Murābahah and the Credit Sale

Imran Ahsan Khan Nyazee

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MURĀBAḤAH AND THE CREDIT SALE
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Al-Shāfi‘ī (God bless him) said: “O so and so, you criticise a person (Abū Ḥanīfah) to whom the entire ummah concedes three-fourths of knowledge when he does not concede to them even one-fourth.” The man said, “And how is that?” He replied, “Fiqh is questions and responses (through the formation of cases) and he is the one who alone formulated the questions, thus, half the knowledge is surrendered to him. Thereafter, he answered all the questions and even his opponents do not say that he erred in all his answers. When that in which they agreed with him is compared with what they disputed with him, three-fourths is surrendered to him. The remaining is shared by him with all other jurists.”

AL-SHĀFI‘Ī
Introduction to al-Hidāyah (2006)

In the Name of Allah, Most Merciful and Compassionate

*Murābahah lil-ʿĀmir bish-Shirā* or *Murābahah* to the Purchase Orderer is the most widespread and controversial contract adopted by Islamic banks. This small book attempts to record its background in *fiqh*, modern version, conditions and applications. It then tries to analyze and question the legal validity of this contract. In doing so, it presents arguments in response to those alleged for the validity of the contract. It is hoped that the reader will have a very clear picture about the nature of the contract after reading the book.

This book is the second in a series of small books to be written on different areas that are of importance to Islamic commerce, which should be emphasised more than so called “Islamic” Banking. The next in the series, most probably, will be *The Governing Principles of Islamic Commerce and Banking*.

Imran A. Nyazee
Islamabad
May, 2009
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Chapter 1

Introduction: *Murābaḥah lil Āmir bish-Shirā’*

He for whom God wills His blessings is granted the *fiqh* of *Dīn*

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1.1 Islamic Banking Will Collapse Without the Contract of *Murābaḥah* to the Purchase Orderer

The contract of *murābaḥah* to the purchase orderer, as it is called, or *Murābaḥah lil Āmir bish-Shirā* is the backbone of Islamic banking. Indeed, without this contract Islamic banking as it is practiced today will collapse. It is a hybrid contract, presumably constructed upon the traditional contract of *murābahah*, which was originally intended to help those who were not adept at market transactions and were wary of the guiles of traders.

The hybrid contract, embedded in a series of other contracts, has become the perfect tool, though more expensive than interest, that replaces the modes of financing adopted by conventional banks. Consequently, it is used in a large number of Islamic banking “products” ranging from basic credit needs of the businessman, import and export, and even in *sukūk* (bond) transactions.

Is this altered contract legal? Literature on the contract, that forms the soul of Islamic banking, is in abundance. Much has been written on it. The contract has also been questioned by some scholars on various grounds. It has been defended by many. The AOIFI has approved it and so has the Islamic Fiqh Academy of the OIC at Jeddah. Yet, there are doubts about its legality.

Mawlana Muhammad Taqi Usmani, in his book on Islamic finance, says: “It should never be overlooked that, originally, *murabahah* is not a mode of financing. It is only a device to escape from ‘interest’ and not an ideal instrument for carrying out the real economic objectives of Islam. Therefore, this instrument should be used as a transitory step taken in the process of the Islamization of the economy, and its use should be restricted only to those cases where mudarabah or musharakah are not
practicable.”¹ Such views have been expressed by others too, yet murābahah continues to dominate Islamic banking to an extent of ninety percent or more, according to some estimates.

Our contention is that if the contract in its new shape is unlawful it should not be used at all, but if it is lawful there is no harm in using it if it advances the objectives of Islamic commerce. The current situation is that its legality is upheld by most scholars as well as institutions they represent. The arguments advanced against its legality have been brushed aside in a shorthand way, and have not been given the attention they deserve.

It is said that the contract came into being after a dissertation written by Sami Hamoud in 1976. We have not had occasion to see this text, therefore, the exact form in which it was proposed is not known to us. He recommended the contract to both the IDB and the Dubai Islamic Bank, in 1976. In 1978, he applied it in the Jordan Islamic Bank and also proposed it to the Kuwait Finance House. Sami Hamoud was honored with the IDB prize in Islamic Banking in 1987 for his development of the murābahah mode of financing.

It has been asserted that hybrid form of murābahah was derived by Sami Hamoud from the Kitāb al-Umm of the learned Imām al-Shāfi‘ī. The truth is that Kitāb al-Umm discusses issues of muḍārabah very briefly in volume 7 and then in volume 8. There is nothing in that text to indicate the features of this hybrid contract. The text relied upon by Sami Hamoud is in volume 3 of the book, and pertains to an issue other than murābahah. We shall deal with this in a separate chapter devoted to Imām al-Shāfi‘ī’s text.

Apparently, Murābahah lil Āmir bish-Shirā is an attempt to undertake talfiq, which is the creation of a new contract from different types of contracts. The presumption is that if the opinions concatenated are lawful separately, the new contract they give rise to is lawful too. The contract appears to have been

¹Muhammad Taqi Usmani, Introduction to Islamic Finance (Karachi, 1998), 72.
structured from the basic form of murābahah, bayʾ al-ʿīnah (buy-back agreement) and waʾd (unilateral promise).

There has been considerable disagreement among scholars over the validity of the hybrid contract. The major arguments have been that this is similar to bayʾ al-ʿīnah and is similar to interest based transactions in conventional banks. A major disagreement has centered around the concept of waʾd or binding promises. Those who support the validity of the contract have the support of a number of fatwā issuing institutions, especially those concerned with financial institutions. In this book, we will not occupy ourselves with the concept of waʾd or that of ʿīnah, except to the extent that they forms part of Imām al-Shāfīʿī’s text.

Consequently, the debates over the legality of this contract, based on waʾd and ʿīnah, are of small significance for us. What is significant is the present form of the contract and arguments given to justify the legal validity of the contract of murābahah to the purchase orderer (hereinafter referred to as the hybrid contract). The only meaningful and significant arguments given with proper legal reasoning are those by the learned Mufti Muhammad Taqi Usmani. His knowledge and expertise are outstanding and we are indebted to him for providing a basis on which we have built our own arguments.

This small book will, therefore, be a discussion and analysis of these arguments. The analysis is being undertaken on the assumption that some crucial points have been left unclarified or unexplained. There may be some inadequacies of legal reasoning that make the validity of this contract doubtful. The main issue is that if such contracts can be declared lawful and used in the service of banking, what is the point in prohibiting ribā?

It is not our purpose to go into the details of the conditions of this contract and how it is applied, because there are many good sources that address these issues in detail. Nevertheless, as the reader may not wish to turn to other sources, we will describe the structure, conditions, and applications of the new hybrid contract very briefly.
1.2 A Brief Introduction to the Types of Sales in Islamic Law

A brief description of the different ways in which sales are classified may help in understanding the nature of the murābahah contract and also the nature of the derived hybrid contract.

Transactions may first be viewed on the basis of subject-matter. By this is meant the nature of the thing or subject-matter being transferred to the other party, and whether or not ownership is transferred to the other party. There are two points to note here. First, the subject-matter may be corporeal property. Second, the corporeal property or its use may be passed on to the other party. When we say corporeal property, we mean real as well as personal property. There are three situations for visualizing this, as is shown in the figure below:
1. Each party is passing on some corporeal property in exchange for another corporeal property. This is called *bay‘ proper. Thus, *bay‘ is an exchange of one corporeal property for another. Here property offered by one party forms the counter-value or the consideration for the property offered by the other party. The main point here is that
ownership in the property offered passes to the other party.

2. In the second situation, ownership in the corporeal property itself is not passed to the other party, rather it is the use or the benefits (manfa'ah) arising from the property that are passed on to the other party for a period in exchange for some consideration, which is usually corporeal property. This is the meaning of the contract of ijārah that is translated in various ways: hire, rent, leasing and so on.

3. In the third situation, the underlying idea is to make a gift of the use of corporeal property to another person, that is, without taking any counter-value in return. The counter-value is in fact the same thing that was borrowed. The same thing must be returned after use. The problem is that in certain cases the same property cannot be returned, because by use the property stands consumed. If I lend wheat to a friend, he is going to consume it when he uses it. In such cases, a similar has to be returned. If I give my car to my friend for use, he can return the car to me as it still retains its form. The main difference between the two situations is that ownership of the car does not pass to my friend, but ownership in the wheat does pass to him. Where ownership passes, a similar has to be returned. Where ownership passes the transaction is called qard. When ownership in the thing borrowed does not pass to the other party, the transaction is called ‘āriyah. The transaction called qard, when it is in currencies, is actually associated with the contract of ṣarf.

Out of these transactions we need to focus on bay‘ for our present purposes. Bay‘ (exchange of corporeal counter-values) is classified in different ways. We will first classify it on the basis of the counter-value that is termed as the thaman or price with a focus on the variation in price.
Bay' with a variation in price

Bay' al-musawamah, which is the sale of goods (bought) for any price that is agreed upon.

Bay' al-murabahah, which is the exchange of goods (bought) for a price equal to their cost price and an increase as profit (mark-up).

Bay' al-tawliyah, which is the exchange of goods (bought) for a price equal to their cost price without any increase or decrease.

Bay' al-ishtarak, which is tawliyah, but for part of the goods (bought) for part of the cost price.

Bay' al-wadiah, which is an exchange of goods (bought) for the cost price with some reduction in it.
1. **Bay' al-musāwamah**: This is the “negotiated sale” or an exchange or sale of goods for any price that is agreed upon. The price, however, is always more than the cost of the goods, that is, a profit is added to the cost. Further, the profit is not stated separately. The focus is on the price alone and the price alone is stated.

2. **Bay' al-murābahah**: It is the sale of goods for a stated cost price plus a stated profit that together form the price. The profit has to be stated with sufficient clarity so that the cost and profit are clearly determined.

3. **Bay' al-tawliyah**: This is sale at stated cost price. No profit is charged from the buyer. It is, therefore, translated as “friendly” sale.

4. **Bay' al-ishtirāk**: Sale in which profit is shared by the buyer and seller. Thus, the seller charges a profit for part of the goods. The sale is, therefore, tawliyah in part.

5. **Bay al-wadī'ah**: This is sale for a price that is less than the cost of the goods. The seller may do this when he is trying to reduce his inventories and offering the goods at less than cost price.

Our focus is on the *murābahah* sale, but there is another element in the hybrid contract and that is delay in the price for a certain period. The jurists did not permit, or at least state, that the payment of the price in *murābahah* could be delayed.\(^2\) The new contract devised does exactly that.

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\(^2\)We are fully aware of the opinions of the some later jurists quoted by Tāqī Usmani. We will discuss these later.
1.2.2 Bay′ with a focus on delay

The word *dayn* has crucial significance for understanding issues of Islamic finance and *fiqh* transactions. The word *dayn* is something that does not have to be measured or weighed at the time of the contract. It only needs to be mentioned by count,
weight or measure at the time of the contract. It becomes a
liability that has to be paid as a result of being stated in the con-
tract. In the words of the jurists, it is attached to the dhimmah.
It does not have to be present at the time of the contract, but has
to be paid before the session of the contract ends.

Debt is not dayn, rather it is dayn that has been delayed for
a period. This concept is derived from the verse of the Qur’ān:

O you who believe! When you undertake a transac-
tion in dayn with a period of delay (ajal), reduce it
to writing.\(^3\)

Here dayn and ajal (period) are two separate things. They
come together to form a debt. It can also be seen that the debt
created is through the credit sale here and is not a loan. It is for
this reason that dīnārs and dirhams are called dayn by the ju-
rists. The classification in the diagram is based on this meaning
of dayn. Think of the word dayn as dīnār and dirhams in this
classification for reasons of simplicity, although that is not the
complete meaning. The types mentioned in the diagram are:

1. Barter or ‘Ayn for ‘Ayn: These are goods that need to be
   ascertained at the time of the contract by count, weight or
   measure. Barter is called muqāyaḍah. In other words, the
goods are ‘ayn and the price or thaman too are ‘ayn.

2. Sale of Goods or ‘Ayn for Dayn: Here the sold commod-
   ity is ‘ayn, while the thaman is dayn, that is, dīnārs and
dirhams or what can be treated as a price. This is the ma-
jor type of sale. The contract of murābaḥah is included in
this and so is musāwamah.

3. Advance Payment or Dayn for ‘Ayn: In this contract, it
   is not the dayn that is delayed, but the ‘ayn that is being
delayed. The contract of salam is the example of this type.

\(^3\)Qur’ān 2 : 282
4. Currency transactions or Dayn for Dayn: Both counter-values are those that are normally treated as prices (athmān). This type is covered by the contract of ṣarf. No counter-value or dayn can be delayed here.

Can counter-values be delayed in these types? In the first type, the tradition of the six commodities from ‘Ubādah ibn al-Ṣāmit (God be pleased with him) does not permit delay, at least in fungible things. There are other traditions that restrict the deferment of the ‘ayn. In the second type, delay is possible as is obvious from the verse of dayn and ajal quoted above, but there are other conditions that apply in case the price is delayed. The third type is a contract of delay, permitted as an exemption (rukḥāḥ), and is called salam. In the fourth type, delay is not permitted under any circumstances. Here too the tradition of ribā applies.

The contract of murābāḥah falls within the second type. We have stated that delay in the price is possible in this type, but with certain conditions. We shall see later what these conditions are and how they apply to the credit-sale and hence to murabāḥah with a delayed price or the hybrid contract under discussion.

1.3 The Contract of Murābāḥah Practiced by Islamic Banks is a Combination of two Contracts

The contract of murābāḥah, as described by the earlier jurists, has never been discussed with the concept of delay, that is, delaying the payment of the price of the goods bought. The contract, as described, contemplates a buyer, who needs a commodity, and who is not skilled in the ways of the market; he asks some expert trader to buy goods on his behalf. Instead of appointing such an expert buyer as his agent, he agrees to pay a reasonable
profit that the expert buyer will demand in addition to the cost of the goods.

In the hybrid contract designed for Islamic banking, the element of delay has been built into the contract of *murābahah*. This amounts to converting it into *murābahah* plus *bayʿ al-nasīʿah* (or *bayʿ muʿajjal* or *bayʿ bi-thaman ājil*) irrespective of what we call such a contract. The resulting contract borrows from both types of contracts.

In discussions of this contract in Islamic finance, the following elements, *inter alia*, are considered important.

1. **The statement of the markup or profit:** As *murābahah* requires the statement of the profit, the profit must be stated. This in reality is a substitute for the statement of interest in a loan transaction in conventional banking. The client needs to know how much interest he is paying, and the bank needs to know how much it is earning.

2. **The element of delay:** *Murābahah* in its traditional form does not accept delay. Delaying payment, however, is necessary so that the client can be advanced money for his needs. This is the substitute for a loan in conventional banking where the period of the loan has to be stated and granted.

3. **The concept of waʿd or unilateral promise:** To arrange the purchase and resale of the commodity involved in the hybrid contract, the bank needs to be sure that the client will not back out of the transaction, after the bank has
purchased the goods. Thus, a binding promise is required that can be enforced in court for recovery of damages or costs if the client actually does so. Traditional Islamic law works in a different way, therefore, the concept of *wa'd* that is binding had to be devised.

4. **Issues of agency:** Agency issues arise if the client is appointed as an agent to undertake a transaction that is being undertaken for his benefit.

Out of these issues, we shall focus on the first two for analysis. The concept of *wa'd* will be taken up later in an independent study as it affects several other transactions that Islamic banks undertake, that is, it is built into some other products. We shall deal with it in a comprehensive manner in that study. Further, in this book, a discussion of *wa'd* and agency are not required to show that the hybrid contract of *murābahah* is lawful or unlawful.

In the next chapter, we shall summarize the provisions of the *murābahah* contract in *fiqh* and then show how it is applied in modern Islamic banking transactions. This will be followed by three chapters that deal with the first two elements above. These three chapters will contain our analysis of the arguments given in support of the hybrid contract. Finally, we will conclude with a statement of our findings.
Chapter 2

Murāḥah in Fiqh—From Badāʾiʿ al-Ṣanāʾiʿ

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Instead of giving a description in our own words, we present here a translation from Abū Bakr al-Kāshānī’s *Badā’i’ al-Sanā’i’*. The purpose is that the reader should understand the *fiqh* of *murābāhah* directly from the *fuqahā’*; he will not only learn more, but will develop the skill to analyze *murābāhah* and other transactions. A major part of the text is presented here, but not all of it.

‘Alā’ al-Dīn Abū Bakr ibn Masʿūd al-Kāshānī (d. 587 A.H.), also known as Malik al-ʿUlamā’, says:

### 2.1 Relationship with the General Conditions of *Bay‘*

Among the specific conditions of sale is that the “first price” (cost) be known in the sales of *murābāhah*, *tawliyah*, *ishrāk* and *waḍī’ah*. The legal basis for all these contracts are the general texts that apply to *bay‘* without distinction between one type of *bay‘* or another. Allah, the Majestic and Glorious, has said, “And seek of the Bounty of Allah,”^2^ and “It is no crime in you if ye seek of the bounty of your Lord.”^3^ *Murābāhah* is the seeking of the bounty of Allah expressed in the texts through sale.

It is narrated that when the Messenger of Allah (pbuh) decided to undertake the Ḥijrah, Sayyadnā Abū Bakr (God be pleased with him) purchased two camels. The Prophet (pbuh) said to him, “Sell one to me.” Sayyadnā Abū Bakr (R) said to

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^1^The meaning of these sales has been elaborated in the previous chapter.

^2^Qur’ān 62 : 10

^3^Qur’ān 62 : 10
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him, “It is yours for nothing.” The Prophet (pbuh) replied, “No, not without a price.”

It is related that Sayyadnā Abū Bakr (R) purchased Bilāl (R) and manumitted him. The Prophet (pbuh) said, “Partnership, O Abū Bakr!” He replied, “O Messenger of Allah, I have emancipated him.” Had partnership (the *ishrāk* sale) not been lawful the Messenger of Allah (pbuh) would not have demanded it. Likewise the people inherited these sales in consecutive periods without denial from anyone. This amounts to consensus (*ījma‘*) about their permissibility.

Thereafter, the discussion of *murābahah* extends over several issues: the description of the *murābahah* sale; its conditions; the elaboration of the nature of the *ra’s al-māl* (capital); the description of what is associated with the *ra’s al-māl* and what is not associated with it; description of what is to be stated at the time of *murābahah* when not stating it amounts to a breach of trust; and what is not required to be stated and not stating it does not amount to a breach of trust.

As for its meaning, we mentioned it at the beginning of the book: *it is the sale for a price (exactly) similar to the first price along with an excess as profit.*

As for its conditions:

### 2.2 The First Price Must be Known to the Second Buyer

Among the conditions is, what we have already mentioned, that the first price be known to the second buyer, because *murābahah*

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4Zayla‘ī said that this is a *gharīb* tradition, however, a similar tradition is found in al-Bukhārī’s *Saḥīh*. See al-Zayla‘ī, *Naṣb al-Rāyah*, vol. 4, vol. 4, 31.

5It is essential to note here that the second price paid has to be exactly similar to the first price, not only in terms of amount, but type as well. Thus, if the first price was paid in *dīnārs*, the same number of *dīnārs* have to be paid. If the first price was paid in wheat, it is wheat of the same quantity that has to be paid.
is a sale at the first price along with an excess as profit. Knowledge of the first price is a condition of validity in all sales, on the basis of what we mentioned in the preceding text. If it is not known, the sale is rendered *fāsid* (vitiated), until it comes to be known within the session.

Till it becomes known, he has the option to accept it if he likes, in which case it becomes valid, or the option to reject it making it void. As for the vitiation (*fasād*), at the moment it is due to the ambiguity in price, because the price at the moment is unknown. As for the option, it is granted due to a defect in consent, because a person may agree to buy a thing at a low price and he may not agree to buy at a high price, therefore, his consent is not complete till the amount of the price is known. When he does not know it, his consent becomes deficient and deficiency in consent gives rise to an option. If the price does not become known till they part at the end of the session, the contract becomes void due to the confirmation of *fasād*. We have already mentioned the variation in the narrations from our companions about this type of sale, like the sale of a thing on the basis of the previously recorded price and so on, that it is *fāsid* according to some and suspended (*mawqūf*) according to others subject to ratification and an option when the price becomes known.

In the application of this condition, the *tawliyah*, *ishrāk* and *wadī‘ah* sales are similar to *murābahah*. The reason is that *tawliyah* is the sale at the first price, therefore, it is essential that the first price be known. *Ishrāk* is *tawliyah*, but it is so for part of the commodity with part of the price, thus, knowledge of the entire price is a condition for the validity of the sale. *Wadī‘ah* is sale at the first price along with some determined reduction in such price. Consequently, it is necessary that the first price be known in order to determine the reduction in such price.

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⁶He is elaborating the concept of “voidable” for us here. The contract is voidable at the option of the second buyer till the price becomes known.
It is on this basis that takhrīj (extension of the rule) is undertaken for the case where two persons buy a mixed up commodity that has a similar (mithl). They divide it and then each one wishes to sell his share by way of murābaḥah. This is valid, because division even though it truly carries the meaning of exchange, the meaning of exchange in the case of similars is suspended by law. In reality, division in them is merely treated as separation and taking into possession. If this is the case, what reaches each one of them is exactly the same thing that belonged to them prior to division. It was, therefore, possible for each one of them to sell his share by way of murābaḥah prior to division just as he did after division.

If these two persons together purchased a property that does not have a similar and they divide it up, it is not permitted to any of them to sell his share by way of murābaḥah, because the meaning of exchange in this type is legally taken into consideration. The original rule is the recognition of the underlying reality. Thus, what each person gets through division is one-half his own property and one-half that is the counter-value for his property. It is as if he bought one-half of it with his own property. It is, therefore, not permitted to him to sell it by way murābaḥah. It is as if he had bought goods with goods and then wished to sell them by way of murābaḥah. Allah, the Glorious and the Exalted, knows best.

If a person makes an advance payment of ten dirhams for two identical dresses that are of the same genus, the same type, of the same description, the same length, so that the contract of salam in them becomes valid by consensus, but he does not allocate the share of each dress out of the capital (ra’s al-māl), and then the period of delivery comes to an end, he has the right to sell, without disagreement, both dresses by way of murābaḥah on the basis of ten dirhams (as the price). If he sells one of these

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7The legal reasoning undertaken here by this great jurist on this issue puts to shame the level of reasoning that we undertake today in our writings. It appears almost impossible to match the skills of these great jurists.
dresses by way of *murābāḥah* on the basis of five *dirhams* (as the first price), it is not permitted according to Abū Ḥanīfah, but it is permitted according to Abū Yūṣuf and Muhammad. If he had specified the share of each dress in the capital sum, it is permitted to him, by consensus, to sell one of them by way of *murābāḥah* on the basis of five.

The reasoning of the two jurists is that what has been taken into possession is the *salam* commodity and ownership in the *salam* commodity is established through the contract of *salam*. The contract of *salam* in this case requires that the price, which is the *ra’s al-māl*, be divided equally over the two dresses taken into possession due to their similarity in terms of genus, type, description, and length. The share allocated to each dress is, therefore, known. Consequently, *murābāḥah* is permitted (separately) in these dresses. It is the same as making an advance payment for two *kurrs* of wheat and he takes possession on the conclusion of the *salam* selling one *kurr* by way of *murābāḥah*.

Abū Ḥanīfah’s reasoning is that the commodity taken into possession does not constitute the corpus of the *salam* commodity, because the *salam* commodity (till it is delivered) is a debt, and taking a debt into possession cannot be conceived. Accordingly, the commodity is not owned through the contract of *salam*, but through actual physical possession. Possession here has the status of novation of the contract. It is as if he purchased both dresses at this time without allocating the share of each dress separately. After this he wishes to sell one of them by way of *murābāḥah*. This is not permitted in things that are not *mithlîs*; it is only permitted in things that have similars, as we have mentioned. So also here.
2.3 The Profit Must be Known as it is Part of the Price

Among the conditions is that the profit be known as it is part of the price, and knowledge of the price is a condition for the validity of sales.

2.4 The Capital Sum Must be a Fungible Commodity

Among the conditions is that the capital sum (ra's al-māl) be a mithli. It is a condition for the validity of murābaḥah without qualification. Likewise for tawliyah.

The elaboration of this statement is that the capital sum is either one that has a similar, like measurable, weighable and countable identical things, or it is one that does not have a similar like those subjected to linear measure or differing countable things. If it is one that has a similar, it is permitted to sell it by way of murābaḥah for the first price, and by way of tawliyah in the unqualified sense, irrespective of its being sold to the seller or to another, and irrespective of the profit being of the same genus as the capital sum or of a different species, after the price has become known and the profit too has become known.

If the goods are those that have no similar, it is not permitted to sell them by way of murābaḥah or tawliyah to one who does not have such goods in his ownership. The reason is that murābaḥah is sale of something similar to the first price. The same is the case with tawliyah. When the first price is not of the same genus, the sale either takes place for goods that are different or it takes place for its value where the corpus is not in his possession. The value here is unknown and determined through estimation and conjecture with the valuators differing about it. The tawliyah sale is permitted for the person who owns the goods and has them in his possession.
As for the sale of such goods by way of *murābahah* that is when the goods are in the ownership of the person and in his possession, it is to be examined whether the profit is determined to be something independent of the capital sum, and is known like *dirhams* or an identified dress and the like, it is permitted, because the first price is known and the profit is known. If the profit is deemed a part of the capital sum, like his saying, “I have sold you the first price with a profit of ten percent,” then it is not permitted. The reason is that he has deemed the profit to be part of the chattel, and the chattel does not have similar constituent parts. This is known through valuation and the value is unknown, as its knowledge is based on estimation and conjecture.

As for the sale of *waḍ‘iah* in the case of a person who owns the goods and has them in his possession, the response is the exact opposite of what it is for *murābahah*. The response is that if he deems the reduction to be something independent of the capital sum, and which is known like *dirhams* or the like, it is not permitted, because he is in need of reducing this amount from the capital sum and is unknown. If it is deemed part of the capital sum, like saying that he reduces it by ten percent, it is permitted by giving eleven parts for ten parts of the capital sum, because the reduced amount is a mingled part of a capital sum that is known.

### 2.5 The First Price in the First Contract Must Not be a Counter-value for its Own Species That is a *Ribā*-Bearing Commodity

Among the conditions is that the price in the first contract should not have been exchanged for its own species from the *ribā* bearing commodities. If he has exchanged a thing sold by
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cubic measure or weight for another like it “equal for equal,” it is not permitted to him to sell it by way of *murābahah*. The reason is that *murābahah* is the sale of the first price and an excess, and an excess in *ribā*-bearing wealth amounts to *ribā*, not profit.\(^8\) Likewise, it is not permitted to sell it at a discount, due to what we have said. He is, however, permitted to sell it by way of *tawliyah*. The reason is that the obstacle is the realization of *ribā*, which is not found in *tawliyah*, because it is the sale of the first price without an excess or discount. So also the *ishrāk* sale as it is *tawliyah*, but for part of the price. Allah, the Glorious and Exalted, knows best.

When the genus is different, there is no harm in concluding the *murābahah*. Thus, if the first buyer buys one *dīnār* for ten *dirhams* and then sells it for the profit of one *dirham* (eleven in all) or a dress as profit, it is valid. The reason is that that *murābahah* is the sale of the payment of the first price and an excess. Had he purchased one *dīnār* with eleven *dirhams* or with ten *dirhams* and a dress, it would have been valid; so also here. If he sells the *dīnār* with a profit in gold, by saying, “I have sold you this *dīnār* that I purchased, for a profit of two carats (of gold),” it is not permitted according to Abū Yūsuf, but according to Muḥammad it is valid.

Muḥammad’s reasoning is that *murābahah* is that sale for the first price and an excess. It is as if he has sold a *dīnār* for

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\(^8\)What the Author is saying is that if the first price was wheat exchanged with an equal quantity of wheat, the second buyer must pay wheat too. In such a case, if profit is added it will amount to *ribā*. The second price has to be exactly the same (thing) as the first price, as that is the definition of *murābahah*. Consequently, wheat will be exchanged for wheat in equal quantities and an excess has to be added. This excess in this example will amount to *ribā*. It does not matter whether this excess is also wheat or something else.
ten dirhams and two carats of gold. This is permitted, and the method of its permissibility is that the two carats are being exchanged for their equivalent amount out of the dinār and the ten dinārs are for the remaining part of the dinār. The same is the case here.

Abū Yūsuf’s reasoning is that in such permissibility there is an alteration in the nature of the murābāḥah. The reason is that the exchanged currency values have deemed the ten dirhams as the ra’s al-māl and (additional) dirhams as the profit. If we permit what Muhammad has stated, the carats become the ra’s al-māl along with part of the dirhams being treated as profit. In this there is alteration of the counter-values and taking the transaction out of the meaning of murābāḥah. Thus, it is not valid.

If he buys a silver ornamented sword, where the ornamented hilt is worth fifty, for one hundred dirhams, and then sells it with a profit of one dirham or the profit of one dinār or a dress as profit, it is not valid. The reason is that murābāḥah is sale with the first price and an excess as profit, where the profit is spread over the entire price as it is the profit of the entire price. It is, therefore, essential that it be divisible over all of it so that it can be deemed murābāḥah for the whole price. When it is divided over the whole, the ornamented part will have a share in the profit without exception, thus ribā is realized and the contract is not valid. Allah knows best.

2.6 The First Contract Must be Valid

Among the conditions is that the first contract be valid. If the contract is fāsid, the murābāḥah sale is not allowed. The reason is that murābāḥah is sale with the first price plus an excess as profit. The fāsid sale, even though it amounts to the passage of

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9Where the second price must be exactly the same as the first price.
10It will amount to the sale of silver for dirhams plus an excess.
title in general, but at the value of the sold commodity or its similar and not on the basis of price, due to the fasād in the named price. Allah, the Majestic and Powerful, knows best.

2.7 Elaboration of the Meaning of Ra’s al-Māl

As for the capital sum (ra’s al-māl), it is what becomes binding for the (second) purchaser on the basis of the (first) contract, and not what he pays after the contract. The reason is that murābahah is the sale of the first price, and the first price has become binding on the basis of the sale. As for what he pays after the contract, it becomes binding through another contract of sale, and that is the substitution. Consequently, he takes from the second purchaser what is binding on the basis of the contract, not what is paid later after the contract. Likewise in the tawliyah sale.

The elaboration of this rule is that if he buys a dress for ten dirhams, and in place of these he pays a dinār or even a dress, then the capital sum is the ten dirhams and not the dinār or the dress. The reason is that it is the ten dirhams that have become binding on the basis of the contract. The dinār or the dress are a substitute for the price that has become binding.

Likewise, if he buys a dress for ten standard dirhams, and pays non-standard (zuyūf) dirhams. Even if the first seller agrees to accept them, the second purchaser is under an obligation to pay the standard dirhams, as we have maintained. If he buys a dress for ten dirhams that are not the currency of the land, and then sells them by way of murābahah, then the mentioning of the profit in unqualified terms, like saying, “I have sold to you for the first price and the profit of one dirham,” the second purchaser is under an obligation to pay the species that has actually been paid and the profit from the dirhams of the land. The reason is that murābahah is sale on the basis of the first price, and the first price is what is due on the basis of the first contract,
that is, ten *dirhams* that are not the currency of the land and that have become obligatory on the basis of the first contract. A similar will be due on the basis of the second contract along with a profit that is from the currency of the land, because it was stated in unqualified terms and attributed to the capital sum. The absolute and the unqualified reverts to what is known in practice, and that is the currency of the land. In case he attributes the profit to the ten *dirhams* by saying, “I sell you with profit on the ten,” or “profit of ten percent,” then the ten due and the profit will be of the same species as the first price. If, however, he says “profit of the ten,” then he has attributed the profit to these ten if they are from the same species, but if he says, “ten percent” then he has deemed the profit a part of the ten, in which case they will be of the same species necessarily.

The *takhrīj* on this rule is that if the buyer increases the first price for the first seller, prior to his selling it by way of *murābahah* or *tawliyah*, it will be on the basis of both the original price as well as the increase. The reason is that the increase alters the original basis of the contract, therefore, it will be assumed that the contract was for both the original price as well as the increase. The original price and the increase amount to the capital sum due to their becoming obligatory on the basis of the contract under this assumption. The *murābahah* will, therefore, take place on this basis.

Likewise if the first seller reduces part of the price for the buyer. He will sell it by way of *murābahah* to the second buyer on the basis of the reduced price. The reason is that the reduction is also associated with the *āsl* or the contract. What remains after the reduction will be the capital sum, which is the first price, therefore, the *murābahah* will take place on this basis.

If the first seller reduces the price for the first buyer after he has sold it to the buyer, the first buyer will reduce such an amount for the second buyer along with a proportionate reduction in the profit. This is based on what we have said, that the reduction is associated with the *āsl* of the contract, therefore, the *ra’s al-māl* becomes the same as the first price, that is, what it is
after the reduction, therefore, the first buyer will reduce for the second buyer the same amount, and will reduce a proportionate part from his profit as well. The reason is that the profit is divided over the entire price, thus, if a part of this price is reduced, it becomes essential to reduce a proportionate amount from the profit as well. This is distinguished from the *musawamah* sale where the first seller reduces part of the price for the first buyer. Here, he does not have to make a reduction for the second buyer, because the first price is the *ašl* in the case of *murābahah*, while it is not taken into account in the *musawamah* sale.

Do you not see that if he buys two slaves, whose value is equal, with one thousand for the first slave and five hundred for the second slave, and then sells them by way of *musawamah*, the price will be divided over them according to value into two equal parts. If he sells it by way of *murābahah* or *tawliyah*, the price will be divided on the basis of the price into a third and two-thirds and not on the basis of value. This indicates that the first price is the basis in *murābahah*, but it is not taken into account in *musawamah*. Accordingly, a reduction in the first price gives rise to a reduction in the second price, but it does not do so in *musawamah*. What we have mentioned is based upon the rule adopted by all our three companions, because the excess is associated with the *ašl* of the contract. Likewise the reduction in it, for it is as if the contract was concluded at this price *ab initio*. As for the rule adopted by Zufar and al-Shāfi‘i, the increase and reduction cannot validly lead to an increase or decrease in the price, but it is valid as an initial gift. The issue will come up at its proper occasion.

2.8 What is Associated With the Ra’s *al-Māl* and What is Not

As for the elaboration of what is associated with the capital sum and what is not associated with it, we say: There is no harm if
the wages of the butcher, dyer, washer, rope-maker, tailor, broker ... are included ... [text not translated after this].

2.9 What is Stated at the Time of Murābahah and What May Not be Stated

As for the elaboration of what is, and is not, to be stated by way obligation in the murābahah, the basis in murābahah and tawliyah is that it is a sale of amānah (trust), because the buyer has relied upon the seller and his expertise with respect to the first price without relying upon any evidence or affidavit, therefore, it must be protected against a breach of such trust, and against all causes of breach as well as suspicion. [further text in this section not translated].

2.10 Legal Effects of a Breach of Trust

As for breach of trust when it becomes evident, we say seeking success from Allah: When a breach of trust is evident in murābahah, it may either appear in the description of the price or it may appear in the amount of the price. If it appears in the description of the price, like his buying on the basis of a credit sale and then selling by way of murābahah on the basis of the first price, but without elaborating that he bought it on the basis of a deferred sale. He may be selling it by way of tawliyah on the same basis, that is, without elaboration. The second buyer then comes to know that it has been bought on credit. He will have an option, on the basis of consensus, to accept it or reject it. The reason is that murābahah is a contract based upon amānah (trust), and also because the buyer has relied upon the seller, especially in the report about the first price, therefore, trust is a requirement in this contract. Protection against a breach of trust is implied as a stipulation in this contract. A loss of such trust
gives rise to an option, as in the case of loss of protection against defects. [further text in this section not translated].

2.11 Conclusions Drawn From the Translated Text

The entire text on *murābahah* in *Badā‘i‘ al-Ṣanā‘i‘* has not been translated, however, we are in a position to draw the following conclusions.

1. The second price has to be exactly the same as the first price: This is a crucial point in the contract of *murābahah*, and al-Kāsānī has been emphasizing it again and again.

2. The second price cannot be delayed: In the entire text, even that not translated, nowhere has al-Kāsānī mentioned that the second price can be delayed. The reason is that delaying the second price over a period of time will cause a change in its value. According to al-Sarakhsī there is a loss that occurs as a result of delay. The occurrence of a loss will result in the violation of the first rule, that is, if the second price is delayed, it can never be equal to the first price. It is for this reason that the jurists do not even discuss the idea of delay in *murābahah*.

3. In certain situations, the concept of *wa‘d* is built into the contract of *murābahah* and there is no need to specify it separately: This is evident from al-Kāsānī’s text presented above. We leave the reader to find this meaning, as part of an interesting exercise.
Chapter 3

Modern Form and Applications of Murābahah

Contents

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      3.4.3.1 Ensuring return on deposits .................................. 42
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3.1 The Basic Sources for *Murābahah lil Āmir bish-Shirāʿ*

The basic sources for the modern form of *murābahah* or *murābahah lil āmir bish-Shirāʿ* are the following:


3. Agreements of Islamic Banks as modified to suit the needs of each bank. The modification is undertaken by the Sharia Boards of the Islamic banks. These documents are usually not available. Probably, the banks try to conceal them in order to avoid criticism.

4. Collections of *Fatwās* on specialized issues, like *murābahah*, or comprehensive compilations dealing with products generally. A general compilation of *Fatwas* was issued by the Islamic Banking and Insurance Institute London.
3.2 Murabahah

One such collection, available on the web, is by Dallah Al-Baraka Group, Al-Baraka Banking Group (ABG), Department of Research & Development, Shariah Opinions (Fatwa) On Murabaha, compiled & classified by Ahmed Mohieddin Ahmed and Reviewed by Abdul Sattar Abu Ghuddah. There is no date on this publication.

5. In addition to this, there are a host of books, articles and webpages that record the meaning of murabahah.

The first two sources are true sources when they are adopted by banks and followed, the rest are sources of information. The AOIFI standard is accompanied by a description of evidences relied upon and brief legal reasoning. In the description provided below, we shall rely on these two sources and on other literature. The description given in Justice Taqi Usmani’s book comes very close to what is stated on the State Bank of Pakistan website.

3.2 The Conditions of the New Contract

The conditions given below have been reproduced from the document called Instructions for Shariah Compliance in Islamic Banking Institutions, Appendix A. This document in itself is Annexure 1 of IBD Circular No: 02 of 2008. We will give brief comments where necessary below the basic provisions listed.

i) Murabaha means a sale of goods by a person to another under an arrangement whereby the seller is obliged to disclose to the buyer the cost of goods sold either on cash basis or deferred payment basis and a margin of profit included in the sale price of goods agreed to be sold.

Comments

This meaning of murabahah here differs from the traditional contract in several respects: (1) The definition provided by al-Kasani implies that not only the cost has to be disclosed, but the contract is concluded on the basis of the “first price.” In
other words, the price paid by the client has to be the exactly the same thing or currency that was paid by the bank. This is the obligation arising from the initial contract of murābaḥah. Yes, the parties may later enter into another contract for payment through a substitute. (2) The second issue is about murābaḥah being valid on a “deferred payment basis.” We will deal with this issue in the rest of the book, but here we need to mention that the justification given by the Sharia Standard of the AOIFI is superficial to the extent of being shocking. The Standard says: “The basis for the permissibility of installment payment is because Murabaha is one of the sale contracts that are subject to spot payment, deferred payment or installment payment.” Some writers have tried to attribute the validity of the issue of deferred payments to Imam al-Shāfī’ī (God bless him). The two occasions on which Kitāb al-Umūm discusses murābaḥah has no relevance to deferred payment. This is what we found. In our view, it is highly unethical to attribute such a view to the Imām, unless a direct passage or statement can be quoted. In any case, the issue is discussed below in detail. (3) The word “arrangement” has been used instead of a contract, because the modern contract is implemented in several steps in which promises, agency, guarantees and earnest money play a role.

ii) Murabaha may be transacted in both tangible and intangible assets. Murabaha shall not be transacted in respect of any debt instrument including receivables.

Comments

This statement appears to be fine on the face of it, but the issue of intangibles and intellectual property has not been decisively settled as yet by modern Muslim scholars. These are choses of action, like the share certificates, and so are debt instruments. Share certificates, even though they have been deemed tangible property by the Companies Ordinance, 1984 (following India), yet for practical purposes they continue to be actionable claims. If these certificates reach the niṣāb, it can lead
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to cutting of the hand under sariqah now. What about easements and servitudes? What we are saying here is that there is a need to be a little more specific and precise in such statements.

iii) Being a sale transaction, it is essential that the commodities which are the subject of sale in a Murabaha transaction, must be existing, owned by the seller and in his physical or constructive possession. Therefore, it is necessary that the seller must have assumed the risks of ownership before selling the commodities to the buyer/customer.

Comments

Frankly, this rule applies to all sales, except for salam, in which an exemption has been granted.

iv) Murabaha, like any other sale, requires an offer and acceptance which will include certainty of price, place of delivery, and date on which the price, if deferred, will be paid.

Comments

This condition should have mentioned certainty of profit as well.

v) In a Murabaha transaction, the appointment of an agent, if any, the purchase of goods by or for and on behalf of the IBI and the ultimate sale of such goods to the customer shall all be transactions independent of each other and shall be so separately documented. An agreement to sell, however, may embody all the aforesaid events and transactions and can be entered into at the time of inception of relationship. The agent would first purchase the commodity on behalf of his principal, i.e., financier and take its possession as such. Thereafter, the customer would purchase the commodity from the financier, through an offer and acceptance. According to Sharia it is sufficient in respect of the condition of “possession” that the supplier from whom the IBI has purchased the item, gives possession to the IBI or its agent
in such a manner that subject matter of the sale comes under the risk of the IBI. In other words, the commodity will remain in the risk of the financer during the period of purchase of the commodity by the agent and its ultimate sale to the customer and its possession by him.

Comments

Here again, we leave the reader with the same exercise, but a few more facts. The question is: In the traditional contract of murābahah where the client has placed an order, are the contracts really independent?

vi) The invoice issued by the supplier will be in the name of the financer as the commodity would be purchased by an agent on behalf of such financer. It is preferable that the payment for such commodities should be made by the financer directly to the supplier or credited in an Escrow Account. In both the cases, the Murabaha financing account shall be debited only after completion of offer and acceptance between the customer and the IBI. If direct payment to the supplier by the IBI is not feasible for valid reasons, such reasons shall be recorded by the IBI for making payment to the supplier through the agent for purchase of goods. However, in this case proper utilization of funds and timely submission of documentary evidence for purchase of goods by the agent shall be ensured by the IBI.

vii) Once the sale transaction has been concluded, the selling price determined cannot be changed.

Comments

Is this true for the traditional contract? Read al-Kasâni above where he is saying that if the “first price” is increased or decreased, the impact has to be passed on to the client. The word “concluded” here, however, clarifies the issue.

viii) It can be stipulated while entering into the agreement that in case of late payment or default by the client, he shall and
be deemed to have irrevocably authorized the IBI to recover from him an amount calculated at a predetermined percentage per day or per annum as compulsory contribution to Charity Fund constituted by the IBI. This contribution to Charity Fund shall not constitute income of the IBI.

Comments

This issue needs to be dealt with separately.

ix) The IBIs can also approach competent courts for award of solatium which shall be determined by the Courts at their discretion, on the basis of direct and indirect costs incurred, other than opportunity cost.

x) The buyer, i.e., the customer may be required to furnish security in the form of pledge, hypothecation, lien, mortgage or any other form of encumbrance on asset. However, the mortgagee or the charge-holder shall not derive any financial benefit from such security.

Comments

This is a direct effect of delaying payment. It is not an issue in the traditional contract.

xi) If the customer pays any security deposit in cash to the IBI, the same shall be placed in a PLS account under lien of the IBI. Customer shall be entitled to receive the profit from such PLS account against the security deposit. However, in case of default by the customer, the IBI is allowed to adjust the security deposit to the extent of customer’s liability.

Comments

This is a direct effect of delaying payment. It is not an issue in the traditional contract.

xii) A Murabaha contract cannot be rolled over because the goods once sold by the IBI become property of the customer and, hence, cannot be resold to the same (or another) financial institution for the purpose of obtaining
further credit. The IBI can, however, extend the repayment
date provided that such extension is not conditional upon
an increase in the selling price of goods, originally agreed.

xiii) Buy-back arrangement is prohibited. The commodities al-
ready owned by the client cannot become the subject of a
Murabaha transaction between him and any financier. All
Murabaha transactions must be based on the purchase of
goods from third party(ies) by the IBI for sale to the cus-
tomer.

Comments

Apparently, this is what usually takes place in practice, and
the documents are manipulated by the banks. The client has
the goods in possession and he wants a loan against them.
Can the banks be sued for damages, or the officers prosecuted,
if they indulge in this?

xiv) In the event of any customer intending to convert his ex-
isting interest based borrowings into a Riba-free arrange-
ment, he may sell his existing assets including stock in trade
to IBI, and the funds so procured from the IBI shall be paid
by the IBI directly to the lending bank/financial institution
to settle his interest based liabilities. Subsequently, the IBI
may sell same assets to the same customer under Murabaha
arrangement.

xv) The promissory note or bill of exchange or any evidence of
indebtedness cannot be assigned or transferred on a price
different from its face value.
3.3 *Murābahah* to the Purchase Orderer is Used as the Islamic Substitute Whenever a Loan has to be Raised or Given

Those who have tried to give explanations of how *murābahah* is used in Islamic banks actually explain the procedure of how banks give loans and fix loan limits. These procedures are no different from those used in conventional banks. Thus, the descriptions talk about how applications are made, loan limits are fixed for single transactions and running limits. The writers go step by step through the procedures on how the bank transacts the loan or financing. There is no difference between these steps and those followed by conventional banks. The only difference in procedure arises due to the purchase of commodities and assets on which the contract is based. We will, therefore, not dwell on such descriptions. Our concern is with the structure of the transaction rather than with the details of banking procedures. This will show us how this contract has become a substitute for many loan raising and financing transactions practiced by conventional banks. We will first talk about the basic form of *murābahah* to the purchase orderer and then talk about commodity *murābahah* that has become a matter of great concern for the reputation of Islamic banks. Here we may add that the basic form of *murābahah* used by the banks is the same. It is the use to which it is put and the underlying assets that have given rise to new terminology like “basic *murābahah*,” “commodity *murābahah*,” “reverse *murābahah*” and so on.
3.4 **Important Murābahah Applications**

3.4.1 **Client needs a loan to finance his business—Murābahah to the Purchase Orderer**

In this case, the client actually need financing of his business and not a cash loan. The bank financing the client’s business purchases the goods needed by the customer and sells them to the customer on the basis of deferred *murābahah* charging the cost and an agreed upon, and stated, profit margin. The customer then pays the sale price for the goods either in installments over the specified period or on lump sum basis at the end of the period.

This form is used to fund the purchase of a variety of assets including items of ordinary use and machinery. As this is a sale, the title to the asset passes from the bank to the customer at the time of the contract. This basic structure is shown in the figure below:

![Diagram of Murābahah to the Purchase Orderer](image)

Two points have to be noted about this transaction:

- **A master facility agreement is drawn up:** This agreement incorporates binding promises on the part of the client that once the bank has purchased the goods or incurred expenses in doing so, he will be bound to purchase the goods from the bank and be liable for the expenses incurred. A similar promise is sometimes made by the bank that it will sell the goods on credit to the client.
• Different agents may be appointed: In this transaction, the bank may appoint the client himself as the agent for purchasing the goods for the bank. The client and bank may agree to appoint a third person as the agent for undertaking the purchase transaction.

As stated above, transactions like import financing, commodity murābaḥah and so on are variations of this basic transaction.

3.4.2 Financing the import of goods

The function of the bank is to issue a letter of credit and pay for the goods. This the bank does either on receipt of a full margin, percentage of the margin or no margin. In case the client deposits the full margin, there is no need of credit or murābaḥah. The time of payment is the same as in transactions of the conventional banks, usually on receipt of the title documents and sometimes after the grace period. The main point is that the bank purchases the goods from the exporter abroad and then sells them to the importer with a stated profit. In case the client had deposited a percentage of the margin, this becomes part of the price and he is liable for the balance price alone.

3.4.3 Cash loans and returns on deposits—commodity murābaḥah

We need to explain this form of murābaḥah in simple terms, without dealing with technicalities that may have a number of variations. To do so we look at two types of persons or institutions:

1. Individuals, corporations and financial institutions with excess liquidity. These entities need to invest their money somewhere on a short term or long term basis so that their money does not sit idle and can generate a return.
All of them will invest with some financial institution. In
the case of institutions dealing with each other this is the
well known case of bank borrowings and treasury trans-
actions.

2. **Individuals, corporations and financial institutions in
need of loans.** These entities need to borrow money to
meet their short term or long term needs. They will turn
to a financial institution. Their demand has to be matched
with the supply created by those in the first category.

The solution is commodity *murābahah*. It takes the name
from the commodities sold by the commodity exchanges. In
current practice banks deal with metals, perhaps due to rela-
tively stable prices. The dealings are through brokers. It is im-
portant to note that sale and purchase takes place through bro-
kers, simultaneously, and the goods almost never change hands
or even physically come into the picture. It is obvious here that
there is no interest in the goods. They are merely being used to
create a financial arrangement.

### 3.4.3.1 Ensuring return on deposits

We examine the case of a depositor first. This may be an individ-
ual, corporation or a financial institution seeking to invest idle
cash. The investor approaches the Islamic bank, and the bank,
acting as agent of the depositor, purchases a commodity from
broker A on spot value. This commodity is then sold, instantly,
on behalf of the client, to broker B on a deferred payment basis
with mark-up. The returns from the deferred sale are passed on
to the depositor along with the original investment on maturity.
We have recorded the skeleton of the idea. In actual practice the details may vary.

3.4.3.2 Loans and bank borrowing

Loans are created the same way. The bank purchases the commodity from broker A and then immediately sells the commodity to the client at cost plus markup on a deferred basis. The bank then, instantaneously, sells the commodity to broker B at spot value. The cash received is passed on to the client. The client now has the loan and it owes the bank the deferred payment along with the mark-up. Again the mechanics may differ and we present the basic idea in the figure below.

The HSBC website, for example, describes the structure as follows:
Based on the amount of financing you need, the Bank will purchase commodities at a specified cost price from the international market and will sell it to you on deferred payment at a Sale Price (cost plus profit). The cost, profit amount and deferred payment date have to be determined at outset.

You then sell the commodities to Broker on immediate payment and delivery basis through your Agent (a subsidiary of the Bank).

The same methods are used for bank borrowing. Two financial institutions collaborate to create the same transactions without the goods ever changing hands.

3.4.3.3 Regularizing commodity *murābahā* and making it more efficient

In early 2008, it was reported that “The International Islamic Financial Market (IIFM), a group founded by central banks to develop the Islamic capital and money market, is in the final stages of developing a set of guidelines that could standardise the controversial commodity murabaha transaction. The Master Agreement for Treasury Placement (MATP) is currently undergoing a final review by financial institutions, it was announced on Monday, to be followed by a review by prominent Shariah scholars.”

Another report on the same development had the following to add in May, 2008:

An Islamic financial standards body yesterday said it had created standard documentation for one of the booming industry’s most common transactions, which it hopes will make such deals quicker

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and cheaper. Lack of standardised documentation and practices has been repeatedly highlighted by the Islamic finance industry as one of the key constraints on the rapidly growing sector.

Islamic law is open to interpretation, which leads to differences in banking practices depending on the financial institution’s advisors.

The Bahrain-based International Islamic Financial Market (IIFM) hopes its Master Agreement for Treasury Placement, which is in the final stages of gaining approval by Islamic scholars, will become a standard document.3

The Singapore based Central Provident Fund website states, “Commodity Murabaha has been approved with effect from 1 July 2004 under the CPF Investment Scheme (CPFIS) as a Shariah compliant treasury product.”4

The irony is that the passage from Imam al-Shafi‘i that we record in the next section, and which was claimed to be the basis of the *murābahah* as practiced by the banks, rejects the commodity transaction outright by saying that if the two transactions are linked in some way they are void. These reports place the responsibility squarely on the shoulders of the shaykhs when they say, “Islamic law is open to interpretation, which leads to differences in banking practices depending on the financial institution’s advisors.” In short, Islamic law has been turned into a farce by the power of money. That is all we can say about the commodity *murābahah* transaction.

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3http://islamicfinancenews.wordpress.com/2008/05/10/iifm-developing-standards-for-commodity-murabaha/
3.4.4 Using *murābaḥah* for *sukūk* and investment funds

*Murābaḥah* transactions are also used by investment funds in different ways, and they are used for *sukūk* transactions usually in conjunction with a *muḍārabah* variant.

3.5 *Murābaḥah* to the Purchase Orderer has Become a Gateway to *Ribā* in Brazen Violation of the Norms of the *Sharī‘ah*

Any intelligent person, without even going into the rules of *fiqh*, on examining the above transactions of *murābaḥah*, will exclaim at once that this is *ribā* out and out. The contract of *murābaḥah lil-‛āmir bish-shirā‘* is giving rise to a flood of *ribā*-like transactions through the use of the contract of *‘inah* under the name of *murābaḥah*, in insolent violation of the rules of *fiqh*. This insolence comes from the power of money that has turned some well-meaning scholars into tools of the world of finance. The innocent investors are being lured into investing or depositing their money in the name of Islam. All this has been made possible through the creation of *sharī‘ah* boards that are themselves no longer “*sharī‘ah*-compatible.”

Although the contract of *murābaḥah*, even without further examination, appears to be a devious device for undertaking transactions in *ribā*, we shall devote the remaining chapters to showing how the rules of *fiqh* are being twisted and violated for legalizing the charging and paying of interest.

We shall first examine the passage on which the validity of *murābaḥah lil-‛āmir bish-shirā‘* is allegedly based. The credit sale, which lies at the heart of this transaction, will then be taken up and its rules will be indicated. Finally, we will show that even the profit of *murābaḥah* is not mentioned in this new contract.
Chapter 4

Murābaḥah, Bayʿ al-ʿĪnah and Imām al-Shāfīʿī’s Text

Contents

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  4.3.3 Conclusions drawn from Imām al-Shāfīʿī’s text for murābaḥah .... 57
4.1 Scholars who Support the Validity of *Murābāḥah lil-Āmir bish-Shirā’* and Those who Oppose it

It is stated by Sami Hamoud that inspiration for the idea of *murābāḥah lil-Āmir bish-Shirā’* first came from Muḥammad Faraj al-Sanhūrī. According to others, the term can be found in the texts of the earlier jurists like al-Shaybānī, Mālik and al-Shāfi‘ī. We think it amounts to reading too much into the texts of these jurists.

Among those who upheld the legal validity of the contract called *murābāḥah lil-Āmir bish-Shirā’* are: Sami Hamoud, Justice Taqi Usmani, Ḥusayn Ḥāmid Ḥassān (our brilliant and learned teacher), Yūsuf Qarḍāwī, and ‘Abd al-Sattār Abū Ghudah. In fact, we can safely say that all those who did not openly oppose this contract upheld its legal validity in one way or another. The main arguments of these scholars hover around three points:

- *Al-āṣlu fil-ashyā’ al-ibāḥah*: This is based upon the general permissibility of the contract of *bay‘*. The basic rule is that unless *ribā* is proved, all sales are permitted. In other words, there is freedom of contract in this area and the only limitation is *ribā*.

- *Bay‘ mu‘ajjal* is permissible and an excess can be charged for the period of delay. This is an important argument and is analysed below in considerable detail.

- The making of binding promises (*wa‘d*) is valid. There has been a heated debate about this issue and the general conclusion drawn is that promises should be binding. This is crucial for the hybrid contract.

As these scholars dominate the various bodies that issue rulings for Islamic banks, most of the institutions have issued

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1See *Majallat Majma‘ al-Fiqh al-Islāmī*, vol. 2, issue 5, 1092.
the ruling of validity or made the recommendation of validity. Among these are: (1) The first Islamic banking conference held in May, 1979 at Dubai; (2) The second Islamic banking conference held at Kuwait in 1983; (3) Conference held at Madina in 1983 (this listed a number of questions and responses, some of which are reproduced below); (4) Rulings by individual scholars like Bin Baz; (5) Resolution of the Islamic Fiqh Academy in its meeting held at Kuwait in 1988; (6) Rulings and standards issued by various bodies like AOIFI and the Shariah Boards.

The scholars who opposed the contract on various grounds include: Muhassan Sulaymān al-Ashqar; Bakr ibn 'Abd Allāh Abū Zayd; Rafīq al-Maṣrī; Ḥasan ‘Abd Allāh al-Amīn; and ‘Abd al-Rahmān ‘Abd al-Khāliq. The arguments presented by these scholars against the contract of *murābāḥah* practiced by Islamic banks were as follows:

- It is prohibited as it violates the rule of “do not sell what you do not have.”

- It is prohibited as it is a conditional sale, because the client says to the bank, “If you buy this, I will buy it from you.”

- It is a legal fiction (*hilah*) created to justify the lending of money on interest.

- This transaction belongs to the category of the buy-back agreements, which is rejected by the majority of the jurists on the basis of reliable evidences.

- It amounts to selling a debt for a debt (*bay‘ al-kālī bi-al-kālī*), because this is the situation at the time of making the general facility agreement.

- It amounts to making two sales in one, the first purchase and the second purchase, though the device of binding agreements.
• None of the jurists have approved this type of arrangement. In fact, there are those who have declared it unlawful.

• This arrangement is based upon binding promises (wa’d), and the majority of the jurists have not considered mere promises to be binding.

Many of these objections were discussed in the conferences and seminars mentioned above. In the final analysis those who upheld the validity, backed by big money, prevailed. It can be readily seen that some of these objections are valid, yet they are peripheral arguments; they do not touch the heart of the matter.

The two arguments about ‘ınah and hiyal for legalising ribā are in reality the same argument. In this chapter, we are concerned with this argument, but only because of Īmām al-Shāfi‘ī’s text that has been allegedly relied upon to justify murābahah to the purchase orderer.

The response given for this argument is that in the contract of ‘ınah the purpose is the raising of a loan, there is no interest in the underlying goods involved. In the contract practiced by the banks, the main aim is to buy goods and to seek financing for buying them. On paper this response may appear reasonable, but that does not mean that it cannot be used as a device for raising loans and dealing in interest. It is well known that many clients use their existing goods to seek financing from the banks on the basis of murābahah. All they have to do is route the goods on paper through a complying dealer, usually with the silent agreement of the bank. Nevertheless, this is not what we are concerned with here. Our main aim is to see what the great Īmām al-Shāfi‘ī has to say about the contract of ‘ınah and other matters. The purpose is to find out whether his text could be relied upon to justify murābahah to the purchase orderer.
4.2 Bay‘ al-‘Inah and its Relevance for Murābāhah lil Āmir bish-Shirā’

We have stated above that the justification for murābāhah lil-āmir bish-shirā’ or murābāhah to the purchase orderer is based upon Imām al-Shāfī‘ī’s text from his Kitāb al-Umm. This text is in volume 3 of the book, and deals with the sale of goods (‘urūḍ). We will reproduce this text in this chapter for analysis.

The background for discussing this text is that there are two crucial elements of murābāhah lil-āmir bish-shirā’ without which it cannot be implemented. These are (1) delay in the second contract between the client and the bank and (2) the concept of wa’d or promise (whether unilateral or bilateral). The client is in need of funds. The provision of funds is not possible without a delay in the payment of goods. The idea of a binding promise is essential, because the bank must be sure that once it has bought the goods the client will definitely purchase them from him.

The credit sale or bay‘ mu’ajjal is the basis of the contract of ‘inah or the buy-back agreement. In the remaining part of this chapter we will discuss bay‘ al-‘inah within the context of Imām al-Shāfī‘ī’s text that has been relied upon by Sami Hamoud for justifying the hybrid contract for Islamic banking. We will discuss next the text from Kitāb al-Umm. This will be followed by our analysis and objections to the inferences drawn by those who permit the hybrid contract.

Accordingly, we will first understand the buy-back transaction. We draw upon our text in an earlier book on ribā. The entire text is reproduced below with a very slight amendment.

[Quoted text begins] We have stated earlier that the concept of a loan is not acknowledged by Islamic law. The only form of loan that Islamic law permits is qarḍ ḥasan, which is not an interest-free loan as we understand it today, but a conscious gift by the owner of money of the use of his money to another person for an undetermined period that is usually based upon the
ability of the borrower to repay. In such a situation, what does the person, who is in urgent need of cash, do when no one is willing to give him the money as a *qard hasan* and the law prohibits the charging of interest. In such a situation, the borrower may find a person who is willing to give him money on fixed mark-up, say, twenty rupees for every hundred borrowed—the total to be returned coming to one hundred and twenty.

The willing parties enter into a contract that involves two separate transactions. Let us assume that the borrower needs 1000 rupees. Let us also assume that he has a book. The lender will first enter into a contract of sale of the book with the borrower. He will pay the borrower 1000 rupees in cash and take the book. This transaction will be followed immediately by another sale transaction between the two parties. If the fixed mark-up is 20%, the total amount due after one year comes to 1200 rupees. The borrower now buys back his book from the lender for rupees 1200, but he does not pay in cash. Instead, he agrees to a credit sale (*bay' al-nasi'ah*) according to which the book is delivered to him at once though he will pay rupees 1200 after one year.

The net result of this transaction is that the borrower has received rupees 1000 from the lender and will be returning rupees 1200 (which includes a fixed mark-up of rupees 200) after one year. Some say that this transaction is called ‘*inah*, because the ‘*ayn* (substance—book in this case) sold by the seller returns to him.

Mālik and Aḥmad ibn Ḥanbal prohibited this transaction outright, because it is a legal device (*hilah*) for dealing in ribā, both *faḍl* and *nasi'ah*. The *faḍl* is reflected by the mark-up of rupees two hundred and *nasi'ah* by the delay of one year.

The jurists who forbid such a transaction argue on the basis of the tradition of ‘Ā’ishah (God be pleased with her) when Umm Mahabbah informed her that she had a slave-girl whom she sold to Zayd ibn Arqam for eight hundred *dirhams* till he could pay. He then decided to sell her so she bought her back for six hundred. ‘Ā’ishah (God be pleased with her) said, “It was
§4.3  

*Murābahah*

bad what you sold and bad what you bought. Make it known to Zayd that his *jihād* alongside the Messenger of Allāh (God’s peace and blessings be upon him) has been nullified, unless he repents.” She said to her, “What if I should just take my capital from him?” She replied, “Those who after receiving direction from their Lord, desist, shall be pardoned for the past.”

Al-Shāfī’ī, on the other hand, upheld its permissibility on the basis of the tradition in which the sale of low quality dates for *dirhams* and the subsequent purchase of high quality dates was permitted by the Prophet. He considered it an evidence for the permissibility of a legal device (*hīlah*) for the avoidance of the forbidden in unusual circumstances. Imām Shāfī’ī did not consider the tradition of `Ā’ishah as authentic, moreover he argued that Zayd went against it. When there is disagreement among the Companions, the rule according to al-Shāfī’ī is to follow analogy. An opinion similar to that of al-Shāfī’ī has been related from Ibn `Umar. From this it should not be concluded that al-Shāfī’ī permitted the charging of *ribā* or of profit through such a transaction. What he was saying was that the outward statements of Muslims are to be presumed to be true, unless proved otherwise. If, however, it is known that the parties are using this transaction as a device for evading the prohibition of interest, he too would not permit it. Today, banks are using this device for giving loans. This is outrageous from the Islamic point of view, because the majority of the jurists look down upon this transaction and consider it a device for the evasion of the prohibition of *ribā*. [Quoted text ends]

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4.3 Imām al-Shāfi‘ī’s Text and its Meaning

4.3.1 The text explained

The passage we reproduce below is from volume 3 of Kitāb al-Umm. It is the passage that was relied upon by Sami Hamoud. We are reproducing the whole passage in its proper context so that the reader knows what is being discussed. Our comments follow this passage.

§4.3

Imām al-Shāfi‘ī’s Text and its Meaning

The text explained

The text explained...
§4.3  Murābahah

Instead of translating the above text, we will explain the main ideas in our own words.

The illustrious Imām is concerned with the permissibility of a buy-back transaction in this passage. If a person sells some goods on credit and then buys the same goods at a lesser price on cash, then this is permitted. In other words, if a person has bought goods on credit from another, and then sells them for a lesser amount (most probably to the same person), it is permitted. This is the regular bay' al-‘īnah. This transaction is structured on the credit sale and a spot sale. The Imām elaborating this transaction says that if someone says to another, “If you buy this I will give you a profit on it.” He may then state that I will buy on a spot basis from you or on credit. Now this person is making an arrangement for the bay' al-‘īnah.
The Imam deals at length with the tradition that we have already recorded in the previous section. The argument and discussion are almost similar to what we have stated in the previous section.

4.3.2 Defective inferences and fake justifications

There are three very important points in this passage for our purpose:

1. The delayed sale here is not murābahah; it is a an ordinary bay' mu‘ajjal in which an additional profit is permitted. Using this passage to show that a delay in murābahah is permitted is not justified. Accordingly, the contract of murābahah to the purchase orderer cannot be proved from this passage.

2. The second even more important issue is about the granting of option to the person buying on credit. The Imam is saying that though these two transactions appear to be related, the person will have an option to go ahead with the second transaction or to reject it. It will not be binding upon him to undertake his part of the transaction. Purchase by the other person of the goods, however, will be valid. If the two transactions are related so that one is dependent on the other or becomes binding because of the other transaction, the transactions are void. This is a crucial point as it strikes at the heart of murābahah lil-āmir bish-shirā’, which makes the two transactions dependent upon each other through binding promises. Such a concept of wa‘d for this transaction is not only rejected by the great Imam, he considers the transactions void if it is.

3. The third point is that according to Imam al-Shafi‘i a combination of two transactions resembling bay‘ al-‘inah may be treated as valid only if they are not related to each other and made dependent upon each other through a
binding promise or obligation. Accordingly, the permission granted by the Imam for undertaking *bayʿ al-ʿinah* is not absolute, but is concluded with an option (*khiyār*) to revoke the arrangement.

### 4.3.3 Conclusions drawn from Imām al-Shāfīʿī’s text for *murābahah*

In our view, the following conclusions may be drawn from this passage:

1. *Bayʿ al-ʿinah* that consists of two transactions, a credit sale at a higher price and a spot sale at a lower price, is valid provided that the two transactions are not linked and the second transaction is not binding on the person requesting the arrangement.

2. This passage has nothing to do with *murābahah* and delay in *murābahah*. The delay mentioned pertains to the ordinary *bayʿ muʿajjal*, which in turn is based upon *musāwamah*.

3. An additional profit may be given when a credit sale is undertaken. This is not the profit or mark-up of *murābahah*.

4. The concept of *waʿd* (binding promise) is rejected outright by this passage, at least for two apparently linked transactions.

In our view, this passage does not prove anything about *murābahah*. All it is saying is that Imām al-Shāfīʿī permits *bayʿ al-ʿinah* provided that the two transaction composing it are not interdependent and it is not binding on the party who wanted to give a profit to go ahead with the transaction, that is, the borrower. In fact, this passage is deadly for the concept of *waʿd* on which the hybrid contract is based.
Chapter 5

Legal Validity of the Credit Sale and Related Rules

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5.1 The Rules for the Credit Sale are Tied Closely to the Rules of Ribā

In our work on ribā we have already show how the rules or ribā and the credit sale or bay‘ al-nasī‘ah are related. Here, we will recall those rules and present them in a systematic manner independently of the discussions of ribā.

5.1.1 The Verse of Ribā and the Credit Sale

We have shown elsewhere that the verse of ribā, which is the primary principle of the prohibition of ribā according to the jurists, cannot be understood except by comparing ribā to the credit sale or bay‘ mu’aijāl. For the details see the book on ribā in this series, but the basic idea is reproduced below:

 ذٰلٰک یَا بَنِي مَان ۖ قَالُوا إِنَّا الْبَيْع مِثْلَ الْرَّبَا وَإِلَّهَ الْبَيْعَ وَحَرَّمَ الْرَّبَا

That is because they say: “Trade is like ribā,” but Allah hath permitted trade and prohibited ribā.¹

According to al-Ja‘ṣṣāṣ, the controlling words are “and prohibited ribā.” All forms of prohibited ribā are included in these words. The word ribā, he says, is in need of elaboration as it is mujmal (unelaborated) and such elaboration always comes from the Sunnah.

The issue here is: What is this similarity between trade and ribā that is implied in this verse? It is the same objection that is repeated again and again: “But interest is rent on capital,” or “Interest is return on capital.” It is the same thing that the Jews are saying here: “But trade is like ribā?” In other words, there is nothing new in these objections. They were made fourteen centuries ago and have surely been around much before that.

¹Qur‘ān 2 : 275. While we use the term “trade” for bay‘ following the acceptable translations, in reality it means “exchange is like ribā.”
When scholars give explanations of the distinction, they might say that there is excessive profit in *ribā* and that is *ẓulm* (injustice), or that there is risk in trade and none in *ribā*. These are attempts to provide the underlying wisdom of the prohibition (the *ḥikmah*) and not the real distinction. It is the same as presenting a large number of economic theories that indicate the evils of *ribā*. These explanations may or may not be true, yet they do not constitute legal reasoning. The jurist is interested in the legal rule as it relates to the distinction. It is the legal rule that will tell him about the nature of the prohibition.

The distinction lies in comparing two credit sales. As both are credit sales, with one being prohibited and the other permitted, the comparison has real meaning for us. Now it is well known that when a person sells on cash he charges less, but when he gives the buyer a credit for a stipulated period he charges a little more depending on the extent of the delay. As a general rule (without going into details here) the sale of goods on credit with an enhanced price is permitted in Islamic law, and it was permitted at the time the objection was raised.

Let us consider two transactions “X” and “Z.” In transaction “X,” the seller A sells to the buyer B 100 gold dinars, with a delay of one year, for 110 dinars. We have called this transaction a sale, but it can be seen very easily that this is a loan transaction. One
person has given a loan to another for one year at 10% interest. It is important to remember that for the analysis of ribā in Islamic law, a loan or debt will always be treated as a sale transaction. In practice, it does not matter and we may look at it as a loan transaction; the nature of the underlying transaction does not change whatever we call it.

In “Z,” the second transaction, A is selling 100 bags of wheat to B, by giving him credit of one year, for a sum of 110 dinārs. We may assume here that had the buyer paid cash on the spot, the 100 bags of wheat would have cost him 100 dinārs. He is charging an extra 10 for the delay of one year. It is also obvious that in transaction “X” had the seller demanded exactly similar dinārs for his 100, the buyer would not have given him more than 100 dinārs.

In Islamic law, transaction “X” is prohibited, while transaction “Z” is permitted. This is quite confusing for the persons raising the objection. They would say, “Transaction X is just like transaction Z insofar as an extra 10 is being charged for delay in both transactions that are of equal value.” In other words, they are saying, “Trade is like ribā.” The response is quite clear. In our words, “Allāh has permitted transaction Z and prohibited transaction X.” In the words of the Qur’ān, “Allah has permitted trade and prohibited ribā.”

The net result for our purposes here is that a comparison of two credit sales shows that one type of credit sale where the species are different is impliedly permitted by this verse.

### 5.1.2 The Tradition of ‘Ubādah (R) and the Credit Sale

The tradition of ‘Ubādah ibn al-Ṣāmit (God be pleased with him) if given a very wide meaning would appear to restrict even the second credit sale impliedly permitted in the verse above. Let us show how.
From ‘Ubādah ibn al-Ṣāmit, who said, “The Messenger of Allāh (God’s peace and blessings be upon him) said, ‘Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, like for like, in equal weights, and from hand to hand. If these species differ, then, sell as you like, as long as it is from hand to hand.’” It is reported by Muslim.²

According to Imām al-Sarakhsī, the tradition of ‘Ubādah ibn al-Ṣāmit contains commands that have to be complied with individually and also together wherever possible. The commands are divided into two groups, however, we must have a transaction to which these rules apply:

**We begin with the loan transaction**, or the sale of gold dinars for gold dinars with an excess, in which A has 100 gold dinars that he is about to give to B with the stipulation that B will pay 100 dinars plus 10 dinars after one year.

Now the commands in the tradition are:

**Group 1**  Dealing in the same species (Gold for Gold, say)

(a) Make the weights equal on both sides.

(b) Exchange the two commodities immediately.

Group 2  Dealing in the same species (Gold for Silver, say)

1. There is no harm if the two counter-values are unequal.

2. But exchange immediately.

The transaction is that of group 1, therefore, the first command in the tradition says to A and B: *Make the two counter-values equal*. The second command in the tradition says to A and B: *Exchange the two counter-values at once*.

The combined impact of the command is:

**Do not sell gold for gold, unless the weight on both sides is equal, and unless you exchange from hand to hand.**

This is the rule of the contract of *šarf* (currency exchange). The contract also applies where gold is exchanged for silver. The illustration for an exchange of gold dinars for silver may be as follows:

![Diagram of sale of dinars for dirhams](image)

Here the transaction is that of group 2, therefore, the first command in the tradition says to A and B: *There is no harm if the two counter-values are unequal*. The second command in the tradition says to A and B: *Exchange the two counter-values at*
Once. This transaction is one that serves a need of the people and it is the exchange of one currency for another. The rate is whatever prevails in the market and is acceptable to the people. The same transaction with the delay is not allowed as that may convert it into a loan with interest.

The details of these rules are contained in the contract of *sarf* as far as currencies are concerned. What if we widen the application of the tradition so as to apply across the board to all commodities and currencies.

For this we will have to examine the six commodities and try to apply the rules. Such an application would mean that the credit sale (of say exchange of wheat for *dinārs*) is prohibited too. For example, if A is giving 10 *dinārs* to B for 100 bags of wheat to be delivered after one year, the species are different, so 10 *dinārs* can be paid for 100 bags of wheat, but the exchange has to be immediate according to rule 3 stated above. In other words, the counter-values are to be exchanged at once and there can be no delay, which is the basis of the *bay‘ al-nāsī‘ah* or the credit-sale.

In the figure above, if rule 3 is applied, the credit sale will not be possible. The answer of the *fuqahā‘* to this objection would be “no,” the exchange does not have to be immediate. To understand this we have to comprehend the system used by the *fuqahā‘* for determining the underlying causes, that is, the *‘ilal,*
as derived from the traditions. Here we may simplify the issue by saying that if the method of estimation (qadr) is the same for the species, they have to be exchanged immediately, but when the method of estimation is different, delay is permitted. Thus, the method of estimating gold and silver is the same, therefore, these have to be exchanged at once. Wheat, however, has a different method of estimation; it is measured in containers or cubits.

A system of measure was used for food items during the period of the Prophet (pbuh) and that is maintained by the fuqahā’ for purpose of analysis. It is possible for A to pay 10 dinârs, after one year, for 100 bags of wheat or barley or anything that is measured, and take delivery of the wheat immediately. In other words, credit sale is allowed in such cases.

In fact, gold dinars and wheat are not even different species; they are different genera altogether. The Mâlikī and Shâfâ‘ī jurists divide them into things with currency value and food. What about buying platinum or iron ore on credit by paying gold. Here too the jurists state that the method of weighing gold and silver is quite different from weighing iron ore. We have discussed this in detail elsewhere.3 The jurists divide commodities into different genera or categories, and credit sale is possible across these categories. The figure below elaborates this classification.

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The above figure implies that metals can be sold on credit for currency, just as food can be sold on credit for currency.

All the rules of *ribâ* and other sales, especially the classifications into different genera and species, are supported by traditions, and the *fuqahā’* use them to refine the concepts. It is on the basis of these traditions, after a thorough refinement of the rules, that the famous jurist Ibrāhīm al-Nakha’ī framed the following famous formula:

Muḥammad from Abū Ḥanīfah from Ḥammād from Ibrāhīm, who said: Exchange (make an advance payment with) what is measured for what is weighed, and an advance payment with what is weighed for what is measured, but do not make an advance payment with what is weighed for what is weighed nor with what is measured for what is measured. If the species are different in what is not measured or weighed then there is no harm in (exchanging) it, two for one, from hand to hand, and there is no harm in it (even) with a delay.

This applies primarily to the contract of *salam*, but it illustrates the rule for the credit sale as well. The credit-sale is, therefore, permitted by the verse as well as traditions in the exchange of currencies for commodities. There are, however, a few further crucial rules that we shall elaborate below. Those rules must also be met for a credit sale or *bayʿ muʿājjal* to be valid.
5.2 Delay, Charging an Excess for Delay, and Discounting in the Credit Sale

The main issues pertaining to the credit sale are the following:

1. Is an excess over price allowed when the payment is deferred, that is, a credit is given for a period?
2. Can a discount be given if early payment is made?
3. What are the implications of the rules in the above issues on the contract of murābahah?

In this section we shall discuss the first two issues with respect to the credit sale alone. The implications for murābahah will be discussed in the next section when the legal validity of murābahah is taken up.

5.2.1 Charging Additional Profit in the Credit Sale on Account of Delay

We begin by quoting Justice Taqi Usmani. He gives detailed rational arguments for justifying an excess over and above the price in a credit sale. We have nothing against this opinion. An excess is allowed as is understood from the writings of the fuqahā’ and their interpretation of the texts. Nevertheless, certain important points need elaboration and qualification, because the validity of the credit sale depends on them. The quotation below is from Introduction to Islamic Finance.

The upshot of this discussion is that when money is exchanged for money, no excess is allowed, neither in cash transaction, nor in credit, but where a commodity is

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4 We may point out here that credit is not possible in the sale of currencies, because that amounts to a loan. The conditions of ṣarf require immediate exchange (this note added by us to this quotation).
sold for money, the price agreed upon by the parties may be higher than the market price, both in cash and credit transactions. Time of payment may act as an ancillary factor to determine the price of a commodity, but it cannot act as an exclusive basis for and the sole consideration of an excess claimed in exchange of money for money.

This position is accepted unanimously by all the four schools of Islamic law and the majority of the Muslim jurists. They say that if a seller determines two different prices for cash and credit sales, the price of the credit sale being higher than the cash price, it is allowed in Shari'ah. The only condition is that at the time of actual sale, one of the two options must be determined, leaving no ambiguity in the nature of the transaction. For example, it is allowed for the seller, at the time of bargaining, to say to purchaser, “If you purchase the commodity on cash payment, the price would be Rs. 100/- and if you purchase it on a credit of six months, the price would be Rs. 110/-.” But the purchaser shall have to select either of the two options. He should say that he would purchase it on credit for Rs. 110/-. Thus, at the time of actual sale, the price will be known to both parties.5

However, if either of the two options is not determined in specific terms, the sale will not be valid. This may happen in those installment sales in which different prices are claimed for different maturities.6

In his book Qaḍāyah Fiqhiyyah Mu‘āṣarah, the learned Justice Taqi Usmani gives further arguments.7 We will summarize or translate his views below.

6Taqi Usmani, Introduction to Islamic Finance, 80–81.
7Muhammad Taqi Usmani, Qaḍāyah Fiqhiyyah Mu‘āṣarah (Karachi: Maktabah Dār al-‘Ulūm, 1425 A.H.), vol. 1, 7–10.
He first quotes al-Shawkânî to show that a few authorities considered the charging of an excess over the price on account of delay in payment to be *ribā* and unlawful.\(^8\) As for the four Sunni Imams and the majority of the jurists as well as Imams of traditions, they uphold the permissibility of charging an excess, as long as the period is clearly specified and the price stated.\(^9\) He then quotes Imam al-Tirmidhî, who says:

> Some scholars have elaborated the meaning, saying, “Two sales in one” is like saying, “I will sell you this dress for ten paid in cash (immediate) and for twenty by way of *nasī‘ah* (delay).” Then he separates from him (session) without deciding upon one of the two sales. If he separates after choosing one, then there is no harm in this, that is, when the contract is for one of them.\(^10\)

Commenting on this Justice Taqi Usmânî says that this is the preferred view of the four Imams and the majority of the jurists. He then elaborates that there is nothing in Qur’ân or the *Sunnah* that goes against this increase, because it does not pertain to a *qard* nor to counter-values that invoke *ribā*. It is merely a sale and the seller has the right to sell at whatever price he likes. He further elaborates that the jurists agree that a person who sells at 8 for cash and at 10 with a delay, may also sell at 10 for immediate payment. What is then to stop him for selling at 10 with a delay?\(^11\) The stipulation of excess for a delay will become interest if the seller says, “I have sold you these goods for 8 rupees on immediate payment, but if you delay the payment till a month I will charge you 10.” The practical effect, he adds, is

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\(^8\)Ibid., 8.
\(^9\)Ibid.
that by choosing one of the options, the price becomes determined and fixed. Thus, an early payment will not have the effect of altering the price.\footnote{Ibid., 10.}

These are sound statements and we have no disagreement with them. Yet, these statements do not emphasize a crucial point on which depends the validity of the credit sale. Before we highlight this point, let us see what the jurists have to say in justification of charging an excess over the normal price in a credit sale. We rely mainly on al-Sarakhsi here, but other jurists have similar views on the issue.

Imām al-Sarakhsi, while explaining a statement of Imām Muḥammad al-Shaybānī has the following to say:

(He (Imam Muḥammad) said:) If a person sells something for a thousand dirhams by way of credit of one year, and then buys it back for a thousand dirhams for a credit of two years prior to taking possession of the price, it is not valid. (Explanation) The reason is that this amounts to purchasing something for less than what he has sold it for.

The excess in the ajal (period of delay) causes a loss in the value (māliyyah) of the price. Do you not see that the ajal essentially causes a loss in value, so that the delayed counter-value is less than its present value. It is for this reason that ribā arising from delay is established in the law. Likewise, by increasing the period of delay there is a loss in māliyyah.\footnote{Al-Sarakhsi, \textit{al-Mabsūt}, vol. 13, 146–47.}

He is saying clearly that the present value of money is less than its future value, therefore, an excess over the normal price is allowed. For the same reason, the prohibition of \textit{ribā al-nasī′ah} is established in the law even when it exists without the \textit{faḍl}. Excess in the latter case is not permitted, because the law treats
it as *ribā*, while it does not treat a credit sale as *ribā*. This, we may add, is the exact implication of the verse of *ribā* discussed above. It is also what Justice Taqi Usmani has said in the quotation that we have given from his book at the beginning of this section.

In fact, we may go one step further and say that if a person does not charge an excess for a period of delay, he is passing on a value to the other party for which the other party is not paying. In other words, an excess must be charged. Yes, if a person does not charge such an excess for delay, he is passing on a value to the other party by way of gift. He has every right to grant such a favor to his client, but only when he is doing so with his own money. If he is making a transaction on behalf of someone else like a shareholder or a depositor, he has not right to grant such favors.

We will now address the main point that we are trying to make in this section. This pertains to the issue of “two sales in one” or “two conditions in one,” for which Justice Taqi Usmani has quoted a tradition recorded by Imam al-Tirmidhī and others.

(He (Imam Muhammad) said:) If a person buys something on the condition that the seller will grant him a *qard*, make him a gift, grant him charity, or that he sell it to him such a price or such a price, then the sale in all these cases stands vitiated. (Explanation) This is due to the prohibition expressed by the Prophet (pbuh) about “sale with a loan” and “two sales in one.”

On another occasion, he explains it as follows:

It is related from ‘Abd Allāh ibn ‘Umar (God be pleased with both) that the Messenger of Allah (pbuh) sent ‘Atāb ibn Asīd to Makkah and said, “Forbid them from indulging in ‘two conditions in

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bay’; ‘bay’ with a loan; ‘sale of something not taken into possession;’ and ‘profit that is not supported by damān.’” This is what we adopt. The description of two conditions in one is that for immediate payment so much and for delay so much. This is not valid.\(^\text{15}\)

In another location, he adds another explanation to this:

(He (Imam Muḥammad) said:) If a person buys something for two delayed periods (ajalayn) and separate (after the session) on this condition, it is not valid. (Explanation) This is due to the prohibition expressed by the Prophet (pbuh) about “two conditions in one.” If he negotiates with him and makes him agree on one, concluding the sale on that, it will be valid.\(^\text{16}\)

We are now ready to state our additional rule. This rule has two parts or may be treated as two rules.

The first point to be noticed is that when a person wishes to charge more for bay’ mu’ajjal, there are two stages in the session of the contract. The first is the negotiation phase where the seller says, “so much for immediate payment and so much for cash.” He has to inform the buyer that these are the options or possibilities. The second stage is of offer and acceptance. The offer and acceptance must be for a single price. Thus, the offer cannot say, “I have sold you this thing for so much immediate payment and for so much payment in case of delay.” The offer must say, “I have sold you this thing for so much to be paid after one year.” This is in accordance with what Imam al-Tirmidhi has recorded, “when the contract is for one of them.” The same meaning is found in al-Sarakhsi’s words, “If he negotiates with him and makes him agree on one, concluding the sale on that, it will be valid.” What does this mean? It means the following:

\(^{15}\)Al-Sarakhsi, al-Mabsūṭ, vol. 14, 45.
\(^{16}\)Al-Sarakhsi, al-Mabsūṭ, vol. 13, 34.
THE MARKUP CANNOT BE STATED SEPARATELY IN A CREDIT SALE CONTRACT. A SINGLE DEFERRED PRICE HAS TO BE STATED.

When we state two prices, the difference indicates the markup. Likewise, when we state two periods with different prices, the markup can be worked out. The law has, therefore, closed this door, so that the markup or the additional amount charged is not known. This condition alone is enough for declaring the hybrid contract called Murâbahah lil Āmir bish-Shirā as unlawful.

In the second part of this rule, let us focus on the reason or the rationale for not mentioning the markup or the excess being charged on account of the delay in the payment of price. It should be obvious to the reader, but let us quote al-Sarakhsi again:

لاَنَ هَذَا مَقَايِضُ الْإِجْلَ بَالْدِرْحَامِ، وَمَقَايِضُ الْإِجْلَ بَالْدِرْحَامِ رَيْاً

The reason is that this the juxtaposition of the ajal with dirhams, and the juxtaposition of the ajal with dirhams is ribā.17

This is clear as daylight. We do not need to dwell on this further. We may just state the rule in the box below as follows:

LINKING THE MARKUP WITH THE PERIOD OF DELAY IN A CREDIT SALE CONTRACT AMOUNTS TO THE CHARGING OF RIBA.

We will, however, have little more to say about this in the following section.

5.2.2 Increasing and Decreasing the Markup of a Credit Sale According to Variation in Delay

The next issue discussed by Justice Muhammad Taqi Usmani is that of discount, that is, the reduction in the markup if an early payment is made. We will mention part of the discussion here and the remaining that pertains to murābahah in the next section, because the issue concerns murābahah as well.

The views presented by the learned scholar treat two separate issues in a combined fashion. As we do not wish to prolong and lengthen this discussion, we will separate the two issues at the outset. The two separated issues are as follows:

1. Can a part of the debt be waived off in the case of debts that have become due for satisfaction?

2. Can the markup be decreased for early payment, that is, can a discount be given to the debtor for early satisfaction of the claim?

Let us record the general evidences pertaining to these issues first. Both traditions, as recorded by Justice Taqi Usmani, are weak, but they may be mentioned anyway. The first is the case of the Jews of Banū an-Naḍîr who were evicted from their holdings and they said that they had outstanding claims against people. They were asked to reduce the claims in order to hasten payments. This tradition is opposed by another tradition, in which the Prophet (pbuh) deemed the granting of discount for early payment as the consumption of ribā. The case of the Jews, which permits a discount, is explained away by al-Sarakhsi as an incident that either occurred prior to the prohibition of ribā or that the rules of ribā do not apply when Muslims deal with the enemy. In short, reliance on these two weak evidences does not help us much.

Thereafter, the learned scholar mentions the view of the Mālikis, quoting al-Mudawwanah al-Kubra, that claims that are due (duyūn ĥallah) may be reduced. The Mālikis permit such
reduction for prompt payment. Our simple answer to this issue is that it does not pertain to discounting. It is an issue of writing off part of the bad debt in order to recover the rest. This cannot be prevented in any case, as it is the claim of an individual who is giving up part of the claim. It has nothing to do with the issue of ribā. The view of Justice Usmani appears to be the same.\footnote{See Muhammad Taqi Usmani, Qadāyah Fiqhiyyah Mu‘āṣarah, 28.}

The main issue is that of discount. The evidences recorded by the learned scholar from fiqh show that most jurists do not permit the granting of discount for early payment. In our view, the reason that they do not permit it is that they do not acknowledge the statement of the markup separately. When there is no markup linked to the period, the question of granting a discount does not arise.

When a single price is quoted, discount may still be possible, but then the whole price claim is linked to the period and not a particular markup or interest. In such a case, it will just be the discretion of the seller if he wishes to reduce the price of the goods sold. This he can do in the case of a spot transaction too. The issue is taken up again in relation to murābaḥah in the next section. For the present we will restate the rules for the credit sale recorded so far.

### 5.3 Summarizing the Rules for the Credit Sale

Rules or general guidelines for the credit sale, recorded so far, are as follows:

1. The credit sale is to be understood within the context of the tradition of ‘Ubādah ibn al-Ṣāmit (God be pleased with him). This is the tradition about the six commodities that restricts the delaying of counter-values.
2. The credit sale is allowed even within the same species if the *mi‘yār* standard for determining excess is different. Thus, gold can be exchanged for iron because the method of weighing is different even though both are weighed.

3. The charging of an excess on account of delay is permitted, because delaying payment results in a loss of value for the seller.

4. Islamic law does not permit the stating of the excess separately and a single price that includes the markup is to be stated. The details, however, can be discussed at the negotiating stage. The offer and acceptance that constitute the markup cannot mention the markup.

5. The reason for not mentioning the markup is that it cannot be linked with the period of delay. Linking the markup with delay leads to *ribā*.

6. As there is no separately stated markup, the question of increasing or decreasing the markup does not arise.

7. It is only when the markup is stated and linked to the period of delay that discounting is possible. Once it is mentioned, there is logically no hurdle in granting a discount.

It is obvious that these simple rules create a huge problem for the contract devised by bankers today for use in Islamic banks. It should also be obvious from the above that the jurists were no simpletons as some people who are “full of knowledge” today may assume. They knew what they were doing.
Chapter 6

The Legal Validity of Murābahah Combined with the Credit Sale

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*Murābahah* lil Āmir bish-Shirā’ or *Murābahah* to the Purchase Orderer, a contract that dominates Islamic banking and forms its backbone, is supposedly a combination of the traditional contract of *murābahah* and the traditional contract called *bay’ al-nasī’ah* or *bay’ mu’ajjal*. The result of the combination is that the cost of the goods is stated along with a profit that is clearly stated, but unlike the traditional contract, the payment of the resulting price is delayed.

6.1 The Earlier Jurists Never Permitted Delay in *Murābahah*

We have been stating throughout that the earlier jurists did not permit delay in *murābahah*. We still maintain this view. Justice Taqi Usmani has, however, has quoted a discussion by Ibn ‘Ābidīn that might imply that delay in *murābahah* was permitted by the later jurists of the 16th or 17th century. This is an important discussion and we would like to present the entire discussion here so that a proper opinion can be formed about this issue. We will rely entirely on the material recorded in *Qadāyah Fiqhiyyah Mu’āṣarah*. The material that follows is a translation of the two or three pages of the said book. The context is that of discount for hastening payments in *murābahah*.

6.1.1 Case relied upon for justifying *murābahah* with a delay

Ibn ‘Abidin states:

The debtor repays the debt prior to the due date or he dies and payment becomes due on account of his death. The debt is satisfied from his estate. In such a case the debt claim from the *murābahah* is not to exceed the
number of days that have passed. This is the response of the later jurists of Quniyah. It is also the fatwā given by the later Abū al-Saʿūd Afandi, the muftī of al-Rūm. He justified it on the basis of compassion for both parties.

Under this paragraph, Ibn ‘Abidīn states:

His statement, “the debt claim from the murābahah.” The form is that a person buys something for ten on immediate payment and sells it to another for twenty with a period of delay that is of ten months. If he repays after completion of five months, or dies after five months, the creditor is to take five and relinquish five (that is half the profit).

Ibn ‘Abidīn then adds: I recorded the same issue in Tanqīḥ. In that work, the following additional details are provided:

A question was raised stating that Zayd has a claim, of a known and determined debt, against ‘Amr, and he concludes a murābahah contract with him for a year. Twenty days thereafter, ‘Amr the debtor dies. The debt becomes due and is paid by the heirs to Zayd. Is the amount due on account of the murābahah to be reduced (discount given)?

Response: The response of the later jurists was that only an amount equal to the number of days that have passed is to be recovered on account of the murābahah concluded between them. It was said to ‘Allāmah Najm al-Dīn: Will you issue the same ruling? He said: “Yes.” This is how it is recorded in al-Anqrawī and al-Tanwīr. The same ruling was issued by ‘Allāmat al-Rūm Mawlāna Abū al-Saʿūd.

This entire passage above is quoted by Taqi Usmani, who then gives the following comments:

This fatwā by the later Ḥanafī jurists distinguishes between the musāwamah (negotiated sale) and the murābahah
sale in which the seller has expressly stated an excess in the price on account of the *ajal*. Thus, “discount and hasten payment” is not permitted in the *muswaamanah* sale, as we have stated earlier, while it is permitted in the *murabaahah* sale. Perhaps they issued a *fatwa* about this on the grounds that the *ajal* (period), even though it is not eligible for compensation independently, may be juxtaposed with part of the price when it is inclusive of the price and secondary to it. It is like the sale of a foetus inside the womb of the cow, which is prohibited, but an additional amount may be added on account of it to the value of the cow. Thus, a thing that cannot be sold independently may be compensated as a subsidiary part. When the basis of *murabaahah* is the statement of the amount of profit, it is permitted that the profit be in lieu of the *ajal* (period). When this attribute becomes deficient on the payment of the debt prior to its becoming due, or through its becoming due on account of the death of the debtor, the price is reduced in proportion to it. It is towards this meaning that Ibn ʿAbidin has pointed, while providing the rationale of this issue.

The reasoning given by Ibn ʿAbidin is recorded as follows:

The reasoning is that the profit is in lieu of the *ajal* (period), because the period, even though it is not wealth and no part of the price is in lieu of it, has been considered *maal* (wealth) in *murabaahah* when the period is mentioned in lieu of the increase in price. If the entire price is recovered prior to the termination of the period, it amounts to taking it without a counter-value.¹

Justice Taqi Usmani then, rightly, disagrees with Ibn ʿAbidin, and says the following:

This reasoning carries some weight, but it goes against the evidences we have adduced for the prohibition of

¹For all the passages quoted above see Muhammad Taqi Usmani, *Qadaya Fiqhiyyah Muʿasarah*, vol. 1, 30–32.
“discount and hastening payment.” These evidences apply to all delayed debts without any distinction between 
\textit{musāwamah} and \textit{murābaḥah}. Acting upon this \textit{fatwā} will bring \textit{murābaḥah} and sale by installments closer in form to \textit{ribā} bearing transactions …. We therefore do not consider it suitable to act according to this \textit{fatwā} for sale by installments nor for \textit{murābaḥah} contracts practiced by the banks. Allah, the Glorious and Exalted, knows best.

\textbf{This view is sound for purposes of discounting, but the implication of the whole case is what concerns us here.} In other words, the entire case by implication is saying that “delay is permitted in \textit{murābaḥah}” as was approved by the later jurists. Accordingly, we analyze this case in the following section and reject it in its entirety for reasons provided.

\subsection{Analysis of case and its rejection}

The whole case is shocking for us. It proves, what Ibn ‘Ābidīn has indicated in several places in his works, that the opinions of some later writers are highly unreliable. To prove what we mean, let us examine the transaction that is contemplated in the above description. The transaction described is as follows:
In the case described, ‘Amr owes a debt to Zayd and this debt has become due. Let us assume that ‘Amr owes $1000 to Zayd. ‘Amr now wants an extension in the period. Zayd is willing to grant him an extension for a year, but he wants an interest of $200 to be paid for the extension. They enter into a murābahah contract, where Zayd sells fictitious goods worth $1000 to ‘Amr and states a sum of $200 as profit. A period of delay of one year is fixed for payment of the price. Note that no goods have exchanged hands in this transaction, because they cannot.

This case has come right from the days of the Jāhiliyyah, a case described by al-Jassās. In those days when a debt became due the lenders used to extend the period for an increase in the amount to be paid, leading sometimes to a debt that was “doubled and multiplied.” There is no possibility of goods changing hands here, because Zayd cannot hand over goods to a person who owes him a debt already. This is a paper transaction. It is a transaction practiced by banks today when they wish to grant cash loans to salaried people. They just state on paper that goods have been bought, but actually goods do not exist. Even the deaf and the dumb, who have some idea of Islamic law will say that this transaction is void and unlawful ab initio.

The graphical description of the case is as follows:
It is surprising for us that jurists, who are muftis, would even discuss such a case, while assuming that it is legal. It appears to be a fake hypothetical where scholars are playing “theoretical mind games” with each other. It is possible that they created a hypothetical to discuss the case of discounting for it is difficult to imagine a case in Islamic law in which discounting can be discussed with the period of delay linked to a separate part of the price. The reason is that even in an ordinary credit sale, as we have indicated above, the increase in the price cannot be stated separately.

The scholars of this age did discuss different kinds of ḥiṣāl to do what was not possible under the usual contracts. It is for this reason that Qāḍîkhan, after elaborating a number of ḥiṣāl, says in a complaining tone: “The Mashā‘ikh of Balkh have said that bay‘ al-‘inah is better than the transactions that they practise today in our markets.”

A further surprise for us is that Ibn ʿAbidin who was a great jurist and scholar should overlook this problem and not criticize it. It is possible that he toned down his observations out of respect for the scholars who have issued the fatwās. His words,

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2 Fatāwā Qāḍîkhan, vol. 2, 408.
however, do contain a subtle indication of the illegality, which we will mention in the next section.

In short, this case, as stated, has no legal basis for showing that a discount can be given or even showing that the price of the murābahah can be delayed. Our claim that the jurists never permitted delay in the contract of murābahah still stands.

Here we may mention another case that Justice Taqi Usmani has cited, in another location for a different purpose, from Imām Muḥammad’s book, Kitāb al-Huğjah. He relies on the case just to prove the charging of a different price in the case of delay. The quotation is as follows:

Imām Muḥammad ibn al-Ḥasan al-shaybānī (God bless him) said: Abū Ḥanīfah said about a person who has a debt claim of one hundred dinārs on another, and when the debt becomes due the debtor says to him: “Sell me goods whose cash price is one hundred dinārs for one hundred and fifty dinārs with a delay.” This is valid, because the two parties have not made any kind of stipulation, and have not mentioned any kind of stipulation that will render the transaction ḥāṣid.

What the great Imām (Imām A’ẓam) is saying: The two transactions have not been related to each other, therefore, they are separately valid. The debt owed has nothing to do with the new credit sale. The transaction is, therefore, valid. In the above rejected contract, there is a connection between the debt and the murābahah. The connection can only be established if goods do not actually change hands. In this present contract they do. Perhaps, the inspiration was drawn, incorrectly, by the later jurists from this statement of the learned Imām (God be pleased with him).

6.2 The Modern Hybrid Contract Combines Markup and Delay

The contract called *Murabaḥah lil Āmir bish-Shirā‘*, or *Murabaḥah* to the Purchase Orderer, is exactly similar to the contract described above.

The contract is also used for similar purposes, that is, to grant loans with a separate statement of the interest represented by the markup. The separate statement of the profit is in lieu of the period of delay as in the above contract. Can this markup be reduced if the period of payment is reduced by early payment? Can it be increased if the payment is rescheduled, some kind of rollover? Justice Taqi Usmani rejects this idea on reading the suggestion by Ibn ‘Abidin. Let us deal with it in more detail in the next section.
6.3 Increasing or Decreasing the Markup of Murâbahah According to Variation in Delay

In the previous section, we have highlighted the possibility of delay in the Murâbahah contract and rejected it for reasons recorded. Justice Taqi Usmani and Ibn ‘Abidîn, however, are more concerned with the possibility of granting a discount for early payment. Let us recall first what Ibn ‘Abidîn said in terms of the reasoning underlying the transaction. He says:

The reasoning is that the profit is in lieu of the ajal (period), because the period, even though it is not wealth and no part of the price is in lieu of it, has been considered māl (wealth) in Murâbahah when the period is mentioned in lieu of the increase in price. If the entire price is recovered prior to the termination of the period, it amounts to taking it without a counter-value.\(^4\)

He is making two important points here:

1. **First:** When the period of delay is linked with the markup, there is nothing to prevent increase or decrease in this markup in proportion to the increase or decrease in the period of delay. In other words, once a markup is stated in the contract with reference to delay, there is no difference between this markup and interest.

2. **Second:** Stating a separate markup with reference to the period of delay means that such markup MUST BE INCREASED OR DECREASED IN PROPORTION TO THE INCREASE OR DECREASE IN DELAY, otherwise the party enjoying the period of delay will be enjoying the benefits of the delay without paying a counter-value. This

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\(^4\)For all the passages quoted above see Muhammad Taqi Usmani, *Qaḍâyah Fiqhîyyah Mu‘âsarâh*, 30–32.
§6.3  

Murābahah

is exactly what the jurists mean by ribā al-nasī'ah or ribā on account of delay.

This is exactly what İmam al-Sarkhī says in al-Mabsūṭ:

He (Muḥammad al-Shaybānī) said: If one person has a claim of dayn against another for a period of delay, and it is on account of the price of a sold commodity. He reduces the claim somewhat on the condition that the person hasten payment of what remains. This is not valid. He is to return what he took and the entire amount is to be paid within its stipulated period of delay. (Elaboration by al-Sarakhsī: This is the opinion of ‘Abd Allāh ibn ‘Umar (God be pleased with both), while Zayd ibn Thābit (God be pleased with him) used to permit it, but we do not follow his view. The reason is that this the juxtaposition of the ajal with dirhams, and the juxtaposition of the ajal with dirhams is ribā. Do you not see that if the debt was due and he increased the amount for him so that he may grant him an additional period of delay, it would not be permitted. Likewise in the case of a delayed claim when the amount is reduced so that the remaining be paid earlier.5

This is clear to the extent that linking the markup or any other amount of the price with the period amounts to ribā. The hypothetical case discussed by Ibn ‘Abidīn is reflected in al-Sarakhsī’s words: “Do you not see that if the debt was due and he increased the amount for him so that he may grant him an additional period of delay, it would not be valid.”

The conclusion here is that the moment you stipulate a markup for the credit sale, whether murābahah or musāwamah, the delayed period gets linked to the markup, which can then be

increased or decreased according to the lengthening or shortening of the period. This is exactly what is meant by interest with a premium and discount.

6.4 Completing the Statements of Imām Muḥammad and Ibn ʿAbidīn

It is a matter of concern for us that when scholars quote from the texts of the jurists they usually quote a part that is relevant for their discussion and ignore the rest. This leads to a confusion in the mind of the reader and can also distort the concepts. In the present discussion we are concerned with two passages that we have reproduced from Justice Taqi Usmānī’s book referred to above. The first is a statement by Ibn ʿAbidīn and the other is the statement of Imām Muḥammad made in his Kitāb al-Ḥijjah ʿalā’ Ahl al-Madīnah, that is, the evidences he has adduced in response to the jurists of Madinah, which means Imām Mālik and his companions. We, therefore, have recourse to the original texts to complete their statements.

We sincerely hope that the position taken by the schools with respect to bayʿ al-ʿīnah or transactions resembling it will be quite clear.

6.4.1 Ibn ʿAbidīn on bayʿ al-ʿīnah

In the above section we stated, “A further surprise for us is that Ibn ʿAbidīn, who was a great jurist and scholar, should overlook this problem and not criticize it.” We will not be doing justice to this great jurist if we do not withdraw our words about him. To do so we go to the actual text and record the complete statement by the jurist. Ibn ʿAbidīn actually stated this:

(Not to be taken from the murābahāh…) The form here is that he purchases something with ten on cash (spot) basis and then sells it to the other for twenty for ten
months. If he repays after the completion of five months or dies after this period, five are to be taken and five are waived.

I would say: It is like giving a loan to the person and selling him goods with a known price by introducing a period of delay for it. Thus, the calculation of the price for him will be to the extent of the period that has passed. Ponder over this. (He gave the ‘illah as compassion ...), that is, al-Ḥanūṭī provided this ‘illah for staying away from the allegation of ribā, because it belongs to the category of ribā that is linked to it in reality. The reasoning is that the profit is in lieu of the ajal (period), because the period, even though it is not wealth and no part of the price is in lieu of it, has been considered māl (wealth) in murābahah when the period is mentioned in lieu of the increase in price. If the entire price is recovered prior to the termination of the period, it amounts to taking it without a counter-value.\(^6\)

The lines in the middle of the passage were omitted from the source that we relied upon in the previous section. Especially relevant is the sentence that we have rendered in bold.

Ibn ‘Abidin’s complete statement confirms what we have been saying. The hypothetical mentioned in the previous section is in reality like an ‘īnah transaction that has as its purpose the creation of a loan with ribā. It is based not on murābahah, but on the ordinary credit sale. It is being called murābahah in order to separate the markup from the basic loan so that a discount can be visualized. Allah knows best.

6.4.2  Imâm Muḥammad al-Shaybānî on bay‘ al-‘inah

The passage from Imâm Muḥammad that we reproduced above was not complete. The complete passage is quite instructive and we now reproduce it from the original text.

Imâm Muḥammad ibn al-Ḥasan al-shaybānî (God bless him) said: Abû Ḥanīfah (God be pleased with him) said about a person who has a debt claim of one hundred dinārs on another for a specified period. When the debt becomes due, the debtor says to him: “Sell me goods whose cash (spot) price is one hundred dinārs for one hundred and fifty dinārs with a delay.” This is valid, because the two parties have not made any kind of stipulation, and have not mentioned any kind of stipulation that will render the transaction fāsid. The jurists of Madīnah said: This is not valid.

Muḥammad said: And why is this not valid? (They argued:) Do you not see that when a person has a debt claim against another, Allah has made it ḥarām for him that he sell him something so as to make a profit from him. They said: The reason is that we are apprehensive that this will become a means (dhari‘ah) towards ribā. In response it is said to them (by Muḥammad): And you declare the transactions of people void (bāṭil) on the basis of your apprehensions that you conceive, without indicating a condition that they have stipulated (linking the two transactions) and without indicating a fāsid sale that is well known for its fasād. You do this only on the basis of what you guess and think will happen.

A man undertakes trade with another frequently, and he is his well known trading partner in these transactions, then it is necessary that he will have debt claims on him. Thereafter, if he sells him goods that amount to one hundred on cash basis for one hundred and fifty with a period of delay, can we say that this is how people undertake transactions? If they delay, they will face increase in rates
There is nothing wrong with this. If such trading is prohibited for the people it will lead to most sales becoming prohibited.

They said: We hold that he sold to him to replace his debt. It is said to them in response: The two did not mutually mention the debt in greater or lesser part.

They said: We came to know that they did not mention the debt in part or full, but we fear that the sale between them was because of this. It is said to them in response: What do you think, will you permit the sale like we permit it or will you prefer that he recover his debt from his companion as it has become due? They said: Of course, he should first recover his debt from him. It is said to them: If he recovers his debt, the sale will then become valid. On what basis have you nullified his sale (in the first place)?

It becomes necessary for you to say: “A person who has a debt claim against another is not permitted to enter into a trade transaction with this person from which he derives a profit.” What can be worse that this! A man undertakes trade with people who owe him debts, is he not to sell goods to them, a slave girl, or anything that fetches him a profit? It is not proper that these be denied to you, nor is it proper that sales be declared void on the basis of conjectures, because conjectures may be right or wrong.7

This is a fascinating discussion in which Imám Muḥammad is saying that things should not be declared unlawful on the basis of mere whims. We may add to this that they should not be declared lawful either on the basis of mere whims, under the guise of al-ṣu lū fil-ashyā’ al-ibāḥah. In each case, a sound and stable evidence should be adduced.

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In this passage, Imām Muḥammad is saying that a transaction that appears to be an inah transaction is not to be prohibited unless the parties link the two transactions in some way, like wa’d or something in the offer and acceptance. The jurists of Madinah (Ahl al-Madinah) are saying that it should be prohibited on the basis of sadd al-dhāri‘ah, that is, blocking the lawful means to an unlawful end. Imām Muḥammad considers such blocking of lawful means to be based upon whims and conjecture.

The most important point to note here is that this view expressed by Imām Muḥammad is exactly the same as the one expressed by Imām al-Shāfī‘ī in the text that we reproduced earlier. In fact, that passage in itself appears to be based upon this discussion by Imām Muḥammad.

6.4.3 Conclusion about bay‘ al-‘inah

We draw the following conclusions from the complete statements of the jurists quoted above:

1. In a combination of two transactions that appear to be related on the face of it, the deferred sale is not to be prohibited, unless the parties somehow link the two transactions in some way, whether by wa’d or by mentioning the debt. This is the view of the Ḥanafī and the Shāfī‘ī jurists.

2. The Mālikīs prohibit the sale on the basis of suspicion of ‘inah and sadd al-dhāri‘ah.

3. When the bay‘ mu‘ajjal is permitted, being unrelated to a debt, the markup cannot be stated separately, because stating it separately on account of delay will convert the transaction to one of ribā, as stated by al-Sarakhsi and Ibn ‘Ābidīn.

In the entire text that has preceded in this book there may have been some repetition, but the aware reader will understand that
it cannot be avoided as the arguments of the scholars have to be answered.

6.5 The Rules Derived

The rules derived from this discussion are as follows:

1. In a murābaḥah sale delay in the payment of price or the markup is not permitted. There is no case in fiqh, except for the defective hypothetical mentioned above, where delay has been associated with murābaḥah. Here too it is not murābaḥah in reality, but a credit sale that is used for ‘īnah.

2. In a sale with a delayed price, stating the markup separately is not permissible. The moment it is stated separately, it becomes linked to the ajal (period) and this converts the transaction into one of ribā.

The conclusion is that in any kind of sale with a delayed period the mentioning of a markup will lead to ribā. It is for this reason that Islamic law does not permit the mentioning of the increase due to delay as a separated markup.
Chapter 7

Stated Profit Essential in *Murābahah* is Missing From the New Contract

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7.1 Profit or Markup Must be Stated Clearly in Murābahah

We have been stating again and again that the profit charged by the seller in the murābaḥah contract must be clearly stated. This is essential to know what the cost is as that is the essence of this contract. We are repeating this point here again as the discussion that follows is based on this crucial element. This element is also linked with the credit sale.

In the discussion below, we shall first explain the nature of the profit in a credit sale. This will then be compared with the nature of the profit in the contract called Murābaḥah lil Āmir bish-Shirā‘, which is the basis of Islamic banking.

7.2 The Usual Credit Sale has two Profits

It is well known that a credit sale has two profits within it. It is easy to understand, however, we will explain it through a few diagrams.

![Diagram showing regular sale for cash/spot with profit stated and not stated]

When a person sells goods on cash or spot basis, it is obvious that he is charging a profit for that is his earning. Thus, in a musāwamah contract or the sale with a negotiated cash price,
a single price is stated. The seller is under no obligation to state the profit separately nor does he state it. Likewise, he is under no obligation to state the cost nor does he state it. Yet, whatever the price, a profit is being charged by the seller. If the seller bought the goods for $90 and he is charging a profit of $10 for a spot transaction, the price will be $100. A single price is stated, which in this case will be $100. The buyer is not aware that the goods were bought for $90. This is shown in the figure above.

If the buyer wants that the same price may be deferred for a period, say one year, the seller, if he is doing business, is definitely going to charge a higher price as compared to the price in the spot transaction. Thus, the seller may demand a price of $110 instead of $100. In other words, an additional profit of $10 will be charged by the seller. This additional profit is over and above the regular profit of $10 and is charged because he will be deprived of his capital of $100 for one year. The additional $10 is charged for use of the capital of $100 by the buyer for one year. The price, therefore, is made up of the cost and two profits, or $90+$10+$10 amounting to a total of $110. The structure of the credit sale is shown below:

**CREDIT SALE WITH DELAY**

**BAY` MU’AJJAL**

\[
\begin{array}{c}
\text{Cost of} \\
\text{Goods} \\
\text{NOT STATED}
\end{array}
\begin{array}{c}
\text{Reg} \\
\text{Profit} \\
\text{NOT STATED}
\end{array}
\begin{array}{c}
\text{Profit} \\
\text{for} \\
\text{Delay} \\
\text{NOT STATED}
\end{array}
= 
\begin{array}{c}
\text{Price} \\
\text{STATED}
\end{array}
\]

Islamic law permits the charging of this additional profit for delay in credit sales, as we have been trying to show in this book right from the discussion of the verse of *ribā*. In reality, the seller must charge this additional profit. If he does not charge an additional profit, he is passing on a benefit to the buyer, which is the use of the capital for one year, for which the buyer is not paying
any counter-value. Not paying a counter-value for use of capital or goods amounts to \( \text{ribā} \) arising from delay. This is clear from the statements of al-Ṣarakhsī and Ibn ʿAbidīn above.

If the seller decides not to charge an additional profit then he is making a gift of the use of the capital to the buyer. This would not be a credit sale, but some other transaction resembling a charitable loan, as in the \( \text{tawliyah} \) sale. He can do this if he is himself the owner of the capital, but if he is an agent selling for a principal, he has no right to grant such relief or gift.

The charging of two profits is, therefore, essential in a credit sale or \( \text{bayʿ muʿajjal} \). We may repeat here that the seller will inform the buyer of the additional profit on account of delay, but it cannot be stated separately in the contract or in the offer and acceptance. The price of $110 alone will be stated along with the condition of delay. Stating the additional profit in the contract will render the contract \( \text{fāsid} \) as it will invoke the provisions of \( \text{ribā} \). This has been elaborated in detail above.

### 7.3 The Hybrid Contract Must Have Two Profits But it Talks About a Single Profit

The hybrid contract, \( \text{Murābahah lil ʿAmir bish-Shirāʾ} \), is a combination of the credit sale and the traditional \( \text{murābahah} \). It must have two profits as shown in the figures below.

In reality, \( \text{Murābahah lil ʿAmir bish-Shirāʾ} \) is just a normal credit sale that talks about a single profit and states it separately. In short, it violates the provisions of Islamic law on two counts: (1) it does not state the profit of \( \text{murābahah} \), which is required—it merely states the profit for delay; and (2) it states the profit for delay separately in the contract, and this is not permitted as discussed above. We feel that this point needs to be explained in a little more detail.

The regular, traditional, \( \text{murābahah} \) contract consists of a cost, say $90, and a stated profit, say $10. This brings the price to $100, and it is a basic requirement of the contract that all three
be stated or at least the cost and the profit be stated clearly. The transaction is depicted in the diagram below.

**REGULAR MURABAHAH**
**WITHOUT DELAY**

\[
\begin{align*}
\text{Cost of Goods} + \text{Profit} &= \text{Price} \\
\text{STATED} &+ \text{STATED} \quad = \quad \text{STATED}
\end{align*}
\]

When delay is incorporated into the *murābahah* contract, it must have its original stated profit of $10 as well as an additional profit for delay. The new form of credit sale must have the form shown in the figure below.

**COMBINING BAY’ MU’AJJAL**
**WITH MURABAHAH**

\[
\begin{align*}
\text{Cost of Goods} + \text{Reg Profit} + \text{Profit for Delay} &= \text{Price} \\
\text{STATED} &+ \text{STATED} \quad = \quad \text{STATED}
\end{align*}
\]

**THIS COMBINED SALE SHOULD HAVE**
**TWO PROFITS: REGULAR PROFIT**
**PLUS PROFIT FOR DELAY**

Thus, the components of the delayed price should be $90+$10+$10. The total price should come to one hundred and ten dollars. This, however, is not the case with *Murābahah il Amīr bish-Shirā*. It merely states a single profit and introduces delay. In our view, this stated profit is actually the profit for delay. The profit of the *murābahah*, which must be stated, has been omitted. The structure of the hybrid contract must be like that in the diagram below:
In actual practice, however, the contract is merely a *fāsid* credit sale as shown in the figure below:

**MURABAHAH LIL-`AMIR BISH-SHIRA HAS A SINGLE STATED PROFIT**

\[
\text{Cost of Goods} + \text{Profit for Delay} = \text{Price}
\]

**THIS COMBINED SALE SHOULD HAVE TWO PROFITS: REGULAR PROFIT PLUS PROFIT FOR DELAY**

Our conclusion is that *Murābahah lil-`Amir bish-Shirā*’ is not a contract of *murābahah* at all; it is merely an ordinary credit sale in which the profit has been stated in violation of the rules of Islamic law.

Why do we say that the single profit is on account of delay and not *murābahah*? We conclude this from the writings of
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scholars. Justice Taqi Usmani, elaborating delay in murābahah, says:

As for the excess in specified profit over the price at which the bank has purchased the goods, and the delay in price up to a specified period, there is no obstacle for that either. A contract like this is valid according to the majority of the jurists.

He then goes on to quote al-Tirmidhī about so much spot and so much for delay. We have provided this quotation above. This shows that he has a single profit in mind and that is on account of delay. In addition to that it is obvious that the banks are interested in creating a transaction that resembles a cash loan with interest. They are only interested in stating the interest in lieu of delay and that is the only thing they are concerned with.

7.4  Not Mentioning the Profit or Markup Makes the New Hybrid Contract Unlawful

From the above we conclude that the profit mentioned in murābahah to the purchase orderer is the profit on account of delay introduced into the traditional murābahah contract. The profit on account of murābahah itself is not mentioned.

We have stated again and again that mentioning the profit in murābahah is essential otherwise the contract is void. In our example above, the structure of the price should have been $90+$10+$10 amounting to a total of $110. It is, however, $90+$10 amounting to a total of $100. The profit of $10 on account of murābahah is missing. This renders the contract void.
7.5 Mentioning the Profit or Markup Makes the New Hybrid Contract Unlawful

If it is claimed that this profit of $10 is actually the profit of *murābahah* and the bank is not charging an additional $10 on account of delay, even then the contract is void. It is void on two counts:

- In a credit sale, the profit cannot be mentioned separately. This is based on the analysis we undertook with respect to the credit sale. When we sell on the basis of *bay' mu’ajjal*, the additional profit may be explained to the buyer, but it cannot be stated separately in the offer and acceptance. Stating the profit separately makes the contract *fāsid*.

- The bank has no right to omit the excess profit on account of delay. It is a legal entity dealing with funds that belong to other people. It must charge an excess on account of delay. The bank cannot pass on a counter-value without compensation to the other party. The contract is void for this reason as well.

7.6 *Murābahah* to the Purchase Orderer is in Reality *Bay‘ al-‘īnah* That is *Fāsid*

*Murābahah* to the purchase orderer is actually the buy-back agreement that is structured upon the transaction described in Imām al-Shāfi‘ī’s text recorded above, which in turn is based upon Imām Muhammad’s text as shown. The contract, however, is void on the basis of what is stated in his text as well as on the basis of what we have said about the credit sale. It is to be noted that *bay‘ al-‘īnah* described in the Imām’s text is not based upon *murābahah*, but on the ordinary credit sale. The contract is void on the basis of the following two reasons:
• It is based upon the idea of a binding promise (wa’d), which has been rejected by Imām al-Shāfi‘ī himself. The concept of a condition relating the two transactions in some way was rejected by Imām Muḥammad as well.

• The profit cannot be stated separately in the offer and acceptance of a credit sale, whether we call it murābahah or bay‘ mu‘ajjal. If it is stated, the contract becomes void on account of ribā.
In this last chapter we list the conclusions that were drawn during the discussions in the previous chapters. We state these conclusions in the form of rules, so that they can be applied to other transactions as well.
8.1 Rule 1: Stating a markup separately in a credit sale is unlawful

After a detailed discussion of the credit sale, we came to the conclusion that an excess can be charged in such a sale on account of a delay. The excess can be stated during the negotiations, but it cannot be made part of the offer and acceptance that finalize the sale. The buyer has to choose either the spot sale or the credit sale, and in both the final price is to be mentioned in the offer and acceptance. This conclusion is based on the tradition recorded by al-Tirmidhī. The meaning arises from the text of the tradition and this is the meaning that is unanimously adopted by the jurists.

The rationale for this is that when a separate amount is related to the period it becomes similar to ribā. This was shown in a detailed discussion of the opinions of later jurists recorded by Justice Taqi Usmani. The conclusion was that when you relate the excess to a period of delay, the excess can be increased or decreased with an increase or decrease in the period of delay. This is the meaning of ribā al-nasi‘ah.

8.2 Rule 2: A murābaḥah contract cannot be delayed

The contract of murābaḥah does not accept delay. The earlier jurists never permitted or mentioned such a delay. A case mentioned by Ibn ‘Ābidin from the later jurists is a fake hypothetical that is void in itself and cannot be used as an example. The basic reason is that bay‘ mu‘ajjal does not accept the statement of the profit separately, but statement of the profit separately is an essential element of murābaḥah. The two transactions, murābaḥah and bay‘ mu‘ajjal, are incompatible and cannot be combined.
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We may add a more technical reason here why delay is not acceptable to the contract of murābahah. Al-Kāsānî has been saying throughout that murābahah is the sale of the “first price” plus an addition. This means that the amount paid for this first price must be the same as the first price in terms of type as well as value. When the second price is delayed it does not remain the same as the first price. With delay, over time, it loses value. A delayed second price can never be equal to the first price. This in itself should render the contract of murābahah void.

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Rule 3: All that the bank can do in a delayed sale is to mention a single price, but the transaction does not accept the idea of waʿd

When we apply the rules above, we are left with the ordinary bayʿ muʿajjal. The bank can undertake this with the client. This is to be done with two conditions: (1) The markup cannot be stated separately; (2) It cannot be linked through waʿd with another spot transactions so as to create an ʿinah type contract. The other transaction can be undertaken as long as the two transactions are not linked. If the two transactions are related, each of the parties will have on option (khiyār) not to go ahead with the second transaction that incorporates a delayed period.

As the markup cannot be stated separately, the discussions of using LIBOR or KIBOR become irrelevant. We have, therefore, not given them any place in this book.
8.4 Rule 4: *Murābaḥah lil-Āmir bish-Shirā’* or *Murābaḥah* to the Purchase Orderer is Unlawful

The final rule that we derive from the entire discussion in this book is that *Murābaḥah lil-Āmir bish-Shirā’* or *Murābaḥah* to the Purchase Orderer is absolutely unlawful and is being undertaken in gross violation of the norms of *sharī‘ah* and *fiqh*. In reality, it amounts to a distortion of the rules of *fiqh*.

We fully understand that the Islamic banks will not give up this contract whatever arguments we advance. Our main concern is that the money of the small investor is being passed on for use to the rich people under the pretext that this is an Islamic transaction. The ordinary Muslim is being asked to deposit his money with the claim that the bank is undertaking “shariah compatible” transactions. We are not sure whether such a demand is morally or legally correct.
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The approach of the present series is to provide adequate information about Islamic banking and the products offered. Yet, the main purpose is to show that more important than Islamic banking is Islamic commerce itself, which regulates the daily economic activity of the ordinary Muslim. Another purpose is to monitor developments in the field of Islamic banking to check whether the rules of fiqh or Islamic law are being observed. We sincerely feel that this task of monitoring cannot be performed by those who are paid by Islamic banks or are benefiting directly or indirectly from this activity.

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