

RIBA IN SHARES AND SECURITIES: ANALYTICAL STUDY

707649



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DECLARATION

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I, Naureen Akhtar bearing the university registration number 27-FSL/LLMICL/F07, declare in the name of Allah that my thesis entitled,

“Riba In Shares and Securities: an Analytical Study”,

Submitted to the Department of Shariah, Faculty of Shariah and Law, is a genuine work of mine originally conceived and written down by me under the supervision of Associate Professor Dr. Abdullah Rizk Al Muzaaini, by Allah’s will and approbation.

I do, hereby, understand the consequences that may follow, if the above declaration be found contradicted and/or violated, both in this world and in the Hereafter.

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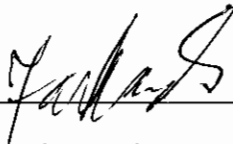
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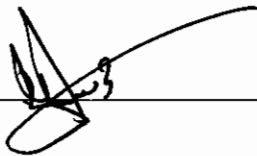
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I dedicated my research work to Allah Almighty Who
created me and made me able to use my abilities and
strength to complete my task.

And this research work is also dedicated to Prophet
Muhammad (صلی اللہ علیہ وسلم).

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ABSTRACT

Riba is an increase or addition over and above the principle sum. It is stipulated in an exchange of property for property. It is an increase without any corresponding consideration and it is strictly prohibited in Shariah.

A company is a voluntary registered association of natural persons, having a separate legal entity, a perpetual succession, shared capital divided into transferable shares, with limited liability and a common seal. Company is in need of capital to run the business and to earn the profit. Capital denotes the amount of money which is used by the company for the commencement of business. A company usually raises its capital by issuing equity and debt securities. Equity securities include i) common stock and Preferred stock ii) and Derivatives. While debt securities include i) Short Term Loans consist of Unsecured or Secured Notes ii) and Long Term Loans consist of debentures (Unsecured) and Bonds (Secured). From equity securities only shares and from debt securities only debentures have been discussed in the proceeding chapters.

A share is a unit by which the interest of a shareholder in a company can be measured in terms of a sum of money. The rights and liabilities of the shareholders are to be ascertained in accordance with the nature and number of shares acquired by the shareholders. A share represents the proprietary relationship between a shareholder and a company. Shares can be categorized into different types like preference shares, ordinary shares, redeemable shares, deferred or founders' shares, stock, non-voting shares, employees' shares and qualification shares. In Islamic law word *Saham* (شاهم) is used for share. According to Islamic law; it is a document or instrument which represents a share

of equal value in the capital of the company which cannot be divided further but can be transferred through any commercial manner or way. Share represents the rights of shareholders in the company who contribute to the capital of the company. According to Muslim Scholars a share is an allotment of a portion or part to the shareholder in the stock or assets of the company. Trading with share is permissible or not, depends upon the nature of the share.

Besides share a company can also raise its capital through debentures. Debenture is an acknowledgment of indebtedness, usually given under seal and it created a charge on the unencumbered assets of the company issuing it. Debenture-holders have rights against the company only but never in the company itself. Like shares, debentures can be categorized into many different types like mortgage, convertible, redeemable, irredeemable, registered, bearer and unsecured debentures. In Islamic law it is an instrument of debt for a long period of time, having face value, can be transferred, gives its holder the right to demand an amount written on it and also a fixed rate of return on it irrespective of the fact that whether company is earning profit or not. According to Muslim scholars, trading with *sanadat* (سندات) is strictly prohibited. Therefore Muslims are required to go for the alternatives.

INTRODUCTION

i. SIGNIFICANCE AND IMPORTANCE OF THE SUBJECT:

All praise is to Almighty Allah, the undisputed lord and the creator of this magnificent universe and all that exists in it. May His peace and blessings shower on his chosen and final messenger, the best of His creation Muhammad (peace be upon him), his family, companions and all those who follow the path of guidance to the end of the time.

The topic of this research work is "**Riba In Shares And Securities: An Analytical Study**". The purpose of this research is to ascertain the nature of shares and debentures in Common Law as well as in Islamic law and to highlight the presence of element of riba in some of the types of shares and in debentures. A lot of work has been done already on shares and debentures both in Common and in Islamic law, but in this particular research work an attempt has been made to make the comparison between Common Law and Islamic Law on the relevant topic and after making comparison some recommendations have been made.

Raising money by issuing shares is a viable option for a company because investors have to rely on the company's performance in the future to get their money back. Debt financing can take the form of financing through loans from financial institutions (e.g. banks and finance companies) or through the issuance of notes, commercial papers or bonds. In all these situations the lenders are usually paid a fixed rate of return irrespective of profits or losses incurred by the borrowing business. Because of their fixed nature of payments on debt financing, such instruments need to be more clearly examined.

The sad reality is that though every one concedes that Islam prohibits interest, there is not a single Muslim country which is running its financial institutions without resorting to interest.

The injunction on “Riba” in Islam re-awakened the Muslims. To get rid off the menace of interest bearing transaction Muslims all over the world awakened in the mid of this century, to revive the Islamic system of economics. Of course concrete efforts have been made to press hard upon the need of a change in the present economic scenario which revolves around the element of “interest”.

Islamic injunction aims at ameliorating the masses by ensuring social justice. Interest is that worse menace which continues sucking the blood of the needy inspite of non-generating capacity in the body. It is therefore, imperative to spotlight the presence of riba or interest in some of the types of shares and in debentures so that the Muslims will neither invite the wrath of Allah in this life nor in life hereafter.

ii. RESEARCH METHEDODOLOGY:

This is a comparative and analytical research work in which methods of comparative and analytical research have been used. In the first chapter of this research work meaning or riba, shariah ruling on riba, types of riba and underlying cause of prohibition of riba have been discussed comprehensively.

In second chapter I explained the origin and meaning of capital, sources of capital (share and loan capital). At the same place concept of *maal* given by Islamic Law is also discussed there. Afterwards I pointed out the sources of financing of the company. Brief

concept of *Sharikah tul Musahama* and sources of financing of *Sharikah tul Musahama* is given. At the end of this chapter history of emergence of shares and debentures has been given.

The third chapter of this research work is about the comparative and analytical analysis of shares. Meaning and nature of shares, classes of shares, rights of shareholders, and dividend on shares and characteristics of shares have been discussed in this chapter. Afterwards Shariah rulings on shares have been discussed in detail. At the end of this chapter Shariah rules for dealing with shares have been given.

The fourth chapter of this research work is about the comparative analysis of debentures. Power of borrowing, power to give security and different forms of borrowing has been discussed initially. From different forms of borrowing only debentures have been discussed in this chapter in detail. Meaning and nature of debenture, types of debentures, coupons attached to debentures, status of debenture holders, periods of debentures, concept of *pari passu*, rights and remedies of debenture holders, characteristics of debentures, similarities and differences between shares and debentures have been discussed in this chapter. Afterwards Shariah rulings on debentures have been discussed in detail with arguments at the appropriate place.

At the end conclusion and some recommendations are given in this research work.

iii. LITERATURE REVIEW

There are a lot of excellent books available for the study of shares and debentures from Common Law perspective as well as from Islamic point of view. In order to complete my

research work, I consulted not only the books or articles written in English language but also I resorted to books and articles written in Arabic and in Urdu language: Some of the important writings in this connection are introduced here:

- 1) "The Concept of Riba and Islamic Banking" by Imran Ahsan Khan Niyazee is a master piece in writing on the topic as it provides a comprehensive material on the topic. "Islamic Law of Contracts and Business Transactions" by Dr. Muhammad Tahir Mansoori and "Understanding Islamic Finance" by Muhammad Ayub also provide a good material on the topic of riba.
- 2) "Gower's Principles of Modern Company Law" by L.B.C. Gower, D.D. Prentice, B.G. Pettet. "Ranking & Spicer's Company Law" by J.M. Gullick. "Northey & Leigh's Introduction to Company Law" by L.H. Leigh, V.H. Joffe, D. Goldberg. "Company Law" by John H. Farrar, Nigel Hannigan, O.P Wylie. "Company Law Fundamental Principles" by Stephen Griffin. All these books deal with shares and debentures in great length from Common Law perspective. These books are master piece in writing on the relevant topic.
- 3) "Law for Business" by A. James Barnes, Terry Morehead Dworkin and Eric L. Richards provides me the excellent hierarchy of equity and debt securities issued by the company in order to raise its finance.
- 4) "Mercantile Law In Pakistan" by A.G. Chowdhry. "Practical Approach To Companies Ordinance 1984" by Nazir Ahmed Shaheen. "Company Law and Practice In Pakistan" by Khawaja Amjad Saeed. "Company Law In Pakistan" by A.G. Chaudhary. These are some of the important books which have been used

extensively while writing on the topic. These books are written in accordance with the Companies Ordinance 1984 of Pakistan.

- 5) "*Al Muammalat Al Malia Al Muasarra Fii Duu Al Fiqh wa Shariah*" by Dr. Muhammad Rawas Qilla Jai. "*Al Musariif Al Islamia Beena Al Nazaria Wa Tatbeeq*" by Dr. Abdul Razaq Raheem Jaddi Al Hetti. "*Bahoos Fii Al Iqtissad Al Islami*" by Dr. Ali Muhuddin Ali Al Qirra Al Daggi. "*Al Sharikat Fii Al Shariah Al Islamia wa Al Qanoon al waddi*" by Dr. Abdul Aziz Izzat ul Khiyyat. These are some of the books written in Arabic language which have been consulted while writing on the Islamic perspective of the topic.
- 6) "*Al Ashumm al Jaizza Wa Al Mahzoora*" by Dr. Saad Bin Tarkii Al Khaslan. This is an excellent article written on Shariah rulings on shares. This article also explains different types of shares along with their legal validity. The author of this article supported the view points with relevant arguments and references.

Though a lot of work has been done on shares and debentures in Common Law as well as in Islamic Law. But no one has made a comparative analysis of shares and debentures. So in this research work an effort has been made to make the comparative analysis of shares and debentures and after making comparison an effort has been made to make shariah rules for shares and debentures. At the end of this research work some recommendations have also been made.

iv. STATEMENT OF THE RESEARCH PROBLEM/THESIS STATEMENT

- 1) What is meant by riba and what is Shariah ruling on it?
- 2) What is the origin and meaning of capital?

- 3) What are the sources of financing of the company?
- 4) What is the history of emergence of shares and debentures?
- 5) What is the meaning and nature of shares?
- 6) What are different classes of shares?
- 7) What are different rights of shareholders?
- 8) What are the characteristics of shares?
- 9) What are the shariah rulings on shares?
- 10) What are the Shariah rules for dealing with shares?
- 11) What is meant by power of borrowing and what are different forms of borrowing?
- 12) What is meant by debentures?
- 13) What are different types of debentures?
- 14) What is the status of debenture holder?
- 15) What are the rights and remedies of debenture holders?
- 16) What are the characteristics of debentures?
- 17) What are the similarities and differences between shares and debentures?
- 18) What are the Shariah rulings on debentures?
- 19) What are the Shariah rules for debentures?

v. OBJECTIVES OF RESEARCH

The underlying purpose of this research is to:

- 1) Comparative analysis of shares and debentures.
- 2) Highlight the effect of involvement of riba in certain types of shares and in debentures on their legal status.

- 3) Clear the legal discrepancies in the validity of shares and debentures in Islamic Jurisprudence.
- 4) Point out the areas where riba exists impliedly or explicitly in shares and debentures.
- 5) Express the opinions with arguments of different Muslim scholars on shares and debentures.
- 6) Attract the attention of people towards the presence of riba in some of the types of shares and in debentures.
- 7) Awake the Muslims regarding the boundaries of Shariah.
- 8) Encourage the Muslims to invest their money through such financial instruments which are interest free.

In the end alternatives are suggested while making recommendations so that Muslims can lead their lives in conformity with the Shariah rulings and can refrain from indulging in riba which is strictly prohibited by Islam.

CHAPTER 1

THE CONCEPT OF RIBA & ITS PROHIBITION IN ISLAM

1.1 MEANING OF RIBA

الربا في لغة العرب: الزيادة.¹

Literally the word riba means “an increase”.

Allah Almighty said in the Holy Quran:

”و ترى الأرض هامدة فإذا أنزلنا عليها الماء اهتزت وربت و أنبتت من كل زوج بهيج”²

“And you see the earth barren, but when We send down water (rain) on it, it is stirred (to life), and it swells and puts forth every lovely kind (of growth)”.

There is unequivocal consensus among jurists and exegesists that the word “Riba” signifies “addition”, “growth” or “excess” at the literal level.³ However there is difference of opinion among Muslim scholars that what constitute riba.⁴

عرفه الحنفية بأنه: فضل خال عن عوض بمعيار شرعي مشروط لأحد المتعاقدين في المعاوضة⁵

According to Imam Abu Hanifah riba is the stipulated excess without a counter-value for one of the contracting party in a sale.

¹ Aweesh, Abdul Haleem, *Mussuah Al Fiqh Al Islami Al Muaasir*, (Darul Wafa), 1st Edition 2005, Vol. 2, p. 50.

دكتور عبد حليم عويش، موسوعة الفقه الإسلامي المعاصر، (دار الوفاء)، الطبعة الأولى 2005، جزء ثاني، ص، 50.

² Surah Al Haj: 5.

³ Kazmi, Aqdas Ali, “Riba: an epistemological interpretation”, Dawn Islamabad, Sunday, 28th November, 2010.

⁴ Ayub, Muhammad, *Understanding Islamic Finance*, (England: John Waley & Sons Ltd.), p. 44.

⁵ <http://www.jameataleman.org> (last visited: 30th Nov, 2010.)

وعرفه الشافعية بأنه: عقد على عوض مخصوص غير معلوم التماثل في معيار الشرع حالة العقد أو مع تأخير في البديلين أو أحدهما⁶

According to Imam Shafi technically, it is used to designate a consideration without corresponding consideration which is unknown and having no similarity in accordance with the standard of legislation at the time of contract or with a delay in exchanging things or in one of the consideration.

وعرفه الحنابلة بأنه: تفاضل في أشياء، ونسء في أشياء، مختص بأشياء، ورد الشرع بتحريمها— أي تحريم الربا فيها— نضاً في البعض، وقياساً في الباقي منها

According to Imam Ahmad Bin Hanbal riba is the stipulated excess in specified things or delay in specified things, it is prohibited in Shariah through a clear text sometimes and sometimes it is prohibited through analogy.

في الشريعة الربا هو الفضل الخالي عن العوض المشروط في البيع.⁷

In Shariah riba is the stipulated excess without a counter-value in a sale.

1.2 SHARIAH RULING ON RIBA (حكم الربا)

It is important to note that there is no difference of opinion among Muslim scholars regarding the prohibition of riba and all the Muslim sects consider the involvement in any

⁶ Aweesh, Abdul Haleem, *Mussuah Al Fiqh Al Islami Al Muaasir*, (Darul Wafa), 1st Edition 2005, Vol. 2, p. 50.

دكتور عبد حليم عويش، موسوعة الفقه الإسلامي المعاصر، (دار الوفاء)، الطبعة الأولى 2005، جزء ثاني، ص، 50.

⁷ Nyazee, Imran Ahsan Khan, *The concept of Riba and Islamic Banking*, (Rawalpindi: Federal Law House), p. 28.

transaction through which money is earned on the basis of riba a great sin. This is because of the reason that the Holy Quran and Sunnah strongly condemn riba.⁸

1.2.1 PROHIBITION OF RIBA IN QURAN

A number of verses from the Holy Quran prohibit riba expressly. During Makkan period some indication was made about the displeasure against riba. Riba was expressly prohibited sometime before the battle of Uhad in the year 3 AH. Final and repeated prohibition came in the year 10 AH, just about two weeks before the passing away of the Holy Prophet (عليه الصلاة والسلام).⁹ From the Holy Quran, verses on riba are given below in order of revelation:

First Revelation:

"وَمَا آتَيْتُمْ مِنْ رِبَا لِيَرْبُو فِي أَمْوَالِ النَّاسِ فَلَا يَرْبُو عِنْدَ اللَّهِ وَ مَا آتَيْتُمْ مِنْ زَكَاةٍ يُرِيدُونَ وَجْهَ اللَّهِ فَأُولَئِكَ هُمُ

الْمُضْطَفُونَ"¹⁰

"And that which you give as riba to increase the people's wealth increases not with God; but that which you give in charity, seeking the goodwill of Allah, multiplies manifold".

Second Revelation:

"وَأَخْذِهِمُ الرِّبَا وَقَدْ نَهَوْنَا عَنْهُ وَأَكْلِهِمْ أَمْوَالِ النَّاسِ بِالْبَاطِلِ وَأَعْتَدْنَا لِلْكَافِرِينَ مِنْهُمْ عَذَابًا أَلِيمًا"¹¹

"And for their taking riba although it was forbidden for them, and their wrongful appropriation of other people's property. We have prepared for those among them who reject faith a grievous punishment".

⁸ Ayub, Muhammad, Understanding Islamic Finance, (England: John Waley & Sons Ltd.), p. 44; Siddiqui, Shahid Hassan, Islamic Banking, (Karachi: Royal Book Company), p. 1; Khan, Abdul Jabbar, Non Interest Banking In Pakistan Concept, Practice and Evaluation, (Karachi: Royal Book Company), p. 2.

⁹ Ibid

¹⁰ Surah Al Rum: 39.

¹¹ Surah Al Nisa: 161.

Third Revelation:

"يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا الرِّبَا أَضْعَافًا مُضَاعَفَةً وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُفْلِحُونَ"¹²

"O believers, take not doubled and renounced riba, and fear Allah so that you may prosper".

Fourth Revelation:

"الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ مِنْ رَبِّهِ فَانْتَهَى فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ- يَمْحَقُ اللَّهُ الرِّبَا وَيُرْبِي الصَّدَقَاتِ وَاللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَثِيمٍ"¹³

"Those who take riba shall be raised like those who have been driven to madness by the touch of the Devil; this is because they say: 'Trade is just like interest' while Allah has permitted trade and forbidden interest. Hence those who have received the admonition from their Lord and desist may keep their previous gains, their case being entrusted to Allah; but those who revert, shall be the inhabitants of the fire and abide their in forever. Allah deprives riba of all blessing but blesses charity; He loves not the ungrateful sinner".

Fifth Revelation:

"يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنْتُمْ مُؤْمِنِينَ- فَإِنْ لَمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِنَ اللَّهِ وَرَسُولِهِ وَإِنْ تَبَتُّمْ فَلَكُمْ رُؤُوسُ أَمْوَالِكُمْ لَا تَظْلِمُونَ وَلَا تُظْلَمُونَ- وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ وَأَنْ تَصَدَّقُوا خَيْرٌ لَكُمْ إِنْ كُنْتُمْ تَعْلَمُونَ"¹⁴

"O believers, fear Allah, and give up what is still due to you from riba if you are true believers. If you do not do so, then take notice of war from Allah and His messenger. But, if you repent, you can have your principal. Neither should you commit injustice nor

¹² Surah Al Imran: 130.

¹³ Surah Al Baqarah: 275-276.

¹⁴ Surah Al Baqarah: 278-280.

should you be subjected to it. And if the debtor is in misery, let him have respite until it is easier, but if you forego it as charity, it is better for you if you realize”.

1.2.2 PROHIBITION OF RIBA IN SUNNAH

A large number of traditions from the Holy Prophet (عليه الصلاة والسلام) are dealing with various aspects of riba. Some of them are related to the prohibition, some of them are related to its sin and some of them are related to the different forms of riba. Only some of them are given below for the sake of brevity so that the concept about the prohibition of different types of riba can be made vivid and clear.¹⁵ Along with the Quranic verses the following traditions of the Holy Prophet (عليه الصلاة والسلام) reiterate the prohibition of riba:

First Tradition:

عن جابر رضي الله عنه قال: "لعن رسول الله عليه الصلاة والسلام آكل الربا و موكله و كاتبه و شاهده و قال هم

سواء"¹⁶

From Jabir (رضي الله عنه): "The Holy Prophet (عليه الصلاة والسلام) cursed the receiver and the payer of interest, the one who records it and the witnesses to the transaction and said:

They are all alike (in guilt)".

Second Tradition:

From Anas Bin Malik (رضي الله عنه): "The Holy Prophet (عليه الصلاة والسلام) said: When one of you grants a loan and the borrower offers him a dish, he should not accept it; and

¹⁵ Ayub, Muhammad, Understanding Islamic Finance, (England: John Waley & Sons Ltd.), p. 46.

¹⁶ Transmitted by Imam Abi Daood In His Sunann, Chapter Wadh Al Riba, p. 249.

اخرجه الامام ابي داود في سننه، جزء 3، باب في وضع الربا، ص، 249.

if the borrower offers a ride on an animal, he should not ride, unless the two of them have been previously accustomed to exchanging such favours mutually”.

Third Tradition:

Zaid Bin Aslam reported that interest in pagan times was of this nature: “When a person owed money to another man for a certain period and the period expired, the creditor would ask: ‘you pay me the amount or pay the extra’. If he paid the amount, it was well and good; otherwise the creditor increased the loan amount and extended the period for payment again”.¹⁷

Fourth Tradition:

The Holy Prophet (عليه الصلاة والسلام) announced the prohibition of riba in express terms at the occasion of his last Hajj, which was the most gathering of his Companions. The Prophet (عليه الصلاة والسلام) said: “Every form of riba is cancelled; capital indeed is yours which you shall have; wrong not and you shall not be wronged. Allah has given His Commandment totally prohibiting riba. I start with the amount of riba which people owe to my uncle Abbas and declare it all cancelled”. He then on behalf of his uncle cancelled the total amount of riba due on his loan capital from his debtors.

Fifth Tradition:

قال اسامة بن زيد أن النبي قال: "لا ربا إلا في النسية"¹⁸

Usamah Ibn Zaid said that the Prophet said: “There is no riba, except in *nasiah*”.

¹⁷ Transmitted by Imam Malik in his book *Muuta*, Chapter no: 418 Riba Fi Daeen, Hadith No: 1362, p. 427.

رواه امام مالك في موطأ، الباب 418 ربا ي دين، ص، 427، رقم الحديث: 1362.

¹⁸ Transmitted in *Saheeh Al Bukhari*, Vol. 5, Hadith No: 2178, p. 408.

اخرجه البخاري في صحيحه، جزء 5، ص، 408، رقم الحديث: 2178.

Sixth Tradition:

و عن عبادة بن الصامت قال: قال رسول الله عليه الصلاة والسلام "الذهب بالذهب و الفضة بالفضة و البر بالبر و الشعير بالشعير و التمر بالتمر و الملح بالملح مثلاً بمثل، سواء بسواء، يدا بيد، فإذا اختلفت هذه الأصناف فبيعوا كيف شئتم إذا كان يدا بيد"¹⁹

From Ubadah Ibn Al Samit: The Holy Prophet (عليه الصلاة والسلام) said: "Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt-like for like, equal for equal and hand to hand; if the commodities differ, then you may sell as you wish, provided that the exchange is hand to hand".

Seventh Tradition:

جاء بلال إلى النبي صلى الله عليه وسلم بتمر برني ، فقال له النبي صلى الله عليه وسلم : (من أين هذا) . قال بلال : كان عندنا تمر ردي ، فبعت منه صاعين بصاع ، لنطعم النبي صلى الله عليه وسلم ، فقال النبي صلى الله عليه وسلم عند ذلك : "أوه أوه ، عين الربا عين الربا ، لا تفعل ، ولكن إذا أردت أن تشتري فبع التمر ببيع آخر ، ثم اشتر به"²⁰

Bilal (رضي الله عنه) once visited the Holy Prophet (عليه الصلاة والسلام) with some high quality dates; the Prophet (عليه الصلاة والسلام) inquired about the source. Bilal explained that he traded two volumes of lower quality dates for one volume of that of higher quality. The Prophet (عليه الصلاة والسلام) said: "This is precisely forbidden! Do not do this. Instead, sell the first type of dates and use the proceeds to buy the others".

Humanity is living under the heavy and unbearable burden of Riba. In other words it can be said that humanity is living under the exploitation of one man at the hands of the other

¹⁹ Transmitted in *Saheeh Muslim*, Vol. 8, Hadith No: 2970, p. 259.

أخرجه مسلم في صحيحه، جزء 8، ص، 259، رقم الحديث: 2970.

²⁰ Transmitted in *Saheeh Al Bukhari*, Vol. 6, Hadith No: 2312, p. 20.

أخرجه البخاري في صحيحه، جزء 6، ص، 20، رقم الحديث: 2312.

and exploitation of one nation at the hands of the other. The eternal message of Allah Almighty is to eliminate this burden from the humanity so that the human race can live in freedom, prosperity and happiness.²¹

The rationale behind the severe verdict against riba is that Islam is against all forms of exploitation and pleads a just system for the common people of the society. Therefore Islam condemns all forms of exploitation particularly the injustice done to the borrower.²²

1.3 KINDS OF RIBA

There are two main types of riba. One of them is riba of debt transaction (ربا الديون، ربا) and other is riba of sale transaction (ربا البيوع) (الجاهلية). Riba of sale transaction is further divided into two types. One of them is Riba Al Nassa (ربا النساء) and the other is Riba Al Fadal (ربا الفضل).²³ Most important of the types of rib are as follow:

1.3.1 RIBA AL NASIA (ربا النسيئة)

It can be defined as:

هو الزيادة في الدين نظير الأجل²⁴

It is the excess in amount of debt against the time period.

1.3.2 RIBA AL FADAL (ربا الفضل)

It can be defined as:

ويكون التفاضل في الجنس الواحد من أموال الربا إذا بيع بعضه ببعض، كبيع درهم بدرهمين أو بيع صاع قمح

بصاعين من القمح و نحو ذلك²⁵

²¹ Kazmi, Aqdas Ali, "Riba: an epistemological interpretation", Dawn Islamabad, Sunday, 28th November, 2010.

²² Siddiqui, Shahid Hassan, Islamic Banking, (Karachi: Royal Book Company), p. 25.

²³ Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, (Islamabad: Shariah Academy), p. 127.

²⁴ <http://ejabat.google.com> (last visited: 30th Nov 2010).

It is the stipulated excess in one of the specie among the species of *riba* at the time of their exchange for instance exchange of one dirham with two dirhams or the exchange of one *saa* of wheat with two *saa* of wheat etc.

1.4 UNDERLYING CAUSE (علة) OF THE PROHIBITION OF RIBA

There is a consensus among Muslim scholars on the point that prohibition of *riba al nasia* and *riba al fadal* is not restricted to the six commodities mentioned in the tradition of Ubadah Ibn Al Samit. So the prohibition can be extended to other commodities which resemble the six commodities with respect to underlying cause.²⁶

Hanafih Point of View

According to Hanafih Jurists the underlying cause in gold and silver is weight (الوزن) and in rest of four commodities the underlying cause of prohibition is measure (الكيل). So according to this interpretation all weighable articles or commodities must fulfill the requirement of equality or sameness in quantity and simultaneous exchange. According to this point of view there is no *riba* in the sale of eggs because eggs are sold by count.

Shafi Point of View

According to Shafi Jurists the underlying cause in gold and silver is the currency value (التمنية) and in rest of four commodities the underlying cause of prohibition is food value (مطعومة). Therefore *riba* is present in vegetables and requirements must be fulfilled.

²⁵ Ibid

²⁶ Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, (Islamabad: Shariah Academy), p. 129.

Maliki Point of View

According to Shafi Jurists the underlying cause in gold and silver is the currency value (الشمية) and in rest of four commodities the underlying cause of prohibition is food value (مطعومة) provided that they can be stored for a reasonable time without perishing. Therefore riba is not present in vegetables as they can not be stored for a reasonable time. The difference between the view points of Imam Shafi and Malik is that the attribute operating in gold and silver according to Imam Shafi is not of general rule while Imam Malik considers the attribute operating in gold and silver of general application.

Hanbali Point of View

There are three versions which are attributed to Imam Ahmad Bin Hanbal which are as follow:

- 1) First version attributed to Imam Ahmad Bin Hanbal is similar to that of Hanafih school of thought.
- 2) Second version attributed to Imam Ahmad Bin Hanbal is very much similar to view point of Imam Shafi and Imam Malik. The underlying cause in gold and silver is the currency value (الشمية) and in rest of four commodities the underlying cause of prohibition is food value (مطعومة).
- 3) The underlying cause in four of the commodities is their being foodstuffs which can be weighable and measurable.²⁷

Zahiri point of View

According to their point of view riba only exists in the six commodities specified in Hadith because they do not accept analogy (قياس) as a source of legislation in Shari'ah.²⁸

²⁷ Ibid, p. 130-132.

This is not the appropriate place to discuss riba in detail. As the topic of this research work is “Riba in shares and securities: an analytical study” and the main objective of this research work is to highlight the effect of involvement of riba in certain types of shares and in debentures on their legal status. So before going into the details of shares and debentures the concept of riba have been discussed comprehensively.

²⁸ <http://www.jameataleman.org> (last visited: 30th Nov, 2010.)

CHAPTER NO 2

THE CONCEPT OF CAPITAL & THE FINANCING OF COMPANIES: COMPARATIVE ANALYSIS

2.1 ORIGIN & MEANING OF CAPITAL

2.1.1 IN COMMON LAW

It is said that no concept in economics is so ambiguous and confusing as capital is. The word “capital” may denote any of the following meaning:

- ❖ Wealth;
- ❖ A factor or means of production;
- ❖ The value of those means of production;
- ❖ The net worth of a business enterprise;
- ❖ The present value of a future sequence of receipts;
- ❖ Money;
- ❖ The money value of assets and possibly other things as well.

Therefore capital is thought of in three different senses:

- 1) Physical terms;
- 2) Value terms; and
- 3) In money terms.

The etymology of the word seems to be the Latin “*caput*” which means head or principal.

In Medieval Latin, constant references can be found to *capitalis pars debiti*, i.e. the

principal sum as distinct from interest. Originally the term seems to be confined to loans of money. Later it took in other assets and acquired a wider meaning than loan. The full phrase is said to be “**capital stock**”. Capital was used as capital stock at least as early as 1635.²⁹

Latham CJ said in the Australian case of *Incorporeal Interest Pty Ltd. V. Federal Commission Of Taxation*³⁰ that,

“It is impossible to say that “capital” has a single technical meaning which prima facie should be attributed to the word in any statutory provision”.

In ordinary sense capital means a particular amount of money with which the business is started.³¹ Capital refers to the net assets of the corporation.³²

In **Company Law** the word capital is used to cover:

- 1) Share capital--- the funds subscribed by members;
- 2) Loan capital--- the funds provided by commercial finance providers and investors holding debentures or debenture stock;
- 3) All funds whether provided by members, creditors or by retention of profits; and
- 4) The assets in which all the funds have been invested.³³

²⁹ Farrar, John H., Furry, Nigel, Hannigan, Brenda, *Company Law*, (London: Butterworths 1985), p. 125.

³⁰ (1943) 67 CLR 508.

³¹ Chowdhry, A.G, *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 68; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 40.

³² Anderson, Ronald A., Fox, Ivan, Twomey, David P., *Business Law*, 11th Edition, (Cincinnati: South-Western Publishing Co.), p. 652.

³³ John H Farrar, Nigel Furry, Hannigan, Brenda, *Company Law*, (London: Butterworths 1985), p. 126.

In company law there is a difference between the company's assets and the capital contributed by the shareholders. The shareholders are not the equitable owners of the company's assets but they are solely and beneficially owned by the company itself.³⁴

Share capital can be raised either at the time of formation of the company for the commencement of the business or latter on, for further expansion of the business. But once it is raised, becomes a permanent liability of the company and can be returned or repaid only at the time of winding up and except in the case of redeemable preference shares.³⁵

A company requires capital for two purposes:

- 1) For the purchase of fixed assets like land, building, machinery, etc., which are to be retained in the business for productive purposes; and
- 2) For purchase of raw materials or goods and for meeting current and recurring expenses of the business.³⁶

2.1.2 CONCEPT OF CAPITAL (رأس المال) IN ISLAMIC LAW

In Islamic law the term used for capital is رأس المال which is defined as:

رأس المال هو مصطلح اقتصادي يقصد به الأموال و المواد و الأدوات اللازمة لإنشاء نشاط اقتصادي و يكون

الهدف من المشروع الربح.³⁷

³⁴ Pennington, Robert R, Company Law, (London: Butterworths 1985), 5th Edition, p. 135.

³⁵ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 115-116.

³⁶ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 98.

³⁷ www.ar.wikipedia.org (last visited: 4th Nov, 2010).

It is an economic term which means money, wealth, physical material and a necessary mean or medium or instrument for economic activities. The primary purpose of capital is to earn lawful profit.

The term is comprised of two words. One of them is رأس which means a primary thing and the other word is مال which means wealth or a thing which can be preserved or accumulated.³⁸ In order to understand the concept of capital in Islamic Law it is necessary to understand the concept of *Māl* (مال) in Islamic law.

2.1.2.1 DEFINITION OF *MAAL* IN ISLAMIC LAW (تعريف المال)

المال في اللغة: كل ما يكتنى ويحوزه الإنسان بالفعل سواء أكان عينا أم منفعة كذهب أو فضة أو حيوان أو نبات أو منافع الشيء كالركوب و اللبس و السكنى. أما ما لا يحوزه الإنسان فلا يسمى مالا في اللغة كالطير في الهواء و السمك في الماء و الأشجار في الغابات و المعادن في باطن الأرض.³⁹

Literally speaking the word *Māl* is implicated on things which can be acquired and possessed by human being either it is tangible or intangible ones like gold or silver or animals or vegetables or utility of a thing like riding on an animal or clothes or living in a house. On the other hand the commodities which can not be possessed by human being are not considered to be *Māl* literally like birds in air or fish in water or trees in forest or minerals in earth.

المال لغة: كل ما يملكه الفرد أو تملكه الجماعة من متاع أو عروض أو تجارة أو عقار أو نقود أو حيوان.⁴⁰

³⁸ www.arab-ency.com (last visited: 4th Nov, 2010)

³⁹ Zuhaili, Wahba, *Al Fiqh Al Islami Wa Adilla Tuhu*, (Damishq: Dar Ul Fiqr), 1st Edition, Vol. 4, P. 2875. دكتور وهبة الزحيلي، الفقه الإسلامي و أدلته، (دمشق: دار الفكر)، الطبعة الرابعة، الجزء الرابع، ص، 2875 :

Literally the word *Māl* means everything which can be possessed by a person or by a group of people like property or land or merchandize or cash or money or animal.

Technically speaking there are two approaches regarding the technical meaning of word *Māl*, which are as under:

First Approach:

First approach regarding the technical meaning of word *Māl* is by Hanafih school of thought and in it there are three famous definitions which are as follow:

جميع الفقهاء من الحنفية حريصون على حصر المال في الأعيان دون المنافع و الحقوق.⁴¹

Most of the Hanafih scholars are desirous to confine the technical meaning of *Māl* in property or assets and they exclude benefits and rights.

يركز بعض الفقهاء من الحنفية في تعريفهم للمال على كون المال إليه الطبع.⁴²

Some of the Hanafih scholars consider anything to be *Māl* to which human nature is inclined.

بعض الفقهاء من الحنفية يقولون أن المال هو ما يميل إليه الطبع و يمكن إدخاره لوقت الحاجة.⁴³

⁴⁰ Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafaas), p. 17.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (دار النفاس)، ص، 17.

⁴¹ Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafas), p. 17; Hussain, Ahmad Faraaj, *Al Milkia Wa Nazaria Tul Aqd Fii Al Shariah Al Islamia*, (Muassisa Al Taqqaffa Al Jamiyah), 1st Edition, p. 9.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (دار النفاس)، ص، 17؛ دكتور أحمد فراج حسين، الملكية و نظرية العقد في الشريعة الإسلامية، (مؤسسة الثقافة الجامعية)، الطبعة الأولى، ص، 9.

⁴² Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafaas), p. 17.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (دار النفاس)، ص، 17.

Some of the Hanafih scholars defined *Māl* as anything to which human nature is inclined and which can be preserved for a hard time.

Second Approach:

Second approach is by majority of schools of thought and according to them the technical meaning of *Māl* is:

المال هو ما يباح الإنتفاع به.⁴⁴

Māl is a thing from which it is permissible to get benefit.

Preferred Definition:

أحسن ما يعرف به المال هو ما أباح الشرع الإنتفاع به ولو في المال من غير ضرورة.⁴⁵

Māl is a thing from which it is permissible by shariah to get benefit even if it is not necessary.

2.1.2.2 TYPES OF MAAL (أنواع المال)

The following are the types of *Māl* in Islamic law:

1) Tangible or Intangible (مال العين أو منافع أو حقوق)

⁴³ Ibid.

⁴⁴ Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafas), p. 18; Dr. Ahmad Faraaj Hussain, *Al Milkia Wa Nazaria Tul Aqd Fii Al Shariah Al Islamia*, (*Muassisa Al Taqqaffa Al Jamiyah*), 1st Edition, p. 8.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (دار النفاس)، ص، 18؛ دكتور أحمد فراج حسين، الملكية ونظرية العقد في الشريعة الإسلامية، (مؤسسة الثقافة الجامعية)، الطبعة الأولى، ص، 8.

⁴⁵ Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafas), p. 18.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (دار النفاس)، ص، 18.

Māl in Islamic Law can be tangible or it can be intangible. Examples of tangible are a car or a chair etc. intangible can be in shape of benefit or in shape of rights. Examples of intangible are living in a house or services rendered by a servant or right to put a condition (حق خيار الشرط) etc.

Property can be moveable or immoveable (مال منقولة أو غير منقولة)

Tangible property can be divided into moveable or immovable. Examples of moveable are chair or table etc. Hanafih school of thought consider only land an immovable property while Maliki school of thought consider land and whatever is attached with the land an immovable property. For Example Maliki school of thought consider trees embedded in the land an immovable property.

2) Fungible or Non-fungible (مال مثلي أو قيمي)

Māl is considered by Muslim scholars fungible when maal similar to it is available in market and when it is not available it is considered as non-fungible.

3) Amortized or Non-Amortized (مال إستهلاكي أو غير إستهلاكي)

Māl is considered by the Muslim scholars amortized when benefit from it can not be derived without its complete consumption. Examples of amortized *Māl* are fruits or vegetables. When benefit from *Māl* can be acquired without its complete consumption then it is called as non-amortized *Māl*. Examples of non-amortized *Māl* are clothes or a vehicle etc. Zakat is likely to be paid on amortized *Māl* and not on non-amortized *Māl*.

4) Visible or Non-Visible (مال الظاهر أو الباطن)

Māl is considered by Muslim scholars visible when person other than the owner can reckon or count it for example animals. *Maal* is invisible when person other than the owner can not reckon or count it for example money. On visible *Māl* state is required to impose Zakat and on non-visible *Māl* the person who is holding that is required to pay Zakat as his responsibility.

5) Absolute Ownership or Defective Ownership

When the owner of *Māl* has a right to possess as well as a right to get benefit from *Māl* the ownership is absolute. While on the other hand has only one right that is to use it in such a way so that he can get benefit from it without destroying it the ownership is defective. Zakat is levied in case of absolute ownership and not in case of defective ownership.

6) Permitted or Prohibited (مال حلال أو حرام)

Māl is haram for itself (مال حرام لذاته) when that was declared by Shariah to be prohibited for itself *ab initio* or right from the start and not due to an external factor. Examples of this are wine or pig or swine.

Māl is haram due to an external factor (مال حرام لغيره). It means that Shariah does not prohibit that in itself but an external factor intervened and led to its prohibition. Examples of this are money earned through fraud or through bribery.⁴⁶

⁴⁶ Dr. Muhammad Ruwas Qila jaei, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafas), p. 18-20.

دكتور محمد رواص قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (دار النفاس)، ص، 20-18.

2.1.2.3 SHARIAH RULINGS FOR *MĀL* (أحكام المال في الشريعة)

Shariah rulings for maal are as under:

- 1) *Māl* should be capable of possession.
- 2) Shariah does not permit the destruction or impairment of *Māl*. Instead of destructing it Shariah directed to utilize it in a beneficial manner. Therefore it is not permissible to throw extra food into the garbage and Shariah required giving that extra food than need in the way of charity to poor and needy people. This rule derived its authenticity from Hadith of Prophet Muhammad (عليه الصلاة والسلام) which is as follow:

"إن الله كره لكم قيل قال، وإضاعة المال وكثرة السؤال"⁴⁷

"Indeed Allah disliked for you transferring of information without confirming it, wastefulness of *Māl* and asking too many questions".

So Allah has created *Māl* for the benefit of human beings and does not allow its destruction.

- 3) Shariah does not allow the transgression or encroachment of *Māl*. Whether transgression or encroachment to property is made without the knowledge of the owner in case of theft or with the knowledge of owner in case of coercion it is not permitted in Shariah.

⁴⁷ Transmitted in *Al Jamm Baeena Al Shahehain Al Bukhari Wā Muslim*, Chapter: Afrad Muslim, Vol. 3, Hadith No: 2680, p. 216.

رواه في الجمع بين الصحيحين البخاري و مسلم، الباب: افراد مسلم، جزء 3، ص، 216، رقم الحديث: 2680.

Shariah order to implement Hadd punishment on whom who encroach upon the maal of others without their knowledge. Allah said in Holy Quran:

"و السارق و السارقة فاقطعوا ايديهما جزاء بما كسبا"⁴⁸

"And (as for) the male thief and the female thief, cut off (from the wrist joint) their (right) hands as a recompense for that which they have committed"

Shariah prescribed tazir punishment for the person who encroaches upon the *Māl* of others through coercion.

- 4) Shariah permitted the owner of *Māl* to protect it from any kind of transgression.

This rule derived its authenticity from Hadith which is as follow:

"من قتل دون ماله فهو شهيد"⁴⁹

"The one who is killed while defending his maal is martyr":

- 5) According to Shariah the true owner of *Māl* is Allah almighty. Allah almighty transfers this ownership in a limited sense to human beings so that they can get benefit from it. Muslims can refrain a person from transacting *Māl* if he is not mature or if he does not know how to invest it in a useful manner. Allah almighty said in Holy Quran:

"و لا تؤنوا السفهاء أموالكم التي جعل الله لكم قيما و أرزقوهم فيها و أكسوهم و قولوا لهم قولا معروفا"⁵⁰

⁴⁸ Surah Al Maida: 38.

⁴⁹ Transmitted in *Al Jamm Baeena Al Shahehain Al Bukhari Wa Muslim*, Chapter: Afrad Al Bukhari, Vol. 3, Hadith No: 2941, p. 332.

رواه في الجمع بين الصحيحين البخاري و مسلم، الباب: افراد البخاري، جزء 3، ص، 332، رقم الحديث: 2941.

“And give not to the foolish your property which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice”

- 6) Shariah directed Muslims to invest their maal in useful and permitted transactions and prohibited the hoarding of it. The Holy Prophet said,

“من كانت له أرض فليزرعها أو ليمنحها أخاه، فأبى، فلمسك أرضه.”⁵¹

“The one who have land must cultivate on it or he must give it to anyone who can cultivate on it and if no one is ready to accept his land for cultivation then he should keep his land with himself”.

“من ولي يتيما له مال فليتجر له، ولا يتركه حتى تأكله الصدقة.”⁵²

“The one who is the guardian of an orphan must invest the maal of that orphan in a business and he should not abandon the wealth of an orphan so not to be ended through charity”.

- 7) Shariah rules regarding *Maal* are applicable not on poor ones but on rich ones only. For Instance only rich ones are responsible to pay Zakat, Zakat ul Fitr, Jizziya, Nafaqa, kaffarah through maal.⁵³ Allah said in Holy Quran:

⁵⁰ Surah Al Nissa: 5

⁵¹ Transmitted in *Al Jamm Baena Al Shahehain Al Bukhari Wa Muslim*, Chapter 77: Al Muta'fiq Aliha Min sanad Abi Abdullah, Vol. 2, Hadith No: 1358, p. 236.

رواه في الجمع بين الصحيحين البخاري و مسلم، الباب 77: التفق عليه من سند أبي عبد الله م، جزء 2، ص، 236، رقم الحديث: 1358.

⁵² Transmitted in Sunann Al Nissai, Chapter: Zakat Maal Al Yateem, Vol. 3, p. 32.

رواه في سنن الترمذى، الباب: زكاة مال اليتيم، جزء 3، ص، 32.

⁵³ Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafas), p. 20-22.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (دار النفاس)، ص، 20-22.

"أَسْكُونَهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وَجْدِكُمْ".⁵⁴

"Lodge them (the divorced women) where you dwell, according to your means"

"لِيَنْفِقَ ذُو سَعَةٍ مِنْ سَعَتِهِ وَ مَنْ قَدَرُ عَلَيْهِ رِزْقُهُ فَلْيَنْفِقْ مِمَّا آتَاهُ اللَّهُ لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا".⁵⁵

"Let the rich man spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person what He has given him".

It can be observed from above discussion that Common Law gives the limited concept of capital. While on the other hand Islamic Law gives the broader concept of capital. Islamic Law not only defines capital but also provides certain limitations while dealing with *maal*.

2.2 SOURCES OF CAPITAL

According to sections 16-18 of Companies Ordinance 1984 of Pakistan the capital and its division into shares are required to be stated in the memorandum.⁵⁶

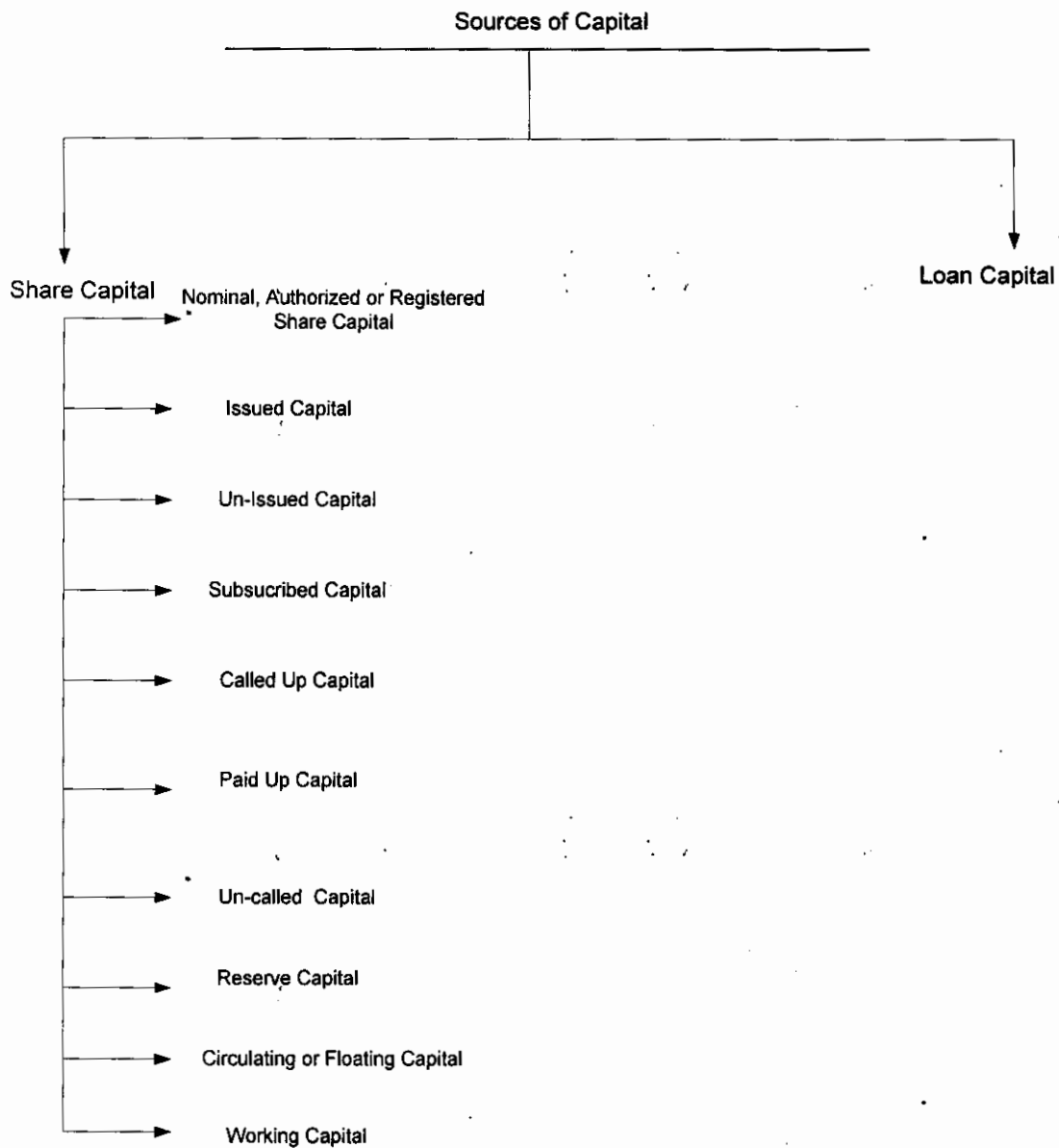
Share capital and loan capital such as debentures are usually sources of long term capital of the company.⁵⁷

⁵⁴ Surah Al Talaq: 6

⁵⁵ Surah Al Talaq:7

⁵⁶ Chowdhry, A.G., Mercantile Law in Pakistan, (Lahore: Khyber Law Publishers), p. 68.

⁵⁷ Farrar, John H, Nigel, Furry, Brenda, Hannigan, Company Law, (London: Butterworths 1985), p. 128.



2.2.1 SHARE CAPITAL

The term 'Share capital' denotes the amount of capital raised by a company through the issue of shares.⁵⁸ Only companies limited by shares and registered with a share capital

⁵⁸ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 116.

can raise capital through the issue of shares.⁵⁹ The memorandum of association presented to the registrar at the time of formation of the company is required to state 'the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount'.⁶⁰ It forms the general fund of the company for use in its business.⁶¹ It can be classified under the following categories.

2.2.1.1 Nominal, Authorized Or Registered Share Capital

It means the sum stated in the memorandum of association as the capital of the company. The sum so mentioned is the maximum amount which the company is authorized to raise by issuing shares and stamp duty is paid on that sum.⁶² It is called as authorized capital. Another name is nominal capital.⁶³ The issued capital of the company is usually different from the authorized capital. As the memorandum is registered with the registrar, it is also called as "Registered Capital".⁶⁴ The initial amount on registration, which is set out in the

⁵⁹ Ibid, p. 98.

⁶⁰ Gullick, J.M., Ranking & Spicer's Company Law, (London: HFL Publishers Ltd), 12th Edition 1981, p. 88.

⁶¹ Baig, Luqman, Mercantile Law, (Karachi: Ghanzanfar Academy Pakistan), 1st Edition 1994, Section 8.1

⁶² Dasgupta, S.K., Mercantile Law, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 315; Inns of Court School of Law Company Law In Practice, (Blackstone Press Ltd.), 2nd edition 1990, p. 41; Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (John Wiley & Sons, 1984), p. 335; Farrar, John H., Furry, Nigel, Hannigan, Brenda, Wylie, OP., Company Law, (London: Butterworths 1985), p. 126; Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 164; Chaudary, A.G. Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 40; Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 116; Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 74; مولانا مفتی منیر احمد اخوان، کمپنیوں کے شیئرز کا مسئلہ، ماہانہ بینات (کراچی: ایجوکیشنل پریس)، ص. 32.

⁶³ Baig, Luqman, Mercantile Law, (Karachi: Ghanzanfar Academy Pakistan), 1st Edition 1994, p. Section 8.1; Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 164; Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 74.

⁶⁴ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 116.

memorandum can be increased or reduced.⁶⁵ This initial amount is considered to be sufficient for the activities of the company.⁶⁶ It is customary for companies to confine their initial registration of capital to an amount which is calculated to be adequate for their immediate and early future requirements.⁶⁷ Authorized capital is shown in the balance sheet of a company as statistical information.⁶⁸ **For Example:** - A company may have a registered or authorized or nominal capital of Rs.100, 000 divided into 10,000 shares of Rs.10 each.⁶⁹ Once all Rs.100, 000 shares have been issued, the capital must first be increased before the company can issue any more shares.⁷⁰

The requirement that the authorized share capital shall be divided into shares of a fixed amount means that every share must have a nominal value. This is significant since it fixes the minimum value of the consideration in money or money's worth which a company must be entitled to receive under the terms of allotment of its shares. For this reason the nominal value is also referred as 'par value'. In Latin par means 'equal'. The allotment of shares 'at par' means that the consideration has been fixed at an amount equal to the nominal value of the shares. The shares may also be allotted 'at a premium'. A company generally may not allot shares at a discount, i.e. for a consideration of lesser

⁶⁵ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 116.

⁶⁶ Reeday, T.G., The Law Relating To Banking, (London: Butterworths), 5th Edition 1985, p. 126.

⁶⁷ Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 74.

⁶⁸ Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 164.

⁶⁹ Baig, Luqman, Mercantile Law, (Karachi: Ghanzanfar Academy Pakistan), 1st Edition 1994, Section 8.1.

⁷⁰ Reeday, T.G., The Law Relating To Banking, (London: Butterworths), 5th Edition 1985, p. 127.

value than the nominal value of the shares. A company may allot them on terms that all or part of the consideration is to be received by the company at a later date.⁷¹

2.2.1.2 Issued Capital

A company is not in need to issue all the nominal or authorized shares to the public for subscription before it commences business, a part of the authorized capital which the company needs for the time may be issued for the subscription. This is known as the Issued Capital.⁷² **For Example:** - if a company has a capital of Rs.100, 000 divide into 10,000 shares of Rs.10 each. If out of the authorized capital the company decides to issue 5,000 shares of Rs.10 each to the public, then the issued capital will be Rs.50, 000.⁷³ The remaining shares may be issued at any time by the directors either specifically or generally to make the allotment.⁷⁴

Issued Capital = Shares offered by the company to the public for subscription ⁷⁵

2.2.1.3 Un-issued Capital

It is that type of capital which is authorized but not yet issued.⁷⁶ So the balance of nominal capital remaining to be issued is called Un-issued capital.⁷⁷ The difference between the issued and authorized capital is called as Un-issued Capital.⁷⁸

⁷¹ Gullick, J.M., Ranking & Spicer's Company Law, (London: HFL Publishers Ltd), 12th Edition 1981, p. 88.

⁷² Dasgupta, S.K., Mercantile Law, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 315; Inns of Court School of Law Company Law In Practice, (Blackstone Press Ltd.), 2nd edition 1990, p. 41; Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (John Wiley & Sons, 1984), p. 335; Baig, Luqman, Mercantile Law, (Karachi: Ghanzanfar Academy Pakistan), 1st Edition 1994, Section 8.1; Gullick, J.M., Ranking & Spicer's Company Law, (London: HFL Publishers Ltd), 12th Edition 1981, p. 88; Chaudary, A.G. Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 40.

⁷³ Baig, Luqman, Mercantile Law, (Karachi: Ghanzanfar Academy Pakistan), 1st Edition 1994, Section 8.1.

⁷⁴ Reeday, T.G., The Law Relating To Banking, (London: Butterworths), 5th Edition 1985, p. 127.

⁷⁵ Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 164.

2.2.1.4 Subscribed Capital

The part of the issued capital which the public has subscribed for in cash or agrees to take is known as subscribed capital of the company.⁷⁹ Thus in a company where shares are fully paid up, the 'subscribed capital' would be equal to the 'Issued Capital'.⁸⁰ For

Example: -In the above quoted example, if the public subscribes for 4,000 shares of Rs.10 each, out of the issue of 5,000 shares then the subscribed capital will be Rs. 40,000.

Subscribed Capital = value of shares subscribed and allotted – value

Of shares forfeited.⁸¹

2.2.1.5 Called Up Capital

Some of the companies do not insist on the full payment of their shares at the time of either calling for applications or allotment, but only collect some portion of the total face value of the share capital.⁸² Therefore the amount of the subscribed capital which has been actually called up by the company i.e. required to be paid in accordance with the

⁷⁶ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (John Wiley & Sons, 1984), p. 335; Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 74.

⁷⁷ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 117.

⁷⁸ Baig, Luqman, Mercantile Law, (Karachi: Ghanzanfar Academy Pakistan), 1st Edition 1994, Section 8.1.

⁷⁹ Dasgupta, S.K., Mercantile Law, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 31; Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 74.

⁸⁰ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 116.

⁸¹ Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 164.

⁸² Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 164.

terms of issue represents the called up capital of the company.⁸³ Usually the total amount due on the subscribed shares is not demanded by the company at a time, but it is called up in three or four installments payable on application, allotment, first call, final call, etc.⁸⁴

For Example: - In the above example the company has called only Rs. 8 on each share subscribed, then the called up capital of the company will be $4,000 \times \text{Rs. } 8 = \text{Rs. } 32,000$.⁸⁵

2.2.1.6 Paid Up Capital

This is the amount of called up capital which has actually been paid up by the shareholders to the company⁸⁶ but it is not so, the called up capital is divided into paid-up capital and unpaid capital.⁸⁷ The paid up capital will be less than the called up capital, if some of the shareholders fail to pay the calls made upon their shares. The difference between the paid up capital and called up capital is known as Calls In Arrears.⁸⁸ If the

⁸³ Dasgupta, S.K., Mercantile Law, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 315; Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 116; Baig, Luqman, Mercantile Law, (Karachi: Ghanzanfar Academy Pakistan), 1st Edition 1994, Section 8.1; Gullick, J.M., Ranking & Spicer's Company Law, (London: HFL Publishers Ltd), 12th Edition 1981, p. 89; Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 74.

⁸⁴ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 116-117.

⁸⁵ Baig, Luqman, Mercantile Law, (Karachi: Ghanzanfar Academy Pakistan), 1st Edition 1994, Section 8.1.

⁸⁶ Baig, Luqman, Mercantile Law, (Karachi: Ghanzanfar Academy Pakistan), 1st Edition 1994, Section 8.1; Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 164; Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.); p. 40; N.K Jains, Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 117; Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 74; مولانا مفتی منیر احمد اخوان، کمپنیوں کے شیئرز کا مسئلہ، ماہانہ بینات کراچی، جلد نمبر 57، شمارہ نمبر 3، (کراچی: ایجوکیشنل پریس)، ص 32-33.

⁸⁷ Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 74.

⁸⁸ Baig, Luqman, Mercantile Law, (Karachi: Ghanzanfar Academy Pakistan), 1st Edition 1994, Section 8.1.

reference to a company's capital is made in its business letters or order forms, the reference must be to its paid up capital.⁸⁹

2.2.1.7 Uncalled Capital It is the total amount not called up on shares issued. In case of uncalled capital, the shareholders continue to be liable to pay for their balance amount as and when called.⁹⁰ **For Example:** - In the above quoted example the balance of Rs. 2 per share is termed Uncalled Capital.

2.2.1.8 Reserve Capital

That part of the uncalled capital of a company, which it has decided by special resolution, shall not be called up except in the event of a company being wound up, and is called the reserve capital.⁹¹ Sometimes the company may feel that it does not require the entire amount of subscribed capital, and instead of calling up the whole amount of these shares, some part should be kept in reserve for meeting contingencies arising at the time of winding up.⁹² Reserved capital cannot be turned into ordinary capital without leave of the court, and it cannot be dealt with or charged by the creditors.⁹³

⁸⁹ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 116.

⁹⁰ Dasgupta, S.K., Mercantile Law, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 315; Inns of Court School of Law Company Law In Practice, (Blackstone Press Ltd.), 2nd Edition 1990, p. 41; Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 117.

⁹¹ Dasgupta, S.K., Mercantile Law, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 315; Reeday, T.G., The Law Relating To Banking, (London: Butterworths), 5th Edition 1985, p. 127; Gullick, J.M., Ranking & Spicer's Company Law, (London: HFL Publishers Ltd), 12th Edition 1981, p. 89; Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 165; Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 43; Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 117.

⁹² Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 117.

⁹³ Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 43.

The members together provide the company with its share capital. The money or assets so contributed become the property of the company. If the company does well, it will have assets worth more than the nominal value of its issued share capital. If it does not well the sum total of the assets may be less.⁹⁴

2.2.1.9 Circulating or Floating Capital

The circulating capital is a part of subscribed capital which is circulated in business in the form of using goods or other assets such as book debts, bill receivables, cash, bank balance, etc.⁹⁵

2.2.1.10 Working Capital

Just as there are Floating or Current Assets of a company, there are also corresponding liabilities of this nature, viz bills payable, expenses payable, etc. these are called floating or current liabilities. Working capital is represented by the excess of current assets over current liabilities.⁹⁶

2.2.2 LOAN CAPITAL

Loan capital comprises debentures and other long-term loans to a business.⁹⁷ Money raised by the debentures is not strictly speaking capital, although it is often an alternative way of raising money needed for carrying on the company's business instead of issuing further shares. A debenture is distinguished from share capital in that it is a loan to the

⁹⁴ Inns of Court School of Law Company Law In Practice, (Blackstone Press Ltd.), 2nd Edition 1990, p. 41.

⁹⁵ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 117.

⁹⁶ Ibid

⁹⁷ Corporate and Business Law, Recommended Study Text for F4 of Association of Chartered Certified Accountants (ACCA), (United Kingdom: BPP Learning Media Ltd.), p. 258.

company. It is often secured by either a charge on a specific asset or assets, or a floating charge on all the assets, or a combination of both. It carries no voting rights or any share of control. The interest charge must be met whether profits are made or not and may therefore be paid out of capital unlike the dividends on shares.⁹⁸

2.3 SOURCES OF FINANCING OF THE COMPANY

One of the major reasons that the promoters select the corporate form of business is the variety of funding sources available to business that incorporate. The initial funds and property may come directly from the promoters or it may come from many diverse types of investors. An important source of financing is the sale of corporate securities in the form of shares, debentures, bonds and long term notes. Other sources of funding are also prevalent. Short term bank loans may provide at least part of the operating capital of the corporation.⁹⁹ Equity financing is preferable to the conflict of interest which exists in case of debt financing situation and the principles of risk sharing and cooperation through equity financing are promoted now a days.¹⁰⁰ On the practical level equity financing being participatory in nature is more equitable as a source for long term investment funding rather than reliance on debt financing as risks are shared in equity financing.¹⁰¹

There are two types of corporate securities which are as follow.

⁹⁸ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 116.

⁹⁹ Barnes, A. James, Dworkin, Rerry Morehead, Richards, Eric L., Law For Business, (Irwin McGraw Hill), 7th Edition, p. 504.

¹⁰⁰ Rodney Wilson, Edited by: M.A Manan, "The Role of Equity, Participation In Financing Economic Development", Financing Development In Islam, Jedda: Islamic Research and Training Institute Islamic Development Bank.

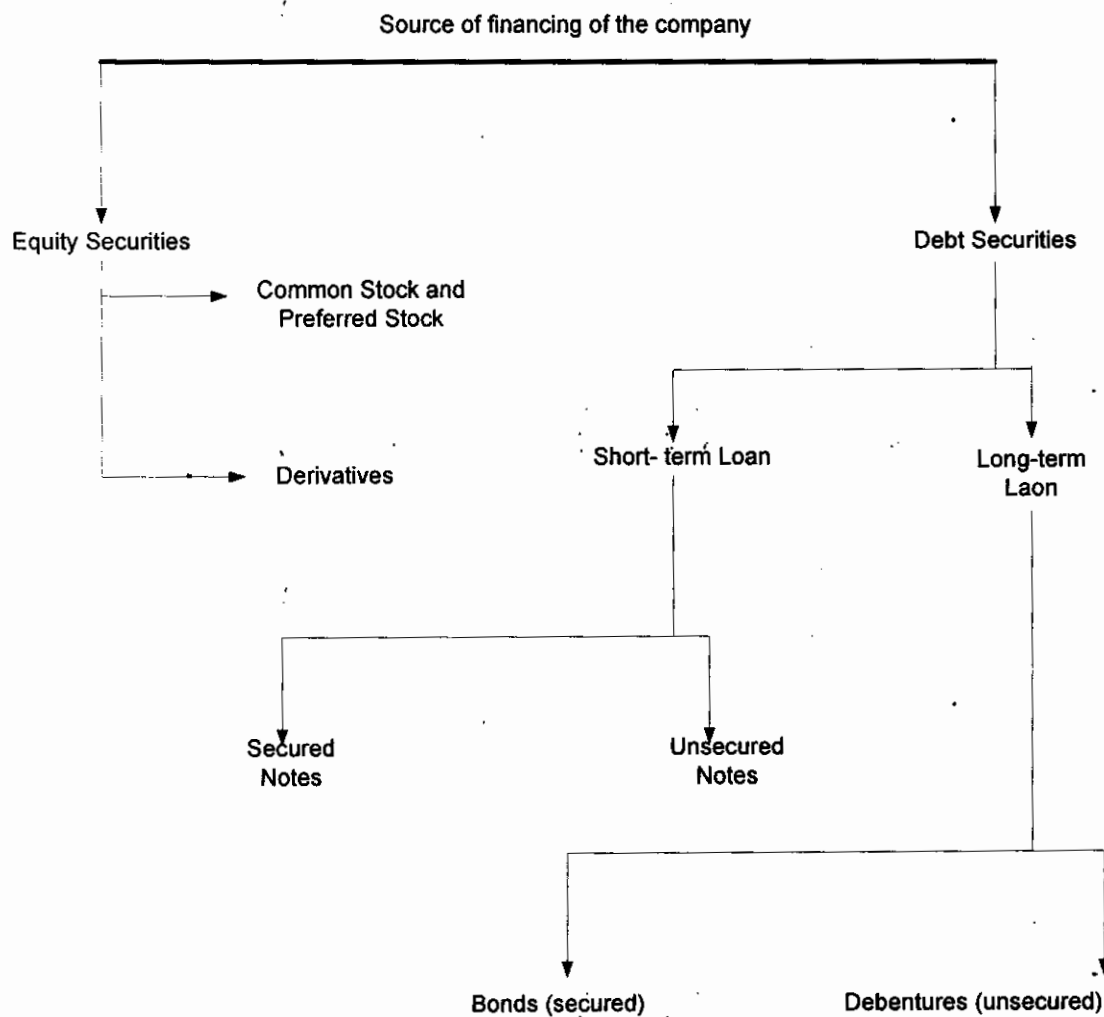
¹⁰¹ Mohammad Anas Zarqa, Edited by, M.A Manan, "Shariah compatible Shares: A Suggested Formula and Rationale", Financing Development In Islam, Jedda: Islamic Research and Training Institute Islamic Development Bank.

1) Equity Securities

- i. Common Stock and Preferred stock
- ii. Derivatives

2) Debt Securities

- i. Short Term Loans
 - a) Unsecured or Secured Notes
- ii. Long term Loans
 - a) Unsecured (Debentures)
 - b) Secured (Bonds)



2.4 SHARIKA- TUL- MUSAHAMA(شركة المساهمة)

شركة المساهمة هي عقد على مال بقصد الربح مقسوم إلى أسهم متساوية القيمة قابلة للتداول على أن لا يسأل كل شريك إلا بمقدار أسهمه، و على أن لا يقل عدد الشركاء عن خمسة، و على أن يتولى ادارتها وكلاء مختارون عن ملاك الأسهم.¹⁰²

Sharikah tul Musahama is the contract on maal with an intention to get profit on shares which are equal in value and are transferable and shareholders have limited liability means each shareholder is liable only to the extent of his shares and the members of such *Sharikah* should not be less than five and these shareholders are independent owners of their shares and board of directors are given authority to run the affairs of the business.

Sharikah tul Musahama is known as Joint Stock Company. According to majority of Muslim Jurists *Sharikah tul Musahama* is permissible provided that it is not involved in riba or interest which is strictly prohibited in Shariah. Rules and regulations of *Sharikah Tul Inan* only or *Sharikah Tul Inan* and *Mudarabah* are applicable. If members of board of directors are also the members of company and getting share in the profit being the member then it is *Sharikah Tul Inan* and *Mudarabah* and if the members of board of directors are getting only remuneration of their services and are not the members then it is *Sharikah Tul Inan* only and not *Mudarabah*.¹⁰³

¹⁰² Izatul Khiyyat, Abdul Aziz, *Al Sharikat Fii Al Shariah Al Islamia Wa Al Qanoon Al Wadi*, (Beroot: Muasisa Tur Rislaha), 4th Edition 1994, p. 87.

دكتور عبد العزيز عزت الخياط، الشركات في الشريعة الإسلامية والقانون الوضعي، (بيروت: مؤسسة الرسالة)، الطبعة الرابعة 1994م، ص، 86-87.

¹⁰³ Izatul Khiyyat, Abdul Aziz, *Izatul Khiyyat, Al Sharikat Fii Al Shariah Al Islamia Wa Al Qanoon Al Wadi*, (Beroot: Muasisa Tur Rislaha), 4th Edition 1994, p. 208; Haddad, Ahmad Bin Abdul Aziz, "*Al Ashuum Wa Al Sanadaat Tasawr Wa Ahkam*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 10-11.

2.4.1 SOURCES OF FINANCING OF *SHARIKAH- TUL- MUSAHAMA* (شركة المساهمة)

Sharikah tul Musahama issued three types of securities in order to raise its capital. These are as follow:

- 1) Shares (الأسهم)
- 2) Bonds or Debentures (سندات)
- 3) Founders' shares (حصص التأسيس)¹⁰⁴

Sharikat ul Musahama does not issue derivatives as they are prohibited in Islam. Islamic law used the same term for bonds and debentures that is *Sanadat*. So *Sharikah tul Musahama* issues only three types of securities in order to raise the capital of the company but according to Common Law the company issued five types of securities for the financing of the company.

Founders' shares are those types of shares which are issued to the persons like promoters, underwriters and directors who contributed a lot to the establishment of company in recognition of their services. Therefore they can be considered as gift. According to Muslim Scholars issuance of Founders' shares is permissible but selling of these shares is

دكتور عبد العزيز عزت الخياط، الشركات في الشريعة الإسلامية والقانون الوضعي، (بيروت: مؤسسة الرسالة)، الطبعة الرابعة 1994م، ص، 208؛ دكتور أحمد بن عبد العزيز الحداد، الأسهم و السندات تصور و أحكام، (مؤتمر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 10-11.

¹⁰⁴ Shareef, Muhammad Abdul Ghaffar, "*Ahkam Al Suuk Al Maalia*", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 208.

دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة و الدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص 208.

allowed only if they are in actual possession of the person before getting any profit on these shares. Holy Prophet said:

"لا تبع ما ليس عندك"¹⁰⁵

"And do not sell a thing which is not in your possession".

There is no Zakat on founders' shares because of defective ownership as they are not possessed by the persons to whom these shares have been issued.¹⁰⁶ These shares have no par value and these shares do not represent a part of capital. The holders of these shares have no right to say anything regarding the management of the affairs of the company.¹⁰⁷

I will discuss shares and debentures in the following chapters. Before that I would like to give historical background about the emergence of shares and debentures.

2.5 HISTORY OF EMERGENCE OF SHARES & DEBENTURES

Shares and debentures have been in existence since a long time. Companies are generally in need of a huge capital which cannot be acquired unless the companies issued shares and debentures as securities so that they can meet their requirement of a huge capital. Shares and debentures existed initially not in their present form. The exact history of

¹⁰⁵ Transmitted in Tirmizi in his Sunann, Kitab: Al Biyyu Un Rasool (عليه الصلاة والسلام), Chapter: Maa Jaa Fii Karahiya Bae Maa Laeesa Indak, Vol. 5, Hadith No: 1153, p. 9.

أخرجه ترمذی فی سننه، کتاب: البیوع عن رسول (عليه الصلاة والسلام)، باب: ما جاء في كراهية بيع ما ليس عندك، جزء 5، ص، 9، رقم الحديث: 1153.

¹⁰⁶ Shareef, Muhammad Abdul Ghaffar, "Ahkam Al Suuk Al Maalia", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 227-228.

دكتور محمد عبد الغفار الشريف، أحكام السوق المالية: (مجلة الشريعة و الدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص 228-227.

¹⁰⁷ Daghi, Ali Muhayudin Al Qura, *Bahoos Fii Al Iqtissad Al Islami*, (Beroot: Daar Al Bashair Al Islami), 1st Edition 2002, p. 218.

دكتور علي محيي الدين علي القرعة قداغي، بحوث في الإقتصاد الإسلامي، (بيروت: دار البشائر الإسلامية)، الطبعة الأولى 2002م، ص، 218.

emergence of shares and debentures cannot be traced back but there are certain evidences which give us a hint about the history of emergence of shares and debentures. **For Example** history tells us that stock market for commodities (بورصة البضائع) existed before the emergence of stock market for negotiable instruments (بورصة الأوراق التجارية) and for securities (بورصة الأوراق المالية). For the first time trading with negotiable instruments appeared in 3rd century in France. In order to organize this properly the emperor of France Fellable Ashkar (فيليب الأشقر) introduced mediation in currency exchange.

In 1599 East India Company was established in India which floated its shares for trading purposes in the market. Later on it started dealing with letter of credit (سندات الائتمان) and afterwards it started dealing with securities in 16th century when the governments started taking debts from people and issued debentures as a security for a debt. The very first step towards the trading of debentures was the issuance of resolution by William III in 1693 regarding trading with debentures. It is permitted in this resolution that the debentureholder can abandon his right for anyone who is not in a position to purchase it.

So in this way trading with negotiable instruments and with securities continued till the establishment of stock markets for securities. History tells us that French stock market was dealing with securities and with negotiable instruments in 1764 at the same time. Later on separate and distinct market for trading with securities was established.

Shares and debentures in their present form emerged with the emergence of joint stock companies (الشركات المساهمة).¹⁰⁸

¹⁰⁸ Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 33-34.

Reason of Issuance of shares & Debentures:

The sole reason of issuance of shares and debentures is that the big investors want to take up big ventures but they do not have a huge capital. So the solution to the problem is the division of the capital of the company into shares. When the company is in need of more capital it ventures into the issuance of debentures.¹⁰⁹

دكتور عبد الحق حميش، في حكم تداول الأسهم المختلفة، (منتصر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 33-34 .
¹⁰⁹ Ibid, p 35.

CHAPTER NO 3

EQUITY SECURITIES: SHARES

COMPARATIVE ANALYSIS

3.1 MEANING AND NATURE OF SHARES

3.1.1 IN COMMON LAW

Section 2(35) of the Companies Ordinance 1984 defines the term 'share' in the following words,

"Share" means share in the share capital of a company".¹¹⁰

It also includes stock except where a distinction between stock and shares is expressed or implied."¹¹¹

The above quoted definition of a share does not help us to ascertain the legal nature of a share. In order to ascertain the legal nature of a share another section of the Companies Ordinance 1984 must be taken into consideration.¹¹² Section 89 of the Companies Ordinance 1984 provides that,

¹¹⁰ Shaheen, Nazir Ahmad, Practical Approach to Companies Ordinance 1984, (Islamabad; Ali Publications), p. 12.

¹¹¹ Chowdhry, A.G., Mercantile Law in Pakistan, (Lahore: Khyber Law Publishers), p. 80.

¹¹² Nath, Surendra, Shareholders' Rights and Protection Under Company Law, (New Delhi: Deep & Deep Publications), p. 29.

"The shares or other interests of any member in a company shall be moveable property, transferable in the manner provided by the articles of the company".¹¹³

The literal interpretation of the definition of share provided in section 2(35) of the Companies Ordinance 1984 provided that the holder of a share would become the holder of a share in the share-capital of a company. This interpretation is not very sound due to the concept of legal personality of the company. This interpretation might be correct in earlier period when it was considered that the share was an interest in an undivided portion of the company's assets. The evolution of the concept of legal personality of a company made it difficult to accept such an interpretation. The question arose that how could the property be owned by two persons---the company and the shareholders? The problem was resolved when the distinction was drawn between the legal and equitable interest in the property. Equitable ownership is vested with the shareholders and legal ownership is vested with the company.¹¹⁴

There was a time when share was regarded as "goods".¹¹⁵ According to **section 7 of Sales of Goods Act 1930**, "goods" mean every kind of moveable property other than actionable claims and money; including stock, shares, growing crops, grass.¹¹⁶ According to **section 19 of Sales of Goods Act**, property in the goods sold passes when it is intended to pass.¹¹⁷

¹¹³ Shaheen, Nazir Ahmad, Practical Approach to Companies Ordinance 1984, (Islamabad; Ali Publications), p. 190.

¹¹⁴ Nath, Surendra, Shareholders' Rights and Protection Under Company Law, (New Delhi: Deep & Deep Publications), p. 29-30.

¹¹⁵ Singh, Avtar, Company law, (Lahore: Irfan Law House), 2nd Edition, p. 176.

¹¹⁶ Amin, Qazi Awais, Business Law, (Lahore; Azeem Academy Publishers), 11th Edition, p. 179.

¹¹⁷ Manan, M.A., Pollok & Mulla, The Sales of Goods Act (III OF 1930), 8th Edition, (Lahore: PLD Publishers), p. 133.

"Shares" are specific goods and according to Sales of Goods Act the ownership in specific goods passes when the contract is made. Thus the purchaser of a share becomes the owner of the property in the shares when he contracts to buy them. The inevitable implication of these provisions is that the company cannot deprive him of his ownership by refusing to register him as a shareholder unless there is a genuine reason to do so. But even then the shares are not the goods in the ordinary sense of the word.¹¹⁸ It was decided in the case of *Vadilal Sarabhai vs. Manekji Pestonji Bharucha*¹¹⁹ that:

"Shares are a peculiar kind of moveable property which cannot pass from hand to hand like bales of cotton. The property in these shares belonged to the registered shareholders and could not be transferred to another except according to the articles of the company".

Moveable property of a man is of two kinds:

- 1) Chose-in-possession---it means a property which can be taken into physical possession.
- 2) Chose-in-action---it means a property which cannot be taken into possession immediately but a person has a right to it which can be legally enforced through a court of law. This right is generally evidenced by a document, **for example** a railway receipt.¹²⁰

¹¹⁸ Singh, Avtar, Company law, (Lahore: Irfan Law House), 2nd Edition, p. 177.

¹¹⁹ AIR 1932 Bom at 432.

¹²⁰ Singh, Avtar, Company law, (Lahore: Irfan Law House), 2nd Edition, p. 176.

Today it is generally stated that an issued share is a chose in action---a species of intangible property¹²¹ and a share certificate is an evidence of it.¹²² A chose in action implies the existence of some person entitled to the rights, which are rights in action as distinct from rights in possession, and, until the share is issued, no such person exist.¹²³ Actually it is an attempt to equate shares with rights under a contract as it can be observed that the memorandum and article of association constitute a contract to some extent between the company and its members and these documents defined the rights conferred by the shares directly or indirectly. But it is crystal clear that a share is something more than a mere contractual right in *personam*.¹²⁴

The issued share does not confer any direct entitlement to or interest in the assets of the company. It is an interest in the company and not its assets.¹²⁵ Since a company is an incorporated association, the share is an interest in the association because by subscribing for it or purchasing it, the shareholder has become a member of an association.¹²⁶ The classic statement of the characteristics of a share was made by Farwell J. in *Borland's Trustee V. Steel Bros. & Co. Ltd.*¹²⁷

¹²¹ Farrar, John H., Furry, Nigel, Hannigan, Brenda, Wylie, O.P., *Company Law*, (London: Butterworths 1985), p. 134; Davies, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd 2003), p. 615; Gullick, J.M., *Ranking & Spicer's Company Law*, (London: HFL Publishers Ltd), 12th Edition 1981, p. 151; Gower, L.B.C., Prentice, D.D., Pettet, B.G., *Gower's Principles of Modern Company Law*, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 358; Gower, L.B.C., Cronin, J.B., Easson, A.J., *Gower's Principles Of Modern Company Law*, (London: Stevens & Sons), 4th Edition, p. 398.

¹²² Singh, Avtar, *Company law*, (Lahore: Irfan Law House), 2nd Edition 1990, p. 176.

¹²³ Dasgupta, S.K., *Mercantile Law*, (Calcutta: Capar & Company Publication Division), p. 316.

¹²⁴ Gower, L.B.C., Cronin, J.B., Easson, A.J., *Gower's Principles Of Modern Company Law*, (London: Stevens & Sons), 4th Edition, p. 398.

¹²⁵ Gullick, J.M., *Ranking & Spicer's Company Law*, 12th Edition 1981, (London: HFL Publishers Ltd), p. 151.

¹²⁶ Farrar, John H., Furry, Nigel, Hannigan, Brenda, *Company Law*, (London: Butterworths 1985), p. 134.

¹²⁷ [1901] 1 Ch. 279, 288.

“A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with. The contract contained in the articles of association is one of the original incidents of a share. A share is not a sum of money... but is an interest measured by a sum of money and made up of various rights contained in the contract including the right to a sum of money of a more or less amount.”¹²⁸

The statement made by Farwell J. in *Borland's Trustee V. Steel Bros. & Co., Ltd* about the nature of shares indicated that shares are a means of indicating three things:

- i. The shareholders' financial stake in the company. It includes the shareholders' liability to contribute funds to the company and also right of shareholder to income receipts from the company;

¹²⁸ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 277; Davies, Paul, Principles of Modern Company Law, (Sweet & Maxwell Ltd 2003), p. 615; Farrar, John H., Furry, Nigel, Hannigan, Brenda, Company Law, (London: Butterworths 1985), p. 134; Keenan, Denis, Smith & Keenan's Company Law for Students, 1996, (Great Britain: Pitman Publishing), 10th Edition, p. 117; Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 95-96; Gullick, J.M., Ranking & Spicer's Company Law, (London: HFL Publishers Ltd), 12th Edition 1981, p. 151; Dasgupta, S.K., Mercantile Law, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 316; Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 358-359; Singh, Avtar, Company law, (Lahore: Irfan Law House), 2nd Edition, p. 178; Nath, Surendra, Shareholders' Rights and Protection under company Law, (New Dehli: Deep & Deep Publications), p 30; Shukla, M.C., A Manual of Mercantile Law, (New Delhi: S. Chand & Company Ltd.), 13th Edition, p. 459; Gower, L.B.C., Cronin, J.B., Easson, A.J., Gower's Principles Of Modern Company Law, (London: Stevens & Sons), 4th Edition, p. 398-399; Fundamentals of Ethics Corporate Governance and Business Law, Recommended Study text for C05 of Certified Institute of Management Accountants (CIMA), (United Kingdom: BPP Professional Education Publishers), p. 328; Corporate and Business Law, Recommended Study Text for F4 of Association of Chartered Certified Accountants(ACCA), (United Kingdom: BPP Learning Media Ltd.), p. 257.

- ii. Their interest in the company as an association. It includes rights of shareholders as members, especially voting rights and other rights conferred by statute and the company's constitution; and
- iii. Their rights as owners of a species of property which is able to be bought, sold, charged, etc, and in which there can be both legal and equitable interest.¹²⁹

Farwell J's definition mentions that the interest of a shareholder is measured by a sum of money.¹³⁰ A share is not a sum of money but it is an interest measured by a sum of money and made up various rights contained in the contract.¹³¹ A share is an expression of proprietary relationship between a shareholder and the company.¹³² The sum of money is the price attached to a share. Once a person has advanced the full purchase price for a company share that person's liability to contribute capital to the company ceases. The extent of a shareholder's interest is measured by the number and class of shares purchased.¹³³

The above quoted definition laid stress on the contractual nature of the shareholder's rights and on the fact that the shareholder has an interest in the company. This theory stipulates that the contract constituted by the articles of association defines the nature of the rights. These rights are not purely personal rights but instead confer some sort of

¹²⁹ Sealy, Len, Worthington, Sarah, Cases and Materials In Company Law, 8th Edition, p. 426.

¹³⁰ Davies, Paul, Principles of Modern Company Law, (Sweet & Maxwell Ltd 2003), p. 616-617; Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 359.

¹³¹ Mahmood, Mian Arshad, The Company Law, (Lahore: Mian Asad Hakim), p. 94; Sheikh, Irfan Ahmad, Company Law in Pakistan, (Lahore: Mian Asad Hakim), p. 193; Rustomji, Kaikhosru J., revised by K.M.L. Nigam, Company Law, (Allahabad: The University Book Agency), 3rd Edition, p. 424.

¹³² Rustomji, Kaikhosru J., revised by K.M.L. Nigam, Company Law, (Allahabad: The University Book Agency), 3rd Edition, p. 425.

¹³³ Griffin, Stephen, Company Law Fundamental Principles, (London: Pitman Publishing), p. 91

proprietary interest in the company though not in the property of the company.¹³⁴ The company itself is treated not only merely as a person, the subject of rights and duties, but also as a *res*, the object of rights and duties. It is the fact that the shareholder has rights in the company as well as against it, which in legal theory distinguishes the member from the debenture holder whose rights are also defined by contract but are rights against the company and if the debenture is secured, in its property, but never in the company itself.¹³⁵

It is well established that shares are simply the bundles of intangible rights against the company which had issued them.¹³⁶ A share is a right to receive a certain proportion of the profits made by a company while it is a going concern and of the capital when it is wound up.¹³⁷ A share in a company is one of the units into which the total capital of the company is divided.¹³⁸ The capital of the company is divided into a number of individual units of a fixed amount. These units are called as 'share'. A share is a unit by which a

¹³⁴ Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 359; Davies, Paul, Principles of Modern Company Law, (Sweet & Maxwell Ltd 2003), p. 616-617.

¹³⁵ Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 359.

¹³⁶ Singh, Avtar, Company law, (Lahore: Irfan Law House), 2nd Edition, p. 178; Rustomji, Kaikhosru J., revised by K.M.L. Nigam, Company Law, (Allahabad: The University Book Agency), 3rd Edition, p. 424.

¹³⁷ Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 48; Choudhary, A.M., A Hand Book Of Company Law, (Lahore: All Pakistan Legal Decisions), p. 55; Chowdhry, A.G., Mercantile Law in Pakistan, (Lahore: Khyber Law Publishers), p. 80.

¹³⁸ Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 165; Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 95; Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 97; Elgari Bin Eid, Muhammad A., Towards an Islamic Stock Market, Journal of Objective Studies, Vol. 3, No. 2, July 1991, p. 26; Dr. Elgari Bin Eid, Muhammad, "Stock Exchange Transactions: Shariah Viewpoints", Encyclopedia of Islamic Banking and Insurance, (London: Institute of Islamic Banking and Insurance), p. 166; حافظ مبشر حسین، جدید فقہی مسائل کتاب و سنت کی روشنی میں، (لاہور: مبشر اکیڈمی)، ص، 253.

member's interest in and liability is measured.¹³⁹ It is incorporeal property in its nature and it merely consists of a bundle of rights and obligations.¹⁴⁰ **For Example:** If the capital of the company is Rs. 10,000 and it is divided into 1,000 units of Rs. 10 each, each unit of Rs. 10 shall be called a share of the company.¹⁴¹

A share is a fractional part of the capital of the company which forms the basis of ownership of certain rights and interests of a subscriber in the company.¹⁴² Each share in a company having a share capital shall be distinguished by its appropriate number.¹⁴³ Each share usually entitles the holder to one vote and to a share of the profits in the form of dividends, when declared, and to participate in the distribution of capital upon dissolution of the corporation.¹⁴⁴

Shares are personal estate and not real estate. They are, therefore, in the same category as money or goods.¹⁴⁵ A share is a definite portion of the share capital of the company. An experienced company lawyer, Lord Wrenbury described in the case of *Bradbury V. English Sewing Cotton Co. Ltd.* share as follows:

¹³⁹ Gullick, J.M., *Ranking & Spicer's Company Law*, (London: HFL Publishers Ltd), 12th Edition 1981, p. 151; Dr. Elgari Bin Eid, Muhammad, "Stock Exchange Transactions: Shariah Viewpoints", *Encyclopedia of Islamic Banking and Insurance*, (London: Institute of Islamic Banking and Insurance), p. 166.

¹⁴⁰ Dasgupta, S.K., *Mercantile Law*, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 316.

¹⁴¹ Jains, N.K., *Corporate Laws Administration and Management*, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 95.

¹⁴² Jains, N.K., *Corporate Laws Administration and Management*, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 95.

¹⁴³ Dasgupta, S.K., *Mercantile Law*, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 316.

¹⁴⁴ Anderson, Ronald A., Fox, Ivan, Twomey, David P., *Business Law*, (Cincinnati: South-Western Publishing Co.), 11th Edition, p. 653.

¹⁴⁵ Keenan, Denis, *Smith & Keenan's Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 190.

“...A share is, therefore, a fractional part of the capital. It confers upon the holder a certain right to a proportionate part of the assets of the corporation, whether by way of dividend or of distribution of assets in winding up. It forms, however, a separate right of property. The capital is the property of the corporation. The share, although it is a fraction of the capital, is the property of the corporators. The aggregate of all the fractions if collected in two or three hands does not constitute the corporators the owners of the capital---that remains the property of the corporation. But nevertheless, the share is a property in a fractional part of the capital...”¹⁴⁶

It can be concluded that shares are recognized in law, as well as in fact, as objects of property which are bought, sold, mortgaged and bequeathed. They are indeed the typical items of property of the modern commercial era and particularly suited to its demands because of their exceptional liquidity.¹⁴⁷

3.1.2 DEFINITION OF *SAHAM* (سهم) IN ISLAMIC LAW

سهم لغة:- في اللغة يدل على أحدهما: على تغيير في لون و الآخر على حظ و نصيب و شيء من الأشياء.¹⁴⁸ و

عند الفقهاء هو الحصة الشائعة في الشيء المشترك.¹⁴⁹

¹⁴⁶ Farrar, John H., Furry, Nigel, Hannigan, Brenda, Company Law, (London: Butterworths 1985), p. 134.

¹⁴⁷ Davies, Paul, Principles of Modern Company Law, (Sweet & Maxwell Ltd 2003), p. 617-618; Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 360.

¹⁴⁸ Khaslan, Saad Bin Tarki, “*Al Ashuum Al Jaiza Wa Al Mahzoora*”, (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 4.

¹⁴⁹ دكتور سعد بن تركي الخثلان، الأسهم الجائزة و المحظورة، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث ص. 4.
¹⁴⁹ Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafas), p. 20-22.

Literally it implies many things. Mostly it implies two things: firstly the change of colour and secondly a share, portion, a part or a lot; fate or destiny and according to Islamic jurists (scholars) it is a distinct part or portion of a joint property.

The word *Sahamm* (سهم) is used in the Holy Quran by Allah Almighty as He said:

"فساهم فكان من المدحضيين"¹⁵⁰

"Then he (agreed to) cast lots, and he was among the losers"

إصطلاحاً: صكوك تمثل حصصاً في رأس مال الشركة، متساوية القيمة، غير قابلة للتجزئة، وقابلة للتداول بالطرق التجارية، وتمثل حقوق المساهمين في الشركات التي أسهموا في رأس مالها.¹⁵¹

It is a document which represents a share in the capital of the company, of equal value, not further divisible, transferable through any commercial manner or way and it represents rights of shareholders in the company who contribute to the capital of the company.

عرف السهم في الإقتصاد و القانون التجاري بأن الصك أو الوثيقة المثبتة التي تعطي للمساهم إثباتاً بحقه.¹⁵²

Share is defined in economics and in commercial law as an instrument or a document through which rights of the shareholders are to be established.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (دار النفاس)، ص، 56 .

¹⁵⁰ Surah Al Saffat: 141.

¹⁵¹ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 4.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة و المحظورة، (منتشر أسواق الأوراق المالية و البورصات)، المجلد الثالث ص، 4.
¹⁵² Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 33-34.

دكتور عبد الحق حميش، في حكم تداول الأسهم المختلفة، (منتشر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 33-34.

السهم هو: جزء من رأس مال إحدى الشركات المساهمة، يعطي لصاحبه الحق في حصة من الأرباح التي تحققها الشركة، و توافق الجمعية العمومية للمساهمين على توزيعها.¹⁵³

A share is a component or portion or part of the capital of the joint stock company which gives its holder right in the profits earned by the company and on the distribution of which general meeting agrees to the shareholders.

جزء من رأس مال شركة مساهمة يمثل حق المساهم مقدارا من النقود لتحديد مسؤوليته ونصيبه في أرباح هذه الشركة أو خسارتها.¹⁵⁴

It is a portion or part of the capital of the joint stock company which represents the liability of the shareholder to the extent of his share and his share in the profit and loss of the company.

The above quoted definitions regarding shares given by different Muslim scholars show that there is no difference between Common Law and Islamic Law as far as the nature and meaning of shares is concerned.

¹⁵³ Haitti, Abdul Razaaq Raheem Jaddi, *Al Masaarif Al Islamia Beena Al Nazaria Wa Al Tatbeeq*, (Urdan-Oman: Dar Usamma Linashar), 1st Edition 1998, p. 338; Azami, Muhammad Mehroos Al Madarras, "Al Aswaaq al Maalia (Boorasat) Min Al Manzoor Al Shari Wa Al Qanooni", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 25; Mehdi, Nazeeh Muhammad Al Saadiq, "Al Awrraq Al Maalia Al Mutadawilla Fii Al Aswaaq Wa Al Boorasat "Al Ashuum", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 1, P. 4.

دكتور عبد الرزاق رحيم جدي الهيبي، المصارف الإسلامية بين النظرية والتطبيق، (الأردن- عمان: دار أسامة للنشر)، الطبعة الأولى 1998م، ص، 338؛ دكتور محمد محروس المدرس الأعظمي، الأسواق المالية (البورصات) من المنظور الشرعي والقانوني، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 25؛ دكتور نزيه محمد الصالح المهدي، الأوراق المالية المتداولة في الأسواق و البورصات "الأسهم"، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الأول، ص، 4.

¹⁵⁴ Haitti, Abdul Razaaq Raheem Jaddi, *Al Masaarif Al Islamia Beena Al Nazaria Wa Al Tatbeeq*, (Urdan-Oman: Dar Usamma Linashar), 1st Edition 1998, p. 338

دكتور عبد الرزاق رحيم جدي الهيبي، المصارف الإسلامية بين النظرية والتطبيق، (الأردن- عمان: دار أسامة للنشر)، الطبعة الأولى 1998م، ص، 338.

3.2 CLASSES OF SHARES

A company has a power to issue different classes of shares by virtue of its articles or this power may be conferred upon the company by later alteration of its articles or by virtue of the company's constitution.¹⁵⁵ According to **sections 92(1), (3) & (5) of Companies Ordinance 1984** of Pakistan when the memorandum of association provides the power to divide shares then it can be altered only by resolution passed in a general meeting and a notice of passing of such a resolution is required to be given to the Registrar with in 15 days.¹⁵⁶ A company may confer different rights on different classes of shares. It is necessary to refer to the articles, or to the terms of issue, in order to ascertain the rights attaching to the various classes of share.¹⁵⁷ The rights attached to different classes of shares can be altered only if the memorandum itself permits an alteration or by the order of the court.¹⁵⁸

There is a presumption of equality as between shareholders, i.e. that all shares confer equal rights and equal liability. But that presumption can be rebutted and is usually rebutted by the terms of issue which may by clear language give special rights to one class of shareholders. Preference shares and the rights attaching to them are an example.

¹⁵⁵ Davies, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd 2003), p. 620; Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 285; Sealy, Len, Worthington, Sarah, *Cases and Materials in Company Law*, 8th Edition, p. 426; Inns of Court School of Law *Company Law In Practice*, (Blackstone Press Ltd.), 2nd edition 1990, p. 39-40; Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 77.

¹⁵⁶ Chowdhry, A.G., *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 68-69.

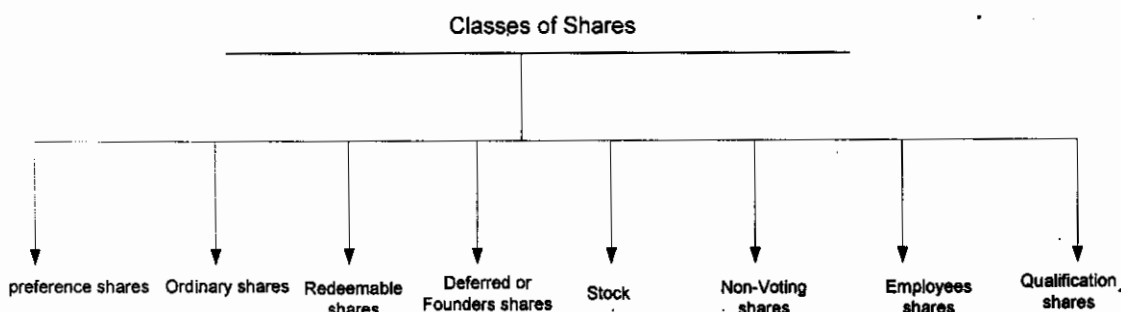
¹⁵⁷ Keenan, Denis, *Smith & Keenan's Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 117.

¹⁵⁸ Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 77.

The terms of issue may make a distinction as between classes of shareholders as to rights to dividend, to return of capital or to voting at meetings of the company.

Share capital may be divided into:

- 1) Preference shares, including redeemable shares;
- 2) Ordinary shares;
- 3) Deferred or founders shares;
- 4) Stock;
- 5) Reserve capital;¹⁵⁹
- 6) Non Voting shares;
- 7) Employees shares;¹⁶⁰
- 8) Qualification shares.¹⁶¹



3.2.1 PREFERENCE SHARES

¹⁵⁹ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 285.

¹⁶⁰ Sealy, Len, Worthington, Sarah, Cases and Materials in Company Law, 8th Edition, p. 427.

¹⁶¹ Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 167.

A preference share is a share to which certain preferential rights are attached.¹⁶² Preferred share is a share that has a prior claim to dividends or to assets on dissolution, over other classes of shares. The most important right given to a preferred stockholder is the right to receive a certain specified dividend, even though the earnings are not sufficient to pay a like dividend to common shareholders.¹⁶³ Preferred shares have a prior right to dividends i.e. dividends on other classes of shares are deferred until the fixed rate has been paid on the preference shares.¹⁶⁴ These shares will usually be entitled to have dividends paid, at a predetermined rate (e.g. at a rate of 10% on their nominal value) in priority to any dividend on the ordinary shares.¹⁶⁵ Preference shareholders are entitled to a fixed rate of return (fixed dividend).¹⁶⁶ Such dividend is presumed to be cumulative unless otherwise stated.¹⁶⁷ It is first necessary for the company to have distributable profits, and for a dividend to be declared. However, if these conditions are met, the first claim on the corporate profits in any year will be that of the preference shareholders.¹⁶⁸ These shares

¹⁶² Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), 1st Edition 1994, p. 100; Inns of Court School of Law *Company Law In Practice*, (Blackstone Press Ltd.), 2nd edition 1990, p. 40; Dasgupta, S.K., *Mercantile Law*, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 316.

¹⁶³ Corley, Robert N., Robert, William J., *Principles of Business law*, (Englewood Cliffs New Jersey: Prentice-Hall Inc.), 11th Edition, p. 723-724; Anderson, Ronald A., Fox, Ivan, Twomey, David P., *Business Law*, (Cincinnati: South-Western Publishing Co.), 11th Edition, p. 653.

¹⁶⁴ Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 79.

¹⁶⁵ Sealy, Len, Worthington, Sarah, *Cases and Materials in Company Law*, 8th Edition, p. 427; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 40; Inns of Court School of Law *Company Law In Practice*, (Blackstone Press Ltd.), 2nd Edition 1990, p. 40; Jains, N.K., *Corporate Laws Administration and Management*, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 95; Gullick, J.M., *Ranking & Spicer's Company Law*, (London: HFL Publishers Ltd), 12th Edition 1981, p. 157-158.

¹⁶⁶ Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), 1st Edition 1994, p. 101; Davis, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd, 2003), p. 614; Delaney, Patrick R., Gleim, Irvin N., *CPA Examination Review Business Law*, (Newyork: John Wiley & Sons), 1984 Edition, p. 336; Dasgupta, S.K., *Mercantile Law*, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 317.

¹⁶⁷ Inns of Court School of Law *Company Law In Practice*, (Blackstone Press Ltd.), 2nd Edition 1990, p. 40

¹⁶⁸ Sealy, Len, Worthington, Sarah, *Cases and Materials in Company Law*, 8th Edition, p. 427; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 40.

are entitled to preferential treatment when dividends are declared.¹⁶⁹ The directors have a right to declare no dividend at all.¹⁷⁰

Preferred share may also have a priority over common shares in the distribution of capital upon dissolution of the corporation.¹⁷¹ The constitution of the company confer additional rights on the holders of the preference shares, e.g., to be entitled to surplus profit.¹⁷² Preference shares carry no right to participate in profits distributed as dividend after the fixed preference dividend has been paid unless a right to participate is sufficiently clearly expressed. The holders of the preference shares have the restricted voting right. Voting rights may be restricted in any way, e.g. to vote only when preference dividends are in arrears or the rights attached to the shares are to be varied or the company proposes to go into voluntary liquidation.¹⁷³

The rights of the holders of this class of share may vary considerably from company to company. In all cases it is necessary to examine carefully the terms of issue to determine the precise nature of the preference conferred.¹⁷⁴

3.2.1.1 TYPES OF PREFERENCE SHARES

¹⁶⁹ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 117.

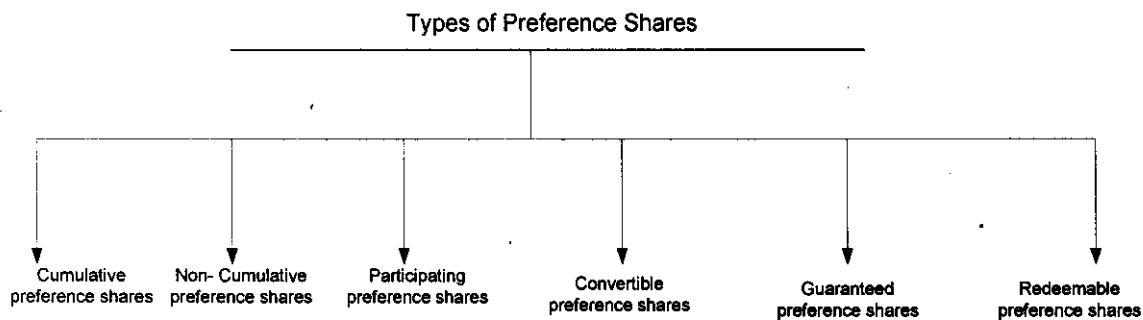
¹⁷⁰ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 96.

¹⁷¹ Anderson, Ronald A., Fox, Ivan, Twomey, David P., Business Law, (Cincinnati: South-Western Publishing Co.), 11th Edition, p. 653.

¹⁷² Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 40.

¹⁷³ Gullick, J.M., Ranking & Spicer's Company Law, (London: HFL Publishers Ltd), 12th Edition 1981, p. 159.

¹⁷⁴ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 286.



The right to dividend, which is actually expressed as a percentage of the nominal value of the share may be cumulative or non cumulative.¹⁷⁵

1) Cumulative Preference shares

If the profits of the company in any year are not enough to pay the dividend on such shares, and the deficiency is made up out of the profits of subsequent years, they are called as cumulative shares.¹⁷⁶ That is, if the company makes sufficient profits in any subsequent year, the accumulated arrears of dividends will have to be paid off along with the current dividend.¹⁷⁷ So the arrears of preference dividends not declared in early years must be paid, as well as that for the current year, before any dividend is paid to the ordinary shareholders.¹⁷⁸

¹⁷⁵ Farrar, John H., Furry, Nigel, Hannigan, Brenda, *Company Law*, (London: Butterworths 1985), p. 180.

¹⁷⁶ Chowdhry, A.G., *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 69; Zarqa, Mohammad Anas, Edited by: M.A Manan, *Shariah compatible Shares: A Suggested Formula and Rationale*, Article in *Financing Development In Islam*, (Jeddah: Islamic Research and Training Institute Islamic Development Bank, p. 22; Corley, Robert N., Robert, William J., *Principles of Business law*, (Englewood Cliffs New Jersey: Prentice-Hall Inc.), 11th Edition, p. 724, Jains, N.K., *Corporate Laws Administration and Management*, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 96.

¹⁷⁷ Jains, N.K., *Corporate Laws Administration and Management*, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 96.

¹⁷⁸ Sealy, Len, Worthington, Sarah, *Cases and Materials in Company Law*, 8th Edition, p. 427; Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), 1st Edition 1994, p. 101; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 40; Keenan, Denis, Smith & Keenan's *Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 117; Delaney, Patrick R., Gleim, Irvin N., *CPA Examination Review Business Law*, (Newyork: John Wiley &

If nothing is stated about the payment of the dividends, the preferred stock is cumulative.¹⁷⁹ Preference shares are presumed to be cumulative and ambiguous language in the articles will not be enough to make them non cumulative.¹⁸⁰

Ordinarily the right to receive dividends is dependent upon the declaration of dividends by the board of directors for that particular period of time. If there is no fund from which the dividends may be declared or if the directors do not declare them from an available fund, the shareholder has no right to dividends. The fact that a shareholder has not received dividends for the current year does not in itself give the right to accumulate or carry over into the next year a claim for those dividends.¹⁸¹

2) Non Cumulative Preference shares

When only the current year's preference dividend is payable, it is termed to be as Non Cumulative Preference Shares.¹⁸² These shares get preference in the matter of payment of dividend at a fixed rate in any year, only if there is any profit available for distribution in

Sons), 1984 Edition, p. 336; Gullick, J.M., Ranking & Spicer's Company Law, (London: HFL Publishers Ltd), 12th Edition 1981, p. 158.

¹⁷⁹ Corley, Robert N., Robert, William J., Principles of Business law, (Englewood Cliffs New Jersey: Prentice-Hall Inc.), 11th Edition, p. 724

¹⁸⁰ Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 40; Gullick, J.M., Ranking & Spicer's Company Law, (London: HFL Publishers Ltd); 12th Edition 1981, p. 159; Chowdhry, A.G., Mercantile Law in Pakistan, (Lahore: Khyber Law Publishers), p. 69.

¹⁸¹ Anderson, Ronald A., Fox, Ivan, Twomey, David P., Business Law, (Cincinnati: South-Western Publishing Co.), 11th Edition, p. 653; Jains, N.K., Corporate Laws Administration and Management, (New Delhi: Deep & Deep Publications Pvt. Ltd.), p. 96.

¹⁸² Sealy, Len, Worthington, Sarah, Cases and Materials in Company Law, 8th Edition, p. 427; Farrar, John H., Furry, Nigel, Hannigan, Brenda, Company Law, (London: Butterworths 1985), p. 180; Griffin, Stephen, Company Law Fundamental Principles, (London: Pitman Publishing), 1st Edition 1994, p. 101; Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 40; Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 118; Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 337; Corley, Robert N., Robert, William J., Principles of Business law, (Englewood Cliffs New Jersey: Prentice-Hall Inc.), 11th Edition, p. 724; Chowdhry, A.G., Mercantile Law in Pakistan, (Lahore: Khyber Law Publishers), p. 69.

that year. If there is no profit available for distribution in that year, preference dividend cannot be paid and the arrears of dividends will not accumulate.

Preference share, whether it is cumulative or non cumulative, the holder of a preference share is entitled to receive dividend at a rate prescribed by the articles before the company declares any dividend on other shares. In case of a non cumulative preference shares, if the whole or part of the preference dividends cannot be paid due to insufficiency of profits, the preference dividends unpaid do not accumulate but lapse.¹⁸³

Some other types of preference shares are as follow:

3) Participating Preference Shares

Sometimes the preferred stock is given the right of participation.¹⁸⁴ These types of shares carry right to a fixed dividend and also entitle the holder to participate in the surplus profits, if available, after the ordinary shareholders have received a dividend at a stated rate.¹⁸⁵

4) Convertible Preference Shares

Such type of shares possesses the right of converting it into any class of shares in a stipulated time.¹⁸⁶

5) Guaranteed Preference Shares

¹⁸³ Dasgupta, S.K., *Mercantile Law*, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 317.

¹⁸⁴ Anderson, Ronald A., Fox, Ivan, Twomey, David P., *Business Law*, (Cincinnati: South-Western Publishing Co.), 11th Edition, p. 653.

¹⁸⁵ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 165; Jains, N.K., *Corporate Laws Administration and Management*, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 97.

¹⁸⁶ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 166.

In such type of shares, payment of dividend and repayment of capital are guaranteed by another company.¹⁸⁷

6) Redeemable Preference Shares

According to **section 85 (1) (a) of The Companies Ordinance 1984** of Pakistan, a company, if authorized by its article, may issue preference shares redeemable:

- ❖ Out of profits, or
- ❖ Out of proceeds of a fresh issue of shares, or
- ❖ Out of sale proceeds of any property of the company.

Shares already issued cannot be converted into redeemable preference shares. According to **section 85 (1) (b) of The Companies Ordinance 1984** of Pakistan, no shares can be redeemed unless they are fully paid. According to **section 85 (1) (c) of The Companies Ordinance 1984** of Pakistan, if the shares are redeemed out of profits or sale proceeds of any property, the amount applied must be carried to a *Capital Redemption Reserve Fund* which for the purposes of reduction of capital must be treated as paid up capital.¹⁸⁸

Preference shares may be redeemable at par, at a discount or at a premium.¹⁸⁹ When redeemable shares have been issued every balance sheet must contain a statement specifying what part of the capital consists of such shares and the date on which the company has power to redeem the shares. According to **sections 234(6) & 230(7) The Companies Ordinance 1984** of Pakistan, in default, the company and every officer

¹⁸⁷ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 166.

¹⁸⁸ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 42; Chowdhry, A.G., *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 71-72.

¹⁸⁹ Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 81.

thereof, who is a party thereto, is liable to one year imprisonment and a fine of not less than 10,000 rupees; and in case of other companies, 6 months' imprisonment or a fine upto 5000 rupees.¹⁹⁰

Since there may be several classes of preference shares ranking one after the other, it is essential to refer to the company's articles, or the terms under which the shares were issued, to ascertain the precise rights of a holder of a particular preference share.¹⁹¹

2.2.1.2 COMPARISON OF PREFERENCE SHARES, ORDINARY SHARES & DEBENTURES

In some ways, preference shares are more like debentures than ordinary shares. They normally carry dividends at a fixed rate which thus resembles the fixed interest payable on a debenture. They normally have a measure of priority over the ordinary shareholders in a winding up although unlike a debenture this is limited to a solvent winding up. Like debenture stockholders, their voting rights are usually limited to meetings where their rights are affected, but unlike debenture holders, they have votes at general meetings in such circumstances. They rank after secured and unsecured creditors.¹⁹²

Preferred share is a curious hybrid between debt and equity.¹⁹³ The hybrid nature of preference share becomes apparent when one tries to classify it in relation to debentures and equity shares. The priority feature and the fixed dividend indicate that preference

¹⁹⁰ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 42; Chowdhry, A.G., *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 72.

¹⁹¹ Keenan, Denis, *Smith & Keenan's Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 117.

¹⁹² Farrar, John H., Furry, Nigel, Hannigan, Brenda, *Company Law*, (London: Butterworths 1985), p. 180.

¹⁹³ Zarqa, Mohammad Anas, Edited by: M.A Manan, "Shariah compatible Shares: A Suggested Formula and Rationale", *Financing Development In Islam*, (Jeddah: Islamic Research and Training Institute Islamic Development Bank, p. 22.

share is similar to debentures. On the other hand, failure to pay the stipulated dividends does not cause default of the obligations, as does failure to pay debenture interest. In this characteristic, preference share is similar to equity share.¹⁹⁴

When preference shares are compared with the debentures, the preference shares represent less of a financial risk to a company. This is so because interest payments on debentures are fixed financial obligations that must be met in good and bad times. In contrast, stipulated dividends on preference shares need not be paid unless the company makes profit.¹⁹⁵

3.2.2 ORDINARY SHARES

Equity is the term most commonly used to identify the investment made by ordinary shareholders in a company. Equity shares provide a company with long-term finance.¹⁹⁶

If the shares are divided into classes, and the special rights of such class are set out, the remaining shares will be ordinary shares.¹⁹⁷ The holders of ordinary shares are residual claimants on the profits and assets of a company.¹⁹⁸ Ordinary shares normally carry residual rights of participation in the income and capital of the company which have not

¹⁹⁴ Subrahmanyam, Y., "Role of Preference Shares in the Indian Corporate Sector", *Economic and Political Weekly*, Vol. 12, No. 48 (Nov. 26, 1977), p. 125; <http://www.jstore.org/stable/4366124>

¹⁹⁵ Zarqa, Mohammad Anas, Edited by: M.A Manan, "Shariah compatible Shares: A Suggested Formula and Rationale", *Financing Development In Islam*, (Jeddah: Islamic Research and Training Institute Islamic Development Bank, p. 23.

¹⁹⁶ Vause, Bob, *Guide To Analysing Companies*, (London: The Economist and The Profile Books Ltd.), 3rd Edition, p. 194.

¹⁹⁷ Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), P. 100; Sealy, Len, Worthington, Sarah, *Cases and Materials in Company Law*, 8th Edition, p. 427; Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 166.

¹⁹⁸ Zarqa, Mohammad Anas, Edited by: M.A Manan, "Shariah compatible Shares: A Suggested Formula and Rationale", *Financing Development In Islam*, (Jeddah: Islamic Research and Training Institute Islamic Development Bank, p. 21.

yet been granted to other classes.¹⁹⁹ This is the basic or the residuary category²⁰⁰ in which is vested everything after the special rights of preference classes, if any, have been satisfied.²⁰¹ Ordinary shareholders are generally those holding shares to which no special rights are attached.²⁰² If the shares of the company are of one class, then these are necessarily ordinary shares.²⁰³ If the company's shares are issued without differentiation, they will be ordinary shares.²⁰⁴ The greatest part of a company's share capital normally consists of ordinary shares.²⁰⁵ Ordinary shares are the vast majority of shares.²⁰⁶ Ordinary shares are those shares that have no preferences.²⁰⁷ When preference shares of any type exist, the ordinary shares rank after them for dividends.²⁰⁸

Ordinary share capital is sometimes referred to as "equity" share capital.²⁰⁹ The expression "equity" share capital emphasizes that ordinary shareholders are the

¹⁹⁹ Farrar, John H., Furry, Nigel, Hannigan, Brenda, *Company Law*, (London: Butterworths 1985), p. 178.

²⁰⁰ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 292; Gower, L.B.C., Prentice, D.D., Pettet, B.G., *Gower's Principles of Modern Company Law*, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 373.

²⁰¹ Gower, L.B.C., Prentice, D.D., Pettet, B.G., *Gower's Principles of Modern Company Law*, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 373-374.

²⁰² Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), P. 100; Sealy, Len, Worthington, Sarah, *Cases and Materials in Company Law*, 8th Edition, p. 427; Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 166.

²⁰³ Davis, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd, 2003), p. 624; Gower, L.B.C., Prentice, D.D., Pettet, B.G., *Gower's Principles of Modern Company Law*, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 374; Barnes, A. James, Dworkin, Rerry Morehead, Richards, Eric L., *Law For Business*, (Irwin McGraw Hill), 7th Edition, p. 504.

²⁰⁴ Sealy, Len, Worthington, Sarah, *Cases and Materials in Company Law*, 8th Edition, p. 427.

²⁰⁵ Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), 1st Edition 1994, p. 100.

²⁰⁶ *Inns of Court School of Law Company Law In Practice*, (Blackstone Press Ltd.), 2nd Edition 1990, p. 40

²⁰⁷ Anderson, Ronald A., Fox, Ivan, Twomey, David P., *Business Law*, (Cincinnati: South-Western Publishing Co.), 11th Edition; p. 653.

²⁰⁸ Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 85.

²⁰⁹ Sealy, Len, Worthington, Sarah, *Cases and Materials in Company Law*, 8th Edition, p. 427; Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 166.

proprietors of the company entitled to the residuary profits.²¹⁰ It is perhaps because of the priorities given to the preference shareholders that the ordinary shareholders are said to hold the equity share capital of the company, presumably by analogy with the equity of redemption held by a mortgagor in the law of mortgages. A mortgagor who pays off all the charges on his property has the right to redeem or recover it by virtue of this equity; indeed it is the last right he retains, for when he has lost his property. Similarly the equity shareholders are entitled to the remaining assets of the company after the claims of creditors and of preference shareholders have been met.²¹¹ They receive a dividend after any preferential shareholders entitled to a preferential dividend have been paid.²¹² They receive what is left over after the preferences of other classes have been satisfied.²¹³ The dividends paid to the ordinary shareholders will vary with the fortunes of the company.²¹⁴ They have no right to a fixed dividend. Indeed they have no right to a dividend at all, until it is declared.²¹⁵ These shares carry a right to the whole of the profits earned by a

²¹⁰ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 295; Davis, Paul, Principles of Modern Company Law, (Sweet & Maxwell Ltd, 2003), p. 624; Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 374.

²¹¹ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 124.

²¹² Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 124; Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 295; Griffin, Stephen, Company Law Fundamental Principles, (London: Pitman Publishing), 1st Edition 1994, p. 100; Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 43; Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 336; Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 97.

²¹³ Barnes, A. James, Dworkin, Rerry Morehead, Richards, Eric L., Law For Business, (Irwin McGraw Hill), 7th Edition, p. 504.

²¹⁴ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 295; Griffin, Stephen, Company Law Fundamental Principles, (London: Pitman Publishing), 1st Edition 1994, p. 100; Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 43.

²¹⁵ Farrar, John H., Furry, Nigel, Hannigan, Brenda, Company Law, (London: Butterworths 1985), p. 178.

company after paying the fixed dividend or to payment of capital.²¹⁶ Ordinary shareholders have no advantage, priority, or preference over any other class of shareholders.²¹⁷ Furthermore, where the preference shares have preference as to the capital, the ordinary shares rank behind the preference shares for repayment of capital on winding up or where there is a reduction of capital by repayment.²¹⁸ Only the ordinary shares carry voting rights at general meetings of the company's shareholders.²¹⁹ Ordinary shares usually carry one vote per share. Preference shares on the other hand only carry restricted voting rights: these are limited to meetings which in some way affect their rights.²²⁰ The voting power of the ordinary shareholders in general meetings is such as to allow them to control the resolutions at such meetings.²²¹ Common stockholders through their voting rights theoretically can control the operations of the enterprise and in this sense they are the real owners of the enterprise.²²² Ordinary shares may be created as non-voting shares, shares with limited voting rights, or shares with enhanced voting rights.²²³

²¹⁶ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 166.

²¹⁷ Corley, Robert N., Robert, William J., *Principles of Business law*, 11th Edition, (Englewood Cliffs New Jersey: Prentice-Hall Inc.), p. 723.

²¹⁸ Keenan, Denis, Smith & Keenan's *Company Law for Students*, 10th Edition 1996, (Great Britain: Pitman Publishing), p. 124.

²¹⁹ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 295; Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), 1st Edition 1994, p. 100; Delaney, Patrick R., Gleim, Irvin N., *CPA Examination Review Business Law*, (New York: John Wiley & Sons), 1984 Edition, p. 336.

²²⁰ Farrar, John H., Furry, Nigel, Hannigan, Brenda, *Company Law*, (London: Butterworths 1985), p. 178.

²²¹ Keenan, Denis, Smith & Keenan's *Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 124; Farrar, John H., Furry, Nigel, Hannigan, Brenda, *Company Law*, (London: Butterworths 1985), p. 178.

²²² Zaman, M. Raquibuz, "The Operation of the Modern Financial Markets for Stocks and Bonds and its Relevance to an Islamic Economy", *American Journal of Islamic Social sciences*, Vol 3, No. 1, 1986, p. 128-129.

²²³ Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), 1st Edition 1994, p. 100.

It is they who bear the lion's share of the risk and they who in good years take the lion's share of the profits (after the directors and managers have been remunerated).²²⁴ They carry the risk but stand to gain the most in a prosperous company.²²⁵ The ordinary shareholders usually bear the major risks of the business and will benefit most from success.²²⁶ From the investors point of view common stock is more risky than the preferred stock. This is because the claims of the common stockholders on returns and assets come after those of the preferred stockholders. For the corporation the least risky way of financing is through the issuance of common stock because it is not legally binding on the corporation to pay the dividends even when there is some net profit.²²⁷

➤ **DISTINCTION BETWEEN PREFERENCE SHARES & EQUITY SHARES**

Differences between preference and equity shares can be drawn as follow:

- 1) Preference shares are entitled to a fixed rate of return or fixed amount of dividend.

The rate of dividend on equity shares depends upon the amount of net profit available after payment of dividend to preference shareholders and the fund requirements of the company for future expansion etc.²²⁸

- 2) Fixed rate of dividend on the preference shares is paid in preference to the equity shares. But unlike interest on a bond the promised dividend rate does not

²²⁴ Davis, Paul, Principles of Modern Company Law, (Sweet & Maxwell Ltd, 2003), p. 624; Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 374.

²²⁵ Farrar, John H., Furry, Nigel, Hannigan, Brenda, Company Law, (London: Butterworths 1985), p. 178.

²²⁶ Barnes, A. James, Dworkin, Rerry Morehead, Richards, Eric L., Law For Business, (Irwin McGraw Hill), 7th Edition, p. 504.

²²⁷ Zaman, M. Raquibuz, "The Operation of the Modern Financial Markets for Stocks and Bonds and its Relevance to an Islamic Economy", American Journal of Islamic Social sciences, Vol 3, No. 1, 1986, p. 129.

²²⁸ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 98.

constitute a fixed obligation on the issuing company. If the company makes no profits, or sustains losses in a given year, preference shareholders get nothing.²²⁹

- 3) The preference shares have been preference in relation to equity shares with regard to the repayment of capital on winding up.
- 4) If the preference shares are cumulative, the dividend not paid in any year is accumulated and until such arrears of dividend are paid, equity shareholders are not paid any dividend.
- 5) Redeemable preference shares are redeemed by the company on expiry of the stipulated period, but equity shares cannot be redeemed.
- 6) The voting rights of the preference shareholders are restricted. An equity shareholder can vote on all matters affecting the company.
- 7) A company may issue rights shares or bonus shares to the company's existing equity shareholders whereas it is not so allowed in case of preference shares.²³⁰

3.2.3 REDEEMABLE SHARES

These shares are created on the terms that they shall be (or at the option of the company or of the member, may be) bought back by the company at a future date.²³¹ Redeemable shares ordinarily cease to exist after redemption.²³² Redemption permits the corporation to buy back the shares even if the holders do not wish to sell. Redemption will not be

²²⁹ Zarqa, Mohammad Anas, Edited by: M.A Manan, "Shariah compatible Shares: A Suggested Formula and Rationale", Financing Development In Islam, (Jeddah: Islamic Research and Training Institute Islamic Development Bank, p. 21.

²³⁰ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 98.

²³¹ Sealy, Len, Worthington, Sarah, Cases and Materials in Company Law, 8th Edition, p. 427.

²³² Anderson, Ronald A., Fox, Ivan, Twomey, David P., Business Law, (Cincinnati: South-Western Publishing Co.), 11th Edition, p. 653.

permitted if the cost would make the corporation insolvent.²³³ The power to issue redeemable equity shares has been little used and when redeemable shares are to be found, they will normally be preference shares.²³⁴

Both private and public companies have the right to issue redeemable shares of any class.

The advantages of a power to issue such shares are these:

- a) It is helpful to a close held company which wishes to retain family control;
- b) It provides a means by which a shareholder or the estate of a deceased shareholder may find a purchaser for shares in an unlisted company; and
- c) It is particularly useful in relation to employee share schemes in enabling shares acquired by employees to be repurchased on their leaving the company's employed.

These advantages apply in particular to private companies; the advantages to public companies are less obvious, but it is helpful to be able to buy out small shareholdings which is costly to service.²³⁵

The company must be authorized by its article to redeem such shares. Redemption is to be effected on terms specified by the articles. Redeemable shares may not be issued at any time when there are no shares issued which are not redeemable. This safeguard is intended to prevent a situation arising in which there would be no members left. Redeemable shares may not be redeemed unless they are fully paid and the terms of

²³³ Barnes, A. James, Dworkin, Rerry Morehead, Richards, Eric L., *Law For Business*, (Irwin McGraw Hill), 7th Edition, p. 505.

²³⁴ Davis, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd, 2003), p. 625.

²³⁵ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 291.

redemption must provide for repayment on redemption.²³⁶ Redeemable shares may only be redeemed out of the distributable profits of the company or out of the proceeds of a fresh issue of shares made for the purpose of redemption. Any premium payable on redemption must be paid out of the distributable profits of the company.²³⁷ Redemption of shares does not reduce the amount of the company's authorized share capital. A company which is authorized to do so by its articles may purchase its own shares, including any redeemable shares. The safeguards applicable to redemption also apply to "own share purchases" with the exception that the terms and manner of purchase need not be determined by the articles.²³⁸

Redeemable shares can be made redeemable between certain dates. The holder thus knows that his shares cannot be redeemed before the earlier of the two dates; which is normally a number of years after the issue of the shares, in order to give him an investment which will last for a reasonable period. He also knows that the shares are bound to be redeemed by the later of the two dates mentioned.²³⁹

3.2.4 DEFERRED OR FOUNDERS' SHARES

²³⁶ *ibid*, p. 292.

²³⁷ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 292; Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 121.

²³⁸ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 292.

²³⁹ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 121.

Deferred shares are sometime called as 'founders' shares'.²⁴⁰ It reflects the founders' offer to defer their own entitlements to those of other investors from whom additional capital is sought. As the name implies, deferred shares normally enjoy rights to distributable profit or to the return of capital ranking after the claims of the preference shareholders and the ordinary shareholders.²⁴¹ The articles usually provide that any profits remaining undistributed after the preferential and ordinary shareholders have received dividends at fixed rates will be divided between the ordinary and deferred shareholders..²⁴² They rank for dividend after all the prior interests have been received dividends according to the terms of the articles.²⁴³ The articles usually provide that these shares will carry a dividend fixed in relation to the profits available after dividends have been declared on the preference and equity shares. It is because of this deferment of the dividend payment that these shares are called as 'Deferred shares'.²⁴⁴ These shares are usually of a smaller given equal voting rights with equity shares which may be of higher denomination say Rs. 10 each.²⁴⁵

²⁴⁰ Sealy, Len, Worthington, Sarah, Cases and Materials in Company Law, 8th Edition, p. 427; Farrar, John H., Furry, Nigel, Hannigan, Brenda, Company Law, (London: Butterworths 1985), p. 178; Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 166; Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 98.

²⁴¹ Sealy, Len, Worthington, Sarah, Cases and Materials in Company Law, 8th Edition, p. 427; Farrar, John H., Furry, Nigel, Hannigan, Brenda, Company Law, (London: Butterworths 1985), p. 178; Griffin, Stephen, Company Law Fundamental Principles, (London: Pitman Publishing), 1st Edition 1994, p. 99.

²⁴² Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 295; Farrar, John H., Furry, Nigel, Hannigan, Brenda, Company Law, (London: Butterworths 1985), p. 178.

²⁴³ Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 166; Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 43.

²⁴⁴ Jains, N.K., Corporate Laws Administration and Management, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 98.

²⁴⁵ Ibid

These shares are usually allotted to the promoters in consideration of the services rendered by them and to the underwriters in consideration of the commission due to them and to the directors.²⁴⁶ In either case, the particulars of contract must be filed with the Registrar and the number of such shares must be stated in the prospectus or in the statement in lieu of prospectus.²⁴⁷ As these shares are often held by the promoters and directors of the company, such persons will then have a very direct interest in the success of the company and also to indicate faith in their enterprise because they will receive dividends on these shares only if the profits are high enough to leave a balance after paying dividends to preference and equity shareholders.²⁴⁸ They often had disproportional high voting rights and were used by promoters as a method of fraud.²⁴⁹ The greater the profits of the company the higher their dividends will be. The deferred shares are usually entitled to a certain proportion of the profits which remain after paying the dividend on the capital paid up on all the other shares for the time being issued at a particular rate.²⁵⁰

3.2.5 STOCK

²⁴⁶ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 42, 43; Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 295; Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 166; Jains, N.K., *Corporate Laws Administration and Management*, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 97; Chowdhry, A.G., *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 72.-73.

²⁴⁷ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 42-43; Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 295; Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 166; Chowdhry, A.G., *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 73.

²⁴⁸ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 295; Farrar, John H., Furry, Nigel, Hannigan, Brenda, *Company Law*, (London: Butterworths 1985), p. 179; Jains, N.K., *Corporate Laws Administration and Management*, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 98.

²⁴⁹ Farrar, John H., Furry, Nigel, Hannigan, Brenda, *Company Law*, (London: Butterworths 1985), p. 179.

²⁵⁰ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 43; Jains, N.K., *Corporate Laws Administration and Management*, (New Dehli: Deep & Deep Publications Pvt. Ltd.), p. 98.

The use of the term "stock" merely denotes that the company has recognized the fact of the complete payment of the shares and that the time has come when those shares may be assigned in fragments, which for obvious reasons could not be permitted before. Stock is a short name for "joint stock" and joint stock is only another name for "shares" because the owner of a part of capital of a company is an owner of a part of share of a joint stock.²⁵¹

Stock is a part of the capital of a company, but unlike shares, it is divisible into any number of portions. In Pakistan it cannot be issued directly, but only by the conversion of its fully paid shares into stock.²⁵² According to **section 92 (1) (b) of Companies Ordinance 1984** of Pakistan shares that are fully paid up may be converted into stock and not otherwise.²⁵³ According to **section 92 (3) of Companies Ordinance 1984** of Pakistan, the power of the company to convert fully paid up shares into stock must be exercised in the general meeting. Notice of conversion of paid up shares into stock must be filed within 15 days with the Registrar and thereupon the rules regarding shares would cease to apply to such stock in accordance with **section 93 (1) of Companies Ordinance 1984** of Pakistan.²⁵⁴ The registrar must show the amount of stock held by each of the

²⁵¹ Dasgupta, S.K., *Mercantile Law*, 2nd Edition 1990, (Calcutta: Capar & Company Publication Division), p. 324.

²⁵² Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 167.

²⁵³ Davis, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd, 2003), p. 626; Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 295; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 43; Gower, L.B.C., Prentice, D.D., Pettet, B.G., *Gower's Principles of Modern Company Law*, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 376; Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 76; Chowdhry, A.G., *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 73.

²⁵⁴ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 43; Dasgupta, S.K., *Mercantile Law*, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 324; Chowdhry, A.G., *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 73-74.

members concerned instead of the shares so converted which were previously held by him.²⁵⁵

The stock may be registered or unregistered. When stock will be registered then in such case the holders appears on the register and the ordinary rules as to transfers apply. When it is unregistered then share warrants will be issued. Share warrants may be transferred by delivery in the same manner as negotiable instruments.²⁵⁶

The relationship between shares and stock was discussed by Lord Carins in *Morrice V. Aylmer*²⁵⁷. He said:

“The use of the term ‘stock’. . . [merely denotes] that the company has recognized the fact of the complete payment of the shares, and that the time has come when those shares may be assigned in fragments, which for obvious reasons could not be permitted before, but that stock shall still be the qualification . . . and that the meetings shall be persons entitled to this stock, who shall meet as shareholders, and vote as shareholders, in the proportion of shares which would entitle them to vote before the consolidation into stock”.

The only advantage in having fully paid shares converted into stock is that the holder is not required to dispose of the stock in the denominations formerly represented by the shares he held. A person holding stock retains his membership in the company and is

²⁵⁵ Dasgupta, S.K., *Mercantile Law*, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 324.

²⁵⁶ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 295.

²⁵⁷ (1874), to Ch. App. 148, 154.

liable to exercise all the rights of membership.²⁵⁸ At the same time converting fully paid up shares into stock greatly simplifies the work of maintaining the register and issuing certificates.²⁵⁹

➤ DISTINCTION BETWEEN SHARES & STOCK

The distinction between shares and stock can be summarized as follow:

- 1) Shares in a company, as shares, cannot be bought in small fractions of any amount. But the consolidation stock of a company can be bought in small fractions, split up into as many portions and as small portions as desired.
- 2) A share can be partly paid up, whereas, stock cannot be partly paid up, as shares can only be converted into stock when they are fully paid up.
- 3) Shares are numbered consecutively; whereas, stocks are not so numbered.²⁶⁰
- 4) Shares may be offered and subsequently converted into stock when fully paid up.

Whereas capital cannot be offered in the form of stock in the first instance.²⁶¹

The difference between stock and shares is the difference between a bucket full of water and a bucket full of peas. Each drop of water combines with the rest while each pea retains its identity.²⁶²

3.2.6. NON VOTING SHARES

²⁵⁸ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 296.

²⁵⁹ Dasgupta, S.K., Mercantile Law, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 324.

²⁶⁰ Dasgupta, S.K., Mercantile Law, (Calcutta: Capar & Company Publication Division), 2nd Edition 1990, p. 325; Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 76.

²⁶¹ Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 76.

²⁶² Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 43.

These may be issued where it is sought to restrict control of the company to the holders of the remaining shares. This is quite commonly desired when a family controlled company looks to outside investors for additional capital. The stock exchange does not encouraged listed companies to create non-voting shares, although it does not ban them altogether.²⁶³

3.2.7. EMPLOYEES' SHARES

Many companies issued shares to their employees, commonly under an 'employees' share scheme', which carries certain tax advantages and encouraged the employees to take up shares.²⁶⁴ Employees' shares are not usually designated as a separate class of shares by the memorandum or articles of association, but are issued simply as ordinary shares or as the case may be preference shares etc.²⁶⁵

3.2.8. QUALIFICATION SHARES

These are such shares which must be held by each director as a condition to acting as director under the articles of association. If the limit of qualification shares is fixed by the articles of association, a person who is not already holding qualification shares must obtain his qualification within two months after his appointment or such shorter time as may be fixed by the articles.²⁶⁶

²⁶³ Sealy, Len, Worthington, Sarah, Cases and Materials in Company Law, 8th Edition, p. 427.

²⁶⁴ Griffin, Stephen, Company Law Fundamental Principles, (London: Pitman Publishing), 1st Edition 1994, p. 99; Sealy, Len, Worthington, Sarah, Cases and Materials in Company Law, 8th Edition, p. 427-428; Farrar, John H., Furry, Nigel, Hannigan, Brenda, Company Law, (London: Butterworths 1985), p. 179.

²⁶⁵ Sealy, Len, Worthington, Sarah, Cases and Materials in Company Law, 8th Edition, p. 427, 428; Farrar, John H., Furry, Nigel, Hannigan, Brenda, Company Law, (London: Butterworths 1985), p. 179.

²⁶⁶ Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 167.

3.3 CANONS OF CONSTRUCTION

According to my humble opinion after analyzing different types of shares present cannons of construction can be summarized as follow:

- 1) Prima facie all shares rank equally. If some of the shares have priority over others there must be provisions to this effect in the terms of issue.²⁶⁷
- 2) A presumption of priority rights is exhaustive.²⁶⁸
- 3) If shares are expressly divided into separate classes then the rights of each class are to be determined in accordance with the terms of issue.
- 4) If nothing is expressly said about the rights of one class with respect to: (a) dividends, (b) return of capital, or (c) attendance at meetings or voting, then prima facie, that class has the same rights in that respect as the residuary ordinary shares.
- 5) If any rights in respect of any of these matters are expressly stated, that statement is presumed to be exhaustive so far as that matter is concerned.
- 6) Where shares are entitled to participate in surplus capital on a winding up, prima facie they participate in all surplus assets and not merely in that part which does not represent undistributed profits that might have been distributed as dividend to another class.
- 7) If a preferential dividend is provided for, it is presumed to be cumulative. This presumption can be rebutted.

²⁶⁷ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 285; Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 371.

²⁶⁸ Inns of Court School of Law Company Law In Practice, (Blackstone Press Ltd.), 2nd Edition 1990, p. 40

8) It is presumed that even preferential dividends are payable only if declared.²⁶⁹

3.4 RIGHTS OF THE SHAREHOLDERS

In the beginning an enlarged partnership was considered as the company and the partnership property was vested in trustees. Therefore the members were entitled to an equitable interest in the assets of the company. It was true that initially the exact or definite nature of this equitable interest was not crystal clear. At that time the members could not lay the claim to any particular asset or they had no right at that time to prevent the directors from the disposing of it. But this idea has been rejected since a long time ago. Shareholders have ceased to be regarded as having equitable interests in the company's assets. Shareholders now no longer share any property in common. They share certain rights in respect of dividends, return of capital on a winding up, voting, and the like.²⁷⁰

The legal rights of any given type of share are determined by either, the terms of a company's construction, i.e. the memorandum or articles, or by the terms of the particular share issue.²⁷¹ A shareholder has obligations to the company as well as rights. Thus, he is liable as a contributory in a winding up.²⁷² The rights of shareholders are a matter largely of contract between the company and investor, rather than of a statutory stipulation.

²⁶⁹ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 285; Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 371-373.

²⁷⁰ Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 357-358; Davies, Paul, Principles of Modern Company Law, (Sweet & Maxwell Ltd 2003), p. 615.

²⁷¹ Griffin, Stephen, Company Law Fundamental Principles, (London: Pitman Publishing), 1st Edition 1994, p. 98-99.

²⁷² Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 277.

Therefore a company can issue several types of shares with differing rights attached to them.²⁷³

3.4.1 THE PRESUMPTION OF EQUALITY BETWEEN SHAREHOLDERS

The initial presumption of the law is that all shares confer the same rights and impose same liabilities. Equality prevails in the absence of agreement to the contrary.²⁷⁴

Normally the shareholders have three rights, i.e

- 1) Rights as to dividend payments;
- 2) Voting rights; and
- 3) Rights to the return of capital on an authorized reduction of capital or on a winding up of a company.²⁷⁵

All the shares will confer the like rights to all three unless there is some indication to the contrary. As far as the voting right is concerned this is a recent development. It was felt that members' voting rights should be divorced from their purely financial interests in respect of dividend and capital on the analogy of the partnership rule. So the equality in voting should be between members rather than between shares. It is now recognized that if voting rights are to vary, separate classes of shares should be created so that the different number of votes can be attached to the shares themselves and not to the holders.

²⁷³ Davies, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd 2003), p. 614.

²⁷⁴ Davies, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd 2003), p. 618; Gower, L.B.C., Prentice, D.D., Pettet, B.G., *Gower's Principles of Modern Company Law*, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 361.

²⁷⁵ Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), 1st Edition 1994, p. 98-99.

Common law rule is that each member has one vote irrespective of the number of shares held and this older idea still prevails.²⁷⁶

There is a similar presumption of equality in relation to shareholders' liabilities but it can be altered by the provisions in the memorandum and articles.²⁷⁷

3.4.2 WHEN THE RIGHTS OF SHAREHOLDERS COMMENCE

The rights of shareholders commence:

- 1) When the corporation accepts a subscription.
- 2) In contract to purchase at time of payment and delivery of certificates.
- 3) When registration is changed on corporate books then between corporation and new shareholder.²⁷⁸

3.4.3 RIGHTS OF SHAREHOLDERS

Different rights attached to the shareholders are as follow:

- 1) **Right to a stock certificate.**
- 2) **Right to transfer stock by endorsement and delivery or by separate assignment.**
 - a) Stock certificates are negotiable instruments.

²⁷⁶ Davies, Paul, Principles of Modern Company Law, (Sweet & Maxwell Ltd 2003), p. 618; Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 361.

²⁷⁷ Davies, Paul, Principles of Modern Company Law, (Sweet & Maxwell Ltd 2003), p. 619; Gower, L.B.C., Prentice, D.D., Pettet, B.G., Gower's Principles of Modern Company Law, (London: Sweet & Maxwell Ltd.), 5th Edition 1992, p. 362.

²⁷⁸ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 342.

- No holder in due course can give a good title, but if properly endorsed then the holder in due course can give good title.
- If endorsement is forged, corporation will bear the loss against a purchaser in good faith if it has issued a new certificate. **For Example:** X steals stock certificate from Y, forges Y's endorsement, submits it to the corporation for a new certificate, and transfers the new certificate to P, a purchaser in good faith. P will get to keep the certificate as a valid stockholder and the corporation will be liable to Y for the value of the shares.

b) Corporation registers the transfer and issues new shares to transferee.

c) Limitations on transfer may be imposed, but they must be reasonable.²⁷⁹

3) Right to vote for:

a) Election of board of directors whose members are entrusted with the management of the corporation.²⁸⁰

b) Amendment of bylaws and charter

c) Decision to dissolve the corporation²⁸¹ and

d) Approve or disapprove extraordinary transactions of the corporation.²⁸²

e) Any other fundamental corporate changes.

The right of the shareholder to vote is governed by the following rules;

²⁷⁹ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 342.

²⁸⁰ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 342-344; McCarty, F. William, Bagby, John W., The Legal Environment of Business, (Irwin Publishers Ltd.), p. 434.

²⁸¹ McCarty, F. William, Bagby, John W., The Legal Environment of Business, (Irwin Publishers Ltd.), p. 432.

²⁸² Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 342-344.

- a. Governed by the charter and class of stock owned.
- b. Trustee votes shares held in trust.
- c. Shareholders do not vote on how to manage the corporation. Management is entrusted to the board of directors.
- d. Cumulative voting may be required, i.e., a person gets as many votes as he has shares times the number of directors being elected. **For Example:**

$$100 \text{ shares} \times 5 \text{ directors} = 500 \text{ votes.}$$

- e. Can vote by proxy—an assignment of voting rights. The shareholder may give up his voting power and place it irrevocably in the hands of others as in a voting trust.
- f. Amendments of the articles of incorporation and approval of fundamental corporate changes such as merger, consolidation, or sale of all assets require only majority approval by shareholders.²⁸³

4) Right to dividends:

- a) Shareholder generally has no inherent right to dividends unless they are declared by the board of directors. Power to declare is discretionary based on the board's assessment of business needs. If surplus is available, the shareholders may be able to force payment on the grounds that withholding payment is an abuse of director discretion.
- b) Dividends are normally payable to shareholders of record on a given date.

²⁸³ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (New York: John Wiley & Sons), 1984 Edition, p. 342-343.

- c) Dividend becomes a debt to the corporation when declared. Generally cannot be revoked once declared.
- d) Cannot be paid out of legal capital. They must be paid out of retained earnings. They increase legal capital.²⁸⁴

5) Right of Shareholders to inspect books and records

- a) Shareholders have a right to inspect books and records.²⁸⁵ Right of shareholders to inspect books and records exists in common law and may be provided for by statute.
- b) These books and records include minute books, stock certificate books, stock ledgers, general account books.
- c) Inspection must have a purpose reasonably related to his interest as shareholder, e.g., to communicate with other shareholders, not to compete with corporation.
- d) Corporation may be subject to fines if it refuses to allow the shareholders to inspect books and records.
- e) Directors, as opposed to the shareholders, have an absolute right of inspection and they can bring their accountant or attorney along with them.²⁸⁶

6) Pre-emptive right

²⁸⁴ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 343.

²⁸⁵ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 343; McCarty, F. William, Bagby, John W., The Legal Environment of Business, (Irwin Publishers Ltd.), p. 435.

²⁸⁶ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 343.

- a) This is the right to subscribe to new issues of shares so that the shareholder's ownership will not be diluted without the opportunity to maintain it. **For Example:** Corporation has one class of common stock. Stockholder A owns 15%. A new issue of the same class of stock is to be made. Stockholder A has a right to buy 15% of it.
- b) This is the right of first refusal and applies to issuances of new stock of the same class or series that the shareholder owns.
- c) Usually only applies to common stock, not preferred and treasury stock.
- d) There is no preemptive right to purchase stock at par value.
- e) This right may be denied by the charter.²⁸⁷

7) Shareholders Right to Sue.

- a) Shareholders can sue on behalf of the corporations in the event of improper action²⁸⁸, i.e., a derivative suit.
- b) In cases where a duty to the corporation is violated and corporation does not enforce, e.g. Directors violates his fiduciary duty to corporation or illegal declaration of dividends or fraud by officer on corporation. In such circumstances the shareholders must first demand that directors sue in name of corporation and then may proceed if they refuse. Suit may be barred if directors make good faith business judgment that the suit is not in the corporation's best interests.

²⁸⁷ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 343-344.

²⁸⁸ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 344; McCarty, F. William, Bagby, John W., The Legal Environment of Business, (Irwin Publishers Ltd.), p. 435.

c) Damages go to corporation

d) Plaintiff must be shareholder of record.

8) Shareholders have a right to a pro rata share of distribution of assets on dissolution after creditors have been paid.²⁸⁹

All these rights of shareholders are recognized by Islamic law.

3.5 DIVIDENDS ON SHARE

The law assumes that the purpose of a business corporation is to make a profit. Shareholders usually invest in a corporation primarily to share in the expected profit through dividends. It is not unusual for the corporations to retain all earnings over long periods of time and to reinvest them in the business. Dividends must be paid ratably on the shares of any class or series within the class.²⁹⁰ Dividends must be paid in cash unless there is an express authority to pay them in shares or debentures.²⁹¹

The power to pay dividends is inherent in every company, and therefore, it need not be given by the memorandum or the articles.²⁹² Dividends are profits of a trading company divided amongst members in proportion to their shares. Such proportion may be

²⁸⁹ Delaney, Patrick R., Gleim, Irvin N., CPA Examination Review Business Law, (Newyork: John Wiley & Sons), 1984 Edition, p. 344.

²⁹⁰ Lusk, Harold F., Hewitt, Charles M., Donnell, Johan D., A James Barnes, Business Law, (Ontario: Richard D. Irwin, Inc), 4th Edition 1978, p. 548.

²⁹¹ Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 61.

²⁹² Choudhary, A.M., A Hand Book Of Company Law, (Lahore: All Pakistan Legal Decisions), p. 63; Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 134

determined by the articles; if not, dividend may be paid on each share in proportion to the nominal value of that share without reference to the amount actually paid up thereon.²⁹³

Shareholders have a right to share in the net income of the corporation; however the declaration of dividends is subject to the business judgment of the board of directors.²⁹⁴ It is the discretionary power of the board of directors to declare the dividend.²⁹⁵ This discretion applies even to preference shares. Dividends are not gratuities handed out to shareholders by a benevolent board of directors but they are the expected returns on capital investment.²⁹⁶ The directors may refuse to declare dividends and the shareholders cannot insist on the payment of dividends even if the profits are very large. But where they choose to pay the dividends they must state in their report, to be attached to the company's balance sheet. The amount which they recommend should be paid by way of dividend. Directors of the company may declare in the general meeting of the company a dividend which should in no event exceed the amount recommended by the directors in their report.²⁹⁷ A board of directors must act reasonably and in good faith. Where fraud or a gross abuse of discretion is shown and there are profits out of which dividends may be declared, the shareholders may compel the board of directors to declare dividends

²⁹³ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 59; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 63.

²⁹⁴ Barnes, A. James, Dworkin, Rerry Morehead, Richards, Eric L., *Law For Business*, (Irwin McGraw Hill), 7th Edition, p. 516; Corley, Robert N., Robert, William J., *Principles of Business law*, (Englewood Cliffs New Jersey: Prentice-Hall Inc.), 11th Edition, p. 725.

²⁹⁵ Corley, Robert N., Robert, William J., *Principles of Business law*, (Englewood Cliffs New Jersey: Prentice-Hall Inc.), 11th Edition, p. 725; Lusk, Harold F., Hewitt, Charles M., Donnell, Johan D., Barnes, A James, *Business Law*, (Ontario: Richard D. Irwin, Inc), 4th Edition 1978, p. 549.

²⁹⁶ Lusk, Harold F., Hewitt, Charles M., Donnell, Johan D., Barnes, A James, *Business Law*, (Ontario: Richard D. Irwin, Inc), 4th Edition 1978, p. 549.

²⁹⁷ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 59-60; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 63.

through the court.²⁹⁸ Declaration of dividends is the responsibility of the directors.²⁹⁹ Besides these dividends the articles may empower the directors to declare interim dividends, i.e., dividends in between two ordinary general meetings of the shareholders of the company.³⁰⁰

A dividend become a debt from the date on which it is declared or when it is payable, and a shareholder who is entitled to it can sue to recover it within six months from such date. Such dividend cannot bear any interest unless the articles so provide. A dividend, once its declaration has been made public, may not be rescinded.³⁰¹ An interim dividend, however, is not a debt and the directors may pass a resolution to rescind it.³⁰² A declaration of dividend is proper as long as it does not impair the capital stock. Any declaration that reduces the net assets of the corporation below the outstanding capital stock is illegal.³⁰³

A company instead of paying dividends may capitalize its profits if the articles so permit. The company in such a case declares dividend or bonus out of its undistributed profits and issues at the same a corresponding number of new shares. The company thus enabled to increase its capital and the shareholders, on the other hand, get their dividends in the shape of fully paid up shares which are called bonus shares.³⁰⁴ The effect of capitalization

²⁹⁸ Corley, Robert N., Robert, William J., Principles of Business law, (Englewood Cliffs New Jersey: Prentice-Hall Inc.), 11th Edition, p. 725.

²⁹⁹ Lusk, Harold F., Hewitt, Charles M., Donnell, Johan D., Barnes, A James, Business Law, (Ontario: Richard D. Irwin, Inc), 4th Edition 1978, p. 549.

³⁰⁰ Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 60. Choudhary, A.M., A Hand Book Of Company Law, (Lahore: All Pakistan Legal Decisions), p. 64.

³⁰¹ Corley, Robert N., Robert, William J., Principles of Business law, (Englewood Cliffs New Jersey: Prentice-Hall Inc.), 11th Edition, p. 725.

³⁰² Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 60.

³⁰³ Corley, Robert N., Robert, William J., Principles of Business law, (Englewood Cliffs New Jersey: Prentice-Hall Inc.), 11th Edition, p. 725.

³⁰⁴ Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 61; Choudhary, A.M., A Hand Book Of Company Law, (Lahore: All Pakistan Legal Decisions), p. 64.

is that the company does not part with any of its assets; but each shareholder gets a larger number of shares.³⁰⁵

3.6 CHARACTERISTICS OF SHARES

- 1) All the shares have equal value and all the shares collectively constitute the capital of the company. Some of the commercial legislations describe the minimum and maximum par value of shares.
- 2) The main objective of making the shares of equal value is to facilitate the business conducted by the company, the distribution of dividends or profits, to determine the majority in general meetings of the company and to regulate the prices of shares in the stock market.
- 3) Equal value of shares provides equal rights to its holders except the holder of preferred shares or stock.
- 4) The shareholders have limited liability.³⁰⁶
- 5) The shares cannot be further divisible. Shares must be in the ownership of one person. The main objective of this restriction is to regulate the relationship between the shareholders and the company.
- 6) Shares are transferable. It is the salient feature of shares.³⁰⁷

³⁰⁵ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 61.

³⁰⁶ There is difference of opinion among Muslim scholars regarding the admissibility of limited liability of shareholders because they differ in the permissibility of notion of legal person in Islamic Law. According to a group of scholars in South Africa the concept of limited liability does not exist in Islamic Law because it is the cornerstone of Western Capitalist economic system. While on the other hand according to Maulana Taqi Usmani the concept of limited liability is the logical consequence of legal personality and hence acceptable in Islamic Law.

³⁰⁷ Khaslan, Saad Bin Tarki, "*Al Ashuum Al Jaiza Wa Al Mahzoora*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 4-5; Shareef, Muhammad Abdul Ghaffar, "*Ahkam Al Suuk Al Maalia*", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 213; Kurdi, Ahmad Al Hajji, "*Al*

3.7 SHARIAH RULINGS ON SHARES (التكليف الفقهي للأسهم)

Share is a portion or part of the capital of the company and shares overall presents a company and company in Islamic Fiqh is based on the principle of agency. Shareholder is an agent of another shareholder in dispositions. Therefore the acts or dispositions of all the shareholders are implemented in the company due to ownership with respect to his share and due to the principle of agency with respect to the shares of other shareholders. But some of the prevailing enactments provide that capital of the joint stock company is not in the ownership of shareholders. Joint Stock Company has a legal identity and a corporate personality. The liability of company is different from the liability of

Mutajara Bi Ashum Sharikat Garduha wa Amaliha Mubah Lakina Taqtarid Min Al Bank Bisiffa Mustamira, (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol.44, March 2001, p. 144; Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 25; Yahyah, Fahad Bin Abdur Rahman, "Al Mudarraba Alla Al Ashuum Qabal Buudh Al Sharikah Fii Nishatiha", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, p. 34-35; Mehdi, Nazeeh Muhammad Al Saadiq, "Al Awraq Al Maalia Al Mutadawilla Fii Al Aswaaq Wa Al Boorsat "Al Ashuum", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol, 1, P. 25-27; Abdullah, Syed Hassan, "Al Aswaaq Al Maalia Wa Al Boorasat Min Al Manzoor al Shari wa Qanoon", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 2, p. 24; Asbahi, Mustaffa Yaseen Muhammad, "Al Qanoon Al Wajib Al Tatbeeq Alla Al Ilaqaat Al Qanoonia Al Mutasilla Bi Aswaaq Al Aooraq Al Maalia Zaat Al Tabi Al Duuli", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 11-13; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 4-6; Abu Al Nassar, Assam, "Al Hukam Al Shari Fii Tamalik Al Ashumm Wa Keefia Tatheer Ashuum Al Sharikat Alati Ikhtalata Fiha al Haram Bil Hala", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, p. 4-5.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 4-5؛
دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة والدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص.
213؛ دكتور أحمد الحجى الكردي، المتاجرة بأسهم شركات غرضها وعملها مباح لكن تقتصر من البنك بصفة مستمرة، (مجلة الشريعة
والدراسات الإسلامية)، العدد الرابع والأربعون، مارس 2001م، ص. 144؛ دكتور عبد الحق حميش، في حكم تداول الأسهم المختلفة،
(منتظر أسواق الأوراق المالية والبورصات)، المجلد الرابع، ص. 25؛ دكتور فهد بن عبد الرحمن البجي، المضاربة على الأسهم قبل
بدء الشركة في نشاطها، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الرابع، ص. 34-35؛ دكتور نزيه محمد الصادق المهدي،
الأوراق المالية المتداولة في الأسواق والبورصات "الأسهم"، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الأول، ص.
25-27؛ دكتور سيد حسن عبد الله، الأسواق المالية والبورصات من المنظور الشرعي والقانوني، (منتظر أسواق الأوراق المالية و
البورصات)، المجلد الثاني، ص. 24؛ دكتور مصطفى ياسين محمد الأصبحي، القانون الواجب التطبيق على العلاقات القانونية المتصلة
بأسواق الأوراق المالية ذات الطابع الدولي، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 11-13؛ دكتور ياسين
محمد أحمد، الأسهم الجائزة والمحظورة ودورها في إحداث نهضة اقتصادية شاملة ومعاصرة، (منتظر أسواق الأوراق المالية و
البورصات)، المجلد الثالث، ص. 4-6؛ دكتور عصام أبو النصر، الحكم الشرعي في تملك الأسهم وكيفية تطهير أسهم الشركات التي
إختلط فيها الحرام بالحلال، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الرابع، ص. 4-5.

shareholders. There is difference of opinion among the Muslim Jurists with respect to the Shariah ruling (الحكم الشرعي) on shares. In this regard there are two opinions:

First Opinion: According to this opinion share is considered to be a commercial commodity. This is the opinion of *Sheikh Jadd-ul-Haq* and others.

Arguments of First Opinion:

There are two arguments on which this opinion is based. These are as follow:

- 1) Joint stock Company is formed as a consequence of man-made laws or statutes or enactments which provide that the capital of the company is not the ownership of the shareholders.

This argument can be repudiated **Firstly** that the establishment of corporate personality or separate legal entity of company and limited liability of the company do not exclude it from *Inan* partnership (شركة العنان). Capital is joint property of all partners and Board of Directors takes remuneration form the owners of the capital and loss is to be beard by owners of the capital. **Secondly** it is inevitable from this argument that there is no difference between Joint Stock Company involved in permissible business and the one involved in impermissible business according to Shariah. Both of these have separate legal entity and distinct from its shareholders and none of the Muslim jurists is of that opinion.

- 2) A share is a property used for commercial trading purposes and shares have their own markets to be traded there. Those who traded with shares can earn profit as well as bear loss. The reason of trading with them is the commercial value of shares in stock markets. That's why shares are considered to be commodities.

This argument can also be repudiated that considering shares a commodity is not a matter of dispute. This assumption does not exclude the shares to be a portion or part of assets of the company.

Second Opinion: According to this opinion share is an allotment of a portion or part to the shareholder in the stock or assets of the company. This is the opinion of most of the contemporary scholars. This opinion is based on the fact that Sharikah in Islamic law is based on the principle of agency.

Preferred opinion: Second opinion is preferred over the first one.³⁰⁸

According to Muslim scholars the shares of a company are negotiable only if the company owns some non liquid assets. If all the assets of the company are in liquid form i.e. in the form of money, then the shares can be purchased and sold only at par value because in this case the shares represent money only and money can be traded only at par value.³⁰⁹

3.7.1 SHARIAH RULINGS ON DIFFERENT TYPES OF SHARES

In Shariah there are different types of shares. Shares are of different types on the basis of:

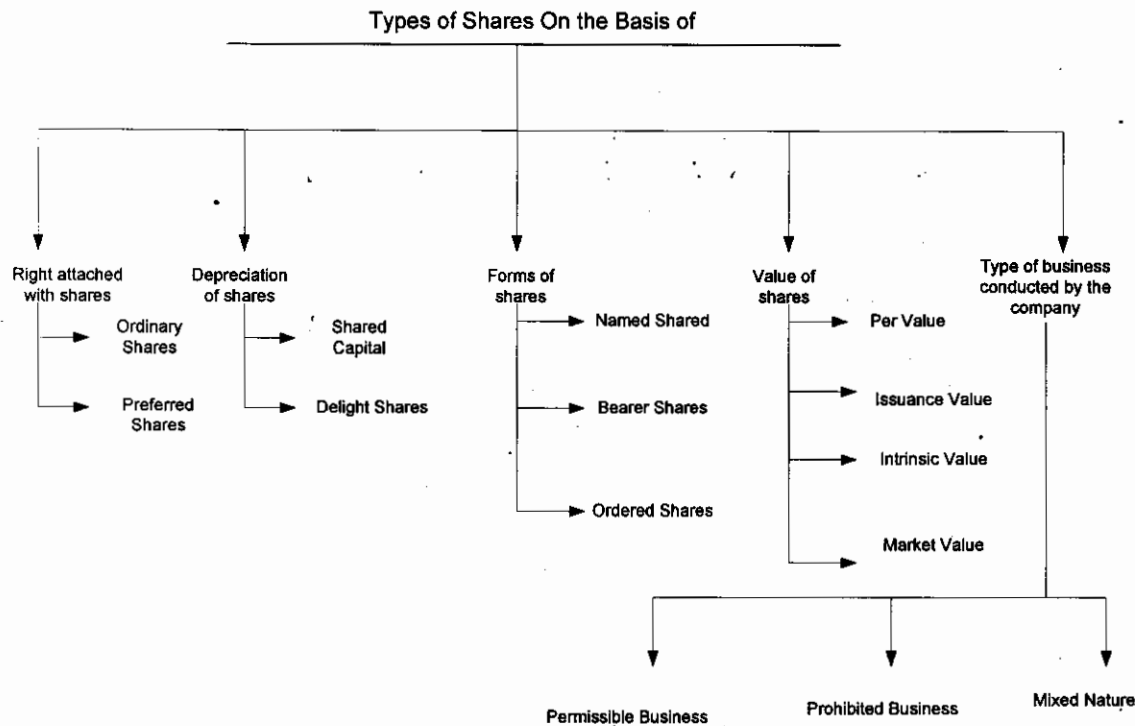
1. Rights attached with shares

³⁰⁸ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 4-12; Ijaz, Irshad Ahmad, "Bazzar Hissas Ki Sargarmian Aur Inka Shari Jaiza" Sunday Magazine 16th August 2009.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث ص، 4-12؛ مفتي ارشاد احمد اعجاز، "بازار حصص کی سرگرمیاں اور انکا شرعی جائزہ"، جنگ سنڈے میگزین 16 اگست 2009۔

³⁰⁹ Iqbal, Zamir, Mirakhor Abbas, An Introduction To Islamic Finance Theory and Practice, (Lahore: Vanguard Books Pvt. Ltd.), p. 174; Usmani, Muhammad Taqi, An Introduction to Islamic Finance, (Karachi: Maktaba Maariful Quran), Edition 2002, p. 208.

2. Depreciation of shares
3. Forms of shares
4. Value of shares
5. Types of business conducted by the company.



1st TYPE OF SHARES:

PERMISSIBLE AND NON PERMISSIBLE SHARES WITH RESPECT TO THE RIGHTS ATTACHED WITH THE SHARES (الأسهم الجائزة و المحظورة باعتبار حقوقها)

One of the basic characteristics of the shares is that all the shares are of equal value and this particular characteristic requires equal rights of the shareholders. Some of the legislations permit to issue shares with particular and peculiar characteristics or features which differentiate them from other types of shares. In this respect there are two types of shares which are as follow:

1) ORDINARY SHARES (الأسهم العادية)

Ordinary shares are shares of equal value. The shareholders of ordinary shares are granted equal rights. The shareholders of ordinary shares are entitled to get dividend and are liable to bear loss in accordance with their respective shares.

Shariah Ruling (الحكم الشرعي): Ordinary shares are permissible in Shariah because they are based on the principle of equality (عدالة).³¹⁰

2) PREFERRED SHARES (الأسهم الممتازة).

The shareholders of preferred shares enjoy the rights which are not enjoyed by the ordinary shareholders.³¹¹ When the company needs more capital or desire to increase its capital then the company issues new shares with certain peculiar features which are not attached with already issued shares to motivate the public towards the subscription of these shares. Some times the company offers its ordinary shareholders to convert their shares into preferred shares in recognition of their services which they rendered to the

³¹⁰ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 12-13; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 14; Iqbal, Zamir, Mirakhor Abbas, An Introduction To Islamic Finance Theory and Practice, (Lahore: Vanguard Books Pvt. Ltd.), p. 194.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص 13-14؛
دكتور ياسين محمد أحمد، الأسهم الجائزة والمحظورة ودورها في إحداث نهضة إقتصادية شاملة ومعاصرة، (منتظر أسواق الأوراق
المالية والبورصات)، المجلد الثالث، ص، 14 .

³¹¹ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 12-13; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 14.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص 13-14؛
دكتور ياسين محمد أحمد، الأسهم الجائزة والمحظورة ودورها في إحداث نهضة إقتصادية شاملة ومعاصرة، (منتظر أسواق الأوراق
المالية والبورصات)، المجلد الثالث، ص، 14 .

company. It is due to this reason that preferred shares might be issued at the first instance or ordinary shares might be converted into preferred shares.³¹²

Shariah Ruling: Generally preferred shares are not permissible in Shariah.³¹³ It is permissible to grant certain shareholder priorities in matters related to procedural or administration in addition to the right of vote of ordinary shareholders.³¹⁴ The reasons for the prohibition of preferred shares are as follow:

1. Non equality in profit and loss;
2. The peculiar characteristics attached with the preferred shares are against the contract of Sharikah.
3. Preferred shares also violate the Shariah legal maxim i.e. "Damage and benefit go together" (الغرم بالغرم).³¹⁵

³¹² Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 1-14.

³¹³ Abdullah, Syed Hassan, "Al Aswaaq Al Maalia Wa Al Boorasat Min Al Manzoor al Shari wa Qanooni", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol.2, p. 29; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 15; Jadeed Iqtasadi Masail Shariat Ki Nazar Main, Institute of Policy Studies Islamabad, 2nd Edition, December 1997, p. 15; "Tarjeehi Hissas Ki Islami Khatoot Par Tanzeem", Annual Report 1981-82, Islamic Ideological Council Islamabad, 2nd Edition, 20th July 1993, (Islamabad: Printing Corporation Of Pakistan Press), p. 216; Shariah Standards, (Behrain: Accounting and Auditing Organization for Islamic Financial Institutions), p. 380.

دكتور سيد حسن عبد الله، الأسواق المالية و البورصات من المنظور الشرعي و القانوني، (منتمر أسواق الأوراق المالية و البورصات)، المجلد الثاني، ص 29؛ دكتور ياسين محمد أحمد، الأسهم الجائزة و المحظورة و دورها في إحداث نهضة إقتصادية شاملة و معاصرة، (منتمر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص 15؛ جديد اقتصادي مسائل شريعت كي نظر مين، انستى ثيوث آف پاليسى استيڈيز اسلام آباد، اشاعت دوم، دسمبر 1997، ص 15؛ ترجیحی حصص کی اسلامی خطوط پر تنظیم، سالانہ رپورٹ 1981-82، اسلامی نظریاتی کونسل اسلام آباد، اشاعت دوم، 20 جولائی 1993، (اسلام آباد: پرنٹنگ کارپوریشن آف پاکستان پریس)، ص 216.

³¹⁴ Shariah Standards, (Behrain: Accounting and Auditing Organization for Islamic Financial Institutions), p. 380.

³¹⁵ Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 15

دكتور ياسين محمد أحمد، الأسهم الجائزة و المحظورة و دورها في إحداث نهضة إقتصادية شاملة و معاصرة، (منتمر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص 15.

➤ TYPES OF PREFERRED SHARES:

There are different types of preferred shares which are as follow:

First Type: It is the type of preferred shares which have been granted preferred rights in the recovery of value of their shares fully from the stock or assets of the company at the time of winding up of the company.

Shariah Ruling (الحكم الشرعي): Such types of shares are not permissible because in Shariah profit cannot be guaranteed without bearing loss in Sharikah type of contracts. So if the shareholders have been guaranteed the recovery of the value of their shares fully from the stock or assets of the company, it is against the essence of the Sharikah in Shariah and it also amounts to injustice to the other shareholders.

Second Type: It is the type of preferred shares which have been preferred in distribution of dividends earned by the company. They have been guaranteed to give fixed percentage from the dividends or profits earned by the company before the dividends or profits have been distributed among other shareholders.

Shariah Ruling (الحكم الشرعي): Such type of preferred shares are also not permissible in Shariah because all the shares of the company are of equal value and this equality requires that all the shareholders should have equal rights. The holders of such shares do not provide any extra service against which they should be given such a prestige. According to majority of Muslim Jurists generally right to get more dividend or profit against nothing is not permissible in Shariah.

Third Type: It is the type of preferred shares which have been granted both, preference in the recovery of the value of their shares fully from the stock or

assets of the company at the time of winding up of the company and also have been preferred in the distribution of dividends or profits earned by the company before the distribution of dividends or profits to other shareholders as they have been guaranteed to get fixed percentage from the dividends or profits of the company.

Shariah Ruling (الحكم الشرعي): Such type of preferred shares is not permissible in Shariah.

Fourth Type: It is the type of preferred shares which have been granted more voting rights in the general meetings of the company. They have been given more hold in the general meetings of the company.

Shariah Ruling (الحكم الشرعي): Such type of preferred shares is not permissible in Shariah because shares are of equal value and it requires equality in rights of the shareholders. Therefore all the shareholders must possess equal voting rights in the general meeting of the company.

Fifth Type: It is a type of preferred shares which have been granted fixed rate of return or interest or riba or usuary annually whether the company earns profit or not.

Shariah Ruling (الحكم الشرعي): Such type of shares is not permissible because fixed rate of return amounts to riba and riba is strictly prohibited in Shariah.

Sixth Type: It is a type of preferred shares which have been granted right to be preferred in the subscription of new shares when issued because they are the primary shareholders of the company.

Shariah Ruling (الحكم الشرعي): Such type of preferred shares is permissible on the basis of right of pre-emption.³¹⁶

2nd TYPE OF SHARES:

PERMISSIBLE AND NON PERMISSIBLE SHARES WITH RESPECT TO THE DEPRECIATION OF SHARES (الأسهم الجائزة و المحظورة باعتبار إستهلاكها)

Generally the par value of shares is not refunded to the shareholders except in case of winding up of the company after the creditors have been repaid. It is the right of the shareholder to be a part of the company as a shareholder as long as the company exists and enjoy the benefits being a shareholder of the company. Sometimes it become inevitable for a company to depreciate some of its shares and it is provided by the Memorandum of Association (MOA) of the company. On this basis shares have been divided into two types:

1. SHARE CAPITAL (أسهم رأس المال)

These are those shares, the par values of which do not come under the possession of the shareholders or such shares do not depreciate their value.³¹⁷

³¹⁶ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 13-16.

³¹⁷ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 18; Mehdi, Nazeeh Muhammad Al Saadiq, "Al Awrraq Al Maalia Al Mutadawilla Fii Al Aswaaq Wa Al Boorasat "Al Ashuum", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 1, P. 6; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 21.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة و المحظورة، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث ص، 18؛ دكتور نزيه محمد الصادق المهدي، الأوراق المالية المتداولة في الأسواق و البورصات "الأسهم"، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الأول، ص، 6؛ دكتور ياسين محمد أحمد، الأسهم الجائزة و المحظورة و دورها في إحداث نهضة إقتصادية شاملة و معاصرة، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 21.

Shariah Ruling (الحكم الشرعي): Such type of shares is permissible. According to Muslim Jurists on the share capital the Shariah ruling of ordinary shares is applicable.³¹⁸

2. DELIGHT SHARES (أسهم التمتع) Action de jouissance

These are those shares the value of which have been depreciated and the par values of such shares come under the possession of shareholders.³¹⁹ Depreciation of shares have been done either through casting lots (قرعة) annually until the winding up of the company or by repayment of some of the portion or part of par value of all the shares annually so that total depreciation of shares is completed with in the time specified by the constitution of the company.³²⁰ The rights of delight shareholders are preserved even after the depreciation of their shares. But the rights of delight shareholders in dividends or profits earned by the company and in reserves of the company are less than shareholders of share capital. At the time of winding up of the company the holders of share capital are

³¹⁸ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 18; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 21.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 18؛ دكتور ياسين محمد أحمد، الأسهم الجائزة والمحظورة و دورها في إحداث نهضة إقتصادية شاملة ومعاصرة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 21.

³¹⁹ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 18; Mehdi, Nazeeh Muhammad Al Saadiq, "Al Awrraq Al Maalia Al Mutadawilla Fii Al Aswaaq Wa Al Boorasat "Al Ashuum", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 1, P. 6; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 21.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 18؛ دكتور نزيه محمد الصادق المهدي، الأوراق المالية المتداولة في الأسواق والبورصات "الأسهم"، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الأول، ص. 6؛ دكتور ياسين محمد أحمد، الأسهم الجائزة والمحظورة و دورها في إحداث نهضة إقتصادية شاملة ومعاصرة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 21.

³²⁰ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 18; Shuarabi, Abdul Hameed, *Muassisa Al Sharikat al Tizariya Sharikat Al Ashkhas Wa Al Amwaal Wa al Istasmaar*, (Iskandria: Manshaa Tal Muaraaf), p. 586.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 18؛ دكتور عبد الحميد الشواربي، موسوعة الشركات التجارية شركات الأشخاص والأموال والاستثمار، (الاسكندرية: منشأة المعارف)، ص. 586.

preferred to the holders of delight shares in getting the payment equal to the par value of their shares from the reserves of the company.

Shariah Ruling (الحكم الشرعي):

- If the company issues two types of shares and one of them is ordinary shares the holders of which are responsible to manage the affairs of the company and the second one is delight shares. If the depreciation of delight shares occurs then they are dispensed with the bearing of loss and they are entitled to get dividend. It is not permissible in Shariah because it is against the essence of Sharikah that is the equality among the shareholders and bearing of risk by all the shareholders. It is not allowed in Shariah to exclude some of the shareholders or partners from bearing the loss and put the burden to bear the loss completely on the other shareholders or partners.
- If all the shares depreciate annually by fixed percentage, it is permissible in Shariah because it follows the principle of equality.³²¹

These are those shares the value of which have been depreciated and the par values of such shares come under the possession of shareholders. The rights of delight shareholders are preserved even after the depreciation of their shares. It is because of this particular feature that delight shares are not permissible in Shariah. Once the par value of shares comes under the possession of shareholder then he is not entitled to get any sort of right on his respective share. There is another way through which the rights of holders of delight shares can be preserved even after the depreciation of their

³²¹ Khaslan, Saad Bin Tarki, "*Al Ashuum Al Jaiza Wa Al Mahzoora*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 17-19.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص 17-19.

shares. Guarantee (كفالة) can be demanded from the holder of delight shares. When the holder of delight shares gives guarantee then right to get dividend from profit can be granted to him on the basis of legal maxim of Shariah (الغنم بالغرم) "Liability is an obligation accompanying gain"

3rd TYPE OF SHARES:

PERMISSIBLE AND NON PERMISSIBLE SHARES WITH REFERENCE TO THE FORMS OF SHARES (الأسهم الجائزة و المحظورة باعتبار شكلها)

One of the characteristics of the shares is that they are transferable. So the shares should be issued in such a form that they can be transferred easily. The following are the types of shares according to their forms:

1) NAMED SHARES (أسهم إسمية) Actions Nominatives

On the certificate of these shares the name of the holder of shares is written at the time of the issuance of the shares.³²² The person whose name is written on the certificate is only entitled to get the benefits arises from that certificate and no person other than him can get the benefits from that particular certificate. The ownership of such shares is

³²² Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 19; Hameesh, Abdul Haq, "Fii Hukam Tadawāl Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 24; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 17.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة و المحظورة، (منتشر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 19؛
دكتور عبد الحق حميش، في حكم تداول الأسهم المختلطة، (منتشر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 24؛ دكتور
ياسين محمد أحمد، الأسهم الجائزة و المحظورة و دورها في إحداث نهضة إقتصادية شاملة و معاصرة، (منتشر أسواق الأوراق المالية و
البورصات)، المجلد الثالث، ص، 17.

established by the registration of shares in the company. It is the most common type of shares.³²³

Shariah Ruling (الحكم الشرعي): such type of shares is permissible in Shariah.³²⁴

2) BEARER SHARES (أسهم لحاملها) Actions au Porteur

On the certificate of such shares the name of the holder of shares is not written at the time of the issuance of the shares. Any person holding the certificate of such shares can claim the rights accrue from such certificate. It is written on the certificate of such shares that the shares belong to the holder of these and holder of such shares is considered to be the owner of these shares by the company.³²⁵ In such cases the possession of the share certificate establishes the ownership in the eyes of the company.

³²³ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 19.

³²⁴ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 19; Abdullah, Syed Hassan, "Al Aswaaq Al Maalia Wa Al Boorasat Min Al Manzoor al Shari wa Qanooni", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 2, p. 28; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 17.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتشر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص، 19؛
دكتور سيد حسن عبد الله، الأسواق المالية والبورصات من المنظور الشرعي والقانوني، (منتشر أسواق الأوراق المالية والبورصات)،
المجلد الثاني، ص، 28؛ دكتور ياسين محمد أحمد، الأسهم الجائزة والمحظورة ودورها في إحداث نهضة اقتصادية شاملة ومعاصرة،
(منتشر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص، 17.

³²⁵ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 19-20; Hussain, Hafiz Majister, *Jadeed Fiqhi Masaail Kitabu Sunnat Ki Rooshni Main*, (Lahore: Majister Academy), p. 255; Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 24; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 17.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتشر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص، 19-20؛
حافظ مبشر حسين، جديد فقه مسائل كتاب وسنت كي روشني مين، (لاهور: مبشر اكيڏمي)، ص، 255؛ دكتور عبد الحق حميش، في
حكم تداول الأسهم المختلطة، (منتشر أسواق الأوراق المالية والبورصات)، المجلد الرابع، ص، 24؛ دكتور ياسين محمد أحمد، الأسهم
الجائزة والمحظورة ودورها في إحداث نهضة اقتصادية شاملة ومعاصرة، (منتشر أسواق الأوراق المالية والبورصات)، المجلد الثالث،
ص، 17.

Shariah Ruling (الحكم الشرعي): There is difference of opinion among the Muslim Jurists regarding the permissibility of such shares.

- a) **First Opinion:** According to first opinion such type of shares is prohibited because it is based on uncertainty and gharar which leads to dispute.
- b) **Second Opinion:** According to second opinion such type of shares is permissible. According to this opinion the share certificate is itself an instrument which establishes the rights of shareholder in the company. It is not obligatory or compulsory to write the name of the shareholder. Negotiable instruments like cheques can be issued with name or without name and are permissible in Shariah. So such type of shares is also permissible and not prohibited.³²⁶

Preferred Opinion: Second opinion is preferred by the Muslim Jurists.³²⁷

3) ORDERED SHARES (الأسهم الإذنية أو للأمر)

These are the type of shares the certificate of which bear the statement that these shares are capable of being endorsed like sanadat (سندات) which bear the condition of endorsement.³²⁸

Shariah Ruling (الحكم الشرعي): Such type of shares is also permissible in Shariah.³²⁹

³²⁶ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 19.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص 19.

³²⁷ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 19; Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 24.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص 19.

دكتور عبد الحق حميش، في حكم تداول الأسهم المختلطة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الرابع، ص 24.

³²⁸ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 20-21; Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 24.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص 20-21.

دكتور عبد الحق حميش، في حكم تداول الأسهم المختلطة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الرابع، ص 24.

4th TYPE OF SHARES:

PERMISSIBLE AND NON PERMISSIBLE TYPE OF SHARES WITH REFERENCE TO THE VALUE OF SHARES (الأسهم الجائزة و المحظورة باعتبار قيمتها)

The rate of share value growth depends upon the company's overall actual and projected success. Shares are of four types with reference to the value of their shares. These are as follow:

1) PAR VALUE (القيمة الاسمية)

It is the value which is stated on the instrument at the time when company came into being. It is stated value, nominal value or face value.³²⁹ Total par value of all the shares is equal to the capital of the company at the time of its formation. Capital of the company can be estimated by the total par value of all the shares of the company issued at the time

³²⁹ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 19-21; Abdullah, Syed Hassan, "Al Aswaaq Al Maalia Wa Al Boorasat Min Al Manzoor al Shari wa Qanooni", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 2, p. 28; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 20.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة و المحظورة، (منتم أسواق الأوراق المالية و البورصات)، المجلد الثالث ص، 19-22؛
دكتور سيد حسن عبد الله، الأسواق المالية و البورصات من المنظور الشرعي و القانوني، (منتم أسواق الأوراق المالية و البورصات)،
المجلد الثاني، ص، 28؛ دكتور ياسين محمد أحمد، الأسهم الجائزة و المحظورة و دورها في إحداث نهضة إقتصادية شاملة و معاصرة،
(منتم أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 20.

³³⁰ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 23; Shuarbi, Abdul Hameed, *Mosooah Al Sharikaat Al Tijaria Sharikat ul Ashkhas Wa Al Amwaal Wa Al Istasmaar*, (Iskandria: Mansha tul Muarif), p. 585; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 25.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة و المحظورة، (منتم أسواق الأوراق المالية و البورصات)، المجلد الثالث ص، 23؛
دكتور عبد الحميد الشواربي، موسوعة الشركات التجارية شركات الأشخاص و الأموال و الاستثمار، (الاسكندرية: منشأة المعارف)، ص،
585؛ دكتور ياسين محمد أحمد، الأسهم الجائزة و المحظورة و دورها في إحداث نهضة إقتصادية شاملة و معاصرة، (منتم أسواق
الأوراق المالية و البورصات)، المجلد الثالث، ص، 25.

of its formation. Total par value of the shares represents the capital contributed to the company.³³¹

Shariah Ruling (الحكم الشرعي): There is no restriction from Shariah to issue such type of shares.³³²

2) ISSUANCE VALUE (قيمة الإصدار)

Sometimes the company needs more capital and decides to issue new shares for subscription and determine the value of such shares.

- 1) If the value of these new issued shares is equal to the par value of existing shares then there is no restriction from Shariah regarding the permissibility of these shares because equality in value is there as required by justice.
- 2) If the value of these new issued shares is less or greater than the par value of existing shares, then there is difference of opinion among Muslim Jurists regarding the validity of such shares;

First opinion: According to the first opinion it is not permissible to issue such type of shares as it is against the principle of equality and justice among the new shareholders and the previous shareholders.

³³¹ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 23; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 25.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص، 23؛
دكتور ياسين محمد أحمد، الأسهم الجائزة والمحظورة و دورها في إحداث نهضة إقتصادية شاملة و معاصرة، (منتظر أسواق الأوراق
المالية والبورصات)، المجلد الثالث، ص، 25.

³³² Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 23; Abdullah, Syed Hassan, "Al Aswaaq Al Maalia Wa Al Boorasat Min Al Manzoor al Shari wa Qanooni", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 2, p. 29.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص، 23؛ دكتور
سيد حسن عبد الله، الأسواق المالية والبورصات من المنظور الشرعي والقانوني، (منتظر أسواق الأوراق المالية والبورصات)، المجلد
الثاني، ص، 29.

Second Opinion: According to this opinion it is permissible to issue such type of shares because issuance value of shares is very near to the market value of shares. Therefore the issuance value of such shares will be very near to the market value of previously issued shares. Further more the shares are important and not their value.³³³

Preferred opinion: Second opinion is preferred over the first one.³³⁴

3) INTRINSIC VALUE (القيمة الحقيقية)

Intrinsic value of shares denotes the amount of money deserved by the shareholder from undistributed capital of the company after the creditors have been satisfied.³³⁵ Intrinsic value is par value at the time of formation of company. But afterwards the intrinsic value differs from par value when the company comes across with successes and failures in course of its business. If company is successful in its business then the intrinsic value of shares increases from par value. If the company is not successful in its business then the intrinsic value of shares decreases from par value. If the company is neither successful

³³³ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 23.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 23.

³³⁴ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 23; Abdullah, Syed Hassan, "Al Aswaaq Al Maalia Wa Al Boorasat Min Al Manzoor al Shari wa Qanooni", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 2, p. 29.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 23؛
دكتور سيد حسن عبد الله، الأسواق المالية والبورصات من المنظور الشرعي والقانوني، (منتظر أسواق الأوراق المالية والبورصات)،
المجلد الثاني، ص. 29.

³³⁵ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 23-25; Shuarbi, Abdul Hameed, *Mosooah Al Sharikaat Al Tijaria Sharikat ul Ashkhas Wa Al Amwaal Wa Al Istasmaar*, (Iskandria: Mansha tul Muarif), p. 585; Ahmad, Yaseen Muhammad, "Alashuum al Jaiza wa Al Mahzoora Wa Dooreha Fii Ihdaas Nahda Iqtasadia Shamila Wa Muasaara", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 26.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 23-25؛
دكتور عبد الحميد الشواربي، موسوعة الشركات التجارية شركات الأشخاص والأموال والاستثمار، (الإسكندرية: منشأة المعارف)، ص. 585؛
دكتور ياسين محمد أحمد، الأسهم الجائزة والمحظورة ودورها في إحداث نهضة إقتصادية شاملة ومعاصرة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 26.

nor unsuccessful in its business then the intrinsic value of shares is equal to the par value of shares.³³⁶

Shariah Ruling (الحكم الشرعي): It is permissible in Shariah.³³⁷

4) MARKET VALUE (القيمة السوقية)

It is the value or price of shares when presented for sale. Market value of shares depends upon demand and supply, political and economic state and on the conditions of the stock market etc. it also depends upon the progress of the company in its business, on the assets of the company and on the inclination of people towards the trading of shares. The market value of the share is different from the par value of the shares.³³⁸

Shariah Ruling (الحكم الشرعي): It is permissible in Shariah as it is allowed for a human being to sell his commodity on any price without any restriction.³³⁹

³³⁶ Khaslan, Saad Bin Tarki; "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 23.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتصر أسواق الأوراق المالية والبورصات)، المجلد الثالث ص، 23.

³³⁷ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 23; Abdullah, Syed Hassan, "Al Aswaaq Al Maalia Wa Al Boorasat Min Al Manzoor al Shari wa Qanoon", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 2, p. 29.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتصر أسواق الأوراق المالية والبورصات)، المجلد الثالث ص، 23؛
دكتور سيد حسن عبد الله، الأسواق المالية والبورصات من المنظور الشرعي والقانوني، (منتصر أسواق الأوراق المالية والبورصات)،
المجلد الثاني، ص، 29.

³³⁸ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 23-26.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتصر أسواق الأوراق المالية والبورصات)، المجلد الثالث ص، 23-26.

³³⁹ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 23-26; Abdullah, Syed Hassan, "Al Aswaaq Al Maalia Wa Al Boorasat Min Al Manzoor al Shari wa Qanoon", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 2, p. 29.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتصر أسواق الأوراق المالية والبورصات)، المجلد الثالث ص، 23-26؛
دكتور سيد حسن عبد الله، الأسواق المالية والبورصات من المنظور الشرعي والقانوني، (منتصر أسواق الأوراق المالية والبورصات)،
المجلد الثاني، ص، 29.

5th TYPE OF SHARES:

PERMISSIBLE AND NON PERMISSIBLE SHARES WITH REFERENCE TO THE TYPE OF BUSINESS CONDUCTED BY THE COMPANY (الأسهم الجائزة والمحظورة)

(باعتبار نشاطها)

This type of shares is introduced by Shariah because of the presence of concept of halal and haram. While on the other hand no such concept is there in Common Law so consequently no such type exists there.

There are three types of shares with reference to the type of business conducted by the company. These are as follow:

- 1) Shares of companies which are involved in permissible business
- 2) Shares of companies involved in non permissible or prohibited business
- 3) Shares of companies which are involved in business of mixed nature.

The detail of these three types of shares is as follow:

1) SHARES OF COMPANIES INVOLVED IN PERMISSIBLE BUSINESS

(الأسهم شركات ذات الأنشطة المباحة)

These are the shares of the companies which are conducting their businesses within the parameters of Shariah exclusively. The capital of such companies is raised through permissible means and such companies are involved in permissible activities. The Memorandum of Understanding of such companies explicitly provides that they would strictly follow the limitations of Shariah (halal & haram) and would not advance money or borrow money on riba and would not give guarantee of repayment of capital to some of the shareholders.

Shariah Ruling (الحكم الشرعي): There is no difference of opinion regarding the subscription, trading or sale or purchase of shares of such type of companies. These are permissible in Shariah.

2) SHARES OF COMPANIES INVOLVED IN NON PERMISSIBLE BUSINESS (أسهم شركات ذات الأنشطة المحرمة)

These are the shares of companies which are involved in non permissible activities e.g. wine company, company doing the business of narcotics, flesh of pig etc.

Shariah Ruling (الحكم الشرعي): There is also no difference of opinion regarding the subscription, trading or sale or purchase of shares of such type of companies, that they are not permitted in Shariah.

3) SHARES OF COMPANIES INVOLVED IN BUSINESS OF MIXED NATURE (أسهم شركات ذات الأنشطة المختلطة)

These are the shares of companies which are primarily involved in permissible activities such as cement, electricity and medicine companies but they are lending or borrowing money on *riba* or they give guarantee of repayment of capital to some of the shareholders and not to all of the shareholders or such companies are involved in making of *Fasid* contracts etc. This is the situation of most of the companies at present.

Shariah Ruling (الحكم الشرعي): There is difference of opinion among the contemporary Muslim Jurists regarding the subscription, trading or sale or purchase of shares of such companies. There is a great agitation among the contemporary Muslim Jurists regarding the issue at hand.

Reason Of Difference Of Opinion:

The reason of difference of opinion is based on mental perception:

- Those Muslim Jurists who concentrate on the fact that primarily such type of companies are involved in permissible activities and their non permissible activities are less than their permissible activities. The Muslim Jurists allow the subscription, trading or sale or purchase of shares of such type of companies on the basis of following legal maxim of Shariah:

لأكثر حكم الكل

"Shariah ruling with respect to a large part is applicable on the whole'.

- Those Muslim Jurists who concentrate on the fact of presence of involvement of companies in non permissible activities though such activities are in less amount, they prohibit the subscription, trading or sale or purchase of shares of such type of companies on the basis of following legal maxim of Shariah:

و ما أسكر كثيره فقليله و كثيره حرام

"The things which intoxicate if it is taken in a great amount, then the doze of it taken in less or in a large amount both are not allowed".³⁴⁰

Different Opinions On The Permissibility of shares Of Such Companies:

There are two opinions regarding the permissibility of shares of such companies which are as follow:

³⁴⁰ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 26-29.

دكتور سعد بن تركي الختلان، الأسهم الجائزة والمحظورة، (منتظم أسواق الأوراق المالية والبورصات)، المجلد الثالث ص، 26-29.

First Opinion: Subscription, trading or sale or purchase of shares of such companies is prohibited. This is the opinion of most of the renowned Muslim scholars like Sheikh Abdul Aziz Bin Baan, Dr. Saleh Al Foozuun, Dr. Abu Bakar Zaid, Sheikh Abdullah Al Bisaam, Dr. Yousaf Al Qardawi, Dr. Muhammad Al Saeel, Dr. Ahmad Fahmi Abu Sannah, Dr. Muhammad Mustafa al Zarqa, Sheikh Abdullah Bin Beeah, Dr. Saleh Bin Zabin al Marzooqi, Dr. Hussain Hamid Hassan, Dr. Ali Saloos, Dr. Siddique Al Dareer and Ahmad Al Hajii Al Kurdi.³⁴¹

Arguments Of First Opinion:

- 1) Firstly they support their opinion by quoting all Ayahs and Hadiths regarding the prohibition of riba. Allah said in Holy Quran:

"يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنتُمْ مُؤْمِنِينَ"³⁴²

"O you who believe! Fear Allah and give up what remains of your demand for usuary, if you are indeed believers."

"وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا"³⁴³

"And God has permitted trade and forbidden riba".

The Holy Prophet (عليه الصلاة السلام) said:

³⁴¹ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 29; Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 40; Taneeji, Ibraheem Ali Ahmad Al Shaal, "Al Dawabit Wa Al Maayeer Al Hikma Li Sharikat Al Mukhtalita Fii Duu Al Shariah Al Islamia", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 5.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص. 29؛ دكتور عبد الحق حميش، في حكم تداول الأسهم المختلطة، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الرابع، ص. 40؛ دكتور إبراهيم علي أحمد الشال الطنجي، الضوابط والمعايير الحكمة للشركات المختلطة في ضوء الشريعة الإسلامية، (منتظر أسواق الأوراق المالية والبورصات)، المجلد الرابع، ص. 5.

³⁴² Surah Al Baqarah: 278.

³⁴³ Surah Al Baqarah: 275.

عن أبي جحيفة رضي الله عنه "أن النبي عليه الصلاة والسلام قال ألا وإن كل ربا من ربا الجاهلية

موضوع لكم رؤوس أموالكم لا تظلمون ولا تظلمون"³⁴⁴

From Abu Jaheefa رضي الله عنه it has been reported that the Holy Prophet عليه الصلاة والسلام said that all riba is a type of riba al jahiliya and it was written, for you is the capital money only, don't transgress and not be transgressed.

و عن جابر رضي الله عنه "أن النبي عليه الصلاة والسلام لعن آكل الربا و موكله و كاتبه و شاهديه و كل

هم سواء"³⁴⁵

From Jabir رضي الله عنه it has been reported that the Holy Prophet عليه الصلاة والسلام cursed the one who charges riba; he who gives it; the one who records it; and the two witnesses; saying that " they are equal".

The above texts, are quoted by the supporters of the first opinion because of the fact that these texts refer to the prohibition of riba generally and this general prohibition includes riba in large or less amount. Therefore riba or interest earned by the company through lending or borrowing money is also included in *riba al jahiliya* which is clearly prohibited by Quran and Sunnah. So the subscription, trading or sale or purchase of shares of such companies is prohibited.

Objection On This Argument: The above argument is objected that the shareholder is not getting the riba or interest as it is compulsory for him to dispose

³⁴⁴ Transmitted by Imam Abi Daood In His Sunann, Chapter Wadh Al Riba, p. 249.

اخرجه الامام ابي داود في سننه، جزء 3، باب في وضع الربا، ص، 249.

³⁴⁵ Transmitted by Imam Ahmad In his Musnad, Vol. 1, Hadith No: 660, p. 456.

اخرجه الامام احمد في مسنده، جزء 1، ص، 456، رقم الحديث: 660.

off the money earned by the way of riba or interest by giving such money in the way of charity or benevolence.

This objection can be answered **firstly** that the shareholder is not among the ones who himself eats riba but he is the one makes others to eat it therefore he comes in the ambit of above quoted Hadiths i.e. the Holy Prophet عليه الصلاة والسلام cursed the one who charges riba; he who gives it; the one who records it; and the two witnesses; saying that "they are equal". **Secondly** in order to get rid of a part of earnings which is earned by illegal or unlawful means, it is first of all required to determine or specify that portion from earnings which is illegal because of the involvement of riba or interest. Such portion can be determined only if the money earned is taken into possession. It is an established fact that the shareholders practically do not get the possession of those earnings. So exact estimation is not possible.

Muslim Jurists said that it is mandatory for the shareholder to dispose off the money earned by way of riba or interest by giving it in the way of charity or benevolence. This can also be refuted that the repentance with a determination to commit a sin is not acceptable in Shariah. Ibn al Qayyim said:

"تستحيل التوبة مع مباشرة الذنب"

"Repentance is impossible when it is directly followed by the commission of sin"

- 2) When company is lending or borrowing loan on riba or interest actually it is shareholders who are lending or borrowing loan on riba or interest because the transactions done by the company are considered to be done by the shareholders.

It is prohibited for a human being to invest money in prohibited activities similarly it is prohibited for a company to invest its capital in prohibited activities. Sharikah in Islamic law is based on the principle of agency. Therefore the shareholder (shareek) is considered to be an agent of other shareholders in dispositions. The acts done by one shareholder is implemented on other shareholders due to principle of agency.

- 3) The texts of Shariah (النصوص الشرعية) do not tolerate riba even if it is presently insignificantly.

جاء في حديث سعد بن أبي وقاص رضي الله عنه قال: سئل النبي عليه الصلاة والسلام عن بيع الرطب بالتمر، فقال عليه الصلاة والسلام: أينقص الرطب إذا بيع؟ قالوا: نعم، فنهى عن ذلك.³⁴⁶

On the authority of Hazrat Saad Bin Ibi Waqas رضي الله عنه it is reported that Hazrat Muhammad عليه الصلاة والسلام said Muhammad عليه الصلاة والسلام was asked about the exchange of wet date with dry date and he inquired whether the wet dates decreases when become dry? Muhammad عليه الصلاة والسلام prohibited the exchange when he was provided with the positive answer of his question.

- 4) The Holy Prophet said:

"إذا نهيتكم عن شيء فاجتنبوه، وإذا أمرتكم بشيء فأتوا منه ما استطعتم"³⁴⁷

"When you are ordered not to do something refrains from doing it and when you are ordered to do something accomplish it according to your capacity".

³⁴⁶ Transmitted by Imam Abi Daood in His Sunann, Chapter: Al Tamr Bi al Tamr, Vol. 3, p. 257.

أخرجه الإمام أبي داود في سننه، باب التمر بالتمر، جزء 3، ص، 257.

³⁴⁷ Transmitted in Atraaf Al Muatali Bi Atraaf Al Musnad Al Hanbali, Chapter: Hamam Bin Manbah Aan Abi Hurraira, Vol. 8, Hadith No: 10394, p. 79.

رواه في أطراف المسند المعتلي باطراف المسند الحنبلي، الباب: حمام بن منبه عن أبي هريرة، جزء 8، ص، 79، رقم الحديث: 10394.

This Hadith refers to the fact that it is obligatory to refrain from a thing which Hazrat Muhammad عليه الصلاة والسلام ordered to refrain from it. Riba is prohibited and ordered to be refrained from it by Shariah. Involvement of riba is there in the activities of such companies. In accordance with the above quoted Hadith it is not permissible to subscribe, trade or sale or purchase of shares of such companies.

- 5) Muslim Jurists disapproved Musharakah between Jews or Christians and Muslims because Jews or Christians practice usuary or riba.
- 6) According to Muslim Jurists who prohibit the subscription, trading or sale or purchase of shares of such companies is considered to be an assistance to commit a sin. Allah said in the Holy Quran:

"وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ"³⁴⁸

"Help you one another in *Al Birr* and *At Taqwa* (virtue, righteousness and piety); but do not help one another in sin and transgression".

In the light of above quoted Ayah Muslim Jurists prohibited the subscription, trading or sale or purchase of shares of such companies because it amounts to assistance to the commission of sin. It is because of this reason that Muslim Jurists put a condition that motive behind the contract should be legal or lawful for a contract to become valid. **For Examples:** Selling of grapes is permissible generally but if the grapes are sold to make wine from them then the sale is not allowed in Shariah. Similarly the sale of weapons to the enemies at the time of war is prohibited. According to the view of Muslim Jurists subscription, trading

³⁴⁸ Surah tul Maida: 2

with shares of such companies amounts to greater assistance to the commission of sin and transgression than to sell the grapes for wine or the sale of weapons to the enemies at the time of war. Because assistance to commit a sin in case of sale of grapes is suspicious (مظنونة) the buyer of grapes may not make wine from purchased grapes but in case of subscription or trading of shares of companies involved in the business of mixed nature it is confirmed customary practice of such companies to deposit their money in banks and get riba or interest.³⁴⁹

Second Opinion: Subscription, trading or sale or purchase of shares of such companies is permissible but with certain conditions and also it is compulsory to get rid of amount of money earned by illegal or unlawful means. The conditions attached are as follow:

- 1) The constitution (MOA) of the company should restrict the company from trading with interest or riba or trading of unlawful or illegal objects like wine, flesh of pig etc.

It should be one of the objects of the company provided by the constitution (MOA) of the company not to deal with riba or interest or earn riba or interest through lending or borrowing money.

- 2) The majority of the capital of the company should not be raised through borrowing money on riba i.e. only 1/3rd of the capital is allowed to rise through borrowing or lending money on riba.

³⁴⁹ Khaslan, Saad Bin Tarki, "*Al Ashuum Al Jaiza Wa Al Mahzoora*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 31-38.

دكتور سعد بن تركي الخنلان، الأسهم الجائزة و المحظورة، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص 31-38.

- 3) The majority of the capital of the company should not be there in the accounts of a bank which gives the company on the deposit of the capital to the bank fixed rate of return or interest.
- 4) Only 5% of the total production of the company comes from the non permissible activities like riba.
- 5) It is compulsory for the shareholders to get rid of illegal earnings by disposing it off by the way of charity.³⁵⁰

This is the opinion of some of the Muslim scholars like Sheikh Ibn Usmaneen, Sheikh Abdullah Suleman al Maneeh, Sheikh Abdul Aziz, Sheikh Muhammad Taqi Usmani, Dr. Ali Al Qurra Daghi, Dr. Abdul Sattar Abu Ghada and Dr. Nazeeh Hammad.

Arguments of second opinion:-

The arguments in support of second opinion are as follow:

- 1) If the Haram (حرام) or prohibited portion or part of a thing is negligible and the large portion or part of a thing is permissible (مباح) then the prohibited portion of that thing does not affect the validity of transactions. Muslim Jurists support their above statement by the following maxims:

³⁵⁰ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 30; Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 45-46; Taneji, Ibraheem Ali Ahmad Al Shaal, "Al Dawabit Wa Al Maayeer Al Hikma Li Sharikat Al Mukhtalita Fii Duu Al Shariah Al Islamia", ((Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 5-11; Shariah Standards, (Bahrain: accounting and Auditing Organization for Islamic Financial Institutions), p. 381; Ijaz, Irshad Ahmad, "Bazzar Hissas Ki Sargarmian Aur Inka Shari Jaiza" Sunday Magazine 23rd August 2009.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة و المحظورة، (منتصر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 30؛ دكتور عبد الحق حميش، في حكم تداول الأسهم المختلفة، (منتصر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 45-46؛ دكتور إبراهيم علي أحمد الشال الطنجي، الضوابط و المعايير الحكمة للشركات المختلفة في ضوء الشريعة الإسلامية، (منتصر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 5-11؛ مفتي ارشاد احمد اعجاز، "بازار حصص کی سرگرمیاں اور انکا شرعی جائزہ"، جنگ سنڈے میگزین 23 اگست 2009.

a. إختلاط الجزء المحرم بالكثير المباح لا يجعل المجموع حراما

Mixing of haram which is in small quantity with the halal which is in large quantity does not make the commodity on the whole as haram.

b. للأكثر حكم الكل

The majority deserves to be treated as the whole of a thing.

Objection On This Argument: The Shariah legal maxim إختلاط الجزء المحرم بالكثير

is not applicable on the issue at hand because this maxim is applicable where in the earnings of the person, the very small portion or part of it is earned through illegal means and large portion of the earnings of that person is earned through legal means. In this situation the above quoted maxim is applicable and that earned money is halal for such a person. This is the opinion of Imam Ibn e Taymia and Imam Ibn al Qyyiam.

2) There is also an other legal maxim of Shariah which is as follow:

انه يجوز تبعا ما لا يجوز إستقلا

"Thing which is not permissible distinctly is permissible incidentally"

The legal validity of this maxim is based on Hadith which is as follow:

"من باع عبدا وله ماله فماله للذى باعه إلا أن يشترطه المبتاع"³⁵¹

"One who sells his slave and the slave has a property; the property of the slave belongs to the seller except if the buyer put a condition to get the property of the slave along with him at the time of contract".

³⁵¹ Saheeh Bukhari And Muslim

This Hadith provides that the sale of the property of slave is permissible because the property is attached with the main subject-matter of the contract.

The above quoted maxim is applied on the sale and purchase or subscription of shares of such companies because primarily these companies are involved in legal and lawful transactions. Such companies only lend or borrow money on riba or interest which is prohibited by Shariah.

Objection On The Above Argument: This maxim is not applied on the issue of subscription or trading with shares of such companies because riba is not permitted by any Muslim Jurists or by any fatwa as a subsequent (تبعية) of the matter. Riba is prohibited in Shariah whether it is in small or in large amount or it arises subsequently and not primarily. This maxim is applicable with consensus of opinion of Muslim Jurists on sale of things which are prohibited separately or distinctly. **For Examples:** Property of a slave can not be sold without the sale of slave, similarly unborn child without the sale of his mother and milk in udder cannot be sold etc.

- 3) It is needed by the people (حاجة الناس) to invest their money through subscribing or trading with the shares of companies because either they do not have enough capital to start their own business or they do not have enough knowledge how to invest their money in business and earn money. Therefore they are of the opinion that prohibition of subscription or trading with shares of such companies leads towards hardship and difficulty. There is a legal maxim which is as follow:

الحاجة العامة تنزل منزلة الضرورة

"Need of general public can be considered as necessity".

Allah said in the Holy Quran:

"و ما جعل عليكم في الدين من حرج"³⁵²

"And He (Allah) has not laid upon you in religion any hardship."

Objection On The Above Argument: Objection can be raised from two aspects:

firstly that there is a difference in meaning of necessity (ضرورة) and need (حاجة) and therefore it is not acceptable to extend the Shariah Ruling (الحكم الشرعي) of one towards another. **Secondly** if we accept the veracity or trueness of the maxim even then it is not applicable on the issue at hand because of the following two reasons:

- In reality general public is not in need of subscription or trading with the shares of such companies. It is an established fact that people of Muslim Ummah would not face any kind of hardship or difficulty if they had not deal with the shares of such companies. There are Shariah alternatives for the Muslims to invest their money.
- The above quoted maxim is not applicable where something is prohibited by clear and specific text (نص خاص).

4) Another maxim is also quoted by these Muslim Jurists to support their point of view which is as follow:

ما لا يمكن التحرز منه فهو عفو

³⁵² Surah Al Haj; 78

"Where it is not possible to take the possession of the commodity, it is forgiven".

Muslim Jurists are of the opinion that the possession of shares of such companies is difficult and it can be exempted on the basis of above quoted legal maxim of Shariah.

Objection On The Above Argument: This maxim is not applicable on the issue at hand. It is applicable where it is extremely difficult to take the possession of something. **For Examples:** Dirt is attached with the clothes of a person but he can not get rid of it, an agent can not give the guarantee that people would not cheat him, possession of an unborn child is impossible and so on.

- 5) There is a great maslaha (مصلحة عظيمة) in the permissibility of shares of such companies.

Objection On The Above Argument: It is a necessary condition that maslaha should not be in contradiction to the text of Shariah (نصوص الشرعية). If it is so then such maslaha is annulled, it would not be considered as maslaha.

Preferred Opinion: First opinion is preferred over the second opinion.³⁵³

3.7.2 ZAKAT ON SHARES

3.7.2.1 MODE OF PAYMENT OF ZAKAT ON SHARES

Contemporary Muslim scholars differ on the manner or mode of imposition of Zakat on shares and in this regard they have four opinions which are as follow:

³⁵³ Khaslan, Saad Bin Tarki, "Al Ashuum Al Jaiza Wa Al Mahzoora", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, P. 38-47.

دكتور سعد بن تركي الخثلان، الأسهم الجائزة والمحظورة، (منتصر أسواق الأوراق المالية والبورصات)، المجلد الثالث ص، 38-47.

First Opinion:

Some of the Muslim Jurists are of the opinion that commercial Zakat (زكاة التجارة) is *Wajib* (واجب) on the shares of the company according to the activities of the company. If the company is involved in manufacturing of commodities (شركة صناعية) then Zakat is liable to be paid on the profits earned by that company. If the company is of commercial nature (شركة تجارية) then Zakat is liable to be paid on the shares of that company after the deduction of value of fixed assets from par value of shares. This is the opinion of Sheikh Abdur Rahman, Sheikh Abdus Salam and Sheikh Wahba tul Zuhaili.

Second Opinion:

Zakat is *Wajib* (واجب) on shares according to the intention of the shareholder and types of shares.

- If the shareholder acquire the shares in order to get the profits or proceeds or income then Zakat is liable to be paid according to the type of *Sharikah*.
 - ✓ If *Sharikah* is of agriculture nature (شركة زراعية) then Zakat is liable to be paid in accordance with the Zakat imposed on husbandry or farming or agriculture.
 - ✓ If *Sharikah* is of manufacturing nature (شركة صناعية) then Zakat is liable to be paid in accordance with the Zakat imposed on merchandize i.e. on the net profit.

✓ If *Sharikah* is of commercial nature (شركة تجارية) then Zakat is liable to be paid according to the intrinsic value of shares after the deduction of value of fixed assets and charges of institution.

- If the shareholder acquire the shares for the purpose of trading or for sale and purchase. In such case Zakat is likely to be paid of commercial item (زكاة العروض) (التجارة) i.e. according to the market value of shares and not on the profits of the *Sharikah*.

This is the opinion of Muslim scholars like Sheikh Abdullah Bin Maneeh, Sheikh Ahmad Al Hujii.

Third Opinion:

Some of the Muslim scholars are of the opinion that on shares Zakat of commercial items is likely to be paid irrespective of the type and activities of *sharikah*. This is the opinion of Muslim scholars like Sheikh Abu Zahra, Abdur Rahman Hassan, Abdul Wahab Khilaf, Dr. Abdur Rahman Al Hulv, Dr. Rafeeq Al Missri, and Dr. Hassan al Ameen.³⁵⁴

Argument: the above scholars supported their opinion with an argument that the underlying cause (علة) of imposition of Zakat is to increase or to grow (النماء) in maal. This underlying cause is present in shares as progress and prosperity of a company

³⁵⁴ Aqal, Yousaf Bin Abdul Aziz, "Zakat Al Ashuum Wa Sanaadat", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 3-4.

دكتور يوسف بن عبد العزيز العقل، زكاة الأسهم و السندات، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص. 3-4.

depends upon the trading with shares. So Zakat should be paid on shares of all types of companies.³⁵⁵

Fourth Opinion:

According to this opinion *Sharikah* is liable to pay Zakat as it is a natural person and not a legal person. Maal of all the shareholders is considered to be the maal of one single person with respect to maal on which Zakat is liable to be paid. Other requirements like *Nisab* and how much is to be paid as Zakat etc. all these are to be decided in accordance with the Zakat of a single person.

This opinion is the preferred opinion in the eyes of Dr. Al Siddique Al Darrer.³⁵⁶

The capital of commercial oriented *Sharikah* (شركة تجارية) consists of:

- Fixed assets like store houses and land;
- Cash money and
- Commercial commodities for sale.

So 2.5 % Zakat is *Wajib* on cash money (السيولة النقدية) and on commercial commodities for sale but not on fixed assets like store houses and land because fixed assets is non-amortized (غير ناميا) property on which there is no Zakat. The shareholders of such

³⁵⁵ Qila jaei, Muhammad Ruwas, "Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah", (Dar Al Nafaas), p. 63.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (دار النفاس)، ص، 63.

³⁵⁶ Aqal, Yousaf Bin Abdul Aziz, "Zakat Al Ashuum Wa Sanaadat", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 4-5.

دكتور يوسف بن عبد العزيز العقيل، زكاة الأسهم و السندات، (منتصر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 4-5.

companies should know the proportion of fixed assets in the capital of the company so that they can pay Zakat on their shares after deducting the value of fixed assets.

The capital of agriculture oriented *Sharikah* (شركة زراعية) consists of:

- Fixed assets like store houses and land;
- Instruments used in agriculture like tractors etc.
- Cash money and
- Agricultural produce.

There is no Zakat on fixed assets and on instruments used in agriculture because of being non-amortized property. 2.5 % Zakat is *Wajib* on cash money. As far as agricultural produce is concerned if it is irrigated by rain water then 10 % Zakat is liable to be paid and if it is irrigated not by rain water but irrigated through artificial means which involves human labour then 5 % Zakat is liable to be paid on such agricultural produce.

The capital of manufacturing oriented *Sharikah* (شركة صناعية) consists of:

- Fixed assets like store houses and land;
- Instruments used in manufacturing process like machinery etc.
- Cash money and
- Manufactured product.

There is no Zakat on fixed assets and on instruments used in agriculture because of being non-amortized property. 2.5 % Zakat is *Wajib* on cash money. As far as manufactured

product is concerned as it is being made for trade so Zakat of commercial item (زكاة الأموال) is likely to be paid on them.³⁵⁷ (التجارية)

3.7.2.2 APPRAISAL OF IMPOSITION OF ZAKAT (تقويم الأسهم في الزكاة)

There is difference of opinion among Muslim scholars in appraisal of imposition of Zakat. In order to impose Zakat on shares the market value of shares should be taken into consideration or the intrinsic value of shares should be taken into consideration. In this regard there are two situations:

First situation:

If shares are acquired by the shareholders for trading purpose, then there are two opinions:

- 1) Some of the Muslim scholars are of the opinion that in this situation the market value (القيمة السوقية) of shares should be taken into consideration. This is the opinion of Muslim scholars like Sheikh Wahba Tul Zuhaili, Sheikh Abdur Rahman Al Hulv, Dr. Ahmad Kurdi, Dr. Raqeeq Al Missri, Sheikh Abdullah Maneeh, Sheikh Abdullah Al Bisaam, Sheikh Rajab Biyuud al Tameemi, and Sheikh Muhammad Abduhuu Ummar.
- 2) While on the other hand some of the Muslim scholars said that intrinsic value (القيمة الحقيقية) of shares should be taken into consideration. This is the opinion adopted by Dr. Muhammad Siddique al Darrer.

³⁵⁷ Qila jaei, Muhammad Ruwas, "Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah", (Dar Al Nafaas), p. 63-64.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (دار النفاس)، ص، 63-64 .

Second situation:

If shares are acquired by the shareholders not for trading purpose but for the sole purpose of getting income on them. There are two opinions:

- 1) Some of the Muslim scholars are of the opinion that in this situation the market value (القيمة السوقية) of shares should be taken into consideration. This is the opinion of Muslim scholars like Dr. Ahmad Al Kurdi.
- 2) While on the other hand some of the Muslim scholars said that intrinsic value (القيمة الحقيقية) of shares should be taken into consideration. This is the opinion of Muslim scholars like sheikh Abdullah Bin Maneeh.

Preferred opinion

If shares are acquired by the shareholders for trading purpose then the market value (القيمة السوقية) of shares should be taken into consideration and Zakat should be paid accordingly. If shares are acquired by the shareholders not for trading purpose but for the sole purpose of getting income on them then the intrinsic value (القيمة الحقيقية) of shares should be taken into consideration and Zakat should be paid accordingly.³⁵⁸

3.7.2.3 WHO IS LIABLE TO PAY ZAKAT?

³⁵⁸ Aqal, Yousaf Bin Abdul Aziz, "Zakat Al Ashuum Wa Sanaadat", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 14-16.

دكتور يوسف بن عبد العزيز العقل، زكاة الأسهم و السندات، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث ص، 14-16.

Contemporary scholars differ on the issue that who is liable to pay Zakat on shares whether on shareholders or on shareholders but company should pay on behalf of shareholders or on company.³⁵⁹

First Opinion:

It is obligatory on shareholders to pay Zakat on their shares.³⁶⁰ This is the opinion of scholars like Sheikh Abdullah Bin Abdur Rehman al Bisaam, Sheikh Muhammad Al Mukhtar Al Islami, Sheikh Saalam Al Wadood, Dr. Muhammad Seed Ramzan Al Biyuuti, Dr. Fazal Al Dabbu, Dr. Hassan Abdullah al Ameen.

Arguments of This Opinion:

- 1) Zakat is made an obligation. It is demanded by Allah Almighty from His subjects. Therefore the concept of reward or punishment is related with it. On the other hand company is not addressed by Allah Almighty for the imposition of *Hukam Shari*. Therefore there is no obligation on company and there is no question of reward or punishment.
- 2) Shareholders are the owners of shares. If it is said that Zakat is *Wajib* on company then it means that company is the owner of shares. Therefore contradiction occurs if Zakat is made an obligation on the company.

³⁵⁹ Baqmi, Saleh Bin Zaabin Al Marzooqi, "*Man Tajib Alihi Zakat Ashuum Al Sharikat Al Musahaama*", (Majallah Tal Bahoos Al Fiqhiha al Muasarra), Vol. 78, p. 8; Aqal, Yousaf Bin Abdul Aziz, "*Zakat Al Ashuum Wa Sanaadat*", (Muatamir Aswaaq Al Aooraq Al Maali Wa Al Boorasat), Vol. 3, p. 10.

دكتور صالح بن زابن المرزوقي البقمي، من يجب عليه زكاة أسهم الشركات المساهمة، (مجلة البحوث الفقهية المعاصرة)، العدد الثامن و الستون، ص، 8. دكتور يوسف بن عبد العزيز العقل، زكاة الأسهم و السندات، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث ص، 10.

³⁶⁰ Ibid

- 3) Shares can be transferred from the owner to another person before the completion of a year. So if it is said that company is liable to pay Zakat on shares, it leads to the payment of Zakat before the completion of year in the ownership of a new shareholder. This leads to an injustice to the new shareholder and it is in contradiction of Hadith of Muhammad (عليه الصلاة والسلام).

"لا زكاة في مال حتى يحول عليه الحول"³⁶¹

"There is no Zakat on maal on which a year does not pass".

- 4) Nisab is a condition for the payment of Zakat. The purpose of making Nisab a condition is to facilitate the owner. If it is said that a company is liable to pay Zakat on shares then there is a possibility that condition of Nisab is not fulfilled by the new shareholder and company pays the Zakat on his shares. So it also leads to injustice to the new shareholder. Holy Prophet (عليه الصلاة والسلام) said:

"ليس فيما دون خمس أواق من الورق صدقة"³⁶²

"Zakat is not likely to be paid if maal is less than 5 *awaak*".

- 5) Holy Prophet (عليه الصلاة والسلام) said:

"فأعلمهم أن الله افترض عليهم صدقة في أموالهم تؤخذ من أغنيائهم فترد على فقرائهم"³⁶³

³⁶¹ Transmitted in Sunann Tirmizi, Chapter: La Zakat Ala Al Maal Al Mustaffad Hatta Yahuul Alihi, Vol. 3, p. 26.

رواه في سنن ترمزي، الباب: لا زكاة على المال المستفاد حتى يحول عليه، جزء 3، ص، 26.

³⁶² Transmitted in *Al Jamm Baena Al Shahehain Al Bukhari Wa Muslim*, Chapter: Afrad Muslim, Vol. 2, Hadith No: 1631, p. 288.

رواه في الجمع بين الصحيحين البخاري و مسلم، الباب: افراد مسلم، جزء 23، ص، 288، رقم الحديث: 1631.

“And teach them that Allah Almighty has made an obligation on them to pay Zakat on their maal. It is taken from affluent people and is distributed among the poor ones”

If the maal of the person does not reach to Nisab he cannot be considered a rich person rather he is a poor person in the eyes of Islamic Law. The owner can determine clearly that whether his maal is fulfilling the condition of Nisab or not. The company can not determine it as it is not the owner of shares. So only the shareholders can determine it. Therefore shareholders should be liable to pay Zakat on their shares.³⁶⁴

Second opinion:

According to this opinion Zakat is *Wajib* on shareholders but the company will pay it on behalf of the shareholders. This is the opinion of scholar like Dr. Siddique Muhammad Al Ameen Al Dareer.

Argument of This Opinion:

- 1) According to Islamic Law the investment made through shares is considered to be one commodity item. It means that money invested by all the shareholders are mixed together. Therefore company can pay Zakat on behalf of shareholders. For Example if animals of different persons are mixed together then one of them can

³⁶³ Transmitted in *Al Jamm Baeena Al Shahehain Al Bukhari Wa Muslim*, Chapter: Afrad Al Bukhari, Vol. 1, Hadith No: 640, p. 243.

رواه في الجمع بين الصحيحين البخاري و مسلم، الباب: افراد البخاري، جزء 1، ص، 243، رقم الحديث: 640 .
³⁶⁴ Baqmi, Saleh Bin Zaabin Al Marzooqi, “*Man Tajib Alihi Zakat Ashuum Al Sharikat Al Musahaama*”, (Majallah Tal Bahoos Al Fiqhiaha al Muasarra), Vol. 78, p. 20-21.

دكتور صالح بن زابن المرزوقي البقمي، من تجب عليه زكاة أسهم الشركات المساهمة، (مجلة البحوث الفقهية المعاصرة)، العدد الثامن و الستون، ص، 20-21 .

pay Zakat on these mixed animals on behalf of others. Similarly in case of shareholders company can pay Zakat on behalf of shareholders.³⁶⁵

The opinion of Shafi school of thought, with respect to the payment of Zakat on livestock by one person on the behalf of others, is extended and it is applied on money, commodities and agricultural produce. Similarly this opinion is adopted regarding the shares of the company in order to pay Zakat on them. Imam Shafi put certain conditions when he allowed the payment of Zakat by one person on behalf of others, which are required to be strictly fulfilled. These conditions must also be taken into consideration when the opinion is adopted to pay Zakat on shares by company on behalf of the shareholders. These conditions are as follow:

- 1) The person whose maal is amalgamated should be Muslim upon whom the injunctions of Allah Almighty are applicable.
- 2) The amalgamation of maal should continue for a whole year.
- 3) All the persons whose maal has been amalgamated should follow one school of thought i.e. Shafi school of thought.
- 4) The person whose maal is amalgamated should be an affluent one.³⁶⁶

Muslim Jurists put certain conditions to be fulfilled if company is made liable to pay Zakat on behalf of the shareholders. These conditions are as follow:

³⁶⁵ Ibid, p. 67.

³⁶⁶ Shaweesh, Waleed Mustafa, "*Ikhrāj al Sharikat al Musahama Zakat al Ashuum Ann al Musahemeen Dirassa Wa Tehleel Fii Duu al Nasooos al Fiqhiya*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, p. 7.

وليد مصطفى شايوش، إخراج الشركات المساهمة زكاة الأسهم عن المساهمين دراسة وتحليل في ضوء النصوص الفقهية، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص 7.

- 1) State law should provide that company should pay Zakat on behalf of shareholders. State law should give clear directions in this regard.
- 2) Resolution must be passed in general meeting regarding the liability of the company to pay Zakat on behalf of the shareholders.
- 3) Shareholders should give their assent in this regard.³⁶⁷

Third Opinion:

According to this opinion Zakat is *Wajib* on company and it is the responsibility of a company to pay it.³⁶⁸ This is the opinion of scholars like Dr. Yousaf Al Qardawi, Dr. Wahbah Tu Zuhaili, Dr. Abdul Latif Saleh Al Farfoor and Dr. Umaar Al Ashqar.³⁶⁹

Arguments of This Opinion:

- 1) Joint Stock Company is a separate legal entity. Therefore it is different from its shareholders. Joint stock Company has some rights as well as some obligations. One of its obligations is to pay Zakat on its shares. Zakat is a monetary liability

³⁶⁷ Ibid, p. 4.

³⁶⁸ Baqmi, Saleh Bin Zaabin Al Marzooqi, "*Man Tajib Alihi Zakat Ashuum Al Sharikat Al Musahaama*", (Majallah Tal Bahoos Al Fiqhiaha al Muasarra), Vol. 78, p. 8; Aqal, Yousaf Bin Abdul Aziz, "*Zakat Al Ashuum Wa Sanaadat*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 10.

دكتور صالح بن زابن المرزوقي البقمي، من يجب عليه زكاة أسهم الشركات المساهمة، (مجلة البحوث الفقهية المعاصرة)، العدد الثامن و الستون، ص، 8؛ دكتور يوسف بن عبد العزيز العقل، زكاة الأسهم و السندات، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 10.

³⁶⁹ Baqmi, Saleh Bin Zaabin Al Marzooqi, "*Man Tajib Alihi Zakat Ashuum Al Sharikat Al Musahaama*", (Majallah Tal Bahoos Al Fiqhiaha al Muasarra), Vol. 78, p. 23.

دكتور صالح بن زابن المرزوقي البقمي، من يجب عليه زكاة أسهم الشركات المساهمة، (مجلة البحوث الفقهية المعاصرة)، العدد الثامن و الستون، ص، 23.

and not a personal liability. So it can be paid by a legal person and not required to be paid by a natural person.³⁷⁰

- 2) *Sharikah tul Mashia* (شركة الماشية) is *Sharikah Tul Amwaal* (شركة الأموال) and not a *Sharikah tul Ashkhas* (شركة الأشخاص) and Zakat is paid on *Sharikah tul Mashia* on the whole and not separately on the basis of amalgamation of livestock by different persons. Similarly in case of shares of the company shareholders Zakat is paid on all the shares by the company on the whole and it is not the responsibility of each and every shareholder to pay Zakat on his respective share by analogy on the payment of Zakat on *Sharikah Tul Mashia*.³⁷¹

- 3) Holy Prophet said:

"لا يجمع بين متفرق ولا يفرق بين مجتمع خشية الصدقة"³⁷²

"Not to combine the things which are separate and not to separate the things which are combined in order to avoid *sadaqqa*"

This Hadith provides a general rule and there is no text which creates an exception from it. This Hadith is applicable on all the things which are combined together. Shares of the company are also included in the *Hukam* of this Hadith. So shares of the

³⁷⁰ Baqmi, Saleh Bin Zaabin Al Marzooqi, "*Man Tajib Alihi Zakat Ashuum Al Sharikat Al Musahaama*", (Majallah Tal Bahoos Al Fiqhiaha al Muasarra), Vol. 78, p. 8; Aqal, Yousaf Bin Abdul Aziz, "*Zakat Al Ashuum Wa Sanaadat*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 10.

دكتور صالح بن زابين المرزوقي البقمي، من يجب عليه زكاة أسهم الشركات المساهمة، (مجلة البحوث الفقهية المعاصرة)، العدد الثامن و الستون، ص، 8؛ دكتور يوسف بن عبد العزيز العقل، زكاة الأسهم و السندات، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 10.

³⁷¹ Aqal, Yousaf Bin Abdul Aziz, "*Zakat Al Ashuum Wa Sanaadat*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 11.

دكتور يوسف بن عبد العزيز العقل، زكاة الأسهم و السندات، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 11.

³⁷² Transmitted in Saheeh Bukhari, Chapter: Maa Infarada Al Bukhari Bi Ikhrajihi Min Zalik, Vol. 1, p. 21. أخرجه البخاري في صحيحه، الباب: ما انفرد البخاري بإخراجه من ذلك، جزء 1، ص، 21.

company can not be separated and company should pay Zakat on these shares on behalf of the shareholders.

- 4) If company will pay Zakat on the shares then there is a huge benefit in it for poor people which is the ultimate objective of Shariah.
- 5) It is also feasible that company pays the Zakat on the shares on behalf of shareholders. In this way the company will pay a huge amount of money to the poor people. If all the shareholders pay Zakat on their respective shares then it would be difficult and also the Zakat paid by each shareholder will be in fewer amounts.³⁷³

Preferred Opinion:

The shareholders are liable to pay Zakat on their shares.³⁷⁴ Zakat is one of the five fundamentals of Islam. The main objective behind the imposition of Zakat is the training of the Zakat giver and the purification of the soul of the Zakat giver or to make the Zakat giver a righteous and pious person.³⁷⁵ Allah Almighty said:

³⁷³ Baqmi, Saleh Bin Zaabin Al Marzooqi, "Man Tajib Alihi Zakat Ashuum Al Sharikat Al Musahaama", (Majallah Tal Bahoos Al Fiqhiaha al Muasarra), Vol. 78, p. 8.

دكتور صالح بن زابن المرزوقي البقمي، من تجب عليه زكاة أسهم الشركات المساهمة، (مجلة البحوث الفقهية المعاصرة)، العدد الثامن والستون، ص، 8.

³⁷⁴ Baqmi, Saleh Bin Zaabin Al Marzooqi, "Man Tajib Alihi Zakat Ashuum Al Sharikat Al Musahaama", (Majallah Tal Bahoos Al Fiqhiaha al Muasarra), Vol. 78, p. 25; Aqal, Yousaf Bin Abdul Aziz, "Zakat Al Ashuum Wa Sanaadat", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 12.

دكتور صالح بن زابن المرزوقي البقمي، من تجب عليه زكاة أسهم الشركات المساهمة، (مجلة البحوث الفقهية المعاصرة)، العدد الثامن والستون، ص، 35. دكتور يوسف بن عبد العزيز العقل، زكاة الأسهم و السندات، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 12.

³⁷⁵ Shaweesh, Waleed Mustafa, "Ikhray Al Sharikat al Musahama Zakat Al Ashuum Ann Al Musahameen Dirassa Wa Tehleel Fii Duu Al Nasooos al Fiqhiya", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, p. 17.

وليد مصطفى شوايش، إخراج الشركات المساهمة زكاة الأسهم عن المساهمين دراسة و تحليل في ضوء النصوص الفقهية، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 17.

”خذ من أموالهم صدقة تطهرهم و تزيهم بها“³⁷⁶

“Take *sadaqqa* (alms) from their wealth in order to purify them and sanctify them with it”.

The piousness in Zakat giver will be created only when he has an intention (النية) to perform one of the fundamentals of Islam. Presence of intention is one of the elements (ركن) of Zakat. So its importance can not be negated.³⁷⁷

According to my humble opinion any one of the following two ways can be adopted:

- 1) If company is made liable to pay Zakat on the shares on behalf of the shareholders then all the conditions laid down by Imam Shafi with respect to the payment of Zakat of amalgamated maal should be strictly followed or
- 2) If is not possible to comply with all the conditions stipulated by Imam Shafi then the shareholders should be made liable to pay Zakat on their respective shares.

3.8 SHARIAH RULES FOR DEALING WITH SHARES (الضوابط الشرعية)

(للتعامل بالأسهم)

Following shariah rules must be taken into consideration while dealing with shares, which are as follow:

- 1) The company which is issuing shares must be involved in lawful activities.³⁷⁸

³⁷⁶ Surah Al Taubba: 103.

³⁷⁷ Shaweesh, Waleed Mustafa, “*Ikhrāj Al Sharikat al Musahama Zakat Al Ashuum Ann Al Musahameen Dirassa Wa Tehleel Fii Duu Al Nasooos al Fiqhiya*”, (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, p. 29.

وليد مصطفى شويش، إخراج الشركات المساهمة زكاة الأسهم عن المساهمين دراسة و تحليل في ضوء النصوص الفقهية، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 29.

- 2) It is permissible to grant certain shares priorities in matters related to procedural or administration in addition to the right of vote of ordinary shareholders.³⁷⁹
- 3) Sale and purchase of shares should be accomplished on cash and not on debt.
- 4) Riba should not be involved.
- 5) When the sale of the shares is completed the possession of the shares must be accomplished without any delay by the purchaser of the share.
- 6) Complete ownership of the shares must be transferred to the purchaser by the seller.³⁸⁰
- 7) The shares of such a company whose assets are composed of cash only can be sold and purchased only at their nominal value and with the condition of delivery of possession.
- 8) If the assets of the company are composed of debts then the rules for dealing in debts must be strictly observed in case of trading of shares of such companies.

³⁷⁸ Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 37; Shariah Standards, (Bahrain: accounting and Auditing Organization for Islamic Financial Institutions), p. 379; Mansoori, Muhammad Tahir, Abroo, Abdul Hai, *Al Madkhal Lilfiqh Al Masrifii*, (Islamabad: Shariah Academy International Islamic University Islamabad), 1st Edition 2002, p. 239; Ijaz, Irshad Ahmad, "Bazzar Hissas Ki Sargarmian Aur Inka Shari Jaiza" Sunday Magazine 16th August 2009.

دكتور عبد الحق حميش، في حكم تداول الأسهم المختلطة، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 37؛ دكتور محمد طاهر منصورى، أستاذ عبد الحى ابرو، المدخل للفقہ المصرفى، (اسلام آباد: اكاديمية الشريعة الجامعة الاسلامية العالمية)، الطبعة الأولى 2002، ص، 239؛ مفتى ارشاد احمد اعجاز، "بازار حصص كى سرگرمياں اور انكا شرعى جائزہ"، جنگ سنڌ ۷ ميگزين 16 اگست 2009.

³⁷⁹ Shariah Standards, (Bahrain: Accounting and Auditing Organization for Islamic Financial Institutions), p. 380.

³⁸⁰ Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 37.

دكتور عبد الحق حميش، في حكم تداول الأسهم المختلطة، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 37.

9) If the assets of a company are made up of tangible assets, benefits, cash and debts then in such a case the rule for trading in the shares of such a company will differ according to the primary assets which are in accordance with the main objective of the company and its usual activity.³⁸¹

10) It is not permissible for Muslims to purchase the shares of a company about which he knows that such a company is involved in transactions which yield into riba. If he came to know about the involvement of company in riba generating transactions after becoming the member of such a company, it is mandatory for him to get rid of shares of such a company as soon as possible.³⁸²

So the sale and purchase of shares is permissible in shariah but above conditions must be complied with.

CONCLUSION

It can be concluded after discussing the nature and meaning of shares in Common Law and in Islamic Law that there is no difference between Common Law and Islamic Law as far as the nature and meaning of share is concerned. It can be said that Islamic Law adopts the concept given by Common Law regarding shares and Muslim Jurists gave Shariah rulings regarding each and every type of shares. Islamic law differs with the Common law on the question of permissibility of certain types of shares where the fixed

³⁸¹ Shariah Standards, (Bahrain: Accounting and Auditing Organization for Islamic Financial Institutions), p. 384.

³⁸² Haddad, Ahmad Bin Abdul Aziz, "*Al Ashuum Wa Al Sanadaat Tasawr Wa Ahkam*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 9.

دكتور أحمد بن عبد العزيز الحداد، الأسهم و السندات تصور و أحكام، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص. 9.

rate of return is paid which amounts to riba. While dealing with shares certain shariah standards are required to be followed.

CHAPTER NO 4

DEBT SECURITIES: DEBENTURE

COMPARATIVE ANALYSIS

4.1 POWER OF BORROWING

The majority of companies do not rely solely on share capital as the source for financing corporate activities.³⁸³ Therefore companies also borrow money from persons who have enough money to lend. It is important for the lenders to ascertain the borrowing powers of companies. The general public will rely on the details given in the prospectus which is required to be issued in connection with a public loan.³⁸⁴ The rights of lenders depend upon the precise terms of their contract with the company. As a general rule, the creditors are entitled to an agreed rate of interest regardless of the commercial success of the company. Their loan agreements may be secured or unsecured providing different protection to different creditors. However, all creditors are paid out, in full if possible, before the shareholders are entitled to any return. Shareholders on the other hand, generally expect to receive a higher total return on their equity funding than providers of debt funding. The level of dividend depends upon the commercial success of the

³⁸³ Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), p. 144.

³⁸⁴ Reeday, T.M., *The Law Relating to Banking*, (London: Butterworths), 5th Edition 1985, p. 129.

company and on the discretion of the directors. Debt is commonly considered a cheaper but less flexible form of corporate funding than equity funding.³⁸⁵

Every trading company has an implied power to borrow to a reasonable amount for the purposes of its business.³⁸⁶ In the case of a non trading company, the power to borrow must be expressly contained in the memorandum of association in which event it may raise money, with or without giving security, as the directors think fit, subject to any particular restrictions in the memorandum.³⁸⁷ If therefore, a company has no express or implied power to borrow, it can only apply to the court for getting it or extending it if its existing power is limited. If a company has an express or implied power to borrow, it may exercise such power to any extent.³⁸⁸ A power to borrow, whether express or implied, carries with it by a further implication of law a power to give security for the loan and to repay interest upon it. It is usual for the company's constitution to give an express power to do these things.³⁸⁹

A practice often followed is to have the company's borrowing powers unlimited, but to impose a restriction in the articles on the director's borrowing powers, though on the other hand, many companies allow their directors to have the same unlimited borrowing

³⁸⁵ Sealy, Len, Worthington, Sarah, Cases and Materials In Company Law, 8th Edition, p. 437.

³⁸⁶ Gough, William James, Company Charges, (London: Butterworth & Co. Ltd. 1978), p. 24.

³⁸⁷ Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 303; Saeed, Khawaja Amjad, Company Law and Sectarial Practice In Pakistan, (Lahore: Institute of Business Management), p. 284; Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 62; A. M. Choudhary, A Hand Book Of Company Law, (Lahore: All Pakistan Legal Decisions), p. 65; Reeday, T.M., The Law Relating to Banking, (London: Butterworths), 5th Edition 1985, p. 129-130; Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 381; Jones, Frank H., The Students Guide To The Company Law, (London: Gee and Co Publishers Ltd), p. 148.

³⁸⁸ Choudhary, A. M., A Hand Book Of Company Law, (Lahore: All Pakistan Legal Decisions), p. 65; Denis, Keenan, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 381.

³⁸⁹ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 381.

powers as the company has.³⁹⁰ Provisions related to powers to borrow are contained in the memorandum and articles of association. Sometimes limitation is placed that the directors cannot borrow beyond a certain limit, except with the approval of shareholders in a general meeting,³⁹¹ but such a limitation cannot restrict the general power of the company to borrow money or credit.³⁹²

If the company borrows beyond its powers, the borrowing is *ultra vires* and consequently void. Therefore, the lender in such cases cannot sue the company for the return of loan.³⁹³ However, he has certain remedies.³⁹⁴ If the money has not been spent, either the lenders can get an injunction to prevent the company from parting with it, or he may institute a suit against the directors for damages for the breach of an implied warranty of authority. If the money has been used in paying off debts which could have been enforced against the company, the lenders may sue the company as he steps into the shoes of the creditors who have been paid by virtue of the principle of subrogation.³⁹⁵

³⁹⁰ Reeday, T.M., *The Law Relating to Banking*, (London: Butterworths), 5th Edition 1985, p. 130.

³⁹¹ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 303; Saeed, Khawaja Amjad, *Company Law and Sectorial Practice In Pakistan*, (Lahore: Institute of Business Management), p. 284; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 62; Choudhary, A. M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 65.

³⁹² Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 62; Choudhary, A. M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 65.

³⁹³ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 303; Saeed, Khawaja Amjad, *Company Law and Sectorial Practice In Pakistan*, (Lahore: Institute of Business Management), p. 284; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 62; Choudhary, A. M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 65; Reeday, T.M., *The Law Relating to Banking*, (London: Butterworths), 5th Edition 1985, p. 130; Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 149;

³⁹⁴ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 349.

³⁹⁵ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 63; Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 149.

4.2 POWER TO GIVE SECURITY

Where a company has a borrowing power, it has, an incident of such power, also a power to give security for the debt by a mortgage or charge on all or any of its property, real or personal, present or future, unless expressly prohibited by the articles.³⁹⁶ The money borrowed can be secured by mortgage or a charge which must be registered with the Registrar within 21 days otherwise it will be void under **section 121 of The Companies Ordinance 1984.**³⁹⁷

If the borrowing company is insolvent, then security affords secured creditors priority in repayment of their debts. Basically the secured assets are used first to fund repayment of the secured debt and any remaining assets are then used to repay all the debts owed to unsecured creditors. **For Example:** if a company owes 100,000 dollars to a secured creditor and 100,000 to its unsecured creditors, and its assets are only worth 100,000, then those assets will go entirely to repaying the secured debt and the unsecured creditors will get nothing.³⁹⁸

4.3 FORMS OF BORROWING

³⁹⁶ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 63; Choudhary, A. M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 65-66; Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 148; Chowdhry, A.G., *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 102-103, Gough, William James, *Company Charges*, (London: Butterworth & Co. Ltd. 1978), p. 27.

³⁹⁷ Chowdhry, A.G., *Mercantile Law in Pakistan*, (Lahore: Khyber Law Publishers), p. 103.

³⁹⁸ Sealy, Len, Worthington, Sarah, *Cases and Materials In Company Law*, 8th Edition, p. 463.

A company may borrow in the form of short term or long term loans according to its needs. Short term loans are usually taken from commercial banks.³⁹⁹ The money borrowed can be secured in one or more of the following ways:

- 1) A legal mortgage of specific parts of its property;
- 2) An equitable mortgage by deposit of title deeds;
- 3) A mortgage of chattels;
- 4) A charge on uncalled capital;
- 5) Promissory Notes and Bills of Exchange;
- 6) A floating charge;
- 7) Debentures;
- 8) Debenture Stock; and
- 9) Mortgage of Book Debts.⁴⁰⁰

Here I will discuss only debentures from above different forms of borrowing.

4.4 DEBENTURES

4.4.1 MEANING & NATURE OF DEBENTURE IN COMMON LAW

The word 'debenture' has its origin in a Latin word for 'owing'.⁴⁰¹ The term debenture is defined in clause (4) of sub section (1) of section 2 to include debenture stock. However,

³⁹⁹ Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 304; Saeed, Khawaja Amjad, Company Law and Sectorial Practice In Pakistan, (Lahore: Institute of Business Management), p. 284 – 285.

⁴⁰⁰ Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 63; Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 351; Choudhary, A.M., A Hand Book Of Company Law, (Lahore: All Pakistan Legal Decisions), p. 66.

⁴⁰¹ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 381.

this does not appear to be good definition of the debenture as it does not show any light as to what it really means.⁴⁰² According to **section 2(12) of The Companies Ordinance 1984**, debenture can be defined as:

"A debenture includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of a company or not".⁴⁰³

A company may raise debt finance in a large number of ways.⁴⁰⁴ The normal way in which a company raises loans is by the issue of debentures, which are documents issued by a company, usually under its seal, as evidence of a loan and of any charge securing it.⁴⁰⁵ It is an instrument usually used by companies in order to bridge finance purposes.⁴⁰⁶

A common and convenient form of borrowing exercised by companies is by the issue of debentures.⁴⁰⁷

Every document which is an evidence of indebtedness by a company is commercially called a debenture. Although it is an ancient term, there is no precise legal form of a debenture. Various forms of instruments are usually called debentures. There are mortgage debentures which create a charge on some kind of property. There are bonds

⁴⁰² Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 305; Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), p. 144, Saeed, Khawaja Amjad, *Company Law and Sercial Practice In Pakistan*, (Lahore: Institute of Business Management), p. 285; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 66.

⁴⁰³ Shaheen, Nazir Ahmad, *Practical Approach to Companies Ordinance 1984*, (Islamabad; Ali Publications), p. 6.

⁴⁰⁴ Davies, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd 2003), p. 806.

⁴⁰⁵ Reeday, T.M., *The Law Relating to Banking*, (London: Butterworths), 5th Edition 1985, p. 141; Keenan, Denis, *Smith & Keenan's Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 381.

⁴⁰⁶ Fazal Suleiman Kazi, *Hand Book of Banking Terms*, (Karachi: Royal Book Company), p. 102.

⁴⁰⁷ Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 150.

which are under seal. There are others which are nothing more than a formal acknowledgment of indebtedness. They all seem to have the common characteristic that they are documents which either create or acknowledge a debt. The use of the term is not necessarily conclusive as to the nature of the instrument. A debenture can be issued singly or in series.⁴⁰⁸

Debentures are normally secured by a charge on the company's assets, either by a provision to that effect in the debenture itself, or by the terms of the trust deed drawn up in connection with the issue. Sometimes a provision appears in both documents.⁴⁰⁹

Bowen L.J. in *English and Scottish Mercantile Investment Co. Ltd. V. Brunton*⁴¹⁰ stated that there were the following three usual forms of debentures, but he did not suggest that these were exhaustive.

"The first is a simple acknowledgment, under seal, of the debt; the second, an instrument acknowledging the debt, and charging the property of the company with repayment; and the third, an instrument acknowledging the debt, charging the property of the company with repayment, and further restricting the company from giving any prior charge".⁴¹¹

Palmer defines a debenture as an instrument under seal evidencing a deed, the essence of it being the admission of indebtedness. A debenture is not more than an

⁴⁰⁸ Farrar, John H., Furry, Nigel, Hannigan, Brenda, Wylie, O P., *Company Law*, (London: Butterworths 1985), p. 208.

⁴⁰⁹ Keenan, Denis, *Smith & Keenan's Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 383.

⁴¹⁰ [1892] 2 Q.B. 700-712

⁴¹¹ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 361.

acknowledgement of a debt. It need not create a charge nor need it be accompanied by a deed under seal.⁴¹²

Debenture is a legal evidence of a debt and the company's obligation to repay the loan and normally also to pay interest on it at a specified rate.⁴¹³ A company is obliged to repay the prescribed rate of interest stipulated in the debenture irrespective of whether it is earning profit or not.⁴¹⁴

4.4.2 DEFINITION OF BOND OR DEBENTURE (السند) IN ISLAMIC LAW

السند في اللغة: ما قابل الحبل، و أيضا ما يعتمد عليه الإنسان.⁴¹⁵

Literally *Sanad* means a thing which accepts support and on which a human being can rely.

إصطلاحاً: عند الفقهاء وثيقة بقرض طويل الأجل ذات قيمة إسمية، قابلة، للتداول، تعطى صاحبها حق إسترداد القيمة التي سجلت عليها و حق الحصول على فائدة محددة منها.⁴¹⁶

⁴¹² Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 66; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 66.

⁴¹³ Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 150-151; Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 305; Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), p. 144, Saeed, Khawaja Amjad, *Company Law and Sectorial Practice In Pakistan*, (Lahore: Institute of Business Management), p. 285; *شركت و مضاربت عصر*، دأكثر مولانا محمد عمران اشرف عثمانى، *حاضر مین، (کراچی: اداره المعارف)*، ص، 471.

⁴¹⁴ Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), p. 144.

⁴¹⁵ Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafaas), p. 66; Shareef, Muhammad Abdul Ghaffar, "*Ahkam Al Suuk Al Maalia*", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 22.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (كويت: دار النفاس)، ص، 66؛ دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة و الدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص، 209.

⁴¹⁶ Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafaas), p. 66.

Technically speaking it is an instrument of debt for a long period of time, having face value, transferable, gives its holder a right to demand an amount written on it and also a fixed rate of return on it.

السند هو عبارة عن صك يمثل ديناً على الهيئة التي أصدرته سواء كانت إحدى الشركات أو هيئة حكومية ويتعلق بقرض متوط أو طويل الأجل.⁴¹⁷

A bond or debenture is an instrument which is similar to debt issued by any one of the company or government authority and it is related to debt either for a medium or a long period of time.

عقد طويل الأجل يتعهد من خلاله المقرض لى دفع فوائد ثابتة القيمة بالإضافة إلى القيمة الاسمية للسند خلال فترات زمنية لحامل السند.⁴¹⁸

A contract for a long period of time, during which the borrower paid fixed return in addition to the face value to the bond or debenture holder.

ورقة مالية تصدرها الدولة أو المؤسسة إلزاماً بدين و وثيقة عن الغرض الممنوح لها يعطى مالكة حق الحصول على دخل محدد.⁴¹⁹

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (كويت: دار النفاس)، ص، 66 .
⁴¹⁷ Jumma, Ali Bin Muhammad, *Mujam al Mustalahat Al Iqtasdia Wa Al Islamia*, (Riyyadh: Maktaba Al Abkiaat), 1st Edition 2000, p. 326; Haitti, Abdul Razaaq Raheem Jaddi, *Al Masaarif Al Islamia Beena Al Nazaria Wa Al Tatbeeq*, (Urdan-Oman: Dar Usamma Linashar), 1st Edition 1998, p. 348.

علي بن محمد الجمعة، معجم المصطلحات الإقتصادية و الإسلامية، (الرياض: مكتبة العبيكات)، الطبعة الأولى 2000م، ص، 326؛
دكتور عبد الرزاق رحيم جدي الهيبي، المصارف الإسلامية بين النظرية و التطبيق، (الأردن- عمان: دار أسامة للنشر)، الطبعة الأولى 1998م، ص، 348 .

⁴¹⁸ <http://3bdulsalam.wordpress.com> (last visited: 5th April 2010).

⁴¹⁹ Haddad, Ahmad Bin Abdul Aziz, "*Al Ashuum Wa Al Sanadaat Tasawr Wa Ahkam*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 13; Imrani, Abdullah Bin Muhammad, "*Al Sanadaat Min Manzoor Al Sharf*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 3.
دكتور أحمد بن عبد العزيز الحداد، الأسهم و السندات تصور و أحكام، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 13؛
دكتور عبد الله بن محمد العمراني، السندات من منظور شرعي، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 3.

A commercial paper issued by a state or a company in acknowledgement of debt or loan and an instrument through which the owner is bestowed with the fixed rate of return on limited participation.

السند يمثل جزءاً من قرض على الركة أو الجهة المصدرة له و تعطى عليه الشركة فائدة. و هذه الفائدة غير مرتبطة بربح الشركة أو خسارتها.⁴²⁰

It is an integral part of debt on the company or on the authority issuing it and the company gives fixed rate of return on it. This fixed rate of return is not associated with the profit earned or loss suffered by the company.

هي صكوك متساوية القيمة قابلة للتداول تمثل قرضاً طويلاً يعقد عن طريق الإكتتاب العام.⁴²¹

It is an instrument subscribed publicly, having equal value, transferable, and manifesting debt for a long period of time.

In Islamic law the word السند is used for bond as well as for the debenture. Islamic Law adopted the concept of debenture as given by Common Law. Islamic law differs from Common Law only where there is something which is not allowed by Shariah.

4.5 TYPES OF DEBENTURES

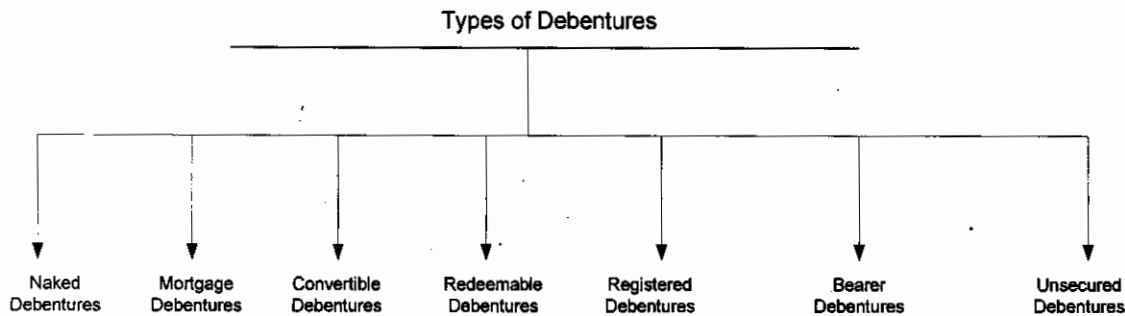
4.5.1 IN COMMON LAW

⁴²⁰ <http://www.zakatfund.ae> (last visited: 27th August 2008).

⁴²¹ Saeedi, Abdullh Bin Muhammad Bin Hassan, *Al Riba Fii Al Muamalaat Al Masriyya Al Muasarra*, (Riyyadh: Darut Tabba Linashar), 1st Edition 1999, p. 698; Shareef, Muhammad Abdul Ghaffar, "Ahkam Al Suuk Al Maalia", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 209; Izatul Khiyyat, Abdul Aziz, *Al Sharikat Fii Al Shariah Al Islamia Wa Al Qanoon Al Wadi*, (Beroot: Muasisa Tur Rislaha), 4th Edition 1994, p. 102.

دكتور عبد الله بن محمد بن حسن السعيد، الربا في المعاملات المصرفية المعاصرة، (الرياض: دار طيبة للنشر)، المجلد الأول، الطبعة الأولى 1999م، ص، 689؛ دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة و الدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص، 209؛ دكتور عبد العزيز عزت الخياط، الشركات في الشريعة الإسلامية و القانون الوضعي، (بيروت: مؤسسة الرسالة)، الطبعة الرابعة 1994م، ص، 102.

There are several types of debenture which are discussed as below:



1) NAKED DEBENTURES

In this case no security is given to lenders for the payment of interest and the repayment of the capital. Such types of debentures are virtually unknown in practice.

2) MORTGAGE DEBENTURES

These types of debentures are secured by a charge on the whole or part of the company assets. First mortgage debentures are the ones which have first claim on the property charged. Second mortgage debentures are those which have a second claim on the assets charged.⁴²²

3) CONVERTIBLE DEBENTURES

In some instances an option is given to the debenture holders to exchange debentures into shares.⁴²³ PICIC issued such type of debentures in the year 1971. Where debentures are offered on the basis that at some future date they can be converted into company shares, the directors of the issuing company must be authorized by the company in general

⁴²² Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 305.

⁴²³ Griffin, Stephen, Company Law Fundamental Principles, (London: Pitman Publishing), p. 144-145; Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 381

meeting or by its articles to make the issue. Convertible debentures must first be offered to existing shareholders or debenture holders before being offered to the general public.⁴²⁴

4) REDEEMABLE & IRREDEEMABLE DEBENTURES

Debentures which are repayable after stated periods are called redeemable debentures. Companies usually issue redeemable debentures. The debentures trust deed includes details governing the terms of redemption. Debentures which are not repayable during the life time of the company are called irredeemable debentures. The other term used for these debentures is 'Perpetual Debenture'.⁴²⁵ Debentures are normally redeemable within a specified time period. Unless there is a provision within a company's articles to the contrary, a company may re-issue debentures which have been redeemed.⁴²⁶ The company will redeem at a fixed future date, but usually has an option to redeem on or after a given earlier date, and this allows the company to choose the most convenient time for redemption. Redemption may be at the issue price or at a higher price **For Example:** suppose that debentures may be issued at 80 and redeemed at 100, or issued at 100 and redeemed at 110, thus giving the debenture holders a capital gain in addition to the interest payments made.⁴²⁷

Debentures are usually redeemable, and the company may provide a fund for their redemption. The annual amount so provided must be charged whether profits are made or

⁴²⁴ Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), p. 144-145.

⁴²⁵ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 305.

⁴²⁶ Griffin, Stephen, *Company Law Fundamental Principles*, (London: Pitman Publishing), p. 145.

⁴²⁷ Keenan, Denis, *Smith & Keenan's Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 384.

not, though in some cases the terms of issue may stipulate that the fund shall be provided only out of profits, if made.⁴²⁸

Debentures may be redeemable at the option of the company or irredeemable. At common law when a debenture was redeemed or transferred to the company, the debt was discharged and the debenture ceased to exist. When the debentures have been redeemed the company can reissue them or issue other debentures in their place unless any express or implied provision to the contrary is contained in the articles or in any contract entered into by the company or unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures should be cancelled. On a reissue of redeemable debentures a person entitled to the debentures has the same priorities as if the debentures had never been redeemed.⁴²⁹

A debenture which is issued with no fixed date of redemption is an irredeemable debenture, though such debentures are redeemable on a winding up, and the liquidator is empowered to discharge them. In addition irredeemable debentures always empower the debenture holders to enforce their security.⁴³⁰

➤ Ways of Redemption

Debentures may be redeemed in the following ways:

- **By drawing a lot**, either at the company's option or at fixed intervals.

⁴²⁸ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 384.

⁴²⁹ Farrar, John H., Furry, Nigel, Hannigan, Brenda, Wylie, O.P., Company Law, (London: Butterworths 1985), p. 209.

⁴³⁰ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 385.

- **By the Company buying them in the market**, and if the debentures are bought in the market at a discount, the consequent profit to the company is a realized profit available for dividend unless the articles otherwise provide.
- **By the company redeeming them either out of a fund or possibly by a fresh issue of debentures.** A fresh issue is useful to the company where rates of interest have fallen, because the old debentures can be redeemed and the money reborrowed by the fresh issue at lower rates of interest. Where redemption is by a fresh issue, it is usual to allow the existing debenture holders to exchange the old debentures for the new ones if they wish so.⁴³¹

5) REGISTERED DEBENTURES

In these cases the holders of debentures are registered in the books of the companies. Complete details of the debenture holders are included in the register of the debenture holders.⁴³² They are non negotiable and are only payable to the registered holders thereof. But they may be transferred in the manner specified in the conditions endorsed on them. Although the debentures of this class are non negotiable, the coupons for interest attached thereto are negotiable.⁴³³ Such debentures are transferable in accordance with the provisions of the terms of issue, but transfer is usually affected by an instrument in writing in a way similar to that of shares.⁴³⁴

6) BEARER DEBENTURES

⁴³¹ Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 384.

⁴³² Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 305; Keenan, Denis, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 383.

⁴³³ Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 67.

⁴³⁴ Denis Keenan, Smith & Keenan's Company Law for Students, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 383.

These are payable to the bearer and these are transferable by mere delivery.⁴³⁵ Its object is that it may become a negotiable instrument having the following incidents:

- It is transferable by delivery;
- A person who acquires it in due course, *bona fide* and for valuable consideration, gets a good title inspite of the presence of any defect in the title of the transferor thereof;
- Notice of transfer need not be given to the company; and
- No stamp duty is payable on transfer.⁴³⁶

Interest is paid by means of coupons attached to the debenture, these coupons being in effect an instrument to the company's banker to pay the bearer of the coupon a stated sum on presentment to the bank after a certain date. The company can communicate with the holders of bearer debentures only by advertisement, and is often provided that the holders of such debentures may exchange them for registered debentures.⁴³⁷

7) UNSECURED DEBENTURES

Such a debenture is no more than an unsecured promise by the company to repay the loan. The holder can, of course, sue the company on that promise, but is only an ordinary creditor in a winding up, although, since he is a creditor, he can file a petition in the court for a winding up.⁴³⁸

⁴³⁵ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 305.

⁴³⁶ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 64; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 66-67.

⁴³⁷ Keenan, Denis, *Smith & Keenan's Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 385.

⁴³⁸ Keenan, Denis, *Smith & Keenan's Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 385.

4.5.2 TYPES OF BONDS OR DEBENTURES (أنواع السندات) IN ISLAMIC LAW

Debenture is an instrument through which a debt is acknowledged by the company who has issued. Different types of debentures are as follow:

1) Government Bonds or Debentures (السندات الحكومية)

Government bonds or debentures are divided into two categories: medium-term (treasury notes) and long-term (treasury bonds) government bonds, and usually the holder of long term bonds or debentures is entitled to get any benefit on his bond or debenture after ten years from the date of issuance.

The sale of government bonds through competitive bidding is similar to the general Treasury Bills, but the buyer in this assignment determines desired yield at the date of maturity and not by the deduction method. The Government bonds or debentures are sold at a nominal price and the interest on Government bonds or debentures is paid every six months, and a very nominal value of the bond is paid at maturity.

The element of risk related to government bonds or debentures in the capital market is very less, and for that reason it is commonly used. This makes the interest rate on these bonds as an indicator of the interest rate on other financial instruments.

2) Corporate Bonds or Debentures (سندات الشركات)

Corporate bonds or debentures are the long-term bonds or debentures with the maturity period of five or more than five years. These bonds or debentures are often issued by companies having good financial position in the market. The legal framework for these bonds is determined by the rate of interest, period of maturity and the nominal value of the bond. Interest on these bonds is paid twice a year, while payment of a nominal value

of bond is made at maturity date. The companies provide certain facilities on the bonds to attract the investors. Thus companies facilitate by providing the ability to transfer. The companies ensure the fixed income for the owner of the bond, and to attract the investors convertible bonds are issued with low interest rate than the interest rate on regular bonds.

3) **Bill of Debts (السند الإذني – الأمر)**

Promissory note is a written instrument as prescribed by the law. It contains an undertaking by a person called the (المحرر) - the debtor - that pays a certain amount of money at a specified date or subject to the appointment of another beneficiary.⁴³⁹

4.5.2.1 TYPES OF CORPORATE BONDS

1) **Bond to meet Premium upon its issuance (السند المستحق الوفاء بعلاوة إصدار)**

It is a bond issued by the company upon a certain amount which is known as "issuance price", but it undertakes to refund it with in a certain period with higher price, added with a supplement called "premium". For example, if a company issues shares for the sum of 50 dinars, by expecting that amount of share will rise up to 60 dinars, or a premium of ten dinars.

2) **Bond of assessment (سند النصيب)**

A bond which issued with a nominal and real value, which implies that the company should abide by the assigned value of the bond, it identifies fixed interest to the author upon due and certain date, but draw takes place each year to exclude a number of bonds,

⁴³⁹ Jumma, Ali Bin Muhammad, *Mujam al Mustalahat Al Iqtasdia Wa Al Islamia*, (Riyyadh: Maktaba Al Abkiaat), 1st Edition 2000, p. 326-327.

علي بن محمد الجمعة، معجم المصطلحات الاقتصادية و الإسلامية، (الرياض: مكتبة العبيكات)، الطبعة الأولى 2000م، ص، 326-327

and the owners are paid the value of bond with reward, and another draw takes place to ascertain those bonds which are to remain without interest, and this is a kind of lottery. The law has banned issuance of such type of bonds by special notification or with the order of government.

3) Bond of assessment without interest (سند النصيب بدون فائدة)

A bond by acquiring it the holder recovers his capital in case of loss. It is different from the above type where the holder does not recover anything in case of the loss.

4) Bond with a fixed interest upon issued rate (السند ذو الإستحقاق الثابت الصادر بسعر الإصدار)

It is an ordinary bond but is usually for short time period, and provides high interest.

5) Secured bond (السند المضمون)

A bond in which a company offers guarantee for the fulfillment of its obligation, that it mortgages properties in exchange of secured bonds, or mortgages property or provides lien for such bond. The companies usually issue bonds to attract the people to lend cash, as a precaution to avoid bad financial circumstances. This kind is known as regular bonds. ⁴⁴⁰

⁴⁴⁰ Izatul Khiyyat, Abdul Aziz, *Al Sharikat Fii Al Shariah Al Islamia Wa Al Qanoon Al Wadi*, (Beroot: Muasisa Tur Rislaha), 4th Edition 1994, p. 104-105; Shareef, Muhammad Abdul Ghaffar, "*Ahkam Al Suuk Al Maalia*", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 211-212.

دكتور عبد العزيز عزت الخياط، الشركات في الشريعة الإسلامية و القانون الوضعي، (بيروت: مؤسسة الرسالة)، الطبعة الرابعة 1994م، ص، 104-105؛ دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة و الدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص، 211-212.

4.6 COUPONS ATTACHED TO DEBENTURES

Every debenture has coupons for interest attached to it. The interest is payable to the bearer of the coupon which is an order on the company's bank to pay a certain sum to the person who presents it on or after a certain date. These coupons are always negotiable.⁴⁴¹

4.7 STATUS OF DEBENTURE-HOLDERS

A debenture holder is a creditor of the company and is entitled to interest at a specified rate in respect of the fact whether the company earned profit or not.⁴⁴² A debenture holder is not entitled to anything more than his fixed interest, inspite of the fact that the company is making profits from its investments.⁴⁴³

The basic difference between the debenture holder and shareholder is that the latter is a member of the company to whom dividend becomes payable solely out of the availability of divisible profits whereas a debenture-holder is a creditor usually possessing a security for his loan.⁴⁴⁴

⁴⁴¹ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 67; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 67.

⁴⁴² Keenan, Denis, *Smith & Keenan's Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 381; Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 306; Saeed, Khawaja Amjad, *Company Law and Secterial Practice In Pakistan*, (Lahore: Institute of Business Managmenmt), p. 286; Jones, Frank H., *The Students Guide To The Company Law*, (London: Gee and Co Publishers Ltd), p. 151.

⁴⁴³ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 306; Saeed, Khawaja Amjad, *Company Law and Secterial Practice In Pakistan*, (Lahore: Institute of Business Managmenmt), p. 286.

⁴⁴⁴ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 306; Saeed, Khawaja Amjad, *Company Law and Secterial Practice In Pakistan*, (Lahore: Institute of Business Managmenmt), p. 286.

4.8 PERIOD OF DEBENTURES

Debentures may be:

- 1) For a fixed term of years,
- 2) Payable on demand, or
- 3) Perpetual; in which case no time is fixed within which the company would be bound to redeem them.⁴⁴⁵ It operates as a restriction on the right of the debenture holder to demand payment. In case of such irredeemable debentures, the company undertakes to keep on paying interest thereon at fixed intervals. Therefore it is no exaggeration to say that such a debenture is not a mortgage, at all, but an annuity in perpetuity to the holder.⁴⁴⁶

All debentures of whatever kind may be, become immediately payable on the company going into liquidation.⁴⁴⁷

4.9 THE CONCEPT OF *PARI PASSU*

The word *Pari Passu* means that all the debentures of the same series are to be paid ratably. If the words *Pari Passu* are not put in, the debentures payable accordingly to the date of their issue, or if they were all issued on the same day, then according to numerical order.⁴⁴⁸ However, when these words are put in, a debenture holder who seeks to enforce

⁴⁴⁵ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 68; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 67-68.

⁴⁴⁶ Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 68.

⁴⁴⁷ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 68.

⁴⁴⁸ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 67; Saeed, Khawaja Amjad, *Company Law and Sectorial Practice In Pakistan*, (Lahore: Institute of Business Managmenmt), p. 290; Keenan, Denis, *Smith & Keenan's Company Law for Students*, (Great Britain: Pitman Publishing), 10th Edition 1996, p. 382.

his security must sue on behalf of himself and all other debenture holders of the same series. The company cannot create a new series to rank *Pari Passu* with the old series, unless power to do so is expressly reserved.⁴⁴⁹

4.10 RIGHTS OF A DEBENTURE HOLDER

The legal relationship between a company and its debenture holders is simply the contractual relationship of debtor and creditor, coupled, if the debt is secured on some or all of the company's assets, with that of mortgagor and mortgagee.⁴⁵⁰ In contrast with a shareholder, the debenture holder is in law not a member of the company having rights in it, but a creditor having rights against it.⁴⁵¹ The rights of debenture holders rank before those, of shareholders and unsecured creditors in the event of the issuer's liquidation.⁴⁵²

There are two important and prominent rights of bond or debenture holder. These are as follow:

- 1) Right to get fixed rate of return as agreed upon whether the company is earning profit or not.
- 2) Right to get the debt back at certain or specified time by way of redemption.⁴⁵³

⁴⁴⁹ Saeed, Khawaja Amjad, *Company Law and Sectorial Practice In Pakistan*, (Lahore: Institute of Business Managmenmt), p. 290.

⁴⁵⁰ Davies, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd 2003), p. 806.

⁴⁵¹ Davies, Paul, *Principles of Modern Company Law*, (Sweet & Maxwell Ltd 2003), p. 806.

⁴⁵² Fazal Suleiman Kazi, *Hand Book of Banking Terms*, (Karachi: Royal Book Company), p. 102.

⁴⁵³ Saeedi, Abdullh Bin Muhammad Bin Hassan, *Al Riba Fii Al Muamalaat Al Masriyia Al Muasarra*, (Riyyadh: Darut Tabba Linashar), 1st Edition 1999, p. 860-861; Shareef, Muhammad Abdul Ghaffar, "Ahkam Al Suuk Al-Maaliah", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 210; Izatul Khiyyat, Abdul Aziz, *Al Sharikat Fii Al Shariah Al Islamia Wa Al Qanoon Al Wadi*, (Beroot: Muasisa Tur Rislaha), 4th Edition 1994, p. 106.

دكتور عبد الله بن محمد بن حسن السعدي، الربا في المعاملات المصرفية المعاصرة، (الرياض: دار طيبة للنشر)، المجلد الأول، الطبعة الأولى 1999م، ص، 860-861؛ دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة و الدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص، 210؛ دكتور عبد العزيز عزت الخياط، الشركات في الشريعة الإسلامية و القانون الوضعي، (بيروت: مؤسسة الرسالة)، الطبعة الرابعة 1994م، ص، 106.

4.11 REMEDIES OF DEBENTURE HOLDERS

If the debenture is one of a series ranking *Pari Passu* and trustees for the debenture holders have been appointed by trust deed, the remedies of the debenture holders are enforced by the trustees. It is preferable to have trustees appointed for the debenture holders. Trustees are a small body of persons who can watch the interests of a large number of investors who may be widely dispersed. If trustees have not been appointed, any debenture holder may take action on behalf of himself and the other debenture holders. Where there is a single debenture, the holder may take action to enforce his remedies.⁴⁵⁴ The remedies available to debenture holders are:

- 1) **Sale through trustees:** He may sell the property through trustee subject to the debenture if the debenture gives him or the trustees a power of sale;⁴⁵⁵
- 2) **Debenture – holder action:** He may sue the company on behalf of himself and all other debenture holders to obtain payment to enforce his security by sale. This is sometimes called a 'debenture-holder's action'. The court then appoints a receiver and also manager, if necessary, for the purpose of the company's business, declares the debentures to be a charge on the assets of the company,

⁴⁵⁴ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 362.

⁴⁵⁵ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's Introduction To Company Law, (London: Butterworths, 1983), 3rd Edition, p. 362; Saeed, Khawaja Amjad, Company Law and Practice In Pakistan, (Lahore: Accountancy and taxation Services Institute), p. 314.; Chaudary, A.G., Company Law In Pakistan, (Karachi: Pak Publishers Ltd.), p. 70; Choudhary, A.M., A Hand Book Of Company Law, (Lahore: All Pakistan Legal Decisions), p. 69; Reeday, T.M., The Law Relating to Banking, (London: Butterworths), 5th Edition 1985, p. 150.

directs inquiries as to who are debenture-holders and orders a sale of the property.⁴⁵⁶

- 3) **Decree for Specific Performance:** An agreement to take up and pay for the debentures of a company is made enforceable by a decree for specific performance. Similarly, specific performance of an agreement to give debentures may be enforced against the company.⁴⁵⁷
- 4) **Appointment of receiver:** He may appoint a receiver or manager if the debenture confers this power; if no power is given he may apply to the court for an appointment;⁴⁵⁸
- 5) **Petition for winding up:** He may present a petition for the winding up of the company, and prove that he is the creditor of the company for the amount advanced by him and interest thereon, but not for any premium to be paid on redemption unless the debenture expressly so provides.⁴⁵⁹
- 6) **Foreclosure:** He may apply to the court for foreclosure of the company's right to redeem the debentures. This remedy is usual, and for its proper exercise it is

⁴⁵⁶ Saeed, Khawaja-Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 314; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 69; Reeday, T.M., *The Law Relating to Banking*, (London: Butterworths), 5th Edition 1985, p. 150.

⁴⁵⁷ Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 68; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 68.

⁴⁵⁸ Leigh, L.H., Joffe, V.H., Goldberg, D., Northey & Leigh's *Introduction To Company Law*, (London: Butterworths, 1983), 3rd Edition, p. 362; Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 314; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 69; Reeday, T.M., *The Law Relating to Banking*, (London: Butterworths), 5th Edition 1985, p. 149.

⁴⁵⁹ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 314; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 69; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 69; Reeday, T.M., *The Law Relating to Banking*, (London: Butterworths), 5th Edition 1985, p. 150.

necessary that all the debenture-holders of the company should join in the application.⁴⁶⁰

- 7) **Valuation or giving up security:** If the company is insolvent, he may value his security, and if found insufficient, prove for the balance of his debt, or give up the security and prove for the whole debt.⁴⁶¹ But he cannot prove for the interest which became due after winding up nor can get such interest out of his security.⁴⁶²

4.12 CHARACTERISTICS OF DEBENTURES

The following are the important characteristics or salient features of debentures:

- 1) It manifests a debt on the company.
- 2) Debenture-holder is entitled to fixed rate of return or dividend whether the company earns profit or not. In case of winding up of the company debenture holder is preferred to the shareholder.
- 3) Debenture holder does not participate in general meetings as shareholder does. The resolutions passed by such meetings do not affect the rights of bond or debenture holders. Such meetings cannot alter the contract or any terms of the contract between debenture holder and the company and cannot alter the date of maturity for entitlement of fixed profit.

⁴⁶⁰ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 314; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 69; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 69.

⁴⁶¹ Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 314; Saeed, Khawaja Amjad, *Company Law and Sectorial Practice In Pakistan*, (Lahore: Institute of Business Management), p. 292-293; Chaudary, A.G., *Company Law In Pakistan*, (Karachi: Pak Publishers Ltd.), p. 70; Choudhary, A.M., *A Hand Book Of Company Law*, (Lahore: All Pakistan Legal Decisions), p. 69.

⁴⁶² Saeed, Khawaja Amjad, *Company Law and Practice In Pakistan*, (Lahore: Accountancy and taxation Services Institute), p. 314; Saeed, Khawaja Amjad, *Company Law and Sectorial Practice In Pakistan*, (Lahore: Institute of Business Management), p. 292-293.

- 4) Debenture is usually issued for a long period of time.
- 5) Debentures are transferable.
- 6) Debentures are non divisible.
- 7) Capital raised by the company through debentures is a collective debt. Company enters into a contract with all the creditors because it is the collective debt divided into equal parts called as debentures.⁴⁶³

4.13 SIMILARITIES BETWEEN SHARES & DEBENTURES

Though the shares and debentures are two different things yet there are certain similarities between shares and debentures which are as follow:

- 1) Both the shares and debentures are issued of equal value.
- 2) Both shares and debentures cannot be divided further.
- 3) Both the shares and debentures are represented through instrument which establishes the rights of the holder of shares and debentures respectively.
- 4) Both shares and debentures are transferred by the ways of corporate law.
- 5) Both the shares and debentures are considered to be incorporeal moveable property.

⁴⁶³ Izatul Khiyyat, Abdul Aziz, *Al Sharikat Fii Al Shariah Al Islamia Wa Al Qanoon Al Wadi*, (Beroot: Muasisa Tur Rislaha), 4th Edition 1994, p. 106; Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafaas), p. 66; Shareef, Muhammad Abdul Ghaffar, "Ahkam Al Suuk Al Maalia", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 210; Assar Duyuun Wa Naqood al Sharikah Awuu Al Muhfaza Alla Hukam Tadawl Al Ashuum Wa Al Sakook Al Istasmaria, *Al Mushkilla Wa Al Halool, Dirassa Fiqhiya Iqtasadia*, p. 211-212; Imrani, Abdullah Bin Muhammad, "Al Sanadaat Min Manzoor Al Shari", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 13.

دكتور عبد العزيز عزت الخياط، الشركات في الشريعة الإسلامية والقانون الوضعي، (بيروت: مؤسسة الرسالة)، الطبعة الرابعة 1994م، ص، 106؛ دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه والشريعة، (كويت: دار النفاس)، ص، 68؛ دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة والدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص، 209-210؛ أثر ديون ونقود الشركة أو المحفظة على حكم تداول الأسهم والصكوك والوحدات الإستثمارية المشكّلة والحلول، دراسة فقهية إقتصادية، ص، 211-212؛ دكتور عبد الله بن محمد العمراني، السندات من منظور شرعي، (مؤتمر أسواق الأوراق المالية والبورصات)، المجلد الثالث، ص، 13.

- 6) Both the shares and debentures are issued through public subscription.⁴⁶⁴

4.14 DIFFERENCES BETWEEN SHARES & DEBENTURES

Besides above similarities, differences exist between shares and debentures. The point of differences between the shares and debentures are as follow:

- 1) The shareholder is entitled to get dividend which can be altered. The shareholders are entitled to get dividend as well as they are liable to bear the loss suffered by the company. On the other hand the debenture holders are entitled to get fix rate of return, which cannot be altered, whether the company prosper or not.
- 2) The shareholders have a right to attend the general meeting while the debenture holders cannot have the right.
- 3) The shareholders actively participate in the management of the affairs of the company while the debenture holders cannot do so.
- 4) The shareholder is considered to be a participant while the debenture holder is considered to be a debtor to the company.
- 5) Generally the shares are issued before the formation of the company while the debentures are issued after the formation of the company.
- 6) The value of shares becomes due only at the time of the winding up of the company or at the time of depreciation of shares. While the value of debentures becomes due at the time of maturity.

⁴⁶⁴ Hameesh, Abdul Haq, "*Fii Hukam Tadawal Al Ashum Al Mukhtalita*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 35.

دكتور عبد الحق حميش، في حكم تداول الأسهم المختلفة، (منتصر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص. 35.

- 7) There is minimum and maximum par value for the shares. While there is no such minimum and maximum par value for the debentures.
- 8) The debenture holder is preferred in getting the value of debenture while the shareholder is entitled to get the value of share after the debenture holders.⁴⁶⁵

The above quoted differences cannot affect the Shariah rulings for shares or debentures.⁴⁶⁶

4.15 SHARIAH RULINGS ON DEBENTURES

Economic experts designate the bonds or debentures as debt which is required to be reduced into writing, establishing the responsibility of the debtor. According to Shariah the debt should be reduced into writing.⁴⁶⁷ Allah Almighty said:

" يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدِينٍ إِلَى أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ " ⁴⁶⁸

"O you who believe! When you contract a debt for a fixed period, write it down".

There are two opinions of jurists regarding this Ayah. One group of jurists said that it is binding or obligatory (واجب). The majority of jurists said that it is not binding rather it is recommendatory (نذير). Islamic Law raises objection when interest is paid on debt against

⁴⁶⁵ Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 35-36; Abdullah, Syed Hassan, "Al Aswaaq Al Maalia Wa Al Boorasat Min Al Manzoor al Shari wa Qanooni", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 2, p. 38-40.

دكتور عبد الحق حميش، في حكم تداول الأسهم المختلفة، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 35-36؛ دكتور سيد حسن عبد الله، الأسواق المالية و البورصات من المنظور الشرعي و القانوني، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثاني، ص، 38-40.

⁴⁶⁶ Hameesh, Abdul Haq, "Fii Hukam Tadawal Al Ashum Al Mukhtalita", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 4, P. 35-36.

دكتور عبد الحق حميش، في حكم تداول الأسهم المختلفة، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الرابع، ص، 35-36.

⁴⁶⁷ Shareef, Muhammad Abdul Ghaffar, "Ahkam Al Suuk Al Maalia", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 217.

دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة و الدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص، 217.

⁴⁶⁸ Surah Baqarah: 282

time period because it amounts to Riba-al-Nasia (ربا النسيئة) and Riba-al-Nasia is prohibited by Shariah through Quran, Sunnah and Ijma. It does not matter whether that interest is in great amount or in a less quantity. Interest on debt is prohibited because it is a gratuitous contract (عقد الإرفاق).⁴⁶⁹ The basis of the prohibition of riba is that of distributive justice because the prohibition of riba is intended to prevent the accumulation of wealth in a few hands.⁴⁷⁰

From the definition of *sanad* it is clear that it is debt on the company. It is raised through public subscription. It does not amount to contribution or participation to the capital of the company. That's why in case of winding up holders of *sanadat* are preferred to shareholders and in case of insolvency of company they share with other creditors. The holders of *sanadat* have no role to play in the management of the company. They are entitled to get fixed rate of return or interest whether the company earns profit or not. They are not sharing the risk, but they have been given the guarantee that they will be paid either with the lapse of the duration of the debt or in the winding up of the company.⁴⁷¹ Therefore issuance of *sanadat* is not permissible in Shariah.⁴⁷²

⁴⁶⁹ Shareef, Muhammad Abdul Ghaffar, "Ahkam Al Suuk Al Maalia", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 218-219; Shariah Standards, (Bahrain: Accounting and Auditing Organization for Islamic Financial Institutions), p. 345.

دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة و الدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص، 219-218.

⁴⁷⁰ Ayub, Muhammad, Understanding Islamic Finance, (England: John Waley & Sons Ltd.), p. 54.

⁴⁷¹ Izatul Khiyyat, Abdul Aziz, *Al Sharikat Fii Al Shariah Al Islamia Wa Al Qanoon Al Wadi*, (Beroot: Muasisa Tur Rislaha), 4th Edition 1994, p. 227.

دكتور عبد العزيز عزت الخطاط، الشركات في الشريعة الإسلامية و القانون الوضعي، (بيروت: مؤسسة الرسالة)، الطبعة الرابعة 1994م، ص، 227.

⁴⁷² Madni, Salim Bin Hamza bin Ameen, "Al Ahkam Al Fiqhiyya al Mutaritabba Alla Tehrim Sanadaat Al Qird", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 4; Shareef, Muhammad Abdul Ghaffar, "Ahkam Al Suuk Al Maalia", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 219.

4.17.1 TRADING WITH SANADAT (الحكم الشرعي في بيع و شراء السندات)

There are two opinions regarding the sale and purchase of *sanadat*:

First Opinion: Sale and purchase transaction of *sanadat* is illegal or void or prohibited.

This is the view of majority of Muslim Jurists but they differ in determining the root cause or foundation of the prohibition of *sanadat*. There are two opinions regarding the root cause of the prohibition of *sanadat*:

- a) Some of the Muslim Jurists said that one of the legal maxims of Shariah is:

"كل قرض جر نفعا فهو ربا"

"Any loan on which benefit is granted that is Riba".

It is because of this maxim that *sanadat* are prohibited.

- b) Some of the Muslim Jurists are of the view that root cause of the prohibition of *sanadat* is not of the fact that there is benefit on debt but the fact of payment of fixed rate of return or interest without sharing the loss or of the fact that it is the type of *bai ul kali bil kali* (بيع الكالي بالكالي).

Second Opinion: Sale and purchase transaction of *sanadat* is permissible or valid. They also differ in determining the root cause of the permissibility of trading with *sanadat*. There are four opinions regarding the root cause of the permissibility of trading with *sanadat*:

دكتور سالم بن حمزة بن أمين مدني، الأحكام الفقهية المترتبة على تحريم سندات القرض، (منتظر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 4؛ دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة و الدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص، 219.

- a) Majority of the scholars who permit the sale and purchase transaction of sanadat are of the view, that these sanadat are a type of Mudarabah. The holder of sanad is Mudarib or *Rab ul Maal* (رب المال). The company is *Aamil* (عامل) and invests the money lend by the creditors.

There are two main objections on this opinion:

- a. **Firstly** division of profit is not on proportional basis such as 1/2, 1/3 or 1/4 etc. as required by contract of Mudarabah. It is not permissible to fix the amount as profit for any of the contracting parties.
- b. **Secondly** the contract of Mudarabah is based on trust (امانة) so if the wealth is destroyed without any transgression or negligence from *Aamil*, he is not responsible. If it is a condition stipulated by *Mudarib* on *Aamil* then the contract of Mudarabah is valid but the condition attached is fasid according to Hanafi's and Maliki's school of thought. It is a known fact the capital contributed through sanadat is guaranteed from the aspect of issuing it whether the company is earning profit or not. If investment through sanadat is considered to be contract of Mudarabah from the fact that there is capital from the holders of sanadat and labour from the company then all the limitations attached with the contract of Mudarabah by the scholars must also be complied with. Therefore the interpretation of sanadat as contract of Mudarabah is not correct because sanadat doesn't comply with all the limitations or conditions of contract of Mudarabah as stipulated by the Muslim jurists.

It is said that the bank is surety and considered to be intermediary between the issuer of the sanad and the holder of it. Bank is giving guarantee of soundness or integrity of capital voluntarily. This contention can be repudiated that the contracts like Mudarabah, Musharakah, Wakalah and Wadiya are gratuitous in nature that's why guarantee in case of destruction is not allowed.

- b) Some of the scholars are of the view that such type of transaction is legally valid because such type of transaction is innovative and not present at the time of the revelation or during the era of Muhammad (ﷺ). Therefore if *Shari Hukam* on anything is not there then it is considered to be permissible. On this basis as debentures are the creation of the present era, having no *Shari Hukam* on debentures explicitly, therefore they are considered to be permissible (فهى عقد مستحدث، فتأخذ حكم المسكوت عنه).
- c) Some of the scholars who permit the sale and purchase of sanadat are of the view that sanad is a debt and limited benefit on debt is permissible on the basis of view of some of the late followers of Hanafi School of thought. Limited monetary benefit on debt is permitted if it is stipulated by the government and people are not allowed to transgress that limit. Such a sale is called as transaction sale (بيع المعاملة).

The contention of these Muslim jurists can be repudiated **firstly** that benefit on debt is strictly prohibited in Islam whether it is in small amount or in large amount because it amounts to *riba al nasia*. **Secondly** the Messenger of Allah Almighty acted so in order to meet the ends of justice and the fatwa of late scholars of Hanafi

school of thought regarding the permissibility of limited benefit on debt stipulated by the government did not reach the level of argument. This is the matter of dispute even among the scholars of the Hanafi school of thought.

d) Some of the scholars who permit the trading of sanadat are of the view that the root cause of permitting is the necessary interests (ضروريات) of people.⁴⁷³ The justification given by these scholars to rationalize trading of sanadat on the basis of necessary interests of people can be answered by the fact that necessary interests are those without the protection of which there would be anarchy and chaos in society. The absence of protection for these interests would mean the loss of everything that we consider dear. These prized social interests are five in number:

1. Preservation and protection of religion (حفظ الدين)
2. Preservation and protection of life (حفظ النفس)
3. Preservation and protection of progeny (حفظ النسل)
4. Preservation and protection of intellect (حفظ العقل)
5. Preservation and protection of wealth (حفظ المال)⁴⁷⁴

There are certain conditions described by the scholars of Islamic Jurisprudence to consider something necessary interest. These rules are as under:

- a) There must be no other way for a person in coercion except to go against the injunctions of Shariah.

⁴⁷³ Haitti, Abdul Razaq Raheem Jaddi, *Al Masaarif Al Islamia Beena Al Nazaria Wa Al Tatbeeq*, (Urdan-Oman: Dar Usamma Linashar), 1st Edition 1998, p. 351-356.

دكتور عبد الرزاق رحيم جدي الهيتمي، المصارف الإسلامية بين النظرية والتطبيق، (الأردن- عمان: دار أسامة للنشر)، الطبعة الأولى 1998م، ص، 356-351.

⁴⁷⁴ Imran Ahsan Khan Niyazee, *Islamic Jurisprudence*, (Islamabad: Islamic research institute press), p 199.

- b) Necessary interest should not be an illusion or an anticipatory or mislead thing.

It can be observed that there are alternatives available to remove the hardship of people and in adopting those alternatives there is nothing to go against the injunctions of Shariah e.g. sanadat can be converted into shares. Necessary interest of which they are talking about is illusionary, imaginative and not existing actually.⁴⁷⁵

Preferred Opinion

Trading with sanadat is prohibited⁴⁷⁶ because of the following reasons:

1. In reality sanadat are debt with conditional profit or benefit and it is well accepted among scholars that benefit on debt is prohibited as it amounts to riba.
2. The holder of sanad is entitled to fixed rate of return or interest without bearing loss and it is against Shariah legal maxims:

a. لا ضرر ولا ضرار

“Injury may not be met by an injury”

b. النعم بالغرم

⁴⁷⁵ Haitti, Abdul Razaaq Raheem Jaddi, *Al Masaarif Al Islamia Beena Al Nazaria Wa Al Tatbeeq*, (Urdan-Oman: Dar Usamma Linashar), 1st Edition 1998, p. 356.

دكتور عبد الرزاق رحيم جدي الهيئي، المصارف الإسلامية بين النظرية والتطبيق، (الأردن- عمان: دار أسامة للنشر)، الطبعة الأولى 1998م، ص، 356.

⁴⁷⁶ Haitti, Abdul Razaaq Raheem Jaddi, *Al Masaarif Al Islamia Beena Al Nazaria Wa Al Tatbeeq*, (Urdan-Oman: Dar Usamma Linashar), 1st Edition 1998, p. 356; Azmi, Muhammad Al Mudariss, “*Al Aswaaq Al Maalia (Boorsaat) Min Al Manzoor Al Shari Wa Al Qanooni*”, (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 2, p. 13; Ijaz, Irshad Ahmad, “*Bazaar Hissas Ki Sargarmian Aur Inka Shari Jaiza*” Sunday Magazine 16th August 2009.

دكتور عبد الرزاق رحيم جدي الهيئي، المصارف الإسلامية بين النظرية والتطبيق، (الأردن- عمان: دار أسامة للنشر)، الطبعة الأولى 1998م، ص، 356؛ دكتور محمد محروس المدرس الأعظمي، الأسواق المالية (البورصات) من المنظور الشرعي والقانوني، (منتشر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 13؛ مفتي ارشاد احمد اعجاز، “بازار حصص کی سرگرمیاں اور انکا شرعی جائزہ”، جنگ سنی میگزین 16 اگست 2009.

“Liability is an obligation accompanying gain”

3. Sanctioning of trading with sanadat depends upon the concept that money generates money. But the accepted presumption is that labour generates money.⁴⁷⁷
4. There is no reason to contend that *sanad* is equivalent to the share of the investment holder (رب المال) in *Mudarabah*.⁴⁷⁸

Options to the bond or debt holder

Allah Almighty said:

“وإن تبتم فلکم رؤوس أموالکم لا تظلمون و لا تظلمون”⁴⁷⁹

"But if you repent, you shall have your capital sums. Deal not unjustly (by asking more than your capital sums), and you shall not be dealt with unjustly (by receiving less than your capital sums)".

In the light of above quoted Ayah the holder of sanad is entitled only to get back or to redeem his capital sum and not entitled to get interest or extra amount on capital sum.

The holder of sanad can dispense with it by any of the following ways:

- 1) Wait to end the time period of sanad without resuming to revive it again.

According to different fatawas he is required to donate the amount received by him as an interest

⁴⁷⁷ Haitti, Abdul Razaaq Raheem Jaddi, *Al Masaarif Al Islamia Beena Al Nazaria Wa Al Tatbeeq*, (Urdan-Oman: Dar Usamma Linashar), 1st Edition 1998, p. 357-358.

دكتور عبد الرزاق رحيم جدي الهيتمي، المصارف الإسلامية بين النظرية والتطبيق، (الأردن- عمان: دار أسامة للنشر)، الطبعة الأولى 1998م، ص، 358-357.

⁴⁷⁸ Izatul Khiyyat, Abdul Aziz, *Al Sharikat Fii Al Shariah Al Islamia Wa Al Qanoon Al Wadi*, (Beroot: Muasisa Tur Rislaha), 4th Edition 1994, p. 228.

دكتور عبد العزيز عزت الخياط، الشركات في الشريعة الإسلامية والقانون الوضعي، (بيروت: مؤسسة الرسالة)، الطبعة الرابعة 1994م، ص، 228.

⁴⁷⁹ Surah Baqarah: 279

- 2) He can compromise with the debtor i.e. company;
- 3) If it is taken into consideration that the contract is valid but the condition attached with is fasid, as said be majority of Muslim jurists then the bond or debenture holder should endorse some of the debt to the debtor (company) with a price with which the sanad is being purchased.⁴⁸⁰

It is not permissible to dispense with sanad by selling it to another or third person because it involves the sale of debt to a person who is not responsible for it (بيع الدين لغير من هو عليه) and it is not allowed in Shariah.⁴⁸¹

4.17.2 ZAKAT ON DEBENTURES

According to Islamic Law the company is debtor and the debenture-holder is a creditor. So debenture is an instrument creating debt and Muslim scholars differ in their opinions regarding the imposition of Zakat on debentures. The opinions are as follow:

First Opinion:

Some of the Muslim scholars are of the opinion that there is no Zakat in case of secured debt until the creditor get back his money. When the creditor get back his money he is liable to pay Zakat on that money for the current year irrespective of the fact that how many years the debtor kept this money. This is the opinion of Maliki school of thought.

Second Opinion:

⁴⁸⁰ Shareef, Muhammad Abdul Ghaffar, "Ahkam Al Suuk Al Maalia", (Majalah Al Shariah Wa Al Dirasat Al Islamia). Vol. 18, May 1994, p. 219-220.

دكتور محمد عبد الغفار الشريف، أحكام السوق المالية، (مجلة الشريعة و الدراسات الإسلامية)، العدد الثامن عشر، مايو 1994م، ص، 220-219.

⁴⁸¹ Ibid

Some of the scholars are of the opinion that there is no Zakat in case of secured debt until the creditor get back his money. When the creditor get back his money he is liable to pay Zakat on that money not only for the current year but also for the years for which the debtor kept this money. This is the opinion of scholars of Hanafih and Hanbili school of thought.

Third Opinion:

Some of the scholars are of the opinion that in case of secured debt the creditor is liable to pay Zakat on that money every year. There is no condition of possession of that money by the creditor. This is the opinion of majority of scholars like Hazarat Usman Bin Affan, Abdullah Bin Ummar, Ibraheem Al Nikhaai and scholars of Iraq and scholars of Shafi school of thought.

Preferred opinion:

Third opinion is the preferred opinion. Debentures are considered by Islamic Law commercial items and commercial item are one the things on which Zakat is liable to be paid. Though debentures are prohibited in Islam but they are not excluded from Zakat.⁴⁸²

Muslim scholars differ also that Zakat is liable only the principle amount which is lended to the company through debenture or also on fixed rate of interest which is given to the debenture holder by the company.

First Opinion:

⁴⁸² Qila jaei, Muhammad Ruwas, *Al Muamalat Al Muasarra Al Malia Fii Duu Al Fiqh Wa Al Shariah*, (Dar Al Nafaas), p. 69-70.

دكتور محمد رواس قلعة جي، المعاملات المالية المعاصرة في ضوء الفقه و الشريعة، (كويت: دار النفاس)، ص، 69-70.

Some of the Muslim scholars are of the opinion that Zakat is *Wajib* only on the principle amount which is lent by the debenture holder to the company and not on the fixed rate of return which is given to debenture holder by the company because it is *riba* which is prohibited in Shariah. According to Islamic Law there is no Zakat on haram maal. This is the opinion of Muslim scholars like Dr. Ahmad al Kurdi, Dr. Wahba tul Zuhaili and Dr. Rafeeq Al Missri.

Second Opinion:

Some of the Muslim scholars are of the opinion that Zakat is *Wajib* on the principle amount which is lent by the debenture holder to the company and also on the fixed rate of return which is given to debenture holder by the company though that fixed rate of return on debenture amounts to *riba*. This is the opinion of Muslim scholars like Sheikh Abdur Rahman Al Hulvi.

Preferred Opinion:

First opinion is the preferred opinion.⁴⁸³

In order to pay Zakat on debentures the par value of debentures should be taken into consideration and not the market value because if market value of debentures is taken into consideration then it amounts to *bai ud dain Bil dain* (بيع الدين بالدين). 5 or 6 % of Zakat is liable to be paid on debentures.⁴⁸⁴

⁴⁸³ Aqal, Yousaf Bin Abdul Aziz, "*Zakat Al Ashuum Wa Sanaadat*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 3, p. 35-36;

⁴⁸⁴ دكتور يوسف بن عبد العزيز العقيل، زكاة الأسهم و السندات، (منتصر أسواق الأوراق المالية و البورصات)، المجلد الثالث، ص، 35-38
⁴⁸⁴ Abdullah, Syed Hassan, "*Al Aswaaq Al Maalia Wa Al Boorasat Min Al Manzoor al Shari wa Qanooni*", (Muatamir Aswaaq Al Aooraq Al Maalia Wa Al Boorasat), Vol. 2, p. 65.

CONCLUSION

Debenture is simply an instrument which acknowledges a debt. It creates a relationship of creditor- debtor between the debenture holder and the company. The debenture holder must have all the rights which creditors have against debtors. According to shariah creditor is not allowed to demand any extra amount on the principle sum which he lend to the debtor and if he demands so it will amount to Riba ul Nasia (ربا النسيئة) which is strictly prohibited by Sh'ariah.

CONCLUSION

After making the comparative analysis of capital, shares and debentures following conclusions can be made:

- 1) Riba is prohibited in Shariah.
- 2) A company is a voluntary registered association of natural persons, having a separate legal entity, a perpetual succession, shared capital divided into transferable shares, with limited liability and a common seal. Shariah accepted the concept of company as incorporated by Common Law. Shariah gave the concept of *Sharikah ul Musahama* (شركة المساهمة) which is commonly known as Joint Stock Company. *Sharikah tul Musahama* is the contract on maal with an intention to get profit on shares which are equal in value and are transferable and shareholders have limited liability means each shareholder is liable only to the extent of his shares and the members of such *Sharikah* should not be less than five and these shareholders are independent owners of their shares and board of directors are given authority to run the affairs of the business. *Sharikah tul Musahama* is permitted in Shariah provided that it is not involved in Riba.
- 3) Capital is the amount of money with which the business is started. Islamic Law called it *Raasul Maal* (رأس المال). Shariah adopted the concept of capital as incorporated in Common Law and gave its unique concept of *maal*.

- 4) Capital is raised for the commencement of the business or for further expansion of the business. Therefore different sources of financing of company are available.
- 5) Common Law is man made law but Islamic Law is a divine law based on the injunctions of Allah almighty who is the sole creator of this universe. Common Law gave the concept of shares and debentures and Islamic Law analyzed that concept. Islamic Law differs from Common Law only where there is something which is not allowed by Shariah like the involvement of riba which is strictly prohibited by Islam and is not allowed in any form. Question of halal or haram arises only in Islamic Law as it is a divine religion but there is no question of halal or haram in Common Law as it is a man made law.
- 6) Share is the fractional part or definite portion of the capital of the company. It is the interest of the shareholder in the company measured by a sum of money. Shares are of equal value, not divisible further and are transferable.
- 7) There are different classes of shares. Different rights are granted to these different types of shares according to the terms of their issue. Neither all types of shares are permissible in shariah nor prohibited. So Shariah rulings differ according to different types of shares.
- 8) Shareholders are liable to pay Zakat on their respective shares.
- 9) Debenture is simply an instrument which acknowledges a debt. It creates a relationship of creditor- debtor between the debenture holder and the company. The debenture holder must have all the rights which creditors have against debtors. According to shariah creditor is not allowed to demand any extra amount

on the principle sum which he lend to the debtor and if he demands so it will amount to Riba ul Nasia (ربا النسيئة) which is strictly prohibited by Shariah.

- 10) Though debentures are not allowed in Shariah but they are not excluded from Zakat. So debenture holder is liable to pay Zakat on the money lend to the company.
- 11) Shariah alternative to debentures is investment sukuuk which should be promoted by Islamic states. Muslims should invest their money either in form of shares or in the form of investment sukuuk. But they should refrain from debentures which are not permissible in Shariah.
- 12) It is not an easy task to eliminate riba from the economy of the state when it is being practiced by other states. Most of the people argue that if riba is eliminated from the economy of Pakistan it would be difficult for the state like Pakistan which is under developed state to survive because its economy would collapse and a state cannot survive without a strong and stable economy. It must be kept in mind that if economy of the state cannot survive without interest then it would never have been prohibited by Shariah. Allah Almighty said in the Holy Quran

"وَمَا جَعَلْ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ"⁴⁸⁵

“And (Allah) has not laid upon you in religion any hardship”

So will and determination is required to eliminate riba from the economy of Pakistan.

⁴⁸⁵ Surah Al Haj: 78.

RECOMMENDATIONS

- 1) In order to create awareness about the involvement of riba in debentures and in some of the types of shares. Media campaign should be launched to convince people to adopt those means which are not against Shariah. Writings through print media and lectures through electronic media can be very effective tool in his regard. Media is influencing our society in every walk of life and if campaign is launched through it with full determination and diligence desired results can be obtained.
- 2) Article 2-A of the Constitution of Pakistan 1973 provides that Muslims shall be enabled to order their lives in individual and collective spheres in accordance with the teaching and requirements of Islam as set out in Holy Quran and Sunnah. Similarly Article 31 of the Constitution of Pakistan 1973 provides that steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam. Article 38 of the Constitution of Pakistan 1973 provides that state shall eliminate riba as early as possible.

So in the light of above articles of the Constitution of Pakistan 1973 the Government of Pakistan is under an obligation to endeavour in this respect. In this economic well being of the people can be promoted. It is a true fact that government can not achieve this huge target alone. So Muslim scholars and well versed economists should co-operate with the government. The government,

Muslim scholars and economists should work in close collaboration with each other.

- 3) An act should be passed by the parliament in which detail mechanism should be given in order to eliminate riba from the economy of Pakistan. In this regard Muslim scholars should render their services in order to make rules and regulations where question arises with respect to Shariah ruling on certain matter and well versed economists should offer their services where technicalities are involved in order challenge the issue of elimination of riba from economy.
- 4) Judgment of Supreme Court of Pakistan should be taken into consideration by the government of Pakistan and it should be implemented in letter and spirit.
- 5) Being Muslims we are duty bound to follow the commandments of Allah Almighty in every walk of life. So we are also responsible to eliminate things from our lives which are strictly prohibited by Allah Almighty in the Holy Quran like riba. We should be conscious of our responsibility before Allah Almighty.
- 6) It is not possible to eliminate riba from the economic system with in few days. Question arises that in the mean time of elimination of riba from the economic system what should be done with that money which will be earned through riba during this process of elimination. So pragmatic approach should be adopted to deal with this situation. A mechanism should be introduced at state level through which money earned through riba in the meantime should be deposited in the charity account of the government. Later on the government should spend that money on the poor and deprived section of society.

- 7) Option should be given to the debenture holders either to become a member of the company or to retain the status of creditor to the company. If he opted to retain the status of the creditor he should not be entitled to any sort of benefit or interest on the principal amount of debt. He should be entitled to get back his money only on the stipulated time period which he lent to the debtor.
- 8) It should be permissible for bond or debenture holder to convert his bond or debenture into an instrument through which he can become a member of the company and can get percentage in profit but it is not permissible for the shareholder to get fixed rate of interest on debt because it amounts to riba which is strictly prohibited in Islam.

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