

THE JURISTIC FRAMEWORK OF *MUDARABAH* CONTRACTS AND ITS MODERN PRACTICES

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Abstract

Islamic financial institutions have come to stay while more prospects in the industry grow day by day. With the permeation of the Islamic financial institutions (IFIs) across the globe, there is need for emergence of new academic researches that will surf across the Islamic heritage where numerous components of investment tools are explored and presented to the modern economic understanding. Mudarabah is one of the most popular investment tools and applied instruments in Islamic financial institutions. Fraught with numerous benefits and prospects that are always secured in Mudarabah transactions if applied and practiced within the dictates and conditions laid down by Islam as discussed and enunciated by Islamic jurists across the globe. The objective of this work is to disclose the juristic framework of this Islamic contract, conditions of its application and its modern usages and benefits in Islamic banking. The research is a library base through consultation of some original references in Islamic jurisprudence in order to make sure that submissions are worthwhile while in some cases citations are made to modern available literatures in the subject. Results and findings of this work revealed that the Mudarabah contract does not enjoy maximal preference in Islamic banks and other financial markets as compared to other models and thus it is recommended that Mudarabah contracts is not necessarily required to replicate its early structures as found in the books of fiqh but can rather be structured in a way that suits the modern requirements without necessarily bypassing its basic shariah requirements. Some modern innovative methods of investing in Mudarabah contracts are cited and as well recommended

Keywords: *Financial, Mudarabah, Industry, Heritage, Investment.*

INTRODUCTION

Islamic finance is currently experiencing a swift growth and development in the modern world as the increasing growth of the Muslims population globally has made halal earnings and consumptions not only required but also necessary (Jumah Habeeblai & Aminu Yakubu, 2019).

Amongst the areas in which the Islamic finance tends to thrive is the *Mudarabah* contracts, as the *Mudarabah*

activities of Islamic financial institutions (herein latter referred to as: IFIs) keep growing day by day. Discussion of *Mudarabah* as a transactional contract is an offshoot of the discussion of *Shirkah* or *Sharkah* (Islamic partnership) in Islamic *fiqh* (jurisprudence), since the former is a branch phenomenon from the latter.

In the modern practices of the IFIs, *Mudarabah* transactions take significant shares in the list of the IFIs

investment instruments. Being a classical financing tool from the Islamic economic theories, the concept has enjoined a plethora of discussions in the books of Islamic jurists across ages.

In this paper, the researchers have painstakingly surveyed this concept vis-a-vis its lexical formation, juristic conceptualization and rulings, legal framework and conditions, economic worthiness and practical operations.

We will examine various definitions cum rulings of Mudarabah as given by different jurists within but not restrictedly to the four popular juristic schools and from the modern scholastic writings in the field of Islamic economy in other to reach at a common concept of the contract along with other necessary conditions and rulings.

DEFINITION OF MUDARABAH

Lexical Definition Of Mudarabah

According to Az-zabidi, the word “*daraba*” being the root word of “*daraba*” suggests numerous literary denotations among which is to embark on a trade- journey: “he roamed about in the land / or in the cause of Allah, if he travels or journeys on it trading. The word “*darb*” applies to all actions except few” (Al-Zabidi Murtada, n.d).

In his own contribution Ibnu Manzur writes:

“He partners with him in wealth from the word “Mudarabah” which is also called “Qirad” and it means that “you give a person from your wealth to trade with it with the agreement that the profit be shared accordingly or that he has a predetermined known portion (of the profit). And it is taken from “Darbu fil-ard” which means travelling through the land in the earth in search of provisions. Allah says” and others travelling through the land, seeking for Allah’s bounty” [Q. 73:20] and it is on this basis that a worker is referred to as “mudarib” because he is the one who travels through the land” (Ibn Manzur, 1994).

Additionally, as cited in a work, Al-Zamakshari notes that: the *mudarabah* contract may also be referred to as *muqata’*. This simply refers to the fact that

the capital provider (*rabb al-mal*) would cut off some of his money to be utilized by the Mudarib in business activities” (Dasuki, A. W, 2016).

From the account given above, it is obvious that *mudarabah* from the lexical point of view is being derived from “*darbun fi al-ard*”, which means journeying through the land seeking the bounties of Allah. As a result of his work and travel, the mudarib (worker, risk-taker, or entrepreneur) becomes entitled to part of the profits of the venture.

As established in the books of fiqh (Islamic Jurisprudence), the jurists of Madinah or Hijaz preferred the term *muqaradah* or *qirad*. Some scholars also preferred the term “*mu’amalah*” in replacement of the duo (Ibnu ‘Abd Al-Barr, Yusuf ‘Abdullah, 2014), although the term *Mudarabah* is commonly used and is the most popular of all the three related terms.

Stating the reason (s) for preferring the term *mudarabah* over other related terms Al-Sarakhsi says “we selected the first term (that is: *mudarabah*) as it corresponds with what is in the Quran (referring to Allah’s statement) “And others who journey through the land (*yadribuna fi al-ard*) seeking the bounty of Allah” [Q. 73: 20] (Al-Sarakhsi, 1993).

MUDARABAH

In practical operations, Mudarabah is a kind of partnership (business) on the basis that capital comes from a part and venture and trading comes from the other part and the capital giver is referred to as “*rabb al-mal*” the capitalist or financier while the risk-taker is referred to as “*mudarib*” the industrious” (Majallat Al-Ahkam Al-‘Adliyyah, n.d). It refers to a contract whose subject matter is the profit where a party contributes money and the other party contributes skill” (Ibn ‘Abidin Muhammad Amin, 2003).

Ibn Juzayy defines *qirad* as a concept where somebody gives out his wealth to another to make a business while the accrued profits are shared on a pro rata basis” (Ibn Juzayy, n.d).

According to Al-Nawawi (2005)

“it is a contract that consists of appointing somebody (of carrying out a transactional responsibility) by the soul-owner or to give him a wealth for trading on the agreement that the profit be shared”.

Ibn Muflih (1418H) from the Hanbali school defines *mudarabah* saying: *“it is for someone to give out his money to another for business purpose while profit is shared in between them on a pro rata basis”.*

The above definitions all clearly state that the main motive behind this contract is to partner in the sharing of the anticipated profit.

According to al-Kharqi, there are different forms of *mudarabah* and these definitions only suggest only a form, although Nyazee has fortunately merged all these forms together in his work when he cited Al-Kharqi that *mudarabah*: *“is the participation by two persons with the wealth of one, or two persons with their wealth, or the wealth of both and the body of one person”* (Nyazee & Imran Ahsan, 2006).

According to Rashad Hasan Khalil (1981) the most sententious definition for *mudarabah* is to say that *“it is an agreement which implies given out particular cash-or its equivalent- whose quantity, quality and kind are known to a sane and prudent person in order to trade with it in return of a known shared portion”.*

In summary, *mudarabah* is a contract based on a fiduciary relationship (*‘aqd al-amanah*). Under this principle, a *mudarib* manages the *mudarabah* asset in trust and is not liable for the impairment of the asset except for impairment which is a result of the *mudarib*’s misconduct, negligence or breach of specified terms” (Bank Negara Malaysia, 2016).

LEGALITY AND PERMISSIBILITY OF MUDARABAH IN ISLAMIC LAW

Scholars of all known fiqh schools are of the view that the *mudarabah* is a valid legal contract” (Muhammad Marjan & Ahmed Mezbah, 2016). The Jurists are unanimous on this ruling. Ibnu Rushd relates this consensus in his book when he says: *“And there is no controversy among*

the Muslims (scholars) that Qirad (Mudarabah) is permissible” (Ibn Rushd, n.d). The justification (s) and authority of this ruling of legality and permissibility are numerous among which are the following:

1. From the Quran: Allah’s statement in Surah al-Muzzammil which reads thus: *“and others who traveling through the land, seeking of Allah’s bounty”* (Q73: 20).
2. Allah’s statement in the Quran which reads thus: *“but when the prayer is ended, they disperse abroad in the land and seek Allah’s grace”* (Q62:10). Although the above verses do not directly address the legality of *Mudarabah*, but they have been interpreted by the jurists to include (in their meanings) those who travel for the purpose of trading and seeking permissible income as cited by al-Kasani (1984).

From the Sunnah there are also numerous incidents among which are:

1. The incidence of *Mudarabah* that the prophet (ﷺ) had with his wife Khadija (May Allah be pleased with her) prior to their marriage as contained in books of sirah: *“Abu N’aim and others related that the prophet (ﷺ) ventured to Syria for Khadija (may Allah be pleased with her) with her wealth prior to their marriage for about a year and two months and he was then in his twenty-fifth year and she released with him her slave-boy Maysarah and that was before the call to prophecy”* (Shihab Al-Din Ramli, 1984; Al-Zahabi, 2014; Ibn Kathir, n.d; Al-Salabi A. M, 2001; Al-Mubarakfuri, 2002).
2. Al-Zayla’i records numerous cases (many of which are not authentic) of the companions’ transactions of *Mudarabah* such as the case of ‘umar and his two sons (‘Abdullah and ‘Ubaydullah), the case of Ya’qubu Al-Juhani and ‘Uthman ibn ‘Affan, the case of Hakim ibn Hizam, the case of Jabir ibn ‘Abdullah, the case of ‘A’ishah and other

prominent members of the companions (may Allah be pleased with all of them) whose cases are recorded in the books of history and *Fiqh* (Al-Zayla'i, 2010; Al-Sarakhsi, n.d).

From the consensus (*ijma'*): According to Ibn al-Mundhir and Ibn Hazm, the legality of *Mudarabah* can be only proved through al-Ijma' as there is no expressed text in the Quran or the Sunnah on the subject. Ibn Hazm said that: of all jurisprudential matters, there is any matter without having its prove (s) from either the Quran or the Sunnah except *qirad*, we do not find any (expressed) evidence that supports it, although there is a sound consensus on that (Ibn Hazm, n.d; Ibn Mundhir, 2004).

In view of this, relation of scholars' consensus on the permissibility of *Mudarabah* is maximally enunciated in many of the books of *Fiqh* since there is no any case of controversy on its permissibility. Ibn 'Abidin from the Hanafis, Ibn Rushd from the Malikis, Al-'Imrani from the Shafi'is and IbnuQudamah from the Hanbalis relate this consensus in their books (Ibn 'Abidin, n.d; Ibn Rushd, n.d; Al-'Imrani, n.d; Ibn Qudamah, n.d).

From the analogy (*qiyas*): unlike the Hanafis and the Malikis, the Shafi'is and the Hanbalis opine that *mudarabah* may also get evidence of permissibility through *qiyas* (analogy). This analogy is placed on *musaqat* (share-cropping). They rationalize that since *musaqat* is permitted on the basis of necessity in the sense that the owner of the tree may not have the knowledge or chance to share-crop while the one who has the knowledge or chance to do so may not have tree and this is the available circumstance in the *mudarabah* contract hence it is permitted just like *musaqat* (Nyazee & 'Imran Ahsan, 2006).

More so, economic necessity is one of the main justification (s) for the legality of this contract as put by Al-Sarakhsi (1993):
"Because the people have a need for this

contract, the owner of wealth may not have the opportunity for a profitable investment, while the person who has such an opportunity may not have wealth, and profit is acquired through both, that is, wealth and ability to transact. And in permitting this contract, the goals of both are achieved".

TYPES OF MUDARABAH

In Islamic jurisprudence, *mudarabah* is of two types namely:

1. Mudarabah Mutlaqah

(Absolute/unrestricted): This is a kind of *Mudarabah* in which the worker is not restricted by any barrier, either place, time and/or other restrictions. He will be given freedom to his decision in the sales and he has right to display his desired expertise and experience as possible as he wishes, he can buy and sell whatever he thinks of as long as it is permissible and does not contradict any of the general Shari'ah provisions and maxims that govern transactions (Al-Maydani 'Abd Al-Ghani, n.d; Rashad Hasan Khalil, 1981).

2. Mudarabah Muqayyadah

(Conditional/Restricted): This is a kind of *Mudarabah* that is based on certain restrictions is only acceptable and valid in the Hanafi's and Hanbali's jurisprudence (Al-Zuhayli, n.d). In this kind, the worker may be restricted from a particular business, person (s) and or a particular land.

In consequence, the *mudarib* is legally restricted not to act beyond the conditions but rather act and transact in favor of the condition (Al-Kasani, n.d). Allah's statement reads: {*O you who believe! Fulfill (your) obligations*} [Q5: 1]. The prophet (ﷺ) also said: {*Muslims are (held) by their agreement except that which legalize the unlawful or that which make unlawful the lawful*} (Al-Tirmidhi, n.d).

These and other related quotes affirm that there may be stipulated conditions in transactions and that the conditions are to be met as long as they are valid. Although, the Shafi'i and the Malikis resent the fact that *mudarabah* could be restricted and if it is, it is null and

void, and the most correct opinion is that there is no harm in that (Nyazee & 'Imran Ahsan, 2006).

CONDITIONS OF MUDARABAH

Since *mudarabah* is a kind of contractual partnerships (*sharikat al-'uqud*), all general conditions of contracts in Islamic law are also applicable among which are: conditions of legal capacity to become a principal in a contract agency as regards to the money-giver; and that of legal capacity to be an agent as regards to the entrepreneur (*mudarib*) (Nyazee & 'Imran Ahsan, 2006).

Notwithstanding, there are other specific conditions stipulated for the capital invested in *mudarabah* and likewise for the profit incurred in the transaction. Jurists of different juristic schools have stated that the capital with which this partnership is inaugurated must certify certain conditions among which are:

- i. The capital must be an absolute currency and must not be given in tangible properties (*'urud*), and in the case where capital is in the state of tangible properties the capital would be derived from the sale of the properties and then employed as capital of *mudarabah* and this condition is wholly- agreed upon (Al-Nawawi, 1991).
- ii. The capital must be delivered to the *mudarib* before the commencement of work as he cannot commence work prior to this. So if the money-giver decides the capital would be a debt owed to him by the worker (*mudarib*) the *mudarabah* is invalid according to the majority of jurists including the Hanbalis (Al-Kasani, n.d; Ibn Juzayy, n,d; Al-Nawawi, 1991; Al-Hajawi, n.d while some jurists from the Hanbalis among which is Ibn al-Qayyim (1423H) opine there is nothing wrong in that as it contradicts any *fihi maxim* nor does it negate any known Shariah principle. But if the debt is owned by a third-party but the money-giver only delegates the worker to collect it on his behalf, scholars from the Malikis and Shafi'is

hold it is not valid while the Hanafis and the Hanbalis permit that, and this is the most correct there is nothing wrong in that as it does not contradict any *fihi Maxim* nor does it negate any known Shariah principle (Rashad Hasan Khalil, 1981).

- iii. The amount of the capital must be known to the parties at the inception of agreement. If the amount is not certain and known, the *Mudarabah* is not valid because this will also lead to uncertainty in calculation of the profit which is the main bone of contention in *Mudarabah* contract, thus this certainty of profit is a necessary condition in *Mudarabah* (Rashad Hasan Khalil, 1981).

As for the conditions that govern the profit incurred from the business, jurists also state that:

- i. The profit must be expressed as a ratio or as part of the total profit such as half, one-third, one-fourth etcetera of the profit. The profit must not be expressed as a percentage of the capital invested or by stating a particular amount from the profit because no one knows if that particular amount would be got as a profit or not, and this kind of condition invalidates the contract (Al-Nawawi, 1991). Ibn al-Mundhir states that: "And they (the jurists) are unanimous that any *Mudarabah* in which either or both of the parties stipulate for each other a certain amount of money is invalid" (Salim, 2013). Likewise, any conditions that may lead to the uncertainty of the profit will render the contract invalid (Salim, 2013).
- ii. The general rule in the sharing of profits is equality, thus if the ratio for sharing profit is not mentioned in the agreement the profit will be shared equally except if any part/ratio of the profit is stipulated for a party thus the other part/ratio becomes the other's automatically (Salim, 2013).

SOME RULINGS THAT GOVERN THE CONTRACT OF MUDARABAH

There are a set of rulings that guide and

govern the permissibility and application of *mudharabah* among which are the following;

Mudharabah Is Not A Lazim (Binding) Contract

One of the features of partnership business in Islamic law is that it is an annulable, terminable and cancellable contract, that is, either of the partners has the right to discontinue the contract without prior consent from the other party (Ibn Hazm, n.d).

Consequently *mudharabah* is a kind of partnership in which the contractor is not legally compelled not to quit, but rather it is a *ja'iz* (annulable) contract which means either the worker or the capital-giver has the right to discontinue the contract agreement.

There is a unanimous opinion that this right of discontinuity is guaranteed before the take-off of the business although there are controversies in some areas like the propriety of informing either of the party before the quit and whether the capital must remain capital as at the time of quitting or not and some other related issues.

However there is juristic controversy on whether the worker or the financier can discontinue the contract after the commencement? while the majority of jurists among the Hanafis, the Shafi'is and the Hanbalis hold that as permissible since the status quo is that *mudharabah* can be discontinue. the Malikis hold it is not permissible after the commencement because that will constitute harm to one of the contracting parties and this is the most correct view (Al-Zuhayli, n.d).

Accounting and Auditing Organization for Islamic Financial institutions (AAIOFI) Shariah Standard No. (13) 4/3 explains this thus: The general principle is that a Mudharabah contract is not binding, i. e. each of the contracting parties may terminate it unilaterally except in two cases:

1. When the *mudharib* has already commenced the business, in which case the *mudharabah* contract

becomes binding up to the date of actual or constructive liquidation.

2. When the contracting parties agree to determine a duration for which the contract will remain in operation. In this case, the contract cannot be terminated prior to the end of the designated duration, except by mutual agreement of the contracting parties (Accounting and Auditing Organization for Islamic Financial institutions, 2015).

The Mudharib Is Amin And Wakil (A Reliable And An Agent)

The *mudharib* is legally a trustworthy, faithful and secure. He becomes a trustee for the capital entrusted to him. Thus, if the capital entrusted to him is destroyed in his possession without any negligence from his end, he is not liable and legally responsible for the repayment as long as he has not engaged the capital to a different cause for which it was remitted.

This ruling implies that any claim of disaster in respect of the capital which is proved beyond any reasonable doubt will not be refunded. This is because the reliability nature of the *mudharib* prevails and he would not be legally reliable of the damage in as much as he has not walked out of the agreed condition of service such as traveling through a land which the agreement prohibits or trading in a business that is not authorized.

At this juncture, it is noteworthy that the power of the *mudharib* to decide on the nature of the *mudharabah* varies according to the kind of *mudharabah* concluded between the parties, that is, whether the *mudharabah* is *mutlaqah* (absolute) or *muqayyadah* (restricted) and the nature of his responsibility or otherwise is directly related to the kind of *Mudharabah* agreed upon (Al-Zuhayli, n.d).

The Mudharib Is A Partner When Profit Emerges

The worker becomes a partner to the money-giver when profit surfaces because as stated earlier, the main concern of this contract is partnership in profit. Here, the wealth or the profit incurred from the *mudharabah* becomes a

joint ownership (sharikatul-milk) between the worker and the financier.

It is also to be noted that the profit must not be shared unless its emergence is secured, Ibn 'Abidin writes: "His (the worker's) right to any amount (from the profit) depends on whether the profit is sure and present" (Ibn 'Abidin, 1992). So the worker must not single-handedly take his own portion of the profit in the absence of the other party (money-giver).

It was agreed unanimously by the jurists that profit in *mudarabah* should be distributed on pro rata basis. The proportion must be decided at the beginning of the contract by both contracting parties. The division of *mudarabah* profit in the form of fixed amount is not accepted and will invalidate the contract. The fixed amount of profit is prohibited because it leads to the inequitable situation of sharing the proceeds of the business (Nyazee, 'Imran Ahsan, 2006).

The Vitiated Mudarabah Becomes A Vitiated Ijarah

If the *mudarabah* becomes vitiating the contract becomes null and void and the capital must be returned to the owner and the *mudarib* would not be responsible for any damages on the capital provided he is not careless; and if profit emerges therein, scholars differ on the basis of its sharing into five opinions – the most correct of these opinion is that the *mudarib* will be given his adequate share from the profit either half, one-third or two-third and this opinion is upheld by Ibn Taymiyyah (Al-Zuhayli, n.d).

The Mudarib Becomes A Usurper If He Violates Stipulated Conditions

If the worker for any reason seeks to violate the agreed-upon conditions in the inception of *mudarabah* he becomes a usurper and will be liable for any damage caused in the process. Alhaskafi says: "and it (*Mudarabah*) is usurpation if he violates" (Ibn 'Abidin, 1992).

Ibn 'Abidin (1992) comments on this by saying: "because he has transgressed on another person's wealth thus he becomes a usurper and liable". In

this case, if any profit emerges it belongs only to the *mudarib* since he is liable for compensating whatever he was given by the money-giver" (Ibn Hazm, n.d).

Only The Mudarib Has The Right Of Administration

The basic law of this contract stipulates that only the *mudarib* has right to administer sales and other transactional activities because he is only the one who carries out such activities, hence the money-giver does not share from this right and must not specify that in the agreement draft. Although he may seek to have the right to the business administration provided the worker consents to his request, and if he does not he is not entitled to have it (Nyazee & 'Imran Ahsan, 2006).

The Mudarib's Financial Up-Keeps

In many cases, activities of *mudarabah* may necessitate that the worker be given right to a particular financial spending out of the capital slated for the *mudarabah* in order to have good-running of the business. Jurists have consequently discussed whose responsibility for these necessary financial needs and the summary of their discourse is that; the *mudarib* has any right to financial upkeeps either when he is a traveler or a city dweller and this the view of the Shafi's and the hanbalis although the hanbalis makes that conditional to their agreement before the take of of the contractual activities.

Some jurists the likes of Alhasan Al-Bisri allow that either he is a traveller or city-dweller. the majority of the jurists among the Hanafis and the Malikis permit that only if the *mudarib* is journeying and provided he is reimbursed for this from the accrued profits or even from the capital in the absence of any profit.

The most corrects is that the *mudarib* must be sure whether he can take any of his financial up-keeps during and in related to *mudarabah* exercise from the *mudarabah* pool or not based on the kind of *mudarabah* agreement he holds (Al-Zuhayli, n.d).

Permissibility Of Having Multi-Investors And/Or Multi-Workers

It is permissible to have, in *mudarabah* contracts, a number of investors and/or workers, so there is no harm in getting two parties to the contract; an investor and a worker or more than one party on either side, that is, a number of investor and a number of a workers, such as having three investors giving their money to a worker or to more than a worker and the sharing of the profit would be according to their agreement (Nyazee & 'Imran Ahsan, 2006).

Termination Of Mudarabah Contract

As noted earlier, *mudarabah* is a terminable and annullable contract and it is terminated by all acts that terminate partnership businesses generally among which are;

- i. Agreement of both the investor(s) and the worker(s) to terminate it.
- ii. If either of the party seeks for its termination with the condition that he makes it known to the other party.
- iii. It is also terminable by the death of either of the party except that the Maliki jurists opine that the *Mudarabah* agreement is inheritable (Ministry of Endowments and Islamic Affairs, 1427H).
- iv. Termination of the period, if it is for a particular period.
- v. Destruction of the capital of *mudarabah* after its possession and before commencement of transactions.
- vi. Absence of legal capacity to transact from either or both the parties, this may occur through Insanity of either or both of the party or through legal restriction (*al-hajr*).
- vii. Through constructive termination, that is, if a court orders that a particular *mudarabah* agreement is terminated due to any legal and/or judicial reasons (Nyazee & 'Imran Ahsan, 2006).

ROLE OF MUDARABAH CONTRACT IN THE MODERN BANKING AND FINANCIAL ACTIVITIES

Mudarabah contract is one of the most

suitable Islamic alternatives for legalizing many of the modern interest-related transactions.

It has had vivid roles of converting investments of the riba-based banks, insurance and bonds through halal instrument in order to align with the shariah dictates and rulings whereas modern investments would be Shariah compliant contracts.

This mode of contract can as well be allowed to thrive in any micro investment industries that are aimed at earning reasonable profits and returns through legitimate means. *Mudarabah* as a financing tool benefits individuals and the society at large and plays vital roles in restoring the socio-economic and religious lives of people.

Among the benefits of *Mudarabah* are;

- i. Increment of societal cohesion: *mudarabah* contracts strengthen the well-being of the financier with the financed. The only way the financier will do well is if the financed is doing well. As such, the financed cannot cause the financier to do poorly without affecting himself. This dynamism is absent in the interest-eating loans; often lenders will wish default on borrowers in order to foreclose on the collateral of the borrowers who may also purposefully default on their obligations if the asset they gave as collateral becomes worthless than what they took and vice versa.
- ii. Financing the most productive members of society: In *mudarabah*, financing will only be provided to the most productive members of the society.
- iii. Reduction of societal stress: The burden of financial stress harms people's health, relationships and destroys families. Substituting debt with a product that is designed to provide affordable payments will reduce the burden of financial stress on the society.
- iv. Profit and loss sharing criteria: one of the significant features of this product is that it is a PLS (profit and

loss) System of business; that is, Profit is shared in accordance with the terms of the *mudarabah* agreement and losses are to be borne only by the financier unless the losses are due to the Mudarib's misconduct, negligence, or breach of the terms and conditions of the contract (Rakaan Kayali, 2015).

MUDARABAH AS PRACTICED IN MODERN ISLAMIC BANKS AND TAKAFUL INSURANCE

As the world changes it is logically impossible that the change would not touch on all aspects of human live, rather it is a multi-dimensional change which covers all the nooks and crannies of human development.

As a result of that, applications of *Mudarabah* in the modern Islamic banks may not necessarily rely on the classical applications of this contract some of which have been discussed hitherto; or must it rely on a particular mode practiced in any part of the world neither must it be carried out in compliance to the practice of any Islamic banks in the globe because these banks may be governed by certain environmental or customary dictations which are bound to change from one place to another or one set of people to another.

Iqbal has written that:

“When academic work on Islamic banking as an alternative to Interest-based banking first started, discussion essentially focused on the traditional forms of Islamic modes of finance such as mudarabah and musharakah. But subsequent writings, as well as the practice of Islamic banking, have Made important contributions both to the evolution of new forms of Islamic Business enterprises” (M. Iqbal & P. Molyneux, 2005)

So, different modes of investments have been devised many of which were tapped from the western world. As a researcher in the fields of Islamic Jurisprudence, Economics and Finance, the most requiring is to appraise any newly-structured modes of investments in Islamic banks under the

prefix of *Mudarabah* or other permissible transactions based on the general maxims and principles of these contracts in Islamic jurisprudence .

As put by Nyazee:

“If the forms designed by the earlier jurists are not considered important (for the modern age), we cannot throw out the baby with the water, the legal principles that they sought to implement must be taken to account. Some of these vital legal principles governed the forms of business organizations (Musharakah) and they should govern the modern forms too if these are to be deemed Islamic” (Nyazee & Imran Ahsan, 2006).

The principles referred to here, are those that are either stated explicitly in the texts or are implied by the texts. These principles have been unanimously accepted by the jurists. They may be interpreted in different ways, but they cannot be done away with altogether (Nyazee & Imran Ahsan, 2006).

In the world today and due to proliferation of Islamic banks across the globe there have emerged different kinds of *Mudarabah* contracts tailored under different hybrid contractual modules such as arrangement of *mudarabah* with *wadi'ah*, *wakalah* or *musharakah* In Islamic banks, takaful insurance and sukuk managements.

Under these transactional units, the contracting parties will agree to an arrangement whereby a certain amount of fund is assigned as a *Mudarabah* and another portion of the fund is assigned under *wadi'ah*, *wakalah* or *musharakah* contracts. Under these hybrid agreements, the contracting party shall observe the shariah requirements on each portion/units of contract it is assigned to (Bank Negara Malaysia, 2016).

Also in the practical operations of the modern IFIs is its feature of financial regulatory boards whose main activities is to regulate their financial activities and adjudge the propriety and /or otherwise of their market activities. “While conventional institutions have been established and governed by secular, man-made laws and regulations, the IFIs

must also adhere to the divine rules and principles of shariah” (Muhammad Marjan & Ahmed Mezbah, 2016).

These main parts of roles are that which the shariah scholars and Islamic jurisprudential experts seek to play in their modern regulatory roles on the IFIs and this is one of the major different features of Murabaha contracts as widely operated in its modern practices. Mudarabah is commonly utilized as the underlying contracts for the restricted Mudarabah investment account, unrestricted Mudarabah investment account, corporate financing, and working capital financing and securitization-based product such as *mudarabah sukuk*.

It is also used in interbank money market products. Some takaful operators have also developed their business model based on Mudarabah principle of investing the participants’ investment fund (Muhammad Marjan & Ahmed Mezbah, 2016).

In the modern day practices of Mudarabah, the customer places an investment of his desired currency in a Mudarabah unrestricted investment account. The customer and the bank mutually agree on the profit-sharing ratio while the bank invests the fund in sharia-compliant investment activities without any restriction(s) from the customer on management of the fund.

Should the investment generate profit, both parties share the profit based on the predetermined profit-sharing ratio. In the case of a loss, the customer shall solely bear the financial loss. The bank shall only be financially liable if the loss is due to its misconduct or negligence (Muhammad Marjan & Ahmed Mezbah, 2016).

CONCLUSION

In conclusion, the research findings are that Mudarabah is one of the main contracts fraught with numerous business opportunities. It is one of the permissible contracts as evident in the many texts legalizing trading in generality. There are instances from the life experience of the prophet (ﷺ) and his

companions to the propriety of Mudarabah contract while scholar’s consensus also supports its permissibility.

Conditions to its permissibility are discussed in clear terms while opinions of the jurists on its regulations and principles are enunciated. The modern practices and operations of Mudarabah and other forms through which it is tailored are also cited in precise and brevity.

The research also discusses the major regulatory role played by scholars and experts. For further researches, the researchers proposes that an appraisal and assessment is made on the available Islamic financial institutions (IFIs) in different sampled countries or regions especially in their applications, practices and *mudarabah* transaction activities in order to adjudge how consistent and compliant their *mudarabah* practices are as compared to the laid down shariah principles and conditions.

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