

The Gray area Beyond Raised Objections (Sharia'h Perspective)

Regarding In-practice Islamic Banking System

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ABSTRACT

Shari'ah's teachings are perfect and forever. They leave everlasting impacts on society towards its spiritual as well as material purification (Tazkia) if implemented properly according to Qur'an and Sunnah. Interest (Sood/Ribā) has been forbidden by Almighty Allah whereas Trade (Ba'a) has been legitimated. To bring the Muslims of today out of Interest-based Banking System, religious scholars have outlined and introduced Islamic Banking System which, although, has got fast growth in market but still, a number of objections are being raised by different scholars leading to an impression that this system is not working in accordance with Shari'ah. This not only discourages the entry of new ones to Islamic Banking Sector but also create confusions in the minds of the enlisted customers. Keeping in view the above scenario, need is felt to assess, evaluate and analyze the Objections raised with special emphasis on Islamic Concept of Bank, Charity Fund (Iltzām be tasaduq) and Murābaḥa being the major points of objections of the critics. The present study investigates different aspects and dimensions of these objections in the context of Shariah and ground realities in order to know the extent of validity of these objections, highlight the gray areas giving rise to objections and give real picture to the public in general and enhance the satisfactory level of the enlisted Islamic Banking customers in particular.

Keywords: *Iltzām be tasaduq, Compulsion of charity, Murābaha, Sale of goods with predefined cost.*

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The contemporary world revolves around economy. Most of the international conflicts, even are one way or other, due to economic interests. As an eternal divine religion Islam too has blessed humanity with its economic teachings. Interest that had chained up the people before and even after Islam was denied by Islam. Simultaneously unlike an incomplete code it gives a perfect code of economic system. Interest based system that comprised of simple & compound interests in a number of ways like Qemār, ba‘a Qabl-ul-qabz (resale before possession) and individual and business interest’s transaction etc prevailed in pre-Islamic society. Today’s environment also sees humanity chained up like-wise in the name of world global trade in the forms of giving and receiving Aids, all forms of Insurance, Stock and Money Markets and different interest based banks.

Islam purified transaction by eliminating interest and introducing business system in ways like *Mushārahah*, *Mudhārahah*, *Istisnā’*, *Ijārah Salam* etc. Quran says:

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَٰلِكَ بِأَنَّهُمْ
قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا⁽¹⁾

“Those who benefit from interest shall be raised like those who have been driven to madness by the touch of the devil; this is because they say: “trade is like interest” while God has permitted trade and forbidden interest.”

The domination of capitalism affected the whole world by their new interest based economic system, in such a way that no country is able to survive freely without adopting it, even Islamic world has also been affected likewise. Keeping in view the severity of the situation, the religious scholars stepped forward to pull up the Muslims from the interest based business system in order to prevent them from exploitation as well as to protect their faith and life after death. Eventually the sketch of interest free banking was designed and develops by some religious scholars, which have been adopted by certain banks in various Islamic countries. Since Interest Free Banking system is in its initial stages and has not yet got the maturity. The Banks practicing Islamic system are less in number, so the majority of population is not benefited, which consequently allows the system to be exposed to less number of people. So due to lack of

understanding the basic principles and elements of Interest Free Banking, some scholars show their different views regarding the same. This study focuses, mainly, on the objections and these objections will be analyzed in accordance with Islamic principles and it will be determined as to how far these objections are valid or otherwise.

One of the objections raise is regarding *Murābaḥa* as practiced in Islamic banking system. *Murābaḥa* is one of the Islamic modes of Financing and the practice is carried out by Interest Free Banks. But some of the religious scholars have some concerns on it.

According to the *Fiqh-e-Islami*, *Murābaḥa* is defined as, "The business agreement wherein the cost and profit received thereon are predefined". In other words it is particular kind of sale where the seller expressly mentions the cost of sold commodity he has incurred, and sells it to another person by adding to some profit thereon. The most authentic book of Islamic jurisprudence, *Al-Hidāya* states;

المراحة نقل ما ملكه بال عقد الاول بالثمن الاول مع زيادة ربح والتولية نقل ما ملكه بالعقد الاول بالثمن الاول من غير زيادة ربح، والبيعان جائزان لاستجماع شرائط الجواز والحاجة ماسة الى هذا النوع من البيع⁽²⁾

Murābaḥa has been accepted as legitimate business agreement by almost all schools of thought of Islamic fiqh due to its ability of possession.

فان الجمهور الفقهاء من ارباب المذاهب الاربعة قد ذهبوا الى جواز بيع المراحة، وانه سبب صحيح للملك حتى نقل الامام ابن جرير الاجماع على ذلك⁽³⁾

So it is proved from all school of thoughts of Islamic Fiqh that the Transaction of *Murābaḥa* is legal mode of trade. Moreover Imam Ibn-e-Jarīr narrated 'Ijm'a of all the four Jurists on permissibility of *Murābaḥa*.

وأما بيع المراحة فصورته أن يقول أبيعك هذا الثوب مراحة على أن الشراء مائة درهم وأريح في كل عشرة واحد فهذا بيع جائز لا يكره⁽⁴⁾.

فَصَلُّ فِي الْمُرَابَحَةِ وَهُوَ بَيْعُ السِّلْعَةِ بِالْثَمَنِ الَّذِي اشْتَرَاهَا بِهِ وَزِيَادَةُ رِبْحٍ مَعْلُومٍ هُمَا (وَجَازَ) الْبَيْعُ حَالَ كَوْنِهِ (مُرَابَحَةً)⁽⁵⁾

معنى بيع المراحة، هو البيع برأس المال وريح معلوم، ويشترط علمهما برأس المال فيقول: رأس مالي فيه أو هو علي بمائة بعثك بها، وريح عشرة، فهذا جائز لا خلاف في صحته، ولا

نعلم فيه عند أحد كراهة.⁽⁶⁾

Translation: It is legal status of *Murābaḥa* that one purchase a product [clothes] at hundred dirham and then sale it on the same price with addition of profit one dirham on each tenth dirhams .i.e. ten percent profit. Similarly it is legitimated that *Murābaḥa* provides sound ground for transferring of ownership and nobody among Jurists go against it.

An important aspect of existing *Murābaḥa* system practiced by today's interest free banks is very clear and lucid, besides the conventional *Murābaḥa* it contains some additional features of trade like contract of agency, promise to sale etc as well. Here the complete process of *Murābaḥa* is highlighted;

1. The client put forward his/her application to concerned department of the bank along with all required documents. These may include the client's financial status which is meant for minimizing the risk and to get satisfaction of payback ability of client. This process is called the credit assessment.

2. In second step, after credit assessment the bank authority rejects or accepts his/her application. On acceptance the bank approve the limit of transaction.

3. The Bank purchases the required goods of the client according to his specification. Some time the bank make the client or anybody else agent for purchasing.

4. When client purchased for bank as agent, get possession on goods and informed bank accordingly. With that the whole risk transfers to Bank.

5. The final stage is the execution of *Murābaḥa*; here the client offers to bank to sale the goods on predefined cost and profit along with mentioning of all conditions of payment like time period & installment rate etc. As bank gives acceptance of it, then transaction of *Murābaḥa* take place.⁽⁷⁾

Keeping in view the above procedure of *Murābaḥa* that practices in Interest Free Banks is totally accordance with the *Murābaḥa* mentioned in *fiqha's* Books. One of the objections raised on *Murābaḥa* transaction regarding *Shari'ah* perspective that it is not legal for a person to have two

statuses at a time like in one transaction, for example, single person is buyer as well as a seller. Similarly it is also restricted in Islamic fiqh for person to have the status of Agent as well as purchaser in one transaction simultaneously. ⁽⁸⁾

The “Rufaq’ a Binūri Town” states; This is one of the basic principles of Jurists and the objection raised totally based on that principal; in Interest Free Banks, in Murābaḥa transaction it normally occurs that in one time the client act as Buyer as well as Bank agent for purchasing goods comprising both statuses that is not permissible. ⁽⁹⁾

The gray area lying behind this objection is lack of awareness from the existence practice of Murābaḥa in Interest Free Banks. The documentations shows that in some special cases client acts as bank agent but this contract of agency signed by Bank with client separately with out any linkage with actual contract of Murābaḥa. The purpose of this is to ensure the client for purchasing the goods according his own choice and specification. When client as agent finished purchasing, he is suppose to informed the bank and then Bank ensure the possession of goods and the risk totally transfer to Bank and here the contract of Agency come to an end. After word the client buys the same goods with new agreement/ contract with fulfilling the all requirements of Murābaḥa transaction. In short the Critics fell in confusion not to get the real picture of situation as they merging the two separate boundaries of two different contracts in different time. So the above objection is not valid in the light of Shari‘ah.

Some other religious scholar claims that the running exercise of Murābaḥa in Interest Free banks is totally different from the actual Islamic Murābaḥa [Murābaḥa fiqhia, the one mentioned in Islamic Jurisprudence books] because for valid Murābaḥa there is condition of predefined cost and price where as in Banks the cost and price is not mention during this transaction. Moreover the bank Murābaḥa is not only contradicted the Shari‘ah principles but also violating the condition of valid sale. ⁽¹⁰⁾

Actually the Bank exercises two different types of clients, some deals with banks once or twice or in limited number according to their need. Some deals repeatedly with Banks with short operation cycles. In order to

avoid the repetition of pre requisite process and procedure of Murābaḥa transaction, the Bank signs with such clients special agreement called, Master Murābaḥa Agreement [MMA] that comprises of all initial rules and conditions in general. This agreement is supportive document for new sale transaction, not mentions the cost and price of specific commodity. During this Agreement neither there is proper contract take place nor is the agreement holder restricting to buy something on Murābaḥa bases. It is just like understanding of memorandum. The critics raise his objection on the bases of this Master Murābaḥa Agreement because they didn't get the mentioned cost and price there. The fact is that during sale, proper documentation occurs comprising all of it.

Here are some written documents of the interest free banks that show the process of agent after finishing the purchasing of commodities.

DECLARATION FOR EACH MURĀBAḤA TRANSACTION

Date _____

We hereby declare and certify that acting as your agent we have used the sum of Rs _____ (Rupees _____ only) paid to us by you for purchase of the assets on your behalf details whereof are set out in the schedule of assets appearing in the annexure to this appendix 'C' and/ or contained in invoices hereto on your behalf: and we hereby certify that the asset procured on your behalf, as your agent, have not been consumed at the time signing of this declaration and will only be consumed/resold after the purchase from the bank.

Now, we offer to purchase the above assets from you for the price of Rs _____ (Rupees _____ only) We undertake to pay the contract price referred to above as per the Master Murābaḥa Facility Agreement Dated _____ between us on the payment dates specified in the payment schedule.

After getting these documents from Agent side, the concerned bank also produce a document signed by concerned authority.

Date _____

We accept your offer and we sell the above Mentioned Assets to you for Rs _____ (Rupees _____ only) which shall be payable as per the terms of the master Murābaḥa Facility Agreement

between us dated _____ in accordance with the payable schedule appearing in Appendix E hereto, and we have confirmed that the said Assets are available with the clients and have not been consumed/ resold at the timing of signing of this acceptance.⁽¹¹⁾

Another objection on Murābaha practice of Interest Free Banking is the transferring of Risk of commodity. According to them; the commodities purchased by Agent do not come under the risk of Bank. The Base of this objection is actually the incomplete paragraph they got from any interest free Bank which is as under,

I/we shall immediately acquire the assets from you.....failing which we undertake to compensate you for any actual loss suffered.....etc.⁽¹²⁾

From this paragraph the critic/objectors come to conclusion that risk in real not transfer to the bank but the whole sole burdens lay down on the shoulders of agent which is illegal, against the principles of Shari‘ah.

This paragraph is in-complete, some of the portion is not mentioned in it and that was only shown by dots. The hidden area of the paragraph is essential in the sense that it changed the whole sense of the paragraph.

Here I will mention the complete paragraph as under:

I/we shall immediately acquire the assets from you on the basis of Murābaha failing which we undertake to compensate you for any actual loss suffered (not being opportunity cost) by selling the assts to the third party.⁽¹³⁾

So this complete paragraph clearly shows that above objection is invalid and the practice is against this statement of not transferring the risk to the Bank. So for the assets are in the custody of agent, if destroy without his intension, the bank will bear the loss because that will consider trust in his hands. The above statement is supported by Fatāwa al-Hindiah, narrates:

وَإِنْ هَلَكَتْ بَعْدَ الشِّرَاءِ قَبْلَ أَنْ يَنْقُذَهُ إِنْ هَلَكَتْ قَبْلَ الشِّرَاءِ فِي يَدِ الْوَكِيلِ فَالشِّرَاءُ يَكُونُ وَاقِعًا لِلْمُوكَلِّ وَيَرْجِعُ بِمِثْلِ ذَلِكَ عَلَى الْأَمْرِ هَذَا إِذَا اتَّفَقَا عَلَى الْهَلَاكِ قَبْلَ الشِّرَاءِ أَوْ بَعْدَهُ.⁽¹⁴⁾

The only case where clients have to bear the loss; when they not fulfill his promise of buying the commodity without any valid excuse. Then the bank sale that commodity to third party and the client will pay

the difference between cost and price to Bank in order to compensate the real loss instead of opportunity cost.

Some religious scholars says that in-practice *Murābaḥa* and *'Ijāra* in so called Islamic banks is nothing but pretends [*Heela*] and these two modes are frequently use in these banks. So it is right to say that we should call these banks not Islamic banks but *Heela Banks*.⁽¹⁵⁾ Islamic Banks have blind trust on their agents...⁽¹⁶⁾

Reality is that these modes are in practice in Islamic banks with full supervision of *Shari'ah* Advisors and there is no such *heela* that violet the *Shari'ah's* principle in order to merge *Halal* [Permissible] with *Haram* [Prohibited], neither these modes are used for opening the doors for *Ribā* [Interest]. The gray area behind this objection is lacking of understanding of *Heela's* topic and seems misguidance from the Jurist's opinion regarding it. The objection becomes valid when all *heelas* are considered *haram*, but the situation is not like that. This topic was thoroughly discussed by *Hanfi* Jurist *Shams-al- 'Aema, Sarkhsī*:

قال السرخسى: فمن كره الخيل فى الاحكام فانما يكره فى الحقيقة احكام الشرع، و انما يقع مثل هذه الاشياء من قلة التأمل.

فا لحاصل: أن ما يتخلص به الرجل من الحرام أو يتوصل به الى الحلال من الخيل فهو حسن، وانما يكره ذلك أن يجتال فى حق الرجل حتى يبطله، أو فى باطل حتى يموجه، أو فى حق حتى يدخل فيه شبهة، فما كان على هذا السبيل فهو مكروه، وما كان على السبيل الذى قلنا اؤلا فلا بأس به.⁽¹⁷⁾

Sarkhsī stated that one who abhors the *heelas* is actually dislike the *Shari'ah* principles [*Aḥkām*] and it occurred due to limited awareness. In comprehensive words the *Heela* used for protection from *Haram* and leads to *Halal* is *Hasan* [better] and on contrary, *Heela* used for deprivation of other's right, or to make the perplexity is *Makrūh* [detest].

So the above statement is baseless regarding it having no any valid proofs and arguments.

Charity Fund [*Iltezām be tasaduq*], the word *iltezām be tasaduq* refers to the compulsion to offer charity. In both modes i.e. in *'Ijāra* and *Murābaḥa* the client induce his self to pay a specific amount to Bank

charity if he didn't pay the installment in time without any valid excuse. Objection on this activity of bank is that how you restrict one to offer charity [sadqa] where he is not willing to pay. In Shari'ah charity is optional. If anybody is not willing give sadqa, no body can force him to do so, although the situation in interest free Banks is totally different. This activity is not certifiable regarding Shari'ah prospective. Moreover there is no any clear saying of scholar in Hanfi jurisprudence favors the above activity of Bank. But there are sayings of some scholars of Mālki jurisprudence favor the above. Similarly the other objection is to why you leave your own school of thought while conditions are not fulfilled to leave .so it is some what to obey your self wishes and interest, not Shari'ah requirement.

The above objections are based on some realities; firstly it seems important to discuss these in order to make the issue clear and easy to understand. At very start the interest free banks had not been practicing of undertaking of sadqa. The client was free to pay without any specific restriction. In Murābaha once price declared by both parties of transaction, so the price can not be change at any case if the payments delayed by clients. Taking benefit of this feature, instead of payments in time, they started late payments intentionally without any reason. This was not only the loss of Bank but also the loss of all account holders. The disturbance in smooth flow of cash affected the financial activities of bank and had adverse impact on Bank's output. While in conventional banks, they didn't late the payments because of interest factor.

In order to avoid such circumstances and to protect the Bank from the loss and to give safe side to account holder's money within the Shari'ah boundaries, with consultancy of 'Ulam'a of all school of thoughts agreed on this kind of under taking with two conditions before going to enter in Murābaha transaction. In case, the client defaulter in real, this undertaking will not on him as Almighty Allah says in his Nobel Quran:

وان كان ذو عسرة فنظرة الى ميسرة⁽¹⁸⁾

Translation: If he is underprivileged, then should wait for his soundness.

With out having any valid excuse if anybody make late installment, he/

she will pay that much amount in Charity Fund and this fund will neither be the part of bank profit nor it will spend by Bank authority for his goodwill. The objective of it is to put pressure on the client to make installment in time.

Keeping in view above it is useless to say that above activity is contradicting the Shari'ah's principles and the objection on *Iltezām be tasadūq* is no more valid and the picture is quite clear from above evidences.

Another precedent of objections on Interest free banks is the reservations on basic concept of Islamic Banks or Interest Free Banks. 'Ulam'a [Religious Scholars] have different opinion about it. Some says that Islam and Bank are two Contrast facts that never get in together. Other says that as it is not possible to exist any Islamic wine and Islamic gamble likewise existence of Islamic Banks are not possible. Other says that to present alternative of convention bank is not our responsibility. These are such comments need to answer in order to avoid the confusion and to provide the transparent picture. In fact these gray areas are due to lacking of depth knowledge of the matter.

It is very clear and basic principle of Shari'ah and also the past trend of Muslim jurists that whatever is according to the fundamental needs of human being which is unavoidable and majority of Muslim 'Ulam'a involved and can't get relieve from that, then 'Ulam'a is actual responsible to seek alternative in order to give relief and relaxation to Muslims and same is the teaching of Allah's messenger Muhammad ﷺ.

عن ابى سعيد الخدرى و ابى هريرة عن النبى ﷺ انه استعمل رجلا على خيبر فاتاه بتمر، فقال له رسول الله ﷺ: أكل تمر هكذا؟ فقال: لا والله انما ناخذ الصاع بالصاعين والصاعين بالثلاثة، قال: فلا تفعل، بع الجميع بالدراهم ثم اشتر بالدراهم جَيِّبًا. (19)

“The Abu Saeed Al Khudri and Abu Huraira (R.A) narrates that in Khyber, Allah's Messenger (S.A.W) asked a person that all dates are of this quality? He replied No, we got one volume of this by two volume and two by three volumes. Allah messenger forbad him and advised him to sell all by price [Darāhim] and then purchased the good one”.

In current scenario, the Bank sector is not only important but seems the life blood of Country's economy. The existence of small business unit is up to more extent dependent on it. The foreign trade is not possible with out Bank's involvement. Likewise the individual's lives are also highly influenced by it. Almost all fields of life are linked with banks like education (submission of admission fee etc), Money transferring, keeping of savings, utility bills etc.

So by considering the principle of Shari'ah to seek permissible way, there is dire need to introduce such banking system that works free of interest in order to protect the Muslim Ummah from Haram. The in-practice interest free banking system is one of the first step to get the mentioned objective to free the world in general and specifically the Muslim Ummah from Ribā [Interest].

From above it is cleared that the objection regarding, 'The Bank and Islam are two opposite and contradictive fact' is not valid. Similarly the objections regarding mentioned areas of Interest free banking system are totally based on some assumptions, indefinite information and unclear knowledge of the subject matter.

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