Islamic Finance

And its modern applications

(V.01)

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بسم الله الرحمن الرحيم

In The Name of Allah, The Most Gracious, The Merciful

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ لَا تَأۡكُلُوٓاْ أَمۡوَٰلَكُم بَيۡنَكُم بِٱلۡبَٰطِلِ إِلَّآ أَن تَكُونَ تِجَٰرَةً عَن تَرَاضٖ مِّنكُمۡ

O believers! Do not devour one another's wealth illegally, but rather trade by mutual consent. And do not kill ˹each other or˺ yourselves. Surely Allah is ever Merciful to you. (Nisa: 4:29)

The book is dedicated to-

My respected mentor and Professor Dr. Kabir Hasan sir. May Allah give him a long life with good health.

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Author's Preface

بسم الله الرحمن الرحيم

I am grateful to Almighty Allah SWT for giving me a chance to prepare this booklet in such a short time. The book will be useful for students of Islamic finance, inshallah. It discusses some important contracts in Islamic Finance or Fiqhul Muamalat. Islamic finance is one of my subjects of study and engagement. Therefore, I have not stopped here only with the introductory discussion but also discussed the modern application as briefly as possible.

I am thankful to Prof. Kabir Hasan sir. He reviewed the book. The book was originally scheduled to be unveiled at the first International Conference on Islamic Finance to be held in North America. It is written for this purpose. I am invited as a guest speaker there. The conference will be held on October 20-21, 2023, inshallah.

May Allah accept the Holy Book. Make it useful. IFA Consultancy Ltd. is going to publish the book. Its research team has been very helpful. I am grateful to all of them.

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Before entering the book

What do we need to know about the Islamic economic contract and its modern application?

1. The first thing to note is that the Shariah analysis of any financial transaction depends on the significance of the underlying contract. According to the agreement, its Shariah infrastructure is built. Its validity and invalidity are then proved according to the analysis of the Shariah structure of the contract. Hence, acquiring a comprehensive understanding of financial contracts in Islam holds great importance when analyzing the Shari'ah aspects of a transaction.

2. When you're faced with a question about whether a company or an individual's transaction is permissible or not, it's important to recognize that the person asking may not provide you with the original Shariah agreement for that transaction, possibly because they're unaware of it. They often leave out some details of the situation. For instance, you might be asked if someone instructed another person to buy a specific plot of land on their behalf. However, the person who bought the land did so for their own benefit, not on behalf of the other person. Is this considered permissible or not?

In order to answer this question according to Shari'ah law - a Shari'ah advisor must think first - what is the underlying contract in the above transaction?

Here, that contract is a wakalah, or representative contract. Then you have to think that, in such a contract, the representative or agent can buy it for himself without buying it for the employer or the client.

In this way, if you want to know the Shariah provisions of every financial transaction, you must have a good understanding of Islamic financial contracts.

3. There are various types of financial contracts in Islamic finance. Certain contracts are of ancient origin, while others have been established in modern times. Basically, Contract is formed from society and customs. It has no specific number. Various types of contracts came into existence over time.

Shaikh Jaraka Rah. Written by:

العقود جميعاً إنما عرف البشر أنواعها وتعارفوها بالتعامل تباعاً بحسب الحاجات المتجددة.

"People are aware of all contracts and their types based on the customs and practices of society according to their ever-new needs". (Kitabu Aqdil Bai, P. 8)

However, since the basic principles of Shariah are immutable, it is possible to determine the Shariah provisions of those new contracts in light of this.

What topics have been discussed in this book?

Basically, there are countless financial contracts in Islamic finance. Of these, 15 ancient, recognized contracts are mentioned in

Majallatu Ahkamil Adliyyah. But currently, my research indicates that there are over 80 contracts in modern Islamic finance. With the blessings of Allah, I have completed my work, initially penned in my mother tongue, Bengali. From there, I have compiled it into English, resulting in this book. The book delves into fundamental topics such as:

Introduction to contracts, Ijab, Qabul, Ikalah contract, Murabaha, Salam, Istisna, etc.

InshAllah, the series of books will be published with the rest of the contracts.

An introduction to a contract (Aqad)

At the beginning:

At the core of any financial transaction is a contract, or Aqad. The word Aqd' (عَقْد) is used to mean contract in English. It is originally derived from the Latin word contract. According to the Oxford Advanced Learner's Dictionary, it means an official written agreement (institutionally written contract).

DK Illustrated Oxford Dictionary defines it as:A written or spoken agreement intended to be legally binding (a legal written or oral agreement or promise). [1]

In Arabic, the word 'Aqd' (عَقْد) is used to mean 'agreement'. To express the original meaning of this word, the ancient Arabic linguist Allama Ibnu Faris Rahimahullah (died 395 Hijri) wrote:

أصل#واحد#يدل#على#شَد#وشِدة#وثوق#وإليه#ترجع#فروع#الباب#كلها#

The word 'Aqd' basically means something firm, strong, and reliable. [2]

Shykh Mustafa Jarka Rahimahullah (died: 1420 Hijri) wrote—

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[1] There is another English word close to it, “Deed”, which means a legal document that you sign, especially one that proves that you won a house (Oxford Advanced Learner's Dictionary). Generally, 'deed' refers to a document. And 'contract' means agreement or contract. It can be written or verbal.

[2] Makayisul Lugah, Page 587.

العقد في أصل اللغة الربط وهو جمع طرفي حبلين ونحوهما وشد أحدهما بالآخر حتى يتصل فيصبح كقطعة واحدة

Literally, 'Aqd' is the name of a bond. And the nature of this bond is to tie the two ends of two ropes or rope-like things together and tie one to the other or fasten one to the other so that the two become one.[3]

Shaykh Wahba Zuhayli Rahimahullah (died: 1436 Hijri) wrote the meaning—

العقد في لغة العرب معناه الربط أو الإحكام والإبرام بين أطراف الشيء سواء أكان ربطاً حسياً أم معنوياً من جانب واحد أم من جانبين

In Arabic, the term 'عَقْد' (Aqd) refers to a connection or strong bond between multiple parts of an entity. This connection can be physical, like the threads of a rope, or it can be non-physical, such as a marital contract. Furthermore, this connection can exist between two or more parties, or it can exist within a single entity. For example, you may decide to do something on your own and commit to it, or it may also occur unilaterally, like when you make a personal decision. [4]

[3] Al-Madkhal Fiqhil Am, Volume: 1, Page: 291. Maddah: 2/27
[4] Al-Fiqhul Islami Wa'adillatuhu, page 2917.

The essence of the contract

At the heart of the contract lies the will and satisfaction of both parties. This satisfaction is an internal matter. It is expressed through words. Shaykh Jarqa Rahimahullah (died 1420 Hijri) wrote very well.

الأصل في معنى العقد اتفاق الإرادتين أي التراضي وليست الألفاظ إلا ترجمة عنهما.

The basic meaning of Aqd is the unity of the will and satisfaction of the two parties. That desire is only expressed through words. [5]

Akad or contract in fiqh terms

In Fiqh terms, 'Aqd' means—

محله في أثره يثبت مشروع وجه على بقبول إيجاب ارتباط

"Through the process of 'Ijab-Kabul,' a strong bond or connection is established between both parties in a Shariah-compliant manner, in cases where its benefits can be realized." [6]

In simpler terms, a 'contract' is essentially a form of agreement. However, since agreements are matters of personal intention, they are expressed through the process of 'Ijab-Kabul.' Through 'Ijab-

[5] Al-Madkhal Fiqhil Am, Volume: 1, Page: 318.
[6] Al-Fiqhul Islami wa Adillatuhu, Preface, Al-Madkhal Fiqhil Am, Section 3/27.

Kabul,' a connection is formed between the buyer and the seller, and both parties benefit from it. This means that ownership of the product is transferred to the buyer, while on the other hand, the seller gains the right to the price.This happens in all bilateral contracts, including marriage and business.

Definition review

The term 'Strong bond' means that there must be a voluntary and conscious agreement. So, if someone says in a drowsy state, "I sold you this mobile phone for 200$," and someone else, fully awake, hands over the mentioned amount and takes the mobile phone, it will not be considered a contract. This is because in this situation, there was no 'Ijab-Kabul' to create a strong bond.

Moreover, by 'firm bond' it is also intended to imply that legal obligations will be created thereby. Legal liability and rights will be created, and due to non-payment of goods or prices, recourse may be made to the law.

'Between two parties"—it is a well-known rule that any valid contract requires two parties. Because the demand of the contract is to establish the rights of the buyer and the seller, respectively, on the product and its value.

In a 'Shariah-compliant manner': After confirming the above points, the process and content of the contract should be checked to see if it is Shariah-compliant or not. So if a contract is made for the sale of goods that have not been acquired, it will be treated as a general contract. However, since the process and content are not Shariah-

compliant, it will not produce Shariah-prescribed results. That is, no right shall be established over the goods or value; rather, the contract shall be deemed to be a void contract. The same applies to making an agreement to kill someone. Because here also, the content of the contract is not allowed by Shariah.

Aqd: an in-depth analysis

In addition to the identity of 'Aqd' (contract) that we are familiar with, there is also a broader connotation beyond it. Some Islamic jurists have delved into this concept in more detail. According to them, 'Aqd' or contract essentially represents a specific human intention or behavior. From the perspective of jurisprudence, this human intention is referred to as ‘Tasarruf’, which signifies voluntary conduct or actions of a person. It can be categorized into two types:

1. **Behavioral Tasarruf or Conduct:**Aqd In this type of Tasarruf, the action itself is primary and essential. There is no need for 'Ijab-Kabul' here, for example, drawing water from a river, harvesting, and so on.

2. **Speech-Related Tasarruf:** This can be divided into two categories—

a. When the characteristics and specifics of a contract are present within the speech: In this case, 'Ijab-Kabul' is not required.

b. When the characteristics and specifics of a contract are not present within the speech: In this type of Tasarruf, it can further be divided into two subcategories.

A. The term ‘Aqd’ will be understood in a comprehensive sense. When a person voluntarily imposes a Shariah obligation upon himself through a welcoming statement, such contracts fall under this category. It is one sided. Such as freeing a slave, giving divorce without exchange of wealth, making waqf, gifting etc. In terminology it is also called 'Iltijame Sharia' (Sharia Obligations).

b. Aqad shall specifically mean an agreement entered into between two parties, which is concluded by acceptance. From a practical point of view it is called 'Aqd' or 'Agreement'.

And if the speech-containing Tasarruf does not have the character or characteristics of Aqd, then it will be considered as a promise or a promise. For example, say, in response to someone's invitation, "Okay, I accept your invitation."[7]

So we have three terms in total here:

One. tasarruf,
Two. Iltijam,
Three. Akad

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[7] Ahkamu Muamalatish Shariah, Shaykh Ali Al Khafif Rahimahullah, page : 186, Al-Fiqhul Islami wa Adillatuhu, page : 2917, Mawsuah Fiqhiyah Quwatiyah, Volume : 30, page : 198, Al-Madkhal Fiqhil Am, Volume : 1, page : 288 .

Terminology: Of the three, Tasarruf is the most widespread, followed by Iltiyam and Aqd. Every aqd is a tasarruf, but not every tasarruf is an aqd.
According to Allama Alusi Rahimahullah, in the following verse of the Holy Quran, 'Aqd' or 'Agreement' may have a wider meaning[8]—

أوفوا بالعقود

('Fulfill the covenants you made.' (Surah Ma'idah, verse: 01)

But here we are talking about the specific Aqd above, not this comprehensive Aqd.

Features of the contract

A financial contract in Islamic economics has five basic characteristics. They are-

- mutual consent, which will be expressed through an offer and acceptance.

- Legal basis of the contract
-Shari'a legality of the content of the contract
-Obligation to unilaterally not withdraw from the contract after completion
-ensuring that proper rights are established in the thing to be exchanged through the contract. For example, when a contract is concluded with respect to a product, the buyer will have certain rights before taking possession of the product.

[8] Tafsir-E-Ruhul Mauni, 7/48.

Creation of certain rights with acceptance and acceptance

As the goods are offered and accepted, certain rights are created, which are as follows:

-The product becomes specific. For example, when a contract is concluded in respect of a particular model of car, the buyer establishes a kind of ownership and authority over it, even if it is not taken over. Therefore, if the seller sells it elsewhere, the buyer has the right to take legal action against the seller and get it from the second buyer. Not only that, if the second buyer destroys it, the first buyer can also impose a penalty on the second buyer through the seller in a legal process.[9]

-The buyer can bring the goods even if the seller has deposited them. However, he can also cancel the contract if he wants.

-If the goods are land or immovable property, the buyer may sell them after payment of the price or before payment of the price with the consent of the seller, but cannot pay rent.

-The buyer can donate the land before taking possession of it, even without paying the price, if the seller approves.

- If the goods are immovable, then the sale and lease are not valid even before the sale, but donations, gifts, loans, and mortgages are all valid.

[9] Sharhul Majalla, Volume: 2, Pages 91-92

So it appears that Islamic law creates several rights for the buyer over the seller and the goods sold before the acquisition. Needless to say, these rights create a balance.The buyer's rights are divided into different levels to ensure their protection. For example, when paying for a product, the extent of rights created is not the same as when the payment is not yet made. Similarly, the rights over tangible assets are not the same as those over intangible assets, as the value of intangible assets cannot be precisely determined. Islamic law has thus ensured various levels of protection for the buyer's rights, which are absent in our conventional laws.

Pillar of the Agreement

The fundamental or essential component of any object is called its pillar or foundation. For example, Islam has five pillars, which are the foundational principles of Islam. Similarly, the foundation of a building is its pillar. However, it's important to remember that for almost everything, there is a need for additional components or means to come into existence. For instance, purification (Wudu) is necessary for prayer, a roof and walls are required for a building. Similarly, there are special pillars for a contract.

According to the Hanafi jurists, the *Rukon* of everything is its root. And all that is needed to express *Rukon* is the condition. As the root of the human body is *Ruh*, it is *Rukon*. But it needs a body to express it, so the body is the condition.

The jurists of other madhhabs differed on this matter. According to them, just as the soul is a pillar, likewise, for the manifestation of

the existence of the soul, certain things are also included within the pillar. As such, there are three *Rukons* to the contract:

A. Parties to the Agreement
b. product and price
c. Ijab-Qabul.

That is, they did not separate the condition from the *Ruqan*.

However, this is just a terminological difference. In practice, this has no particular consequence.

Hanafi jurists, on the other hand, say that the root or *rokon* of aqad is the expression through which both parties express their consent—in word or deed. In Arabic, it is called *Ijab-Qabul*. These two are the basic rules of the contract. Besides, the other elements of the contract—such as goods and price and buyer and seller—are not rokon but necessary conditions for the execution of the contract.

In essence, there are five main elements of a contract in Islamic economics. Namely:

1. Ijab (offer).
2. Acceptance.
3. Contracting Parties
4. Characteristics of the Subject Matter
5. Objectives of the Contract

Each is discussed in detail below

Offer and Acceptance (Ijab-Qabul)

These two are called the expression of the contract, through which both parties communicate their consent or satisfaction either verbally or through their conduct. In English, they are referred to as "The Form of Contract." Both of these are the fundamental pillars or elements of a contract. Both of these are the main elements of the agreement.[10] Details are coming soon, in sha Allah.

Parties to the Agreement

There must be two parties to any contract. The two parties in the contract of sale are the buyer and the seller. Those who would be buyers and sellers should possess the following qualities and characteristics:

1. The offeror and offeree must be separate parties.

One of the main conditions for a financial contract to be valid is that both parties have entered into an agreement. Therefore, one party or the same person cannot perform the two main functions of the contract, i.e., acceptance and rejection. Because it makes conflicts of interest inevitable. An example will make it easier to understand. Suppose Raihan appoints Umar as a representative to sell one of his watches. But by chance, Umar liked the watch, and as usual, he decided to buy it. But as Raihan's sales representative, he cannot become his buyer again.[11] Because here the same person is the

[10] Al-Madkhal Fiqhil Am, Volume: 1, Page: 318

[11] There are some exceptions to this condition. For example, a father can purchase the property of his minor child for himself. (Mufti Taqi Usmani,

seller-representative from the owner's side, and he himself is the original buyer. As a result, the conflict of interests between the buyer and the seller is becoming inevitable around the same person. That is why it is important to separate the two parties in the purchase and sale agreement.

2. Competence of contracting parties

It is called capacity to contract. Capacity in Islamic law refers to two things:

A. Having a healthy brain
b. be sensible

Therefore, a contract made by an immature child is considered void. The same applies even in the case of a mentally challenged individual. Being of sound mind and being a Muslim are not conditions for the validity of a contract.

Sensible child (*Sabi-Al-Momayej*)

A "sensible child" in the context of a transaction refers to a child who is of minimum age or understanding, capable of grasping their own gain or loss to some extent in the given situation. For instance, selling implies giving up something without receiving anything in return, while buying implies ownership of something. Some people

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Fiqhul Buyu, page : 183) Sheikh Mustafa Jarka Rah. He mentioned three such exceptions. Namely-a. Judge/Qazi on his duty to sell property of one orphan to another orphan. b. Executor appointed by father to sell any of his assets to orphans. c. A father sells any of his assets to his young, ignorant son. (Kitabu Aqdil Bai, p.28)

have also associated this with the concept of being able to comprehend profit or loss, distinguishing between what is a "grave deception" and what is not.[12]

In simpler terms, the ability to understand the profit-loss scenario in a substantial transaction distinguishes whether one is eligible to enter into a contract. This is what we refer to as a "sensible child." In contrast, if someone lacks this understanding, they would be considered like a "foolish" or "insensible child" who is not eligible for a contract. In plain language, a "sensitive child" has the capability for contract eligibility, while an "insensible child" does not. This aligns with the opinion of some minority jurists, making it clear that we are not discussing "insensible children" in our conversation.

Two conditions of san child

A sane child will have two conditions. namely-

A. sane child's guardian will allow him to be sold. If so, anyone can do business with him. That transaction will be executed.

This authorization may be explicit. May be by hints and signs too. For example, a parent watches his or her child transact. But did not stop. Then this will also be considered approval. However, it should be noted that the sane children do their own work independently. Not as a representative or service on behalf of the parent. If so, it

[12] Fiqhul Buyu, page: 151

will not be considered as the child's own work. rather be considered the work of the guardian.[13]

Even if this approval is granted, it will not be tasarruf in any harmful matter. Such as giving loans, giving gifts, selling at high losses (Gabane Fahish) etc.[36]

B. Absence of consent from parent of Sensible child. In such case, the transactions made by him shall be subject to the approval of his guardian. Needless to say, this is when the sane child will make up his own mind. On the other hand, if acting on behalf of the guardian or acting as his agent, then the agreement entered into will become effective as soon as it is directly connected with the guardian.[14]

Age of sensible child

The criteria for determining a "sensible child" vary in opinion. Some people believe that it can be determined by age, with a minimum age of 7 years being considered. Allama Haskafi. expressed such an opinion. Shaykh Mustafa Jaraka also accepted this view.[15]

On the other hand, Shaykh Taqi Usmani Hafizullah thinks, it is not by age; Rather, it will be determined by qualities and characteristics. The minimum quality of being a sane child, as mentioned earlier, is

[13] Fiqhul Buyu, page: 151
[14] Kitabu Aqdil Bai, Shaykh Mustafa Jarka, p.27.
[15] Kitabu Aqdil Bai, Shaykh Mustafa Jarka, p.27.

the key. The age at which it is available will be accepted. Although it may be less than or more than 7 years.[16]

A standard of 7 years can normally be adopted. But if there is a different situation, then the qualities and characteristics will be considered.

legal entity

However, sometimes the contracting party may be a legal entity rather than a person. For example, waqf properties, mosques etc. are included in 'Legal Entity'. The company is one of the examples of this in the modern economy. The reason they are called entities is that, like individuals, they also own property as legal entities, can own others, are lenders, and can also borrow. However, these tasks are performed on his behalf by his representative - owner or authority. So in these cases the original contracting party is an invisible legal entity. The benefit or liability of the contract belongs to him. The individual here is merely a representative of his party.[17]

Common law

Under the prevailing contract law, we have discussed the eligibility of the contracting parties, and at the end of this point, there is a contradiction with our existing contract law. Section 11 of the Contract Act of 1872 states that it is necessary to be of "capacity to contract" for contracting parties. To be considered capable, one must

[16] Fiqhul Buyu, page: 165
[17] Fiqhul Buyu, page: 164

be at least 18 years old. If someone below this age enters into a contract, it is considered void. Even if a minor purchases luxury items from a shop on credit, the shopkeeper cannot recover the price. However, if necessary, goods are purchased, the minor can pay the price, but this payment is limited to the minor's property. If they have no property, the shopkeeper will not receive anything in such a case.

Now note the difference between Islam and conventional law. Islam first set a minimum age for children. Which we called 'sense'. Through this, I got out of harmful transactions. It is then left to the guardian to ensure full benefit. Must not be prohibited by the guardian. Not only that; harmful transactions are excluded from this comprehensive approval in determining the final level of benefits.

It was found that, on the one hand, the child's rights have been guaranteed by the condition of minimum intelligence. But even in this case, so that he cannot exercise his right, he has provided that even if the general and beneficial contract of a sound child is valid subject to the approval of the guardian, if the contract is harmful, it will be considered null and void.

On the other hand, it has also been made easy for people. Transactions with such sane and authorized children are legalized. This is because we often deal with boys under the age of 18. But these matters are completely ignored in the existing law. As a result, on the one hand, the rights of the boys have been undermined, and on the other hand, the interests of the people involved in the contract with the boys have been destroyed. Therefore, the laws and policies of Islam are more benevolent and sustainable.

Applicability of the Agreement

By scope here is meant the object or goods for the ownership or benefit of which the contract is entered into. For example, goods for sale and purchase, housing facilities, or usufructuaries in the case of house rent However, it must be remembered that in Islamic law, everything cannot be called the 'applicability of the contract', but for this, the following 7 points have to be fixed:

1. The scope of the contract being 'property'. That is, the first condition for the contract to be enforceable is that it must be 'property'. And wealth refers to all those things—society and aliases—that are valuable and exchangeable. So visible valuables are assets, as well as invisible rights (Rights) are assets, such as copyright. However, there are some Rights, which are not 'assets' and cannot be sold, such as Pre-Emption Rights. So it should also be remembered that whatever appears to be wealth may not be wealth in Shariah.

2. Scope of contract to be Shariah-compliant. That is, the scope of the contract of sale must be Shariah-permitted. Thus wine, dead animals (Halal animals that are dead is prohibited.) etc. are not salable, although they are bought and sold as wealth everywhere.

3. Stock of goods at the time of contract means that the goods being sold must be proved to be in existence at the time of contract. So it cannot be sold before the fruit is on the tree. A contract of sale cannot be entered into before the baby is born. As it exists. But it was not salable. It cannot be sold either. For example, entering into a contract to sell a cow with a baby in its stomach. In terminology it

is called 'mulhaq bil-ma'dum' (ما هو ملحق بالمعدوم) or non-existent similar products. Because it contains prohibited 'Gara'. Similarly, the product will not be salable even if there is a fundamental mistake in the description. For example, giving a silver ring after a contract of sale of a gold ring. This also includes non-existent products. However, there will be no problem if there is a mistake in the quality description. In that case, the buyer's 'Kheyar' or freedom will be created.

Salam agreement and Istesna agreement shall be exempted from the said condition. In these two contracts the sale is pure even if the goods do not exist. Details are forthcoming.

4. The goods remain in the seller's possession during the contract. So items not yet purchased, only pre-contracted, cannot be sold elsewhere. Similarly forest animals cannot be sold before being hunted. [18] Needless to say, salam contract and istesna contract will be free from the said condition. In these two contracts the sale is pure even if the goods do not exist. Details are forthcoming.

[18] The terms of the seller's ownership of the goods are usually included in the terms of formation of the contract (شرائط الانعقاد). But sometimes the assets of others can be sold. For example, a third party sells another's assets. In terminology it is called 'Bayul Fuzuli'. In this case the sale is subject to the approval of the original owner. It is not a condition of contract formation. Rather, it includes the conditions for the contract to be effective (شرائط النفاذ). This happens only when presented for sale. This is a specialized field. So in general the ownership of goods is included in the terms of contract formation. (In this case, Shaykh Jarqa differs from Rah. See Kitabu Aqdil Bai, p. 30)

5. Having the ability to deliver the goods during the contract of sale. That is, the product that the seller is going to sell, must not only be stocked or owned, but the seller must have the ability to assign it in the contract. So houses and cars cannot be sold while they are in the possession of the enemy. Similarly, fish cannot be kept in the pond and sold.

6. The goods are in the seller's possession at the time of the contract. So the item which is not yet in possession of the seller, cannot be resold. To do this, after purchasing the product, you must first take possession of it yourself or through one of your representatives. It can then be sold elsewhere, otherwise it cannot be sold. [19] For example, the goods are purchased, orders are placed for home delivery as usual. But not yet in hand or possession. In this condition it cannot be sold elsewhere. However, if the deliveryman is the representative of the buyer, then the opportunity to sell elsewhere will arise due to the presence of the representative, otherwise it will not.

7. The product or service should be clear to both the buyer and the seller at the time of the contract — so that no disputes arise later. This specification may also be in words, actions or gestures.[20]

It is clear that conditions 2-6 shall not apply to Salam and Istisna agreements.

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[19] Fiqhul Buyu, Volume: 1, Pages: 261-417.
[20] Al-Fiqhul Islami wa Adillatuhu Pages: 2932-3029

Purpose of the Agreement

"Purpose of the contract" (موضوع العقد) means the nature of the contract or the purpose for which the contract is made. It varies from contract to contract. For example, the nature of a contract of sale is an exchange of ownership of goods and value. The basic nature of a lease agreement is to grant the right to enjoy a benefit at a fixed exchange rate.

It is also called 'Hukum' (حكم) or the result of agreement in the language of earlier jurists. The purpose or effect of each contract is different.

Terms of contract

Earlier we briefly learned about the essential elements of a contract. Each of those elements has several conditions for proper implementation. Here by 'Conditions of Agreement' basically means those conditions. As such, the goods must be in possession of the seller. What is the minimum condition for possession to be proved, how is it to be usurped? (More details can be found in various places relevant to this discussion.)

Offer and Acceptance introduction

Offer and acceptance (OA) is a fundamental aspect of contract. As the root of the human body is the spirit, so the root of the contract is acceptance. It is important to have a clear understanding in this regard, otherwise the purchase and sale will not be pure. Offer and acceptance (OA) has many uses. Days are passing and its uses are

increasing. So, to ensure its correct use, there is no alternative to knowing the principles of Sharia.

The root of Ijab-Qabul (Offer and acceptance (OA))

The spontaneous consent and satisfaction of both is necessary for one to become the owner of another's property. In the language of the Quran, it is called 'Tarazi' (The satisfaction between Buyer and Seller / التراضي) or bilateral consent. This consent is the root of offer and acceptance. Almighty Allah says:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ لَا تَأۡكُلُوٓاْ أَمۡوَٰلَكُم بَيۡنَكُم بِٱلۡبَٰطِلِ إِلَّآ أَن تَكُونَ تِجَٰرَةً عَن تَرَاضٖ مِّنكُمۡ

"O you who believe, do not consume one another's wealth unjustly, except when it is done with mutual satisfaction (it is permissible)." (Surah Nisa, verse 29)

Prophet Mohammod sallallahu alaihi wa sallam said:

#إنما#البيع#عن#التراضي

"Buying and selling should be done on the basis of mutual satisfaction." (Sunanu Kubra, Baihaqi, Volume: 6, Page: 17)

In another hadith,

منه نفس لا يحل مال إمرىء مسلم إلا بطيب

"It is not lawful to take the wealth of a Muslim without his voluntary consent." (Musnadu Abi Yala: 1570—the chain of the hadith is acceptable—Mazmauz Jhawayid: 6866)

Therefore, in the eyes of the Shari'ah, the satisfaction of both parties is essential for any reciprocal agreement to be concluded. Needless to say, 'satisfaction' is a silent issue. A simple and easy way to express it is Ijab-Qabul. If the offer and acceptance are duly made and there is no external force, the result will be reflected in the content of the contract. It will not be seen who has what in mind or whether he is willing to buy or sell. For example, someone sold land to send his son abroad. It does not matter for what reason the land is being sold if the acceptance is done.

Certainly, if there is any external matter that is contrary to the principles of consent or questions its validity, such as holding a knife to someone's throat, it will not be considered lawful, even if there is an apparent agreement. In other words, any action that compromises the consent or approval of one party will not be permissible.

Summary

Balance or mutual satisfaction is the key in buying and selling. This is expressed through acceptance. And Ijab must be accepted in a way that creates a strong bond between the two parties in a Shariah-compliant manner—in terms called a contract or aqd.

Offer

The word 'Ijab' (الإيجاب) is Arabic. Its literal meaning is شيئ لأي الإثبات كان 'to establish or bringing about something new'.[21] Simply we can define it as "Offer".

Ijab is defined in Section 101 of Majallatul Ahkamil Adliyyah, a statutory law on Islamic economic transactions as follows—

الإيجاب أول كلام يصدر من أحد العاقدين لأجل إنشاء التصرف وبه يوجب ويثبت التصرف.

"Ijab" is the first statement uttered by the contracting parties for the purpose of performing a Shariah-compliant act. Through this,the offer is basically made, along with granting or rejecting the rights to the other party.

So when one says to another - 'I sold this pen to you for 10$', then it is 'Ijab' or (Offer). And when the other person says based on his proposal - 'I accepted it', then it is 'Acceptance'.

Similarly, if the first person is the buyer and says, 'I bought the pen for 10$', then that is an 'Offer'. And when the seller says, 'I accepted it', then it is 'acceptance'.

Summary

-An offer is the initial statement or behavior provided with the intention of entering into a contract, whether it is from the buyer's side or the seller's side.

[21] Sharhul Majallah, Al-Atasi, Volume: 2, Page: 3.

-The subject matter of the contract must be Shariah-compliant.

-This gives the other party full right to accept or reject the negotiated contract.[22]

Acceptance

The word 'Qabul' (القَبول) is Arabic. Meaning 'to كان شيئ لأي الإثبات establish something anew.' But it is more commonly used in the sense of 'adopting'. Acceptance is defined in section 101 of Majallatul Ahkamil Adliyyah, Islamic Financial Transactions Statutory Law as follows—

القبول ثاني كلام يصدر من أحد العاقدين لأجل إنشاء التصرف وبه يتم العقد.

“Acceptance" is the last statement uttered by the contracting parties to perform a Shariah-compliant act. Through this basically the contract is fulfilled.”

Here, 'Qabul" is defined not only by words or speech but also by any unambiguous action that signifies agreement or consent. It can be in the form of words or any other behavior. For example, even if the seller said, "You can buy a glass of juice for only 1$," whether or not the words were said, the buyer started drinking the juice. Through this action, the contract is considered complete. This

[22] Between the contracting parties, the first statement of either buyer or seller is Ijab, and the last person's statement is acceptance.' For example, contracts of sale and exchange. On the other hand, in cases where there is no exchange, but rather one-sided financial transactions, there is no acceptance because there is no need for acceptance. However, waivers are possible, such as Hiba contracts. Ahkamu Muamalati Shariah, Ali al-Khafif, page: 187.

behavior is what is referred to as 'Qabul'' or consent in this context. Similarly, boarding a local bus from different stops by passengers is also considered behavioural acceptance or accepted through action.

Summary

-'Acceptance' is the last statement or act given for the purpose of consenting to a contract, whether by the buyer or the seller.

-Consent must be Shariah-compliant.

-Through such an acceptance, the contract is considered consummated.The contract is consummated by said assent or acceptance.[23]

The principle of correctness of Offer and acceptance (OA)

Islamic law has six specific principles for ijab-kabul to be pure. They are-

1. Having appropriate words or behavior for acceptance.
2. Competency of contracting parties to contract.
3. Being two separate contracting parties.
4. Acceptance in favor of Ijab.
5. Ijab and Qabul being in the same Majlis.
6. Interrelation between Ijab and Qabul is maintained.

Below is a brief discussion of each topic-

[23] Ahkamu Muamalati Shariah, Ali al-Khafif, page: 187.

Appropriate words or behavior for acceptance

Acceptance requires the help of appropriate words or behavior to be done properly. In this case it is very important to follow two principles-

1. The conduct of acceptance should be clear i.e. the wording or conduct used for acceptance should unambiguously point to the desired contract between the buyer and the seller. Because there are contract variations. So in this case there is no alternative to be clear. So if you want to buy and sell, you have to use words that mean buying and selling. Similarly, in the rental agreement, only such words should be used, which only refers to the use of facilities or services.

If, however, one uses words in the course of buying and selling which originally mean something else, then the meaning must first be ascertained with the help of signs. For example, one pointed at the other and said, 'I gifted you this book for 100 $.' The other accepted it as usual. In this case, the said transaction will not be 'Hiba', rather it will be considered as purchase and sale. Because the word 'Hiba' does not originally mean purchase and sale, but since it is followed by the word 'exchange', it will be considered unambiguously in the sense of purchase and sale rather than donation. That is why the jurists said-

إن#العبر#في#العقود#للمقاصد#والمعاني#لا#للألفاظ#والمباني#

"Consideration in a contract is the intention and substance, not words and sentences."

Similarly, if a word or behavior is such that it has more than one possibility, then the least possibility will be considered if there is no special sign or evidence. As someone said, 'Take the money' - one meaning of this is Hiba. If there is no clear evidence for it, then its minimum meaning would be 'Save these as Amanah'.

2.. The words of Ijab-Kabul must have the meaning of immediacy and firmness. Simply put, the wording used for acceptance and acceptance must be strong for the contract and imply that the contract has been executed in cash. Thus the contract will not be executed by using words which give future meaning or fail to guarantee the contract's immediate effect. Now the matter is, how do we know which words have these characteristics and which ones do not? The answer is that nickname or social usage is the main consideration in determining this characteristic of words. So in the country which according to its own language and culture the word that gives cash and hard money in favor of the contract, it will be considered as representing acceptance.

In article namber: 168 of Majallatul Ahkamil Adliyyah has been mentioned —

الإيجاب والقبول في البيع عبارة عن كل لفظين مستعملين لإنشاء البيع في عرف البلد والقوم.

"Ijab and Qabul in buying and selling are meant as a pair of words, which are used in the sense of executing a contract of buying and

selling in cash according to the nickname and custom of the country and society."

The universally accepted word for offer and acceptance in Arabic with the above two features is the past participle, eg, بعت و اشتريت meaning 'I sold, I bought.'

Which words that refer to the future are not allowed to use for Ijab and Qabul, like, “I will sell to you”."Because it implies a promise, there is no guarantee that the sale will be carried out immediately. However, if one verbally expresses the present meaning in some other way, then the contract is also completed with the predicate, as when a seller hands the goods to the buyer by saying أبيعك or says, ابيعك الآن i.e., I am selling it to you now. Then the purchase and sale will be final in both these tones—though normally the past tense is better in Arabic.

Ijab will not take place with imperative words such as future words, such as بعني هذا الثوب بعشرة (Sell this cloth to me for ten Dollars), it belongs to the stage of bargaining. Not direct firm and not a cash offer.

Of course, marriage is different. There Ijab is also formed with direct imperative words. For example, someone said, marry your daughter to me. In response, the girl's father said, OK, I gave her in marriage. In this case, the first imperative word will be considered as ijab.

Shaykh Jaraka Rahimahullah, one of the faqihs of the recent past, has written that if the issue of providing Ijab of buying and selling becomes widespread, then Ijab can also be given directly with

imperative words. Because customary practices are important in the case of Ijab.[24]

Needless to say, the use of imperative words is also in vogue in the case of Izab.

Bengali, on the other hand, has distinct words that convey the immediacy of contract execution. The same character exists in Urdu, Persian and English. Therefore, in these languages, not the past tense, but the words that mean the present must be used. [25]

If we get out of the wording of words, offer and acceptance can be done only through question and answer. But in this case, the condition is that there should be a sense of soundness and immediacy in the question and answer. As it is said - 'Are you willing to sell your book to me for ten rupees?' The answer is 'Yes.' Once the product is accepted by the buyer, the acceptance will be completed.

In some cases this 'yes' can be considered as acceptance. As in saying, ‘I bought the book from you for ten rupees.’ You said, ‘OK.’ Here your ‘OK’ is considered an acceptance and the contract of sale is completed.[26] In essence, languages and customary practices are the key consideration here.

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[24] Al-Madkhal Fiqhil Am, Volume: 1, Page: 326

[25] Fiqhul Buyu Pages: 34-35.

[26] Note that if the seller speaks first, as he said - I sold the book to you for ten rupees. The buyer replied, OK/Yes. Then the 'OK' or 'Yes' will not be considered as acceptance. Because, it may mean assent to the

Behaviors that are not sufficient for offer and acceptance

4 behaviors are not sufficient for **offer and acceptance** to be purified—

1. It is not enough to have the intention to give and receive consent, but it is necessary to express it in words or behavior.

2. It is not enough to express consent by words or conduct, but it must be voluntary and conscious. So if you accept the offer in sleep, it will not be accepted.

3. Words or behavior must be understood, if you don't understand it, it won't happen. Therefore, if one does not know the language, one will not be purified if one accepts the request in that language.

4. The person's words or conduct must have the intention to conclude the contract. Otherwise the acceptance will not be pure. So the words of the agreement which have to be pronounced for the sake of understanding the students, will not constitute the agreement. Because there is no will to implement the contract.

Capacity to Contract

As discussed earlier, the contracting parties must be of sound mind, consent and sound mind. But for this it is not necessary to be a minor of 18 years as in British law. This has been discussed in detail earlier.

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seller's statement as an offer, not assent as an acceptance. (Ahkamul Mu'amalati Shariah, Shaykh Ali Al Khafif, Page: 204)

Being two separate contracting parties

An important condition for the validity of the contract is that there are two separate parties to the contract. One party or the same person cannot perform the two main parts of the contract. Because then conflict of interest becomes inevitable. This has also been discussed in detail earlier.

Favorable acceptance

The main condition for the acceptance to be correct and acceptable is that it must be in favor of Ijab/offer one hundred percent. If not in favor of Ijab, the acceptance is void. And due to the annulment of acceptance, Izab also lost its effectiveness. So acceptance favoring Ijab is important for both Ijab and Qabul. Here 'favorable' means 100% agreement with the seller's proposal on the following 6 points. Namely:

-Products.
-Product quantity.
-Product quality.
-Amount of value.
-Nationality of value.
-Absence of option condition.

Therefore, acceptance should be based entirely on the quality and quantity offered by the seller. If different, it will be treated as a new proposal. For example, the seller offered to sell multiple products together and said, I sold these three books to you together for 150$, in this case the buyer has to agree on the whole package, otherwise

the acceptance will be canceled and the buyer's modified acceptance will take the form of a new offer, which the seller wants to accept. Can also exclude.[27]

Ijab and Qabul are different from each other

There are four ways to creat difference in ijab and qabul in terms of price—

a) Accepting at a price lower than the price offered. For example, the seller offered, 'I am willing to sell such and such an item for one hundred Dollars', but the buyer agreed to take it for 90$ Dollars. The contract will not be concluded at the price accepted by the buyer in the said tune. But it will be considered a new offer on the part of the buyer, which the seller may accept or not. In terminology, it is called Counter Offer.

b) Acceptance in a national currency other than the proposed currency. For example, the seller offers one show at Rs. The buyer agreed to buy it for two dollars, even though the price of two dollars is more than one hundred rupees. [28] In this case, the buyer's statement will be considered a new counter offer.

c) Accepting the offer in deferred sales at a higher price. For example, the seller offers at Spot sale. The buyer accepted it by deferred sales.

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[27] Fiqhul Buyu, page: 41.
[28] Fiqhul Buyu, page: 43

d) accepting a price higher than the price offered. For example, if the seller offers to sell for ten dollars in cash, the buyer is willing to buy it for twelve Dollars in cash. It is completely profitable for the seller. In terminology, it is called 'Indirect Offer'.

The price offered by the buyer in the first three types will be considered a new offer, called a 'counter offer'. Contracts will be entered into only to the extent covered by the fourth type, which is known as an 'indirect offer'. In this case the excess will depend on the satisfaction of the seller. In simple words, even if you say twelve taka instead of ten taka, the contract will be on ten dollars. The seller will have the freedom to accept or reject the additional 2 dollars at the meeting of the contract (On Spot).

Summary

A counter-offer is not directly acceptable, but it may constitute a new offer to the other party. On the other hand, indirect offers are conditionally acceptable. This does not affect the original contract.

Ijab and Qabul being in the same Majlis

In order for the offer to be accepted, it must be in the Majlis (session) of Ijab. There is no disagreement about this. So if Ijab is done in one Majlis, and accepted in another Majlis, then the contract will not be fulfilled.

Objectives by Majlis (Session).

The word 'Majlis' is Arabic, literally meaning meeting. In English it is expressed in words like ‘session’, sitting and so on. In the contract of sale it means 'a time or condition when both the buyer and the seller are engaged in the execution of the contract. In the words of Shaikh Jarka Rahimahullah—

مجلس#العقد#هو#الحال#التي#يكون#فيه#المتعاقدان#مقبلين#على#التفاوض#في#العقد#

"A contract forum is a situation where both the buyer and the seller are engaged in mutual negotiations regarding the contract".[29]

In a resolution of the 'Islamic Fiqh Academy India', it is said in this regard—

مجلس سے مراد وہ حالت ہے جس میں عاقدین کسی معاملہ کو طے کرنے میں مشغول ہوں۔اتحاد مجلس کا مقصد ایک ہی وقت میں ایجاب کا قبول سے مربوط ہونا ہے۔ اور اختلاف مجلس سے مراد یہ ہے کہ ایک ہی وقت میں ایجاب وقبول میں ارتباط کا تحقق نہ ہو سکے۔

"What is meant by majlis/session is a state in which both parties to the contract are engaged in finalizing a transaction." By 'Same session' the intention is to get Ijab and Qabul at the same time. And by 'Majlis different', the intention is not to create an interrelationship between Ijab and Qabul at the same time.”[30]

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[29] Al-Madkhal Fiqhil Am, Volume: 1, Page: 322.
[30] Jadid Fiqhi Mabahis, Volume: 21, Page: 217

So it was understood that 'Majlis' does not mean that the buyer and seller physically gather at a certain place and complete the Ijab-Accept sitting there, but it means that the inter-relation between the Ijab-Accept is formed during the contract and that relationship remains in force until the contract is finalized. Therefore, two buyers and sellers can buy and sell over the phone from both countries, and even from a distance, their decision-making process can be identical.

The nature of the 'Different of Majlis'

There are two types of contracts in the modern economy considering the 'Majlis'. Namely:

A. Verbal acceptance.
b. Written acceptance.

A. Verbal acceptance.

Verbal Acceptance means acceptance by speaking directly, as we do in the daily life. It also includes making an agreement by talking on the phone. In these cases, 'Majlis' being identical means not leaving the place of the agreement, not cutting the line midway in the case of a phone agreement or not conveying a different context. A few examples of the case of verbal agreements-

-Doing ijab and qabul by talking directly on telephone or mobile.

-Completion of ijab and qabul directly while sitting in the moving vehicle.

-Doing ijab and qabul directly in the same room or at the same place.

The Majlis of the Agreement shall be considered as one and the same in all the above sectors. Provided, however, that nothing shall be done before the completion of the contract which causes the dissolution of the Majlis.

Majlis is dissolved due to:

-Moving away from the Majlis to which it has been offered, without accepting it. For example, moving to another room or room. Moving away from the store front. Exiting the store, leaving the shopping mall.
-Indulging in another discussion, minding another task or falling asleep in the middle of the acceptance of the offer from the same meeting.

-Engaging in other negotiations between acceptance and acceptance while making a contract over telephone or mobile.
-To cut the telephone line.

In these cases, if the Mojils are accepted after they differ, it will basically be considered as a new ijab, which the other party can accept or avoid.

B. Written acceptance

A written acceptance means:
-Letters
-E-mail

-Messaging

In the case of written offer-acceptance, two issues deserve special discussion—

A. Determination of Majlis.

b. Acceptance of proposals and finalization of contracts.

These two issues are discussed below-

Determination of Majlis:

Previous jurists have written, in the case of correspondence, the Majlis of the message will be considered as the original Majlis of the contract, that is, the Majlis to which the letter reaches, is the original Majlis of the contract. There will be an opportunity to accept till the end of that Majlis. So when the Ijab-letter arrives, if it is not accepted just before the Majlis breaks, the Ijab will be canceled. After that, if accepted in another Majlis, it will be considered as a new job.
Needless to say, it is very difficult to determine Majlis like this in the case of mails, faxes and messages these days. Because, sometimes it is not possible to reply to mail immediately due to a busy schedule. Moreover, there is no special opportunity to prove whether the answer was given in that Majlis or not. Most importantly, the Majlis for Kabul is given importance to ensure an opportunity to think about the pros and cons of the agreement. Now if the other party is asked to accept the written message as soon as it arrives, then the proper decision-making process in the case may be disrupted.

Considering these aspects, the famous Faqih Shaykh Ali Al-Khafif Rahimahullah and many other economists including Shaykhul Islam Mufti Taqi Usmani Hafizahullah have decided that in the case of letters, mails, faxes, etc., the possibility of 'acceptance' will be abolished only by the end of the Majlis of reaching the message.[31]

Now the question is, when will the Majlis end in these cases? In response to this question, Shaikhul Islam Mufti Taqi Usmani Hafizahullah said, the opportunity to accept modern Ijab will be canceled in the following four situations. Namely:

1. Verbal or written rejection of the offer by the person to whom it is mailed.

2. State by mail any time limit set by the offeror for acceptance of the offer, within which the offer shall be void if not accepted. For example, it is said that the answer must be given by next Friday. So if no reply is given within then the offer will be automatically canceled. In this case, it is not valid for the proposer to withdraw from his proposal before the prescribed period has passed. Because it is a promise that needs to be kept. However, there will be an opportunity to withdraw through the legal process. And if it moves like this, it will become effective.

3. To withdraw from the offeror's own offer before acceptance. But the condition for this is that it must be done by informing the other party. So if accepted before notification, withdrawal will have no

[31] See more : Itre Hidayah, page: 94.

effect. Therefore, in this case, the withdrawal of the proposal should be communicated through another mail.

4. Even if none of the above conditions are found, the opportunity to accept will not remain valid forever; Rather, according to the business practice, if there is silence in everything, the opportunity to accept is canceled, here too, the same time will be required. This time may vary from product to product. So in case of perishable products the shelf life will be less than other products. In essence, trade names and customs will prevail—to be determined by judges and courts.

More about this source textSource text required for additional translation information.[32]

Acceptance of proposals and finalization of contracts

Usually, the purchase and sale is completed through acceptance. In the case of verbal acceptance, the matter is very simple. The contract is completed when the buyer verbally accepts the contract. But how exactly is 'acceptance' to be considered in the case of mail, fax and other such messaging mediums? For this, only verbal acceptance is enough, or should it be written on paper or sent by message to the proposer? If it is sent, is it enough to send it, or is it also necessary to reach the proposer and be seen by him after sending it? Due to the existence of such possibilities, different opinions have been created

[32] Fiqhul Buyu, page: 56.

in the existing law. There are four popular opinions in this regard. Namely:

1.Acceptance declaration theory

The contract will be finalized only by the acceptance of the person to whom it is mailed. For example, someone offers to sell a car via mail or message. If the offer is accepted verbally after it is received, the contract will be complete—even if no return mail of acceptance is mailed.

2.Acceptance Foreword Theory

It is not enough to say the acceptance itself, but the acceptance letter should also be sent and it should be done in such a way that there is no chance of taking it back. For example, sending mail. Once mail is sent, it cannot be retrieved. Or sent by post, which cannot be returned. Once the acknowledgement is sent in this way, it becomes effective. There is no possibility of withdrawal.

3.Acceptance approval theory

It is not enough to send the acceptance letter but it must also be accepted by the offeror. Accepted here means that the acceptance reaches him. It is not necessary to know what is there or not.

4.Acceptance Acknowledgement Theory

It is not enough for the offeror to accept the acceptance, but also to know its contents. So if the acceptance letter is sent by post, there will be an opportunity to withdraw it till it reaches the hand of the

proposer. However, once it is in the hands of the proposer, it cannot be taken back. This is the existing law of Bangladesh.

In this regard, the principle of Islamic economics is that 'mutual satisfaction' is necessary for the completion of the contract. However, it is not clearly stated in the Qur'an-Sunnah how this process of satisfaction will be completed through acceptance-acceptance. Because the matter largely depends on customs and traditions. Acceptance is done differently in each custom. Sometimes in behavior, sometimes in speech.

Fundamentally, 'mutual satisfaction' is ensured by the consent of the recipient. As such, the agreement is supposed to be binding only through consent. It does not need to be sent or seen by the sender. But here's the problem, how does the sender know whether the recipient has consented at all? If the recipient does not send a return letter, it is natural for the sender to assume that his offer may not have been accepted. Not only that, but based on this idea, he can also make a sales pitch to someone else. In that case, the recipient will suffer. Then again, the poor proposer didn't propose to someone new, thinking the recipient had consented. But later it was found that the recipient did not consent. In that case the sender will suffer.

The safe way to solve this problem is that consent alone is not enough to make a contract inevitable; Rather it will be at the attention of the proposer. If the offeror is aware of the acceptance, then the contract is binding. Before this, the contract will not be binding on either side, as per the law of Bangladesh.

Shaikhul Islam Mufti Taqi Usmani Hafizahullah, after a long discussion on the matter, said—

#الكريم#القرآن#اشترط#الذي#التراضي#تفسير#على#مبنية#اجتهادية#المسئلة..
#بأي#الأخ#وإن#محتملة#كلها#ذكرناه#التي#الأربعة#والنظريات#العقد#لصحة
#والسنة#القرآن#نصوص#من#نص#مصادمة#إلى#يؤدي#لا#السائد#العرف#حسب#منها

"The Qur'an al-Karim stipulates that there must be "mutual satisfaction" for the contract to be valid, and how it will be implemented depends on ijtihad. So all the four theories and principles discussed in this context are likely to be correct. There is no problem in adopting any of its principles or methods according to the aliases and customs. It will not create any conflict with the Quran and Sunnah."[33]

Special Notes:

Contracts made through remote acceptance without physical presence are valid only in cases where there is no obligation to hand over goods in cash at the meeting of the contract itself. Where this obligation exists—for example, a contract to buy and sell currency—the contract is not valid if it is accepted at a distance. There are only three ways in this case-

A. Transactions should be done in person.

[33] Fiqhul Buyu, page: 63.

b. If that is not possible, each party must have an attorney or representative to take possession of the goods at the contracting party.

c. If neither of the above is possible, the contract has to be executed remotely on a promise basis. Later, the purchase and sale should be finalized by attending in person at a convenient time.

Sustaining inter-relationship between Ijab and Qabul

The final condition for Ijab-qabul to be correct is that the inter-relationship between Ijab-qabul holds. If it is not there then the contract will not be completed as this is not fulfilled. In order to maintain the interrelationship between Ijab and Qabul, the jurists have basically mentioned three conditions—

1. According to the above interpretation, the Majlis remains the same.

2. First Ijab then acceptance is to maintain this continuity, not to make exceptions. For example, Zaid sent an offer to sell a car to Raihan. Meanwhile Raihan wrote to Zaid before getting the letter, I bought your car for so much money. In this case, the acceptance of both letters will not be completed by reaching both of them. Because the acceptance here is not after Ijab. Therefore, it will be considered as independent ijab and therefore Zaid can accept Raihan's ijab if he wants and he can not. Same thing with Raihan. He can also accept or reject the offer after receiving it.

Simply put, a fresh acceptance by either party would be required to complete the contract properly and there would be an opportunity to withdraw from the offer prior to that acceptance.

3. The offeror not withdrawing from his offer. If the offeror withdraws from his offer before acceptance, it will not be accepted if subsequently accepted.

It should be noted that, according to the majority of jurists, the proposer can withdraw from his proposal while the Majlis is pending.[34]

[34] Fiqhul Buyu, page : 43, Al-Fiqhul Islami wa Adillatuhu, page : 2945, Al Milkiya wa Nazriyatul Aqd, Shaykh Abu Zahra Rahimahullah, page : 175.

Methods of Applying Offer & Acceptance

Basically, there are three methods of acceptance. Namely:

1. Through speech.
2. through writing.
3. through behavior. [35]

Each is discussed in detail below:

Through speech

Verbal speech is the key in obtaining acceptance. In this statement, words are to be used which refer to cash and sound money to give and receive ownership through execution of contracts. And in this case, nickname and practice is the last word. That is to say, in the language of the country where the word or words signify the execution of a contract for the purpose of giving and receiving ownership, that word or words are intended here. But if a contracting party cannot speak, i.e., is mute, then clear gestures are sufficient—writing is not necessary.[36]

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[35] Allama Fatah Lakhanbi Rahimahullah. mentions another method, which is invisible Ijab-Qabul (ضمني.)As Zaid said to Bakar, you donate your mangoes on my behalf in exchange for one hundred rupees. Bakar did so.Then it has both acceptance and acceptance invisibly. As Zaid said, I bought it. Now you become a lawyer on my behalf and donate it. And Bakar said, I sold it. Then I donated it. (Itre Hidayah, pp. 95-96)

[36] Of course, Sheikh Mustafa Jarka Rahimahullah said, writing is mandatory in this case. Pointing is not enough (if he knows the text). Al-Madkhal Fiqhil Am, Volume: 1, Page: 328.

On the other hand, gestures are not sufficient for a person who can speak, but his gesture is a 'behavioral method'. There will be an opportunity to include As someone said, “brother, sell this item of yours to me for 10$. In response, the seller nodded his head without saying anything. The buyer then said, "Okay, I bought it. Well, the deal will be done. The sale and purchase shall be deemed to have been consummated here by act and not by gesture.

Mere silence is not enough

Mere silence after Ijab is not sufficient for acceptance. Someone mailed:'If you don't reply by this date, you will be deemed to have accepted it.' After receiving the mail, the buyer did not respond and did not say yes or no. In this case, mere silence on his part will not make the contract final. The marriage contract is an exception.

By writing

Acceptance can be done verbally as well as in writing. Acceptance in writing from a distance is the same as verbal acceptance in person. The principle in this case is كالخطاب الكتاب i.e., 'Written proposal is like oral speech'. However, two things are essential for the written proposal to be accepted: Namely:

A. The writing must be clear. In terminology, it is called 'Mushtabina' (Identified/مستبينة). What is meant by this is that the writing should be on something that is clear and fixed. So if something is written with a finger in air or water, it will not be considered a contract proposal.

B. The writing should be in accordance with the rules. In terminology, it is called 'Marshumah' (legally written). That is, in writing, it should be according to the customs and customs of people. For example, the established convention is to have the sender's name at the beginning and the recipient's name at the end. Or just have the sender's name at the end. So any writing without a name or address will not be accepted [37]

Acceptance in writing in accordance with the above method shall be effective after receipt and notice from the other party. That is, Izab or Qabul will not take place merely because of writing. But divorce is different. It becomes effective by writing in the above rule. At present, writing tools include e-mail, messenger, fax, etc.

By conduct/behavior

As we have already learned, the mutual satisfaction and consent of the buyer and seller are the keys to the purchase and sale agreement. The main means of obtaining it is Ijab-Qabul. But it is not the only medium. Sometimes satisfaction and compliance can be expressed through work behavior. As in super shops, the price of the product is given by the seller; the buyer selects the product of his choice and pays the price. You don't have to say anything. In this case, satisfaction is mainly expressed through behavior, and the purchase and sale are completed based on that formula.

[37] Al-Madkhal Fiqhil Am, Volume: 1, Page: 327.

In terminology, this is called 'behavioral buying and selling'. In Arabic, it says, "Bai Bit-Ta'ati" ﷺالبيع#بالتعاطي And in English, it can be said: hand-sell or sell by indication.

In the terminology of jurists, the introduction of this transaction is:

أن#يعطي#البائع#المبيع#ويدفع#المشتري#الثمن#بدون#أن#يتلفظ#بالإجابو القبول##

The seller will deliver the goods. The buyer will pay the price. That's it. Apart from this, there will be no verbal acceptance.

Basically, a sale and purchase agreement can be executed in three ways: through

A.Through verbal acceptance.
B. Through written acceptance.
C. through behavioral acceptance.

The latter method is called 'Bai Bit Ta'ati'.

Terms

-The conduct or action must be for the purpose of buying and selling.
-The conduct/behavior shall be the alternative of verbal acceptance, which shall be determined by customary practices.
-The said 'Urf'/ customary practices should be clear again, so that no dispute arises later.

There are two types of 'bai bit ta'ati' or barter-based transactions. Namely—

A.One party shall offer, and the other party shall accept it by action. As the customer said, ‘give a chip for 10$. The shopkeeper gave the requested product without saying a word. So here Ijab is through speech. And acceptance comes through action.

B. Neither party shall speak, as aforesaid.

Such transactions are frequent in our daily lives, especially in cases where the price of goods is fixed.

Shariah comment

According to the Majority of Scholars' Opinion, both of the above types are Bai Bit Ta'ati. However, some jurists/Faqih hold that the first type is not Bai Bit Ta'ati. According to them, there must be action on both sides for ta'ati, which is not present in the first type. However, although there is disagreement over the name of this type, all agree on its validity.

Another thing. Many times, it is seen that the customer comes to the store and takes the product without saying anything. It also falls within Bai Bit Ta'ati. But the condition for such a purchase and sale to be pure is that there should be sufficient understanding between both parties, and it should not be a cause of dispute in any way.

In short, the main issue here is '*Tara'*i', or the mutual consent of buyer and seller. If this is proven in any way, the contract will be constituted.

Islamic Banking and Bai Bit Ta'ati:

The ta'a'at we have discussed so far applies to ordinary transactions, where there is no risk of violating Shari'ah law in doing so. However, it cannot be applied where the transaction becomes haraam or doubt enters into it. That is why it cannot be applied to Murabaha transactions in Islamic banking. Because, in the case of Murabaha in conventional Islamic banking, the client is usually made the bank's agent or advocate for the purchase of products. Then the client first purchases the product on behalf of the bank. After the purchase, according to Shariah law, the customer has to accept the offer again from the bank. If the client takes the product from the market without doing this, then this *murabaha* will not be valid. Islamic scholars therefore warn that 'bai bit ta'ati' cannot be done here.

Because, Murabaha is a very risky transaction.Here the risk of the product has to be proved for the seller or the bank even if it is for a while. This is the only line that separates business from usury. But the approval of Bai Bit Taati in Banking Murabaha obliterates this distinction. Then the main form of business is that the money taken is relatively less, and more will be returned. Again the bank or the facilitator will not take any risk. Undoubtedly, this is a characteristic of usurious transactions. So the application of 'bai bit taati' is not correct here.

Some practical example of Bai Bit Ta'i

-People select and pay for preferred products from department stores. In this case, there is no need for any conversation between buyer and seller. This is the most common example of Bai Bit Ta'ati.

-In import-export trade goods are also transferred by way of shipment of goods by the exporter. Here too Bai Bit Taati happens.

-In developed countries, Vending machines are installed on roadsides, parks and other populated areas. Various products are stored inside it. When people put a certain amount of coins in the designated place of the machine, the product comes out. Neither the seller nor any of his representatives are present there. Such transactions also fall under Bai Bit Ta'ati.

-In developed countries there are telephone booths along the road. People put money into it and talk. It is also bye bit taati.

It must be remembered that, where conduct is available from both sides, the first conduct will be deemed to be Ijab. So it is better to give coins to the vending machine. Likewise, it is advisable to buy the goods first from the grocery store.[38]

Invitation to Proposals and Proposals

Original proposal and invitation to proposal are two completely different things. After the 'original offer', the agreement is

[38] Fiqh al-Buyu, page : 66, Mawsu'ah Fiqhiya Quytiyya, volume : 12, page : 198.

completed when the other party agrees. But a response after an 'invitation to offer' does not constitute a contract. Because, it is not a consent, but a new proposal. Therefore, the other party can accept this offer if he wants, or reject it if he wants. The main proposition is clear to everyone. So here are just a few examples of invitations to proposals—

Invitation to Proposal

Generally, mass advertising announcements are invitations to proposals, such as newspaper and radio-television advertisements. Similarly asking the price of the product. As said, how much is the price of fish? The seller said, 600 dollars. The display of timetables and ticket prices by the railways, are all invitations to offer. So you can offer it for purchase.

Same goes for super shops. There is also a price written on each product. Buyers take the desired products and deposit them in the basket. Then went to the counter and paid the bill. This is not an offer, but an invitation to offer. So when the customer puts the products in the basket for the purpose of purchase, it is a unique offer on his part. So the cashier can accept it if he wants, or not.

Currently in e-commerce all product details and prices are given. People who sell products on social media also adopt the same approach. These campaigns are considered invitations to proposals.

How an invitation to offer turns into an offer

If the comprehensive declaration is an express statement of intention to execute the cash contract, then it will be considered as the original proposal. By 'express statement' is meant that the declaration may either expressly state the offer or contain some sign or sign which shows that it is not only a declaration but also an offer to sell. As can be seen in Dhaka's Gulistan, street vendors keep calling out, 'See, choose, ten taka'. That is, the price of each cloth is ten rupees. It is basically a comprehensive job. Not just an invitation to offer. Similarly, the price of the shares displayed in the stock market is also Ijab.[39] Besides hanging the price list in front of the shop, if it is also said that this is the offer, then that too will no longer be an invitation to offer, but will itself become an offer.

A simple criterion

The key in determining proposals and invitations to proposals is the associated customs and practices. Here are some simple criteria for ease of understanding:

§ Willingness to sell directly is an offer, and willingness to offer is an invitation to offer.

§ Invitation to offer asking whether the buyer needs a particular product or service.

[39] For details see Fiqhul Buyu, page : 66, Mawsu'ah Fiqhiya Qutiya, Volume : 12, page : 198.

§ Promotion and advertisement are invitations, but any additional expression expressed in addition to the advertisement is an offer.

Basically, what is just an advertisement and what is an offer-containing advertisement and offer will be determined according to the respective aliases and usages. If there is any disagreement, the court will give the final decision. The prevailing domestic laws also state the same.[40]

Practical example

In the past, determining offer and acceptance in transactions used to follow a different process compared to modern transactions. Therefore, here are some modern examples to illustrate how offer and acceptance are handled differently in contemporary transactions:

Vending machine

In developed countries, vending machines are installed along roads, in parks and in busy areas. Various products are stored inside it. When people put a certain amount of coins in the designated place of the machine, the product comes out, without the presence of the seller or any of his representatives, much like ATM booths. If you give the card, the money comes out. Such sales are valid by consensus. However, in these cases, there are different opinions in determining which is permissible and which is acceptable.

[40] Itre Hidayah, page: 96.

According to some, it is permissible to announce the machine and the price list and it is acceptable to accept the product with money.

However, Shaikhul Islam Mufti Taqi Usmani Hafizahullah wrote, it is basically a process of 'hand by hand sell'. Here payment by the customer is a 'conduct'. Similarly giving products by machines is another 'behaviour'. And hanging the price on the machine is an invitation to offer, not a direct offer. If it is called a direct offer, then the payment will be deemed to be an acceptance. Then it will be inevitable to convey the product to the other party. But in reality, sometimes the product is not available even after paying the money. Hence the machine or price list cannot be called a proposal.[41]

Acceptance determination in app-based ride sharing

Currently, app-based ride shares are widespread in Dhaka city. Ride share means providing a service of transporting someone from one place to another by vehicle or car for a fixed fee with the help of a designated app. It is easily also called online transport services like Uber, Pathao etc. People now feel more comfortable to travel from one place to another through these. Because it takes less time as well as it is comfortable.

How ride sharing services are provided

A rider or driver needs to register with one or more ride sharing companies to provide ride sharing services. Riders need a motor vehicle to register. It can be a motorcycle, it can be a private person. Can be owned, can also be driven for rent. Besides, driving license

[41] Pragukta, page: 76

has to be shown for registration. Some app companies also mandate initial training for riders.

After completing the registration, riders have to download a specially developed app on their mobile. This app is only available to riders, not passengers. The passenger app is separate. A ride is considered eligible after the driver downloads the app. Through the app-company under which the registration is done, he will now receive passenger requests in his vicinity.

The rider can see his passenger's pickup location, destination and possible fare while receiving the request. After seeing these, the rider can accept the ride or cancel it. If accepted, the rider first calls the passenger to finalize the contract. Then go to the pickup location of the passenger and take him to the destination. Passengers and riders can easily verify each other based on the information provided in the app.

After confirming over the phone, the rider arrives at the pickup point and waits. At this time the rider clicks on the 'waiting button'. After the passenger arrives, the ride sharing is started by clicking on the 'Ride Start' button after picking up the passenger in the vehicle.

Now the question is, when is the acceptance of these ride sharing apps completed? Who is the proposer and who is the recipient? What practical research has shown is that ride-sharing apps have three parties, the passenger, the app-company, and the rider, working together to exchange riding services—the sequence is such that the passenger first sends a request to the app authority to find a ride through the app. App Authority advocates for him and finds rides.

After that, the passenger and the rider finalize the rental agreement through a phone conversation, that is, after finding a ride, one of the two parties calls the other party and offers the rental agreement. Usually the rider calls first, sometimes the passenger also calls. According to Shariah, the one who calls here first will be considered Ijab. And the one who receives the phone and confirms it will be accepted.

Basically, after the user sends the ride request, the acceptance and acceptance is done mainly through a phone conversation between the rider and the user.

It is clear that sending a passenger request here is not a job; it is basically a request to find a rider. According to the request, the app authority finds the ride. In this case, the app authority only plays the role of agent. And the mobile app is considered an invitation to offer.

However, when the rider comes to receive the passenger after the izab acceptance is completed in the aforementioned manner, the object originally hired, i.e.',*'mustazar* fih' or the subject of the ire contract, is deemed to have been handed over to the hirer for enjoyment.

Online shopping

Nowadays online shopping is very popular. People now feel more comfortable shopping online than offline. Books, plots, flats are all sold online now. Product pictures, details are all given there. At the end there is an order option to purchase the product. From a Shariah point of view, product descriptions and advertisements are

invitations to proposals. And order is proposed. However, due to not seeing the product, in many cases there will be 'khiyare ruiah' for the buyer.

An example: offer, invitation to offer and counter offer

Umar went to the fish market and asked a fish seller about the price of a Rohu fish. The seller said it's 50$. Umar offered to pay 40$ for the fish, but the seller was not willing to accept that. When Umar was about to leave, he mentioned that he could pay 45$. Still, the seller was not satisfied.

As Umar was walking away, the seller stopped him and agreed to sell the fish for 45$.

In this incident, asking about the price of the fish was the "invitation to offer." The seller's initial price of 50$ was his offer. When the buyer offered 40$, it was a counteroffer. The seller's refusal to accept the counteroffer marked the end of that offer. Afterward, when the buyer mentioned 45$, it was another new offer from his side. The seller's acceptance of this offer made it the final agreement.

Basic conditions for a sale to be cleared

Generally, for a sale to be pure, it must be free from 6 types of negative qualities in Shariah view. namely-

1. Not having 'jahalah' or ignorance in trading. By 'jahalah' is meant the extreme level of ignorance which leads to quarrels and on which no resolution is possible. That is, a dispute is one where the arguments and arguments of both sides are on equal footing due to ignorance.

For example, someone contracts to buy a goat indefinitely from a herd of goats. Now the seller wants to give him a goat. The buyer will want to take it as it is. This will cause a quarrel between the two. There is so much product ignorance here that either can say on the basis of that ignorance that his proposal is correct.

It is important to remember that the potential for conflict is high. Whether or not it actually happens is not important.

Such ignorance in a sale can be from four aspects. namely-

A. Ignorance among products. There may be ignorance of the product's ethnicity, type/type or quantity etc.
B. Thus the price is ignorance.
C. Ignorance of time-limits for collection of dues.

D. Ignorance by guarantee. For example, in a sale at remainder, the seller stipulates to furnish a guarantor or mortgage for the remainder price. Then these two must be specific. Otherwise, the sale will fail.

2.Not to force sale or purchase. According to Hanafi fiqh, if the sale is forced, it will become corrupt. But it will become valid again if

spontaneous approval is obtained. However, Jufa's life. According to it, it will be waived from the beginning. Not corrupt. Shaikh Jaraka Rah. Commented in this regard - like Majallatu Ahkamil Adliya, Jufa's Rah. like this In such case, this condition shall be considered as a condition of execution of the contract of sale (شرائط الصحة). Not as a condition (شرائط النفاذ) of being correct.

3. Sales are not tied to any fixed period. For example, I sold this house for one year. If this is the case, the sale will become corrupt. Because ownership is not limited by time.

4. Absence of 'Gara'[42] in contract of sale. The intention here is to have a quality (غرر الوصف) in quality. Not in original existence (غرر الوجود). Eg, someone sold a cow. The condition of the sale was that the cow should give 15 liters of milk per day. If it is sold in this way, it will be corrupt. Because this quality of cow is uncertain. Garr exists in it. Yes, if sold like this, the cow will give milk. It is permissible to sell by mentioning or condition so much quality. The amount of milk will not be a condition. Or even if mentioned, it will be assumed. Not as a condition. In our conventional markets, these qualities are sometimes referred to as conditions, sometimes as general assumptions. The two are not the same. If it is the first, the transaction fails. So awareness is desirable.

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[42] 'Gara' is an agreement whose outcome is unknown. It is unknown that both the product and the legs are equal. Allama Kasani Rah. He introduced it as follows - الغرر هو الخطر الدهي آستوى فيه ترف الوجود والعدم بمنزلة الشك
"Gharar is a transaction with uncertainty, in which there are both sides to be and not to be." - Badayus Sanaye 4/366

5. No one's loss is inevitable in the sale. For example, someone sold half of his house. If it is divided now, other unsold parts of the house may suffer. If so, it will not be valid. But since this condition is said to be aimed only at the interest of the individual, the sale becomes pure if the individual agrees to it. Usually in our society, when this happens, the person accepts his loss on his own. Offer to sell by acceptance.

6. Absence of adverse conditions in the sale. By 'discretionary condition' is meant - every condition which confers a special advantage on one of the parties to the contract. The condition must not be one which the Shari'ah authorizes or is recognized by custom or is of contractual claim or relevance. Simply put, it can be said that there are three types of conditions for thick spots in sales. namely-

A. valid conditions.
b. Bad condition.
c. Meaningless or vain condition.

Contingent Conditions: Conditions that must be complied with can be of four types. namely-

A. Conditions which include contractual claims. These are conditions which, although not stated as conditions, may be complied with as per the general requirements of the contract. For example, the seller stipulates that the goods will be withheld until the price is paid. It is a general requirement of a contract that the goods will not be delivered if the price is not paid. It can be done without condition.

B. Terms that are consistent with the contract. For example, in the case of a sale in arrears, the seller has stipulated that the guarantor must furnish the outstanding price.

C. Conditions in respect of which there is Shariah approval. For example, cucumber sharath.

D. A condition in favor of which there are customs and nicknames. For example, buying a fridge on the condition that the seller will service it for free for so long. Or fix any errors. In today's language that is known as warranty.

Fasid Conditions: Conditions which are outside of the above four types of conditions. A condition involving only the interest or benefit of one of the parties. For example, someone sells a car on the condition that the car is allowed to be used by the seller once a week. Such conditions are corrupt conditions.

Pointless Terms: Terms that are of no particular benefit to anyone. For example, the house is sold on the condition that it cannot be rented out to anyone.

It is worth noting here that in Hanafi *fiqh*, if there is a custom or nickname regarding a condition, it is no longer fasid. This is an important point. Keeping this in mind, various conditions in conventional transactions are no longer considered corrupt. Because most of the conditions are customary. Sheikh Mustafa Jaraka Rah. Commented on this:

كل#شرط#فاسد#في#الأصل#ينقلب#صحيحاً#ملزم#إذا#تعارف#الناس#وشاع#بينهم#
اشتراطه#وهذا#توسع#حسن#في#تصحيح#الشروط#قلما#يبقى#معه#شرط#فاسد.

When every fasid condition becomes customary, common among people, then it is no longer fasid. It becomes inevitable and inevitable. This view of Hanafi Fiqh is truly a wonderful liberal view. Through this, the conditions are easily understood. According to this principle, there is not much left for fasid conditions.

He also said-

أصبحت#الشروط#في#هذا#العصر#كلها#صحيحة#بمقتضى#قواعد#الاجتهاد#
الحنفي#نفسه#لأن#الناس#قد#ألفوا#بناء#مبايعاتهم#وسائر#عقودهم#على#الشروط#
بوجه#عام#بسبب#اشتباك#مصالحهم#وتنوع#معاملاتهم.

According to the *ijtihad of Hanafi fiqh*, almost all *fasid* conditions become saheeh in the present age. Because usually people make their conditional sales, transactions and contracts mainly based on their business patterns, understandings and customs.

At the end he clearly said:

الشرط المفسد قد أصبح بحسب قواعد الحنفية نادراً بسبب نظرية العرف.

"According to the view of Custom and tradition, according to the principles of Hanafi fiqh, the condition of fasid has actually become rare in this age."

However, it must be remembered that only those fasid conditions will be permitted due to nicknames and customs, where there is no

other Shariah reason behind the condition being fasid. Moreover, nicknames and customs must also be proved. [43]

[43] Kitabu Aqdil Bai Kitab. p. 38-39.

Shariah Principles in Application of *Ijarah Mousufa Bil Dhimma* for Academic Purposes[44]

Abstract

This study delves into the application of Shariah principles in the context of Ijarah Mousufa Bil Dhimma for academic purposes. Ijarah Mousufa Bil Dhimma is an Islamic finance concept that involves leasing a specific asset, with the lessee bearing responsibility for maintenance and risk. The research aims to provide a comprehensive analysis of how this financial instrument aligns with Islamic jurisprudence, especially within the realm of academia. It focuses on Ijarah Mousufa Bil Dhimma, exploring its mechanics and implications within the framework of Islamic finance. The paper concludes by providing a Shariah-compliant model to execute Ijarah Mousufa Bil Dhimma for academic purposes.

Keywords: forward Ijarah, Shariah principles, Ijarah Mausufa bil Dhamam, academic purposes.

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Introduction:

The products of Islamic banking are gradually improving in every aspect. Considering the diverse needs of customers, innovative Shariah-compliant products are expanded in the Islamic Banking Industry (IBI), which will ensure the sustainability of IBI. Among such new products is Izarah Mausuf Fiz Jimmah or Forward Izarah noteworthy through which Islamic banking is providing its customers with Shariah-compliant cash facilities for various purposes. Its use, especially in the education sector, is a commendable and acknowledgeable step. Many students, both in the country and abroad, need to pay various types of university fees, such as varsity tuition fees, exam fees, etc. when they often don't have the cash to pay instantly. Students are then forced to resort to usurious banking and loans based on interest. In this case, Islamic banking has decided to use forward lease products to settle the cash deficiency of these students, and this innovation indeed deserves to be applauded. However, the primary stipulation of a product being an Islamic product is that it must comply with the Shariah principles; otherwise, it will be labeled as a synthetic product. Some Islamic banks in Bangladesh have already commenced implying Ijarah Mausuf Fiz Jimmah in the education sector, but their Shariah process is not translucent. The article aims to explain the fundamental Shariah principles to be pursued and the processes of implementing Ijarah Mausuf Fiz Jimmah in the education sector

Research Question:

- The definition of Forward Ijarah.
- The Shariah principles for implying forward Ijarah.

●The requirements to use Forward Ijarah for academic purposes

According to Islamic Jurisprudence (Fiqh), Ijarah, the terminology, refers to paying compensation in exchange for a specific work. (أجر- من باب ضرب-يضرب) (يأجِر) means "paying someone compensation" When it is from Baab (stem) al Mufa'alah, it means exchange of Ijarah. Furthermore, it means invoking compensation or rental when it is derived from Baab (stem) al Istifa'al. Article No. 405 of the Islamic Statutory Law 'Majallatu Ahkamil Adliyya' written under the Ottoman Sultanate in the 13th Hijri century defines the lease agreement as follows:

وفي#اصطلاح#الفقها#بمعنى#بيع#المنفعة#المعلومة#في#مقابلة#عوض#معلوم#

According to the Jurisprudents *(Fuqaha)*, Ijarah refers to the "Sale of specific benefits against specific compensation."

Points to underline:

1. Specific Compensation or Exchange: According to the aforementioned definition, the reference to specific compensation at the stage of the transaction is a precondition for Ijarah. For instance, if a house is leased, the rental must be specified at the stage of concluding the contract; otherwise, the contract becomes void. In a similar vein, if someone is appointed for a job, the salary must be specified during the conclusion of the contract.

2. Benefit or Manfa'at (In Arabic): the fundamental of the Ijarah contract is the acquisition of a specific usufruct (Manfa'at) of a person or an object. On the contrary, in a sale contract, not only the usufruct but also the possession of the object is transferred. The basic difference between a sale and an ijarah contract is that the former is permanent, whilst the latter one is temporal.

   Thus, for the ijarah contract to be permissible, the aforementioned benefit (Manfa'at) has to be specially stated, such as if anyone rents a house, he must know the purpose of the rent; otherwise, the contract becomes void.

   Fundamentally, all the jurisprudents *(Fuqaha)* unanimously validate the Ijarah contract. The famous Faqeeh Imam Ibnul Munzir of the fourth Hijri century (d. 318 AH) notes ijma on its basic validity.

Forward Lease: A Subtle Concept

Generally, there are two types of Ijarah contract; one is called the *Ijaratul Akhsas* (employment contract), which is determined by the work, and the other is the *Ijaratul Ayan* (lease contract), depending on the wealth.

There are two types of lease contracts around us. Certain things will be leased, for example, house rent. However, some leases are those under which the principal benefits are agreed to be received in the future, and the benefits are not confined to anything specific but

accrue to the lessor, which is called Mausufa Fiz Zimma. For instance, a car is rented through a rent-a-car. Usually, in these cases, the car is not specified, but the details are given through the number of seats, features, brand, etc. of the car, and afterward, it is the responsibility of the renter to arrange the car according to the aforementioned details.

Since the car is not specified, no specific car can be claimed by the renter, who is bound to accept any car as per specification. Similarly, the renter can provide a car to someone else after arranging it according to the specifications; afterward, He will provide another such car to the first customer. Similarly, if the vehicle provided by him is destroyed or lost, another vehicle will be provided in its place.

However, if, on the contrary, the car had been specified in the original contract, the original contract of lease would have been terminated by its destruction. On the other hand, if one of the assets undertaken by the lessor is destroyed, another must be paid according to the description.

In brief, the leased article is not fixed during the lease contract; rather, the liability of the lessee is required. The jurists therefore introduced it as follows-

هي#بيع#منفعة#معلومة#في#الذمة #

"It is the name of the sale of certain prescribed benefits revolving around liability."

Ahmad Muhammad Mahmud Nassar, after a detailed discussion introduced it as follows-#

د# على# منفعة# عمل# أو# منفعة# عين# تمليك# منافع# مستقبلية# ثابتة# في# الذمة# وار
د# هي# أسلم# في# المنافع# سواء# كانت# منافع# أعيان# أو# منافع# أعمال# أو هي#
إجار# الذمة# لأن# المنفعة# المستوفاة# متعلقة# بذمة# المؤجر# وليست# متعينة# أو#
الإجار# الوارد# على# منفعة# مضمونة# لأن# المنفعة# فيه# يضمن# المؤجر# تقديمها

في# كل# الحالات# وهي# متعلقة# بذمته# ويطلق# عليها# باللغة# (Forward Ijarah)
الإنجليزي

Means: Owning fixed future benefits which apply to the benefit of work or the benefit of an asset" or it is "a ladder of benefits" whether it is the benefits of property or the benefits of business, or it is a "lease of liability" because the benefit received is related to the lessor's obligation. It is not specific or the lease is included in a guaranteed benefit because the benefit in it guarantees that the lessor will provide it. In all cases, it is related to his liability. It is called in English forward Ijarah

Significance of Ijara Mausuf Fiz Jimmah:

1. The objective will be the benefit attained in the future.
2. The benefit could be related to any object or person.
3. The details of the benefit shall be written in the core contract and the responsibility of the renter shall be to provide rentals accordingly.

4. The subject of the rental will be determined during the contract.

Forward Ijarah and Future Ijarah:

Future Ijarah and forward Ijarah are not similar. Future leases are, where the subject of the lease is fixed but the lease commences in the future. For example, the contract is that the house is rented to you from next 1st of August. It is permissible while it is not permissible in the contract of sale. buying and selling has to be cash paid; therefore, it is impermissible to say: " I have this item for sale next Friday." In terminology, it is called Future Ijarah (المضاف إلى المستقبل)

On the other hand, forward Ijarah is where the lease contract, like a future lease, commences in the future whereas here the subject of rent is not specific but the details are given. It is the lessor's responsibility to supply the article of the rental in accordance with that description.

Types of Forward Ijarah

Forward Ijarah has fundamentally two types, the same as the main Ijarah contract; for example, the hiring person contract and the borrowing object contract.

1. Forward Ijarah in Hiring Person: Appointing someone in such a way that he has to perform a task that becomes his responsibility; however, he does not have to complete it himself and does not have to do it in his presence.

2.**Forward Ijarah in Lending Object**: It refers to concluding the lease contract on the basis of mentioning the details of any article where the article is not specified. Forward Ijara refers to the latter one which is the discussion point.

Forward Ijarah and Salam Contract

A salam contract refers to a sale contract where the price is paid prior to the delivery of the products in the future. The specifications, such as quality, quantity, delivery date, place, etc., shall be explicitly written in the contract paper, and the products will be delivered according to those specifications. The aforementioned Forward Ijrara is almost the same as the Salam contract since the lease contract is concluded referring to the specifications of the lease article delivered in the future.

Thus, Forward Ijarah resembles the Salam contract, although all the conditions of the Salam contract are not required. Nonetheless, if the word Salam is mentioned, all the conditions of the Salam contract

will be observed, especially providing the rental in advance. In this case, it is called Salam Forward Ijarah contract or in Arabic ' سلم في المنافع'

The fundamental Shariah ordinance of the forward Ijarah contract:

1. Details should be mentioned so that any future chaotic incidents can be avoided.
2. The renter must determine whether s/he will prepare or collect the compensation to pay the rental according to the designated details.
3. If the renter fails to provide the compensation as per the details, the lessor has the right to terminate the contract and to ask for the compensation. The ownership of the subject matter or the acceptance of rent by the renter should be assured before leasing.
4. The ruination of the subject matter shall not terminate the contract unless the leaser provides a new subject matter with predefined specifications.
5. The stipulation of including a penalty clause is permissible in terms of failure to pay compensation on time.
6. In a forward lease, the article of rent will first be determined by describing the quality without being specific. However, the article can be finally specified during the execution of the contract later. In that case, it will be converted into a general fixed tenancy contract. Dallatul Barakah, a fatwa of theirs, allowed it whilst it has to be by a separate contract.
7. Earnest rental: There are different opinions on whether earnest rental is mandatory or not among scholars. However

> I believe that paying cash advance is important because this is *Salam Fil Manaf* and in *Salam fil Manaf* paying compensation or capital in cash is considered significant.

Moreover, other scholars like Guddah, Dagi, Hammad, etc. contend that earnest rental is not significant. The AAOIFI Shariah Board and Al Raji Bank Shariah Board also agree with the adjudication. However, if the word, *Salam*, is mentioned, the advance rental shall be provided since it is mandatory in the Salam contract. The validity of the contract will be sustained according to the amount of rental paid; therefore, if the rental of one month is paid, the Salam Lease contract has to be renewed for the imminent months.

This appears to be a sensitive issue because both exchanges fall in due if the rental is which creates uncertainty of the DEBT SALE (الكالئ بالكالئ). Therefore, Dr. Ahmad was not satisfied regarding this issue and invited for a wide range of discussions at Islami Fiqh Academy, Jiddah

Forward Ijarah for Academic Purposes:

Context:

To enroll in higher education both at home and abroad, a considerable number of students need to pay admission fees, semester fees, etc. to the university. In the case of private universities, sometimes the amount seems higher, and often much higher in private medical colleges. Many students cannot afford these fees alone. Therefore, they approach the interest-based banks

to lend the expected money. In these circumstances, Islamic banks are urged to design and offer alternative Shariah products.

Shariah product Model:

Islamic banking can provide fees for universities that comply with Shariah principles and ensure profits. Thus, Islamic banks shall conclude MoUs with some reputed (where students are more inclined to study) universities. The subject of MoUs shall be the agreement of jointly cooperating university (having contract) students to secure their studies, and the buildings and seats under it shall be purchased by the Islamic Bank.

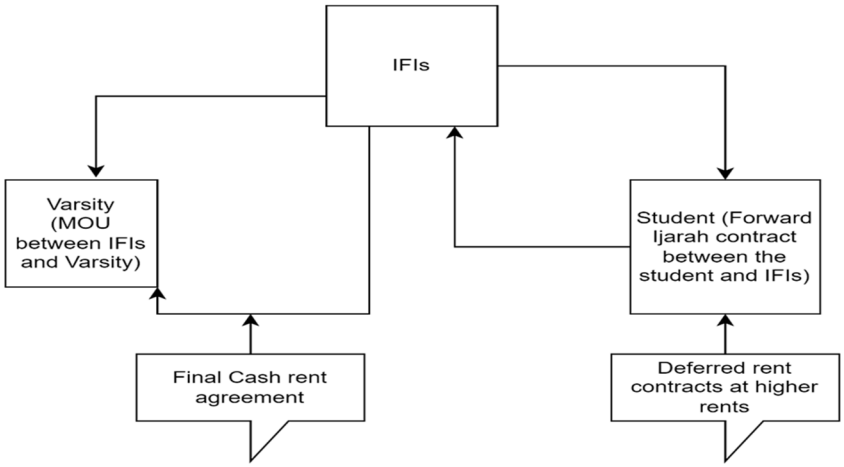
On completion of MoUs, Islamic Bank will receive some academic seats (as per necessity) as rent; afterward, the seats are leased to the students on a deferred basis. There are two lease contracts; one is between Islamic Bank and the university, and the other is between students and Islamic Bank. The rental of the former one shall be determined, and *Ijarah Mausufa fiz dhimma* is not executed here. The later contact is based on *Ijarah Mausufa Fiz dhimmah*. Despite the university being determined, there is no issue with utilizing the *Ijarah Mausufa fiz dhimma* contract since the seats are not specified.

Islamic banking contracts with students can be concluded in two stages. Firstly, there will be a master agreement when it is not mandatory to complete the first lease contract by the bank. The second stage is the commencement of the lease, which will succeed in the completion of the first lease.

Two lease agreements may also be simultaneous; Islami Bank will complete the lease contract with the university first; afterward, *Ijarah Mausufa fiz dhimma* can be concluded parallelly with the students. However, the first lease must be completed before the second lease can take effect.

For example: 'X' is going to be admitted to a university where the expenditure is almost fifty thousand taka, including tuition fees and other fees. Since 'X' is unable to manage the required amount, he needs to borrow the money from financial institutions. In this circumstance, he may accept money from interest-bearing loans from conventional banks, or Islamic banking can provide that service in a Shariah-based method utilizing the *Ijarah Mausufa fiz dhimma* project.

The procedures are that the Islamic Bank first concludes the *Ijarah Mausufa fiz dhimma* contract with 'X' person, and later on it shall accept the rental ownership of the academic seats. Afterward, it shall conclude a parallel ijarah contract following the aforementioned procedures, and this ijarah will ensure the profit of the Bank since it is leased on a higher price or deferred payment.



Self-filmed

Explanation:

1. Firstly, MoUs will be signed with IFIs (Islamic Financial Institutions) and designated universities, through which both institutions will agree on hiring the required number of academic seats in the future.
2. The Islamic financial institution will have an *Ijara Mausufa Fiz dhimmah* contract with the students. The first and aforementioned second steps can be simultaneous. .
3. In the third step, the Islamic financial institution will receive the main lease contract from the university as per the aforesaid contract.

4. Finally, the Islamic financial institution sub-lease the remaining academic seats to the student at a higher exchange rate.

A significant aspect in implementing Forward Ijarah: Financial Institutions context

1. Firstly, the core Ijarah contract shall be concluded between the university and the financial institution.
2. The financial institution stipulates that the services shall be provided by the university to its representatives.
3. The Ijarah contract with the recipient can only be concluded once the contract between the university and the financial institution is concluded.

Conclusion

It is an important responsibility for Islamic financial institutions, especially Islamic banking, to assess the various financial necessities of customers and develop innovative products to address them in a Shariah-compliant manner. The aforementioned forward Ijarah is one of such innovative products through which Islamic banking in various service sectors can provide financial benefits to customers in a Shariah-compliant manner. Especially in the education sector, it has been used in many countries as an interest-free system to manage university fees for students. It can also be widely used in Islamic banking in Bangladesh. However, to ensure Shariah compliance and maintain proper measures, it is required to develop Shariah models and innovative systems. Furthermore, banking institutions, especially Islamic banking, should invest in

this regard to develop the model and infrastructure. There are banks that have taken initiatives in this regard. Hopefully, if it progresses properly, it will retain a pervasive contribution to a sustainable, interest-free, and Shariah-compliant society.

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Sharī'ah Scrutiny of Islamic Banks' Financial Compensation Fund in Bangladesh: Governance Principles in the COVID-19 Perspective[45]

Abstract

Purpose – The purpose of this study is to critically analyze the Financial Compensation Funds being accumulated by Islamic Banks of Bangladesh in credit-based transactions. In this connection, due to the evolved liquidity crisis amidst the COVID-19, industry opinions are observed that suggest including the compensations or the donation funds directly into the bank's income account. But the Sharīʿah does not permit it. Such alternative proposals of using compensation or donation fund during crises are scrutinized under Sharīʿah principles to come to a logical conclusion.

Design/methodology/approach – The approach followed in the study is textual and discourse analysis through descriptions of ideal Sharīʿah-compliant methods for handling late payment of credit and comparison with the industry practices.

Findings – It is observed that there are conceptual gaps in the industry as is reflected in the Islamic Banking Guideline of Bangladesh. The funds collected from the debtor due to late payment are named as compensation (*Ta'wīḍ*) whereas the nature of

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the transaction is a donation (*Tabarru'*). The misconception can lead to various Sharīʿah non-compliant activities later with the funds. The proposals brought out in the industry to use such compensation/donation funds during a crisis are a consequence of this. The proposals of using such funds for banks' purposes in any situation are not supported by Sharīʿah principles and are against the Islamic banking philosophy.

Originality/value – The study is very relevant to the current crisis of COVID-19 in the domestic Islamic Banking Industry and also instrumental for the future guidance to stick to the Sharīʿah principles in managing compensation or donation funds by the Islamic Banks.

JEL Classification: G20, G21, G28 **KAUJIE Classification:** J32, L24, L26

Keywords *Ta'wīḍ*, *Gharamah*, *Al-Iltizam bi-al-Tabarru'*, Penalty Clause, Islamic Bank, Bangladesh

Paper type Research paper

1. Introduction

For Islamic Financial Institutions, it is a big challenge to handle the delayed repayments from the debtors. In the light of COVID-19, the situation is crucial. In the conventional system, receiving fines as

the addition to the interest payment is an established method. But, the procedure is not justified for an Islamic Financial Institution. So, alternative action plans are necessary. One of the recognized procedures is 'Undertaking to Donate' by the borrower in case of delay in the repayments which is made obligatory in the contract. In Bangladesh, there are 'Foundations' as subsidiary organizations of the Islamic Banks. The amounts collected by the branches of a bank are directed to the headquarter. The head office directs the money then to the foundation. From the foundations, the funds are spent on different charities. Generally, Islamic Banks in Bangladesh have hospitals in the group of companies and the donation funds are used in these hospitals for charity purposes.

Ethically, the Islamic Bank or Financial Institution cannot include this amount in the income. But, during the COVID-19 scenario, due to the evolved liquidity crisis, several opinions in the industry are observed that advise to include the donation from the late repayments in the Bank's income which is completely unacceptable in the Islamic Sharīʿah. Again, though as per the feature of procedures- the extra amounts received by Bangladeshi Islamic Banks are 'Donations', the guideline of the central bank defined it as 'Compensation' (Bangladesh Bank, 2009). Bangladesh lacks a full-fledged Islamic Banking Act. The loopholes and discrepancies

in the governance are creating risks in Sharīʿah compliance and the practice of Islamic finance techniques.

This study critically analyses the process in the light of Sharīʿah principles and sheds light on the governance principles of the Financial Compensation Fund in Islamic Banks and Financial Institutions. Initially, Sharīʿah terminologies are discussed in the literary framework to deduce the Sharīʿah guidelines along with the scholar opinions and religious text references. Then the industry opinions are scrutinized to arrive at a logical conclusion. The Sharīʿah principles are brought out which are to be followed in any case of recovering delayed payments.

2. Literary Framework

*2.1 Ta'wīḍ (*التعويض*)*

If anyone's wealth is damaged or anyone is physically harmed, compensation is imposed on the doer. In Sharīʿah terminology, it is called *Ta'wīḍ* (التعويض). The root word is *'iwaḍ* (العوض) of which lexical meaning is 'exchange'. According to Islamic economic terminology- compensation is the obligatory exchange against the damage caused - التعويض هو دفع ما وجب من بدل مالي بسبب إلحاق الضرر بالغير (Hammad, 2008, p.142). In Islamic Economics, there are four ways of becoming the owner of wealth. One of them is *al-Khalafiyah*

which means replacing the ownership with a new one. *Al-khalafiyah* occurs in two forms-

a. Inheritance (Inheritor becomes the owner after the death of the former owner);
b. Compensation (When somebody's wealth is damaged, the victim becomes the owner of a certain portion of the wealth owned by the doer formerly).

In both cases, the ownership is created later. So, it becomes clear that ownership created through compensation is established later; not declared earlier. That is why, *al-Khalafiyah* is known as late-arrival (Al-Zarqa, 2004, p.7).

In English, *Ta'wīḍ* (التعويض) is known as 'Compensation' (Binti Zulkipli, 2019). According to Hornby and Turnbull (2010) from Oxford Advanced Learners' Dictionary, compensation is something, especially money, that somebody gives you because they have hurt you, or damaged something that you own. To be specific, it is financial compensation that ultimately means the same as *Ta'wīḍ*. The value is determined later as the actual indemnity against the damage or infringement caused.

On the contrary, in Islamic Banking, the excess payable by the debtor (what is received as a donation) is pre-determined. There is no relation between it with the actual damage or infringement

because sometimes the debtor is unable to repay in reality. Then s/he is not a transgressor. Therefore, donation or the excess paid by a debtor in Islamic Banking cannot be told Financial Compensation or *Ta'wīḍātu Māliyyah* from an academic perspective.

But according to Bangladesh Bank (2009) from the Guidelines for Conducting Islamic Banking, "*Compensation means such financial penalty as is imposed by an Islamic Banking Company over and above the amount of installment when a client fails to repay Bank's investment on due dates as per the agreement executed by him*". It is evident that in the guideline provided by the central bank-compensation indicates the financial compensation or the *Ta'wīḍātu Māliyah*. As per the contract, when the client fails to repay in due time, Islamic Bank imposes this excess amount on the payable amount. The use of the term 'Compensation' in this context requires a logical explanation.

2.2 Gharamah or Penalty

Gharamah (الغرامة) is another Arabic term that means- what is obligatory to pay. Viz- debt, compensation, etc. In the *Qur'ān*, it appears as 'والغارمين' which means 'and those who are indebted' (*Qur'ān*, 9:60). According to Islamic *Fiqh* Encyclopedia, ' مال يجب أداؤه تعزيرا أو تعويضا' i.e. such financial liability that is mandatory to

pay as compensation or penalty (Ministry of Awqaf and Islamic Affairs Kuwait, 2012).

Gharamah is of two kinds (Al-Suwailem, 2009). They are-

a. *Al-Gharamah al-Ta'zīriyyah* (الغرامة التعزيرية): Penalty or punitive fine which is imposed due to the violation of any law (Binti Zulkipli, 2019). It is generally imposed by the authority or the government and pre-determined against the breach of certain laws. For example- fines were imposed for the violation of the traffic act. In lexical meaning, a punishment for breaking a law, rule, or contract (Oxford Advanced Learner's Dictionary, 2010).
b. *Al-Gharamah al-Ta'wīḍiyyah* (الغرامة التعويضية): Compensatory fine which evolves against any real or actual loss. This is the compensation discussed above that is not predetermined (AAOIFI, 2016, p.243).

But the practice of Islamic Banking being discussed here cannot be *Al-Gharamah al-Ta'wīḍiyyah*, since it is similar to *Ta'wīḍ* i.e. compensatory fine to be determined after the damage. On the other hand, compensation received by the Islamic Bank from the debtor as the donation is predetermined. Moreover, Islamic Bank cannot use the donated money for its use. But, the penalty or punitive fines collected by any authority or government is added to the authority's

pool of funds. So, the concept of *Al-Gharamah al-Ta'zīriyyah* is also conventional as the case of Islamic Bank is very much different here.

2.3 Al-Sharṭ al-Jazā'ī or Penalty Clause

Al-Sharṭ al-Jazā'ī (الشرط الجزائي) is the indenture that binds one party of a contract with some principles at the inception of the contract. Violation of these clauses will compel the party to pay a fixed compensation amount. This is *al-Sharṭ al-Jazā'ī* or Penalty clause (AAOIFI Sharī'ah Standards, 2021) [1]. This terminology was not in use during the time of former *Fuqahā*. When trade and commerce spread over time, the term evolved through human laws. But the use of such clauses in the contracts is found in classical *fiqh* (Bukhari, 2004, *ḥadīth* no. 2611)

Al-Suwailem (2009) introduced a penalty clause as the condition attached in the main contract which compels any contracting party to compensate provided that they have failed to satisfy the condition without a valid reason. Al-Darir (1985) wrote in this context, both the contracting parties agree that the party responsible for performing the task would compensate for the loss incurred if the task is not performed or delayed. *Al-Sharṭ al-Jazā'ī* is classified in two categories:

a. Penalty clause indicating the failure to pay any debt or financial liability in due time. It means, both contracting parties agree that

if the debtor fails to pay the debt in due time, s/he will pay a fixed amount of financial compensation over the real debt amount. This is usury.

b. Penalty clause attached in regular buy-sell or service-based contracts. For instance- a compensatory fine is payable due to the failure of completing the task in time (AAOIFI Sharī'ah Standards, 2021) [2].

The practice of collecting excess amounts in Islamic Bank due to the failure of debt repayment in due time is similar to the first category of *al-Sharṭ al-Jazā'ī* or Penalty clause. But in a practical sense, this practice cannot be called a penalty clause because this type of penalty clause in money lending contracts is not permissible. It becomes like the conventional banking practice of receiving anything above the debt value- usury dealing.

2.4 Al-Iltizam bi-al-Tabarru'(Undertaking by the Debtor to Donate)

'Iltizam' means making something obligatory on ownself. *Tabarru'* means the donation, charity, etc. So, *al-Iltizam bi-al-Tabarru'* is making donation compulsory on ownself by anyone. For example- making donation compulsory through taking vow (*Manut*). In the *Murābaḥah* Investment method, the client takes a one-sided responsibility of donating a fixed amount to the bank's charity fund, in case s/he fails to pay in due time (Usmani, 2011, p.146). Thus in

murābaḥah mode- if the client fails and there is no valid reason behind the failure, it becomes compulsory for him/her to donate. The rate of donation can be aligned with the conventional bank's interest rate [3]. This whole process is *Al-Iltizam bi-al-Tabarru'* or Undertaking by the Debtor to Donate (AAOIFI Sharī'ah Standards, 2021) [4]. In this method, the client is compelled to pay in due time, otherwise, his/her payable would increase which is unacceptable for him/her. This is now evident that the amount collected from the loan defaulter in Islamic banking is *al-Iltizam bi-al-Tabarru'*; neither compensation nor penalty clause. Other terms except the 'Undertaking to Donate' are not appropriate in this context according to Islamic philosophy. AAOIFI also rejected these terms.

2.5 Islam's Position regarding the Loan Defaulters

It is not appropriate to think that Islam relaxes the legal bindings on the loan defaulters, since Islam does not allow the creditors to receive a financial penalty from the defaulters. On the contrary, willingly defaulting is a grave sin in Islam. This is explicitly forbidden to do so.

It appears in the *ḥadīth* being narrated by Abu Huraira Ra.: *Whenever a dead man in debt was brought to Allah's Messenger (ﷺ) he would ask, "Has he left anything to repay his debt?" If he was informed that he had left something to repay his debts, he would*

offer his funeral prayer, otherwise, he would tell the Muslims to offer their friend's funeral prayer. When Allah made the Prophet (ﷺ) wealthy through conquests, he said, "I am more rightful than other believers to be the guardian of the believers, so if a Muslim dies while in debt, I am responsible for the repayment of his debt, and whoever leaves wealth (after his death) it will belong to his heirs (Bukhari, 2004, *ḥadīth* no. 2298).

In another *ḥadīth* being narrated by Suhaib Al-Khair Ra.- *The Messenger of Allah (ﷺ) said, "Any man who takes out a loan, having resolved not to pay it back, will meet Allah (SWT) as a thief"* (Ibn Majah, 2008, *ḥadīth* no. 2410) [5].

Abu Huraira Ra. also narrated another *ḥadīth* in this context- *The Prophet (ﷺ) said, "Whoever takes the money of the people to repay it, Allah will repay it on his behalf, and whoever takes it to spoil it, then Allah will spoil him."* (Bukhari, 2004, *ḥadīth* no. 2387).

Therefore, there is no chance of reconciliation with the deliberate defaulters. The sin is grave and to recover money from them, it is allowed to take necessary actions. Even, they can be banned from future transactions, foreign travel, etc. But to do so, the application of a Sharīʿah-based financial system across all the sectors of the economy is necessary. Charging a fine that is to be paid to the

creditor is not the way of Islam to deal with loan defaulters as it is associated with *ribā*.

3. Methodology

The research design followed in this study is descriptive under the qualitative method. At first, there are the observation of standard directives according to Sharīʿah teachings along with the scholarly opinions and then the observation of industry practice in real scenarios. To analyze the industry practices and the intents, textual and discourse analyses are conducted. The theme of understanding texts and discourses is gradually developed in the form of- what should be and what is being followed- action research approach. The texts and discourses are collected from various primary and secondary sources. The COVID-19 pandemic created a depression in almost all spheres of the economy. Regulators discouraged the Islamic Banks to push the debtors to repay hurriedly. Consequently, banks' respective incomes decreased in the process. The effect ultimately hit two different aspects-

a. Profit-share of the depositors,
b. Operating and administrative costs of the banks.

Overall, a liquidity crisis is observed across the industry. On the other hand, there is ample idle money accumulated in the Donation Funds (named as compensations) of the banks which have not been

donated for long. Under this circumstance, in a seminar conducted by the Central Sharīʿah Board for Islamic Banks of Bangladesh (CSBIB), different proposals have been brought out to tackle the liquidity crisis (CSBIB, 2020). But there are Sharīʿah non-compliance risks associated with the proposals which question the existence of the banking principles of Islamic Banks. At this point, the motive behind this study was created. The notable proposals brought out in the discussion of the industry professionals:

- Proposal 1: In case of exceptional need, the money accumulated in the Compensation Fund can be added to the Income Account.
- Proposal 2: Directly adding the compensation to the bank's income and declaring it as a usury percentage during the income declaration through financial statements. It will be accounted as usury so that the depositors can donate the *ribā* portion from their share of profit.
- Proposal 3: The donated money by the debtor would be utilized by the bank in act of charities to its poor clients or customers.
- Proposal 4: The loss bank incurs due to the late payment of debt or delay in the repayments, would be collected from the defaulting clients.
- Proposal 5: Compelling the debtor to donate by the central bank or any third party, where the bank itself will not take part.

The study ultimately evaluates the justifiability of the above proposals in exceptional situations like- COVID-19.

4. Sharīʿah Inference of the Terminologies

4.1 Ta'wīḍ or Compensation

Islam preserves everyone's life and wealth from others. None is permitted to harm or occupy another person's wealth and property. It is stated in Surah An-Nisa, "*Do not consume one another's wealth unjustly but only [in lawful] business by mutual consent*"- لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلَّا أَن تَكُونَ تِجَارَةً عَن تَرَاضٍ مِّنكُم (*Qur'ān*, 4:29). It appears in the Sahih *Ḥadīth*, "*All things of a Muslim are inviolable for his brother in faith: his blood, his wealth and his honor*"- كل المسلم على المسلم حرام دمه وعرضه وماله (Muslim, n.d., *ḥadīth* no. 2564). Therefore, receiving *Ta'wīḍ* or compensation against the loss of life or wealth is valid in Sharīʿah. In another *ḥadīth* it is told - لا ضرر ولا ضرار - "*There should be neither harming nor reciprocating harm*" [6] (Ibn Hanbal, 2008, *ḥadīth* no. 2865) [7]. In this context, compensation will be compulsory on three fundamental conditions-

i. The infringement is proved against the law whether it is obvious in statement or custom (AAOIFI, 2016, p.220).
ii. Harm is caused. It can be financial or physical (AAOIFI Sharī'ah Standards, 2021) [8].

iii. Loss is incurred. It should not be based on any possibility (AAOIFI Sharī‘ah Standards, 2021) [9].

One important consideration here is that the discussion's focus is business-related loss. In economics, the loss is of two kinds. One is actual and another is opportunity loss. Opportunity loss or cost is a foregone investment. Here the value of the loss is a possibility that could have happened. Mufti Taqi Usmani defined opportunity loss- الفرصة الضائعة - as the profit could have gained by the bank if an amount was invested (Usmani, 2009, p.226). Islam does not recognize such opportunity loss. That is why, if someone's money is thieved, the exact amount is to be paid back along with other punishments. But, the opportunity loss would not be considered in repayment (Usmani, 2011, pp.143–144). Similarly, when a *murābaḥah* client refuses to purchase a product later, the actual loss can be received by the bank. For instance- the product purchased by the bank for *murābaḥah* was sold at a lower value than cost. Here, the lost amount can be recovered as compensation from the first or original client who refused. But the opportunity cost of selling the product to the first client in profit, cannot be asked as compensation (AAOIFI Sharī‘ah Standards, 2021) [10]. Similarly, the opportunity cost of not buying the product rather investing the amount in any other project is also not to be considered.

4.2 Gharamah or Penalty

The first type of Ghaaramah, *Al-Gharamah al-Ta'zīriyyah*, or the punitive fine is imposed due to the violation of the law. It is imposed in various forms like physical punishment, financial penalty, etc. The financial penalty is called *Ta'zir bi-al-Māl*. Classical *Fuqahā* differed in their opinion on the permissibility of *Ta'zir bi-al-Māl* and most of them did not allow it. Oppressive rulers can illegally occupy general peoples' wealth by this mean for own purposes. But Imam Ahmad RAH. (780 AD- 855 AD), Imam Abu Yousuf RAH. (738 AD- 898 AD) approved it. Many present *Fuqahā* support it (Al-Zarqa, 2004, p.50). But the execution of this punishment should be done by the court according to state law. The money will be delivered to the state's treasury. Without the interference of the court, none can impose such financial penalty on anyone and it will not be valid.

Therefore, when a person is found to delay in repayments for no reason, the court can impose such punishments on him. It is told in the *Ḥadīth*, "If one who can afford it delays repayment, his honor and punishment become permissible."- لي الواجد يحل عقوبته وعرضه (Ibn Hanbal, 2008, *ḥadīth* no. 17946) [11]. The punishment mentioned in the *ḥadīth* is not specific. So, it is not necessarily to be a financial penalty. It can also be physical. If the financial penalty is imposed,

then it has to be executed by the court and directed to the state's treasury (Usmani, 2011, p.143). The creditor cannot receive the financial penalty.

4.3 Al-Sharṭ al-Jazā'ī or Penalty Clause

At present, in different financial transactions, a penalty clause is included in the contracts from the beginning. The main objective of this clause's inclusion is to complete the task associated with the transaction. Another usefulness is- loss can be recovered without any legal proceedings. For example, if the cloth is not delivered on the due date a hundred pennies are deducted from the wage. Such penalty clauses are applied in two aspects-

i. Transactions where product or services are received; viz- contractual service agreements, *Istiṣnā'*, *Salam*, *Ijārah*, etc. Using the penalty clause in these transactions is valid. It is similar to the above example. But no such obstacle can be placed which is unavoidable so that the deduction in wage becomes obvious from the beginning (AAOIFI Sharī'ah Standards, 2021) [12].

ii. Transactions in loan or any payment like- failure to pay the creditor in time is associated with the penalty of paying extra money as fine. This is not acceptable at all in Islam. This is the obvious usury (AAOIFI Sharī'ah Standards, 2021) [13].

In a resolution by the International Islamic *Fiqh* Academy, Jeddah- it is stated clearly that it is invalid whether paid in currency or any form of wealth [14]. In such contracts, even if the collected extra money i.e. fine is donated without consumption, the sin of contracting prevails [15].

4.4 Al-Iltizam bi-al-Tabarru' (Undertaking by the Debtor to Donate)

This is taken from the *Mālikī Fuqahā*'s *Fiqh* Principles; currently followed in Islamic Banking. It came through several stages to the current form. Initially, this undertaking was not in the practice of Islamic Banking. The best way to handle a person who defaults willingly is to punish him centrally. This central punishment is executed by the central bank or the government by banning him/her from the banking facilities for good. Thus the practice of defaulting willingly would decrease. But the precondition to implementing this step is to ensure Islamic Banking all over the country which is absent now. Banned individuals would move to conventional banking to get banking facilities. Later penalty clause comes into discussion. But due to the resemblance of a type of usury in the penalty clause, it was rejected by the scholars. Then this undertaking or *Al-Iltizam bi-al-Tabarru'* was proposed as a one-sided promise by the debtor.

To implement *Al-Iltizam bi-al-Tabarru'*, two fundamental conditions are provided-

i. If a person fails to repay debt due to financial inability within time, then firstly, s/he has to be given the chance to repay within additional time. No financial pressure can be imposed on him.

ii. When the failure to repay occurs without any reason rather due to the irresponsibility of the debtor, then donation through *Al-Iltizam bi-al-Tabarru'* can be collected as per the advice from the Sharīʿah Board of the Islamic Bank for the Charity Fund. The bank will not be able to use the donation for its purpose (Usmani, 2009, pp.280–281).

But nowadays, the first condition is waived and not followed. By and large, with every client in *murābaḥah* contract, 'Undertaking to Donate' is attached. Then the donation is collected from everyone irrespective of being unable or irresponsible to repay. Though as per the contract, there is no wrong here in practice, collecting donations in such a way without verifying the real cause does not match with the vision of Sharīʿah principles. Again, some Islamic Banks waive the donation provided that the debtor appeals to the bank stating the inability to repay in due time. This is worthy of appreciation, although it is necessary to ensure that the bank takes the

responsibility to investigate the reasons for defaulting and waive the incapable individuals. There is no alternative to implement the Sharīʿah principle in each segment of the Islamic Banking procedure. The derailments from the Sharīʿah principles in any part of the Islamic Banking procedure is a disgrace to the establishment of the whole Islamic Financial System and its divine philosophy of justice in every financial transaction. If the second condition, directing the donations mandatorily to the bank's charity fund, is waived then the whole system will be corrupted and the bank's income will be contaminated.

Al-Iltizam bi-al-Tabarru' was approved by the following experts-

- The Council of Present Issues in Pakistan (*Majlis-e-Tehqeeq Masail-e-Hazira*) approved *Al-Iltizam bi-al-Tabarru'* in 1992 AD (1412 AH). The then Islamic Scholars and Banking experts participated in a conference and passed a resolution together where the eighteenth resolution was on 'Undertaking to Donate by the Debtor' (Ludhyanvi, 2003, p.111).
- The *Fatwā* and Sharīʿah Supervisory Board of Kuwait Finance House approved it [16].
- It was also the decision of the sixth Al-Baraka Symposium which approved the undertaking by the debtor (AAOIFI, 2016, p.252).

- Accounting And Auditing Organization For Islamic Financial Institutions, Bahrain also approved it in their different Shari'ah Standards [17].

5. Scholar Opinions on the Actual Financial Compensation Concept

This discussion on charging fine or extra money from a defaulting client in the name of recovering loss is not new at all. Almost for more than two decades, scholars have been discussing the issue to find out a Sharīʿah-compliant way to handle such events. Conventional banks increase the interest rate at the occurrence of default of the due date being over. Since no such provision is possible in Islamic Banking, opportunist clients started to skip payments in *Murābaḥah* agreements. In a country where the whole economy is run under Islamic Financial System, there enacting laws binding the defaulters within legal actions is easier. But in the mixed economy, things are difficult to implement. These clients can shift towards conventional banking easily whenever they need it. To get control over the situation the present scholars proposed two measures which are-

a. Receiving actual financial loss on certain conditions;
b. One-sided compulsory donation agreement.

5.1 Conditions on Receiving Actual Financial Compensation

The validity of the second measure is already understood from the aforesaid discussion of *Al-Iltizam bi-al-Tabarru'*. But the first one needs a detailed focus here. The question arises if there is any financial loss that incurs due to the late payment or not. Firstly, the opinion of collecting actual loss is an isolated view of five/six individuals amongst a large assembly of scholars (Binti Zulkipli, 2019, p.194) [18]. Secondly, The conditions they provided on the execution of this measure are nearly impossible. The conditions are-

- The client is not unable to repay i.e. s/he is delaying for no valid reason. The proof of this can be brought out in various ways, like- self-incrimination (testification), witness, information on his/her investments in other institutions, possession of other wealth, etc.
- There is no Sharīʿah approved, the valid reason behind the delay. Viz- if the client is poor, then the measure cannot be applied.
- One month of extended period is allowed even after the due date is over. During the extended period, notice and letters from the bank are to be mailed stating the possible actions against him/her (Usmani, 2011, p.140).
- There has to be an actual financial loss on the bank's part incurred at the delay of repayment by that particular client;

otherwise, the measure cannot be executed. To prove this, profits against all liquid assets of the bank have to be realized. Only then, it will be proved that, in absence of that particular client's money, a certain amount of profit is missed by the bank. On the contrary, even if at that time, there exists no profit in the bank's income and liquid assets remain under the bank's holding- it will be considered as no loss incurred at the bank's side (AAOIFI, 2016, pp.263–266; Usmani, 2011, p.140).

- Compensation to be received must equal the actual loss incurred; it cannot cross the actual amount. That is why the compensation to be received cannot be fixed at the inception of the contract. It will be determined at the occurrence of default.
- The bank cannot keep any type of asset as a mortgage to recover the debt amount. Also, there cannot be any guarantee for the debt. If there are, then the measure is unnecessary and cannot be executed (AAOIFI, 2016, p.287).

SAC BNM (Sharīʿah Advisory Council of Bank Negara Malaysia) passed a Sharīʿah resolution in this context on May 20, 2010. The actual loss recovery method is described in that resolution as said above (Binti Zulkipli, 2019, p.188).

5.2 Assessing the Actual Financial Loss

How the actual loss would be determined, that needs further discussion. Notable opinions of some scholars are such-

- One way is, the profit margin gained by the bank for the number of days, the payments are delayed, at that rate compensation can be imposed. For example- payment is delayed for 3 months and for that three months, the bank's profit was shared with the depositors at 5%. Then the bank can receive compensation at a 5% rate from the actual defaulters (AAOIFI, 2016, pp.264–280). This is the opinion of Shaykh Al-Siddiq Mohammad al-Amin Al-Darir and also Dr. Ali Ahmad As-Salus (AAOIFI, 2016, p.293).
- Some scholars emphasized the court interference. It is stated in the civil law of Jordan (AAOIFI, 2020, p.291). Dr. Wahbah Mustafa al-Zuhayli emphasized this opinion in several articles written for AAOIFI (AAOIFI, 2016, p.341).
- Shaykh Abdullah bin Sulaiman Al-Manea was told to determine the loss in currency value. For example- ‘B’ owes ‘A’ USD 1 million. The last date to repay is May 01. When the debt was issued, one dollar was BDT 80. On May 01, the value became BDT 75. Money was asked on May 01 by ‘A’, but ‘B’ skipped the payment for no reason. When the compensation was about

to be executed, it was observed that the per dollar value was reduced to BDT 70. So, 'A' incurred a loss of BDT 5 per dollar due to the irresponsible behavior of client 'B'. It would be considered as an actual loss (AAOIFI, 2016, p.293).

- SAC BNM in another resolution approved to receive compensation up to a maximum of 1% of the debt value.

5.3 Evidence Presented to Support Actual Financial Compensation

Though the view of receiving actual compensation is isolated from a large number of other scholars, some Sharīʿah evidence is presented by the scholars who advised this method. According to AAOIFI (2016) by and large the evidence or *Dalīl* that is presented them is the aforesaid *ḥadīth*- لا ضرر ولا ضرار - "*Neither harm nor reciprocating harm*" (Ibn Hanbal, 2008, *ḥadīth* no. 2865). Their stand on this is- the only way to recover the loss incurred due to the defaulter's action is by imposing actual compensation on him/her. Financial loss has to be recovered by financial compensation, not otherwise (AAOIFI, 2016, p.274).

Besides, another *ḥadīth* is also taken as evidence - لي الواجد يحل عقوبته – "*Delay in payment on the part of one who possesses the means makes it lawful to dishonor and punish him*" (Ibn Hanbal, 2008, *ḥadīth* no. 17946). In the light of this *ḥadīth*, the permissibility of punishing the defaulter is inferred. Punishment can be in many

forms where actual financial compensation is also included (Usmani, 2011, p.143).

5.4 Reasons behind the Refusal of Actual Compensation Concept by the Majority of Scholars

It is the established, recognized, and by and large accepted opinion that at the maturity of debt accepting any form of financial compensation from the defaulter is invalid and illegal. It would be considered usury or *ribā*. Shaykh Mufti Taqi Usmani discussed this opinion in detail stating that the majority of the scholars or Ulamā did not accept the first opinion that permits acceptance of financial compensation. The proposal neither goes with the Sharīʿah principles nor antidotes the defaulters' behaviors (Usmani, 2011, p.141).

So, curiosity arises about what could be the majority's evidence against this method. Association of Ribā in imposing anything extra in advance with the return of the original debt value is a universally recognized concept across all schools of thought. From the opinion of Imam Al-Jassas which defines Ribā as- هو القرض المشروط فيه الأجل وزيادة مال على المستقرض i.e. such a debt where both maturity period and excess return from the borrower is conditioned (Al-Jassas, 1980, p.557). Lending anyone with the condition of excess return in association with a maturity date is known as Ribā al-Qarḍ. Another

type of ribā that was in vogue during the Jāhiliyya (age of ignorance) is Ribā al-Dayn which is increasing the maturity date in credit sales and loan repayments with the condition of excess return in payments. Both the forms were in vogue before Islam had arrived.

Generally, during the *Jāhiliyya*, when debtors failed in repayments on the due date, excess money had been collected from them. Then it was told to the defaulters- إما أن تقضى وإما ان تربى i.e. *either pay now or pay in excess after increasing time* (Imam Malik Ibn Anas, 2017, *ḥadīth* no. 1380). Shaykh Ibn Taymiyyah (1228 AH- 1263 AH) stated clearly on this issue- أما المعاملة التي يزاد فيها الدين والأجل فهي معاملة ربوية i.e. *the transaction where debt value and credit period is increased is a usury associated transaction* (Ibn Taymiyyah, 1997, p.439). It becomes evident here that taking excess as financial compensation against the debt payment is similar to *Ribā al-Dayn* of the *Jāhiliyya*. Here, what is received as excess is not important, rather important is receiving anything excess in the credit transactions. No classical explained as such that taking financial compensation would not be considered as *Ribā*.

On the other hand, for the approval of financial compensation in credit dealings, it is said that the *Ribā* of *Jāhiliyya* has no resemblance with it and that was used to be imposed in every default case. But here, the financial compensation is to be imposed on only

the deliberate defaulters even after they are provided a month of extra credit period so that his/her financial status is revealed to the bank.

The reality differs from the rebuttals of the supporters of financial compensation. All the conditions mentioned to execute the financial compensation method are difficult to implement. Because each of the defaulters claims himself to be unable to pay and it is also hard to establish by a bank that a defaulter is not unable without the help of legal proceedings. It not only will create a lengthy event just to prove the defaulter's ability but also incur bank additional costs which may outgrow the actual loss of the bank in the case of default. The only hassle-free way to understand the inability by the bank is that a defaulter is unable when s/he declares himself/herself bankrupt. This is also a rare phenomenon and then the conventional banks also waive charging interest on him/her. The conditions are not valid from the reality perspective (Usmani, 2011, p.142).

Another rebutting argument comes from the supporters of financial compensation- in the *Ribā* of *Jāhiliyya*, the excess return is predetermined. There is no relation to the actual loss incurred. But in imposing financial compensation, the value would not be determined during the inception of the contract, rather it will be evaluated at the occurrence of default.

But the fact is, the actual financial loss that has been mentioned in the proposal is completely vague and invalid from the Islamic point of view. Because the dealers of a usury claim usury in credit dealings from the loss-recognizing perspective. The arguments presented usually for the support of *Ribā* by the usury dealers or the conventional capitalistic finance experts mainly focus on the excess return that compensates the forgone profit that could have been realized if the money was not left at the borrower's or the debtor's end. So, this fades the distinction line between the conventional interest-seeking financial system and the Sharīʿah-compliant Islamic Financial System.

Even if the payments arrived on due time, it would not be ensured that the amount could have earned profit. The concept of this opportunity cost is a possibility, not a sure thing (Hammad, 1985, p.110). According to Islam, no type of loss is acceptable against credit dealings. It is a wrong concept that loss must occur due to the delay in payments. In Islamic Economics, the money price is not acceptable and only profit is not fixed in business transactions. Usury concept brings the idea of only profit at transactions and price for money in lending. That is why, fundamentally, *Ribā* is a forbidden concept in Islam (Hammad, 1985, p.110). Therefore, financial compensation cannot be accepted in Islamic Finance.

The international forums on *Fiqh* Study also rejected the financial compensation concept. The mentionable decisions are-

- International Islamic *Fiqh* Academy, Jeddah: Resolution no. 53 (Hammad, 1985, p.110).
- Kuwait Finance House: *Fatwā* no. 932 (AAOIFI, 2016, p.272).
- AAOIFI Sharī‘ah Standards No. 3, Section 2/1/2.

5.5 Rebutting the Evidence for the Actual Compensation Concept

How the evidence used for financial compensation is refuted- is also to be discussed. The *Ḥadīth* presented for financial compensation- "*Neither harm nor reciprocating harm*"- only states that harm cannot be caused. But to understand what is harmful and what is not, other pieces of evidence from Sharīʿah are to be taken into consideration. The events where compensations are valid are also to be determined based on Sharīʿah. That is why, *Ḥudūd*, penal codes, etc. are not considered as loss or harm; although these are also harming in a sense. But Sharīʿah does not declare these as harms (Atasi, n.d., p.25).

Moreover, the loss considered against the delay in payments is not recognized in Sharīʿah as an established loss. Otherwise, usury would have been approved in Islam. The way of compensating Sharīʿah also needs to be under the Sharīʿah principles. There is a *Ḥadīth* that tells us about the punishment of defaulters- لي الواجد يحل

عقوبته وعرضه – "If one who can afford it delays repayment, his honor and punishment become permissible" (Ibn Hanbal, 2008, *ḥadīth* no. 17946). In this *ḥadīth*, punishment is mentioned in not specific, rather vastly comprehensive. It is not necessarily to be in the form of financial compensation. It can be physical punishment too. Though financial compensation is a kind, in reality, punishment can only be imposed by the state or the court and the amount must be directed to the government treasury. The creditor cannot impose any punishment on the debtor without court interference (Usmani, 2011, p.143).

In addition, the losses considered to implement financial compensation are directly opportunity costs. It has already been evident that opportunity cost is not supported by Sharīʿah and it is the source of usury-based thoughts. Therefore, based on Islamic *Fiqh* and its comprehensive principles, the concept of actual financial compensation has to be rejected.

Here, the second opinion of one-sided undertaking to donate is prominent. If the financial compensation is allowed, the process will be generalized in every financial transaction gradually and ultimately *Ribā* will appear preacically in vogue. Dr. Rafic Yunus al-Masri said in this context- إن هذه الاقتراحات أخشى أن تتخذ ذريعة في التطبيق العملي إلى الربا، فتصبح الفائدة الممنوعة نظرياً تمارس عملياً باسم العقوبة

"جزاء التأخير"، وينتهى الفرق إلى فرق في الصور والتخريجات فحسب، وأرى أن هذا الاقتراح من جنس اقتراحات أخرى عصرية مماثلة تحوم حول الحمى، وربما تؤول إلى الدخول من النوافذ بعد أن أقفل الباب i.e. *these vague proposals warn us that these would be used as the media of receiving usury in practice. The forbidden ribā would be introduced newly as late penalty, like- the interest in today's finances. Ultimately, the difference between fine and usury would exist in names only. What I suppose, the inclusion of such proposals fundamentally insecures the central concept of Islamic Finance. It is just like making entry through the window when the main entrance is closed* (AAOIFI, 2016, p.271). Dr. al-Masri here brought out the reality in a nutshell.

6. Comments on the Fund Management Proposals in the Light of Sharīʿah

The proposals arose in the banking community regarding the fund management in the COVID-19 crisis are inspected in the light of Sharīʿah below:

6.1 Proposal 1: In case of exceptional need, the money accumulated in the Compensation Fund can be added to the Income Account.

a. It has already been discussed that the precondition behind the approval of receiving compensation, which is *Al-Iltizam bi-al-Tabarru'*, cannot be directed to the bank's useable accounts. If it goes to the bank's funds, it would be obvious usury.

b. When offer and acceptance are performed in contract, then it becomes complete i.e. legally the contract is established. But in *Tabarru'* based contracts like- *Hibah*, *Sadaqah*, *Wasiyyah*, etc. '*Qabz*' or constriction is simultaneously important to make a contract complete. In this connection the principle of Islamic *Fiqh* is- لا يتم التبرع إلا بالقبض – 'volunteered contract becomes completed by constriction' (Al-Zarqa, 2004, p.13) [19].

So, after the contract has been completed, there remains no way other than sending the money to the charity account. Here, the owner of the money is neither the bank nor the client/ debtor. The bank is the agent to spend the money. Therefore, using the fund by the agent is misconduct and will be considered as theft and unauthorized possession.

6.2 Proposal 2: Directly adding the compensation to the bank's income and declaring it as a usury percentage during the income declaration through financial statements. It will be accounted as usury so that the depositors can donate the ribā portion from their share of profit.

This is also against the Sharīʿah principles. Receiving usury is itself a sin and an illegal act. Moreover, here it is going to be done through declaration which is defiance towards Sharīʿah. On the other hand, donating the *ribā* portion by the depositors is uncertain and it does

not soothe the sin of taking part in a *ribā*-based contract. The whole process of this proposal is unacceptable.

6.3 Proposal 3: The donated money by the debtor would be utilized by the bank in act of charities to its poor clients or customers.

This is unjust again. The donation from the debtors cannot be used by the bank for its purpose. Clear guidelines should be stated in the Sharīʿah governance of the compensation fund of Islamic banks.

6.4 Proposal 4: The loss bank incurs due to the late payment of debt or delay in the repayments, would be collected from the defaulting clients.

From the Sharīʿah analysis above, this proposal of compensation that is incurred is not acceptable. Even if the opinion is accepted for the sake of debate, is it possible to use the compensations in the light of the COVID-19 situation?

The answer here is a no. Because the funds created in Islamic Banks in Bangladesh at present are created through donation contracts. Here the contracts are completed through donations and banks are not the owner of those funds. The money newly to be received by the banks in the name of financial compensation cannot be mixed with the present funds also named as compensation, although these are the funds that came via one-sided undertaking of donation by the debtors. So, the banks have no funds previously as financial

compensation practically and the approval to receive financial compensation now cannot suffice the necessary measures of tackling the liquidity crisis of the Islamic Banks.

Moreover, in reality, the opinion of financial compensation is an isolated view of few scholars. It cannot be implemented by going against the united views of the internal forums of scholars which are Sharīʿah compliant. Also, the preconditions associated with the execution of the method are much more to be compliant. Still, Bangladesh does not have a versatile Sharīʿah compliance guideline for all the sectors of the economy. Islamic Banking system has no separate government act too. Under this circumstance, it is not possible to prove a defaulter able to repay as per the Sharīʿah. The patronizers of the financial compensation concept were divided in their opinions in evaluating the compensation value. So, another discrepancy is evident in the method. Above all, conduct where the possibility of association with usury is higher and Sharīʿah compliance risk is increased must be avoided to preserve the Sharīʿah compliance in Islamic Banking.

6.5 Proposal 5: Compelling the debtor to donate by the central bank or any third party, where the bank itself will not take part.

This proposal does not make the compensation valid, though by contract bank is not asking for compensation or fine due to the

failure to repay. When any third party is getting involved in collecting the compensation externally for such a transaction where the third party itself is not a party at all, then the third party is acting as the agent of the bank. So, ultimately the money is being asked by the bank as fine or compensation via its agent whether it be the central bank or any other authority. Moreover, it is evident in the Sharīʿah principles that no additional cost or loss is recognized against the delay or failure in repayment by the debtor. So, involving a third party in collecting compensation is a vague idea.

7. Recommendations

7.1 Sharīʿah Compliant Directives to Tackle the Crisis

The steps that should be followed in general without deviating from Sharīʿah principles and tackling any crisis soon-

- Cutting on those expenditures which are not necessities for the bank and its employees.
- Taking necessary steps for the sale of existing mortgages, but before that, the related client must be informed first.
- Banking experts and Sharīʿah scholars jointly can research to find out new ways to tackle liquidity crises. A combined effort can lead to a better solution.
- Applying for *Qarḍ al-Hasan* to the Central Bank during a crisis.

- Asking to clear the earlier debts before letting the defaulters get any new loan facility from the incentives received from the government or the central bank.
- Arranging consultancy for the defaulters from the bank's Sharīʿah team so that their problems are understood and the Sharīʿah teachings become clear to them in financial dealings.
- Using blockchain technology to maintain the client data so that if a defaulter was irresponsible in repayments s/he can be brought under formal actions to clear his/her debts.
- When nationally, it is told to relax the payment collection during the crisis period; the guideline must focus on the unable debtors. The able and irresponsible debtors who delay in repayments must be taken into action to fasten their debt clearance process during the crisis period. Relaxing the system for all types of clients is a wrong decision. The central bank should be careful in implementing such guidelines in the industry. Sharīʿah's principles also tell to allow chances for the unable and incapable debtors, not the able and irresponsible ones.
- Reducing investments in the *Murābaḥah* method in the export-import deals along with *Bay' al-Istijrār* (supply contract), *Mushārakah* and *Muḍārabah*. These modes come with increased investment risk in export-import contracts. *Istiṣnā'*,

Salam and *Ijārah* modes are to be increased to mitigate risks. These methods are allowed to use the penalty clause as per the Sharīʿah principles. Before introducing any new financial deal in the banking practice, consultation with the Sharīʿah board is a must.

Alternative Proposals to Withstand the COVID-19 Situation:

a. The institutional defaulters can be proposed to provide equity share with the bank if they are unable to repay. The bank sells the share later to recover its own money. According to Sharīʿah, it goes under the Sale of Debt category; i.e. Sale of Debt by the Debtor. The debtor here transfers the debt to the creditor in exchange for his other wealth. This method is valid. In Sharīʿah Terminology, it is known as *Bay' al-Dayn min-al-Madyun*- بيع الدين من المديون (AAOIFI Sharīʻah Standards, 2021) [20].
b. Another way is, keeping a certain percentage of institutional clients' company shares as mortgage to the bank and providing power of attorney over those mortgaged shares to the bank. In case of necessity, the bank can cash the shares and recover money. This is also valid according to Sharīʿah.

7.2 Sharīʿah Governance Principles of the Compensation Fund

The donations collected by Islamic Bank as *Al-Iltizam bi-Al-Tabarruʿ* are to be managed as per the Sharīʿah principles. The Sharīʿah governance principles in this context are stated below-

- Strict measures of not including the donated fund into the income account have to be taken in each Islamic Bank. Moreover, the money cannot be used for any purpose of the bank. Even, it cannot be proxied for the provisional reserve requirements. If it is done, in extreme cases, the bank might use the funds to take back the depositor's money which would be illegal and unjust. The bank is not the owner of the funds accumulated through *Al-Iltizam bi-Al-Tabarruʿ*. So, taking control in the name of compensation is not valid.
- The donated money should be directed to any third party other than the bank. That organization should not be related to the bank in any form of financial dealings. It will act as the trustee and the control over the donation fund must not remain under the jurisdiction of the bank. This was the decision made in 1992 by the Sharīʿah scholars in association with the then bankers. This was indeed a foresighted decision that is evident by this time as the deviation from Sharīʿah principles is observed in the

practice. As the control remains with the bank nowadays, the chances of misusing and violating Sharīʿah are increasing.

- The take care organization shall donate from the fund directly to the poor and for the humanitarian activities amongst the Muslim community according to the philosophy of Islam. If the fund is used in any business activity, the profit earned also must be donated. Sharīʿah Scholars also warned to not donate on behalf of the bank i.e. the bank's name must not come in the mass donation since the bank is not the owner of the fund as discussed in the previous sections (Usmani, 2009, pp.280–281).
- The trustee organization can use the fund for *Qarḍ al-Hasan* to appropriate needy individuals (Usmani, 2011, p.77).
- In practice, it is observed that the date of the last payment is not accounted as the expiry date, rather the date is recorded as deferred and the donation amount is accounted as the original value of the transaction. It must be stopped because of associated usury.
- The bank also should not receive the donation fund as a loan for tackling any crisis. Though the bank is not the owner of the donation/compensation fund, the money is being directed through the bank from the debtors. So, receiving loans from the

fund by the bank itself is also risky in case of any evolved association of any form of *ribā*.

7.3 Sharī'ah Prescribed Ways to Recover Late Payments

Failing in repayment at the due time can be due to two possibilities:

a. being unable to repay,
b. able to repay but irresponsible in repayment.

In the *Qur'ān*, it is stated- وَإِن كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ ۚ وَأَن تَصَدَّقُوا خَيْرٌ لَّكُمْ ۖ إِن كُنتُمْ تَعْلَمُون – "*If it is difficult for someone to repay a debt, postpone it until a time of ease. And if you waive it as an act of charity, it will be better for you, if only you knew*" (*Qur'ān*, 2:280). So, if a person is unable, he has to be allowed additional time to repay until he becomes able financially. This is divine order from the Creator.

Now, what is the touchstone to understand whether a person is unable or not? In a resolution of Islamic *Fiqh* Academy, Jeddah, it is declared- ضابط الإعسار الذي يوجب الإنظار ألا يكون للمدين مال زائد عن حوائجه الأصلية، يفي بدينه نقداً أو عينا i.e. the level of inability which will be appropriate to provide additional time for the debtor is having no excess wealth in any form (cash or non-cash, tangible or intangible) under the debtor's ownership with which the debt can be cleared [21]. According to *Fatwā* no. 993 of Jordan Islamic Bank, The

person will be considered capable if s/he has any tangible and intangible asset (AAOIFI, 2016, p.287).

When the case is opposite, being irresponsible in repayment, it has been prohibited in Islamic Sharīʿah. This is the real defaulting in loan repayments. In the *ḥadīth*, it is written- مطل الغني ظلم - "*Procrastination (delay) in paying debts by a wealthy man is injustice*" (Bukhari, 2004, *ḥadīth* no. 799). Also, it is mentioned in another *ḥadīth*- لي الواجد يحل عقوبته وعرضه – "*If one who can afford it delays repayment, his honor and punishment become permissible*" (Ibn Hanbal, 2008, 388)

Therefore, based on the above considerations, a creditor, bank, or any financial institution can take the following necessary steps in recovering debt from the real defaulter who is irresponsible in debt repayments as per the Sharīʿah:

- Repeatedly asking for repayments when the time is over.
- If the actual defaulter has any deposit account with the same bank, the bank can debit the account with the exact amount of debt without any approval.
- The court can order the debtor to settle debt with similar wealth s/he owns now. This is also possible with assets that are dissimilar to the debt. The bank can sell the dissimilar assets to

recover the debt at the court's approval or lease to recover the payment amount.

- Such irresponsible debtors can be blacklisted in the industry to save the economy from unethical practices in the future. Using debtor's historical information through blockchain technology can be of great help here.
- Also, his ability to testify in any legal proceedings can be limited by the jurisdiction of the court. His/her discretion of financial transactions can be limited by the court. Such legal actions are valid and can help to improve the overall integrity of the financial dealings.
- An irresponsible defaulter can be imprisoned, punished, and restricted from foreign tours.
- His/her installment facilities in the existing transactions can be revoked by the court and declared as payable in cash.
- The cost of legal proceedings and processes associated with loan recovery from such defaulter can be collected from the same defaulter. But such amounts must be incurred not corrupted [22].
- If such a defaulter is engaged in a Murābaḥah contract, his/her product can be taken back by the bank provided that certain conditions are fulfilled. According to the AAOIFI Sharī'ah Standards No. 8, Section 5/4; it is permissible to not register the

product with the buyer until full payment is done. So, the ownership stays with the bank. Alternatively, the bank can sell the product to the third party on behalf of the defaulter to recover the unpaid balance. In both alternatives, the conditions are- the product has to be intact or in its original form and the product has not been handed over. When the bank is retaining the product to itself (taking back), it has to return the exact received amount from the buyer. When the bank is selling to the third party, it has to keep only the due balance of the repayment value from the sales proceed and return the rest amount to the original buyer.

- The provision of 'undertaking to donate' in case of failure during the inception of the financial contract is already discussed. It can be used as a precaution to avoid legal proceedings. If the client defaults due to one irresponsibility, s/he has to donate an amount to any *Tabarru'* based Islamic Insurance company from where anyone can be benefitted (AAOIFI, 2016, p.238).

8. Conclusion

The problems of delayed repayments from the debtors and ensuing liquidity issues that arose in Islamic banking due to the COVID-19 are not only important for the sake of COVID-19 but also for the associated problems prevailing for long in the industry. It was

important to find out the loopholes in the system to fix them as early as possible so that any future crisis can be tackled vibrantly. The ideological promotion of Islamic Finance needs to be spread all over the economy. *Mushārakah* and *Muḍārabah* based financing processes need to be addressed more. The risk of default is reduced in these methods. The general public should be acquainted with the profit-loss based *Muḍārabah*. This has to be accustomed in the society. Islamic financial literacy is another necessary issue to be taken care of. Without knowledge and awareness against *ribā*, the general masses cannot comprehend the concealed harms of usury and the grandeur of Islamic Banking in following Sharīʿah. Also, the desired behavior of Muslims in financial transactions and the teachings of *Muʿāmalāt* can be disseminated through proper literacy programs. Bangladesh needs a completely separate Islamic Banking Act to implement Sharīʿah governance in Islamic Financial Transactions and Sharīʿah-compliant organizations. To speed up the loan repayment legally, the Sharīʿah compliant ways other than the compensation (donation in practical form in Bangladesh) should also be followed. The necessity of a separate law is felt here too. The transactions where financial penalties, legal as per the Sharīʿah, can be practiced in the industry at an increased rate are *Istiṣnāʿ*, *Salam*, *Ijārah*, etc.

An individual's wealth is secured from others in Islamic Sharīʿah. Each individual is entrusted with each individual's wealth and life. No harm can be caused without any valid reason. The term compensation used in vogue in Bangladesh is *Al-Iltizam bi-Al-Tabarruʿ* (undertaking to donate). It is approved globally with certain conditions. This donation fund needs to be governed by strict Sharīʿah principles, otherwise, misuse may arise in the process. The original concept of collecting actual financial compensation is not supported by Sharīʿah principles and is rejected by the international *fiqh* forums. Willingly defaulting on credit payment is a grave sin in Islam. It must be avoided by a Muslim and the banks must take Sharīʿah-compliant steps to tackle this.

Notes

1. Sharī‘ah Standards No. 3, Section 2/1/2.
2. Sharī‘ah Standards No. 5, Section 2/3.
3. But there are three distinct differences between this rate and the conventional bank’s interest rate: i) this is not a usury contract, ii) this is not interest earning of a bank and also not income in any form; rather a donation or charity, iii) it is one-sided undertaking to donate that has to be performed by the borrower; not a bilateral agreement.
4. Sharī‘ah Standards No. 3, Section 2/1/8.
5. According to Imam ‘Abd al-Qawī Mundhirī‘, there is no problem in the *Sanad* of this Ḥadīth. (Mundhirī‘, n.d., ḥadīth no. 2687).
6. In the explanation of this ḥadīth, Shaykh Al-Zarqa told, punishing a criminal is not against this ḥadīth because the punishment for criminals is executed to eliminate harm. “Nor reciprocating harm” means one should not harm another’s wealth because of his wealth being harmed by the other; rather he should take the justified compensation from the man who harmed. See more at the book- Al-Madkhal Al-Fiqhī Al-ʿĀmm, Section 81/18.

7. The ḥadīth is Ḥasan according to Shaykh Al-Zarqa RAH. and Shaykh Shuaib Al Arnaout RAH. See more at the books- Al-Madkhal Al-Fiqhī Al-ʿĀmm, Section 81/18 and Musnad Al-Imam Ahmad Ibn Hanbal, Vol. 5 (Ibn Hanbal, 2008, p.55).
8. Sharī'ah Standards No. 5, Section 2/2/1.
9. Sharī'ah Standards No. 8, Section 6/8/2.
10. Sharī'ah Standards No. 8, Section 4/2.
11. The ḥadīth is Ḥasan (Ibn Hajar al-Asqalani, n.d., p.61).
12. Sharī'ah Standards No. 3, Section 2/3. See more at the Sharī'ah Standards of the book- Abḥāth Hay'at Kibār al-'Ulamā' (Hay'at Kibār Al-'ulamā' (Saudi Arabia), 1991, p.105).
13. Sharī'ah Standards No. 3, Section 2/1/2.
14. Resolution No. 51, Section 6/1/193, (cited in Hammad,1985, p.110 and AAOIFI, 2016, p.247). This is also the decision of the International Islamic Fiqh Academy, Makkah (AAOIFI, 2016, p.249). It has to be remembered that this is not the appropriate application of Al-Sharṭ al-Jazā'ī as per the AAOIFI Sharī'ah Standards No. 3, Appendix B (AAOIFI, 2016, p.102).
15. But in a resolution of the Al-Baraka Symposium, the penalty clause is considered valid provided that the penalty money is donated. But again, this is self-contradictory, hence, not acceptable (AAOIFI, 2016, p.252).

16. Fatwā No. 520 from the book: Al-Fatawa Al-Shar'iyyah Fi Al-Masa'il Al-Iqtisadiyyah, Vol. 1 (cited in AAOIFI, 2016, p.251).
17. Sharī'ah Standards No. 3, Section 2/1/8.
18. Shaykh Abdullah bin Sulaiman Al-Manea, Shaykh Mustafa Ahmad Al-Zarqa, Dr. Mohamad Akram Laldin, Dr. Wahbah Mustafa al-Zuhayli, Dr. Abdul Hameed Al Baali.
19. Al-Madkhal Al-Fiqhī Al-ʿĀmm, Section 30/13.
20. Sharī'ah Standards No. 59. According to this standard, the condition of Sale of Debt being valid is- Riba cannot evolve in this transaction. That is why, values of debt and wealth must be equal and the transaction must be in cash; not in credit.
21. Majallat Majma' al-Fiqh al-Islāmī, 7/2/218 (cited in AAOIFI, 2016, p.287).
22. AAOIFI Sharī'ah Standards No. 3, Section 2/1/4.

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Ikala: Introduction, Significance and Application

Many times, after purchasing a product, there is no desire to buy it for some reason—maybe the product is already there or the need for which it was purchased is no longer available. There are many reasons to cancel the contract by returning the product. This process is known as 'iqala' in Islamic economics.

Acoustic analysis

The word 'Iqala' (الإقالة) is Arabic, meaning cancellation of contract (الرفع اي العقد)[46] In English it is called Waiver of Contract/Dismissal/Refund/Recission. Many call it Happy Return.

erminological identity

Shaykh Mustafa Jarka Rahimahullah after analyzing some definitions of Iqala wrote—

سابق عقد به يرفع عقد أنها عام بوجه تعريفها في والتحقيق

In the terminology of the jurists, Iqala is a special contract, through which a previous contract is abrogated.[47]

Here by 'agreement' is meant not only sale but also lease. To be more precise, Iqla can be applied to almost all financial contracts except

[46] Lisanul Arab, Volume: 11, Page: 572. Both sides of Iqbala are called Mukil (مُقيل) or Muqalun in Arabic (Al-Madkhal Fiqhil Am, p. 624).
[47] Al-Madkhalul Fiqhil Am, Page: 262, Volume: 1.

marriage.[48] Although it is discussed as a part of Kitabul Buyu in Fiqh texts.[49]

Grounds for cancellation of contract

Cancellation of contract and return of goods is a purely personal matter. This may be due to a lack of interest in the purchase, or because the need for which the purchase was made has been met in another way. It is not necessary to have any legal right behind it, such as defective product, purchase without seeing, not available as per prescribed qualities, etc.

Ikala resale, or rescission of previous contract

'Ikala' means annulment of contract. And the inevitable consequence is to return the product and charge back the price. Now to understand whether this work is a re-sale contract (New Sale Contract) or rescission of the previous contract (Recision), we need to review the wording used in the contract-

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[48] Ikala will not apply in 'Ukude Ghaire Lazyma' like marriage. It appears that a special form of Aqbad is also done in such a way that—
A. The identity of Akdu Lazim is that after the formation of the contract, neither party can unilaterally cancel it. or unilateral rescission would result in the loss or violation of another's rights, such as a general contract of sale.
b. Aqdu Ghairi Lazim is an agreement that can be unilaterally canceled after it is formed, such as - Amanah, Ariyah, Odiat, Shirkat contract. Preface, pp. 594-595.

[49] Al-Madkhalul Fiqhil Am, Pages: 624-625, Volume: 1.

-If the contract mentions 'cancellation', 'return', 'drop' or similar words, it will be considered as cancellation of the contract both by the buyer and the seller; and others. because of 'new purchase and sale agreement'. This decision has several pros and cons. They are-

(a) The seller must refund the price paid by the buyer. Can't give a little less. It could have been done if it was a new sale and purchase agreement.

(b) Ikala contract has been signed, goods have not yet been returned. At the moment, if the seller wants, he can sell it elsewhere without holding it. A new contract of sale would not have been valid for the seller.[50]

(c) Buyer may cancel the contract hereunder even before taking possession of the goods. This could not be done if there was a new sale and purchase agreement.

(d) If the goods are land, the owner of the land next to the buyer cannot claim pre-emption. Because, it is not buying and selling

-If the contract is concluded by the word 'ikala', then it will be a rescission in the case of the buyer and seller, and a new sale for the third party. As the buyer said, I want to do Ikala. Consequences of this decision—

All of the results we saw in the previous two decisions can be found here.

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[50] Sharhul Majalla, Volume: 2, Pages: 71 and 76.

Ikala in our society is usually done in the first way i.e. cancellation, not new sale.

If Ikala is not possible

Sometimes it happens that Ikala-contract is made by the word 'Ikala', but still Ikala is not possible in reality. For example, if the commodity is an animal and it gives birth to a baby, then even if the word Ikala is uttered, it will not be Ikala, but a new purchase has to be made. In the same way, if the seller wants to keep part of the price, even in that case, Ekala will not be possible, but the contract will have to be completed in a new way of sale and purchase.[51]

Conditions for acceptance of Ikala (*Sahiah*)

A. Satisfaction of both buyer and seller. Because 'Ikala' is cancellation of contract. And to cancel any contract, it is necessary to have the consent of both the parties to the contract.

B. Having the ability to return the product. So if the product is faulty or defective, the Ikala will not be pure.

C. Existence of the goods in the previous condition with the buyer at the time of ekala. However, the exchange given by the buyer at the time of ekala need not be exactly in existence with the seller.

[51] Sharhul Majallah, Volume: 2 Pages: 73, 71.

D. Non-increase in price of goods in case of Ikala.[52]

Reasons for which *Ikala* was cancelled (*Batil*)

A. Product loss or damage. However, if one of the two goods is lost or damaged, the other can be claimed.[53]

B. Modifications to the Product. So if one buys a white cloth and dyes it, then the cloth will no longer have a chance to be dyed. Similarly, if one buys a cow and gives birth to a cow, it cannot be sold again.

***Ikala*: From Hadit**

'Ikala' is basically a legal and mustahab transaction. In the hadith the seller is encouraged to Iqala. In the words of Nabiji—

عثرته الله أقال مسلما أقال من

"Whoever allows a Muslim to get out of a contract, Allah Almighty will forgive his mistakes on the Day of Resurrection".[54]

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[52] Al-Mawsuatul Fiqhiyah al-Quatiyyah, (Iqala words), Sharhul Majallah, Volume: 2 p.76-80.

[53] Sharhul Majallah, Volume: 2 Page: 77.

[54] Mustadarak al-Hakim, hadith number 2291 (Kitabul Buyu), is a Sahih hadith transmitted by Bukhari-Muslim. After narrating the hadith, Hakim Rahimahullah wrote, هذاحديث صحيح على شرط الشيخين ولم يخرجاه means this hadith has passed the meaning of Bukhari-Muslim. However, the hadith was not narrated in Bukhari-Muslim. Imam Zahabi (Rahimahullah) supported this statement of Hakim (Rahimahullah). See also—Musnadu Ahmad, Hadith 7431. (الشيخ قال رح الأرنؤوط شعيب: إسناده صحيح اهـ.)

Application of Ekala in our society

Although we are not separately familiar with the word Ikala, we all do such transactions more or less in our practical life. Here are some real pictures of Ikala:

- § Many a time, we buy a variety of products from the grocery store. After coming home, it can be seen that some products have come in excess. If the shopkeeper is known, take back those products and give money. Sometimes they give another product of equal value without returning the money. In this case, if the shopkeeper returns the money, it is Ikala, and if he gives something else instead, it is a new purchase.
- § After ordering a book on some e-commerce sites, there is an option to return it at a specified time. They call it 'Happy Return'. It is also basically a type of Ekala.
- § Many times the decision changes after purchasing a product from the store. It also falls within Ikala.

Preference share and *'Tanazul'* theory: a Shariah analysis[55]

Abstract

Preference share is one of the modern phenomena of capital market. Due to its attractive features and certain profit mechanism, people are more confiding in it than the other shares irrespective of considering Halal or Haram. Nonetheless, Islamic Shariah principles do not validate preference shares for some of its Shariah-violating features. The core principles that Shariah prescribes for partnership business *(shirkat)* are not properly observed in preference shares; such as fixed profit assurance, priority in profit distribution, non-bearing loss etc. Considering the upward inclination of people, many institutions have endeavoured to unearth different methods to Islamize the sector. Likewise, the Shariah Advisory Council of the Securities Commission of Malaysia issued a resolution named "preference shares legal in the light of the *'Tanazul'* theory." where they declared preference shares to be permissible following *'Tanazul'* theory. However, according to the basic Shariah principles, the classical references and the opinions of mainstream international Fatwa councils, this statement appears to be inaccurate and ambiguous. This paper aims at presenting an in-depth Shariah analysis of preference share and the status of the *'Tanazul'* theory. The paper also explains the reason preference share is impermissible in Shariah referring to the primary sources,

[55] Mufti Abdullah Masum (First author) dbg#&1P1#Ndeu#Kdvdb#Frd#bxkru,#

the resolutions of modern international fatwa councils and the classical opinions and guides an Islamic preference share alternative. Furthermore, It refutes the arguments that the Shariah Advisory Council of the Securities Commission of Malaysia presented to validate preference share implying the *'Tanazul'* theory analyzing the core Shariah principles of partnership business *(shirkat)*. The article is concluded by guiding the appropriate method to implement the *'Tanazul'* theory in partnership business *(shirkat)*.

keywords:

Preference Share, Shirkat, *Tanazul,* Riba

Introduction

Capital raising through share issuance is currently one of the vastly recommended tools. Therefore, a capital market has been formed to execute it properly. There are different types of shares or stocks where preference shares appear to be one of the most discussed shares. Compared to other shares, People are more inclined to it because of its special features. However, the conventional use of preference shares is not permissible from a Shariah perspective. There are Shariah resolutions in international fiqh forums to assure Shariah compliance. Recently, the Shariah Advisory Council of the Securities Commission of Malaysia issued a resolution named "preference shares legal in the Light of the *'Tanazul'* Theory."

However, in-depth Shari'ah analysis proves that it has no scope to be called valid/Halal. The Shariah analysis that they intended to justify is not acceptable at all. In this case, the decisions of other international Fiqh Forums seem more reliable and close to Islamic Shariah.

Preference Share: Introduction

Preference shares are a special type of share with which the security of capital is almost guaranteed; however, its owners do not have voting rights in the company. investopedia.com presents a detailed introduction to Preference Shares as follows:

> "Preference shares, more commonly referred to as preferred stock, are shares of a company's stock with dividends that are paid out to shareholders before common stock dividends are issued. If the company enters bankruptcy, preferred stockholders are entitled to be paid from company assets before common stockholders.
>
> Most preference shares have a fixed dividend, while common stocks generally do not. Preferred stock shareholders also typically do not hold any voting rights, but common stock shareholders usually do (FERNANDO, 2023)."

There are different types of preference shares and the common characteristics of most of them are that they have specific dividend yield figures, unlike ordinary shares. Specific profits are always provided to the preference shareholders before the other

shareholders. when a company goes bankrupt, its capital is repaid to them earlier from the company's assets than the ordinary shareholders. A common feature, which is equally present in all types of preference shares, is "a Priority claim over ordinary shareholders on the issuing entity's distributable earnings and net assets at the time of liquidation (ISRA Research Paper 94/2017 et al., 2017)."

One of the significant advantages of preference shares is the assurance of the income and profit of shareholders in various ways. On the contrary, their voting right and involvement in the business function are denied, unlike the other shareholders. For instance, when someone lends money on interest, the lender has no right in the borrower's business; only he is allowed to enjoy the guaranteed interest. Bursa Malaysia (n.d.) identifies it as follows:

> These are shares that carry the right to a dividend (customarily fixed), which ranks for payment before that of ordinary shareholders. Preference shares may also be preferred as regards the distribution of assets upon the dissolution of the company (ISRA Research Paper 94/2017 et al., 2017, 4).

Two Characteristics of Preference Shares:

Preference shares have the characteristics of equity shares and debentures. Equity shares resemble preference shares in a manner that, in terms of both shares, the dividend depends only on the

profit and the decision of the board of directors. Moreover, the dividend on preference shares is fixed similar to debenture.

Types of preference shares

There are different types of preference shares; namely-

1. **Cumulative preference stock:**

   Typically, Cumulative Preference shares refer to providing priority to the preference shareholders upon the ordinary shareholders in terms of distributing the profit if the company does not pay dividends for any fiscal year; therefore, it becomes due.

2. **Non-Cumulative Preference Shares**:

   In the case of non-cumulative preference shares, the dividend is payable only on net profit per year. If there is no profit in any year, dividends cannot be claimed in subsequent years. It is reduced if no dividend is paid on preference shares by the company in a particular year.

3. **Convertible Preference Shares**
   It refers that the preference share is allowed to be converted into ordinary shares on desire after a specified period.

4. **Non-Convertible Preference Shares:** It is exactly the opposite of the right aforementioned one.

5. **Redeemable shares**

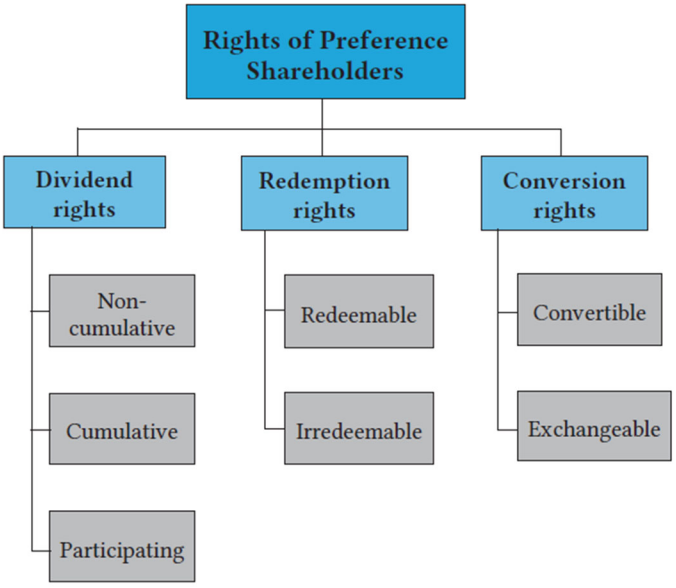
After the prescribed period, the Company may redeem the shares payable by giving notice or the company retains the option that the shares can be redeemed after a specified period. The issuing entity has to pay the original price of the share or any pre-determined amount.

6. **Non-redeemable shares**
   It is exactly the opposite of the right aforementioned one.
7. **Participating Preference Shares**
   If the ordinary shareholders earn more than the rate fixed for the preference shares, they will also receive the excess amount. For example, ABC Company announced that in the case of preference shares, a fixed $1 per share shall be given. At the end of the year, it has announced that common stockholders would receive $1.50 per share; then, the preference shareholders will be provided with a total of 1 + 0.5 = 1.5 dollars.

8. **Non-Participating Preference Shares**
   It is exactly the opposite of the right aforementioned one.

Types of Preference Shares at a Glance

Figure 2: Rights of Preference Shareholders



(ISRA Research Paper 94/2017 et al., 2017, 5).

Preference shares and its importance

A preference share is a lucrative share through which quick funds can be arranged; therefore, people are highly interested in it.

Shares and rights

Shareholders generally preserve three types of rights-

1. Income rights—rights about the payment of dividends

2. voting rights—the right to vote at company meetings,
3. Capital rights—rights to the return of capital on an authorized reduction of capital or a winding up

However, Preference shares allow the shareholders only income and capital rights while voting right is completely denied.

What exactly are preference shares?

There are different opinions about its nature. According to some experts, it is a "mezzanine instrument" having qualities of both equity and Bond whereas others opine that it is a hybrid instrument since it consists of the qualities of both equity and bonds.

Preference shares: when liability, when equity?

From an Accounting perspective, it is a significant issue to resolve when preference shares become a liability and when equity. There are different types and varieties of preference shares where one is equity and the other is liability.

If it is considered from a contractual obligation to Pay Dividend perspective, it has appeared that;

- Non-cumulative preference shares and Participating preference shares are equity since in non-cumulative, no additional dividend has to be paid; similarly, in Participating, the additional payment depends on the adequacy of profits which may or may not happen. On the contrary, preference share is indeed a liability.

From a Capital Guarantee perspective;

- **Redeemable**: It is usually liability because, here, the issuing price is needed to be reimbursed. However, if it depends on the issuer's own decision, it will be equity. (usually, it does not happen.)
- **Irredeemable**: It is equity. Because, there are no stipulations to reimburse the capital whilst, in case of winding up or liquidation, the capital is returned on a priority basis, that too may be less or more or maybe less than the issuing price as well.
- **Convertible**: It is a liability. Because it has to be converted to the price of ordinary shares. In this case, ordinary shares are issued along with the capital whereas if it is based on market value, it will be equity because it has the probability to be equal to the capital or less that time.

How will financial reporting be occupied?

The reporting method varies considering the preference shares whether it is liability or equity.
If preference shares are considered as equity, their financial reporting is executed in a manner while in terms of liability, it is significantly different. The following table can be followed:

Preference share as a liability		Preference share as an equity	
Statement of profit or loss		**Statement of profit or loss**	
	RM mil		RM mil
Revenue	100	Revenue	100
Expenses	(70)	Expenses	(70)
Finance cost		Tax	(8)
(PS dividend)	(2)		
Tax	(8)		
Net profit	20	Net profit	22
Net profit margin = (20/100) = 20%		Net profit margin = (22/100) = 22%	

(ISRA Research Paper 94/2017 et al., 2017, 8).

When preference shares are equity, the dividend of preference shares or PS does not seem negative and It shows more amount of net profit. On the other hand, when PS is considered a liability, it becomes a minus dividend and shows less net profit. Notwithstanding, the tax will always be negative.

If the preference shares are considered equity, it demonstrates positive results and the balance sheet of a company appears to be healthy. However, it is not favourable for ordinary shareholders because their shares are protected simultaneously since they receive the remaining portion of the preference shareholders. On the contrary, preference shares as a liability ease the ordinary shareholders

Preference share and Shariah analysis

Whether Preference sharing is Shariah-compliant or not has been discussed in various international fiqh forums and the decision has been made. Here are the main issues of Shariah;

From the Shariah point of view, the Shariah structure of shares is a type of *shirkat* or partnership business. In Shariah's view, it is included in *Shirkatul Inan* or *Amwal* (AAOIFI, 2017, 338).

As it is under the 'Shirkat' contract, and one of the principles of the Shirkat contract is to ensure the participation of all the partners in obtaining the profits. It is not lawful to impose any condition, due to which the participation of one of the partners in the profits becomes uncertain (AAOIFI, 2017, 333).

As it is evident in the aforementioned analyses, preference share shareholders are assured of profit as compared to ordinary share shareholders which is completely against the principles of the *Shirkat*. Therefore, the crystal-clear decision of the International Fiqh Forums is that the customer preference share is not permissible. Some of the decisions are mentioned below:

The decision of the AAOIFI Shariah Board:

AAOIFI says in their 12th Shariah Standard:

"لا يجوز إصدار أسهم ممتازة لها خصائص مالية تؤدي إلى إعطائها الألوية عند التصفية أو عند توزيع الأرباح."

It is not permitted to issue preference shares, i.e., shares that have special financial characteristics that give them priority at the date of liquidation of the company or the date of distribution of profit (AAOIFI, 2017, 341).

Shariah's interpretation says:

ÑÃمستند#عدم#جواز#إصدار#اسهم#ممتاز#أن#ذلك#يؤدي#إلى#قطع#الاشتراك#في#الربح#ووقوع#الظلم#على#الشركاء#الآخرين#Ã##

The basis for the impermissibility of issuing preference (preferred) shares is that preference shares are inconsistent with profit sharing and involve depriving other partners of their fair share of profit (AAOIFI, 2017, 360).

Islamic Fiqh Academy Jiddah wrote after their 14th Fiqh Seminar:

ثالثاً: يحرم على الشركة أن تصدر أسهم تمتع أو أسهم امتياز أو سندات قرض.

> Third: It is prohibited for the company to issue jouissance shares, preference shares, or bonds (International Islamic Fiqh Academy (IIFA), 2021, 415).

Earlier, in their seventh seminar, a decision was made:

لا يجوز إصدار أسهم ممتازة، لها خصائص مالية تؤدي إلى ضمان رأس المال أو ضمان قدر من الربح أوتقديمها عند التصفية، أو عند توزيع الأرباح

> It is not permissible to issue premium shares with financial privileges that involve guaranteed payment of the capital or a certain amount of profit or ensure precedence over other shares at the time of liquidation or distribution of dividends (International Islamic Fiqh Academy (IIFA), 2021, 199).

The Bank Negara Malaysia Shariah Board wrote in one of their resolutions:

> "The capital invested shall not be guaranteed by any of the partners and/or the managers (Bank Negara Malaysia, 2016, 115)."

Summarizing the discussions, there are three fundamental violations of Shariah principles in preference shares. Those are the following;

1. Security of capital

   One of the core features of Preference Shares is that the ordinary shareholders are required to guarantee the capital of preference shareholders. If the company ever goes bankrupt, there is a prior stipulation to return the capital to the preference shareholders first. Moreover, even if anyone decides to redeem, he has to repay the original price of the shares.

   In such many ways, the capital is guaranteed. However, according to the recognized principles of partnership, one partner cannot provide security for the capital of another partner. If so, it jeopardizes everyone's participation in the profits, making usurious transactions inevitable (AAOIFI, 2017, 331).

   The Shariah board of Bank Nagara, Malaysia has stated in one of their resolutions that; "The capital invested shall not be guaranteed by any of the partners and/or the managers." (BNM (2016, p. 115) "S 15.14)

Preference shares are not permissible due to the violation of the Shariah provision.

2. Losses are not borne.

   One of the Shariah directives of the partnership agreement is that the partners must bear losses or liabilities in proportion to their capital. One of the features of preference shares is

that, in the event of the company's liquidation, the preference shareowners will be the first to return the capital. This leaves their loss-bearing condition neglected.

Besides, in normal conditions, their profits will be paid prior to the ordinary shareholders. Even if there is a loss, it will not affect them. Even if no profit is paid in any year, it has to be paid later (cumulative) (AAOIFI, 2017, 333).

3. Profits are well-defined and guaranteed.

   One of the Shariah guidelines for partnership businesses is that profit cannot be fixed at a specific figure. Profit must be determined as a percentage and profit cannot be guaranteed as well. Profit on preference shares is fixed at a specific figure and also the profit is guaranteed. It has been discussed many times before (AAOIFI, 2017, 331, 333).

To summarize, the aforementioned discussion clearly states that preference shares with these features are not permitted in any way from the Shariah point of view. Furthermore, redeemable preference shares are not valid because of the capital guaranteed. Similarly, cumulative is also void as it creates a profit liability. Afterwards, the general or common features of preference shares are also not Shariah-compliant. Participating in preference shares is also not permissible because their main basis is fixed profit.

Preference shares and their Shariah Alternative

The discussion of the Shariah alternative of something is only possible when the original intention of the thing to be called an alternative is correct or valid. If, on the other hand, the main objective is lumps, then no alternative can be prescribed. For

example, gambling is forbidden due to its inherent toxicity; thus, there must not exist any alternative way to proclaim it Halal.

The main purpose of preference shares is fundamentally flawed because the main objective behind it is to ensure profit, avoid loss bearing and guarantee capital. According to Shariah rules and regulations, these objectives in partnership business are inherently void. Therefore, retaining these features, there can be no alternative to preference shares.

However, An Islamic Preference Share infrastructure can be proposed around it by excluding Shariah-objectionable issues.

Islamic Preference Share: Proposed Shariah Framework

The key point of the proposed Shariah framework is that it will not contain the common features of preference shares. However, since it is a preference share, some Shariah-compliant features shall be added to it.

1. The profit rate will be determined as a percentage as per the principles of the general partnership business. However, there may be a different benefit for those who buy Islamic Preference Shares (IPS), such that only they will receive the profit in excess of the prescribed amount. For example, the contract will be: if the net profit is more than 500000 USD, only the IPS holders will be distributed the excess amount (AAOIFI, 2017, 334). It can be preferably a valid alternative to participate in preference shares. (The fault of ceiling the

profit figure' is avoided by the abovementioned alternative proposal.)

2. When the profit is declared, the IPS holders, like others, will receive the profit at the predetermined declared rate without providing a priority basis. Since it is a preference share, they may be given a higher profit rate (AAOIFI, 2017, 332).

3. There will be no security or guarantee of capital. In the event of loss, it has to be borne in proportion to the capital. In the event of a redemption, shares will be bought and sold at market price, not at issuing price. However, as a preference share, the company might provide the advantage that it will sell any asset to them at a discount against the paid-up capital. In this circumstance, although the shareholders' capital is reduced, they shall acquire valuable assets at low prices; however, this will not be stipulated in the original agreement.

Preference shares and *'Tanajul'* theory

The word *'Tanazul'* in Arabic means "to come down", "give up"etc. There is another word close to it is *'Ishqat'* which means to cancel or omit. The denotation here is to renounce any rights. For instance, someone holds preemption rights, but he released it to the buyer. Some had permanent government jobs, but he left that position for another person. Someone has discharged debts owed to creditors. In these veins, relinquishing one's right is called *'Tanazul'* or *'Ishqat'*. Some scholars have suggested the application of the *'Tanajul'* theory to legitimise preference shares. Their arguments are following;

1. Preference shareholders are given priority in receiving profits to the common (ordinary) shareholders where the ordinary shareholders also have proportionate rights; they would also receive profits at the same time. The *'Tanazul'* theory has been applied since they relinquished that right to the preference shareholders.

2. In the event of liquidation of the company, all shareholders, including other common shareholders, have equal rights to receive capital; however, they have waived that right in favour of preference shareholders. In case of termination, preference shareholders will receive their capital first and then the others. *Tanazul'* theory has also been applied in this case.

Recently, on 17 October 2022, the Shariah Advisory Council (SAC) of the Securities Commission of Malaysia applied the theory of *'Tanajul'* to acquire profit under preference shares and declared it valid in a Shariah resolution passed in their 261st Shariah meeting.

Regarding the implementation of *'Tanajul'* theory in the resolution about preference shareholders getting profit based on preference, it is mentioned that;

> ‘The OS holders waive their right to receive dividends after profit is realized by giving preference to the PS holders. *Tanazul* takes place via ratification by the Board of Directors of the company based on the mandate given by the OS holders.’

They further explained that the Shariah interpretation of this can also be concluded in a way that the common shareholders have waived their right to receive profits through *'Hiba'*. At the time of the purchase of the shares, there is a promise on their part to renounce the right. Their comments are:

> *al-Wa`d bi al-Hibah*
>
> The OS holders promise to waive their right through *Hibah* to receive dividends after profit is realized by giving preference to the PS holders. The HibahHibah contract takes place via ratification by the Board of Directors of the company based on the mandate given by the OS holders.

-The second issue was to provide a priority in receiving capital in the event of the liquidation of the company. In this case, they also suggested the implication of *'Tanazul'* and *'Wa`d theories* in the aforementioned method.

They also validate some other aspects of preference shares by applying the *'Tanazul'* theory. For instance;

> - If the company ever declares more profit or dividend than the expected profit, the excess portion will be considered a discount on behalf of the ordinary shareholders based on the *'Tanazul'* theory.
>
> - the *'Tanazul'* theory will also validate receiving additional dividends in participating preference shares in that way.

Shariah Review:

Fundamentally, *'Tanazul'* or *'Ishqat'* is permissible in Islamic Shariah. It has diversified applications. Nonetheless, in certain cases, it is not permissible or effective for some special conditions. The principle in this case is:

- "That which is concerned with *Haq ul Ibad* and renunciation does not violate anyone else's rights as well as there is no specific Shariah prohibition on abrogation, in that case, it is permissible to relinquish one's rights through *'Tanazul'*.

  For example, emancipating a debtor from a debt or liability, liberating a slave in exchange for money, divorcing a woman in exchange for money etc.
- However, no servant can abandon the rights of Allah. For example, exempting oneself from one's worship
- Similarly, *'Tanazul'* does not apply to such a right which is the right of a slave while it has been established by the Shari'ah with the intention of a pervasive *'Maslahat'*.

  For example, the extent or punishment of adultery
- In the same vein, the guardian of the orphan cannot mitigate the orphan's debt because of the inexorable loss of orphans.
- If a product is purchased without seeing it, the buyer has the right to return it after seeing it. It cannot be revoked by the buyer at the outset because even though it is merely a right related to a servant, it has a greater Shariah objective and welfare. Shari'ah stipulates this right in special *'Maslahat'* (Kuwait Ministry of Awqaf and Islamic Affairs, 1986, 227).

It has been explained that *'Tanazul'* can not be applied to every aspect; rather, it has specific principles and scope of implementation and enforcement.

Would it be appropriate to apply the *'Tanazul'* theory to the aforementioned preference shares?

One of the universal principles of partnership *(Shirkat)* contracts from an Islamic perspective is that nobody's right to participate in the profits can be denied and any condition that creates uncertainty on any of the partners to participate in the profits must be abandoned. If this happens otherwise, it makes usury transactions inevitable. This can be caused by various conditions; some examples are mentioned below:

- Determining the profit for someone in a specific amount creates uncertainty for others to participate in the profit (AAOIFI, 2017, 333).
- Agreement in such a way that, for a certain period, one particular partner shall receive the profit whilst the others will remain deprived. In this case, the participation of the other partners is not assured (AAOIFI, 2017, 374).
- Stipulating that one of the partners shall be provided priority in receiving the profit whereas the remaining portion shall be received by the rest of the participants. This also generates severe uncertainty (International Islamic Fiqh Academy (IIFA), 2021, 202).

In all the aforementioned cases, the participation of all the partners in the profit is not guaranteed; therefore, the transaction precisely converts into a usurious practice. Because the receipt against the invested money becomes guaranteed which is the fundamental form of usury practice in business.

Likewise, ensuring capital safety with Non-loss-bearing clauses is unanimously prohibited. As described by Ali (R.A):

الربح على ما يصطلح عليه الشركاء، والخسارة على قدر المال.

> The distribution of profits will be as per the agreement of the partners and the loss will be borne in proportion to the capital (Abi Shaybah, 2007, 485).

Imam Ibnul Munzir (Rah.) has quoted *Ijma* on this matter. He wrote-

> As evident in Preference Shares, the Preference shareholders usually receive their capital prior to the ordinary shareholders in the event of liquidation of the company which provides them security for their capital while no loss is borne by them.

Such non-bearing of losses in partnership transactions makes usurious transactions inevitable.

To summarize, it has been evident from the analyses that if the *'Tanazul* theory is implied in the aforementioned areas of preference shares, it makes the usurious practice in transactions inexorable.

Furthermore, the theory of *Tanazul* does not apply to usury practice. In this regard, the statement of the famous Faqeeh Imam Shihabuddin Karafi of the 7th Hijri century (d. 684 AH) is particularly noteworthy: He contended-

جاء في "أنوار البروق في أنواء الفروق" للإمام أبو العباس شهاب الدين أحمد بن إدريس بن عبد الرحمن المالكي الشهير بالقرافي رحمه الله تعالى (المتوفى: 684هـ) :".. وَقَدْ يُوجَدُ حَقُّ اللَّهِ تَعَالَى وَهُوَ مَا لَيْسَ لِلْعَبْدِ إسْقَاطُهُ وَيَكُونُ مَعَهُ حَقُّ الْعَبْدِ كَتَحْرِيمِهِ تَعَالَى لِعُقُودِ الرِّبَا وَالْغَرَرِ وَالْجَهَالَاتِ فَإِنَّ اللَّهَ تَعَالَى إنَّمَا حَرَّمَهَا صَوْنًا لِمَالِ الْعَبْدِ عَلَيْهِ وَصَوْنًا لَهُ عَنْ الضَّيَاعِ بِعُقُودِ الْغَرَرِ وَالْجَهْلِ فَلَا يَحْصُلُ الْمَعْقُودُ عَلَيْهِ أَوْ يَحْصُلُ دَنِيًّا وَنَزْرًا حَقِيرًا فَيَضِيعُ الْمَالُ فَحَجَرَ الرَّبُّ تَعَالَى بِرَحْمَتِهِ عَلَى عَبْدِهِ فِي تَضْيِيعِ مَالِهِ الَّذِي هُوَ عَوْنُهُ عَلَى أَمْرِ دُنْيَاهُ وَآخِرَتِهِ وَلَوْ رَضِيَ الْعَبْدُ بِإِسْقَاطِ حَقِّهِ فِي ذَلِكَ لَمْ يُؤَثِّرْ رِضَاهُ وَكَذَلِكَ حَجْرُ الرَّبِّ تَعَالَى عَلَى الْعَبْدِ فِي إلْقَاءِ مَالِهِ فِي الْبَحْرِ وَتَضْيِيعِهِ مِنْ غَيْرِ مَصْلَحَةٍ." (325:1 الطبعة الأولى- مؤسسة الرسالة ناشرون)

In this statement, it is underlined that the theory of *'Ishqat'* or *Tanazul* does not apply to riba-based transactions or usury practice. Because, even though it is related to the right *(Haq)* of the slave, it has been an inexorable part of the right*(Haq)* of Allah since Allah has explicitly forbidden it. Thus, it is completely impermissible to inundate the usury practice in the name of *'Ishqat'* (بن عبد الرحمن المالكي, n.d., 325).

'Tanazul' Theory and partnership business

In the above analyses, the inaccurate application of The *'Tanazul'* theory in certain cases has been pervasively discussed. However, it does not invalidate the implication of the theory in any partnership business; rather, with appropriate measures, it can be implied to some. For example-

- During the distribution of the profits, one partner relinquishes his share of profit, fully or partially, to the other partners, but the conditions are:
    - It can not be s pre-condition.
    - The rate of profit-sharing shall be fixed and included in the original contract.
    - Decisions regarding profit cannot be deferred to the distribution of profit (AAOIFI, 2017, 333).

-If the company ever confronts a loss, one of the partners may agree to bear the loss alone. There is no Shariah prohibition in this regard to apply *Tanazul theory* as well, but the provisions are:

- It can not be s pre-condition.
- The original contract should contain a provision for bearing losses in proportion to capital.

- A decision on loss cannot be deferred until the loss. (AAOIFI, 2017).

Conclusion:

Currently, people are conveying upward interest towards preference shares due to some of their unique characteristics. Without considering the Shariah perspective and analyzing the classical opinions of the scholars, some institutes and councils are validating the preference shares to observe the growing inclination of people. Recently, the "Shariah Advisory Council of the Securities Commission of Malaysia" issued a resolution where they declared that preference shares are permissible with a view to the *'Tanazul'* theory. However, the classical Shariah scholars and mainstream advisory and Fatwa councils strongly oppose the decision. In this paper, the arguments and analyses that the Shariah Advisory Council of the Securities Commission of Malaysia has presented are refuted to be misguided and inaccurate. The implementation of the *'Tanazul'* theory in preference shares is impermissible in Islamic Shariah since it has inevitable *Riba* ingredients and creates utmost uncertainty and ambiguity as well as violates the core Shariah principles for partnership business *(shirkat)*. However, the *'Tanazul'* theory can be appropriate in the partnership business *(shirkat)* following some particular measures and it is also possible to prescribe an alternative Islamic Preference sharing infrastructure which is presented in this paper. Therefore, the *'Tanazul'* theory can not justify preference shares to be permissible.

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