys therefrom;
- (d) the custody of other moneys received by or on behalf of the Federal Government;
- (e) their payment into, and withdrawal from, the Public Account of the Federation; and
- (f) all matters connected with or ancillary to the matters aforesaid.

This mandate has not yet been obeyed and complied with as no enactment has been till date framed and enacted by the Parliament. All the above matters are being dealt with under the Rules made by the President which Rules, as commented in one of the paragraphs above, are deficient in many respects and, in any case, cannot be a valid substitute of law framed by the Parliament itself. The Rules existing on the subject were probably made pursuant to section 151 of the Government of India Act, 1935, which section provided that the Rules may be made by the Governor General and by the Governor of Province for the purpose of securing all moneys received on account of revenues of the Federation or of the Province and also with regard to the moneys to be paid into the Public Account of the Federation or the Province. After the establishment of Pakistan, the Constitutions of 1956 in Article 62, the Constitution of 1962 in Article 38 and the Constitution of 1973

in Article 79 mandated for the enactment of an Act by the Parliament to regulate the custody of the Federal Consolidated Fund, the payment of and withdrawal of moneys into or therefrom as well as custody of other moneys received by or on behalf of the Federal Government, their payment or withdrawal from the Public Account of the Federation and all matters connected with or ancillary thereto. Reference may also be made to Article 81 of the Constitution of which clause (c) provides that the expenditure charged upon the Federal Consolidated Fund includes all debt charges for which the Federal Government is liable, including interest, sinking fund charges, the repayment or amortisation of capital, and other expenditure in connection with the raising of loans, and the service and redemption of debt on the security of the Federal Consolidated Fund. Reference may also be made to Article 166 of the Constitution which provides that the executive authority of the Federation extends to borrowing upon the security of the Federal Consolidated Fund within such limits, if any, as may from time to time be fixed by Act of Majlis-e-Shoora (Parliament), and to the giving of guarantees within such limits, if any, as may be so fixed. Similar provisions were contained in the Constitutions of 1962 and 1956 in Articles 139 and 115 respectively. The economists appearing before us showed ignorance as to the existence of any such law as contemplated by these Articles on the statute book. In the absence of any such

enactment providing guidelines and fixing the limits up to which the borrowing power can be exercised by the Federation, Dr. Waqar Masood, argued that the charged expenditure enjoys the protection of complete insulation from parliamentary oversight as, on the one hand, no guidelines exist and, on the other, such expenditure can be debated but is not to be put to vote. Moreover, the Federal Government has complete freedom to manage the finances of the Federation and this unrestricted power has plunged the Nation into huge indebtedness and has ruined the economy. It would be seen that for almost fifty years we have not been able to obey the mandate of the Constitution by not enacting appropriate law defining the borrowing powers, the purposes, the use and limit of the exercise of such power. The contracts of billions of dollars burdening the nation through execution of sovereign guarantees are being entered into without information of even the members of the cabinet what to say of obtaining approval of the National Assembly by a member of bureaucracy or advisor appointed by Prime Minister in his sole discretion injudiciously. The contract executed with IPPs provide sufficient basis for providing prudential laws and making approval of such contracts by the National Assembly mandatory. Such a law should be enacted without further loss of time so that prudential measures could be adopted so as to regulate management of Federal Consolidated fund

as well as Provincial Consolidated Funds and Public Accounts and the borrowing powers of the Federation particularly.

The contention that the process of prohibition cannot be extended to Government Finances under the existing scheme of Judicial Review of laws with regard to their consistency with the injunctions of Islam on account of the fact that the constitutional provisions cannot be scrutinized on the touchstone of injunctions of Islam under Article 203-D of the Constitution merits some consideration. It is on account of exclusion of the Constitution from the definition of the term “law” given in clause (c) of Article 203-B that this view has been expressed. No doubt, the question of repugnancy or otherwise of the constitutional provisions on the touchstone of injunctions of Islam cannot be examined by the Federal Shariat Court and also by the Shariat Appellate Bench of the Supreme Court but the enactment which as and when framed regulating the Federal Consolidated fund or the Public Accounts as well as defining, prescribing and limiting the borrowing powers are enacted, the said statute, enactment or even the rules shall have to conform to the injunctions of Islam as contained in the Holy Quran and Sunnah of the Holy Prophet not in view of the provisions contained in Article 203-B © but also of the provision of Article 2-A and Article 227 of the Constitution. This constitutional position is well established and in support reference may be made to Hakim Khan and 3 others versus

Government of Pakistan through Secretary Interior and others (PLD 1992 SC 595) wherein five learned Judges of this Court, inter alia, held that the Court has no power to apply the test of repugnancy by invoking Article 2-A of the Constitution for striking down Article 45 of the Constitution of the Islamic Republic of Pakistan for the reason that if any Article of the Constitution is in conflict with Article 2-A, the appropriate procedure is to have it amended in accordance with the prescribed provision for the purpose. However, it does not absolve the Courts of their duty to give effect to the provisions of Article 2-A as it has been made substantive part of the Constitution. A Constitution is an organic whole. All its Articles have to be interpreted in a manner that its soul or spirit is given effect to by harmonising various provisions. Again in The State versus Syed Qaim Ali Shah (1992 SCMR 2192) it was observed that the Courts while construing the provisions of statute should make efforts that the interpretation of the relevant provision of the statute should be in consonance with Article 2-A of the Constitution and the grund norms of human rights.

This Court in the case of Zaheeruddin and others versus The State and others (1993 SCMR 1718) declared that effect of adoption of Objectives Resolution as Article 2-A in the Constitution by the chosen representatives of the people as the operative part of the Constitution, is the acceptance of sovereignty of Allah to be binding on them who

vowed that they will exercise only the delegated powers within the limits fixed by Allah. Such adoption also enhanced the power of judicial review of the superior Courts. It was further observed that “the Constitution has adopted the Injunctions of Islam as contained in Quran and Sunnah of the Holy Prophet (p.b.u.h.) as the real and the effective law. In that view of the matter, the Injunctions of Islam as contained in Quran and Sunnah of the Holy Prophet (p.b.u.h.) are now the positive law. Article 2-A, made effective and operative the sovereignty of Almighty Allah and it is because of that Article that the legal provisions and principles of law, as embodied in the Objectives Resolution, have become effective and operative. Therefore, every man-made law must now conform to the Injunctions of Islam as contained in Quran and Sunnah of the Holy Prophet (p.b.u.h.). Therefore, even the Fundamental Rights as given in the Constitution must not violate the norms of Islam.”

Again this Court in the case of Mushtaq Ahmad Mohal and others versus The Honourable Lahore High Court, Lahore and others (1997 SCMR 1043) held the appointments to various posts by the Federal Government, Provincial Governments, statutory bodies and other Authorities, either initial, ad hoc or regular, without inviting applications from the public through the press to be violative of Article 18 read with Article 2-A of the Constitution of Pakistan. Not only the actions but also the laws to be framed as such are to conform to the

grund norm established by the incorporation of the Objectives Resolution as substantive part of the constitution with the addition of Article 2-A in the Constitution of the Islamic Republic of Pakistan, 1973.

Reference may be made to the case of Dr.Mahmood-ur-Rahman Faisal versus Government of Pakistan through Secretary, Ministry of Justice, Law and Parliamentary Affairs, Islamabad (PLD 1994 SC 607) wherein Shariat Appellate Bench of the Supreme Court observed that the provisions of the Constitution conferring jurisdiction on the Federal Shariat Court to examine whether or not any law or provision of the law is opposed to the Injunctions of Islam, are to be interpreted in a manner which would give full effect to the process of Islamization of laws and such interpretation will be more harmonious with the spirit and letter of the Constitution.

The net result of the above discussion is that every law to be framed by the Parliament has to conform to the injunctions of Islam as contained in Holy Quran and Sunnah of the Holy Prophet (Peace Be Upon Him) and if any such law is found to be repugnant to the injunctions of Islam, the Federal Shariat Court as well as the Shariat Appellate Bench of the Supreme Court has the power to scrutinize the said law on the touchstone of Islamic injunctions and make the necessary declaration as is contemplated in Article 203-D of the

Constitution and the Federal Government or the Provincial Governments, as the case may be, shall have to amend the law suitably as required in the judgment.

The definition of '*Riba*' as finally determined by this Court will provide touchstone for evaluating as to whether a provision of law conforms to the injunctions of Islam or not and any such provision of law as finally declared to be not conforming to the injunctions of Islam shall have to be amended suitably. The position of the past and closed transactions and the liabilities already incurred under the existing provisions of law is, however, different and shall be dealt with at appropriate stage while dealing with the said question in this judgment.

The stage is now set to examine the question of definition of *Riba*, the Concept of *Riba*, as found in Quran and expounded by the prophet of Islam, practiced by the Righteous Caliphs and understood and explained by the Fuqaha. The criticism of the opponents of Islam, the pleas urged and the apprehension expressed by certain quarters will also be examined here under.

The question of redefining *Riba* in the context of modern international economic and monetary system has been raised time and again, during the past few decades. It was raised before the learned Federal Shariat Court and has also been raised before us not only in the Appeal submitted on behalf of the Federation but also on behalf of some

other appellants. It has been asserted that since the present monetary system has become much more advanced, complex and developed as compared to what is termed by some as the rudimentary system prevalent during the early centuries of Islam, a fresh definition of *Riba* is needed and the earlier or traditional definition, if any, developed by the early doctors of Islamic *Fiqh* suited only their time when the economy was based mostly on barter rather than complex paper currency system. According to this opinion, *Riba* has to be redefined afresh in every age keeping in view the existing economic realities, monetary system and financial institutions of the time. The new definition, it is contended, should be liberal, accommodative and contributive to economic progress and well-being of the people; it should be free from the limited approach of the medieval jurists who, according to this view, were not exposed to such complex and difficult problems as are faced by the modern jurists and the contemporary economists. The upholders of this view differentiate between interest and usury and take pains to show that *Riba* is synonymous with usury and is basically different from the present day interest. Basing their argument on the Qur'anic verse (4: 160-161) which refers to the prohibition of *Riba* in the Jewish law, they argue that the Jews were known for charging interest at exorbitant rates employing all sorts of harsh, coercive and treacherous methods. In their society, *Riba* was extracted from the poor along with a pound of flesh. However, those

who propound this view do not themselves come out with any definite, clear and viable definition of *Riba* which should exclude bank interest and cover only usury charged at exorbitant rates. Any worthwhile, logically phrased and technically defensible definition is bound to be such that either it would exclude everything, even what is conceded to be usury at exorbitant rates or it would include everything traditionally considered *Riba* by Muslim jurists including the bank interest regardless of its rate.

Despite this difficulty, some scholars have tried to develop a theory of *Riba* in such terms as may be helpful to exclude bank interest from the ambit of *Riba*. We wish to thoroughly examine their views and weigh the arguments marshalled in support of this interpretation of *Riba*. But we have noted that either the upholders of this view do not give any definition of *Riba*, or, if they do, it is either all-inclusive or all-exclusive. Therefore, one is left with no other option but to accept the definition of *Riba* agreed upon by almost all the commentators of the Qur'an, the Hadith, the jurists the classical and traditional writers on *Riba*. This definition has been phrased differently by different scholars but, in fact and in effect, there is no material or substantial difference among them. However, we shall come back to the definition of *Riba* later. Before discussing the definition of *Riba* as agreed upon by the overwhelming majority of the Ummah, it is advisable that the minority view of those

who do not consider bank interest as *Riba* is discussed in detail. Among those who advocate this view, the names of Sayyid Rashid Rida, Maulana Jaafar Shah Phulwarwi, Syed Yaqub Shah, Dr. Fazlur Rahman, Mr. Justice Qadeeruddin Ahmad and Shaikh Muhammad Sayyid Tantawi are prominent and deserve mention. The views of earlier four scholars were summarized and condensed in a scholarly article by late Mr. Justice Qadeeruddin Ahmad. Out of these, the views of Sayyid Rashid Rida, Shaikh Muhammad Sayyid Tantawi, Dr. Fazlur Rahman and late Justice Qadeeruddin Ahmad deserve deeper examination because their views and findings were placed before us by the counsel of some of the parties as well as by Mr. Khalid M. Ishaque and Mr. H. U. Beg a former Secretary Finance to the Government of Pakistan who appeared before us on his own initiative. Although the views of other scholars, namely Maulana Jafar Shah Phulwarwi and Syed Yaqub Shah were not formally quoted before us, yet we have taken notice of their views because of the prominent stature these scholars possess. These views have a tendency to influence such people who may not have profound or systematic knowledge of Islam and may be carried away by the apparent force of their arguments. This is evident by some letters written to us by some people as well as some newspaper articles.

We have gone through all this material. It is evident from perusing this bulky literature that a lot of time, resources and energy has

been exhausted by these scholars in exploring and determining the meaning and interpretation of *Riba* as used in the Holy Qur'an to determine whether interest and profit in vogue in our present day economic and financial system fall under the purview of *Riba*. It is contended that Islam being a progressive religion and a way of life for the Muslims', the question of *Riba* should be resolved with a progressive approach so that the progress brought about by the modern economic system does not halt and the journey to progress is not disturbed. In such like arguments reference is always made to the Jews. It is said that since ages Jews have been particularly reputed to be experts in usurious business i.e. charging exorbitant rates of interest by employing all sorts of harsh, coercive and treacherous methods for extracting interest with a pound of flesh. After narrating the details of the harsh attitude of Jewish money-lenders, it is claimed that the position about interest (as used in our day-to-day transactions) is entirely different from usury or *Riba*. In the case of interest it is claimed that there is no compulsion or coercion but it is a simple agreement for levy of a small sum to be paid by the borrower for the use of money. It is contended that the payment of interest is justified because the principal money is used for financing public welfare projects and enterprises in public and private sectors. On the basis of this difference between usury and interest, it is asserted that

the bank interest is not *Riba* and that the misconception has been created by those who do not differentiate between usury and interest.

Following are main grounds on which bank interest is claimed to be different from *Riba*:-

- (i) The prohibition of *Riba* as laid down in the Holy Qur'an should not be interpreted in isolation without considering the context or background in which these verses were revealed as well as the situation in which this prohibition was applied. This neglect or disregard of the context is bound to result in misconception.
- (ii) That *Riba* has a relationship with economic and financial system of Islam and unless there is an ideal Islamic society, free from want, corruption and avarice in the true sense of the terms it is not proper to enforce any of the Qur'anic injunction in isolation.
- (iii) Some people also contend that the traditional sources of government income in an Islamic system are restricted to only four sources, i.e. *Zakat*, *Ushr*, *Jizyah* and *Ghanimah*. In view of the pitiable condition of *Zakat* and *Ushr* collection, the government cannot rely on these sources alone and has to resort to borrowings which, according to this view, cannot be ensured without the payment of interest. Reference is made to the deplorable situation of the distribution of *Zakat* in which mismanagement and embezzlement is known to all and sundry. There being no question of the levy of *Jizyah* and *Ghanimah* in the present days, no alternative is left except borrowing on interest. It is asserted that under the Islamic

system no taxes, duties, cesses can be levied as they are all un-Islamic. But the government has to undertake development work for the welfare of people for which resources are needed which can only be obtained through taxation and borrowings from local as well as foreign lenders.

- (iv) Government also borrows and inculcates the habit of savings among people. The money thus collected is used for welfare projects whereas some profit or interest is given to the persons who contribute to these savings schemes.
- (v) In the absence of any dependable system of welfare for the old and the needy, people want to keep something for the rainy day. If investment is made in a savings scheme both the government and the people enjoy its benefit. Such people can neither work or toil nor can they incur the risk and face the ordeals caused to them by the so-called finance companies in the early eighties. For such people, it is argued, there is no other viable option except to deposit their savings in banks and receive the interest accruing from such investment. The interest accruing on such savings, therefore, should not be equated with *Riba*.
- (vi) There are various methods of deceiving oneself through change of nomenclature. One may call it PLS account or mark-up, yet, this is that very old system which is prevalent since last century. This experience shows that the present system based on interest cannot be changed.
- (vii) The spirit of Islam is the welfare of the people and should remain a predominant factor. The present interest has provided

welfare to the people. There is no exploitation in this system; exploitation has been committed by the vested interest and not by the present day banking system.

These are some of the grounds or arguments advanced by the advocates of bank interest at the popular level in support of their plea. During the hearing of this case quite a good number of newspaper articles have appeared in some of which the views summarized above were expressed. A number of letters, notes and memoranda were sent to us reflecting the wishes and sentiments of the writers concerned. Of these, some supported the view that bank interest was not *Riba*. They based their opinion by and large on these very grounds summarised above. These arguments will be dealt with in the course of this judgment at a proper place. Let us first examine the views of the scholars whose writings have been referred to by some experts as well as learned Counsel of some of the parties:

First of all we take up the views of Sayyid Rashid Rida, being the oldest and the most widely respected among the advocates of this view, and also for the fact that Mr. Khalid M. Ishaque who had relied mostly on these views, complained that the learned Federal Sharait Court neither allowed him to elaborate these view nor dealt with those aspects, nor considered them in the impugned judgment.

The views of Rashid Rida are found in a booklet presented to us along with an English translation by Mr. Khalid M. Ishaque. The English translation being extremely poor, if not altogether faulty, we have discarded it and confined our examination to the original Arabic text entitled “*Riba and Commercial Dealings in Islam*” (published in Cairo, 1960 along with a Foreword by Shaikh Muhammad Bahjah-al-Baitar). This booklet is, in fact, the writer’s response to a set of questions put to him by some people from Hyderabad Deccan, India, in early thirties or late twenties of this century. The booklet includes a lengthy *Istifta* (a request seeking legal ruling by a *Mufti*) covering 39 pages (pages 10-48) of the booklet followed by the detailed answers given by Rashid Rida and reproduced at pages 49-103. The long Introduction to the *Istifta* gives the four questions sent to him from Hyderabad Deccan. It also summarizes the discussion prevailing on the question of *Riba* in the Sub-continent. The Introduction is well-researched and contains a fund of references to the wide range of books of *Tafsir*, *Hadith* and *Fiqh*. References to *Fiqh* books are overwhelmingly from Hanafi books with the exception of very few. This Introduction is followed by the following four questions:-

1. Whether the term *Riba* as used in the Qur’anic verse: “Allah has permitted trading and prohibited *Riba*” requires any explanation or not, particularly according to the Hanafi Jurists? What is briefly the explanation of this term given by

the Law-Giver in the Qur'an and the sound (or *Sahih*) Ahadith?

2. Kindly explain the meaning of *Riba* as used in the Qur'an and the sound Ahadith.
3. Whether the stipulated and definite amount of profit to be paid on the loan is *Riba* according to the *Nass* or not?
4. If it is held that the stipulated profit on the loan is *Riba* then what is the argument in support of this view from the sources recognized among the Jurists.

These questions were answered by some Indian scholar(s) whose name(s) have not been mentioned in the booklet. However, the answers given may be summarized as follows:-

1. The *Riba* as mentioned in the Qur'anic verse (2:275) needs explanation and elaboration according to the Hanafis as well as according to other Jurists. It may well be said that the Ummah has unanimously held this view and the Ahadith reported by Ubadah ibn Samit furnish the required explanation and elaboration to this term according to the majority of the Jurists. (Elaborate discussion on the Ahadith reported by Ubadah and other companions will come later in this judgment.)
2. *Riba* is the increase which has no corresponding consideration in an exchange of property for property. Thus, there is no discrepancy or difference between the meaning of term *Riba* as used in the Qur'an and the meaning of the term as used in the Hadith because the *Riba* mentioned in the Hadith is only

an elaboration and explanation of the *Riba* mentioned in the Qur'an.

3. The stipulated profit on a loan is not *Riba* according to the *Nass* because it has no proof from the Qur'an or from a sound Hadith.
4. The view that the stipulated profit on a loan is *Riba* is not supported by the Qur'an or the Hadith. Sometimes it is substantiated by *Qiyas* (analogical reasoning) and sometime by the Hadith which says: "every loan which entails any benefit or profit is *Riba*". Both these arguments require reconsideration. The argument based on analogical reasoning is not sound because there is no common ground or *illah* between the original case and the present case. As to the second argument it is also inadmissible because it is based on a weak Hadith which cannot be accepted as a basis of argument. Even if we accept the argument that analogical reasoning is sound it is subject to change with the passage of time; because rulings and views based on analogical reasoning are subject to change with the change of environment and circumstances.

The *istfita* containing the long introductory Note along with the above brief answers to the four questions was referred to Sayyid Rashid Rida for an authoritative ruling and/or confirmation of the above answers. Rashid Rida praised the Note along with the answers and spoke highly about the author of the Note. He pointed out at the very outset that the Indian author, despite of the depth of his knowledge and the

mastery over the subject, had confined himself to the views of the Hanafi jurists while the subject required that it should have been studied in the larger perspective of *Fiqh* in general without adopting a certain ruling or abiding by the rules of *Ijtihad* followed in any particular legal school. However, Rashid Rida did not confine himself to subscribing to the views of the Indian scholar but also gave his own opinion. However, he did not agree with the definition of *Riba* as given by the Indian author in his response to the second question and insisted that *Riba* was always in a debt and was not confined to a loan or to a deferred price. According to him, the original Qur'anic *Riba* was different from the *Riba* of the Hadith. The latter, namely the *Riba* of the Hadith had been prohibited because it might have led to the perpetration of the Qur'anic *Riba*. Otherwise, he maintains, the *Riba* of the Hadith does not directly fall under the Qur'anic prohibition and condemnation of *Riba* since it does not involve that enormous evil which is represented by the Qur'anic *Riba*. Rashid Rida had spoken at length on the answer to the fourth question as, according to him, this constituted the basis of the whole discussion.

The nutshell of the views on Rashid Rida is that it is only the *Riba al-Nasi'ah* (also called *Riba al-Qur'an* and *Riba al-Jahiliyyah*) which is prohibited in the Qur'an. All other kinds of *Riba* prohibited by the Prophet (PBUH) are only by way of preventive measures. He

expresses his disagreement with those who consider both kinds of *Riba* to fall under one and the same category. He contends that most of the opinions and rulings given by the jurists in respect of *Riba* have no support from the Shariah directly or indirectly. According to him, this extended meaning of *Riba* is neither in consonance with the fundamentals of Islam nor any principle of legislation nor is based on any *ratio decidendi* drawn from the divine revelation dealing with the prohibition of *Riba*. He disagrees with the views of Imam Abu Hanifah who says that the exchange of two fungible (i.e. countable, measurable or weighable) commodities with an excess is *Riba*. The large body of legal rulings developed by the jurists on the basis of this understanding of *Riba*, according to Rashid Rida, is irrational and unsubstantiated by the scriptural authorities. In this context, Rashid Rida comes out with vehement criticism against the Jurists and considers it to be an intervention in the divine prerogative to determine what is lawful and what is unlawful. He goes on citing examples where a Hanafi jurist considered something to be unlawful and which should not have been held unlawful in the opinion of Rashid Rida or any other jurist.

Although Rashid Rida claims to take up the question of defining the contours of *Riba al-Jahiliyyah* prohibited by the Qur'an, yet his treatment of this subject is self-contradictory. On the one hand, he establishes that the term *Riba* as used in the Qur'an was clear and

express and was fully understood by the addressees of the Qur'an, namely, the Companions. On the other hand, he tries to develop a definition on the basis of some illustrative reports found in the Hadith literature about the nature of *Riba* and *Riba*-based transactions prevalent in pre-Islamic Arabia. He picks up one such report recorded by several authorities and concludes that *Riba* is only that increase which is agreed upon by the parties at the stage of maturity of the initial loan if the borrower is not in a position to pay. Any increase, irrespective of its weight, measure or quantity agreed upon between the two parties at the time of the initial taking of the loan is not *Riba* according to the Egyptian scholar. To put it in more clearly and elaborately, following illustrations will explain the position taken by Rashid Rida: “‘A’ takes Rs.100,000/- as loan from ‘B’ to be paid after one year with an increase of 20%. This initial increase of twenty percent, according to Rashid Rida is not *Riba*. However, if ‘A’ is not in position to pay Rs.120,000/- to ‘B’ at the stipulated time and ‘B’ demands that in order to get more time ‘B’ should extend the period of maturity and, in turn, ‘A’ increases the payable amount from Rs.120,000/- to Rs.150,000/-, only this additional amount of Rs.30,000/- will be *Riba*”. In order to get support for this strange and queer interpretation, Rashid Rida has collected a host of references from different texts of *Tafsir*, *Hadith* and *Fiqh*. However, even a cursory look over this large number of passages and quotations

shows that no single quotation or passage supports the position taken by Rashid Rida. Moreover, the general discussion made by him about the nature of *Riba* and the rationale of its prohibition not only does not support his contention but also ultimately goes against him. The literal meaning of the word *Nasa* and *Nasi'ah*, the illustrative example quoted by the early authorities as well as the rationale of the prohibition of *Riba al-Fadl* as discussed by Rashid Rida himself, all go against the interpretation advanced by him. It is strange that while he expressly and unequivocally considers *Riba al-Nasi'ah* to be the prohibited Qur'anic *Riba*, he tries to apply all the relevant passages where *Riba al-Nasi'ah* has been discussed to his own understanding of *Riba* and insists in a sheer arbitrary manner that all earlier scholars also meant by *Riba al-Nasi'ah* what he himself means. He has simply ignored the very pertinent question why the increase on the first *Nasi'ah* (deferred payment) should not be considered *Riba* and why only the increase or increases on the second or subsequent *Nasi'ah(s)* (deferred payments) should be considered *Riba*. Even if this strange interpretation is taken to be correct for a moment for the sake of argument even then many forms of bank interest will fall under the category of *Riba* prohibited even by Rashid Rida. Under no logic or argument can the interest accruing as a result of the first delay be excluded from the *Riba* as defined by Rashid Rida. Nor the subsequent increases in case of further delays and defaults

be considered to be the only increase included in the *Riba*. All such subsequent increases will have to be counted as second or third increase over and above the principal amount plus the first increase. Neither Rashid Rida nor Mr. Khalid M. Ishaque addressed this question. In short, the views of Rashid Rida are Islamically untenable, logically inconsistent and practically inconsequential insofar as these latter forms of increase or increases are concerned. In spite of academic value of the material contained in the booklet it fails to serve any useful purpose in offering a viable and practical solution to the question of *Riba*.

Following this argument, Mr. Khalid M. Ishaque has also highlighted the report found in the celebrated commentary of the Qur'an by Imam Abu Bakr Jassas Razi, entitled *Ahkam al-Qur'an* in an effort to develop a working definition of *Riba*. According to him, only that kind and brand of *Riba* is prohibited by the Qur'an which was prevalent in pre-Islamic Arabia. Any definition of *Riba*, therefore, should confine itself only to that brand and must of necessity be exclusive of any other increase. According to this report when a person (a debtor) failed to pay his debt by the stipulated time, he was given the option by the creditor either to pay then and there or to increase the payable amount (in consideration for further time). Mr. Khalid M. Ishaque considered only this kind of increase as *Riba* to the exclusion of all other forms of increase over and above the principal amount. To him, this is the *Riba* of

pre-Islamic days which was prohibited by the Qur'an. On a closer and deeper examination, however, it transpires that even this solitary example of one of the prevalent forms of *Riba* has all the elements of *Riba* as defined by Muslim jurists. The nutshell of this deal is the increase over and above the principal amount payable in a contractual obligation against nothing but time. Moreover, if the debtor failed to pay even after the extension of period and increase on the principal amount, he was again to seek further time and to agree to further increase both on the principal and the first increase put together, making the *Riba* doubled and redoubled. Today, when a person borrows from a bank, a financial institution or a credit company and fails to pay the debt at the stipulated time, he has to accept the increase according to the prevalent rate; and if he fails to pay the amount (principal plus the first increase) at the second stipulated time he has to pay further increase or increases calculated exclusively in terms of time. Therefore, even if we accept the contention that this was the only form of *Riba* prohibited by the Qur'an, it would fail to exclude bank interest from its ambit.

Counsel for several appellants and some experts, including Mr. Khalid M. Ishaque and Mr. Abu Bakr Chundrigar, also referred to the view of late Mr. Justice Qadeeruddin Ahmad on the permissibility of bank interest. It was again and again complained that the learned Federal Shariat Court did neither properly examine the views of the late jurist

nor assessed his arguments. It was contended that if the learned court below had thoroughly and impartially examined his views on the subject, it would possibly have reached a different conclusion. Mr. Abu Bakr Chundrigar presented before us the views of late Mr. Justice Qadeeruddin Ahmad and submitted that he fully endorses his views and adopted his arguments. Copies of the articles written by Mr. Justice Qadeeruddin Ahmad were also supplied to us by Mr. Chundrigar. We intend to examine here the views of the late savant in detail. Following are the main points discussed by Mr. Qadeeruddin Ahmad:-

- (i) Only one kind of *Riba* out of several kinds, *Riba al-Nasi'ah* has been prohibited by the Qur'an. The learned jurist here refers to the book of Mr. Nabil A. Saleh, entitled, *Unlawful Gain and Legitimate Profit in Islamic Law* where various kinds of *Riba* have been discussed. According to Justice Qadeeruddin Ahmad, the expression (*Riba*) refers to the form of loan which was in vogue in Arab Society before the advent of Islam. Only this kind of *Riba* (*Riba* of the *Jahiliyyah*) is directly forbidden by the Qur'an to the exclusion of any other form of *Riba*.
- (ii) The Qur'an has condemned *Riba al-Jahiliyyah* but has neither described it nor explained its *modus-operandi*. The Holy Prophet (peace be upon him), too has provided no guidance in this respect. The Qur'an does not tell us what was the mechanism of *Riba al-Jahiliyyah* and how that mechanism functioned. The learned jurist says that the detail of the manner in which a debt increased has not been explained. He

does not know whether it was simply an amount added to the payable due or the capital amount itself was inflated. The language of the verses, nevertheless, indicates that the increase was enormous. It also tells us that there was wickedness, serious injustice and iniquity in these transactions. But we are not told clearly as to what amount was doubled and redoubled. Was it the amount that was increased by reason of a default, namely interest or was it the capital amount itself was doubled and redoubled?

- (iii) The same language (i.e. threat of war with Allah and His Prophet) was used by the Prophet (peace be upon him) for those who would lease out their land to tillers on the condition that they would share the income with the tillers. The Prophet (peace be upon him) pronounced: “One who does not give up lease of land (*Mukhabarah*) for a share of its produce must be prepared for war with Allah and His Messenger (peace be upon him).” This ban on leasing has been treated very differently and lightly by the Muslims as compared to the ban of *Riba* on loans.
- (iv) The alternative methods suggested for the enforcement of interest-free banking system in Pakistan do not adequately meet the requirements of the existing system and do not respond to the needs of international commerce because of the involvement of foreign countries and non-Muslims in this complex exercise.
- (v) The Islamic juristic science has by virtue of interpretation played a controlling role by telling the mankind what Allah

and His Prophet (peace be upon him), have conveyed to humanity.

- (vi) The second caliph, Umar said: “The verse of *Riba* (i.e. the verse which forbids *Riba*) is among those which were revealed during the last days of the Prophet (peace be upon him). He passed away before explaining its implications to us”. Justice Qadeeruddin Ahmad says that the observation of Umar refers to the verse of the Qur’an which prohibits *Riba* and not to an act or observation of the Prophet (peace be upon him). The Prophet (peace be upon him) was not able to explain the implication of the Divine command since he did not live long enough to do so. The Prophetic prohibition of *Riba* as contained in his Farewell Address anticipated the prohibition of *Riba al-Jahiliyyah* which came a few months later in the form of the Qur’anic revelations. The second Caliph Umar appears to have noted that our knowledge of the subject was inadequate but he did not attempt to augment it because obviously the issue was of too serious and delicate a nature for any Muslim to assume the responsibility of playing that vital role. The actual situation therefore remains that neither the Qur’an nor the Prophet (peace be upon him) has explicitly told us as to what precisely the prohibited transactions were which are referred to as *Riba* in the Qur’an and are referred to as *Riba al-Jahiliyyah* by the jurists. Caliph Umar was unable to solve the problem of discovering what exactly *Riba* or *Riba al-Jahiliyyah* was. Umar’s simple and practical advice was, “therefore you should shun all those transactions which clearly involve *Riba* as well as those regarding which there may be doubt that *Riba* is involved in them”. This was a stern decision

which neither explained *Riba* nor removed doubts. Secondly, the lament of Umar over the absence of Prophetic guidance has been amply justified by a voluminous growth of literature on this subject which is the creation of juristic predilections.

- (vii) In spite of all this wealth of thought and wisdom the Muslim world of today presents no true image of the transaction of *Riba*. It only offers by way of substitute the misleading concepts of interest, usury and *sûd*.
- (viii) *Riba* is essentially a concept which deals with economic problems and is meant to save the Ummah from cruel exploitation of the needy by the rich and of the weak by the powerful.
- (ix) The learned jurist quoted from *Encyclopedia Britannica*: “In ancient and medieval times, the main focus of inquiry into the theory of interest was ethical and the principal question was the moral justification of interest. On the whole, the taking of interest was regarded unfavourably by both classical and medieval writers. Aristotle regarded money as “barren” and the medieval school-men were hostile to usury. Nevertheless, where interest fulfills a useful social function, elaborate rationalizations were developed for it”.
- (x) The Prophet (peace be upon him) encourages debtors to voluntarily return more money or a better animal than was borrowed. He himself acted on this principle.
- (xi) The need of clarifying the concept of *Riba* has been so persistent that to this day it has not been differentiated from the concept of *sûd* or interest, although, they are clearly

different in nature and far apart. Muhammad Asad has pointed out that the word usury too is not synonymous with *Riba*. *Riba* is more often translated into English as “usury” than “interest”, because the word “usury” means in the modern usage charging unconscionable interest rather than the ordinary interest.

- (xii) Impartial observers who have a world wide reputation for their knowledge of Islamic thought like Joseph Schacht and Maxim Rodinsen have noted in the *Shorter Encyclopedia of Islam* and in *Islam and Capitalism* respectively, that the concept of *Riba* which has been banned by the Qur’an has not been precisely delineated by the Muslims.
- (xiii) The concept of interest also has features which are wholly absent from the concept of *Riba*. For example, there can be simple interest and compound interest (i.e. the maximum permissible rate of interest) as well as gross interest (i.e., interest inclusive of administrative cost and expenses).
- (xiv) *Riba* was never completely and practically forbidden in Islamic history. Prof. Dr. Hamidullah has said: “As far as my study is concerned during the life of the Prophet (peace be upon him), and in the regimes of the four righteous Caliphs there were Muslims who borrowed [money on interest] from non-Muslims.” Justice (Retd) Sheikh Aftab Hussain, a former Chief Justice of the Federal Shariat Court, has, in an interview given to the daily *Muslim* stated as follows: “For the last 1400 years except for the period of the first four Caliphs, interest was not forsaken. None of our ulema ever felt disgusted by the payment of interest of a Muslim to (non-Muslim) money

lenders. Not only ordinary Muslims but governments and Abbasi Caliphs used to take loans and hypothecate to the Jews the income of some territory which always far exceeded the principal amount. The Turkish Caliphs who presided over the destinies of the Ottoman Empire borrowed money in millions in the nineteenth and twentieth centuries at exorbitant interest rates from England and other European countries.

- (xv) The transactions that are prohibited by the Qur'an are those in which there was injustice, wickedness, iniquity and demand for doubled and redoubled amounts of money. Lending money is not always an act of injustice or wickedness. It can be a blessing to a poor person in whose dark day nobody is prepared to pay any heed to his needs.
- (xvi) The conclusion is that *Riba* is not the interest of modern times, if we carefully read together the two verses of the Qur'an, provided that the word usury, or interest or *sûd* (which is a Persian word meaning profit) is not arbitrarily introduced into them in the place of the Qur'anic word, *Riba*. There seems to be no doubt that according to the Qur'an the word *Riba* does not mean the additional amount of interest or usury or *sûd*. The context shows that it means the capital sum which was doubled or redoubled.
- (xvii) For us the choice is clear because we have in support of our view the acts of the Prophet (peace be upon him). It is well known that he sometimes paid more money to his creditors than that was borrowed by him and termed the excess to be a gift. The practice of charging *Riba* which obtained in pre-Islamic Arabian society, is found to be peculiar to those times

and to that territory. It no longer exists in any Muslim country, nor in any other country of the world. The up-shot of his discussion is that *Riba* was not a system of charging interest, in the sense in which the term “interest” is understood and used today.

These were the main points raised by late Mr. Justice Qadeeruddin Ahmad in his oft-quoted essay. Now we take up these points for a careful examination. In this examination we have benefited from the writings of Mr. Anwar Ahmad Meenai, Dr. Tanzilur Rehman and Maulana Mufti Muhammad Shafi.

The contention of the late jurist that the alternatives so far suggested to replace interest do not adequately meet the requirements is superfluous as according to him neither the bank interest is *Riba* nor it requires to be substituted by any alternative. Moreover, the mere claim that the alternatives are not adequate cannot be accepted without any supporting argument. Today, when more than one hundred and fifty banking and non-banking financial institutions are working around the globe on the basis of these alternatives it is strange to assert that these are inadequate. Furthermore, these alternatives have been suggested not by traditional ulema but by professional bankers and trained economists. But the most significant assertion of late Mr. Justice (Retd) Qadeeruddin Ahmad is that the term *Riba* as used in the Qur’an is very peculiar and is undefinable and untranslatable. Let us see whether the Qur’an has left

the term, *Riba*, undetermined and unspecified, because no formal definition occurs inspite of the stern warning issued to its perpetrators. When we read verses 278—279 in Surah al-Baqarah, we get the following message: “O believers, fear Allah and give up whatever is left of *Riba* if you are believers. But, if you do not desist, then take notice of war from Allah and His Messenger; and if you repent you can have your capitals or *Ra's al-Mal*”. In this verse, the plural of *Ra's al-Mal*, namely, *Ru'us-u-Amwalikum* has been used. *Ra's al-Mal* (singular) literally means the capital or the amount originally invested in a business by the financier or the investor. In the case of loan, it simply means the principal amount, i.e., the amount originally lent. It is more than obvious in this verse that Qur'an prevents the Muslims from claiming anything over and above the principal amount. Even the literal meaning of the word *Riba* clarifies that it means the increased amount paid or claimed in excess of the principal by the borrower or the lender. It has been called *Riba* which is exactly what interest means.

It may be emphasized here that the style of the Qur'an is neither that of a dictionary nor of a law book in the technical sense. It is a guidance revealed for the benefit of the entire mankind and is couched in a language which is easily understandable even by the common reader. It has been revealed in clear and express Arabic, or *Arabiyy Mubin*. It always uses Arabic terms which were well known to the

people to whom it was first addressed. These terms conveyed the popularly understood meaning unless the context suggested otherwise or the Prophet (peace be upon him) guided his followers to the real meaning or the actual intent if it was different from the obvious or apparent meaning. Qur'an has used many other terms like *Shirk*, *Kufr*, *Zina*, *Khamr*, *Maisir* and *Sariqah* to cite only a few examples; but nowhere these terms have been defined in the Qur'an in the technical style of a law-book or a lexicon. Yet, with the help of Arabic dictionaries, the practical demonstration by the Holy Prophet (peace be upon him), the explanations given by the Companions and the Followers (or *Tabi'ûn*), the interpretations given and the details worked out by the Muslim jurists and scholars, each of these terms stand fully defined, candidly explained and clearly understood. The Prophet (peace be upon him) and his Companions around him and the Followers and the disciples of the Companions did not need any lexicons to understand and interpret these terms, since Arabic was their native language and they had the taste of the language. As soon as a verse was revealed they, both friend and foe alike, understood its meaning and received the message. They knew that the style of the Qur'an was to provide only the fundamental axioms while the Sunnah enunciated the detailed principles. On the basis of these two foundations the Companions and their disciples developed the elaborate law. The Qur'an and Sunnah, thus, do

not provide such details of the matters relating to each principle as may be developed by the jurists. The function of divine revelation is not to suspend human mind and to take over the province of independent human reasoning too. Its function is to provide the basic guidelines and to leave the matters of detail to be decided by human reasoning.

The learned jurist here has totally ignored the meaning of the term *Ra's al-Mal* (the plural of which is *Ru'us al-Amwal* used in verse 279). If the Qur'an is to set limit to fundamental axioms then it categorically requires that the lender is entitled only to claim his *Ra's al-Mal*. Abdullah Yusuf Ali, whose translation has been relied upon by late Mr. Justice (Retd) Qadeeruddin Ahmad, has translated the term *Ra's al-Mal* as "capital sums". Here, a question may be raised in line with the thinking of the late jurist as to how can one define the capital sum; more importantly, how can one prove that capital sum includes "reasonable" amount of interest which, according to him, is not *Riba*. But this very verse has provided a clear answer to this question. By restricting the claim of the lender to claiming his *Ra's al-Mal* only, the Qur'an has categorically and explicitly declared that even a single penny paid or claimed in excess of *Ra's al-Mal* is *Riba*. This is precisely what present day interest means irrespective of the name given to it. Immediately after restricting the lender's claim to the *Ra's al-Mal* to the exclusion of any other sum, the Qur'an has added *La Tazlimuna wa la Tuzlamun*

(neither you deal unjustly nor you should be dealt with unjustly). This phrase lays further stress on the principle that claiming anything in excess of *Ra's al-Mal* is unjust. Similarly, borrower's refusal to pay back the *Ra's al-Mal* is equally unjust. In the verse that immediately follows the above verse, the Qur'an says: "but if he (the borrower) is in financial difficulties give him time to repay until his circumstances improve and if you remit by way of charity (i.e., write off the *Ra's al-Mal*) it is better for you, if you understand" (2:280). This verse further clarifies that *Riba* includes anything paid in excess of *Ra's al-Mal* (irrespective of the name given to it). The Qur'an has urged upon the lender to even remit the *Ra's al-Mal* if the borrower is facing financial difficulties. It is again a categorical indication of the philosophy that Qur'an wishes to foster and inculcate in the minds of the Muslims.

This concern of the Qur'an can hardly be compatible with the mentality the interest-based system creates. It is difficult to agree to the contention that on the one hand, the lender is asked to remit even the *Ra's al-Mal* and at the same time, he is allowed on the other hand to charge a "reasonable or conscionable" interest as advocated by the learned jurist. Another question may also arise: What is the definition of "conscionable" and "reasonable" interest? Who and under what authority will lay down this definition? The commercial rates of interest range between 10% to 22% per annum in Pakistan. In the past, lease

financing was available at the annual rate of 28-32 per centum. Will this rate be accepted as a reasonable rate? If so, then what would be the unreasonable and unacceptable rate?

The claim that the Prophet of Islam, peace be upon him, provided no explanation or guidance to solve the important problem of how to define *Riba* is an extremely serious statement which borders on irresponsibility if not anything more serious. Towards the close of the worldly mission of His Messenger, Allah categorically declared, "Today I have completed for you your *Din* and have perfected My blessings and chosen Islam as a *Din* for you". (Qur'an, *al-Ma'idah*: 3). During the Farewell Pilgrimage in the year 10A.H., the Prophet (peace be upon him) delivered the celebrated Farewell Address and asked everyone present: "Have I conveyed to you the message of Allah in its entirety?" The unanimous reply from more than 100,000 Companions was "Yes" to which the Prophet (peace be upon him) is reported to have raised his finger to the sky and said "O Allah! Be a Witness to this (affirmation)". It was on the same occasion that the Prophet (peace be upon him) declared that all outstanding claims of interest, including those due to his own uncle Abbas ibn Abdul Muttalib were null and void, and were given up. Even more queer is the claim that the Prophet (peace be upon him) tacitly and by implication approved the payments of increase over and above the principal amount loaned. This claim has been based on a

report found in the Hadith books that the Messenger of Allah returned voluntarily something better or more than he had actually borrowed. One cannot and should not be oblivious to the obvious difference between a voluntary payment and a compulsory demand as a matter of right. Today a lender has the right to get this increase paid to him through the courts. There is a world of difference between this and the action of the Prophet. What the Prophet (peace be upon him) did was in keeping with the Islamic principal of *Ihsan* which is an important cornerstone of the social teachings of Islam and which seeks to promote better dealings among members of the society. Present day interest, on the other hand, is stipulated as a contractual obligation. Nowhere the Prophet (peace be upon him) or any of his Companions ever borrowed with even the slightest hint of a promise, not to speak of a contractual obligation, to repay with something better or more than the quantity borrowed.

The assertion that Hazrat Umar did not know what *Riba* was, is again a very strange claim. To say the least it amounts to impose an opinion on the Shariah rather than submitting to the clear and emphatic Injunctions of Qur'an and Sunnah. Hazrat Umar accepted Islam at the grown up age of thirty one years. Prior to it and even after having embraced Islam, he earned his livelihood through trading and business for which his family was known throughout Arabia. At this time the practice of charging *Riba* was common and was well known among the

merchants in Makkah as well as other parts of Arabia. *Riba* to them clearly meant stipulated increase on the amount payable in a loan or credit transaction, in consideration of time. The meaning of *Riba* as understood by the Arab traders before Islam is evident from the following definitions and explanations given by leading Muslim authorities of the early centuries of Islam. To quote only a few of these authorities only by way of illustration: According to Qatadah ibn Di‘âmah (d. 120 A.H), a Tabi‘î and a known authority on *Tafsir* and Hadith, *Riba* of the period of *Jahiliyyah* was as follows: a person would sell something to another and allow a moratorium for payment of the price. If the buyer did not pay on the agreed date, the period was extended and the amount was increased. This was *Riba*. According to Mujahid ibn Jabr (d. 86 A.H), a disciple of the Companion, Abdullah ibn Abbas, *Riba of Jahiliyyah* was that a person would borrow from another and promise to repay more if he was given a certain period of time to repay. Imam Abu Bakr Jassas (d. 390 A.H.), a Hanafi jurist of note and fame, has established that during the period of *Jahiliyyah* when people used to borrow from each other, it was usually agreed that a specific amount more than the sum borrowed would be repaid. Imam Fakhruddin Razi (d. 606 A.H.) an authority on rational interpretation of the Qur’an, has also established that during the period of *Jahiliyyah*, people used to lend for a specific period. Interest was charged from the borrower on a

monthly basis. Upon maturity of the term, the repayment of the principal amount was required. If the borrower was unable to pay, the loan was rescheduled and the amount of interest was increased.

These were the forms of business on interest which were in vogue in Arabia. Arabs used the term *Riba* for such transactions. This is exactly what was prohibited by Qur'an. These definitions referring to different kinds of transactions involving *Riba* have one thing in common: the element of increase over and above the amount borrowed, demanded in consideration of a specific time period allowed for repayment. With all the wealth of thought and wisdom about the modality of *Riba* and the rationale of its prohibition preserved for us by the early doctors of Islam, it is difficult to agree with the contention of late Mr. Justice Qadeeruddin Ahmad that the Muslim world presented no true image of the transactions of *Riba* and that it only offered by way of substitute the misleading concepts of interest, usury and *sûd*.

It seems that the learned writer erred in quoting late Maulana Mufti Muhammad Shafi. In his article he quotes Mufti Sahib as admitting that there was some confusion or ambiguity about the true meaning of *Riba*. Mufti Sahib's approach is poles apart. In his masterly treatise entitled *Maslah-e-Sûd*, he has categorically stated: "Upon hearing verses of the Qur'an everybody immediately realized that Qur'an referred to the obvious well known meaning of the term *Riba*,

i.e. charging of anything in excess (of the principal) in credit or loan transactions. Everybody took it as prohibited and gave it up immediately”. Same is true about the claim that verses of al-Baqarah 279-281 clearly prohibiting *Riba* were revealed only 9 or 30 days before the death of the Prophet (peace be upon him). This statement was never made by late Mufti Sahib. In this book *Masalah-e-Sûd*, he has categorically stated that it was around 8th year of Hijrah that the last verses in respect of *Riba* were revealed and through which *Riba* was categorically and finally prohibited in its all forms.

As to the claim that Hazrat Umar lamented the lack of sufficient and adequate guidance by the Holy Prophet about *Riba* and that his statement “Shun all those transactions which clearly involve *Riba* as well as those regarding which there may be doubt that *Riba* is involved in them” was a precautionary measure to put the anxiety at rest. It is also not only misleading but amounts to a thought-less assertion about one of the closest companions and most trusted disciples of the Holy Prophet. A careful and deeper look into the statement of Hazrat Umar, is correctly attributed to him, shows the weakness of the conclusions drawn by late Mr. Justice Qadeeruddin Ahmad. If really Hazrat Umar did not know what *Riba* or *Riba al-Jahiliyyah* was, how could he advise, “shun all those transactions which clearly involve *Riba*.”? The people around him could have asked him as to how they

could shun those transactions which involved *Riba* when the very meaning of *Riba* was not clear. If really Hazrat Umar and no one else present at that time knew what *Riba* or *Riba al-Jahiliyyah* was, either he would himself said that he could not define *Riba* or someone else would have definitely asked him to first define *Riba* in order to enable people to avoid that which he was asking people to shun. If this were the case, Hazrat Umar's advice should have been considered something ridiculous and more confusing. On the one hand, he was not aware of what was to be avoided, and on the other, he directed the people to shun all those transactions which involved *Riba* or had a doubt or possibility of *Riba*.

The fact is that the concern of Hazrat Umar as reflected in this statement does not relate to *Riba al-Jahiliyyah* or *Riba al-Nasi'ah* i.e. the *Riba* par excellence. It relates only to *Riba al-Fadl*. The Prophet (peace be upon him), had fully explained to his Companions that in addition to the excess amount charged on loan or credit sale, the term *Riba* would also apply to certain barter exchanges. This new kind of *Riba* came to be known as *Riba al-Fadl*. Any difference in quantity or any deferment of delivery by one party in a barter dealing on the same commodity is termed as *Riba al-Fadl* and tantamounts to *Riba*. It was this *Riba al-Fadl* about which Hazrat Umar felt the difficulty in outlining the details because the saying of the Prophet (peace be upon him) apparently specified only six commodities. It was not clear to many

whether the prohibition applied only to these six specific commodities or similar things could also be included in the list to which the principle of prohibition could be applied. The fact is that the Companions of the Prophet (peace be upon him) did not ask for further details about this kind of *Riba*. Later on, Hazrat Umar expressed the wish that it would have been better if he or other Companions had found out further details from the Prophet (peace be upon him). The gist of the matter is that in addition to the well known and commonly accepted meaning of *Riba* (i.e., charging excess on amount loaned or offered as credit), the Prophet (peace be upon him) also explained that there is always a possibility that an element of *Riba* may be found in various forms of sale and purchase transactions. As such, the two kinds of *Riba* namely, (i) *Riba al-Nasi'ah* or *Riba al-Qur'an* and (ii) *Riba al-Fadl* or *Riba al-Bai* or *Riba al-Naqd* or *Riba al Hadith* should be clearly understood and differentiated. According to some scholars, *Riba al-Jahiliyyah* included both these kinds because during the period of *Jahiliyyah*, it was common for people to exchange a certain quantity of good quality dates with a larger quantity of inferior quality dates. This was mostly done by the Jews of Madinah who through such tricks controlled the economy and the agriculture of Madinah. This kind of *Riba* was prohibited to close the door of their exploitation and injustice. (See for details Islam ke Ma'ashi Nazaviyye by Dr. Yusufuddin, vol. II, Karachi, 1984).

Late Mr. Justice Qadeeruddin Ahmad also emphasizes the point that during the days of the four Righteous Caliphs, some Companions of the Prophet (peace be upon him) borrowed money on interest from non-Muslim lenders and that the Abbasi Caliphs and rulers of the Ottoman empire also borrowed on interest. As regards the Companions of the Prophet (peace be upon him) the learned Judge has made contradictory claims. On the authority of Dr. Muhammad Hamidullah, it is claimed that during the life of the Prophet (peace be upon him) and of the four Righteous Caliphs there were Muslims who borrowed (money on interest) from non-Muslims. The words “money on interest” appears in parentheses. It is not clear whether these have been added by Justice (Retd) Qadeeruddin Ahmad or these are found in the original writing of Dr. Hamidullah. In the same paragraph, it has been claimed on the authority of late Mr. Justice Shaikh Aftab Hussain, a former Chief Justice of the Federal Sharait Court, that for the last 1400 years, except for the period of the first four Caliphs, interest was not forsaken. Notwithstanding the obvious and glaring contradiction between the two statements, one wonders as to why should Dr. Hamidullah’s claim be accepted on face value without examining his arguments. Moreover, it is not clear whether Dr. Hamidullah has really said it or not. As far as mere borrowing from non-Muslims is concerned it continued till the last moment of the Holy Prophet (peace be upon

him). Even when he passed away he was to pay back a certain amount of money to a Jew with whom his coat-of-arm was mortgaged. As regards the Companions, some of them, such as Hazrat Abbas and Hazrat Khalid ibn al-Walid, had wide-scale interest-based business before Islam. We find several reports about their business in the Hadith literature. But one should not forget that it was in pursuance of the policy of gradualism or *Tadrij* adopted in respect of all major Islamic reforms, that the prohibition of *Riba* was also brought about in stages. An obvious indication of this gradualism is that the verse 130 of Al-Imran was revealed in 3A.H. which prohibited charging of *Riba* doubled and redoubled. It may be observed here that the term *Ad'aafan Muda'afah* qualifies the term *Riba* and not defines it. As pointed out elsewhere in this judgement, the final prohibition as contained in verses 278-279 of Al-Baqarah was revealed in 6 or 7A.H. before the conquest of Makkah. No historical record supports the contention, even indirectly, that the Prophet (peace be upon him) condoned the usurious dealings and borrowing by Muslims after this prohibition. As to the remaining part of the statement attributed to late Mr. Justice (Retd) Shaikh Aftab Hussain that the practice of *Riba* was prevalent after the period of the first four Righteous Caliphs, it may be said that the statement is not substantiated by historical record; and, even if it does have the support of history, the practice of later rulers, hundreds of years after has no legal or normative

value. The authority to legislate and lay down the law or the norms belongs only to Allah. (Qur'an 6:57; 7:54; etc). In the presence of clear and emphatic injunctions of the Qur'an and unequivocal pronouncements of the Holy Prophet (peace be upon him) one cannot rely on the precept practice of non-practising Muslim rulers what to speak of non-Muslim writers, particularly of those whose unfriendly attitude to Islam is well-known. The statement of "impartial" observers like Joseph Schacht and such-like scholars about the meaning and application of Qur'anic terms like *Riba* cannot be relied upon. The claim that the verses relating to the prohibition of *Riba* were revealed just few days before the death of the Prophet (peace be upon him) seems to be based on some misunderstanding or on inadequate study of the chronology of the Qur'anic verses on *Riba*. We have dealt with this question elsewhere in this judgement and discussed the order and the timing of the revelation of these verses. The assertion that till the Farewell Pilgrimage, *Riba* was practised and it was prohibited during the Farewell journey has already been refuted. In the light of our discussion, it is well established that Verses 278-279 of al-Baqarah were revealed in 6 or 7A.H. before the conquest of Makkah (8A.H.) and even before the expedition of Khyber (Muharram 7 A.H.). It has been reported by Imam Sarakhsi and several others, that during the expedition of Khyber, the

Prophet (peace be upon him) instructed two of his Companions to refund any interest that they had charged.

Justice Qadeeruddin Ahmad also raised the issue of *Mukhabarah*, *Muzara'ah* or crop-sharing and contended that Muslims underplayed its prohibition and overplayed the prohibition of *Riba*. This contention is not only highly confusing but also misleading and needs a further examination. Since the learned judge has raised an important and difficult question which may lead to confusion it is necessary that the problem may be discussed in some detail. He has picked out a Hadith on the subject of crop-sharing perhaps to show that the prohibition of crop-sharing as understood by him has been neglected by the Muslims in general and by the jurists in particular. He has also contended that the jurists have not given due importance to the condemnation of *Mukhabarah* by the Prophet of Islam (peace be upon him) implying thereby that the prohibition of *Riba* which was also in similar terms has unduly and unnecessarily been played up. It appears that the author has not gone into other Ahadith on the subject and has not had opportunity to study the Ahadith on the subject as a whole and to arrive at a definite and sound conclusion. It may be mentioned that the Ahadith reported by Rafi ibn Khadij have been profusely misquoted and misinterpreted during the recent decades by the upholders of socialism for various motives. Efforts were made to give the impression that Muslim jurists

collectively and willfully violated the injunction of the Holy Prophet in respect of the prohibition of crop-sharing and insisted to legalize something forbidden by the Prophet (peace be upon him). This impression is far from truth.

In fact, there were several ways of land management and agricultural administration prevalent in Madinah, the details of which are found in the Hadith books under the chapters on *Muzaraah*. A cursory glance over these Ahadith shows that there were four major methods of crop-sharing and land tenure in Madinah. Out of these four the Prophet (peace be upon him) prohibited three and permitted one. The methods prohibited by him were the following:

- (a) As reported by Bukhari, a land-owner would give a tract of land to the tenant on lease on the condition that the tenant would cultivate not only the land leased to him but will also cultivate the land not leased to him by the land-owner. The produce of the two pieces of lands would be respectively divided between the land-owner and the tenant. According to Rafi ibn Khadij, this was prohibited by the Holy Prophet (peace be upon him) because sometimes the produce of two pieces of land was different both in terms of quality and quantity. It was injustice either to the tenant or to the land owner. (See the *Sahih* of Bukhari, Chapter on Muzara'ah and Harth). It was always possible that only one piece of land would produce which the other piece of land would fail to produce anything at all. In this case the party to whom the

latter piece was to be allocated was to be at an obvious disadvantage.

- (b) In some cases the more fertile part of the land or the one nearer to the course of water was allocated to the land-owner while comparatively barren part of the land or the one farther than the course of water was left for the tenant with the result that the land-owner received higher quality and larger quantity of the produce and the tenant was left with lower quality and lesser quantity of the produce. In some cases the part allocation to the tenant did not give any produce at all and the land-owner took the entire produce. Such arrangements were also prohibited by the Holy Prophet (peace be upon him) as reported by Muslim (chapter on Sales). However, if the land-owner did not fix any particular piece of land for himself and the produce of the whole of the land was divided on the basis of same proportion it was allowed.
- (c) In some cases the tenant was required to pay to the land-owner a certain amount of some other produce such as dates etc. other than the one grown on the land. This was also prohibited by the Holy Prophet (peace be upon him) because it also involved injustice to the tenant as nobody could foresee whether his share in the produce would be equal, less or more than the value of the commodity demanded.
- (d) As reported by Bukhari on the authority of Jabir ibn Abdullah, some people leased out their land to the tenant on the condition that a certain percentage of the produce would go to the tenant. This arrangement was allowed by the Holy Prophet (peace be upon him). Not only a large number of Companions

but also the Holy Prophet himself entered into this kind of arrangement with their respective tenants. This is a kind of agricultural *Mudarabah* which was in practice in pre-Islamic Arabia and continued to be in practice after Islam. A similar arrangement was made by the Holy Prophet (peace be upon him) himself with the tenants working on his land situated in Khyber. Many lady companions, particularly the wives of the Holy Prophet (peace be upon him) who were allotted agricultural lands in Khyber and other conquered areas had made similar arrangements with the tenants working in their respective lands. This view has been held by the overwhelming majority of the Companions and other jurists including Imam Malik, Sufyan Thawri, Layth ibn Saad, Imam Sahfi'i and Imam Abu Yusuf and Imam Muhammad from amongst the Hanafis.

In the Hadith literature, a large number of Ahadith have been quoted dealing with different kinds of land tenure mentioned above. The Ahadith in which prohibition has been quoted apply to the earlier three categories mentioned under (a), (b) and (c) above. On the other hand, the kind of arrangement mentioned under (d) has been allowed and was practised by the Companions themselves. It may be mentioned that there were some big land-owners in Madinah whose land was either neglected or under utilized. The owners, because of their affluence or otherwise, did not bother either to cultivate it themselves or to put it to proper use. To such people the Holy Prophet (peace be upon him) advised that they

should give away their land to those who could use it for the benefit of the society and to generate economic and productive activity out of it. A number of such Ahadith in which such advise was given by the Holy Prophet (peace be upon him) have been reported by Imam Muslim and other compilers of the Ahadith. Such Ahadith were always considered by the Companions as motivations and moral recommendations because nowhere the Prophet (peace be upon him) forcefully took away from anyone any unutilized land owned by him. During the recent decades mostly under the spell of communism, these Ahadith were interpreted by some writers to mean the abolition of private ownership of land or to prohibit the system of crop-sharing. Dr. Muhammad Yusufuddin has discussed this question in detail in his masterly work titled '*Islam ke Muashi Nazariyyea*' (Karachi 1984, pp. 328-350). He has discussed the economic implications of the modes prohibited by the Holy Prophet (peace be upon him) and has given also the details of crop-sharing system during the days of the Prophet (peace be upon him) and during the period of his immediate successors. In the light of this brief discussion on crop-sharing it becomes clear that it is only a kind of agricultural *Mudarabah* and is allowed in Islam. The conclusions drawn by late Mr. Justice Qadeeruddin Ahmad are unfounded and without any valid argument.

Another scholar whose views were quoted before us is late Dr. Fazlur Rahman. It was said that Dr. Fazlur Rahman was known for his opinion of considering bank interest to be different from *Riba* and considered it to be allowed under Shariah. Dr. Fazlur Rahman was a profound scholar of Muslim philosophy and had served as Director of the Central Institute of Islamic Research, then situated in Karachi. He had written an article on *Riba* and Interest in 1963 which had created a stir in the academic circles of the country. His was considered to be the first strong voice in favour of holding that bank interest was not the *Riba* prohibited by the Qur'an. His views endorsed the views earlier expressed by Maulana Muhammad Ja'far Shah Phulwarwi and Syed Yaqub Shah. The arguments advanced by the latter two are, by and large, a paraphrasing of the arguments found in the said article of Dr. Fazlur Rahman. Dr. Fazlur Rahman has developed his thesis on the assertion that the *Riba* of the Qur'an is totally different from the *Riba* of the Hadith. Thus, he adopts a wrong line of argument from the very beginning by considering different terms used for the convenience of discussion and facility of understanding by some jurists to be the basis of a distinction in the nature and substance of *Riba*. After making a survey of the relevant Qur'anic verses and the order in which these were revealed, the author tries to explain the meaning of the *Riba* in the light of the established maxim that _____ or one part of the

Qur'an explains another. On the basis of the relevant Qur'anic verses, interpreted in the light of each other, the author concludes that:-

- (i) The *Riba* of the pre-Islamic days was a system whereby the principal sum was doubled and redoubled (اضْعَافًا مُّضَاعَفَةً) through a usurious process.
- (ii) because of this process of doubling and redoubling the principal, the Qur'an refused to admit that *Riba* was a kind of fair business transaction; and
- (iii) while permitting the commercial profit, the Qur'an encouraged the spirit of cooperation as opposed to that of profiteering.

Dr. Fazlur Rahman contends that the historical evidence possessed by him corroborates his conclusions. In support of his contention he selects the tradition recorded in the *Muwatta* of Imam Malik on the authority of Zaid ibn Aslam which is as follows: "In the pre-Islamic days *Riba* operated in this manner: if a man owed another a debt at the time of its maturity the creditor would ask the debtor: will you pay up or will you increase? If the latter paid up, the creditor received back the sum; otherwise the principal was increased on the stipulation of a further term". It is significant to note here that Dr. Fazlur Rahman does not agree with Maulana Abul A'la Maududi who, according to Dr. Fazlur Rahman, assumed that for the first term the credit was granted free of interest. Disagreeing with this view he says

“one fails to understand how this is intelligible in a social set-up such as the commercial Makkahn society or the Jewish Medinise society, where the *Riba* system was quite normal. How could the usurers, who were keen in doubling and redoubling their capital forego the initial interest by way of charity, so to say”. This comment shows that Dr. Fazlur Rahman agreed that the initial increase was also interest and that the usurers would not forego it.

However, Dr. Fazlur Rahman, following the line of Rashid Rida, contends that since the initial increase or interest in itself was not usurious it was not disallowed and cannot, therefore, be considered *Riba*. In reaching this conclusion he relies on the report of Zaid ibn Aslam quoted above. As pointed out earlier, the report of Zaid ibn Aslam does not make even the slightest hint that the first and the initial increase was not to be treated as *Riba* and only the second, third or other subsequent increases were meant to be prohibited. Apart from being logically unsustainable, this contention is contrary to the express Qur’anic injunction which allows only the repayment of *Ra’s al Mal*, i.e. the capital or the principal sum. Under no logic or linguistic interpretation or through any stretch of imagination the first increase can be legitimately included in the principal sum and the subsequent increase excluded. Either each and every increase is to be treated as part of the principal sum allowing thereby all increases even what is considered to be usury

at exorbitant rates doubling and redoubling the principal amount as something pure and permissible, or each and every increase irrespective of the rate, amount or order in which it was demanded is to be included in the definition of *Riba* and to be prohibited. This contention of Dr. Fazlur Rahman also contradicts his own views about the chronological order in which the verses relating to *Riba* were revealed. According to him, verse 39 of Chapter 30 of the Qur'an was the first statement of the Qur'an about *Riba*. This verse which passes a moral stricture on *Riba* was revealed in Makkah in the 4th year of Prophetic mission. The learned scholar rightly points out that it is not at all surprising that *Riba* is condemned in so early a revelation; rather, the absence of such early condemnation could have not only been surprising but also contrary to the wisdom of the Qur'an. The Makkahn verses of the Qur'an are replete with the denunciation of the economic injustices of contemporary Makkahn society, the profiteering and stinginess of the rich and their unethical commercial practices such as cheating in the weight and measurements etc., how is it possible then that the Qur'an would have failed to condemn an economic evil such as *Riba*. However, here it passes only a moral stricture on *Riba*: it does not yet declare it legally prohibited, for Islam had not yet attained political power by which it could eradicate this evil. Dr. Fazlur Rahman goes on to say that when Islam became politically dominant after the Prophet's (PBUH) migration

to Madinah, *Riba* was categorically prohibited in the following words of the Madinise Surh Al-i-Imran: “O ye who believe, do not consume *Riba* with continued redoubling and protect yourselves from Allah, perchance you may be blissful” [Quran III: 130].

This shows that, even according to Dr. Fazlur Rahman, the prohibition of compound interest was revealed soon after the migration of the Prophet (PBUH) to Madina where Islam had become politically dominant. This prohibition was later reasserted in very emphatic terms in a series of revelations which were revealed in three or four installments. As has been discussed elsewhere, the Qur’anic verses 275-276 of Al-Baqarah reasserted the prohibition of every kind of *Riba*. In these verses *Riba* has been mentioned in juxtaposition to trading which was declared to be lawful. It is significant to note that the mention of the permissibility of trading in this verse precedes the prohibition of *Riba*, which fact signifies that the alternative of *Riba* is trading and Allah’s book has already identified the alternative to *Riba* even before totally and fully prohibiting it. This juxtaposition of *Riba* and Trading excludes all discussion about the compound or simple rate of interest because both kinds of interest fall outside the purview of trade. However, the learned scholar’s contention missed this clear and significant message of this verse and he concluded that *Riba* of the pre-Islamic days was a system whereby the principal sum was doubled and redoubled through a

usurious process and because of this process of doubling and redoubling the principal amount, the Qur'an refused to admit that *Riba* was a kind of fair business transaction. Without prejudice to our discussion on the real meaning of the term 'doubling and redoubling' in the context of Qur'anic diction and style, the very simple statement that Allah has prohibited *Riba* takes away the force of the arguments, if any. It is strange that, on the one hand, the learned scholar admits that the revelations regarding the prohibition of *Riba* came gradually and through a series of Qur'anic verses whose chronology has been determined by himself; on the other hand, he overlooks the fact that the qualified statement of verse 130 of Al-i-Imran has been followed by an unqualified and generalized prohibition in verses 275-276 of Al-Baqarah. If the chronology determined by the late scholar is correct, as it undoubtedly is, then the earlier revelation will have to be interpreted in the light of the later revelation under the principle acknowledged by the late scholar as well that one part of the Qur'an explains another. In support of his contention, Dr. Fazlur Rahman has concluded that the *Riba* prohibited by the Qur'an was only that which has been explained in the well-known tradition recorded in *Muwatta* of Imam Malik, reported on the authority of Zaid ibn Aslam according to which the *Riba* during the pre-Islamic days operated in this manner: if a man owed another person a debt, at the time of its maturity the creditor would ask the

debtor: ‘will you pay up or will you increase’? If the latter paid up, the creditor received back the sum; otherwise the principal was increased on the stipulation of a further term”. As mentioned above, the author insists that even the first term of the credit was not granted free of interest and considers it un-intelligible in a social set-up such as the commercial Makkahn society or the Jewish society of Madinah where *Riba* was quite normal to presume that for the first term the credit was granted free of interest. This being the situation there arises no question of restricting the prohibition of *Riba* to what Dr. Rahman considers the doubling and redoubling rate. The Qur’anic injunction that you can receive back only your principal sum clarifies that even the simplest form of *Riba* and the lowest rate of interest was prohibited as it involved increase on *Ra’s al-Mal* or the principal sum. There is strong evidence in the early Islamic literature, some of which has been quoted by Dr. Fazlur Rahman himself which negates his contention. For example, he has quoted another statement of Zaid ibn Aslam showing that the *Riba* of pre-Islamic days consisted in its doubling and redoubling in terms of cash in the case of barter of money and age in the case of barter of cattle. This simply shows that in the repayment of a cattle bigger in age than what had been initially taken there was no question of any doubling or redoubling. This is a case of simple *Riba* or increase over and above the principal amount payable. The force of the historical evidence has

indeed been testified by Dr. Fazlur Rahman himself who concedes that in fact all interest has been abolished by the *Riba*-Ordinance of the Qur'an. Contrary to his earlier contentions Dr. Fazlur Rahman admits at the end of his article that the capital was not doubled or redoubled in each and every given case of loan and that it remained within a great deal of variation in individual cases depending on the circumstances such as the nature of investment, the amount of risk etc. The author of the article concedes that since all these individual cases were part of one *Riba* system in whose nature it was to be so exorbitantly usurious that it had to be banned. It was the system as a whole which was abolished by the Qur'an and hence no exception could be made in individual cases. When the entire system was banned, the milder cases were also naturally abolished since the system itself was tyrannical. On the basis of this last hypothesis the author tries to conclude that the bank interest of today should not be condemned. It is not possible to agree to this view which is based only on mere conjecture. The Qur'an has never differentiated between the milder or harder forms of *Riba*. It has prohibited *Riba* or *Al-Riba* which includes all forms whether harder or milder. The Prophet (PBUH) has equated one dirham by way of *Riba* to be as bad and heinous as the commission of adultery. There can be no two opinions that one dirham increase can neither be considered exorbitant or exploitative by any stretch of imagination. Therefore, the express

prohibition of one dirham indicates that the Holy Prophet (peace be upon him) places the so-called milder interest at par with the so-called harder one.

Dr. Fazlur Rahman has also discussed the well-known tradition attributed to Caliph Umar in which he has been alleged to have said that the last verse of the Qur'an to be sent down was the one prohibiting *Riba* but the Messenger of Allah (PBUH) passed away without having expounded it to us: so leave aside *Riba* and *Reebah* i.e. whatever is doubtful. After having relevant reports on the subject of the last revelation examined, the author has refuted the report attributed to Caliph Umar, because this as well as the other such reports prevent the correct appreciation of the nature of *Riba* prohibited by the Qur'an. It means that Dr. Fazlur Rahman does not agree with the opinion that there are gray areas in the prohibition of *Riba* where a confusion or difference of opinion may arise. The paper also deals with the question of *Riba al-Nasih* and *Riba al-Fadl*, the two well-known categories of *Riba* discussed elsewhere in this judgement. In this context reference has also been made to the question of crop-sharing which is not directly relevant to the subject of bank interest. The author has quoted a host of early Islamic authorities on the definition of *Riba*. But, strangely enough, he disagrees with almost all of them by claiming that *Riba* is only that exorbitant increment whereby the capital sum is doubled several-fold

against the fixed extension of term of payment of the debt. It seems that the underlying purpose of confining *Riba* only to exorbitant rate is to legitimize bank interest and interest rate prevalent in the present day economy. He seems to be in agreement with the upholders of the legitimacy of interest who claim that if the rate of interest i.e., the price of loaning money is reduced to zero one would be faced with a limited supply of money against infinite demand and that, in such a situation, it would become impossible to control the rationing of the credit available. The author also agrees with the western economists in their claim that the rate of interest occupies the same place as price and performs the all-important function that any price mechanism performs, namely, regulating the supply and demand of credit and rationing it among the consumers. To him, the rate of interest functions as an objective standard for allocating the credit and determining the real need for a loan. He dismisses the belief that the interest rate is arbitrary as absolutely groundless. However, it is again strange that after going through a long discussion on the justification of bank interest, it seems that the author considers bank interest and the banking system as a whole to be something alien to the spirit of Qur'an. He admits that the system of economy which the Qur'an requires us to establish is based on the spirit of cooperation for which a total reconstruction of the society is needed in accordance with the teachings of the Quran. Once this objective is

achieved it “would make bank interest and the present banking system quite superfluous which is just what is the spirit of the Quran and the Sunnah requires of us. As long as our society has not been reconstructed on the Islamic pattern outlined above, it would be suicidal for the economic welfare of the society and the financial system of the country and would also be contrary to the spirit and intentions of the Quran and Sunnah to abolish bank-interest. In accordance with the principle of Tadrij or “graduation” and “the easing of the way”, it would be necessary to enact legislation against such grave social inequities as feudalism and hoarding, etc. before proceeding to abolish bank-interest. It would be necessary for every citizen of Pakistan to work arduously and with an untiring zeal to reach the desirable goal of reducing bank-interest to the zero point, in other words, to eliminate it completely. For this end, it would be necessary to increase the volume of real wealth and credit capital in the country to such a point that an equality or near-equality comes to exist between the supply and demand of money in credit, and credit becomes very easy. In such ideal circumstances the motive for bank-interest, and indeed, the profiteering motive may become extinct.”

These last remarks of the late scholar show quite clearly that he himself was not convinced that his conclusions about the

permissibility of bank-interest were in conformity with the spirit of the Qur'an. Otherwise, there was no question of bank-interest being rendered superfluous in the wake of the establishment of the economic system of Islam.

We may now examine the views of Dr. Muhammad Sayyid Tantawi, the Grand Shaikh of al-Azhar as contained in his Arabic book on Interest and Banking Practices. Apart from going through the book of the Grand Shaikh, we have also benefited from a summary containing his views made available to us through the good offices of the Embassy of Egypt in Islamabad. Here is the summary of his views:-

“Dr. Tantawi has made it clear at the very outset that his view on current bank interest and prevalent banking practices are his personal views based on his own understanding of the Injunctions of Shariah though in some respects these views were held by some earlier scholars of al-Azhar as well. Secondly, as Dr. Tantawi himself admits, his views are based on the situation prevailing in Egyptian society and the practice of the Egyptian banks. In the process of formulating his views, Dr. Tantawi benefited from the advice and expert opinion made available to him by a group of Egyptian economists and bankers. A number of factors led him to

study and keep in touch with the problems pertaining to the bank interest and other banking practices. The most important one is that irrespective of their size the banks are working as financial institutions which circulate wealth and distribute profit. In addition, people have to enter into financial dealings in various forms, on which the Shariah does not place any restrictions. Shaikh Tantawi tries to develop some rules which, in his opinion, should not be transgressed and violated in the course of trade and business. According to him, all such commercial dealings are permitted in Shariah which are free from cheating, deception, greed and such other vices as these are prohibited by Allah. Likewise, any trade, business dealing or banking operation which involves any of these evils is prohibited. With these two basic principles in view, the study of the banking operations was undertaken with reference to Egyptian banks and opinion was expressed concerning each one separately. Before discussing the details of the banking practices he clarifies his views concerning "interest". He admits that *Riba* has been expressly prohibited by the Holy Qur'an and Sunnah as is unanimously held by the jurists of Islam. He says: "No two people differ that 'interest' (sic) is one of the gravest vices prohibited by all revealed religions. All people hold this view. In fact, if a Muslim objects to this prohibition of Islam, he thereby defies a matter which is of necessity known to be a tenet of Islam and by this he will be crossing the boundaries of Islam. This shows that the difference of opinion between Dr. Tantawi and other jurists is not about any injunction of Islam with regard to interest. This difference of opinion is, about the

bank interest and the extent to which it is actually *Riba*. Such difference about the details one also finds in the writings of jurists of Islam of earlier period.

According to Dr. Tantawi, interest has been defined by the jurists in a number of ways but he has chosen the following definition: “It is the increase over and above the capital not in exchange for a lawful compensation”. The interest which is prohibited is the one which was known as *Riba al-Nasihah* referred to in the Holy Qur’an. This is the interest which increases with the passage of time. The Sunnah has also stated that interest is one in which the increase or surplus is reserved for a particular party to a contract without anything in exchange. For example, a man gives a loan of a 100 pounds to another but expects 120 pounds in return. Two kinds of dealings fit the above example in the present age.

- ◆ Firstly, what some construction firms do when they sell a building for 10000 pounds — for instance — and the buyer has to pay 1000 pounds in advance and the rest he pays in installments with a certain profit or increase annually. This profit or increase is interest.
- ◆ Secondly, what the richer states do when they give a loan to a poverty-stricken country which needs that money to fulfill its basic needs: a heavy interest is incurred on the actual sum making repayment an uphill task. This interest is also *Riba*.

Before proceeding to discuss bank dealings, Shaikh Tantawi defines four terms which he finds relevant to the discussion on bank dealings. These terms are:

1. *Qurud* (Loans), plural of *Qard* or loan
2. *Duyun* (debts), plural of *Dayn* or debt
3. Deposits
4. Investment

Qurud is more particular than *Duyun* as it is that loan which a person gives to another as a help, charity or advance for a certain time. *Duyun* are those amounts or payments that one has in his liability but it does not belong to him. A *Dayn* is incurred either by way of rent or sale or purchase or in any other way which leaves it as a debt to another. *Duyun* (debts) ought to be returned without any profit since they are advanced to help the needy and meet their demands and, therefore, the lender should not impose on the borrower more than what he had lent. But if borrower volunteers to give something extra out of his own free choice to the lender then he is free to do so. Deposit is that amount of money or goods which one leaves with another person to preserve it for him as a trust and whenever he demands it back, it ought to be returned. All the jurists agree that the man who keeps the deposit has the right to ask for something in return as it might have engaged his efforts and money. Investment means making up wealth just as a farmer makes up his cultivation to get more production. It also means an endeavour to enhance wealth through various means and methods which conform to Allah's injunctions. Each of these terms refers to an activity which has its own principles and rules in Shariah to regulate

it. The main consideration taken into account is the meaning and objective and not merely the words. Whenever words are misused mistake has to occur about the legal position of the transaction. In view of this discussion, Shaikh Tantawi classifies the practices, operations and functions of a bank into two main kinds:

1. Services
2. Investment

The most essential services include: salaries of workers and the funds they earn after retirement, arrangement for the transfer of money from one place to another, issuance and circulation of currency, preserving valuable deposits and guaranteeing its safe hand over when demanded according to the system agreed upon by the bank and the depositors. In addition to these, there are other services offered by some social banks like granting easy-term loans to students, the needy and workers. For instance, Nasir Social Bank (of Egypt) offers these services. All these services are quite laudable and there is nothing wrong if the bank charges something in exchange for these services as service charges. In fact, all revealed religions encouraged these services as they cater for the welfare of a person. The second function of the bank is that of investment which means taking measures leading to the growth of wealth through profit permitted by Allah. It is for this very reason that trading companies and investment banks are established. Investment of surplus money, which is the main source of financiers and funds available to a bank, may be done in various ways.

- (1) Sharing which means that the bank shares with someone in enhancing its wealth according to agreed terms. The Islamic Shariah permits all this so long as it is free from cheating, embezzlement and untrustworthiness. A number of banks have invested their wealth and are sharing profit with others. The National Bank of Egypt has its shares with 64 firms which deal with agricultural, industrial and social enterprises.
- (2) *Murabahah*, which literally means mutual profit is defined as the resale of a commodity with an agreed ratio of profit. An example of this is that the seller (in this case the bank or any finance company) says that I bought a certain item for this much and will sell it with this much profit and the buyer buys it after fully satisfying himself about the original value of the commodity. Nasir Social Bank invests a part of its wealth by *Murabahah*.
- (3) *Mudarabah*: It means that a man who has wealth but lacks expertise and skill offers his money to one who lacks the wealth but is an entrepreneur or an expert. The money is invested with the condition that the profit will be distributed according to the agreed ratio which should be in terms of a known percentage. This dealing was practised before Islam and was endorsed by Islam under a set of rules and conditions to systemize and regularize it.

The most important condition for this kind of a dealing to become lawful, according to Islamic law, is that the percentage of the profit should be known, before hand to both the parties, such as half, a third or a fourth. But if a certain amount of money is fixed and predetermined before hand, this dealing loses its validity. But Shaikh Tantawi here prefers the view of some modern jurists like Abdul Wahhab Khallaf who say that there is no argument in the Qur'an and Sunnah for this last-mentioned condition. *Mudarabah* is validated according to the terms agreed upon by both the parties especially these days when there is no mutual trust. If this kind of dealing is nullified owing to the absence of a certain condition, the entrepreneur should be treated like a hired worker or an employee who works and receives his remuneration in return of his labour and in this way both parties receive the benefit. Allah has not prohibited anything which reaps benefit for the people. The opinion of Shaikh Tantawi of permitting the fixation of a predetermined amount before hand is based on nine arguments presented by him in the book. Moreover, he agrees with Khallaf's view on *Mudarabah* and considers it applicable to those who keep their wealth in banks and get a fixed profit out of its proceeds. The amount of profit may be fixed keeping in view the amount of the capital. The arguments given by Shaikh Tantawi may be summarized as follow:

- (1) Fixing the profit before hand is not a matter of creed or worship so that it cannot be altered. Rather, it is a financial dealing which is based upon the agreement of the parties to the contract. His argument is the Qur'anic

verse: “O ye who believe, devour not your property among yourselves vainly, unless it be a merchandise by mutual consent.....” (*al-Nisa*: 29). This means that it does not befit a believer to devour the wealth of another through unlawful means.

- (2) Islamic Shariah is based on the principle of *Maslahah* or caring for the peoples’ welfare for all times and places. This gives the authority to government to take steps to ensure the welfare of the people. This may apparently go against the express text of some Ahadith where the Prophet (peace be upon him) disallowed price-fixing but a great many jurists allow it especially if the traders raise prices of commodities to exorbitant rates. So if the jurists considered the peoples’ welfare and did not abide by the express injunction even in its presence, then it is all the more befitting that fixing the profit, especially when it is in the interest of the people, should be allowed particularly when there is no express injunction on the matter. The maximum that can be said is that those who disallow this dealing do it on the basis of their own *Ijtihad* and analogical reasoning. They compare the contract of *Mudarabah* with the contract of *Muzara‘ah* or crop-sharing.
- (3) There is no Islamic injunction which prohibits any party to a contract of *Mudarabah* from fixing the profit in advance so long as it is agreed amicably by both the sides. Accordingly, there is nothing wrong if the bank where money is deposited for investment fixes the profit and uses the money for lawful investment.

- (4) The banks always fix the profit in advance after carefully studying the international and national markets and the economic conditions of the society. Moreover, the Central Bank regulates the fixation of these profits.
- (5) Fixing the profit brings benefit for both the investor/saver and the entrepreneur.
- (6) Fixing the profit in advance does not contradict the possibility of a loss on the part of the investor, whether a bank or individual. This is because if there is loss on one ground in a trade, one may gain on another ground. If the loss occurred due to external factors, the investor ought to shoulder the burden as a necessary consequence. This is decided by those responsible in this regard. This condition can also be mentioned in the contract. As for losses due to mishandling or bad administration they do not fall under this category and may not be discussed here.
- (7) Non-fixation of a particular amount as profit in these days when dishonesty and mistrust are the order of the day may put the owner of wealth at the mercy of the entrepreneur who might not be honest.
- (8) Another reason is that there is a rule in some factories that if there is any loss at the hands of a worker, he should be made responsible for it. The same losses can be shouldered by bank deposits for which the saver has the right to ask for steps to save and protect his capital. The Shariah does not mention any particular requirement in this regard but since they are for the

welfare of the people they can be categorized under *al-Masalih al-Mursalah*.

- (9) Even if fixing the profit impairs the contract of *Mudarabah*, none of the jurists said that this condition turns it into an interest-based contract. Rather, they all agree that the entrepreneur becomes like a hired worker who will get his remuneration according to the market rate (or *Ajr Mithl*). The investor may take whatever remains of the profit. The position of the bank here, according to Dr. Tantawi, is like a hired worker for those who deposit their money in it and are satisfied with the profit they receive. In this way, this dealing will not be that of interest. Although it is true only through a *Qiyas*, because according to the jurists in a *Mudarabah* which is impaired the workers share is fixed and not the share of the investor.”

Dr. Tantawi, thus, holds that bank dealings are allowed not only because they fall under *Musharakah*, *Murabahah* and *Mudarabah*, but also because, there are other forms of dealings as well which Allah has permitted. According to him, all bank dealings of investment are permissible. The bank exercises the power of attorney or legal representative. This is seen by him to be exactly in accordance with the Islamic framework. His view is manifest and clear: the saver assigns the bank and delegates to it total power of representation to invest his wealth

in things permitted by Allah. The saver should be satisfied with the profit that the bank offers.

The Shaikh's views can be summarized as follows: Fixation or non-fixation of the profit in bank dealings does not have any impact on the lawfulness or unlawfulness of the dealing as long as both the parties agree upon and as long as all dealings are done without any cheating, lie, deception, oppression or interest or anything which Allah has prohibited. One is, therefore, free to deal with banks whether they fix the profit or not. But it should be kept in mind that the standard requirement is that all dealings should be made free from the evils mentioned above. The Shaikh finally gives preference to the dealings which fix the profit saying that it is closer to the spirit of Islam as it clearly defines the rights of the parties and what they deserve. Added to this is the Sahikh's opinion concerning "certificate of Investment" about which he says that it is permissible and so are the profits coming therefrom as long as the saver agrees to give full authority to the bank to invest his wealth where it wishes and be satisfied with the profit he receives whether monthly or otherwise.

The gist of this discussion is that Dr. Tantawi does not consider the present bank interest to be *Riba*. He treats it to be like the profit of a *Mudaraba* or *Murabahah*. However, on a closer examination their argument advanced by the Egyptian Shaikh loses ground. Even if

this logic is accepted for the sake of argument that the bank interest is like profit and it can apply only to the profit paid by the bank to the depositors. But it does not apply to the interest charged by the banks from the borrowers. Dr. Tantawi has not discussed this aspect of the operation in his book which deals only with one side of the coin. What the banks do with the savers money, how they lend it out and under what conditions and arrangements they charge interest? These questions have been ignored by the learned scholar. Unless these important questions are properly answered his arguments will remain incomplete. The learned Shaikh has missed the important fact that it is the lendings of the Bank which is the major factor and not the deposits it receivers. It may be pointed out here that Shaikh Tantawi does not claim any direct knowledge, not to speak of any expertise about modern banking system. He has clearly and repeatedly said that his opinion is based on the understanding of the banking operations given to him by a group of bankers. However, it may also be noted that there was great uproar in the academic circles of Egypt when the book was published. Even the concerned bodies of Al-Azhar are said to have disowned the views expressed in the book. This is in addition to a number of rejoinders coming from many Egyptian scholars in refutation of the views of Shaikh Tantawi. The most powerful and academically most sound

rejoinder came from Dr. Yusuf al-Qaradawi, a renowned jurist from Egypt itself.

The most important question raised by some scholars which also finds its echo in the writings of Dr. Fazlur Rahman, Justice Qadeeruddin Ahmad and Dr. Shaikh Muhammad Sayyid Tantawi is that of any possible difference between consumption loans and production loans. It is vehemently argued by these writers that while determining whether any increase on a loan is *Riba* or not, the question of the purpose of the loan has to be kept into consideration. According to this opinion, a loan taken for commercial purposes should be considered different from the one taken for the purpose of personal use. While a demand to pay more over and above the principal amount of a loan taken for personal consumption is *Riba*, it is asserted that no justification is found to include the increase on loans taken for commercial and investment purposes in the category of *Riba*. The upholders of this view mainly rely on the arguments contained in the writings of Maulana Jaafar Shah Phulwarwi and Mr. Yaqoob Shah, both published by the Institute of Islamic Culture, Lahore. We shall shortly examine this contention. During his submissions before this Court as well as before the learned Federal Shariat Court, Mr. Khalid M. Ishaque also advocated this point of view. He relied on the writings of a contemporary Lebanese author, Dr. Nabil A. Saleh and American Jewish author Dr. Abraham L.

Udovitch. Mr. Khalid M. Ishaque also provided to us photo copies of the scholarly books of these authors.

Dr. Nabil A. Saleh in his book *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* has examined the concept of *Riba* and its application to the financial system developed by the Muslims both in the past and in the contemporary Muslim world. As a balanced and judicious author, he has tried to discuss all possible aspects of the question of *Riba* as discussed in Muslim history and has referred to different views on the subject. The difference between *Riba al-Nasi'ah* and *Riba al-Fadl* has also been discussed by the author. While he faithfully records that there is no doubt that the majority of Muslim scholars and modern men have interpreted and continue to place a wide-range interpretation on the prohibition of *Riba*. A few of them have endeavoured to confine such prohibition within more restricted limits. The learned author has noted that since these few scholars and men of learning include some most eminent scholars, their views carry some weight and deserve to be reported. It is clear from his treatment of the views of this minority group that he is reporting them because they deserve to be taken notice of in view of the eminence of their upholders. The author's own findings on the basis of which his entire book has been developed are exactly the same as held by the overwhelming majority. The author also records that each of these minority views has been the

subject of incessant discussion and, of course, harsh criticism. The personalities to whom this minority view is attributed are the well known companion of the Prophet (peace be upon him) and his cousin Abdullah ibn Abbas, the renowned jurist and thinkers of the 14th Century C.E. and a Hanbali theologian Ibn Qayyim al-Jawziyyah, the renowned Egyptian scholar and leader of modern renaissance Mufti Muhammad Abduhu, his celebrated disciple Sayyid Rashid Rida, the renowned modern Egyptian jurist Abd al-Razzaq Sanhuri, the contemporary Syrian scholar and statesman Dr. Maroof Daoualibi, the well known Egyptian jurist Shaikh Abdullah Draz and one Mr. Zaydan Abu al-Karim Hassan.

Let us discuss the views attributed to these luminaries. It has been reported in some earlier writings of the subject that Hazrat Abdullah ibn Abbas was initially of the view that the only *Riba* which was declared unlawful by the Prophet of Islam was the *Riba al-Jahiliyyah* as was practised by the Arabs before Islam. It has been attributed to Hazrat Abdullah ibn Abbas that he did not consider *Riba al-Fadl* to be the *Riba* prohibited by the Prophet (peace be upon him). It is contended by the author and also endorsed by Mr. Khalid M. Ishaque that Abdullah ibn Abbas held a liberal view of *Riba* and relied on a Hadith reported by himself which, in his opinion, as understood by Dr. Nabil Saleh and Mr. Khalid M. Ishaque, superseded the Ahadith about *Riba al-Fadl*. These Ahadith being the last ruling of the Prophet (peace

be upon him) on the subject of *Riba* say: “No *Riba* except in the *Nasi’ah*”. The author also records the interpretation given to this Hadith by the upholders of the majority view who see it as putting more emphasis on *Riba al-Nasi’ah* and not as superseding the earlier Ahadith. The author also acknowledges that there are reports that Abdullah ibn Abbas had later reviewed his earlier interpretation.

The question of the views of Abdullah ibn Abbas about *Riba al-Fadl* had been the subject of long discussions in the academic and juristic circles throughout Islamic history. Almost all the major writers on the subject have dealt with this question. There is almost a consensus that Abdullah ibn Abbas had retracted on his earlier views and had adopted the majority view that both kinds of *Riba* (*Riba al-Nasi’ah* and *Riba al-Fadl*) were prohibited in Islam. We shall refer to these findings of the renowned writers on the subject separately. However, even if it is conceded that Ibn Abbas continued to stick to his original interpretation and continued to exclude *Riba al-Fadl* from the Qur’anic prohibition of *Riba*, it will serve no purpose as far as the question of bank interest is concerned. The transactions of the banks can in no way be considered to be in the nature of barter sales and hence, subject to *Riba al-Fadl*. As we have already pointed out, *Riba al-Nasi’ah* means increase on the principal amount in a deferred payment, as the word *Nasi’ah* (deferred payment or deferment) clearly and unequivocally shows.

Ibn Qayyim al-Jawziyyah had dealt with the subject of *Riba* in his juristic *chef d'oeuvre*, *I'lam al-Muwaqqi'in*, basically with a purpose to highlight the rationale of the prohibition of *Riba* and the juristic principles which regulate this prohibition and demarcate its limits. In this context, Ibn Qayyim has tried to differentiate two kinds of *Riba* from each other. The *Riba par excellence* was to be distinguished for facility of understanding and argument from the *Riba* by way of extended meaning. For the first category he uses the term manifest *Riba* showing thereby that this is the *Riba* which is expressly and manifestly prohibited by the Qur'an. On the other hand, he calls *Riba al-Fadl* as Hidden *Riba* prohibited by the Prophet (peace be upon him) under the principle of *Sadd al-Dhariah* or preventive measures. Dr. Nabil Saleh has given a faithful summary of the views of Ibn Qayyim which may profitably be quoted here:-

“In one of his treatises, Ibn Qayyim differentiates between “hidden *Riba*” (*Riba khafi*) and “manifest *Riba*” (*Riba jali*). Manifest *Riba* is *Riba* by way of deferment (*Riba al-Nasi'ah*) and hidden *Riba* is *Riba* by way of increase (*Riba al-Fadl*). Hidden *Riba* is not forbidden in itself but only when it is a way to gain manifest *Riba*, which is forbidden in itself. Because of such a distinction, Ibn Qayyim saw that the degree of prohibition was not the same in both categories: it was much stronger in manifest *Riba* or *Riba al-Nasi'ah* than in hidden *Riba* or *Riba al-Fadl*. As a consequence, manifest *Riba* (*Riba al-Nasi'ah*) cannot become lawful except in the case of pressing necessity (*darura mulji'a*), like that which allows the eating of carrion. On the contrary, hidden *Riba* (*Riba al-Fadl*) can become lawful in case of need (*haja*) only, which is obviously governed by less stringent conditions than “pressing necessity”. In other words, *Riba al-Fadl* or hidden *Riba* is a “gray

area”: it is prohibited when there is a fear that it may be allowed in case of need”. [Page 27: Unlawful Gain and Legitimate Profit in Islamic Law, Cambridge University Press- 1986 (Quoting I’lam-al-Mawaqqrin, Vol-II, P154ff)]

These views of Ibn Qayyim leave no doubt that *Riba al-Nasi’ah* is manifestly and emphatically prohibited by Islam. As such, there is no difference between the views of Ibn Qayyim and the views of the overwhelming majority of Muslim jurists. The plea that Ibn Qayyim’s views support the contention that bank interest is not *Riba* is not substantiated by the writing of Ibn Qayyim himself or even by the summary of his views given by the Lebanese author. To this extent, the contentions of Mr. Khalid M. Ishaque are unfounded.

Mufti Muhammad Abduhu and Sayyid Muhammad Rashid Rida have been referred to by Mr. Khalid M. Ishaque in support of his submissions to the effect that bank interest was not prohibited under the principles of Islam. We have already discussed the views of Sayyid Rashid Rida as contained in his own booklet on the subject of usury and bank dealings in Islam. Let us now take up the view of Mufti Muhammad Abduhu as reported by Dr. Nabil Saleh. According to his summary of the views of Mufti Muhammad Abduhu, the *Riba* disallowed is only the *Riba al-Jahiliyyah* (pre-Islamic *Riba*) which is manifest (*Jali*) *Riba* and consequently is prohibited not as a way of leading to an usurious transaction but as an usurious transaction in itself. As for the two other sorts of *Riba*, namely (*Riba al-Fadl* and *Riba al-*

Nasi'ah) both provided for in the Hadith and not in the Qur'an, their prohibition tends to close the loophole which otherwise might permit manifest *Riba (Riba Jali)*. Thus, *Riba al-Fadl* and *Riba al-Nasi'ah* are under a presumption of prohibition and this presumption is not conclusive but rebuttable. Thus, again the sale of any of the six articles mentioned in the Hadith, with an increase and whether in a hand-to-hand transaction or in a deferred one, is disallowed only if it is intended to lead to manifest *Riba (Riba Jali)*, which takes place when interest accrues on interest already accounted by the time the transaction was concluded. The net result of the views of Mufti Muhammad Abduhu as quoted by the author is that the first increase on the termed loan is lawful even though agreed in consideration of the delayed term of payment but if, at maturity date, it is decided to postpone that maturity date against a further increase, that is the unlawful *Riba al-Nasi'ah*.

It is difficult to critically examine and assess the views of Mufti Muhammad Abduhu as to the basis of differentiation between the *Riba al-Jahiliyyah* and *Riba al-Nasi'ah*. No original writings of Mufti Muhammad Abduhu have been quoted by Dr. Nabil Saleh nor identified by Mr. Khalid M. Ishaque. These views have been recorded by his disciple Sayyid Muhammad Rashid Rida in one of his *Fatawas*. Moreover, in the presence of such an overwhelming evidence and scholarly authorities which establish beyond any shadow of doubt that

Riba al-Jahiliyyah and *Riba al-Nasi'ah* were identical and were always considered to be one and the same thing, it is not possible for any responsible student of Islamic Law to agree to the views of Mufti Muhammad Abduhu. If *Riba al-Nasi'ah* is not the *Riba* prohibited by the Qur'an then what is the *Riba* against which a declaration of war has been made by Allah and His Messenger? It is strange that Mr. Khalid M. Ishaque seems to uphold the views of Mufti Muhammad Abduhu and Sayyid Rashid Rida at the same time, while the former does not consider the *Riba al-Nasihah* to be the Qur'anic *Riba*, the latter is clear on this point and concedes to the views of the majority. Again, the statement attributed to Abdullah ibn Abbas and heavily relied upon by all the defenders of the Bank interest also goes against the view attributed to Mufti Muhammad Abduhu.

An attempt to find out whether the *Riba* in the Pre-Islamic Arabia was paid on personal and consumption loans or on commercial and productive loans as well, was undertaken by the Institute of Islamic Culture, Lahore in late fifties and early sixties of this century. The Institute had published a book under the title “کمرشل انٹرسٹ کی فقہی حیثیت” which consisted of articles written mostly by Maulana Muhammad Jaafar Shah Phulwarwi and Syed Yaqoob Shah, a former Auditor General of Pakistan. The latter had further elaborated his article and got it published as an independent book by the Institute of Islamic Culture

itself. The arguments advanced by the learned contributors to this book seek to prove that commercial interest was unknown to pre-Islamic Arabia and that the Qur'anic prohibition of *Riba* is applicable only to the interest charged on personal and consumption loans. By claiming that pre-Islamic Arabs were not aware of commercial and productive loans, the learned writers tried to establish that neither Bank interest nor the interest paid by the Government on loans received by it or the securities and certificates issued by it falls within the ambit of *Riba* prohibited by the Qur'an. Without going into the merits of this argument at this stage it has to be observed that the foundation on which the argument has been raised is very shaky and uncertain. The approach of the learned writers is not supported by valid arguments accepted for a historical inquiry. A historian may establish the existence of a practice or an institution at a certain stage of past history in the light of the available data and recorded evidence. But it is extremely difficult, if not at all impossible, to establish the absence or negate the existence of a practice or institution in the ancient history. Secondly, either the available data establishing not only the existence but general prevalence of commercial loans in pre-Islamic Arabia was not known or available to the learned writers or they purposely chose to ignore it which seems to be the case in view of the internal evidence of their own writings. They have taken for granted as a basic postulate that commercial and productive loan is

the invention of the western capitalism and that the institution of financiers and financial intermediaries was unknown to other civilization particularly the Arab-Islamic civilization.

Before we take up the examination of the material relevant to the existence or otherwise of commercial loan in pre-Islamic Arabia, we should be clear in our minds about the extension of the Qur'anic prohibition of *Riba* to such forms and practices of *Riba* which were not known to pre-Islamic Arabs. Nowhere the Qur'an restricts the prohibition of *Riba* to the form or forms prevailing at that point of time in Arabia. It prohibits *Riba* with the definite article '*al*' which is used to denote all-inclusiveness (*Istighraq*) which means that all forms and categories of *Riba* are prohibited as long as they fall within the description of *Riba* given by the Qur'an. Nowhere the Qur'an or the Sunnah of the Holy Prophet (peace be upon him) refer to the purpose or the object of loan as something relevant to the prohibition of *Riba*. The Qur'an declares each and every increase over the principal sum as *Riba* irrespective of the object or purpose for which the principal sum was borrowed. The exercise to find out whether the Arabs of pre-Islamic Arabia were aware of productive and commercial loans is, therefore, merely an academic exercise. However, when examined carefully there is found an abundant fund of evidence to establish beyond any shadow of doubt that the Arabs were not only aware of the concept of

commercial loans but also practised it at such a wide scale that almost the entire trade of the pre-Islamic Arabs was mainly run on the basis of commercial loans taken on the payment of interest or *Riba* which was later prohibited by the Qur'an. Not only the express wording of the Qur'an in verse No. 279 of Chapter-II but also the commentators of the Qur'an, compilers and scholars of the Ahadith, the jurists and the lexicographers are unanimous and clear that *Riba* means any increase over and above the principal sum required to be paid in consideration of time. Some examples of how *Riba* was defined by earlier authorities have been quoted in the judgment of the learned Federal Shariat Court as well. Some of these may be reproduced here:

The word "interest", by and large, has now been accepted and is understood as *Riba* (See Stienagass English – Arabic Dictionary, Lahore 1979, the word 'interest'). *Riba* Usury, as defined in 'A Dictionary of Islam' by Thomas Patrick Hughes, (Lahore, 1964, page 544) means "an excess according to a legal standard of measurement or weight, in one or two homogenous 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". 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 Exod, xxii. 25; Lev. XXV. 36 (Usuri). 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 Tabari (d. 310 AH) in *Tafsir Tabari* (Vol. III, p.64) commenting on the Qur’anic verse (Baqarah: 275) writes that: “*Riba* is that increase which the owner of money or the financier receives from his debtor for giving him time to repay his debt”. Ibn al-Athir, in his famous work *Kitab al-Nihayah fi-Gharib al-Hadith wa’l-Athar* Cairo, 1322 AH. Vol. II, p. 66 says: “The original meaning of *Riba* is excess and in the terminology or the Shariah, it means increase over and above the principal without any contract of sale having taken place”. Ibn ‘Arabi in his noted work, *Ahkam al-Qur’an*, (Cairo, 1957, Vol. I, p. 242) has defined *Riba* to be the name of every increase in lieu of which there is no consideration. Allama Burhanuddin al-Marghinani (d. 593 AH) has defined *Riba* in his book, *Al-Hidayah* as: “*Riba*, in law, signifies an increase in a (loan) contract in which such increase is stipulated as an obligatory condition on one of the parties, without any return, i.e. without any corresponding property (*Mal*), in exchange. (See also Book XIV on Sale Chapter VIII on *Riba* or usury. *Hidayah*, English Translation by Hamilton, Lahore, p. 289). Imam Fakhr-al-Din Al-Razi

(d. 606 AH) 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. The forbiddance of *Riba* relates to a special kind of contract which was known amongst the Arabs as *Riba al-Nasi'ah* i.e., increase on debt. (The other kind of *Riba* called *Riba al-Fadl* is outside the scope of the present discussion). Allamah Jassas in his *Ahkam al-Qur'an* (Istanbul, 1335 AH. Vol. I, p. 469) defines the term *Riba* as the loan given for a specified period on the condition that on the expiry of the period, the borrower will repay it with some excess. Even in common law parlance "interest" has been held as the excess over and above the original advance paid to the creditor in consideration of the time allowed for repayment. The fact that it is not described in so many words as interest will not alter its character". (AIR 1944 Mad. 243). Halsbury's Laws of England, (Para 106, Vol. 32, 4th Edition) defines interest as follows:

"Interest is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another...."

These examples, taken from the impugned judgement of the learned Federal Shariat Court, provide sufficient and ample evidence to establish that the purpose of loan is totally irrelevant in the context of the definition of *Riba* as the prohibition of the Qur'an extends to both the categories of *Riba*, namely interest charged on commercial loans and the

interest charged on personal or consumption loans. Precedents of the pre-Islamic and early Islamic Arabia also establish that the Arabia Riba did include excess paid in commercial and productive loans. The economic history of the city of Tayef, the habitat of the tribe of Thaqif, provides examples of different kinds of loans prevailing in pre-Islamic Arabia as well as the kinds and modes of interest charged on such loans. As against the city of Makkah, the city of Tayef was known for its agricultural produce as well as industry and handicrafts in addition to trade and commerce. As reported by the historian al-Baladhuri (*Futuha al-Buldan*, Cairo 1932 page 67), there was a sizeable Jewish population in the city which also participated in the trade and business of the city. They, alongwith the members of the tribe of Thaqif, had organized their trade and commerce on the basis of interest. There were sections of the population which had specialized in Riba as recorded by the well-known commentator of the Qur'an, Abu Hayyan al-Andulasi in his well known commentary of the Qur'an known as al-Bahr al-Muhit (Vol.II, p. 335). He also records that the tribe of Thaqif was in the forefront of all the Arab tribes in their involvement in interest. The traders and businessmen of Tayef not only provided money on interest to the people of their own city but also provided interest-bearing loans to the traders and businessmen of Makkah. This interest was received both in cash as well as in kind. According to the earliest authorities (such as al-Tabari,

commentary of the Qur'an, Vol. IV, p.55), the tribe of Banu Mughirah, a branch of the tribe of Quresh of Makkah were regular and permanent clients of the traders of Thaqif and regularly received interest-bearing loans from them. In fact, the interest-bearing business of the people of Tayef prospered mostly because of the Makkahn traders who received loans from Tayef. Makkah was neither an agricultural town nor there were goods and minerals nor any major industry. The main source of their affluence was trade and commerce for which they borrowed money on interest from others particularly from Tayef. It was because of this exceeding involvement of the people of Tayef in Riba and interest that on their submission to the political authority of the Holy Prophet (peace be upon him) immediately after the conquest of Makkah in the 8th year of Hijrah the Holy Prophet (peace be upon him) expressly provided in the agreement of peace that they would stop all interest-bearing transactions, would also give up their claims of Riba against others and would not pay others' claims involving Riba. This express provision of the Treaty of Peace with Thaqif as well as other non-Muslims groups such as the Christians of Najran clearly and unequivocally lays down the principle that no Muslim or non-Muslim citizens of the Islamic State is allowed to indulge in any Riba-based transaction. It may be pointed out here that the meaning of the application of the term Riba had already been extended by the Holy Prophet (peace be upon him) to include what

is known as Riba al-Fadl, Riba al-Sunnah or Riba Khafi. This kind of Riba was prohibited much earlier than the conquest of Makkah and had become well-known among the Muslims. The fact that the Prophet of Islam prohibited the non-Muslims of Tayef from all Riba without restricting it to the pre-Islamic mode or brand negates the argument of the learned counsel for the Federation that the non-Muslims in an Islamic State are allowed to practise Riba al-Fadl.

When the Prophet (peace be upon him) left for Madinah after completing the conquest of Makkah and signing the Treaty of Peace with Tayef, there was a dispute between some traders from Makkah and Tayef about the payment of certain pre-Islamic outstanding claims. It seems that the newly converted Muslims of Makkah were not clear about the extension and application of the prohibition of Riba to the outstanding claims of pre-Islamic days. Some of them thought that the prohibition of Riba was not retrospective and that they could still claim the outstanding amounts due on others. The dispute was referred to the Qadi of Makkah, Attab Ibn Usaid who was appointed by the Holy Prophet (peace be upon him) after the conquest of the city. The young Qadi dismissed the claim but on the insistence of the claimants he was forced to refer the matter to the Holy Prophet (peace be upon him) himself. Among the tribe of Thaqif four brothers were known for their interest-based trade. They used to give loans on interest to Banu

Mughirah. When the Holy Prophet conquered the city of Tayef, all the four brothers accepted Islam. They had some outstanding claims of interest payable by Banu Mughirah who now refused to pay interest and said that Islam had prohibited interest and, thus, they are no more liable to pay it. It was this dispute which was taken up to Attab ibn Usaid' the new Qadi of Makkah appointed by the Holy Prophet. Upon this the verses 278-280 were revealed in which all the outstanding claims of *Riba* were abolished in very strong and emphatic terms and the creditors were allowed only to receive back their capital or the principal sum.

As pointed out earlier, the city of Tayef was particularly famous for its commerce and trade on the basis of *Riba*. Most of the data available about *Riba* in pre-Islamic Arabia relates to Tayef. According to historian al-Baladhuri (*Futuh al-Buldan*, Leiden, p 56, Tayef), the people of Tayef were known for their usurious practices. The tribe of Thaqif, out of Tayfian tribes, was notorious in this practice which had become a profession for them. This usurious trade was not confined to Tayef; it was, rather, extended to Makkah. The Makkahn traders used to get loans from the Tayefians on interest which was paid both in cash and in kind. The tribe of Banu Mughirah,, a rich sub tribe of Quresh tribal group, used to get loans on interest from the Thaqifite traders. The main component of the deal was the extension of period of repayment of the principal sum (see further details in the commentary of the Qur'an by

Tabari under verse 130 of Al-Imran). In the context of this discussion, Tabari reports that the mode of charging interest in pre-Islamic Arabia by the tribe of Thaqif was that whenever they advanced loan to a debtor to be repaid after a fixed period they would tell the debtor at the time of the repayment:” Either pay the loan or increase the amount,”. If the debtor had money to pay he would pay. Otherwise, he would accept increase and get the period extended for one more year. Thus, if one year old camel was to be originally paid, it was converted into a two year-old camel. After the extended period the creditor required the debtor to pay the two year-old camel instead a one year old camel. In the event of a third extension for the third year a three year old camel would become payable while for a fourth extension a four year old camel became payable; thus the chain of increases and the extensions continued. Similar was the practice in respect of cash. Thus, if the debtor failed to make repayment in time, the period was extended by the creditor on the condition that the amount payable would be increased or even doubled, and in case one hundred *dirhams* or *dinars* were payable, the debtor was required to pay two hundred *dirhams* or *dinars*. At the end of the second year, if the period was extended further the amount was also doubled. These details have been recorded by Tabari on the authority of Ibn Juraij, a disciple of Hazrat Abdullah ibn Abbas. There are other reports found in the early sources with variations about the amount of increase

or the rate of interest. These details have been collected by the companions and their followers with the purpose of preserving necessary information and data about the prevalent modes of usury and interest. These reports show that there existed a variety of modes and rates of interest, the common feature being the increase in lieu of time over and above the principal amount payable by way of loan or debt.

It may be mentioned here that the Holy Prophet took special measures to curb the practice of *Riba* and interest from Tayef because this practice had deeply ingrained in the body social and body economic of the Taifians and needed special measures to be eradicated. One such measure was a clear and express provision included in the agreement signed between them and the Holy Prophet at the time of their conversion to Islam. It has been reported by Abu Ubaid, who has quoted full text of the agreement, that the agreement also included the following provisions: “Whatever debt is payable to them by the people they will not be liable to pay except the principal sum (*Kitab al Amwal* by Abu Ubaid al-Qasim ibn Sallam paragraphs 506-507). A similar provision was made in the covenant issued by the Prophet to the Christian population of Najran in Southern Arabia. It provided that the citizenship of those who indulge in eating *Riba* would be cancelled (*Kitab al-Amwal* by Abu Ubaid, paragraph 502). The same practice was by and large prevalent in Madinah prior to the conversion of the city to Islam. Imam

Malik has reported same details about the usurious practices prevalent in pre-Islamic Arabia in his *Muwatta*. After Makkah and Tayef, Madinah was also known for its *Riba*-based practices. Here, the creditors were mostly the Jews while debtors were mostly the peasants of Madinah. The Jews had invented some new modes of charging interest which were not found in other cities and towns of Arabia. In his masterpiece on the history of pre-Islamic Arabia, the Iraqi historian Dr. Jawad Ali tells us that the Jews would sell the commodities of common use by the Madinian population such as wheat, barley, dates and salt at a time when their supply was scarce or the season was off on a deferred payment and would charge a larger quantity of the same commodity at the time of repayment to create further scarcity and to resell that very commodity to its own producer again on the deferred payment of a higher amount. Thus the producers, traders and the agriculturists of Madinah continued to be indebted to the Jews. This practice not only increased the power and influence of the Jews but also contributed to the concentration and control of the Madinian wealth and resources in the hands of the Jewish businessmen. Not only this but the Jews also demanded that the properties and goods of the debtors be mortgaged with them or pledged to them. Imam Bukhari reports several incidents which show that the Jews demanded the mortgage of even the children, wives and weapons of the debtors.

These details clearly establish that the Arabs in pre-Islamic Arabia were fully aware of the concept of commercial and productive loans. Their entire trade was financed through loans advanced on payment of interest. The affluent tribes of Thaqif and Banu Mughirah never needed loans for consumption purposes. The landed aristocracy of Madinah hardly needed consumption loans from the Jews. Most of their loans were either to finance their trade or to improve their agriculture. The claim that the Qur'an has condemned only the interest charged on personal or consumption loans is totally unfounded particularly in view of the unprecedented generosity of the Arabs in general and the Quraish in particular. Hashim ibn Abd Manaf, the great grandfather of the Holy Prophet who had instituted the two celebrated trade journeys mentioned in the Qur'an as well was known for his unique generosity. The very name, Hashim, is indicative of that generosity. At the time of famine he would get the food prepared at his own expense and get it distributed among the poor of Makkah. Because of this he came to be known as Hashim or as "bread-grinder". This habit of Hashim had percolated deep in all the members of the tribe of Quraish. Tabari has quoted a poet praising the Quraish for their generosity as saying:

These are the people who have mixed their poor with their wealthy so much so that their poor have become like the self-sufficient.

This being the habit of the Arab traders, no one can say that they would charge interest on consumption loans given to a poor and needy person. Dr. Muhammad Yusufuddin has recorded details of the corporate trade conducted by the Quraish in pre-Islamic Arabia. (See his book *Islam ke Muashi Nazariyyea*, (Karachi 1984, pp. 44-50).

Some other scholars have also studied trade and business prevalent in pre-Islamic Arabia and have concluded that every tribe or sub-tribe was like a business firm or investment company in which not only the members of that very tribe participated but also members of other tribes contributed with their funds and loans advanced either on the basis of profit-sharing or on the basis of interest. Even the ladies conducted their business and financed the business of the others both as creditors as well as in capacity of inactive partners. The *Mudarabah*-based business of Hazrat Khadijah in which the Holy Prophet participated sometime as an entrepreneur and sometimes as a managing agent is well-known. There were other ladies in Makkah whose funds were invested in international trade. The well-known trade caravan led by Abu Sufyan immediately before the battle of Badr was funded among others by many ladies from Makkah. In his history, Tabari has recorded the details of these caravans under the third year of Hijra.

Another ‘argument’ advanced in support of this point of view is that the Qur’an has not prohibited interest. It has prohibited only

usury. It is in view of this consideration that some people translate the term *Riba* as usury. Let us examine the difference between the two. It may be pointed out that the distinction between interest and usury was made on a wide scale for the first time in the 17th Century when banking emerged as an organized institution. This distinction was made on the basis of the purpose of borrowing. Increase on the loans advanced for personal and consumption purposes was called usury while the increase on commercial and productive loans was known as interest. It is believed that the purpose of this distinction was to grant moral and legal legitimacy to usury and to satisfy the conscience of the common man who hated usury and interest as part of his religious belief. Since it had become the backbone of the modern capitalist economy it was felt that the economic system could not successfully work without interest. The rapid expansion of the West in the field of colonization and its advancement in scientific discoveries coincided with its dazzling economic progress. In fact, the advancement of the West in commerce and industry was the mainstay of its military power which, in turn, sustained the political domination of different colonial powers in the Muslim world. This created a slavish and defeatist mentality in the mind of many Muslims particularly those elitists classes which had lost their power and prestigious positions to the new masters. They sharply reacted to the political defeat, economic downfall and social

disintegration of their co-religionists. Their sensitivity led them to believe that the power and prestigious of the West was drawn from its social, economic and political institutions. Despite partial truth in this belief, this added to the defeatist mentality of the former elitists classes. It also caused to weaken their confidence in their own values, history, civilization and religious foundations. Many of them did not wait long in subscribing to the idea that bank interest and capitalist economy was the penacea needed to cure their maladies and that *Riba* was different from interest, that Allah has prohibited only usury and that interest was not different from trade and profit. It was in this background that some Muslims leaders sincerely, though mistakenly, felt that if interest was declared to be prohibited it may cause insurmountable difficulties in the development of trade and industry in the Muslim world. Their concern with the welfare and future of the Muslims made them believe that bank interest was the only solution to the economic progress and welfare of the Muslims. They tried to satisfy their conscience by claiming that the Qur'anic *Riba* is not interest which was now allowed as lawful trade and business and what is prohibited is usury charged on personal loans, particularly usury charged at exorbitant rates. It is significant to note that those who fully subscribed to this way of thinking among the Muslims were those who had the first exposure with the West. A bulky literature came into existence as a result of their efforts in which the main concern

was to portray the declining economy of the Muslim World and to play up the role of the banks in the development of the Western economies. Dr. Fazlur Rahman, a former Professor in the Faculty of Theology, Aligarh Muslim University has surveyed some such writings in his valuable book, *Tijarati Sûd: Tarikhi Awr Fiqhi Nuqtah-i-Nazar Se* (Aligarh 1967, pp. 1-5). The crux of their arguments was their claim that the Arabs were not aware of commercial interest either during the days of the Holy Prophet (peace be upon him) or before him, and the *Riba*, according to them, was only that which was charged on personal and consumption loans. We will deal with the question of distinction between usury and interest.

The writings and the literature produced in defence of bank interest also influenced a section of the ulema who tried to legitimize *Riba* in the context of British India. They believed that since India was *Dar al-Harb* and since, according to the opinion attributed to Imam Abu Hanifah, there was no *Riba* between a Muslim and a citizen of the *Dar al-Harb*, therefore, bank interest should not be treated as *Riba*. Some of the ulema issued *Fatawa* in support of this view. One such *Fatwa* was issued from Hyderabad Deccan which was published on a wide scale both within and outside the Indian Subcontinent. It was this *Fatwa* which was sent to Sayyid Rashid Rida for confirmation. The answer given by Rashid Rida was relied upon by Mr. Khalid M. Ishaque in his

submissions before us. Several leading ulema of the Subcontinent including Mawlana Ashraf Ali Thanvi, Mawlana Mufti Mahmood Hasan Tonki, Mawlana Zafar Ahmad Usmani and Mawlana Abul A'la Mawdudi came out with strong rejoinders and established that *Riba*-based transactions in India or elsewhere could not be justified or legalized on the plea that India was *Dar al-Harb*.

As pointed out earlier, before the industrial revolution in Europe, there was no distinction between usury and interest. This was made in the wake of industrial revolution and commercial expansion when money and capital acquired supreme importance in human societies. In this context interest was justified as rent of capital and was substantiated by a well-developed philosophy. Before this revolution there was no such distinction between usury and interest either in the Islamic literature or in any other religious tradition of the East or the West. The definition given by almost every writer, of the term *Riba* included both usury and interest. Even the non-Muslim writers defined the term *Riba* as usury and interest. The *Shorter Encyclopedia of Islam* (1953, p. 471) has included both interest and usury within the ambit of *Riba*.

The historical evidence available to us establishes beyond any shadow of doubt that corporate financing in its rudimentary form was known to the Arabs even before Islam. The Qur'an refers to two

annual trade caravans undertaken by the Makkahn traders. This was an international trade covering the vast areas stretching over large territories and long distances. These caravans needed several months of travel which was carried on extensively. This trade involved the production or import of goods, on the one hand, and their sale or export, on the other. This was done with the pooling of financial resources and trading and manufacturing skills. During the pre-Islamic period all financial resources were mobilized on the basis of either interest or *Mudarabah* and *Musharakah*. Islam abolished the interest basis and organized the entire production and trade on the basis of *Mudarabah* and *Musharakah*. With the abolition of interest, economic activity in the Muslim World not only did not suffer any decline but there was an unprecedented increase in prosperity.

A combination of several economic and political factors, including the ability to mobilize adequate financial resources, was responsible for this prosperity. All these factors together provided a great boost to trade which flourished from Morocco and Spain in the West, to India and China in the East, Central Asia in the North and Africa in the South. The extension of Islamic trade influence is indicated not only by the available historical documents but also by the Muslim coins of the seventh to the eleventh centuries which have been found in several outlying parts of the then Islamic world. Dr. Muhammad Umar

Chapra has referred in one of his articles submitted to this Court that many Muslim coins have been found in different parts of Russia, Finland, Sweden, Norway, the British isles and Ireland. The great wealth of material goods which the enterprising Islamic world procured from far-distant lands were also exported to Europe. These consisted not only of Chinese, Indian and African products but also of the goods which the Muslim countries themselves produced or manufactured. The economic prosperity in the Muslim world had made possible a development of industrial skill which brought the artistic value of the products to an unrivalled height.

Mudarabah and *Musharakah* were the basic methods by which financial resources were mobilized and combined with entrepreneurial and managerial skills for purposes of expanding long distance trade and supporting crafts and manufacture. They fulfilled the needs for commerce and industry and enabled them to thrive to the optimum level given the prevailing technological environment. They brought to the disposal of commerce and industry the “entire reservoir of monetary resources of the medieval Islamic world” and served as a means of financing, and to some extent, insuring commercial ventures, as well as providing the combination of necessary skills and services for their satisfactory execution.

The legal instruments necessary for the extensive use of financing through *Mudarabah* and *Sharikah* were already available in the earliest Islamic period. These instruments, which constituted an important feature of both trade and industry and provided a framework for investment, are found in a developed form in some of the earliest Islamic legal works. Accordingly, Udovitch has been led to conclude that “some of the institutions, practices and concepts already fully developed in the Islamic legal sources of the late eighth century did not emerge in Europe until several centuries later. The efficacy and vitality of these legal commercial institutions endured for most of the Islamic Middle Ages”.

With moral decay and political and economic degeneration, the Muslim world lost its vitality in all those walks of life which had once contributed to its rise and glory. Foreign domination played its own devastating role. Although *Riba* is still despised by Muslims, centuries of Western political, economic and financial domination has unwittingly caused the Muslim world to drift away from the pooling of financial and entrepreneurial resources through the humane institutions of *Mudarabah* and *Musharakah*. These institutions need to be revived, activated, institutionalized and modernized in order to get rid of *Riba*. They can no doubt once again play the same invigorating role of stimulating

investments, rewarding skills and entrepreneurship and accelerating growth for the benefit of the Muslim masses.

The discussion made in proceeding paragraphs has established beyond any shadow of doubt that commercial and productive loans were known to the Arabs and that the Qur'anic prohibition of Riba does include every kind of increase or interest charged on loans advanced for commercial and productive purposes. This discussion also disposes of the contentions of Mawlana Jafar Shah Phulwarwi and Syed Yaqub Shah.

Counsel for the Federation, Dr. Sayyid Riazul Hasan Gillani has stressed as his main argument that Bank interest is a form of *Riba al-Fadl* prohibition of which is not as strong as that of *Riba al-Nasi'ah*. Mr. Khalid M. Ishaque also indirectly but clearly suggested that bank interest was a form of *Riba al-Fadl* about which the Shariah is not so strict. In order to examine these submissions and also to understand the Shariah position about *Riba al-Fadl* in its true perspective, it is necessary that the question of *Riba al-Fadl* is studied in depth and examined in detail.

Riba al-Fadl is also termed as *Riba al-Hadith* and *Riba al-Buyu*. This category of *Riba* is different from the *Riba par excellence* in the sense that there is no direct increase on any deferred payment and, therefore, it does not fall directly under the category of *Riba* prohibited by the Qur'an. The prohibition of *Riba al-Fadl* is based on the principle

of *Sada al-Dhariah* by the Holy Prophet (peace be upon him). There are many Ahadith reported by more than a dozen companions to the effect that the Prophet of Islam prohibited the sale of gold for gold, silver for silver, wheat for wheat, barley for barley, salt for salt and dates for dates if the two commodities are not exactly equal in terms of quantity and are not paid and delivered hand to hand. Apparently, it seems to be something very innocuous because even in a barter transaction no one would be tempted to sell a given quantity of wheat for a similar quantity of wheat paid and delivered then and there. But on a deeper examination it becomes clear that this prohibition was primarily to close the slightest possibility of increase on the principal amount which was possible if this backdoor was left open. The Hadith is, in fact, a discouragement to enter into this kind of transaction. If it were allowed to sell these commodities with a difference in the quantity or with a permission to make deferred payment there was a strong possibility of using this mode of transaction to legalise increase on the principal amount. For example, a person could sell wheat of certain quantity for a bigger quantity to be paid/delivered to him at a later date. Now, wheat being a medium of exchange in some societies even today, would have become a source of *Riba* when used as medium of exchange in this transaction. There are several other examples which establish the policy of the Shariah to prohibit all such transactions which may in any eventuality lead to *Riba*-generating

dealing through such dealings. One such example of eating *Riba* through an indirect mechanism instead of charging interest on the money lent or loaned one could easily sell a commodity to the prospective borrower on a deferred payment and then immediately buy it back from him on the cash payment of lesser price. In actual terms it would mean that the commodity has been used merely to circumvent the Shariah about the prohibition of *Riba*. Otherwise, the net result was the receipt of a lesser amount by the borrower appearing in garb of a purchaser and buyer's liability to pay a higher amount with a certain increase over and above the original or principal amount. This was also declared to be *Riba* pure and simple by Hazrat Aisha when it was reported to her that a person had contracted such a transaction with a companion. She immediately sent a message to the companion asking him to annul the transaction forthwith if he wanted to retain his reward as a companion of the Prophet.

In the *Ahadith* related to *Riba al-Fadl*, the Prophet of Islam has mentioned only six commodities. It is historically established that these six commodities among others, were used as medium of exchange in different parts of Arabia. Some of them are still used in rural societies in many parts of the world particularly in Subcontinent. However, there has been a slight difference of opinion among the jurists whether the prohibition be confined to these six commodities or be extended to other

commodities as well. The overwhelming view of almost all the jurists barring very few exceptions is that the prohibition is not confined to these six. It is, rather, extended to other commodities as well. But the jurists disagree among themselves as to the grounds on the basis of which the prohibition is to be extended to other commodities. It is significant to note that the grounds suggested by different jurists to determine the common denominator for the application of prohibition include one or another ingredient of money as identified and explained by modern economists and experts of monetary and fiscal policies. For example, according to Imam Abu Hanifah, the common denominator is that the commodities should be fungibles items, indicating thereby that the items may be used for counting of the units of the property or commodity purchased in consideration thereof. According to Imam Malik the common denominator is the storability of the items indicating thereby that it should be the store or repository of value.

This difference of opinion had started during the days of the companions themselves. Different companions tried to identify the common denominator and reached different conclusions. A great disciplinarian and superb systematiser as he was, Hazrat Umar felt uncomfortable with this difference of opinion on this important issue involving the trade and business in the fast expanding Muslim trade and finance. He regretted not to have been able to seek specific guidance

from the Holy Prophet (peace be upon him) about the common denominator of these six commodities in the absence of which there was a possibility of a continuing difference of opinion on an issue of such a great importance. It was in this context that he said he did not have an opportunity to ask the Holy Prophet (peace be upon him) and that he recommended to avoid all doubtful transactions in order to avoid real *Riba*. This clearly shows that Hazrat Umar had no doubt or confusion about the *Riba par excellence*, its real nature, its prohibition or even about *Riba al-Fadl* insofar as it related to the six commodities. What he considered to be doubtful was the gray area beyond the six commodities where the identification of common denominator was subject of discussion among the companions. Now, it will be wrong to assume that the question of bank interest has any ambiguity or confusion and that this ambiguity and confusion should be taken to be a ground for concluding that it is not *Riba*.

It is clear from a general look on the Ahadith dealing with *Riba al-Fadl* that these specifically refer to trading transactions of a barter type. Loan too is, in a way, like-for-like exchange. It is, therefore, desirable to begin the argument with a review of the Qur'anic injunctions about loan. A loan transaction always carries with itself some costs for the lender. Depending on the matter of the case, there may be various kinds of costs. Yes in a like-for-like exchange of

commodities the lender must concede his costs and the lender must ignore the qualitative differences between the thing given and the thing taken back, and treat the two as the same in terms of the relevant units of exchange—rupees in the case of rupee-denominated loans, tons of wheat lent by tons and so on.

With these two points before us, it should now be easy to see the message in Ahadith on *Riba*, which are about trading of gold, silver, wheat, barley, dates and salt. We select the cases of gold and dates to explain the main point. The Prophet (peace be upon him) ordered that gold be traded for gold on the basis of equality in terms of weight and on spot. In spot trading, gold-for-gold transaction meant exchanging gold in one form for that in another. A voluntary gold-for-gold exchange is unthinkable otherwise. It may also be recalled that once Hazrat Bilal traded two weights of poor quality dates for one weight of good dates. The most likely reason on Bilal's part was that qualitative differences between the dates sold and those purchased justified their treatment as two different things and, hence, the exchange on unequal terms. But the Prophet (peace be upon him) declared the excess to be *Riba*. The point was: as long as Hazrat Bilal was transacting in a dates-for-dates framework, he ought to have ignored the qualitative differences between the two types of dates and traded them on a one-to-one and equal basis.

Otherwise, the discrepancy in the give-and-take-back process came under *Riba*.

The foregoing illustrations establish that the fundamental position of the *Ahkam* in the Ahadith is that of rationalizing trading practices with the Qur'anic injunction on *Riba*. In this perspective, we may now discuss the meanings of various restrictions on trading specifically mentioned in the Ahadith. Basically, three conditions are prescribed to govern like-for-like exchanges of gold, silver, wheat, barley, dates and salt: *mithlan-bi-mithlin*, *sawa'an-bi-sawa'in* and *yadan-bi-yadin*. Of the three conditions, *yadan-bi-yadin* and *sawa'an-bi-sawa'in* are clear-cut. *Yadan-bi-yadin* means "hand to hand" or "on spot". *Sawa'an-bi-sawa'in* implies that there must be equality in the exchange. The Ahadith further state that the equality was to be observed in terms of weight for gold and silver and by measure for the other four commodities. The condition *mithlan-bi-mithlin* calls for extreme care in interpretation.

It is noteworthy that the Ahadith explicitly refer to "gold for gold", "silver for silver" and similar other exchanges. And, the condition *mithlan-bi-mithlin* comes in the Ahadith texts after the said mention. "Gold for gold" signifies that one is already talking in the framework of a like-for-like exchange. Thus, *mithlan-bi-mithlin* ought to mean something more than "like for like". It cannot be translated as "same for

same” either due to the following reason. If, for example, the gold to be given and that the gold to be taken back were identical in every respect, spot trading of gold for gold would become meaningless, and the decree in the Ahadith redundant. Thus, *mithlan-bi-mithlin* would mean that the unit of exchange must be one and the same for both buying and selling in like-for-like exchanges. That is, it should not be the case that one sells, say, wheat by some measure but buys it by a weight like kilograms; moreover, the chosen measure or weight must be the same for both buying and selling. This interpretation is supported by the fact that there were no uniform standards for weights and measures in Arabia during the early Islamic days. According to Abdullah ibn-i-Umar, the Prophet (peace be upon him) appreciated measures of the people of Madinah as well as weights of the people of Makkah. Thus, for example, the *mithlan-bi-mithlin* condition required the use of the same measures either that of Madinah or that of Makkah – for both selling a product and buying its like. In other words, it was not to be the case that two Makkahn and Madinan traders exchanged their dates (of different qualities) with each one of them using a different measure to make his offer. This principle governed, among other things, trading transactions between Makkahn and Madinan businessmen in trade fairs at the time. The differences in the US and the UK measures of bushels, gallons and pints affirm the relevance of *mithlan-bi-mithlin* restriction even today.

Together, the three conditions *mithlan-bi-mithlin*, *sawa'an-bi-sawa'in* and *yadan-bi-yadin* firmly closed the doors of *Riba* in like-for-like trading exchanges.

Let us now review the dilemma in the literature about the significance of the spot restriction in the Ahadith. The Prophet (peace be upon him) ordered to strictly observe this condition irrespective of whether it was, for example, gold-for-gold or gold-for-silver trade. As noted above, *Fuqaha* have taken an extreme position on this point. Dr. Muhammad Umar Chapra has raised an important question which is relevant to understand the wisdom of the prohibition of *Riba al-Fadl*. He says that before one concedes that time lag alone means *Riba* in the said trading exchanges, the following points merit consideration.

Is it possible that if trading of gold for gold was on a one-to-one and equal basis by weight, as directed by the Prophet (peace be upon him), but either the payment or the delivery of gold was deferred, there was *Riba*? The answer of Dr. Chapra's this question is "no" because the said transaction would not involve any discrepancy in the give-and-take-back process. That deferment in payment or delivery does not automatically amount to *Riba*, is also confirmed by the following fact: the Prophet (peace be upon him) imposed the same spot restriction on the heterogeneous exchanges in gold, silver, wheat, barley, dates and salt as well, although he left the rates of exchange at the discretion of the

trading parties. But, then, where did the significance of the spot restriction on trading lie? This point may be clarified with reference to the following narration. It so happened that the companions were on a military campaign under the command of Hazrat Mu‘awiyah during the days of Hazrat Umar. The booty of war included a silver pot. Mu‘awiyah ordered its auction with the price to be adjusted against the future salary of soldiers. Hazrat Ubadah ibn al-Samit strongly objected to this transaction, and it did not fall through. In giving his reasons, Hazrat Ubadah ibn al-Samit repeated the message of his other well-known Ahadith. In this Hadith the message between the lines was the following is that the salary of soldiers was in dirhams (silver coins). Thus the transaction became a silver-for-silver trade with deferment of payment at the buyer’s end. It may now be seen that if the transaction lost its cash or spot character, it automatically became impossible to satisfy the *saw’an-bi-sawa’in* condition because the weight of the future dirhams at the buyer’s end could be different from that of the silver pot. Thus a discrepancy of *Riba* became likely in the transaction. Indeed, these possibilities of *Riba* could be avoided with a directive by the Prophet (peace be upon him) obliging the companions to take suitable remedial measures and closed the doors on accidentally landing into *Riba* by requiring them to observe the spot restriction in the said trading exchanges.

To close this discussion on the categories of *Riba*, particularly *Riba al-Fadl* and *Riba al-Nasi'ah*, we may sum-up this discourse with the views of Dr. Muhammad Umar Chapra who has very lucidly thrown light on the philosophy of *Riba al-Fadl*'s prohibition. Among the most important teachings of Islam for establishing justice and eliminating exploitation in business transactions is the prohibition of all sources of unjustified enrichment. The Qur'an emphatically instructs Muslims not to devour each other's property wrongfully (2:188 and 4:29; see also 4:161 and 9:34). The Qur'an and the Sunnah have given principles whereby a Muslim society can distinguish as to what constitutes a 'wrongful' or 'rightful' or 'unjustified' source of earning or acquisition of property from others. One of the important sources of unjustified earnings is receiving any monetary advantage in a business transaction without giving a just counter value. The prohibition of *Riba* appears in the Qur'an in four different revelations which came down in a gradual manner. The first of these (30:39), in Makkah, emphasises that while interest deprived the wealth of God's blessings, charity raised it manifold. The second (4:161), in the early Madina period, severely condemned it, in line with its prohibition in the previous scriptures. It placed those who took *Riba* in juxtaposition with those who wrongfully appropriated other people's property and threatened both with severe punishment from God. The third revelation (3:130-2), around the second year after Hijrah,

enjoined Muslims to keep away from *Riba* if they desired their own welfare. The fourth revelation came later and severely censured those who take *Riba*, established a clear distinction between trade and *Riba*, and required Muslims to annul all outstanding *Riba*, instructing them to take only the principal amount, and forego even the principal in case of the borrowers' hardship. The Prophet (peace be upon him) also condemned, in the most unambiguous words not only those who take *Riba*, but also those who give *Riba* and those who record the transaction or act as witnesses to it. He even equated the taking of *Riba* to committing adultery thirty-six times or being guilty of incest with one's own mother.

Riba, literally means increase, addition, expansion or growth, technically refers to the 'premium' that must be paid by the borrower to the lender along with the principal amount as a condition for the loan or for an extension in its maturity. In this sense, *Riba* has the same meaning and import as interest in accordance with the consensus of the jurists without any exception. The term *Riba* is, however, used in the Shariah in two senses as we have already pointed out. The first is *Riba al-Nasi'ah* and the second is *Riba al-Fadl*. The term *nasi'ah* comes from the root *nasa'a* which means to postpone, defer, or wait, and refers to the time that is allowed for the borrower to repay the loan in return for the 'addition' or the 'premium'. Hence *Riba al-Nasi'ah* refers to the interest

on loans. It is in this sense that the term *Riba* has been used in the Qur'an in the verse "God has forbidden interest". This is also the *Riba* which the Prophet (peace be upon him) referred to when he said: "There is no *Riba* except in *Nasi'ah*". The prohibition of *Riba al-Nasi'ah* essentially implies that the fixing in advance of a positive return on a loan as a reward for waiting is not permitted by the Shariah. It makes no difference whether the return is a fixed or a variable percent of the principal, or an absolute amount to be paid in advance or on maturity, or a gift or service to be received as a condition for loan. The point in question is the predetermined positiveness of the return. It is important to note that, according to the Shariah, the waiting involved in the repayment of a loan does not itself justify a positive reward. There is absolutely no difference of opinion among all schools of Muslim jurisprudence that *Riba al-Nasi'ah* is *haram* or prohibited. The nature of the prohibition is strict, absolute and unambiguous. There is no room for arguing that *Riba* refers to usury and not interest, because the Prophet (peace be upon him) prohibited the taking of even a small gift, service or favour as a condition for the loan, in addition to the principal. However, if the return on principal can be either positive or negative depending on the final outcome of the business, which is not known in advance, it is allowed provided that it is shared in accordance with the principles of justice laid down in the Shariah.

Islam, however, wishes to eliminate not merely the exploitation that is intrinsic in the institution of interest, but also that which is inherent in all forms of dishonest and unjust exchanges in business transactions. These are extensively identified in the teachings of the Qur'an and the Sunnah. However, they are also encompassed by the generic term of *Riba al-Fadl*, which is the second sense in which *Riba* has been used and which is encountered in hand to hand purchase and sale of commodities. It covers all spot transactions involving cash payment on the one hand and immediate delivery of the commodity on the other. The discussion of *Riba al-Fadl* has arisen from the Ahadith requiring that if gold, silver, wheat, barley, dates and salt, are exchanged against themselves they should be exchanged on the spot and be equal and alike. There are two questions which arise from these Ahadith. The first is why have only six commodities been specified? And the second is why is exactly the same reciprocal payment required?

Of the six commodities specified in the Ahadith dealing with *Riba al-Fadl*, two unmistakably represent commodity money. Whereas the other four represent staple food items. Hence, the jurists have over the centuries debated the question of whether *Riba al-Fadl* is confined only to these six items or it can be generalised to include other commodities; and if so, what should be the reasoning (*'illat*) used for this purpose. On the basis of the characteristic of gold and silver as

commodity money, it has been almost unanimously concluded that all commodities used as money enter the sweep of *Riba al-Fadl*. With respect to the other four items, there is a difference of opinion. One opinion argues that since all four commodities are sold by weight or measure (Hanafi, Hanbali, Imami and Zaydi) therefore, all items which are so saleable would be subject of *Riba al-Fadl*. A second opinion is that since all four items are edible, *Riba al-Fadl* would be involved in all commodities which have the characteristic of edibility (Shafi'i and Hanbali). A third opinion is that since these items are necessary for subsistence and are storable (without being spoiled), therefore, all items that sustain life and are storable are subject to *Riba al-Fadl* (Maliki). The Zahiri school, however, confines *Riba al-Fadl* to only the six commodities specifically mentioned by the Prophet (peace be upon him). It is, however, the only school and a minority, to be so restrictive. A fourth, but perhaps a more plausible, explanation is that all the six commodities were used as money in and around Madinah, particularly among the Bedouins, and therefore, *Riba al-Fadl* would be involved in the exchange of any goods against cash or any commodity which is used as money.

The whole discussion, however, does not bring into focus the real significance of *Riba al-Fadl*, which may be understood only by answering the question. On the surface it appears hard to understand

why anyone would want to exchange a given quantity of gold or silver or any other commodity against its own counterpart, and that too ‘spot’. What is essentially being required is justice and fair play in spot transactions: the price and the counter value should be just in all transactions where cash payment (irrespective of what constitutes money) is made by one party and the commodity or service is delivered reciprocally by the other. Anything that is received as ‘extra’ by one of the two parties to the transaction is *Riba al-Fadl*, which could be defined in the words of Ibn al-Arabi as “all excess over what is justified by the counter value”. Justice can be rendered only if the two scales of the balance carry the same value of goods. This point was explained in a most befitting manner by the Prophet (peace be upon him), when he referred to six important commodities and emphasised that if one scale has one of these commodities, the other scale also must have the same commodity, “like for like and equal for equal”. To ensure justice, the Prophet (peace be upon him) even discouraged barter transactions and asked that a commodity for sale be exchanged against cash and the cash proceeds be used to buy the needed commodity. This is because it is not possible in a barter transaction, except for an expert, to visualise the fair equivalent of one commodity in terms of all other goods. Hence, the equivalents may be established only approximately thus leading to some

injustice to one or the other party. The use of money could therefore help reduce the possibility of an unfair exchange.

In this sense, all commodities exchanged in the market would be subject to *Riba al-Fadl*. One would then tend to agree with the majority of Muslim jurists who have not confined *Riba al-Fadl* only to the six commodities mentioned but have tried to extend the coverage on the basis of certain inherent characteristics of these six commodities. The more staple the food item or the greater its need for sustaining life, the greater the injustice inflicted in an unfair exchange. Similarly, the greater the capability of a goods or service to be weighed or measured, the greater would be the buyer's or the seller's exposure to *Riba al-Fadl* if the just weight or measure is not given in exchange for the money or the counter value received. The prohibition of *Riba al-Fadl* is, thus, intended to ensure justice and remove all forms of exploitation through 'unfair' exchanges and to close all backdoors to *Riba* because, in the Islamic Shariah, anything that serves as a means to the unlawful is also unlawful. The Holy Prophet (peace be upon him) equated with *Riba* even the cheating of an unsophisticated entrant into the market and the rigging of prices in an auction with the help of agents implying thereby that the extra money earned through such exploitation and deception is nothing else but *Riba al-Fadl*. Since people may be exploited or be cheated in several different ways, the Prophet (peace be upon him)

warned that a Muslim could indulge in *Riba* in a number of ways. This is the reason why the Prophet (peace be upon him) said: “Abstain not only from *Riba* but also from *Reebah*”. *Reebah* is from *Rayb* which literally means ‘doubt’ or ‘suspicion’ and refers to income which has the semblance of *Riba* or which raises doubt in the mind about its rightfulness. It covers all income derived from injustice to, or exploitation of, others.

The *Riba al-Nasi‘ah* and *Riba al-Fadl* are both essential counterparts of the verse “God has allowed trade and prohibited *Riba* (2:275). While *Riba al-Nasi‘ah* relates to loans and is prohibited in the second part of the verse, *Riba al-Fadl* relates to trade and is implied in the first part. Trade is allowed in principle, but it does not mean that everything is allowed in trade. Since the injustice inflicted through *Riba* may also be perpetuated through business transactions, *Riba al-Fadl* refers to all such injustices or exploitations. It requires absence of rigging, uncertainty, speculation, monopoly or monopsony. It demands a fair knowledge of the prevailing prices on the part of both the buyer and the seller. It necessitates the elimination of cheating in prices or quality, and in measurements or weights. All business practices which lead to the exploitation of the buyer or the seller or to a restriction of fair competition must be effectively prohibited.

While *Riba al-Nasi'ah* can be defined in a few words, *Riba al-Fadl*, deals with a wide range of business transactions and practices and is not so easy to be defined in precise terms. This is what prompted 'Umar, the second Caliph to advise the Muslims by way of precaution to give up *Riba* as well as *Reebah*. It is true that the Prophet (peace be upon him) did not elaborate *Riba al-Fadl* in as much detail as one may have desired. However, this was not necessary. The whole Qur'an and his Sunnah are there to help the Ummah. This is the ongoing challenge to all Muslims — to examine their economic practices continually in the light of Islamic teachings and to eliminate all shades of injustice. This is a more difficult task than eliminating *Riba al-Nasi'ah*. It requires a total commitment, an overall restructuring of the entire economy within the Islamic framework to ensure justice. This was, and is, the unique contribution of Islam. While *Riba al-Nasi'ah* was well-known in the *Jahiliyyah* (pre-Islam period) the concept of *Riba al-Fadl* was introduced by Islam and reflects the stamp of its own unflinching emphasis on socio-economic justice.

The argument that interest was prohibited because during the Prophet's days there were only consumption loans and interest charged on such loans caused hardship is also unfounded and invalid both on historical and factual counts, as we have already discussed, as well as on technical and economic grounds. During the Prophetic period, the

Muslim society had become sufficiently inspired to adopt simple living and to shun conspicuous and unnecessary consumption. There was no question of borrowing for either self display or for unnecessary consumption needs. It had also become adequately organized to fulfil the basic needs of the poor and those in hardship due to any natural calamity. However, even if it is assumed that, in spite of simple living and the socio-political commitment of a Muslim society to fulfil the basic needs of those hard-pressed, consumption loans were resorted to, these must have been limited and for small amounts, and fulfilled primarily through *qurud hasanah*. As rightly pointed out by the eminent Muslim scholar and jurist, late Shaykh Muhammad Abu Zahara, there is absolutely no evidence to support the contention that the *Riba* of *Jahiliyyah* was on consumption loans and not on development loans. In fact, the loans for which a research scholar finds support in history are production loans. The circumstances of the Arabs, the position of Makkah and the trade of Quraysh, all lend support to the assertion that the loans were for production and not consumption purposes. Hence, the Qur'anic verse about remitting the principal in the event of the borrower's hardship does not refer to consumption loans. It refers essentially to interest-based business loans where the borrower had encountered losses and was unable to repay even the principal, let alone the interest.

The whole argument that interest causes hardship only for the one who borrows for consumption needs is unfounded. It is the obligation of the Muslim society to meet the dire consumption needs of the poor. Borrowing for other consumption purposes needs to be controlled and organized by the society as well as by the state. Borrowing in a Muslim society should be largely for business purposes. It is only in this context that one may be able to understand the argument of the *Jahiliyyah* that trade is like interest. While in trade an entrepreneur has the prospect of making a profit, he also faces the risk of incurring a loss. In contrast to this, interest is predetermined to be positive irrespective of the ultimate outcome of business, which may be positive or negative depending to a great extent on factors beyond the control of the entrepreneur. Imam Fakhruddin Razi posed the question of what was wrong in charging interest when the borrower was going to employ the funds so borrowed in his business and thereby earn a profit. His well-considered reply to the question was that the earning of profit is uncertain while the payment of interest is predetermined and certain. The profit may or may not be realised. Hence there can be no doubt that the payment of something definite in return for something uncertain inflicts a harm.

Accordingly, *Riba* is essentially in conflict with the clear and unequivocal Islamic emphasis on socio-economic justice. Financiers

who do not wish to take the risk are entitled to only the principal and no more. Those who insist on charging *Riba* in spite of its prohibition are declared by the Qur'an to be at war with God and His Prophet (peace be upon him). While declaring the total and final abolition of interest on the occasion of his Farewell Pilgrimage, the Prophet (peace be upon him) announced the remission of interest accumulated in favour of his own uncle 'Abbas ibn 'Abd al-Muttalib. This was interest on business loans given to the Banu Thaqif tribe of Tayef. This tribe had not taken the loan from 'Abbas and others for fulfilling 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 trade and business acted essentially like large partnerships, borrowing finances from members of their own tribe or from other from other friendly tribes, to carry on large-scale businesses, which their own resources would not permit. This is because they could not finance on their own 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-Qur'an, 106:2). Accordingly, they collected all the finance they could muster through loans and borrowings in order to be able to purchase the local produce, sell it abroad and bring back what was necessary to satisfy the 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 the basis of profit-and-loss-sharing. The financier got a just share and the entrepreneur did not get crushed under adverse conditions, one of which was the caravan being waylaid during the journey.

The principal reason why the Qur'an has delivered such a harsh verdict against interest is that Islam wishes to establish an economic system where all forms of exploitation are eliminated, and particularly, the injustice perpetuated in the form of the financier being assured of a positive return without doing any work or sharing the risk, while the entrepreneur, in spite of his management and hard work, is not assured of such a positive return is brought to an end. Islam wishes to establish justice between the financier and the entrepreneur and in order to achieve socio economic objectives of Shariah interest had to be prohibited in Islamic society. According to Umar Chapra, the difficulty to understand the Islamic prohibition of interest comes from lack of appreciation of Islamic values and particularly its uncompromising emphasis on socio-economic justice and equitable distribution of income and wealth. Any attempt to treat the prohibition of *Riba* as an isolated religious injunction and not as an integral part of the Islamic economic

order with its overall ethos, goals and values is bound to create confusion.

After having examined different views about *Riba*, its categories and kinds, it is proper if the general rules regulating the matter are also discussed in the light of the Shariah. As is abundantly clear from the preceding discussion, *Riba* is the predetermined, fixed and time-related increase over and above the principal of a loan or debt. A distinction is also maintained between *Riba al-Nasi'ah* (*Riba* in loans) and *Riba al-Fadl* (*Riba* in trading). Several explanations are offered to rationalize the law of *Riba*. The most important of these explanations is that through the prohibition of *Riba*, Islam puts an end to *zulm* (exploitation or injustice). Occurrence of *zulm* is often traced to lenders seeking a return while borrowers might be in dire need of funds. Another conclusion drawn—with reference to the permissibility of trade is that guaranteed return claimed by owners of capital is despicable because other economic agents have to exert effort and/or expose themselves to risk for seeking any gains. While these explanations may have some element of truth in them, they leave much to be desired. For example, they become less convincing when one finds that Shariah does not, in normal conditions, prescribe any ceiling on prices and, thereby, the rate of profit even when trading activities may carry little or no risk

but it is to be remembered that charging of exorbitant or excessive profit is not conceived.

A correct approach to understand *Riba* would be to treat it as a technical term in the Qur'an and Hadith, like *salah*, *saum*, *zakah* and *hajj*, and to determine its meaning with reference to these two primary sources of Islamic knowledge. Briefly, the argument can be understood with reference to the basic verdict on *Riba* in the Qur'an. In the light of *al-Baqarah* 2:279 which restricts creditors to their principals, this decree can be stated as follows: All loans and debts must be settled on an equal basis (in terms of the units of the object of the loan/debt). The same principle is to be followed in retiring debts created in lieu of, for example, sales or purchases on deferred payment or delivery basis. If a loan or debt is not handled in this manner, it would constitute a violation of the law of Islam about *Riba* and, hence, give rise to *Riba*.

Interest is a pre-determined, fixed and time-related excess on loans and debts. But as explained above, *Riba* is a broader concept. It stems from a violation of the Qur'anic decree that loans and debts must be settled on an equal basis. Likewise, the purpose for which loans are taken is also unimportant for purposes of *Riba*. At present, bank transactions involving interest come under the purview of loan transactions. Thus bank interest is *Riba*. That modern banks have no precedent in Islamic history is no ground for treating bank interest

differently from *Riba* for two reasons. First, notwithstanding their complex nature, banks still personify groups of individuals—their shareholders. Hence, the prohibition of *Riba* applicable to individuals automatically carries over to banks. Second, again notwithstanding the complexities of modern transactions, they are still combinations of primary transactions—such as lending, trading, leasing, partnership, etc.—for which the basic principles have been laid down. Any change in the nomenclature of interest to ‘mark-up’ or ‘profit’ is inconsequential from the point of view of *Riba* as long as the basic transaction between banks and their customers remains a loan transaction.

Riba arises in loans, and profits in trading. A loan transaction represents the case of temporary exchange—give and take back— of property rights of the thing at hand for the pendency of the transaction. Trading, on the other hand, is a case of irrevocable exchange of property rights between two parties: ownership of the object of sale goes from the seller to the buyer and that of the thing paid toward price from the buyer to the seller. Alternatively, one may view the loan transaction as a homogeneous exchange and trading as a heterogeneous exchange. Thus, *Riba* and profits relate to two different situations with their own legal implications. Accordingly, any comparison between the two is unwarranted. This point also applies to profits versus interest comparisons. Economists have viewed profits as reward for risk-taking.

This interpretation is only partly true. Primarily, profits arise in trading in which two parties are involved in the process of reciprocal and irrevocable exchange of their property rights. On the other hand, lending involves transfer of some of the rights related to that property only for the pendency of loan—a limited period. The claim to a reward from another party through loan transactions, albeit *Riba*, is not recognized in Shariah.

Deposits in government-sponsored saving schemes, Defence Savings Certificates, Treasury Bills, Federal Investment Bonds, Foreign Exchange Bearer Certificates, Prize Bonds and their likes, are all debt installments. The fact that it is the government which is on the other side of the contract does not change the character of the transaction. A loan is a loan whether it is taken from an individual, a group or an institution. From the Shariah point of view, all these instruments represent “loan” contracts between the government and the parties subscribing to these instruments. The holder in each case gives money and wants his money back, and there is no other contract governing the legal relation with the issuer of these instruments. In a technical sense, therefore, these are all direct money-for-money exchanges. Accordingly, interest, mark-up or “profit” offered on them is nothing but *Riba* irrespective of the name given to it. The same argument also applies to zero-coupon bonds in which case buyers pay a lesser price initially but

receive a greater sum equal to the face value of the bonds. Some people mix up the question of government loans with the concept of Hasn-i-Ada or better repayment found in the Ahadith. It is contended that the Prophet of Islam (Peace be upon him) used to please his creditors at the time of repayment of loan by paying him more than what was his due. It is pleaded that if the government on its own pays or gives more than the amount received it should not be considered Riba because it is not pre-fixed or predetermined. This plea may appear to be plausible on the face of it but this increased payment cannot be called Hasn-i-Ada. A Hasn-i-Ada was never declared before hand, was never expected by the creditor and was never allowed to him as a matter of right. Moreover, it was a personal favour by the Holy Prophet (Peace be upon him) to his creditor.

Rent arises in a lease contract that involves the transfer of usufruct of an asset while ownership remains with the lessor. This is essentially a different arrangement as compared to a loan contract. Therefore, there is no point in equating rent with *Riba*. Alternatively, one can say that, for example, house rent is not *Riba* because the tenant and the landlord enter into a transaction of money for housing services—a heterogeneous exchange—whereas *Riba* arises in give and take back of items of the same kind. Likewise, in *Mudarabah* and *Musharakah*—two forms of business partnership—the financier is also a legal party to the use of funds. Thus, these transactions are fundamentally different

from a loan transaction. Accordingly, both these transactions are outside the purview of *Riba*. Similarly, *Muzara'ah* and *Musaqaat*—two special kinds of partnership—as such have nothing to do with *Riba*.

Riba may lead to *zulm*, and thus the prohibition of *Riba* would result in putting an end to exploitative practices. But it does not necessarily follow that an end of *zulm* is the genesis of the prohibition of *Riba*. Restricting the rationale of the prohibition of *Riba* to the elimination of *zulm* as referred to in al-Baqarah 2:279 is mistaken for two reasons. First, the verse points to the existence of some dispute between two parties that was settled through this verse, while the end-of-exploitation explanation is given independent of the nature of the dispute. Second, the factual position was that according to this verse, both creditors and debtors were directed to give each other their respective rights in the light of the Shariah. It is pertinent to note that in the earlier revelations about the prohibition of *Riba*, the directive was that loan transactions be contracted and debts retired on equal basis, and there is no mention of *zulm* or its equivalent.

Some people try to rationalize or institutionalize *Riba* on the basis of indexation, mostly due to their concern about changes in the value and the purchasing power of money in inflationary situations. Their usual plea is as follows. Even though *Riba* (interest) is prohibited and a lender cannot claim at *a priori* fixed return on his loan, he must be

compensated for the loss he incurs in the purchasing power of his money due to inflation. This may be done through indexation of loans with a view to compensate the loss caused by inflation. We shall, however, come to the question of inflation at a subsequent stage in this judgment. We will also discuss the pros and cons of indexation as a suggested solution to this problem.

However, suffices here to say that according to the law of *Riba*, all loans and debts are to be settled on an equal basis in terms of the units of the object of loan or debt. In the case of paper currency, the exchange takes place by counting. Accordingly, the following conclusion would be drawn for loans for debts denominated in, for example, rupees: if the sum lent (or debt contracted) amounted to Rs.1,000/- the lender (creditor) may claim only one thousand rupees by counting — no more, no less. This argument may also be restated, again, in the context of *Riba*, as follows:

- i) The nature of a loan transaction does not change with inflation. So there are no grounds for changing the scope of the application of the law in inflationary regimes.
- ii) Lenders already incur transaction costs associated with loan transactions. Inflation just escalates those costs. So there are again no grounds for changing the applicability of the law.
- iii) A lender may get nothing if the borrower expires without leaving behind anything because debt is not transferable from

one generation to the next through inheritance. Thus, reduction in value of loans and debts to zero does not represent a new situation, vis-à-vis the original rules dealing with *Riba*, that merits special treatment.

The factual position about the other ground for indexation—putting an end to injustice to lenders and creditors — has been clarified above. It can also be substantiated by noting that when Allah the Almighty directed the creditors to give grace period to debtors in a tight situation (*al-Baqarah* 2:280), the extension was clearly with reference to the then existing debt obligations, not the inflation-adjusted principal in future. In view of this there are no grounds for exempting loans and debts denominated in paper currency from the law on *Riba*. But despite the above analysis and conclusions drawn against indexation, there is no Shariah bar on taking remedial steps to neutralize the effect of inflation for loan and other debts created through credit transactions. A general principle in this regard would be that not only the means but also the ends should be Shariah-compatible. Keeping this in view, a recommended strategy would be to eliminate unanticipated inflation from the economy through prudent government policies, and to make anticipated inflation a part of decision-making by all concerned—keeping in view their needs and other interests. Thus, for example, instead of there being a loan to a needy person to fulfil his consumption or business need, there may be either a *bai' mu'ajjal* or a partnership

arrangement between the resource-owner and the needy party. While the need of the latter may be fulfilled, concerns of the former may be accommodated through the margin added in the deferred price or automatically adjusted through the realized profits.

The upshot of this discussion is that the relevant laws of the Shariah which prohibit *Riba* are binding for individual believers as well as for any collective entity that represents them and their governments. They also apply to non-Muslim subjects of a Muslim state. The prohibition of *Riba* applies to both taking and giving of *Riba*. This, in turn, implies that regardless of whom one may be transacting with and where, that person or anyone representing him ought to observe and abide by the prohibition of *Riba*. The prohibition of *Riba* essentially requires that, generally speaking, all like-for-like exchanges be executed on an equal basis—in terms of the relevant units of exchange. If this does not suit someone, he is free to avoid such an exchange and to pursue an alternative permissible course of action.

Leaving the evils and maladies of *Riba* aside for the time being, it is clear that bank interest does fall under the definition of *Riba* referred to and discussed above. Banks have normally two tier transactions. On the one hand, they accept money from the savers and pay them return on their savings. On the other hand, they lend money to the entrepreneurs who pay return to the banks at a rate higher than the

one paid by the banks to the savers. Let us take the second tier first. The money provided by the banks to the entrepreneur is undoubtedly a loan. Any increase on the principal amount paid by entrepreneur to the bank must and does fall under the category of *Riba al-Nasi'ah* about the prohibition of which none of the appellants has any reservation. It is besides the point whether the entrepreneur employs and invests that money in a business, commerce, trade or industrial enterprise. As long as the repayment of the principal amount is guaranteed whether because of the collateral or otherwise it will remain a loan (*Qarz*) and shall be subject to the principles of Shariah regulating loan (*Qarz*). Moreover, the concern of the banks is never to ensure the success of the enterprise or to participate in the risk at any stage in any way. There is no moral or legal justification to demand any increase over this amount. As to the money of the savers with the bank it is normally claimed to be an *Amanat* (Trust). Had it been really a trust it should have been regulated and managed under the law of Trust. For all practical, legal and theoretical purposes it has never been considered to be an *Amanat* or Trust. It is always and has always been treated to be a loan and meets all the required ingredients of a loan (*Qarz*) under the Shariah; its repayment is guaranteed and the bank has full freedom to use, spend and invest it in any manner which the bank decides; the saver cannot even take it back at will without meeting certain conditions. In some cases a

saver can take it back only in installments and in other cases he has to give prior notice to the bank of his intention to withdraw his '*Amanat*' from the bank. Now, if it is a loan, no increase can be admissible thereon under the definition of *Riba*.

The half a century long experience in the field of Islamic Banking has brought to the fore a number of basic principles on which the edifice of Islamic Banking and finance rests. Without having a clear perception of these fundamental axioms, no meaningful or worthwhile progress can be made in the direction of establishing Islamic banking. It seems appropriate that before discussing the alternative modes of financing and investment suggested or put to operation so far, the suggested restructuring of banks and financial institutions and other necessary steps to be taken, it is appropriate that these axioms are enumerated in clear and specific terms:

- i) The banks under the Islamic system shall continue to perform their primary functions of receiving money from the savers and making it available to various enterprises, entrepreneurs, business and businessmen. This exercise will be totally free from any involvement of *Riba*, *Qimar*, *Gharar* and such other practices which have been prohibited by the Shariah.
- ii) *Riba* is prohibited in all its forms. There is no difference between usury and interest, simple and compound interest, interest on nominal rate and interest on exorbitant rates. All

these forms of interest fall under the category of *Riba* and are prohibited.

- iii) All transactions should be in exchange of commodities, goods, services or labour. No purely monetary transaction should be made because such transactions eventually lead to opening the door of *Riba*.
- iv) Loans should be avoided as far as possible in all commercial and business transactions. Financing on the basis of loaning and lending has no place in Islamic Shariah because the enterprise undertaken on the basis of lending and borrowing create loopholes for usurious practices.
- v) Lending and borrowing may be resorted to in exceptional cases to meet any emergency or contingency; but it should always be by a way of *Qard-i-Hasan*.
- vi) Banks under the Islamic system shall be primarily financial intermediaries to finance through equity, participation or partnership. Banks may also work as holding companies and may, where feasible, also directly engage themselves in commercial, industrial, agricultural and other enterprises and businesses.
- vii) Any transaction or enterprise which is free from the fundamental prohibitions enumerated in the Shariah is Islamically allowed subject to other requirements laid-down by the Shariah or the law.
- viii) Banks may render their services and undertake their operations in accordance with any of the forms or alternatives

hereinafter enumerated; subject to the fundamental consideration of equity and risk participation:

- a) *Mudarabah*
- b) *Musharakah*
- c) Leasing
- d) *Murabahah*
- e) *Bai Salam*
- f) *Bai-Muajjal*
- g) *Istisna* (Pre-production sale)
- h) *Muzaraah*
- i) *Musaqah*
- j) Agency
- k) Service charges
- l) *Qard-i-Hasan*
- m) Buy - Back Agreement (subject to certain conditions)
- n) Hire-Purchase
- o) Sale on installments
- p) Developmental charges
- q) Equity participation
- r) Rent sharing
- s) Sale and Purchase of shares in such companies which have tangible assets
- t) Purchase of trade bills
- u) Financing through Auqaf

There might be some duplication and over-lapping in some of these modes mentioned above but these are some of the examples which only show how different scholars and experts tried to develop modes of financing and investment keeping in view the framework of the Shariah. These modes, even if the list is expanded, will not in any way be exhaustive because new modes and techniques will keep on coming into existence. It is always the need of the entrepreneurs and the requirements of the market which give rise to new and novel modes and

techniques. The approach of Shariah is not to lay down a set of exhaustive modes or techniques and prohibit the rest. The approach of the Shariah is just the other way round. It prohibits certain practices and permits the rest. These and any other Shariah modes are to be understood and applied in the light of this observation. We shall shortly discuss some of these alternatives in detail only to show that alternatives do exist which are being practised in Islamic banks and can easily be developed into viable alternatives.

- ix) In all transactions and dealings which involve any debt obligation the rights and privileges as well as the obligations and liabilities of both the parties should be specified beforehand and shall not be subjected to any change or modification later without mutual consent. This will apply to the specifications of commodities and manufactured goods in the contract of *salam* and *istisna* and delivery in the payment of price in *Bai-Muajjal*.
- x) No debt or financial liability can be sold at a discount. The discounting of bills have therefore been prohibited.
- xi) Transfer of obligation is permissible and shall be regulated under the laws of *Kafalah* and *Hawalah*.
- xii) Delay in payment of debt or in the delivery of goods should be dealt with under the law of civil obligations, or if need be, under the penal law for which appropriate provisions may be made in the statute book. Any delinquency or neglect of duty or obligation shall be dealt with under the normal law and shall not, in any way, lead to the increase in the financial liability of the concerned party.

- xiii) No debt shall be compounded or increased because of any delay or delinquency however long it might be.
- xiv) Only tangible things or legitimate entitlements shall be the subject of contracts of exchange, such as sales, rent, leasing, *salam* etc.
- xv) No one shall be authorized to sell a commodity or title thereto without taking it into his actual or constructive possession. As such forward sales not covered under the rules of *Bai Salam* shall be prohibited.
- xvi) In a *Salam* sale both, the delivery of the commodity and the payment of the price cannot be deferred. It amounts to the sale of debt for debt which is not allowed.
- xvii) Exchanges of gold for gold, silver for silver, money for money e.g. local against foreign shall be void if it is not hand-to-hand, i.e. on the spot.
- xviii) All such agreements and transactions in which two or more exchange contracts are interdependently combined, are void. For example, loan dependent on sale or sale dependant on a loan shall be void.
- xix) Benefits or usufruct accruing from the collateral is the right of the owner. Financier has no right to use or enjoy it.
- xx) Any uncertainty about the rights and obligations of the parties or the specification of the commodity or its value which may lead to a dispute or litigation invalidates the contract.

The above discussion will show that under the Shariah no distinction can be made between interest and usury. It has been pointed out by different scholars that the distinction between usury and interest has no academic or scientific basis. It has been established that this so-called distinction made to justify interest on weak and emotional grounds. Professor Shaikh Mahmud Ahmad has dealt with this question in his masterpiece, Man and Money. We may profitably give a jist of his extremely valuable discussion on the history of the separation of usury from interest. It may be noted that Professor Muhamud's book, Man and Money is one of the best books written on Riba and interest and their economic and moral evils by the pen of a Muslim. Prof. Shaikh Mahmud Ahmad writes that one way of winning acceptability for interest was to emphasize the common elements, if any, between profit and interest, rent and interest or hire and interest. This was done to attract legitimacy to interest by confusing it with other categories. At the same time, the difference in the high and low rates of interest was played up to establish that it is only the high or exorbitant rate which was bad while the fair rate was something fully justified on economic grounds. Once the economic grounds were accepted at the popular level, there was no difficulty in giving them a moral justification too. Through this device, the evil of interest, *Riba* or *biyaj* was attributed to usury and interest was artistically extricated from the consequences of

this blame. According to Shaikh Mahmud Ahmad, this sophistry, as it was, is devoid even of superficial sanction. Even this superficial distinction made centuries ago to tolerate some forms of interest, has been rendered meaningless by the emergence of bank interest and credit in a powerful and institutionalized way.

It will be both significant and interesting to note that early Christian and Jewish usury was in no way different from *al-Riba* or the Riba of the Qur'an. Under the influence of the Old Testament, the Christianity was uncompromisingly opposed to the institution of interest, even though the word used for it was usury, which conveyed the same meaning in the Middle Ages as interest does today. Charlemagne, under whom State forbade usury for the first time, defines it in his collection of ordinances as "where more is asked than is given". This definition (which is strikingly in conformity with the views of the *Fuqaha*) was rigorously applied in the decisions of the Church. Pope Eugene III, for instance, decreed that "mortgages, in which the lender enjoyed the fruits of a pledge without counting them towards the principal, were usurious". This verdict also fully conforms with the position of the jurists. Similarly Pope Alexander III declared that "credit sales at a price above the cash price were usurious. Even the troublesome permission in *Deuteronomy* to take usury from strangers had been superseded by the concept of universal brotherhood: there were no strangers.

As trade and industry developed after the 11th century, the more rigorous application of the doctrine of prohibition of usury started being replaced by this differentiation between usury and interest. The Latin noun *Usura* means the use of any thing, in this case the use of borrowed capital, hence usury was the price paid for the use of money. On the other hand the Latin verb *Intereo* means “to be lost”; a substantive form *Interesse* developed into the modern term interest. Interest was not profit but loss. To claim usury was to demand a return for the use of money, which remained illicit, to claim interest was to demand compensation for loss which the lender suffered by depriving himself in various ways which became licit. This compensation for loss is now called opportunity cost of capital, which became a compulsive reason for the acceptance of interest. It is the development of institutionalized credit which rendered the differentiation of schoolmen obsolete, otherwise it is not possible to change them with sophistry at least in this context. The concept of opportunity cost of capital now seems to have become irrelevant in this age of institutionalized credit. It has become irrelevant because the need to differentiate between usury and interest is not so pressing outside the modernized Muslim elite as it was a few centuries ago. Now, the present interest is exactly what usury was claimed to be: i.e. payment of compensation or rent for the use of money. Towards the beginning of this century, a new justification was

sought to give legitimacy to the differentiation between usury and interest. It was claimed that the reason for the opposition of the church to interest was because it was charged on consumption loans taken by the poor in their difficult days and the lender took unfair advantage of their need and charged them a rate of interest which was higher than what was 'fair'. This 'unfair' rate was now termed as usury. But what was fair and what was unfair and what was the logical or rational basis to determine the level of fairness, nobody bothered to answer. Thus, interest was now confined to the 'profit' charged on loans advanced for productive purposes. It was claimed that since the borrower makes profit out of that loan he must share it with the lender. But this logic conveniently ignored that the lender should also share the loss to keep the balance equal.

The propositions that borrower must, in every case, share his profit, and NOT the loss, with the lender who is not concerned with the fate of the enterprise, has been accepted without any effort to substantiate it. The net result of all such propositions, the reprehensible character of usury and the fair character of interest, is passed from hand to hand as an accepted, authenticated and established truth. No one appears to have concerned himself with examining the propositions whose joining together produces this distinction. No one appears to have raised any of the queries which should have normally occurred to

every one: Were loans granted for consumptional purposes only or mostly in earlier societies? Do modern societies mostly avail of loans for productive purposes? Is there any empirical evidence, any historical proof showing a remarkable excess of productive loans in modern communities as contrasted with a significant excess of consumption loans in olden societies? Is there any statistical verification that the rate of interest charged in modern times is significantly lower than the one that was charged in earlier societies? What is a fair rate of interest, by exceeding which its nature and nomenclature is charged from interest to usury? Do the really needy ever enter the money market? Did they ever do so at any time past? Is there any guarantee that a loan secured for a productive purpose will necessarily result in a reward to the entrepreneur in excess of the rate of interest which he pays for the loan? How does the exploitative element existing in consumptional loans form a different genus or specie compared to the exploitative element in a productive loan when interest is charged during gestation period of an enterprise, or even after it when the production of value made possible by the loan is lower than the rate of interest?

After raising these important questions, Professor Shaikh Mahmud Ahmad says that the distinction between usury and interest was made without any scientific study or empirical enquiry. No one appears to have deemed it essential to provide any kind of evidence in support of

this assertion based on the half dozen contentions. The learned economist takes upon himself the onus of examining the questions raised by him and brings home the shaky foundations on which this hypothesis has been developed. Here is the summery of the findings of late Professor Shaikh Mahmud Ahmad about the illogical and arbitrary distinctions between usury and interest. At the outset of his discussion on the subject he says that some economists have tried to shift the responsibility of differentiation between usury and interest to the so-called sophistry of the schoolmen. However, the fact is that they were forced into it by the pressures of trade and industry. It was the existence of “extrinsic titles” which the church recognized worthy of acceptance which necessitated the employment of the word interest, signifying payment for the loss incurred in advancing a loan, as contrasted with usury which was payment for the use of money, and which remained unacceptable to church. The extrinsic titles are now called by a blanket name of the opportunity cost of capital. While there could be some justification for this differentiation by schoolmen, at the time when it was made, in view of the fact of individual lending and borrower being no less significant than institutional credit, the present day development of financial intermediaries as practically exclusive source of capital, has rendered “extrinsic titles” as completely irrelevant. The concept of opportunity cost which could have sanctioned the use of the word

interest in place of usury is already an obsolete concept. The effort of economists to provide moral underpinning to the institution of interest with the help of an extinct notion is a variety of sophistry of which it is grossly unfair to charge the schoolmen.

While keeping the concept of opportunity cost at its back and call, economics has chiselled a whole set of reasons for differentiation between usury and interest. It advances the view that in earlier ages loans were advanced for consumptional purposes, to persons in straitened circumstances, and lenders took unfair advantage of their need and charged an unduly high rate of interest. This was usury and was rightly considered reprehensible. Interest 'on the other hand' is charge on productive loans. Since these enable the borrowers to earn substantial profits, there is no harm in the claim of the lender to demand a part of these profits. This is interest and is entirely fair. This makes a list of half a dozen propositions whose joining together was ensured to seek support for this differentiation. Whether or not it is valid would hinge on how correct the various propositions adduced in its support happen to be. Professor Mahmud expresses his surprise when he notices that economics tends to shirk from examining in depth any of these propositions, and assertion and its repetition are regarded as adequate substitutes for inductive evidence. Economics knows and observes rules of the game which devolve on it as a social science, except when it has

to deal with any issue relating to interest, and insistence on the distinction between usury and interest, without advancing a single sustainable evidence for its various contentions, illustrates how indifferent to reality economics can at times become. Since economics declines to advance proof for its contentions on the basis of which it differentiates interest from usury, Professor Mahmud Ahmad undertook to examine their postulates beginning with the claim that in earlier societies most loans were advanced for consumptional purposes.

Looking up the history of ancient societies and their economic picture it appears highly unlikely that consumptional loans could command the bulk of the credit market. For instance, Sumerian society was a busy commercial society. Seals unearthed from the ruins relating to the period indicate international commerce and many clay containing are business documents with ample evidence of credit transactions on interest, but there is no mention of consumptional loans. Similar is the situation of Babylonians who were essentially a commercial society. Most documents that have reached us relate to sales, loans, contracts, partnerships etc. These also indicate a highly developed system of finance. History attests to credit of both these societies being primarily related to commerce and industry, but there is hardly any evidence of consumptional loans. The prosperity of ancient Egypt was nurtured by import of raw materials and export of finished

goods. Credit was so developed that written transfers, prepared by scribes, available in markets, took the place of exchange of commodities or payment, something which is enough to indicate that credit was largely commercial. Similar situation prevails in the case of the other ancient societies including the Assyrians, the Phoenicians, the Arabians, the Indians and the Chinese, which fact confirms the chain that consumptional loans constituted the bulk of credit in ancient societies is not borne out by history. However, instead of reaching an indirect conclusion from the nature of economies of most ancient societies, if the specific history of the nature of loans prevalent in these ancient societies is checked up, one can directly find a confirmation of these results.

History gives ample evidence that earliest loans were those of seeds and animals. Although there is evidence of the existence of all varieties of loans, the first mention of extensive borrowing is made in connection with ship loans in Greece in 7th century B.C. Productive loans appear to have become even more prevalent after 400 B.C. in Greece. We have some evidence of consumptional loans as well but these were seldom given to people in distress, but were given to the wealthy or average farmers to meet personal emergencies. Loans are stated to have been on the security of either cargoes, or pawns or real estate. Though loan sharks are mentioned in Greek literature but these

are not characteristic of any ancient society as no modern society is free of this scourge. There were mitigating circumstances like free loans from temples which are no longer available. Records of loans in Roman Africa indicate setting up of endowment funds by wealthy persons which advanced loans at 5-6 per cent. In 13th century Europe consumptional loans were associated with nobility who often incurred debt and ruined. History, thus, appears to contradict both the assertions of economics that early loans were primarily for consumptional purposes and were given mostly to people in distress.

Misrepresentation by economics regarding the nature of loans is not confined to ancient societies but extends to modern age where, contrary to unimpeachable statistical evidence, it is claimed that most of the lending is for productive purposes. The factual position regarding present times is that in most countries belonging to the so-called free world, budgetary deficit of governments alone exceeds more than one half of the loanable resources of these countries. Checking the situation in this regard of just two countries, viz., U.S.A. and Pakistan, relating to the decade from 1974-83, Professor Mahmud reaches the conclusion that the above statement is more likely to be an under-estimate than an over-estimate. Un-weighted annual average of budgetary deficit for 10 years in U.S.A. comes to 107.17 percent of the annual increase of demand and time deposits in the country during these very years. In the case of

Pakistan unweighted annual average of budgetary deficit for the period 1975-82 works up to 64.98 percent of the annual accretion of total deposits in the banking system. A noteworthy feature of these figures is that the trend of deficit in both countries is virtually consistently in the upward direction. This is not the only variety of consumptional loans which pervades the scene. Installment purchases, which involves 13.3 per cent of disposable income in U.S.A. and is a significant entity in Pakistan as well, have to be added along with other consumptional loans like those covered by credit cards.

So far three of the basic ingredients of the argument of economics for differentiating usury from interest have been formed to have no objective reality. Neither the loans in earlier ages were for consumptional purposes, nor are loans in the present day for productive purposes, nor the implication that exploitation characterized earlier loans and creativity inheres in modern ones conforms to facts; nor was this the reason why Christian Church was opposed to interest and why it relented in its acceptance subsequently. The claim of economics that “almost all loans” in earlier societies were given to “people in distress” is a variety of gross mis-statement of which no discipline can feel proud. The mere fact that security of loan and its assurance of return along with interest has been the permanent consideration of every lender in all ages, immediately excludes the needy and the destitute from the money

market. Even pawnbroking is not available to people below the level of moderate poverty. The nearest we come to distress is the case of emancipated peasants who mortgaged their lands to be able to work over them.

A cardinal postulate on which economics leans for its differentiation between interest and usury is the claim that in earlier societies loans were advanced at high rates of interest and were usurious, while a reasonable rate of interest is charged in the modern times. Though no one has defined the word “reasonable”, a study of interest rates in various ages becomes necessary for evaluation of the claim made by economics. Starting with ancient times and confining to the rates more often mentioned in particular contexts we find 20% the customary rate of interest for silver loans during Sumerian period in Babylonia, i.e. 3000 to 1900 B.C. Laws of Manu in India, in 24th century B.C. set 24% as permissible level of interest. Code of Hammurabi fixed a limit of 20% for loans of silver, a legal maximum which lasted from 1900 to 732 B.C. and beyond during the Neo-Babylonian Empire. In Greece, the rate at the time of Solon (638-558 B.C) was about 16 per cent, and ranged between 12 and 18 percent during the time of Orators in Athens. Twelve Tables about 443 B.C. fixed the maximum rate at $8\frac{1}{3}$ percent. The Greek temple of Delos charged 10% on all loans. In Egypt after 300 B.C. one finds repeated mention of “normal” interest

rate of 12 percent, which was regarded legal and maximum by Roman emperors. The Code of Justinian (6th century A.D.) declared 12% as exorbitant and reduced it to the range of 4-8 percent. It is for us now to compare the maxima and the minima of ancient times with those of the present days and decide whether there is any difference of the magnitude which can justify the coining of two different names for payment for the use of money.

Early middle ages are marked by controversy about usury and by diverse methods of avoiding it, including partnerships, annuities and triple contracts these last were also called "5 per cent contracts". The information about interest rates during this period is relatively scarce, partly because of usury laws and partly because of disturbed conditions in Europe. These factors also operated in some measure in the case of the Islamic world. Though, in the early middle ages, Byzantine commerce could raise money at the moderate rate of 8 to 12 percent, which was lower still in 10th century, it was not usual for the rest of Europe. During the 12th century the rate varied from 8 to 20 per cent at various periods and places, except for 43. 1/3 per cent charged by Jews in England. During the 13th century even more fanciful rates were charged by Jews which sometime went up to 300 per cent. Because of widespread dissatisfaction with such high rates, various states fixed maximum limits beyond which would be deemed usury. These varied

from 15% in Milan to 10% in Verona. In the fourteenth century except for loans to princes which commanded 30 per cent interest, loans could be secured around 15%. Long term government loans paid only 5%. In the 15th century Montes Piatatis were established which helped lower pawnshop rates to 6 percent, 5 percent became the standard on triple contracts. By the 16th century Montes had developed into saving banks, and charged 8-10% from borrowers. Annuities were floated by governments with return varying from 5 to 6 percent. The trend towards low rate continued in the 17th century and the discount rate of Bank of England reached 4% in 1968. Colbert, Finance Minister of Louis XIV reduced the return of annuities to 5% and rates in Amsterdam varied between 3 and 4 per cent. Early middle ages indicate interest rates much higher than ancient rates, whereas the fall in rates during later middle ages lowers the level compared to what obtains today. None of these realities justifies the thesis of economics regarding high rates in ancient times and low rate in modern times. In the Eighteenth century England, the government emerged as the chief borrower, mainly for war purposes. The yield on bonds, which were mostly of the form of perpetual annuities, varied from 3.50 to 6.57 per cent. Usury limit applied on all other loans, which was 6% at first and 5% later. In France, 5% is the commonly mentioned rate, particularly in connection with perpetual annuities, but when opportunity presented itself 8 ½ per cent became the

ruling rate. There were no usury laws in Holland and yet the rate seldom exceeded 3 percent. In Italy and Germany 5% was considered normal for census annuities, though some times it fell to 4%. In U.S.A. 5% was regarded a suitable rate and 8% an exorbitant one. England witnessed in nineteenth century rapid economic growth and declining interest rates. Throughout the century yield on British consols kept falling till it was below 2 per cent in the last decade of the century. Dutch long rates were generally higher than British long rates, reversing the position of earlier two centuries, which was reflected in the change in economic position of the two centuries. Situation was not dissimilar in Belgium, Germany and Switzerland, but in U.S.A., in spite of the declining trend of interest rates, these were almost always higher than the British rates and witnessed wide fluctuations.

The history of interest rates in the present century is remarkable for its wide gyrations. Between 1900 and 1975 we find the lowest and the highest interest rates of marketable credit instruments. For instance, in U.S.A. in 1964 best long municipal bonds sold to yield less than 1 per cent, whereas at the peak in 1974 commercial paper yields reached 12%. The change in interest rates in England, France and Holland is in identical directions. On this basis of this valuable fund of information, Professor Shaikh Mahmud Ahmad reaches the unmistakable conclusion that the rise and fall of interest rates has an

inverse co-relation with the rise and fall of nations. Sidney Homer illustrates this point with reference to several civilizations including those of Babylonia, Greece and Rome. In modern Western civilization, there has been identical fall till the middle of 20th century and the consistent rise since then can only lead to eventual disintegration. However, that may be, the gyration of rates in this or earlier centuries does not support the thesis of overriding declining trend in rates to justify differentiating interest from usury. The only difference appears to be the widening of the band of fluctuations. We have had the lowest interest rates in this century, provided we exclude availability of free loans, at least partially, in some earlier societies. Simultaneously peak yields of 20th century are well above identical yields of 17th, 18th and 19th centuries. The statutory limit for small loan companies in U.S.A. exceeds the limits prescribed by Hammurabi, and even Manu. If we confine ourselves to exceptionally fanciful rates charged by Jews in the middle ages, loan sharks in U.S.A., according to a study made in 1933, charge anything between 240 to 1500 per cent per annum. Whatever rate of interest we look into from the prime to the government long one, or the consumptional to the statutory one, 20th century appears ahead of all earlier ages and epochs. Therefore, the entire basis of differentiation between usury and interest, so far as the level of rates is concerned has no legs to stand upon.

The differentiation of interest from usury as already noted is predicated by economists upon six main postulates. These are, firstly, that loans in earlier societies were mainly advanced for consumptional purposes and to people in distress; secondly, modern loans are largely advanced for productive purposes; thirdly, that the former category of loans is exploitative and the latter creative; fourthly, that this was the reason why Christian church was opposed to usury and eventually relented in favour of interest; fifthly, that interest in earlier ages was high; and, sixthly, that it is comparatively low now. Except the third postulate we have examined each one at some length and found them factually devoid of any basis. There is much to be said about the third postulate as well, but if we concede this postulate to economists, it will involve, in case it adheres to its logic, calling the present basis of banking as usury, as the loans are largely consumptional and advanced at rates which are among the highest in the entire history of interest rates. Applying the criteria of economists, if all loans are usurious today, then it is the responsibility of economics to point out the exact location of that interest which it is trying persistently to differentiate itself from usury.

There are two more fundamental questions, overreaching the flimsy and false postulates of economics, relating to differentiation between interest and usury, to which no attention appears to have been

paid. Firstly, what is the principle which governs the differentiation between the two, and secondly, what exactly is the level at which one ends and the other begins? The late economist only amplifies these questions and leaves it to those who regard this differentiation as legitimate to answer these. He finds variations in the level of usury both during the middle ages and at present between various states of U.S.A. How exactly malevolence of usury shifts to benevolence of interest when one crosses a specific limit by even a fraction of 1 per cent, or even while sticking to the same limit by merely crossing over a specific boundary, or while sticking to the same limit and the same location by merely crossing a particular date in a particular year; or finally how does the same rate at the same time and at the same pace becomes benign in one case and malignant in the other?

This so-called differentiation between usury and interest is not comparable to the one between profit and profiteering and rent and rack-rent because there are principles which govern these differentiations. The absence of a comparable principle in the case of usury and interest is very much like the absence of any categorization among various degrees of blackmail, or adulteration or murder. If this categorization is to be retained evolution of a fundamental principle would be necessary. It is possible to argue that though the basis of differentiation between interest and usury projected by economics may

be unsustainable the differentiation many yet be valid for other reasons. In this context erosion of the value of money during the period of a loan is sometime advanced as a cogent argument. Although the question of inflation has been separately dealt with at length in this judgement, we may see at this stage what Prof. Mahmud has to say on this problem. According to him, if inflation were historically an inseparable appendage of our economy the argument would be an unanswerable one. As it is we who have inflicted it upon ourselves through expansionary fiscal and monetary policies in order to restrict unemployment, instead of eradicating it by adopting the remedies suggested by the economists, particularly by Keynes. If inflation has emerged on account of our mishandling of the economy dictated by our desire to retain the institution of interest, we cannot now turn round and project this as an argument for perpetuation of the same exploitative institution. If interest is the cause of inflation, it cannot now be used as its cure.

Another practical consideration advanced for retention of interest relates to meeting the costs of banking and making it a worthwhile vocation. This again would have been a persuasive consideration provided it were accompanied by compelling evidence that no substitute of interest, shorn of its depredation, can be devised. Actually, we have not even seriously started on our quest in this direction, making the argument patently premature. But suppose after

making the necessary effort we do not find a workable alternative to interest, it would be a good argument for retention of interest, but not for the reason of its assumed benevolence as contrasted with usury, but for the reason that an unexploitative basis of credit, in spite of all conceivable efforts, had eluded our grasp. Similarly, capital depletion as justification of interest has no valid basis because interest is a payment for financial capital and not for physical capital. All theories of interest are mere quibbling and all positive qualities attributed to this institution including the fairy tale of its differentiation from usury mere balderdash. According to Prof. Mahmud Ahmad, inspite of these convincing arguments, interest exists because no equally workable alternative basis of banking has yet been devised. After raising the question, how far this persuasive argument is withheld for the fear of focussing of attention of all creative thought on the devising of an unexploitative credit structure, he thinks it is something best left to the reader to decide.

What Professor Shaikh Mahmud Ahmad has said about bank interest applies to the problem of bank reserve. There is no mention of its restrictive role which we are forced to suffer because of the absence of an alternative which may be able to perform its positive functions. This issue hitherto has not deserved even a mention by our economics. Interest is in reality only monopoly price charged by capital. Its rise and fall has no relevance to the fine-woven difference between interest and

usury, but merely with the limit of what the traffic will bear. Bank reserve plays a double role in enabling perpetuation of this monopoly price. On the one side, it represents collusion between wealth owners which is an essential ingredient of monopoly, and, on the other, it ensures restrictive supply of capital resources in order to confer on them eligibility of demanding a price for their utilization. Interest in short is an exploitative category completely indistinguishable from what was called usury a few centuries back.

The question of interest is closely related with the concept of money which occupies an important place in any discussion on financial, fiscal and monetary reform. It is generally claimed by the western writers on the subject that money was introduced much later at a certain stage of evolution. Before that stage, it is asserted, that exchange and transfer of commodities was done on the basis of barter which signified direct exchange of goods and service. But there being no historical evidence to substantiate this claim, it seems to be based on mere conjecture. It appears from a Hadith that the concept of money is as old as human dealings and transactions are. The Prophet of Islam is reported to have said that Allah has created gold and silver to be the natural money. It shows these two metals have been designed to serve as medium of exchange, measure of value and storing the wealth and easy mode of deferred payments. But it does not mean that in primitive

societies barter exchange had not been common. Rather, it is still practiced at many places particularly in the remote areas of under-developed countries. The Shariah has taken cognizance of both monetary exchange and barter exchange and has laid down principles to regulate both kinds of transactions and dealings. The law of *Riba* takes care of both the kinds of economies. While *Riba al-Nasi'ah* primarily seeks to eliminate interest from monetary economy where goods buy money and money buys goods, the prohibition of *Riba al-Fadl* seeks elimination of interest from barter economy where goods buy goods. Although barter economy is rapidly shrinking at domestic level, it exists at international level and may continue for sometime in future as well. It is not, therefore, safe or advisable to brush it aside as something bygone and out-dated. The traditional difficulties and demerits of a barter economy as enumerated by the writers on monetary theories apart, the relevance of Islamic precepts about the prohibition of *Riba al-Fadl* remains to have a permanent relevance. Muslim Jurists and economic thinkers seem to have been aware of difficulties faced in a barter system. It was perhaps to over-come the problem of the lack of double coincidence of wants that they tried to identify certain commodities as quasi money. The discussions made by Muslim jurists for the identification of the *Illah* and the determination of *ratio decidandi* clearly indicate their desire to develop quasi monetary commodities.

According to Imam Malik, for example, the *ratio decidandi* of the prohibition of the six well known commodities is the storability and facility to make deferred payments. According to Imam Abu Hanifah, it is the common measurement and fungibility of these commodities which is the *Illah* of their prohibition.

The upshot of this discussion is that Islam acknowledges not only the real money, namely gold and silver or anything which may represent them, but also takes into consideration the barter practices and quasi money if it meets the requirement of measurement and storage of value and usability for making deferred payments.

The Hadith that gold and silver constitute the real and natural money is very significant. It does not appear to be a mere statement of a historical fact. It seems to be a reaffirmation of the universal economic principle that there has been and has to be a common, universally acknowledged and easily manageable medium of exchange which is nothing but gold and silver, whether in the form of bullion or coin or any promissory or banknote which should be supported by a corresponding quantity of gold. Historical records show that gold coins were in use even in the ancient-most societies ever found on the surface of the globe. There has hardly been any excavation of ancient human dwelling where the traces of gold coinage have not been found. The introduction of paper money did create some problems for Muslims jurists of the

eighteenth and nineteenth centuries who faced some difficulties in understanding the true nature of paper money and, accordingly, different points of view were advanced by the jurists in their effort to formulate Islamic positions regarding paper money according to their respective understandings and perceptions. The nature and dimensions of paper currency has undergone such quick changes that Muslims jurists had to keep pace with the changing positions of the western bankers and fiscal experts. The different and apparently conflicting views of Muslim jurists are to be explained and interpreted in the light of the changes in the nature and attendant features and functions of paper money in leading western economies, particularly in Britain, France and other colonial powers. In 19th century most Muslim jurists tried to explain paper money in terms of Islamic categories of *Kafalah*, *Hawalah* and other similar instruments. But these traditional instruments were never meant to be used as paper money. They were simply designed to serve as means of transferring debt or other obligations from one person to another. Their nature was not different from a cheque which facilitates transaction between two specific parties and expires after a single transaction. Like a cheque, a *Hawalah* instrument was not money; it was simply a written order or undertaking to transfer or accept money or obligation. This important background must always be kept in view while considering

the writings of Muslim scholars and ulema about paper money as introduced by western powers in the Muslim World.

As far as the kinds of money are concerned, the Shariah position is very clear. The metallic money made of gold and silver is the real and the natural money and is subject to all the rules and principles laid down in the Shariah to regulate its transaction, transfer, use, investment and all other forms of disposal. Money made of other metals such as nickel, copper and steel, is to be taken as money as long as it is considered a legal tender. This kind of money was normally classified as *fulus* and Muslim scholars have dealt with it in detail. We will come to it later.

The standard money or full bodied money was in vogue during the days of the Prophet of Islam and continued to be in use for quite sometime after him. In fact during his days and the days of his immediate successors the gold and silver coins which were in circulation in Arabia and elsewhere were standard money and their value for non-monetary purposes was exactly the same as their value as money. The *fulus* made mostly of copper or nickel represented only the token money as their intrinsic value as a metal was definitely much less than the face value they carried. But one thing is very significant in respect of *fulus* which should always be kept in mind. The *fulus* were used mostly, if not exclusively, as units of gold or silver coins. The number of *fulus*

included in a particular silver or gold coin varied from time to time as a result of the interplay of market and other forces and the value of one *Fals* fluctuated without affecting the value of the parent coin of gold or silver whose value underwent little change and that too very rarely. In a way the *fulus* were subsidiary money in their relation to the standard money. The *Fiqh* literature has extensively dealt with these kinds of money in the context of commercial contracts, trade operations and business transactions.

The paper money, being something comparatively new, found little mention in the standard works on *Fiqh* produced even as late as the seventeenth or eighteenth centuries. Most of the Muslim scholars and ulema had an encounter with paper money when it was not a fully representative paper money and was, in fact and in effect, a kind of receipt issued from the circulating agency for full-bodied coins or their equivalent amount of gold or silver in bullion. As such Muslim scholars and ulema in the beginning did not consider paper money to be real money and treated it only the way a receipt is treated. Later, when the representative paper money degenerated into convertible and then non-convertible paper money, Muslim scholar started reviewing their earlier positions. There have been different views and opinions about the Islamic position vis-à-vis fiduciary money or the fiat money. But the consensus which appears now to have been made is that the fiat money

is money for all practical purposes and will have to be taken as a substitute for gold and silver, the real and natural money. There is no difficulty as far as the legal status of fiat money is concerned. However, the difficulty arises when it is asserted, to quote J.M. Keyens, that the fiat money has no fixed value in terms of an objective standard. Again, the distinction made by Keyens between what he calls the money of account and the money proper has to be dealt with carefully in order to formate Islamic positions vis-à-vis the same. According to him, money of account is represented by debts, prices and the general purchasing power. In fact, it is the general purchasing power which now seems to be occupying the field rapidly and is perhaps driving out other forms of money to the corner. The concept of SDR is nothing but a money of account which is now controlling most of the international transactions. However, it is too early and pre-mature to express any definite ruling or final verdict on the Islamic position about the money-of-account as a whole and different kinds of this money will have to be taken separately. Some of them will continue to be dealt with under the law of *Hawalah* and *Kafalah*. Some other kinds may be taken to be the substitute for real money, namely gold and silver, insofar as their use as medium of exchange and unit of value is concerned. Some other forms of money-of-account e.g., SDRs will have to be equated with fiat money insofar as the application of law of *Riba* is concerned. The question of negotiable

instruments is closely related to, if not all together dependent on, the formulation of Islamic position about the money-of-account and near money. The non-legal-tender money or optional money is, in fact, a very grey area where one hard and fast rule cannot be applied. However, if the bonds, securities, debentures, treasury bills which have a ready market and are negotiable and easily convertible into real money within a short time, these should be treated like a substitute of the fiat money and should be subject to those very limitations and restrictions which control the fiat and the real money. However, such other types of the money-of-account which have no ready market and not easily negotiable and convertible into real money shall continue to be treated like personal instruments and *Sukuk*.

The question of currency and coins has also occupied a significant position in the discussion on Islamic solution to inflation and the possible role of indexation as well. Before we embark upon a treatment of Islamic position about indexation it is necessary that the status and legal position of coins and currency in Islam is determined. This is necessary because some people confuse the modern concept of legal tender and fiat money with the coins or *fulus* used in the early centuries of Islam as smaller units of *dirams* and *dinars*. In the early days of Islam fungible items, particularly dates, wheat, barley, hides and such other similar commodities were used as medium of exchange in

addition to gold and silver coins. It appears from the Qur'an that the gold, silver and other coins were used in very ancient societies. In the context of the people of the cave the Qur'an tells us that they had carried with them silver coins (*wariq*) for the hour of need. They sent one of their colleagues with these coins to the town to purchase food for them (al-Qur'an, *al-Kahf*: 18). Similarly in the context of Prophet Yusuf there is a mention of *dirhams* paid by the Egyptian caravan for the purchase of young Yusuf (al-Qur'an *Yusuf*: 12). In his commentary, Tabari has quoted a report which shows that the people of Prophet Shuaib used to discount or reduce the weight of the coins which was prohibited by Prophet Shuaib. When Islam came, various coins were in vogue in Arabia particularly in the main commercial centres of Tayef, Makkah and Madina. The popular currency was the Roman *dinar* made of gold, the Iranian *dirham* made of silver and Yemenite coins made of copper. These were exchanged primarily on their face value which was not normally different from their intrinsic value. However, some people used to steal away gold and silver from the coins either by cutting their corners or otherwise which necessitated that in case of doubt these *dinars* and *dirhams* were weighed before they were accepted. During the days of Holy Prophet (PBUH) and the first Caliph, these coins continued to be in use. However, the Prophet of Islam (PBUH) gradually discouraged the barter system and encouraged monetary transactions for

which he declared that gold and silver are the natural mediums of exchange and store of value. That is why in many transactions he directed that gold and silver (i.e. the money par excellence) should be the basis of mutual dealing. In respect of the payments of *Zakat*, *Mahr*, *Diyat*, *Daman*, *Kharaj*, *Jizyah*, *Ushr* and in several other areas the respective amounts were fixed in terms of dinars and dirhams. For *Mudarabah* particularly the jurists of Islam had considered it necessary that the capital be paid in the form of gold or silver, i.e. cash. This was, on the one hand, to close that doors for *Riba al Fadl* and to put and end to the tricks of the Jews, on the other.

In the 18th year of Hijrah the second Caliph ordered the preparation of first Islamic dirhams with Islamic inscriptions on them which were circulated side by side with the Roman and Iranian coins. The *Bayt-al-Mal* coordinated and controlled the circulation of all these coins and ensured that debased and less pure coins are replaced by the genuine and pure ones. This first Islamic coinage was confined to silver dirhams while the golden dinars continued to be as usual. Caliph Muawiyah was the first Muslim ruler who got some dinars. However, towards the middle of the second half of the first century the Umayyad Caliph, Abdul Malik, reviewed the entire fiscal policy, demonetized all earlier coins including dirhams and dinars of various origins and substituted them with regular and permanent Islamic coins in 74 A.H.

The demonetization of earlier coins was necessary because many of them were either debased or impure and as such, had a tendency of driving the Islamic coins out of circulation. It may be noted that Muslim scholars noted this fact and advised Abdul Malik to eliminate all pre-Islamic coins by demonetizing them so that they were totally out of circulation. The hallmark of the new Islamic coins was that their face value was exactly equal to their intrinsic value. The Umayyads not only regulated the preparation and circulation of coins but also ensured that no one violated the laws of coinage, their weightage and the rate of exchange. The historians Baladhuri and Maqrizi have preserved the details of the fiscal policy of the Umayyads.

The rate of exchange of these coins *inter se* was determined by the market forces keeping in view the respective intrinsic value of the metal concerned. Gold was the ultimate standard and it was with reference to gold that the rate of exchange in respect of other coins was determined. The position of copper *fulus* was, however, different. They were not considered money in themselves. They were, rather, smaller units to facilitate payment of the fraction of a dirham or other silver coins: the *fulus* neither had any independent reference of value in their own right nor could they replace the silver or gold coins. Had the copper *fulus* been independent monetary units they would have driven the silver coins out of circulation under the Gresham law. (It may be pointed out

here that this law was not given by Gresham for the first time. It was noticed for the first time by Abdul Malik as pointed out earlier and was formally and academically discussed by Maqrizi. The law should therefore be called either Abdul Malik Law or Maqrizi Law).

The Holy Prophet (PBUH) issued instructions to regulate the exchange of the dinars and dirams in such a way that not only *Riba* in deferment (*al-Nasihah*) but also *Riba* on cash (*al-Fadl*) is avoided. The principle of equality in the exchange of silver and gold was to prevent usurious activities in exchanges. According to Dr. Yusufuddin, in the early days of Islam the Roman, Iranian, Yemeni and other coins were in currency in the markets of Makkah and Madina. The traders going to other countries needed the currency of that particular country and got it exchanged with the available currency. The money-changers used to discount at the time of exchanging the money of a country with that of another. The Hadith material included in Bukhari (*Kitab al Buyu* and *Kitab al Sarf*) indicates that the increase or decrease prohibited by the Holy Prophet in *Riba al Fadl* was in the context of such exchanges. Dr. Yusufuddin interprets the Hadith reported by Hazrat Uthman that the Holy Prophet (PBUH) has said: “Do not sell one dinar for two dinars or one dirham for two dirhams” in this context. This interpretation seems to be plausible and convincing because otherwise there seems to be no logic in purchasing one dinar for two dinars and one dirham for two

dirhams. A similar Hadith has also been reported by Imam Malik on the authority of Abu Huraira that the Messenger of Allah (PBUH) has said: “Dinar for dinar and dirham for dirham (may only be exchanged) without any excess or increase between the two”. Commenting on these two Ahadith, as well as on other instructions of the Holy Prophet (PBUH) in similar terms, Dr. Yusufuddin writes: “Those who may not be aware of the techniques and methods of money-changers may possibly ask after casting a cursory glance over these traditions as to who and why would accept one dinar for two dinars or one rupee for 1.5 rupees. But even an elementary student of economics would clearly understand what these Ahadith mean. Generally, the silver and gold coins of one country are exchanged for the silver and gold coins of another country. But one has to concede some discount for the procurement of other coins and currencies”. Commenting on the rationale and impact of these injunctions of the Holy Prophet (PBUH), Dr. Muhammad Yusufuddin further writes: “The international vision of the Mercy of the Worlds (Rahmat li'l-Alamin) wished to introduce international coinage and currency in the whole world. In those days, the Roman coins were costlier and enjoyed greater prestige as compared to Iranian coins because the reputation of the Iranian Government was falling due to weaknesses creeping into it. Since that vision cannot be met if discount is allowed, there is no other solution except this that all

Governments should have introduced silver and golden coins of the same weight and value at international level and abolish the practice of discounting, such as the number of the days of the week and the months of the year are equal almost in all the countries. The difficulties being faced by the business world due to the machinations of money-changers, particularly the sufferings of the enslaved nations at the hands of the colonial powers are not unknown to the economists. The command of the Prophet of Islam as a universal message deserves to be considered in the light of its merits and benefits as well as the demerits of the existing practice". In support of his views about the interpretation of these Ahadith, Dr. Yusufuddin has referred to the views of some Western scholars. He has extensively quoted from a book entitled **Money and the Mechanism of Exchange** (chapter 14). This interpretation of the author is further supported by the tendency of the modern world to adopt uniform modes of weights and measures at the international level. These uniform standards have been adopted to facilitate the exchange of goods both at national and international levels and to avoid any confusion, misgiving and uncertainty. The same considerations applied to a situation where the currency and coins of one country are exchanged with those of other countries with excesses and increases. Apart from being *Riba*, it opens the door for confusion, uncertainty and practical difficulties. Although with the introduction of paper money and

fiduciary money the discussion of medieval economists about the metallic currency and coins have become less relevant, yet the principles which regulated this discussion are still applicable and the objectives which motivated Muslim jurists to control the exchange of currency and coins under strict Shariah regulations still require to be met.

As far as the copper *fulus* are concerned, it has already been pointed out that their position was not that of an independent currency. They were a form of sub-money used only to make payments of the fractions of a silver coin because it was not easy to break one silver diram into two equal parts for making payment of half diram nor it was easy for the Government or the money changers to issue smaller silver coins to facilitate such fractional payments. Therefore, the principles developed by the jurists to regulate the exchange of copper *fulus* will not be applicable to the paper currency and fiat money of today. Today's paper money has practically become almost like natural money equal in terms of its facility of exchange and credibility to the old silver and golden coins. It will, therefore, be subject to all those injunctions laid down in the Qur'an and the Sunnah which regulated the exchange or transactions of gold and silver.

However, this principle of equating paper money with gold and silver may be applied to stable currencies without any difficulty or problem. The problem arises when we deal with a currency which has no

stability. As far as the minor inflationary or deflationary trends are concerned the tendency of Shariah is to ignore them and to leave them to be determined by the independent market forces provided they are operating in an atmosphere of freedom, fair-play, justice and law-abiding market. But if the inflationary trend exceeds its natural limit and renders the currency totally unstable and undependable it can no more be equated with gold and silver. Here, an important question arises: How to decide whether a level of inflation is within the normal limits or has exceeded the acceptable normal limit. Unless this important question is decided the solution of the problem of inflationary trends and to save the rights of the creditors is not possible. The Qur'an requires (*al-Baqarah*: 287) that neither the creditor is done injustice nor the debtor. It also requires (*al-Araf*: 85, etc.) that peoples' money should not be reduced. In view of these two Qur'anic injunctions if the inflation rate exceeds the limits of justice and fair-play steps shall have to be taken to protect the creditor from suffer and loss. But the problem is that inflation is not a simple and easy-to-understand phenomenon. It is a complicated issue which can be solved only through a long-term planning and major changes in the fiscal, monetary and economic policies of the country. There are a number of forces which contribute to the emergence of hyper inflation or galloping inflation. We will, however, deal with this question shortly.

The principle of controlling *Ghabn Fahish* may be invoked to protect the rights of the creditor and to save him from loss. The *Ghabn Fahish*, which literally means excessive loss, has been defined as a loss which cannot be estimated by the experts. Muslim jurists have variously defined the amount which may be considered to be falling under *Ghabn Fahish*. What may be concluded from their discussion on the subject is that an inflation which reaches the stage of hyper inflation or galloping inflation is to be treated under the principle of *Ghabn Fahish* and would call for steps to be taken for the protection of the rights of the creditor. Here, the principle developed by the jurists in respect of *fulus* seems to be applicable. They have concluded that if the circulation of the copper coins is stopped or the value of the *fulus* substantially falls as compared to their face value, they will lose their status as medium of exchange and store of value and will no more be considered as *Thaman Istilahi* or legal tender. In such a case the original value of the *fulus* as prevalent at the time of the transaction shall have to be paid. Under this principle as long as a currency continues to be within the normal limits of inflation, the difference of its latent value will have to be ignored and all transactions, payment and repayment will have to be made on the basis of its face value. But as soon as it exceeds that limit and enters the province of hyper inflation it will be taken to have caused *Ghabn Fahish* to the creditor. Now if the creditor is paid the same currency on the basis

of its face value it will be an injustice to him in terms of Qur'anic verses quoted above. In that case he will have to be paid in accordance with the actual value of the currency as existed at the time of the contract. There have been jurists who are of the view that the payment should be made according to the value which existed at the time when the reduction in the value took place. But it is difficult to agree to this proposition in the context of inflation affecting the paper money. In the case of *fulus* it was possible to identify a particular date on which the value was reduced but it is not possible in the context of a paper money always to identify the particular date on which the hyper-inflation took place. Inflation is a continuing and on-going process. Sometimes it continues to be within the normal limit while sometimes it crosses that limit and is called hyper-inflation. If demonetization or devaluation takes place by an order or decision of the Government which substantially reduces the value of money we may take that particular date to determine the value to be paid to the creditor. But in cases where a formal devaluation or demonetization has not taken place it may not be possible to determine with certainty and exactitude as to the date on which the hyper-inflation took place. In view of this absence of certainty and exactitude the safest way is to fall back on the date on which the transaction had taken place.

It has been asserted time and again by many people that whether bank interest is *Riba* as interpreted by Jassas does not include

bank interest. This has been claimed by Mr. Khalid M. Ishaque as well as some other scholars whose writings have been placed before us in support of this contention. However, when the views of Jassas are examined in the light of his own writings, particularly his commentary on the Qur'an this assertion turns out to be baseless. He says in his *Ahkam al-Qur'an* (Volume 1, page 551) that 'in Shariah, the term *Riba* also includes meanings and situation which did not fall under the literal meanings of *Riba* as generally understood by the Arabs. The well-known statement attributed to Hazrat Umar () refers only to those meanings and situation. The reason is that the word *Riba* has become a term of the Shariah after the revelation of the Shariah and it needs elaboration as far as the extension of its meaning to this new situation is concerned. Hazrat Umar only referred to this elaboration, otherwise, there is no question of these aspects being hidden from Hazrat Umar. The form of *Riba* prevalent among the Arabs was that they advanced their capital such as Dirhams, Dinars etc. to people on the condition that the debtor will return this capital to the creditor at the maturity date along with the access determined by the creditor.' This statement of Abu Bakr Jassas is not only very comprehensive but repels several misunderstandings created by some modern writers. It clearly shows that the concern of Hazrat Umar was never in respect of the prevalent and known forms of *Riba*. It was only about those new forms which were

declared to be *Riba* for the first time by the Shariah in addition to the existing form or forms. Secondly, he clearly says that the definition of *Riba* is so clear and well-known that it could never be unknown or unintelligible to a man like Hazrat Umar. Thirdly, he clearly and emphatically identifies the form of *Riba* prevalent in pre-Islamic Arabia.

A survey of the literature on *Hadith*, *Tafsir* and pre-Islamic history clarifies beyond any shadow of doubt that in spite of the variety of the forms of *Riba*, the common element in all these forms was the stipulated increase demanded by the creditor over and above the principal amount payable in a contract of loan or sale. Tabari, Jalaluddin Suyuti, Ibn-i-Kasir and Mahmood Alusi in their respective commentaries have collected examples of various transactions prevalent as *Riba* during the pre-Islamic days. These forms can be reduced into the following:

- i) Charging of interest on a loan advanced to a debtor in consideration of the time allowed for repayment. (*al-Durr al-Manthur*, Volume 1, page 366). This is the simplest form of *Riba* and undoubtedly includes the present day banking interest.
- ii) Compound interest charged on the principal amount and the interest accruing thereto in case the debtor failed to pay the debt at the appointed time. This was the case of charging interest at exorbitant rates doubling and redoubling the

principal amount. The reason of singling out this form of *Riba* in verse No. 130 of Aal-i-Imran is that it was so obviously evil and heinous that every single person agreed that it should be prohibited. This form of compound interest had a tendency of doubling and redoubling the payable amount. The interest charged by many of our banking and non-banking financial institutions definitely falls under this category where in spite of paying double the amount a poor debtor is chased by the creditor.

- iii) The creditor would require the debtor to mortgage his valuables such as ornaments, jewelry and weaponry by fixing its price much lower than its actual market value. The loan was advanced keeping in view the lower price of the mortgaged property. They settled their claims by either confiscating the mortgaged goods or selling them at a higher price in the market.
- iv) As has been expressly reported by several authorities the creditor advanced commercial and productive loans on interest to leading businessmen and entrepreneurs. The principal amount along with the interest, both simple and compound, had to be repaid by the debtor irrespective of the success or failure of the business or enterprise. Hazrat Abbas used to advance such loans before Islam and it was this kind of interest which was abolished by the Holy Prophet (peace be upon him) in his Farewell Address (see among other sources *al-Durr al-Manthur*, Volume 1, page 364).
- v) Animals and cattle, particularly camels, were also advanced by way of loans and the animals to be repaid were required to

be in higher in age than those originally loaned. In case the debtor was unable to pay at the maturity date the requirements of the animals in terms of age etc. were increased and, thus, the creditor would receive ultimately a fully developed and grown up he- or she-camel in return of a young child-camel of one year or even less.

All these forms are included in what he has been called as *Riba al-Nasihah* (or interest on deferred payments), *Riba al-Duyun* (or interest on loans), *Riba al-Jahiliyyah* (or interest prevalent in pre-Islamic Arabia), *Riba al-Qur'an* (or interest prohibited by the Qur'an), *Riba Jali* (or express interest) or *Riba Haqiqi* (or real interest). These are various names given only for convenience and facility of understanding by various scholars to one and the same thing. This kind of *Riba* was known to the Arabs both before Islam and also at the time when the revelation regarding the prohibition of *Riba* was given. This kind of *Riba* is to be distinguished from the second category introduced by Islam by way of preventive measures. The Arabs did not consider this second kind of transaction to be *Riba* before its prohibition by the Holy Prophet (peace be upon him). This has been termed by the jurists as *Riba al-Buyu* (or interest on sales), *Riba al-Naqd* (or interest on cash), *Riba al-Fadl* (or interest by way of excess), *Riba Khafi* (or tacit interest) or *Riba al-Hadith* (or interest prohibited by the Hadith). The variety of names given to these two categories of *Riba* is sometimes confusing to non-

experts and has led some scholars to misunderstand and misinterpret the relevant texts and passages of jurists. As the first category of *Riba* was clearly and unequivocally understood by all and sundry, the jurists did not discuss it in much detail. Most of the discussion in the *fiqh* books is concentrated on the second category because it was something new and prohibited for the first time in Islam. This second category of *Riba* has been defined as the excess of one of the commodities in a sale of barter or exchange of cash if both the commodities are the same. Thus the exchange of wheat for wheat or gold for gold or silver for silver with excess or deferred payment on either sale has been declared as *Riba al-Fadl*. However, we shall come to this category of *Riba* later.

Muslim scholars have addressed themselves to the important question of the rationale of the prohibition of *Riba*. These include both classical writers and commentators of the Qur'an as well as the modern Muslim writers. The well-known commentators of the Qur'an, Imam Fakhruddin Razi and Allamah Khazini have identified the following main reasons for the prohibition of *Riba*. Firstly, *Riba*-based transactions have a tendency of eating up people's money without consideration. A habitual interest eater gets money without any risk or labour whether the transaction is on the basis of cash payment or on the basis of deferred payment. Secondly, when interest gains currency it prevents people from productive activities such as trade and commerce with the result that this

sphere of human activity withers away. Thirdly, interest puts an end to the pious act of giving free loans to people. If the interest is prohibited people would be happily prepared to give consumption loans to the needy persons in the society. Fourthly, for a Muslim, the very fact that the Qur'an has prohibited *Riba* is sufficient to abstain from it without seeking any further rationale or wisdom to justify its prohibition. Fifthly, the *Riba*-based transactions have a strong tendency of causing injustice to the poor and to add to the wealth and affluence of the wealthy. Similar views have been expressed by Sayyid Qutb in his well-known commentary *Fi Zilal al-Qur'an* (Volume III, page 33). He says that the hallmark of an Islamic society is love and respect of each other's rights by the members of the society. People should demonstrate moral purity and good behaviour. When a person demands interest from another person he can do so only after divorcing himself from good morals and conscience and whenever a society adopts this practice the whole society becomes devoid of mutual love, affection and the spirit of cooperation. Shaikh Muhammad Abu Zahrah, a leading jurist of modern Egypt considers injustice to be the basis of the prohibition of *Riba*. Injustice has been condemned and prohibited in respect of everyone. It is not something which may be prohibited for some people and may be accepted as permissible for others. The Holy Prophet (peace be upon him) reports that Allah, the Almighty, has said: "My Servant! I have

declared injustice to be prescribed for Me and prohibited it to be practiced among you. Therefore, do not deal with each other unjustly”. Similar grounds have been mentioned by other commentaries of the Qur’an. In particular, the moral aspects of interest and its social implications have been highlighted by many jurists and the commentators of the Qur’an. Reference may be made to Qadi Sanaullah Panipati and Shaikh Abdul Haq Muhaddith Dihlivi. The former, a leading authority on Tafsir in late 19th Century Muslim India, has discussed the moral, spiritual and social implications of eating interest. He says that every human action has an impact on the inner psyche and the spirit of the person concerned. When a person commits an act in a habitual way, it becomes part of his personality and becomes integral to his spirit and psyche. Experience has shown that interest hardens the hearts and inculcates misery in the life of many and creates cowardice to such an extent that it cannot be properly explained (*Tafsir Haqqani*, Volume III, page 20).

In view of the clear and express prohibition of *Riba*, particularly *Riba al-Nasiah*, there is a unanimity among the jurists that if a person denies the prohibition of *Riba al-Nasiah* (interest payable on debts) and claims that it is not prohibited shall be treated to have denied an essential of Islam and shall be considered to be outside the fold of Islam. This view has been recorded in *Mirqat*, a commentary of *Mishkat*,

a well known collection of Hadith (Volume III, page 313) as well as in Sawi's commentary of *Jalalayn* (Volume I, page 116).

The upshot of this discussion is that the classification of *Riba* as made by Muslims jurists right from the beginning, has been mostly to facilitate understanding its rationale and grounds of prohibition. The most important and fundamental classification is that of *Riba al-Nasihah* and *Riba al-Fadl*. Generally, the former is considered to be the *Riba* par excellence while the latter was included in the definition of *Riba* by way of extension by Prophet (peace be upon him) to foreclose any possible avenue or backdoor to have access to *Riba*. *Nasihah* or *Nasi* literally means deferment or postponement. The term *Nasi* has been used in the Qur'an in another context to convey the meaning of deferment and postponement. In the Qur'an (Chapter IX: 37) the term *Nasi* has been used in the sense of interchanging the months of the calendar with a view to postpone the months of *Hajj* to avoid certain prohibitions which were in vogue in pre-Islamic Arabia. This literal meaning of *Nasi* and *Nasihah* is an integral part of the technical meaning of the term *Riba al-Nasihah* which simply means increase of a debt i.e. a deferred payment. There have been various forms of charging this increase as well as the deferment of the payment but the variety of form of increase or the mode of deferment was never held or understood to have any impact on the prohibition of *Riba*. According to the unanimous view of Muslim Jurists

any stipulated increase on the principal amount in a deferred payment is *Riba*. Some scholars have called this form of *Riba* as the *Riba* par excellence, *Riba al-Qur'an*, *Riba al-Jahiliyyah*. It was called the *Riba* par excellence because this is the most important and most widely prevalent form of *Riba*. It is also the earliest form of *Riba* prohibited in almost all the major religions of the world as we shall see later. It was called *Riba al-Jahiliyyah* because it was the most popular mode of *Riba* in practice during the Days of Ignorance. It is called *Riba* of the Qur'an because this form of *Riba* was directly hit by the Qur'anic prohibition. Those who think these are different forms or categories of *Riba* are mistaken as the nature and the definition of all these forms is one and the same. *Riba al-Nasihah* is further classified by some latter writers into simple *Riba* and compound *Riba*. However, these latter categories might have some importance for purposes of calculation and accounting, they have no relevance as far as the prohibition is concerned. An increase on the principal amount, whether simple or compound, falls under *Riba* and is prohibited. Some writers of the recent past have tried to build-up a theory according to which only compound interest would fall under *Riba* and simple interest would be permissible. They rely on Chapter III: 130 of Qur'an where the believers have been forbidden to eat *Riba* doubled and redoubled. On a deeper examination this logic is eroded when seen in the light of other Qur'anic verses on the subject, particularly verses

278-279 of Chapter-II as well as the bulk of Ahadith on the subject. In order to understand the historical context and the chronological order in which the Qur'anic verses on *Riba* were revealed a brief discussion on these verses is needed. This discussion, in fact, is mostly based on the study made by Dr. Sayyid Tahir who placed before the Court his valuable article entitled *Qur'an and Riba*, published in the *Qur'anic Horizons*, Lahore, April-June, 1996.

The first Qur'anic revelation on *Riba* is 30:39, which is a Makkahn Surah. According to Maulana Abul A'ala Maududi (*Tafheem-ul-Qur'an*, Vol. 3, pp. 726-7), its time of revelation is 5 years before the Hijrah of the Prophet (peace be upon him). Maulana Amin Ahsan Islahi (*Tadabbur-e-Qur'an*, Vol. 6, pp. 90-100) notes that the verse is a part of the message in which Muslims are advised to become single-minded about Islam as the way of life. For this purpose, the suggested line of action is (i) development of *Taqwa*, (ii) extreme caution against *shirk*, (iii) establishment of *Salat*, (iv) spending on one's near-relatives, the destitute, and the wayfarer, and (v) caution against *Riba*. The verse 39 of Surah *Rum* emphatically says that the *Riba*-based investments on your part which you undertake, in order to increase your wealth on the basis of other people's (i.e., the borrowers') assets, do not increase from the point of view of Allah. However, rest assured about the acceptance of what you give by way of *Zakat* for the sake of Allah; those who give

Zakat are the ones whose net worth increases manifold with Allah. This verse is a complete message in itself. It contains reference to the undesirability of *Riba* which appears in the perspective of lending, and *Zakat* in the general sense of charitable and other expenditures for the sake of Allah. The verse laid the seed of *Riba*-free economic system which was to be given to the Muslim society later.

The second verse in the chronological order is 4:160. The circumstances at the time (e.g., the expulsion of Bani Qainqa' from Madinah in Shawwal 2 A.H) and the text of the verses implies that they were revealed quite early in the Madinan period. Al-Nisa 4:153-162, is in response to a provocation by the Jews of Madinah whereby they sought through the Prophet (peace be upon him) the revelation of a book directly from the Heavens exclusively for themselves. Almighty Allah (SWT) did not respond to this absurd demand, but observed that they belonged to the same lot who wanted to see Him during the time of Prophet Musa and then went to disobey Him time and again. After this, Allah the Almighty recounts the major crimes of the Jews, which invited His wrath on them. In this perspective, the verse 160 and its companion verses 161 and 162 are as follows:

We (i.e., Allah) decreed many a previously permitted things *haram* for the Jews, because: i) they did *zulm*; ii)

they stopped others from the Way of Allah in virtually all matters (Al-Nisa 4:160); iii) they charged *Riba* despite being forbidden to do so; and iv) they ate into the wealth of others without any *Shariah* justification. And, We have prepared a painful doom for these disobedient persons (Al-Nisa 4:161). However, We will give a great reward to those (among the Jews) who are clear-minded about the truth, without a grain of doubt, and who believe in the Qur'an and all other Revealed Books, establish *Salat*, give *Zakat* and believe in Allah and the Day of Judgement. (Al-Nisa 4:162).

These verses are self-explanatory. Though their immediate addresses were the Jews of Madinah, in the general style of the Qur'an they are also meant to bring the likes and dislikes of Allah to the attention of the Muslims.

The third revelation on *Riba* consists of Aal-i-Imran 130-136. Among these verses, the verse 130 is the principal one, and the remaining six verses reinforce its message. According to the commentators (for example) Maulana Amin Ahsan Islahi *Tadabbur-e-Qur'an*, Vol. 2, pp. 167-234), this passage was revealed after the battle of Uhad that took place in Shawwal, 3 A.H. These verses are as follows:

O Believers, don't eat *Riba* on top of *Riba*. And, be afraid of Allah so that you may be successful (Aal-i-Imran 130). And, be afraid of the fire of Hell, which is

prepared for the disobedient (Aal-i-Imran 131). And, obey Allah and the Messenger (SAW) so that you may benefit from Allah's Mercy (Aal-i-Imran 132). And, rush toward the forgiveness of your Lord and the Paradise whose boundary spans the heavens and the earth; it (the Paradise) is prepared for the Allah-conscious. (Aal-i-Imran 133).

(As to who are the Allah-conscious, note that) They are the people who spend for the sake of Allah in both good and bad times, who control their temper and who forgive others. Surely Allah holds such *mohsineen* very dear (Aal-i-Imran 134). Moreover, they are the ones who, in the event of committing any mistake or anything against themselves to remember Allah and seek His forgiveness for their sins. After all, who is it except Allah who can exonerate failings? Furthermore, they are the people who do not insist on their mistakes knowingly. (Aal-i-Imran 135).

They (the Allah-conscious people) will be rewarded by their Lord with forgiveness and gardens, with streams flowing underneath, to live (forever). This is indeed an excellent reward (waiting) for those who do good. (Aal-i-Imran 136)

This is a commentary on the events of the battle of Uhud and its aftermath. Just on the way to the battlefield, the chief of hypocrites

Abdullah Ibn Ubay and his followers deserted the Islamic forces. During the battle too, the Muslims went through extremely trying moments. Allah used this battle to serve three important purposes in favour of this Ummah. First, the isolation of those who harboured ill motives towards Islam from the mainstream of the Muslims. Second, bringing to fore their secret desires and designs by creating a false impression of Islam's vulnerability. And third, identification of the potential sources of weakness in the ranks of the Muslims in order to prepare them for future responsibilities.

In the background of the battle of Uhud the verse 130 and its companion verses can be seen in many ways. These were aimed at inspiring the believers for *Jihad* and were meant to prepare the Muslims for financial and material sacrifices in connection with *Jihad*. This was done by first prohibiting *Riba* which, unlike *Infaq*, is a materially beneficial proposition for the wealthy. Moreover, it has been noted by some scholars that the disbelievers of Makka used to do *Riba*-based business, and they utilized the proceeds of the caravan that came from Syria (on the eve of the battle of Badr) to finance the battle of Uhud. In

this perspective, Allah the Almighty advised the Muslims to stay away from *Riba* even if it were to finance a battle against the disbelievers.

There is no doubt that the above purposes were served by these verses; they constituted the formal prohibition of *Riba* for the Muslims. This point is also confirmed by internal evidence in Surah al-Baqarah 2:275 in which the Qur'an has used past indefinite tense that *bai'* (trading) was permitted but *Riba* prohibited by Him. If one looks for this past decree on *Riba*, it is in Surah Aal-i-Imran 3:130. As to why the prohibition of *Riba* was revealed immediately after the battle of Uhud. Following points have been noted:-

The battle of Uhud was preceded by 13 years effort on faith and character-building of Prophet's Companions in Makkah, and a similar endeavor for 3 years in Madinah. By the time this battle was over, the Companions had gone through two thoroughly rigorous and demanding tests: one was that of the battle of Badr (Ramadan 2 A.H) and the other was the battle of Uhud. The credentials of the Companions of the Prophet (Peace be upon him) as true believers — who could withstand all temptations and tribulations just for the Pleasure of Allah — were fully established. Islam was to expand after the battle of Uhad too. More trials were still awaiting the Muslims. But nothing like the tribulations faced by the pioneering Companions were to come in the way of the new *sahabah*.

In the above background, one may claim that the Madani society was literally purified at the time of battle of Uhud. Moreover, it was at a critical juncture when unconditional obedience of Allah (Peace be upon him) and His Prophet (peace be upon him) by the believers could be taken for granted. This was, therefore, the most opportune moment for the revelation of major injunctions calling for staying away from material gains by the believers.

Another equally important factor behind the early prohibition of *Riba* is as follows. *Salat, Saum, Zakat* and *Hajj* were prescribed and perfected during the blessed lifetime of the Prophet (peace be upon him). The problem of *Riba* with the associated declaration of all-out war by Allah and His Prophet (Al-Baqarah 2:279) called for a similar treatment. Elimination of *Riba* required delineation of the contours of the Islamic economic system while the Prophet (peace be upon him) was among his Companions.

Prohibition of *Riba* also meant giving way to a radically different system for mutual contracting, especially for mobilizing resources from those with surplus funds to those in need of financial intermediation. Anyone who is familiar with legislation process would confirm that such a monumental task could not be accomplished in a short period. This required sufficient time during which most of the practical problems could come to fore and be satisfactorily resolved by

Allah (Peace be upon him) and His Prophet. The time-consuming nature of the job required an early start. In short, the right frame of mind of the Companions and the time required for the building of new institutions may be construed as the main explanations for the prohibition of *Riba* by the end of 3 A.H, as per Aal-i-Imran 130.

The fourth revelation on *Riba* consists of Al-Baqarah 2:275-277. In the text of the Qur'an, these verses are followed by four more verses on *Riba*, namely Al-Baqarah 2:278-281. Generally the commentators of Qur'an discuss all of them together. However, the background and the tone of these verses confirm that in fact the passage Al-Baqarah 2:275-281 consists of two independent sets of verses revealed on two separate occasions. Before looking at the Qur'anic verses 275-277, it is worthwhile to note an important point in the text of the Qur'an applicable to the entire block of Al-Baqarah 2:275-281.

In the textual order of the Qur'an, the verses 275-281 are preceded by the most comprehensive set of *ayaat* on voluntary spending for the sake of Allah (Al-Baqarah 2:261-274), and followed by a verse containing exhaustive guidelines on loans and credit transactions (Al-Baqarah 2:282). While the relation of the latter to the injunctions of *Riba* is obvious, one may note that the verses 261-274 serve as preface to the injunctions of *Riba* for all times to come.

In the verses 261-274, the believers are given compelling reasons to go all out for *Infaq*, and the principles and norms for this purpose are prescribed. For example, the believers are told that reward of spending for the sake of Allah is seven hundred times or even more (Al-Baqarah 2:261). Moreover, spending for the sake of Allah should be free from (a) the quest for personal glory, (b) causing any distress to the recipients, and (c) giving out of unlawful and bad things (Al-Baqarah 2:262-267). The verses on *Infaq* close on the following note:

Those who spend their wealth for the sake of Allah day and night, secretly and openly, have their reward with their Lord. They have nothing to fear and nothing to be sorry about. (Al-Baqarah 2:274).

Among other things, these verses mentally prepare the readers of the Qur'an for the injunctions of *Riba* in the *ayaat* 275-281. After this useful digression, let us look at Al-Baqarah 2:275-277. The background of these verses is as follows.

Riba was prohibited by the end of 3 A.H. according to Aal-i-Imran 3:130. This decree clearly affected both taking and giving of *Riba* on new loans. But it also had implications for *Riba* on the then existing debts. The Companions never missed any opportunity for immediate, unconditional and total obedience of Allah and His Prophet. Therefore, it is certain that soon after the decree of Surah Aal-i-Imran, they beseeched additional guidance about *Riba* on the existing debts. And,

given the level of their *Taqwa*, it is quite likely that some Companions also approached the Prophet (peace be upon him) with queries about the *Riba* charged in the past.

Another significant factor at the time was the role of the Jews who used to deal in *Riba* (Al-Nisa 4:161). They were part and parcel of the Madinan society when the Prophet (peace be upon him) migrated to Madinah. There were three Jewish tribes in Madinah: Banu Qainqa', Banu Nudair and Banu Quraizah. They dominated the civic and economic life of loans. The Jews had their reservations about Islam. First friction and then hostilities followed. This to the expulsion of Banu Qainqa' toward the Syrian territories in Shawwal, 2 A.H. Banu Nudair were exiled to Khyber, about 200 miles from Madinah, in Rabi al-Awwal 4 A.H. and Banu Quraizah were penalized in Zi Qa'adah 5 A.H for their role in the battle of Ahzaab (Shawwal 5 A.H). This was followed by the battle of Khyber in Muharram, 7 A.H. This sequence of events implies that one section of the society actively resisted the rise of Islam in Madinah at least until 7 A.H. Of course, it had the sympathies of the *munafiqeen*, the other group in Madinah with nefarious intentions towards Islam.

By the end of 3 A.H, Islam had taken a clear-cut stand against *Riba*. One can see that the vested interests went on a counter-offensive, both because of the fear of losing their clientele and because

of their grudge against Islam. Issues like mixing up of *Riba* (on a sum lent) with profits (on trading using the same money) can be seen as part of the propaganda. Those who understand the nature of psychological warfare would confirm that any propaganda campaign works while the issue is still fresh in the minds of the people. Thus, the circumstantial evidence suggests that as soon as Allah forbade *Riba* (as per Aal-i-Imran), Jews and their sympathizers in Madinah launched a war of attrition against Islam. In the above background, the verses 275-277 read as follows:

Riba-eaters will get up on the Day of Judgment like someone driven to madness by the devil with his evil touch. This will happen because of their claim that (profit on) *bai'* (trading) is the same as *Riba* whereas Allah has permitted *bai'* but prohibited *Riba*.

Whoever received the advice from his Lord (as per Aal-i-Imran 130) and (hence) stayed away from *Riba*, his matter is with Allah as far as *Riba* charged in the past is concerned. That subject should be treated as closed in this world. However, all those who continue to charge *Riba* in lieu of the outstanding debts, they belong to the Hell where they shall live. (Al-Baqarah 2:275).

Allah mitigates *Riba* and multiplies *sadaqaat*. Surely, Allah does not like any thankless, sinner (Al-Baqarah 2:276)

Verily, those who are believers and who do good deeds, establish *Salat* and discharge *Zakat* obligations, they have their reward with

their Lord. They have nothing to fear or to be sorry about. (Al-Baqarah 2:277).

The verse 275 has both a comment on the doubts raised about the nature of *Riba* and some guidelines for action in lieu of *Riba* on existing debts. The issue drawing the most attention of the people is addressed first.

Those favouring *Riba* rested their case on *Riba* being no different from profits on *bai'* (trading). But in order to give a punch to their claim and to ridicule the injunctions of Allah, the provocateurs changed the order of comparison, and contended: "*Bai'* is like *Riba*." As in the case of repeated challenges from disbelievers about the timing of *Qiyamah*, Allah did not directly respond to this provocation. He just observed that *bai'* was permitted and *Riba* prohibited.

The said observation is also a polite reminder for all concerned that what matters in the case of *Riba* is not return (or the rate of return) on one's money, but the form of the transaction. One form (i.e., trading) is permitted, but the other (i.e., interest-based loans) prohibited. This being so at the discretion of Allah.

Both trading and loans carry risk — trading risk in one case, but commercial credit risk (of borrowing) in the other. Time too is not critical, because loans may also have a very short duration. Overnight lending in international financial markets is an example. Nonetheless

trading involves a heterogeneous exchange: money versus some goods, for example. On the other hand, a loan represents a homogeneous exchange. That is, in this case the items given and taken back belong to the same category. Furthermore, the transfer of ownership in a loan is only for the pendency of the loan, and the lender is not a legal party to the use of the object lent at the borrower's end. The nature of the exchange and these legal dimensions distinguish loans from other transactions. Thus the injunctions of *Riba* prescribe the principles according to which loan transactions are to be executed.

As noted earlier, the point “Allah has prohibited *Riba*” in verse 275 confirms that absolute prohibition of *Riba* did take place before this verse. The verse 275 goes on to give some guidelines for the “elimination of *Riba*” from the economy. These include the abolition of *Riba* clauses from the then existing contracts. The choice of words by Allah signifies two things. First, once the *Riba* decree (Aal-i-Imran 3:130) was given, all *Riba* calculations had to stop forthwith. Secondly, those wilfully charging *Riba* are promised an abode in the Hell because of their denying the absolute and authoritative status of the Qur'an.

After the above point, Allah, Who created man and Who knows his psyche, emphasizes some negative dimensions of *Riba* and positive aspects of *sadaqaat*. This is the focus of the *ayah* 276. How do *Riba* and spending for the sake of Allah affect the life at individual and

national levels? A detailed account of this issue requires a separate study. However, one point may be just mentioned here in order to inspire some thinking on the subject. From economics point of view, *Riba* discourages investment and hence curtails economic development. On the other hand, *sadaqaat* enhance aggregate demand and hence augment economic activity.

The message is completed in the *ayah* 277 by drawing the attention of the creation of Allah to the road to ultimate success; having *Iman*, doing good deeds in general, and establishing *Salat* and *Zakat* in particular.

The fifth and the last revelation on *Riba* consists of Al-Baqarah 2:278-281. These verses have a background. Its proper appreciation is essential both for the correct understanding of these verses as well as for avoiding any questionable propositions about *Riba*.

The above verses can be put into a proper perspective by first noting that, with the revelation of Aal-i-Imran 3:130 and Al-Baqarah 2:275-277 in the Qur'an, the necessary legislation on the subject of *Riba* was complete. And this happened toward the end of 3 A.H. These verses are with reference to loan transactions. This point is also confirmed by Al-Baqarah 2:279. As explained elsewhere, the above decrees also called for further action in order to bring other exchange practices (comparable in nature to loan transactions) in line with the Qur'anic

commandments. This purpose is served by the guidelines prescribed by the Prophet for trading practices. The Ahadith of Hazrat Fudalah Ibn Obaid, with a mention of the battle of Khyber, confirm the existence of such injunctions in Muharram, 7 A.H.

There was nothing unusual about the practice on the above injunctions. All the Prophet's Companions observed them. If, however, someone unwittingly made a mistake and it came to the attention of the Prophet (peace be upon him), he would simply correct the error. Everything was normal until after conquest of Makkah, which took place on 20th Ramadan, 8 A.H.

The conquest of Makkah was followed by the battle of Hunain on 6th Shawwal, 8 A.H. Immediately thereafter, Banu Thaqeef were besieged in Taif by the Islamic forces. The siege lasted for two weeks. The Prophet (Peace be upon him) did not press for military defeat of Bani Thaqif. He returned to Madinah, via Makkah, after appointing Attaab Ibn Usaid as Governor of Makkah.

In Ramadan 9 A.H. a delegation of Banu Thaqif visited Madinah with Abdyaleil as its head. The delegation presented several demands for embracing Islam. One of these was permission for business involving *Riba*. The Prophet (peace be upon him) did not grant this request. Though some of them did embrace Islam, the delegation itself returned after concluding a general peace agreement with the Prophet

(peace be upon him). Banu Thaqif gradually entered the fold of Islam, and all of them became Muslims by the Last Pilgrimage in Zil Hijjah, 10 A.H.

The incident leading to the revelation of verses 278-281 involved Banu Amr Ibn Umair — a Thaqeef family — and Banu Moghirah — a family of Banu Makhzum of Makkah. The following details are provided by Allama Badruddin Ayni in *Umdatul Qari: Sharah Sahih al-Bukhari*:

“Zaid bin Aslam, Ibne Juraij, Muqatil ibn Hayyan and Suddi reported as follows. The verse 278 and its related verse were revealed in the context of a controversy between Bani Amir bin Omair of Bani Thaqif and Bani Al-Moghirah of Bani Makhzoom. It also happened that Bani Amr and Bani Al-Moghirah had some *Riba* deal between them during the days of *Jahiliyyah* (i.e., before embracing Islam). When the time of maturity of the said deal came, Bani Amr of the Thaqif’s demanded *Riba*. There was a heated argument. Bani Al-Moghirah refused to pay *Riba* on the ground that it was abolished by Islam. The matter came before Sayyidena Attaab bin Aseed, the Governor of Makkah. He sent a written request to the Prophet (Peace be upon him), who was then in Madinah, for a decision. Thereupon the verses under reference were revealed. The Prophet (Peace be upon him) clearly forbade them from receiving any excess money due to them on account of interest. Upon hearing Prophet’s judgment, Bani Amr said: “We turn toward Allah, and give

up the *Riba* due in our favour.” Thereafter, all of them gave it up.”

According to *Tafsir-e-Mazhari* (Urdu, Vol.2, p. 105), Abu Y’ala reports the above incident in his *Masnad* on the authority of Kalbi and Abu Saleh; the latter attributed his narration to Abdullah ibn Abbas. Qurtubi (*Tafsir Al-Qurtubi*, Vol. 3, p. 363) also reports this incident with reference to Ibn Ishaq, Ibn Juraij, Suddee and others. In the narrations of Abu Y’ala and Qurtubi, Bani Amr are said to rest their case on a permission from the Prophet (Peace be upon him) whereby Banu Thaqif were allowed to continue to charge *Riba* in return for becoming Muslim. As noted above, this was not the case. This is also unlikely for the following reasons.

Banu Thaqif signed their peace agreement in 9 A.H, the same year in which Prophet (peace be upon him) concluded another pact with the Christians of Najran. This latter treaty explicitly requires discontinuation of *Riba* practices by the people of Najran as a condition for peace. It is noteworthy that the Christians of Najran did not embrace Islam. Banu Amr are addressed as Muslims in Al-Baqarah 2:278. Acceptance of Islam automatically brought them under the purview of the Qur’anic injunctions on *Riba*. There is not a single instance in which the Prophet (peace be upon him) exempted Muslims from an order in the Qur’an. In view of this to say the least, the insistence of Banu Amr must

have been caused by a lack of their knowledge of al-Baqarah 2:275, and not on the basis of some sort of permission from the Prophet (peace be upon him).

It is also pertinent to note that the embracing of Islam by Hazrat Attaab and his appointment as Governor of Makkah by the Prophet (peace be upon him) occurred almost at the same time. He was then 21 or 22 years of age. One may argue that he too was unaware of the injunctions of *Riba* in al-Baqarah 2:275-277. But given the trust which the Prophet (peace be upon him) placed in him, and given that there must also have been other Companions in Makkah at that time, this point is not tenable. The most likely explanation for Hazrat Attaab's action is that the parties involved in the dispute were heavy-weights, and he deemed it appropriate to seek a resolution of the matter by the Prophet (peace be upon him) in order not to spark any tribal conflict between the people of Makkah and Banu Thaqeef.

Notwithstanding minor differences in details, quite a few sources leading to the same information and a general consensus among many respected *mufasserin* on basic points confirm that the reported incident did happen in late 9 A.H. or early 10 A.H. The words in all narrations imply that the Prophet (peace be upon him) wrote to Attaab Ibn Usaid. This must have happened before the 25th Zi Q'adah, 10 A.H. when the Prophet (peace be upon him) left Madinah for *Hajj al-Wida'*.

On 9th Zil Hijjah, 10 A.H., the Prophet (peace be upon him) decreed, in person, the abolition of *Riba* on all of the then existing debts. This was a retrospective decree. Thereafter, the Prophet (peace be upon him) lived in this world for only 81 days. The said announcement was made in the presence of the Companions gathered in Arafat from all over Arabia. With the status of *Riba* on existing debts fairly recently coming into the knowledge of virtually everybody, there was hardly any need for making references of the above nature to the Prophet (peace be upon him). Therefore, it is quite unlikely that any need for intervention by Allah arose after the Hajj al-Wida'. One may, therefore, conclude that the time of revelation of the *ayaat* under reference is after the conquest of Makkah but before the last pilgrimage. The verses 278-281 are as follows:

O believers, fear Allah and give up whatever is left in lieu of *Riba* if you are indeed believers. (Al-Baqarah 2:278)

Watch out! If you do not obey this order (and give up all outstanding *Riba*), then there is a declaration of war against you from Allah and His Prophet. However, if you do *tawbah* (i.e. repent, along with the resolve to make amends for past mistakes), you have right only to your principals. Neither you inflict *zulm* on others, nor the others should do *zulm* on you. (Al-Baqarah 2:279).

In the process of settling any outstanding accounts, if you find the debtor in a tight situation, give him some grace period so that he

can manage to clear the dues against him. However, if you consider converting the outstanding debts into *sadaqah* (charity), that would be better for you if you understand. (Al-Baqarah 2:280).

And be afraid of the Day on which you will be returned to Allah. At that time everyone will be fully rewarded for his actions, without being subjected to any *zulm*. (Al-Baqarah 2:281)

The tone of the address confirms that something happened which annoyed Almighty Allah, Who is also the Owner, Master, and Sustainer of the universe. As explained above, this was indeed the case. The closing words of the verse 278 make it plain that *Riba* is an offence of unimaginable proportions, and Almighty Allah simply does not recognize any person as a believer unless he gives up *Riba*.

While the first part of the verse 279 warns of the dire consequences of not giving up *Riba*, the second part is also significant. The creditors are pointedly restricted to their principals while settling any existing debts. According to verse 280, if the debtors face genuine difficulties in meeting their payment obligations, the creditors are ordered to give them grace period to meet their payment obligations to the tune of the principal. This principle was already observed by the veteran Companions after the revelation of Al-Baqarah 2:275 in late 3 A.H. But now the decree from Allah formalized it. This may be viewed as His special favour for this Ummah. More and more people were going to enter the fold of Islam in the future. Settlement of old contracts which

involved *Riba* by the new converts to Islam could create social problems. This verse forestalled such problems. The *ayah* 280 also contains an additional guideline about the treatment of the written-off loans. They are to be treated as *sadaqah* by the lenders. Whereas the verse 279 restricts lenders to their principals, it also closes on the following note: Neither the creditors do *zulm* on the debtors nor the latter do *zulm* on the former. The link between charging *Riba* by creditors and *zulm* is often easy to understand. But how does *zulm* arise on the debtors' side? The Ahadith of Hazrat Abu Hurairah clarify that debtors commit *zulm* when they deliberately cause delays in meeting their payment obligations.

Most of the commentators of the Qur'an interpreted the point about *zulm* to conclude that genesis of *Riba* is *zulm*. Hence, they went on to rationalize the prohibition of *Riba*. Many reasons are offered. In the case of consumption loans, lending on interest is equated with exploiting the needy. In the case of production or commercial loans, it is suggested that *Riba* gives the capitalist an opportunity to enjoy the fruits of the borrowers' effort without either putting in any effort of his own or taking any risk. Some others have used this *ayah* to defend their case for indexation of loans for inflation (in order to compensate lenders for loss in the purchasing power of their loans). Respectfully, both lines of

interpretation take the meaning of the *ayah* out of the context. The factual position is as follows.

Actually the verse 279 contains an order from Allah that both creditors and debtors should avoid *zulm*. Technically speaking, *zulm* occurs when any party is denied its rights as per the injunctions of Shariah. Thus the question one needs to ask is: what were the (relevant) injunctions of Shariah, from the creditors' and the debtors' perspectives, at the time of revelation of al-Baqarah 2:278-281? Quite clearly, these injunctions are given in Aal-i-Imran 3:130 and Al-Baqarah 2:275-277. On both these previous occasions, there is no mention of *zulm* or its equivalent. Therefore, when Allah decrees that both creditors and debtors avoid *zulm*, it means adherence to the said injunctions, and nothing else.

The above conclusion has significant implications for guiding the thinking on *Riba*. First, *Riba* may lead to *zulm*, but *zulm* per se is not the reason behind its prohibition. Second, there is no room for generalizing the interpretation of "lender's principal" in order to seek a compensation for decline in the value of loans due to inflation during their pendency.

In order to understand the true spirit of gradual prohibition of *Riba*, it is necessary that all the relevant verses of the Qur'an are seen in a chronological order. A look at these verses would clearly show, as

rightly noted by the participants of the IIIE workshop, that the process of the elimination of *Riba* during the time of the Holy Prophet (Peace be upon him) had the following features:

- i) *Riba* was formally prohibited with a directive for the believers in Aal-i-Imran 3:130, in late 3 A.H.— soon after the battle of Uhud. Notwithstanding the linguistic style of this decree, the prohibition of *Riba* was absolute, regardless of whether the transactions were for satisfying personal or business needs and whether *Riba* was simple or compound.
- ii) The above decree left no doubt about the status of the new *Riba*-based contracts. However, two issues arose: (a) the status of the existing loans and debts, and (b) a need for review of all existing exchange practices in order to bring them into line with the Qur'anic decree on *Riba*.

The issue of the then existing loans and debts was tackled with a directive from Allah in al-Baqarah 2:275. The believers were ordered to honour the relevant contracts after deleting the *Riba* clauses in them while ignoring *Riba* already charged or given. The unmistakable message was that the switch-over to a *Riba*-free state, in respect of the existing loans and debt, has to be instantaneous. No gradualism was allowed.

As to the issue of rationalizing other exchange practices, there was the case of trading with, generally speaking, homogeneous items of both ends of the exchange. This happened, for example, when a

party had gold in the form of pieces, ornaments or crockery and the other had it in the form of dinars. Likewise, among other things, there was the question of trading dates of one variety for those of another. Technically speaking, these were special cases of loan transactions with no time lag in the give and take back process. Thus, when lenders were called upon to concede all costs associated with loan transactions, it put a question mark on the permissibility of unequal exchanges in the aforementioned and similar other cases. Therefore, in order to bring the said trading transactions into line with the Qur'anic Ahkam, the Holy Prophet (peace be upon him) also took steps and prescribed rules for trading exchanges. The Ahadith of Fadalah bin Ubaid confirm the existence of such instructions in Muharram 7 A.H. In other cases, one cannot be definite because no event of a historic significance is mentioned in the texts of the Ahadith. However, the following two things support the contention that the Prophet (peace be upon him) gave the necessary Ahkam quite early after the prohibition of *Riba* in 3 A.H:-

First, given the seriousness with which Allah views dealing in *Riba* (al-Baqarah 2:278-279), it is inconceivable that any necessary legislative action was delayed. Second, texts of the various Ahadith on *Riba* have internal evidence to support the above view. Hazrat Ubadah ibn Samit was incharge-cum-instructor of the first teaching institution of Islam established by the Holy Prophet (peace be upon him) for the

residents of Suffah, a raised platform in the Masjid of the Holy Prophet (peace be upon him). His narrations on the subject are by far the most comprehensive, and their tone and tenor un-mistakenly authoritative. Against the background of his narrations, it is easy to see that the aforementioned narrations of Hazrat Fadala have an “explanatory” character. This is, while trading of gold for gold on unequal terms was forbidden much earlier, as in the Ahadith of Hazrat Ubadah, the scope of the proviso “gold for gold” was not equally clear to all the Companions of the Holy Prophet (Peace be upon him). Thus, a need for clarification arose on the eve of the *Ghazwah* of Khyber in 7 A.H. which the Holy Prophet (peace be upon him) made — as reported by Hazrat Fadalah.

- iii) With the revelation of al-Baqarah 2:275 and the enforcement of the adjunct guidelines, as above, by the Holy Prophet (peace be upon him), the process of the elimination of *Riba* was officially completed. However, sometime in late 9 to 10 A.H. but before the departure of the Holy Prophet (peace be upon him) for Hajja-tul-Wida’, some new Muslims sought exception to the Ahkam in lieu of their outstanding debt claims. The matter was referred by Hazrat Attaab bin Aseed, the then Governor of Makkah, to the Holy Prophet (peace be upon him) in Madinah. Thereupon al-Baqarah 2:278-281 were revealed. These *ayaat* not only confirmed the above Ahkam but also warned of retribution against those who hesitated to close the chapter on *Riba*. This decree also explicates some

additional, though not fresh, guidelines for the elimination of *Riba*. That is, while the lenders were restricted to the principal in lieu of their existing claims in al-Baqarah 2:279, in very next *ayah* they were ordered to give grace period to the debtors to meet their payment obligations to the extent of the principal; however, any written-off loans were to be treated as *sadaqah* (charity). This decree just formalized what was already in practice among the veteran Companions of the Holy Prophet (peace be upon him) since the revelation of al-Baqarah 2:275.

The background of al-Baqarah 2:278-281 also raises some questions. Was there not gradualism in the process of the elimination of *Riba* from the then Islamic economy? That is, was it not the case that the said process officially started toward the end of 3 A.H. but completed, albeit gradually, sometime in 9 or 10 A.H? In particular, was it not that the formal completion of this process coincided with the abrogation of the *Riba* claims of Hazrat Abbas, among others, by the Holy Prophet (peace be upon him) during Hajja tul-Wida' 10 A.H? The answer to these points in favour of the gradualism thesis is “no” for the following reasons:

- i) One must differentiate between the enforcement of a law and its violations. The latter may take place after the enforcement of the law, and this is where the law comes into picture. The incident behind the revelation of the verses 278-281 falls in the category of violation of the then existing law. The unique

thing about this case was that it was referred to the Holy Prophet (peace be upon him), the supreme legal authority at the time, and settled by a decree from Allah.

- ii) Indeed, the Holy Prophet (peace be upon him) declared annulment of *Riba* claims of Abbas, among others, in Zul Hijjah 10 A.H. But it is wrong to conclude that Abbas or any other Companion of the Holy Prophet (peace be upon him) continued to charge *Riba* as a Muslim despite its prohibition. This point may be seen as follows:

When the Holy Prophet (peace be upon him) made the said announcement, it was the third of three declarations made by him, at that time. The first was about the prohibition of unlawfully killing someone or depriving him of his property, and the second was about the revocation of blood claims dating back to the days of *Jahiliyyah* (Ignorance)—the pre-Islamic period. In lieu of the second, the Holy Prophet (peace be upon him) also specifically mentioned the annulment of blood claims of his family, Banu Hashim, in lieu of the murder of infant Ibne Rabi'ah that took place before the dawn of Islam. These two decrees have never been taken to conclude, and rightly so, that the murder of innocent people was either allowed or condoned before these decrees were made in late 10 A.H. Moreover, the factual position is that Banu Hashim never claimed retribution for the murder of Ibne Rabi'ah after the conquest of Makkah in 8 A.H.—the time when all of

them came into the fold of Islam. The position about *Riba* claims of Hazrat Abbas is likewise. Technically speaking, like the other two decrees of the Holy Prophet (peace be upon him), this too was a retrospective decree. As with the other two decrees, its significance lay in pressing home the message on a few sensitive matters where emotions could prevail and disturb the harmony of the Ummah later on.

- iii) The Ahkam of *Riba* are no different from the Ahkam of, for example, *salah* (prayer) and *saum* (fasting). The Ahkam for none of these were prescribed with the dawn of Islam. However, once ordained, the relevant Ahkam were enforced at once. As to those becoming Muslims later on, there was and there is no choice but to initiate all ‘relevant’ and, of course, ‘possible’ steps at once.
- iv) The analogy of Sulah Hudabiyah (the Peace Treaty signed at Hudabiyah) cannot be invoked to take a lenient position on the elimination of *Riba*. This is because the said treaty was between the Muslims and non-Muslims while today in a Muslim country the issue pertains to dealings among the Muslims or their transactions with non-Muslims. In passing, one may note that in the case of Pakistan many target dates for the elimination of *Riba* have come and gone during the last five decades without any result. Thus, “gradualism” has already lost its meaning, and it cannot be on the agenda any more.
- v) No doubt the Holy Prophet (peace be upon him) took a lenient view of the request of the tribe of Thaqeef on the payment of

Zakah when the latter negotiated with him, the terms for entering into the fold of Islam. But again any conclusions in respect of *Riba* are unwarranted for two reasons. First, the Thaqeefs were not given exemption from the payment of *Zakah* as Muslims. In fact, the entire tribe did not become Muslim when their delegation presented the said demands before the Holy Prophet (peace be upon him). The Thaqeefs embraced Islam over a period of two years after their delegation's visit to Madinah. Second, while the delegation made the above demand about *Zakah*, it also sought exemption from the *Ahkam* on *Riba*. But this latter demand was categorically rejected by the Holy Prophet (peace be upon him).

- vi) Finally, the case of *khamr* (drinking) cannot be cited as an example to justify gradualism in the elimination of *Riba* for the following reason. In that case, the Muslims were first told to stay away from drinking at the time of *salah*, and later on ordered to give it up entirely. In the case of *Riba*, the very first directive to the Muslims (Aal-i-Imran 3:130) prescribes its absolute prohibition.

Riba has been dealt with in the Hadith literature very extensively and the Holy Prophet has thrown light on every significant aspect of it. He declared it to be one of the most heinous crimes and sins. He condemned and cursed those who eat *Riba*, who pay it, who prepare its document and who attest it as a witness. In a Hadith he said that a single dirham eaten by a person by way of *Riba* exceeds in its

heinousness and wickedness the commission of the most obnoxious crime of committing incest with one's own mother thirty six times.

Apart from the *Riba al-Nasihah* which was in vogue in pre-Islamic Arabia and clearly and expressly prohibited by the Qur'an, the Prophet took several preventive measures to close all the possible avenues which may in any eventually lead to the commission of the *Riba* par excellence. This preventive *Riba* is called by different names. It is called *Riba al-Hadith* because it has been mentioned in the Hadith as against *Riba al-Nasihah* which is called *Riba al-Quran*. It is also called *Riba al-Buyu* because it is mostly applicable in contracts of sale or exchange of property, as against *Riba al-Duyun*, i.e. *Riba* payable on debts. It is also called *Riba Khafi* or Tacit or hidden *Riba* as against express *Riba*. These different nomenclatures are only to understand the nature and province of these two kinds. This second category (*Riba al-Fadl*, *Riba al-Hadith*, *Riba al-Buyu* or *Riba Khafi*) is based on the traditions of the Holy Prophet reported in different versions by all the compilers of the Ahadith on the authority of a large number of companions. A few versions of these Ahadith may be quoted here:

- i) It is reported from Jabir. He said that Allah's Messenger SAAWS cursed the persons who ate *Riba*, gave *Riba*, documented a *Ribawi* deal or stood witness to it. According to Jabir, the Prophet (Peace be upon him) further said that all of

the said persons were equal (in violating the Ahkam of *Riba* and, hence, being subject to curse). (Muslim 2995).

- ii) This Hadith is reported by Abu Hurairah (RAA). According to him, the Prophet (Peace be upon him) said that the sin of *Riba* equalled seventy sins with the slightest of them being equal, in despicability, to incest with one's own mother. (*Ibn Majah*, 2265).
- iii) The Hadith narrated by Abu Hurairah (RAA). According to him, the Prophet (peace be upon him) said as follows: "On the Night of Ascendance to the Heavens, I passed by a group of people who had tummies as big as houses, filled with snakes that could be seen from outside. I asked the Arch-Angel Jibrail as to who they were. Jibrael said that they were the people who ate *Riba*." (*Musnad Ahmad*, 2264).
- iv) According to Ubaidullah b. Abu Yazid (RAA), he heard Ibn-i-Abbas (RAA) saying that Usama b. Zaid (RAA) told him as follows: "The Prophet (peace be upon him) said that there was no *Riba* except in lending." (*Nasa'i*, 4504).
- v) According to Ubaidullah b. Abi Yazid (RAA) as saying that Usama b. Zaid (RAA) informed him (Ibn-i-Abbas) as follows: "The Prophet (peace be upon him) said that verily *Riba* was in lending." (*Muslim*, 2991).
- vi) This Hadith is narrated by Imam Awza'i. He said that Ata b. Ribah reported as follows. Abu Saeed Khudri (RAA) met Ibn-i-Abbas (RAA) and put the following question to him: "What do you think about your views on the trading of gold for silver? Have you heard anything from the Prophet (peace be

upon him) to support your point of view? Or, do you find something (to support you) in the Book of Allah?” The answer of Ibn-i-Abbas was: “No, I never say so. As far as (attributing the said view to) the Prophet (Peace be upon him) is concerned, you know His teachings. And, as to the Book of Allah, I don’t know much about it (on this issue). However, my claim is the basis of what Usama b. Zaid (RAA) reported to me. That is, the Prophet (peace be upon him) said ‘Beware, indeed *Riba* is in lending’. (*Muslim*, 2993).

vii) This Hadith is from Yahya. He said that he heard it from Ubadah b. Abdul Ghafir who, in turn, heard it from Abu Saeed Khudri (RAA). Abu Saeed Khudri said that once Bilal (RAA) brought to the Prophet (peace be upon him) some *burney* (good quality) dates. The Prophet (peace be upon him) inquired as to where he got those dates from. Bilal replied: “We had some *radi* (inferior) dates. I sold two saa’ of them for one saa’ of *burney* dates in order to give them to the Prophet (peace be upon him) to eat.” Upon hearing this, the Prophet (peace be upon him) exclaimed: “Oh no! Oh no! That is *Riba*. That is exactly *Riba*! Don’t do that again. If you want to buy (good) dates for (inferior) dates next time, first sell your dates, and then buy the new ones with the sale proceeds.” (*Bukhari*, 2145).

viii) This Hadith is narrated by Abu Saeed Khidri (RAA) as well as Abu Hurairah (RAA). The Prophet (peace be upon him) appointed a person to look after the affairs of Khyber. He brought to the Prophet (peace be upon him) dates of very good quality. The Prophet (peace be upon him) inquired whether all

dates of Khyber were like that. The person replied: “No. O Prophet (Peace be upon him) of Allah, in fact we acquire one saa’ of the good dates in exchange for two saa’ of dates of lesser quality and two saa’ in exchange for three saa’.” Upon hearing this, the Prophet (Peace be upon him) said: “Don’t do that. Sell all your dates for dirhams. Then buy the good dates with the dirhams.”

- ix) It is on the authority of Uthman b. Affan (RAA) that the Prophet (peace be upon him) said: “Don’t trade one dinar (gold coin) for two dinars and one dirham (silver coin) for two dirhams.” (*Muslim*, 2968).
- x) It is on the authority of Abu Saeed Khudri (RAA) that the Prophet (Peace be upon him) said: “Don’t trade gold for gold or silver for silver except on the basis of *waznan-bi-waznin* (weight), *mithlan-bi-mithlin* (like for like) and *sawa’an-bi-sawain’* (equal for equal).” (*Muslim*, 2966).
- xi) It is on the authority of Abu Saeed Khudri (RAA) who reported that the Prophet (Peace be upon him) said: “While exchanging gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt, do so on *mithlan-bi-mithlin* (like for like) and *yadan-bi-yadin* (hand to hand or on spot) basis. Thus, whosoever gave more or demanded more, verily he dealt in *Riba*. Both the taker and the giver are equal—i.e., equally guilty—in this regard.” (*Muslim*, 2971).
- xii) Ubadah b. Samett (RAA) directly reports the Prophet (Peace be upon him) as saying: “Buy and sell gold for gold, silver for

silver, dates for dates, wheat for wheat, salt for salt and barley for barley on the *mithlan-bi-mithlin* (like for like) basis. Whosoever gave more or took more, verily he made a *Riba* deal. However, trade gold for silver as you wish subject to the condition that the exchange be *yadan-bi-yadin* (on spot). Trade wheat for dates or barley for dates also likewise.” (*Tirmizi*, 116).

xiii) This narration is from Abu Qilabah. He told that he was sitting in Syria in a circle that also included Muslim bin Yasar. There came Abul Ash’ath. According to Abu Qilabah, everybody exclaimed: “Abul Ash’ath!” Abul Ash’ath joined the circle. Abu Qelabah asked him to narrate the Hadith of Ubadah b. Samett (RAA) for a brother there. Abul Ash’ath agreed. His narration is as follows:

We (i.e., Abul Ash’ath and his colleagues) were on a military mission under the command of Mo’aawiyah (RAA). We gained a lot of spoils of war. Among them, there was a silver utensil. Mo’aawiyah directed a person to auction it against the salary due in favour of the soldiers. People showed great interest in the auction. When the news reached Obadah bin Samett, he stood up and said: “I heard the Prophet (peace be upon him) forbidding the sale of gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt except on *sawa’amm-bi-sawaa’* (equal) and *ainamm-be-ain* (like for like) basis. The Prophet (peace be upon him) further said that if someone gave more or took more, he entered into *Riba*.” As soon as the people heard this, they withdrew from the auction. When the news reached Mo’aawiyah, he got up and addressed the people as follows: “What is the matter with the people that they attribute to the Prophet (peace be upon him) the Ahadith that we did not listen even though we also saw the Prophet (peace be

upon him) and kept His company?” Obadah stood up and repeated the whole thing. He then angrily said: “We will narrate what we heard from the Prophet (peace be upon him) even though it might be unpleasant for Mo’aawiyah (or, he said: even if it is against the will of Mo’aawiyah).” Obadah further said: “I don’t care even if it (i.e., contradicting Mo’aawiyah) costs me my stay with Mo’aawiyah’s army on this very dark night.” (*Muslim*, 2969).

- xiv) This narration is from Fadalah b. Ubayd (RAA). He said that he and other companions of the Prophet (Peace be upon him) were with Allah’s Messenger on the eve of the conquest of Khyber. They were trading one *wuqiyyah* (=7 *mithqal*) of gold for two or three dinars with the Jews. When this came to the notice of the Prophet (peace be upon him), He ordered: “Don’t trade gold for gold except on the basis of *waznan-bi-waznin* (equality in terms of weight).”
- xv) This narration is from Fadalh b. Ubayd al-Ansari (RAA) who reports as follows: When the Prophet (peace be upon him) was in Khyber, a gold necklace studded with precious stones was brought to him (Peace be upon him). This necklace, a part of the war booty, was up for sale. The Prophet (Peace be upon him) ordered that gold content of the necklace be separated from the rest. Thereafter, the Prophet (Peace be upon him) directed that the gold (of the necklace) be sold for gold on the basis of *waznan-bi-waznin* (equality in weight). (*Muslim*, 2978).
- xvi) This Hadith is narrated by Ma’mer b. Abdullah (RAA). He said that he used to hear the Prophet (peace be upon him) as saying: “Exchange meal for meal *mithlan-bi-mithlin* (like for like).” (*Muslim*, 2982).

- xvii) This Hadith is narrated by Abdullah b. Amr (RAA). Allah's Messenger (Peace be upon him) directed him to make provisions for the army. When Abdullah ran out of camels, the Prophet (peace be upon him) asked him to acquire camels against those of *zakah*. Accordingly, Abdullah acquired one camel for two camels to be paid from the future *zakah* proceeds. (*Abu Daud*, 2913).
- xviii) According to Samurah (RAA), the Prophet (Peace be upon him) prohibited trading of animals for animals on credit. (*Tirmizi*, 1158).
- xix) This Hadith is from Ibn-i-Umar (RAA). He reported that he used to sell camels in the market of Baqi' for dinars (gold coins) but received payment in dirhams (silver coins). He went to see the Prophet (peace be upon him) in the house of Hafzah (RAAH), wife of the Prophet (peace be upon him), in order to inquire about the validity of his practice. He said: "O Prophet of Allah! With all due respect, I want to know the Shariah position of my trading of camels in Baqi' whereby I sell camels for dinars but accept dirhams towards payment." The Prophet (peace be upon him) said: "There is no problem if you accept the payment in the form of dirhams provided that it is according to the exchange rate (agreed) at that time and that the transaction is fully settled—i.e., payment also cleared—before both you and your client part company." (*Nasa'i*, 4506).
- xx) This Hadith is narrated by Anas b. Malik (RAA). He reported that Allah's Messenger (Peace be upon him) said as follows: "If someone among you lend something to another person, the

former should not accept from the latter any gift or a ride except when both have such dealings between them before the loan.” (*Ibn-i-Majah*, 2423).

- xxi) This Hadith is by Saeed b. Abi Burdah (RAA), who reported it from his father. When the latter came to Madinah, he met Abdullah b. Salam (RAA) who said to him: “You (i.e., Abu Burdah) come from a land where *Riba* is common. If you have a claim against someone, don’t accept from his anything—be it some sickle, barley or grass—because that would be *Riba*.” (*Bukhari* 3530).
- xxii) This Hadith is reported by Abu Qatadah (RAA). He said that a person inquired from the Prophet (peace be upon him) as follows. If that person was killed in the path of Allah while he remained steadfast, self-critical and moved forward in the way of Allah without ever turning his back, would Allah forgive his sins? Allah’s Messenger (Peace be upon him) answered in the affirmative. However, when that person was leaving, the Prophet (Peace be upon him) called him back, and said as follows: “Yes, all sins would be forgiven except outstanding debt. This is what Jibrail has told me.” (*Muslim*, 3497).
- xxiii) This Hadith is narrated by Amr b. Shareed on the authority of his father who, in turn, reported it from the Messenger of Allah. The Prophet (peace be upon him) said that delay in the repayment of debt by a person, who can afford to repay, legitimizes dishonouring him and punishing him. (*Abu Daud*, 3144).

xxiv) This Hadith is reported by Abu Hurairah (RAA). The Prophet (peace be upon him) said as follows: “If a person is in a position to meet his debt obligations but delays repaying the debt (as per schedule), he is *zalim* (one who commits *zulm*). If someone is referred by the creditor to a *malie'* (a debtor who is willing to pay back the debt but cannot afford to do so at the moment), that person should accede to the request.” (*Bukhari*, 2125)

The nutshell of these Ahadith is that the exchange of gold with gold, silver with silver, dates with dates, wheat with wheat, barley with barley, salt with salt should take place only when both the commodities are fully similar and exactly equal to each other in terms of weight and measure and are delivered and received then and there hand by hand. Any increase or decrease on either side or any deferred payment or delivery will render the transaction as *Riba*-based and will be disallowed. There has been a consensus among the Muslim jurists about the prohibition of *Riba al-Fadl* right from the days of the companions. There are reports about two companions namely Abdullah ibn Umar and Abdullah ibn Abbas who did not initially hold this view because they either were not aware of the prohibition of such transactions or interpreted the prohibition differently. Their counter rulings are found in some Hadith books but it has been established about Ibn Umar that he had reviewed his earlier position and joined the consensus when he came to know about the Ahadith prohibiting *Riba al-*

Fadl. The same thing is reported about Abdullah ibn Abbas. It has been narrated by Imam Hakim that when the companion Abu Said Khudri (who is one of the main narrators of the Ahadith on the prohibition of *Riba al-Fadl*) informed him about the Hadith on this subject he immediately changed his view and started vehemently opposing it. It seems that he was initially mistaken about the real meaning of another Hadith reported on the authority of Usamah by Bukhari and Muslim that the *Riba* is in deferred payments (*Nasihah*) (نسيئة). Companions and jurists have differently interpreted the Hadith of Usamah. The well known authority on Hadith and the leading commentator of Bukhari, Allamah Ibn Hajar Asqalani says that there is no doubt about the soundness and validity of the Hadith of Usamah; yet there is a difference among the Ulema as to how it is to be reconciled with the Hadith of Abu Said. Some say that the Hadith of Usamah (being of an earlier period) is abrogated. But Allamah Ibn Hajar dismisses this view by saying that abrogation cannot be proved by mere possibility. Some scholars are of the view that the wording (لا ربا الا فى النسيئة) “There is no *Riba* except in *Nasihah*” simply means that the worst, the most heinous and the most strongly prohibited *Riba* is the *Riba* on deferred payments. This is similar to the Arab style of saying that there is no scholar in the city except so-and-so. It does not mean that there are no scholars in the city at all. It simply means that there is no scholar of that calibre and

perfection, and hence it is not a negation of the existence of any scholar *ab initio*. Moreover, the negation of the prohibition of *Riba al-Fadl* on the basis of the Hadith of Usamah is only by way of indirect inference while the Hadith of Abu Said is clear and express and therefore will have preponderance over the former. However, the fact that Ibn Abbas and Ibn Umar had abandoned their earlier point of view and had agreed to the general consensus on the prohibition of *Riba al-Fadl* has closed the door for any further discussion on the grounds and implications of this initial and short-lived difference of opinion. Imam Shawkani has quoted a report from Ibn Abbas to the effect that his earlier ruling was based on his own personal opinion and when he heard Abu Said Khudri narrating the Hadith of the Messenger of Allah he abandoned his opinion and surrendered to the Hadith. It may be pointed out that the narrators of the Ahadith on the prohibition of *Riba al-Fadl* include more than two dozen companions leading among them being Abu Bakr, Umar, Usman, Anas and of course Abu Said Khudri.

In the popular version of the Ahadith on *Riba al-Fadl*, six commodities have been mentioned as quoted above. Yes, in another version, a companion Mamar ibn Abdullah reports that he used to hear the Prophet (S) as saying: “Food for food (should be purchased) equal for equal.” He further reports that in those days their popular food was barley. In yet another version, Ubadah and Anas, the two leading

companions, report that the Prophet has said “What is weighed is to be equal for equal as long as it is one and the same kind of commodity. Likewise is the case of what is measured. But if the two kinds are different then there is no harm (if it is sold differently.)”

These last two versions quoted by Imam Ahmed and Muslim and Darqutni respectively clearly establish that the common ground in all the above commodities is weight and measure, i.e. their fungibility. Thus, all fungible or *nithli* commodities shall be subject to the prohibition of *Riba*. We shall, however, revert to the subject of fungible and non-fungible kinds of property at a later stage. The general principle is that the exchange of a fungible commodity with the same commodity is allowed only if both the commodities are of the same quantity and are delivered then and there. But if the commodities are different, these may be sold with a difference in quantity as long as delivery is immediate. On the other hand, Imam Shafi’i has a slightly different view. He agrees with Imam Abu Hanifah in respect of silver, gold and cash but limits the application of the prohibition of *Riba* to only those commodities which are either edible or are common in their genus. The rest of the fungible items even if they are weighable cannot be included in the same category of prohibition with gold and silver. In support of his ruling to consider edibility as a deciding factor, he relies on the Hadith dealing with food for food quoted above. Imam Malik also has the same view as

far as gold and silver are concerned. In respect of other items he considers fungibility and edibility as the *Illah* or ratio decidandi. However, the last mentioned Hadith clearly supports the point of view of Imam Abu Hanifah that the prohibition applies to all fungible items. However, the discussion on this kind of *Riba* insofar as it relates to fungible commodities other than silver, gold, cash and currency is outside the purview of bank interest. For our purpose in the present discussion, it is relevant only to the extent of gold and silver, i.e. cash and currency, as far as it relates to banking and other monetary transactions.

It appears from a Tradition reported by Bukhari and Muslim and other traditionists on the authority of Abu Said Khudri that the tendency of Islam is to encourage monetary transactions as far as possible and to limit the scope of barter dealings to the minimum required. According to this tradition, the Messenger of Allah appointed a person on some assignment in Khyber (perhaps as a collector of revenues and zakat). He brought dates of good quality. The Messenger of Allah asked him: "Are all the dates of Khyber like this one?" The man replied: "In fact we purchased one measure of these dates for two or two of these for three other kinds of dates. The Prophet declared it to be *Riba*, revoked the sale and forbade the person from doing it. He advised the man to sell the ordinary dates on cash in the open market and then to

purchase dates of a better quality on cash. He also advised to adopt this procedure in all weighable items. This last sentence further supports the opinion of Imam Abu Hanifah that all weighable and measurable items are subject to the prohibition of *Riba*. The ground of this prohibition is that the principle of exact similarity is impaired. The Shariah has emphasized the principle of similarity and exactitude of the two commodities in sale and purchase to the maximum possible extent and any increase on one side only invalidates the contract. The parties should clearly know that both the commodities are exactly equal to each other in term of their quantities. The principle is that the lack of knowledge about the equality of the two commodities shall be presumed to be like having knowledge about the existence of the increase. Imam Shawkani has adopted this maxim as a title to a chapter in which he quotes the following Hadith: “It is reported from Jabbir who says that the Messenger of Allah has prohibited the sale of a heap of dates whose quantity is not known for another quantity of dates whose quantity is known”. Commenting on this Hadith which is originally reported by Muslim and Nasai, Imam Shawkani says that the sale of one kind of commodity for that very kind is not allowed if the quantity of one of them is not known because a knowledge with certainty that both the commodities are exactly equal in weight and quantity is a precondition of the contract of sale. Without fulfilling this condition the sale will be

invalid. Imam Shawkani further says that the ignorance of the quantity of one or both the commodities is always subject to the possibility that the quantity of one commodity may be bigger or smaller than the other commodity and that whatever is subject to this possibility shall be prohibited and should be avoided. The prohibition of this sale is not only because it has the possibility of the involvement of *Riba* but also the involvement of *Gharar*, or the uncertainty and speculation which may lead to dispute and litigation.

On the other hand the sale of non-fungible things is allowed both with increase as well as with deferred payment. There are Ahadith reported by Bukhari, Muslim, Abu Dawood, Trimidi, Nasai, Ibn-i-Majah, Imam Ahmad, Imam Malik, Dar Qutni, Bayhaqy, and others on the authority of Jabbar, Anas, Abdullah Ibn-i-Amr, Ali ibne Abi Talib, Samurah and several other companions to the effect that non-fungible thing may be sold with increase and deferred payment. In these Ahadith, instances have been reported where the sale of one camel of high breed for two, three, four or even twenty camels of a lower breed both on cash as well as deferred delivery may be allowed. Explaining this permission, Hazrat Abdullah ibn Abbas says that one camel (of high breed) may be costlier than two. It has been reported by Imam Bukhari and Imam Abdul Razzaq that Hazrat Rafi Ibn Khadij, a companion, once bought one camel for two camels and delivered one camel on the spot and

promised to give the delivery of the other, next day. On the basis of these authorities Said ibn al-Musayyib, the most prominent Follower, has laid down the maxim, as quoted by Imam Bukhari, Imam Malik and Imam Ibn Abi Shaybhas, that there is no *Riba* in (sale and purchase of) animals. Similar views have been expressed by Ibn Sirin, another leading Follower. This has been the opinion of the overwhelming majority of the Jurists. But this applies only to such animals which are considered *qimi* or non-fungible in the market. As regards such animals as are treated fungible in the market, the prohibition will apply.

An important question relevant to the problem of *Riba* is that of the contract of '*Inah*' which has been prohibited by the Prophet of Islam (PBUH). It has been reported by Tabarani, Imam Ahmad and Abu Dawood on the authority of Hazrat Abdullah Ibn-i-Umar that the Holy Prophet (PBUH) has said "when people become miserly and niggard about dinars and dirhams and enter into transactions on the basis of '*Inah*', stick to their cattles and agriculture and abandon the *Jihad* in way of Allah, Allah imposes on them a colossal trial and disgrace and He will not lift it until the people revert back to their *Din*". In this Hadith the term '*Inah*' is very significant. Literally it means purchase on credits, sale on deferred payment or sale on the basis of loan. If the literal meaning of the word '*Inah*' is taken then the Hadith would mean that the economic activity based on credit and loan brings ordeal and disgrace to

people. However, the scholars of Hadith have mentioned a particular kind of sale which was known with the name of '*Inah*'. According to Firuzabadi, the well known classical Arabic lexicographer, the *Inah* sale was that a person would sell his commodity for a price to be paid later and then would re-purchase it back from him for a lesser price. The same explanation has been given by Imam Rafi'i. His explanation of the *Inah* sale is more elaborate. He says that in an *Inah* sale the seller would sell his commodity for a price to be paid later and would make the delivery of the commodity to the buyer and then would purchase it back before receiving from him the delivery of the price for a cash price lesser than the previous price. This explanation shows that it was similar to the buy-back agreement prevalent today. As a further support to the prohibition of this kind of sale, Ibn Qayyim refers to the Hadith reported by Imam Awzai that the Prophet (PBUH) has said: "A time shall come to mankind when they will legalise *Riba* under the garb of trade". Commenting on this practice Ibn Qayyim says that in effect "it is an open and clear *Riba*-based transaction on which both the parties are agreed before entering into the actual contract. Only its name has been converted and an outer term of trade has been used without being actually intended. It is nothing but a trick, fraud and deception perpetrated against Allah the Almighty". Ibn Qayyim further says that such tricks cannot affect the prohibition of *Riba* and cannot eliminate the

evils because of which *Riba* has been prohibited. Rather, such tricks add further force and emphasise to those evils.

It has been pointed out elsewhere that the tendency of Islam is to discourage barter system and to encourage monetary economy as far as may be practical. The Holy Prophet (PBUH) issued certain instructions and laid down several principles which discourage barter trade. The prohibition of the exchange of fungible goods with the same fungible goods if they are of the same kind is a clear indication of that tendency. This is also supported by a Hadith reported by Imam Ahmad, Abu Dawood, Ibn Majah and Hakim on the authority of Abdullah ibn Amr al Mazini who says that the Messenger of Allah has forbidden from melting the coins prevalent and current among the Muslims without any excuse and to convert the dirhams into silver and the dinars into gold. Imam Shawkani extends the prohibition to the melting of other metallic coins or the *fulus* as well, particularly when these are current and popular among the Muslims. The wisdom of this prohibition, according to him, is the harm caused to the people by the reduction in the supply of available dirhams and other coins as a result of their melting and the resultant stoppage of their circulation. It shows that Muslim jurists were aware of the impact of the increase and decrease in the circulation of money on the inflation and deflation respectively. Ibn Ruslan has however exempted from this prohibition to melting of those coins which

have been demonetized and substituted by new ones. According to him in such a situation the melting of the demonetized dirhams is allowed with the purpose of extracting the gold or the silver from them.

In order to pre-empt the possible avenues and to foreclose the doors of tricks that may possibly be employed to enter usurious transactions through backdoors, the Prophet of Islam discouraged practices and modes of trade which could possibly be resorted to for this purpose. One such example is found in the case of Hazrat Fadalāh ibn Ubaid the details of which have been recorded by Muslim, Nasai, Abu Dawood and Tirmidhi. Hazrat Fadalāh reports: “On the day of Khyber I bought a necklace for twelve dinars. (A dinar of Madinah was a golden coin of almost 4.5 grams of gold). The necklace contained some gold and some precious stones. When I separated the two I found that it contained more than twelve dinars of gold. I mentioned it to the Prophet (PBUH). The Prophet said that it cannot be sold unless it is separated. The companion said: “I only wanted to purchase the stones.” The Prophet said: “No you cannot purchase it unless you separate the two”. The reporting companion says that the Prophet ordered him to revoke the deal until such time when the two were separated. It may be mentioned that he had purchased the necklace for seven or nine dinars. The principle derived from this Hadith is that any deal in which a quantity of gold is sold for a smaller or larger quantity of gold is invalid

whether it is the exclusive sale of gold or it includes other commodities. This principle will also apply to all such commodities in the exchange of which the law of *Riba al-Fadl* applies. This principle is also supported by the Hadith which prohibits the sale of an unknown quantity of wheat for a known quantity of wheat as already pointed out. It is also supported by the Hadith in which the sale of one kind of dates for another kind of dates without weighing the two has been prohibited because of the absence of definite knowledge and verification of the quantity of the two commodities with exactitude. Likewise, is the case of necklace it was difficult to determine the weight of gold included in the necklace without it being separated from the stones. Moreover, mere separation is not sufficient for sale but it is to be ensured that the quantity of gold taken from the necklace was exactly equal to the quantity of gold represented by the dinars. A large number of jurists including Hazrat Umar, Imam Shafi'i, Imam Ahmad and Imam Ishaq are of the view that the sale of a commodity which includes gold or silver as a part in any ratio is prohibited. However, Imam Abu Hanifah and some other scholars hold a different view. On the basis of the details reported about the case of necklace, Imam Abu Hanifah is of the view that if the gold included in the necklace etc. is lesser than the price offered the deal is allowed. He considers the excess amount to be the price of the stone. While the price of the gold will be presumed to be exactly the equal

amount out of the dinars paid. Imam Malik also holds a similar view but with a slight variation. He says if the gold does not constitute major component of the goods and the gold component in the commodity is less than one third its sale is allowed without separating the two.

Another example of preventive measures taken by the Prophet to close backdoors of *Riba* is the prohibition of '*Muzabanah*' sale which was prevalent in Madinah. It was the forward sale of dates while they were still on the trees for a certain quantity of ripe dates delivered at the time of the deal. This prohibition has been reported among others by Imam Bukhari and Imam Muslim on the authority of Hazrat Abdullah Ibne Umar. Muslim adds in one of his versions and the Messenger of Allah also prohibited the sale of any fruit without weighing it. In a Hadith reported by all the five major compilers of the Hadith Saad Ibn Abi Waqqas says that he heard the Prophet being asked about the sale of dry dates for fresh dates. The Prophet asked those around him: "Do fresh dates get reduced in weight when they are dried up?" They answered in the affirmative. The Prophet then forbade it.

On the basis of these Ahadith the overwhelming majority of Muslim jurists hold that the sale of unknown quantity of any commodity is invalid if the commodity is *mithli* or fungible. These examples show how the Shariah is sensitive about *Riba* and its contributives and how it closes all possible avenues to foreclose the door of *Riba*. Another

example is the prohibition of buyback agreement, if it is misused for covering up any *Riba-based* dealing as is evident from the following Hadith reported by Dar Qutni: “A lady called on Hazrat Ayesha, Mother of the Faithful, and told her that she had sold something to Zaid ibn Arqam for eight hundred dirhams to be paid later and she had immediately purchased it back from him on cash payment of 600 dirhams. Hazrat Ayesha said to her: “Woe to what you have purchased and woe to what you have sold! The *Jihad* undertaken by him with the Messenger of Allah has been thereby put to a naught unless he repents.”

Another important question in the context of the discussion of *Riba* and its meaning in the Qur’an and the Hadith has been technical status of the Hadith which lays down the principle that every loan which entails benefit and usufruct is *Riba*. (كل قرض جر نفعًا فهو ربا) This has been accepted principle right from the beginning and the technical discussion about its status in terms of the categories of Ahadith has never been taken to be a basis or justification to dispute the authenticity of this principle. Some scholars raise the issue of the status of this dictum as a Hadith and conclude that the principle laid down on its basis is not acceptable because technically it has not been declared to be a Hadith of the highest category of sound Hadith. A number of scholars have discussed the technical status of the Hadith including late Maulana Zafar Ahmad Usmani who had dealt with this question in a scholarly

treatise entitled *Kashf al-Duja an Wajh Ma'na al-Riba*. The late Maulana Zafar Ahmad Usmani dealt with different aspects of the question of the authenticity of this Hadith and has concluded that the principle laid down in the Hadith is an acceptable principle supported by a number of reports and principles. Relying on the sayings of leading authorities of the science of Hadith, Maulana Zafar Ahmad Usmani says that the general acceptance of Hadith by the jurists is a clear indication that it is a valid Hadith and has to be accepted as a basis of laying down the principle. He has quoted the names of various companions and other early authorities who have relied on these reports and accepted the Hadith as a fundamental principle. Moreover this Hadith and several other AAhadith and sayings of the Companions highlight different forms of *Riba* as prevalent among the Arabs, some of which have been accepted without any scrutiny by writers like Dr. Fazlur Rahman, Shaikh Tantawi and Justice Qadeeruddin Ahmad. As far as this principle is concerned objection has been raised to doubt the authenticity and blur the acceptability of this Hadith on weak grounds. Maulana Zafar Ahmad Usmani has quoted several statements of the Companions recorded by different compilers of the Hadith to support the principle that usufruct or benefit accruing from a loan is *Riba*. These statements put together reach the status of consensus of the Companions and their followers. It can undoubtedly be considered to be a tacit consensus because in the

absence of any counter opinion, the views expressed by several Companions about the usufruct or benefit accruing from loan being *Riba*, such views should be accepted as *Ijma'*. It means that the remaining body of the Companions agreed to the views of these Companions. Therefore, even if there is any doubt at all in the fact that this statement is a Hadith, it makes no difference in view of the unanimity of the Companions. It may be pointed out here that a unanimous ruling of the Companions constitutes an integral part of the Sunnah and has the authority of not only Prophet of Islam (SAW) but also enjoys the support of the Qur'an.

Before parting with the discussion on the nature, classifications of *Riba* and impact of its prohibition on trade and business, it appears appropriate to discuss the rationale and wisdom (Hikmat) in the prohibition of Riba in all its forms. This discussion does not mean that we consider the wisdom to be the ratio decidandi or illah or the deciding factor of this prohibition. Riba is prohibited because Allah has prohibited it. The wisdom discovered by finite human beings cannot be the illah or the deciding factor behind a divine decree. Following discussion is based on the writings of Muslim scholars as well as the submissions made before us.

Muslim scholars have been addressing themselves to the important question of the rationale of the prohibition of Riba from the

very beginning. These include both classical writers and commentators of the Qur'an as well as the modern Muslim scholars. The well known commentators of the Qur'an, Imam Fakhruddin Razi and Allamah Khazini have identified the following main reasons of the prohibition of Riba. Firstly, Riba-based transactions have a tendency of eating up people's money without consideration. A habitual interest-eater gets money without any risk or labour whether the transaction is on the basis of cash payment or on the basis of deferred payment. Secondly, when interest gains currency it prevents people from productive activities such as trade and commerce with the result that the sphere of human activity suffers adversely. A capitalist prefers risk-free money-lending to risky operations of trade, commerce and industry with the result that cash-flow is diverted from real and productive economic activity to unrealistic and non-productive usurious practices. Thirdly, interest puts an end to the pious act of giving free loans to people. When interest is prohibited people would be happily prepared to share their resources with others in a spirit of cooperation and sacrifice. In a society where interest is rampant, no one is ready to come to the help of others without claiming his own premium. This puts an end to the sentiments of brotherhood and charity. Fourthly, for a Muslim, the very fact that the Qur'an has prohibited Riba is sufficient to abstain from it without seeking any further rationale or wisdom to justify its prohibition.

Fifthly, the Riba-based transactions give rise to a strong tendency of causing injustice to the poor which adds to the wealth and affluence of the wealthy. Similar views have been expressed by Syed Qutb in his well-known commentary, Fi Zilal al-Qur'an (volume III, page 33). He says that the hallmark of an Islamic society is love and respect of each others' rights by the members of the society. People should demonstrate moral purity and good behaviour. When a person demands interest from another person he can do so only after devoiding himself from good morals and conscience and whenever a society adopts this practice the whole society becomes devoid of mutual love, affection and the spirit of cooperation. Shaikh Muhammad Abu Zahrah, a leading jurists of Egypt of 20th Century considers injustice to be the base of the prohibition of the Riba. Injustice has been condemned and prohibited in respect of everyone. It is not something which may be prohibited for some people and may be accepted as permissible for others. The Holy Prophet (SAW) reports that Allah, the Almighty, has said: "My Servant! I have declared injustice to be proscribed for Me and prohibited it to be practiced among you. Therefore do not deal with each other unjustly".

The Qur'an has also referred to the elimination of Zulm as the wisdom and rationale behind and prohibition of Riba in Chapter-II:279 which mentions that neither the lender nor the borrower should be wronged. In this verse the term 'zulm' has been used which is the

antonym of Adl (justice) in Islam. Some people take very cursory view of wrong and injustice mentioned in this Qur'anic verse. It has been contended that wrong and injustice is found only in an interest charged on a loan taken by the poor for personal and consumption purposes. Undoubtedly the increase on consumption loans falls under the category of Riba and is prohibited. But it does not ipso facto mean that increase on other forms of loans does not involve any injustice or wrong. If the rationale and wisdom of the prohibition of Riba is to close the door for every wrong and injustice in all its forms and at all possible levels, then the prohibition of Riba must extend to all increases on all forms of loans, i.e. those meant for personal and consumption purposes as well as those for commercial and production purposes.

The element of *zulm* and injustice in Riba has to be discussed in the wide application of concept of justice in the field of distribution of resources and socio-economic life in the society. It is difficult to agree with the contention that the charging of interest is prohibited only because of the wrong and injustice it inflicts upon the poor. This argument does not go far enough towards the full rationale of the prohibition. Borrowings during the days of the Prophet (SAW) were primarily undertaken not by the poor for their personal needs, as the Bait al-Mal as well as the philanthropic Muslim community was more than ready to come forward to respond to the needs of the poor, but

borrowings were always taken by the tribes and groups of rich traders who operated as large partnership companies to conduct large scale trade. Tribes and tribal groups worked as trading companies whose formation was necessitated by the prevailing circumstances: the different terrain, the harsh climate, the inclement weather and the slow means of communication. These factors had made the task of the trade caravans difficult and time consuming. In such conditions it was almost impossible for individual traders and businessman to undertake trade journeys on their own and to pay for their business trips to such far off places as are known to be the destinies of Arab Traders: Rome, Syria, Asia Minor, Egypt, Pesia, Zanjibar, China, India, Sri Lanka etc. In view of these difficulties, Arab traders had organized themselves into large tribal groups which operated as big partnership companies, and undertook two major business trips every year: to the East during the winter and to the West during the summer as referred to in the Qur'an as the trip of the winter and the trip of the summer (the Qur'an:106). According to the available data members of the Makkahn aristocracy and the businessmen from the hill resort of Tayef either themselves undertook these journeys or contributed to it by providing money to those who undertook them. The traders joining the caravans also took big loans from more affluent members of the aristocracy and the business community. The money so borrowed remained blocked for

long periods of time extending from months to years. It was, therefore, necessary for the caravans to muster and mobilize all available financial resources by which they would also purchase the local exportable products to be sold abroad so that the importable items and products manufactured in the different parts of the world are brought to the 'Mother of the Towns'. Thus all the needs of the local population were procured and fulfilled till the next trip was organized. Any person familiar with the history of trade in pre-Islamic Arabia knows the secret of the affluence of the Makkahn society as well as of their undisputed political prestige and unrivaled commercial influence throughout Arabia. This international trade accounted for the pride and vanity of the inhabitants of Makkah and Tayef. It was because of this deep-rooted nature of Riba and interest in the life of Arabia which accounts for the stern opposition of the Makkahns to the message of Islam. It also answers the question why gradualism was observed by Islam in eliminating this evil. It also explains the curt and the uncompromising attitude of Islam towards any form of Riba or any element of interest or usury.

It is known to everyone familiar with Seerah and Islamic history that the Prophet (peace be upon him) and the righteous Caliphs as well as other companions after him made many agreements with the non-Muslims living in Islamic territories. Such agreements were made

with Jews, Christians and the Polytheists living in different areas. Under these agreements, these non-Muslims were granted their rights of honourable living within the territories of Islam according to their respective religious convictions. They were even permitted to drink liquor and eat pork. Yet despite these liberal conditions of religious-cultural autonomy, they were never allowed to indulge in the transactions of interest. The agreement made by the Prophet (PBUH) with the Christian of Najran and the polytheists of Tayef clearly stipulated the condition that in the event of their indulging in the business of interest, this agreement shall be void.

Similarly the second Caliph Umar (RA) made a number of treaties with non-Muslim tribes under which the latter were permitted to live as free citizens under the Islamic dispensation. The texts of these treaties have been thoroughly discussed by the Jurists of Islam. They have paid special attention to the treaties during the reign of Umar (RA) and derived from them detailed provisions of the *Shariah* with regard to the relations with non-Muslims. These documents were prepared by the Prophet's own companions. There could not have been a more sacred source than the treaties made by the companions. All these documents and treaties stipulate the condition that these treaties shall be void if the non-Muslims indulged in any transaction of usury. This clearly means that if they will murder a Muslim, only the murderer shall be punished.

The community as a whole will not be taken to task. If these people will be found involved in any conspiracies against Muslims, then only the conspirators will bear the brunt of their misdeeds. And this will not affect the agreement with the community of non-Muslims as a whole. Similarly, anyone committing adultery shall be individually held liable to punishment. The agreement will remain intact. But if anyone indulged in usury, then the whole agreement shall ipso facto become void and there will then be open war with them. This clearly demonstrates that the Prophet (SAW) and the Prophet's companions considered usury such a heinous crime that an individual's commission of it was regarded as sufficient ground for terminating the whole agreement of peace and friendship with them.

It has been pointed out that the very verse of the Qur'an that implies disapproval of Riba is verse 39 of the Chapter al-Rum. This verse refutes the supposition that through Riba the wealth grows. For in the sight of Allah this is no growth. But the spending by way of Zakat and charity that seeks the pleasure of Allah is the real excess and growth. This chapter was revealed in Makkah prior to Hijrah. This shows that even before handing down detailed provisions of the Shariah, the Qur'an had forewarned its followers about the undesirability of Riba. The first express mention of the prohibition of Riba for the Muslims, as discussed earlier, is found in Verse 130 of Surah Al-i-Imran of the

Qur'an which was revealed in the context of the Qur'anic narration of the battle of Uhud. Apparently there is no relevance of this battle to the prohibition of interest. But actually there is close relation between the two. The Mufassirin have mentioned a number of reasons for this Qur'anic reference to the prohibition of interest in the context of this narration of the battle of Uhud. Some of these reasons are as follows:

- i) The difficulties faced by the Muslims during the battle of Uhud and the heavy loss of lives was chiefly attributable to the secret collusion between the Jews and the hypocrites (the latter were in effect the agents of Jews).
- ii) The Jews exercised an effective control over the market and commercial life of Madinah. All the Arab tribes of the adjoining areas were in debt to the Jews (the Jews had always been proverbial for their practice and promotion of usury. They still control the interest bearing banking system of the world today). Through lending money on interest, they had shattered these Arab tribes in the stakes of their influence. In this context, the Qur'an dealt a severe blow to their economic domination by declaring the prohibition of interest. Thus it gave a message to the believers for all times to come that the most effective means of liberating themselves and guarding themselves against the conspiracies of the Jews was the prohibition of interest. (If usury or interest is totally abolished it becomes quite easy to terminate the economic domination of the Jews and their agents. That is why whenever the issue of abolishing interest is agitated, the strongest opposition comes

from the mercenaries of Jews and Hindus who are chosen allies of each other as eaters of interest).

- iii) In the battle of Uhud some Muslims showed weakness which was exploited by the infidel forces and the tables were turned. This weakness was caused by the eating of interest which blackens the heart. This darkness of the heart hampers the performance of virtuous deeds.
- iv) The thing which had caused the greatest loss to the Muslims in the battle of Uhud was the retreat of the marksmen from their position in their hurry to get the spoils of war. This attitude betrayed a certain love of wealth. If love of wealth becomes deep-rooted, this love leads to the practices of usury and gambling. That was why Allah (SWT) uprooted this feeling at the very outset by prohibiting interest so as to keep the human tendency to love wealth within natural limits.
- v) The spirit of Jihad is to give away one's life and property in the cause of Allah without hesitation. If this spirit is weak, the requirements of Jihad cannot be fulfilled. That is why the fighters in the cause of Allah are to this day immune from the germs of eating usury. In fact the eaters of usury have never been seen fighting in the cause of Allah. This is because performing Jihad with money and wealth and eating usury are two totally opposite things.

In the verse cited above, eating doubled and redoubled usury has been prohibited. However, this does not mean that eating interest less than double or quadruple is permissible. For the express injunctions of the Qur'an and the Sunnah clearly prohibit the practice of interest in

the above forms. The expression used in the above verse has been employed to expose the evil and abominable nature of usury.

These verses not only clearly and emphatically prohibit the practice of Riba, but also point to an evident and obvious difference between Riba and buying and selling. The Qur'an has contented itself by regarding those who equate between the two as baseless and stupid. It has not detailed the difference between the two. This shows that the Qur'an considers this difference to be such an obvious and self-evident fact that hardly needs elaboration.

The major difference between sale and interest is that the money received in sale in consideration of some wealth whereas the money which the eater of usury charges in excess to the principal is not charged in consideration of any wealth. The second difference between sale and usury is that buying and selling promote trade and thus disseminate wealth, whereas in usury, the wealth shrinks and becomes concentrated. As a result of this the eaters of usury become richer and richer. The third difference between sale and usury is that everyone is responsible for the gain and loss of the wealth that he holds. But in the system of usury the creditor is merely entitled to gain and throws the entire burden of loss on the debtor. The fourth difference between sale and usury is that the transaction of sale once taking place is concluded and the two parties thereafter may carry on their normal business.

Whereas the eaters of usury in most cases do not leave the debtors and continue endlessly with their claims on him. The curse of compound interest causes untold destruction of the whole families through its treacherous mechanism. The fifth difference between sale and usury is that once the profit is procured by whatever ratio it might be the claims of the seller come to an end. But the demands of the eaters of usury seldom end and often continue to secure gains and interests for long periods of time. The sixth difference between sale and usury is that the process of sale claims the hard work, potential, ingenuity and time of the seller and thereafter provide him with some profit. Whereas in the case of usury, the eater stays away from all labour and toil and from the security of his home, he continues to receive all gains and interests. In this way, he is not a participant in the trade or business. These and several other differences between sale and usury underline the emphatic Qur'anic injunction of considering one of them is totally prohibited and the other is pure and permissible.

Commenting both on the economic rationale and the moral wisdom of the prohibition of Riba, it is said that usury is not the means to progress and prosperity, rather it is conducive to decline and bankruptcy. The wealth acquired out of usury is devoid of blessing. It neither provides contentment of the heart or tranquillity of the soul, nor does it promise any real system of social justice for the society.

Moreover, the eaters of usury shall be deprived of the ultimate bliss of the hereafter. But on the other hand, charity (Sadaqa) brings blessing to wealth. The performer of this good is rewarded with the wealth of inner contentment and peace of mind. Moreover, a society based on the values of truth, brotherhood and compassion soon witnesses a system of socio-economic justice in a real sense. In addition the Prophet (PBUH) has pointed to the fact that the wealth of usury despite its apparent increase eventually leads to bankruptcy. History of economics also clears this fact out. When a society dealing with usury is afflicted by recession, it meets such disastrous and catastrophic consequences that are without parallel in an interest-free society. The rise and fall characteristic of an interest-bearing system that affect the trade and business are almost absent in an interest-free economy. The theories propounded by economists about trade cycles and their after-effects are more or less applicable to the system based on the concepts of usury. The Qur'an verse (ii:276) makes a comparison between usury and charity. Both of them are concepts that are poles apart in their letter and spirit. The former essentially represents the attitudes of greed, selfishness, exploitation and a mad pursuit of money and wealth. The latter epitomizes the virtuous and lofty values of co-operation, fraternity and contentment.

The last Qur'anic verse pertaining to usury that was revealed at the conquest of Makkah prior to the Farewell Pilgrimage, abolishes all

prior claims and outstanding dues of interest. This injunction was further reiterated by the Prophet (PBUH), in his last sermon during the Farewell Pilgrimage. Moreover, acting on his old practice, the Prophet (PBUH) first implemented the prohibition on himself and his family before imposing it on others. He abolished all claims of his uncle Abbas to the outstanding dues of interest. Moreover, he abolished all claims of interest that Muslims had against non-Muslims. In this verse the Qur'an has used the term ra's al-mal (capital). This is a clear allusion to the fact that this prohibitory command extends to both commercial and consumption loans. Because on the one hand, the consumption loans were in negligible number, and on the other, it was quite unlikely and of rare occurrence, in view of the golden Arab traditions of generosity, charity, and helping the needy, that the chieftains of Quraish and generous and magnanimous men like Abbas bin Abd al-Muttalib should extend consumption loans to poor people on interest.

Islam seeks to build a society based on justice and equity. It bears the torch of the perennial values of justice and generosity and wants these values to reign supreme in the society as a whole. The nature of relations between the individual members of the society stipulated by Islam is rooted in mutual care, brotherhood and sympathetic co-operation. Hence the relationship and the dealing between the members of the Islamic society is free from the elements of

selfishness, exploitation and mutual deception and fraud. It is rather anchored in the noble feelings of co-operation, mutual sympathy and support. To protect and promote these noble values, Islam has closed all the avenues of oppression and exploitation. It has prohibited and discouraged all those things that lead to injustice and oppression and has extolled and encouraged all those deeds that inspire people towards mutual care and co-operation.

The mentality which is bred by the indulgence of people in usury militates against the values of Islam at every step. For the sole aim of the eaters of usury is to fill their purse and pocket through exploiting the needs and wants of other people. Therefore, the words of sympathy and care are foreign to their vocabulary. In fact the Islamic concepts of mutual care and healthy co-operation are totally intolerable in their quarters not to speak of finding any congenial climate for their fruition. In the following pages we would enumerate some of those evils of interest that bring into focus the contradiction and conflict between the practice of interest and the over-all teachings of Islam. For facility of comprehension, we may divide these evils into three main categories:

- 1. Moral evils**

- 2. Social evils**

- 3. Economic evils**

First, the moral evils. The ethical considerations were seldom allowed to enter the arena of economics and banking under the aegis of

the Western civilization. However, under the Islamic terms of reference, it should be the conviction of us all as Muslims that the goodness or evilness of everything is to be determined by those moral principles that have been prescribed by the Shariah. It is on the basis of these principles that we regard something as permissible or prohibited.

- i) The very first evil of usury is its being a sheer injustice. Not only that, but it gives rise to a series of injustices the scope of which is widened and expanded day by day and moment after moment. Any business initiated on the terms of usury starts a new vicious circle of usury in the society. This vicious circle tramples the innocent hopes and aspirations of all those whom it envelopes and entangles. With the result that none feels the slightest tinge of remorse over the plunder of an oppressed home, bankruptcy of an insolvent, or destruction of the supporter of someone rendered suddenly shelterless. This cruel and callous psyche is the essential consequence of usury. Once these hardened attitudes gain ground in human affairs, the result is the eventual death of all elements of humanness, virtue and fraternal feelings among the people.
- ii) The second biggest evil of usury is that it engenders such an abominable and loathsome self-entredness that makes everyone solely concerned with his own profiteering and success in business. Whatever might be happening to others is none of his business. Whether the debtor is dying of starvation or living in luxury is not the creditor's concern at all. His sole concern is to secure his principal amount with interest at the stipulated time whether this might require the debtor to sell off his domestic utensils or dress of his body.

- iii) The third evil of usury which leads to scores of serious cultural ailments is the superiority of money and wealth over human beings. Whereas money is merely an instrument of fulfilling human needs. It is not an end per se. But under the system established by the eaters of usury, man is relegated to a secondary position while the satisfaction of his needs is given ever lesser importance. Money and capital assumes the first and foremost priority in life. This attitude reduces man's labour into a worthless and trivial thing, while capital becomes a value unto itself. None regrets the loss of human toil and labour. But if the eater of usury by any chance loses a few pennys, he leaves sighs of grief for grief for many years. The system of usury, instead of making man the object and the capital his servant, turns the capital into deity and reduces man into its subject and servant.
- iv) Once entangled in the vicious circle of usury, one forgets the blessings of legitimate earning. For the blessing that one receives out of his earning through hard labour is never enjoyed by those who receive free and labourless benefits of capital in the security of their homes. In the beginning human nature refrains from indulging in usury. With the passage of time man becomes addicted to easy proceeds of interest and becomes averse to the thought of legitimate sustenance.
- v) While explaining verse (2: 275) the exegetes have said that the eaters of usury become so much blinded by love of wealth and capital that this becomes their sole motive in life. This sick obsession with money erodes all moral virtues one after the other. Greed and niggardliness that have been vehemently condemned not only by the Qur'an and the Sunnah but by all

books of religion and morality, permeate the soul and spirit of usury eaters. Their chief motive of life becomes hoarding of wealth through maximum exploitation and deprivation of others.

- vi) It is often observed that the eaters of usury soon take to gambling. Once they are overcome by the damns of greed and passion for money, their minds become engrossed in thinking of new ways of grabbing money and securing gains. Soon their diabolical mind seduces them to pursue the way of gambling which is even easier means of getting riches than usury. When one becomes habitual in enjoying easy money, he taps every source that might provide him maximum wealth with minimum labour. And this object is quite easy of attainment through gambling. When human perversion drags someone to plug the games of chance, he gravitates to the lowest ebb of indignity and disgrace. How often one hears of those who lose their wives and daughters in gambling.

These were some of the very obvious evils of usury that pertain to moral category and that are to be found in all those societies that practice the system of usury. Although mention of morality in the context of economics often raises many eye-brows, but if we are really genuine in our claims of Islamizing the society, then we will have to initiate and conclude everything on the moral criteria. Apart from these moral evils, there are certain social evils that are born of the womb of usury. These evils infect the whole social fabric with their germs of corruption and finally bring about the destruction of a society. We will

mention below some of these social evils that directly arise out of the system of usury. These are the evils that have afflicted the contemporary society including a large part of the present day Muslim society with their ailment.

- vii) The horrible concentration of wealth (which we will shortly elaborate) brought about in the society owing to the system of usury bifurcates the society into two parts. On one side of the fence there are found some individuals who are the eaters of usury. They control 95% of the whole society's resources. Through this monopoly they dictate their whims to the society. On the other side of the fence are found millions of multitudes languishing and crying for a morsel of bread to keep their bodies and souls together. This brings a serious social divide between the two classes. This divide is further cemented by the economic frontiers that are permanently established between them minimizing the prospects of the social nobility for the poor and deprived ones. This state of affairs breeds mutual distrust and hatred often leading to rancour, feuds and fights. In this way the society presents such abominable specimens of class struggle that have constituted a classical chapter of history in the communist philosophy.
- viii) It is the nature of wealth that it loses weight and value if it is acquired without labour and toil. Easy money seldom receives proper care of the possessors. In all those societies where money is obtainable by the affluent classes without investing the required effort and struggle, there always arise unlimited ailments. People in these societies compete with each other in squandering money and wasting resources. This state of affairs

does little harm to the few hundred families who hoard vast riches but takes its toll from those hundreds of thousands of families who either have no easy money or lack the resources for it. The most deplorable becomes the social condition of those millions of families who do not find even a single night's meal easily. The tendency to concentration of wealth and un-warranted inflation of money is invariably productive of such serious social and moral evils that agitated the mind of the Prophet (PBUH). And that is why the Prophet (PBUH) was seldom worried about scarcity of money but often apprehended its excess.

- ix) A society basing its economic life on a system of usury could never aspire to establish itself on firm moral footing. It simply cannot generate that spirit of co-operation which Islam calls for. That is why whenever we talk today of the concepts of mutual care and maintenance granted by Islam and invoke the perennial social values of our religion that give rise to these concepts, people who are not properly educated in the lore of Islam are rather taken by surprise.

These are some of the social evils that are the necessary consequences of the system of usury. They gradually eat into the whole fabric of the society. Apparently the societies seem to expand and flourish but actually lose all substance and potential. With slight jolt, they crumble to the ground. There has been exhaustive discussion among the economists about the economic ills of usury. It has become by now a near consensus among all fair-minded and objective observers and planners of economic future of humanity that the economic

problems arising out of the interest-bearing economic systems could only be solved through abolishing interest from the whole world. The most famous economist of the modern Western world who is internationally recognized expert in his field Lord Keynes emphatically says that the problem of un-employment shall defy all solutions unless interest is abolished from the economics of the world. He further contends that the best way to demolish the exploitative superiority of the capitalist's class is to eliminate the system of interest. The writings of Keynes and other leading economists of the world on the negative aspects and demerits of interest has been comprehensively summarized by our country's most outstanding economist and researcher late Shaikh Mahmud Ahmad, in his concise but masterly work entitled "Man and Money".

In fact when interest is accepted as the principal basis of investment, it militates against the well-being and welfare of humanity from so many directions that a slight description of it is sufficient to substantiate the Qur'anic declaration of war against its perpetrators: Prof. Shaikh Mahmud Ahmad has enumerated sixteen evil characteristics of interest:

- 1) An evil consequence of interest is that it creates such a heavy encumbrance on the capital that it limits the scope of all productive and commercial activities. The result is that the productive activity shrinks and its natural growth and

expansion is arrested. This is the basic and fundamental point which represents the roots of all the economic exploitation the interest based system creates.

- 2) The interest has an adverse effect on employment, particularly, self-employment, mostly because of borrowing facility of the interest-based system is limited to big financiers and capitalists. Small businessmen and entrepreneurs seldom get any borrowing from this system.
- 3) An entrepreneur is forced to maintain the level of profit much higher so that it should always exceed the highest limit of interest. If the level of interest is commensurate with the actual level of profit, the borrower faces the problem in paying the interest. Thus, interest and profit are concomitant. The excessive profiteering and the result out increase in prices is a direct result of interest.
- 4) The rental of all landed property (agricultural land, houses, shops) is consistently on the increase because the entrepreneur has to pay interest on the value of the landed property as well.
- 5) The entrepreneur is forced to keep the level of profit above the level of average rent plus the cost of wear and tear. This also results in decreasing the salaries and wages of the labour and adds a further dimension of socio-economic conflicts and problem.
- 6) The price hike is consistently on the rise resulting in increasing the agonies and accentuating the economic difficulties of the lower and poor class.

- 7) The rising price curtail the demand leading alternatively to the fall of production. The fall of production places the whole economy at a very precarious level.
- 8) As a result of the depression in the market a tendency takes place to freeze the production at a certain stage, i.e. a stage where the maximization of profit is possible. The freezing of the production level is the cornerstone of the interest-based system which is found in almost every capitalist country and capitalist economy. The most striking example of this policy can be seen in the US where the government spends around 12 billion dollars (in 1980) to freeze the agriculture produce of the country. Such huge amount is not easily available and has to be acquired on interest. Professor Mahmud Ahmad laments the over powerfulness of the capital and weakness of human element as well as suffering of mankind as reflected in this example.
- 9) The situation resulting from these evils of interest lead to another dimension: the capitalist class of the country which controls most of the economic resources make the government believe that the public exchequer should always keep its expenditure above the level of income to prevent unemployment and subsidize the purchasing power of the people. The governments easily fall prey to this logic and further add to the economic problems and miseries of their people.
- 10) Once the governments fall prey to this machination of the capitalist class it starts controlling the resources of the government as well and capture a major portion of national income paid as debt servicing to the capitalists. The result is

that the government borrows billions annually and pays billions annually in debt servicing.

- 11) The wealthy continue to become wealthier and the poor poorer. The middle and the lower classes are continuously crushed under two stones of unemployment and dearness.
- 12) This situation adds to international tension. Every country tries to increase its exports and decrease its imports so that the unemployment created by the interest inside the country is exported to other countries through expansion in its exports. Since all the countries equally suffer from this disease no country can achieve any viable success in this exercise. It only adds the international tension often leading to armed conflicts and wars.
- 13) The most important causality is the culture and civilization. Interest being a means to give preponderance to money over human-beings, it has no concern with the success or failure of human labour. Even if all human labour is lost the capitalist is not prepared to abstain from and relinquish his interest. This results in the continuous and infinite downfall of human values and continuous rise of capital and limitless materialistic tendency.
- 14) Those involved in this devilish exercise, to quote the Qur'anic Phrase: **stand like one whom the devil has striving to madness by his touch.** A cursory study of the economic consequences of this system and the resulting miseries will show the ineffectiveness and bewilderment of modern economy in the face of this colossal problem.
- 15) The capitalist system ensures that capital-flow is always controlled so that it does not exceed to the level and the

weapon of interest becomes ineffective and useless. In order to perpetuate interest it is necessary that a system is developed to control the flow of capital and to arrest it within the required limit. The most important step taken for this purpose is what is known as bank reserves. Banks keep a certain portion of their deposits as reserve to meet any possible eventuality. The higher the reserve the lower the supply of capital. If the reserve is 33% the credit issued can be three times the amount of savings. If the reserve is 25% than the credit may be four times. So also in case of 20% 5 times and in case of 10% 10 times. In our country the bank reserve is 35% so that slightly less than three times this amount the advanced as credit. It means that interest is a self generating mechanism in which capital will always be less than the actual need and it will ensure to receive its cost because of its scarcity.

- 16) The capitalist class which is the defender of interest is always prepared to put everything at a stake for the sake of its own interest. Nationalization and socialism are some examples of the extent to which capitalist can go to safeguard his interest.

Professor Shaikh Mahmud Ahmad further writes: From the above description, it should not be supposed that these were only evils of interest. The truth of the matter is that the knowledge of the subject is still quite scanty. The capitalist system and its protagonists are trying their utmost to prevent any institutionalized effort to undertake serious research on the problem of interest and its allied issues. The above

enumeration of sixteen evils of interest point to the fact that we have not thus far even traversed one quarter of the distance towards gauging the whole range of the negative impact of interest on human life. This is because in a tradition related by Hazrat Abdullah ibn Mas‘ud, the Prophet (PBUH) has said that there are seventy three evils of usury. The lowest level of these is like committing adultery with one’s mother.

These sixteen aspects of the exploitative nature of usury are those that have been regarded by the Qur’an as injustice. The nature of this injustice perpetrated by interest is different from other categories of interest both in intensity and depth. It is an injustice that not only deprives the poor of their morsel of bread, but also prevents them from finding an alternative means of survival until one surrenders his freedom and honour. There could be other ways of oppression whereby human beings might be deprived of their means of survival. But there is no other instrument of oppression whereby the victims could possibly be prevented from finding the alternative means of survival. Since the system of Riba directly challenges the Divine Attribute of sustenance and becomes a hurdle to His Sustaining authority and continues to block the bread of human beings until they are deprived of their dignity and honour. That is why this crime deserves declaration of war from Allah and His Prophet (PBUH) and is seventy times more heinous than adultery with one’s mother.

Apart from the social and economic evils of the interest, it must also be borne in mind that the interest and Riba come into direct conflict with a number of Qur'anic dictates and precepts. As soon as interest is allowed, a number of Qur'anic injunctions cease to operate. A few illustrations may be useful. The Qur'anic verse (2:280) lays down the nature of relationship that should obtain between creditors and debtors when the latter is poor and destitute. Here only two ways are possible. The best attitude is to write off the loan and relieve the debtor. Otherwise respite must be given. The question is if that is the command of the Qur'an and this ought to be the conduct of the Muslims, then we should see whether there is any bank or eater of usury today who is prepared to appreciate the difficulties and hardships of the debtors and grant them respite so as to restore them to survival? But the actual situation in the society is just the opposite. As soon as there appears any sign of weakness or loss in the business of the debtor and there seems little chances of his recovery, the bankers, the financiers and the creditors are the first to arrive at the scene of the tragedy and place the demand for repayment of their loans before anything else. The cases of companies that have gone bankrupt in our country are well-known to everyone. In most of the cases the company was doing good business. For some reason the investor became suspicious or doubts were deliberately cast in his mind by any business rival. For this situation,

instead of lending help, sharing the problem and helping in its solution, the investor came with his one-sided selfish demand to recover his money before everything else. Now the Qur'an invites us to the opposite attitude in this regard. It says that in the first place, when you lend money to your brother, your motive should be mutual sympathy, care and love. If the debtor is in difficulty, you must give him respite. Further than that, if you could afford this, then you should even write off the loan. Compare this approach prescribed by the Qur'an with the usury eater's mentality. The first thing which happens in such a situation is the cruel and callous strangulation of the debtor by the creditors.

Regarding the circulation of money, the Qur'an has laid down the clear and un-equivocal principle in the verse (59:7) that the wealth should not circulate only amongst the wealthy sections of society. The purpose of this principle is that all strata of the society should benefit from the wealth and it should be disseminated among all sections of citizenry. As blood is distributed by the heart and is disseminated to all tissues and fibers of the body each moment in the same way the wealth should reach every portion of the social body and should continue to reach evenly and equitably. To achieve this objective the *Shariah* has supplied a number of legal and other devices. The aim of these devices or injunctions is to block the possibilities of the concentration of wealth and to distribute the available wealth equitably

and as widely as possible. But contrary to this principle, the entire circle of interest revolves around one axis: to acquire more wealth by the force of wealth and to go on maximizing capital by means of capital until the entire resources of the society are concentrated and come under the control of a handful of financiers. The tendency of usury is that it collects wealth from all the corners. Instead of disseminating wealth, the mechanism of interest ensures that even a meager amount of wealth does not remain out of its clutches. Now the modern banking system as it operates today, ensures precisely this draining off the society's wealth. The small income groups deposit their small savings of money earned through hard labour in banks. In this way, the earnings of hundreds of thousands of people are pooled in a pond of wealth, as it were. This huge pond of wealth is controlled by a few capitalists. Apparently it is claimed that this capital shall lend money for business and thus it will be spent for the common goals of the society. However, in actual practice, this seldom happens; an ordinary man cannot possibly take loan from the bank and do business with it. Every bank, before granting a loan, demands a guarantee worth hundreds of thousands of rupees. Sometime, it says to the borrower, if he already has a business worth so much amount, he might get a loan worth this much. This means that only those who could provide guarantees and sureties worth millions of rupees have the right to obtain loans from these banks. Then only the already rich

and affluent are entitled to enjoy the benefits of bank loans. For instance on the surety of a property worth two and a half million rupees (Rs.2,500,000/-) one gets another two and a half million rupees. Thus a capitalist who owned 2.5 million rupees became the owner of five million rupees. If he applies for further loan, he could still get as much more amount. He will thus get ten million rupees, thanks to the banking system. This means that within a matter of 10—15 years, the rich shall become richer and the poor shall become poorer. Whatever little wealth was available in the society was drained off and collected in a few hands. As vultures keep watching the dying ones, as soon as death approaches, the vultures come first. In the same way, the creditors keep vigil over those engaged in business. Whoever appears to be weakening these creditors, hasten to grab his neck and in no time, his whole property is distributed among them. The poor businessman is thus doomed and his remaining resources are also acquired by these capitalist creditors.

An established principle of the Shariah upheld by all Muslim scholars and jurists is the mutual relation between profit and loss. This principle has been derived from the famous tradition of the Holy Prophet (PBUH) which says: *الغنم بالغبرم* “Benefit devolves with liability”. Various jurists and traditionalists of Islam have explained this principle in their own language. There is no difference over this principle between

any Muslim religious group. All Muslims have consensus on this principle of the *Shariah* that “anything of which one does not accept the risk or obligation to cover the loss, he is also not entitled to enjoy benefits accruing therefrom”. If you are doing business or sharing one, then you will have to incur the risk involved in that business to the extent of your participation in it. When you undertake to accept the obligation to endure loss, then you are entitled to all the profits that might accrue to that business in the open market. But to say that one’s money is safe and it will be payable to him irrespective of the successive failure of the business, is something unacceptable to the Shariah. This position of Islam has been frequently reiterated by the Shariah. There are people who are so naïve as to wonder why the scholars of Islam consider charging rent on a landed property permissible, but declare interest on the capital prohibited. The contention of these people is that if some property is given on rent, then the very basis on which we justify charging rent, should equally justify charging rent on the capital. Why one sort of rent is permissible and the other prohibited? Actually this confusion between the two different issues is either due to misunderstanding or willful distortion of the truth.

First, the principle of the Shariah is that only that thing could be lent which itself could be consumed. For example currency notes, coins, gold, silver, wheat and sugar etc. But on the contrary, those things

that are not consumable but could be utilized frequently by the same person or by several persons could be given to someone for temporary use, but could not be given by way of loan. For example house, car, book, pen and other similar things of frequent use. Therefore, interest could be charged on gold and silver because these could be lent but could not be charged on land and immovable property because these can be given for use but can not be lent.

Second, if immovable property is lost or damaged due to a natural calamity, then the loss is that of the lessor/owner, rather than the lessee. But someone who borrows capital for doing business, if his business is lost, he will have to return the capital to the creditor. Because in the latter case, the risk is not that of the owner, but that of the debtor who is doing business. Hence there is a wide difference between the two. And the Shariah clearly distinguishes between the two situations.

There is another dimension of this issue. It might sound surprising strange to the economists, who might also regard it as surprising:, but the Shariah holds a different view of the question of loan and credit. Anyone least familiar with the teachings of Islam, knows that Qur'an and Sunnah emphasized abstention from debts and liabilities, and have taught the supplicant to seek protection of God against debts and liabilities. Debt has been generally viewed with disapproval in Islam. That is why the basis of trade and business is participation,

partnership and sharing and not on debts and loans. Islam provides for a model of trade which is based on a system of sharing profits and losses by the participants subject to a solemn agreement between them. Therefore, all this system of trade and commerce revolving around borrowed capital is incongruent with the principles of Islam. All this present system of usury is based on loans. There is a person who is earning millions of rupees daily. Yet he does not invest in it anything from his own pocket. He has taken all the loans from the banks.

The most important feature of the modern banking system which is to be noted in the context of the elimination of Riba is that it is based entirely on credit and loan. It seems that credit, to the exclusion of anything else, has become the life-blood of modern economy. Not only big businesses, heavy industries and the whole sphere of the corporate financing but also day to day national needs and family requirements have become dependent on credit and loan. The greater the economy the larger the role of credit and loan. In most of the developed economies, the majority of the citizens are heavily burdened with loans and credits of various kinds and dimensions. It appears that the life, dignity, property, honour and even freedom of people, not only on the national level but also at the international level is mortgaged to the creditors whose power and influence is constantly on the rise. This situation is undoubtedly inconsistent with the teachings of Islam where

loan and credit has been considered to be an evil which may be resorted to only in very rare and exceptional case of extreme necessity. The Prophet of Islam (SAW) sought refuge and protection of the Almighty from the horrors and evils of credit and loan.

The most prominent demonstration of rising power of the credit is the modern banking system given to us by Western capitalistic economy. The entire structure of the banking system is founded on the organization and management of various forms of credit and financing through loans, lending and borrowing. There have been different reasons and factors which have led the Western world to this situation. We need not enter here into those details as they lie outside the scope of this discussion. However, one thing is clear that the practice has emerged from the unauthorized sale and purchase of the deposits and securities kept with goldsmiths for purposes of security and safety. Almost all the writers agree that the goldsmiths soon realized that the depositors use only a little portion of their gold while the rest always lay with them and, therefore, they secretly and discretely started issuing instruments against the securities of peoples deposited for 'safe' custody with them. They started earning money on the basis of these instruments which, later became the basis of currency and paper money. The role of the church and monastic orders was not less significant in popularizing this practice. Virtually breaking the confidence reposed in them by the

innocent masses' the churchmen and monists also validated the practice of goldsmiths and started minting money on the strength of the cash, gold and silver kept with them for safety and security.

Late Professor Shaikh Mahmud Ahmad, a leading thinker and a senior economist of our country had devoted a considerable part of his life to the study of the theory of interest. The result of this study are embodied in the book **Man and Money**, printed posthumously in Lahore. According to his findings interest-based economy leads to such insurmountable economic problems as unemployment, inflation, fiscal deficit, deficit financing and business fluctuations. These are only some of the many incurable diseases of which the western economics does not appear to possess any dependable remedies. These precisely are the issues which are of the highest concern to the common man all the world over. The difficulty of the western economics, according to him, is that the remedies suggested by it for unemployment are the ones that add to inflation, and the ones for curing inflation are those that increase unemployment. The late scholar notes with great concern that there is little logic behind these prescriptions, and finds that these are not distinguished for clear thinking, in so far as these confine to respective symptoms, rather than the causes that lead to their emergence.

Dr. Muhammad Umar Chapra addressed the court on March 17, 18 & 19, 1999. He presented an overall survey of the issues and

problems involved in the question of eliminating Riba from the economy of Pakistan. He started with the question of the rationale of the prohibition of Riba by Islam. He did not agree with the belief of some people that interest or Riba was prohibited mainly because it involves injustice. He also dealt with the history of the establishment of Islamic banking institutions from the establishment of Mit-Ghamar in Egypt in 1963 to the latest experiment made in the field in some modern Muslim countries. He also pointed out that the concept and principles of Islamic Banking have attracted the attention of leading western banks and some international financial institutions. In the context of this discussion he identified the problems and difficulties involved and examined the criticism advanced against Islamic Banking by some scholars. We will come to the question of problems and difficulties later.

The question of rationale of the prohibition of interest by Islam has been dealt with by Dr. Chapra in his prestigious publications on the subject as well as some articles written for popular consumption. His book **Towards a Just Monetary System**, submitted by him to the Court, contains valuable discussion on the question of rationale. The gist of Dr. Chapra's thoughts on the subject is embodied in a note submitted by him to the Court. Discussing the wisdom of the prohibition of interest Dr. Umar Chapra says that the consideration of injustice inflicted upon the poor does not go far enough towards the full

rationale of this prohibition. It is neither historically supported by the evidence nor is consistent with the theoretical framework of the economic system of Islam.

During the Prophet's time (may the peace and blessings of God be upon him) borrowing was primarily undertaken not by the poor but by tribes and rich traders who operated as large partnership companies to conduct large-scale trade. This was inevitable. The difficulty of the circumstances, toughness of the terrain, harshness of the climate and primitiveness of communication made the task of trade caravans difficult and time-consuming.

It was not easy for the Arab traders to make business trips to the commercial centres as frequently as the need demanded. They would, rather, confine to two trips every year, the Winter Trip and the Summer Trip. It was necessary for the caravans to muster all available financial resources to purchase the local exportable products, sell them abroad, and bring back the entire needs of their society for imports during a specific period. Before Islam, such resources were mobilized on the basis of interest. Islam abolished the interest-based nature of the financier-entrepreneur relationship and reorganized it on a profit-and-loss sharing basis. This enabled the financier to have a just share in the enterprise, but the entrepreneur was not crushed by adverse conditions — such as the caravan being waylaid on the journey. This demonstrates

that although the extension of meaningful help to the poor carries a high priority in the Islamic value system, it is not the only reason for the proscription of interest. The primary reason is the realization of overall socio-economic justice, which is declared by the Qur'an to be the main mission of all God's Messengers[57:25].

Justice, however, is not a hollow term. It has several implications, the most important of which is that the resources provided by Allah to mankind must be utilized in such a manner that the universally-cherished humanitarian goals of general need fulfillment, full employment, equitable distribution of income and wealth, and economic stability, are realized. These humanitarian goals cannot be realized without a humanitarian strategy. An important, though not the only, element of such a strategy is the abolition of interest. This would necessitate the reorganization of financial intermediation on the basis of equity and profit-and-loss sharing; and making the financier share the risks as well as the rewards of business, and not assuring him of a predetermined rate of return irrespective of the ultimate outcome of business.

Financial intermediation on the basis of interest tends to allocate financial resources among borrowers on the criteria of their ability to provide acceptable collateral to guarantee the repayment of principal, and sufficient cash-flow to service the debt. End-use of

financial resources does not constitute the main criterion. Hence, financial resources go to the rich, who fulfil both the criteria, and also to governments which, it is assumed, will never go bankrupt. However, the rich borrow not only for investment but also for conspicuous consumption and speculation, while governments borrow not only for development and public well-being, but also for defence and big projects. This contributes to a rapid expansion in unproductive and, at times wasteful, spending and, besides accentuating macro-economic and external imbalances, squeezes resources available for need fulfillment and development. This explains why even the richest countries in the world, like the United States, have been unable to fulfil the essential needs of all their people in spite of abundant resources at their disposal.

The unproductive and wasteful spending which the collateral-linked, interest-based financial inter-mediation has the tendency to promote, has led to a decline in savings in almost all countries around the world. Even in the industrial countries, net national saving as a percentage of national income declined by almost 4% between the 1960s and the 1980s. The world saving shortfall has been responsible for persistently high levels of real interest rates. This has led to lower rates of rise in investment, economic growth and employment. Unemployment has hence become one of the most intractable problems

for all countries, including the rich industrial world. Unemployment stood at 8.6 per cent in Europe in 1988-90, three times its level of 2.9 percent in 1971-73. It is not expected to fall significantly below this level in the near future because a real rate of economic growth of 3.5 percent is required to prevent unemployment from rising, and European growth has been below this benchmark since 1976. Even more worrying is the higher than average rate of youth unemployment because it hurts their pride, dampens their faith in the future, increases their hostility towards society and damages their personal capacities and potential contribution. Given the budgetary constraints, the ever-looming threat of inflation, and the prospect of low growth rates continuing in the foreseeable future, the possibility of attaining full employment in the Western world is not very bright. A decline in wasteful spending and a rise in savings and investment would be very helpful. But this is not possible when the value system encourages both the public and the private sectors to live beyond their means and the interest-based financial intermediation makes this possible by making credit easily available without due regard to its end use. If, however, interest is prohibited and banks are required to share in the risk and rewards of financing, they will be more careful in lending. Wasteful spending will decline and more resources will become available for productive

investment and development. This will lead to higher growth, a rise in employment opportunities, and a gradual decline in unemployment.

The inequitable allocation of financial resources in the conventional interest-based financial system is not widely recognized. According to Arne Bigsten, ‘the distribution of capital is even more unequal than that of land’, and ‘the banking system tends to reinforce the unequal distribution of capital’. The reason, as already indicated, is that interest-based financial intermediation relies heavily on collaterals, giving inadequate consideration to the strength of the project or the ultimate use of financing. Thus, while deposits come from a cross-section of society, their benefit goes mainly to the rich. The Islamic financial system can be more conducive to the realization of equity. Risk-and-reward sharing would compel the financier to give due consideration to the strength of the project, thus making it possible for even the poor but competent entrepreneurs to get finances if they have worthwhile projects. A large number of small and medium enterprises would thus be able to get finances from financial institutions without being able to offer the collaterals. This should enable the society to harness the pool of entrepreneurial ability from even among the poor. The rich contribution that such entrepreneurs can make to output, employment and need fulfillment would thus be tapped.

According to Dr. Umer Chapra, there is no reason to be unduly apprehensive about loan losses from such financing. The experience of the International Fund for Agricultural Development (IFAD) is that credit provided to the most enterprising of the poor is quickly repaid by them from their higher earnings. Other small-loan programmes have yielded similar results in several countries.

The rate of interest has become one of the most important destabilizing factors in the present-day world economy. Milton Friedman, a Nobel Laureate, attributed the un-precedently erratic behaviour of the US economy to the erratic behaviour of interest rates. The high degree of interest rate volatility injects great uncertainty into the investment market. It makes the share of interest in the total return on invested capital (interest+profit) to continually fluctuate. This makes it difficult to take long-term investment decisions with confidence. It drives borrowers and lenders alike into the shorter end of the financial market, thus bringing about a shift in the short and long term commitment of funds, and between equity and loan financing. Fluctuating interest rates also create gyratic shifts in financial resources between users, sectors of the economy and countries, causing erratic movements in loan based investments, commodity and stock prices, and exchange rates. With every rise in the rate of interest in a floating rate system in a short-ended market, there is a rise in the rate of business

failures, not because of any inefficiency or slackness on the part of the proprietor, but because of sudden decline in profit which is the entrepreneur's share in the total return on capital. Business failures mean not only personal financial losses to proprietors and stock-holders, but also a decline in employment, output, investment and productive capacity — losses which take longer, and are more difficult to make up. All these factors have, no doubt, serious implications for economic activity and stability.

In a wholly equity-based system, the entrepreneur's share in the total return on capital would depend on the profit-sharing ratio and the ultimate outcome of the business. The profit-sharing ratio between the entrepreneur and the financier cannot fluctuate from day to day or even month to month like the rate of interest because it would be determined by custom and considerations of justice and remain contractually stable throughout the duration of the financing agreement. Since the ultimate outcome of business depends on a number of factors which do not change erratically, an equity-based economy would therefore tend to be more stable than a loan-based economy. This has been recognized by a number of prominent Western economists.

Dr. Chapra considers the prohibition of interest an indispensable part of the strategy of any system which believes in the brotherhood of mankind and wishes to actualize the humanitarian goals

of need fulfillment, full employment, equitable distribution of income and wealth, and economic stability. The reason why capitalism has not been able to realize these goals is that there is a conflict between its goals and its strategy. The goals are humanitarian, originating from its religious past, while the strategy is social-Darwinist, based on the concept of the survival of the fittest. For the allocation of scarce financial resources, capitalism relies primarily on the rate of interest, which gives an edge to the rich and leads not only to a concentration of wealth but also a rise in conspicuous and wasteful consumption. This hurts the goal of need fulfillment and contributes to a slower growth in saving, investment, employment and output, thus frustrating the realization of overall human well-being.

Counsel for the Federation and several other experts including Mr. Khalid M. Ishaque, Dr. Muhammad Aslam Khaki and Hafiz Abdul-ur-Rehman Madani, have submitted that the main and the primary cause of the prohibition of interest is zulm or injustice. Dr. Muhammad Umar Chapra has also dealt with this issue at length in some of his written documents presented to us. Let us, here, examine the meaning, scope and contours of zulm in this context.

In order to understand the rationale of the prohibition of interest one should also look into the objectives or the Maqasid of the Shariah. The financial policy of Islam has to be commensurate with

these objectives. If it is not, the objectives would be defeated. In this context when we look into Qur'an we find that the establishment of Qist or real justice is the primary and central objective of Islam. The Qur'an and the Sunnah have both placed tremendous stress on justice. According to the Qur'an, establishment of real justice (Qist: just, Qistas: Justice) the primary purpose for which Allah has sent down His prophets (Qur'an: 57:25). The Qur'an places justice nearest to Taqwa (Qur'an, 5:8), in terms of its importance in the Islamic scheme. Righteousness or Taqwa is the most important because it serves as a springboard for all rightful actions, including justice. The Holy Prophet (peace be upon him) equated the absence of justice with "absolute darkness". (Sahih Muslim (1955), vol 4, p. 1996: 56, Kitab al-Birr wa al-Silah wa al-Adab, Bab Tahrim al-Zulm, from Jabir Ibn Abdullah). The Prophet (peace be upon him) has used the word zulumat in this Hadith. Zulumat is the plural of zulmah or darkness, and signifies several layers of darkness, leading ultimately to 'pitch' or 'absolute' darkness, as is also evident in the Qur'anic verse, 24:40. This is but natural, because injustice undermines brotherhood and solidarity, accentuates conflict, tensions and crimes, aggravates human problems, and thus leads ultimately to nothing but agony and ordeal in this world and misery and condemnation to Hellfire in the Hereafter. Brotherhood or Ukhuwwah whose establishment is an ideal for Muslims to be achieved becomes a

meaningless jargon if it were not sustained by justice in all walks of life particularly in the allocation and distribution of God-given resources.

All leading jurists throughout Muslim history have, therefore, without any exception, held justice to be the foundation stone of the Maqasid al-Shariah. For example, Imam Abu Yusuf laid considerable stress on justice in his letter to Caliph Harun al-Rashid by saying that: “Rendering justice to those wronged and eradicating injustice, raises tax revenue, accelerates development of the country and brings blessings in addition to reward in the Hereafter”. A great Shafi’i jurist and a political thinker of note, Abul Hasan Mawardi stressed that comprehensive justice “inculcates mutual love and affection, obedience to the law, development of the country, expansion of wealth, growth of progeny, and security of the sovereign”, and that “there is nothing that destroys the world and the conscience of the people faster than injustice”. The celebrated revivalist thinker and the renowned Hambali jurist Ibn Taymiyyah considered justice to be an essential outcome of Tawhid or belief in one God. To him justice is a very wide concept — “everything good is a component of justice and everything bad is a component of injustice and oppression. Hence, justice towards everything and everyone is an imperative for everyone and injustice is prohibited to everything and everyone. Injustice is absolutely not permissible irrespective of whether it is to a Muslim or a non-Muslim or

even to an unjust person”. Ibn Taymiyyah refers to the well-known saying attributed to Hazrat Ali that “Allah upholds the just state even if it is unbelieving, but does not uphold the unjust state even if it is Islamic”, and that “the world can survive with justice and unbelief, but not with injustice and Islam”. The great philosopher of history and the founder of the Science of Sociology Ibn Khaldun stated unequivocally that it is not possible for a country to develop without justice, something that has now been belatedly recognized by the pundits of development economics after a long flirtation with injustice. Ibn Khaldun goes to the extent of emphasizing that “oppression brings an end to development and the end of development becomes reflected in the breakdown and destruction of the state, and that “a decline in prosperity is the necessary and inevitable result of injustice and transgression”. He elaborated further that, “oppression does not consist merely in taking away wealth and property from its owner without cause or compensation. Oppression has rather a wider connotation. Anyone who seizes the property of others, forces them to work for him against their will, makes unjust claims on them, or imposes on them burdens not sanctioned by the Shariah, is an oppressor”.

Given the importance of justice in Islam, there arises the question of its implications. Justice is a comprehensive term in Islam and covers all aspects of human interaction, irrespective of whether it

relates to the family, the society, the economy or the polity, and irrespective of whether the object is a human being, animal, insect or the environment. This has wide implications, one of the most important of these is that the resources provided by God to mankind should be treated like a trust and must be utilized in such a manner that the well being of all is ensured, irrespective of whether they are rich or poor, high or low, male or female, and Muslim or non-Muslim. In the field of economics, one could assert that justice demands the use of resources in such an equitable manner that the universally cherished humanitarian goals of general need fulfillment, optimum growth and full employment, equitable distribution of income and wealth, and economic stability are realized. These humanitarian goals are recognized by almost everyone everywhere. They are the outcome of moral values provided by most religions. However, it is the strategy for realizing these which makes a difference. These humanitarian goals cannot be realized without a humanitarian strategy. The strategy requires, among other things, the injection of a moral dimension into economics in place of the materialist and hedonist orientation of capitalism. Abolition of interest is a part of this moral dimension. This is perhaps one of the reasons why Islam is not alone in condemning interest. All other major religions, including Judaism, Christianity and Hinduism have also condemned it. The Bible

makes no distinction between usury and interest and brands those who take interest as wicked.

Even though the extension of help to the poor and the raising of their socio-economic condition enjoys a high profile in the Maqasid al-Shariah, confining the rationale behind the prohibition of interest to just this limited objective is not only factually wrong but also unduly restrictive in terms of the concept of justice in Islam. During the Prophet's time, may the peace and blessings of God be on him, the Muslim society had become so well organized in terms of mutual care that the needs of the poor were automatically taken care of by the rich. To the extent that this did not happen, the Bayt al-Mal was there to fill the gap. The poor were not, therefore, constrained to borrow to fulfil their basic needs. Since there was no conspicuous consumption of extravagance in marriages and other festivities there was no need to resort to borrowing for this purpose as well.

Throwing light on the distributive justice in Islam, in his written statement submitted to us, Dr. Muhammad Umar Chapra refers to the example of Pakistan. He says Pakistan is a very clear example of how excessive borrowing squeezes resources for need-fulfillment. Governments in Pakistan have borrowed right and left until debt-servicing (interest + amortization) has reached 46 per cent of total central government spending in the 1998/99 budget. Since another 24

per cent of the total is allocated to defence and 12 per cent to administration, only 18 per cent remains for development spending, including education, health and infrastructure construction. This is far less than what Pakistan needs to fulfil its dream of becoming an Asian tiger. If the Government of Pakistan had taken the Islamic injunction against interest seriously, it would have tried to reduce its deficits with a view to minimize its borrowing. It would have streamlined the tax collection system and also reduced its unproductive and wasteful spending. A number of projects which were undertaken by the Government and which have proved to be sour would have been avoided. The Far Eastern countries adopted fiscal discipline, while Pakistan, which should have done so all the more because of its commitment to Islam, did not do so. Pakistan is, of course, not alone in this predicament. A number of other countries are in a worse condition. Suggesting the basic ingredients for sustained growth in a modern economy Dr. Chapra refers to saving, investment, hard and conscientious work, technological progress and creative management, along with helpful social behaviour and government policies. As far as saving is concerned, its positive effect on growth is now well established. It helps raise capital formation, which in turn helps raise output and employment. A well established fact is that high saving countries have generally grown faster than low saving countries. The

central importance of saving brings into focus the likely effect of Islamic values and institutions on aggregate savings? It is now well recognized that since Islam prohibits extravagance, status symbols and living beyond means, there should be a positive effect of Islamic values on saving. Moreover, studies conducted in conventional economics have indicated a strong link between the households' access to credit and the savings rate. High saving countries like Japan and Germany have tax systems that tend to discourage consumer borrowing. On the basis of these findings, it may be hoped that the adoption of the profit and loss sharing system would help raise savings provided we totally close the doors of credit to both the public and the private sectors for unproductive purposes, as it has always been a major drain on savings. It may be mentioned here that some experts who appeared before us explained to us how over the last hundred years the equity premium has been substantially high in the U.S. On the other hand, the hyperinflation of the 1920s wiped out bondholders altogether in Germany, and the post-World War-II hyperinflation did the same in Japan. Equity investments involve greater risk, and everyone may not be willing to bear that risk, or some people may prefer to have less risky modes. All these are available within the Islamic framework. Hence, what is important is the availability of, and easy access to, investment

opportunities of varying risks and maturates to satisfy different preferences of the savers.

Having discussed nature, classifications of Riba and the impact of its prohibition on trade and business, as well as the wisdom in the prohibition of Riba, question of inflation which is set up as a formidable problem in the context of the elimination of Riba may be analyzed.

The question of inflation is, undoubtedly, an extremely important question and poses a challenge to the scholars of Islam as well as to the economists and financial experts. There is no denying the fact that the value of the paper-currency has a trend of continuous decrease in inflationary situations. If a debtor who has borrowed a particular amount of paper-currency repays the same amount to his creditor after a substantial time, the creditor suffers the effects of inflation. If he demands his debtor to pay more in order to compensate him for the loss of value he has suffered, the question arises whether this demand would be treated as a demand of '*Riba*' ? If the required increase is *Riba*, then what is the remedy to the problem?

A section of our scholars and bankers is of the view that such increase is not to be treated as *Riba*. According to this view, the introduction of paper currency has led to persistent inflation in the modern world, thereby continuously eroding the real value or purchasing

power of money. There are other causes of inflation also. In an inflationary situation, compensation for depreciation of money over a period of time in a situation of inflation should, according to this view, be justified. If compensation is not given in such a situation it would be tantamount to penalizing creditors or savers, including those with small means. Mr. Sartaj Aziz in the statement submitted to this Court recording his views as an economist and not in the capacity of Finance Minister, suggested that a clear consensus on the subject of indexation is necessary to clarify that any compensation paid for the loss of value is not '*Riba*'. It was also pointed out that the concept of compensatory cost as provided in Section 35 of CPC has not been held by the Federal Shariat Court to be contrary to the Injunctions of Islam. On the other hand, there is another view which does not favour interest or indexation as the possible solutions to the problem of inflation. According to this view, the real cause of erosion in the value of money is to be sought in the wrong monetary and economic policies which result in crude deviations from a state of price stabilization. There can be no two opinions that one of the major objectives of Islamic monetary policy is stabilization of the value of money. In the Islamic context money is primarily a medium of exchange and a measure of value. It is also a measure for deferred payment and as such its value has to be protected. According to this latter view there is no substance in the thesis that

interest is a reward for erosion of the value of money. The discussion in economics relating to the nominal rate of interest and the real rate of interest must not confuse us, because the rationale for interest is one thing and the phenomenon of inflation and various ways to reduce, if not to mitigate, the evil consequences of inflation is a different matter altogether. In his written statement submitted to this Court, Prof. Khurshid Ahmad argued that challenge should not be mixed up with the problem of inflation which is many-dimensional and must be addressed to separately in its own right. According to him it is illogical to argue in favour of interest on the basis of inflation. Indexation is one of the many ways suggested to fight some of the effects of inflation but the results of such a policy are mixed and inconclusive, if not adverse. In fact, a lot of empirical evidence about movements in interest rates and rates of inflation leads to conflicting hypotheses. Prof. Khurshid Ahmad considers it difficult to find out a positive correlation between the two in all parts of the world and even in the same country over a long-period/time horizon. That is why under a regime of inflation even negative rates of interest have prevailed over certain time periods. The trends that emerge from empirical and econometric studies remain inconclusive if not erratic. The remedy for erosion in the value of money lies in a monetary policy aimed at price-stabilization and not in retaining interest under any title or pretext.

The examination of the question of inflation undertaken hereunder is based mostly on the material placed by a number of experts in response to the questionnaire circulated by this Court. It is not the domain of this Bench to frame fiscal policies for the country, the discussion, therefore, contains the views expressed in the material referred to us and the views urged during hearing for the guidance of those whose duty is to frame monetary and fiscal policies and then implement the same in the best interest of the country.

Although the problem of inflation is a world-wide phenomenon, yet there is hardly anything to be termed as a consensus on its definition. The term has always been highly controversial among the economists and has undergone several changes during the last three quarters of the century. In the context of our discussion, however, we can use the term inflation in the sense of unreasonable, uncontrolled price-rise caused by excessive increase in the quantity of money resulting in the rapid loss of the purchasing power of money. It may be pointed out here that the problem of inflation is peculiar to the fiat money or the paper currency. Standard money or full-bodied money never had this problem in such proportion. The term 'money' is defined as something capable of storing the value, serving as a dependable standard for deferred payments and an easy and quick medium of exchange. But inflation virtually robs the fiat money of its two former

characteristics, namely, the store of value and a standard for deferred payment. Inflation goes on to reduce the chances of securing growth and progress in the field of economic activity. An inflated economy soon loses its stamina to compete with other developing and developed economies operating in the world market and the balance of trade is greatly disturbed and the exchange rate starts suffering from rapid depreciation.

Briefly speaking, following are considered to be the causes of inflation:-

1. Monetary expansion i.e. the increasing supply of money;
2. Deficit financing;
3. Too much bank financing;
4. Increased and un-invested foreign remittances;
5. Increasing and uncontrolled urbanization in a society;
6. Rising disequilibrium between demand and supply of goods;
7. Scarcity of supply (due to natural causes);
8. Scarcity of supply (due to temporary causes);
9. Rising costs on account of excessive wages etc.;
10. Rising costs due to heavy taxes;
11. Rising costs due to exorbitant rates of profits;
12. Devaluation of currency;

13. Impact of the international market;
14. Inefficient use of resources.

Inflation in the sense of galloping rise of prices at the hands of unhealthy economic or market tendencies is not something to be tolerated under Shariah. Undoubtedly, this kind of price-hike causes hardships and creates difficulties for the people. Therefore, it must be eliminated at source under the principle of *Al-darar yuzal* (الضرر يزال) i.e. hardship or damage must be eliminated, as well as under the principle of *Al-Mashaqqah Tajlib al-Taisir* (المشقة تجلب التيسر) i.e. hardship invites convenience. Apart from these general principles, there are some verses in the Quran which require a Muslim government to take steps for the stabilization of prices. It says “observe the balance equitably with justice and do not let the balance fall short.” (55:9)

The question of inflation has close relationship with the question of prices and their control with a view to ensure that they do not go beyond the reasonable limit. Rapid and sharp fluctuation in the prices is not approved under the Shariah. Although the Shariah does not allow price control mechanism as a rule, as long as the prices are determined in the open market under the normal application of the law of demand and supply, but in exceptional cases where the freedom in the open market is misused and prices are raised in an unnatural way, the state is under an obligation to control them and ensure that the public

(including the consumer, the producer and the middle-man) does not suffer at the hands of each other. The *Fiqh* literature has taken notice of the devaluation of money and quite a substantial discussion is found in our classical books on this subject. Paper currency was not prevalent in those days and, therefore, we do not find sufficient mention thereof in our *Fiqh* books. However, token money was in vogue and the jurists have discussed the consequences of their devaluation or total demonetization. In case of devaluation, there is an absolute unanimity that in all deferred payments the question of the devaluation of the coins (token money) will be ignored and the same amount or quantity of money will have to be paid as was originally agreed in total disregard of the difference of value of the token money at the time of loaning and at the time of making payment. In case of complete demonetization, according to a group of jurists, its value at the time of demonetization will be paid. Some modern Muslim scholars have tried to make out a case for indexation to meet the challenges of inflation on the basis of this last mentioned ruling of our jurists. But a deeper study of this ruling and the arguments on which it is based will show that it cannot serve as an acceptable basis for indexation. But before we dilate upon the Shariah position about indexation let us briefly touch upon the history and techniques of indexation as are prevalent in different countries.

Indexation as a regular economic device to make up the deficiency caused to a person due to inflation was first adopted in UK in the early decades of the present century. But it was used to benefit the workers in their wages. It seems that the initial apparent success to meet the problem (mind that it was in the field of wages) involved other countries to follow suit in the coming decades. By the seventies the practice became popular in almost the entire Europe and America as well as some eastern countries. But the history of indexing capital is also not very old. It dates back to mid-twentieth century. Finland was, perhaps, the first country which made an experiment in trying indexation of capital (bonds, deposits etc.) as a solution to overcome inflation. This experiment gradually moved forward over a long period of more than a decade. It seemed that the financial planners were moving very cautiously keeping into consideration the process of trial and error. But in spite of this cautious and careful movement in this way, Finland soon had to give up indexation obviously because of its unfavourable results.

There are many forms and techniques of indexation developed in the countries which have adopted this method. Some have indexed only the wages, pensions and various forms of social security payments. Some other countries have indexed different forms of investments and capitals. Yet, in some other countries debts, debentures and securities have been indexed. Then there are innumerable ways of

indexing a particular amount of money in different situations. The primary and basic motive of indexation was to restore two important failings caused to fiat money by inflation, namely, its failure to serve as a store of value and its failure to serve as a dependable standard for deferred payments. Indexation as a mean to meet the challenges of inflation captured the imagination of scholars and financial experts in the beginning. Soon it called the attention of the governments and policy planners in many countries. But it seems that they were soon disenchanted with its projected usefulness in responding to the problems in a positive and lasting manner and several countries soon gave up this practice.

Modern western economists have a strong tendency to accept inflation as something natural or as a necessary evil which is only a concomitant of economic growth and technological development. Instead of admitting their failure to counter it they have now started to justify it on many counts. But in spite of their efforts to justify inflation upto a certain limit they could not agree as to what is that reasonable limit beyond which inflation was to be arrested. There is still a wide difference of opinion about the reasonable limit of price rise. The idea of indexation is, in fact, an acknowledgement on the part of economists of their failure to counter inflationary tendencies. Indexation is an effort to

institutionalize inflation and to ensure its perpetuation in the national economy of a people.

Indexation has been claimed to constitute a positive contributory factor for the growth of savings in an economy hit by inflation as it would ensure the preservation, though partially in some cases, of the original value of the fiat money at the time of savings and deposits. But a deeper examination of this claim shows the weakness of the entire argument. Even, if it is accepted as a favourable factor in the increase of savings, it cannot be accepted as a valid argument in terms of Shariah. For, merely the growth of savings at the cost of perpetrating a *Riba*-based practice which also involves other objectionable elements cannot provide a sound basis for allowing this practice.

The Council of Islamic Ideology had examined indexation as one of the possible alternatives to interest and came to the conclusion that it could not be accepted as a valid mode to face the problem of inflation. It rejected indexation both on grounds of Shariah as well as on purely economic grounds. For example, the Council observed, indexation of bank advances would place the agricultural sector in a disadvantageous position compared to sectors where price rise was equal to or more than the rise in the general price level, because the increase in the prices of agricultural products was less than the rise in the general price level. However indexation of wages and salaries paid to the

employees does not create a big problem and may be justified under Shariah with some minor adjustments. But the question of indexing bank deposits, advances and investment loans certainly constitutes a big problem. It involves several elements which render it objectionable under Shariah and has been assailed on various counts.

We may point out that discussion here pertains to the indexation of loans, advances and various forms of credit only, and the arguments advanced by some scholars to support indexation as a valid and lawful device to meet the consequences of inflation were briefly as under:-

- i) The indemnification of damages caused to any body by a person without any fault or failure on the part of the former is one of the basic principles of the civil law of Islam. All mutual dealings and commercial transactions between the parties take place on the basis of a set of principles laid down by the Shariah. There are several legal maxims throwing light on the question how to remove or indemnify a damage. These principles and maxims are based on a well-known Hadith: *La darar wa la dirar* (لا ضرر ولا ضرار) i.e. “ no damage and no counter damage.” Some Islamic economists have based their agreement in favour of indexation on this Hadith arguing that inflation is a damage because it steals away the purchasing power of one’s money and decreases its value and, therefore, it must be indemnified under this Hadith and, it is asserted, that the only way to indemnify the damage is to adopt the

principle of indexation. Although this argument appears to be a strong one in favour of indexation but, as we shall see later, if we examine it more closely it becomes evident that instead of supporting the indexation, it goes against it.

- ii) Inflation and indexation are entirely new phenomena and were completely unknown to our early jurists. Therefore, the principles developed by them to respond to their economic and monetary requirements cannot be expected to meet the challenges of the modern world. As such, we need a new *Ijtihad* in respect of inflation and indexation problems and, therefore, we have to develop some mechanism to make up the lost purchasing power of money and give some relief to the lender.
- iii) Some people argue that the Quranic verse “and establish the weight with justice and do not cut the scale short,” requires that the weight (a term which these scholars try to equate with the purchasing power) of people’s money should not be cut short. But a deeper examination of the verse proves just the opposite. Establishment of weight with justice requires that the interests of both, the creditor and the debtor, be protected. If the tilt is visibly in favour of one of them it would be contrary to the purport of the verse.

These arguments have been discussed alongwith scores of others not only in Pakistan by the Council of Islamic Ideology but by other Muslim scholars outside Pakistan on several forums but the overwhelming majority of Muslim scholars could not convince itself of

the permissibility of indexation under the Shariah, mainly on following grounds.

The most important argument against indexation is that it places the burden caused by the inflation upon someone who is not responsible to create it. Inflation in third world countries is mostly caused by various policies of the governments, such as deficit financing, unnecessary monetary expansion, devaluation of currencies etc. In such a situation, it would be contrary to the Islamic principles of justice to place its burden on someone who is not responsible to create it. The Quran clearly lays down *La Taziru Waziratun Wizra Ukhra*

(لَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَى) i.e. no bearer of a burden shall bear the burden of another. (Quran 35:18; 53:38).

However, basic argument of the Council of Islamic Ideology in rejecting indexation as a valid mechanism to overcome inflation was that it involves *Riba* because the basic principle laid down by the Shariah in this regard is that in the borrowing and loaning of fungible things the same quantity and or number of units should be returned as was borrowed or loaned even though the price of the commodity may have changed in the meantime. While discussing the Shariah position about indexation we should not forget that the success of indexation in achieving its two basic objectives for which it was introduced has been highly disputed. Indexation has failed to deliver the fruits on both the

counts: it could not secure a fool-proof guarantee to protect the character of money as a store of value as well as a dependable standard for deferred payments. In any case, indexation as such represents a defeatist tendency on the part of its advocates and shows that inflation has been acknowledged as an inevitable evil and that more serious efforts to control it have been given up. This simply means a perpetuation of inflationary tendencies in the national economy.

Moreover, indexation would lead to three significant and inescapable results which are objectionable from the Shariah point of view.

- i) It would become extremely difficult to draw a definite dividing line beyond which the plea of purchasing power should not be used. This will give rise to innumerable disputes and will place dark clouds of uncertainty over all the transactions based on deferred payments — a situation called *Gharar* in Shariah and is disallowed.
- ii) There will be much more disputes on the question of converting the purchasing power clauses of various contracts and agreements into actual monetary terms. This is again *Gharar* and renders transactions invalid.
- iii) There will be a big scope for gambling and speculations about the future value of money.

Partial indexation (for example, indexation of wages etc.) can protect the living standard of those to whom it is applied but only at the

expense of those whose wages and incomes have not been protected. It only implies the assumption that some income is more respectable than the rest and hence should be subject to lesser risks of change than the rest. This is in flagrant violation of the Shariah which upholds absolute justice and equality.

The tendency of the Shariah is to provide support and protection to the poor debtor. The Quran exhorts the creditors to give respite to a debtor incapable of making repayment till such time when he is in a position to pay. But in the system of indexation the whole burden caused by the depreciation of the value of money has been placed on the shoulders of the debtor. He has to bear the burden of something he is not responsible to bring about. This is contrary to the Quranic principle that no souls will be required to bear the load (i.e. liability) of the deeds of others. Inflation is always a continuous process and is also beyond the control of the individuals. A paper money gets inflated wherever it may happen to be. If it is hoarded in the cellars of the capitalist it is not free from being subject to inflation. Now, if he gives it on loan to anybody, why the debtor alone should be responsible to make up the loss caused by inflation?

The entire thinking and philosophy working behind the concept of indexation is *Riba*-based economic thinking. In Islam, the transactions for productive and investment purposes would be based on

Musharakah and *Mudarabah* in which no question of indexation arises.

Indexation is only an effort to secure additional money over and above the principal amount, without putting any labour or running any risk, merely in the name of protecting the purchasing power. The *Riba*-based mentality also tries to secure additional money without any labour or risk. Indexation places additional burden of indemnifying the loss of purchasing power of money on one of the following:

- i. the Public Exchequer
- ii. the employer
- iii. the borrower
- iv. the debtor
- v. the banker

Now, in all these cases, any party on whose shoulder this additional burden is placed will always be at a disadvantageous position as compared to others. In case the burden is placed on the Public Exchequer, it would mean that all deferred payments shall be subsidized by government — a situation which is not the intention of even the advocates of indexation. In case of others, this will be contrary to many norms and principles enunciated by the Shariah for a free and just commercial dealing between the parties. The tendency of the Shariah is to lessen the burden as far as possible. It requires that least possible burden should be placed on the individuals by minimizing the regulatory laws, simplifying the procedures and avoiding unnecessary

technicalities. The basket-price system, with all its variations proposed by the exponents of indexation, will place the common man in such a difficult position that the objectives of the Shariah will have to be compromised.

A fundamental principle of the Shariah which must be kept in view while formulating a new policy or adopting a new method or technique is that of *Sadd al-Dhariah* or the *Foreclosure of the Door*. Under this principle anything which may produce results contrary to the policy of the Shariah must be prohibited and controlled even if it may be originally and initially lawful. There are many examples in the Shariah in which permissible things were prohibited because they were expected to lead to bad consequences. Now, the indexation allowed primarily by the banks and other financial institutions in loan contracts will have far-reaching repercussions particularly on private loans which are mostly given on personal basis for consumption purposes. As soon as indexation takes ground, individuals will also have to follow suit and this will open the flood gates of all notorious usurious practices condemned even by the few modernists who are reluctant to consider commercial interest as *Riba*. An important corollary of indexation would be that virtually there would be two standards of money: the existing legal tender, the Pak Rupee and the projected monetary unit contemplated to be used in loan contracts as a unit of purchasing power.

If the existence of two monetary units is inevitable, then why not adopt a measure closer to the spirit of Shariah as well as easier to practise and understand. The real answer to inflation, therefore, is not indexation but price stability which conforms to the Islamic ideals of socio-economic justice. The Islamic law dealing with *Tas'ir* (price-control) clearly lays down the objective of discouraging monopoly prices and ensuring of fair, just and reasonably free operations of the market forces.

Dr. S.M. Hasanuzzaman, a renowned scholar, economist and banker, in the statement submitted to this Court has examined the arguments advanced in favour as well as against indexation as a possible answer to inflation. According to him about twenty-one countries of world have introduced indexation but the scope of indexation has not been similar in different countries. A large number of countries have indexed only wages, pensions and social security payments. Some other countries have indexed single bonds while many countries have indexed different forms of investments as well. Brazil is the only country where this practice was adopted in a comprehensive manner. It is because of these differences that the modes and techniques of indexation and the choice of index differ with different countries. The most common technique of indexation is linking wage or investment to the prices of consumer goods. Some countries prefer to make advance adjustments with expected prices while most countries practice *ex post facto*

adjustments. The period of adjustment ranges from one month to one year; in some cases the period is even three years.

Dr. Hasanuzzaman reaches the conclusion that the merits attributed to indexation are generally theoretical. On the other hand, the critics of indexation have based their arguments partly on theory and largely on the basis of experience gained in different countries. In the 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 Shariah justifies such a payment by any of these parties we shall have to apply the Islamic Law of compensation and the Islamic principles of *Daman* to these transactions after we have determined the person or the institution responsible for inflation. In the Shariah, the question of return on physical human labour and on the return on financial contribution are governed by two different sets of rules. The former is assigned a fixed remuneration according to the prevalent market rate or *Ajr-i-Mithl*. 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; any excess over and above the sum lent would become interest and is strictly prohibited.

This fact is borne out from the Quran, the Holy Prophet's tradition and the detailed discussions of the *fuqaha* of all the schools of thought without any exception.

The Muslim jurists are so particular about this Quranic prohibition that they have disapproved this practice in all those 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. Guided by the principles and injunctions laid down in the Ahadith, the *fuqaha* have held 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.

Discussing the question of *Fulus* and its relevance to modern day fiat money, Dr. Hasanuzzaman says: In case the amount of loan is in terms of *fulus* or similar 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 *Fulus* will be fixed on the basis of its value 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, inspite 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 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. The same approach has been followed by the jurists in the case of payment of outstanding wage remuneration. In this context, Dr. Hasanuzzaman draws support for this logic from another ruling of the Hanafi jurists. This ruling relates to the situation that causes liability on account of unlawful occupation of somebody'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.

The approach of linking the liability with the purchasing power as made by the *fuqaha* is very clear and consistent. The same consistency exists in case any 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, compensation and indemnity. In all these situations a loan is to be returned in the same unit of currency and in 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 strict 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 *Fatawa 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.

Dr. Hasanuzzaman refers to another aspect of indexation which is objectionable from the Shariah point of view. It is the element of ignorance and uncertainty found in indexation. An important condition of a contract of deferred payment is that the liability of the parties should be precisely determined at the time of making contract. Ignorance of this liability at the time of making contract makes the contract void. In indexation, the liability is known with determination and certitude only 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 even projected inflation in the index. While *ex post* indexation involves an element of ignorance (*jahl*), projected inflation involves the element of uncertainty (*gharar*) too. Both make a contract null and void.

While the principle of linking loans and debts to purchasing power cannot be justified on Shariah grounds, there may yet be some arguments to adduce for indexation on rational and logical plan. Dr. Hasanuzzaman examines these arguments on 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 *Ijtihad* and not to stick to the opinions of the early *Fuqaha*. The answer given by Dr. Hasanuzzaman to this argument is that the rule of *Ijtihad* is that *Ijtihad* is done only where textual argument, or *Nass* does not exist. Since this question has been decided by a *Nass*, there is no scope for a new *Ijtihad*. Any *Ijtihad* contrary to *Nass* is invalid.
2. The Holy Prophet has said that no damage should be done nor any damage should be borne. According to the arguments, inflation is a damage to the purchasing power of money and the indexation is a redress against this damage. In order to answer this question Dr. Hasanuzzaman examines the applicability of the Islamic Law of indemnity in context of indexation. In this context the Shariah provides that a person responsible for inflicting a damage should 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 loaned 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. Dr. Zaman asks. 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 is indemnifying the bond holder alone while everybody in the society is equally the sufferer.

3. It can be advocated that the government being guardian of the interest of the people (*wali al-amr*) may indemnify the people of their loss in the purchasing power of money whether it is responsible for it or not. In this respect the guiding principle is that a damage is to be redressed. Dr. Zaman answers this plea by saying that this 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 an individual or limited damage may be tolerated to redress a un-invested or common damage. Contrary to it, according to observers, indexation is

a mechanism which is very complicated to devise and operate and is a recipe for perpetuating the 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 what 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 limited damage would only be avoided by exposing the country to a greater and more general damage.

4. Another argument that may be adduced in support of indexation is that during inflation trade unions succeed in getting their wages increased. If such increase is permissible in the Shariah why and how indexation can be treated to be

unjustifiable. On a deeper examination it turns out to be a fallacious analogy because in the Shariah 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.

At this stage notice may be taken of the case of Aijaz Haroon versus Inam Durrani (PLD 1989 Karachi 304) wherein one of us Mr. Justice Wajihuddin Ahmed in the High Court had come to the conclusion that indexation could be adopted as a solution to protect the purchasing power of money. The judgment had taken note of the views of the earlier jurists about *fulus*. Particularly the views of Imam Abu Yousaf and the findings of Allama Ibn Abedin were also discussed by my learned brother. Since then more material has appeared on the subject and comprehensive arguments both from Shariah and economic points of view have been placed before us. We feel that the matter noted in the judgment requires further examination in view of the matters noted hereunder by the experts on the subject.

Our brother in the judgment has referred to Quranic Verse, a saying by Pious Ali (Allah be pleased with him) and has referred to a booklet written by a celebrated jurist of 13th Hijra century, generally known as Ibn Abidin Shami. The booklet discusses the liability of payment under situations of demonetization, debasement, fluctuation in

value of the coin, monometallism and bimelallism and reproduces the opinions of earlier Ulama on the issue some of which we have already given in the foregoing pages.

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 goods and money should be specified undisputably. 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*. According to Zahidi in case a person sells something for a specific amount of money in circulation but after-words 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 or if otherwise, the price of the goods in terms of current money *equivalent to the value of money that prevailed on the day goods was delivered to him*.

The above legal opinion is found in respect of trading. In case it is a contract of hire the contract would become invalid and the 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. The above opinion represent 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 Muhammad he will be liable to pay the demonetized currency which was contracted upon. According to Al-Ghizzi 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.

According to *Hidaya*, 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 Muhammad he shall pay the equivalent of the value of debased money in terms of current money.

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). 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. Alongwith it official decrees sometime 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.

The Decree, in making out the case for ‘paying the purchasing power of the amount of loan, claims to have been guided by the Quranic verse 3:7 which is reproduced below: ‘He it is Who hath revealed unto thee the scripture wherein are clear revelations – They are the substance of the book – and others which are allegorical (متشابهات). But those in whose hearts is doubt, pursue, forsooth 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)

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 vss 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:

“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).

The emphasis placed in the judgment on protecting the interest of both parties and restraining them from doing injustice is admirable but, it is also to be kept in view that indexation of financial liabilities in itself is fraught with injustice. It will be found that the early 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 set up, disfavours the concept of indexation.

We at the end would like to impress upon Muslim economists to explore the ways of fighting inflation within the sanctions provided by the Shariah. 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 Shariah, has failed to cure the evils of inflation.

It may not be out of place here to cast a glance over the concept and functions of the institution of banks. This is necessary because in the present day world the important process of production and consumption is vitally affected by the process of the supply of money which consists of the currency paper money and various forms of deposits and securities with the banks. The banks, therefore, occupy a significant position not only in the national economy of a country but also in its political life, as they influence the size and composition of almost all the economic variables. The modern economy being based on credit money, the role of banks has become that of the power house in a city or that of blood-supplying heart in a human body. If the banks provide blood of money to the national economy the interest plays the

role of liver which creates that blood. Thus, any position taken about interest will have to affect the role and functions of banks in general and commercial banks in particular. Today, a modern commercial bank also provides a host of ancillary services to the customers which include the provision of lockers and safe houses, advisory services on matters of investment, portfolios and other financial transaction, protection of the interest of minors by acting as trustee of their state and several other services. But the main function remains to accept the 'deposits' from the public and lending money on interest to the businessmen and entrepreneurs mostly against collaterals and hypothecations. In most of the banking laws of different countries the term banking has been defined as accepting for purpose of lending or investment of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, pay order or any other negotiable instrument.

There seems two extreme views about the Islamic position vis-à-vis banking operations and practices. A section of the people in our country is of the view that all banking operations and practices are opposed to the Shariah and are prohibited. They even think that service in a bank or any kind of cooperation with a bank is violative of the spirit of Islam and a good Muslim should totally abstain from having any direct or indirect relationship with a banking company. On the other

hand, there is another view which holds that all banking operations are absolutely in conformity with the Shariah and the banks contribute to the promotion of the objectives of Islam. Both these views are far from truth and need to be reviewed. Before deciding whether a particular operation of a bank is or is not opposed to the teaching of Islam, the functions of a bank or banking institutions should be clearly identified. According to standard text books on current banking, following are the main functions of a bank:

1. Receiving the Savings of the people as deposits;
2. Advancing loans and finances on credit;
3. Opening Letters of Credit;
4. Issuance of Security Loans;
5. Issuance of negotiable instruments;
6. Discounting of securities and other negotiable instruments;
7. Provision of Safe Deposits for the security of valuables, important documents etc.
8. Transfer of money
9. Sale and Purchase of Foreign Exchange
10. Opening of Current Accounts
11. Issuance of Traveller Cheques

12. Sale of shares
13. Issuance of Dividends and Proceeds of Debenture
14. Issuance of National Currency (performed by the Central Bank of the country only)

It is neither possible nor required for the present discussion to discuss and pass any verdict on the permissibility or otherwise of all these functions from the stand point of Shariah. But it must be emphasized that these are extremely important functions and any disruption in the performance of any of these functions may land the country into serious difficulty and may even place national economy into jeopardy. However, some of these functions are being performed in such a way and through such modalities which are violative of the Shariah and must be adjusted to the dictates of the Shariah to remove their repugnance from the Law of Allah. The objective for which these functions are performed are not only allowed under the Shariah but also promote its objectives. Banks facilitate safe transfer of money from one place to another. In the present day context banks and banking institutions are the quickest, easiest and fastest mean of transfer of money from one corner of the globe to the other, which is, undoubtedly, a great facility available to the people. This objective is absolutely in conformity with the Shariah. The second objective is the facilitation of production and development of industry, agriculture and commerce

through providing finance and investments. Almost all the major developmental, agricultural and industrial projects are financed by the banks which thus contribute to the development of the country and ameliorate the standard of life. There can be no objection from the perspective of the Shariah to that objective also. The third objective of the bank is to coordinate and streamline the use of available capital through appropriate allocation of resources to the enterprise and projects needed by the society. No objection can be raised to this objective as well.

The problem only arise when we go to the modalities adopted by the banks and the details of their operations. If the needs do not justify means then the lofty objectives of the banks cannot and should not to be taken to justify the practices and modalities developed by the banks to realize their objectives. The most important of these practices which falls under the core of our discussion in the context of this judgement is the nature of deposits received by the banks and the nature of credit or loans advanced to the entrepreneurs and businessmen. Savings and deposits being the most important and the main source of capital coming to the bank, it is of utmost importance that Islamic position of these savings and deposits is determined. It is mainly for the purpose of security and safety that the overwhelming majority of savers place their savings in the banks. The ratio of those who put their

deposits for the sake of any return is comparatively limited. Those who deposit their savings for the sake of return either put their money in schemes like Defence Saving Certificate, Khas Deposit Certificates or place them in term deposits. The majority of Savings-Deposit holders in any case are those who do not expect any return on their savings. The question which occupies a significant position in this discussion is whether bank deposits are really Amanat as these are claimed to be or they are Wadiah or Qard (loan) or investment in terms of Mudarabah and Musharakah as many people claim them to be. The identification of their nature is necessary because the Shariah has given different principles to regulate each of these kinds of deposits. Let us, therefore, keep in mind that bank deposits also fall under various categories which include i) Current Accounts; (ii) Fixed Deposits; (iii) Savings Accounts; (iv) Special Accounts; (v) Term Deposits etc.

There are different rules to regulate these accounts but there are two important aspects which are common to all these kinds of deposits. Firstly, as soon as a sum of money comes to any of these deposits it becomes a property of the banks for all practical purposes. From that moment onwards the bank has exclusive control over that money and the account holder has nothing to do with that particular amount of money. The bank invests it, uses it and spends it according to its own decisions and policies. The account holders or the savers neither

have any right to object to the use of that money nor they have any say in the formulation of the policies and the making of any decision by the bank. Secondly, the money deposited by the savers and the account holders is reasonably guaranteed and the bank is under an obligation to pay it back according to the conditions and rules applicable to particular kind of deposits to the savers irrespective of the loss, if any, or the volume of loss incurred by the bank. In case of any loss, it has to be incurred exclusively by the bank. However, the 'profit' is to be shared by the bank as well as by the depositor. This being the nature of bank deposits, when we examine them in the light of the Islamic principles, we come to the conclusion that these can neither be considered as Amanat nor Wadiah because in both the situations the role of the bank should not be more than that of a trustee and the depositor; it should have no right to use, invest or spend it. The principle of Amanat requires that Amin should only protect and keep it in safe custody and should have no authority to dispose of that money. Moreover, there is no question of any profit or increase on the Amanat or the Wadiah. It cannot be considered to be a Qurd (loan) either because while a borrower is allowed to use, to invest or to spend the borrowed money, neither he is under an obligation to pay any increase over and above the borrowed money nor a creditor (in this case the account holder or the depositor) is allowed to receive any increase. Such increase is not only

disallowed by the Qur'anic verse 279 of al-Baqarah but is also hit by the well-known dictum unanimously accepted by the companions of the Holy Prophet (SAW) and the subsequent jurists that any additional benefit accruing to a loan is Riba. Thus, we are left only with the last option, namely, that bank accounts are investments within the meaning of Ra's al-Mal of a Mudarabah or Musharkah. If that be the case then banking operations will have to be in accordance with the principles that regulate the Mudarabah, Musharkah and other Islamic modes of financing.

Now the position of Government Bonds, treasury bills and other securities and debentures which are put to sale or purchase in open market operations, may be taken. Government bonds and securities, in many cases, represent a debt, loan or a deferred payment. The Shariah has expressly prohibited the sale or purchase of a debt for another debt. Thus, the sale or purchase of a debt in lieu of a deferred payment will not be allowed under Shariah as it will be hit by the well-known Hadith reported by many compilers of the Hadith in which the Holy Prophet, peace be upon him, has prohibited the sale of debt with debt or the sale of *al-Kali bil-Kali*. This Hadith has been reported by Dar Qutni on the authority of Ibn Umar. According to Hakim, this Hadith is a sound one according to the standard set by Imam Muslim. Another version has been reported by Tabarani on the authority of Rafi Ibn Khadij which has also been declared to be sound by Hakim. This later version has also

been reported by Hibban, Baihaqi, Tirmizi and Nasai. Hakim has also reported from earlier authorities the explanation of the term sale of Kali for Kali. According to this explanation it is the sale of deferred payment (*Nasihah*) for another deferred payment (*Nasihah*). Baihaqi has also reported on the authority of Imam Nafi, a disciple of Abdullah ibn Umar, saying that it is the sale of debt for debt. Imam Shawkani has recorded on the authority of Imam Ahmad ibn Hanbal that there is a complete unanimity among the Muslims that the sale of a debt for debt is not allowed. This view has been endorsed by Imam Abu Hanifa, Imam Malik, Imam Shafi'e, Imam Awzai and Imam Sufyan Thawri (see for details, Imam Shawkani, *Nayl al-Awtar*, Beirut, 1973, Vol. V, pp. 254-255). In view of this discussion the open market operations involving the sale of debt for debt will not be allowed under Shariah. Either such deferred payments should be sold or purchased on the basis of cash payment or, if cash payment is not possible, it may be through other Shariah compatible modes, for example, only those instruments be sold which represent a tangible asset or those in a tangible property. Another possible Shariah compatible mode may be through the principal of *Hawalah* in which the responsibility of paying the debt is transferred from the debtor to some other person. *Hawalah* has been defined as the transfer of liability from the debtor to the one who volunteers to undertake the liability. There is a unanimity among the jurists of Islam

that once the *Hawalah* is complete, i.e., once the liability is transferred the original debtor stands absolved of all responsibility and liability. The *Hawalah* institution gets legitimacy from the Hadith as well as from the consensus of the jurists. As soon as the concerned parties agree, the process of *Hawalah* is complete. It may be pointed out here that the *Hawalah* should not be confused with the contract of sale because according to the jurists the *Hawalah* is a peculiar kind of transaction and is different from the institution of sale not only in its basic elements but also in its implications.

It may be pointed out here that the sale of debt for cash or in lieu of urgent delivery of the corresponding commodity is allowed by Imam Malik and Imam Shafi'e to a party other than the original creditor. In view of this opinion, the discounting of bills or the sale and purchase of bonds and debentures will be restricted to the cash payment and to the parties different from the original creditors. With these considerations the open market operations may be restructured in the light of the law of *Hawalah*.

Another but most important function performed by the banks is the provision of loans extended by them to possible entrepreneurs and businessmen. These loans are to a very large extent, if not totally exclusively, advanced on the basis of interest whose payment along with the repayment of the principal is secured and guaranteed against a

collateral; the interest is charged in accordance with the prevalent rate. This prevalent rate is charged keeping in view the Bank Rate, LIBOR as well as the time frame in which the repayment is to be made. Although there are different kinds of loans advanced under a variety of conditions, the above ingredient are common to all kinds of loans. These kinds or classes of loans are mostly to facilitate the operation rather than changing the nature of the deal. For example, the conditions required of individual borrowers are different from those imposed on companies big enterprises and the governments. Moreover, the performance of the party also has a role in affecting the nature of contracts and other requirements. However, the basic nature of the loan and its ingredients are not changed. It is not, therefore, relevant for our purpose to go into the details of these conditions and classification of loans. Such loans are offered in the form of cash, opening of letters of credit, discounting of instruments etc. The interest charged on all these kinds of loans is to be paid by the borrower irrespective of the fate or the outcome or the duration of the loans and irrespective of the success or failure of enterprise for which the loan was advanced. Obviously, the interest or increase charged on these loans fall under the category of Riba and is prohibited. Some modern scholars, particularly Dr. Fazalur Rahman, Late Mr. Justice Qadeeruddin Ahmad, Maulana Muhammad Jafar Shah Phulwarwi and lately Dr. Muhammad Sayyid Tantavi have tried to

distinguish bank interest from Riba on the grounds that the objectives of bank loans are different from the objectives of loans advanced during the pre Islamic period. We have examined this argument at length. The gist of the argument is that the Arabs were not aware of productive or commercial loans. They only knew consumption loans on which the increase was considered to be Riba and was prohibited. The second foundation of the argument is that the interest charged on production or commercial loans does not constitute injustice referred to in the Qur'an in the context of Riba (Chapter-II verses 278-279). However, it is difficult to agree with both these premises as discussed in paras above. Some scholars have tried to consider that this transaction was a simple contract of Musharakah and tried to equate bank interest with the profit accruing from Musharakah. This equation turns out to be different when the basic principles of Musharakah are applied to a bank transaction. While, on the one hand, an investor in a Musharakah enjoys ownership title in the assets of the company and it is with reference to those assets that he is entitled to receive his share in the profit. Secondly, the capital as well as the assets of the Musharakah are considered to be a trust in the control of the managing partners/entrepreneur and in case of any genuine loss or any damage by an act of God it is to be shared proportionately by all the investors. Thirdly, and the most importantly, the ratio of profit is to be determined

with reference to the success or failure of the enterprise. It has nothing to do with the time or duration of the loan. While, on the other hand, the interest is charged without any reference to the failure or success of the enterprise and is always determined with reference to the time and duration of the loan. In the light of these glaring dissimilarities between the two, the bank interest cannot be equated with profit accruing to a Musharakah.

Some contemporary scholars tend to consider this transaction to be a sale and treat the increase as equivalent to the profit accruing to the buyer in an agreement of sale. Although this contention is obviously faulty on the face of it to be discussed, yet it may be noted that it does not meet any ingredient of contract of sale. Firstly, there is no commodity on either side and it is a 'sale' of cash for cash. As such it is subject to the laws applicable to Sarf contract where exchange of gold, silver, coins or cash takes place. According to the clear and express instructions of the Sunnah the delivery of both the price/commodities should be equal for equal and hand to hand. The Ahadith dealing with the Riba al-Fadl are primarily to foreclose the door for this very kind of transaction. Even if it is accepted for the sake of argument that it is a kind of sale, it will be prohibited under the Shariah, as it involves both kinds of Riba, namely Riba al-Nasiah in view of the deferred payment

on the part of the borrower, and Riba al-Fadl on the part of buyer because of the increase over and above the amount payable.

The true and legal position of bank loans under Islamic Shariah is that they are contracts of loans (Qard) because all the basic elements of Qard are found in these contract. It has been held to be a Qard (loan) not only by almost all the contemporary Islamic scholars but also by the up-holders and expert of this system — even in the Western world. The repayment is guaranteed like a Qard, it is supported by a mortgage or a collateral like a Qard, the authority of the taker is to use, spend, invest or dispose it of is unlimited like a Qard; the lender has no concern with the purpose or the objectives for which it is taken. Finally, the success or failure of the enterprise of the purpose for which the loan was taken is absolutely irrelevant in both the cases. In view of all these obvious and significant facts it is not correct to claim that the lending transaction, undertaken by the banks are in the nature of trust, deposit, Musharakah or sale. It is in the nature of loan (Qard) pure and simple and has to be subjected to the restrictions placed by the Shariah on lending and borrowing of money and other fungible items. The most important of these principles is that the loan is to be returned exactly in the same quantity in which it was taken. Any increase over and above the amount borrowed is Riba irrespective of the pretext on which the increase is claimed. This principle is clearly embodied in the Qu'ranic

verses of Surah al-Baqarah (verse 279). It was understood by the Companions, the Followers and the later jurists to be cardinal principle governing a loan. There is unanimity of views among all the jurists of Islam that any benefit accruing out of loan is Riba. This unanimity of views found expression in the well-known dictum _____ . This dictum has been reported by many compilers of Hadith on the authority of several Companions. It has been reported by Abdullah Ibn Saud, Ubayy Ibn Ka'b, Abdullah Ibn Salam and Abdullah Ibn Abbas on the authority of Hazrat Ali by Syyuti, Fadalrah Ibn Ubaid Bayhaqi. Some scholars have attributed this to the Holy Prophet (SAW) through some weak chain of narrators. It is, therefore, beyond any shadow of doubt that this is an accepted principle among the Companions and it is they who have phrased this dictum into this wording.

Now we proceed to examine the position of Letters of Credit of Banks. The purpose or the objective of the opening of letters of credit is not something objectionable. On the other hand, it is a facility extended by the banks to the traders and the businessmen. The purpose of opening letters of credit is to facilitate quick and easy payment and the transfer of money from one place to another. This facility, being a lawful service, has to be properly compensated in terms of Shariah. If the payment of compensation or remuneration is linked with the volume

of service, the Shariah has no objection. In this case it will be a kind of service charge which has been already considered and approved by almost all the contemporary scholars and learned bodies. In this case it will be necessary that the rate of service charge is determined keeping in view the magnitude of the service, quickness of the payment and the level of credibility and performance of the bank concerned. Since it is related with the time or duration of payment and is collected in terms of percentage of the amount paid, it becomes Riba. There is no objection if the banks require collateral or hypothecation of certain assets or securities to ensure timely repayment, provided the guarantor does not charge any interest and the mortgage is controlled by the law of Rahn. The payment made by the bank to an importer or a purchaser under a letter of credit is again in the nature of Qard because it does not fall in any other legitimate category of transaction. As such it is to be regulated under the law of Riba. It seems worthwhile if the State Bank of Pakistan determines certain fixed rates of service charge to be paid by the importer/purchaser to the bank as a compensation to the service rendered by the bank. There may be different rates for different kind of transactions provided these rates do not change with any delay in the payment and are not calculated on the basis of the amount of money involved. There may be flat rates for various kinds of transactions whenever letters of credit are need to be opened.

The discounting of negotiable instruments is not only an important function of modern banks but also constitutes a sizeable source of their income. The discounting of instrument by the State Bank of Pakistan is a big source for the revenue of the Government. One of the experts appearing before us estimated the proceeds of the government from discounting to reach upto 19% of the total state revenue. However, irrespective of the magnitude of the income the question of discounting is to be tackled in the light of the Shariah. There has been difference of opinion as to the real nature of this transaction in terms of Islamic law. The question whether the practice is permissible under Shariah and, if so, upto what extent and under what conditions depends on determining the question where the discounting is Hawalah (transfer of debt), or sale of a title or a loan taken from the bank. As we have seen, it cannot be taken to be a sale because it is the sale of debt for higher price which is not allowed. Moreover, the deferred payment is involved in the sale of money for money. It may, however, be construed to be a loan and has to be regulated as a loan. The increase ultimately earned by the bank through this operation would fall under the category of Riba. Some scholars have tried to justify this practice on the basis of a precedent attributed to the Prophet (SAW) in a similar case. We have dealt with that precedent elsewhere.

The rest of the activities undertaken by the banks are allowed under the Shariah on payment of such fee, remuneration or service charge as may be fixed by the State Bank or may be determined by the concerned bank under the general guidelines issued by the State Bank. However, it will be necessary that the amount of fee, remuneration or the service charge is not related to the duration or the time frame of any payment or repayment involved and that it is calculated exclusively on the basis of the volume of labour involved and the nature of service rendered.

The banking operations having been analysed in the perspective of Injunctions of Islam, the need to restructure and redesign banking operations by amending the related laws and affording new approach and dedication to the objectives of Shariah is apparent. This brings to focus the development of alternative modes conforming the requirements of Shariah. The question of developing a viable alternative to the present interest-based operations has engaged the attention of a large body of scholars. There has been no difference of opinion, even among those who considered bank interest to be permissible, that the modern banking operations require remodeling and restructuring if interest is to be abolished. To have a cease-fire with Allah and His

Messenger (SAW) has always motivated Muslim minds to come out with a Riba-free model.

There is a general consensus that the abolition of interest will require some restructuring of the banking practices and patterns. It is generally felt that the banks should work as investment banks and, wherever necessary, as holding companies. If the banks reorganize themselves as holding companies, they may, perhaps, easily undertake what was known in the United States as group banking. It is said that group banking, has some merits if it works under a holding company. Under the group banking a corporation, a business trust or a professional association controls two or more commercial banks. The experiment of holding companies controlling commercial banks has been successful in the United States. The main feature of the group banking system is the centralized management and a uniform command and control system leading to economizing the expenditure and maintenance of larger cash reserves. Moreover, the resources of all the member banks can be pooled to finance large enterprises and business concerns. However, if group banking system is adopted it will require strict legal measures to ensure effective control and supervision, larger and more effective coordination and to avoid the furtherance of personal or group interests of those controlling the holding company.

It should not be difficult to restructure our present banking system into a mixed banking system, which our banks are already to some extent, to perform the dual work of commercial banks making both long-term and short-term financing to the industries, commerce and agriculture but also to serve holding companies establishing their own commercial enterprises, industrial concerns and agricultural projects. Their role should not, therefore, be confined to the supplying of money for short-term requirement of trade and commerce. Traditionally, the commercial banks have been refraining from supplying long-term credit to industries. This trend has been prevalent in Britain from where it influenced our bankers. On the other hand, in some countries of Central Europe, particularly in Germany, the commercial banks have reportedly contributed in a substantial way to the industrial development by providing long-term finances to industries. The experience of this mixed banking system is that they have quite successfully promoted the industrialization of their respective countries and have also provided initial capital to the newly started industries. It may be pointed out here that the factors which had led to the development of mixed banking in Germany are also found in our country. It was the scarcity of capital, the reluctance of the foreign investors and the absence of suitable entrepreneurs and such other reasons which led the commercial banks in Germany to develop the concept of mixed banking and to closely

collaborate with the local needs in the interest of country's rapid industrial development. The shortage of capital was mostly because of the down-fall in the savings which was, in turn, due to the absence of mobilization and motivation. This situation was remedied by the mixed banking system which provided capital to industries not only by providing long-term finances but also by floating debentures of joint stock companies. This made the banks active partners in the economic development of the country and promoted big industrial projects. Some banks provide help to German industries by underwriting their equity and debenture issues and also by granting them advances in anticipation of such issues in future. Expert financial advice and consultancy was also provided by the banks to big industrial projects about the issues related to the investment market. In some cases where large amounts of liquidity were available with the banks they invested them in long-term industries credit and earned high dividends. The role of the State Bank of Pakistan would become pivotal in controlling and streamlining the process of funding and financing short-term and long-term projects. It has to be ensured that capital resources are not blocked in such long-term finances which do not yield sufficient dividend or in sick industries under political pressure which is, unfortunately, not uncommon in our country. If such situations are not avoided the loss in major industrial concerns is bound to affect the performance of the banks.

An important function performed by the State Bank in relation to commercial banks is the authority to control credit and thereby to regulate the working of the banks and flow of capital. The main purpose of credit control is to ensure the stabilization of exchange rate and to maintain the stability of the national currency in relation to foreign exchange. In the past when the currency was on the gold standard there was little fluctuation in the value of the currency and it was easy to retain the fluctuation within the narrowest possible limits. But with the abolition of gold standard the fluctuation in exchange rates has become a major problem which has to be dealt with at the central level by the State Bank. Different techniques are adopted in different countries to control the credit and the flow of capital. These techniques and policies are considered to be unavoidable in the modern complex economic organization. Generally, it is the interest rate and the safety regulations or prudential directions of the State Bank which are considered to be effective tools used by the State Bank to exercise influence to control bank credit and money supply. There are a number of instruments used by the State Bank to control the credit and the bank rate or the interest rate. The most important of these, which have a direct relevance to the abolition of interest include open market operation, rationing the credit, minimum statutory cash reserve ratio, regulations to

control consumers credit and margin requirements. Of these, two need fuller discussion, namely, the bank rate and the open market operations.

Open market operations have now become the most important instrument of credit control. Previously, it was bank rate which was considered to be the primary tool of exercising control over the credit flow. It seems that the role of bank rate in controlling the credit and streamlining the flow of liquidity in the money market will continue to be marginalized in future and the role of open market operations will continue to expand in various directions and different dimensions. This is because of the fact that the world is moving towards a direction which may ultimately lead to either total abolition of interest or to reduce it to a minimum rate. This tendency is visible in some leading economies of the modern world wherein the interest rate is continuously on the decrease. It is now mostly through the open market operations that the State Bank exercises its control. It withdraws funds from the market primarily either by borrowings from the market or by selling its securities, assets and documents. The bank sells consolidated Governments stocks for cash and repurchases them on a deferred payment till the date fixed for the monthly settlement of the stock exchange. In this manner it withdraws cash from the market temporarily for the un-expired period of monthly account. Borrowing of the bank include borrowing from discount houses and bill-brokers against the

pledge or mortgage of Government securities. This also helps reducing the available volume of funds in the market and thus the market rate stands controlled to the extent of banks operations. The increased popularity and the rising importance of the open market operations is indicative of the fact that the policy of bank rate or discount rate has not been successful in controlling the credit and streamlining the cash flow in the market. The sale or purchase of securities and other instruments available in the market by the State Bank is not objectionable in itself from the Islamic point of view. Rather, it is something which contributes to the proper and balanced functioning of the money market in the country. As long as these operations are done keeping in view the independent interplay of market forces and avoiding involvement in Riba; positively or negatively, these operations are allowed subject to observations made above.

Moreover Council of Islamic Ideology has warned time and again that interest free banking cannot be successfully operative unless a total change does not take place in the society. There is no denying the fact that elimination of interest is only a part of the overall socio-economic system of Islam and, to quote from the report of the Council of Islamic Ideology, this major change alone cannot transform the entire system in accordance with the Islamic vision, as simultaneously with the introduction of interest free Banking System strenuous efforts shall have

to be made on a wide front to inculcate in the society, basic virtues such as fear of Allah, honesty, trustworthiness, sense of duty and patriotism. There are wide range of steps to be taken by all concerned for the realization of this objective, namely, the establishment of socio-economic ideal of Islam. These steps shall have to be taken jointly by the individuals, the business community, the banks, the industrialists, the tax collectors and the government in power. Unless the entire machinery and the government and the entire business life is geared with full dedication in this direction, the curse of Riba cannot be eliminated. The challenge is undoubtedly colossal and the task is tremendous and it requires a serious and dedicated efforts.

At this stage, we propose to discuss the apprehension expressed and the objections raised by western capitalists to the effect that an interest-free economic system would face difficulties and is bound to meet failure. The most important objection raised is that mobilization of resources will be possible with the elimination of Riba to generate resources at an optimum level. The basis of the apprehension is the belief that capital is a factor of production in itself. Therefore, it must have a price and should perform the functions of a price, namely, it should control and regulate the allocation of loanable funds to different users keeping in view the ability of the respective user or users to pay the price. This argument pre-supposes that the loanable funds are scarce

and the number of users is unlimited and the relationship between them should be regulated by law of demand and supply and that the interest rate should be adjusted as a result of operations of these forces. Those who advance this argument presume that the loanable funds will be available to the users totally free in the absence of interest and that this free availability of loans would encourage unlimited number of borrowers to make their demand for funds and that in the absence of any available mechanism for balancing the demand and supply, the situation will lead to a chaos. They also presume that the interest-based system has been proved to be a faultless and just mechanism to allocate the resources optimally, an assumption whose fakeness and baselessness is too obvious to need any arguments. The up-holders of this point of view either forget or do not take into consideration that the legitimate profit calculated on the basis of the actual success and productivity of an enterprise actually performs function of allocation of resources successfully, efficiently and justly. The assumption that funds will be available free is also based on non-recognition of the role and functions the genuine profit will perform in the national economy. In an interest-free system the allocation of funds shall be regulated by the share in the profit which will, for practical purposes, be the 'cost' of funds. It means that rate of profit and the viability of the project will be the deciding factor not only for the allocation of resources but also for performing of

functions of balancing between demand and supply. The enterprise and the users showing greater dividend or anticipating greater rate of profit will receive larger funds. It will be the actual combination of the market and the performance in terms of profit and dividend that will decide the fate of a business and its entitlement to receive further funds. The banks and the financiers will ensure that their funds are invested in such enterprises and business whose success has highest expectancy. No financier will be ready to invest in a project without careful evaluation and due vigilance. The door of getting money in the name of inefficient and unproductive projects will be closed. This is because a lender in an interest-based system does not share any risk in the business he finances. The entire risk is shifted to the entrepreneur while the finance is guaranteed not only the safe return of the principal amount but also a pre-determined rate of interest. In the present system the financier has no concern about the legitimate outcome and fate of the business. When a financier in an Islamic framework would know that not only his principal amount is at risk but also his profit is dependent on the success of the enterprise he is bound to undertake as thorough an evaluation as possible. For this purpose either the banks and non-banking financial institutions may themselves create expert advisory cells or may establish consultancy consortium to get such requests and feasibility reports examined. As soon as the system starts working and takes of,

consultancy firms will come into existence to help the financier examine and decide the viability of an enterprise or a business.

The assumption that interest has served as an effective and efficient mechanism for the allocation of resources is a weak assumption. Without going into experience of other countries, even a cursory glance over the history of the performance of our own banks is sufficient to steal away the carpet from beneath this argument. Almost all the experts who appeared before us have produced detailed evidence supported with facts and figures to show that present system has failed to ensure a just and equitable distribution of resources which may be considered to be equitable and just at any standard.

In the book **Towards A Just Monetary System**, Dr. Muhammad Umar Chapra quoted the views of western experts who have found compelling evidence to conclude that in the United States the existing capital stock is misallocated — probably seriously — among sectors of the economy and types of capital. Such allocation of resources can take place only in a dream world of perfectly competitive equilibrium models the market economies have theoretically formalized. On the authority of another leading western expert Dr. Chapra establishes inadequacy of the capitalist models for proper allocation of resources. He quotes yet another western authority who says that the money rate of interest does not rule the roost and feels that the rate of

interest is irrevocable to investment decision and should be replaced by the price of existing equipment (or share price).

Other scholars have also thrown light on the question of the so-called equilibrium in the rate of interest which is only something theoretical and bookish. Such a rate does not exist in the actual market. Moreover, the determination of the equilibrium rate is such a complicated and complex exercise that it is very difficult to effectively observe it, if any body wants to. The real deciding factor in the market is neither equilibrium nor equity. It is, rather, credit-worthiness of a borrower which is the main consideration for the release of credit. This is so obvious in favour of the rich and against the poor that hardly needs any explanation. The richer the person more credit worthy he would be. The more credit worthy a borrower the lower the rate of interest. The lower the rate of interest, the greater the borrower is beneficiary. That is why the biggest businessmen in the country always manage to get larger chunks of funds at lower prices because of their highest credit-worthiness. This results in a situation where the richest borrower has the less burden and the poorest, if ever allowed in the club of privilege of borrower, bears the highest burden. This makes the whole business atmosphere extremely and increasingly unfriendly to a small and even medium businessmen and the country is deprived of their contribution and profitability which may be more as compared to the so-called credit-

worthy entrepreneur. In this entire game, honesty and integrity of a person, viability of a project, feasibility of a scheme, needs of the country, requirements of justice, all are relegated to the background and carry no weight in the scale of credit-worthiness. The financier is always prone to release his funds to secure rather than productive hands. According to Dr. Muhammad Anas Zarqa, this state of affair is the logical outcome of an interest-based financing, only because it does not share the risk of the business. Thus he naturally feels inclined to lend his money to the richer in order to ensure that the payment of the principal amount along with the interest without incurring any risk. But if he is made to share the risk he would be more concerned about the viability and profitability of the business, in which case the borrower will be on the same footings as rich to try a chance. Now, it has been widely acknowledged by the western experts that the interest-based system ensures greater flow of credit to the rich.

The up-shot of the discussion is that the interest-based credit system is by nature and definition a handicap in the establishment of the distributive justice initiated by Islam. It has failed to give any objective criterion for credit rating. Its criterion is totally biased in favour of the tiny rich minority of the society. Even in the leading economies of the western world, system has provided constant impetus to big businesses which have grown bigger and bigger; but in return, have created

invincible monopolies which control both the borrower and the money in the country. The whole economic and political life becomes a hostage in the hands of the few. The entire nation finds itself at the mercy of the few who dictate their policies for their own benefits and to the detriment of the common man. Small businessmen constituting the overwhelming majority of country's business life never get anything from the lenders, both from banks and non-banks financial institutions. Even if some small businessmen manage to get loans they are constantly looked with suspicions and indignation on any sign of trouble and difficulty, loans given to them are recalled adding to and accelerating their problems. On the other hand, big businessmen are allowed default after default under the honourable title of rescheduling.

Moreover, in an Islamic system the share of the financier is always linked with the profit and success of the entrepreneur. The higher the success and profit the greater the share of the financier and vice-e-versa. Thus, contrary to the interest-based capitalist system, if the profit of a business is bigger it should pay higher return both to the financiers as well as the entrepreneur. According to the teaching, policy and spirit of Islam, the resources allocated should not only be more effectively utilized but also be equitably distributed.

Another objection that savings and capital formation in the private sector will come down in an interest-free economy and the

erosion of purchasing power of money as a result of inflation will further reduce the savings. This objection is based on the traditional western concept that interest motivates savings and the abolition of interest is bound to reduce savings. On a closer examination this objection seems to be baseless, if not, totally ill-founded. There is abundant empirical evidence collected both by western and Muslim scholars that there is no relationship between savings and interest. If we take the example of our own country we find that almost 80% of the savings in our banks have been deposited by lower middle class who do not put their money in the banks for sake of any return but for security. Even those who want to invest their money in return-yielding sources do not deposit them in commercial banks. They rather deposit them in such investment schemes which offer greater returns such as Defence Savings Scheme etc. The large scale investment in finance companies established in mid 80's in Karachi and Lahore is inductive of the fact that banks are not the proper place for yielding the profits, at least in the perception of the overwhelming number of savers. A number of western scholars have discussed the relationship between interest and savings and have come to the conclusion that the impact of the interest rates on savings is extremely negligible. However, it does not mean that in Islam savers, small or big, should not expect any return on their savings. If the savers find the required friendly atmosphere in small business they will

invest in small businesses and will look for more and more profitable finance for investment of their savings to offset the erosive effect of inflation and meet any future uncertainty and the need of a rainy day in future.

Another objection often raised in pathetic term is the future of such savers who are not in a position to organize businesses for themselves or to participate in any active business enterprise or commercial activity. Retired Government servants, widows and orphans and the disabled who have no option except to invest money as sleeping partners must have to receive regular income by investment in some profit-yielding enterprises. Undoubtedly, such sleeping partners should have avenues for investment, and participation in any partnership or equity. It is also necessary that the savings available with such people should be as less risky as possible. We shall discuss the possible options later. The scope for sleeping investors is wide enough under Shariah to accommodate their special needs keeping in view their special situation. There are modes of investment with varying degrees of risk, maturity and amount of finance involved which may be of use for such investors. Once the interest is abolished and Islamic economy sets in motion there will be a host of instruments of various modalities to satisfy the needs of different investors in terms of level of risk and the amount and scope of liquidity. Moreover, the concern expressed by the up-holders of the

problems of the old, the widows and the orphans is based on the presumption that Islamic state does not have any responsibility for this section of the society. They are not left at the mercy of their own fate in any Islamic framework. The state is under an obligation to create a fund in the Baitul Mal, far or less on the patron of Benevolent Fund, where the contribution of these peoples of the society are invested along with contribution of the public exchequer which may be bigger or smaller or equal according to the resources of the country. This fund which will keep on increasing with the passage of time will be an amount of trust, the proceeds of which will be regularly paid to those who can invest and also to those who cannot, of course, with varying degrees keeping in view the amount and the resources available. But one should not forget that the attitude of the Baitul Mal is not to create a class of parasites who sit ideally at home only to receive monthly pension or stipend from the public exchequer. Such facility is available only to those who are not in a position to earn because of their physical or other in-capacity. For such people the Baitul Mal should have exclusive fund from zakat and other contributions both from the Government as well as the public which should be invested exclusively to meet the needs. The zakat fund may also be separately invested in suitable enterprises which may become the sole property of such deserving people. The Islamic emphasis on partnership and equity will generate funds and encourage

people to save for investment in their own business. The experience of smaller businessmen in our market is indicative of the success of this fund. There are hundreds of thousands of investors and self employers who save for the investment for their own businesses are operating in an informal and non-corporate business. In fact, a large chunk of informal business in the country is already, by and large, interest-free. The rapid success of small traders and business in our market is indicative of the fact that it is not interest but elimination of interest which provides real impetus to economic success. Another objection, rather apprehension is that the abolition of interest will lead to an instability in the system that the equity-based market will not be able to bring stability in the system. This apprehension is not based on any empirical study. Rather, it is the interest which has been one of the important destabilizing factors in the capitalist economies.

Now we propose to deal with borrowing by the Government and the effect of the borrowing on economy of the country and steps needed to be taken for interest free economy. The note submitted by Mr.Muhammad Ashraf Janjua, Chief Economic Adviser, State Bank of Pakistan shows that the Government of Pakistan is the biggest borrower as it is continuously borrowing to finance its fiscal deficit. As of 5th May, 1999 its total domestic borrowing stood at Rs.1258 billion from the following sources:

(Rs. Billion)

i)	State Bank of Pakistan	Rs. 333.8 billion
ii)	Commercial banks	Rs. 297.0 billion
iii)	Non Bank borrowing (Saving schemes)	<u>Rs. 627.2 billion</u>
	Total	Rs. 1258 billion

In addition, government's foreign debt as of 31st March, 1999 stood at \$ 31.15 billion or Rs. 1610 billion at the current inter-bank rate. Together, the national debt at Rs.2868 billion amounts to nearly 95% of the GDP. All this debt is based on fixed interest rates.

Government borrowing from the commercial banks at Rs.297 billion constitutes nearly one-third of banks total lending and investment. It is asserted in the note that rates of return on these lendings have implications for the banks' policies including forecasting of their balance sheets. The conversion of this stock of debt will have implications for the profitability of banks and hence for both the depositors and borrowers. The same position prevails as regards the Government borrowing from the State Bank which stands at Rs.333 billion. Next comes the Non-Bank Borrowing through various national savings schemes which stand at Rs.627.2 billion which is half of the total public domestic debt. Thus the savings are owned by people of different walks of life such as pensioners, old people, widows and others, who exclusively depend on reasonable return on their savings. The point of view advanced in this note is that all this data is based on

interest rates and till such time that the Government fiscal deficit is totally eliminated either through improvement in its resource mobilization or containing its expenditure and investment to the absolute minimum, the government borrowing from the above sources would be inevitable and if the government's need to borrow continues, this would require the evolving of interest-free, equity-based or similar instruments which in turn involve research and analysis and some period of experimentation. It is added that both the developing of such instruments and then gradual introduction will be time consuming exercise. It is urged that keeping in view the size and complexities associated with this management both the conversion of this debt into interest free instruments that do not disrupt the operations of financial system or its retirement will take a long time. The note does not spell out this "long time" statedly noted for adopting interest free economy system.

The major issues in the fiscal policy in shifting to interest-free operations have been summarized as under:-

- i) To retire and/ or convert and restructure the stock of public debt in a manner that the new arrangements are acceptable to the savers, investors and other economic agents without major economic disruptions.

- ii) To reduce and eventually eliminate the government borrowing in future.

The problems which are likely to be faced in converting the interest based system to interest free operations have been detailed as under:-

“The conversion to interest free economy needs a great deal of in-depth research and analysis, an appraisal of experience of countries where similar experiments have been made and finally developing of instruments, representing real assets, which can replace the existing instruments, can be handled efficiently and are acceptable to savers, investors and other concerned economic agents. This will also involve a broad-based training programme for bank staff, familiarity with terminology, changes in documentation, new methods of accounting and a whole series of other changes including the attitude of users of credit. One major constraint will be the uncertainty both about the principal and the rates of return which can be overcome over time when economic agents can base their expectations on changes in developments that determine profitability etc. Banks and other financial institutions which are traditionally used to investing in fixed rate papers would have to operate within this constraint. As yet, there is no precedent of a central bank managing an efficient monetary policy through interest-free instruments. The experiments made so far show only partial success in this area.”

As regards operations of the commercial banks dealing with private sector both for working capital and for investment, it is urged that the difficulties arise mostly on the assets side of banks as it requires the development and introduction of efficient and compatible with Shariah modes of financing. It is urged that to provide credit to private sector on interest-free basis, without adequate home work in research and analysis, is likely to generate many problems including uncertainty,

the need for monitoring, transparency and detailed documentation. Experience has shown that established investors/entrepreneurs are generally reluctant to share profits with management of bank or even equity holders. In fact in some countries where Musharaka (or partnership) has been tried, the problem has been that of different perceptions on the part of bank and the borrower about profitability, costs and accountability. According to Mr. Ashraf Janjua, “additional problems and difficulties that the commercial banks are likely to face include tax system that encourages lavish expenditure by the corporate sector and makes it reluctant to make full disclosure of its financial affairs, lack of awareness among public about the new system, lack of expertise and even commitment among the bankers to successfully manage financing under Islamic modes, apprehension of the business and industrial community that if they enter into Musharaka agreement with banks for financing, there may be undue interference by the banks in their management, their perception that Islamic system of Musharaka is full of complexities, and lack of speedy disposal of the default cases and disputes. If banks are advised to engage in purchasing/selling of commodities and to create inventories for the purpose of genuine Murabaha it will not only encourage corruption among the banks incumbents, but also adversely affect their intermediation function. Murabaha, because of being simple transaction is very popular whenever

Islamic modes of financing have been tried. However, it requires actual purchase and sale of commodities with the purchaser assuming the risk before selling it on credit to the buyer. Also, because of its popularity, banks have turned into trading houses.”

The note of Mr.Ashraf Janjua also describes the problems relating to external sector as follows:-

“Pakistan has a large foreign sector comprising exports, imports, receipts and payments of invisible, home remittances, inflow of resources including borrowing by the government and servicing of country’s external debt. Even for a reasonable rate of economic growth Pakistan is dependent on inflow of resources particularly from international financial institutions. These institutions being of international character have their own policies. As a beneficiary of the resources of these institutions, Pakistan has to observe a measure of discipline and meet a number of commitments. Among other things, liberalization of economy, market-orientation of management, removal of distortions and frictions, competitiveness in the financial sector and similar other conditions are invariably a part of commitments. Also, Pakistan has been borrowing from the international market and from banks in the private sector. Except for foreign investment other inflows involve not only conditionalities and discipline may be at variance with the requirements of a system working under interest-free arrangements. Resolving of these conflicts will take its own time.

Because of its overriding importance, Pakistan’s external debt deserve a special mention. As of end-March, 1999 Pakistan’s external debt stood at \$ 31.5 billion. In the past five years the stock of debt has increased at an average annual rate of \$ 1.33 billion. This is in addition to foreign investment, foreign currency accounts and some other liabilities. Like domestic debt the problem of both the stock of foreign debt, or even a significant part of it, looks unlikely in the foreseeable future. The only options are to renegotiate the debt, if possible, and contain the further expansion of stock through improvement in balance of payments. It is also necessary to encourage the non-debt creating inflows like Foreign Direct Investment (FDI) and home remittances. This requires,

besides the creditworthiness of the country, a competitive environment which responds to price signals and a robust private sector. Lately, both the foreign investment and home remittances have shown a declining trends for a number of reasons. Renegotiations in terms of conversion of foreign debt into equity based and other modes acceptable in Shariah is not a promising option either. At best, we can devote greater efforts to removing misgivings, entailing any changes in the financial system which, in all likelihood, will be interpreted as having religious motivation.”

The conclusions drawn in the note may now be reproduced:-

“There is a general agreement that the interest based financial sector and economic management in Pakistan should be shifted to riba-free modes of operations. However, the features of the operation of financial sector as detailed above i.e. a large government debt held by various segments of the economy, monetary and credit policy anchored to the market mechanism, age-old working of financial sector particularly the banks, on interest-based instruments and transactions, savings and investment in the economy and the size, the attitude and expectations of private sector indicate that shifting to interest-free arrangements of all these operations will involve a fairly long transitional period. A great deal of research work, institutional changes and broad based reforms will be necessary. It will have to be a gradual process and will involve development of new instruments of monetary & fiscal policies, improvement in the documentation of the economy, transparency of operations, amendment in laws, research and analysis, education and training, change in the attitude and values of people and, above all, a strong and flourishing private sector in a competitive environment which offers investment opportunities and responds to price signals which would require removal of distortions and frictions in the markets. Any intervention in the financial sector without first addressing the above mentioned problems could cause serious disruptions in the economic management with adverse impact on growth and cost-price relationships.

The requisite changes and improvements mentioned above would need to be watched, coordinated and monitored by a high powered Board consisting of Shariah scholars who are familiar with economic and economists and bankers with some understanding of Shariah as well as experts in other relevant fields.

Doing a thorough job may require the hiring of the services of international experts and scholars. Such a Board should ponder over how the concerned institutions can be reoriented and new instruments developed. It should also overview the entire process of transition from the present interest-based system to interest-free modes of economic and financial management.

It is pertinent to point out in this connection that during the past two decades a number of Islamic countries including Pakistan, Iran and Sudan have tried to introduce comprehensive Islamic financial system. However, there has not emerged any example of a really Islamic system of finance and banking that could serve as a standard of reference and lend guiding principles for a comprehensive move towards elimination of Riba, in letter and spirit. There exists a number of differences in perception regarding interpretation of Riba and the minimum acceptable standards of various modes of financing. The scholars in Iran permit the system of giving gifts as return on loans, sale and purchase of debt with discount or premium and discounting of bills, and the return paid on intra-government loans. Scholars in Pakistan and the Middle East are not inclined to accept this view point. A consensus can be of great help in achieving the real objective. Reliance of banks in all such countries, and even in the case of individual banks, on short-term financing on the basis of lending based modes like cost-plus sale or leasing is due to a number of serious impediments and difficulties. The most important areas that needs to be addressed are research for development of the requisite equity-based monetary policy and regulatory instruments, ensuring transparency and all pervasive accountability, restructuring the corporate sector, tax system and the legal framework, creating conducive environment and enhancing the expertise of banks' incumbents at all levels."

Though the note concedes that there is a general agreement that interest based financial sector and economic management in Pakistan should be shifted to riba-free modes of operations yet nothing has been said as to the steps taken by the State Bank of Pakistan which is the Central Bank of the nation and which monitors the monetary and fiscal operations as to the steps it has taken despite the aforementioned

general agreement and the consensus and the judgment of the Federal Shariat Court pronounced in the year 1991. Even in the note the Court has not been taken into confidence as to the estimate of time needed for adopting the riba free modes of operation and what is the thinking of the State Bank of Pakistan as to the practical steps needed to be taken for creating of necessary infrastructure and establishment of the bodies or institutions for introducing, managing and monitoring the riba free economy. We can only express regret while noting that due thought has not been given by the concerned authorities/officers of the State Bank to various recommendations made by Commissions and bodies constituted by the Government of Pakistan for the purposes of elimination of riba. Even in this note they have not referred to these recommendations what to say of commenting on their point of view. These bodies are Council of Islamic Ideology, Prime Minister's Committee on Self Reliance, Commission for Islamisation of Economy.

The Reports of the Council of Islamic Ideology and the views expressed therein have been noted in the impugned judgment. These need not be reiterated here.

The Prime Minister's Committee on Self Reliance in its Report, at page 49, 50 deals with the Inter-Governmental Debt, Bank Loans to Government and Non-Bank Loans to Government as under:-

“Inter-Governmental Debt:

These loans are rarely contracted on economic basis nor are such considerations relevant in their settlement. It is quite feasible, as such, to convert such loans on an interest-free basis. A rationing scheme could be adopted to decide on future allocational problems in this category of loans. A specific proposal can easily be developed in the context of an award by the National Finance Commission, which is expected soon.”

“Bank Loans to Government:

These consist primarily of government borrowing from banks, including from State Bank of Pakistan, against Treasury Bills. The government’s transactions with the State Bank are of a book keeping nature. It is proposed that government would no longer pay interest on State Bank holdings of Treasury Bill; future borrowing will continue as before except that it would be on an interest-free basis. In so far as other banks are concerned, existing government debt will have to be settled by provision of new non-interest bearing government paper, which will be redeemed by the State Bank of Pakistan over a five year period. This essentially amounts to creating additional reserves of the banks with the State Bank which will be released over a five year period. Accordingly, no undue inflationary pressures will be developed in the economy. This will also be profitable to banks as, in return for losing interest on this debt, its low yielding fund [government pays substantially lower interest

rates on these bills relative to its other borrowings] will be gradually released which could be subsequently used for more profitable investments.

After the commencement day of the Ordinance, no new borrowing from banks [except the State Bank] will take place. The commodity operations of the government can be conducted on the basis of trade related modes of financing. However, if there are losses they should be covered from borrowings from the State Bank of Pakistan.

“Non-Bank Loans to Government:

This consists mainly of Khas Deposits, Defence Saving Certificates etc., and is perhaps the most important component of domestic public debt, which needs special care in its settlement, since it is owned by private individuals. To settle this debt, it is proposed that the government create a mutual fund out of its shares in selected public sector corporations or Government Sponsored Corporations (GSCs). Salient features of the proposed fund, including a proposed portfolio and 12 Modes of Financing have been given in the Self Reliance Report, 1991 as Annex-6 and Annex-7. This fund would be managed initially [for three years] by an independent group of portfolio managers appointed by the government; subsequently, the portfolio managers would be chosen by the shareholders. Share certificates in this mutual

fund would be issued to holders of this type of debt, equivalent to the value of their holdings.

The idea of a mutual fund, would be particularly effective in insulating small investors from exposure to risk. The need to minimize risk is important since part of this debt is held also by windows, retired individuals and other small investors, whose risk taking capability is minimal. Through the fund these investors would be allowed to hold a diversified portfolio of shares, thus enjoying the benefits of risk-spreading.

Also this would be fully in keeping with the government's policy of privatization and disinvestment, on which there has been no progress. This measure would serve to speed up the implementation of existing government policy. This would also be a step in the direction of deregulation and would help to increase the efficiency of public enterprises.

As of 30th June 1989, the book value of the combined assets of these corporations amounted to Rs.800.442 billion and their net equity was more than Rs.100 billion. Given that the market value of the equity is likely to be a multiple of the book value, it should be possible to redeem the full amount of about Rs.155.08 billion of obligations

outstanding at the end of May 1990. This portfolio can be expanded to include T&T, Railways, etc. which have presently been excluded.”

This Commission has made with regard to Foreign Public Debt the following comments and recommendations.

“As on 30th June 1990, the total outstanding and disbursed foreign debt amounted to Rs.345 billion (\$15.67 billion). The composition of this debt is biased in favour of Consortium countries which account for some 86 percent of this amount. However, within the Consortium, the debt is fairly diversified with USA holding 23 percent, Japan 14 percent, West Germany 10 percent, multilateral agencies 42 percent and the rest is held by Belgium, Canada, France, Netherlands, Italy and U.K.

Given the amount of uncertainty involved in settling the matter with the foreign creditors, a variety of scenarios need to be constructed to meet the likely contingencies. In fact the response of foreigners would depend in large measure on how they perceive our motives. As we will show below, the proposed measures should not pose much difficulties for the foreigners as they are not designed to evade our obligations towards them. It is intended in the perspective of moving towards a self reliant way of life and hence has no ultra motive, such as a ploy for defaulting on the debts owned by the country.

To ease the process and to ensure that there are no disruptions in economic relations with out creditors, the committee felt that some preparatory time should be given to the government in which it will negotiate with the foreigners, on a bilateral basis, an interest free basis for the existing debt. Unlike the domestic debt, which is proposed to be eliminated with effect from 1st July 1991, a two year preparatory period is given for achieving this goal in the case of foreign debt. It is proposed that a committee be formed that would hold negotiations with the foreigners.

Thus on the effective date all the principal and interest will become due and payable, unless converted into an interest-free obligation. The period of two years is hopefully sufficient to arrive at an alternative basis. There will be no restrictions on capital movements if they are done on the basis of non-interest

arrangements. A number of options are available which can form the basis of renegotiating external debt by the proposed committee, as well as to mobilize resources for cases where conversion may not be feasible. The most significant of these methods is the debt-equity conversions being used extensively by countries facing foreign debt problems. On such method, known as ‘debt-equity swaps’, requires the debtor country to allow a foreign investor to purchase its debt from the creditor at a discount and convert it into local currency for purchasing a local equity-based asset. Typically, the creditor is willing to sell the debt at a discount thus allowing the investor to obtain a discount on purchase of local currency. The scheme could be preferentially offered to any non-resident Pakistani with foreign holdings, on a simple conversion basis.

Here, a marginally higher exchange rate would be offered to resident purchasers of debt obligations. In addition, no restrictions should be placed on the use of local currency obtained through the conversion. A variant of the scheme could also be offered to resident importers who could mobilize foreign exchange earnings from abroad.

Another source of foreign resources could be disinvestment of shares of public sector corporations to resident and non-resident Pakistanis in foreign exchange. Such receipts would be particularly useful in releasing the pressures on foreign exchange resources.

Finally, the creditors can be asked to convert their debt into equity in those projects where the fund are used. This is quite feasible as a sizeable amount of foreign debt has been used for on-lending to private sector through the financial system. Hence the debt is supported by a portfolio of assets, which can allow conversion into equity.”

The Report of Commission for Islamisation of Economy on Elimination of Riba (August 1997) proposes to enact a law known as Prohibition of Riba Act, 1997 which contains a provision for the settlement of outstanding debts. The proposed section 6 reads as under:-

“6. Settlement of outstanding debts – On the effective date all debts, covered by the prohibition in Section 3, and as accrued until the last day, will become due and payable in full; this amount may be settled as follows:

(1) Private domestic parties to a debt will be given six months to renegotiate, on a one time basis, fresh contracts based on permissible forms of financing which may have retrospective validity, i.e. from the date of effectiveness.

(2) Federal Government may re-negotiate all existing foreign debt, both public and publicly guaranteed (civil and military), on the basis of permissible modes of financing.

(3) Existing domestic public debt, other than inter-government and due to State Bank of Pakistan, may be settled by the issue of share certificates in the amount of the debt obligations in the Mutual Fund or by outright retirement through the use of proceeds from the privatization of public assets.

(4) All inter-government and SBP debt will be made interest free, with effect from the effective date.”

The methods of “Settlement and Retirement of Government Debt” proposed in this Report are ---

- (1) Restructuring of the financial structure, fundamental changes in the conduct and formulation of Government’s fiscal policy and a rearrangement of financial relations with the foreign countries. These key economic variables, such as growth, consumption, investment and saving will also be affected by the proposed measures.
- (2) The policy regime presents two fundamental problems of economic re-organization. First, the assessment of the likely

impact on the flow of resources for investment; second, the settlement of the existing stock of outstanding debt.

- (3) The detailed analysis of the impact on real variables is given in Annex 3 to the Report wherein it is asserted that the analysis is based on an integrated macro-economic model and impact in all the key sectors is assessed. The effect of the proposed measures on balance of payments, government budget, credit plan and the macro-economic framework are evaluated as under:-

Balance of Payments

“We begin by analyzing the effects of the proposed measures on the balance of payments (BOP). A number of components of the balance of payments will be affected by the change. Of particular significance are the effects on imports, exports, interest payments, long term capital inflows and foreign reserves.”

Imports

“The proposed measures will prohibit any interest payments on the existing debt. As noted earlier, it needs to be negotiated as to how the existing debt will be settled or converted into non-interest bearing basis. However, to arrive at a reasonable set of projections we need to make certain assumptions about both the interest payments as well as the flow of capital.

To this end we have adopted the approach to eliminate the entire interest payments and also to stop the flow of future capital. This is the worst possible scenario, as in the presence of positive net transfer of resources, this assumption would worsen the overall BOP position. But at the same time the assumption would allow us to arrive at the benchmark that would result from the worst possible response from the foreigners. Moreover, it would also point out the cushion that the economy would have to meet the debt servicing obligations, in case it decides to retire them without having any settlement with the foreign creditors.

The suspension of future disbursements would have significant impact on imports, since these disbursements are needed to finance them. Accordingly, a cut in imports demand would be inevitable. As an approximation to the size of this cut we assume that imports will decline by the amount of suspended disbursements plus any decrease in exports, in the first year (i.e. 1998-99). Thereafter, imports are allowed to grow at the same rate as in the Base Case.

How the cut in imports will be achieved. There are essentially two ways to adjust to this problem. First, we may reduce the imports by drastic controls, which would allow us to maintain the present path of exchange rate movements. Second, the market may be allowed to freely

arrive at a new equilibrium, which would essentially involve a combination of both import reduction and exports expansion.

For a variety of reasons, the second option is superior, as the recommendation is basically in line with the policy changes initiated in the country over the last two decades. This would require further liberalization of the foreign exchange market, which incidentally is on the agenda of the Government.

A comparison of the imports under the new regime, denoted as Prohibition of Riba Act (PRA) case, with the Base Case projection is given below:

Table-1
Comparison of Imports

	(million dollars)					
	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Base case	11972	13096	14267	15574	17001	18559
PRA	11972	13047	9952	10846	11819	12880

Exports

Essentially, there are two ways in which our exports could be affected because of the new policy regime. First, exports intensive in the use of imported inputs would be affected by a reduction in imports. Second, because of uncertainty as to the nature and working of the alternative system, resulting from the policy change, the foreigners may

show some reluctance in the beginning in entering into new exports contracted until things become clear.

An examination of the existing classification of exports reveals that some 40 percent of exports are primary and semi-manufactured, which are intensive in domestic inputs. More than 60 percent of the remaining manufactured exports are also intensive in the use of domestic inputs. Thus, our exports have a low dependence on imported raw materials. Hence, it can safely be argued that the Base projection of exports will be unaffected.

However, one must allow for the uncertainty factor noted above. Accordingly, we have assumed an immediate cut of about 20 percent in exports for the first year. Thereafter, exports are allowed to grow as in the Base Case. Exports in alternative regimes compare as follows:

Table-2
Comparison of Exports

	(million dollars)					
	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Base case	8355	9678	11211	12987	15043	17426
PRA	8355	9642	8903	10274	11857	13685

Invisibles

On the invisibles account, the only item that will be affected significantly from the policy change is interest payments on foreign debt. These payments will be suspended. Since a significant reduction in

imports has been allowed, some adjustment in other payments, which includes such things as shipment/freight has been made to reflect the change. Thus on the payments side besides these changes no other change will take place.

On the receipts side, there will be no change; a significant part of such receipts are in the form of remittances, for which there is no reason to allow for a change, while most of the remaining part comes from non-factor income, which would also be largely unaffected by the change. As a result of this adjustment the invisible account will experience significant improvement relative to the Base Case. A Comparative position is presented below:

Table-3
Comparison of Invisible Trade

	(million dollars)					
	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Base case	-2485	-3102	-3278	-3438	-3586	-3711
PRA	-2485	-3102	-856	-783	-703	-617

As a result of improvement in both the trade and invisible accounts, the current account would also experience significant improvements and would only marginally be negative over the 5 year period. This improvement should be viewed as a surplus that can be used to design countervailing measures for offsetting the decline in net capital inflows and in restoring the domestic absorption capacity which will be reduced because of a sharp decrease in import demand. Thus the surplus

has been used to restore the level of imports to the maximum possible level. Hence small deficit, that can be easily financed from the residual capital flows, in current account is allowed. The comparison of Base Case with PRA is given below:

Table-4
Comparison of Current Account

(million dollars)

	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Base case	-4628	-5128	-4900	-4521	-3964	-3185
PRA	-4628	-5141	-473	151	915	1846

Long Term Capital

As noted earlier, under the new policy the new policy regime disbursements on existing commitments of loans will be suspended until a settlement is reached. This will be true to the extent that such commitments are interest-based. Essentially all the foreign loans, short and long term, fall in this category. Thus we have eliminated all flows of foreign capital, both long term and short term during the period under consideration. A comparative position of the capital flows is given below:

Table-5
Comparison of Capital Flows

(million dollars)

	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Base case	3018	5285	5074	4968	4866	4370
PRA	3018	5285	0	0	0	0

Reserves

The resulting position of basic balance is sustainable though in the first two years it draws slightly on the reserves, but as the current account improves in subsequent years the position of reserves improves. Indeed the position of reserves is that on average, in subsequent years it provides for an average 7 weeks of imports. The comparative position of gross reserves under the alternative scenarios is given below:

Table-6
Comparison of Reserves

	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Base case	945	1133	1339	1820	2757	3978
PRA	945	1120	679	864	1819	3695

Second proforma regarding settlement of debts has been dealt with in Annexure 2 to the Report and the proposals made read as under:-

Outstanding Stock of Debt

The proposed measure will immediately pose a problem of settlement of the outstanding debt. This obviously will affect both public and private sectors. In each case what is needed essentially is to either retire the debt or convert it into one of the permissible modes of financing as provided for in the Act. To be sure, in every case where the stock of debt is supported against an asset, the stock can be converted to

a permissible mode of financing. Where this is not possible the debt must be retired within a stipulated time.

Foreign Public Debt

As on 30-6-1997, the total outstanding and disbursed foreign debt amounted to Rs.924 billion (\$23,106 million). The composition of this debt is biased in favour of Consortium, the debt is fairly diversified with USA holding 12.47 percent, Japan 16.38 percent, Germany 7.12 percent, multilateral agencies 48 percent and the rest is held by Belgium, Canada, France, Netherlands, Italy, Sweden and U.K.

Other than the long-term loan, which is largely from official channels, in recent years, particularly after the onset of the so-called foreign exchange reforms in 1991, a significant amount of short-term debt has also been acquired by Pakistan. As on 31-3-1997, the outstanding amount of short-term loans was estimated at some Rs.400 billion (US\$ 10 billion) in foreign current accounts held mostly by Pakistani residents, and Rs.211 billion (\$ 5,270 million) held mostly by foreign banks.

As for foreign creditors (short and long term), their response will depend in large measure on how they perceive our motives. Given the amount of uncertainty involved in settling the matter with the foreign creditors, a variety of scenarios need to be constructed to meet the likely

contingencies. As we will show below. The proposed measures should not pose such difficulties for the foreigners as they are not designed to evade our obligations toward them. It is intended in the perspective of moving toward an Islamic economic system, and hence has no ultra motive, such as a ploy for defaulting on the debts owed by the country.

To ease the process and to ensure that there are no disruptions in economic relations with our creditors, the Act gives more time to Government for settling or re-negotiating the debts with the foreigners, unlike the domestic private transactions which are required to be settled or re-negotiated with immediate effect. The Government must form a committee for this purpose which may begin negotiations well in advance of the effective date.

Thus on the effective date all debts accrued until then will become payable and due in full, unless converted into a permissible form of financing. The period of 18 months allowed for this purpose is hopefully sufficient to arrive at an alternative basis. There will be no restriction on capital movements if they are done on the basis of permissible arrangements.

A number of options are available which can form the basis of renegotiating external debt by the proposed committee, as well as to mobilize resources for cases where conversions may not be feasible. The

most significant of these methods is the debt equity conversions being used extensively by countries facing foreign debt problems. Since the greater part of our loan portfolio is from official sources, unlike the commercial debt which attracted such methods, a natural ready market for this purpose may not emerge. Still the idea is fully applicable, if for instance a scheme can be drawn where specific public assets may be offered for sale with the exclusive purpose of retiring well targeted debt obligations.

Although no official reports are available indicating the likely value of assets that are target of privatization, a recent statement of Government indicated that such assets are at least worth \$30 billion. This is a conservative estimate, but fairly capable to meet the present level of obligations, if all of them were required to be retired, which obviously would not be the case, as a significant portion of the foreign loans must be secured against specific assets which can be used for conversion to a permissible mode of financing.

Domestic Private Debt

This kind of debt is contracted by private parties. Private sector and public sector enterprises' borrowings from commercial banks and development finance institutions (DFIs) constitute bulk of this debt. A limited amount of such debt also consists of transactions between private

parties, such as directors' loan, etc. After the implementation of the measures during 1979-85, such borrowings [excluding foreign currency loans] are contracted on the basis of one of the 12 modes of financing approved by the State Bank of Pakistan. As noted elsewhere in this judgment, serious objections were raised by Islamic scholars on the permissibility of such modes in Shari'ah. Thus it may appear that this kind of debt will pose major restructuring problems. However we contend that this type of debt is easiest to settle along the lines of permissible modes of financing.

Given the fact that consumption loans are rare in the country, the entire private debt is supported by a corresponding portfolio of assets. Hence, a conversion of this debt is quite feasible. The permissible methods, as illustrated in the report of the Commission on banking and finance, and provided for in the Act, are fully adequate to support this conversion exercise. Foreign currency loans, if required to be settled, would be settled along the lines indicated in public foreign debt.

Domestic Public Debt

These Public Debts consist of debts incurred within federal and provincial Governments, between Government and private persons/entities, and between Governments and banks, including State Bank of Pakistan. The proposal in respect of the debts incurred through

these channels are the same as were given by the Self Reliance Committee. These have been noted above. It is also asserted that as on 30th of June, 1996 the value of investment made in the National Savings Scheme was Rs.304 billion and the value of assets at the disposal of the government is sufficient to meet these obligations provided it undertakes an exercise in earnest and does not fritter away the proceeds.

The concluding remarks toward the end of the Report emphasize that as the familiarity with the new arrangements develops and the apprehensions of foreign investors are removed together with the settlement of existing debt, these flows of long term capital from the source eliminated would resume and secondly there might be some strong retaliatory measures adopted by the lending countries against our trading interests. Such measures could include restricted access to export markets, freezing of reserves and other assets held abroad and restriction from the membership of multilateral agencies. Though there are strong reasons to believe that the likelihood of such measures is very low but it would be pertinent to address these doubts. The measures which the Consortium countries in retaliation countries may take and the impact of the steps taken to eliminate riba on Defence Imports, Government Budget, Credit Plan and Macro-Economic Framework have been detailed in the Report on Elimination of Riba as under:-

“19. The retaliation could come from Consortium countries who would be forced to rearrange their contracts on a non-interest basis. However, the institutional arrangements in these countries would not allow sweeping changes in policy, unless a situation of hostility is developed with Pakistan. The economic system in these countries is market oriented. If the apprehensions of the market are removed, for which we have already allowed sufficient time, there is no reason why we should suffer from this reorganization. Finally, the trade relations of Pakistan are fairly well diversified. These could only be damaged if a joint action is taken by the trading partners, which is highly unlikely.

20. The possibility of freeze on reserves and other assets again assumes a situation in which there is hostility against Pakistan. With effective diplomacy, this need not be so. In the last resort we could always place our reserves in neutral countries. Future accumulation of reserves would be insulated from this possibility. Also, we would need to withdraw our reserves anyway so as to place them on a non-interest basis, either by converting them into gold or to other approved basis.

21. Finally, on the possibility of losing our membership in multilateral agencies, we would like to cite the comments of IFC regarding its willingness to participate in investment financing on the basis of profit-loss sharing (cited earlier). The IFC was keen on this issue but was discouraged when it discovered that the government was not enthusiastic. IMF has also shown considerable interest in the new system. It would be interesting to note that IMF has expended considerable effort on research in this area. At one time, the IMF Board had deliberated on one such report and commented favourably on the possibility of IMF getting into such arrangements.

22. On the domestic economy there could be some adverse effects on the rate of inflation. This will happen both because of likely shortage of imported goods, and a temporary shift away from bank deposits to speculative physical assets. To control the market, Government will have to revise its exchange rate policy. A suitable upward revision in the exchange rate will be required, not only to discourage flight of capital, but to encourage exports and workers remittances. We will discuss this issue in detail both in the discussion on fiscal policy in the next session on adjustment policies.

Defence Imports

23. A point can be made on the possible adverse effect of foreign exchange shortage on defence imports. We maintain that such imports will be unaffected from the proposed changed in policy regime. First, the cut in imports is assumed to come from market responses and not from any planned efforts. Defence imports would suffer to the extent that Government does not allocate fund for this purpose. In fact availability of foreign exchange would not be constrained because the Government can purchase any amount of foreign exchange from the market. Second, defence imports are presently in the range of one billion dollars. Since even after applying the cuts, imports are averaging \$ 11 billion, there is sufficient amount of resources to finance defence imports. Finally, even if there is a retaliation and economic sanctions, defence imports would largely be unaffected. This is so because such imports are rarely available in the open market. These are made on special relations with the supplier countries; the basic determinant of such relations is the goe-political conditions which will be unaffected because of the policy measures.

Government Budget

24. The budget would be affected in a number of ways. Despite the suspension of debt servicing, the balance of payments implications discussed above have profound impact on the budget. The public capital flows, proposed to be eliminated, are used in financing the budget. Hence to that extent sustaining the level of current spending would be a problem, particularly if substitution between local and foreign currency resources is not possible.

25. The most important effect on the budget, which will counter the BOP effects, would be the requirement for the balancing across both current and development accounts, except for the first two years on account of foreign debt, which is a natural implication of prohibiting Governments power to contract debt. [This conditions will be relaxed that the bank borrowing is in proportion to the required increase in money supply to finance the increased output. This is called seigniorage].

26. Obviously, this would put serious limitations on Governments spending options. Apart from meeting its current expense, it will have to throw up some savings to finance the development expenditure. One of the recommendations of the

Commission is to limit the economic role of the Government, particularly it be excluded to undertake any such projects where markets exist and private sector is willing to bear the burden of investment. This would mean that Government's ADP activities will largely be restricted to social sectors.

27. Based on these changed the comparative position of various components of budget relative to the based is reported below:

Table-7
Comparison of Indirect Taxes

(Rs. In billion at current prices)

	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Base case	223	252	294	345	405	476
PRA	223	252	287	327	374	428

Table-8
Comparison of Total Reserves

(Rs. In billion at current prices)

	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Base case	412	482	572	666	777	906
PRA	412	482	564	648	744	428

Table-9
Comparison of Total Expenditures

(Rs. In billion at current prices)

	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Base case	621	709	831	978	1136	1320
PRA	621	709	521	591	670	760

Table-10
Comparison of Overall Deficit

(Rs. In billion at current prices)

	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Base case	-209	-228	-259	-312	-359	-414
PRA	-209	-228	43	57	74	96

Credit Plan

28. There are no serious repercussions of the proposed measures on the Credit Plan as envisaged in the Base Case. There are

essentially two ways in which the credit expansion will be affected from the change. Changes in net-foreign assets and the bank-borrowing by the Government. However, the two will be working in the opposite direction. In terms of their relative impact, the decrease in monetary expansion on account of Government's reduced demand will be more than offsetting the increase resulting from reserves build up. Accordingly, the monetary expansion shows a much slower growth compared to the Base Case.

29. A comment on the likely impact on inflation is in order. It appears that the proposed changed would largely have no long term effect on inflation. The projection of the credit plan shown no major shifts in monetary policy. However, there will be some pressure on prices from the resulting pressure on foreign exchange. Since we have recommended market based adjustment to this problem, the problem would be short lived, as the market stabilises pressure on prices would also be eased.

Macro Economic Framework

30. The macro-economic framework of the Base Case is developed on the assumption of a marginal domestic savings rate (MRS) of 24.3 percent and incremental capital/output ratio (ICOR) of 2.8. This gives a growth rate of 4.83 percent. We have retained the assumption about the MRS and ICOR. After incorporating the effects on balance of payments and Government budget, the macro-economic framework under the new policy compares with that of Base Case as follows:

Table-11
Macro-Economic Framework
(5 Years totals)

(Rs. In billion in current prices)

	Base Case	PRA
GDP(fc)	13682	13608
Indirect taxes (net)	1736	1633
GDP (mp)	15418	15241
Net Factor Income	-27	334
GNP (mp)	15391	15575
Net Foreign Resources	689	238
Total Resources	16083	15813

Consumption	13010	12876
Investment	3071	2937
Fixed	2835	1756
Public	1843	946
Private	992	235
Changes in Stock	236	235

Compared to a growth rate of 6.76% achievable under the Base Case, a slightly lower growth rate of 6.51% is achievable under the new policy regime, which is basically resulting from an decrease in domestic absorption capacity due to a reduction in imports. There is, therefore, no threat of a drastic reduction in the standard of living on account of the new policy initiative as the economy would suffer a nominal reduction of 0.25 percentage points in its growth.

32. A complete set of projections across the Base Case and PRA are given in the Appendix.

33. The policy measures recommended are quite feasible and will considerable smoothen the adjustment path of the economy. A slight reduction in the growth rate is witnessed, which could be eliminated by worsening the current account. However, the entire policy framework of the Base Case, along with the conservative projection of balance of payments, is retained. This is the bench mark impact of PRA without any policy support and no knowledge about the settlement of the existing debts as well as future capital. The economy cannot do worse than this. The policy changes would be and large improve economic performance over this bench mark impact.

34. These policy measures also dispel fear of inflationary pressures noted earlier. First, there is a considerable relief on monetary expansion because of a much smaller amount of bank borrowing under the new regime. Second, the new taxation measures could help to curb the demand, which have not been imposed at present. Finally, the reserves position is at a manageable level. Accordingly, there is no possibility of inflation getting out of hand in the country.”

Due notice of the above should be taken and preventive measures and other necessary precautions cannot be over-emphasised.

The question “how to deal with the current debts, the economic effects of borrowing and alternatives to such borrowing?” has been answered by the Islamic Development Bank of Pakistan in its recent response submitted to this Court as under:-

“Switching to the Islamic economic system does not mean giving up the settlement of outstanding debts contracted under a conventional system. A such debts have had risen from past contracts and obligations, and as Muslims should honor the conditions and contracts they had accepted, the principal and interest amounts of such debts should be settled, regardless of whether they were contracted with domestic or foreign parties. Should a country find it difficult to secure the liquidity required to settle all its outstanding debts, it could resort to one of the following solutions:

A. PURCHASE AND SWAP OF FOREIGN PUBLIC DEBT

It is a well known fact that the outstanding debts of developing countries, which are facing economic difficulties, are offered in markets at prices less than their nominal value; the amount of discount given varies with the economic conditions of each indebted country. It is known also that it is possible to negotiate the cash purchase of such debts or swap them with equity and get, at the same time, more discounts on the price of those debts.

Government is developing countries tend to have a large public sector, which could be privatized in the course of a comprehensive structural adjustment program. A part of the proceeds obtained from selling some of the public enterprises could be utilized in purchasing foreign debts at a discount, or swapped with equity in the newly privatized enterprises.

B. PURCHASE AND SWAP OF DOMESTIC PUBLIC DEBT

It might be preferable to begin with the process of swapping domestic public debt with equity participation in public enterprises undergoing privatization, or utilize part of the proceeds of such privatization in its settlement.....

Countries would be well steering away from borrowing as much as possible and is using, instead, the Islamic modes of financing.

III ALTERNATIVES TO FOREIGN BORROWING

What can an Islamic country do to benefit from foreign financial resources? The key to the answer lies in the innovative utilization of financial markets to attract foreign capital. Dialogue with foreign financing institutions may get them to appreciate the advantages of using the Islamic modes of finance, while making foreign financing more efficient and effective in economic development. Such dialogue to be more effective if other countries are to participate in it.

In this context, the following methods may be considered for adoption:

- A. Issue of Islamic Financial Instruments in Foreign Currencies.
- B. Design Special Funds to Cater for the Needs of Specific Projects and Sectors such as:
 1. An infrastructure fund for use in financing road, transport projects, building of airports and seaports, power stations... etc.;
 2. A leasing fund;
 3. A trade financing fund;
 4. An agricultural investment fund;
 5. An industrial investment fund
 6. A housing investment financing fund, and
 7. A fund for financing of a specific project.
- C. Profit sharing.

This could be an effective means to attract venture capital as well as to finance working capital.

Profit sharing certificates can be issued by enterprises as well as banking and financial institutions in foreign and domestic currencies to attract resources.

- D. Interest free loans like the ones provided by the Islamic Development Bank for which it charges the actual service charges.

IV WHEN IS IT PERMISSIBLE TO BORROW?

Should an Islamic country exhaust all the alternatives to foreign borrowing without succeeding in satisfying its needs, could it resort to interest based borrowing?

The answer to this question is based on the general Islamic juridical rule stating that “Necessity renders legitimate that which is originally illegitimate”. *The principles of necessity* it left for the discretion of Sharia’h scholars in each country to decide after full and accurate understanding of the country’s real conditions. From the viewpoint of the Bank, interest-based foreign borrowing is only for cases of compelling need, which amounts to ‘necessity’ for development purposes, or to cover necessary government expenditures.

Feasibility studies of the projects to be financed by way of foreign borrowing should be undertaken, scrupulously reviewed and evaluated. Borrowing should be made to the extent of such necessity only and accompanied by a plan and schedule for repayment from the returns of the project to be financed, or from specifically earmarked government revenues.”

At this stage the views of some of the economists expressed in the presentations made before the Court may be noted.

Dr.Waqar Masood Khan, Vice President, International Islamic University posed the questions: Should these obligations continue to remain?; whether they will be allowed to mature?; and whether they will be settled either through conversion or retirement?; In case such a possibility exists, whether the conversion would be acceptable to debt-holders and, in the case of retirement, where would the resources come from. According to him very little revenues are available to finance interest payments which are largely financed from additional borrowings. Resultantly the extension of prohibition to

Government finances could only be possible when, besides discontinuing future interest-based transactions, the existing obligations are either retired or converted to a Shariah compliant form. The proposal to allow these obligations to mature is thus not feasible. This would entail continued borrowings, and such borrowings could only be possible on interest basis which would mean that effectively the prohibition would not be applicable to Government finances. It is for this reason that the elimination of riba from Government finances is most problematic and would require extraordinary efforts. He has further noted that in the Report of Prime Minister's Committee on Self Reliance (April 1991) the experts proposal to the effect that these obligations, at an appropriate date, may be declared as due and payable and ways be devised to either retire them or convert them in other forms which would be Shariah compliant. This scholar answering the question whether it will be practical to imagine that a settlement can be made of these obligations observed that the settlement would be a formidable problem, but not something that cannot be imagined. It is added that the monopoly over fiat money gives people confidence that it will not renege on its promise to repay the principal with interest. So the Government is neither constrained to build a portfolio of profitable assets to ensure servicing of ensuing obligations nor does it care to distinguish between borrowed resources and revenues it receives from

taxes and non-tax sources. Moreover, there are assets that the Government has built over a long period of time, other than those against which specific loan obligations are clearly identifiable. He has identified the possibilities to accomplish the goal as under:-

SBP Obligations:

These obligations are basically book-keeping entries as the SPB is essentially a Government owned body. There is no need for any adjustment on this account. Borrowings from SBP, which are notional, would continue to remain available to the Government in future as well with the only difference that no interest cost will be attached to such borrowing.

Inter-Governmental Debt:

These are the transactions between the Federal Government and the Provincial Governments primarily and are not regulated on market and economic principles and these being internal transactions of the State are merely book keeping transactions. In these cases, for future transactions, a question of efficiency of use of scarce resources will be raised, which the interest rate is supposed to regulate. Again, Islamic instruments of finance can be found that can regulate the use of resources in the desired form, otherwise the only option is to adopt a

system of rationing the parameters of which will largely be determined by political and social considerations.

Banks and Financial Institutions Obligations:

These obligations are largely the Treasury Bills and Federal Investment Bonds of the Federal Government held by these institutions. As these institutions have to make these investments under Prudential Regulations, the adjustment of these obligations was proposed to be made by a number of ways such as, firstly, through privatisation of public sector assets; secondly, through conversion into a non-earning paper of the Government redeemable over a period of time (say five years), but which can be used for the purpose of reserve requirements and other statutory requirements such as liquidity ratio and credit-deposit ratio; and thirdly, the State Bank may assume part of these liabilities and remunerate them on the basis of its own profit and loss position. Explaining the third proposal the scholar added that a Central Bank can play active role in market stabilization by taking positions in the capital and money markets with motivation of market stabilization as are opposed to profit earning. Its control over money supply makes it a unique player in terms of the influence it can exercise in the functioning of the market. Thus, the central bank will have an active investment-cum-regulatory role which would provide it enough leverage to influence the market. Its own securities, which would not be interest

based, and its investments in capital and money market would generate significant returns which it can share with its security holders.

Obligations of General Public:

Dr. Waqar Masood in his submissions urged that in terms of its risk bearing capacity, the investments made by the individuals and organizations in various savings schemes of the Government constitute a sensitive group and as such needs special care in devising a plan to adjust the obligations of this group to a Shariah compliant form. The most desirable form in which the adjustment can be accomplished is to replace these liabilities by the equity of Government in its economic projects, provided appropriate resources are available. The retirement of these liabilities generating necessary resources by selling Government assets was commented upon as under:-

“Leaving aside, for a moment, the adequacy of Government’s assets, suppose these assets exist. Would it be desirable to sell them and use the proceeds to retire these obligations, or trade these obligations against the value of Government’s equity in such assets? Ideally a combination of the two will be required, but largely it should be the second form that should be used. The reason for this is the fact that the economic assets of the Government, having the capacity to meet such huge obligations, are of a strategic nature. The sums involved in their outright sale may not be easily forthcoming from the local market. Inevitably, one will have to search for foreign investors to bring the required resources. However, considering the sensitive nature of such assets, the nation may not want to see them go in the hands of the foreign investors. Accordingly, the option of outright sale may not even be feasible. This leaves us with the trading

option, i.e. to buy the obligations against the transfer of Government ownership of such assets.”

So, best form to accomplish this conversion is to form a grand mutual fund of all Government equities in its economic projects, and after proper valuation the certificates of such a fund may be given in lieu of the obligations. The two questions which are fundamental to the success of this scheme i.e. (i) Does the Government has adequate assets to be transferred to such a mutual fund so that it may meet the obligations? And (ii) How the fund would be managed?, were answered in paragraphs 131 and 132 of the written submissions as under:-

“131. Regarding the adequacy of Government resources, no published data is available to satisfactorily determine this question. However, it is possible to identify the nature of these assets and reflect on their commercial nature. At present, by and large, all infrastructure projects are owned by the Government Projects belonging to Power, Water, Highways, Telecommunications, ports and shipping, aviation, dams, oil and gas sectors are in the ownership of the Government. In terms of specific commercial entities, Pakistan Telephone Corporation, WAPDA, KESC, OGDC, KPT, PNSC, PIA etc. are owned by the Government. Besides infrastructure, a number of banks and financial institutions are still operating in the public sector. In mid-'97, according to a news item, while briefing the Prime Minister on the potential of privatization, a figure of \$30 billion was indicated as the value of assets that would be up for privatization. However, it is the Government alone that can undertake a reliable exercise on this account and determine the adequacy of this scheme. Many of these corporations may not be profitable bodies at present, but their potential be become as such is doubtless. It would therefore be fair to assume that the overall fund would indeed generate a reasonable return to the certificate holders.

132. Regarding the management of the proposed fund, it has to be professional and independent of Government influences. Indeed,

this would be required to ensure that the benefits typically associated with privatization will be coming by transfer of ownership to the Mutual Fund. This would only be possible if the fund is managed by those who could also monitor the performance of management of the underlying units. For an interim period, the managers of the Fund may be made answerable to a Parliamentary Committee, which will judge the performance of the managers.”

Foreign Transactions:

Dr. Waqar Masood has noted that the long term debt is largely product related and hence in principle specific assets were created against them and even some assets were created in case of short term debts though ready identification of such assets may not be possible. He adds that wherever assets are available, a conversion of foreign liability into a Shariah compliant form would be possible, except perhaps the response of the foreigners may pose some difficulty. Where assets cannot be identified, the methods discussed in the context of settlement of Government obligations would have to be resorted to by offering mutual fund certificates or alternatively a portion of the fund may also be offered in the foreign markets, and the proceeds may be used to retire such obligations. He further commented that there is no reason to believe that response of the foreigners would be adverse, so long as they are made to understand that their investments are protected and future transactions would continue to be allowed based on commercially viable principles of financing that are consistent with the requirements of Shariah, and that it is a matter of education of the foreigners that by

eliminating interest the country is not restricting the scope of business transactions rather it is only eliminating a method of such transactions. Throughout the world, Islamic banks and financial institutions are operating on profitable basis, a large number of well known financial institutions have opened special counters and departments that deal exclusively on the basis of Islamic principles of finance so the country would not be embarking on a venture which is unknown or untested, and that so long as the foreigners believe that the move is not motivated by a desire to evade obligations to them, there is no reason to suspect that their reaction would be hostile. However, it will still be prudent to allow a longer period, to say a period of two years, for acquiring the foreign transactions to be brought in conformity with new system.

Dr.Shahid Hasan Siddiqui, Chairman, Research Institute of Islamic Banking and Finance in his verbal submissions as well as in his written submissions has also dealt with the subject of borrowing and debts. The Magnitude of the Problem was manifested by Dr.Shahid Hasan Siddiqui by putting across the comparative position of 1988 i.e. after 41 years of independence and ten years later in 1998 by citing the following table:-

S.No.	Item	1988	1998	Rise in ten years
i.	Public debt	520	2518	1998

ii.	Stuck-up Advances	39	250	211
iii.	Qarz-utaro Mulk Sanwaro Scheme	-	17	17
iv.	FCAs utilized (\$10 b converted at prevailing rate)	-	460	460
v.	Privatization proceeds	-	58	58
Total		559	3303	2744

These public debts are required to be repaid and losses in respect of stuck-up advances recouped from the taxes of the common man and by paying lower rates of returns to the depositors of Banks/DFIs respectively. According to him the causes of this evil are large scale corruption, persistence with interest based economy, Government's exorbitant/wasteful expenditures, poor revenue collections and foreign exchange out-flow exceeding its in-flow. The resultant budget deficit and adverse balance of payment position have been forcing successive governments to impose heavy taxes and resort to more and more domestic and external borrowing and stage has reached that the public debts, instead of meeting the budget deficits, have become biggest source of creation of these deficits. Due to this, the negative effect of the IMF conditionalities are also making the task of movement towards Islamic system of banking more difficult. He cited CBR's reports to show that the revenue declined from 12.4 per cent of GDP in 1995-96 to 11.7 per cent in 1996-97 and further to 10.6 per cent in 1997-98, though

in 1998-99 the position has improved. According to him the solution of the problem of budget deficit can be solved as under:-

		<u>“Rupees in billion</u>
S.No.	Particulars	Position on 30-6-99
i.	Desired tax revenues-18% of GDP	520
ii.	Budget projections Rs. 354 b, subsequently reduced to Rs. 318 b, which may not be achieved	<u>310</u>
iii.	Room for additional recovery	210*
iv.	Projected deficit in the budget	<u>134</u>
v.	Possible Surplus budget	<u>76</u>

In the humble opinion of this writer it was also within the government's reach to obtain additional resources/savings as under, even in the financial year ending June 30, 1999:-

		<u>Rupees in billion</u>
S.No.	Item	Amount
i.	Surplus budget as aforesaid	76
ii.	Savings due to prudent utilization of Development Expenditure (according to official sources about 60% of expenditure is misappropriate/wasted)	55
iii.	Restoring the profitability of public sector enterprises at 1995-96 level (Profitability declined from Rs.42.2. b, in 1995-96 to Rs. 1.7 b, in 1997-98)	<u>90</u>
Total Savings/additional resources		<u>261</u>

It will be kindly seen that the projected budget deficit of Rs.134 billion for the financial year ending June 30, 1999 could have been converted into a surplus budget and additional resources of Rs.261 billion generated. In any case, there would also be substantial reduction in debt servicing liability due to re-scheduling of Pakistan's external debts, the full impact of which would be fully known after a decision is made by the London Club.

There is now an urgent need of allocating, from the surplus resources so created at least Rs.20 billion per year for providing basic health care, primary education, safe drinking water and sanitation facilities. In addition, Rs.40 billion per year should also be diverted for providing subsidy on items like Atta, rice, ghee, and petrol etc. These steps are essentials for achieving the “Maqasid-e-Shariah”.

It may, however, be submitted that all this will necessarily requires a total change in attitudes and difficult and tough decisions will have to be taken.”

It is unfortunate that we are not in a position to comment on this proposed solution as neither the representatives of the State Bank of Pakistan nor of the Finance Division or the Law Division thought it fit to attend the hearings even to note these contentions or to submit written submissions in respect thereof. The only written submissions made by Mr.Muhammad Ashraf Janjua contained the State Bank’s own point of view which have been duly noticed in the paras above. These comments do not take notice of the submissions of any of the economist, scholar or Islamic Development Bank.

Domestic Debt:

Dr.Shahid Hasan Siddiqui adds that in view of the submissions made by him as noted above there should be no need to take any domestic loan except for securing finances for essential projects for which second line techniques should be resorted to in addition to Musharaka financing. The so-called prestige projects with questionable economic justification must be abandoned forthwith or “Qard-e-Hasna”

as a source of security funds should be used in case of need by the State but there seems to be little scope of this source as after the launching of Prime Minister's Debt Retirement Programme, the government shattered the confidence of the nation by securing such loans as were never taken in the history of Pakistan.

External Debt:

He (Mr. Shahid Hassan Siddiqui) argued that the following statistics, facts and suggestions provide a ground for action packed approach:-

- (i) A former US Consul General to Pakistan, in 1997 twice said that a sum of \$100 billion has been looted from Pakistan and transferred abroad. He expressed the view that if this wealth could be retrieved, Pakistan could re-pay the entire external debt and there would be no need for securing loans and credits in future.
- (ii) Mr. Malik Mairaj Khalid as Caretaker Prime Minister said that he has been informed by international financing agencies that a significant portion of the external loans accrued by Pakistan have found their way in the Western banking system outside Pakistan.
- (iii) There are reliable reports to suggest that in total violation of State Bank regulations, resident Pakistanis are maintaining deposits of

about \$40 billion in banks abroad. These resident Pakistanis include politicians, policy makers, powerful feudals, big industrialists and traders, defaulters of Banks/DFIs retired and serving bureaucrats and the like.

The actions he proposes are –

- (i) An Ordinance should be promulgated making it obligatory for all resident Pakistanis to transfer their accounts from abroad to Pakistan within 45 days. If a person gives information in proof of an account of a resident Pakistani still being maintained abroad after expiry of this period of 45 days, he should be offered a percentage of deposits as a reward.
- (ii) All members of Parliament are required to submit declarations to the Chairman Senate or the respective Speakers after 45 days declaring that they and their dependent family members whether living in or outside Pakistan are not maintaining accounts abroad. Similar declarations should be required to be submitted by all State functionaries including economic managers to the competent authority.

- (iii) All borrowers (existing and prospective) having advances of Rs.0.5 million and above should also be required to submit such declarations to the Banks/DFIs.

According to Dr.Shahid Hassan Siddiqui, if only 25% of the deposits held by resident Pakistanis in violation of the existing laws are brought back to the country, Pakistan could get rid of the international debts and also can adopt the policy of not taking external loans and credit except project related financing. Non-resident Pakistanis are reported to be having deposits over \$35 billion outside Pakistan. The restoring of the credibility of the government and improvement in the investment climate of the country is a must for the transfer of a substantial portion of these funds to Pakistan. He referred to the conversation of the two billionaires held in the presence of Mr.Khalid M. Ishaque, Advocate who had during his submissions before the Court disclosed the said conversation. He stated that two Pakistanis are saying to each other that both of them, if put together their resources, can meet the external debts of Pakistan. Dr.Shahid Hassan Siddiqui stated that Mr.Khalid M. Ishaque should be asked to divulge in confidence particulars of these two Pakistanis and the Government should make a real effort to persuade them to provide necessary funds so that the nation could discharge its debt burden and could have the letters of indebtedness broken for securing their economic independence and the

entire nation should not only pay homage to these persons for their nation saving act, and giving them and to their generations a prestigious place, and also to undertake to return to them and to their coming generations the necessary amount in instalments. He suggested that a constitutional ban should be imposed on the Government restraining it from securing external loans for balance of payment support or fixing parameters and limits of borrowing and that too with the permission of the National Assembly/Parliament. He was of the view that all valid contracts are to be honoured minus interest which in many cases will, however, have to be paid except in the cases of embezzlement of funds and unauthorized loans, and that we may have to continue to pay interest unless, of course, alternate modes of financing are mutually agreed to in respect of the existing debts. Same was the view of Dr. Muhammad Umar Chapra as he has also pleaded honouring commitments with the foreign lenders.

We have summarized above the position taken by the representative of the State Bank, the apprehensions expressed, the difficulties counted, the explanations offered and the proposals mooted by the scholars, economists and bankers. Formulating of fiscal and monetary policies and the procedure to be adopted to implement those policies so as to effectively achieve the objectives and goals is the task of the State Bank of Pakistan and the Government. This Court is neither

possessed of the necessary expertise nor is required under the Constitution to frame such policies or to provide guidelines. We, however, cannot refrain from observing that wasteful expenditure ostentatious living, spend thrift policies must be shunned by all and sundry, from top to bottom. It is common knowledge that the nation has to stand on its own feet and has to depend on its own resources. The wasteful expenditures must be stopped. Everyone of us from top to bottom must live according to standard that we can afford on the basis of our own national resources. All expenditure in the name of protocol duties must come to an end. Everyone, be he constitutional or public office holder, or a civil servant or a corporate executive must be made to adopt a standard of living which the nation can afford on the basis of its own resources and income. The leaders on the top and the high-ups have to create examples and we have no doubt in our mind that every member of the society will follow suit without any rancour or hesitation. It is the only method by which we can stop borrowing for even meeting our day to day expenses.

If these measures are adopted then those sons of the soil who have kept their wealth in the foreign banks will also feel motivated to join the nation in offering their wealth to sustain the country by having their debt burden released by making available their wealth in liquidation of the debt burden, and will thus relieve the nation of the

economic slavery of international agencies such as IMF and World Bank and would thereby secure and preserve economic independence of the country. We have to recall that our ancestors when called by the Holy Prophet (Peace Be Upon Him) laid their entire wealth at the feet of the Holy Prophet (Peace Be Upon Him) saying that for them the Allah Almighty and His Prophet are sufficient sustainers and reckoners. The sons of soil and the believers will still be prepared to offer the entire belongings provided they are assured that their sacrifice will not go waste and will not be scalded away by others through extravagance or digression. The formation of these policies as indicated in other part of this judgment is to be secured by the Parliament by framing necessary laws securing proper monitoring of the public accounts and the Consolidated Funds by enacting an Act in compliance with the mandate of the Constitution. This law should also ensure the transparency in addition to securing national fiscal and monetary interest in line with the objectives of Shariah by following principle of Ijtehad. The Parliament in the present days circumstances, as opined by Allama Muhammad Iqbal, the thinker and the great philosopher of the nation, is the appropriate forum for conducting Ijtehad in all such matters. Allama Muhammad Iqbal in his book “The Reconstruction of Religious Thought in Islam” observed as under:-

“The growth of republican spirit and the gradual formation of legislative assemblies in Muslim lands constitute a great step in

advance. The transfer of the power of Ijtehad from individual representatives of schools to a Muslim legislative assembly which, in view of the growth of opposing sects, is the only possible form Ijma can take in modern times, will secure contributions to legal discussion from laymen who happen to possess a keen insight into affairs. In this way alone, can we stir into activity the dormant spirit of life in our legal system, and give it an evolutionary outlook.”

We have in this judgment endeavoured to understand the rationale behind Allah’s stern commandment about the prohibition of Riba and made an earnest effort to lay down foundation of the Islamic Economic System by eliminating Riba from all facets of our life. If this logic does not satisfy anyone, it should be borne in mind that “Allah alone has the convincing argument” (al-Qur’an, 6:14) and He alone knows the total rationale.

Before parting with the judgment we deem it our duty to acknowledge the guidance provided and the contribution made by our brother Dr.Mahmmod Ahmed Ghazi till the period that he remained associated as member of the Bench.

We would like to gratefully acknowledge the valauble assistance rendered by the economists, bankers and religious scholars who pursuant to our request appeared before us and shared with us their knowledge and experience. We have immensely benefitted from their assistance as is apparent from reading of this judgment. We are also indebted to the hundereds of Pakistanis who by addressing us letters containing their views and by sending their own written works and

books and material written by others made valuable contribution in understanding the different questions involved in the case.

Judge

Judge

WAJIHUDDIN AHMED, J.- I have had the privilege of going through the scholarly and voluminous judgement, proposed to be delivered by Mr. Justice Khalil-ur-Rehman Khan, Chairman of the Shariat Appellate Bench as also the erudite, largely, concurring judgement of my learned brother, Mr. Justice M. Taqi Usmani. If for no other purpose except to provide a commentary on the herculean efforts, which have gone into the rendering of these judgements, I would, in all humbleness, venture to add a few lines. This may also be taken to be the reason why some aspects have come to be dealt with abruptly and without a prelude, taking it for granted that the subject is neither novel nor new, having already been treated in the said judgements. At the same time only crucial aspects have been ventured to be touched. The rest, by and large, I respectfully endorse. In the rare instances where, with all respect, I have come to entertain any reservations or constraints, such would be discernable either by necessary implication or by express articulation.

2. *Biaj*¹, *neshec*², *sood*³, interest, usury, or *riba*, whatever name be ascribed to an ‘increase’, ‘addition’, ‘excess’ or “gain”, accruing on the principal amount loaned, the notion is practically as old as civilization itself. The essence of the transaction has been and remains a fixed or predetermined, and thus predictable, return for the use of money lent or advanced in a purely time related arrangement. While evidence of such transactions is found reflected, and perhaps not approved except with reservations, in the code of Hammurabi (1792 – 1750 BC) of the

1 Sanskrit/Hindi equivalent of interest or usury

2 Hebrew word for interest or usury.

3 Persian term denoting interest or usury.

Babylonian era, the practice was either controlled or consistently

disapproved in the religious precepts and teachings of Hinduism (code of Manu), Judaism and Christianity, on the one hand and the philosophic dissertations of the likes of Plato and Aristotle, on the other.

Aristotle even regarded money as “barren”. The recurrent criticism of the concept was largely rooted in the purported exploitation and consequent misery of one man at the hands of another by merely passing on the use of money in a time related frame-work with firm or settled and even guaranteed returns thereon without the lender himself doing anything, generating *zulm* (exploitation or injustice), in a background where other economic agents (including capital differently deployed) were to exert efforts/expose themselves to risks for seeking gains. Man is weak. To justify the ever multiplying returns on money lent or for forbearance of a debt, the otherwise prohibitive dogmas of Judaism and Christianity, pertaining to interest related transactions, over centuries of political, social and economic interaction, came to be softened. Meanwhile, however, Islam, appearing on the scene, had demonstrably re-modeled the concept in such a way (terming it as *riba*) that not merely fixed or predetermined time oriented returns on principal sums of money lent were endorsed in their prohibition but the rule was perfected (re-iterated according to some) also to include other items, at

the minimum, carrying monetary or utilitarian implications. To be specific, the preclusion was extended, as well, to settled or predetermined time related returns on the bulk of exchanges. History testifies the prohibition to have been so well delineated and clearly understood that trade or commercial transactions amongst Muslims, for the best part of the ensuing fourteen hundred years of the Islamic era, have essentially remained free of all taints of interest or *riba*. Wherever deviations took place, and those occurred largely at the level of Muslim rulers, the transgressors had to pay heavily not only in economic but also political terms. In point is the example of the Ottomon Caliphate, which, in a large measure, owes its disintegration to international debts. No small tribute, however, to the perfection of a *riba* or interest free economy, continued and generated by Islam, is furnished when the thousands upon thousands of papers, lately compiled and coming to be known as the *Janaza* documents, dating back to medieval Islamic times, do not contain any mentionable *riba* or interest bearing transaction.

Having attempted a summary of the historical position, which has emerged upon hearing of these appeals, for the better part of some five months, further analysis of the concept of *riba* at the etymological and epistemological levels follows:

3. The judgment of the Federal Shariat Court (FSC), in appeal before us, has drawn on a good number of lexical sources of the Arabic language, purporting to define and demonstrate the concept of *riba*. Copious references have been made

by Tanzil-ur-Rahman, CJ, who has authored the judgment of the Court, *inter alia*, to Lanes's *Arabic-English Lexicon*, Imam Raghīb al-Isfēhānī's '*Mufradat ul-Quran*', Md Murtaza al-Zubaydi's '*Taj ul-Aroos Min Jawahar-ul Qamoos*', "*Arabic English Dictionary*", by Stien-gass, "*A dictionary of Islam*" from Thomas Patrick Hughes, Imam Tabrī's '*Tafseer-e-Tabrī*', Ibn al-Athīr's well known work '*Kitab al-Nihayah fi-Gharib al-Hadith wa'l-Athar*', Ibn 'Arabi's '*Ahkam al Quran*', Imam Fakhrud-Din Al-Razi's '*Tafsir al Kabir*' and '*Ahkam al-Qur'an*' of Al-Jassas. Of these the definition of *riba* in "*A dictionary of Islam*" by Thomas Patrick Hughes may, specifically, be noted here. The author, evidently, mindful of both the *riba al-nasi'ah* (*riba* in loans) and *riba al-fadl* (*riba* in trade) aspects of the prohibition, to a large extent, correctly treats *riba* to be:-

"A term in Muslim Law defined as *an excess according to a legal standard of measurement or weight, in one or two homogenous articles opposed to each other in a contract of exchange in which such excess is stipulated as an obligatory condition on one of the parties without any return*. 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 Mosaic Law, conditions of gain for the loan of money or goods were rigorously prohibited"

The quoted definition is also remarkably similar to the succinct description in Abd al Rahman al-Jaziri's famous compilation *al-Fiqh ala al-Madhahib al-Arba'ah*, which says:

"Riba is one of those unsound (*fasid*) transactions which have been severely prohibited (*nahyan mughallazan*). It literally means increase...

However, in fiqh terminology, *riba* means an increase in one of two homogeneous equivalents being exchanged without this increase being accompanied by a return. It is classified into two categories. First, *riba al-nasi'ah* ----
-----.

The second category is *riba al-fadl*.....”

Anyway, either definition draws, directly or indirectly, upon the *Qur'an* and *Sunnah*, the first of those, while speaking of *riba* and *bai* (sale), putting them in Juxtaposition with each other and the second unfolding the notion of *riba al-fadl*. Each is a happy blending of the thoughts attributed to great thinkers of the likes of al-sarakhsi who, terming *riba*, in its literal sense, as “*excess*” goes on to define it, in its technical (*Shari'ah*) sense as “*the stipulated excess without a counter value in bai*”, Imam Tabri, who construes *riba* as that *increase which the owner of a valuable property (Mal) receives from his debtor for giving him time to pay off his debt* and Ibne ‘Arabi for whom *riba* denotes every *increase in lieu of which there passes no consideration in the way of property (Mal)*. Be it mentioned here, albeit in passing, that *bai* (sale) in *fiqh* (Islamic Jurisprudence) is a word of wide connotations and includes virtually all exchanges, even loans. It is for this reason that upon the (explicit) prohibition of *riba* the non-believers maintained that *bai* was also like *riba* and the Almighty retorted, “*but Allah has permitted (profit on) bai and prohibited riba*”. More of this later.

4. Speaking strictly, no further augmentation of the FSC references appears to be necessary. However, to provide a self-contained exposition of the subject and elaborating upon the theme, much like other works, in the *Advanced Learner Arabic – English Dictionary* (pub. 1989, London) the word *riba*, as a noun, is stated to be the equivalent of “*excess*” “*addition*” or “*surplus*”, its verb denoting “*to increase, to multiply, to exceed, to exact more than was due, to*

practise usury". In "*Lisan-ul-Arab*" to Allama Ibne Manzur Al-Afriqi, *riba* signifies the "excess" or "surplus", which accrues on a loan or the (predictable) profit generated thereon. In his work entitled, *Tahzeeb*, Abu Mansur-Al Azhari similarly describes *riba* as the "excess" or the "surplus", which accrues on a loan or the (foreseeable) profit generated by a loanable fund.

5. Similar results follow when the word *riba* is examined, contextually, as found employed in the *Qur'an* itself. Such is the epistemological dimension, employed to discover and verify the purport and significance of the institution of *riba*. In the *Qur'an*, the word signifies "to rise", "at a height", (II:265;XXIII:50); "to increase", "to prosper", (II:276;XXX:39); "to swell", (XIII:17); "to nurture", "to raise", (XXVI:18; XVII:24); "to grow", (XII:5); and "augmentation" or "increase in power", (XVI:92;LXIX:10). The Federal Shariat Court records, and apparently correctly, that the term *riba*, in its various linguistic forms, occurs at about twenty places in the *Qur'an*.

6. In short, theoretically, *riba*, as a noun, signifies an excess or addition, but never a decrease or depletion, and with reference to a loan an excess payable or an increase chargeable over and above the principal amount or thing borrowed or lent. The quantum of the addition or premium, large or small, much as the purpose, productive or consumptive, as dilated upon in the exhaustive judgements of my brothers, remains contextually irrelevant. It is in this perspective that the *Qur'an* disallowed all accruals in the way *riba* and permitted, but not without reservations, only returns of the principals then due (*al-Baqarah* II: 278-281, hereinafter reproduced), prophet Mohammad (SAAWS), explicitly repeating the command in his celebrated sermon on the occasion of *Hajjat-ul-Wida* (also reproduced but somewhat later). The broader implication of *riba*, as inclusive also of exchanges

other than in money, again ordained in the *Qur'an* and *Sunnah*, as hinted above, is elsewhere more elaborately reflected.

7. The *Qur'anic* prohibition against *riba*, in the background of pre-existing restrictions applicable to *Ahl-e-Kitab* (people of the Scripture i.e. Jews and Christians), for “*there is no change in religion*”, (*Al-Qur'an*) which, evolutionary processes and man-made deviations apart, has remained the same since Adam, was gradual, first as pointers and then as the strictest of the commandments. Such, in chronological order, as reflected in the “*Blue-print of Islamic Financial System*”, based on the report of the International Institute of Islamic Economics (IIIE), placed on the Court record by Dr. Sayyid Tahir, Director General, IIIE, International Islamic University, Islamabad, are these:

Ist Revelation (5 Years Before *Hijrah*).

Caution was addressed to the believers to the effect that *riba* remained an anathema as hereto-before:

“That which ye lay out in usury in order that it may increase on (other) people’s wealth hath no increase with Allah: but that which ye give in charity, seeking Allah’s pleasure, hath increase manifold”. (al-Room XXX:39)

2nd Revelation (Early *Madni* Period around 2 A.H.)

Historically, in the beginning, in response to provocations of the Jews, *Allah* SWT recounted their major sins that invited His wrath upon them. However, as in most other cases, these *Ayaat* indirectly served the purpose of bringing the dos and don’t to the notice of Muslims.

“Because of the inequity (repression) of the Jews We forbade them food good; and wholesome which were

(before) made lawful unto them, in that they hindered many from Allah's way: ¹⁶⁰

And of their taking usury when they were forbidden it, and of their devouring men's substance wrongfully;- We have prepared for those of them who disbelieve a painful doom. ¹⁶¹

But those among them who are firm in knowledge and the believers (who) believe in that which is revealed unto thee, and that which was revealed before thee, especially the diligent in prayer and those who pay the poor-due, the believers in Allah and the Last Day: to them shall We surely give a great reward." ¹⁶²

(al-Nisaa IV : 160-162)

Pertinently, with the advent of Jesus ^(SAAWS) the Divine favours were restored thus:

"And He will teach him (Jesus) the Book and wisdom, and the Torah and the Gospel. ⁴⁸

"And will make him a messenger unto the children of Israel, (he, when descended, saying): Lo! I come unto you with a sign from your Lord. Lo! I fashion for you out of clay the likeness of a bird, and I breathe into it and it is a bird, by Allah's leave. I heal him who was born blind, and the leper, and I raise the dead, by Allah's leave. And I announce unto you what ye have eaten and what lies stored in your houses. Lo! herein verily is a portent for you, if ye did believe. ⁴⁹

"And (I come) confirming that which was before me of the Torah, and to make lawful some of that which was forbidden unto you. I come unto you with a sign from your Lord, so keep your duty to Allah and obey me." ⁵⁰

(Aal-e-Imran III:48-50)

3rd Revelation (Shawwal 3 AH, after the Ghazwah of Ohud).

Riba was prohibited, in express terms, for the Muslims on this occasion.

“O ye who believe! Devour not usury, doubling and quadrupling. Observe⁴⁵ your duty to Allah, that ye may prosper. ¹³⁰

And ward off (from yourselves) the Fire prepared for disbelievers. ¹³¹

And obey Allah and the Apostle, that ye may find mercy. ¹³²

And vie one with another for forgiveness from your Lord, and for a Paradise as wide as are the heavens and the earth, prepared for the righteous; ¹³³

Those who spend (in alms) alike in ease and in adversity, those who control their wrath and are forgiving toward mankind; Allah loveth the good;¹³⁴

And those who, when they do an evil thing or wrong their (own) selves, remember Allah and implore forgiveness for their sins-Who forgiveth sins save Allah only?-and will not knowingly repeat (the wrong) they did. ¹³⁵

The reward of such will be forgiveness from their Lord, and Gardens underneath which rivers flow, wherein they will abide for ever- a bountiful reward for those who act (righteously)!” ¹³⁶

(Aal-e-Imran III:130-136)

4th Revelation (Shortly after Aale Imran III:130-136).

¹ Literal translation of this part of the Ayah would be “Don’t feast on riba – doubled and quadrupled”. However, in the light of general linguistic style of the Qur’an, the message is “Stay away from riba”.

Adversaries of Islam called into question the preceding decree in Aal-e-Imran III:130 by drawing parallel between profit (in trading) and riba. Moreover, while application of the decree to fresh transactions was obvious, some of the companions of the prophet (SAAWS) were not clear about handling the then existing riba-based debts and the riba already appropriated. These issues came to be addressed in the following ayat:

“Those who swallow usury cannot rise up save as he ariseth whom the devil hath prostrated by (his) touch. That is because they say: Trade is just like usury; whereas Alah permitteth trading and forbiddeth usury. **He unto whom an admonition from his Lord cometh and (he) refraineth (in obedience thereto), he shall keep (the profits of) that which is past, and his affair (henceforth) is with Allah. ⁶As for him who returneth (to usury)-Such are rightfulewners of the Fire. They will abide therein.** ²⁷⁵

Allah hath blighted usury and made almsgiving fruitful. Allah loveth not the impious and guilty. ²⁷⁶

Lo! Those who believe and do good works and establish worship and pay the poor-due, their reward is with their Lord and there shall no fear come upon them neither shall they grieve.” ²⁷⁷

(**al-Baqarah II:275-277**)

5th Revelation (9 or 10 AH, before Hijjat-ul-Widaa’-The Fare well Pilgrimage⁷).

Two newly Muslim families, one from Makkah and the other from the tribe of Thaqeef, reportedly, quarreled over a ribawi debt contracted

⁶ That is, the matter of *riba* given or taken in the past should be treated as closed in this world.

before they embraced Islam. The creditors sought exception to the Ahkam in force at the time or, perhaps, immediate settlement of accounts. The matter came to be settled by Allah SWT as follows:

“O ye who believe! Observe your duty to Allah, and give up what remaineth (due to you) from usury, if ye are (in truth) believers. ²⁷⁸

And if ye do not, then be warned of war (against you) from Allah and His messenger. And if ye repent, then ye have your principal (without interest). Wrong not and ye shall not be wronged. ²⁷⁹

And if the debtor is in straitened circumstances, then (let there be) postponement to (the time of) ease; and that if ye remit it (the capital) as charity such would be better for you if ye did but know. ²⁸⁰

And guard yourselves against the Day when ye shall be brought back to Allah. Then shall every soul be paid in full that which it earned, and none shall be wronged.” ²⁸¹

(Al-Baqarah II: 278-281)

Compare here the following from the New Testament:

“If you love only the people who love you, why should you receive a blessing? Even sinners love those who love them” ³²

“And if you do good only to those who do good to you, why should you receive a blessing? Even sinners do that!” ³³

“And if you lend only to those from whom you hope to get it back, why should you receive a blessing? Even sinners lend to sinners, to get back the same amount! ³⁴

“No! Love your enemies and do good to them; lend and expect nothing back. You will then have a great

¹ Opinions have varied about the exact time of this revelation. Some put it as early as Muharram, 7 A.H. See main judgment.

reward, and you will be sons of the Most High God.
 For he is good to the ungrateful and the wicked.”³⁵
 “Be merciful just as your Father is merciful”.³⁶

(Luke 6: 32-36)

8. It is significant that the *Qur'an* has studiously refrained from defining the term *riba* since to define is to limit and restrict. The *Qur'an*, being the last Book descended upon the ultimate amongst the prophets, was to enure for the benefit of the creation till the end of time and thus had to cater to the ever evolving new forms and dimensions of *riba*. Indeed, as to the all enveloping paradigms of *riba* it was so prophesied more than fourteen centuries ago:

Narration is from Abu Hurayrah: The prophet (SAAWS) said,

“There will certainly come a time for mankind when every one will take riba and if he does not do so, its dust will reach him”. (Abu Daud)

Having said as much, the *Qur'anic* verses on *riba* are still singularly explicit as to the deducible meanings, implications and ingredients of *riba*, on the one hand and the level or extent of the prohibition thereof, on the other. In the result, as seen, a clear distinction is crafted between the principals lent and the accruals thereon, the first alone being recoverable, recovery being tampered with grace and conversion into *Sadaqah*, or charity, still better: (*Al-Baqarah II*: 275, 279 and 280) and the second prohibited in the strongest of terms, the equal of which is no where to be found even in the *Qur'an*:

*“If ye do not, take notice of war from Allah and His Apostle:
 but if ye turn back, ye shall have your capitals: deal not
 unjustly and ye shall not be dealt with unjustly”*

(*al Baqarah II*: 279)

Yet, productivity of capital is recognised though only when it is employed in trade, commerce, industry or any other fruitful activity, with varying and uncertain (including negative) returns to the investor. Still, mere variability or unpredictability of gains or even risks in an undertaking would not suffice; the pursuit must be lawful, for one of the most pronounced of uncertainties (*gharar*), is in gambling (*Qimar*), which itself is prohibited. The essence of the *nasus*, against *riba*, lies in a denunciation of hoarding and drawing gains from idle capital with reference to its holder for the time being, because, notionally, all things in Islam belong to *Allah* and man is only entrusted with the transitory user thereof, an incident, which led Muslims, over the centuries, to dedicate their tangible assets to *Allah* by way of *Waqf* (Trust), reserving, at the maximum, a life interest, in whole or in part, for personal use or use of their progenies. Indeed the prohibition is a manifestation, *inter alia*, of two other Quranic mandates namely, a recommendation to expend, towards good and charitable causes, all the excess that there be in the way of wealth, after having catered to one's (short or long term) requirements:

*“They ask thee (O Muhammad) how much they are to spend
(in the way of Allah); say:*

“what is beyond your needs” (II:219)

and an emphasis on creative activity culminating in the declaration:

“For man there is only that to achieve which he labours”

(XXXIX:53)

9. The distinction between *riba* and productive employment of assets being illuminated thus, that very circumstance occasioned the singularly terse but meaningful *Quranic* dictum:

“Such (the affliction already noted) would befall them because of their saying that (profit on) bai’ or trading is the same as riba, but Allah has permitted bai’ and prohibited riba.” (Al-Baqrah II: 275)

10. The commonly known form of *riba*, at the advent of Islam, was *riba al-nasi’ah* (*riba* in lieu of delay/period = increase in loan) or, as some would call it, *riba al-Jahiliyyah*, (*riba* of the age of ignorance), which signified an excess or gain obtained in a time related money advance or against delay in payment thereof. While this was, essentially, related to a myraid of monetary transactions the *Qur’an*, as elaborated upon by the prophet of Islam, expanded the concept to include stipulated increases in exchanges of articles, susceptible to measure, weight and, in one view, even storability or, at the minimum, things of value or of fundamental utility, conveniently classified as *riba al-fadl* (*riba* in trade), exemplified in the under-noted traditions, originating, *inter alia*, from Abu Saeed Khudri ^(RAA).

“It is on the authority of Abu Saeed Dkudri ^(RAA) that the Prophet ^(SAAWS) said: “Don’t trade gold for gold or silver for silver except on the basis of waznamm-bi-wazn (weight), mithlamm-bi-mithl (like for like) and sawa’amm-bi-sawaa’ (equal for equal)”

(*Muslim*, 2966)

It is on the authority of Abu Saeed Khudri (RAA) who reported that the Prophet (SAAWS) said: "While exchanging gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt, do so on mithlamm-bi-mithl (like for like) and yadamm-bi-yad (hand to hand or on spot) basis. Thus whosoever gave more or demanded more, verily he dealt in riba. Both the taker and the giver are equal-i.e., equally guilty-in this regard." (*Muslim*, 2971)

Obadah b. Samett (RAA) directly reports the Prophet (SAAWS) as saying: "Buy and sell gold for gold, silver for silver, dates for dates, wheat for wheat, salt for salt and barley for barley on the mithlamm-bi-mithl (like for like) basis. Whosoever gave more or took more, verily he made a riba deal. However, trade gold for silver as you wish subject to the condition that the exchange be yadamm-bi-yadd (on spot). Trade wheat for dates or barley for dates also likewise." (*Tirmizee*, 1161)

Question immediately arises as to whether the admonition, administered in the *ahadith*, was confined only to the six articles described or such articles were a genus, from which a principle emerged. Most jurists agreed that the six items, mentioned, were only illustrative but some said the articles referred to qualities of weighablity (موزوں) or measurablity (مکیل) and all that satisfied the requirements was and is covered but others identified monetary value (ثمنیت) or storeability/edibility (طعم) as the criteria to determine the applicability of the

rule. The leading exponent of the first of these constructions is *Imam* Abu Hanifa ^(RAA) whereas the second is attributed to those subscribing to the thinkings of *Imams* Malik ^(RAA) and Shafei ^(RAA), the former apparently broadening the category to which *riba al-fadl* would extend while the latter, not unreasonably, constricting it. M. Umer Chapra in his treatise, “Towards a *Just Monetary System*” is explicit as well as incisive when he disserts upon the parameters of *riba al-fadl* thus:

“On the basis of the characteristic of gold and silver as commodity money, it has been generally concluded that all commodities used as money enter the sweep of riba al-fadl. With respect to the other four items, there is a difference of opinion. One opinion argues that since all four commodities are sold by weight or measure (Hanafi, Hanbali, Imami and Zaydi) therefore, all items which are so saleable would be subject to riba al-fadl. A second opinion is that since all four items are edible, riba al-fadl would be involved in all commodities which have the characteristic of edibility (Shafi’i and Hanbali). A third opinion is that since these items are necessary for subsistence and are storeable (without being spoilt), therefore all items that sustain life and are storeable are subject to riba al-fadl (Maliki). The Zahiri school, however, confines riba al-fadl to only the six commodities specifically mentioned by the Prophet. It is however, the only school, and minority, to be so restrictive. A fourth, but perhaps a more plausible, explanation is that all the six commodities were used as money in and around Madinah, particularly among the bedouins, and therefore, riba al-fadl would be involved in the exchange of any goods against cash or any commodity which is used as money.”

Without being unduly partial to any of the foregoing interpretations, we have, for this discourse, used those versions almost interchangeably. Relative to the

diversity itself, however, one view projected before us is that the eminent jurists were really identifying the multifarious dimensions of the same thing, much as the on-lookers of a structure, from different angles, may be prone to do. Indeed, as above indicated, an excellent amalgam of such varying expositions is to be found in the definition of the generic term *riba* itself, rendered by Abdur Rehman al Jaziri, who declares:

“...in fiqh terminology, riba means an increase in one of two homogeneous equivalents being exchanged without such increase being accompanied by a return.”

11. Be that as it may, while the added guidelines as to all increases, also in exchanges of a large variety of chattels, but distinguished from the legal tender as such, remain operative with full force, the argument itself, some hold, is no longer as crucial as in the days of barter. However, all that, it, in essence, has signified in the past and signifies now is a redoubled emphasis on an embargo against unearned excess on identical articles exchanged, on the one hand and a like increase in deferred exchanges of dissimilar goods, on the other. What, therefore, emerges from the foregoing *ahadith* is a preclusion to take anything in excess while exchanging gold for gold, silver for silver and so on (i.e. similars) or to conclude any such transaction except as a hand to hand transfer. The rule, however, alters where gold is exchanged for silver or silver for dates or dates for wheat and so on (i.e. dis-similars), the rate of exchange instantaneously becoming discretionary, whilst the ready nature of the contract still holding. Because all the six items named in the *ahadith* represented commodity money of the time, an obvious incident of the rule is targeting the time honoured exchanges inter se between local and external currencies, which, though, on ready or hand to hand basis, may freely

be transacted, according to market forces, yet any forward trading therein would immediately attract the sanction underlying the doctrine of *riba al-fadl*. This aspect of *riba* has always featured as a bulwark against uncertainty or *gharar*, as inclusive of speculation, emerging as a notable contributory to a just social order. Significance here, some say, also lies in things of value or of fundamental utility not being countenanced to suffer artificial scarcity on account of exposure for being loaned away or hoarded. As distinguished from this, however, *bai' mu'ajjal* (sale against deferred payment) is clearly made permissible since, added to the foregoing, in all probability, the prophet (SAAWS) desired to encourage monetary transactions (even upon deferral) as against barter, the latter of which had the potential of degenerating into *riba*. Another dimension of *riba-al fadl* may have subsisted in an intendment to forestall unwary citizens being taken in by sharp traders, the stipulated safeguard for exchange of similar goods being, like for like, weight for weight, measure for measure and hand to hand. The institution of *riba al-fadl*, therefore, has not been rendered toothless much less having become a dead letter in economic terms by passage of time. Few seem to have noticed the prophetic wisdom in reading *riba al-fadl* within the ambit of the *Quranic* prohibition yet that emerges as an unmistakable symbol against all un-earned increases in the way of anything having the semblance of *riba*. But for the preclusion of *riba al-fadl* and, by that token, broadly of all increases, while, bartering in similars or delving in futures, the ignorant or the motivated would, possibly, have succeeded in sheltering later day deviations, whereby the generalised *Quranic* concept of *riba* could stand restricted only to non-productive, patently oppressive and purely un-conscionable fixed returns on advances, thus,

recklessly, neutralising a basic economic expedient, so necessary for a welfare society.

12. I tend to disagree here with the observation of the Federal Shariat Court that *riba al-fadl*, in the context of lawfulness or otherwise of interest or usury in Islam, did not concern the Court. Having already dilated upon the continuing efficacy of *riba al-fadl*, down to our own times, I would only broadly state my seasons for disagreeing with such stance of the Federal Shariat Court: Firstly, it was *riba*, in all and sundry manifestations thereof, which had come up for appraisal before the FSC and, therefore, the FSC had little choice of drawing a distinction in the matter. Significantly, there is little warrant for later day jurists in equating *riba al-nasi'ah* with the generic term *riba*, employed in the *Quran*, questionably terming that alone as *riba al-Qur'an* on the ground that only *riba al-nasi'ah* was previously known to the Arabs whereas *riba al-fadl* was introduced by the prophet (SAAWS). In the first place, the assertion is factually incorrect since it is empirically established that the Arabs used to exchange inferior quality commodities for superior ones of the same kind, e.g. one *saa'* of good quality dates for two *saa'* of the inferior ones or bartered in heterogeneous items e.g. barley for wheat etc. Additionally, this is to deny the *Qur'an* and *Sunnah* as inseparable and the latter as a live commentary of the former. While the *Qur'an* is the revealed message for all times and all peoples, the prophet (SAAWS)

provided the details of things already ordained therein, the juristic difference in the *Qur'an* and *Sunnah* being that the first was the inspired message from the Almighty alongwith its revealed phraseology whereas the latter was likewise inspired but in words chosen by the prophet (SAAWS) himself. Whenever and wherever, therefore, one is called upon to interpret *Qur'anic* doctrines one must advert to the *ahadith* (words, deeds and even meaningful silence) of the prophet (SAAWS) more as elaborative of something, which is complete rather than innovative in regard to something, which needs to be complemented or perfected. Thus the prophet (SAAWS) indiscriminately dilated upon *riba al-nasi'ah* and *riba al-fadl*, never distinguishing between their consequences and none of the early doctors identified *riba al-nasi'ah* as the sole equivalent of *riba* in the *Quran*. Such, apparently, inadvertent references started with Ibn Rushd, a Spanish jurist and continued with *Imam Razi*, as aptly identified in “*The Concept of Riba and Islamic Banking*” by Imran Ahsan Khan Niazi. The *Qur'an*, accordingly, uses the term *riba* in the broadest of senses so as to encompass all its forms, then known and practised, as also such as may thereafter evolve. Interpreting the *Quran* is, to cite an inferior example, like interpreting a written Constitution, commensurate with a requirement to meet all conceivable exigencies of time, space and the like. Secondly, during the life-time of the law-giver, the *Sharae*, there was no currency, as such, of the Muslim State

and the function of legal tender had largely devolved on the Persian and Roman currencies. This was besides barter, which also was substantially in vogue. Hence, inter alia, as above hinted, the apparent necessity of including common items of barter, so as to preclude *riba* enveloping barter deals. Misgivings, genuine or otherwise, on this score were not un-likely because barter also constituted *bai'* (trade) and *bai* was freely permissible whereas only *riba* was, literally, prohibited. The prohibition in the way of *riba al-fadl* was, therefore, a direct consequence of *bai*, in contradistinction to *riba*, having explicitly been approved in the *Quran*. Approaching the matter from this angle, the object of deducing *riba al-fadl* from the Quranic concept of *riba*, (for, as said, I am not inclined to think that *riba al-fadl* was either supplemental or complementary to what was ordained or was an innovation of the *Sharae*) may also have

been to preclude *ribawi* contracts being introduced through the back-door of barter deals. Efficacy of the caution can immediately be seen when it is realised that such circumvention is practised even now, e.g. trading in futures when trade through barter, in effect, stands forsaken. However, so great was the impact of the *Quranic* prohibition of *riba* and its *al-fadl* aspect that at the advent of Islam, well-into the days of Caliph Omer and much after, the followers would not pay or take any thing in

excess of the gold or silver contents in the purchase of gold or silver artifacts in lieu of dinars (gold coins) or *dirhams* (silver coins) respectively even though (possibly) manufacturing costs thereof could warrant for more. All this, as reflected below, for fear of involuntarily transgressing the *Quranic* commandment:

“This narration is from Abu Qelabah. He told that he was sitting in Syria in a circle that also included Muslim bin Yasaar. There came Abul Ash’ath. According to Abu Qelabah, everybody exclaimed: “Abul Ash’ath! Abul Ash’ath!” Abul Ash’ath joined the Circle. Abu Qelabah asked him to narrate the Hadith of Obadah b. Samett ^(RAA) for a brother there. Abul Ash’ath agreed. His narration is as follows.

We (i.e., Abul Ash’ath and his colleagues) were on a military mission under the command of Mo’aawiyah. We gained a lot of spoils of war. Among them, there was a silver utensil. Mo’aawiyah directed a person to auction it against the salary due in favour of the soldiers. People showed great interest in the auction. When the news reached Obadah bin Samett, he stood up and said: “I heard the Prophet ^{SAAWS} forbidding the sale of gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt except on sawa’amm-bi-sawaa’ (equal) and ainamm-bi-ain (like for like) basis. The Prophet ^{SAAWS} further said that if someone gave more or took more, he entered into riba.” As soon as the people heard this, they withdrew from the auction. When the news reached Mo’aawiyah, he got up and addressed the people as follows: “What is the matter with the people that they attribute to the Prophet ^{SAAWS} the Ahadith that we did not hear even though we also saw the Prophet ^{SAAWS} and kept his company?” Obadah stood up and repeated the whole thing. He then angrily said: “We will narrate what we heard from the Prophet ^{SAAWS} even though it might be unpleasant for Mo’aawiyah (or, he said: even if it is against the will of Mo’aawiyah).” Obadah further said: “I don’t care even if it (i.e.,

contradicting Mo'aawiyah) costs me my stay with Mo'aawiyah's army on this very dark night."

According to Abu Qelabah, Hammad told the above or something more or less like it.- The compiler of the source book for this Hadith further states that he also heard it from Ishaq b. Ibrahim and Ibne Abi Omar both of whom narrated it on the authority of Abd al-Wahab Thaqfi who, in turn, reported Ayub. At Ayub, the chain of narrators becomes the same as that for this Hadith.

(Muslim, 2969)

The tradition, just quoted, signifies, in the first place, that the transaction in question offended the rule that all exchanges, whether of gold for silver or of wheat for dates or of barley for wheat and the like (i.e. in dis-similars), even though they may not be Mithlamm-bi-mithl (like for like) and waznamm-bi-wazn / sawa'amm-bi-sawaa' (equal in weight/measure), had still to follow the other rule of Yadamm-bi-yad (hand to hand or on the spot). This arose because the auction price of the utensil under reference was to be paid from the salary of men, which till then still remained to be disbursed and in exchanges, upon deferment (delivery and/or payment), one is prone to agree to give more than strictly justified, part-taking an element of riba. In such context, the objection was and remains valid. Secondly, the other condition of like for like together with equality in weight/measure, may also have had the prospect of being infringed because the troops were paid salary in silver coins and the auction may have produced an unequal exchange between

the silver content of the utensil and that in the dirhams (silver coins). There is only one aspect, however, in relation to which the caveat may (perhaps) have evoked some reservations and that consisted in the fact that the utensil, put to auction, also carried fabricating costs for which an added consideration may have been required. According to some reports

(because manufacturing costs of gold and silver utensils, as possibly distinguished from ornaments of those metals, were inadmissible, the reason being a prohibition against the use of precious metals in eating/drinking articles) this ground as well was not recognised by Caliph Umer, when the matter was brought to his notice. Even so, the first two objections, indisputably, remain valid and as to the third, touching ready but lawful transactions, jurists have found an answer, based on another *hadees* of the prophet (SAAWS) namely, that the difference in cost or quality may be made up by an express stipulation in the price paid (in *dinars*, of gold, in this case because the urn was of silver, as distinct from a like for like exchange), thereby encouraging *bai'* in preference to barter and ensuring that *riba* did not sneak into commercial transactions through one artifice or another. Such *hadees* runs thus:

“This Hadith is from Yahya. He said that he heard it from Oqbain b.

Abdul Ghafer who, in turn, heard it from Abu Saeed Khudri (RAA). Abu

Saeed Khudri said

that once Bilal (RAA) brought to the Prophet SAAWS some burney (good quality) dates. The Prophet SAAWS inquired as to where he got those dates from. Bilal replied: “We had some radl (inferior) dates. I sold two saa’ (measure of volume) of them for one saa’ of burney dates in order to give them to the Prophet SAAWS to eat.” Upon hearing this, the Prophet SAAWS exclaimed: **“Oh no! That is riba. That is exactly riba! Don’t do that again. If you want to buy (good) dates for (inferior) dates next time, first sell your dates, and then buy the new ones with the sale proceeds.”** (Bukhari, 2145)

Lastly, the objective considerations for the institution of riba al-fadl are of such an over-riding nature that without its continued prohibition a riba free economic system cannot possibly be conceived. The concept was designed, essentially, to foster justice in trade and commerce, as aptly described by M.Umer Chapra:

“The prohibition of riba al-fadl is thus intended to ensure justice and remove all forms of exploitation through ‘unfair’ exchanges and to close all back-doors to riba because, in the Islamic Shari‘ah, anything that serves as a means to the unlawful is also unlawful. The Holy Prophet, peace be on him, equated with riba even the cheating of an unsophisticated entrant into the market and the rigging of prices in an auction with the help of agents (ahadith C.9 and C.10), implying thereby that the extra money earned through such exploitation and deception is nothing else but riba al-fadl. Since people may be exploited or cheated in several different ways, the Prophet warned that a Muslim could indulge in riba in a number of ways (hadith A.5). This is the reason why the Prophet, peace be on him, said: “Leave what creates doubt in your mind in favour of what does

not create doubt”, and Caliph ‘Umar was inspired to say: “Abstain not only from riba but also from ribah”(hadith C.1). Ribah is from rayb which literally means ‘doubt’ or ‘suspicion’ and refers to income which has the semblance of riba or which raises doubts in the mind about its rightfulness. It covers all income derived from injustice to, or exploitation of, others.

Thus riba al-nasi’ah and riba al-fadl are both essential counterparts of the verse “God has allowed trade and prohibited riba” (2: 275). While riba al-nasi’ah relates to loans and is prohibited in the second part of the verse, riba al-fadl relates to trade and is implied in the first part. Because trade is allowed in principle, it does not mean that everything is allowed in trade. Since the injustice inflicted through riba may also be perpetuated through business transactions, riba al-fadl refers to all such injustices or exploitations. It requires absence of rigging, uncertainty or speculation, and monopoly or monopsony. It demands a fair knowledge of the prevailing prices on the part of both the buyer and the seller. It necessitates the elimination of cheating in prices or quality, and in measurements or weights. All business practices which lead to the exploitation of the buyer or the seller or to a restriction of fair competition must be effectively prohibited.”

13. Now may be taken up the question as to when the final verdict on riba was descended and, correspondingly, when was riba al-fadl identified and enforced. Contextually a purported declaration, attributed to Caliph Umar, is cited, which is reported in the following terms:

“The last of what was revealed was the verse on riba and the messenger of Allah departed before he could elaborate upon it. So give up riba together with all doubt.”

It has been argued before us that one of the narrators of this hadith, Saeed bin Al-musaib, suffering from confusion and a faulty memory, is weak and untrustworthy. That apart, as urged by Hafiz Abdur Rehman Madani, Director, Institute of Higher Studies (Shariah & Qada), there are at least two ahadith, one from Abu Huraira ^(RAA) etc., regarding the prophet's ^(SAAWS) appointee at Khyber, who presented high quality dates to the prophet ^(SAAWS) and upon the latter's query disclosed that he had exchanged a larger quantity of inferior dates with a smaller return in superior ones, meeting a similar response as Bilal ^(RAA), above quoted and the other from Fuzaila bin Ubaid, who, on the day of Khyber, had purchased a gold necklace (apparently, otherwise than for its user as an ornament, for, if that were the case, there should have been no occasion to break it up) for 12 dinars (gold coins) which, when dismantled, produced a larger gold content than in the dinars, also meeting the disapproval of the prophet ^(SAAWS), who observed that this was nothing but riba and required that such transactions, of like for like, may be concluded upon opening up of the contents, each of the ahadis suggesting that riba al-fadl was read in the prohibition at least as early as the battle of Khyber (7 A.H.) and negating the plea that the advent of riba al-fadl was close to the end of the prophet's wordly life or even that the Quranic doctrine of riba, in its multi-dimensional facets, was perfected only that late in the day for, if riba al-fadl was identified

around Khyber, the broader prohibition should, arguably, have preceded that. According to Mr. Riazul Hasan Gilani, learned counsel for the Federation, similar conclusions are, inter alia, shared by Allama Muhammad Hussain Taba Tabai, Ibne Majah, Allama Shibli Naumani and Suleman Mansoorpuri. Indeed, the imputed report from Hazrat Umar ^(RAA) is also contradicted directly by another quote from the second Caliph himself, where he is reported to have said:

“You think that we are unacquainted with some forms riba. By God, knowledge of such forms, in my view, is even dearer than Egypt and its districts. Then, of ribawi dealings, some are not hidden from any one, such as forward purchase of gold for silver or purchase of fruit while still on trees and not yet ripe and *bai salam* concerning animals”. (Al-Musanif_Abdur Razzaq, Vol 8, p.26, hadees 14161)

The above is a complete answer that the Companions did not fully comprehend riba al-fadl, the prophet ^(SAAWS) having, purportedly, departed before he could expand upon the same. All that seems to have been their refrain consisted of the fact that riba was prone to taking ever changing forms, some of which may not have readily been encountered. Even so, the quoted passage makes it clear that the concept of riba was fully understood and appreciated by the interlocutor. In so far as the Quranic revelations, touching riba, are concerned, it is further obvious that the final word must have descended before the sermon of Hajjat-tul Wida (the last or farewell pilgrimage, below quoted) because such

emphatic renunciation, as in that sermon, could not have come about without that having already been accomplished. I have already quoted the likely dates of the various revelations on the subject but, analysed as above, the last one should have been if not closer to Khyber at least around the time of the bloodless entry to Makah (8 A.H.) and, therefore, substantially prior to the sermon. For more of this see the main judgement, where the time sequence is extensively dilated upon. Reverting those, who succumb to the caveats, hinged on the quoted alleged lament of the Caliph, remain un-mindful of the Almighty's declaration, near the end of the prophet's (SAAWS) worldly sojourn; "Today, I (Allah) have completed for you your deen (faith), perfected My blessings and chosen Islam as the deen for you," an intimation which instantly made the followers apprehensive that the prophet's (SAAWS) days, thenceforth, were numbered, his assignment having been completed. Correspondingly, they remain oblivious, also, to the simple logic that, if the prophet (SAAWS) had descended with a message and mission, he could not have left without accomplishing it, including duly clarifying the fundamental of riba. Thus and even though the alleged protestation of Caliph Umar may have been quoted by some jurists of note that fact, in itself, is not enough to lend authenticity thereto. Indeed the adversaries had, even during the days of the first two Caliphs, become active in fabricating false ahadees and one of the most effective methods of

fraudulent coinage of sayings, facts or events is to mix, Ex Facie, commendable portions with falsely invented ones, such as saying that the concept of riba could not be explained, because of the prophet's (SAAWS) being taken away, and that the best course was not only to give up riba but also al-reebia (doubt), meaning everything having the semblance of it. Assuming, however, that the prophet, in fact, did not have time to fully elaborate upon all shari'ah forms of riba, even though he did not depart for 81 days after the Hajjat-ul-wida and no serious commentator doubts that the last revelation had already come at least at that juncture, Dr. M. Umer Chapra clinches the issue, when he counters the outcome thus:

“However, this (prophet's elaboration) was not necessary. The whole Qur'an and his Sunnah are there to help the ummah do so. This the ongoing challenge to all Muslims – to examine their economic practices continually in the light of Islamic teachings and to eliminate all shades of injustice. This is a more difficult task than eliminating riba al-nasi'ah. It requires a total commitment, an overall restructuring of the entire economy within the Islamic framework to ensure justice. This was, and is, the unique contribution of Islam. While riba al-nasi'ah was well-known in the Jahiliyyah (pre-Islam period) the concept of riba al-fadl was introduced by Islam and reflects the stamp of its own unflinching emphasis on socio-economic justice.”

14.

Here

may, explicitly, be addressed the query, whether small and gratuitous

additions to a principal sum lent, also claimed to have, at times, been added by the prophet of Allah (SAAWS) himself are or are not permissible.

The answer is furnished by the following caution of the prophet (SAAWS):-

“Anas Ibn Malik reports: The prophet (SAAWS) said, “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”
(Kitab al Buyun)

If, therefore, any such favour, as above, is ascribed to the prophet (SAAWS) that may directly be relatable to his generally gracious conduct (customarily disposed towards ahsan i.e. conferment of favours), always being at the giving and never at the receiving end. The foregoing hadees is also a pointer that, as a rule, no mala fide accretion on a loan, how-so-ever small, is admissible. To this neither any government nor a State is an exception. In fact, to allow any leeway on the point, subject to the hadees above quoted, would serve little purpose other than to allow entry to riba through a back door.

15.

Having

identified the foundations of the institution of riba in Islam, it remains to be reiterated that the prohibition was nothing new and had devolved and descended from the earlier religious thought and teachings. It is for this reason alone that the earlier Qur’anic revelations on the subject only

implicitly invoked the prohibition for the Muslims. Thus for the Jews the

Old Testament (Exodus 22: 25-27) prescribed as under:

“25- If thou lend money to any of My people that is poor by thee, thou shalt not be to him as an usurer, neither shalt thou lay upon him usury.

26- If thou at all take thy neighbour’s raiment to pledge, thou shalt deliver it unto him by that the sun goeth down:

27- For that is his covering only, it is his raiment for his skin: wherein shall he sleep? And it shall come to pass, when he crieth unto Me, that I will hear; for I am gracious.”

Much the same is enjoined in LEVITICUS 25: 35-38:

“35 ‘And if your brother becomes poor and cannot maintain himself with you, you shall maintain him; as a stranger and a sojourner he shall live with you. ³⁶ Take no interest from him or increase, but fear your God; that your brother may live beside you. ³⁷ You shall not lend him your money at interest, nor give him your food for profit. ³⁸ I am the LORD your God, who brought you forth out of the land of Egypt to give you the land of Canaan, and to be your God.”

The edict, however, seems to have been relaxed for strangers (non-believers) when the Old Testament (Deuteronomy 23: 19-20) provided thus:

“19-Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of any thing that is lent upon usury.

20- Unto a stranger thou mayest lend upon usury; but unto thy brother thou shalt not lend upon usury: that the LORD thy God may bless thee in all that thou settest thine hand to in the land whither thou goest to possess it.”

At the time, there does not appear to have been any distinction between interest and usury and the concept was uniformly covered by the Hebrew word neshec, which meant gain, arising from a loan, whether in money or in kind. The later day Jewish practice of trading and even monopolizing in usury or interest bearing transactions, ostensibly and historically, owes a great deal to the Jews being discriminated against in the matter of employments and other lawful callings. Money lending business, therefore, seems to have been found as an escape route by that down-trodden community in the then Western society. On the other hand, such Jewish pursuits, of the time, came extremely handy to the autocratic rulers, holding sway in Chris'tendom, whose Christian subjects were precluded from obligingly catering to their financial needs. Read here autocratic Muslim rulers and their Muslim subjects, as a later day addition if not substitution. Co-relate the declaration: "No Christian is an usurer 1551" (Shorter Oxford Dictionary, Vol II, p. 2326, 3rd ed.) --- the condemnation of Gibbon: "The usurer, who derived from the interest of money a silent and ignominious profit" and the criticism of Ruskin, " I know myself to be an usurer as long as I take interest on any money."

Specifi

c to the Christian thought on usury, interest or riba, the doctrine does not seem to have been explicitly related to Jesus ^(SAAWS) but was evolved,

partly, upon some direct reflections attributed to him and, generally, on the basis of his life and teachings, taking firm root in the philosophy and thinking of the Church and the mediaeval scholastics (9th to 14th centuries), known as the School-men. In point, ascribed to the Messiah (New Testament, Luke 6:35), is the observation, “No! Love your enemies and do good to them; lend and expect nothing back”. (Compare the Qur’anic exhortation, **“If the debtor be in difficulty, grant him time till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew”**. Al-Baqarah II:279). In turn, Popes and Councils alike consistently decried all kinds of payments for the use of money lent, since, to them, money had little purpose other than as a medium of exchange and its principal use lay in consumption, whereby it was sunk in exchange. Augustine placed usury in the category of crime and denounced usurers as a breed of vipers that gnaw the womb that bears them. (See the hadith, which goes:

“Jamil

bin Daraj reports Imam Jafar Sadiq (RAA) saying:

In the sight of Allah the sin of one dirham of riba is greater than the sin of incest. If that sin is divided into seventy parts, the sin of the lightest part would equal the sin as of one, gone into his mother within the Ka’ba”. (Al Burhan by Bahrani; a similar version also in Baihiqi).

The early Fathers totally disapproved usury, as inclusive of later day interest. A canon of the Third Lateran Council (1179 A.C) directed that manifest usurers shall not be admitted to Communion nor, if they die in their sin, shall receive Christian burial. (A priori, refer the hadees of the

*prophet (SAAWS), where he is reported to have declined to lead the funeral prayers of a Muslim, who had died in a state of indebtedness and the successors to the estate left the debt un-requted. Islam, in theory and practice, discourages even contracting of loans what to say of indulging in riba). Pope Clement V made the prohibition of usury absolute and declared all legislations, even remotely, countenancing usury as void (1311 A.C). To elaborate, in Chris'tendom interest, in its pristine form, denoted "money paid for the use of money lent (the principal) or for forbearance of a debt, according to a fixed ratio (rate per cent.). 1545". (Shorter Oxford Dictionary, Vol-1, p.1026, 3rd ed.) Correspondingly, "the crime of usury, before the Reformation, consisted in taking of any interest for the use of money; and now in taking any higher rate of interest than is authorised by law 1754". Subsequently, the statutes against usury were repealed (in Britain) so that one may take for one's money whatever amount of interest one can get: *ibid.*, Vol-II, p.2326. Correspondingly, *Encyclopaedia Americana* (1970) records:-*

"Interest is a charge for the use of money----- Interest has not always been considered a legitimate or even moral payment. Until the end of middle ages, any charge for a loan was generally considered to be usury. The teachings of Christian, Judaic and Islamic religions, all condemned in varying degrees, the taking of interest. In recent times, however, usury has come to be regarded as only the charging of illegal rates of interest-----"

It thus becomes plain that, in the context of Judaism as well as Christianity, there initially was no distinction between interest and usury, the last being a derivative of the Latin words usus, uti, meaning “to use” and signifying “the fact or practice of lending money at interest”, as also, “the premium or interest on money (or goods) lent”. Only in its later day adaptation did “usury” denote “the practice of charging excessive or illegal rates of interest for money on loan”. It was not until 1830 that the holy Office allowed interest to be lawfully taken for money lent to marchants, who engaged in profitable trades.

Beaus

e Islam was revealed at a time when society did not recognise any difference between interest and usury, each denoting an excess, whether large or small, over and above the principal advanced and because the word usury, from the beginning, has, commonly, been used in translations of the earlier Scriptures the same word has been preferred in the translated versions of the Qur’an, herein cited. Accordingly, for the purposes of this discourse, usury and interest, are words used interchangeably, unless, of course, the context otherwise suggests.

16. Viewed in this background and demonstrated through the relevant Quranic texts and ahadith of the prophet (SAAWS) riba, in Islam, encompasses every return and all excess arising purely in consideration of time allowed for the use of money or of any other thing of value lent as also

every such increase on goods exchanged violative of any or all of the mandates of sawa'amm-bi-sawaa', (meaning equal for equal), Mithlamm-bi-mithl (like for like) and Yadamm-bi-yad (hand to hand or on spot), where the exchange, subject to the ahadith, is of like commodities or at least that in Yadamm-bi-yad, if such exchange be in dissimilar articles. Upon the first part of this analysis, for the second (riba al-fadl) has not been found relevant by the Federal Shariat Court, bank interest as also other similar returns, such as interest on

Government securities etc., have been found to fall by that Court in its judgment, impugned before us, to be within the mischief of *riba*. This Ex Facie is correct so far as it goes. We have, however, already seen that *Qur'an* co-relates *bai* (sale) and *riba* but allows the first while prohibiting the second. Indeed, let it be stated here, even at the pain of repetition, that the meaning and significance of *bai* (sale) in Islamic law (*fiqh*) is broad enough to include all exchanges, loans being but one of them. Invoking the *Qur'an* and *Sunnah*, therefore, the early jurists construed *riba* as a form of *bai* and forestalled any gulf being developed between *riba al-nasi'ah* and *riba al-fadl*, each emerging from a common reading of the *Qur'an* and *Sunnah*. The standard definition on the subject is that of *al Sarakhsi in al-Mabsut*, a commentary of *Imam Muhammad's* pioneering work, also carrying the same name but

distinguished as *Al asl*. There, as reflected above in passing, it is thus stated:

“Riba in its literal meaning is excess...and in the technical sense (in the shari’ah), riba is the stipulated excess without a counter-value in bay’ (sale).”

As analysed by Nyazee, (*Supra-*) the quoted definition of *riba* carries the following ingredients:-

- “1. *Riba* is excess.
2. It is an excess that is stipulated in a bay’ (exchange).
3. It is an excess that is without a counter-value.”

This then remains the classical definition of riba and treats with the subject, in all its forms, without any distinction. The definition, besides being endorsed by the terminology in the Qur’an and Sunnah, is also logical because even in excesses on loans (nasi’ah) a thing of value is parted against a corresponding, though inadequate, return, the increase being matched with delay.

17. *Having*
said as much, let us now turn to the caveats entered in favour of interest simplicitor or of bank interest or of interest carried by Government securities etc., claiming such to fall outside the four corners of the institution of riba, as ordained in Islam: Apparently, to categorise oppressive and so called non oppressive interest separately, it has been

argued that the illat, or the juristic cause, behind the prohibition lies in the element of zulm or inequity peculiar to usurious transactions (carrying an excessive rate of interest) and to interest derived from loans advanced for personal consumption, as distinct from loans designed to undertake or continue a productive activity, interest transacted by banks and State institutions supposedly suffering from neither infirmity. The simple answer to this purported distinction is that while zulm indisputably, as recognised by the Qur'an, may furnish something in proximity of the hikmat, or wisdom, resultant upon which riba has fallen into disrepute that element in itself cannot be the illat or touchstone to determine whether a particular charge or accretion on the specified exchange (ba'i) constitutes or does not constitute riba, because all that has to be seen is whether or not such return is or is not covered by the parameters of riba reflected in the Qur'an and determined in the ahadith. Here may be identified the difference between the concepts of hikmat and illat. The various precepts of Shariah are founded on the common expedients of ensuring benefit and precluding harm to mankind, the generation of benefit and prevention of detriment assuming varying forms and carrying the nomenclature of public welfare. Such expedient equals the hikmat or raison d'etre of many a Shariah rule (hukm) or command. Often, however, hikmat behind a command is either not manifest or is subject to vicissitudes. This has led fuqaha to

discover a common factor of a somewhat lower order, which they term as the illat behind a Shariah rule. A couple of illustrations would establish the point. Take the case of limited postponement of fasting during Ramadan (month of fasting). This option occurs while one is journeying or has fallen ill. The reason for the exemption (hikmat) can arguably be to save the affectee from hardship. Yet there may be plenty of hardships, which believers, while fasting, may otherwise encounter and on occasions a traveller may, individually, be exposed to no hardship, none of which would attract the exemption or alter the rule. Hence the juristic necessity of discovering the illat for the exemption, which in the case on hand is simply the contingents of a journey or sickness. Another example is furnished by the law of pre-emption, where a joint owner or neighbour of the seller of an immovable property may successfully stake a claim to a preferential purchase against an ordinary buyer. Hikmat behind the entitlement may again be discomfort or inconvenience to the vendor's cosharer or neighbour, as the case may be. Yet, in actual fact, there may be found no detriment or there may be plenty in another sale involving neither a co-sharer nor an immediate neighbour none of which would affect the rule. Here hikmat for the law is disruption but the illat lies in the special linkages with the seller in the way of co-ownership or neighbourhood. Now, take the case of a common and day to day sale and purchase transaction. The seller sells

his merchandise because such is the source of his livelihood and the buyer buys because he is in need of the commodity, which is the subject matter of the transaction. The objectives, aforementioned, may furnish the hikmat of the transaction. Yet, in a given case the seller, being well provided for, may not require the transaction for maintaining himself or, likewise, his buyer, being well stocked of the commodity may, actually, be in no need thereof. The illat for the deal, therefore, may be no more than the plain offer and acceptance, manifestation of which transfers the title of the goods sold from the vendor to the vendee. As correctly identified by Hafiz Abdur Rehman Madani, during the course of the hearing, for a consideration to be treated as illat behind a particular thing, deed or transaction it is essential that such, contextually, remains ever present in all things, deeds or transactions of the genus. That may not be the position of zulm in relation to riba, because some ribawi transactions could be free of zulm, at least, in the conventional sense. It is difficult, however, to locate bank and Government interest beyond the pale of common-place zulm. At times, recourse is taken to the command in III:130, condemning the devouring of riba, doubled and redoubled and argued that it is only this kind of riba, extortionist, in effect and substance, which is prohibited. Even if the objection is honestly taken, it still lacks in “good faith” because the message is to be read as a whole and in II:279 (ibid.) Allah has expressly permitted only

the realisation of the capitals loaned and categorically prohibited all excess thereon. Indeed, analysed closely, every interest bearing loan has the potential of doubling and redoubling. Regarding the simple and compound interest encountered, generally, in public advances or loans Shahid Hasan Siddiqui in his “Islamic Banking” analyses:

“It is important to appreciate that a loan of \$100 at 10% per annum simple interest in 100 years comes to \$1100 only, whereas at compound rate of interest, it comes to \$1.378 million. This reflects the magnitude of the problems being faced by developing and underdeveloped countries of the world, which depend on foreign long-term loans and are unable to pay the instalments of interest and principal amounts, due to poor economic conditions.”

As distinguished from zulm qua riba, the potential to intoxicate is the illat behind the prohibition of al-khamr (wine prepared from grapes) and, apparently, for that reason the prohibition has been read into all intoxicants. Accordingly, as to the un-acceptability of riba, it is really the Masaleh-e-Shari’ah or Maqasid al-Shari’ah (the expedients or objectives of Shari’ah), that equal its hikmat or raison d’etre. Those, in turn, hit the peculiar offer and acceptance in a ribawi transaction, the peculiarity of the contract emerging from the hikmat, constituting the illat, relative to the targeted dealing. Some-times, however, Hikmat also can become illat, as possibly in the above case of khamr.

18. *The question, therefore, that must be grappled with is as to what are the Maqasid al-Shariah or Masaleh-e-Shariah, retraction whereof*

throws up such peculiar transactions, which, in themselves, constitute the illat or cause for the Islamic prohibition of riba. For one thing, Maqasid al-Shariah are a constant and pivot around public welfare. They do not change, either with time or with location. No better description thereof can be cited than that of Al Ghazali, who says:

“The objective of the Shari’ah is to promote the welfare of the people, which lies in safeguarding their faith, their lives, their intellect, their posterity and their wealth. Whatever ensures the protection of those five serves public interest and is desirable”.

M. Umer Chapra, in his notable work, “Islam and the Economic Challenge”, rightly draws attention to the comparative importance ascribed by the Imam to the elements of faith and wealth, the former having been cited as the first and foremost and the latter, the last factor for ensuring welfare. Such is and remains the basis of Islamic thought and teachings, the spirit being accorded pre-eminence and matter relegating to the bottom, signifying the ordained priority of mind over body. What, therefore, applies to all Islamic concepts and institutions applies equally, if not more, to the principle of riba.

19. We have already noticed the Quranic declaration that there is nought for man except that for which he strives : (39:53). Relative to this very aspect two of the Ahadees from the Holy (PBUH) may also be quoted:-

“To strive for legitimate earnings is an obligation only next, after the ordained prayers/religious duties”.

“There is no better livelihood than that derived by employing one’s own hands.”

Clearly, riba or interest on money or other things loaned does not involve any effort on the part of the lender and the very commodity loaned is returned together with the agreed addition solely against the time factor, which intervenes between delivery of the thing lent and the return thereof. It is elementary that allocated time is all that living beings have and yet time has little value unless productively utilised. Store anything of value, e.g. gold or silver, for decades on end, nothing would grow out of either. Hence the epitaph of Aristotle that money is “barren” or the condemnation of Gibbon: “The usurer, who derived from the interest of money a silent and ignominious profit” Dr. Waqar Masood Khan, Vice President, International Islamic University, Islamabad, who appeared before us, correctly contrasted riba with bai (sale), saying that all wealth is generated through exchange of dissimilar things, the only exception being riba, which represents bai of money against money i.e. an exchange in the same commodity, the sole difference being moneys at two different time periods, present against

the future. Neither the Qur'an nor the Sunnah nor the fuqaha have accepted moneys of different time-frames as dis-similar articles, legitimately allowing any premium in their exchange. What is more, in such an exchange of similars, no risk to the lender is involved, no attention is riveted to the pecuniary state of the borrower and no weight attaches for the general good or well being of the society as a whole. Is all this just, fair and equitable? It will be instructive here to recall that Nassau Senior addressed the question whether profit and interest were paid for anything and whether there was an identifiable product of society that would not emerge if this form of income was not paid. He identified such function and called it abstinence. Karl Marx denied the existence of any such function and argued that the social product must be attributed entirely to acts of labour, capital being merely the embodied labour of the past. In the opinion of professor Mehmood Ahmad (see his pioneering work, Man and Money, published by the Institute of Islamic Culture, Lahore), who has, upon sound reasoning, exploded these theories, savings would be generated yet, and capital formation would take place still, even when the so called incentive of interest stands removed. Now, capital is a word of many meanings. They all imply that capital is a stock by contrast with income, which is a flow. In the modern view, it is capital and income rather than capital and interest that are the related concepts. Even so, the foregoing

theorisation constitutes mere semantics. Capital, quite arguably, is certificate/store of applied labour and its in-put (statedly often equalling abstinence), if and when worked upon, may end up in generating income, which, in turn, could either be profit or interest. It is another matter though that interest may accrue yet even if capital, parted with, is not employed gainfully at all. Profit, these days, is defined broadly to signify “gain resulting from the employment of capital”. This, obviously, also embraces interest within its fold. Profit, in its original signification, however, was a variable or uncertain positive return from capital invested (set apart = purported abstinence) in an agricultural, industrial, commercial or other purposeful activity, where the contributor of capital stood to enjoy or share the gain as also to suffer or partake in the loss, if any, in the enterprise. The Islamic version of profit is still the same. Correspondingly, but without distinction, interest has been and is nothing but a definite return on the unit of a given store of value (money or goods), belonging to the lender against no more than parting with the same (supposed abstinence) for a stipulated quantum of time without the least effort forthcoming on the part of the lender and usually no anticipated risk attaching either to the thing lent or to the projected return thereon. Manifestly, such transactions, where idle money, attracts and generates more idle money lead to inequities in society, making the rich richer and the poor poorer. That which applies

to individuals applies equally to their institutions, big and small, local, national or international. It is thus that the inequities and injustices so generated have transcended geographical frontiers and engulfed nations, states, communities alike. Two inter-connected aspects may be mentioned here. One, as adverted to earlier, Islam discourages contracting of loans themselves because of the potential dangers inherent therein. Qarood-e-hasana apart, Caliph Ali ^(RAA) is reported to have equated debt with slavery and its discharge with emancipation. Second, domestic loans bad as they are, at the international level wealthy nations first habituate poor ones of the so called aid and then of gratuitous loans, finally coming down to usurious disbursals, leading invariably to a degenerative stage, where, what to say of the ability to repay the loans, the poor debtor countries cannot even service them, compelling the victims to contract more and more loans and survive only to pay --- a status even worse than slavery, as predicted by the last of the four pious Caliphs. This is the worst form of neo-colonialism yet known to man.

20. *Banks, which are the present day custodians of (people's) wealth and, therefore, the most proximate source of capital, are motivated, in this state of things, only to obtain the maximum returns (usually interest), irrespective of the nature of enterprise financed and to incur the least risk in securing the return of the investment and the gain*

thereon. The first of these priorities renders financial institutions virtual accomplices in the flow of capital to immoral, or at least unacceptable, channels, encouraging speculation, gambling, narcotics, hoarding, luxuries simplicitor and pursuits catering to lasciviousness etc. whereas the second becomes instrumental in concentration of wealth in ever fewer hands because risk-free capital out-lay can only be assured by matching collaterals of which the poor segment of society has none or little. It is prompted by the latter of such aspects that democratisation of capital – that is the extension of the borrowing power to all classes in society - emerged as one of the notable social movements of the 20th century. As to the first, regrettably, economists and social scientists have yet to focus attention thereon. The earlier they do so, the better. In this overall milieu, the potential, as to the twain of utility and efficiency, of a venture rarely enters the equation.

21. *All this apart, interest, inter alia, is also a known factor in inflating of prices at every level of economic activity viz. manufacture, whole-sale, retail etc., each economic agent adding its profit in the price charged but treating interest as part of the cost structure on which even in-come tax is usually exempt. As against this, evincing partiality, if not anything more, profit is fully taxed, much like any other mode of income. So pervasive has interest become in the world economic order that members of the work force (particularly in the West) rarely cast eyes on*

their salaries, the bulk going towards purchases and instalments already constructed, of course, with the inevitable interest ingredient covering a substantial portion of the outgoings. Having said as much, let it not escape mention that the now well documented cycles of inflation and deflation, may only be an end product of an interest based world economic scene (e.g. banks and financial institutions generating manifold money supply etc.), much as the frequent movements of short term (hot) money from one geo-economic zone to another, often bringing misery and devastation in their wake, as has been witnessed recently in the case of the East Asian, so called, tiger economies. The main judgement of the Bench, authored by Mr. Justice Khalil-ur-Rehman Khan, is replete with data, depicting the awe-some magnitude of short term money movements, so devastating in their impact. Likewise, the proposed judgment of my learned brother, Mr. Justice M. Taqi Usmani, besides being singularly crude, also contains valuable source material, reflective of the potential dangers and pitfalls in an interest oriented economy and the manifold advantages that a riba free economic order ensures. As to the alternating cycles of inflation and deflation in the present day economic scene Prof. T.H. Watkins of Montana State University and auther of "The Hungry Years: A narrative History of the Great Depression in America." in his article, "Myth of eternal boom", focusing on the attitudes of the pupils around him, writes:-

“Although the market has been erratic of late, and there are jitters about inflation, many commentators say there seems to be no reason why this saraband of prosperity cannot continue indefinitely, and confidence continues to ring from nearly every quarter of society.

That includes the young men and women who surround me. I look upon them and wonder if my generation is the last to remember that there is no such thing as limitless prosperity. All booms are followed by busts. All of them.

Most of us grew up with the memory of the worst bust of all, the Great Depression, firmly fixed in our family consciousness; even I, born in 1936, have floating in my mind shadowy images of destitute men, women and children travelling along Route 66, near where my family lived in California, and my mother and father carried the Depression’s scars all their lives. They used their experience as a cautionary tale, and it is as real to me as the nightly news, sometimes more so.

Yet I find myself reluctant to play Cassandra to a generation that seems not to want to know the reality written in my family bones: that there once was a time very like theirs in which, as Frederick Lewis Allen put it in “Only Yesterday,” “the prosperity bandwagon...rolled down Main Street,” but that the era ended abruptly and catastrophically, particularly for people of precisely their age.

They cannot imagine that at one point 28 per cent of Americans had no incomes at all – a figure that, if applied to today’s population, would come to nearly 73 million people. Nor can they imagine that grown men and women, people just like themselves, once were driven to begging in the streets and fighting like junkyard dogs over scraps buried in garbage heaps, or that we still do not know precisely how many people were killed in the longest and bloodiest period of class warfare in our history.

They cannot conceive that it could happen again – that to one degree or another, it will happen again.”

At best, relatedly and consequently, while individuals in an interest-ridden society may, ostensibly but momentarily, prosper and

while goods and services may be generated from the capital, so expended, the society, as a whole, is potentially the sufferer. The element of Zulm, thus demonstrated as the rule rather than an exception in ribawi transactions, emerges as one of the many reasons why the Shari'ah ordains prohibition of riba. Viewed thus, zulm often attracts the hikmat if not the illat behind ribawi pursuits.

22. *Islam, as already seen, postulates a welfare society where people may interact by working upon the available resources in a just and fair manner. Partnership between capital and labour for agricultural, industrial, commercial and other productive purposes is, therefore, not only the choice but the only economic activity sanctioned by Islam. The Islamic culture of Zakah (poor tax or a fixed proportionate deduction for sanctification of property), Ushr (tax on agriculture) Khairat (alms or charity), Sadqat (voluntary payment to seek Almighty's pleasure) and Qarooz-e-Hasna (loans repayable at borrower's convenience and without any return), crowned by free but fair agricultural, commercial, industrial and similar beneficial activities, is the logical answer to the ills of an uncontrolled and unguided system of present day economic strife. In such a socio-economic order, it is exclusively the spirit of co-operation and mutual aid or assistance, which pervades the society and man strives not merely for wordly gains but also the hereafter by rendering selfless service*

(Khidmat) to all at hand, that the Almighty has created. Indeed, gratuitous and selfless service (Khidmat) is the third factor of production, contextual to a socialistic economic order (in addition to land and labour), which Islam introduced fourteen centuries ago, attaining thereby, albeit briefly, the religion's essential economic objective of distributive justice. The foregoing Maqasid-e-Shariah or Masaleh-e-Shariah are reflected in the numerous verses of the Qur'an. Thus, spending in the way of Allah and for the benefit of mankind is exhorted in these words:-

“They ask thee (O Muhammad), what ought they to spend (in the way of Allah): Say: “What is beyond your needs.” (S.II:219)

“The parable of those who spend their where-withal in the way of God is that of a grain of corn: it groweth seven ears, and each ear hath a hundred grains. Allah giveth increase manifold to whom He pleaseth: and Allah is All-Embracing, All-Knowing”, (S.II: 261)

“And there are those who bury gold and silver and spend it not in the way of Allah; unto them give tidings (O Muhammad) of a painful doom: On the Day when heat will be produced out of that (wealth) in the fire of Hell, and with it will be branded their foreheads, their flanks, and their backs, (and it will be said unto them): Here is that which ye hoarded for yourselves: taste ye then, the (treasure) ye used to hoard!” (S.IX:34-35)

“That which ye lay out for increase through the property of (other) people, will have no increase with God: but that which ye lay out for charity, seeking the Countenance of God, (will increase): it is these who will get a recompense multiplied”. (S.XXX: 39)

“...and nothing do ye spend in the least (in His Cause) but He replaceth it: for He is the Best of Providers.” (S.XXXIV:39)

“Lo! Those who give in charity, men and women, and lend unto Allah a goodly loan, it shall be increased manifold (to their credit), and they shall have (besides) a liberal reward.” (S.LVII:18)

“ And they feed, for the love of Allah, the indigent, the orphan, and the captive, - (saying), “We feed you for the sake of Allah alone: no reward do we desire from you, nor thanks”.(S.LXXVI:8-9).

“(It is:)...freeing the bondman; or the giving of food in a day of privation to an orphan near of kin, or to the indigent (down) in the dust. Then to be of those who believe, and exhort one another to perservance, (patience, and self-restraint), and for deeds of kindness and compassion”. (S. XC: 13-17)

“Did He not find thee an orphan and protect (thee)? Did He not find thee wondering, and direct (thee)? Did He not find thee in need and provide (thee)? Therefor the orphan neglect not, Therefor the beggar drive not away, And therefor the bounties of thy Lord convey!” (S.XCIII: 6-11)

Charity as such is enjoined, encouraged and approbated, inter-alia, in the following verses:-

“Those who spend their wherewithal in the cause of Allah and do not mar their generosity with insult or with injury for them awaiteth recompense from their Lord- No fear doth come upon them, no sorrow doth touch them.” ²⁶²

“Apology with kind words is better than bestowal with ill-will. Allah is Un-dependent, Understanding”.

“O ye who have believed! Mar ye not your generosity by publicising it and (thereby) hurting (its recipients). Be not like those who spend for mere show-believing neither in Allah nor in the Final Day. Their likeness is the likeness of a solid rock thinly covered with rich soil: a shower of rain washeth off the soil and lo, it is a barren stone! Naught will they achieve with what they’ve garnered. Allah guideth not pretenders”.²⁶⁴

“But the likeness of those who spend their wherewithal seeking for the goodwill of Allah and for strengthening themselves (as a group), is the likeness of a garden raised on high - showers of rain and clouds enhance its produce many times, and even if it raineth not the clouds suffice- Allah, of what they do is quite Aware.”²⁶⁵ (II: 262-265)

“Those who (in charity) spend of their wealth by night and by day, in secret and in public, vErily their reward is with their Lord: on them shall be no fear, nor shall they grieve”. (S.II: 274)

“Those who believe, and do deeds of righteousness, and establish regular prayers and regular charity, will have their reward with their Lord: on them shall be no fear, nor shall they grieve.” (S.II: 277)

“Successful indded are the believers,
who are humble in their prayers,
And who shun vain conversation,
And who are active in deeds of charity”.
(XXIII: 1- 4)

“Seest thou one who denies the Judgment (to come)? Then such is the man who repulses the orphan (with harshness), and encourages not the feeling of the indigent. So woe to the worshippers who are neglectful of their Prayers, those who want (but) to be seen (of men), but refuse (to supply) (even) neighbourly needs”.(S.CVII : 1-7)

Spending in the way of Allah and charitable pursuits have been equated with loans to the Almighty Himself, amongst others, in these verses:-

“Who is he that will loan to God a beautiful loan, which God will double unto his credit and multiply many times?” (S.II:245)

“If ye loan to God a beautiful loan, He will double it to your (credit), and He will grant you Forgiveness : for God is most Ready to appreciate (service), Most Forbearing,---” (S.LXIV:17)

In short, the Nizame Zakah, Ushr, Sadaqat, Kairat and Qarooz-e-Hasna pre-empts and precludes the concentration of wealth in a few hands and what still remains in the way of possessions, after the Islamic law of inheritance further divides it, is the subject of such lofty declarations as are reproduced below:-

“It is not righteousness that ye turn your faces to the East or the West; but righteous is he who believeth in Allah and the Last Day and the Angels and the Scriptures and the Prophets: and giveth his wealth, for Him, to kinsfolk and the orphans and the needy and the wayfarer and to those who ask, and to set slaves free; and observeth proper worship and payeth the poor-due. And those who keep their treaty when they make one, and the patient in tribulation and adversity and times of stress. Such are the God-fearing.” (S.II:177)

“Fair in the eyes of men is the love of things they covet: women and sons; heaped-up hoards of gold and silver; horses branded (for blood and excellence); and (wealth of) cattle and well-tilled land. Such are the possessions of this world’s life; but in nearness to God is the best of the goals (to return to).” (S.III.:14)

“What God has bestowed on His Apostle (and taken away) from the people of the townships, - belongs to God, - to His Apostle and to kindred and orphans, the needy and the wayfarer: in order that it may not (merely) make a circuit between the wealthy among you.” (S.LIX:7)

In Al Nehl (XVI: 95-96) is the following and perhaps the ultimate tiding for those, who hearkened to the call:

“And purchase not a small gain at the price of Allah’s covenant. Lo! that which Allah hath is better for you, if ye did but know.”⁹⁵

“That which ye have, wasteth away, and that which Allah hath, remaineth. And verily We shall pay those who are stedfast a recompense in proportion to the best of what they used to do.”⁹⁶

No better practical translation of the preceding verses from Al-Nehl is possible than in the ensuing report: The prophet (SAAWS), on one occasion, when he, after the day’s work, returned home, asked whether any thing in the way of edibles was available. Hazrat Aisha (RAA), the prophet’s spouse, replied that, as customary with the first household amongst Muslims, all that there was had been given to the needy but that a small portion was saved. Replied the last amongst the prophets (SAAWS): Saved is not that, O’Aisha, which you surmise to have retained; in truth, saved is such that you have disbursed, as succour, for the needy and the indigent. So great was the identity in the prophet’s (SAAWS) word and deed that, after his passing away, when one, who had not seen the holy prophet, asked of Hazrat Aisha (RAA) as to what was the prophet like, the latter, instead of

making reply, posed a counter-question viz. whether the questioner had not read the Qur'an whereupon, reply having been received that indeed he had, the ummul Momineen (mother of the believers) stated that he, the prophet (SAAWS), was the Qur'an personified.

In so far as the prophet (SAAWS) himself or his family was concerned, he denied either of most of the foregoing offerings. As correctly pointed out by Prof. Hiti, he is the only prophet, who lived during the period of recorded history, and with-stood the test thereof. He (SAAWS) first practised on himself and his own, what he preached. As would be seen shortly he, during his celebrated sermon on the occasion of Hajjat-ul-wida, before abolishing the blood claims of others, began by abolishing that of minor Ibne Harith of Banu Hashim, his own tribe much as, before, finally, remitting interest dues of the rest, first remitted those of his own uncle, Abbas, who had only lately entered the fold of Islam. It was this volubly transparent conduct, which provided such momentum to his message that, in spite of all possible corrupting influences from adversaries, within and without, it is only lately that the march of Islam has momentarily been thwarted. See the quote appearing below:

“He even went to the extent of prohibiting the acceptance of Zakah to the entire clan of Bani Hashim, to which he himself belonged, by proclaiming in an unequivocal manner that ‘Sadqa’ is not allowed to us. On his own part he strictly abstained from accepting charity in any form. It is related by Abu Huraira ‘that when anyone brought to the prophet something to eat he used to enquire

whether it was by way of gift or Sadqa and partook of it only when he was assured that it was a gift and if it turned out to be Sadqa he declined to eat it and offered it to the Companions'. He also forbade his kinsmen from accepting charity so that they did not become accustomed to it and the Muslims did not choose his family for making such offerings to the exclusion of others. It is related by Abu Huraira that once Hasan bin Ali (one of the Prophet's grandsons) put a date of Sadqa in his mouth. The Prophet admonished him and told him to spit it out. 'Do you know', he said, 'that we do not eat charity?'

"This injunction held good during the lifetime of the prophet as well as after his death. It is related that the prophet once remarked, Sadqa is the grime of the People and it is not permitted to Muhammad and his descendants to accept it. The Islamic Corpus Juris (Fiqh) has consistently upheld this principle and it has been acted upon all the way in Muslim society. The doors of Zakah and alms-giving have always remained open for the general body of Muslims, to the poor, the needy and the destitute, and their rights have never been ignored.

"The attitude of the sacred Prophet towards his kinsmen was the same in all such matters. They were kept at the head of others when it came to giving or incurring a loss, but where economic benefit was concerned they received the smallest portion of it."

23. In other words, the economic order in Islam is one, which guarantees constant pursuit, optimum employment, fair gains, no poor or destitute, no shelterless, no untended sick or infirm and no sufferers from avoidable human want. Once this system was introduced and fully worked upon, speaking historically, there were left no men of need qualifying for Zakah and the Baitul mal (the State treasury) literally over-flowed. The system, when practised honestly and sincerely, proved to be the true but effective precursor of the socialistic dogma, reflected

in the precept: from each according to his (productive) work to each according to his need. This, however, was achieved without abolishing private property and without holding all things in common. It was the second Caliph in Islam, Hazrat Umar (RAA) who, having fulfilled all human needs of the society completely, was able to declare that even if there be a single hungry dog on a bank of the Tigris he (Umar, in far off Madina) would be held responsible for failing to provide/cater to its hunger.

Anticipating the foregoing analysis and indeed an essential argument of other Jurisconsults etc. who have appeared before us, the learned counsel for the Federation, Mr. Riaz-ul-Hasan Gillani, has argued that the term riba, as it occurs in the Qur'an and the Ahadith, is none other than riba al-Jahiliyyah or riba al-nasi'ah, and the Prophet (SAAWS) has himself *said:*

انما الربوا في النسية

“Riba is in the nasiyah.” (Muslim)

or

لا ربا الا في النسية

“There is no riba except in nasiyah.” (Bukhari)

Without questioning the authenticity of the quoted hadees, which is usually cited as from Usama bin Zaid (RAA) but also, through Usama (RAA), from Ibn Said al Khudri (RAA) the fact remains that the holy prophet (SAAWS)

also spoke of and, according to some, even introduced riba al-fadl. The significance of the hadees under reference can, therefore, only be contextual rather than absolute. Ulema (Muslim Jurists) have explained the hadees in various ways. Some opine that, in the presence of riba al-fadl, which may encompass specified increases even in spot transactions, the only meaning, which can be ascribed to the hadees is that such has a nexus merely with non-ribawi commodities (اموال غير ربويه), in exchanges whereof increase is permissible but credit is prohibited. As seen, a number of Ulema of different persuasions, in elaboration, have rendered that where the commodities are different e.g .wheat and barley or wheat and gold/silver, excess (ادھار), in exchange, is allowed and loan (تفاضل) alone is prohibited. The same significance is attached by fuqaha (jurists) to another hadees descended from Amirul Momineen (Leader of the faithful), Ali ibn Abi Talib (RAA) namely:

“Every loan from which a profit accrues is riba.”

Another interpretation, that handed down by Ibn Rushd is:

“It is probable that he intends by his statement, “there is no riba except in nasiah”, that this is what is the usual case. If this is what is probable, when the first is explicit about it, it is necessary to interpret in a manner that reconciles the two”

(Bidayat al-Mujtahid vol-2, 163)

Nothing , therefore, turns on the argument thus permised.

In further elaboration and indeed support of the foregoing argument viz. that the Qur'an only proscribes riba al Jahilyyah or riba al- nasi'ah the following narration of Imam Malik from Muwatta is also quoted:

“

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

The passage quoted from Imam Malik is, in turn, occasionally reproduced verbatim by later day Jurists, when recording the essential features, occurring in riba al-Jahiliyyah. Now, it must straightaway be stated that the contours and paradigms of riba, which was not mere riba al-Jahilyyah nor only riba al-nasi'ah, are fully set out in the Quran and Sunnah and from there it emerges, as clearly as can be, that all fixed or predetermined returns on money or other things of value lent as also in all exchanges of chattel, of the kind and subject to the restrictions imposed in the Ahadith, is naught but riba. As stated above, definitions only constrict the meanings and confine words or expressions to the defining clauses. Islam being the final shape ascribed to religion, and descended through the ultimate amongst prophets, it is in the intendment of the Qur'an and Sunnah that the meanings and implications of riba

have to be discovered. In context, much as the claimed illat for the prohibition is irrelevant not dissimilar is the position of what, allegedly, passed as riba or otherwise in the days of ignorance (Jahiliyyah).

The

argument having been disposed of thus, it may, nonetheless, bear mention here that what Imam Malik and the other Jurists, under reference, meant when they described riba al-Jahiliyyah, as above, was no more than spotlighting the ultimate shape, which a transaction qualifying as riba al-Jahiliyyah finally assumed. This may be demonstrated immediately: the quoted narration could involve firstly, that the loan, taken initially, did not carry any interest whatsoever which, if such was the case, would normally be improbable for a subsequent such imposition of riba, as under discussion. Secondly, the transaction may have covered a situation where, in actuality, a smaller sum was contracted but a larger one was shown to be payable at a later point of time and in case of non-payment, within time, the stipulation narrated may have come into play. This could take various forms. One such may have been to set the imposition in motion where, in the case of a bai mu'ajjal (credit sale), the contracted money was not required at the time appointed and the creditor (seller) became entitled to clamp the pre-determined or other penalty. A similar situation has been recorded by Qatadah Ibn Di'amah, a tabi'i (d.120 A.H.) This, in also another

context, is recounted by Imram Ahsan Khan Nyazee in “The concept of Riba and Islamic Banking” as follows:

“

A credit sale is one where the buyer acquires the goods sold and promised to pay later after a determined period. It is to be expected that the seller in such a case will charge a slightly higher price than he would if the payment was made in cash. Thus, the seller and the buyer used to agree upon a period within which the payment would be made and the excess in price was not stipulated separately.

I

ncrease at the end of the period of payment. When this period was over the seller demanded his money from the buyer saying: “Will you pay or increase the amount due in lieu of further delay.” In case they agreed upon a further delay, the buyer not being in a position to pay or not wanting to pay for some other reason, the amount due would be increased or even doubled.”

A third situation may have been, as appears frequently to be the case with money lenders, throughout the various phases of history, the charging of a periodic return, such as on monthly, quarterly, half yearly or yearly basis, with an ultimate date of return of the principal, timely non-return, generating the penalty of further interest, as reported by Imam Malik. While Mussanaf Abdul Razzak (d. 211 A.H) and Mussanaf Ibne Sheba (d. 235 A.H) also describe riba al-nasiah transactions, it is Imam Fakhruddin Razi’s (534/1149 – 606/1209) report, which identifies riba al-nasiah in the precise terms preceding. Such is as appears below:

“

Riba al-Nasia was a type well known and widely used in Jahiliyah. It was that (lenders) provided valuables on condition that every month they would take a specified value, but the original valuable would remain intact. When the period of loan concluded (lenders) would demand from the debtor the original value loaned. But if return was not possible for him, they increased in the right and time. This is the Riba they practiced in Jahiliyah. (Al-Tafseerul Kabir Razi; Vol. 7, p 91; Matba Bahria 1938).”

Look, therefore, whatever way one may even riba al-Jahiliyyah was nothing but the common interest not unknown to mankind throughout the passage of time. Indeed Imam Abu Bakar Al Jassas (d. 370 A.H.), in “Ahkamul Qur’an”, has generally, elaborated upon riba al Jahiliyyah in these words:-

“That, which th

agreement, stipulating an increase thereon-----
This was introduced to and well known amongst
them---- So Allah Almighty voided their trading in
interest---- And together with that some modes of
sale and purchase were also declared as null.”

24. *It appears proper here to relate the historical background, inclusive of the social, economic and political circumstances in pre-Islamic Arabia to appreciate the true meanings and connotations of the concept of riba, as understood and practised in those times and in that area. The Arabian society of the time comprised of nomadic tribes, pastoral groups and settled communities. They inter-acted with one another as also with the outside world. Makkah, on account of its*

location and being the venue of Ka'ba, occupied a central place in this arrangement. It was located in a barren valley and had been, for centuries, a stopover for trade caravans (large congregations of travellers carrying merchantdise i.e. exports and imports, coming and going, when

emanating from Makkah itself, as frequently as twice every year), that travelled through the Hijaz, either going North or North East to Syria or Iraq or South to Yemen. Makkah had no agricultural surplus but was endowed with the spring of Zemzem, thus catering to a rare commodity in that environment namely, water. Over the ages, the territory around Makkah came to be held as sacred, its focal point being the Ka'ba. It was an incident of such sanctity that, while the Makkans dealt freely in ribawi transactions yet they never considered riba as free of taint. For this precise reason, when the Ka'ba got burnt, near about the time of the prophet's (SAAWS) birth, then custodian of the Ka'ba, the prophet's (SAAWS) grand father, Abdul Mutalib, did not entertain any money for its repair, except such as was demonstrated to be free of riba. In this environment, life and property were rendered safe and secure within the precincts of Makkah. The city, thus the sacred destination of pilgrims and on the trade route of caravans, becoming a natural haven for pilgrims and merchants, Makkans were, thereby, facilitated in accumulating merchant capital. So generated, the capital was utilised in financing the

merchandise for those very caravans, largely passing through but also originating from, Makkah and in pastoral - agricultural pursuits, the last of which introduced the Makkan capitalists to Taif, which virtually became their summer resort. Banu Thaqif of Taif indulged heavily in interest oriented transactions and it was a dispute regarding such transactions with Bani Mughirah of Makkah, which led the prophet (SAAWS), to enforce the prohibition in all firmness (8 A.H.) also drawing upon the covenants, precluding ribawi dealings, in the treaty with the Taifites. Reverting, as to the deployment of the merchant capital and whether the same was for consumption or productive purposes M. Abu Zahrah in Buhuth if al-Riba reports:

“There is absolutely no evidence to support the contention that the riba of al-Jahiliyyah was on consumption and not on development loans. In fact the loans for which a research scholar finds support in history are production loans. The circumstances of the Arabs, the position of Makkah and the trade of Quraysh, all lend support to the assertion that the loans were for production and not consumption purposes”.

Much to the same effect is the refrain of Abraham Udovitch in his

“Partnership and Profit in Medieval Islam” when he says:

“

Any assertion that medieval credit was for consumption only, and not for production is just as untenable with reference to the medieval Near East”.

Be that as it may, because interest or usury, in a large measure, was at the back of these transactions, the same helped concentrating wealth in

fewer and fewer hands, causing disruption in the clan based social structure. Indeed many a Makkans, who thrived partly upon usury and partly upon trade and commerce later came to play prominent roles in Islam. They included the prophet's uncle, Abbas bin Abdul Muttalib ^(RAA), his son-in-law, Usman bin Affan ^(RAA), his favoured general, Khalid bin Walid ^(RAA) and the celebrated Abdul Rahman bin Awf ^(RAA) etc. It was in this state of things that the prohibition of riba was, systematically, ordained in the Qur'an and the prophet of Islam, on the occasion of Hajjatul Wida (the last pilgrimage, 9th Zil Hijjah, 10 A.H.), before a large congregation of over a hundred thousand pilgrims, inter alia, declared:

“Behold! all practices of paganism and ignorance are now under my feet.

The blood revenges of the days of ignorance are remitted. The first claim on blood I abolish is that of ‘Ibne Harith who was murdered in the tribe of Saad and whom Hudhail killed.

Usury is forbidden

beginning by remitting the amount of interest which Abbas Abd Al-Muttalib has to receive.”

*Note that the highlighted words and phrases are a repetition of **Al-Baqarah** II: 278 – 281, indicating, as above stated, that such verses from Al Baqarah must have been revealed earlier, thus contradicting the alleged lament of Caliph Omer ^(RAA) that the last verses on riba were too close to the prophet's ^(SAAWS) recall, resulting in lack of time (the holy prophet lived for 81 days even after the farewell pilgrimage) to enlarge*

thereupon.

As to

the remitted interest accumulated in favour of Abbas Abd Al-Mutalib, who reportedly embraced Islam a little prior to the bloodless conquest of Makkah (Ramadan 20, 8 A. H.). Dr.M. Umer Chapra in “Towards a Just Monetary System” observes:

business”.

“This was interest

In the

*foregoing background, it is futile to urge that the various forms of riba were not known at the time of the Qur’anic revelations or that only one form had come to be prohibited. Indeed, as pointed out by Thomas Patrick Hughes *ibid.*, the Old Testament had operated to proscribe usurious transactions in Chattels as well and the Arabs, in turn, would contrive excesses in exchanges between similar or dis-similar things in ready as well as forward transactions, a practice which was countered by the Sharae, through the institution of riba al-fadl. Now, the fuqaha represented the dominant culture of their times and it is inconceivable that they could ignore the most obvious forms of interest then prevalent, no different than those which continue to be commercially in vogue to this day. The very wide consensus amongst the ulema, irrespective of time and location, as regards the prohibition of riba and their manifest agreement that such was to be rooted out, totally and irrevocably, suggests that at no time or place the fuqaha had any doubts as to*

ingredients and connotations of riba. Indeed the prophet of Islam (SAAWS) had himself amplified, in the most specific of terms, all that was intended to be prohibited something, which had come to be crystalised in the only, and yet conditional, Quranic permission:

“ And if you do it not, then be apprised of war from God and His Messenger, but if you repent (and give up interest) then you shall have your capitals; Deal not unjustly (with others) nor shall ye be dealt with unjustly. ²⁷⁹

“And if (any debtor) be in straitened circumstances, then let there be respite until (he is in) ease; but that if you forego it (even the capital) (as charity) it is better for you ye only knew. ²⁸⁰

And fear the Day wherein you shall return to God; each one shall be measured back in full what he earned and they shall not be wronged.” ²⁸¹

(al-Baqarah II:279-281)

25. *It is next contended by Mr.Riaz-ul-Hassan Gillani and some other proponents of curtailing the meanings and implications of riba, that the Qur’an speaks not merely of riba but of al-riba, thus identifying and singling out the riba which was prevalent at its advent namely, riba al-Jahiliyyah and none other and for that reason alone bank and other kinds of interest, evolving in course of time, do not qualify as al-riba. The argument can brook little further consideration in the face of the now established proposition that the Qur’an and Sunnah embrace all unearned additions and increases (i.e. without counter values) over and*

above the principals exchanged (“you shall have your capitals” **Al-Baqarah**) and thus bank and other modern forms of interest equally fall within the fold of *riba*. Besides, even the argument’s present angle overlooks the peculiar mode in which the Quranic diction is couched. The syllable “al” does not seem to have been added to restrict the prohibition only to the *riba* prevalent in the then Arab society or even the known world. On the contrary, other similar pre-fixes in the Book e.g. *al-khimr* and *al-fahisha*, as identified by the Federal Shariat Court, would indicate that neither the liquor used in the then Arab society alone was prohibited nor were immoralities restricted to those, which prevailed amongst the Arabs at the time. Note also that similar use of the pre-fix “al” in *riba al-nasi’ah* (*riba* in loans) and *riba al-fadl* (*riba* in trade) neither signifies a particular loan nor a specific trade. Besides, as already said, Islam did not come to reform a particular people, race or clime nor is it confined to any particular period or time. Its message is universal and time-less.

26. Another argument advanced has a two-fold dimension and impact. Firstly, it is urged that *riba al-Jahiliyyah* (confined within the limited connotations, as above contended) having alone been prohibited (*haram*) for Muslims as well as non-Muslims in *darul Islam* and *riba al-fadl*, in contradistinction, being detested or dis-approved (*makrooh*) for Muslims but freely permitted to the rest, any enunciation, holding bank

or other modern day interest to be encompassed within the prohibition, would only allow benefits to non-Muslims at the expense of the Muslim population of an Islamic State. Expediency, as inherent in this reasoning, is hardly a consideration in applying the rules of interpretation. Even otherwise, the argument, in its own terms, is untenable for the simple reason that if banking and other interest is found covered within the four corners of *riba al-Jahiliyyah* or *riba al-nasi'ah* the same, as discussed below, would equally be prohibited amongst the Muslim as well as the non-Muslim components of *darul Islam*. The other limb of the argument, which may now be taken up, is to the effect that there can be no *ribawi* transaction between a Muslim and a *harbi* nor does the prohibition of *riba* cover transactions exclusive to the populace of *darul harb*, irrespective of the components of believers and non-believers therein. In context, two *ahadith* of the holy prophet (SAAWS) may be quoted and such are recorded thus:-

“There is no riba between ahlul harb and ahlul Islam”.

“There is no riba between a Muslim and a harbi within the bounds of darul-harb”.

Irrespective of the authenticity of the quoted *ahadith*, an aspect which need not detain us here, the argument revolves around the question as to who is a *harbi* and what is meant by *darul harb*. For obvious reasons, *zimmis*, that is to say, non-Muslim citizens of a Muslim State and *mustamin* viz. other non-Muslims, who, for the time being, with the

permission of a Muslim State, happen to be in such a State do not fill the character of being *harbi* (*hostile, war-like*), a word which, in its pristine sense, should signify an enemy alien. Correspondingly, the expression *darul harb* (literally abode or country of the enemy) may not denote every non-Muslim State. There has been a difference of opinion, amongst jurists, as to this, some going as far as to find even the seas and the oceans degenerated into *darul harb*. *Imam* Abu Hanifa ^(RAA) has spelled out three attributes for treating a polity as *darul harb*: one, promulgation therein of laws ordained by non-believers (interpreted to mean effective dis-appearance of Sharia'h rules and practices); two, contiguity of the area with *darul harb* and three, non survival therein of a free and peace-able subsistence for Muslims and zimmi, as emanating from a previous Islamic legal order. The Sahibeen (his disciples, meaning *Imams* Mohammad and Abu Yousuf, great jurists in their own rights), however, hold that *darul Islam* turns into *darul harb* merely upon the emergence of non-believers' legal order. This is all very well where non-believers come to hold sway in *darul Islam* and such relegates to *darul harb*. But, that kind of thing never happened during the days of the prophet ^(SAAWS) as Islam was then in the ascendant. Thus *darul harb*, at the time, could arguably be a non Muslim legal entity at war with the Muslim State. The category, in all likelihood, also would not extend to a non Muslim entity without any pretensions to wage war

with the then world of Islam. With all respect, what was true at the advent of Islam should also be true now. Therefore, the expression may cover only such a non-Muslim State as be at war either with the entire world of Islam or with the particular Muslim State, of which a Muslim citizen is either located in such darul harb or is found to have contracted a ribawi loan with any of his non Muslim harbi counterparts. It follows, as a corollary, that people, frequenting the planet, are classifiable in the under-noted categories:-

- (a) *Muslims*.
- (b) *Zimmis* (Non-Muslim citizens of a Muslim State).
- (c) *Mustamin* (Non-Muslims who, by permission, happen, temporarily, to be in a Muslim State).
- (d) *Non-Muslims* who are neither *Zimmis* nor *Mustamin*. They should fall in one or the other of the following sub headings:-
 - (i) Those, who some-how are located within the precincts of a Muslim State.
 - (ii) Those who are citizens of a non-Muslim State.
 - (iii) Those who are citizens (resident or otherwise) of a State at war (actual or potential) with the Muslim State.

The last mentioned alone (d) (iii) should fill the character of harbis and the State they belong to qualify as darul harb. A process of elimination would also reveal that there must also have been, and should subsist yet, a big chunk of neutral territory, neither qualifying as darul Islam nor filling the character of darul harb, covered by (d)(ii) above. A priori it follows that the prophet (SAAWS), in the ahadis, above quoted, may only have been referring to ostensible ribawi dealings between Muslims and their

said {at (d)(iii) above} harbi counterparts, either within or without the bounds of darul harb. May it also be noted here that there is a consensus amongst jurists that riba as between Muslim and zimmi citizens of a Muslim State, (the rule extending to mustamin), is as much prohibited as amongst Muslims themselves. Indeed, by and large, the usual civil rights and obligations as also criminal or penal liabilities extend to all such people (zimmi and Mustamin), if duly located, except dealings in and consumption of wines and pork, the last two excluded because such may not have come to be prohibited for them according to their religious practices.

A long drawn debate has, historically, raged, amongst others the Muslim scholars of the then British India, some of whom appear to have condoned payments of interest received by Muslims from banks and other institutions of non Muslim States, ostensibly treating the latter as darul harb and such British or other institutions as harbi. Interestingly, while some other jurists treated British India as darul Islam, saying that many of the Shuaere Islam (precepts and practices of Islam) still continued to be in vogue there, they yet exempted interest and ex gratia receipts from the British Government, provided only that the Muslim recipients did not notionally regard the same as riba. The same held good for similar receipts from British Indian institutions of which Muslim(s) were not owners, in whole or in part. Most, in effect, treated

non Muslims and their exclusive institutions as harbi and refrained from labelling un-earned returns upon the capital deployed with such non Muslims and related institutions as riba. These fatawa (legal opinions on debatable issues) are not only of doubtful authority but have also occasioned allegations and counter allegations of mala fides, concerning the author ulema, subscribing to different schools of thought. Hakeem Hashmi, propounding the astounding theory that bank interest is nothing but mudaribah, in his "Tablighee Silsila" 62 and 63 under the title, "Musalman aur sood" has, in purported support, quoted from and named names of ulema from the British Indian interlude, which do not make a pleasant reading. Bulk of these quoted fatawa, also elsewhere available, hold that whereas it is permissible for Muslims, in Muslim and non Muslim countries alike, to lend against interest to non Muslims, located other than in darul Islam, it remains impermissible for some, but permissible for other jurists, to borrow from such non Muslims in consideration for payment of interest. In other words, gain from the resulting transactions is deemed acceptable but there is a difference of opinion as to outgoings/defrayals upon Muslim borrowings, over and above the principal sums borrowed. A diluted version of this thinking is to the effect that whereas such incoming interest may be suffered, apparently, on grounds of necessity, the same may only be utilised towards alms-giving or other charitable objects, implying thereby that

while Muslims, as is their present day wont, may continue to squander their other possessions in self-serving pastimes the most questionable part of their incomes be allocated to the worthiest of causes, upstaging it beyond all recognition from its actual lowly station. An extension of some the foregoing dicta, as regards the present day India and its Muslim citizens, is reflected in “Jadid Bankari Aur Islam” by Md. Nizamuddin Rizvi. With greatest respect, such-like enunciations, wholly misconstrue the Qur’an and Sunnah, palpably ignore the treaties concluded by the holy prophet (SAAWS) (e.g. with the Christians of Najran and the polytheists of Taif) and the Khulfa-e-Rashideen (the first four pious Caliphs) with non Muslim tribes and other political entities, envisaging voiding of such treaties themselves in the event the non Muslim signatories to the same did not observe the prohibition as to riba even amongst themselves and recklessly engender free flow of Muslim owned capital to non Muslim individuals, institutions and States alike. It is a direct consequence of this kind of flawed approach that all Muslim finance that matters, currently, stands parked either in non Muslim organisations or their States. To whose advantage, it need hardly be asked!

Be that as it may, the compounded result has been a virtual legalisation of riba between Muslims and non Muslims, on the one hand and their respective countries on the other. Not only this, the message

that has passed equates the absolute prohibition of riba in Islam to a qualified one, as seems to have prevailed amongst the Jews, who made a distinction between themselves and strangers in the matter of ribawi transactions, something, which one or the other of the schools of thought in Islam would term as a later day deviation from the original text of the Old Testament, that in this view, probably carried a similar prohibition, as revealed in the Qur'an.

27.

Here

may be outlined the salient features of the foregoing analysis: The essence of the conclusions, based on the preceding discussion, is that Islam does not permit riba in any shape or form, whether amongst Muslims or between Muslims and non Muslims, (other than harbis), irrespective of the question where any of such contracting parties is domiciled or otherwise located. The prohibition applies equally to non Muslims located within the bounds of a Muslim State. The commandments as to riba, inclusive of the present day practices of interest and usury, being all pervasive, transcend individuals and envelope not only groups of men or their institutions but even geographical entities such as State edifices. The concept of riba itself has no nexus whatever either with productive or non productive loans or the soft or hard terms upon which riba is generated incidental to such

loans. As to the effect of ribawi transactions, qua the persons or social structures targeted, such are void ab initio but, not unlike other void contracts, the beneficiary is obligated to return the benefit derived from the deed, to wit, the capital borrowed, as ordained in the Qur'an and Sunnah. Seen in this perspective, all interest bearing loans or advances, whether between depositors and banks, financial or other institutions or between any other category of borrowers and lenders, including governments or their agencies, whether sovereign or otherwise, would be hit by the Islamic Injunctions concerning riba and, as from the efflux of the time frame(s) prescribed no lender would be entitled to claim anything more than that loaned nor any borrower be liable to pay any thing in excess of that borrowed. As for the interest, which has already accrued, accounted/paid for or otherwise standing appropriated in the context of ribawi transactions such, as postulated in the Qur'an and Sunnah, would remain a matter between the offender(s) and his Creator.

28. Having discussed the connotations and implications of *riba* and to what extent and in what manner or form *riba* interacts with modern day economies, we may proceed to discuss as to what foreseeable consequences would follow if the command as to the prohibition of *riba* is duly enforced. Another question, arising in the circumstances narrated in the main judgement, would be as to what should be the mode and method of necessary translation of the command into actual practice. All these aspects have been dealt with in the illuminating judgements of my learned brothers. However, the subject may brook a few more words.

In the first place, it is absolutely wrong to assume that a total disruption and irreversible chaos would follow upon a switch over from a *ribawi* economy to an Islamic economic order. It has correctly been pointed out by Professor Khurshid Ahmad, who appeared before us, that the prevalent economic order in Pakistan would not collapse with the introduction of the Islamic system but that such would, surely, erode totally, if the present system continues to have sway. Not only professor Khurshid Ahmad, but many other eminent economists, scholars and jurisconsultants, who found time to appear before and assist us, have adverted to irrefutable data to bring home the reality behind the misleading façade of the current economic dispensation. In so far as the banking sector is concerned there are varying reports of the defaulted loans aggregating rupees 300 billion (neutral observers' view) to rupees 211 billions (erstwhile official version) and, the latest, that of the present finance minister, Mr. Shaukat Aziz, of a sum in excess of rupees 148 billion but then the last mentioned figure is backed by a definition of default, implying non payment by a borrower for a period of one year or more, preceding the preparation of the data. Knowing, as we do, the continued so called exercises of re-scheduling of bad debts in the banking sector, the figures premised on the foregoing definition of default have, at the minimum, to be taken with a grain of salt. Thus the banking sector presents a very serious situation. Here, neither the lenders nor the borrowers fill the conventional roles and, in fact, these positions stand reversed in so far as the modern day banking is concerned. Contextually, the lenders (i.e. bank depositors) are small savers, virtually supplying their life blood in bank deposits and, being essentially from the middle and low income groups, run into millions. Their counterparts in banking transactions, banks filling the role of middle-men, represented by borrowers/entrepreneurs, supposedly engaged in

agricultural, industrial, commercial or other productive pursuits, as elaborated by Mr. Shahid Hassan Siddiqui, are in thousands if not in hundreds. For decades the latter class has done little in generating the economy, has ensured a minimum stake in the enterprises run by it and, on top of every thing, has syphoned away the cream of the profits, not merely out of the documented economy but from the domestic economy itself. The combined (liquid) wealth of these classes, together with members of a conniving officialdom is conservatively assessed at US \$ 100 billion, reported conveniently to be deposited outside the country and in foreign banks. There is no tax culture in the country. What is worse, agricultural sector is not taxed at all. So called land reforms of the Ayub and Bhutto eras, respectively, have been no more than a mere eye wash, lands remaining where they always were and land-less *haris*, our version of serfs, undergoing a perpetual slavery, without education and without any means of their own. On top of all this the *Shari'ah* Courts having, only prospectively, declared compulsory and compensation-free acquisition of property to be against the precepts of Islam, the State, governed as it is, has conveniently construed the dicta as implying that even such land reforms, which have already been enacted, may not, in letter and spirit, be implemented. In a population of nearly 140 million hardly 2% pay taxes. The informal sector of the economy is as large, if not larger, than the documented economy itself and probably, it is out of this documented economy that 13% of the GDP, is villy nilly recovered as taxes, well below an average of above 29% of the real GDP realised in developed countries. As a direct consequence of these horrendous imbalances, nay perversions, the elite classes of Pakistan, including very substantially Government officials in all fields of Government, semi Government or local activities, live almost princely lives.. No where in the world the elitist classes

own, possess or live in such palatial accommodations as in Pakistan. A ready demonstration of the same malaise would instantaneously be at hand if one were merely to step out on a busy road in any major Pakistan city. Such an observer, *inter alia* (e.g. *bazaars* stocked largely of foreign goods), would find latest model luxurious automobiles plying in profusion. Correspondingly, there is hardly any worthwhile public transport on the roads, local trains are almost non-existent and the elaborate railway system, which the British left behind, stands totally decimated. This is how the valuable resources (monetary equivalent of GDP) of an impoverished country are frittered away by those who matter here. It would not take a genius to visualise, in anticipation, the other side of the picture. As a corollary, the State of Pakistan is not only poor but, as the argument goes, has degenerated into virtually a highly indebted poor country (HIPC). By conservative estimates, about half the budget of the nation, currently, goes in debt servicing and that together with defence and other expenditures constitutes 83% of the total outlay, leaving thereby a bare 17% for other activities, including health, education development etc. As one analyst, taking only the expenditure-revenue ratio (deficit financing excluded) puts it, debt servicing and defence, put together, take away 120% of our budget. With illiteracy mounting by the hour, the population exploding and the country indebted, externally as well as internally, to a veritable chocking point, the present socio-economic dispensation has not only failed but stands all but collapsed. As against this, the simple Islamic system of profit and loss sharing, free of *riba*, ensures for banks and financial institutions alike, direct say in the conduct of business and other ventures they finance on behalf of their clients (depositors). The importance of this is self evident, where defaulted bank loans, by all accounts, have become astronomical and carry their own tales of dis-

honest application of credit. Where periodic performance reports to the financing bankers become a norm and where these bankers physically oversee the actual profits earned by the enterprises financed, something, which should be one of the inevitable incidents of the profit and loss sharing system, the economy would necessarily come to be documented, due profits would be distributed and, what is more, requisite taxes would be paid. In situations, where the entrepreneurs continue to indulge in the current and prevalent mal-practices, their banker, up-staged as a vigilant partner in capital contribution, should catch the culprits sooner than later and forthwith choke any further such activities. Correspondingly, banks would contribute in capital mobilisation not so much on the strength of collaterals as on the credit-worthiness of the entrepreneurs and the viability of the venture(s), sought to be financed. With a system of proper checks and balances at all levels and a contemporaneous cleaning up of the existing mess, the economy is likely to soar in not too distant a future. All it would take is the required will and an unswerving *belief* in the righteousness of the *cause*.

Even so, it is argued that a complete shift from a *riba* based economy to an Islamic one is no ordinary task. Apart from gestation throes, there are apprehended to be pitfalls at every juncture of the transition. The fears and apprehensions on this score, even if bona fide, stem from an assumption that the transition would not only be swift but abrupt. Undoubtedly, it has to be swift if Allah's message has any meaning, but it need not be abrupt.

There can hardly be two opinions about the proposition that in commercial transactions, particularly of banks and financial institutions, it is rare that an advance, in *good faith*, is made without duly adverting to the economic feasibility of the venture intended to be financed and without ensuring, in the way of

collaterals, a virtual certainty of repayment. These, *per se*, a guarantee for a smooth transition, would, substantially, continue as the parameters within which Islamic finance, essentially based on profit and loss sharing, would come to be extended, the only likely difference being a purposeful relaxation of the two considerations above mentioned, in a reasonable proportion, for those ventures, which are solely directed towards universal good and public welfare. The last, I repeat, shall only have to be in a reasonable proportion to purely commercially gainful activities, anticipated to be pursued by banks and financial institutions in an interest free economy. Another, and again a largely beneficial difference, would be that finance for speculation, ostentatious pursuits and other ungainly activities would become scarce. Besides banks, because they would emerge as partners in business, would lose much of their existing role as creators of money, a circumstance, which has, in an un-abated manner, continued to trigger an inflationary market. On the practical side, Islamisation of finance, it may added, is no longer a fanciful idea. For workable purposes, necessary documentation has already been accomplished. Fine tuning, if any, can take place within the visualised time schedule. As pointed out, in the main judgement and in his separate note by my learned brother, M. Taqi Usmani, J., Islamic banking is a physical reality all the world over and in so far as Pakistan is concerned we, specific to dealings having a nexus with financial institutions, at least on paper, have already gone completely *riba*-free. All that has to be done is to foresake appearances and follow the realities of the Islamic economic order, a prospect neither too difficult nor too remote.

29.

It has

been said, and to my mind correctly, that a riba free economy may be a

non-starter if the same is introduced in a continually selfish, dishonest and corrupt socio-economic milieu, such as that which, regrettably, prevails in countries like Pakistan. Even so, these difficulties, posed by the unfortunate social factors on the ground, are not insurmountable. The system of proper checks and balances, as envisaged in the various reports for Islamisation of the economy submitted, from time to time, to the Federation should adequately and promptly take care of these negatives. It is unnecessary to give details of the possible pre-emptive measures, particularly, when the relevant reports are available and speak for themselves and, what is more, the other two judgments in these appeals have elaborately dilated upon the matter. Even so, a passing statement may be made: firstly, an all pervasive credit rating of the existing and proposed agricultural, commercial, industrial or other productive ventures has compulsorily to be effected and constantly kept up-to date by the beginning of each financial year. Secondly, for effectively launching a profit and loss oriented economy, a qualitative and quantitative change in the practices of auditors has to be brought about, strict penalties being provided against irresponsible conduct of those experts, let alone their mis-conduct, which should be made an offence, subject to summary peer- oriented trials, ending in immediate disqualifications upon conviction, besides imposing sufficiently deterrent punishments in the way of prison terms. Indeed the crucial roles of

independent valuers and auditors is to be made so effective and so trust inspiring that on the basis of reports of the latter alone income tax and other revenue liabilities may be assessed, without the assessee having to go to the revenue offices or to have any truck with such bureaucratic sections of the society, obviously resulting in enrichment of the officials (focused below) and the business classes and the corresponding impoverishment of the State. The recommendation is by no means new; such is being practised in developed countries. Thirdly, sine qua non for an Islamic economic order, in the modern day world, is an all out effort to document the entire gamut of trading activities. However, if insistence for documentation is made together with a hefty sales-tax burden, the effort would surely fall prey to politicisation, as has hitherto happened. This has to be done in stages. First, a reasonable time schedule for documentation needs to be framed. Then a moderate sales tax is to be imposed. Last, but most important of all, each business or industrial enterprise, subject to such tax, should justly, fairly and transparently be assessed to a tax liability on capacity basis, ensuring for no more than a couple of years, to begin with. This, because official interference, and what goes with it, always up-sets the apple-cart. The move should require, strictness, on the one hand and cojolement on the other, a veritable carrot and stick policy. Fourthly, Islam permitting a large variety of taxes, not running contrary to its basic tenets, no section of the

society should be left tax free but such would necessitate a spreading of the tax burden equitably. Taxes, in Islam, must never be oppressive and always voluntary, without corrupt officials, the so called tax hounds at the backs of tax payers. This is easy; only the tax culture is to be generated. But tax culture can never evolve unless the tax-payers are convinced, less by proclamations and more by transparent public conduct, that their taxes would be well managed and well spent. This, however, must be accompanied by less and less official meddling and discretion but exemplary punishments for evasions not merely of assesseees but also of conniving officials. Fault in the system lies not in under-spreading of the tax net, which is far too wide, but in the yawning gaps therein from which big sharks can conveniently escape whereas small fries get inextricably trapped. In short, without good governace a true Islamic economic order would remain a distant dream and all effort in that direction merely counter productive. Lastly, because a riba free economy cannot be realised without the means to rid the country of the menace of an already deep rooted riba, internally as well as externally, transparency and purposefulness in managing the shift is a necessary co-comitant. Undisputably the debt burden, both domestic and foreign, is multiplying at a furious pace. Those, who began with protestations of breaking the beggar's bowl and sold away public sector enterprises (rightly termed as the equivalent of family silver) at throw away prices

did no better than leaving behind a much larger inventory of liabilities. For any success in this direction, a faithful resolve and a workable strategy is to be planned. This is simple enough, provided the requisite will is not found wanting. To start with, there ought to be an absolute “no” to any further loans at any level by the Government and its agencies. Then, a quick debt-equity swap in so far as domestic loans are concerned. Public sector enterprises, except where dictates of national security warrant otherwise, should be converted into limited liability companies or even corresponding mutual funds and their share capitals be publicly sold through stock exchanges etc. During the process, a rational subsistence must be paid on the deposits or other public issues contracted by the Government. This, hopefully, would clear the domestic debt and in a whole-some manner too. Care, however, must be taken of those who sit well entrenched in those white elephants of government owned or managed enterprises. They, sure enough, would do all that they can to engineer the failure of yet another of such-like efforts. Banks loans are no different. Immediate steps ought to be taken in that sector for a similar debt-equity swap. With that alone banks would become proportionate sharers in the financed institutions, individual and corporate. This would go a long way in curing the sick economic entities. External debt, which by all impartial estimates, has already exceeded US \$ 32 billion in less challenging. The exercise, again, can

only begin by a firm resolve of no more foreign loans. We are, in effect, a highly indebted poor country (HIPC) and should seek a write off, where-ever possible. I chanced to come across a very useful article entitled, "Of the bank, the fund and the Poor", where the author, A.B.S. Jafri, analysed the back-ground in which the Third World debt, with specific reference to HIPCs, came to be contracted, how unrepresentative regimes, apparently both dictatorial and having a mere façade of democracy, came to be propped up, how very conveniently generation after generation was trapped and correspondingly, public good became only scarcer than when the things began. The author, inter alia, wrote:

“If today Pakistan and so many other countries are in a state bordering perilously on financial bankruptcy, moral morass and environmental degradation, it is because of squalid governance, propped up largely by uncritical support and instigation by powers on whose behalf the Bank and the Fund operate without any inhibition. The unrepresentative and anti-people regimes have squandered aid and loans. Nowhere have the people been the beneficiary. At no stage were the people associated with these arrangements. There is no way the people can be held morally or even legally responsible to honour commitments behind such loans.

It is indeed good to see that the Bank and the Fund are now moved by a sense of some sort of moral obligation (or remorse?) to relieve the distress of the “heavily indebted poor countries.” They should first try to see what are the benefits from their loans over the years that have filtered down to the people. Also, in what manner these loans have contributed to the prosperity out of which the process of repayment of the loans should start. They would also do themselves a deal of good if they try to see what link there is between

the billions that the Bank and the Fund have so generously poured into the coffers of the governments of what are now the ‘heavily indebted poor countries.’”

It is not unlikely that they find themselves confronted with the view that in one way or another the Fund and the Bank have wittingly or otherwise been an ally and privy to the regimes that have plundered their own people and drowned them into a sea of wretchedness that literally beggars description.

There are many who find themselves forced to the view that the Bank and the Fund have been instrumental in distorting the character and motivations of the nations in whose good name they have advanced money to usurpers, impostors and charlatans.”

While negotiations for write off (in no case rescheduling because that, unceremoniously, multiplies the debt burden) would take their own time, a quick swipe may be directed at those, who illicitly hoard well over US \$ 100 billion of our precious wealth abroad. Every bit of this money, as and when realised, should go for immediate clearance of the foreign debt, to the extent feasible at a given time. Correspond to this an end to living on undeserved imports. All luxury imports must forthwith cease. These imports (dumping by veritable smugglers) have eroded our industrial base, factories have closed down. We are fast reverting to yet again becoming a raw material exporting country. Alas, with a dwindling agriculture, we may not be able to become even that. Enough of being a pliable market for others. Private automobiles should be phased out in favour of public transport, both on intra and inter city basis. This should also ease our oil bill, already soaring beyond the \$ 2.5 billion mark. Substantial export, and at that value

added one, should be a priority area. No more smuggling. This too should be a significant foreign exchange saver. Land reforms of the Ayub and Bhutto eras need to be duly enforced. There is no law against that. Agricultural produce, thus induced, should even generally be encouraged. What a travesty, a basically agrarian, and once a wheat surplus country, is surviving on imported wheat. These and other cognate measures should generate a yearly surplus of at least US \$ 3 to 4 billion. That too should exclusively go towards debt servicing. Where there is a will there is a way, the foregoing and other similar measures should, in God's good time, see us through our present plight of total helplessness.

30. Now to our bureaucratic quagmire. Bureaucratic corruption, of which the revenue staff and the police force are outstanding contributors has, in all promptitude, to be rooted out in an Islamic polity. There is no dearth of exercises in this direction so far as the Islamic Republic is concerned. However, it remains a fact that all such were either half hearted measures, or substantially wanting in good faith and, in any case, inconclusive or selective. It is axiomatic that all local politics is about jobs. In Pakistan, by and large, these jobs are held, at every level, by either incompetent or dishonest or otherwise undeserving officials. On the other hand, better people are sitting out and remain jobless. In the current state of affairs, they have no chance! Every government that comes reconciles itself with the incumbents, who soon establish their in-dispensability. It yet callously inducts its own camp followers, adding to the burden of the exchequer, which, for all intents and purposes has gone bankrupt. Talking of bankruptcy, from the material,

which has been produced before us virtually all Pakistani banks are in doldrums, presenting a totally moth eaten interior and there is little doubt that if the depositors, who are in millions, were merely to cease making further deposits in Pakistani banks, such banks and their hand-picked (defaulting) agrarian, commercial and industrial entrepreneurs would be left with nothing else except to prey upon one another's vitals. A very serious exercise to correct these imbalances is over-due. There is no need for witch hunting. All bureaucrats, as inclusive of bankers, should be required to submit details of assets owned or possessed by them, by members of their immediate families etc. and wherever such are, inexplicably, more than would be warranted necessary action should follow including compulsory or optional retirements. Correspondingly, all institutions, as have any nexus with properties, their allotments or transfers, banks, financial institutions or other connected entities may be required to provide details of individual and corporate holdings with which the above declarations of assets may be matched and discrepancies, if any, not only corrected but also penalised. Another link of the same exercise would lie in requiring similar compliances from the agrarian, commercial or industrial sections of the society, but of specific categories. The data, synchronised thus, would lead to necessary remedial measures. Of particular importance is the matter of bringing back the above US \$ 100 billion, belonging to Pakistanis and stated illegally to be parked abroad. Given the necessary will and resolve, there can be many ways to do it. First and foremost is to institute adequate awards, with corresponding secrecy, for would be informers. Then foreign governments/lenders may be persuaded to co-operate with a firm commitment to clear their liabilities on priority basis, once necessary material to trace and recover evaded assets is made available. Last but not the

least, tax and other incentives may be offered to the evaders themselves to reconstitute the valuable national wealth. This, and other moneys, realised sooner than later, should be utilised in paying off the foreign debt and the domestic liabilities of the country in that order. In laying down these guidelines, it is not proposed to exclude the judicial segment of the State. An identical exercise can go on in the provinces at and below the levels of the High Courts and at the Federal level in the Supreme Court. Much as, basically, the cleaning up of the officials would be at the bureaucratic level itself, the cleaning up of the judiciary shall have to be by and under the members of the judiciary themselves. Neither politicians nor the armed forces should be immune from these exercises. The politicians would be covered, apparently, under the categories of agrarian, commercial or industrial classes, above mentioned and, if necessary, a separate dispensation, regarding them also can be worked out but the corrective machinery, as regards participation of their peers, should only comprise of political figures of high integrity and impeccable characters. As regards the armed forces the exercise can be internal but transparent and open to public view. Relevant to the tribunals of exclusive jurisdiction, which such matters should necessitate two things must be ensured. One, these should be manned only by sitting and retired Judges of high integrity and two, the appointees should exclusively attend to these special assignments and for looking after their normal duties, if serving Judges are assigned these functions, temporary or other vacancies of their posts be created. Under no circumstances any direct appointment to these tribunals be made because such has never delivered. It is only from within the system that something good may yet come.

31. Having expressed general agreement with the findings and conclusions of my learned brothers together with some explicit or implicit

reservations I would here before concluding, like to make an express mention of some matters:-

- i) *With respect, the finding, that riba al-fadl was not envisioned in the Qur'an and introduced, for the first time, by the prophet of Islam appears, both factually and historically, to be ill-founded. As dilated upon above, the concept had, broadly, found a place in the Old Testament and besides, Arabs of the time physically indulged in riba al-fadl, as the quoted Ahadith of Bilal ^(RAA) and the prophet's ^(SAAWS) representative at Khyber would tend to demonstrate. Thus the Qur'an cannot be assumed to have ignored either the previous revelations in the Scripture or the facts on the ground. Prophet ^(SAAWS), none-the-less, has been fully credited with articulating and perfecting the institution of riba al-fadl. Even so, the views of my learned brothers may not make any particular difference because, after the Qur'an, Sunnah is the most important source of Muslim Law and the prophet ^(SAAWS) never discriminated in the import or effect of either form of riba. Thus, whatever be the rationale riba al-fadl would remain as much prohibited for Muslims as riba al-nasiah.*

- ii) *In my humble opinion, Government, and particularly an Islamic Government, cannot be differentiated in the way of so called "voluntary" additions and all such increases, upon the touch-stone of Qur'an and Sunnah constitute nothing but riba. Furthermore, in so far as law-making, touching the relevant Consolidated Funds and Public Accounts are concerned two aspects need be under-scored:-*
 - a) *In the absence of due fulfilment of the constitutional requirement to provide necessary framework on the point all debt raising loses legal sanctity.*

- b) *After our declarations qua riba no law can now be framed, regulating riba-infested barrowing by Government. Borrowing has now to be riba free and only if absolutely necessary, for Islam does not sanction any other form of borrowing.*
- iii) *Evidently, the objective behind some of the affirmative observations, regarding the “mark up” system, is merely to sanction trading, upon duly and fully complying with the concepts of bai muajjal and marabaha sale, each observing the caution, administered by the holy prophet ^(SAAWS) of physical delivery of the goods sold.*
- iv) *As regards the Shariah compliant modes and instruments of finance let it be noted that, such already stand, very largely, developed. No un-necessary time should, therefore, be lost in that direction nor banks and other financial institutions should, in any manner, delay the due implementation of a riba free and profit and loss oriented Islamic system.*
- v) *I have reservations about the time schedule, adopted in the Order of the Court. Besides, there are some lacunas in it. In my humble opinion comparatively smaller periods would have been sufficient. Any way, consensus, in essentials, is a pre-requisite in such delicate matters and such is reflected in the Order of the Court. Having said that there should be no misgivings in any quarters that this or the Federal Shariat Court would brook any un-necessary delay during the implementation phase of the judgement of this Court. Thus, time schedule or not, no one, be it the Government itself, would any longer be countenanced to conduct any further avoidable ribawi dealings, here or with the outside*

world. Transgressions, if any, can be appropriately brought to the notice of the Court.

- vi) *Lastly, there are some aspects of the matter e.g. inflation/indexation and the argument of Mr. M.Aslam Khaki regarding the lawfulness or otherwise of a fixed (percentage) payment to the contributor of capital, subject to accrual of profits from a venture, on which I would like to reserve my opinion for a more appropriate time and occasion. For one thing, a true Islamic economy should necessarily be inflation-free and, as to Mr. Khaki's contention there are plenty of Islamic modes of finance to justify indulging, at this stage, in merely academic discussions.*

32. Before parting, I would like to bring on record our deep appreciation for all those who found time to appear before us. We have gained from their knowledge and experience. I experienced paucity of time in naming each worthy participant during the course of my judgement but that failing has been duly taken care of in the main judgement of my brother, the learned Chairman. On my part, I am also very deeply indebted to the hundreds of concerned Pakistanis, who, by addressing extremely illuminating letters and sending also their own written works on the subject, have made my, otherwise onerous, task easier.

Dated: _____

JUDGE

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

ان الحكم الا لله عليه توكلت وعليه فليتوكل المتوكلون الحمد لله رب العالمين والصلاة والسلام
على رسوله الكريم و على آله واصحبه اجمعين

Maulana Muhammad Taqi Usmani, J:- All these appeals arise out of the same judgment of the learned Federal Shariat Court dated 14.11.1991 whereby the Court has declared a number of laws of the country repugnant to the Injunctions of Islam as they have provided for charging or paying interest which according to the findings of the learned Federal Shariat Court falls within the definition of Riba clearly prohibited by the Holy Quran.

2. The basic issues involved in all these appeals being similar all of them were heard together and are being disposed of by this single judgment.

3. Most of the appellants as well as some juris-consults argued before us that interest-based commercial transactions are invented by the modern business, and their history does not refer back to more than 400 years, therefore they are not covered by the term 'Riba' used by the Holy Quran, and the prohibition of Riba does not include the prohibition of interest as in vogue in modern transactions.

4. This view is sought to be supported by five different lines of argument adopted before us against the prohibition of interest.

5. The first approach to interpret the term Riba, as adopted by some of the appellants, was that the verses of the Holy Quran which prohibit Riba were revealed in the last days of the life of the Holy Prophet (Sallallahu Alaihi Wassallam) and he could not have an opportunity to interpret them properly and therefore no hard and fast definition of the term Riba can be found in the Holy Quran or in the Sunnah of the Holy Prophet(Sallalhu Alaihi Wassallam) Since the term remained ambiguous in nature, it falls within the area of *Mutashabihaat* and its correct meaning is unknown. According to this approach the prohibition of Riba should be restricted to the limited transactions expressly mentioned in the Hadith literature and the principle cannot be extended to the modern banking system which was not even imaginable at the time of revelation of the verses.

6. The second line of argument runs on the basis that the word 'Riba' refers only to the usurious loans on which an excessive rate of interest used to be charged by the creditors which would entail exploitation. As for the modern banking interest, it cannot be termed as 'Riba' if the rate of interest is not excessive or exploitative.

7. The third argument differentiates between consumption loans and commercial loans. According to this approach the word “Al-Riba” used in the Holy Quran is restricted to the increased amount charged on the consumption loans used to be taken by the poor people for their day to day needs. These poor people deserved sympathetic attitude on humanitarian grounds, but the rich people exploited their miserable condition to charge heavy amounts from them in the form of usury. The Holy Quran has taken this practice as a severe offence against humanity and declared war against those involved in such abominated transactions. So far as the modern commercial loans are concerned, they were neither in vogue in the days of the Holy Prophet (Sallallahu Alaihi Wassallam) nor has the Holy Quran addressed them while prohibiting ‘Riba’. Even the basic philosophy underlying the prohibition of ‘Riba’ cannot be applied to these commercial and productive loans where the debtors are not poor people. In most cases they are wealthy or at least economically well-off and the loans taken by them are generally used for generating profits. Therefore, any increase charged from them by the creditors cannot be termed as ‘*Zulm*’ (Injustice) which was the basic cause of the prohibition of ‘Riba’.

8. The fourth theory advanced during the arguments was that the Holy Quran has prohibited '*riba-al-jahiliyya*' only which, according to a number of traditions, was a particular transaction of loan where no additional amount over and above the principal was stipulated in the agreement of loan. However, if the debtor could not pay off the loan at its due date, the creditor would give him more time against charging an additional amount. According to this theory, if an increased amount is stipulated in the initial agreement of loan, it does not constitute *riba al-Quran*. However, it does fall in the definition of *riba-al-fadl*, prohibited by the Sunnah. Its prohibition is of a lesser degree which can be termed as *makrooh* and not *haram* . Therefore, this prohibition may be relaxed in cases of genuine need and it does not apply to the non-Muslims. Being a special law applicable to the Muslims only, it falls within the category of 'Muslim Personal Law' which falls outside the jurisdiction of the Federal Shariat Court, as contemplated in Article 203(B) of the Constitution of Pakistan.

9. The fifth way of argument was that although the modern interest-based transactions are covered by the prohibition of 'Riba', yet the commercial interest being the back-bone of the modern economic activities throughout the world, no country can live without being involved in interest-based transactions and it will be a suicidal act to

abolish interest from domestic and foreign transactions. Islam, being a practical religion, recognizes the principle of necessity and it has allowed even to eat pork in extreme situation where one cannot live without eating it. The same principle of necessity should be applied to the interest-based transactions also, and on the basis of this necessity the laws permitting the charge of interest should not be declared repugnant to the injunctions of Islam.

10. All these different sets of arguments led us to resolve the main issue i.e. whether or not commercial interest of modern financial system falls within the definition of *Riba* prohibited by the Holy Quran, and if it does, whether they can be allowed on the basis of necessity. This also led us to examine whether the modern financial transactions can be designed without interest and whether or not the proposed alternatives are feasible keeping in view the modern structure of commerce and finance. In order to resolve these issues we invited a number of experts as juris-consults consisting of Shariah scholars, economists, bankers, accountants and representatives of modern business and trade who have provided assistance to the Court in their respective areas of specialization.

An objective study of the Quranic verses dealing with Riba

11. Before analyzing the above-mentioned arguments, let us undertake an objective study of the verses of the Holy Quran about Riba. There are four different sets of verses which were revealed on different occasions.

12. First, in Surah Al-Rum (30:39), a Makkan Surah wherein the term *Riba* finds mention in the following words:

وَمَا أَنْتُمْ مِّنْ رَبَّآ لَيْرُبُؤَآ فِيْ أَمْوَآلِ النَّآسِ فَلَا يَرْبُؤَآ عِنْدَ اللّٰهِ

(And whatever Riba you give so that it may increase in the wealth of the people, it does not increase with Allah.)[30:39]

وَآخِذْهُمُ الرِّبَا وَقَدْ نُهُوَآ عَنْهُ

13. The second verse is of Surah Al-Nisa (4:161) where the term Riba is used in the context of sinful acts of the Jews in the following words:

يَآئِيهَا الَّذِيْنَ آمَنُوا لَا تَأْكُلُوا الرِّبَا اَضْعَآفَا مُضْعَفَةً

(And because of their charging Riba while they were prohibited from it)[4:161]

14. In the third verse of Surah Al-Imran (3:130) the prohibition of Riba is laid down in the following words:

يَآئِيهَا الَّذِيْنَ آمَنُوا لَا تَأْكُلُوا الرِّبَا اَضْعَآفَا مُضْعَفَةً

(O those who believe do not eat up

Riba doubled and redoubled)

15. The fourth set of verses is found in the Surah Al-Baqarah in the following words:

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا
الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ مِنْ رَبِّهِ فَانْتَهَى فَلَهُ مَا سَلَفَ
وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ ۝ ۲۷۵
يَمْحَقُ اللَّهُ الرِّبَا وَيُرْبِي الصَّدَقَاتِ وَاللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَتِيمٍ ۝ ۲۷۶
إِنَّ الَّذِينَ آمَنُوا وَعَمِلُوا الصَّالِحَاتِ وَأَقَامُوا الصَّلَاةَ وَآتَوُا الزَّكَاةَ لَهُمْ أَجْرُهُمْ عِنْدَ رَبِّهِمْ وَلَا خَوْفٌ
عَلَيْهِمْ وَلَا هُمْ يَحْزَنُونَ ۝ ۲۷۷
يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنْتُمْ مُؤْمِنِينَ ۝ ۲۷۸
فَإِنْ لَمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِنَ اللَّهِ وَرَسُولِهِ وَإِنْ تُبْتُمْ فَلَكُمْ رُءُوسُ أَمْوَالِكُمْ لَا تَظْلِمُونَ وَلَا
تُظْلَمُونَ ۝ ۲۷۹
وَإِنْ كَانَ دُونُ عُسْرَةٍ فَنَظِرَةٌ إِلَى مَيْسَرَةٍ وَأَنْ تَصَدَّقُوا خَيْرٌ لَكُمْ إِنْ كُنْتُمْ تَعْلَمُونَ ۝ ۲۸۰
وَاتَّقُوا يَوْمًا تُرْجَعُونَ فِيهِ إِلَى اللَّهِ نَحْتُمْ تَوْفَى كُلِّ نَفْسٍ مَّا كَسَبَتْ وَهُمْ لَا يُظْلَمُونَ ۝ ۲۸۱

“Those who take *riba* (usury or interest) will not stand but as stands the one whom the demon has driven crazy by his touch. That is because they have said: “Trading is but like *riba*”. And Allah has permitted trading, and prohibited *riba*. So, whoever receives an advice from his Lord and stops, he is allowed what has passed, and his matter is upto Allah. And the ones who revert back, those are the people of Fire. There they remain for ever. Allah destroys *riba* and nourishes charities. And Allah does not like any sinful

disbeliever. Surely those who believe and do good deeds, establish Salah and pay Zakah, have their reward with their Lord, and there is no fear for them, nor shall they grieve.

O those who believe, fear Allah and give up what still remains of the 'riba' if you are believers. But if you do not, then listen to the declaration of war from Allah and His Messenger. And if you repent, yours is your principal. Neither you wrong, nor be wronged. And if there be one in misery, then deferment till ease. And that you leave it as alms is far better for you, if you really know. And be fearful of a day when you shall be returned to Allah, then everybody shall be paid, in full, what he has earned. And they shall not be wronged.

(Verses 275-281)

Historical Analysis of the Verses of Riba:

16. Before proceeding further it will be appropriate to understand these verses in their chronological order.

Surah al-Rum

17. First of these verses is a part of Surah Al-Rum which was undisputedly revealed in Makkah. This verse is not of prohibitive nature. It simply says that the *Riba* does not increase with Allah i.e. it carries no reward in the Hereafter. Many commentators of the Holy Quran are of the opinion that the word *Riba* in this verse does not refer to usury or interest. Ibn Jari Al-Tabari (D310 AH), the most famous exegete of the Holy Quran, reports from Ibn Abbas (R.A.A) and several Tabi'in like Saeed Ibn Jubair, Mujahid, Tawoos, Qatadah, Zahhak and Ibrahim Al-Nakha'i that the word *Riba* in this verse means a gift offered by someone to a person with the intention that the latter will give him a greater gift to the former ⁸. However, some commentators of the Holy Quran have taken this word to mean usury. This view is attributed to Hasan AlBasri as reported by Ibn AlJawzi⁹. If the word *Riba* used in this verse is taken to mean usury according to this view, which seems more probable, because the word of 'riba' used in other places carries the same meaning, there is no specific prohibition against it in the verse. The most it has emphasized is that *Riba* does not carry a reward from

⁸ Ibn Jarir: *Tafsir Jami'-al-Bayan*, Dar-ul-Fikr, Beirut 1984, V.21, P.46-48

Allah in the Hereafter. Therefore, this verse does not contain a prohibition against Riba. However, it may be taken as a subtle indication to the fact that the practice is not favored by Allah.

Surah al-Nisa:

18. The second verse is of Surah AlNisa where, while listing the evil deeds of Jews, it is mentioned that they used to take Riba which was prohibited for them. The exact time of this verse is very difficult to ascertain. The commentators are mostly silent on this point, but the context in which the verse was revealed suggests that it would have been revealed before 4th year of Hijra. Verse 153 of the Surah AlNisa is as follows:

يَسْأَلُكَ أَهْلُ الْكِتَابِ أَنْ تُنزِّلَ عَلَيْهِمْ كِتَابًا مِّنَ السَّمَاءِ

(“The People of the Book ask you to bring down upon them a Book from the heaven”.)

19. This verse implies that all the forthcoming verses were revealed in answer to the argumentation of the Jews who came to the Holy Prophet (Sallallahu Alaihi Wassallam) and asked him to bring down a Book from the heavens like the one given to the prophet Musa (Alaihis-Salam) It means that this series of verses was revealed at a time when Jews were

⁹ Ibn-al-Jauzi, *Zad-ul-Masir*, Al-Maktab-al-Islami, Beirut, 1964, V.6, P.304

abundantly present in Madina and were in a position to argue with the Holy Prophet (Sallallahu Alaihi Wassallam) . Since most of the Jews had left Madinah after 4th year from Hijra, this verse seems to have been revealed before that. Here the word *Riba* undoubtedly refers to usury because it was really prohibited for the Jews. This prohibition is still contained in the old testament of Bible. But it cannot be taken as a direct and explicit prohibition of Riba for the Muslims. It simply mentions that Riba was prohibited for the Jews but they did not comply with the prohibition in their practical lives. The inference, though, would be that it was a sinful act for the Muslims also, otherwise they had no occasion to blame them for the practice.

Surah Al-Imran:

20. The third verse is of Surah Al-Imran which is estimated to have been revealed sometime in the 2nd year after Hijra, because the context of the preceding and succeeding verses refers to the battle of Uhud which took place in the 2nd year after Hijra. This verse contains a clear prohibition for the Muslims and it can safely be said that it is the first verse of the

Holy Quran through which the practice of *Riba* was forbidden for the Muslims inexpress terms. That is why Hafidh Ibn Hajar Al-Asqalani, the most famous commentator of Sahih AlBukhari, has opined that the prohibition of Riba was declared sometime around the battle of Uhud¹⁰. Some commentators have also pointed out the reason why this verse was revealed in the context of the battle of Uhud. They say that the invaders of Makkah had financed their army by taking usurious loans and had in this way arranged a lot of arms against Muslims. It was apprehended that it may induce the Muslims to arrange for arms on the same pattern by taking usurious loans from the people. In order to prevent them from this approach the verse was revealed containing a clear-cut prohibition of Riba¹¹.

21. That the prohibition of Riba had been imposed sometime around the battle of Uhud finds further support from an event reported by Abu Dawood in his Al-Sunan from the noble companion, Abu Huraira (R.A.A) The report says that Amr ibn Aqyash was a person who had

¹⁰ Ibn Hajar, *Fath-ul-Bari*, Makkah, 1981, V.8, P.205.

advanced some loans on the basis of interest. He was inclined to embrace Islam but was reluctant to do so on the apprehension that after embracing Islam he would lose the amount of interest and therefore he delayed accepting Islam. In the meantime the battle of Uhud broke up whereby he decided not to delay embracing Islam and came to the battlefield, started fighting on behalf of Muslims and achieved the rank of a *Shaheed* (martyr) in the same battle¹².

22. This tradition clearly shows that Riba was prohibited before the battle of Uhud and it was the basic cause for the reluctance of Amr ibn Aqyash to embrace Islam.

23. The fourth set of verses are contained in Surah AlBaqara where the severity of the prohibition of Riba has been elaborated in detail. The background of the revelation of these verses is that after the conquest of Makkah the Holy Prophet (Sallallahu Alaihi Wassallam) had declared as void all the amounts of Riba that were due at that time. The declaration embodied that nobody could claim any interest on any loan advanced by him. Then the Holy Prophet (Sallallahu Alaihi Wassallam) proceeded to Taif which could not be conquered, but later on the inhabitants of Taaif who belonged mostly to the tribe of *Thaqif* came to him and after

¹¹ Al-Razi, *Al-Tafsir Al-Kabir*, IIIrd Ed., Iran V.9, P.2

embracing Islam surrendered to the Holy Prophet (Sallallahu Alaihi Wassallam) and entered into a treaty with him. One of the proposed clauses of treaty was that Banu Tha'qif will not forego the amounts of interest due on their debtors but their creditors will forego the amount of interest. The Holy Prophet (Sallallahu Alaihi Wassallam) instead of signing that treaty simply wrote a sentence on the proposed draft that Banu Tha'qif will have the same rights as the Muslims have¹³. Banu Tha'qif having the impression that their proposed treaty was accepted by the Holy Prophet (Sallallahu Alaihi Wassallam) claimed the amount of interest from Banu Amr Ibn-al-Mughirah, but they declined to pay interest on the ground that Riba was prohibited after Islam. The matter was placed before Attaab ibn Aseed (R.A.A) the governor of Makkah. Banu Tha'qif argued that according to the treaty they are not bound to forego the amounts of interest. Attaab ibn Aseed (R.A.A) placed the matter before the Holy Prophet (Sallallahu Alaihi Wassallam) on which the following verses of Surah AlBaqarah were revealed:

يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنْتُمْ مُؤْمِنِينَ ۚ ۲۷۸
 فَإِن لَّمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِّنَ اللَّهِ وَرَسُولِهِ ۗ وَإِن تُبْتِغُوا فَلَئِمَّ رُءُوسُ أَمْوَالِكُمْ ۗ لَا تَظْلِمُونَ وَلَا
 تُظْلَمُونَ ۚ ۲۷۹

(O those who believe, fear Allah and give up
 what still remains of the Riba if you are

¹² Abu Dawood: *Al-Sunan*, Hadith No.2537, V.3, P.20.

¹³ Ibn Atiyyah, *Al-muharrar-al-wajiz*, Doha, 1977, V.2, P.489.

believers. But if you do not, then listen to the declaration of war from Allah and His Messenger. And if you repent, yours is your principal. Neither you wrong, nor be wronged.[278-279])

24. At that point of time Banu Tha'qif surrendered and said *we have no power to wage war against Allah and His Messenger*.¹⁴

The time of Prohibition of Riba:

25. This study of the verses of the Holy Quran in the light of their historical background clearly proves that *Riba* was prohibited at least in the 2nd year of Hijra. It is rather doubtful whether or not it was prohibited before that. If the word *Riba* in the verses of Surah Al-Rum is taken to mean usury as interpreted by a number of authorities, it would mean that the practice of *Riba* was discarded by the Holy Quran in Makkan period. That is why a number of scholars are of the view that *Riba* was never allowed in Islam. It was prohibited from the very beginning but the severity of prohibition was not emphasized during that

period because Muslims were being persecuted by the infidels of Makkah and their major focus was on establishing and defending the basic articles of faith and they had no occasion to indulge in the practice of Riba. Be that as it may, the fact that cannot be denied is that the express prohibition of Riba was undoubtedly imposed in the 2nd year of Hijra.

26. Some appellants and juris-consults have assailed this statement and urged that the prohibition of Riba was imposed in the last year of the life of the Holy Prophet(Sallalhu Alaihi Wassallam) They tried to support this view on three different traditions:

27. Firstly, it has been reported in a number of traditions that the Holy Prophet (Sallallahu Alaihi Wassallam) announced the prohibition of Riba in his last sermon during his last Hajj. The Holy Prophet (Sallallahu Alaihi Wassallam) not only prohibited Riba on that occasion but had also declared that the first Riba decreed to be void is the *Riba* payable to his uncle Abbas ibn Abu Muttalib (R.A.A). This declaration shows that the first transaction declared to be void was that of Abbas ibn

¹⁴ Ibn Jarir, *Jami-al-Bayan*, Op Cit, V.3, P.107, Al-Wahidi, *Alwasit*, V.1, P.397, Ibn Atiyyah, Op.Cit V.2, P.489,

Abdul Muttalib (R.A.A) which means that the prohibition of Riba was not effective before the last Hajj of the Holy Prophet (Sallallahu Alaihi Wassallam) i.e. before 10th year after Hijra.

28. A deeper study of the relevant material reveals that this argument is misconceived. In fact the prohibition of Riba was effective at least from the 2nd year of Hijra but the Holy Prophet (Sallallahu Alaihi Wassallam) deemed it necessary to announce the basic injunctions of Islam at the time of his last sermon which was the most attended gathering of his followers. To avail this opportunity, he announced the prohibition of a large number of practices prevalent in the days of Jahiliyya which were prohibited in Islam, but it did never mean that these practices were not prohibited before that point of time. For example, the Holy Prophet (Sallallahu Alaihi Wassallam) has emphasized on the sanctity of human life and honour. He announced the prohibition of liquor and warned the Muslims against maltreatment of women, against back-biting and mutual quarrels. Obviously all

these injunctions were effective since long, but the Holy Prophet (Sallallahu Alaihi Wassallam) announced them at the time of his last sermon so that all the audience may be fully aware of them and nobody could plead ignorance about these injunctions. The same is true about Riba. It was prohibited since long, but the announcement of its prohibition was repeated in express terms on that occasion also. At the same time the Holy Prophet (Sallallahu Alaihi Wassallam) declared that no claim of Riba will be entertained forthwith. It was a time when large number of Arab tribes were entering the fold of Islam throughout the peninsula. The practice of Riba was rampant among them and it was apprehended that they would continue claiming the amounts of usury from one another, therefore, the Holy Prophet (Sallallahu Alaihi Wassallam) deemed it fit to announce not only the prohibition of Riba but also that all the previous transactions of Riba will no more be honoured. It was in this context that he declared the amounts of Riba payable to his uncle Abbas ibn Abd-ul-Muttalib (R.A.A) as void. It should be kept in mind that his uncle Abbas (R.A.A) embraced Islam in 8th year after Hijra shortly before the conquest of Makkah¹⁵. Before embracing Islam he used to advance loans on the basis of interest and his debtors owed him huge

¹⁵ Ibn Hajar, *Al-Isabah*, V.2 P.263

amounts¹⁶. It seems that after the conquest of Makkah he migrated to Madina and could not settle his transactions with his debtors. Therefore, when he traveled for Hajj along with Holy Prophet(Sallallahu Alaihi Wassallam) it was the first occasion when he could settle his transactions, hence, the Holy Prophet (Sallallahu Alaihi Wassallam) declared that the whole amount of Riba payable to his uncle

Abbas (R.A.A) was void and no more payable. The words *first Riba* occurring in this declaration do not mean that no Riba was declared void before it. What it means is simply that this is the first amount of Riba which is being declared as void at that occasion of the last sermon. We have already quoted the case of Banu Thaqeef who demanded interest from their debtors after the conquest of Makkah (i.e. two years before the last Hajj) and the amounts of interest claimed by them were held to be void. It is, therefore, not correct to say that the *riba* of Abbas b. Abdulmuttalib (R.A.A) was the first ever *riba* which was declared void, nor that the prohibition of *riba* was enforced for the first time at the the time of last Hajj.

¹⁶ Al-Wahidi, Op Cit.

The Last Verse of the Quran

29. Secondly, the view that Riba was prohibited in the last days of the Holy Prophet (Sallallahu Alaihi Wassallam) is sought to be supported by another tradition of Imam Bukhari where he has reported from Abdullah ibn Abbas (R.A.A) that he said:

أَخِرُ آيَةٍ نَزَلَتْ عَلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ آيَةُ الرَّبَا

(The last verse of the Holy Quran which was revealed on the Holy Prophet (R.A.A) was the verse of Riba ¹⁷.)

30. But at the first place Abdullah ibn Abbas (R.A.A) is not saying that the last injunction of Shariah was the prohibition of Riba. All he is saying is that the last verse revealed on the Holy Prophet (Sallallahu Alaihi Wassallam) was the verse of Riba which in this sentence undoubtedly means the verse of Surah AlBaqarah already quoted above.

The words “verse of Riba” is used as a title to it.

¹⁷ Sahih Al-Bukhari Kitab-al-Tafseer Ch.53, Hadith No.4544.

Therefore, even if the above statement of Abdullah ibn Abbas (R.A.A) is taken at its face value, it is an admission on his own part that the verses of Surah Al-Imran, Surah Al-Nisa and Surah Al-Rum were revealed before this verse of Surah AlBaqarah which clearly indicates that the prohibition of Riba was already imposed before the revelation of these verses. It is, therefore, evident that this statement of Abdullah-ibn-Abbas (Sallalhu Alaihi Wassallam).

31. Moreover, the same statement of Abdullah ibn Abbas (R.A.A) is reported by a number of other scholars, like Ibn Jarir AlTabari, who have explained that this statement of Abdullah ibn Abbas (R.A.A) refers only to the following verse:

وَاتَّقُوا يَوْمًا تُرْجَعُونَ فِيهِ إِلَى اللَّهِ خِ تَمَّ تُوقَى كُلُّ نَفْسٍ مَّا
كَسَبَتْ وَهُمْ لَا يُظْلَمُونَ ۚ ۲۸۱ ۝

(And be fearful of a day when you shall be returned to Allah, then everybody shall be paid, in full, what he has earned. And they shall not be wronged. [v.2:281])

32. Since this verse is placed in the present order immediately after the verses of Riba which are 275-280, Abdullah ibn Abbas (R.A.A) has termed it as a verse of Riba. That is why Imam Bukhari has related this

statement of Abdullah ibn Abbas (R.A.A) in that chapter of his Katab-al-Tafseer which deals with the commentary on verse 281 only and not in the chapters 49-52 which deal with verses 275-280¹⁸. In the light of this explanation, it is more probable that according to Abdullah ibn Abbas (R.A.A.) the verses mentioning the severity of the prohibition of Riba (verses 275-280 of Surah AlBaqara) were already revealed and it was only verse 281 which was revealed in the last days of the Holy Prophet(Sallallahu Alaihi Wassallam) This view finds further support from the fact that verse 278 was certainly revealed soon after the conquest of Makkah when the tribe of Thaqif had claimed the amount of Riba outstanding toward Banu Mughira as already mentioned in detail. The conquest of Makkah was in 8th year of Hijra while the Holy Prophet (Sallallahu Alaihi Wassallam) passed away in 11th of Hijra. How can it be imagined that no other verse of Holy Quran was revealed during this long period of more than 3 years. This presumption which is false on the face of it is very difficult to be attributed to a person like Abdullah ibn Abbas (R.A.A.). It is, therefore, almost certain that by the verse of Riba he did not mean any other verse than verse 281 which according to him was revealed separately in the last days of the Holy Prophet (Sallallahu Alaihi Wassallam) and this too is the personal opinion of Abdullah ibn Abbas (R.A.A.). Some other Sahaba have identified some

¹⁸ Ibn Hajar: *Fathul Bari* V.8, P.205

other verses of the Holy Quran as being the last revealed verses. The issue has been discussed in detail by Al-Suyyuti in his Al-Itqan and many other books of Tafseer and Hadith.

33. This explanation is more than sufficient to prove that the prohibition of Riba was imposed long before the last days of the Holy Prophet(Sallalhu Alaihi Wassallam)

34. The upshot of the above discussion is that although some indications of displeasure against Riba were given in the Makkan period also, but the express prohibition of Riba was revealed in the Holy Quran sometime around the battle of Uhud in the second year of Hijra.

35. The third tradition relied upon by some appellants for their claim that the prohibition of riba came in the last days of the Holy Prophet (Sallallahu Alaihi Wassallam) is a statement of Hazrat Umar (R.A.A.) . We shall analyze this statement later on in para 56 in a greater detail inshaallah.

What is meant by Riba?

36. Now we come to the question what is meant by Riba ? The Holy Quran did not give any definition to the term for the simple reason that it

was well known to his addressees. It is like the prohibition of pork, liquor, gambling, adultery etc. which were imposed without giving any hard and fast definition because all these terms were well known and there was no ambiguity in their meaning. Similar was the case of Riba. It was not a term foreign to Arabs. They all used the term in their mutual transactions. Not only Arabs but all the previous societies used to practice it in their financial dealings and nobody had any confusion about its exact sense. We have already quoted the verse of Surah AlNisa where the Holy Quran has reproached the Jews for their taking *Riba* while it was prohibited for them. Here this practice is termed as Riba in the same manner as it is termed in Surah Al-Imran or Surah AlBaqarah. It means that the practice of *Riba* prohibited for Muslims was the same as was prohibited for the Jews.

Riba in the Bible:

37. This prohibition is still available in the old testament of the bible. The following excerpts may be quoted with advantage:

“Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of any thing that is lent upon usury.”

[Deuteronomy 23:19]

“Lord, who shall abide in thy tabernacle?
Who shall dwell in thy holy hill? He that
walketh uprightly, and worketh
righteousness and speaketh the truth in his
heart. He that putteth not out of his money
to usury, nor taketh reward against the
innocent.” [Psalms 15:1,2,5]

“He that by usury and unjust gain
increaseth his substance, he shall gather it
for him that will pity the poor”. [Proverbs
28:8]

“Then I consulted with myself, and I
rebuked the nobles, and rulers and said unto
them, Ye exact usury, every one of his
brother. And I set a great assembly against
them.” [Nehemiah 5:7]

“He that hath not given forth upon usury,
neither hath taken any increase, that hath

withdrawn his hand from iniquity, hath
 executed true judgment between man and
 man, Hath walked in my statutes, and hath
 kept my judgments, to deal truly; he is
 just,.

He shall surely live, said the Lord GOD.

[Ezekiel 18:8,9]

In thee have they taken gifts to shed blood;
 thou hast taken usury and increase, and
 though hast greedily gained of thy
 neighbours by extortion, and hast forgotten
 me,

said the Lord God. [Ezekiel 22:12]

38. In these excerpts of the Bible the word Usury is used in the sense of any amount claimed by the creditor over and above the principal advanced by him to the debtor. The word Riba used in the Holy Quran carries the same meaning because the verse of Surah AlNisa explicitly mentions that Riba was prohibited for the Jews also.

The definition of Riba as given by the Exegetes of the Holy Quran:

39. Moreover, the literature of Hadith while explaining the word Riba has mentioned in detail the transactions of Riba which were used to be effected by the Arabs of Jahiliyya on the basis of which the earliest commentators of the Holy Quran have defined Riba in clear terms.

40. Imam Abubakr AlJassas (D.380 AH) in his famous work Ahkamul Quran has explained Riba in the following words:

والربا الذي كانت العرب تعرفه وتفعله إنما كان قرض الدراهم والدنانير إلى أجل بزيادة على مقدار ما استقرض على ما يتراضون به.

And the Riba which was known to and practiced by the Arabs was that they used to advance loan in the form of Dirham (silver coin) or Dinar (gold coin) for a certain term with an agreed increase on the amount of the principal advanced.¹⁹

¹⁹ Ahkamul Quran by Al-Jassas P.465 V.1 Lahore 1980

41. On the basis of this practice the same author has defined the term in the following words:

هو القرض المشروط فيه الاجل و زيادة مالٍ على المستقرض-

The Riba of Jahiliyya is a loan given for stipulated period with a stipulated increase on the principal payable by the loanee ²⁰.

42. The well-known Imam Fakhruddin Al-Raazi has mentioned practice of Riba in the days of Jahiliya as follows:

واما الربا النسبيّة فهو الأمر الذي كان مشهورا متعارفا في الجاهلية وذلك أنهم كانوا. يدفعوا المال على أن يأخذوا كل شهر قدرا معيناً، ويكون رأس المال باقياً، ثم إذا حل. الدين طالبوا المديون برأس المال، فإن تعذر عليه الأداء زادوا في الحق والأجل' فهذا هو الربا بالذي كانوا في الجاهلية يتعاملون به

42. The same explanation is given by Ibn Aadil AlDimashqi in his detailed Tafseer AlLubaab v.4 p.448.

The detailed Account of riba-al-jahiliyya:

²⁰ op cit P.469 V.1

43. Mr. Riazul Hassan Gillani, the learned counsel for the Federation of Pakistan argued before us that Riba Al-Jahiliyya which was prohibited by the Holy Quran was a particular transaction in which no increase used to be stipulated at the time of advancing a loan; however, if the debtor could not pay the principal amount at the time of maturity, the creditor used to offer him two options: either to pay the principal or to increase the amount in exchange of an additional term allowed by the creditor. The learned counsel argued that the original loan advanced in the days of Jahiliyya would not stipulate any additional amount in the principal, and therefore, any amount stipulated in the original contract of loan does not fall within the definition of Riba alQuran. However, it may fall in the definition of Riba-al-Fadl which is a *Makruh* (detested, not advisable) practice.

44. The learned counsel referred to a number of traditions narrated by the exegetes of the Holy Quran. For example, he cited the well-known Tafseer of Ibn Jarrir AlTabari who on the authority of Mujahid has explained the Riba of Jahiliya as follows:

كانو فى الجاهلية يكون للرجل على الرجل الدين'
 فيقول 'لك كذا وكذا و توخر عنى-

In the days of Jahiliyya a person used to owe a debt to his creditor then he would say to his

creditor “I offer you such and such amount and you give me more time to pay”²¹.

45. The same explanation has been given by a number of commentators of the Holy Quran. Mr. Riazul Hassan Gillani argued that there is no mention in these traditions of any increase on the principal stipulated in the original transaction of loan. What is mentioned here is that the increase used to be offered or claimed at the time of maturity which shows that Riba prohibited by the Holy Quran was restricted to claiming an amount for giving an additional time to the debtor. If an increased amount is stipulated in the initial transaction of loan, it is not covered by Riba-al-Quran.

46. This contention of the learned counsel did not appeal us at all, for the simple reason that a careful study of the relevant material in the original resources of Tafseer clearly shows that the claim of an increased amount over the principal had different forms in the days of Jahiliyya. Firstly, while advancing a loan the creditor used to claim an increased amount over the principal and would advance loan on this clearly stipulated condition as is mentioned by Imam Al-Jassas in his Ahkamul Quran already quoted above; secondly, the creditor used to charge a

²¹ Tafseer Ibn Jarir P.101, V.3

monthly return from the debtor while the principal amount would remain intact up to the day of maturity as mentioned by Imam AlRaazi and Ibn Aadil already quoted.

47. The third form is mentioned by Mujahid as quoted by the learned counsel, but the full explanation of this transaction is given by Ibn Jarrir himself on the authority of Qatadah in the following words:

وَمِنْ طَرِيقِ قَتَادَةَ " إِنَّ رَبَّأَ أَهْلِ الْجَاهِلِيَّةِ يَبِيعُ الرَّجُلَ الْبَيْعَ إِلَى أَجَلٍ مُسَمًّى , فَإِذَا حَلَّ الْأَجَلَ وَلَمْ يَكُنْ عِنْدَ صَاحِبِهِ قَضَاءً , زَادَ وَأَخَّرَ عَنْهُ

“The Riba of Jahiliyya was a transaction whereby a person used to sell a commodity for a price payable at a future specific date, thereafter when the date of payment came and the buyer was not able to pay, the seller used to increase the amount due and give him more time ²².”

48. The same explanation has been given by Alsuyuti on the authority of Faryabi in the following words:

كانوا يبتاعون الى الاجل' فاذا حل الاجل زادوا عليهم وزادوا في الاجل-

²² Ibn Jarir: *Tafseer*, op cit.V.3, P.101

They used to purchase a commodity on the basis of deferred payment, then on the date of maturity the sellers used to increase the due amount and increase the time of payment ²³.

49. It is clear from these quotations that the transaction in which the creditor used to charge an additional amount on the date of maturity was not a transaction of loan. Initially; it used to be a transaction of sale of a commodity on deferred payment basis in which the seller used to fix a higher price because of deferred payment, but when the buyer would not pay at the date of maturity, the seller used to keep on increasing the amount in exchange of additional time given to the buyer. This particular transaction is meant by Mujahid also, that is why, he did not use the word *Qarz* (loan); he has rather used the word *Dain* (debt) which is normally created by a transaction of sale.

50. This form of Riba has been frequently mentioned by the commentators of the Holy Quran because they wanted to explain a particular sentence of the verses of Riba which is as follows:

²³ Al-Suyuti, Lubab-al-Nuqool P.20

قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا

The non-believers say that sale is very similar to Riba.

51. This saying of the non-believers clearly refers to the particular transaction of sale mentioned above. Their objection was that when we increase the price of commodity in the original transaction of sale because of its being based on deferred payment, it is treated as a valid sale. But when we want to increase the due amount after the maturity date, when the debtor is not able to pay, it is termed as *Riba* while the increase in both cases seems to be similar. This objection of the nonbelievers of Makkah has been specifically mentioned by the famous commentator Ibn Abi Hatim on the authority of Said ibn Jubair:

قالو: سواء علينا زدنا في أول البيع ، أو عند مَحَلِّ المال فهما سواء فذالك قوله: قالو انما البيع مثل الربوا.

They used to say that it is all equal whether we increase the price in the beginning of the sale, or we increase it at the time of maturity. Both are equal. It is this objection which has been referred to in the verse by saying “They say that the sale is very similar to Riba²⁴.”

²⁴ Tafseer Ibn Abi Hatim V.2, P.454, Makkah, 1997

52. The same explanation is given in *Albahr AlMuheet* by Abu Hayyan²⁵ and several other original commentators of the Holy Quran.

53. It clearly shows that the practice of increase at the time of maturity relates to two situations: firstly, a situation where the original transaction was that of sale of a commodity as mentioned by Qatadah, Faryabi, Saeed Ibn Jubair etc. and the second situation was where the original transaction was that of a loan whereby monthly interest used to be charged by the creditor and the principal amount used to remain intact until the date of maturity, and if the debtor would not pay the principal at that point of time, the creditor used to increase the due amount on the principal in exchange of further time given to debtor as mentioned by Imam Raazi and Ibn Aadil etc already quoted in paras 42 and 43 above.

54. It is thus established that the *Riba* prohibited by the Holy Quran was not confined to the transaction referred to by Mr. Riazul Hassan Gillani, the learned counsel for the Federation of Pakistan. It had

²⁵ Abu Hayyan, *Albahr-al-Muheet*, V.2, P.335

different forms which all were practiced by the Arabs of Jahiliyya. The common feature of all these transactions is that an increased amount was charged on the principal amount of a debt. At times this debt was created through a transaction of sale and some time it was created through a loan. Similarly the increased amount was at times charged on monthly basis, while the principal was to be paid at a stipulated date, and some time it was charged along with the principal. All these forms used to be called *Riba* because the lexical meaning of the term is ‘increase’. That is why, the commentators of the Holy Quran like Imam Abubakr AlJassas have defined the term in the following words:

هو القرض المشروط فيه الأجل و زيادة مال على
المستقرض-

55. Now we come to the different arguments advanced before us against the prohibition of the modern interest.

The Statement of Hazrat Umar about the ambiguity in the concept of Riba:

56. Mr. Abu Bakr Chundrigar, the learned counsel for Habib Bank Ltd placed his reliance on an article written by Mr. Justice (late)

Qadeeruddin Ahmad which appeared in daily DAWN dated 12th August 1994. In this article the late Justice Qadeeruddin Ahmad contended that the term Riba as used in the Holy Quran is an ambiguous term, correct meaning of which was not understood even by some companions of the Holy Prophet(Sallalhu Alaihi Wassallam) He referred to the statement of Hazrat Umar (R.A.A.) that the verses of Riba were among the “last verses of the Holy Quran and the Holy Prophet (Sallallahu Alaihi Wassallam) passed away before he could explain them to us, therefore, avoid Riba and every thing which is doubtful”. The same argument has been adopted by a number of appellants in their memos of appeal so-much-so that some of the appellants have termed the verses of Riba as *Mutashabihaat* (the verses having ambiguity or confusion in their meaning). They argued that the Holy Qura’n has asked us to follow only those verses which are clear in meaning (*Muhkamaat*) and not to follow *Mutashabihaat*. The verses of Riba being of the second category, according to the appellants, they are not practicable.

57. This argument is fallacious on the face of it, because in the verse of Surah AlBaqarah Allah almighty declared war against those who do not avoid the practice of Riba. How could one imagine that Allah almighty, the All-wise, the All-merciful, can wage war against a practice, the correct nature of which is not known to any body. In fact the term

Mutashabihaat used in the beginning of Surah Al-Imran of the Holy Quran refers to two kinds of verses: firstly, they refer to some words used in the beginning of different Surahs, the correct meaning of which is not known to anybody for sure, like, الم 'الراء' ياسين but the ignorance of the correct meaning of these words does not affect the lives Muslims because no precept of Shariah has been given through these words. Secondly, the word *Mutshabihaat* refers to some attributes of Almighty Allah, the exact nature of which is not conceivable for a human being. For example, Holy Quran has referred to the 'hand of Allah' in certain places (like 3:73, 5:63, 48:10). No body knows what is the nature of the hand of Allah, nor is it necessary for one to know, because no practical issue depends on its knowledge, but some people used to indulge in the quest of their exact nature which was neither their responsibility to discover nor did any practical precept of Shariah depend on their understanding. Allah Almighty has forbidden those people from indulging in the hypothetical discussion about the nature of these attributes because it had no concern with the practical precepts of Shariah they were required to follow. But it never happened that a practical rule of Shariah is termed as *Mutashabihaat*. It is not only declared by the Holy Quran (in 2:233) but it is also a matter of common sense that Allah never burdens a people with a command the obedience of which is beyond their control/ability.

If the correct meaning of Riba was not known to any body, Almighty Allah could not have made it incumbent on the Muslims to avoid it. A plain reading of the verses of Surah AlBaqarah reveals that Riba has been declared a very grave sin and its gravity is emphasized in an unparalleled manner when it was said that if the Muslims did not leave this practice, they should face a declaration of war from Allah and His messenger.

A description of Riba al-fadl

58. So far as the statement of Hazrat Omar (R.A.A.) is concerned, it will be necessary before analyzing it to note that the Holy Quran had prohibited the Riba of Jahiliyya with all their forms already mentioned above. All these forms related to the transactions of a loan or a debt created by sale etc. But after the revelations of these verses, the Holy Prophet (Sallallahu Alaihi Wassallam) prohibited some other transactions as well which were not known previously as Riba. The Holy Prophet (Sallallahu Alaihi Wassallam) felt that, given the commercial atmosphere at that time, certain barter transactions might lead the people to indulge in Riba. The Arabs used certain commodities like wheat, barley, dates etc., as a medium of exchange to purchase other things. The Holy Prophet (Sallallahu Alaihi Wassallam) treating these

commodities as a medium of exchange like money, issued the following injunction:

الذَّهَبُ بِالذَّهَبِ وَالْفِضَّةُ بِالْفِضَّةِ وَالْبُرُّ بِالْبُرِّ وَالشَّعِيرُ بِالشَّعِيرِ وَالتَّمْرُ بِالتَّمْرِ وَالْمِلْحُ بِالْمِلْحِ مِثْلًا
بِمِثْلِ يَدًا بِيَدٍ فَمَنْ زَادَ أَوْ اسْتَزَادَ فَقَدْ أَرَبَى

Gold for gold, silver for silver, wheat for wheat, barley for barley, date for date, salt for salt, must be equal on both sides and hand to hand. Whoever pays more or demands more (on either side) indulges in Riba ²⁶.

59. It means that if wheat is exchanged for wheat, the quantity on both sides must be equal to each other and if the quantity of any one side is more or less than the other, this transaction is also a Riba transaction, because in the tribal system of Arab these commodities were used as money, and the exchange of one kilogram of wheat for one and a half (1½) kilogram of another wheat would stand for the exchange of one *dirham* for one and a half (1½) *dirham*. However, this transaction was termed as *riba* by the Holy Prophet, (Sallallahu Alaihi Wassallam) , and

²⁶ Sahih Muslim, Karachi, V.2, P.25

it was not meant by the term 'riba aljahiliyya' Therefore, it was known as '*riba alfadl*' or '*riba-al-sunnah*'.

60. It is to be noted that, while prohibiting the *riba al-fadl*, the Holy Prophet (Sallallahu Alaihi Wassallam) has identified only six commodities and it was not clearly mentioned in the above hadith whether this rule is limited to these six commodities or it is applicable to some other commodities as well, and in the latter case what are those commodities? This question raised controversy among the Muslim jurists. Some earlier jurists, like Qatadah and Tawoos, restricted this rule to these six commodities only, while the other jurists were of the opinion that the rule will be extended to other commodities of the same nature. Then there was a difference of opinion about the nature of these commodities that might be taken as a common feature found in all the six commodities and a criterion for identifying the commodities which are subject to the same rule. Imam Abu Hanifa and Imam Ahmad are of the opinion that the common feature of these six commodities is that they can either be weighed or measured, therefore, any commodity which is sold by weighing or measuring falls within this category and is

subject to the same rule, if it is bartered with a similar commodity. Imam AlShafie is of the view that the common feature of these six commodities is that they are either eatables or they are used as a universal legal tender. Wheat, barley, date, salt represent eatables while gold and silver represent universal legal tenders. Therefore, according to Imam AlShafie all eatables and universal legal tenders are subject to the rule mentioned in the Hadith. Imam Maalik is of the opinion that the common feature among these six commodities is that they are either food items or they can be stored, therefore, he holds that every thing which falls under the food items or can be stored is included in the same category, hence, subject to the same rule²⁷.

61. This difference of opinion among the Muslim jurists was based on the fact that after specifying the six commodities the Holy Prophet (Sallallahu Alaihi Wassallam) did not expressly mention whether or not other commodities will assume the same status.

The correct meaning of Hadrat Umar's Statement

62. It is in this back-ground that Sayyidna Umar (R.A.A.) has stated that the Holy Prophet (Sallallahu Alaihi Wassallam) passed away before

²⁷ All the books of Islamic fiqh have mentioned this difference of opinion. See for example: Ibn Qudamah, Al-

giving any specific direction with regard to this difference of opinion. A deeper study of the statement of Hazrat Umar (R.A.A.) reveals that he was doubtful only about the *Riba al-fadl* mentioned in the Hadith cited above, and not about the original Riba which was prohibited by the Holy Quran and was practiced by the Arabs of Jahiliya in their transactions of loan and non-barter sales. This is evident from the most authentic version of the statement of Hazrat Umar (R.A.A.) reported in the Shahih of Al-Bukhari and Muslim. The words reported by Bukhari are as follows:

ثَلَاثٌ وَدِدْتُ أَنْ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَمْ يُفَارِقْنَا حَتَّى يَعْهَدَ إِلَيْنَا عَهْدًا الْجَدُّ وَالْكَالَاهُ
وَأَبْوَابٌ مِنْ أَبْوَابِ الرَّبَا

There are three things about which I wished that the Holy Prophet (Sallallahu Alaihi Wassallam) did not leave us before explaining them to us in detail: the inheritance of grand father and the inheritance of Kalalah (a person who has left neither a father nor a son) and some issues relating to Riba ²⁸.

Mughni, Dar-ul-Kutub-al-ilmiyyah, Beirut, V.4, P.124-127

²⁸ Al-Bukhari, *Hadith* No.5266

63. Moreover, at another occasion Hazrat Umar (R.A.A.) has clarified his position in the following words:

إِنَّكُمْ تَزْعُمُونَ أَنَّا لَا نَعْلَمُ أَبْوَابَ الرَّبَا، وَلَآنَ أَكُونُ أَعْلَمُهَا أَحَبَّ إِلَيَّ مِنْ
 أَنْ يَكُونَ لِي مِثْلُ مِصْرَ وَكُورَهَا، وَمِنَ الْأُمُورِ أُمُورٌ لَا يَكُنُّ يُخْفَيْنَ
 عَلَى أَحَدٍ: هُوَ أَنْ يَبْتَاعَ الذَّهَبَ بِالْوَرَقِ نَسِيئًا،

You think that we do not know about any issue from the issues of Riba - and no doubt I would love to know all these issues more than I would like to own a country like Egypt with all its habitations - but there are many issues (about Riba) which cannot be unknown to any one e.g. purchasing gold for silver on deferred payment basis and purchasing the fruits on the tree while they are yellow and did not reap (in exchange of similar fruits without weighing them²⁹).

64. These narrations of the statement of Hazrat Umar (R.A.A.) clearly reveal two points: firstly, that all his concern in the issues of Riba related to *Riba alfadl* and not to *Riba AlNasiah* which was prohibited by the Holy Quran, and secondly, that even in the issue of *Riba Alfadl* he did

not feel difficulty in many transactions which were clearly prohibited, however, he was doubtful only with regard to some transactions which were not expressly mentioned in the relevant hadith or in any other saying of the Holy Prophet(Sallalhu Alaihi Wassallam)

65. An objection may be raised on the above explanation: According to a narration reported by Ibn Majah, Hazrat Umar (R.A.A.) had declared that the verse of Riba was the last revealed verse of the Holy Quran, therefore, the Holy Prophet (Sallallahu Alaihi Wassallam) passed away before explaining it in full terms³⁰. This narration shows that the doubts of Hazrat Umar (R.A.A.) related to the same *Riba* as was prohibited by the Holy Quran and not to *Riba Alfadl*. But after studying different sources narrating this statement of Hazrat Umar (R.A.A.) , it transpires that the narration of Ibn Majah is not as authentic as that of Bukhari and Muslim. One of the narrators in the report of Ibn Majah is Saeed Ibn Abi Arubah who has been held by the experts of Hadith as a person who used to confuse one narration with the other³¹ . We have already quoted the exact words reported by Bukhari and Muslim with very authentic chain of narrators. None of them has attributed to Hazrat Umar (R.A.A.) that the verse of Riba was the last verse of the Holy Quran. It seems that a narrator like Saeed Ibn Abi Arubah has confused

²⁹ Abdurrazzaq: *Almusnaf*, Beirut, V.8, P.26

the exact words of Hazrat Umar (R.A.A.) with the words of Hazrat Ibn Abbas (R.A.A.) , already discussed or with his own view that the verse of Riba was the last verse of the Holy Quran. We have already explained in detail the real facts in this respect and that it was not correct to believe that Riba was prohibited in the last days of the Holy Prophet (Sallallahu Alaihi Wassallam) or that the verses of Riba were the last revealed verses of the Holy Quran. Therefore, the version given by Ibn Majah cannot be relied upon while correctly assessing the statement of Hazrat Umar (R.A.A.). It is consequently established that whatever doubts Hazrat Umar (R.A.A.) had in his mind about Riba were relevant to Riba Alfadl only. So far as Riba AlQuran or Riba AlNasiah is concerned, he had not the slightest doubt about its nature and its prohibition.

Productive or Consumption Loans:

66. Another argument advanced by some Appellants was that the Holy Quran had prohibited to claim any increase over and above the principal in the case of consumption loans only, where the borrowers used to be poor persons borrowing money to meet their day to day needs of food and clothes etc. Since no productive loans were in vogue in the days of Holy Prophet (Sallallahu Alaihi Wassallam) it was not contemplated by

³⁰ Ibn Majah, Book 12, Ch.58, hadith No.2276, Riyadh 1999

the verse of Riba to prohibit a charge on the commercial and productive loans. Otherwise also, they argued, it is injustice to claim any additional amount on the principal from a poor person, but it is not so in the case of a rich man who borrows money to develop his own commercial enterprise and earn huge profits through it. Therefore, it is only the loans of the first kind i.e. consumption loans on which any excess is termed as *Riba* and not an increased amount charged on the commercial loans.

67. We have paid due consideration to this argument but it could not stand the academic scrutiny for three different reasons:

(i) Validity of a transaction is not based on the financial status of a party

68. Firstly, the validity of a financial or commercial transaction does never depend on the financial position of the parties. It rather depends on the intrinsic nature of the transaction itself. If a transaction is valid by its nature, it is valid irrespective of whether the parties are rich or poor. Sale, for example, is a valid transaction whereby a lawful profit is generated. It is allowed regardless of whether the purchaser is rich or poor. Lease is a lawful transaction and it is permissible even though the

³¹ Ibn Hajar: Tahdhib-al-Tahdhib, V.4, P.64-65

lessee is a poor person. The most one can say is that a poor purchaser or a poor lessee deserves concession on humanitarian grounds, but one cannot say that charging any amount of profit from him is totally *haram* or prohibited. If a poor person wants to purchase bread from a baker, one can say that the baker should not charge a high profit from him, but no one can say that the baker is obligated to sell the bread to him at his cost and any profit charged by him above the cost is totally unlawful for which he deserves hell. If a poor person hires a taxi, one can advise the owner of the taxi to give some concession to him on the basis of his poverty, but no one can reasonably assert that the owner of the taxi must not charge any fare from him or must not charge a fare higher than his actual expense, otherwise his income will be held as *haram* and analogous to waging war against Allah and His Messenger. The baker has opened his shop to earn a lawful profit through the transaction of sale which is intrinsically a valid transaction, and he deserves a reasonable profit for his investment and labor, even though the purchaser is poor. If he is obligated to sell his breads to all the poor persons at his cost price, he can neither run his shop nor can earn livelihood for his children. Similarly, the one who runs a taxi for rendering transport services to the passengers is allowed to charge a reasonable fare from those benefitting from his service. If he is required to render this service to all poor persons free of charge, he cannot run the taxi. Nobody has,

therefore, ever claimed that charging any profit or a fee or a fare from a poor person is totally *haram*. The reason is that profit, fee and fare, being lawful charges deserved by valid transactions, may be charged from the persons

benefiting from the commodities sold or services rendered, even though the benefiting persons are poor.

69. On the other hand, the prohibited transactions are invalidated on the basis of their intrinsic nature and not on the basis of the financial position of the parties. Gambling is prohibited for both rich and poor persons. Bribery is unlawful regardless of whether the bribe is charged from the rich or from the poor. It is, therefore, evident that it is not the richness or poverty of the parties that renders a transaction valid or invalid. It is the intrinsic nature of the transaction that really determines its validity or otherwise.

70. The case of charging interest from a debtor is in no way different. If it is a valid charge according to its intrinsic nature, it should be allowed, even though the debtor is poor, but if it is an invalid charge by itself, it should be unlawful irrespective of the financial position of the parties. There is no justification for distinguishing the case of interest from that of a sale in this respect by restricting the former's validity to

the rich borrowers only, while charging of profit in a sale is allowed from both rich and poor persons. In fact, the notion that interest is prohibited only where the borrower is poor is totally against the well-established principles of business and trade where the validity of transactions is judged on the basis of their own strength and not on the identity of the parties involved.

71. Moreover, 'poverty' is a relative term which has different degrees. Once it is accepted that interest cannot be charged from the poor, while it is quite lawful to be charged from the rich, who will have the authority to determine the exact degree of poverty required for exempting a person from the charge of interest? If the distinction between lawful and unlawful interest is drawn on the basis of the purpose of the loan, and the loans taken for consumption are exempted from the charge of interest, as urged by some appellants, the consumption itself may be of different kinds which range from food items to luxurious objects. Even if the 'consumption' is restricted to the requirements of one's life, they too vary from person to person. One may argue that private transport has become one of the necessities of life and therefore he is entitled to take an interest-free loan for purchasing a car. House is one of the fundamental necessities of one's life and no interest can be charged on millions of rupees borrowed for the purpose of constructing or

purchasing a house, because all these borrowings fall within the category of ‘consumption loans’. On the other hand, if an unemployed person borrows a few hundred rupees to start hawking on the streets, it will be quite lawful to charge interest from him, because his loan does not fall within the definition of a ‘consumption loan’.

72. It is thus clear that the permissibility of interest can neither be based on the financial position of the debtor, nor on the purpose for which money is borrowed, and therefore the distinction between consumption loans and productive loans in this respect is contrary to the well-established principles.

(b) The Nature of Quranic Prohibitions:

73. The second reason for which this argument is not tenable, is that the verses which prohibit *riba* do not at all differentiate between a consumption or a commercial loan, nor does this difference find any mention whatsoever in the vast literature of the Sunnah dealing with *riba*. Even if it is presumed for the sake of argument that commercial loans were not in vogue in the days of the Holy Prophet(Sallallahu Alaihi Wassallam) it does not justify the insertion of a new condition in the concept of *riba* which, as established earlier, was quite clear in the

minds of the addressees of the Holy Quran. The Holy Quran has prohibited *riba* in general terms which includes all the forms of *riba* whether or not prevalent at the time of its revelation. When the Holy Quran prohibits a transaction, it is not a particular form of the transaction that is meant by the prohibition. It is the basic concept of the transaction which is hit by the injunction. When liquor was prohibited, it was not only the particular forms of liquor available in those days which were forbidden, it was the substance of liquor which was banned, and nobody can reasonably claim that the new forms of liquor which were not available in the days of the Holy Prophet (Sallallahu Alaihi Wassallam) are not hit by the prohibition. When Qimar (gambling) was declared as *haram* the purpose was not to restrict the prohibition only to those forms of gambling which were in vogue at that time. The prohibition, in fact, encompassed all its present and future forms, and no one can sensibly argue that the modern forms of gambling are not covered by the prohibition. We have already discussed the meaning of the term *riba* as understood by the Arabs and as interpreted by the Holy Prophet (Sallallahu Alaihi Wassallam) and his noble companions, and that it covered any stipulated additional amount over the principal in a transaction of loan or debt. This concept had many forms in the days of the Holy Prophet (Sallallahu Alaihi Wassallam) , may have taken other forms in the later ages and still may take some other forms in future, but

as long as the said basic feature of the transaction remains intact, it will certainly invoke the prohibition.

(c) Banking and Productive Loans in the Age of Antiquity:

74. Thirdly, it is not correct to say that commercial or productive loans were not in vogue when *riba* was prohibited. More than enough material has now come on the record to prove that commercial and productive loans were not foreign to the Arabs, and that loans were advanced for productive purposes both before and after the advent of Islam.

75. In fact the academic and historical research has discovered the fallacy of the impression that mercantile loans and banking transactions are the invention of the 17th century A.D³². Modern discoveries have shown that the history of banking transactions refers back to a period not less than two thousand years before Christ. The Encyclopaedia Britannica, while discussing the history of banks, has detailed the early

³² Prof. M.M. Postan (Cambridge 1944) in his treatise "Credit In Medieval Trade" has refuted this assumption on the basis of historical evidence and has established that all sorts of mercantile credit were practiced in the Medieval Ages. (Essays in Economic History, edited by E.M. Carus Wilson Edward Arnold, London 1966, V.1, PP.61-87.

traces of the banking transactions. The relevant article begins with the following remark:

“Pastoral nations such as Hebrews, while they maintained money-lenders, had no system of banks that would be considered adequate from the modern point of view. But as early as 2000 B.C., the Babylonians had developed such a system. It was not the result of private initiative, as that time, but an incidental service performed by the organized and wealthy institution of the cult. The temples of Babylon, like those of Egypt, were also the banks. “The shekels of silver” runs a Babylonian document, “have been borrowed by Mas-Schamach, the son of Adadrimeni, from the Sun-priestess Amat-Schamach, daughter of Warad-Enlil. He will pay the Sun-God’s interest. At the time of the harvest he will pay back the sum and the interest upon it”. It is evident enough that the priestess Amat-Schamach was merely the accredited agent of the institution. No doubt the clay tablet with the inscription corresponds to what we call negotiable

commercial paper. Another document of the same period was certainly such. It runs: “Warad-Ilisch, the son of Taribum, has received from the Sun-Priestess Iltani, daughter of Ibbatum, one shekel silver by the sun-God’s balance. This sum is to be used to buy sesame. At the time of the sesame-harvest, he will repay in sesame, at the current price, to the bearer of this document ³³.”

³³Encyclopaedia Britannica, 1950 ed. “Banks, History of” V.3 P.67

76. The article has then detailed how the banking operations developed from religious institutions to private business institutions, until in 575 B.C. there was a banking institution in Babylon, the Igibi bank of Babylon. The records of this bank show that it acted as buying agent for clients; loaned on crops, attaching them in advance to ensure reimbursement; loaned on signatures and on objects deposited, and received deposits on interest. The article has further detailed that similar banking institutions existed also in Greece, Rome, Egypt etc centuries before Christ and they deposited money, lent it on interest and extensively used letters of credit, financial papers and traded in them.

77. Will Durant, the famous historian of the recent past, has given a detailed account of the banking transactions prevalent in Greece in the fifth century before Christ. He has mentioned that despite interest being denounced even by the philosophers, there were banks in Greece:

“Some deposit their money in temple

... Continued

treasuries. The temples serve as banks, and lend to individuals and states at a moderate interest; the temple of Apollo at Delphi is in some measure an international bank for all Greece. There are no private loans to governments, but occasionally one state lends to another. Meanwhile the money-changer at his table (*trapeza*) begins in the fifth century to receive money on deposit, and to lend it to merchants at interest rates that vary from 12 to 30 percent according to the risk; in this way he becomes a banker, though to the end of ancient Greece he keeps his early name of *trapezite*, the man at the table. He takes his methods from the near East, improves them, and passes them on to Rome, which hands them down to modern Europe. Soon after the Persian War, Themistocles deposits seventy talents (\$420,000) with the Corinthian banker Philostephanus, very much as political

... Continued

adventurers feather foreign nests for themselves today; this is the earliest known allusion to secular-nontemple-banking. Towards the end of the century Antisthenes and Arcestrtus establish what will become, under Pasion, the most famous of all private Greek banks. Through such *trapezitai* money circulates more freely and rapidly, and so does more work, than before, and the facilities that they offer stimulate creatively the expansion of Athenian trade ³⁴.

78. Even in the days closer to the advent of Islam in Arabia, all kinds of commercial, industrial and agricultural loans advanced on the basis of interest were prevalent in the Byzantine Empire ruling in Syria, to the extent that Justinian, the Byzantine emperor (527-565 A.D) had to promulgate a law determining the rates of interest which could be charged from different types of borrowers. Gibbon has detailed the

³⁴ Will Durant: *The Story of Civilization*, Simon and Schuster, New York, 1966, V.2, P.274
Chapter XII

contents of the Code of Justinian and that it allowed the rate of 4% charged as interest from illustrious people, 6% charged from general people as ordinary rate of interest, 8% from the manufacturers and merchants and 12% from nautical insurers. The exact words of Gibbon are as follows:

“Persons of illustrious rank were confined to the moderate profit of Four Per Cent; six was pronounced to be the ordinary and legal standard of interest; eight was allowed for the convenience of manufacturers and merchants; twelve was granted to nautical insurers ³⁵.

(underlining is ours)

79. The underlined part of the above passage shows that the practice of commercial loans was so wide-spread in the Roman Empire that a separate law was enforced to fix their rate of interest. This law of Justinian was promulgated in Byzantine Empire shortly before the birth of the Holy

... Continued

Prophet (Sallallahu Alaihi Wassallam) in Arabia (Justinian died in 565 A.D. while the Holy Prophet (Sallallahu Alaihi Wassallam) was born in 570 A.D.) and obviously the law remained in force for quite a long time after its promulgation. On the other hand the Arabs , especially of Makkah, had constant business relations with Syria, one of the most civilized provinces of the Byzantine Empire. As we shall see later in detail, the Arabs trade caravans used to export goods to and import other goods from Syria. Their economic and financial relations with the Byzantine Empire were so prominent that the currency used throughout the Arabian peninsula was the dirhams (of silver) and dinars (of gold) coined by the Byzantine Empire³⁶, so much so that the poets have referred to the Dinars as Ceazarians. Kuthair 'Uzzah, one of the famous Arab poets says ³⁷:

يروق عيون النظرات كانه' هرقلی وزن احمر التبر راجع

³⁵ Gibbon: *The Decline and Fall of the Roman Empire*, Chapter 44, the Institutes IV, V.2 P.90

³⁶ Al-Balazuri, *Futooh-al-Buldan*, P453, 454, Beirut, 1983, and Al-Masoodi, *Murooj-al-zahab* V.2, P.333

³⁷ See Al-Aghani, by Abulfaraj V.II, P.52

80. Ibn-al-Anbari quotes another poet saying ³⁸:

دنا نير مما شيف في ارض قيصر

81. Rather, some contemporary writers have claimed that the nomenclature of the Arabic coins (dirham, dinar and fals) is originally derived from the Greece or latin words which are very similar to these names³⁹. These Byzantine coins remained in use throughout the Muslim world till the year 76 A.H., when Abdulmalik ibn Marwan started coining his own dinars ⁴⁰ .

82. Keeping in view such close financial relations of the Arabs with the Roman Empire, how can it be imagined that the Arabs were totally unaware of the credit transactions flourishing in the Roman Empire? As we shall see later, the business-relations of the Arabs were not restricted to Syria. They extended to Iraq, Egypt and Ethiopia as well. They

³⁸ "The dinars polished in the land of Ceazar"

(شرح القصائد السبع الا بن الانباري' ص ٣٣٨ قصيده عشره)

³⁹Luwais Shikhu, Christianity and its culture among the jahili Arabs V.2 P.387

(النصرانيه و آداها بين عرب الجاهلييه)

⁴⁰ The reason was that Abdulmalik wrote a letter to the Roman Emperor with a logo of the Quranic *Surah Al-Ikhlās* and a mention of the Holy Prophet (Sallallahu Alaihi Wassallam) . This annoyed the Roman Emperor who wrote to Abdulmalik that if he would continue using this logo, he will insert in the *dinars* some bad words about the Holy Prophet (Sallallahu Alaihi Wassallam) . At this point Abdulmalik decided to coin his own dinars (Alnajoom Alzahirah 1:176)

were fully aware of the business style of these countries, and their awareness about the interest based transactions of these countries is reflected in an advice given by Abdullah b. Salaam (a native of Mdinah) to Abu Burdah (who had settled in Iraq and came to visit Madinah). Abdullah b. Salaam warned him that he was living in a country where *riba* had wide currency, and therefore, he should be very careful while dealing with other people lest he should indulge in *riba* unconsciously ⁴¹. The same advice was given by Hazrat Ubayy ibn Kab (R.A.A.) to his pupil Zirr b. Hubaish ⁴².

Commercial Interest in Arabia

83. Coming to the case of Arabian peninsula itself, no one can deny the fact that trade was the most outstanding economic activity of the Arabs. Makkah, in particular, consisted of barren lands and hills with very little amount of water and therefore was totally unfit for cultivation. That is why commerce and trade was the basic characteristic of the

⁴¹ Sahih-al-Bukhari, *Kitab-al-Manaqib*, (Book 63, Ch.19, Hadith No.3814)

⁴² Al-Baihaqi, *Al-Sunan al-Kubra*, V.5, P.349

economic life of the Arabs of Makkah. One of the most outstanding features of the Arabian trade was that their commercial activities were not restricted to their own land. Their main business was to export their own goods to all the surrounding countries and import their goods to their own cities. For this purpose their commercial caravans used to travel to Syria, Iraq, Egypt, Ethiopia etc. The history of these trade-caravans refers back to a period as early as that of the holy prophet Yaqoob(Alaihis-Salam)(Jacob or Israel). It is mentioned by the Holy Quran that the brothers of Hazrat Yousuf (Joseph)(Alaihis-Salam)had thrown him in a pit from where a passing caravan picked him up and sold him in Egypt ⁴³. According to historical evidence, this caravan was an Arab caravan consisting of the children of Ismail (Alaihis-Salam) who had embarked on a business tour to export goods to Egypt. This fact finds mention in the Old Testament of the Bible itself which says:

And they sat down to eat bread: and they

⁴³ Al-Quran, Surah Yousuf, 12:19,20

lifted up their eyes and looked, and, behold, a company of Ishmaelites came from Gilad with their camels bearing spicery and balm and myrrh, going to carry it down to Egypt ⁴⁴.

84. This Arab caravan was going to export spices, balms and perfumes in such an early period to such a distant country, the Egypt, that was thousands of miles away from the center of Arabia. It may show the extent to which the Arabs had deployed their courageous entrepreneurship right from the beginning of their history.

85. Naturally, the commercial activities of the Arabs kept on increasing in the later days, so much so that they were identified as a *trading nation*. How far their international trade had flourished before the advent of Islam has been detailed by the historians, and it is neither possible nor necessary to give all these details here⁴⁵, but the fact that the Arabs were trade-oriented people can hardly be questioned

⁴⁴ The Bible; Genesis, 37:25

by a person who has studied their history. The importance of their trade caravans can be assessed by the fact that the Holy Quran has revealed a full Surah (*Al-Quresh*) to denote that their business towards Yemen in winter and towards Syria in summer were a blessing from Allah on account of their services to *Kabah*. The Holy Quran has specifically mentioned the term *ilaaf* which refers to the commercial treaties the Arabs of Quraish had with different nations and tribes ⁴⁶. The size of these caravans may be imagined from the fact that the caravan led by Abu Sufyan at the time of the battle of *Badr* consisted of one thousand camels and had returned with 100% profit (one dinar for every one dinar) ⁴⁷.

86. Obviously, the caravan of this huge size could not be owned by any one individual. It was a collective enterprise of the whole tribe and was funded by the contributions of all the members of the tribe like a joint stock company. The historians have noted that:

⁴⁵ Dr. Jawad Ali, in the seventh volume of his excellent work *Almufassal fi tarikh al-Arab qabal al-Islam* has devoted more than two hundred pages (227 to 444) for discussing the commercial life of the Arabs before the advent of Islam.

⁴⁶ See Alzubaidi, *Taj-al-arus* 6:44

⁴⁷ Nihayah-al-Arab 17:81, *Imta'-al-asma'*, V.1, P.75, Cairo, 1981

لم يبق قرشى ولا قرشيه له مثقال الابعث به فى العير

There remained no male or female in the tribe of Quraish who had one *misqaal* of gold and had not contributed to the caravan ⁴⁸.

87. It was not only the caravan of Abu Sufyan that was funded in this manner. Almost all the big caravans used to be organized on the same pattern..

88. Keeping this commercial atmosphere in view, one can hardly imagine that the Arabs were not familiar with commercial loans, or that their loans were restricted to consumption purposes. But apart from hypothesis, there are concrete evidences that they used to borrow money for their commercial and productive needs. Some of these evidences are summarized below.

⁴⁸ Imta' -al-asma', op cit and Al-Zurqani, Sharh-al-Mawahib V.1, P.366

(a) Dr. Jawad Ali, whose extensive research about the Arabs of jahiliyyah is appreciated throughout the academic world, has analyzed the funding sources of these caravans and has remarked as under:

و يظهر مما ذكره اهل الاخبار رواؤردوه عن قوافل مكة
ان مال القفلة يكن مال رجل واحد' اوراسرة معينة بل كان
يخص تجارا من اسرا مختلفه' وافراد وجد عند هم المال'
اوقترضوه من غير هم فرموه فى راس مال القافلة املا فى
ربح كبير

What the historians have narrated about the caravans of Makkah reveals that the capital of a caravan never used to be the capital of one individual or a particular family; it rather belonged to the traders of different families and to those individuals who themselves had money or had borrowed it from others and had contributed it to the capital of the

caravan, with a hope to earn huge profit ⁴⁹.

(underlining is ours)

The underlined sentence shows that these caravans used to be funded, *inter alia*, by the commercial loans.

(b) All the books of *tafseer* have mentioned the background of the verses of Surah al-Baqarah dealing with *riba*. Almost all of them have reported that different tribes of Arabia used to take interest-based loans from each other. For example, Ibn Jarir al-Tabari says:

كانت بنو عمرو بن عمير بن عوف يأخذون الربا من بنى المغيرة⁴⁹ و كانت بنو
المغيرة يربون لهم فى الجاهلية

The tribe of Banu Amr used to charge interest from the tribe of Banu al-Mughirah and Banu al-Mughirah used to pay them interest ⁵⁰.

⁴⁹ Al-Mufassal fi Tarikh-al-Arab, V.7, P.290

These loans were not taken by one individual from another. Instead, the tribe as a collective entity used to borrow money from another tribe. We have already shown that the tribes of Arabia used to work as a joint stock company for the purpose of funding their trade-caravans and in order to undertake their joint enterprise. Therefore, the loans taken by one tribe from the other were not for the purpose of consumption only; they were certainly commercial loans meant to finance their commercial ventures.

(c) While explaining the verse of Surah Al-Rum (30:39), already quoted in Para No.17 of this judgment, Ibn Jarir al-Tabari has reported the view of some earlier commentators of the Holy Quran that this verse refers to the practice of some people in jahilliyah who would finance some others to increase the wealth of the recipients. Ibn Jarir has supported this view by the following statement of Hadrat Ibn Abbas (R.A.A.).

⁵⁰ Al-Tabari, Jami-al-Bayan, V.3, P.107

الم تر الى الرجل يقول للرجل: لامولئك فيعطعه' فهذا لا ير بو عندالله لانه يعطيه لغيرالله يثرى به ما له

Have you not seen a person saying to another, *I shall certainly finance you* then he gives him? So, this does not increase with Allah, because he gives him not to please Allah, but to increase his wealth⁵¹.

He has also quoted the following statement of Ibrahim al-Nakhai in the same context:

كان هذا فى الجاهلية يعطى احدهم ذا القرابة المال يكثر به ما له.

It was in the days of jahiliyyah that one used to give money to one of his relatives to increase his wealth⁵².

Obviously, financing for the purpose of increasing wealth of the recipient means that the recipient would invest this money to earn profit and thereby increase his wealth. These statements of Ibn Abbas (R) and Ibrahim al-Nakhai

⁵¹ AlTabari, Jami-al-Bayan V.21, P.47

⁵² Op cit.

clearly show that the practice of financing for productive purposes was so prevalent in the Arab Society that, according to these commentators, the verse of Surah al-Rum was revealed in that context.

(d) The concept of commercial loan finds mention in a *hadith* of the Holy Prophet (Sallallahu Alaihi Wassallam) himself, which is reported by Imam Ahmad, Al-Bazzar and Al-Tabarani from Abdurrahman ibn Abi Bakr (R.A.A.) .According to him, the Holy Prophet (Sallallahu Alaihi Wassallam) has said:

Allah Almighty will call a debtor on the Day of Judgment. He will stand before Allah and will be asked: *O son of Adam, why did you take this loan and why did you violate the rights of the people?* He will say, *My Lord, you know that I have taken this loan, but neither used it in a eating or drinking nor in wearing clothes nor in doing something, instead, I was*

... Continued

afflicted either by fire or by theft or by a business loss. Allah will say, My slave has told the truth. I am the best One who will pay today on your behalf.⁵³

The underlined words contemplate that this person had borrowed money for commercial purpose whereafter he suffered a business loss. It shows that the concept of the loans taken for commercial purposes was quite clear even in the mind of the Holy Prophet (Sallallahu Alaihi Wassallam) .

(e) The Holy Prophet (Sallallahu Alaihi Wassallam) has, in another authentic hadith reported by Imam Bukhari, narrated the story of an Israelite person who had borrowed one thousand dinars from another person and then embarked on a sea voyage ⁵⁴. Some other reports have expressly mentioned that this borrowing was for commercial purpose ⁵⁵. Moreover, such a huge amount cannot be borrowed for normal consumption needs, and the hadith mentions that the

⁵³ Al-Haithami, Majma'-al-Zawaid V.4, P.133

⁵⁴ Al-Bukhari, Book 39, Hadith No.2291

borrower set out on his sea voyage and after the date of maturity he earned so much that he sent one thousand diners to his creditor, and offered to pay him the same amount once more under the impression that the first payment did not reach him, but the creditor admitted that he had received the amount and therefore he refused the debtor's offer to pay him once more.

There is another example of where the Holy Prophet himself has referred to a commercial loan.

(f) Apart from the practice of the trade-caravans detailed above, there are many examples to show that the commercial loans used to be given and taken on individual level as well.

Some of the examples are given below:

(a) Abu Lahab, the uncle of the Holy Prophet (Sallallahu Alaihi Wassallam) was one of the most

⁵⁵ See Fath-al-Bari, V.4, P.471. Imam Bukhari himself has narrated this hadith at another place under the heading "Trade through Sea" (Book 34, Ch.10, Hadith No.2063)

inimical persons towards him, but he did not participate personally in the battle of *Badr*. The reason was that he had advanced a loan of four thousand dirhams on interest to one Asi bin Hisham and when he could not repay it, he hired his debtor against his loan to replace him in the battle. Obviously, this amount of four thousand dirhams was too big (in those days) to be borrowed by a starving person to satisfy his hunger. It was certainly borrowed for the purpose of trade which could not bring fruit and the debtor stood bankrupt.⁵⁶

(b) It is reported by several books of *hadith* and history that Hazrat Zubair

⁵⁶ Al-Suhaili, Al-Raud-al-Unuf, V.2, P.62, Multan 1977, cf Ibn Kathir: Al-Seerah al-Nabawiyyah V.2, P.383, Al-Tabari, Tarikh-ul-Umam V.2, P.137.

Ibn Awwam (R.A.A.) was one of the richest companions of the Holy Prophet(Sallalhu Alaihi Wassallam) On account of his credibility people wanted to deposit their money with him in trust, but he refused to receive any deposit from any one unless he gives it to him as a loan. It was beneficial for the depositor, because after treating it as a loan, Hazrat Zubair (R.A.A.) was liable to repay it in any case, while in the case of a simple deposit in trust, he would not be liable to repay if the amount is lost by theft, fire etc. Once the people deposited money with Hazrat Zubair (R.A.A.) as a loan, he invested the money in trade. The manner in which Hazrat Zubair (R.A.A.) used to receive deposits and invest them in trade is very similar to a private bank. It is

... Continued

reported by Imam Bukhari that his liabilities toward his depositors were calculated, at the time of his death, to be two million and two hundred thousand, and all this amount was invested in commercial projects ⁵⁷.

(iii) Ibn Saad has reported Hazrat Umar (R.A.A.) wanted to send a trade caravan to Syriya, and for that purpose he borrowed four thousand dirhams from Hazrat Abdurrahman ibn Awaf (R.A.A.)
58.

(iv) Ibn Jarrir has reported that Hind daughter of Utbah and wife of Abu Sufyan borrowed four thousand dirhams from Hazrat Umar (R.A.A.) for the purpose of her trade. She invested this

⁵⁷ See Sahih al-Bukhari, Kitab-al-Jihad (Book 7, Ch.13, Hadith No.3129) and its commentary, *Fath-al-Bari*, by Hafiz Ibn Hahjar al-Asqalani, V.6, P.162

⁵⁸ Ibn Saad, *Al-Tabqat al-Kubra*, Beirut, V.3, P.278

money in purchasing goods and selling them in the market of the tribe of Kalb ⁵⁹.

(v) Al-Baihaqi has reported that Hazrat Miqdad ibn Aswrd (R.A.A.) borrowed seven thousand dirhams from Hazrat Usman (R.A.A.) ⁶⁰. Obviously, this amount was not borrowed by a poor person for his consumption needs, because Hazrat Miqdad (R.A.A.), the borrower was of the rich *Sahaba* who was the only one riding a horse in the battle of Badr and whose agricultural produce was purchased by Hazrat Muawiyah (R.A.A.) for 100,000/- dirhams ⁶¹.

(vi) When Hazrat Umar (R.A.A.) received the fatal blow from a Christian,

⁵⁹ Al-Tabari, Tarikh-al-Umam V.3, P.87, Events of the year 23 A.H.

⁶⁰ Al-Baihaqi, Al-Sunan al-Kubra, V.10, P.184

⁶¹ Ibn Saad, Al-Tabaqat, V.3, P.163

he called his son and directed him to calculate the amounts he owed to his creditors. His son calculated the amount and found that it was 80,000 dirhams ⁶². Some people advised Hazrat Umar (R.A.A.) to borrow this money from Baitulmal, so that he may relieve himself from his liability towards the people and that the debt of the Baitulmal might be settled after selling his assets, but Hazrat Umar (R.A.A.) rejected the suggestion and directed his sons to pay the amount from his own assets⁶³. Obviously, this amount of 80,000 dirhams could not have been borrowed for personal consumption.

⁶² Sahih-al-Bukhari, Kitab-al-Manaqib (Book 63, Ch.19, Hadith No.3814)

⁶³ Ibn Saad, Al-Tabaqat al-Kubra, V.3, P.358

(g) Imam Maalik has reported in his *Al-Muwatta* that Abdullah and Ubaidullah, the two sons of Hazrat Umar (R.A.A.) went to Iraq for the purpose of Jihad. While coming back they met Abu Musa Al-Ashari (R.A.A.) the governor of the City of Basra. He told them he wanted to send some money of the public exchequer to Hazrat Umar (R.A.A.) in Madina. Instead of giving them that money in trust, he suggested that he gives it to them as a loan so that it may remain in the risk of Abdullah and Ubaidullah and may reach safely to Hazrat Umar (R.A.A.) and it was beneficial for Abdullah and Ubaidullah as well because after taking the amount as loan, they could purchase some goods from Iraq and sell them in Madina and after settling the principal amount to Hazrat Umar (R.A.A.) they could earn some profit. They accepted the suggestion and acted accordingly. When

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after reaching Madina they paid the principal amount to Hazrat Umar (R.A.A.) , he asked them whether Abu Musa (R.A.A.) had given such a loan to all the members of the army as well. They replied in negative. Hazrat Umar (R.A.A.) said, ‘he has given you this loan only because of your relationship with me, therefore, you will have to return not only the principal but also the profit earned through it’. Ubaidullah Ibn Umar objected that this decision was not just, because if the goods purchased by them were destroyed in the way, they would have born the risk and were liable to pay the principal amount in any case, therefore, they deserve the profit they earned. Still Hazrat Umar (R.A.A.) insisted to return the profit to Baitulmal. One of the persons present at that time suggested to Hazrat Umar (R.A.A.) that instead of claiming all the profit from them, he might convert this

... Continued

transaction into Mudarabah through which half of the profit would be deserved by Abdullah and Ubaidullah and the remaining half would go to Baitulmaal. Hazrat Umar (R.A.A.) accepted this proposal and acted accordingly⁶⁴. Obviously the loan advanced to Abdullah and Obaidullah in this case was a commercial loan contemplated from the very beginning to be invested in trade.

89. The above material is more than enough to prove that the concept of commercial loans was not alien to the Holy Prophet (Sallallahu Alaihi Wassallam) or his companions when Riba was prohibited. Therefore, it is not correct to say that the prohibition of Riba was restricted to the consumption loans only and it did not refer to the commercial loans.

Excessive Rates of Interest

Another argument advanced on behalf of some 90. appellants was that the prohibition of Riba is applicable only to those interest transactions where the rate of interest is

⁶⁴ Imam Malik, Al-Muwatta, Bab-al-Qirad

exorbitant or excessive. This argument is sought to be supported by the verse of Surah Al-Imran:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا الرِّبَا أَضْعَافًا مُضَاعَفَةً وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُفْلِحُونَ ﴿١٣٠﴾

those who believe, do not eat Riba

doubled and redoubled (3:130)

91. It is argued that this verse of the Holy Quran is the first verse that came with a clear prohibition of Riba, but it has qualified the prohibition by the words “doubled and redoubled” to denote that the practice of Riba is forbidden only when the rate is so excessive that it makes the payable amount twice that of the principal. The logical result of this expression would be that if the rate of interest is not so high, the prohibition is not applicable. The interest charged in the present banking system, it is argued, is not normally so high as to make the payable amount double the principal, and, therefore, the banking interest is not covered by the prohibition.

... Continued

This argument overlooks the fact that the different 92. verses of the Holy Quran relating to the same subject must be studied in juxtaposition with each other. No verse can be interpreted in isolation from the other relevant material available in other parts of the Holy Quran. As explained at the very beginning, the Holy Quran has dealt with the subject of Riba in four different chapters. Obviously, no verse can contradict another verse on the same subject. The most detailed treatment of the subject of Riba is found in Surah AlBaqarah, the relevant verses of which have already been quoted and translated in paragraph 15 of this judgment.

These verses include the following command:

يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنْتُمْ مُّؤْمِنِينَ ﴿٢٤٨﴾

O those who believe fear Allah and give up whatever remains of Riba, if you are believers.

93. The words “whatever remains of Riba” in this verse indicate that every amount over and above the principal has to be given up. This point is further clarified in express terms by the following sentence:

وَإِنْ تَابْتُمْ فَلَكُمْ رُءُوسُ أَمْوَالِكُمْ

And if you repent (from the practice of Riba) then you are entitled to get back your

principal.

94. These words do not leave any ambiguity in the fact that repentance from the practice of Riba is not possible unless any amount exceeding the principal is given up and that a lender is entitled only to the principal he has actually advanced. A combined study of the verses of Surah Al-Imran and Surah AlBaqarah leaves no doubt in the fact that the words “doubled and redoubled” occurring in Surah Al-Imran are not of restrictive nature, and that “doubled and redoubled” is not a necessary condition for the prohibition of Riba. These words have rather been used to refer to the worst kind of practice of Riba rampant at that time.

95. In order to fully understand the point, we must refer to one of the basic principles of the interpretation of the Holy Quran. The Holy Book is not originally a statute book meant to be used as a legal text. It is a book of guidance which, along with certain laws or commandments, embodies many expressions having persuasive value. Unlike the text of a

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statute book, the Holy Quran contains some words or expressions used either for emphasis or for explaining the evil results of a particular act. They are not meant to be taken as a restrictive qualification for the command or the prohibition preceding them. A self-evident example of this style of the Holy Quran is the verse which says:

وَلَا تَشْتَرُوا بِآيَاتِي ثَمَنًا قَلِيلًا

Do not sell my verses for a little price. (AlBaraqah 2:41)

96. Nobody can take this verse to mean that selling the verses of the Holy Quran is prohibited only because the price claimed is very low and that if the verses are sold for a higher price, the practice can be held as permissible. Every person of common sense can easily understand that the words “for a little price” used in this verse are not of restrictive nature. They are rather meant to indicate the evil practice of some people who used to commit the grave sin of selling the verses of the Holy Quran and still did not gain much in financial terms. It never means that the blame is directed towards the

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‘little price’ they gain; rather the blame is directed to the selling of verses itself.

97. Similarly, at another place the Holy Quran says:

وَلَا تُكْرَهُوا فَتَيَاتِكُمْ عَلَيَّ الْبِغَاءِ إِنِ ارَدْنَ تَحَصُّنًا

“And do not force your slave girls to prostitution if they want to remain chaste.”

(AlNoor 24:33)

98. Obviously it does not mean that if the girls do not want to remain chaste, one can force them to prostitution. What the verse means is that although the prostitution in itself is a grave sin, yet it becomes all the more evil if a girl is forced to indulge in this profession while she intends to remain chaste. The words “if they want to remain chaste” are not of restrictive nature meant to qualify the prohibition with their desire to remain chaste. These words have been added only to indicate the increased severity of the crime. It is in the

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same style that the words “doubled or redoubled” have been used with Riba in the verse of Surah Al-Imran. They are not intended to qualify the prohibition of Riba with doubling or redoubling. They are only meant to emphasize the added severity of the sin if the interest charged is so exorbitant or excessive. This intention of the verse of the Holy Quran is quite evident in the light of the verse of Surah AlBaqarah already quoted above.

99. Secondly, the interpretation of the Holy Quran should always be based on the explanation given by or inferred from the Ahadith of the Holy Prophet (Sallallahu Alaihi Wassallam) and his noble companions who were the direct recipients of the revelation and were fully familiar with the context of the verse and the environment in which it was revealed. From this aspect as well, it is certain that the prohibition of Riba was never meant to be restricted to a particular rate of interest. The prohibition was meant to cover every amount charged in excess of the principal, however small it may be. The following Ahadith are sufficient to prove this point:

... Continued

(i) We have already mentioned that the Holy Prophet (Sallallahu Alaihi Wassallam) made a general declaration of the prohibition of Riba at the time of his last sermon on the occasion of his last Hajj. The words used by him in that sermon, as reported by Ibn Abi Hatim, were as follows:

أَلَا وَإِنَّ كُلَّ رِبَا فِي الْجَاهِلِيَّةِ مَوْضُوعٌ لَكُمْ رُئُوسُ أَمْوَالِكُمْ لَا
تَظْلُمُونَ وَلَا تُظْلَمُونَ وَأَوَّلُ رِبَا مَوْضُوعٌ رِبَا الْعَبَّاسِ بْنِ عَبْدِ
الْمُطَّلِبِ فَإِنَّهُ مَوْضُوعٌ كُلُّهُ

Listen, every amount of interest that was due in Jahiliyya is now declared void for you in its entirety. You are entitled only to your principal whereby neither you wrong nor be wronged. And the first liability of interest declared to be void is the interest of Abbas ibn Abd-ul-Muttalib (R.A.A.) which is

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hereby declared void in its entirety ⁶⁵.

(underlining is ours)

Here the Holy Prophet (Sallallahu Alaihi Wassallam) declared the total amount exceeding the principal as nullified in its entirety. He has left no ambiguity in the fact that the creditors will be entitled to get back only the principal and will not be able to charge even a penny over and above the principal amount.

(ii) It is reported by Hammad b. Salamah in his Jame from Hazrat Abu Hurairah (R.A.A.) that the Holy Prophet (Sallallahu Alaihi Wassallam) has said:

إذا ارتهن شاة شرب المرتهن من لبنها بقدر علفها فان استفضل من اللبن بعد ثمن العلف فهو ربا.

If the creditor received a goat as mortgage from the debtor, the creditor may use its milk to the extent he has spent in providing fodder

⁶⁵ Tafseer Ibn Abi Hatim V.2, P.551 Hadith No.2925. See also Tafseer Ibn Kathir V.1, P.331

to the goat. However, if the milk is more than the price of the fodder, the excess is *riba*.⁶⁶

(iii) Imam Maalik has reported the following ruling of Abdullah Ibn Umar (R.A.A.):

من اسلف سلفا فلا يشترط الا قضاءه

Whoever advances a loan must not stipulate except that the principal loan shall be repayable.⁶⁷

(iv) Imam Maalik has also narrated in the same chapter that Abdullah Ibn Masood (R.A.A.) used to say.

من اسلف سلفا فلا يشترط افضل منه وان كان قبضة من علف فهو ربا.

“Whoever advances a loan cannot stipulate in the agreement that he will receive something better than he has advanced. Even if it be a

⁶⁶ Al-Shaukani, Nail-al-Awtar V.5, P.198

⁶⁷ Muwatta Imam Maalik P.613, Noor Muhammad, Karachi

handful of fodder, it is Riba”⁶⁸

(v) It is reported by Imam Al-Baihaqi that a person said to Abdullah Ibn Masood (R.A.A.):

“I have taken a loan of 500 from a person on a condition that I shall lend him my horse for riding.”

Abdullah Ibn Masood answered:

“Whatever benefit of riding your creditor will receive, it will be Riba.”⁶⁹

(f) The same author has reported that Hazrat Anas Ibn Maalik (R.A.A.) was asked about a person who advances a loan to someone and then the debtor gives him something as a gift, will it be permissible for him to accept that gift? Hazrat

⁶⁸ Op cit.

⁶⁹ Albaihaqi, Al-Sunan al-Kubra V.5, P.350

Anas Ibn Maalik (R.A.A.) answered that the Holy Prophet (Sallallahu Alaihi Wassallam) has said:

إذا أقرض أحدكم قرضاً فأهدى إليه طبقاً فلا يقبله أو حملاً على دابته فلا يركبها
إلا أن يكون جرى بينه وبينه قبل ذلك

“If one of you has advanced a loan and the debtor offers the creditor a bowl (of food), he should not accept it, or if the debtor offers him a ride of his animal (cattle) the debtor must not take the ride unless this type of gift has been a usual practice between them before advancing the loan”.⁷⁰

The substance of the *hadith* is that if the debtor and creditor were on friendly terms with each other and it was their habit that one of them used to give a gift to the other, then this type of gift can be acceptable even after the

⁷⁰ Al-Baihaqi, Al-Sunan al-Kubra, V.5, P.350

recipient has advanced a loan to the giver. However, if there were no such terms between the creditor and the debtor before the loan transaction, then the debtor should not accept it, because it will have a smell of *riba*.

(vii) The same author AlBaihiqi has reported from Abdullah Ibn Abbas (R.A.A.) who was asked about a person who owed 20 Dirhams to another person, and started offering his creditor some gifts. Whenever the creditor received a gift, he sold it in the market until the aggregate amount received by the creditor reached 13 dirhams. Abdullah Ibn Abbas (R.A.A.) advised the creditor not to take more than 7 dirhams.⁷¹

(viii) It is reported by Hazrat Ali (R.A.A.) that the Holy prophet (Sallallahu Alaihi Wassallam) has said,

كل قرض جر نفعاً فهو ربا

Every loan that derives a benefit (to the creditor) is Riba.

⁷¹ AlBahaiqi AlSunan alkubra V.5, P.350

This *hadith* is reported by Harith ibn Abi Usamah in his Musnad ⁷²

100. Mr. Riazulhasan Gilani, the learned counsel for the Federation of Pakistan assailed the authenticity of this *hadith* on the ground that certain scholars of *hadith* have taken it as a weak *hadith*. He referred to Allamah Munawi who has held its chain of narrators as weak ⁷³.

101. It is true that certain critics of the *hadith* have not accepted this tradition as authentic, because one of its narrators, Sawwar b. Musab, is held to be unreliable. But at the same time there are other scholars who have accepted the *hadith*, because despite the weakness of Sawwar, it is corroborated by other sources. This is the view of Allama Azizi ⁷⁴, Imam Ghazzali and Imam-al-Haramai⁷⁵. However, this controversy relates to the above narration which attributes this statement to the Holy Prophet(Sallallahu Alaihi Wassallam) but there is no dispute among the scholars of

⁷² Al-Syuti, Al-Jame' al-Saghir V.2, P.94

⁷³ Al-Munawi, Faizulqadir V.5, P.28

⁷⁴ Al-Azizi, Al-Siraj al-Munir, V.4, P.20, Madinah

hadith in that the same principle has been enunciated by a number of *Sahabah* like Hazrat Fazalah b. Ubaid (R.A.A.) whose following statement is reported by *Albaihaqi*:

كل قرض جر منفعة فهو وجه من وجه الربا

Every loan which derives a benefit is a kind of Riba ⁷⁶.

102. According to Imam Baihaqi, the same principle is also enunciated by Abdullah b. Masud, Ubayy b. kaab, Abdullah b. Salaam and Abdullah b. Abbas (R.A.A.) ⁷⁷.

103 Nobody has disputed the authenticity of these narrations. Even if it is held that the tradition of Hazrat Ali (R.A.A.), attributing the above statement to the Holy Prophet (Sallallahu Alaihi Wassallam) is not authentic, the same principle has been established undoubtedly by several companions of the Holy Prophet(Sallalhu Alaihi Wassallam) Since the *Sahabah* were very careful and cautious in mentioning a principle of Shariah, and did not normally base any such principle on their personal opinion, it may be

⁷⁵ Ibn Hajar, Al-Talkhis-al-Habir V.3, P.996, Hadith No.1227, Makkah 1997

⁷⁶ Al-Sunan al-kubra V.5, P.350

⁷⁷ Albaihaqi, Ma'rifah-al-Sunan wa al-atharV.8, P.169.

presumed that the principle enunciated by them unanimously was, in fact, based on a saying of the Holy Prophet (Sallallahu Alaihi Wassallam) himself. Even if this presumption is ignored, these reports are sufficient at least to prove that the concept of *riba*, as understood by the *Sahabah*, includes any increased amount over the principal, however, little it may be. Obviously, the *Sahabah* were direct addressees of the Holy Quran. They were much more aware of the context and the background of the verses of the Holy Quran, and therefore, their understanding of a Quranic term like *riba* is the most authentic basis for its interpretation.

104. Mr. Riyazulhasan Gilani, the learned counsel for the Federation, raised another objection on the authenticity of the above statement. According to him, this statement suffers from an intrinsic infirmity. If a debtor, he argued, gives an additional amount at the time of repayment on voluntary basis without any claim from creditor and without a condition in the original contract of loan, it is never held to be *riba*. Yet the words used in the above statement are inclusive of this additional amount also, because the creditor has derived

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a benefit from his loan, though without his own initiative. It means that the above statement cannot be held as a comprehensive and exclusive definition of *riba*, and such a loose statement should not be attributed to the Holy Prophet (Sallallahu Alaihi Wassallam) or to his companions.

105. This contention of the learned counsel overlooks the colloquial style of the earlier Arab expressions. Instead of the complex expressions of statutory language, they used to express the sense in simple style, often conveying a detailed concept in shortest possible words. In the above statement they have qualified the word *Qarz* (loan) with the verb *Jerra* which lexically means ‘to pull’. The verbal translation of the sentence would be “Every loan which pulls along with it a benefit is *riba*.” Here the underlined words have been added to indicate that *riba* is restricted to a transaction where the loan pulls a benefit along with it in the sense that the contract of loan itself stipulates a benefit for the creditor. The statement has, therefore, excluded any voluntary amount given by the debtor at the time of repayment without pre-determined condition.

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106. In the light of the above discussion, there is no force in the contention that the prohibition of *riba* is confined to an excessive rate of interest. The directions of the Holy Quran and the Sunnah are quite explicit on the point that any amount, however little, stipulated in addition to the principal in a transaction of loan is *riba*, hence prohibited.

Riba-al-fadl and Bank loans

107. Before proceeding further, it will be pertinent to deal with another argument of Mr. Riazul Hasan Gilani, the learned counsel for the Federation, that any increased amount stipulated in a contract of loan right from the beginning does not fall within the definition of Riba AlQuran and that it falls under the definition of Riba al-fadl. However, if the debtor was not able to pay at the date of maturity for a valid reason, any increased amount imposed upon the debtor for giving him more time does fall in the definition of Riba AlQuran. Since the most banking transactions of today stipulate interest right from the beginning of the transaction, they are not covered, according to the learned counsel, by the

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prohibition of Riba AlQuran, they are rather governed by the principles of Riba Alfadl. He further argued that the enforcement of prohibition of Riba al-fadl is not the obligation of the State. Its implementation is the responsibility of individual Muslims. It was never enforced in the form of a statute/decreed/law by the Holy Prophet (Sallallahu Alaihi Wassallam) or by the Khulafa-e-Rashedeen and Muslim rulers of the Islamic history. He further claimed that the prohibition of Riba Al-fadl is not applicable to the non-Muslim residents of Islamic State, hence, it is governed by the term “Muslim Person Law” used in article 203 (b) of the Constitution of Pakistan, and therefore it stands excluded from the jurisdiction of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court of Pakistan.

108. This argument of the learned counsel is based on the unprecedented theory that an increase stipulated in the initial transaction of loan is Riba Al-fadl, rather than Riba AlQuran. The first leg of this argument which restricts the definition of Riba AlQuran only to a situation where the creditor increases

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his claim in exchange of more time given to the debtor after the maturity of the loan has already been fully discussed in para 43 to 54 of this judgment where we have held that Riba AlQuran is not restricted to that situation alone; it rather includes every transaction where an additional amount is claimed over and above the principal, whether at initial stage or after the maturity. Let us now deal with the second leg of this argument that any increase on the principal stipulated in a contract of loan falls within the definition of *Riba Alfadl*. The learned counsel while explaining the concept of *Riba Alfadl* went so far that even interest-free loans, he claimed, are covered by the Prohibition of *Riba Alfadl*, because according to the *hadith* prohibiting *riba-al-fadl*, the exchange of the six things *inter se* must be on spot basis. If gold is exchanged for its equal quantity of gold without any addition, but the payment of one side is delayed, it is included in the prohibition of *Riba Alfadl*. Therefore, the learned counsel contended, any transaction of loan whereby the repayment of the principal money (which stands for gold or silver) is delayed from one side is *Riba Alfadl*, hence, *Makruh* even though it is returned without any addition, because the

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transaction of gold for gold (or money for money) is permissible only when two conditions are fulfilled:

(One) that the quantity on both sides are equal

(Two) that the exchange is effected on the spot.

109. In an interest-free loan the condition (b) is lacking, while in an interest-based loan both conditions are missing, but both kinds of loan fall within the definition of *riba alfadl*.

110. This submission of the learned counsel is not tenable at all, because it is based on a major confusion between the transaction of sale and transaction of loan. The learned counsel has equated the transaction of loan with the transaction of sale. The *hadith* dealing with *riba alfadl* refer to a sale transaction, and not to a loan. The exact words of *hadith* are:

لا تبيعوا الذهب بالذهب الا مثلا بمثل----- ولا تبيعوا منها غائبنا جز-

Do not sell gold for gold, except in equal quantities...and do not sell the deferred (gold or silver) for the (gold or silver)

... Continued

delivered on the spot ⁷⁸.

111. Here the words “Do not sell” are clear to show that the *hadith* is speaking of a transaction of sale and not of a loan. There are many points of difference between the two transactions. One major difference is that in a sale effected on deferred payment basis, the seller cannot ask the buyer to pay the price before the stipulated date, while in a transaction of a simple interest free loan, the creditor may ask the debtor to repay at any time, and even if a time is stipulated in the transaction of loan, it has only a moral value, and is not binding legally ⁷⁹. That is why a transaction of interest-free loan is allowed, while the transaction of gold for gold on deferred payment basis is not permissible. The contention of the learned counsel that even an interest-free loan is covered by *riba-al-fadl* is, therefore, fallacious on the face of it because the Holy Prophet (Sallallahu Alaihi Wassallam) himself has not only allowed the transactions of interest-free

⁷⁸ Sahih-al-Bukhari, Book No.34, Ch.78, Hadith No.2177

⁷⁹ See Aljassas: Ahkam-ul-Quran, Lahore, 1980, V.1, P.482,483 for details.

loan but has also practiced them while he never allowed a sale of gold for gold on deferred payment basis. The learned counsel has referred to the *Ahadith* in which the Holy Prophet (Sallallahu Alaihi Wassallam) has condemned borrowing loans without genuine need and refused to pray *Janaza* of a person who died indebted. But here again, the learned counsel has confused two different issues. The Holy Prophet (Sallallahu Alaihi Wassallam) did not condemn borrowing loans because the transaction itself was prohibited, but he did so for the simple reason that it is not at all advisable for a person to incur the liability of a loan without a genuine need. Had it been on the basis of the prohibition of the transaction of loan itself, it would have been prohibited for both the lender and the borrower, but obviously advancing a loan has never been held as prohibited. The learned counsel himself referred to a *hadith* reported by Ibn Majah to the effect that advancing a loan is more meritorious than spending in charity (Sadaqah) ⁸⁰. It clearly indicates that the transaction of loan in itself is not prohibited as a

⁸⁰ Ibn Majah, Al-Sunan, V.3, P.154, Hadith No.2431, Beirut 1996. It should be noted that this *hadith* is held to be weak by Al-Busiri etc. (see the marginal note in the above).

transaction, however, the people are advised not to incur the liability of a loan without a genuine need. Conversely, a sale of gold for gold or silver for silver on deferred payment basis is a prohibited transaction in itself, and this prohibition is applicable to both the parties, and has never been allowed for any one of them in any case.

112. To sum-up, the *Ahadith of Riba Alfadl* are meant to cover the transactions of sale only, and have nothing to do with the transaction of loan which are covered by the rules of *Riba AlQuran* or *Riba AlJahiliya* and where it is clearly mentioned that the creditor in a transaction of loan is entitled to claim only his principal amount, and if he does so, it has never been prohibited. It is, therefore, not correct to say that a transaction of interest-bearing loan fixing an amount as interest right from the beginning of the transaction is covered by the prohibition of *Riba Alfadl* rather than the *Riba AlQuran* and that the banking interest being a transaction of *Riba Alfadl* is not Haram.

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The jurisdiction of this Court in the laws of Interest:

113. Having held that the interest charged by the banks on their loans is not *Riba Alfadl* (but it is covered by the definition of *riba al-Quran*)we need not go into the question whether its prohibition extends to non-Muslims also. However, we would like to note that even if the standpoint of the learned counsel is accepted for a moment, his argument that *riba-al-fadl* being applicable to the Muslims only, the laws relating to the banking interest are within the definition of “Muslim Personal Law” as contemplated in article 203(B) of the Constitution of Pakistan and therefore they are outside the jurisdiction of the Federal Shariat Court or the Shariat Appellate Bench of this court, is not sustainable for two obvious reasons:

114. Firstly, the laws under consideration in the present case are the laws as they exists today and not the laws as they should have been in the opinion of the learned counsel. The existing laws do not differentiate between the Muslims and

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non-Muslims in their application. They are applicable to non-Muslims as well as to the Muslims of the country.

115. Secondly, the notion that laws applicable to Muslims only fall under the definition of “Muslim Personal Law” for the purpose of article 203(B) of the Constitution is, perhaps, based on a previous judgment of this court in the case of Mst. Farishta (PLD 1981 SC 120). But seemingly the learned counsel is not cognizant of the fact that the view taken by the Court in this case was later reviewed in a subsequent judgment of this Court in the case of Dr. Mahmoodurrahman Faisal Vs. The Government of Pakistan (PLD 1994 SC 607) where it is held that the statute laws, even though applicable only to Muslims in general, do not fall under the term “Muslim Personal Law” for the purpose of article 203 (B) of the Constitution. Therefore, the submission of the learned counsel that the laws relating to bank interest stand excluded from the jurisdiction of this court, is not tenable at any score.

Basic cause of prohibition:

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116. The next argument advanced by some appellants is that the basic cause (illat) of the prohibition of Riba is *Zulm* (injustice). The Holy Quran says:

وَإِنْ تُبْتِغُوا فَلَئِنْ رُءُوسُ أَمْوَالِكُمْ لَا تَظْلِمُونَ وَلَا تُظْلَمُونَ ۝ ٢٧٩

“And if you repent (from charging interest)

then you are entitled to your principal .

You neither wrong nor be wronged.”

117. Here the words “neither you wrong nor be wronged” indicate that the basic *illat* of the prohibition is *zulm*. It is argued by some appellants that there is no *zulm* (injustice) at all in charging interest from a rich person who has borrowed money to earn huge profits therewith. Since the basic *illat* of the prohibition is missing in the commercial interest charged by the banks and the financial institutions, it cannot be held as prohibited. The same argument was partly advanced by Mr. Khalid M. Ishaque, advocate, who, despite his health constraints, was kind enough to appear in this case as a jurisconsult. However, instead of claiming that all the transactions of loan in the present banking system are

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permissible, Mr. Khalid Ishaq has opined that every individual transaction should be analyzed separately taking into account the surrounding situation of that particular transaction. The focus of the analysis, according to him, should be on the question whether there is an element of *zulm* in the given situation. In case there is a *zulm*, the transaction should be taken as *Riba*, hence prohibited, but if there is no *zulm* it should not be taken as *haraam*..

118. We have paid due consideration to this line of argument but were not able to subscribe to it. The argument is based on two assumptions: firstly, that the basic *illat* of the prohibition is *zulm*, and secondly, that there is no *zulm* in the modern interest based transactions or at least there may be some interest-based transactions which have no element of *zulm*. Both these legs of this argument, after a deeper study, have been found untenable. Let us analyze each one of these two assumptions separately.

The Difference between illat and Hikmat:

119. The first assumption which takes *zulm* as the basic *illat* of the prohibition of *Riba* is in fact based on confusing the *Illat* with the *Hikmat* of a prohibition. It is a well settled principle of Islamic jurisprudence that there is a big difference between the *Illat* and the *Hikmat* of a particular law. The *Illat* is the basic feature of a transaction without which the relevant law cannot be applied to it, whereas the *Hikmat* is the wisdom and the philosophy taken into account by the legislator while framing the law or the benefit intended to be drawn by its enforcement. The principle is that the application of a law depends on the *Illat* and not on the *Hikmat*. In other words, if the *Illat* (the basic feature of the transaction) is available in a particular situation while the *Hikmat* (the wisdom) is not visualized, the law will still be applicable. This principle is recognized in the secular laws also. Let us take a simple example: The law has made it compulsory for the vehicles running on the roads to stop when the red street light is on. The *Illat* of this law is the red light, while the *Hikmat* is to avoid the chances of accidents. Now, the law will be applicable whenever the red light is on; its application will not depend on whether or not there is an

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apprehension of an accident. Therefore, if the red light is on, every vehicle is bound to stop, even though the roads of both sides have no other traffic at all. In this particular case, the basic wisdom (*hikmat*) of the law is not discernable, because there is no apprehension of any accident in any way. Still the law will be applicable in its full force, because the red light which was the real *Illat* of the law is present. To cite another example, the Holy Quran has prohibited liquor. The *Illat* of its prohibition is intoxication but the *Hikmat* of this prohibition has been mentioned by the Holy Quran in the following words:

إِنَّمَا يُرِيدُ الشَّيْطَانُ أَنْ يُوقِعَ بَيْنَكُمُ الْعَدَاوَةَ وَالْبَغْضَاءَ فِي الْخَمْرِ وَالْمَيْسِرِ وَيَصُدَّكُمْ
عَنْ ذِكْرِ اللَّهِ وَعَنِ الصَّلَاةِ ۚ فَهَلْ أَنْتُمْ مُنْتَهُونَ 91 ۚ

The Satan definitely intends to inculcate enmity and hatred between you by means of liquor and gambling, and wants to prevent you from remembering Allah. So would you not desist? (5:91)

120. The philosophy of the prohibition of Liquor and gambling given by the Holy Quran in this verse is that liquor inculcates enmity and hatred between people and it prevents them from remembering Allah. Can one say that he has been using liquor for a long time but it never resulted in having enmity with any one, and therefore, the basic *Illat* of the prohibition being not present, he should be allowed to use liquor? Or can one reasonably argue that drinking wine has never prevented him from offering prayers at their due times, and therefore, the basic cause of prohibition mentioned by the Holy Quran being absent, the drinking should be held as permissible. Obviously, no one can accept these arguments because the enmity and hatred referred to by the Holy Quran in the above verse is not intended to be the *Illat* of the prohibition. It simply spells out some bad results which the liquor and gambling often produce. They have been mentioned as a *Hikmat* and the philosophy of the prohibition, but the prohibition itself does not depend on these results. It is in the same way that after prohibiting the transaction of Riba, the Holy Quran has mentioned the *Zulm* as a *Hikmat* or a philosophy of the prohibition, but it does not mean that

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prohibition will not be applicable if the element of *Zulm* appears to be missing in a particular case. The *Illat* (the basic feature) on which the prohibition is based is the excess claimed over and above the principal in a transaction of loan, and as soon as this *Illat* is available, the prohibition will follow regardless of whether the philosophy of the law is or is not visible in a particular transaction.

121. Another point worth mentioning here is that the *Illat* of a law is always something determinable by hard and fast definition which leaves no room for a dispute as to whether the *Illat* is or is not available. Any relative term which is ambiguous in nature cannot be held to be the *Illat* of a particular law because its existence being susceptible to doubts and disputes, it would defeat the very purpose of the law. The *Zulm* (Injustice) is a relative and rather ambiguous term the exact definition of which is very difficult to ascertain. Every person may have his own view about what is or what is not *Zulm*. All the disputing political and economic systems of the world, in fact, claimed to abolish *Zulm*, but what was regarded as *Zulm* in one system has been

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held as justified in another. The communist theory of economy is of the firm view that the private property in itself is a *Zulm*, while the capitalist theory asserts that abolishing private property is the *zulm*. Such an ambiguous term is not competent to be the *Illat* of a particular law.

122. Mr. Khalid M. Ishaque, advocate, who appeared as a jurisconsult in this case, adopted another approach. According to him, non-availability of a hard and fast definition of '*zulm*' or *riba* should be taken as a blessing from Allah, for it provides elasticity to the Muslims of every age to determine what is *zulm* in the given situations of their time. In his written statement the learned jurisconsult has expressed himself in the following words:

One) Misdirected efforts towards definition

making ought to be discontinued.

Absence of definition of Riba in the

Quran should be accepted as such and

rather be looked upon as a mercy for

mankind. The deliberate omission of a

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rigid definition would propel Muslims to come up with their own guiding and evolving principles of identifying *zulm* in space-time situations. Economic conditions are not static and nor are human situations.

Two)A sound economic policy ought to include *“all purposeful governmental action whose actual and professed primary objective is the improvement of the economic welfare of the whole population for which government is responsible, not of some segment of that population”*. The Islamic concept of economy is not inimical or dissimilar to the above. As such, an Islamic approach should neither be insulated and detached from an economic approach/program nor should it be in ignorance of the same as they need not be mutually exclusive.

Jurists should not close their mind to the possibility that both can be synergized to arrive at the most beneficial and fair outcome. Very typically, whenever Muslim jurists have not kept themselves abreast with or informed of contemporary disciplines (economics is a case in point), they have a tendency to become averse to it, treat it with suspicion, regard it as a hazard and simply label it as un-Islamic to avoid study of the same.”

123. We paid due consideration to this approach, but with due respect to the learned jurisconsult, this argument seems to overlook some fundamental points:

124. Firstly, the learned jurisconsult has taken the ‘deliberate omission of a rigid definition’ of riba (by the Holy Quran) as a mercy for mankind. This argument appears to presume that the Holy Quran normally gives definitions of the acts

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prohibited by it, but in the case of *riba* the Holy Quran deliberately omitted to give a rigid definition. The fact, however, is that the Holy Quran has hardly given a legal definition to any one of its prohibitions. No definition is given for *khamr* (liquor), nor for *qimar* (gambling) nor for *zina* (adultery or fornication) nor for theft, nor for robbery, nor for *kufr*. Similarly the Holy Quran did not define its imperatives like *Salah*, *Sawm* (fasting), *Zakah*, *Hajj* or *Jihad*. Should we, then, say that none of these concepts has a specific meaning and all these injunctions are therefore subject to ever-changing whims based on ‘space-time situations’? The Holy Quraan, in fact, did not give legal definitions to these concepts because their meanings were too obvious to need an express definition. Some ancillary details of these concepts might have not been so clear and might have given rise to differences of opinion, but it does not mean that the basic concept of all these injunctions has been floated in void or vacuum, having no specific sense at all.

125. Secondly, the learned jurisconsult has succinctly outlined the basic features of a sound economic policy in the

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italicized portion of the above extract. One can hardly question its soundness. Almost all the economic systems claim to strive for the same objectives, but the question is how to achieve them? It is the answer of this very question that has divided different economic systems into conflicting rivals. The learned jurisconsult suggests that ‘Islamic approach should not be insulated and detached from an economic approach/program’. The suggestion seems to be substantially reasonable, but when this suggestion is given in the context of leaving the definition of *riba* unsettled and ‘evolving principles of identifying *zulm* in space-time situations’ it apparently means that it is the pure economic approach which will play a decisive role in identifying *zulm* in a particular situation and in turn determining what is *halal* or *haram* in Shariah. Once it is taken for granted, the question is ‘which economic approach’? There are numerous theories, conflicting with each other, but each one of them pretending to race towards the sound economic policy of ‘improving the economic welfare of the whole population’. The basic economic goals of a welfare economy are recognized by almost everyone thinking on economic

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subjects. However, it is the strategy for translating these objectives into reality that makes a big difference. The Islamic strategy to achieve these goals is neither too narrow to accommodate the ever-changing needs of the humanity or too biased to interact with the modern thought, nor is it too dependent on the modern theories to make its own way towards these goals. Islam has no problem in welcoming any constructive suggestion from whatever quarter it may have come, but at the same time it has its own principles on which no compromise is possible, because they are based on divine guidance, the most distinct feature of the Islamic economy that draws the line of difference between the Islamic and secular economies - and the prohibition of *riba* is one of those basic principles. To leave this principle at the mercy of the secular economic policies is, therefore, like placing the cart before the horse.

126. Thirdly, abolishing *zulm* (injustice) is not the *hikmat* or purpose of the prohibition of *riba* alone. It is the *reson' detre* of most of the Islamic injunctions relating to business and trade. But whenever the Holy Quran and Sunnah gave a

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specific command or prohibition in these areas, they did not rely on the rational assessment of the people, nor did they leave these transactions at the mercy of human reason to decide whether or not they have an element of *Zulm*. If the Holy Quran and the Sunnah intended to entrust such a decision to the human intellect alone, they would have not revealed such a long list of commands and prohibitions; they would have rather issued one single command that all people must avoid *zulm* in all their transactions. But the Holy Quran and Sunnah were cognizant of the fact that human reason, despite its wide capabilities, cannot claim to have unlimited power to reach the truth. After all, it has some limits beyond which it either cannot properly work or may fall prey to errors. There are many areas of human life where ‘reason’ is often confused with ‘desires’ and where unhealthy instincts, under the garb of rational arguments, misguide the humanity and demonstrate the unjust attitudes in the disguised form of justice. It is these areas where human reason needs the guidance of divine revelation, and it is the divine revelation which finally decides as to which human attitude actually falls within the limits of ‘*zulm*’ or injustice, even though it

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appears to be just in the eyes of some secular rationalists, and it is in such issues that the divine revelations come with a specific command that prevails upon the rational arguments advanced by differing opinions. That is exactly what happened in the case of *riba*. The secular rationalists were fully content with their belief that *riba* transactions practiced by them were quite justified, because the income they earn through interest is very similar to the profit they earn through sales. That is why they confronted the prohibition of *Riba* by their rational argument quoted by the Holy Quran in the following words:

إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا

Sale is nothing but similar to *riba*.

127. They intended that if a profit claimed in a transaction of sale is just and lawful, there is no reason why an interest claimed in a transaction of loan is held to be unjust and unlawful. In answer to this argument of theirs, the Holy Quran could have mentioned the difference between interest and profit in pure logical manner, and could have explained how the profit in a sale is justified while the interest is not.

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The Holy Quran could have also spelled out the evil consequences of *riba* on the economy. But this line of argument was intentionally avoided, and the brief and simple answer given by the Holy Quran was:

وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا

(Allah has allowed the sale and has prohibited interest.)

128. The hint given in this verse is that the question whether these transactions have an element of injustice is not left to be decided by human reason alone, because the reason of different individuals may come up with different answers and no absolute conclusion of universal application may be arrived at on the basis of pure rational arguments. The correct principle, therefore, is that once a particular transaction is held by Allah to be *haraam*, there is no room for disputing it on the basis of pure rational argumentation because Allah's knowledge and wisdom encompasses all those points which are not accessible to ordinary reason. If the human reason was fully competent to reach the correct decision unanimously in each and every issue, no divine revelation was called for. There is a wide area of human

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conduct in which the Creator did not give a specific command. It is this area where human reason can well play its role, but it should not be burdened to play the role of a rival to the express divine injunctions.

129. The Quranic verse referring to *zulm* (Injustice) in the context of *riba* should be studied in this perspective. The exact words of the verse are:

وَإِنْ تُبْتَغُوا فَلََكُمْ رُءُوسُ أَمْوَالِكُمْ ۖ لَا تَظْلِمُونَ وَلَا تُظْلَمُونَ ۝ ٢٧٩

And if you repent (from claiming *riba*), then
you are entitled to get your principal back.

Neither you wrong nor be wronged.

130. Before referring to *zulm*, the Quranic verse has laid down the precise principle that no one can be deemed to have repented from the practice of *riba* unless he has withdrawn from claiming any additional amount over and above the principal, but on

the other hand he is fully entitled to get back his principal, and his debtor is bound to pay him the full amount of loan. If the debtor will not pay the principal, he will be committing injustice against the creditor, and if the creditor will claim something more than the principal, he will be committing injustice to the debtor.

131. Thus the Holy Quran did not leave it to the assessment of the parties to decide what is injustice and what is not. Instead, the Holy Book itself has precisely decided what is injustice for each one of the two parties in a transaction of loan. Therefore, the notion that the permissibility of different transactions of interest should be judged on the basis of human assessment is tantamount to defeating the very purpose of the revelation and is not, therefore, acceptable.

Rationale of the Prohibition of Riba:

132 Now we come to the second leg of the argument which contends that no element of injustice is found in the commercial or banking interest.

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133. Although, in the light of the above discussion, the Holy Quran has itself decided what is injustice in a transaction of loan, and it is not necessary that everybody finds out all the elements of injustice in a *riba* transaction, yet the evil consequences of interest were never so evident in the past than they are today. Injustice in a personal consumption loan was restricted to a debtor only, while the injustice brought by the modern interest affects the economy as a whole. A detailed account of the rationale of the prohibition of *riba* would, in fact, require a separate volume, but for the purpose of brevity we would concentrate on three aspects of the issue:

(One) The logic of the prohibition on theoretical ground

(Two) The evil effects of interest on production

(Three) The evil effects of interest on distribution.

134. On pure theoretical ground, we would like to focus on two basic issues; firstly on the nature of money and secondly on the nature of a loan transaction.

Nature of Money:

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135. One of the wrong presumptions on which all theories of interest are based is that money has been treated as a commodity. It is, therefore, argued that just as a merchant can sell his commodity for a higher price than his cost, he can also sell his money for a higher price than its face value, or just as he can lease his property and can charge a rent against it, he can also lend his money and can claim interest thereupon.

136. Islamic principles, however, do not subscribe to this presumption. Money and commodity have different characteristics and therefore they are treated differently. The basic points of difference between money and commodity are as follows:

(One) Money has no intrinsic utility. It cannot be utilized in direct fulfillment of human needs. It can only be used for acquiring some goods or services. A commodity, on the other hand, has intrinsic utility and can be utilized directly without exchanging it for some other thing.

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(Two) The commodities can be of different qualities while money has no quality except that it is a measure of value or a medium of exchange. Therefore, all the units of money of the same denomination, are hundred per cent equal to each other. An old and dirty note of Rs.1000/= has the same value as a brand new note of Rs.1000/=.

(Three) In commodities, the transactions of sale and purchase are effected on an identified particular commodity. If A has purchased a particular car by pin-pointing it, and seller has agreed, he deserves to receive the same car. The seller cannot compel him to take the delivery of another car, though of the same type or quality.

Money, on the contrary, cannot be pin-pointed in a transaction of exchange. If A has purchased a commodity from B by showing him a particular note of Rs.1000/- he can still pay him another note of the same denomination.

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137. Based on these basic differences, Islamic Shariah has treated money differently from commodities, especially on two scores:

138 Firstly, money (of the same denomination) is not held to be the subject-matter of trade, like other commodities. Its use has been restricted to its basic purpose i.e. to act as a medium of exchange and a measure of value.

139. Secondly, if for exceptional reasons, money has to be exchanged for money or it is borrowed, the payment on both sides must be equal, so that it is not used for the purpose it is not meant for i.e. trade in money itself.

140. Imam Al-Ghazzali (d.505 A.H.) the renowned jurist and philosopher of the Islamic history has discussed the nature of money in an early period when the Western theories of money were not existent, at all. He says:

“The creation of *dirhams* and *dinars* (money)

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is one of the blessings of Allah.... They are stones having no intrinsic usufruct or utility, but all human beings need them, because every body needs a large number of commodities for his eating, wearing etc, and often he does not have what he needs and does have what he needs not... therefore, the transactions of exchange are inevitable. But there must be a measure on the basis of which price can be determined, because the exchanged commodities are neither of the same type, nor of the same measure which can determine how much quantity of one commodity is a just price for another. Therefore, all these commodities need a mediator to judge their exact value.... Allah Almighty has, therefore, created *dirhams* and *dinars* (money) as judges and mediators between all commodities so that all objects of wealth are measured through them... and

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their being the measure of the value of all commodities is based on the fact that they are not an objective in themselves. Had they been an objective in themselves, one could have a specific purpose for keeping them which might have given them more importance according to his intention while the one who had no such purpose would have not given them such importance and thus the whole system would have been disturbed. That is why Allah has created them, so that they may be circulated between hands and act as a fair judge between different commodities and work as a medium to acquire other things.... So, the one who owns them is as he owns every thing, unlike the one who owns a cloth, because he owns only a cloth, therefore, if he needs food, the owner of the food may not be interested in exchanging his food for cloth, because he may need an

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animal for example. Therefore, there was needed a thing which in its appearance is nothing, but in its essence is everything. The thing which has no particular form may have different forms in relation to other things like a mirror which has no color, but it reflects every colour. The same is the case of money. It is not an objective in itself, but it is an instrument to lead to all objectives...

So, the one who is using money in a manner contrary to its basic purpose is, in fact, disregarding the blessings of Allah. Consequently, whoever hoards money is doing injustice to it and is defeating their actual purpose. He is like the one who detains a ruler in a prison...

And whoever effects the transactions of interest on money is, in fact, discarding the

blessing of Allah and is committing injustice, because money is created for some other things, not for itself. So, the one who has started trading in money itself has made it an objective contrary to the original wisdom behind its creation, because it is injustice to use money for a purpose other than it was created for.... If it is allowed for him to trade in money itself, money will become his ultimate goal and will remain detained with him like hoarded money. And imprisoning a ruler or restricting a postman from conveying messages is nothing but injustice ⁸¹.

141. This brief, yet comprehensive, analysis of the nature of money, undertaken by Imam Al-Ghazzali about nine hundred years ago, is admitted to be true by the economists who

⁸¹ This is an abridged translation of the detailed discussion of Imam Al-Ghazali in his landmark work 'Ihya-al-Uloom' V.4, P,88-89, Cairo 1939. He has further discussed that the impermissibility of trading in money is applicable to the units of the same denomination. However, exchange of different currencies is allowed. He has also explained the difference between these two situations.

came centuries after him. That money is only a medium of exchange and a measure of value is universally accepted by almost all the economists of the world, but unfortunately a large number of these economists failed to recognize the logical outcome of this concept, so clearly elaborated by Imam al-Ghazzali: that money should not be treated as a commodity meant for being traded in. After holding that money is a commodity, the modern economists have plunged into a dilemma that was never resolved satisfactorily. The commodities are classified into the commodities of first order which are normally termed as ‘consumption goods’ and the commodities of the higher order which are called ‘productive goods’. Since money, having no intrinsic utility, could not be included in ‘consumption goods’ most of the economists had no option but to put it under the category of ‘Production goods’, but it was hardly proved by sound logical arguments that money is a ‘production good’. Ludwig Von Mises, the well-known economist of the present century has dealt with the subject in detail. He says:

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“of course, if we regard the twofold division of economic goods as exhaustive, we shall have to rest content with putting money in one group or the other. This has been the position of most economists; and since it has seemed altogether impossible to call money a consumption good, there has been no alternative but to call it a production good.”⁸²

142. After citing different arguments in support of this view, he comments as follows:

“It is true that the majority of economists reckon money among production goods. Nevertheless, arguments from authority are invalid; the proof of a theory is in its reasoning, not in its sponsorship; and with all due respect for the masters, it must be said that they have not justified their position very thoroughly in the matter.”⁸³

⁸² Ludwig Von Mises: “The Theory of Money And Credit” Liberty Classics Indianapolis, 1980, P.95

⁸³ Op cit, P.95

143 He then concludes:

“Regarded from this point of view, those goods that are employed as money are indeed what Adam Smith called them, “dead stock, which... produces nothing.”

144. The author has then expressed his inclination to the Kien’s theory that money is neither a consumption good nor a production good; it is a media of exchange.⁸⁴

145. The logical result of this finding would have been that money should not be taken as an instrument that gives birth to more money on daily basis, nor should it have been taken as a tradable commodity, when it is exchanged for another money of the same denomination, because once it is accepted that money is neither consumption good nor production good, and that it is merely a medium of exchange, then there remains no room for making itself an object of profitable trade, for it will be like a mediator himself has been made a party. But, perhaps due to the overwhelming domination of

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interest-based monetary system, many economists did not proceed any further to this direction.

146 Imam Al-Ghazzali, on the other hand, has taken the concept of ‘medium of exchange’ to its logical end. He has concluded that when money is exchanged for money of the same denomination, it should never be made an instrument generating profit by such exchange.

147. This approach of Imam al-Ghazzali, fully backed by the clear directives of the holy Quran and Sunnah, has however been admitted to be true by some realistic scholars, even in societies dominated by interest. Many of them after facing the severe consequences of their financial system based on trade in money have admitted that their economic plight was caused, *inter alia*, by the fact that money was not restricted to be used for its primary function as a medium of exchange.

148. During the horrible depression of 1930s, an “Economic Crisis Committee” was formed by Southampton Chamber of

⁸⁴Op cit, P.102

Commerce in January 1933. The Committee consisted of ten members headed by Mr. E. Dennis Mundy. In its report the committee had discussed the root causes of the calamitous depression in national and international trade and had suggested different measures to overcome the problem. After discussing the pitfalls of the existing financial system, one of the committee's recommendation was that:

“In order to ensure that money performs its true function of operating as a means of exchange and distribution, it is desirable that it should cease to be traded as a commodity.⁸⁵”

149. This real nature of money which should have been appreciated as a fundamental principle of the financial system remained neglected for centuries, but it is now increasingly recognized by the modern economists. Prof. John Gray (of Exford University) , in his recent work *False Dawn* has remarked as follows:

⁸⁵ The Report of Economic Crisis Committee” Southampton Chamber of Commerce, 1933, Part 3, (iii) Para 2 (with thanks to Mr. P.M. Pidcock, Director Institute of Rational Economics, who very kindly provided us with a copy of the report.)

“Most significantly, perhaps transactions on foreign exchange markets have now reached the astonishing sum of around \$1.2 trillion a day, over fifty times the level of the world trade. Around 95 percent of these transactions are speculative in nature, many using complex new derivative’s financial instruments based on futures and options. According to Michael Albert, the daily volume of transactions on the foreign exchange markets of the world holds some \$900 billions - equal to France’s annual GDP and some \$200 million more than the total foreign currency reserves of the world central banks.

This *virtual* financial economy has a terrible potential for disrupting the underlying *real* economy as seen in the

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collapse in 1995 of *Barings*, Britain's oldest bank.⁸⁶

The size of derivatives mentioned by John Gray was, by the way, of their daily transactions. The size of their total worth, however, is much greater. It is mentioned by Richard Thomson in his "Apocalypse Roulette" in the following words:

"Financial derivatives have grown, more or less from standing starting in the early 1970s, to a \$64 trillion (that's \$ 64,000,000,000,000) industry by 1996. How do you imagine a number that big? You could say that if you laid all those dollar bills end to end, they would stretch from here to the sun sixty-six times, or to the moon 25,900 times;⁸⁷"

⁸⁶ John Gray, *False Dawn: The Delusions of Capitalism*, Grunte Books, London, 1998, P.62, based on Wall Street Journal 24 October 1995; Bank of International Settlements, Annual Report, 1995 and Michael Albert, *Capitalism - original capitalism*, London Whurr Publishers, 1993, P.188.

⁸⁷ Richard Thomson: *Apocalypse Roulette: The Lethal world of Derivatives*, Macmillon, London 1998 P.4

150. James Robertson observes in his latest work, *Transforming Economic Life* in the following words:

“Today’s money and finance system is unfair, ecologically destructive and economically inefficient. The money-must-grow imperative derives production (and thus consumption) to higher than necessary levels. It skews economic effort towards money out of money, and against providing real services and goods.

...(It) also results in a massive world-wide diversion of effort away from providing useful goods and services, into making money out of money. At least 95% of the billions of dollars transferred daily around the world are for purely financial transactions, unlinked to transactions in the

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real economy.⁸⁸

151. This is exactly what Imam Al-Ghazzali had pointed out nine hundred years ago. The evil results of such an unnatural trade have been further explained by him at another place, in the following words:

“Riba (interest), is prohibited because it prevents people from undertaking real economic activities. This is because when a person having money is allowed to earn more money on the basis of interest, either in spot or in deferred transactions, it becomes easy for him to earn without bothering himself to take pains in real economic activities. This leads to hampering the real interests of the humanity, because the interests of the humanity cannot be safeguarded without real trade skills, industry and construction.⁸⁹

⁸⁸ James Robertson, *Transforming Economic Life: A Millennial Challenge*, Green Books, Devon, 1998

⁸⁹ Alghazzali, *Ihya-ul-uloom*

152. It seems that Imam- Al-Ghazzali has, in that early age, pointed out to the phenomenon of monetary factors prevailing on production, creating a wide gap between the supply of money and the supply of real goods which has emerged in the later days as the major cause of inflation, almost the same ‘terrible potential’ of trading in money as explained by *John Gray* and *James Robertson* in their above extracts. We will examine this aspect a little later, but what is important at this point is the fact that money, being a medium of exchange and a measure of value cannot be taken as a “production good” which yields profit on daily basis, as is presumed by the theories of interest. This is a mediator and it should be left to play this exclusive role. To make it an object of profitable trade disturbs the whole monetary system and brings a plethora of economic and moral hazards to the whole society.

The Nature of Loan:

153. Another major difference between the secular capitalist system and the Islamic principles is that under the former system, loans are purely commercial transactions meant to

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yield a fixed income to the lenders. Islam, on the other hand, does not recognize loans as income-generating transactions. They are meant only for those lenders who do not intend to earn a worldly return through them. They, instead, lend their money either on humanitarian grounds to achieve a reward in the Hereafter, or merely to save their money through a safer hand. So far as investment is concerned, there are several other modes of investment like partnership etc which may be used for that purpose. The transactions of loan are not meant for earning income.

154. The basic philosophy underlying this scheme is that the one who is offering his money to another person has to decide whether:

(One) he is lending money to him as a sympathetic act or

(Two) he is lending money to the borrower, so that his principal may be saved or

(Three) he is advancing his money to share the profits of the borrower.

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155. In the former two cases (a) and (b) he is not entitled to claim any additional amount over and above the principal, because in the case (a) he has offered financial assistance to the borrower on humanitarian grounds or any other sympathetic considerations, and in the case (b) his sole purpose is to save his money and not to earn any extra income.

156. However, if his intention is to share the profits of the borrower, as in the case (c), he shall have to share his loss also, if he suffer a loss. In this case, his objective cannot be served by a transaction of loan. He will have to undertake a joint venture with the opposite party, whereby both of them will have a joint stake in the business and will share its outcome on fair basis. Conversely, if the intent of sharing the profit of the borrower is designed on the basis of an interest-based loan, it will mean that the financier wants to ensure his own profit, while he leaves the profit of the borrower at the mercy of the actual outcome of the business. There may be a situation where the business of the borrower totally fails. In this situation he will not only bear the whole loss of the

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business, but he will have also to pay interest to the lender, meaning thereby that the profit or interest of the financier is guaranteed at the price of the destructive loss of the borrower, which is obviously a glaring injustice.

157. On the other hand, if the business of the borrower earns huge profits, the financier should have shared him in the profit in reasonable proportion, but in an interest-based system, the profit of the financier is restricted to a fixed rate of return which is governed by the forces of supply and demand of money and not on the actual profits produced on the ground. This rate of interest may be much less than the reasonable proportion a financier might have deserved, had it been a joint venture. In this case the major part of the profit is secured by the borrower, while the financier gets much less than deserved by his input in the business, which is another form of injustice.

158. Thus, financing a business on the basis of interest creates an unbalanced atmosphere which has the potential of bringing injustice to either of the two parties in different

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situations. That is the wisdom for which the Shariah did not approve an interest based loan as a form of financing.

159. Once the interest is banned, the role of 'loans' in commercial activities becomes very limited, and the whole financing structure turns out to be equity-based and backed by real assets. In order to limit the use of loans, the Shariah has permitted to borrow money only in cases of dire need, and has discouraged the practice of incurring debts for living beyond one's means or to grow one's wealth. The well-known event that the Holy Prophet (Sallallahu Alaihi Wassallam) refused to offer the funeral prayer (salat-ul janazah) of a person who died indebted⁹⁰ was, in fact, to establish the principle that incurring debt should not be taken as a natural or ordinary phenomenon of life. It should be the last thing to be resorted to in the course of economic activities. This is one of the reasons for which interest has been prohibited, because, given the prohibition of interest, no one will be agreeable to advance a loan without a return for unnecessary expenses of the borrower or for his profitable

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projects. It will leave no room for unnecessary expenses incurred through loans. The profitable ventures, on the other hand, will be designed on the basis of equitable participation and thus the scope of loans will remain restricted to a narrow circle.

160. Conversely, once the interest is allowed, and advancing loans, in itself, becomes a form of profitable trade, the whole economy turns into a debt-oriented economy which not only dominates over the real economic activities and disturbs its natural functions by creating frequent shocks, but also puts the whole mankind under the slavery of debt. It is no secret that all the nations of the world, including the developed countries, are drowned in national and foreign debts to the extent that the amount of payable debts in a large number of countries exceeds their total income. Just to take one example of UK, the household debt in 1963 was less than 30% of total annual income. In 1997, however, the percentage of household debt rose upto more than 100% of the total income. It means that the household

⁹⁰ Sahih-al-Bukhari, Book No.39, Chapter 3, Hadith No.2295.

debt throughout the country, embracing rich and poor alike, represents more than the entire gross annual incomes of the country. Consumers have borrowed, and made purchases against their future earnings, equivalent to more than the entirety of their annual incomes⁹¹ Peter Warburton, one of the UK's most respected financial commentators and a

past winner of economic forecasting awards, has commented on this situation as follows:

“The credit and capital markets have grown too rapidly, with too little transparency and accountability. Prepare for an explosion that will rock the western financial system to its foundation ⁹².”

⁹¹ Source: OECD Structural indicators 1996, Bank of England and council for Mortgage Lenders Statistics, as quoted by Michael Rowbotham in “The Grip of Death”. Jon Carpenter Publishing, England 1998, p.65.

Overall Effects of Interest:

161. Interest-based loans have a persistent tendency in favor of the rich and against the interests of the common people. It carries adverse effects on production and allocation of resources as well as on distribution of wealth. Some of these effects are the following:

(a) Evil effects on allocation of Resources:

162. Loans in the present banking system are advanced mainly to those who, on the strength of their wealth, can offer satisfactory collateral. Dr. M. Umar Chapra (Senior Economic Advisor to Saudi Arabian Monetary Agency) who appeared in this case as a juris-consult has summarized the effects of this practice in the following words:

“Credit, therefore, tends to go to those who, according to Lester Thurow, are ‘lucky rather than smart or meritocratic’⁹³ The banking

⁹² Peter Warburton: Debt and Delusion, Allen Lane, London 1999, P.261

⁹³ Thurow, Lester, Zero-Sum Society (New York: Basic Books 1980) p.175.

system thus tends to reinforce the unequal distribution of capital.⁹⁴ Even Morgan Guarantee Trust Company, sixth largest bank in the U.S. has admitted that the banking system has failed to ‘finance either maturing smaller companies or venture capitalist’ and ‘though awash with funds, is not encouraged to deliver competitively priced funding to any but the largest, most cash-rich companies⁹⁵ Hence, while deposits come from a broader cross-section of the population, their benefit goes mainly to the rich.”

(Dr. Chapra’s written statement under the caption “Why has Islam prohibited Interest? P.18)

⁹⁴ Bigsten, Arne, “Poverty, Inequality and Development,” in Norman Gemmel, Surveys in Development Economics (Oxford: Blackwell 1987) p.156

163. The veracity of this statement can be confirmed by the fact that according to the statistics issued by the State Bank of Pakistan in September 1999, 9269 account holders out of 2,184,417 (only 0.4243% of total account holders) have utilized Rs.438.67 billion which is 64.5% of total advances as of end December 1998.⁹⁶

(b) Evil effects on production:

Since in an interest-based system funds are provided on the basis of strong collateral and the end-use of the funds does not constitute the main criterion for financing, it encourages people to live beyond their means. The rich people do not borrow for productive projects only, but also for conspicuous consumption.

Similarly, governments borrow money not only for genuine development programs, but also for their lavish expenditure and for projects motivated by their political ambitions rather

⁹⁵ Morgan Guarantee Trust Company of New York, World Financial Markets, January 1987, p.7 as quoted by Dr. Umar Chapra

⁹⁶ Statistical Bulletin of State Bank of Pakistan, September 1999, p.47, Annexure-B

than being based on sound economic assessment. Non-project-related borrowings, which were possible only in an interest-based system have thus helped in nothing but increasing the size of our debts to a horrible extent. According to the budget of 1998/99 in our country 46 percent of the total government spending is devoted to debt-servicing, while only 18% is allocated for development which includes education, health and infrastructure.

(c) **Evil effects on distribution:**

165. We have already pointed out that when business is financed on the basis of interest, it may bring injustice either to the borrower if he suffers a loss, or to the financier if the debtor earns huge profits. Although both situations are equally possible in an interest-based system, and there are many examples where the payment of interest has brought total ruin to the small traders, yet in our present banking system, the injustice brought to the financier is more pronounced and much more disturbing to the equitable distribution of wealth.

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166. In the context of modern capitalist system, it is the banks which advance depositors' money to the industrialists and traders. Almost all the giant business ventures are mostly financed by the banks and financial institutions. In numerous cases the funds deployed by the big entrepreneurs from their own pocket are much less than the funds borrowed by them from the common people through banks and financial institutions. If the entrepreneurs having only ten million of their own, acquire 90 million from the banks and embark on a huge profitable enterprise, it means that 90% of the projects is created by the money of the depositors while only 10% was generated by their own capital. If these huge projects bring enormous profits, only a small proportion (of interest which normally ranges between 2% to 10% in different countries) will go to the depositors whose input in the projects was 90% while all the rest will be secured by the big entrepreneurs whose real contribution to the projects was not more than 10%. Even this small proportion given to the depositors is taken back by these big entrepreneurs, because all the interest paid by them is included in the cost of their production and comes back to them through the increased

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prices. The net result in this case is that all the profits of the big enterprises is earned by the persons whose own financial input does not exceed 10% of the total investment, while the people whose financial contribution was as high as 90% get nothing in real terms, because the amount of interest given to them is often repaid by them through the increased prices of the products, and therefore, in a number of cases the return received by them becomes negative in real terms.

167. While this phenomenon is coupled with the fact, already mentioned, that 64.5% of total advances went only to 0.4243% of total account holders, it means that the profits generated mostly by the money of millions of people went almost exclusively to 9,269 borrowers. One can imagine how far the interest-based borrowings have contributed to the horrible inequalities found in our system of distribution, and how great is the injustice brought by the modern commercial interest to the whole society as compared to the interest charged on the old consumption loans that affected only some individuals.

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168. How the present interest-based system works to favour the rich and kill the poor is succinctly explained by James Robertson in the following words:

“The pervasive role of interest in the economic system results in the systematic transfer of money from those who have less to those who have more. Again, this transfer of resources from poor to rich has been made shockingly clear by the Third World debt crisis. But it applies universally. It is partly because those who have more money to lend, get more in interest than those who have less; it is partly because those who have less, often have to borrow more; and it is partly because the cost of interest repayments now forms a substantial element in the cost of all goods and services, and the necessary goods and services looms much larger in the finances of the rich . When we look at the money system

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that way and when we begin to think about how it should be redesigned to carry out its functions fairly and efficiently as part of an enabling and conserving economy, the arguments for an interest-free inflation-free money system for the twenty-first century seems to be very strong.⁹⁷

169. The same author in another book comments as follows:

“The transfer of revenue from poor people to rich people, from poor places to rich places, and from poor countries to rich countries by the money and finance system is systematic.... One cause of the transfer of wealth from poor to rich is the way interest payments and receipts work through the economy.⁹⁸

(d) **Expansion of artificial money and inflation:**

⁹⁷ James Robertson, *Future Wealth: A New Economics for the 21st Century*, Cassell Publications, London 1990, p.130,131

170. Since interest-bearing loans have no specific relation with actual production, and the financier, after securing a strong collateral, normally has no concern how the funds are used by the borrower, the money supply effected through banks and financial institutions has no nexus with the goods and services actually produced on the ground. It creates a serious mismatch between the supply of money and the production of goods and services. This is obviously one of the basic factors that create or fuel inflation.

171. This phenomenon is aggravated to a horrible extent by the well-known characteristic of the modern banks normally termed as ‘money creation’. Even the primary books of economics usually explain, often with complacency, how the banks create money. This apparently miraculous function of the banks is sometimes taken to be one of the factors that boost production and bring prosperity. But the illusion underlying this concept, is seldom unveiled by the champions of modern banking.

⁹⁸ James Robertson, *Transformation of Economic Life: A millennial Challenge*, Green Books, Devon 1998 pp.51-54.

172. The history of ‘money creation’ refers back to the famous story of the goldsmiths of medieval England. The people used to deposit their gold coins with them in trust, and they used to issue a receipt to the depositors. In order to simplify the process, the goldsmiths started issuing ‘bearer’ receipts which gradually took the place of gold coins and the people started using them in settlement of their liabilities. When these receipts gained wide acceptability in the market, only a small fraction of the depositors or bearers ever came to the goldsmiths to demand actual gold. At this point the goldsmiths began lending out some of the deposited gold secretly and thus started earning interest on these loans. After some time they discovered that they could print more money (i.e. paper gold deposit certificates) than actually deposited with them and that they could loan out this extra money on interest. They acted accordingly and this was the birth of ‘money creation’ or ‘fractional reserve lending’ which means to loan out more money than one has as a reserve for deposits. In this way these goldsmiths, after becoming more confident, started decreasing the reserve

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requirement and increasing the percentage of their self-created credit, and used to loan out four, five, even ten times more gold certificates than they had in their safe rooms.

173. Initially, it was abuse of trust and a sheer fraud on the part of the goldsmiths not warranted by any norm of equity, justice and honesty. It was a form of forgery and usurpation of the power of the sovereign authority to issue money. But overtime, this fraudulent practice turned into the fashionable standard practice of the modern banks under the ‘fractional reserve’ system. How the money changers and bankers have succeeded in legalizing the creation of money by the private banks, in spite of the strong opposition from several rulers in England and USA, and how the Rothchilds acquired financial mastery over the whole of Europe and the Rockfeller over the whole of America is a long story ⁹⁹, now lost in the mist of numerous theories developed to support the concept of

⁹⁹ For the interesting and eye-opening details of this story, following books will be useful:

- a) Michael Rowbotham: The Grip of Death, A Study of Modern Money, Jon Carpenter, England 1998 Chaptrs 13 to 15.
- b) Patric S.J. Carmack and Bill Still: The Money Masters, Royalty Production Company, USA, 1998
- c) William Guy Carr: Pawns in the Game, Fla USA Chapter 6

money-creation by the private banks. But the net result is that the modern banks are creating money out of nothing. They are allowed to advance loans in the amounts ten times more than their deposits. The coins and notes issued by the government as a genuine and debt-free money have now a very insignificant proportion in the total money in circulation, most of which is artificial money created by advances made by the banks. The proportion of real money issued by the governments has been constantly declining in most of the countries, while the proportion of the artificial money created by the banks out of nothing is ever-increasing. The spiral of loans built upon loans is now the major part of the money supply. Taking the example of UK according to the statistics of 1997 the total money stock in the country was 680 billion pounds, out of which only 25 billion pounds were issued by the government in the form of coins and notes. All the rest i.e. 655 billion pounds were created by the banks. It means that the original debt-free money remained only 3.6% of the whole money supply while 96.4% is nothing but a bubble created by the banks. The way this bubble is growing

d) Robert O' Priscoll and Margarita Ivanoff-Dubrowsky: The New World Order, Canada 1993

annually can be seen from the following table that details the quantum of money supply in UK during twenty years:

Year	Total Coins and Notes issued by the Govt (MO) S.Pound billion	TOTAL MONEYS TO CK (M4)S.Pound bln.	Percentage of Real Debt-free Money to the Money Supply
1977	8.1	65	12%
1979	10.5	87	12%
1981	12.1	116	10.5%
1983	12.8	161	7.9%
1985	14.1	205	6.8%
1987	15.5	269	5.8%
1989	17.2	372	4.6%
1991	18.6	485	3.8%
1993	20.0	525	3.8%
1995	22.4	585	3.8%
1997	25.0	680	3.6%

174. This table¹⁰⁰ shows that the money created by the banks it has been growing with a galloping speed throughout the two decades until it reached 680 billion pounds in 1997. The last column of the table shows the yearly declining percentage of the real money to the total money supply which fell from 12% in 1977 to 3.6% in 1997

¹⁰⁰ Source: Bank of England Releases, 1995, 1997 as quoted by Michael Rowbotham in "The Grip of Death - A Study of Modern Money", Jon Carpenter, England 1998, P.13

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175. This phenomenon unveils two realities. Firstly, it shows that 96.4% of the total money supply is debt-ridden money and only 3.6% is debt-free. One can imagine how the whole economy is drowned under debt. Secondly, it means that 96.4% of the aggregate money circulated in the country is nothing but numbers created by computers, having no real thing behind them.

176. The position in USA is almost the same as that in U.K. Patrick S.J. Carmack and Bill Still observe about it as follows:

“Why are we over our head in debt? Because we are laboring under a debt-money system, in which all our money is created in parallel with an equivalent quantity of debt, that is designed and controlled by private bankers for their benefit. They create and loan money at interest, we get the debt....

....So, although the banks do not create

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currency, they do create checkbook money, or deposits, by making new loans. They even invest some of this created money. In fact, over one trillion dollars of this privately-created money has been used to purchase U.S. bonds on the open market, which provides the banks with roughly 50 billion dollars in interest, less the interest they pay some depositors. In this way, through fractional reserve lending, banks create far in excess of 90% of the money, and therefore cause over 90% of our inflation”.¹⁰¹

177. Although the conventional Quantity theory of money has suggested many devices to control the money supply, including the control of interest rates by the government, these remedies are not the cure of the disease. They are

¹⁰¹ Patrick S.J. Carmack and Bill Still: *The Money Masters, How International Bankers Gained Control of America*, Royalty Production Company 1998, PP.78,79

temporary measures and they themselves have their own side effects that subject the economy with shocks of the business cycle. Michael Rowbotham has rightly observed:

“This (monetary management) a government does by lowering or raising interest rates. This alternately encourages or discourages borrowing, thereby speeding up or slowing down the creation of money and the growth of the economy.... The fact that, by this method, people and businesses with outstanding debts can be suddenly hit with huge extra charges on their debts, simply as a management device to deter other borrowers, is an injustice quite lost in the almost religious conviction surrounding this ideology...

This method of controlling banks, inflation and money supply certainly works;

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it works in the way that a sledge-hammer works at carving up a roast chicken. An economy dependent upon borrowing to supply money, strapped to a financial system in which both debt and the money supply are logically bound to escalate, is punished for the borrowing it has been forced to undertake. Many past borrowers are rendered bankrupt; homes are repossessed, businesses are ruined and millions are thrown out of work as the economy sinks into recession. Until inflation and overheating are no longer deemed to be a danger, borrowing is discouraged and the economy becomes a stagnating sea of human misery. Of course, no sooner has this been done, than the problem is *lack* of demand, so we must reduce interest rates and wait for the consumer confidence and the positive investment climate to return. The business

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cycle begins all over again – There could be no greater admission of the utter and total inadequacy of modern economics to understand and regulate the financial system than through this wholesale entrapment and subsequent bludgeoning of the entire economy. It is a policy which courts illegality, as well as breaching morality, in the cavalier way in which the financial contract of debt is effectively rewritten at will, via the power of levying infinitely variable interest charges.”¹⁰²

178. Moreover, the baseless money created by the banks and financial institutions itself has now become the subject of speculative trade through the derivatives in the form of Futures and Options in the international markets. What it means is that in the beginning, claims over money have been treated as money. Now, claims over claims are being treated as such. According to an estimate, over 150 trillion US dollars worth of derivatives are circulating in the world,

¹⁰² Michael rowbotham: The Grip of Death: A study of Modern Money, Op cit, PP.27,28

whereas the combined GDP of all the 188 countries of the world is around 30 trillion US dollars only. Almost 80% of this trade is in the hands of some two dozen big banks and hedge funds¹⁰³ The whole economy of the world has thus been turned into a big balloon that is being inflated on daily basis by new debts and new financial transactions having no nexus whatsoever with the real economy. This big balloon is vulnerable to the market shocks and can be burst any time. It really did several times in the recent past whereby the Asian Tigers reached the brink of total collapse, and the effects of these shocks were felt in the whole world to the extent that the media started crying that the market economy is breathing its last.¹⁰⁴ Once again, we would like to quote James Robertson, who in his excellent work ‘Transforming Economic Life: A Millennial Challenge’ has commented on this aspect as follows:

“The money-must-grow imperative is ecologically destructive... (It) also results in

¹⁰³ Prof.Khurshid Ahmad, Islamic Finance and Banking: The challenge of the 21st Century, the paper-ii submitted to the court by the author.

¹⁰⁴ See for example: Time - November 3, 1997, Newsweek - January 26,1998, and September 14, 1998.

a massive world-wide diversion of effort away from providing useful goods and services, into making money out of money. At least 95% of the billions of dollars transferred daily around the world are of purely financial transactions, unlinked to transactions in the real economy.

People are increasingly experiencing the workings of the money, banking and finance system as unreal, incomprehensible, unaccountable, irresponsible, exploitative and out of control. Why should they lose their houses and their jobs as a result of financial decisions taken in distant parts of the world ? Why should the national and international money and finance system involve the systematic transfer of wealth from poor people to rich people, and from poor countries to rich countries ? Why someone in Singapore be able to gamble on

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Tokyo Stock Exchange and bring about the collapse of a bank in London ? ... Why do young people trading in derivatives in the City of London get annual bonuses larger than the whole annual budgets of primary schools ? Do we have to have a money and financial system that works like this ? Even the financier George Soros has said (“Capital Crimes”, *Atlantic Monthly*, January, 1997) that “the untrammelled intensification of *laissez-faire* capitalism and the extension of market values into all areas of life is endangering our open and democratic society. The main enemy of the open society, I believe, is no longer the Communist but the Capitalist Threat.”¹⁰⁵.

179. All this appalling situation faced by the whole world today is the logical outcome of giving the interest-based

¹⁰⁵ James Robertson, *Transforming Economic Life: A Millennial Challenge*, Grean Books Devon, 1998,

financial system an unbridled power to reign the economy. Can one still insist that the commercial interest is an innocent transaction? In fact the universal horrors brought about by the commercial interest are far greater than the individual usurious loans that used to affect only some individuals.

Interest and Indexation:

180. Some appellants have tried to justify the interest charged and paid by the banks on the ground that since the value of money is decreasing constantly, the interest should be taken as a compensation for the erosion of the value of money during the period of borrowing. The financier, according to them, should have a right to claim at least the same amount in real terms as he had advanced to the borrower, but if his principal is repaid to him in the same numerical terms, he will not receive the same purchasing power as he had advanced to his debtor, because the inflation would have eroded a substantial part of the real value of money. Therefore, they argue, the interest is paid to compensate the loss the financier has suffered through inflation.

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181. This argument is without force because the rates of interest are though a major cause of inflation among other factors, they are not based on the rate of inflation. Had it been a compensation for inflation, the rate of interest should have always matched the rate of inflation, and obviously this is not the case. The rates of interest are determined by the demand and supply of money and not by the rate of inflation at the time of the contract. If at any given time both rates match each other, it may be by chance and not as a matter of principle. Therefore, the interest cannot be held as a compensation for the loss of purchasing power.

182. Some other quarters have taken the aspect of inflation from another angle. They do not claim that interest, as in vogue, is a compensation for the loss caused by inflation. However, they suggest that indexation of loans can be a suitable substitute for the present interest bearing loans. They argue that the financier should be compensated for the erosion of the value of money he had advanced to the borrower and therefore he can claim an additional amount

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matching the rate of inflation. Thus, according to them, indexation may be introduced into the banking system as an alternative for interest.

183. But without going into the question whether indexation of loans are or are not in conformity with Shariah, this suggestion is not practical so far as the banking transactions are concerned. The reason is obvious. The concept of indexation of loans is to give the real value of the principal to the financier based on the rate of inflation, and therefore, there is no difference between depositors and borrowers in this respect. It means that the bank will receive from its borrowers the same rate as it will have to pay to its depositors, both being based on the same measure i.e. the rate of inflation. Thus nothing will be left for the banks themselves, and no bank can be run without a profit. Mr. Khalid M. Ishaq, advocate, who seemed to be inclined towards indexation, was asked by the bench how the banking system can be established on the basis of indexation alone. He frankly admitted that he had no ready answer, but the suggestion should be considered in depth. Some bankers

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who appeared to assist the court, especially Mr. Abdul Jabbar Khan, the former President of the National Bank of Pakistan, gave his absolute opinion that the suggestion of taking indexation as a substitute of interest is not practicable from banking point of view.

184. It is clear from this discussion that neither the present interest rates can be justified on the basis of inflation, nor can indexation be used as a substitute for interest in the present banking system.

185. However, the question of erosion of the value of money is certainly relevant to the individual loans and unpaid debts. There are many cases where the creditors really face hardships, especially where the value of the currency fell to an unimaginable extent, as happened in Turkey, Syria, Lebanon and in the States of the former Soviet Union. In our country too, the value of the rupee today is much less than it was before 1970. The question is whether a person who has advanced a sum of Rs.1000/- before 1970 and the debtor did not pay the principal till today is entitled to get the same

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Rs.1000/-, while this amount has remained not more than Rs.100/- in real terms? This question is more severe where the debtor did not pay despite his being able to pay.

186. In order to solve this problem, many suggestions have been proposed by different quarters, some of which are the following:

One) That the loans should be indexed, meaning thereby, that the debtor must pay an additional amount equal to the increase in the rate of inflation during the period of borrowing.

Two) That the loans should be tied up with gold, and it should be presumed that the one who has loaned Rs.1000/- has actually loaned as much gold as could be purchased on that date for Rs.1000/- and must repay as much rupees as are sufficient to purchase that much of gold.

Three) That the loans should be tied up by a hard currency like dollar.

Four) That the loss of the value of money should be shared by both creditor and lender in equal proportion. If the value of money has declined at a ratio of 5%, 2.5% should be

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paid by the debtor and the rest should be borne by the creditor, because the inflation is a phenomenon beyond the control of either of them. Being a common suffering, both should share it.

187. But we feel that this question needs a more thorough research which before its final decision in this Court should first be initiated by different study circles of the country, especially, by the Council of Islamic Ideology and the Commission. For the Islamization of Economy. Many international seminars have been held to deliberate on this issue. The papers and resolutions of these Seminar should be analyzed in depth.

188. On the other hand, having held that this question does neither justify interest nor provides a substitute for it in the banking transactions, we do not have to resolve this issue in this case , nor does the decision about the laws under challenge depend on it. We, therefore, leave the question open for further study and research.

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Mark-up- and Interest:

189. Some appellants have argued that although the interest is prohibited by the Holy Quran and Sunnah, the present banks do not deal in interest. Instead, they charge mark-up from their customers. Mr. Haafiz S.A. Rahman, the learned counsel for the Agricultural Development Bank of Pakistan gave a detailed history of the legal steps taken by the government of Pakistan to eliminate interest from its economy. According to him, effective from 1.4.1998, all types of finance to all types of clients including individuals were obligated to be designed on interest-free basis. On 1.7.1995 interest bearing deposits ceased to be accepted and the deposits were ordered to be based on PLS (profit and loss sharing) basis except the current accounts which do not attract any return. In order to implement this directive, the State Bank of Pakistan allowed 12 modes of financing, all free of interest, for the banks and financial institutions. The government has also brought amendments to a large number of financial laws to eliminate interest from the economy. After all these steps are taken, interest is no more applicable in the banking transactions of the country. All the banks

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today are working under 12 modes of financing announced by the State Bank of Pakistan. The appellants argued that since the interest has already been abolished, the Respondents have no reason to pray for elimination of interest.

190. The history given by Haafiz S.A. Rahman is essentially true and it is correct that the State Bank of Pakistan had suggested 12 modes of financing instead of interest, but the practical position on the ground is that out of all these 12 modes only 2 or 3 modes are normally being used by the banks and financial institutions, the foremost among them being mark-up. But the way the mark-up is used by the banks today is nothing but a change of nomenclature of the transaction. Practically what is being done is to replace the name of interest by the name of mark-up. The concept of mark-up was originally presented by the Council of Islamic Ideology in its report on the Elimination of Riba submitted to the government of Pakistan in 1980. The Council has in fact suggested that the true alternative to the interest is *profit and loss sharing* (PLS) based on Musharakah and Mudarabah.

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However, there were some areas in which financing on the basis of Musharakah and Mudarabah were not practicable. For these areas the Council has suggested a technique usually known in the Islamic banks as Murabahah. According to this technique the financier bank, instead of advancing a loan in the form of money, purchases the commodity required by the customers from the market and then sells it to the customer on deferred payment basis retaining a margin of mark-up (profit) added to its cost. It was not a financing in its strict sense. It was rather a sale of a commodity effected in favour of the client. The very concept of this transaction implies the following points:

One) This type of transaction may be undertaken only where the client of a bank wants to purchase a commodity. This type of transaction cannot be effected in cases where the client wants to get funds for some other purpose than purchasing a commodity, like overhead expenses, payment of salaries, settlement of bills or other liabilities.

Two) To make it a valid transaction it was necessary that the commodity is really purchased by the bank and it comes

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into the ownership and possession (physical or constructive) of the bank so that it may assume the risk of the commodity so far as it remains under its ownership and possession.

Three)After acquiring the ownership and possession of the commodity it should be sold to the customer through a valid sale.

Four)The Council has also suggested that this device should be used to the minimum extent only in cases where Musharakah or Mudarabah are not practicable for one reason or another.

191. Unfortunately, while implementing this technique in the banks and the financial institutions, all the above points were totally ignored. What was done was to change the name of interest and replace it by the name of mark-up. The mark-up system as in vogue today has no concern with any real commodity whatsoever. In most cases there is no commodity at all in real sense; if there is any, it is never purchased by the banks nor sold to the customers after acquiring it. In some cases this technique is applied on the basis of buy-back

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arrangement which means that the commodity already owned by the customer is sold by him to the bank and is simultaneously purchased by him from the bank at a higher price which is nothing but to make fun of the original concept. In many cases it is done merely on papers without a genuine commodity to be sold and purchased. Moreover, this technique is applied indiscriminately to all the banking transactions having no regard whether or not they involve a commodity. The procedure is being applied to all types of finances including financing overhead expenses, payment of bills etc. The net result is that no meaningful change has ever been brought about to the system of interest on the assets side of the banks. Therefore, all the objections against interest are very much applicable to the mark-up system as in vogue in Pakistan and this system cannot be held as immune from being declared as repugnant to the Holy Quran and Sunnah. We hold accordingly.

Qarz and Qiraz

192. Dr. M. Aslam Khaki, the appellant in Shariat Appeal No.1 (S) 1992 was not a party to the proceedings in the

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Federal Shariat Court in these cases. However, the matter being of general importance we heard him at length. In the memo of his appeal he had adopted almost the same lines of argument as we have already dealt with but while appearing in the court his arguments were on totally different lines. He expressed his opinion that if the financing transaction stipulates a fixed return to the financier regardless of whether the financed party has gained a profit or suffered a loss, it should be regarded as Riba. But if the financing transaction contemplates that in the case of a loss, the loss will be shared by both the parties in proportion to their respective investments, this much is enough to validate the transaction after which the parties can agree on a condition that if the business gains a profit a certain rate of profit attributable to the original investment of the financier will be deserved by him. It will become a transaction of Qiraz which is not impermissible in Shariah.

193. At the first place, this standpoint does not save the laws under consideration from the attack of the Respondents because these laws ensure a fixed return to the financier in

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any case, therefore, his appeal, to save the said laws from being declared as repugnant to the injunctions of Islam, is misconceived. His standpoint can be considered only in the context of finding out alternatives to the interest in our banking system. But his view is not supported by the Holy Quran and Sunnah, nor by any jurist throughout the fourteen centuries. Qiraz is a term used in the literature of the Islamic Fiqh as a synonym to Mudarabah and all the schools of Islamic Fiqh are unanimous on the point that in an agreement of Mudarabah no rate of profit attributable to the investment can be allocated for the financier. Any such arrangement has been held by the jurists as impermissible. The standpoint of the appellant is contradictory in itself because he admits that in the case of loss, the financier does not deserve any profit but on the other hand if the financier has stipulated 10% of his investment as his share in the profit of the business, it is acceptable to the appellant. But what will happen if the whole profit is not more than 10%. In this case the whole profit according to him will be secured by the financier and the Mudarib will get nothing, despite the business having

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earned a profit. This view is, therefore, fallacious on the face of it.

Riba and Doctrine of Necessity:

194. Lastly, some appellants have tried to attract the doctrine of necessity to the case of Riba. Mr. Siddiq AlFarooq, the Managing Director of House Building Finance Corporation (HBFC) argued that the Holy Quran has allowed even to eat pork in the case of extreme hunger to save one's life. The argument of some appellant was that the interest-based system has now become a universal necessity and no country can live without it. Interest is no doubt prohibited by the Holy Quran but to implement this prohibition at country level may be a suicidal act which may shatter the whole economy, therefore, it should not be declared as repugnant to the injunctions of Islam. Some appellants have argued that the whole world today is turning into a global village and no country can survive in seclusion, especially, our country which is drowned in debts and its most development projects depend chiefly on the foreign loans based on interest. Once

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the prohibition of interest is enforced at a whole-sale basis all the development projects will breath their last and the whole economy will face a sudden collapse.

195. We have given due attention to this line of argument and examined this aspect seriously with the assistance of a number of economists, bankers and professional practitioners. No doubt, Islam is a realistic religion and it never binds an individual or a State with a command, the implementation of which is beyond its control. The doctrine of necessity is one of the doctrines enshrined and developed by the Holy Quran and Sunnah and expounded by the Muslim jurists. It is rightly pointed out by Mr. Siddiq AlFarooq that the Holy Quran has allowed even to eat pork in a case of extreme hunger where the life of a human being cannot be saved without it. But the doctrine of necessity in Islam is not an obscure concept. There are certain criteria expounded by the Muslim jurists in the light of the Holy Quran and Sunnah to determine the magnitude of necessity and the extent to which a Quranic command can be relaxed on the basis of an emergent situation. Therefore, before

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deciding an issue on the basis of necessity one must make sure that the necessity is real and not exaggerated by imaginary apprehensions and that the necessity cannot be met with by any other means than committing an impermissible act. When we analyze the case of interest in the light of the above principles we are of the firm view that there is a great deal of exaggeration in the apprehension that the elimination of interest will lead the economy to collapse. For a realistic analysis we will have to consider the domestic transactions and the foreign transactions separately.

Domestic Transactions:

196. In the domestic transactions the apprehension against the elimination of interest is often based on some misconceptions. There are many people who think that abolishing interest means to turn the banks into charitable institutions and that the banks, in an Islamic system, will advance money with no return and the depositors will get nothing on their money held in the banks. Obviously, this misconception is based on sheer ignorance of the Islamic principles. We have already discussed at length the concept

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of a Loan in Islam and that its role in the commercial economy is very limited. What is meant by islamizing the banks and financial institutions is not to advance money without return; what it does mean is that the banks will finance on the basis of profit and loss sharing, and other Islamic modes of financing, none of which is devoid of return.

197. Some other people are of the view that the alternative banking system based on Islamic principles has not yet been designed nor practiced, and therefore, by implementing it abruptly we will enter into a dark and obscure area and subject ourselves to unseen dangers that may bring total disaster to our economy.

198. This apprehension is also based on unawareness of the new thoughts about the present financial system and about what is happening in the field of Islamic banking for the last three decades. The fact is that Islamic banking is no longer a fanciful or utopian dream. Muslim jurists and economists are working on various aspects of Islamic banking from different

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dimensions for the last 50 years, and it is from the 1970s that the concept of Islamic banks has been translated into real institutions working on the Islamic lines. The number of Islamic banks and financial institutions throughout the world has been growing during the last 3 decades. As stated by Mr. Iqbal Ahmad Khan, the head of the Islamic banking division of HSBC London who appeared in this case as a jurisconsult, the number of Islamic banks and financial institutions has now reached more than 200 across 65 countries of the world with US\$ 90 billion capital at a growth rate of 15% p.a. By the year 2000 the Islamic Finance Industry is expected to be a US\$ 100 billion plus business.

199. The present Islamic Development Bank (IDB) based in Jeddah was established in 1975 by the Organization of Islamic Conference (OIC) as a pioneer of Islamic banking. This bank was originally meant for inter-governmental financial transactions providing funds for development projects in the member countries. But it is now providing trade finance facilities to the private sector also. This bank has its own research center working on different issues of

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Islamic banking and economy. The Court invited this bank to send some of its experts to assist the Court and to throw light on the working of the Islamic banks and the feasibility of the proposals presented so far for transforming the banking system to the Islamic ways of financing. The bank was kind enough to send a high level delegation headed by the President of the Bank Dr. Ahmad Muhammad Ali himself. Several members of the delegation, including the President of the Bank, addressed the Court and have submitted their report in writing. Details apart, the substance of their submissions is summarized in their own words as follows:

“The experience accumulated by Islamic banks, in general, and the Islamic Development Bank in particular, as well as attempts made in a number of Muslim countries to apply an Islamic financial system, indicate that the application of such an Islamic system by any Muslim country, at the national level, is feasible. According to the data compiled by the International Union of Islamic Banks, there are 176 Islamic banks and institutions in the world. In terms of

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number, 47% of these institutions are concentrated in South and south East Asia, 27% in GCC and Middle East, 20% in Africa and 6% in the Western countries. In terms of deposits, amounting to US\$112.6 billion and total assets amounting to US\$ 147.7 billion. 73% of the activities of these institutions are concentrated in the GCC and the Middle East. IDB alone, since its inception from 1976 to 1999, has provided financing in the range of US\$21.0 billion. As against a growth rate of 7% per annum recorded by the global financial services industry, Islamic banking is growing at a rate of 10-15% per annum and accounts for 50-60% of the share of the market in the GCC and Middle East.”

“Islamic banking is distinctive in two respects: concentrating on the real sector of the economy, it imparts tremendous stability to the economic system by achieving an identity between monetary flows and goods and services, and by operating on a system of profit and loss sharing in its evolved state, it insulates the society from the debt-mountain on the analogy that if the economies enter into recessionary or

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deflationary phases, the principles of profit and loss sharing protects the states and economic operators from the evils of accumulation of interest and minimizes defaults and bankruptcies.”

200. Since the experience of Islamic banking is passing through its initial phase, the industry is facing numerous issues. These issues have given birth to a number of research institutes, study circles, training programs and specialized groups. There is a large number of seminars, workshops and conferences, held every year in different parts of the world where the Muslim jurists, economists, bankers and practitioners sort out the practical problems and find out their solutions.

201. This does never mean that the Islamic banking industry has achieved the ultimate goal of its maturity. It certainly has its limitations. It may be suffering from a number of weaknesses. There are many issues yet to be resolved. But the progress made by the Islamic banks so far is sufficient to refute the misconception that it is a utopian idea, or that any

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advance in this direction will make us step into a void. This brief account does at least show that much of the ground work has been done in the field of Islamic banking, and while discussing the possibilities of the elimination of interest from the economy, this background cannot be ignored or undervalued.

202. Mr. M. Ashraf Janjua, the Chief Economic Advisor of the State Bank of Pakistan, has been nominated by the SBP as its representative during the hearing of this case. In his written statement submitted to the Court he has opined that shifting of the entire interest-based system to one that is free from interest is feasible, but it is a more complex and challenging task than the one undertaken by the private Islamic banks working in different part of the world.

203. We are not unconscious of the fact that elimination of interest from the entire economy is more complex and challenging in many respects than abolishing it from a single institution. But at the same time, there are many areas where establishing an interest-free system is much easier for the

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government than it was for the private Islamic banks. The Islamic banks working in different parts of the world do not enjoy any support from their respective governments or the central banks for their interest-free transactions. They have to submit to the legal framework and the regulatory requirements that are basically designed for interest-based financing, but are imposed on the Islamic banks with the same force without the slightest change in favour of Islamic modes of financing. The Islamic banks are working with their hands tied by the conventional laws and regulations. If the interest-free system is introduced by the government itself at country level, the government will be free to bring its own legal and regulatory framework and the difficulties faced by the private Islamic banks will create no problem for the government. Moreover, the Islamic banks have to compete the conventional banks. Any client not happy with the arrangement offered by the Islamic banks can easily go to a conventional bank, the other alternative being readily available. If the Islamic modes are enforced at country level, and no bank offers an interest-based arrangement, this problem can easily be overcome. The correct position,

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therefore, is that abolishing interest at country level is easier in some respects and more difficult in some others. To be realistic, we should realize both aspects while determining the time frame for conversion. Let us now examine the main features of the proposed system of Islamic banking.

Profit and Loss Sharing:

204. The basic and foremost characteristic of Islamic financing is that, instead of a fixed rate of interest, it is based on profit and loss sharing. We have already discussed the horrible results produced by the debt-based economy. Realizing the evils brought by this system, many economists, even of the Western world are now advocating in favour of an equity-based financial arrangement. To quote James Robertson again:

“Why was the process of issuing new money into economy (i.e. credit creation) been delegated by governments to the banks, allowing them to profit from issuing it in the form of interest-bearing loans to their customers? Should governments not issue it directly themselves, as a component of a

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citizen's income”?

“Would it be desirable and possible to limit the role of interest more drastically than that, for example by converting debt into equity throughout the economy? This would be in line with Islamic teaching, and with earlier Christian teaching, that usury is sin. Although the practical complications would make this a goal for the longer term, there are strong arguments for exploring it - the extent to which economic life world-wide now depends on ever-rising debt, the danger of economic collapse this entails, and the economic power now enjoyed by those who make money out of money rather than out of risk-bearing participation in useful enterprises.¹⁰⁶

205. John Tomlinson is an Oxford based Canadian economist. Having studied the effect of debt on the economies of developed and less developed countries, he set up and is the Chairman of Oxford Research and Development Corporation Limited which explores the use of equity

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instruments and the development of equity markets for areas of finance currently served by debt. In his book “Honest Money” he has strongly recommended the conversion of debt into equity. His following conclusions merit consideration for those who are adamant on maintaining *status quo* in the financial system:

“Converting debt to equity is not a panacea for all economic ills. It can, however, produce many positive benefits. These benefits will not necessarily follow automatically from conversion. Concentrated effort will be required to ensure they do. Without conversion they will not happen at all.

Not the least of these benefits will be those brought to the banking community itself. The banking and monetary system will not collapse. Nor should there ever need to be the threat of collapse again. Owners of banks will find the value of their shares underpinned as liabilities disappear from balance sheets and are replaced by assets of a

¹⁰⁶ James Robertson, *Transforming Economic Life: A Millennial Challenge*, Green Books, Devon, 1998 p.54.

specific value. Each and every depositor will be able simultaneously to withdraw his or her total deposits.

Demand for the bank's current or cheque account services will not diminish. Longer term depositors will now have to pay for storage: it will be a less attractive option than exchange, so the velocity with which money moves from bank to market-place to bank again, from one account to another, is likely to increase. There will be a continuous flow of money available for new equity investment.

The market-place in general will also receive benefits. Conversion will also cause the value of money to stabilize. Savings can then retain their value. Prices need only vary according to the supply and demand of the product being priced. Measurements of exchange value made by different people at different times can be validly compared. The unit of money will once more be a valid unit of measurement of exchange value. The field of economics can become a science.

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Many of the distortions which now exist in our individual frames of reference will be corrected. For instance, an investment which took an investor, ten, fifteen or twenty years to recoup used to be considered sound. Now, too often the maximum period envisaged is five years; even three. This short-term view has precluded many useful businesses from being created. The re-establishment of stable money and the emphasis on security which will be required within equity investment program will encourage people to take a longer view. More businesses will then be considered viable and the number of new jobs can increase dramatically.

Existing savers will also be protected. The conversion to equity will eliminate the possibility of collapse for individual banks and for the system as a whole. Savings will not disappear. The nature of savings will change from just units of money to units of money and shares. The exchange value of both the shares and the money will have to be re-assessed. But they will have value. If no actions is taken and the system collapses, they may end up having no value.

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The changes proposed will also free many from the enslavement of debt. Both nations and individuals can regain their dignity. They will be free to make their own choices. No longer will managers have to face the choice between paying interest and disemploying some or not paying interest and disemploying all.

Nor shall we need to experience the stresses caused by current economic and business cycles. There will be a steady flow of money into investments. New investment opportunities will continually be sought as a home for both individual saving and business profits. Both will wish to avoid storage charges.

Growth will be dependent upon the continuing development of new ideas and new productive capacity. Growth will no longer be dependent upon the creation of new debt. Economic expansion will depend upon the positive flow of new savings and new profits.

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Re-establishing the integrity of money will eliminate at least one of the causes of human conflict. Money will no longer secretly steal from those who save, those on fixed income and those who enter long-term contracts.

Further, it can lead to a greater premium being placed on personal integrity. The character traits of honest, honourable and forthright behaviour will be in demand. Investors' security will depend on them. Recognition of the degree of interdependence in an equity-oriented market-place can lead to more consideration of the needs of others, and, ultimately, to a more caring and, compassionate society.

Of course, life is never roses all the way. Many mistakes will be made. When new paths are trodden, the way is sometimes uncertain. Some will find it difficult to break the habitual patterns of thought which govern behaviour in a debt-oriented society. No doubt some readers will have already experienced this.

Some will be hard-pressed when the actual

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exchange value of their investments becomes apparent. Yet, the conversion process can be controlled. Collapse cannot. We should be able, as part of the conversion process, to identify those who might suffer unduly. Then we can be prepared to assist them and cushion any hardship.

The case of honest money is a compelling one. Honest money is not a thief. It does not steal from the thrifty. It is not socially divisive. It does not promote economic and business cycles, creating unemployment. On the contrary, it encourages thrift. It promotes sustainable economic growth. It rewards merit. It demands integrity.

These were worthwhile goals. They can be achieved. What is needed now is the will to make them happen.”¹⁰⁷

206. Michael Rowbotham has commented on the above-quoted book of Tomlinson as follows:

“One of the most unusual and original

¹⁰⁷ John Tomlinson: *Honest Money: A Challenge to Banking*, Helix 1993 PP.115-118

contributions to the monetary debate. John Tomlinson is a former merchant banker and presents a powerful case against the debt-based money system; his solution is highly creative and shows the scope for thought outside the normal parameters of monetary reform. The work is currently being incorporated by Nova University in America as part of their master degree in economics.”¹⁰⁸

207. Philip Moore, in his recent study of Islamic Finance, observes as follows:

“Although this long term shift from a bond-based to an equity-based financial system accords in many respects with Islamic economic principles, it is a trend which is by no means confined to the Islamic world and which is increasingly being championed

¹⁰⁸ Michael Rowbotham, *The Grip of Death: A study of Modern Money*, Jon Carpenter 1998 P.330

globally. The resurgence in Islamic finance worldwide is seen by some simply as a reflection of the global economy's discernible transition from bond-based to equity-based finance.

Consider, for example, the strategy of a developed, non-Muslim but heavily indebted economy such as Italy. Under the terms of privatization programme which gathered momentum in 1995 and 1996, Italian law stipulates that “.....all the proceeds of the privatisation of public companies become part of a sinking fund that, by law, can only be used to retire debt, and is not applied towards the reduction of the PSBR.” Perhaps, indeed, the Western world has been gravitating towards Islamic principles of finance without knowing it over the last three

decades”.¹⁰⁹

208. Mr. Abbas Mirakhor and Mohsin H. Khan, both economists of the Research Department of the International Monetary Fund (IMF) have studied in detail the implications of an interest-free Islamic banking, and while discussing the profit and loss system they have observed:

“As shown in a recent paper by Khan (1985) this system of investment deposits is quite closely related to proposals aimed at transforming the traditional banking system to an equity basis made frequently in a number of countries, including the United States.”¹¹⁰

¹⁰⁹ Philip Moore: *Islamic Finance: A Partnership For Growth*, Euromoney Publishers, 1997, P.73

¹¹⁰ Mohsin H. Khan and Abbas Mirakhor: *Theoretical Studies in Islamic Banking and Finance*, Houston 1987, P.168

Peter Warburton has also preferred an equity-based financial system and has discussed the theories of Fisher, Minsky, J.Presley and P.Mills in this respect¹¹¹.

209. Thus, the equity-based banking is not something proposed by the Islamic circles alone. It is being suggested also by some non-Muslim economists on purely economic grounds. The injustice, instability and business shocks created by the present debt-based financial system have themselves compelled them to think about an equity-based system that has more potential to bring about distributive justice and stability. In an equity-based banking the depositors are expected to gain much more than they are receiving today in the form of interest which often becomes negative in real terms by the inflation caused mainly by the expansion of the debt-based money. It will divert the flow of wealth towards the common people and in turn will

¹¹¹ Peter Warburton: Debt and Delusion: Central Bank Follies that threaten Economic Disaster, Allen Lane, 1999, P.224-225

encourage savings and bring a gradual and balanced prosperity.

Some objections on Musharakah Financing:

1. Risk of Loss:

210. It is argued that the arrangement of Musharakah is more likely to pass on losses of the business to the financier bank or institution. This loss will be passed on to depositors also. The depositors, being constantly exposed to the risk of loss, will not like to deposit their money in the banks and financial institutions and thus their savings will either remain idle or will be used in transactions outside the banking channels, which will not contribute to the economic development at national level.

211. This argument is, however, misconceived. Before financing on the basis of Musharkah, the banks and financial institution will study the feasibility of the proposed business for which funds are needed. Even in the present system of interest-based loans the banks do not advance loans to each and every applicant. They study not only the financial

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position of the client, but in some cases they have to examine the potentials of the business and if they apprehend that the business is not profitable, they refuse to advance a loan. In the case of Musharakah, they will have to carry out this study at a wider scale with more depth and precaution, but this extra work will certainly contribute a lot to the betterment of the economy as a whole.

212. Moreover, no bank or financial institution can restrict itself to a single Musharakah. There will always be a diversified portfolio of Musharakah. If a bank has financed 100 of its clients on the basis of Musharakah, after studying the feasibility of the proposal of each one of them, it is hardly conceivable that all of these Musharakahs, or the majority of them will result in a loss. After taking proper measures and due care, what can happen at the most is that some of them make a loss. But on the other hand, the profitable Musharakahs are expected to give more return than the interest-based loans, because the actual profit is supposed to be distributed between the client and the bank. Therefore, the Musharakah portfolio, as a whole, is not expected to

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suffer loss, and the possibility of loss to the whole portfolio is merely a theoretical possibility which should not discourage the depositors. This theoretical possibility of loss in a financial institution is much less than the possibility of loss in a joint stock company whose business is restricted to a limited sector of commercial activities. Still, the people purchase its shares and the possibility of loss does not refrain them from investing in these shares. The case of the bank and financial institutions is much stronger, because their Musharakah activities will be so diversified that any possible loss in one Musharakah is expected to be more than compensated by the profits earned in other Musharakahs. The experience of Pakistani banks is an empirical evidence. Since 1.7.1995 all the deposits in Pakistan are based on profit and loss sharing basis, except current account. No guarantee even of the principal, is provided to the depositors by the banks, and thus the liabilities side of our present banks is fully equity-based. Still, the deposits are being made as before.

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213. Apart from this, an Islamic economy must create a mentality which believes that any profit earned on money is the reward of bearing risks of the business. This risk may be minimized through expertise and diversifying the portfolio where it may become a hypothetical or theoretical risk only. But there is no way to eliminate this risk totally. The one who wants to earn profit, must accept this minimal risk. Since this understanding is already there in the case of normal joint stock companies, nobody has ever raised the objection that the money of the shareholders is exposed to loss. The problem is created by the system that separates the banking and financing from the normal trade activities, and which has compelled the people to believe that banks and financial institutions deal in money and papers only, and that they have nothing to do with the actual results emerging in trade and industry. It is this basic premise on the basis of which it is argued that they deserve a fixed return in any case. This essential separation of financing sector from the sector of trade and industry has brought great harms to the economy at macro-level. Obviously, when we speak of Islamic banking, we never mean that it will follow this conventional

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system in each and every respect. Islam has its own values and principles which do not believe in separation of financing from trade and industry. Once this Islamic system is understood, the people will invest in the financing sector, despite the theoretical risk of loss, more readily than they invest in the profitable joint stock companies.

2. Dishonesty:

214. Another apprehension against Musharakah financing is that the dishonest clients may exploit the instrument of Musharrakah by not paying any return to the financiers. They can always show that the business did not earn any profit. Indeed, they can claim that it has suffered a loss in which case not only the profit, but also the principal amount will be jeopardized.

215. It is, no doubt, a valid apprehension, especially in societies where corruption is the order of the day. However, solution to this problem is not as difficult as is generally believed or exaggerated.

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216. If all the banks in a country are run on pure Islamic pattern with a careful support from the Central Bank and the government, the problem of dishonesty is not hard to overcome. First of all, the system of credit rating will have to be implemented with full force. Every company or corporate body should be compelled by law to subject itself to an independent credit rating. Even the big firms seeking finance above a certain level may also be subjected to the same rule. Secondly, a well-designed system of auditing should be implemented whereby the accounts of all the clients are fully maintained and properly controlled. According to some contemporary scholars, profits may be calculated on the basis of gross margins only. It will reduce the possibility of disputes and misappropriation. However, if any misconduct, dishonesty or negligence is established against a client, he will be subjected to punitive steps, and may be deprived of availing any facility from any bank in the country, at least for a specific period.

217. These steps will serve as strong deterrent against concealing the actual profits or committing any other act of

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dishonesty. Otherwise also, the clients of the banks cannot afford to show artificial losses constantly, because it will be against their own interest in many respects. It is true that even after taking all such precautions, there will remain a possibility of some cases where dishonest clients may succeed in their evil designs, but the punitive steps and the general atmosphere of the business will gradually reduce the number of such cases. (Even in an interest-based economy, the defaulters have always been creating the problem of bad debts). But it should not be taken as a justification, or as an excuse, for rejecting the whole system of Musharakah.

Murabahah Transacton:

218. Moreover, Islamic banking is not restricted to Profit and loss sharing. Though Musharakah is the ideal mode of financing that fully conforms, not only to the principles of Islamic jurisprudence, but also to the basic philosophy of an Islamic economy, yet there is a variety of instruments that may be used on the assets side of the bank, like Murabahah, leasing, salam, istisna, etc. Some of these models are less risky and may be adopted where Musharakah has abnormal

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risks or is not applicable to a particular transaction. Some of the appellants have complained that the Federal Shariat Court, in its impugned judgment, has declared the mark-up system, too, as against the injunctions of Islam. It means that Murabahah cannot be used by an Islamic bank as a permissible mode of financing.

219. This complaint is misconceived. The Federal Shariat Court has not held the Murabahah transaction as invalid in principle. It has rather suggested Murabahah for financing exports in para 367 of its judgment. However, the Court has held the “mark-up system as in vogue” to be against the Islamic injunctions and has expressed its apprehension that this mode will be subject to misuse and, applied without fulfilling the necessary conditions on a large scale basis, it will bring little difference to the present system. We have already observed that the “mark-up system as in vogue in Pakistan” is not a Murabahah transaction in the least. It is merely a change of name. The purported sale of goods never takes place in real terms. If Murabahah is effected with all its necessary conditions, it is not impermissible in Shariah, nor

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has the Federal Court declared it as an absolutely impermissible transaction *per se*. We have already mentioned above while describing the background of the objection of the infidels against the prohibition of riba that “*sale is similar to riba*” (in paras 50 and 51 of this judgment) that they used to sell a commodity on deferred payment for a higher price. Their objection was that when they increase the price at the initial stage of sale, it has not been held as prohibited but when the purchaser fails to pay on the due date, and they claim an additional amount for giving him more time, it is termed as ‘riba’ and haram. The Holy Quran answered this objection by saying “*Allah has allowed sale and forbidden riba*”. As explained earlier (in para 190 of this judgment) Murabahah is a sale and not a financing in its origin. It must, therefore, conform to all the basic standards of a sale. It may be used only where the client of the bank really wants to purchase a commodity. The bank must purchase it from the original supplier and after taking into its ownership and (physical or constructive) possession sells it to the client. All these elements must be visibly present in a valid Murabahah with all their legal and logical consequences, including in

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particular, that the bank must assume the risk of the commodity so long as it remains in its ownership and possession. This is the basic feature of the Murabahah which makes it distinct from an interest-based financing and once it is ignored, though for the purpose of simplicity, the whole transaction steps into the prohibited field of interest-based financing.

220. An objection frequently raised against a Murabahah transaction is that when used as a mode of financing it contemplates an increased price based on the deferred payment. It means that the price of commodity in a Murabahah transaction is more than the price of the same commodity in spot market. Since the price is increased against the time given to the purchaser, it resembles the interest-based loan transaction.

221. We have already explained in para 136 to 140 of this judgment that Islam has treated money and commodity differently. Having different characteristics both are subject to different rules and principles. Since money has no

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intrinsic utility, but is only a medium of exchange which has no different qualities, the exchange of a unit of money for another unit of the same denomination cannot be effected except at par value. If a currency note of Rs.1000/= is exchanged for another note of Pakistani rupees, it must be of the value of R.1000/= . The price of the former note can neither be increased nor decreased from Rs.1000/= even in a spot transaction, because the currency note has no intrinsic utility nor a different quality (recognized legally), therefore, any excess on either side is without consideration, hence, not allowed in Shariah. As this is true in a spot exchange transaction, it is also true in a credit transaction where there is money on both sides, because if some excess is claimed in a credit transaction (where money is exchanged for money) it will be against nothing but time.

222. The case of normal commodities is different. Since they have intrinsic utility and have different qualities, the owner is at liberty to sell them at whatever price he wants, subject to the forces of supply and demand. If the seller does not commit a fraud or misrepresentation, he can sell a

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commodity at a price higher than the market rate with the consent of the of the purchaser. If the purchaser accepts to buy it at that increased price, the excess charged from him is quite permissible for the seller. When the seller can sell his commodity at a higher price in a cash transaction, he can also charge a higher price in a credit sale, subject only to the condition that he neither deceives the purchaser, nor compels him to purchase, and the buyer agrees to pay the price with his free will.

223. It is sometimes argued that the increase of price in a cash transaction is not based on the deferred payment, therefore, it is permissible while in a sale based on deferred payment, the increase is purely against time which makes it analogous to interest. This argument is again based on the misconception that whenever price is increased, taking the time of payment into consideration, the transaction comes within the definition of interest. This presumption is not correct. Any excess amount charged against late payment is *riba* only where the subject matter is money on both sides. But if a commodity is sold in exchange of money, the seller,

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when fixing the price, may take into consideration different factors, including the time of payment. A seller, being the owner of a commodity which has intrinsic utility may charge a higher price and the purchaser may agree to pay it due to various reasons for example:

(One) his shop is nearer to the buyer who does not want to go to the market which is not so near.

(Two) The seller is more trust-worthy for the purchaser than others, and the purchaser has more confidence in him that he will give him the required thing without any defect.

(Three) The seller gives him priority in selling commodities having more demand.

(Four) The atmosphere of the shop of the seller is cleaner and more comfortable than other shops.

(Five) The seller is more courteous in his dealings than others.

224. These and similar other consideration play their role in charging a higher price from the customer. In the same way, if a seller increases the price because he allows credit to his client, it is not prohibited by Shariah if there is no cheating and the purchaser accepts it with open eyes, because

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whatever the reason of increase, the whole price is against a commodity and not against money. It is true that while increasing the price of the commodity, the seller has kept in view the time of its payment but once the price is fixed, it relates to the commodity, and not to the time, the price will remain the same and can never be increased by the seller. Had it been against time, it might have been increased, if the seller allows him more time after the maturity.

225. To put it another way, since money can only be traded in at par value, as explained earlier, any excess claimed in a credit transaction (of money in exchange of money) is against nothing but time. That is why if the debtor is allowed more time at maturity, some more money is claimed from him. Conversely, in a credit sale of a commodity, time is not the exclusive consideration while fixing the price. The price is fixed for commodity, not for time. However, time may act as an ancillary factor to determine the price of the commodity, like any other factor from those mentioned above, but once this factor has played its role, every part of the price is attributed to the commodity.

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226. The upshot of this discussion is that when money is exchanged for money, no excess is allowed, neither in cash transaction, nor in credit, but where a commodity is sold for money, the price agreed upon by the parties may be higher than the market price, both in cash and credit transactions. Time of payment may act as an ancillary factor to determine the price of a commodity, but it cannot act as an exclusive basis for and the whole consideration of an excess claimed in exchange of money for money.

227. This positions is accepted unanimously by all the four schools of Islamic law and the majority of the Muslim jurists. This is the correct legal position of Murabahah transaction according to Shariah. However, two points must be remembered:

One)The Murabahah when used as a mode of trade financing is borderline transaction with very fine lines of distinction as compared to an interest bearing loan. These fine lines of distinction can be observed only when all the basic

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requirements already explained are fully complied with. To ignore any one of them makes it an interest-bearing financing, therefore, it should always be effected with due care and precaution.

Two) Notwithstanding the permissibility of the Murabahah transaction, it is susceptible to misuse and keeping in view the basic philosophy of an Islamic financial system it is not an ideal way of financing. Hence it should be used only where the Musharaka and Mudarabah are not applicable.

228. Apart from Musharakah and Mudarabah there are other modes of financing like Ijara (Leasing), Salam and Istisna that can be used in different types of financing. We need not go into the details of these because they are elaborated in different reports submitted to the government for the elimination of Interest. The first comprehensive report in this respect was submitted by the Council of Islamic Ideology in 1980. The second report was that of the Commission for Islamization of Economy, constituted under the Shariat Act. This Commission has submitted its comprehensive report to the government in 1991. Lastly, the same Commission was

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reconstituted under the Chairmanship of Raja Zafarul Haq which submitted its final report in August 1997. We have gone through all these reports and without commenting on each and every detail proposed in them we are satisfied that all these reports can at least be taken as the basic ground work for bringing about the change in our present financial system.

229. The upshot of this discussion is that the *Doctrine of Necessity* cannot be applied to protect the present interest based system for ever or for an indefinite period. However, this doctrine can be availed of for allowing a reasonable time to the government necessarily required for the switch-over to an interest-free Islamic financial system.

The Loans of the Government:

230. One major difficulty in the process of elimination of Interest is felt to be the borrowings of the Government. At present the government of Pakistan is heavily indebted to domestic and foreign lenders. So far as the domestic loans are concerned, their conversion to Islamic modes of financing

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has been discussed in detail in all the reports referred to above. Dr. Waqar Masood Khan, Vice president of International Islamic University, Islamabad, appearing as a jurisconsult in this case, has also discussed the magnitude of the problem and has thoroughly examined the ramifications of elimination of Interest from this sector. In his statement submitted to the Court he has discussed this issue from page 29 to 49. The substance of the alternative suggestions is that all the borrowings of the government from domestic sources should be designed on the basis of project-related financing. This will, in addition to being compatible with Shariah, help curbing the corruption and misappropriation of borrowed funds. After examining all this material we are of the view that in this sector too, the interest cannot be taken as a necessity to continue for an indefinite period. However, this area may justify some more time for transformation than the private banking transactions will require.

Foreign Loans:

231. Although the laws under challenge in the present case are not specifically related to the foreign borrowings, yet it is

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obvious that once the interest is held illegal, these transactions will also be hit by the prohibition in some way or the other. This seems to be the most difficult area where the prohibition of interest is required to be implemented. The government's foreign loans as of 1.3.1999 stand \$31.15 billion or Rs.1610 billion at the current interbank rate. It is argued that conversion of this type of borrowing to an interest-free basis is almost impossible.

232. Before we touch upon the Islamic solution to this problem we would like to observe that the speed at which our foreign borrowings are increasing merits serious consideration. In the beginning we started borrowing funds from international sources for our development projects. Later the scope of foreign borrowing was extended even to the non-development expenses. Thereafter huge amounts were borrowed for debt servicing and now these borrowings are meant to pay interest to the international lenders.

233. It needs no expertise in economics to realize that this is an alarming situation which is leading us constantly towards

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the slavery of the whole nation in the hands of our lenders. We are mortgaging the future of our present and coming generations by incurring huge debts every year. The notion that the foreign borrowings help the developing countries in their development projects and assist in attaining prosperity is now proved to be false in the case of a large number of the third world countries. This fact is increasingly realized by the independent economists. Susan George, an American economist living in France has written widely on development and world issues. She is an Associate Director of the Transnational Institute in Amsterdam and her books on the Third World debt have been widely admired, some of which have won the international awards. She has summarized the eye-opening results of the Third World debt in the following words:

“According to the OECD, between 1982 and 1990, total resource flows to developing countries amounted to \$927 billion. This sum includes the OECD categories of Official Development

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Finance, Export Credits and Private Flows - in other words, all official bilateral and multilateral aid, grants by private charities, trade credits plus direct private investment and bank loans. Much of this inflow was not in the form of grants but was rather new debt, on which dividends or interest will naturally come due in future.

During the same 1982-90 period, developing countries remitted in debt service alone 1342 billion (interest and principal) to the creditor countries. For a true picture of resource flows, one would have to add many other South-to-North out-flows, such as royalties, dividends, repatriated profits, underpaid raw materials and the like. The income-outflow difference between \$1345 and #927 billion is thus a much understated \$418 billion in the rich countries' favour.

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For purposes of comparison, the US Marshall Plan transferred \$14 billion 1948 dollars to war-ravaged Europe, about \$70 billion in 1991 dollars. Thus in the eight years from 1982-90 the poor have financed six Marshall Plans for the rich through debt service alone.

Have these extraordinary outflows at least served to reduce the absolute size of the debt burden? Unfortunately not. In spite of total debt service, including amortization, of more than 1.3 trillion dollars from 1982-90, the debtor countries as a group began the 1990s fully 61 percent more in debt than they were in 1982. Sub-Saharan Africa's debt increased by 113 per cent during this period; the debt burden of the very poorest - the so-called 'LLDCs' or 'least

developed' countries - was up by 110 per cent¹¹².”

Many neutral writers are of the view that Third World debt is not just a financial matter, but a political one. There were always severe conditions attached to IMF and World Bank loans. Although ‘program aid’ required borrowing nations to conform to a package of economic and social expenditure measures aimed to ensure that funds are used for development, yet when projects failed and debts increased, ‘program aid’ was followed by ‘structural adjustment’ that entailed supervising the development of the entire economy of the indebted countries. Thus the lenders justified their total interference in the domestic policies of the Third World nations. As these policies, too, failed to bring a turnaround in the debt trends, ‘austerity programs’ were introduced whereby expenditure on social services, welfare and education were cut to a considerable extent. Susan George

¹¹² Susan George: *The Debt Boomerang*, How the Third World Debt Harms us All, Pluto Press, London 1992

and Fabrizio Sabelli have commented on the results of these policies as follows:

“Between 1980 and 1989 some thirty-three African countries received 241 structural adjustment loans. During that same period, average GDP per capita in those countries fell 1.1% per year, while per capita food production also experienced steady decline. The real value of the minimum wage dropped by over 25%, government expenditure on education fell from \$11 billion to \$7 billion and primary school enrolments dropped from 80% in 1980 to 69% in 1990. The number of poor people in these countries rose from 184 million in 1985 to 216 million in 1990, an increase of seventeen per cent.¹¹³

¹¹³ Susan George, Fabrizio Sabelli: *Faith And Credit*, The World Bank's Secular Empire, Penguin 1998, P.141.

234. According to the assessment of the World Bank itself, which is subjected to serious doubts by some economists, the success rate of World-Bank-funded projects has been less than 50%. In addition, after a review in 1989, World Bank staff were unable to point out a single project in which the displaced people had been relocated and rehabilitated to a standard of living comparable to that which they enjoyed before displacement ¹¹⁴.

235. Even the successful projects did seldom bring an overall economic well-being of the indebted countries.

Michael Rowbotham says:

“There has been a massive outpouring of literature on the subject of Third World debt. The books are characterized by one feature. Whereas the arguments and policies of the IMF and World Bank have been based upon an apparently reasonable theory, the studies

¹¹⁴ David Korten: *When Corporations Rule the Earth*, Earthscan 1993 as quoted by Michael Rowbotham: “The Grip of Death” P.135

give case after case and country after country, in which the theory has not worked in practice. Either loans have led to development, but repayment has proved impossible; or the projects funded have failed completely leaving the country with a massive debt and no hope of repayment, or repeated additional loans have become necessary simply to provide funds for the repayment of past loans. The debtor countries, as a group, began the 1990s fully 61% deeper in debt than they were in 1980.”¹¹⁵

235. Many critics have compared the Third World debt with peonage or wage slavery. Cheryl Payer observes:

The system can be compared point by point with peonage on an individual scale. In the

¹¹⁵ Michael Rowbotham: *“The Grip of Death”* P.137

peonage, or debt slavery system... the aim of the employer/creditor/merchant is neither to collect the debt once and for all, nor to starve the employee to death, but rather to keep the laborer permanently indentured through his debt to the employer... Precisely the same system operates on the international level... It is debt slavery on an international scale. If they remain within the system, the debtor countries are doomed to perpetual underdevelopment or rather, to development of their exports at the service of multinational enterprises, at the expense of development for the needs of their own citizens.”¹¹⁶

236. In 1987, the conference of the Institute for African Alternatives called for the winding up of the World Bank and the IMF and a complete end to the dominance of the Bretton

¹¹⁶ Cheryl Payer: *The Debt Trap: Monthly Review* Press 1974 as quoted by Rowbotham, op.cit P.137

Woods International monetary system. The conference noted the results of the case studies as follows:

“in virtually all cases, the impact of these (IMF and World Bank) projects has been basically negative. They have resulted in massive unemployment, falling real incomes, pernicious inflation, increased imports with persistent trade deficits, net outflow of capital, mounting external debts, denial of basic needs, severe hardship and deindustrialization. Even the so-called success stories in Ghana and the Ivory Coast have turned out to offer no more than temporary relief which had collapsed by the mid 1980s. The sectors that have been worst hit are agriculture, manufacturing and the social services, while the burden of adjustment has fallen regressively on the poor and weak social groups.”¹¹⁷

¹¹⁷ Bade Onimode: *The IMF, The World Bank and African Debt*. Zed Books 1989, as quoted by Rowbotham opcit, P.136

237. These facts should be sufficient to realize the fallacy of the illusionary notions that the Third World countries cannot live without the help of foreign loans. Who has, in fact, benefited from this system ? This question is closely examined by a Canadian scholar Jaques B. Gelinias in his book “Freedom From Debt”. He says:

“The foreign-aid-based development model has proved itself powerless to bring a single country out of economic and financial dependence. However, it has turned out to be a source of fabulous wealth for certain Third World elites , giving birth to a new form of power and a socio-political class that can rightly be called the ‘aidocracy’¹¹⁸. “

The case of Pakistan is not much different. At a time when we are in the dire need to improve the economic status of our people, to eradicate poverty, to raise the level of our

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education, and to provide at least the minimum health requirements to our rural areas where thousands of men, women and children are at the edge of death for the want of any medical aid, we are forced to allocate 46% of our total budget for repayment of interest-based loans. Still, we are striving to acquire more loans to pay off some of the previous ones. When these new loans will mature, we will have to incur more debts to satisfy some of the present liabilities. How far can we proceed in this vicious circle? How long shall we keep coiling around the spiral of loans over loans? We will have to get rid of this debt-based economy which has usurped our freedom and has pawned our next generations in the hands of our lenders. This is a question of life-and-death of our nation, and we will have to resolve it at any cost.

238. We are not oblivious of the fact that once thrust into the present state of indebtedness, we cannot free ourselves from it overnight. It will require a well-considered program and a firm commitment to implement it. In the intervening period, which must be minimized by competent planning, we will

¹¹⁸ Jaques B Gelinias, *Freedam From Debt*, zed Books, London and New York, 1998, P.59

have to live with the present state of indebtedness. But even in this intervening period, we must try our best to renegotiate with our lenders to convert the existing loans into Islamic modes of financing. Thanks to the atmosphere created by the Islamic banking, these modes of financing are no longer totally unfamiliar to the West. Even the International financial institutions have undertaken studies to understand them. IFC, the private financing branch of the World Bank has already expressed its willingness to use some Islamic modes of financing. The assets-related loans can easily be converted into *Leasing* arrangement. Project related loans can be reshaped on the basis of *Istisna*. The concern of the lenders is to get return on their loans, and not to insist on a particular form. Therefore, it should not be much difficult to renegotiate the existing loans on Islamic lines. For new finances even wider variety of modes is available that can be designed on the basis of Islamic principles. However, it will be possible only if the government itself has a firm commitment to its Islamic obligations and a true will to implement what Islam requires. An apologetic attitude can never convince others to bring change in the long-practiced

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ideas. Embarrassing for the whole nation are the remarks of the President of IFC (International Finance Corporation, an affiliate of the World Bank) in his report to the Board of Directors of IFC about a proposed investment in the Hala Spinning Mills. He observed:

“A change to Islamic modes of financing has been considered by IFC, but this would be contrary to the Government (of Pakistan’s) intentions for foreign loans.

Adoption by a foreign lender of Islamic instruments could be construed as undermining Government’s policy to exempt foreign lenders from this requirement.¹¹⁹”

239. On November 17, 1990, the Prime Minister of Pakistan had appointed a committee of experts to analyze the growing dependence of our country on foreign assistance and to chalk out a plan to reduce this dependence and evolve a self-

¹¹⁹ No.IFC/P-887, dated December 22, 1987, as quoted by the Report of the Prime Minister’s Committee on self-reliance, headed by Prof.Khurshid Ahmad, Islamabad, 1991.

reliance development strategy. The committee, headed by the then Senator Prof. Khurshid Ahmad, comprised the Secretary finance division and the Chief economist of the economic division and several other economic experts. The report of the Committee was submitted to the government in April 1991. This Committee, after deliberations, came to the conclusion that even on pure economic grounds, the goal of self-reliance can be achieved only by elimination of interest. The recommendations of this committee can be availed of while tackling with the issue of foreign loans.

240. Therefore, the admitted difficulties in resolving the problem of foreign liabilities cannot be taken as an excuse for exempting them from the prohibition for good or for an indefinite period on the basis of necessity. However, it cannot be denied that it will take more time than the domestic transactions. The doctrine of necessity will be applicable to this extent only.

C o n c l u s i o n s

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241. The upshot of the above discussion is that:

242. Any additional amount over the principal in a contract of loan or debt is the riba prohibited by the Holy Qur'an in several verses. The Holy Prophet (PBUH) has also termed the following transactions as riba:

(i) A transaction of money for money of the same denomination where the quantity on both sides is not equal, either in a spot transaction or in a transaction based on deferred payment.

(ii) A barter transaction between two weighable or measurable commodities of the same kind, where the quantity on both sides is not equal, or where the delivery from any one side is deferred.

(iii) A barter transaction between two different weighable or measurable commodities where delivery from one side is deferred.

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243. These three categories are termed in the Islamic jurisprudence as *riba-al-sunnah* because their prohibition is established by the Sunnah of the Holy Prophet (PBUH). Alongwith the *riba-al-Qur'an*, these are four types of transactions termed as 'riba' in the literature of Islamic fiqh based on the Holy Qur'an and Sunnah.

244. Out of these four transactions, the last two ones, mentioned above as (ii) and (iii) have not much relevance to the context of modern business, the barter business being a rare phenomenon in the modern trade. However, the *riba-al-Qur'an*, and transaction of money mentioned above as (I) are more relevant to modern business.

245. In the light of the detailed discussion above, there is no difference between different types of loan, so far as the prohibition of *riba* is concerned. It also does not make any difference whether the additional amount stipulated over the principal loan or debt is small or large. It is, therefore, held that all the prevailing forms of interest, either in the banking transactions or in private transactions do fall within the

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definition of 'riba'. Similarly, any interest stipulated in the government borrowings, acquired from domestic or foreign sources, is riba and clearly prohibited by the Holy Qur'an.

246. The present financial system, based on interest, is against the injunctions of Islam as laid down by the Holy Qur'an and Sunnah, and in order to bring it in conformity with Shari'ah, it has to be subjected to radical changes.

247. A variety of Islamic modes of financing has been developed by Islamic scholars, economists and bankers that may serve as a better alternative to interest. These modes are being practiced by about 200 Islamic financial institutions in different parts of the world.

248. These alternatives being available, the transactions of interest cannot be allowed to continue for ever on the basis of necessity. Many experienced bankers, to name the few such as Dr. Ahmad Muhammad Ali, President Islamic Development Bank, Jeddah, Mr. Adnan al-Bahr, Chief Executive International Investor, Kuwait, Mr. Iqbal Ahmad

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Khan, Chief executive Islamic unit of the Hong Kong Shanghai Banking Corporation (HSBC) based in London from outside Pakistan and Mr. Abdul-Jabbar Khan, the former president of the National Bank of Pakistan, Mr. Shahid Hasan Siddiqui and Mr. Maqbool Ahmad Khan from Pakistan are the bankers who have a long experience of banking in different parts of the world, besides others appeared before us. All of them were unanimous on the point that Islamic modes of financing are not only feasible, but area also more beneficial to bring about a balanced and stable economy, for which they have produced detailed proof based on facts and figures. Some outstanding economists like Dr. Umar Chapra, the economic advisor Saudi Monetary Agency, Dr. Arshad Zaman, the former Chief economist of the ministry of Finance government of Pakistan, Prof. Khurshid Ahmad, Dr. Nawab Hyder Naqwi, Dr. Waqar Masood Khan, have supported this view in their detailed discourses.

249. We have also gone through the detailed reports of the council of Islamic Ideology submitted in 1980, the report of

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the commission for Islamization of Economy constituted in 1991, and the final report of the same commission, reconstituted in 1997 which was submitted in August 1997. We have also perused the report of the Prime Minister's Committee on Self-Reliance, submitted to the Government in April 1991.

250. There is thus ample evidence to prove that quite a substantial ground work has been done to suggest the strategy for the transformation of the existing financial system to the Islamic one, and the present interest based system cannot be retained for an indefinite period on the basis of necessity. However, the transformation may take some time which can be allowed on that basis.

251. For the reasons given above, all these appeals are hereby dismissed in the terms detailed hereafter in the Order of the Court.

وآخر دعوانا أن الحمد لله رب العالمين

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

الحمد لله رب العالمين والصلاة والسلام على رسوله الكريم و على آله واصحابه

اجمعين

ORDER OF THE COURT

For the detailed reasons recorded in the three separate judgments authored by Khalil-ur-Rehman Khan, J., Wajihuddin Ahmed, J., and Muhammad Taqi Usmani, J., it is hereby held that any amount, big or small, over the principal, in a contract of loan or debt is “*riba*” prohibited by the Holy Quran, regardless of whether the loan is taken for the purpose of consumption or for some production activity. The Holy Prophet (PBUH) has also termed the following transactions as *riba*:

- (i) A transaction of money for money of the same denomination where the quality on both sides is not equal, either in a spot transaction or in a transaction based on deferred payment.

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- (ii) A barter transaction between two weighable or measureable commodities of the same kind, where the quantity on both sides is not equal, or where the delivery from any one side is deferred.
- (iii) A barter transaction between two different weighable or measurable commodities where delivery from one side is deferred.

These three categories are termed in the Islamic jurisprudence as *riba-al-sunnah* because their prohibition is established by the Sunnah of the Holy Prophet (PBUH). Alongwith the *riba-al-Quran*, these are four types of transactions termed as ‘*riba*’ in the literature of Islamic fiqh based on the Holy Quran and Sunnah.

Out of these four transactions, the last two ones, mentioned above as (ii) and (iii) have not much relevance to the context of modern business, the barter business being a rare phenomenon in the modern trade. However, the *riba-al-Quran* and transaction of money mentioned above as (i) are more relevant to modern business.

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In the light of the detailed discussion above, there is no difference between types of loan, so far as the prohibition of riba is concerned. It also does not make any difference whether the additional amount stipulated over the principal loan or debt is small or large. It is, therefore, held that all the prevailing forms of interest, either in the banking transactions or in private transactions do fall within the definition of riba. Similarly, any interest stipulated in the government borrowings, acquired from domestic or foreign sources, is riba and clearly prohibited by the Holy Quran.

The present financial system, based on interest, is against the injunctions of Islam as laid down by the Holy Quran and Sunnah, and in order to bring it in conformity with Shariah, it has to be subjected to radical changes.

A variety of Islamic modes of financing has been developed by Islamic scholars, economists and bankers that may serve as a better alternative to interest. These modes are being practiced by about 200 Islamic financial institutions in different parts of the world.

These alternatives being available, the transactions of interest cannot be allowed to continue for ever

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on the basis of necessity. Many experienced bankers, to name a few, such as Dr.Ahmad Muhammad Ali, President Islamic Development Bank, Jeddah, Mr.Adnan al-Bahr, Chief Executive International Investor, Kuwait, Mr.Iqbal Ahmad Khan, Chief Executive Islamic unit of the Hong Kong Shanghai Banking Corporation (HSBC) based in London from outside Pakistan and Mr.Abdul Jabbar Khan, the former president of the National Bank of Pakistan, Mr.Shahid Hasan Siddiqi and Mr.Maqbool Ahmad Khan from Pakistan are the bankers who have long experience of banking in different parts of the world, appeared before us. All of them were unanimous on the point that Islamic modes of financing are not only feasible, but are also more beneficial to bring about a balanced and stable economy and in support of this view material containing facts and figures was produced. Some outstanding economists like Dr.Umar Chapra the economic advisor Saudi Monetary Agency, Dr.Arshad Zaman, the former Chief Economist of the Ministry of Finance, Government of Pakistan, Prof.Khurshid Ahmad, Dr.Nawab Naqvi, and Dr.Waqar Masood Khan also supported this view in their discourses.

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We have also gone through the detailed reports of the Council of Islamic Ideology submitted in 1980, the report of the commission for Islamization of Economy constituted in 1991, and the final report of the same commission, reconstituted in 1997 which was submitted in August 1997. We have also perused the report of the Prime Minister's Committee on self-reliance submitted to the Government in April 1991.

There is thus ample evidence to prove that quite a substantial ground work has been done to suggest strategy for the transformation of the existing financial system to the Islamic one, and the present interest based system need not be retained for an indefinite period on the basis of necessity. However, the transformation may take some time which can be allowed on that basis.

We now proceed to examine the provisions of the statutes in the context of the reasoning given in the impugned judgment.

I. **The Interest Act, 1839.**

This enactment confers power on the Court to allow interest to the creditor upon all debts or ascertained sum payable which the Court gets recovered. The Federal Shariat Court has declared the Act repugnant to Injunctions of Islam as even the Council of Islamic Ideology had recommended its repeal in its Session held on 11th November 1981.

The question of allowing interest by the Court while granting decree has been exhaustively dealt with by the Negotiable Instruments Act 1881 and the Civil Procedure Code 1908 as amended from time to time and as such there is no need to retain the Interest Act 1839 on the Statute Book, so the same for this reason alone needs to be repealed. Even otherwise an undefined, naked and generalized power to allow interest on a debt is repugnant to Injunctions of Islam for the reasons already discussed above. We would, therefore, hold that Interest Act, 1839 being repugnant to Injunctions of Islam was rightly directed to be repealed.

II. The Government Savings Bank Act 1873.

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.

Section 10, as challenged, reads as under:-

“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.”

The provision, on account of the use of the word “interest” which is payable along with the amount of deposit was held as repugnant to Injunctions of Islam. Learned Judges of the Federal Shariat Court did not examine the nature of the amount, which is to accrue to the deposit made. If the accrual is caused through permissible mode of investment, obviously no objection can be taken. The emphasis should be on adoption of Islamic modes of Finance and conduct of business following Islamic principles. We would therefore recommend that the word ‘interest’ appearing in Section 10 of the Act is repugnant to the

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Injunctions of Islam and shall be substituted with the words ‘shariah compliant return’.

III. Negotiable Instruments Act, 1881.

The discussion on various provisions of the Negotiable Instruments Act, 1881 is contained in paragraphs 242 to 278 of the impugned judgment. Sections 79 and 80 of this Act, as amended, adopted the concept of “mark up” system, which system as in vogue has been held to be repugnant to the injunctions of Islam and the direction made is that the words “mark up” be deleted from the provisions of sections 79 and 80 of the Act. The opinion of one of us (Mr.Justice Maulana Muhammad Taqi Usmani) expressed in a booklet on the Mark up system as is in vogue and is being practiced in the banks and the effect of it is that it obviously amounts to Riba (interest) prohibited in Islam, has been referred to. This opinion as quoted reads as under:-

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"بلا سود بنکاری پر اب تک جو علمی اور تحقیقی کام سامنے آیا ہے، ان میں احقر کی معلومات کی حد یک سب سے زیادہ ماجع' مفصل اور تحقیقی رپورٹ وہ ہے جو اسلامی نظریاتی کونسل نے علماء اکرام اور ماہرین معاشیات و بنکاری کی اصل بنیاد نفع و نقصان کی تقسیم پر قائم ہوگی' اور بنک کا بیشتر کاروبار شرکت یا مضاربت پر مبنی ہوگا' البتہ جن کاموں میں شرکت یا مضاربت کار آمد نہیں ہو سکتی' وہاں کے لیے اس رپورٹ میں "بیع موجل" کا نام دیا گیا ہے"

اس طریقہ کار کا خلاصہ اس طرح سمجھیے کہ مثلاً ایک کاشت کار - ٹریکٹر خریدنا چاہتا ہے لیکن اس کے پاس رقم نہیں ہے۔ بحالات موجودہ ایسے شخص کو بینک سود پر قرض دینا ہے۔ یہاں سود کی بجائے شرکت یا مضاربت اس لیے نہیں چل سکتی کہ کاشت کار ٹریکٹر تجارت کی غرض سے نہیں بلکہ اپنا کھیت میں استعمال کے لیے خریدنا چاہتا ہے۔۔۔ چنانچہ یہ تجویز پیش کی گئی کہ بینک کاشت کار کو روپیہ دینے کی بجائے ٹریکٹر خرید کر ادھار قیمت پر دے دے' اور اس کی قیمت اپنا کچھ منافع رکھ کر متعین کرے اور کاشت کاروں کو اس بات کی مہلت دے کہ وہ بینک کو ٹریکٹر کی مقررہ قیمت کچھ عرصہ کے بعد ادا کر دے۔ اس طریقہ کو اسلامی کونسل کی رپورٹ میں "بیع موجل" کا نام دیا گیا ہے اور اس میں بینک نے ٹریکٹر کے 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 ۱۹۸۱ سے نافذ ہونے والی اسکیم کا جائزہ لیتے ہیں تو نقشہ بالکل بر عکس نظر آتا ہے۔ اس اسکیم میں نہ صرف یہ کہ "مارک اپ" ہی کو غیر سودی کاؤنٹرز کے کاروبار کی اصل بنیاد قرار دے دیا گیا بلکہ "مارک اپ" کے طریقہ 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:-

"بیع موجل" کے جواز کے لیے لازمی شرط یہ ہے کہ بائع جو چیز فروخت کر رہا ہے وہ اس کے قبضے میں آگئی ہو' اسلامی شریعت کا یہ معروف اصول ہے کہ جو چیز کسی انسان کے قبضے میں نہ آئی ہو اور جا کا کوئی خطرہ 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 چاول کی بازاری قیمت دے گا جس کے ذریعے وہ بازار سے چاول خرید لے گا اور 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 ۱۹۸۱ صفحہ ۹]

" اس میں اس بات کا کوئی ذکر 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 ہو پہلے بینک نے خریدی اور پھر اس کے ہاتھ بیچ دی ہے۔ صرف کاغذ پر کوئی با 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 ۲۸ مارچ کو چاول وغیرہ کی خریداری کے لیے بینکوں نے جو رقمیں رائس کارپوریشن کو مارک اپ کی بنیاد پر دی ہوئی تھیں ۲۸ مارچ کو یہ سمجھا جائے گا کہ کارپوریشن نے وہ رقمیں سود کے ساتھ بینک کو واپس کردی ہیں۔ اور پھر بینک نے اسی روز وہ رقمیں دوبارہ کارپوریشن کو مارک اپ کی بنیاد پر دے دی ہیں اور جس جنس کی خریداری کے لیے وہ قرضے دئیے گئے تھے ' یہ سمجھا جائے گا کہ وہ بینک نے خرید لی ہے اور پھر کارپوریشن کو مارک اپ کی بنیاد پر اور شائد خرید کر آگے فروخت بھی کر چکی ہے اس کے بارے میں کونسی منطق کی رو سے یہ سمجھا جا سکتا ہے کہ وہ بینک نے خرید کر دوبارہ کارپوریشن کو بھیجی ہے؟

" اس سے یہ بات واضح طور پر مترشح ہو جاتی ہے کہ " بیع موجل " کا طریقہ حقیقی طور پر اپنانا پیش نظر نہیں بلکہ فرضی طور پر اس کا 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 ایڈوانس

ADVANCE

اور اس عمل کو قرض دینے

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سے تعبیر کیا گیا ہے۔ " [اسٹیٹ بینک نیوز یکم جنوری ۱۹۸۱ صفحہ ۴]

" اس اسکیم کی ایک سنگین ترین غلطی اور ہے "بیع موجل" 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 مد پر ادا نہ کرے تو اس سے وصول کرنے کے لیے تمام قانونی طریقے استعمال کیے جا سکتے ہیں' لیکن اگر ادائیگی میں تاخیر کی بنیاد پار معینہ مدت میں اضافہ کرنے کا شرعا کوئی جواز نہیں ہے کیونکہ تاخیر کی بنیاد پر قیمت میں اضافہ کرتے چلے جائیں گے تو اسی کا دوسرا نام سود ہے لیکن زیر نظر تاخیر اسکیم میں اس اہم اور بنیادی شرط کی بھی یہ پابندی نہیں لگائی گئی بلکہ بعض معاملات میں وضاحت کے ساتھ اس کی خلاف ورزی کی گئی ہے۔ چنانچہ اس میں کہا گیا ہے کہ امپورٹ بلوں کی ادائیگی میں بینک جو رقم خرچ کرے گا اس پر ابتداء بیس دن کی مدت کے لیے اعشاریہ ۴۸ فی صد مارک

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اپ وصول کرے گا ' اور اگر یہ رقم بیس دن میں ادا نہ ہوئی تو مزید ۱۳ دن کے لیے اعشاریہ ۵۸ فی صد مارک اپ کا مزید اضافہ ہوگا اور اگر ۳۳ دن گزر جائے کے پر بھی قیمت کی ادائیگی نہ ہوئی تو اس قیمت پر مزید اعشاریہ ۶۲ فی صد مارک اپ کا اضافہ ہوگا اور اگر ۳۸ دن گزر جانے پر بھی ادائیگی نہ ہوئی تو آئندہ ہر ۱۵ دن کی تاخیر پر مزید اعشاریہ ۷۹ فیصد کے مارک اپ کا اضافہ ہوتا چلا جائے گا"

" اندزہ 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" 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 لیے محض قانونی لیپ پوت کی نہیں' انقلابی فکر کی ضرورت ہے"

So what has been pointed out is that the practice adopted in the garb of "mark up" is violative of the conditionalities attaching to Bai-Muajal as the permissibility of such a transaction is dependent on fulfillment of the above conditions. The other thing pointed out is that change of heart and commitment to follow the Quranic Injunctions in letter and spirit is not only needed but is necessary for enforcement and implementation of the Islamic economic system. Neither lip service nor mere use of nomenclature will bring the desired change.

It is apparent that errors of omission and commission which crept into the PLS operation have been

the cause for suggesting removal of “*bai’ mu’ajjal*” from the list of permissible methods following the principle that anything leading to that which is prohibited stands itself prohibited. It is, therefore, argued that anything which leads to “Riba” must be foreclosed and disallowed. Jurists, it will be noted, have prescribed following conditions for the validity of *Murabaha/bai’ mu’ajjal*:-

- (i) The time of payment of consideration must be known; and
- (ii) The seller has to possess the commodity involved before it is delivered to the purchaser.

The Council of Islamic Ideology in its report on the Elimination of Interest had approved the use of the mark-up system, *bai’ mu’ajjal*, to a limited extent in unavoidable cases in the process of switching over to an interest-free system and warned against its wide or indiscriminate use in view of the danger attached to it viz. of opening a backdoor for dealings on the basis of interest. It is unfortunate that this warning was not properly heeded and the system of mark up adopted in January, 1981 did not conform to the standard stipulations of *bai’ mu’ajjal*. It is, however, pertinent to note that *bai’ mu’ajjal/Murabaha* is one of the most popularly

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used modes of financing used by the Islamic Banks in the world. The following table demonstrates that Murabaha is the most widely used mode of financing by the Islamic Banks. The weighted average of the share of that mode in total financing provided by Islamic Banks, as per data provided to the Bench by the Islamic Development Bank amounts to 66 per centum. A Table showing Distribution of Financing provided by Islamic Banks among the Various Modes - Average during 1994-1996, reads as under:-

<u>Institution</u>	Total finance (US\$MN)	MURA- BAHA	Musharaka	Mudharaba	Leasi ng	Other Modes
Al Baraka Islamic Bank for Investment	119	82	7	6	2	3
Bahrain Islamic Bank	320	93	5	2	0	1
Faisal Islamic Bank, Bahrain	945	69	9	6	11	5
Bangladesh Islamic Bank Ltd.	309	52	4	17	14	14
Dubai Islamic Bank	1,300	88	1	6	0	6
Faisal Islamic Bank, Egypt	1,364	73	13	11	3	0
Jordan Islamic Bank	574	62	4	0	5	30
Kuwait Finance House	2,454	45	20	11	1	23
Berrhard Islam Malaysia Bank	580	66	1	1	7	24
Qatar Islamic Bank	598	73	1	13	5	8
Total (Ten Banks)	8,563					
Weighted Average		66	10	8	4	13

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Murabaha mode of Finance or the “mark up” system with the conditions attached thereto is permissible mode of Islamic finance and this mode cannot, therefore, be held to be repugnant to the injunctions of Islam if the conditions prescribed are not being practiced by some of the parties. It is to be noted that such violations occurred as there was no monitoring system in existence to check such errors of omission and commission and violations. In the system proposed to be adopted with Shariah Board in existence in the State Bank of Pakistan as well as in the financial institutions themselves, such violations as and when noticed shall be pointed out and eradicated. Moreover, such errors will be eliminated where the system as a whole will be geared up to enforce Islamic Laws with commitment and dedication. The adoption of the mark up system within the limits prescribed appears to be the need of the economic system in the transitional period and till the time more and adequate number of Shariah-compliant financing modes are developed. In the light of the foregoing, let us examine the

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provisions of Negotiable Instruments Act 1881 (hereinafter referred to as Act 1881).

The first section hit by the aforesaid judgment is section 79 of the Act 1881, which reads as follows:

“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

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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 profits 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:
- (c) notwithstanding the provisions of clauses (a) and (b), return on an amount due 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.]

The learned Federal Shariat Court has ordered that the provision of “Interest or return in any other form” in subsections (a) and (b) be deleted from these provisions. We agree with the learned Federal Shariat Court. Any return on a promissory note or a bill of exchange as contemplated in subsections (a) and (b) of section 79 is riba and unlawful according to Shariah. Both these subsections are therefore

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held to be repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah.

However, Federal Shariat Court has not properly analyzed the provision contained in clause (i) to the proviso of section 79 and as such the view recorded therein needs correction. Clause (i) to the said proviso specifies different ways to calculate a return on a promissory note or a bill of exchange where they are based on mark-up, leasing, hire-purchase or service charge. The Learned Federal Shariat Court has based its judgment about this clause on the permissibility or otherwise of the transactions of mark-up, leasing, hire-purchase and service charge. 'Mark-up' as in vogue, was held by the learned Federal Shariat Court as invalid transaction, and therefore the word 'mark-up' was ordered to be deleted, while the same provision about leasing, hire-purchase and service charge has been retained and not declared against Islamic Injunctions.

A careful reading of Section 79 with all its provisions, analyzed in the correct context would show that purpose of Section 79 is not to validate or invalidate a certain return in the transactions of mark-up, leasing etc. The

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basic purpose of clause (i) is that once a promissory note or a bill of exchange is drawn on the basis of these transactions, and the issuer of the note or of the bill could not pay their amount on the date of their maturity, the Court may order a certain return in favor of the holder of the note or the bill for the period in which the amount remained unpaid after its maturity. Looked at from this perspective, this provision, in its present form is totally against the Injunctions of Islam, regardless of whether or not the transactions underlying the instrument (mark-up, leasing etc.) are in accordance with Shariah. The reasons are as follows:

Section 79 in the Act of 1881 was originally designed for the instruments of interest-bearing loans or debts. The nature of interest is such that it is calculated on daily basis and keeps on increasing for the whole period of non-payment. On the basis of this principle, Section 79 has visualized different situations where the amount of a note or a bill was not paid by the debtor on the stipulated date. Taking for granted that every day from the period of non-payment must give the creditor an additional amount as interest or return, sub-section (a) has provided that if the

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instrument has specified a certain rate of interest for the original period of loan, the same rate will be applied to the whole period of further non-payment. Sub-section (b) visualizes a situation where no rate of interest was specified in the instrument, either because the original transaction was free from interest, or because the amount of interest was built in the lump sum mentioned in the instrument. In this situation the rate of interest applied after maturity, has been fixed by law as six percent per annum.

When, in 1980, the government announced the elimination of interest and the State Bank of Pakistan allowed some alternative modes of financing including mark-up, leasing, hire-purchase and service charge, some amendments were brought in certain laws. It is in this background that this proviso in section 79 was inserted, and the provisions relating to the notes and bills of exchange drawn on the basis of interest were applied to the transactions of mark-up, leasing etc. in the manner specified in sub-clauses of the proviso, without having regard to the fact that all these transactions are essentially different from an interest-based debt and they cannot be subjected to the same rules as govern the interest-

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(based instruments. Each one of these four transactions has its own peculiarities, and should have been dealt with differently.

Let us now analyze each one of these transactions separately. The first transaction mentioned in sub-clause (i) is that of Mark-up in price. What is meant by this term is the transaction of murabaha or '*Bai' Mu'ajjal*', the details of which have been explained in paras above as well as in paras 189 and 218 of judgment of Mr. Justice Muhammad Taqi Usmani. It has been mentioned there that this technique was suggested by the Council of Islamic Ideology but was distorted to the worst extent by the banks when they applied it in practical terms. The learned Federal Shariat Court, therefore, observed that "Mark-up system, as in vogue, is held to be repugnant to the Injunctions of Islam" (para 262 of the judgment of the FSC) and consequently, it ordered that the words "mark-up" be deleted from this sub-clause.

We have already held that although the mark-up system as in vogue in our banks is repugnant to the injunctions of Islam, yet it is not correct to assert that the transaction of *murabaha* or *bai' mu'ajjal* in itself is

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prohibited. If the transaction fulfills the necessary conditions spelled out above, it cannot be held repugnant to the Injunctions of Islam. But the reference of this transaction in this clause, in the context of a return on a promissory note or a bill of exchange is not according to the basic principles of a Murabaha transaction. The reason is that *murabaha* or *bai' mu'ajjal* is a transaction of sale effected on the basis of deferred payment. One of the basic conditions of this transaction, like any other sale, is that the price is fixed at the time of the original contract of sale. This price may include a margin of mark-up (profit) added on the cost incurred by the seller. To determine the amount of mark-up, the seller may take different factors into consideration, including the deferred payment, but as already explained once the price is fixed, it will be attributable to the commodity and cannot be increased or decreased unilaterally, because as soon as the sale is accomplished, the price of the commodity became a debt payable by the purchaser. If this debt is evidenced by a promissory note or a bill of exchange, it is not different from a note or a bill evidencing a loan, and no return, whatsoever,

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can be charged over that note or bill, because it will amount to charging interest on the debt.

Sub-clause (i) of the proviso to Section 79 provides that if the purchaser in a murabaha or bai' mu'ajjal transaction did not pay the price, evidenced by a promissory note or a bill of exchange, a further return at the original rate of mark-up shall be payable by the purchaser for the whole period within which the price remained unpaid after its maturity. For example A purchased a commodity for Rs. 100/- B agreed to purchase it from him on a mark-up of 10%. The commodity is thus sold to B for a price of Rs. 110/- to be paid after one year, say, on 31 January. A promissory note in the amount of Rs. 105/- is signed by B in favour of A. Now, this promissory note is nothing but an instrument evidencing a debt payable by B to A, which includes the original mark-up allowed by the Shariah. If B doesn't pay Rs. 110/- to A on 31 January, sub-clause (i) of the proviso to Sec. 79 of the Act 1881 provides that a further return on the same rate of mark-up i.e. 10% in the above example, shall be payable by B to A for the whole period of non-payment after 31 January. This provision is repugnant to the Injunction of Islam, because

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after the sale price becomes a debt, no return on it can be claimed by the seller from the purchaser. If the purchaser could not pay at the due date because of his poverty, the Qur'anic command is very clear that he should be given more time till he is able to pay. The Holy Qur'an says:

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ

And if he (the debtor) is poor, he must be given respite till he is well-off. (2:280)

However, if the purchaser has delayed the payment despite his ability to pay, he may be subjected to different punishments, but it cannot be taken to be a source of further 'return' to the seller on per cent per annum basis as contemplated in section 79. It is discussed in para 51 of the judgment of Mr. Justice Muhammad Taqi Usmani that the following Qur'anic verse was revealed in the background of a similar transaction.

قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا

We, therefore, agree with the finding of the Federal Shariat Court that the words "mark-up price" occurring in sub-clause (i) of the proviso of Sec. 79 are

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repugnant to the Injunctions of Islam, but not because the transaction of mark-up in itself is impermissible, but because after a sale is effected on the basis of mark-up, and the price is evidenced by a promissory note or a bill of exchange, including the original mark-up, no further return on the note or the bill is permissible in Shariah on the basis of the original mark-up.

The second transaction mentioned in sub-clause (i) is lease. The learned Federal Shariat Court has held that Lease being a permissible transaction, no change is necessary in this sub-clause with regard to lease. But, as observed earlier, the learned Federal Shariat Court did not attend to the fact that this clause is not meant merely to legalize the transaction of lease. It goes further. It says that if the obligation to pay rental in a lease transaction is evidenced by a promissory note or a bill of exchange, and the amount of rent is not paid by the lessee at its due date, the note or the bill will automatically subject the lessee to the payment of a further return to the lessor at the same rate at which the original rent was contracted. Let us take a concrete example: A has leased an equipment to B on 1st February 1999 for a

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period of five years. The aggregate amount of rent agreed between the parties is Rs. 100,000/- to be paid in monthly installments. B has signed a promissory note in the sum of Rs. 100,000/- to be paid on 31 January 2004. While fixing the rental, the lessor had amortized the cost of the equipment alongwith a margin of his profit at the rate of 5% per annum. If B does not pay the full amount of Rs. 100,000/- upto 31 January 2004, the sub-clause (i) provides that A will be entitled to claim further return on the promissory note at the same rate of 5% per annum that was taken into account while fixing the original rental, and thus the debt will keep on increasing on daily basis until he pays off the full amount.

The correct position according to Shariah is that once the lessee has enjoyed the usufruct of the leased asset for the period of lease, the amount of rent has become a debt due on him and it will be subject to all the rules relevant to a loan or debt, and as mentioned in the case of mark-up, if the lessee is unable to pay on account of his poverty, he will have to be given further time according to the clear Qur'anic command, and if he is purposely delaying the payment, he will be subjected to punitive steps. But his delay will not be

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taken as an automatic source of return to the lessor, as contemplated in clause (i).

It should be remembered, however, that if the lessee neither pays rent nor delivers the asset back to the lessor and keeps it in his possession even after the lease period, he will be subjected to the same rent as was fixed during the lease period for the days he kept possessing the asset, but it is on the basis of his further enjoying the asset after maturity and not for delaying the previous payable rent.

Hire-Purchase

The third transaction mentioned in the said sub-clause is hire-purchase. The learned Federal Shariat Court has commented on it as follows:

“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...”

We are afraid, the learned Federal Shariat Court did not define the agreement of hire-purchase correctly and has confused it with the concept of ‘diminishing partnership’.

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The correct nature of hire-purchase is explained by Chitty in the following words.

“A hire-purchase agreement may be defined as an agreement under which an owner lets chattels of any description out on hire and further agrees that the hirer may either return the goods and terminate the hiring or elect to purchase the goods when the payments for hire have reached a sum equal to the amount of the purchase price stated in the agreement or upon payment of a stated sum. The essence of the transaction is therefore (i) bailment of goods by the owner to the hirer, and (ii) an agreement by which the hirer has the option to return or purchase the goods at some time or another.”

Chitty: On contracts, sweet and Maxwell, London 24th edition 1977, v.2, p.461, para 3212

This transaction, as practiced in the market, has different forms, some of which may have elements not conforming to Shariah, but it is not the right place to go into these details. Even if the hire-purchase is adopted as mentioned by Chitty in its purest form, with no violation of a principle of Shariah, the question in the clause under discussion is not of the validity of the transaction in itself. The question here is one of payment of a ‘return’ on the promissory note or a bill evidencing the obligation to pay rent in a hire-purchase agreement. Therefore, it is subject to the same finding as recorded in the case of lease.

Service Charges

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Next mentioned in clause (i) is the service charge. It is rightly held by the learned Federal Shariat Court that a service charge based on the actual (secretarial) expenses incurred by the financier in advancing a loan can be claimed by him from the borrower. This principle is derived from the following Quranic verse:

وَأُيْمَلِّ الَّذِي عَلَيْهِ الْحَقُّ

And the indebted person shall dictate (the document evidencing the debt). (2:82)

Here the preparation of the document of loan has been held to be the responsibility of the borrower which naturally means that if this documentation involves some expenses, they will be borne by the borrower.

See Al-Jassas: Ahkam al-Qur'an, Lahore 1980, v.l., p.485

It lays down the principle that the expenses of secretarial nature in a transaction of loan can be claimed by the financier, on condition that they are really based on actual expenses and are not a mere ruse for charging interest.

But again, the question in the clause in discussion is not whether service charge is or is not permissible. The clause contemplates that if the obligation of a service charge

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is evidenced by a promissory note or a bill, and its amount is not paid on the due date, the note or the bill will automatically obligate the debtor to pay a 'return' on the note or the bill at the same rate as at which the original service charge was calculated.

It is now obvious that the service charge is allowed only on the basis of actual expenses and not on the basis of a 'return' at a specific rate. The secretarial expenses in advancing a loan are normally incurred only at the beginning when the loans are advanced. They are included in the original service charge evidenced by the promissory note. These are not normally recurring expenses, and if some additional expenses are incurred after the default through sending reminders etc. they are not necessarily at the same rate at which the original service charge was calculated. They can be less, and they can be more if the financier has to take a legal action against the borrower.

Sub-Clause (ii)

Now, we come to sub-clause (ii) of the proviso of sec. 79 of the Act 1881 which reads as follows:

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“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.”

Proceeding on the assumption that this clause is speaking of profit and loss sharing, which is in conformity with Shariah, the Federal Shariat Court did not touch upon it here, but has expressly declared about a paralleled provision in sec. 80 that it does not appear to be repugnant to the injunctions of Islam. The clause however needs some clarification.

Firstly, the words “when the loan was contracted” at the end of the clause are misleading. Financing on the basis of profit and loss sharing is not a loan. This word, therefore, is misconceived.

Secondly, the proportions of profit agreed to be distributed between the partners may be applicable as long as the musharakah is not finally settled or liquidated, and so far this provision is correct. But the language used in the clause may cover a situation where a certain amount of profit is deserved by the financier after the liquidation and remained

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unpaid for a certain period. The words used in the clause may allow the financier to claim a further 'return' on the unpaid amount at the same rate at which the profit was declared for the financier. This is again objectionable, because if the business is totally liquidated and what remains with the client is only the amount which the financier is entitled to receive as a debt, any 'return' charged thereupon is not permissible, being interest charged on a debt.

The upshot of the above discussion is that even though the transactions of mark-up, leasing, hire-purchase, service charge and musharakah are permissible subject to certain conditions, yet the way a further 'return' on the pronote or a bill of exchange is provided in section 79, which contemplates a return over a debt is nothing but interest. It is therefore held that section 79 is repugnant to the injunctions of Islam in its entirety. Although clause (ii) of the proviso of section 79 speaks of a musharakah and a profit and loss sharing, this type of transaction does not normally require a promissory note or a bill of exchange, because the rate of return in a musharakah is unknown, and the pronote and a bill of exchange are basically designed for a specific amount

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payable by the debtor. Therefore, retention of this truncated clause will make it applicable to a situation about which we have held that no further return is permissible in that situation. So far the amount of profit deserved by the financier remains in the business of the client, a further return on the basis of actual profits accrued to the business will be deserved by the financier, but the provisions of the agreement of *musharaka* can take care of it, its mention in the present context is not called for. The whole of section 79 is therefore held to be repugnant to the Injunctions of Islam.

Section 80

Section 80 of the Act of 1881 is almost analogous to section 79. The learned Federal Shariat Court has, therefore, subjected it to the same findings as recorded by it about section 79. We have the same comments on the findings of the learned Federal Shariat Court as detailed by us with regard to section 79. Like section 79, it is held that the whole of Section 80 is repugnant to the Injunctions of Islam.

Sections 114 and 117 (c)

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The learned Federal Shariat Court has also declared sections 114 and 117 (c) of the Act of 1881 as repugnant to the Injunctions of Islam, because both these provisions provide for interest.

Section 114 confers a right on the payer for honour of a bill of exchange to recover his paid amount alongwith interest from the original debtor. Similarly, section 117 (c) entitles an indorser who has paid the amount of the bill to recover it alongwith an interest at the rate of six per cent per annum. Both provisions provide for charging of interest. The learned Federal Shariat Court has rightly declared them as repugnant to the Injunctions of Islam. The finding of the FSC about these provisions is upheld. However, it is to be noted that if a party has paid the amount due, inclusive of the interest payable on instrument prior to the date of coming into force of this judgment, the amount so paid by the payer for honour will in all fairness have to be allowed to be received by the party paying for honour.

Before parting with our discussion on the Act of 1881, we would like to observe that the definition of a “negotiable instrument” as given in Sec. 13 does not, in itself,

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provide that it will be traded in, or that it will be transferred or indorsed at a discount. But the practice prevalent in the financial market is that it is discounted on the basis of interest. This practice is against the Injunctions of Islam and involves *riba*. A promissory note or a bill of exchange represents a debt payable by the debtor to the holder. This debt cannot be transferred to anybody except at its face value. Discounting of a bill or a note or a cheque, therefore, involves interest. In an Islamic financial market, the papers representing money or debt cannot be traded. However, the papers representing holder's ownership in tangible assets, like shares, lease certificates, *musharakah* certificates etc. can be traded in, and a viable secondary market can be developed on that basis.

IV. The Land Acquisition Act, 1894.

Sections 28, 32, 33 and 34 of the Land Acquisition Act, 1894 to the extent these contain the provisions relating to "interest" have been held, as per discussion contained in paragraphs 279 to 296 of the impugned judgment, to be repugnant to the injunctions of

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Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (P.B.U.H.). Section 28 of the Land Acquisition Act reads as under:-

“28. Collector may be directed to pay interest on excess compensation.- 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.”

A bare perusal of section 28 manifests the intention of the provision i.e. to compensate the land owner who was deprived of the land without payment of the true price payable. The deprivation so made is sought to be calculated through the prescribed mechanism i.e. compensation is being assessed at the rate of 6 per cent per annum difference of the amount payable for the period that the land owner was deprived of the usufruct of the land. The principle sought to be given effect is that an owner cannot be deprived of his property except by paying adequate and proper price/compensation thereof and that the rights in the property are not to be treated as transferred unless proper

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compensation is not paid. Section 28 as amended/
substituted for Balochistan by Baluchistan Act 13 of 1985
reads as under:-

“In addition to the compensation fixed on the basis of market value as prevailing on the date of notification under section 4, an additional amount of fifteen per cent per annum of the compensation so fixed shall be paid from the date of the notification under section 4 to the date of payment of compensation.”

Similar provision for additional compensation was made in Sindh by adding/inserting section 28-A after section 28 in the Land Acquisition Act by Sindh Ordinance No.23 of 1984.

Section 32 of the Land Acquisition Act reads as under:-

“32. Investment of money deposited in respect of land belonging to persons incompetent to alienate.- (1) If any money shall be deposited in Court under sub-section (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

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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 applied 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 moneys are for the time being invested, and for the payment out of Court of the principal of such moneys, and of all proceedings relating thereto, except such as may be occasioned by litigation between adverse claimants.”

This section regulates the amount of compensation which for the reasons given in the previous section i.e. section 31 of the Land Acquisition Act could not be paid to the rightful owner.

Such amount lying with the Court is to be invested in the purchase of other land to be held under the like title and conditions of ownership as the land in respect of which such money has been deposited was held, or if such purchase cannot be effected forthwith, then in such Government or other approved securities. This section further provides that the interest or other proceeds arising from such investment shall be paid under the direction of the Court to the person/persons who are found entitled to the possession of the land acquired.

Then comes section 33, which reads as under:-

“33. Investment of money deposited in other cases.- 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.”

This section provides for regulation of the money deposited in the Court for any cause other than the one mentioned in

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section 32 of the Land Acquisition Act and provides that such money deposited with the Court is to be invested in Government or other approved securities and the interest or the proceeds of any such investment are to be paid to the person/persons found entitled on the basis of their interest in the land and their entitlement to receive benefit from the land in respect of which the money had been deposited.

Section 34 may now be taken up. This section, as originally enacted was as under:-

“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 with interest thereon at the rate of six per centum per annum from the time of so taking possession until it shall have been so paid or deposited.”

This section as amended by West Pakistan Act III of 1969 substituting the words “interest thereon at the rate of six per centum” with the words “Compound interest at the rate of eight per centum” and adding a Proviso thereto was reproduced in the impugned judgment, in the following words:-

“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

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shall pay the amount awarded with 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:

Provided 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.”

Section 34 was omitted altogether from the Land Acquisition Act as regards its application in Province of Balochistan vide Balochistan Act XIII of 1985 (section 11). It is further to be noted that both these amendments in section 34 were made not applicable to the Province of Sindh vide Land Acquisition (West Pakistan Amendment) (Repeal) Ordinance, 1971 (Ordinance VI of 1971). As for NWFP, vide NWFP Ordinance V of 1983 in the Land Acquisition Act, 1894, for section 34, the following section was substituted:-

“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 with simple interest thereon at the rate of six per centum per annum from the time of so taking possession until it shall have been so paid or deposited.”

It appears that learned Judges of the Federal Shariat Court were not assisted properly by presenting before

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them the provisions of section 34 as amended and in force in the four Provinces. This section as amended came under consideration before the Peshawar High Court and the Lahore High Court. In the case of Government of NWFP through Collector, Land Acquisition, Nowshera versus Muhammad Sharif Khan (PLD 1975 Peshawar 161), learned Judges of the Peshawar High Court observed that the amount of compensation includes the amount payable in consideration for compulsory acquisition by way of interest. In Islamia University, Bahawalpur through its Vice-Chancellor versus Khadim Hussain and 5 others (1990 MLD 2158 – Lahore), learned Judges of the Lahore High Court observed, “that the right to receive the interest under sections 28 and 34 is a right to receive the compensation on account of deprivation of one’s land under compulsory acquisition proceedings under the Act. The award of interest is neither a repayment of additional amount on loan nor it is an accretion on compensation in favour of land owner on account of loss of land under coercive statutory proceedings. It is in fact giving an equivalent or a substitute of equal value. It is in fact “that compensation” by which an injured party is

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restored to its formal position”. This second case was noticed in the impugned judgment.

This Act, as noted in the impugned judgment, came up for consideration before the Council of Islamic Ideology for the first time in its meeting held on 19-10-1976 and 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 دہی کہ حکومت کو حصول اراضی کا ایسا اختیار حاصل ہے اور قرآن و سنت کا کوئی حکم اس میں مانع نہیں' نیز ربا کے ضمن میں کونسل جو سفارش کرے گی وہ ان تمام قوانین کو متاثر کرے 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 ربا کے مسئلہ پر کونسل کی سفارش کے تابع ہوں گی۔"

It again came up for consideration before the Council of Islamic Ideology on 14-3-1982 under the Chairmanship of Dr.Tanzil-ur-Rahman, J., as he then was, wherein the following opinion as regards these sections was expressed:-

“The acquisition of land is against awarding compensation to the land-owner 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

section 28, 32 and 34 are in conflict with Shari'ah.”

It is further noted in the impugned judgment that the Council of Islamic Ideology agreeing with the above opinion resolved that the Land Acquisition Act should be amended accordingly.

This Act (Land Acquisition Act) was also considered by the Federal Shariat Court in SSM No.14/P of 1983 and judgment was delivered by it on 27-3-1984. The said judgment was set aside by the Shariat Appellate Bench of the Supreme Court in Shariat Appeal No.22 of 1984 and the matter was remanded to the Federal Shariat Court vide judgment of this Court dated 13-1-1988 for fresh decision. The remand matter came up before the Full Bench of the Federal Shariat Court on different dates and the same was adjourned from day to day and was still pending when the impugned judgment was delivered by the three learned Judges of the Federal Shariat Court.

It is pertinent to note that the contention of the learned counsel for the Federation was that the amount of compensation awardable under sections 28 and 34 of the

Land Acquisition Act represents the compensation on account of deprivation of the land under compulsory acquisition proceedings and so does not qualify to be treated as 'Riba' as laid down by the Holy Quran and Sunnah of the Holy Prophet (p.b.u.h.) and in support of this contention reliance was placed on the judgment of the Lahore High Court (1990 MLD 2158) wherein notice was also taken of the three judgments of the High Courts of Allahabad, Patna and Madras rendered before partition. Learned Judges of the Federal Shariat Court surveyed these judgments and commenting on Behari Lal's case observed that 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

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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 u/s 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*.”.

As regards section 32 of the Land Acquisition Act which provides for investment of the amount of compensation deposited with the Collector either in purchase of the land or other approved securities, it was observed that the said securities should be those which are non-interest bearing. To this view obviously no objection can be raised as the financial institutions have schemes and securities which are non-interest bearing and the Courts while making directions should regulate the investments in Shariah Compliant modes of Finance.

Learned Judges of the Federal Shariat Court also noticed the judgment of this Court in Qazilbash Waqf and others versus Chief Land Commissioner, Punjab, Lahore and

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others (PLD 1990 SC 99) to the effect that the third condition of compulsory acquisition/purchase is that compensation is to be paid either before taking over the possession or within such period that cannot be considered to be delayed payment but under section 13 this payment has been ordered to be made through interest bearing bonds. The principle thus deducible from this observation is that the payment of the price of the land has not only to be adequate and properly counter valued but also to be made before or simultaneously with taking over of the possession of the land purchased or otherwise if the payment is not so made, the same is required to be made within reasonable time which cannot be termed as delayed payment.

The question requiring determination is whether sections 28 and 34 of the Land Acquisition Act are based on such a concept. The judgments of Peshawar High Court and the Lahore High Court noted above have taken the view that the compensation which the Court has been empowered to award under these two sections is compensation on account of deprivation of the use of the land and does not fall within the definition of 'Riba' as contemplated by Holy Quran and

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Sunnah of the Holy Prophet. The three Indian cases noticed in the impugned judgment under the Income-tax Law also held the amount received on account of interest as compensation and damages for loss of right to retain possession of the property. It was further observed in Allahabad High Court's case [Behari Lal Bhargava versus Commissioner of Income-tax, C.P. and U.P. (AIR 1941 Allahabad 135)] that section 28 of the Land Acquisition Act was designed as convenient method of measuring such damages in terms of interest. In the Patna High Court's case [Commissioner of Income-tax, Bihar and Orissa versus Rani Prayag Kumari Debi (AIR 1939 Patna 662)] it was held that the amount received by the assessee by way of damages is not income amenable to assessment under the Income-tax Act, 1922. Though it came to the conclusion, in the peculiar circumstances of the case, that the amount was not income but merely an amount received on account of damages for the detention of the properties was also not accepted. In the Madras High Court's case [Revenue Divisional Officer, Trichinopoly versus Venkatarama Ayyar and another (AIR 1936 Madras 199 – wrongly noted as AIR 1932 Madras 199

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in the judgment of the Federal Shariat Court)] it was observed that right to receive interest under section 34 of the Land Acquisition Act took the place of the right to retain possession and that the foundation of the Land Acquisition 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.

Learned Judges of the Federal Shariat Court in the impugned judgment have not accepted the aforesaid pleas for the reason that it is inappropriate to apply test of finding out a sum to be income under the Income-tax Act for judging it to be Riba or otherwise as the real test is one which is provided by Holy Quran and Sunnah of the Holy Prophet (p.b.u.h.). It was held in the impugned judgment that increase or addition in the form of interest u/s 28 and 34 over the debt payable in the form of compensation by acquiring authority to the land owners falls in the category of Riba.

The nature and purpose of the payment of additional amount under both the sections merits in our view further consideration. The reasoning given in the Allahabad case (AIR 1941 Allahabad 135) which is also the basis of the

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judgment delivered in Madras case (AIR 1936 Madras 199) came to be considered by the Indian Supreme Court in the case of Dr.Sham Lal Narula versus The Commissioner of Income-tax, Punjab Jammu and Kashmir, Himachal Pradesh and Patiala (AIR 1964 SC 1878) and was specifically overruled. The reasoning recorded by the Supreme Court of India is as follows:-

“S.34 Land Acquisition Act itself makes a distinction between the amount awarded as compensation and the interest payable on the amount so awarded. The interest has to be paid on the amount awarded from the time the Collector takes possession until the amount is paid or deposited. A perusal of the provisions of S.23 shows that interest is not an item included in the compensation for any of the matters mentioned therein; nor it is mentioned as a consideration for the acquisition of the land. Under cl. (2) of S.23, the Legislature in express terms states that in addition to the market value of the land the court shall in every case award a sum of 15 per cent, of such market value in consideration of the compulsory nature of the acquisition. If interest on the amount of compensation determined under S.23 is considered to be a part of the compensation or given in consideration of the compulsory nature of the acquisition, the Legislature would have provided for it in S.23 itself. But instead, payment of interest is provided for separately under S.34 in Part V of the Act under the heading “Payment”. It is so done, because interest pertains to the domain of payment after the compensation has been ascertained. It is a consideration paid either for the

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use of the money or for forbearance from demanding it after it has fallen due. Therefore, the Act itself makes a clear distinction between the compensation payable for the land acquired and the interest payable on the compensation awarded.”

This judgment was followed by the Supreme Court of India in AIR 1970 SC 1702 and AIR 1972 SC 260.

Learned Judges of the Federal Shariat Court were right in observing that the test of finding out whether a sum is income under the Income-tax Act cannot be applied for determining the nature of the said amount to be Riba or otherwise. This question, as pointed out in the impugned judgment itself is to be answered according to the touchstone of the principles deduced by the jurists and scholars in Islamic Law and Shariah. The first principle applicable is that in case of compulsory acquisition the compensation or the value of the land and the property acquired is to be paid either before taking over of the possession of property or simultaneously with the taking over of the possession or within such period of time after taking over of possession that the time involved may not be considered as real (mentionable) delay in making payment. If there is any

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delay, then it will be considered and treated that interest in the ownership of the land to that extent has not been passed. This is so treated so as to impress upon the necessity of making of the payment of the due price/counter value and it is for this reason that section 28 of the Land Acquisition Act provides for awarding an amount with reference to the amount of compensation which was less paid or assessed or fixed by the Collector.

From the viewpoint of Shariah, the acquisition is a compulsory purchase of a property from the owner and the compensation awarded to him is the price of such purchase. One of the necessary conditions of a permissible acquisition, as laid down by this Court in the case of Qazalbash Waqf v. Chief Land Commissioner (PLD 1990 sc. 283) is that the owner is given a fair market price of the property before or at the time of taking possession. If the collector has paid less than the fair market price, it means that he has compelled the owner, not only to surrender his property without a fair price, but also to face the hardships of litigation. The function of the Court in this case is to fix a fair price of the property. While discharging this function the court can take into

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consideration the injustice done to and the hardships suffered by the owner of the property and may thus increase the price so as to make it more than the normal market price. Instead of adopting this simple mode, section 28 of the Act 1894 has first fixed the price by specifying the ‘excess’, then it has allowed an additional amount in the name of interest at the rate of 6% per annum. That is why the Federal Shariat Court has declared it repugnant to the Islamic injunctions, because once the price is fixed and it became a debt, any increase over it calculated at per cent per annum basis makes it interest, hence prohibited. On the contrary, if the price itself is increased for the considerations mentioned above, it will not entail interest, because the price of a property may be fixed on the basis of many considerations, including the hardship suffered by the seller at the hands of the purchaser in the same transaction.

Hence, awarding of compensation and the mechanism adopted in original section 28 as well as provided in Provinces of Punjab, Sindh and NWFP is objectionable from Shariah point of view. This section as is enacted in Baluchistan vide section 9-A Baluchistan Act 13 of 1985 also

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does not provide permissible mechanism to allow proper and adequate compensation. These sections shall be substituted by a provision to the following effect:-

“In addition to the compensation fixed on the basis of market value as prevailing on the date of notification under section 4, an additional sum at the rate of fifteen per centum per annum (or the rate fixed from time to time) of the compensation so fixed shall be added to the compensation due and payable from the date of notification under section 4 till the date of payment of compensation finally.”

As regards section 34, the amount awarded, as rightly observed in the Indian Supreme Court judgments, is not compensation paid to the owner for depriving him of his right to possess the land acquired but is given to him for deprivation of the use of money representing the compensation for the land acquired and as such is “interest” paid for the delayed payment of the compensation amount.

As in the case of section 28, the finding of the learned Federal Shariat Court about this section is justified with regard to the language used and the manner specified for imposing an additional amount over the original awarded amount. But, while correctly analyzing the nature of this additional amount we should not overlook the fact that the

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land-owner has been deprived of the possession of his rightfully owned property without any compensation. As we have already mentioned in our discussion on, sec. 28, Acquisition from the point of view of Shariah is a compulsory purchase by the government. One of the basic conditions for the validity of such a compulsory purchase, as held by this Court in the case of Qazalbash Waqf v. Land Commissioner (PLD 1990 sc. 283) is that the fair market price is given to the land-owner before or at the time of taking possession or immediately after it. It means that a valid sale, in the case of Acquisition, takes place only when the price is actually paid by the government to the land-owner. Taking possession without the payment of the price, in the case of acquisition, does not in itself amount to effecting a valid sale. The land-owner, therefore, is entitled to claim a rent for the period commencing from the date of possession to the date of the payment of the price (the awarded amount) whereby the actual valid sale shall have taken place. This rent should not be less than the fair market rent in the relevant period.

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What is wrong in section 34 is, firstly, the use of the word ‘interest’ and secondly, determining the rate of eight per cent per annum, with no regard to the rental value of the acquisitioned property. However, it may be provided that the land-owner shall be paid the fair rental value, or an amount equal to 8% per annum of the awarded amount, whichever is higher, from the time of taking possession to the time when the amount of compensation is actually paid to him.

With these observations and the direction noted above the judgment of the Federal Shariat Court with regard to Land Acquisition Act 1894 is upheld.

V. Code of Civil Procedure, 1908

The provisions of Code of Civil Procedure wherein the word “interest” appears have been discussed in paragraph 297 to paragraph 311 of the impugned judgment. In paragraph 304 it is mentioned that the Shariah position in relation to interest, mark-up, lease, hire-purchase and service charges has been dealt with while examining the provisions of Negotiable Instruments Act, 1881 and the same

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observations do equally apply to the provisions of the Code of Civil Procedure. Sections 34(1)& (2), 34-A (1) & (2) and 34-B(1)(a) of the Code of Civil Procedure were declared repugnant to the injunctions of Islam following the discussion on the question of prohibition of the interest.

Section 34, 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.

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 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’

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on such public dues at the rate of two per cent., above the bank rate.

Subsection (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.

Section 34-B has been newly added by Ordinance LXIII of 1980. It deal with interest on dues of a 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.

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

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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 higher.

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.

Section 34B (b) and (c) relate to the recovery of money owed to a banking company by a client who entered into a transaction of mark-up leasing, hire-purchase, service charge or profit and loss sharing. The learned Federal Shariat Court has subjected these provisions to the same comment as it has made in relation to sections 79 and 80 of the Negotiable Instruments Act. We have already explained the

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shortcoming in the finding of the Federal Shariat Court in this respect while discussing sections 79 and 80 of the Negotiable Instruments Act. The same comments are applicable here with greater force, because these provisions of the Code are meant in more express terms for the recovery of the previous obligations.

Consequently, sub-sections (b) and (c) of section 34 B of the Code are hereby held to be repugnant to the Injunctions of Islam.

The provisions of section 34, and 34-A conferred a power on the Court to grant additional sum over and above the decreed amount and the sums to be allowed have been named as interest. We have already held that any amount over and above the principal amount of debt is Riba, hence prohibited. Therefore, any additional amount contemplated in these provisions does fall within the definition of 'Riba'. However, it is appropriate at this stage to take due notice of some of the submissions emphatically canvassed by the economists and bankers, particularly of Mr.Muhammad Umar Chhapra and Mr.Shahid Siddiqui to the effect that no banking system can successfully operate and particularly the

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Islamic Finance if the lending institutions, corporate bodies, firms and individuals do not on their own abide by their commitments in time in making repayments and are not otherwise made to repay financial assistance/loan received by them according to the agreed upon time limit. They emphasized that recovery system through legal means and Courts should necessarily be so designed as to make possible recovery within weeks. Mr.Chhapra was of the view that if the repayment schedule is not adhered to by the borrowers themselves or they are not made to abide by the repayment schedule by the legal system and the Courts, Islamic Finance cannot flourish and that is why the moral hazard involved in the Islamic economic system has to be taken care of by the law Courts. Mr.Shahid Siddiqui in his address submitted that firstly the borrowing is to be resorted to by a Muslim as a last resort as otherwise Islamic economic system contemplates for other arrangements like masharaka, mudarabah and profit and loss sharing systems for growth of business and industry. He added that veil of incorporation should not be allowed to be used as a shield to commit fraud and avoid the liabilities incurred. The concept of a company being a separate and

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independent entity has to be curtailed in its scope and the persons forming that legal entity have to be held responsible for the failure of the business concern, company or the venture, and the representation made in the feasibility reports and other allied documents, on consideration of which the financial assistance was received should be taken on the failure of the business of the venture to be fraudulent and false representations entailing penal consequence under the penal law of the land. He argued that the burden should be on the persons forming the ostensibly failed venture to prove that the representations made by them in feasibility reports and other documents were true and that the failure was on account of factors beyond their control as otherwise such defaulters after devouring national wealth would continue to flourish inside and outside the country as is the case of the present defaulters of banks and financial institutions. The religious scholars as well as the economists can provide such legal measures which will make the recovery of the dues from the defaulters effective as well as timely. They pointed out that the Holy Prophet (p.b.u.h.) did not join Sala-tul-Janazah of a person who died leaving his debt unpaid. It is

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for such a reason that at the Janazah prayer, legal representatives of a deceased person make a declaration that if any one has any monetary demand against the deceased he may come forth with his claim so that it may be paid and discharged by heirs or they should remit/give up the loan in the name of Allah Almighty. Such an offer/declaration is made in the Janazah prayers of knowledgeable Muslims and people do make claims and receive satisfaction of their claim/debt or they give-up their claim or loan in the name of Allah Almighty so that the deceased soul may rest in peace, but such a declaration is never seen to have been made in case of persons of wealthy class most probably for the reason that they make distinction between personal liability and liability of the venture of the company being separate legal entities though in most of such cases they have executed the documents guaranteeing personally return of the amount involved.

It is also pertinent to note that in our legal system the difficulties of the decree-holders compound when the decree is sought to be executed. The obtaining of decree itself is not an easy task as all sorts of frivolous objections

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and delaying tactics are adopted/used for delaying completion of the trial. In addition to the delaying tactics adopted by the litigants the heavy work load of the Courts also contributes in delaying early and timely decision of causes. The number of cases daily fixed for hearing is so numerous that Presiding Officers cannot afford to give more than a few minutes to each case. The cases keep on lingering for years together due to all these factors.

The provisions of the Code of Civil Procedure are, therefore, to be viewed in the aforementioned perspective in addition to the legal question whether the power conferred by these provisions on a Court to grant additional amount over and above the amount decreed, though the said additional amount is called interest, falls within the definition of Riba.

It may be noted that the power conferred on the Court by law to grant additional sum is not premised on any act of the party to the transaction yet this grant of additional sum is without a counter value and is a payment receipt of which law permits over and above the principal amount. Thus indirectly riba al-nasiah has been allowed to be practiced as it is riba that is paid and received in a loan

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transaction and this is the riba that has been prohibited by the Holy Quran. If the said provision is taken to be conferring a power on the Court to allow compensation to the lender/deed holder for the loss caused to him by not returning the amount of liability through vexatious pleas and dilatory tactics after the filing of the suit or even after passing of the decree then granting of such power to allow compensation cannot be objected to but the compensation at a fixed rate to be awarded in each and every case based on opportunity cost of money is not permissible as in each case such a power will have to be exercised in consideration of the circumstances prevailing in that particular case. The legislature can also confer a power on the Court to impose penalty on a party who makes a default in meeting out his liability or who is found guilty of putting up vexatious pleas and adopting dilatory tactics with a view to cause delay in decision of the case and in discharging his liabilities and from the amount of such penalty a smaller or bigger part depending upon the circumstances can be awarded as solatium to the party who is put to loss and inconvenience by such tactics. The amount of penalty can be received by the

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State and used for charitable purposes and in the projects of public interest including the projects intended to ameliorate economic conditions of the sections of the society possessing little or nothing i.e. needy people/peoples without means. The provisions of the Code of Civil Procedure, quoted above, are therefore, held to be repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet for the reasons given above and these sections may, therefore, be suitably amended keeping in view the observations given above.

Following are the others provisions of the Code of Civil Procedure commented upon in the impugned judgment:-

- i. Section 2(12)
- ii. Section 35(3)
- iii. Section 144(1)
- iv. Order xxi, Rule 11 (2)(g)
- v. Order xxi, Rule 38
- vi. Order xxi, Rule 79(3)
- vii. Order xxi, Rule 80(3)
- viii. Order xxi, Rule 93
- ix. Order xxxiv, Rule 2(1) (a)(i), (iii), (c) (i), and (ii)
- x. Order xxxiv, Rule 2(2)
- xi. Order xxxiv, Rule 4
- xii. Order xxxiv, Rule 7(1)(a) (i)&(iii) and (c)(i)&(ii)
- xiii. Order xxxiv, Rule 7(2)
- xiv. Order xxxiv, Rule 11
- xv. Order xxxiv, Rule 13(1)

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xvi. Order xxxvii, Rule 2

xvii. Order xxxix, Rule 9

The word “interest” wherever appearing in these provisions shall also be deleted and substituted appropriately.

Order xxxvii, Rule 2 [2 (a) and (b)] are similar to the provisions of sections 79 and 80 of the Negotiable Instruments Act, 1881 and are subject to the same findings as recorded by us with regard to that Act. Both these provisions (i.e. sub-rules (a) and (b) of Rule 2, Order xxxvii) of the Code are hereby declared repugnant to the Injunctions of Islam.

Rule 79 (3) of Order xxi of the code provides that if, in pursuance of a decree of recovery, a debt receivable by the defendant is sold, the Court shall prohibit the original creditor of that debt from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser.

Similarly, Rule 80(3) of the Order xxi of the Code contemplates the transfer of a negotiable instrument, required for the purpose of recovery, and provides as under:

“Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some

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persons to receive any interest or dividend due thereupon and to sign a receipt for the same...”

Here again the appointed person has been allowed to receive interest. That is why the Federal Shariat Court has included it in the objectionable provisions.

The judgment of the Federal Shariat Court about these two provisions is upheld to the extent noted above.

VI. **Co-operative Societies Act, 1925**

Section 59(2)(e) of the Co-operative Societies Act, 1925 and Rule 14(1)(h), Rule 22 and Rule 41 along with Appendix I to IV have been discussed in paragraphs 312 to 321 of the impugned judgment and declared repugnant to Injunctions of Islam (PLD 1992 FSC 1). Section 71(2) clause (ee) of the Co-operative Societies Act, 1925 as well as sub-by-law (6) of Bye-law (3) of the National Industrial Co-operative Finance Corporation Limited to the extent that such provide for “interest” have also been declared repugnant to the injunctions of Islam vide PLD 1992 FSC 537 and PLD 1992 FSC 535 respectively.

The word “interest” appearing in these provisions has been ordered to be deleted on the ground that charging,

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levying and recovery of interest is not permissible under the injunctions of Shariah. The impugned judgments of the Federal Shariat Court to that extent are upheld.

(VIII) The Insurance Act, 1938.

The following provisions of the Insurance Act, 1938, were challenged before the Federal Shariat Court and the same to the extent that these provide for range of rate of interest, guarantee as to the interest amount, payment of interest on instalments and other conditions as to interest, were held to be repugnant to the injunctions of Islam in paragraphs 322 to 324 of the impugned judgment:-

S.3BB(1)(b).- Prepare statement of yield indicating the range of rates of interest or yield on the investment of the insurers' funds.

Sub-section (3) of section 27.- In computing the assets required by the 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 Pakistan rupee may, if such sum is invested in securities of, and guaranteed as to principal and interest by,

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the Government of the country in whose currency such policies are expressed, be taken into account.

S.29(8)(b).- the loan is of such amount that the instalment 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;

(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 prescribed.

S.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 requirements, whichever is later, pay interest as specified in sub-section(2) on the amount so payable unless he proves that such failure was due to circumstances beyond his control.

(2) The interest under sub-section (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 contain an abstract in which shall be stated –

(d) the rate of interest assumed.

In the first provision the words “rates of interest” may be deleted in consonance with the objectives of prohibition of interest under Shariah. The word “interest” appearing in subsection (3) of section 27 need not be omitted as this pertains to securities of, and guarantees as to principal and interest, by the Government of the country in whose currency such policies are expressed. This as such pertains to the assured of foreign origin and securities of foreign Government. This amount, however, is to be taken notice in computing the investment required to be invested by an insurer. This aspect was not taken note of and merely as the word “interest” appeared, its deletion was directed. The word “interest” appearing in the other provisions may, however, be deleted but it should be substituted with suitable amendments keeping in view the purposes and the policy of the law on the lines indicated in this judgment. The purpose should be to effectively implement the objectives of eliminating riba from the economy of the society without hampering the economic activities and also ensuring at the

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same time the growth and progress of the economy together with fairness to meet the obligations and liabilities. However, the question whether Insurance business as in vogue is in accord with Injunctions of Islam is a different question, which is not under consideration in these appeals.

(IX) **State Bank of Pakistan Act, 1956**

Section 22(1) of the State Bank of Pakistan Act, 1956 has been scrutinized in paragraphs 325 to 328 of the impugned judgment and purchase of bills and other commercial instruments like Debentures, Bonds etc. on the basis of interest has been declared to be repugnant to the injunctions of Islam by the Federal Shariat Court. This view is maintained and upheld. Obviously, the mode of transacting these financial products/instruments has to be changed to a mode compatible with the Islamic modes of finance. We would, therefore, leave it to the economists and bankers to adapt to the new situation keeping in view the Quranic prohibition of riba.

(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.**

These laws pertaining to money lending and money lenders have been dealt with in paragraphs 329 to 331 of the impugned judgment. These laws, it was rightly observed, being alien to Islamic Injunctions and the concept of Islamic social justice, can have no place on the statute book of the land and these laws or the rules framed thereunder were rightly declared to be repugnant to the Injunctions of Islam.

- (XVI) **Agricultural Development Bank Rules, 1961.**

Paragraphs 332 to 336 of the impugned judgment deal with the vires of Rule 17 of the Agricultural Development Bank Rules, 1961 and the provisions of sub-rules (1), (2) and (3) on the question of interest have been declared to be repugnant to the injunctions of Islam and have

been directed to be deleted. Sub-rules (1) (2) and 3 of Rule 17 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 instalment 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.”

Obviously the levy, charging and recovery of interest cannot be allowed to continue in view of the Shariah prohibition. These rules should, therefore, be suitably amended on lines indicated in this judgment.

(XVII) Banking Companies Ordinance, 1962

The learned Federal Shariat Court has declared section 25(2) of the Banking companies Ordinance 1962 (hereinafter referred to as ‘Banking Ordinance’) repugnant to the injunctions of Islam to the extent of interest and mark-up.

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The section empowers the State Bank of Pakistan to give certain directions to banking companies, including a direction about the rates of interest, charges or mark-up to be applied on advances, or prohibiting the giving of loans to any borrower on the basis of interest.

So far as the provision of interest in this section is concerned, it is against the Injunctions of Islam in the light of the detailed discussion already undertaken about riba. However, the learned Federal Shariat Court has also directed to delete the word “mark-up” from this section, keeping in view the distorted method in which the concept is applied in the banks today. We have already held in the preceding paragraphs that the way ‘mark-up’ is applied at present is nothing but riba, hence prohibited. But at the same time we have held that the concept of a real sale, based on mark-up, is not impermissible in its origin, subject to the conditions mentioned in judgments specially in paras 191 and 219 of the judgment of Mr.Justice Muhammad Taqi Usmani. The major condition for the permissibility of a mark-up transaction is that it should not be charged on lending or advancing money. It must be based on the genuine sale of a commodity with all

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its substantive consequences. But section 9 of the Banking Ordinance prohibits a bank from trading. It is provided in section 9 that:

“Except as authorized under section 7, no banking company shall directly or indirectly deal in the buying or selling or bartering of goods or engage in any trade or buy, sell or barter goods for others, otherwise than in connection with bills of exchange received for collection or negotiation.”

When the word ‘mark-up’ used in section 25 is read in juxtaposition with section 9, it is certainly repugnant to the Injunctions of Islam, because a valid mark-up transaction cannot be imagined without a genuine sale effected by the bank. Therefore, the provision of mark-up and the provision of section 9 cannot stand together. Either of the two must be struck down.

We are conscious of the fact that the transaction of a sale of murabaha based on mark-up, even after fulfilling its necessary conditions is not an ideal mode for the extensive use of Islamic banks. Still, the banks will have to resort to this transaction in certain cases, especially in the initial phase of transformation. It is, therefore, more necessary to strike down section 9 as it stands at present, instead of striking

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down the transaction of 'mark-up' totally, because provisions of section 9 are an obstacle in the way of a true Islamic banking. These not only invalidate the transaction of murabaha or bai' mu'ajjal according to shariah, but also hamper the natural function of leasing hire-purchase musharaka or mudaraba transactions. Section 9 was, in fact, designed in the context of interest-based banking in which the banks deal in money and papers only, while a true Islamic financing is always backed by real assets, and this is the basic distinctive feature of Islamic banking which can rid the economy from many evils of the interest-based banking already detailed before. The concept of Islamic banking cannot be translated into reality unless it is realized that the banks are not meant only to deal in money and papers, but their financing is based on and firmly related with real business activities. The elimination of interest can neither be effective nor feasible without lifting the bar imposed on the banks by section 9 of the Banking Ordinance. We are of the firm view that the correct, just and practicable decision about the concept of mark-up provided in section 25 is not possible unless the bar imposed by section 9 is relaxed.

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Although the learned Federal Shariat Court has not touched upon section 9, yet the principle laid down by this Court in the case of Province of the Punjab vs. Amin Jan Naeem & 4 others (PLD 1994 SC 141at 156) is as follows:

“We have held in a number of cases that where a proper and just settlement of the issues involved in a law under challenge is not possible without striking another provision of the same law, the Court has the jurisdiction to hit that provision also. Reference may be made to the case of Qazalbash Waqf v. The Land Commissioner, Punjab (PLD 1990 SC. 99, para 187, p. 280) where sections 60-A of the Punjab Tenancy Act, 1887 has been struck down without an appeal from the public”. (para 30)

In the light of the principle laid down in the above case, we are satisfied that a just decision about the ‘mark-up’ envisaged in section 25 of the Banking Ordinance is not possible without striking down section 9. It is therefore, held that the word ‘mark-up’ in Section 25 may be retained, however section 9 of the same Ordinance is repugnant to the Injunctions of Islam in so far as it prohibits banks from purchase and sale of goods and other trading activities necessary for adopting the Islamic modes of financing like bai’ mu’ajjal and murabaha based on mark-up, leasing, hire-purchase and musharaka in their true and genuine forms.

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Section 9 shall be substituted to accommodate all the Islamic modes of financing with their necessary requirements.

(XVIII) Banking Companies rules, 1963

Relevant part of Rule 9 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 company maintained with it with the interest realized on rupee securities, subject to

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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).”

Sub rule (2) provides for crediting of interest on foreign approved securities on realization while sub-rule (3) relates to crediting of interest realized on rupee securities. In paragraph 342 of the impugned judgment it is stated that in the face of the detailed discussion held, 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 Quran and Sunnah of the Holy Prophet (p.b.u.h.) The retention of interest on foreign approved securities already realized need not be refused. The amount so received is to be credited to Baitul Mal and can be used for discharging the foreign debt and meeting out the other liabilities. Such a transitory and provisional course of action is allowed by Shariah. Same way, the interest received on Rupee securities already issued and held can be similarly dealt with. However, in future such transactions which involve interest shall not be permitted.

(XIX) **The Banks (Nationalization) Payment of Compensation Rules, 1974.**

Rule 9 which provides for reckoning of interest from the date of acquisition of the shares and its annual payment and the procedure of payment of interest have been dealt with in paragraph 343 to paragraph 350 and these provisions referring to interest have been held to be repugnant to the injunctions of Islam. We are of the view that instead of merely deleting the word “interest” from the various clauses of rule 9, a new rule should be framed on the lines indicated in this judgment ensuring effective enforcement of prohibition of interest in future. However, the return or the profit relating to the shares shall be managed through Shariah Compliant modes.

(XX) **The Banking Companies (Recovery of Loans) Ordinance, 1979.**

Section 8 of the Ordinance had come under scrutiny in paragraphs 351 to 354 of the impugned judgment and whole of section 8(2)(a) relating to interest and section 8(2)(b) relating to mark up have been held repugnant to the Shariah injunctions. These provisions should be dealt with

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on the lines indicated in this judgment while discussing the relevant provisions of Code of Civil Procedure.

We have held in paras above that the framing of the laws and economic and monetary policies is the function of concerned organs and institutions of the State and not of this Court but as the Government has insisted in its application that guidelines be provided in respect of the issues raised and as the economists, religious scholars etc. have expressed their opinion with respect to these issues and with respect to the infrastructure needed to successfully practice Islamic economic system, we hereby proceed to record guidelines for the consideration of the concerned quarters.

The scholars, economists and auditors to name a few of them Dr.Muhammad Umer Chhapra, Dr.Shahid Husan Siddiqui, Mr.Ibrahim Sidat, Syed Muhammad Hussain, Mr.Iqbal Khan and Mr.Faheem Ahmad of Vital Information Services (Pvt.) Limited, were unanimous in the submission that elimination of Gharar, deceit and fraud is necessary by providing effective and necessary legal framework in order to ensure success of any economic

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system. It was added that the small investors who invested either in the stock markets or in bank deposits have been losers for the reasons that their savings have been eroded partially or fully because of presence of Gharar and speculative characteristics of our stock markets. A reduction of nearly Rs. 300 billion in the market capitalization has gone unheeded. Similarly, defaults on bank loans amounting to approximately Rs.300 billion restricted these institutions to offer a reasonable return on deposits of small investors. It was added that loopholes in the economic system allow defaulters to get away without any resistance and as such stringent measures/regulations are required to check speculative activities in the stock markets as also by formulating and administering monetary policy by an independent body which is competent and powerful enough to seek compliance of the monetary policy including borrowing activity prescribed under the laws/regulations to be framed and enacted in terms of the constitutional mandate of Article 79 of the Constitution. Dr.Muhammad Umar Chhapra, a renowned Muslim economist, laid stress on the recovery of the defaulted loans within a reasonable time,

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which according to him, should not be more than one month, by enacting proper laws and creating adjudicatory process, efficient and competent to secure recovery from the defaulters within the prescribed time frame, if the success of the Islamic economic system is to be ensured. He was of the view that if the cases of default of the financial institutions are allowed to linger on for months and years, the availability of funds for the economic activity cannot be ensured and the whole system would collapse. He, therefore, suggested that measures will have to be adopted to ensure elimination of deceit so as to meet the moral hazards likely to arise in the actual working of the Islamic banking system as well as to ensure transparency and regulation of the economic system on sound and practicable norms. Mr.Faheem Ahmad particularly referred to the laws, prudent regulations and other measures being adopted by the United States for the purposes of elimination of Gharar, deceit and fraud. It was pointed out that the monetary policy is administered in America by the Federal Reserve (FED) of the USA similar to the central bank of a country which is an autonomous body outside the influence of President, Congress and Courts in

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USA, to regulate supply of money and credit in the economy. The Freedom of Information Act, 1966 (FOIA - 1966) enjoins all US Government agencies to disclose records upon request. The right so conferred has also been made enforceable through Court. All agencies of the Government are required to disclose their records upon receiving written request for the same except for such records as are protected from disclosure by the nine exemptions and three exclusions provided for in the Act itself. The Privacy Act of 1974 prescribes safeguards for the protection of records the Government collects and maintains on United States citizens and lawfully admitted permanent residents. Security Exchange Commission of the United States maintains public and non-public records such as registration statements and reports filed by regulated companies and individuals. The laws provide for regulating trading and commerce to eliminate fraud, manipulation and dissemination of false information to ensure just and equitable trading. It is also provided that short sales must be made on an 'uptick' to regulate the use of credit for trading, including insider trading. The beneficial owners of 10 percent or more are

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considered 'insiders' and to prevent unfair use of information by insiders, profits realized from security transactions within a period of 6 months are forfeited to the corporation.

In United States even for members of bureaucracy i.e. employees of the Executive Branch, standards of Ethical conduct have been provided by the Ethics in Government Act, 1978 and the Regulations issued by the U.S. Office of Government Ethics. These Regulations provide that Public Service is public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above personal gain; and that employees shall not hold financial interests that conflict with conscientious performance of duty; employees shall not knowingly make unauthorised commitments or promises of any kind purporting to bind the Government and shall not use public office for private gain; they shall not engage in outside employment or activities that conflict with official duties and responsibilities. A gift even of the value of 20 Dollars in a given situation is not to be accepted. The senior employees after leaving service are prohibited for a period of one year in certain situations, even if they were not paid for their work

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from contacting their former department or Agency to seek official action on any matter or assisting a foreign government or foreign political party. In this manner for a period of one year after leaving government job, employment with the foreign or local employer is sought to be prohibited. The ethical standards thus are designed to protect national interests and to ensure transparency and fair dealing. Such like prudential measures of good governance, fair dealings and transparency are conspicuously absent in our laws as in our land, senior employees exchange places frequently i.e. from the employment of Federal Government to foreign Agencies e.g. World Bank and International Monetary Fund and vice versa and the people keep on watching the change of places silently but ask questions to themselves as to whom these experts are supposed to serve, Pakistan or foreign Agencies.

The laws in Pakistan on these subjects do exist but these need to be made comprehensive and also to be implemented in true spirit. It may further be pointed out that effort to eliminate only Riba, in isolation, from banking system would be more harmful than helpful due to intricate

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inter-dependence of different vital economic sectors, and that the efficient course will be to first identify and strengthen the existing critical economic sectors falling under Shariah thus isolating Riba based system for its proper treatment. It was argued that the economy in this way will be strengthened and a strong foundation will be laid to promote Riba free economy. An important fall out of this approach will cause the major savings of citizens to be channeled into Shariah Compliant sectors. This situation, it was emphasized, will automatically put pressure on our Riba based banking system to innovate itself into Islamic system to attract depositors investing in parallel Shariah based sectors. It was explained that the reason for the under-development of Shariah based instruments in our banking system is due to inefficient and unregulated parallel major Shariah compliant (stock markets) economic sectors in existence.

Four major engines of economy identified by the economists which fueled the West's economic growth are following:-

- (i) Banking/Financial Sector;
- (ii) Share market;

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- (iii) Debt/Bond Market; and
- (iv) Government Borrowing/Lending.

The following statistics were cited to illustrate the most important sectors among the above mentioned areas:-

	<u>USA</u>	<u>Malayasia</u>	<u>Pakistan</u>
GDP	8 trl	72 bn	60 bn
Share Market	10 trl	100 bn	6 bn
Debt Market	10 trl	22 bn	40 m

All figures are approx. & in US\$; Debt Market figures are for corporate borrowings only.”

The above figures demonstrate the importance of regulated public participation in most important sectors which have given a solid foundation to these economies and created better distribution of wealth among the masses. It is to be noted that creation of large middle class is also a touchstone of Islamic Financial model to fight concentration of wealth in few hands.

The other pertinent thing to be noted is that the total value of capital market is much bigger than the GDP. So, even if we, in Pakistan, are successful in creating an Islamic based judicious regulations, at least for Capital Markets, we can hope for a quick change for the better as

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these reforms would be effective to check corruption in all the sectors. The disintermediation will also trigger competition within our banking sector towards promoting Islamic products. The regulatory framework to control unlawful conduct including gharar is designed to maximize justice and fair play at all levels of investors' interaction. The regulatory agencies eliminated gharar by bringing as much transparency/fair play as possible in all public dealings. The disclosure requirements are so elaborate that speculative activities are minimized. This is achieved, inter alia, through the following measures:-

(1) Individual's Credit History

No individual is allowed to get utilities connections, open any bank account, or obtain a loan unless his credit report received from a credit bureau is clean. These bureaus are non-government entities and by paying a nominal fee any organization can access the databases for requisite information.

(2) Industries' Rating

Four rating agencies namely, (i) Standard and Poor's (ii) Moody's (iii) DCR, and (iv) Fitch-IBCA are

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referred to by the Financial Institutions and Lending Institutions for reporting about credit ratings of the borrowers before extending loans, whether the borrower is a corporate body or other institution. The Security Exchange Commission, USA grants them licence and monitors their quality of work. In Pakistan to regulate the business of credit rating companies, the Credit Rating Companies Rules, 1995 were framed by the Federal Government under section 33 of the Securities and Exchange Ordinance, 1969, but these rules have not been usefully applied whereas in USA individuals, Corporations, Banks and Financial Institutions and even the municipalities are all rated by the Credit Companies and their credit rating is relied upon by the investors before investing into the bonds or other instruments floated or offered for investment to the public. These ratings are instituted on the philosophy of right to know.

Even in England various statutes provide for prudential regulations and disclosure of necessary information. The Financial Services Act, 1986 and the regulations framed thereunder provide protection for the investors, with the “securitisation” of the investment industry

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in order to provide a system intended to make effective and to enhance London's position as a financial centre. The Serious Fraud Office (S.F.O.) was established as an integral part of the criminal justice system. The S.F.O. is responsible for investigation and prosecution of some of the biggest cases of fraud in British history. The S.F.O. is an independent Government Agency headed by a Director who exercises his powers under the superintendence of the Attorney General, maintains liaison with Government departments and regulatory bodies such as the Department of Trade and Industries, Bank of England, International Stock Exchange, Securities and Investment Board, etc. These and other organizations report to the S.F.O. allegations of serious and complex abuse and misuse of powers and white-collar crimes.

The distinctive feature of the S.F.O's approach to investigations is the use of multidisciplinary teams; a team of Lawyers, Accountants, Police Officers, etc. appointed in each case, headed by a lawyer, who acts as a case controller being responsible for ensuring expeditious investigation and effective prosecution. It is through such measures that the West has effectively adopted Islamic teachings of justice, fair

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play and proper disclosure to minimize gharar. These measures are to be adopted by providing proper legal framework so as to bring about fundamental changes in the fabric of our society as transparency will put the economy on the right track quickly. It is due to absence of this regulatory legal framework and transparency and prudential measures that the investors in Pakistan were deprived of billions in the shape of Taj Company and Cooperatives scams. There has been a quick growth of companies at Stock Exchange as the corporate managers are least bothered to take investors into confidence by sharing company information and do not feel any moral obligation to share profits with investors. All this is due to absence of strict regulations, third party ratings and risk assessment. A comparison between the size of the economy and number of listed companies can be a guide to the loose regulatory framework that encourages rogues to fleece investors and creditors in the disguise of “Limited Liability” Laws. The number of companies at Karachi Stock Exchange Market are 750 while the number of listed companies at New York Stock Exchange is five times larger whereas economy of USA is more than 100 times bigger than

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Pakistan's economy. Unlike western countries there are no laws in Pakistan against insider trading (trading in Shares by owners) by major shareholders, which is conflict of interest, a crime in West.

The market indexes in the west like DOW JONES (USA), FTSE (UK), and Nikkei (Japan) were developed by third parties. In Pakistan the KSE (Karachi Stock Exchange) 100 index is maintained by the stock market itself and has come under adverse comment from Minister of Finance due to its speculative characteristics. It is said that this index serves the purpose of few players in the market by luring innocent investors into investment thus cyclically depriving them of their hard-earned money. This also requires transmission by introducing independent transparency.

(3) Debt markets in Pakistan.

We have an inactive debt market and its savings have been repeatedly wiped out as unlike western markets during melting down of stocks, debt markets are not in a position to provide the necessary "hedge" to the investors. The result of this under-developed debt market is the promotion of riba through savings being channeled into

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banking system as industries want long-term finance , they have to resort to the banking system which in turn results in promoting riba transactions. If the concept of Islamic debt through Musharaka certificates is adopted on urgent basis lot of equity/funds can be made available through developed debt markets and in that way reliance on banks can be reduced. Infrastructure can be provided by advising provinces/municipalities/corporate bodies to connote Qirad certificates/diminishing Musharaka certificates thus reducing reliance on foreign exchange borrowings and this is how local funds can be generated.

(4) Establishment of data collection firms.

The financial institutions should encourage experts, lawyers and others to establish firms for keeping track of the clients, individuals, corporations who commit default so that they could be brought before the competent Courts by facilitating service of the process of the Courts on them and also trace their properties and assets whether standing in their names or benami to facilitate recovery through execution of decrees.

(5) Recovery system.

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The laws pertaining to recovery of the defaulted loans are to be streamlined alongwith establishment of requisite number of Courts presided over by competent Judges of unquestioned integrity. These Judges should not be overburdened and only such number of cases should be assigned to them which can be disposed of within a period of three months. The tendency to institute recovery proceedings only when the borrowing company or the individual have almost squandered away their assets requires to be curbed and defaulters must be brought to book by instituting proper proceedings within reasonable time of default when the borrower as well as his assets are still traceable and realizable.

(6) Training of Officers and Staff.

The Education of the officers and staff of the financial institutions so as to make them aware of the rudimentary or essential principles of Islamic economy is imperative. They should have necessary knowledge of the modes and the products to be used by them. These training institutions should include courses in accounting and audit procedures suited and conforming to the principles of Shariah. Such an

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education will be objective oriented and should inculcate commitment with the objectives of Shariah.

(7) Audit and Accounts.

The development of audit and accounts system and procedures conforming to the principles of injunctions of Islam and capable of achieving objectives of Shariah is also essential. Such standards and procedures have been laid down in detail in the book titled “Accounting and Auditing Standards for Islamic Financial Institutions” published by Accounting and Auditing Organization for Islamic financial Institutions P.O.Box 1176, Manama, Bahrain. Institute of Chartered Accountants and Auditors with the assistance of the representatives of the State Bank of Pakistan and Finance Division should study these standards, procedures for introducing any modification, changes, alterations if any required to suit the requirements and the needs of Financial Institutions and Banks in Pakistan.

In a nutshell measures needed to be taken, the infrastructure and legal framework to be provided may be summarized as under:-

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- (1) Strict austerity measures to drastically curtail the Government expenditure should be adopted and implemented and deficit financing should be controlled as therein lies the solution to economic revival.
- (2) An Act to regulate the Federal Consolidated Fund and Public Account, Provincial Consolidated Fund and Public Account requires to be enacted by the Parliament and the Provincial Assemblies respectively. This law will have to take care of borrowing powers, purpose and the scope of borrowing, its utilization, regulation and monitoring process including all ancillary matters.
- (3) Law providing for necessary prudential measures ensuring transparency be enacted. These laws may include laws like Freedom of Information Act, the Privacy Act and Ethics Regulations of United States, Financial Services Act of Britain.
- (4) Establishment of Institution like Serious Fraud Office to control white collar and economic crimes.

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- (5) Establishment of credit rating agencies in the public sector.
- (6) Establishment of evaluators for scrutiny of feasibility reports.
- (7) Establishment of special departments within the State Bank –
 - (a) Shariah Board for scrutiny and evaluation of Board's procedures and products and for providing guidance for successfully managing the Islamic economics.
 - (b) A Board for arranging exchange of information, financial institutions about feasibility of projects, evaluation thereof and credit rating of institutions, corporations and other entities.
 - (c) A board for providing technical assistance to the financial institutions/banks with regard to the anomalies emerging in the practical operation of the financial institutions or difficulties arising during operation of financial products, transactions or

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arrangement between the financial institutions and the consumers/clients. This may also take the shape of Islamic Financial Service Institution. Such Institutions will also work in the field of shares and investment certificates underwriting promotion and market making to help in activation of primary and secondary markets. The rise of such institutions, whose functions include the promotion of financial instruments and to work as their catalysts in the financial market, would be of great help and support to Islamic Banking. Among the factors which would help the creation and spreading of such institutions is the extension of tax incentives to their operation as well as to Islamic banks to benefit from their services.

The establishment of aforementioned Infrastructure is considered necessary by the economists for operation of the Islamic banking system with success.

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Keeping all these aspects in view, we have decided to appoint different dates for different phases of the transformation. We, therefore, direct that:-

- (1) The Federal Government shall, within one month from the announcement of this judgment, constitute in the State Bank of Pakistan a high-level Commission fully empowered to carry out, control and supervise the process of transformation of the existing financial system to the one conforming to Shariah. It shall comprise Shariah scholars, committed economists, bankers and chartered accountants.
- (2) Within two months from the date of its constitution, the Commission shall chalk out the strategy to evaluate, scrutinize and implement the reports of the Commission for Islamization of the Economy as well as the report of Raja Zafarul Haq Commission after circulating it among the

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leading banks, religious scholars, economists and the State Bank and Finance Division, inviting their comments and further suggestions. The strategic plan so finalized shall be sent to the Ministries of Law, Finance and Commerce, all the banks and financial institutions to take steps to implement it.

(3) Within one month from the announcement of this judgment, the Ministry of Law and Parliamentary Affairs shall form a task-force, comprising its officials and two Shariah scholars from the Council of Islamic Ideology or from the Commission of the Islamization of Economy, to:

- (a) Draft a new law for the prohibition of *riba* and other laws as proposed in the guidelines above.
- (b) To review the existing financial and other laws to bring them into conformity with the requirements of the new financial system.

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- (c) To draft new laws to give legal cover to the new financial instruments.

The recommendations of the task force shall be vetted and finalized by the “Commission for Transformation” proposed to be set up in the SBP, after which the Federal Government shall promulgate the recommended laws.

- (4) Within six months from the announcement of this judgment, all the banks and financial institutions shall prepare their model agreements and documents for all their major operations and shall present them to the Commission for transformation in the SBP for its approval after examining them.
- (5) All the joint stock companies, mutual funds and the firms asking in aggregate finance above Rs.5 million a year shall be required by law to subject themselves to independent rating by neutral rating agencies.

- (6) All the Banks and financial institutions shall, thereafter, arrange for training programmes and seminars to educate the staff and the clients about the new arrangements of financing, their necessary requirements and their effects.
- (7) The Ministry of Finance shall, within one month from the announcement of this judgment, form a task force of its experts to find out means to convert the domestic borrowings into project-related financing and to establish a mutual fund that may finance the government on that basis. The units of the mutual fund may be purchased by the public and they will be tradable in the secondary market on the basis of net asset value. The certificates of the existing bonds of the existing government savings schemes based on interest shall be converted into the units of the proposed mutual fund.
- (8) The domestic inter-government borrowings as well as the borrowings of the Federal Government

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from State Bank of Pakistan shall be designed on interest free basis.

(9) Serious efforts shall be started by the Federal Government to relieve the nation from the burden of foreign debts as soon as possible, and to renegotiate the existing loans. Serious efforts shall also be made to structure the future borrowings, if necessary, on the basis of Islamic modes of financing.

(10) The following laws being repugnant to the Injunctions of Islam shall cease to have effect from 31st March, 2000:-

1. The Interest Act, 1839.
2. The West Pakistan Money-Lenders Ordinance, 1960.
3. The West Pakistan Money-Lenders Rules, 1965.
4. The Punjab Money Lenders Ordinance, 1960.
5. The Sindh Money Lenders Ordinance, 1960.

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6. The N.W.F.P. Money Lenders Ordinance, 1960.
7. The Balochistan Money Lenders Ordinance, 1960.
8. Section 9 of Banking Companies Ordinance, 1962.

(11) The other laws or the provisions of the laws to the extent that those have been declared to be repugnant to the Injunctions of Islam shall cease to have effect from 30th June, 2001.

The appeals stand disposed of accordingly.

Judge

Judge

Judge

Member

Announced in open Court
today on 23rd December, 1999.

Judge

APPROVED FOR REPORTING

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