ISLAMIC JURISPRUDENCE OF FINANCIAL TRANSACTIONS

For Undergraduate Students of Economics & Management

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In the name of Allah
The Entirely Merciful, The Especially Merciful

Introduction

In the name of Allah, Praise is to Him, and Peace and Blessings on His Prophet Muhammad

This book on *"Islamic Jurisprudence of Financial Transactions"* is addressed to undergraduate students in faculties of economics and management. However, the main purpose of the book is not to enable such students to know all about financial transactions and comprehend the host of their tiny details. It rather aims at providing samples of such transactions so as to stimulate the interest of the student or the reader to go deeper in seeking more knowledge about financial transactions from their original and all-inclusive sources.

Having this in mind, the author tried to bring together – within the boundaries of the 350 pages allotted for the book - both traditional and modern financial transactions, while catering for the objectives of clarity and simplicity and responding to the various comments made by the students at the early stages of formulating the plan of the book.

In fact, the idea of the book has originated from a recommendation by the Council of the Center for Research in Islamic Economics (CRIE) – King Abdul Aziz University in its meeting on 28/10/1410H. In that meeting, the Council of CRIE proposed introducing Islamic Jurisprudence of Financial Transactions as a faculty requirement among the subjects in the Faculty of Economics and management so as to be taught for two hours per week in one semester.

The recommendation was then presented, along with the outline of the book, to the sixth meeting of the Heads of Economics and Islamic Economics Departments in the Saudi Universities. held on 21–22/1/1422H. The Center received a number of comments and observations from the scholars whose names have been referred to in the acknowledgement.

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A **Translator's Note**

Translated meanings of the holly *Qur'anic* verses have been quoted from: *Ali, Abdullah Yusuf: The Holly Qur'an (meanings Translation), Beirut, Dar Al-Arabia.*

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Objectives *(Maqasid)*

Objectives are Interests

Islamic jurists indicate that the overall objective of *Shari'ah* is to attract interests *(Masalih)* and word off blights *(Mafasid)*. Interest *(Maslahah)* can be taken to mean benefit, advantage or good deed; whereas blight signifies harm, evil or sin.

In view of the ultimate goals embodied in the teachings of the *Qur'an* and the *Sunnah* (Prophetic Traditions) one can easily understand that Allah *(subhanahu wa taala)* has commanded us to do whatever is good and shun away from whatever is evil, regardless of whether the good or evil act in question is small or big. In this regard Allah *(subhanahu wa taala)* said(1): ***"Then shall anyone who has done an atom's weight of good, see it. And anyone who has done an atom's weight of evil, shall see it"*** [*Al-Zalzalah*: 7 & 8]. Perhaps the most exhaustive *Qur'anic* verse which persuades people to achieve all interests and refrain from all blights is the verse which states that ***"God commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you that ye may receive admonition"*** [*Al-Nahl*: 90].

In one sense, blights can be viewed as "negative interests", and therefore saying that objectives are interested, means the achievement of interests; as well as avoidance of blights.

Objectives do not mean Fancies

Shari'ah has come with the aim of liberating people from the urge of their blind whims so that they become true servants of Allah *(subhanahu wa taala)* according to their own choice, besides being so forcibly. Therefore, *Shari'ah* does not consider curbing blind fancies and whims as an act that involves hardship, even if it is considered to be so in our own perception. Allowing people to formulate *Shari'ah* rulings on the basis of their own likings, can leave the door wide open for them to

(1) Translated meanings of the holly *Qur'anic* verses have been quoted from: *Ali, Abdullah Yusuf: The Holly Qur'an (meanings Translation), Beirut, Dar Al-Arabia*.

pursue tricks and stratagems that can make such rulings serve their own purposes, and respond to their inclinations and desires[2].

Interests and the Scale of Shari'ah Rulings

It is well known that the scale of *Shari'ah* rulings comprises five distinct echelons of human acts, including: duties (*wajibat)*, recommendable acts (*mandoobat*), permissible acts (*mubahat*), detestable acts (*makroohat*), and forbidden acts (*muharramat*). The first three categories (duties, recommendable acts and permissible acts) relate to achievement of interests; whereas the last two categories (detestable and forbidden acts) relate to commitment of blights. Duties involve more interest compared to recommendable acts and so are recommendable acts compared to permissible acts. Also, forbidden acts involve more blight than detestable acts.

According to Al-Iz Ibin Abdul Salam, ***"Allah has ordered his servants to do whatever is good including duties as well as recommendable acts, and to shun away from whatever is evil including forbidden as well as detestable acts. He made them know what is rational and beneficial to them so as to do, and what is irrational and harmful to them so as to avoid"***[3].

Al-Iz Ibin Abdul Salam also indicates that, ***"Interests are of three types, because they can originate from duties, recommendable acts or permissible acts. Also, blights are of two types, because they can originate from either detestable or forbidden acts"***[4].

The degree of guilt committed as a result of blight varies with respect to the size of the blight in question and the loss of interest it causes. Similarly, the degree of reward obtained for achieving interest varies according to the level of that interest[5].

Rewards are ranked according to ranking of interests, and so are punishments according to ranking of harms[6]. Indemnity is permissible so as to restore benefit; and so is punishment in order to ward off blight[7].

When it is not clear whether a specific interest is a duty or a recommendable affair, caution necessitates treating it as a duty. Also

(2) Al-Shatibi: *Al-Muafaqat*; (2/27, 109, 120, 125, and 126)
(3) Ibn Abdul Salam: *Al-Qawa'id Al-Kubra*, (1/5).
(4) Ibid, (1/12).
(5) Ibid, (1/180 & 184).
(6) Ibid, (2/ 195).
(7) Ibid, (1/263).

when it is not clear whether a certain act is forbidden or detestable, caution necessitates considering it as forbidden[8].

Al-Iz argues that ***"Any act that generates blight or obstructs realization of interest, such as wasteful spending of money and extravagance in consumption, is forbidden. Excessive eating, for instance, is forbidden because it involves waste of money, spoiling of one's mood and could probably result in fatal consequences"***[9].

Furthermore, Al-Iz indicates that ***"Eating or drinking should neither exceed the state of eliminating hunger or thirst, nor should it be insufficient to ensure health preservation and the ability to perform worship and life duties. Allah (subhanahu wa taala) said: (Eat and drink, but waste not by excess)*** [*Al-Aaraf*: 31]***"***[10].

The Five Objectives of Shari'ah: Safeguarding of Faith, Self, Intellect, Posterity and Wealth.

As stated by Al-Ghazali ***"The Shari'ah aims to achieve five interests of the people through the safeguarding of faith, self, intellect, posterity and wealth. Whatever ensures safeguarding of these five aspects serves the realization of people's interests and is desirable, and whatever hurts them is against people's interests and is undesirable"***[11].

The sequence in which the five objectives (*maqasid*) are presented (faith, self, intellect posterity and *wealth*) is indicative of their relative importance. Therefore, the fact that faith has to be safeguarded even if at the cost of self safety is the rationale behind the imposition of *jihad* (holy war). By the same token self safeguarding must be pursued even if at the cost of safety of intellect and that is why a person is permitted to drink alcoholic beverages if that is the only way to save his life. Also, posterity should be safeguarded even if at the cost of wealth safeguarding[12].

Ranks of Shari'ah Objectives: Necessities, Demands of comfort and Refinements.

Al-Iz Ibin Abdul Salam divides human interests into necessities, demands of comfort and refinements. He says: ***"necessities include foods, drinks, clothes, shelter, marriage, means of transportation and carriage and any other means of living for which acute need arises. So far as such necessities are concerned,***

(8) Ibid, (2/25).
(9) Ibid, (1/158)
(10) Ibid, (2/345).
(11) Al-Ghazali: *Al-Mustasfa*, (1/284).
(12) Al-Booti: *Dawabit Al-Maslahah*, (pp. 60 & 265).

the bare level of sufficiency is indispensible for every individual. At the other extreme we find refinements, which include things like assortments of delicious food, top-notch clothing, deluxe residence and prestigious transportation devices. Whatever falls in-between these two extremes is part of demands of comfort"(13). Al-Iz also indicates that ***"necessities are more important than the demands of comfort and so are demands of comfort compared to refinements"***(14).

Conflict of Interests and the Need for Weighing

In case of competing interests that cannot be catered for simultaneously, weighing and prioritization become necessary even if that would entail doing away with the overweighed interests. Similarly in a state of competing blights, which cannot be warded off simultaneously we need to resort to weighing and prioritization(15).

When two interests are in conflict and it is clear that one of them outweigh the other, the outweighing interest has to be given priority. If, on weighing, the two conflicting interests are found to be in the same status of importance, we are free to choose any of them(16).

When it is difficult to cater for several interests that are of equal importance we can resort to choice or we may cast lots for prioritization of such interests(17). In fact, casting of lots is permitted in choosing between equal interests(18) (equal rights) so as to avoid rancor and spitefulness, which result in hatred, envy, stubbornness and evil(19).

If the Supreme Guardianship position (*Wilayah Uzma*) is vacant and two candidates are found to be suitable for it, the position should not be assigned to them jointly. If one of them acquires an added merit he should be selected; otherwise choice can be made through lot casting(20).

When appointing a guardian to look after a property or conclude a marriage contract, the father is given priority over other guardians,

(13) Ibn Abdul Salam: *Al-Qawa'id Al-Kubra*, (2/123, 125 & 235).
(14) Ibid, (2/123) and See also: Al-Juwaini: *Al-Ghiyathi*, (pp. 476, 480, 487 & 504).
(15) Ibn Abdul Salam: *Al-Qawa'id Al-Kubra*, (1/40 – 41).
(16) Ibid, (1/91).
(17) Ibid, (1/124).
(18) Ibid, (1/102).
(19) Ibid, Ibid, (1/127 & 128).
(20) Ibid, (1/105).

followed by the grandfather, then the non-relative guardian, and finally public guardianship (the judiciary). This ranking is based on the presumed degree of keenness that each one of these four parties is expected to show towards maximization of the interests of the beneficiary and minimization of the blights that he may encounter(21).

If these controls are so important for such minor cases of guardianship, one can imagine how important they are going to be with regard to guardianship over the interests of the entire Muslim society!(22)

When interest and blight exit side by side, interest should be accomplished and blight should be warded off if that is possible simultaneously. If simultaneous accomplishment of interest and avoidance of blight is unattainable, and the blight is more significant than the interest, the interest can be sacrificed for the sake of avoiding the blight(23). In *Shari'ah* the less important interest can be sacrificed for the sake of achieving the more important one. Similarly, a given blight can also be accepted if that is the only way of avoiding a more destructive one(24).

When two needy people seek help from someone, he is supposed to help them both if he can. If, however, he can help only one of them, and to him the two people are in the same ranking in all respects (degree of need, kinship, neighborhood and righteousness), he is free to choose any of them or divide his donation between them equally. If one of the two needy people is more eligible than the other (mother, father, spouse, relative or a pious person) he becomes more eligible for help than the other(25).

If someone finds two people who are equally in need of bread, and he has only one loaf of bread which can support one of the two needy people for a full day, or support them both for half a day, he should divide the loaf of bread between them. Giving the loaf of bread in this case to one of the two people will make the other feel hatred(26).

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(21) Ibid, (1/108).
(22) Ibid, (1/128).
(23) Ibid, (1/136).
(24) Ibid, (2/158).
(25) Ibid, (1/99).
(26) Ibid, (1/99).

If a person has two children and a quantity of food that suffices to feed only one of them, he should divide the food he has between the two children. If half of the food can bring one of the two children to the state of satiety, while the other half of the food can keep the other child only half satisfied, the father should divide the food in the way that equates the satisfaction of the two children. For instance, if one third of the food is sufficient to make one child half satisfied, whereas the remaining two thirds will suffice to make the other child also half satisfied, the father should divide the food in this manner(27).

The wisdom, which can be drawn out of this example is that justice and equality necessitate estimating sustenance requirements in view of the degree of need. The father in this example has to equate the levels of satisfaction that his two children would reach, rather than the absolute shares of food they receive. This is simply because the end result behind spending is need-satisfaction(28).

For further illustration, let us assume that a person has two animals of which one is eatable whereas the other is not, and he can afford the cost of feeding only one of the two animals while there is also no way of selling any of them. The person in this case can either feed the uneatable animal and slaughter the eatable one, or divide the fodder he has between the two animals(29).

Cooperation for Achievement of Interests: Specialization and Division of labor

Allah *(subhanahu wa taala)* created people and made them dependant on each other. Each group of people (people of high rank, the ordinary masses, the rich, the poor, men, women … etc.) is doomed to pursue the interests of the other groups(30).

Had human life not been designed that way, everybody would have found himself forced to become a farmer, a woodsman, a miller, a baker, a cook … etc.. It is the wisdom of Allah *(subhanahu wa taala)* that

(27) Ibid, (1/99).
(28) Ibid, (1/102).
(29) Ibid, (1/98).
(30) Ibid, (2/120).

induces people to join such groups of specialization and enjoy the type of work they perform within them in order to make a living(31).

According to Ibn Khuldoon, ***"producing wheat as a foodstuff is not a task that every individual has to perform independently. A group of people including: the blacksmith or carpenter who makes the agricultural tools and equipments, the farmers, the harvest workers and so many other people participate in the process of producing wheat requirements of the entire society. In this collective manner, the group will become able to produce several times more than the personal needs of its members"***(32)

Types of Interests

Shari'ah-recognizable Interests versus Shari'ah-deniable interests and Free Interests versus Illusionary Interests

A *Shari'ah*-recognizable interest is the interest that *Shari'ah* texts declare its permissibility, whereas a *Shari'ah*-deniable interest is the interest that is prohibited by *Shari'ah*. *Shari'ah* scholars have also laid down specific criteria for identification of free interests (*masalih mursalah*) so that such interests can be distinguished from illusionary interests which lead to violation of *Shari'ah* rulings.

Transitive Interests versus Intransitive Interests:

When someone performs prayer, for instance, he is the only one who gets the benefit, whereas doing justice is a transitive act which results in benefit to others.

When an intransitive and a transitive interest are in conflict, priority should be assigned to the latter. Therefore performing prayer can be postponed in order to rescue a drowning person(33).

Absolute Interests versus Relative Interests:

According to Al-Shatibi ***"benefits and harms in general are more relative rather than absolute. That is to say, they differ with respect to the situation, person and time. Eating and drinking, for instance, involve obvious benefits to everybody, yet the enjoyment of such benefits depends on so many other factors including: the urge for eating, the taste of the food, whether the food involves any present or future harm***

(31) Ibid, (1/374 & 2/122) and see also: Al-Raghib: *Al-Zari'ah Ela Makarim Al-Shari'ah*, pp. 262 – 265.
(32) Ibn Khuldoon: *Al-Muqaddimah*, (2/871).
(33) Ibn Abdul Salam: *Al-Qawa'id Al-Kubra*, (1/96).

for the eater or not, permissibility of the means whereby food is obtained and whether the food involves any present or future harm for others or not …etc. Of course all these aspects can never be the same in each and every case. Therefore what may appear to be beneficial or harmful to a certain person or at a certain time, may not prove to be so for another person or at a different time"[34].

Pure Interests versus Admixed Interests:

Pure interest is very rare in real life. Usually, people have to suffer considerable toil before, while or after obtaining food, clothing, shelter and means of transportation[35]. Therefore, if benefit is the predominant aspect of an act, such act should not be left just for fear from the minor degree of harm that it may involve[36].

Actual Interests versus Anticipated Interests

Actual interests include food, drink, clothing, shelter, means of transportation and gains from permissible activities such as hunting and wood gathering. Anticipated interests include, for instance, interests sought through engagement in profitable trade activities, learning of sciences and training in industrial and agricultural professions[37].

Realized Interests versus Presumed Interests

Presumption in this context is the act of assigning the status of existence to something that is nonexistent, or the status of nonexistence to something that really exists. For instance, *Zimmah* (capacity to assume and assign commitment)) is presumed to be acquired by a person although it has no material existence. Debts are presumed to exist as liabilities of debtors although neither the debt nor the subject matter of indebtedness has material existence. Also ownership is a presumed power of control over the property rather than a real aspect embodied in it[38].

Interests of Collective Duty versus Interests of Individual Duty

An example of interests of collective duty is the act of helping the poor, whereas interests of individual duty include, for instance,

(34) Al-Shatibi: *Al-Muafaqat*, (2/39).
(35) Ibn Abdul Salam: *Al-Qawa'id Al-Kubra*, (1/10).
(36) Ibid, (1/138).
(37) Ibid, (1/60).
(38) Ibid, (2/205 – 208).

performance of prayers and payment of *Zakah*[39]. Usually, the benefits which result from collective duties are transitive[40].

Compensation Interests versus Donation Interests

Compensation interests are more predominant than donation interests. Al-Iz Ibn Abdul Salam argues that ***"Allah (subhanahu wa taala) has conferred His grace upon people by permitting them to practice buying and selling and enter into leasing, Juaalah (emolument) and agency contracts and thus enjoy uncountable benefits. Had selling not been permissible, people would have lost so many interests relating to their food, clothing, shelter and farming activities. There is no way for people to count on donations, legacies and alms which are in fact very rare. People are usually hesitant to offer such donations except in rare cases, in addition to the inconvenience which the recipient party could feel as a result of being dependant on donations"***[41].

Decreed Interests versus Concessionary Interests

When two contradicting *Shari'ah* evidences are established with regard to whether a given issue calls for strictness (*Tashdeed*) or facilitation (*Teaser*), some *Shari'ah* scholars tend to go for facilitation because it is easier and tolerable, whereas others prefer to side with strictness because it involves more caution[42].

Obvious Interests versus Obscure Interests

Some interests and blights cannot be easily distinguished except by those who have clarity of mind and high sense of depicting sound behavior. Of course the capabilities of people with regard to such merits are in great disparity[43]. That is to say, regarding the extent of obviousness, interests are of three types including: what everybody can distinguish, what only prominent people can distinguish, and what only the most prominent of the prominent can distinguish[44]. Perhaps, it may not be difficult to differentiate between interest and blight, yet it could be difficult to assess the relative weights of two different interests or blights.

(39) Ibid, (1/71 & 222).
(40) Al-Juwaini: *Al-Ghiyathi*, p. 358.
(41) Ibn Abdul Salam: *Al-Qawa'id Al-kubra*, (1/347 & 2/123).
(42) Ibid, (1/370).
(43) Ibid, (2/315).
(44) Ibid, (1/80).

Definite Interests versus Suppositional Interests

Worldly interests are usually known through experience, habit and presumption(45). In most of its verdicts, *Shari'ah* has allowed a room to resort to presumption instead of clear cut knowledge(46). That is to say, when precise knowledge cannot be reached, presumptions could be resorted to. However, there are some *Shari'ah* verdicts that should be based on clear cut knowledge rather than presumption(47). Also a well-founded presumption is much better than a presumption that lacks solid ground(48). Since in most of the cases presumptions change into facts of reality and only in very rare cases they turn to be false, presumed interests should not be abandoned for the mere sake of avoiding rare occurrences of blight(49). Most of the interests are based on presumption rather than on the facts of reality(50).

Interests of the Hereafter versus Interests of this World

Interests of the hereafter are known through the teachings of the *Shari'ah* rather than by reason(51). Interests of the hereafter also do not materialize except through most of the worldly interests such as food, drink, clothing, marriage and many other interests and benefits(52).

Public Interests versus Private Interests

Public interests are not given priority over private interests except in case of contradiction. In the absence of contradiction, pursuance of private interest would lead to maximization of public interest. According to Al-Shatibi "***everybody seeks his own interest through rendering benefit to others, and thus, benefits are rendered for all by all, although everyone strives for the sake of achieving his own***"(53). Furthermore, Al-Shatibi emphasizes "***any work such as industrial occupations and the various types of handicrafts, results in benefit for others through the pursuit of individual benefit. In fact every individual works with***

(45) Ibid, (1/13).
(46) Ibid, (1/138).
(47) Ibid, (2/37 – 38).
(48) Ibid, (1/246 & 2/53).
(49) Ibid, (2/35 & 109).
(50) Ibid, (1/7).
(51) Ibid, (1/11 & 13).
(52) Ibid, (2/130).
(53) Al-Shatibi: *Al-Muafaqat*, (2/129).

the aim of achieving his own benefit, whereas his contribution to the benefit of the entire society is nothing but an incidental outcome."(54)

Basic (Original) Interests versus Corollary Interests

The basic interest in marriage, for instance, is reproduction, whereas pleasure (*Mut'ah*) is the corollary interest.

Immediate Interests versus Postponed Interests
High-priority Interests versus Low-priority Interests
Preservation of Interests

The Prophet (peace and blessings upon him) said ***"take care of what offers you benefit"***(55). Caliphate Omar (may Allah be pleased with him) also said ***"how come you deprive your brother from what offers him benefit, while he offers you benefit?"***(56)

One should never speak except about what can lead to realization of interest or avoidance of harm. In this regard the Prophet (peace and blessings upon him) said ***"whoever believes in Allah and the day of the hereafter may utter only that which is good, or keep silent"***(57).

Therefore, a rational person should not think of or do except what will lead to realization of interest or avoidance of blight. When he feels inclined towards anything else he should do his best to keep that off his mind(58).

Maximization of Interest

Maximization of interest is the attempt to reach the greatest (maximum) possible value of interest or benefit. Allah *(subhanahu wa taala)* said: ***"and come not nigh to the orphan's property, except to improve it"*** [*Al-Anaam*: 152 & *Al-Israa*: 34]. It is not sufficient for the guardian to confine his efforts to pursuing what is good for the orphan's properly, but he should also strive for achieving the best. In this respect Allah *(subhanahu wa taala)* said: ***"will ye exchange the better for the worse?"*** [*Al-Baqarah*: 61]. It

(54) Ibid, (2/133).
(55) Muslim: *Al-Saheeh* with commentary by Al-Nawawi, (16/215).
(56) Imam Malik: *Al-Muata'* (2/746).
(57) Al-Bukhari: (8/13); Muslim: (2/18).
(58) Ibn Abdul Salam: *Al-Qawa'id Al-Kubra*, (2/348).

means that in the process of choice, a rational person would never go for less than the best. In Al-Iz words ***"nobody would stick to the less useful if he can get the best"***[59].

Ibn Taimiyah indicates that ***"Allah, subhanahu wa taala, has commanded people to do the good and refrain from doing evil. He sent His messengers to pursue interests to the maximum, and curb blights to the minimum"***[60].

Similarly, redistribution of income and wealth would lead to maximization of overall social benefits, because one dollar more is more beneficial to the poor than to the rich. Extravagance in consumption of foods and drinks will result in diminishing satisfaction for the rich up to the stage where any additional increment of consumption will generate harm[61].

When predominance of illicit earning in a certain society leaves no chance for lawful earning, relaxation of *Shari'ah* restrictions should not be confined to necessities (*daruriyat)*. It may also include demands of comfort (*hajiyat*) because, otherwise, the Muslim society in question will become weak and exposed to foreign domination. moreover, confining relaxation of prohibition under hardship to necessities would lead to dissertation of handicrafts and all other occupations, which serve public interest[62].

Development and Justice

We have shown earlier that the core objective of *Shari'ah* is to achieve interests and ward off blights; and that interests should be maximized and blights should be minimized through achievement of two fundamental goals, namely: development and distributive justice or what is sometimes known as efficiency and justice[63]. Therefore, people should avoid blights, preserve public interests, observe justice and strive for becoming rational. Rationality in this context refers to appropriate disposition of wealth[64].

(59) Ibid, (2/158).
(60) Ibn Taimiyah*: Al-Fatawa*, (31/266).
(61) Al Shaibani: *Al-Iktisab Fi Al-Rizq Al-Mustatab*, p. 50.
(62) Ibn Abdul Salam: *Al-Qawa'id Al-Kubra*, (2/80 & 313); Al-Juwaini: *Al-Ghiyathi* (pp. 476 – 499).
(63) Ibn Abdul Salam: *Al-Qawa'id Al-Kubra*, (1/23, 228 and 2/329).
(64) Ibid, (2/43).

Chapter: II

Legal maxims

(Al-Qwa'id Al-Fiqhiyah)

Definition

A legal maxim (*qa'idah Fiqhiyah*) is an overall ruling that applies to all particulars in a specific domain of *Shari'ah* guidance. Some contemporary scholars define a legal maxim as: an overall verdict based on *Shari'ah* evidence and put in a rigorous abstraction format to apply to all its particulars or most of them.

Legal maxims are useful in so many respects including, among others, assembling several issues under one theme, facilitating easy memorization of rulings on sub-issues, enhancing the process of *fatwa* issuing (*Shari'ah* opinion) and facilitating general knowledge about *Fiqh*(1).

A Legal maxim could be common among all schools of *Fiqh*, or recognized within only one school of *Fiqh*. That is to say some of these maxims are generally accepted, while others are controversial. A maxim could also be either explicitly indicated by a *Shari'ah* text (*hadith*) or based on its indications(2).

However, a maxim cannot be used as an evidence for derivation of *Shari'ah* rulings, because it may entail exceptional cases. Moreover, maxims are suppositional rather than dogmatic and most of them are based on induction, which could sometimes have its own limitations(3).

Examples

- **Matters are judged in view of intentions**

This maxim seems to have originated from the *hadith* in which the Prophet (peace and blessings upon him) indicates that, ***"acts are judged in view of intentions"***(4)**.** For application of this rule in agency contracts, for

(1) Al-Bahusein: *Al-Qawa'id Al-Fiqhiyah*, p. 114.
(2) Ibid, p. 118.
(3) Ibid, p. 273 & Al-Zarqa: *Sharh Al-Qawa'id Al-Fiqhiyah*, p. 35.
(4) Al-Bukhari: *Al-Saheeh*, (1/2); Muslim: (13/53).

instance, assume that an agent is authorized to purchase a certain commodity for a client. When the agent purchases the commodity with the intention of doing so for the sake of his client or when he uses the amount of money he got from the client for that purpose, the commodity in this case is purchased for the client. If, instead, the agent purchases the same commodity, but with the intention of buying it for his own use, or when he purchases that commodity out of his own money, the commodity in this case belongs to him(5).

When someone places a vessel somewhere and it gathers rainwater, the water becomes the property of that person if he has placed the vessel with the intention of gathering rainwater. Otherwise, the gathered water can be taken by anyone else.

Also when somee spreads a net or digs a hole, he becomes the owner of the prey that may be caught in the net or fall in the hole only if that person has spread the net or the dug the hole with the intention of hunting, otherwise anyone else can take the caught prey(6).

Similarly, when a person finds something lying on the road (a find) and he picks it up with the intention of returning it to its owner the person becomes a trustee of that thing and is not supposed to indemnify the owner for damage or loss of the property in question except in case of transgression or negligence. When the person picks up the find with the intention of keeping it for himself, he becomes an extorter and a guarantor of the property against loss and damage(7). In fact this maxim constitutes the basis for nullification of the stratagems that run counter to the objectives of *Shari'ah*(8).

- **The norm in transactions is permissibility**

The majority of Islamic jurists hold the view that transactions are permissible until an evidence for their prohibition is established. There is also a counter viewpoint, which argues that transactions are forbidden until their permissibility is demonstrated by evidence. A third viewpoint

(5) Al-Zarqa: *Sharh Al-Qawa'id*, p. 48.
(6) Al-Atasi: *Sharh Al-Majallah*, p. 14.
(7) Baz: *Sharh Al-Majallah*, p. 18.
(8) Al-Nadwi: *Jamharat Al-Qawa'id*, (1/136).

indicates that the norm is refraining from concluding transactions until a permitting or prohibiting evidence is established(9).

- **The norm in contracts and conditions is validity**

Other than what *Shari'ah* has declared as null and void or forbidden, contracts and conditions are considered to be valid until evidence is established for their nullity or forbiddance(10). Among the leaders of the Four *Fiqh* Schools *Imam* Ahmad is known for his high record in validation of conditions(11).

- **The norm (in claims) is freedom from liability**

When a person gives someone a *Dirham*, for instance, and the two get into a dispute as to whether the *Dirham* is a loan (as the giver claims) or a gift (as the taker claims), the position of the latter is taken to be valid because he claims freedom from liability which is the norm in judging non-verifiable claims(12).

- **Contracts are to be understood in view of intentions and substance, rather than words and expressions**

This maxim is more special than the previous one. In the context of gift (*hibah*), for instance, if the donor stipulates a condition that he should be compensated for the gift, the process is considered to have been initiated as a gift and finalized as a sale transaction. By the same token, offering the benefit of an asset as a gift on condition of reciprocal compensation is considered as leasing(13).

In applying this maxim in *Mudharabah, for instance,* if it is stipulated that the whole profit is to go to the *mudarib* (worker) the contract becomes a loan, whereas if the whole profit is to be taken by *rabulmal* (owner of the capital) the contract is considered as *ibda'a* (engagement of a trade agent). *Mudharabah* is a partnership that entails sharing of the profit between the owner of the capital and the worker.

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(9) Ibid, (1/438).
(10) Ibn Al-Qayem: *Ea'lam Al-Muaqi'een*, (1/344).
(11) Ibn Taimiyah: *Al-Fatawa*, (29/132).
(12) Baz: *Sharh Al-Majallah*, p. 23; *Al-Nadwi: Jamharat Al-Qawa'id*, (1/248).
(13) Baz: *Sharh Al-Majallah*, p. 19; Al-Atasi: *Sharh Al-Majallah*, (1/16).

Also when money is deposited in the bank it is called deposit (*Wadi'ah*); whereas, in effect, it is a loan (*Gard*). Similarly, a transaction could be named a bank discount, while it is a loan(14).

- **Hardship begets facility**

Hardship necessitates facilitation because human beings are relieved from hardship as has been explicitly indicated in the *Qur'an*. Nonetheless facilitation should not contradict with any of the *Shari'ah* texts. Hardship here refers to that state of difficulty, which justifies temporal relief from a *Shari'ah* obligation. Of course there are hardships, which do not entitle the sufferer to any relief or easement. Such hardships include, for example, the hardship involved in *jihad*, or punishment of culprits, or execution of murderers.

This maxim is applicable under circumstances of traveling, sickness, coercion, forgetfulness, incompetency (under childhood and insanity for instance), distress and state of all-affliction(15).

- **When matters become tight, they end into ease**

It can also be said that: when matters become loose tightening would follow. This means that when necessity or hardship calls for easement, relief should not exceed the extent of putting matters right. Similar to this maxim is the one, which states that ***"necessity is measured in accordance with its true proportions"***. Another maxim relating to this context is that "***necessity justifies that which may be unlawful".*** Such maxims constitute integral parts of the previous one ***(hardship begets facility)*** and indicate positions, which necessitate temporal facility. One of the applications of these maxims in real life is that an insolvent debtor is granted postponement until he becomes able to repay, or he can be allowed to repay his debt in installments, instead of paying it in lump sum(16).

(14) Al-Nadwi: *Jamharat Al-Qawa'id*, (1/560).
(15) Baz: *Sharh Al-Majallah*, p.27; Al-Atasi: *Sharh Al-Majallah*, (1/48); Al-Zarqa, *Sharh Al-Qawa'id*, (p.157).
(16) Baz: *Sharh Al-Maajallah*, p. 28.

- **Harm should neither be committed nor reciprocated**

This maxim which quotes the exact text of a *hadith*[17], means that a person should not cause harm to others, whether by initiating harm from his own side or by responding to harm that has been caused to him by others. The word "*Dirar*" here can be taken to mean either harm, or reciprocal harm done with the aim of taking revenge. It would, however, be more reasonable to understand the *hadith* in the context of the second interpretation of the word "*Dirar*".

There are three maxims relating to harm. The first is this one which prohibits causing harm; the second is that ***"harm should be eliminated"*** and it indicates that harm must be removed when it actually takes place; and the third is that ***"harm should be eliminated to the extent that is possible"*** and it emphasizes that harm should be removed partially if it cannot be removed totally.

The applications of this maxim include option of viewing (*khiyar al-ruyah*) in sale transactions so as to safeguard the buyer against harm, and the option of stipulation (*khiyar al-shart*) in response to the need for avoiding hasty commitments that could lead to inequity. Also in agriculture, when a landowner lends or leases his land to someone he should not claim it back before the time of harvesting. The land should remain at the disposal of the borrower or tenant who should continue paying to the owner the prevailing market rent for such property until time of harvesting.

This maxim is also useful for several other applications including: the case when preemption right is exercised for the sake of preventing any potential harm that might be caused to neighbors; or subjecting the fool or the debtor to legal interdiction so as to protect other parties against harm. moreover, the same maxim is applicable in division of property. If a pearl, for instance, is owned by more than one person it cannot be divided by breaking it into pieces, since that would affect its use as well as market value; in addition to the fact that *Shari'ah* prohibits waste of wealth[18].

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(17) Reported by Ibn Majah: (2/784); Malik in *Al-Muata',* (2/745); and Ahmad in *Al-Musnad*, (5/327).

(18) Al-Nadwi: *Jamharat Al-Qawa'id*, (1/155).

- **Harm is to be eliminated**

That is to say harm ***must*** be removed. Let us suppose that a landowner has lent his land to someone so as to use it during a specific period for construction of a building or plantation of trees. Before the end of the agreed upon period the landowner demanded his land back; whereas the borrower has already used the land for the agreed upon purpose. In such case the landowner can ask the borrower to demolish the building or root out the plants and vacate the land, but he should indemnify him for the resultant loss. If the rooted out plants are valued at say SR 5000 at present and SR 10000 if they were to be left till the end of the period agreed upon, the lender should pay the borrower the full difference(19).

For the sake of elimination of harm *Shari'ah* has also permitted some options in contracts such as "option of defect" (*khiyar al-ayb*) and "option of unfairness" (*khiyar al-Ghubn*)(20). Another example of the actions that aim at elimination of harm is forceful selling of the property of a delinquent debtor so as to repay his creditors(21).

- **Necessity makes the unlawful lawful**

Necessity refers to severe need, or an extremely difficult situation, which compels one to commit a *Shari'ah-banned* act in order to save his life or property, or to avoid an intolerable harm, whether such harm is certain of suppositional. Under the ambit of this maxim *Shari'ah* validates so many acts that are forbidden under normal circumstances including for instance: dumping of the cargo of an overloaded ship to save the lives of its passengers; giving bribe if it is the only way to safeguard oneself against oppression; enforcement of fair pricing; borrowing with interest; permitting a Muslim male to wear silk or use gold or silver in making artificial teeth(22); demolishing adjacent houses to prevent spread of fire and preventing a person who is suffering from an infectious disease from getting in touch with other people so that widespread of the disease can be avoided(23).

(19) Ibid, (p.179).
(20) Al-Borno: *Al-Wajeez*, p. 258.
(21) Baz: *Sharh Al-Majallah*, p. 29.
(22) Al-Zuhaili: *Nazariyat Al-Darurah*, p. 212.
(23) Baz: *Sharh Al-Majallah*, p. 30.

- **Necessity is measured in accordance with its true proportions**

This maxim constitutes a limitation on the preceding one. What is permitted under the urge of necessity should be confined to the bare minimum, which would suffice to eliminate the harm in question. The concession thus received should by no means be carried beyond this limit. When someone is forced by necessity to seize the property of someone else he should not take more than what is essential to cover the necessity that he is compelled to meet, and he should, moreover, guarantee the repayment of whatever he takes(24). Necessity does not nullify the rights of others.

In view of this maxim, when the court decides limitation of the legal competence of a delinquent debtor, it should start repayment of his debts out of his cash funds first. If the cash funds are insufficient for repayment of the debts the court should then sell the debtor's moveable assets, and finally his real estate properties.

- **Harm should not be eliminated by a similar harm**

Of course the more so, that harm should not be eliminated by a worse one. This maxim imposes a limit on the previous one, which indicates that ***"harm should be eliminated"***. Suppose that a buyer after causing a defect in a good that he purchased discovered that the good has also an old defect that had been caused by the seller. In this case, the old defect does not give the buyer the right of returning back the good to the seller; nevertheless, he has the right to claim price discount(25).

- **Limited harm is to be tolerated for the avoidance of inclusive harm**

This maxim implies that avoidance of the greater harm justifies toleration of the lesser one. Hence, a monopolist can be forced to sell his food stocks, which exceed the actual need of his family until the state of hardship is over. Avoidance of public harm can also justify acts such as: resort to pricing when food is sold to the public at excessively high prices; demolition of the neighboring houses to prevent spread of fire; prevention of an incompetent doctor from practicing his profession so as to save people's lives; dismissal of a reckless *mufti* (interpreter of

(24) Ibid, p. 187.
(25) Ibid, p. 31.

Shari'ah rulings) to safeguard people's faith and prevention of a bankrupt carrier from running his transportation business in order to safeguard people's wealth(26).

- **The greater harm is to be removed by the lesser harm (Choosing the lesser of the two harms)**

One of the ramifications of this maxim is that a solvent person has to cater for the sustenance of his ascendants and descendants, and should be punished if he refrains from doing so(27). Forcing a delinquent debtor to repay his debts is another manifestation of the practical applications of this maxim(28). A similar maxim is the one which states that **"*the lesser harm may be tolerated for warding off the greater one*".**

- **When two blights cannot be averted simultaneously the less harmful one is to be tolerated**

This maxim is quite similar to the previous one. According to it one is permitted to refrain from denouncing an unlawful act that he witnesses, if denouncing of the act would result in more harmful consequences. Also, on the basis of this maxim a wage can be paid for performing acts of submissiveness such as *Azan* (call for prayer), *Imamah* (leading of group prayer) and teaching of the *Qur'an* and *Fiqh*(29).

- **Choosing the lesser of the two evils**

It has the same meaning of the previous maxim.

- **Prevention of blights takes priority over attraction of interests**

When blight and interest are in conflict, elimination of blight should be given priority over generation of interest. An owner of the upper or lower floor in a shared building is not entitled to any right of disposition that could cause harm to his neighbors even if such disposition relates to his own property and is beneficial to him. Under this maxim also, an owner of a property is not allowed to cause harm to his neighbors by operating, for instance, a mill which could lead to cracking of the neighboring buildings or a bakery that may cause harm to neighbors by

(26) Ibid, p. 31; and Al-Atasi: *Sharh Al-Majallah*, (1/67).
(27) Al-Zarqa: *Sharh Al-Qawa'id*, p. 199.
(28) Baz: *Sharh Al-Majallah*, p. 31.
(29) Al-Zarqa: *Sharh Al-Qawa'id*, p. 201.

spreading bad smells, smokes and ashes. This maxim also constitutes the basis for the limitation of the legal competence of the fool[30] and banning of trade in alcoholic beverages and pork irrespective of the amounts of profits that can be made out of such activities.

- **Harm is to be eliminated to the extent that is possible**

That is to say, if the harm cannot be totally eliminated, its elimination should be pursued as far as possible. Therefore, if an old defect is discovered in a sold object along with a new defect that has been caused by the buyer, the buyer has no right to return the good to the seller because of the old defect, yet he is entitled to price discount[31]. Also when a father refrains from the sustenance of his kid, he can be forced to do so in order to preserve the life of the kid[32].

- **Public need is tantamount to private necessity**

Necessity signifies the state which drives a person to an act that he finds himself forced to do in order to save his life, whereas need refers to the state which calls for facilitation with the aim of avoiding hardship. Therefore, need is less pressing than necessity. Examples of public need include, for instance, the need for the establishment of government offices or the coining of money. Treating public need as necessity is manifested in terms of permissibility of leasing in spite of the fact that it involves a benefit that is still nonexistent or *Istisna'a,* which constitutes sale of a nonexistent asset; or bequeathing although it involves assigning of ownership that does not materialize before the death of the donor[33].

- **Necessity does not nullify the rights of others**

Under the inevitable pressure of necessity one can take the property of others. However, although necessity would relief such person from being held accountable for taking the property of others without permission, it would never relief him from guaranteeing full repayment of whatever he takes. Similarly when the period of leasing or lending of a piece of land expires before the time of harvesting, the contract has to be

(30) Ibid, p.205.
(31) Baz: *Sharh Al-Majallah*, p. 32.
(32) Al-Atasi: *Sharh Al-Majallah*, (1/72).
(33) Baz: *Sharh Al-Majallah*, p. 33; Al-Zarqa: *Sharh Al-Qawa'id*, p. 210.

extended, yet the tenant or borrower of the land should pay to the landowner the prevailing market rent for such property(34).

- **What is forbidden to be taken is forbidden to be given**

As it is impermissible to take *riba*, it is also impermissible to give it, and so is the case for bribe. In this respect payment of *riba* under the pressure of acute necessity can be treated as an exception and, thus, prohibition in this case would hold true only for the party who takes the *riba*(35). A guardian is not allowed to offer any part of the orphan's property to someone else, or take it for himself; nonetheless, he has the right to give away part of the orphan's property if that is inevitable for safeguarding it against being extorted(36).

- **What is forbidden to be done is forbidden to be demanded.**

If it is unlawful or detestable to keep silent when an unlawful or detestable act is being committed, then how could it at all become permissible to demand unlawful or detestable acts from others? It is the more so that asking other people to commit cheating, theft, seizure or damaging of the properties of others becomes strictly forbidden(37).

- **Change of verdicts overtime is undeniable**

This maxim indicates the fact that rulings may change subject to change in the norms and traditions of the concerned society. At the time when houses were usually built in the same pattern, the prevailing rule among Islamic jurists was that option of viewing (*khiyar al-ruyah*) can be dropped as soon as only one house is viewed. When varying styles of houses emerged later on, Islamic jurists indicated that all houses in question should be viewed before dropping option of viewing.

Likewise, in the absence of perfect legal aptitude, considering a person to be competent for giving testimony or assuming a juridical position should be based on relative competence in order to sustain enforceability of laws and preserve interests and rights. Also, when Islamic jurists noticed the growing tendency of some superintendents and

(34) Ibid, p. 213.
(35) Ibid, p. 215.
(36) Baz: *Sharh Al-Majallah*, p. 33
(37) Al-Zarqa: *Sharh Al-Qawa'id*, p. 217.

guardians to seize a*wqaf* and orphans' properties, they issued *fatwas* indicating that *waqf* superintendents and orphan guardians should guarantee the properties under their control(38).

- **Rule of custom is tantamount to contractual stipulation**

Based on norms and traditions, a sold car should be delivered to the buyer along with the accessories, tools, keys and spare tire, unless the contract stipulates otherwise. When a person delegates an agent to purchase meat, bred or clothes for him, he is supposed to mean what normally people eat or wear. In this regard also sustenance of wife is estimated in terms of what is normally provided to the wives of comparable status. Also a rented truck should not be loaded in excess of its normal load(39). By the same token, when a person gives his dress to a tailor or a color maker without offering a specific pay for the service, he should pay the prevailing market pay for such service if the tailor or the color maker usually provides his services against pay, otherwise he should not. A further example is that if most of the owners of the shops agree to appoint a night guard for the market while some of them oppose the idea, the pay for the night guard should be collected from them all(40).

- **The affairs of a leader concerning his people are judged in view of interest**

A leader in this context refers to anyone who is entrusted with a domain of public affairs such as the head of the state, the ministers, the directors/managers and other officials. A person who assumes such responsibility should provide guidance to his people and treat them on an equitable basis. When he has to choose among competing alternatives, his decisions should be based on public interest rather than on his own likings. He should also assign the leading positions in the various official functions to the most competent candidates(41). It is impermissible for a *Waqf* supervisor to lease the assets of the *Waqf* for an unduly low rent. Also if in the process of selling of an orphan's property, the offer of the first bidder is SR 10000 and that of the second bidder is SR 12000, the

(38) Baz: *Sharh Al-Majallah*, p. 36; Al-Atasi: *Sharh Al-Majallah*, (1/92).
(39) Al-Borno: *Al-Wajeez*, p. 306.
(40) Baz: *Sharh Al-Majallah*, p. 38.
(41) Al-Nadwi: *Jamharat Al-Qawa'id*, (1/534).

guardian may accept the first bid if the first bidder is more solvent than the second[42].

- **Private guardianship is more powerful than public guardianship**

The judicial authority does not have the right of disposition over the *Waqf* property in the presence of its supervisor. Similarly the judge cannot dispose of the property of a child in the presence of a guardian that has been appointed by the father or the grandfather of that child. An exception from this superiority of private guardianship is that, under the acute need for renovation of the *waqf*, the judicial authority has the right to borrow for the *Waqf*, exchange its assets, or subject them to long term leasing; whereas the *waqf*'s superintendent has no right to make such dispositions[43].

- **Facilitation does not nullify what is attainable**

If someone cannot pay the full amount of *zakat al-Fitr* (after fasting alms) he can pay whatever he affords to. Also if a debtor is unable to repay the full amount of his debt he can repay part of it if he can, or he may repay it in installments[44].

- **Conditions must be observed to the extent that is possible**

Reference here is made to *Shari'ah*-permissible conditions. The Prophet (peace and blessings upon him) said: ***"Muslims stick to their conditions"***[45]. When a person leaves a deposit with someone and asks him to keep on holding it day and night so as not to perish, the receiver of the deposit should not be held responsible if the deposit perishes due to non-observance of such request, which is normally unachievable. If the depositor tells the deposit receiver not to take the deposit outside the city and the latter does so he should compensate the depositor if the deposit perishes, except when he is forced to move outside the city due to an evitable reason such as change of place of work or residence[46].

(42) Al-Atasi: *Sharh Al-Majallah*, (1/143); Al-Zarqa: *Sharh Al-Qawa'id*, p. 309.
(43) Ibid, p. 311.
(44) Al-Borno: *Al-Wajeez*, p. 396.
(45) Al-Bukhari: *Al-Saheeh*, (3/120).
(46) Al-Atasi: *Sharh Al-Majallah*, (1/235)

- **Return follows Guarantee**

This is a prophetic *hadith*(47). In the Arabic language the word *"kharaj"* indicates yield and the word *"daman"* means guarantee or bearing of risk. Therefore, return is deserved only as a reward for bearing the risk of loss.

This *hadith* has originated from the case of a person who purchased a return-earning asset and used it for some time before discovering that it is defective. The Prophet (peace and blessings upon him) issued a verdict according to which the buyer was able to return the asset to the seller because of the defect, and the seller was deprived of the right of claiming any share of the yield, because the asset was under full responsibility of the buyer during the time of yield generation. Quite similar to this *hadith* is another one in which the Prophet (peace and blessings upon him) has forbidden to seek profit without assuming the risk that it entails(48).

- **Pay and guarantee do not come together**

When a hired animal perishes at the end of the hiring period, without any misuse on the part of the hirer, the hirer should pay only the carriage agreed upon; whereas when an extorted animal perishes, the extorter has to pay compensation, but no carriage. When the hirer uses the hired animal for traveling beyond the specific destination agreed upon and the animal perishes, the hirer should pay compensation, but no carriage.

That is to say carriage should not be paid when compensation is payable.

However, when a person who hires an animal to ride it alone to a specific destination allows someone else to ride with him, and the animal perishes, the hirer should pay the carriage agreed upon in addition to half of the value of the animal. The justification for payment of the carriage is the fact that the hirer has benefited from the animal as per agreement, whereas the justification for payment of half of the value of the animal is that the hirer has committed breach of contract by allowing someone else

(47) Reported by Ahmad in *Al-Musnad*, (6/80); Abu Dawud in *Al-Sunan*, (3/384); Ibn Majah, (2/754); Al-Tirmizi, (3/573); Al-Nassaee, (7/254).

(48) Reported by Ahmad in *Al-Musnad*, (6/175); Abu Dawud in *Al-Sunan*, (3/283); Ibn Majah, (2/783); Al-Tirmizi, (3/527); Al-Nassaee, (7/295).

to ride with him. Hence payment of the carriage and the payment of the partial compensation in this case has two different justifications(49).

This maxim belongs to the *Hanafi* School and is founded on their viewpoint, which, contrary to the viewpoint of the majority of Islamic jurists, does not consider the benefits to constitute wealth (*mal*) like assets. However, adopting this viewpoint could leave the door wide open for deceitful practices and unlawful benefiting from the properties of others(50).

However, the recent *Hanafi* scholars indicate that the prevailing market carriage for similar property should be taken if the extorted poperty is a *Waqf*, an orphan's property or an income-earning asset(51). In this sense, the *Hanafi* viewpoint becomes close to that of the majority of Islamic jurists.

- **Gain entails cost**

According to this maxim when the passengers agree to dump some cargo from their drowning ship the cost of the dumped cargo should be collected per head from all of them, because the objective behind dumping the cargo was to save their lives(52).

- **Benefit is to be proportionate to cost**

This maxim carries the same meaning of the previous one, which states that **(*return follows guarantee)*** and also the preceding one that indicates that ***(gain entails cost)*.** Yet, this maxim adds one more dimension, which is the amount (proportion), by indicating that distribution of benefits or costs has to be in proportion to shares of ownership(53). When a jointly owned property requires renovation, each partner has to bear a share of the cost proportionate to his respective share in that property(54).

(49) Baz: *Sharh Al-Majallah*, p. 57; Al-Atasi: *Sharh Al-Majallah*, (1/244).
(50) Al-Zarqa: *Al-madkhal*, (2/1037); Al-Nadwi: *Jamharat Al-Qawa'id*, (1/504).
(51) *Al-mawsu'ah*, (31/238).
(52) Baz: *Sharh Al-Majallah*, p. 58.
(53) Al-Zarqa: *Sharh Al-Qawa'id*, p. 441.
(54) Baz: *Sharh Al-Majallah*, p. 58; Al-Atasi: *Sharh Al-Majallah*, (1/247).

- **It is impermissible for a person to dispose of the property of someone else without his permission**

Disposition, without permission of the owner, constitutes an encroachment upon the owner's right. When permission precedes disposition the deal is classified as agency; as is the case when unauthorized disposition has subsequently been endorsed by the owner. Permission here includes *Shari'ah* permissibility as well as permission obtained from the owner. Therefore when *Mudharabah* is restricted to a specific place, commodity or time the worker (labor provider) has no right to overlook such a condition; otherwise he should guarantee the capital(55).

- **It is impermissible for a person to take the property of someone else without a lawful reason**

When a person mistakenly takes the property of someone else, he should return the same property to the owner if it is still available. If the taken property no longer exists, he should compensate the owner in value if the property is a non-fungible asset, or in-kind if it is a fungible asset(56).

- **There is no right to an extorter's root.**

This maxim has been derived from a *hadith* reported by Al-Bukhari (3/14); Abu Dawud (3/178); Al-Tirmizi (3/66) and Malik in *Al-Muta'* (2/743). The *hadith* states that: ***"Whoever brings a dead land into use shall become its owner, and there is no right for an extorter's root".*** The word "root" in this context is a figurative expression meant to stand for plantation. Therefore, the *hadith* indicates that a person who cultivates a piece of land or constructs a building on it, while he knows that it belongs to someone else, is entitled to no right. Such person should uproot what he has planted or demolish what he has built(57).

(55) Al-Borno: *Al-Wajeez*, p. 390.
(56) Baz: *Sharh Al-Majallah*, p. 62.
(57) Al-Borno: *Al-Wajeez*, p. 374; Al-Nadwi: *Jamharat Al-Qawa'id*, (1/206).

Part: II
Wealth, Ownership & Contract
(Al-mal, Al-Mulk and Al-Aqd)

Chapter: I
Wealth (*Al-Mal*)

Definition

The Arabic word *'mal'* refers to everything that a person can own. Therefore, literally, things that are not owned such as birds in the sky, fish in the sea and trees in the forest cannot be considered as wealth(1).

Terminologically, the *Hanafi* jurists define wealth as: what people usually want to acquire and can save for time of need.

According to the *Maliki* jurists wealth is: what can become an object of ownership and give its owner the exclusive right of disposition, when he acquires it through lawful means. Ibn Al-Arabi Al-Maliki defines wealth as: what constitutes a target of greed, and can be benefited from, according to *Shari'ah* as well as traditions. Abdul Wahhab Al-Baghdadi defines wealth as: what can permissibly be owned and compensated for. *Shafiee* jurists define wealth as: what can be benefited from, or what has a sale value. *Hanbali* jurists consider wealth as: what can permissibly be benefited from under all circumstances.

It seems that the *Hanafi* jurists do not impose actual possession as a prerequisite for considering something as wealth. They seem to believe that things that can possibly be owned, like preys in the wild and birds in the sky can also be considered as wealth. However, they exclude from wealth things that cannot be owned, such as the light and heat of the sun.

Wealth, therefore, according to the majority of Islamic jurists (excluding the *Hanafi* School) can be defined as: what has a material value among people and can permissibly be used at times of ease and according to free choice. In this sense wealth does not include what can be used only under hardship and necessity. Also, things of trivial value such as a single bean of wheat, a drop of water or the smell of an apple are not considered as wealth(2).

(1) Al-Abbadi: *Al-milkiah* (1/171).
(2) Al-Khafeef: *Al-milkiyah*, p. 17; Al-Abbadi: *Al-mikiyah* (1/179).

Do Benefits Constitute Wealth?

Benefits in this context include, for instance, residing in a house, wearing a dress or riding an animal. Islamic jurists are in dispute as to whether benefits per se constitute wealth or not. The *Hanafi* jurists do not consider benefits as wealth, because in their view benefits are passing incidents, which have very short continuity. According to them, as soon as benefits pass from the stage of nonbeing to the stage of being they vanish. Nonetheless, the *Hanafi* jurists consider benefits as wealth in the context of compensatory deals (*mu'awadat*); as is the case for leasing. They make this exception on the basis of *istihsan* (approbation) and not subject to *qiyas* (analogical deduction of *Shari'ah* rulings).

The majority of Islamic jurists believe that benefits constitute wealth because, usually, people do not demand assets for the mere desire of possession, but rather for the sake of the benefits generated from them. If benefits are not to be considered as wealth that will lead to loss of rights and temptation of oppressors to unlawfully reap the benefits of the assets that belong to others(3).

Do Debts Constitute wealth?

The majority of Islamic jurists believe that debt constitutes wealth, whereas *Hanafi* jurists believe that debt is a legally possessed wealth (*Mal Hukmi*) rather than wealth in the real sense. Some of the *Hanafi* jurists pose the question of whether the debt is real wealth or just a claim of a right that will be converted into wealth on collection(4). Consequently, they conclude that ownership of debt entails incomplete ownership.

According to the *Zahiri* School debt can hardly be considered as wealth, because its collection is not ascertained (*Dimar or Gharar*), and it is vulnerable to risks of delinquency, insolvency and denial, especially if it is repayable after sometime. The longer the period of repayment of the debt, the greater is the uncertainty about the party who really owns it. Is it the creditor or the debtor? Therefore while ownership of assets is indubitable, ownership of debts is only probable(5).

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(3) *Al-mawsu'ah*, (36/32).
(4) Al-Sarakhsi: *Al-mabsoot* (2/195); Al-Kasani: *Badayee Al-Sanayee* (2/10, 5/224); Ibn Abideen: *Al-Hashiyah* (5/45).
(5) Ibn Hazm: *Al-muhalla* (6/101 – 103).

Types of Wealth

Real Estate versus Movable Wealth

Real estate refers to fixed property, which cannot be moved and transported such as land and buildings; whereas moveable wealth includes what can be moved and transported such as money, moveable assets and livestock.

Fungible versus Non-fungible Wealth

Fungible properties refer to things for which similar substitutes that carry only negligible differences are available in the market. Fungible stuffs include all things that are measured in terms of quantity, weight, number or length.

Non-fungible properties are things for which similar substitutes that carry the same characteristics are not available in the market; such as animals, houses, handicraft products and scare objects that no longer exist in the market like old tools and machinery, second hand cars…etc. According to *Shari'ah*, fungible properties can be lent and borrowed, whereas non-fungible properties cannot; and compensation for fungible properties is made in terms of similar substitutes, while compensation for non-fungible properties are made in terms of value.

Shari'ah-Recognizable versus Shari'ah-deniable Wealth

According to the *Hanafi* School a *Shari'ah*-recognizable something is what can permissibly be benefited from during times of ease and according to choice, while a *Shari'ah*-deniable something is what cannot be benefited from except during times of hardship and necessity, such as alcoholic beverages and pork; which are *Shari'ah*-recognizable for *Zmimmis* (Non-Muslims under Muslim rule).

An owner of a *Shari'ah*-recognizable property is entitled to indemnification for damage, in case of encroachment; while no indemnification is payable for *Shari'ah*-deniable properties. As per the *Hanafi* viewpoint, *Shari'ah*-recognizable wealth includes also permissible objects that have not yet been actually possessed such as fish in the sea, birds in the sky and trees in the forest.

Money versus Other Assets (*Urood*)

Money includes gold and silver money as well as paper money and the like; while non-monetary assets refer to everything that is not money such as plants, livestock, real estate properties, … etc[6]. For *Zakah* purposes, non-monetary wealth is divided into two categories: the first includes what is known as articles of possession (*Urood Al-Qunyah*) such as home furniture and handicraft tools; and the second includes articles of trade such as textiles, clothing and real estate properties that are prepared for trade. According to the majority of Islamic jurist the components of the second category (articles of trade) are subject to *Zakah*, whereas the components of the first category (articles of possession) are not.

Money (*Al-Athman*)

Money has been explicitly mentioned in the holy *Qur'an* under several names including: gold, silver, *Waraq*, *Dirhams* and goods (merchandise or commodity money).

Allah *(Subhanahu wa taala)* said: ***"…and there are those who bury gold and silver and spend it not in the way of God announce unto them a most grievous penalty. On the day when heat will be produced out of that (mal) in the fire of hell, and with it will be branded their foreheads, their flanks and their backs this is that (treasure) which ye buried for yourselves: taste ye then the (treasure) you buried"*** [*Al-Tawbah*: 34&35]. According to the majority of Islamic jurists, hoarding of gold and silver means abstention from payment of *Zakah* out of them. During the time of the Prophet (peace and blessings upon him) money used to be made out of gold (*dinars*) and silver (*Dirhams*).

In *Surat Al-Kahf* Allah *(Subhanahu wa taala)* said: ***"… now send ye then one of you with this money of yours to the town, let him find out which is the best food (to be had) and bring some to you"*** [*Al-Kahf: 19*]. The word "*Waraq"* which has been mentioned in the original text of the verse refers to silver money, and the verse, which tells the story of *As'hab Al-Kahf* (The Companions of the Cave), is a clear *Qur'anic* evidence for existence of money since very old times.

In *Surat Yusuf* Allah *(Subhanahu wa taala)* said: ***"… the (brethren) sold him for a miserable price, for a few Dirhams***" [*Yusuf*: 20]. Again this "*Qur'anic*

(6) Ibn Qudamah: *Al-mughni* (3/30).

evidence" indicates that counted money (as distinct from weighted money) was also present during the old times, since the era of Yusuf (*peace upon him*)[7].

In *Surat Yusuf* also Allah *(Subhanahu wa taala)* said: ***"… and Josef told his servants to put their stocks-in-trade (with which they had bartered) into their saddlebags"*** [*Yusuf*: 62]. Their "stock-in-trade" in this verse means their money, which was in the form of merchandise or commodity money[8].

Money has also been referred to in the holy *Sunnah* by the same names that have been used in the holy *Qur'an* which include: gold, silver, *Waraq*, and *Dirhams.*

Among the *Sunnah* texts in which money has been referred to are the texts on *Zakah*: The Prophet (peace and blessings upon him) said: ***"None of those who own gold and silver and do not pay their Zakah, will escape being burnt on their flanks, foreheads and backs with iron sheets heated in the fire of hell. (The one of these) will be thus treated repeatedly in a day the measure of which is as fifty thousand years, until judgment on the deeds of God's servants is over, then the (hoarder of gold or silver) will become able to see his way either to paradise or to hell"***[9]**.**

The Prophet *(*peace and blessings upon him*)* also said: "***No sadaqah (Zakah) is payable out of an amount of less than five warqas (silver Dirhams)"***[10]**.**

money has also been referred to in the *hadiths* about *riba*, where the Prophet (peace and blessings upon him) said: "***(when exchanging) gold for gold and silver for silver…etc"***[11]. As indicated by the majority of the Islamic jurists, gold and silver here refer to money.

In the same regard the Prophet (peace and blessings upon him) said: ***"One dinar for one dinar nothing more or less and one Dirham for one Dirham nothing more or less"***[12].

Abu Hurairah reported that the Prophet (peace and blessings upon him) appointed someone as a ruler in khaibar. One day the man brought

(7) Al-Tabari: *Tafseer Al-Tabari* (12/174).
(8) Ibn Al-Juzi: *Zad Al-maseer* (4/249, 252).
(9) Muslim: *Al-Saheeh* (7/64).
(10) Al-Bukhari: *Al-Saheeh* (2/144); Muslim: *Al-Saheeh* (7/50).
(11) Muslim: *Al-Saheeh* (11/14).
(12) Muslim: *Al-Saheeh* (11/15).

some well-screened dates to the Prophet (peace and blessings upon him). The Prophet (peace and blessings upon him) asked: "Is all Khaibar's dates like this?" The man answered: Oh no, messenger of Allah! It is not all like this. We have to give two or three vessels of mixed dates to get one or two vessels of such screened dates. The Prophet (peace and blessings upon him) said: don't do that, sell your mixed dates for *Dirhams* and then use the *Dirhams* to buy screened dates"[13]. Using *Dirhams* in-between in this transaction will enable the two parties to avoid *riba al-fadl* (increment in one of the two exchanged amounts of the same usurious commodity). moreover, the *hadith* encourages people to use money as a medium of exchange.

In another *hadith* about those who make themselves slaves of money and worship it like God or like an idol the Prophet (peace and blessing upon him) said: "***curse upon whoever makes himself a slave of the dinar and the Dirham"***[14]**.**

money has received considerable attention in the writings of Islamic jurists and historian. Among the jurists who have contributed to the subject are Al-Ghazali, Ibn Taimiyah, Ibn Al-Qayem and Ibn Abideen. As for historians, Ibn Khuldoon and Al-maqrizi were among those who have made extensive contributions to the subject.

These scholars have thoroughly discussed problems of barter, functions of money and characteristics of good money. They distinguished between pure and false money (mixed with non-precious metals). Some of them also made a distinction between gold and silver as money by nature on the one hand, and as domestic money (*files* and the like) on the other.

According to Ibn Hazm, Ibn Taimiyah and Ibn Al-Qayem money, in its essence, is idiomatic. Al-Raghib Al-Asfahani and Al-Ghazali also seem to share the same viewpoint as can be seen in some of their statements about money.

The definition of money which these scholars have presented do not seem to carry any significant differences compared to the definition of

(13) Al-Bukhari: *Al-Saheeh* (5/178, 9/132); Muslim: *Al-Saheeh* (11/21).
(14) Al-Bukhari: *Al-Saheeh* (4/41, 8/115).

money in conventional economics which considers money as anything agreed upon among people and granted wide acceptance.

According to Al-Raghib Al-Asfahani, ***"Al-Nad (money) is a servant that never enjoys being served. money is doomed to be the servant of all acquirable things, while none of these acquirable things can become the servant of money. This is so in spite of the fact that so many people, due to their ignorance, make their prestige, bodies and minds servants and slaves of money. They make themselves the most degraded and mean slaves of it (money)"***(15)**.**

Al-Blazrri(16) reported that "***One day Omar Ibn Al-Khattab told people that he had thought of coining money out of the skins of camels, but when people told him that if he did so no camel will be left, he gave up the idea***". This means that money is not confined to gold and silver. It can be made out of leather or anything else. This story about Omar also indicates that when a commodity becomes money, its use as money becomes more predominant than its other uses, as it is well known in the literature on modern theory of money.

One of the most illustrious statements of those who hold the view that money originates from custom and general consensus and is not confined to gold and silver, is the statement made by Ibn Taimiyah who said: ***"there is no specifically required nature or a known Shari'ah limitation relating to the substance or shape of the Dirham and the dinar. Dirhams and dinars as such do not constitute the target, as they are just mediums of deal conclusion. The stuff or shape of a mere medium can never make difference, since the medium will do the purpose anyway"***(17)**.**

Some jurists have even indicated that money is just a symbol or a sign. According to Al-Raghib Al-Asfahani ***"Since anyone who serves someone else, becomes entitled to a proportionate reward, Allah (Subhanahu wa taala) has rendered money as a sign from Him so as to be forwarded to the one who extends help so as to use it in his own turn for obtaining things from others, and thus the affairs of people are regulated"***(18) **.**

Al-Ghazali describes the two currencies gold and silver as ***"two stones that - as such - entail no intrinsic benefit"*** or ***"are not desired for a benefit of their***

(15) Al-Raghib Al-Asfahani: *Al-Zari'ah*, p. 274.
(16) Al-Blazri: *Fi Futooh Al-Buldan*, p. 456.
(17) Ibn Taimiyah: *Al-Fatawa* (19/251).
(18) Al-Raghib Al-Asfahani: *Al-Zari'ah*, p. 273.

own". He indicates that money is ***"something which appears to be nothing in its shape, but everything in its meaning"***, and he adds: ***"It does not have any particular image of its own to reflect, just like a mirror which - though colorless - reflects all colors. It has no purpose of its own, but it is a means to all purposes. It is like an alphabetic character which has no meaning of its own, yet it is useful for indicating the meaning of other things".*** He also says: ***"the two currencies (gold and silver) do not attract interest by themselves, because they are two stones. They have been created to serve exchange purposes and constitute a tool that people can use for assessing relative values".***

Al-Ghazali also states that: ***"They (gold and silver) are means for accomplishing ends, while none of them constitutes an end in itself. Their position in relation to property is like the position of an alphabetic letter in relation to speech, which - as grammarians would have said – comes to indicate the meaning of other things, and like a mirror with regard to reflection of colors"***(19).

Muslim scholars accepted the fact that coining of money is a function of the state. They called for stabilization of the value of money and paid much attention to change (difference) in the value of false money; that is to say, its exposure to value fluctuations subject to its abundance and scarcity.

According to Ibn Al-Qayem, ***"Dirhams and dinars constitute the prices of commodities, and the price is the measuring rod whereby property is valued, therefore the price should be specific, well controlled, and invulnerable to fluctuations"***(20).

In Islam money is considered as part of the *Zakah* base when it reaches *Nisab* (*Zakah-liable* wealth level). Money is also one of the wealth items that are subject to *riba* controls. Exchange of two amounts of the same currency should not involve excess payment from any of the two parties; and the process of exchange should take place simultaneously. Nevertheless, when the two currencies are different, the two exchanged amounts need not be equal, although the process of exchange should also take place simultaneously. The excess payment which is permissible in the latter case provides a chance for making profit through spot exchange deals.

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(19) Al-Ghazali: *Ihya' Uloom Al-Deen* (4/88-90); and compare to Al-Raghib Al-Asfahani: *Al-Zari'ah* (pp. 273 – 275).

(20) Ibn Al-Qayem: *Ea'lam Al-muaqi'een* (2/137).

Unrecovered (*Dimar*) Wealth versus Anticipated Wealth

A *Dimar* (unrecovered) wealth is a wealth that has, for some reason, slipped out of its owner's possession with little chance of recovery, such as seized, lost or denied property. The Arabic word "*Dimar*" which describes such wealth indicates hiding or non-existence.

Anticipated wealth refers to wealth, which its owner expects to get it back such as a debt owed and acknowledged by a solvent debtor. This classification of wealth is well-known in *Zakah* literature, because *Zakah* is payable out of anticipated wealth, whereas the payment of *Zakah* on *Dimar* wealth is a controversial issue.

Growing Wealth versus Non-Growing Wealth

Growing wealth refers to that type of wealth, which grows and increases such as livestock, farm products, fruits, money and articles of trade. This type of wealth is divided into two categories: the first is actually growing wealth such as farm products; and the second is presumably growing wealth such as money.

Non-growing wealth indicates that type of wealth, which a person acquires for his own use and not for trade purposes (*mal al-qunyah*), such as household utensils and handicraft tools. This classification is also known in *Zakah* literature, because *Zakah* is payable out of growing wealth and not payable out of non-growing wealth. Hence, *Zakah* is payable out of the "*Nama'"* (growth) and not the principal of the wealth.

Apparent Wealth versus Non-Apparent Wealth

Apparent wealth is that type of wealth, which cannot be hidden such as farm products, fruits and livestock; whereas non-apparent wealth is wealth that can be hidden such as money and articles of trade. This classification is applicable in *Zakah*, where the individual's faith constitutes the drive for payment of *Zakah* out of non-apparent wealth, while the state collects *Zakah* on apparent wealth. Also apparent wealth can be seen by the poor who would become eager to get a share out of it, and may feel miserable when they are deprived from getting such share[(21)]. Contrary to the case for non-apparent wealth, evasion of *Zakah*

(21) Ibn Qudamah: *Al-mughni* (2/545 – 636).

on apparent wealth is difficult, in addition to the fact that imposition of other financial charges (taxes) on apparent wealth mitigates the effect of tax evasion.

In the forthcoming section on bringing unitized wealth into use (*Ihya' Al-mawat*) we shall come to know that Islamic jurists have divided minerals into apparent and non-apparent. Apparent minerals cannot be possessed through brining into use, because they constitute benefits that entail no cost, such as natural streams and rivers. The *Shari'ah* rulings applicable to this type of wealth are similar to those applicable to naturally growing wealth like forests, water resources and pasture lands, which are subject to communal ownership.

Usurious Wealth versus Non-Usurious Wealth

Usurious commodities indicate those types of commodities that should be exchanged subject to *Shari'ah* controls on *riba*; otherwise their exchange would entail a commitment of *riba*. These include the six items mentioned in the holy *hadith:* gold, silver, wheat, barley, dates and salt. The six items can be grouped into two categories: the first category comprises gold and silver (money), and the second category includes foodstuffs (the remaining four items).

Therefore if we have a certain commodity we should see first whether it is a usurious commodity or not. If it is non-usurious the exchange of that commodity does not entail *riba*, and it need not be subjected to any restriction with regard to inequality of the two exchanged amounts or postponement of delivery of any of them. If our commodity is usurious we should look to the other commodity for which it is going to be exchanged. If that commodity is non-usurious the exchange is also non-usurious (does not fall subject to the rulings on *riba*). If the other commodity is usurious we should see if it belongs to the same category (money or foodstuff) of our commodity or not. If the two commodities belong to the same category the exchange is usurious; and the rulings that govern the transaction will be as follows:

- If the two commodities, besides falling in the same category are also of the same kind (wheat for instance), the two exchanged amounts should be equal and there should be no postponement in their delivery.

- If they fall within the same category, but are not of the same kind (wheat and barley for instance), inequality between the two exchanged amounts is permissible, but without postponement.
- If the two commodities do not fall in the same category (gold and wheat for instance), there is no restriction against inequality of the two exchanged amounts or postponement of any of them.

More details regarding this subject shall be presented in the chapter on *riba*.

Development of Wealth

Islam has forbidden waste of wealth and extravagance in spending, and commanded people to preserve, develop and invest their wealth. Islamic jurists consider this issue as part of the objectives of *Shari'ah*. Development of wealth can be pursued through agriculture, industry, trade, construction and all other permissible means, which are quite essential for strengthening the Muslim economy and maximizing private as well as public benefits. Such activities are considered as collective duties which if done by some members of the society, other members are relived from doing them. If, however, such activities remain in lack of sufficient care from all members of a Muslim society all members of that society will be considered to have committed a sin.

If not developed, wealth will be eaten up by *Zakah* until it becomes less than *Nisab*. Therefore Muslims are ordered to keep their wealth operational, utilize their lands, and avoid monopoly and hoarding of money. Adherence to such guidance also conforms to rational economic behavior. Consequently *Shari'ah* permits a number of contracts including: trade, selling, buying, leasing, *Mudharabah*, *Musharakah*, *Muzara'ah*, and *Musaqah*; in addition to other arrangements and dispositions such as bringing unused resources into use and limitation of the legal competence of the fool.

Bringing Unused Resources into Use (*Ihya' Al-mawat*)

Bringing land and other unutilized resources into use is one of the most important aspects of resource utilization and output maximization that have been discussed by Islamic jurists. Also public schemes for allocation of unutilized lands and unexploited mineral resources (*Iqta'a*) can facilitate allocation of such resources to those who are more capable

of utilizing them in the best manner; and can be seen as one form of division of labor that leads to maximization of output.

Some scholarly writings consider *Iqta'a* as a useful method for enhancing the process of resource utilization and development. Abu Yusuf indicates that he ***"does not think that the Imam should leave an unutilized piece of land that has no owner without allocating it to someone, because allocation will accelerate development and increase the kharaj (land tax) income"***(22).

Bringing unused land into use (reclamation) means developing a piece of land that is unutilized, has no owner, and does not constitute a *Hareem* (an annexed facility) of another owned property. Such land can be used for agricultural production or construction of residential buildings and, thus, contribute to food production or provision of housing facilities.

Several *hadiths* have been reported on encouragement of people to perform land reclamation and bring other unexploited resources into use. In this connection the Prophet (peace and blessings upon him) said: ***"Whoever brings dead land into use, shall become its owner"***(23), and in another version of the *hadith* it is reported that he added ***"and there is no right for an extorter's root"***(24). The Prophet (peace and blessings upon him) also said: ***"Whoever develops a piece of land that belongs to nobody else shall become the one who is most entitled to it"***(25).

Hence, unutilized land is owned - along with its annexed facilities - through reclamation even if the one who reclaims it is a *Zimmi*. Some jurists indicate that a *Zimmi* should obtain permission of the *Imam* (competent authority). According to Abu Hanifah both the *Zimmi* and the Muslim need to obtain such permission. The *Maliki* jurists believe that obtaining permission from the *Imam* should be confined to reclamation of the lands that are close to cities, rather than all lands. Reclamation after obtaining permission of the competent authority is considered as *Iqta'a*.

(22) Abu Yusuf: *Al-Kharaj*, p. 16.
(23) Al-Bukhari: *Al-Saheeh* (3/139).
(24) Ibid (3/140).
(25) Ibid (3/140).

The *Hanafi* scholars indicate that reclamation of unused land is valid even if it is done by an immature youth (has not yet been assigned religious duties).

The word '*Hareem*' refers to the surrounding area of a land needed for annexed facilities that are indispensable for complete benefiting from the land, such as the surrounding area of a house or a borehole. The exact size of the surrounding area that can be considered as *Hareem* is usually determined as per the prevailing norms.

Islamic jurists unanimously agree on the permissibility of reclamation of land through an agent(26), because in that case the land developer can bear the risk of reclamation, while the agent (worker) performs the job against a guaranteed wage.

According to the majority of the Islamic jurists, reclamation is quite sufficient for acquiring the right of complete ownership, which facilitates direct use, leasing, or disposing of the land in question through selling, donating, or bequeathing.

As per the *Maliki*, *the Imami* and some of the *Hanafi* jurists, reclamation can facilitate only incomplete ownership, which entitles the owner to no more than the rights of use and exploitation, and not the right of disposition. They consider the case here to be quite similar to that of a person who enters a mosque for performing prayer or walks on the road. That person is entitled to the right of benefiting from such common facilities whenever he likes. Nonetheless, he does not have the exclusionary right which enables him to prevent others from using the same facilities as he does. In the light of such reasoning when a person reclaims a disused land and then leaves it, he will no longer retain the right of ownership. The *Imam* (competent authority) can get the land back and reallocate it to a new developer. Also when the person who reclaims the land dies, the ownership of the land does not shift to his heirs. The proponents of this viewpoint also indicate that the state can impose a fee to be paid by the one who reclaims the land and benefits from it.

(26) *Al-mawsu'ah*, (2/249).

Demarcation of land (*Tahjeer*) is not considered as reclamation, although it makes the person who does it more eligible for ownership of the land than others; for a period of three years as per the *Hanafi* School. The *Shafiee* and *Hanbali* jurists believe that such period is to be determined according to customs and traditions and can be three years, less than that, or more.

All the preceding discussion is about reclamation of land. We may then ask: what about underground minerals? Should they be owned by those who bring them into use? The *Maliki* jurists consider minerals as common wealth; whereas the majority of Islamic jurists makes a distinction between apparent and non-apparent minerals. Apparent minerals cannot be possessed by whoever brings them into use; or allocated through *Iqta'a*, because they constitute benefits that entail no cost. They are like natural streams, pasture lands and forests that fall under communal ownership. Therefore, seeking private ownership of apparent minerals is prohibited, quite like claiming a private domain of possession (*Hima*) in common lands.

As regards non-apparent minerals, most of Islamic jurists believe that they can permissibly be owned, because they are like unused land, which requires additional cost and effort.

Some contemporary scholars indicate that it is more preferable in our present times to adopt the *Maliki* viewpoint, especially in view of the increasing abilities of man with regard to the exploitation of natural resources through application of modern technologies.

Chapter: II
Ownership (*Mulk*)

Definition

Literally, the Arabic word *'Mulk'* indicates the state of possessing something and having the exclusionary right of disposing of it. In *Fiqh* terminology, the *Maliki* jurists define *Mulk* as: ***"a Shari'ah-sanctioned authority over an asset or a benefit"***, or "***a Shari'ah-based authority which enables a person or his delegate to make use of an asset or a benefit and accept compensation for it"***[1], or ***"the competence of having the exclusionary right of benefiting from something and disposing of it"***.

Inviolability of Ownership

In Islam, ownership is inviolable and well safeguarded against transgression. In this regard Allah *(Subhanahu wa taala)* said: ***"eat not your property among yourselves in vanities"*** [*Al-Nisa'*: 29]. The Prophet (peace and blessings upon him) said: ***"transgression onto your lives, properties and honor amongst you is forbidden"***[2].

As stated by Al-Juwaini: ***"The indubitable fact is that robbery, looting, and unlawful seizure of the property of others is forbidden"***[3]. According to Ibn Taimiyah, ***"a person is more entitled to his property than his son, his father and anybody else"***[4].

Ownership is a Trust and Man is a Vicegerent

Allah *(Subhanahu wa taala)* is the real owner of wealth. In this regard He *(Subhanahu wa taala)* said: ***"and spend (in charity) out of the (substance) whereof He has made you Heirs"*** [*Al-Hadeed*: 7], and He also said: ***"ye give them something yourselves out of the means which God has given to you"*** [*Al-Noor*: 33).]

According to Al-Zamakhshari ***"Indeed the properties that are put in your hands belong to Allah (subhanahu wa taala) who created them and enabled you to enjoy them and dispose of them in the capacity of vicegerents. In fact these properties are not at all yours, and you are no more than mere agents"***

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(1) *Al-mawsu'ah*, (39/31).
(2) Al-Bukhari: *Al-Saheeh* (1/26, 37); Muslim: *Al-Saheeh* (8/182).
(3) Al-Juwaini: *Al-Ghiyathi*, p.495.
(4) Ibn Taimiyah: *Al-Fatawa* (29/189).

Al-Razi, indicates that "***a person who is mandated to dispose of these properties has the capacity of an agent, a deputy or a vicegerent. He should therefore find no difficulty in spending, since one would not find it difficult to spend out of the wealth of others when he is permitted to do so. He (Allah – Subhanahu WA taala) has made you successors of the preceding generations by passing forward their wealth to you through inheritance, so you should learn the lesson behind that. As wealth has been transferred to you from the past generations, it will also be transferred from you to future generations, hence do not be stingy***".

In this regard Ibn Al-Qayem posed and discussed the following questions: ***"you may ask: is it acceptable to say that someone is an agent of Allah? I say: the answer is no it isn't, because an agent acts on behalf of his client in the capacity of deputyship, whereas Allah (Subhanahu wa taala) has no deputy and no one can become his successor. In fact Allah (Subhanahu wa taala) is the successor of his servants. The Prophet (*peace and blessings upon him*) used to say: (Oh Allah! You are the companion in travel and the successor in the family). Nonetheless we may say that man is an agent of Allah (Subhanahu wa taala) in the sense that man is ordered to preserve, manage and handle what he has been entrusted with looking after".***

Performing the role of a vicegerent is not confined to the mere task of helping the poor. It should also include improvement, utilization, development and justice.

Types of Ownership

Private, Communal and State Ownership

A privately owned property is a property that has a specific owner; be it an individual or a company.

A community owned property is the property that does not belong to a specific owner, and in which the entire community has the right of title in addition to rights of access and use. Water resources (rivers and seas), pasturelands and fire (forests) are fitting examples of such property, because they constitute public endowments that belong to all members of the society.

State owned property refers to what is owned by *bait al-mal* of the state (or there could be more than one *bait mal*), whether such properties are in the form of moveable assets like cash, or in the form of non-moveable assets such as land. The state has the right to dispose of its property quite like a private owner, provided that such disposition conforms to public interest.

As regards community owned property, neither the individual nor the state has the right to dispose of it through sale or grant. Permissibility of disposition in this case is confined to the benefits generated from such properties.

Significance of Distinction between Communal Ownership and State Ownership

Regarding state owned property, the government is quite similar to a private owner in having the right to dispose of such properties through selling, buying, leasing…etc. That is to say, it has the right to dispose of the asset as well as the benefit. Concerning community owned property, the government does not have such right, otherwise big communal properties such as rivers, seas, and forests would have been transferred to the domain of private ownership. Since such communal properties constitute naturally growing wealth just like apparent minerals, they should not be privately owned(5).

Communal Ownership in the Global Perspective

So far we have been referring to communal ownership at the single state level. Therefore, we shall proceed now to a brief discussion on communal ownership at the global level, as this issue seems to have been up to now completely neglected in the literature on ownership in Islamic economics.

It can be noted that when rivers, gulfs, and lakes are within the territories of one state, that state will have sovereign authority over such natural resources. It can also be observed that a coastal state would enjoy sovereign authority over that part of a sea, a gulf, an ocean or a lake which faces its borders; what is known in the international law terminology as "Territorial Sea" or "Adjacent Zone".

Apart from territorial water bodies, there are the far waters, which are called the "upper seas" in the international law jargon. Such international waters constitute a communal property of the entire humanity, and are supposed to be owned by all the states in the globe including coastal as well as landlocked countries.

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(5) See Al-Syouti: *Al-Hawi Lilfatawa* (1/180).

It is well known that such water bodies which cover about three fourths of the earth are important natural means of navigation and a fundamental source of a huge variety of living as well as nonliving wealth including fish, sponge, corals, shells, pearls, minerals and oil. Such multitude of bounties is available on the surface of the seas or above them, inside the waters, and in the seabed or beneath. Some countries have managed to exploit seabed by extending communication cables and oil pipelines. Others have huge ships and fleets that sail on seawater and aircrafts, which fly over the seas. It goes without saying that, every country in the world is entitled to the right of using these renewable and nonrenewable natural resources in a way that does not cause harm to other countries.

Due to the fact that countries in the world are at extremely varying degrees of scientific, technological, financial and military progress, the relative abilities of these countries with regard to the exploitation of global natural resources are in great disparity. This situation has led to an apparent conflict of transnational interests and recurrent dispute, especially between feeble developing countries and powerful industrial countries. Developing countries have started to claim their due share in these global natural resources and the gains that are being extracted out of them. Some developing countries have also started to raise voices high in demand of preservation of their living resources – particularly fishing resources – against excessive exploitation from the part of powerful industrial countries. Such Mal-exploitation would certainly lead to severe exhaustion of these basic food resources of coastal developing countries.

In spite of the fact that international interests and disputes are governed by a series of international norms, treaties and conventions, the countries of the third world – including Islamic countries – need to improve their completive position by making a significant breakthrough in the field of scientific, technological and military advancement. This seems to be the only possible way for these deprived countries to snatch their rights under this overheating international struggle and ensure real freedom of international navigation, fishing, flight and all other freedoms to which all members of the international family have the right of access.

The rule that governs access to these international resources is that they should be enjoyed by the state which succeeds to reach them first. Before taking part in such open race, a country needs to start with having access to advanced technology.

It may also be noted that in case of community-owned properties in the context of a single state, those who reach first to natural endowments would still render some benefits to the community at large as they will have to pay *Zakah* or other transfer payments. In the contrary, those who reach first to the communal bounties of the globe would refrain from rendering such benefits to human community at large. Powerful industrial countries are yet to be convinced to leave a meager share of the cake for poor countries. Indeed, industrial countries may extend official development aid sometimes. However, even in that case, and under the existing international trade relations, these seemingly donor countries usually succeed to take back by the left hand what they give by the right, if not several time more. Needless to say, this situation will still be more aggravated when stratagems, collusion and power are used for shifting globally owned properties to the realm of national ownership.

Complete Ownership versus Incomplete Ownership

Complete Ownership: refers to ownership of the asset as well as its benefit. Incomplete Ownership: indicates ownership of the asset; or the benefit of the asset; or the right of benefiting from the asset. Some scholars prefer to use the term "Weak Ownership" instead of "Incomplete ownership". When you buy a car you become a complete owner by owning both the car and its benefit. If you lease that car to someone else you become the owner of the car only, while the ownership of the benefit will go to the car hirer. Similarly, when you lend that car to someone, you become the owner of the car and the borrower becomes the owner of the benefit. As regards ownership, which is confined to the right of benefiting from the asset only, the example is the right of salesmen to use the common facilities (e.g. seats) in the market.

Ownership of debt is also considered as incomplete as long as the debt is outstanding.

Optional Ownership versus Mandatory Ownership

Optional ownership is that which takes place subject to free choice, whether through verbal expression as is the case in selling and buying, or by performing permissible activities like hunting or gathering of wood and grass. Mandatory Ownership refers to ownership which results, for instance, from inheritance, *waqf*, preemption right, and entitlement to a share in war booties.

Stable Ownership versus Unstable Ownership

Stable Ownership is the ownership that can never be exposed to annulment; such as the price of a sold commodity that has already been delivered to the buyer or a dower of a wife after commencement of marital relationship. Unstable Ownership is that which can be annulled; such as the price of a sold commodity that has not yet been delivered to the buyer, or the rental of an asset before obtaining the benefit.

Modes of Ownership

Permissible modes of ownership include the following:

- Offspring of owned property; such as the product of livestock or fruit trees.
- Search for and capture of permitted objects; such as gathering wood and grass, hunting, sharing in war booties, and bringing idle resources into use.
- Inheritance.
- Blood money.
- Compensation for damage of property.
- Compensation contracts; such as sale and leasing.
- Donations like grant gift and will.

Therefore ownership can stem from work (search for and capture of permissible objects); or from growth of wealth (offspring of owned livestock); or from an act of beneficiation (charity); or from social relationships (gift).

Property can be a free gain that need not be obtained from a previous owner (search for and capture of permissible objects); or something that has been forcefully taken from a previous owner who has no legal immunity (war booty); or something that has been acquired through mutual agreement with a previous owner; either against compensation (sale contract), or without compensation (gift).

Restrictions on Ownership

Restrictions relating to mode of ownership

modes of ownership must be permissible. They should not entail commitment of forbidden acts such as theft, unlawful seizure, monopoly, gambling, *riba*, cheating and whoredom.

Restrictions relating to utilization of the owned property

In using property one should avoid squandering, wastefulness, thrift, hoarding, use of utensils of gold and silver, wearing of silk and gold (for male), and using wealth in a way that causes harm to neighbors or anyone else.

Restrictions relating to transfer of ownership

Transfer of ownership should take place through mutual consent and avoidance of cheating, fraud and coercion.

Expropriation

The state has the right to expropriate private property on exceptional basis, provided that expropriation is done to serve public interest and against fair compensation.

For instance, if someone has food stocks during time of food shortage, the competent authority can force him to sell it so as to safeguard people against famine.

Also a mosque or a street can be enlarged by expropriation of the adjacent lands and buildings that are privately owned.

Similarly, the competent authority can sell the properties of a delinquent debtor, when the creditors refrain from doing so, and distribute the sale proceeds among the creditors in proportion to their respective debts.

It is also permissible – for the sake of executing a preemption right - to nullify any preceding contract with an external buyer and sell the property to the partner or neighbor (especially if adjacent) at the same price.

Chapter: III
Contract (*Aqd*)

Literally, the Arabic word *'Aqd'* (contract) indicates fastening; as when the two ends of a rope are tied together. The same word can also be taken to mean a pledge.

In *Fiqh* terminology a contract is an agreement that takes place between two parties through offer and acceptance. The basic elements of a contract include: the contract parties, the subject matter of contracting, and the contract form (offer and acceptance).

According to the *Hanafi* School the 'offer' is what comes first, and "acceptance" what comes next. As per the viewpoint of the majority of Islamic jurists offer comes from the party who is going to assign ownership and acceptance comes from the party who is going to accept it. That is to say the seller is the offering party and the buyer is the accepting party. In order for a contract to be valid offer and acceptance should take place in the same contracting session (*Majlis al-Aqd*).

One of the controversial issues among Islamic jurists is whether in contracts recognition should be made to ends and intentions or to words and expressions. While some jurists believe that what really matter in the contract are words and expressions, others argue that consideration should be for ends and intentions.

In *Mudharabah*, for instance, if a condition is made that the whole profit should go to the *mudarib* (the worker) the deal becomes a loan, whereas if the condition is that the whole profit should go to *rab al-mal* (owner of the capital) the deal becomes *ibda'a* (engagement of a trade agent). Similarly, a grant if made conditional upon counter reward is taken to mean sale; and lending when made conditional upon counter compensation becomes leasing.

A contract party should have legal capacity of disposition, which necessitates adulthood and rationality. As for the contractual dispositions of a mature boy (7 years old), they are treated as follows:

- The contract is valid (without confirmation from his guardian) if it is absolutely to his benefit; such as acceptance of a grant.
- The contract is null and void (even if confirmed by the guardian) if it is absolutely harmful; such as offering grants.
- If the contract is in-between (could be useful or harmful) it needs to be confirmed by the guardian.

Also the contract party should act on the basis of his full consent. Compulsion, ignorance and acting by mistake are examples of acts that signify absence of full consent.

The subject matter of contracting should also be available and well known, especially in compensatory contracts. *Gharar* (uncertainty) and *Jahalah* (ignorance) are forgivable in donation contracts in order to solicit more charitable initiatives; and because, unlike the case for compensatory contracts, uncertainty and ignorance do not cause too much harm in donation contracts.

The subject matter of contracting should also be something that can possibly be delivered. Selling of a straying animal or a seized house is therefore forbidden. Some scholars indicate that a straying animal and an extorted house can be given as a grant because a grant is a donation and not a compensatory deal.

Revocable versus Irrevocable Contracts

***An irrevocable contract*:** is a contract that cannot be terminated by one of its two parties without the consent of the other. Such enforceability of the contract can be true for both parties of the contract (as is the case in sale contracts), or for only one of them (as is the case in warranty contracts).

***A revocable contract*:** is the contract that can be revoked by one of its two parties or both of them; such as partnership.

Islamic jurists may hold different viewpoints as to whether some contracts, such as racing, are revocable or not. Some jurists believe that such contracts are irrevocable because they are like leasing, while others argue that they are revocable because they are classifiable as *Juaalah*.

Valid, Invalid and Void Contracts

***A valid contract (Aqd saheeh)*:** is the contract that has full status of *Shari'ah* compatibility with regard to its essence and form.

An invalid contract (Aqd batil): is the contract that either lacks *Shari'ah* compatibility with regard to its essence and form, or has a defect in its basic elements or subject matter of contracting.

A Void contract (Aqd fasid): is defined by the *Hanafi* School as the contract, which is *Shari'ah*-compatible in principle, yet it lacks *Shari'ah* compatibility with regard to its form. That is to say the contract as such has no defect in its basic elements or the subject matter of contracting, but the problem lies in the contract's formulation. An example of this type of contract is a sale contract in which dispute is highly probable due to non-specification of the subject matter of contracting (e. g. the subject matter of contracting is any of two houses or any of two cars which the seller owns).

Effective versus Suspended Contracts

***An Effective contract*:** is a valid contract signed by someone who has legal competence as well as power of disposition (on his own behalf or as an agent). Or it is the contract that does not encounter any third party claim or requires further confirmation.

***A Suspended Contract*:** is a contract signed by someone who is legally competent but has no power of disposition, such as the act of a person who sells the property of someone else without his permission; which is known in *Fiqh* terminology as the act of the *fudooli* (nosy person). The validity of such contract is subject to confirmation by the one who has the power of disposition. Subsequent clearance of such contract is considered as tantamount to prior agency.

Spot, Pending and Future Contracts

A Spot Contract: is the contract that contains immediately enforceable provisions, as when in a sale contract the seller makes the offer and the buyer accepts.

A Pending Contract: is the contract that depends on the occurrence of a future incident; as when you say to somebody you will become my agent if my son does not come back from makkah by the end of this month. If the incident awaited can never occur, the contract is invalid; as when someone says to the other: I shall guarantee the debt, which my friend owes to you if the color of the crow changes into white. If the awaited incident must occur or normally occurs, the contract is also invalid; as when a landowner says to the tenant: I shall lease out my land to you if the sun comes up tomorrow.

A Future Contract: The example of this type of contracts is when the landowner says to the tenant: I agree to lease out my land to you starting from the beginning of the coming month.

Part: III
Sustenance Dowry and Inheritance
(*Nafaqah, Mahr & Mirath*)

Chapter: I

Sustenance (*Nafaqah*)

'Sustenance' becomes obligatory on the basis of: kinship, marriage and possession. Sustenance commitment, which stems from possession means that a person has to sustain whatever he possesses; whether it is an animal, a plant or any other type of property, otherwise wealth will become exposed to erosion and damage.

Sustenance commitment, which originates from marriage indicates that a husband is bound to sustain his wife at the level of sufficiency. The level of sufficiency in this case is determinable in the light of the state of solvency of the family in question. Obligatory sustenance is supposed to include food, clothing, shelter, and service. The husband is obliged to sustain his wife even if she is rich, because the general principle is that sustenance of everybody is supposed to be out of his own money if he has, except for the wife.

Sustenance of kin means sustaining parents and children to the level of sufficiency if they have no money. In principle sustenance is to be out of one's own money. This holds true even for a small kid (whether a male or a female) if he has an indoor or outdoor source of income; otherwise his sustenance is the responsibility of his father.

When the son reaches the stage of adulthood his sustenance is no longer the responsibility of his father, if the son is able to work and earn income. If at the stage of adulthood the son is still unable to earn his living because of joblessness, disability or pursuit of learning, the responsibility for his sustenance may still remain with his father.

The father is also responsible for sustenance of his daughter, if she has no money, until she gets married. After marriage the responsibility for her sustenance will rest with her husband whether she is rich or poor. Sustenance of wife is considered as a duty according to some Islamic jurists, and as compensation to which the wife is entitled according to others.

Some Islamic jurists indicate that a rich wife should sustain her husband if he is unable to earn his living. In this case the wife should not claim repayment when her husband becomes solvent, because Allah

(Subhanahu wa taala) said: ***"an heir shall be chargeable in the same way"*** [*Al-Baqarah*: 233]. It has been reported that Ali Ibn Abi Talib (may Allah be pleased with him) said: ***"a wife is an heir; hence she has to sustain her husband as per the very texts of the Qur'an"***[(1)].

Fiqh Schools hold different viewpoints with regard to sustenance of kin, other than a wife.

The *Maliki* School considers sustenance of kin to be confined to parents and children and is, therefore, considered as the most restrictive school towards this issue.

The *Shafiee* School holds the view that sustenance of kin includes ascendants and descendants. That is to say the *Shafiee* School adds grandparents and grandchildren.

The *Hanafi* School has a more expanded perspective of sustenance, which includes even collateral relatives (*hawashi*).

As regards the *Hanbali* School kin sustenance is obligatory on every heir and hence this School seems to have the most widened view with regard to the issue; and maybe the *Zahiri* School also shares this viewpoint[(2)]. According to Ibn Hazm, ***"if a father is unable to sustain his children or if he passes away leaving nothing for them to spend, the mother is obliged to sustain them, because Allah (Subhanahu wa taala) said: (no mother shall be treated unfairly on account of her child nor father on account of his child)*** *[Al-Baqarah: 233]****, and nothing could be more harmful than the act of a rich mother leaving her children to go around begging their food"***[(3)].

(1) Ibn Hazm: *Al-muhalla* (10/92).
(2) Ibid, (10/100).
(3) Ibid, (10/109).

Chapter: II

Dowry (*Mahr*)

'Dowry' (*Mahr* or *Sidaq*) should be paid, by the husband, to the wife at marriage. It should not necessarily be mentioned in the marriage contract, because it is not the ultimate goal of marriage. What is basically sought by marriage is satisfaction of the indispensable need for having a spouse and enjoyment of marital relationships. According to the majority of Islamic jurists (except the *Maliki* School) when a wife accepts to get married without dowry the contract is valid.

One of the underlying wisdoms of dowry is that in its absence the husband may resort to divorce for any trivial clash with his wife. Moreover, dowry is a testimony of the honoring granted to woman, and a measure of safeguarding her against the fragility of marital ties.

Dowry is of two types: specified dowry and dowry of the analogous (*Mahr al-mithl*). For specification of dowry, consideration should be given to the faith, beauty, ancestry, wealth, mental capabilities, knowledge, decency and virginity of the wife as well as the other circumstances of the wife and the husband. In case the wife has a merit or defect compared to analogous wives, dowry can be adjusted in a suitable manner. Therefore, dowry of the analogy is considered as an indicator, which can be adjusted up and down to suit any particular case.

Islamic jurists do not specify a maximum limit for the dowry amount, whereas they seem to be in dispute as to whether the minimum amount is 10 *Dirhams*, less than that or more. Generally speaking, exaggeration in dowry is not recommendable. The Prophet (peace and blessings upon him) said: ***"among the signs of an auspicious wife are facilitation of her marriage affairs and lowness of her* dowry"**[1].

Driven by the desire to have good fame and under the urge of hypocrisy and showing off, the marrying couple may agree on a small undeclared amount of dowry along with a big declared amount.

(1) Ibn Hibban: *Al-Saheeh* (6/158); Al-Hakim: *Al-Mustadrak* (2/181).

The wife is not supposed to prepare the family home or provide furniture and other household utensils, because such responsibilities fall under the husband's obligations. If the wife willingly does so, that is considered as a donation.

Dowry can be paid at the time of marriage or thereafter. Postponement should be for a specific period of time. When the date of payment is not specified, dowry will remain payable up to the date of divorce or death. If someone divorces his wife before commencement of marital relationships, he should pay her half of the specified dowry amount.

Chapter: III
Inheritance (*Mirath*)

In Islam, inheritance is not left to the whims of the testator so that he can bequeath or deprive an heir according to his own likings. Also, inheritance in Islam is not confined to the elder child as is the case in some other systems, or permitted to males and withheld from females. The Islamic system of inheritance is based on a well-designed pattern of distribution ratios that cater for the degree of kinship, gender and the principle of correlation between cost and gain "*al-ghunm bilghurm*". Therefore, the Islamic inheritance system can hardly be understood in isolation from the Islamic sustenance system.

Another characteristic of the Islamic inheritance system is that it does not entail the allocation of any part of the inherited wealth to *bait al-mal*, except in the absence of all heirs. That is to say, *bait al-mal* is the last heir. A system of this kind would certainly encourage people to exert every effort to maximize their wealth for their own benefit and the benefit of their families. If, instead, the testator has to leave his wealth to someone other than to his family members, he could be induced to spend it in a wasteful manner during his life.

In determining the maximum portion of property that one can donate as will, the Prophet (peace and blessings upon him) said: ***"the third - and it is too much. It is better for you to leave behind a rich family, than a family that seeks sustenance through begging***"[(1)]. Therefore, a Muslim has no right to make a will that exceeds one third of his wealth. It is also impermissible to make a will to the benefit of an eligible heir.

Under the Islamic inheritance system, a person who murders someone so as to inherit his wealth is to be deprived from inheritance. This is so because according to one of the Islamic legal maxims, when somebody commits such an act so as to gain something before its due time, he should be punished by depriving him from getting that thing.

The holy *Qur'an* has specified most of the *Shari'ah* rulings pertaining to inheritance, as can be seen in *Surat Al-Nisa'* [verses: 7, 8, 11, 12 and

(1) Al-Bukhari: *Al-Saheeh* (4/3); Muslim: *Al-Saheeh* (11/77).

176] and *Surat Al-Anfal* [verse: 75]. The *Qur'an* has also given more consideration to inheritance distribution than to *Zakah* distribution. For inheritance distribution, the *Qur'an* has specified the eligible heirs, their priority ranking and the appropriate ratios of distribution (a half, a quarter, one-eighth, two-thirds, one-third and one-sixth).

Entitlement to inheritance is based on kinship and marriage. One of the merits of the Islamic inheritance system is that the wealth is distributed among the testator's family members subject to a set of priority ranks. The father has priority over the grandfather, and so is the mother compared to the grandmother and the son compared to the brother. Shari'ah has also prescribed a bigger share for the heir who has more financial obligations. Consequently, a male is entitled to twice the share of a female heir (though not in all cases), because a male has to pay *Mahr* when he is to get married and has to sustain his children and relatives, whereas a female is sustained by her father or one of her relatives before marriage, and by her husband afterwards.

Although the Islamic inheritance system is based on the principle of dividing the testator's wealth among the heirs, yet this may not be the case for some indivisible types of wealth. It has been reported that the principle of avoidance of *tadiyah* (harm) in the process of inheritance distribution was well observed during the early times of the Islamic state. A sward, for instance, cannot be broken into pieces so that each heir can get his share. Similarly division of a piece of land into small portions could make it economically useless. In this case the problem must be resolved by having some heirs selling their shares to others or all the heirs agree to form up a company, or a cooperative institution so as to benefit from the inheritance jointly.

It is strictly forbidden for a Muslim to resort to fraud and deception so as to evade inheritance rules and deprive an eligible heir from inheritance. Going around inheritance rules could take place; for instance, when a person distributes his wealth during his life to the heirs he likes and obtains a delegation from them to act as an agent for the rest of his life. Prohibition includes several other stratagems that can be used for breaching the rules that Allah *(Subhanahu wa taala)* has set by depriving eligible heirs from getting their lawful rights.

Knowledge in the field of Islamic inheritance is the first branch of knowledge that Allah *(Subhanahu wa taala)* will withdraw from among Muslims. The Prophet (peace and blessing upon him) said: ***"learn the Qur'an and teach it; and learn about inheritance shares and teach them. I am doomed to passing away, and this branch of knowledge (inheritance) will be withdrawn from amongst you on my death. At that time, when two of you are in dispute with regard to an inheritance share, they will never find a knowledgeable person to resolve their case"***(2). In another *hadith* also he said: "***learn about inheritance and teach what you learn, because this field constitutes half of knowledge, it can be forgotten, and it is the first thing that will be withdrawn from my Ummah***"(3).

Scope of Wealth Diffusion under the Islamic Inheritance System

1. Had inheritance in Islam been confined to one heir such as the elder son (as is the case in some other systems) wealth would have been concentrated in the hands of the few, instead of being widely diffused.

2. The inheritance system of Islam is a family-based rather than an individual-based system. That is to say, the inherited wealth spreads over, along the ramifications of the testator's family, instead of being concentrated in the hands of a single family member; unless the family itself is composed of only one strong heir such as a son or a father as will be explained later on.

3. The inheritance will be more diffused with the increase in the number of the deceased's family members. If the deceased has more than one wife and a number of children the inheritance becomes more diffused, and vice versa.

When there is more than one wife, they have to share the quarter of the inheritance if the testator has no child and one-eighth of it if he has. That is to say, the share of the testator's wives is fixed at the limit of a quarter (or one-eighth) whether their number rises up to four (the maximum permissible number of an individual's wives in Islam), or declines to one, because Allah *(Subhanahu wa taala)* said "***they get***" [*Al-Nisa*': 12], referring to more than one wife.

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(2) Al-Hakim: *Al-Mustadrak* (4/333); Al-Tirmizi: *Al-Sunan* (4/414).
(3) Al-Hakim: *Al-Mustadrak* (4/332); Ibn Majah: *Al-Sunan* (2/908); Al-Darqutni: *Al-Sunan* (4/67).

Also a single daughter who has no brother to share the inheritance with her is entitled to half of the inheritance. When there are two such daughters or more, they have to share two thirds of the inheritance; and hence, the inheritance (or rather the share of the daughters in the inheritance) becomes more diffused.

Similarly, when sisters (whether full sisters or half sisters of the father's side), become eligible to inheritance in the absence of the father and the children, they are entitled to half of the inheritance regardless of their number; quite like daughters who are entitled to two thirds of the inheritance irrespective of their number.

4. The rest of the inheritance, after distributions to the statutory heirs (*as'hab Al-furood*), is distributed among the testator's sons and daughters if any (the share of a son is twice that of a daughter) and, thus, the scope of inheritance diffusion increases with the increase in the number of heirs and vice versa. Consequently it could be argued that birth control would lead to inheritance concentration, whereas removal of birth controls would make inheritance diffuses over a wider scope.

The same arrangements (regarding sons and daughters) are also applicable to full brothers and half brothers of the father's side, if they become eligible for inheritance; as when the testator is a *kalalah* (has no son or parent).

5. As for the half brothers and sisters of the mother's side, a single heir is entitled to one-sixth of the inheritance, whereas all of them have to share the third when they are two or more. Hence, an increase in the number of these heirs leads to more diffusion in their inheritance share, and vice versa.

6. Diffusion of inheritance also increases by adoption of the viewpoint of those who call for prohibition of *rad.* The term *rad* refers to redistribution of the remaining inheritance among the statutory heirs (*as'hab al-furood*), if the testator has no blood relatives (*asabat*). The adoption of this principle will lead to concentration of inheritance.

Therefore, it can be noticed here that the difference of opinion among *Fiqh* schools with regard to inheritance distribution has significant implications for inheritance concentration and diffusion.

7. Application of the principle of *awal* is another reason for more diffusion of inheritance. *Awal* refers to reducing the shares of heirs to cater for an increase in their number. This happens when the total sum of inheritance distribution ratios is more than one. For more illustration let us assume that the heirs group is composed of the husband, and two full sisters. Hence, the husband is entitled to half of the inheritance (1/2), and the two sisters are entitled to two thirds (2/3); therefore: (1/2) + (2/3) = 3/6 + 4/6 = 7/6, which is more than one.

Therefore, according to those who call for adoption of the principle of *awal* the inheritance is to be distributed to seven instead of six shares, by reducing the shares of all the heirs proportionately. That is to say, each heir will bear a reduction commensurate with the size of his respective share in the inheritance.

It has been reported that some former *Muslim* scholars, including Ibn Abbas, did not support the idea of *awal*. In fact both viewpoints are based on *awal*. The only difference between them is that the first supports application of the reduction to the shares of all the heirs, while the second contends that the reduction should be applied to the shares of only some of the heirs.

8. **Exclusionary Disinheritance** *(hajb al-hirman)* can also limit diffusion of inheritance, because it leads to concentration of inheritance in the hands of the one who disinherits the others. Disinheritance usually affects the shares of the male blood-relatives of the testator (father, sons, brothers, and uncles), because the remaining part of the inheritance (after distributions to *statutory* heirs) goes to the most eligible male relative. The Prophet (peace and blessings upon him) said: ***"give the statutory shares to those who deserve them and the remainder should go to the most eligible* male*"***[(4)]**.** This ruling can be derived from the *Qur'an* - directly from the verses on inheritance in *Surat Al-Nisa'*. However what should be noted here is that a male relative can take the whole inheritance or the remaining part of it, and disinherit those who come after him.

(4) Al-Bukhari: *Al-Saheeh* (8/187); Muslim: *Al-Saheeh* (11/55).

Contrary to **exclusionary** disinheritance, **decrement disinheritance** (*hajb al-nuqsan*) leads to an increase in inheritance diffusion, because it entails reducing the shares of some heirs to the benefit of others.

The son (and also the brothers) disinherits the testator's mother by decreasing her share from the third to the sixth. It has to be observed here that the decline in the share of the mother caused by the son will go to the son himself, whereas a decline in the mother's share caused by the brothers will not go to them, but to the father. This means that disinheritance in the first case was to the benefit of the disinheriting person himself, whereas in the second case it is to the befit of someone else.

The son also disinherits the husband by reducing his share from a half to a fourth and the wife by reducing her share from a fourth to an eighth; and in both cases the reduction is to the son's own benefit.

9. In conclusion, in the Islamic inheritance system inheritance is neither concentrated at the individual level, nor is it diffused at the national level. It is, in fact, diffused at the family level. Or you may say if you like, it is concentrated at the family level; except when it goes to *bait al-mal* in the absence of any eligible heir, or in case of adopting the viewpoint that prohibits *rad* and bequeathing of the remote relatives (*zawi al-arham*) of the testator.

10. Regarding eligibility of husband and wife to inheritance, it can be noticed that if the married couple are at the same financial status redistribution of wealth through inheritance tends to become negligible. If in the contrary husband and wife are at different financial positions, the redistribution effect becomes more significant, the greater the degree of variance between the financial positions of the two[(5)].

Since the share of the husband is twice that of the wife, diffusion of inheritance will lead to more concentration of wealth at the side of the husband compared to that of the wife. Nevertheless such concentration will quickly vanish due to the financial obligations of the husband towards the sustenance of the family; according to the rules of *Shari'ah*.

(5) Al-Zarqa: *Nuzum Al-Tawzeea*, p. 21.

11. If we look into the inheritance ratios we can see that they are as follows:

    1/2, 1/4 and 1/8
    2/3, 1/3 and 1/6

It can be seen here that the highest share for a single heir is half (the share of a single daughter, a full sister, a half sister of the father's side or a husband). The two thirds is not a single heir share, because it is allocated for two heirs or more (the share of two daughters or more; or two full sisters or half sisters of the father's side or more).

The lowest ratio is one-eighth in the first set of ratios and one-sixth in the second. This gives a clear idea about the scope of inheritance diffusion and concentration through inheritance ratios, which seems to be moderate.

12. Finally in order to give a numerical illustration let us suppose, for simplicity, that the heirs are the children, the two parents and the husband or the wife. All these heirs are mentioned in the *Qur'an*, in *Surat Al-Nisa'* [verses: 11 and 12] and they are the most powerful heirs compared to others such as brothers and the rest.

1. If the son is the single heir he gets the whole inheritance.
2. If the father is the single heir he gets the whole inheritance.
3. If the daughter is the single heir she gets half of the inheritance (and the remainder goes to the closest male relative).
4. If there are two daughters or more they get two-thirds of the inheritance (and the remainder goes to the closest male relative).
5. If the heirs are the children only (male and female) they share the inheritance (a male gets twice the share of the female).
6. If the husband is the single heir he gets half of the inheritance (and the remainder goes to the closest male relative), and this will remain true for him as long as there is no son who shares with him.
7. If the wife is the single heir she gets a quarter of the inheritance (and the remainder goes to the closest male relative), and this will remain true for her as long as there is no son who shares with her.

8. If the mother is the single heir she gets one third of the inheritance (and the remainder goes to the closest male relative), and this will remain true for her also when there is a husband or a wife.

9. If the heirs are the parents alone the mother will get one-third; while the father will get two-thirds of the inheritance (the two thirds of the inheritance in this case constitute the share of a single heir to which the father is entitled in his capacity as *asib* rather than as a regular heir. The two thirds usually constitute a joint and not a single heir share).

10. If the heirs are the husband, the children and the parents, the inheritance is divided as follows:

The husband:	1/4	=	3/12	3 shares
The father:	1/6	=	2/12	2 shares
The mother:	1/6	=	2/12	2 shares
The children:	the remainder	=	5/12	5 shares
Total				12 shares

Therefore, the biggest share of the inheritance goes to children (nearly half of it). If the children are two sons and one daughter each of the two sons will get two shares and the daughter will get one share. What needs to be emphasized here is that, the total portion of the inheritance, which goes to children is bigger than any heir's share (it is equal to the sum of the share of the husband and one of the parents)

11. If the heirs are the wife, the children and the parents, the division becomes as follows:

The wife:	1/8	=	3/24	3 shares
The father:	1/6	=	4/24	4 shares
The mother:	1/6	=	4/24	4 shares
The children:	the remainder	=	13/24	13 shares
Total				24 shares

12. Again the biggest share goes to the children. Their share in this case is bigger than in the previous case, because the fact that the share of a wife is half of that of a husband will atomically lead to

an increase in the share of the children. It can also be seen here that the share of the children is more than half of the inheritance, and is more than the sum of the shares of all other heirs. If the children are two sons and one daughter each of the two sons will get a share that exceeds the share of any other heir.

13. The previous examples indicate that diffusion of inheritance depends on the number of heirs; the degree of kinship; the pattern of inheritance ratios; the process of disinheritance; application of the principles of *awal* and *rad;* the number of those who compete for having a slice in a group shares; variation in the financial positions of husband and wife; and difference of opinion among *Fiqh* schools in relation to the pattern of inheritance distribution.

14. To recapitulate this discussion, we can say that in the Islamic inheritance system inheritance is diffused among the members of the deceased's family in a way, which achieves efficiency and equity.

Efficiency is achieved because the wealth of the deceased goes to his family and, thus, a Muslim is kept highly motivated to pursue productive activities in order to maximize his income and wealth.

As regards equity, it is achieved through distribution of the deceased's wealth on the basis of kinship and sustenance commitments of the heirs. Hence, a closer relative is more eligible to inheritance because his contribution to the formation of the deceased's wealth is supposed to be greater. The male is entitled to a bigger share compared to the female because he has more sustenance commitments than her. Children get more than parents because parents who have spent so many years in pursuit of wealth accumulation are supposed to be better off than children, in addition to the fact that parents are turning their backs to life, while children are turning their faces to it.

Part: IV

Zakah, Taxation and Financial Penalties

Chapter: I

Zakah

Definition

Literally, the word '*Zakah*' means growth, righteousness and purity. In *Fiqh* terminology the term *Zakah* refers to a right in the wealth of the rich, which *Shari'ah* has prescribed for the poor and other specific outlets. The very name of *Zakah* indicates its role in purifying the wealth from the rights that are due to other parties, besides releasing the *Zakah* payer from the grasp of miserliness and facilitating the appropriate utilization and growth of wealth under the blessing that Allah *(Subhanahu wa taala)* will bestow upon it.

Shari'ah Status of *Zakah*

Zakah is a basic duty and one of the fundamental pillars of Islam. It constitutes a financial worship which the holy *Qur'an* often refers to in the same context of referring to prayer. The Prophet (peace and blessings upon him) said to mua'z Ibn Jabal when he appointed him as ruler of Yemen ***"tell them that Allah has imposed alms on their wealth, to be taken from the rich and given to the poor"***[1]. Therefore, refraining from payment of *Zakah* is one of the great sins in Islam.

Zakah is due on every adult and sane Muslim. According to the majority of Islamic jurists *Zakah* should also be paid out of the wealth of the child or the insane. Public wealth is not subject to *Zakah* as per the viewpoint of the majority of Islamic jurists. Nevertheless some jurists, including the companion of Abu Hanifah (*Imam* Mohammad), hold the view that *Zakah* should also be paid out of invested public wealth (the economic public sector).

Conditions of *Zakah*

In addition to the conditions relating to *Zakah* payer, which we have already indicated, there are also other conditions that relate to the wealth out of which *Zakah* has to be paid, including the following:

(1) Al-Bukhari: *Al-Saheeh* (2/130).

1. The wealth should have a specific owner. Hence, *Zakah* is not payable out of a *waqf* property that has no specific beneficiary (e. g. for the poor).

2. The wealth should be under full ownership. Full ownership in this context indicates possession as well as holding. Therefore, *Zakah* is not payable on what is known as a *Dimar* property, which refers to a property that has slipped out of its owner's possession with little chance of recovery, such as a straying animal; a confiscated or sized property or a denied debt.

3. The wealth should be growing so that *Zakah* can be paid out of the growth and not the principal. The very name of *Zakah* is indicative of the fact that it is supposed to be taken out of actually growing wealth such as agricultural produce and fruits, or presumably growing wealth such as money and articles of trade. *Zakah* is not payable out of what is known in *Fiqh* terminology as *urood al-qunyah* (articles of possession), which refer to those possessions which a person acquires with the aim of satisfying his household needs, such as household furniture and utensils. *Zakah* is also not payable out of fixed assets that are owned for production purposes including machinery, buildings, and trucks.

According to the majority of Islamic jurists wealth, which is possessed for satisfaction of the owner's basic needs include also fed animals as well as working animals.

4. The wealth should exceed basic needs. That is to say, *Zakah* is levied on the remaining balance of wealth after self and family sustenance.

5. Elapse of a lunar year, except for agricultural produce, fruits, minerals and treasure (*rikaz*). The lunar year for the flow of wealth acquired during the year is taken to mean the lunar year of the principal.

6. The wealth should reach the *Nisab* (*Zakah*-liable wealth level), which differs subject to type of property. The *Nisab* is 5 for camels, 30 for cows, 40 for sheep 20 *mithqals* (85 grams) for gold, 200 *Dirhams* (595 grams) for silver, and five *awsuk* (653 kilograms) for agricultural produce and fruits.

According to the *Hanafi* School what really matters is that the wealth should reach the *Nisab* at the beginning and the end of the year, regardless of variations in its size during the year.

7. The wealth should be free from indebtedness. However, some jurists believe that debt prevents payment of *Zakah* out of non-apparent wealth such as money; whereas it does not justify exemption from *Zakah* on apparent wealth such as agricultural produce and fruits; especially that *Zakah* on apparent wealth is well affirmed and the poor look forward to getting it(2).

Zakah-Liable Wealth

- Grazing livestock including: camels, cows and sheep
- Gold and silver money as well as other types of money.
- Articles of trade: Trade means exchange of wealth through buying and selling with the aim of making profit. Articles of trade refer to wealth that is prepared for selling. Fixed assets (work tools) are not considered as articles of trade. For *Zakah* purposes, articles of trade are to be valued at their market price on the date when *Zakah* is due.
- Agricultural produce and fruits: According to the majority of Islamic jurists agricultural produce and fruits are to be estimated for *Zakah* purposes as soon as they are likely to give yield, so as to grant the fruit owners the chance for early marketing of their remaining output.

Zakah Rates

- On grazing animals: (see the schedules presented in Chapter II of this Part of the Book). The Zakah rates for this category of wealth are estimated in the range of 2 – 2,5%;
- On money: 2,5%;
- On articles of trade: 2,5%;
- On agricultural produce and fruits: 5% if irrigated, and 10% if rain-fed.

(2) Ibn Qudamah: *Al-Mughni* (2/545 and 636).

Therefore, the rate of *Zakah* differs with regard to whether the *Zakah*-liable wealth is composed of the principal in addition to the yield (articles of trade) or only the yield (agricultural produce); besides the cost and effort involved therein.

Zakah Heads (Outlets)

- To the poor and the needy: The poor and the needy may indicate the same category or two different categories. Regardless of the meaning of the two words, the poor and the needy are entitled to two shares of *Zakah*. In principle, *Zakah* should not be given to a poor or a needy whose sustenance is the responsibility of someone else.
- To those who are engaged in its collection and distribution: Some Islamic jurists indicate that the share of this category should not exceed the eighth.
- To those whose hearts are being reconciled (Islamic propagation): A share of *Zakah* is payable to the members of this category who could be Muslims or non-Muslims, so as to strengthen their faith, or to encourage them to become Muslims, or to avoid the evil they may cause.
- For freeing of slaves: This indicates the importance that *Shari'ah* assigns to freedom.
- To the indebted: There are two types of indebted persons: a person who borrows money for a purpose of his own, and a person who borrows money for a purpose that concerns others (for reconciliatory purpose).
- In the way of Allah: This includes sustenance of the warriors and provision of fighting devices.
- To the wayfarer: A poor traveler has to be given out of *Zakah* income the amount which enables him to sustain himself until he reaches home, regardless of whether he is rich or poor at home, and provided that his trip is not for a *Shari'ah*-deniable purpose.

Principles of *Zakah*

Zakah constitutes an ideal model of an efficient and equitable system of financial duties. The underlying principles of *Zakah* are quite distinguishable from those of any other financial system that came to be known in our present eras. Most important among *Zakah* principles are the following:

1. Obligation is to be commensurate with capacity

Allah *(Subhanahu wa taala)* said: ***"on no soul doth God place a burden greater than it can bear"*** [*Al-Baqarah*: 286]; and He also said: ***"take what is beyond the needs"*** [*Al-Aaraf*: 199]; and in another verse He said: ***"and they ask thee how much they are to spend; Say: what is beyond your needs"*** [*Al-Baqarah*: 219]. The Arabic word *afw* (which has been referred to in the original text of the verse) means wealth that exceeds the owner's needs.

This principle is applied in all Islamic financial duties including, among others, *Zakah* and *kharaj* (land tax). Ali Ibn Abi Talib (may Allah be pleased with him) said ***"indeed we are ordered to take from them the afw, do you know what afw is? It means what is affordable"***[(3)].

It is in view of this principle that *Nisab* has been fixed, and exemption from *Zakah* has been granted to the original (basic) needs and articles of possession (that are kept for non-trading purposes).

The same principle also constitutes the basis for using *khars* (approximation without volume or weight measurement) in *Zakah* on fruits, and adopting varying rates of *Zakah* (2,5%, 5% and10%) subject to whether the wealth in question comprises the principal amount in addition to the yield (as is the case for money and articles of trade) or only the yield (as is the case for agricultural produce and fruits).

Again, on the basis of this same principle a *Zakah* rate of 5% is applied in the case of irrigated agricultural produce, in contrast to a

(3) Ibn Zanjawayh: *Al-Amwal* (1/167).

rate of 10% on the produce of rain-fed agriculture; so as to cater for the difference in the relating costs of production.

According to Al-Sarakhsi ***"incurring of more costs entails a reduction in the duty"***[4]. Duty in this context means the *Zakah* rate.

2. Moderate rate

It is well known that when the tax rate exceeds certain limit tax revenue will decline as a result of a parallel decline in economic incentive. This principle, which is widely admitted in modern theories of public finance, was well recognized by our ancestor Islamic jurists. Abu Yusuf argued that, ***"besides the reward from Allah, observance of equity and justice and avoidance of oppression would lead to realization of more kharaj revenue and accelerate countrywide development. Blessings are always accomplishable through justice and losable through oppression, and therefore a kharaj which is obtained through an unjust system of collection will lead to a declining pace of development and overarching devastation"***[5].

Al-Iz Ibn Abd Al-Salam indicates that, ***"if we are asked why we insist on levying no more than a rate of one-tenth as ushr (sales tax), once a year, on the goods of the nonbelievers, our answer should be that, otherwise, the nonbelievers would not be interested to pursue trade in our countries. If this happens, Muslims will no longer be in a position to benefit from ushr revenue or the various goods that nonbelievers bring into our countries"***[6].

According to Ibn Khuldoon, ***"collection is mainly from peasants and merchants...when peasants and merchants refrain from doing business, there will be no collection; or perhaps collection may witness a continuous rate of decline"***[7].

3. Avoidance of *Thuna* (Double Taxation)

Avoidance of double taxation is one of the issues that receive much attention in the literature on public finance. However, this fundamental principle has been vividly stipulated by Islam since very long time. The Prophet (peace and blessings upon him) said:

(4) Al-Sarakhsi: *Al-mabsoot* (3/4).
(5) Abu Yusuf: *Al-kharaj*, p. 111.
(6) Al-Iz Ibn Abd Al-Salam: *Al-Qawa'id Al-Kubra*.
(7) Ibn Khuldoon: *Al-muqaddimah* (2/734).

"no duplication in alms"[8]. This *hadith* indicates prohibition of imposing two *Zakah* charges, on the same property, for the same year and on the same basis[9].

4. Prevention of using stratagems for Zakah evasion

Taxpayers often resort to stratagems to evade payment of taxes whenever it is possible under man-made laws and regulations. Such acts should presumably decrease under religious laws and regulations where fulfillment of financial duties constitutes a way of worshipping of Allah *(Subhanahu wa taala)* Who is closely observing everybody.

Regarding *Zakah* on livestock the Prophet (peace and blessings upon him) said: ***"separate herds should not be combined and combined herds should not be separated; for fear from alms"***[10].

Some people used to resort to such stratagems for the sake of total or partial evasion of *Zakah*. It is well known that in *Zakah* on livestock the amount of *Zakah* charge increases with the increase in the number of heads subject to the *awqas* (brackets) system.

5. Prevention of Spying

In order to prevent resort to spying with the aim of maximization of *Zakah* collection, Islam has made a clear distinction between apparent and non-apparent wealth. While the state collects *Zakah* on apparent wealth, people are left free to be inspired by their own faith to pay *Zakah* on non-apparent wealth either to the state or to *Zakah* recipients directly.

It has been reported that Omar Ibn Abd Al-Aziz said: ***"look at Muslims around you, and take Zakah out of that part of their apparent wealth which results from their various trading activities. The rate applicable is one dinar per every amount of forty dinars"***[11].

(8) Abu Obaid: *Al-Amwal*, pp. 536 & 614.
(9) Ibn Qudamah: *Al-mughni* (2/629).
(10) Al-Bukhari: *Al-Saheeh* (2/145).
(11) Imam Malik: *Al-muwata'* (1/246); Ibn Hazm: Al-*muhalla* (6/66).

According to Abu Obaid ***"it has never been reported about the Prophet (peace and blessings upon him) or those who came afterwards to have forced people to pay Zakah on money. People are left free to pay Zakah on money if they like, because Zakah in this case is under their own trusteeship and they are supposed to be keen enough to discharge of it"***[12].

6. *Zakah* is a financial duty on growing capital

Zakah is a financial duty levied on growing capital, and is supposed to be paid out of the "*Nama*'" (growth) rather than the principal. Levy of financial duties on capital may have a negative impact on budgetary allocations for production. However, *Zakah* is not due on fixed assets as per the viewpoint of the majority of the Islamic jurists.

Zakah also constitutes a direct charge because it is levied on the basis of possession rather than the circulation of capital. It is a duty on growing capital (productive capital), and not an overall levies on the wealth of the individual including fixed as well as movable assets. This is why *Zakah* is not levied on properties that are possessed for satisfaction of the owner's own needs. moreover, *Zakah* is levied at low rates so as to facilitate its payment out of the growth of the wealth. In the conventional fiscal system, financial charges that are levied on capital are considered as exceptional and complementary, because financial duties in that system are mainly based on income.

However, levy of financial duties on capital involves an incentive for investment; in addition to the fact that, it is more equitable than levy on income. Capital is more reliable than income in indicating the financial ability of the tax payer.

Therefore, *Zakah* rates are comparable to capital rather than to profit or income tax rates; when – contrary to present day tax systems - capital taxes constitute the basic rather than the supplementary component of the system.

(12) Abu Obaid: *Al-Amwal*, p.536 & 614.

Zakat Al-Fitr

Zakat al-fitr, which is sometimes called *futrah*, is a *Zakah* levy that becomes due after fasting during the whole month of *Ramadan*. The main objective of this charitable duty is to show sympathy with the poor and make them feel happy and enjoy *eid* celebrations with their other Muslim brothers.

When a person pays *Zakat al-fitr* before the *eid* prayer, it is considered as a valid *Zakah*; whereas if he pays it after the *eid* prayer it is considered as alms.

Zakat al-fitr is obligatory for every Muslim who possesses his daily food requirements. Its rate (per individual regardless of his gender or age) is one *sa'a* (2.175 kilograms) of dates, barley or the most predominant local foodstuff. The amount of *Zakat al-fitr* does not vary with regard to the financial position of the payer, because it is a per-head levy and not a levy on wealth. When a rich person pays *Zakat al-fitr* he will enjoy purification as a reward from Allah *(Subhanahu wa taala)*; and when a poor person pays it Allah *(Subhanahu wa taala)* will repay him in reward several times more than what he pays.

A Muslim has to pay *Zakat al-fitr* for his own self as well as for those whose sustenance is his responsibility. *Zakat al-fitr* becomes due starting from the time of sunrise on the day of *eid* up to the time of the *eid* prayer. Some jurists believe that it can be paid one or two days earlier.

The majority of Islamic jurists do not permit payment of *Zakat al-fitr* in cash; whereas the *Hanafi* jurists believe in the contrary. As per the Hanafi School, payment of *Zakat al-fitr* in cash is more preferable because it would enable the poor to buy the commodity he is more in need of. Nevertheless, it should be noted that at times of hardship and scarcity of food grains, it could become much better to pay *Zakat al-fitr* in kind than to pay it in cash.

Chapter: II
Taxation

Definition

Taxes or financial duties include financial obligations other than *Zakah*. Some Islamic jurists are of the view that there are no financial rights on wealth other than *Zakah*; while others believe that there are[(1)].

Perhaps the first scholar who strongly defended the idea of levying complementary financial duties was Ibn Hazm in his book *Al-Muhalla*, followed by Al-Juwaini in his book *Al-Ghiyathi*. In view of the way in which Ibn hazm tackles the issue, one can feel the fierce resistance that he seems to have encountered from the scholars of his time.

Reasons for Levy of Financial Duties

Al-Juwaini indicates some of these reasons as follows:

- Drought, sterility and poverty.
- Holy war and salaries of warriors, especially when an enemy's attack actually takes place or is expected.
- Building reserves for contingencies and catastrophes

Resorting to levy of financial duties under such circumstances is justifiable in the absence of enough funds in *bait al-mal* to cover such needs. Al-Juwaini states that ***"what I support and dogmatically assure is that the Imam has to persuade the well-to-do people to pay the leftover of their wealth in order to facilitate need satisfaction and sufficiency"***[(2)].

The Phenomenon of Growing Public Spending

This phenomenon, which is closely related to the reasons behind levy of financial duties and which is still being deliberated in contemporary writings on public finance has been tackled long time ago by Muslim scholars. During the time of Omar Ibn Al-Khattab (may Allah be pleased with him) there was a notable expansion in the geographical area of the Islamic state and a large increase in public spending on soldiers, the

(1) Ibn Zanjawayh: *Al-Amwal* (2/799).
(2) Al-Juwaini: *Al-Ghiyathi*, p. 261.

poor…etc. Under those circumstances, Omar Ibn Al-Khattab (may Allah be pleased with him) refrained from dividing the forcibly opened lands and declared them as *waqf*. In response to those who were asking for division of the conquered lands he said: ***"if I divide the lands in Iraq (…..) and Al-Sham (…..), what will be left to generate enough income for defending our borders and providing sustenance to poor children and widows in this country as well as in Iraq and Al-Sham?"***[3] He then added*: "do you see these borders? They need men to defend them; and do you see these big territories like Al-Sham, Al-Jazeerah, Al-Kufah, Al-Basrah and Egypt? They all need to be filled with troops that require generous spending. From where can all this be catered for, if I divide the lands? "*(4).

Al-Juwaini indicated that, **"*in this era the Islamic world is much wider than ever and – thank to Allah (Subhanahu wa taala) that it is still expanding. Indeed, every era has its suitable plans and rules*"**(5). Al-Juwaini also argues that, ***"when there are large military troops in the Islamic state need will certainly arise for more spending in order to sustain them"***(6).

Controls on Levy of Financial Duties

Scholars have established certain controls on levy of financial duties, including:

1. Justice on the part of the levying authority(7).
2. Consultation with those who have knowledge and expertise.
3. Existence of *Shari'ah*-acceptable public need. Al-Juwaini said: ***"I do not see that the Imam has the right to ask for Muslims' money so as to build well-protected palaces everywhere, or keep treasures of wealth, or spend money in pursuit of his own bride and fame"***(8).

   Such type of excessive spending on private purposes is strictly forbidden, because it entails wastefulness and extravagance.

4. Activities that result in private benefits should not be financed from public sources. If there is a publicly owned canal that needs cleaning and maintenance, public sources of revenue can be tapped

(3) Abu Yusuf: *Al-kharaj*, p. 25.
(4) Ibid.
(5) Al-Juwaini: *Al-Ghiyathi*, p. 255.
(6) Ibid, p. 280.
(7) Al-Ghazali: *Shifa' Al-Ghaleel*, p. 236; Al-Shatibi: *Al-Ietisam* (2/121).
(8) Al-Juwaini: *Al-Ghiyathi*, p. 286.

for this purpose. If, instead, the canal is privately owned the cost of its cleaning and maintenance should be borne by those who benefit from it. The justification for this, according to Abu Yusuf is ***"because (in the first case) cleaning and maintenance of the canal constitutes a public affair and, hence, can be financed from bait al-mal"***[9], and he adds*: **"when there is public need for maintaining the main canals the cost of maintenance is to be borne by bait al-mal, whereas people have to cater, out of their own sources, for the costs of maintenance of the sub-canals which they extend to their privately owned farms and orchards. Such costs have nothing to do with bait al-mal"***[10].

In the same context, Al-mawsili argues that, ***"the cost of maintenance of the main canals is to be covered out of the resources of bait al-mal, because such facilities are of communal benefit"***[11].

5. There should be no funds in *bait al-mal*, which can be spent for the purpose in question[12].
6. There should be no outstanding duties that the state can collect and use for the purpose in question[13].
7. There should be no big funds allocated for luxurious spending by statesmen and influential military ranks and civil officials instead of being directed towards the satisfaction of public needs.

In this regard Al-Iz Ibn Abd Al-Salam said to Sultan Qutz when the Tatars armies were about to invade the Muslim territories: ***"If the enemies break into the Muslim territories people must fight them and you may also take from the public what you need for the battle, provided that nothing is left in bait al-mal, and after you sell all the golden collectables and precious utensils that you have. Every soldier must have only his fighting weapon and a riding device, and there should be equality between soldiers and the public. Taking the wealth of the public along with only the leftover of the luxurious possessions and immense wealth of the soldiers, is strongly objectionable"***[14]. Imam Al-Nawawi also had a similar position with Al-Zahir Bebars

(9) Abu Yusuf: *Al-Kharaj*, p. 110.
(10) Ibid.
(11) Al-mawsili: *Al-Ikhtiyar* (3/72).
(12) Al-Ghazali: *Shifa' Al-Ghaleel*, p. 236
(13) Sultan: *Sultat Wali Al-Amr*, p. 310.
(14) Ibn Taghri: *Al-Nujoom Al-Zahirah* (7/72-73); Ibn Katheer: *Al-Bidayah wa Al-Nihayah* (13/283).

8. There should be no sufficient donations[15].

9. The state may resort to borrowing whenever it is possible, provided that it can repay what it borrows. It could also be possible to solicit settlement of premature financial commitments of *Zakah* and *Kharaj*. Such prepaid funds should be treated as loans to be redeemed later on through clearing arrangements. In this connection the Prophet (peace and blessings upon him) said: ***"we were in need of funds, and therefore, Al-Abbas lent us alms of two years"***[16] (three years according to some other versions of the *hadith*).

Al-Ghazali made further elaboration on the subject as follows: ***"If the Imam is not anticipating an inflow of funds that exceed future allocations of bait al-mal for military spending, how can he resort to borrowing with an empty hand at present and no hope for future income? However, if the Imam has any anticipated income (outstanding debt), or a guaranteed source of obtainable funds (deposit with a solvent party, kharaj receivables...etc) then borrowing is more appropriate than any other arrangement"***[17].

Al-Shatibi also, believes that ***"borrowing during crises has to be when an inflow of income to bait al-mal is expected. In the absence of any anticipated inflow of income, and when current sources of funds are very weak, levy of financial duties becomes inevitable"***[18].

10. Levy of financial duties should be proportionate to need, and subject to the spirit, objectives and rules of the *Shari'ah* pertaining to justice, absence of favoritism to relatives and influential personalities, due consideration to the ability of payers; *Nisab*; levy of reasonable rates; and all other principles that have been referred to in the preceding chapter on *Zakah*[19].

11. Revenue should be spent on the purposes for which it has been collected, without resort to tricks and stratagems[20].

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(15) Al-Juwaini: *Al-Ghiyathi*, p. 255 & 272.
(16) Al-Baihaqi: *Al-Sunan* (4/110); Al-Shawkani: *Nail Al-Awtar* (4/168).
(17) Al-Ghazali: *Shifa' Al-Ghaleel*, p.241.
(18) Al-Shatibi: *Al-Ietisam* (2/122).
(19) Al-Ghazali: *Al-Mustasfa* (1/303); Ibn Taimiyah: *Al-mazalim Al-Mushtrakah*, p. 28; Al-Shatibi: *Al-Ietisam* (2/121).
(20) Al-Shatibi: *Al-Ietisam* (2/122). See also Al-Qaradawi: *Fiqh Al-Zakah* (2/1089); Al-Abbadi: *Al-Milkiyah* (2/299); Sultan: *Sultat Wali Al-Amar*, 333.

Modern Taxes

1. Direct taxes and indirect taxes

There are two types of modern taxes: direct taxes and indirect taxes. Direct taxes are defined as the taxes levied on capital or income, such as profit tax and tax on wages and salaries. In this type of tax due consideration is given to the ability of the taxpayer as well as his personal and family circumstances. Direct taxes are normally payable on an annual basis and are borne by those who afford the payment.

Indirect taxes refer to taxes levied on consumption, production, import, export …etc. Examples of indirect taxes include import duties, financial stamps, and car or real estate registration fees. No consideration is given here to the ability of the taxpayer or to his personal or family circumstances. Revenue from indirect taxes is generated throughout the year, and the tax is borne by the poor as well as the rich. Therefore, indirect tax constitutes a heavier financial and psychological burden to the poor than to the rich, in spite of the differentiation in tax treatment, which is sometimes made between necessities and luxuries.

If direct taxes are more equitable, indirect taxes have the merit of generating more revenue. In most cases the taxpayer can shift the burden of the indirect tax to the consumer by adding it to the price of the commodity, contrary to the case of direct taxes where the burden remains on the taxpayer.

Rich people and holders of foreign investment concessions may use their influence to ensure that more indirect taxes are levied at the cost of direct taxes. This is done as a means of tax evasion and disavowal of financial commitments that are commensurate with the actual capabilities of such people(21).

As for the *Shari'ah* opinion pertaining to indirect taxes, it can be summarized in the following points:

a. It is well known that *Zakah* in the Islamic fiscal system is considered as part of direct financial duties, because it is levied on growing capital (money, articles of trade and livestock) and on

(21) Al-Mahjoob: *Al-Maliyah Al-Amah*, p. 247.

agricultural produce. Due consideration is given to the ability of the Zakah payer with regard to *Nisab*, basic personal and family needs, and elapse of a lunar year, or appearance of the produce (for agriculture).

b. One can hardly realize any indirect financial duties in the Islamic fiscal system other than custom duties in some exceptional cases; as we shall see hereafter. This characteristic of the Islamic fiscal system may have been due to the fact that Islam puts more emphasis on achievement of justice than on maximization of collection (the Islamic state is a state of *hidayah* "guidance" rather than a state of *jibayah* "collection").

c. Ibn Taimiyah indicated that, **"*the duties which the state levies on wealth are specified either per head; or on the basis of the size of herd or orchard, or the amount of money. There are also new levies other than those, which Shari'ah has prescribed on certain types of wealth. The new levies include duties payable by those who deal in trade of foodstuffs, clothes, livestock, fruits and the like. Such duties are charged when trade deals are concluded, and are taken either from sellers or from buyers"*** [22]**.**

According to Ibn Khuldoon, **"*a densely populated country is characterized with high prices, a situation which is usually aggravated by tolls. Imposition of tolls on transactions boosts up prices because traders as well as laymen price their commodities on the basis of detailed calculation of all the costs they incur including even their personal spending. Hence, tolls constitute an integral part of the prices of commodities"*** [23]. Furthermore, Ibn Khuldoon indicates that, ***"the prices of food commodities may include also the tolls levied on them and any other charges that the government imposes in the markets and at custom points"*** [24]**.**

d. *Shari'ah* research on indirect financial duties is very rare, and the general trend in the available contributions reveals an inclination towards prohibition of such duties on the basis of the injustice they entail (forbidden tolls).

(22) Ibn Taimiyah: *Al-Fatawa* (30/337).
(23) Ibn Khaldoom: *Al-Muqaddimah* (2/889).
(24) Ibid (2/877).

2. Progressive taxes

A tax rate can be either proportional (single rate) or progressive (increasing rates). Again a progressive tax can be based either on a strata or a brackets system. To grasp the difference between these three types of taxation formulas let us consider the following examples:

a. A proportional tax rate of 10% in an amount of SR 5000 is: 5000X10% = SR 500.

b. Now let us assume that we have the following progressive strata system:

Stratum	Tax Rate
01 – 1000	Zero
1001 – 2000	5%
2001 – 3000	10%
3001 – 4000	15%
4001 – 5000	20%

Under this progressive tax system the tax on SR 5000 is: 5000X20% = 1000

c. If we have the following progressive brackets system:

Bracket	Tax Rate
01 – 1001	zero
1001 – 2001	5%
2001 – 3001	10%
3001 – 4001	15%
4001 – 5001	20%

The progressive tax on SR 5000 in this case is calculated as follows:

The first thousand riyals:		= exempted
The second thousand riyals	1000X 5%	= SR 50
The third thousand riyals	1000X 10%	= SR 100
The fourth thousand riyals	1000X 15%	= SR 150
The fifth thousand riyals	1000X 20%	= SR 200
The total tax amount		= SR 500

The discussion on the principle of progression from the *Shari'ah* perspective can be summarized in the following points:

a. It is well known that the rate of *Zakah* is proportional, and in the order of 2,5% on money and articles of trade; 5% on irrigated agricultural produce and fruits; 10% on non-irrigated agricultural produce and fruits; and 20% on treasure.

b. Some researchers seem to have been misled by the illusionary feeling that some types of *Zakah*, such as *Zakah* on livestock, are progressive. This might have been due to the fact that *Zakah* on livestock can be presented in a tabular form just like progressive taxes, and can be divided into brackets.

Table of *Zakah* on camels

Number	**Due *Zakah***
01 – 04	No *Zakah*
05 – 09	1 ewe
10 – 14	2 ewes
15 – 19	3 ewes
20 – 24	4 ewes
25 – 35	*1 bint makhad*
36 – 45	*1 bint laboon*
46 – 60	*1 hiqqah*
61 – 75	*1 jaza'ah*
76 – 90	*2 bint laboons*
91 – 120	*2 hiqqahs*
For a herd of more than120 camels	Either *1 bint laboon* for every 40 heads or *1 hiqqah* for every 50 heads

Bint makhad: 2 years old camel
Bint laboon: 3 years old camel
Hiqqah: 4 years old camel
Jaza'ah: 5 years old camel

Table of *Zakah* on Sheep

Number	**Due *Zakah***
01 – 039	No *Zakah*
40 – 120	1 ewe
121 – 200	2 ewes
201 – 299	3 ewes
For a herd of more than 299	1 ewe out of every 100 ewes

Table of *Zakah* on Cows

Number	Due *Zakah*
01 – 29	No *Zakah*
30 – 39	*1 tabeea*
40 – 59	*1 musinnah*
60 – 69	*2 tabees*
70 – 79	*1 musinnah + 1 tabeea*
80 – 89	*2 musinnahs*
90 – 99	*3 tabeeas*
100 – 109	*1 musinnah + 2 tabeeas*
For a herd of more than 109 heads	Either *1 tabeea* for every 30 cows or *1 musinnah* for every 40 cows

Tabeea: 2 years old cow
Musinnah: 3 years old cow

What should be emphasized here is that the rate of *Zakah* on livestock is also proportional rather than progressive. It is 2,5%, on the average, just like *Zakah* on money and articles of trade. This has been emphasized by the holy *hadith* of the Prophet (peace and blessings upon him) in which he said about *Zakah* on camels: ***"one bint laboon out of every 40 camels"***[25]**;** and about *Zakah* on sheep ***"one ewe out of every 40 sheep"***[26]***;*** and about *Zakah* on cows ***"musinnah out of every 40 cows"***[27].

c. There seems to be no need for progressive rates in financial duties, since the wealth is supposed to have stemmed from a permissible origin and is not acquired through *riba*, monopoly, bribe, cheating, unfairness, *Najash* (fictitious biding up of price) or oppression. Even when wealth is acquired through *Shari'ah*-forbidden means, the appropriate remedial action is to return back the seized properties to their owners rather than to pay more to the state through progressive taxation.

If the objective behind payment of progressive taxes is to increase government revenue so that it can become able to meet the increasing public needs, there are other permissible means for achieving this

(25) Al-Bukhari: *Al-Saheeh* (2/146).
(26) Imam Malik: *AL-muata'* (1/260); Abu Dawud: *Al-Sunan* (2/98); Al-Tirmizi: *Al-Sunan* (3/8).
(27) Imam Malik: *AL-muata'* (1/259); Abu Dawud: *Al-Sunan* (2/100); Al-Tirmizi: *Al-Sunan* (3/11).

objective. Such means include revenue from state-owned properties (*kharaj*), increasing the proportional rates, encouragement of donations, public borrowing, prevention of evasion, refraining from favoritism to relatives and powerful groups, and avoidance of extravagance and wasteful public spending.

If the objective behind the progressive rates is elimination of wealth and income disparities, Islam has been able to achieve that purpose through other permissible means including among others legislations on inheritance and *fay'* (what nonbelievers surrender to Muslims without fighting).

d. The viewpoints of contemporary *Shari'ah* researchers with regard to progressive taxation reveal some degree of variance in addition to the fact that the volume of research in this field is still very limited. While some researchers seem to be against the prohibition of progression(28), others explicitly indicate that it is forbidden(29).

e. Even if we accept that progression – as its advocates would claim - constitutes shifting of more burden from the poor to the rich in order to equate marginal sacrifice among the different social groups, progression should still be applied within the reasonable limits. It should not be carried on to the extreme stage of confiscation or to where it can lead to evasion and weakening of economic incentive.

f. The principle of equality of sacrifice is based on the principle of marginal utility of money; which is not at all alien to Islam and Islamic scholars. As indicated by Imam Al-Shafiee ***"a single dinar could mean too much to the extremely poor, whereas hundreds of dinars could mean nothing to the extremely rich"***(30). Al-Juwaini believes that ***"the poor may regard a single penny as great, while heaps of money might not appear so great in the eyes of a king"***(31). According to Al-Iz Ibn Abd Al-Salam ***"equality is not to be visualized in terms of quantity, but rather in terms of satisfaction; or you may say - if you like – in terms of sacrifice"***(32).

(28) Al-Qaradawi: *Fiqh Al-Zakah* (2/1065); Al-Abbadi: *Al-milkiyah* (2/299).
(29) (m. Allais, L 'Impôt sur le Capital et la Reforme monétaire).
(30) Al-Iz Ibn Abd Al-Salam: *AL-Qawa'id Al-Kubra* (2/222).
(31) Al-Juwaini: *Al-Burhan* (2/920)
(32) Al-Iz Ibn Abd Al-Salam: *AL-Qawa'id Al-Kubra* (2/66).

3. Inheritance tax

Inheritance is the wealth that a deceased leaves behind to his heirs, after catering for the expenses of his preparation, shrouding, and burial; and repayment of his debts. The inheritance tax is a direct and progressive tax levied on capital, and is one of the modern taxes that were unknown during the early Islamic era. Taxation and public finance scholars define inheritance tax as the tax levied on the transfer of wealth from the testator to the heirs or legatees(33). However, scholars seem to be in disagreement with regard to legal characterization of this tax.

a. Some scholars believe that the inheritance tax is a price for a common service represented by the protection which the state renders to the deceased and the inheritance he leaves.

b. Other scholars consider it as the share of the state in the inheritance, since the state is considered as one of the heirs; and it may become the sole heir when there is no other heir. According to this group, it is true that the Islamic inheritance system is based on kinship; yet citizenship ties between the individual and the state are not totally excluded from the overall setup of the Islamic inheritance system.

c. A third group argues that inheritance is a legal system determined by the state, and therefore the state has the right to consider (or impose) itself as a partner in the inheritance.

d. A fourth group is of the opinion that the inheritance tax is an income tax in its essence, but it is postponed until the time when wealth is transferred on death. Or it is a tax debt postponed till the time of death. In the absence of this tax a higher rate of income tax would have been levied on the wealth of the deceased during his life.

e. Some scholars hold the opinion that inheritance tax is an income tax from the standpoint of the living heir, rather than a tax on capital from the standpoint of the testator as the case is mistakenly taken to be.

(33) Al-mahjoob: *Al-maliyah Al-Amah*, p. 273.

f. Another group believes that the inheritance tax is a matter of state sovereignty, and that the state has the right to levy any tax that could help the achievement of its fiscal, economic, social and political objectives. Furthermore, the inheritance tax has several merits that tempt the state to levy it. It constitutes one of the basic forms of income tax due to the fact that it is cost-effective (low cost of collection and big amount of revenue), equitable (it is levied on a wealth which does not entail much effort from the heir) and can be levied in a variable rate subject to the degree of kinship (a low rate in case of close kinship and vice versa). In addition to all that, the inheritance tax tends to reduce wealth and income disparities, and does not constitute a heavy burden to its payer.

Inheritance tax is a progressive tax that increases in proportion to the size of the taxed amount and remoteness of kinship, on the assumption that a close relative has more contribution to the wealth of the deceased; either through direct involvement in the work effort exerted for generation of the wealth or through indirect facilitation of work environment.

The tax is levied either on the total amount of the inheritance before its division among the heirs, or on the share of every heir after division. The second method of levy seems to be more equitable with regard to catering for the personal and family circumstances of the taxpayer, the degree of his kinship and the size of his share in the inheritance. Sometimes the two methods of levy are combined(34).

What can be said about the inheritance tax from the Islamic perspective is the following:

a. When a person inherits a *Zakah*-liable wealth he has to pay *Zakah* on it as part of his other *Zakah*-liable wealth. The heir in this case adds each kind of inherited wealth to the relevant kind in his own stock of wealth and pay the due amount of *Zakah* after the elapse of one lunar year, or at the time of harvesting (for agricultural produce and fruits).

(34) Al-mahjoob: *Al-maliyah Al-Amah*, p. 273.

Even the few scholars, who believe that income earned during the year should be subjected to *Zakah* as soon as it is earned[35], emphasize that what should be levied on inherited wealth is *Zakah*, and it has to be levied by the state, on the inherited (apparent) wealth, and according to the prescribed *Nisab* and rate. The revenue generated from such *Zakah* is to be spent on the normal *Zakah* heads and not on the usual spending outlets of tax revenue.

b. It is well understood that the state (*bait al-mal*) is the heir of any deceased that has no statutory heir, blood relative or remote relative. This has been indicated by the four *Fiqhi* Schools and can easily be seen in the various *Fiqhi* contributions pertaining to ranks of heirs. Nevertheless, *Fiqh* scholars are in disagreement as to whether the state is entitled to such inheritance in its capacity as a blood relative (*asib*) of the deceased, or because if not taken by the state, the inheritance would become left without an owner.

c. As per the viewpoint of the former *Maliki* and *Shafiee* jurists the remaining inheritance - after distribution to statutory heirs; and when there is no blood relative of the deceased, is to be taken by the state (*bait al-mal*). That is to say it should not be redistributed (on the basis of the principle of *rad*) among the same statutory heirs. However, the more recent *Maliki* and *Shafiee* scholars believe that the remaining inheritance should be redistributed among the same statutory heirs because *bait al-mal* is no longer adhering to the rules of *Shari'ah* in collection and distribution of its resources.

d. The state (*bait al-mal*) becomes entitled to inheritance when there is no statutory heir or a blood relative of the deceased. This is so because the eligibility of remote relatives (*zawi al-arham*) to inheritance is disputable due to their remote relationship with the deceased and hence; while the *Hanbali* and the *Hanafi* jurists believe that they are entitled to inheritance the former *Maliki* and *Shafiee* jurists believe that they are not. However, according to the more recent *Maliki* and *Shafiee* scholars, remote relatives are entitled to inheritance because *bait al-mal* is no longer abiding by the rulings of *Shari'ah* so that it can become entitled to inheritance.

(35) Al-Qaradawi: *Fiqh Al-Zakah* (1/495).

e. The inheritance revenue that may go to *bait al-mal* is something other than the inheritance tax. The inheritance tax is levied whether there are statutory heirs and other blood and remote relatives of the deceased or not. Therefore, the inheritance tax constitutes a specific levy on the inheritance, which has nothing to do with eligibility of the state to the whole inheritance (or the remainder of it) in the absence of eligible heirs.

f. It seems that levy of inheritance tax does not enjoy wide acceptance among inheritance scholars and jurists. This is so because division of inheritance is a matter that Allah *(Subhanahu wa taala)* Himself has chosen to resolve. Therefore, the presence of a clear *Qur'anic* pattern of inheritance division, allows only a quite narrow scope for interpretative judgment(36).

g. There are no *Shari'ah* studies on inheritance tax. The few scholars who studied the subject indicated that inheritance tax is forbidden because it is part of the oppressive tolls(37).

4. Commercial and industrial profit tax

This is one of the modern types of income tax. It is a direct (and usually progressive) tax levied on the net profit of the company as it appears in the Profit and Loss Account. If the profit exceeds the exemption limit the company has to pay the tax. If it is at the exemption limit or below, or there is a net loss, the company enjoys an exemption from the tax irrespective of the value of its fixed and current assets. modern tax administrations pay much attention to determination of taxable profit in the light of the declaration of the taxpayer and after checking his books entries if he has a proper accounting system. In the absence of a proper accounting system, as is the case for small single-proprietor enterprises, taxable profit can be estimated on the basis of the apparent conditions of the enterprise.

The *Shari'ah* status of commercial and industrial profit tax can be visualized in terms of the following points:

(36) See *Surat Al-Nisa'*, verses No. 11, 12 and 176.
(37 Sultan: *Sultat Walie Al-Amr*, 485.

a. It is well known that in the Islamic system *Zakah* is levied on capital, rather than on profit. The most relevant type of *Zakah* to our present discussion on commercial and industrial profit tax is *Zakah* on articles of trade, which is levied on the net current assets of the enterprise (cash in hand and bank balances + goods and materials at their values on the date when *Zakah* is due + receivables – payable debts).

It has been reported that maymoon Ibn Mahran said: ***"when it is time to pay Zakah, add the cash balances you have to the money value of your articles of trade and the amounts of debt owed to you by solvent debtors, and deduct the amounts of debt you owe to others; and then pay Zakah"***(38).

Fixed assets such as real estates, machinery, tools and furniture are exempt from *Zakah* on the ground that such assets are as essential to the merchant as basic needs (articles of possession, which include: residence, household utensils and transport device).

Some scholars hold the view that exemption from *Zakah* should be confined to trade fixed assets, whereas industrial fixed assets should be subjected to *Zakah*(39).

b. *Zakah* on articles of trade can be applied to commercial as well as industrial enterprises. Ibn Taimiyah indicates that: ***"these (millers and bakers) should pay Zakah on articles of trade according to the four Fiqh schools and the majority of Islamic jurists. Payment of Zakah is also obligatory for anyone who purchases a commodity with the aim of selling it for a profit, whether in its original form or after manufacturing"***(40).

However, some contemporary scholars applied the *Zakah* on agricultural produce and fruits to industrial enterprises.

c. *Zakah* on articles of trade differs from profit tax in several respects, including *Nisab* (compared to tax-free level of profit), *Zakah* base (compared to tax base) and *Zakah* rate (compared to tax rate).

(38) Abu Obaid: *Al-Amwal*, pp. 521, 527 & 535.
(39) Al-Qaradawi: *Fiqh Al-Zakah* (1/457 & 476).
(40) Ibn Taimiyah: *Al-fatawa* (28/90); Al-Shatibi: *Al-Fatawa*, p. 132.

1. *Nisab* is different from tax-free level of profit with regard to amount. moreover, when the *Zakah* payer's wealth is below *Nisab* he enjoys exemption from *Zakah*, but when his wealth reaches the *Nisab* or exceeds it, the *Zakah* rate is applied to the whole amount of his wealth without exclusion of the *Nisab* amount. In case of profit tax, when the profit exceeds the level of exemption, the tax becomes payable on the excess amount of the profit only, excluding any amount of profit that falls within the level of exemption.

2. The *Zakah* base for articles of trade and the tax base for profit tax are different, because for articles of trade the *Zakah* base is capital (trade stocks, money, and current assets) while the tax base for profit tax is profit. Accordingly, in *Zakah* on articles of trade the *Zakah* payer is obliged to pay *Zakah* even when he incurs a loss as long as his wealth reaches the *Nisab*; whereas a profit tax payer does not have to pay the tax when he incurs a loss, even if his assets are in millions.

3. The *Zakah* rate on articles of trade and profit tax rate are also different. The rate of *Zakah* on articles of trade which is 2,5% is proportional and moderate, while profit tax rate is higher than that, and normally progressive. It may also be noted that the *Zakah* rate is levied on capital, while the tax rate is levied on income (profit). Regarding articles of trade, there is no *Zakah* on profit except for that part which is embodied in the trade articles themselves during the year and which can be positive (profit) or negative (loss).

4. Consequently, we can say that business profit tax cannot be compared to *Zakah* on articles of trade due to the differences we have shown in the preceding points and other differences that are not supposed to be tackled in detail here.

In levying any new financial duty we should seek guidance in the Islamic rules and principles, especially those pertaining to *Zakah*. This is so because what Allah *(Subhanahu wa taala)* has prescribed is certainly the most equitable, efficient and farthest away from fancy, suspicion, selfishness and manipulation.

5. *Zakah* on salaries and wages

This is also one type of modern income taxes, and is usually progressive. The tax is deducted at source from the salaries of the staff and the wages of the workers to the benefit of the state.

The *Shari'ah* status of this tax can be visualized in the following context:

Zakah in Islam is levied on capital, and not on income. However, some may argue that *Zakah* on agricultural produce and fruits is a *Zakah* on income. Others may hold the view that *Zakah* on that part of wealth acquired during the year (*al-mal al-mustafad*) also constitutes *Zakah* on income.

a. *Zakah* on agricultural produce and fruits

Agricultural produce and fruits, which are the yield of farms and orchards, are quite similar to income, yet they do not constitute profit. Profit signifies the difference between revenue and expenses originating from sale operations. In this sense, profit also is not a salary or a wage. At the evolutionary stages of Islamic legislation, there were salaries and wages in the private as well as the public sector, yet no *Zakah* was levied on them. *Zakah* was levied on money which constitutes the excess income and wealth that reaches *Nisab*, after deduction of all expenses including personal and family needs.

b. *Zakah* on acquired wealth (*Al-Mal Al-Mustafad*)

Acquired wealth in this context indicates the wealth that the owner gains during the year. The *Fiqhi* controversy here relates to the issue of whether – for the sake of easement - such wealth can be added to the principal wealth as if a complete lunar year has elapsed since its acquisition, or we should adopt the more complex treatment of calculating a separate *Zakah* year for it.

However, it seems to be more appropriate to calculate a separate *Zakah* year for such additional wealth when it is a big amount arising, for instance, from inheritance, will, or grant.

On interpretation of certain *Shari'ah* texts, some Islamic jurists thought that in the early Islamic period the state used to give grants after immediate deduction of *Zakah* from them, and hence they went on to advocate *Zakah* on salaries and wages along the same lines. In fact what the state used to deduct from grants was not a *Zakah* on grants. The process was no more than late collection of outstanding *Zakah* amounts (debts) which the grant recipients owed to the state. Therefore, the state used to deduct such amounts from the grants in a way that resembles clearing arrangements.

As reported by Al-Qasim Ibn Mohammad, ***"Abu Baker used to ask people while giving them their grants: do you have any wealth on which Zakah is due? When a grant recipients answers in the affirmative, Abu Baker used to deduct Zakah from his grant, and when he answers in the negative he used to give him the full amount of his grant"***(41).

Abu Baker on his part did not take *Zakah* out of any type of wealth before the elapse of a full year. According to Abu Obaid ***"in fact what they (Abu Baker and Othman) used to take was the Zakah that had fallen due before the grants, and not after them"***(42).

Also, Qudamah Ibn maz'uoon indicated that *"**at the time of distributing grants Othman Ibn Affan (may Allah be pleased with him) used to send someone to ask my father if he had unpaid Zakah commitments so that they can be deducted from his grant"***(43). This practice is also adopted by the states of our present times.

5. Custom Duties

These are the taxes levied on the incoming and outgoing goods; that is to say on imports and exports of a country. Custom duties constitute one of the most important types of indirect taxes with regard to the volume of tax revenue, especially in developing countries which heavily rely on imports (of manufactured commodities) and exports (of raw materials).

(41) Imam Malik: *Al-muwata'* (1/245); Abu Obaid: *Al-Amwal*, 504.
(42) Abu Obaid: *Al-Amwal*, 504.
(43) Ibid.

The objective behind levy of custom duties could be fiscal (increasing the volume of public revenues), economic (protection of infant industries at the national level), political (application of the Principle of Reciprocity) or social (levy of low duties on necessities and high duties on luxuries; or levy of high duties on certain national commodities to curtail their exports).

Regarding custom duties in the Islamic fiscal system, the following can be said:

a. In the Islamic history there were political custom duties known as *Ushoor*, charged to those who used to come from *dar al-harb* (the abode of the war). Such levies were based on the Principle of Reciprocity.

b. There were also some financial duties carrying the same name "*ushoor*" charged to Muslims. This has led some researchers to think that such charges were also custom duties. In fact those charges were *Zakah* levied on non-apparent wealth of Muslims that became apparent while moving across the borders.

c. A state may use *ushoor* as a tool of economic policy by changing the rate up and down subject to the degree of domestic need for the commodity in question. The following examples can illustrate the point:

1. Ibrahim reported that the *ushr* levied on the wealth of the *Zimmis* was 5%, while that levied on alcoholic beverages was 10%[(44)].

2. Omar Ibn Al-Khattab (may Allah be pleased with him) used to levy a rate of (5%) as *ushr* on oil and wheat to boost up the supply of these two commodities to Al-madeenah Al-munawarah; and (10%) on cotton fabrics.

3. The preceding examples indicate that custom duties (*ushoor*) were mainly charged to traders from *dar al-harb* as an exceptional case of indirect taxation, subject to the principle of reciprocity.

(44) Ibn Adam: *Al-Kharaj*. P. 69.

Evasion of Conventional Taxes

Some people may feel that conventional taxes are unjust tolls that lack *Shari'ah* permissibility and therefore they may try their best to escape paying them.

However, Ibn Taimiyah has indicated in his message about *Al-mazalim Al-mushtarakah* (Common Inequities) that when an unjust financial duty is imposed as a collective obligation on the whole members of a certain community, evasion of such duty by some members of the community will aggravate the burden of injustice that falls on the others, especially the weak segments of the society.

According to Ibn Taimiyah ***"In case of collective duties like unjust tolls imposed by the ruler on the members of a certain village - per head or according to the size of their properties - every member has to pay his share so as not to cause injustice to others. He should pay either his full share or even more than it in order to render help to others.***

No member of the group should refrain from payment of his share since that will aggravate injustice inflicted on other members. If the total amount of the levy has to be collected anyway; and a member uses his social status or bribe or any other means to evade payment of his share, other members will have to pay more than their original shares. Hence, the member who evades payment will cause injustice to those who will be forced to pay his share over and above their own shares. Evasion of payment in this case cannot be considered as a permissible act of safeguarding one's own self against payment of the unjust levy. It could have been so, if the unpaid share would not be charged to other members.

Such harmful evasion of payment could happen when, for instance, the ruler imposes a lump sum amount of 10000 Dirhams as a collective duty of the residents of a certain village. Some of the notable personalities of the village may use their social status, bribe or any other unlawful means to avoid payment of their shares. Consequently, the shares of those who evade payment will be charged to those who have no means for evasion.

A person who evades payment of his share cannot claim that he has nothing to do with the injustice inflicted upon those who will be forced to pay more than their original shares, and that the responsibility of a harm thus inflicted rests with the party who forces them to pay.

Such argument is invalid because firstly: the party who collects the levy could be executing the orders of a supreme authority to collect the full amount of the duty and, hence, he will be obliged to increase the share per member when some members avert payment.

Secondly: even when the party who collects the levy is the supreme authority, it is still incumbent upon him to achieve justice in what he demands from these people. If the levy itself is unjust, it should at least be made a fair process of causing injustice. Forcing the non-evading members to pay increased shares in this case will escalate the oppression they have to suffer. People always appreciate equality and detest favoritism under all circumstances.

The person who manages to get relief from payment of his share is well aware that his evasion will compel the party who collects the levy to do more injustice by squeezing other people to pay more. It is impermissible for a person to request from other people what will make them do injustice; even if such request is not in the form of direct order.

Therefore, when the member who manages to evade payment claims that aggravation of injustice for others is not his fault, he will be quite similar to a ruler who designates someone to be in charge of a certain public affair and orders him to do justice; while he is quite sure that the designated person will not do justice.

Evasion of collective duties will lead to a disproportionate relationship between ability to pay and the assigned share. The poor and weak segments of the society may have to shoulder the burden which should have been shouldered by the well-to-do groups; and the whole situation will end into a horrible mess of evil and corruption"[45].

(45) Ibn Tymiyah: *Al-Fatawa* (30/337-342).

Chapter: III

Financial Penalties (*Tazeer Mali*)

The Arabic word *'Tazeer'* is a bi-meaning word which could mean, in one sense revering someone; and in another sense subjecting him to disciplinary action. In *Fiqh* terminology *'Tazeer'* is a discretionary punishment that becomes due for breach of a right of Allah *(Subhanahu wa taala)* or a right of a human being; by committing an unlawful act that has no *Shari'ah*-prescribed punishment or penance.

In Islam, the discretionary punishment may include execution, flogging, exile, imprisonment or imposition of financial punishment. Financial penalties can include withholding, damaging, changing the form, or seizure of property.

Some scholars believe that punishment through damaging of property is a detestable act, because the property can be given as alms to the poor and hence the punishment of the perpetrator can, at the same time, result in a benefit for the poor.

An example of punishment by changing the form of the property is dismantling the facilities used for *Shari'ah*-banned entertainment.

Some Islamic jurists are of the view that financial penalties are permissible, while others argue that they are not. According to the former group an example of permissible financial penalties is confiscation of part of the wealth of a *Zakah* evader.

Part: V

The Most Important Taboos

Chapter: I

Usury *(Riba)*

In Arabic language, the word *'Riba'* means increment. In *Fiqh* terminology *'Riba'* refers to the additional amount charged against acceptance of postponement (commitment of *riba al-nasi'ah* or *riba al-qard* in *Fiqh* terminology).

There are also two other types of *riba*, namely: "*riba al-nasa"*" and "*riba al-fadl*". *Riba al-nasa'* is the *riba* which originates from postponement of one of the two exchanged commodities in barter deals. For instance, when the deal involves exchange of gold for gold, silver for silver or wheat for wheat; and one party makes immediate delivery while the other postpones delivery for some time; the transaction leads to commitment of *riba al-nasa'*. In this case, the usurious increment goes to the party who postpones delivery, because the commodity that has been immediately delivered worth more than its postponed equivalent. Therefore *riba al-nasa'* stems from the merit of spot delivery over postponed delivery.

Riba al-fadl refers to the addition to any of the two exchanged amounts when both are delivered simultaneously. For instance, when 1000 kilograms of wheat are exchanged on spot for 1100 kilograms of wheat the excess amount (100 kilograms) is considered as *riba al-fadl*.

Hence, we can say that *riba al-nasa'* relates to time rather than to the excess amount, and *riba al-fadl* relates to excess amount rather than to time, whereas *riba al-nasi'ah* involves both time and excess amount.

It seems that prohibition of *riba al-nasa'* and *riba al-fadl* stems from the need for barring the way to pretexts which may be used for commitment of *riba al-nasi'ah*. A fictitious sale process can sometimes be used as a means for concealing a usurious loan.

The major *hadith* on prohibition of *riba* is the one known as the *hadith* of the six items. The Prophet (peace and blessings upon him said) ***"(when exchanging) gold for gold; silver for silver; wheat for wheat; barley for barley; dates for dates; or salt for salt, the two exchanged amounts should be of identical type and quantity, and must be delivered simultaneously. If the two***

exchanged amounts are of different kinds, then you may exchange them in the quantities you like provided that the deal does not entail postponement of delivery"[1].

To know that in Islam a loan should not generate a predetermined usurious benefit is not sufficient to understand the overall concept of *riba* in Islam. Besides prohibition of interest on loans one needs to know that in Islam cash capital is entitled to a share in the profit in *Mudharabah* and that in sale on credit an addition to price is permitted to cater for time dimension; or time is entitled to a share in the price as *Fiqh* scholars would have said.

The Danger of *Riba*

Riba is dangerous even if it is in a minor degree. The usurer – under economic stability and in the absence of inflation – can be able to accumulate huge amounts of wealth especially if he deals in compound *riba* by reinvesting the principal and the return in each round. *Riba* works in accordance with the same rules of geometric progression and therefore it grows at an unimaginably rapid pace.

For further illustration it may be suitable to refer to the story of the chess player who made a condition that if he beated his opponent the latter should put one bean of wheat on the first square in the chessboard and then double the quantity of wheat while moving from one square to the other up to the sixty-fourth square. The quantity of wheat that the beaten player had to provide was found to be very huge.

At the beginning of the capitalist era, an English religious man and economist named Richard Brice said ***"If a penny were invested through compound interest in the first year of the Gregorian calendar, its value in the early capitalist era would have become equal to the value of a solid ball of gold that is several times bigger than the earth".***

In other words: ***"If a single penny were invested since the time of birth of the Christ at an interest rate of 4%, the outcome of that in 1750 would have been sufficient for purchasing a ball of gold that is equal to the earth in weight; and in 1990 the yield of the investment would have been sufficient for the purchase of 8190 balls of gold of the same weight"***[2].

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(1) Muslim: *Al-Saheeh* (11/14).

(2) Boyle D. (ed.), money Changers, p. 104 (quoted from: Al-Suwailim: *Al-Takafu' Al-Iqtisadhi*, p. 6).

According to the French economist and 1988 Nobel laureate maurice Alias, ***"An amount of capital invested through interest increases at an exponential rate, and it is quite easy to prove the fact that even if the interest rate is relatively low; continuous capitalization of interest earnings will lead to tremendous growth in the principal amount"***(3).

In a lecture he delivered in Damascus in 1953, Schacht indicated that using a simple mathematical calculation reveals the fact that the whole wealth on the earth was about to be in the hands of a very small number of usurers(4).

As stated by J. H. Houston ***"compound interest is a compound sin which, in a limited economic world, gives freedom to an exponential growth that causes a great deal of injustice, and makes debts non-repayable. This is not just absolute religion, but the outcome of thousands of years of gloomy experience of concentration of wealth in the hands of the few and debt slavery; as has been discussed by all the old books of wisdom: the Bible, the Qur'an and the Greek philosophers. In a world where per capita output and total real output achieve no growth, and also money (…) cannot grow steadily, the imposition of any positive interest rate will lead to excessive concentration of wealth in the hands of few usurers, and hence to economic collapse"***(5).

Therefore, it seems that when Allah *(subhanahu wa taala)* says: ***"Devour not usury doubled and multiplied"*** [*Al merman*: 130] He instructs Muslims not to practice *riba*, because however small it is, *riba* increases in multiples.

Distinction between *Riba* and Interest

Interest has become permissible in Western thought after long theorizing as well as practicing battles. The state had sometimes intervened with the aim of determining the appropriate interest rate or imposing a maximum limit for it, as was the case during the Greek era. During other times there was no state intervention for determination of the rate of interest and that was the case during the Roman era. Under the state intervention, a specific limit for permissible interest was fixed so that any interest charge beyond it was to be regarded as forbidden usury.

(3) Allais, Economie et intérêt, t. 1, p. 43.
(4) Qutb: *Tafseer Aayat Al-Riba*, p. 14.
(5) mills and Presley, Islamic Finance, p. 117.

However, it seems that such distinction between *riba* and interest was not a widely accepted idea. There were some scholars who argued that the state should stop intervention (pricing) and interest rate should be left to be determined by the free interplay of market forces subject to the principle of economic freedom. According to these scholars determinations of the interest rate through state intervention is useless, or it is even harmful, because it gives rise to the prevalence of scams and expansion of black economy; and hence provokes rising rather than declining interest rate tendencies.

On the success of these arguments, Britain issued a law according to which the lender was left free to impose the rate of interest he liked. Since the issuance of the Consumer Credit Law of 1974 there was a continuous move towards deregulation and liberalization of interest rates. Weak borrowers had to prove their claims of exploitation before the courts, on case by case basis.

In the USA the Usury Law was abandoned since the 1980's. Other countries also did the same(6).

It is clear, therefore, that distinction between *riba* and interest was not based on a solid foundation. Perhaps it was just a preparatory step on the way to permitting both *riba* and interest.

Distinction between *Riba* and Profit

Contrary to profit, *riba* denotes an increase (or a decrease) made in compensation for time; an increase is for delay and a decrease for acceleration of payment. Profit is not at all like that. When someone borrows SR 100,000 today against SR 110,000 after a year, the increment (interest) he has to pay is SR 10,000 per annum. As we have shown earlier, interest is very effective even if it is at a very low rate. Therefore, one can imagine how disastrous *riba* will be if it is left free like profit without any ceiling. No doubt interest rates, if left uncontrolled, will result in tremendous increases in usurious gains and become one of the major sources of disaster that hinder sound growth and distribution.

(6) Ibid, p. 105.

Consequently no one has the right to issue *fatwa* that interest can be considered as profit and, hence, treated on that basis; or that a loan can be considered as a sale transaction. Such *fatwas* would pave the way for interest rates to escape all controls of monetary policy.

The Wisdom behind Prohibition of *Riba* in Consumption and Production Loans

In Islam capital and labor are subject to different treatments. Labor can enjoy either a fixed wage or a share of the profit, whereas capital is of two types: capital that can be lent (such as money) and capital that can be leased (such as machinery). The first type of capital is completely different from the second.

When capital is provided as a loan, ownership of the lent amount shifts from the lender to the borrower during the loan period, and so is the guarantee of that amount. That is to say, the borrower has to bear the responsibility of repaying the full amount of the loan. Consequently, the borrower will become entitled to the benefit, which results from consuming or investing the borrowed amount, because the general rule is that ***return*** follows ***guarantee*** and that ***gain*** is linked to ***cost***. It is, therefore, impermissible for the lender to obtain compensation from the borrower (besides the guarantee) since the ruling principle is that ***pay and guarantee do not come together***.

When capital funds are provided for the sake of financing production, which also requires labor input, should the risk be borne by the owner of capital or the owner of labor? If the owner of capital is to get a predetermined amount of interest, the poor worker will have to bear the whole risk (of both capital and labor). If the project incurs loss the worker will lose his labor and will have, over and above, to guarantee the amount of funding that has been provided by the owner of capital. If, instead, such project is to be based on profit sharing, each of the two parties will have to bear his respective share of risk.

In other words, the owner of capital should not be relived from bearing the risk of his capital; because in the absence of borrowing, or if the owner of capital is to invest his funds by himself he will be obliged to bear the risks. Hence each of the two parties has to bear the risk of his share in the project. If the owner of capital is to enjoy a predetermined

amount of interest it means that he is allowed to shift his risk to the worker. In Islam the worker can shift his risk to the owner of capital by getting a predetermined wage, yet the owner of capital cannot shift his risk to the worker by obtaining a predetermined interest.

Any project can hardly be completely free from risks, and therefore if the owner of capital is to avoid all the risks, the worker will have to bear them all. In this case the poor worker will be burdened with two risks: his own risk and the risk of the other party. The owner of capital can bear his own risk besides the risk of the worker he employs, whereas the worker cannot bear his own risk besides the risk of the capital that does not constitute his contribution in the project. How can the worker manage to provide guarantee for capital if he does not have even the funds that he can invest in the company? Therefore, it seems to be more logical that each of the two parties bears the risk of his respective share in the company.

As regards the type of capital that can be leased, it should be noted that its leasing does not entail shifting of ownership to the lessee, and hence such capital remains under the guarantee of the leasing party in his capacity as an owner. The leasing party should bear all the risks associated with ownership such as risks of fire, perishing and obsolescence; as long as such risks are not due to transgression or negligence of the lessee. The lessee is supposed to guarantee the leased asset against any loss that stems from transgression, misuse, or negligence up to the extent of the damage he causes. At the end of the lease period the lessee has to return the same asset to the leasing party; and not a similar asset as is the case in loan. In this way adherence to the relevant *Fiqh* principles is well observed. The leasing party becomes entitled to the rent against the guarantee he provides subject to the *Fiqh* principle which states that ***return follows guarantee*** and that ***gain follows cost***. In this case also, ***pay (rent) and guarantee do not come together***, since the lessee pays the rent and the leasing party guarantees the leased asset.

Land which constitutes an asset that can be leased, has always remained as a controversial issue. Some jurists prohibit leasing of land and indicate that it should have a share in the produce (*Muzara'ah*) and hence they treated it like money and other types of capital that can be

lent. Contemporary *Fiqh* scholars and researchers who studied the wisdom behind the prohibition of interest and whether it is applicable to land leasing or not have concluded that fixed rent for land is forbidden, especially if land is still in its natural form without being subjected to any development effort.

In discussing the wisdom behind the prohibition of *riba* in production lines, it should also be mentioned that while the rate of interest is known and predetermined, the rate of profit is to be known later on. Therefore the rate of profit may rise to a level, which is higher than the level expected at the time of fixing the rate of interest; and hence the lender may feel that he has been subject to injustice. Similarly when profit falls below expectations the borrower could feel that he has been made to suffer injustice. Hence, profit sharing proves to be more suitable for achievement of just treatment for both parties.

Moreover, interest rates induce the owner of capital to pay little attention to the final results of the project, as he will be more interested in the size of the borrower's wealth and the guarantees which he can provide. Consequently, the lender may not care about the skills of the borrower and his efficiency in managing the project.

In the contrary, the owner of capital under profit sharing will be more interested in the success of the project which constitutes the main determinant of his share in the profit. Thus, both parties will be interested in making the project a success so that it can generate the maximum possible profit and enable them both to maximize their gains.

A further wisdom behind the prohibition of interest is to keep the returns on capital funds linked to the returns of projects and, thus, maintain the balance between the gains made by the finance providing group and the productive group. In the absence of prohibition of interest, and when there is loss, the financing party could make huge gains at the cost of the producing party.

When consumption loans are given for the sake of financing essential needs it means that the owners of the funds are left free to exploit the position of those who are in acute need for funding. Under such conditions fund providers could seize the chance to increase interest rates

subject to the degree of need severity, and the whole process ends up in one of the most repugnant types of *ribs* practicing. This is more so because consumption loans generate no returns from which the borrowers can repay their debts.

If consumption loans are extended for the purpose of financing luxurious spending this very objective constitutes a good reason for raising suspicions around them or even calling for their complete rejection. Luxurious spending is objectionable from a *Shari'ah* standpoint even when it is to be financed from one's own sources, leave alone when it is financed through borrowing from others.

Consumption loans can also be given with the aim of financing durable goods, or tools and instruments that would enhance productivity and enable the borrower to earn more income. Nevertheless such additional income may not materialize, since it is only presumed and not definite. moreover, even if such additional income is realized it would not become measurable like the returns of projects.

Our present world is heavily burdened with consumer debt facilities, a fact that has encouraged people to live beyond their actual capabilities. This situation of steadily increasing rate of debt accumulation and credit mismanagement has been one of the major factors behind widespread forfeiture and destruction in modern societies.

When a loan is given for the sake of financing production, there is still a possibility that production may not take place because it is only presumed rather than definite and, hence, the borrower may become subject to inequity. At the other end also the loan may lead to realization of a big amount of production and thus the deal will prove to be inequitable from the standpoint of the lender. It is, therefore, more reasonable for the lender and the borrower to resort to profit sharing instead of interest based financing. Shifting from *qard* (loan) to *qirad* (*Mudharabah*) will make both parties stand on equal footing so far as sharing of risks and returns is concerned.

Why time is considered as an acceptable justification for excess payment in credit sales?

Islam has a very precise approach to *riba*, which can be summarized as follows:

1. Stipulated increment against postponed repayment in loan transactions comes under *riba al-nasi'ah.*
2. Stipulated increment against postponed repayment in credit sale transactions does not come under *riba al-nasi'ah.*

Some scholars believe that these two increments should be treated equally with regard to prohibition or permission. These scholars seem to be facing some difficulty in understanding the reason behind prohibition of such increment in loans and permitting it in credit sales. In fact, there are two arguments, which justify such differentiation in treatment of these two increments. One of these arguments is derived from the *Shari'ah* texts, while the other is based on logical reasoning. The argument that can be derived from *Shari'ah* texts relates to the *hadith* of the Prophet (peace and blessings upon him) about the six items (gold, silver, wheat, barley, dates and salt), which indicates the following:

1. When gold is exchanged for gold there should be no *fadl* (excess compensation) or *Nasa'* (postponed delivery) by any of the two parties.
2. When gold is exchanged for silver *fadl* is permissible, while *Nasa'* is forbidden.
3. When gold is exchanged for wheat both *fadl* and *Nasa'* are permissible.

In case (1), if *fadl* and *Nasa'* were permitted, interest-bearing loans would have become permissible.

In case (2) *fadl* is permitted because the two exchanged items are different and *nasa'* is forbidden so as to leave no room for a pretext of receiving increment against postponement. That is to say, *nasa'* is forbidden with the aim of preventing pretexts that may lead to conclusion of interest-based loans by offering the loan in gold and having it repaid in silver.

In case (3) *fadl* is permitted due to difference in the two exchanged items and also due to difference in the two times of delivery. As equity necessitates prohibition of *nasa'* in case (1) due to prohibition of *fadl*, it also necessitates permission of *fadl* in case (3) in line with permission of *nasa'*. Consequently, credit sale is permitted; because it resembles exchange of (wheat) to be delivered instantly for (gold) to be delivered in the future.

The second argument, which can be proved through logical reasoning is that, in Islam, loan is a principal transaction, whereas sale is another distinct and principal transaction. Loan in Islam is founded on benevolence, and therefore constitutes an incomplete (single-sided) process of compensation; while sale is based on equity, and hence it is a complete (double-sided) process of compensation.

In principle, Islam does not deny the fact that time (postponement) has value. In case of loan such value is reflected in terms of reward (*thawab*) from Allah (subhanahu wa taala), whereas in case of sale it is reflected in terms of additional payment. The logic behind this distinction is that the increment in sale is closely linked to the *Shari'ah*-recognizable trading activities associated with sale, while the increment in case of loan stands on its own and has no linkage with any type of sale-related activities.

In *Shari'ah,* and as has been indicated by a well-known *Fiqh* maxim, something may turn to be permissible when it is a corollary (*tabi*), while it may not be so when it is independent. In our present case for instance, loan is specially devised as an act of benevolence and sale is meant to constitute a trade activity. Consequently, there is no harm in practicing sale for the sake of trading and making profit even if profit originates from the aspect of time (postponement), whereas it is impermissible to obtain a return for time (postponement) in the context of a loan transaction that has nothing to do with trade and profit earning.

Early Repayment Rebate (*Da' wa tajjal*)

Ibn Abbas reported that "***when the Prophet (peace and blessings upon him) issued his orders that Bani Al-Nadeer should be forced out of the city, some of Bani Al-Nadeer came to the Prophet and said: Oh the messenger of Allah! You have issued your orders that we should be forced out of the city while we have immature debts that other people owe to us. The Prophet (peace and blessings upon him) said: make discount to expedite repayment"***(7).

Using rebates for expediting debt settlement (*wadha'* or *wadhi'ah* in *Fiqh* terminology) is a controversial issue, and a practice, which only a small group of Islamic jurists believe that it is permissible. In the contrary, price increment in credit sales is acceptable according to the majority of Islamic jurists.

According to Ibn Abdeen, ***"when a person purchases something for 10 (dinars) and sells it for 20 (dinars) to be repaid during a period of ten months and the debtor repays all his debt or dies after the elapse of five months, the lender should take five (dinars) and leave five"***(8).

Wadhi'ah (discount), which is in essence a rebate for early repayment, constitutes a relationship between two parties. When a third party (like a bank) comes in-between the process as a whole becomes impermissible; as it will, thus, become similar to discounting of commercial papers (bank discount). The bank in this case pays SR 100, for instance, so as to get SR 110 and, hence, the deal will fall under the strictly forbidden form of *riba* known as *riba al-nasi'ah*(9).

Time Value of money and Time Preference

When defining *riba al-nasi'ah* we came to know that what is to be received at present is far better (or worth more) than what is to be received in the future even if the two amounts are equal in terms of nominal value. For instance, SR 100 payable at present, worth more than SR 100 payable after some time. Time preference originates from an intrinsic inclination of human beings. Allah *(subhanahu wa taala)* said: ***"Nay (ye men) but ye love the fleeting life. And leave alone the hereafter"*** [*Al-Qiyamah*: 20 & 21). It is, therefore, said that: "Life is like cash and the

(7) Al-Hakim: *Al-Mustadrak*, (2/52). Al-Hakim indicated that the *hadith* is correct.
(8) Ibn Abdeen: *Al-Hashiyah*, (5/160).
(9) See also the resolution issued by the Islamic Fiqh Academy – Jeddah in 1412H (1992).

hereafter is like deferred payment and cash is better than deferred payment"[10]. However, this would have been true if life and the hereafter were equal.

In order to divert people away from preference of the worldly life to preference of the hereafter life, Allah *(subhanahu wa taala)* made the hereafter life far better than the life of this world in terms of quality and lasting. In this regard He *(subhanahu wa taala)* said: ***"But ye prefer the life of this world. Although the hereafter is better and more lasting"*** [*Al-Aala*: 16 & 17] and He also said ***"As to these, they love the fleeting life and put away behind them (the remembrance) of a grievous day"*** [*Al-Insan*: 27).

As indicated by Al-Shafiee ***"food to be obtained at present is more valuable than food to be obtained later on"***[11] and ***"a hundred sa'as (of any commodity) to be obtained at present, are more valuable than a hundred sa'as (of the same commodity) to be obtained later on"***[12].

Riba Stratagems

Allah *(subhanahu wa taala)* said: ***"But Allah hath permitted trade and forbidden usury"*** [*Al-Baqarah*: 275]. In spite of the fact that Allah *(subhanahu wa taala)* has strictly forbidden *riba* and barred all the ways that lead to it directly, people often resort to stratagems that would enable them to practice different types of masked *riba*. The most prevalent stratagems are usually done by resorting to fictitious sales, so that the transaction can appear like permissible trade. Such stratagems which are usually practiced either for the sake of going around prohibition of *riba* in principle, or so as to facilitate earning of excessively high interest rates that are not allowed by law, are denounced by *Shari'ah* as well as reason. We shall present hereunder one of the most famous *riba* stratagems, which constitutes a plain act of deception and jugglery; that is *einah* sale.

Einah Sale

Einah sale takes place when someone purchases a commodity on credit at SR 1000, for instance, and sells it back to the same seller for SR 900 in cash. In this case purchasing and reselling of the commodity is not

(10) Al-Ghazali: *Al-Kashf wa Al-Tabyeen*, p. 12.
(11) Al-Shafiee: *Al-Um*, (3/62).
(12) Ibid, (3/88).

meant in itself, since the commodity is soon returned back to its original owner. What is really meant is obtaining money through an interest-based loan concealed in the form of a sale transaction.

The *riba* amount is represented by the difference between the deferred price and the cash price. The essence of the transaction is that the borrower gets a loan of SR 900 to repay it back as SR 1000; therefore, the *einah* sale is nothing but an interest-bearing loan hiding in the form of a sale transaction. It is called *einah* because the borrower gets the cash (*ayn*), or because the *ayn* (the sold commodity in this case) is returned back to its owner. This, however, should not be taken to mean that sale on credit at more than cash price is forbidden. Prohibition here is confined to the act of using the form of sale as a pretext for interest-based borrowing and lending. That is to say, using what is permitted to reach what is forbidden.

Tawaruq Sale

We have seen that *einah* is the sale in which a person buys a commodity on credit and sells it back for a lower cash price. When such person sells the commodity to the same buyer the deal is considered as *einah*, whereas if he sells it to a third party the process is considered as *tawaruq*. The Arabic term *einah* relates to *ayn* (gold money), while the term *tawaruq* relates to *Waraq* (silver money), yet what is meant in both cases is money; without any distinction between gold and silver.

Islamic jurists are in controversy with regard to *tawaruq*. Some of them believe that it is permissible, especially when it is just a process of buying and selling that does not entail any collusion between its three parties. Others hold the view that it is forbidden, and the more so if it entails collusion. According to Ibn Al-Qayem: ***"Our Sheikh (Ibn Taimiyah) was of the view that tawaruq is forbidden. He argued in support of this viewpoint on several occasions in my presence indicating that: in essence, the deal is a strictly forbidden type of riba, in addition to the loss incurred by purchasing the commodity and selling it at a lower price. Shari'ah can never forbid the less serious harm and permit the more serious one"***[13].

(13) Ibn Al-Qayem: *Ea'lam Al-muaqi'een* (3/182).

Combining Sale and Borrowing "*Bai' wa Salaf*"

The Prophet (peace and blessings upon him) has forbidden deals, which involve selling and borrowing in one transaction. Prohibition of such deals is meant to bar the way to pretext, because the lender in this case will, most probably, be able to make a usurious gain (similar to that obtained through loan) in terms of sale profit. A lender who wants to practice *riba* through this stratagem can push up his profit margin in a parallel sale transaction in which he is the seller; or push down the profit margin in a transaction in which the borrower is the seller. This also holds true in case of transactions, which entail combining of exchange and borrowing, or leasing and borrowing; because exchange and leasing come under the ambit of sale transactions.

Wafa' Sale

As indicated by clause No. (118) of *majalat Al-Ahkam Al-Adliyah*, *wafa'* sale refers to the deal in which a person who is in need of money sells his real estate property (a house or a piece of land) on condition that he gets it back as soon as he repays the price. It is a sale that lasts until time of repayment. In effect, such transaction is a usurious loan documented by a mortgaged asset and its *riba* aspect is represented by the benefits of the mortgaged asset that the lender enjoys. In *wafa'* sale the seller says to the buyer: I sell you this piece of land for 1000 *dinars*, or for the 1000 *dinars* which I owe to you, on condition that whenever I refund the price to you or repay the said debt I get back my land. Such type of sale can be called a sale with a "returning back condition". In the French law it is called a sale with a "repurchase condition".

According to the *Hanafi* School, *wafa'* sale is permitted on the basis of *Istihsan* (approbation), although its permissibility cannot be validated through *qiyas* (derivation of *Fiqh* rulings by analogy). However, according to the Islamic Fiqh Academy – Jeddah, *wafa'* sale is forbidden.

Theories of Interest

Economic books comprise a number of theories on interest. Some of these theories relate to justification of interest, while others strive for its identification. Emphasis here shall be on the justificatory type of interest theories.

Theory of risk

A number of economists believe that interest is a compensation for the various types of risks to which a lender is exposed, that is to say risks of default.

The response to this is that, in order to make a gain, capital should be exposed to risk. Yet, in interest-based borrowing and lending, the lender enjoys a gain without assuming any risk. It is true that the lender is exposed to risks of denial of right, delinquency and default; yet, compensation for such risks should not be through interest. It should rather be through warranty arrangements and physical guarantees. moreover, interest represents only a small increment in the capital, whereas guarantee may cover the whole amount of capital.

Furthermore, it could be argued that this theory tends to draw focus to the risks of the financier, while totally ignoring those of the finance receiver. In fact, the finance receiver is also exposed to risk of loss. If this is so, then why should the finance receiver bear the loss of the capital as well as that of the work, and the financier be relieved from bearing any risk? Logically, each of the two parties should bear the risk pertaining to his specific share in the project. The worker should bear the risk relating to work and the owner of the capital should bear the risk that relates to capital. Isn't it necessary to cater for justice in determination of the appropriate pattern of risk sharing?

This theory also seems to be applicable to sale on credit rather than to loan contracts. This is so because in a loan, the presence of interest is objectionable in principle, while in sale on credit the additional payment is justifiable in terms of the risk involved therein. Time can also render a further justification for increment in credit-sale transactions. It should be noted here that risk and time are in fact two different aspects.

Theory of yield-seeking (loan interest and land Rent)

The proponents of this theory assert that capital is a productive asset. It has a yield. So if a landowner is to be left free to enjoy a fixed return in terms of the rental he obtains for leasing his land, without contributing any work or being exposed to risk, then why should the owner of capital be deprived of obtaining interest? If the owner of capital is not allowed to

get interest, he could, thus, be tempted to refrain from lending. It would become more preferable to him to buy a piece of land, offer it for rent and enjoy the return. Therefore, capital is quite similar to real estate with regard to eligibility for obtaining rent.

It would not be difficult to deny this theory if we take into consideration the *Fiqhi* viewpoints that prohibit land leasing. In that case both types of rent - capital rent and land rent - will become forbidden. In fact, some classical as well as contemporary *Fiqh* scholars do consider charging a fixed rent for land as strictly forbidden. Instead, they believe that it is permissible for the landowner to get a specific share of the produce through *muzara'ah*. Consequently, money becomes like land with regard to prohibition of fixed return, and permissibility of making a gain through partnership. In other words, money is not entitled to interest, but to a profit share through *Mudharabah*, and land is not entitled to rent, but to a crop share through *muzara'ah*.

It could, however, be difficult to defeat the theory of capital yield when we take into consideration the *Fiqhi* opinion of those who consider land leasing to be permissible, especially when such *Fiqhi* opinion is applied to natural land that has not been subject to any improvement through the application of labor or capital.

Theory of utilization

The advocates of this theory hold that interest is the price of using capital. Therefore, if capital is used for consumption or production purposes it must have rent. However, speaking about the case when capital is used for production purposes brings us very close to another theory which we shall discuss hereafter.

What can be raised against the theory of utilization is that the benefits obtained from using capital for consumption or production purposes could hardly encounter dispute; yet capital is not supposed to make a gain against no risk. That is to say, capital should have a "probable" rather than a "guaranteed" return. When discussing the rationale for the prohibition of *riba,* we have already explained the different forms for remuneration of the various types of capital.

Theory of Labor Productivity

Those who believe in labor productivity theory indicate that capital is a productive asset, because it is one of the factors of production, and through its help production can be increased. Hence capital must be entitled to gain.

The response here is that capital can be either in the form of a cash or non-cash asset. Also non-cash capital can be either in the form of commodity (e. g seeds), or in the form of durable asst (e. g machinery). Therefore, when capital is in the form of machinery or any other type of leasable assets, it can permissibly be remunerated in terms of a fixed return (rent); whereas if capital is in the form of commodity or any other type of non-leasable (lendable) assets such as money, it has to be subjected to risk.

It should be noted here that eligibility of the second type of capital (lendable capital) for getting a share in the profit is not denied. The justification for linking the return on lendable capital to profit-sharing is that the project may end without realizing any in-kind output. Or even if in-kind output is realized it may not lead to realization of cash income (revenue). Or, again, if cash income (revenue) is realized it may not lead to realization of profit if the costs of the project absorb the whole amount of revenue.

According to maududi, ***'the claim that generating profit is an intrinsic attribute of capital is a fallacy'***[(14)]**.** Siddiqi also believes that ***"Value is a market phenomenon, rather than one of the built-in corollaries of cash capital"***[(15)]**.**

moreover, if the theory of capital productivity explains the returns on the financing extended for production purposes, it does not give enough explanation for the financing extended for consumption purposes, unless the supporters of this theory believe that consumption loans should follow production loans with regard to entitlement to interest; presuming that interest will pass from the latter to the former.

(14) Al-maududi: *Al-Riba*, p. 16.
(15) Siddiqi: Why Islamic Banks, p. 244.

It can also be argued that if this theory is based on capital productivity, let entitlement to interest also be founded on the same basis. Therefore if capital succeeds to generate output and make profit, then it becomes entitled to a share in that profit. If, instead, capital fails to generate output and consequently has to incur a loss, it has to bear such financial loss.

Al-Razi in his book *Al-Tafseer* had, in fact, posed and discussed a relevant question about the rationale behind prohibition of *riba* (interest in production loans in particular). In this regard he asked, ***"Why is it unacceptable to consider the additional payment (interest) as remuneration for capital? This may seem acceptable in view of the fact that the borrowed amount will be kept in the hands of the borrower for quite some time. Had this amount not been lent to the borrower, the lender could have been able to invest it in a gainful trade purpose. Since the lender has sacrificed the chance of utilizing the funds so as to make them at the disposal of the borrower, the former is entitled to such additional payment in compensation".***

Al-Razi then responded to the question he raised as follows: ***"In fact the benefit which some would mistakenly speak about in this argument is illusionary*** (a more suitable word could have been: expected) ***and it may take place or may not, while charging the additional amount is a definite gain. It can therefore be argued that making a definite remuneration for a merely expected gain cannot be considered as a harmless deal"***[16].

Hence, there is no doubt that the owner of capital would bear the harm of forgoing a probable gain when he gives away his money to others and that he should be compensated. Nevertheless, payment of interest also causes harm to the borrower and would, therefore, constitute nothing more than a means for rectifying the old harm through creation of a new one. What is more likely to achieve benefit and justice is to remunerate capital in terms of a profit share through partnership.

Theory of Time

The defenders of this theory contend that interest is the pay for time, and therefore it is charged against acceptance of postponement. This theory is sometimes discussed under other denotations such as "*Theory of Waiting*".

(16) Al-Razi: *Al-Tafseer*, (7/87).

In fact, this theory could be valid in case of sale on credit rather than in loan transactions. While a loan should bear no interest, sale on credit may involve additional payment as remuneration for time, provided that such additional payment is decided at the time of signing the contract and not at the time of debt maturity. This is simply because when the debt is due it becomes subject to the same rulings on loan. As regards loan, additional payment to compensate for time would mean enabling money to enjoy a risk-free gain, and that is exactly what has been rejected for several reasons as we have shown earlier.

Theory of Time Preference

This theory is based on the belief that interest is the difference between present value and future value of money. money has a future value, which is less than its present value, and therefore present money is more preferable than deferred money of the same amount. A loan transaction entails the process of exchanging present money for deferred money, and hence the lender should get the difference between the two values.

Again this theory is applicable to sale on credit rather than to loan. While no interest is to be paid for a loan, additional payment as remuneration for time is permissible in sale on credit. The arguments presented by *Fiqh* scholars in this regard are in fact the same as those presented by economists. The essence of both sets of arguments is that time has a share in price; that is to say time is to be rewarded for in sale transactions.

Theory of Liquidity Preference

According to this theory money can be kept with negligible cost of storage, so as to be spent on fulfillment of expected and contingent needs. Therefore parting with money necessitates compensation which is interest.

It is obvious that this theory explains a cash loan, but not an in-kind loan, say of wheat or barley, for instance. If, according to this theory, transfer of the advantage of keeping money from lender to borrower necessitates compensation, then why shouldn't such compensation become applicable to all other forms of wealth? It seems that this theory

should have tackled preference from the broad perspective of wealth, instead of confining it to liquidity.

Theory of Work: Pay for Saving

The proponents of this theory claim that saving is a task, which justifies entitlement to reward. Since wage is the reward for labor, saving money is also a work effort that should be rewarded for. There are also other theories that come very close to labor theory, when they emphasize abstention from consumption, penny-pinching, or "waiting" in order to save as acts of sacrifice that must be rewarded for.

The reply to such theories is that labor is one of the factors of production and so is capital, yet each of the two is of completely different nature. Consequently, while labor deserves wage or a share of the profit, the reward for capital is confined to the form of profit-sharing only, because entitlement of capital to return necessitates risk-bearing.

The supporters of this theory could again argue that if no reward is to be made for saving, people may refrain from it.

There is no doubt that interest is one of the factors that encourage people to save. Nevertheless it is not at all the sole or the most significant factor.

There are so many other factors which seem to be more important for motivating people to save such as reserving money for the age of eldership or for emergencies, improvement of living standard through purchase of a better house or furniture, the desire to leave inheritance for descendents and wealth maximization; to mention but a few.

moreover, saving can have access to return through profit sharing.

Theory of Accumulated Labor

This theory considers capital to be nothing but accumulated or stored labor, or indirect labor. According to this theory we can achieve the same level of output by using less capital and more labor, or vice versa. That is to say, up to a certain limit, capital and labor are perfect substitutes of each other.

Objection to this theory stems from the fact that accumulated labor (capital) has a different nature compared to direct (or live) labor, and therefore the rulings applicable to them should also differ. Live labor can get a fixed wage or a share in the profit, whereas capital can get only a share in the profit.

It would be very interesting to note that such theorizers used to emphasize similarity of capital to labor so as to justify a fixed return for capital. This was done in an era when power was dominated by Labor. Nowadays, when power shifted to capital they started to emphasize similarity of labor to capital, hence they say "*human capital*"!

Theory of Scarcity

This theory holds that capital is a scarce resource; therefore, a zero interest rate would create an unlimited demand for capital. Contrary to free resources, scarce resources have a price or cost, and capital is a scarce rather than a free resource.

The reply is that capital is not a free resource, yet if it is not provided against interest it can still be provided against a share in the profit. Had capital not been considered as a scarce resource, it would have been denied the right of obtaining a share in profit. Consequently the return to be enjoyed by the owner of capital constitutes a cost of production. Economic costs of production are not only the accounting costs charged to Operating, Trading, and Profit and Loss Account. They include also items that inter in the distribution account such as the ordinary profit earned by the entrepreneur and the return on capital manifested in the form of a share in the profit.

Theory of Insurance

The defenders of this theory believe that when the owner of capital shares in the profit he would normally get a rate of return that exceeds the rate of interest. The difference between the two rates is in fact sort of an insurance premium, which the lender relinquishes to the borrower so as to obtain a guaranteed return, which is interest. That is to say, as if the borrower says to the lender: I shall insure you against loss if you would accept a lower rate of return. Or I shall guarantee a return for you, but it should be lower (than your actual share in the profit).

The problem with this theory is that profit may not be realized, or even a loss could be incurred - and thus - this theory will cease to be valid because, in that case, the entitlement of the lender to the interest rate will lose justification.

Based on this, the presumed manipulation of the rate of profit into a rate of interest through waiver of risk premium is unacceptable. Furthermore, it can be argued that this insurance or guarantee is impermissible because capital should remain exposed to risk (unguaranteed) and therefore shifting the risk to the borrower is forbidden.

The General Flaw of Interest Theories

As has already been indicated, labor – in the Islamic view - is permitted to receive a fixed wage or a share of the profit; whereas capital can be forwarded against a fixed rent if it is in the form of machinery, and against a share of the profit if it is in the form of money.

Theories of interest in general have succeeded to justify a return for capital, yet they have failed to justify interest in specific as the appropriate form for rewarding capital. Why shouldn't this justified return for capital be a share of the profit? This seems to be the question that these theories have not yet been able to answer.

In this sense, interest theories could be useful for challenging the socialist doctrines, which do not allow a pay or a profit share for capital. However, interest theories cannot serve the purpose of challenging the Islamic view, which prohibits interest in loans and permits it in sale on credit, besides permitting a share in the profit for capital.

Is there any benefit that can be derived from Interest Theories?

Interest theories are analytical tools, which, as has been mentioned before, might be useful in the theoretical debate between capitalists and socialists theorizers. To us as Muslims, these theories do not provide a clear justification for entitlement of capital to interest, as their advocates would claim.

If the arguments raised by these theories were to justify eligibility of capital to reward, they could have become acceptable. Even in that case, the advocates of these theories would have remained in need of moving a step further in order to depict the appropriate means for rewarding each specific form of capital.

However, theories of interest might prove to be useful to us as Muslims in justification of the divine reward *"thawab"* for loan, the increment payable in sale on credit, and permissibility of a profit share for capital. Nevertheless, these theories are useless for justification of variation in the form of reward subject to variation in the form of capital.

In fact, some of these theories - such as theory of risk, theory of liquidity preference, theory of capital productivity and theory of scarcity – have been implicitly indicated in our Islamic jurisprudence. Others also have been explicitly discussed; including theory of time preference which is a very important one – perhaps the most important among all these theories. Since long time Islamic jurists acknowledged the value of time by stating that: time has a share in price, or present income is better than future income, or if cash and debt are equal in amount preference would go to the former …*etc*[17].

(17) See maududi: *Al-Riba*, p.10.

Chapter: II
Gambling (*Qimar*)

Definition

Abu Obaid defines *'Qimar'* or *'Maysir'* (gambling) as ***"the venture in which neither of the two parties knows whether he will take away the property of the other or not"***[1]. Al-Baali defines it as ***"any game that involves a property which the winner is to take from the loser"***[2]. According to Ibn Al-Arabi gambling takes place when ***"each of the two parties challenges to beat the other in an act or statement so as to get the reward allotted by the two parties for the winner"***[3]. Gambling can, therefore, be defined as a process of risk assumption; or competition between two parties in which one party gains what the other party loses.

Benefits of Gambling

Allah *(subhanahu wa taala)* said: ***"They ask thee concerning wine and gambling, say: "in them is great sin and profit; but the sin is greater than the profit"***. [*Al-Baqarah*: 219].

Among the benefits of gambling are the following:

- Satisfaction of people's instincts and inclination towards amusement, pleasure, self pride, competition and challenge.
- What a gambler gets through gambling, which could be a considerably big amount.
- Popularity
- The profits earned by those who arrange gambling games, whether they are public or private entities.
- The benefits that go to the poor if the lottery is done for charity purposes.
- Public revenues earned by the state from the casinos and clubs in which tourists and other people practice gambling; or from the taxes levied on arrangers and winners.

(1) Abu Obaid: *Al-Amwal*, p. 592.
(2) Al-Baali: *Al-Muttali'a ala Abwab Al-Muqni*,a, p. 256.
(3) Ibn Al-Arabi: *Aaridat Al-Ahwazi*, (7/18).

Disadvantages of Gambling

- Makes people accustomed to earning by mere luck.
- Encourages laziness.
- Leads to addiction; because gambling is like alcoholic beverages and drugs in inducing one to get more and more involved in it. Gamblers often devote themselves to gambling just like the worshippers of an idol. In the strict *Qur'anic* perception, gambling has always been the consort of alcoholic beverages, worship of idols (*ansab*) and divination by arrows (*azlam*)[(4)]. When a gambler is defeated he tries again and again so as to take revenge, safeguard his image and get back what he has lost in the previous rounds. When a gambler defeats his opponents he feels the ecstasy of victory and self pride and therefore keeps on joining the coming rounds to gain more image, money and glory; or he may keep on playing so that his opponents would not think that he is a coward.
- Gamblers acquire the habits of using obscene words, making impudent shouts, indulging into severe disputes, and neglecting religious as well as worldly duties.
- Gambling is a non-productive activity since it adds nothing to the wealth of the society. Through gambling wealth will just keep on shifting from one gambler to the other.
- Gambling can lead to complete destruction of families and spread of crimes like theft, commitment of suicide, and bribe (from gambling arrangers to government officials).
- Most of those who dream of winning the lotteries are from the poor segments of the society**.**
- Few people win at the cost of the vast majority. Some newspapers[(5)] reported that in a city casino in France an Arab businessman incurred a loss of US$ 14 million in one night. As has been illustrated by Larry Anderson (professor of mathematics at Whitman College – Washington): ***"imagine the existence of 35 football fields each is wide enough to accommodate 100,000 viewers. Every seat has a number; and the winner's number shall be randomly selected out of the 3.5 million numbers. Imagine the publicity campaigns which persuade you to book***

(4) See *Surat Al-Ma'idah*: Verse: 90 & 91.
(5) Al-Yamamah Magazine (23/11/1414H); Al-Madeenah Newspaper (29/11/1414H).

your seat for a specific price. Here you are watching in the television screens how the last winner spends his weekend in one of the most fascinating resorts. Some friends may encourage you to choose your seat number according to the number of your street or birthday…. Then as soon as time comes for drawing the winner's number, we discover that all of us are losers, except one! All the people, on all the seats, in all the rows are losers except only one! The noise is over, the hope has faded away, and nothing is left except the losers who are 3,499,999 people. All those who were busy in arranging the lottery, all the amounts of money we paid, and we have got nothing. Those people had manipulated our desires and feelings, and our dreams to win the allotted amount. We joined the petting without being cautious and no one has warned us about our chances to win in contrast to our chances to lose which were at the ratio of 1: 3.500,000! No doubt so many poor people rush to the lottery dreaming of easy and sudden fortune. Commercial advertisement keeps on hitting on this tendon and promises the poor masses of a happy life that encounters no hardship. One has just to purchase a lottery ticket today and not tomorrow. No chance to win for those who do not pay. The promoters of the lottery argue that no one is forced to buy a ticket. Everybody who purchases a ticket does so willingly in pursuit of the chance for making a fortune. He is an adult, rational and free person who can make his own decision to take part of the game or not. Nevertheless, the defect of this argument is that most of the people are not well informed about games and contests so that they can determine the probability of their winning and assess the results of the random selection. The promotion and advertisement campaigns do not tell you that if you participate in the lottery by purchasing a ticket every day your chance to win is 1/3,500,000. Consequently, you may have to wait for 9500 years to win the lottery only once!" [6] ***They hide from you the huge amounts that go into their pockets in the form of lottery profits. Had you come to know all that, you wouldn't have become one of the lottery victims.***

Spread of Gambling

Gambling has witnessed a widespread in capitalist countries when capitalism – or casino capitalism as some researchers would call it – has become a global phenomenon. Nowadays, even socialist countries may permit practicing of gambling so as to generate public revenues, especially when gambling becomes a state monopoly. Nowadays, gambling manifests in so many forms including, among others, television, telephone and commercial contests. Gambling is arranged through such means for the sake of maximizing revenues of its arrangers even if through causing misery and hardship to a large number of people.

(6) Al-Sharq Al-Awsat Newspaper (13/9/1995, p. 1).

In Britain, every two out of three adult people practice gambling weekly through purchase of lottery tickets which generate a total income of £ 5 Billion per annum. This amount exceeds what British people spend annually on bread and books. It goes without saying that such spending must have negative impact on growth, since gambling is a non-productive activity. In the United States people spend US$ 500 Billion annually on different types of gambling. So many other countries also have decided to join the race by establishing big casinos to attract tourists, and facilitate issuance of lottery tickets(7).

Lot Casting

Lot casting is simply a means that can be used for a forbidden purpose and thus becomes forbidden, or for a permitted purpose and hence becomes permissible. When lot casting is used in gambling it is forbidden, yet it can also be used for a permissible or even a desirable purpose(8). This could happen when several people have equal rights in an asset that cannot be equally or proportionately divided among them. Casting lot in this case is quite essential for avoidance of favoritism, grudges and hatred.

Also when several people compete for a job and two of them prove to be equally competent in all respects; whereas only one vacancy is available, selection can be made by casting of lot. However, there are some cases where lot casting cannot serve the purpose. When two scholars, for instance, are equally competent for winning a scientific prize casting of lot cannot be used for selecting one of them. Dividing the prize between them equally would become more appropriate in this case, since such division is possible as we have already indicated. Abu Obaid(9) and Ibn Al-Qayem(10) have tried to respond to those who claimed that casting of lots is gambling.

(7) See what Salim Ahmad Sahab wrote in Al-Madeenah Newspaper (24/5/1416H).
(8) See *Surat Al Emran*, Verse: 44; *Surat Al-Saffat*, Verse: 142.
(9) In his book *Al-Amwal*, p. 592.
(10) In his book *Al-Turuq Al-Hukmiyah*, pp. 287 – 328.

Contests

A contest is a contract between two people/parties or more who agree to compete with each other in a military, scientific, athletic or cultural field, in order to see who will be the winner. A contest may not involve a material reward, or it can be with a reward to be divided among the contestants in proportion to their different ranks. Some contests are permissible, while others are not; subject to the interests or blights they involve.

The aim behind a contest could be to enhance the spirit of competition and pursuit of excellence among the contestants so as to enable them to acquire certain skills in fighting, athletics or science, through interaction and learning from each other. Regardless of its underlying purpose, a contest is a means for facilitation of recreation and avoidance of worry and stress. Nevertheless, when contests are misused, they can lead to dispute, quarrel and hatred. When a contest involves a material gain besides the moral gain, incentives become more powerful.

According to Ibn Taimiyah and Ibn Al-Qayem contests can be divided, with regard to permissibility, into the following three categories.

1. Contests that contain more harm than benefit such as dice and chess games. Such contests are forbidden, whether a contest of this type involves a financial gain or not. Ibn Taimiyah and Ibn Al-Qayem believe that chess is more harmful than dice in distracting the mind of the player.

2. Contests that involve more benefit than harm such as javelin sport, and these are permissible even when they involve material gains.

3. Contests that do not entail any benefit or harm such as racing which is permissible, provided that it does not involve a material gain[(11)].

(11) Ibn Taimiyah: *mukhtasar Al-Fatawa Al-misriyah*, p. 525; Ibn Al-Qayem: *Al-Froosiyah*, pp. 32 & 83.

Chapter: III
Uncertainty (*Gharar*)

Definition

Literally the Arabic word *Gharar* is synonymous to the word *khatar* (danger). *Gharar* has not been explicitly mentioned in the *Qur'an*, but it has been mentioned in the *Sunnah*. The Prophet (peace and blessings upon him) has forbidden practicing of *bai al-Gharar* (sale which involves uncertainty).

In *Fiqh* terminology, *Gharar* indicates probability, doubt or uncertainty. It is the state of being uncertain whether a specific result will take place or not. Some of the *Maliki* scholars define *Gharar* as ***"the state of being uncertain about two matters, of which one is the desired result and the other is the contrary"***. According to some *Shafiee* scholars *Gharar* indicates ***"the situation in which one is not sure which of two probable outcomes will occur; whereas the outcome that is more likely to occur is the worse"***. For some *Hanafi* scholars ***"Gharar means the state of feeling equal doubts with regard to occurrence or non-occurrence of a certain result".***

Examples of *Gharar* in sale transactions include: selling of fish in the water, birds in the sky, a fetus in the womb of an animal, or a straying animal. Of course we are referring here to fish and birds that are owned by the seller, otherwise the deal will entail selling of things which the seller does not own.

Types of Gharar

Gharar which relates to existence**:** as when the subject matter of the contract is nonexistent.

Gharar which relates to possession: such as selling of what the seller does not hold.

Gharar which relates to quantity: as when the sold commodity is what a diver may get from the sea or a hunter may get from the forest.

Gharar which relates to kind: as when the sold commodity is unknown.

Gharar which relates to type: as when rice is sold without specifying its exact type.

Gharar which relates to time (period): the example here is a forward sale or sale on credit in which time of delivery of the good sold or payment of the price is not specified.

Gharar which relates to site: like a sale contract in which site of delivery is not specified.

Gharar which relates to specifications: as when a sale transaction is concluded on condition that the buyer can take any of two different commodities.

Gharar in Compensation contracts (*Uqood Al-mu'awadat*) versus *Gharar* in Donation Contracts (*Uqood Al-Tabaru'aat*)

The Arabic term *mu'awadah* refers to the process of presenting something in exchange of something else, as is the case in sale and leasing transactions; while the word *tabaru* (donation) indicates a one-side bestowal for which no recompense is to be paid.

It may be noted that prohibition of *Gharar* as the Prophet (peace and blessings upon him) has indicated, relates to sale (he has forbidden practicing of *Gharar* in sale); and that sale is a compensation, rather than a donation contracts. This has led some Islamic jurists, especially those of the *Maliki* School to hold the view that donation contracts enjoy a wider scope of exemption from *Gharar* compared to compensation contracts. According to these jurists the reason is that donation contracts are based on charity, whereas compensation contracts are based on achievement of justice.

Hence, you may say to someone: I offer you as a grant what is inside this room, yet you cannot sell what is inside the room to him without specifying it. Since the buyer is going to pay a price, he needs to know the specific equivalent for that.

Similarly, milk in the udder of a sheep, a fetus in the womb of a cow, the awaited fruit yield of a tree, a straying camel or any of two different garments or horses can be offered as a grant, but cannot be sold without specification.

That is to say, in addition to things that can be sold, things that cannot be sold may also be given as a grant. Or we can say that what can be offered, as a grant may not be suitable for being sold. This could also be taken to mean that the degree of *Gharar* that can be accepted in a grant may not be acceptable in a sale transaction.

In fact overlooking *Gharar* in donations will enhance benevolent initiatives.

Gharar in Corollaries (*Tawabi*)

Forbidden *Gharar* is usually involved in the primary object of the contract, whereas *Gharar* in the corollaries is usually overlooked. This fact constitutes the basis for the *Fiqhi* maxim which states that ***"what can be forgiven in corollaries cannot be forgiven elsewhere"***. It is, therefore, impermissible to sell milk alone while it is in the udder of an animal, but it can be sold along with the animal itself. Also a fetus in the womb of an animal cannot be sold separately, although it can be sold along with the animal.

Excessive versus minor *Gharar*

Islamic jurists unanimously believe that what is forbidden is excessive rather than minor *Gharar*. Nevertheless, they are in vast disagreement as to how excessive *Gharar* can be identified. They agree that minor *Gharar* includes, for instance: selling of a padded dress without seeing its padding material; or a house without seeing its foundation.

As regards excessive *Gharar*, they agree that it includes for example: selling of what a diver will get out of the sea; or selling of a fetus in the womb of an animal; or postponement of the price of the sold commodity for an unspecified date. However, Islamic jurists are in disagreement about the degree of *Gharar* in selling of what is hidden under the ground such as onion and radish; or what is hidden in its peel such as walnut and pistachio; or selling at anticipated market price.

It seems that most of the cases on which Islamic jurists unanimously agree are those which have been specifically referred to in *Shari'ah* texts. According to some Islamic jurists, *Gharar* is said to be excessive when it becomes a dominating and distinctive aspect of the contract; while minor

Gharar is that degree of *Gharar*, which no contract can possibly avoid, and which can be overlooked subject to the prevailing traditions.

This flexible standard for determination of excessive and minor *Gharar* would certainly lead to flexible controls on *Gharar* and allows enough room for accommodating the complexities that take place subject to change of place or time(1).

Controls on Forbidden *Gharar*

It seems that classifying *Gharar* into avoidable and unavoidable, as some Islamic jurists used to do, is more acceptable than dividing it into minor and excessive. This is simply because even excessive *Gharar* can become tolerable in some contracts such as *Juaalah* which involves *Gharar* in the work to be done and its duration, yet it is permissible because people need it. Likewise, minor *Gharar* need not be forgiven when it can easily be avoided. Therefore, we can say that any *Gharar*, which cannot be avoided, or can be avoided only with severe hardship, can be overlooked on the basis of need. Need in this context indicates the state in which the person will encounter intolerable hardship and suffering if he is not relived from observing prohibition; whereas necessity indicates a more severe situation in which the person may die or would – certainly or presumably – face the danger of death if he is not relieved from observing prohibition.

Consequently, some jurists divide *Gharar* into the following three categories:

1. *Gharar* which can hardly be avoided, such as selling of walnut, hazelnut, pomegranate and watermelon in its peel. This type of *Gharar* can be overlooked.
2. *Gharar* that can easily be avoided; and hence cannot be overlooked.
3. *Gharar* that falls between these two extremes; and, therefore, remain controversial. Some jurists believe that it should be added to the first category, while others hold the view that it should be added to the second(2).

(1) Al-Sanhoori: *masadir Al-Haq*, (3/56); Al-Dareer: *Al-Gharar*, p.592.
(2) Ibn Abd Al-Salam: *Al-Qawa'id Al-Kubra*, (2/15).

There is no need for committing avoidable *Gharar*. Therefore, in order to set a limit for permissible *Gharar*, we can say that permissible *Gharar* is confined to that type of *Gharar*, which cannot be avoided while there is a need for it; in addition to *Gharar* which cannot be avoided without severe hardship.

It can be noted here that *Gharar* is overlooked on the basis of need; whereas *riba* (in loans) is overlooked on the basis of necessity (need and necessity are to be decided as per their actual proportions). This very fact has led some jurists to conclude that *Gharar* is less harmful than *riba*[3].

(3) Ibn Taimiyah: *Al-Fatawa*, (29/25).

Chapter: IV
Ignorance (*Jahalah*)

In Arabic language the word *jahalah* means lack of knowledge and is used to describe the state of someone who shows lack of knowledge in his beliefs or words and acts. In *Fiqh* terminology *jahalah* is used to indicate ignorance about a certain aspect of a sale, leasing or loan transaction. This chapter is intended to tackle *jahalah* in its terminological sense.

According to the Islamic jurists *jahalah* has three different ranks:

- **Excessive *Jahalah***, which leads to dispute and nullification of the contract; such as selling of a fetus in the womb of an animal.

- **minor *Jahalah***, which does not generate dispute or affect the validity of the contract; such as ignorance about the foundation of a sold house or the padding material of a suit.

- **medium *Jahalah***, which remains as a disputable issue among Islamic jurists, as to whether it should be part of excessive or minor *jahalah*. One example of medium *jahalah* is selling of grapes before becoming black; or grain spikes before becoming white.

It seems to be very difficult to differentiate between *Gharar* and *jahalah* as exhibited in the writings of Islamic jurists, although some scholars, like Al-Qarrafi have tried to make such distinction[(1)].

(1) Al-Qarrafi: *Al-Furooq*, (3/265).

Chapter V

Monopoly (*Ihtikar*)

The Arabic word *'Ihtikar*' (monopoly) means keeping foodstuffs in anticipation of price rise. Terminologically the *Hanafi* scholars define *Ihtikar* as: purchasing of foodstuffs and other similar commodities with the aim of keeping them until time of price rise.

According to the *Maliki* jurists, *Ihtikar* is the process of monitoring markets behavior in anticipation of rise in prices.

For the *Shafiee* jurists, *Ihtikar* means purchase of food at the time when food prices are showing a rising trend, so as to sell it at higher prices later on; an act, which cause hardship to others.

In the *Hanbali* School's perception, *Ihtikar* refers to purchase of food and keeping it in anticipation of a rise in price.

The Prophet (peace and blessings upon him said: "***whoever practices monopoly is a wrongdoer"***[1]**.**

The rationale behind the prohibition of monopoly is to safeguard people against hardship. Islamic jurists unanimously agree that if someone monopolizes a commodity for which people are in need, while no substitutes of it are available in the market; he can be forced to sell that commodity.

However, Islamic jurists are in disagreement as regards the types of commodities that should be subjected to controls against monopoly.

- Some jurists consider prohibition of monopoly to be confined to foodstuffs.
- Others think that prohibition includes foodstuffs and clothes in particular.
- A third group believes that prohibition includes foodstuffs, clothes and any other commodity that people need.

(1) Muslim: *Al-Saheeh*, (11/43).

The majority of Islamic jurists holds the view that among the conditions for considering a case as monopoly is that the commodity in question is acquired through purchasing. Some jurists indicate that monopoly can include also what is acquired through cultivation; as when the farmer keeps the agricultural products of his farm until time of price rise.

Another group of jurists argues that purchasing commodities at the time of cheapness so as to sell them when prices rise has nothing to do with monopoly, because it is a lawful act of trading.

Monopoly and Oligopoly

Ibn Taimiyah and Ibn Al-Qayem discussed the case of single man monopoly in some of their writings indicating that, ***"nobody other than (that specific person) sells the commodity"***. However, in most of their writings, they concentrated on monopoly when practiced by a small group of people (oligopoly). They indicate that the situation involves ***"enforcing commitment of the entire society that nobody, except a small group of people, shall trade in foodstuffs or the commodity in question. People are thus forced not to sell such commodities except for that small group of monopolists so that it can sell the commodity to the public at the price it wants. If anybody breaches this commitment he will become liable to the prevention and punishment"***[2].

Monopoly in Goods versus monopoly in Services

The preceding illustration indicates that Monopoly can be practiced in trading of goods. Nevertheless some jurists have discussed monopoly in services. A number of jurists believe that expert dividers who specialize in division of real estate and other types of property against fee should not collude for the sake of raising their fees; when people are in need of their services[3].

Monopoly in Selling versus Monopoly in Purchasing

Monopoly in selling refers to collusion among sellers to sell at an unduly high price, whereas monopoly in purchasing refers to collusion among buyers to buy at an unduly low price[4].

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(2) Ibn Taimiyah: *Al-Fatawa*, (28/77); Ibn Al-Qayem: *Al-Turuq Al-Hukmiyah*, p. 245.
(3) Ibn Al-Qayem: *Al-Turuq Al-Hukmiyah*, pp. 246 -247.
(4) Ibn Taimiyah: *Al-Fatawa*, (28/76 101); Ibn Al-Qayem: *Al-Turuq Al-Hukmiyah*, p. 245.

Monopoly versus Harding (*Iktinaz*)

Monopoly takes place in goods, whereas hoarding takes place in the money. According to the majority of Islamic jurists hording means refraining from payment of *Zakah* on money. When *Zakah* is paid, the remaining amount of money is not considered as *kanz* (treasure). However, some jurists including Al-Ghazali considers hording to be broader than that. They believe that, even after payment of *Zakah*, keeping money away from circulation constitutes hording(5).

Monopoly and Saving (*Iddikhar*)

The Arabic word *'Iddakhar'* means keeping something until time of need. Saving is usually made with the aim of catering for self and dependants' future needs, while monopoly is pursued with the objective of making profit. Saving as a concept is broader than monopoly; because the former is not restricted to things, which, if kept away from circulation, people will encounter hardship. Also saving is broader than hording.

Saving can be practiced by the state, as well as the individual. Islamic jurists have two opposing viewpoints with regard to saving when practiced by the state:

1. Some hold the view that it is impermissible for the state to make any saving. Any excess public revenues should be divided among the citizens. When the need for funds arises at the time of cataclysms the state may mobilize the required funding through levy of taxes on the wealth of the rich.

2. Others indicate that it is permissible for the state to save money for cataclysms and emergencies so as to ensure timely response and the possibility of shifting the saved funds from one region to another. This viewpoint is supported by the story of the Prophet Yusuf(6) (peace upon him).

(5) Al-Ghazali: *Ihya' Uloom Al-Deen*, (4/89); Al-Raghib Al-Asfahani: *Al-Zari'ah Ela makarim Al-Shari'ah*, p. 274.
(6) *Surat* Yusuf, Verses: 47 – 48.

As regards individual saving, it is considered to be permissible if the saved amount is below the *Nisab* (*Zakah-liable* wealth level). When the saved amount reaches the *Nisab*, *Zakah* on it should be paid and the remaining amount can be saved as per the viewpoint of the majority of jurists. In this regard the Prophet (peace and blessings upon him) said: "***It is better for you (on your death) to leave a rich family, than a family that seeks sustenance through begging"***[7].

Some jurists make further elaboration indicating that before saving, the owner of the wealth should pay the incidental duties levied on his wealth such as feeding of the hungry, releasing of war captives and equipping of holy war troops. Other jurists suggest a maximum limit of one year for saving, because the Prophet (peace and blessings upon him) used to store a food stock of one year for his family[8]. Nonetheless, if anyone has a food stock that exceeds his need while other people are in need of it, the ruler (competent authority) can force such person to sell his excess food stocks at market price in order to ward off public suffering. In this regard, the Prophet (peace and blessings upon him) said: ***"whoever has excess food should make it available to those who do not have"***. As regards saving of luxuries, it is permissible as long as it does not reach the level of extravagance.

Pricing (*Tas'eer*)

The majority of Islamic jurists considers pricing as forbidden. Even those who accept it on an exceptional basis, acknowledge that it is forbidden in principle. They indicate that it is permissible only under certain circumstances such as crises, famines, monopoly and collusion among sellers or buyers[9]. Under such circumstances pricing should be just, and has to be made in consultation with experts so as not to lead to price distortions and scarcity[10].

Investment (*Istithmar*)

The Arabic word *Istithmar* means good management of resources in pursuit of growth. It is quite similar to the word *'Istighlal*' (exploitation),

(7) Al-Bukhari: *Al-Saheeh,* (4/3).
(8) Al-Bukhari: *Al-Saheeh,* (7/81).
(9) Ibn Taimiyah: *Al-Fatawa,* (28/77); Ibn Al-Qayem: *Al-Turuq Al-Hukmiyah,* p. 244.
(10) Al-Baji: *Al-muntaqa,* (5/18).

which also indicates good management of resources with the aim of making gains.

Investment is preferable, since it can lead to the benefit of the individual as well as the society at large. Investment can be practiced by the owner of the capital or as a joint venture between him and another party. It is permissible through all *Shari'ah*-acceptable occupations like trade, industry, agriculture, and through all permissible forms of contracting such as sale, leasing, partnership, *Mudharabah*, *Muzara'ah*, *Musaqah*, and *Mugharasah*. Islam encourages people to pursue development of the earth, work hard to make gains, bring dead land into use, preserve and develop property and shun away from wastefulness and hoarding.

In this regard, Allah *(subhanahu wa taala)* said: ***"It is He who hath produced you from the earth and settled you therein"*** [*Hood:* 61]. According to Al-Jassas, ***"this implies that development of the earth through cultivation, plantation and construction is a duty"***(11).The Prophet (peace and blessings upon him) said: ***"whoever has a piece of land may cultivate it or let his brother do so"***(12). He also said: ***"whoever brings a dead land into use shall become its owner"***(13)**.** In another *hadith* he said: ***"any Muslim who plants trees or cultivates crops and, thus, makes food available to birds, human beings and animals; becomes entitled to a dole in reward"***(14)**.**

Hence, Islam uses all religious and material incentives to motivate people to pursue investment in real estate, agriculture, industry, commerce and finance.

Investment and Risk

Earning of yield or profit necessitates bearing of risks. Therefore, risk taking is not only permissible, but it is also preferable to justify entitlement to gain. Seeking more profit would entail bearing of more risks(15). Diversification of risks also constitutes an important aspect of investment activity. Allah *(subhanahu wa taala)* said in the words of

(11) Al-Jassas: *Ahkam Al-Qur'an*, (3/165).
(12) Muslim: *Al-Saheeh*, (10/199).
(13) Al-Bukhari: *Al-Saheeh*, (3/139).
(14) Al-Bukhari: *Al-Saheeh*, (3/135); Muslim: *Al-Saheeh*, (10/215).
(15) Ibn Khuldoon: *Al-Muqaddimah*, (2/930).

Prophet *Yaaqup* (peace upon him): ***"O my sons! Enter not all by one gate, enter ye by different gates"*** [*Yusuf*: 67].

Islam has also forbidden us from making gain without bearing its underlying risk. Therefore, in *Mudharabah*, the owner of the capital has to bear the financial risk. He should not evade assumption of the risk that entitles him to reward, because the Prophet (peace and blessings upon him) has declared that as forbidden. As we have already indicated, it is a well known Islamic legal maxim that: ***"return follows guarantee"*** or ***"return follows cost (risk)"***. Quite like the owner of capital, a lesser is entitled to rent against bearing the risks of the leased asset.

Chapter: VI
Bribe (*Rashwah*)

Definition

Bribe refers to the act of forwarding money or any other type of property to someone so as to solicit his favor through courteousness and adulation. Bribe is usually practiced with the aim of nullifying a valid right or enforcing a false claim. It can also be used for obtaining unlawful relief from a duty, or commitment of a banned act. Bribe can be taken forcefully or through collusion and mutual consent of the briber and the bribe receiver so as to achieve their own interests at the cost of public interest.

Ibn Al-Arabi defines bribe as "***any money or other type of property given to a high standing person for getting his support in an unlawful act"***.

According to Al-Ghazali, bribe is ***"the act of forwarding money or any other type of property to someone with the aim of getting his support in committing an unlawful act or averting an incumbent duty"***[(1)].

As is usually the case for other taboos, bribe is sometimes concealed in many other names such as: gift, gratuity, fee, commission, remuneration, *Juaalah* entertainment or *barteel.* The Arabic word *barteel* refers to a rectangular-shaped stone, and is used here to assimilate the act of giving bribe to insertion of such a stone into the mouth of the bribe taker so as to make him keep silent. There is a known Arabic proverb, which states that ***"brateel lend authority to abateel"*** meaning that bribes facilitate enforcement of false claims.

Shari'ah Status of Bribe

Bribe is impermissible for the briber, bribe taker and the middleperson who facilitates its payment[(2)]. It is strictly forbidden if it is given for the sake of accomplishing a forbidden act, or inflicting oppression upon others. Some jurists consider bribe as impermissible for its taker, while it is permissible (or detestable) for the briber when he

(1) Al-Ghazali: *Ihya' Uloom Al-Deen*, (5/917-921).
(2) See Surat *Al-Baqarah*: 188; *Al-ma'idah*: 42; *Al-Aaraf*: 169 and relevant commentaries.

forwards it for the sake of obtaining a lawful right or avoiding injustice. An example of this is the case when the briber is afraid of harm, which might be caused to him or to his family. However, there is no doubt that the sin committed by someone who takes the bribe for the facilitation of an unlawful act is greater than the sin committed by a person who fails to get his right without forwarding bribe.

In conclusion, *Shari'ah* strictly prohibits all forms of benefiting from bribe. The property obtained through bribe should be returned back to the briber if he can be reached, otherwise it should be spent on charitable purposes, as is the case for any unlawful gain.

Economic and Social Impacts of Bribe

Bribe has adverse effects on production due to its role in weakening efficiency and economic incentives, reducing public revenues; and distorting costs of transactions. Bribe can also aggravate the state of uncertainty because, in most cases, it would be difficult to know how much one is going to pay as bribe or whether bribe takers are going to fulfill their promises or not. Consequently, bribe and corruption result in misallocation of development yields and promotion of widespread backwardness and misery; and hence lead to total collapse of the economy. Under corruption the entire setup and operational mechanisms of the economy become exposed to complete disorder. That is why, in *Shari'ah,* avoidance of blight is given priority over attraction of interest.

In addition to dissolution of intentions and widespread of corruption, proliferation of bribe can lead to promotion of bad goods and services and deprivation of honest producers from any chance for doing business; while keeping the door wide open for bribers and bribe takers.

Again, since bribe is an easy way of earning income without any effort or cost, and is totally dependent on misuse of authority and prestige, it works very fast in jeopardizing the process of justice and provoking mal-distribution tendencies that favor the corrupt segments of the society.

Chapter: VII

Unfairness (*Ghubn*)

In Arabic language the word *Ghubn* or *ghabn* means decrement, while in *Fiqh* terminology it indicates selling of a commodity at more than its highest acceptable price. *Ghubn* is forbidden because it exposes the buyer to deception and cheating. It can be divided into two types: minor *Ghubn* and excessive *Ghubn.*

According to the *Hanafi* jurists, *Ghubn* is considered to be minor when the price remains within the range of experts' evaluation if the commodity in question is of an unknown price. If the commodity is of a known price like bread, meat, apples and banana *Ghubn* cannot be considered as minor. The *Maliki* jurists believe that minor *Ghubn* refers to the degree of *Ghubn*, which is normally considered to be acceptable. To the *Shafiee* jurists also, minor *Ghubn* indicates the degree of Ghubn, which normally thought to be tolerable.

As regards excessive *Ghubn*, the *Hanafi* jurists indicate that it refers to the case when the price does not fall within the range of experts' evaluation. For instance, if a good is sold at SR 100, while experts estimate its price to be ranging between SR 90 – SR 100, *Ghubn* is considered to be minor. If the range of evaluation of experts for the price of that commodity is SR 80 – SR 90, then *Ghubn* (which is SR 10 in this case) is excessive. That is to say, *Ghubn* is the difference between the price at which the commodity is sold, and the upper limit of the experts' evaluation range for the price of that commodity.

The *Hanafi* jurists have also given the following percentages to illustrate the degree of excessive *Ghubn*:

- In money: 2.5% of the price.
- In assets other than real estate: 5% of the price.
- In livestock: 10% of the price.
- In real estate: 20% of the price

The *Maliki* jurists consider excessive *Ghubn* to mean selling at an abnormally high price, which – according to some of them - is one third more than the normal price, or even more than that according to others. *Shafiee* jurists believe that excessive *Ghubn* is the degree of Ghubn that is normally intolerable. *Hanbali* jurists suggest resorting to custom, while some of them point out to the limit of one third in excess of normal price.

The majority of Islamic jurists hold the view that minor *Ghubn* does not affect the validity of the contract, while they are in dispute regarding the effect of excessive *Ghubn*.

- Some jurists believe that the mere presence of *Ghubn*, does not entitles the buyer to the right of contract termination. The buyer in this case is considered to have been negligent in not pursuing the opinion of experts before concluding the deal. According to Al-Sanhoori, ***"Ghubn which is not accompanied by deceit (…) is unrecognizable in Islamic Fiqh as well as western laws except in very exceptional cases"***[1].

- Other jurists hold the view that when there is excessive *Ghubn*, the buyer should have the option to conclude or revoke the contract even if excessive *Ghubn* does not involve deceit.

- A third group of jurists argue that the buyer should have the option to conclude or revoke the contract only if *Ghubn* is accompanied by deceit.

(1) Al-Sanhoori: *masadir Al-Haq*, (2/137).

Chapter: VIII

Deceitful Bidding up of Price *(Najash)*

Definition and *Shari'ah* Status of *Najash*

Literally, the word *'Najash'* can be taken to mean concealing, because the person who performs *Najash* usually tries to conceal his real aim. The word *Najash* also indicates disturbing, as when hiding birds are stirred out of their nests so as to be hunted; or deceiving, as when the hunter uses different tricks and stratagems in order to hoax the prey. *Najash* also indicates praising and excitement.

In *Fiqh* terminology *Najash* refers to the fictitious bidding up of the price of a commodity in order to induce the buyer to purchase it at that high price. Misleading advertisement can be considered as one of the modern forms of *Najash.*

Najash is forbidden especially when it leads to excessive unfairness (*Ghubn*). However, some *Hanafi* jurists are of the view that *Najash* is permissible when it is practiced by a person who lacks market information and is, therefore, compelled to do so in order to reach market price.

The *Maliki* jurists prohibit *Najash* when it leads to selling at more than market price. When *Najash* does not lead to that, the *Maliki* jurists have three different viewpoints. Some of them believe that *Najash* in this case is permissible; others indicate that it is preferable and a third group argues that it is forbidden.

The effect of *Najash* on sale transactions is also one of the controversial issues among Islamic jurists:

- Some indicate that the contract becomes null and void because *Najash* is forbidden.
- Others think that the buyer should have the option to conclude or revoke the contract especially when the deal entails an unusual degree of *Ghubn.*
- The majority of Islamic jurists hold the view that, although *Najash* is sinful, the contract is valid because the buyer should have been keen enough to seek advice of experts.

Some Economic Implications of *Najash* and *Ghubn*

1. Information

One of the conditions of perfect competition in economics is that both the seller and the buyer should be aware of the price and the quality of the good in question (symmetry of information). Without fulfillment of this condition competition will not be perfect and there will be no single market price for the commodity. Also in the absence of this condition the two parties of the contract will not be satisfied, because satisfaction is based on information.

Looking into the diverse *Fiqhi* viewpoints on *Najash* indicates that the majority of jurists do not suggest termination of the contract when it involves *Najash*, because prohibition is about *Najash* rather than *Najash*-based sales. These jurists blame the buyer for not seeking enough information about the commodity through consultation of experts or by trying to get offers from several sellers in the market. According to Ibn Qudamah, "***negligence is from his own side, if he chooses to purchase a commodity without being aware of its price***"(1). Ibn Abdul Barr also argues in his book titled Al-Iztizkar that ***"the buyer is supposed to be more cautious and should seek the help of experts if he doesn't know the price"***(2).

As far as *Ghubn* is concerned, and as we have indicated in the preceding chapter, there are some scholars who believe that the buyer should have the option to conclude or terminate the contract. However, most of these scholars do not suggest such option except when the deal involves abnormal *Ghubn*. If *Ghubn* is of the minor type, which people normally accept, there should be no option of contract termination for the buyer. The buyer who refrains from seeking information about the price has to surrender to the minor - or may be excessive – *Ghubn*, if the deal does not involve deception.

(1) *Al-mughni*, (4/278).
(2) *Al-Iztizkar*, (21/78).

2. Need for flexibility in validation of transactions and contracts whenever that is possible

Those who declared the validity of sale even when it involves *Najash* constitute the majority of Islamic jurists. This very fact indicates the importance of being flexible in validation of commercial deals whenever that is possible, so as to facilitate stability of commercial transactions and reduce legal disputes.

According to Al-Hattab, ***"when selling or purchasing takes place through bargaining, there will be no room to cater for Ghubn as per the generally accepted viewpoint"***(3). Al-Hattab indicates that this is the viewpoint of the *Hanafi*, *Shafiee* and the *Maliki* jurists(4). He then makes further elaborations indicating that ***"mughbanah (Ghubn) is acceptable among people even when it is excessive"***(5), and he adds: ***"how can we say that a sale transaction is to be revoked because of Ghubn, while Ghubn is permissible between any seller and buyer, except for those forms of Ghubn which Sunnah has specifically denied? So, when someone (...) purchases what really worth a hundred Dirhams for a thousand Dirhams the transaction is still valid, as per general consensus"***(6), and he adds ***"I have never come across any dispute around the validity of the sale contract, even when the sale price of the commodity is several times higher than its normal price"***(7)**.**

According to Ibn Abideen ***"giving the buyer the absolute right of contract termination (in case of excessive Ghubn) is not less cumbersome for people than otherwise, because it will lead to more conflict in sales. merchants usually make substantial profits on their sales, and it is permissible to sell the less valuable for the more valuable and vice versa"***(8)**.**

Ibn Aashoor believes that ***"minor Ghubn could be overlooked for the sake of achieving the interest of contract validation, especially for those sales that become null and void for lack of some Fiqhi requirements"***(9). He then referred to five *Shari'ah* objectives pertaining to wealth; including

(3) Al-Hattab: *mwahib Al-Jaleel*, (4/470).
(4) Ibid, (4/471)
(5) Al-Hattab: *mawahib Al-Jaleel*, (4/471).
(6) Ibid, (4/469).
(7) Ibid, (4/470).
(8) Ibn Abideen: *Al-Rasa'il (Resalat Tahbeer Al-Tahreer Fi Ibtal Al-qada Bilnaskh BilGhubn Al-Fahish Bila Taghreer)*, (2/80).
(9) Ibn Aashoor: *Maqasid Al-Shari'ah*, p. 183.

circulation (turnover of funds), which requires the encouragement of trade. The validity of this viewpoint is confirmed by the fact that, in principle, Islam regards contracts to be binding rather than optional (unless the option is stipulated), and forgives minor *Gharar* and *Gabon*[10].

Al-Sanhoori is of the view that ***"most of the schools of Islamic Fiqh consider Ghubn as negligible even when it is excessive; unless it is accompanied by fraud and deception. In this respect, Islam tries to sacrifice respect of will for the sake of achieving stability of dealings. This is also true for western legislation which rarely pays much attention to Ghubn except in very limited cases"***[11].

As perceived by Al-Khafeef ***"compensation contracts must be preserved against revocation whenever that is possible, especially if revocation is to rectify what has been caused by negligence of one of the two parties and his failure to seek advice from experts. Such negligence of a contract's party is his own responsibility and he should bear its full consequences"***[12].

Al-Jazeeri argues that ***"selling and buying are permissible so that people can gain profits from each other. Therefore mughabanah (Ghubn) as such is inevitable among people. Both the seller and the buyer want to make a big gain, while Shari'ah does not prohibit profit or specify a maximum limit for it. Shari'ah forbids deception, cheating and false praising of the sold good or concealing a defect that it has. When any of these forbidden practices takes place the buyer has the right to return the good. The wisdom behind this ruling is to give both the seller and the buyer the chance to avoid being exposed to injustice. The question which can be posed here is that if both the seller and the buyer are keen enough to avoid being subjected to excessive Ghubn, but still Ghubn has taken place without cheating or deception, how can such Ghubn be judged? What is the limit within which it can be considered as forgivable?"***[13].

According to Al-Zarqa, ***"as for the Hanafi School, Najash does not constitute a defect of the contract. Due to the need for maintaining stability of transactions, Najash does not lead to contract nullification. Nevertheless from a religious standpoint Najash encounters prohibitive detestation"***[14].

(10) Ibid, pp. 175 – 179.
(11) Al-Sanhoori: *Masadir Al-Haq*, (2/133 & 112).
(12) Al-Khafeef: *Ahkam Al-Muamalat*, p. 397.
(13) Al-Jazeeri: *Al-Fiqh Ala Al-mazahib Al-Arba'ah*, (2/283).
(14) mustafa Al-Zarqa: *Al-madkhal*, (1/378); and see also muhammad Anas Al-Zarqa: *Qwa'id Al-mubadalat*, p. 48.

Al-Zarqa also indicates that, ***"excessive Ghubn alone does not constitute a defect in consensual contracting, unless it is accompanied by khalabah (deception). This seems to be the conclusion that has been reached by most of the interpretative efforts in this respect. When Ghubn does not involve any deception it becomes solely attributable to the mere negligence of the concerned party who is supposed to seek price information before concluding the deal. Everybody has the right to pursue benefit through free and lawful means, without committing deception or causing harm to others. It is only when pursuit of benefit leads to infliction of harm upon others that the freedom of the individual is controlled and his benefit is subjected to limitation; as in the case of monopolization of necessities and collusion among sellers for control of prices.***

As regards the flow of normal transactions that take place among people without involving any fraud or deceit, it is not at all the mission of the legislator to prevent the occurrence of Ghubn per se. The legislator is supposed to just ensure that the two contracting parties are on equal standing with regard to freedom and legal capacity. If that is ensured everybody has to keep his eyes wide open so as to avoid being subjected to Ghubn. People do have the inherent urge for choosing the best for themselves, and taking care of being deceived by others. Consequently, a negligent person has to bear the full consequences of his negligence. This is exactly what the majority of interpretative efforts of Islamic jurists about non-fraudulent Ghubn seem to have reached"[15].

"***The Shari'ah text, which the proponents of this viewpoint quote to defend their argument, is the hadith of the Prophet (peace and blessings upon him) in which he said: (let people gain the livelihoods that Allah destines to each of them from the other)***[16]***. The Hanafi jurists have two opposing viewpoints regarding permissibility of contract revocation in case of non-deceitful Ghubn. Of these two viewpoints the most predominant one is that revocation is impermissible in the absence of deceit"***[17].

3. Justice and Freedom

We have come to see that the majority of Islamic jurists have indicated the validity of sales, which involve *Najash* and admitted the possibility of overlooking minor *Ghubn* presuming that the buyer is to bear the consequences of his negligence. The lesson that can be learnt from this is that the advocates of this viewpoint seem

(15) Al-Zarqa: *Al-madkhal*, (1/387); and see also Al-Zuhaili: *Al-Fiqh Al-Islami*, (4/222).
(16) Muslim: *Al-Saheeh*, (10/165).
(17) Al-Zarqa: *Al-madkhal*, (1/387).

to have accepted a little bit of sacrifice of justice and satisfaction in order to promote economic and commercial freedom for achievement of efficiency and development. They seem to be opting for striking the midway point where the contradiction between justice and freedom can be resolved. That is the point of minor *Ghubn*, *Gharar* or dissatisfaction. This is simply because there is no economic system that can be entirely based on either freedom or justice. Economic efficiency and development are normally the outcome of a balanced blend of justice and freedom.

There is no doubt that the Islamic jurists who supported the validity of sales which involve *Najash* and minor *Ghubn* have given much care to commercial freedom at the group level. In the contrary, those who preferred to go for contract revocation because of *Najash* - or giving the buyer the right of annulment - seem to have assigned preponderance to the side of justice and, therefore, have shown much interest in freedom and satisfaction at the individual level.

4. Profit maximization

On the basis of the preceding discussion, it is clear that *Shari'ah* does not blame the buyer or the trader for his endeavor to maximize price or profit. This is exactly tantamount to the economic principle that, in his attempt to maximize price or profit, the seller should encounter no barrier other than competition by other sellers and the buyer's right of access to information. In fact *Shari'ah* permits all this in performing trading activities, provided that the deals would not involve cheating, deceit or concealing of any defect of the commodity.

Shari'ah scholars have explicitly emphasized the importance of profit maximization in several respects including dispositions of public *waqfs* and orphans' properties. Regarding such properties, ***"efforts should be exerted for selling at the maximum possible price. It is impermissible for the guardian to sell at less than the maximum price he can obtain, regardless of whether that price is equal to, more than or less than market price. Ignoring the possibility of selling at a higher price in this case would mean sacrificing a guaranteed benefit that can result to the owner of the property"***[(18)].

(18) Al-mawardi: *Al-Hawi*, (6/446).

Selling through overbidding, which is meant to attract the maximum possible price, is also permissible according to Islamic jurists.

While attempting a comparison between selling through overbidding and selling through bargaining Al-mawardi states that ***"the purpose (of selling through overbidding) is to maximize the price of commodities without indicating their owners, whereas the purpose of selling through munajazah (bargaining) could involve the desire to indicate the owners"***[19]. Therefore bargaining which refers to the process of selling and buying, seems to be like competition in that it requires nothing more than equality in competency and access to the information relating to the good in question; in addition to absence of deceit.

(19) Ibid, (2/423).

Chapter: IX

Extravagance (*Israf*)

Israf means the act of exceeding the limits of moderation, or misspending of money. It is sometimes said that *Israf* in spending means surpassing the limits either through venturing upon forbidden consumption, or by exceeding the limits of moderation and actual need with regard to permissible consumption.

Quite similar to *Israf* are the words *Tabzeer* (wastefulness) and *Safah* (irrationality). Some scholars have tried to differentiate between these three terms indicating that *Israf* refers to excessive spending on appropriate consumption, and *Tabzeer* indicates spending on inappropriate consumption. That is to say, *Israf* originates from ignorance about appropriate proportions of permissible spending, while *Tabzeer* stems from ignorance about permissible channels of spending. As regards *Safah*, it is said to be the underlying cause of *Israf* and *Tabzeer*.

Taqteer (penny-pinching) is the opposite of *Israf*, and both of them are dispraised. *Taqteer* is a manifestation of miserliness; from which the Prophet (peace and blessings upon him) used to seek refuge with Allah *(subhanahu wa taala)*[(1)], because it leads to physical, mental and spiritual weakness; reduced business incentives; and a weak Muslim society that remains exposed to exploitation by enemies[(2)].

Some jurists believe that overspending on charitable purposes is not considered as *Israf*. Others scholars argue the other way round because, according to them, Allah *(subhanahu wa taala)* said: ***"but render the dues that are proper on the day that the harvest is gathered"[****Al-Anaam*: 141], that is to say, do not spend all your produce on charity and remain empty-handed.

Muslims are therefore commanded to shun away from extravagance, high living, and wastefulness. They have to economize in all their affairs including worshiping, donation, consumption and punishments. According to the majority of Islamic jurists, *Israf* is an acceptable reason for legal interdiction[(3)].

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(1) Al-Bukhari: *Al-Saheeh*, (4/43); Muslim: *Al-Saheeh*, (17/29).
(2) Al-Juwaini: *Al-Ghiyathi*, pp. 477, 481, 482 & 485.
(3) *Al-Mawsoo'ah,* (4/176).

Chapter: X
Injustice (*Zulm*)

Islam has commanded people to achieve justice and refrain from inequity, tyranny, aggression, extortion and theft. Injustice means improper handling of matters, or transgression and encroachment upon the rights of others.

Injustice is strictly forbidden at all levels of political, judicial and administrative responsibility. Justice is a virtue that has far-reaching benefits. For instance, a leader or a manager who shows moderation in worship practices but is always keen to achieve the highest levels of justice, is far better than a leader or manager who is very keen about worship practices, but he does not mind to be unjust. Worship practicing generates benefit to the worshipper alone, while justice generates benefit to all. Transitive benefit deserves priority over intransitive benefit. It is also well known that a fair *Imam* is one of the seven persons whom Allah *(subhanahu wa taala)* will shade on a day whereon no shade is available except His[(1)].

According to a popular proverb: Reign depends on helpers; and helpers require money; and money is earned from *kharaj* (land tax); and *kharaj* comes from the public; and the public need development; and development depends on justice.

Injustice is a major hindrance to development. As has been stated by Ibn Khuldoon ***"one has to know that encroachment upon the property of people makes them lose the incentive for work and earning, because they will come to believe that whatever they earn will be taken from them. When people lose incentive for work and earning they become inactive. Consequently, when encroachment upon property spreads over to all occupations of the society, disincentive for work and earning also becomes widespread"***[(2)]**.**

(1) Al-Bukhari: *Al-Saheeh*, (1/168); Muslim: *Al-Saheeh*, (7/120).
(2) Ibn Khuldoon: *Al-muqaddimah*, (2/741).

Chapter: XI

Extortion (*Ghasb*)

Extortion indicates taking the property of someone else through oppression and subjugation. In *Fiqh* terminology extortion means a change of ownership title of someone's property through open compulsion; or the unlawful seizure of the property of others. Extortion differs from theft in that it takes place publicly, whereas theft takes place in secrecy.

Extortion is forbidden even if the value of the seized property is below the minimum value specified by *Shari'ah* for application of theft penalty (the *Nisab* of theft). In this regard, Allah *(subhanahu wa taala)* said: ***"O ye who believe! Eat not up your property among yourselves in vanities"***[*Al-Nisa'*: 29]. The Prophet (peace and blessings upon him) said: ***"Allah the Almighty has forbidden shedding in vain of your blood and abuse of your property and honor amongst you (and made these) as sacrosanct as this day in this city in this month"***(1). He also said: ***"It is impermissible to take the property of someone else except with his consent"***(2)**.**

According to the majority of Islamic jurists extortion takes place as soon as the owner is denied access to his property. However, Abu Hanifah and Abu Yusuf are of the opinion that extortion does not take place until the title of ownership is changed from the owner of the property to the extorter. Change of title here indicates shifting of the right of disposition.

An extorter deserves punishment in this world and in the hereafter. He should return the extorted asset to its same place before extortion, because the value of an asset differs with respect to change of place. The extorter should also guarantee the asset and pay compensation for its benefits (at market rate); especially if the asset is an income-generating asset, a *waqf* or an orphan's property.

Sustenance of an extorted asset such as an animal that needs fodder or a cultivated land that needs irrigation is to be borne by the extorter. In

(1) Al-Bukhari: *Al-Saheeh*, (8/198).
(2) Ahmad: *Al-Musnad*, (5/72).

this case the extorter becomes entitled to the yield of the extorted asset, because return follows guarantee. Nonetheless, the extorter can be deprived from the yield and refunded the actual cost he incurred.

When the extorter causes any change in the form of the extorted asset (as when he slaughters and cooks the extorted animal; or crushes the extorted wheat; or makes a household utensil or a sward out of the extorted metal), he should indemnify the owner in kind in case of fungible assets; or in terms of value in case of non-fungible assets.

Chapter: XII

Theft (*Sariqah*)

Theft refers to the act of taking the property of others in secrecy. In *Fiqh* terminology theft denotes taking in secrecy the equivalent of the *Nisab* (*Shari'ah* prescribed minimum value for application of theft penalty) from a safeguarded property of someone else. Theft differs from embezzlement and plundering in that it is a hidden act whereas embezzlement and plundering entails revelation.

According to the majority of Islamic jurists theft includes also the act of the *'nabbash'* (the one who unearths dead bodies to steal the shrouds), as well as the act of the pickpocket who depends on hand sleight in tearing the pockets of inattentive people so as to take what is hidden inside.

Several conditions must be fulfilled before application of the *Shari'ah*-prescribed theft penalty. First, there should be no irresistible reason that forced the accused to steal. Therefore, theft penalty is not applicable during famines. Second, there should be no family relationship between the thief and the victim. Hence, theft penalty is inapplicable when a father steals the property of his son. Third, there should be no suspicion of ownership or a sound claim of entitlement, as when a partner steals the property of the company. All these suspicions jeopardize application of the *Shari'ah*-prescribed theft penalty, yet they do not prevent application of other discretionary punishments.

Notwithstanding some other juristic viewpoints, the *Nisab* of theft is ten *Dirhams*.

Part: VI

Compensatory Deals

(*Muawadhat*)

Chapter: I
Sale (*Bai'*)

Sale refers to the process of exchanging a property for another; or payment of compensation in reward for another. The one who forwards the good is the seller, while the one who forwards the price is the buyer.

Shari'ah Status of Sale

Sale is permissible as has been indicated in *Shari'ah* texts, and because everybody is in need of what is in the hands of the other. Sale could become *mandoob* (recommendable) as when the buyer entreats the seller to sell him his property without any harm to be caused to the latter; or *wajib* (a duty) as when somebody is in acute need for buying food or drink; or detestable (*makrooh*) if it involves selling of a detestable commodity; or forbidden (*haram*) if it involves selling of a forbidden commodity.

Barter

Barter indicates selling of a good for another good or an asset for another asset. That is to say, it is a sale process that does not involve money. In this connection, the Prophet (peace and blessings upon him) said to someone: ***"I can offer you something in barter if you like"***[1].

Trusteeship Sale (*Bai' Al-Amanah*)

Sale can take place either through bargaining or on the basis of trusteeship. In bargaining the seller does not reveal his capital (purchase price), whereas he reveals it in case of trusteeship sale. Trusteeship sale includes the following three types:

1. *murabahah*, which denotes the sale in which price is fixed by adding a specific lump sum or percentage markup to the purchase price.

2. *Tawliyah*, which indicates selling at cost (without any profit or loss).

3. *Wadhi'ah (or Hateetah)*, which refers to sale at a given lump sum or percentage loss margin.

(1) Abu Dawud: *Al-Sunan*, (3/122).

Sale on Credit (*Bai' Al-Nasi'ah*)

Sale can involve immediate delivery of the sold commodity and payment of price; or it can entail postponement of the sold commodity as well as price, (*bai' al-kali bilkali* in *Fiqh* terminology); or it may involve postponement of either the commodity or the price. In case of advance payment of the price and postponement of the commodity sale is classified as *Salam* (*or salaf*). When commodity is delivered in advance while the price is postponed, the transaction is denoted as *bai nasi'ah*(2) (sale on credit). In sale transactions, postponement of either the commodity or the price is permissible. Price can be totally or partially postponed, so as to be paid in lump sum or in installments at specific dates. Installments can also be made payable regularly (annually, for instance), or subject to any other arrangement; and they could be equal, increasing or decreasing(3). In sale on credit it is permissible to increase price to compensate for time. According to Islamic jurists ***"time has a share in value"***. This viewpoint is shared among the majority of Islamic jurists from the four schools of *Fiqh* as we have already seen in the preceding chapter on *riba*.

Salam Sale (Bai' Al-Salam or Al-Salaf)

The term *salam* is derived from the Arabic world *tasleem* (handing over); hence when it is said that the buyer hands over the price to the seller it means that he forwards the price to him as *salaf* (loan). In *Fiqh* terminology, *Salam* is a sale transaction in which the price is paid in advance, while delivery of the good is postponed.

Permissibility of *Salam* is explicitly indicated by *Shari'ah* texts. The Prophet (peace and blessings upon him) said: ***"whoever practices Salam, let him do that for a specific amount or weight and for a specific time"***(4). The word *Salam* is predominantly used in the Hejaz area, whereas the world *salaf* is more prevalent in Iraq. Sometimes the word *salaf* is also used to denote loan.

One of the wisdoms behind permissibility of *Salam* is that a farmer, for instance, may not have enough money to fund his agricultural operations, and he may also lack access to interest-free financing. This is

(2) Al-mawardi: *Al-Hawi*, (8/237).
(3) Ibid, (9/227).
(4) Al-Bukhari: *Al-Saheeh*, (3/111); Muslim: *Al-Saheeh*, (11/41).

why *Salam* is sometimes called the sale of the penniless or the sale of the needy people. At the other end, *Salam* also enables the buyer to benefit from the low price(5).

Among the conditions that need to be fulfilled in practicing S*alam* are the following:

1. Both commodity and the price should be *Shari'ah*-recognizable. Therefore, *Salam* is impermissible when it involves *Shari'ah*-banned commodities like alcoholic beverages or pork.

2. The two exchanged objects should be different, so as not to commit *riba al-fadl* and *riba al-nasa'*.

3. Price should be paid immediately. However, the *Maliki* jurists permit postponement of price for a maximum period of three days.

4. Commodity should be well specified so as to leave no room for dispute. Therefore, *salam* can be practiced in fungible rather than non-fungible goods.

5. Date of delivery should be specifically known, because value changes through time.

6. Place of delivery should also be known, because value changes according to change of place.

7. Commodity must be something that can be delivered. It should be a commodity that is usually available at time of delivery, whether in the stores of the seller or in the market. Some jurists believe that the commodity must be available in the market from time of signing the contract until time of delivery. Availability of the good in the market facilitates determination of the *Salam* price, which is usually fixed below market price to cater for advance payment of price for a good to be delivered in the future.

Option of contract termination is not allowed in *Salam*, especially when price is already received (remember that the *Maliki* jurists permit postponement of price for a maximum period of three days). If option of contract termination is allowed in *Salam*, the buyer could use it as a pretext for obtaining a loan in the name of Salam. He can do this by

(5) Ibn Qudamah: *Al-mughni*, (4/312).

reviving the price on the basis of Salam, and then refunding it back to the buyer after benefiting from it(6).

According to the majority of Islamic jurists, *Salam* is permissible in commodities as well as benefits. The example of *Salam* in commodities is the case when price is paid in advance for a specifically defined quantity of wheat, whereas the example for *Salam* in benefits is advance payment of price for use or exploitation of a building; or hiring of a person.

The majority of Islamic jurists also permit *Salam* in money if the *salam* price is something else. However, in effect this is nothing but sale on credit in which the good is delivered in advance, while price is postponed.

It is impermissible to pursue commitment of the buyer to accept delivery before the date agreed upon, because that may entail costs of storage, cooling, and insurance; in addition to risks of perishing and theft.

The sold commodity can be delivered in specifically defined batches at specific dates, provided that the value of each batch (present value of each undelivered batch) is identified, so that when a batch is terminated other batches will not be affected(7).

For the sake of avoiding *riba al-nasi'ah, salam* should not be concluded at market price on date of delivery less a specific lump sum or percentage discount. For instance, let us assume that the buyer has paid to the seller SR 100 for delivery of a specific type of wheat provided that if on date of delivery the market price per sack of wheat is SR 10 *salam* price is to be SR 9 (10% less). In that case the quantity of wheat to be delivered becomes 100/9 = 11 sacks; as if the buyer has lent the seller SR 100 so as to repay him SR 110 at a future date.

This might have been the meaning of the statement made by Abu Saeed Al-Khudary that ***"Salam at market price is riba"***(8). The statement

(6) Al-Shafiee: *Al-Um*, (3/118).
(7) Al-Shafiee: *Al-Um*, (3/88); Ibn Hazm: *Al-muhala*, (9/113).
(8) Ibn Hajar: *Fat'hul Bari*, (4/435); Abd Al-Razzaq: *Al-Musannaf*, (8/7); Al-Shawkani: *Nail Al-Awtar*, (5/256).

seems to have been founded on the presumption that *salam* is usually concluded on the basis of price discount.

Istisna'a

Istisna'a is a sale transaction in which the buyer requests the seller to make the commodity. The purchased good in this case is not already produced and offered for sale in the market to whoever wants to buy it. It is made on the basis of a certain request that comes from a specific customer. In this sense *istisna'a* seems to be quite suitable to handicrafts and small business enterprises such as dressmaking, shoemaking, and manufacturing of furniture. *Istisna'a* also seems to be similar, in some respects, to *salam* as well as to hiring.

Similarity between *istisna'a* and *salam* can be seen in terms of the fact that in both cases the sold commodity is non-existent at the time of contracting; except in the form of raw materials in case of istisna'a. moreover, it can also be noticed that in *istisna'a* as well as *salam* the good in question is specifically defined.

As regards similarity between *istisna'a* and hiring, it is manifested in terms of the fact that in *istisna'a* the buyer signs a contract with the seller for purchase of something that he requests the seller to make; and therefore the seller (maker) in this sense is quite similar to what is known in *Fiqh* terminology as a shared employee (*ajeer mushtarak*).

Nevertheless *istisna'a*, in several other respects, is quite different from *Salam* and hiring. *istisna'a* and *salam* are different in the sense that in *istisna'a* the good in question is specific (has to be made subject to certain specifications) and it should not necessarily have a similar equivalent available in the market; whether at time of contracting or at time of delivery. moreover, in *istisna'a* specifying a certain period for accomplishing the task is not obligatory and may be resorted to just for the sake of expediting the process. However, the two companions of Abu Hanifah indicated that specifying a certain period for *istisna'a* is permissible. A further difference between *istisna'a* and *Salam* is that in *istisna'a,* there is no need for payment of the full price (including pay for work) at time of contracting. Also price may not be specified at time of signing the contract (perhaps this is so in case of non-binding contracts).

The difference between *istisna'a* and hiring is that the raw material, in *istisna'a,* is provided by the maker, because if it is to be provided by the buyer the deal will become hiring.

Due to some of the similarities between *istisna'a* and *Salam*, we find that Islamic jurists usually discuss *istisna'a* after *Salam*, or perhaps as part of their discussion on *salam*. It should also be noted that as *Salam* can be practiced in agricultural products, it can also be practiced in manufactured commodities that can be precisely specified. Therefore when somebody forwards price, at time of contracting, for a precisely defined good to be manufactured and delivered on a specific future date, the deal becomes subject to the same *Shari'ah* rulings applicable to *Salam* in agricultural products.

However, *istisna'a* as described above (without specifying the period of the contract or stipulating advance payment of price) is impermissible except in the *Hanafi* School; on the basis of *istihsan* (approbation). The *Shari'ah* texts which some of the *Hanafi* jurists use to defend their viewpoint comprise non-affirmed *hadiths* (at least with regard to their exact meaning), such as the *hadith* which indicates that ***"the Prophet (peace and blessings upon him) practiced Istisna'a for acquiring a finger ring***(9)***, or an oratory platform***(10)***".*** The question that can be raised here is whether *istisna'a* in that case was similar to what *Hanafi* jurists advocate now or it was through hiring of a maker to perform a specific work?

Islamic jurists, including those of the *Hanafi* School, indicate that: *istisna'a* is impermissible on the basis of *qiyas* (derivation of *Fiqh* rulings by analogy), because it involves selling of something, which the seller does not own. Nevertheless, it can be argued that the seller is, in fact, selling something which he possesses its raw material and has the expertise required for its manufacturing. That is to say, as if the buyer purchases the raw material from the maker or anyone else, and hands it over to the maker to manufacture the good. The buyer in this case may pay the full price in advance or on deferment basis.

One of the important issues relating to *istisna'a* is that Abu Hanifah and muhammad believe that *istisna'a* is a non-binding contract.

(9) Al-Bukhari: *Al-Saheeh*, (8/165).
(10) Ahmad: *Al-Musnad*, (2/109).

According to them each of the two parties of the contract has the option to conclude or revoke the contract if he so wishes. The seller can sell the good to someone else on the basis of the fact that the subject matter of the *istisna'a* contract is a well-described commodity to be delivered in the future rather than a specific commodity. Alternatively, the seller may drop his option to sell the good to someone else and present the manufactured commodity to the buyer who is also free to conclude the contract or not.

However, the most predominant viewpoint is that of Abu Yusuf and *majalat Al-Ahkam Al-Adliyah* where *istisna'a* is considered as a binding contract. According to this viewpoint, when the maker uses his option of revoking the contract the buyer will be in trouble and will have to go around from one maker to another so as to obtain the good he wants. Similarly, when the buyer revokes the contract the maker may also face trouble because the product is made subject to certain specifications, which may not be acceptable to any other buyer. For instance the product could be a pair of shoes of a very large size.

Therefore, the seller should make the product subject to the required specifications and the buyer has to accept it as long as it satisfies what has been stipulated in the contract. This viewpoint, which constitutes the ruling practice in modern transactions, seems to be more suitable for maintaining stability of transactions and avoiding dispute and waste of time, money and effort.

Perhaps, term-specific *istisna'a* contracts are justifiable in view of the fact that it is better to make respect and honoring of time commitments part of the contract's stipulations, instead of leaving that for temperaments, attitudes and nature of people. Consequently *istisna'a* in this sense differs from *Salam* as far as the need for existence of the good in the market is concerned. For *istisna'a* it is quite sufficient for the good to be specifically defined since the raw material is already there; and hence no matter if a date for accomplishing the job is specified, or price is paid (partially or fully) at time of contracting.

It is also possible to treat price in *istisna'a* in the same way it is treated in *salam.* Therefore, price can be lower when it is paid in advance and higher when it is delayed. Also the amount and date of payment of price should be specified in the contract

The *istisna'a* commodity can also be subjected to similar treatment. When delivery is to be made after a short period, the buyer might see no reason for demanding price discount. In case of long period of delivery, such period should be compared to the period stipulated for payment of the price. If the price is to be paid at the same date of delivery there will be no justification for increasing or decreasing the price. If the date fixed for payment of price precedes delivery date, price can be decreased in proportion to the difference between the two periods and so on. Such arrangement is quite important in big *Istisna'a* transactions.

Overbidding (*muzayadah*)

In ordinary language, the word *muzayadah* means competitive bidding up of the price of a good offered for sale. In *Fiqh* terminology *muzayadah* refers to the process of selling something through calling for successive price bids, up to the highest bid which entitles the bidder to buy the good in question(11). Such sale can also be called: highest bid sale, hawking sale, auction sale, sale of the needy (when they sell their properties on need), sale of non-moving stocks, or governments' sale.

muzayadah sale is completely different from the strictly forbidden type of sale in which the seller motivates the buyer to retreat from a previous deal he is about to conclude with another seller. In that type of sale, the seller says to the buyer - at the time of contract session or during the period of an option – step out of this deal and I shall give you this good at a lower price, or a better one at the same price.

muzayadah is also different from a sale transaction in which the buyer induces the seller with a higher price offer to quit a sale contract he is about to conclude with a previous buyer.

muzayadah sale is permissible according to the majority of Islamic jurists, while it is detestable (*makrooh*) according to some of them. Another group of jurists believes that *muzayadah* sale is detestable except for booties and inheritance properties. According to the *Hanbali* jurists, *muzayadah* sale is preferable (*mustahab*) in case of selling the properties of a bankrupt.

(11) Ibn Juzay: *Qwaneen Al-Ahkam*, p. 290.

The *Maliki* jurists hold the view that the highest bidder is committed to purchase the good at the price he offers, if the owner of the good accepts that price(12). When the highest bid is made by two bidders, they become partners in the good. Some jurists believe that the good should go to the one who announces the highest bid first.

According to some jurists, it is permissible for a bidder to ask another bidder to stop bidding against paying him a specific amount of money, or so that the two bidders become partners in the good. Nevertheless, these jurists do not permit collusion among all bidders due to the harm that could be caused to the seller. Forbiddance of general collusion among bidders stems from the fact that they may do so with the aim of purchasing the good at less than its real price and become partners in it.

It seems that the *Maliki* jurists have given much care to *muzayadah* and its detailed aspects compared to all other jurists.

Earnest money (*Arboon*)

The Arabic word *arboon or urboon* refers to the amount of money, which the buyer pays to the seller so that if the buyer decides to conclude the transaction, that amount becomes part of the price; otherwise it will go to the seller. This type of sale is called *arboon* sale and is concluded in that manner for the sake of minimizing the possibility of commitment breach on the part of the seller. Some jurists are of the view that, in essence, *arboon* is nothing but an advance payment of part of the price, if the sale is concluded.

Arboon is permitted by the *Hanbali* jurists, contrary to all other jurists who hold the view that it is forbidden.

In support of their viewpoint, the *Hanbali* jurists point out to what has been reported about Nafie Bin Al-Harith who is said to have purchased jail premises from Safwan Bin Umayyah, on behalf of Omar Ibn Al-Khattab (may Allah be pleased with him), on condition that finalization of the deal is subject to Omar's clearance; and that in case of deal rejection Safwan was to become entitled to a specific amount of compensation.

(12) Al-Hattab: *mawahib Al-Jaleel*, (4/237).

It has been reported that when Imam Ahmad was asked whether he found that arrangement reasonable or not he responded: What can I say? It is Omar! (may Allah be pleased with him).

According to Ibn Sirin: a man said to someone from whom he hired a back-animal: get your animal ready for traveling and if I am unable to travel with you on such and such date I shall give you hundred *Dirhams*. When the man was unable to travel with the owner of the back animal, Shuraih said: whoever stipulates a condition that he willingly undertakes to observe, should stick to his word(13).

The majority of Islamic jurists argue that *arboon* is forbidden because it constitutes an unlawful means of earning money, besides the fact that it involves *Gharar*; since it is quite like an unknown option. According to these jurists, in *arboon* the door is left wide open for rejecting the sold goods at any time. As if the buyer says to the seller: I have the option to return the good back to you at any time along with a certain amount of money.

In 1414H, the Islamic Fiqh Academy – Jeddah adopted the viewpoint of the *Hanbali* School after adding specification of the contract period as a restrictive measure. *Arboon* is applicable in sale as well as in leasing.

Sale in Lump sum (*Juzaf* sale)

Juzaf sale refers to the act of selling measurable, weighable or countable commodities without measuring, weighing or counting. Examples of such type of sale include sale of an unknown quantity of foodstuff; sale of a herd without counting its heads; sale of a piece of land without knowing its area; and sale of a piece of cloth without measuring its length.

According to the majority of Islamic jurists *juzaf* sale in general is permissible. However, some jurists believe that it is permissible, but still detestable (*makrooh*). The *Maliki* as well as some other jurists make the following conditions for permissibility of *juzaf* sale:

1. Viewing of the commodity at time of contracting, or before that if it will not change.

(13) Al-Bukhari: *Al-Saheeh*, (3/259).

2. Both parties should be unaware about the quantity of the commodity to be sold. If one of the two parties has access to such information, the deal is impermissible.

3. Estimation of the quantity should be possible (quantity should not be so big or so small). When quantity is so big, estimation will be difficult; whereas if it is so small it can be subjected to measuring, weighing or counting.

4. For the sake of avoiding deceit in the real quantity of the commodity, it should not be put on a bench, or on the top of a hill or a rock.

It is permissible to sell - on viewing – an apparent heap of a stuff (of an unknown quantity) at a lump sum price. According to some jurists such heap can also be sold at a certain price per kilo, so that the total sale price can be reached after weighing.

It is impermissible to exchange two unknown quantities of one of the six usurious commodities (gold, silver, wheat, barley, dates and salt) because such exchange necessitates identity between the two exchanged quantities. So far as these usurious commodities are concerned, once identity between two quantities of any one of them is unascertained, the two quantities should be treated as non-identical.

Selling of Gold and Silver Jewelries

The issue of exchange of articles that are decorated with gold and silver is a special case of the broader issue of exchanging gold for gold and silver for silver. This special issue relates to the case when gold or silver constitutes a decorative component of something else such as a copy of the holly *Qur'an* or a sword, and that thing is to be sold for a quantity of the same stuff of decoration. In this case a decorated article should not be sold as one unit for a single price. Instead, the gold or silver component should be separated and sold independently for an identical quantity of its same kind to be paid immediately. The part, which remains after separation of the metal component can then be sold as usual.

This is the acceptable way according to the *Zahiri*, *Shafiee* and *Hanbali* schools (acting according to the apparent meaning of the

hadith). *Imam* malik believes that the article should be evaluated. If the value of the gold or silver component in it is of secondary significance (less than a third of total components) the article can be sold without separation of the metal, otherwise the metal should be separated.

According to Abu Hanifah and his companions, if the gold to be paid as a price for the article worth more than the gold which constitutes the decorative component of the article (that is to say if the separate gold worth more than the embodied gold) the article can be sold without separation of its gold component. This is so because price in this case is supposed to be made up of two parts: one part that covers the value of the decorative metal and, thus, the requirement of exchanging gold for gold is satisfied; and the other part, which covers the value of the other components of the article. This second part of the price does not encounter any restriction with regard to *fadl* (exchange of unequal amounts) or *nasa'* (postponement of one of the two exchanged amounts); unless it is one of the usurious commodities. If, however, the gold to be paid as a price worth less than or equal to the gold used in the decoration of the article the deal is impermissible.

Ibn Taimiyah indicated that sensuous separation is not required when the amount of the usurious commodity in the mixture is known(14). Furthermore, he argues that gold and silver jewelries are considered as commodities (articles) rather than *athman* (money) and therefore exchanging them for money is not a usurious act and is subject to no restriction with regard to *fadl* (exchange of unequal amounts of the same commodity) or *nasa'* (postponement of one of the two exchanged commodities).

Ibn Taimiyah as well as Ibn Al-Qayem went as far as to indicate that ***"it is permissible to sell molded gold or silver for a quantity of its own kind, regardless of identity between the two exchanged quantities, because the excess quantity in the unmolded metal is considered as remuneration for molding. This holds true whether sale is in cash or on credit, and as long as the two exchanged commodities are not meant to constitute money"***(15).

(14) Ibn Taimiyah: *Al-Fatawa*, (29/35, 457 and 4610.
(15) Ibn Taimiyah: *Al-Ikhtyarat Al-Fiqhiyah*, p. 127, Ibn Al-Qayem: *Ea'lam Al-muaqi'een*, (2/140).

Selling of fruits

1. It is impermissible to sell fruits before they appear, because that involves sale of a non-existent commodity.

2. It is impermissible to sell fruits after their appearance and before they seem to have become ripe; on condition of keeping them until time of harvesting.

3. It is permissible to sell fruits after their appearance and before they seem to have become ripe on condition of immediate harvesting; if such fruits are useful.

4. It is permissible to sell fruits after they become ripe, because at that stage they become safe from plant diseases.

Calamites' exemption (*Wad'ul Jawa'ih*)

Islamic jurists have discussed this issue in the context of sales (Pre-harvesting sale of fruits) as well as leasing and other fields of contracting. Perhaps the *Shari'ah* basis of this concept is the *hadith* of the Prophet (peace and blessings upon him) in which he said: "***if Allah has held back the fruits, then what will be the basis on which one of you takes his brother's money?"***(16) In another *hadith* the Prophet (peace and blessings upon him) also said: ***"If you buy fruits from your brother and then his land is hit by a calamity, it becomes impermissible for you to take anything from him. On what basis can you take your brother's money?"***(17) It has also been reported that the Prophet (peace and blessings upon him) ordered people to make exemptions during calamities(18).

Calamity (*Ja'ihah*) in this context refers to any heavenly catastrophe which nobody can safeguard something against its hit such as: wind, chilliness, heat, rain, snow, and thunderbolt (compelling forces). Among such calamities is also the damage caused by the invading troops of the enemy or thieves.

According to the *Maliki* School the magnitude of calamity exemption is the third, because the Prophet (peace and blessings upon him) said in

(16) Al-Bukhari: *Al-Saheeh*, (3/101); Muslim: *Al-Saheeh*, (10/217).
(17) Muslim: *Al-Saheeh*, (10/216).
(18) Muslim: *Al-Saheeh*, (10/217).

the context of will: ***"the third - and it is too much"***[19]. As to whether it is the third of the value or the quantity, the *Maliki* jurists have two opposing viewpoints.

Sale between a Citizen and a Bedouin (*Bai' Al-Hadir Lilbadi*)

The Prophet (peace and blessings upon him) said: ***"no citizen shall perform sale for a Bedouin"***[20]. What is meant by this *hadith* is the following:

1. The act of a citizen who performs an intermediary role in the sale of a Bedouin's commodity. Had the citizen left the Bedouin to sell his commodity alone, the latter would have sold it at a lower price. Hence intervention of the citizen may cause harm to other citizens.

2. The act of the citizen who sells his good to a Bedouin so as to get a higher price, whereas people in the city are in acute need for the commodity.

Islamic jurists have indicated several conditions for prohibition of such sale including:

1. There should be a predominant need for the commodity in question whether it is a foodstuff or any other commodity.

2. The Bedouin must be unaware of the price.

3. The Bedouin should be desirous of selling his commodity rather than storing or consuming it[21].

Selling of what the seller does not have

It has been reported that Hakeem Ibn Hizam said: Once I told the messenger of Allah (peace and blessings upon him) that people used to come to me for purchasing goods that I didn't have and I used to sell to them goods that I bought for them from the market. The Prophet (peace and blessings upon him) said:"***do not sell what you don't have"***[22]. There are several probable meanings for this *hadith*:

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(19) Al-Bukhari: *Al-Saheeh*, (3/4); Muslim: *Al-Saheeh*, (11/76).
(20) Al-Bukhari: *Al-Saheeh*, (3/94).
(21) *Al-mawsu'ah Al-Fiqhiyah* (9/80).
(22) Ahmad: *Al-Musnad*, (3/402 and 434); Abu Dawud: *Al-Sunan*, (3/384), Al-Tirmizi, (3/525); Al-Nasaee, (7/288) and Ibn Majah, (2/737).

1. When Hakeem said: ***"I used to sell…to them"*** this could be taken to mean that Hakemm's role was just to ***"hand over"*** the goods to those people. This seems to be so because he said: goods that I ***"bought for them"***. Hence buying was not performed for himself, but for other people who always remained committed to accept whatever he bought for them.

2. It is also probable that Hakeem used to receive the price before buying the goods, purchase the goods at a lower price and keep the difference for himself.

3. A third probability is that Hakeem did not receive the price, but he purchased the commodities in cash and sold them to his customers on credit at more than the purchase price. As we have indicated earlier, selling on credit can permissibly be at more than cash price; as per the viewpoint of the majority of Islamic jurists. Nevertheless there is still a possibility that people used to receive the goods directly from original sellers. In that case we can say that Hakeem was able to make a gain without having the goods under his ownership and guarantee. Hence, the end result will be that Hakeem had lent the cash price of the goods against a usurious pay reflected in terms of the difference between the deferred price and the cash price.

4. According to case (3) above, "selling of what the seller does not have" could mean selling of what he does not own, or maybe what he is not accustomed to dealing in. Even if the sale is *Salam* (advanced price and deferred commodity) the seller must be a trader who deals in commodities in general and the commodity to be sold in particular, otherwise he will be selling what he does not have, or what he is not competent to sell[23].

5. Furthermore, what Hakeem used to sell might have been offered on the basis of either deferred or immediate delivery. Hence, there will be two probabilities:

The goods might have been sold on the basis of precise specification and deferred delivery, and Hakeem used to receive the price from those who wanted to buy the goods; while he was actually involved in trading in such commodities. If this was the case, the deals, which Hakeem

(23) Ibn Al-Qayem: *Zad Al-maad*, (5/816).

concluded can be considered as permissible *salam* as per the prophetic *hadiths* on *salam*.

Instead, the deals might have been concluded on the basis of immediate delivery of the purchased commodities. In that case the deals can be regarded as *salam* transactions concluded on the basis of immediate delivery; which is permissible according to *Imam* Al-Shafiee who argues that since immediate-delivery *salam* involves less *Gharar* (uncertainty) than deferred-delivery *salam,* the former is more worthy of being permitted.

However, the *hadith* does not seem to be relevant to the first assumption because *salam* is permissible according to the majority of Islamic jurists. Therefore, the *hadith* looks to be more relevant to the second assumption given the viewpoint of the majority of Islamic jurists who do not consider immediate delivery *salam* as permissible.

6. Again what Hakeem used to sell might have been a specific non-fungible commodity for which no identical substitutes were available in the market; or it might have been a fungible commodity for which market substitutes were available.

If the good in question was a non-fungible asset, it was not certain – then - that Hakeem would always succeed to get it from the market at the price he received, and hence he was in lack of ensured capacity of delivery and, therefore, the deals he performed had involved forbidden *Gharar*.

If the sold goods were fungible stuffs and price was paid in advance, the deals he performed fall under permissible *Salam*.

Selling of what the seller does not hold

Ibn Abbas reported that, "***the Prophet (peace and blessings upon him) has forbidden selling of food that the seller does not hold"***. People then asked Ibn Abbas: How is that? He said: ***"in essence, that is selling of Dirhams for Dirhams, while food is postponed"***[24]. In another version of the same *hadith* Ibn Abbas added: ***"I don't think that there is anything else which should be treated differently***"[25].

(24) Al-Bukhari: *Al-Saheeh,* (3/89).
(25) Ibid.

Some Islamic jurists do not seem to agree with Ibn Abbas on considering prohibition to be applicable to commodities other than foodstuffs.

However, the viewpoint of Ibn Abbas and those who support it could still remain very strong. In commodity exchanges of today we can see the same commodity sold several times, without any holding (delivery). Such sterile operations are nonproductive; and the commodity has never become their real target.

Sale of a debt for another Debt (*Bai' Al-Kali' BilKali'*)

As has been reported by Ibn Omar (may Allah be pleased with him) ***"the Prophet (peace and blessings upon him) has forbidden bai' al-kali' bilkali'"***(26). Prohibition here includes exchange of a debt for another debt, or for a credit-sale commodity that has not yet been delivered (*nasi'ah)*. Although this *hadith* is considered to have a weak narration series, it has been well received by the *Ummah*. Selling of a debt for another debt takes several forms including:

1. Exchange of two outstanding debts. This happens when both price and commodity in a *Salam* transaction are postponed. The *Maliki* jurists call this "using an old debt for establishing a new one".

2. A *Salam* contract in which tenor is extended against increment in the debt amount. Suppose that a *Salam* buyer has paid SR 100 to the seller for a given quantity of wheat to be delivered after one year. At the end of the contract period the seller said to the buyer: I cannot make delivery now, therefore I need extension of the contract period for another year against an increase of 10% in the quantity of wheat to be delivered. The *Maliki* jurists call this "revocation of an old debt with a new one".

Another example is when the period of a sale on credit (*nasi'ah*) contract is extended against price increment. Assume that a good has been sold for SR 100 payable after one year. At the end of the contract period the buyer sought the acceptance of the seller for extension of the contract period for another year against increasing the price to SR 110.

(26) Al-Darqutni: *Al-Sunan*, (3/71); Al-Hakim: *Al-Mustadrak*, (2/57).

Sale at market Price

The majority of Islamic jurists do not permit sale without a specific price stipulated in the contract. However, Ibn Taimiyah believes that it is permissible for the two parties to conclude the deal on the basis of the market price for similar commodities. He argues that this seems to be more suitable for achieving convenience, because – according to him - ***"This has always been the practice of Muslims. They still take bread from the baker, meat from the butcher, food from the food seller and fruits from the fruit seller; without prior bargaining on prices. The seller and the buyer consensually agree to the ruling price. The buyer accepts the price at which the seller sells to other people. In fact a normal buyer does not haggle with the seller regarding the price. He accepts the price at which other people used to buy, even if he doesn't know how much it is"***[27].

Combining two sales in one sale

The Prophet (peace and blessings upon him) has forbidden combining two sales in one sale[28]. Among the forms that such sale can take are the following:

1. The buyer and the seller agree that the price of the good is either SR 100 in cash or SR 110 payable after a year, without confirming any of these two options.

2. The seller says to the buyer I sell this good to you for SR 100 payable after one year, on condition that I buy it back from you for SR 80 in cash.

3. The seller says to the buyer I sell to you either my house on condition that I reside in it for one month, or my car on condition that I use it for a week. According to some jurists, this from is permissible.

4. Conclusion of a *Salam* contract on a ton of wheat to be delivered after one year. At the end of the contract's period the seller offers to purchase the due ton of wheat for two tons of wheat to be delivered after one year.

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(27) Ibn Taimiyah: *Nazariyat Al-Aqd*, pp. 165 and 220; Ibn Al-Qayem: *Ea'lam Al-muaqi'een*, (4/5).

(28) Ahmad: *Al-Musnad*, (2/174); Malik: *Al-muwata'*, (2/663); Al-Nasaee: *Al-Sunan*, (7/296); Al-Tirmizi, (3/524). Al-Tirmizi indicated that this *hadith* is *saheeh* and *hasan* (narrated by reliable sources)

Options

An option is the right of a contract party to conclude or revoke the contract by virtue of *Shari'ah* rulings or contract stipulations. Generally speaking, options are meant to facilitate more satisfaction and convenience for the contracting parties. An option can be either mandatory or willful (contractual). A mandatory option is an option that has been granted by *Shari'ah* with the view of avoiding harm; whereas a willful (contractual) option is the option acquired by virtue of contract stipulations with the aim of having a chance for deliberation, consultation and testing.

Options are so many, yet we shall confine our discussion here to seven of them, which are all mandatory except two that are willful, namely: option of stipulation and option of specification(29).

Option of Contracting Session

Sale is one of the binding contracts, yet it does not become binding before the two parties are separate and the sale session is over. Before separation of the sale parties, each of them has the right to revoke the contract. The Prophet (peace and blessings upon him) said: ***"the two parties of a sale have the option until they are separate"***(30).

Option of Stipulation

A seller may accept to sell a book to a buyer for SR 50, on condition that he (the seller) retains the option to conclude or revoke the sale transaction within three days. Also a buyer may accept to buy a book from a seller for SR 50, provided that he (the buyer) retains the option to conclude or revoke the deal within three days. Or both parties can simultaneously agree to conclude the deal, on condition that each of them retains the option of concluding or revoking the contract within three days.

Stipulation of such conditions is permissible, because the Prophet (peace and blessings upon him) said to Hibban bin munqith Al-Ansari who used to be cheated in sales: ***"when you are part of a sale transaction say: [la khalabah (no Cheating) and I should have the option for three days]"***(31). Some

(29) mandur: *Al-Khiyarat Fi Al-Bai'*, p. 7.
(30) Al-Bukhari: *Al-Saheeh*, (3/84); Muslim: *Al-Saheeh*, (10/173).
(31) Al-Bukhari: *Al-Saheeh*, (3/85); Muslim: *Al-Saheeh*, (10/173).

jurists permit specification of the period of the option according to the desire of the two parties.

When the buyer has the option to conclude or revoke the contract, it is permissible for the seller to agree with him on dropping the option against price discount. Similarly, when the seller has the option, the buyer may agree with him on dropping the option against price increment(32).

Option of stipulation is permitted with the aim of facilitating deliberation, testing and consultation, rather than for rendering a means for speculation and betting on price changes. Nevertheless a contract party may use this option for such purposes, so that he can conclude the contract when price changes are favorable and revoke it when they are unfavorable. There are some jurists who do not permit agreement on dropping of option against money(33).

Option of choice

Option of choice can relate to the commodity as when the seller offers to sell to the buyer one of three shirts and gives him the option to choose the one he wants to take. Option of choice can also relate to the price as when the seller offers to sell a shirt to the buyer either at a certain price in cash, or another price on credit.

According to the *Hanafi* jurists option of choice is permissible because people need it; and is traditionally practiced without generating any dispute. Some people do not prefer going to markets, and they may need goods to be brought to them at home so that they can choose what they like. The seller may not accept to do so unless he is sure that one of his goods will be bought. If the goods presented are of different qualities (high, medium and low quality) the seller has to indicate that to the buyer. The period during which the option remains valid should also be specified within a maximum limit of three days(34).

Option of choice is permissible according to the *Hanafi*, *Maliki* and some of the *Hanbali* jurists.

(32) *Al-Fatawa Al-Hindiyah* (3/45).
(33) Ibn muflih: *Al-Furooa'*, (4/91).
(34) Al-Khafeef: *Ahkam Al-muamalat*, p 454.

Option of viewing

If you buy a car that you haven't seen, you have the option to conclude or revoke the contract when you see the car. The Prophet (peace and blessings upon him) said: ***"whoever buys something that he hasn't seen has the option on viewing to leave it or take it"***(35). Viewing in this context stands for investigation by using all other senses subject to the commodity in question. For instance perfumes may need to be smelled, food may need to be tasted and other commodities may need to be touched.

Option of defect

When you buy a book and you find that some pages are missing you have the option to return it back to the seller. You may also claim price discount (*arsh*), especially on the occurrence of an incident that prevent sale revocation; as when a new defect is caused in the book while it is still under your possession. Some jurists indicate that price discount in this case does not mean permissibility of remunerating the buyer for dropping the option of defect(36).

Option of breach of specification

The buyer may stipulate certain specifications that he desires to be in the good and then discovers later on that such specifications are missing. In that case he has the option to revoke or conclude the contract at the full price. Such options become null and void when the buyer disposes of the good in the capacity of an owner.

Option of deal fragmentation

When a valid claim of a third party is laid for part of the sold commodity - before full delivery - the contract becomes null and void for that part, and the buyer has the option to conclude the contract for the remaining part of the commodity; or revoke it and get proportionate refund of the price.

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(35) Al-Darqutni: *Al-Sunan*, (3/4).

(36) *Al-Fatawa Al-Hindiyah* (3/45); Ibn muflih: *Al-Furooa'*, (4/91); Al-Suyooti: *matalib Uli Al-Nuha*, (3/99).

Chapter: II
Exchange (*Sarf*)

Exchange refers to the process of selling one currency for another. Using the Arabic word *sarf* (which implies displacement) to denote exchange implies that the process entails shifting of money from one constituency of disposition to another, as if money constitutes different dispositions of a single (monetary) reality. *Sarf* can involve exchange of gold for gold (two different golden currencies), silver for silver, gold for silver, *filses* (*fils* is an Arabic currency) for *filses* or paper money for paper money.

Exchange is one of the important areas where *Shari'ah* rulings on *riba*-based transactions are applicable, because exchange often intermingles with the process of loan transactions performed by currency exchange dealers and banks.

Practicing *riba* by using money is always easier than practicing it through using commodities, such as wheat and barley. Dealing in exchange does not require more than a drawer or a purse for keeping currencies; whereas non-monetary loans require big storage facilities with all the costs involved therein.

It seems that some Islamic jurists are inclined towards imposing more restrictions on currency exchange dealings than on commodity exchange operations. They put more controls on *Nasa'* in currency exchange than in barter operations. This is why it is sometimes said that *Shari'ah*-permissible currency exchange has a narrower scope compared to all other types of dealings. The proponents of this viewpoint believe that moneychangers can hardly escape commitment of *riba*. Al-Hasan used to say: ***"when you ask for drinking water, do not accept to get it from the house of a money-changer"***. Asbagh also used to hate being shaded by the shelter of a moneychanger. When people said to malik: ***"do you see it detestable for a person to deal in currency exchange?"*** He answered: ***"Yes, unless he will fear God in performing that (business)"***[1].

(1) Malik: *Al-mudawwanah*, (3/52). Ibn Rushd: *Al-muqaddimat*, p. 507; Ibn Abi Shaybah: *Al-Musannaf*, (7/111).

If an exchange transaction involves gold for gold or silver for silver the two exchanged currencies should be equal and their exchange should take place simultaneously. If the deal involves exchange of gold for silver inequality of the two exchanged currencies is permissible, yet exchange should take place without *Nasa'*. In all cases exchange should involve immediate delivery of the two currencies.

Equality between the two (gold or silver) currencies is measured in terms of weight. There is no harm if the two exchanged currencies are different in number as long as they are equal in weight, because the number of the units of the two currencies must differ unless each currency unit is of the same weight and standard.

The preceding points hold true if the currencies in question are pure. In case of adulterated currencies equality of the exchanged amounts of the two currencies can be realized only if the degree of adulteration in these currencies is known.

Filses are among the adulterated currencies in which the degree of adulteration cannot be known. Therefore, *filses* cannot be exchanged with other *filses* of different kind even when the two exchanged amounts are equal in number or weight. However, exchange of *filses* can be based on market value.

Paper money is also among the types of currency that have no intrinsic value. That is to say its value as paper is totally ignored with respect to its face value. Therefore, it cannot be exchanged on the basis of weighing or counting. Even when a unit of paper money has the same denomination in both currencies (*e.g.* 5, 10, 100, 500 or 1000) the purchasing power of such unit differs from one currency to the other. Consequently – quite like the case for *filses* – inequality of the exchanged amounts of paper money is permissible. Nevertheless, the condition of simultaneous delivery of the two exchanged currencies has to be fulfilled. Permissibility of inequality of the exchanged amounts of paper money means that paper money of two different currencies is treated as two different types of money. This is quite similar to treatment of gold and silver as different commodities when applying the prophetic tradition on the six usurious items. Differentiation between the two amounts of paper money of two different currencies is based on the difference in their source of issuing rather than nature.

The money-changer or the bank can make profit from spot exchange transactions, because difference in the exchanged amounts is permissible when the currencies in question are different; and hence such difference can allow a room for making profit. The moneychanger can have a purchase price and a selling price. If exchange involves gold for gold (one golden currency for another) or silver for silver (one silver currency for another), there will be no room for making profit because the two exchanged amounts should be equal in weight and number.

Debt-based exchange dealings

I may have a certain amount of *dinars* that someone owes to me as a result of a loan or sale transaction. I can get such amount repaid to me in *Dirhams* at the current exchange rate provided that when my debtor and I part away, none of us will be indebted to the other. In this connection, it has been reported that Ibn Omar (may Allah be pleased with him) said: ***"While selling camels at Al-Baqee'a, I used to conclude the deals in dinars and receive the price in Dirhams; giving this for that and taking that for this. Then I said to the Prophet (peace and blessings upon him): O messenger of Allah! Let me ask you a question (…). The Prophet (peace and blessings upon him) said: No harm to make such settlement at current price, unless you part away and one of you still owes something to the other"***[(2)].

If after concluding the exchange transaction one of the two parties still owes something to the other the deal is impermissible because it involves an exchange as well as a loan transaction, and hence the debtor may favor the creditor in the exchange transaction. There are some *hadiths,* which have explicitly forbidden the act of combining a sale and a loan transaction in one deal[(3)].

As exchange is permissible in the process of debt redemption through cash payment, it is also permissible between two amounts of debts (debt clearing or debt swap)[(4)]. In this case clearing takes place up to the limit of the lowest amount of debt and the deference is paid in terms of the

(2) Al-Tirmizi: *Al-Sunan,* (3/335); Al-Nasaee: *Al-Sunan,* (7/282); Abu Dawud: *Al-Sunan,* (3/340); Ibn Majah: *Al-Sunan,* (2/760); Al-Hakim: *Al-Mustadrak,* (2/44). Al-Hakim indicated that the *hadith* is *saheeh* (narrated by reliable sources).

(3) Malik: *Al-muata',* (2/657); Al-Tirmizi: *Al-Sunan,* (3/527); Al-Nasaee: *Al-Sunan,* (7/288); Al-Hakim *Al-Mustadrak,* (2/17). Al-Hakim indicated that the *hadith* is *saheeh* (narrated by reliable sources).

(4) Al-Sabki: *Takmilat Al-Majmua,* (10/107).

currency of the other amount, at market price, and without leaving any outstanding commitment.

It should be noted here that debt-based exchange dealings as described above do not mean to jurists exchange transactions that entail postponement of one or both of the two exchanged amounts. An exchange transaction that involves postponement of one of the exchanged amounts or both of them entails *Gharar*, and is impermissible whether concluded on the basis of current or future price. In Islam, the two amounts involved in an exchange transaction should be paid simultaneously. The logic behind this is that postponement leads to *Gharar*. If the exchange transaction is concluded at current price; while the two exchanged amounts are postponed, a different price may prevail at time of delivery. If, instead, the deal is concluded on the basis of future price, it means that it is concluded on the basis of an unknown price.

Exchange pledges

It is permissible for the two parties to make mutual pledges for concluding an exchange transaction in the future provided that such pledges are non-binding. If a pledge of this kind is to be binding for any of the two parties the deal becomes impermissible, because enforcement of the pledge will convert the deal from a process of mere pledging to a real exchange transaction. Since the two exchanged amounts are postponed the contract becomes impermissible. Therefore, making binding pledges in this case and all similar cases is nothing but a stratagem to go around restrictions.

Chapter: III
Hiring/Leasing (*Ijarah*)

Ijarah indicates assigning of the ownership of a benefit to someone against compensation. Contrary to sale in which commodity can be received in lump sum, the benefit in *ijarah* is not received all at once but gradually. Also not all what can be hired can be sold (a person for instance).

Hiring of persons

There are two types of employees: The first type is the private employee who works for a single employer; such as an employee or a worker of a given institution.

A private employee should not be given any assignment that is beyond his abilities. Allah *(subhanahu wa taala)* said in the words of musa (peace upon him): ***"but I intend not to place thee under a difficulty"*** [*Al-Qasas*: 27]. He also said: ***"On no soul doth God place a burden greater that it can bear"*** [*Al-Baqarah*: 286].

The Prophet (peace and blessings upon him) said: ***"Do not assign to them (workers) what is beyond their abilities, and if you do so help them"***(1). He also said: ***"he (a worker) should be assigned no work greater than what he can perform"***(2). An employee has also the right to take rest. In this regard the Prophet (peace and blessings upon him) said: ***"you owe a right to your eye, yourself, your family and your guest"***(3). Therefore, the worker has to be allowed to discharge of the rights he owes to himself, his wife, his children and his guest.

The second type of employee is the shared employee who works for more than one person, such as a tailor, a mason or a porter. According to some jurists a shared employee is a trustee who should not guarantee what he is assigned to work on except in case of negligence or transgression; while other jurists argue that he should guarantee in all cases for the sake of safeguarding people's properties. Ali (may Allah be pleased with him) said: ***"nothing else can be useful to people"***(4).

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(1) Al-Bukhari: *Al-Saheeh,* (1/14); Muslim: *Al-Saheeh*, (11/134).
(2) Muslim: *Al-Saheeh*, (11/134).
(3) Al-Bukhari: *Al-Saheeh,* (3/51); Muslim: *Al-Saheeh*, (8/46).
(4) Ibn Qudamah: *Al-mughni* ((6/106).

According to some jurists, the pay offered to the shared employee can involve more than one option. For instance one can say to the tailor: I shall give you one *Dirham* if you sew this shirt today or half a *Dirham* if you sew it tomorrow(5). This implies that time (expedition) has a share in the pay.

Is it permissible for the worker to get a share in the profit besides the pay?

Some jurists indicate that an employee can receive a lump sum pay just like the case when he is hired; or a share of the profit similar to the case in *Mudharabah*; or a share of the produce as is the case in *muzara'ah* and *musaqah*. According to these jurists it is impermissible for the employee to get a lump sum pay besides any profit or yield share, because he will thus become an employee and a partner at the same time; whereas hiring and partnership are contradictory. Hiring may set the partnership ineffective if profit is less than or equal to the pay earmarked for the worker.

This viewpoint, however, seems to demand revisiting, because even in the case when the entitlement of the employee is confined to the pay, this pay alone may absorb the whole profit. Since it is permissible for the employee to become either a paid worker or a partner it seems only reasonable that he can assume the two roles by getting the pay for one part of his work and a share of the profit for the other.

Pricing of work

In principle, goods and services should not be priced. However, some jurists permit pricing in specific cases. Ibn Al-Qayem indicates that when workers act collectively (through unions, companies, monopoly or any other form of collusion) with the intention of raising their pay, pricing (wage specification) in this case is considered as fair and permissible; or even obligatory. If people are in need of the services of a certain occupation such as farming, construction or weaving, the competent authority has the right to compel the workers in that occupation to provide such services against the prevailing pay for analogous tasks(6). Similar to hiring of persons, is also leasing of properties.

(5) Ibid, (6/87).
(6) Ibn Al-Qayem: *Al-Turuq Al-Hukmiyah*, pp. 246 and 253.

Land leasing

Some Islamic jurists permit leasing of land for a fixed rent. Others prohibit fixed rent leasing and permit *muzara'ah,* which entitles land to a share in the produce. A third group argues that land leasing against a fixed rent is permissible, but *muzara'ah* is more so. There is also a fourth group who prohibits fixed rent as well as *muzara'ah,* especially for land, which is still in its natural (undeveloped) form.

The period of leasing should also be specific (one year for instance). Some jurists permit leasing of land for a period of ten years or more. The *Shafiee* jurists go as far as to argue that land can be leased for hundred years or more, because leasing of an asset is permissible as long as the asset is still existent. Nevertheless there are some *Shafiee* jurists who indicate that land leasing should not be for more than one year because such period is sufficient to satisfy the need behind leasing(7).

When land is leased for a long period (10 years for instance) a question arises as to whether a separate rent for each year should be indicated or not. The majority of Islamic jurists indicate that there is no need for specification of rent per year, while the *Shafiee* jurists argue that specification of a separate amount of rent per year is necessary, because passage of time has implications for rent. If the rent for each forthcoming year is not specified beforehand, and the contract is revoked, there will be *jahalah* with regard to the portion of rent to be refunded(8). Based on this, commencement of the leasing period should also be known, especially if the rent is payable in advance.

The tenant has the right to make use of the land as per normal practice and contract stipulations and not in any way that could prove to be excessive. It is permissible for him to cultivate the land in the way that is commensurate with (or less harmful than) what has been agreed upon(9).

(7) *Al-mawsu'ah*, ((1/279).
(8) Al-Shirazi: *Al-muhazzab*, (1/398).
(9) Ibid, (1/282).

Subleasing at a higher rent

The *Shafiee* and the *Maliki* jurists go for permissibility of subleasing whether the new rent is equal to, more than or less than the original rent. The *Hanafi* Jurists permit subleasing if the land is subleased for a different purpose. If leasing and subleasing are for the same purpose, the *Hanafi* jurists believe that subleasing should not be at a higher rent, except when the first leasing party makes improvements in the leased property. This same viewpoint also gains support from some *Hanbali* jurists, regardless of whether the land is subleased for the same purpose of the original leasing or not.

Chapter: IV

Emolument (*Juaalah*)

Definition

Literally, *Juaalah* means a reward set for a person to do some work. Those who permit it indicate that it means allocation of a specific pay for someone to do - within a specific or unspecific time - some work, which will be useful to the payer if done completely. According to the *Maliki* School, the worker is entitled to the whole pay in case of doing all the work; otherwise he is entitled to nothing. The *Shafiee* jurists define *Juaalah* as a pledge to allocate a specific remuneration for a specific or nonspecific work that can hardly be precisely identified. According to the *Hanbali* jurists, *Juaalah* means specification of a pay for someone so as to do some permissible work for the payer even if the desired work is unknown, or will last for an unknown period.

Shari'ah status

Juaalah is permissible according to the majority of Islamic jurists of the *Maliki, Shafiee* and *Hanbali* Schools. Allah *(subhanahu wa taala)* said: ***"for him who produces it, is (the reward of) a camel load"*** [*Yusuf*: 72]. Hence, *juaalah* was a known practice since the old times of history. The Prophet (peace and blessings upon him) said: ***"whoever proves, that he has killed a battle slain, shall become entitled to his booty"***(1). *Juaalah* can also be needed for accomplishing tasks that the *juaalah* payer himself cannot do or find a volunteer person to do it; or tasks that cannot be accomplished through hired workers because of *jahalah* such as search for and recovery of a lost property.

Juaalah versus *Ijarah*

Juaalah differs from *Ijarah* in the following respects:

1. *Juaalah* is valid for unknown work.
2. *Juaalah* can be assigned to an unknown worker; as when someone announces that he will pay a specific reward to whoever brings back his straying animal.

(1) Al-Bukhari: *Al-Saheeh*, (4/111); Muslim: *Al-Saheeh*, (12/59).

3. The worker does not become entitled to the pay except when he completes the work for which *juaalah* is allocated.
4. In *juaalah*, declaration of acceptance from the part of the worker is not required.
5. In *juaalah*, compensation is sometimes unknown (whoever proves that he has killed a battle slain, shall become entitled to his booty).
6. Non-specification of the period of the *juaalah* work.

There are some cases where *Juaalah* rather than *Ijarah* should be applied; as - for instance - when a lost property is to be recovered. Similarly, there are other cases where *ijarah* rather than *juaalah* is applicable; as when a borehole is to be dug, or in case of any other type of work which can be useful even to the *juaalah* payer if it is not done completely.

Chapter: V

Brokerage (*Samsarah*)

Definition

The term *samsar* (broker) is often discussed in the context of sale through overbidding. The *Maliki* jurist Al-Abyani discussed sale through overbidding under the title of *masa'il Al-Samasirah* (Issues of Brokers). Some jurists also consider sale through overbidding to mean "Auction Sale".

As stated in the Arabic lexicon *Lisan Al-Arab* "*samsar* is a transliterated Persian word and *samsarah* (brokerage) is the act of a citizen who becomes the agent for selling the commodities which Bedouins bring to the market. In interpretation of the Prophetic *hadith,* which states that "***no citizen shall perform sale for a Bedouin",*** it is said that the *hadith* prohibits being a broker for a Bedouin(1). This, however, should not be taken to mean that brokerage is forbidden, since prohibition here is confined to the case of a citizen acting as a sale agent of a Bedouin.

The word *samsar* is also used to indicate: "the caretaker and keeper" of the matter. In the context of sale: *samsar* refers to the person who plays an intermediary role between the seller and the buyer so as to facilitate deal conclusion; and *samsarah* refers to the process of selling and buying"(2). According to the Arabic lexicon *Al-mujam Al-Waseet samsarah* refers to "the profession of the *samsar* (broker), or the pay he receives"(3).

Use of a Variable Rate of Brokerage

Task-based rates

Is it permissible to stipulate a condition that the broker shall be entitled to the full pay if he manages to sell the commodity in question and to half of the pay otherwise?

In his book titled *masa'il Al-Samasirah,* Al-Abyani presents the following statement: ***"I asked him about a broker who receives the commodity on***

(1) Al-Bukhari: *Al-Saheeh,* (3/94); *Fat'hul Bari*, (4/373).
(2) *Lisan Al-Arab,* (4/380).
(3) *Al-mujam Al-Waseet,* (1/294).

condition that he gets one Dirham if he succeeds to sell it, and half a Dirham if he fails to do so; and whether that is permissible or not. He said: that is permissible if the two parties agree on a specific period"[(4)].

Hence, it seems as if *juaalah* and *ijarah* are combined in such contract; where the pay for *ijarah* is half a *Dirham* and that for *juaalah* is one *Dirham*. *Ijarah* is deserved for the broker's effort and the *juaalah* for achieving the desired result, which is selling of the commodity. Specification of the contract's period is essential in this case, especially that the deal involves *ijarah* in which *jahalah* (ignorance) about the contract's period is forbidden.

Time-based Rates

Is it permissible to agree with the broker that if he sells the commodity today, he shall get one *Dirham*, and if he sells it tomorrow he shall get half a *Dirham*?

This can be permissible either on the basis of *juaalah* rulings, or on the basis of the viewpoint of those who permit a similar form of *ijarah* in which the tailor, for instance, can be given the choice between sewing the shirt today for one *Dirham*, or tomorrow for half a *Dirham*. Regarding this case *Imam* Ahmad has reported two opposing viewpoints:

- The first is that it is impermissible, and the tailor is entitled to what is normally paid for similar work (…). This is the viewpoint of malik, Al-Thawri, Al-Shafiee, Is'haq and Abu Thawor (…).
- The second is that it is permissible; and this is the viewpoint of Al-Harith Al-Akli, Abu Yusuf and muhammad. The supporters of this viewpoint argue that such deal is permissible because a separate remuneration for each task is specified, as when someone says to the worker: I shall give you this much of dates for each bucket of water[(5)].

(4) Al-Abyani: *masa'il Al-Samasirah*, 49.

(5) Ibn Qudamah: *Al-mughni*, (6/87); Ibn Al-Qayem: *Ea'lam Al-muaqi'een*, (3/401); Al-mawardi: *Al-Insaf*, (6/18); Ibn Rushd: *Al-Bayan Wa Al-Tahseel*, (8/438); Imam Malik: *Al-mudawwanah*, (3/389).

Assigning of sale income above a specific limit to the Broker (Sale Bonus)

According to the *Maliki* jurists assigning of sale income beyond a certain limit to the broker is prohibited; whereas Ahmad, Al-Bukhari, Ibn Abbas, Is'haq, Ibn Sirin, Ibn Qudamah and Ibn Al-Qayem hold the view that it is permissible.

Chapter: VI

Stipend (*Rizq*)

Rizq can be taken to mean stipend if it is paid by the state (*bait al-mal*). The importance of setting *Shari'ah* controls on *rizq* originates from the fact that there are some acts of obedience and piousness - such as performing of prayers or fasting - that do not entitle their doer to any pay or *rizq*, because they are individual duties. At the same time there are other acts which, make the doer entitled to pay or to *rizq*, such as the work performed by workers and office employees. There is also a third type of engagements - such as *fatwa* (provision of *Shari'ah* opinion), judgeship and assumption of state leadership - for which *rizq* is more relevant than pay.

Rizq is sometimes based on need and sufficiency. A person who is not in need, is not entitled to *rizq*. Also a person who deserves *rizq* should not be given more than what is required for sufficiency.

The *Zakah* worker deserves a share in *Zakah* on the basis of the explicit order issued by Allah *(subhanahu wa taala)* in the holy verse: ***"and those employed to administer (the funds)"*** [*Al-Tawbah*: 60]. Similarly, the basis of entitlement to *rizq* is what Allah *(subhanahu wa taala)* has decreed for a guardian of an orphan in the holy verse which states that: ***"If the guardian is well-off let him claim no remuneration, but if he is poor let him have for himself what is just and reasonable"*** [*Al-Nisa'*: 6]. On this holy verse Omar (may Allah be pleased with him) based his well-known statement when he became the caliphate: ***"but, my status concerning your properties is just like that of an orphan's guardian, when I am not in need I shall claim no remuneration; and when I am in need I shall take for myself what is just and reasonable".***

Therefore, when there is a volunteer candidate who is willing to fill a job of the kind that entitles its occupant to *rizq* only, and if that volunteer is more competent than or as competent as non-volunteer candidates, he should be assigned priority.

Chapter: VII

Agency (*Wakalah*)

Agency refers to delegation of the right of disposition to someone else. Such delegation involves financial as well as all other dispositions that can be delegated according to *Shari'ah*. People need agency because one may not be able (or may not want) to look after all his interests personally.

Agency can be either against pay or against *ju'ul* (emolument); or it can be against none of that. When agency is against pay or *ju'ul*, it becomes subject to the rulings on *ijarah* and *juaalah*, otherwise the agent is considered as a volunteer.

Agency can be general or specific; and it can be for selling or buying. A sale agent has no right to sell the commodity to himself or to any of his family members and close relatives, because such sale entails suspicion of vested interest. Some jurists, however, permit such sale if it is not at less than the prevailing market price.

Agency is impermissible for acquisition of free resources like gathering of firewood and grass or hunting. When an agent performs a task of this kind what he captures belongs to him rather than to his principal. However, some jurists permit agency even in such tasks.

Agency is impermissible in performing of prayers and fasting, while it is permissible in *hajj* and *umrah*. Agency is also permissible in collection and payment of debts as well as in litigation (advocacy).

An agent has no right to appoint a subagent without the consent of the principal, because agency is based on the confidence of the principal in the experience and honesty of the agent in person.

An agent is a trustee and therefore he does not guarantee what he is appointed as an agent for, except in case of transgression negligence or breach of instructions.

Chapter: VIII

Disposition of a Nosy Person (*Fadalah*)

Literally, the word *Fadalah* or *fudool* indicates the behavior of a person who bothers himself with what does not concern him. In *Fiqh* terminology it refers to assumption of illegitimate right of disposition over the property of others. That is to say disposition from the part of a curios person who is not an owner, an agent or a guardian.

In principle the owner is the one who has the right of disposition. An agent can dispose of the property on the basis of delegation from the owner, whereas a guardian acquires such right by virtue of *Shari'ah* rulings, as in the case of a parent and his child.

Islamic jurists have two viewpoints with regard to the case when a nosy person disposes of the property of someone else through selling, buying, leasing, bequeathing, gift or *waqf*.

- The first viewpoint is that his disposition is null and void because it entails assignment of ownership performed by an unauthorized person (who does not act in the capacity of an owner, an agent or a guardian).
- The second viewpoint is that his disposition should become subject to nullification or endorsement by the owner of the property or his guardian, because subsequent endorsement is tantamount to prior agency.

Chapter: IX

Termination (*Iqalah*)

Literally the Arabic word *iqalah* means elimination or removal. For instance, in making *duaa* (praying) people seek "*iqalah*" for their sins or the sins of their friends from Allah (subhanahu wa taala) by asking Allah, the Almighty, to regard their lapses as undone.

Terminologically, *iqalah* refers to termination of the contract subject to the desire of one of its two parties. The prophet (peace and blessings upon him) said: ***"whoever terminates a sale with a Muslim (with "a repentant" in another version of the hadith), Allah will regard a lapse of his as undone"***[1].

Iqalah is recommendable and has to be subject to certain conditions, of which that the sold object should not change.

Islamic jurists are in disagreement as to whether *iqalah* is to be considered as contract termination or a new sale. In fact, it can be regarded as contract termination when the sale conditions remain the same. When conditions change (e.g. different price) it becomes a new sale.

Iqalah is permissible in sale, *salam*, *ijarah*, partnership and *Mudharabah*.

(1) Abu Dawud: *Al-Sunan*, (3/372); Ibn Majah: *Al-Sunan*, (2/741); Ahmad: *Al-Musnad*, (2/252); Al-Hakim: *Al-Mustadrak*, (2/45); Al-Bayhaqi: *Al-Sunan*, (6/27).

Chapter: X

Conciliation (*Sulh*)

In Arabic language, the words *Sulh, Musalahah* or *Tasaluh* indicate the opposite of antagonism or litigation. In *Fiqh* terminology conciliation refers to agreement on putting an end to dispute, in the sense that conciliation is usually sought when dispute is already there. Nevertheless, conciliation can also be sought in anticipation of a dispute that has not yet arisen.

Allah *(subhanahu wa taala)* said: ***"In most of their secret talks there is no good, but if one exhorts to a deed of charity or justice or conciliation between men"*** [*Al-Nisa'*: 114]; and He also said: ***"and such settlement is best"*** [*Al-Nisa'*: 128].

The Prophet (peace and blessings upon him) said: ***"Conciliation among people is permissible, except when it permits a forbidden act or prohibits a permitted act"***[1].

Conciliation takes many forms, including reconciliation with regard to dispute on property which constitutes the subject matter of this chapter.

Generally speaking, conciliation is recommendable, yet it is strictly forbidden when it leads to acts that involve disregard of *hudood* (*Shari'ah*-prescribed penalties), dealing in *riba*, or skipping of duties. Conciliation is also forbidden when it leads to injustice through giving favor to those who possess power, wealth or prestige.

It is preferable for the disputing parties to seek conciliation before resorting to courts. The judiciary may also direct disputing parties to seek reconciliation, because litigation would most probably stirs up persistent grudges and hatred.

According to the majority of Islamic jurists conciliation is not an independent contract. Therefore, conciliation is performed subject to *Shari'ah* rulings pertaining to sale if the dispute relates to a trade deal; or *Shari'ah* rulings on leasing if the dispute relates to leasing of an asset; or

(1) Abu Dawud: *Al-Sunan*, (3/413).

Shari'ah rulings on *salam* if the dispute is about money paid in advance for purchase of a deferred commodity; or *Shari'ah* rulings on exchange if the subject matter of dispute is a currency exchange transaction; or *Shari'ah* rulings on gift if reconciliation involves partial waiver of the right in an asset, or *Shari'ah* rulings on *Ibra'* (discharge) if the dispute is about partial debt relief.

Hence, it can be said in brief that conciliation is usually returned to the contract that best suits its compensatory or concessionary nature.

Among the well-known forms of conciliation, is granting of rebate for soliciting early settlement of debts (*da' wa taajjal* in *Fiqh* terminology), which is not considered as *riba* if it is arranged between the two parties, without involvement of a third party.

Chapter: XI

Preemption Right (*Shuf'ah*)

Preemption right is a mandatory right that entitles the partner to repurchase what his counter-partner sells to any external (non-partner) buyer; at the same price. That is to say, when a partner wants to sell his common share in a property, his counter-partner is supposed to be worthier of purchasing that share than any other buyer, so that no room is left for admission of an undesired partner. In this sense, preemption right is the purchasing right that has priority over the right of any other potential buyer of the property.

It has been reported that the Prophet (peace and blessings upon him) passed verdicts permitting exercising of preemption right in all types of indivisible property(1). Therefore, it is impermissible for a partner to sell his share of a property without notifying his counter-partner so that the latter can see if he wants to buy the offered share or not. When a partner sells his share without such notification, the entitlement of his counter-partner to buy the share of that property still remains valid(2).

Preemption right is applicable to properties such as land or a house that is not divided. Permissibility of preemption right is confirmed for real estate, while it is controversial among Islamic jurists with regard to movable property.

Some jurists do not permit preemption right in moveable property on the ground that contrary to the case for real estate, harm in moveable property will not be as perpetual as the property itself (temporary harm). Other jurists argue that preemption right is permissible in moveable property because - as we have indicated before - the Prophet (peace and blessings upon him) passed verdicts permitting preemption right in all types of indivisible property. The quoted prophetic traditional is generic; and seems to cover real estate as well as moveable property. moreover, those who believe in permissibility of preemption right in moveable property argue that harm in moveable property is not at all less - if not more – than harm in real estate.

(1) AL-Bukhari: *Al-Saheeh*, (3/114).
(2) Muslim: *AL-Saheeh*, (11/46).

What is meant by partnership in the preceding discussion is what is referred to in *Fiqh* literature as *Shirkat Al-Mulk* (Proprietary partnership). Some of the *Maliki* jurists also permit preemption right in what is known as *Shirkat Al-manfa'ah* (Partnership in benefit). An example of this type of partnership is when two people rent a house and one of them decides to lease his share in the benefits of the house. In this case his counter-partner can exercise his preemption right.

The *Hanafi* jurists add permissibility of preemption right acquired by virtue of neighborhood (an adjacent neighbor) for the sake of avoiding the risk of admitting an undesired neighbor. The adjacent neighbor in this case should be an owner and not a tenant or a borrower because the latter two do not stay permanently.

In exercising of preemption right, the asset in question is treated as indivisible, in the sense that the partner cannot demand part of the sold property and leave the other part (no deal fragmentation).

According to some jurists, the claim to preemption right should be laid immediately, whereas according to others preemption right can remain valid for a long period ranging between one and five years or even more. The opponents of this viewpoint argue that such period is too long, and could cause harm to the buyer. For instance, if the property in question is an agricultural land the buyer may have to stop cultivation during this period for fear of being forced to root out his plantation.

Islamic jurists are in disagreement regarding the case when the buyer cultivates the land and then the holder of the preemption right lays a claim to his right. Some jurists indicate that the holder of the preemption right should pay the cost of construction or plantation to the buyer, while others hold the view that he should not force the buyer to root out his plantation.

Islamic jurists are also in disagreement as to whether preemption right can be inherited or not. Some of them believe that it can, while others argue that it cannot.

Another controversial issue among Islamic jurists is whether waiver of preemption right against compensation is permissible or not. While the

majority of Islamic jurists are of the view that waiver of preemption right against compensation is forbidden, malik believes that it is permissible. It seems that prohibition in this regard is more reasonable than otherwise, because the holder of the preemption right would be induced to claim it even when there is no risk of encountering any harm.

Chapter: XII

Entitlement (*Istihqaq*)

In Arabic language *'Istihqaq'* means: laying a claim to a right; or certitude and enforceability of such right. In *Fiqh* terminology *istihqaq* indicates appearance of something as a lawful right of someone else. *Istihqaq* also means nullification of a present right, on validation of a preceding one; without compensation. The entitled property, in this case, goes back to its owner irrespective of the consent of the unlawful possessor.

Istihqaq can be validated through evidence (testimony); or through a confession made by the buyer to the benefit of the claiming party; or through recoiling of the buyer after an oath in which he denied knowledge about entitlement.

It is impermissible for a Muslim to buy something while he is aware that it is subject to a valid claim of entitlement. When entitlement is proved for the whole property, any precedent sale contract in which that property is involved becomes null and void; or subject to endorsement or nullification by the lawful owner. As regards partial entitlement, jurists have three viewpoints:

1. Nullity of the sale contract for the whole property.
2. Giving the buyer the option to choose between nullification of the contract; or keeping the non-entitled part of the sold asset and recourse to the seller with regard to the entitled portion.
3. Nullity of the contract for the entitled portion and its validity for the remaining part of the asset, if the asset in question is divisible. According to this viewpoint, if the value of the asset on the day of entitlement is SR 100 and the value of the entitled portion is SR 20, recourse to the seller will be for one fifth of the price.

Part: VII
Debt Contracts
(*Mudayanat*)

Chapter: I

Loan (*Qard*)

Definition

Literally, *qard* indicates what a person gives or performs so as to be rewarded for. The term *qard* has originated from the word *qata'* (cutting), and it signifies that the lender cuts off part of his wealth and gives it to the borrower in anticipation of reward.

As defined by Islamic jurists loan refers to the process in which the lender gives the borrower a specifically known fungible property so as to consume it and make repayment in terms of a similar one. For instance, the lender may give the borrower SR 100 to spend it and repay him SR 100; or a vessel of wheat to consume it and repay him a vessel of the same type of wheat, and so on for all other types of properties that can permissibly be lent.

Loan is a contract that entails assigning of ownership. That is to say, the borrower becomes the owner of the property as soon as he receives it from the lender; and, therefore, he becomes indebted to the lender with a similar asset, rather than the same asset he borrowed.

Loan is classifiable as a contract of piousness and donation, in the sense that the benefit that results from it goes to the borrower alone, whereas the lender is considered as a donor. Some jurists indicate that loan is an act that has two different implications. At the beginning it takes the form of donation since ownership of the borrowed asset goes from the lender to the borrower without compensation. At the end, the process takes the form of a compensatory deal when the lender repays a similar asset to the borrower. However, it can be said that loan is a donation contract, which does not take the complete compensatory form, except with the *thawab* (reward) which Allah *(subhanahu wa taala)* grants to the lender.

Shari'ah status of loan

From the standpoint of the lender, Loan is a recommendable act (*mandoob*) because it entails relieving of a needy person who suffers hardship.

Loan can become a duty (*wajib*) if the borrower is forced for borrowing by a pressing necessity that endangers his own life or the lives of his dependants; while the lender is a well-off person who can salvage the borrower.

Loan can also be a permissible act (*mubah*) when it does not stem from necessity or need. In extending the loan the borrower, for instance, may have the desire to keep his money under the guarantee of the borrower.

Under some circumstances loan can become a detestable act (*makrooh*), as when the borrower intentionally gives it to the less needy of two demanding people who are in equal standing with regard to other eligibility merits such as kinship, neighborhood, righteousness, moral integrity and honesty; or when he gives the loan in spite of being aware that the borrower is going to use it for a detestable purpose such as wasteful spending.

Finally, loan can become forbidden (*haram*) if the lender is aware that the borrower will use it for a forbidden purpose such as purchasing wine alcohol, gambling or payment of bribe.

The preceding points indicate the *Shari'ah* status of loan from the standpoint of the lender. As regards its *Shari'ah* status with respect to the borrower, loan can be permissible if the borrower is in need of it; or recommendable if the borrower sees in it a suitable means that he can use for resolving his hardship and gaining ability to discharge of his duties; or a duty if it is necessary for salvaging the borrower's life or the lives of his dependants; or detestable if the borrower is going to use it for a detestable purpose such as unnecessary spending; or forbidden when the borrower is intending to use it for a forbidden purpose.

The majority of Islamic jurists are of the view that loan is immediately repayable on claim even if a specific date for its repayment is agreed upon at the beginning. Other jurists, including malik, argue that loan is repayable on maturity if a specific date for its repayment is agreed upon.

The borrower should be keen enough to repay the loan without delinquency. In this regard, the Prophet (peace and blessings upon him) said: ***"whoever takes people's money with the intention of repaying it Allah will***

repay on his behalf, and whoever takes it with the intention of spoiling it Allah will spoil him"[1]. Repayment of a loan along with an agreed upon increment is strictly prohibited; yet such increment is permissible when it does not come as a result of a prior condition or collusion.

Is it permissible under change in the value of money to repay the loan at other than face value?

When the value (purchasing power) of non-golden or silver money changes, jurists have three viewpoints with regards to the amount that the borrower should repay:

1. Some jurists indicate that he should repay the same borrowed amount regardless of the change in the value of money.

2. Others believe that if the debt has arisen from a sale transaction, repayment should be at the value of the currency in question on the day of concluding the deal; and if it has arisen from a loan, repayment should be at the value of that currency on the day of receiving the loan.

3. A third group argues that repayment should be at current value if the change in the value of money is considerable, otherwise the same amount of the loan should be repaid[2].

Public lending

It has been reported that Omar Ibn Al-Khattab (may Allah be pleased with him) gave four thousands as a loan from *bait al-mal* to Hind Bint Utbah to use it in trade under her own guarantee[3]; and that Abu musa Al-Ashari lent the two sons of Omar Ibn Al-Khattab for trade purposes[4]. It has also been reported that Al-Zubair Ibn Al-Awwam used to conclude loan contracts with depositors so as to be able to use their funds in trade and real estate investment[5]. During the time of Omar Ibn Abd Al-Aziz the state provided investment loans even to the *Zimmis* (free non-Muslims under Muslim rule)[6].

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(1) Al-Bukhari: *Al-Saheeh*, (3/152).
(2) Hammad: *Drasat Fi Usul Al-mudayanat*, p. 222.
(3) Al-Tabari: *Al-Tareekh*, (3/29); Malik: *Al-Mudawwanah*, (9/36).
(4) Malik: *Al-muata'*, (2/687).
(5) Ibn Hajar: *Fat'hul Bari*, (6/227)
(6) Abu Obaid: *Al-Amwal*, p. 320.

Public borrowing

There is evidence that the Prophet (peace and blessings upon him) used to borrow for *bait al-mal* in some forms, among which is expediting early payment of *Zakah* that will become due within a couple of years ahead[7]. This means that he used to borrow from *Zakah* payers so as to make settlement latter on out of the *Zakah* income payable by these lenders or other people.

Al-Juwaini said: ***"I do not see that the Imam shouldn't borrow for bait al-mal when need arises"***. He also said: ***"I believe that borrowing is permissible when funds are needed and there is indication that forthcoming events will lead to shortage of funds"***[8].

Al-Ghazi also stated that, ***"The Prophet (peace and blessings upon him) used to borrow when there were no funds for equipping the army. I do not deny permissibility of resorting to borrowing as a sole source of funding when need arises. However, if the Imam is not anticipating an inflow of funds that exceed the allocations of bait al-mal for the supplies of the army and payment to mercenaries, on what basis can he resort to borrowing with an empty hand at present and no hope for future income? If the Imam has any anticipated income, or a guaranteed source of obtainable funds (****that can be used for repayment of the loans****), borrowing would become the most suitable solution***[9].

According to Al-Shatibi, ***"borrowing during crises is acceptable only when an inflow of income to bait al-mal is expected. In the absence of any anticipated inflow of income, and when current sources of funds are very weak, levy of financial duties becomes inevitable"***[10]. He then adds that: ***"(this issue) has been discussed by Al-Ghazali in some of his books, followed by Ibn Al-Arabi in his book Ahkam Al-Qur'an. Both scholars emphasize - as prerequisites for permissibility of borrowing - observance of justice on the part of the Imam and abidance by Shari'ah in collection and disposition of funds"***[11].

Cooperative loans

Qalyoubi stated in his book *Al-Hashiyah* that: ***"the famous method of collective saving (jam'ah) which women practice by contributing to a fund to be taken by turn every week or month is permissible according to Al-Wali Al-Iraqi (d 826H)"***[12].

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(7) Al-Shawkai: *Nail Al-Awtar*, (/168).
(8) Al-Juwaini: *Al-Ghiyathi*, pp. 277 and 279.
(9) Al-Ghazali: *Shifa' Al-Ghaleel*, p. 241.
(10) Al-Shatibi: *Al-Eetisam*, (2/122).
(11) Ibid.
(12) Qalyoubi: *Al-Hashiyah*, (2/258).

Chapter: II

Bill of Exchange (*Suftajah*)

Bill of exchange (*suftajah* or *saftajah*) refers to repayment of debt in a country other than the country of its origin, whether such repayment is made through a written document or not. Therefore bill of exchange can arise from a loan or any other deal such as sale on credit.

When bill of exchange results from sale in which price or commodity is postponed, there is no harm in repayment in another country, whether subject to prior condition or not. Nevertheless, when debt is due, it should be treated subject to the rulings on loan.

When bill of exchange arises from a loan transaction and without prior agreement, nobody seems to deny its permissibility. Dispute among Islamic jurists is on whether bill of exchange can be stipulated as a condition in the loan contract or not. In this regard there are a number of probabilities:

1. If the bill of exchange is stipulated as a condition by the lender; and the borrower will thus be obliged to transport what he is going to deliver in repayment (whether it is a cash amount or a commodity), bill of exchange in this case is impermissible because it entails *riba*. Since the property will remain under the guarantee of the borrower until time of repayment at the place agreed upon, the lender will gain from saving the costs of transportation and customs duties (if any), besides avoiding the risks of theft, loss, and damage.

However, the process could also entail some benefit for the borrower if the commodity, which is to be delivered in another place is cheaper in that place than in the original place of the loan. In this case the borrower could make a gain from price difference. This will also hold true in case of a cash loan, when exchange rates are different between the two places.

2. When the bill of exchange is desired by the borrower and refused by the lender, the latter should not be forced to accept it; otherwise he will have to bear the costs and risks associated with transporting the commodity from place of delivery to his own place.

3. If the bill of exchange is desired by the borrower and the lender is willing to pay the costs and risks of transporting the repaid commodity from the place of the borrower to his own place, such arrangement is permissible. The lender in this case will be doing favor twice to the borrower, first by granting him the loan; and second by accepting to bear the cost of bringing the commodity delivered in repayment from the place of the borrower.

4. If the bill of exchange is desired by the borrower who wants to repay the loan in his own country without bearing any cost or risk of transporting the commodity; while at the same time repayment in that country will also serve an interest of the lender who needs the commodity to be repaid there, the deal is permissible since it does not entail cost for any of the two parties.

Regarding bill of exchange, what really matters is the amount to be delivered in repayment; rather than the loan amount and whether the borrower consumes it at the place of borrowing or elsewhere. This is simply because when the borrower transports the borrowed commodity to another place so as to consume it there he will be doing so in pursuit of his own benefit, and therefore any costs or risks that he may encounter have nothing to do with the lender. The costs and risks that affect permissibility of the deal are those related to transportation of the repaid commodity.

In short, stipulation of bill of exchange as a condition in the way described in this latter example is permissible because it is beneficial to both parties. What is more important is that the benefit, which the lender gains does not entail any cost to be borne by the borrower.

In the absence of bill of exchange in this example, the borrower will have to transport the commodity to make repayment at the place of borrowing, while the lender will have to transport the loan once again back to the place of the borrower. Hence each party will be incurring additional costs, which he can avoid. *Shari'ah* prohibits waste of money whenever there is a chance for saving it.

A further lesson that can be drawn from this example is that attention should be given not only to the benefit of the borrower but to that of the

lender as well, otherwise handling of the case could lead to issuance of erroneous *Shari'ah* verdicts.

It is also better for the lender not to present the loan in pursuit of his personal benefit. Nonetheless, even when he chooses to do so he will not be committing a sin. He will, however, lose the reward from Allah (*subhanahu wa taala*), due to the fact that the lender is not presenting the loan for the sake of charity. The loan contract in this case becomes quite similar to a compensatory contract in which benefits are exchanged between the two parties. Allah (*subhanahu wa taala*) does not accept an act unless it is done exclusively for His sake. He will not accept a loan that is presented for His sake along with another objective, because He (*subhanahu wa taala*) is the farthest away from having a partner.

Summary

Bill of exchange is permissible if it is to the benefit of the borrower, even if at the cost of the lender (Case: 3); or if it is to the benefit of the borrower while it entails some benefit to the lender as well (Case: 4); or if it is to the benefit of the lender without causing any harm to the borrower (as when the borrower is indifferent with regard to repayment of the debt at the place of borrowing or elsewhere).

In a nutshell, bill of exchange is permissible when it does not involve an additional cost to the borrower. This would in other words mean that, bill of exchange is permissible if the additional cost it entails is to be borne by the lender; or when it is to the benefit of the lender, without involving any cost or benefit to the borrower; or (the more so) when it is to the benefit of the borrower.

Chapter: III
Clearing (*Muqassah*)

Literally, the Arabic words *'Muqassah'*, *'Taqas'* or 'Q*asas'* indicate matching, equating or reciprocating. In the context of debts, *muqassah* refers to the process of comparing the debts which two parties owe to each other with the aim of making settlement. In the Islamic legal jargon *muqassah* is the act of cancelling the debt that you owe to someone against the debt which he owes to you. *muqassah* is, therefore, a method of debt settlement.

Allah (*subhanahu wa taala*) said: ***"Ye who believe! The law of equality is prescribed to you in cases of murder"*** [*Al-Baqarah*: 178]. Some commentators indicate that the holy verse refers to settlement of blood money payable for slain from two parties(1).

The Prophet (peace and blessings upon him) said: ***"when it is mortgaged, a riding animal is ridden against its sustenance"***(2). This is a clearing process, which involves the cost of sustenance of the animal and the pay for riding it.

Clearing is useful to the two parties as it entails saving of the costs incurred in debt collection. In clearing, both debts must be either mature or have the same tenor. When one of the two debts is bigger than the other clearing takes place with respect to the smaller debt.

Recovery of seized property

Ibn Sirin stated that when an oppressed person finds a property of his oppressor he can take it and demand clearing. Ibn Sirin then read the holy verse ***"And if ye do catch them out, catch them out no worse than they catch you out"*** [*Al-Nahl*: 126].

Islamic jurists unanimously agree that when you find a property that belongs to someone who has unlawfully taken your property or denied your deposit, you may take it if you are secure from being accused of committing theft.

(1) Al-Tabari: *Al-Tafseer*, (2/102).
(2) Al-Bukhari: *Al-Saheeh*, (3/187).

Chapter: IV

Debt Assignment (*Hawalah*)

'Hawalah' refers to the process of assigning a debt commitment to another party. The Prophet (peace and blessings upon him) said: ***"delinquency of a solvent debtor is oppression; and when any of you is asked to pursue repayment from a solvent person let him accept"***[1]. In another version of the *hadith the text is:* ***"when any of you, in claiming his right, is referred to a solvent person let him accept"***[2].

Therefore, debt assignment constitutes a form of debt collection. There could be real need for it as it may facilitate claiming of settlement from a more solvent and flexible person. Or it can be useful when the person who is assigned the task of collecting the debt is more capable of compelling the delinquent assignee to repay.

According to Ibn Taimiyah, ***"debt assignment is a form of debt collection, rather than a process that entails selling of debt. When the creditor gets his debt repaid to him by his debtor this is debt collection. The debtor may also ask the creditor to get the debt repaid by someone else, and hence the creditor in this case will be seeking repayment in terms of a debt, which the assignee owes to his debtor. For this purpose the Prophet (peace and blessings upon him) referred to debt assignment in the context of debt collection (…) commanding a solvent debtor to repay his debt without delinquency"***[3].

Some jurists indicate that both debts should be either mature or have the same tenor.

(1) Al-Bukhari: *Al-Saheeh*, (3/123); Muslim: *Al-Saheeh*, (10/228).
(2) Al-Bayhaqi: *Al-Sunan*, (6/70); Ahmad: *Al-Musnad*, (2463).
(3) Ibn Taimiyah: *Al-Qiyas*, p. 16.

Chapter: V
Warranty (*Kafalah*)

Literally, *'Kafala'* indicates annexation or commitment. As defined by Islamic jurists *kafalah* means annexation of one commitment to another; that is to say, annexation of the warrantor's commitment to that of the debtor. There is no harm when commitment towards the same debt rests with more than one person because, contrary to tangible assets, debts are no more than acknowledged rights.

Warranty is permissible because Allah (*subhanahu wa taala*) said: ***"for him who produces it, is (the reward of) a camel load; I will be bound by it"*** [*Yusuf*: 72]. This implies that warranty was well known to ancient nations because the Arabic word *"zaeem"* which has been used in the original text of the holy verse means warrantor. The Prophet (peace and blessings upon him) said: ***"a warrantor is a debtor"***[1].

It is permissible to arrange warranty for a debt, which is already due; or a debt that is still outstanding, because warranty is an act of donation.

According to the majority of Islamic jurists warranty does not lead to discharge of the principal debtor from commitment, and therefore the creditor can claim repayment of his debt from the debtor as well as the warrantor. Some jurists are of the view that the creditor should not claim repayment from the warrantor unless repayment by the principal is hardly possible. The warrantor should not demand the debt amount from the principal before making repayment. If discharge of the principal debtor is stipulated as a condition for warranty, the deal becomes *hawalah* (debt assignment).

Being a donation contract, warranty not be offered against pay. However, in our present times it could be difficult to arrange free-of-charge warranty, especially for big deals.

(1) Abu Dawud: *Al-Sunan*, (3/402); Ibn Majah: *Al-Sunan*, (2/804); Al-Tirmizil: *Al-Sunan*, (3/556); Ahmad: *Al-Musnad*, (5/267).

The logic behind prohibition of remuneration for warranty is that if a pay is not permitted for extending a loan, which entails forwarding money, how it can be permitted for warranty which requires no more than forwarding prestige? Forwarding money in case of warranty is only probable. If by virtue of a remunerable warranty contract the warrantor finds himself obliged to repay the debt, there will be a suspicion of *riba*.

Chapter: VI
Mortgage (*Rahn*)

In Arabic language, the word *'Rahn'* has several meanings including: constancy, permanence, restraining or withholding. In *Fiqh* terminology *rahn* refers to the process of documenting a debt by a property that can be used for repayment in case of default.

Allah (*subhanahu wa taala*) said: ***"If ye are on a journey and cannot find a scribe, a pledge with possession (may serve the purpose)"*** [*Al-Baqarah*: 283]. Therefore mortgage is recommendable (*mandoob*), especially when people are on travel.

It is permissible to obtain mortgage when the asset in question is held under guarantee; whereas mortgage should not be obtained for asset that are held under trusteeship. Consequently, mortgage may be obtained from a debtor because debtors hold debts under guarantee, while it cannot be obtained from a trust keeper; except for covering probable incidents of transgression and negligence.

All assets that can be sold can also be mortgaged, because the very objective of mortgaging lies in the possibility of selling the mortgaged asset when repayment of the debt is impossible.

According to *Maliki* jurists, debts can also be mortgaged by using one debt as a guarantee for another. The *Maliki* jurists argue that debt is a property and hence can satisfy the need for documentation(1).

In order to avoid any suspicion of *riba*, the creditor should not benefit from the mortgaged asset. If the mortgaged property is a riding or milk-giving animal, the creditor can benefit from it against bearing the costs of its sustenance; provided that benefiting would not exceed the actual limits of such costs. In this connection the Prophet (peace and blessings upon him) said: ***"In case of mortgaging, a riding animal is ridden against its sustenance and the milk of a milk-giving animal is drunk against sustenance. The one who rides and drinks should bear the cost of sustenance"***(2).

(1) Al-Di'ailij: *Al-Rahn*, p.264.
(2) Al-Bukhari: *Al-Saheeh*, (3/187).

Chapter: VII
Discharge (*Ibra'*)

Literally '*Ibra'* means: declaring someone to be far away, or completely free from being involved in an affair. In *Fiqh* terminology *Ibra'* indicates waiver of a right that someone owes to another. Hence, *Ibra'* involves two meanings; the first is waiver of right, and the second is assignment of ownership.

Ibra' can be a duty if it is made in acknowledgement of repayment; or recommendable if it involves waiver of a right owed by an insolvent debtor. Allah (*subhanahu wa taala*) said: ***"If the debtor is in a difficulty, grant him time till it is easy for him to repay, but if ye remit it by way of charity that is best for ye if ye only knew"*** [*Al-Baqarah*: 280].

Therefore *Ibra'* is of two types: the first is made in acknowledgement of repayment; and the second is for waiver of right. The first type is no more than a mere form of acknowledgement.

When a creditor agrees to discharge his debtor from the entire commitment against compensation, the process is considered as reconciliation. A creditor may also discharge the debtor from commitment to repay on maturity. In this case discharge involves debt rescheduling rather than waiver of right.

Some jurists believe that validity of discharge necessitates consent of the debtor, because discharge may involve declared sympathy (*minnah*), which is unacceptable to those who have high sense of self respect, especially when such sympathetic favor comes from someone who is not known for it, or when it is not actually needed(1).

Discharge is permissible in the plain rights of human beings, and strictly forbidden in the plain rights of Allah (*subhanahu wa taala*); such as *Shari'ah* prescribed penalties (*hudood*).

When discharge is granted to the principal it will also involve his warrantor, whereas if it is granted to the warrantor it may not involve

(1) Al-Qarrafi: *Al-Furooq*, (2/111).

relief from the debt. That is to say, discharge could be meant to include only the warrantor's commitment.

Discharge can be from the entire debt or part of it. The Prophet (peace and blessings upon him) said to Kaab: ***"remit part of your debt"***[2].

Partial discharge can be conditional upon timely or early repayment of the remaining portion of the debt on the basis of the principle of *Da' wa Tajjal* (early payment against rebate).

(2) Al-Bukhari: *Al-Saheeh*, (1/127); Muslim: *Al-Saheeh*, (10/220).

Chapter: VIII

Bankruptcy (*Iflas*)

The Arabic word *iflas* describes the state of a person who becomes an owner of *filses*, after being an owner of gold and silver; or a person who has become penniless. In the *Fiqh* jargon *iflas* refers to the state of a debtor whose debt commitments exceed his assets. *Iflas* (bankruptcy) is different from *ea'sar* (insolvency), which indicates lack of money for settlement of financial commitments on maturity.

According to the majority of Islamic jurists, when the debt commitments of a person absorb all his assets, and his debtors call for limitation of his legal competence, the competent authority should declare him, publicly, as bankrupt. Abu Hanifah argues that such a person should not be declared as bankrupt, because he has full legal competence and therefore declaring him as legally incompetent means abuse of his human dignity and denial of his freedom and rationality.

The majority of Islamic jurists argue that the Prophet (peace and blessings upon him) subjected muaz to legal interdiction, sold his properties, distributed the money among his creditors and said to them: "***take whatever you find and you have nothing more to demand"***. In another version of the *hadith* it has been reported that the Prophet (peace and blessings upon him) said to those creditors: ***"you have no further claim against him"***.

From a religious point of view, it is impermissible for a bankrupt debtor to make any disposition that will cause harm to his creditors. It is also impermissible for other people to conclude any deal with such a debtor, if that deal could be harmful to his creditors.

It is recommendable to declare, publicly, the decision of limiting the legal competence of the bankrupt debtor so that people can avoid the risks of concluding any further deals with him.

The dispositions of a bankrupt debtor are permissible as far as they are to the benefit of his debtors; as when he accepts grants. By the same token, the dispositions of a bankrupt debtor are impermissible when they

are harmful to his debtors; as when he offers grants. Islamic jurists are in disagreement regarding those dispositions of a bankrupt debtor which may or may not be to the benefit of his creditors; as when he performs trade.

Declaring a debtor as bankrupt does not justify premature settlement of the debts that other people owe to him. As regards the outstanding debts, which the bankrupt owes to others, Islamic jurists have two different viewpoints. Some jurists believe that such debts should become payable before maturity; while others believe that they should not. In support of its point of view, the second group of jurists argues that, unlike death, which totally nullifies commitments of the deceased, bankruptcy does not nullify the right of the debtor to postpone settlement of debts till maturity.

In selling the assets of the bankrupt for repayment of his debts the competent authority should start first with selling the mortgaged assets; followed by perishable commodities such as foodstuffs; then livestock which may also perish or need sustenance; then other collectables and finally real estate properties.

The properties of the bankrupt that are to be sold for repayment of his debts should not include his food, clothes, books and residence. According to some jurists residence of the bankrupt can be sold and a new one rented for him.

Part: VIII
Partnerships
(*Musharakat*)

Chapter: I

Partnership (*Shirkah*)

Common, Proprietary and Contract Partnerships

Common Partnership: refers to partnership of the entire society in common resources such as water, pasture and fire. Of course water in this sense means water resources which have no specific owner; such as seas, rivers, water springs and public boreholes. Also pasture in this context refers to what is not privately owned; such as grass and herb in free grazing areas. Similarly what falls under common partnership is firewood that has no single owner; like trees in the forest.

To these public resources one can also add underground minerals and public facilities such as streets and mosques.

Proprietary or Joint Partnership is the form of partnership, which takes place when two people or more own an asset or a debt through one of the usual means of ownership such as sale, grant and inheritance. According to this form of ownership, individual shares of partners in the asset or debt in question are merged together in such a way that it becomes difficult or rather impossible to identify which portion of the common property belongs to that specific partner.

Contractual Partnership is a partnership between two people or more in the principal (capital) and the profit. Some Islamic jurists permit formation of partnerships for capturing free resources such as gathering of wood and grass from the forest or hunting; whereas other jurists believe that such partnerships are impermissible.

mandatory versus Optional Partnership

mandatory Partnership is formed up when two people or more forcefully own an asset, a debt or a benefit; as is the case in inheritance or when two quantities of wheat or barley that belong to two different people, somehow, get mixed.

Optional Partnership: takes place when two people or more willfully share the ownership of an asset, a debt or a benefit; as when funds are willingly mixed; or when the partners as a group purchase a house or rent a truck.

mufawadah versus *Anan* Partnership

***mufawadah* Partnership** is a partnership in which the partners have equal status with regard to capital subscription, managing of the affairs of the company and profit-and-loss sharing.

***Anan* Partnership** is a partnership in which the partners have unequal status with regard to capital subscription, managing of the affairs of the company and profit and loss sharing.

Capital Association, Work Association and Personal Association Partnerships

Capital Association Partnership refers to partnership between two people or more in the principal (capital) as well as the profit and loss. According to some *Fiqh* schools profits are to be distributed in proportion to capital subscription. Other *Fiqh* schools are of the view that profits can be distributed according to any agreed upon ratios so as to cater for differences in the volume and quality of work contributions.

The process of profit distribution should take the form of common shares (percentage-wise); for instance a half, a third or a fourth.

It is impermissible to set a predetermined lump sum amount of profit for any partner, because such amount may absorb the whole profit, and thus nullify the partnership contract itself. From the standpoint of Justice none of the partners is allowed to take the whole profit leaving nothing to others.

It is also impermissible to stipulate a prior condition that ties the profit share of one partner to the profit generated by a certain portion of the capital; or a specific portion of the output; or a certain line of production; or at a specific production site; or during a certain operating period.

Loss should be distributed according to capital subscription and not according to any other ratios.

In brief, distribution of profits and losses should be subject to the rule, which indicates that ***"Profit is subject to what is agreed upon, and loss is subject to capital subscription"***.

Work Association Partnership: This form of partnership, which is sometimes known as Physical Association, Crafts Association or Admittance Partnership, depends on admittance of work skills for formation of a partnership, in which the gain (revenue or pay) is distributed among partners as per agreement. Such partnership can be formed up by, for example, physicians, engineers or tailors. Some jurists permit work association partnerships even when occupations or work sites are different.

Personal Association (Equity-free) Partnership: This type of partnership is also known as Liability Association Partnership or Partnership of the Penniless. This refers to the case when two people or more form a partnership without capital subscription and perform business through purchasing commodities on credit and selling them for cash or on credit. Profit is distributed in proportion to the share of each partner in the purchased assets (what he guarantees), or as per the ratios agreed upon.

Generally speaking, entitlement to profit comes as a result of contribution of work, subscription of capital or provision of guarantee. Work entitles the worker to a profit share because work is an underlying cause of profit; and capital entitles its provider to a profit share because profit is an offspring of capital; and guarantee justifies having a share in the profit because guarantee is associated with ownership. The Prophet (peace and blessings upon him) said: ***"return follows guarantee"***[(1)].

In personal association partnership, loss is distributed according to the share of each partner in the partnership assets. Using any other ratios for loss distribution is forbidden because the Prophet (peace and blessings upon him) has forbidden any return that is not associated with assumption of guarantee (risk bearing)[(2)].

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(1) Ahmad: *Al-Musnad*, (6/80); Abu Dawud: *Al-Sunan*, (3/284); Ibn Majah: *Al-Sunan*, (2/754); Al-Tirmizi: *Al-Sunan*, (3/573); Al-Nasaee: *Al-Sunan*, (7/254).

(2) Ahmad: *Al-Musnad*, (3/175); Abu Dawud: *Al-Sunan*, (3/283); Ibn Majah: *Al-Sunan*, (2/738); Al-Tirmizi: *Al-Sunan*, (2/527); Al-Nasaee: *Al-Sunan*, (7/295).

Chapter: II

Mudharabah

In Arabic language the words *Mudharabah*, *qiradh* and *muqaradah* are synonymous. The term *Mudharabah* is predominantly used in Iraq, whereas *qiradh* and *muqaradah* are more predominant in the Hejaz area. This is similar to the case of the two terms *Salam* and *Salaf* which are used to indicate the same type of sale in Iraq and Hejaz respectively. *Mudharabah* is a form of profit sharing, based on contribution of capital from one party and labor from the other.

Islamic jurists justify permissibility of *Mudharabah* on the basis of the fact that Al-Abbas Bin Abd Al-muttalib (may Allah be pleased with him) used to provide funds to *Mudharabah* workers and stipulate that they should not carry the funds while traveling by sea or on country road, or use the funds for trading in livestock; otherwise they should guarantee repayment of the principal in case of loss(1).

The companions of the Prophet (peace and blessings upon him) also used to invest orphans' funds through *Mudharabah*.

One of the wisdoms behind permissibility of *Mudharabah* is that there are people who are well experienced in trade, but have no money; while there are other people who have enough money but no trade experience. Therefore, *Mudharabah* can render a good chance for satisfaction of the needs of both parties, besides development of the capital.

There are two types of *Mudharabah*. The first type is unrestricted or general *Mudharabah* in which the nature, place, and time of the work to be performed as well as the person who will perform it are not specified. The second type is restricted or special *Mudharabah* in which these four aspects are specified.

Islamic jurists indicate that *Mudharabah* capital should be a specifically known amount of money (cash). It should not be a debt or any other type of non-monetary asset, because *Mudharabah* or *shirkah* starts with money and ends up with it so that profit and loss as well as the share of each party can be known.

(1) Al-Bayhaqi: *Al-Sunan*, (6/111).

Quite similar to the case in *shirkah*, the profit share of each of the *Mudharabah* parties has to be determined in terms of a common share (percentage), rather than a lump sum amount agreed upon beforehand. As we have already indicated in the case of *shirkah*, agreement beforehand on a lump sum amount of profit for one party may lead to nullification of the *Mudharabah* deal itself if the total profit earned is just equal to or less than that lump sum amount. However, it is permissible for the worker to be given a lump sum amount (bonus) out of the profit that exceeds a certain agreed upon limit; for instance he can be given SR 1000 when the *Mudharabah* profit is SR 10000 or more. The worker may also get such lump sum amount in addition to a specific share of the profit as has already been indicated in the preceding chapter on *ijarah*.

If the two parties agree that the whole profit should go to the worker the deal becomes a loan contract, while when they agree that the whole profit has to be taken by the owner of the capital the deal becomes hiring of an employee. In order for the deal to be considered as *Mudharabah* the two parties should agree that each of them is entitled to a share in the profit.

Islamic jurists are in disagreement as to whether the worker becomes entitled to profit as soon as profit is realized, after division takes place, or on liquidation? However, entitlement to profit should not precede ensuring of safety of the capital, because profit constitutes a shield for capital.

Profit, and so is loss, can be a direct consequence of the worker's effort (revenue profit in the language of modern accounting) or may have nothing to do with that (capital profit). According to Ibn Hazm ***"livestock offspring, orchard yield and house rent should belong to the owner of the capital because such gains result from mere growth in his property. The worker is entitled to a share in the profit that originates from sales only; excluding all other gains that are not sale-related"***[2].

(2) Ibn Hazm: *Al-muhalla*, (8/249).

It is impermissible to stipulate as a condition that the worker should guarantee the capital. The worker is a trustee at the time when he receives the capital, an agent when he starts disposing of it and a partner (as per his agreed upon share) when profit is achieved.

Distinction should be made between the expenses that must be borne by the *mudarib* and those, which should be borne by the *Mudharabah*. Personal expenses of the *mudarib* should be charged to his profit account, whereas *Mudharabah* expenses are trading expenses, which should be charged to the *Mudharabah* account. If the two parties wish to charge some of the personal expenses of the *mudarib* to the *Mudharabah* account such expenses should be clearly specified and agreed upon for the sake of avoiding dispute.

The *mudarib* should not sell on credit except with the consent of the owner of the capital. However, some jurists permit selling on credit without the consent of the owner of the capital if that is the normal practice in the trade. Also, the *mudarib* should not buy on credit except when the owner of the capital authorizes him to do so, because buying on credit entails more commitments on the part of the owner of the capital. When the owner of the capital permits the *mudarib* to borrow under guarantee of the *Mudharabah* capital, the two parties should become partners in the borrowed funds subject to the rulings on "Personal Association Partnership".

According to some jurists, the *mudarib* can conclude subcontracts of *Mudharabah* with others when the owner of the capital authorizes him to do so.

Chapter: III

Muzara'ah

muzara'ah is a form of partnership in agricultural products in which one party provides the land and the other party contributes agricultural labor. *muzara'ah* is permissible because the Prophet (peace and blessings upon him) used to allow agricultural workers to cultivate *Khyber* lands against a specific share of the produce(1). Omar (may Allah be pleased with him) also used to agree with agricultural workers that when he provides the seeds, he should get half of the produce; and when workers provide the seeds, they should get a specific share of the output"(2).

Among the wisdoms behind *muzara'ah* is that the landowner may not be a good farmer, while the famer may not have the agricultural land. *muzara'ah* is therefore a suitable means whereby the needs of both parties can be satisfied along with achievement of land development. The *Hanbali* jurists consider *muzara'ah* as a form of partnership, contrary to other jurists who consider it as a form of leasing.

In *muzara'ah*, the share of each of the two partners must be a given ratio - such as a half, a third or a fourth – of the produce. It should not be a lump sum amount of the output because if nothing more than that amount is produced, one party will have to get nothing, and hence, partnership will cease to be valid. Also the share of any of the two partners should not be confined to the output of a certain part of the farm, because that output may perish before being harvested or it may be the only output obtained from the farm(3), and hence in each of the two cases one of the two partners will have no share in the output.

muzara'ah is permissible if the land is owned, rented or borrowed. The landowner should not stipulate a condition that commits the worker to do any work from which the landowner can benefit after the end of the *muzara'ah* period; such as building of a wall or digging of a canal. Capital costs of this kind should be borne by the landowner. After sharing the produce the *muzara'ah* deal is over, and therefore the cost of any work that follows should be borne by its respective beneficiary.

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(1) Al-Bukhari: *Al-Saheeh*, (3/137); Muslim: *Al-Saheeh*, (10/208).
(2) Al-Bukhari: *Al-Saheeh*, (3/137).
(3) Muslim: *Al-Saheeh*, (10/206).

Chapter: IV

Musaqah

musaqah is the process of giving an orchard to someone to look after it against a share of the produce. *musaqah* is permissible because the Prophet (peace and blessings upon him) used to agree with farmers in *Khyber* to look after fruit trees against a specific share of the produce.

One of the wisdoms behind permissibility of *musaqah* is that the owner of the orchard may lack knowledge in the area of fruit production, while the worker who has enough expertise in this field may not have an orchard.

Islamic jurists are in disagreement with regard to the type of trees that can be utilized through *musaqah*. However, there is unanimous agreement that palm and grapevines can be utilized through *musaqah,* because their output can be easily estimated. According to some jurists, *musaqah* is also permissible in flowers and useful leaves such as blossoms and jasmine.

In *musaqah*, the share of each of the two parties must be a certain ratio of the produce; such as a half, a third or a fourth. It should not be a lump sum amount of the output, or the output of a certain number of trees or part of the orchard, because the total produce may not exceed the earmarked output, and hence only one party will get the yield and the partnership ceases to be valid.

The owner of the orchard should not stipulate a condition that commits the worker to do any work other than the *musaqah* works. For instance, the worker should not be responsible for works that can still render benefit to the owner of the orchard after the contract's period; such as digging of a well, renting of an irrigation canal, building of a warehouse for fruits or plantation of new shoots. The benefits of such works will go to the orchard rather than to the produce. moreover, the worker should not be burdened with works that do not relate to fruit production; such as construction of a residence for the owner of the orchard or serving him for a certain period.

Some Islamic jurists indicate that the *musaqah* worker can get the work done through subcontractors, except when his commitment in the original *musaqah* contract necessitates doing the work personally.

Chapter: V

Mugharasah

Mugharasah is the process of giving land to someone so as to plant trees in it against a specific share of what he plants. The *Maliki* jurists permit *Mugharasah* subject to certain restrictions. H*anafi* jurists also permit *m* if it is confined to the trees and the fruits excluding the land[1], because the land exists before conclusion of the *m* contract and, therefore, the work effort does not entitle the worker to a share in it.

Perhaps the *Maliki* jurists consider *Mugharasah* as *Juaalah* for plantation of the trees, in which the reward is payable in terms of a share of the plants. Among the conditions *Maliki* jurists indicate for permissibility of *Mugharasah* is that the trees should be of the same kind or of similar kinds, and that the contract should not be for a long period.

(1) Al-Zuhaili: *Al-Fiqh Al-Islami*, (5/652).

Chapter: VI
Division (*Qismah*)

Division of Assets

The Arabic word *qismah* refers to the act of dividing something into parts. In *Fiqh* terminology *qismah* refers to specification of shares; or identification of separate rights; or converting common property into individual properties.

On division of war booty, Allah (*subhanahu wa taala*) said: ***"And know that out of all the booty that ye may acquire (in war) a fifth share is assigned to God – and to the Apostle and to near relatives, orphans, the needy and the wayfarer"*** [*Al-Anfal*: 41].

On division of inheritance, Allah (*subhanahu wa taala*) said: **"*From what is left by parents and those nearest related is a share for men and a share for women, whether the property be small or large a determinate share"*** [*Al-Nisa'*: 7]. Therefore, division of inheritance should be according to the teachings of this holy verse.

On division of wealth between its owner and the poor, Allah (subhanahu wa taala) said: ***"And those on whose wealth is a recognized right; for the needy who asks and him who is prevented (for some reason from asking)"***. [*Al-maarij*: 24 & 25].

On division of inheritance also Allah (*subhanahu wa taala*) said: ***"But if at the time of division other relatives or orphans or poor are present feed them out of the (property) and speak to them words of kindness and justice"*** [*Al-Nisa':8*]. The word division (*qismah*) is explicitly mentioned in this holy verse.

Among the wisdoms behind such *Qur'anic* guidance on division is the desire to ensure avoidance of any harm that could be inflicted upon partners.

Islamic jurist are in disagreement as to whether division is a sale process or it is just an act of identification of rights. However, division can be considered as a sale process in the sense that each partner sells the portion of the property that he leaves to his partner for the portion that his partner leaves to him. Some jurists are of the view that, in most cases, division of fungible properties constitutes a process of identification of rights, whereas division of non-fungible properties involves the meaning of sale.

There are three types of division, including separation, adjustment and refund Division.

Separation division is the process that becomes applicable when the property to be divided does not require valuation, such as money, or a homogeneous amount of a certain commodity like wheat or clothes, or a house, which is composed of identical parts with regard to number and size of rooms as well as other facilities. Hence division by separation is applicable when shares are identical in terms of m and value.

Adjustment division is applicable when equalization of shares has to be made in terms of value, rather than form. One third of the property to be divided may be equal in value to the other two thirds; or a watch, for instance, may be equal to a book and a pen in terms of value.

Refund division is resorted to when shares are unequal due to practical considerations or as per partners' choice. In this case the partner who gets the bigger share has to make refund to the other party. That is to say equalization of shares necessitates the use of an additional amount for settlement of the difference. Refund division become necessary when, for instance, the share of one of the two parties includes an indivisible property such as a borehole, a building, or a garden.

In summary, Separation division is used when the shares of the divided property are identical in terms of form and value; and adjustment division is used when the unequal shares can be equated without refund; whereas refund division is used where separation and adjustment cannot serve the purpose.

Division can take place through mutual consent or casting of lots, for the sake of avoiding any suspicion of favoritism.

The Divider's Pay

Division can be performed by all the partners as a group or some of the m; or it can be performed by a volunteer or a paid divider. A divider is paid for his services by the partners as a whole when they appoint him; or by *bait al-mal* if he is a public divider appointed by the judiciary. In this latter case the divider will get *rizq* (stipend) from *bait al-mal* just like a judge. Remuneration of a public divider can also be borne by the partners

because they are the beneficiaries of the division process. The amount of pay to which a divider is entitled can be estimated in the light of the ruling practice. The judiciary may also give the partners the option to choose between accepting the public divider, and appointing someone else.

Some jurists warned against collusion among dividers with the aim of increasing their pay, or performing unjust division against bribe. According to these jurists the public divider should also not claim payment from the partners except when he actually performs division among them. Other jurists hold the view that performing division against pay is detestable (*makrooh*), because division, according to them, is an act of charity.

The cost of division services is distributed among partners either per head or per share. Those who suggest per head allocation of such cost believe that it does not vary with respect to share size; while those who suggest per share allocation believe that it does. According to this latter group, cost of division services is a cost that relates to ownership, and hence should be allocated in proportion to the respective size of ownership; similar to all other costs of this nature.

The majority of Islamic jurists indicate that even when only some of the partners ask for division, cost of division should be distributed among all partners, because the benefit will result to all. In the contrary, some jurists argue that it should be borne by only those who requested it so as not to cause harm to the refusing partners.

Division of Benefits: Place and Time Adaptation (*muhaya'ah*)

Time Adaptation refers to successive benefiting from the whole asset in question. The duration of benefiting from the asset is determined for each partner in proportion to his share in the common asset. For instance, one partner may benefit from the asset for one day and the other for one or two days.

Place Adaptation indicates the case when each partner, independently, benefits from a specific part of the property. For instance one partner may benefit from the front side, while the other partner benefits from the backside of the land; or one partner may benefit from the lower floor, and the other partner benefits from the upper.

Allah (*subhanahu wa taala*) said: "***He said: "Here is a she camel, she has a right of watering and ye have a right of watering (severally) on a day appointed".*** [*Al-Shuara'*: 155]. This incident reflects time adaptation in the laws of the preceding nations.

If time adaptation is permissible, so – or even the more so - is place adaptation which enables both parties to benefit from their rights simultaneously. Simultaneous benefiting seems to be more just than successive benefiting from the asset, because time has a share in value. In successive benefiting, the party who benefits first will get more benefit than the one who follows; even if the two periods of benefiting are equal.

Therefore, time should be taken into consideration in valuation of benefits, especially when the period (turn) of benefiting is relatively long; as in the case of an agricultural land or a house of which each partner will keep benefiting for a whole season or year. Contrary to place adaptation where casting of lots is acceptable for specification of the part of the property to be used by each partner, in time adaptation it may not be fair to cast lots for determining who should start first.

It is impermissible for one partner to lend his turn to the other so that the other will do the same later, because loan provision is an affair of benevolence while division is a matter of justice.

Benefits in this context refer to benefits of the assets or properties that can be used while they remain in survival (durable assets).

The process of dividing the benefits among partners is called *muhaya'ah* (adaptation) because each partner is given the chance to benefit from the asset in a way that conforms to the way of benefiting allowed for his counter-partner.

Division of benefits can take place on the consent of the partners or on the request of one of them, especially when division of the assets themselves (in-kind division) is impossible; or if it is possible but some partners do not agree to it.

There could be a case where time adaptation can be possible, while place adaptation is not. For instance it may not be possible for all the partners to benefit from a house that has a limited area and therefore only one of them at a time can benefit from it.

Part: IX

Donations

(*Tabaru'at*)

Chapter: I

Lending of Property /Lent Property (*Ariyyah*)

The Arabic word *ariyyah* is usually used to signify lending of property, or the lent property itself. In *Fiqh* terminology, *ariyyah* means - according to the *Hanafi* School - assigning of ownership against no compensation. The *Shafiee* jurists define *ariyyah* as permission of benefiting from something, while preserving its existence. Allah (*subhanahu wa taala*) said: ***"but refuse (to supply) (even) neighboring needs"*** [*Al-ma'oon*: 7]. The expression neighboring needs (*al-ma'oon*) which has been used in the holy verse means those utensils that can be lent; such as a cooking pot, a bucket or a balance. The Prophet (peace and blessings upon him) said: ***"a lent asset is to be returned, an accorded facility is to be surrendered, a debt is to be repaid and a warrantor is a debtor"***(1).

Ariyyah is recommendable because it is an act of grace and benevolence. It can become a duty when the lender is not in need of the lent property; while lending of the property will lead to salvaging of a needy borrower.

Ariyyah can also be forbidden when it can lead to commitment of a forbidden act, as when a gun is lent to someone who declares his intention to commit murder; or it can be detestable (*makrooh*) if it involves helping someone who intends to perform a detestable act.

Lendable properties include assets that can be benefited from while they remain in existence. Examples of such properties include durable assets like real estates, clothes, jewelries and work tools.

Ariyyah differs from loan in that in case of the former the lender retains the ownership of the borrowed asset which he will get back at the end of the lending period; whereas in case of loan ownership of the asset is transferred to the borrower who has to make repayment by providing a similar asset rather than the same one he borrowed. Therefore one can say that *ariyyah* is lending for the sake of using; while loan is lending for the sake of consuming.

(1) Abu Dawud: *Al-Sunan*, (3/402); Al-Tirmizi: *Al-Sunan*, (4/433); Ahmad: *Al-Musnad*, (5/267).

The majority of Islamic jurists are of the view that in *ariyyah*, the lender can claim back the lent asset at any time he wishes; whether lending is free or subject to task or time restrictions. This is so because *ariyyah* is an act of benevolence and hence should not lead to enforcement of commitment on the donor. This viewpoint is quite similar to what has been indicated by Islamic jurists regarding the right of a loan provider to demand repayment at any time, even if the loan is given for a specific period.

However, in exercising such right, withdrawal of the lent asset should not inflict harm upon the borrower. When, for instance, somebody lends a boatman a wooden board to use it for fixing his damaged boat, he should not claim it back before reaching the shore. Similarly, when someone lends a farmer a piece of land to cultivate, he should not demand it back before harvesting. Nevertheless, the borrower in this case should compensate the lender at the prevailing market rent for the period in question. However, it seems that this can be used as a stratagem for enforcing a lease contract on the borrower by offering *ariyyah* and then demanding it back before expiry of the lending period.

When someone borrows a back-animal he should not use it for a purpose other than what is normally considered as acceptable or lend it to someone else.

When one party says to the other: lend me your back-animal today and I shall lend you mine tomorrow such mutual lending is considered as *ijarah.*

The borrower is supposed to guarantee what he borrows in case of transgression or negligence; as when he retains the borrowed asset after expiry of the lending period or after being demanded by the lender. According to the *Maliki* jurists, guarantee for retaining the borrowed asset after expiry of the lending period or after lender's demand is confined to the case when the asset in question is of the type that can be hidden (non-apparent property); such as clothes and jewelries.

It might be permissible to make *ariyyah* conditional upon provision of guarantee (Guaranteed *Ariyyah*). It is also permissible to stipulate a condition that *ariyyah* does not involve provision of guarantee, because *ariyyah* is an act of kindness, and relief from guarantee is a further act of kindness.

According to some jurists, the lender, being the owner, should bear the cost of sustenance of the subject matter of *ariyyah*; such as the cost of feeding of a back-animal. The proponents of this viewpoint indicate that if sustenance is to be borne by the borrower the deal will become *ijarah*. However, this justification seems to be questionable because sustenance is something different from pay.

Other jurists believe that sustenance should be borne by the borrower, because the lender is a charity doer and it would not be fair to burden him with a further charity without his consent.

Chapter: II

Gift (*Hibah*)

'Hibbah' refers to assignment of ownership against no compensation. It is more recommendable for close relatives, due to its role in strengthening kinship ties. Gift can be an asset or a benefit. What we shall discuss here is the case when gift is an asset, because we have already discussed the case when gift is a benefit (*ariyyah*).

When the donor stipulates a condition that the gift should be against a reward, it means that the deal has started as a donation and ended up into a sale. Nevertheless, gift against reward is still different from ordinary sale in that the former is permissible even if the amount of the reward or the date on which it is to be delivered is unknown.

All what can be sold can also be given as a gift. According to some jurists, gift may include even what cannot be sold such as a straying camel, an extorted property and unripe fruits. This is so because, contrary to the case for compensatory contracts, *jahalah* is forgivable in donation contracts.

A debt can also be given as a gift, whether to the debtor or to a third party.

The process of gift remains incomplete until receipt of the donated asset. However, the *Maliki* jurists hold the view that the deal becomes complete as soon as the gift agreement is concluded.

Withdrawal from gift is permissible, especially in case of gift from parent to child; unless the gift is made against reward. However, withdrawal is considered as a detestable act.

The majority of Islamic jurists indicate that gift (*or atiyah*) from parents to children should, preferably, involve equal amounts to male and female. The *Hanbali* jurists believe that it should be subject to the rules of inheritance. That is to say a male should be given twice the share of a female. Nevertheless, the *Hanbali* jurists permit varying amounts of gift to children if there is a *Shari'ah*-acceptable justification such as illness, indebtedness, poverty or engagement in learning.

Umra and Ruqba

The form of *umra* is that one party says to the other: I put my house or my land at your disposal so that you can reside in it or exploit it as long as you are alive; or as long as I am alive. *Umra* is permissible according to some jurists(1). If the intention behind *umra* is to put the property under the disposal of the beneficiary and his decedents, it is permissible according to all jurists. However, the way *umra* is expressed does not imply this meaning.

Umra is permissible although it involves *jahalah* with regard to how long one is going to stay alive. Permissibility of *umra* even if it involves *jahalah* is due to fact that *umra* is a donation rather than a compensatory contract, and therefore *jahalah* in it can be overlooked. It is a well established fact among eminent *Fiqh* scholars that donation contracts can permissibly involve more *jahalah* compared to compensatory contracts. This is due to the fact that donation contracts do not involve two compensations that have to be exchanged against each other. There is only one amount donated by one party. In the contrary, compensatory deals include two exchanged compensations that need to be identical in the eyes of the two parties of the deal. Hence access to pertinent information in this case is a must.

Ruqba is the case when one party says to the other: I put my house or my land at your disposal as long as you are alive. If you die before me I shall get it back; and if I die before you it becomes yours. *Ruqba is* permissible according to almost all those who permit *umra*(2).

There is, however, another form of *ruqba* in which the *ruqba* provider says to the other party: If you die before me, I shall take your house, and if I die before you, you shall take my house(3). It is said that the Arabic word *ruqba* which carries the meaning of waiting is used to indicate the fact that each of the two parties will be waiting for the death of the other. This latter form of *ruqba* is impermissible because it involves gambling, besides the fact that it contradicts with the rights of the heirs.

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(1) Ibn Qudamah: *Al-mughni*, (6/304 & 307).
(2) Ibid, (6/311).
(3) Ibn Shas: *Iqd Al-Jawahir Al-Thameenah*, (3/60); Ibn Juzai: *Al-Qawaneen Al-Fiqhiyah*, p. 403.

Chapter: III
Will (*Wasiyah*)

'Will' refers to donation of an asset or a benefit that has to be acquired after the death of the donor. It reflects the desire of the donor to cater for some charitable deeds that he could not do during his life. Will is recommendable if it is for the poor or for public utilities such as mosques, schools, hospitals, public libraries and orphanages. A will can become a duty if it relates to repayment of a debt or returning of a borrowed asset or a deposit. It can also become permissible if it is made for a rich person; or forbidden if it involves commitment of blight.

Charity during one's life is much better than after his death. A man once asked the Prophet (peace and blessings upon him) which type of alms is the best? The Prophet (peace and blessings upon him) answered: ***"to give alms while you are healthy and covetous enough to wish richness and fear poverty. You should not wait until your soul reaches the throat (in the throes of death) then you say: this is for so-and-so and that is for so-and-so; (whereas) it is theirs anyway"***[1].

Debt should be repaid out of the inheritance before catering for will. A will that is made for an eligible heir is invalid unless it is cleared by the other heirs, because it affects their rights and may provoke dispute, hatred, jealousy and dissociation among them. Some jurists have gone as far as to contend that a will for an eligible heir is impermissible even if it is approved by the heirs. According to these jurists, when the heirs approve such a will, it becomes a grant that has been initiated at their own side, rather than a will[2].

A murderer should be deprived from getting the will, because murder leads to deprivation from inheritance as well as will. Deprivation of the murderer is done with the aim of imposing a counter punishment on him for using an unlawful means to expedite receipt of the will. As per one of the Islamic legal maxims, when somebody uses such means to expedite realization of something before its lawful time he should be punished by depriving him from getting it.

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(1) Al-Bukhari: *Al-Saheeh*, (4/5); Muslim: *Al-Saheeh*, (7/123).
(2) Ibn Hazm: *Al-muhalla*, (9/318).

A will does not necessitate unity of religion or homeland between the testator and the legatee. It is permissible for a Muslim to make a will to a non-Muslim; or vice versa. A Muslim can also make a will to someone who lives in a non-Muslim land, provided that the principle of reciprocity is observed between the two countries.

A will can also involve an unknown property or things that cannot be delivered, because it is an act of donation and hence *jahalah* is forgivable in it.

According to the *Hanafi* jurists, it is permissible for a testator who has no heir to make a will that absorbs all his wealth. However, the majority of Islamic jurists indicate that a will should not exceed one third of the testator's wealth and the rest of the deceased's wealth should go to *bait al-mal*; because *bait al-mal* is the eligible heir of any heirless deceased.

When the will is made to more than one legatee and the third of the wealth is insufficient to cover all their entitlements, it should be divided among them equally if their entitlements are equal or proportionately if entitlements are of varying amounts.

Bequeathal of Benefits, Agricultural Produce and fixed Salaries

A will can involve residing in a house, or getting a share in the output of a farm or an orchard, or entitlement to a specific salary. Such a will can be either for a specific period, or for the whole lifetime of the beneficiary.

A will that involves a benefit is quite different from a one that involves an asset, because the latter can easily be estimated and paid out of the inheritance. What seems to be more difficult is how to estimate the future flow of benefits for determination of the share of a benefit legatee. Some jurists hold the view that estimation in this case should be based on the underlying assets from which the bequeathed benefit is to be generated; while others argue that estimation should be based on the future flow of the benefits. According to Abu Yusuf, we should retain - out of the third of the inheritance assets – that portion which can generate enough income to pay the legatees salary for the specified period, or for his estimated lifetime (prevailing life expectancy rate). Nowadays, financial mathematics can be used for calculation of the present value of the future benefits or salaries of the legatee.

Obligatory Will

Allah (*subhanahu wa taala*) said: ***"It is prescribed when death approaches any of you, if he leave any goods, that he make a will to parents and next of kin, according to reasonable usage; this is due from the God fearing".*** [*Al-Baqarah*: 180]. The "obligatory will" is a *Fiqhi* expression which has been derived from this holy verse, because in this holy verse Allah (*subhanahu wa taala*) said: ***"it is prescribed"***; an expression which indicates that will in this context is obligatory, and He also said: ***"this is due"*** indicating once again that will in this context is a duty.

Islamic jurists have two different viewpoints with regard to the meaning of this verse:

1. The majority of the Islamic jurists are of the view that the verse is totally abrogated by the verses on inheritance.

2. Some jurists contend that only the part of the verse that relates to inheriting relatives is abrogated, while the verse is still valid for the non-inheriting relatives.

On the basis of this holy verse, and the viewpoint of the Islamic jurists who indicate that the verse is still valid for non-inheriting relatives, some Islamic countries have passed legislations enforcing the validity of will for a grandson whose father dies before the testator or with him (as in the case of group death as a result of drowning, fire or building collapse). In this case the grandson is entitled – within the third of the inheritance - to a will in compensation for the share of the inheritance that his father would have become entitled to, had he not died before or along with the testator. When there is more than one eligible grandson the amount of the will should be divided among them subject to the rules of inheritance. The will to such non-inheriting relatives should be taken out of the inheritance property before its division among the heirs.

The reason behind enactment of such laws, as indicated in most of their accompanying explanatory notes, is the repeatedly raised grievances about the case of grandsons whose parents die before or with their grandparent and, thus, they become entitled to no share of the inheritance if the testators have sons. The grandsons who face such situation might be more in need of the inheritance than anyone else since they have already lost their breadwinners. Therefore, depriving a young orphan from inheritance would mean adding a new misfortune to his old one.

Chapter: IV

Endowment (*Waqf*)

The term *'Waqf'* (or *habs* as prevails in the writings of the *Maliki* jurists and in the maghreb Arab countries) refers to making a property invulnerable to any disposition that leads to transfer of ownership, and donating its benefit.

According to the *Shafiee* jurists, the term *habs* signifies dedication of a property that can be benefited from; while preserving its existence. Preservation of the existence of the underlying asset is a fundamental requirement in lending and leasing of property or donating it as *waqf*.

As regard ownership of the *waqf* property, some jurists indicate that, once donated, *waqf* becomes under the ownership of Allah (subhanahu wa taala), whereas other jurists believe that it becomes under ownership of the beneficiaries. A third group argues that *waqf* remains under the ownership of the donor.

There are two types of *waqf* including: family *waqf* and charitable *waqf*.

Family *waqf* is donated for the benefit of descendants and will finally end into a charitable *waqf* when no one of the descendents is still alive. Such *waqf* is invalid in Syria and Egypt by virtue of laws issued in 1949 and 1952 respectively.

Charitable *waqf* is donated for charitable purposes such as provision of support to the poor and orphans.

There is also public *waqf* which is dedicated to the benefit of the society at large including the rich as well as the poor. Examples of such *waqf* include schools, hospitals, roads, forests and water facilities. Similar to this type of *waqf* are the lands that had been conquered during the time of the rightly guided Caliphate Omar (may Allah be pleased with him). Instead of dividing those lands among the warriors, Caliphate Omar declared them as public *waqf* for Muslims so as to constitute a continuous source of funding for the - then - steadily growing state budget.

In principle, *waqf* is to be eternal; yet some jurists permit interim *waqf* whether for a short or long period. *Waqf* is permissible in real estate as well as moveable properties (durable assets). Some jurists permit also cash *waqf* to be used for lending, *Mudharabah* or funding of trade business. In this case the repaid amounts (in case of lending) or the revenues and returns (in case of *Mudharabah* and trading) ensure perpetuity of the *waqf* entity.

When the *waqf* donor stipulates a certain condition that condition has to be treated at par with *Shari'ah* texts as far as interpretation of the donor's objectives behind *waqf* are concerned. This, however, does not mean that a donor's condition is always enforceable. When such condition runs counter to the rules of *Shari'ah* it should be considered as null and void(1).

Exchange of the *Waqf* asset *(Istibdal)* as a means of maximizing its income

'Istibdal' (or *Munaqalah*) is one of the methods that facilitate sustainability of the *waqf.* Sustainability of the *waqf* property in this case is achieved conceptually rather than physically; since replacement of the *waqf* property with a new one means that the original property itself is no longer existent(2).

There are some Islamic jurists who believe that *istibdal* is absolutely forbidden. They go as far as to contend that a *waqf* property should not be sold even when it becomes ruined. Other jurists permit *istibdal* subject to very tight restrictions. According to this latter group, *istibdal* is impermissible unless the *waqf* asset is completely inoperative; or its income has become extremely insignificant.

Nevertheless, there are still some other jurist, such as Abu Yusuf, Abu Thawre, Ibn Taimiyah and Ibn Qadi Al-jabal, who argue that *waqf* can be exchanged when there is a decline in its income. Ibn Qadi Al-Jabal strongly defends permissibility, or even necessity, of selling the *waqf* and replacing it with a more useful and income-earning one(3).

(1) Ibn Taimiyah: *Al-Fatawa*, (31/47); Ibn Al-Qayem: *Ea'lam Al-muwaqieen* (3/305).
(2) Ibn Qudamah: *Al-mughni*, (6/ 226 & 243).
(3) Ibn Qadhi Al-Jabal, Al-*munaqalah Bilawqaf*, p. 32.

Perhaps the intention of those who strongly oppose *istibdal* is to ensure safeguarding of *waqf* properties against vested interests which could make them vulnerable to cheating and seizure. As for those who defend *istibdal*, they seem to give more consideration to maximization of the income of *awqaf* properties, which cannot always be achieved by simple maintenance and renovation.

Sources of financing maintenance and renovation of *Waqf* properties

1. Funds of the *waqf.*
2. Funds of the beneficiaries.
3. Income of the *waqf.*
4. Income of another *waqf.*
5. State Department in-charge of public utilities.
6. Reserve Funds retained from the *waqf* income.
7. Selling of part of the *waqf* assets.
8. Donations.
9. Borrowing.

Long-term leasing of *Waqf* assets

Islamic jurists are of the view that in principle, ***"waqf assets should not be leased for a long period"***(4). ***"The generally accepted viewpoint is that houses and shops should not be leased for more than a year, and agricultural lands should not be leased for more than three years"***(5); especially under instability of economic conditions (inflation and recession). The aim behind such restriction is to mitigate the *Gharar* (or risk) stemming from long-term leasing under unstable economic conditions, which may cause serious harm to one of the contract parties. According to this viewpoint, it would be difficult to accept the assertion that the general rule for specification of the lease period is the expected lifetime of the asset.

Even when the amount of rent to be paid is more than the prevailing market rate for similar property, Islamic jurist do not consider that as a good incentive for permitting long-term leasing of *awqaf* assets(6).

Islamic jurists have indicated the shortcomings of long-term leasing which include the following:

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(4) Ibn Abideen: *Al-Hashiyah*, (4/408).
(5) Ahmad Ibrahim: *Al-muaamalat*, p. 344.
(6) Ibn Hajar Al-makki: *Al-Fatawa*, (3/337-348).

1. Risk of seizure of the *waqf*, which is more harmful to it than becoming ruined, because ***"a long period of leasing could lead to annulment of the waqf. When people, for a long time, see the tenant disposes of the waqf property like an owner, they may think that he is really the owner"***[7]; or he himself may claim that he is the owner[8]. Also when a leasing period is so long ***"all the witnesses and those who know that the property is a waqf may die, and hence the waqf becomes the property of the one who holds it"***[9].

In this regard also, Islamic jurists forbid leasing of the *waqf* property to a tenant who is feared to lay a hand on it[10].

2. The rent earned by the *waqf* may become insignificant through time.

3. The difficulty involved in estimating the future market rent for a long period,[11] besides the fact that the rent of similar properties may witness sharp increases in certain years[12], and hence the *waqf* property will be losing.

Notwithstanding all these shortcomings, necessity may call for offering the *waqf* property for tong-term leasing so as to provide sufficient funds for its maintenance and renovation, especially: ***"when the waqf has no accumulated income to be used for its renovation, and there is no one who can lend it the required amount except against such long period of leasing. In the absence of such need, it does not make sense to seek long-term leasing against prepaid rent (…..). When such need arises, long-term tenants should not always be accused of having a hidden desire to seize the waqf properties. When something is clearly useful at present, it would not be reasonable to rejected it for the mere fear that it may turn to be harmful in the future"***[13], ***"ascertained interests can never be forgone on the basis of presumed blights"***[14].

(7) Ibn Abideen: *Al-Hashiyah*, (4/400).
(8) Ibid, (4/405).
(9) Al-Wanshareesi: *Al-mi'eyar Al-mu'arrab*, (7/106); Al-Hattab: *mawahib Al-Jaleel*, (6/47); Al-Dusuqi: *Al-Hashiyah*, (4/96).
(10) Ibn Abideen: *Al-Hashiyah*, (3/541).
(11) Ibn Hajar Al-makki (Fatawa): *Al-It'haf Bibayan Ijarat Al-Awqaf*, (3/338).
(12) Al-Wansharisi: *Al-mi'eyar Al-mu'arrab*, (7/106); Ibn Al-Qayem: *Ea'lam Al-muaqi'een*, (3/304).
(13) Ibn Hajar Al-makki: *Al-Fatawa*, (3/339).
(14) Ibid.

Some Economic Objections against *Waqf*

1. "*Waqf* hinders disposition of the property and encourages withholding it away from circulation and this has undesirable effects from the economic point of view including aggravation of recessionary tendencies. Circulation maximizes the benefits of assets and facilitates their use in a proper manner, whereas withholding assets from circulation is economically harmful in modern societies".

No doubt, circulation can lead to maximization of time and place benefits through storing of goods for time of need, or transferring them from one place to another. Circulation is supposed to maximize personal benefits of the two parties of each transaction, and hence ends up into maximization of the benefits of the whole society.

Nevertheless, *waqf* is not simply a means through which assets are withheld from circulation. The adverse effects which may result from withholding the asset are matched with a set of benefits that should also be taken into consideration if an acceptable judgment is to be reached. However, it seems that the temporal *waqf* form which has been permitted by some jurists is more suitable for falsification of this argument than *waqf* in its eternal perspective. Of course, maximization of the *waqf* benefits through *istibdal* would also minify the significance of this argument.

2. *Waqf* eliminates (private) ownership with all its social and economic merits (……). It does not constitute a suitable form for good management of wealth, because *waqf* supervisors do not have the personal drive that makes them keen enough to maintain *waqf* properties in a good condition. For this very reason, the *waqf* system has often resulted into damage of *awqaf* properties.

It is true that private ownership is associated with more managerial efficiency compared to government, communal and *waqf* forms of ownership. Nonetheless, this fact may not suffice to induce any economic system to do away with all types of non-private forms of ownerships. This is simply because each of the different types of ownership in an economic system has a function that cannot be discharged of by the other.

moreover, even in private ownership the prevailing notion in our present times is separation between ownership and management, on the ground that an appointed manager can be more efficient than the owner. Therefore, what really matters is ensuring good selection, accountability and control of the manager rather than assigning management to the owner.

moreover, we have already indicated that Islamic jurists have three viewpoints with regard to ownership of the *waqf*, including: ownership of the *waqf* by Allah (subhanahu wa taala), ownership of the asset by the beneficiaries, and ownership of the asset by the donor. If we take the third viewpoint into consideration *waqf* is still under private ownership.

3. *Waqf* has adverse effects on the side of the beneficiaries, because it induces them to refrain from productive work and become lazy; and again this does not conform to the interest of the society".

This argument seems to challenge all types of charity, rather than ongoing charity (*waqf*) alone. However, in this regard, The Prophet (peace and blessings upon him) said: ***"Sadaqah (alms) is impermissible for a rich, or a fit and powerful person"***(15).

However, the arguments raised against *waqf* as an institution are not at all new, and so are the responses to them. Abu Yusuf used to say: ***"Analogously, donation of lands as waqf seems to be unacceptable because it entails keeping such lands away from (private)* ownership*. However, Shari'ah has annulled private ownership of mosques, for instance, to facilitate an act of pious that renders benefits to us in the form of divine reward. This also holds true for withheld waqf lands which are similar to mosques in facilitating divine reward"***(16).

The Economic and Developmental Role of Waqf

Waqf is one of the projects that have a charitable as well as a commercial dimension. It is a project managed by a supervisor (*nazir*) who oversees its affairs, preserve its assets through renovation and maintenance, utilizes its capacities and spends its income on the specified outlets.

(15) Abu Dawud: *Al-Sunan*, (2/159); Al-Tirmizi: *Al-Sunan*, (3/33); Al-Nasaee: *Al-Sunan*, (5/99); Ibn Majah: *Al-Sunan*, (1/589); Ahmad: *Al-Musnad*, (2/164).

(16) Ibn Al-Hasan Al-Shaibani: *Sharh Al-Siyar Al-Kabeer*, (5/2104).

In spite of the fact that a charitable *waqf* is devoted to serve causes of charity, yet disposition of its affairs and investment of its assets must be pursued on economic basis. Hence, *waqf* has commercial activities relating to management and investment of its assets; besides charitable activities relating to distribution of its income. A project of this type must have proper bookkeeping and accounting systems, and remain subject to modern techniques of financial control and monitoring.

If the *waqf* is devoted to roads, bridges, archways, irrigation devices, shops or hotels, it contributes to development of economic infrastructures, promotion of trade activities, facilitation of manpower mobility, and enhancement of the capacity and performance of the transport sector.

If the *waqf* is devoted to hospitals, health care facilities, production of vaccines and medicines, and provision of clean drinking water, it contributes to promotion of health, which constitutes a fundamental prerequisite for enhancement of labor productivity and optimization of resource use. Spending on health services in our present times is considered as an indispensable aspect of investment in human capital.

If the *waqf* is devoted to mosques, academic institutions, scientific research, vocational training, libraries and publications, it means that it is targeting educational, training and knowledge dissemination objectives, and can thus contribute to investment in people. In this case the *waqf* should offer due attention to both religious and non-religious education so as to improve the general state of the society and enhance its competitiveness and ability to achieve power and advancement. The *waqf* administration should also strive for the best results in designing of curricula, selection of teaching staff and specification of reference materials. The whole process should be carried out in such a way that ensure close linkage between educational programs and facts of reality, and guarantee an efficient system with regard to quality, relevance, depth, precision and promptitude of deliverables.

Devoting *waqf* to health, education, defense and infrastructure projects would certainly relief the state budget from part of its burden of public spending. As we have indicated earlier in this respect, Omar Ibn Al-Khattab (may Allah be pleased with him) refused to consider the

lands that had been conquered during his time as war booties which can be divided among warriors. Instead, he declared those lands as *waqf* for all Muslims; and said defending his position: ***"if I distribute the lands in Iraq (…..), and Al-Sham (…..), what will be left for defending our borders and sustaining the poor children and widows in this country and in Iraq and Al-Sham?"***(17) He then added*: **"do you see these vast borders? They need men to defend them; and do you see these big territories like Al-Sham, Al-Jazeerah, Al-Kufah, Al-Basrah and Egypt? They need to be filled with troops that require generous spending. From where can all this be catered for, if I distribute the lands? "***(18)**.**

Thus, we can see that Omar Ibn Al-Khattab (may Allah be pleased with him) used public *waqf* to increase public revenues and ensure enough resources for funding public utilities. Such policy may gain special importance in our present era when the role of the state and its intervention in economic activity is desired to be kept to the minimum.

If the *waqf* is devoted to food, medication, clothing, shelter, drinking water, drainage, health care and education, it will contribute to catering for the basic needs of the poor and releasing them from the grasp of poverty, ignorance and illness; the triangle of suffering which continued to constitute an intolerable burden for poor societies.

However, similar to the case with regard to *Zakah*, rich people and those who are fit to earn their living through work are not among the target groups of charitable *waqf*. Charitable *waqf* is a *sadaqah* and ***"Sadaqah (alms) is impermissible for a rich, or a fit and powerful person"***.

Nonetheless, unless it is well managed, *waqf* could lead to unemployment, laziness and loitering; and thus has negative impact on national income and growth. In that case *waqf* could become one of the factors that drag the economy towards weak performance and backwardness, and weaken the competitive position of the country and its people.

Waqf is supposed to alleviate rather than aggravate the problem of unemployment. It is supposed to provide jobs for supervisors, administrative staff, revenue collection and disbursement officers, accountants and financial control officers.

(17) Abu Yusuf: *Al-Kharaj*, p. 25.
(18) Ibid.

Even if *waqf* has a useful role to play in the society, excessive expansion in the *waqf* sector is not recommendable. Beyond a certain limit *waqf* could lead to freezing of wealth and financial assets and limitation of commercial activity.

As we have already seen, Abu Yusuf indicates that: ***"Analogously, donation of lands as waqf seems to be unacceptable because it entails keeping such lands away from (private)* ownership"**[19]. Al-Iz Ibn Abd Al-Salam also indicates that most of the alms of the *Sahabah* (companions of the Prophet – Peace and blessings upon him) and their successors in the early Islamic era were immediate, ***"and their waqf alms were limited compared to their immediate donations. Had they done the contrary, most of the properties would have been withheld within the confines of waqf and people would have been unable to make use of them. Indeed, when everybody diverts his properties to waqf, nothing will be left for circulation"***[20]. That is to say all private wealth will become under communal ownership. Therefore, the individual as well as the society should seek the optimum level of *waqf* donation; especially that moderation in all dispositions of a Muslim is recommendable.

Finally, the waqf administration must be very cautious about the effects of inflation which leads to deterioration of the purchasing power of the currency. *Waqf* becomes vulnerable to the adverse impacts of inflation in the following cases:

1. When the assets of the *waqf* are in the form of cash, instead of fixed assets.
2. If the *waqf* is leased for a medium or long period for a rent that does not change with the change in the rate of inflation.
3. If, in the case of *istibdal*, the real estate property of the *waqf* is sold and the sale income is kept for a long time before purchasing a new property.

Therefore, concerned parties should exert every effort to achieve efficiency in management and investment of *awqaf* properties, so as to ensure their economic efficiency.

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(19) Ibn Al-Hasan Al-Shaibani: *Sharh Al-Siyar Al-Kabeer*, (5/2104).
(20) Ibn Abd Al-Salam: *Al-Qawa'id Al-Kubra*, (2/139).

Chapter: V

Deposit (*Wadi'ah*)

Deposit refers to property that its owner (the depositor) gives it to someone (the deposit keeper) so as to keep it (safekeeping delegation).

As indicated in the holy *Qur'an* a deposit is a trust *(amanah)* Allah (*subhanahu wa taala*) said: ***"God doth command you to render back your trusts to those to whom they are due"***. [*Al-Nisa'*: 58]. He also said: ***"And if one of you deposits a thing on trust with another, let the trustee discharge his trust"***. [*Al-Baqarah*: 283]. The Prophet (peace and blessings upon him) said: ***"render the trust to the one who entrusts you"***[(1)].

The deposit keeper has to keep the deposit as it is normally kept. Deposit keeping is a pious act which entitles the deposit keeper to reward from Allah (*subhanahu wa taala*). The deposit keeper, as a trustee, does not guarantee the deposit except in case of transgression or negligence; as when he uses the deposit. When a deposit keeper uses an amount of money he is entrusted with keeping it, that amount becomes a loan under his guarantee. In this sense, bank deposits are loans because the bank is permitted to use them as per rules and customs. In a bank, deposits are mixed with each other and with the bank's own funds.

Islamic jurists have three viewpoints regarding the case when a deposit keeper uses it for trading purposes. Some jurists believe that he is entitled to the profit; since as soon as he uses the deposit, it becomes under his guarantee. Other jurists indicate that the profit should be spent on charitable purposes. A third group is of the view that the profit should go to the depositor[(2)].

It is impermissible for the deposit keeper to demand remuneration for keeping the deposit unless it is so big that a special space has to be arranged for keeping it. When the deposit requires a special lock or any other safekeeping arrangements, the cost should be borne by the depositor.

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(1) Abu Dawud: *Al-Sunan*, (3/393); Al-Tirmizi: *Al-Sunan*, (3/555); Al-Hakim: *Al-Mustadrak*, (2/46).

(2) Ibn Rushd: *Bidayat Al-mujtahid*, (2/234); Ibn Juzai: *Qwaneen Al-Ahkam*, p. 406.

Chapter VI

Find (*Luqtah*)

The Arabic verb *laqata* indicates the act of picking something up from the ground. In *Fiqh* terminology, *luqtah* means lost property. Islamic jurists have different viewpoints concerning the *Shari'ah* position with regard to *luqtah*, including the following:

- It should be taken if otherwise it will go to waste.
- It is recommendable to take it if one is sure that he will not commit dishonesty by adding it to his properties.
- It is impermissible to take it if one feels that he may commit dishonesty.
- It is recommendable to leave it so as not to make oneself exposed to commitment of dishonesty.

When someone picks up a find with the aim of keeping it, he is considered as a trustee, and therefore he is not supposed to guarantee it except against transgression or negligence. However, when someone picks up the find with the intention of acquiring it he becomes a guarantor.

Declaration of the find is recommendable so that the person who picks it up would not think of possessing it.

Regardless of its value, a find should be declared for a whole year[(1)]. However, some jurists indicate that declaration for a whole year is required only for finds of big value. According to these jurists, declaration can be for less than a year (for days) in case of finds of small value (less than 10 *Dirhams*).

Declaration of the find has to be made in markets, festivals, gatherings and caravans; twice a day at the beginning of the year, once a week in the middle of the year and monthly at the end of the year.

(1) Al-Bukhari: *Al-Saheeh*, (3/162); Muslim: *Al-Saheeh*, (12/20).

If the matter of the find is put up to the competent authority, because the cost required for keeping it will absorb all its value, the competent authority may sell the find and order its value to be kept.

When someone picks up a find with the aim of keeping it, the cost of declaration is to be borne by the owner of the find or *bait al-mal*; while if it is proved that the person has picked up the find with the intention of acquiring it, he should be forced to bear the cost of its declaration.

In case of finds that require costs of sustenance (such as livestock), the person who picks up the find is considered as a donor if he catered for such costs without obtaining permission from the competent authority.

The person who picks up the find may declare it personally or through an agent. Also the owner of the find can announce a *jυ'l* (an emolument) for a specific person or for whoever manages to find the lost property.

When someone does not like to bother himself with the inconvenience of declaring the find he can take it to the competent authority or to the trust box.

Declaration should not involve all the particulars of the property so as to leave no room for a false owner to claim it before its real owner.

The owner of the find is not supposed to pay *Zakah* on it until he gets it back. Also the person who picks up the find is not supposed to pay *Zakah* on it during the period of declaration. However, the find's picker has to pay *Zakah* on it when it becomes part of his properties; and so is the case for a person who picks up the find with the aim of acquiring it.

Chapter: VII

Vow (*Nazr*)

Vow is a donation which a person declares that he is bound to provide. Vow in general is permissible and has to be fulfilled if it pertains to submissiveness.

Allah (*subhanahu wa taala*) said: ***"perform their vows"*** [*Al-Hajj*: 29]. He also said: ***"They perform their vows"*** [*Al-Insan*: 7]. In another holy *surah*, Allah (*subhanahu wa taala*) also said: ***"Among them are men who made a covenant with God, that if He bestowed on them of His bounty, they would give (largely) in charity, and be truly amongst those who are righteous. But when He did bestow of His bounty, they became covetous, and turned back (from their covenant), averse (from its fulfillment). So He hath put as a consequence hypocrisy into their hearts, (to last) till the Day whereon they shall meet Him, because they broke their covenant with God, and because they lied (again and again)"*** [*Al-Tawbah*: 75 – 77].

The Prophet (peace and blessings upon him) said; ***"whoever makes a vow to be obedient to Allah let him be so, and whoever makes a vow to disobey Him let him not do that"***[1].

Islamic jurists are in disagreement as to whether a vow is recommendable or detestable.

Those who consider it as recommendable have given much attention to the pious acts which a vow maker performs in the process of his supplication; such as prayer, fasting, giving alms and performing hajj.

Other jurists who hold the view that making vow is detestable are more concerned about the fact that the vow maker could encounter difficulties in fulfilling his vow, especially if he makes vows repeatedly. moreover, a vow maker seems to be following a compensatory rather than a mere pious approach in his endeavor to attract benefit or avert harm.

On forbiddance of vow, it has been reported that the prophet (peace and blessings upon him) said: ***"A vow does not expedite or delay anything, yet it is a way of squeezing alms form a miser"***[2].

(1) Al-Bukhari: *Al-Saheeh*, (8/177).
(2) Al-Bukhari: *Al-Saheeh*, (8/176); Muslim: *Al-Sheeh*, (11/97).

Jurists are in disagreement around this Prophetic guidance. Some of them believe that, apparently, it indicates impermissibility, whereas others argue that it indicates detestation.

However, had vow been recommendable, the Prophet (peace and blessings upon him) would have done it.

Regarding the case when someone declares all his properties as vow, jurists have several viewpoints including the following:

1. The vow is not binding and the vow maker does not have to make atonement for it.

2. The vow is not binding and the vow maker has to make the atonement prescribed for breach of oath, because a vow carries the meaning of an oath.

3. He may donate a third of his property in fulfillment of the vow. This viewpoint is based on the *hadith* which states that the Prophet (peace and blessings upon him) said: ***"a third is sufficient"***[3].

4. He must donate all his property in fulfillment of the vow.

5. It is sufficient for him to donate the equivalent of *Zakah* amount (2,5%) out of his total wealth.

6. He should donate the equivalent of the *Zakah* amount out of his *Zakah*-liable wealth.

When someone makes a vow to offer alms and dies before fulfilling it, some jurists believe that his heirs should pay the alms out of the inheritance, whether the vow maker has stated this in his will or not; while other jurists believe that the heirs have to pay the alms only if it is declared in the will.

(3) Ahmad: *Al-Musnad*, 93/453).

Chapter: VIII

Atonements (*Kaffarat*)

To atone for a sin means to strive for covering or erasing that sin through an act of piety. Atonement indicates the donation or act of worship made for this purpose such as offering of alms (food or clothes), and fasting. Atonement is permitted for the sake of facilitating a means of reparation of *Shari'ah*-related offences and infringements like oath breaking, unintentional murder, fast breaking at daytime in *Ramadan*, commitment of a proscribed act during hajj and *zihar* (a pre-Islamic Arabia's form of uttering divorce).

Regarding atonement for oath breaking Allah (*subhanahu wa taala*) said: ***"God will not call you to account for what is futile in your oath, but He will call you to account for your deliberate oaths: for atonement, feed ten indigent persons on the scale of the average for the food of your families; or clothe them"*** [*Al-ma'idah*: 89].

Regarding atonement for accidental homicide He said: ***"if one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely"*** [*Al-Nisa'*: 92].

Regarding atonement incumbent upon those who are physically unfit for fasting during *Ramadan*, He said: ***"for those who can do it (with hardship), is a ransom the feeding of one that is indigent"*** [*Al-Baqarah*: 184].

Regarding atonement for shaving the head during hajj (*fidyah*) He said:"***and do not shave your heads until the offering reaches the place of sacrifice. And if any of you is ill or has an ailment in his scalp (necessitating shaving) (he should) in compensation either fast, or feed the poor or offer sacrifice"*** [*Al-Baqarah*: 196].

Regarding atonement for *zihar* he said***:"But those who divorce their wives by zihar, then wish to go back on the words they uttered – (it is ordained that such a one) should free a slave before they touch each other: this are ye admonished to perform: and God is well acquainted with (all) that ye do. And if any has not (the wherewithal) he should fast for two months consecutively before they touch each other, but if any is unable to do so he should feed sixty indigent ones"*** [*Al-mujadilah*: 3-4].

Kafarah, therefore, includes, among other types, financial atonements such as: alms, feeding or clothing of indigent, and freeing of slaves.

Chapter: IX

Blood money (*Diyah*)

Blood money refers to the financial indemnity paid to the heirs of a slain in case of murder, or to the victim or to his caretaker in case of bodily injury.

In Arabic language the word *aql* (shackling) is also used to denote blood money. Describing the process as shackling might have been due to the fact that blood money prevents further blood shedding; or because when blood money is to be paid in terms of camels, the camels are shackled for being driven together to the caretaker of the deceased. In Arabic language blood money, whether for a slain or bodily injury, is also called *arsh*.

Blood money is due for accidental, semi-intentional and premeditated homicide. In addition to these cases of complete self damage, blood money is also due for damaging of any member of the body.

Usually, blood money is lightened for accidental homicide; toughened for premeditated murder; and kept at a moderate level for semi-intentional homicide.

For accidental homicide both blood money and atonement are due. Allah (*subhanahu wa taala*) said: ***"if one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely"*** [*Al-Nisa'*: 92].

Blood money for accidental homicide is to be paid by the kinfolk of the offender. The term "kinfolk" in this context refers to the relatives of the offender from the father's side (*asabat*). When there is no kinfolk of the offender or when kinfolk are unable to pay the blood money, recourse has to be made first to the occupation colleagues of the offender; then to *bait al-mal* which assumes the role of the heir for those who have no heir and the kinfolk for those who have no kinfolk.

Blood money for accidental homicide is not made a duty of the offender because accidental offenses can be committed repeatedly; while the amount payable as blood money is usually big. Blood money for

accidental homicide is, therefore, made a duty of the kinfolk so that they may console the offender and contribute to alleviation of his misfortune.

According to the *Hanafi* School, the amount of blood money is100 camels, 1000 *dinars* or 10000 *Dirhams*; whereas the majority of Islamic jurists are of the view that it is 12000 *Dirhams*.

In case of semi-intentional homicide - which refers to homicide caused by a means that is not usually lethal - blood money is the duty of the kinfolk as per the viewpoint of the majority of Islamic jurists.

In case of deliberate homicide, *qisas* (similar punishment) is due in principle. Allah (*subhanahu wa taala*) said: ***"O ye who believe! The law of equality is prescribed to you in cases of murder"***. However, blood money can become due instead of *qisas* in case of reconciliation. In that case, blood money – which is the duty of the offender - has to be paid immediately.

According to some jurists blood money ceases to be valid when all the family members of a slain agree to remission, because blood money is a right of human beings. Nevertheless, when only some members of the deceased's family accept to relief the offender from payment of blood money, the rights of the other members still remain valid.

Payment of blood money through kinfolk's subscriptions signifies a vital form of social solidarity through mutual donation and support, especially in cases of accidental homicide.

Chapter: X
Sacrifices (*Zaba'ih*)

Ud'hiyah

Literally, *ud'hiyah* is the sheep slaughtered at the forenoon time (after sunrise) on the *ad'ha* feast day (*eid al-ad'ha*). In the *Shari'ah* sense *ud'hiyah* is the sacrifice offered by way of rapprochement to Allah (*subhanahu wa taala*) during the days prescribed for offering it.

Allah (*subhanahu wa taala*) said: ***"therefore to thy Lord turn in prayer and sacrifice"*** [*Al-Kawthar*: 2)]. The holy verse thus ordains a Muslim to perform the prayer of the *ad'ha* feast day and sacrifice the *budn* (plural of *badanah*). In Arabic language, the word *badanah* (bulky-bodied) refers to the she-camel because of its fat body.

It has been reported that the Prophet (peace and blessings upon him) once sacrificed two white and horny rams"[(1)].

Among the wisdoms behind sacrifice is that it constitutes an act of revealing thankfulness to Allah (*subhanahu wa taala*) for the bounty of life, and reviving the *Sunnah* (tradition) of our master Ibrahim Al-Khaleel. Sacrifice also reminds the believer of the fact that Ibrahim and Ismail (may Allah be pleased with them) gave much more preference to submissiveness to Allah (*subhanahu wa taala*) than to self-love or love for son; and that their submissiveness had been the direct cause of granting them the ransom and relieving them from the affliction.

A further wisdom behind sacrifice is that it is a means of generating comfort and happiness to self, family, neighbors and guests; as well as the poor who will in such day share with the rich the pleasure of enjoying the feast. This is certainly a way for rehearsing the bounties which Allah (*subhanahu wa taala*) renders to us. Allah (*subhanahu wa taala*) said: ***"But the bounty of thy Lord rehearse and proclaim"***. [*Al-Duha*: 11].

Sacrifice is a confirmed *Sunnah* according to the majority of Islamic jurists. Abu Hanifah indicates that it is a duty because the word ***"and***

(1) Al-Bukhari: *Al-Saheeh*, (7/130); Muslim: *Al-Sheeh*, (13/120).

sacrifice" in the holy verse indicates that it is an order which apparently implies obligation.

Sacrifice is a duty for any Muslim who has 200 *Dirhams* or 20 *dinars* over and above his outlay on basic needs. One sheep is sufficient as sacrifice offered by one person; whereas a camel or a cow is sufficient as an offering of seven people.

The time of sacrificing starts at sunrise in the first day of *eid* (feast day) and ends at the end of the two following days (*tashreeq* days). Hence, the time available for sacrificing is three days; including the first day of *eid* and two days after.

Regarding distribution of the sacrifice meat, the person who offers the sacrifice may keep one third of the meat for his family; give one thirds as gift (to his relatives, friends and neighbors); and offer one third in charity. Allah (*subhanahu wa taala*) said: ***"then eat ye thereof and feed the distressed ones in want".*** [*Al-Hajj*: 28]; and see also: [*Al-Hajj*: 28].

Some jurists indicate that the person who offers the sacrifice can give priority to his own need, especially if he has so many children and he is not well-off; because the Prophet (peace and blessings upon him) said: ***"in giving charity, take out of it what you need first".***

Hadi' (Offering):

Hadi' refers to the sheep, cow or camel slaughtered at the *Haram* during the days of sacrifice. Hadi' is offered in case of *tamatu* (performing *umrah* during the *hajj* months), *qiran* (performing *umra* and hajj jointly), failure to do one of the *hajj* duties, or commitment of an act that is banned during *hajj* or *umrah*. *Hadi'* can also be offered for the mere sake of rapprochement to Allah (*subhanahu wa taala*). Contrary to *hadi'*, *ud'hiyah* has nothing to do with *tamatu*, *qiran*, breach of *hajj* duties or commitment of an act that is banned during *hajj* or *umrah*.

Hadi' is subject to the same rulings on *ud'hiyah*, with regard to what is sufficient as a sacrifice by an individual and by a group and how the meat is to be divided among deservers (family, relatives/neighbors, and the poor).

Walimah (Banquet)

Wedding banquet is a confirmed *Sunnah* as per the majority of Islamic jurists, who define it as food served during a joyful occasion. Some jurists indicate that a wedding banquet is a duty, because the Prophet (peace and blessings upon him) said: ***"Give a banquet even if a single sheep"***. This *hadith* apparently indicates that a banquet is a duty. The Prophet (peace and blessings upon him) also said: ***"if any of you is invited to a banquet let him join it"***. In another *hadith* he said: ***"The worst food is that of a banquet to which rich people are invited and poor people are not"***.

Aqiqah (Birth Offering)

In Arabic language the word *aqiqah* has several meanings including: a piece of carnelian, the hair of a newly born child, and the offering slaughtered on the occasion of having a newborn baby.

A birth celebration *aqiqah* is usually slaughtered on the seventh day after the child's birth; which is also the day when the head of the child is shaved.

In *Fiqh* terminology, *aqiqah* refers to the sheep slaughtered as a gesture of thankfulness of the parents to Allah (*subhanahu wa taala*) for granting them the baby and bestowing the bounty of life upon him.

Aqiqah is a confirmed *Sunnah* according to the *Shafiee* and the *Hanbali* Schools, and a duty according to the *Maliki* School. Among the wisdoms behind *aqiqah* is showing happiness, rehearsing the bounty of Allah (*subhanahu wa taala*) and celebrating the admittance of the new family member.

Aqiqah is a duty of the baby's sustainer if he affords it after meeting his personal and family needs.

According to some jurists, the time for slaughtering the *aqiqah* starts from the moment the baby is born; while others believe that it should be on the seventh day after the baby's birth.

Aqiqah is subject to the same rulings on *ud'hiyah*, with regard to the suitable animal to be offered in sacrifice; and how the meat is to be divided among family consumption, gifts and charitable donation.

Part: X
Modern Transactions

Chapter: 1

Joint Stock Companies

A joint stock company is one form of capital association companies in the modern legal sense. Contrary to personal association companies, joint stock companies are formed on financial rather than personal basis. That is to say the relationship is based on the share of each partner in the capital as distinct from his personal entity. Partners should not necessarily know each other and the company is not exposed to annulment as a result of exit, entry, death or limitation of legal competence of any of the partners.

In a joint stock company capital is divided into a number of portions of equal value, each of which is called a share. A partner can own one or more of these shares which are also tradable. The liability of the partner with regard to the company's debts and losses is commensurate with his share subscription.

This form of company is suitable for big projects where the number of shareholder is so big and the capital of the company does not change as a result of the entry or exit of an individual shareholder. If "public corporation" is the distinct legal form of commercial enterprises under the socialist system, Joint Stock Company is the distinct legal form of commercial enterprises in the liberal system.

Islamic jurists have two viewpoints regarding Joint Stock Company:

1. Some Islamic jurists contend that this type of company is impermissible because consideration is given to capital only. In order for anyone to become a partner he has just to purchase a share regardless of the consent of the other partners. moreover, voting in the general assembly of the company depends solely on the number of shares.

2. Other jurists argue that Joint Stock Company is permissible unless it is basically engaged in a *Shari'ah*-forbidden activity such as dealing in alcoholic beverages, pork, *riba*, or gambling; because ***"the norm in transactions is permissibility"***; and ***"Muslims stick to honor their conditions"***.

Shares

A share is the unit of subscription in the capital of a company. A share can be named, in the sense that it carries the name of a specific owner; or marked to bearer without carrying any specific name; or issued to order and, hence, is endorsable. A share can also be of the ordinary type which entitles all shareholders to equal rights; or a preference share which entitles its holder to an additional (lump sum or percentage) amount of profit or gives him the right of full redemption of the share value on liquidation. Again a share can be an equity share and hence irredeemable before liquidation; or an enjoyment share that can be redeemed before liquidation.

A share has several values including: a face value represented by the value written on its face; a real value which is higher or lower than the face value subject to the profits and losses of the company; a market value determined by supply and demand; and an issuing value which can be equal to face value or more than it (subject to the amount of the issue premium), or less than it (subject to the amount of the issue discount).

Islamic jurists permit preference shares that give initial (founding) shareholders the priority of subscription to new share issuances. As regards preference shares, which give annual fixed interest or the right of full redemption of the share (guarantee of capital), Islamic jurists hold the view that such preference shares are forbidden, because in this case the share is just like a loan or an interest bearing bond.

Islamic jurists also forbid enjoyment shares of which the company redeems some at face value through casting of lots. In such arrangement, the shareholder is given a share that entitles him to less than the profit allocated per share, besides giving him the right of voting in the general assembly.

Share Negotiation (Trading)

Some Islamic jurists are of the view that share negotiation should be subject to the following controls:

1. If the subscribed funds of the company are still in the form of money, negotiation should be subject to *Shari'ah* controls on exchange, which in this case entails permissibility of *fadl* (inequality between the

two exchanged amounts) and prohibition of *nasa'* (deferment of one of the two exchanged amounts).

2. If the subscribed funds of the company are in the form of debts, negotiation should be subject to *Shari'ah* controls on debt. That is to say the share should not be purchased on credit so that the deal would not involve sale of a debt for another debt, which is strictly forbidden.

3. If the subscribed funds of the company are in the form of assets and benefits, there should be no restriction on share negotiation, with regard to *fadl* as well as *nasa'*.

4. If the subscribed funds of the company are in the form of assets, benefits, money and debts; whereas the assets and benefits constitute the major part of the capital, the ruling in item (3) above becomes applicable.

Case (4) above is the most predominant situation under normal circumstances of companies, especially during the period that starts from incorporation of the company and ends before its liquidation. The other three cases would, most probably, hold true at the early stages of instituting the company (pre-operating period) or at the late stages of its lifetime (liquidation period).

moral Personality and Limited Liability

In the context of institutions, companies and societies, modern laws make clear distinction between a natural and a moral (or legal) person. The manager of an institution, a society or a company is a natural person, and so is a shareholder in the company. From a legal point of view, the institution, the company or the society itself, is an independent person who has an independent name, home country, nationality and capacity to assume and assign financial commitment. Consequently, the debts owed to or by the company are quite different from the debts owed to or by the shareholder. If the shareholder dies or becomes bankrupt, this may not necessarily lead to liquidation of the company. Also the financial liability of the shareholder in the company is limited to his share in the capital. It does not involve his other properties. That is to say the shareholder is not to be held accountable for the debts of the company beyond the limit of his subscription to the capital of that company.

Some contemporary Muslim scholars have reached the conclusion that Islamic jurisprudence has defined the concept of moral personality in the context of *waqf*, mosque and *bait al-mal*. It seems that this concept has been present in Islamic jurisprudence name-wise as well as meaning-wise. *Waqf*, for instance, has an independent financial liability. When a *waqf* supervisor borrows for the *waqf*, the debt commitment is assigned to the *waqf* rather than to the supervisor; or you may say the *waqf* supervisor is indebted in his official rather than personal capacity. The *waqf* supervisor may die or lose his job, yet the debt commitment still remains valid(1).

Islamic jurists also indicate that a *waqf* can own(2) and borrow(3).

Similarly, it is permissible for a ruler to borrow for *bait al-mal* and leave the debt commitment to be honored by his successors(4).

Islamic jurists define *Zimmah* as ***"a legal capacity which Shari'ah presumes that an adult person can assume and assign"***(5) or ***"an unrealized presumption of the ability of a person to assign and assume commitment"***(6). Presumption in this connection is defined as ***"the act of assigning the status of existence to the nonexistent"***(7).

Islamic jurists also indicate that liability remains presumably valid after the death of the natural person and until settlement of the claims on the inheritance, because the Prophet (peace and blessings upon him) said: ***"A believer's self remains affixed to his debt until repayment"***(8).

(1) *Hashiyat Al-Dusuqi Ala Khaleel* (7/80); *Al-Zarqani Ala Khaleel* (7/76); *Hashiyat Al-Dusuqi* (4/426); *Nihayat Al-muhtaj* (3/16 & 6/46).
(2) Al-Khassaf: *Ahkam Al-Waqf*, pp. 122, 234, 301, 308 & 316.
(3) Ibid, p. 268.
(4) Al-mawardi: *Al-Ahkam Al-Sultaniyah*, p. 31; *Al-Fatawa Al-Hindiyah* (1/191).
(5) Al-Qarrafi: *Al-Furooq*, (3/231 & 226 – 237); *Al-Zarqani Ala Khaleel* 95/216); Al-Kharshi (5/217); Al-Hattab: *mawahib Al-Jaleel*, (4/534).
(6) Ibn Abd Al-Salam: *Al-Qawa'id Al-Kubra*, (2/207).
(7) Ibid, (2/205).
(8) Al-Tirmizi: *Al-Sunan*, (3/381).

Chapter: II
Moral Rights

Copyright

Copyright is composed of two rights: moral right, in the sense that the work should be attributed to its owner and that it is impermissible for anyone else to plagiarize it; and a financial right. However, eligibility to financial right is a disputable issue among contemporary Islamic jurists.

Some scholars consider such financial right as impermissible because intellectual work falls under the acts of rapprochement and submissiveness to Allah (*subhanahu wa taala*), in addition to the fact that seeking financial gain may hinder free dissemination of knowledge.

Other scholars advocate permissibility of financial right on the basis of the prevailing traditions, and due to the fact that financial reward is more likely to serve as a good stimulus for more intellectual work. International laws and conventions have set a limit of fifty years after the death of the author, for validity of his financial right[(1)].

Patent Right

Unlike copyright which relates to intellectual work in the fields of arts and science, patent rights usually relate to the field of industrial business. Patent right is subject to the same rulings on copyright because both rights are the outcome of intellectual and innovative efforts[(2)].

Trade Name

Trade name is used for differentiation between commercial enterprises, whereas trademark (registered mark) is used for distinguishing between commercial products[(3)]. Some contemporary Muslim scholars indicate permissibility of selling of trade name or trademark provided that the product of the buyer institution is going to be at the same standard of that of the seller institution. moreover, the change that takes place in the source of production should also be declared.

(1) Al-Sanhoori: *Al-Waseet*, (8/282).
(2) Ibid, (8/450).
(3) Ibid, (8/467).

Evacuation Right

Evacuation right can take one of the following forms:

(1) money which the owner of the property receives from the tenant in addition to the rent.

(2) money which the tenant receives from the owner of the property for premature termination of the lease contract.

(3) money which the tenant receives from another tenant against vacating the property.

All the three forms are permissible due to the fact that the paid amount of money in the first case is considered as part of the rent, while it is considered as remuneration for waiver of right in the second and the third cases(4).

(4) *Majalat Al-Majma'*, (4/2329).

Chapter: III

Insurance

Definition

The Arabic term *Ta'meen* has come into use only recently as an equivalent of the English term insurance which means achievement of security. The word "*sawkarah*" or "*sawkartah*", which constitutes a transliterated version of the English term "security", has also found its way to some colloquial dialects of the Arabic language. Such words have even been used in the titles of some of the books and *Fatwas* on insurance that have been published recently.

Insurance is a contract in which the insurer undertakes to pay to the insured or to the person to whose benefit the contract is signed, a specific amount of compensation, on occurrence of the hazard which constitutes the subject matter of insurance. Such commitment is provided against a premium that the insured pays to the insurer.

Another technical definition of insurance is that "it is a collective scheme to convert uncertainty into certainty through pooling of risks and subjecting them to clearing arrangements with the help of statistical tools".

Charitable Insurance

This type of insurance is manifested in terms of several institutions and practices such as *Zakah*, alms, family sustenance, kinfolk's commitments (in case of blood money for instance), will, *waqf*, atonements and vows; and is basically meant to mitigate the suffering of the poor. Contrary to cooperative or commercial insurance which aims at restoration of the previous level of wealth, compensation under charitable insurance need not necessarily go beyond the extent of helping the injured to surpass the stage of his ordeal.

It should be noted here that charitable insurance cannot be covered by the definition of ordinary insurance; since the former is an insurance process that does not entail payment of any insurance premium or contribution. That is to say, charitable insurance is a free type of insurance. Some Islamic jurists are of the view that charitable insurance

can constitute a full-fledged substitute for the "incoming" cooperative and commercial insurance systems.

Self Insurance

Self insurance refers to the process in which the beneficiary insures himself through use of his own resources. In order to do so, he can build up an insurance reserve through periodical deductions from the profits of his enterprise. When the anticipated hazard takes place, compensation can then be sought out of this insurance reserve.

This type of insurance could be more suitable for big rather than small enterprises. Self insurance also seems to be more applicable when there are so many enterprises operating in isolation from each other, and less applicable when enterprises are small in number and have close relationships. moreover, self insurance may prove to be more significant during the late years of operation of the enterprise, rather than the early years of operation when it may not be possible to build up a reserve fund that would suffice to cover all the hazards which the enterprise could face.

Self insurance can also facilitate avoidance of the long procedures required by insurance institutions. It can also encourage the insured to be more cautious regarding avoidance or mitigation of risks, in addition to the fact that it does not lead to incurring of any costs except when the anticipated risk becomes a real incident.

Contrary to cooperative and commercial insurance, self insurance encounters no dispute with regard to permissibility.

Social Insurance

Social insurance ***"provides coverage for workers by insuring them against work accidents, illness, disability and eldership. Besides the contributions of the insured workers, the employer also contributes to the social insurance fund in addition to the contribution of the state, which also takes the responsibility of arranging and managing the scheme"***[(1)].

Social insurance includes the following types:

(1) Al-Sanhoori: *Al-Waseet*, Vol. 2, Part 7, p. 1156.

- Eldership Insurance
- Illness and Death Insurance
- Unemployment Insurance
- Social Care Insurance which facilitates: residing in social care centers and benefiting from libraries, clubs, museums, exhibitions, trips and transportation subsidies.
- Work Accidents Insurance which covers: work accidents, road accidents, occupational diseases and risks of work exhaustion and fatigue.

Some jurists have forbidden individual insurance (cooperative and commercial) and kept silent about (or explicitly permitted) state-run social insurance, either because it is a state-managed scheme or due to its cooperative nature.

Actually, all the arguments presented by the scholars to justify prohibition of individual insurance are quite relevant to social insurance. Therefore they should have treated both types of insurance equally, regarding permissibility or prohibition.

Firstly, in social insurance there is a contribution paid by the worker which is quite similar to the insurance premium. Secondly, the contribution paid by the employer does not make any difference, or it can even be considered as an amount paid by the worker; in the sense that it constitutes a deferred part of his wage. Thirdly, in social insurance there is also an amount of probable compensation which may increase or decrease, especially in some types of social insurance. In unemployment or accident insurance, for instance, the worker keeps on paying the contribution throughout the time of his service while he may not encounter unemployment or any accident during his life. Hence, it would be difficult to realize any difference - with regard to *Gharar* or any other aspect - that justifies permissibility of social insurance as an exceptional case among all other types of insurance.

Mutual Insurance and Cooperative insurance

Mutual insurance is usually arranged by a small group of people who have no capital. When any member of the group encounters loss, compensation is collected from the other members (principle of payment on actual realization of risk). Among the merits of this type of insurance is minimization of fraud and deception; whereas among its disadvantages is that the member does not know beforehand the exact amount of the premium or contribution he will be asked to pay, and thus his liability is unlimited. The number of members might not be big enough to make them subject to the Law of large Numbers. Among the factors that facilitate formation of mutual insurance groups that are not subject to the Law of large Numbers is that the program is based on a variable contribution rather than on a fixed premium.

Some writers try to make distinction between mutual and cooperative insurance. However, going a little bit deeper makes one feels that such distinction is rather difficult. Cooperative insurance is based on the principle of cooperation: The door is left wide open for membership. Each member has only one vote irrespective of his contribution. The surplus (if any) is distributed among members; and when the surplus is used for formation of a reserve, the ultimate target of the reserve is public or charitable purposes.

Some mutual and cooperative insurance organizations resort to collection of advanced contributions so as to be ready for prompt payment of compensations. Such prepaid contribution could take the form of a lump sum advance amount or a regular contribution.

Commercial Insurance

It is usually performed by a commercial enterprise through obtaining fixed premiums from the insured, in expectation of covering full operational and compensation expenses, and earning a profit.

Commercial insurance can be seen as transference of risk against a specific compensation. Perhaps for this very reason, some jurists believe that commercial insurance is impermissible; contrary to cooperative insurance which entails bearing and fragmentation of risks.

Shari'ah Ruling on Insurance

There are some Islamic jurists and economists who argue that Muslims should be satisfied with their juristic heritage and pay no attention to the "incoming" types of insurance"; be it cooperative or commercial. These jurists and economists believe that the degree of *jahalah*, *Gharar*, gambling, *riba*, *Ghubn* and cheating which these incoming forms of insurance involve can hardly leave any room for their permissibility.

Other jurists are of the view that cooperative insurance is permissible because cooperatives are donation-based institutions in which *jahalah* and *Gharar* can be overlooked. moreover, in the *Shari'ah* as well as legal perspectives, insurance - in its essence - is quite different from gambling. Firstly: while insurance is a serious process, gambling is a game. Secondly: while insurance is founded on scientific basis, gambling is based on luck. Thirdly: while gambling creates risks, insurance is a means of protection against risks.

A third group of jurists holds the view that commercial insurance is also permissible, because it carries no difference from cooperative insurance. Cooperative insurance is a compensatory rather than a donation contract. Perhaps the distinctive attribute of cooperative insurance compared to commercial insurance is that the former does not lead to profit. Therefore both types of insurance are permissible since Islam does not prohibit profit earning.

Chapter: IV

Islamic Banks

A bank: is an institution that normally specializes in receiving deposits (borrowing) from the public and lending them to commercial, industrial or other institutions. A bank is, therefore, an institution that performs intermediation between lenders and borrowers through trading in loans. In addition to lending and borrowing, banks provide a number of services including, among others, discounting, exchange, debt assignment, guarantee, and leasing of safe boxes (for trust deposits as distinct from loan deposits).

An Islamic bank is the institution that performs *riba*-free and *Shari'ah* compliant banking business. The bank receives deposits through *Mudharabah* and provides funds through *Mudharabah, murabahah and ijarah*.

Unanimously Permitted Transactions

- *Mudharabah* (*Qirad*);
- Partnership, which we have already discussed in Part: VIII on Partnerships.

Controversial Transactions

1. Service Charge:

Some Islamic banks used to take service charges from their borrowing customers. If the service charge is no more than another name for interest and is to be calculated in view of the amount and tenor of the loan, it is impermissible. If, instead, a service charge represents actual expenses incurred by the bank in processing the loan, then it is permissible(1). Some jurists are of the view that service charge involves a suspicion of *riba*.

There are, in fact, some economic disadvantages of service charge including: that it is less than the suitable price for allocation of capital as a scarce resource; it does not constitute a significant financial incentive for the bank; it deprives the central bank from appropriate means of

(1) *Qararat wa Tawsiyat Majma' Al-Fiqh Al-Islami*, p. 27.

credit monitoring such as diversification of profit sharing ratios; and finally it aggravates the state of wealth and income disparities because most of the depositors (lenders) are from the fixed-income groups, while most of the borrowers are from the high-income groups(2).

2. *murabahah* on Order of Purchase

A customer may resort to an Islamic bank to purchase for him a specifically defined commodity. In this case, the bank makes a pledge to purchase the commodity for the customer and the customer makes a counter pledge to buy it. The bank then purchases the commodity on cash and sells it to the customer on credit at a higher price. If such pledges are nonbinding, the deal is permissible according to the majority of contemporary Islamic jurists. If the pledges are binding some jurists indicate that the deal is impermissible, because a binding pledge is tantamount to a full-fledged contract.

3. A Binding Pledge

Former Islamic jurists have three viewpoints concerning pledge including the following:

1. Honoring of pledge is recommendable, as per the viewpoint of the majority of those jurists.

2. According to Ibn Shubrumah and others, honoring of pledge is a duty except when there is an inevitable reason for breach.

3. Honoring of pledge becomes a duty when the promised party gets into a predicament (incurs a cost); as when you pledge to give SR 10000 to someone if he gets married, and he gets married. The *Maliki* jurists suggest enforceability of pledge in this case.

Such controversy around pledge per se is acceptable, because pledge in the absolute sense falls under issues that can normally be viewed from different standpoints. However, the controversy among contemporary Islamic jurists goes farther than that to tackle the issue of carrying pledge from the sphere of donation contracts to the sphere of compensatory contracts so that it can replace the contract itself.

(2) *Elgha'a Al-Fa'idah*, Majlis Al-Fikr, 26.

For instance, *murabahah* on order of purchase as practiced by Islamic banks is impermissible because it involves selling of something that the seller does not own (the bank does not own the commodity) therefore, some jurists believe that the contract in this case can be replaced by a binding pledge. However, other jurists argue the other way round because, according to them, a binding pledge and contract are alike.

Financial Leasing (Lease ending in ownership)

Hire purchase is a lease contract which ends up into sale (assignment of ownership). Obviously hire purchase is more suitable in the area of leasable assets such as durable goods or fixed assets. Sellers sometimes resort to it instead of installment sale so as to retain ownership of the asset until all installments are repaid. Therefore, it constitutes a guarantee in their hands in case of default on the side of the buyer.

Financial leasing is quite similar to hire purchase, because the former involves the latter except that in case of financial leasing the good to be leased is not possessed by the leasing party who has to purchase, lease and then sell it.

Hence, there are three pledges pertaining to purchasing, leasing and then selling of the commodity. This process is permissible if a pledge is not binding. If a pledge is to be binding some jurists would not permit the deal as it will thus fall within the domain of selling of non-owned or non-held (yet to be purchased) commodities.

Reciprocal Loans

I may lend you SR 1000 for a year on condition that you lend me in the future the same amount for the same period. Or I may lend you SR 1000 for 30 days on condition that you lend me in the future SR 3000 for 10 days. In these two cases the two loans are equal in terms of what is known as "Loan Numbers".

Some contemporary scholars permit such reciprocal loans since neither of the two exchanged loans involves interest. Other scholars indicate that reciprocal loans are forbidden because a loan in Islam is an act of good turn, and therefore it will lose its charitable nature when it is performed against a similar loan in reward. Reciprocal lending according

to this group of scholars is what ancient jurists had already discussed under the term ***"lend me and I shall lend you"***. Ibn Qudamah indicated that ***"it is impermissible to stipulate provision of a future counter loan as a condition in a loan contract"***(3).

Diminishing *musharakah*

The bank may share with one of its clients the ownership of a real estate property, for instance. The two parties may then agree that the client should repay to the bank a specific number of periodical installments after which the bank would waive its right of ownership to the client so that the latter becomes the sole owner of the property.

Some contemporary scholars permit this type of partnership, while others prohibit it. According to the latter group, waiver of ownership right should be at market rather than nominal value; otherwise the deal would apparently seem to be partnership, whereas it is financing in essence.

Letters of Guarantee

In Islam, guarantee (warranty) - as well as loan - is considered as an act of kindness and benevolence.

If a lender should provide his money without counter reward, it is with all the more reason that a warrantor gets nothing for the mere act of providing guarantee or prestige. Furthermore, if it happens that a paid warrantor has to repay the debt on behalf of the guaranteed party, the pay that the warrantor has received will involve a suspicion of *riba*.

Nevertheless, it is permissible for the warrantor to recover any expenses that he incurs in the process of providing the guarantee. Recovery of expenses in this case should be confined to what has been actually incurred, because any increment will come directly under the forbidden pay for warranty provision.

The Islamic Fiqh Academy- Jeddah has issued a resolution on the Letter of Guarantee in which it distinguished between a letter of

(3) Ibn Qudamah: *Al-mughni*, (4/360); *Al-kharshi Ala Khaleel* (6/54); Al-Dusuqi: *Al-Hashiyah*, (3/364).

guarantee that has no cash cover, and a one that has. The resolution considered the relationship between the demander and the issuer of the letter as a mere guarantee relationship in the first case; and as an agency relationship - that can be rewarded for - in the second case. In both cases the resolution permitted recovery of the administrative expenses incurred in provision of the guarantee.

However, it is not at all clear why the resolution of the Islamic Fiqh Academy need to make such distinction between covered and uncovered letters of guarantee since the distinction does not seem to have any bearing on the final conclusion reached by the resolution; which is - in both cases - prohibition of obtaining a pay for guarantee per se, and permissibility of recovering administrative costs?

There is also another reason for the irrelevance of this distinction between covered and non-covered letters of guarantee which imply that the bank can get a fee when the letter is covered and cannot get it when it is uncovered. Logically speaking, the case should have been the contrary form the standpoint of the bank; because when the guarantee is covered, the bank can make use of the cash cover besides obtaining a fee; while when the letter of guarantee is uncovered, the bank will have neither a cash cover to make use of nor a fee for the guarantee it provides!

It would, however, be difficult in reality to imagine Islamic banks issuing letters of guarantee against recovery of only administrative expenses. Islamic banks would expect such expenses to include a profit margin for provision of the service.

Therefore, one can pose the question that if in the case of financing, Islamic banks can quit interest-bearing loans to *qiradh* (profit sharing), can they do the same in the case of guarantee? Can these banks shift from paid guarantee to guarantee through *qiradh* (*Mudharabah*) or *musharakah* arrangements?

Indeed, provision of capital against a share in the profit is permissible as per the strict sense of *Shari'ah* texts and general consensus of Islamic jurists. However, provision of guarantee against a share in the profit is a matter that has not been authorized by a *Shari'ah* text or general consensus of Islamic jurists. It is true that some Fiqh Schools

have permitted entitlement to profit against guarantee. Nonetheless, the meaning of guarantee in that context is quite different from its meaning here. The guarantee that entitles to profit is supposed to be attached to either capital or labor. The general *Fiqhi* postulate that governs this issue, according to these Fiqh Schools, is that ***"profit is deserved for capital, labor or guarantee"***. Entitlement to profit for provision of mere guarantee, in isolation from capital and labor, is strictly forbidden.

Hence, it can be noticed that capital is in a better position than guarantee. If a pay (interest for capital and fee for guarantee) is impermissible for both capital and guarantee, *qiradh* (profit sharing) is permissible for capital; while it is impermissible for guarantee.

Credit cards

Travelers like business men and others need to carry cash, checks, traveler checks, or credit cards. Through a credit card, a traveler can purchase goods and services from fuel stations, restaurants, hotels, car renting companies…etc. He has just to hand over his magnetized card - which carries the name, number, date of issuance and date of expiry - to the company that accepts it. The seller then uses his computerized checking devices to make sure that the buyer's bank balance or credit ceiling permits conclusion of the transaction. The buyer also has to sign the receipts which the seller will submit to the card's issuing bank or company for collection.

Therefore, a credit card involves three parties:

1. The card's issuing institution or its local agent (a bank for instance).
2. The commercial institution.
3. The Cardholder

A credit card is useful to each of these three parties:

1. For the issuing institution it constitutes a source of income in terms of an annual subscription fee (for instance $ 120 per year) which the issuing institution (or its agent) charges to the client. The issuing institution or its agent also charges 4 – 5% of the invoices value when the commercial institution presents such invoices for collection.

2. For the commercial institution the credit card could serve some promotional purposes and provide guarantee for timely collection of sales revenue from a highly solvent institution, which is the issuing institution or its agent bank.

3. For the cardholder a credit card is useful for avoiding the inconvenience and risk of carrying cash amounts which could be lost or stolen. A cardholder also enjoys the chance of buying on credit and the possibility of having discounts from commercial stores at the rate of 5 – 30%, subject to the commodity and enterprise in question.

Also a credit card has costs including:

1. The commercial enterprise has to pay, out of the invoices value, to the issuing institution an amount ranging between 4 – 6%.

2. The cardholder has to pay the annual subscription fee.

When the credit card is used for purchasing a traveling ticket, the ticket entitles the cardholder to an insurance cover during his trip (life insurance).

Credit cards are of two types:

1. The first type which may entail an interest-bearing loan. In this case the client can either repay the total amount of the invoices in cash, or receive a loan amounting to the value of these invoices; payable in installments. The installments include an interest charge on the loan in addition to another charge for late repayment of any installment. It is clear that this type of credit cards is usurious and, therefore, strictly forbidden in Islam.

2. The second type of credit cards which does not involve any loan. In this type of cards the bank repays the value of the invoices to the commercial enterprise out of the client's account, as soon as it receives them. Repayment can take place once or several times a day.

In the light of the preceding points, we should look into the following compensations (costs and revenues):

1. The subscription fee which the client has to pay whether he benefits from the card or not.

2. The discount that the commercial enterprise grants to the client.

3. The percentage of sales value which the enterprise pays, or relinquish, to the card's issuing institution

4. The insurance cover enjoyed by the client during his travel

5. The warranty which the card's issuing institution issues to the benefit of the client (preparedness to repay).

Do these aspects involve *Gharar*, *riba* or any other forbidden practice? What about the insurance cover that the client enjoys on using the card for purchasing a ticket? Is it commercial, cooperative or donation-based insurance?

In answering these questions the following can be indicated:

1. Subscription fee can be considered as a price for the card and the services it facilitates, and therefore can be considered as permissible.

2. The discount which the commercial stores grant to the client can be considered as a reduction in the price so that the real price of the commodity becomes the net price after deduction; and hence such discount is permissible. In fact a seller is free to sell at the price he agrees upon with the buyer. There is no difference between concluding the deal at SR 100, or at SR 120 with a price discount of 20%.

3. The percentage of the sales value which the enterprise relinquishes to the card's issuing institution can be regarded as a brokerage fee. It is permissible for a person to send customers to a merchant on condition that the sender receives a lump sum fee for each customer who goes to or purchases from the merchant. Such fee can also take the form of *Juaalah*; that is to say a percentage of the total value of sales per client.

4. The insurance cover from which the client who uses his credit card in buying an air ticket could benefit during his travel comes under commercial insurance, because it is covered by part of the annual subscription fee. Therefore, this insurance cover is permissible according to those who permit commercial insurance. If this insurance cover can, somehow, be adjusted to become a profit-free cooperative insurance, the number of jurists who support its permissibility will increase; because it will in that case include those who permit cooperative insurance in addition to those who permit commercial insurance. If it cannot be

adjusted the insurance cover can be cancelled against a proportionate reduction in the annual subscription fee.

5. The card's issuing institution is not considered as a warrantor (*kafeel*) of the client so far as the commitment of the latter towards the commercial store is concerned. If the relationship between the two is to be considered as warranty relationship the process will entail provision of warranty (*kafalah*) against pay, because the service is already paid for in terms of the annual subscription fee. Visualization of the deal as a warranty process would therefore lead to its prohibition, since in Islam warranty (as well as loan) is an act of benevolence.

Therefore, the relationship between the issuing institution and the client is to be considered as debt assignment (*hawalah*) which is permissible in Islam; especially when debt is assigned to a solvent party. The Prophet (peace and blessings upon him) said: ***"If anyone of you (in claiming repayment) is referred to a solvent person let him accept"***[4].

Debt assignment in this case is permissible, because it is of the type in which the debt is assigned to a debtor of the assigning party. If it were of the type in which the debt is assigned to someone who is not a debtor or a deposit keeper of the assigning party, it would have become a process of assigning repayment to a lender; and hence impermissible. In this case debt assignment will entail a suspicion of *riba* relating to the loan forwarded by the assignee against the annual subscription fee

In conclusion: the credit card that does not involve a usurious loan from the issuing institution to the client is permissible. A credit card of this type is called a debit card (repayment card or account debiting card), in the sense that, once received from the commercial enterprise, the invoices' value will be debited to the account of the client with the bank.

Tawaruq

When discussing *riba* in Part: 5 we mentioned that *einah* refers to the case when somebody purchases a commodity on credit for SR 100 and sells it back to its original owner in cash for SR 90. *Tawaruq* is similar to *einah* except that the commodity is sold to a third party, instead of selling it to the former seller.

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(4) Al-Bukhari: *Al-Saheeh*, (3/123); Muslim: *Al-Saheeh*, (4/72).

The majority of Islamic jurists prohibit *einah*, because it constitutes a pretext for dealing in *riba*. Some jurists permit *tawaruq* for being more close to mere buying and selling, and does not involve any collusion among its three parties. Nevertheless, *tawaruq* in some cases can be given full rein (through collusion) to become *einah* in essence and thus encounters prohibition from those who prohibit *einah*.

Delinquency

When a client obtains a loan or purchases a commodity on credit from an Islamic bank and delays repayment of an installment for no acceptable reason, some contemporary scholars permit claiming compensation from him for the harm stemming from his delinquency. Other scholars consider him as an extorter who has to be subjected to litigation. It is, however, impermissible for the creditor and the debtor to agree beforehand on the compensation for the probable harm emanating from delinquency. The court is supposed to estimate the amount of compensation in consultation with experts, at the lowest normal limit of the profit that has slipped away as a result of the debtor's delinquency.

However, some jurists permit (subsequent) agreement between the creditor and the debtor on the compensation without resorting to court. Estimation in this case has to be made on the basis of the profit that the bank has missed during the period of delinquency. For instance if the net return on capital achieved during such period is 15%, the debtor has to pay 15% of the delayed amount of the debt in compensation.

Nonetheless, another group of scholars considers such financial compensation for harm to be quite similar to the traditional default charge, and therefore it is impermissible. These scholars propose the following solutions:

1. The delinquent debtor has to bear the loss caused by the decline in the purchasing power of money.

2. A fine can be imposed on the delinquent debtor to the benefit of charitable purposes; and not to the benefit of the creditor.

3. Assigning a share of the debtor's profits to the creditor.

4. Increasing the share of the creditor in the profit.

Receiving a pay for *fatwa*

members of supervisory boards of Islamic banks used to receive honoraria for the *fatwa*s they issue. They consider such honoraria to be permissible just like the pay received for acts of pious and submissiveness so as to encourage people to devote their full time to such activities.

However, there are some jurists who prohibit receipt of a pay for *fatwa*, because it is normally received from the seeker of the *fatwa* and therefore does not ensure independence of the *fatwa* issuer. The issuer of the *fatwa* in this case could be induced to use stratagems. moreover, the *fatwa* issuer also needs to be protected against being fired at any moment so as to be replaced by someone who is more flexible.

What is permissible, according to these jurists is that remuneration for *fatwa* takes the form of a stipend (*rizq*) payable by the state rather than by the seeker of the *fatwa*, just like the stipend paid to the judge or the teacher under the Islamic system.

Chapter: V

Supply Contract

In modern laws, Supply Contract is defined as ***"a contract according to which someone pledges to deliver – regularly - certain goods or services, to someone else, during a specific period and at a specific price"***[1].

Supply contract can also be defined as: an agreement according to which one party pledges to supply to the other specifically defined commodities, all at once or in batches, against a specific price, mostly payable in installments in such a way that an installment of the price is paid once a batch of the goods sold is received.

A supply contract can be local or international. That is to say, it can be signed between two enterprises in the same country or in two different countries. It should not necessarily be relating to importing and exporting, even if the seller is called the supplier and the buyer is called the supply receiver.

Examples of supply contracts for commodities include supply of foodstuffs, medicines, clothes, and fuel; to hospitals, schools, airports, military units and other entities.

Examples of supply contracts relating to services include supply of electricity, gas, water, newspapers, and workers; or signing of cleaning and maintenance contracts with schools and hospitals.

Contract Purposes

In a supply contract the buyer wants to ensure having the required materials or commodities on the dates agreed upon so as to use them in commercial, industrial, agricultural, or service providing activities. In this manner the buyer could be able to reduce the costs of storage and the risks associated with perishing and obsolescence of goods and materials. Batch supplying can also enable the buyer to deal in commodities that need to be sold in their fresh form.

(1) Al-Jabr: *Al-Qanoon Al-Tijari Al-Saudi*, p. 67.

The seller in a supply contract aims to guarantee the necessary channels for distribution of his output through responding to the continuous requests of his corporate customers. A supply contract would, therefore, enable him to avoid stagnancy of his sales, as he will be producing what he has already signed a contract for its marketing.

If the price is specified in advance, at the time of signing the contract, the buyer will be aware of the purchase price beforehand, and can therefore determine his costs as well as his sale prices and scale of production. moreover, since the seller will be able to know the selling price in advance, he can also determine his revenues.

If, instead, the contract is concluded subject to market price, then its benefit will be confined to certainty of each of the two parties about the volume of business he will achieve at the target dates of delivery.

Comparisons

1. ***Salam*:**
   Supply contract is similar to *salam* contract in that the good to be sold in both contracts is deferred, precisely specified and the buyer should accept it when it conforms to the agreed upon specifications.

2. ***Istisna'a*:**
   According to the *Hanafi* jurists, Supply contract is similar to *Istisna'a* contract, because price in both contracts need not be paid in advance.

3. **Sale of a Non-Possessed Good:**
   It has been reported that Hakeem Ibn Hizam said: ***"Once I told the Prophet (peace and blessings upon him) that people used to come to me for purchasing goods that I didn't have and I used to sell to them goods that I bought for them from the market. The Prophet (peace and blessings upon him) said: do not sell what you don't have"***[(2)]. According to Ibn Hajar in his book titled "*Fat'hul Bari*", Hakim said to the Prophet (peace and blessings upon him): ***"I used to sell the commodity to the person and then purchase it for him from the market"***[(3)].

(2) Ahmad: *Al-Musnad*, (3/402 & 434); Abu Dawud: *Al-Sunan*, (3/384), Al-Tirmizi: *Al-Sunan*, (3/525); Al-Nasaee: *Al-Sunan*, (7/288); Ibn Majah: *Al-Sunan*, (2/737).
(3) Ibn Hajar: *Fat'hul Bari*, (4/349).

According to Ibn Al-Qayem, prohibition here is confined to the seller who is not a regular trader in commodities, or has any expertise in such occupation. Such a person simply wants to buy the commodity at the responsibility of the demander and sells it to him at a higher price so as to make an ensured and risk-free gain. The role of this person, therefore, comes under two forbidden acts which are: selling things that one does not own; and pursuing a business gain without assuming its underlying risks. Trade is permissible only when it involves risk(4). Consequently, in a supply contract the supplier should be a lawful trader and his business must involve risk bearing so as not to indulge into a *Shari'ah*-forbidden act.

4. ***Bai Al-Kali' BilKali'*** (Deferment of the Price and the Good Sold)

   Ibn Omar reported that: ***"the Prophet (peace and blessings upon him) has forbidden bai' ak-kali' bilkali'"***(5). In some versions of the *hadith*, an addition is made indicating that this means: selling of a debt for a debt; or a *nasi'ah* (on-credit-sale commodity) for a *nasi'ah*.

According to some jurists, if the two parties agree that both the good sold and the price, are to be delivered at a future date, this is considered as *bai al-kali' bilkali'*. The deal here is classified as a *salam* contract in which both price and commodity are postponed. The *Maliki* jurists call this process as ***"initiating a debt by another debt"***.

However, the *hadith* narrated about the Prophet (peace and blessings upon him) regarding *bai al-kali' bilkali* is considered to have a weak narrating series, and hence is not confirmed. The consensus among jurists seems to be around the wording rather than the content of the *hadith*. Some jurists indicate that what is consensually forbidden is the sale in which both price and commodity are postponed. Other jurists contend that what is forbidden is sale on deferment basis (*salam* or *nasi'ah*) in which tenor is extended against increment in price or commodity.

The *Hanafi* jurists do not stipulate advance payment of price as a condition in *istisna'a*. According to them in *istisna'a* price can permissibly be delayed.

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(4) Ibn Al-Qayem: *Zad Al-maad*, (5/816).
(5) Al-Darqutni: *Al-Sunan*, (3/71); Al-Hakim: *Al-Mustadrak*, (2/57).

Some jurists indicate that if in the signing session the contract is declared as *salam* or *salaf*, price should be paid in advance before adjournment of the contract signing session; whereas if it is declared as a sale transaction, price need not be paid in advance.

The *Maliki* jurists permit delay of *salam's* capital (price) for a maximum period of three days subject to a pre-stated condition, and for more than that without such condition. They also permit land leasing in which the tenant is enabled to hold the land after a year, and pays the rental after 10 years.

Some jurists also use a *hadith* narrated by Jabir to support permissibility of a sale transaction in which both price and commodity are postponed. Jabir reported that one day when he was passing by on his camel; the camel became so tired that he thought of forsaking it. Jabir said: ***"then the Prophet (peace and blessings upon him) caught up with me. He prayed for me and whipped the camel; and the camel started to go as fast as it had never done before. The Prophet (peace and blessings upon him) said: sell it to me for an ounce; and I said: no. Then again he said: sell it to me. I sold the camel to him for an ounce on condition that I drive the camel to him after riding it to my house. After reaching home, I drove the camel to him and he paid me the price in cash. After I went home, he sent someone to call me back and said: Had I haggled with you to take your camel? Take your camel and your money, it is yours"***(6).

Resolution of the Islamic Fiqh Academy

In its 12th Session, held in 1421H (2000G), the Islamic Fiqh Academy - Jeddah resolved that: If the commodity involved in a supply contract requires manufacturing, the contract is classifiable as *istisna'a* and is, therefore, permissible. If the commodity does not require manufacturing and is a well specified commodity to be delivered in the future, the contract is considered as *salam*. In this latter case the full price has to be paid in advance; otherwise the deal is impermissible.

(6) Muslim: Al-Saheeh, (11/30).

Chapter: VI

Exchanges

Definition

An exchange is a regulated market, held periodically in specific places, for dealers in selling and buying of commodities, currencies and financial papers. In an exchange, dealings are performed in fungible assets that can be specifically defined in terms of kind, characteristics and quantity; and communications between sellers and buyers - who do not know each other - take place through licensed agents or intermediaries (brokers).

An exchange has useful economic functions, in that it constitutes a regular and active market for facilitating exchange operations and easy access to price information(1). Nevertheless, most of the operations of an exchange (about two thirds) take the form of speculation (betting) on price changes with the aim of making a gain out of price differentials without any mutual holding of the traded assets. Neither the buyer nor the seller cares for receiving the subject matter of the deal.

In an exchange, operations take place through calling, and prices are clearly displayed on public screens.

Some of the exchange's operations are on spot, while others are forward dealings manifested in speculation or betting on price changes; a practice that makes an exchange quite similar to a gambling club (casino). In the final analysis, such operations have no significant economic impact, because what is lost by some dealers is gained by others; in addition to the fact that exchange operations usually lead to market instability(2). If *riba* constitutes the backbone of the banking system, gambling constitutes the basic mainstay of exchanges.

Usually the real losers are the small speculators who are not as knowledgeable as big and influential (overruling) dealers. Having no forecasting talent, small dealers have to act on the basis of rumors and hence become the victim of manipulation and deceit(3).

(1) mohieddin: *Aswaq Al-Awraq Al-maliyah*: p. 37.
(2) Alias: monetary Conditions, pp. 22, 34 and 48.
(3) Chapra: *Nahwa Nizam NAqdi Adil*, p. 135.

Primary and Secondary markets

The primary market is the market for issuing financial papers, whereas the secondary market is the market where financial papers are traded. The secondary market can be a regulated or non-regulated (over-the-counter) market.

Brokers and dealers are the basic intermediaries in these markets. The dealer, whether a buyer or a seller, is a basic party in the negotiation process; while the broker acts as an agent of the investor in performing selling and buying operations.

Exchange Dealers:

1. Professional Speculators: This group aims at benefiting from price differentials and therefore, pays much attention to monitoring of price changes and forecasting of market trends. They use economic and statistical tools to analyze and interpret the behavior of the factors which affect the market and know the technical developments that take place therein.

2. Outsiders: This group also aims at benefiting from price differentials, but it does not have the scientific and practical capabilities of the professional speculators. In most cases this group of dealers quickly vanishes from the market as soon as it encounters losses.

3. manipulators: They have huge financial resources and ability to control the market up and down through mannered means that make the price of a financial paper higher than its fair price which originates from the free interplay of supply and demand.

4. Investors: These are of two types including; ordinary investors who want to achieve capital returns in addition to commercial returns; and insiders who are well informed about the market, and have the desire to first: control the company and its management by holding sufficient portion of its shares; and second: make profit(4).

(4) Abdul Lateef: *Borsat Al-Awraq Al-maliyah*, p. 32.

Time and Place Arbitrages

Arbitrage refers to the act of purchasing something so as to sell it at another time or in another place. It is permissible; whether with the aim of price balancing or any other *Shari'ah*-acceptable objective, because it is a productive activity.

Futures

Futures are deferred contracts in which neither the seller is intending to deliver the commodity in question nor does the buyer aim to pay the price. The sole aim of both parties is to speculate on price changes so as to make a gain from price differentials, without actual holding of the commodity or receipt of the price.

Options:

An option refers to the process of giving the seller or the buyer the right to execute the contract on maturity or nullify it against a predetermined consideration or penalty(5).

Indices

An index is a financial figure calculated through a special statistical method, and used to indicate the size of change in a certain market. In some global markets, an index can be an object of selling and buying.

According to the Islamic Fiqh Academy, selling and buying of an index is impermissible, because it is a mere act of gambling or sale of a fictitious thing that does not really exist(6).

(5) mohieddin: *Amal Sharikat Al-Istithmar*, p. 497; *Qararat wa Tawsiyat Majma' Al-Fiqh Al-Islam*i, p.138.
(6) Ibid, p. 140.

Chapter: VII
Audiovisual Contests

Introduction

Telephone and television contests, which constitute a new form of lottery, have continued to spread rapidly in our present times. The interested participant has to purchase a telephone card and keep on communicating with a specific contest program. The revenue generated from such calls is shared between the telecommunication company and the company that produces the contest. Perhaps, there might be no telephone card; yet the process of sharing comprises the revenues that result from contacting a specific telephone number. The interested participants keep on contacting in spite of the difficulty they encounter and the enormous expenses they incur before taking part in the contest. Although not all those who make contacts succeed to participate in the context, every contact will certainly constitute an inflow of revenue for the telecommunication and the contest producing companies.

Potential Participants

Potential participants of contests include people from the various parts of the globe; such as holders of postgraduate degrees, university graduates, undergraduate students, school boys, physicians, engineers, teachers, white-collars, merchants, workers and so many other segments of the world population. This rapidly mushrooming business seems to be targeting everybody; regardless of gender, secular or religious orientation, cultural standard and social background. Among the participants of the same contest you may find a secularist besides a religious man; or a highly cultured person besides an illiterate person whose educational capabilities can hardly exceed the bare level of reading and writing.

All these people spend money through telephone calls for the sake of participating in the contests. No doubt the vast increase in the number and geographical coverage of satellite channels and the rapid advancement in telecommunication devices have kept the door wide open for maximization of the revenue generated from such contests. Any increase in the number of participants coupled with an increase in the

communication tariff and a decrease in the number of winners, will result in a direct increase in the total revenue of the contest and the amount of the prize.

Revenues and Expenses of the Contest

Revenues: Include shares in the proceeds of the telephone calls, in addition to the revenue of the commercial breaks telecasted during the contest.

Expenses: Include the share of the principal company that gives the license for quoting the idea of the contest; expenses incurred in preparing the questions; salaries of the contest's staff; rent of the studio; cost of remuneration for a group of audience who keep on clapping during the contest and provide help to the contestant on request; traveling expenses for the contestant and his companion; cost of board and lodging for the contestant and his companion for one or two nights in London or Paris where the contest is held in specialized studios; the amounts of the prizes; honoraria for the team involved in the production and presentation of the program including technical as well as administrative and support staff; cost of depreciation of hardware and software; and cost of an international call to communicate with a friend of the contestant for seeking his help in answering one of the questions.

Gainer and Looser

The gaining party is always the company that arranges the contest, because it controls the revenues and expenses in a way that ensures a high and guaranteed profit for it. The wide-scope participation resulting from the vast increase in the number of satellite channels acts as a helping factor. The contest winners also constitute a small group of gainers in contrast to the large group of participation seekers who are screened out during the process of selection. The individual gain of prizes winners ranges between SR 1000 and SR 10000, or more than that in some rare cases.

The losing party is the large number of people who incur the expenses, bother themselves with repeated telephone calls and fail to participate as a result of the first and second rounds of selection. The first round of selection is run through lot casting before the participants reach

the studio and appear on the television; and the second is arranged afterwards when a single participant is chosen out of a small group if he succeeds to be the only one or the fastest in answering a question posed for this purpose.

Decoration of the Contest

Donation to Charity: It can be noticed that when the program entertains prominent figures as contestants, such guests explicitly or implicitly pledge to spend the prizes they win on charitable purposes. They may sometimes mention, in front of the audience, some specific names of charitable institutions as the potential receivers of the donations. Since the prize will go to charity, the contestant could be granted much help to reach a certain amount: for instance SR 100000 or SR 250000. Intention to donate the prize to charity may also induce the audience to condone the participation of such distinguished guests in the contest and appreciate the role of the contest program as a means of serving the cause of charity.

In fact donation of gambling proceeds to charitable purposes is an old idea. People in the pre-Islamic Arabia used to purchase a camel on credit and ask a specialized butcher to slaughter it and divide its meat into ten equal lots. A gambling round was then convened and attended by a large group of players, audience and poor people; especially during winter seasons when the poor were in severe need for clothing to protect them against coldness. However, the difference is that the poor were present in those gambling gatherings; whereas in the modern contests they are not. The poor in the modern contests may get the prizes or may not.

Luck

Luck is hidden in almost every aspect of the contest:

Are you going to be accepted as a participant either at the time of making the call or at the stage of quick answer screening?

Are the questions going to be in the field of your specialization?

Will the program presenter be willing to help you?

Will your friend – who might be called to help you in answering one of the questions – be helpful and sincere to you?

Is the group of audience going to be helpful or misleading?

Are you sure that you will not be confused during the contest?

Are you going to be just an ordinary contestant or a fortunate one who has been selected with the intention of giving him support to win a big amount?

In conclusion, the role of luck in these contests is much greater than that of skill. It could happen that an ordinary person wins the contest while an outstanding contestant fails to do so, because the scope of questions is very wide; and so is the scope of participation. Contrary to the prizes awarded for eminent scientific works, this is not a specialized contest for specialized people. The basic aim of such contests is to attract the largest possible number of participants so that the arrangers of the contest can maximize their gains.

Advantages and Disadvantages

Advantages:

- The high profits which the arranging party generates from telephonic communications and commercial breaks, especially that – thanks to satellite TV channels - the contest enjoys a global scope of participation.

- Success of a small number of participants to win some prizes of varying amounts.

- making TV audience feel amusement and pleasure and using every possible means of deception to encourage them to watch the contest and its accompanying commercial breaks.

Disadvantages

- A large group of losers who incur the cost and suffer the tiredness of repeated telephonic calls to the benefit of a small group of gainers.

- Encouraging people to depend on gaining by luck rather than on exerting effort to gain through productive activities such as agriculture, industry, trade and services. A contest is a

nonproductive activity that leads to waste of time, effort and money. The amusement that people may gain from it is insignificant.

- The prizes won in contests are bigger than those granted to outstanding scientists. The highest prize in the contests is SR 1000000, whereas the King Faisal's Prize for Science is SR 750,000 and is sometimes shared between two winners.

- Taking care of specialized scientific prizes is what can facilitate real advancement in the fields of civilization and culture, whereas TV and telephone contests cover a host of general affairs that usually of meager significance. Such contests can, thus, distract people's attention away from more significant affairs in the various fields of specialization, to relatively trivial matters.

- Contests constitute an irrational means of wealth distribution, because wealth is distributed according to luck rather than on the basis of production or need.

- Contests make the state of wealth and income distribution worse by giving more to the rich at the expense of the poor. What a miserable situation is that of a society whose government wants to solve its thorny problems of poverty through lotteries!

- Arranging contests is not allowed except for those who have the franchise right. A license for arranging a contest is not given to whoever requests it.

- Finally, let us assume that the contest arranger collects 10 million Riyals from people and that he retains 9 millions for himself and gives one million to the winner. One could then ask what makes this winner deserves a million to be collected for him through this cunning game? Anyone who feels an inner urge to join these contests should ask himself a couple of questions: Does it sound logical that I spend my money just for the sake of enabling the arranging company and a handful of winners to gain such huge amounts? Does any contest deserve being paid for generously?

Ethics

With the recent retreat of religious cultures and downturn of socialist doctrines that used to stand to capitalism and mitigate its excessiveness, capitalist civilization is now able to unveil once again its ugly face. The scene is now quite free from any competitors who can hinder the success of capitalism in instilling its principles that call for complete denial of the significance of religion and ethics in the fields of arts and sciences.

Nowadays, the position towards religions manifests either indifference or resistance through encouragement of corruption and deceit. It is now argued everywhere that people are to be left free to mold their norms and traditions the way they like. The most striking reality in our present times is that any religious or ethical act encounters fierce resistance and denial, whereas any act that is more akin to vices, evils and denounced behavior is given every facility from the part of the hegemonic mafias and pressure groups, so as to proliferate and persist across the globe. It is in the surge of this wild notion that evil is granted awards of encouragement and recognition.

One of the big flaws of capitalism is that it has converted the whole globe into a wide hall for gambling. Capitalism has succeeded to make out of itself a real paradigm of casinos and cabarets. Unfortunately capitalism now is not confined to just casinos and cabarets. It has already managed to break into almost every house with the intention of globalizing the entire world subject to its own forms and interests. Under capitalism there is no harm in gaining through *riba*, gambling, bribe, cheating prostitution and all other blights that some people would not mind to commit for the sake of becoming wealthy. As long as there is a demand for such practices, supply would come in. The capitalist city nowadays is either unethical or unethical!

The few ethical features that you might see scattered here and there are meant for nothing but to serve the purpose of decoration, facilitate a means for money laundering and display some faint attributes and signs of the folkloric heritage of ethics in order to misguide people. There are some mafias that strive to enjoy excessive richness and power even if at the cost of destroying the entire world. Ethics today are objects of mockery and deride and sheer means of pretexts and stratagems, whereas

corruption is an object of recognition and encouragement. This is so because ethics, as perceived by the advocates of the capitalist notion, tend to limit gain-seeking and innovation.

If in an ethic-based culture the norm in transactions is permissibility and people are free to practice whatever is permissible until a prove for its prohibition is established, perhaps the norm in the hegemonic civilizations of today is that people are to pursue whatever is lucidly forbidden, until a prove for its permissibility is established!.

Can prizes of contests be donated in charity?

If such contests are a matter of luck and gambling, in which participants pay the price for their participation (through telephonic calls) and still they may win or lose depending to a large extent on luck and to a meager extent on skill, and if loss is the most probable outcome, is it permissible, then, that the winner donates the prize to the poor and they accepts it?

It could be argued that: a chance will thus come to the poor (who will be granted the prize) to obtain money and meet their needs without being involved in gambling. Why should the poor be deprived from getting the money, while there are scholars who contend that the liability towards such prohibited gain does not shift with the transfer of the money from the hands of the original owner to a second party (the poor in this case)? The process seems to be quite like money laundering. If a worker, for instance, has provided a service to a rich person and it has been discovered afterwards that the wealth of the rich person had originated from impermissible sources, does it seem reasonable to deprive the worker from taking his pay or from working with that rich person?

Nonetheless, it can also be argued that the case here is similar to that of a woman who commits adultery in order to pay alms. Is it permissible for such a woman to practice paid adultery because she offers part of her pay or all of it as alms? For the woman, it is clear that the answer of this question is in the negative, because adultery is forbidden and so is the pay received for it. As regards those who receive the alms, they may also shun away from satisfying their needs from impermissible sources, especially when they become aware that this money has come from an impermissible source. “Allah (subhanahu wa taala) is pure and, therefore, He accepts only that which is pure”.

Alms do not justify adultery. However, when this woman commits adultery and then decides to pay alms, she can do so in order to get rid of the impermissible money; yet payment of alms in this case does not entitle her to any reward from Allah (subhanahu wa taala).

In the words of one poet:

A man has built a mosque out of ill-gotten gain

Praise to God that such a person solicits reward in vain

Like a slave bitch who feeds the poor from adultery gain

If only she from all that would refrain!

Chapter: VIII

Marketing Against Probable Commissions: Network and Pyramid Marketing Schemes

When you buy a product (a good or service) from an institution, you become at the same time a member of a marketing net so that if you succeed to bring at least nine customers you become entitled to a certain commission. Each customer will then make efforts to bring other customers and so on. The commission will increase into multiples with the increase of the number of customers. On this basis you may get a commission or you may not; and also the commission you may get can be big or small.

The following remarks can be made with regard to this process:

1. In this process, you cannot become a marketing middleperson unless you buy the product first. Normally, a middleperson is not supposed to purchase the product first. Hence, can we say that this process comes under ***"combining of two deals in one deal"*** and therefore it is forbidden?

2. Usually a middleperson is supposed to obtain commission for every customer. In our present case, the middleperson is entitled to no commission unless the number of customers he brings reaches nine, whereas the institution benefits from each customer who purchases the product. Why should the customer not benefit in the same way? Therefore, this process does not seem to be in conformity with the rules of *juaalah*, according to which the middleperson would benefit as long as the institution is benefiting.

3. Brokerage has to be subject either to the rules of *juaalah*, or to those of *ijarah*. If - as we have already seen - *juaalah* is not applicable here, does the deal conform to the rules of *ijarah*? The answer is no, because the pay (commission) in this case is neither paid immediately, nor is it going to be paid on a specific future date. Commission is payable only when nine customers are brought; when this will happen? God knows.

4. The gain that the middleperson may achieve can partly be attributed to his own effort and the time and money he spends. Nevertheless, he may also gain from the multiplication of the fee resulting from the efforts of the other customers who succeed him. Hence, how can this second part of his gain be permissible?

5. most probably, the customer would not purchase the product of the company because he needs it, but rather because he wants to benefit from the commissions which will increase at an exponential rate; similar to geometrical progression. The net result is that the institution becomes the biggest gainer along with a small group of customers who receive attractive commissions. As for the remaining vast majority, either nothing or only a small gain is available. This means that there is a gaining minority and a losing majority, and that the minority earns what the majority loses; which is gambling in the strict sense.

6. Every customer will encourage his relatives, neighbors, friends and fellows to join the network or pyramid marketing scheme. However, when one of these people wins a big commission and the others lose, dispute may arise among them and each of them claims that the other has misled him to this predicament.

7. Do the products of the company worth their prices; or they can be available elsewhere at less prices, or even free of charge?

8. Are the products of the company real products, or nothing more than tricks? The company could be aiming at using such products for practicing gambling under the veil of trading; just like the case when gambling is practiced nowadays under the veil of telephone contests and the likes; or when *riba* is practiced under the veil of sale. All that is done for the sake of extorting money from people, especially the poor youth who dream of making a quick fortune; and soon their dreams change into nightmares.

Chapter: IX

Sales Quotas

Two institutions may agree that the first sells to the second a largely demanded commodity at a price of SR 10 so that the second company can sell it to the consumer at SR 8 (market price), provided that when the second company purchases monthly a specific quantity of the commodity and pays all its commitments, it will be given a price discount to buy the commodity at SR 5 (which is an attractive price). The selling institution arranges this scheme of marketing at three different levels including: the diamond level as the highest level followed by the medium golden level and then the lowest silver level. The purchased quantity as well as the price discount increase subject to these three levels. Is this scheme of marketing permissible?

1. First of all, it seems that there is something unusual in this process. The normal thing is that the institution purchases the commodity at SR 5 and sells it at SR 8, for instance. How can an institution purchase a commodity for SR 10 and sell it for SR 8?

In view of the method of pricing adopted by the selling company, it seems that it intends to grant discount to the purchasing company when the latter pays its commitment on time. Normally discount is granted for premature repayment; so how can such discount be interpreted?

The interpretation of this discount is that the selling institution wants to take precautionary measures against default, and therefore it sets its sale price above market price in order to collect default charges in advance. In case the purchasing institution settles its commitments on time, the advance default charges will be reimbursed to it in the form of price discount.

2. In this process of contracting the purchasing institution enters into the contract on the basis of taking the commitment to market a certain quantity of the commodity. In effect, such arrangement is useful to the selling company, while it is harmful to the purchasing company, because a trader cannot make sure whether he can dispose of a certain quantity of a commodity during a specific period or not. The world of trade is based on supposition and uncertainty.

According to Al-Iz Ibn Abd Al-Salam ***"so are people in the world, they act on the basis of favorable supposition; because suppositions usually materialize when underlying causes are there. merchants travel on presumption that they will gain from the business activities they will perform; peasants plow and cultivate the land because they expect to obtain yield; scientists get involved in sciences because they think that they will excel in that field; diligent jurists who perform rigorous research to verify rulings are motivated by their hope for achieving success; and sick people pursue medication in expectation of healing.***

most of these suppositions are genuine and relevant and not at all dissenting and false. It is, therefore, unacceptable to incapacitate all these probable interests for mere fear from the very remote chances of failure. Indeed, only ignorant people can do that"[(1)]**.**

Hence, we can see from this text that trade is not based on certainty and guarantee, but rather on supposition and uncertainty, as it is also well-known in conventional economics.

In our present case we can see that the selling company is shifting the commercial risk to the purchasing company. The issue seems to be that the purchaser speculates on a certain quantity to be marketed within a specific period in the future. In effect, this sounds like betting or gambling.

3. It is clear that if the purchasing company is to sell for SR 8 a commodity which it has purchased for SR 10, it will incur a loss that cannot be recovered unless the purchasing company settles all its commitments and obtain discount from the selling company. This means that the profits of the purchasing company are to be retained with the selling company until settlement of commitments and granting of discount.

4. The agreement seems to be counting on the optimistic side of the deal and totally ignores the pessimistic side. How settlement is going to take place and at what price, if the purchasing company fails to market the quantity agreed upon? Apparently the price of settlement will be SR 10 and the purchasing company will be indebted to the selling company because of this high price! This means that the selling company has succeeded to convert its goods, which should have remained under its own risk, into guaranteed debts that the purchasing company owes to it; and that the value of the debts is higher than the value of the goods.

(1) Ibn Abd Al-Salamugharasah, *Al-Qawa'id Al-Kubra*, (1/6 – 7).

5. As a matter of encouragement and warming up and as an attempt for risk shifting also, the marketing manager of the selling company may offer to enter as a partner with the purchasing company in the offers it receives from the selling company. Here, a question could be posed: How can the marketing manager do this while he is assuming a fulltime job with the selling company? He may pretend to be intending to quit his job with the selling company shortly. Or perhaps the fact is that he does so in collusion with the selling company; especially that he is the one who designs its marketing schemes.

6. It is also probable that the relationship between the selling company and its marketing manager is based on the sales quotas' system which is a well known marketing system. This could be done with the aim of sales maximization through motivating the marketing manager and enhancing controls on his performance. A sales quota is a specific volume of sales that the marketing manager is asked to sell. In that case the marketing manager may wish to transfer such quota to the purchasing company. He may also see no harm in entering as a partner with the purchasing company in this quota, in order to mitigate the risk at his own side; as far as possible. Thus, it can be noticed here that the risk shifts from the selling company to the marketing manager, and then from the latter to the purchasing company.

7. What seems to be natural in this context is that the two institutions agree on a specific lump sum or percentage discount to which the selling company shall become entitled when sales reach a certain volume (quantity discount).

As regards pricing, it should have also been founded on normal basis so that if the purchasing company settles its commitments before maturity, the selling company grants it a lump sum or percentage discount as an early settlement rebate. Both discounts - quantity discount and early settlement rebate - are permissible. This proposed method can serve as a good substitute for the sales quotas' method.

Chapter: X
Time-Share

Definition

This transaction is based on purchase of a unit (a suite, a room, a flat or a beach cabin) or the right of benefiting from such unit, for a specific period (share) of time such as a week or its multiples, every year, during the years agreed upon.

Price differs according to time of the year (high during peak seasons and low during other seasons). Also price can be paid in advance or in installments (monthly, yearly…*etc*); and installments can be collected before enabling the purchaser to make use of the property. Ownership or the unit or the right of using it can be purchased from the owner of the resort facility or his marketing agent.

The purchaser has the right to dispose of his right of ownership or right of benefiting; through lending, granting, leasing, selling or bequeathing. He has also the right to exchange his right of benefiting from a certain unit - against a fee - for the right of benefiting from another unit; whether such exchange is in the same facility or two different facilities; and whether the two facilities are located in the same country or in two different countries. This is done through the system of exchange of holidays and leaves which constitutes a complementary system for time-share arrangements; and is performed by specialized international companies that are provide service coverage for more than 80 countries around the world and cover more than 3000 hotels and resort areas.

Similar to exchange of units, exchange among beneficiaries is also possible. That is to say exchange of the times of benefiting from the units.

Time-share transactions are performed by foreign companies through a network of local agents all over the world. Among the major companies engaged in this business are: Hilton, marriott and World Disney.

In the Kingdom of Saudi Arabia the company engaged in such business must own the land of the resort facility or hold it by virtue of a

long-term lease contract, for not less than 40 years; or for not less than the period during which purchasers are entitled to benefiting from the facility. moreover, the resort facility should be a member of one of the international institutions specializing in this business.

Name

The term "timeshare" indicates that the purchasers have shares in the unit or its benefit. They exercise their rights of benefiting in successive turns within the time available for benefiting from the same facility.

It should be noted here that time in this context should not be taken to mean "absolute time", because selling of time per se is impermissible. What is meant is time of benefiting from the common unit; or you may say time-wise sharing of the process of benefiting.

History

This type of transactions started for the first time in France or may be in Switzerland in the tourist resorts of the Alp mountains in 1963. In 1969 it managed to spread out in America, Europe and a number of other countries. However, it was not until 1986 when the transaction came to be known in Egypt. Currently, time-share transactions are spreading in almost all Arab and Islamic countries.

Time-share as an Integrated System

Time-share as a transaction usually takes an international form, and is protected by supporting institutions among which are: The American Resort and Residential Development Association (ARRDA), the Time-share Council of Britain, specialized tourism companies, and international companies specializing in the field of leave exchange transactions such as Resort Condominiums International (RCI) and Interval International (II). Leave exchange system facilitates more flexibility in time-share transactions and makes them more attractive, because the beneficiary may not like to spend all his leave in the same resort or during the same time every year.

Advantages

Among the advantages of time-share transactions are the following:

- Activating the tourism sector (throughout the year) including: hotels, furnished apartments, villas, resorts, touristic compounds and villages, and all other accommodation facilities.
- Distributing tourists over the different seasons of the year and thus mitigating pressure during the peak season. This will consequently lessen excessive use of tourism infrastructural facilities and reduce environmental pollution.
- Increasing investment and ownership opportunities for national and foreign investors.
- During periods of high price rise in the tourism sector, time-share enables those who want to keep their units for their own use to avoid incurring high costs for having touristic services, while it generates high income for those who opt for commercial utilization of their units.
- Creation of job opportunities and enhancement of the operational level in the transport as well other services sectors.
- Relieving tourists from the inconvenience of acquiring their own residential units in resort areas and bearing all the cost and management complexities associated with such ownership. If tourists were to have their own units, they would have been obliged to freeze their funds in the form of facilities that remain vacant for most of time the year, and bear the costs of maintenance and taxation pertaining to such facilities. Therefore, time-share provides a less costly form of ownership for those who want to acquire touristic facilities and renders a chance for cost saving and further improvement in the quality of touristic services
- Offering middle income groups a chance to enjoy tourism because the costs of construction, furnishing, maintenance, guarding, insurance and taxes are distributed among a number of people rather than being borne by a single person.
- Enabling tourism companies to collect big funds in advance; even from middle-income groups.

- Rendering a chance for beneficiaries who aim at exploiting (investing) their shares instead of retaining them for their personal use.

Classification

A question could be posed as to whether time-share is a sale, leasing, partnership or *muhaya'ah* (adaptation) transaction?

Time-share is a sale transaction in so far as it involves a benefit being sold to a beneficiary. It can also be considered as *ijarah* since *Ijarah* is nothing but a process of selling of benefits. Some companies have actually subjected time-share to the rules of *ijarah*. Time-share also constitutes a form of partnership, which can be either in the asset or the benefit (subject to the case in question). When time-share beneficiaries own the asset, the process is considered as capital-based partnership; and when they own the benefit it is considered as benefit-based partnership. Finally, time-share comprises an aspect of *muhaya'ah* manifested in the process of sequencing the chances of benefiting from the same facility within the available time span.

muhaya'ah refers to the process of dividing the benefits of a real estate property between the concerned parties, either space-wise so that each party can use one division; or time-wise to enable each party to benefit from the property during a specific period. The space or period of time allotted for each party is commensurate with his share in the asset. Partners resort to *muhaya'ah* in general when the property in question is indivisible or when they do not want the property to be divided. Time-based *muhaya'ah* becomes necessary when the property in question cannot be subjected to space-based *muhaya'ah* because of the small space available or when the partners do not accept space-based *muhaya'ah*.

The process is called *muhaya'ah* because each partner benefits from the property in the same manner his counter-partner does.

Therefore time-share can be considered as a form of time-based *muhaya'ah*; and this very fact constitutes the *Fiqhi* or legal basis for this transaction. The partner has no right to demand division (separation division) of the asset, because such division would lead to annulment of the time-share contract, which is basically founded on continuity of joint ownership.

Is time-share system permissible?

1. The touristic unit in question could be an existent asset (fungible or non-fungible); or a specifically defined unit that has to be made available in the future. If the touristic unit is an existent non-fungible asset then there is no problem, since it can be seen and inspected without *jahalah* or *Gharar*. Also, if the unit is an existent fungible asset, there will be no problem, because fungible assets can replace each other. When the unit is a specifically defined asset that has to be delivered in the future time-share can be treated subject to the rules applicable to *salam* in real estate properties. If the deal is considered as *salam* in real estate property, it becomes impermissible when the unit in question is a non-fungible asset; and permissible when it is a fungible asset that can be precisely described in order to leave no room for dispute that arises from *jahalah* and *Gharar*.

2. Under time-share system management is assigned to the owner company or the management company; while beneficiaries – in spite of being partners – have no right to intervene in or object to managerial decisions. This seems quite similar to *Mudharabah* (*qirad*) where the capital providing party (*rab al-mal*) does not intervene in the management process, which is to be totally undertaken by the *mudarib* (the manager).

3. The price or the rent can be paid in advance or postponed. However, Islamic jurists indicate that in a sale contract only one of the two exchanged objects can be postponed. If the price is postponed the contract is sale on credit; whereas if the commodity is postponed the contract is *salam*. As regards *ijarah*, the rent can be paid in advance or postponed, so as to be paid either as a lump sum or in specific number of installments. Hence there is no problem as far as the price or rent is concerned.

4. The period should be known. Islamic jurists are of the view that *ijarah* should preferably be for a short period. Long-term *ijarah* which could be for 50 or 80 years in our present case makes it difficult to specify the prevailing market rate and stick to it for such long period, because rent may go up and down leaving the door wide open for dispute.

5. If, however, the deal is considered as capital-based or benefit-based partnership, long term contracting becomes more suitable than in the case of *ijarah*. Time-share will, thus, become a process of capital-based or benefit-based partnership in which income shares are received in terms of using or exploiting the asset; against sharing the expenses (maintenance, water, electricity, guarding, cleaning, gardens, swimming pools, insurance, management, taxes, fees and depreciation).

6. It is impermissible to agree that the period is the whole lifetime of the beneficiary. Islamic jurists unanimously agree that specification of such period is impermissible in compensatory contracts because of *jahalah*, while it could be permissible in donation contracts (*umra* for instance).

7. A beneficiary does not have the exclusive right of benefiting from the asset, because beneficiaries change successively every week, or every one or two weeks. If two weeks out of the 52 weeks of the year are reserved for maintenance, there will remain 50 weeks for the beneficiaries. Assuming that every beneficiary purchases a period of one week, there will be 50 partners in the unit.

Tourism companies endeavor to protect the units against misuse or transgression through charging the costs of any damage stemming from such acts to the beneficiary. Tourism companies also conduct maintenance and renovation works so as to meet the standard specifications of touristic facilities.

8. Exchange between one beneficiary and another; or one unit and another; or one year and another should be based on symmetry of vale. It may not be possible to base such exchange on the form of the two exchanged units because the values of two units of identical forms might differ subject to the country where each unit is located and the time when the unit is used. There are high (red) seasons, medium (white) seasons and low (blue) seasons.

It should be noted here that a problem would arise if the company fails to enable the beneficiary to make use of his unit during a specific year, and therefore decides to give him a compensatory period sometime in the future. The problem is that from the *Fiqhi* as well as economic

point of view, the future period worth less in terms of benefiting than a present period of the same length.

9. Some companies stipulate a condition that in case of default on the part of the beneficiary in payment of installments, the company should have the right to terminate the contract without granting the beneficiary the right of claiming refund of the installments he paid, or any other compensation.

Such condition seems to involve cheating due to lack of balance between the paid portion of the price, and the benefit obtained. If such condition is introduced as a penalty clause it would also involve *jahalah* (ignorance) or abuse. *Jahalah* in this case stems from lack of conformity between price and commodity, whereas abuse arises from the probability that the company as the strong party may try to exercise arbitrary control over the beneficiary as the week party.

In conclusion: If the beneficiaries are partners in the asst, (that is to say if they own the proprietary right), time-share is subject to the rulings on contractual partnership (which includes proprietary as well as benefits partnership). If the beneficiaries own only the right of benefit, time-share can be subjected to the rulings on *ijarah*.

Whatever the case may be, I believe that this transaction is permissible in principle, although there could be some differences of opinion regarding some of the details and conditions it entails. Time-share is very close to time-based *muhaya'ah* which is a well known concept in Islamic jurisprudence, and therefore it can be considered as one of the modern forms of this type of *muhaya'ah*.

Chapter: XI
Money Laundering

Money laundering (which is also referred to as money whitening or money cleaning) refers to investment or utilization of dirty money that has been earned through unlawful means or is trying to escape taxation, in lawful or charitable activities so as to conceal its illegal sources and avoid prosecution(1). Such money tries to seek shelter in banks like those of the Bahamas Islands as well as the banks in America and Italy, and make use of the principle of confidentiality of bank accounts' information.

Dirty money originates from corruption, forgery, embezzlement, bribe, theft, robbery, misuse of influence, dealing in drugs, smuggling, escaping away with unguaranteed bank loans, trading in perished goods, and so many other economic crimes.

Among the factors that facilitate money laundering are opening of borders, removal of barriers for globalization of trade, widespread of modern communication devices, rapid growth of the hidden economy, pressures groups and mafia gangs; in addition to collusion among politicians, businessmen and scholars including some *Shari'ah* and *Fiqh* specialists.

Added to all the preceding factors are factors like the astounding greed of some people for money and their unruly desire to make gains even if at the cost of conscience. Such mal attitudes are further aggravated by the far-reaching diffusion of materialistic culture and the prevailing fragility of religious commitment which some misleadingly believe to be confined to a few acts of worship that entails no cost or effort.

money laundering practices have adverse economic and social impacts, among which is exhaustion of the economy of one country and reducing its national income to the benefit of the economy of another country. money laundering leads to flight of savings, because instead of being invested in the same country savings are smuggled out of the

(1) Abdul Khaliq: *Al-Aathar Al-Iqtisadiyah*, p. 3.

country so as to be deposited in secret accounts with foreign banks, or used for purchase of shares, bonds, financial derivatives, gold, currencies, precious metals, antiques, jewelries, durable goods, private jets, real estate properties, and weapons; or donated to mosques, schools, scientific centers, institutes and universities.

moreover, money laundering leads to more unemployment and mal-distribution of income and wealth, because it shifts income and wealth away from productive and deserving groups to other groups. It also induces extravagance and luxurious spending on the one side, and deprivation and hardship on the other; besides its role in increasing wasteful consumption, inflationary tendencies, and increasing external debt burdens. In addition to all that, money laundering constitutes one of the major factors behind breach of national security. The mafia groups involved in such practices have always been trying to defend themselves through use of weapons, forming of violence gangs, and commitment of terrorist attacks and organized crimes.

In *Shari'ah*, one is not allowed to make use of unlawful earnings. Unlawful earnings should immediately be returned to their original owners once they are known; otherwise such earnings should be donated to charitable purposes, while the offenders must shun away from making any further gains of this kind.

If a person is known for earning such forbidden income and insisting on that, it is impermissible to accept his donations to charitable purposes such as teaching of the *Qur'an*, building of mosques, and other charitable purposes; because accepting donations for such purposes would mean provision of support and harboring to those who indulge into malpractices.

Chapter: XII
Electronic Commerce

Electronic commerce is the process of buying and selling of products and services through electronic systems such as the internet and other computer networks. Its basic requirements include pc hardware and software, a network and a website. The pc hardware facilitates data entry, processing, presentation and retrieval; the network facilitates exchange of information; the software provides the means for settlement of mutual commitments; and the website is the place where the products and services are displayed in a way that reveals their content and merits.

Electronic commerce, which is now spreading out rapidly, has its own merits and shortcomings.

Among the advantages of electronic commerce are: adaptation to the new era of advancement in technology and information, easy access to international markets, and achievement of ease and speed in the field of commercial activities.

In the United States of America the leading role in the area of electronic commerce is assigned to the private sector. The role of the government is confined to ensuring the removal of tax and non-tax barriers and restrictions; protection of intellectual rights; preservation of privacy; fast resolution of disputes; provision of adequate legislations for authenticity of electronic signatures; and formation of the criteria for acceptance of such signatures in establishment of legal evidences.

One of the characteristics of electronic contracting is that it is a process of distance contracting between two parties who are not present in the same place or (perhaps) in the same country. This very fact would induce one to enquire about the law that would govern the transaction, and the court that would be resorted to in case of dispute between two parties of different nationalities.

Further questions can also be posed with regard to the degree of authenticity of electronic correspondences and contracts in establishment of legal evidence. How can the validity of electronic purchase orders be

verified, especially under the growing phenomenon of site penetration and widespread practices of information fraud, deception, forgery and all other crimes relating to computer and internet? How can copyright and innovation rights be protected? Innovations usually precede laws and regulations, and therefore acute need arises for the accompanying legislation that would facilitate protection and encouragement of new innovations.

However, there is no doubt that the success of electronic commerce in forming up a solid base for its operational customs and traditions would boost the process of a parallel response to its growing legislative needs.

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