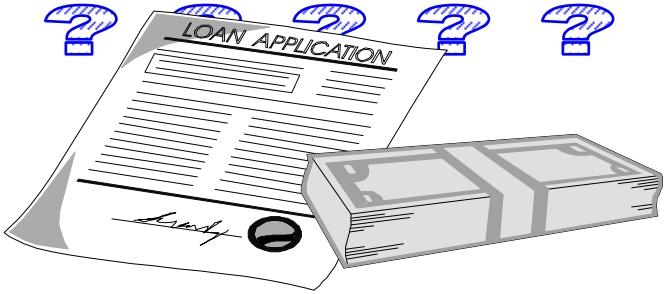
ISLAMIC FINANCE



REFUTATION OF THE BAATIL CONCEPTS OF CAPITALISM DUBBED 'ISLAMIC FINANCE'

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DON'T ENVY THEIR WORLDLY PROSPERITY

Allah Ta'ala says in the Qur'aan Shareef:

"Never stretch your eyes (with yearning and envy) at the wealth (and technology) which We have bestowed to some nations among them (i.e. the kuffaar) as glitter of the world (for them) so that We cast them into trial in it (their worldly provisions). And (understand well that) the Rizq (Provision) of Your Rabb (which He grants you is best and more enduring)." (Surah Ta-Ha)

It does not behove the Mu'mineen to strive for the acquisition of worldly prosperity in ways which culminate in the Wrath and Displeasure of Allah Ta'ala.

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INTRODUCTION

A Durban secular lawyer, Mr. Shoaib Omar, a self-appointed 'authority' of 'Islamic Finance' has written a brochure on a subject which he terms, *Contemporary Issues in Islamic Banking & Finance.*

The greater part of the 50 page brochure consists of *baatil* drivel. The opinions of this layman are basically granules of regurgitation from some books of Hadhrat Mufti Taqi Uthmaani Sahib who has, sad to say, abdicated from the high pedestal of Shar'i *Uloom* he once occupied.

In the endeavour to find an Islamic basis for the fallacious concepts of the *riba,* neo-capitalist so-called 'Islamic' banks, the venerable Mufti Taqi Sahib has mutilated many *Ahkaam* of the Shariah by *faasid ta'weel.* From the conglomeration of convoluted opinions contained in Mufti Taqi's book, *An Introduction To Islamic Finance,* the modernist lawyer, Mr. Omar, has extracted ideas and views which he attempts to present as inviolable principles and teachings of the Shariah.

Being a layman, unacquainted with the juridical ramifications, intricacies and operation of the principles of Fiqah, Mr. Omar has succeeded in only making a ludicrous display of his ignorance of the Shariah. He seeks to hoist the notion of him being in the galaxy of the illustrious Fuqaha, and even Aimmah-e-Mujtahideen. Like a fool he believes that he possesses the qualifications for weighing, sifting, dissecting, selecting and determining which of the views of the Aimmah-e-Mujtahideen and the Fuqaha in general are *Raajih* and *Marjooh.*

In the compound *jahaalat* in which he wallows, nay sinks by degrees, his oblique intellectual vision stemming from lack of proper Deeni Uloom, crass *Ujub,* and lack of dread for the dire warnings of Rasulullah (sallallahu alayhi wasallam) to the *juhhaal* who dive and dabble in the deep waters of Revealed Knowledge with their sapling 'courage', discerns from behind the haze spawned by his inept and deficient research of the *kutub* of the different Math-habs that his puerile and *baatil* 'fatwas' based on truncated *juzwi masaa-il* (detail rules or particulars) as opposed to *Usool (Principles)*, are invested with the authority and sanctity with which the Rulings of the illustrious Fuqaha are divinely predicated.

For those who discharge noxious intellectual effluent in the form of stupid 'fatwas', in consequence of the machinations of their stercoraceous mentality inherited from years of indoctrination of kuffaar secular institutions, Rasulullah (sallallahu alayhi wasallam) has sounded an adequate threat:

"Whoever speaks about the Qur'aan with his opinion, should prepare his abode in the Fire (of Jahannum)."

Every *mas'alah* of the sacred Shariah is the product of a Divine Process of efflorescence of the Fountain of Uloom gushing forth from the Qur'aan. It is the flower of *Divine Knowledge* which is the preserve exclusively of those illustrious Souls and Giants of Islamic Knowledge whom the Ummah has designated the *Aimmah-e-Mujtahideen* and the *Fuqaha*. It is not a shallow stream of placid water in which kindergarten kids of Mr. Omar's ilk can romp and splash.

When Imaam-e-A'zam, Imaam Abu Hanifah (rahmatullah alayh), the greatest of the *Aimmah-e-Mujtahideen* of this Ummah after the Aimmah and Fuqaha of the Sahaabah, sought

the counsel of his noble Student, Imaam Abu Yusuf (rahmatullah alayh) on the issue of accepting or rejecting the post of Chief Qaadhi which the Khalifah Haarun Ar-Rashid had ordered the Great Imaam to accept, the illustrious Student responded:

"The Ocean is deep and turbulent. But the Ship (which is earmarked to undertake the voyage) is powerful, and the Pilot is an Expert par excellence."

In the context of Imaam Abu Yusuf's response and advice to Imaam Abu Hanifah (rahmatullah alayh), the *Ocean* represents the sacred and razor-sharp Path of *Qadha'* (the Post of the Chief Qaadhi); *The Ship* refers to the sacred Knowledge of the Qur'aan and Sunnah, and the *Expert* is Imaam Abu Hanifah.

When the noble Student offered this sagacious and deserving praise in the form of counsel to his Ustaadh, Imaam Abu Hanifah (rahmatullah alayh), the latter glared with a gaze of Wrath at Imaam Abu Yusuf (rahmatullah alayh), and dismissed him from his august presence.

But in this age of *Jahaalah* and audacity, cranks and quacks of all varieties, solemnly believe themselves to possess the highest qualifications and expertise to swim in and cross the bottomless Ocean of Qur'aanic Knowledge at its most turbulent junctures, in a way in which even Imaam Abu Hanifah (rahmatullah alayh) could not achieve.

Therefore, the chancer and the freelancer who dabble in the *Masaa-il* related to the Qur'aan, are voicing their unqualified opinions in the domain of Qur'aanic Knowledge. And for this, they possess neither expertise nor right.

Mr. Omar's dastardly habit of flitting from one Math-hab to another in his inordinate craving for the acquisition of the flimsiest basis to bolster his ramshackle structures of opinions and alternatives for the provision of a license to the crowd of neo-capitalist bankers, sufficiently displays his inadequacy and ineptitude in the branches of Shar'i Uloom. His salvation in this world and in the Aakhirah will be assured if he can understand the wisdom of clamming his lips, never dreaming of cleaving them – i.e. shutting up – maintaining silence and not trundle into a domain into which even the *Muqarrab* Angels (Jibraeel, Israafeel, Mikaaeel, Israaeel and the 8 Bearers of the Divine Throne) fear to tread – the Domain in which only the elite Fuqaha could swim and emerge safely, albeit at times severely scathed by the ravages of the turbulence in the Ocean of Uloom into which they were cast by Allah Azza Wa Jal, not by their volitional choice or desire.

Hadhrat Imaam Maalik (rahmatullah alayh), for whose Math-hab, Mr. Omar has a selected penchant when the *mas'alah* superficially appears to offer a straw of support, said that the sign of a true Aalim is that he flees from society. He does not intrude his head with desire into the domain of Ilm. On the contrary, he is constrained by a juxtaposition of circumstances divinely enacted to anchor him in the Ummah which he reluctantly serves in the capacity ordained for him by Allah Ta'ala – in the capacity of a true *Waarith (Representative/Heir)* of the Nabi (sallallahu alayhi wasallam).

The deceptive alternatives which Mr. Omar proffers as solutions or rather untenable stratagems as outward cover with Shar'i hues for the *Riba* dealings of Muslim capitalists, lack validity in terms of all Math-habs due to the patchwork 'fatwas' structured on bits and pieces taken from different

Math-habs in exercises of invalid *Talfeeq* which no Math-hab condones.

For example, he presents the *baatil* theory of the permissibility of riba on late payments of instalments by the debtor, on a convoluted basis by a corrupt interpretation of the incumbency of certain forms of self-imposed vows in terms of the Maaliki Math-hab. While he pats himself on the back in the silly understanding of having achieved an accomplishment, he remains blissfully ignorant of the Maaliki Math-hab's ruling on the very mas'alah of interest on late payments for which he extracted 'permissibility' supposedly on evidence from the Maaliki Math-hab. The Maaliki Ruling is given at the end of this treatise.

Another example of Mr. Omar's mental convolution is the laborious attempt to legalize the haraam transaction known as *Bay-ul-Wafa'*. In his argument for legalization of this haraam stratagem, Mr. Omar abortively presents the Maaliki *mas'alah* of the legal incumbency and enforceability of self-imposed promises and vows, which he utilizes as a basis for his miscarriage of 'permissibility' which he suffered. But, he manifests shocking ignorance of the categoric ruling of the Maaliki Math-hab on this very same transaction which he seeks to legalize in terms of an unrelated Maaliki *mas'alah.*

Thus, while he blindly claims permissibility of *Bay-ul-Wafa'* on a fictitious basis which he attributes to the Maaliki Fuqaha, he is unaware that the Maaliki Math-hab unequivocally says about this transaction:

"Ibn Salmoon (a Maaliki Jurist) said that Ibnul Ghafoor said that it has been stated (by the Maaliki Fuqaha) that Bay-uth Thanaya (the Maaliki term for Bay-ul-Wafa') is Faasid (corrupt/invalid) and

perpetually mardood (rejected) because, verily, it is haraam and muharram. It is a gateway from among the gateways of Riba."
And this is the Math-hab of Imaam Maalik and Ibnul Qaasim….."
(Fathul Alil Maalik, Vol.1)

In a similar devious fashion, he projects his ignorance of the intricacies of the principles of Fiqah when he tries to laboriously extract evidence from the Works of the Fuqaha for the *baatil* practices of the neo-capitalist Muslim banks from particular *masaa-il (Furu-aat)* of the other Math-habs. When he stumbles on any particular in the Hambali Math-hab, for example, which he thinks will serve as a basis/proof for his fallacy, his invariable hackneyed expression is: *"The great Hanbali jurist, Ibn Qudama states…."* But then he cites the great Ibn Qudaamah partially, omitting the context and shying away from the conclusion which the great Ibn Qudaamah states.

And, when the view of the great Ibn Qudaamah is in refutation of his opinion, then Mr. Omar is ominously silent about what the "great and distinguished Hambali jurist Ibn Qudama" has to say on the score.

Mr. Omar, with his outworn clichés which he confers to a jurist of a Math-hab only when he feels comfortable with a specific view propounded by the jurist, will cite him in a style to convey that he (i.e. Mr. Omar) is an authority of the Math-hab on par with the 'great' Ibn Qudamah when in reality the smattering of tit bits he has managed to acquire from Mufti Taqi's book on "Islamic Finance" and some "unpublished works" of Mufti Taqi Sahib, constitute the ultimate limit of his 'knowledge', 'authority' and 'ijtihad'. In the words of the Qur'aan Majeed:

"This is the limit of their knowledge. Verily your Rabb knows best the one who has deviated from His path, and He knows best the one who has gained guidance." (Surah Najam)

Also in Surah Najam, is a message for Mr. Omar and others of his ilk:

"(They dabble in it) without having any knowledge. They follow nothing but conjecture. And, most certainly, conjecture is bereft of substance in (the face) of the Haqq."

In these pages of our Refutation – *Islamic Finance? – Refutation of the Baatil Concepts of Capitalism,* we have denuded the falsehood peddled by Mr. Omar in the name of the Maaliki Math-hab in particular, and the other Math-habs in general. The endeavour of our treatise is in compliance with our obligation of *Amr Bil Ma'roof Nahy Anil Munkar*, among whose variegated aims and objects is the defence of the Immutable Shariah against the predations and mutilations of the deviates, modernists and liberals.

In conclusion, some advice may benefit Mr. Omar. *Zakaat,* everyone knows, purifies wealth from the accretion of the contamination of haraam which unintentionally finds its way into a man's wealth during the course of the year. Payment of *Zakaat* eliminates this pollution.

Everything has its own form of *Zakaat*, the discharge of which is incumbent for achieving purification from spiritual and moral contamination, and to ensure the correct and healthy functioning of the *Ni'mat* which Allah Ta'ala has bestowed to us.

Among the wonderful bounties of Allah Ta'ala is man's *Aql (Intelligence)*. It is imperative to pay the *Zakaat* of *Aql* as well. If the *Zakaat* of *Aql* is not discharged, the spiritual contamination of Ujub *(vanity), takabbur (pride) and riya (ostentation)* will constrain the *Aql* to operate beyond its divinely demarcated and balanced confines. Then Aql with its aberrant excesses becomes the handmaid of Iblees.

Hadhrat Fudhail Bin Iyaadh (rahmatullah alayh) said:

"The Zakaat of Aql is Toolul Huzn."

Toolul Huzn is Enduring Grief/Sorrow in the heart of the Mu'min brought about by lapses, deficiencies, sins and transgression, among the worst of which is the dabbling of the inept novice in the domain of *Shar'i Uloom.*

"But (in reality) We (Allah) strike baatil with the Haqq. Then it (Haqq) smashes out its (baatil's) brains. Then suddenly it vanishes." (Qur'aan)

May the Peace of Allah settle on those who follow guidance.

Mujlisul Ulama of South Africa

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THE DECEPTIVE ALTERNATIVE

In his booklet, Mr. M. S. Omar states:

"For example, a contract cannot be concluded between the client and the bank in the following form:

"Client hereby sells his property (as defined) to the bank, for a specified price, subject to the condition that the bank agrees to lease the property back to the client upon stipulated conditions."

The valid alternative is that the contingent contract should be separate, and should be expressed in the form of an enforceable unilateral promise which should not be a term of the contract itself.

In such a case, the sale transaction is separate and independent of the unilateral promise. In the hypothetical situation referred to above, the client sells the property to the bank. The bank in turn separately and apart from the sale, promises to lease the property back to the client upon mutually agreed terms. If the breach of the promise causes the client actual loss, the client is entitled to recover such loss from the bank."

At the outset it is best to clarify the author's peculiar penchant for selective extrication of views from the different Math-habs. The deficiency of the basis on which the author constructs his whimsical opinions stems from his random selective extrication of views from the Math-habs. Whatever suits his palate in his endeavour to legalize the *baatil, faasid* and *riba* practices of the capitalist world, he digs out from the *kutub* of the Fuqaha, therewith fabricating a patchwork of fallacious 'fatwas'.

The author has presented his postulate of permissibility despite having acknowledged: *"one distinct contract cannot be made conditional upon another distinct contract."* In his bid to overcome this Shar'i prohibition, he tendered a hypothesis which he terms "the valid alternative". A scrutinization of his

'valid alternative' will establish the deception and invalidity of the alternative which he has presented.

The postulate of the writer, Mr. Omar, suffers from two major flaws:

(1) The figment of "an enforceable unilateral promise"
(2) The tacit condition *(shart)* of the 'unilateral Promise'

According to the Shariah, a promise belongs to the moral domain. The rules applicable to a promise are:

- It is unlawful to apply pressure on a person to extract a promise from him. Such a promise is invalid.
- It is incumbent to fulfil a promise made voluntarily provided it does not give rise to any violation of the Shariah.
- It is permissible to absolve oneself from fulfilment for valid reasons. In this case the one who is unable to honour the promise is not guilty of any sin.
- Even if the promise is violated without valid reason, it is not legally enforceable. The violation is a moral issue beyond the jurisdiction of the legal courts of the Shariah.

A promise cannot be enforced legally. The promissory contract which the author has suggested is therefore *baatil.* It has absolutely no validity. Besides invalidity, it is a corrupt encumbrance which renders the sale contract *Faasid* (Invalid).

The 'client' is not entitled to recover any loss sustained in consequence of 'breach of promise' committed by the bank as has been explained.

In his attempt to present a basis for his view of the enforcement of a promise, the author states:

"The Islamic Fiqh Academy of Jiddah has resolved in accordance with the Maaliki school that a unilateral promise (made by one party) is binding and enforceable."

This corrupt resolution of the Jiddah academy is devoid of Shar'i substance. It is in conflict with the Shariah. If the academy in Jiddah has managed to dig up some remote view from the Maaliki Math-hab, it should be known that such a view is in total conflict with the categorical rulings of the Math-habs, including the Maaliki Math-hab.

The author presents the 'view of enforcement' in a misleading manner to create the impression that the official position of the Maaliki Math-hab is the legal enforcement of promises. But this impression is grossly erroneous and the attempt of the author is contemptible.

Regarding vows and promises, the position of the Maaliki Math-hab is:

"The Mash-hoor view of the Math-hab is that there shall be no court-ruling (to enforce) it regardless of whether the institution (the beneficiary) is stipulated or not. Thus, it appears in Kitaabul Hibaat of Al-Mudawwanah that if a man says: 'My house is Sadqah for the Masaakeen or for a specific man (whom he names)', thereafter he violates his vow, there shall be no court-ruling against him (to enforce the self-imposed vow/promise of Sadqah)."
(Tahreerul Kalaam fi Masaa-ilil Iltizaam of Allaamah Al-Hattaab)

It is highly unprincipled to cite an obscure view of a small minority in an attempt to negate the *Mash-hoor* Ruling of the Maaliki Math-hab as well as the *Ijmaa-ee (Unanimous)* Ruling

of the other Three Math-habs *distinct contract* in other words the Unanimous law of the Shariah.

Legal enforcement of vows/promises is a very contentious issue in the Maaliki Math-hab.

"Muhammad Bin Abdul Hakam said: He who takes a vow to give as Sadqah a specified sum of money or an unspecified sum to a particular man or to the Masaakeen (in general), or in the Path of Allah, or he vowed to make his house waqf, or to contribute horses in the Path of Allah (Jihad) or camels or oxen or sheep, then he violated (his vow), whether he confesses to this (violation) or it is proven by witnesses, nothing will be legally enforced on him. We shall, however, instruct him (morally to fulfil and honour his vow). But if he does not, he will not be compelled to do so." *(Tahreerul Kalaam)*

"Imaam Maalik said: 'A legal decree will not be made regarding every Sadqah which is made in the vow of the haalif (the one who vows)……however, the donor will be advised and admonished. If he then happily fulfils it, it is best for him. However, if he acts miserly (i.e. refuses to fulfil the vow), no legal ruling, whatsoever will be given against him. Ibn Rushd said: 'So is it stated in Kitaabul Hibaat of Al-Mudawwanah, i.e. whatever Sadqah is (undertaken) by way of a vow for the Masaakeen or for a specified person, the Sultan shall not compel him to pay it, And, this (view) is the Mash-hoor (most popular and authoritative) in the Math-hab (of Imaam Maalik)." (Tahreerul Kalaam)

The rationale for the *Mash-hoor* view of the Maaliki Math-hab, is: *"Verily, a legal decree will not be given against him (to pay) the Sadqah despite him being sinful in refraining from fulfilment, because there is no reward (thawaab) for him by issuing a legal decree against him whilst he is displeased (and not disposed to give the Sadqah). Thus, his wealth will be appropriated without any benefit. Similarly, a legal decree of fulfilment (of a vow) will not be given against a person who has made a vow.* *(Tahreerul Kalaam)*

"Al-Baaji said: 'Verily, Hibah (a gift) becomes incumbent with a verbal statement. When this has been established, (then know) that it is of two kinds:
(1) A category regarding which there is no legal ruling. (2) A category for which there is a legal ruling. The category for which there is no legal decree applies to Sadqah or Hibah (gift) or Waqf made by way of Yameen (Vow) whether made for a specified person (or institution) or for an unspecified person. There is consensus of our As-haab (Maaliki Jurists), Ibn Qaasim, Ash-hab and others besides them, on the view that no legal decree shall be given against him in this regard. However, he shall be instructed with it."

The writer of the deceptive and *baatil* alternative in which he postulates the 'unilateral promise' theory, has regurgitated the view of Hadhrat Mufti Taqi Uthmaani Sahib, which he (Mr. Omar) has extracted from the book, *'An Introduction to Islamic Finance',* in which Hadhrat Mufti Taqi Sahib states: *"However, in order to assure the creditor of prompt payment, the debtor may undertake to give some amount in charity in case of default. This is, in fact, a sort of Yamin (vow) which is a self-imposed penalty to keep oneself away from default. Normally such vows create a moral or religious obligation and are not enforceable through courts. However some Maaliki jurists allow to make it justiceable, and there is nothing in the Holy Qur'aan or the Sunnah of the Holy Prophet (sallallahu alayhi wasallam) which forbids making this 'vow' enforceable through the courts of law."*

We have responded in some detail in our booklet, *The Penalty of Default,* to this liberal and baseless view propounded by Hadhrat Mufti Sahib. Mr. Omar has structured his deceptive alternative on this weird premise presented by Hadhrat Mufti Taqi Sahib. The salient features of this postulate, which needs examination are:
(a) The unilateral promise is a "sort of a Yamin (vow)" which "some" Maaliki Fuqaha hold is enforceable by the courts of

law. While Hadhrat Mufti Taqi Sahib clearly attributes this view to "some Maaliki jurists", Mr. Omar presents it as the official stand of the Maaliki Math-hab when in reality it is not so.

(b) We have above, cited references of the Maaliki Fuqaha and the *Mash-hoor* ruling of the Maaliki Math-hab pertaining to the claim of the enforcement of promises/vows. According to the Maaliki Math-hab such vows and promises are not enforceable by the legal courts. Hadhrat Mufti Taqi Sahib has erred in his conclusion, and Mr. Omar has structured his legalization of issues of capitalism on the basis of the errors of Hadhrat Mufti Taqi Sahib.

While there is a type of 'self-imposed' vow which is legally enforceable according to "some Maaliki jurists", it does not bring within its purview a promise constrained by financial difficulties, demands of capitalism, attempts to legalize haraam interest and similar other transactions fabricated to circumvent the prohibitions of the Shariah.

In fact, "some Maaliki jurists" mentioned by Hadhrat Mufti Taqi Sahib, constitute such an insignificant minority, that the Maaliki Faqeeh, Al-Baaji, was constrained to claim *'Ittifaaq' (Consensus)* on the impermissibility of legal enforcement of the effects of *Yameen* (Vow). Furthermore, the legal enforcement view of the small minority of Maaliki Fuqaha pertains to promises of Sadqah and acts enacted to gain the Pleasure of Allah Ta'ala, not to acts which are in this era being fabricated to circumvent the Shariah and which are in diametric conflict with the Shariah's spirit and *ta'leem* of altruism and brotherhood, and which are in all truth imposed on the debtor by the creditor as an incumbent stipulation in a financial agreement.

(c) Hadhrat Mufti Taqi Sahib has acknowledged: *"Normally, such vows create a moral or religious obligation and are not enforceable through courts"*. However, it should be added that the choice of the word, *'Normally'*, is incorrect. Vows/promises *always* create moral obligations, and are *never* enforceable by the legal courts, with rare exceptions. At best, the view of "some Maaliki jurists" has been presented, and that too for a certain category of vows.

The consensus of the Math-habs on this issue is sufficient to dispel the impression created by the reasoning of Hadhrat Mufti Taqi Sahib. Hadhrat Mufti Mahmudul Hasan Gangohi (rahmatullah alayh) clarifies the issue of legal enforcement of a promise very emphatically and explicitly in his *Fataawa Mahmudiyyah*. He states with regard to a promise made at the time of a certain business transaction (this will, Insha'Allah, be fully discussed soon):

"….In brief, legally there is no right over him (who had made the promise). However, morally it is best for him to fulfil this promise. However, if at the time of making the promise, if it was his intention to honour it, but later due to circumstances he does not fulfil it, then according to the Shariah there is no sin on him."

(Fataawa Mahmudiyyah, Vol.6, page 287)

The Ruling of the Hanafi Math-hab – and we are followers of Imaam A'zam Abu Hanifah (rahmatullah alayh) – is too well known to require elaboration. Fulfilment of a promise cannot be enforced by the courts. It is an issue which pertains to morality. The same applies to the Shaafi and Hambali Math-habs, and this is also the view of the *Jamhoor* Fuqaha of the Maaliki Math-hab.

(d) An error of exceptional gravity is committed by Hadhrat Mufti Taqi Sahib by making the claim: *"...and there is nothing in the Holy Qur'aan or the Sunnah of the Holy Prophet (sallallahu alayhi wasallam) which forbids making this 'vow' enforceable through the courts of law."*

In making this sweeping claim, Hadhrat Mufti Sahib has tacitly stated that 100% of the Hanafi Fuqaha from Imaam Abu Hanifah (rahmatullah alayh) downwards, and all the thousands of Fuqaha of all ages, and of all Math-habs, have raised the Ruling of the impermissibility of legal enforcement of promises on the figments of their imagination for which they have no Qur'aanic or Sunnah basis. It is this type of unwarranted, baseless liberal opinion tendered to justify the practices of capitalist bankers, which we are constrained to brand as weird.

For the Muqallideen it suffices that the Ruling of the Math-hab is on impermissibility of legal enforcement of promises. This Ruling in fact is the Qur'aanic and Sunnah basis which the Muqallideen have to incumbently accept. If this Ruling was bereft of Qur'aanic and Sunnah basis, it is inconceivable that there would have existed *Ijma'* on this issue. It is precisely for this reason that Hadhrat Mufti Taqi Sahib found it necessary to say: *".....vows……are not enforceable through courts"*.

The Qur'aan and the Sunnah undoubtedly substantiate the official Ruling of impermissibility of legal enforcement of promises. Hence, the unanimous Ruling of the Math-habs. The view of the insignificant minority has to be necessarily set aside.

The liberalism of the Jiddah Fiqh Academy is the very first attitude to disqualify the opinions emanating from that source.

(e) The second major discrepancy in Mr. Omar's postulate is the incumbent stipulation of the *faasid* (corrupt and haraam) condition in the deceptive alternative which he has offered in his endeavour to circumvent the Law of the Shariah. In the alternative which he presents, *"the condition that the bank agrees to lease the property back to the client upon stipulated conditions should be expressed in the form of an enforceable unilateral promise"* in a separate contract and not as a term of the sale agreement by which the client sells his property to the bank.

If this stratagem is not an attempt to deliberately befuddle and mislead, then it is pure self-deception if the writer honestly believes that he has achieved the miracle of legalizing the haraam contract in which the condition is stipulated. In the example he has postulated, the client sells his own property to the bank on the understanding that the bank will 'lease the property back' to him. The purpose of the sham contract is plainly to gain a cash loan from the bank.

The bank is not in this type of market. If it does not have the assurance of the client 'leasing' the property, it will not venture into the deal. Conversely, if the client who owns the property does not gain the assurance from the bank that it will 'lease' the property to him, he will not 'sell' to the bank. The deal is executed on the firm undertaking that the condition will be honoured. Regardless of the condition of the 'unilateral promise' not being part of the written contract, it is a verbal condition which has been tacitly agreed to by the parties. It is a bilateral agreement.

In fact, it is the basis on which the whole contract pivots. There can be no gainsaying that irrespective of a 'separate' document

prepared to record the *baatil legally enforceable stipulation*, it forms part of the sale contract by virtue of the prior agreement and the understanding.

In view of the tacit agreement on the condition, it is utterly baseless for the writer to aver: *"In such a case, the sale transaction is separate and independent of the unilateral promise."*

The writer, Mr. Omar has abortively attempted to justify his deceptive alternative by analogising it with what is known in the Shariah as *Bay-ul-Wafa'*. Insha'Allah, the fallacy of this analogy will soon be exposed.

The writer is conveniently or ignorantly silent with regard to the timing of his 'unilateral enforceable promise'. At what stage of the sale transaction is the 'legally enforceable promise' agreed to? Prior to the sale, simultaneous with the sale or after the sale?

Prior to the Sale: If the condition is agreed to prior to the sale, it is tantamount to stipulating the condition at the time of the sale. This encumbrance renders the sale *faasid* --corrupt and haraam in the category of riba.

Simultaneously: If the condition is stipulated at the time of the sale, it likewise renders the contract faasid.

After the Sale: If the condition is agreed to after conclusion of the sale, it is totally superfluous in so far as the sale is concerned. It has absolutely no effect on the sale. It is then not a condition concomitant to the sale. It is an independent promise having only moral implications. It cannot be legally enforced.

After finalisation of the sale, the prejudiced party will not be inclined to encumber himself unnecessarily with a provision of either legal or moral implications if he deems such a promise detrimental to his interests. The party, (the creditor) who is keen for this stipulation will have no clout of imposition after conclusion of the sale. He will enjoy the right of imposition, albeit in a haraam manner, only if a prior agreement to the effect has been arranged. Why would the unwilling party assume an unnecessary obligation which cannot be imposed on him after the conclusion of the deal?

THE MUTUAL PROMISES

In his attempt to insulate his deceptive alternative, Mr. Omar says: *"The mutual promises do not themselves give rise to a contract of sale. The contract is only concluded on the future date when delivery and payment occurs by way of offer and acceptance at the relevant time."*

While the 'mutual promises do not give rise to a contract of sale', they most certainly invalidate a sale. The promise, as pointed out above, is a *faasid* (corrupt) condition which encumbers the transaction whether stipulated before or at the time of the contract of sale. The parties who wish to enter into this type of corrupt sale understand and know that the actual aim of the sale is the realization of the condition. Without the condition they will not enter into the sale. It is precisely for this reason that Mr. Omar postulated the priority of the condition. He at least understands that it would be futile to stipulate the condition after the conclusion of the sale due to its redundancy as well as the almost certain refusal of the party who is not favoured by the condition.

THE SELLER'S CLAIM

Using the convoluted *Bay-ul-Wafa'* as the basis for his deceptive alternative, Mr. Omar says: *"Ownership passes immediately from the seller to the buyer. The buyer is in turn obliged to pay the agreed price."*

If the 'buyer' in this transaction truly gains ownership immediately on conclusion of the 'sale' as averred by Mr. Omar, the promise cannot compel him to 'resell' his own property to the former owner who has absolutely no rights over the property which has passed into the ownership of the buyer. The promise pertaining to the corrupt 'buy back' condition cannot be legally enforced to usurp the property of others.

In his quest for providing a basis for the riba banks, he has stumbled on the *Bay-ul-Wafa'* ploy and has torn it out of its context to confer legality to the transactions which he proposes.

The reason for the right of the so-called 'seller' to reclaim his property, if it has not been destroyed, or its value if destroyed, is not the promise, for a promise does not give rise to such consequences. The reason has been defined with clarity in the *Kutub* of the *Ahnaaf.* The plain and simple reason is that *Bay-ul-Wafa'* is not a valid sale transaction. It is a *Rahn* (Pawn) contract. This will be shown, Insha'Allah, in the explanation on *Bay-ul-Wafa'.*

The so-called 'seller' is not a true seller. He is the debtor who has pawned his property to the so-called 'buyer' in lieu of the loan given to him. Since the ownership rights of the 'seller' (the pawner) are not extinguished by the *Bay-ul-Wafa'* contract, he does not lose his property in the event of the insolvency of the 'buyer' (the pawnee) who had advanced the loan. In this arrangement, the promise is devoid of legal

substance, and does not ensure for either party any special rights. The one who has made the promise subsequent to the 'sale' is morally obliged to honour it. But the condition which is either attached to the contract or made prior to it is *faasid.* Such a corrupt promise is not to be honoured, not even morally.

LEGAL CONSEQUENCES?

On the basis of a solitary corrupt contract condoned by a small minority of post 4th century Ulama, Mr. Omar proclaims in the tones of an 'authority': *"On the other hand, bilateral promises do not give rise to immediate legal consequences following upon a sale. If the promisor is unable to fulfil his promise for a valid reason, he is not liable to the promise for compensation or otherwise."*

This averment is another example of Mr. Omar's unprincipled style of reasoning This unprincipled way of reasoning has constrained him to present a potion which is constituted of an admixture of moral and legal aspects. In the same breath while he speaks of legal consequences, he introduces the moral dimension of the 'promisor not being liable if he has a valid reason'.

If the promise in the first instance had been a legal device, it would not have receded into the realm of moral oblivion which exonerates the 'promisor' of liability. The legal wheel in legal issues makes its full turn to squeeze from the defaulter everything he has to make good his liability.

Furthermore, Mr. Omar has sucked from his thumb this convoluted 'ruling' of his nafs. Even the Fataawa Khaaniyyah text which states the incumbency of honouring the promise

does not tender the convolution which Mr. Omar has ventured. From whence did Mr. Omar acquire the 'ruling' that a promise of 'legal consequences' – a promise which he claims is legally enforceable – fizzles out in the moral domain in the event of inability to honour it 'for a valid reason'?

In brief: Mr. Omar has postulated here pure drivel. A promise in the Shariah has no legal consequences.

'ISLAMIC BANKING'

On the basis of the *Bay-ul-Wafa'* fallacy, Mr. Omar states: *"In the context of Islamic banking, it becomes necessary to use 'promises' in relation to different financial instruments."*

Mr. Omar here commits a capital blunder and a capital sin while simultaneously demonstrating his lack of understanding of the methodology of the operation of the Principles of Fiqah.

It should be remembered that *Bay-ul-Wafa'* is a *faasid* sale transaction. There exists consensus of the Fuqaha – both the *Mutaqaddimeen* and *Muta-akh-khireen* – on the *fasaad* (corruption) of this type of contract. Precisely for this reason is there considerable argument, controversy, incongruency, uncertainty, interpretation and explicit pronouncements of prohibition in the *Kutub* on this perplexing issue.

The aforementioned consensus includes the small minority of the Ulama of the later centuries. Even they who have ruled permissibility know that they are skating on thin ice. Even they do not challenge the Principles on which the prohibition is based. However, they have inclined towards permissibility on entirely a different basis, invoking the principle of 'need' which operates to produce the permissibility of pork.

In view of the extremely deficient ruling of the small minority, and in view of the conspicuous conflict of the permissibility with the *Dalaa-il of the Shariah*, and the flimsy claim of 'need', no one has ventured the stupidity which Mr. Omar has audaciously postulated as if he is an authority of the Shariah. Mr. Omar has committed the capital blunder and sin of extending the deficient, corrupt and shaky *Bay-ul-Wafa'* ruling to a variety of 'different financial instruments' of the riba banks.

The *permissibility of Bay-ul-Wafa'* is a ruling which is in conflict with the Analogical Reasoning Process *(Qiyaas)* of the Shariah. In terms of the conditions for the validity of *Qiyaas* it is invalid and not permissible to fix an irrational *(Khilaaf-e-Qiyaas or in conflict with rational reasoning) mas'alah* as the basis or first premise *(Maqees Alayh)* for the syllogism to effect transference of a Ruling *(Hukm)* to the new contingency, which in this case is the "different financial instruments".

No authority of the Shariah has ventured to execute the stupidity which Mr. Omar has selected for himself in his 'pioneering' mission to give material effect to the Hadith of Rasulullah (sallallahu alayhi wasallam):

"THEY ARE ASTRAY AND WILL LEAD OTHERS ASTRAY" – (WITH THEIR JAHAALAT)

The materialization of this Hadith is among the Signs of the Approaching Hour of Qiyaamah.

For the process of formulation of rulings for the "different financial instruments" of the banks, it is imperative for a properly qualified Mufti or for Muftis to resort to the *Dalaa-il of the Shariah*. Every such 'financial instrument' has to be

incumbently submitted to the scrutiny of the Shariah's *Dalaa-il* and a principled approach be made on this sacred basis to extract a *Shar'i Hukm* which will carry the force of the Shariah. It will then be brought within the ambit of the Immutable Law of the Shariah, violation of which can be said to be sinful.

But the opinion spawned by Mr. Omar is a figment of his nafs having absolutely no basis in the *Dalaa-il of the Shariah*. He very amateurishly displays his inexpertise and inability to deal with issues which are in need of Shar'i rulings. An authoritative ruling of the Shariah cannot be acquired by rambling through the books of the different Math-habs, and randomly select in the process of stumbling on incongruencies, such individual *mas'alahs* which appeal to the palate of whim and fancy. This type of rambler compounds his error when he believes that the expedient which he has extracted from a kitaab is a principle on which to base the variety of '*different financial instruments'* of the banks in the capitalist riba world. No one among the authorities of the Shariah had adopted such an unprincipled approach which is the consequence of lack of knowledge and deficiency of understanding.

A BASELESS CALCULATION

An example of the "different financial instruments" presented by Mr. Omar is a Muraabahah transaction. Having satisfied himself by his convoluted and unprincipled style of reasoning that his *Bay-ul-Wafa'* is a valid 'principle of Islamic jurisprudence', he deducted on its basis the legal enforceability of a promise which has only moral consequences in Islam. Then he extended this misrule and fallacy to a Muraabahah sale contract. In so doing he renders the Muraabahah deal *faasid* with the *faasid* promise condition.

One injustice and stupidity spawn other injustices and stupidities. He then concludes that a man who does not wish to enter into a Muraabahah sale with the bank after having intimated his desire to purchase, be penalized and forced to pay the bank "damages it would suffer".

This ludicrous 'ruling' of Mr. Omar brings into existence several haraam and unjust consequences:
(a) A man is being forced to buy something he does not want.
(b) A man who refuses to purchase the property of the bank be robbed of his money. Such robbery is then interpreted as payment of damages for 'breach of promise'. Even if it is momentarily conceded that the particular promise attached to the sale contract has validity, then too it is haraam to extort money for breach of promise. But the reality is that the 'promise' is not valid since it appears in the form of a *faasid* condition which encumbers the sale in an unlawful manner.

Votaries of such baseless arguments contend that if the promise is not made legally enforceable, the bank stands to suffer considerable financial losses because the vehicles are bought specifically for the clients on their request. This argument is bereft of valid substance because:

(i) The very same argument rebounds on these votaries, for they have entrapped themselves by the self-contradiction: *"If the promisor is unable to fulfil his promise for a valid reason, he is not liable to the promisee for compensation or otherwise."*

Regardless of validity or invalidity of reason, the bank will suffer the same losses concomitant to breach of promise based on invalid grounds. In an irrational and corrupt 'ruling' based

on a hybrid legal-moral concept, the bank simply has to accept the 'loss' – the imaginary loss – if the promisor has valid grounds for reneging. On the other hand, it can legally pursue the promisor if he lacks valid reasons. So, just as Mr. Omar has accepted that the bank simply has to suffer the loss in one dimension of the promise, it has also to be accepted that the bank has to necessarily suffer the 'loss' in the other dimension of the promise.

Just as the supposedly legally enforceable promise cannot be legally enforced according to Mr. Omar if the promisor has a valid reason for reneging, so too says the Shariah—that the promise cannot be legally enforced irrespective of validity or invalidity of reason for breach. Furthermore, the Shariah rules that the very promise encumbering the sale contract is a *faasid shart*. The question of legal enforceability, hence, does not arise.

(ii) In actuality, the bank suffers no loss. The vehicle is the property solely of the bank. If a prospective buyer refuses to purchase, the bank retains its property. If circumstances constrain the bank to sell the vehicle for less than its cost, such loss cannot be extracted from another person who is a stranger and an outsider in so far as the bank's property is concerned. Any 'damages' the bank suffers on account of depreciation in the price of the vehicle is for the account of the bank, and cannot be unjustly loaded onto a man who had intimated a desire to purchase.

The Muraabahah or any other 'financial instrument' of the Shariah may not be utilized as stratagems and ploys to legalize riba and haraam. These are valid trade contracts which come with all their benefits and risks. When an entrepreneur ventures into this field, he understands or should understand the risks

involved. But since the banks are pure Riba institutions which specialize in the 'trade' of money spawning money, i.e. lending money on interest, the risks attached to valid commercial sale transactions are incomprehensible and unacceptable to the banks. This is so because they stand like insane men driven to insanity by the touch of shaitaan. Confirming this, the Qur'aan Majeed declares:

"Those who devour riba do not stand except as one who has been driven to madness by the touch of shaitaan."

It is glaringly obvious that the deceptive alternative will have reality for the client and the bank only if the condition of the enforceable promise has been concluded either prior to the sale or simultaneously. This, however, effectively renders the sale transaction *faasid.* All the sophistry employed by Mr. Omar in the desperate ploy to weave the idea of a totally separate bilateral agreement apart from the actual sale contract is pure bunkum and humbug.

Acknowledging the prior stipulation of this *haraam* condition, the writer says: *"The contract is only concluded on the future date when delivery and payment occurs by way of offer and acceptance at the relevant time."*

In the discussion on *Bay-ul-Wafa'*, in the ensuing pages, it will, Insha'Allah, be shown that the prior and simultaneous stipulation of repulsive condition renders the sale *faasid.*

If this *faasid* encumbrance does not constitute an integral part of the sale transaction in the deceptive model offered by Mr. Omar, the deal will not be concluded. The very essence of the type of transaction which has been presented by the writer is

the "buy back" condition. The 'sale' of the property is merely a stratagem of circumvention, albeit a *baatil* method.

AL-MA'ROOF KAL MASHROOT

Al-Ma'roof Kal Mashroot is a *Fiqhi* Principle of the Shariah which means that a well-known, customary practice is just like the one with the specified conditions. Thus, even if a condition is not verbally stated or written in a contract, but its existence is implied and tacitly accepted by the parties, it is tantamount to the expressly stated condition.

Even if a depositor of money in a bank does not enter into a riba agreement with the bank to pay him interest on his savings, the interest the bank credits on his savings is haraam riba. If it is a prevalent practice that the lender will only advance a loan if he receives an extra amount upon repayment, and in the absence of such extra payment he will not give a loan, then the extra sum given is haraam riba despite the fact that it was not a stipulated condition when the loan was given.

Similarly, if it is a known customary practice for the debtor to incumbently repay extra on a loan, then too the excess will be riba notwithstanding the absence of a verbal or written condition to the effect. Hence, there is consensus of all Ulama that bank interest on savings is haraam riba.

The separately recorded 'unilateral enforceable promise' is a necessary corollary of the deceptive alternative offered by Mr. Omar. As such it comes within the purview of *Al-Ma'roof Kal Mash-root*. It is tacitly agreed on and understood to be integral to the sale transaction. The alternative offered by Mr. Omar is deceptive since it offers nothing new. It is identical to the sale

which is subjected to the stipulated haraam condition declared in the same contract.

PRECEDENTS

Proclaiming his fallacy, Mr. Omar states: "*There are precedents in Islamic Law for the enforceability of bilateral promises in the case of commercial need."*

This claim is false. Firstly, we have shown that according to Islamic Law a promise is a subject for the Moral Code *(Akhlaaq)* of Islam, not for the legal law *(Qadha).* The question of 'enforceability' via the agency of the courts, moreover kuffaar courts, of which Mr. Omar happens to be an agent/officer, is therefore devoid of Shar'i substance.

The fourteen century *Mas'alah* of the Impermissibility of legally enforcing a Promise may not be convoluted and abrogated for any reason whatsoever, especially when the motivation is the accommodation of aspects of the capitalist *Riba* system. The legal enforceability of a certain category of vows, not all vows and promises, according to an insignificant minority of the Maaliki Jurists cannever be appropriated, especially by Muqallideen of the Hanafi Math-hab, leave alone miscreants and misguided self-appointed authorities, to constitute a valid premise for a Shar'i analogy with the aim of transferring the effect of that obscure ruling to constitute a permanent *Fatwa* of legality and permissibility for the corrupt business transactions of the agencies of capitalism, viz., the banks of this era, be they Muslim-owned.

The factors which prevent and prohibit this baseless analogy and the transference of its effect are:

* The ramblings of a modernist layman in the domain of Islamic Law are of no consideration. An unqualified man in the Shariah, in its domain of Law, who ventures opinions on issues pertaining to the Sacred and Immutable Divine Shariah, comes fully within the scope of Rasulullah's warning:

"Whoever speaks on (issues of) the Qur'aan (the Shariah) without Knowledge, should prepare his abode in the Fire."

It is also mentioned in the Hadith that even if such a person stumbles on the correct opinion by coincidence or fluke, he has still grievously erred. He still deserves the Fire of Hell. He is in the category of a quack who tries to diagnose and prescribe to medical patients.

* The view of enforceability is in conflict with fourteen centuries of *Ijma' (Consensus)* of the Ummah.

* There is absolutely no need, commercial or otherwise, for the incorporation of a *haraam* act within the scope of permissibility. Swine flesh will become lawful for consumption only in the case of Shar'i *Dhuroorah* (dire need which is life-threatening).

Some of the later Fuqaha have said that the mutual promises of the parties are incumbent because of *'haajat linnaas'* (the need of people). Mr. Omar translated these terms as *'commercial need'*. This rendition is palpably erroneous. In the Shariah there is no concept of legalization of a *haraam, faasid or baatil* transaction on the grounds of 'commercial' need, whatever this may mean. If a dire need develops in relation to the masses, the exigency will be scrutinized in the light of the situation and the relevant principles of the Shariah, and the necessary ruling can then be issued by only qualified, experienced and expert Ulama.

In terms of the Shariah's principle, prohibitions temporarily become lawful by way of concession due to 'dire need' (*Dhuroorah/Haajat)* which is a concept not left open to the interpretation of the vagaries of wildly vacillating commodity markets, commercial desires of the *nafs* and opinions of westernised Muslims acting as the clandestine agents of *Riba* capitalism.

* Mr. Omar has claimed that "there are precedents in Islamic Law for the enforceability of bilateral promises in the case of commercial need". We have already mentioned that there is no such 'commercial' need which occasions the transformation of a prohibition into a permissibility. As for 'precedents', he has failed to cite any valid precedent other than tendering the *Bay-ul-Wafa'* transaction which itself is a *haraam* and *baatil* sale contract. We shall discuss this deal soon, Insha'Allah.

There is no such precedent in even the *Bay-ul-Wafa* example which he has presented in his attempt to formulate a basis for the legalization of a haraam transaction, namely, his deceptive alternative.

* The text from Fataawa Khaaniyyah, which Mr. Omar cited as his 'precedent' for legal enforceability of a promise, makes no mention of such enforceability. The text is as follows:

و ان ذ كر البيع من غير شر ط،ثمّ ذكر الشر ط على وجه الو اعلة قد تكون لازمة، فتجعل لازمت لحاجة الناس عة

Mr. Omar translated as follows: *"if the sale is concluded without reference to the "buy back" condition; thereafter the "buy back" condition is expressed separately in the form of*

bilateral promises, the sale is valid; and the promises are enforceable because of commercial need."

This rendition is incorrect. The proper version is as follows: *"If the sale transaction is mentioned without (stipulation) of a condition, thereafter (i.e. after the finalisation of the sale), the condition is mentioned by way of mutual promise, then at times it (the mutual promise) will be incumbent. Hence, it (the promise) shall be made incumbent due to the need of the people."*

Mr. Omar is guilty of having interpolated:

- "the sale is valid"
- "the promises are enforceable"
- "commercial need."

Although the validity of the sale is mentioned elsewhere, and even though the inference of validity could be inferred from this text, the writer stated it as part of the original text of Fataawa Khaaniyyah, while it is not so.

By 'enforceable' Mr. Omar clearly means 'legally enforceable by the courts of law'. This is his whimsical injection into the translation. It is nowhere mentioned that the promise is 'legally enforceable', neither in the text produced by Mr. Omar nor in any other text of Fataawah Khaaniyyah or any other Hanafi Book of Law.

The word, '*laazimah'* appearing in the text means incumbent or binding, i.e. morally binding. This is in accord with the principle of the Shariah applicable to promises. In other words, the promise is binding and its fulfilment is binding (Waajib) simply on the basis of the Qur'aanic command: *"Honour promises..."* The incumbency of fulfilling promises is not

contested. But there is a vast difference between morally honouring a promise and legal enforcement.

Furthermore, on the assumption that a promise in this regard is legally enforceable, which court does he envisage will be entrusted with this obligation? The Kuffaar courts of which Mr. Omar is an officer? Mr. Omar has fabricated his deceptive model for Muslim neo-capitalist banks which operate in either kuffaar countries or Muslim lands governed by fussaaq of the kuffaar ilk. In all these countries, there is no truly Islamic court available to execute the functions of Shar'i *Qadha'*. If Mr. Omar in a state of extreme naivety intended his model for an imaginary Islamic state, then it is necessary that he desists from redundant exercises dreaming of Utopia.

Thus, there is no support for Mr. Omar in the text of Fataawah Khaaniyyah which he has tendered as his evidence for the legal enforceability of promises. If it should be momentarily accepted for the purpose of this argument, that the text of Fataawah Khaaniyyah does mean 'legal enforceability', then we shall retort that there is absolutely no incumbency to adopt this view in the face of a thousand Rulings of the highest class of Fuqaha and Aimmah-e-Mujtahideen and the Consensus which all are in diametric opposition to the view of legal enforceability of a promise.

Since Mr. Omar has chosen to extract this reference from Fataawah Khaaniyyah selectively to bolster his convoluted opinion, it will be appropriate to cite the very same authority (Fataawah Khaaniyyah) on also an issue involving a promise. The following Ruling appears in Fataawah Khaaniyyah:

"A man rents his house to someone, then sells it to another person. The new owner now collects the rent. He, has however, promised the seller of

the house (in a Bay-ul-Wafa) that when he (the seller of the house) returns the money (which he had paid for the house), he will return the house to him, and he will also deduct the amount of collected rents from the price (which he had paid). After some time the seller comes with the money and intends to deduct from the amount (i.e. the price he had received). The Ulama said in this regard: 'The seller may not deduct the amount (which the buyer had promised to be deducted). The statement of the buyer, namely, the collected rentals will be deductible from the price at the time of the return of the house, is a promise, fulfilment of which is not legally binding. However, if he honours his promise, then it is commendable."

The *luzoom* (binding nature/incumbency) of the promise mentioned in the *mas'alah* cited by Mr. Omar from Khaaniyyah should be viewed in the light of the clarity of the negation of legal enforcement stated in the aforementioned Ruling of Fataawa Khaaniyyah.

HAAJATUN NAAS

Furthermore, there does not exist a situation of dire need to justify acceptance of a view which clashes with the *Asal Math-hab* – the Original Ruling of Hurmat (being haraam) of the Hanafi Math-hab as well as of the other Math-habs.

Haajatun Naas (need of the people) which Mr. Omar translates as *'commercial need'*, besides being incorrect, does not exist in our time to the degree of a *Shar'i Dhuroorat* which is a genuine and a dire need causing great hardship, thus necessitating the operation of the principle: *"Dhururaat (dire needs) legalize prohibitions"*

'Commercial need' is the need to make money. Such a need is related to even billionaires who ply their trade until the day

they enter the grave, motivated by the need to gratify the inordinate greed of the nafs. All their trade and commerce are dictated by their respective commercial needs. But these 'needs' are not within the ambit of the Shariah's definition of 'Need' on the basis of which a prohibition falls away for the concession of permissibility.

There is absolutely no such need in our time for even contemplating legalization of a haraam and baatil sale based on the *Bay-ul-Wafa* stratagem, which itself cannot constitute a basis for the formulation of a Shar'i *Hukm.*

UNPRINCIPLED REASONING

All modernists and liberals suffer from the same disease of unprincipled reasoning. Since they lack proper understanding of the operation of the Principles of the Shariah, they invariably resort to corrupt and unprincipled reasoning which is the product of their whimsical and emotional opinions which are generally bereft of the rationalism which the Shariah's *Qiyaas* process demands.

When a ruling is required for an exigency or a new development which had not existed in exactitude during the early ages of Islam, the imperative and principled methodology to employ is for experienced, qualified and *Muttaqi* Ulama to issue the ruling on the basis of the Principles of the Shariah, not on the basis of the permissibility of consuming a minimum amount of swine's flesh when one is on the verge of death due to starvation. The permissibility of pork consumption is formulated on principled basis – on solid *Shar'i Daleel.*

The permissibility of consuming pork, for example, is not based on the Hadith which allowed certain people to consume

camel's urine as a cure for their diseases. The permissibility is based on principles of the Shariah. After a process of principled reasoning, the *Hukm* of permissibility is issued.

The *Shar'i Dhururat* has to be firstly established and proved. When the genuine need has been conclusively established, then the ruling will be based on the principle of the Shariah applicable to the exigency in the relevant context.

As far as *Bay-ul-Wafa'* is concerned, it is not among the *Usool* (Principles) of Fiqah. It is not a principle on which permissibility for another contingency or development could be based. *Bay-ul-Wafa'*, as will be shown later, Insha'Allah, itself is a *haraam* and *baatil* transaction which a small minority of the *Mutakh-khireen* Ulama (those who had appeared from the 5th Islamic century) had ruled to be permissible based on 'need', not 'commercial' need, but a genuine need of the people – a need which in their esteem was sufficient for the invocation of the principle underlying the ruling for concession. But no such need exists today. If someone had consumed swine's flesh because he was on the verge of physical extinction due to starvation, a general rule of permissibility of consuming pork cannot be issued citing as the basis for the desired universal 'permissibility' the case of the starving man.

It is therefore most unprincipled to cite *an unlawful transaction legalized on extremely flimsy grounds by a minority of the later-day Ulama*, for the purpose of using it as a stratagem to legalize uncalled for and unneeded *faasid* trade deals of the capitalist riba banks.

On the issue of the corrupt *Bay-ul-Wafa'* transaction, Mr. Omar has selected out of nine different views, the one which suited

his liberal palate. And, this selection was executed by him for the sole purpose of finding accommodation for the western riba capitalist system in the Shariah.

CONFUSION

The existence of numerous (nine) different views on the nature of *Bay-ul-Wafa'* suffices for its discardence. However, despite the confusion, ambiguity and differences on this issue, there is consensus on two aspects relating to this deal:

"Bay-ul-Wafa' is considered to be either Rahn (Pawning) as some (Ulama) have said, or Bay-e-Faasid (corrupt/invalid sale) as other Ulama have said."

(Khaaniyah, Vol. 2, page 171)

While Mr. Omar swiftly and conveniently cites *Fataawa Khaaniyah* on the 'promise' issue, he overlooks, or perhaps is blissfully ignorant, of the verdict stated in *Khaaniyah* (as above) on the *baatil Bay-ul-Wafa'* deal.

According to those Ulama who aver that it is *Rahn*, all the rules of Pawning will be applicable. This is confirmed with clarity in the Fiqh books, including *Fataawa Khaaniyah*. According to those who aver that *Bay-ul-Wafa'* is a *Faasid Bay'*, all the *ahkaam* of corrupt/invalid sales will apply.

In view of this categoric ruling based on the Principles of the Shariah, *Bay-ul-Wafa'* should be buried and not exhumed from its grave, and then ludicrously present the decomposed skeleton as if it is an *Asl* (Principle) of Fiqah.

In the maze of confusion surrounding this corrupt transaction, Mr. Omar has overlooked the following ruling also stated in *Khaaniyah* from which he has extracted his imagined

'principle' of the legal enforceability of a promise which in reality belongs to the moral domain according to the Shariah. On page 307, Vol. 2, Khaaniyah states:

"A man rents his house to someone, then he sells it to another person. The new owner now collects the rent. He (the new owner) has promised the seller of the house that when he (the seller) refunds his money (the price he had paid), he (the buyer) will then return the house to him, and he (the seller) can also deduct from the price all the rent he (the buyer – the so-called new owner) had collected. After some time the 'seller' comes with the money (to claim the house). He now intends to deduct the amount of the rent (which the buyer had collected and had promised to make over to him by deducting it from the price). In this regard the Ulama said: "The seller may not deduct it (the rent collected by the buyer) from the price. The statement which the buyer made to the seller, namely, that he may deduct it from the price when the house is returned, was a promise. Hence, its fulfilment is not incumbent (or enforceable) legally. If he fulfils it, it will be good, otherwise there is nothing (no claim) against him. If they had stipulated this as a condition in the sale contract, then it would have rendered the sale faasid (corrupt and invalid)."

In this example of *Bay-ul-Wafa'* it is explicitly mentioned that a promise is not legally enforceable. In fact, it is made clear in the aforementioned example that fulfilment of this type of promise is not even morally incumbent, hence it is mentioned: *"If he fulfils it, it will be good"*. Despite the 'bilateral promise' made here, *Khaaniyah* states that its fulfilment is not even morally incumbent. This is in diametric conflict with *Khaaniyah's* statement in another example of *Bay-ul-Wafa'* where it is mentioned that fulfilment of the promise is incumbent.

To eliminate the incongruity and contradiction, the term *laazimah* (incumbent) should be interpreted to mean morally incumbent. It will then conform with the Shariah's moral ruling

pertaining to promises. Furthermore, should it be assumed that in the specific example mentioned in *Khaaniyah,* the meaning of incumbent is 'legally enforceable', then there is no incumbency to accept this interpretation or meaning since it is in conflict with the established tenet of the Shariah pertaining to promises. It also represents a *faasid* condition which corrupts the sale. It is furthermore, in conflict with the *Asl Math-hab.*

Mr. Omar thus has no valid grounds for having made the selection of this specific corrupt transaction which embodies two *faasid* elements:

(1) A *faasid* condition, namely, the 'buy-back' condition.
(2) Legal enforcement of a promise which according to the Shariah is NOT legally enforceable.

Let us now examine the *Fataawa* of our immediate Akaabireen on *Bay-ul-Wafa'.*

THE FATAAWA OF THE SENIOR ULAMA

(1) Hakimul Ummat Hadhrat Maulana Ashraf Ali (rahmatullah alayh), while acknowledging that according to some Muta-akh-khireen Fuqaha, *Bay-ul-Wafa'* is permissible because of a need which they had perceived, states about this type of sale: "A contract, the intent of which is *Rahn* and the external form of which is *Bay'* is called *Bay-ul-Wafa'.* According to the Principles of the Math-hab this *(i.e. Bay-ul-Wafa')* too is *Rahn.* It is haraam (for the buyer/pawnee) to derive any benefit from it (the 'sold' object). (Assuming) it to be a *Bay',* then because of the *(faasid)* condition it is a *Bay' Faasid*, hence haraam." *(Imdaadul Fataawa, Vol. 3, page 107)*

"According to the *Asl Math-hab*, the transaction is faasid."
(Imdaadul Fataawa, Vol. 3, page 108)

(2) Fataawa Daarul Uloom Deoband states: "There is considerable difference of opinion among the Fuqaha on the issue of *Bay-ul-Wafa'*. According to some it is *Rahn* and according to others it is *Bay'*...If the condition of return (i.e. the 'buy-back' condition) is made at the time of the sale or stipulated in the contract, then it will be *Bay' Faasid.* If the condition is made after conclusion of the transaction, then the sale is proper. In this case (i.e. after conclusion of the sale) the condition is a promise which does not corrupt the transaction (since it was made after termination of the sale)."
(Vol. 8, page 20)

(3) "*Question:* Is it permissible to buy something on condition of returning the item to the seller when he returns the amount which was paid?
Answer: If this condition is stipulated in the transaction or before the transaction or if the parties do not consider the transaction binding, then this will be a *Bay' Faasid* (corrupt/invalid sale). If the promise is made after conclusion of the sale, the sale is valid, and it is necessary to fulfil the promise." *(Ahsanul Fataawa, page 507, Vol. 6)*

(4) "*Question:* I sell my property valued at 2000 rupees for 900 rupees due to my need, on this condition that if I pay back the 900 rupees, the buyer will return my property… The buyer will derive the benefit of the property (rent, etc.) during this period. Is this sale permissible? Is it permissible for the buyer to derive benefit from the property?
Answer: According to the Shariah, this sale is not valid. It is in effect *Rahn* (pawning). It is not permissible for the 'buyer' who in reality is the *murtahin* (pawnee), to derive any benefit from

the property. Whatever income is derived, belongs to the original owner (i.e. the 'seller') who in reality is the *raahin* (the pawner). The income will also remain pawned along with the property. When the true owner returns the 900 rupees, his property and the income will be handed to him."

(Fataawa Mahmudiyyah, page 276, Vol. 11)

(5) "*Question:* Circumstances compelled me to sell my house to Bakr on condition that after a year if I am able to repay Bakr, I will take back my house. Is this method permissible? Is it permissible for Bakr to use this house?
Answer: Selling with this condition renders the sale *faasid* (corrupt/invalid). It is on the contrary *Rahn* (pawning). It is called *Bay-ul-Wafa'*. The house will be pawned. It is not permissible for the pawnee to derive benefit (rent, etc.) from the house. The sale should be transacted without any condition. Thereafter, at another meeting, the promise of returning the house could be made. The sale will then be valid. When the money is returned within the specified time, it will be morally incumbent to return the house in view of the promise."

(Fataawa Mahmudiyyah, Vol. 290, page 297)

(6) "*Question:* In the presence about 15 people, Zaid who had taken the land of Amr in lieu of some money, said to him: 'I shall return your land when you pay me 2000 rupees.' No time period was fixed for repayment. On the contrary, Zaid had said that he could pay back whenever he wished and reclaim the land. Amr now is able to repay the amount, but Zaid refuses to give back the land. How is this possession of the land by Zaid regarded (in the Shariah)?"

Answer: If Zaid had held the land as a pawn, then it is not permissible for Zaid to derive any benefit from the land. The condition of 2000 rupees is baseless. He is entitled to take back

his full right (whatever amount he had lent to Amr), and it is incumbent that he returns the land to Amr on receiving his money.

However, if he had bought the land with the condition that he will return it in exchange for 2000 rupees, then this sale is *faasid.* It is incumbent to annul it. If the condition was not made at the time of the transaction, but made separately after conclusion of the deal, then it is morally necessary for Zaid to fulfil the promise made."

(Fataawa Mahmudiyyah, Vol. 11, page 301)

(7) "*Question:* Due to financial straits Zaid sells his land to Bakr who became the registered owner. Bakr farms the ground. Although the condition of returning the land (to Zaid) was not explicitly mentioned, it was implied. Is this transaction proper or not?

Answer: If there was no buy-back condition in this transaction, the sale is valid. If a verbal promise was made afterwards, its fulfilment is morally incumbent because violation of a promise is haraam. But, the sale cannot be forcibly (i.e. legally) revoked (to enable Bakr to take back the land).

If the promise was in the actual transaction, then it is *Bay-ul-Wafa'*. Shaami has narrated several views regarding *Bay-ul-Wafa'*. The preferred view is that this is a sale in outward form, but in effect it is *Rahn* (pawning). It is not permissible for the pawnbroker to derive any benefit from the pawned item. Hence, whatever wealth has been gained during this time (of custody) should be returned (to the owner) or it should be deducted from the 'price' which in reality is *qardh* (a loan). Maulana Abdul Hayy Lucknowi (rahmatullah alayh) has

written a treatise on this mas'alah. Its title is *Alfalakul Mashjoon.* The arguments are stated with elaboration."

(Fataawa Mahmudiyyah, Vol. 13, page 358)

(8) Explaining the invalidity of *Bay-ul-Wafa'* with clarity, Hadhrat Mufti Mahmoodul Hasan Gangohi (rahmatullah alayh) states:

"**Question:** Zaid has categorically sold his property to Bakr. Zaid requested Bakr to grant him the concession of taking back his property within a specified period of time if he (Zaid) pays back the money. Is this sale permissible according to the Shariah?

Answer: If the return of the property was not stipulated as a condition in the sale contract or by way of a promise, and the sale was contracted in the usual manner in which people daily transact sales, and at some other time and sitting, Zaid had requested Bakr for this favour, and Bakr had accepted it, then according to the Shariah the sale is valid.

Now, Zaid has no right whatsoever of legally demanding the return (of the property). He cannot compel Bakr in any way whatsoever to return the property. Bakr has the full and unfettered rights of ownership of the property. If he wishes, he may dispose of it to someone by sale, gift, pawning, etc. Zaid has no right of debarring any of these operations (of Bakr).

Even if Zaid wishes to pay back the money within the mutually agreed time period, Bakr has the right to return the property if he deems it appropriate and if he feels that there is nothing to impede him (from so doing). If it is in conflict with the interests of Bakr and harmful to him, he cannot be (legally) compelled to return the property. In fact, he can refuse to accept the money tendered by Zaid. In short, legally there is no obligation on Bakr. However, it is morally better to fulfil the promise. Inspite of this, if at the time of making the promise it was his intention to honour it, but later due to circumstances he does not fulfil it or there is a possibility of him suffering a loss (if he honours the promise), then according to the Shariah he is not sinful (for not fulfilling the promise).

If the (buy-back) condition was stipulated in the sale contract or if prior to the sale this promise was made, then this 'sale' is in fact *Rahn.* The property will remain as a pawn. It is not permissible for Bakr to derive any benefit from the property. He may not take its rent nor can he sell it nor hire it nor pawn it nor make a gift of it. He only remains the custodian and trustee of the property. Whatever income the property yields will also remain in trust as a pawn. After receiving his money (which he had loaned to Zaid), he has to incumbently return the property and whatever income he had received.."

(Fataawa Mahmudiyyah, Vol. 6, pages 286 and 287)

From the aforegoing elaboration it should be abundantly clear that:

- A promise in Islam gives rise to the moral obligation of fulfilment. However, a valid reason is acceptable in the Shariah for dishonouring this moral obligation.
- A promise does not give rise to legal consequences. A promise is not legally enforceable even if the one who promised dishonours his promise for no valid reason. The consequences of intentional violation of a promise for no valid reason is a matter for the Divine Court in the Aakhirah, not for the legal court in this world.
- *Bay-ul-Wafa'* is a *haraam* transaction. It cannot be tendered as a basis for legalization of any trade practice.
- *Bay-ul-Wafa'* is not a principle which could be utilized for the formulation of a Shar'i effect *(Hukm)*.
- *Bay-ul-Wafa'* cannot be presented as a first premise in Shar'i syllogism for the transference of a *hukm* (ruling) to render lawful the corrupt riba practices of the capitalist banks.
- *Bay-ul-Wafa'* is *haraam* in the *Asl Math-hab*. Some Ulama of the later era *(Muta-akh-khireen)* had condoned it on the basis of what they perceived to be a *'need'* of the time.

- There is intense and severe difference of opinion among the later era Ulama regarding the permissibility of the *Bay-ul-Wafa'* stratagem. Laborious and confused interpretations have been tendered in the attempt to give this scheme some credibility.

Mr. Omar has made a silly and an abortive attempt to resurrect the decomposed bones of the *Bay-ul-Wafa'* stratagem which has continued to emit a pulverizing noxious stench through its coffin in which it was interred centuries ago. The attempt to resurrect the rotting haraam bones of *Bay-ul-Wafa'* has not been constrained by any dire need.

The far-fetched and fallacious interpretation *(Ta'weel-e-Baatil)* and the misconstruction which modernists and liberal Molvis and Shaikhs apply to the peculiarities in the Books of *Fiqh,* are the consequence of a pathological desire to find accommodation for the concepts of capitalism in the Shariah. In this age, the insane craving for finding Shar'i basis for the practices of the capitalist system of economics has gripped some liberal scholars (molvis and sheikhs).

They do not research a product to discover whether it is acceptable to Islam or not. Their methodology is to wade through the Books of the Shariah and blindly latch on to any straw which they feel has the property of constituting some veneer of 'evidence' to justify the riba concepts of the kuffaar capitalist system.

Following in the footsteps of such scholars, Mr. Omar too has set himself up as a 'scholar' of Islamic jurisprudence, making a hash of whatever he randomly extracts from the books of the different Math-habs, nibbling from this basket and that basket like the holy bulls and cows of the Hindus roaming about

aimlessly getting whacked by the irate vendors into whose baskets they plunge their unwanted snouts and traps. This is the condition of the modernists and liberals who crave to be seen as authorities of the Shariah.

BASELESS MURABAHAH THEORY

Mr. Omar claims: *In the context of Islamic banking, it becomes necessary to use "promises" in relation to different financial instruments. For example, in a Murabahah transaction, the client promises, or undertakes to purchase the commodity (in terms of a Murabahah sale) after the bank has acquired the same from the supplier and has taken actual or constructive possession thereof."*

This drivel which Mr. Omar has expounded is in conflict with the Shariah. 'Islamic banking' in the conception of the liberals is nothing other than the capitalist banking structure. There is no such concept as 'Islamic banking'. Whatever system of banking the modernists have invented and managed to acquire a 'shar'i licence' from the liberal scholars, and the hired scholars of their so-called 'shariah boards', after the application of a very transparent 'islamic' veneer which hopelessly fails to provide adequate cover for the riba under-currents, is a perfect duplication of the capitalist banking structure. There is *absolutely* nothing Islamic about the many so-called 'Islamic' banks which have mushroomed all over the world with the blessings of misguided liberal molvis and sheikhs whose prime function on earth is to issue 'halaal' certificates for the riba products of the Muslim capitalists.

Murabahah in Islam is a simple sale transaction unencumbered with 'promises'. It is a straight unadulterated sale transaction in which the amount of profit is specified and declared to the buyer. There is nothing more to this simple transaction. But the modernists have presented it in the form of an incomprehensible potion which is unacceptable to the Shariah.

In the context of the Shariah, there is no need and no permissibility to fetter the simple Murabahah transaction with a promise. The promise which Mr. Omar has posited, renders the *Muraabahah* sale *faasid* (corrupt and invalid). It has already been explained that a promise is not legally enforceable in the Shariah. Secondly, if one has a valid reason for dishonouring the promise, one is not in violation of even the moral code of Islam. In addition, the sale is rendered invalid by the stipulation of the *faasid* condition.

Even if it is assumed that the banks do in actual fact take possession of the item – which in practice they do not – then too, the prospective client is under no legal Shar'i obligation to purchase the item. In the *Murabahah* as well as any other sale transaction, the capitalist bank is required to sell to the customer property which it owns. The bank does not act as an agent to sell a vehicle, etc. which belongs to another party. It sells its own property.

If a prospective customer refuses to purchase the item after the bank has presumably procured it, the client cannot be held liable for anything. The bank is a multi-billion rand riba empire. It simply has to sit with the vehicle and find another buyer if the first prospective buyer refuses to purchase. There are risks involved in all avenues and categories of trade and commerce.

The Qur'aan Majeed unequivocally declares:

"And Allah has made lawful trade, and has prohibited riba."

Notwithstanding all the ballyhoo surrounding the 'Shariah-compliant' products of the neo-capitalist Muslim banks, every person with an average intelligence understands that the banks

are primarily riba money-lending institutions. They have a natural aversion for trade. The multitude of prevaricated terms and stipulations which their sale and leasing agreements embody bear ample testimony for the fact that banks are not traders in the true sense of the word. They are basically, essentially and primarily money-lenders, selling money for money – dealers in Riba. Their 'Islamic' portfolios are achievements of skulduggery – Islamic sounding names, with natures drenched in Riba. Thus, the end result of all dealings with 'Islamic' banks is generally the same, and in many case worse than the ultimate result of kuffaar banks in monetary terms. You end off paying more for a product if the deal is executed via the channel of the 'Islamic' bank.

Traders carry stock – merchandise and undertake all the risks and hardships concomitant with normal, healthy trade. If the trade is accompanied by honesty and piety – *the Taqwa defined in the Qur'aan and Sunnah*—such traders qualify for the glowing accolade stated by Nabi-e-Kareem (sallallahu alayhi wasallam):

"KNOW, VERILY, THE AID OF ALLAH IS WITH THE PIOUS TRADERS."

No so-called 'Islamic' bank can aspire for this Divine Aid, for the simple reason that banks are institutions of Riba, not of trade.

Consider the haraam insurance trade. People acquire insurance with corrupt motives. They commit arson to insured property, murder insured relatives/friends, and stage burglaries to collect insurance money. Such corruption is a frequent occurrence. Yet, the insurance companies tolerate it, and despite such superficial losses, they continue with minting their money. The banks too can quite comfortably tolerate the rare case of refusal

to buy. But a mentality corrupted with the pollution of Riba miserably fail to understand such simple facts due to the inordinate greed for more and more money.

The flimsiest stratagem which hopelessly fails to pass the test of technical validity in terms of the rules to constitute an adequate legal ploy for circumvention of Shar'i prohibition and the charge of *fasaad,* will be adopted for making a contract 'shariah-compliant' simply for the sake of insulating the bank against the probability of a rare cancellation or reneging of a client from a promised purchase.

No trader who carries merchandise for sale will hold an interested buyer liable for any damages if he reneges at the last moment and purchases the product from a competitor for whatever reason he deems appropriate. This cannot be expected from those swimming in the blood of Riba.

But, in practice the banks suffer absolutely no loss if a client who had intended to enter into a sale reneges. The banks have an understanding with the dealers. If the client refuses to buy, the bank simply does not purchase the vehicle from the dealer. Mr. Omar seeks to pull wool over the eyes of the Muslim community with his drivel of *"actual or constructive possession"*. No such possession occurs in relation to the banks who are negotiating *Muraabahah* deals with prospective clients.

The massive aversion banks have for pure and holy trade, precludes them from spending a few rands to appoint a real living human being (not a stupid legal entity termed legal person) to take actual and physical possession of the asset purchased with the aim to resell it on a *Muraabahah.* Their greed is shocking and alarming. Tedious attempts will be made

to split hairs to avoid hiring a man to take actual possession of the asset. This attitude of the banks necessitated the production of the concept of 'constructive possession' which the hired scholars of the 'shariah boards' have to fabricate under duress. The fabrication of terminologies has been designed to bamboozle and dupe the unwary and the ignorant. When there is no possession, the 'scholars' describe it as 'constructive possession'. They make fools of themselves and understand the whole world to be an abode glutted with fools, hence the fiction of 'constructive possession' is presented to make the product supposedly 'shariah-compliant'. This clique – 'shariah-compliant' – is now so over-worn and out-worn that it makes the user sound and look foolish. It has become a laughable expression denoting the silliness of the speaker.

Should possession truly and Islamically occur, thus saddling the bank with an unwanted vehicle which the client had rejected, the bank will simply have to find some other way to overcome the problem. But reneging from a promise to buy is so rare that it poses no problem which necessitates the implementation of measures to overcome it.

Assuming that such a need arises, there will be other Shariah stratagems – valid measures – which could be implemented. Since the mentality of Muslim banks is also anchored to capitalism, they fail to understand any system other than methods which conform to the capitalist ideology and methodology. Their minds indoctrinated with capitalism and their hearts darkened by devouring riba, view the simple Islamic methods of trade too cumbersome and even impractical in the context of their capitalist system of banking which they ludicrously dub 'Islamic' banking – a system which brooks no scope for the normal risks associated with lawful trade.

A FIGMENT

Pursuing his conjecturing, Mr. Omar states: "*If the client refuses to conclude a Murabahah sale at the relevant time, then he or she is in breach of promise (to purchase). The difference between the price paid by the bank to the supplier (under the first sale), and the proceeds of realizing the asset in the open market, represents the actual direct damages that would be suffered by the bank. Such damages may be recovered by the bank from the client as a result of breach of promise…*"

This is utterly baseless. It is a pure figment of his imagination. Just from where did Mr. Omar suck this stupidity? Did the 'great Ibn Qudama' perhaps prescribe it?

A *Hukm* in the Shariah vacillates between the two extremes of *halaal* and *haraam.* Let Mr. Omar say if his damages theory is a *halaal* imposition of the Shariah, discardence of which is *haraam* and sinful. If someone claims that his damages theory is bunkum – stupid nonsense – and humbug, will that person be guilty of *kufr* for having rejected a Shar'i *Hukm?* Most assuredly, no one will have to answer in the Divine Court on Qiyaamah for having discarded Mr. Omar's personal theory which he has sucked from his thumb. There is not a single jurist of any Math-hab whom Mr. Omar could cite to bolster his *baatil* damages theory.

In the very first instance, the bank suffers no loss whatsoever. If the client refuses to purchase, the bank simply does not purchase the vehicle from the dealer. There exists this understanding between the banks and the dealers. The understanding between the dealer and the bank is a separate issue which gives rise to certain consequences which do

concern the Shariah. This will be bypassed. If there is a need, it will be discussed at a later stage.

For the purposes of our present refutation of Mr. Omar's drivel and baatil, it will suffice to know that if the client refuses the vehicle, the bank does not sit with it. It will remain the property of the dealer. In so far as the bank and the dealer are concerned, the sale simply did not take place. The contention of 'loss' is fallacious.

On the assumption that after the bank has actually paid for the vehicle and taken "actual or constructive possession", the client refuses to purchase, then too, according to the Shariah it cannot pursue the recalcitrant client. The bank sits with its own property. The client cannot be held liable for any 'loss' which the bank suffers if it sells the asset less than the price it had paid for it.

The merchandise which a trader acquires in the hope of selling to clients who had promised to purchase, or in the expectation of selling the stock, is his sole property which he had bought at his own risk. All trade comes with risks. There is no 100% insulation against risks. The argument that the prospective client is the cause of the 'loss' by virtue of breach of promise is not accepted by the Shariah because a promise does not give rise to a sale transaction. Explaining this fact, Hakimul Ummat Maulana Ashraf Ali Thanvi (rahmatullah alayh) states:

"**Question:** Amr asked Zaid to purchase for him some stock and to sell it to him on credit. The time of payment will be after a month or at any other time which can be agreed on. He would give him 5% profit. Zaid responded that he would buy the goods. However, Zaid insisted on a written undertaking to ensure that Amr would not dishonour his promise. Amr agreed.

Answer: Firstly, the mutual discussion between Zaid and Amr is only a promise. It is not an incumbent transaction on any of the parties. Even after Zaid purchases the goods and Amr refuses to accept it, Zaid has no right whatsoever of compelling Amr (to purchase). If in customary practice (Urf) Amr is regarded to be bound (to purchase the goods in view of his promise), then this transaction is haraam, otherwise halaal."

Mr. Omar desires to override the Shariah with his attempt to resurrect the putrefied bones of *Bay-ul-Wafa'*. He behaves as if all the great Ulama-e-Muhaqqiqeen had been unaware of *Bay-ul-Wafa'*.

The 'damages' which Mr. Omar suggests is owing to the bank are nothing other than *Riba.* Riba is the cornerstone and lifeblood of the capitalist system. In the miserable endeavour to award Shar'i credibility to the riba transactions of the bankers, Mr. Omar could unearth nothing better that the *haraam* corpse of *Bay-ul-Wafa.*

The two arithmetical illustrations presented by Mr. Omar, in which he calculated the riba sum 'owing' to the bank under guise of 'damages' are laughable. He has attempted to appear professional with his figmentary illustrations, but really has made a fool of himself. He lacks absolutely in even the flimsiest Shar'i evidence for his attempt to legalize *riba.*

MAALIKI MATH-HAB?

Miserably failing to substantiate his opinion in terms of the Hanafi Math-hab, Mr. Omar flits to the Math-hab, citing a minority view on the legal incumbency of a certain category of promise. He thus presents the view of a Maaliki jurist as a basis for legalizing the *faasid* condition of the promise which encumbers the *haraam Bay-ul-Wafa'* stratagem.

Mr. Omar was born a Hanafi. He conducts his religious practices as if he is a Hanafi. To the best of our knowledge he has not publicly reneged from the Hanafi Math-hab. This Hanafi muqallid who lacks in the necessary Shar'i qualifications to permit him to speak on even minor issues of the Hanafi Math-hab, has assumed on himself the unholy burden of posing as a 'mujtahid' of the Maaliki Math-hab. Even a Mufti of high rank of the Hanafi Math-hab has no right to flit from his Math-hab and issue fatwa on terms of the Maaliki or any other Math-hab.

Mr. Omar has a flair for whimsical selection from the different Math-habs. If something suits his free-lancing palate in the Hambali Math-hab, then he cites *Ibn Qudaamah*. When the Hambali Math-hab is in conflict with his desires, he will select from the Maaliki Math-hab or from any other Math-hab to bolster his baatil whimsical opinions. He has developed the practice of unprincipled argumentation whereby he extracts just any mas'alah from any Math-hab in abortive attempts to produce substantiation for his *nafsaani* opinions primarily to appease the capitalist banks.

For sustaining the corrupt *(faasid* and *baatil)* transactions of the capitalist banks, Mr. Omar was constrained by a total lack of Shar'i evidence to attempt resuscitation of the putrefied carrion of the *Bay-ul-Wafa'* stratagem. When the hollowness of this rickety stratagem appeared glaringly conspicuous in view of the emphasis of the Hanafi Math-hab on the prohibition of *Bay-ul-Wafa',* and due to the total lack of evidence to support the idea of the legal enforceability of a promise, Mr. Omar cast his gaze on other pastures. Fishing in the Maaliki Math-hab, he managed to select the view of legal enforceability of promises propounded by some Maaliki Ulama. He thus cites the Maaliki

jurist, Sahnoon who stated the legal enforceability of a certain category of promises.

While Mr. Omar has cited a view of the Maaliki Math-hab, to extract support for his claim of a promise being legally enforceable – a claim on which rests his whole theory pertaining to his deceptive alternative – he either conveniently ignores or is ignorant of the Maaliki Math-hab's ruling on the very *Bay-ul-Wafa'* which constitutes his fundamental basis without which the entire edifice of his capitalist model crashes to the ground.

Let us now see what the Maaliki Math-hab says about *Bay-ul-Wafa'* which is known to the Maaliki fuqaha as *Bay-uth Thunya.* The Maaliki Math-hab defines this transaction as follows: *"Bayuth Thunya is that a person says: 'I sell to you this asset or this commodity on condition that if I come to you with the price (which you had paid me) within a specified time or whenever I come to you, the commodity will be returned to me'....In Al-Mudawwanah it appears: 'A person buys a commodity on condition that when the seller returns the price, then the commodity is his. This is not permissible because it is a sale and a loan. In fact, Sahnoon said that it is a loan accompanied by benefit."*

(Fathul Alil Maalik, Vol. 1. page 291)

Mr. Omar has been at pains in his labour to substantiate his claim of the validity of legal enforceability of a promise by means of a stratagem *(Bay-ul-Wafa') which both the Hanafi and the Maaliki Math-habs condemn.* Furthermore, he cites the Maaliki Jurist, Sahnoon in his abortive bid while this eminent Maaliki Faqeeh rejects *Bay-ul-Wafa*, classifying it as a loan which draws riba.

Let us see how the other Maaliki Fuqaha view the *Bay-ul-Wafa'* mutant.

"Ar-Rajraji said: 'If the (buy-back) condition is cancelled – will the sale be permissible or not? There are two views. The one is that the sale and the condition are baatil. And this is the Mash-hoor (the popular, majority, most authentic) view. The second view is that the sale is permissible when the (corrupt) condition is cancelled."

(Fathul Alil Maaliki, Vol. 1, page 291)

It should be clearly understood that the difference among the Maaliki Fuqaha is not related to the invalidity and prohibition of *Bay-ul-Wafa'*. Their difference pertains to the status of the sale after cancellation of the offensive/corrupt buy-back condition. The most reliable and majority view is that notwithstanding the cancellation of the corrupt condition, the sale remains *baatil* (null and void) and haraam. The minority view of the permissibility of the sale does not relate to *Bay-ul-Wafa'*. It pertains to the sale minus the corrupt buy-back condition. It will thus be seen that there is consensus of the Maaliki Fuqaha on the *hurmat and butlaan* of *Bay-ul-Wafa'* which constitutes the fundamental basis of Mr. Omar's edifice erected for awarding Shar'i licence to the riba practices of the capitalist banks.

Rejecting the validity of *Bay-ul-Wafa,* Imaam Maalik (rahmatullah alayh) says: *"The basis of this sale is neither permissible nor good. The buyer is liable for whatever benefit he had gained (from the commodity), and the owner of the commodity is liable for whatever the buyer had spent in the maintenance of the asset (while it was in his custody)."*

(Fatul Alil Maalik, Vol. 1, page 291)

"Muhammad Bin Rushd said: 'They (the Maaliki Fuqaha) name this sale, 'Bayuth Thunya'. ....It has been said that it is a bay' faasid because the seller imposes on the buyer the condition that he is most deserving (of buying back the commodity) when he brings the price (the amount which the buyer had given him). (The sale is faasid) because it is like a sale and a loan. And this is the view of Imaam Maalik.

(The other view is): It has been said that this is not a sale. It is merely a loan which brings with it benefit (i.e. riba). Sahnoon has said this in Al-Mudawwanah. This is also the view of Ibnul Majishoon and others. (It is not a sale) because the buyer gave the price as a loan to the seller on condition that he (the buyer) derives the benefit of the asset's income until the time he (the seller) returns the loan. On the basis of this view, the yield (income of the asset) will be returned to the seller because it is (in fact) the price (paid) for the loan. And this is haraam." (Fatul Alil Maaliki, Vol. 1, page 291)

"A person purchases a commodity on condition that when the seller returns the price (the amount he had received from the buyer), the commodity is his (the seller's)—this is not permissible." (Fathul Alil Maaliki, Vol. 1, page 292)

"Ibn Salmoon (a Maaliki jurist) said that Ibn Abdul Ghafoor said: 'Verily, it has been said that Bayuth Thunya is everlastingly faasid and mardood, because it is haraam and muharram (the prohibition is emphasised in this expression). It is an avenue among the avenues of Riba. The view of the majority of Ulama as well as the Math-hab of Imaam Maalik and Ibn Qaasim is that there is no rental for the asset whether the time is specified or not, because verily, it is a faasid sale according to them. The amal (practice/ruling) is with this (Mash-hoor view).' " (Fat-hul Alil Maalik, Vol. 1 page 292)

THE ALTERNATIVE

About his "valid alternative", Mr. Omar says: "*In the hypothetical situation, the client sells the property to the bank. The bank in turn separately and apart from the sale, promises to lease the property back to the client upon mutually agreed terms."*

What does the Maaliki Math-hab have to say regarding this stupid alternative which Mr. Omar endeavours to legalize for the capitalist banks on the basis of the fiction that the Maaliki Math-hab permits such *riba* dealings? Scuttling Mr. Omar's theory and 'valid alternative', the Maaliki Math-hab states unequivocally its rejection of the nonsense of leasing a man's own property to him:

"In our age a practice is widely prevalent. That is: A man, for example, sells his house valued at four or five thousand dinars for 1000 dinars. He stipulates the condition that when he comes up with the price (1000 dinars), the buyer has to return the house to him. Then (after the deal), the buyer leases the house to the seller (the actual owner) for a rental of 100 dinars per annum (for example).. This he (the buyer) does before he takes possession of the house and before the seller has vacated the house with his goods (furniture, etc.). On the contrary, the seller remains living in the house. (In the theory of Mr. Omar, he has taken 'constructive possession' of the house).

The buyer takes the mutually agreed rent from the seller. This is not permissible without any differences of opinion, for verily, it is categoric Riba. The transaction which they had transacted superficially is of no consideration. Because in effect it is a benefit for the buyer in a faasid sale. Infact, even if the buyer takes possession of the commodity (the house) and hands it over to the seller after he had vacated it, then he (buyer) leases it to him (seller) in the aforementioned way, it is not permissible because the exit (of the asset from the sellers

possession) and its return to him are nonsensical.....The situation culminates in categoric Riba. This is manifest for anyone who reflects. And Allah knows best."
(Fat-hul Alil Maalik, Vol. 1. page 293)

This categoric rejection by the Maaliki Math-hab of Mr. Omar's baseless alternative is an adequate last nail for the coffin of his capitalist 'buy-back' model.

SUMMARY

(1) *Bay-ul-Wafa'* is *baatil* and *haraam* according to both the Hanafi and Maaliki Math-hab. In fact, according to all four Math-habs.

(2) The consequence of *Bay-ul-Wafa'* is *Riba.*
(3) The *Bay-ul-Wafa'* stratagem constitutes the fundamental basis of Mr. Omar's alternative proposal. The collapse of this stratagem brings about the negation of the fallacious alternative – and alternative which is *haraam.*

Mr. Omar's baseless 'valid alternative' is an unprincipled patchwork comprising of pieces of *masaa-il* torn from their respective contexts from the Hanafi and Maaliki Math-habs. He has attempted a fusion which is invalid and exceedingly corrupt in terms of both the Math-habs.

While the Hanafi Math-hab rejects the validity of *Bay-ul-Wafa',* and the legal enforceability of a promise, the Maaliki Math-hab, in particular the Maaliki Jurist, Sahnoon whose view of legal enforceability Mr. Omar has cited, unites with the Hanafi Math-hab in condemnation of *Bay-ul-Wafa'.*

Despite Sahnoon's view of legal enforceability of a certain class of promises, neither he nor other Maaliki Fuqaha, relate

this enforceability to the *promise* which is stipulated as a condition in relation to the sale transaction. It is abundantly clear from the unanimous ruling of the Maaliki Math-hab on the issue of *Bayuth Thunya* that the legal enforceability of a promise does not apply to promises which in terms of the Maaliki Math-hab are *faasid* conditions attached to sale transactions. A *faasid* condition, be it in the form of a promise attached to a sale contract, is *haraam.* A haraam act cannot be legally enforceable.

The flair for selective extraction of *juz'i* (particulars/details) *masaa-il* (rules), as opposed to *Usool* (Principles), from different Math-habs, and to present them in isolation of their context, divested of their accompanying *shuroot* (imperative conditions), then to utilize such hybrid mutations as principles for the formulation of *ahkaam* by a defective syllogistic process, is a demonstration of compound ignorance and subservience to the whimsical fancies of the nafs.

Consider for example Mr. Omar's rash citation of Sahnoon, the Maaliki jurist. In his random quest for strands and snippets from the different *Kutub* of the Math-habs to present as evidence for his fallacious theory, he stumbled across the view of Sahnoon relative to enforceable promises. Without comprehending the context of this Maaliki ruling, Mr. Omar hastily and baselessly concluded that promises in general are legally enforceable in terms of the Maaliki Math-hab. Yet this is not the case.

After having made this assumption, he further perpetrates the gaffe of failing to ascertain what precisely is the view of Sahnoon in particular, and of the Maaliki Fuqaha in general on the issue of *Bay-ul-Wafa'* which he (Mr. Omar) has fixed as the

fundamental basis and guiding principle for his theory of legalized *riba*.

The absurdity of Mr. Omar's syllogistic reasoning in the endeavour to fabricate '*fatwas'* is the consequence of the silly, haraam exercise of selecting just any statement or view from any Math-hab which to his mind appears to bolster his corrupt 'ijtihad'. The very same Sahnoon whom Mr. Omar cites as the central pillar of support for his theory of legal enforceability of a promise, unequivocally labels the stipulated promise in relation to the sale transaction as "categoric riba", hence haraam.

What Mr. Omar has concluded is not the Hanafi Math-hab, nor the Maaliki Mat-hab, nor the Shaafi Math-hab nor the Hambali Math-hab. His corrupt 'fatwa' is the fallacious 'math-hab' of his *nafs*. May Allah Ta'ala save us from such *jahaalat!*

HAMISH JIDDIYYAH AND URBOON

Mr. Omar states: *"Arbun is an amount paid by the purchaser pursuant to a binding and valid sale in terms of which the purchaser has the option to withdraw therefrom. If the purchaser elects to resile from the sale, the amount or deposit paid by him is forfeited in favour of the seller. If he confirms the sale, the amount or deposit so paid is offset against, and thereby reduces, the purchase price. The Arbun is recognized by the Hambali School. The great Hambali jurist Ibn Qudama states as follows:*

'Arbun in this context of sale means: the purchaser acquires a commodity, and pays an amount to the seller, on the basis that if he (the purchaser) takes the commodity, the amount so

paid by him will be offset against the price. If he does not take the commodity the amount will accrue to the seller.' "

(Al-Mughni, Vol. 4 p 289)

Undoubtedly, the "Hambali jurist Ibn Qudama" is "great" just as Mr. Omar avers. But, has Ibn Qudama's greatness eclipsed Imaam Maalik's greatness – and Imaam Sahnoon's greatness? Why has Mr. Omar silently and surreptitiously shied away from Sahnoon and the Maaliki Math-hab on the issue of 'Arbun'? Why has he suddenly abandoned the Maaliki Sahnoon and clung to Ibn Qudamah? After all, Sahnoon is the pivot on which hinges Mr. Omar's fallacy of the legal enforceability of promises. Insha'Allah, we shall *resile* to these questions after the demolition of Mr. Omar's 'Arbun' device which is simply another haraam stratagem for circumventing Shar'i prohibitions to mellow the life of the riba banks of the capitalist system.

BAY-UL-URBOON

Bay-ul-Urboon (also known as Arboon, Arbaan, etc.) is a sale in which the client forfeits his deposit in the event he decides not to proceed with the transaction.

Mr. Omar contents himself with only the definition of *Urboon* given by the great Ibn Qudama in his *Al-Mughni.* It is an unadulterated act of chicanery to conveniently omit the great Ibn Qudama's comments on the sale of *Urboon,* and to cite only the definition which he gives – a definition on which there is consensus of all Math-habs.

With clumsy portrayal of audacity, Mr. Omar says: *"The Arbun is recognized by the Hambali School."*

In his half-hearted, unsubstantiated averment, Mr. Omar has sought to peddle the misleading notion that the permissibility of 'Arbun' is an issue of consensus in the Hambali Math-hab. But this idea which he has attempted to slink in, is but one of the numerous fallacies which Mr. Omar subscribes to.

The great Ibn Qudaamah explicitly mentions on page 313, Vol. 4 of his *Al-Mughni: "Abul Khattaab adopted the view that, most certainly, it (Arboon) is not valid."* Abul Khattaab is among the senior Hambali Fuqaha. Furthermore, the view of the great Ibn Qudaamah, himself, is in conflict with the view of Imaam Ahmad (rahmatullah alayh). The great Ibn Qudaamah on page 313 presents the valid arguments of the Three Math-habs in rejection of *Bay-ul-Urboon.* Thus, even in terms of the Hambali Math-hab, Mr. Omar is skating on extremely thin ice.

THE HANAFI, MAALIKI AND SHAAFI MATH-HABS

And, what about the Hanafi, Maaliki and Shaafi Schools? Why the sudden eerie silence on the views of these three Math-habs, especially when the Maaliki Math-hab was conspicuously projected to the frontline on the promise issue? And, after all, Mr. Omar is not a Hambali. Let us now see what the great Ibn Qudaamah states in *Al-Mughni* about the views of the Three Math-habs – the views which Mr. Omar had hoped would not be unearthed if he restricts himself to the solitary definition of *Urboon* by the great Ibn Qudaamah.

To ascertain the Fatwa of these Three Math-habs, Mr. Omar need not delve too deeply into the Kutub. On the very page No. 313 of *Al-Mughni* from which he has extracted the only definition of *Bay-ul-Urboon,* the great Ibn Qudaamah says explicitly: *"Abul Khattaab has adopted the view that it*

(Urboon) is not valid. This is (also) the view of Maalik, Shaafi and As-haabur Raai" (a reference to the Ahnaaf).

The great Ibn Qudama states:
"Abul Khattaab (who is a very denote distinguished Hambali jurist) has adopted the view that it (Bay-ul-Urboon) is not valid. And, this is the view of Maalik, Shaafi and the As-haabur Raai' (i.e. the Ahnaaf). This (invalidity of Urboon) is narrated from Ibn Abbaas (radhiyallahu anhu) and Hasan (Basri): 'Verily, Nabi (sallallahu alayhi wasallam) forbade the sale of Urboon.'— Narrated by Ibn Maajah. And (it is invalid) because something (some money) is stipulated for the seller without anything in exchange, hence it is not valid....This is the demand of Qiyaas.

If a dirham (for example) is given to the seller prior to the transaction, and he (the buyer) says: 'Do not sell this commodity to anyone else. If I do not purchase it, then the dirham is for you. Thereafter he purchases the commodity from the seller in a new transaction, and he deducts the dirham from the price, it is valid because the transaction is without the corrupt condition. It is probable that the purchase which was made for Hadhrat Umar (radhiyallahu anhu) was executed in this manner. Thus, it (the Hadith on which Imaam Ahmad bases his view) shall be given this interpretation to reconcile Hadhrat Umar's action with the Hadith (which prohibits Urboon), and to conform with Qiyaas and with the Aimmah (Jurists) who hold the view of the fasaad (corruption) of Urboon.

If the client does not purchase the commodity, then in this case, the seller is not entitled to the dirham because he will be taking it without giving anything in exchange. The client has the right of taking it (the dirham). It is also not valid to aver that the dirham is in exchange for the seller's waiting and for the postponement of the transaction. If indeed it (the dirham) was in lieu of this (waiting), then it would not have been permissible to deduct it from the price in the event of purchasing the commodity. Furthermore, giving something in exchange for the waiting period of the sale is not permissible. If it was permissible, it would have been Waajib to fix a time as it is in Ijaarah (leasing)."
(Al-Mughni, Vol. 4, page 313)

These are the comments of the great Ibn Qudamah. But Mr. Omar deemed it prudent to conceal or ignore what the great Ibn Qudamah said, in the endeavour to cadge just any straw to proffer as 'evidence' for the *haraam* transaction known as *Bay-ul-Urboon* which Rasulullah (sallallahu alayhi wasallam) categorically prohibited. Hence, all the Muhadditheen as well as the Fuqaha of the Hanafi, Maaliki and Shaafi Math-habs upholding the prohibition of *Urboon*, said:

"Verily, Nabi (sallallahu alayhi wasallam) prohibited Bay-ul-Urboon."

It is accepted that Ibn Qudaamah reports Imaam Ahmad's view of the permissibility of *Bay-ul-Urboon* in his *Al-Mughni.* But, the surreptitious manner in which Mr. Omar approached the great Ibn Qudaamah's multi-facetted comments on the issue, merely citing the definition of *Urboon* presented by Ibn Qudaamah without quoting the actual *tafseer* of *the great Ibn Qudaamah,* provides us with a vivid illustration of the unholy intentions of an incompetent man, lacking in the Islamic academic qualifications requisite for scholarly dilation and discourse on a subject well beyond his intellectual, educational and spiritual range of comprehension.

Mr. Omar's intentional mutilation of the great Ibn Qudaamah's *tafseer* in the desperate attempt to provide some vestige of 'proof' for the *haraam Urboon* practices of the so-called Islamic banks, is the effect of his scrabbling exercises and random searches through the books of the Math-habs. The shameless concealment of the great Ibn Qudaamah's comments on *Urboon* compels us to advise Mr. Omar to scram off from the stage of Islamic Jurisprudence. He will present himself with a lasting mundane favour by restricting his secular abilities to the field of secular law in which he qualifies to operate.

The way in which this gentleman conducts himself in matters of Shar'i import bogs him down in a mess of incongruities in consequence of the mass of gaffes he makes when he is overwhelmed by an inordinate desire to pose as a '*faqeeh'* (Islamic jurist) of the calibre of the *Aimmah-e-Mujtahideen.*

Did a state of temporary blindness overcome Mr. Omar which did not permit him to see the following statement of the great Ibn Qudaamah appearing on the very same page from which he extracted Ibn Qudaamah's definition of *Urboon?*

"Abul Khattaab adopted the view that it (Urboon) is not valid, and this is also the view of Maalik, Shaafi and the As-haabur Raai' (the Hanafi Fuqaha)."

The view of Abul Khattaab as well as the interpretation favoured by the great Ibn Qudaamah himself, and which appears on the same page from which Mr. Omar acquired the definition, is an attenuation of the lack of consensus on permissibility in the Hambali Math-hab. Even those Hambali Fuqaha who have accepted the permissibility view, present it in feeble tones. Hence, even Imaam Ahmad (rahmatullah alayh) said about *Urboon: "I don't see anything wrong with it."*

Ibn Seereen, echoing the tone of Imaam Ahmad, also said: *"I don't see anything wrong with it."* The thrust of the great Ibn Qudaamah's elaboration in *Al-Mughni* on *Bay-ul-Urboon* is that this transaction is not permissible.

Even if it is conceded that the Hambali Math-hab allows *Bay-ul-Urboon,* Mr. Omar possesses absolutely no right whatsoever to offer a transaction prohibited by Rasulullah (sallallahu alayhi wasallam) and the three Math-habs, in vindication of the *haraam* riba practice of the Muslim capitalist banks which have painted themselves deceptively with Islamic hues.

Furthermore, Mr. Omar, as far as it is known, is still a muqallid layman of the Hanafi Math-hab. He does not occupy any pedestal in the firmament of Islamic Uloom. And the greatest Mufti alive today too lacks the authority to embark on the task which Mr. Omar, in his egotistical stupor, has set for himself.

Let us now ascertain what the Maaliki Math-hab has to say about *Bay-ul-Urboon.* Firstly, we should draw attention to another miserable tactic of Mr. Omar. In view of his contemptible penchant of *nafsaani* random selection from the Math-habs, Mr. Omar had proudly cited the Maaliki jurist, Sahnoon as his proof for the legal enforceability of promises. He boisterously presented the Maaliki view on that issue.

However, on the *Urboon* question he is eerily silent about Sahnoon and the Maaliki Math-hab. Since he was apprised of the vehement stand of the Maaliki Math-hab against *Bay-ul-Urboon,* he had no option other than casting a veil of concealment on the Maaliki view and seeking refuge in an impregnable fortress of silence on the *Urboon* question as it relates to the Maaliki stand, which we shall now, Insha'Allah, present.

"Imaam Maalik narrating from a narrator who according to him is authentic, who narrated from Amr Bin Shuaib who narrated from his father who narrated from his grandfather, said: "Verily Nabi (sallallahu alayhi wasallam) prohibited Bay-ul-Urboon."

The Fuqaha of the cities of Hijaaz and Iraq, among them are Imaam Shaafi, Thauri, Imaam Abu Hanifah, Imaam Auzaa', Laith Bin Sa'd and Abdul Azeez Bin Ubay Salmah, are in agreement with the view (of prohibition of Urboon) of Imaam Maalik because it (Urboon) is a transaction of deception,

gambling, and devouring money without giving anything in exchange. And all this is baatil (unlawful).

According to them (these Fuqaha) Bay-ul-Urboon is Mansookh (abrogated). The commodity shall be returned (to the seller) if it is intact. If it has been disposed of (used up, destroyed, lost, etc.), then the value on the day of possession has to be returned. In every case, whatever has been appropriated by Urboon transaction will be returned, whether it was by purchase or lease.

Bay-ul-Urboon is not permissible according to us (Maalikis)."
(Al-Istithkaar lil Qurtubi, Vol. 6)

Shaikhul Islam Sughdi of the fourth Islamic century enumerates thirty kinds of *Faasid* (corrupt and invalid) sale transactions in his kitaab, *An-Nutf Fil Fataawa.* One of these *faasid* transactions mentioned in his list is *Bay-ul-Urboon. (Page 290)*

The great Ibn Qudaamah also confirms in his *Al-Mughni,* Vol. 4, page 313, the prohibition of *Urboon* according to Imaam Maalik (rahmatullah alayh). But Mr. Omar has shied away from even mentioning Imaam Maalik's categoric rejection of *Bay-ul-Urboon*, and the Maaliki Math-hab's *Fatwa* of prohibition.

The following appears in *Al-Fiqhul Islaamiyyu Wa Adillatuhu: "The Ulama differ on it (Urboon). The Jamhoor (the vast majority of Ulama) say that it is a prohibited sale which is not valid. It is Faasid according to the Hanafis, Baatil according to the other Fuqaha besides them (the Hanafis), because, verily, Nabi (sallallahu alayhi wasallam) prohibited Bay-ul-Urboon. And, because it is of the ways of deception, gambling*

and devouring wealth without exchange. And, because it comprises of two faasid (corrupt) conditions. The first: The condition of hibah (gift). The second: The condition of something to be given to the seller without receiving anything in exchange. Hence, it is not valid." (Page 449, Vol. 4)

Al-Qurtubi states in Vol. 5, page 150:
"Among the ways of devouring wealth in a baatil manner is *Bay-ul-Urboon*...This is not valid or permissible….because it is a sale involving gambling, deception and devouring wealth in a baatil way without (receiving anything) in exchange and hibah (gift). This is unanimously baatil. And, Bay-ul-Urboon is abrogated if it is transacted in this manner (as explained in the definition) whether before or after possession. The commodity shall be returned if it is intact. If it is no longer intact, its value on the day of possession shall be returned."

The Shaafi kitaab, *Kitaabul Majmoo',* states:
"Khattaabi said: "Maalik and Shaafi ruled it (Urboon) to be baatil on the basis of the Hadith. The *As-haabur Raai'* also state that it is baatil. (It is baatil) because in it is a faasid condition, deception, devouring wealth in a baatil way……Ahmad Bin Hambal inclined to it (to permissibility)." *(Vol. 9, page 407)*

All the *kutub* of Fiqh of all Math-habs, while mentioning Imaam Ahmad's view and its basis, state with great clarity the rulings of the Hanafi, Maaliki and Shaafi Math-habs. Despite this clarity, Mr. Omar deemed it expedient in the interests of peddling his fallacy to conceal the Fatwa of the *Jamhoor* of all Three Math-habs, as well as the *Fatwa* of those Hambali Fuqaha who reject the permissibility of *Bay-ul-Urboon.*

FORFEITURE

There is no *zulm* (injustice) of any kind in the Islamic system. Forfeiture of a deposit paid is an act of brazen and cruel injustice. The Qur'aan Majeed prohibits with great emphasis such *baatil*, and says:

"Do not (mutually) devour your wealth in baatil ways."

Bay-ul-Urboon is among the *baatil* transactions which come within the purview of this Qur'aanic prohibition. It has also been explicitly prohibited in the Hadith as mentioned earlier. However, in the endeavour to find justification for such forfeiture conditions of the riba banks, Mr. Omar resorted to clutching straws. His contention of *Urboon* is devoid of valid Shar'i substance.

In his *'Arbun'* debacle Mr. Omar, for total lack of Shar'i evidence for his lost cause, degenerates into the ludicrous spectacle of citing some 'articles' of some dubious 'Shariah standard' of the equally dubious 'Shariah board of AAQIF'. The riba standards of the 'shariah' boards of the modernist Muslim capitalist institutions which Mr. Omar cites, have no validity on an issue pertaining to the Shariah. The Qur'aan, Sunnah and the Rulings of the Aimmah-e-Mujtahideen and the Fuqaha of the Salf-e-Saaliheen era are of decisive importance.

Citing the articles and clauses of such modernist institutions serves to further confirm the bankruptcy of the so-called 'Islamic banking and finance' theories of Mr. Omar.

HAMISH JIDDIYAH

Defining *Hamish Jiddiyah*, Mr. Omar writes:
"Hamish Jiddiyah is an amount or deposit which is paid by the client to bank at the inception of dealings (at the time of

promise) in anticipation of concluding a Shariah compliant transaction, such as Murabahah or Ijarah…….If the client breaches his promise to purchase or lease the commodity….then the bank is entitled to appropriate the anticipation deposit in settlement of the actual direct damages suffered…"

This is another specimen of *Riba and Zulm* which the modernist capitalist Muslim bankers and their liberalist 'scholars' have fabricated or more correctly, sucked from their thumbs.

In the presentation of his process of fallacious *'dalaa-il'* (proofs) for his equally fallacious contentions, Mr. Omar slid incrementally into degeneration. In his brochure on so-called 'Islamic banking and finance', he initiated the process of his argumentation by the presentation of snippets from some books of the Shariah. He began with the Maaliki view of the legal enforcement of certain types of promises. He shakily ventured to cite a Maaliki kitaab, *Furuq*.

Mr. Omar then attempted to resuscitate the corpse of *Bay-ul-Wafa'* which some later Hanafi Ulama had legalized on the basis of 'need'.

Then, on the issue of *Urboon*, he flitted from the Maaliki Math-hab and jumped onto the Hambali wagon, feebly citing the great Ibn Qudaamah and his kitaab, *Al-Mughni*, albeit in mutilated form.

Regarding *Hamish Jiddiyah*, he is astonishingly silent in the matter of *daleel* presentation. He fails to cite even one Shar'i basis to bolster this fictitious concept. He fails to name even a single book of Islamic jurisprudence to substantiate the

bunkum he has gorged up after licking it from the platters of some liberalist scholars. In the matter of presenting *daleel* for the ludicrous alien riba practice of deposit forfeiture *(Hamish Jiddiyah)*, Mr. Omar has demonstrated his absolute bankruptcy. Nevertheless, he has attempted to surreptitiously introduce this *haraam* practice into the Shariah under cover of *Arbun* which he has abortively laboured to present as a lawful transaction in the Shariah.

Before his flimsy portrayal of *Arbun*, he tendered the definition of the totally un-Islamic, alien concept of *Hamish Jiddiyah.* Thereafter Mr. Omar presents the *Arbun* device although the latter was a *baatil* sale contract which had already existed during the time of Rasulullah (sallallahu alayhi wasallam). It is inappropriate, therefore, to discuss the alien, non-existing concept of *Hamish Hiddiyah* prior to settling the score with *Arbun.* The agenda underlying this inversion of presentation is quite palpable. Mr. Omar's scrounging around for a basis, has managed to unearth Imaam Hambal's view to bolster the *Arbun* claim. But, for the illegitimate anachronism of *Hamish Jiddiyah* there exists not a vestige, not a strand or a floating straw to present as *daleel.* Mr. Omar thus made an astute calculation in the hope that the total denudation of *daleel* from the alien concept will go by undetected if it is coated with the *Arbun* veneer for which Imaam Ahmad's view has been cited.

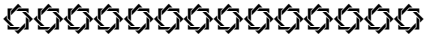
The rash attempt to pass off this *Hamish Jiddiyah* as an Islamic concept upheld in the Shariah is truly astounding. A man who embarks on a topic of scholastic substance should cite the rational, logical and textual basis and references for his theories and claims, especially when he has assumed the unenviable and onerous task of marketing a product which is sure to attract strident criticism for its close affinity with the riba practices of a system which stands at the opposite side of Islam. Yet, Mr.

Omar has hoped that Muslims will offer some sort of absurd *taqleed'* to him by accepting his *Hamish Jiddiyah* product for which he has miserably failed to produce even one straw of proof from the Shariah.

CONCLUSION

Bay-ul-Urboon or *Arboon* is a haraam transaction which Rasulullah (sallallahu alayhi wasallam), himself, had prohibited. The Hanafi, Maaliki and Shaafi Math-habs are in agreement on the prohibition of this transaction in which the client forfeits the deposit he has paid. While some Hambali Fuqaha have inclined to permissibility, there is no consensus of the Hambali Fuqaha on the permissibility of *Urboon.*

Hamid Jiddiyah is a phantom fabricated by the liberalists and protagonists of *Riba* practices under a variety of religious sounding titles coined to mislead the ignorant and unwary masses and to induce them to invest in the capitalist so-called 'Islamic' banks. It is a totally alien practice bereft of the slightest iota of Shar'i proof.



BAY-UD-DAIN (SALE OF DEBT)

While there is some difference of opinion on this question, the Hanafi Math-hab unequivocally prohibits the sale of debt to anyone besides the debtor himself. Mr. Omar has acquitted himself ambiguously on this question. The random manner in which he has superficially dealt with this issue displays his lack of having understood the *Fiqhi* elaboration given in the kutub.

The conspicuous confusion in his essay on this subject is probably due to a lack of relevant information. Mufti Taqi Sahib's *Introduction to Islamic Finance* does not deal with this question, and the elucidation of the Fuqaha has defied his (Mr. Omar's) comprehension. He, therefore, blusters the following absurdity:

Utter Confusion

"On the other hand, in case of the sale of the debt, the buyer of the debt (being the third party) steps into the shoes of the seller (the original debtor) and thereby acquires all the rights and obligations of the seller, with the result that he (the original debtor) is released. It follows that the creditor has no right of recourse against the original debtor, if the third party purchaser goes insolvent or disputes the debt."

Mr. Omar has fabricated this nonsense in the context of the sale of the debt to a third party other than the debtor. Firstly, such a sale of debt is haraam in terms of the Hanafi Math-hab.

While the Maaliki Math-hab allows the sale of a debt by the creditor to a person other than the debtor, there are eight compulsory conditions for the validity and permissibility of such a sale. The stringent conditions eliminate every vestige of *riba* and *gharar* (uncertainty, ambiguity and deception). Inspite of this achievement of the Maaliki Math-hab – the achievement to eliminate *riba* and *gharar* – by the straitjacket of eight stringent conditions, the Hanafi Math-hab disallows this type of sale.

The Hambali Math-hab too prohibits the sale of debts to anyone other than the debtor himself.

With regards to the Shaafi Math-hab, Mr. Omar incorrectly states: "*The Shafi'i view is more complex. The majority of Shafi'i jurists prohibit the sale of a debt to a third party (other than the debtor).*"

In the dozen lines which Mr. Omar has written on the Shaafi viewpoint, we find only ambiguous rambling and error. The alleged 'complexity' should not have restrained Mr. Omar from presenting an accurate explanation of the Shaafi position since he had ventured into that domain – for what purpose? He has rendered the Shaafi Math-hab a disservice by his injudicious intrusion and incorrect acquittal.

He has erroneously concluded from his defective 'research' of whatever book/s he has scanned through, that the 'majority' of the Shaafi Fuqaha prohibit the sale of debts to persons other than the debtors. This is not so.

Firstly, the Shaafi Math-hab categorizes *Dain (Debt)* into two classes: *Mustaqarr and Ghair Mustaqarr (Established and Not Established).* The Majority and most authoritative Shaafi Ruling on this question is stated in the authoritative Shaafi kitaab, *Al-Muhath-thab* as follows:
"Regarding Duyoon (Debts), if the ownership over the debts is mustaqarr (established), its sale to the debtor is permissible even prior to qabdh (possession) because, verily, his (the creditor's) ownership is established over it (the debt)…..

However, (the question is): Is its sale to another party (other than the debtor) permissible? There are two views in this regard. One view is that it is permissible…..The second view is that it is not permissible. The first view (of permissibility to sell to a third party) is the most authoritative……"
(Al-Muhath-thab, Vol. 1, pages 262/263)

This elaboration appears in the other *Kutub* as well.

Regarding the *Ghair Mustaqarr* (insecure – not established) debts, there is no consensus in the Shaafi Math-hab on it. There are also two views in this regard. While one view is that such insecure debts may not be sold to a third party, the other view is that it is permissible.

We believe that these ramifying differences, plurality of views, division and subdivision of the debts in both the *Mustaqarr and Ghair Mustaqarr* categories, as well as a coalition of other factors which produce an oblique mental vision culminating in a defective 'research', contributed to Mr. Omar's inability to unravel the 'complexity' which he had discerned in the Shaafi viewpoint. The summary of the Shaafi Math-hab on the *mas'alah* of selling debts to a person other than the debtor is:

- Debts are of two kinds as explained above.
- The majority and most authoritative Shaafi view pertaining to *Mustaqarr Duyoon*, is the permissibility of selling to a third party.
- Regarding the *Ghair Mustaqarr Duyoon*, one view is that it is permissible to sell this too to a third party.

Let us now revert to his statement of Utter Confusion which we have reproduced above, in the beginning of this question. Firstly, Mr. Omar says: *"the buyer of the debt (being the third party) steps into the shoes of the seller (original debtor)."*

In this absurd hypothesis, Mr. Omar has transformed the debtor into the seller of the debt (i.e. the debt he owes another person). The debtor sells his debt to a third party who is not the creditor. In the first instance, how is it possible, legal and permissible

for a debtor to sell the debt he owes Zaid (the creditor), to Bakr (a third party)?

Mr. Omar has clarified that this is not a *Hawaalah* (Transference of the debt to a third party and absolution of the original debtor with the agreement of the creditor), hence he says: "*The sale of a debt to a third party (other than the debtor) must be distinguished from Hawala."*

Now when this 'sale' which Mr. Omar has absurdly concocted is not *Hawaalah*, how is it possible for the debtor to simply shrug off the debt he owes to Zaid, his creditor, by unilaterally 'selling' the debt to a third party? And, which moron is afflicted with adequate mental derangement to pay money for saddling himself with the liability of another's debt? It is not a case of a man buying book debts from the creditor for a price substantially less than the value of the debts. He pays the creditor R10,000, for example, for the purchase of book debts valued at perhaps R100,000 which he (the new creditor) will collect, making a huge riba profit. This is a sale valid in the capitalist system

But, what Mr. Omar has proposed is not this capitalist sale with its lucrative yield. He has proposed something absurd and downright stupid. His prevaricated model envisages the following scenario: A debtor sells the debt he owes a creditor to a third party. The stupid third party pays this debtor (the original debtor) a sum of money to transfer the debt onto his head.

By this 'sale' Mr. Omar claims that the "original debtor": is released from his obligation to pay his creditor. This is a perfect example of bunkum. The original debtor will not be released from his obligation as long as he does not pay his

creditor or as long as his creditor does not release him of the debt.

By what stretch of imagination did Mr. Omar ever manage to conclude: *"It follows that the creditor has no right of recourse against the original debtor, if the third party purchaser goes insolvent or disputes the debt."*

The mind is truly boggled by this latest stratagem of circumventing payment of debt. If the capitalist lobby can only succeed in getting the government to enact this stratagem into the statute books, it will provide wonderful relief and absolution from debt for all debtors.

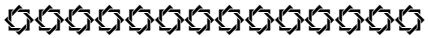
In terms of this hypothesis, a debtor in order to be released from his debt, only needs to arrange with a friend (a penniless one with no assets to his name) to overtly 'purchase' his debt. As soon as he has documentary proof that he has sold his debt to a third party, he (the debtor) is released. Now when Zaid the creditor comes along demanding payment, Amr (the debtor) coolly claims that he has sold the debt to Bakr (the third party). Zaid hastens to Amr to claim his debt which he (Amr) had purchased from the original debtor. But, Bakr is either insolvent or disputes the debt. Zaid has to return empty-handed without "any right of recourse against the original debtor (Amr)."

Neither is the original debtor released from his obligation nor is the right of the creditor cancelled by this stupid stratagem.

Hadhrat Junaid Baghdaadi (rahmatullah alayh) offers Mr. Omar the following *naseehat:*

"He who searches for honour with baatil, Allah will afflict on him humiliation with the Haqq."

We think we have adequately commented on the absurdity of the nonsense which Mr. Omar has peddled in his model of the debtor selling his debt to a third party thereby cancelling the right of the creditor to claim his due from his debtor.



DISCOUNTING CHEQUES AND BONDS

CHEQUES

Mr. Omar states: *"....the contemporary practice of cheques is not permissible. In essence, it amounts to the sale of money for money."*

This understanding of cheques is incorrect. A cheque is not the sale of money for money. A cheque is an instruction to the bank to pay the holder of the cheque from the drawer's own money which the bank is holding.

Zaid purchases goods from a dealer, and he pays with a cheque. By tendering the cheque, Zaid in actual fact – in reality – asks the dealer to collect the money from his treasurer, the bank. Thus, when the dealer presents the cheque to the bank, he merely requests the treasurer (bank) of Zaid to pay the amount which the client (Zaid) owes him.

In essence, when payment is made with a cheque, the dealer is selling his goods on credit. The rules of *Dain* (debt incurred by the purchase of goods on credit) apply.

The claim that payment by cheque is a sale of money for money is absurd. The client who purchases from a dealer is the debtor and the dealer is the creditor when payment is made by

cheque because a cheque is not money. It is plainly an instruction to the bank. When the bank honours the cheque, it merely pays the client's debt from the client's own money as instructed by the latter. The claim of the sale of money for money is therefore palpably erroneous.

If a cheque is tendered in lieu of a loan, then too, the question of the sale of money for money does not arise. The cheque is not money. Zaid acquires a loan from Bakr to whom he gives a post-dated cheque. The cheque merely informs Bakr that Zaid will repay the loan on the due date of the cheque. Furthermore, the debtor (Zaid) by giving the cheque, requests his creditor, Bakr to collect the money owed to him from his treasurer, theer bank, on due date. Therefore, if interest is not paid, discounting cheques will be permissible.

In the case of a loan, the rules of *Qardh* will apply. Among these rules, is the creditor's right to demand payment even before due date.

BONDS

Regarding bonds, Mr. Omar states: "*These money bonds are issued by government or private companies to fund projects. These bonds are essentially interest-bearing instruments. The negotiation of these bonds are only permissible at their face value……"*

Since these bonds are "interest-bearing instruments", dealing in them is haraam. Before speaking of negotiability of these bonds at "their face value", the hurdle of interest has to be addressed. Acquisition of bonds is *haraam* from the very onset. The issuing agency (the government or the company) pays interest for the loans. Bonds do not come without interest.

According to all Math-habs, bonds are *haraam.*

NEGOTIABLE INSTRUMENTS

Mr. Omar presents two 'permissible' transactions for negotiating cheques and bills of exchange.

First transaction

Explaining the first transaction, he says:
"The holder of the cheque or other negotiable instrument authorises the bank as his agent to collect the amount of the cheque upon the due date of maturity. As consideration for this service, the holder undertakes to pay the bank an agreed fee….."

As explained earlier, the cheque is an instruction by the drawer to the bank to pay the holder (the drawee) from his (the drawer's) own funds which the bank holds. The scenario here is as follows:

(a) The bank of the drawer and the drawee is the same. As such, the holder of the cheque is not authorising the bank *"as his agent"* to collect the cheque amount on his behalf. On the basis of the cheque, the holder merely demands payment which the drawer has instructed the bank to make.

In effecting payment to the holder, the bank is the wakeel (agent) of the drawer of the cheque, not the agent of the holder of the cheque. The same person cannot be an agent for two people in the very same transaction. The bank as the agent of the drawer of the cheque, pays the holder on the instruction of its principal (the drawer).

Since the bank is the agent of the drawer, it can charge him a service fee. It cannot levy a fee on the holder of the cheque whom it was instructed to pay. Its service is to its principal, the drawer of the cheque. If an employer sends his worker to deliver some goods, the worker cannot seek remuneration from the client of his employer. The same applies to the drawer's wakeel , the bank. The 'service' fee which the bank in this case charges the holder of the cheque is *Riba.*

(b) The banks are not the same. Both the drawer and the drawee operate accounts in different banks. In this case, the banks are the agents of their respective account-holders. Each bank may charge a fee for its service. In this case, the holder authorises his own worker to collect the payment due to him.

Second transaction

Explaining his second transaction, Mr. Omar states: *"The bank lends the client as holder of the cheque an interest-free loan equal to the face value, but less the agreed agency fee, which loan is payable on the date of maturity. The bank on the due date of maturity collects the amount of the cheque from the drawer/debtor. The bank deducts the agency fee, and offsets the balance against the interest-free loan advanced to the client."*

If the bank which advances the 'loan' on the basis of the post-dated cheques is the bank where the drawer operates his account, then this will not be a loan. It will be a payment by the *wakeel* on the instruction of his *muakkil* (principal). The bank merely advances to the holder the money which belongs to the drawer. In this case the bank is not the lender nor is the holder of the cheque the debtor of the bank. The transaction is between the drawer and the drawee, not between the bank and

the holder (drawee). The bank is merely the agent/worker of the drawer. The 'agency fee' which the holder has to pay is *Riba* in this instance. The bank may levy its service fees on the drawer who instructed it to effect payment.

If it happens to be another bank which discounts the cheques, and if it is assumed that the bank will not charge interest, it will in this instance be a loan. The bank may now claim a fee for having to execute a service on behalf of its principal who requests it to collect the debt from the bank of the drawer. If the holder effects payment on due date or prior to due date directly to the bank which had loaned him the money, obviating the need for the bank to collect the money from the drawer's bank, then any fee charged will be interest.

BAY BIT-TA'AATI

Bay bit-Ta'aati is a sale in which the two fundamentals of the sale, *Ijaab* (the offer) and *Qubool* (the acceptance) exist without being verbally stated. These fundamentals are implied by the actions of the buyer and the seller. In regard to this type of tacit sale, Mr. Omar cited an Arabic text of Ibn Qudaamah, supposedly from *Al-Mughni.* Mr. Omar translates the quoted Arabic text as follows:

"[O]ffer and acceptance indicate contractual consent. If such consent is evidenced by conduct, then such conduct takes the place of offer and acceptance."

This translation is incorrect. The correct translation is:

"…..because offer and acceptance are implied by virtue of (the conduct of the transactors) indicating consent. Thus, when there exists an act of bargaining and giving and taking indicating consent, then it (the indication is in substitution of both (i.e. *Ijaab and Qubool—offer and acceptance).*"

Mr. Omar's translation, viz., *"offer and acceptance indicate contractual consent"*, is grossly inaccurate. He has fitted his translation within the folds of inverted commas to give the idea that he has presented the translation of the Arabic text whereas the statement is an inaccurate meaning which he has assigned to Arabic text.

The Arabic statement of Ibn Qudaamah does not say *"offer and acceptance indicate contractual consent."* Offer and Acceptance are the two fundamental requisites of a valid sale contract. Ibn Qudaamah, in the text cited by Mr. Omar, is not informing what the two requisite fundamentals are for the validity of the sale. In other words, he is not telling us that ' a sale for its validity requires offer and acceptance'. Rather, he explains in this statement a particular kind of *Ijaab* and *Qubool.*

He conveys in the text that offer and acceptance can take place tacitly. The bargaining, handing over the price and taking possession of the commodity without explicit verbal statements, or the mere tendering of the price and appropriating the commodity without any verbal utterances are acts which indicate consent, hence the requisites of offer and acceptance are found.

Ibn Qudaamah does not say *"[O]ffer and acceptance indicate contractual consent"* as Mr. Omar alleges. He says: conduct in which there is no verbal expression implies consent which in turn is tantamount to offer and acceptance.

Offer and acceptance are in fact contractual consent. They are not indications of contractual consent. Contractual consent

comprises of offer and acceptance. In *Bay-ut-Ta'aati* the offer and acceptance are effected tacitly by conduct.

Regarding *Bay-ut-Ta'aati* in relation to a Muraabahah sale, Mr. Omar states: *[I]t follows that, if such offer and acceptance (i.e. tacit) were to be permitted tacitly, almost immediately after the client has taken possession of the commodity, on behalf of the bank, then the abovementioned distinction between a Murabahah sale and an interest-bearing loan would become blurred."*

Describing the Muraabahah sale of the banks, Mr. Omar explains: *"In practice, the client normally takes possession of the commodity on behalf of the bank in his capacity as an agent of the bank. Thereafter, the client in his capacity as purchaser acquires the commodity from the bank in terms of a separate sale concluded by offer and acceptance."*

Although in practice, the so-called 'Islamic' banks do not follow the simple method mentioned by Mr. Omar, for they bind the client with the *faasid* condition which Mr. Omar has painfully laboured to sanction with his endeavour of resuscitation of the corpse of *Bay-ul-Wafa',* we shall briefly assume for the purpose of this discussion, that this is indeed the factual position.

If the client has truly terminated his *wikaalat* (agency) duty after having taken possession of the commodity on behalf of the bank, and if he thereafter enters into a proper sale agreement with the bank to purchase the commodity, then Mr. Omar's assertion of the impermissibility of tacit offer and acceptance is devoid of substance. The act of *Ta-aati (tacit Ijaab* and *Qubool)* is an adequate substitute for explicit or verbal *Ijaab and Qubool.* As long as the fundamental requisites

of *Ijaab* and *Qubool* are fulfilled in a valid manner, the sale is valid regardless of the category of offer and acceptance.

The 'blurring' of the line between a Murabahah sale and an interest-bearing loan exists in the imagination of Mr. Omar. He should explain with precision the way in which this 'blurring' occurs to enable us to assist him to eliminate the obliquity which taunts his comprehension of *Fiqhi* (juridical) issues of the Shariah.

Inspite of his own explicit averment of a "separate sale concluded" *after* termination of the agency contract, he claims that if the sale of the commodity is effected in terms of *Bayut-Ta-aati,* it would not be permissible, as well as akin to interest. He needs to explain and illustrate with specific examples to extricate himself and others who read his brochure from confusion and misunderstanding.

If *Ijaab* and *Qubool* (offer and acceptance) are effected in a valid substratum – after the termination of *wikaalat* (agency) in this case – the transaction is valid irrespective of the *Ijaab* and *Qubool* being explicit/verbal or tacit. As long as there are no *faasid* (corrupt) stipulations, e.g. a promise, payment of interest, etc., encumbering the agreement, the sale is valid whether the *Ijaab* and *Qubool* are explicit or tacit. The quality of the offer and acceptance are not the issues of determination. As long as these requirements are validly discharged in a lawful substratum, the sale is valid.

Mr. Omar's 'fatwa' of impermissibility in relation to tacit offer and acceptance is conditioned with his fantasy of *"almost immediately"*. He thus says: *"It follows that, if such offer and acceptance were to be permitted tacitly, almost immediately after the client has taken possession of the commodity, on*

behalf of the bank, then the above mentioned distinction between a Murabahah sale and an interest-bearing loan would become blurred."

There is nothing here that 'follows' either in terms of the Shariah, rationally or logically. There is a glaring contradiction between Mr. Omar's two averments, namely, (1) *the separate sale* ***after*** *termination of the client's agency, and* (2) *the occurrence of the sale 'almost immediately after' possession of the commodity by the client.*

His statement: *"the purchaser acquires the commodity from the bank in terms of a separate sale concluded by offer and acceptance",* presupposes the absolute termination of the earlier *wikaalat* of the client. This confirms the birth of the Murabahah transaction as a totally separate entity – an effect subsequent to the ending of the *wikaalat.* The supposition that the transaction takes place "almost immediately after possession of the commodity" does not adversely influence the validity and permissibility of the sale if the latter is executed in accordance with the Shariah. Mr. Omar has to explain the Shar'i basis of his *'almost immediately'* concept.

He has to define the meaning of *'almost immediately'*. Then he has to explain and substantiate on Shar'i grounds why one transaction will not be permissible if contracted 'almost immediately after' another transaction regardless of whether the intervening time factor is just a minute. It is grossly inadequate to merely say that the line of distinction is blurred. He has to explain how it became 'blurred' by one transaction rapidly following another. Then he has to provide his Shar'i basis for the validity of his 'blurring' claim. In short, he has to substantiate every claim and 'fatwa' with the evidence of the

Shariah. His personal ideas and theories have no significance in the Shariah.

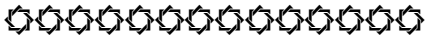
Will 5, 10 or 15 minutes or let's say 2 minutes come within the scope of *'almost immediately'?* If yes, what is the Shar'i *daleel?* If no, what is the Shar'i *daleel?* He has to precisely define and demarcate the parameters of his '*almost immediately'* concept.

He further claims: *"The transaction would be analogous to an interest-bearing loan, with the bank effectively assuming no risk."* Again he talks nonsense. Yes, the bank will assume no risk if Mr. Omar's *baatil* theory of legal enforceability of a promise is incorporated in the agreement. Why would the bank not be assuming a risk if the sale is conducted and concluded in compliance with the Shariah? The commodity is present. *Ijaab* and *Qubool* takes place in a valid substratum. The bank sells what it owns after it has taken possession of the asset. Now why would this sale be analogous with an interest-bearing loan?

We hold no brief for the banks. In fact we believe that they all, i.e. all the so-called Muslim banks, are Riba institutions. Our discussion here pertaining to the validity of the Murabahah sale subsequent to the termination of the *wikaalat* which existed between the bank and the client, is in relation to an assumed valid sale which takes place 'almost immediately' after the valid termination of the agency contract.

Mr. Omar has no valid Shar'i basis for his analogy. He has absolutely no grounds for his fictitious 'fatwa' that *"it is not permissible to conclude such contracts tacitly"*.

If the commodity is present, and in the bank's possession, *Bayut Ta-aati* will be permissible. The entire proceedings of the transaction have to take place at a time when the client is not the agent of the bank even if it is one minute after termination of the *wikaalat.*



BANK FEES

Regarding fees charged by banks, Mr. Omar says:
"The administration fee must be commensurate with actual costs incurred in rendering the relevant service."

There is no Shar'i basis for this claim. What is the meaning of "commensurate with actual costs"? Who will compute this "commensurateness"? And, even if some expert secularist works out a formula for the personal figment of commensurateness, what is the Shar'i basis for it? There is no incumbency in the Shariah for wages, fees or remuneration to be commensurate with "actual costs". The "commensurateness" theory of Mr. Omar is another one of his fallacies.

An institution is free to charge any fee for its services without consideration of the actual cost for the relevant service in the same way as traders are allowed to charge any sum as a profit on their wares just as they please.

Exploitation – exorbitance – taking gross advantage of a situation to fleece people as the riba banks do – relates to the moral domain. If the situation is out of hand, as it is with the riba banks, an Islamic government has the right of intervention to regulate the fees. But, the commensurateness fantasized by Mr. Omar is baseless. There is no such principle in the Shariah.

Mr. Omar further says in this regard: *"This may be calculated by having regard to a fair and equitable formula which is pro rated to the amount of each transaction financed by the bank."*

Mr. Omar purports to expound "Islamic Finance". But he presents ideas which he sucks from his thumb. Since he has courageously embarked on his exercise of 'Islamic Finance', he is under obligation to furnish Islamic/Shar'i grounds for every idea, every theory, and every figment of the imagination he expounds.

He should divest himself of the notion that his secular qualification entitles him to present just any fallacy of his imagination as a rule, principle and 'fatwa' of the Shariah. What gives him the idea that his 'pro rated' formula is 'fair and equitable' in terms of the Shariah? What is the Shar'i basis for this formula? He does not tender the great and distinguished Ibn Qudaamah to bolster his claims. Nor does he cite the Maaliki jurist, Sahnoon, to provide a semblance of support for his theory and formula of equitability.

In an endeavour to appear professional and qualified in the Shariah, Mr. Omar degenerates childishly by presenting a laughable 'mathematical' formula for his theory of equitability. The formula he offers is:

$$\text{Fee} = \frac{a}{b} \times p$$

His 'a' is the "amount of the relevant transaction", and his 'b' "is the total aggregate value of transactions….", and his 'p' is "the ratio in which the total costs incurred to date bears to the aggregate value…."

What Mr. Omar has palpably failed to mention, is his 'Islamic' basis for this laughable formula. Which Math-hab bolsters him on this issue? If perhaps the great and distinguished Ibn Qudaamah does, then it devolves on Mr. Omar to produce the relevant evidence for our diagnosis and prescription.

The only textual presentation he makes in his brief exposition of bank fees, consists of :

(1) Ibn Qudaamah's ruling that the fee an agent charges may be a fixed portion of an amount, e.g. R10 for every R1000 of the price or a percentage of the price.

(2) Ibn Aabideen's ruling that despite Ibn Qudaamah's view being *haraam* some Hanafi Fuqaha have legalized it on the basis of the need of the people.

None of these two rulings supports Mr. Omar's theory of equitability. The fee, in terms of Ibn Qudaamah's view, is determined by the agent himself, not by the imposition of some stupid theory and laughable 'mathematical' formula of a secularist seeking to peddle the figments of his nafs as Shar'i principles pertaining to Islamic Finance. Ibn Qudaamah's view is simple. The determination of the amount of the fee is left to the individual agent.

Although Ibn Qudaamah's view is untenable and *haraam* according to the Hanafi Math-hab, some Hanafi Fuqaha have given credence to it due to what they perceived is a true need of the people.

As was mentioned earlier in our exposition of *Bay-ul-Wafa',* a *haraam* act cannot be legalized on the basis of the permissibility of eating pork in a given situation of starvation.

If the consumption of pork was permissible for Zaid at one time, it will be a conspicuous demonstration of *jahaalat* to aver that since the great and distinguished Ibn Qudaamah had ruled the permissibility of consuming pork due to the dire need of Zaid, relishing on pork has, therefore, become lawful for all time and for all people.

Haraam can be temporarily legalized on the basis of certain Shar'i principles. When a situation of dire need develops, recourse has to be made to the *Usool* (Principles). The relevant principle has to be invoked, and the contingency should be measured on its (the principle's) standard to ascertain the legality of its applicability to the situation of need. But, Mr. Omar acquits himself in the style of ignorant laymen who has seen in a kitaab that pork is halaal for a starving man. On this basis the ignoramus proclaims the permissibility of eating swine flesh for all people at all times. This is the analogy of Mr. Omar's 'fiqhi' (juridical) deductions. He makes a complete hash when he brews his potions.

THE BANK AS MUDHARIB

In his discussion on this issue, Mr. Omar says:
"The depositors as the contributors of capital are regarded as whole as the rabb-ul-mal, whereas the bank, as a separate legal entity, is regarded as the mudharib."

While this is the position in the theory of the modernists and the liberal molvis, it is not the position of the Shariah. Firstly, the concept of legal entity is a fiction of the kaafir capitalist system. It has absolutely no place in Islam. It is a system of the humbug capitalist devourers of riba who, in Qur'aanic

parlance, stand *"like one who has been driven to insanity by the touch of shaitaan."*

Islam has no truck with the haraam legal entity concept fabricated to defraud creditors. We have explained the fallacy and prohibition of this imaginary 'legal entity' in our book, *The Concept of Limited Liability – Untenable in The Shariah.* Anyone who wishes to have a copy may write to us.

The first fundamental flaw in Mr. Omar's aforementioned postulate is the Shariah does not recognize the capitalist concept of the imaginary phantom of 'a separate legal entity'.

In the Shariah, both the *Rabbul Maal* (the investor or contributor of the capital) and the *Mudhaarib* (the worker – the one who employs the capital to gain profit for the joint venture) are *Insaan* (living human beings). All acts, contracts and institutions of Islam are regulated by *Arkaan (Fundamental requisites)* and *Sharaa-it (Imperative Conditions).* In the absence of any of these essential requisites, the act, contract or institution is null and void.

Among the essential requisites for the validity of the institution of *Mudhaarabah* is the *shart (condition)* of *Ahliyatut-Taukeel*. In other words, both the *Rabbul Maal* and the *Mudhaarib* must necessarily be qualified persons capable of assuming the institution of *Wikaalat (Agency).* This, according to the Shariah, is possible only if both transactors are *baaligh* (adults) and *aaqil* (sane). Therefore, a minor and an insane person cannot become either of the transactors in a *Mudhaarabah* venture.

These *fardh* and imperative conditions do not exist in the ghost they define as 'separate legal entity'. An agreement with a

fictitious being, i.e. the capitalist riba 'legal entity', is neither valid nor intelligent nor acceptable in the Shariah. Thus, since this vital fundamental condition is lacking in the current 'mudhaarabah' agreements of the so-called Muslim capitalist banks, a Shariah compliant *Mudhaarabah* simply does not exist. All these *'mudhaarabah'* schemes of the banks are *baatil* – baseless and haraam.

The *Rukn* (the very fundamental basis) of a valid Shar'i *Mudhaarabah* is *Ijaab and Qubool* (verbal expressions) by the sane adult participants of the enterprise. A phantom 'legal entity' is incapable of fulfilling the Shariah's demand for this *Rukn.* This too renders the current 'mudhaarabah' schemes of the banks totally *baatil.*

In a valid *Mudhaarabah* enterprise, the *Mudhaaribeen* will be the bank's directors – those who are in charge of the money and who direct the money into profitable ventures. The conglomerate of directors is in actual fact the *Mudhaarib.* They do not represent the *Mudhaarib.* They collectively are the *Mudhaarib.*

The *Mudhaarib* in the Shariah acts like the boss. He has unrestricted use of the money, and he may employ it profitability according to the terms of reference of the *Mudhaarabah* venture. The bank's directors pose as bosses, not as hired workers. They can therefore best act in the role of the *Mudhaarib* in a valid *Mudhaarabah* business venture.

Bringing the present *baatil* 'mudhaarabah' schemes of the so-called Muslim capitalist banks fully within the confines and compliance of the Shariah poses no formidable task. But, the corruptive transformation which the brains and hearts of the Muslim capitalists have suffered in consequence of the western

capitalist *Riba* systems to which they are anchored, constrains them to defy with reckless intransigence the dire Divine castigations sounded in the Qur'aan and Ahaadith for those who refuse to desist from *Riba* and *Riba* tainted dealings. Consider the specific case of *Mudhaarabah* in relation to the banks. Inspite of the simplicity and permissibility of the bank's conglomerate of directors acting the role of the *Mudhaarib,* thereby satisfying all the vital requisites imposed by the Shariah for the validity of the venture, they mulishly insist and persist to buckle themselves with the yoke of the system of capitalism. Thus, they rather adopt the kuffaar *baatil* concept of 'a separate legal entity', then they perform an unholy – null and void – marriage between the contributors of the capital and the non-existing 'legal person'.

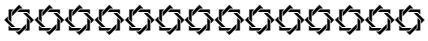
Riba produces an unquenchable thirst for money. It engenders spiritual blindness which completely effaces the conscience which develops from the bedrock of Imaan. It is for this reason that the liberal molvis and pseudo-molvis perpetually and incorrigibly incline to hybrid models which are incongruous in relation to both the Islamic and the capitalist systems. Eager to effect a fusion of the two mutually repelling systems, they fabricate financial products of *Riba* with an outer-coating of an extremely diluted Islamic hue which does not really serve the objective of concealing the corruption of the schemes.

Mr. Omar says: *"The bank is entitled to its share of the profit in consideration for its labour. The bank itself as a separate juristic entity is the Mudharib".*

The bank being a 'separate juristic entity' in the imagination of the capitalists, is supposedly entitled to a share of the profit in its imagined capacity as the 'mudharib'. Since the bank is a fictitious 'person' without real existence, who is destined to

gobble up the 'mudharib's' share of the profit? The depositors/contributors of the capital are the *Rabbul Maal.* Acquisition of profit by the human *Rabbul Maal* is understandable. But into whose coffers will go the profit share of the imaginary ghost – the 'legal entity'?

If there are human faces behind this sham of a 'legal person' of no existence, whose pockets the 'mudharib's' share of profits will grease, then they will be the *Mudhaarib*, not the fiction spawned by brains demented by the *'touch of shaitaan'.*



THE EXPENSES OF THE MUDHAARABAH

In this regard, Mr. Omar claims: *"...[A]ll indirect expenses incurred by the bank in conducting its operations must be borne by the bank, and not the Mudhaarabah partnership. These indirect expenses include salaries, rental, water, electricity, maintenance of equipment and ancillary expenses. Direct expenses, on the other hand, are those which are connected directly with the Mudhaarabah partnership…. These expenses must be borne by the Mudhaarabah partnership itself."*

Mr. Omar ominously refrains from citing the great and distinguished Hambali jurist, Ibn Qudaamah in substantiation of the myth he has propounded here. He baselessly categorises the expenses into direct and indirect. The owners/directors of the bank are the *Mudhaarib.* The expenses may not be loaded on the *Mudhaarib.* Whether direct or indirect, all expenses will be for the *Mudhaarabah* partnership. The imposition of any part of the expenses on the Mudhaarib alone, is a *faasid*

condition which the *Mudhaarabah* contract is not allowed to bear.

Mr. Omar gives examples of 'indirect' expenses, e.g. salaries, rental, etc., etc. But he refrains from citing even one example of 'direct' expenses. Just what are these 'direct' expenses related to the *Mudhaarabah* venture? Why are salaries, rental, electricity and the like excluded from the liability of the *Mudhaarabah* partnership? A partnership business employing its capital for the acquisition of profit is saddled with this kind of expense.

No one should become fuddled and fooled by the false talk of banks engaging in *Mudhaarabah* business ventures. Imaam Ghazaali (rahmatullah alayh) says in his *Ihya-ul-Uloom* that assuming there would be trade and commerce in Jahannum (in Hell-Fire), the only trade which will subsist in that horrendous substratum would be the banks – the illicit trade of the money-exchangers and money-lenders. These institutions of parasitism, imperceptibly gnawing and eroding the economic foundations of the nation with their satanic ventures of *Riba*, never engage in lawful trade. They gamble on the haraam stock exchange. Their only profession is the transference of money from one account to another. They only sell money for money. Their *mudhaarabah* deals are huge ploys and gimmicks. They succeed in duping the ignorant masses. The Ulama have truly observed: *"The masses are like dumb animals"*.

The banks do not roll up their sleeves and work for profit. Their eyes see only *Riba.* They dream *Riba*. They devour *Riba*. The 'profit' they distribute is *Riba.* They live and die for *Riba.* Their investments in a variety of trading companies are all *Riba* dealings which they adorn with Islamic sounding paraphernalia.

The banks' hired scholars of this age relentlessly seek to justify the *Riba* of the capitalist so-called Islamic banks with the over-used metaphors of *mudharabah, mushaarakah, muraabahah* and a litany of other Islamically flavoured terms. Their mismanipulation of Shar'i terminology is a deceptive exercise consisting of huge hyperbole developed solely for camouflaging the riba transactions of the banks in the hope that the ignorant Muslim masses will swallow it hook, line and sinker, as well as to intimidate Ulama of superficial textual knowledge, of shallow understanding and bereft of the depth of *Ilm* which emanates from a heart imbued with divine efflorescence of the Knowledge of Wahi.

Hired scholars paid huge 'salaries' from riba funds by riba banks cannot hope to partake in this efflorescence of *Noor-e-Ilm*. It is for this reason that they have enslaved their minds to serving the dictates and demands of capitalism.

THE 'LEGAL PERSON' RED HERRING

Utterly bereft of any Shar'i base, Mr. Omar licks the very dregs of the barrel of *Baatil* in claiming:

"It must be noted that the contemporary Shariah experts have recognized a company or other body corporate as a separate legal person, with rights and obligations (on the same basis as a natural person). On this basis the bank is regarded as a separate legal person, which is the mudharib itself, and which acts through its authorised Board of Directors, officers and employees. This was recognised by the supreme Shariah Board of Albarakah…."

"Contemporary Shariah experts" are not the representatives of the Shariah of Islam. They are not among the *Warathatul Ambiya*. These imagined 'experts' of the Shariah are the hired scholars and representatives of the riba banks which they serve. Their function is to churn out financial models portrayed as 'shariah-compliant' for the Muslim masses.

"The supreme Shariah Board of Albarakah"? This is indeed ludicrous and laughable. The hopeless, miserable board of hired 'scholars' of a capitalist bank wallowing in *riba has suddenly become a 'supreme shariah board'*. It may be such a supreme board for modernists *juhhaal* who happen to be self-appointed 'mujtahids' of this age – such 'mujtahids' who, when their defective and superficial research of the kutub, and the shallowness of their intellectual grasp fail to exhume any facts for their baatil theories, seek refuge in stupid blind following of 'shariah boards' of hired scholars. To give credibility to such laughable taqleed, the need has arisen in the ranks of the *juhhaal* to appoint some phantom of a 'supreme shariah board', which in reality is the handmaid of the capitalist banks, and just as fictitious as the ghost which the *juhhaal* term 'legal person'.

In our book, *The Concept of Limited Liability – Untenable in the Shariah,* we have, Alhamdulillah, explained in detail the fiction and invalidity of the 'separate legal person' or the figment termed 'company'.
Anyone interested to acquire this book, may write to us for a copy.

When the 'supreme shariah board' of the capitalist banks has recognized the validity and permissibility of riba as an imperative requisite for the smooth functioning of the figment of 'Islamic' finance, albeit portrayed with Islamic hues, it

should not be surprising when they issue their corrupt 'fatwa' of the validity of the phantom they term 'separate legal person'. Even a Muslim businessman of mediocre Deeni knowledge of just the basics of the Shariah necessary for moral and spiritual survival, knows and understands that the company and limited liability concepts are forgeries of the kuffaar capitalist experts of economics.

The hired scholars sitting on the shariah boards of the capitalist banks were constrained to fabricate a basis for the legalization of the *haraam* effects created by the company concept. When all their tedious exercises and futile labour perpetrated in the kutub of the Shariah produced no basis for their bank masters, they had no alternative other than to throw all Imaani caution and conscience overboard to proclaim Islamically lawful the *haraam* figment of the phantom legal person dubbed 'the company' with its appendage of fraud, viz., its limited liability attribute.

In the commission of this monstrous legalization of *baatil,* they have placed themselves in the full glare of the Qur'aanic castigation:

"O People of Imaan! Verily, numerous of the Ahbaar and Ruhbaan, most certainly are devouring the wealth of the people by means of baatil (falsehood and haraam), and (in so doing) they prevent (people) from the Path of Allah (i.e. from following the Shariah of Allah)." (Aayat 34, Surah Taubah)

The 'supreme shariah boards' of the ulama and mashaaikh of the Yahood and Nasaara – all hired scholars of the wealthy capitalists of their age – had set the stage for selling the laws of Allah Ta'ala for miserable worldly remuneration. This is precisely the profession of the 'supreme shariah boards' of the

Muslim capitalists banks of today. The function of these 'supreme shariah boards' is nothing other than to search in the books of Fiqah for the flimsiest textual straws and stratagems to weave a fabric which could very deceptively posit as a basis for the theories of capitalism thereby according Shar'i acceptability and legality to the corrupt concepts and practices of an economic system which has absolutely no affinity with the system of trade and commerce enunciated by the Divine Shariah of Islam.

'TA ADDI AND TAQSIR'

Citing from the *baatil* resolutions of Albaraka bank's so-called supreme shariah board, Mr. Omar presents:

"Any changes in the shareholding or directors of the bank does not affect the relationship between the depositors as rabb-ul-maal and the bank as mudharib; because the depositors are protected in the event of negligence or misconduct on the part of the bank (despite changes in shareholding) in accordance with the ordinary rules of TA ADDI and TAQSIR governing partnerships such as Mudaarabah."

The hybrid nature of this proposition adequately displays the split mentality and oblique vision of the members of the 'supreme shariah board'. In the aforementioned fallacious theory they have laboured to legalize an invalid position by an act of bamboozlement – using two Arabic terms which have no technical significance in the terminology of the Fuqaha. The two words, *ta-addi* and *taqseer* simply mean 'transgression' and 'deficiency' respectively. These terms cover negligence, fraud, theft, mismanagement and the like. They are words of literal meanings applicable to all spheres of life.

These two words are unlike the technical terms of *mudhaarabah, muraabahah, etc.,* which are not words of literal meaning, but are concepts and specific practices encumbered by a myriad of rules and regulations.

It is not difficult to see through the thin veneer for the employment of the Arabic words of literal meaning in the context of the corrupt resolution of the so-called 'supreme shariah board' of the capitalist bank. Since the entire resolution is devoid of Shar'i substance, its western capitalist colour is too conspicuous for comfort, hence the need to inject an 'Islamic' flavour by the silly use of Arabic terms which just have no juristic significance.

The resolution mentioned above is invalid in terms of the Shariah. The *Mudhaarabah* contract is between two parties – *Rabbul Maal and Mudhaarib.* If anyone of the parties opts out of the deal, the contract terminates. If a new partner *(Mudhaarib in this case)* enters the show, a fresh contract has to be arranged between the parties. The contract with the first *Mudhaarib* ends with his withdrawal from the agreement.

The *Mudhaarib* cannot sell his share of the business unilaterally to a third party and impose the *mudhaarabah* partnership on the *Rabbul Maal* (the one who advances the capital). Thus, in the event where a valid Shar'i *Mudhaarabah* contract exists, a change of directors will terminate the existing contract, necessitating the formulation of a new agreement between the *Rabbul Maal* and the new directors who intend to continue with the *Mudhaarabah* contract. The aim of the baseless resolution is simply to perpetuate the functioning of the capitalist banking structure along the lines which the capitalist concept has cast in stone for its systems.

Having understood the conflict with the Shariah of the aforementioned resolution, Mr. Omar cites the following resolution of the 'supreme shariah board' of the capitalist bank, in an abortive attempt to minimise the conflict:

"The aforegoing is subject to the following: a depositor may explicitly stipulate that his or her investment as rabb-ul-maal is subject to the condition that there be no change in shareholdings or directors and managers or one or more of them. A breach of this stipulation would entitle the relevant depositor to withdraw his or her investment in the Mudaarabah which by virtue of the said stipulation is regarded as a limited Mudaarabah".

This is a typical utopian supposition. The poor depositor is an infinitesimal screw in the gigantic banking structure of the capitalist world. Leave alone having any say in the affairs of the bank, he totally lacks awareness of the banking system, of the functioning of the bank, of the methods employed by the bank and of even the meaning of the 'mudhaarabah' agreement. As far as the average depositor is concerned, he simply deposits money in the bank which he is told will pay him a share of the 'profit'. He knows absolutely nothing beyond this rudimentary awareness.

This resolution is indeed a gimmick to befool people who have little understanding of the mechanics of the Shariah pertaining to invalidity of trade agreements. The *Mudhaarib* holds in trust the capital entrusted to him by the *Rabbul Maal.* If he desires to opt out of the contract by any of the stratagems recognized by the capitalist system, he may not do so. Thus, he cannot sell his percentage share of the profit and appoint the buyer to his share as the new *mudharib.* The newcomer will have to enter into a *Mudhaarabah* agreement with the *Rabbul Maal.*

There is no automatic transfer of the *Mudhaarbah* to someone unilaterally selected by the *Mudhaarib* who opts out in consideration of payment by the prospective new *'mudharib'.*

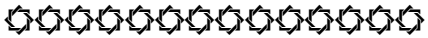
Insulation against *ta'addi* and *taqseer* does not validate automatic transference of the *Mudhaarabah* agreement to one with whom the *Rabbul Maal* had not transacted. *Ta'addi* and *Taqseer* are separate issues with no bearing on the contract of *Mudhaarabah.* Negligence and deliberate mismanagement of any kind exercise their effect on the issue of *Amaanat* (Trust). The capital in the possession of the *Mudhaarib* is an *amaanat*, hence the rules of *Amaanat* are applicable. If the capital is lost while in the possession of the *Mudhaarib,* he is not liable. The *Rabbul Maal* sustains the loss. However, if the *Mudhaarib* is guilty of gross negligence, he will be held liable. This is the limit of the operation of *ta'addi* and *taqseer.* But, the votaries of capitalism have abortively attempted to elevate these terms to the status of a principle or a specific concept, and to blindly apply it in a bid to sustain the *Mudhaarabah* agreement despite its invalidity when the *Mudhaarib* changes by way of a haraam deal – namely, the sale of his share in the *Mudhaarbah* contract

The explicit stipulation enunciated in the 'supreme shariah board's' resolution is *baatil.* There is absolutely no need for such a stipulation. The question of the *Rabbul Maal's* entitlement to withdraw from the *Mudhaarabah* contract being subject to the 'explicit stipulation' fabricated by the deviant 'supreme shariah board' of the capitalist bank, is a fallacy. The *Rabbul Maal* is not bound to perpetuate the *Mudhaarabah.* He may terminate the agreement at any time at will. The issue of *ta'addi and taqseer* is irrelevant. Absence of transgression and mismanagement cannot restrain the *Rabbul Maal* from

cancelling the *Mudhaarabah* agreement. Hence, what the resolution states is pure drivel.

The irrefutability of this Shar'i fact is so well-grounded and conspicuous that Mr. Omar is compelled to concede:

"The classical Muslim jurists express the view that any party to a Mudaarabah contract may terminate the contract at any time."



PREMATURE WITHDRAWAL OF DEPOSITOR

Under this caption, Mr. Omar attempts to supersede the right to terminate the *Mudhaarabah* contract which the Shariah grants both parties. Inspite of him conceding that according to the "classical Muslim jurists", any of the parties has the right to terminate the contract at any time, he seeks to override the Shariah as propounded by the Fuqaha (the classical jurists) among the Sahaabah, Taabieen and Tab-e-Taabieen, by citing as his 'daleel' the unsubstantiated opinion of Mufti Taqi Usmani Sahib.

Even Mufti Taqi Sahib in his book, *An Introduction to Islamic Finance,* has no alternative other than to concede with clarity the right of the parties to terminate the *Mudhaarabah* contract at will.

Since Mr. Omar has miserably failed to present even a semblance of evidence from any of the Four Math-habs for his untenable view on what he terms 'premature withdrawal of depositor', his only succour is in seeking aid from Mufti Taqi's book which is basically an exercise presenting much of the personal ideas of the author. Mufti Taqi's opinions which

conflict with the rulings of the Fuqaha of Islam are unacceptable and baseless.

In his brochure, Mr. Omar refers readers to pages 52 and 53 of Mufti Taqi's book. They are supposedly to obtain the proof for the proposal to fetter the unrestricted right of termination, on pages 52 and 53 of Mufti Taqi's book.

But on page 51, Mufti Taqi Sahib states unequivocally:
"The contract of mudarabah can be terminated at any time by either of the two parties. The only condition is to give notice to the other party."

Mufti Taqi Sahib here states the Shar'i position. There exists ample evidence in the Books of Fiqh for the position stated by the Fuqaha. Notwithstanding this clear-cut ruling of the Shariah which he acknowledges without ambiguity, Hadhrat Mufti Taqi Sahib, very peculiarity states on page 52 of his book:

"This unlimited power of the parties to terminate the mudarabah at their pleasure may create some difficulties in the context of the present circumstances, because most of the commercial enterprises today need time to bring fruits. They also demand constant and complex efforts. Therefore, it may be disastrous to the project, if the rabb-ul-maal terminates the mudarabah right in the beginning of the enterprise. Specially, it may bring a severe set-back to the mudharib who will earn nothing despite his efforts. Therefore, if the parties agree, when entering into the mudarabah, that no party shall terminate it during a specified period, except in specified circumstances, it does not seem to violate any principle of the Shariah…."

It most certainly does violate the Shariah in that the Shariah has granted both parties the unfettered right (or unlimited power according to Mufti Sahib) to cancel the contract at will. While the Fuqaha have their solid *Qur'aanic* and *Sunnah dalaail* for their rulings, Mufti Taqi Sahib has presented absolutely no proof for his view which he presents in negation of the 14 century ruling of the Shariah.

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In this opinion, Mufti Taqi Sahib implies that the Shariah has erred in its bestowal of 'unlimited power' to the parties to terminate the contract, because this bestowal, according to Mufti Taqi, culminates in the creation of such difficulties which may be 'disastrous to the project'. In other words, Mufti Taqi Sahib expects Muslims to believe that the Shariah based on the immutable principles of the Qur'aan and Sunnah, did not foresee the degree of complexity of later projects. This leads to the conclusion of the inadequacy of the Shariah – *Nauthubillaah!* This is the theme of the modernists who monotonously and fallaciously labour to 'prove' that the Shariah of Islam is the product of the minds of the illustrious Aimmah-e-Mujtahideen, and not that of the Qur'aan and Sunnah.

Furthermore, Mufti Taqi's argument (as mentioned above) is baseless. The 'difficulties in the context of the present circumstances' are imaginary. The other claim, namely, "the mudharib will earn nothing despite all his efforts', is also baseless, having no reality. The system of the Shariah is orderly and divinely designed for the maximum benefit of all concerned. It is most unbecoming of a learned Mufti of the Shariah to envisage disaster as an effect of observance of the limits prescribed by the Shariah. The Qur'aan-e-Kareem expressly states: *"These are the limits of Allah. Whoever*

commits ta'addi (transgression) against the limits of Allah, verily he has committed injustice against his own nafs."

Hadhrat Mufti Sahib has to incumbently retract his statement: *"Therefore, it may be disastrous to the project, if the rabb-ul-maal terminates the mudarabah right in the beginning of the enterprise."*

When the Shariah has bestowed this right of termination to the *Rabbul Maal*, it does not then behove any Mu'min to read disaster into the bestowals and *Ahkaam* of the Shariah. The principles evolved by the illustrious Aimmah-e-Mujtahideen on the basis of the Qur'aan and Sunnah are ample for all contingencies and developments until the Day of Qiyaamah. The rationale of Mufti Taqi Sahib to justify tampering with the explicit rulings of the illustrious Fuqaha is untenable and unacceptable. Hadhrat Mufti Taqi Sahib should not excise from his mind the fact that he is a Muqallid of the Hanafi Math-hab. He has therefore to incumbently operate within the confines of the Math-hab and abstain from the destructive exercise of bending and battering the rules to accommodate the concepts and theories of western capitalism for the sake of the monetary designs and pursuits of the neo-capitalists in Muslim society.

TERMINATION AT WILL

If the *Rabbul Maal* terminates the contract in the early stage of the enterprise, he does not harm the *Mudhaarib*. He simply recalls his capital. The *Rabbul Maal* will undoubtedly have valid reason for his desire to terminate the contract. Either he is in desperate need of his cash for another project or he has lost confidence in the integrity of the *Mudhaarib* or he has some other good reason for his desire to terminate the contract.

To satisfy his needs with his own wealth, he has every right to recall his capital. Upholding this right, the Shariah allows him unfettered freedom to cancel the contract. In so doing he does not usurp the rights of the *Mudhaarib.*

The argument that the *Mudhaarib* "will earn nothing despite all his efforts" is palpably false. According to the Shariah, when the *Rabbul Maal* notifies his partner of termination, the position will be as follows:

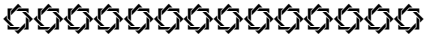
(1) The capital has not yet been employed by the *Mudhaarib.* In other words, the *Mudhaarib* sits with the hard cash. If this is the position, the *Mudhaarib* is not entitled to receive any remuneration/profit. He will suffer no "severe set-back" by simply returning the *Amaanat* of the *Rabbul Maal.*

(2) The capital has already been employed in the enterprise. It has already been converted into merchandise. In this situation notification of termination will not culminate in an abrupt halt and discontinuation of the enterprise. The notice to terminate while restraining the *Mudhaarib* from further employment of the cash, allows him to continue trading with the merchandise, selling off whatever stock he has, thereby bringing about an orderly cessation of the enterprise.

In this situation, the *Mudhaarib* is not deprived from his share of the profit. He will acquire his right. It is therefore injudicious and improper to aver that the *Mudhaarib* "will earn nothing despite all his efforts".

Since the Shariah gives both parties the right to terminate the *Mudhaarabah* at any time, the claim of 'premature withdrawal' is baseless. The Shariah does not accept this postulate.

In his brief essay on premature withdrawal, Mr. Omar has conspicuously refrained from sighting the "eminent Hambali jurist Ibn Qudamah" or the Maaliki jurist, Sahnoon or any other jurist of any other Math-hab. Pure personal conjecture has been employed to justify an untenable position.



THE OPTION TO REPOSSESS IN THE EVENT OF INSOLVENCY

If the seller did not secure his right over the asset by means of a *Rahn* contract, he is on par with all the creditors in the event of the debtor's insolvency. This is the unanimous ruling of the Hanafi Fuqaha. In the absence of *a Rahn (Pawning)* contract, the seller has no preferential rights to the exclusion of other creditors.

After unequivocally acknowledging this Hanafi position, Mr. Omar whom we still believe to be a layman Muqallid of the Hanafi Math-hab, advocates the ruling of the other Math-habs which allow the seller a preferential right – the right to take possession of the asset if it still exists in the buyer's possession in its original form.

He has absolutely no right whatsoever to peddle views and opinions which soothes his nafs, and which he calculates will be in the interests of the riba banks of the Muslim neo-capitalists. Mr. Omar is bereft of the qualifications which allow a Faqeeh to prefer certain views among the conflicting opinions of the Fuqaha of even his own Math-hab. Great Ulama of the calibre of Imaam Raazi, Saahib-e-Hidaayah and the like, possessed this ability and right, not total non-entities deficient in the knowledge of even the masaail of Tahaarat and

Salaat. It is beyond all limits of *jahaalat* for a layman in this age to propel himself onto the pedestal of the Aimmah Mujtahideen thereby arrogating for himself the right to set aside the unanimous ruling of his Math-hab to advocate just any view of another Math-hab which appeases his whimsical agenda.

Mr. Omar is guilty of intellectual abortion of the worst kind for discarding the authoritative and unanimous Ruling of the Hanafi Math-hab, and transgressing beyond its confines to advocate the view propounded by Ibn Qudaamah of the Hambali Math-hab. Fools rush in where angels dread to tread.

Furthermore, in his presentation of the view of the other Math-habs, Mr. Omar states:
"The majority of the jurists including the Shafi'i, Maaliki and Hambali schools are of the view that the seller has an option upon the buyer's insolvency: the seller may retake possession of his goods, or such of them as are found in the buyers possession."

The Ruling of the other Math-habs is the right to repossess if the exact asset is found intact in the possession of the debtor. The claim of *"such of them as are found"*, is incorrect. The goods must be exactly the same, not part of them, part having been sold.

Continuing his presentation, Mr. Omar states:
"The view of the majority of the jurists may be effectively implemented by incorporating an appropriate clause in the underlying sale agreement to the effect that the seller will be entitled upon the buyer's insolvency to retake possession of the goods, which remain unsold, and are with the buyer at the time of insolvency. The seller will, by the inclusion of such a

contractual term, be able to bring a claim against the insolvent estate for the return of the goods (or their value, if they are sold in the ordinary course by the trustees) in preference to other creditors."

Mr. Omar is either blissfully ignorant of the full *mas'alah* on this issue according to the Hambali Math-hab or he has conveniently cast a blind eye in order to peddle his fabrication to protect the interests of the riba banks. The Hambali position is that there are five conditions for the validity of the buyer's right to reclaim the goods he had sold.

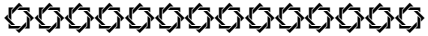
Among these five stipulations, the condition which is most germane to the 'right' which Mr. Omar seeks to abortively confer to the banks is:

"The second condition is that the seller did not receive any payment on the price of the asset. If he has accepted part of the price (i.e. the debtor had made payments), his (the seller's) right of reclamation falls away."

This condition nullifies the incorporation of "an appropriate clause" as proposed by Mr. Omar. It is indeed rare and highly unlikely that the debtor did not make any payments on his vehicle to the bank. As such, the right to repossess the asset is extinguished.

Thus, while according to the other Math-habs the seller may reclaim his asset, in practice this is not possible on account of the conditions which nullify the seller's right to reclaim. And, above all, Mr. Omar has no right whatsoever to overrule and override the authoritative Ruling of the Hanafi Math-hab.

In the stratagem proposed by Mr. Omar, there is no security for the bank. The only measure available to the bank to protect its interests, is the contract of *Rahn.*



TAWARRUQ

A man in financial straits is in need of some cash. He requests a moneylender for a loan. The hard-hearted creature refuses, but offers the availability of a stratagem by which the struggling man can acquire some cash. The moneylender offers to sell him some goods for perhaps substantially more than the market value on credit. Since the hard-pressed man has no option, he purchases on credit from the blood-sucking parasite R1000 worth of goods for R1500, for example. He then sells the goods to others for substantially less, even below the R1000 market value in order to gain the cash to satisfy his need.

This irregular and unnatural dealing is with the full knowledge of the moneylender whose only interest is his R1500 to be paid on due date. While this type of sale, termed *Tawarruq,* is technically/legally valid and permissible, it is morally inhuman and obscene.

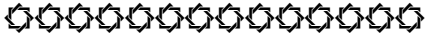
Technically there is no *riba* here. But morally it is 'riba' and cruel. It is a reflection of the worst form of human greed which makes the moneylender totally forgetful of his purpose in this world. This type of transaction totally banishes Allah from the human mind.

In view of the fulfilment of the requisite conditions for a valid sale, the abnormal *Tawarruq* stratagem is considered legal although prohibited by many Jurists. Mr. Omar is ominously

silent about the view of the great Ibn Qudaamah for whose views he has a penchant, that is, whenever these coincide with his whimsical theories. Nevertheless, in all fairness to Mr. Omar, he does mention that according to Ibn Taimiyyah and Ibn Qayyim, *Tawarruq* is prohibited since they regard it as *riba.* In fact, morally it is *riba.*

Tawarruq is a stratagem to alleviate a man in distress. It is invoked in isolated cases of need. It is not a practice which the Shariah encourages nor should it be adopted as a normal trade practise. Although Mr. Omar advocates this stratagem to be incorporated as a normal trade practice and offers some silly advice to banks in this regard, we are sure that even the capitalist banks will frown and have no inclination for this type of dealing.

Mr. Omar has indulged in a futile discussion by introducing the stratagem of *Tawarruq* in his brief brochure. The only discernable reason for broaching this redundant and unhealthy practice is perhaps to flaunt his smattering 'knowledge' on *Fiqhi* issues.



PRIZES BY THE BANKS

Mr. Omar says: *"Investment accounts of depositors in Islamic banks do not represent loans."*

Therefore, if banks award prizes to investors, such prizes are permissible *"[P]rovided that they are paid for from the bank's own funds (and not that of the depositors)."*

The pertinent question is: Does the stupid 'legal person' devoid of body and soul 'own' funds? How does the phantom earn and

own funds? In terms of the capitalist concept of which Mr. Omar is an ardent devotee and expounder, the directors are not the owners; the depositors are not the owners; the managers are not the owners. Who in heaven's name will inherit the funds of the ghostly and ghastly being they term 'legal entity'?

Brains are not required to understand that the Shariah does not accept that a stupid figment existing in the minds of riba capitalists is an intelligent human being who can own funds. Since no human being is the owner of the bank according to Mr. Omar and his ilk of thinkers, from whence did the imaginary 'person' siphon off the funds which is ludicrously claimed to be the funds of the bank?

Undoubtedly, the funds which the directors set aside as the 'property' of the ghost – the legal entity – are siphoned off from the gains, whether ill-gotten or otherwise – of the depositors and so-called investors.

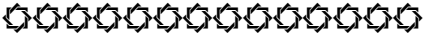
The bank, i.e. its managers and directors, are in the capacity of the *Mudhaarib* or *Shareek (partner)*. The investors are collectively the *Rabbul Maal.* It is clearer than daylight that the directors do not pay prize money from their pockets. The *Mudhaarib* pays the *Rabbul Maal* the prize acquired from money which is 'legally' stolen from the *Rabbul Maal* – the partners and investors – and/or from the gains which the monies of the other depositors yield. The bank's funds are the product of legal trickery, thievery and riba which are siphoned off from the monies of depositors and investors under cover of baseless interpretation spawned by the concepts of the capitalist system of economics.

Under the sun and on the surface of the earth, there exist no greater humbugs than the banks, hence Imaam Ghazaali

(rahmatullah alayh) averred that if ever there would be trade in Jahannum, it would be the banking trade.

Prizes given by banks, be these the so-called 'Islamic' banks – there is nothing Islamic in these banks – are *Waajibut Tasadduq*. It is incumbent to give such prizes to the poor as Sadqah. The sophistry employed in the arguments to legalize such prizes are merely a thin or even a transparent veneer which lack the ability to conceal the crookedness and false agenda underlying the prizes which banks dole out.

Mr. Omar, with temerity describes bank prizes as *'tabarru'* – favour, gift or donation. No one should entertain the misconceived notion of the banks being philanthropic institutions with altruistic motives. There is absolutely no relationship between banks and *Tabarru'*. To predicate *Tabarru'* for the capitalist banks is tantamount to the affirmation of Sajdah for Iblees. That banks render favours and present donations based on altruism are furthest from the imagination of every person who has had dealings with the devourers of ***riba who are driven to insanity by the touch of shaitaan***. *– Qur'aan*



THE HARAAM RIBA PENALTY TERMED 'CHARITY'

The worst misdemeanour perpetrated by the liberal molvis and their modernist unqualified cronies of Mr. Omar's ilk is the dastardly attempt to legalize **Sareeh Riba** (categoric riba) which the Qur'aan and Sunnah unequivocally prohibit and castigate as the worst of sins for which Allah Ta'ala and His Rasool have proclaimed the ultimatum of war.

In this pernicious attempt, baseless, false and devious arguments have been employed. The endeavour is to convey the impression that the Maaliki Math-hab condones the interest on late payment of instalments. There is nothing further from the truth. The Maaliki Math-hab like all the other Math-habs prohibit this riba penalty which the *mudhilleen* describe as a 'self-imposed charity contribution'. Perhaps they may succeed in hoodwinking themselves with their self-deceptive arguments which are devoid of the slightest vestige of Shar'i substance.

In his very unprofessional brochure, Mr. Omar states:
"The distinguished jurist Mufti Taqi Usmani has expressed the view that the clause is permissible in Shariah, based on the Maaliki school of jurisprudence.'

Mr. Omar further adds: *"The great Maaliki jurist Allama Hattaab (RA) has dealt with the enforceability of obligations in his incisive and authoritative work: Tahreerul Kalaam Fi Masaailul Iltizaam."*

Then in an unabashed claim which is pure falsehood, Mr. Omar states: *"The Maaliki jurists state that a debtor may permissibly stipulate to pay an amount to a third party, as a deterrence for his own breach of contract, if he (the debtor) were to default in payment on the stipulated future date of payment."*

In brief, we shall at this juncture content ourselves with an unequivocal rejection of the falsehood which Mr. Omar has brazenly and ignorantly attributed to the Maaliki Math-hab, and which Mufti Taqi Sahib has cautiously implied in his book on Islamic Finance.

We have written two booklets in refutation of Mufti Taqi's highly erroneous opinion in which he had presented misleading

arguments to justify the haraam riba which banks charge on late payments. We shall, therefore not repeat here our discussion in negation of Mufti Taqi's most weird and preposterous claim of the permissibility of riba on late payments. Those who are interested in the refutation of Mufti Taqi's baseless opinion on the permissibility of riba on late payments, may write to us for the following two booklets:

(1) PENALTY OF DEFAULT
(2) PENALTY ON LATE PAYMENT IS INTEREST

Pure chicanery has been employed to obtain the quotient of permissibility of interest on late payment, in terms of the Maaliki Math-hab. It is far, very far from the truth to claim or even to imply that the Maaliki Math-hab permits interest on late payments under the deception of self-imposed obligation.

THE ATTEMPT TO JUSTIFY THE RIBA

In an extremely feeble attempt to justify the interest levied in the name of 'charity on late payments', Mr. Omar says: *"The first answer is that the amount is paid by the debtor to charity, and not to the creditor, pursuant to a unilateral undertaking, in the form of a vow, taken by the debtor. The bank as the creditor derives no direct or indirect benefit from the payment, which is made to charity."*

In this argument, three blatant lies are perpetrated.

(1) The **lie** that the debtor pays the interest to charity.
(2) The **lie** that the debtor does not pay the interest to the creditor.
(3) The **lie** that the debtor pays the interest pursuant to a unilateral undertaking in the form of a vow.

The First Lie

It is palpably false to claim that the debtor pays the demanded penalty (the riba) to charity. He does not do so. The agreement which the bank has imposed on the debtor against his wishes stipulates that the debtor *must* pay the penalty to the bank (i.e. the creditor). The bank will decide to which charity the haraam riba penalty should be given.

Charity is Sadqah. Sadqah is given voluntary with a happy heart and to whomever one wishes, whenever one wishes without the application of the pressure of the riba-sucking parasites of the capitalist banks whose men stand only like those *driven to insanity by the touch of shaitaan.*

Inspite of the bank dubbing the haraam riba 'charity', it denies the debtor the right of paying his own 'charity' to whomever he wishes and whenever he wishes. Only the inane minds of insane men are capable of conjuring such a warped concept of Sadqah as is professed by the capitalist banks.

It is totally false and misleading to say that "the amount", more appropriately the riba amount, is paid by the debtor to charity.

The Second Lie

It is likewise a glaring falsehood to aver that the debtor does not pay the penalty of interest to the creditor. The agreement clearly stipulates that the debtor has to compulsorily pay the so-called 'charity' to the bank in the event of default. The bank's act of contributing the interest penalty amount to some charity of its choice does not negate the fact that the debtor pays the amount to the creditor. The bank's disposal of the interest to charity is irrelevant and does not negate the interest nature of the money extracted under duress from the debtor in the name of 'charity'.

Haraam money, be it the proceeds of robbery, gambling, prostitution or interest, does not transform these crimes into virtuous deeds if contributed to charity. Since the debtor has no option other than to hand the penalty directly to the creditor, it is a blatant lie to claim that the debtor does not pay the interest to the creditor. This reality is not negated by the bank's act of contribution of the interest to charity.

The Third Lie

The claim that the penalty extracted from the debtor is by way of a unilateral undertaking made by him, is also a brazen falsehood. The payment of the penalty on late payments is a bilateral agreement between the bank and the client who has no alternative but to accept the bank's imposition.

The debtor does not unilaterally agree to pay the penalty. The condition of payment is compelled on him and so is the confounded vow which is null and void in the Shariah. A vow to commit haraam is in itself a crime. If the bank does not insist on the penalty payment, no debtor whose sanity is intact will encumber himself with the burden of paying a penalty on late instalments.

Mr. Omar has made extremely misleading claims in his abortive attempt to vindicate the indefensible crime of riba.

Pursuing his drivel, Mr. Omar says**:** *"The second answer is that Riba is contractually agreed amount between creditor and debtor, in respect of and against which no consideration (recognized by Shariah) passes, such contractually agreed amount (Riba) accruing exclusively to the creditor. In this case, the creditor receives no compensation on the monetary*

amount of the debt in any form whatsoever, with the result there is no Riba."

Perhaps Mr. Omar has succeeded in fooling himself with this blithering argument. For the validity of *riba*, the contractual stipulation of a specified amount is not an imperative requisite. Whether the amount is contractually stipulated or not, it will be *riba* if the loan attracts its payment or if the debt demands this excess in the form of a penalty or any other guise and by whatever ruse. Thus, if a creditor taking advantage of the loan he gave, extracts any kind of monetary benefit from the debtor, it will be *riba* even if it was not contractually agreed to by the parties. Rasulullah (sallallahu alayhi wasallam) said:

"EVERY LOAN WHICH DRAWS A BENEFIT IS A RIBA (LOAN)."

Furthermore, with regard to the interest penalty falsely described 'charity', this is contractually agreed by the parties. From the very inception of the contract in making, there is a bilateral agreement that the debtor is obliged to pay the penalty on late payment. Therefore, the claim that this riba penalty is not by way of contractual agreement is not only stupid, but Islamically obscene

Contrary to Mr. Omar's claim, the penalty does in fact accrue exclusively to the creditor (the capitalist bank). The debtor has absolutely no right in terms of the haraam agreement to divert the so-called charity to any avenue other than the bank. Hence, it accrues exclusively to the bank. As far as the debtor is concerned, he hands over the penalty exclusively to the bank. What the bank does with the haraam interest is entirely a different act. The incontrovertible fact remains that the debtor incumbently has to pay the penalty to only the bank. The bank will then dictate the avenue of charity of its own sweet choice.

Mr. Omar's assertion that *"in this case, the creditor receives no compensation on the monetary amount of the debt"* is erroneous and misleading. The diversion of the haraam penalty to charity does not negate the bank's receipt of compensation. The sophistry employed in the agreement does not negate reality. A well-known principle of the Shariah is: *"Consideration is for the meanings, not for the words."*

The legal trickery employed in the phraseology adornment of the penalty to create the idea of it being 'charity' does not negate the fact that the penalty payment is a compensation which the debtor has to compulsorily pay in consequence of his late payment. Then, he is obliged by the contractual obligation to pay the compensation to only his creditor, the bank. Thus, the penalty compensation accrues to the creditor exclusively. What the creditor does with the penalty amount does not detract from the riba reality of the penalty payment. The bank's act of contributing the penalty amount to a charity of its own choice is a red herring created to divert attention from the riba nature of the penalty.

"Riba is every excess acquired in consequence of a transaction." (Badaaius Sanaa') That is, every such excess which has no tangible commodity as its equivalent. This is the precise nature of the penalty on late payment.

The Unilateral Obligation

In another baseless argument which Mr. Omar tenders in justification of the haraam riba penalty, he says:
"This unilateral obligation which the debtor assumes against himself, pursuant to a vow, to pay an amount to charity is therefore a tabarru…."

We have already pointed out earlier that the obligation to pay the penalty is not a unilateral undertaking by the debtor. It is a bilateral agreement with the pressure loaded against the debtor. In other words, the debtor is compelled by financial straits to submit to the stipulation imposed by the bank. He understands well that if he refuses to submit to the coercion of the bank, his need will not be fulfilled by the bank. He therefore reluctantly agrees to the bank's imposition of the penalty clause. Anyone with brains understands this position.

The 'unilateral obligation' claim is therefore fallacious. While *Tabarru'* cannot be compulsorily imposed on the donor, the bank stipulates the penalty as an incumbent payment. The avenue of expenditure set out for the penalty payment is of no significance and has no relevance in the determination of the nature of the payment. The way the money is eliminated does not affect the status of its method of acquisition. If the money is acquired by gambling, the act of acquisition remains haraam regardless of the funds being utilized for charity. If money is acquired by prostitution, the means of acquisition remain haraam notwithstanding the use of such money for charitable purposes. In exactly the same way, the penalty amount remains haraam riba regardless of the chicanery of the 'vow' and 'charity'.

The penalty demanded by the bank is not *Tabarru'* because: (1) Both the penalty and the vow are imposed on the debtor by the creditor. (2) The penalty comes into effect in consequence of the debtor's inability to meet his financial commitment on due date. (3) The penalty is an excess amount which is created by a bilateral binding agreement on a monetary transaction between the creditor and the debtor.

These are the attributes of *Riba,* not of *Tabarru'.* It is indeed lamentable when even men of learning are unable to distinguish between the attributes of *Tabarru'* and *Riba'.* The so-called 'vow' which produces the haraam effect of the haraam interest penalty in the theory of Mufti Taqi Sahib, is not one which the debtor volitionally imposes on himself. It is the consequence of the pressure of the creditor and the subject of a bilateral agreement in which the bank sees nothing but its monetary interests.

The difference between *Tabarru'* which is a voluntary gift or Sadqah purely for the Pleasure of Allah Ta'ala, and the baselessly claimed 'self-imposed' penalty, is glaringly conspicuous. It is painful to offer this lengthy explanation for bringing to the fore the *riba* nature of the haraam penalty which is extracted from the debtor in the event of late payment of an instalment.

Stating another fallacy, Mr. Omar claims: *"The Muslim jurists are unanimous that a person may assume a tabarru obligation and thereby become bound or obliged to perform it."*

In the context of the *riba* penalty this is false and misleading. It has already been pointed out that the penalty amount is not *Tabarru'.* It is a pure *riba* payment. It is a cut and dry issue which the Maaliki Math-hab too has unequivocally declared haraam. We have already furnished the Maaliki Math-hab's unequivocal proclamation of the *hurmat of the interest penalty on late payment. This Ruling will be repeated at the end of this discussion to clinch the argument.*

Mr. Omar's 'short answer'

In a monotonous reiteration of what he has claimed in his presentation of argument, Mr. Omar says: *"The payment to*

charity amounts to a penalty for non-performance by the debtor on due date (i.e. this is the objection). *The short answer to this is that the 'penalty' so called is not imposed by the bank as the creditor. It is a 'penalty' which is imposed by the debtor upon himself, for the purpose of serving as a deterrent for his own possible non-performance or breach of contract."*

This is a regurgitation of the same lies which we have exposed and nullified above. The claim that the haraam penalty is not imposed by the bank but is a self-imposed fine/levy/riba by the debtor, is a crude and a naked attempt to mislead those who are unaccustomed to operate their brains.

If the penalty is not incumbently imposed by the bank, NEVER would the debtor even think of introducing this issue in the agreement, leave alone voluntarily step forward to pay the penalty on a late payment. Mr. Omar talks plain bunkum here. If the penalty is voluntarily self-imposed and the debtor regards it as a Sadqah for which he will gain thawaab in the Aakhirah, why will every debtor be rabidly averse to making such penalty payment?

A man in possession of the capacity to think will have no doubt in concluding that the payment which the debtor is required to make on late instalments is riba which is extracted from him against his will. No amount of legal trickery will alter this fact and understanding.

Clutching at another flimsy straw in the bid to justify the riba penalty, Mr. Omar says: *"The amount of the 'penalty' so-called, is not fixed to the amount of the profit or loss, in proportion to the period of the delay, but may be determined in any other manner…"*

The determination of the penalty amount "in any other manner" does not extricate this charge from the domain of *Riba.* Calculation of the amount of the penalty by the method mentioned by Mr. Omar above, is not a requisite for the validity of *Riba.* From whence did Mr. Omar acquire the notion that if the amount is not determined by the method he has mentioned, it will not be *Riba?* He is indeed scraping the very bottom of the barrel in his quest for proof for his utterly untenable riba penalty.

Regardless of the method of determination and calculation adopted by the bank, the penalty which the bank obtains from the debtor by the exertion of haraam pressure, is irrefutably *Riba.* Every Muslim is capable of understanding this fact except those whose agenda is the upliftment of the capitalist system.

THE UNEQUIVOCAL RULING OF HURMAT OF THE MAALIKI MATH-HAB ON THE RIBA PENALTY

It will be most appropriate to clinch this argument with the Ruling of the Maaliki Math-hab itself:

"However, when the debtor imposes on himself that if he does not fulfil (pay) the due of the creditor in the stipulated time, then upon him (the debtor) is a certain amount (to pay for the default in payment), then there is no difference of opinion regarding its butlaan (invalidity and being haraam), because this is categoric riba (Sareehur Riba). It is the same (ruling of butlaan and prohibition) whether the (self) imposed thing (amount) is of the same kind as the debt or other than it. And, it is the same (i.e. baatil) whether the (self-imposed amount) is a tangible item or a benefit." ***(Fathul Alil Maalik, page 263, Vol. 1)***

In the face of this categoric Ruling of the Maaliki Math-hab declaring baatil and haraam the self-imposed payment of a sum on late payment of instalment, the attempts to mislead the Ummah by attributing permissibility of this type of *Sareeh Riba* to the Maaliki Math-hab, is callous and most despicable. It is only lack of fear for Allah Ta'ala and total *ghaflat* regarding the accountability in Qiyaamah that can constrain men of learning to descend to the low ebb of writing articles with corrupt 'daleels' to legalize the worst of sins – Riba.

It is abundantly clear from the aforementioned Maaliki Ruling that the 'self-imposed vow' pertaining to riba payment is not valid. Those who have attempted to attribute the permissibility of the riba payment on the basis of a self-imposed vow to the Maaliki Math-hab, have rendered a grave injustice to the Ummah in general, and to the Maaliki Fuqaha in particular.

The validity of self-imposed vows according to all Math-habs does not legalize criminal acts

May Allah Ta'ala save us all from the evil lurking in our nafs and from the deceptions and traps of shaitaan which have been the downfall of many learned men.

SOME REPRIMANDS FOR HADHRAT MUFTI TAQI UTHMAANI SAHIB

Undoubtedly, Hadhrat Mufti Taqi Uthmaani Sahib has rendered the Deen a great disservice with his extremely liberal and unsubstantiated views of Islamic Finance. Many senior Ulama in Pakistan are in sharp disagreement with Hadhrat Mufti Taqi's opinions which are calculated to serve the needs of the capitalist banks, not the needs of the Ummah, nor do his

opinions guard the Shariah in any way whatsoever. In fact, the contrary is the truth.

We cite here some excerpts from a booklet written by Hadhrat Mufti Habeebullah, Shaikhul Hadith of Jaamiyyah Islaamiyyah, Karachi, Pakistan. The booklet is in refutation of Hadhrat Mufti Taqi Uthmaani's variegated views of 'Islamic Finance', which are in sharp conflict with the Shariah.

* "…..Mufti Taqi Sahib has, furthermore, attempted by the addition of the word *jadeed* (modern), to present the capitalist system in the hues of the Shariah."

* "Prior to this attempt, Mufti Taqi Sahib had issued a *fatwa* to enable the government to claim Zakaat from the banks. However, the Authorities of Fatwa and Knowledge (i.e. the Ulama-e-Haqq), had rejected this *fatwa..."*

* "…..On 24th Rajab 1415 (28-09-1994) at a conference of Muftis convened at Darul Uloom Karachi, Hadhrat Mufti Sahib had abortively attempted to legalize bank interest on the basis of *Faasid Ta'weelaat (Corrupt Interpretations).* The Muftis, hearing the flimsy interpretations of Mufti Taqi Sahib, were bewildered and aghast. We have to congratulate Mufti Abdus Sattaar, Chief of Daarul Ifta, Khairul Madaaris of Multan who rejected these interpretations. In the evening this conferences ended without legalizing interest."

* "This concept (i.e. the limited liability idea which absolves the debtors) does not have the slightest affinity with Islam. None of the analogies presented by Mufti Taqi Sahib has any relationship with this concept. Inspite of this, he (Mufti Taqi) has made an ardent effort to defend the capitalists….."

* "Mufti Taqi Sahib's motive underlying this statement is the defence of the capitalists."

* "The basis for this claim is nothing but a fabricated terminology." (i.e. Fabricated by Mufti Taqi Sahib).

* "In the process he (i.e. Mufti Taqi Sahib) has deemed that all people are ignoramuses who will swallow this fabrication of the company being a legal person."

* "For the Sake of Allah Ta'ala, do not fabricate terminologies to ruin the people (of Islam). Inform them unequivocally that the transactions of the stock exchange are improper (i.e. not permissible)."

* "You (i.e. Mufti Taqi Sahib) have made the innovation of terminologies the basis in your (capitalist) conception."

* "You (Mufti Taqi Sahib) had presented interpretations for legalizing bank interest…….these interpretations were rebuffed (by the Muftis of Pakistan). You thus did not attain the aim for which you had invited the honourable Muftis."

* "This in fact is your fabricated terminology which you (Mufti Taqi) have invented for the protection of the capitalists."

* "You answer the objections of the Ulama to which you have conceded, by the repeated presentation of your fabricated terminology that a company is a legal person."

* "Hadhrat Mufti Sahib! There is no scope in Islam for this type of idea, for fabricating theories and swallowing debt, then to give Shar'i protection to those who devour the debts."

* "Every ta'weel (interpretation) of Mufti Taqi Sahib is unprincipled."

* "Maulana Mufti Abdus Sattaar of Multan has correctly said that your every interpretation is beyond comprehension." – (In fact, some of Mufti Taqi's interpretations are Islamically bizarre. – Mujlisul Ulama)

* "Mufti Sahib! The truth is that irrespective of all the manoeuvring, the ultimate conclusion is that trading (on the stock exchange) is the trade of papers (documents) – the share certificates. It is never the trade of tangible assets."

* "It is thus clear that this (trade on the stock exchange) is a fabricated artificial trade which you have proclaimed lawful."

* "In the attempt to seek support from the statement of Hadhrat Maulana Ashraf Ali Thanvi (rahmatullah alayh), Mufti Taqi Sahib has bumped himself… You have therefore erroneously sought to take support from Hadhrat Thanvi's statement."

* "The imposition of monetary fines/penalties is *zulm* according to the Shariah. There is no basis for it in the Shariah."

* "What is the basis for this opinion (i.e. permissibility of the riba penalty on late payments)? Among the Akaabireen, whose view is it? Bring forth your proof if indeed you are truthful."

* "There is no *Mustadal* (Basis of Deduction) for this (penalty) opinion, and, Insha'Allah Ta'ala, there will be no basis forthcoming for it."

* "We, therefore have no need to mutilate the *Ahkaam* (Laws of the Shariah) for the sake of the capitalists."

* "Whatever monetary penalties have been imposed on people, should be returned to them."

(Excerpts from Ar-Raddul Fiqhi Alaa Justice Mufti Muhammad Taqi Uthmaani – A Juridical Rebuttal Against Justice Mufti Muhammad Taqi Uthmaani)

AR-RADDUL FIQHI ALAA JUSTICE MUFTI TAQI UTHMAANI

Hadhrat Maulana Mufti Habeebullah, the author of Ar-Raddul Fiqhi Alaa Justice Mufti Muhammad Taqi Uthmaani, is the Shaikhul Hadith of Jaamiyyah Islaamiyyah, Karachi, Pakistan. He is also Ra-eesut Takhassus of this Institution.

His concise treatise is a rebuttal of Mufti Taqi Sahib's theories which are designed to give Shar'i protection to the baseless and baatil economic concepts of the capitalists.

This book has been translated from the Urdu into English, and is available from the Mujlisul Ulama of S.A., P. O. Box 3393, Port Elizabeth 6056.

The Honest and Pious Trader

Rasulullah (sallallahu alayhi wasallam) said:

"Know, most certainly, the aid of Allah is with the pious (and honest) traders."

"The truthful and honest trader will be on the Day of Qiyaamah with the Ambiya, the Siddiqeen (the Auliya) and the Shuhadaa (martyrs)."

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