“If we ban contracts and conditions between people, we are prohibiting something that Allah did not prohibit.” Ibn Taimiyyah

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ISLAMIC HIRE-PURCHASE TRANSACTION

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ABSTRACT

Islamic hire-purchase transaction is a modified form of hire-purchase contract that has been practiced for a long time by conventional banks. The Islamic hire-purchase begins with *ijārah* contract and ends with transferring the ownership to the lessee by a sale contract for a nominal price or the asset will be gifted to him. The practiced forms by the Islamic banks were criticized by many scholars and researchers for some issues. The major issues are: the transaction is formed of two contracts, it comprises more than one condition, the practiced forms according to the schools of *fiqh* violate many conditions required for a lease contract and whether the lessor is legally bound to honor a promise usually is made by him to transfer the ownership to the lessee. The study followed comparative and analytical method. The research discussed the classic *ijārah* and the Islamic hire-purchase. Similarities and differences between both contracts are indicated. The issues in the Islamic hire-purchase comprehensively are discussed, relying on the view of prominent classical and current scholars. Moreover, some similar transactions to the Islamic hire-purchase have also been discussed. These transactions have been compared to Islamic hire-purchase and similarities and differences between them and the Islamic hire-purchase are indicated. This is to show whether the Islamic hire-purchase is preferred over them or not. To conclude, *ijārah* and Islamic hire-purchase are absolutely two different contracts. However, amongst the practiced forms of the Islamic hire-purchase, some of them conform to the Islamic law of contracts and others do not. Therefore, the prohibitions in the *aḥādīth* do not apply to indicated legal forms of the contract. The Islamic hire-purchase as well as other similar contracts have advantages and disadvantages for the contracting parties. For this reason, it is hard to tell that one of these contracts can absolutely be preferred over the others.

ملخص البحث

الإجارة المنتهية بالتمليك التي تمارسها البنوك و المؤسسات المالية الإسلامية, هي الصيغة الإسلامية ل(البيع الإجاري) والذي يمارسه البنوك الربوية منذ مدة طويلة. المعاملة تبدأ بلإجارة و تنتهي بالبيع أو هبة ناقلا الملكية الي المستأجر. الصيغة المتبعة من قبل البنوك الإسلامية إحتوت علي مسائل عدة كن موضع خلاف من قبل العلماء والباحثين المعاصرين. من هذه المسائل, هل الوعد من قبل المؤجر بتحويل الملكية الي المستأجر هبة أو بثمن رمزي ملزم قضاءا؟ و أن المعاملة تحتوي على عقدين في معاملة واحدة, وأن فيها أكثر من شرط واحد. وكذلك أن الصيغة المتبعة من قبل البنوك الإسلامية عمليا يخالف كثيرا من الشروط الموضوعة من قبل العلماء القدامي لعقد إيجار صحيح. البحث اتبع أسلوب المقارنة والتحليل, فقد قام الباحث بتوضيح ماهية عقد الإيجار وما تلزمه من الشروط ليكون عقدا صحيحا. ثم نوقش ماهية الإجارة المنتهية بالتمليك مع اهم المسائل التي اختلف عليها العلماء والباحثون, مبينا الرأي الاقوي للعلماء في مواضع الخلاف مستندا في ذلك الي آراء العلماء الافاضل. بعدها قورن الإجارة المنتهية بالتمليك بالإجارة القديمة, مبينا الفروق والتشابه بينهما. علاوة علي هذا, قد ذكر بعض المعاملات المتاشبهة مع الإجارة المنتهية بالتمليك واللاتي يستخدمهن البنوك لنفس الغرض الذي تستخدم الإجارة المنتهية بالتمليك لاجله, مع بيان وجه الشبه بينهم. و ما توصل اليه البحث هو أن الإجارة المنتهية بالتمليك تختلف تمام الاخلاف عن الإجارة القديمة, و أن للاجارة المنتهية بالتمليك صور مشرعة و غير مشروعة ايظا. و لكن معني النهي في الأحاديث لا تشمل الصيغ المتبعة في الصور المشروعة. و كذلك إن لكل من الإجارة المنتهية بالتمليك والمعاملات المتشابهة محاسن في بعض الجوانب و مساوئ في جوانب أخرى لكلا العاقدين. فلذلك من الصعب أن تفضل أي منهن علي اخرى اطلاقا لتكون المعاملة الأمثل في تحقيق الغرض المراد.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of comparative laws.

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Supervisor

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Name: Abdullah Omar Hama

Signature..... Date …….

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Affirmed by Abdullah Omar Hama

…….. ……..

Signature Date

- To my parents
- My fiancée
- All knowledge seekers

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TRANSLITERATION TABLE

Table 1: Consonants

ء	ʾ	خ	kh	ش	Sh	غ	gh	ن	n
ب	B	د	d	ص	ṣ	ف	f	هـ	h
ت	T	ذ	dh	ض	ḍ	ق	q	و	w
ث	Th	ر	r	ط	ṭ	ك	k	ي	y
ج	J	ز	z	ظ	ẓ	ل	l		
ح	ḥ	س	s	ع	ʿ	م	m		

Table 2: Vocalisation Signs (Representing Arabic Vowels)

Short Vowels	
ـَ	a
ـِ	i
ـُ	u

Long Vowels	
ـَ + ا	ā
ـِ + يْ	ī
ـُ + وْ	ū

CHAPTER ONE

1.1 INTRODUCTION

Islamic banking globally has a history of more than three decades[1]. Since the introduction of the Islamic banking and finance system, Islamic banks have innovated many modes of financial transactions which are based on the Islamic law of transactions and different to what people are familiar with. From the Islamic point of view, this implementation ensures the legality and fairness of all transactions to the customers. This major task is still going on. In achieving this goal, Islamic banks have to be progressive and dynamic to meet all kinds of demands and find alternatives to those facilities offered by the conventional banks. In pursuing this objective, Islamic banks somehow have to modify some original or classical Islamic transactions and shape them into new forms that will be suitable for their customers.

However, there are controversies about the legality of some of the new modes of Islamic transactions that have been adopted.[2] Islamic hire-purchase transaction or leasing and then purchase is one of them. Hire-purchase has been practiced by conventional banks for nearly one century, and after the establishment of the Islamic banks, some of them started to practice this transaction as well. Due to the modernity

[1] The first modern experiment with Islamic banking was undertaken in Egypt under cover, without projecting an Islamic image. The pioneering effort, led by Ahmad al-Najjār, took the form of a savings bank based on profit-sharing in the Egyptian town of Mit Ghamr in l963. The Nāsir Social Bank, established in Egypt in l97l, was also declared an interest-free commercial bank, although its charter made no reference to Islam or *Sharīah*. After that, the IDB was established in l974 by the Organization of Islamic Countries (OIC). In the seventies, a number of Islamic banks, came into existence in the Middle East, e.g., the Dubai Islamic Bank (l975), the Faisal Islamic Bank of Sudan (l977), the Faisal Islamic Bank of Egypt (l977), and the Bahrain Islamic Bank (l979), to mention a few. Islamic banking made its debut in Malaysia in l983, when Bank Islam Malaysia Berhad (BIMB) was established.

[2] One reason for this is that in most cases Muslim scholars have different views on the legality of the Islamic transactions. Another reason is that Islamic banks do not have many choices, so that they cannot exclude any controversial transaction. An example of a controversial transaction that they practice is *Bay' al-'Īnah*.

of the adaptation of Islamic hire-purchase, one cannot find any direct reference from the Islamic schools of *fiqh* (Islamic jurisprudence) which specifically refers to this kind of contract.

The Islamic hire-purchase transaction is a contract of leasing which contains a promise of sale of the leased asset at the end of the agreed period of leasing, either for a nominal or a market price.[3] The transaction is similar to a sale of assets by installment, which has been offered by Islamic banks long time before the emergence of Islamic hire-purchase. However, for the benefit of both parties, especially the bank, this product is offered. Moreover, diversification in services is another reason for offering Islamic hire-purchase.

1.2 OBJECTIVES OF THE STUDY

The research aims to discuss the legality of the Islamic hire-purchase transaction and compare Islamic hire-purchase transaction with the classical *ijārah* (leasing), highlighting the differences and similarities between both transactions. It will also discuss the legal consequences of both transactions. The efficiency of Islamic hire-purchase as a mode of financing, compare to some other similar modes will be another objective of the research.

1.3 STATEMENT OF PROBLEM

The controversy between Muslim scholars on the legality of Islamic hire-purchase gives rise to new research as an endeavor to remove the doubt about its legality. One major point of dispute is that the transaction is formed from two

[3] Ali Muhyyedīn al-Qaradāghī, "*Al-ijārah al-muntahiyyah bi al-tamlīk*," *Majalat Al-Majma' Al-Fiqh al-Islāmī*, vol, 1, no. 12, 492 (Jeddah: Organization of Islamic countries, 2000). Selling for market price is in some cases only.

transactions in one (*bayʿatāni fī bayʿah*), which are the contracts of *ijārah* and sale. The other point of dispute is that, it is a contract with a condition (*bayʿ maʿa al-sharṭ*) which is not allowed by some scholars. According to some other scholars the second point depends on the nature of the condition. Since the Islamic hire-purchase is different from *ijārah*, most of the scholars dealt with the topic with different approaches and had different observations on it. The researcher will try to bring about different views of the present scholars and discuss them. Relying on the earlier and the present views of scholars, the researcher will choose the strongest and most suitable view for the Muslim society.

1.4 HYPOTHESIS

Islamic hire-purchase is different from classical *ijārah* but it is still a valid form of contract provided that some changes are made to be in line with the principles of Islamic law.

1.5 LITERATURE REVIEW

There is no comprehensive book discussing the Islamic hire-purchase transaction in detail. Some papers such as *"al-ta'jīr al-muntahi bi al-tamlīk wa alṣuwar al-mashrūʿah fīh,"* by Abdullah M. Abdullah, *"al-'ījār al-muntahi bi al-tamlīk"* by Ḥassan Ali Shādhlī, *"al-'ījār alladhi yantahi bi al-tamlīk"* by Abdullah Al-Sheikh Almaḥfuẓ Ibn Beh, *"al-ijāra bi sharṭ al-tamlīk wa al-wafā' bi al-waʿd"* by Muhammad Ali Al-taskhīrī and *"al-ta'jīr al-muntahi bi al-tamlīk"* by Abdullah Ibrāhīm) had been presented in the conference of Islamic Fiqh Academy in 1988,[4] but

[4] *Majalat Al-Majmaʿ Al-Fiqh Al-Islāmī*, (Jeddah,: Munaẓamat Al-Mu'tamar Al-Islāmī, 1988) 4:2595-2764.

the information given was not adequate. As a result the Academy could not give a clear legal opinion (fatwa) about the validity of the transaction, but the Academy gave some other alternatives such as sale by installment or selling the property to the lessee at the end of the rental period against the market value. There are some other articles explaining the existing forms of the present practice of the Islamic hire-purchase and others focus only on some part of it, giving inadequate information about every part of the transaction. For example, Muhammad Muzaffar,[5] although the title of his article is "*Ijārah*: Financing on the basis of hire-purchase and leasing," he did not mention about hire-purchase except in a few sentences. However, Sa'ud al-Funaysan[6] has discussed the topic in his article "*al-'ījār al-muntahi bi al-tamlīk*," with more detail and has stressed on the effect of the penalty clause for default in payment that renders the transaction uncertain in price. It thus invalidates the contract.

Wahbah Zuḥaylī[7], in his book- *Al-mu'āmalāt al-māliyyah al-mu'āṣirah* – discussed the topic in detail. He says that if the transaction comprised of two contracts at the same time on the same subject matter - like leasing and selling - is not allowed by the *Shari'ah* (Islamic law). There are some other scholars who are in disagreement with this viewpoint. However, Zuḥaylī mentioned some other types of hire-purchase which are allowed. He also did not elaborate on the positions of the parties in the case of dispute. Muhammad Ahmad Sirāj and Muhammad Abd al-Karīm A. Irshīd mentioned about the transaction without sufficient explanation. The Sirāj book- *Al- niẓām al-maṣrafī al-Islāmī* -was written in 1989, so the definition of the transaction was the same as for *Mushārakah Mutanāqiṣah* (diminishing

[5] *Encyclopaedia of Islamic banking and insurance*, 1995, "*Ijārah*: Financing on the basis of hire-purchase and leasing".
[6] Sa'ūd al-Funaysān, " *Al-'ījār al-Muntahī bi al-tamlīk*," *Majalat al-Buḥūth al-Fiqhiyyah al-Mu'āṣirah*, no. 48 (2000).
[7] Wahbah Zuḥaylī, *Al-mu'āmalāt al-mālyyiah al-mu'āṣirah*, (Damascus, Dār al-Fikr, 2002), 393-413.

partnership) and Irshīd in- *Al-shāmil fī al-muʻāmalāt wa al-ʻamaliyyāt al-maṣārif al-Islāmiyyah* – also do not provide details at all.

1.6 SCOPE AND LIMITATION OF STUDY

The research will discuss Islamic hire-purchase transaction, comparing it with *ijārah*, indicating the differences and similarities between them. For the purpose of comparison, it will also discuss a few issues relating to the contract of *ijārah*, its validity and conditions. One of the controversial issues in Islamic hire-purchase is when the parties dispute the repudiation of the contract. However, it will not tackle conventional hire-purchase from the Islamic point of view. The research will also compare Islamic hire-purchase with other similar transactions such as *Murābaḥah* (sale at a specified profit margin), *Bayʻ bi al-taqsīṭ* (sale by installment) and *Mushārakah Mutanāqiṣah*.

1.7 METHODOLOGY

The study will be mostly library-based. It will be a comparative analytical study of different views of scholars about the legality of Islamic hire-purchase. Since there are very limited resources on the topic, the study will depend on the *fiqh* books and some papers presented to Fatwa councils. Articles written by current scholars and specialists on Islamic banking will be another source of the study. Books and articles written both in English and Arabic will also be used as references. The translation of *Qur'ānic* verses throughout the research is taken from "The Holy Quran, English translation of the meanings and commentary, revised and edited by the presidency of Islamic research, Iftā', call and guidance, Riyadh, by Majmaʻ al-Khādim al-Ḥaramayn al-Sharīfayn li ṭibāʻat al-Muṣḥaf al-Sharīf, 1413H"

1.8 CONTENTS

The study is divided into five chapters. Chapter one is an introductory chapter it discusses objectives of the study, statement of the problem, hypothesis, literature review, scope and limitation of the study and research methodology adopted.

Chapter two discusses the contract of *ijārah* according to Islamic schools of *fiqh*. This discussion will include definition of *ijārah*, legality, terms and conditions and some other issues which involve the *ijārah* in the present time, such as guarantee in *ijārah*, maintenance and repairs, penalty for late payment and the like.

Chapter three covers the Islamic hire-purchase transaction as practiced by Islamic banks. The discussion mainly will be about some major issues; sale with conditions, legal status of new contracts, two contracts in one and the legal status of honoring a promise. In addition, some other small issues will also be discussed.

Chapter four explains some other transactions like *Murābaḥah, Bayʿ bi al-taqsīṭ* and *Mushārakah Mutanāqiṣah,* comparing them with Islamic hire-purchase. These transactions are used for the purpose of financing same as Islamic hire-purchase.

Chapter five contains the result of the research on the Muslim scholars' views on various forms of the hire-purchase transaction and the best suggested form to be applied by the Islamic banks.

CHAPTER TWO

AL-IJĀRAH

2.1 INTRODUCTION

Ijārah is a contract to use the usufruct of something for a countervalue, which has been practiced since the beginning of Islam and even before that. However, Islamic hire-purchase transactions practiced by Islamic banks are legalized on the basis of *ijārah* or lease contract. Therefore, we have to know some basic information about classical *ijārah*. This will help us to make a comparison between Islamic hire-purchase and classical *ijārah,* and to know whether this new form of Islamic hire-purchase is still a form of *ijārah* or whether the additional features added into this new form of transaction has created a new type of contract altogether.

2.2 DEFINITION OF *IJĀRAH*

Ijārah literally means the sale of the usufruct. However Muslim scholars have provided different definitions for *ijārah*. Ḥanafīs simply define *ijārah* as a contract for the use of the usufruct for a countervalue or price.[1] Mālikīs and Ḥanbalīs define it as the transfer of the use of the usufruct of a permissible thing for a known countervalue[2]. The Shāfi'īs however, provided a more detailed definition of *ijārah* where they said; *ijārah* is a contract for the use of a permissible, determined, and

[1] Shamsaddīn Abu Bakr Muhammad al-Sarakhsī, *Al-mabsūṭ*, (Beirut: Dār al-Fikr, 2000), 8:65; Al-Sheikh Niẓām, *Al-fatāwā al-Hindiyyah*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 2000), 4:459.
[2] Muhammad Ibn Ahmad Ibn 'Arafa al-Dasūqī, (1996), *Ḥāshiyyat Al-Dasūqī 'alā al-sharḥ al-Kabīr*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1996), 4:334.

known usufruct, capable of being spent, for a known countervalue or price[3]. The Shāfi'īs definition has indicated the fundamental conditions that should exist in the usufruct, particularly in the contract of *ijārah* generally. The definitions from the other schools of *fiqh,* especially the Ḥanafīs, did not mention that many conditions.

From the definitions it can be noted that the main subject of *ijārah* is the usufruct and not the leased property itself, whereby in most cases it is in the form of usufructs of goods. However, *ijārah* also includes services such as the service of a hired worker.[4] In both cases, whether the subject matter of *ijārah* is the usufruct of goods or the service of a person, it is still classified as *ijārah*.

2.3 LEGALITY OF *IJĀRAH*

There are two different views of the Muslim scholars on the validity of *ijārah*. The majority of them have allowed the *ijārah* contract on the basis that it fulfills all the elements of a contract required by the *Sharī'ah*. However, a few scholars are of the view that *ijārah* is not permitted[5]. This is view based on the logic that *ijārah* is the sale of the usufruct. Since this usufruct cannot be submitted at the time of the contract, it constitutes the sale of nonexistent goods which is not permitted[6]. This argument is opposed by clear-cut texts from *al-Qur'ān* and the *Sunnah* of the Prophet (s.a.w) and the consensus of the companions of the Prophet (s.a.w)[7].

---

[3]Muhammad Ibn Muhammad al-Khaṭīb al-Shirbīnī, *Mughnī al-muḥtāj ilā ma'rifat ma'ānī alfāẓ al-minhāj*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 2000), 3:438; Muṣṭafā al-Raḥibānī al-Siyūṭī, *Matālib'ulī al-nuhā fi sharḥ ghāyat al-muntahā*, (n.p., 2nd edn, 2000), 5:90-91.

[4] Al-Sheikh Niẓām, 462.

[5] Alā'addīn Ibn Abī Bakr Ibn Mas'ūd al-Kāsānī, (1982), *Badā'i' al-ṣanā'i' fi tartīb al-sharā'i'*, (Beirut: Dār al-Kitāb al-'Arabī, 2nd edn., 1982), 4:173.

[6] Muhammad Ibn Ahmad Ibn Rushd al-Qurṭubī, *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*, (Beirut: Dār al-Fikr, 2001), 178.

[7]Wahbah Zuḥaylī, *Financial transactions in Islamic jurisprudence*, (Muhammad A, El Gaml, trans,), (Damascus: Dār Al-Fikr, 2003), 1:385; Al- Kāsānī, 174; Ibn Rushd, 178; Ibrāhīm Ibn Muhammad Ibn Sālim Ḍoyān, *Manār al-sabīl*, (Beirut: Al-Maktab al-Islāmī, 7th edn., 1989), 1:413.

The *Qur'ānic* proof is derived from some verses, such as:

فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ

"And if they suckle your offspring, give them their recompense." [8]

Another verse is about the Prophets Shu'ayb and Musā;

قَالَتْ إِحْدَاهُمَا يَا أَبَتِ اسْتَأْجِرْهُ إِنَّ خَيْرَ مَنِ اسْتَأْجَرْتَ الْقَوِيُّ الْأَمِينُ{*} قَالَ إِنِّي أُرِيدُ أَنْ أُنكِحَكَ إِحْدَى ابْنَتَيَّ هَاتَيْنِ عَلَى أَن تَأْجُرَنِي ثَمَانِيَ حِجَجٍ فَإِنْ أَتْمَمْتَ عَشْراً فَمِنْ عِندِكَ وَمَا أُرِيدُ أَنْ أَشُقَّ عَلَيْكَ سَتَجِدُنِي إِن شَاء اللَّهُ مِنَ الصَّالِحِينَ

"Said one of the (damsels), O my father hire him on wages, for truly the best to employ is a strong and trustworthy man. I intended to wed one of my daughters to you on condition that you work for me for eight years and if you complete ten full years, that will be a grace from you."[9]

The verses clearly indicate that the contract of *ijārah* is permitted. In the first verse Allah orders the father of the infant who has been breast fed to give to the woman a reward for her work as a countervalue. In the second verse, Allah approves the contract of hiring Prophet Musā by Prophet Shu'ayb which clearly means the validity of the contract.

[8] *Al-Qur'ān*, *al-Ṭalāq*: 6; The Holy Quran, English translation of the meanings and commentary, revised and edited by the presidency of Islamic research, Ifta', call and guidance, Riyadh, Majma' al-Khādim al-Ḥaramayn al-sharīfayn li ṭibā'at al-Muṣḥaf al-sharīf, 1413H.
[9] *Al-Qur'ān*, *al-Qaṣaṣ*: 26-27.

Proof of permissibility of the contract of *ijārah* can also be found in the *Sunnah* of the Prophet (s.a.w). One of them is a *ḥadīth* (*Qudsī*)[10] which says:

ثلاثة أنا خصمهم يوم القيامة: رجل أعطى بي ثم غدر, ورجل باع حرا فأكل ثمنه, ورجل إستأجر أجيرا فاستوفى منه و لم يعطه حق.

"Allah says: I will be against three persons on the day of Resurrection: one who make a covenant in My name, but he proves treacherous, one who sells a free person (as a slave) and eats the price and one who employs a labourer and gets full work done by him but does not pay him his wages."[11]

Another *ḥadīth* (tradition) is narrated from Sa'īd Ibn Musayyib, whereby he said:

كنا نكرى الأرض على أن لنا هذه و لهم هذه فربما أخرجت هذه ولم تخرج هذه, فنهانا عن ذلك فأما الورق فلم ينهانا

"We used to rent out lands for a share of the grain, and the Prophet prohibited us from such practice. Instead, he asked us to lease it out for gold or silver."[12]

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[10] *Ḥadīth qudsī* is a statement in which Prophet Muhammad (s.a.w) reports a statement and he refers it directly to Allah. Differences between *al-Qur'an* and the *ḥadīth qudsī* are: (1) *Al-Qur'an* was revealed to the Prophet (s.a.w) verbatim, that is, both its words and meanings are from Allah. The *ḥadīth qudsī* was not a verbatim revelation; its words are from the Prophet (s.a.w). (2) *Al-Qur'an* was revealed via Angel Jibreel while the *ḥadīth qudsī* may have been inspired by other ways, such as in the form of a dream. (3) The words of *al-Qur'an* are miraculous or inimitable (*mu'jizah*) while the words of the *ḥadīth qudsī* are not of this nature. (4) *Al-Qur'an* is recited in formal Prayers (*salah*) but the *ḥadīth qudsī* cannot be recited in Prayers. (5) *Al-Qur'an* cannot be reported except word by word, while *ḥadīth qudsī* can be reported by different words but same meaning. (6) Parts of *al-Qur'an* called either *surat* or *'ayah* but not *ḥadīth qudsī*. From Abd Al-Karīm Zaydān, *'Ulūm al-ḥadīth*, (Baghdad, Maṭba'at 'Iṣām, 2nd edn, 1990), 27.

[11] Muhsin Khan, *The translation of the meaning of Ṣaḥiḥ al-Bukhārī*, (New Delhi: Kitāb Bahavan, 5th edn., 1984), 3:236.

[12] Muhammad Ibn Ali al-Shawkānī, *Nail al-awṭār sharḥ muntaqā al-akhbār*, (Cairo: Maktabat al-Kuliyyāt al-Azhariyya, n.d.,), 7:14.