alBaraka

Fiqh of
Contemporary Financial and Banking Transactions

New Reading

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In the Name of Allah, the Most-Merciful, the Ever-Merciful

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First English Edition published 2013

Introduction(*)

All praise is rightfully due to Allah, and peace and blessings be upon the best of mankind, Muhammad, Allah's Messenger and Servant, and upon his Household, Companions and Followers.

This study is meant to reflect a new reading on *Fiqh* (Islamic Jurisprudence) tackling contemporary issues which are closely related to the current financial transactions and which give rise to serious effects and results pertaining to the existing activities of Islamic banks. The study has been guided by the general aim to renovate the religion, as advised and commended by the Messenger (Peace be upon him) in his saying:

> *«Allah will send for this nation at the end of every hundred years someone who will renovate its religion for it.»*(1)

Moreover, this reading aims at reconsidering the understanding of the legacy of *fiqhî* texts, and trying to deduce *shar`î* rulings concerning new events from the detailed proofs thereof or attribute such to general points in *Fiqh* or issues in particular branches. This is carefully done in light of the status quo and existing conditions and events, as well as people's needs and

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(*) **N.B:** References in this book are transliteration to the original Arabic references (See transliteration System at the end of this book). The reader should refer to the Arabic editions when needed.

(1) Related by Abû Dâwûd; At-Tabarânî in "*Al-Awsat*"; Al-Hâkim in "*Al-Mustadrak*"; and Al- Bayhaqî in "*Al-Ma`rifah*" from Abû Hurayrah (may Allah be pleased with him). Al-Zayn Al-`Irâqî said that it is a *hadîth* with an authentic chain of transmission. As-Sayûtî indicated that the *hadîth* is authentic and Al-Minâwî approved of this opinion. ("*Mukhtasar Sunan Abû Dâwûd*" by Al-Mundhirî [6: 163]; "*Fayd Al-Qadîr*" [2: 281]; and "*Kashf Al-Khafâ*'" by Al-`Ajlûnî [1: 282]).

current conventions, and in line with the purposes of *Sharî`ah* as regards bringing about interests and warding off evils, removing difficulty from the people, nullifying corrupt stratagems and fraudulent means, and not relying on blind imitation and sectarian fanaticism. In this reading, we follow the approach of the prominent scholar At-Tâhir Ibn `Âshûr who stated, "I have seen the people, with respect to the legacy of the predecessors, divided into two camps. The first includes those who confine themselves inside what was built by the predecessors, while the second includes those who use their tools to demolish all that is old. Both cases cause great harm. However, there is a third case whereby a broken wing can be cured; that is, to take what has been established by the predecessors, and refine and obtain the most from it. We should never demolish or eliminate such a legacy, for denying their favor would be ingratitude. It is not a good trait for a nation to be ungrateful to the merits of its predecessors."(1)

The features of this new reading can be outlined in the following points:

a) A reliance on well-established rulings in the Qur'ân and Sunnah.

b) An examination of the views of *Faqîhs* and their differences with regard to issues subject to *Ijtihâd* (the practice of *fiqhî* diligence and reasoning), review of their proofs and arguments for the sake of verification and arriving at the truth, and choosing the most substantiated and preponderant of their views, schools and statements in order to attribute them to any new events thereto, if possible. It is well-known that the prominent Imams of *Fiqh* adopt the opinion stating: "A man must not give a fatwa (*shar`î* opinion) until he knows the different opinions of *Faqîhs*, so he may choose therefrom, according to his knowledge, the soundest for the religion as well as the one most likely to be certain."(2)

In his book entitled *"Qawâ`id At-Tasawwuf"*, Zarrûq said; "Then, if any of the later scholars adopts a view not adopted by anyone before him, this should not affect the esteem of the early scholars. Moreover, the later scholar

(1) *"Tafsîr At-Tahrîr Wa At-Tanwîr"* by Ibn `Âshûr [1: 7].
(2) *"Qût Al-Qulûb"* by Abû Tâlib Al-Makkî [1: 160].

may not vilify the views adopted by the early scholars, nor misbehave with them. This is because it is well-established that the merits of the predecessors would make them (the Predecessors) return to the right view upon hearing any clarification thereof. Hence, the Imams from among the later scholars have disagreed with the predecessors, but this should not open the door for censuring any of them (both the early and later scholars)."[1]

c) A deduction of rulings on new issues for which no *shar`î* text, *Ijtihâd*, or *fiqhî* disagreement is found. Such deduction is to be performed using the appropriate general and partial proofs and principles.

An-Nawawî said; "Observing deduction is one of the most stressed upon duties, as the explicit *shar`î* texts do not provide clear-cut rulings of new issues except for a small number of them. Therefore, if deduction is disregarded, rulings on most or some of the new situations that occur would be unattainable."[2]

d) An explanation of the inevitability of the change of rulings to cope with the changes in times, with respect to the issues whose rulings are based on customs and conventions, and which are liable to change. In *"Al-Furûq"*, Al-Qarâfî said; "The rulings based on customs follow the same course of such customs and become invalid if they (the customs) become invalid. So whatever becomes new, according to convention, should be considered, and whatever becomes invalid should not be considered. One should not adhere forever to what is written in books. Instead, if someone comes to you from another country seeking your Fatwa (*shar`î* opinion), you should not apply to his case the conventions applicable in your country, but ask him about the conventions applicable in his own country and apply them to his case, giving a Fatwa accordingly while disregarding the conventions of your country and what is stated in your book. This is the clear truth. Moreover, adhering forever to the views transmitted over time is considered a mistake according to the religion and indicates that one is ignorant of the intentions of

(1) *"Qawâ`id At-Tasawwuf"* by Zarrûq (p. 22).
(2) *"Ar-Radd `Alâ Man Akhlada Ilâ Al-Ard"* by As-Sayûtî (p. 77).

early Muslim scholars and the predecessors."[1] In the book entitled *"Al-Iḥkâm"*, Al-Qarâfî said; "The continuous application of rulings based on customs when such customs have undergone changes is contradictory to the consensus of scholars and indicates that one is ignorant of the religion. Rather, all the rulings pertaining to *shar`î* matters which are based on customs are changeable whenever such customs change. This is in order for the rulings to comply with the requirements of the new customs. This is not a way of renovating *Ijtihâd* by imitators (scholars who are not qualified to perform *Ijtihâd*), which necessitates possessing the competence to practice *Ijtihâd*, but this is an agreed upon rule reached through the diligence of scholars. Hence, we are only following their footsteps in this respect, without basing our conclusion on any *Ijtihâd*."[2]

Al-Qarâfî (may Allah have mercy on him) drew attention to this meaning by stating, "Many *Faqîhs* have missed this (the above rule). They found that the early Imams (Predecessors) had given Fatwas according to their own conventions and written them down in their books, then the later *Faqîhs* came across those Fatwas and gave their opinions accordingly, despite the fact that such conventions no longer exit. Thus, they have been mistaken and have contradicted the consensus: That is, giving Fatwas by applying a ruling based on grounds which no longer exist is contradictory to consensus."[3]

e) A reliance on the purposes of the *Sharî`ah*, i.e. bringing about interests and warding off evils, when attributing and deducting rulings. Al-`Izz Ibn `Abdus-Salâm said; "The entire *Sharî`ah* involves bringing about all types of interests, whether small or large, and warding off all types of evils, whether small or large. You will not find a ruling issued by Allah except that it leads to some good, sooner or later, or that it wards off some evil, sooner or later."[4]

Then he went on to say; "Whoever traces the purposes of the *Sharî`ah* as regards bringing about interests and warding off evils shall eventually

(1) *"Al-Furûq"* [1: 176].
(2) *"Al-Iḥkâm Fî Tamyîz Al-Fatâwâ `An Al-Aḥkâm"* by Al-Qarâfî (p. 231).
(3) *"Al-Furûq"* [3: 162].
(4) *"Al-Qawâ`id Al-Kubrâ"* [1: 39].

> come to the conclusion or belief that such an interest may not be disregarded and such an evil may not be approached, even if there is no *shar`î* text, consensus, or special *Qiyâs* (analogical deduction) relating thereto. That is, understanding the spirit of the *Sharî`ah* necessitates such a belief."(1)

It should be observed that the rulings built on the rule of bringing about interests will be subject to change when such interests face changes due to the change of time, place or people. In this respect, Ibn Burhân said; "What used to be an interest at a certain time is not necessarily so at another time. An action may be considered as an interest at a certain time and an evil at another time; times are not similar."(2) As a result of change, rulings undergo changes as a means of bringing about interests for the people and warding off evils therefrom, as well as facilitating matters for them. If such rulings are to remain unchangeable, people's interests would be negatively affected. People would suffer hardships, and the purposes of *Sharî`ah* would become unsound. In this connection, Al-Âmidî said; "The change and difference in interests necessitate the introduction of change and difference in rulings."(3)

In the event of a difference in the degree of attention paid to some interests, the most important of such interests should be given priority. This is expressed by Ibn `Âshûr who said; "Whenever two interests contradict each other, the greater interest should be given preference."(4) Moreover, Ibnul-Qayyim said; "If there are many interests, the most important and greatest of them should be given priority, even if the least of them is not achieved."(5)

In case an interest conflicts with an evil, the greater should be considered (i.e. regarding permitting or prohibiting actions or transactions in concern). Al-Qarâfî said; "The Muslim scholars unanimously agree that a weak evil is forgivable with a strong interest."(6)

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(1) Ibid. [2: 314].
(2) *"Al-Wusûl Ilâ Al-Usûl"* by Ibn Burhân [1: 158 and 175].
(3) *"Al-Ihkâm Fî `Usûl Al-Ahkâm"* [2: 380].
(4) *"Maqâsid Ash-Sharî`ah Al-Islâmiyyah"* (p. 75).
(5) *"Muftâh Dâr As-Sa`âdah"* [2: 407 and 420].
(6) *"Adh-Dhakhîrah"* [13: 322].

Ibn Taymiyyah said; "The secret of the *Sharî`ah* is: If an action involves an evil, it is to be forbidden, unless it is counteracted by a strong interest… The greater of two evils should be avoided by enduring the lesser one."(1) He also said; "The *Sharî`ah* is built on bringing about and perfecting interests, and preventing and minimizing evils. Piety involves giving preponderance to the better of two goods by avoiding the lesser of them, and driving away the worse of two evils, even if it entails that the lesser of them will happen."(2)

f) An adoption of the stance of the *Sharî`ah* to forgive all that a legally accountable person is unable to do of the *shar`î* required matters or is unable to avoid of the *shar`î* forbidden matters with respect to people's dealings in the present time. Ibn Taymiyyah said; "When Allah commands us to do something, such command is conditional on our ability to do it and our possession of the means to do it. Thus, whatever we cannot do or do not have the means to do is forgivable."(3) He also said; "It is well-known that the *Sharî`ah* obligates matters according to the person's ability. It lays down conditions with regard to acts of worship and contracts according to the person's ability."(4) This is substantiated by Allah's statement:

{"Allah burdens not a person beyond his scope."}

[Al-Baqarah (The Cow): 286]

This stance of forgiveness that the *Sharî`ah* takes also includes all the forbidden matters which are too difficult to avoid, and which are badly needed or are very common to take place in the current dealings among the people, as per the rule of "*`Umûm Al-Balwâ*" (a common affliction which is too difficult to avoid) which is agreed upon by the majority of scholars. Expressing this meaning, Al-Qarâfî said; "The avoidance of any commanded matter which is too difficult for the people to observe is excusable, and the carrying out of any prohibited matter which is too difficult for them to avoid is excusable."(5)

(1) *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* by Ibn Taymiyyah (p. 338).
(2) *"Majmû` Fatâwâ Ibn Taymiyyah"* [30: 193].
(3) Ibid. [29: 322].
(4) Ibid. [30: 234 and 235].
(5) *"Adh-Dhakhîrah"* [1: 189].

In *"Tahdhîb Al-Furûq"*, it is stated, "The general rule in the tolerant religion (i.e. Islam) is to ease burdens in all matters wherein affliction is common."(1) Additionally, it is stated in the *fiqhî* Maxim, "Any matter wherein affliction is common is to be excused."(2)

Al-Wansharîsî said; "Whatever is widely practiced by the people and has become well-established in their customs and habits should be excusable by *Sharî`ah*, if possible, whether it is a matter upon which the scholars differ or not."(3)

In *"Al-Qawâ`id Al-Kubrâ"*, Al-`Izz Ibn `Abdus-Salâm said; "Ash-Shâfi`î said; 'The *Uṣûl* are based on (a rule stating) that whenever matters become too tight they are about to 'loosened'. Here, the word *'Uṣûl'* means the rules of *Sharî`ah*; 'loosened' means giving a license or concession outside the scope of analogies and standard rules; and 'tight' refers to a difficulty."(4)

This is based on the fact that the tolerant *Sharî`ah* of Islam has not come to make things difficult for the people; rather, it has come to fulfill the real needs necessitated by circumstances of life and requisites of dealings in all times and places, so as to facilitate matters for the people and remove any burdens or difficulties for them. This is manifested in Allah's Statement; ***{...Allah intends for you ease, and He does not want to make things difficult for you...}*** [Al-Baqarah (The Cow): 185]. Allah, Exalted and Glorified be He, also says; ***{... and (He) has not laid upon you in religion any hardship...}*** [Al-Ḥajj (Pilgrimage): 78].

Ibn Taymiyyah said:

> "He (Allah) has told us that He has not laid upon us in religion any hardship by generally and definitely negating this. So whoever believes that there is any hardship (in the religion) equal to even the weight of an atom is in fact belying Allah and His Messenger."(5)

(1) *"Tahdhîb Al-Furûq Wa Al-Qawâ`id As-Saniyyah"* [3: 82].
(2) *"Al-Ashbâh Wa An-Naẓâ'ir"* by Ibn Nujaym (pp. 88 and 93). See also *"Al-Ashbâh Wa An-Naẓâ'ir"* by As-Sayûṭî (p. 83).
(3) *"Al-Mi`yâr"* [6: 471 and 8: 377].
(4) *"Al-Qawâ`id Al-Kubrâ"* [2: 326].
(5) *"Jâmi` Ar-Rasâ'il"* by Ibn Taymiyyah [2: 370].

g) A consideration of the consequences of actions and a nullification of all ill-favored stratagems which direct permissible contracts and actions to forbidden purposes. Instead, the permissible channels (i.e. commendable means) direct permissible actions to permissible and good purposes, and thus avoid falling into sins and also result in considerable interests and lawful purposes. This is a praiseworthy matter for which the one who performs it and the instructor shall be rewarded, according to Ibnul-Qayyim.(1)

Ash-Shâṭibî said:

> "The stratagems which have previously been deemed invalid, disproved and forbidden involve: Those which undermine a *shar`î* principle or contradict a *shar`î* interest. If a 'stratagem' neither undermines a *shar`î* principle nor contradicts an interest which the *Sharî`ah* urges to consider, it should not be included in the forbidden acts nor be considered invalid."(2)

h) An awareness of the distinction between immoderation in religion and application of the rule of "eliminating the means leading to evils". Aṭ-Ṭâhir Ibn `Âshûr said; "With respect to practicing *Fiqh* and *Ijtihâd*, distinction should be observed as regards to immoderation in religion on one side and elimination of the means leading to evils on the other, which is a delicate distinction. To illustrate, the elimination of the means leading to an evil is attributable to the existence of an evil, while immoderation is attributable to an exaggeration and excessiveness in attaching a permissible matter to a matter commanded or forbidden by the *Sharî`ah*, or in performing a permissible matter in an excessive manner compared to what is indicated by the Lawgiver (Allah and the Messenger) on the plea of fearing to fail in doing what is indicated by the Lawgiver. In the Sunnah, this is called 'over-stringency and rigorousness'. Such immoderation has different ranks, such as: (I) Matters relating to piety with regard to oneself, which may involve hardship, or piety with regard to others by laying burdens on them;

(1) *"Ighâthat Al-Lahfân"* by Ibnul-Qayyim [1: 339 and 2: 86].
(2) *"Al-Muwâfaqât"* [2: 387].

and (II) Matters involving dispraised misgivings. Those practicing deduction and formulating Fatwas should avoid immoderation and over-stringency when directing the nation to follow the *Sharî`ah* and the rulings enacted therefrom. Verily, this is a great responsibility on their part."(1)

In the researches I compiled in this new reading, I tackled the following topics:

1- Concept of *Ribâ*: Significances of *Shar`î* Texts and Classifications by *Faqîhs*.

2- *Muwâṯaȧah* on Concluding Several Contracts and Pledge in a Single Transaction.

3- Debt Conversion: Rulings and Contemporary Alternatives.

4- *Tawarruq*: Its Rulings and Modern Applications.

5- *Mu`âwaḏah* for Commitment to Exchange Currencies in the Future.

6- Adhesion Contracts.

7- Conditional Guarantee of Investment Deposits in Islamic Banks.

8- Set-off between Credit and Debit Interests, and Reciprocal Loans.

9- *Ṣukûk Al-Ijârah*.

10- *Sharî`ah* Boards in Islamic Banks (Characteristics and Standards).

11- Leasing the Bought Asset to its Seller.

12- Instruments of Investment in Managing and Funding Public Utilities (Proposals for Islamic Banks).

Some of the above academic researches have been presented in academic conferences or seminars in various countries or published in academic periodicals and journals. However, I have tackled them with revision and editing; introducing corrections, refinements and additions thereto; and ornamenting them with worthy academic additions and investigations.

(1) *"Maqâṣid Ash-Sharî`ah Al-Islâmiyyah"* by Ibn `Âshûr (p. 118).

To conclude, through the researches detailed in this book I arrived at the admission of new ideas and principles, as well as unique preferences and options, which I did not write down except after careful consideration, contemplation, reasoning and scrutiny, avoiding blind imitation and sectarian fanaticism. Perhaps I have realized the truth in such efforts, thanks to Allah's Support and guidance. There is a great statement by Ibn Mâlik in which he says, "If knowledge is only a gift from Allah and a talent granted to certain people instead of others, it would not be unlikely that the problematic matters concerning which many of the early scholars faced great hardship in explaining, might be easily explained by some of the later scholars."(1)

Vancouver, Canada on 09/09/1427 A.H. (01/10/2006 A.D.)

Dr. Nazîh Hammâd

(1) *"Al-Qawâ'id"* by Zarrûq (p. 21).

Research (1)
Concept of *Ribâ*
Significances of *Shar`î* Texts and Classifications by *Faqîhs*

Prelude

Preface

Topic One: *Shar`î* Concept of *Ribâ*

Item (1): Specific Definition of *Ribâ*
Item (2): General Definition of *Ribâ*

Topic Two: Types of *Ribâ* in *Fiqhî* Terminology

Conclusion

Prelude

All praise be to Allah, the Lord of the Worlds, the blessed end is for the pious, and peace and blessings be upon the Seal of the Prophets, Prophet Muhammad, who was sent as a mercy to the worlds, and upon his Household, Companions and those who follow them until the Day of Resurrection.

This is a full-length, concise academic research written in a simplified, smooth style and clear wording. It tackles the verification of the *shar`î* significance of the term *'Ribâ'* (usurious transactions) as derived from the definitions and sayings of *Faqîhs* and their classifications of the types of *Ribâ*, in light of the texts of the Qur'ân and Sunnah, as well as from the diligence, scrutiny and deep thoughts of the people of knowledge. Moreover, the research clarifies the relative general conditions and exceptional provisions deduced from the principal and secondary sources of legislation.

I have been very particular not to let this methodological study lack any of the five beneficial features referred to by Imam Al-Khâzin in the introduction of his interpretation of the Qur'ân entitled: *"Lubâb Al-Ta'wîl Fî Ma`ânî At-Tanzîl"*. He indicated that every significant academic research should include these five beneficial features. In the said work, Imam Al-Khâzin stated, "The work of every author, in a domain he was preceded to by other authors, should not lack five beneficial features: (I) a deduction of problematic points, (II) the compilation of something which is scattered, (III) an explanation of something which is ambiguous, (IV) the arrangement of the text in a well-organized manner, and (V) the omission of redundancy as well as lengthiness."

Finally, I would like to quote Imam Al-Khaṭṭâbî in the introduction of his book entitled *"Gharîb Al-Ḥadîth"* [1: 49], where he said; "As for all that has been realized through the exertion of our minds and derived from our peers, we ought not to praise nor stress trust therein. We entreat whoever finds a letter or meaning that should be changed to correct it and offer advice thereon. This is because man is weak and liable to err unless he is safeguarded by Allah's guidance. We ask Allah to guide us and we are desirous to follow His Path. Allah is the Most Generous and the True Bestower."

Preface

1- In the *shar`î* terminology, the term '*Ribâ*', with its relative rulings and explanations, discussions and classifications, excuses and causes, and agreements and disagreements among scholars, is considered one of the most critical and difficult issues in *Fiqh* (Islamic Jurisprudence). This is the case when it is tackled in any analytical, in-depth study, and examined as a whole to reveal its limits and features, clarify its problems and solve any problematic topics related to it. This is a truth that cannot be denied by any fair scholar or scrutinizing researcher who looks beyond superficiality and delves deeply into the core of the issue.

This fact was referred to by the contemporary *Faqîh* Muḥammad Rashîd Riḍa, who stated, "In the Islamic *Sharî`ah*, there has been no civil issue open to dispute and debate since the first era of Islam and that still attracts more complexity and intricacy among scholars due to their continuous and unrelenting research on it, as the issue of *Ribâ*, which resembles the issue of fate with regard to creeds."(1) He was preceded in this view by some prominent *Faqîhs*. Ibn Kathîr said; "*Ribâ* is one of the most problematic issues for many scholars."(2) Commenting on *Ribâ Al-Biyû`* (interest on sales), Ash-Shâṭibî said; "It (*Ribâ Al-Biyû`*) is subject to consideration and the distinctive aspects thereof are hard to be realized by even the most diligent people. It is one of the most inscrutable matters whose inner meaning has not been revealed till the present."(3)

(1) *"Ar-Ribâ Wa Al-Mu`âmalât Fî Al-Islâm"* (p. 85).
(2) *"Tafsîr Ibn Kathîr"* [1: 327].
(3) *"Al-Muwâfaqât"* [4: 42].

Al-`Izz Ibn `Abdus-Salâm said; "Also, as for the evil causing *Ribâ* (*Ribâ Al-Biyû`*) to be considered as one of the cardinal sins, I could not find a decisive basis to rely on. Being a consumable, a priceable or a measurable item (of the *Ribâ*-related monetary items), dealing with it does not cause any major evil for it to be considered one of the cardinal sins. It would not be right to explain that, due to its position of respect, *Ribâ Al-Faḍl* (an unlawful excess in the exchange of two counter-values) and *Ribâ An-Nasâ'* (interest on credit transactions) are prohibited therein. To illustrate, the trading in which one sells one thousand dinars for one dirham is considered valid, but on the other hand, whoever sells one measure of barley for one thousand measures of wheat, or one *Mudd* (a kind of measure) of barley for one thousand *Mudds* of wheat, or one *Mudd* of barely for its like, or one dinar for its like, or one dirham for its like, and delays the transaction for only one moment, the sale becomes invalid, though no significance or basis which can be relied on to judge it as so is apparent in such forms of *Ribâ*."(1)

Commenting on the explanation that *Ribâ* is one of the cardinal sins, Al-Bujayrimî, in his "*Ḥâshiyah `Alâ Sharḥ Al-Khaṭîb*", said; "That is, it (*Ribâ*) is one of the greatest sins. It is well-established that the greatest sins involve *Shirk* (polytheism), killing, adultery, stealing, drinking intoxicants, *Ribâ* and extortion (in the said order). Being one of the cardinal sins is obvious in some of the forms of *Ribâ*, i.e., the one involving excess. As for the *Ribâ* related to deferment or a specified term without any excess in either of the two exchanged items, it is considered one of the minor sins, due to the fact that the utmost blame that may be said against it is that it is an invalid contract. Scholars have stated that invalid contracts are considered one of the minor sins."(2)

This comes as no surprise as Imams Al-Bukhârî, Muslim, Abû Dâwûd and An Nasâ'î narrated that `Umar Ibnul-Khaṭṭâb said:

(1) *"Al-Qawâ`id Al-Kubrâ"* [1: 292].

(2) *"Ḥâshiyat Al-Bujayrimî `Alâ Sharḥ Al-Khaṭîb Al-Ma`rûf Bil-Iqnâ` Fî Ḥall Alfâẓ Abû Shujâ`"* [3: 15]. As-Sayyid Al-Bakrî quoted it in his commentary *"I`ânat Aṭ-Ṭâlbîn `Alâ Ḥall Alfâẓ Fatḥ Al-Mu`în"* [3: 21] and approved it.

> *«I wish Allah's Messenger (Peace be upon him) could have explained to us in (more) detail the laws pertaining to the inheritance of the grandfather of one who dies leaving no issue, and some of the problems pertaining to Ribâ.»*[1]

In his *"Musannaf"*, `Abdur-Razzâq reported that `Umar Ibnul-Khattâb (may Allah be pleased with him) said:

> *«We abstained from nine tenths of all lawful transactions for fear of falling into Ribâ.»*[2]

He was also reported to have said:

> *«I fear we have increased Ribâ tenfold (i.e. abstained from many lawful transactions) for fear of falling into it.»*[3]

Moreover, Ahmad, Ibn Mâjah, Ibn Jarîr, Ibnul-Mundhir and others narrated that `Umar Ibnul-Khattâb (may Allah be pleased with him) said:

> *«Among the last Verses revealed was the Verse of Ribâ,*[4] *and Allah's Messenger (Peace be upon him) died before explaining it, so abstain from Ribâ and suspicion*[5]*.»*[6]

2- Commenting on `Umar's saying, Judge Ibn Rushd (the Senior) said; "He (`Umar) did not mean that Allah's Messenger (Peace be upon him) had not interpreted the Qur'anic Verse related to *Ribâ* or had not explained its

(1) *"Jâmi` Al-Usûl"* [5: 105]; and *"Mukhtasar Sunan Abû Dâwûd"* by Al-Mundhirî [5: 258].
(2) *"Muntakhab Kanz Al-`Ummâl"* [2: 239].
(3) *"Musannaf Ibn Abû Shaybah"* [6: 464, 560 and 563]; and *"Musannaf `Abdur-Razzâq"* [10: 302].
(4) Al-Hâfiz Ibn Hajar said; "Note: The word 'last' here means that the Verses tackling the issue of *Ribâ* in the Sura of *Al-Baqarah* (The Cow) were revealed long after the ruling forbidding *Ribâ*, as indicated by Allah's Statement ***{"... Consume not Ribâ doubled and multiplied..."}*** [Âl-`Imrân (The Household of `Imrân): 130] in the middle of the story of Uhud (*"Fath Al-Bârî"* [8: 205]).
(5) Ibn Rajab said; "By the phrase 'so abstain from *Ribâ* and suspicion, `Umar meant that there are many types of *Ribâ* and there are some suspicious matters which have not been unequivocally ascertained as being among the *Ribâ* forbidden by Allah, so it is better to leave it." (See *"Rawâ'i` At-Tafsîr Al-Jâmi` Li-Tafsîr Ibn Rajab"* [1: 198].
(6) See: *"Jâmi` Al-Usûl"* [5: 105]; *"Musnad Ahmad"* [1: 36 and 50]; *"Muntakhab Kanz Al-`Ummâl"* [2: 239]; *"Sunan Ibn Mâjah"* [2: 764]; and *"Ahkâm Al-Qur'ân"* by Al-Jassâs [1: 464].

intended meaning; rather, he (`Umar) meant that the Messenger (Peace be upon him) had not mentioned all the forms of *Ribâ* in his *hadîths*. This is due to the fact that the Messenger had already tackled many of such forms in his *hadîths*. As for those forms which he did not mention, he referred them to the evidence of *Sharî`ah* and clarified any forms thereof. In fact, the Messenger (Peace be upon him) did not die until after he had perfected the religion (i.e. Islam) and clarified all that Muslims need to know. Allah, the Almighty, says:

> ***{"This day I have perfected your religion for you, completed My Favor upon you, and have chosen for you Islam as your religion."}***
>
> [*Al-Mâ'idah* (The Table): 67]

Ibn Rushd (the Junior), then added; "What substantiates our interpretation of `Umar's saying is his own words, *'You think that we know every issue from the issues of Ribâ. No doubt I would love to know all these issues more than I would like to own a country like Egypt with all its territories.'* This is despite the fact that there are forms of *Ribâ* known to everyone. `Umar (may Allah be pleased with him) reported that there are apparent forms of *Ribâ,* as they are explained by the Messenger (Peace be upon him), as well as concealed forms not stated (by the Lawgiver). `Umar wished that all forms of *Ribâ* be apparent and known to him through the *hadîths* of the Messenger, and thus he would not need to search for evidence for any of them. When Allah, Exalted be He, wants to test His servants, He diversifies the means of seeking knowledge, making some apparent and easy to comprehend and others hidden and not so easy to grasp. In this way, the hidden matters may be distinguished from the apparent ones through diligence and scrutiny. Accordingly, Allah will exalt in degree those who believe and those who have been granted knowledge."(1)

Sheikh At-Tâhir Ibn `Âshûr discussed `Umar's saying and concluded, "I believe that `Umar did not mean *Ribâ* as a whole, as he followed its ruling with clarification and explanation. Rather, he meant that the realization of the ruling on each of the several forms of sales is not attainable

(1) *"Al-Muqaddimât Al-Mumahhidât"* [2: 12 and 13].

to everyone, and the Messenger (Peace be upon him) had not covered each one of such forms individually through *shar`î* texts."[1]

Imam Al-Mâzarî had previously drawn attention to the origin and core of the complexity of *Ribâ* as well as the key to solving its riddle. He said; "The *Sharî`ah* has not covered all incidents in the texts. Rather, it mentions some points and entrusts scholars to infer therefrom. An example of this is the prohibition of the unlawful excess involved in the six types of *Ribâ*.[2] The Lawgiver (Allah and the Messenger) could have introduced a term encompassing all types of *Ribâ* to avoid any disagreement among scholars, but He did not, in order to allow the nation to practice *Ijtihâd* (diligence) on the matters not mentioned specifically and to exalt in degree those who have been granted knowledge due to his effort to deduce the meaning of Allah's words with respect to the matters indicating His purposes and rulings."[3]

3- It is worth noting that I do not intend in this study to elaborate on the forms of *Ribâ*, present the views of *Faqîhs* on the reason why *Ribâ Al-Biyû`* is prohibited and discuss it, or tackle the issue of *Ribâ*-related excuses and stratagems. There are other references where the discussion of such topics can be sought. In fact, my aim is restricted to refining speech and clarifying the features of the technical concept of *Ribâ* and its types, as derived from the texts of the Qur'ân and Sunnah, and learned from the *Ijtihâd* and consideration of *Faqîhs*, along with all the academic investigations related to this topic. I only hope that the reader may find in this study a significant academic addition to the previous elaborate writings on *Ribâ*.

(1) *"At-Tahrîr Wa At-Tanwîr"* [3: 87].
(2) Gold, silver, wheat, barely, dates and salt.
(3) *"Îdâh Al-Mahsûl Min Burhân Al-Usûl"* by Al-Mâzarî (p. 345).

Topic One
Shar`î Concept of *Ribâ*

4- Linguistically speaking, *Ribâ* means an 'excess'. In Arabic, the verb '*Rabâ*' means to 'increase.'[1] Al-Râghib Al-Aṣbahânî said; "However, *Ribâ* is specifically defined in *Sharî`ah* as an excess in either of the two counter-values."[2]

In brief, the term '*Ribâ*', according to *shar`î* terminology, has two meanings: a specific and a general one.

Item (1): The Specific Definition of *Ribâ*

5- *Ribâ*, according to the specific definition (which is the prevalent conventional definition in *Sharî`ah*),[3] refers to:

a) *Ribâ An-Nasî'ah*; which was widely-practiced during *Al-Jâhiliyyah* (pre-Islamic period) and with respect to which the Qur'anic Verses at the end of Sura *Al-Baqarah* (The Cow) were revealed, and

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(1) *"Mu`jam Maqâyîs Al-Lughah"* [2: 483]; *"Basâ'ir Dhawî At-Tamyîz"* [3: 34]; and *"Al-Mutli`"* by Al-Ba`lî (p. 239).

(2) *"Al-Mufradât"* (p. 340).

(3) Al-Qurṭubî said; "The *Ribâ* conventionally known in *Sharî`ah* involves two types: *Ribâ An-Nasâ'* and *Ribâ Al-Faḍl* in money and foods, as we have clarified. It usually refers to the agreement made when the Arabs used to say to a debtor: 'Will you pay (the debt) off now or delay payment for an increase?' The debtor would increase the amount of money due on him and the creditor would delay payment. All this is prohibited according to the unanimous agreement of scholars." (*"Al-Jâmi` Li-Aḥkâm Al-Qur'ân"* [3: 349] and *"Aḥkâm Al-Qur'ân"* by Al-Jaṣṣâṣ [1: 465].

b) *Ribâ Al-Biyû`*; which is prohibited according to the *Sahîh* (authentic) *hadîth* narrated by `Ubâdah Ibnus-Sâmit (may Allah be pleased with him) and others in which Allah's Messenger (Peace be upon him) said:

«Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, and salt by salt, (only in the form) like for like…»[1]

Each of these two types shall be discussed in detail as follows:

a) *Ribâ An-Nasî'ah*

6- It refers to the interest paid on loans or credit transactions. It is called *Ribâ Al-Jâhiliyyah* (i.e. *Ribâ* widely practiced during the pre-Islamic period). Imam Ibnul-Qayyim called it '*Ribâ Jaliyy*' (apparent *Ribâ*).[2] It means 'any stipulated increase added to the principal (of a loan),'[3] whether such increase is fixed or changes according to the loan's amount and term. It is known today as

(1) See: *"Bidâyat Al-Mujtahid"* [2: 128].

(2) *"I`lâm Al-Muwaqqi`în"* [2: 135].

(3) However, if the debtor pays his debt with something better in amount or quality without any condition or an agreement being stipulated, it is permissible according to the majority of the *Hanafî*, *Shâfi`î* and *Hanbalî Faqîhs*, and Ibn Habîb, `Îsâ Ibn Dinâr, Judge `Abdul-Wahhâb Al-Baghdâdî from the *Mâlikî* School and others. This is based on the fact that the Messenger (Peace be upon him) borrowed a young camel and gave a better one instead, and said: *"The best among you is the one who is best in repaying the debt."* This is because such an increase was not in exchange for a delay (term) in repaying the debt, nor a means of obtaining the debt itself, nor was it demanded as a means of repayment; therefore, it is lawful, as if it was not related to the debt. In fact, the *Hanafî*, *Shâfi`î* and *Zâhirî Faqîhs* stated that it is desirable for a borrower to repay his loan with something better than what he borrowed, but without any such condition being stipulated, and it is not detestable for the creditor to take such. It was stated in Article (753) of *"Majallat Al-Ahkâm Ash-Shar`iyyah `Alâ Madhhab Ahmad"*: "A debtor may repay his debt with something better or lesser than what he took with the consent of both parties, even with an increase or decrease in the amount or quality, but without any such condition or previous agreement being stipulated." See: *"Al-Mughnî"* [6: 438 and after]; *"Rawdat At-Tâlibîn"* [4: 34]; *"Al-Mubdi`"* [4: 210]; *"Al-Muhallâ"* [8:77]; *"Sharh Muntahâ Al-Irâdât"* [2: 227]; *"Al- Qawânîn Al-Fiqhiyyah"* (p. 294); *"Sahîh Muslim"* [3: 1224]; *"Al- Muwattâ'"* [2: 680]; " *`Âridat Al-Ahwadhî"* [6: 58]; *"Sunan Abû Dâwûd Ma`a Badhl Al-Majhûd"* [14: 210]; *"Al-Ma`ûnah"* by Judge `Abdul-Wahhâb [2: 999]; and "*`Iqd Al-Jawâhir Ath-Thamînah"* [2: 392].

'interest calculated on a loan which is determined in annual, biannual or other percentages and whose amount changes according to such percentages and terms; the greater the interest or term the greater the amount of the increase. It also involves any increase in the amount that will be repaid in exchange for a term upon every subsequent delay in repayment of a debt after it has become due, whether it is related to a loan, sale on credit, etc.

This type of *Ribâ* is decisively prohibited and such prohibition is known by necessity in religion, and it is the one originally intended by the prohibition in this regard.(1) In this regard, Allah, Exalted Be He, revealed:

> ***{"Those who consume Ribâ (usury) will not stand (on the Day of Resurrection) except like the standing of a person beaten by Shaytân (Satan) leading him to insanity. That is because they say: 'Trading is only like Ribâ,' whereas Allah has permitted trading and forbidden Ribâ. So whosoever receives an admonition from his Lord and stops consuming Ribâ shall not be punished for the past; his case is for Allah (to judge); but whoever returns (to Ribâ), such are the dwellers of the Fire - they will abide therein..."}***
>
> [Al-Baqarah (The Cow): 275-280]

7- In their explanation of the Verses tackling *Ribâ*, exegetes have presented this form of *Ribâ* as follows:

I) Al-Jassâs said; "The *Ribâ* that was known and practiced by the Arabs involved lending dirham or dinars for a certain term in exchange for an agreed upon excess."(2) He also said; "It is known that the *Ribâ* practiced during *Al-Jâhiliyyah* (pre-Islamic period) involved a loan to be repaid after a certain term in exchange for a conditioned increase. In this way, such an increase is viewed as a consideration for the term, and thus Allah invalidated and prohibited it."(3)

(1) *"I`lâm Al-Muwaqqi`în"* [2: 154]; and *"Al-Jâmi` Fî Usûl Ar-Ribâ"* by Dr. Rafîq Al-Misrî (p. 10).
(2) *"Ahkâm Al-Qur'ân"* by Al-Jassâs [1: 465]; and *"Ahkâm Al-Qur'ân"* by Alkiyâ Al-Harrâsî [1: 354].
(3) "*Ahkâm Al-Qur'ân*" by Al-Jassâs [1: 467].

This type of *Ribâ* refers to a financial loan given for an increase on the principal which is delayed for a certain term; the interest thereon may be paid along with the debt or paid in any other form agreed upon.

II) Al-Fakhr Ar-Râzî said; "*Ribâ An-Nasî'ah* was widely known during *Al-Jâhiliyyah* (pre-Islamic period). A man would lend another a sum of money on the condition that the lender would receive a monthly interest while the principal remains untouched, then when the loan becomes due for repayment, the debtor was asked to repay the principal. In case the debtor could not repay on the due date, the lender would increase the amount of the loan due and allow a time extension for some repayment."(1)

This type of *Ribâ* is regarded as a deferred financial loan whose interest is to be paid monthly, and the principal is to be repaid at the end of the specified term. In case the debtor could not repay his loan on the due date, the loan would be extended for a new term along with an agreed upon interest.

III) Mâlik reported that Zayd Ibn Aslam said:

> «*Ribâ in Al-Jâhiliyyah involved a man giving a loan to another for a set term. When the term was due, he would say; 'Will you pay it off or delay payment for an increase?' If the man paid, he (the lender) would take it. If not, he would increase the amount due and extend the term for him.*»(2)

It should be noted here that the deferred amount which is due may be the value of a loan or an item sold on credit. This form explained above involves deferring the repayment of a loan which is due in exchange for an increase added to the principal against the new extended term.

IV) Al-Baghawî said; "During *Al-Jâhiliyyah* (pre-Islamic period), if a creditor asked a debtor to repay the debt when it was due but the debtor

(1) *"Tafsîr Al-Fakhr Ar-Râzî"* [7: 85]; and *"Az-Zawâjir"* by Ibn Hajar Al-Haytamî [1: 222].
(2) *"Al-Muwattâ'"* [2: 672]; and *"Rûh Al-Ma`ânî"* [4: 55]; *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 418]; *"Al-Jâmi` Li-Ahkâm Al-Qur'ân"* by Al-Qurtubî [3: 348], *"Ad-Dur Al-Manthûr"* by As-Sayûtî [1: 365]; and *"Tafsîr Al-Khâzin"* [1: 204].

could not repay it, the latter used to say; 'Extend the term for me and I will increase the amount due to you.' The two parties would agree to do so, saying, 'Increasing the amount in the beginning of a sale by adding to the profit is the same as adding an increase on the repayment date in exchange for the extension.' However, Allah, the Almighty, impugned their statement by saying: ***{"... whereas Allah has permitted trading and forbidden Ribâ (usury)..."}***."[1]

This form also involves a debt originating from a sale on credit. If the repayment date becomes due, but the debtor does not have the means to repay it, he agrees with the creditor to delay repayment for another set term in exchange for an interest.

V) At-Tabarî stated; "It (i.e. this form of *Ribâ*) is when a creditor asks a debtor when the repayment date becomes due, 'Will you pay off your debt or delay repayment for an increase?' The debtor would repay his debt if he had the means to do so; otherwise, he would agree to delay repayment for a set term in exchange for an increase (in the age with respect to camels, for example). That is, if the debt is a one-year old camel, the debtor would offer a two-year old camel in repayment; if it is a two-year old camel, he would offer a three-year old camel in repayment; and so on."[2]

The above pertains to a deferred loan of camels. If the debt is a one-year old camel and the repayment date becomes due but the debtor does not have the means to pay, he will be asked to repay his debt later by offering a two-year old camel. In case of non-payment of the debt later, such increase will continue in the same manner every year, i.e. every year another year is added to the age of the camel that should be returned.

To summarize, *Ribâ* during *Al-Jâhiliyyah* would take place upon granting a loan and upon any subsequent extension of the set term of repaying this loan. It would also take place in the price of an item sold on credit when the date for repayment became due but it was extended for another set term.[3]

(1) *"Tafsîr Al-Baghawî"* [1: 341]; and *"Ahkâm Al-Qur'ân"* by Ibnul-`Arabî [1: 241 and 242].
(2) *"Tafsîr At-Tabarî"* [4: 59].
(3) *"Al-Jâmi` Fî Usûl Ar-Ribâ"* (pp. 24 and 25).

8- With respect to *Ribâ An-Nasî'ah*, it should be clarified that Allah's Statement ***{"O you who believe! Consume not Ribâ (usury) doubled and multiplied..."}*** [Âl-`Imrân (The Household of `Imrân): 130] came to refer to the condition prevalent at the time or to show how *Ribâ* is consumed.(1) Hence, this statement does not indicate the prohibition of only 'atrocious' *Ribâ* and permit any other forms which do not involve any multiplication. Rather, the Qur'anic context introduces the description '***doubled and multiplied***' as a means of censure against the people of *Al-Jâhiliyyah*, showing and disapproving of their abominable practice. The same style can be witnessed in Allah's Statement:

> ***{"And force not your maids to prostitution, if they desire chastity, in order that you may make a gain in the (perishable) goods of this worldly life."}***
>
> [An-Nûr (The Light): 33]

To illustrate, the purpose is not to prohibit forcing maids(2) to practice prostitution only if they desire chastity, but permit it for them if they do not. In fact, Allah, Exalted and Glorified Be He, wants to disapprove and censure their practice by telling them that they have reached the highest point (of detestability) by forcing their maids to practice prostitution while they desire chastity, and that this is the most abominable act practiced by a lord towards his maids. This is also true with respect to the Verse tackling *Ribâ*, as if Allah wants to tell them that they have reached the highest point (of detestability) by deeming it lawful to consume *Ribâ* to the extent that they consume it doubled and multiplied. In this way, He, the Almighty, is telling them not to take any *Ribâ*.

This is emphasized by the fact that the forbiddance of *Ribâ* is generally and explicitly mentioned in other places. Allah has promised to destroy *Ribâ*,

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(1) In his book entitled *"I`lâm Al-Muwaqqi`în"* [2: 135], Ibnul-Qayyim said about *Ribâ*, "As for the apparent type, it is called '*Ribâ An-Nasî'ah*', which used to be practiced during *Al-Jâhiliyyah* (pre-Islamic period). An example of this type of *Ribâ* is when a debtor delays the repayment of his debt in exchange for an increase in the amount, and the longer the extended term the greater the amount to be paid by the debtor, till a sum of one hundred becomes several thousands."

(2) Women servants.

whether it is little or great, cursed the consumer (lender), payer (borrower) and the one who writes the contract of *Ribâ* as well as the witnesses thereon, and threatened those who do not give up *Ribâ* of war from Him and His Messenger (Peace be upon him). *Ribâ* has been mentioned generally in all these places without any restriction to the amount (little or great).(1)

b) ***Ribâ Al-Biyû`***

9- It is the type described by Ibnul-Qayyim as 'hidden *Ribâ*'.(2) This type of *Ribâ* was not common among the Arabs during *Al-Jâhiliyyah* (pre-Islamic period) and was not prohibited in Islam until the Day of Khaybar in the seventh year of the *Hijrah* (immigration to Medina), when `Ubâdah Ibnus-Sâmit and others reported Allah's Messenger (Peace be upon him) as saying:

> *«Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, (only in the form) like for like and equal for equal, and payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand.»*(3)

10- *Faqîhs* have agreed to classify these six classes into two categories: (I) gold and silver, and (II) wheat, barely, dates and salt.

- *Faqîhs* have unanimously agreed that the trading of two congeneric items (e.g. gold for gold, or salt for salt) must not involve any increase or deferment.
- Moreover, they have unanimously agreed that the trading of two related items, i.e. items falling within the same category (e.g. gold for silver, or barely for salt) may involve an increase but no deferment.

(1) *"Tafsîr Al-Qur'ân Al-Karîm"* by Mahmûd Shaltût (pp. 150 and 151); *"Al-Ishârât Al-Ilâhiyyah"* by At-Tûfî [1: 418]; and *"Ahkâm Al-Qur'ân"* by Al-Jassâs [1: 465].

(2) *"I`lâm Al-Muwaqqi`în"* [2: 135, 136 and 138].

(3) This *hadîth* was narrated as a *marfû`* (traceable) *hadîth* by `Ubâdah Ibnus-Sâmit, Abû Sa`îd Al-Khudrî and Bilâl. The *hadîth* narrated by `Ubâdah was related by the six prominent Imams except for Al-Bukhârî, and was also related by Al-Bayhaqî. The *hadîth* narrated by Abû Sa`îd was related by Imam Muslim. As for the *hadîth* narrated by Bilâl, it was related by Al-Bazzâr in his *"Musnad"*. *"Nasb Ar-Râyah"* [4: 35 and after]; and *"Sunan Al-Bayhaqî"* [5: 278].

- *Faqîhs* have unanimously agreed that the exchange of two different items, i.e. items falling within two different categories (e.g. gold for barely or for dates) may involve an increase and deferment, as is the case with transactions wherein either of the two exchanged items is delayed (e.g. sale on credit and *Salam*).(1)

11- However, *Faqîhs* have differed on the applicability of the rulings pertaining to the above type of transactions to other categories of merchandise. Their differences fall into two views:

First: A group of Muslim scholars have restricted the above rulings to only these six classes of merchandise, and do not allow the application of *Qiyâs* (analogical deduction) thereto on other merchandise. The oldest to adopt this view was Qatâdah. This view is also adopted by the *Zâhirî* School. Ibn `Aqîl of the *Hanbalî* School adopted the same view in the last of his compilations; however, he is among the *Faqîhs* adopting *Qiyâs*. He (Ibn `Aqîl) said; "This is because the arguments relied on by analogists with respect to the issue of *Ribâ* are weak. And, if there is no clear argument, *Qiyâs* may not be applied."(2)

Second: The majority of *Faqîhs* have viewed that mentioning only these six classes of merchandise is a means of referring to the general by introducing the specific. However, they differed concerning the general meaning referred to by the said classes. They adopted two opinions in this regard:

a) The *Hanafî* and *Hanbalî Faqîhs* opine that the cause of prohibition concerning gold and silver is that they are weighable, while wheat, barely, dates and salt are measurable.(3)

b) The *Shâfi`î* and *Mâlikî Faqîhs* view that the cause of prohibition concerning gold and silver is that they are priceable, while wheat, barely, dates and salt are edible.

(1) *"Al-Jâmi` Fî Uṣûl Ar-Ribâ"* (p. 105); and *"Dirâsât Islâmiyyah"* by Dr. Dirâz (p. 161).
(2) *"I`lâm Al-Muwaqqi`în"* [2: 136]; *"Bidâyat Al-Mujtahid"* [2: 107]; and *"Ma`âlim As-Sunan"* by Al-Khaṭṭâbî [5: 22].
(3) *"Aḥkâm Al-Qur'ân"* by Al-Jaṣṣâṣ [1: 552]; *"Radd Al-Muḥtâr"* (*Al-Ḥalabî* Edition) [5: 172 and 178]; *"Al-Muḥarrar"* [1: 319]; *"Kashshâf Al-Qinâ`"* (*Al-Muḥammadiyyah* Press) [3: 215]; *"Al-Mughnî"* (*Al-Manâr* Edition) [4: 9 and after].

According to the most known view adopted by the *Shâfi`î* and *Mâlikî Faqîhs*, the cause of being priceable is restricted to only gold and silver. Yet, they differed with regard to what is meant by being 'edible', which is the cause pertaining to the other four classes. The *Shâfi`î Faqîhs* stated, "The word 'edible' refers to a substance fit for human consumption, whether as the main food, dessert, or cure. This is the reason for prohibiting an increase and deferment in transactions involving such items."

The *Mâlikî Faqîhs* stated; "The word 'edible', with respect to the prohibition of *Ribâ An-Nasî'ah*, is intended to refer to all edible substances, whether (I) those used as a main source of nourishment and storage, i.e. to maintain life and do not spoil over time, such as wheat and rice, (II) those not used as a main source of nourishment nor storage, such as apples and pears, (III) those used as a main source of nourishment but are not fit for storage, such as turnips, or (IV) those used for storage but are not a main source of nourishment, such as nuts and almonds. As for the prohibition of *Ribâ Al-Faḍl*, the intended meaning refers to the items fit for eating and storing, and usually to maintain life, but not all edible substances as in '*Ribâ An-Nasâ'*."[1]

12- According to all scholars, *Ribâ Al-Biyû`* (interest on sales) is of two types: *Ribâ Al-Faḍl* (an unlawful excess in the exchange of two counter-values) and *Ribâ An-Nasâ'* (interest on credit transactions). For example, if someone sells one dirham for two dirham or one *Ṣâ`* (a kind of measure) of dates for two *Ṣâ`s* of dates and delivery is made on the spot, this is called '*Ribâ Al-Faḍl*'. However, if someone sells one dinar for one dinar, one dinar for ten dirham, or one *Ṣâ`* of dates for one *Ṣâ`* of dates or two *Ṣâ`s* of barely, while delaying the delivery of either items, this is called *'Ribâ An-Nasâ"*. A third example is if someone sells one dinar for one and a half dinars, or one *Ṣâ`* of wheat for two *Ṣâ`s* of wheat while delaying the payment of either items; this involves both '*Ribâ Al-Faḍl*' and '*Ribâ An-Nasâ"*.

(1) *"Takmilat Al-Majmû`"* by As-Subkî [10: 93]; *"Fatḥ Al-`Azîz"* [8: 165 and after]; *"Rawḍat Aṭ-Ṭâlibîn"* [3: 378]; *"Mughnî Al-Muḥtâj"* [2: 22]; *"Al-Umm"* [3: 31]; *"Al-Muntaqâ"* by Al-Bâjî [5: 3]; *"Al-Ishrâf"* by Judge `Abdul-Wahhâb [1: 256]; *"Al-Bahjah Sharḥ At-Tuḥfah"* [2: 24]; *"Mayyârah `Alâ At-Tuḥfah"* [1: 294]; *"Iḥkâm Al-Aḥkâm"* by Ibn Daqîqul-`Îd with *"Hâshiyat Al-`Uddah"* by Aṣ-Ṣan`ânî [4: 108]; and *"I`lâm Al-Muwaqqi`în"* [2: 136 and after].

Cases Wherein *Ribâ Al-Biyû`* Is Excusable:

Some of the prominent *Faqîhs* have indicated that *Ribâ Al-Biyû`* may be excused in two cases: (a) when it is related to something accessory/consequential in the contract and (b) when it is called for by a necessity or some paramount interest:

a) Being excusable for being accessory/consequential

13- This means that *Ribâ Al-Biyû`* may be excusable, i.e. licensed by the *Sharî`ah*, if it involves an accessory or consequential matter and not the matter primarily intended in a contract. This is considered as a means of showing ease and leniency to the people, and removing any hardship they might suffer. This is substantiated by the *hadîth* narrated by Al-Bukhârî, Muslim, Abû Dâwûd, At-Tirmidhî, An-Nasâ'î, Ibn Mâjah, Ad-Dârimî and others, wherein the Messenger (Peace be upon him) said:

> *«He who buys a slave, his property belongs to the one who sells him except when a provision has been laid down by the buyer (that it will be transferred to him along with the slave).»*(1)

Judge Abû Bakr Ibnul-`Arabî clarified this principle by saying; "Rulings pertaining to the property of a slave are based on the Tenth Rule, i.e. Purposes and Interests. This is because if a man purchases a slave possessing gold with gold, the Third Rule forbids such a transaction as it involves *Ribâ*, while the Tenth Rule on Purposes and Interests permits it based on the idea that only the slave, not his property, is intended in the transaction, and such property is deemed accessory in the contract."(2)

In *"Sharh Az-Zarqânî `Alâ Al-Muwatta'"*, Az-Zarqânî said; "Mâlik said; 'The view agreed on by us (in Medina) is that if the buyer puts a provision that the slave's property is to be transferred to him along with the slave, he shall receive it, whether such property is money, a debt (owed to the slave) or an object of value, pursuant to the generality of the *hadîth*. This is

(1) *"Fath Al-Bârî"* [5: 51]; *"Sahîh Muslim Bi-Sharh An-Nawawî"* [10: 192]; *"`Âridat Al-Ahwadhî"* [6: 3]; *"Mukhtasar Sunan Abû Dâwûd"* by Al- Mundhirî [5: 78]; and *"Sharh As-Sunnah"* by Al-Baghawî [8: 104].

(2) *"Al-Qabas Sharh Al-Muwatta'"* [2: 805].

because the slave's property is an accessory matter and it is not considered in the sale, as if no share in the price is allocated thereto. The *Hanafî* and *Shâfi`î* scholars said; 'Such a sale is not valid as it involves *Ribâ*.' However, this view is refuted by the above *hadîth*."(1)

Al-Baghawî said; "According to Mâlik, it is valid to sell his (the slave's) property along with him, whether such property is unknown or a debt owed to him, as such property is accessory to the slave himself; it is like taking a goat with its milk."(2)

Al-Khattâbî said; "Mâlik considers the property of a slave something accessory to the slave himself in the event the buyer puts a condition in the transaction to this effect, regardless whether such property is cash, an object of sale or a debt (owed to the slave), or whether such property is more or less than the price of the slave. The slave's property is deemed an accessory item to the slave, the same as milk is accessory to a goat."(3)

14- The criterion for distinguishing between what is intended in the contract and what is accessory/consequential thereto is: The originally intended matter in a contract is that which the two parties usually have in mind when concluding such transactions. This is expressed by Ibn Taymiyyah as the 'major purpose',(4) 'greatest purpose'(5) and 'main purpose.'(6) On the other hand, the accessory/consequential matter is what follows the originally intended matter or is subsequent thereto. Al-Khatîb Ash-Shirbînî defined it as "What is not usually intended, even if it can be intended in itself."(7)

The word 'purpose' here does not mean the intention of the contractor himself, as the criterion of 'being accessory' is objective and not subjective.

(1) *"Az-Zarqânî `Alâ Al-Muwatta'"* [3: 253].
(2) *"Sharh As-Sunnah"* [8: 105].
(3) *"Ma`âlim As-Sunan"* [5: 79].
(4) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 56]; *"Al-Fatâwâ Al-Kubrâ"* [4: 35]; and *"Al-Qawâ`id An-Nûrâniyyah"* (p. 138).
(5) *"Majmû` Al-Fatâwâ"* [29: 35, 55 and 80]; *"Al-Fatâwâ Al-Kubrâ"* [4: 23, 35 and 49]; and *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (pp. 124, 137 and 154).
(6) *"Majmû` Al-Fatâwâ"* [29: 34]; *"Al-Fatâwâ Al-Kubrâ"* [4: 23]; and *"Al-Qawâ`id An-Nûrâniyyah"* (p. 123).
(7) *"Mughnî Al-Muhtâj"* [2: 28].

In other words, it is not related to the contractor's intention and purpose, as they are part of the hidden matters with respect to which no rulings or justifications can be derived in order to judge the contracts related thereto. Rather, by this word we mean the 'purpose of the contract', i.e. the purpose targeted by all or the majority of contractors making such a transaction. This is expressed in *"Majallat Al-Aḥkâm Al-`Adliyyah"*(1) – in the Chapter on what is accessory to the sold item – i.e. to "the purpose of purchase." Such purpose is to be defined and determined according to the prevalent conventions, commercial dealings, and the expertise of the concerned and specialized parties.

15- *Ribâ Al-Biyû`* for an accessory item being excusable is consistent and compliant with the general *Fiqhî* maxims which state:

> "Things that cannot be excused in original matters can be pardoned in subsidiary ones"(2); "That which is excusable for a matter that is accessory is not excusable for that which is intentional"(3); "That which is not excusable in independent matters may be excusable in accessory matters"(4); "Things that cannot be pardoned in independent matters can be pardoned in implied ones"(5); "What can be stipulated for the principal object may be not stipulated for the subsidiary and implicit objects"(6); and "That which is not excusable in independent contracts may be excusable in implied contracts."(7)

b) Being excusable when called for by a necessity or some paramount interest

16- This means that *Ribâ Al-Biyû`* may be excusable under the *Sharî`ah* when called for by a necessity or some paramount interest.

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(1) Article (231) of *"Majallat Al-Aḥkâm Al-`Adliyyah"*.
(2) Article (54) of *"Majallat Al-Aḥkâm Al-`Adliyyah"*; and *"Al-Ashbâh Wa An-Naẓâ'ir"* by As-Sayûṭî (p. 120).
(3) *"Al-Manthûr Fî Al-Qawâ`id"* by Az-Zarkashî [3: 376].
(4) *"Ṭarḥ At-Tathrîb"* by Al-`Irâqî [6: 122]; and *"Kashshâf Al-Qinâ`"* [3: 166].
(5) *"Fatâwâ Ar-Ramlî Bi-Hâmish Al-Fatâwâ Al-Kubrâ"* by Al-Haytamî [2: 115].
(6) *"Badâ'i` Aṣ-Ṣanâ'i`"* [6: 58].
(7) *"Al-Manthûr Fî Al-Qawâ`id"* by Az-Zarkashî [3: 378].

This view is adopted according to the following:

First: The opinion of Ibnul-Qayyim whereby he stated, "*Ribâ* is of two kinds: apparent and hidden. The apparent one is prohibited due to the great harm it involves while the hidden one is prohibited as it represents a means that leads to the apparent one. Hence, the first kind is prohibited as it is the purpose of the contract itself while the second is prohibited as it is a means. The apparent one refers to *Ribâ An-Nasî'ah* (interest on credit transactions/ loans) which used to be widely practiced during *Al-Jâhiliyyah* (pre-Islamic period). An example of this is when a man delays the repayment of a debt for an increase, and each time repayment is delayed an additional increase becomes due, until a debt of one hundred becomes a debt of several thousands."(1) The hidden kind involves the two forms of *Ribâ Al-Biyû`*: *Ribâ Al-Fadl* and *Ribâ An-Nasâ'*.

As for *Ribâ Al-Fadl*, Ibnul-Qayyim said:

> "*Ribâ Al-Fadl* is prohibited as a way of eliminating the means that lead to evils, as mentioned in the *hadîth* narrated by Abû Sa`îd Al-Khudrî from the Messenger (Peace be upon him) who said: '*Do not sell one dirham for two dirham, as verily, the thing I fear most for you all is the Rimâ (Ribâ).*' Accordingly, the Messenger (Peace be upon him) forbade the people from practicing *Ribâ Al-Fadl* for fear that they might engage in *Ribâ An-Nasî'ah*. To illustrate, when a man sells one dirham for two, which is not done except for a difference between the two kinds whether in terms of quality, mintage, weight or anything else, he would gradually turn from dealing with instant profits earned in such transactions to delayed profits, which is the essence of *Ribâ An-Nasî'ah*. This is indeed a very clear means that leads to such an end. The Lawgiver's wisdom is manifest in eliminating such means and in forbidding the contracting parties from selling one dirham for two, whether in cash or on credit. This is a reasonable and logical wisdom which eliminates the means that lead to evil."(2)

(1) *"I`lâm Al-Muwaqqi`în"* [2: 135].
(2) Ibid. [2: 136].

With respect to *Ribâ An-Nasâ'*, Ibnul-Qayyim said:

> "Form Ninety: The Lawgiver prohibits the two contracting parties from separating before exchange is made on the spot, and selling a Ribâ-related monetary item for another of the same kind before exchange is made hand to hand, so as not to take it as an excuse to delay, which is the core of Ribâ. In this way, The Lawgiver protects the two parties from approaching *Ribâ* by stipulating that the exchange should be on the spot, then obligating that the two exchanged items must be equal if they are of the same kind. This is in order to avoid selling one mudd (a kind of measure) of a high quality article for two mudds of a lesser quality, even if the two amounts are equal (in value), so as to eliminate the means that leads to *Ribâ An-Nasâ'* (which is equal in this sense to the *Ribâ* on credit transactions and *Ribâ Al-Jâhiliyyah*), representing the essence of true *Ribâ*."(1)

Ibnul-Qayyim also said; "Permitting *Ribâ An-Nasâ'* would lead the two parties to the option: Will you pay it off or delay payment for an increase? Hereupon, the Lawgiver showed great care for the interests of both parties by stipulating that such transactions should be made hand to hand and in whatever manner they agree on. This would bring about a mutual benefit and ward off an evil by delaying repayment for an increase… However, the two parties do not need to sell any of such items for another by practicing *Ribâ An-Nasâ'*, which is a clear means that leads to the evil of *Ribâ*. They are allowed to practice whatever is called for by necessity, but not to use a means that leads to a most likely evil. In other words, they are forbidden from that which is not called for by necessity and is usually used as a means to a most likely evil."(2)

Second: The opinion mentioned in the general *fiqhî* maxims: "What can be pardoned in the means cannot be par doned in the objectives"(3); "That which is prohibited as a means may be permitted for some necessity or paramount interest"(4); and "That which is prohibited as a way of eliminating

(1) *"I`lâm Al-Muwaqqi`în"* [3: 167].
(2) Ibid. [2: 138 and 139].
(3) *"Al-Ashbâh Wa An-Naẓâ'ir"* by As-Sayûṭî (p. 158).
(4) *"Zâd Al-Ma`âd"* [2: 242].

the means that leads to evils may be permitted for some paramount interest… and whatever is called for by necessity may be permitted."[1] This opinion is based on the principle stating: "Prohibition for the sake of blocking the way to the means is less forceful than prohibition for the sake of prohibited objectives."[2]

Accordingly, whereas the prohibition of *Ribâ Al-Biyû`* (interest on sales) is meant to eliminate the means that lead to *Ribâ An-Nasî'ah*, it is permitted when it is called for by some necessity or paramount interest. This is viewed by Ibnul-Qayyim, who said; "That which is prohibited as a way of eliminating the means that leads to evils may be permitted when called for by some necessity or paramount interest… Likewise, *Ribâ Al-Fadl* (an unlawful excess in the exchange of two counter-values) is also prohibited as a way of eliminating the means that lead to the evil involved in *Ribâ An-Nasî'ah*, and only the cases of *Al-`Arâyâ*[3] which are called for by some necessity are permitted."[4] Judge `Abdul-Wahhâb Al-Baghdâdî, commenting on *Ribâ Al-Biyû`*, said; "*Ribâ* has been prohibited in order to safeguard and secure people's property and interests. This is why only that which is called for by some necessity is permitted."[5]

17- The criterion for determining the need/necessity for a contract is: If it is avoided, a hardship results due a *shar`î*-acknowledged interest being missed. In this respect, Ibn Taymiyyah said; "The entire *Sharî'ah* is based upon the principle stating that if an evil, which therefore entails prohibition, is contradicted by some paramount need, the prohibited matter becomes permitted."[6] He also stated; "That which the person essentially needs to buy is more forgivable than other things which involve no need; therefore, the Lawgiver allows it because of the need, though there is reason to prohibit it."[7]

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(1) *"I`lâm Al-Muwaqqi`în"* [2: 142].
(2) Ibid. [2: 140].
(3) It refers to a palm tree whose owner donates its produce of dates for one year to some needy people to eat.
(4) *"Zâd Al-Ma`âd"* [4: 78].
(5) *"Al-Ishrâf `Alâ Masâ'il Al-Khilâf"* by Judge `Abdul-Wahhâb [1: 262].
(6) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 49].
(7) *"Al-Masâ'il Al-Mârdînîyyah"* by Ibn Taymiyyah (p. 99); and *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 488].

18- The criterion for determining the paramount interest herein is: When the interest resulting from dealing in *Ribâ Al-Biyû`* is greater than the evil that may result therefrom. In this regard, Al-Qarâfî said; "The Muslim scholars have unanimously agreed that a weak evil is forgivable with a strong interest."(1) Moreover, Ibn Taymiyyah said; "The secret of the *Sharî`ah* is: If an action involves an evil, it is to be forbidden, unless it is contradicted by a strong interest. An example of this is the permissibility of eating dead animals when forced by necessity. Also, the sale involving *Gharar* is forbidden, as it is a simplified way of consuming other people's property without right, but it is permitted when it is a way of avoiding a greater evil. That is, the greater of the two evils should be driven away by enduring the lesser of them."(2)

Al-`Izz Ibn `Abdus-Salâm had previously introduced this exception as a principle. He said; "A general principle on exceptions of *shar`î* rules: Let it be known to you that Allah has commanded His Servants to seek to eliminate the means that lead to evils in the two worlds (this life and the afterlife), or in any one of them. Each rule tackles a single issue, then He excluded thereof any matter the avoidance of which diverts an interest greater than the evil involved in the matter. All this is meant to show mercy, consideration and kindness to His Servants. All of this is considered allowable, though it contradicts *Qiyâs* (analogical deduction). This is applicable to the acts of worship, commutations and any other dispositions."(3)

19- As a secondary issue to the above, the *Mâlikî Faqîhs* viewed that *Al-Mubâdalah* (i.e. exchanging items, and according to their *fiqhî* School, it means selling gold for gold or silver for silver by counting them)(4) is permissible, even if there is a slight difference in weight, if such difference results as a means of showing kindness and favor, and not a means of practicing deceit.(5)

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(1) *"Adh-Dhakhîrah"* [13: 322].
(2) *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* by Ibn Taymiyyah (p. 338).
(3) *"Al-Qawâ`id Al-Kubrâ"* [2: 283].
(4) If it is delivered hand to hand (see *"Lubâb Al-Lubâb"* (p. 137); *"Al-Ma`ûnah"* (2: 1025); and *"At-Tafrî`"* [2: 156], and whether they are coined or in the form of similar bars, or the like. See *"Ḥâshiyat Aṣ-Ṣâwî `Alâ Ash-Sharḥ Aṣ-Ṣaghîr"* [3: 64].
(5) *"`Iqd Al-Jawâhir Ath-Thamînah"* [2; 390]; *"Minaḥ Al-Jalîl"* [2: 528]; =

They also viewed that it is permissible to practice *Radd* in dirham[1] if there is any necessity or interest to do so, while forgiving *Ribâ Al-Faḍl* in the two cases, viewing it as an exception from the applicable principles.

Judge `Abdul-Wahhâb Al-Baghdâdî said; "Exchanging a deficient dinar for another of full weight as a means of kindness and favor is permissible, but delivery should be made hand to hand as the process of making coins deficient is not permissible. It is permissible when it is a way of favoring others, but it is not permissible for other reasons."[2]

In *"Al-Qawâ`id"* by Al-Maqqarî, it is stated, "Rule: The general state of being excusable as viewed by Mâlik necessitates an exception from *Uṣûl* (*fiqhî* Principles) by applying *Qiyâs* (analogical deduction) from what is stated in *shar`î* texts. Therefore, *Mubâdalah* (exchanging items), *Radd* in dirham and delay of the capital in *Salam* for three days, are allowed as exceptions."[3] Also, "Rule: A small amount of *Ribâ* may be deemed permissible by Mâlik, whether for showing favor as in *Mubâdalah*, or showing kindness, as in *Radd* in dirham, as a means of giving preponderance to an interest over the evil therein."[4]

Item (2): General Definition of *Ribâ*

20- In its general sense and according to many prominent *Faqîhs*, *Ribâ* refers to any increase in money or the term specified for repayment in *Ribâ* on credit

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= *"Ḥâshiyat Aṣ-Ṣâwî `Alâ Ash-Sharḥ Aṣ-Ṣaghîr"* [3: 63 and 64); *"Al-Ma`ûnah"* [2: 1025]; *"Lubâb Al-Lubâb"* (p. 141); and *"Ash-Sharḥ Al-Kabîr"* by Ad-Dardîr and *"Ḥâshiyat Ad-Dusûqî `Alayh"* [3: 41].

(1) Its form: When a man gives one dirham and takes some change, food or anything else which is half the value of the dirham, and takes silver for the other half. The general opinion adopted by the *Mâlikî* scholars is that such a transaction is forbidden, as it is not permissible to add to either of the two types of money another different type, as it causes ignorance of the equality. Ignorance of equality is deemed the same as *Tafâḍul* (increase in one item without the other). Mâlik used to view the impermissibility of *Radd* in dirham,then he lightened his opinion due to people's need for it; this is the well-known opinion in the *Mâlikî* School and it is adopted by Ibnul-Qâsim. (See: *"Mawâhib Al-Jalîl"* [4: 319]; *"Al-Ma`ûnah"* [2: 1027]; *"At-Tâj Wa Al-Iklîl"* [4: 318]; *"Ash-Sharḥ Aṣ-Ṣaghîr"* by Ad-Dardîr [3: 49]; and *"Sharḥ Al-Yawâqît Ath-Thamînah"* by As-Sijilmâsî [2: 497].

(2) *"Al-Ma`ûnah"* [2: 1025].

(3) Rule (875) of *"Al-Qawâ`id"* by Al-Maqqarî, paper No. (81) of the manuscripts at King Faisal Center in Riyadh.

(4) Rule (868) of *"Al-Qawâ`id"* by Al-Maqqarî, paper No. (81) of the same above manuscripts.

transactions/loans and *Ribâ Al-Biyû`*, as well as any invalid or illegal sale. Accordingly:

a) In *"Al-Baḥr Ar-Râ'iq"* by Ibn Nujaym and the commentary thereon entitled *"Minḥat Al-Khâliq"*, it is stated; "Every forbidden or invalid sale is *Ribâ*."(1)

b) In *"Tabyîn Al-Ḥaqâ'iq"*, Az-Zayla`î said; "Invalid conditions are considered to be kind of *Ribâ*… as *Ribâ* is an increase for nothing in return. In fact, invalid conditions refer to an increase which is not required by the contract nor befitting it; thus, the contract involves an increase for nothing in return, which is the essence of *Ribâ*."(2)

c) In *"Radd Al-Muḥtâr"* by Ibn `Âbidîn, it is stated; "It will be tackled in the Chapter on *Ribâ* that every invalid contract is *Ribâ*."(3) He means: If such invalidity comes as a result of an invalid condition.

d) In *"Aḥkâm Al-Qur'ân"*, Al-Jassâs said; "A debt for a debt is one of the types of *Ribâ*."(4) He also said; "*Salam* (payment in advance for an item to be delivered later) with respect to animals is one of the types of *Ribâ* mentioned in the *Sharî`ah*."(5)

e) In the beginning of the topic of *Al-Biyû`* (sale contracts) in the book entitled *"Al-Mabsût"*, As-Sarakhsî said; "This topic is intended to clarify the 'lawful', which refers to legal trading, and the 'unlawful', which refers to *Ribâ*."(6) He also said; "Trade is of two kinds: 'lawful' which is called trading in the *Sharî`ah*, and 'unlawful' which is called *Ribâ*. Each of them is considered as trade."(7)

f) In *"Al-Fatḥ"*, Al-Ḥâfiz Ibn Ḥajar said; "Any prohibited sale is called *Ribâ*."(8)

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(1) *"Al-Baḥr Ar-Râ'iq"* [6: 135 and 137); and *"Minḥat Al-Khâliq"* by Ibn `Âbidîn [6: 136].
(2) *"Tabyîn Al-Ḥaqâ'iq"* [4: 131].
(3) *"Radd Al-Muḥtâr"* [4: 99].
(4) *"Aḥkâm Al-Qur'ân"* [1: 466].
(5) Ibid. [1: 465].
(6) *"Al-Mabsût"* [12: 110].
(7) Ibid. [12: 108].
(8) *"Fatḥ Al-Bârî"* [4: 313].

g) Interpreting the *hadîth* stating '*Ribâ is of seventy types*,'[1] Al-Minâwî said; "(This is) Because the decrease made by whoever gives less in measure or weight is considered a form of *Ribâ*, and thus it has several types and causes."[2]

h) Ibn Hibbân, in his "*Sahîh*", and Muhammad Ibn Nasr Al-Marwazî, in his book entitled "*As-Sunnah*", related that `Abdullâh Ibn Mas`ûd (may Allah be pleased with him) said; "The conclusion of two deals in one is considered *Ribâ*."[3] Al-Marwazî then said; "Ibn Mas`ûd's saying is a proof indicating that every invalid sale is considered *Ribâ*."[4]

i) Ibn Rajab Al-Hanbalî said; "The *Ribâ* prohibited by Allah includes all types of commutation that involve consuming other people's property without right. Allah, Exalted be He, says; ***{"... whereas Allah has permitted trading and forbidden Ribâ..."}*** [Al-Baqarah (The Cow): 275], so trade is considered permissible, while that which is not considered as trade is a prohibited *Ribâ*, i.e. an increase in the permitted-by-Allah trade. Hence, the prohibition of *Ribâ* covers all types of invalid and prohibited commutations that involve consuming other people's property without right, such as *Ribâ Al-Fadl* with respect to the matters wherein *Tafâdul*[5] is forbidden and *Ribâ An-Nasâ'* with respect to the matters wherein delayed payment in exchange for an increase is forbidden; the prices of forbidden objects, such as wine, dead animals, swine and idols; the acceptance

(1) Related by Al-Bayhaqî in "*Shu`ab Al-Îmân*" through a fair chain of transmis sion, then he said; "It is a *gharîb* (related through a single narrator) *hadîth* with this chain of transmission, and it is known to be related by `Abdullâh Ibn Ziyâd from `Ikrimah (he means Ibn `Ammâr)." Al-Bayhaqî also said; "This man, called `Abdullâh Ibn Ziyâd, used to narrate *munkar* (denounced) *hadîths*." See "*Az-Zawâjir*" by Al-Haytamî [1:227]. It is also related by Al-Bazzâr in his "*Musnad*", and its chain of transmission consists of narrators known to relate authentic *hadîths*, as mentioned in "*Majma` Az-Zawâ'id*" [4: 117]. See "*Fayd Al-Qadîr*" by Al-Minâwî [4: 50].

(2) "*Fayd Al-Qadîr*" [4: 50].

(3) "*Mawârid Az-Zamân Ilâ Zawâ'id Ibn Hibbân*" (p. 272); and "*As-Sunnah*" by Al-Marwazî [1: 57].

(4) "*As-Sunnah*" by Al-Marwazî [1: 57].

(5) It refers to an increase in one item without an increase in the other in an exchange transaction.

of a present in return for interceding on another's behalf; invalid contracts, such as the sales of *Mulâmasah*,(1) *Munâbadhah*,(2) *Habal Al-Habalah*,(3) *Gharar*,(4) and fruits before they appear to be ripe; *Mukhâbarah*(5); and *Salaf*(6) with respect to the matters wherein it is forbidden."

There were many views of the Companions of the Messenger indicating that they considered such as *Ribâ*. They maintained that *Qabâlât*(7) is *Ribâ*, *Najsh*(8) is *Ribâ*, concluding two deals in one is *Ribâ*, and the sale of fruits before they appear to be ripe is *Ribâ*.

It is also reported that the Messenger (Peace be upon him) said; *'Cheating Mustarsil*(9) *is (a kind of) Ribâ.'* Moreover, it is related: *'Any loan that produces a profit is Ribâ.'* Ibn Mas`ûd related, *'There are seventy-three kinds of Ribâ'*, which is related by Ibn Mâjah(10) and Al-Hâkim(11) from him as a *marfû`* (traceable) *hadîth*(12)

j) In *"Al-`Âridah"*, Judge Ibnul-`Arabî said; "Allah has permitted trading in general and forbidden *Ribâ*, which involves any invalid sale which is not permissible due to any aspect of invalidity therein,

(1) *Mulâmasah* refers to the sale by only touching.
(2) *Munâbadhah* means trading items which are not inspected; throwing the item to be sold to the buyer without him inspecting it.
(3) *Habal Al-Habalah* refers to the sale of an unborn fetus or an animal's anticipated offspring.
(4) *Gharar* refers to a sale involving deceit or uncertainty.
(5) *Mukhâbarah* is when a man gives a barren land to someone else for him to cultivate it with his own money, then takes a share of the harvest in exchange.
(6) *Salaf* refers to a sale of payment in advance.
(7) *Qabâlât* (sing. *Qabâlah*): An example of this is when a man agrees to take palms, trees and the cultivated plants before they are harvested for a certain amount of the yield thereof; it is a type of selling fruits before they appear to be ripe and before taking a known form.
(8) *Najsh* means: Artificially inflating prices via auctions, outbidding and the like.
(9) *Mustarsil* is a person who does not know the actual value of goods and is not good at bargaining.
(10) *"Sunan Ibn Mâjah"* [2: 764].
(11) *"Al-Mustadrak"* [2: 37].
(12) *"Rawâ'i` At-Tafsîr Al-Jâmi` Li-Tafsîr Ibn Rajab Al-Hanbalî"* [1: 197].

whether with respect to the exchanged items or the contractors."[1] In *"Al-Qabas"*, he said; "Allah, Exalted be He, says; ***{"...whereas Allah has permitted trading and forbidden Ribâ..."}*** This Verse covers every valid as well as invalid form of trade."[2]

k) Ibn Juzayy Al-Ghirnâṭî said; "Linguistically, the word '*Ribâ*' means an 'increase', and it is used in the *Sharî`ah* to refer to forbidden transactions, mostly related to an increase."[3]

l) In *"Al-Muqaddimât"*, Judge Abul-Walîd Ibn Rushd reported some types of *Ribâ*, besides *Ribâ Al-Faḍl* and *Ribâ An-Nasâ'*, such as combining a sale contract and a *Salaf* contract together in one transaction, concluding two deals in one, selling what you do not possess, selling involving *Mulâmasah*[4] or *Munâbadhah*,[5] and the selling of fruits before they ap pear to be ripe.[6]

21- The argument these *Faqîhs* rely on, with regard to the generalization of *Ribâ* to include any invalid sale and forbidden commutation, are represented in the following:

First: The *hadîth* reported by `Â'ishah in *"Ṣaḥîḥ Al-Bukhârî"*:

> *«When the Verses of Sura Al-Baqarah regarding Ribâ were revealed, Allah's Messenger recited them before the people and then he prohibited the trade of alcoholic liquors.»*[7]

Commenting on the *ḥadîth*, Aṭ-Ṭâhir Ibn `Âshûr said; "The apparent meaning is that the prohibition of trading in alcoholic liquors came as an application of the Verse forbidding *Ribâ*, while the trading in liquors did not involve any aspect of *Ribâ* known to them at the time; rather, it is an invalid sale."[8]

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(1) *"`Âriḍat Al-Aḥwadhî"* [5: 237].
(2) *"Al-Qabas `Alâ Al-Muwaṭṭa'"* [2: 786].
(3) *"At-Tashîl Li-`Ulûm At-Tanzîl"* (p. 94).
(4) *Mulâmasah* refers to the sale by only touching.
(5) *Munâbadhah* means trading items without the buyer inspecting them; throwing the item to be sold to the buyer without the buyer inspecting it.
(6) *"Al-Muqaddimât Al-Mumahhidât"* [2: 12].
(7) *"Fatḥ Al-Bârî Fî Ṣaḥîḥ Al-Bukhârî"* [1: 554 and 8: 302]; and [4: 313 and 417); *"Ṣaḥîḥ Muslim Bi-Sharḥ An-Nawawî"* [11: 5]; and *"Ṣaḥîḥ Muslim Ma`a Ikmâl Al-Mu`lim"* [5: 253].
(8) *"At-Taḥrîr Wa At-Tanwîr"* [3: 88].

The same view had already been adopted by Imam Ibn Rajab, who said; "When the Verses tackling the prohibition of *Ribâ* were revealed, the Prophet (Peace be upon him) forbade *Ribâ* and trading in liquors to explain to the people that all types of forbidden trading were included in the forbidden *Ribâ*."(1)

Second: The *ḥadîth* related by Al-Bayhaqî from Anas Ibn Mâlik who reported that the Messenger (Peace be upon him) said:

«Cheating Mustarsil is (a kind of) Ribâ.»(2)

Mustarsil is a person who does not know the exact value of goods. An example of *Mustarsil* is the person who says to the seller, "Sell it to me at the market price or according to the price you charge other people."(3)

Third: The *ḥadîth* related by An-Nasâ'î and Aḥmad from Ibn `Abbâs (may Allah be pleased with him), who said:

«Salaf(4) *in Ḥabal Al-Ḥabalah*(5) *is Ribâ.»*(6)

Fourth: The *ḥadîth* related by Aṭ-Ṭabarânî from `Abdullâh Ibn Abû Awfâ, who reported Allah's Messenger (Peace be upon him) as having said:

«Nâjish is an accursed consumer of Ribâ (usurer).»(7)

Here, the word '*Nâjish*' refers to a seller who maliciously agrees with someone to let him increase the price of the seller's commodity, not out

(1) *"Rawâ'i` At-Tafsîr Al-Jâmi` Li-Tafsîr Ibn Rajab"* [1: 198].

(2) *"Sunan Al-Bayhaqî"* [5: 349]. As-Sayûṭî mentioned it in *"Al-Jâmi` Aṣ-Ṣaghîr"* and stated that it was also reported from Jâbir Ibn `Abdullâh and `Alî Ibn Abû Ṭâlib. The interpreter of the *ḥadîth*, Al-Minâwî, said; "Al-Ḥâfiẓ (Ibn Ḥajar) said; 'Its chain of transmission is good.'" *"Fayḍ Al-Qadîr"* [4: 400].

(3) *"Al-Qawânîn Al-Fiqhiyyah"* (p. 269); *"Al-Mughnî"* [3: 584]; and *"Radd Al-Muḥtâr"* [4: 166].

(4) *Salaf* refers to a sale of payment in advance for an item to be delivered later.

(5) *Ḥabal Al-Ḥabalah* refers to the sale of an unborn fetus or the animal's anticipated offspring.

(6) *"Sunan An-Nasâ'î"* [7: 293]; and *"Musnad Aḥmad"* [1: 240]. See also *"Jâmi` Al-Uṣûl"* [1: 490] wherein the verifier of the *ḥadîth*, `Abdul-Qâdir Al-Arnâ'ûṭ, said; "Its chain of transmission is authentic."

(7) *"Fayḍ Al-Qadîr"* [6: 293]. It is also related by Al-Bukhârî, Ibn Abû Shaybah and Sa`îd Ibn Manṣûr from Ibn Abû Awfâ, as a *Mawqûf* (discontinued) *ḥadîth* with the wording *"Nâjish is a treacherous consumer of Ribâ"*. See *"Fatḥ Al-Bârî"* [4: 355 and 356]; and *"Al-Muṣannaf"* by Ibn Abû Shaybah [6: 571].

of his desire to purchase it, but to deceive others to buy it for a value more than its actual worth. It also refers to the owner of a commodity who keeps praising his commodity's quality or price by lying, so as to lure someone into buying it.(1)

Fifth: The *hadîth* related by Abû Dâwûd, At-Tabarânî and Ahmad from Abû Umâmah, who reported the Prophet (Peace be upon him) as having said:

> *«If anyone intercedes for another and the latter presents a gift to him for it (the intercession), which he (the interceder) accepts, he (the interceder) has then practiced a grave kind of Ribâ.»*(2)

Sixth: The saying related by Abû `Ubayd in *"Al-Amwâl"* from Ibn `Umar:

> *«Qabâlât is Ribâ.»*

Abû `Ubayd said; "This forbidden transaction called '*Qabâlât*' means: A man agrees to take palms, trees and the cultivated plants before they are harvested for a certain amount of the yield thereof; it is a type of selling fruits before they appear to be ripe and before taking a known form."(3)

Seventh: The *hadîth* related by Al-Bazzâr from Ibn Mas`ûd, who reported the Messenger (Peace be upon him) to have said:

> *«Ribâ has seventy types, and Shirk (polytheism) is also like that.»*(4)

The *hadîth* related by At-Tabarânî, in *"Al-Awsat"*, from Al-Barâ' Ibn `Âzib, who reported:

> *«The Messenger (Peace be upon him) said; 'Ribâ has seventy-two kinds, the least of which is as evil as a man having sexual relations with his mother, and the worst kind of Ribâ is equal to discrediting a Muslim brother's honor.»*(5)

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(1) *"Fayd Al-Qadîr"* [6: 293]; *"Al-Mughnî"* [4: 160]; *"Majmû` Fatâwâ Ibn* Taymiyyah" [28: 73 and 29: 358]; *"Ash-Sharh As-Saghîr"* by Ad-Dardîr [4: 139]; and "Al-Muhadhdhab" [1: 291].

(2) *"Mukhtasar Sunan Abû Dâwûd"* by Al-Mundhirî [5: 189]; *"Musnad Ahmad"* [5: 261]; and *"Mishkât Al-Masâbîh"* [2: 1109]. Al-Albânî said that its chain of transmission is good.

(3) *"Al-Amwâl"* (pp. 84 and 85); and *"Ahkâm Ahl Adh-Dhimmah"* by Ibnul-Qayyim [1: 108 and 109].

(4) *"Majma` Az-Zawâ'id"* by Al-Haythamî [4: 117] from the *hadîth* related by Ibn Mas`ûd. He said; "It is narrated by Al-Bazzâr, and its chain of transmission consists of narrators who used to narrate authentic *hadîths*." See: *"Fayd Al-Qadîr"* by Al-Minâwî [4: 50].

(5) Related by Al-Haythamî; *"Majma` Az-Zawâ'id"* [4: 117] from Al-Barâ' Ibn `Âzib, =

In addition to the *hadîth* related by Ibn Mâjah, Al-Hâkim and Al-Bayhaqî from Ibn Mas`ûd, who reported the Messenger as having said:

> *«There are seventy-three kinds of Ribâ, the least of which is as evil as a man having sexual relations with his mother.»*(1)

= and he said; "At-Tabarânî related it in '*Al-Awsat*', including `Amr Ibn Râshid in its chain of transmission. It is deemed as authentic by Al-`Ijlî, whereas the majority of Imams judged it as weak." See *"Kashf Al-Khafâ"* [1: 508]; and *"Fayd Al-Qadîr"* [4: 51].

(1) *"Sunan Ibn Mâjah"* [2: 764]; and *"Al-Mustadrak"* [2: 37]. Al-Hâkim said; "It is deemed *Sahîh* according to the criteria set by the two Sheikhs (Al-Bukhârî and Muslim), but they did not relate it." Al-Hâfiz Al-`Irâqî said; "Its chain of transmission is authentic." *"Fayd Al-Qadîr"* [4: 50]. Al-Haytamî mentioned it in *"Az-Zawâjir"* [1: 227], and said; "Al-Hâkim related it and deemed it *Sahîh* (authentic) according to the criteria set by the two Sheikhs (Al-Bukhârî and Muslim), and Al-Bayhaqî related it from Al-Hâkim, and he (Al-Bayhaqî) said; 'It has an authentic chain of transmission, whereas the text of the *hadîth* is *Munkar* (denounced) with such a chain of transmission. I cannot say except that it is obscure, as if some of its narrators have been confused.'"

N.B.: The description introduced in the above *hadîths* in the phrase '*… the least of which is as evil as a man having sexual relations with his mother*' is not to be taken literally, but it is just a simile intended to scold those who consume *Ribâ*, as such an act should be highly disapproved by those with a sound mind and nature.

The same can be said for the *hadîth* related by Ahmad and At-Tabarânî, who reported the Prophet (Peace be upon him) as having said; *"The sin of consuming a dirham of Ribâ, by a person who knows that it is Ribâ, is graver than committing thirty-six adulteries." "Musnad Ahmad"* [5: 225]; and *"Fayd Al-Qadîr"* [3: 524]. It is denounced with respect to its meaning and is not to be attributed to the Prophet (Peace be upon him) as a *Sahîh hadîth*, as mentioned by `Abdur-Rahmân Ibn Yahyâ Al-Ma`lamî in his commentary on *"Al-Fawâ'id Al-Majmû`ah"* by Ash-Shawkânî (p. 149), and by those who verified the *"Musnad Ahmad"* in its verified version [36: 290], Abû Hâtim Ar-Râzî in *"Al-`Ilal"* [1: 387], and others. Moreover, Ibnul-Jawzî drew attention to this point by saying, "Let it be known to you that what rebuts the authenticity of such *hadîths* is that the gravity of any sin is known by its effect. In this regard, adultery spoils the lineage and causes inheritance to go to undeserving parties. However, hideous sins (such as adultery) have effects graver than those of consuming a bite (a small amount of money) without right, which is a sin that does not go beyond committing a banned act. Hence, there are no grounds to deem such *hadîths* as being authentic." *"Al-Mawdû`ât"* [2: 248].

To illustrate, the evils resulting from committing thirty-six adulteries exceed those resulting from the unlawful consumption of one dirham by means of *Ribâ*. This is because it is easy and possible to rectify the harm and evil resulting from unlawfully consuming one dirham by returning the same to its owner and absolving one's liability, while it is not possible to rectify and repair the serious evils and consequences caused by committing adultery. Additionally, the purpose of the wise Lawgiver behind the prohibition of adultery is to preserve lineage, while the purpose behind =

In any case, whether the number of the kinds of *Ribâ* mentioned in these *hadîths* is meant to show that it is numerousness or meant to reflect an actual number, *Ribâ* is undoubtedly used therein according to its general meaning, which includes all types of invalid and forbidden sales and prohibited gains, and not its specific meaning, which tackles only *Ribâ* on credit transactions (*Ribâ An-Nasî'ah*) and *Ribâ Al-Biyû`* (*Ribâ Al-Fadl and An-Nasâ'*).

Eighth: From another perspective, Imam Abû `Abdullâh Al-Qurtubî clarified the reason for calling invalid and forbidden sales as '*Ribâ*' in the

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= the prohibition of *Ribâ* is to preserve property. In this context, the preservation of lineage is given precedence over the preservation of property, as viewed by the scholars of *Usûl* (*Fiqhî* Principles) with respect to the order of the five necessities. In *"Al-Ihkâm"* [4: 380], Al-Âmidî said; "The purpose of preserving lineage is given precedence over the purpose of preserving the mind as well as preserving property." This view is affirmed by the statement of Ash-Shams Ar-Ramlî, in *"Nihâyat Al-Muhtâj"* [3: 424], as he said; "The apparent meaning of the above reports indicates that *Ribâ* is a sin graver than adultery, stealing, and drinking of intoxicants; however, my father (Ash-Shihâb Ar-Ramlî) adopted a different opinion." Furthermore, Al-Bujayrimî, in his *"Hâshiyah `Alâ Sharh Al-Khatîb"* [3: 15], said; "It is well-established that the greatest sins involve *Shirk* (polytheism), killing, adultery, stealing, drinking intoxicants, *Ribâ* and extortion (in the said order)."

My opinion is that even if the chain of transmission of the said *hadîth* is authentic, as stated by some scholars *"Fayd Al-Qadîr"* [3: 524]; *and "Majma` Az-Zawâ'id"* [4: 117], the *hadîth* should carry the meaning that the unlawful consumption of a dirham by means of *Ribâ* is graver, in the sight of Allah, than that (sins mentioned in the *hadîths* above). To explain, a man might fall into the snares of Satan and commit adultery, and afterwards feel the gravity of his sin and so sincerely repent to Allah, Who accepts his repentance. On the other hand, Allah will not forgive the consumer of *Ribâ* nor accept his repentance until he is forgiven by the one from whom he took the dirham with out right and did not return it to him. The same opinion is related by At-Tabarânî in *"Al-Awsat"*, Ibn Abud-Dunyâ and Ar-Râfi`î, who reported the Prophet (Peace be upon him) as having said; *"Abstain from backbiting. Verily backbiting is worse than committing adultery. A person may commit adultery and afterwards repent, and Allah forgives him. But a person who backbites is not forgiven unless the person whom he had backbitten forgives him."* *"Kashf Al-Khafâ"* [1: 81]; *"Majma` Az-Zawâ'id"* [8: 91]; and *"Tathîr Al-`Îbah"* by Ibn Hajar Al-Haytamî [p. 54]. Likewise, the same meaning is reported in the *hadîth* related by At-Tabarânî from Al-Barâ' Ibn `Âzib, as a *Marfû`* (traceable) *hadîth*, in which the Prophet (Peace be upon him) said; "Ribâ has seventy-two kinds, the least of which is as evil as a man having sexual relations with his mother, and the worst kind of Ribâ is equal to discrediting a Muslim brother's honor." *"Majma` Az-Zawâ'id"* [4: 117]; and *"Fayd Al-Qadîr"* [4: 51]. And Allah knows best.

Sharî`ah by saying, "Most of the forbidden sales are actually prohibited due to the presence of an increase, whether in the principal or in a benefit for one party, resulting from a delay or the like. There are other sales which do not involve an increase, such as the sale of fruits before they become ripe and trade during the call for the Friday Prayer; in such cases, the one engaged in such transactions may be called a consumer of *Ribâ*, as a form of simile."(1)

22- Some *Faqîhs* and exegetes stated that *Ribâ* refers, according to its general *shar`î* meaning, to every forbidden financial dealing as well as every prohibited ill-gotten gains, whatever the means used may be."

Abul-`Abbâs Al-Qurṭubî, in *"Al-Mufhim"*, and Abû `Abdullâh Al-Qurṭubî, in *"Al-Jâmi`"*, stated; "Linguistically, *Ribâ* generally means an increase. This is indicated in the *ḥadîth*: '*By Allah, we do not take a bite except that which beneath it increases*.' He means the food (concerning which) the Prophet (Peace be upon him) prayed for it to be blessed. In fact, the *Sharî`ah* has dealt with such a generalization, thereafter restricting it to some specific forms:

- Sometimes *Ribâ* is used to refer to ill-gotten gains, as when Allah, the Almighty, says with respect to the Jews: ***{"... their taking of Ribâ, though they were forbidden from taking it..."}*** [*An-Nisâ'* (Women): 161]. This does not refer to the *Ribâ* forbidden for us under the *Sharî`ah*, but, in fact, it refers to ill-gotten gains. Allah, Exalted be He, also says: ***{"(They like to) listen to falsehood, to devour anything forbidden..."}*** [*Al-Mâ'idah* (The Table): 42]. It refers to the ill-gotten money collected from bribes and whatever they unlawfully take from the money of *Al-Ummiyyîn* (the illiterate), as they would say; ***{"There is no blame on us to betray and take the properties of the illiterates."}*** [Âl-`Imrân (The Household of `Imrân): 75]. Hereupon, *Ribâ* includes every ill-gotten gain, whatever the means used may be.
- The *Ribâ* usually meant by the *Sharî`ah* involves two types: *Nasâ'* (interest on credit transactions) and *Tafâḍul*(2) in money and food, as

(1) *"Al-Jâmi` Li-Aḥkâm Al-Qur'ân"* [3: 348].

(2) It refers to an increase in one item without an increase in the other in an exchange transaction.

we will explain. These were the types widely practiced by the Arabs, as they would say to a debtor: 'Will you pay off your debt or delay repayment for an increase?' The debtor would delay repayment for a set term in exchange for an increase. All such dealings are forbidden as per the unanimous agreement of Muslim scholars."(1)

(1) *"Al-Jâmi` Li-Aḥkâm Al-Qur'ân"* [3: 348]; and *"Al-Mufhim Limâ Ashkal Min Talkhîṣ Kitâb Muslim"* [4: 472] (Abridged).

Topic Two
Types of *Ribâ* in *Fiqhî* Terminology

23- *Faqîhs* have adopted several names for the types and categories of *Ribâ* in *shar`î* terminology. Some of such names are specific or used in one or more *Fiqhî* school, while some others are unanimously used by all *Faqîhs*. After tracking such names, I have discovered eleven types, which I will introduce in this topic along with the proper definition thereof, without boring expatiation or defective summarization.

a) *Ribâ Haqîqî*

24- It is the stipulated increase in exchange for a specified term with respect to a loan or for a time extension for the repayment of a debt after it has become due. It also refers to the increase in the exchange of a *Ribâ*-related monetary item for another of the same kind on the spot. Accordingly, '*Ribâ Haqîqî*' (Real *Ribâ)* includes both *Ribâ An-Nasî'ah* (interest on credit transactions/loans) and *Ribâ Al-Fadl* (an unlawful excess in the exchange of two counter-values) in sales.

Waliyyullâh Ad-Dahlawî restricted it to *Ribâ An-Nasî'ah*, while the followers of the *Hanafî* School restricted it to *Ribâ Al-Fadl*.[1]

(1) *"Minhat Al-Khâliq `Alâ Al-Bahr Ar-Râ'iq"* [6: 136]; *"Radd Al-Muhtâr"* [4: 178]; *"Hujjatullâh Al-Bâlighah"* [2: 647]; *"Al-Muntaqâ Min Rawâ'i` Fatâwâ Al-Manâr"* by Muhammad Rashîd Ridâ [1: 285 and 324].

The corresponding type to '*Ribâ Haqîqî*' in *fiqhî* terminology is '*Ribâ Hukmî*' (Implicit *Ribâ*).

b) *Ribâ Hukmî*

25- It is the increase in the term with respect to the exchange of a *Ribâ*- related monetary item for another of the same kind or of a different kind if they both have the same cause rendering them to be one of the *Ribâ*- related items. This is because instant payment is more advantageous than delayed payment. In this regard, Ibn `Âbidîn said; "A term given for either of the two exchanged items is considered an implicit increase in return for no consideration." This means that the implicit *Ribâ* is the same as *Ribâ An-Nasâ'* with respect to sale contracts. This is the view adopted by the followers of the *Hanafî* School. However, Waliyyullâh Ad-Dahlawî contradicted them as he viewed that it refers to *Ribâ Al-Fadl*.

The corresponding type to '*Ribâ Hukmî*' (Implicit *Ribâ*) in *fiqhî* terminology is '*Ribâ Haqîqî*" to "*Ribâ Hukmî*' in *fiqhî* terminology is '*Ribâ Haqîqî*'.[1]

c) *Ribâ Halâl*

26- According to the *fiqhî* terminology, *Ribâ Halâl* (Lawful *Ribâ*) refers to 'a gift for a reward' which means that someone voluntarily bestows something to a person with the purpose of being rewarded with something better in return.

It is called "*Ribâ*" as it involves a request of an increase from the grantee. In this respect, Ibnul-`Arabî said; "The *Ribâ* in a gift given for a reward is permissible. `Umar Ibnul-Khattâb said; *'Whoever gives a gift while seeking a reward in return will deserve to be considered for it until he obtains that which satisfies him.'* This type is an exception with regards to the forbidden matters included in the general prohibition of *Ribâ*."[2]

In their explanation of Allah's Words ***{"And that which you give as a gift (to others), in order that it may increase (your wealth by expecting to get a better one in return) from other people's property, has no increase with Allah."}*** [Ar-Rûm (The Romans): 39], the majority of exegetes and *Faqîhs*

(1) *"Radd Al-Muhtâr"* [4: 176 and 178]; and *"Hujjatullâh Al-Bâlighah"* [2: 647].
(2) *"Ahkâm Al-Qur'ân"* by Ibnul-`Arabî [1: 244].

view that there are two types of *Ribâ*: Prohibited *Ribâ* (which has been discussed in Topic One) and Lawful *Ribâ*, i.e. a gift for a reward.(1) This point is tackled in "*Al-Jâmi` Li-Aḥkâm Al-Qur'ân*" by Al-Qurṭubî: "Concerning this Verse, `Ikrimah said; 'Ribâ is of two types: prohibited and lawful. The lawful *Ribâ* is the one involving giving a gift while seeking a better one in return.' Commenting on this Verse, Aḍ-Ḍaḥḥâk said; 'It is the lawful *Ribâ* which is given as a gift while seeking a better one in return. In fact, it brings neither a reward (from Allah) nor a sin.' Similarly, Ibn `Abbâs said; 'With respect to Allah's Words ***{"And that which you give as a gift (to others), in order that it may increase..."}***, Allah refers to a man giving a gift in order to get a better one in return. Actually, it has no increase with Allah, and the giver will neither be rewarded nor blamed for it.' This is the meaning concerning which this Verse has been revealed. Ibn `Abbâs, Ibn Jubayr, Ṭâwûs and Mujâhid stated, 'This Verse has been revealed with respect to the gift given for a reward.'"(2)

In *"Ḥilyat Al-Fuqahâ'"*, it is mentioned; "*Ribâ* is of two types: lawful and prohibited. As for the lawful one, it is when someone gives a gift to another while expecting a reward for it; requesting a better one. Though it is permissible, it is dispraised."(3)

Judge Ibn Rushd (the senior) said:

> "The (*shar`î*) principle for the permissibility of giving a gift in return for a reward is referred to in Allah's Words; ***{"And that which you give as a gift (to others), in order that it may increase (your wealth by expecting to get a better one in return) from other people's property, has no increase with Allah."}***. It is when someone gives something to another as a gift in order to be rewarded with a better one in return. Allah, Exalted and Glorified be He, revealed that when someone gives a gift while seeking to make his wealth increase from the

(1) *"Ad-Durr Al-Manthûr"* by As-Sayûṭî [5: 156]; *"Aḥkâm Al-Qur'ân"* by Al-Kiyâ Al-Harrâsî [4: 332]; *"Al-Kashshâf"* by Az-Zamakhsharî [3: 205]; and *"Aḥkâm Al-Qur'ân"* by Ibnul-`Arabî [3: 1491].
(2) *"Al-Jâmi` Li-Aḥkâm Al-Qur'ân"* [14: 36].
(3) *"Ḥilyat Al-Fuqahâ'"* by Ibn Fâris (p. 125).

> recipient's property, this does not bring about an increase with Allah nor is it an appropriate/sound action in the sight of Allah in the Sight of Allah. This indicates that the giver will have no reward except receiving what he actually intended, i.e. making his wealth increase from the recipient's property, but he will receive no reward from Allah. This is permissible; however, the one giving a gift for the sole sake of being rewarded from the recipient in return, will neither receive a reward from Allah nor incur a sin. This is because it is considered a form of trade; it is a lawful matter but not a desirable or commendable one."(1)

From the *fiqhî* perspective, the gift for a reward is viewed as a type of trade whose rulings apply thereto, such as the condition of knowing the price and being void of *Ribâ Al-Biyû`* (interest on sales). This view is explained in *"Al-Qawânîn Al-Fiqhiyyah"* as: "The ruling on the gift for a reward is the same as that on trade: That which is permissible for trade is permissible for the gift for a reward, and that which is prohibited for trade is prohibited for the gift for a reward, including *Nasî'ah* (interest on credit transactions/loans) and the like."(2) In *"Al-Mudawwanah"*, Mâlik said; "The gift given for compensation is a type of trade and it, as well as its compensation, has the same rulings pertaining to trade."(3)

d) *Ribâ Al-`Ajlân*

27- This term has two meanings according to the *Faqîhs*:

First: To refer to *Ribâ Al-Fadl*. `Umar Ibnul-Khattâb was reported to have said; *"O people! Do not sell one dirham for two, as this is Ribâ Al-`Ajlân."* As- Sarakhsî said; "By the term '*Ribâ Al-`Ajlân*,' he means *Ribâ* in monetary items (on the spot). This indicates that *Ribâ* is of two types: *Ribâ* in monetary items (on the spot) and *Ribâ An-Nasî'ah*."(4)

(1) *"Al-Muqaddimât Al-Mumahhidât"* [2: 443].
(2) *"Al-Qawânîn Al-Fiqhiyyah"* by Ibn Juzayy (p. 242).
(3) *"Al-Mudawwanah"* [4: 333].
(4) *"Al-Mabsût"* by As-Sarakhsî [14: 11].

Second: To refer to *Qabâlah*.[1] In *"Al-Istikhrâj"* by Ibn Rajab, it is reported that Ibn `Umar said; *"Qabâlât* is *Ribâ."*[2] According to Ibn Taymiyyah, it means: A man agrees to take a plot of land, with its palms and farmers, for a specified amount of the produce it yields. That is, he does not exert anything, neither his effort nor his money, as the farmers carry out the whole work and he just gives the agreed upon produce and takes compensation (from the produce of the land). It is all about seeking a profit from an exchange of money without any work or trade; this is true *Ribâ*.[3]

In *"Al-Amwâl"*, Abû `Ubayd reported that Ibn `Umar (may Allah be pleased with him) was told:

> *«We use Qabâlah for a plot of land and gain from the produce it yields. (i.e. we take the amount that remains after giving the owner the agreed upon amount).» He replied; «This is Ribâ Al-`Ajlân.»*[4]

e) *Ribâ Al-Fadl*

28- It is the exchange of a *Ribâ*-related monetary item for another of the same kind on the spot, along with an increase in either of the two exchanged items but without any increase in the other, such as exchanging one dinar for two dinars on the spot, or exchanging one *Sâ`* (a type of measure) of wheat for one and half *Sâ`s* of wheat when delivery is made hand to hand. (It is one of the two types of *Ribâ Al-Biyû`*.)[5]

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(1) *Qabâlah* (pl. *Qabâlât*): An example of this is when a man agrees to take palms, trees and cultivated plants before they are harvested for a certain amount of the yield thereof; it is a type of selling fruits before they appear to be ripe and before taking a known form.

(2) *"Al-Istikhrâj Li-Ahkâm Al-Kharâj"* (p. 314); and *"Al-Amwâl"* by Abû `Ubayd (p. 84).

(3) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 68 and 69]; and *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (pp. 145 and 146).

(4) *"Al-Amwâl"* (pp. 84 and 85).

(5) Some *Faqîhs* of the *Shâfi`î* School view that the *Ribâ* on a loan which stipulates a benefit for the lender is an implicit type of *Ribâ Al-Fadl*. (*"Nihâyat Al-Muhtâj"* and *"Hâshiyat Ash-Shabramullisî `Alâ Nihâyat Al-Muhtâj"* [3: 424]. The same view is adopted in *"Asnâ Al-Matâlib"* by Shaykhul-Islâm Zakariyyâ Al-Ansârî at the end of his discussion on *Ribâ Al-Biyû`* [2: 21], as he said; "Al-Mutawallî added the *Ribâ* on a loan which stipulates a benefit (for the lender), and it can be attributable to *Ribâ Al-Fadl*. The same opinion is adopted by Az-Zarkashî." =

The *Ribâ*-related monetary items: They are the ones mentioned in the following *hadîth* of the Messenger (Peace be upon him):

> *«Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, (only in the form) like for like and equal for equal, payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand.»*
>
> [Related by Muslim]

In addition to the above items, the *Ribâ*-related monetary items include those items deemed by the majority of *Faqîhs* to have a similar ruling by applying *Qiyâs* (analogical deduction) thereto. In fact, these *Faqîhs* view that the ruling pertaining to the said six items apply to other items as well, though there is a difference among *Faqîhs* regarding the specific meaning behind giving attention to these items in particular.(1)

Dr. Muhammad `Abdullâh Dirâz said; "Calling the excess in such an exchange as '*Ribâ*' is only a figurative expression, making it resemble the real *Ribâ*, which is *Ribâ An-Nasî'ah*."(2)

f) *Ribâ Al-Qurûd*

29- *Ribâ Al-Qurûd* (Interest on Loans) refers to the increase in the amount or a benefit stipulated for the lender in return for the term specified for the repayment of a loan.(3)

= Commenting on *Ribâ Al-Biyû`*, Ibn Hajar Al-Haytamî, in *"At-Tuhfah"*, said; "It is either *Ribâ Al-Fadl*, wherein one of the two exchanged items is increased, such as *Ribâ Al-Qard* (interest on loans) in which a certain benefit is stipulated for the lender, in a way that is different from the method of offering a pledge as a security for a loan." Commenting on the phrase 'such as *Ribâ Al-Qard*', Ash-Shirwânî said; "It is attributed thereto, though it is not included in this type. This is because the stipulation of a benefit for the lender makes it similar to selling the loan for a greater one of the same kind; thus, it is implicitly related thereto." (See: *"Tuhfat Al-Muhtâj"* and *"Hâshiyat Ash-Shirwânî `Alâ Tuhfat Al-Muhtâj"* [4: 272]. Their view is not to be taken for granted as *Ribâ Al-Qard* (*Ribâ An-Nasî'ah*, *Ribâ* on loans and *Ribâ Al-Jâhiliyyah*) is not originally a part of *Ribâ Al-Biyû`*; rather, it is a corresponding type thereto. A type corresponding to something cannot be considered a part of it.

(1) See: Notes (9 – 12) of the Research.

(2) *"Dirâsât Islâmiyyah"* by Dr. Dirâz (p. 164).

(3) *"Tuhfat Al-Muhtâj"* [4: 272]; *"Asnâ Al-Matâlib"* [2: 21]; *"Hâshiyat Al-Qalyûbî"* [2: 167]; *"Mughnî Al-Muhtâj"* [2: 21]; and *"Nihâyat Al-Muhtâj"* [3: 424].

As-Sughdî said; "*Ribâ* with respect to loans is of two forms:

I) When a lender provides ten dirham as a loan in return for eleven, twelve or so dirham in repayment; and

II) When a lender gains a benefit for himself through such a loan or when a benefit reaches him as a result of the loan."(1)

This term is used in the literature of the *Hanafî* and *Shâfi`î* Schools of *Fiqh*.

g) *Ribâ Al-Muzâbanah*

30- This term was used by some of the *Mâlikî Faqîhs*, including Abul-Hasan Al-Mâlikî in his commentary on *"Ar-Risâlah"* in connection with his classification of *Ribâ Al-Biyû`* into three categories: *Ribâ Al-Fadl*, *Ribâ An-Nasâ'*, and *Ribâ Al-Muzâbanah*. He said; "*Ribâ Al-Muzâbanah* refers to the exchange of a known item for an unknown one, or exchange of an unknown item for another unknown item of the same kind (i.e. of the *Ribâ*-related monetary items.)."(2)

Al-Mâzarî said:

> "As for its (i.e. *Muzâbanah's*) involvement of *Ribâ*, this is due to the possibility that one of them (i.e. the two exchanged items) may be greater than the other. There is no difference between possibility and certainty thereof with regard to prohibition."(3)

The principal rule in this respect is that equality is a condition on the sale thereof, and the suspected excess therein is the same as the ascertained one, as stated in *"Qawâ`id Al-Madhhab"*, and thus it is forbidden because of such an excess (in either of the two exchanged items).(4)

As for *Muzâbanah* which refers to the exchange of an item of unknown weight, measure or number with an item of a known amount of the same kind, or with an item of an unknown amount of a different kind with regard to non-*ribâ*-related monetary items, the *Mâlikî* scholars view the permissibility

(1) *"An-Nutaf Fî Al-Fatâwâ"* by As-Sughdî [1: 484].
(2) *"Kifâyat At-Tâlib Ar-Rabbânî Wa Hâshiyat Al-`Adawî `Alayh"* [2: 128].
(3) *"Al-Mu`lim"* [2: 171].
(4) *"Ash-Sharh As-Saghîr"* [3: 49]; *"Al-Ma`ûnah"* [2: 967]; and *"Ash-Sharh Al-Kabîr"* [3: 54].

thereof if either of them (i.e. the two exchanged items) is greater and it is deem as a non-*ribâ* type.(1)

h) *Ribâ An-Nasâ'*

31- It refers to the deferment of either of the two exchanged items in the exchange of a *Ribâ*-related monetary item with another of the same kind or of a different kind if they both have the same cause rendering them to be one of the *Ribâ*-related items; that is, being measurable or weighable as maintained by the *Hanafî* and *Hanbalî* schools, and being priceable or edible as viewed by the *Shâfi`î* and *Mâlikî* schools. This is due to the fact that the instant payment is more advantageous than a delayed payment.(2)

It is one of the two types of *Ribâ Al-Biyû`*. Some *Faqîhs* call it *Ribâ An-Nasî'ah* as it refers to deferment as in *An-Nasâ'*.

i) *Ribâ An-Nasî'ah*

32- It refers to any stipulated increase on the principal of a loan, as well as any increase in exchange for an extension of time upon every subsequent delay in repayment of a debt after it has become due, whether it is related to a loan, sale on credit, etc.

It is the one called '*Ribâ* on debts', '*Ribâ Al-Jâhiliyyah*' and '*Ribâ Jaliyy*' (apparent *Ribâ*).(3)

j) *Ribâ An-Naqd*

33- It is the increase in either of the two exchanged items in the trade of a *Ribâ*-related monetary item for another of the same kind on the spot, such as exchanging one dirham for two dirham hand to hand.

It is conventionally synonymous with *Ribâ Al-Fadl*, and has been used only by the *Hanafî* and *Shâfi`î Faqîhs*, but not others.(4)

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(1) *"Ash-Sharh As-Saghîr"* [3: 90 and 91]; *"Ash-Sharh Al-Kabîr"*; *"Hâshiyat Ad-Dusûqî `Alâ Ash-Sharh Al-Kabîr"* [3: 55); *"Al-Ma`ûnah"* [2: 964); and *"At-Tafrî`"* [2: 165].

(2) See: Notes (9 to 12) of the Research.

(3) See: Notes (6 and 7) of the Research.

(4) *"Al-Mabsût"* by As-Sarakhsî [14: 11]; *"Takmilat Al-Majmû`"* by As- Subkî =

k) *Ribâ Al-Yadd*

34- It refers to the deferment in the delivery of the two exchanged items or one of them, without specifying any term at all, in the trade of a *Ribâ*-related monetary item for another of the same kind or of a different kind if they both have the same cause rendering them to be one of the *Ribâ*-related items.

Ribâ Al-Yadd (With Hand) has been related to the hand as it is the means of delivery.

This term has been used only by the *Shâfi`î Faqîhs*, but not others, and its meaning is considered to be close to that of *Ribâ An-Nasâ'*. However, they use a delicate criterion to distinguish between the two: With respect to *Ribâ Al-Yadd*, one of the two parties leaves the place of the contract before delivery is made and without agreeing to defer the delivery, or even mentioning it, unlike *Ribâ An-Nasâ'* in which deferment, even for a short time, is mentioned or stipulated with respect to either of the two exchanged items.(1)

All Praises and Thanks are to Allah, the Lord of the Worlds!

= [10: 26]; *"Al-Ḥâwî"* by Al-Mâwardî [6: 86]; and *"Tafsîr Ar-Râzî"* [7: 85 and 86].

(1) *"Tuḥfat Al-Muḥtâj"* [4: 273]; *"Mughnî Al-Muḥtâj"* [2: 21]; *"Takmilat Al-Majmû`"* by As-Subkî [10: 69]; *"Ḥâshiyat Al-Qalyûbî"* [2: 167); and *"Asnâ Al-Maṭâlib"* [2: 21].

Conclusion

After the *fiqhî* study encompassing the *shar`î* significance of the term '*Ribâ*' – as derived from *Faqîhs*' definitions, sayings and views, and their classifications of the types thereof – as well as the study of the relative general conditions and exceptional provisions deduced from the principal and secondary sources of legislation, we have concluded the following:

1- According to *shar`î* terminology, the term '*Ribâ*', with its relative rulings and explanations, discussions and classifications, excuses and causes, principal rulings and exceptions, agreements and disagreements among scholars, is considered one of the most critical and difficult issues in *Fiqh* (Islamic Jurisprudence). This is a truth that cannot be denied by any fair scholar or scrutinizing researcher who looks beyond superficial ity and delves deeply into the core of the issue.

2- The term '*Ribâ*', according to *shar`î* terminology, has two meanings: a specific and a general one.

3- *Ribâ*, according to the specific definition (which is the prevalent conventional definition in *Sharî`ah*), includes:

i) *Ribâ An-Nasî'ah*, which was widely-practiced during *Al-Jâhiliyyah* (pre-Islamic period) and with respect to which the Qur'ânic Verses at the end of Sura Al-Baqarah (The Cow) were revealed.

ii) *Ribâ Al-Biyû`*, which is prohibited according to the *Marfû`* (traceable) *hadîth* narrated by `Ubâdah Ibnus-Sâmit and others in which Allah's Messenger (Peace be upon him) said:

«Gold is to be paid for by gold, silver by silver, wheat by wheat…»

4- *Ribâ An-Nasî'ah,* which is called '*Ribâ* on loans' and '*Ribâ Jaliyy*' (apparent *Ribâ*), refers to 'any stipulated increase added to the principal of a loan,' whether such increase is fixed or changes according to the loan's amount and term. It is known today as 'interest calculated on a loan.' It also involves any increase in exchange for a term upon every subsequent delay in repayment of a debt after it has become due, whether it is related to a loan, sale on credit, etc.

This type of *Ribâ* is decisively prohibited and such prohibition is known by necessity in religion, and it is the one originally intended by prohibition in this regard.

5- *Ribâ Al-Biyû`* is the type sometimes described as 'hidden *Ribâ*'. This type of *Ribâ* was not common among the Arabs during *Al-Jâhiliyyah* and was not prohibited in Islam until the Day of *Khaybar* in the seventh year of the *Hijrah* (immigration to Medina), when `Ubâdah Ibnu<u>s</u>-<u>S</u>âmit and others reported Allah's Messenger (Peace be upon him) as saying:

«Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, (only in the form) like for like and equal for equal, and payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand.»

[Related by Muslim]

6- *Faqîhs* have agreed to classify the six classes mentioned in the *<u>h</u>adîth* into two categories: (I) gold and silver, and (II) wheat, barely, dates and salt.

- *Faqîhs* have unanimously agreed that the trading of two congeneric items (e.g. gold for gold, or dates for dates) must not involve any increase or deferment.
- Moreover, they have unanimously agreed that the trading of two related items, i.e. items falling within the same category (e.g. gold for silver, or barely for salt) may involve an increase but not any deferment.

- *Faqîhs* have unanimously agreed that the exchange of two different items, i.e. items falling within two different categories (e.g. gold for barely or for dates) may involve an increase and deferment.

However, *Faqîhs* have differed on the applicability of the rulings pertaining to the above type of transactions to other categories. They have adopted two views in this respect. As for those viewing applicability, they have differed with regard to the general meaning referred to by these six classes into two opinions:

First: The *Hanafî* and *Hanbalî Faqîhs* opine that the cause of prohibition with regard to gold and silver is that they are weighable, while wheat, barely, dates and salt are measurable.

Second: The *Shâfi`î* and *Mâlikî Faqîhs* view that the cause of prohibition with respect to gold and silver is that they are priceable, while wheat, barely, dates and salt are edible.

7- According to all scholars, *Ribâ Al-Biyû`* is of two types: *Ribâ Al-Fadl* (an unlawful excess in the exchange of two counter-values) and *Ribâ An-Nasâ'* (interest on credit transactions/loans). For example, if someone sells one dirham for two dirham, or one *Sâ`* (a kind of measure) of dates for two *Sâ`s* of dates and delivery is made on the spot, this is called '*Ribâ Al-Fadl*'. However, if someone sells one dinar for ten dirham, or one *Sâ`* of dates for one *Sâ`* of barely, while delaying the delivery of either item, this is called '*Ribâ An-Nasâ*'". A third example is when someone sells one dinar for one and a half dinars while delaying the delivery of either items; this is considered as '*Ribâ Al-Fadl*' and '*Ribâ An-Nasâ*'."

8- Some of the prominent *Faqîhs* have indicated that *Ribâ Al-Biyû`* may be excused in two cases:

i) When it is related to something accessory/consequential in the contract.

ii) When it is called for by a necessity or some paramount interest. This is considered as a means of showing easiness and leniency to the people, and removing any hardship they might suffer.

9- The criterion for determining whether something is accessory/consequential to a contract or not is:

"The primary/principal matter is considered to be the one originally intended in a contract and which the two parties usually have in mind when concluding such a transaction."

This is expressed by some *Faqîhs* as the 'major purpose,' 'greatest purpose' and 'main purpose.'

On the other hand:

"The accessory or consequently intended matter is what follows the originally intended matter or is subsequent thereto."

10- The criterion for determining the need/necessity for a contract is:

"If such a matter is avoided, a hardship would result due to a *shar`î*- acknowledged interest being missed."

11- The criterion for determining the paramount interest therein is:

"When the interest resulting from dealing in *Ribâ Al-Biyû`* is greater than any evil that may result therefrom."

12- In its general sense and according to the majority of *Faqîhs*, *Ribâ* refers to any increase in money or the term specified for repayment in the *Ribâ* on credit transactions/loans and *Ribâ Al-Biyû`*, as well as any invalid or illegal sale. Some *Faqîhs* and exegetes state that *Ribâ* refers to every forbidden financial dealing as well as every prohibited ill- gotten gain, whatever the means used may be.

13- By referring to the types and categories of *Ribâ* in *Fiqhî* terminology, we find eleven types which have been defined by *Faqîhs*. They are as follows:

a) ***Ribâ Haqîqî*** **(Real *Ribâ*)**: It is the stipulated increase in exchange for a specified term with respect to a loan or for a time extension for the repayment of a debt after it has become due. It also refers to the increase in the exchange of a Ribâ-related monetary item for another of the same kind on the spot.

b) ***Ribâ Ḥukmî* (Implicit *Ribâ*)**: It is the increase in the term with respect to the exchange of a Ribâ-related monetary item for another of the same kind or of a different kind if they both have the same cause rendering them to be one of the Ribâ-related items.

c) ***Ribâ Ḥalâl* (Lawful *Ribâ*):** It refers to 'a gift for a reward.' It is when someone voluntarily bestows something to a person with the purpose of being rewarded with something better in return.

d) ***Ribâ Al-`Ajlân*:** This term is used by *Faqîhs* to refer to the follwoing two meanings:

First: To refer to *Ribâ Al-Faḍl*.

Second: To refer to *Qabâlah*. It is when a man agrees to take a plot of land, with its palms and farmers, for a specified amount of the produce it will yield. It is all about seeking a profit from an exchange of money without any work or trade.

e) ***Ribâ Al-Faḍl*:** It is the exchange of a *Ribâ*-related monetary item for another of the same kind on the spot along with an increase in either of the two exchanged items but without an increase in the other, such as exchanging one dinar for two dinars on the spot, or exchanging one *Sâ`* (a type of measure) of wheat for two *Sâ`s* of wheat, when delivery is made hand to hand. (It is one of the two types of *Ribâ Al-Biyû`*.)

f) ***Ribâ Al-Qurûḍ* (Interest on Loans):** It refers to the increase on the principal (in a loan) stipulated for the lender in exchange for the term specified for a loan.

g) ***Ribâ Al-Muzâbanah*:** It refers to the exchange of a *Ribâ*-related monetary item of a known amount for another of an unknown amount, or the exchange of an unknown item for another unknown item of the same kind.

h) ***Ribâ An-Nasâ'*:** It refers to the deferment of either of the two exchanged items in the exchange of a *Ribâ*-related monetary item with another of the same kind or of a different kind if they both have the same cause rendering them to be one of the *Ribâ*-related

items; that is, being measurable or weighable as maintained by the *Hanafî* and *Hanbalî* schools, and being priceable or edible as viewed by the *Shâfi`î* and *Mâlikî* schools. (It is one of the two types of *Ribâ Al-Biyû`*.)

i) ***Ribâ An-Nasî'ah*** **(interest on credit transactions/loans):** It refers to any stipulated increase on the principal of a loan, as well as any increase in exchange for a specified term upon every subsequent delay in repayment of a debt after it has become due, whether it is related to a loan, or sale on credit, etc. It is also called '*Ribâ Al-Jâhiliyyah*' and '*Ribâ Jaliyy*' (apparent *Ribâ*).

j) ***Ribâ An-Naqd*** **(in money on the spot):** It is the increase in either of the two exchanged items in the trade of a *Ribâ*-related monetary item for another of the same kind on the spot, such as exchanging one dirham for two dirham hand to hand.

k) ***Ribâ Al-Yadd*** **(with hand):** It refers to the deferment in the delivery of the two exchanged items or one of them, without specifying any term at all, in the trade of a *Ribâ*-related monetary item for another of the same kind or of a different kind if they both have the same cause rendering them to be one of the *Ribâ*- related items.

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- ***"Rawâ'i` At-Tafsîr Al-Jâmi` Li-Tafsîr Ibn Rajab"*** – Jum`ah Târiq Ibn `Awadullâh - *Dâr Al-`Âsimah* Edition, Riyadh (1422 A.H.).
- ***"Rawdat At-Tâlibîn"*** - An-Nawawî - *Al-Maktab Al-Islâmî* Edition, Damascus (1388 A.H.).
- ***"Zâd Al-Ma`âd Fî Hady Khayr Al-`Ibâd"*** - Ibn Qayyim Al-Jawziyyah – *Mu'assasat Ar-Risâlah* Edition, Beirut (1399 A.H.).
- ***"Az-Zawâjir `An Iqtirâf Al-Kabâ'ir"*** - Ibn Hajar Al-Haytamî - *Dâr Al-Ma`rifah* Edition, Beirut (no date), and *Dâr Al-Hadîth* Edition, Egypt (1423 A.H.).

- ***"As-Sunan Al-Kubrâ"*** - Al-Bayhaqî - *Hyderabad Deccan* Edition, India (1344 A.H.).
- ***"Sunan Ibn Mâjah Al-Qazwînî"*** - *Dâr Ihyâ' Al-Kutub Al-`Arabiyyah* Press, Egypt (1373 A.H.).
- ***"Sunan An-Nasâ'î"*** (*Al-Mujtabâ*) - *Al-Misriyyah* Press, Cairo (1348 A.H.).
- ***"As-Sunnah"*** - Al-Marwazî - *Mu'assasat Al-Kutub Ath-Thaqâfiyyah* Edition, Beirut (1408 A.H.).
- ***"Sharh Az-Zarqânî `Alâ Al-Muwatta'"*** - *Dâr Al-Ma`rifah* Edition, Beirut (1398 A.H.).
- ***"Sharh As-Sunnah"*** - Al-Baghawî - *Al-Maktab Al-Islâmî* Edition, Damascus, (1391 A.H.).
- ***"Ash-Sharh As-Saghîr"*** - Ad-Dardîr - and ***"Hâshiyat As-Sâwî `Alayh"***, the UAE Edition (1410 A.H.).
- ***"Sharh Muntahâ Al-Irâdât"*** - Al-Buhûtî - Egypt Edition (no date).
- ***"Sharh Mayyârah `Alâ Tuhfat Ibn `Âsim"*** - *Al-Istiqâmah* Press, Egypt (no date).
- ***"Sharh An-Nawawî `Alâ Sahîh Muslim"*** - *Al-Misriyyah* Press, Cairo (1349 A.H.).
- ***"`Âridat Al-Ahwadhî `Alâ Sunan At-Tirmidhî"*** - Ibnul-`Arabî - *As-Sâwî* Press, Egypt (1353 A.H.).
- ***"Al-Fatâwâ Al-Kubrâ"*** - Ibn Taymiyyah - *Dâr Ar-Rayyân* Edition, Cairo (1408 A.H.).
- ***"Fath Al-Bârî `Alâ Sahîh Al-Bukhârî"*** - Ibn Hajar Al-`Asqalânî - *As-Salafiyyah* Press, Egypt.
- ***"Fath Al-`Azîz Sharh Al-Wajîz"*** - Ar-Râfi`î - Printed with the Margin of ***"Al-Majmû`"*** - *At-Tadâmun Al-Akhawî* Press, Egypt (1347 A.H.).
- ***"Fayd Al-Qadîr `Alâ Al-Jâmi` As-Saghîr"*** - Al-Minâwî - *Mustafâ Muhammad* Press, Cairo (1356 A.H.).

- ***"Al-Qabas `Alâ Al-Muwatta'"*** - Ibnul-`Arabî - *Dâr Al-Gharb Al-Islâmî* Edition, Beirut (1992 A.D.).
- ***"Al-Qawâ`id Al-Kubrâ"*** - Al-`Izz Ibn `Abdus-Salâm - *Dâr Al-Qalam* Edition, Damascus (1421 A.H.).
- ***"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"*** - Ibn Taymiyyah - *As-Sunnah Al-Muhammadiyyah* Press, Egypt (1370 A.H.).
- ***"Al-Qawânîn Al-Fiqhiyyah"*** - Ibn Juzayy Al-Ghirnâtî - *Ad-Dâr Al-`Arabiyyah Lil-Kitâb* Edition, Tunisia (1982 A.D.).
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- ***"Kashshâf Al-Qinâ` `An Matn Al-Iqnâ`"*** - Al-Buhûtî - *Al-Hukûmah* Press, Mecca (1394 A.H.).
- ***"Kashf Al-Khafâ Wa Muzîl Al-Ilbâs"*** - Al-`Ajlûnî – *Mu'assasat Ar-Risâlah* Edition, Beirut (1405 A.H.).
- ***"Kifâyat At-Tâlib Ar-Rabbânî"*** – Abû Al-Hasan Al-Mâlikî - and ***"Hâshiyat Al-`Adawî `Alayh"***, *Mustafâ Al-Halabî* Edition, Egypt (1357 A.H.).
- ***"Al-Mubdi` Sharh Al-Muqni`"*** - Burhânud-Dîn Ibn Muflih - *Al-Maktab Al-Islâmî* Edition, Damascus (1400 A.H.).
- ***"Al-Mabsût"*** - As-Sarakhsî - *As-Sa`âdah* Press, Egypt (1324 A.H.).
- ***"Majallat Al-Ahkâm Ash-Shar`iyyah `Alâ Madhhab Ahmad"*** - Al-Qârî - *Tihâmah* Edition, Jeddah (1401 A.H.).
- ***"Majallat Al-Ahkâm Al-`Adliyyah"***, Beirut Edition (1388 A.H.).
- ***"Majma` Az-Zawâ'id Wa Manba` Al-Fawâ'id"*** - Nûrud-Dîn Al-Haythamî - *Al-Qudsî* Edition, Egypt (1353 A.H.).
- ***"Majmû` Fatâwâ Ibn Taymiyyah"***, KSA Edition, Riyadh (1398 A.H.).
- ***"Al-Muhallâ"*** - *Ibn Hazm Al-Andalusî* - *Al-Munîyriyyah* Press, Egypt (1350 A.H.).
- ***"Mukhtasar Sunan Abû Dâwûd"*** - *Al-Mundhirî* - *As-Sunnah Al-Muhammadiyyah* Press, Egypt (1369 A.H.).

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- ***"Al-Masâ'il Al-Mâridînyyah"*** - Ibn Taymiyyah - *Al-Maktab Al-Islâmî* Edition, Damascus (1399 A.H.).
- ***"Al-Mustadrak `Alâ Aṣ-Ṣaḥîḥayn"*** - Al-Ḥâkim An-Naysâbûrî - *Hyderabad Deccan*, India (1341 A.H.).
- ***"Musnad Al-Imâm Aḥmad Ibn Ḥanbal"*** - *Al-Maymaniyyah* Press, Egypt (1313 A.H.).
- ***"Ma`âlim As-Sunan"*** - Al-Khaṭṭâbî - *As-Sunnah Al-Muḥammadiyyah* Press, Egypt (1948 A.D.).
- ***"Al-Mu`lim Bi-Fawâ'id Muslim"*** - Al-Mâzarî - *Dâr Al-Gharb Al-Islâmî* Edition, Beirut (1992 A.D.).
- ***"Al-Ma`ûnah `Alâ Madhhab `Âlim Al-Madînah"*** - Judge `Abdul-Wahhâb Al-Baghdâdî - *Al-Maktabah At-Tijâriyyah* Edition, Mecca (no date).
- ***"Al-Mughnî"*** - Ibn Qudâmah Al-Maqdisî - *Hajar* Edition, Egypt (1410 A.H.).
- ***"Mughnî Al-Muḥtâj Sharḥ Al-Minhâj"*** - Al-Khaṭîb Ash-Shirbînî - *Muṣṭafâ Al-Bâbî Al-Ḥalabî* Press, Egypt (1377 A.H.).
- ***"Mufradât Alfâẓ Al-Qur'ân"*** - Ar-Râghib Al-Aṣbahânî - *Dâr Al-Qalam* Edition, Damascus (1412 A.H.).
- ***"Al-Mufhim Sharḥ Mukhtaṣar Ṣaḥîḥ Muslim"*** - Al-Qurṭubî - *Dâr Ibn Kathîr* Edition, Damascus (1417 A.H.).
- ***"Al-Muqaddimât Al-Mumahhidât"*** - Ibn Rushd (The Senior) - *Dâr Al-Gharb Al-Islâmî* Edition, Beirut (1408 A.H.).
- ***"Al-Muntaqâ Sharḥ Al-Muwaṭṭa'"*** – Abû Al-Walîd Al-Bâjî - *As-Sa`âdah* Press, Egypt (1332 A.H.).
- ***"Al-Muntaqâ Min Rawâ'i` Fatâwâ Al-Manâr"*** - Muḥammad Rashîd Riḍâ - *Dâr Al-Fatḥ* Edition, Beirut (1419 A.H.).

- ***"Al-Manthûr Fî Al-Qawâ`id"*** - Az-Zarkashî - *Ministry of Awqaf* Edition, Kuwait (1402 A.H.).
- ***"Al-Muhadhdhab"*** - Abû Ishâq Ash-Shîrâzî - *Mustafâ Al-Bâbî Al-Halabî* Edition, Egypt (1379 A.H.).
- ***"Al-Muwatta'"*** - Mâlik Ibn Anas Al-Asbahî - *Dâr Ihyâ' Al-Kutub Al-`Arabiyyah* Edition, Egypt (1370 A.H.).
- ***"Al-Muwâfaqât"*** - Ash-Shâtibî - *Al-Maktabah At-Tijâriyyah Al-Kubrâ* Edition, Egypt (no date).
- ***"An-Nutaf Fî Al-Fatâwâ"*** - As-Sughdî – *Mu'assasat Ar-Risâlah* and *Dâr Al-Furqân* Edition (1984 A.D.).
- ***"Nasb Ar-Râyah Li-Ahâdîth Al-Hidâyah"*** - Az-Zayla`î - *Dâr Al-Ma'mûn* Press, Egsypt (1357 A.H.).
- ***"Nihâyat Al-Muhtâj Ilâ Sharh Al-Minhâj"*** - Ar-Ramlî - *Mustafâ Al-Bâbî Al-Halabî* Edition, Egypt (1386 A.H.).

Research (2)
Muwâṯa'ah on Concluding Several Contracts and Pledges in a Single Transaction

Preface: Definition of *Muwâṯa'ah*

Topic One: Forms of *Muwâṯa'ah*

Topic Two: Enforceability of *Muwâṯa'ah* on Contracts and Pledges

Topic Three: *Shar`î* Regulations on *Muwâṯa'ah* in Contracts and Pledges Combined in One Agreement

Conclusion

Preface
Definition of *Muwâṯa'ah*

a) Linguistic Definition of *Muwâṯa'ah*

1- In *"Mu`jam Maqâyîs Al-Lughah"* by Ibn Fâris, it is stated that *'Muwâṯa'ah'* means 'preparing or facilitating something'.(1) Arab Linguists say, the word *'Tawṯi'ah'* means 'preparation or smoothing out'. Also, *'Muwâṯa'ah'* or *'Tawâṯu"* means 'agreement or coincidence'.(2)

In *"Al-Qâmûs Al-Muḥiṯ"*, the verb *'wâṯa'a'*, means 'agreed on'.(3) Ibn Al-Athîr said; *'Wâṯa'a `Alâ* (on) *Al-Amr* (the matter)' means 'agreed on the matter'.(4)

Ibn Fâris also said; *'Muwâṯa'ah'* means 'agreement on something which each party prepares or facilitates for the other'.(5)

In the same regard, Abû Hilâl Al- `Askarî said; "Linguistically, *Muwâṯa'ah* means support or help,(6) which is the same opinion adopted by `Abdur-Raḥmân Al-Hamazânî."(7)

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(1) *"Mu`jam Maqâyîs Al-Lughah"* [6: 120].
(2) *"An-Nihâyah"* by Ibnul-Athîr [5: 201 and 202]; and *"Mashâriq Al-Anwâr"* by Judge `Iyâḍ [2: 285].
(3) *"Al-Qâmûs Al-Muḥiṯ"* (p. 71); *"Al-Miṣbâḥ Al-Munîr"* [2: 830]; and *"Asâs Al-Balâghah"* (p. 503).
(4) *"An-Nihâyah"* [5: 202]; and *"Al-Mufradât"* by Ar-Râghib (p. 875).
(5) *"Mu`jam Maqâyîs Al-Lughah"* [6: 121].
(6) *"At-Talkhîṣ"* by Abû Hilâl Al-`Askarî [1: 151].
(7) *"Al-Alfâẓ Al-Kitâbiyyah"* by Al-Hamazânî (p. 142).

b) *Fiqhî* Terminological Definition of *Muwâṯa'ah*

2- *'Muwâṯa'ah'* or *'Tawâṯu"* in *Fiqh* terminology has several meanings, the most important among which are:

i) Explicit or implicit intention of the parties to the contract to use a certain stratagem to practice forbidden *Ribâ* using a *Sharî`ah* accepted contractual form.

ii) An agreement between the seller of a commodity and someone else, called *Najsh*, in auction sales and the like, to offer a higher price for the commodity, not with an intention to buy, but simply to elicit a higher bid or offer from other potential buyers.

iii) An apparent agreement between both parties to produce a simulated contract, which is called *'Talji'ah'*.

iv) A disclosed prior agreement between the two parties to perform a *Sharî`ah*-permissible act or deal so as to find a *Sharî`ah*-accepted solution to problematic situations (i.e. an acceptable 'stratagem')

v) An agreement between craftsmen to increase the price of their products above the usual price, or an agreement between merchants to buy commodities from their owners for a price much lower than the usual price, or to sell them to consumers for a price much higher than the usual price.

vi) A consensus of the intentions of the parties to the contract in the preparatory negotiations that precede the signing of an agreement (deal) which comprises a group of contracts, successively linked together according to a set of conditions that govern them as one unit to achieve one intended goal, to fulfill such an agreement after its conclusion according to the conditions and terms agreed upon beforehand.

c) The Relationship Between the Two Definitions

3- It is obvious that the terminological meaning of the word *'Tawâṯu"* or *'Muwâṯa'ah'* is derived from its linguistic meaning, which implies 'preparing or facilitating something', or 'agreement', as stated by Ibn Fâris, or 'support' as stated by Abû Hilâl Al-`Askarî and Al-Hamazânî. Also, the linguistic

meaning implies that such acts, i.e. the preparation, agreement or support, are done in an undisclosed manner or in secret.

d) Practicing *Muwâṯa'ah* Explicitly and Legally

4- *Faqîhs* stated that *Muwâṯa'ah* can take place explicitly using unequivocal words and statements, or implicitly by ways known conventionally or indicated by custom and practice. In this regard, Ibn Taymiyyah and Ibnul-Qayyim said; "If one sells a commodity to another while he intends to use the price to buy from the same person a commodity of the same kind, then there are two possibilities; first, the two parties had agreed explicitly or implicitly, according to convention, on the second purchase. Second, they did not agree either explicitly or implicitly on this type of transaction. In the case of the first possibility, the transaction will be invalid. This is because the aim of this transaction is not to exchange the commodity for the price, but rather, to exchange a commodity for another commodity of the same kind. Also, in such a transaction, the price is used only as a stratagemto practice *Ribâ*, which makes it similar to the cursed *Muḥallil* (the man marrying a triple divorced woman with the intention to divorce her so as to be lawful for her former husband) in the *Taḥlîl* contract. If they did not agree previously to conclude the deal in this way, but still the buyer knew that the seller intended to practice a *Ribâ*-based purchase, the transaction will also be invalid, since the buyer's knowledge in such a case indicates implicit agreement (*Muwâṯa'ah*), according to customary practice."(1)

e) *Tawâṯu'* or *Muwâṯa'ah* in the Terminology of *Faqîhs*

5- The scholars of *Uṣûl* (Fundamental Axioms of *Fiqh*) state that the relation between Arabic terms and their corresponding meaning can be one of the following; *Tawâṯu'* (similarity and agreement), *Tashâkuk* (doubt), *Takhâluf* (antonymy), *Ishtirâk* (homonymy), *Tarâduf* (synonymy). Accordingly, *Tawâṯu'* is the unity or correspondence of both term and meaning, as in the term 'human' referring to human persons; like Zayd and `Amr.(2)

Al-Qarâfî, accordingly, defined the Arabic term *'Mutawâṯi"* as a term

(1) *"I`lâm Al-Muwaqqi`în"* [3: 243]; and *"Bayân Ad-Dalîl `Alâ Buṭlân At-Taḥlîl"* (p. 52).
(2) *"Fatḥ Ar-Raḥmân `Alâ Luqaṭat Al-`Ajlân"* by Zakariyyâ Al-Anṣârî (p. 52).

indicating a general meaning present in all objects it describes. Then, he added: "The term *'Mutawâṯi"* (i.e. a person who agrees) is derived from the term *'Tawâṯu"* (i.e. agreement). That is, one says; *'Tawâṯaʾa Al-Qawmu `Alâ Al-Amr'* (i.e. the people agreed on a certain matter) to indicate agree ment. If the objects designated by any term are similar, such a term is called a *Mutawâṯi'."*[1]

In this regard, Al-Ghazâlî said; *'Mutawâṯi"* terms are the terms which designate things that are different in number but similar in meaning, such as the term 'man' which designates individuals like Zayd, `Amr, Bakr and Khâlid, and the term 'body' which is general for entities like the sky, earth and humans. It is known that any general term which is not specific for one thing, as stated in the examples above, is used to designate the single entities that can be described by this general term by means of *'Tawâṯu"* (similarity), such as the term 'color' is used to describe 'red', 'black' and 'white', since they all have the common characteristic of being colors; yet, they do not have the same meaning at all."[2]

(1) *"Sharḥ Tanqîḥ Al-Fuṣûl"* (P. 30).
(2) *"Al-Mustaṣfâ"* [1: 31].

Topic One
Forms of *Muwâṯa'ah*

There are many forms of *Tawâṯu'* or *Muwâṯa'ah* (prior agreement) for contracts, according to the matter upon which it is exercised. In all, there are seven forms:

First Form: *Muwâṯa'ah* on Usurious Stratagems

6- The Arabic equivalent of the English word 'stratagem' is '*Ḥîlah*'. According to Ibn Taymiyyah, the word '*Ḥîlah*' is derived from '*Taḥawwul*' (conversion), which is a particular type of action exercised by someone to change something from one state to another. Ibn Taymiyyah added, "So the word '*Ḥîlah*' has come to be used as devious ways to reach a certain goal, which cannot be achieved except through acuteness and alertness. If the goal is something good, the stratagem (or *Ḥîlah*) is called a good stratagem (or *Ḥîlah Ḥasanah*), and if it is something bad, the stratagem is called a bad stratagem (or *Ḥîlah Qabîḥah*)." (1)

7- Accordingly, *Faqîhs* have divided stratagem into two kinds: impermissible and permissible stratagems. Permissible stratagems refer to the stratagems used as an escape from embarrassing situations and deadlocks, or as a way to do permissible acts, avoid forbidden acts, give rights to their owners and fight injustice.

Impermissible stratagems, on the other hand, refer to the stratagems used to commit illegal acts in the guise of legal ones. According to Ibn

(1) *"Bayân Ad-Dalîl `Alâ Buṭlân At-Taḥlîl"* by Ibn Taymiyyah (p. 230).

Qudâmah, a form of impermissible stratagem is when someone signs a legal contract to reach a forbidden purpose or to do something prohibited by Allah, such as illegally avoiding a duty or shirking the payment of dues...etc.[1]

8- The majority of Muslim scholars agree that usurious stratagems are *shar`î* impermissible and invalid. Many of them point out that the condition for the prohibition and invalidity, or validity of a stratagem, depends if *Tawâṭu'* is used to perform the stratagem or not. In other words, *Tawâṭu'* is often the way used to perform the stratagem. In this regard, Ibn Taymiyyah and Ibnul-Qayyim said; "Trickery in usurious (*Ribâ*-based) transactions is often achieved by explicit (verbal) or implicit (convention-based) *Muwâṭa'ah* (prior agreement)."[2] This opinion can be clarified by these examples:

a) *`Înah*

9- Forbidden *`Înah* refers to a sale whereby one party, for instance, sells the commodity to the other for one hundred pounds, on a deferred payment basis, and repurchases it from him for eighty pounds, payable immediately. Apparently, this transaction consists of two deals, however, it is, in fact, nothing but a mere stratagem to practice usurious lending, and the commodity is used for no other purpose but to facilitate the usurious transaction. In other words, the deal in this case has nothing to do with the purposes and objectives of the sale, nor does it contain any of their elements. In this regard, Ibn Taymiyyah said; "*`Înah* refers to a deal whereby a commodity is sold to a person on credit and then bought from him on cash for a price lower than its credit price. The prior agreement (*Muwâṭa'ah*) to conclude the two transactions in this way makes them invalid since they both were used as a mere stratagem to practice a usurious loan or transaction."[3] Ibnul-Qayyim also said; "According to the Qur'ân, Sunnah, Arabic language, and custom, 'trade' refers to real transactions whereby the exchange of the price for the commodity is the ultimate goal.

(1) *"Al-Mughnî"* [6: 116]; *"Ighâthat Al-Lahfân"* [1: 339]; *"I`lâm Al-Muwaqqi`în"* [3: 252]; and *"Al-Muwâfaqât"* [2: 387 and 4: 201].

(2) *"I`lâm Al-Muwaqqi`în"* [3: 241]; and *"Bayân Ad-Dalîl `Alâ Buṭlân At-Taḥlîl"* Ibn Taymiyyah (p. 284).

(3) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 30].

However, transactions where both parties agree on a purely usurious deal, and conclude a form of sale as a stratagem to give such usurious transactions (which may include, for instance, lending 100 pounds for 120 pounds) a *Sharî`ah*-accepted form, have nothing to do with permissible forms of trade. In fact, such transactions are nothing but usurious deals."[1] He also said; "Loan is permitted only when the amount of money lent, i.e. the loan, is the same as the amount of money paid back, that is, without any interest or increase. However, if it implies increase or interest, whether directly or by means of some stratagem, then it is a forbidden loan. By the same token, the purpose of a sale is to exchange the price for the commodity, but not to be used as a stratagem to practice excess usury (*Ribâ Al Faḍl*) or delayed usury (*Ribâ An-Nasâ'*), where the ultimate aim of the parties is the usurious transaction, not the exchange of the commodity for the price."[2]

b) *Rajâ'* Sale

10- In *Fiqh* terminology, this is a sale whereby the seller has the intention of buying back the sold commodity. One of the most famous forms of this type of sale is when one party, who wants to obtain an interest-bearing loan, agrees to sell an income-earning asset to the lender. The lender will thus become entitled to the income of the asset as long as it remains in his ownership. The buyer then undertakes to return the sold asset to the seller whenever the seller pays back the price charged for the asset. In this manner, the lender (formally the 'buyer') regains the lent amount along with payment of the surreptitious interest.[3]

In this respect, Ash-Shawkânî says, "*Rajâ'* sale has many forms, some of which are categorically invalid, namely those intended to set an increase or interest on the lent amount. An example is when the lender wants to take an increase on the loan, but he and the borrower try to avoid the sin resulting from being implicated in an interest-based transaction. In this case, they agree that the lender buys an asset from the borrower in

(1) *"Ighâthat Al-Lahfân"* [2: 105].
(2) *"I`lâm Al-Muwaqqi`în"* [3: 250].
(3) *"Fatâwâ Ṣiddîq Ḥasan Khân"* (pp. 783 and 784); and "*`Uqûd Az-Zabarjad Fî Jîd Masâ'il `Allâmat Ḍamad"* by Ash-Shawkânî (pp. 225 and 226).

return for the loan amount, say 100 dirhams, on the basis that the lender is entitled to the income of the asset against the loan. Thus, the intended goal of such a transaction is not the sale, but the interest."[1] Ash-Shawkânî added, "If the sale transaction is used as a stratagem to charge an interest on the loan, then it is invalid, because both parties, in such a case, did not agree to execute the sale according to the conditions set forth by Allah, the Almighty, but rather they sought a stratagem to do something forbidden by Allah, Glorified Be He. Therefore, the sale transaction is invalid, and the lender must give the asset's income back to the borrower, and take back the price of the asset, i.e. the loan."[2]

Ibnul-Qayyim said; "The great corruption in *Ribâ* (usury) cannot be removed by just changing its name from *Ribâ* to 'transaction', or by changing its form to another form, while both parties have agreed to do such *Ribâ*-based transaction before they conclude the contract. In fact, they agreed on a purely usurious transaction before concluding the contract, and then changed its name and form to a sale transaction. It is not a sale transaction at all, but rather a stratagem meant to do something forbidden by Allah, the Almighty, and His Messenger (Peace be upon him)."[3] In the book *"Majmû' Fatâwâ Ibn Taymiyyah"*, it is stated that "If this transaction implies that one party, i.e. the borrower, takes the dirhams, i.e. the loan, while the other party, i.e. the lender, benefits from the borrower's asset during the period of the loan, and when the borrower pays back the dirhams, the lender returns back the asset, then such a transaction is undoubtedly prohibited. This is because in this transaction the income of the asset taken by the lender is an interest, which changes the whole transaction into a clear form of *Ribâ* (usury). Another form of this transaction implies that both parties agree that the borrower sells his asset to the lender for a specific price, and the lender then rents it to the borrower for a certain period on the basis that the lender will return the asset back to the borrower once he takes back the price, i.e. the loan. In this transaction, it is clear that the borrower paid an increase on the loan represented in the rent he paid to the lender during the period of the loan,

(1) "*'Uqûd Az-Zabarjad*" (p. 225).
(2) Ibid. (p. 227).
(3) *"Ighâthat Al-Lahfân"* [1: 350].

which turns the transaction into an interest-based loan. Thus, both forms of this transaction are forbidden."[1]

c) *Tawâṭu'* on *Ribâ Al-Faḍl*

11- In his book *"Al-Mughnî"*, Ibn Qudâmah said; "If one sells half a bushel of bad dates for dirhams, and then buys good dates with such dirhams, or sells a complete dinar (dinar *Saḥîḥ*) for dirhams, and then buys *Qurâḍah* (a small piece of golden and silver)[2] with such dirhams, the transaction is valid, as in this form it does not involve any stratagem. This opinion depends on the *ḥadîth* narrated by Abû Sa`îd Al-Khudrî and Abû Hurayrah that:

> *«Allah's Messenger employed someone as a governor at Khaybar. When the man came to Medina, he brought with him dates called Janîb. The Prophet asked him; 'Are all the dates of Khaybar of this kind?' The man replied; 'No, we exchange two Ṣâ`s (a unit of measure equal to 2172 gm) of inferior quality dates for one Ṣâ` of this kind of dates (i.e. Janîb), or exchange three Ṣâ`s for two of it.' On that, the Prophet (Peace be upon him) said; 'Don't do so [as it is a kind of Ribâ (a usurious transactions)]. Sell the dates of inferior quality for money, and then buy Janîb with the price.'»*[3]

According to this *ḥadîth*, the Messenger of Allah (Peace be upon him) did not order the man to buy the good dates from someone else other than the one to whom he sold the bad dates, which implies that such a transaction is not prohibited. This is because the person, in such a transaction, sold a commodity, i.e. bad dates, for a commodity of another species, i.e. dirahms, without any condition or *Muwâṭa'ah* (agreement). This makes the transaction valid, as though he bought the good dates from someone else. However, if the two men previously agreed to conclude the transaction in such a way, then it would be invalid and regarded as a forbidden stratagem. This opinion is adopted by Imam Mâlik."[4]

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(1) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 333, 334, and 335].

(2) *"Al-Muṭli`"* (p. 241); *"Ash-Sharḥ Al-Kabîr `Alâ Al-Mughnî"* [12: 82]; and *"Ma`ûnat Ulî An-Nuhâ"* [4: 206].

(3) Related by Al-Bukhârî, Muslim, At-Tirmidhî, An-Nasâ'î, and Mâlik (*"Saḥîḥ Al-Bukhârî"* [3: 97]; *"Saḥîḥ Muslim"* [3: 1208]; *"`Âriḍat Al-Aḥwadhî"* [5: 249]; *"Al-Muwaṭṭa"* [2: 632]; and *"Sunan An-Nasâ'î"* [7: 244]).

(4) *"Al-Mughnî"* [6: 114-116]; and *"Ash-Sharḥ Al-Kabîr `Alâ Al-Muqni`"* [12: 111 and 112].

Ibnul-Qayyim said; "This opinion is also supported by the Prophet's saying, …but sell the mixed dates (of inferior quality) for money, and then buy the good dates with that money."

This means that a second sale contract should be initiated and executed after finishing the first one. However, if both parties agree, from the beginning, to conclude the two sale contracts, then the second contract cannot be regarded as a separate contract, but rather as being complementary to the first one. According to the literal meaning of the *ḥadîth*, the Prophet (Peace be upon him) ordered the two contracts to be separate and independent from one another, not to be integral to and dependent on each other."(1)

Ibnul-Qayyim added, "If one usuriously sells a commodity to another while he intends to use the price to buy from the same person a commodity of the same kind (either more or less of it), then there are two possibilities; first, the two parties agreed explicitly or implicitly, according to custom, on the second purchase. Second, they did not agree, either explicitly or implicitly. In the case of the first possibility, the transaction will be invalid. This is because the aim of this transaction is not to exchange the commodity for the price, but rather, to exchange a commodity for another commodity of the same kind. Also, in such a transaction, the price is used only as a stratagem to practice *Ribâ*, which makes it similar to the cursed *Muḥallil* in the *Taḥlîl* contract."(2)

12- Another example is the opinion of the *Ḥanbalî* scholars regarding the transaction in which A buys a dinar from B for, say, 10 dirhams, and each receives his commodity, i.e. dirhams or dinar, and after that A buys from B 9 dirhams for the same dinar. In such a case, the transaction is valid if they did not agree previously to conclude the two transactions in this way. However, it will be invalid if they agreed on such a matter, since the transaction will be regarded as a means to practice excess usury (*Ribâ Al-Faḍl*). In the book *"Ma`ûnat Ulî An-Nuhâ"* it is stated that, "Either party of the exchange transaction may buy from the other the same currency the

(1) *"I`lâm Al-Muwaqqi`în"* [3: 238]; and *"Ighâthat Al-Lahfân"* [2: 103].
(2) *"I`lâm Al-Muwaqqi`în"* [3: 242]; and *"Bayân Ad-Dalîl"* by Ibn Taymiyyah (p. 284).

latter bought from him if there is no previous agreement between them on such a transaction. This is because in such a transaction the commodity is sold for another commodity of a different species, which makes the transaction valid, as though the other party was different in the second transaction."(1) In the book *"Al-Inṣâf"* by Al-Mirdâwî, it is also stated that, "After both parties have finished exchanging and receiving the currencies, it is permissible for one party to buy from the other currencies of the same kind they exchanged in the first transaction, but only if there was no previous agreement to do so. This is according to the soundest opinion in the school, which is stated in "*Al-Mughnî*", *"Ash-Sharḥ"*, *"Sharḥ Ibn Ruzayn"*, *"Al-Furû`"* and other books."(2)

Ibn Muflih said; "After both parties have finished exchanging the currencies, it is permissible for one party to buy from the other currencies of the same kind they exchanged in the first transaction, but only if there is no previous agreement to do so."(3)

Second Form: *Muwâṯa'ah* on Usurious Means

13- In the Arabic language, the word *'Dharî`ah'* (the means) refers to the course of action taken to do something, and the statement *'Sadd Adh-Dharâ'i`'* (blocking the means which may lead to an expected evil) refers to the method adopted to prevent such means from being used.(4)

In *Fiqh* terminology, the statement *'Sadd Adh-Dharâ'i`'* refers to the prevention of using permissible practices as a means to perform impermissible and prohibited acts. In this respect, the Judge `Abdul-Wahhâb Al-Baghdâdî said; *'Sadd Adh-Dharâ'i`'* is to prevent the permissible act in case there is a strong suspicion that it is used as a means to perform prohibited practices."(5)

(1) *"Ma`ûnat Ulî An-Nuhâ"*; and *"Sharḥ Al-Muntahâ"* [4: 227].
(2) *"Al-Inṣâf"* [12: 125].
(3) *"Al-Furû`"* [6: 313].
(4) *"Al-Miṣbâḥ Al-Munîr"* [1: 247].
(5) *"Al-Ma`ûnah"* by Judge `Abdul-Wahhâb [2: 996]; *"`Iqd Al-Jawâhir Ath-Thamînah"* [2: 441]; *"Al-Muwâfaqât"* [4: 199]; *"Irshâd Al-fuḥûl"* (p. 246); and *"Bayân Ad-Dalîl `Alâ Buṭlân At-Taḥlîl"* (p. 352).

According to Ibn Taymiyyah, the difference between *'Ḥîlah'* (stratagem) and *'Sadd Adh-Dharâ'i` '* is that *'Ḥîlah'* is associated with its performer's intention to do something legally prohibited, and, accordingly, the performer must be prevented from fulfilling his corrupt intention. *Sadd Adh-Dharâ'i`*, however, is associated with the good intention of preventing *Dharî`ah* (a mean which may lead to an expected evil) from changing into *'Ḥîlah'*, and, accordingly, being used as a means for doing what is prohibited."[1]

14- Accordingly, every *'Muwâṯa'ah'* (agreement) on usurious means (*Dharâ'i` Rabawiyyah*), whose structure is very suspicious and is frequently used as a way to practice prohibited acts, should be deemed as a reason for prohibiting such means (*Dharâ'i`*) which are, in principal, permissible. This can be explained through the following two examples:

a) *Muwâṯa'ah* on Giving a Gift or Excess Repayment to the Lender

15- The consensus of the scholars is that any gift or excess in the repayment of a loan, whether in terms of quantity or quality and whether it is an asset or benefit, which is stipulated in the loan contract for the lender is a type of forbidden *Ribâ*.[2] The same applies if both parties to the contract agreed on such a gift or excess before concluding the contract, according to the soundest of the two opinions of scholars concerning this point.

In this regard, Ibn Taymiyyah said; "The scholars agreed that if the lender stipulates an excess in the repayment of the loan, the loan will be forbidden, and the same applies if both parties agree on such an excess, according to the soundest of the two opinions of scholars regarding this point."[3]

However, if the borrower repays the loan with an unsolicited increase, in quality or quantity, or gives the lender a gift after repaying the loan, then there is no problem in such a practice. Ibn Qudâmah said; "If the

(1) *"Tafsîr Âyâtin Ashkalat"* by Ibn Taymiyyah [2: 682].
(2) *"Ash-Sharḥ Al-Kabîr `Alâ Al-Muqni`"* [12: 342]; *"Al-Muhgnî"* [6: 436]; *"Az-Zakhîrah"* [5:289]; and *"Al-Ma`ûnah"* [2: 999].
(3) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 334].

borrower repays the loan with an increase in quality or quantity, the loan transaction is permissible."[1] Also, it is stated in the book *"Al-Muqni`"* and its explanation *"Al-Mubdi`"* that it is not permissible, in loan transactions, to stipulate what may possibly procure a benefit for the lender, such as allowing him to dwell in the borrower's home, or giving him an increase on the loan amount. However, if such a benefit or increase is given without a previous condition or agreement between the two parties, then it is permissible, according to the soundest opinion concerning this issue[2]. In this regard, the article (753) in *"Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Al-Imâm Aḥmad"* states, "It is permissible for the borrower to repay the loan with an increase or decrease in terms of quantity or quality, but only if there is no condition or previous agreement stipulating this."

b) *Muwâṯa'ah* on Combining a Sale with a Loan

16- It has been narrated that:

> *«The Prophet (Peace be upon him) prohibited giving a loan against a sale.»*[3]

Ibnul-Qayyim said; "Combining a loan with a sale transaction is prohibited because such a transaction can be used as a means for taking *Ribâ* on the loan, whereby the lender is paid back more than he lent, and the sale or lease transaction is used as a means to justify such a *Ribâ*-based practice.[4]" He also said; "The Prophet (Peace be upon him) forbade combining a loan with a sale. However, it is permissible to conclude each one independently. The reason is that combining the two transactions can be used as a means to practice a *Ribâ* transaction whereby the lender, for example, lends the borrower 1000 pounds, and

(1) *"Al-Kâfi"* [2: 93].
(2) *"Al-Mubdi`"* [4: 209].
(3) At-Tirmidhî said; It is a *Ḥasan* (good), *Ṣaḥîḥ* (authentic) *ḥadîth*. (See: *"Al-Muwaṭṭa'"* [2: 657]; *"Mukhtaṣar Sunan Abû Dâwûd"* by Al-Mundhirî [5: 144]; *"Musnad Aḥmad"* [2: 178]; "*`Âriḍat Al-Aḥwadhî"* [5: 241]; *"Mirqât Al-Mafâtîḥ"* [2: 323]; *"Nayl Al-Awṭâr"* [5: 179]; and *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 39]).
(4) *"Ighâthat Al-lahfân"* [1: 363]; *"Al-Muwâfaqât"* by Ash-Shâṭibî [3: 196]; "*Majmû` Fatâwâ Ibn Taymiyyah"* [29: 62]; *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyah"* (p. 142); and *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 39].

at the same time, sells him a commodity, whose real price is 800 pounds, for 1000 pounds. By doing so, the borrower would take 1800 pounds from the lender, and repay the sum as 2000 pounds, which is a pure form of *Ribâ*."[1] The scholars agree that the same ruling applies to the case of combining a loan with a *Salam* sale, a loan and exchange transaction, and a loan and a lease, since they are all forms of transactions combined with a loan transaction.[2]

17- It can be concluded from the *Faqîhs'* opinions that the cause of the prohibition is the presence of a condition or prior agreement when combining between a loan and another compensation-based transaction, meaning that if the combination between the two transactions takes place without any condition or prior agreement, then it is permissible. This is because in such a case there is no clear evidence that the combination is used as a means to practice an interest-based loan.[3]

Third Form: *Muwâṯa'ah* on *Shar`î* Solutions to Problematic Situations

18- According to the *fiqhî* scholars, stratagems, in the viewpoint of *Sharî`ah*, can be divided into two kinds:

First: Corrupt Stratagems which refer to those permissible contractual arrangements and other practices that may be used to achieve prohibited goals, such as permitting what the *Sharî`ah* has prohibited, shirking duties, deceiving people and performing other *shar`î*-banned practices. In this regard, Ibn Taymiyyah said; "Stratagems are of two kinds. One of them implies escaping duties and deceiving people by making them regard the right as wrong, and the wrong as right. This kind of stratagem is one which is dispraised by the scholars of the *Salaf* (Predecessors)."[4] He also said;

(1) *"I`lâm Al-Muwaqqi`în"* [3: 153].
(2) *"Bidâyat Al-Mujtahid"* [2: 162]; *"Al-Mughnî"* [6: 334]; *"Al-Qabas"* by Ibnul-`Arabî [2: 843]; *"Al-Mabsûṯ"* [14: 40]; *"Fatḥ Al-`Azîz"* [6: 80]; *"Ar-Rawḍah An-Nadiyyah"* [2: 104]; and *"Al-Ḥisbah"* (p. 20).
(3) *"Al-Ḥâwî"* by Al-Mâwardî [6: 431]; *"Ṯilbat Aṯ-Ṯalabah"* by An-nasafî (p. 249); *"Ash-Sharḥ Al-Kabîr `Alâ Al-Muqni`"* [12: 132]; *"Rawḍat Aṯ-Ṯâlibîn"* [3: 3987]; and *"Asnâ Al-Maṯâlib"* [2: 30].
(4) *"Ighâthat Al-Lahfân"* [1: 339].

"All stratagems intended to do something contradicting the *Sharî`ah* are forbidden, as well as the means used to perform such stratagems.(1)

Second: *Shar`î* acceptable solutions or strategies, which refers to the acts performed for the sake of avoiding committing sins, for achieving a permissible objective, for avoiding prohibited acts, or for fulfilling a *Sharî`ah* acceptable interest. In his book *"Ighâthat Al-lahfân"*, Ibnul- Qayyim said; "Stratagems are of two kinds; one is performed for the sake of doing what Allah, the Almighty, order us to do, or avoiding what Allah, the Al mighty, ordered us not to do as well as avoiding committing sins, getting one's right from a tyrant, or releasing a wronged person from the hands of a tyrant. All these stratagems are acceptable and should be done and taught."(2) In his answer to a question about stratagems, Ash-Sha`bî said; "There is no harm in stratagems as long as they are used for permissible acts and practices, such as those performed to avoid committing sins or to find a *shar`î* acceptable solution. However, the stratagems used for the sake of denying a person's right or deceiving people are impermissible."(3)

19- The criterion used to differentiate between the two kinds of stratagems is based on the objectives and intentions behind the acts and practices performed by such stratagems. That is, if the final objective in tended by the stratagem is permissible and compatible with the *shar`î* rulings, then the stratagem itself is permissible, and by the same token, if the end objective intended by the stratagem is forbidden or contrary to the *shar`î* rulings, then the stratagem is impermissible. In this respect, Ibnul-Qayyim said; "The stratagems conform to the final objective with regard to permissibility and prohibition. That is, if the objective is something good, then the stratagem is good, and vice versa, and if the objective intended by the stratagem belongs to the acts of obedience to Allah, the Almighty, the stratagem will be classified in the same category as well, but if it belongs to sins, then the stratagem itself falls in the same category."(4)

(1) *"Ighâthat Al-Lahfân"* [2: 86].
(2) Ibid.[1: 339].
(3) Ibid.[1: 383].
(4) Ibid. [1: 385].

20- In the light of the above, it can be concluded that the agreement of two or more parties to use *shar`î* solutions, i.e. acceptable stratagems, is permissible in case the means used to achieve such solution and the final objectives intended by them do not contradict the *Sharî`ah*, and in the case that such solutions do not lead to a certain or probable evil. This is because the agreement in such a case concerns contracts and practices permissible in principle and intended to achieve *shar`î* acceptable goals and certain or probable interests, which makes it a permissible agreement. In this regard, Ibnul-Qayyim said; "There is a difference between achieving *shar`î* acceptable goals by the means always used to achieve them, and achieving *shar`î*-banned goals by the means always used to achieve other goals. In other words, the difference in the two ways is clear in terms of the means and the objective. That is, the ways used to reach *shar`î* acceptable goals are those in which the means used imply no deception and the goals intended are *Sharî`ah*-compatible."(1)

21- One of the most well-known applications of this type in current Islamic financial transactions is agreement (*Muwâṭa'ah*) on monetization (*Tawarruq*). In this agreement the client agrees with the bank on two points; first, the client buys a commodity from the bank or from another seller, through the bank, for a specific deferred price. Second, the client empowers the bank to sell this commodity on his behalf to a third party, which has no relation with the bank, for a cash price equal to the market value of the commodity (i.e. the price of its like) so that the client receives the cash he needs. The bank is resorted to in such a transaction since it is more capable of managing such operations than the client, which protects the client from any great loss he may incur, whether in the local or international markets.

22- As for the permissibility of *Muwâṭa'ah* (prior agreement) on *Tawarruq*, it can be judged depending on two points; First, the *fiqhî* ruling on *Tawarruq*. Second, the *fiqhî* ruling on *Muwâṭa'ah* on *Tawarruq*.

a) In *fiqhî* terminology, *Tawarruq* refers to a transaction whereby one buys a commodity on a deferred payment basis, and then sells it

(1) *"Ighâthat Al-Lahfân"* [2: 86].

> for cash to someone other than the first seller to obtain cash. This transaction is permissible, according to the majority of scholars.(1)

This kind of transaction is called *Tawarruq* only by the *Ḥanbalî* scholars, since Imam Ash-Shâfi`î called it *Zarnaqah*, and Al-Azharî called it permissible *`Înah* in his book "Az-Zahir", where he said; "*Zarnaqah* is a transaction whereby one buys a commodity on credit for a specific price, and then sells it to someone else other than the first seller for cash, which is permissible according to the majority of scholars."

It is narrated concerning `Â'ishah (may Allah be pleased with her) that though she used to take her *`Aṭâ'* (allocation), which was 10000 dirahms, from Mu`âwiyah, she used to deal with *Zarnaqah*, which is the permissible form of *`Înah*.(2)

In their 15th session in holy Mecca on 11/7/1419 A.H., corresponding to 31/10/1998 A.D., The Islamic *Fiqh* Academy permitted *Tawarruq* transactions. Their resolution No. 5 states:

First: *Tawarruq* refers to the process of purchasing a commodity for a deferred price, and selling it to a party other than the first seller for a cash price for the sake of obtaining cash (*Wariq*).

Second: *Tawarruq* is a *shar`î*-permissible transaction, an opinion adopted by the majority of scholars. This is because the original ruling on sales is permissibility, depending on Allah's Saying:

> ***{"...whereas Allah has permitted trading and forbidden Ribâ (usury)"}***
>
> [Al-Baqarah (The Cow): 275]

However, this sale does not imply *Ribâ* (usury), whether explicitly, i.e. in its obvious form, or implicitly, i.e. intended by the parties to the sale. Also,

(1) *"Kashshâf Al-Qinâ`"* [3: 175]; *"Al-Furû`"* [6: 316]; *"Al-Mughnî"* [6: 263]; *"Al-Qawânîn Al-Fiqhiyyah"* (p. 277); and *"Sharḥ Muntahâ Al-Irâdât"* [2: 158]. Article no (234) of *"Majallat Al-Aḥkâm Ash-Shar`iyyah Al-Ḥanbaliyyah"* states, "*Tawarruq* transaction, whereby one buys a commodity on credit for a higher price and sells it for cash for a lower price to obtain cash, is permissible."

(2) *"Az-Zâhir"* (p. 216).

there is a need for such a kind of sale, for people who want to repay their debt, for example, or to marry...etc.

Third: A condition for this sale to be permissible is that the buyer does not sell the commodity for a lower price to the first seller, whether directly or indirectly, otherwise the sale will change into a prohibited *`Înah* sale due to the utilization of a usurious stratagem, which, thus, makes the contract prohibited.

b) As for *Muwâṭa'ah* on *Tawarruq*, it is permissible provided that the commodity is sold to a third party that has no relation to the first seller, and that the transaction does not cause the commodity to return back to the first seller for a cash price lower than its credit price due to any stratagems or means.

The cause of permissibility of such a transaction, i.e. *Tawarruq*, depends on the argument that *Tawâṭû'* or *Muwâṭa'ah* in such a case is a prior agreement to buy a commodity on a deferred payment basis from a seller, and then authorize the seller, or another person, to sell such a commod ity to a third party that has no relation to the first seller. Concluded in such a way, the whole transaction is *shar`i* permissible. It is also important to point out that each contract that constitutes the entire transaction is permissible, whether concluded separately or in combination with other contracts. This is because neither one of the contracts contradicts *Sharî`ah*, or is used as a means or a stratagem to do something banned by the *Sharî`ah*. Moreover, all con tracts com bined in the transaction help to achieve a probable in terest for the *Mutawariq* (monetization beneficiary) who needs liquidity. Accordingly, it can be concluded that *Tawâṭu'* on *Tawarruq* is permissible.

However, if the third party is an agent for the first seller in the purchase or buys (the third party) the commodity for himself by means of an ex plicit or implicit prior agreement (*Muwâṭa'ah*), the transaction will be invalid and impermissible.(1) This is because the transaction is such a case will be regard ed as *`Înah*, even if it is concluded in the form of *Tawarruq*, which

(1) *"Al-Mughnî"* [6: 263]; *"Al-Furû`"* [6: 315]; and *"`Iqd Al-Jawâhir Ath-Thamînah"* [2: 450].

makes it impermissible according to the *fiqhî* principle stating that the crucial factor in contracts is the objectives they are concluded for, not the form in which they are concluded. In this respect, Ibnul-Qayyim said; "The crucial factors in contracts are their real objectives, not the superficial meaning of their words,(1) and the real objectives of contracts are the cause of their permissibility or impermissibility, since Allah, Glorified Be He, does not regard the outer forms of contracts or the statements used in their formation, but rather, He regards the real intentions and objectives behind concluding such contracts."(2)

It is well known that *`Înah* is nothing but a banned usurious stratagem, as mentioned in Note (9) above. This is because the sale in such a transaction, i.e. *`Înah*, is a stratagem through which the commodity sold returns back to the first seller. Ibnul-Qayyim in this regard said; "If the contract is concluded only to be cancelled later on, then the contract itself is not the final objective of the transaction and, accordingly, it becomes of no importance",(3) This is unlike *Tawarruq* transactions whereby the sale contract is concluded to be fulfilled and, accordingly, the relationship between the first seller and the commodity ends completely, which is the ultimate end of sale transactions as stated in the *Sharî`ah*.

Fourth Form: *Muwâṭa'ah* on *Talji'ah* Sale

23- In Arabic, the word *'Talji'ah'* is derived from the word *'Iljâ"*, which means compulsion or coercion. Accordingly, the word *'Talji'ah'* means to force or compel someone to do something whose hidden intention differs from its declared intention.(4) From this linguistic meaning of the word *'Talji'ah'*, the *fiqhî* terminological meaning of the statement *'Talji'ah* sale' is derived. To illustrate, *Talji'ah* sale, in *fiqhî* terminology, means to conclude a contract that is not really intended, i.e. a simulated or unreal contract, as stated in article no (179) of *"Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ*

(1) *"I`lâm Al-Muwaqqi`în"* [3: 107].
(2) Ibid. [3: 245].
(3) "Ibid. [3: 240].
(4) *"Al-Mughrib"* [2: 242]; *"At-Tawqîf"* by Al-Minâwî (p. 154); and *"At-Ta`rîfât Al-Fiqhiyyah"* (p. 213).

Madhhab Al-Imâm Aḥmad". In this regard, *Faqîhs* regard *Talji'ah* sale as a transaction whereby both parties agree in advance to conclude a contract which they, in fact, do not intend. In other words, they conclude a simulated contract. Such a contract is concluded for many reasons, most important of which is to avoid or resist unjust practices exercised against one or both of them. So, it can be said that both parties to the contract agree secretly that it is not a real contact. In this respect, Ibn Taymiyyah said; *"Talji'ah* sale is an agree ment whereby both parties agree in advance to conclude a fake con tract in cases such as when someone wants to protect his own property from being illegally seized. In such a case, the owner of the property may agree with someone else to sell him his property through a fake contract to protect it from being taken illegally by an unjust person. This is why such a kind of sale is called *Talji'ah* sale, since one or both of the parties are forced to conclude such a simulated contract. Later, the *Talji'ah* contract came to refer to any kind of fake or simulated contract, regardless of its real intention."(1) In the same respect, the author of the book *"Ad-Durr Al-Mukhtâr"* said; *"Talji'ah* sale is an agreement whereby both parties conclude a contract they do not intend, i.e. a simulated contract, for the purpose of avoiding the danger of an enemy. That is, it is not a real contract."(2)

24- *Fiqhî* ruling on *Talji'ah* sale: In the book *"I`lâm Al-Muwaqqi`în"*, it is stated; "The third form of *Talji'ah* sale is when both parties agree in the contract to exchange a commodity for a certain price through a nominal, not real, sale, with the purpose of protecting such commodity from being taken illegally by an unjust person. This form of contract is invalid, even if both parties do not state in the contract that it is a fake sale. Judge `Iyâḍ said; "This opinion is concluded through a *Qiyâs* (analogical deduction) applied to Imam Aḥmad's and Imam Mâlik's opinions, and it is the opinion adopted by both Abû Yûsuf and Muḥammad Ibnul-Ḥasan Ash-Shaybânî." Imam Abû Ḥanîfah and Imam Ash-Shâfi`î said; "The contract cannot be regarded as a *Talji'ah* contract unless both parties stipulate this therein. The scholars invalidating such a contract argue

(1) *"Bayân Ad-Dalîl `Alâ Buṭlân At-Taḥlîl"* (p. 143).
(2) *"Ad-Durr Al-Mukhtâr Ma`a Radd Al-Muḥtâr"* [4: 244].

that the two parties do not really intend to conclude the contract, and intention is a prerequisite for the validity of the contract. On the other hand, the opinion of the scholars validating this contract depends on the idea that the condition stating that the contract is a fake one precedes the contract, while the contract is only affected by the conditions enshrined in it.(1) In this concern, the article no. (235) of *"Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Al-Imâm Aḥmad"* states, *"Talji'ah* sale is an invalid contract; that is, if the seller confesses that he is selling due to fear or to protect his property, the sale contract will be invalid."(2)

Fifth Form: *Muwâṯa'ah* on *Najsh*

25- In Arabic, the word *'Najsh'* implies elicitation and extraction, and this is why the hunter is called *'Nâjish'*, since he ferrets out his prey from its hideout.(3)

Ibn `Umar narreted:

> *«Allah's Prophet (Peace be upon him) forbade Najsh (outbidding) .»*(4)

Najsh in sale is to bid a high price for the commodity, not wit an intention to buy, but simply as a ploy to procure a high price that other potential buyers may start their offers from.(5) Ash-Shâfi`î said; "*Najsh* is to bid a high price for the commodity, not with an intention to buy but to deceive the one who really wants to buy the commodity into offering a high price for it."(6) Ibn Rajab said; "*Najash* is to bid a high price for a commodity without

(1) *"I`lâm Al-Muwaqqi`în"* [3: 104].
(2) *"Al-Mughnî"* by Ibn Qudâmah [6: 308].
(3) *"Tahdhîb Al-Asmâ' Wa Al-Lughât"* [2: 161]; *"Al-Mutli`"* (p. 235); *"Mu`jam Maqâyîs Al-Lughah"* [5: 394]; *"Fatḥ Al-Bârî"* [4: 355]; *"An-Nawawî `Alâ Muslim"* [10: 159]; *"Al-Mufhim"* by Al-Qurṭubî [4: 367]; and *"Ikhtilâf Al-`Irâqiyyîn"* by Ash-Shâfi`î [3: 80]. Ibn Tyammyah said; "The origin of the word *"Najsh"* is *"Khatl"*, which means deception, and this is why the hunter is called *"Nâjsih"* since he deceives the prey to be able to catch it."
(4) *"Al-Bukhârî Ma`a Al-Fatḥ"* [4: 355]; *"Muslim Bi-Sharḥ An-Nawawî"* [10: 159]; *"Sunan An-Nasâ'î"* [7: 227]; *"Sunan Ibn Mâjah"* [2: 734]; *"Al-Muwaṭṭa'"* [2: 684]; and *"Musnad Aḥmad"* [2: 7, 63, 108, 156, and 319].
(5) *"Ṭarḥ At-Tathrîb"* by Al-`Irâqî [6: 61].
(6) *"Ikhtilâf Al-`Irâqiyyîn"* by Ash-Shâfi`î [3: 80]; and *"Fatḥ Al-Bârî"* [4: 355].

any intention to buy, but just to benefit the seller or cause a loss to the buyer by increasing the price of the commodity."[1]

26- *Najsh* is prohibited by the majority of scholars. In this respect, Ash-Shâfi`î said; "*Najsh* is a kind of deception, and contradicts the *shar`î* principles."[2]

The *fiqhî* scholars state that *Najsh* may be practiced by someone without the knowledge of the seller, and consequently, the guilt is confined to only him. But *Najsh* may be used by the seller himself, while the buyer does not know that this person is the owner of the goods, and thereupon the guilt is on the seller. In other cases, the seller may agree with the *'Nâjish'* (the one who practices *Najsh*) to practice *Najsh* in the sale, and in this case they both bear the guilt.[3]

27- Thereupon, if *Najsh* is practiced in the sale through a prior agreement (*Muwâṭa'ah*) with the seller, and the buyer is deceived into buying the commodity but then discovers the stratagem, the sale can be judged in terms of validity and enforceability depending on three *fiqhî* opinions:

First: According to the soundest opinion in the *Ḥanafî* and *Shâfi`î* Schools, and according to a report on Imam Aḥmad, the sale is valid and binding, and the buyer has no option to cancel it. This is because deception is the result of the buyer's negligence, since he did not consider the sale carefully, nor did he consult experienced people, and chose to increase the price willingly.[4]

Second: According to *Ẓâhirî* scholars, some *Ḥadîth* scholars, and another report on Aḥmad, the sale is invalid and must be canceled, according to

(1) *"Jâmi` Al-`Ulûm Wa Al-Ḥikam"* [2: 263]; see the definition of *Najsh* in the book *"Al-Muwaṭṭa'"* [2: 684]; *"Al-Mu`lim"* by Al-Mâzarî [2: 92]; *"Al-Qabas"* by Ibnul-`Arabî [2: 851]; *"Al-Baḥr Ar-Râ'iq"* [6: 107]; *"Tuḥfat Al-Muḥtâj"* [4: 315]; *"Al-Muḥallâ"* [8:448]; *"Al-Ḥâwî"* by Al-Mâwardî [6: 421]; and *"Al-Mughnî"* by Ibn Qudâmah [6: 304].

(2) *"Ikhtilâf Al-`Irâqiyyîn"* [3: 80]; and "*Mukhtaṣar Al-Muzanî Ma`a Al-Ḥâwî"* [6: 240].

(3) "*Ṭarḥ At-Tathrîb"* [6: 62]; *"Fatḥ Al-Bârî"* [4: 355]; and "*Al-Istidhkâr"* [5: 541].

(4) *"Jâmi` Al-`Ulûm Wa Al-Ḥikam"* [2: 264]; *"Al-Mughnî"* [6: 305]; *"An-Nawawî `Alâ Muslim"* [10: 159]; *"Fatḥ Al-Bârî"* [4: 355]; *"Al-Bayân"* by Al-`Umrânî [5: 347]; *"Al-Ḥâwî"* by Al-Mâwardî [6: 421]; *"Al-Baḥr Ar-Râ'iq"* [6: 107]; *"Asnâ Al-Maṭâlib"* [2: 40]; "*Al-Istidhkâr"* [5: 541]; and *"Ikhtilâf Al-`Irâqiyyîn"* [3: 80].

the *shar`î* principle stating that the prohibition of an act implies that, if it occurs, it is void.(1)

Third: According to the widely-circulating opinion in the *Ḥanbalî* and *Mâlikî* Schools, and according to an opinion attributed to Ibn Ḥazm and *Shâfi`î* scholars, and validated by Al-Ghazâlî, one of their Imams, the buyer has the option to cancel or complete the sale, because this is a form of deception carried out by the seller, making the sale similar to *'Taṣriyah'*, i.e. binding the animal's teats so that the milk accumulates in its udder with the aim of deceiving the buyer.(2) Al-Ghazâlî said; "If *Najsh* is practiced without prior agreement (*Muwâṭa'ah*) with the seller, the guilt is on the one who practiced it, and the sale will be valid. However, the scholars disagree concerning the buyer's option to cancel the sale in case *Najsh* is preceded by a prior agreement with the seller. The buyer should be given the option (to cancel or complete the sale), because such a sale is based on a kind of deception similar to that practiced in *'Muṣrrâh'* (binding the animal's teats so that the milk accumulates in its udder) and the interception of the caravan (of goods) en route (to buy the goods for other than the market price)."(3) At the same time, it should be pointed out that the *Ḥanbalî* scholars stated that in order for the buyer to be entitled to the option to cancel the contract, the sale must have been concluded under a form of extraordinary deception. Also, Ibn Ḥazm stated that the buyer would not be entitled to the right of option unless he buys the commodity for a price higher than its market value (the price of the like). In this respect, Ibn Rajab said; "In this case, the buyer has the option either to cancel the sale, or to go ahead with it and be given back the additional amount he paid over the commodity price, which is the opinion stated by scholars of our persuasion."(4)

(1) *"Al-Muḥallâ"* [8: 449]; *"Al-Mufhim"* [4: 367]; *"Bidâyat Al-Mujtahid"* [2: 167]; *"Jâmi` Al-`Ulûm Wa Al-Ḥikam"* [2: 263]; *"Al-Istidhkâr"* [5: 542]; *"Al-Mughnî"* [6: 305]; *"Tarḥ At-Tathrîb"* [6: 62]; and *"Fatḥ Al-Bârî"* [4: 355].

(2) *"Al-Mu`lim"* by Al-Mâzarî [2: 92]; *"Al-Muhdhdhab"* [1: 298]; *"Al-Ḥâwî"* [6: 421]; *"Al-Bayân"* by Al-`Umrânî [5: 346]; *"Al-Mughnî"* [6: 305]; *"Sharḥ Muntahâ Al-Irâdât"* [2: 173]; *"Al-Muḥallâ"* [8: 448]; *"Mughnî Al-Muḥtâj"* [2: 37]; *"Tuḥfat Al-Muḥtâj"* [4: 315]; *"Al-Kâfî"* by Ibn `Abdul-Barr (p. 365); *"Tarḥ At-Tathrîb"* [6: 62]; *"Fatḥ Al-Bârî"* [4: 356]; and *"Kashshâf Al-Qinâ`"* [3: 200].

(3) *"Iḥyâ' `Ulûm Ad-Dîn"* [2: 71].

(4) *"Jâmi` Al-`Ulûm Wa Al-Ḥikam"* [2: 264].

Sixth Form: *Muwâṯa'ah* on Monopoly

28- Ibn Taymiyyah and Ibnul-Qayyim, stated that if the members of a certain craft unjustly agree to increase the price of their vital product or service, this will be regarded as an act of injustice and corruption in the land, which necessitates government intervention to impose a set price for such a product or service, and force the craftsmen to provide their services for prices equal to the prices of similar products and services. This should be done so that people find no difficulty, in terms of the price, in obtaining such necessary products and services.

By the same token, if a certain group of merchants trading in basic commodities agree to buy such commodities from their providers for a lower price, or to sell them for a higher price, the government should intervene by setting fixed prices for their products and compelling them to buy and sell according to the just value. This is because conceding to their plan can be regarded as aiding them in committing unjust practices.(1) Allah, the Almighty, says:

> ***{"Help you one another in Al-Birr and At-Taqwâ (virtue, righteousness and piety); but do not help one another in sin and transgression. And fear Allah. Verily, Allah is Severe in punishment."}***
>
> [Al-Mâ'idah (The Table): 2]

In this regard, it may be useful to cite this quotation from the *Fatâwâ* (legal opinions) of Ibn Taymiyyah: "This is why some scholars, including Abû Ḥanîfah and his pupils, prohibited those working for a wage in the property division from working in a syndicate, so that they may not increase the wage of their necessary service. Accordingly, the sellers are also prohibited from agreeing on selling their commodities for prices they determine among themselves, and the buyers are prohibited from agreeing among themselves to buy commodities with the intention of lowering their prices. Also, if the sellers or the buyers of a commodity agree on selling or

(1) *"Aṭ-Ṭuruq Al-Ḥukmiyyah"* by Ibnul-Qayyim (p. 208); and *"Al-Ḥisbah"* by Ibn Taymiyyah (p. 26).

buying it for a price that is higher or lower than its normal price, this will be more detrimental and inequitable than other prohibited activities, such as intercepting the caravans en route (with the intention of buying goods before the seller knows the market price), or the practice of a townsman selling on behalf of the desert man (which is prohibited by the Prophet, peace be upon him), or *Najsh*. This is because by doing so they agree to do wrong and force people to sell their commodities for prices lower than they should be or to buy other commodities for prices higher than they should be. In fact, sale and purchase transactions are very important for the people, and thus, the commodities which most people trade in should be sold at their regular value."(1)

Seventh Form: *Muwâṯa'ah* in Modern Transactions

29- The combined contraction is one of the new financial transactions which has been invented these days. It refers to contractual arrangements which comprise a number of contracts and undertakings that the parties agree beforehand to carry out in a specific manner and according to an agreed number of successive stages. Such arrangements aim to achieve a given purpose or interest for the parties to the contract. According to financial and banking practices, the agreement preceding the signing of the combined contracts is to be regarded and is binding on both parties. This is because it is based on a collection of connected contracts intended to achieve specific purposes according to a set of conditions that manage such contracts as one indivisible unit. This can be clarified by the following examples:

a) *Murâbaḥah* to a Purchase Order

30- This process is usually practiced in Islamic banks according to the following regulations:

i) The client requests the bank to buy a certain commodity, and it buys it for him on a deferred payment basis for a specified period on a *Murâbaḥah* basis, which includes the total cost of the commodity plus the profit margin agreed upon. The bank then agrees

(1) *"Majmû` Fatâwâ Ibn Taymiyyah"* [28: 78].

to undertake to buy the commodity for the agreed upon price and then sell it to the client, and the client agrees to undertake to buy the commodity from the bank on *Murâbaḥah* basis for the agreed upon deferred price.

ii) The bank, then, actually buys the required commodity, and sells it the client on *Murâbaḥah* basis and according to the prior agreement.

This process represents an integrated system and a single transaction with connected stages, which both parties agreed upon in advance before they concluded and executed the contracts and undertakings therein, in order to achieve a specific financial goal. Thus, if any of these stages is not performed properly, the ultimate goal of such a transaction cannot be achieved as required, which is detrimental for either, or both, parties to the transaction.(1)

b) *Ijârah Muntahiyah Bit-Tamlîk*

31- This transaction is carried out by Islamic banks mostly on the basis of an agreement between the bank and the client as follows:

i) The bank leases the asset to the client at a specific rent and for a specific period through a contract upon which all the *shar`î* rulings pertaining to the *Ijârah* (lease) of assets are applied.

ii) The bank promises the client to transfer the title of this asset to him at the end of the *Ijârah* contract and after the client pays all the installments due to the bank. After such requirements are fulfilled the bank transfers the ownership of the asset to the client through a separate contract. Another form is that the bank transfers the ownership of the asset by means of a separate deferred (*Muḍâf*) contract which takes effect after the end of the *Ijârah* contract, and which is conditional on the payment of all *Ijârah* installments.

32- Since the purpose of *Ijârah Muntahiyah Bit-Tamlîk* (the lease-into-ownership transaction) is to finance the client (who is the lessee in the

(1) See resolutions No. [40 and 41 (2:5) (3:5)] issued by The Islamic *Fiqh* Academy in Jeddah (Subordinate to the Organization of Islamic Conferences) in its 5th Session concluded in Kuwait from 1 to 6/5 1409 A.H., corresponding to 10 to 15/12/1988 A.D., regarding the fulfillment of promises and *Murâbaḥah* to a purchase order.

first contract and the donee in the second) using a *shar`î* acceptable way that implies the combination of *Ijârah* and *Hibah* (gift) contracts in one indivisible transaction, as stated above. The agreement that precedes the transaction has the same validity and binding nature of the proper conditions within the transaction itself. This is because such a prior agreement specifies the initial goal intended by the parties through this combined transaction, and which cannot be achieved if one of the conditions agreed upon therein is violated.(1)

c) Diminishing *Mushârakah*

33- This is a process whereby two parties agree to enter into partnership in a project or an asset they buy, provided that the equity share of one partner (the financing bank) is transferred gradually through separate sale contracts to the other partner (the client). In fact, such a transaction is a financial scheme based on a partnership between the bank and a client to buy an income-earning asset, where the bank sells its share to the client gradually. This transaction is used as a *shar`î* acceptable alternative for interest-based loans, where the bank can provide finance to its client while avoiding interest-based transactions.

34- According to the preliminary agreement (*Muwâṭa'ah*) that precedes it, diminishing *Mushârakah* consists of a combination of connected under takings and contracts, which are executed successively, and aim to perform a certain financial scheme. Both parties to the diminishing *Mushârakah* agree on the following:

i) To enter into a partnership to buy an income-earning project or asset.

ii) To perform mutual undertakings on the following:

First: They lease the asset they bought to a third party; where each party is entitled to a portion of the lease income equivalent to its share in the asset, or the financing party leases its share to the client (the partner).

(1) See resolution No. [110 (4:12)] issued by The Islamic *Fiqh* Academy in Jeddah (Subordinate to the Organization of Islamic Conferences) in its 5th Session concluded in Riyadh from 28 to 6/1 1421 A.H., corresponding to 23 to 28/9/2000 A.D., regarding *Ijârah Muntahiyah Bit-Tamlîk*.

Second: The first partner (the client) buys the share of the second partner (the financing partner) gradually, through successive sale contracts according to a specific schedule they agree upon. Accordingly, the client's share in the asset increases while the financing partner's share decreases by the same amount, and thereupon the latter's share in the lease income decreases. This process continues until the ownership of the financing partner's share is fully transferred to the client.

iii) Both parties lease the shared asset to a third party through a separate lease contract, and the lease income is divided between them according to each partner's share in the asset, or the financing partner leases its share to the client against a certain rent specified in a separate lease contract.

iv) Successive sale contracts are to be concluded between the financing partner and the client after previously agreed upon time periods until the ownership of the financer's share is completely transferred to the client under such contracts, which are successive and separate from one another in terms of conclusion, execution, and their periods.

v) In case a damage or loss happens to the asset before the end of the term of the diminishing partnership, each party shall bear a share of the loss or damage proportionate to its share in the asset.

35- According to contemporary financial and banking practices, the agreement (*Muwâṯa'ah*) that precedes such a transaction is enforceable and binding, due to the indivisibility and non-interchangeability of such a scheme, which aims at performing a unified financing plan.

By the same token, the undertakings within the agreement are binding on both parties because they constitute part of the whole transaction, which is concluded according to specific conditions governing it as a whole unit. In other words, if such undertakings are not binding on both parties, then it will not be certain that the goals behind making such undertakings will be achieved, and there will be no need for either party to engage in such a risky process.(1)

(1) *"Al-Mushârakah Al-Mutanâqiṣah Wa Aḥkâmihâ Fî Daw' Ḍawâbiṭ Al-'Uqûd Al-Mustajaddah"* by Dr. Nazîh Ḥammâd [2: 513] (*Majallat Al-Fiqh Al-Islâmî* in Jeddah, issue no. 13).

d) Documentary Credit

36- Documentary Credit is a process consisting of a collection of connected contracts and pledges preceded by an agreement (*Muwâṭa'ah*) between the contracting parties on the way, the order, and the form in which they will be concluded and executed. These conditions and pledg es are governed by binding conditions as one indivisible unit.

This transaction consists of a combination of contracts and undertakings as follows:

i) A binding undertaking from the client to buy, and a binding undertaking from the bank to sell.

ii) A power of attorney from the bank to its correspondent to buy the commodity and pay the price.

iii) The sale of the commodity by the seller to the bank, represented by its correspondent.

iv) The sale of the commodity by the bank to the client.

37- It is important to point out that the scheme of documentary credit has been invented to perform a certain financial service that did not exist before. This service or role lies in arranging the relationship and executing the transaction between the importer and the exporter through the banks (the bank of the buyer and its correspondents in the seller's country, and the bank of the seller). This reassures the buyer that the goods he requested will be shipped and the seller will also be sure that he will get the price of the goods, since there had been no previous dealings between the buyer and the seller regarding this matter. In other words, if they had dealt with one another before, there would be no need for such a system, since the buyer would simply ask the seller to ship the goods and, in return, the buyer would transfer the price using conventional methods.

Accordingly, documentary creditcan beregarded as a unified, connected system invented in the world of finance as a method of guaranteeing the rights of both the buyer and the seller, which is achieved through the mediation of the banks. In other words, through documentary credit, the buyer can be sure

that his conditions regarding the sold object will be met, and the seller, on the other hand, can be sure that he will get the price if he ships the goods according to the specifications agreed upon. Documentary credit, as a financial scheme, is designed as an integrated group whose components cannot be changed and none of them can be dropped, and the overall aim is to achieve tangible interests for the contracting parties.

38- Documentary credit can be summed up as the buyer requesting the bank to open a credit for the seller when the bank receives the shipping documents, the bill, the insurance policy and other documents that the bank needs (such as the certificate stating the origin of the goods and the certificate confirming that the goods were inspected at the dock by the relevant authorities to check their quality and conformity to the required specifications).

The buyer should also deposit the price in his bank. However, in most cases, the bank requests only 10% to 20% of the price at the opening of the credit. The bank then informs its correspondent in the seller's country that a credit has been opened and also communicates the conditions of such a credit. In return, the correspondent bank informs the seller, who prepares to ship the goods and sends the required documents to the correspondent bank, or to its bank, if convenient. Thereupon, the bank pays the price to the seller immediately, and sends the documents to the bank of the buyer, which informs the buyer about the arrival of the documents. At this stage, the buyer pays the remaining amount to the bank, and receives the documents by which he can receive the goods on arrival.

Due to the fact that dealing through documentary credit is often made by international banks, there arose the need to lay down its regulations according to the practices adopted by the banks in their international transactions. This is why these regulations have been set in forms designed by the International Chamber of Commerce, and stated in international agreements, so that they would become binding on contracting parties all over the world.

The idea of documentary credit in this system is based on the fact that banks do not deal in the trading of goods but, rather, they deal through

the documents they are requested to handle. In other words, the bank does not have or possess the goods unless the buyer abstains from paying the remaining amount, where the bank, in this case, sells the goods to obtain its remaining dues.(1)

(1) *"Athar Taghayyur Al-Wâqi` Fî Al-Ḥukm Taghyîran Wa Istiḥdâthan"* by Dr. Jamâlud-Dîn `Aṭiyyah (p. 43); and *"Al-Bunûk Al-Islâmiyyah"* by Dr. `Aṭiyyah (p. 123).

Topic Two
Enforceability of *Muwâṯa'ah* on Contracts and Pledges

39- According to *Fiqh*, *Muwâṯa'ah* (prior agreement) on contracts and (binding) undertakings has three features:

First: It is an agreement between two parties to fulfill contracts and undertakings in the future.

Second: This agreement has the same effect as any condition preceding these contracts and undertakings, and the *fiqhî* rulings with regard to permissibility and prohibition, validity and invalidity, obligation and enforceability...etc applicable to such a condition also apply to it.(1) In this respect, Ibn Taymiyyah said; "If both parties agree on something prior to the contract, and then they conclude the contract, the contract will be relevant to the preceding agreement."(2)

Third: Enforceability of *Muwâṯa'ah* (prior agreement) is the same as enforceability of the conditions preceding the contracts (and the attached undertakings). There are two *fiqhî* opinions regarding this point:

a) The opinion of *Ḥanbalî*, *Ẓâhirî* and *Shâfi`î* scholars, which is also reported to be adopted by Imam Aḥmad. According to this opinion,

(1) Refer to Notes (11, 15 and 17) of the research, and study the *fiqhî* statements regarding this issue.

(2) *"Naẓariyyat Al-`Aqd"* by Ibn Taymiyyah (p. 204).

the condition preceding the contract cannot be regarded as a condition included therein, and it has no effect on the contract at all. Accordingly, it is not a must to fulfill such a condition, and it can be cancelled. This is because all conditions and agreements preceding the contract are of no importance, and have no binding nature because the contracting parties did not intend to observe or fulfill them, since they are not expressed clearly within the contract.(1)

In his book *"Al-Bayân"*, Al-`Umrânî said; "The condition preceding the contract cannot be attached thereto if it is valid, and cannot invalidate the contract if it is void."(2) Also, in his book *"Al-Majmû`"*, An-Nawawî said; "A preceding condition cannot be attached to the contract, nor does it affect the contract, and thus it is not necessary to fulfill it. It also cannot invalidate the contract if it is a void condition, since whatever is agreed upon before the contract is irrelevant. This opinion is stated that way, and our fellow scholars agree upon it."

b) The second opinion is the soundest opinion in the *Hanbalî* Schools regarding this issue, and it is the opinion of the *Mâlikî* School. This opinion says: the preceding condition has the same validity, binding nature, nullity and voidness, and effect as a normal condition within the contract. That is, if the contracting parties agree on something, and then they conclude the contract, the contract will be dependent on the parties' preceding agreement, since there is no difference between the condition stated in the contract and the condition agreed upon in advance and not stated in the contract, as long as the contract depends on such a preceding condition. In other words, the implicit condition is the same as the explicit one, and the condition laid down according to custom is the same as that expressed clearly, and intentions are binding in contracts. (3)

(1) *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 108]; *"Al-Muhallâ"* [8: 412]; and *"Al-`Uqûd Wa Ash-Shurût Wa Al-Khayârât"* by Ahmad Ibrâhîm (p. 711).

(2) *"Al-Bayân Sharh Al-Muhadhdhab"* [5: 137].

(3) *"I`lâm Al-Muwaqqi`în"* [3: 105, 145, 212, and 241]; *"Kashshâf Al-Qinâ`"* [5: 98]; *"Bayân Ad-Dalîl `Alâ Butlân At-Tahlîl"* (p. 533); *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 36]; *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 108]; *"Al-`Uqûd Wa Ash-Shurût Wa Al-Khayârât"* by Ahmad Ibrâhîm (p. 771); and *"Al-Madkhal Al-Fiqhî Al-`Âmm"* by Az-Zarqâ [1: 487].

In his book *"Naẕariyyat Al-`Aqd"*, Ibn Taymiyyah said; "The basic opinion in *Fiqh* is that the conditions that precede the contract are the same as those included therein; that is, if the contracting parties agree on something, and then they conclude the contract, the contract will be dependent on such a preceding agreement."(1) Also, he (may Allah have mercy upon him) said in his book *"Al-Fatâwâ Al-Kubrâ"*, "The well-known opinion in Imam Aḥmad's writings and original books, which is adopted by his early pupils, and which is the same as the opinion of the people of Medina regarding this issue, is that: the preceding condition is the same as the condition stated within the contract; meaning, if the contracting parties agreed on something, and then concluded the contract, the contract will be dependent on, and interpreted according to, whatever they agreed upon, exactly the same as when dirhams and dinars that are mentioned in contracts are interpreted according to the currencies known according to custom, and the same as when contracts are interpreted according to what is known between the contracting parties."(2)

In this opinion, the scholars depend on evidence from the Qur'ân, Sunnah (Prophetic Traditions), and reason:

The evidence taken from the Qur'ân:

There are many Qur'anic Verses that enjoin the fulfillment of promises and contracts, and praise those who keep their promises and contracts, and censure those who do the opposite. Here are some of these Qur'anic Verses:

{"O you who believe! Fulfill (your) obligations."}

[Al-Mâ'idah (The Table): 1]

And;

{"And fulfill (every) covenant. Verily, the covenant, will be questioned about."}

[Al-Isrâ' (The Night Journey): 34]

(1) *"Naẕariyyat Al-`Aqd"* (p. 204).
(2) *"Al-Fatâwâ Al-Kubrâ"* [4: 108].

And;

> ***{"Those who are faithfully true to their Amânât (all the duties which Allah has ordained; honesty, moral responsibility and trusts etc.) and to their covenants."}***
>
> [Al-Mu'minûn (The Believers): 8]

And;

> ***{"Then whosoever breaks his pledge, breaks only to his own harm..."}***
>
> [Al-Fath (Conquest): 10]

Ibn Taymiyyah said; "Allah, glorified be He, did not differentiate between contracts or between promises. Accordingly, if one party sets conditions regarding matters upon which he and the other party agree on, and then they concluded the contract depending on such conditions, the conditions will be regarded as binding, even though they are not stated in the contract. Thereupon, anyone who violates a preceding condition will be regarded the same as he who violates a condition within a contract, since Arabs do not differentiate between the two kinds of condition."(1)

The evidence taken from the Sunnah (Prophetic Traditions):

Here are some of the *hadîths* from which such evidence are extracted:

> «*Abû Hurayrah reported that the Prophet (Peace be upon him) said; 'Muslims must keep to the conditions they make, except for a condition that makes something prohibited lawful or something lawful prohibited.*»
>
> [Related by Abû Dâwûd and At-Tirmidhî](2)

(1) *"Bayân Ad-Dalîl"* (p. 527).

(2) Narrated by Abû Dâwûd, At-Tirmidhî, Ad-Dâraqutnî, Al-Bayhaqî, and Ibn Hibbân, Al-Hâkim, Ibn Al-Jârûd, and others. Al-Bukhârî cited it in his book *"Sahîh Al-Bukhârî"*, in Chapter: ***Ajr As-Samsarah***, from the book *Al-Ijârah*. It is also regarded as a *Sahîh* (authentic) *hadîth* by some scholars, and At-Tirmidhî said; "It is a *Hasan* (good), *Sahîh* (authentic) *hadîth*." (See: *"Fath Al-Bârî"* [4: 451]; *"Mukhtasar Sunan Abû Dâwûd"* by Al-Mundhirî [5: 214]; *"'Âridat Al-Ahwadhî"* [6: 103]; *"As-Sunan Al-Kubrâ"* by Al-Bayhaqî" [6: 79]; *"Al-Mustadrak"* [2: 49]; *"Irwâ' Al-Ghalîl"* [5: 142]; and *"Talkhîs Al-Habîr"* [3: 23]).

It is evident that this *ḥadîth* enjoins Muslims to keep the conditions they make as long as they do not permit something prohibited, or prohibit something permissible. According to the Arabic language, any relevant agreement that precedes a contract is called a condition. This term applies also to the agreements stated within the contract. This is why when dispute arises between parties regarding any contract, they refer to the condition and agreement they set before making the contract, meaning that both the preceding and implicit conditions have the same ruling.(1)

Another *ḥadîth* is the one narrated by Al-Bukhârî, Muslim, Al-Bayhaqî, and Aḥmad from Ibn `Umar

> « *`Abdullâh reported Allah's Prophet (may peace be upon him) as saying: 'There will be a flag for every perfidious person on the Day of Judgment, and it would be said; Here is the perfidy of so and so.»*(2)
>
> [Related by Aḥmad and Al-Bayhaqî]

Ibn Taymiyyah said; "If one agreed with another on something, and then they concluded a contract depending upon such a prior agreement, he will be regarded as being perfidious if he does not comply with this agreement. This is known by all the people, and there is no linguist or reliable person who differentiates between both kinds of conditions."(3)

Reason-based opinions:

It is clear that contracts and their validity de pend on the mutual consent of the contracting parties, as stated by the following Qur'anic Verse;

> ***{"... except it be a trade amongst you..."}***
>
> [An-Nisâ' (The Women): 29)

The agreement reached by both parties, whether verbally or by any other means, can be regarded as an indication of such a consent. That is, if the contracting parties agreed on some points and, after that, concluded the

(1) *"Bayân Ad-Dalîl"* (p. 527).
(2) *"Al-Lu'lu' Wa Al-Marjân"* [2: 437]; *"As-Sunan Al-Kubrâ"* by Al-Bayhaqî [8: 159]; and *"Musnad Aḥmad"* [2: 16, 29, and 48].
(3) *"Bayân Ad-Dalîl"* (p. 527).

contract without restating them when concluding it, then this implies that they both agreed on a contract which observes the points (the conditions) they agreed upon before concluding the contract. Thus, whoever argues that the contracting parties agreed on an absolute contract (which does not take into consideration any preceding agreement), is necessarily in error. In other words, the two parties agreed on the conditions they set for the contract before they concluded it; which means that they agreed on the contract along with the preceding conditions, not just on the contract by itself.(1)

In this respect, Ibn Taymiyyah said; "Contracts depend on intentions, which are revealed through spoken statements. It is said that spoken statements are a revelation of the inner intentions, whether they are uttered as a whole on one occasion or uttered separately over different occasions. The same applies if they are discussed and agreed upon prior to the contract. This technique is used by all the people in their dialogues, and it is even used in the most eloquent forms of dialogue. In other words, whoever lays down any rule through which he reveals his intentions, he can use words and statements to explain it, and the listener is able to understand this. For example, a scholar may say, "It is permissible for one to bequeath one third of his property ...", and we are able to understand that his words do not include the insane or the like if he had pointed out, in another explanation, that the words of the insane are not taken into consideration under the *Sharî`ah*.

By the same token, one party may say to another party, "I sold you..." or "I accept you as a husband for..." These words, though general, refer to what both parties have agreed upon before. In other words, the words imply that "I sold you what we had agreed upon", or "I accept you as a husband for so and so according to the prior conditions we have agreed upon." So, whoever uttered general words preceded by specific conditions and agreements, such words will be interpreted based on the previous conditions and agreements, a matter that does not need further explanation."(2)

(1) *"Nazariyyat Ash-Shurût Al-Muqtarinah Bil-`Aqd"* (p. 50).
(2) *"Bayân Ad-Dalîl"* (p. 531).w

40- The Preponderant Opinion: By looking at the evidence of both groups, it is possible to notice the acceptability of the opinion introduced by the *Mâlikî* and *Ḥanbalî* scholars, which states that the preceding condition is the same as the condition in cluded in the contract in terms of validity, binding nature, enforceability, voidness and cancellation. That is, if the preceding condition is a *shar`î* valid condition, then it will be legally binding. This opinion is chosen to be the more favorable one due to the evidence and arguments buttressing it. Another reason is that the opinion of the *Ḥanafî*, *Shâfi`î* and *Ẓâhirî* scholars, which differentiates between the preceding condition and the condition stated in the contract on the basis that the former is senseless, and thus unbinding, is a weak opinion and can be refuted by refuting the arguments supporting it as follows:

First argument: The force of an action (contract) by the statement indicating its institution does not necessitate considering such a statement in isolation, and thus the action can be regarded as either being general or restricted (by a preceding statement); accordingly, there is no need to consider the conditions and agreements preceding such an action.

We have proved, through *Sharî`ah*-based and reason-based evi dence, that an action should be restricted by the statements and agreements that precede it, and, accordingly, the consequent action should be considered by taking into regard the preceding agreement.(1)

Second argument: By convention, people consider conditions agreed upon before concluding contracts as being binding, which refutes the opinion of the other side, who regard the preceding condition as being meaningless. That is, it is the prevailing fact that when the contracting parties stipulate conditions, and later conclude a contract, they take the preceding condition into consideration and also make the contract itself dependent on such conditions.(2)

41- Among the other facts that reinforce the opinion stating that the preced ing condition is the same as the included condition is that apply ing

(1) *"Nazariyyat Ash-Shurûṭ Al-Muqtarinah Bil-`Aqd"* by Dr. Zakî Ad-Dîn Sha`bân (p. 53).
(2) *"Nazariyyat Ash-Shurûṭ Al-Muqtarinah Bil-`Aqd"* by Dr. Zakî Ad-Dîn Sha`bân (p. 53); and *"I`lâm Al-Muwaqqi`în"* [3: 145].

such a rule closes the door on methods of trickery which seek to realize *shar`i-* banned conditions. This is because, according to the more acceptable opinion, the contract is affected by any void conditions, whether they are preceding or included in the contract, unlike the other opinion, which opens the door to methods of trickery to realize *shar`î*-banned conditions. To illustrate, according to the second opinion, whoever wants to conclude a contract prohibited by the *Sharî`ah* because of the void and banned provisions it contains, can agree with the other party on such void conditions without mentioning them in the contract, so that they can reach their objectionable aim.

Moreover, whoever considers the *Sharî`ah* properly can see that there is no difference between a preceding condition and a condition stated in the contract. This is because the void nature of the condition cannot be removed by setting it prior to the contract, since the corrupting effect will be the same whether the condition is laid down before or within the contract. The question here is, how can the *Sharî`ah* differentiate between two contracts identical in all aspects except for the order in which some of their conditions are stated; even though the two contracts are the same with regard to their meaning and essence? Of course such differentiation can be used as a means to reach *shar`î*-prohibited goals, which explains why it should not be accepted.(1)

Thereupon, it can be concluded that *"Tawâṯu"* (prior agreement) is the same as the preceding condition with regard to its enforceability and effect, and the preceding condition has the same validity and binding nature of the normal condition as long as the contract depends upon it and the contracting parties agree on observing it. This is according to the more acceptable *fiqhî* opinions.

(1) *"I`lâm Al-Muwaqqi`în"* [3: 145 and 146]; and *"Naẓariyyat Ash-Shurûṯ Al-Muqtarinah Bil-`Aqd"* (pp. 55 and 56).

Topic Three
Shar`î Regulations on *Muwâṯa'ah* in Contracts and Pledges Combined in One Agreement

42- Based on the above discussion about *Muwâṯa'ah*, its forms, its enforceability, and its applications in contemporary financial transactions, and the *shar`î* ruling on combining more than one contract and undertaking in one deal, we can conclude the following[1]: The prior agreement between any two parties to institute and conclude new composite agreements, which contain a collection of connected contracts and undertakings combined in one deal, and built in a specific structure with successive parts and stages according to certain conditions which govern them all as one indivisible unit, to perform specific financial functions, and to reach a specific goal intended by the contracting parties, is a *shar`î* acceptable and binding agreement. This is because the agreement preceding the contract can be regarded the same as the condition stated therein if the following five regulations are met:

First Regulation:

**43- *Muwâṯa'ah* on a *shar`î*-banned contract:** If *Muwâṯa'ah* is practiced on a *shar`î*-banned contract, both the *Muwâṯa'ah* and the relevant contract will be invalid according to the *Sharî`ah*. Examples are *Muwâṯa'ah* (prior agreement)

(1) Refer to the research *"Ijtimâ` Al-`Uqûd Al-Muta`addidah Fî Safqah Wâḥidah"* in the book *"Qaḍâyaâ Fiqhiyyah Mu`âṣirah Fî Al-Mâl Wa Al-Iqtiṣâd"* by Dr. Nazîh Ḥammâd (pp. 249 - 274).

on combing a sale with a loan in one transaction[1], or *Muwâṯaʾah* on *`Înah*,[2] or *Muwâṯaʾah* on *Taḥlîl* Marriage.[3]

Second Regulation:

44- ***Muwâṯaʾah* should not be practiced to enact *Ribâ*-based (usurious)** stratagems**,** such as *Muwâṯaʾah* on *`Înah*, *Muwâṯaʾah* on *Rajâʾ* sale, or *Muwâṯaʾah* on stratagems to practice excess usury (*Ribâ Al-Faḍl*).[4]

(1) Abû Dâwûd, AT-Tirmidhî, An-Nasâ'î, Ibn Mâjah, Aḥmad, Ahs-Shâfi`î, and Mâlîk reported that the Prophet (Peace be upon him) prohibited giving a loan for a sale (*"Mukhtaṣar Sunan Abû Dâwûd"* by Al-Mundhirî [5: 144]; *"`Âridat Al-Aḥwazî"* [5: 241]; *"Al-Muwaṭṭa'"* [2: 657]; *"Musnad Aḥmad"* [2: 178]; *"Mirqât Al-Mafâtîḥ"* [2: 232]; *"Nayl Al-Awṭâr"* [5: 179]; and *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 39]).

(2) Aḥmad, Abû Dâwûd, and Al-Bayhaqî related that Ibn `Umar narrated that the Messenger of Allah (Peace be upon him) said; *"If you transact in `Înah (a transaction in which one buys a commodity on credit then sells it in cash to the same person, but at a lesser price), follow the tails of cows (till the land), become content with agriculture and abandon Jihâd (fighting or striving in the Cause of Allah), Allah will send on you disgrace that He will not remove until you return to your religion."* In his book *"Bulûgh Al-Marâm"* Ibn Ḥajar said; "Abû Dâwûd narrated it (the *ḥadîth*) from the narration of Nâfi`, and its attribution is questionable. Aḥmad also narrated the *ḥadîth* form `Aṭâ', whose transmitters are trusty. It is also regarded as a *Ṣaḥîḥ* (authentic) *ḥadîth* by Inul-Qaṭṭân." He also said; in his book *"At- Tlkhîs Al-Ḥabîr"*, "I consid er the narration of the *ḥadîth* regarded as *Ṣaḥîḥ* (authentic) by Ibnul- Qaṭṭân as unauthentic, because his transmitters being trusty does not necessitate that the *ḥadîth* is *Ṣaḥîḥ* (authentic). This is because 'A`mash is *Mudallis* (one who conceals information) and did not mention that he heard the *ḥadîth* from `Aṭâ', although `Aṭâ' himself may be `Aṭâ' Al- Khurâsânî, which means that there is a form of *Tadlîs At-Taswiyah* (i.e. omission of an intermediate weak narrator, which is intermediate between two trustworthy narrators in the *Isnâd* (chain of transmitters), making it appear as though it consists of only reliable narrators), where Nâfi`, who was between `Aṭâ' and Ibn `Umar, is omitted." (*"Bulûgh Al-Marâm Ma`a Subul As- Salâm"* [3: 14]; *"Mukhtaṣar Sunan Abû Dâwûd"* by Al-Mundhirî; *"Tahdhîb As- Sunan"* by Ibnul- Qayyim [5: 99]; and 104]; *"Musnad Aḥmad"* [2: 42 and 84]; *"As-Sunan Al-Kubrâ"* by Al-Bayhaqî [5: 316]; and *"At-Talkhîṣ Al-Ḥabîr"* [3: 119]).

(3) Ibn Mas`ûd reported that "the Messenger of Allah (Peace be upon him) cursed the *Muḥallil* (the man marrying a triple divorced woman with the intention to divorce her so as to be lawful for her former husband) and the *Muḥallal Lahu* (the former husband)." (Related by Aḥmad, An-Nasâ'î, At-Tirmidhî, Al-Bayhaqî and Ibn Abû Shaybah). At- Tir midhî said it is a *Ḥasan* (good) and *Ṣaḥîḥ* (authentic) *ḥadîth*. Ibn Taymiyyah said its at tri bu tion is good. Ibnul-Qayyim said its attribution is authentic. In another narration, the *ḥadîth* says, "Allah (the Almighty) cursed the *Muḥallil* and the *Muḥallal Lahu*." *"Bayân Ad-Dalîl"* (p. 386); *"Ighâthat Al-Lahfân"* [1: 269]; *"`Âridat Al-Aḥwazî"* [5: 44]; *"Musnad Aḥmad"* [1: 488 and 462]; *"Sunan An-Nasâ'î"* [6: 149]; *"Sunan Ad-Dârimî"* [2: 185]; *"As-Sunan Al-Kubrâ"* by Al-Bayhaqî [7: 208]; and *"Musnad Abû Shaybah"* [4: 95 and 14: 190].

(4) Refer to the first form of *Muwâṯaʾah* in Topic One, Notes (6 - 12).

Third Regulation:

45- ***Muwâṯa'ah* should not be practiced for usurious means *(Dharî`ah Rabawiyyah)*,** such as *Muwâṯa'ah* (prior agreement) between both parties that the borrower has to present a gift to the lender, or make excess repayment. Another form is *Muwâṯa'ah* to combine a sale transaction with a loan.(1)

46- Since this regulation is based on the principle of *Sadd Adh-Dharâ'i`* (blocking the means which may lead to an expected evil), the two requirements of this principle should be regarded when applying this regulation. The following explain these two requirements:

First: The first requirement is that such means (*Dharî`ah*), that is doing something prohibited by using something permissible through this transaction, should be those that are resorted to very frequently and excessively among the people. Also, there should be a strong suspicion with regards to the intention of the people resorting to such a prohibited action. In this regard, Ash-Shâṯibî said in his book *"Al-Muwâfaqât", Sadd Adh-Dharâ'î`* is the principle that Imam Mâlik resorted to in most *fiqhî* topics. This is because *Dharî`ah* is used as a means to do something prohibited or void by using something permissible or valid...however, such a principle should be applied based on a specific requirement; namely, that it should be clear that the people intend to use such a permissible act to do an impermissible act, and that the use of such means (*Dharî`ah*) should be that which is resorted to very frequently and excessively."(2) In the same regard, Judge `Abdul-Wahhâb Al-Baghdâdî said; "The principle *'Sadd Adh-Dharâ'i`'* refers to the prohibition of permissible practices that are frequently used as a means for accomplishing *shar`î*-prohibited objectives."(3) Also, Ibn Shâs said; "If this is confirmed, the scholars of that *fiqhî* school agree on accepting this principle and on the necessity of canceling the contract, if it is frequently used as means to do prohibited practices, such as the transaction where a sale is combined with a loan, or a loan which causes benefit to the lender."(4)

(1) Refer to the second form of *Muwâṯa'ah* in Topic Two, Notes (13 - 17).
(2) *"Al-Muwâfaqât"* [4: 198].
(3) *"Al-Ma`ûnah"* [2: 966].
(4) *"`Iqd Al-Jawâhir Ath-Thamînah"* [2: 441].

Second: The second requirement is the absence of any interest or need for such a transaction (which is used as a *Dharîʿah*). This is very clear in the *fiqhî* Maxim stating, "Prohibition for the sake of blocking the way to the means is less forceful than prohibition for the sake of prohib ited objectives",(1) and that "What can be pardoned in the means cannot be par doned in the objectives",(2) and that "Acts that are prohibited for the sake of blocking the way to *Dharâʾiʿ* (the means) become permissible in case of a need or desire to achieve a lawful interest."(3)

In this respect, Ibn Taymiyyah said; "The *Sharîʿah* enjoins blocking the way to *Dharâʾiʿ* (the means) in certain cases. However, this should not prevent the achievement of a possible lawful interest and, thus, what should be prohibited is the means that imply evil, not those which imply likely interests. In other words, the means (*Dharîʿah*) that lead to the achievement of a likely interest become permissible, since the expected interest, in such a case, is more likely than the evil feared. This is why it is permissible for one to look at the woman he wants to marry, though if there is no need for this, it would be impermissible, meaning that the interest here is more likely to occur."(4) He also said; "Imam Aḥmad, and other *faqîhs*, laid down a rule that the acts that can be used as a means for doing something prohibited should be prohibited in case there is no need for them. However, they should be permissible if there is a lawful interest that cannot be achieved except through them. This is why, in contracts, we differentiate between stratagems and the means. This is because the one who uses stratagems seeks to do something prohibited, which explains why stratagems should be prohibited. On the other hand, the one who uses the means (*Dharîʿah*) does not intend to achieve something prohibited. Yet, such means should be only permitted if there a need for them; otherwise, they should be prohibited."(5) Also, Ibnul-Qayyim said; "Acts that are prohibited

(1) *"Iʿlâm Al-Muwaqqiʿîn"* [2: 140].
(2) *"Al-Ashbâh Wa An-Naẓâʾir"* by As-Sayûṭî (p. 158).
(3) *"Zâd Al-Maʿâd"* [4: 78].
(4) *"Tafsîr Âyâtin Ashkalat"* by Ibn Taymiyyah [6: 682].
(5) *"Majmûʿ Fatâwâ Ibn Taymiyyah"* [23: 214 and 215]; and *"Majmûʿ Al-Fatâwâ"* [32: 2828 - 229].

for the sake of blocking the way to *Dharâ'i`* (the means) become permissible in case of a need or a desire to achieve a lawful interest."[1]

Fourth Regulation:

47- *Muwâṯa'ah* should not be practiced to combine two, or more, conflicting contracts with regard to obligations and *fiqhî* rulings: A conflict of such a kind often occurs when both contracts are concluded on the same subject matter or the same compensation object, such as in the combination between *Muḍârabah* and lending the *Muḍârib* (speculator) the capital of *Muḍârabah*, or changing dirhams for dinars and lending the dinars to their seller, or the combination between exchange and *Ja`âlah* transactions where the object of both transactions is the same, or the combination of *Salam* and *Ja`âlah* using the same subject matter for both transactions.[2] Examples in contemporary transactions include the combination between sale and *Ijârah* (hire) in one agreement, called Hire-Purchase (*Ijârah Muntahiyah Bit-Tamlîk*). In this transaction both parties agree to hire a certain property for a specific rent and a specific period of time, and the ownership of the hired property is transferred to the lessee after he pays the last rent installment. In this case, the rent paid is regarded as the price of the property, and the lessee is deemed liable for the property during the hire period.[3]

Fifth Regulation:

48- Each Part (i.e. contracts and pledges) of the agreement upon which *Muwâṯa'ah* is practiced should be valid in itself: This is because the original ruling is the permissibility of combining different contracts and undertakings in one transaction when each one of them is permissible in itself, unless there a *shar`î* evidence prohibiting such a combination, which is regarded as an exception in this case. To illustrate, components. Thereupon,

(1) *"I`lâm Al-Muwaqqi`în"* [2: 142].

(2) Shihâb Ar-Ramlî said; "This may lead to a contradiction of rulings because, in case of *Ja`âlah*, it is not a must to deliver the price until the work is done, however, in case of *Salam* and exchange, the price must be delivered when the contract is made. There is a rule that says a contradiction between obligations leads to a contradiction between the acts which are binding." See: *"Ḥâshiyat Ar-Ramlî `Alâ Asnâ Al-Maṯâlib"* [2: 45].

(3) *"Bay` At-Taqsîṯ"* by Dr. Rafîq Al-Misrî (p. 28); and *"Al-Ijârah Al-Muntahiyah Bit-Tamlîk Fî Ḍaw' Al-Fiqh Al-Islâmî"* by Al-Ḥâfî (p. 47).

in case the transaction (agreement) combines more than one contract and undertaking, and each one is permissible in itself, the combination as a whole will be regarded as permissible. This is the opinion adopted by the majority of scholars in their discussion of many topics, such as:

a) The opinion of Az-Zayla`î Al-Hanafî arguing for the validity of absolute and controlled transfer, where he said; "Because both of them include matters which are permissible when carried out on their own, such as the commitment of the assignee to pay the debt, authorizing the assigned person to receive the debt from the assignee, and ordering the assignee to pay the debt to the assigned person, then they are permissible when combined together."(1) In other words, since each one of these contracts is permissible in itself, then they will be so when combined together.

b) The opinion of Al-Kâsânî in his discussion of the permissibility of *Sharikat Al-Mufâwadah* (Comprehensive partnership), where he said; "Because it comprises two permissible acts, a power of attorney and suretyship, it is permissible."(2)

c) What has been stated in the book *"Al-Muqni`"* and its explanation *"Al-Mubdi`"*, namely: "If both parties combine *Sharikat Al-`Inân* (Cooperative partnership), *Sharikat Al-Abdân* (Manual partnership), *Sharikat Al-Wujûh* (Reputation-based partnership) and *Mudârabah* in one transaction, this will be permissible, since each one of these transactions is permissible in itself, and accordingly, their combination is also permissible.(3)

d) The opinion of Ibnul-Qayyim, in which he stated; "The combination of two contracts cannot be deemed invalid as long as each one of them is permissible in itself, as in the case in which one party sells a commodity to another, and the latter rents the former his house for one month in return for 100 dirhams."(4)

(1) *"Tabyîn Al-Haqâ'iq"* [4: 174].
(2) *"Badâ'i` As-Sanâ'i`"* [6: 58].
(3) *"Al-Mubdi`"* by Burhânud-Dîn Ibn Muflih Al-Hanbalî [5: 43]; and *"Al-Mughnî"* [7: 137].
(4) *"I`lâm Al-Muwaqqi`în"* [3: 345].

e) The opinion mentioned in *"Asnâ Al-Maṯâlib"*, says, "If one combines between two contracts with two different *fiqhî* rulings, such as a sale and *Ijârah* (lease), or a sale and *Salam*, or a sale and marriage, in one deal, this will be valid, since each of these contracts is permissible when carried out on its own, which means that it will be permissible also if it is combined with another permissible contract. In such a case the difference in *fiqhî* rulings of the different contracts will have no effect on the whole deal…

In the above opinion, the scholars stress the difference in *fiqhî* rulings between the two contracts to reveal the points of difference between them. Considering the case when the two contracts have the same *fiqhî* ruling, such as *Sharikah* (partnership) and loan, where one party pays 2000 pounds and the second pays 1000 only in a partnership on the basis that the amount paid by the first party be divided as 1000 pounds in the partnership and 1000 as a loan to the second party, it is clear that the whole deal is certainly valid, since both transactions are based on the permissibility to dispose of one's property."(1)

49- This regulation is not applied generally to all cases, since it is affected by the principle of subordination (and implication), upon which an important group of *shar`î* permissions is based. This principle states: what can be pardoned in subsidiary and implicit combined transactions cannot be pardoned in case of independent single transactions.

To illustrate, the *Sharî`ah* differentiates between the ruling of the original object(2) of the contract and the ruling of the subsidiary or implicit object in a transaction that comprises two or more contracts. It pardons some of the defects and violations in the subsidiary and implicit objects of the contract,

(1) *"Asnâ Al-Maṯalib"* by Zakariyyâ Al-Anṣârî Ash-Shâfi`î [2: 45]; *"Al-Bayân"* by Al-`Umrânî [5:148]; *"Mughnî Al-Muḥtâj"* [2: 41 and 42]; *"Rawḍat Aṭ-Ṭalibîn"* [3: 429]; and *"Qalyûbî Wa `Umayrah"* [2: 188].

(2) This is what Ibn Taymiyyah called *'Al-Maqṣûd Al-Akbar'* (the wider object of the contract) and *'Al-Maqṣûd Al-A`ẓam'* (the greatest object of the contract), and *'Mu`ẓam Al-Maqṣûd'* (most of the object of the contract): (*"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 34, 34, 55, 56 and 80]; *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 23, 35 and 39]; and *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (pp. 123, 124, 137, 138 and 154).

which differ from the main or original object of the contract. In this regard, Ibn Taymi yyah said; "In case the individuation of a transaction, which consists of two or more contracts, will lead to an injury, then it will be permissible to combine two contracts in the transaction, even if it is not permissible to conclude any of the two contracts separately. This is because the ruling on combining contracts differs from the ruling on separating contracts."(1)

This *fiqhî* principle has been stated in *fiqhî* rulings, such as the *fiqhî* Maxim which states "Things that cannot be excused in original matters can be pardoned in subsidiary ones",(2) and "Things that cannot be pardoned in independent matters can be pardoned in implied ones",(3) and "Things that cannot be excused in principal and appurtenant matters can be excused in implied and subsidiary matters",(4) and "What can be pardoned in implicit objects cannot be pardoned in the principal objects",(5) and "What can be stipulated for the principal object may be not stipulated for the subsidiary and implicit objects",(6) and "It may be prohibited to sell an object if it is the principal object of a contract, while it is permissible to sell it if it is included, as a secondary object, in another contract",(7) and "Purposes that cannot be allowed independently can be allowed when only implied in a contract",(8) and "What can be pardoned in a subsidiary contract cannot be pardoned in a separate contract",(9) and "What can be permitted when it is an implicit object may not be permitted when it is the main intended object".(10)

50- What can be concluded from the opinions of the *Faqîhs* on this issue is that pardoning based on subordination and implication covers the defects in the following five matters:

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(1) *"Al-Qawâ`id An-Nûrâniyah Al-Fiqhiyyah"* (p. 148); *"Majmû` Fatâwâ Ibn Taymiyyah"* [29:71]; and *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 44].
(2) Article no. (54) of *"Majallat Al-Aḥkâm Al-`Adliyyah"*; *"Al-Ashbâh Wa An-Naẓâ'ir"* by As-Sayûṭî (p. 120).
(3) *"Fatâwâ Ar-Ramlî"* [2: 115].
(4) *"Zâd Al-Ma`âd"* [5: 825].
(5) *"Badâ'i` Al-Fawâ'id"* by Ibnul-Qayyim [4: 27].
(6) *"Badâ'i` Aṣ-Ṣanâ'i`"* [6: 58].
(7) *"Al-Manthûr"* by Az-Zarkashî [3: 376].
(8) Ibid.[3: 378].
(9) *"Sharḥ Muntahâ Al-Irâdât"* by Al-Buhûtî [2: 147].
(10) *"Radd Al-Muḥtâr"* [4: 170].

First: Pardon of significant *Gharar* in a sale (and other exchange contracts) in case the *Gharar* is a subsidiary object in the contract, or in case the contract in which it exists is a subsidiary contract; this ruling depends on the following *ḥadîth*:

`Abdullâh Ibn `Umar (may Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying:

> *«He who buys a tree after it has been fecundated; its fruit belongs to the one who sells it, except when a provision has been laid down by the buyer (that it will belong to him).»*(1)
>
> [Related by Al- Bukhârî and Muslim]

This *ḥadîth* indicates that the reason for the pardon of *Gharar* in the fruits sold before the appearance of their ripeness, as stipulated by the buyer, is the subordination of the fruits. In other words, the fruits in this contract are not the main object of the contract, but rather they are an object subsidiary to the main object, which is the tree. In this case, there is no harm in specifying a price for the unripe fruits as long as they are regarded as a subsidiary object, and not as the main or separate object in the contract. In this respect, Ibn Qudâmah said; "This is because *Gharar* in the main object of the contract invalidates the contract. However, if the fruits are sold along with the tree, they will be regarded as a subsidiary object and, accordingly, the contract will be valid depending on the *fiqhî* Maxim that states, "What is not permitted for the principal object may be permitted for the subsidiary object.""(2)

Second: Pardon of significant *Jahâlah* (Ignorance) in exchange contracts if it pertains to the subsidiary object or a subsidiary contract, as is the case with *Gharar*, since both have the same meaning.(3) Depending on this ruling, the following *fiqhî* opinions are laid down:

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(1) *"Al-Bukhârî Ma`a Al-Fatḥ"* [5: 49]; *"Ṣaḥîḥ Muslim"* [3: 1172]; *"Sunan Abû Dâwûd"* [2: 240]; *"`Âriḍat Al-Aḥwadhî"* [5: 252]; *"Sunan An-Nasâ'î"* [7: 260]; *"Sunan Ibn Mâjah"* [2: 745]; *"Al-Muwaṭṭa'"* [2: 617]; *"Musnad Aḥmad"* [2: 6, 9, 54, 63, 78, 102, 150 and 5: 326]; and *"Al-Lu'lu' Wa Al-Marjân"* [2: 376].

(2) *"Al-Mughnî"* [6: 150].

(3) *"Az-Zarqânî `Alâ Al-Muwaṭṭa'"* [3: 253]; and *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 56].

a) The scholars permit selling the milk in the udder along with the animal, i.e. sheep, she-camel, cow, even though it is not permissible to sell it by itself while still in the animal's udder.(1) In this regard, An- Nawawî said; "The Muslim scholars unanimously agree on the sale of an animal with milk in its udder, even if the quantity of the milk is unknown, because, in such case, the milk is regarded as an object subsidiary to the animal."(2)

In his opinion permitting the sale of milk along with the animal, Ibn Qudâmah depends on the argument that states, "Milk is a subsidiary object to the main object of the sale, i.e. the animal, and it is allotted an amount of the price, even though it is not permissible to sell it by itself due to the *Jahâlah* (ignorance) involved. This is because the ruling of *Jahâlah* is dropped in subsidiary objects."(3)

Accordingly, some scholars permitted the sale of a wall's foundation and the sale of the stones inside the dates, even though it is not permissible to sell them by themselves.(4)

b) The *Hanafî* and *Hanablî* scholars stated that a power of attorney contract to buy a commodity of unknown species, quantity and value is not permissible when concluded by itself, but it is permissible when concluded within *Sharikat Al-`Inân* (Cooperative partnership), *Mudârabah*, *Sharikat Al- Mufâwadah* (Comprehensive partnership), and *Sharikat Al-Wujûh* (Reputation-based partnership). By the same token, *Hanafî* scholars stated that suretyship contracts are impermissible when concluded separately if the ensured object is unknown, while it is permissible if it is concluded as a sub sidiary or implicit contract in a *Sharikat Al-Mufâwadah*. This is because a combination of contracts, as stated by Al- Ghazâli in his book *"Al- Wasît"*, is a valid transaction, but it is not a separate contract in

(1) *"Al-Majmû`"* [9: 323]; *"Al-Mughnî"* [6: 239 and 299]; and *"An-Nawawî `Alâ Sahîh Muslim"* [10: 156].
(2) *"Al-Majmû`"* [9: 236].
(3) Ibid.[6: 239].
(4) Ibid. [9: 323].

itself.(1) That is, it is not one contract, such as a sale, an exchange, *Salam*, *Ijârah* (lease), *Hibah* (gift), suretyship, or a remittance, but rather it is a transaction that comprises a number of contracts, such as a repetitive sale with a purchase, hiring with leasing, an exchange with *Salam*, or a power of attorney or some forms of suretyship with permission to dispose of joint property. It is clear that the power of attorney and suretyship in such a transaction are regarded as being subsidiary, not main, contracts, which explains why the *Jahâlah* factor is neglected in them in such a case. This is clearly noticeable in the following *fiqhî* texts:

- In his response to the scholars who adhered to *Qiyâs* (analogical deduction), and accordingly prohibited *Sharikat Al-Mufâwaḏah* (Comprehensive partnership) because it comprises a power of attorney contract on an unknown object and a suretyship contract on an unknown object, both contracts being impermissible when they are concluded separately, Az-Zayla`î said; It is unreasonable to assume that since the power of attorney on an unknown object is impermissible, then such a *Sharikah* (partnership) would accordingly be impermissible because it entails a power of attorney on an unknown object, as in the case when someone entrusts another to buy him a garment (without determining its specifications). This is because, in our opinion, the power of attorney on an unknown object is not permissible when the contract is concluded separately, but it would be permissible if it is included in another transaction. This is why *Muḏârabah* with *Jahâlah* is permissible, since it implies an authorization to buy an unknown object within the *Muḏârabah* contract, and this also applies to *Sharikat Al-Mufâwaḏah*.

Another example is *Sharikat Al-`Inân* (Cooperative partnership), which is permitted according to the consensus of Muslim scholars even though it implies a form of *Jahâlah* in the power of attorney. This is because such a form of *Sharikah* (partnership) should imply a power of attorney....

It is also unreasonable to say that since *Kafâlah* (suretyship) cannot be permitted except with the acceptance of *Al-Makfûl Lahu* (suretyship

(1) *"Al-Wasîṯ"* by Al-Ghazâlî [3: 259].

beneficiary) at the session of the contract, then how can it be permissible in such a case (*Sharikat Al-Mufâwaḍah*)? This is because such a rule can be applied only when the suretyship contract is the main contract in the transaction, but in case it is included in another contract, then it would be permissible, as in the case of the power of attorney regarding an unknown object when it is included in another transaction. Also, we can say that it should be permitted because people need it in their transactions, as in the case of *Istiṣnâ`* (Manufacturing),(1) which makes it necessary not to apply *Qiyâs* (analogical deduction) in such a case.

- In this regard, Al-Kamâl Ibnul-Humâm said; "Power of attorney and suretyship on unknown objects are prohibited when they are the main intended contracts; however, their prohibition in such a case does not necessitate that they should be prohibited when they are included in another transaction."(2)
- In his discussion on the permissibility of *Sharikat Al-`Inân* (Cooperative partnership) and *Sharikat Al-Muḍârabah* when they include a general power of attorney, though a general power of attorney cannot be deemed permissible when concluded separately unless it is void of *Jahâlah*, Al-Kâsânî said; "The power of attorney is not the main contract in such a transaction, but it is included in the contract of *Sharikah* (partnership), and a contract can be permitted when included within another contract, although it is not permitted when concluded separately. Also, the conditions or regulations laid down for main contracts may not be needed for included or subsidiary contracts."(3)
- In his opinion in which he permits *Sharikat Al-Wujûh* (Reputation-based partnership) when it includes a power of attorney on an object of unknown species, quantity and value, though the power of attorney involving such *Jahâlah* (ignorance) is not valid when concluded separately, Al-Buhûtî said; "This is because *Sharikat Al-Wujûh* depends on the contract of the power of attorney and, thus, it should be governed

(1) *"Tabyîn Al-Ḥaqâ'iq"* [3: 314].
(2) *"Fatḥ Al-Qadîr"* [5: 381].
(3) *"Al-Badâ'i`"* [6: 58]; *"Radd Al-Muḥtâr"* [3: 337]; and *"Aṭ-Ṭaḥṭâwî `Alâ Ad-Durr"* [2: 514].

by its condition. This is regardless of whether the object of the power of attorney, i.e. the sold object, is specified in terms of species, quantity and value or not, since such a requirement is regarded only when the power of attorney is concluded as a separate contract, but when it is concluded within the contract of *Sharikah* (partnership), this requirement is not relevant. This is the same as *Mudârabah* and *Sharikat Al-`Inân*, since both of them include a suretyship contract, though they are not subject to the requirement of specifying the object. In other words, if one party says to the other, 'whatever you buy will be owned jointly by us', the transaction will be valid under the above-mentioned argument, even though they bought object is not specified in such a transaction."(1)

- Article no. (1824) of *"Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Al-Imâm Aḥmad"* states, "The power of attorney included in the *Sharikah* (partnership) contract is not the same as a separate power of attorney, since it is not a condition for the validity of *Sharikat Al-Wujûh* (Reputation-based partnership) that the species, quantity, and value of the bought object should be specified." That is, if each party says to the other, 'whatever you buy will be shared by us', the transaction will be valid."

Third: Permitting *Ribâ Al-Buyû`* (*Ribâ* due to certain objects of sales) and disregarding the requirements for the validity of exchange transactions in case the defects occur in the subsidiary objects, not in the main objects, of the transactions.

In his book *"Al-Mughnî"*, Ibn Qudâmah said; "If one sells a commodity in which another commodity is included in return for a commodity of the same kind of the included commodity, but the included commodity is not the intended, i.e. the main, object of the sale, the transaction will be valid, as in the case when one sells a house whose roof is coated with gold. This is because the roof is not the main object of the sale in such a case, but the house as a whole. The same applies also in case of exchanging two houses whose roofs are coated with gold or silver. This is because the objects that

(1) *"Kashshâf Al-Qinâ`"* [3: 517]; *"Sharḥ Al-Muntahâ"* by Al-Buhûtî [2: 339]; *"Maṯâlib Ulî An-Nuhâ"* [3: 544]; and *"Al-Mughnî"* [7: 122].

involve *Ribâ*, i.e. the roofs, are not the main object of the sale and, thus, have no effect on the whole transaction. Another example is when one buys a slave along with any money he owns in return for a specified amount of money. In this case, though the transaction implies buying an object, i.e. the money in the possession of the slave, for another of the same species, i.e. the price, the transaction will be valid in case the money of the slave is not the intended, i.e. the main, object of the sale. The same applies also to the transaction whereby two slaves, each of whom owns money, are exchanged for each other along with the money they have. That is, the transaction will be valid in case the money owned by the slaves is not the intended object of the sale, as is the case with the roof coated with gold."(1)

The above ruling depends on the *ḥadîth* narrated by `Abdullâh Ibn `Umar (may Allah be pleased with them) that Allah's Messenger (Peace be upon him) said:

> *«He who buys a tree after it has been fecundated, its fruit belongs to the one who sells it, except when a provision has been laid down by the buyer (that it will belong to him), and he who buys a slave, his property belongs to the one who sells him except when a provision has been laid down by the buyer (that it will be transferred to him with the slave).»*(2)

This ruling is manifest and confirmed in the opinion of Judge Abû Bakr Al-`Arabî, in which he stated; "The property owned by the slave who is sold is judged depending on the tenth *fiqhî* ruling, i.e. intentions and interests. This is because if one buys a slave who owns gold in return for gold, the transaction will be deemed invalid according to the third *fiqhî* ruling, due to the *Ribâ* it involves. However, the tenth *fiqhî* ruling, relating to fundamental objectives and interests, permits such a transaction because the intended object is the slave, while the gold he owns is regarded as a subsidiary object in the sale."(3)

(1) *"Al-Mughnî"* [6: 96].
(2) *"Al-Bukhârî Ma`a Al-Fatḥ"* [5: 49]; *"Saḥîḥ Muslim"* [3: 1172]; *"Sunan Abû Dâwûd"* [2: 240]; *"`Âriḍat Al-Aḥwadhî"* [5: 253]; *"Sunan An-Nasâ'î"* [7: 261]; *"Sunan Ibn Mâjah"* [2: 746]; *"Sunan Ad-Dârimî"* [2: 253]; *"Al-Muwaṭṭa'"* [2: 611]; and *"Musnad Aḥmad"* [2: 9, 78, 82, 150, 3:301, 310 and 5: 326].
(3) *"Al-Qabas"* [2: 805].

In the books *"Al-Muwaṯṯa'"* and *"Sharḥ Al-Muwaṯṯa'"*, by Az-Zaraqânî, it is stated; "Mâlik said; 'The opinion adopted by us (the people of Medina) is that if the buyer of a slave sets a condition entitling him to the property of the slave, he will be entitled to it, be it money, debt or asset, according to the general meaning indicated in the *ḥadîth*. This is because the property of the salve is a subsidiary object in the sale and, accordingly, it is not relevant, as if it were not assigned a portion of the price.' Abû Ḥanîfah and Ash-Shâfi`î, however, regarded the sale as invalid due to the *Ribâ* (usury) it involves. Yet, their opinion is refuted by the *ḥadîth*, since the outward meaning of the *ḥadîth* implies that the sale will be valid regardless of whether the property the slave owns is known or not, which contradicts the opinion stating that the property of the slave should be known (even if it is more valuable than the price of the slave), regardless of whether the price is cash, debt or assets."(1)

In his explanation of this *ḥadîth*, Abû Al-`Abbâs Al-Qurṯubî stated that this principle applies to all contracts. In his book *"Al-Mufhim"*, he said; "This ruling applies to all contracts, such as marriage and *Ijârah* (lease)."(2)

It goes without saying that the buyer of the slave takes into consideration the property the slave owns, be it little or much and, accordingly, assigns it a portion of the price, even if such a portion is not stated separately in the sale. That is, if this had not been the case, the buyer would not have set a condition entitling him to the property of the slave in the contract. Thereupon, it is clear that the *ḥadîth* implies that it is permissible to buy a property subsidiary to an asset on the basis that it is implicitly assigned a portion of the price, without considering the rulings on exchange transactions, as long as the property is not the main, but rather, the subsidiary object in the transaction. Also, the general meaning of the *ḥadîth* implies that specifying the quantity and the nature of the slave's property has no effect on the validity of the sale.

Fourth: Pardon for selling a debt for a debt (i.e. a delayed object for a deferred price); this takes place in case such a transaction is concluded on subsidiary objects, but not on the main objects of the contract, according

(1) *"Az-Zaraqânî `Alâ Al-Muwaṯṯa'"* [3: 253].
(2) *"Al-Mufhim"* by Al-Qurṯubî [4: 399].

to the following *ḥadîth*:

`Abdullâh Ibn `Umar (may Allah be pleased with them) reported Allah's Messenger (peace be upon him) as saying:

> *«He who buys a tree after it has been fecundated, its fruit belongs to the one who sells it, except when a provision has been laid down by the buyer (that it will belong to him), and he who buys a slave, his property belongs to the one who sells him, except when a provision has been laid down by the buyer (that it will be transferred to him with the slave).»*

In his book *"Al-Muwaṭṭa'"*, Imam Mâlik permitted the sale of the slave along with his property, even if the property was a deferred debt and the price was a deferred debt in the liability of the buyer, depending on the general meaning of the *ḥadîth* and on the opinion adopted by the people of Medina.

Fifth: Pardon for the absence, in subsidiary and implicit contracts, of some of the conditions required for the validity of contracts. Here are some examples:

a) Pardoning the absence of the "Offer and Acceptance" requirement in a sale contract implicit in another contract. In the book *"Al-Ashbâh Wa An-Naẓâ'ir"* by As-Sayûṭî, the following *fiqhî* Maxims are stated; (I) "Things that cannot be excused in original matters can be pardoned in subsidiary ones", (II) "What can be pardoned regarding the object (contract) when it is included in another object (contract) cannot be pardoned when such an object (contract) becomes the intended (or the main) object (contract)", and (III) "The absence of the 'Offer and Acceptance' requirement can be pardoned in a sale contract included in another contract, but not when it is a separate sale contract."(1)

b) Pardoning the absence of the 'immediate execution' requirement in a sale contract included in another contract. In the book *"Al-*

(1) *"Al-Ashbâh Wa An-Naẓâ'ir"* (p. 120).

Ashbâh Wa An-Naẓâ'ir" by As-Sayûṭî, it is stated; "Sale contracts cannot be made conditional except in certain forms, the third of which is the 'implicit sale', as in the case when one says to another, 'emancipate your slave on my behalf at the beginning of the coming month in return for 100 pound.'"[1]

(1) *"Al-Ashbâh Wa An-Naẓâ'ir"* (p. 377).

Conclusion

After a detailed study of the *fiqhî* opinions and evidence regarding the issue of *Muwâṭa'ah* (prior agreement) on contracts and undertakings in conventional financial transactions and modern contractual systems, we concluded the following results:

1- *'Muwâṭa'ah'* or *'Tawâṭu"* in *Fiqh* terminology has several meanings, most important of which are stated below:

i) Explicit or implicit intention of the parties to the contract to use a certain stratagem to practice *Ribâ* using a *Sharî`ah* accepted contractual form.

ii) An agreement between the seller of a commodity and someone else in auction sales and the like, to bid a high price for the commodity, not with an intention to buy but simply to elicit a high price from other potential buyers.

iii) An agreement between both parties to conclude a simulated, or fake, contract, which is called *'Talji'ah'*.

iv) An undisclosed or clearly spoken prior agreement between the two parties to perform a *Sharî`ah*-permissible act or deal for the sake of finding a *Sharî`ah*-accepted solution (acceptable stratagem).

v) An agreement of the intentions of the parties to the contract at the stage of preparatory negotiations that precede the signing of a deal which comprises a group of successive contracts, linked together according to a set of conditions that govern them as one

unit to achieve one intended goal, to fulfill such an agreement after its conclusion according to the conditions and terms agreed upon previously.

2- ***'Muwâṯaʾah'*** can take pace explicitly using clear words and statements, or implicitly according to customary practices or that which is deducible by circumstantial evidence.

3- *'Muwâṯaʾah'* (prior agreement) on contracts and pledges has three distinctive features:

First: It is an agreement between two parties to fulfill contracts and undertakings in the future.

Second: This agreement is considered as a condition preceding these contracts and undertakings, and is subject to the relevant rulings with regard to permissibility and prohibition, validity and invalidity, bindingness and enforceability...etc.

Third: *'Muwâṯaʾah'* has the same enforceability as the conditions preceding contracts and obligations, which, according to the soundest *fiqhî* opinions, have the same validity and binding nature of the contracts stated in the main or overall contract, and are subject to their rules with regard to invalidity and cancellation. That is, if the contracting parties agree on something and they go on to conclude the contract, then the contract will extend to cover the parties' preliminary agreement, since there is no difference between the condition stated in the contract and the condition agreed upon in advance and not stated in the contract, as long as the contract depends on such a preceding condition. In other words, the implicit condition is the same as the explicit one, and the condition acceptable according to custom is the same as that expressed clearly, and the intentions in contracts are relevant under the *Sharî`ah*.

4- *'Tawâṯu"* or *'Muwâṯaʾah'* on contracts and deals has many forms which are determined according to the matter upon which it is exercised. They are in total seven forms:

a) ***'Muwâṯaʾah'* to perform *Ribâ* stratagems:** This is a forbidden and invalid form of *'Muwâṯaʾah'*, in which the two parties agree to

practice, for instance, *`Înah* sale, *Rajâ'* sale, or *Ribâ Al-Faḍl* (excess usury). A number of scholars state that these kinds of stratagems become prohibited only when the concluding parties agree on them prior to the contract. That is, if such sales are executed without prior agreement (*Muwâṭa'ah*), they will be *shar`î* valid.

b) ***'Muwâṭa'ah'* on usurious means:** This is prohibited if such means (*Dharî`ah*) are frequently used to practice *Ribâ*-based transactions, and in case it is not needed for achieving lawful interests. Examples of this form include: *Muwâṭa'ah* on giving a gift or excess repayment in terms of quantity or quality to the lender in the loan contract, and *Muwâṭa'ah* on combining an exchange contract with a loan. A number of scholars state that these kinds of stratagems become prohibited only when the concluding parties agree on them prior to the contract. That is, if such sales are executed without prior agreement (*Muwâṭa'ah*), they will be *shar`î* valid.

c) ***Muwâṭa'ah* for obtaining *shar`î* solutions to problematic situations (acceptable stratagems):** This is permissible because the means used do not violate *shar`î* rules, nor contradict with *shar`î* objectives or result in any harm to others.

Examples of such a form include: *Muwâṭa'ah* on *Tawarruq* and *Muwâṭa'ah* on concluding modern agreements which comprise connected and successive contracts, each of which is valid by itself or when combined with other contracts, and which aim to achieve a given *shar`î*-acceptable goal.

d) ***Muwâṭa'ah* on a *Talji'ah* (simulated) sale:** This occurs when two parties agree to conclude a sale contract, which they do not intend in reality, but they resort to for some reason, such as when the seller is worried that his property will be unjustly taken by someone else. Thus both parties agree that such a deal is just a simulated sale.

This sale, along with any prior agreement, is invalid, and they do not incur any of the rules and obligations of a normal sale contract.

e) ***Muwâṭa'ah* on monopoly:** This occurs when the members of a craft agree to unrightfully increase the price of their vital product or ser-

vice. This is to be regarded as an action of injustice and corruption in the land and, accordingly, it will necessitate government intervention to impose a specific price for such a product or service, and bind the craftsmen to provide their services for prices equal to the prices of similar products and services.

By the same token, if a certain group of merchants trading in basic commodities agree to buy such commodities from their providers for a price lower than it should be, or to sell them for a price higher than they should be, the government should intervene by setting specific prices for their products, and force them to buy and sell according to the market value.

f) ***Muwâṯa'ah* on *Najsh*:** *Najsh* is to bid a high price for the commodity, not with an intention to buy but simply to elicit a high price from other potential buyers. This is banned under the *Shar`îah*.

Najsh may be practiced by someone without the knowledge of the seller and, consequently, the guilt is confined to him only. But it may be applied by the seller himself when the buyer does not know that he is the seller and, thereupon, the guilt falls on him. In other cases, the seller may agree with the *'Nâjish'* (the one who practices *Najsh*) to practices *Najsh* in the sale, and in this case they are both guilty.

g) ***Muwâṯa'ah* in present-day contractual agreements:** These are contractual arrangements which comprise a number of connected contracts and undertak ings that are designed in specific patterns to be executed in a specific manner and to follow an agreed number of successive stages, according to a number of conditions that govern them as one unit. Such arrangements aim to achieve a given purpose or interest of the parties to the contract.

Examples of such a form of *Muwâṯa'ah* are the legal forms of *Murâbaḥah* to the Purchase Orderer, hire-purchase, diminishing partnership, and documentary credit.

Such a form of *Muwâṯa'ah* is permissible and binding on both parties to the contract if the group of contracts the parties agreed beforehand to

construct and execute are compatible with the *shar`î* regulations. This is because the agreement that precedes the transaction has the same validity, binding nature and regulations of any condition that is stated in the contract.

5- The following five *shar`î* regulations should be met in order for *Muwâṯa'ah* on present-day contractual agreements to be valid.

a) *Muwâṯa'ah* should not be practiced on a transaction prohibited by a *shar`î* text, otherwise both the *Muwâṯa'ah* and transaction will be invalid according to the *Sharî`ah*.

b) *Muwâṯa'ah* should not be practiced on usurious stratagems, such as *Muwâṯa'ah* on *`Înah*, or on *Rajâ'*, or *Ribâ Al-Faḍl* (excess usury).

c) *Muwâṯa'ah* should not be practiced on usurious means (*Dharî`ah Rabawiyyah*), such as *Muwâṯa'ah* on giving the lender a gift or excess repayment, or *Muwâṯa'ah* on combing an exchange transaction with a loan. This is if the two requirements of the principle *Sadd Adh-Dharâ'i`* are met, which are:

   - The means (*Dharî`ah*) are frequently used as a way to do something prohibited.
   - There should be no need for using such means (*Dharî`ah*).

d) *Muwâṯa'ah* should not be practiced to combine two or more contracts that are contradictory with regard to relevant *shar`î* rulings and obligations.

Examples include: Combining between *Muwâṯa'ah* and lending the capital of *Muḍârabah* to the *Muḍârib* (speculator), or combining between exchange and *Ja`âlah* using one in both contracts, or combining between a sale and *Ijârah* (lease) contracts in one agreement, which is called hire-purchase.

e) Each part (contracts, pledges and conditions) of the agreement should be valid in itself.

Excluded from this regulation are the *shar`î* licenses that are based on the principle of subordination and implication. According to such a principle, some defects and shortages in subsidiary and implicit contracts which result

from the absence of some prerequisites that uphold the validity of contracts, are overlooked. This applies to the following five cases:

i) *Gharar* which affects financial contracts.

ii) *Jahâlah* (ignorance) which also affects financial contracts.

iii) Sale-based *Ribâ* and violation of currency exchange rules.

iv) Selling a debt for another debt.

v) The absence of some prerequisites that uphold the validity of contracts.

This is based on the ruling stating that what can be pardoned in implicit and subsidiary objects (contracts) when combined together may not be pardoned for single contracts.

And our last prayer is to praise Allah, the Lord of the Worlds.

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Research (3)
Debt Conversion Rulings and Contemporary Alternatives

Topic One: The Concept of Debt Conversion

Topic Two: *Shar'î* Alternatives for Debt Conversion

Conclusion

Topic One
The Concept of Debt Conversion

Debt conversion (Arabic: *Qalbud-Dayn*) is a *fiqhî* term that was introduced by Ibn Taymiyyah and his student Ibn Qayyim Al-Jawziyyah in their compilations,(1) and, subsequently, it was also reported by some later *Hanbalî* scholars with the relevant *shar`î* rulings from Ibn Taymiyyah.(2) This designation (debt conversion) was not used, before or after Ibn Taymiyyah, by the scholars of *Fiqh*. However, *Mâlikî* scholars used another term, which is very close to the term "debt conversion", both in meaning and concept, and is known in their compilations and School as *"Faskh Ad-Dayn Fî Ad-Dayn"* (the defeasance of one debt for another).

Forms of Debt Conversion

After careful consideration of the *fiqhî* meaning of the two terms, I found that there are five forms of debt conversion:

First Form: Delaying the repayment of a debt for a conditional increase in its amount in return for a new repayment term given by the creditor.

This form is the same as *Ribâ An-Nasî'ah* practiced in the pre-Islamic period. It is when the creditor says to the debtor on the maturity date; 'Will you pay off your debt, or delay repayment for an increase?' If the debtor defaulted on the repayment of the debt, the creditor increases the term for him in return for an increase in the principal. This form is unanimously forbidden.

(1) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 302, 418, 419, 437, 438]; *"At-Turuq Al-Hukmiyyah"* by Ibnul-Qayyim (p. 203); and *"Al-Hisbah"* by Ibn Taymiyyah (p. 21).
(2) *"Kashshâf Al-Qinâ`"* [3: 175]; and *"Matâlib Ulî An-Nuhâ"* [3: 62].

In *"At-Turuq Al-Hukmiyyah"*, Ibnul-Qayyim said; "If the lender regarded the debt conversion as lawful (though he knows that it is prohibited by *Sharî`ah*), saying to the debtor: 'Will you pay off your debt, or delay repayment for an increase?' he is to be considered as an infidel, and shall be asked to repent. If he did not repent, he is to be killed, and his property is to be taken for the treasury as *Fay'* (booty)."(1)

Al-Khurashî said; "The defeasance of one debt for another is when the creditor defers the debt due on the debtor to a later date for more than the amount of the original debt, such as deferring a debt of ten pounds in return for repaying it as fifteen pounds. It is also when the creditor defers the debt due on the debtor to a later date in return for repaying it in a kind different from the kind of the original debt, or replaces the debt amount with a specified object deferred to a later date."(2)

There is a comment in *"Kifâyat At-Tâlib Ar-Rabbânî"* on the text mentioned in *"Ar-Risâlah"* by Ibn Abû Zayd Al-Qayrawânî saying, "It is not permissible to make a defeasance of one debt for another"; the comment states: "It is unanimously impermissible to defer a debt beyond its original term, because such a process involves the *Ribâ* (usurious transaction) practiced during the pre-Islamic period, whose form is 'Will you pay off your debt, or delay repayment for an increase?' This form is consensually prohibited, since the increase in the term necessitates an increase in the amount of the debt."(3)

Second Form: Delaying the repayment of a debt in return for an increase in its amount using a fraudulent transaction (which is not contracted for its own sake).

This also is a form of "the defeasance of one debt for another" which is prohibited by *Mâlikî* scholars on the argument of blocking the means which may lead to the usurious transaction of *Ribâ* that was practiced during the pre-Islamic period.(4)

(1) *"At-Turuq Al-Hukmiyyah Fî As-Siyâsah Ash-Shar`iyyah"* (p. 203).
(2) *"Sharh Al-Khurashî `Alâ Khalîl"* [5: 76]; *"Az-Zarqânî `Alâ Khalîl"* [5: 81]; *"Minah Al-Jalîl"* [2: 562]; and *"Al-Muwâfaqât"* by Ash-Shâtibî [4: 40].
(3) *"Kifâyat At-Tâlib Ar-Rabbânî Wa Hâshiyat Al-`Adawî `Alayh"* [2: 166].
(4) Ibid. [2: 166 and 167].

Ibn Taymiyyah explained this form in much detail in his compilations and addressed its *shar`î* rulings stating that the debtor who resorts to this form of transaction could be either solvent or insolvent:

If the debtor is insolvent, the creditor is not allowed to convert the debt using this form of transaction, according to the consensus of scholars.

In his *"Al-Hisbah"*, Ibn Taymiyyah said; "Some of these transactions are consensually prohibited, as in the case when the creditor converts the debt of the insolvent debtor. In this case, the insolvent debtor should be granted a respite or delay, and it is not allowed to impose an increase on him under any transaction, according to the consensus of Muslim scholars."(1)

Ibn Taymiyyah also said; "It is not permissible for the creditor to refuse to grant the insolvent debtor a respite or delay so as to force him to convert the debt. Further, if the creditor said to the insolvent debtor; 'Convert the debt or otherwise I will take legal action against you,' and the debtor fears he may be held in custody because he is unable to prove his insolvency, and so he accepts the debt conversion; this transaction is unanimously forbidden and is not binding. This is because the debtor has been wrongfully forced to enter into this transaction, and whoever ascribes the permissibility of imposing debt conversion on the insolvent by using a fraudulent way to any *fiqhî* School, makes an improper mistake. Rather, the scholars differed only on transactions which are optional, such as *`Înah* (buy back) sale and *Tawarruq* (monetization)."(2)

In *"Majmû` Fatâwâ Ibn Taymiyyah"*, it states: "If the debt became payable while the debtor is insolvent, it is unanimously impermissible to impose debt conversion on him in any way, be it a transaction or other; rather, the debtor should be granted a respite or delay."(3)

It is also stated in the same book: "Also, if the debt became payable and the debtor is insolvent, he should be granted a respite or delay, and he shall not be forced to accept debt conversion, according to the consensus of Muslim scholars. Anyway, this transaction and ones similar to it, like

(1) *"Al-Hisbah"* (p. 21).
(2) *"Kashshâf Al-Qinâ`"* [3: 175]; and *"Maṭâlib Ulî An-Nuhâ"* [3: 62].
(3) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 419].

transactions aimed at selling dirhams on credit for more than their value, are invalid, *Ribâ*-based transactions."(1)

Ibn Taymiyyah gave some examples of imposing debt conversion on insolvent debtors by using a fraudulent transaction, which is not carried out for its own sake, to increase the value of the debt in return for an increase in the term of repayment. Among these examples are the following:

The creditor says to the insolvent debtor at the maturity date: "I will buy for you certain goods from a third party (such as a shop owner) for a specified amount paid in cash, then I will sell these goods to you on credit for an increase of one hundred dirhams deferred to a specified term, if you accept this offer, I will delay the repayment of my original due debt for a other specified deferred term."

In *"Majmû` Fatâwâ Ibn Taymiyyah"*, it is reported: "A question was asked about the *shar`î* ruling on a man who engages in a transaction with another person who defaults in repaying dirhams which are due, and the creditor demands his money, although the debtor is insolvent. To settle his debt, the creditor buys for the insolvent debtor goods from any shop owner and then sells these goods to him for an increase of one hundred dirhams in return for delaying the maturity date of the original debt; is this transaction valid?

The answer was: This transaction is impermissible; rather, if the debtor is insolvent, the creditor should grant him a respite or delay. As for the transaction which involves an increase in the debt and the term, it is a usurious transaction, even if it involved a third party (such as a shop owner). The creditor should demand only the principal of the debt, with no increase."(2)

The creditor says to the insolvent debtor at the maturity date: "I will buy these goods from you for a certain amount paid in cash equaling the amount I owe you, to discharge your liability from the debt. Then, I will sell you these goods on credit for a price more than the purchase price."

(1) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 438].
(2) Ibid. [29: 438 and 439].

In *"Bayân Ad-Dalîl `Alâ Buṭlân At-Taḥlîl"* by Ibn Taymiyyah, it states: "If (A) owes (B) one thousand dirhams, and (A) says to (B): 'Do you agree to give me a respite or delay of one year in return for increasing the debt amount to one thousand and two hundred dirhams,' but (B) says: 'Sell me this commodity you own for the one thousand you owe to me, and then buy it from me for one thousand and two hundred dirhams,' then this is a fake transaction of sale because, in reality, the creditor just sells the debt due as one thousand for a deferred one thousand and two hundred. Thus, they colluded to return the commodity to its owner, and they have not entered into a transaction whose true purpose was a sale."(1)

In a *Salam* (payment in advance) contract, the creditor says to the insolvent debtor at the maturity date: "I will sell you an amount equal to the amount of the subject matter of the *Salam* contract at a certain price (which is more than the principal) deferred to a specified date, which is the new date of repaying the due debt of *Salam*."

In *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* by Ibn Taymiyyah, it is stated; "(A) pays (B) one hundred dirhams in advance for silk to be delivered later, but when the delivery date becomes due, he (B) cannot find the silk required for delivery. Hence, (A) provides silk and says to (B): 'Buy this silk from me at one hundred and fifty dirhams on credit.' Then, (A) says to (B): 'Give me this silk in return for the debt you owe to me'; such a transaction is a prohibited form of usury, and this usurer (A) deserves only the amount he has paid or its equivalent."(2) Ibn Taymiyyah commented on this saying: "(A) sold (B) this silk on credit to settle his due debt. This is like when a man sells the silk to another person on credit provided that he buys it from him at a lesser value (in cash). Ibn `Abbâs was asked about the ruling of this transaction, and he replied: 'Allah and His Messenger prohibited this transaction.'"(3)

If the debtor is solvent, is it permissible for both the creditor and the debtor to engage in this transaction voluntarily?

(1) *"Bayân Ad-Dalîl"* (p. 70).
(2) *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* (p. 345).
(3) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 436].

Ibn Taymiyyah said; "If this is the purpose of this transaction (i.e. to increase the term of repayment in return for increasing the amount of the due debt) but they seek such a purpose through another transaction, it should be pointed out that recent Muslim scholars have differed regarding the ruling of this transaction; however, the Prophet's Companions held that it is absolutely unlawful, as (the correctness and rewards of) deeds depend upon intentions. The *shar`î* traditions stating the opinions of the Prophet's Companions regarding this transaction are many and widely known."(1) Then, Ibn Taymiyyah added: "If the debtor is solvent, he must settle his debt and so there is no need to convert it into another transaction."(2) He also said; "Whoever owes another person a debt and he is solvent, he must settle it."(3)

The view of Ibn Taymiyyah indicates that if the debtor is solvent, entering into this transaction is prohibited according to the consensus of the Companions, although later scholars disagreed on its prohibition. This is because Ibn Taymiyyah obligates the solvent debtor to pay his debt off immediately. This means that abstaining from settling the debt by entering into such a transaction is prohibited, according to him.

This is affirmed by the lack of differentiation between a solvent and insolvent debtor regarding the prohibition and invalidity of this form of transaction in some of Ibn Taymiyyah's statements on this issue. Among these statements is his saying In *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* and *"Majmû` Al-Fatâwâ"*: "Whoever buys wheat at a certain deferred price, and then uses a stratagem to make an increase in the value of the price in return for increasing the term of repayment by a means which involves usury, is committing an impermissible act, and the creditor should only get back the principal, because such a transaction is the *Ribâ* (usurious transaction) mentioned in the Qur'ân. This is when the creditor says to the debtor at the maturity date: 'Will you pay off your debt, or delay repayment for an increase?' In this case the debtor has to pay the debt to the creditor, but if he does not pay, the creditor will increase the term for

(1) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 419].
(2) Ibid. [29: 419].
(3) Ibid. [29: 302].

the debtor in return for an increase in the value of the debt. Allah, Exalted Be He, has forbidden this form of transaction and has threatened with war those who do not comply with such a forbiddance."(1)

Third Form: The sale of a due debt by the creditor to the same debtor, for a deferred price of another kind (which is allowed to be sold on credit).(2)

The example of this form is when a man is owed one hundred dirhams by another deferred from a sale or lease, or the like, and when the creditor demands his debt at the maturity date, the debtor offers to sell him a *Kurr* (unit of measure = 15.638 kg) of wheat to be delivered a month later in return for the dirhams which are due, and so the creditor accepts the deal. Another example is when the buyer in a Salam transaction (the creditor) sells the debt of a *Salam* (the deferred commodity) on the maturity date (delivery date) to the seller (the debtor) in return for a described deferred object of a kind other than that of the debt.

According to the majority of the scholars of the *Hanafî*, *Mâlikî*, *Shâfi`î* and *Hanbalî* Schools, this form of sale is impermissible because it falls within the sale of one debt for another, which is *shar`î* prohibited and is unanimously believed to be invalid.(3) The *Mâlikî* scholars deemed this transaction as a form of "the defeasance of one debt for another" because the first debt payable in the debtor's liability has been cancelled and his liability has been charged with another debt.(4)

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(1) *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* (p. 324); and *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 429, 430].

(2) This restriction was imposed to exclude the sale of the debt of dirhams which has become due for dinars paid on credit, or the debt of wheat on the payment date for barely or dates on credit, and the like, since these transactions involve the usury due to a delay which is prohibited in the Qur'ân.

(3) *"Al-Muntaqâ"* by Al-Bâjî [5: 33]; Abû `Ubayd: *"Gharîb Al-Ḥadîth"* [1: 21]; *"Al-Mughrib"* by Al-Muṭṭarrizî [2: 228]; *"Mashâriq Al-Anwâr"* [1: 340]; *"Al-Muwâfaqât"* [4: 40]; *"Takmilat Al-Majmû`"* by As-Subkî [10: 107]; *"Al-Mubdi`"* [4: 150]; *"Minḥat Al-Khâliq `Alâ Al-Baḥr Ar-Râ'iq"* [5: 281]; *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 429]; *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* by Ibn Taymiyyah (p. 324).

(4) *"At-Tâj Wa Al-Iklîl"* [4: 367]; *"Ḥâshiyat Al-Ḥasan Ibn Raḥhâl `Alâ Sharḥ Mayyârah"* [1: 317]; *"Al-Ma`ûnah"*; *"Az-Zarqânî `Alâ Khalîl"* by judge `Abdul-Wahhâb [5: 81];=

However, Ibnul-Qayyim argued for the permissibility and validity of this form of transaction based on the following:

This transaction has a valid purpose and involves a required and desired benefit for the two parties, since the liability of the debtor is discharged from the first debt and becomes charged with another which may be easier to be settled and more beneficial for the creditor at the same time. Accordingly, this transaction is *shar`î* permissible because financial transactions are laid down to achieve benefits for the people and fulfill their needs.

Faqîhs permit that one of the two parties to a contract of the sale of an asset on credit charge his liability with a debt (the deferred price) while the other party receives a profit (an increase over the original price) by selling this asset against the debt. Accordingly, one party is allowed to discharge his liability from a debt and charge it with a new debt as if his liability were charged from the beginning with the second debt, which could be a loan or exchange–based contract. That is, the debtor's liability was charged with an obligation and then it was converted to another obligation.

There is no general *shar`î* text that forbids the sale of one debt for another except for a *hadîth*, whose authenticity has not been proved, which states: *"The Prophet (Peace be upon him) forbade selling Al-Kâli' in return for Al-Kâli'."*(1) i.e. selling a deferred object which has not been received for another deferred object which has also not been received. An example of this is when (A) and (B)

= *"Minah Al-Jalîl"* [2: 562]; *"Mawâhib Al-Jalîl"* [4: 368]; and *"Ash-Sharh As-Saghîr Wa Hâshiyat As-Sâwî `Alayh"* [3: 96].

(1) Related by Ad-Dâraquṭnî, Al-Bayhaqî, At-Taḥâwî, Al-Hâkim, Al-Bazzâr, Ibn Abû Shaybah, Ibn `Adiyy, and `Abdur-Razzâq from the *hadîth* narrated by Mûsâ Ibn `Ubaydah Ar-Rabadhî. It is a *Da`îf* (weak) *hadîth*. Ash-Shâfi`î said; "The scholars of *Hadîth* deemed this *hadîth* as being weak." Ahmad said; "There is no authentic *hadîth* concerning this transaction." Despite the weakness of the chain of transmitters of this *hadîth* resulting from it only being narrated by Mûsâ Ibn `Ubaydah, the scholars of *Hadîth* apply it according to its general or interpreted meaning.

Further, the four Schools of *Fiqh* approved this *hadîth* as a reliable *shar`î* proof. *("At-Talkhîs Al-Habîr"* [3: 26]; *"Ad-Dirâyah"* by Ibn Hajar [3: 157]; *"Bidâyat Al-Mujtahid"* [2: 162]; *"Takmilat Al-Majmû`"* by As-Subkî [10: 107]; *"As-Sayl Al-Jarrâr"* by Ash-Shawkânî [3: 14]; *"Nayl Al-Awtâr"* [5: 255]; *"Nazariyyat Al-`Aqd"* by Ibn Taymiyyah (p. 235); *"Al-Mughnî"* by Ibn Qudâmah [4: 53]; and *"Subul As-Salâm"* [3: 18]).

exchange two objects (neither of which has been received yet) by means of a *Salam* transaction. This transaction is unanimously impermissible. As for the issue addressed here, it is a sale of a due debt for another, deferred debt; hence, the two cases are different. In addition, there is no apparent consensus among *Faqîhs* that prohibits the latter transaction.(1)

In *"Mamjû` Fatâwâ Ibn Taymiyyah"*, it states: "There is no general *shar`î* text or consensus that prohibits the sale of one debt for another, but the prohibition relates to the sale of *Al-Kâli'* in return for *Al-Kâli',* i.e. selling a delayed object which has not been received for another delayed object which has also not been received. This is like when (A) and (B) exchange two objects, neither of which has been received yet, by means of a *Salam* transaction. This transaction is unanimously impermissible.

As for the sale of one debt for another debt, it comes in different types; the sale of a due debt for another due debt (which is forbidden), the sale of a cancelled debt for another cancelled debt, the sale of a cancelled debt for a due debt, and the sale of a due debt for a cancelled debt, all of which are controversial issues." (2)

Ibnul-Qayyim commented, saying: "The sale of a cancelled debt for a due debt happens when the creditor sells his due debt to the creditor for a debt of another kind. In this case, the sold debt becomes cancelled and its compensation becomes payable…. . Since it is permissible that one of the two parties to a contract in the sale of an asset on credit can charge his liability with a debt while the other party receives a profit in return for the delay, it is allowed to discharge his liability from a debt and charge it with a new debt, as if his liability were charged from the beginning with

(1) *"I`lâm Al-Muwaqqi`în"* [3: 352, 1: 388]. In *"Nazariyyat Al-`Aqd"* by Ibn Taymiyyah, it mentions: "The statement prohibiting the sale of one debt for another was not narrated from the Prophet (Peace be upon him) through any authentic or even weak chain of transmitters. However, there is a *Munqati`* (disconnected) *hadîth* prohibiting selling *Al-Kâli'* in return for *Al-Kâli',* i.e. selling a delayed object which has not been received for another delayed object which has also not been received. As for the sale of one debt for another, Ahmad said; 'There is no authentic *hadîth* concerning this transaction, but it is unanimously prohibited'. An example of this is when (A) and (B) exchange two objects, neither of which has been received yet, by means of a *Salam* transaction; a transaction which is unanimously forbidden." *"Nazariyyat Al-`Aqd"* (p. 235).

(2) *"Mamjû` Fatâwâ Ibn Taymiyyah"* [20: 512]; and *"I`lâm Al-Muwaqqi`în"* [1: 388].

the second debt, which could be a loan or exchange-based contract. That is, the debtor's liability was charged with an obligation and then it was converted to another obligation. This does not involve selling a deferred object which has not been received for another deferred object which has also not been received. Further, if it is a sale of one debt for another, *Faqîhs* have not forbidden it, either explicitly or implicitly. Rather, *shar`î* rules necessitate its permissibility, since the *Hawâlah* (transfer of debt) necessitates the transference of the debt from the liability of the transferor (the debtor) to the liability of a third party. That is, the transferor refers the transferee (the creditor) to a third party, who owes a debt to the transferor, so as to collect the money which is due from him. Accordingly, if he replaces the due debt with another debt in his liability, it would be all the more permissible when considering the aforementioned transaction."(1)

Ibnul-Qayyim added: "If the debt of a *Salam* (the deferred commodity) is in the liability of the debtor, and he buys it for another object in his liability, the first debt in his liability becomes cancelled and it is converted into another debt. This is a form of selling a cancelled debt for a due one, and this is permissible, like the sale of a cancelled debt for a cancelled debt in offset deals."(2)

The chosen opinion

After considering the arguments regarding the two opinions, I give more cogency to the opinion of Ibnul-Qayyim stating that this form of sale is valid and permissible. This is because: (I) the *Sharî`ah* does not contain any proofs prohibiting this form, (II) this form does not involve any evil or corruption, (III) its permissibility does not contradict any *shar`î* rule, nor does it involve any prohibited act such as usury, gambling, or *Gharar*, nor does it pave the way to use stratagems or give a pretext to increase the amount of the debt in return for increasing its term (e.g. give me a respite and I will increase the amount of the debt), and (VI) it is an actual sale (not a fake one) which carries the potential risks of trade since the market value of the due (purchased) debt upon concluding the contract is unknown at

(1) *"I`lâm Al-Muwaqqi`în"* [1: 389].
(2) Ibid. [1: 352].

the maturity date or at the time of repayment. That is, the market value of the due debt may be more, less, or equal to the market value of the cancelled one at the time of selling it. Therefore, it is obvious that this form falls within the *shar`î* forms of sale (a trade by mutual consent), not within the prohibited forms of usury. Allah, Exalted Be He, says:

> ***{"...whereas Allah has permitted trading and forbidden ribâ (usury)"}.***
>
> [Al-Baqarah (The Cow): 275].

Due to the absence of any *shar`î* constraint on the permissibility of this form of sale, and due to the fact that it brings benefit and advantage to the two parties, as otherwise they would not choose to conclude it, it is not proper for the *Sharî`ah* to forbid it, as rendering it permissible is among the beauties and requirements of the *Sharî`ah* which facilitates people's lives, treats them leniently, and removes the hardships facing them. Judge Abû Yûsuf said; "Every act which promotes leniency for the people can be adopted as long as there is no *shar`î* constraint on such leniency."(1)

Fourth Form: The creditor's conversion of his debt by rendering it as a capital of a *Salam* in the debtor's liability in return for a described object to be delivered at a specified deferred date.

The majority of scholars are of the view that this form is prohibited and invalid because it falls within the sale of one debt for another, which is *shar`î* prohibited.(2) Also, the *Mâlikî* scholars regarded it as a form of "the defeasance of one debt for another", because the debt in the debtor's liability was discharged and then converted into another debt.(3)

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(1) *"Al-Mabsût"* by As-Sarakhsî [11: 25].

(2) *"Radd Al-Muḥtâr"* [4: 209]; *"Tabyîn Al-Ḥaqâ'iq"* by Az-Zayla`î [4: 140]; and *"Fatḥ Al-`Azîz"* [9: 212].

(3) The *Mâlikî* scholars were divided concerning the sale of *Al-Kâli'* in return for *Al- Kâli'* . They had three opinions: the constituting of one debt in return for a counter-debt, the defeasance of one debt for another debt, and the sale of one debt for another. Al-Khurashî said; "Linguistically, the sale of one debt for another includes the three types; however, the *Mâlikî* scholars gave each type a particular designation," they said:

- **Initiating one debt in return for a counter-debt:** This is the sale of a deferred debt, which has not been established yet (until the time of the contract) for another =

In *"Al-Mughnî"* by Ibn Qudâmah, it states: "If a man has a debt of one dinar in someone else's liability, and he converted it into a *Salam* (payment in advance) contract for food to be delivered later, the transaction would be invalid. Ibnul-Mundhir said; 'All scholars I know, such as Mâlik, Al-Awzâ`î, Ath-Thawrî, Ahmad, Ishâq, *Hanafî* scholars, and Ash-Shâfi`î, unanimously agree upon its invalidity.' It is reported that Ibn `Umar said; 'This form is invalid. This is because the subject matter of the *Salam* is a debt and if the price is rendered into a debt too, it would fall under the sale of one debt for another, which is unanimously invalid."(1)

Likewise, in *"Nihâyat Al-Muhtâj"* it states: "If the creditor said to the debtor: 'I will pay you the one hundred in your liability in advance (as a *Salam*) for such and such,' the *Salam* shall be invalid."(2)

In *"Al-Badâ'i`"*, Al-Kasânî said; "If the capital of a *Salam* is originally a debt in the liability of the seller (debtor) or someone else, it would be invalid because the condition of the actual receipt of the object is not met; thus, the two parties would have left after concluding a sale of one debt for another, which is prohibited. However, if the object is paid/delivered in the session of the contract, it would be valid if the debt is in the liability of the seller (debtor). This is because the only *shar`î* constraint here is the

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= deferred debt which has not been established yet (until the time of the contract).This is when a man sells a described deferred object at a described deferred price.

- **The sale of one debt for another:** This is the sale of a deferred debt which has been established to be in the debtor's liability to someone other than the debtor, at a described deferred price.
- **The defeasance of one debt for another**: This is when the creditor defers his debt due in the debtor's liability to a later date in return for an increase in the amount of the debt, to be paid in kind, such as deferring a debt of ten pounds in return for repaying it as fifteen pounds. It is also when the creditor defers his debt due in the debtor's liability to a set term in return for repaying it with a kind different from that of the original debt, or replaces the value of the debt with a specified object deferred for a set term or for guaranteed usufructs. (*"Al-Khurashî"* [5: 76, 77]; *"Az-Zarqânî `Alâ Khalîl"* [5: 81, 82]; *"Minah Al-Jalîl"* [2: 562]; *"Mawâhib Al-Jalîl"* [4: 368]; *"Hâshiyat Al-Hasan Ibn Rahhâl `Alâ Sharh Mayyârah"* [1: 317]; and *"Ash-Sharh As-Saghîr Wa Hâshiyat As-Sâwî `Alayh"* [3: 96]).

(1) *"Al-Mughnî"* [6: 410].

(2) *"Nihâyat Al-Muhtâj"* by Ar-Ramlî [4: 180].

absence of the actual receipt of the object, and in such a case this constraint has been removed."[1]

In *"Sharḥ Muntahâ Al-Irâdât"* by Al-Buhûtî, we read: "It is not allowed to render the debt in a debtor's liability into a capital of a *Salam*, because the object of the deal here is a debt, and if the capital is also a debt, it would be a sale of one debt for another."[2]

"Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Aḥmad" approved this view in article (490), which states: "The capital of a *Salam* should be received in the session of the contract, and its amount and description must be specified, since it is invalid to render the debt into a capital of a *Salam*." Ibn Taymiyyah and Ibnul-Qayyim disagreed with the above opinions, stating that this form of sale is permissible due to the absence of the prohibitive constraint applicable to the sale of *Al-Kâli'* in return for *Al-Kâli'* i.e. selling a delayed object which has not been received for another delayed object which has also not been received, and due to the absence of the consensus of *Faqîhs* on its prohibition.

Ibn Taymiyyah said; "The statement prohibiting the sale of one debt for another was not narrated from the Prophet (Peace be upon him), neither through an authentic chain of transmitters nor through a weak one. However, there is a *Munqaṭi`* (disconnected) *ḥadîth* prohibiting *selling Al-Kâli'* in return for *Al-Kâli'*, i.e. selling a delayed object which has not been received for another delayed object which has also not been received. As for the sale of one debt for another, Aḥmad said; 'There is no authentic *ḥadîth* concerning this transaction, but it is unanimously prohibited. An example of this is when (A) and (B) exchange two objects, neither of them having been delivered yet, by means of a *Salam* transaction. This transaction is unanimously impermissible.'"[3]

Ibnul-Qayyim said; "As for the sale of a due debt for a cancelled one, this is like when the creditor converts ten dirhams in the liability of the debtor to a capital of a *Salam* contract for a *Kurr* (unit of measure = 15.638 kg) of

(1) *"Badâ'i` Aṣ-Ṣanâ'i`"* [5: 204].
(2) *"Sharḥ Muntahâ Al-Irâdât"* [2: 221].
(3) *"Naẓariyyat Al-`Aqd"* by Ibn Taymiyyah (p. 235).

wheat to be delivered later. In this case the debtor owes the creditor a *Kurr* of wheat as a new debt, while the old debt of ten dirhams has been cancelled. Ibn Taymiyyah said; "It is alleged that this form of sale is unanimously prohibited, but this is not true." Rather, Ibn Taymiyyah considered its permissibility to be correct, stating that it is the most appropriate view because this form does not involve anything which has been prohibited, and it does not fall under the sale of *Al-Kâli' in return for Al-Kâli'*, and thus it cannot be prohibited by the words or by the deduced meaning of the *hadîth* mentioned in this concern. In the forbidden form, the two liabilities have been uselessly charged with a debt, since neither has the first party received the price in advance to benefit from it, nor has the second one received the deferred commodity to benefit from it."[1]

The chosen opinion

After considering the proofs offered by the two opinions, I consider the opinion of Ibn Taymiyyah and Ibnul-Qayyim, which permits and validates this form of debt conversion, to be more correct. This is because: (I) the sale of *Al-Kâli' in return for Al-Kâli'* (i.e. selling a delayed object which has not been received for another delayed object which has also not been received), which is *shar`î* prohibited, is not to be found here in view of the fact that the de jure receipt of the capital of the *Salam* (which is in the liability of the debtor) is fulfilled, as if the debtor received the capital of the *Salam* from the creditor and returned it to him, and then it was paid de jure in advance. Accordingly, the *shar`î* constraint has been removed, (II) the argument stating the consensus on its prohibition is disputable, (III) there is an absence of *Ribâ An-Nasî'ah* (the usury practiced during the pre-Islamic period) whose form is "give me respite, and I will increase the amount of the debt due", and (VI) it does not use stratagems nor give a pretext for usury, as the contract of the *Salam* in this form is intended in itself and it also carries the potential risks of trade usually present in the sale of a *Salam*, but not the increase in the debt amount in return for delaying its maturity date which is involved in *Ribâ* and its pretexts and stratagems.

(1) *"I`lâm Al-Muwaqqi`în"*: [1: 389].

That is, at the time the contract of the *Salam* is concluded, the market value of the due debt at the maturity date or at the time of repayment is not known since it may be more, less, or equal to the market value of the first debt rendered as a capital of *Salam*.

Accordingly, it has been proved that the conversion in this form is not prohibited, either explicitly or implicitly, and thus it should remain permissible, since each of the two parties may have a sound purpose, a well-defined benefit, or a real need for the transaction, and the *Sharî`ah* has come to achieve the benefits of the people where no offense or harm exist, and to remove the hardships that may face them when entering into all forms of financial transactions they need. Allah, Exalted Be He, says:

{"and has not laid upon you in religion any hardship"}

[Al-Hajj (The Pilgrimage): 78]

Ibn Taymiyyah said; "Allah, the Almighty, has told us that He has never burdened us in religion with any hardship, and this is an clear-cut, all-inclusive negation, and whoever thinks that the Commandments of Allah include even an atom of hardship, has attributed a lie to Allah and His Messenger."(1)

This opinion is supported by the view of the *Hanafî* scholars who, after considering these arguments, held this form permissible (after making a nominal amendment to it) in accordance with *Istihsân* (*shar`î* approbation). They said; "If the creditor, at the maturity date, paid the debtor in advance an amount that equals the value, kind and description of the debt as a price of a described object to be delivered at a specified date, and then they agreed to conduct an offset deal between the capital of a *Salam* payable in advance to the debtor and the debt in his liability, this form is sound and permissible according to *Istihsân*. In *"Al-Badâ'i`"*, Al-Kasânî said; "If the buyer (the creditor) in a *Salam* transaction sold the seller (the debtor) a garment of ten dirhams and did not receive this ten dirhams until the debtor paid him ten dirhams in advance for a *Kurr* (measure = 15.638 kg) of wheat to be delivered later, then if they agreed to settle the two debts by means of an offset deal, the transaction would be

(1) *"Jâmi` Ar-Rasâ'il"* by Ibn Taymiyyah [2: 370].

an offset transaction, however if one party refused, the transaction would not be an offset. This form is accepted according to *Istiḥsân*, but according to *Qiyâs* (analogical deduction) the aforementioned form cannot, in any way, be an offset, as stated by *Zufar*."(1)

Fifth Form: The creditor's replacement of his due debt with the usufructs of properties possessed by the debtor, such as a house, building, storehouse, orchard, car, plane, or the like, to be delivered at a specified deferred date; for example, one or five years.

Imam *Mâlik*, in one of his two opinions, considered this form of debt conversion as a type of the forbidden defeasance of one debt for another. This is the prevailing opinion in the *Mâlikî* School, and the opinion adopted by Ibnul-Qâsim. Their argument for the prohibition of this form is that these usufructs, regardless of being specified, are like a debt since they cannot be delivered in full at the time of defeasance. Rather, these usufructs are delivered gradually, so replacing the debt with them falls under the sale of *Al-Kâli'* in return for *Al-Kâli'*.(2)

In *"Al-Mudawwanah"*, it is reported: "I said; 'If I have a debt which is payable or deferred in the liability of a person, can I rent from the debtor his house for a year; or his slave for this month, as a replacement for the debt he owes to me?'" He said; "Mâlik said to me: 'It is invalid whether the debt in his liability is due or deferred, because it is a form of selling one debt for another, since the creditor replaces his dinars due in the debtor's liability with an object he does not fully obtain receipt of at the time of the contract'"(3)

In his *"Adh-Dhakhîrah"*, Al-Qarâfî said; "In *"Al-Mudawwanah"*, it is stated; 'Do not receive, against a due or deferred debt, the usufructs of any property, such as a house, arable land, or fruit, because its receipt is delayed, and thus this resembles the defeasance of one debt for another."(4)

(1) *"Badâ'i` Aṣ-Ṣanâ'i`"* [5: 206].
(2) *"Sharḥ Al-Kurashî"* [5: 77]; *"Az-Zarqânî `Alâ Khalîl Wa Ḥâshiyat Al-Banânî `Alayh"* [5: 82]; *"Adh-Dhakîrah"* [5: 302]; *"Minaḥ Al-Jalîl"* [2: 563]; *"At-Tâj Wa Al-Iklîl"* [4: 367]; *"Ash-Sharḥ Al-Kabîr Wa Ḥâshiyat Ad-Dusûqî `Alayh"* [3: 62]; and *"Ash-Sharḥ Aṣ-Ṣaghîr Wa Ḥâshiyat Aṣ-Ṣâwî `Alayh"* by Ad-Dardîr [3: 97].
(3) *"Al-Mudawwanah"* [9: 128].
(4) *"Adh-Dhakhîrah"* [5: 302].

Al-Bâjî said; "Question: how about the creditor taking, in return for his debt, a house to dwell in, a secure land to cultivate, or some work to perform? Ibnul-Qâsim forbade this, but Ashhab deemed it permissible; yet, both of them attributed their opinions to Mâlik. The argument of the first opinion is that the liability of the debtor has been charged with the debt on the basis of its current description, and if the creditor replaces his debt with a leased house to dwell in, the debtor's liability will not be discharged from his debt until the period of lease is over. Accordingly, the debtor's liability has become conditional on the lease period. That is, if such a period is completed to its final date, the debtor's liability will be discharged from the debt, but if otherwise, he will have to pay off his debt. As it turns out, the debtor's liability has become charged with something other than the debt it was initially charged with, and this falls under the defeasance of one debt for another, since the meaning of the defeasance of one debt for another is to charge one's liability with something other than the debt it was initially charged with."(1)

However, Ashhab disagreed with this opinion, deeming it permissible to replace the debt in one's liability with the usufructs of specified properties because the receipt by the creditor of these properties is considered as a receipt of their usufructs. This opinion is reported from Malik, and later scholars deemed it sound. Moreover, it is narrated that Ibn Rushd gave a Fatwa based on the cogency of this opinion.(2)

In "*Hâshiyat As-Sâwî*" there is a comment on the statement of Ad-Dardîr (and Ashhab deemed it permissible) that says: "(This opinion) is deemed sound. Al-Ajhûrî adopted this opinion as he had a shop in which a bookbinder was dwelling, and when the rent of this shop became due in the liability of the bookbinder but he defaulted in the payment, Al-Ajhûrî employed him to bind his books in return for the rent in his liability, and he said; 'This is the opinion of Ashhab, and later scholars deemed it sound,' and further, Ibn Rushd gave a Fatwa based on this opinion."(3)

(1) *"Al-Muntaqâ `Alâ Al-Muwatta'"* [5: 33].
(2) *"At-Tâj Wa Al-Iklîl"* [4: 367]; *"Hâshiyat Ad-Dusûqî"* [3: 62]; *"Sharh Al-Kurashî"* [5: 77]; *"Minah Al-Jalîl"* [2: 563]; *"Az-Zarqânî `Alâ Khalîl Wa Hâshiyat Al-Banânî `Alayh"* [5: 82]; and *"Al-Khurashî Wa Hâshiyat Al-`Adawî `Alayh"* [5: 77].
(3) *"Hâshiyat As-Sâwî `Alâ Ash-Sharh Al-Kabîr "* by Ad-Dardîr [3: 62].

The chosen opinion

After considering the arguments of the two opinions, I favor the opinion holding the permissibility of the defeasance of the due debt for the usufructs of a specified property owned by the debtor. This is because deeming the usufruct of this property as being a debt is not sound, even if the receipt of this usufruct in full is delayed until after the time it is sold. This is because:

The original *fiqhî* Maxim states that "receiving one part of an object has the same effect as receiving the object as a whole"(1); and "receiving the first part of an object is the same as receiving the last ".(2)

If the usufructs of properties were like debts in view of the prohibition of discharging a debt for another, then it would be forbidden to lease these properties in return for a rent in the liability of the lessee. However, since such a lease is unanimously permissible, the purchase of these usufructs in return for a rent in the liability of the lessee should be permissible too.(3)

Al-Qarâfi explained this in his saying: "Sanad said; 'It is reported that Mâlik deemed the defeasance of the due debt for the usufructs of a specified property owned by the debtor as being permissible because the delivery of the property is the same as the delivery of its usufructs. Also, because if the property is a dowry of a woman and then the owner delivered it to her, the woman should allow him to consummate their marriage, and because leasing a house for a rent in the liability of the lessee is permissible, yet if it is a debt it would be forbidden as the Prophet (Peace be upon him) prohibited the sale of *Al-Kâli'* in return for *Al-Kâli'*."(4)

The narration reporting that `Umar Ibnul-Khaṭṭâb sold the fruits of the orchard of Usayd Ibn Ḥuḏayr, after his death, to his creditors as a settlement for a debt he (Usayd) owed to them, and none of the Prophet's Companions disagreed with him; this is a sound argument, according to the majority of scholars.

(1) *"Minaḥ Al-Jalîl"* [2: 563].
(2) *"Ḥâshiyat Ad-Dusûqî `Alâ Ash-Sharḥ Al-Kabîr"* [3: 62].
(3) *"Az-Zarqânî `Alâ Khalîl"* [5: 82]
(4) *"Adh-Dhakhîrah"* [5: 303].

In *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyysh"*, Ibn Taymiyyah said; "Sa`îd Ibn Manṣûr narrated, through an authentic chain of transmitters, that `Umar sold the fruits of the orchard of Usayd Ibn Ḥuḍayr, after his death, to his creditors for a period of three years, and gave them the price he received as a settlement for a debt of six thousand dirhams he (Usayd) owed to them. And none of the Prophet's Companions rejected his act."(1)

In *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"*, it states: "It is reported that Sa`îd Ibn Manṣûr, and Ḥarb Al-Kirmânî cited from him in his book *"Masâ'il Ḥarb Al-Kirmânî"*, said; ``Abbâd Ibn `Abbâd narrated from Hishâm Ibn `Urwah from his father that Usayd Ibn Ḥudayr died while being indebted for six thousand dirhams. `Umar sent for his creditors and sold them the fruits of Usayd's orchard for a certain number of years.'"(2) Ibn Taymiyyah said; "This story must have been well-known, and it has not come to our knowledge that it has been denied by anybody, thus it is unanimously approved."(3)

Ibnul-Qayyim said after mentioning this narration: "``Umar performed this transaction in Medina in the presence of *Al-Muhâjirûn* (the Emigrants) and *Al-Anṣâr* (the Supporters). Yet, it is a story that would have become widespread among the people of Medina, and consequently the Companions of the Prophet, but not one of them denied it; rather, they approved it. It is well-established that the Companions denied transactions which were less grave than this one, even if they were performed by `Umar himself."(4)

(1) *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* (p. 337).
(2) *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* by Ibn Taymiyyah (p. 140). This tradition was mentioned by Ibn Kathîr in *"Musnad Al-Fârûq"* [1: 358], and it was related by Ibn Sa`d in his *"Aṭ-Ṭabaqât"* [3: 606]; and others.
(3) *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (p. 144).
(4) *"Zâd Al-Ma`âd"* [5: 828].

Topic Two
Shar`î Alternatives for Debt Conversion in Contemporary Islamic Banking Transactions

We have already indicated that both the first and second forms of debt conversion are invalid and consequently *shar`î* prohibited. This is because the first form represents a kind of *Ribâ An-Nasî'ah* or (interest on credit transactions/loans) practiced during the pre-Islamic period, which is prohibited in the Qur'ân. The second form, however, is regarded as a dispraised form of stratagem used for practicing this kind of *Ribâ*, and it has the same nature of the *`Înah* transaction which is prohibited based on the *shar`î* rule of *Sadd Adh-Dharâ'i`*.

Moreover, it is worth mentioning that the new Islamic institutions nowadays face many problems and crises because many clients do not pay their debts which have come into being as a result of commutative contracts, such as the *Nasî'ah*, *Salam*, *Istiṣnâ`* (manufacturing) sales, etc…, on the maturity dates, claiming that they are insolvent or cannot repay at the specific dates. As a result, these institutions face difficulties in fulfilling their financial liabilities, since they mostly depend on repayment of the delayed debts, which are supposed to be paid on the maturity dates. Also, these institutions may fail to repay the money of the depositors upon their request due to the stoppage of financial cash flows paid by the clients at maturity. Not only that, but they may also face difficulties in repaying debts resulting from *Salam* and *Istiṣnâ`* transactions.

Also, this problem can be intensified by the global banking system because it provides absolute confidentiality with regard to the accounts of depositors and investors. This leads to the possibility of traders and individuals opening current and investment accounts in foreign banks under a name and number, or under only a number, giving them the ability to move their money, and to withdraw any amounts they want, in any country, in complete confidentiality. This often helps the solvent debtor, if he intends to procrastinate in giving the repayment, to hide his wealth and to claim that he is insolvent when the maturity date is due. The debtor in this case can present forged evidence to prove his insolvency so that the creditor cannot rebut them before the judiciary. Thus, the procrastinator can deceive the judiciary, and enjoy judicial protection when he falsely and spuriously alleges that he is insolvent. This is to be added to the fact that bad behavior has spread among the people and that there is an absence of religious observances, which results in some people being willing to consume ill-gotten money and to falsely claim to be insolvent to delay the payment of debts, a matter that can eventually lead to instability and failure of Islamic banking systems. Not only that, but failure to repay the debts under the pretext of insolvency on the part of some clients leads to the loss of trust between the client and the banking institution with regard to repaying debts on the due dates. It is well known to financial experts that complete confidence in repayment of debts on their maturity dates is one of the most important reasons for the success of the Islamic banking system and for the protection of its assets against loss and damage…etc.

As a result, some Islamic financial institutions tried to devise appropriate methods to solve this problem (i.e. failure to repay debts on time), while voiding the two prohibited forms of debt conversion but at the same time protecting the financial institutions against the harm and losses they may incur due to the clients' procrastination in paying their debts under the pretext of being insolvent. Also, these new methods have to take into consideration the changing circumstances, living conditions and financial transactions of people as well as the absence of religious motivation among them. Another important factor that has to be observed is the principle of "corrupted morals in any particular age" and how it should affect the *fiqhî*

rulings that are based on the *Ijtihâd* of scholars in a way that fulfils interests and protects the Islamic nation against corruption and harm.(1)

In this regard, the procedure I see acceptable in view of the *Sharî`ah* - if the debtor refrained from repaying his debt on time – is that the Islamic financial institution makes an agreement with the client to help him obtain the liquidity he needs to settle his debt on maturity by means of *Tawarruq* (monetization), a *Salam* (payment in advance) sale, an *Istiṣnâ`* (manufacturing) sale…etc.(2) This should be an option, despite the fact that such means for providing liquidity may cost him an extra sum over the amount he obtains to settle his debt.(3) However, this extra sum, which the debtor pays in return for obtaining

(1) It is worth mentioning that the rightly-guided Caliphs stated that the manufacturers (common workmen) should be held liable for the properties in their hands, contrary to the original *shar`î* ruling, for the sake of achieving public interest and protecting people's properties against damage and loss. This is due to the inability of the owners to prove transgression or negligence on the part of the workmen if they are not held liable, especially with the corruption of morals and the frequent cases of misdeeds committed by workmen or hired persons who often claim that damages occur beyond their control, or without transgression or negligence on their part. This opinion was adopted by Imam Mâlik and his followers, and it is the well-known opinion in the *Mâlikî* School. Judge Ibn Rushd said; "The original ruling for the craftsmen is that they are not guarantors but trustees (of the commodities in their hands) because they are hired for the services they offer. Moreover, the Prophet (peace be upon him) ordered the hired people to be held as trustees of, but not liable for, the commodity in their hands . Yet, scholars held them (i.e. the craftsmen) liable due to the need of the people for their services. This is because if they are held as trustees, and so not liable, they may think of taking people's properties unjustly, which can be regarded as opening up the means to damage properties in a way that would cause great injury to the owners of such properties." *("Al-Muqaddimât Al-Mumahhidât"* by Ibn Rushd (the Senior) [2: 243]; *"Al-I`tiṣâm"* by Ash-Shâṭibî [2: 119]; *"`Uddat Al-Burûq"* by Al-Wansharîsî (pp. 546, 558); *"Bidâyat Al-Mujtahid"* [2: 231, 232]; *"Al-Ma`ûnah"* by Judge `Abdul-Wahhâb [2: 1111]; and *"Al-Bahjah"* by At-Tusûlî [2: 282, 283].

(2) The aim of a deferred sale is to defer the payment of the price of the object sold in return for an increase over the price, and the aim of a *Salam* sale is to buy the deferred commodity for a lower price. In *"Al-Badâ'i`"* [5: 201], Al-Kâsanî said; "A *Salam* sale depends on the depreciation of the price because it is a form of a sale practiced by insolvents (*Bay` Al-Mafâlîs*)."

(3) This is regardless of whether the debtor is solvent or insolvent, or of an unknown financial condition (unless he is destitute or suffers apparent extreme poverty), based on the view of Ibn `Abbâs, Judge Shurayh, and An-Nakh`î regarding the meaning of Allah's Saying: ***"And if the debtor is in a hard time (has no money), then grant him time till it is easy for him to repay,.."*** [Al-Baqarah (the Cow): 280]. They argue =

the cash, should not go to the creditor (the Islamic financial institution) in any way, and it should not be likely that the whole process is used as a means or stratagem for practicing usury due to a delay.

Here, one may ask, "How do you permit the use of a stratagem to practice debt conversion, which is *shar`î* prohibited?"

In this regard, I can say that this method is not a form of debt conversion whereby the creditor delays the due debt for another term in return for an increase in terms of quality or quantity. It is, on the contrary, a method intended to help the debtor repay his due debt at the specified time by canceling that debt in return for the creation of another debt which becomes payable at a future date, without bringing any benefit to the creditor. This contractual action is not prohibited by any *shar`î* evidence, and thus is regarded as permissible based on the opinion of Ibnul-Qayyim, in which he says: "All contracts that are not prohibited by Allah and His Messenger cannot be prohibited by anyone else. This is because Allah (glorified be He) has explained to us in detail what is forbidden to us. Accordingly, nothing can be regarded as being prohibited unless it is clearly prohibited (by Allah or his Messenger). Moreover, since it is not permissible to allow what Allah prohibited, it is not permissible to prohibit what Allah did not prohibit."(1) Also, Imam Ash-Shâṯibî said; "The established rule is to differentiate between acts of worship and acts of business. This is because acts of worship are originally meant for worshiping, without any need to consider the intentions involved. Moreover, no act of worship can be performed unless there is unquestionable evidence stating that it is permitted. That

= that the debt referred to in this verse is that resulting from borrowing, which can be deferred for a longer time until the debtor can repay it. However, other debts resulting from financial transactions should be paid at the specified date, otherwise the debtor should be imprisoned until the debt is repaid. This depends on Allah's saying: ***{"Verily! Allah commands that you should render back the trusts to those to whom they are due;"}*** [An-Nisâ' (the Women): 58]. This is aimed at achieving public interest and protecting people's properties against loss and damage, especially in times of corruption of morals. (See: *"Al-Jâmi` Li-Aḥkâm Al-Qur'ân"* by Al-Qurṯubî [3: 372]; *"Aḥkâm Al-Qur'ân"* by Ibnul-`Arabî [1: 245]; *"Aḥkâm Al-Qur'ân"* by Al-Jaṣṣâṣ [2: 194]; *"Aḥkâm Al-Qur'ân"* by Al-Kiyâ Al-Harrâsî [1: 362].

(1) *"I`lâm Al-Muwaqqi`în"* [1: 383].

is, the acts of worship are not something that can be invented. As for acts of business, or transactions, they can be practiced as long as there is no evidence stating that they are prohibited, since they are originally judged according to their intention. Also, the original ruling on transactions is that they are permissible as long as there is no evidence indicating the opposite."(1)

As for considering this procedure as a stratagem aimed at helping the debtor repay his debt on maturity, there is no *shar`î* problem concerning this. This is because this stratagem is one form of the *shar`î* acceptable stratagems and solutions to problematic situations. In the view of the *Sharî`ah*, stratagems (*Hiyal*) are of two kinds:

First: Invalid, unacceptable stratagems: They are the stratagems through which legal contracts and acts are used to achieve prohibited goals, such as shirking duties, turning the right into wrong and the wrong into right, or other goals that contradict or violate *shar`î* principles. In this regard, Ibnul-Qayyim said; "Stratagems are of two types; one type is practiced for the sake of shirking duties, permitting the practice of prohibited matters, and confusing between the wronged and the wrong doer and between right and wrong. This kind is dispraised by the *Salaf* (predecessors)."(2) He added: "All stratagems that lead to an act or behavior that contradicts or violates any *shar`î* principle should be prohibited and invalidated."(3)

Second: Valid, acceptable stratagems (or solutions): They are the stratagems through which legal contracts and acts are used to reach a permissible goal, to do what Allah has ordered us to do, to avoid what Allah has prohibited, to avoid the commitment of sins, and to achieve an established interest. In *"Ighâthat Al-Lahfân"*, Ibnul-Qayyim said; "Stratagems are of two kinds; one is performed for the sake of doing what Allah, the Almighty, ordered us to do, or avoiding what Allah, the Almighty, ordered us not to do, or avoiding the commitment of sins, or extracting one's right from a tyrant, or releasing the wronged from the hands of a tyrant. This kind is permissible and worthy of a reward."(4)

(1) *"Al-Muwâfaqât"* [1: 248].
(2) *"Ighâthat Al-Lahfân"* [1: 339].
(3) "Ibid. [2: 86].
(4) Ibid. [1: 339].

Ash-Shâṭibî said; "Prohibited stratagems are those that violate a *shar`î* principle or contradict a *shar`î* interest. Accordingly, if a stratagem does not violate a *shar`î* principle or contradict a *shar`î* interest, it is not prohibited or invalid."(1)

The criterion used to differentiate between the two kinds of stratagems is based on the objectives and intentions behind the acts and practices performed by such stratagems. That is, if the final objective intended by the stratagem is permissible and compatible with *shar`î* rulings, then the stratagem itself is permissible, and, by the same token, if the end objective intended by the stratagem is forbidden or contrary to *shar`î* rulings, then the stratagem is impermissible. In this respect, Ibnul-Qayyim said; "The stratagems conform to the final objective with regard to permissibility and prohibition. That is, if the objective is something good, then the stratagem is good, and vice versa, and if the objective intended by the stratagem belongs to acts of obedience to Allah, the Almighty, the stratagem will be classified in the same category of good deeds, but if it belongs to sins, then the stratagem itself falls in the same category of sins."(2)

In the light of the above, it can be concluded that the agreement of two or more parties on using *shar`î* solutions to problematic situations, i.e. acceptable stratagems, is permissible if the means used to achieve such solutions and the end objectives intended by them do not contradict the *Sharî`ah*, and if such solutions do not lead to a certain or probable evil. This is because the agreement in such a case concerns contracts and practices permissible in principle and intended to achieve *shar`î* acceptable goals and certain or probable interests, which makes it a permissible agreement.

(1) *"Al-Muwâfaqât"* [2: 387].
(2) *"Ighâthat Al-Lahfân"* [1: 385].

Conclusion

Sharî`ah Controls for Debt Conversion and Replacement

After careful consideration regarding the opinions of the *fiqhî* scholars on debt conversion and replacement,(1) and after conducting an impartial and objective analysis and discussion of their arguments over the forms they agreed and disagreed upon, I deduced the following *shar`î* controls:

First Regulation: Delaying the repayment of a debt payable in the debtor's liability for a conditional increase in its amount or description is *shar`î* forbidden, whether this debt is a debt of a *Salam*, a price of a sold object, a loan, or a compensation for a damaged object. This is because it is a kind of *Ribâ An-Nasî'ah* (interest on credit transactions/loans) which was practiced during the pre-Islamic period, whose form is (give me a respite, and I will increase the amount owing to you; or 'Will you pay off your debt, or delay the repayment for an increase in the amount of the debt?)

Second Regulation: Delaying the repayment of a debt due in the debtor's liability in return for an increase in its amount or description through a fraudulent transaction represented in concluding a contract which is not intended in itself. This form is *shar`î* forbidden, whether the debtor is solvent or insolvent, since it is classified under the *`Înah* (buy back) sale, which is *shar`î* forbidden. Moreover, forcing the debtor to resort to this

(1) An-Nawawî said; "Replacement is to buy the debt from the debtor for another debt".

form is even more detestable and inflicts a graver sin, since the creditor is commanded to give respite or delay the due date for the debtor.

Third Regulation: The sale of a due debt by the creditor to the same debtor for a deferred price of another kind (which is allowed to be sold on credit) is *shar`î* permissible.

Fourth Regulation: The creditor's conversion of his due debt by rendering it as a capital of a *Salam* in the debtor's liability in return for a described object to be delivered at a specified deferred date, is *shar`î* permissible.

Fifth Regulation: The creditor's replacement of his due debt with the usufructs of properties possessed by the debtor, such as a house, building, storehouse, orchard, warehouse, plane, or the like, to be delivered at a specified deferred date, for example, one or five years, is *shar`î* permissible.

Sixth Regulation: The debtor's receipt of cash funds in exchange for a deferred object, by means of *Tawarruq* (monetization), a *Salam* (payment in advance) or *Istiṣnâ`* (manufacturing) contract, or through any other similar *shar`î* contract in order to pay off the due debt he does not possess on maturity, is *shar`î* permissible, even if this costs him an increase over the funds he receives. There is no *shar`î* constraint on financial institutions to make arrangements necessary for the clients to achieve this purpose, provided that this increase does not return, in any way, to the creditor (the Islamic financial institution), and that the whole process is not likely to be used as a means or a stratagem for practicing usury due to a delay.

Verily, Allah Knows Best

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Research (4)
Tawarruq
(Rulings and Modern Applications)

Topic One: Definition of *Tawarruq*

Topic Two: Rulings of *Tawarruq*

Topic Three: Modern Applications of *Tawarruq*

Conclusion

Topic One
Definition of *Tawarruq*

a) Linguistic Definition of *Tawarruq*

1- In the Arabic Language, the statement 'Awraqa (verb; get *Wariq*) *Arrajul* (man)' means that one has got '*Wariq*', and the word '*Istawraqa* (verb)' means that he seeks '*Wariq*'. The word '*Wariq*' means dirhams coined from silver. Accordingly, Arabs refer to money as coined silver and to ordinary silver as uncoined silver. In *"Mu`jam Maqâyîs Al-Lughah"*, it is stated that the term '*Wariq*' means money. In this regard, Al-Fayrûz Âbâdî said that the verb '*Awraqa*' implies that a man has become of great wealth.(1)

Depending upon the above mentioned explanation, the word '*Tawarruq*' refers to a great effort exerted by someone to get money. It also implies that such a process is exercised by someone who does not work in such a field, i.e. finance. This explains why a merchant who sells a commodity for money, or a man who sells a portion of his properties to pay back his debt or to increase his liquidity, cannot be called '*Mutawarriq*', which means benefiting from monetization.

b) Terminological Definition of *Tawarruq*

2- The term '*Tawarruq*' is used only by the *Hanbalî* scholars. According to them, it refers to a process whereby someone buys a commodity on credit, and then sells it in cash to someone else other than the original seller for

(1) *"Al-Qâmûs Al-Muhît"* [P. 1198]; *"Mu`jam Maqâyîs Al-Lughah"* by Ibn Fâris [6: 101]; *"Asâs Al-Balâghah"* [P. 496]; *"Al-Mughrib"* [2: 350]; and *"Al-Misbâh"* [2: 816].

a lower price to get cash.(1) In this regard, Ibn Taymiyyah said; "*Tawarruq* is a transaction where someone buys a commodity on credit, and then sells it somewhere else in cash for a lower price due to his need for cash."(2)

3- The *Hanbalî* scholars said that the terminological meaning of the word '*Tawarruq*' is related to its linguistic meaning. This is because, according to them, the word '*Tawarruq*' is derived from the word '*Wariq*', which means silver dirhams. In this regard, they said; "The transaction is called '*Tawarruq*' because the purchaser buys the commodity to sell it again in order to get cash."(3) They also said; "It is called *Tawarruq* because the buyer's aim is not to possess the commodity, but to get *Wariq*, i.e. money."(4) In another place, they also said; "The ultimate aim of *Tawarruq* is to get *Wariq*."(5) The meaning of the word *'Tawarruq'* then has expanded to imply gathering all forms of money through such a transaction. This is why article (234) in *"Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Aḥmad"* states; "*Tawarruq* refers to a transaction whereby one buys a commodity on credit for a high price and then resells it in cash for a lower price to get liquidity." It is clear that this definition is not limited to silver dirhams, but it extends to cover all forms of money.

4- In the *Shâfi`î* school, *Tawarruq* is known as *'Zarnaqah'*. In his book *"Az-Zâhir"*, the great *Shâfi`î Faqîh* and linguist Abû Manṣûr Al-Azharî said; "*Zarnaqah* is a transaction whereby one buys a commodity on credit, and then resells it in cash to someone else other than the original seller." He also said; "It is the permissible form of *`Înah*."(6)

(1) *"Al-Inṣâf"* [11: 195]; *"Al-Mubdi`"* [4: 49]; *"Ma`ûnat Ulî An-Nuhâ"* [4: 67]; *"Kashshâf Al-Qinâ`"* [3: 175]; *"Sharḥ Muntahâ Al-Irâdât"* [2: 158]; and *"Maṭâlib Ulî An-Nuhâ"* [3: 61].

(2) *"Mukhtaṣar Al-Fatâwa Al-Miṣriyyah"* by Ibn Taymiyyah (p. 327); and *"I`lâm Al-Muwaqqi`în"* [3: 182].

(3) *"Maṭâlib Ulî An-Nuhâ"* [3: 61]; and *"Kashshâf Al-Qinâ`"* [3: 175].

(4) *"Majmû` Fatâwa Ibn Taymiyyah"* [29: 302].

(5) *"Majmû` Fatâwa Ibn Taymiyyah"* [29: 30]; *"Tahdhîb Mukhtaṣar Sunan Abû Dâwûd"* by Ibnul-Qayyim [5: 108]; *"Al-Masâ'il Al-Mârdîniyyah"* by Ibn Taymiyyah (p. 121); *"Bayân Ad-Dalîl `Alâ Buṭlân At-Taḥlîl"* by Ibn Taymiyyah (p. 119); and *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (p. 121).

(6) *"Az-Zâhir"* (p. 216). In his book *"Al-Miṣbâḥ"* [2: 527], Al-Fayyûmî said; "It is also a form of *`Înah*, but it is permitted according to the agreement of the *fiqhî* scholars."

The rest of the scholars referred to and discussed this issue, i.e. *Tawarruq*, in their discussion of *`Înah* and deferred sales; however, they did not give it a special name.

5- On the other hand, there is a partial similarity between *Tawarruq* and *`Înah*, which results in some confusion among some scholars. In other words, they consider *Tawarruq* as a type of *`Înah*, and accordingly apply the same *fiqhî* ruling on both transactions. For example, Ibnul-Athîr said; "*Zarnaqah*, which is the same as *`Înah*, is a process where one buys a commodity on credit for a high price, and then sells it to the original seller or to someone else for a lower price. The word *'Zarnaqah'* is derived from the arabized word *'Zarnah'*, which means 'I have no gold'.[1] In this regard, Ibnul-Qayyim asked, "If one asks, if the buyer sells the commodity to someone else other than the original seller, will this be *`Înah*?" The answer is: This transaction will be regarded as *Tawarruq*, because it is meant to get *Wariq*, i.e. money. In a narration by Abû Dâwûd, Imam Ahmad stated that such a transaction is a form of *`Înah*, and, accordingly, he called it *`Înah*.[2] Also, Al-Fayyûmî said; "Even if the buyer sold the commodity to someone else other than the original seller, but it was at the same session of the first contract, it would be also a form of *`Înah*."[3]

(1) *"An-Nihâyah"* [2: 301]; *"Al-Mughrib"* [1: 364]; and *"Al-Qâmûs Al-Muhît"* (p. 1149).
(2) *"Tahdhîb Mukhtasar Sunan Abû Dâwûd"* by Ibnul-Qayyim [5: 108].
(3) *"Al-Misbâh Al-Munîr"* [2: 527].

Topic Two
Rulings of *Tawarruq*

a) Opinions of *Fiqhî* Schools

6- The majority of *Faqhîs* in the *Hanafî*, *Shâfi`î*, *Mâlikî* and *Hanbalî* schools see that *Tawarruq* is permissible. It is stated that Ibnul-Mubârak said; "There is no problem in *Zarnaqah*."(1) It is narrated about Iyâs Ibn Mu`âwiyah that he permitted *Tawarrssuq*.(2) Abû Mansûr Al-Azharî said that it is permissible according to the opinion of all *Faqîhs*. He also said; "It has been narrated about *`Â'ishah* (May Allah be pleased with her) that though she used to take 10000 dirhams annually as her allowance from the treasury, she used to deal in *Zarnaqah*, which is the permissible *`Înah*."(3)

Ibn Taymiyyah, however, was of a different opinion as he regarded *Tawarruq* as a *Makrûh* (detestable) transaction,(4) which is a narration reported from Imam Ahmad.(5) It is also said that Ibn Taymiyyah prohibited *Tawarruq*,(6) which is

(1) *"An-Nihâyah"* by Ibnul-Athîr [2: 301]; and *"Al-Mughrib"* by Al-Mutarrizî [1: 364].
(2) *"Tahdhîb Mukhtasar Sunan Abû Dâwûd"* by Ibnul-Qayyim [5: 108]; and *"Bayân Ad-Dalîl"* by Ibn Taymiyyah (p. 119).
(3) *"Az-Zâhir"* by Al-Azharî (p. 216).
(4) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 30, 302, 442, and 446]; *"Mukhtasar Al-Fatâwâ Al-Misriyyah"* (p. 327); and *"Al-Masâ'il Al-Mârdînîyyah"* (p. 121).
(5) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 303, 302, 442, and 446]; *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (p. 121); *"Bayân Ad-Dâlîl"* (p. 119); *"Al-Masâ'l Al-Mârdînîyyah"* (p. 121); *"At-Tahdhîb"* by Ibnul-Qayyim [5: 108]; *"Al-Insâf"* [11: 195]; *"Al-Mubdi`"* [4: 49]; and *"Ma`ûnat Ulî An-Nuhâ"* [4: 67].
(6) *"Al-Ikhtiyârât Al-Fiqhiyyah"* (p. 129); *"Al-Furû`"* [6: 316]; *"Al-Mubdi`"* [4: 49]; and *"Al-Insâf"* [11: 195].

another narration from Imam Aḥmad. Ibnul-Qayyim, furthermore, followed the opinion of his Sheikh which prohibits *Tawarruq*.(1)

Moreover, it has been narrated about `Umar Ibn `Abdul-`Azîz that he said; "*Tawarruq* is the same as *Ribâ* (usury)",(2) meaning it is also prohibited.(3)

First: *Ḥanbâlî* School

7- Imam Aḥmad stated that *Tawarruq* is permissible and his disciples adopted the same opinion, which is the authorized opinion in the school. This type of transaction is permitted by Ibn Muflih in the book *"Al-Furû`"*, by Burhânud-Dîn Ibn Muflih in the book *"Al-Mubdi`"*, by Ibnun-Najjâr Al-Futûḥî in the book *"Ma`ûnat Ulî An-Nuhâ"*, by Al-Buhûtî in the books *"Kashshâf Al-Qinâ`"* and *"Sharḥ Al-Muntahâ"*, by Ar-Rayḥabânî in the book *"Maṭâlib Ulî An-Nuhâ"*, and by other scholars.(4)

In his book *"Al-Inṣâf"*, Al-Mardâwî said; "If one needs cash, and accordingly buys a commodity, whose real cash price is 100 pounds, for 150 pounds on credit, then there is no harm in such a transaction, which is *Tawarruq*. This opinion is the authorized opinion in the School and the one adopted by the disciples of Imam Aḥmad."(5)

Accordingly, article (234) in *"Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Al-Imâm Aḥmad"* states; "*Tawarruq* is permissible and refers to a transaction where one buys a commodity on credit at a high price and then resells it in cash for a lower price to get liquidity."

Second: *Mâlikî* School

8- *Mâlikî* scholars did not have a clear opinion regarding the issue of *Tawarruq*, and did not mention its known form in their writings. However,

(1) *"I`lâm Al-Muwaqqi`în"* [3: 182]; *"At-Tahdhîb"* by Ibnul-Qayyim [5: 108]; *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* (p. 327); and *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 303 and 434].

(2) *"I`lâm Al-Muwaqqi`în"* [3: 182]; *"At-Tahdhîb"* by Ibnul-Qayyim [5: 108]; and *"Bayân Ad-Dâlîl"* (p. 119).

(3) As Ibn Taymiyyah said; *"Majmû` Al-Fatâwâ"* [29: 434]; and *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* (p. 327).

(4) *"Ma`ûnat Ulî An-Nuhâ"* [4: 67]; *"Al-Mubdi`"* [4: 49]; *"Maṭâlib Ulî An-Nuhâ"* [3: 61]; *"Al-Furû`"* [6: 316]; *"Sharḥ Muntahâ Al-Irâdât"* by Al-Buhûtî [2: 158]; and *"Kashshâf Al-Qinâ`"* [3: 175].

(5) *"Al-Inṣâf Li-Ma`rifat Ar-Râjiḥ Min Al-Khilâf"* [11: 195].

their opinions regarding the issue of 'deferred sales', which states; "Whoever sells a commodity for a deferred price is not allowed to buy it in cash for a lower price from the buyer", implies that *Tawarruq* is permissible. This is because the transaction stated in the above mentioned opinion is prohibited only if the seller in the first sale is himself the buyer in the second sale. They also attributed the prohibition of this transaction to the argument that the ultimate goal of such two sales is to incur an interest-based loan where a person lends another an amount of money to be paid with an increase at the due date. As for the issue of *Tawarruq*, it is clear that such a cause of prohibition is absent here. Moreover, in his opinion regarding deferred sales, Ibn Juzayy said in his book *"Al-Qawânîn Al-Fiqhiyyah"*, "It is permissible to sell the commodity to someone else other than its first seller."(1) This opinion implies that it is permissible to sell a commodity to someone else other than the first seller, even if it is sold in cash for a price lower than its deferred price, which is the issue of *Tawarruq*.

The above mentioned argument is confirmed by the following *fiqhî* opinions:

a) In his book *"An-Naẓâ'ir Fî Al-Fiqh"*, Abû `Imrân Al-Fâsî As-Sinhâjî said; "If one sells a commodity on a deferred payment basis and then buys it from the same buyer on a cash basis for a price lower than its first price, the second transaction will be invalid. This is because the whole transaction is used here as a means for practicing *Ribâ*. In other words, the commodity goes back to the first seller as if he did not sell it in the first place. Accordingly, the sale, in this case, is used as a stratagem for paying an amount of money and getting it back with an excess, which is a pure form of *Ribâ*." He added, "Our opinion concerning this issue is that it is a sale which is used as a means for practicing *Ribâ*, which explains why it is forbidden, since it is *Ribâ* which is the intended transaction in this process, not the sale. So, the sale is to be forbidden if the following conditions occur; (I) the first seller is the buyer in the second sale, (II) the second sale is executed immediately after the first one, (III) the commodity is the same in both sales, and (IV) the cash price

(1) *"Al-Qawânîn Al-Fiqhiyyah"* by Ibn Juzayy (p. 277).

is lower than the deferred one. That is, in the presence of all these conditions, the transaction changes from a sale-based transaction into a *Ribâ*-based one."[1]

According to the first condition, if the buyer in the second sale is someone else other than the seller in the first sale, the transaction will be valid, since it becomes, in this case, a *Tawarruq* transaction.

b) In his book *"Ash-Sharḥ As-Saghîr"*, Ad-Dardîr said; "Types of sales are to be forbidden in case they are frequently used as a means for doing something banned by the *Sharî`ah*. An example is concluding a sale for the sake of incurring an interest-based loan. In this sale, the seller sells a commodity for, say; 10 pounds on a deferred payment basis, and then re-purchases it on a cash basis or on credit for a shorter period at a lower price. In this case, the commodity goes back to its original owner, and he receives an amount which is higher than the amount he paid for it.[2] In his book *"Hâshiyaht As-Sâwî `Alâ Ash-Sharḥ As-Saghîr"*, As-Sâwî said; "The following are the conditions that, if all are present at the same time, make deferred sales invalid; (I) the first sale is on a deferred payment basis; (II) the buyer in the second sale is himself the first seller or his agent;(III) the commodity is the same in both sales; (IV) the seller in the second sale is himself the buyer in the first sale or his agent; (V) the second price is of the same kind as that of the first price; and (VI) the second price is paid in cash as a whole or deferred as a whole."[3]

c) In his book *"Al-Muqaddimât Al-Mumahhidât"*, Ibn Rushd said; "Among the transactions upon which the principle of *'Sadd Adh-Dharâ'i`'* (blocking the means which may lead to an expected evil) can be applied are the sales whose outer form is valid, however, they are in fact used as a means for practicing *Ribâ*. An example is a sale whereby one buys a commodity on a deferred payment basis for, say; 100 dinars, and sells it to the same seller for, say; 50 dinars, on the spot. In such a case, both parties used

(1) *"An-Naẓâ'ir Fî Al-Fiqh"* (pp. 28 and 29).
(2) *"Ash-Sharḥ As-Saghîr"* [3: 117].
(3) *"Hâshiyat As-Sâwî `Alâ Ash-Sharḥ As-Saghîr"* [3: 118].

an outwardly valid sale to practice a *Ribâ*-based loan where the seller pays the buyer 50 dinars on the spot to be paid 100 dinars afterwards, which is a prohibited transaction."[1]

Depending on the above discussed points, it can be concluded that *Tawarruq* is permissible in the *Mâlikî* School.

Third: *Shâfi`î* School

9- The *Shâfi`î* scholars permit *Tawarruq*,[2] as stated by Abû Mansûr Al-Azharî in his book *"Az-Zâhir Fî Gharîb Al-Fâz Ash-Shâfi`î Alladhî Awda`ahu Al-Muzanî Fî Mukhtasarih"*, where he said; "*Zarnaqah* is a transaction whereby one buys a commodity on a deferred payment basis for a specific price, and then sells it to someone other than its seller on the spot, which is a permissible transaction according to the consensus of the scholars."[3] This implies that *Tawarruq* is permissible according to the *Shâfi`î* School, because Al-Azharî, besides being a great linguist, was a great specialist in *fiqhî* opinions of *Shâfi`î* School, as stated by those who wrote his biography, such as Ibnus-Subkî, who said about him in his book *"Tabaqât Ash-Shâfi`iyyah"*, "He was a significant linguist, and a great specialist in *Fiqh* and *fiqhî* Schools."[4] In fact, his saying 'the consensus of the scholars', should mean the consensus of the scholars of *Fiqh*, or the consensus of *Shâfi`î* scholars, as he was a trustworthy person in citing their opinions.

The permissibility of *`Înah* sale in the *Shâfi`î* School can also be affirmed by Ash-Shâfi`î's opinion in his book *"Al-Umm"*, where he said; "If one buys

(1) *"Al-Muqaddimât Al-Mumahhidât"* [2: 39].

(2) They also permit *`Înah* sale. In his book *"Ar-Rawdah"*, An-Nawawî said; "*`Înah* sale is not among the prohibited sales. It is a sale whereby one sells something for a deferred price to someone and delivers it to him, and then re-purchases it from him on a cash basis, before receiving the deferred price, for a lower price. It is also permissible for one to sell a commodity on a cash basis for a specific price, and then re-purchase it from the same person for a higher deferred price, whether he has received the first price or not, and whether *`Înah* sale has become a custom in the country or not. This is the sound and known opinion in the books of the pupils of Imam Ash-Shâfi`î. Moreover, Ibnul-Qayyim, in his book *"`Ilâm Al-Muwaqqi`în"*, stated that Imam Ash-Shâfi`î permitted *`Înah* sale, an opinion also mentioned by At-Tahâwî in his book *"Ikhtilâf Al-`Ulamâ"* [3: 114]; and by other scholars.

(3) *"Az-Zâhir"* (p. 216).

(4) *"Tabaqât Ash-Shâfi`iyyah Al-Kubrâ"* [3: 64].

a commodity from another on a deferred payment basis, the seller is allowed to buy the same commodity from the buyer or from someone else at a higher or lower cash or deferred price, or in return for another commodity regardless of its price, since the second sale is not related to the first one. To illustrate, if the commodity in the first sale is a slave girl, the buyer shall be entitled to have sexual intercourse with her, to give her as a gift, to emancipate her, or to sell her to someone other than her first seller for a price lower or higher than the deferred price by which he bought her. If this is the case, then how can selling the slave girl to her first seller be banned? And how can one assume that the price paid for the slave girl in the second sale is a compensation for the deferred price, especially after her possession went to the first seller through a new sale and for a new price? And how can this be permissible for the seller while not permissible for the buyer?"(1)

Fourth: *Hanafî* School

10- Unlike *`Înah*, *Tawarruq* is permissible according to the *Hanafî* School. This can be demonstrated by the following opinions:

a) In his discussion of *`Înah* and the conditions of its invalidity, Az-Zayla`î said; "According to us, *`Înah* is invalid if the commodity is re-purchased from its buyer or his heirs. This is because if the buyer sells, gives as a *Hibah* (Gift), or bequeaths the commodity to someone, and then the original seller buys it from the latter, the sale will be valid, since the change of the cause of possession, in this regard, has the same effect as selling different properties."(2) Ibn `Âbidîn, the great researcher in the *Hanafî* School, mentioned and approved the opinion of Az-Zayla`î which is stated in his book *"Radd Al-Muhtâr"*.(3)

(1) *"Al-Umm"* [3: 69]. Ash-Shâfi`î stated the same opinion in another place in his book *"Al-Umm"*, where he said; "My principle is that any contract which is outwardly valid cannot be invalidated due to an accusation or a custom between the two parties. Accordingly, I permit the contract in such a case depending on its outward validity; however, I disapprove the intention of the two parties if it would make the contract invalid if it is declared." It is clear that the ruling of '*Karâhah*' (detestability), here, is applied only to *`Înah*, not to *Tawarruq* due to the valid intention of the buyer in the latter.

(2) *"Tabyîn Al-Haqâ'iq Sharh Kanz Ad-Daqâ'iq"* [4: 55].

(3) *"Radd Al-Muhtâr"* [4: 114].

b) In the book *"Sharḥ Al-`Inâyah `Alâ Al-Hidâyah"*, it is stated; "…this is unlike the case when the buyer sells the commodity to a party other than the seller, because the profit does not go to the seller in such a case, or when the seller buys the commodity from a party other than the original buyer, since the profits he gets in such a case is not from the original buyer. This is because the difference of causes of possession has the same effect as selling different properties."(1)

c) Al-Kâsânî said; "According to us, if one sold a commodity for a deferred price and the buyer took possession of it, the seller cannot be allowed to buy it from the original buyer for a lower price. However, if the original buyer sold the commodity to another buyer, the original seller would be allowed to buy it from the second buyer for a price lower than its first deferred price. This is because the difference of the cause of possession has the same effect as selling different properties, which prevents *Ribâ*."(2)

Accordingly, the writings of the *Ḥanafî* scholars stated that their authorized books clearly state the permissibility of *Tawarruq* because the profit does not go to the first seller. Therefore, they referred to and permitted the *Tawarruq* transaction, though they did not call it by such a name. This is clear in their opinion stating that the transaction will be *shar`î*-valid if (A) sells (B) a commodity at a deferred price, then (B) sells this commodity to a third party from whom (A) repurchases the same commodity on the spot at a price lower than the deferred one for which (A) had sold it to (B). This is because the transaction, in this form, cannot be used as a means of practicing *Ribâ*. Accordingly, it can be said that the permissibility of such a transaction is based on the permissibility of *Tawarruq* in their School.

Fifth: The Scholars Prohibiting This Practice

11- In his books, Ibn Taymiyyah gave more credence to the second narration of Aḥmad, which implies the detestability (*Karâhah*) of

(1) *"Sharḥ Al-`Inâyah"* by Al-Bâbartî [6: 69].
(2) *"Badâ'i` Aṣ-Ṣanâ'i'"* [5: 199].

Tawarruq.(1) It is also reported that he adopted the third narration of Imam Ahmad in which he prohibited *Tawarruq*.(2)

Ibnul-Qayyim adopted the opinion of his sheikh Ibn Taymiyyah in which he favors the prohibition of *Tawarruq*.(3) However, he stated that it is less harmful than *`Înah*. In this regard, he said; "If the (compelled) person resells the commodity again to its seller, it will be *`Înah*, and if he sells it to a third party, it will be *Tawarruq*, and if he sells it to a third party with whom he and the first seller made an agreement in advance, it will be a stratagem for practicing *Ribâ*. All these three kinds of transactions are used by usurers, and the least of them in terms of prohibition is *Tawarruq*." `Umar Ibn `Abdul-`Azîz stated that *Tawarruq* is reprehensible, and in this regard he said; "It is the same as *Ribâ*… and our Sheikh used to prohibit *Tawarruq*. He was asked many times about it while I was present, however, he did not permit it."(4)

b) Proofs of the Scholars Permitting *Tawarruq*

First Proof:

12- Most of the Qur'anic Verses imply permissibility, such as the following:

- {"…whereas Allah has permitted trading…"}

[Al-Baqarah (The Cow): 275]

- {"…while He has explained to you in detail what is forbidden to you…"}

[Al-An`âm (Cattle): 119]

- {"… O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent "}

[An-Nisâ' (Women): 29]

(1) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 30, 302, 442, and 446]; *"Al-Masâ'il Al-Mârdîniyyah"* (p. 121); and *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* by Ibn Taymiyyah (p. 337).
(2) *"Al-Ikhtiyârât Al-Fiqhiyyah"* by Al-Ba`lî (p. 129); *"Al-Furû`"* by Ibn Muflih [6: 316]; *"Al-Inṣâf"* by Al-Mardâwî [11: 195]; and *"Al-Mubdi`"* [4: 49].
(3) *"I`lâm Al-Muwaqqi`în"* [3: 182 and 212]; and *"Tahdhîb Mukhtaṣar Sunan Abû Dâwûd"* [5: 108].
(4) *"I`lâm Al-Muwaqqi`în"* [3: 182].

Al-Kâsânî said; "The outward meaning of the Verses implies that all forms of sale are permissible except those prohibited by evidence. "[1]

The above stated Qur'anic Verses clearly indicate that a contract which is not prohibited by Allah, the Almighty, and his Messenger (peace be upon him) cannot be prohibited. This is because Allah, the Almighty, has explained to us in detail what is prohibited for us. Accordingly, what is prohibited should be prohibited in a clear, detailed manner. Also, just as it is not permissible to allow what Allah has prohibited, it is not also permissible to prohibit what Allah has permitted.[2] In his book "*Al-Muwâfaqât*", *Ash-Shâṭibî* said; "The established rule is that one should differentiate between acts of worship and business activities. This is because acts of worship are originally meant for worshipping, without any need to study their intricate details. Moreover, no act of worship can be performed unless there is unquestionable evidence stating that it is permitted. That is, acts of worship are not something that can be invented. As for business activities, or transactions, they can be practiced as long as there is no evidence stating that they are prohibited, since they are originally judged according to their intricate details. Also, the original ruling on transactions is that they are permissible as long as there is no evidence indicating the opposite."[3]

Accordingly, the original ruling concerning contracts, which are ordinary practices, is that they are not prohibited, and accordingly, they are judged as permissible until there is evidence that proves the opposite. As for *Tawarruq*, there is no *shar`î* evidence stating that it is prohibited, which means that it is permitted. In other words, the absence of evidence prohibiting an act is in itself a proof of the permissibility of such an act. Thereupon, *Tawarruq* is not *shar`î* prohibited because there is no *shar`î* evidence prohibiting it, and thus, practicing *Tawarruq* is permissible as it is not referred to in any *shar`î* text, just like any other matter which is not prohibited.

(1) *"Badâ'i`As-Sanâ'i`"* [5:189]
(2) *"I`lâm Al-Muwaqqi`în"* [1: 383].
(3) *"Al-Muwâfaqât"* [1:284]

Second Proof:

13- A *Qiyâs* (analogical deduction) should be drawn between things and their counterparts or analogues, as mentioned in the letter sent by `Umar Ibnul-Khattâb to Abû Mûsâ Al-Ash`arî (may Allah have mercy upon them both) regarding the principles of issuing Fatwa, in which he said; "Compare things with their analogues, and see which is more closer to Allah, and to the right, and follow it."(1) In his comment on the letter, Imam Najmud-Dîn An-Nasafî said; "If something new happens or appears regarding which there is no known Fatwa, try to compare it with similar things to find out its ruling."(2) In the same respect, Al-Maznî said; "The *Faqîhs*, from the time of the Prophet (peace be upon him) until now, agree unanimously that the analogue of something right is also right, and the analogue of something wrong is also wrong."(3) Accordingly, we can conclude the following:

a) *Tawarruq* is similar to the known sale transactions between merchants, which are permitted by the consensus of the scholars. In such transactions, a merchant may sell and buy on the spot, or buy in cash and sell on deferred payment, or buy on deferred payment and sell in cash. In this case, the merchant may sell a commodity for a price higher than the purchase price, or may sell it for the same price or with no profit, to avoid market recession or to obtain cash which he needs to buy other commodities. In other cases, he may have to sell one commodity for a price lower than the purchase price, which is *Tawarruq*, to get cash so as to trade, settle his debts and financial duties, or to support his family, which are all legally acceptable interests. In the viewpoint of *Fiqh*, there is no difference between the purposes aimed at through such transactions, be they *Tawarruq*, profit, or benefiting from the commodity, since they are all legally permitted interests due to the non-existence of any *shar`î* proof or evidence prohibiting them. In his justification for the permissibility of *Tawarruq*, Sheikh Ibn Sa`dî said; "…(*Tawarruq* is

(1) *"Al-Madkhal Al-Fiqhî Al-`Âmm"* by Az-Zarqâ [1: 68]
(2) *"Tilbat At-Talabah"* by An-Nasafî (p. 130)
(3) *"Al-Madkhal Al-Fiqhî»* by Az-Zarqâ [1: 75]

permissible) because the purchaser does not resell the commodity to the first seller, and because most *shar`î* texts in this regard indicate its permissibility. Moreover, the meaning of the transaction itself implies that it is permissible, since there is no difference, from the *Fiqhî* viewpoint, between purchasing a commodity for using it in daily life activities or reselling it for the sake of cash. This does not imply resorting to stratagems to practice *Ribâ*, and also the transaction itself is needed by the people, which makes it subject to the principle stating that what is needed by the people and does not contradict *shar`î* principles cannot be prohibited by the *Sharî`ah*.(1)

b) *Tawarruq*, as a transaction, is similar to the *shar`î* solution to problematic situations (*Makhraj shar`î*) which the Prophet (peace be upon him) directed the man to in the incident of the bad dates. Instead of buying one measure of good dates for two measures of bad dates (which is prohibited by the *Sharî`ah* due to being a form of excess usury), the Prophet (peace be upon him) ordered the man in question to sell two measures of bad dates for, say; one dirham, and then buy one measure of good dates with that dirham. This is stated in the *hadîth* narrated by Abû Sa`îd Al- Khudrî and Abû Hurayrah saying:

«Allah's Messenger employed someone as a governor at Khaybar. When the man came to Medina, he brought with him dates called Janîb. The Prophet asked him; 'Are all the dates of Khaybar of this kind?' The man replied; 'By Allah, no, O Allah's Messenger! But we exchange two Sâ`s (a unit of measure equal to 2172 gm) of inferior quality dates for one Sâ` of this kind of dates (i.e. Janîb), or exchange three Sâ`s for two of it.' On that, the Prophet (Peace be upon him) said; 'Don't do so [as it is a kind of Ribâ (a usurious transactions)]. Sell the dates of inferior quality for money, and then buy Janîb with the price'.»(2)

(1) *"Al-Irshâd Ilâ Ma`rifat Al-Ahkâm"* by Ibn Sa`dî (pp. 107, 108)

(2) Narrated by Al-Bukhârî, Muslim, At-Tirmidhî, An-Nasâ'î,and Mâlik from Abû Sa`îd Al-Khudrî and Abû Hurayrah. *"Sahih Al-Bukhârî"* [3: 97]; *"Sahih Muslim"* [3:1208]; *"`Âridat Al-Ahwazî"* [5: 249]; *"Sunan An-Nasâ'î"* [7: 244]; *"wAl-Muwatta'"* [2: 632]. =

In other words, the Prophet (peace be upon him) taught the man to avoid the forbidden transaction and to replace it with two permissible separate contracts executed successively in a way that achieves the same goal; namely to replace bad dates with good dates of lesser quantity. By doing so, two legal contracts are carried out, since the goal behind them is legally permissible, even though achieving it by one contract is prohibited.

This is also the case with *Tawarruq*. Although obtaining cash through an interest-based loan or through *`Înah*, which is a usurious stratagem, is prohibited, it is permissible according to the *Sharî`ah* to obtain it (cash) through *Tawarruq*. It is permissible to get cash through *Tawarruq* to settle a debt or to meet other needs. However, this should be done through a permissible transaction, such as a *Salam*, or through two separate transactions or contracts, each of which is permissible on its own. Also, the second party should be different in both transactions. This is the case with *Tawarruq*, where lending with an interest, whether directly or indirectly, by using a stratagem, as in the case of *`Înah*, is not present. The great scholar Muḥammad Aṭ-Ṭâhir Ibn `Âshûr analyzed this issue. He said; "In *Fiqh* terminology, *At-Taḥâyul* (trickery) is an attempt to dress a prohibited act in the form of a permissible act, or to dress a *shar`î*-unacceptable act in the form of a *shar`î*-acceptable one, so as to dodge the resulting blame. Thereupon, *At-Taḥâyul* is used with the affairs prohibited by *Sharî`ah*. However, doing something permissible using a way which is different from the normal one could be called skillfulness or good management."(1)

Third Proof:

14- It is invalid to draw a *Qiyâs* (analogical deduction) between *Tawarruq* and *`Înah*. This is simply because the reason for prohibiting *`Înah* does not exist in *Tawarruq*, that is, *`Înah* is used as a means to practice an interest- based loan, while *Tawarruq* is not. To explain, the commodity in the *`Înah* sale goes back to its original or first seller, as though it had not been taken from his possession, meaning that the sale is of no importance in the whole process. Accordingly, the transaction is used only as a means to practice *Ribâ*, where

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= In his book *"I`lâm Al-Muwaqqi`în"* [3: 238], Ibnul-Qayyim said; "The apparent meaning of the *ḥadîth* implies that it is an order to conclude two separate contracts."

(1) *"Maqâṣid Ash-Sharî`ah Al-Islâmiyyah"* by Ibn `Âshûr (p. 110).

one party gives the other an amount of money, and then he gets it back with an excess. *Tawarruq*, however, is very different from such a stratagem. The seller in *Tawarruq* does not benefit except from the sale of the commodity in the first sale, since the commodity does not go back to him in the second sale, but rather, it goes, through a new separate contract, to another party who has no relation with the first seller. Accordingly, comparing the seller with the lender, who practices *Ribâ* by means of a stratagem in the *`Înah* sale, shows the great difference between them, which proves that it is not a valid *Qiyâs*.

On the other hand, one may argue that the buyer in *Tawarruq* may suffer a loss represented in the difference between the purchase using a deferred price and the sale in cash to a third party. The answer is simply that this is permissible according to the *Sharî`ah*. The majority of scholars argue that the deferment in a credit sale is assigned a portion of the price.(1) In this regard, Ash-Shâṯibî said; "A seller of a commodity will not defer the price unless he expects a higher value, which is an excess over the cash price."(2) Ash-Shawkânî also said; "It is permissible to sell a commodity on a deferred payment basis for a higher price."(3) This is because, as Al-Kâsânî said; "There is a difference between cash payment and deferred payment, since the commodity is better than the debt, and the cash price is more valuable than the deferred price."(4)

c) Proofs of the Scholars Prohibiting *Tawarruq*

First Proof:

15- Purchasing the commodity on a deferred payment basis is not permissible in principle, since the ultimate end of the purchase for the buyer is to subsequently resell the same commodity in return for a price paid on the spot lower than the one he paid on credit, which is the same as an interest-based loan. The original ruling is that credit sale is deemed permissible only when the buyer's intention behind the purchase of the commodity is to trade or benefit from the commodity. This differs from

(1) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 499]; *"Al-Mughnî"* by Ibn Qudâmah [6: 432]; and *"Az-Zarqânî `Alâ Khalîl"* [5: 176].
(2) *"Al-Muwâfaqât"* [4: 42]
(3) *"Umanâ' Ash-Sharî`ah"* by Ash-Shawkânî (p. 288); and *"Nayl Al-Awṯâr"* [5: 152 and after].
(4) *"Badâ'i` Aṣ-Ṣanâ'i`"* [6: 187].

Tawarruq, where the buyer's intention is to sell the commodity which he bought on credit for a lower cash price to get cash, which is the same as *Ribâ*, as it implies excess repayment represented in the deferred price.(1)

In the book *"Majmû` Fatâwâ Ibn Taymiyyah"*, Ibn Taymiyyah said; "There are three forms of purchase:

First; purchasing the commodity for the sake of benefiting from it, such as food, drinks, clothes, houses, etc…, and this is the permissible form of sale.

Second; purchasing the commodity for the sake of trading, which is a permissible form of trading.

Third; purchasing the commodity for a purpose other than the above mentioned purposes, which is to obtain cash. In other words, if one fails to obtain cash through a loan or a *Salam* sale, he may buy a commodity on a deferred payment basis, and then sell it for a price paid on the spot to obtain cash, which is *Tawarruq*. This transaction is regarded as reprehensible, according to the prevalent *fiqhî* opinion. This is also the opinion attributed to Ahmad in one of the two narrations from him regarding this issue, in which he quoted the saying of `Umar Ibn `Abdul-`Azîz: '*At-Tawarruq* is the same as *Ribâ*'."(2)

It is also stated in the same book that "If the buyer in a credit sale buys the commodity with the intention to utilize or trade in it, the sale is permissible; however if he buys it for the sake of cash, that is, to buy the commodity for, say; 100 pounds on a deferred payment basis, and then sell it for 70 pounds in cash, the transaction is invalid according to the prevailing opinion of the scholars."(3)

In "*Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah*" Ibn Taymiyyah said; "*Tawarruq* is a process where the buyer buys the commodity for a deferred price, and then sells it somewhere else for a cash price lower than the deferred price to obtain cash. There is a disagreement among the scholars concerning such a transaction; however, the strongest opinion states that it is prohibited because it is, in reality, *Ribâ*."(4)

(1) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 30, 302 and 446]; and *"Al-Masâ'il Al-Mâridînîyyah"* (P. 121)
(2) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 442].
(3) Ibid. [29: 303].
(4) "*Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah*" [P. 327].

Ibnul-Qayyim said; "Our Sheikh used to prohibit the transaction of *Tawarruq*, and although he was questioned about it several times, he did not permit it. He said; 'The cause of the prohibition of *Ribâ* exists in *Tawarruq*. This is beside the additional cost represented in purchasing the commodity and then selling it for a lower price. The *Sharî`ah* cannot prohibit something harmful and then permit something else which is more harmful."(1)

Ibn Taymiyyah said; "There is a disagreement among the early (*Salaf*) and contemporary scholars regarding the issue of *Tawarruq*; however, it is prohibited according to the prevailing opinion, which is backed by the opinion of `Umar Ibn `Abdul-`Azîz in which he said; *'Tawarruq* is the same as *Ribâ'*. Allah, the Almighty, prohibited giving an amount of money in return for a higher amount to be paid at a later date due to the harm and injustice incurred to the borrower who is in need of money, which applies also to *Tawarruq*. Deeds (their correctness and rewards received from them) depend upon intentions, and every person gets but what he has intended."(2)

Ibnul-Qayyim said; "….in case the commodity is sold to its first seller, it will be *`Înah*, and in case it is sold to a third party, it will be *Tawarruq*. The ultimate purpose behind the two transactions is the price, i.e. cash. That is, the buyer obtains a price paid on the spot in return for a higher deferred price (debt), which is the same as *Ribâ*."(3)

Second Proof:

16- *Tawarruq* can be deemed as a form of the sale of the compelled (*Bay` Al-Mudtarr*), which is forbidden by the Prophet (peace be upon him) in the following *hadîth*:

«*…the Prophet forbade the sale by a compelled person…*»(4)

(1) *"I`lâm Al-Muwaqqi`în"* [3: 182].
(2) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 434]
(3) *"Tahdhîb Mukhtaṣar Sunan Abû Dâwûd"* [5: 108]
(4) Narrated by Abû Dâwûd, Aḥmad, Al-Bayhaqî, but its chain of transmission is weak, as stated by An-Nawawî in *"Al-Majmû`"* [9: 161] and other scholars. *"Mukhtaṣar Sunan Abû Dâwûd"* [5: 47]; *"As-Sunan Al-Kubrâ"* by Al-Bayhaqî [6: 17]; and *"Musnad Aḥmad"* [1: 116].

Ibnul-Qayyim said; "There are two narrations from Ahmad regarding the issue of *Tawarruq*, one of them states that *Tawarruq* is detestable (*Makrûh*) due to it being a form of compelled sale. Abû Dâwûd narrated from `Alî that the Prophet (peace be upon him) forbade the compelled sale."[1] In the *Musnad* of Ahmad, it is narrated that `Alî said:

> *« `Alî Ibn Abû Talib gave a sermon to us saying, 'A stingy time is certainly coming to mankind when a rich man will hold fast to what he has of his possessions (his property), though he was not commanded to do so. For this, Allah, the Most High, says: {"... **And do not forget generosity among you."}**.[2] The men who are compelled will effect the sale, while the Prophet (peace be upon him) prohibited any sale based on compulsion'. Then `Alî mentioned the hadith (of the compelled person).»*[3]

In this regard, Ahmad pointed out that *`Înah* is practiced by a man who is in great need of cash, and because the rich refuse to give him an interest free loan (*Qard Hasan*), he is forced to buy a commodity on a deferred payment basis, and then sell it in cash. In this case, if the buyer sells the commodity to the first seller, the transaction will be *`Înah*, and if he sells it to a third party, it will be *Tawarruq*. It is clear that the price is the intended objective of both transactions.[4]"

Third Proof:

17- In *Tawarruq*, the seller says to the buyer: this commodity is for, say; 10 pounds in cash, and then sells it to him for a higher deferred price, which is prohibited by the *Sharî`ah*, depending on the opinion of Ibn `Abbâs in which he said; "If you agree on a cash price, and then execute the sale upon this agreement, it will be permissible. However, if you agree on a cash price, and then change the sale to be on a deferred payment basis, the transaction will be regarded as selling money for money, which is prohibited."[5] In this

(1) *"Mukhtaṣar Sunan Abû Dâwûd"* by Al-Mundhirî [5: 47].
(2) [Al-Baqarah (The Cow): 237].
(3) *"Musnad Aḥmad"* [1: 116]
(4) *"Tahdhîb Mukhtaṣar Sunan Abû Dâwûd"* [5: 108]; and *"Bayân Ad-Dalîl"* (p. 119).
(5) *"Al-Muṣannaf"* by Ibn `Abdur-Razzâq [8: 236].

regard, Ibn Taymiyyah said; "Ibn `Abbâs pointed out that if one specified a cash price for a commodity, and then sold it for a deferred price, then his intention was to sell dirhams for dirhams, and deeds depend upon the intentions of their doer. This transaction is called *Tawarruq*."(1) He also said; "His words imply that if one sets a cash price for a commodity, and then sells it for a deferred price, this suggests that his intention was to exchange dirhams for dirhams, which is the process of *Tawarruq*, that is the process of specifying a cash price, and then concluding the transaction on a deferred payment basis at a higher price."(2) In another place, he also said; "In the same respect, Muḥammad Ibn Sîrîn said; 'If one wants to sell a commodity on a cash basis, then he should begin by bargaining (with the buyer) on this basis, and if he wants to sell it on credit, then he should also begin by bargaining over a credit price. The scholars regard a sale transaction where both parties bargain over a cash price and then execute the sale at a deferred price as a reprehensible transaction because it may be intended for selling dirhams for dirhams.'"(3)

Fourth Proof:

18- *Sadd Adh-Dharâ'i`* to *Ribâ*, by drawing a *Qiyâs* (analogical deduction) to *`Înah*. In this respect, Ibnul-Qayyim said; "We disagree completely with the *Ḥanbalî* scholars regarding these issues. They permit *Tawarruq*, which is the same as *`Înah*. What is the difference between reselling the commodity to its first seller or to a third party? On the contrary, reselling the commodity to its first seller would not cause the buyer much harm or loss. How can they prohibit something that causes harm, and permit another thing that causes a greater harm? The end objective of both practices is the same, namely to get 10 dirhams on the spot and repay 15 dirhams on a later date, while the commodity, which is nominally exchanged, is used only as a means to achieve such an objective, since it is sold back to either its first seller or a third party, both of them making no difference to the basic objective of the transaction."(4)

(1) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 446]
(2) Ibid. [29: 442]
(3) *"Bayân Ad-Dalîl `Alâ Butlân At-Taḥlîl"* (p. 120)
(4) *"I`lâm Al-Muwaqqi`în"* [3: 212]

d) Discussing the Proofs and Determining the Strongest Opinion

After reviewing the proofs presented by the scholars permitting *Tawarruq* and those prohibiting it, I reached the following conclusions;

First Point:

19- The scholars prohibiting *Tawarruq* depend on the argument that the *Tawarruq* beneficiary purchases the commodity for a deferred price with the intention of selling it for a cash price which is often lower than the deferred price. The intention here is to obtain cash, which is banned by the *Sharî`ah* because of such an intention. This is because the buyer in such a case cannot be differentiated from the borrower in an interest- based loan situation with regard to the outcome of both transactions. Also, the permissible form of purchase is that practiced with the purpose of possessing, making use of or trading in the commodity purchased, but not for other purposes.

This argument has two defects:

a) There is no *shar`î* principle prohibiting this transaction, and the one assumed to be so is nothing but an opinion that is not supported by any *shar`î* or reasonable evidence. On the contrary, in the view of the *Sharî`ah* there should be no difference between the one who purchases with the purpose of possessing, making use of or trading in the commodity and the one who purchases with the purpose of selling the commodity for the sake of obtaining cash, since all these purposes are legally permissible. In his book *"Al-Mudâyanah"*, Ibn `Uthaymîn said; "One purchases the commodity for the purpose of possessing it or for the purpose of selling it to obtain cash, and both purposes are valid."(1)

b) Drawing a *Qiyâs* (analogical deduction) between the *Tawarruq* beneficiary and the borrower in interest-based loans under the pretext that both of them become liable to pay an amount which is higher than the amount they obtained, is an unsound

(1) *"Al-Mudâyanah"* (p. 7).

Qiyâs. The reason is that such a pretext is ineffective due to it being contrary to a *shar`î* principle that implies that obtaining a cash amount in exchange for a higher compensation deferred for a later date is forbidden only when it is achieved through *Ribâ* or *`Înah*, which is a means or a stratagem to practice *Ribâ*. Achieving such a purpose, however, through permissible contracts or *shar`î* solutions (*Makhârij Shar`iyyah*)(1) is *shar`î* permissible, due to the non-existence of any *shar`î* evidence prohibiting it, and based on the rulings pertaining to the following similar or analogous transactions:

i) Permissibility of the *Salam* contract, which the scholars called *"Bay` Al-Mafâlîs"*, i.e. a sale exercised by insolvents, or *"Bay` Al-Maḥâwîj"*, i.e. a sale exercised by those in great need of money. In this sale, the one in need of money receives an amount of cash in advance in exchange for a specific deferred commodity whose market value is higher than the amount he received.(2) This is the same purpose as that of *Tawarruq*. Al-Kâsânî said; "The *Salam* sale depends on the depreciation of the price because it is a form of sale practiced by insolvents (*Bay` Al-Mafâlîs*)."(3) As-Sarakhsî said; "The *Salam* contract is one of the 'insolvent contracts' because its subject matter is sold for a lower price than its likes or its market value. In other words, if the commodity sold was in the hands of the buyer at the time of the contract, he would sell it at its market value, or even higher, if he could."(4) Moreover, Ibnul-Qayyim said; "This belongs to the *Salam* sale, which is called "*Bay` Al-Mafâlîs*" (sale practiced by insolvent persons).

(1) *"Al-Makhârij Ash-Shar`iyyah"* (permissible solutions) refers to the stratagems used as an escape from deadlocked situations or as a way to do permissible acts, avoid forbidden acts, give rights to their owners and fight injustice. This is unlike prohibited stratagems, which Ibn Qudâmah defined as "when someone signs a legal contract to reach a forbidden purpose or to do something prohibited by Allah, such as illegally avoiding a duty or shirking the payment of dues...etc." *"Al-Mughnî"* [6: 116]; *"Ighâthat Al-Lahfân"* [1: 339]; *"I`lâm Al-Muwaqqi`în"* [3: 252]; and *"Al-Muwâfaqât"* [2: 387 and 4: 210].

(2) *"Al-Ishrâf `Alâ Masâ'il Al-Khilâf"* by Judge `Abdul-Wahhâb Al-Baghdâdî [2: 567].

(3) *"Badâ'i` As-Sanâ'i`"* [5: 201].

(4) *"Al-Mabsût"* [12: 126].

In such a form of sale, one may have to sell a commodity that would be available only in the future, such as an expected crop, for a price that is to be paid in advance. He resorts to such a form of sale in case he is insolvent or in great need of the price (in ready cash). Accordingly, such a sale is permissible only in case of a great need, but would not be so if someone, for example, needs the price for trade or to achieve higher profits. To explain, the seller sells his future commodity for a price paid on the spot lower than the market value, and the buyer thinks that it is better to buy it now for a lower price than its price at the time it becomes available (deliverable). This means that the buyer would not buy a commodity which is not present on the spot for a price paid in advance unless he thinks that the price he pays now is lower than the price of the commodity when it is available. In other words, he seeks the financial profit, because if he hopes to receive a divine reward, he would give the seller (the insolvent) the amount of the price as an interest free loan (*Qarḍ Ḥasan*)."[1]

ii) Permissibility of the *Qarḍ Ḥasan* (interest free or 'goodwill' loan) whereby one party borrows upon the request of a second party (who is in need of money) an amount of money from a third party in return for a certain compensation, which is deemed permissible according to the opinion of the *Shâfi`î* and *Ḥanbalî* scholars. In such a case, the borrower undertakes to repay an excess amount, but the extra amount in such a case goes not to the lender, but to the mediator (the first party), which does not contradict the *Sharî`ah*. In his book *"Al-Mubdi`"*, Burhânud-Dîn Ibn Muflih said; "If one says to another: 'Borrow 100 pounds for me (from a third party), and I will give you 10 pounds', it would be permissible because the extra amount granted to him is regarded as a compensation for using his reputation to obtain the loan in question."[2] In "*Ḥâshiyat Ash-Sharawânî `Alâ Tuḥafat Al-Muḥtâj*", it is stated

(1) *"Zâd Al-Ma`âd"* [5: 815].
(2) *"Al-Mubdi`"* [4: 213].

that, "If one says to another: 'Borrow 100 pounds for me, and I'll give you 10 pounds,' the 10 pounds here will be regarded as compensation, and the loan beneficiary (the real borrower) shall be responsible for the repayment."(1) In his book *"Al-Ḥâwî"*, Al- Mâwardî said; "If one says to another: 'Borrow 100 pounds for me, and I will give you 10 pounds', this transaction is regarded as reprehensible by Isḥâq, while it is permitted by Aḥmad. We, however, regard it as a compensation-based transaction, and thus permissible. That is, if the mediator gives the loan from his own money, he would not be entitled to the compensation, which is paid for the service represented in obtaining the loan from a third party."(2)

Second Point:

20- The argument used by the scholars prohibiting *Tawarruq* - which states that the reason behind the prohibition of *Ribâ* is present in *Tawarruq* and that this transaction also involves the cost of buying the commodity and selling it at a lower price, which means that it should be prohibited since the *Sharî`ah* cannot prohibit something harmful and permit another thing that is more harmful(3)- has two defects:

a) The reason behind the prohibition of *Ribâ* lies in the unjust act practiced by the lender against the borrower represented(4) in stipulating an excess over the capital of the loan or obtaining such an excess by using a usurious stratagem (as in the case of *`Înah* whereby the parties agree, in advance, on executing a usurious transaction in which an amount of money is lent in return for an excess over the capital using a commodity as a stratagem or a nominal counter to give such a prohibited transaction a legal form). This means that the cause of prohibition here has nothing

(1) *"Ḥâshiyat Ash-Sharawânî"* [6: 381].
(2) *"Al-Ḥâwî Al-Kabîr"* [6: 440]; and *"Ḥâshiyat Al-Qalyûbî"* [2: 258].
(3) *"I`lâm Al-Muwaqqi`în"* [3: 182].
(4) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 24]; and *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* by Ibn Taymiyyah (P. 117).

> to do with a compensation contract whereby a party may endure a financial loss to obtain an amount of cash, as in the case of *Salam*, or to obtain a commodity in advance, as in the case of deferred payment sales. These forms of financial transactions are permitted according to the consensus of the scholars. To explain, it is permissible, according to the *Sharî`ah*, for the price paid in advance in the *Salam* contract to be lower than the current market value of the deferred commodity,(1) and for the period of deferment to be allotted a portion of the price.(2)

Moreover, it is clear that the seller in *Tawarruq* transactions does not take an excess over the capital through an interest-based loan or through a usurious stratagem, unlike the usurer who takes advantage of the bor-

(1) Ibn Rushd said; "*Salam* is permitted for the sake of facilitating financial transactions for people since the buyer chooses to pay the price in advance to get the commodity at a lower price at a future date, and the seller chooses to obtain a lower price in advance due to the deferment of delivery of the commodity in question." (*"Bidâyat Al-Mujtahid"* [2: 302]). Ibnul-Qayyim said; "The seller, in a *Salam* sale, sells his future commodity for a lower price, and the buyer thinks that it may be better to buy it in advance at a price lower than its price when it becomes available for delivery. This means that if the buyer knows that the price of the commodity at the time of the delivery would be the same as the price he paid, he would not pay the price in advance" (*"Zâd Al-Ma`âd"* [5: 815].

(2) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 499]. Ibn Qudâmah stated that the period of deferment becomes obligatory when the concluding parties agree to defer the price, the rent, the dowry, or *Khul`* (conditioned release from marriage for payment from the wife) compensation. This is because the period of deferment is allotted a portion of the price in such transactions. *"Al-Mughnî"* [4: 432]. This opinion relies on the *shar`î* principle stating that the period of deferment has a financial value in absolute compensation contracts. This is because such contracts represent a kind of trade, which is permitted and encouraged by the *Sharî`ah*, as a way to achieve a profit. Allah, Glorified Be He, says: ***{"O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you"}*** *[An-Nisâ' (Women): 29]*. This is unlike the delay of the repayment in loan transactions, which should not be compensated, otherwise it will change into *Ribâ An-Nasî'ah* (interest on credit transactions/loans). This is because the loan, in the view of the *Sharî`ah*, is a contract of charity and leniency that depends on the lender's desire to donate the usufruct of his loan to the borrower, seeking the reward from Allah on the Day of Resurrection. This implies that it is not *shar`î* permissible to use the loan as a means for eliciting profits and trading in debts, which is done by taking compensation against the delay of repayment.

rower's misfortunes. To illustrate, the seller in *Tawarruq* transactions sells his commodity to the buyer on a deferred payment basis for a higher price, which is *shar`î* permissible, even if the buyer is forced (by his need for money) to do this transaction. In this respect, Ibn Taymiyyah said; "If the buyer is forced to buy something, then the seller should sell it to him for the price of the like (market value), such as when one is forced to buy a type of food available only in the possession of a certain person. In this case, the seller should sell it to him at the market value. If the seller, however, sells it to him on a deferred payment basis, he may increase the price since the period of deferment is allotted a portion of the price."(1) Moreover, there is no relation between this form of sale and the independent sale contract the buyer concludes with a third party for a cash price lower than the price for which he bought the commodity from the first seller, which can be regarded as the main difference between *Ribâ* and *Tawarruq*.

b) The assumption that the cost the buyer bears in *Tawarruq* (through purchasing the commodity and selling it at a loss) is higher than the interest in a *Ribâ* transaction, if true, cannot be leant on as evidence for prohibiting *Tawarruq* under the pretext that the *Sharî`ah* cannot prohibit something harmful and then permit another thing that is more harmful. In fact, this argument has nothing to do with the issue in question, since an interest- based loan is prohibited by *shar`î* texts, while *Tawarruq* is permitted by many *shar`î* proofs. Not only that, but also there is no *shar`î* evidence prohibiting *Tawarruq*.

It is well-known that no scholar of *Sharî`ah* prohibits the transaction in which one sells bad dates for dirhams, and then buys, with such dirhams, a lesser amount of good dates, if such a quantity is lower than the quantity he may obtain by exchanging the bad dates for good dates directly, under the pretext that the *Sharî`ah* cannot prohibit something harmful and permit something more harmful. By the same token, no scholar prohibits the transaction whereby one buys a commodity on credit if borrowing its (cash) price in exchange for an interest would help him buy it at a lower price than the credit price, under the pretext that the *Sharî`ah* cannot

(1) *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* (p. 326)

prohibit something harmful and permit something more harmful. Also, no scholar prohibits *Salam* transactions if the cost the buyer bears (to obtain immediate cash) is higher than the cost he may bear if he obtains the cash he needs by means of *Ribâ*, under the pretext that the *Sharî`ah* cannot prohibit something harmful and permit another thing that is more harmful.

Third Point:

21- The scholars prohibiting *Tawarruq* depend on the argument that *Tawarruq* belongs to *"Bay` Al-Mudtarr"* (the sale of the compelled), which is prohibited by the Prophet. However, this argument is not acceptable and can be refuted referring to the following points:

a) The *hadîth* prohibiting *"Bay` Al-Mudtarr"* (the sale of the compelled) has a weak chain of transmission and cannot be taken as proof, as stated by the scholars of *Hadîth*. It is narrated from Ahmad, Abû Dâwûd, Al-Bayhaqî from Sâlih Ibn `Âmir, from a Sheikh from Banî Tamîm, from `Alî as a *Marfû`* (traceable) *hadîth*. Ibnul-Qattân said; "Sâlîh Ibn `Âmir is unknown, and the Sheikh from Banî Tamîm is unknown." In the book, *"Mîzân Al-I`tidâl"*, it is stated; "Sâlih Ibn `Âmir is unknown. He does not even exist. He is only mentioned in the chain of transmission of a *Marfû`* (traceable) *hadîth* from `Alî in which *"Bay` Al-Mudtarr"* (the sale of the compelled) is prohibited. However, this *hadîth* is *Munqati`* (discontinued)." `Abdul-Haqq said; "It is a weak *hadîth*." Also, Al-Bayhaqî said; "It is narrated through different chains of transmission from `Alî and Ibn `Umar, and all are weak." It is also classified as a weak *hadîth* in the book "*Al-Muhallâ*" by Ibn Hazm. In the book *"Al-Majmû`"*, An-Nawawî said; "This chain of transmission is weak because this Sheikh from Banî Tamîm is unknown."(1)

b) If we suppose that *"Bay` Al-Mudtarr"* (the sale of the compelled) is prohibited, then it should be pointed out that not everyone who

(1) *"Faydal Al-Qadîr"* [6: 332]; *"Mukhtasr Sunan Abû Dâwûd"* by Al-Mundhirî [5: 47]; *"Musnad Ahmad"* [1: 116]; *"Sunan Al-Bayhaqî"* [6: 17]; *"Al-Muhallâ"* [9: 22]; *"Ma`âlim As-Sunan"* by Al-Khattâbî [5: 47]; and *"Al-Majmû`"* by An-Nawawî [9: 161].

needs money to buy food, drink, medicine, clothes, or shelter for himself and his family, or who is forced to sell any of his properties to buy any of the previous items can be classified under the category of *"Bay` Al-Mudtarr"* (the sale of the compelled), which is prohibited. After stating the weakness of the *hadîth* prohibiting *"Bay` Al-Mudtarr"*, Ibn Hazm said; "Since the two narrations of the *hadîth* are not authentic, let us find out the ruling on this issue elsewhere. Undoubtedly, anyone who buys food and clothes for himself and his family is compelled (*Mudtarr*) to do this transaction. Therefore, if such a transaction is deemed invalid due to the element of compulsion it involves, then every transaction whereby one obtains his basic needs, i.e. food, clothes, etc., from somewhere else other than his own productive means would be deemed invalid as well, which is surely unreasonable. The Prophet (peace be upon him) bought measures of barley for his family, and died while his armor was mortgaged against their price. Thus, any transaction whereby one buys or sells to provide for his own and his family's basic needs (despite being compelled to do so) is deemed valid. This is because the sale transaction here is exercised through mutual consent of the contractual parties, and thus, is deemed valid based on the Qur'anic Verse permitting transactions that are based on mutual consent."(1)

c) The scholars prohibiting *"Bay` Al-Mudtarr"* (the sale exercised by a compelled person due to his need) did not prohibit all forms of such a sale, including *Tawarruq*, but rather they only prohibited the forms involving injustice and excessive deceit.(2) However, concluding sale

(1) *"Al-Muhallâ"* [9:22].

(2) In his book *"Kashshâf Al-Qinâ`"*, Al-Buhûtî said; "Purchasing from him (the compelled) is reprehensible." This is because, as he stated in the book *"Al-Muntakhab"*, "He (the compelled) often sells for a lower price than the price of the likes (i.e. the market value)" *"Kashshâf Al-Qinâ`"* [3: 140]. In his discussion of *"Bay` Al-Mudtarr"* (sale exercised by a compelled person) Burhânud-Dîn Ibn Muflih said; "According to a narration about Ahmad, *"Al-Mudtarr"* is the one who has to buy a commodity even for a higher price than its normal value (due to his urgent need of it)". *"Al-Mubdi`"* [7: 4], Ibn `Âbidîn said; "*Bay` Al-Mudtarr* takes places when the seller refuses to sell a basic commodity to someone who is in urgent need of it except =

and purchase transactions with the compelled (*Mudtarr*) person at the market (fair) prices is *shar`î* valid, according to the consensus of Muslim scholars. Not only that, but also some of them regard it as recommendable from the *Sharî`ah* perspective, since it helps the compelled person meet his needs.

In this respect, Al-Manâwî said; "*Bay` Al-Mudtarr* is prohibited. It is when a person is compelled, by someone else, to enter into a contract, which is deemed invalid in such a case, or when a person has to sell any of his properties to repay a debt or to buy food, and is thus forced to sell at a lower price. In this case, the person in need (*Mudtarr*) should be supported, whether by giving him a benevolent loan or by purchasing his commodity at the market value…etc."(1)

In the same regard, Al-Khattâbî said; "*Bay` Al-Mudtarr* has two forms:

i) It is when a person is compelled to enter into a contract. In such a case, the contract is void.

ii) It is when a person has to sell any of his properties to repay a debt or to buy food, and thus is compelled to sell at a lower price. In such a case, this person should not be exploited, but rather, he should be supported by purchasing his property at the market value."(2)

Ibn Taymiyyah said; "If the buyer is forced to buy something, then the seller should sell it to him at the price of the likes (i.e. the market value), such as when one is forced to buy a type of food available only in the possession of a certain person. In this case, the seller should sell it to him at the market

= for a price much higher than the market price, or when the buyer refuses to buy a commodity from someone who is in urgent need of the price except for a price much lower than the market price" *"Radd Al-Muhtâr"* [4: 106]. The same meaning is stated in the book *"An-Nutaf"* by As-Sughdî. Also, in the book *"Al-Ikhtiyârât Al-Fiqhiyyah Min Fatâwâ Ibn Taymiyyah"* (p. 122), it is stated that, "*Al-Mudtarr* is the one who cannot find the commodity he needs except in one place. In such a case, the seller should sell it to him at the market value. That is, the buyer has the right to buy the commodity at the market value whether the seller accepts this or not." *"Mawâhib Al-Jalîl"* [4: 248].

(1) *"Fayd Al-Qadîr"* [6: 332].

(2) *"Ma`âlim As-Sunan"* [5: 47].

value. If the seller, however, sells it to him on a deferred payment basis, he may increase the price since the period of deferment is allotted a portion of the price."(1)

He also said; "Similarly, when one cannot find the commodity he needs except in one place, the seller should sell it to him at the same price he sells to other people, since the Prophet (peace be upon him) prohibited *"Bay` Al-Mudtarr"* (the sale exercised by a compelled person). Likewise, in case of any urgent need, as when the people cannot find basic commodities, i.e. clothes and foodstuffs, except in one place, the seller is obligated to sell it to them at the market value, and they should not pay any extra amount."(2)

d) Even if we presume that *"Bay` Al-Mudtarr"* is prohibited, it is clear that the reason why such a sale is prohibited is not present in *Tawarruq*. *Al-Mutdarr*, from the *Sharî`ah* perspective, refers to a person who has to buy or sell a commodity. Here, the scholars divided *"Bay` Al-Mudtarr"* into two forms; the first is when one is compelled (by another) to buy or sell a commodity, and this practice is prohibited. The second is when one is compelled (by his need) to buy food, drink, medicine, clothes… etc, which is not available except in the possession of one person who sells such a commodity for a price much higher than the market price (*Ghabn Fâhish*), or when one is compelled (by his need) to sell any of his commodities to obtain cash to buy food, drink, clothes, medicine…etc, and cannot find anyone to buy such a commodity from him except one person who buys it at a price much lower than the market price. This reason, namely selling to or buying from *"Al-Mudtarr"* (the compelled person) at unfair prices (due to his need) is not present in the transaction of *Tawarruq* that we are discussing. This can be explained according to the following two points:

   i) In *Tawarruq*, the person usually buys a commodity on a deferred payment basis at the market value (for a credit sale) or at a slightly higher value to sell for cash, which is *shar`î* permissible. That is, he is allowed to buy a commodity on credit for a price higher than its cash price on the basis that the deferment is settled in return

(1) *"Mukhtaṣar Al-Fatâwâ Al-Miṣriyyah"* (p. 326).
(2) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 300].

for a portion of the price. Also, there is no *shar`î* problem for the seller in this transaction.

ii) The *Tawarruq* beneficiary (*Mutawarriq*) sells the commodity he bought on credit to a third party, who has no relation with the first seller, for a cash price usually lower than the credit price, which is a *shar`î* permissible transaction for both parties; the seller (*Mutawarriq*) and the new buyer. These are the true contemporary forms and applications of *Tawarruq* upon which the scholars permitting *Tawarruq* have based their opinions.

Fourth Point:

22- The scholars prohibiting *Tawarruq* argue that the seller, in *Tawarruq*, says to the *Tawarruq* beneficiary (the buyer in this case): "This commodity is for (X) pounds on cash", and then sells it to him for a higher price on a deferred payment basis, which is not permissible based upon the opinion of Ibn `Abbâs reported by `Abdur-Razzâq in his *"Muṣannaf"*. This opinion states: "If both parties agreed on a cash price, and then conclude the transaction accordingly, there will be no problem. However, if they agreed on a cash price, and conclude the transaction on a deferred payment basis, the transaction will be invalid due to it being a form of selling dirhams for dirhams." In fact, this argument is not acceptable due to the following two problems:

a) It is not necessary in *Tawarruq* that the seller specifies a cash price for the commodity and then sells it to the *Tawarruq* beneficiary for a higher deferred price. This even does not usually happen in *Tawarruq*.

b) Even if this happens between the *Tawarruq* beneficiary and the seller, it is not prohibited by any *shar`î* evidence, and the narration about Ibn `Abbâs cannot be regarded as a *shar`î* proof upholding its prohibition because of the following reasons:

i) It is also reported about Ibn `Abbâs that he permitted this form of transaction. In the book *"Al-Muṣannaf"* by Ibn Abû Shaybah, it is stated that, "If the seller says to the buyer: 'This commodity is for (X) pounds on credit, and for (Y) pounds in cash', and

then they agreed on either price and departed, the sale is valid, according to Ibn `Abbâs, Ṭâwûs, `Aṭâ', Al-Ḥakam, Ḥammâd and Ibrâhîm."(1)

ii) In his book *"Sunan At-Tirmidhî"*, Imam At-Tirmidhî said; "If the seller says to the buyer: 'This garment is for 10 pounds in cash and for 20 pounds on credit', it is permissible if they agreed on either price before they separated."(2)

iii) At the end of the narration (of the *ḥadîth*) that prohibits *Tawarruq* in the book *"Al-Muṣannaf"* by `Abdur-Razzâq, Ibn `Uyaynah said; "When I told Ibn Shubrumah about it, he said; 'There is no problem in performing it'."

iv) The explanation given by Ibn Taymiyyah for the *ḥadîth* prohibiting *Tawarruq* (by Ibn `Abbâs) is contradictory to the other explanations provided by the scholars of the traditions. In his book *"An-Nihâyah"*, Ibn Al-Athîr said; "This *ḥadîth* refers to a transaction whereby one party gives a garment, for example, to another party to estimate, and when the second party estimates the garment at, say; 30 dirhams, the first party says to the second party: 'Sell it, and take any amount that is over this price'. In this case, if the second party sells the garment for more than 30 dirhams in cash, the transaction will be permissible, and he is entitled to the extra amount. However, if he sells it on credit for a higher price than its cash price, the transaction will be void and impermissible."(3)

Both explanations of the *ḥadîth* are ambiguous and cannot be used as evidence upon which *Tawarruq* can be prohibited.

Fifth Point:

23- Prohibiting *Tawarruq* based on drawing a *Qiyâs* (analogical deduction) to *`Înah* is not acceptable. To explain, the scholars, in this case, prohibit *Tawarruq* on the strength of the argument that there is no difference in the

(1) *"Al-Muṣannaf"* by Ibn Abû Shaybah [6: 119 - 121].
(2) *"Sunan At-Tirmidhî Ma`a Al-`Âriḍah"* [5: 239].
(3) *"An-Nihâyah Fî Gharîb Al-Hadîth Wa Al-Athar"* [4: 125].

fiqhî ruling between selling the commodity to the original seller (as in *`Înah*) and selling it to a third party (as in *Tawarruq*). According to them, selling the commodity to the original seller may cause the buyer only a little cost and effort, which raises the question, how something harmful (i.e. *`Înah*) is prohibited while something more harmful (*Tawarruq*) is permitted. This is despite the fact that both transactions are used for the same purpose, which is giving 10 dirhams on the spot in return for 15 dirhams payable later using a piece of silk (commodity) that is resold to its original seller in one transaction and to a third party in the second transaction.(1) The reason why this argument is not acceptable is that it overlooked the difference between the two transactions; namely selling the commodity to a third party in the case of *Tawarruq*. Also, it does not pay attention to the principle of achieving people's interests or the difference between the circumstances (in both transactions). We pointed out the shortcomings of this *Qiyâs* (analogical deduction) previously, and thus there is no need for repetition.(2)

The Chosen Opinion:

24- After an objective review of the proofs introduced by both parties, I conclude that the arguments introduced by the scholars permitting *Tawarruq* are stronger and more persuasive, unlike those presented by the scholars prohibiting *Tawarruq*, which are unreliable and can easily be refuted by impartial, academic scrutiny. This is despite the ineffective attempts made by the scholars prohibiting *Tawarruq* to prove its prohibition relying on the principle of *"Sadd Adh-Dharâ'i`"*, which are based on exaggeration and extremism. Here, I find it important to state the opinion of the great scholar Muḥammad Aṭ-Ṭâhir Ibn `Âshûr in which he draws the scholars' attention to the difference between exaggeration and *"Sadd Adh- Dharâ'i`"* in deducing *fiqhî* opinions. He said; "One thing that should be pointed out and stressed in the field of *Fiqh* and *Ijtihâd* (legal reasoning and discretion) is the difference between exaggeration in religion (or in applying *fiqhî* rules) and the principle of *"Sadd Adh-Dharâ'i`"*, which is a minute difference. The principle of *"Sad Adh-Dharâ'i`"* aims at preventing a cause of corruption (*Mafsadah*), while exaggeration in

(1) *"I`lâm Al-Muwaqqi`în"* [3: 212].
(2) See: Notes (14 and 20) of the Research.

religion refers to the extreme practice of attaching something permissible to something prohibited by the *Sharî`ah*, or the process of practicing a *shar`î* act in a more excessive manner than required by the *Sharî`ah* under the pretext of avoiding slackness, which, in the *Sunnah*, is called "extravagance". There are different degrees of extravagance, according to *Fiqh*, some of which fall under the category of piety regarding personal acts, which sometimes leads to undue difficulties, or piety regarding public acts which the people sometimes find disconcerting, and some fall under the category of dispraised obsession. Thus, the Muftis and scholars should avoid exaggeration and extremism in their fatwas and opinions, which are often related to people's activities and acts of worship."[1]

(1) *"Maqâṣid Ash-Sharî`ah"* by Ibn `Âshûr (p. 118).

Topic Three
Modern Applications of *Tawarruq* (Organized Banking *Tawarruq*)

a) Definition of Organized Banking *Tawarruq* (OBT)

25- Many Islamic financial institutions (IFI) nowadays use Organized banking *Tawarruq* (OBT) as a *shar`î* alternative for the interest-based loan practiced by conventional banks, and as an organized alternative for individual unorganized forms of *Tawarruq*, which cause large financial losses and requires great effort from the *Mutawarriq* (*Tawarruq* beneficiary). OBT is based on the same *shar`î* ruling and mechanisms of individual *Tawarruq*, however, it uses a better contractual system that ensures the required liquidity for the client when needed, without the difficulties and great losses that usually result from individual *Tawarruq*. In OBT, the bank purchases the commodity or commodities for the client from the international market (whose prices are less changeable, which protects the client against sharp price fluctuations in other markets), and then sells it to a third party on behalf of the client (after the client legally takes possession of it), with the objective of providing liquidity for the client.

26- Though the formulas used by IFI's in the agreements they conclude may differ in terms of their details and components, they all depend on the same contractual system, which is defined as follows:

First: The bank purchases the commodity or commodities from the international market at a set price according to the specifications determined by the client.

Second: After taking possession and legal receipt of the commodity by the bank, it sells it to the client at a specified price according to the installment scheme both parties agreed on.

Third: The client then entrusts the bank to sell the commodity or commodities to a third party for a cash price.

Fourth: The bank sells the commodity on behalf of the client under the terms they agreed upon and delivers its price to him.

27- In this regard, it is worth mentioning that though it is based on the *shar`î Tawarruq*, OBT can be regarded as a new financial transaction or deal that consists of a set of successive and inseparable contracts, which the bank and the client agree beforehand to execute in a specific manner according to an agreed number of successive stages. Such an arrangement of contracts aims at achieving a specific financial goal intended by both parties to the contract.

Moreover, in present day commercial and banking traditions, the agreement (*Muwâṭa'ah*) preceding such a transaction is considered as being binding on both parties. This is because this transaction is based on a contractual arrangement of connected parts, which is designed to achieve a specific purpose by grouping the contracts and undertakings in one deal according to a set of conditions that govern that deal as one inseparable unit.

b) Basis for Concluding *Shar`î* Ruling on Organized Banking *Tawarruq* (OBT)

To understand the *shar`î* ruling on Organized Banking *Tawarruq* (OBT), the following five principles should be taken into consideration:

First Principle:

28- Organized Banking *Tawarruq* (OBT) is a new transaction and thus its components (concluding parties, formula, and subject matter) and consequences should be judged according to the general *shar`î* rulings on

contracts. This means that whenever these *shar`î* rulings are met, *Tawarruq* will be regarded as a valid and binding transaction, and thus its requirements have to be fulfilled. This is based on the following Qur'anic Verse:

{"O you who believe! Fulfill (your) obligations"}

[Al-Mâ'idah (The Table): 1]

This is because it is undoubtedly permissible for people to invent new types of contracts that help them meet their needs and serve their interests, as long as these contracts are compatible with *shar`î* principles.(1)

Second Principle:

29- It is well known in the *Sharî`ah* that the traditional form of a contract or deal cannot be regarded alone as evidence that any form different from the known form of this contract would be *shar`î* prohibited. To explain, prohibition should be applied only if the conditions and regulations of the contract that should be observed according to the *Sharî`ah*, are violated or modified in a way that the contract becomes no longer compliant with the *Sharî`ah*.

However, if the conditions or terms modified or even violated are not among those that should be observed according to the *Sharî`ah*, but rather they are only adopted and followed due to convention, then the change or violation in this case can be classified under the acts regarding which there are no *shar`î* rulings. Thereupon, the *shar`î* ruling that should be applied in this case is permissibility, subject to the *shar`î* principle stating, "The original rulings for acts regarding which there is no *shar`î* text is permissibility."

30- Therefore, there is no *shar`î* problem regarding the development of the individual form of *Tawarruq* into organized banking *Tawarruq*, which can achieve the same purpose, i.e. providing liquidity, for only a small cost and effort. This is according to Ibn Taymiyyah's opinion, stating: "The *Sharî`ah* aims at achieving and increasing interests, on the one hand, and preventing and decreasing corruption as much as it can, on the other. Also,

(1) *"Al-Madkhal Al-Fiqhî Al-`Âmm"* by Az-Zarqâ [1: 571].

it aims at realizing the better of two good deeds in case they both cannot be realized together, and preventing the worse of two evils in case they both cannot be prevented together."[1]

Third Principle:

31- In OBT, the general *shar`î* regulations on combining more than one contract and undertakings in one deal should be observed. This is the type of deal which the contracting parties agree beforehand to conclude in a specific manner according to a series of conditions that govern the included contracts as an indivisible unit, that aims at achieving a specific financial purpose intended by the concluding parties. There are five regulations that should be observed:[2]

First Regulation: Contract combining should not include the cases that are explicitly banned by the *Sharî`ah*, like combining a sale and a loan in one contract,[3] combining two sales in one sale,[4] and combining two deals in one.[5]

Second Regulation: Contract combining should not be used as a stratagem to commit *Ribâ*, such as in *Muwâṭa'ah* between two parties to practice *`Înah*, reverse *`Înah* or *Ribâ Al-Faḍl* (excess usury).

Third Regulation: Contract combining should not be used as a means to practice *Ribâ*, such as combining sale and loan contracts, or agreeing beforehand to give the lender a gift or an excess over the loan amount.

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(1) *"Al-Masâ'il Al-Mâridînîyyah"* by Ibn Taymiyyah (p. 63).

(2) The research *"Ijtimâ` Al-`Uqûd Al-Muta`addidah Fî Ṣafqah Wâḥidah"* in the book *"Qaḍâyâ Fiqhiyyah Mu`âṣirah Fî Al-Mâl Wa Al-Iqtiṣâd"* by Dr. Nazih Ḥammâd (p. 249-274).

(3) The Prophet (Peace be upon him) prohibited giving a loan for a sale. [Related by Abû Dâwûd, At-Tirmidhî, An-Nasâ'î, Ibn Mâjah, Aḥmad, Ash-Shâfi`î and Mâlik]. At- Tirmidhî said; "It is a *Ḥasan* (good) *Ṣaḥîḥ* (authentic) *ḥadîth*. *"Mukhtaṣar Sunan Abû Dâwûd"* by Al-Mundhirî [5: 144]; *"`Âriḍat Al-Aḥwazî"* [5: 241]; *"Al-Muwaṭṭa'"* [2: 657]; *"Musnad Aḥmad"* [2: 178]; *"Mirqât Al-Mafâtîḥ"* [2: 323]; and *"Nayl Al-Awṭâr"* [5:179].

(4) *"The Prophet (peace be upon him) forbade two sales in one sale."* [Related by Abû Dâwûd, At-Tirmidhî, An-Nasâ'î and Mâlik]. *"Mukhtaṣar Sunan Abû Dâwûd"* [5: 98]; *"Al-Muwaṭṭa'"* [2: 663]; *"`Âriḍat Al-Aḥwazî"* [5: 239]; *"Sunan An-Nasâ'î"* [7: 295]; *"Al-Qabas"* [2: 842]; and *"Nayl Al-Awṭâr"* [5: 152].

(5) *"The Prophet (peace be upon him) forbade concluding two deals combined in one."* [Related by Aḥmad, Al-Bazzâr and At-Ṭabarânî]. *"Musnad Aḥmad"* [1: 198]; *"Nayl Al-Awṭâr"* [5: 152]; *"Fatḥ Al-Qadîr"* [6: 81]; and *"Majma` Az-Zawâ'id"* [4: 84].

Fourth Regulation: Combined contracts should not contain any disparity or contradiction with regard to their underlying rulings and ultimate goals. Conflicts of such a kind often occur when both contracts are concluded on the same object or the same offset object, such as in the combination between *Mud̲ârabah* and lending the *Mud̲ârib* (speculator) the capital of *Mud̲ârabah*, or changing dirhams for dinars and then lending the dinars to their seller, or the combination between exchange and *Ja`âlah* transactions where the object of both transactions is the same, or the combination of a *Salam* and *Ja`âlah* using the same object for both transactions.(1)

Fifth Regulation: Each contract, undertaking or condition within the combination should be valid on its own. This is because the original ruling is that combining different contracts and undertakings in one transaction is permissible if each one of them is permissible on its own, unless there is a *shar`î* evidence prohibiting such a combination, which is regarded as an exception in this case. To illustrate, the original ruling states that the combination is judged depending on its components. Thereupon, if the transaction (agreement) combines more than one contract and undertaking, and each one is permissible on its own, the combination as a whole will be regarded as being permissible. This is the opinion adopted by the majority of scholars in their discussion of many topics, such as:

i) The opinion of Az-Zayla`î Al-H̲anafî when arguing for the validity of free and restricted transfer, where he said; "Because both of them include matters permissible on their own, such as the commitment of the assignee to pay the debt, and authorizing the assigned person to receive the debt from the assignee, and ordering the assignee to pay the debt to the assigned person, then they are permissible when combined together."(2) In other words, since each one of these contracts is permissible on its own, then they will be so when combined together.

(1) Ash-Shihâb Ar-Ramlî said;"This may lead to a contradiction of rules, because in the case of *Ja`âlah* it is not a must to deliver the price until the work is done, however, in the case of a *Salam* and exchange, the price must be delivered at the time the contract is made. There is a rule that states that contradiction between obligations leads to a contradiction between binding acts." (*"H̲âshiyat Ar-Ramlî `Alâ Asnâ Al-Maṯâlib"* (2: 45).

(2) *"Tabiyîn Al-H̲aqâi̭q"* [4: 174].

ii) The opinion of Al-Kâsânî in his discussion of the permissibility of *Sharikat Al-Mufâwaḍah* (Comprehensive partnership), where he said; "Because it comprises two permissible acts, power of attorney and suretyship, it is also permissible."(1)

iii) What has been stated in the book *"Al-Muqni`"* and its explanation *"Al-Mubdi`"*, namely: "If both parties combine *Sharikat Al-`Inân* (Cooperative partnership), *Sharikat Al-Abdân* (Manual partnership), *Sharikat Al-Wujûh* (Reputation-based partnership) and *Muḍârabah* in one transaction, this will be permissible, since each one of these transactions is permissible on its own, and accordingly, their combination is permissible too."(2)

iv) The opinion of Ibnul-Qayyim, in which he said; "The combination of two contracts cannot be deemed invalid as long as each one of them is permissible on its own, as in the case in which one party sells a commodity to another, and then the latter rents his house to the former for one month in return for 100 dirhams."(3)

v) The opinion mentioned in *"Asnâ Al-Maṭâlib"*, says; "If one combines between two contracts with two different *fiqhî* rulings, such as a sale and an *Ijârah* (lease), or a sale and a *Salam*, or a sale and a marriage, in one deal, this will be valid, since each of these contracts is permissible on its own, which means that it will also be permissible if it is combined with another permissible contract, and in such a case the difference in *fiqhî* rulings will have no effect on the whole deal....

Here, the scholars stressed the difference in *fiqhî* rulings between the two contracts which are combined together to reveal the points of difference between them. Considering the case when the two contracts have the same *fiqhî* ruling, such as *Sharikah* (partnership) and loan; where one party pays 2000 pounds and the second pays 1000 in a partnership on the basis that the amount paid by the first party is divided as 1000 pounds in the partnership

(1) *"Badâ'i` Aṣ-Ṣanâ'i`"* [6: 58].
(2) *"Al-Mubdi`"* by Burhânud-Dîn Ibn Mufliḥ Al-Ḥanbalî [5: 43]; and *"Al-Mughnî"* [7: 137].
(3) *"I`lâm Al-Muwaqqi`în"* [3:345].

and 1000 as a loan to the second party. In such a case the whole deal is certainly valid, since both transactions are based on the permissibility of the disposal of one's property."(1)

Fourth Principle:

32- The prior agreement (*Muwâṯa'ah*) between the bank and the client to conclude the agreement of OBT with its permissible contracts and undertakings should be binding on both parties to the contract. This is because *Muwâṯa'ah* represents a prior agreement between the two parties to fulfill contracts and pledges in the future, and this agreement has the same enforceability as the conditions preceding the contracts, which, according to the prevailing *fiqhî* opinion, have the same validity and binding nature of the conditions stated in the contract as long as the contract depends upon them. Also, according to commercial and banking traditions, the prior agreement (*Muwâṯa'ah*) preceding contemporary contractual transactions should be observed by and is binding on the concluding parties. This is because such transactions are based on a contractual system consisting of connected parts and is designed specially to achieve a given task through a group of contracts and undertakings combined in one deal. In a word, since the prior agreement (*Muwâṯa'ah*) preceding this set of contracts does not contradict a *shar`î* text, it should be deemed binding and observable under the *Sharî`ah*.(2)

Fifth Principle:

33- A difference should be made between the invalid stratagems, through which legal contracts and acts are used to reach prohibited goals, as in the case when one enters into a valid contract as a stratagem to perform acts prohibited by the *Sharî`ah*, and the *shar`î* acceptable solutions or stratagems, through which legal contracts and acts are used to reach a permissible

(1) *"Asnâ Al-Maṯalib"* by Zakariyyâ Al-Anṣârî Ash-Shâfi`î [2:45]; *"Al-Bayân"* by Al-`Umrânî [5:148]; *"Mughnî Al-Muḥtâj"* [2:41,42]; *"Rawḏat Aṯ-Ṯalibîn"* [3:429]; *"Qalyûbî Wa `Umayrah"* [2:188].

(2) *"Qaḍâyâ Fiqhiyyah Mu`âṣirah Fi Al-Mâl Wa Al-Iqtiṣâd"* by Dr. Nazîh Ḥamâd (pp. 270 and after). *"Al-Muwâfaqât"* [2: 286]; *"Al-Mi`yâr"* by Al-Wansharîsî" [6: 63]; *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 17]; *"Al-Majallah Al-`Adliyyah"* [Articles: 36 and37]

goal, with the objective of escaping from embarrassing and deadlocked situations by carrying out legal acts and avoiding illegal ones.(1) In this respect, Ash-Shâṭibî said; "Prohibited stratagems are those that violate a *shar`î* principle or contradict a *shar`î* interest. Accordingly, if a stratagem does not violate a *shar`î* principle or contradict a *shar`î* interest, it will not be prohibited or invalid."(2) Also, Muḥammad At-Ṭahir Ibn `Âshûr said; "*At-Taḥâyul* (trickery) is used with the affairs prohibited by the *Sharî`ah*. However, doing something permissible through a way different from the normal one can be called skillfulness or good management."(3)

34- The criterion used to differentiate between the two kinds of stratagems is based on the objectives and intentions behind the acts and practices performed by such stratagems. That is, if the final objective intended by the stratagem is permissible and compatible with *shar`î* rulings, then the stratagem itself is permissible, and, by the same token, if the end objective intended by the stratagem is forbidden or contrary to the *shar`î* rulings, then the stratagem is impermissible. In this respect, Ibnul-Qayyim said; "The stratagems conform to the final objective with regard to permissibility and prohibition. That is, if the objective is something good, then the stratagem is good, and vice versa, and if the objective intended by the stratagem belongs to acts of obedience to Allah, the Almighty, the stratagem will be classified in the same category of good deeds, but if it belongs to sins, then the stratagem itself falls in the same category of sins."(4)

c) *Shar`î* Ruling On Organized Banking *Tawarruq* (OBT)

35- Based upon the above analysis, I can say that the OBT will be deemed *shar`î* valid and permissible if its contracts and undertakings are compatible with the *shar`î* principles and rulings. However, this is based on the condition that the commodity bought by the *Tawarruq* beneficiary should be sold to a third party who has no relation to the bank, and it should not go back to

(1) *"Al-Mughnî"* by Ibn Qudâmah [6: 116]; *"Ighâthat Al-Lahfân"* [1: 339 and 2: 86]; and *"I`lâm Al-Muwaqqi`în"* [3: 252].
(2) *"Al-Muwâfaqât"* [2: 387].
(3) *"Maqâṣid Ash-Sharî`ah Al-Islâmiyyah"* by Ibn `Âshûr (p. 110).
(4) *"Ighâthat Al-Lahfân"* [1: 385].

the bank, in any way, against a cash price lower than the deferred price for which the bank sold it in the first sale. My opinion is based on the following points:

i) All contracts and pledges combined in the transaction are valid, and so the whole transaction will also be valid. This is because in the *Sharî`ah* the validity of a transaction consisting of more than one contract depends on the validity of each one of these contracts.

ii) This modern contractual statement, i.e. OBT, is not prohibited by a shar`î text and it is not used as a stratagem or a means to practice *Ribâ* or other prohibited acts, and the contracts and undertakings combined within it do not contradict *shar`î* rulings.

iii) It can be regarded as a *shar`î* acceptable solution that helps provide the liquidity needed by the *Tawarruq* beneficiary (with no recourse to interest-based loans and the means used to practice them in any hidden way), which is a *shar`î* acceptable purpose represented in realizing a *shar`î* permissible interest.

iv) This transaction does not lead to an act that is prohibited by or contradictory to the *Sharî`ah*.

v) This transaction is nothing but a developed form of classical *Tawarruq*, which is permitted by the majority of the scholars depending upon cogent evidence and arguments, and it has the same concept, purpose and methodology of classical *Tawarruq*. Thus, it is deemed permissible, since there is no effective difference between it and classical *Tawarruq*.

36- However, if the third party (who buys the commodity from the client or the *Tawarruq* beneficiary) is the bank's agent, or buys the commodity on behalf of the bank through a verbal (explicit) or conventional (implicit) *Muwâṭa'ah*, the transaction will be invalid,(1) because in such a case it will be the same as an *`Înah* sale concluded in the guise of *Tawarruq*. Ibnul- Qayyim said; "The crucial factors in contracts are their real objectives, not the

(1) *"Al-Mughnî"* [6: 263]; *"Al-Furû`"* [6: 315]; and *"`Iqd Al-Jawâhir Ath-Thamînah"* [2: 450].

superficial meaning of their words."[1] Also, it is well known in *Fiqh* that *`Înah* is nothing but a usurious stratagem which is prohibited because the first sale of *`Înah* is concluded to be nullified later as the commodity goes back to the original seller. In this respect Ibnul-Qayyim said; "If the contract is concluded only to be cancelled later on, then the contract itself is not the final objective of the transaction and, accordingly, it becomes of no relevance."[2] This is unlike *Tawarruq* transactions whereby the sale contract is concluded to be fulfilled, and, accordingly, the relationship between the first seller and the commodity ends completely, which is the ultimate end of sale transactions as stated in the *Sharî`ah*.

And our last prayer is praise be to Allah,
the Lord of the Worlds

(1) *"I`lâm Al-Muwaqqi`în"* [3: 107]
(2) *"I`lâm Al-Muwaqqi`în"* [3: 240]

Conclusion

1- The term *"Tawarruq"* is used only by the *Hanbalî* scholars. According to them, it refers to a process where someone buys a commodity on credit, and then sells it in cash to someone else other than the original seller for a lower price to obtain cash. This terminological meaning of the word *"Tawarruq"* is derived from its linguistic meaning, which means a great effort exerted by someone to get money. This is because the word *"Tawarruq"* is derived from the word *"Wariq"*, i.e. silver dirhams, which is the ultimate goal of the *Mutawariq* (*Tawarruq* beneficiary). The meaning of the word *"Tawarruq"* then expanded to imply gathering all forms of money by such a transaction. The *Shâfi`î* scholars use the term "*Az-Zarnaqah*" instead of *"Tawarruq"* to refer to such a transaction. However, all other scholars knew the concept of "*Tawarruq*" and discussed it in their discussions of *`Înah* and deferred sales, but they did not give it a specific name.

2- The majority of the *Hanafî*, *Shâfi`î*, *Mâlikî* and *Hanbalî* scholars permitted *Tawarruq*. Ibn Taymiyyah, however, was of a different opinion as he regarded *Tawarruq* as a *Makrûh* (detestable) transaction, which is also a narration from Imam Ahmad. However, it is also reported about him that he prohibited it, which is a third narration from Imam Ahmad. Ibnul-Qayyim, likewise, followed the opinion of his Sheikh Ibn Taymiyyah and prohibited *Tawarruq*.

3- After an objective review of the evidence introduced by both parties, I conclude that the arguments of the scholars permitting *Tawarruq* are cogent and more convincing, unlike those presented by the scholars

prohibiting *Tawarruq*, which are unreliable and can easily be refuted by impartial criticism.

4- As for Organized Banking *Tawarruq* (OBT), we have pointed out that many Islamic financial institutions (IFI's) nowadays use it as a *shar`î* alternative for the interest-based loans offered by conventional banks, and as an organized form of *Tawarruq*, instead of the individual unorganized form which causes large financial losses and requires great effort from the *Mutawarriq* (*Tawarruq* beneficiary). We also explained that OBT depends on the same *shar`î* ruling and mechanisms of individual *Tawarruq*, but it uses a better contractual system that ensures the required liquidity for the client when needed, without the difficulties and great losses that usually result from individual *Tawarruq*. This is done through a process in which the bank purchases the commodity or commodities for the client from the international market (whose prices are relatively stable, which protects the client against sharp price fluctuations in other markets), and then sells it to a third party on behalf of the client (after the client takes possession of it), with the objective of providing liquidity for the client.

After a detailed discussion of Organized Banking *Tawarruq* (OBT), I can say that the OBT can be deemed *shar`î* valid and permissible if its contracts and undertakings are compatible with *shar`î* principles and rulings. However, this is based on the condition that the commodity bought by the *Tawarruq* beneficiary should be sold to a third party who has no relation to the bank, and it should not go back to the bank, in any way, against a cash price lower than the deferred price for which the bank sold it in the first sale.

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Research (5)
Mu`âwaḏah for Commitment to Exchange Currencies in the Future

Prelude

Preface: Concept and Types of Commitments

Topic One: *Fiqhî* Ascription of *Mu`âwaḏah* for Commitment

Topic Two: Derivation of *Fiqhî* Ruling on the Legality of *Mu`âwaḏah* for Commitment

Topic Three: The Necessity for Having Recourse to *Mu`âwaḏah* for Commitment

Conclusion: *Shar`î* Controls on *Mu`âwaḏah* for Commitments

Prelude

1- This research aims to deduce a *shar`î* ruling on a new contemporary issue of great import which has been the subject of many inquiries due to the need of its use by Islamic financial institutions, as well as many traders, manufacturers, countries and governments. Despite such a need, this issue has not been tackled in serious academic studies as it should have been, nor carefully clarified in the studies of contemporary *Faqîhs*. The issue concerns: A financial institution offering a commitment to sell to or purchase from its client a certain currency at a specified future date with another currency at a fixed exchange rate against a specified consideration for such a commitment, regardless of whether the buyer of the commitment opts to conclude the exchange contract offered by the said financial institution at the agreed upon date or not. Is it permissible for clients (e.g. traders, manufacturers, Islamic banks, countries, etc.) to purchase such a commitment to fulfill their need for buying or selling that currency, and protect themselves against a possible or expected loss resulting from the several international fluctuations in currency exchange rates; i.e. to carry out a transaction known in modern banking as 'hedging'?

This issue relates to, or branches from, the topic of "sale of a commitment" or "offering a consideration for a commitment" in Islamic *Fiqh*. Attempting to reach a ruling on this issue necessitates a detailed discussion of the issue of whether a commitment is regarded to have an estimable financial value or not, and the derivation of a *fiqhî* ruling on the transaction involving a consideration for commitments, as well as a broad consideration to see if there is any necessity to practice such a transaction in the present time.

The ruling on an issue is derived from how it is conceptualized. As stated in *"Al-Qawâ`id"*, Zarrûq said; "The ability to discuss a matter is based on the how one conceptualizes the nature and benefit thereof, by means of an acquired or intuitive intellectual understanding that may be referred to when tackling any of the individual parts of such a matter, whether to accept or reject it, and to clarify its basic elements and details thereof."(1) Therefore, it is necessary to start by defining 'commitment' and clarifying the concept of commitment in Islamic *Fiqh*.

The nature of the research necessitated dividing it into five sections: A foreword, three separate items, and a conclusion.

(1) "*Al-Qawâ`id*" by Abul-`Abbâs Zarrûq Al-Mâlikî (p. 3).

Preface
Concept and Types of Commitment

2- **Commitment:** The state of being bound to do, or abstain from doing, an action for the benefit of another.

a) To guarantee another person's damaged property (which has a value that is acknowledged by the *Sharî`ah*) is a commitment that is shouldered by the one who caused the damage; to deliver the sold item and guarantee the latent defects thereof are two commitments undertaken by the seller for the benefit of the buyer; and to pay the price for the sold item and receive it are two commitments undertaken by the buyer for the seller. Each of these commitments is considered an obligation to perform an action; that is, to cause something to exist. All of these commitments are described as being 'positive'.

b) Not to encroach upon others' lives, property or dignity is a commitment imposed under the *Sharî`ah* on every person accountable for his actions; for the depositary/trustee not to waste or transgress a deposit is a commitment imposed on every depositary for the benefit of the depositor under the deposit contract; and a seller's commitment not to object or refuse if the buyer chooses to cancel the sale within the specified period if a condition of cancellation (i.e. option) has been stipulated, or in a deposit-secured sale (or down payment sale), is a commitment on the seller for the benefit of the buyer based on the option in the two contracts. Each of these commitments involves an obligation to abstain from an act; that is, to prevent oneself from doing an act one is about to do. All of these commitments are described as being 'negative'.

3- The source of any commitment may be (I) the *Sharî`ah*, as in the commitment to provide for relatives; (II) a contract, as in the lessee's commitment to pay the rent, and the seller's commitment to guarantee a defect in the sold item; or (III) a damage, as in guaranteeing damaged items and compensating for other damages.

4- The object of any commitment may be a lawful or forbidden matter. For example, a seller's commitment to deliver the sold item to the buyer; a borrower's or lessee's commitment not to misuse the borrowed or leased object, or be neglectful in preserving it; and a husband's commitment not to take a second wife or not to force his wife to leave her hometown under a condition in the marriage contract, are all commitments related to lawful matters.

On the other hand, a debtor's commitment to pay a usurious interest on the loan he has borrowed; a *Muḥallil's*[1] commitment to the wife or the former husband to divorce her in order for her to be lawful for the former husband to remarry; and a husband's commitment, under the marriage contract, not to have sexual intercourse with his wife, are all commitments related to forbidden matters.[2]

(1) the man marrying a triple divorced woman with the intention to divorce her so as to be lawful for her former husband is called *Muḥallil*, a word which literally means, "One who makes things lawful."

(2) "*Al-Madkhal Al-Fiqhî Al-`Âmm*" by Az-Zarqâ (with a slight modification) [1: 436 - 438]; and "*Al-Iltizâmât Fil Shar` Al-Islâmî*" by Aḥmad Ibrâhim (pp. 21 and after).

Topic One
Fiqhî Ascription of *c* for Commitment

a) Grounds on Which the Relative Ruling Is Built and the Basic Considerations of *Mu`âwaḍah* for Commitment

5- The *shar`î* ruling on the sale of a commitment to exchange currencies in the future at a pre-determined rate, i.e. whether it is permissible or not, is based on whether such a mere commitment is considered, in *Fiqh*, as a monetary item or not.

- If it is considered a monetary item, it is then permissible to exchange it for money, and it is valid to sell such a commitment for a specified monetary consideration; that is, the sale would involve the exchange of money for money.
- If it is not considered a monetary item in itself, it is then impermissible to exchange it for money, as such a transaction would be considered as consuming people's property unrightfully, which is forbidden under the *Sharî`ah*.

Accordingly, the realization of the *shar`î* ruling on the issue requires investigating two matters:

First: The nature of money and the elements rendering anything as being monetary in Islamic *Fiqh*.

Second: The availability of the elements rendering anything as being monetary in such a commitment.

b) The Nature of Money and Its *Shar`î* Concept

6- The majority of the *Shâfi`î*, *Mâlikî* and *Hanbalî Faqîhs* view that there are three elements, if present in anything, that render it to be classified as money under the *Sharî`ah* and permit exchanging it for money. They are as follows:

First: It involves a real, intended benefit.

Second: This benefit is lawful, according to the *Sharî`ah,* when one is in a state of affluence and has a free choice.

Third: This benefit has a monetary value according to the custom of the people.

In the commentary entitled "*Tarshîh Al-Mustafîdîn,*" it is stated; "Money is what intrinsically involves an intended benefit which is acknowledged by the *Sharî`ah*, and so it may be exchanged for something customarily considered as money in the state of one having a free choice."(1)

In this respect, Al-Mâzarî said; "A thing that involves no benefit in itself may not be an object of a contract, as it would be a means of consuming property unrightfully, as a contracting party who pays money does not in fact pay it as a gift; but if it were a gift, it would be permissible for him."(2)

In "*Al-Ashbâh Wa An-Nazâ'ir*," As-Sayûtî reported that Imam Ash- Shâfi`î said; "The name 'money' is to be given only to items that have a value, no matter how small it is, according to which they can be sold and which entails compensation in case they are damaged."(3)

Ibn Taymiyyah said; "A benefit which usually has no value is the same as valueless objects which cannot be leased or sold, according to the consensus of Muslim scholars."(4)

Defining 'money,' Judge Ibnul-`Arabî said; "It refers to something coveted (by the people), and can validly be benefited from according to customs and *Sharî`ah*."(5)

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(1) "*Tarshîh Al-Mustafîdîn `Alâ Fath Al-Mu`în*" by As-Saqqâf Ash-Shâfi`î (p. 218).
(2) "*Al-Mu`lim `Alâ Sahîh Muslim*" [2: 157].
(3) "*Al-Ashbâh Wa An-Nazâ'ir*" by As-Sayûtî (p. 327).
(4) "*Mukhtasar Al-Fatâwâ Al-Misriyyah Li Ibn Taymiyyah*" by Al-Ba`lî (p. 368).
(5) "*Ahkâm Al-Qur'ân*" by Ibnul-`Arabî [2: 607].

Ibn`Aqîl defined 'money' by saying, "It refers to what is usually transferred by the people through *shar`î* contracts – with the aim of seeking profits and gains which hold one liable for property and rights – due to people's interest therein and benefit therefrom."(1)

In "*Adh-Dhakhîrah*," Al-Qarâfî said; "**Rule**: Objects and benefits are of three categories: (I) that which may be exchanged for a consideration, such as wheat and rent; (II) that which may not be exchanged for a consideration, either for being forbidden under the *Sharî`ah*, such as alcoholic beverages and singing, or for being of no value according to prevalent customs, such as a single grain of wheat and the act of handing over one shoe, or for involving no purpose at all, such as a particle of dust and a movement of a finger; and (III) that which is open to controversy, i.e., whether it may be exchanged for a consideration or not, such as manure, phlebotomy and cupping."(2)

In "*Al-Iqnâ`*" and its commentary entitled "*Kashshâf Al-Qinâ`*," it is stated; "Money under the *Sharî`ah* refers to that which involves a lawful benefit in itself, and when its legality is not due to a need or necessity.(3) So excluded from this definition is all that which does not involve a benefit in itself, such as insects; all that which involves a prohibited benefit, such as alcoholic beverages; all that which involves a benefit made lawful due to a need, such as a dog; and all that which involves a benefit made lawful due to a necessity, such as eating the dead body of an animal in the state of severe hunger and drinking alcoholic beverages to push a morsel of food clogging one's throat.

N.B. According to the apparent meaning of the above words (of "*Al-Iqnâ`*"), "It is not valid to sell a benefit," though the author deemed it valid when tackling the controls of sale. Thereupon, it should have been said (when defining 'an item valid for sale'), 'The salable item is a monetary item or any lawful benefit, in general.' Or he should have defined 'money' with a definition that includes both objects and benefits together."(4)

(1) "*Al-Wâḍiḥ*" by Ibn `Aqîl [1: 191].
(2) "*Adh-Dhakhîrah*" [5: 478].
(3) This is due to the fact that a forbidden matter in the state of need or necessity is excusable and forgivable.
(4) "*Kashshâf Al-Qinâ`*" [3: 141].

c) Availability of the Elements Rendering Anything As Being Monetary in Such a Commitment

7- In light of what has been stated with respect to the nature of money and its *shar`î* concept, it appears to me that the transactions involving a consideration for the commitment (discussed herein) are lawful and permissible, as it contains the three elements rendering it to be considered as monetary. For illustration:

First: Such a Commitment Involves Intended Benefit

8- As the 'intended benefit' under the *fiqhî* terminology refers to the one to which a valid purpose is related, whether such a purpose is to bring about an interest or ward off an evil,(1) there is no doubt that the commitment, under discussion, has a real intended benefit for the buyer thereof. That is, it is meant to fulfill a real need for such a currency required at the stated future date and to protect oneself against a possible or expected loss caused by the several international fluctuations in currency exchange rates. This transaction is closely related to traders and manufacturers that import goods or raw materials in successive batches and in deferred installments, paying in a foreign currency, and then sell the products in their local currency, whether in cash or on credit, or under contracts of supply, *Salam*,(2) *Istiṣnâ`*,(3) etc.. These parties need to protect themselves from severe losses or bankruptcy as a result of the fluctuations that may occur in currency exchange rates in the future. This applies to a situation when a client buys a commitment offered by a financial institution to purchase from him an amount of a certain currency which will be available with him at a specified future date and which he will need to exchange at that time for his local currency to meet his obligations payable in that currency. This is in order for him to protect himself against any possible or expected loss as a result of the severe fluctuations in the currency exchange rates.

(1) Al-Qarâfî said; "**Rule:** The *Sharî`ah* does not consider anything to be one of the lawful intended benefits except the one to which a valid purpose is related, whether such purpose it to bring about an interest or ward off an evil." "*Adh-Dhakhîrah*" [5: 478].
(2) *Salam* refers to payment in advance for an item to be delivered later.
(3) *Istiṣnâ`* is an order to manufacture something.

Second: The Benefit in Such a Commitment Has Monetary Value

9- This means that the benefit in such a commitment must have a monetary value according to the customs of the people. This element undoubtedly exists in the said commitment in the present time. It does not matter whether this element existed in the past or not, as the principle in the *Sharî`ah* states that a benefit which did not have a monetary value under the *Sharî`ah* for lacking any value according to the customs of the people in the past, is deemed to have a monetary value in the *Sharî`ah* if it starts to possess a monetary value in another time. This is because rulings are built on the prevalent customs, and it cannot be denied that the rulings built on customs are subject to change due to the changes in the times which result in such customs facing a change. This is a well-known fact established in the rules derived by *Faqîhs* and in the principles of *Sharî`ah*.

10- This is clarified through the justification introduced by Imam Al-Qarâfî concerning the prohibition of offering a consideration for a guarantee (by which one assumes responsibility to pay a debt) because it involves a benefit which was not considered to have a monetary value according to the customs of the people (at his time). Accordingly, he did not view it as money, and opined that it would be impermissible to exchange it for money. This opinion is consistent with the preponderant opinion in the *Mâlikî* School.

In "*Adh-Dhakhîrah*," Al-Qarâfî stated; "**Rule**: Objects and benefits are of three categories: (I) that which may be exchanged for a consideration, such as wheat and rent; (II) that which may not be exchanged for a consideration, either for being forbidden under the *Sharî`ah*, such as alcoholic beverages and singing, or for being of no value according to prevalent customs, such as a single grain of wheat and the act of handing over one shoe, or for involving no purpose at all, such as a particle of dust and a movement of a finger; and (III) that which is open to controversy, i.e., whether it may be exchanged for a consideration or not, such as manure, phlebotomy, cupping, etc. An example of the second category is a 'guarantee'; even though it is considered commendable in the eyes of the judicious, yet it does not have

a monetary value according to the customs of the people, and thus it may not be exchanged for monetary objects."(1)

However, a guarantee, in the present time, has a *shar`î*-acknowledged value in trade. As such, it should be viewed as a monetary item and considered permissible to be exchanged for money. One should not stick rigidly to the views stating its prohibition, due to the fact that the grounds on which the prohibition was built, according to those views, have changed. This opinion conforms to another well-known opinion in the *Mâlikî* School. It was introduced by Ibn Râshid Al-Qafaṣî, one of the prominent *Mâlikî Imams*, in his discussion of the prohibition of 'forward/credit sales' which lead to something apparently permissible while in fact it is something implicitly forbidden. He stated; "Imam Mâlik viewed it as forbidden in order to eliminate the means (leading to an evil). In this regard, the general principle instructs one to consider what one gives and what one receives in return, and compare each to one another, and observe: (I) if the transaction involves exchanging items which are permissible to be dealt with in the first place, then it is permissible; (II) however, the transaction is to be deemed forbidden if it is usually used as a means (leading to an evil), such as combining a sale and *Salam* (in one contract); (III) but if it is not frequently used as a means (to an evil), such as a guarantee for a consideration, there are two well-known views (permissibility and forbiddance) in this regard; although (IV) if it is rarely practiced, such as when one says to another 'Sell me your commodity on credit and I will sell you mine on credit,' the well-known opinion states permissibility, unlike the opinion adopted by Ibnul-Mâjishûn."(2)

Third: The Benefit Is Lawful

11- With regard to our present issue, this element varies according to the purpose behind purchasing the commitment as follows:

a) When the purpose and intention behind the purchase of such a commitment is to merely speculate on the exchange rate of a certain currency, as to when it is expected to increase or decrease, and not to actually own such a currency, i.e. to only gain the difference in prices when rates go

(1) "*Adh-Dhakhîrah*" by Al-Qarâfî [5: 478].
(2) "*Lubâb Al-Lubâb*" by Ibn Râshid Al-Qafaṣî (p. 144).

high or low. In this case, the benefit intended from this purchase, if any, is considered impermissible as it involves a risk and a form of betting, which is the same as gambling. Hence, the quality of being monetary is lacked in this commitment and it is, in no way, permissible to be exchanged for money. This form of deal is no more than a type of 'option contracts' which are forbidden under the *Sharî`ah*, and concerning which the Resolution No. 63 (1/7) was issued from the Islamic *Fiqh* Academy, Jeddah. The said Resolution states: "Option contracts, as currently applied in the world financial markets, are a new type of contracts which do not come under any type of the contracts nominated in the *Sharî`ah*. Since the object of the contract is neither a sum of money, nor a utility, nor a financial right which may be exchanged for a consideration, then the contract is not permissible under the *Sharî`ah*."

Ibnul-Qayyim said; "The purpose for which Allah, the Almighty, has legalized trading is that the seller receives the price and the buyer receives the sold item, and thus, each of them fulfills his purpose through the sale. That is, one obtains the price and the other obtains the commodity. This is only realized when the buyer intends to purchase the commodity itself to utilize it or trade in it, and when the seller intends to obtain the price itself… Therefore, if this is the true intention of both, then they have intended to rely on lawful means and have applied it to reach their intended purpose. If a contract is intended to be nullified, then it is not actually intended in the first place, and accordingly, it is deemed as being non-existing, and seeking to conclude it would be futile."(1)

b) When the purpose behind the purchase of such a commitment is to actually possess such a currency at a future date, as the client will need it at such a future date, and he has not resorted to this transaction (i.e. the purchase of the commitment) in advance except to meet a real future need for such a currency and protect him self against a loss that may result from the fluctuations in exchange rates in light of the difficulty of the instant exchange of all the currencies that may be needed by the client in the future.

(1) "*I`lâm Al-Muwaqqi`în*" [3: 239].

In this case and in light of the current conditions of international trade, the benefit obtained from the commitment, i.e. to exchange currency at a future date, is viewed permissible and considered to have a monetary value under the *Sharî`ah*. Hereupon, exchanging it for money is allowed. This is based on the following *fiqhî* rules:

Judge Ibnul-`Arabî said; "Any benefit permitted under the *Sharî`ah* may be sold and a consideration may be taken in return for it."(1) Az-Zayla`î said; "Any item allowed to be benefited from under the *Sharî`ah*, whether on the spot or at a later date, and which has a value, may legally be sold. If it is other than this, then it is not permissible (to sell it)."(2) Moreover, Ash-Shawkânî said; "Any item to which a benefit allowed by the *Sharî`ah* is related may be sold, and any item originally devoid of any benefit or has a benefit which is not permissible (under the *Sharî`ah*) may not be sold, as the means leading to a prohibited matter is prohibited."(3)

In the same context, Ibnul-Qayyim said; "Evidence and rules in the *Sharî`ah* demonstrate that purposes in contracts are taken into account and they affect the validity or invalidity, and permissibility or forbiddance of a contract. More importantly, purposes may even affect the permissibility and prohibition of an action which is not considered as an object of a contract. That is, sometimes an action may be permissible and at other times it is forbidden, due to the difference in the intention and purpose behind it. Moreover, sometimes it is valid and at other times it is not, due to the difference therein (i.e. in purposes and intentions)."(4)

12- The following opinions and texts substantiate and document our conclusion stating that the permissibility of purchasing the commitment benefited from is dependent on the contracting party's purpose behind the purchase thereof. Put differently, if the purpose is to obtain a lawful benefit, then exchanging it for money is viewed permissible; otherwise, the sale thereof is deemed forbidden under the *Sharî`ah*. Let us consider the following:

(1) "*`Âridat Al-Ahwadhî*" [5: 301].
(2) "*Tabyîn Al-Haqâ'iq*" [4: 126].
(3) "*As-Sayl Al-Jarrâr*" [3: 23].
(4) "*I`lâm Al-Muwaqqi`în*" [3: 121].

a) The views of the *Mâlikî Faqîhs* stating that a dog which is kept for amusement and fun may not legally be sold or bought, as it is not considered as a monetary item due to the impermissible purpose behind keeping it. As for the dog kept for hunting or guarding houses, belongings and cattle, it may legally be sold and bought due to the permissible purpose behind keeping it, and it is considered, in such a case, as a monetary item, so it is valid to exchange it for money.(1) In "*Al-Bahjah*," and after mentioning this issue, At-Tusûlî said; "All that is kept for a benefit which is deemed permissible under the *Sharî`ah*, is permissible to be exchanged for a consideration."(2)

The *Faqîhs* in the *Ḥanafî* School view that it is permissible to sell dogs which have a legal benefit, such as hounds or guard dogs. In "*Al-Mabsûṭ*," As-Sarakhsî said; "Since it (a dog) is established to be a monetary item (acknowledged under the *Sharî`ah*) and has a legal benefit, then it is permissible to sell it, like other monetary items."(3) Then he said; "The same applies to a lion; if it is tamable and used for hunting, it is permissible to sell it. If it is untamable or there is no benefit from it, then it is not permissible to sell it."(4)

b) The general principle adopted by the majority of *Faqîhs* states that it is not permissible to sell impure matters, such as excrement, urine, and animals' waste and the like, as it is forbidden to eat such matters and they lack a legal benefit. Seeing some legal benefits in such matters, the *Ḥanafî*, *Mâlikî* and *Zahirite Faqîhs*, as well as the *Ḥanbalî Faqîhs* and Imam Aḥmad in one of their views, opine that it is permissible to sell all that has a legal benefit intended therefrom, such as excrement and dung used to fertilize soil, and dried manure used as a fuel to make fire for cooking, baking, etc.

At-Tusûlî, from the *Mâlikî* School, viewed the permissibility of selling impure oil used to lubricate weapons, used as a fuel for lamps, or used to make soap.(5) Ibnul-Majishûn said; "It is allowed to sell dung as it involves

(1) "*Al-Qabas*" by Ibnul-`Arabî [2: 840].
(2) "*Al-Bahjah `Alâ At-Tuḥfah*" [2: 46].
(3) "*Al-Mabsûṭ*" [11: 235].
(4) Ibid.
(5) "*Al-Bahjah*" [2: 10].

a benefit for the people."[1] It was stated in "*Al-Mudawwanah*" that Ibnul-Qâsim said; "I asked, 'Does Mâlik view the permissibility of selling manure?' He replied, 'I have not heard any opinion adopted by Mâlik in this respect, and I see that there is no harm in selling it.'"[2]

In "*Al-Inṣâf*," Al-Mirdâwî said; "It is not permissible to sell impure dung. This is the view adopted in the *Ḥanbalî* School as well as by the majority of the followers of the *Ḥanbalî* School, and many of them hold this view. A view was reported stating the validity of selling dung based on the *Qiyâs* (analogical deduction) derived from the permissibility of selling impure grease. Muhannâ said; 'I asked Abû `Abdullah about using *Salam*[3] with respect to waste and dung, and he replied that there would be no harm in doing so.' Ibn Razîn introduced two views on the sale of impure matters, and Abul-Khaṭṭâb viewed the permissibility of selling the skin of dead animals. In '*Al-Furû`*,' Ibn Mufliḥ stated; 'According to this view, it is permissible to sell an impure matter that is allowed to be benefited from. There is no difference in the two cases (i.e. the sale of dung and dead skin) and there is no unanimous agreement on one opinion in this matter.'"[4]

Ibn Ḥazm said; "The selling of dung and manure for fertilization, and urine for dyeing, is permissible. However, some scholars viewed that it is prohibited to sell all such matters."[5] Then he introduced the evidence and arguments supporting the opinion stating the permissibility of selling all such impure matters as they involve some legal benefits.

In "*Al-Mabsûṭ*," As-Sarakhsî said; "The prohibition of eating a certain matter does not necessarily lead to the prohibition of selling it. For example, it is not permissible to eat impure grease yet it is permissible to sell it. Similarly, it is permissible to sell manure though it is prohibited to eat it. In fact, manure is a prohibited object in itself (since it is an impure substance); however, it is permissible to sell it."[6]

(1) "*`Iqd Al-Jawâhir Ath-Thamînah*" by Ibn Shâs [2: 333].
(2) "*Al-Mudawwanah*" [4: 160].
(3) *Salam* refers to payment in advance for an item to be delivered later.
(4) "*Al-Inṣâf Fî Ma`rifat Ar-Râjiḥ Min Al-Khilâf*" [11: 48]; and "*Al-Furû`*" by Ibn Mufliḥ [6: 128].
(5) "*Al-Muḥallâ*" [9: 31].
(6) "*Al-Mabsûṭ*" [24: 15]; and "*Al-Muḥallâ*" [10: 198 and 23: 14].

In his commentary on "*At-Tuḥfah,*" Mayyârah said; "It has been stated that among the conditions related to the object of a contract is that it must be pure. Thus, selling an impure object, such as manure, is forbidden; however, it is deemed permissible to sell it for the need thereof."(1) He applied *Qiyâs* based on this view to derive a ruling on water altered by an impurity, such as water collected in toilets, viewing that, for a greater reason, it is permissible to sell it to make use thereof in any legal way.

He then said; "The ruling on the sale of the types of animals' waste: In '*Al-Muqarrib*,' Ibn Al-Qâsim was reported to have said; 'There is no harm in selling the dung of camels, sheep and cows. Accordingly, it is permissible to sell the waste of pigeons and chickens.'"(2)

My opinion is that it is obvious that selling a commitment to exchange currencies at a future time for a legal benefit for the beneficiary and due to a permissible purpose under the *Sharî`ah* is worthier and more deserving of permissibility than the selling of manure, urine, animals' waste and other impure matters for the possibility of benefiting therefrom in any way.

(1) "*Sharḥ Mayyârah `Alâ At-Tuḥfah*" [1: 83].
(2) Ibid [1: 83].

Topic Two
Derivation of *Fiqhî* Ruling on the Legality of *Mu`âwaḍah* for Commitment

The derivation of *fiqhî* ruling on the legality of this issue is based on two elements:

First: The General *Fiqhî* Approach Permitting It

13- There is a general clear-featured *fiqhî* approach in numerous *fiqhî* texts, scattered topics, various *fiqhî* justifications introduced by eminent scholars of different schools of *Fiqh*, and narrations reporting the opinions and deeds of some of the prominent *Faqîhs* among the Prophet's Companions, to indicate the validity of offering a consideration for commitments involving an intended benefit and legal purpose. Such an approach is clearly perceivable after contemplating a number of *fiqhî* issues similar to the issue discussed herein. Such similar issues can be used as a basis for applying *Qiyâs* to determine the permissibility of selling the commitment (under discussion), due to the absence of any difference between them and the point under discussion. That is, among the rules and principles considered when deducing *shar`î* rulings on new incidents and matters is to apply *Qiyâs* to similar and corresponding matters. Imam Al-Muzanî said; "The *Faqîhs*, from the time of the Messenger (PBUH) until the present, have unanimously agreed that a matter similar to another matter which is rightful is also considered rightful, and a matter

similar to another matter which is wrong is also considered wrong."(1) With respect to the principles of deducing judgments and Fatwas, `Umar Ibnul-Khaṯṯâb (may Allah be pleased with him) sent a letter to Abû Mûsâ Al-Ash`arî (may Allah be pleased with him) in which he said; "Then, you may search for similar and corresponding issues, apply *Qiyâs* (analogical deduction) to determine the rule for (new) matters according to ones similar to them, and choose the nearest of which to Allah and the most similar to the truth in your opinion, then follow it."(2) Commenting on this, Imam Najmud-Dîn An-Nasafî said; "If a new incident takes place and you do not know the answer thereto, then refer it to its similar incidents, and, accordingly, you will know the answer."(3) Ibn Taymiyyah said; "Commutations/exchanges are based on one law, and the *Sharî`ah* is conformable and upright; it treats similar matters equally and differentiates between dissimilar ones."(4)

The features of this original *fiqhî* approach are clearly apparent in the following examples:

a) Many *Faqîhs* have viewed the permissibility of transactions of several forms and types of plain commitments for money if such commitments involve a permissible benefit for the beneficiary. These forms and types are considered as being similar and corresponding issues to the one under discussion, and which can be attributed thereto to indicate the permissibility thereof, due to the absence of any difference among them.

Moreover, the *Mâlikî Faqîhs* have maintained the permissibility of certain types of plain commitments as long as they are allowed under the *Sharî`ah*, such as a commitment undertaken by a husband to his wife not to take a co- wife in return for a consideration given to him; a wife's commitment not to marry again after the death of her husband in return for a consideration given to her; and *Umm Al-Walad*'s(5) commitment not to marry again after the death of her master in return for a similar consideration. Some of the *Ḥanbalî*

(1) "*Al-Madkhal Al-Fiqhî Al-`Âmm*" by Az-Zarqâ [1: 75].
(2) Ibid [1: 68].
(3) "*Ṯilbat Aṯ-Ṯalabah*" by An-Nasafî (p. 130).
(4) "*Naẓariyyat Al-`Aqd*" by Ibn Taymiyyah (p. 172).
(5) Lit., mother of the child, meaning, in Islamic terminology, a slave-girl who gave birth to a child from her master. For this, she cannot be sold, and is automatically freed upon the death of her master.

scholars, such as Judge Abû Ya`lâ and Ibn Taymiyyah, have also viewed that it is permissible for a wife to waive her right for sexual intercourse, or her share of the time the husband should spend with her, etc., for a financial consideration agreed on by the two spouses.

In "*Taḥrîr Al-Kalâm Fî Masâ'il Al-Iltizâm,*" Al-Ḥaṭṭâb said; "As for the commitment in which a man gives a consideration to his wife or *Umm Al- Walad* for her not marry another after his death, or the commitment in which a wife gives a consideration to her husband on the condition that he must not take a co- wife, it is permissible. However, they are not to be prevented from marriage, but they can return whatever consideration they have received.

In the chapter on wills in '*Al-Mudawanah*,' Ibnul-Qâsim said; 'And if a master bases his will on the condition that his *Umm Al-Walad* must not marry again, it would be permissible. If she marries, she is to be excluded from the will. Likewise, if he has bequeathed a thousand dirhams to be given to her on the condition that she must not marry again and she took that money, but later married another man, that money should be taken from her.'

Abul-Ḥasan said; "Moreover, if a husband bequeaths something to his wife on the condition that she must not marry again, it is deemed permissible." Ibn Yûnus said; 'A wife may give money to her husband on the condition that he must not take a co-wife. Though this is deemed allowable for them, they deprive themselves from benefiting from a marriage, in return for money. Whenever they recant their commitments, they must return what they have taken.'"[1]

In "*Al-Ikhtiyârât Al-Fiqhiyyah Min Fatâwâ Ibn Taymiyyah,*" it is stated; "The followers of our *fiqhî* School said; 'It is not permissible for a wife to take a consideration in compensation for waiving her right to spend the night with her husband as well as to have sexual intercourse with him. However, Judge `Iyâḍ's statements involve grounds for viewing the permissibility of such.' Abul-`Abbâs Ibn Taymiyyah said; 'According to

(1) "*Taḥrîr Al-Kalâm Fî Masâ'il Al-Iltizâm*" (p. 111).

our *fiqhî* School, *Qiyâs* indicates that it is permissible for a wife to take compensation for all her rights, including her share of the time that the husband should spend with her and other rights. Since it is permissible for a husband to take a consideration from her for his rights,(1) it is permissible for her to take a consideration from him for her rights, as both rights represent a physical benefit.' Imam Ahmad pointed out in more than one position that it is permissible for a woman to give a consideration in order to have the authority to divorce. This is also based on the fact that it is permissible for a wife to prevent her husband from taking a co-wife if she stipulates so, just as a husband can prevent her from marrying another man after his death, which is a kind of restriction of freedom. A consideration may be taken in exchange for such rights. This matter resembles the reconciliation for compensation in order to relinquish the right of preemption or the penalty of slander."(2)

b) According to the well-known opinion in the *Mâlikî* School, it is permissible under the *Sharî`ah* for the creditor to offer a consideration for the debtor if the latter brings a surety to guarantee his debt.(3) Ad-Dardîr said; "If a consideration is offered by the creditor or a third party to the debtor in return for bringing a surety for the debt, it is deemed permissible."(4) Al- Khurashî said; "As for the consideration offered by a creditor or third party to the debtor, on the condition that the latter should bring a surety, it is regarded as being permissible."(5)

In my opinion, such a consideration is nothing but a compensation for the commitment made by the surety, who assumes the responsibility for a debt in case of default, as intended by the creditor offering such a consideration.

c) It is stated in the provisions and justifications introduced by some of the *Shâfi`î* and *Hanbalî Faqîhs* that the buyer's right of option

(1) **Translator:** This is the intention in the case of *Khul`*, i.e. conditioned release from marriage for payment from the wife (usually monetary) to her husband.
(2) "*Al-Ikhtiyârât Al-Fiqhiyyah*" by Al-Ba`lî (p. 249).
(3) "*Ash-Sharh Al-Kabîr*" by Ad-Dardîr [3: 341];"*Mawâhib Al-Jalîl*"[5: 113]; and "*Adh-Dhakhîrah*" [9: 214].
(4) "*Ash-Sharh As-Saghîr Wa Hâshiyat As-Sâwî `Alayh*" [3: 443].
(5) "*Al-Khurashî `Alâ Khalîl*" [6: 30].

(i.e. stipulating that the right of option is his in the sale contract) is in exchange for a portion of the specified price of the sold object.

This means that the portion of the price, in exchange for the right of option in a sale contract, is actually a price for the seller's commitment to cancel the contract at any time chosen by the buyer during the option period.

In his discussion on the rulings pertaining to the right of option, Al- Mâwardî said; "Since the option is in return for a portion of the price, do you not see that the price conventionally increases with the presence of an option and decreases with its absence?"(1)

Al-Khaṭîb Ash-Shirbînî said; "This is because the right of option usually involves an increase in the price or is considered a kind of favoritism (when it is given without any increase)."(2)

Discussing the rulings on the right of option in "*Al-Mughnî*," Ibn Qudâmah said; "Because a portion of the price is allocated to the option."(3)

In this regard, I view that the same applies to the down-payment sale.(4) In fact, the down-payment is nothing but a price for the seller's commitment to cancel the contract if the buyer chooses so during the period specified in the contract, and the remaining price is the real consideration for the sold item. Accordingly, if the buyer chooses to cancel the sale contract, he then drops the actual price of the sold item, but if he chooses to carry it through, he has to pay it to the seller. As for the down-payment, the seller deserves it

(1) "*Al-Ḥâwî Al-Kabîr*" [6: 76].
(2) "*Mughnî Al-Muḥtâj*" [2: 47].
(3) "*Al-Mughnî*" [6: 44]; and the same view is stated in "*Ash-Sharḥ Al-Kabîr `Alâ Al-Muqni`*" [11: 287].
(4) Resolution No. 72 (3/8) by the Islamic Fiqh Academy, Jeddah, states:

a) Down-payment (earnest) sale means the sale of a commodity with the buyer making a down-payment to the seller on the understanding that if he took the commodity, the down-payment would be deducted from the selling price, and if he dropped it, then the down-payment would be the seller's property.

b) Down-payment (earnest) sales are permissible if the time frame of the contract is set, and the down-payment is considered as part of the selling price if the purchase is carried through, and as the property of the seller if the buyer revokes the sale.

as a price for his said commitment, whether the buyer chooses to conclude the sale contract or chooses to cancel it.

This presumption is emphasized and clarified by the fact that there is no *shar`î* reason, in my opinion, for the seller's entitlement to such a down- payment, especially in the case of canceling the sale contract, except for the reason I have mentioned above. But for this presumption, the seller's taking of the down-payment in this case would be considered as a form of consuming people's property without right.

d) There is a significant view in the *Mâlikî* School stating that a buyer's commitment towards the seller (under the option) to bring a guarantor or security for the deferred debt in a sale on credit or similar contracts of financial transactions, is in fact offered in exchange for a part of the price of the sold item. This is one of the two views adopted in the *Mâlikî* School as mentioned by Ibn Shâs, Al-Maqqarî, Al-Wansharîsî, Al-Manjûr, As-Siljmâsî, and others.(1)

In "*Al-Qawâ`id*," Al-Maqqarî said; "**Rule**: Does the stipulation of some kind of benefit in the contract, such as a security or surety, deserve a portion of the price or not? The *Mâlikî Faqîhs* have differed on the ruling in this respect, and accordingly they have viewed the invalidity of such a contract (which involves such a condition) due to the risk involved."(2)

Moreover, in "*Idâh Al-Masâlik*," Al-Wansharîsî said; "**Rule Fifty Three:** Do accessories (of an object of a contract) deserve a portion of the price or not? Based on the answer to this question, that issue (of whether it is permissible or not to stipulate a security or surety therein) may be settled."(3)

In brief, a commitment to document a deferred debt in the contracts of financial transactions is considered a legal monetary benefit for the

(1) "*`Iqd Al-Jawâhir Ath-Thamînah*" by Ibn Shâs [2: 378 and 381]; and "*Sharh Al-Yawâqît Ath-Thamînah*" by As-Sijlmâsî [2: 593].
(2) "*Sharh Al-Manhaj Al-Muntakhab Ilâ Qawâ`id Al-Madhhab*" by Al-Manjûr [1: 361]; Commentary on "*Sharh Al-Yawâqît Ath-Thamînah*" [2: 593]; and Commentary on "*Îdâh Al-Masâlik*" (p. 254).
(3) "*Îdâh Al-Masâlik*" (p. 254).

beneficiary, and thus it is regarded as money in exchange for which a portion of the specified price is allocated.

e) The *Mâlikî* and *Ḥanbalî Faqîhs* have opined that if the sold item is specified, it is transferred to the buyer's property and enters into his liability once he has entered into the contract. Accordingly, if the sold item is damaged after the contract has been entered into and before actually delivering it to the buyer, then it is considered as if it has been damaged while in his liability.(1) This is based on the narrations of Al-Bukhârî, At-Taḥâwî, and Ad-Dâraquṭnî reported from Ibn `Umar, who said; "That which is contracted upon while it is alive and healthy is in the liability of the buyer."(2) In another narration from him, it is stated; "The *Sunnah* states that whatever is contracted upon while it is alive and healthy is in the liability of the buyer."(3)

In this regard, the following story was mentioned in "*Al-Mudawwanah*": Ibn Wahb related to me from Ibn Jurayj from Ibn Shihâb that he said; "`Uthmân and `Abdur-Raḥmân Ibn `Awf were of the cleverest in trading among the Messenger's Companion. The people would say; 'We wish to see them entering into a sale together so we could know which of them is cleverer.' It then happened that `Abdur-Raḥmân bought from `Uthmân a horse, which was not present at the time of sale, for twelve thousand dirhams and he said that if it was well that day, he would be responsible for it – I have no doubt that `Abdur-Raḥmân had already seen it – then `Abdur-Raḥmân said to `Uthmân, 'How about giving you an extra four thousand dirhams in return for the horse being in your liability until it is delivered to my messenger?' `Uthmân accepted, so `Abdur-Raḥmân gave him another four thousand dirhams due to that condition. The horse then died and `Abdur-Raḥmân's

(1) "*Kashshâf Al-Qinâ`*" [3: 232]; "*Al-Muntaqâ*" by Al-Bâjî [4: 250 and after]; "*Al-Mughnî*" [6: 186]; and "*Mayyârah `Alâ At-Tuḥfah*" [2: 195].

(2) "*Fatḥ Al-Bârî Sharḥ Saḥîḥ Al-Bukhârî*" [4: 351]; "*Sharḥ M`ânî Al-Athâr*" by At-Taḥâwî [4: 16]; and "*Sunan Ad-Dâraquṭnî*" [3: 54].

(3) Ibn Battah Al-`Ukbarî commented on this narration by saying; "I believe that this is a *marfû`* (traceable) *ḥadîth* based on the words 'The *Sunnah* states'." Ibn Qudâmah said; "When the Prophet's Companions say; 'The *Sunnah* states;' this refers to the *Sunnah* of the Prophet (PBUH)." "*Al-Mughnî,*" [6: 182]; "*Badâ'i` Al-Fawâ'id,*" [4: 56]; and "*Al-Musawwadah*" [1: 581].

messenger came after he had died. Thereupon, the people realized that `Abdur-Rahmân was cleverer than `Uthmân (in matters of sales). Ibn Wahb related to me, from Yûnus Ibn Yazîd from Ibn Shihâb, who said; 'He (`Abdur-Rahmân's messenger) found out that the horse had died, so the seller was liable for it.'"[1]

In my opinion, it is obvious, in light of the above narration, that `Uthmân Ibn `Affân sold, to `Abdur-Rahmân Ibn `Awf, a commitment to be liable for his horse until the messenger of `Abdur-Rahmân would come to receive it (after the horse had been deemed to be out of the seller's property and liability according to the sale contract) in exchange for four thousand dirhams. Accordingly, when the horse died, `Uthmân was liable for its death from his own money, in line with his commitment to guarantee the horse. As none of the Companions was known to disagree on or disapprove of what happened, though the people were aware of that incident, as indicated in the narration, this is considered as a tacit agreement on their part on the permissibility of offering a consideration for a commitment to bear the consequence of any damage to another person's property.

f) The most authentic views adopted by the *Hanafî Faqîhs* state that it is permissible for a person to accept work, such as tailoring a dress or building a wall, and commit himself to accomplish it by a specified date for a determined fee, then agree with another person (through a subcontract) to undertake such work for a lesser fee, and take the difference as a lawful gain. That person deserves such a difference or gain for guaranteeing work, although he did not perform it himself, and perhaps he does not even have money in the first place.[2]

On the same subject, Al-Kâsânî said; "If a manufacturer accepts work for a fee and he does not perform the work himself, but he assigns it to someone else for a lesser fee, then the resulting profit is considered lawful. There is no reason for deserving the resulting profit except by means of guaranteeing (the performance of the work)."[3]

(1) "*Al-Mudawwanah*" [4: 306]; the text is repeated therein in [4: 209].
(2) "*Fath Al-Qadîr*" by Ibnul-Humam [5: 405].
(3) "*Badâ'i` As-Sanâ'i`*" [6: 62].

As a rule, it is permissible to take money (i.e. a profit) in exchange for a commitment to undertake a work, even if the one making the commitment does not perform the work himself.

The same meaning has been stressed by the *Ḥanbalî Faqîhs*. In "*Al- Mughnî*," Ibn Qudâmah said; "If someone says; 'I will take this work and you will do it, and the fee will be divided between you and me,' then such a partnership is deemed valid… In our view, a guarantee entitles one to a profit, as evidenced in an *Abdân* Partnership.(1) Accepting work necessitates making a guarantee by the accepting party, and based on such a guarantee, he shall be entitled to the resulting profit."(2)

g) The most authentic views adopted by the *Ḥanbalî Faqîhs* state that it is permissible for a person to take a profit in exchange for a guarantee (i.e. a financial security) in a *Wujûh* Partnership (Reputation-based-partnership). In this type of partnership, the partners do not provide a specific capital, but use their business reputation and goodwill. The partners agree to buy on credit and sell for cash. They share the profit or bear the loss in proportion to their mutual agreement.

Thereupon, the extra profit stipulated for a partner in excess of his share in the ownership of the purchased commodity is only deserved by him in exchange for his guarantee, i.e. his liability for any debts resulting from buying on credit under such a type of partnership.(3) This is because the *Wujûh* Partnership is actually based on agency and liability; that is, each partner is an agent for the other in selling and purchasing, and a guarantor for the other with respect to the price. This is stated in Article (1886) of "*Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Aḥmad.*"

This opinion indicates the permissibility of taking a consideration for bearing a liability for a debt.

(1) A partnership between two or more persons to combine their skills, or mental or physical labor (without any capital). They jointly accept work, perform it according to their agreement and share the profit.

(2) "*Al-Mughnî*" [7: 113].

(3) "*Maṭâlib Ulî An-Nuhâ*" [3: 545]; "*Al-Mubdi`*" [5: 38]; "*Kashshâf Al-Qinâ`*" [3: 517]; "*Sharḥ Muntahâ Al-Irâdât*" by Al-Buhûtî [2: 339]; and "*Ma`ûnat Ulî An-Nuhâ*" [4: 764].

h) The view adopted by many of the *Mâlikî Faqîhs* which states that it is permissible for a guarantor to stipulate, under a guaranty contract, that the creditor should waive a portion of the debt due from a debtor and that he (the guarantor) will guarantee the payment of the remainder on a date they agree upon together.(1)

In "*Adh-Dhakhîrah*," Al-Qarâfî said; "If a man owes another ten dirhams payable in a month, and the creditor asks him to bring a surety to guarantee the debt in return for him (the creditor) waiving two dirhams, this is deemed forbidden by Ibnul-Qâsim. This is because such a surety is considered a guarantor for a consideration, and though the surety would not actually take the two dirhams, he would be viewed as if he said to the creditor, 'Grant them (the two dirhams) to the debtor.' It would be as if he also said; 'I will not guarantee (the debt) until you grant so-and-so two dinars.' Ashhab said; 'If he (the creditor) waives a portion of the debt on the condition that the debtor brings him a surety or guaranty to guarantee the repayment within a specified term, this is deemed permissible, as it is considered a favor for a party other than the guarantor.' In this respect, Asbagh said; 'If he (the creditor) gives the debtor one dinar on the condition that he brings him a surety to guarantee the repayment in a specified term, this is deemed permissible, and it is like waiving a portion of the owed debt.'"(2)

It is stated in "*Mawâhib Al-Jalîl*": "Muhammad reported from Mâlik, Ibnul-Qâsim, Ashhab and others that if a man says to another, 'Waive some of your debt owed to you by so and so and I shall guarantee the repayment of the remainder in another specified term,' this is deemed as being allowed, as the creditor is entitled to take his dues on the spot. Ashhab reported that Mâlik deemed it permissible yet detestable. Also in '*Al-`Utbiyyah*,' Mâlik said; 'This is not valid. It is like telling someone to give you ten dirhams and you will guarantee the debt for him. The guaranty here is forbidden.' But the first view is given more preponderance. In '*Al-`Utbiyyah*,' Ibnul-Qâsim said that it is allowed to say to someone (a debtor), 'Take these ten dinars and bring me

(1) "*Mayyârah `Alâ At-Tuhfah*" [1: 121]; "*Ash-Sharh Al-Kabîr `Alâ Khalîl*" [3: 341]; and "*Adh-Dhakhîrah*" [9: 218 and after]

(2) "*Adh-Dhakhîrah*" [9: 213 and 214].

a surety or a guaranty for the debt you owe me.' Although according to one of Mâlik's views, this is not permissible. That is if someone says to a creditor, 'I shall guarantee the debt for you on the condition that you give so and so, other than the debtor, one dinar,' it is not deemed permissible. Muḥammad reported from Ashhab that he said; 'If a man is entitled to a debt worth ten dinars payable after a specified term, then he waives two dinars therefrom before the end of the term on the condition that the debtor brings a guaranty or surety for the remainder, it is allowed.' However, Ibnul-Qâsim viewed that it is not permissible."(1)

It is also stated in "*Sharḥ At-Tâwûdî `Alâ At-Tuḥfah*": "A man says to a creditor, 'Will you drop ten (dirhams, for example) from the hundred due from your debtor and I shall guarantee the payment of the remainder in a specified term?' In such a case, if the one hundred (dirhams) are due at the time, then such a proposal is viewed as being invalid by Mâlik (in '*Al-`Utbiyyah*); it would be as if he says; 'Give me ten and I shall guarantee payment for you.' In '*Al-Mawwaziyyah*,' Ibnul-Mawwâz stated that it is allowed. This is because he would be entitled to take his dues on the spot; therefore, delaying payment would be like starting a new lending transaction with a surety. This view is adopted by Ibnul-Qâsim, Ashhab, and others. On the other hand, if the one hundred (dirhams) are delayed , Ashhab views that it is allowed while Ibnul-Qâsim views that it is not permissible, since the acceptance of a surety is like advancing the payment of the debt. Its form is: 'Drop a portion of the debt and get repaid before the due date,' which is forbidden."(2)

In my opinion, the statements of these *Faqîhs* viewing the permissibility for a surety to stipulate upon the creditor to drop a portion of the debt owed from the debtor on the condition that the surety will guarantee the remainder, indicate the permissibility of a surety's guarantee of a debt in exchange for a portion of the debt due from the debtor to be dropped by the creditor. This entails that the mere guarantee of the debt by the surety has a benefit which has a financial value in itself, according to conventions, so

(1) "*Mawâhib Al-Jalîl*" [5: 113].
(2) "*At-Tâwûdî `Alâ Tuḥfat Ibn `Âṣim*" [1: 185].

that a financial consideration may be offered in exchange for such a benefit. In other words, without this, it would not be permissible for the creditor to drop some of the debt in exchange for the surety's guarantee for the payment of the remainder thereof.

i) There are several contemporary forms and common applications of the selling and purchasing of a commitment for a financial consideration with respect to estimable benefits at a pre-determined price, whether the beneficiary conducts such financial exchange later or opts not to conduct it. These forms and applications are similar to the issue discussed herein. They are used in Muslim countries without any objection on the part of any of the people of knowledge. An example is when service providers (telecommunications, telex, electricity, gas, etc.) sell their services and commit themselves to provide such services for subscribers in return for a determined price (i.e. subscription fees), whether subscribers use such services or not. Then, in case the commitment-buyer (i.e. subscriber) chooses to use such services, the said service providers will charge him the fees for using the services according to the pre-determined prices. It is established in the *Hanafî* School that when people practice some matter without facing any objections or repudiations, this would be considered as a *shar`î* argument and a principle for deducing rulings. Further, some of the *Hanafî Faqîhs* consider it a tacit agreement on the permissibility of such a practice.(1)

Among the similar well-known issues and examples widely practiced by the people at the present is the annual subscription to credit cards issued by Islamic financial institutions and banks, the client being charged upon their issuance thereof for the first time and later upon their renewal in exchange for the commitment undertaken by such institutions to guarantee the repayment of the client's debts within the subscription year, whether the client uses the card or not.

(1) "*Badâ'i` As-Sanâ'i`*" [5: 157]; "*Al-Fatâwâ Al-Hindiyyah*" [5: 276]; "*Majma` Ad-Damânât*" (p. 314); "*Radd Al-Muhtâr*" [4: 123]; and "*Al-Mabsût*" [10: 146, 12: 63 and 138, and 13: 77].

Accordingly, if it is deemed permissible under the *Sharî`ah* to sell a commitment in the above-mentioned forms and similar issues, it should also be deemed permissible to do the same in the issue under discussion, due to their conformity and absence of any difference between them.

Second: The Rule Stating the Elimination of Hardship

14- It goes without saying that among the principles and general rules of the *Sharî`ah* is to eliminate hardship for the people and not charge them with a matter that causes them distress and trouble that may arise either from committing an action or refraining from another. In this respect, Allah, the Almighty, says; ***{"Allah does not want to place you in difficulty"}*** [*Al-Mâ'idah* (The Table): 6]. Interpreting this, Ibn Taymiyyah said; "Allah tells us that He does not want to put us in difficulty with regard to that which we are commanded to do. These words are meant to be general and negating any kind of difficulty."(1) Moreover, Allah, Exalted and Glorified be He, says; ***{"... and has not laid upon you in religion any hardship."}*** [*Al-Ḥajj* (Pilgrimage): 78]. Commenting on these words, Ibn Taymiyyah said; "Allah has told us that He has not laid upon us in religion any hardship by generally and also categorically negating this. So whoever believes that there is any hardship (in religion) equal to even the weight of an atom is in fact belying Allah and His Messenger."(2)

Based on the above, if the Wise Lawgiver did forbid the people from concluding the contracts and making the commitments they inevitably need, they would suffer difficulties and distress. Verily, Allah has permitted for the people, as a basic ruling and out of His justice and mercy towards them, all the contracts that eliminate any difficulty from them. It has never been established that Allah and His Messenger prohibited such contracts or commitments, including the one under discussion. In this relation, Ibn Taymiyyah said; "The basic principle states that all contracts are permissible, except those forbidden by Allah and His Messenger (PBUH). Allah never forbids a contract which involves a benefit for the Muslims when there is no evil that opposes it."(3)

(1) "*Jâmi` Ar-Rasâ'il*" by Ibn Taymiyyah [2: 370].
(2) Ibid. [2: 370].
(3) "*Naẓariyyat Al-`Aqd*" by Ibn Taymiyyah (p. 226).

15- This is clarified and stressed by the fact that there are traders, contractors, manufacturers and others who import various goods and raw materials on scheduled dates, in successive batches, and pay with a certain currency, then they sell such goods or manufactured products all at one time or in successive batches with another currency different from that which they used in buying, selling for cash and on credit, and under contracts of *Salam*,(1) Parallel *Istiṣnâ`*,(2) ongoing supply, and the like. If they are to be forbidden by the *Sharî`ah* from buying a commitment to exchange, at a later time, a certain currency which they need to fulfill their obligations at future dates, then they would suffer a severe hardship and distress as well as a serious risk which may cause them bankruptcy or grave losses which they cannot bear. This is because they really need that currency to be available with them at such specified dates, and also they need to determine the price of such imported goods or raw materials in their local currency in advance so as to know the cost of their purchases of goods and raw materials, and the cost of their manufactured products in their local currency. They need to know such matters in order to be able to precede with the processes of importation, supply, manufacturing and early marketing for their goods without suffering the risks of serious fluctuations in exchange rates which may ruin their business or impede the fulfillment of the supply contracts they are committed to.

Similarly, suppose there is a country which produces oil or any of the international raw materials which are sold in the world market in US dollars, for example, while its official currency is the euro or any other currency. That country may sell quantities of its said products in US dollars on credit. Based on its expected revenues from such transactions, it is able to determine its annual budget in its local currency, considering the current exchange rate of the US dollar. But if a drop in the US dollar exchange rate against its local currency happens later, at the time when its debts are due and payable, this could cause a grave deficit in the country's budget, resulting in imbalances in running its affairs because of its inability to fulfill

(1) *Salam* refers to payment in advance for an item to be delivered later.
(2) *Istiṣnâ`* is an order to manufacture something.

its financial obligations and future projects on the specified dates. This would expose it to inescapable economic and social crises. In fact, there is no way out of such a dilemma except through hedging, i.e. to purchase a commitment from a financial institution to exchange US dollars at a later date for its local currency on the pre-determined dates.

There are countless examples of this issue in the present time, too many to be enumerated.

Topic Three
The Necessity for Having Recourse to *Mu`âwadah* for Commitment

16- According to the above, we have seen that there is a true urgent need in the present time to resort to the compensation-for-commitment transaction for the exchange of currencies at a later date, in line with applicable *shar`î* controls,(1) for the countries exporting raw materials in foreign currency. The same thing applies to the traders, contractors, manufacturers and others who import various goods and raw materials on scheduled dates, or in successive batches, and pay with a certain currency, then sell such goods or manufactured products with another foreign currency, in cash or on credit, under contracts of *Salam*,(2) Parallel *Istiṣnâ`*,(3) ongoing supply, and the like. Those parties need to purchase such commitments from Islamic investment financial institutions and banks to be able to conduct their investments in other foreign currencies. This confirms the basic ruling which states that this compensation-for-commitment transaction would be permissible if the elements rendering something as monetary exist in the commitment representing the object of the contract, as clarified earlier in Topic One of this Research.

17- It is well known that such an urgent need for this type of contract in the present time represents a strong proof and decisive argument substantiating

(1) See: Notes (7 – 12) of the Research.
(2) *Salam* refers to payment in advance for an item to be delivered later.
(3) *Istiṣnâ`* is an order to manufacture something.

the legality of such compensation-for-commitment transactions (even if it were essentially impermissible) as an exceptional ruling due to the special need(1) thereto. Then, what would the case be when the basic ruling indicates the permissibility and legality of this type of transaction, as proven to us, based on *shar`î* general principles, and their similarity thereof to several issues, as well as applications of general rules which regulate the rulings on financial transactions!

The grounds upon which any exceptional ruling is built have been clarified by Al-`Izz Ibn `Abdus-Salâm in "*Al-Qawâ`id Al-Kubrâ*" in which he stated; "Rule on Exceptions from *Shar`î* Rules: Let it be known to you that Allah has commanded His servants to seek to eliminate the means leading to evils in the two worlds (this life and the afterlife) or in any one of them. Each rule tackles a single issue, then He excepted therefrom any matter the avoidance of which involves a great hardship or a prevention of an interest that is greater than any evil that may possibly occur in the situation concerned. All this is meant to show mercy, consideration and kindness to His servants."(2)

Ibn Taymiyyah stated; "That which is necessarily needed to be sold is more forgivable than other objects which involve no need; therefore, the Lawgiver allows it because of the need thereto, though there is a reason for its prohibition."(3)

In Rule No. 875 in "*Al-Qawâ`id,*" Al-Maqqarî stated; "General excusability as viewed by Mâlik necessitates an exception from *Usûl* (*fiqhî* Principles) by applying *Qiyâs* (analogical deduction) from what is stated in *shar`î* texts."(4) He means what is stated with respect to *shar`î* licenses.

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(1) **Special need:** This is when there is a matter needed by a special group of people sharing a common description, such as the people of the same town, the same craft, etc. **General need:** It is when a matter is needed by all the people. "*Al-Madkhal Al-Fiqhî Al-`Âmm*" by Az-Zarqâ [2: 997]; and "*Al-Gharar Wa Atharuhu Fi Al-`Uqûd*" by Dr. As-Siddîq Ad-Darîr (p. 604).

(2) "*Al-Qawâ`id Al-Kubrâ*" by Al-`Izz Ibn `Abdus-Salâm [2: 283].

(3) "*Al-Masâ'il Al-Mârdiniyyah*" by Ibn Taymiyyah (p. 99); and "*Majmû` Fatâwâ Ibn Taymiyyah*" [29: 488].

(4) Paper No. (81) of the Manuscripts at King Faisal Center in Riyadh.

In the same context, Az-Zayla`î said; "That which is strongly needed involves more excusability."(1)

Moreover, Ibnul-`Arabî said; "Seventh Rule: Consideration of the need when permitting a forbidden matter is like consideration of the necessity when allowing a prohibited matter."(2) In other words, "Necessity knows no law."(3)

It is established in the general *fiqhî* Maxims that: "A special need permits a forbidden matter"(4) and "A need is considered the same as necessity, whether such a need is general or special."(5)

Necessity, as declared by the prominent scholar `Alî Ḥaydar, is "A condition which causes one to resort to something forbidden by the *Sharî`ah*,"(6) or it is "When a man reaches the extent wherein if he does not resort to a forbidden matter, he will die or become close to death," as stated by As-Sayûṭî.(7) The forced or necessitous person is "the one who fears death or illness, or a serious weakness that may lead to death, chronic infirmity, or severe harm," as described by Aṭ-Ṭûfi.(8) On the other hand, 'need,' from the *fiqhî* perspective, is in a degree lower than 'necessity.' Need refers to "A state in which one will suffer distress and difficulty, but not a situation wherein one fears death or a serious harm if he does not resort to a forbidden matter."(9) The need for a certain type of contract is regulated by the principle: If it is avoided, a hardship results due to the prevention of a *shar`î*-acknowledged interest. This principle actually exists in the issue under discussion.

(1) "*Tabyîn Al-Ḥaqâ'iq*" [4: 87].
(2) "*Al-Qabas `Alâ Al-Mûwaṭṭa'*"[2: 790].
(3) Article (21) of "*Al-Majallah Al-`Adliyyah*"; "*Al-Manthûr Fî Al-Qawâ`id*" by Az-Zarkashî [2: 317]; "*Al-Ashbâh Wa An-Naẓâ'ir*" by Ibn Nujaym (p. 94); "*Al-Ashbâh Wa An-Naẓâ'ir*" by As-Sayûṭî (p. 84); and "*Iḍâḥ Al-Masâlik*" by Al-Wansharîsî (p. 365).
(4) "*Al-Manthûr Fî Al-Qawâ`id*" by Az-Zarkashî [2: 25].
(5) Article (32) of "*Majallat Al-Aḥkâm Al-`Adliyyah*"; "*Al-Ashbâh Wa An-Naẓâ'ir*" by Ibn Nujaym (p. 100); and "*Al-Ashbâh Wa An-Naẓâ'ir*" by As-Sayûṭî (p. 88).
(6) "*Durar Al-Ḥukkâm Sharḥ Majallat Al-Aḥkâm*" [1: 34].
(7) "*Al-Ashbâh Wa An-Naẓâ'ir*" by As-Sayûṭî (p. 85).
(8) "*Al-Ishârât Al-Ilâhiyyah Ilâ Al-Mabâḥith Al-Uṣûliyyah*" by Aṭ-Ṭûfî [1: 309].
(9) "*Al-Ashbâh Wa An-Naẓâ'ir*" by As-Sayûṭî (p. 85); and "*Durar Al-Ḥukkâm Sharḥ Majallat Al-Aḥkâm*" [1: 34].

Conclusion
Shar`î* Controls on *Mu`âwadah for Commitments

18- This Research involves a careful examination of the issue under discussion, a study of the *fiqhî* views on relative issues, and a discussion of *Faqîhs*' statements and evidence in light of *Sharî`ah* principles and general rules and purposes urging towards bringing about good, warding off evils and eliminating difficulties from the people in view of their needs and living conditions in the present time. All this has helped me realize that it is permissible to exchange any commitment for money – be it a commitment to do or refrain from doing a certain action, whether under a contract or not, and whether it involves an exchange, donation or otherwise – if it meets the following four conditions:

1- It involves a real, intended benefit/utility for the beneficiary.

2- This benefit is lawful under the *Sharî`ah* when one is in a state of affluence and has a free choice.

3- This benefit has a monetary value according to the customs of the people.

4- The commitment is fulfillable.

And my final words are Allah knows best.

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Research (6)
Adhesion Contracts

Preface

Topic One: The Essence of Adhesion Contracts

Topic Two: *Shar`î* Rulings Related to Adhesion Contracts

Appendix: Exclusive Import Agencies

Conclusion

Preface

1- The concept of adhesion contracts and its relevant laws was not known before it emerged in modern western jurisprudence. It, subsequently, influenced modern Arab civil laws, which had been introduced in the last century based on French laws, including the Egyptian civil law and the corresponding Syrian, Iraqi, Lebanese and Libyan civil laws.

2- This concept goes back to the necessity of setting limits to the dominance of the principle of the Power of Will, and the need to lay down exceptions to the principle of contractual freedom [which states that 'Pacta Sunt Servanda' (i.e. agreements shall be kept)] when the application of this general legal principle would result in an injustice against one party to the contract. These limits can be set by giving the judiciary the right to amend some conditions or effects of the contract agreed upon by the two parties in favor of the weaker one, so as to achieve justice, fairness and a balance of interests.

3- This is because the prevailing principle in article (1134) of the French Civil Code states: "Agreements lawfully entered into take the place of law for those who have made them."

The Egyptian Civil Law has been influenced by this principle, so the first clause of article (147) states: "The contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties in the contract or for reasons provided for by law." Thereby, when the agreement is valid, everything stipulated in the contract will be legally binding on the two parties, and none of them or the courts can interfere in revoking or

amending some of its conditions or effects except by mutual consent of the parties.[1]

However, this law, following the French model, excluded two cases from this principle:

First, Unpredictable Events: The second paragraph of article (147) states: "When, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such way as to threaten the debtor with an exorbitant loss, the judge may, according to the circumstances and after taking into consideration the interests of both parties, reduce to reasonable limits the obligation that has become excessive. Any agreement to the contrary is void."

Second, Adhesion Contracts: Article (100) of the Egyptian Civil Law states: "Acceptance, in the case of an adhesion contract, is confined to the adhesion to standard conditions which are drawn up by the provider and which are not subject to discussion." And article (149) of the same law states: "When an adhesion contract contains arbitrary conditions, the judge can modify these conditions or relieve the adhering party of the obligation to perform these conditions in accordance with the principles of justice. Any agreement to the contrary is void." Also, article (151) states: "(I) In cases of doubt, the construction shall be in favor of the debtor. (II) The construction, however, of obscure clauses in an adhesion contract must not be detrimental to the adhering party",[2] (i.e. be he a creditor or debtor).

(1) *"Mabda' Ar-Riḍâ Fî Al-ʿUqûd"* by Dr. ʿAlî Al-Qaradâghî [2: 1198-1202].

(2) The Syrian and Libyan Civil Laws are identical in all these articles with the Egyptian Civil Law (See articles (101, 150, and 152) of the Syrian Civil Law, and articles (100, 149 and 153) of the Libyan Civil Law, and articles (150 and 151) of the Egyptian Civil Law). The Iraqi Civil Law combined all these articles in one provision, namely article (167), which is identical with the articles of the Egyptian Civil Law mentioned above. Also, the Lebanese Code of Obligations, in the second paragraph of article (172), defines the contract of adhesion as stated in the Egyptian Civil Law in article (100). See, *"Maṣâdir Al-Ḥaqq"* by As-Sanhûrî [2: 74].

Topic One
The Essence of Adhesion Contracts

The Technical Concept of Adhesion Contracts

4- Dr. `Abdur-Razzâq As-Sanhûrî summarized the terminological concept of adhesion contracts in modern western jurisprudence, from which the aforesaid articles of the Egyptian Civil Law have been derived, saying: "The scope of the adhesion contract is limited, being governed by the following characteristics:

a) The subject matter of the contract should be goods or utilities which are regarded as necessities of life for the consumers or users.

b) The provider shall legally or actually monopolize these commodities or utilities, or at least have an exclusive control over them in a way that limits the amount of competition.

c) The offer is to be issued to all people according to the same conditions and on an indefinite basis; i.e. for an unspecified period.

In general, these contracts are generally stated in a printed form containing detailed conditions which are indisputable and, mostly, for the benefit of the provider. That is, sometimes these conditions reduce the contractual obligations of the provider, and sometimes they stress the obligations of the other party. Moreover, these conditions are, in total, so complicated that the general public can hardly understand them.

Examples of these contracts are numerous, such as contracting with the electricity, water and gas companies, and with the postal, telegraph and

telephone services, etc… all these forms fall within the scope of adhesion contracts."[1]

An Objection to the Designation

5- Dr. Rafîq Al-Miṣrî said; "The phrase *`Uqûd Al-Idh`ân* (i.e. Adhesion Contracts) is an Arabic translation of the French phrase (Contrat d'adhésion). It seems that it was formulated by the well-known jurist, Dr. `Abdur-Razzâq As-Sanhûrî…, but I disagree with this Arabic translation, which I consider responsible, to this day, for many confusions and errors in the attitudes of contemporary jurisprudents towards these contracts.

That is, the inclination of the contemporary *Faqîh* whenever he sees this Arabic phrase encourages him to judge it as being prohibited. This is because the term *Idh`ân* (i.e. adhesion) is rejected by any free spirits seeking freedom of will and mutual consents. According to lexicons of Arabic, the Arabic verb *'Adh`ana'* (i.e. adhere), means to 'humiliate, submit, and compel'; it is thus linked to the meanings of humiliation, submission and compulsion, which may push the *Faqîhs* to abstain from thinking deeply about this term so as to perceive its true meaning. This explains why the *Faqîh* often unconscientiously adopts, in advance, an attitude of aversion and prohibition.

In this respect, I suggest another translation for these contracts; that is *`Uqûd Al-Indimâm* (conjoint contracts). This is because the term '*Indimâm*' is closer to the meaning of the French term 'adhésion' and more comprehensive than the term 'adhesion', since adhesion is only a particular case of the term conjoint . Moreover, I find no need to change the meaning of the French term to another one."[2]

The Essence of Adhesion Contracts

6- The French jurists differ regarding the essence of adhesion contracts. They fall into two main schools:

First, (This opinion belongs to a minority of civil law and most of common law jurists): Adhesion contracts are not actual contracts, because acceptance

(1) *"Maṣâdir Al-Ḥaqq Fî Al-Fiqh Al-Islâmî"* by As-Sanhûrî [2: 75].
(2) *"Al-Khaṭar Wa At-Ta'mîn"* by Dr. Rafîq Al-Miṣrî (pp. 79 - 81).

in these contracts is only a question of submission. A proper contract, on the contrary, is a mutual agreement of two free wills and, therefore, adhesion contracts are rather like a law by which monopolistic companies force people to comply with the companies' conditions. Thus, these contracts should be explained as laws, and the prerequisites of justice and goodwill should be maintained in their implementation, with the economic requirements leading to their conclusion taken into consideration.

Second, (This opinion is adopted by most civil law jurists): Adhesion contracts are real contracts made by the mutual consent of two free wills, and are subject to the rules with which all other contracts comply. That is, in making such a contract, the law does not stipulate prior discussion, negotiations or compromises between the two parties. Yet, the argument stating that one party of the adhesion contract is weaker than the other is refuted by the fact that these contracts represent an economic phenomenon not a legal one, since legal equality and mutual consent are fulfilled, and the adhering party enters into the contract voluntarily, without compulsion, coercion or duress. As for the argument that these contracts may include arbitrary conditions or onerous effects in favor of the provider, this does not negate their description as being contracts; rather it necessitates the interference of the court to amend or revoke the elements of inequity, injustice or arbitrariness involved.[1]

Regulations of Adhesion Contracts

7- In modern legal terminology, the following four conditions are necessary for adhesion contracts to be effective:

First; The subject matter of the contract should be commodities or utilities which are urgently and indispensably needed, such as water, electricity, gas, telephone, etc.

Second; The provider has a legal and actual exclusive control over these commodities, utilities or facilities.

(1) *"Maṣâdir Al-Ḥaqq"* by As-Sanhûrî [2: 75]; *"Mabda' Ar-Riḍâ Fî Al-`Uqûd"* by Dr. `Alî Al-Qaradâghî [2: 1202]; and *"Inshâ' Al-Iltizâm Fî Ḥuqûq Al-`Ibâd"* by Al-Ghazâlî [1: 388].

Third; The provider of the commodities, utilities or facilities single-handedly sets the details, conditions and effects of the contract, without the interference of the other party or his having a right to discuss, cancel or amend any of such details, conditions and effects.

That is, the provider makes a final, decisive and indisputable offer to which the other party can only submit and accept, since he urgently needs these goods or utilities.

Fourth; The offer should be issued to all people, according to the same details, conditions and effects, and should remain valid for an unspecified period which is not restricted to the short period of time required only for the acceptance of the offer, as is conventionally the case in other kinds of contracts.(1)

Contemporary Applications of Adhesion Contracts

8- Dr. As-Sanhûrî cited numerous examples of adhesion contracts which were present and were adopted in his time (50 years ago) by monopolistic companies of public utilities and necessary commodities, major factories that had a monopoly on the work and workers, and all kinds of insurance companies.(2) In this regard, Dr. As-Sanhûrî said; "The examples of these contracts are numerous, as they include contracts with *electricity, water* and gas companies, with postal, telegraph and telephone services, contracts of train, ship, car, and plane transportation, etc., contracts of insurance companies, and contracts of labor in major industries."(3)

9- In this context, I am not concerned with talking about the extent of applicability of adhesion contracts to the examples mentioned by Dr. As-Sanhûrî, nor the extent of the fulfillment of the abovementioned conditions of adhesion contracts in each of these examples, because this approach is out-dated and not applicable nowadays. Rather, I am concerned with the characterization of these examples in our time, particularly after the

(1) See: *"Maṣâdir Al-Ḥaqq"* by As-Sanhûrî [2: 74 and 75]; and *"Inshâ' Al-Iltizâm Fî Ḥuqûq Al-`Ibâd"* by Al-Ghazâlî [1: 387].
(2) See: *"Maṣâdir Al-Ḥaqq"* by As-Sanhûrî [2: 77].
(3) See: *"Maṣâdir Al-Ḥaqq"* by As-Sanhûrî [2: 75].

enormous economic changes and developments that have occurred in the world during the last five decades, which inevitably require reconsidering the status of many of the contracts cited by Dr. As-Sanhûrî as examples of adhesion contracts, due to the absence of any of the rules or conditions of adhesion contracts at the present time.

Therefore, I wish to say: In our time, adhesion contracts include contracts with electricity, water and gas companies, as well as the postal service and local public transportation companies, since the conditions of adhesion contracts mentioned earlier apply to them.

As for telephone companies, the ruling is different and requires further consideration. That is, if the subject matter of the telephone company contract is a service to connect fixed telephone lines in homes, offices, departments and factories, etc. which is monopolized by only one company, then contracting with such a company to provide this service can be described as an adhesion contract.

However, if there are many companies competing to provide this service to the public, or if the subject matter of the telephone company's contract is to provide international communications services and the like, and there are many competing companies that provide this service - as is common in the United States, Canada and other countries - it is incorrect to classify the contract concluded with them to obtain their services as an 'adhesion contract', since these services lack the condition of monopoly.

This point applies to providing communication service via cell phones; if this service is monopolized by one company that imposes its conditions on the public in a final, standard-form contract, contracting with them to provide this service falls under the description of adhesion contracts. On the contrary, if there are many competing companies that provide the same service, then the contract is not an adhesion contract.

Also, this applies to insurance companies; if there are many competing companies in the same country that provide insurance services, then their standard-form contracts cannot be classified as adhesion contracts. Yet, if there is one company monopolizing this service, it is appropriate to classify its contracts as adhesion contracts.

Likewise, the same applies to air transportation companies; if there is one company that monopolizes the service of air transportation, as is the case for domestic flights in many countries, then its contracts with the clients can be described as adhesion contracts. But, if there is more than one air transportation company competing with each other to provide such a service, as is the case for domestic flights in the United States and Canada, and in many international flights in the same continent or across different continents, then their contracts with the clients cannot be classified as adhesion contracts.

The same point also applies to contracts of both urban and intercity public transportation by bus and train, as well as contracts of tanker and ship transportation.

As for classifying contracts of labor in major industries under adhesion contracts, as earlier cited by Dr. As-Sanhûrî, it is not a settled issue in this age. In fact I see no difference between the contract of labor in major industries or in any other company, university or hospital, or in various state institutions including ministries, departments, and others. All these forms are not included in the characterization of adhesion contracts because they lack the condition that the subject matter of the contract should be commodities or utilities which are urgently and indispensably needed by the party accepting the contract, and also the condition that the provider monopolizes these commodities and utilities.

With regard to the condition that the provider of these commodities, utilities or facilities alone sets the details, conditions and effects of the contract, including the determination of wages, working hours, the system of rewards, bonuses, promotions, holidays, work injuries, retirement, compensation, etc., without any involvement of the other party and without giving him the right to discuss, cancel or amend any of such details, conditions and effects, this condition alone does not justify the classification of contracts of labor in major industries under adhesion contracts. This is because prior discussion, negotiation, or compromise between the two parties over the conditions and effects of a contract are not stipulated for the validity of agreement and mutual consent in contracts. Rather, reducing the efforts exerted in negotiations

and discussions by setting printed standard-form contracts that do not include any distinction between the rich and poor, or between the strong and weak regarding the conditions it stipulates, may lead to positive effects, such as reducing the costs of concluding contracts and agreements, which would subsequently benefit the two parties.

The Description of the Conclusion of Adhesion Contracts

10- The common opinion on adhesion contracts is that they are made by mutual consent of the parties, which is expressed by the concurrence of offer and acceptance. The offer is made by the party who has the authority to provide the service or commodity to the public in a final and decisive form, and then the acceptance is expressed by any sign of consent to conclude the contract based on the conditions made by the provider.(1)

Dr. Mustafâ Az-Zarqâ holds that these contracts are made by any word or action suggesting the finalization of the contract, on the basis that the acceptance is expressed by an action which is consequent to the contract and indicates its implementation. That is, the request made by the subscriber is considered as an offer on his part, and the acceptance is shown by action, not by word, by the provider when he delivers the object (i.e. the commodity or service) to the subscriber, since the delivery is a sign of acceptance and consent.(2)

(1) See: *"Inshâ' Al-Iltizâm Fî Huqûq Al-`Ibâd"* by Al-Ghazâlî [1: 289]; and *"Maṣâdir Al-Haqq"* by As-Sanhûrî [2: 75].
(2) *"Al-Madkhal Al-Fiqhî Al-`Âmm"* [1: 330].

Topic Two
Shar`î Rulings Related to Adhesion Contracts

11- We concluded from the foregoing discussion that adhesion contracts, in terms of their designation, distinctive descriptions, characteristics and aforementioned regulations, are modern contracts that have emerged as a result of the tremendous development in the world of industry and economy, and the subsequent emergence of companies that monopolize public services, utilities and goods required by all the people. The legal relations with the adhering parties of these contracts have been organized by modern western jurisprudence.

For this reason, Dr. As-Sanhûrî said; "We should not forget that the concept of adhesion contracts only emerged recently in modern western jurisprudence."(1)

These contracts appeared and spread in many Arab countries whose civil laws, derived from western jurisprudence, organized the exceptions related to these contracts five decades ago.

12- As for the *Shar`î* rulings related to these contracts, Dr. As-Sanhûrî said; "We do not expect to find in Islamic *Fiqh* (jurisprudence) what we see in modern western jurisprudence regarding adhesion contracts."(2)

(1) *"Maṣâdir Al-Ḥaqq"* by As-Sanhûrî [2: 77].
(2) Ibid.

Also, contemporary *Faqîhs* (scholars of *Sharî`ah*) showed no interest in studying these contracts and issuing Fatwas (*shar`î* opinions) or even conducting research regarding them. This is why the identification of their *Shar`î* rulings still waits for new *Ijtihâd* (legal reasoning and discretion) and deduction in the light of the general maxims of Islamic *Fiqh* and the *Shar`î* rulings related to similar issues of the *Sharî`ah*.

In brief, I will try to deal with the relevant *shar`î* rulings and *fiqhî* issues. Initially, I will tackle the rulings related to similar issues and general tenets of the *Sharî`ah* as follows:

First: Sale of the Compelled

13- **Linguistically,** the compelled person is the one who is forced, by necessity, to take a certain course of action. It is also said that he is the one who resorts, by necessity, to a harmful course of action.(1)

The term *Bay`ul-Mudtarr* (sale of the compelled) is mentioned in the *hadîth* narrated by a man from Tamîm (an Arabian Tribe), who said:

> *«`Alî Ibn Abû Talib gave a sermon to us saying, 'A stingy time is certainly coming to mankind when a rich man will hold fast to what he has of his possessions (his property), though he was not commanded to do so. For this, Allah, the Most High, says:* ***{"...And do not forget generosity among you."}*** [Al-Baqarah (The Cow): 237]. *The men who are compelled will effect the sale, while the Prophet (peace be upon him) prohibited any sale based on compulsion'.»*(2)
>
> [Related by Abû Dâwûd, Ahmad and Al-Bayhaqî]

Technically, the sale of the compelled is to sell what is in your possession to people who urgently need it at a price which is much higher than the actual price (i.e. by means of excessive compulsion) because you are the only supplier

(1) *"Al-Misbâh Al-Munîr"* [2: 425]; and *"Al-Mufradât"* by Ar-Raghib Al-Asbahanî (p. 436).

(2) *"Mukhtasar Sunan Abû Dâwûd"* by Al-Mundhirî [5: 47]; *"As-Sunan Al-Kubrâ"* by Al-Bayhaqî [6: 17]; and *"Musnad Ahmad"* [1: 116]. In his *"Al-Majmû`"* [9: 161], An-Nawawî said; "This *Isnâd* (chain of transmitters of *hadîth*) is weak, because this man is unknown." Al-Bayhaqî said; "This *hadîth* is narrated from another *Isnâd* from `Alî and Ibn `Umar. All these *Isnâd*s are weak."

of this object. This also applies to purchase (i.e. by depreciation), exploiting the seller's need to sell this commodity because he needs the price.(1)

Ibn `Âbidîn said; "The sale of the compelled is when a man is forced to buy food, drink, clothing, or other items, from a seller who sells them at a price higher than their actual price, and this also applies to purchase."(2) (i.e. from the one who is forced to sell an object (because he needs money) at a price which is much lower than the actual price).

Burhânud-Dîn Ibn Muflih said; "The sale of the compelled is explained in a narration attributed to Ahmad as occurring when a man needs to buy from you an object he urgently needs and whose price is ten, but you sell it to him for twenty."(3)

Ibnul-Athîr explained it by saying; "The sale of the compelled is when a man has to settle his debt or pay for expensive supplies, and so, out of necessity, has to sell his property at a lower price."(4)

14- As for the *shar`î* ruling on the sale of the compelled, it is a valid contract according to the majority of *Faqîhs*,(5) because its condition; namely, the offer and acceptance, expressed by the interested parties regarding an object which is subject to such a condition, is fulfilled. Furthermore, mere necessity is not among the causes that cancel or invalidate contracts or render them unbinding since the forced person, even though his consent is not totally free, has a free will and can choose to fulfill his need and the price he has to pay for it, or not, accepting the price with satisfaction. Furthermore, the *hadîth* prohibiting the

(1) *"Ma`âlim As-Sunan"* by Al-Khattâbî [5: 47]; *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 361]; *"Hâshiyat At-Tahâwî `Alâ Ad-Durr Al-Mukhtâr"* [3: 67]; *"An-Nihâyah"* by Ibn Al-Athîr [3: 83]; *"Mirqât Al-Mafâtîh"* [3: 322]; *"I`lâm Al-Muwaqqi`în"* [3: 182]; and *"Al-Kâfî"* by Ibn `Abdul-Barr (p. 361). It is said; it is the sale of the coerced, and it is said; it means that a man possesses an object and sells it only on credit, and it is said that the *`Înah* (buy back) sale and *Tawarruq* (monetization) fall within the sale of the compelled. (See, Ibid.).

(2) *"Radd Al-Muhtâr"* [4: 106]; and *"An-Nutaf Fî Al-Fatâwâ"* by As-Sughdî [1: 468].

(3) *"Al-Mubdi`"* [4: 7].

(4) *"An-Nihâyah"* by Ibnul-Athîr [3: 83].

(5) But it is detestable according to the scholars. (*"An-Nihâyah"* by Ibnul-Athîr [3: 83]; and *"Kashshâf Al-Qinâ`"* [3: 140]).

sale of the compelled is *Da`îf* (weak) and cannot stand as a proof of argument, according to the scholars of *Hadîth*.(1)

However, the *Hanafî* School disagrees with this opinion and invalidates the sale and purchase of the compelled. This is because the forced person is not really satisfied with making this contract; rather, he is forced, out of need, to embark upon it. Accordingly, it is an invalid sale, like the sale of the coerced.(2)

15- As for the sale of the compelled at a fair value, (i.e. when the forced person sells or buys an object, out of necessity, at a fair/usual price or at a price involving an insignificant injustice), this contract is valid and unanimously permissible according to the *Sharî`ah*, because it involves no *shar`î* impediment, and because the sale at a fair/usual price will help the forced person to satisfy his need.(3)

Ibn `Abdul-Barr said; "It is permissible to buy lawful objects from the one who is forced, out of necessity or debt, to sell his belongings."(4)

Further, *Faqîhs* stated that if a person is forced, out of necessity, to buy food, drink, clothing or the like from another person, the latter must sell it to him at the price of its kind.(5) Ibn Taymiyyah argued: "If a man is forced, out of necessity, to buy food, drink or clothing from another person, the latter must sell it to him at the value of its kind, making a reasonable profit."(6) He also said; "Likewise, in the case of the forced person who can find his need only with a certain person, such person (the latter) should gain from the forced one a profit that equals what he should earn from an unforced person, since the Prophet (Peace be upon him) forbade the sale of the compelled. If the need is related to something which is indispensable, such

(1) *"Al-Majmû`"* by An-Nawawî [9: 161]; *"Ma`âlim As-Sunan"* [5: 47]; *"Mabda' Ar-Ridâ Fî Al-`Uqûd"* by Al-Qaradâghî [1: 425]; and *"Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Al-Imâm Aḥmad"*, article no. (234).
(2) *"Radd Al-Muḥtâr"* [4: 106]; and *"Ad-Durr Al-Mukhtâr Wa Ḥâshiyat Aṭ-Ṭaḥâwî `Alayh"* [3: 67].
(3) *"Kashshâf Al-Qinâ`"* [3: 140]; *"Mawâhib Al-Jalîl"* [4: 248]; *"Radd Al-Muḥtâr"* [4: 106]; *"An-Nihâyah"* by Ibnul-Athîr [3: 83]; and *"Al-Ikhtiyârât Al-Fiqhiyyah Min Fatâwâ Ibn Taymiyyah"* by Al-Ba`lî (p. 122).
(4) *"Al-Kâfî"* by Ibn `Abdul-Barr (p. 361).
(5) *"Aṭ-Ṭuruq Al-Ḥukmiyyah"* (p. 220); and *"Al-Ikhtiyârât Al-Fiqhiyyah"* (p. 122).
(6) *"Jâmi` Al-Masâ'il"* by Ibn Taymiyyah [1: 226].

as when people are being forced to buy food or clothing, the seller must sell them at their known value."[1]

Also, *Faqîhs* argued that the ruling on commutation for utilities which are required or needed by the people is the same as that on commutation for assets.[2] Ibnul-Qayyim stated; "If people are forced, out of necessity, to dwell in a person's house and they cannot find another place to stay, or if they are forced to stay in a hotel, or borrow clothes to warm themselves, or to rent a mill to grind grains or borrow a bucket to lift water, or a pot, axe or the like, the owner should give this thing to them according to the unanimous view of *Faqîhs*. But, can he receive a rent in return for it? Scholars have two opinions concerning this, both attributed to the disciples of Ahmad. The opinion allowing the provider to receive a rent in return for the utility prohibits him, at the same time, from taking more than the rent of the likes."[3]

Ibn Taymiyyah said; "If people need a particular group of craftsmen, such as farmers to cultivate their land, weavers to weave their clothes, or builders to build their houses, this work is to be a duty on the craftsmen, and if they abstain from performing it, the governor should force them to do the work in return for the wage charged for similar tasks. The governor shall not allow them to demand more than this compensation from the people, nor allow people to wrong them or give them compensation less than their due."[4]

Second: Determining Prices Charged by the Monopolizer

16- Linguistically, monopoly means to take, store, and appropriate an object.[5] In the *Sharî`ah*, there are two kinds of monopoly: permissible and forbidden.

- **The permissible kind of monopoly** is when a person, natural or legal, hoards some goods or utilities to sell them later at a reasonable profit based on market fluctuations, without inflicting harm upon the people.

(1) *"Majmû` Al-Fatâwâ"* by Ibn Taymiyyah [29: 361].
(2) *"At-Turuq Al-Hukmiyyah Fî As-Siyâsah Ash-Shar`iyyah"* (p. 222).
(3) *"At-Turuq Al-Hukmiyyah"* (p. 218).
(4) *"Al-Hisbah"* by Ibn Taymiyyah (p. 29).
(5) *"Al-Qâmûs Al-Muhît"* (p. 484); *"Asâs Al-Balâghah"* (p. 91); *"Lisân Al-`Arab"* [4: 208]; and *"As-Sihâh"* [2: 635].

This kind of monopoly is permissible because it entails a disposal of an object that one possesses without putting pressure or inflicting harm upon the people.

- **The forbidden kind of monopoly** is when a person, natural or legal, hoards an object needed by the people, be it a commodity, utility or facility, and takes exclusive control over it so that he can sell it at an unfair price.

This kind of monopoly is forbidden because it involves injustice and harm to the people.

In this regard, Ibn Hazm said; "Monopoly which inflicts harm upon the people is prohibited, be it through sale or by hoarding what one has purchased."(1)

17- Technically, pricing is when the governor (the State) determines or establishes the prices of the objects needed by the people, be they assets or utilities, and forces their owners to sell them at that fixed price.

According to Ibn Taymiyyah and Ibnul-Qayyim, there are two types of pricing: prohibited unjust pricing and due just pricing.

- **Prohibited unjust pricing** means unjustly forcing the owners of commodities or utilities to sell them at a price they do not agree to, or prevent them from what Allah has made lawful.
- **Due just pricing** means establishing justice among the people by forcing the owners of commodities or utilities needed by the people to sell them at a fair price (price of the likes) if they insist on selling them only at unfair prices.(2)

Its form: It means the interference of the State, by means of equitable forced pricing, to prevent an individual, institution or company from monopolizing or taking exclusive control over a commodity or utility needed by the people in order for them to raise its price, and then selling it to people who are forced, out of necessity, to submit to the unfair price the monopolizers impose.

(1) *"Al-Muhallâ"* [9: 64].
(2) *"At-Turuq Al-Hukmiyyah"* (p. 206); and *"Al-Hisbah"* by Ibn Taymiyyah (pp. 23 - 25).

Ibn Taymiyyah said; "Pricing may involve injustice, which is impermissible, and may involve justice, which is permissible. If it involves injustice against the people and unjustly forces them to sell at a price they do not agree to, or prevents them from what Allah has made lawful, it should be forbidden. But if it involves establishing justice among the people by forcing them to pay the fair price of similar goods, and preventing them from unlawfully receiving more than the fair price of similar goods, then it is permissible; rather, it should be obligatory… If the owners of commodities refrain from selling them, although people need them, except for a price higher than their known price, they must be forced to sell them at the price of the likes, because pricing is meant to force them to sell at this price, and they must comply with what Allah has ordained (i.e. justice)."(1)

Ibnul-Qayyim cited the same opinion, then added: "If people need a particular group of craftsmen, such as farmers, weavers, and builders, the governor can force these workers to work in return for the wages offered for similar tasks, or otherwise the need of people will not be fulfilled.(2) This means that if any of these jobs can only be performed by one person; it becomes an individual obligation on him to do the work. If people need a particular group of craftsmen, such as farmers to cultivate their land, weavers to weave their clothes or builders to build their houses, this work is to be a duty on these workers, and the governor can force them to perform such work in return for the wages paid for similar tasks. The governor shall not allow them to demand more than this wage from the people, nor allow people to wrong them or give them wages less than what is paid for similar jobs."(3)

Third: Giving Priority to Public Interest

18- Among the general principles of Islamic *Sharî`ah* is to give priority to the public over any private interest in case the two conflict, and to accept a personal harm for the sake of warding off a general harm. This is because the bad effects resulting from a general harm or the loss of a general interest

(1) *"Al-Hisbah"* by Ibn Taymiyyah (pp. 23 and 24); and *"At-Turuq Al-Hukmiyyah"* (p. 206).
(2) *"At-Turuq Al-Hukmiyyah"* (p. 208).
(3) *"At-Turuq Al-Hukmiyyah"* (p. 209); and *"Al-Hisbah"* (p. 29).

are greater than the effects resulting from the occurrence of a personal harm or the loss of a private interest. In this regard, the general *fiqhî* maxims state: "If one of two harms must be borne, then the greater harm is warded off by allowing the lesser harm"(1) and "A greater harm is warded off by the lesser one."(2)

Also, the general *fiqhî* maxims state: "A public interest is the same as a private necessity",(3) "Necessity knows no law",(4) "A public interest takes precedence over a private interest",(5) and "A personal harm is borne for the sake of warding off a general one".(6)

The Rulings Derived for Adhesion Contracts

19- After careful consideration regarding the modern adhesion contracts, and its characteristics and the restrictions imposed on them as stated in (Note 7), so as to deduce its *shar`î* rulings from similar issues, like the sale of the compelled, monopoly and forced pricing, and also basing our deductions on the aforementioned general *fiqhî* maxims, we concluded the following:

First: Description of the Conclusion of Adhesion Contract

20- An adhesion contract is concluded by concurrence and correlation between an understood offer and an understood acceptance. This includes any word or action that conventionally indicates the mutual consent of the parties and the concurrence of their free will to conclude the contract without need for any specific wording or form. This form is acceptable in *Fiqh*, since "Words are not intended in themselves, but they indicate the purpose of the speaker. Hence, if this purpose is spelled out in any way, whether in writing, by a sign or gesture, by reasonable deduction or the context, or by custom then the contract becomes effective", said Imam Ibnul-Qayyim.(7)

(1) *"Majallat Al-Aḥkâm Al-`Adliyyah"*, article no. (28).
(2) Ibid. article no. (27).
(3) *"Al-Qawâ`id Al-Kubrâ"* by Al-`Izz Ibn `Abdus-Salâm [2: 314].
(4) *"Majallat Al-Aḥkâm Al-`Adliyyah"*, article no. (21).
(5) *"Al-Muwâfaqât"* by Ash-Shâṭibî [2: 350].
(6) *"Majallat Al-Aḥkâm Al-`Adliyyah"*, article no. (26); and *"Al-Ashbâh Wa An-Naẓâ'ir"* by Ibn Nujaym (p. 96).
(7) *"I`lâm Al-Muwaqqi`în"* [1: 218].

Second: Adhesion Contracts should Fall under the Supervision of the State

21- In view of the possibility that the monopolistic party may have control over prices and conditions imposed in adhesion contracts, and its possibility to inflict harm upon the public, the adhesion contract is to be subject to the supervision of the State before being put into effect, in order for it to approve the fair contracts, and amend those involving harm to the adhering party.

Third: Scope of State Intervention in Adhesion Contracts

22- Adhesion contracts are divided into two kinds:

First, A contract in which the price and conditions are fair and do not involve injustice against the adhering party:

This contract is *shar`î* valid and binding on its two parties, and there is no difference in the rulings between it and a bargaining contract. Moreover, the State or judiciary does not have the right to interfere by cancelling or amending it. This is because:

a) The monopolizer of the commodity or utility is a provider who does not refrain from selling it to the demander at a fair compensation, which is the price of its likes (or at a price that involves an insignificant overcharge which is legally forgivable because it cannot be avoided in financial commutative contracts, and thus people usually excuse it). It is well-established that the sale of the compelled at a fair price is unanimously valid.

b) This form of monopoly is *shar`î* permissible, since the purpose of taking exclusive control over the commodity or utility in order to raise its price unjustly or inflict harm upon the adhering party by means of relying on excessive fraud or imposing arbitrary conditions is nonexistent in this case.

c) The mandatory pricing of the monopolizer's goods in this case is *shar`î* forbidden, and it is classified in *Fiqh* under "unlawful arbitrary pricing" since it prevents the provider from his established *shar`î* right to sell what he possesses at the price he sets as long as he does not inflict

harm upon the public. In this context, Ibnul-Qayyim said; "To sum up, if the interest of the people can only be fulfilled by pricing, then a fair price must be set without injustice or arbitrariness, and if the public need is fulfilled or their interest is served in another way, setting compulsory prices should not take place."(1)

d) There is also the necessity of ensuring a regularity of transactions among the people by enforcing the agreed upon commutative contracts which are based on justice and equity, and do not cause harm to the people.

Second, A contract involving injustice against the adhering party by means of setting an unfair price (which involves excessive fraud) or imposing arbitrary conditions that inflict harm upon him:

Because this kind of adhesion contracts involves the forbidden monopoly leading to inflicting harm and injustice against the people, this necessitates State interference through the implementation of equitable mandatory pricing on the monopolistic companies. This intervention would result in reducing the high prices, or amending or cancelling the arbitrary conditions that cause harm to the people who urgently need the commodity or utility, to an extent that establishes justice between the two parties of the adhesion contract.

The argument supporting the legitimacy and necessity of State intervention by forcing the monopolistic companies to sell at prices and according to conditions they do not agree to is based on two facts:

a) The State (the governor) is *shar'î* obliged to ward off the harm caused by an individual, institution, or company monopolizing a commodity or utility needed by the people but who refrain from selling it to them except at an unfair price or according to arbitrary conditions. This can be done by means of mandatory pricing which ensures establishing justice among the people in their financial transactions, and guarantees their two rights; namely the right of the people to be protected from any harm that might inflict them as a result of the transgression of the monopolist in stipulating unfair prices and

(1) *"At-Turuq Al-Hukmiyyah"* (p. 222).

conditions, and the right of the monopolist to obtain a fair price. In this regard, Imam Ibnul-Qayyim said; "Through His revealed Legislations, Allah, Exalted be He, has clarified that His Purpose is to establish justice among His slaves, and that they shall maintain this justice among themselves. Thus, any way through which justice and fairness can be maintained emanates from religion and does not contradict it."(1)

b) State intervention and mandatory pricing ensure that the public interest (that is the benefit of the people who urgently need certain commodities and utilities being able to buy them at fair prices) takes precedence over any private interest (that is the benefit of the monopolist who unjustly refrains from selling the commodities or utilities to people except for an exorbitant profit or according to arbitrary conditions). Further, it is well-established in the general maxims of *Fiqh* scholars that: "The public interest takes precedence over any private interest", and that: "A personal harm is borne for the sake of warding off a general one", and that: "A public interest is the same as a private necessity", i.e. permitting what is originally forbidden, in view of the fact that: "Necessity knows no law".

(1) *"At-Turuq Al-Hukmiyyah"* (p. 13).

Appendix

Analogous Forms of Adhesion Contracts (Exclusive Import Agencies)

23- A general commercial practice of many major global companies producing certain commodities and utilities has been established by appointing an exclusive agent acting for them in each country of the world. This agent undertakes an exclusive import agreement for the products of these companies to sell them in his country, so that the company does not have the right to export its products to any other agent in the salme country. This agreement is concluded under a concession contract made with the agent giving him the right to monopolize and take exclusive control over importing their products and selling them in his country.

24- It is known that (some of) these commodities or utilities are a necessity for all the people or for a specific group of people such as farmers, builders, carpenters, blacksmiths, children, patients and all descriptions that fall under the *Fiqhî* terminology of 'Private Necessity' or 'Private Need'. Meanwhile, (some of) these commodities or utilities are not that badly needed.

If there is a private or public necessity or need for any of these products, it may be of two kinds; urgent (i.e. there is no way of fulfilling this need or necessity except through obtaining the product of the exclusive agency), and non-urgent (there are equivalents or substitutes to it available in the market, or these equivalents and substitutes can be imported to satisfy such necessity or need).

Also, the exclusive agent monopolizing the product (according to the linguistic meaning of monopoly, which is to accumulate, hoard, and appropriate) may either hold this product or refrain from selling it except at a high price to achieve a great profit that falls under the category of 'excessive fraud', or he may offer it at a fair price involving no injustice or harm to the buyers.

25- After careful consideration regarding the forms and cases of exclusive import agencies in order to deduce their *shar`î* rulings in the light of general *fiqhî* maxims, and basing the deductions upon the rulings related to the sale of the compelled, and monopoly and mandatory pricing, we concluded the following:

First: If there is no public or private (i.e. to a group of people who fall under a common description) need or necessity for the products of the exclusive agency because they are luxury commodities or utilities that can be dispensed with without causing any harm to the people or putting them under any pressure, or because there is no urgent need or necessity for such products due to the availability of their equivalents or substitutes in the market at a fair price, then the importing agent may sell this product at the price he agrees upon with the buyer. The State or the judiciary, in this case, has no right to intervene by forcing prices on the exclusive agent, because the original ruling regarding contracts is that they are based on mutual consent, and their effects are based on the obligations that the two parties made upon themselves.

Further, the monopoly by the exclusive agent to the product (according to the linguistic meaning of monopoly) is *shar`î* permissible, as he is entitled to sell what he possesses at the price he wants as long as he does not inflict harm or any pressure upon the public. Therefore, it is not permissible to deny his *shar`î* right by imposing certain prices on him.

Second: If there is an urgent public or private need or necessity for the product of the exclusive agency, and the agent offers the product at a fair price with no excessive overcharging or imposition of arbitrary conditions, even if such a price is expensive (depending upon the source/supplier of the product), the State has no right to intervene by implementing mandatory

pricing, because the monopoly by the exclusive agent (according to the linguistic meaning of monopoly) of this product is a legal disposal of his own possession in which there is no injustice involved or harm inflicted upon the people who need it. In this context, Ibnul-Qayyim said; "If people sell their commodities based on convention involving no injustice, and the price of the commodity rises, due to the scarcity of the goods, or the great number of people needing it, this is the Will of Allah, the Almighty. Hence, forcing people to sell at a certain price is an unlawful coercion."(1)

Third: If there is an urgent public or private need or necessity for the product of the exclusive agency, but the agent refrains from selling the product except for a high price that involves excessive fraud and inflicts harm and pressure upon the people, the State (the governor) has to intervene, by implementing mandatory pricing to ward off the injustice and harm inflicted on the people who urgently need these commodities or utilities. The State has to force the agent to comply with the *Sharî`ah* and sell at the price of the likes, and prevent the exclusive agent from charging the unlawful increase over that price.(2)

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(1) *"At-Turuq Al-Hukmiyyah"* (p. 206).
(2) Ibid.

Conclusion

1- The concept of adhesion contracts and its relevant laws was not known before it emerged in the modern western jurisprudence. It then influenced modern Arab civil laws, which had been derived from western laws. This concept is based on the necessity of setting limits to the dominance of the principle of the Power of Will, and the need to lay down exceptions to the principle of contractual freedom, which states that 'Pacta Sunt Servanda' (i.e. agreements shall be kept), if the application of this general legal principle would result in an injustice against one party to the contract. These limits can be set by giving the judicial power the right to amend some conditions or effects of the contract agreed upon by the two parties in favor of the weaker one, so as to achieve justice. In addition, the construction of ambiguous clauses in the adhesion contract must be taken to be in favor of the adhering party, be he a creditor or debtor.

2- There are four conditions necessary for a contract to be viewed as an adhesion contract:

First: The object of the contract should be commodities or utilities which are urgently and indispensably needed by the public, such as water, electricity, gas, telephone, etc.

Second: The provider should have exclusive control over these commodities, utilities or facilities.

Third: The provider of the commodities, utilities or facilities should unilaterally set the details and conditions of the contract, while the other party has no right to discuss, cancel or amend any of such details and conditions.

Fourth: The offer should be open to all people according to the same conditions, and should remain valid for an unspecified period of time.

3- The adhesion contract is made and concluded by the concurrence and necessary correlation between an offer and an acceptance. This includes any word or action that conventionally indicates the mutual consent of the parties and the concurrence of their free will to conclude the contract.

4- Adhesion contracts should be subject to State supervision before taking effect to uphold the fair contracts and amend those involving injustice and harm to the adhering party, with the aim of fulfilling the requirements of justice and a balance of interests.

5- In *Fiqh*, adhesion contracts are divided into two kinds:

First, A contract in which the price and conditions are fair and do not involve any injustice or prejudice against the adhering party:

> This contract is *shar`î* valid and binding on its two parties. Moreover, the State or judiciary does not have the right to intervene, either by cancelling or by amending it.

Second, A contract involving injustice against the adhering party due to the stipulation of an unfair price (which involves excessive overcharging) or the imposition of arbitrary conditions that inflict harm upon the adhering party:

> This kind of adhesion contracts necessitates State intervention (before it takes effect) by means of equitable mandatory pricing which prevents injustice and harm being inflicted upon the people. This can be done by reducing high prices to equal the price of their likes, or by cancelling or amending the arbitrary conditions of the contract in a way that establishes justice between the two parties.

6- As for exclusive import agencies, which are somehow similar to adhesion contracts, they represent three cases, as follows:

First: If there is no public or private need or necessity for the product of the exclusive agency because it is a non-vital luxury commodity or utility, or because there is no urgent need or necessity for such a product due to the

availability of its equivalent or substitute in the market at a fair price, then the importing agent may sell this product at the price he agrees upon with the buyer. The State or the judiciary, in this case, has no right to intervene by forcing prices on the exclusive agent.

Second: If there is an urgent public or private need or necessity for the product of the exclusive agency, and the agent offers the product at a fair price, without any excessive overcharging or imposition of arbitrary conditions, the State has no right to intervene by imposing a price.

Third: If there is an urgent public or private need or necessity for the product of the exclusive agency, but the agent refrains from selling the product except for a high price or according to arbitrary conditions that involve excessive overcharging and inflict harm and pressure upon the people, the State, in this case, has to intervene by implementing mandatory pricing, to ward off the injustice and harm inflicted on the people and to force the agent to sell the product to them at the price of its likes and without imposing any arbitrary conditions.

The Islamic *Fiqh* Academy Resolution No. 132 (6/14) Concerning Adhesion Contracts

The Islamic *Fiqh* Academy, constituted by the Organization of the Islamic Conferences (OIC), during its Fourteenth Session in Doha, Qatar, from 11-16 January 2003, after reviewing the research papers that were presented to the Council regarding the issue of adhesion contracts, and after listening to the discussions dealing with it, adopted the following resolution:

1- The adhesion contract is a modern legal western terminology for agreements governed by the following descriptions and conditions:

a) The subject matter of the contract should be indispensable commodities or utilities such as water, electricity, gas, telephone, post and public transport services, etc.

b) The provider should legally or actually monopolize these commodities, utilities or facilities, or at least have an exclusive control over them in a way causing the amount of competition to be limited.

c)The provider of these commodities, utilities or facilities should unilaterally set the details and conditions of the contract, without the participation of the other party by discussing, cancelling or amending it.

d) The offer should be open to all people according to the same details and conditions, and should remain valid for an unspecified period of time.

e) An adhesion contract is made and concluded by concurrence and concordance between the offer and acceptance. This includes any word or

action that, by custom, indicates the mutual consent of the parties and the concurrence of their free will to conclude the contract in accordance with the conditions and details stipulated by the provider.

f) In view of the possibility that the monopolistic party may have control over the prices and conditions imposed in adhesion contracts, and on account of any possible harm that may result, adhesion contracts should be subject to the control of the State before being put into effect, in order to approve the fair contracts and amend or cancel those involving injustice and harm to the adhering party, according to the requirements of justice.

4- In *Fiqh*, there are two kinds of adhesion contracts:

First, A contract in which the price and conditions are fair and do not involve any injustice to the adhering party:

This contract is *shar`î* valid and binding on its two parties. Moreover, the State or judiciary does not have the right to intervene, either by cancelling or amending it, due to the absence of any *shar`î* reason to do so since the monopolizer of the commodity or utility is a provider who does not refrain from selling the product to the buyer at a *shar`î* fair compensation, which is the price of its likes (or at a price that involves an insignificant overcharge which is legally forgivable because it is difficult to be avoided in any financial contract). It is well-established among scholars that the sale of the compelled at a fair price is unanimously valid.

Second, A contract involving injustice against the compliant party due to the charging of an unfair price (which involves excessive overcharging) or the imposition of arbitrary conditions that inflict harm upon him:

This kind necessitates State intervention before it is put into effect by imposing an equitable mandatory price which would result in reducing the high prices, or amending or cancelling the arbitrary conditions that cause harm to those who urgently need the commodity or utility. This should establish justice between the two parties of the adhesion contract. The justification of this action depends on the following:

a) The State (the governor) is *shar`î* obliged to ward off any harm caused by an individual, institution, or company monopolizing a commodity or utility needed by the people and who refrains from selling it to them except at an unfair price (i.e. not as their likes) or according to arbitrary conditions which the monopolizer imposes. This can be done by means of implementing mandatory pricing, which ensures establishing justice among the people in their financial transactions and guarantees their rights; namely the right of the people to be protected from any harm that might be inflicted upon them resulting from the injustice of monopolistic prices and conditions, and the right of the monopolizer to charge a fair price.

b) Mandatory pricing ensures that the public interest (that is the benefit of the people being able to buy certain commodities and utilities which they urgently need at fair prices) takes precedence over the private interest (that is the benefit of the monopolist who unjustly refrains from selling the commodities or utilities to people except for an excessive profit or according to arbitrary conditions). Further, it is well-established in the general maxims of *Fiqh* that: "A public interest takes precedence over a private interest", and that: "A personal harm is borne for the sake of warding off a general one".

5- There are three different cases concerning exclusive import agencies:

First: There is no public or private need or necessity for the product sold by the exclusive agency because it is a non-vital luxury commodity or utility, or because there is no urgent need or necessity for such a product due to the availability of its equivalent or substitute in the market at a fair price. In this situation, the importing agent may sell this product at the price he agrees upon with the buyer. The State or the judiciary, therefore, has no right to intervene by imposing prices on the exclusive agent, because the original ruling regarding contracts is that they are based on mutual consent, and their effects are based on the obligations that the two parties made upon themselves. Further, the monopoly of the product by the exclusive agent (according to the linguistic meaning of monopoly) is *shar`î* permissible, as he is entitled to sell what he possesses at the price he agrees to as long as he

does not inflict harm or put pressure upon the people. Therefore, it is not permissible to deny his *shar`î* right by imposing certain prices on him.

Second: If there is an urgent public or private need or necessity for the product sold by the exclusive agency, and the agent offers the product at a fair price without any excessive overcharging or imposition of arbitrary conditions, the State has no right to intervene by implementing mandatory pricing, because the monopoly by the exclusive agent of this product involves a legal disposal of his own possession in which there is no injustice involved or harm inflicted upon those who need it.

Third: If there is an urgent public or private need or necessity for the product sold by the exclusive agency, but the agent refrains from selling it except at a high price that involves excessive overcharging or according to arbitrary conditions, the State has to intervene by implementing mandatory pricing, to ward off the injustice and harm inflicted on the people who urgently need this commodity or utility.

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Research (7)
Conditional Guarantee of Investment Deposits in Islamic Banks

Preface

Topic One: Points of Disagreement on *Mud̲ârib* Guaranteeing Capital of *Mud̲ârabah*

Topic Two: Evidence Denying Permissibility of Conditional Guarantee of *Mud̲ârabah* Capital by *Mud̲ârib*

Topic Three: Queries about Permissibility of Conditional Guarantee of *Mud̲ârabah* Capital by *Mud̲ârib*

Preface

All Praise is due to Allah, and peace and blessings be upon our Prophet Muḥammad, and upon His Household, Companions and those who follow his example until the Day of Resurrection.

It is well known in Islamic banking that investors deposit their money in Islamic banks under a *Muḍârabah* contract, which is a *shar`î* form of contract. Under this contract, the depositor/investor is regarded as the *Rabbul-Mâl* (owner of the capital) and the bank is regarded as the *Muḍârib* (working partner). According to the *Sharî`ah*, the *Muḍârib* is considered as trustee of the capital of the investors, meaning that he is not deemed liable for total or partial loss of the capital except in case of transgression or negligence.

This raises the question, if the *Rabbul-Mâl* (investor) makes a condition that the *Muḍârib* (the bank in this case) will be held liable for the capital in case of full or partial loss, and if the two parties agreed on that, would this condition be valid and binding in the view of the *Sharî`ah* or would it be void due to it being contradictory to the requirements of the *Muḍârabah* contract?

In this research, we will answer this question. Of course, this answer requires us to investigate the scholars' opinions and evidence regarding this controversial issue in *Fiqh*. Moreover, we need to study and discuss the *shar`î* rulings upon which they based their opinions and arguments. In fact, as far as we are aware, there is no better way to tackle this issue than by following an objective critical approach, through which we can reach the most correct opinion which is supported by reasonable *shar`î* evidence and which is in line with the general purposes of the *Sharî`ah* to

find *shar`î* solutions for distressful situations and facilitate ways of living for the people, in a way that is compliant with the *Sharî`ah*. This is based on Allah's saying:

> ***{"... and has not laid upon you in religion any hardship..."}***
>
> [Al-Ḥajj (The Pilgrimage): 78]

and;

> ***{"Allah intends for you ease, and He does not want to make things difficult for you"}***
>
> [Al-Baqarah (The Cow): 185]

It is also based on the following fiqhî opinions:

a) The opinion of the judge Yûsuf, stating: "*Shar`î* opinions that achieve leniency for people and do not contradict a *shar`î* principle should be adopted."(1)

b) The opinion of Imam Ath-Thawrî, stating: "Giving licenses (regarding the matters of religion) needs real knowledge, but inflexible opinions can be given by any scholar."(2)

c) The opinion of Al-Maqqarî, stating: "General latitude, as viewed by Mâlik, necessitates an exception from *Uṣûl* (Principles of *Fiqh*) by applying *Qiyâs* (analogical deduction) from what is stated in *shar`î* texts,"(3) meaning *shar`î* licenses.

d) The opinion of As-Sayûṭî, stating: "One is not to be blamed if he follows a debatable opinion, but he is to be blamed if he follows an opinion opposite to that agreed upon unanimously."(4)

e) The opinion of As-Sarakhsî, stating: "It is permissible for one to do what he thinks is permissible, even if the scholars disagree regarding its permissibility, and this cannot be regarded as neglecting the element of precaution regarding *shar`î* issues."(5)

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(1) "*Al-Mabsûṭ*" by As-Sarakhsî [11: 25].
(2) "*Ḥilyat Al-Awliyâ*" [6: 367 and 368]; "*Al-Majmû`* " by An-Nawawî [1: 46]; and "*Ṣifat Al-Fatwâ Wa Al-Muftî Wa Al-Mustaftî*" by Ibn Ḥamdân (p. 32).
(3) Rule no. 875. (Al-Maqqarî's Rules), Paper no. 81 (Manuscript of King Faisal Center, Riyadh).
(4) "*Al-Ashbâh Wa An-Naẓâ'r*" by As-Sayûṭî (p. 158).
(5) "*Al-Mabsûṭ*" [23: 13].

6- The opinion of the prominent scholar At-Tâhir Ibn `Âshûr, stating: "I have seen the people become divided, with respect to the legacy of the predecessors, into two groups. The first includes those who confine themselves within what was built by the predecessors, while the second includes those who use their axes to demolish all that is old. Both cases involve great harm. However, there is a third case whereby a broken wing can be cured; that is, we take what was established by the predecessors, and refine and add to it. We should never demolish or eliminate such legacy, for denying their gift would be ingratitude. It is not a good trait for a nation to be ungrateful for the merits of its predecessors."(1)

I beg Allah to accept my work and to give me the best reward for it

(1) "*At-Tahrîr Wa At-Tanwîr*" by Ibn `Âshûr [1: 7].

Topic One
Points of Disagreement on *Mud̲ârib* Guaranteeing Capital of *Mud̲ârabah*

1- There is no disagreement among the scholars of *Fiqh* on the fact that the *Mud̲ârib* (working partner) is to be regard as a trustee of the capital of the *Mud̲ârabah*, which means that he cannot be held liable for the full or partial loss of the capital except in case of transgression or negligence on his part.(1) In their opinions, the scholars depended upon the following arguments:

First: the *Mud̲ârib* is regarded as the investor's deputy regarding the disposal of and protection of the capital, which means that the loss of the capital when it is in the hands of the *Mud̲ârib* is the same as the loss of the capital when it is in the hands of its owner. This is because the *Mud̲ârib* receives the capital through the permission and consent of the owner, without any intention to take possession of or to act as guarantor for this capital.(2) Al-Baghdâdî said in "*Majma` Ad̲-D̲amânât*" that "the capital handed to the *Mud̲ârib* is a trust in his hands because he disposes of it according to the direction of the owner, and not as an owner or proxy."(3) Article 768 in "*Al-Majallah Al-`Adliyyah*" states: "A trust is not to be

(1) "*Al-Ma`ûnah*" by judge `Abdul-Wahhâb [2: 1122]; "*Al-Bahjah Sharḥ At-Tuḥfah*" [2: 217]; "*Mayyârah `Alâ Al-`Âs̲imiyyah*" [2: 131]; "*At-Tafrî`*" [2: 194]; "*Al-Muwat̲ta*'" [2: 692]; "*Badâ'i` As̲-S̲anâ'i`*" [6: 87]; "*Sharḥ Muntahâ Al-Irâdât*" [2: 315]; and "*Kashshâf Al-Qinâ`*" [3: 498].
(2) "*Al-Badâ'i`*" [6: 87].
(3) "*Majma` Ad̲-D̲amânât*" [2: 651].

guaranteed. That is, if it is destroyed or lost due to a reason beyond the trustee's control, the trustee will not be liable for compensation."

Second: Applying the principle of presumption of innocence (*Al- Barâ'ah Al-Aṣliyyah*) of the custodian (of the capital). In this respect, Ash- Shawkânî said; "The original *shar`î* ruling on this issue is that the trustee is not to be held liable for the trust. This is because the property of the trustee is protected by Islam, and thus no part of it shall be given (i.e. as a compensation) unless there is a *shar`î* ruling stipulating this. The presence of this original ruling eliminates the necessity for evidence to support the argument that the trustee is not to be held liable for the trust (or capital) in his hands."(1) He also said; "The trustee will not be held liable (for the trust) unless there is a misdeed or negligence on his part. This is because holding the trustee liable implies that he will pay a compensation (for the loss or damage of the trust) out of his property, which is protected by Islam. Accordingly, the trustee cannot be deemed liable unless there is a *shar`î* ruling stating this, otherwise this will be regarded as a form of consuming other people's property unjustly."(2)

2- The scholars, however, are of two opinions regarding the validity of setting a condition by the *Rabbul-Mâl* (investor) upon which the *Muḍârib* will be held liable for the damage or loss of the capital of the *Muḍârabah*. Here are the two opinions:

First: This condition is void because it contradicts the requirements of the *Muḍârabah* contract.(3) This view depends on the opinion mentioned in the *fiqhî* Maxims, which states: "Setting a condition that makes the trustee guarantee the trust (capital) is void."(4) This view is adopted by the majority of *Ḥanafî*, *Mâlikî*, *Shâfi`î* and *Ḥanbalî* scholars. In this concern

(1) *"As-Sayl Al-Jarrâr Al-Mutadaffiq `Alâ Ḥadâ'iq Al-Azhâr"* [3: 342].
(2) Ibid. [3: 200].
(3) "*Al-Mughnî*" by Ibn Qudâmah [7: 176 and 179]; "*At-Tafrî`*" by Ibnul-Jallâb [2: 195]; "*Al- Ishrâf*" by Judge `Abdul-Wahhâb [2: 61]; "*Al-Ma`ûnah*" [2: 1122]; "*Al-Bahjah*" [2: 217]; "*Al-Muwaṭṭa'*" [2: 692]; "*Bidâyat Al-Mujtahid*" [2: 238]; "*Az-Zarqânî `Alâ Al-Muwaṭṭa'*" [3: 352]; "*Mukhtaṣar Ikhtilâf Al-Fuqahâ'*" by Aṭ-Ṭaḥâwî [4: 47]; "*Al-Istidhkâr*" [6: 19 and 20]; "*Ash-Sharḥ Al-Kabîr*" by Ad-Dardîr [3: 520]; and "*Kashshâf Al-Qinâ`*" [3:498].
(4) "*Al-Baḥr Ar-Râ'iq*" [7:274]; "*Radd Al-Muḥtâr*" [5:40]; and "*Al-Mabsûṭ*" [15:84].

Al-Khattâbî said; "If something (i.e. an agreement or transaction) is based on trust (*Amânah*) according to the original ruling, then it cannot be changed into something else by a condition."(1) In the same respect, the judge `Abdul-Wahhâb Al-Baghdâdî said; "The *Mudârabah* contract is based on the principle of trust (*Amânah*). Therefore, stipulating a guarantee (of the capital) contradicts the requirement of the contract, which makes the contract void based on the fact that a contract that has a condition contradictory to its requirements should be made void."(2) Moreover, Ibn Qudâmah said; "If a condition is made that makes the *Mudârib* (i.e. the working partner) guarantee the capital, such a condition will be void, since it contradicts the requirements of the contract."(3)

3- It is worth noting that this opinion has been adopted by the Islamic *Fiqh* Academy in Jeddah. In its resolution no. 30 (5/4), the Academy stated that it is not permissible to set a condition that makes the *Mudârib* (working partner) guarantee the capital of *Mudârabah*. Thereupon, if the two parties agreed on such a condition explicitly or implicitly, it would be void, but the *Mudârib* would still be entitled to the profit of the likes of such contracts. Also, in its resolution no. 86 (3/9) [second/b] on bank deposits, the Academy stated that it is not permissible for the *Mudârib* (the bank) to guarantee the deposits since they are considered as the capital of the *Mudârabah* transaction.(4)

Second: This condition is *shar`î* valid. This opinion is the lesser-known opinion in the *Mâlikî* School and is said to be adopted by Imam Ahmad. It is adopted by Ibn Taymiyyah and Imam Ash-Shawkânî, from among the contemporary scholars. In his book "*Idâh Al-Masâlik*", Al-Wansharîsî said; "Ibn `Attâb reported about his sheikh Abul-Mutrif Ibn Bashîr that he dictated a form of a contract whereby a custodian of a mentally incapacitated person's property gave that property to another person to invest it through a *Qirâd* (*Mudârabah*) transaction in return for a specific return on the basis that the *Mudârib* (working partner) would guarantee the capital. Ibn `Attâb upheld this

(1) "*Ma`âlim As-Sunan*" by Al-Khattâbî [5:198].
(2) "*Al-Ma`ûnah*" [2: 1122]
(3) "*Al-Kâfî*" [2:194]; and "*Al-Mughnî*" [7:179].
(4) See: Resolutions and Recommendations of the Council of the Islamic *Fiqh* Academy in Jeddah (pp. 69, 70 and 197).

view and supported it with much evidence and many arguments. Yet, other scholars objected to that opinion and argued that it is not permissible to make the *Mudârib* guarantee the capital of a *Mudârabah.*"[1]

4- The scholars adopting this opinion depended on the following arguments:

a) The *hadith* narrated by Abû Dâwûd, At-Tirmidhî, Ad-Dâraqutnî, Al-Bayhaqî, Ibn Hibbân, Al-Hâkim, Ibnul-Jârûd and others, in which the Prophet (peace be upon him) said:

«Muslims must keep to the conditions they make.»[2]

The *hadîth* is also narrated as follows:

«The Prophet (Peace be upon him) said; "Muslims must keep to the conditions they make, except for a condition that makes something prohibited lawful or something lawful prohibited.»

It is well-known that putting a condition that makes the *Mudârib* guarantee the capital of the *Mudârabah* transaction does not contradict a *shar`î* text nor does it make something prohibited lawful or something lawful prohibited.

In his book "*Al-Mughnî*", Ibn Qudâmah said; "It is reported about Ahmad that when he was asked about setting a condition upon which something, which should not be guaranteed, is guaranteed, he said; 'Muslims must keep to the conditions they make.' This means that a guarantee can be cancelled by a condition and can be confirmed by a condition, depending on the Prophet's saying: 'Muslims must keep to the conditions they make.'"[3]

b) By accepting the condition that makes him liable for the capital, the *Mudârib* consents to be responsible for something that he is not obliged to be responsible for. Mutual consent is a crucial factor in financial transactions and is regarded as a requirement for the

(1) "*Idâh Al-Masâlik*" (p. 301); "*Sharh Al-Manjûr `Alâ Al-Manhaj*" (p. 414); and "*Mawâhib Al-Jalîl*" by Al-Hattâb [5: 360].

(2) At-Tirmidhî said; "This is a *Hasan* (good) *Sahîh* (authentic) *hadîth*". It is cited by Al-Bukhârî in chapter "*Ajr As-Samsarah*" in the book "*Al-Ijârah*". It is also deemed as an *Sahîh* (authentic) *hadîth* by some other scholars. "*Fath Al-Bârî*" [4: 451]; "*Mukhtasar Sunan Abû Dâwûd*" by Al-Mundhirî [5: 214]; "*`Âridat Al-Ahwadhî*" [6: 103]; "*As-Sunan Al-Kubrâ*" by Al-Bayhaqî [6: 79]; "*Al-Mustadrak*" [2: 49 and 50]; and "*Irwâ' Al-Ghalîl*" [5: 142].

(3) "*Al-Mughnî*" [8: 115].

validity of making the trustees guarantee objects (i.e. the capital or trust) for which they are not liable in principle, as long as it does not contradict a *shar`î* text or evidence.

In his discussion of the *Mud̲ârib* and other people who act as trustees, Ash- Shawkânî said; "They (*Mud̲âribs* and other trustees) are not to be held liable except in case of misdeeds or negligence on their part. Yet, if they accept to be liable, then they will be so because consent is a crucial factor in financial transactions."(1) He also said; "We said more than once that consent is a crucial factor in utilizing people's property- which is a more general concept than assets and usufructs- unless such a consent is made void by a *shar`î* text, as in the case of the fee paid to the prostitute or the fortune-teller."(2)

Consequently, if the trustee accepts to guarantee something (i.e. the trust) which he is not obliged to guarantee, his obligation will be *shar`î* valid because there is no *shar`î* evidence, in the Qur'ân or the Sunnah, that prevents setting a condition that makes the trustee liable. In this respect, Ash-Shawkânî said; "Since the trustee accepted to be liable, then his consent will justify the amount he pays as a compensation for the trust in the case of loss or damage. There is no problem in this form of transaction, and the opinion invalidating it is not reasonable."(3)

c) Setting a condition by the *Rabbul-Mâl* (investor) that makes the *Mud̲ârib* liable for repaying the capital of the *Mud̲ârabah* is the same as the condition set by the owner of the seeds in the *Muzâra`ah* transaction upon which he becomes entitled to an amount of seeds equal to the amount which he had supplied, with the rest of the seeds being divided between him and the second party. It is also the same as the condition that makes the owner entitled to the trees and the land in the *Muzâra'ah* and *Musâqah* transactions.

In the book "*Al-Ikhtiyârât Al-Fiqhiyyah Min Fatâwâ Ibn Taymiyyah*", it is stated that, "If the owner of the seeds set a condition entitling him to the same amount of his seeds, and the remainder of the seeds is to be

(1) "*As-Sayl Al-Jarrâr*" [3: 217].
(2) Ibid. [3: 196].
(3) Ibid. [3: 197].

divided between both of them, the transaction would be valid, as is the case with the *Mudârabah.*"[1] Also, in the book "*Al-Furû`*" by Ibn Muflih, it is stated that, "In the *Muzâra`ah* (sharecropping) transaction, setting a condition entitling the owner to an amount of seeds equal to the amount he had supplied, with the rest of the amount being divided between them, is void. Yet, it may be permitted based on a *Mudârabah*. Our Sheikh Ibn Taymiyyah said; "It is permissible, such as in a *Mudârabah*."[2] The opinion of Ibn Muflih and his Sheikh, Ibn Taymiyyah, is cited by Al-Mardâwî in his book "*Al-Insâf*".[3] Moreover, in the book "*Majmû` Fatâwâ Ibn Taymiyyah*", it is stated that "The condition of repaying the capital (in *Mudârabah*) is the same as the condition of keeping the possession of the trees and the land" (in the hands of their owner in *Muzâra`ah* and *Musâqah* transactions).[4] In this regard, Ibnul-Qayyim said; "The land in *Muzâra`ah* transactions is the same as the capital in *Qirâd* (*Mudârabah*) transactions."[5]

(1) "*Al-Ikhtiyârât Al-Fiqhiyyah*" (p. 219).
(2) "*Al-Furû`*" [7: 129].
(3) "*Al-Insâf*" [14:246].
(4) "*Majmû` Fatâwâ Ibn Taymiyyah*" [30: 105].
(5) "*Zâd Al-Ma`âd*" [3: 145 and 346].

Topic Two
Evidence Denying Permissibility of Conditional Guarantee of *Mud̲ârabah* Capital by *Mud̲ârib*

5- We pointed out previously that the scholars who declare the invalidity of making the *Mud̲ârib* guarantee the capital of the *Mud̲ârabah* based upon a condition defended their opinion by the argument that this condition contradicts the requirements of *Amânah* (trust) contracts, including the *Mud̲ârabah* contract. They say that the *Mud̲ârib* is regarded as a trustee (*Yadd Amânah*) not as a guarantor (*Yadd D̲amânah*) of the capital, which means that the condition contradicts the purpose of the contract, and thus the contract is deemed void.

Yet, this argument can be refuted on the strength of the following reasons:

First: The ruling stating that "It is not permissible to hold the trustee liable for the property (i.e. the trust or *Amânah*) in his hands except in case of **transgression** or **negligence**" is not a comprehensive ruling. This is because there are reasons other than transgression and negligence for holding the trustee liable for the trust (*Amânah*) in his hands. Here are some of these reasons:

a) Keeping the Trust (*Amânah*) Unknown

6- This takes place when the trustee does not reveal or specify the condition of the trust he is keeping at the time of his death, despite his

knowledge that his heirs know nothing about it.(1) This is why, in their *fiqhî* Maxims, the *Hanafî* scholars laid down a Maxim stating, "In case of a trust which is unknown, the trustee will be held liable for such a trust."(2) Also, article 1430 in "*Majallat Al-Aḥkâm Al-`Adliyyah*" states: "If the *Muḍârib* died before announcing the capital in his hands (to his heirs), such a capital should be paid out of his bequest." In the same respect, article 1883 in "*Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Aḥmad*" states: "The capital of the *Muḍârabah* is a debt payable out of the *Muḍârib*'s bequest in case he died and his heirs did not known about such a capital, and the *Rabbul-Mâl* (the owner of the capital or the investor) shall be the creditor." This opinion is adopted by the *Hanafî*(3) and *Hanbalî*(4) scholars, and the *Shâfi`î* and *Mâlikî* scholars agreed on the principle, yet they disagreed with them on some details, rulings and terms.(5)

b) Convention

7- Some of the *Hanafî* and *Mâlikî* scholars hold the view that convention or custom can be regarded as a reason for making the trustee (*Yadd Amânah*) liable (*Yadd Damânah*) for the trust (*Amânah*) he keeps. According to them, "custom should be binding" and "convention can be regarded as a reasonable argument that should be observed as long as it does not contradict a *shar`î* text". Here are some examples:

- The opinion of Al-Hasan Ibn Rahhâl Al-Ma`dânî in which he said; "After the grand judge Shamsud-Dîn At-Tatâ'î cited what Khalîl said in his book "*Al-Mukhtaṣar*", which states that the custodians are not to

(1) "*Al-Ashbâh Wa An-Naẓâ'ir*" by Ibn Nujaym (p. 326).
(2) "*Al-Mabsût*" by As-Sarakhsî [22: 19].
(3) "*Badâ'i` Aṣ-Ṣanâ'i`*" [6: 213]; "*Al-Mabsût*" [11: 129, 22: 60 and 25: 68]; "*Radd Al-Muḥtâr*" [4: 496]; "*Al-Baḥr Ar-Râ'iq*" [7: 275]; "*Al-Fatâwâ Al-Hindiyyah*" [4: 349]; and "*Al-`Uqûd Ad-Durriyyah*" [2:72].
(4) "*Sharḥ Muntahâ Al-Irâdât*" [2: 336]; "*Kashshâf Al-Qinâ`*" [4: 198]; "*Al-Mughnî*" [9: 269]; article no. (1362) in "*Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Aḥmad*"; article no. (801 and 1355) in "*Al-Majallah Al-`Adliyyah*"; and article no. (795) in "*Murshid Al-Ḥayrân*".
(5) "*Tuḥfat Al-Muḥtâj Wa Ḥâshiyat Ash-Sharawânî `Alayh*" [7: 109 and after]; "*Ḥashiyat Qalyûbî Wa Ḥâshiyat `Umayrah*" [3: 183]; "*Asnâ Al-Maṭâlib*" [3: 77 and after]; "*Rawḍat Aṭ-Ṭâilbîn*" [3: 329]; "*Adh-Dhakhîrah*" by Al-Qarâfî [6: 58]; "*Al-Mudawwanah*" [15: 149]; "*Mawâhib Al-Jalîl*" [5: 259]; and "*Ḥâshiyat Az-Zarqânî `Alâ Khalîl*" [6: 120].

be held liable for what they keep, he said; 'According to the convention nowadays, the custodians are to be held liable for what they keep because they are hired for such a service.' He quoted this opinion from the book "*Sharh At-Tuhfah*" by Al-Yaznâsî, and confirmed it."(1)

- In his explanation of the ruling stating "What is known by a convention is the same as that stipulated by a condition," Ibn Nujaym said; "While I was writing this paper one asked me about a situation in which one leased out a kitchen to produce sugar, and then the potteries which were in this kitchen were damaged. When I knew that the prevailing convention in kitchens is that the lessee is regarded liable for the potteries, I replied that what is known by a convention is the same as that stipulated by a condition, and thus the guarantee should be established as if it were stated explicitly. By the same token, if a condition is laid making the borrower guarantee *`Âriyah* (lending a property to benefit from its usufruct), it will be guaranteed, according to one of our opinions. Az-Zayla`î stated this opinion in his book *"Al-`Âriyah"* and confirmed it in his book "*Al-Jawharah*"."(2)

c) Interest

8- According to the well-known opinion in their *fiqhî* School, the *Mâlikî* scholars hold the view that craftsmen, i.e. tailors, embroiderers, dyers, carpenters...etc, are to be liable for the commodities of their clients. This is aimed at securing public interest and blocking the ways to corruption.(3)

Thus, in spite of the original rule stating that the craftsman is not regarded as a guarantor, but as a trustee, of the assets of the people who hire him based on the principle of "the presumption of innocence" (*Al-Barâ'ah Al-Asliyyah*) and the *fiqhî* Maxim stating "the original ruling for the asset (or any other thing) delivered for a purpose other than transferring of possession is that it is regarded as a trust (*Amânah*)", Imam Mâlik and his disciples hold the view that the craftsman is deemed liable for what is damaged while in his hands,

(1) "*Kashf Al-Qinâ` `An Tadmîn As-Sunnâ`*" by Al-Ma`dânî (p. 120).
(2) "*Al-Ashbâh Wa An-Nazâ'ir*" by Ibn Nujaym (p. 109).
(3) "*Al-Bahjah*" by At-Tusûlî [2: 282 and 283]; "*Mayyârah `Alâ At-Tuhfah*" [2: 195]; "*Bidâyat Al-Mujtahid*" [2: 231]; "*`Iddat Al-Burûq*" (pp. 546 and 558); "*Kashf Al-Qinâ`*" by Al-Ma`dânî (pp. 73 and after); "*Az-Zakhîrah*" [5: 502]; and "*Al-Ma`ûnah `Alâ Madhhab `Âlim Al-Madînah*" [2: 1111].

and this is for the objective of achieving public interest and protecting people's properties.(1) In his book "*Al-Muqaddimât Al-Mumahhidât*", Ibn Rushd said; "The original ruling for the craftsmen is that they are not guarantors but trustees (of the people's commodities in their hands), because they are hired for the services they offer. Moreover, the Prophet (peace be upon him) ordered the hired people to be held as trustees of, but not liable for, the people's commodity in their hands.(2) Yet, the scholars held them (i.e. the craftsmen) liable due to the need of the people for their services. This is because if they are held as trustees but are not liable, they may think of taking people's properties unjustly, which can be regarded as opening the way to damaging properties in a way that would cause great injury for the owners of such properties"(3)

d) *At-Tuhmah* (Suspicion)

9- The concept of "*At-Tuhmah*" refers to the suspicion or the great possibility that the trustee may be lying in his claim that the trust was damaged without any transgression or negligence on his part. Here, some *Mâlikî* scholars regard "*At-Tuhmah*" as a considerable reason for changing the trustee (*Yadd Amânah*) into a guarantor (*Yadd Damânah*) in many cases, such as:

- Holding the common shepherd (the shepherd who can be hired by more than one person) and the broker as being liable: According to the well-known opinion in the *Mâlikî* School, the common workman whose work has no effect on the asset (upon which he works), such as the common shepherd and the broker, cannot be held liable except in case of transgression or negligence on his part.(4) Yet, Ibn Habîb Al-Andalusî and some of the *Mâlikî* scholars disagreed with them in this regard and held the view that the workman is to be held liable based on the principle of "*At-Tuhmah*".(5) In his book *"At-*

(1) "*Kashf Al-Qinâ`*" (p. 75); "*Bidâyat Al-Mujtahid*" [2: 232]; "*Al-Mudawwanah*" [4: 388]; and "*Al-Muqaddimât Al-Mumahhidât*" [2: 244].

(2) This is based on the *hadîth* stating; *"The trustee cannot be held liable,"* [Related by Al-Bayhaqî and Ad-Dâraqutnî]. Yet, this *hadîth* is not confirmed as being authentic. "*Nayl Al-Awtâr*" [5: 296]; "*As-Sayl Al-Jarrâr*" [3: 342]; and "*As-Sunan Al-Kubrâ*" by Al-Bayhaqî [6: 289].

(3) "*Al-Muqaddimât Al-Mumahhidât*" [2: 243].

(4) "*Mayyârah*" [2: 192]; "*Adh-Dhakhîrah*" [5: 507]; and "*Kashf Al-Qinâ`*" by Al-Ma`dânî (pp. 85, 88, 89 and 94).

(5) *"Al-Manjûr `Alâ Al-Manhaj"* (p. 541); *"Kashf Al-Qinâ` `An Tadmîn As-Sunnâ`"* (pp. 85, 97, 106, 109 and 112); *"Al-Bahjah"* [2: 286]; and *"Mayyârah `Alâ At-Tuhfah"* [2: 190].

Tabsirah", Al-Lakhmî said; "Though the shepherd should not be held liable, according to *Qiyâs* (analogical deduction) and reason, the frequent cases of betrayal of trust committed by shepherds nowadays make it necessary to hold the shepherd liable. This is the opinion we adopted with regard to the shepherd and the broker of riding animals. I mean that they are to be held liable."(1)

- The Fatwa of Ibn Habîb stating that the owner of the public bath is held liable (for people's shoes and other clothes they leave with him while they are in the bath): In his book *"Al-Mudawwanah"*, Imam Mâlik argued that the owner of the public bath is not to be held liable for the damage or loss of people's properties that they leave with him while they are in the bath. This depends on the opinion of Al-Lakhmî, in which he said; "The owner of the clothes buys a usufruct represented in using the bathroom, however, the clothes are not subject to such a transaction, that is, they are regarded as a deposit that is not manufactured or hired. If the owner of the clothes pays a fee for the keeper in the bathroom (to keep his clothes), the fee in this case will be against the trusteeship, as in the case when someone gives a deposit to be kept and protected in return for a fee. Thus, taking a fee does not turn the keeper from a trustee into a liable person."(2) However, the *Faqîh* and Imam of Andalusia Ibn Habîb disagreed with them regarding this issue as he held the opinion that the owner of the bathroom is to be liable, based on the principle of *"At-Tuhmah"*. He said; "By the same token, the owner of the bathroom is frequently accused of stealing the clothes of the people, and thus he is to be held liable for them."(3)

10- The reason why the ruling stating that "It is not permissible to hold the trustee liable except in case of transgression or negligence" cannot be regarded as a comprehensive ruling is that there is no *shar`î* text, either in the Qur'ân or the Sunnah, that limits the validity of making the trustee liable to only these two reasons, i.e. transgression and negligence. The principal ruling, as Ash-Shawkânî said; is that making the trustee liable requires a *shar`î* ruling since it implies taking a compensation (for the lost or damaged trust) from a Muslim's property (i.e. the trustee), which is

(1) *"Kashf Al-Qinâ` `An Tadmîn As-Sunnâ`"* (p. 113).
(2) *"Al-Bahjah"* [2: 285]; *"Kashf Al-Qinâ`"* (p. 99); and *"Hâshiyat Ibn Rahhâl `Alâ Mayyârah"* [2: 194].
(3) *"Kashf Al-Qinâ`"* (p. 96); *"Al-Bahjah"* [2: 286]; and *"Hâshiyat Ibn Rahhâl `Alâ Mayyârah"* [2: 193].

protected by Islam. Accordingly, this cannot be permissible except by *shar`î* evidence, otherwise it would be regarded as a form of "consuming other people's property unjustly".[1] Undoubtedly, transgression and negligence represent *shar`î* causes that make the trustee liable; however, there are other *shar`î* causes that have the same effect, such as keeping the trust unknown, convention, *At-Tuhmah* (suspicion) as well as making a condition, which is the strongest and the most significant one among these causes. This is because such a condition is laid down by mutual consent of both parties. This is based on the fact that "mutual consent of both parties is the basis of contracts, and the consequences of contracts are the result of what the two parties agreed upon"[2]. It is also based on the idea that "consent is a crucial factor in utilizing people's properties".[3]

Second: The ruling stating, "Setting a condition that makes the trustee liable is void", is controversial and not all scholars agree on it. Moreover, it is not a comprehensive ruling because it has many exceptions. This is supported by the following opinions:

a) The opinion stating "`*Âriyah* (lending a property to benefit from its usufruct) is regarded as a trust (*Amânah*) in the hands of the borrower, but it can be guaranteed by him upon a condition stating so." This opinion is mentioned in a narration in the *Hanafî* School.[4] It is also attributed to Imam Ahmad in a narration about him.[5] Moreover it is the opinion stated by Qatâdah,[6] `Uthmân Al-Battî,[7] `Ubaydullâh Ibn Hasan Al-`Anbarî[8] and Dâwûd Az-Zâhirî[9]. From the *Hanbalî* scholars, it is adopted by Ibn Taymiyyah and Abû Hafs.[10]

(1) *"As-Sayl Al-Jarrâr"* [3: 200].
(2) *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (p. 203); and *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 93].
(3) *"As-Sayl Al-Jarrâr"* [3: 217].
(4) *"Al-Ashbâh Wa An-Nazâ'ir"* by Ibn Nujaym (p. 109); and *"Majma` Ad-Damânât"* by Al- Baghdâdî [1: 163].
(5) *"Al-Furû`"* by Ibn Muflih [7: 204]; and *"Al-Ikhtiyârât Al-Fiqhiyyah Min Fatâwâ Ibn Taymiyyah"* (p. 231).
(6) *"Al-Mughnî"* [7: 342]; *"Al-Hâwî"* by Al-Mâwardî [8: 395]; and *"Al-Ishrâf"* by Ibn Mundhir [1: 271].
(7) *"Mukhtasar Ikhtilâf Al-Fuqahâ'"* by At-Tahâwî [4: 185].
(8) *"Al-Hâwî"* by Al-Mâwardî [8: 395].
(9) *"Al-Hâwî"* [8: 395].
(10) *"Al-Furû`"* by Ibn Muflih [7: 204]; and *"Al-Ikhtiyârât Al-Fiqhiyyah Min Fatâwâ Ibn Taymiyyah"* (p. 231).

b) The opinion of Qatâdah and Al-`Anbarî, stating, "The deposit is regarded as a trust (*Amânah*) in the hands of the entrusted, yet it can be guaranteed by him upon a condition stating so."(1)

c) The opinion of `Uthmân Al-Battî stating, "The mortgagee and the shepherded are trustees (*Yadd Amânah*), however, they can be held liable (*Yadd Damân*) upon a condition stating so."(2)

d) In the book "*Al-Mughnî*" by Ibn Qudâmah, it is stated that "It is reported about Ahmad that when he was asked about setting a condition upon which something, which should not be guaranteed, is guaranteed, he said; 'Muslims must keep to the conditions they make.' This means that a guarantee can be cancelled by a condition and can be confirmed by a condition, depending on the Prophet's saying: 'Muslims must keep to the conditions they make.'"(3)

e) The opinion of Ibn Taymiyyah validating setting a condition that makes the custodian, and the like, liable, despite the fact that the custodian is a hired person and thus regarded as a trustee (*Yadd Amânah*).(4)

f) The opinion of Ibnul-Hâjib stating, "There are two different opinions on setting a condition that cancels the guarantee for what should be guaranteed and confirms a guarantee for what should not be guaranteed."(5)

g) The opinion of Al-Maqqarî in *"Al-Qawâ`id"* stating, "The scholars disagree on whether stipulating something in a way that contradicts what a *shar`î* ruling necessitates should be observed."(6)

h) The opinion of Imam Ash-Shawkânî that validates holding all types of trustees as being liable upon a condition stating so. He said; "They, i.e. the trustees, chose this for themselves (i.e. chose to be held liable), and consent is a crucial factor in utilizing people's property."(7)

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(1) *"Nayl Al-Awtâr"* [5: 297]; *"Al-Ishrâf"* by Ibn Al-Mundhir [1: 266]; and *"Al-Ishrâf"* by Judge`Abdul-Wahhâb [2:42].
(2) *"Mukhtasar Ikhtilâf Al-Fuqahâ'"* by At-Tahâwî [4: 86 and 309].
(3) *"Al-Mughnî"* [8: 115].
(4) *"Al-Ikhtiyârât Al-Fiqhiyyah"* by Al-Ba`lî (p. 195); and *"Kashshâf Al-Qinâ`"* by Al-Buhûtî [3: 355].
(5) *"Sharh Mayyârah `Alâ At-Tuhfah"* [2: 186].
(6) *"Sharh Al-Manjûr `Alâ Al-Manhaj"* (p. 415).
(7) *"As-Sayl Al-Jarrâr"* [3: 217].

11- Accordingly, it can be concluded that using the ruling stating that "setting a condition that makes the trustee liable is void" as evidence of the invalidity of setting a condition that makes the *Mudârib* liable (for the capital), is not reasonable. It cannot be used as evidence of the invalidity of this condition.

Third: Invalidating the stipulation of a condition that makes the *Mudârib* liable (for the capital of the *Mudârabah*), based on the argument that the condition contradicts the requirement of the contract (i.e. the *Mudârib* is held as a trustee, and so is not liable) and thus is deemed void, is not reasonable. This is because the scholars have two opinions regarding the validity of the conditions that contradict the requirement of the contracts.

The First Opinion: Any condition is deemed *shar`î* invalid if it contradicts the requirement of the contract.

The Second Opinion: A condition that contradicts the requirement of the contract is not generally invalid nor is it generally valid. That is, it should be examined on its merits to find out whether it contradicts a *shar`î* text, validates something prohibited or prohibits something permitted. If so, it will be void and should be prohibited, and if not, it will be valid and binding depending on the *hadîth* stating; "*Muslims must keep to the conditions they make*"

Depending on the second opinion (which I believe to be the most correct one), setting a condition that makes the *Mudârib* liable (for the *Mudârabah* capital) is valid and binding, because it does not violate an established *shar`î* ruling nor does it contradict a text from the Qur'ân or Sunnah.

12- To illustrate, the scholars disagreed on the power of the contracting parties to modify the contract (either by removing items or by adding obligations, to either party, which the original contract does not lay down) by means of conditions. This disagreement can be explained as follows:

First: The *Hanafî* scholars hold the view that the original ruling for the contractual conditions is restriction. This is because each contract in the view of *Fiqh* establishes a set of basic regulations called "requirements of the contract", which are stated by *shar`î* texts from the Qur'ân or Sunnah, or deduced by the scholars of *Fiqh*. These regulations are established for the

sake of setting a balance between rights and obligations in contracts. This is why it is not permissible for either party to set a condition that contradicts the requirements of the contract, because the contract would be void in this case.(1)

The *Shafi`î* scholars, most of the *Malikî* scholars and some of the *Hanbalî* scholars adopted the same opinion of the *Hanafî* scholars, which states that it is necessary to adhere to the requirements of the contract, in general, and that it is not permissible to lay a condition that contradicts such requirements. However, they disagree with them on some details and exceptions, and on the extent to which such exceptions can be applied. In fact, this disagreement can be attributed to the different opinions on the requirements of each contract, the types of conditions that contradict such requirements, to what extent the contradiction exists, and to what extent these conditions violate the terms and regulations of the contracts.(2)

Second: According to the opinions attributed to Imam Ahmad, he held the view that the original ruling, based on evidence from the Qur'ân and Sunnah, is that people are free to make all types of contracts and conditions, and that they have to fulfill all the obligations stated within the contract, as long as there is no *shar`î* text or authentic form of *Qiyâs* that prohibits a certain kind of contract or a specific condition. Accordingly, if any text or *Qiyâs* are present, the contract or the condition should be prohibited, despite this original ruling, and invalidated, such as the contracts of usurious loans, gambling, *Gharar* sale...etc.

In the opinions attributed to him, Imam Ahmad depended on Allah's saying: ***{"O you who believe! Fulfill (your) obligations"}*** and on the *hadîth* stating, *"Muslims must keep to the conditions they make."*(3) As for

(1) *"Al-Madkhal Al-Fiqhî Al-`Âmm"* by Az-Zarqâ [1: 468 - 479]; *"At-Ta`lîq Al-Mumajjad `Alâ Muwatta' Al-Imâm Muhammad"* [2: 250]; *"Majmu` Fatâwâ Ibn Taymiyyah"* [29: 126 and after]; *"Al-Qawâ`id An-Nurâniyyah Al-Fiqhiyyah"* (pp. 184 and after); and *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 76 and after].

(2) *"Al-Madkhal Al-Fiqhî Al-`Âmm"* [1: 476]; *"Al-Mughnî"* by Ibn Qudâmah [6: 166, 323 and 324]; *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 127 and 128]; *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 77 and after]; *"Al-Majmû`"* by An-Nawawî [9: 363, 364 and after]; *"Bidâyat Al-Mujtahid"* [2: 160]; *"Sharh As-Sunnah"* by Al-Bahgwî [8: 147]; *"Al-Ashbâh Wa An-Nazâ'ir"* by Ibn As-Subkî [1: 274]; and *"Al-Ma`ûnah"* by judge `Abdul-Wahhâb [2: 1122].

(3) *"Fath Al-Bârî"* [4: 451]; *"Mukhtasar Sunan Abû Dâwûd"* by Al-Mundhirî [5: 214]; *"`Âridat Al-Ahwadhî"* [6: 103]; *"As-Sunan Al-Kubrâ"* by Al-Bayhaqî [6: 79]; *"Al-Mustadrak"* [2: 49 and 50]; and *"Irwâ' Al-Ghalîl"* [5: 142].

the prohibiting restraint, which is regarded as an exception to the original ruling, it is based on the *hadîth* narrated by Burayrah, which states:

> *«The Prophet (peace be upon him) said; 'Any condition that is not in Allah's Book (Laws) is invalid'.»*[1]

In this regard Ibn Taymiyyah said; "This opinion is supported by the Qur'ân and the Sunnah, and it is the main opinion (regarding this issue) in the School. It is not permissible for one to set a condition that permits what Allah prohibited, or that prohibits what Allah permitted. Thus, if he makes such a condition, it will be void due to it being contradictory to Allah's command. Yet, it is permissible for one to set a condition so as to make something (which is not obligatory without this condition) obligatory. In other words, conditions are aimed at creating obligations regarding something not prohibited. Also, not being binding in principle does not necessitate that a thing cannot be turned into being binding (i.e. by a condition), and thus setting a condition that makes such a thing binding cannot be regarded as an act that contradicts the *Sharî`ah*. In a word, every valid condition should make something (which is not binding on its own) binding (i.e. should be able to create an obligation)."[2]

Therefore, according to the main opinions attributed to Imam Ahmad, he did not support the view that contracts should have specific requirements limited by fixed outlines that control the will of the contracting parties. In other words, according to Imam Ahmad, the *Sharî`ah* gives the contracting parties the right to set and specify such requirements within the limits of their rights, as long as such a process does not contradict a *shar`î* text or a *shar`î* principle.

On the other hand, many of the *Hanbalî* scholars are of the view that not every condition set by either party to secure an interest for himself is necessarily contradictory to the requirements of the contract if the contract

(1) Related by Al-Bukhârî, Muslim, Abû Dâwûd, At-Tirmidhî, An-Nasâ'î and Mâlik. *"Sahîh Al-Bukhârî"* [3: 199]; *"Sahîh Muslim"* [2: 1141]; *"Sunan Abû Dâwûd"* [2: 346]; *"`Âridat Al-Ahwadhî"* [8: 280]; *"Sunan An-Nasâ'î"* [7: 268]; and *"Al-Muwatta'"* [2: 780].

(2) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 148]; *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (p. 198); and *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 89].

itself does not contain such a condition. They, however, think that achieving an interest of the contracting parties (by means of conditions) helps in fulfilling the requirements of the contract as long as such an interest is *shar`î* valid (that is, not prohibited by a *shar`î* text). They also argue that a condition cannot be regarded as being contradictory to the requirements of the contract unless it contradicts the essential items and conditions of the contract in a way that makes it impossible to fulfill the *shar`î* purpose of the contract.(1) In the book *"Majmû` Fatâwâ Ibn Taymiyyah"*, it is stated that, "The original ruling for contracts and conditions is that they are valid and cannot be invalidated except by a *shar`î* text or by *Qiyâs*-based evidence. Most of the opinions attributed to Imam Ahmad are based on this opinion. Though Imam Malik has opinions similar to those attributed to Imam Ahmad, the latter gave the greatest latitude to conditions compared to the other three Imams, i.e. Abû Hanîfah, Mâlik and Ash-Shâfî`î." (2)

In the same regard, the prominent scholar Ibnul-Qayyim supported the opinions attributed to Imam Ahmad. Also, Ibn Taymiyyah adopted and confirmed these opinions in his views on the contractual powers in contracts and conditions. He said; "The original ruling for contracts and conditions is that they are all valid except those invalidated or forbidden by the *Sharî`ah*. This is the correct opinion."(3) He also said; "All contracts that are not prohibited by Allah and His Messenger cannot be prohibited by anyone else. This is because Allah (glorified be He) has explained to us in detail what is forbidden to us. Accordingly, nothing can be regarded as being prohibited unless it is clearly prohibited (by Allah or his Messenger). Moreover, since it is not permissible to allow what Allah prohibited, it is not permissible to prohibit what Allah did not prohibit."(4) In the same respect, he also said; "Here are two overriding *shar`î* issues that Allah, the Almighty, laid down through His Messenger (peace be upon him):

(1) *"Al-Madkhal Al-Fiqhî Al-`Âmm"* [1: 479 - 499]; *"I`lâm Al-Mûwaqqi`în"* [3: 381]; *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (p. 188); and *"As-Sayl Al-Jarrâr"* [3: 59].
(2) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 132]; *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (p. 188); and *"Al-Fatâwâ Al-Kubrâ"* [4: 80].
(3) *"I`lâm Al-Muwaqqi`în"* [1: 344].
(4) Ibid. [1: 383].

First: Every condition that contradicts Allah's commands and the rulings stated in His Book (i.e. Qur'ân) is definitely void.

Second: Every condition that does not contradict Allah's commands and the rulings stated in His Book should be a binding condition.

Nothing (in this regard) can be excluded from these two issues, which have been laid down by the Qur'ân, Sunnah and the consensus of the Prophet's Companions, and thus any other opinion contradictory to this should not be considered since it is not *shar`î* effective."[1]

13- Based on this argument, it can be concluded that it is *shar`î* permissible to set a condition that makes the *Mudârib* liable (for the *Mudârabah* capital), and this liability (guarantee) will be obligatory, pursuant to such a condition. This is because this condition does not contradict a *shar`î* text or principle, and there is no other acceptable reason to prohibit it. Also, the condition pertains to something (i.e. the guarantee) which is permissible to do or not to do regardless of whether this condition is stipulated or not. Moreover, people need such an action (i.e. making this form of condition) so as to achieve their interests and protect their money, which explains why they resort to it. That is, as long as this action is not prohibited, then it is deemed *shar`î* valid based on the *shar`î* principles in the Qur'ân and Sunnah that necessitate removing difficulties from the path of achieving people's interests.[2]

(1) Ibid. [3: 402].

(2) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 156]; *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (p. 204); and *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 94].

Topic Three
Queries about Permissibility of Conditional Guarantee of *Mudârabah* Capital by *Mudârib*

There are two factors that may raise doubts about the permissibility of making the *Mudârib* liable (for the capital of the *Mudârabah*) based upon a condition. They are as follows:

First: Suspicion of Usurious Loan

14- This factor of doubt implies that making a condition that makes the *Mudârib* (working partner) guarantee the capital of the *Mudârabah* distorts and turns the *Mudârabah* contract into a form of an interest-based loan.

This claim can be refuted as follows:

In fact, there is a similarity between the interest-based loan and making the *Mudârib* guarantee the capital in the *Mudârabah* contract in view of the fact that the capital in both transactions is guaranteed by the holder (the *Mudârib* in a *Mudârabah* and the borrower in loans). Yet, there is a significant difference between these two transactions in view of the fact that the extra amount (i.e. interest) over the capital in the usurious loan is certain and guaranteed by the borrower. This is unlike setting a condition making the *Mudârib* guarantee the capital since there is no certain increase over the capital guaranteed by the *Mudârib*, but rather there is just a possible

increase in profit, which is not incumbent on the *Mud̲ârib*. To explain, there are three possibilities in the *Mud̲ârabah* transaction: (I) the *Mud̲ârib* may lose the capital of the *Mud̲ârabah*. (II) he may neither make a profit nor incur loss. In both these cases the *Rabbul-Mâl* in the *Mud̲ârabah* is not entitled to any increase over the capital he handed to the *Mud̲ârib*. (III) he may make a profit, and it is in this case only that the *Rabbul-Mâl* (the owner of the capital or the investor) will be entitled to his share in the profit, which is not guaranteed by the *Mud̲ârib*. Accordingly, it has become clear that there is merely a superficial similarity between the usurious loan and setting a condition making the *Mud̲ârib* guarantee the capital, which is not sufficient to convert the *Mud̲ârabah* contract into a usurious loan due to the significant difference between the two transactions.(1)

(1) This opinion can be supported by the fact that setting a condition making the *Mudârib* liable, even in the view of those prohibiting it, does not distort or convert the *Mud̲ârabah* contract into an interest-based loan. It is also supported by the statements of judge `Abdul-Wahhâb Al-Baghdâdî and Al-Wansharîsî, both *Malikî* scholars who prohibit setting a condition that makes the *Mud̲ârib* liable. In his book "*Al-Furûq*" (p. 56); judge `Abdul-Wahhâb said; "Mâlik said; 'If both parties enter into a *Qirâd̲* (*Mud̲ârabah*) contract with the condition that either party lends a sum of money (i.e. that will be used in the *Mud̲ârabah*) to the other, the working partner (the *Mud̲ârib*) will be entitled to a fee given to his likes, and the profit and loss will be borne by the *Rabbul-Mâl* (i.e. the investor). If the *Rabbul-Mâl* gives the other party (the *Mud̲ârib*) an amount of money to use in the *Mud̲ârabah* for a period of time or with a condition that the *Mudârib* will guarantee the capital, the *Mudârib* will be entitled to a ratio of the profit equal to that given in similar transactions. In both cases, a condition is made which does not belong to the *Qirâd̲* (the *Mud̲ârabah* contract). However, the difference between the two cases is that in the *Qirâd̲* that is made for a period of time or that is conditional on the capital being guaranteed (by the *Mud̲ârib*), there is no other transaction attached to the *Qirâd̲* contract, and thus, it is not converted into another form of transaction. But, in the *Qirâd̲* conditional on lending, another transaction (i.e. a loan) is attached to the *Qirâd̲* contract, and thus it is converted (due to the attached transaction) into another form of transaction. Another difference is that the lending is regarded as an additional right stipulated by either party, and the *Qirâd̲* becomes invalid in case of stipulating an additional right or advantage. This does not apply to a *Qirâd̲* for a set period of time (*Qirâd̲ Ilâ Ajal*) and *Qirâd̲* conditional on the guarantee of the capital since neither party stipulates an additional amount, and thus the *Qirâd̲* contract is not converted into another form of transaction. This is the correct difference between the two cases". The same text is stated in the book "*`Iddat Al-Burûq Fî Jam` Mâ Fî Al-Madhâhib Min Al-Jumû` Wa Al-Furûq*" by Al-Wansharîsî (pp. 560 and 561).

Second: Suspicion of Usurious Means (*Dharî`ah*)

15- This factor of doubt means that setting a condition making the *Mudârib* (i.e. Islamic bank) guarantee the capital of the *Mudârabah* may be used as a means (*Dharî`ah*) through which the depositors give the bank interest-based loans. In *Fiqh* terminology, the word *"Dharî`ah"* refers to the permissible practices that can be used to do prohibited actions.(1) Ash- Shâtibî said; "It is a way of doing something evil using something good."(2) In his definition of *"Dharî`ah"* (means), Ibn Taymiyyah said; "It is a way that is used to do something prohibited, and if it were not used for such a purpose, it would not be deemed a corrupting element."(3)

This claim can be refuted as follows:

The possibility that this condition may be used as a *Dharî`ah* (means) to practice interest-based lending is not sufficient to prohibit it. This is because, according to the scholars, the principle of *Sadd Adh-Dharâ'i`* (blocking the means) cannot be applied unless two requirements are met, which are:

First: The first requirement is that such means (*Dharî`ah*), that is doing something prohibited by using something permissible, should be those that are resorted to very frequently and excessively among the people. Also, there should be a strong suspicion with regard to the intention of the people resorting to such a prohibited action. In this regard, Ash-Shâtibî said in his book *"Al-Muwâfaqât"*, *"Sadd Adh-Dharâ'i`"* (blocking the means) is the principle that Imam Mâlik resorted to in most *fiqhî* topics....however, such a principle should be applied based on a specific requirement; namely, that it should be clear that people intend to use such a permissible act to do an impermissible act, and that the use of such means should be that which is resorted to very frequently and excessively."(4) In the same regard, Judge `Abdul-Wahhâb Al-Baghdâdî said; "The principle of *'Sadd Adh-Dharâ'i`'* (blocking the means) refers to the prohibition of permissible practices

(1) *"Sharh Tanqîh Al-Fusûl"* (p. 448); *"Al-Furûq"* by Al-Qarâfî [2: 32]; and *"Al-Qabas"* by Ibnul-`Arabî [2: 876].
(2) *"Al-Muwâfaqât"* [4: 99].
(3) *"Bayân Ad-Dalîl `Alâ Butlân At-Tahlîl"* (p. 351).
(4) *"Al-Muwâfaqât"* [4: 198].

that are frequently used as a means for accomplishing *shar`î*-prohibited objectives."[1] Also, Ibn Shâs said; "If this is confirmed, the scholars of that *fiqhî* school agree on accepting this principle and on the necessity of canceling a contract if it is frequently used as means to do prohibited practices, such as the transaction where a sale is combined with a loan, or a loan which brings benefit to the lender."[2]

16- It is clear that setting a condition making the *Muḍârib* guarantee the capital is not used frequently as a way of practicing an interest-based loan. Also, there is no strong suspicion that the concluding parties, i.e. the investors and the Islamic bank, resorted to this condition to practice such a prohibited act, i.e. an interest-based loan. In fact, the purpose behind this condition is to protect the investors' capital against transgression, negligence and misconduct of the *Muḍârib* (i.e. the bank), especially these days as many people have become corrupted and cases of betrayal of trust have become frequent.

Second: The second requirement is the absence of any interest or need for such a transaction (which is used as a *Dharî`ah*). This is very clear in the *fiqhî* Maxims stating, "Prohibition for the sake of blocking the way to the means is less forceful than prohibition of prohibited objectives,"[3] that "What can be pardoned in the means cannot be pardoned in the objectives,"[4] and that "Acts that are prohibited for the sake of blocking the way to *Dharâ'i`* (the means) become permissible in case of a need or desire to fulfill a lawful interest."[5]

In this respect, Ibn Taymiyyah said; "The *Sharî`ah* enjoins blocking the way to *Dharâ'i`* (the means) in certain cases. However, this should not prevent the achievement of a possible lawful interest, and thus what should be prohibited is the means that lead to an evil, not those which lead to likely interests. In other words, the means (*Dharî`ah*) that lead to the achievement of a likely interest become permissible, since it is more

(1) *"Al-Ma`ûnah"* [2: 966].
(2) *"`Iqd Al-Jawâhir Ath-Thamînah"* [2: 441].
(3) *"I`lâm Al-Muwaqqi`în"* [2: 140].
(4) *"Al-Ashbâh Wa An-Naẓâ'ir"* by As-Sayûṭî (p. 158).
(5) *"Zâd Al-Ma`âd"* [4: 78].

preferable, in such a case, to achieve the expected interest than to ward off the evil which is feared."(1) He also said; "Imam Ahmad, and other scholars, laid down a rule that the acts that can be used as a means for doing something prohibited should be prohibited if there is no need for them. However, they should be permissible if there is a lawful interest that cannot be achieved except through them. This is why, in contracts, we differentiate between tricks and the means. This is because the one who uses tricks seeks to do something prohibited, which explains why tricks should be prohibited. On the other hand, the one who uses the means (*Dharî`ah*) does not intend to achieve something prohibited. Yet, such means should be only permitted if there is a need for them; otherwise, they should be prohibited."(2) Also, Ibnul- Qayyim said; "Acts that are prohibited for the sake of blocking the way to *Dharâ'i`* (the means) become permissible in case of a need or a desire to achieve a lawful interest."(3)

17- After a careful examination of this issue, I conclude that there is anurgent need for such a condition in our times and that it can help achieve a lawful interest for the people.

- **The Need:** It is clear that there is a need for setting a condition that makes the *Mudârib* liable for or guarantee the capital of the *Mudârabah*. In other words, people need such a condition if they do not have enough trust in the *Mudârib*, so that they may protect their money against fraud and loss in case of misdeeds on the part of the *Mudârib*. A long time ago, the *Hanafî* scholars understood the need for this condition and how prohibiting it (which is the opinion adopted in their School) would cause people many troubles in situations such as when the owner of the capital does not trust the *Mudârib* or is not sure about his ability to invest his money properly. Also, the owner of the capital may not be able to prove that there was transgression, negligence or mismanagement of the capital on the part of the *Mudârib* when the *Mudârib* denies the occurrence of such matters, particularly in view of the lack of integrity and the frequent

(1) *"Tafsîr Âyâtin Ashkalat"* by Ibn Taymiyyah [6: 682].
(2) *"Majmû` Fatâwâ Ibn Taymiyyah"* [23: 214 and 215]; and *"Majmû` Al-Fatâwâ"* [32: 228 - 229].
(3) *"I`lâm Al-Muwaqqi`în"* [2: 142].

cases of dishonesty nowadays. To solve this dilemma, the *Ḥanafî* scholars invented *fiqhî* stratagems through which the *Muḍârib* could be made liable for the capital, some of these are:

a) The opinion of As-Sarakhsî stated in the book *"Al-Mabsûṭ"*, namely: "If one party wants to give an amount of money to another party to invest in *Muḍârabah*, and wants the second party to guarantee the money, he may use the following stratagem: He lends the second party (i.e. the *Muḍârib*) all the money except one dirham, and then enters into a partnership with him with that dirham, while the second party uses the amount the first party lent him. They may then agree on the ratio of profit. This form of transaction is valid because the borrower is to be deemed liable for the debt (i.e. the capital), and the partnership between them is valid, despite the difference in the shares of the capital. Profit is then distributed between the two parties in accordance with the ratio that they agreed upon, based on the saying of `Alî (may Allah be please with him), namely: 'Profit is to be distributed in accordance with the ratio they (i.e. the parties) agreed upon, and the loss will be borne by the owner of the capital'. In this case, it does not matter whether both or only one party works (i.e. in the investment) and gains profit, since the profit will be distributed based on the agreement between them."(1)

b) The opinion of Az-Zayla`î stated in the book *"Tabyîn Al-Ḥaqâ'iq"*, namely: "If the *Rabbul-Mâl* (i.e. the owner of the capital) wants the *Muḍârib* to guarantee the capital, he may lend (and deliver) him the whole capital in the presence of witnesses. Then, the *Rabbul-Mâl* takes the capital again from the second party (i.e. the future *Muḍârib*) according to a *Muḍârabah* contract, and gives it to him again to invest it in the *Muḍârabah*. Here, if the *Muḍârabah* generates profit, it will be distributed between them in accordance with the ratio they agreed upon, and the *Rabbul-Mâl* will take the capital in return for the loan (he gave to the *Muḍârib*). In case no profit is achieved, the *Rabbul-Mâl* will take the capital against the loan. Yet, in case of loss

(1) *"Al-Mabsûṭ"* [30: 238 and 239].

of the capital, it will be the liability of the *Mudârib* (since the capital represents a debt owed by him). Another method is that the *Rabbul-Mâl* may lend and deliver the whole capital save a dirham to the *Mudârib*. They then enter into *Sharikat Al-`Inân* (Cooperative partnership), and the first party pays the dirham to the second party, who will invest the whole capital in *Mudârabah*. Here, the profit will be distributed according to their agreement and the loss will be borne by the *Mudârib*."(1)

- **The Interest:** Undoubtedly, this condition achieves a great interest since it helps the *Rabbul-Mâl* protect his money against waste and loss if he is afraid of being betrayed by the *Mudârib*. In this regard, Al-Buhûtî said; "The interest of the contracting parties goes in line with the interest of the contract, such as stipulating a mortgage transaction in a sale contract."(2) It is clear that this interest is more preferable than the evil resulting from setting a condition making the *Mudârib* liable for the capital, since the condition is made upon his agreement. This is especially necessary in these days where many *Mudâribs* may transgress, neglect or mismanage the capitals, feeling safe because their claim that the loss or damage of the capital was beyond their control is legally acceptable.(3) Also, in many cases, it is very difficult for the *Rabbul-Mâl* to refute the *Mudarib's* claim and prove his liability for the loss or damage.

This argument is supported by the fact that many Islamic banks (in Egypt, Malaysia and Lugano) faced bankruptcy and the depositors lost their money due to them as they were unable to prove transgression, negligence or misconduct on the part of the banks. Also, many Islamic financial institutions incurred massive losses because of the same reason. This led some central banks to stop giving licenses to Islamic banks unless they provided a guarantee for the clients' money deposited on the basis of

(1) *"Tabyîn Al-Haqâ'iq"* [5: 53]; *"Ad-Dur Al-Mukhtâr Ma`a Radd Al-Muhtâr"* [4: 483]; *"Fatâwâ Qâdîkhân"* [3: 168]; and *"Badâ'i` As-Sanâ'i`"* [6: 87].

(2) *"Kashshâf Al-Qinâ`"* [5: 99].

(3) In his book *"Rawdat Al-Qudâh"* [2: 593]; As-Simanânî said; "If they dispute (i.e. the *Rabbul-Mâl* and the *Mudârib*), the claim of the worker (the *Mudârib*) will be accepted, because he is a trustee, and thus his claim is to be accepted."

Mudârabah contracts. This was aimed at protecting the depositors' money against negligence, transgression or misconduct on the part of the bank. This is also of great importance in case of a need, depending on the saying of `Umar Ibn `Abdul-`Azîz, "New crimes require new rules to deter them." This saying is explained by Ash-Shâtibî as follows: "When people invent new crimes, there will be a need for inventing new laws and rules, which have not been existent before, to stop these crimes."(1)

The Chosen Opinion

18- After a careful and objective analysis of the different opinions of the scholars regarding the validity of setting a condition making the *Mudârib* liable for the capital of the *Mudârabah* (in case of damage, decrease, loss... etc), I conclude that the most correct opinion is that which allows laying down a condition that makes the *Mudârib* liable for the capital of the *Mudârabah*.(2) This is due to the weakness of the arguments introduced by the scholars prohibiting this condition and the strength of those introduced by their opponents. In fact, there is no *shar`î* evidence that prohibits this condition and the condition itself does not violate or contradict any *shar`î* ruling, nor does it result in doing something prohibited, such as *Ribâ*, gambling or a *Gharar*-based sale. Also, it represents a better choice than that

(1) *"Al-I`tisâm"* by Ash-Shâtibî [1: 301].

(2) In this regard, it is worth noting that in my study "*Madâ Sihhat Tadmîn Yadd Al-Amânah Bish-Shart*" I discussed the validity of setting a condition that makes the trustee liable for the property he keeps in case of partial or total loss (which falls under the rule of the guarantee of damaged properties). However, I did not discuss the issue of setting a condition that makes the *Mudârib* liable in case of loss or decrease of the capital of the *Mudârabah*, because I intended to discuss it in a separate paper. But, in the footnote of Note (6) in this research, I pointed out that in case of making the *Mudârib* liable based upon a condition, he would bear the costs resulting from only wasting or damaging the properties (i.e. the capital), and would not be liable for any loss or decease of the capital resulting from the business or investment. In this opinion, I depended on the Islamic *Fiqh* Academy's resolutions no. 30 (5: 4) and 86 (3: 9), which state that it is not permissible to set a condition that makes the *Mudârib* (working partner) guarantee the capital of the *Mudârabah*. Now, after carefully studying and analyzing the issue in this research, I have given up my last opinion that considered the *Mudârib* as not being liable for the loss or decrease resulting from the investment (i.e. *Mudârabah* activities), and have adopted the view stated under the title **"The Chosen Opinion"**.

introduced by the scholars prohibiting such a condition but who formulated different stratagems through which one could make the *Mud̲ârib* liable for the capital of the *Mud̲ârabah*.

My Last Words Are: Allah Knows Best

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Research (8)
Reciprocal Loans and Set-off Between Credit and Debit Interests

Preface

Topic One: Reciprocal Loans: Nature and *Shar'î* Rulings

Topic Two: Contemporary Banking Applications of Reciprocal Loans

Topic Three: The Concept of Set-off between Credit and Debit Interests

Topic Four: The Rulings on Set-off between Credit and Debit Interests

Preface

Praise be to Allah, the Lord of the worlds, and Peace and Blessings be upon our Prophet Muḥammad, and upon his Household, Companions, and those who follow him.

I wrote a brief paper on the issue of "Reciprocal Loans" which was published in my book ***"Fiqh of Contemporary Financial and Banking Transactions."*** Yet, after reviewing the *shar`î* rulings and evidence as well as the different discussions regarding this transaction, I found that it may be useful to elaborate on this topic by adding new subjects and drawing a comparison with similar transactions used by conventional banks, with the objective of making this topic more understandable and comprehensive.

Allah Is the Grantor of Success

Topic One
Reciprocal Loans
(Nature and *Shar`î* Ruling)

1- The agreement concluded between some depositors and their banks upon which the depositor undertakes not to take interest (*Ribâ*) on their money provided that the bank in return does not take interest on the loan the depositor withdraws when his account is overdrawn for a period equal to that during which the depositor does not take interest on his money or deposit is *shar`î* permissible, whether it is practiced between the depositors and their banks, or between Islamic and traditional banks. This process is called "reciprocal deposits", "reciprocal loans", "loans taken in return for deposits", or "I will lend to you provided that you will also lend to me." Yet, its permissibility requires that the money deposited and that withdrawn should be equivalent in terms of the amount and period.

2- This opinion depends on five arguments. They are as follows:

First: These reciprocal loans do not fall within the prohibited form of loan which results in profit/interest for the lender from the borrower. The loan that results in a profit/interest is prohibited pursuant to the *fiqhî* Maxim stating; "Any loan that results in profit/interest is *Ribâ*." This is because the benefit which involves certain or probable usury (*Ribâ*), and which the loan should be free of in order to be valid, refers to the increase stipulated by the lender over the amount or the quality of the loan, or to the stipulated benefit that takes the form of a financial bonus. An example

of the last case is when the lender makes a condition that the borrower carries for him goods from one place to another for no charge, although this service is usually done for fees.

However, the benefit represented in lending the lender the same amount for the same period does not involve an increase in the loan's amount or quality, and thus it does not fall within the benefit that involves certain or probable usury. It can, however, be regarded as a mutual benefit that is not confined only to the lender, but is shared equally by both parties, i.e. the lender and the borrower. Further, this is not prohibited by the *Sharî`ah*, either explicitly or implicitly, and thus it should be considered permissible.

Moreover, the benefit gained from reciprocal loans is like the benefit stipulated in the *Suftajah* (a bill of exchange) in view of the fact that it is not limited to the lender alone, but it goes to both parties. This benefit is *shar`î* permissible, according to the most correct opinion of the fiqhî scholars in this regard.

In their discussion of the validity of this process, Ibn Qudâmah, Ibn Taymiyyah and his student Ibnul-Qayyim stated that if the benefit in a loan is not limited to the lender, but is rather shared equally by the lender and the borrower, then it may be stipulated as a condition when the loan contract is concluded.

Ibn Qudâmah said; "It is reported about Imam Ahmad that he permitted the *Suftajah* (a bill of exchange) because it brings benefit to both parties to the contract. `Atâ' stated; 'Ibnuz-Zubayr used to take dirhams from people in Mecca and send with them a written order (bill) to Mus`ab Ibnuz-Zubayr in Iraq to give them the same value of dirhams. When Ibn `Abbâs was asked about this form of transaction, he said there is no problem with it.' Also it is narrated that when `Alî (may Allah be pleased with him) was asked about this form of transaction, he said there is no problem with it. Ibn Sîrîn and An-Nakh`î held the same view. This was also narrated by Sa`îd.

Judge `Iyâd stated that the guardian may lend the property of an orphan to be returned in another country to avoid the risk of losing it during the journey.

This transaction should be permitted because it brings benefit and does not cause harm to either of the two parties. Also, the *Sharî`ah* does not prohibit an interest unless it results in some harm. To illustrate, as long as this transaction is not prohibited explicitly or implicitly by the *Sharî`ah*, it should be considered permissible."(1)

In "*Majmû` Al-Fatâwâ*", Ibn Taymiyyah said; "However, the loan may bring benefit to the lender, as in the case of *Suftajah* (a bill of exchange), and therefore it is regarded as reprehensible by some scholars. Yet, it should not be deemed so because it brings benefit to the borrower as well. That is, it brings benefit to both parties, i.e. the lender and the borrower."(2) In the same regard, he added: "This transaction should be permitted in view of the fact that the lender gains a benefit embodied in avoiding the risk of traveling with his money to that country (in which the borrower owns the money to repay his debt), and the borrower benefits from repaying the loan in the country in which he owns money and avoiding the risk of travelling with the money, and thus, both parties take advantage of the loan, which explains why it should be permitted since the *Sharî`ah* does not prohibit a transaction that serves both parties' interests, but rather it prohibits that which causes harm to either or both parties."(3) In *"I`lâm Al-Muwaqqi`în"*, Ibnul-Qayyim said; "However, the loan may bring benefit to the lender, as in the case of *Suftajah* (a bill of exchange), and therefore it is regarded as reprehensible by some scholars. Yet, it should not be deemed so because it brings benefit to the borrower as well. That is, it brings benefit to both parties, i.e. the lender and the borrower."(4)

Second: *Ribâ* is *shar`î* prohibited because it involves injustice against the borrower.(5) Ibnul-Qayyim said; "*Ribâ* is prohibited by the *Sharî`ah* due to the injustice it involves."(6) However, the reciprocal loan agreement between the lender and the borrower does not inflict injustice on either

(1) "*Al-Mughnî*" [6: 436, and after].
(2) "*Majmû` Fatâwâ Ibn Taymiyyah*" [20: 515].
(3) Ibid. [22: 530].
(4) "*I`lâm Al-Muwaqqi`în*" [1: 391].
(5) Ibid. [1: 386].
(6) Ibid. [1: 386].

party if the loans given to each party are equal in terms of the amount and period. Rather, this agreement ensures justice and mutual interest for both parties, and thus it is permitted by the *Sharî`ah*. Ibnul-Qayyim said; "The original ruling for all kinds of contracts is that they should achieve justice for the concluding parties, which is one of the virtues stressed by Allah's Messengers and Books. Allah, Glorified and Exalted Be He, says: ***{"Indeed We have sent Our Messengers with clear proofs, and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice."}*** [Al-Hadîd (Iron): 25]." Ibnul-Qayyim added: 'The *Sharî`ah* aims at achieving justice and equity among the people, and thus whatever achieves this goal will be compliant with the *Sharî`ah*."[1]

Third: The well-known opinion in the *Malikî* School permitting a transaction known as "I will lend to you provided that you will lend to me." This opinion is mentioned in the scholars' discussion of *Biyû` Al-Âjâl* (future sales). According to the *Malikî* scholars, *Biyû` Al-Âjâl* refer to a combination of contracts each of which appears to be valid on its own; however, there is some suspicion that the combination as a whole is used to reach a hidden forbidden goal.

In "*Jâmi` Al-Ummahât*", Ibn Al-Hâjib said, "***Biyû` Al-Âjâl* (Future Sales):** *Al-Âjâl* refers to some forms of transactions and contracts that are invalidated because of the suspicion that they may be used to achieve a hidden forbidden goal. They are deemed invalid with the aim of blocking the means (*Zarî`ah*) that may be used to reach such forbidden goals. The consensus of *fiqhî* scholars prohibited combining a sale with a loan, which is one of the combinations used to reach a forbidden end. To explain more:

- If this type is resorted to frequently (to do something prohibited), such as combining a sale with a loan or a loan that brings a benefit, it should be prohibited according to the consensus of scholars.
- If it is resorted to rarely (to do something prohibited), such as selling a commodity for a lower deferred price in return for obtaining a guarantee that such a price will be paid at the specified date, its ruling with regard to validity and invalidity is based on two different *fiqhî* opinions (one prohibiting it and the other permitting it).

(1) "*At-Turuq Al-Hukmiyyah*" (p. 13).

- If it is resorted to very rarely (to do something prohibited), such as the transaction known as "I will lend to you provided that you will also lend to me", it is permitted according to the prevailing fiqhî opinion in this regard."(1)

In his discussion of *Biyû` Al-Âjâl* ( Future Sales), Ibn Rushd Al-Qafsî, in his book "*Lubâb Al-Lubâb*", said; "Mâlik forbade this form of transaction based on the principle of *Sadd Adh-Dharâ'i`* (blocking the means which may lead to an expected evil); however, one should examine each transaction in the light of the amount paid and the amount received. Concerning this we can say:

- If the transaction is initially permissible, then it should be permitted.
- If it is resorted to very frequently (to do something prohibited), such as combining a sale and a loan in one transaction, then it should be prohibited.
- If it is resorted to rarely (to do something prohibited), such as securing a guarantee (i.e. for a commodity…etc) in return for a fee, its ruling with regard to validity and invalidity is based on two different well-known *fiqhî* opinions (one prohibiting it and the other permitting it).
- If it is resorted to very rarely (to do something prohibited), such as the transaction known as 'I will lend to you provided that you will lend to me', it should be permitted according to the prevailing *fiqhî* opinion in this regard, which contradicts the opinion of Ibnul-Majshûn. Our colleagues, i.e. the *Malikî* scholars, referred to these controversial forms of transactions as "*At-Tuham Al-Ba`îdah*" and "*Himâyat Adh-Dharî`ah*" (transactions that are not likely to be used as a means or stratagem to do or reach something prohibited)"(2)

In "*As-Sharh As-Saghîr*", Ad-Dardîr, in his discussion of *Biyû` Al-Âjâl* (Future Sales), said; "Forms of sales that are prohibited are those that may be used very frequently by the contracting parties to reach a prohibited goal, even if such a goal is not the real objective behind the contract (i.e. in one particular transaction)."(3)

(1) "*Jâmi` Al-Ummahât*" by Ibn Al-Hâjib (p. 352).
(2) "*Lubâb Al-Lubâb*"(p. 144).
(3) "*As-Sharh As-Saghîr Wa Hâshiyat As-Sâwî `Alayh*" by Ad-Dardîr [3: 117].

In his comment on this opinion, As-Sâwî said; "A transaction that is rarely intended (or resorted to) to do something prohibited is not to be prohibited. This is because of the weakness of the suspicion (that it may be used for such a reason), such as the transaction known as 'I will lend to you provided that you will also lend to me'." He added: "An example is when (A) sells a garment to (B) for two dinars to be paid after one month, and then (A) re-purchases the same garment from (B) for two dinars on the basis that one dinar is to be paid in cash and the other after two months. Here, the whole process represents a transaction whereby (A) (i.e. the original seller) lends (B) (the original buyer) a dinar provided that (A) takes from (B) two dinars after one month, one dinar is in return for the dinar (A) lent (B) and the other represents a loan (A) takes from (B) and which will be repaid after two months. This form is also not prohibited due to the weakness of the suspicion (that it may be used for doing something prohibited)."(1)

Ibn Shâs mentioned the same example in his book "*`Uqûd Al-Jawâhir Ath-Thamînah*" and then added: "According to the well-known opinion in this regard, the transaction is permissible if the two prices are equal in terms of their kind and quality, in a way that neither party will receive more than what he paid."(2) He also said; "The main principle in determining the permissibility of any particular form of *Biyû` Al-Âjâl* (Future Sales) is to consider what is given and what is received by each party to the transaction."(3)

Fourth: The argument that the *Hanbalî* scholars depended upon to prohibit the transaction known as "I will lend to you provided that you will lend to me" is unreasonable, and thus can be easily refuted. In prohibiting reciprocal loans, they depended on the following two proofs:

a) The Prophet (peace be upon him) forbade the sale conditional on lending.(4)

(1) "*Hâshiyat As-Sâwî `Alâ Ash-Sharh As-Saghîr*" [3: 117].
(2) "*`Iqd Al-Jawâhir Ath-Thamînah*" [2: 446]
(3) Ibid. [2: 442].
(4) "*Al-Mughnî*" [6: 437]
The *hadîth* forbidding the sale conditional on lending is reported by Abû Dâwûd, At-Tirmidhî, An-Nasâ'î, Ibn Mâjah, Ahmad, Ash-Shâfi`î and Mâlik.At-Tirmidhî said that it is a *Hasan* (good), *Sahîh* (authentic) *hadîth*. "*Al-Muwatta'*" [2: 657]; =

However, if we look at the transaction in question, i.e. reciprocal loans, we will find that it has nothing to do with the form of transaction prohibited by the *ḥadîth*, i.e. combining a sale with a loan, or making a sale conditional on a loan. According to its apparent meaning, it is clear that the transaction in question does not imply a sale transaction. According to the inferred meaning, we can say that the reason behind the prohibition of combining a sale with a loan does not exist in reciprocal loans. The majority of scholars view that the reason of prohibition lies in the fact that "Combining a sale with a transaction can be used as a means for practicing a *Ribâ*-based deal whereby one party lends the other 1000 dirhams and also sells him a garment worth 800 dirhams for 1000 dirhams. In this transaction, the first party gave the second party 1000 dirhams and a commodity of 800 dirhams in return for 2000 dirhams, which is nothing but *Ribâ*."(1) Also, according to the Shâfi`î scholars, the reason of prohibition is that "when the seller makes a condition that the buyer should give him a loan (to execute the sale), the price of the commodity will consist of the real price plus the benefit of the loan. However, since this condition is not binding, the benefit of the loan can be canceled and thus deducted from the total price, and since the deducted benefit is unknown, the price itself will be unknown, which makes the contract invalid."(2)

b) It falls within the category of "two sales in one sale", which is prohibited.(3)

= "*Musnad Aḥmad*" [2: 178]; "*Mukhtaṣar Sunan Abû Dâwûd*" by Al-Mundhirî [5: 144]; "*`Âriḍat Al-Aḥwadhî*" [5: 241]; "*Mirqât Al-Mafâtîḥ*" [2: 323]; "*Nayl Al-Awṭâr*" [5: 179]; and "*Al-Fatâwâ Al-Kubrâ*" by Ibn Taymiyyah [4: 39]).

(1) "*I`lâm Al-Muwaqqi`în*" [3: 153]; "*Ighâthat Al-Lahfân*" by Ibnul-Qayyim [1: 363]; "*Al-Muwâfaqât*" by Ash-Shâṭibî [3: 196]; "*Majmû` Fatâwâ Ibn Taymiyyah*" [29: 62]; "*Al-Qawâ`id An-Nûraniyyah Al-Fiqhiyyah*" (p. 142); and "*Al-Fatâwâ Al-Kubrâ*" by Ibn Taymiyyah [4: 39].

(2) "*Al-Ḥâwî Al-Kabîr*" by Al-Mâwardî [6: 431]; "*Sharḥ As-Sunnah*" by Al-Baghawî [8: 145]; and "*Fatḥ Al-`Azîz*" [9: 383].

(3) "*Kashshâf Al-Qinâ`*" [3: 304].

The *ḥadîth* forbidding concluding two sales in one is reported by Abû Dâwûd, At-Tirmidhî, and An-Nasâ'î from Abû Hurayrah, and Mâlik =

Yet, it is clear that reciprocal deposits do not belong to this prohibited transaction. According to the apparent meaning, reciprocal deposits are not forms of sale, but rather they are loan-based transactions. According to the inferred meaning, it is well known that the majority of scholars view that "two sales in one sale is a transaction whereby the seller says to the buyer: 'I will sell you this garment for 10 dirhams in cash or for 20 dirhams payable one year later', and then they separate without specifying the price upon which the sale is concluded."(1) The reason behind the prohibition of this transaction is the ignorance about the price and the uncertainty about the contract, which makes it a *Gharar*-based contract. However, it is clear that this reason is not present in the transaction in question.

Ibn Taymiyyah and Ibnul-Qayyim said; "Two sales in one is when one says to another: I will sell you this commodity for one hundred payable after one year on the condition that I will buy it from you for eighty in cash."(2) This is the same as *`Înah* transaction; however, this is not the case in the transaction we are discussing.

The *Hanafî* and *Hanbalî* scholars and Ash-Shâfi`î in one of his opinions argued that "two sales in one is when one says to another: 'I will sell you my orchard for the price (X) on the condition that you sell me your house for the price(Y)'."(3) The reason behind the prohibition of this transaction is that the actual price of each of the two transactions is unknown. This is

= in "*Al-Muwatta'*" from the Prophet (Peace be upon him). In "*Al-Qabas*" by Judge Ibnul-`Arabî [2: 842], he said; "It is a proven and an authentic *hadîth* from the Prophet (Peace be upon him)." (See: "*Al-Muwatta*" [2: 663]; "*Mukhtasar Sunan Abû Dâwûd*" by Al-Mundhirî [5: 98]; "*`Âridat Al-Ahwadhî*" [5: 239]; "*Sunan An-Nasâ'î*" [7: 295]; and "*Nayl Al-Awtâr*" [5: 152].

(1) This is the interpretation of Mâlik, Abû Hanîfah, Ath-Thawrî, Ishâq, one of the two opinions of Ash-Shâfi`î, and others (See: "*Al-Mughnî*" [6: 333]; "*Al-Mudawwanah*" [9: 191]; "*Sharh As-Sunnah*" [8: 143]; "*`Âridat Al-Ahwadhî*" [5: 240]; "*Ma`âlim As-Sunan* " [5: 98];"*Mirqât Al-Mafâtîh*" [2: 323];"*Al-Muntaqâ*" by Al-Bâjî [5: 39]; and "*Nayl Al-Awtâr*" [5: 152].

(2) "*Mukhtasar Al-Fatâwâ Al-Misriyyah*" by Ibn Taymiyyah (p. 327); "*I`lâm Al-Muwaqqi`în*" [3: 161, 162]; and "*Tahdhîb Mukhtasar Sunan Abû Dâwûd*" by Ibnul-Qayyim [5: 100, 106].

(3) "*Al-Mabsût*" [13: 16]; "*Al-Mughnî*" [6: 332]; "*Al-Umm*" [3: 67]; "*`Âridat Al-Ahwadhî*" [5: 239, 240]; "*Ma`âlim As-Sunan*" by Al-Khattâbî [5: 98]; "*Sharh As-Sunnah*" by Al-Baghawî [8: 143]; "*Nayl Al-Awtâr*" [5: 152]; and "*Ar-Rawdah An-Nadiyyah*" [2: 105].

because if the two sales were conducted separately, the seller and the buyer would not agree on the same prices they agreed upon when they concluded the two sales through one contract. Of course, this cause of prohibition is not present in reciprocal loans. It is also said that the cause of prohibition is that one contract is made conditional on another, which also applies to the transaction known as "I will lend to you provided that you will also lend to me." However, this argument is not acceptable because there is no *shar`î* text-based proof, or other proof of the same authority, prohibiting making one contract conditional on another. In other words, it is not reasonable to extend or generalize the prohibition of combining a sale with a loan to include any transaction in which a contract is made conditional on another. This is because the cause of prohibition of this transaction, i.e. combining a sale with a loan, is not present in all forms of contracts claimed to be conditional on another contract, especially reciprocal loans.

Fifth: The contemporary banking applications of "reciprocal deposits" are more important and complex than the form of transaction known by the fiqhî scholars in the past as "I will lend to you provided that you will lend to me." Nowadays the need for reciprocal deposits and their applications has become urgent and unavoidable. This is because there is no other financial system or project that can achieve the same purpose, provide the same degree of flexibility or facilitate the ways with which Islamic banks and institutions as well as traders and manufacturers can deal with traditional banks. In fact, dealing with these traditional banks is necessary for most, if not all, Islamic banks and institutions, which makes such a transaction, i.e. reciprocal deposits, an unavoidable requirement. This explains why many scholars argue for the permissibility of this transaction in the light of the strong proofs and arguments mentioned earlier and due to the "*Ḥâjah Khâṣah*" (particular need) these days, which is classified by scholars to be at the same degree of a "*Ḍarurah*" (necessity). In the general *fiqhî* maxims, it is stated; "The '*Ḥâjah*' (need), be it '*khâṣah*' (particular) or '`*Âmmah*' (general), should be classified to be at the same degree as the '*Ḍarurah*' (necessity),"(1)

(1) Article no (32) of "*Majallat Al-Aḥkâm Al-`Adliyyah*";"*Al-Ashbâh Wa An-Naẓâ'ir*" by As-Sayûṭî (p. 88); and"*Al-Ashbâh Wa An-Naẓâ'ir*" by Ibn Nujaym (p. 100).

and, "The '*Hâjah Khâṣah*' (particular need) can permit something which is prohibited."[1] In permitting this transaction, the scholars also depended on the principle of "*`Umûm Al-Balwâ*" *(*i.e. when something is a widespread and pressing unlawful act that the legally accountable person finds very difficult to avoid*)* regarding the prohibited acts that are urgently needed by people and thus cannot be avoided except with a great degree of hardship and difficulty. This principle *(`Umûm Al-Balwâ)* is well-established In Islamic *Fiqh* and thus the general *fiqhî* maxims state; "If a prohibited matter prevails (due to the people's urgent need for it), it may be permitted," and, "When something becomes so difficult, its *fiqhî* ruling (that depends on *Qiyâs* or *Ijtihâd*) should be reconsidered." In "*Qawâ`id Al-Aḥkâm*", it states; "Imam Ash-Shâfi`î said; 'The *shar`î* rulings are based on the fact that when matters become very difficult, their *fiqhî* ruling should go beyond *Qiyâs* and should be more lenient.'"[2]

This is based on the fact that the lenient *Sharî`ah* does not aim at blocking the ways through which people may fulfill their needs, but rather it helps them meet their legal needs raised by the new circumstances and the different types of dealings in various times and places. This is based on Allah's saying:

> ***- {"Allah intends for you ease, and He does not want to make things difficult for you."}***
>
> [Al-Baqarah (The Cow): 185]
>
> ***- {"Allah wishes to lighten (the burden) for you; and man was created weak (cannot be patient to leave sexual intercourse with woman)"}***
>
> [An-Nisâ' (The Women): 28]
>
> ***- {"And has not laid upon you in religion any hardship"}***
>
> [Al-Ḥajj (The Pilgrimage): 78]

(1) "*Al-Manthûr Fî Al-Qawâ`id*" by Az-Zarkashî [2: 25].

(2) "*Al-Ashbâh Wa An-Naẓâ'ir*" by Ibn Nujaym (pp. 88, 93); and "*Al-Ashbâh Wa An-Naẓâ'ir*" by As-Sayûṭî (p. 83).

In this regard, Ibn Taymiyyah said; "Allah, Glorified and Exalted Be He, has told us that He has not made on us any hardship concerning the religion, and this is an explicit, general negation. Thus, whoever claims that the Commandments of Allah are meant to make matters (or life) difficult for people, is denying what Allah and His Messenger have said."(1)

(1) "*Jâmi` Ar-Rasâ'il*" by Ibn Taymiyyah [2: 370].

Topic Two
Contemporary Banking Applications of Reciprocal Loans

3- In this item we introduce various examples of the contemporary banking applications of reciprocal loans by discussing the fatwas and recommendations made by some scholarly symposiums on contemporary banking issues as well as the *Fatwas* and resolutions issued by a number of *Sharî`ah* control or supervisory boards in different Islamic banks regarding the contemporary forms and applications of this transaction.

a) Fatwas of Al Baraka Symposiums on Islamic Economics

4- Fatwa no. (10) of Al Baraka 8th Symposium on Islamic Economics, held in Jeddah (Ramadan 1413 A.H. - 1993 A.D.), stipulated that:

> "If two banks agreed to provide the amounts requested by each other for a loan of the same currency or in another currency, this agreement is admissible in order to avoid the reciprocal interest-based transactions on the debit accounts between the two banks, on condition that providing a loan is not contingent on giving another."(1)

5- Fatwa no. (6) of Al Baraka 11st Symposium on Islamic Economics, held in Jeddah (Ramadan 1416 A.H. - 1996 A.D.), stipulated that:

(1) "*Fatwas of Al Baraka Symposiums*" (p. 142).

> "An Islamic bank may agree with a traditional bank that if the Islamic bank's account in the traditional bank is overdrawn, the Islamic bank will not be obligated to pay any interest to the traditional bank, but rather it will be obligated to deposit funds in the traditional bank based on the *Nimar*(1) system in order to avoid paying interest on the overdrawn amounts."
>
> "In this case, the rule stating that 'any loan that brings profit/interest is *Ribâ*' should not be applied because the prohibited benefit of a loan is that which causes harm and loss to the other party. However, this transaction brings benefit to both parties and causes no harm to either of them. Moreover, if we assume that this rule is applicable here, the general need (*Hâjah `Âammah*), which has the same level of necessity (*Darurah*), justifies dealing with the correspondent banks through this transaction. This is because there is no *shar`î* way through which Islamic banks can deal with traditional or usurious banks except through this transaction or agreement, which aims at avoiding interest-based transactions."(2)

b) Resolution of the *Sharî`ah* Board, Al-Rajhi Banking and Investment Corporation

6- Resolution No. (16) of the *Sharî`ah* Board, Al-Rajhi Banking and Investment Corporation (1 *Muharram* 1410 A.H.), stipulated that:

> "The opening of accounts for the company in usurious foreign banks is admissible due to its need to run operations, and the company can deal with its correspondent banks outside or inside the Kingdom in the same way the Islamic banks deal with their correspondents, provided that they request those banks to deal with it in the same way, i.e. those banks put their deposits into the company's account without receiving any interest from the company, and vice versa."(3)

(1) **Translator:** A system in which the bank whose account is overdrawn deposits an amount equal to the amount it withdrew from the correspondent bank for the same period during which its account was overdrawn, regardless of interest rate on the days of exposure or deposit.

(2) ***"Fatwas of Al Baraka Symposiums"*** (p. 192).

(3) *"Resolutions **of the** Sharî`ah Board, Al Rajhi Banking and Investment Corporation"* [3: 331].

c) Fatwa of the *Sharî`ah* Control Board for Faisal Islamic Bank (Sudan)

7- Question no. (1) with respect to the method of dealing with foreign banks:

With regard to the correspondent foreign banks outside Sudan, it is obvious that there is a problem related to the way the transactions are audited because transactions are governed and calculated based on the rate of interest, which makes it not permissible for the bank to enter into these transactions due to them being usurious. Thus, we recommend that dealing with foreign banks should be arranged in accordance with a prior agreement with the foreign bank whereby the Islamic bank deposits money in its account in the foreign bank without receiving any interest on that money. At the same time, the Islamic bank should be able to draw from this account, and when the account is overdrawn, i.e. it becomes a debit account, it will not have to pay any interest on the overdrawn amounts, but rather it will then have to transfer amounts of money to its account to counterbalance the amount drawn. Is there any shar`î problem in this form of transaction?

Answer: The *Sharî`ah* board sees that the transaction proposed by the Faisal Islamic Bank in its question is permissible, whether the agreement with the foreign bank includes a condition that the foreign bank will commit to give the Islamic Bank interest-free loans or a condition that the foreign bank will not take an interest from the Islamic bank, in case of not stipulating such a commitment"[1]

d) Fatwas of the *Sharî`ah* Supervisory Board for the Kuwait Finance House

Fatwa no (41):

8- Question: To what extent is it permissible for the Kuwait Finance House to deposit interest-free amounts of money into commercial banks, provided that these banks adopt the same principle in dealing with it?

(1) "***Fatwas of the*** *Sharî`ah Control Board* for *Faisal Islamic Bank* (*Sudan*)" (pp. 51- 53).

Answer: Although we disapprove this transaction with the usurious banks, even if it was conducted with interest-free banks, based on the principle of *`Umûm Al-Balwâ (*when something is a widespread unlawful act that the legally accountable persons finds very difficult to avoid*)* and the need of the people to deal with these banks, there is no constraint on lending and borrowing these amounts as a *Qard Hasan* (interest-free *loan*), so as to encourage these banks to deal in non-usurious operations.(1)

Fatwa no (151):

9- Question: After you approved mutual deposits, the following question was raised: The transaction of mutual deposits falls under the *fiqhî* Maxim stating: "Any loan that brings a profit/interest is usury", this is because if the two parties did not come to an agreement on the reciprocal loan, it would not occur unilaterally. Please provide the *Sharî`ah* opinion regarding this?

Answer: The mentioned *fiqhî* Maxim is not applicable here, because it is not a benefit derived from the loan itself, since the bank returns the amounts borrowed with no financial increase thereof or from another type, but the benefit is derived from engaging in a transaction with whoever wants to deal with you, which is the essence of trade.(2)

Fatwa no (165):

10- Question: Is it *shar`î* permissible for the Kuwait Finance House to agree with a foreign bank on the transaction that the Kuwait Finance House can overdraw any sum in the currency of the foreign bank's country on the basis of a *Qard Hasan* (interest-free loan), and the foreign bank is entitled to accept or reject this transaction, and in return, the foreign bank enjoys the same advantage given to the Finance House to overdraw on the basis of a *Qard Hasan* (interest-free loan), and in the currency of the Kuwaiti Finance House's country, and in turn the Finance House is entitled to accept or reject this transaction?

(1) "***The Sharî`ah Fatwas*** *for Kuwait Finance House*" [1: 73].
(2) **Ibid.** [2: 86].

Answer: This transaction is unobjectionable and *shar`î* permissible.[1]

Fatwa no (264):

11- Question: Is it permissible to borrow from someone one thousand dinars for a year on the condition that I lend you or 'him' three thousand dollars for a year?

Answer: It is permissible.[2]

Fatwa no (697):

12- Question: Are the reciprocal loans carried out between banks on the condition that they are interest-free loans permissible?

Answer: This is permissible if it was stipulated in the reciprocity agreement that it shall be concluded without interest or any condition.[3]

Fatwa no (698):

13- Question: Is it permissible to exchange loans in dinars for loans in dollars, or in any other currency. That is, is it permissible for me to lend a person in dollars on the condition that he lends me in dinars or vice versa, taking into consideration that this loan is provided by the two parties without charging any usurious interests?

Answer: If this loan does not fall within the sale of one currency for another, but is a kind of setting off one loan for another without stipulating any interest from the two parties, then I see that it is permissible.[4]

e) Fatwa of the *Sharî`ah* Consultant for the Dallah Al Baraka Group

14- The Islamic bank borrows dollars, for example, and lends the traditional bank riyals (on an equal basis concerning the amount and the duration of the loan): In this case the bank uses the dollars to finance

(1) "***The Sharî`ah Fatwas*** *for Kuwait Finance House*" [2: 97].
(2) **Ibid.** [2: 191].
(3) **Ibid.** [4: 146].
(4) **Ibid.** [4: 147].

a particular transaction, and when it receives its price from the client in dollars, it repays the loan of the traditional bank in the same currency, and recovers its loan in riyals, without the need to purchase dollars and sell them later, as this may result in the presence of a differential between the two currencies which may totally or partially consume the profits of the operation.

The method of exchanging loans is applied in some Islamic banks, and it is admissible if the transaction is conducted without any contractual liability between the two loans. That is, this transaction should be conducted through a memorandum of understanding and mutual undertakings, which should be carried out through interest-free exchanged loans (even if the traditional bank takes into account the amount and duration of its loan so as to ensure a balance with the amount it lends).[1]

(1) "*The Sharî`ah Answers to the Banking Applications for Dallah Al Baraka*" (p. 119), (In an answer to the question of Al Baraka Islamic Bank for Investment in Bahrain, and the question of the Credit and Marketing Management Dept).

Topic Three
The Concept of Set-off Between Credit and Debit Interests

a) The Nature of Set-off and Its Divisions

15- Jurisprudentially, a set-off indicates "Discharging the liability of one person from a debt due to his creditor in return for discharging the creditor's liability from a debt due to this person."(1) It is divided into two forms: a mandatory (automatic) set-off and a contractual (consensual) set-off.

16- The mandatory set-off occurs automatically between two reciprocal debts due on two liabilities when the debts are equivalent in kind, description and maturity, without the need for a bilateral agreement or consent of the two indebted parties, or either of them. This is because there is no benefit in keeping these two debts unsettled.

Its form: Both the creditor and the debtor are indebted to each other for debts equal in kind, description and maturity, and so the two debts are automatically settled if they are equal in amount.

However, if the two debts are not equal in amount, a set-off will take place so the lesser debt will be deducted from the greater debt, and the remaining portion will remain as a debt owed by the relevant person. This is the view of the majority of *Ḥanafî*, *Shâfi`î* and *Ḥanbalî* scholars.(2)

(1) "*Murshid Al-Ḥayrân*" article no. (224).
(2) "*Murshid Al-Ḥayrân*" articles no. (225, 226, 227); "*Radd Al-Muḥtâr*" [4: 239, 240]; "*Asnâ Al-Maṭâlib*" [4: 493]; "*Sharḥ Muntahâ Al-Irâdât*" [2: 224]; and "*Kashshâf Al-Qinâ`*" [3: 296].

17- The contractual set-off occurs according to the consent of the two parties to extinguish their obligation towards each other without resulting in a matter which contradicts the *Sharî`ah*, such as when the two debts are different in kind or description, or when one of them is immediate and the other is deferred, or if one of them is recoverable and the other is non-recoverable. In these cases the two debts are cancelled by means of a set-off according to the mutual consent of the two indebted parties, whether their reasons for incurring the debts are the same or not. This is the view of the *Hanafî* and *Mâlikî* scholars.(1)

Our discussion here is dedicated to the mandatory (automatic) set-off, but not the contractual (consensual) one. Whenever the term set-off is mentioned without being determined, the mandatory set-off is meant.

b) Set-off between Credit and Debit Interests

18- The set-off between credit and debit interests occurs when a natural or legal person borrows an amount of money from a traditional bank in return for a set interest; meanwhile, the same bank borrows an amount of money from the same client in the same currency for a set interest which may be more, less or equal to the interest charged in the first transaction. After the mandatory set-off is conducted between the amounts of the principal loan, each party remains indebted to the other party by the amount resulting from the set interest on the amount which he/it borrowed.

At this point the set-off between the credit and debit interests takes place; i.e. occurs automatically between the two reciprocal debts of interest payments which are equal in kind, description and maturity, if they are an equal amount. However, if the two debts are not equal in amount, a set-off will take place where the lesser amount will be deducted from the greater amount, and the remaining portion will remain as a debt on the person owing the latter sum.

(1) "*Murshid Al-Hayrân*" articles no. (226 and 231); "*Radd Al-Muhtâr*" [4: 239 and 240]; and "*Al-Qawânîn Al-Fiqhiyyah*" (p. 297).

Topic Four
The Rulings on Set-off Between Credit and Debit Interests

After the above presentation of the concept of reciprocal loans and the set-off between credit and debit interests, we conclude the following rulings:

19- The reciprocal loans, as indicated above, are permissible according to the opinion of *Faqîhs*, because this transaction is based on the equitable exchange of interest-free loans, i.e. loans which are totally devoid of stipulating any usurious interest between the two parties. On the other hand, the set-off between credit and debit interest payments is a transaction based on stipulating interest-based loans between the two parties. Hence, these loans are *shar`î* forbidden, and it is not allowed, on principle, to conclude or stipulate any interest on these loans. Therefore, the set-off between credit and debit interest payments is completely and fundamentally different from interest-free reciprocal loans, although their purposes and consequences are the same. This is because it is *shar`î* established that it is not sufficient to consider the purposes and consequences of any transaction in isolation from the means leading to it. Moreover, since the legally accountable person is required to seek *shar`î* permissible purposes and consequences, he should also seek the lawful means leading to these purposes and consequences.

20- Accordingly, it is not allowed for the Islamic bank to reach an agreement or mutual understanding, or to collude with the traditional bank to deal in interest-based reciprocal loans, [even if the Islamic bank does not receive

any interest on its deposits in the traditional bank, or pay any interest to it when its account is overdrawn] on the basis of the set-off between credit and debit interests. This is because this transaction is based on something which is *shar`î* prohibited; namely concluding contracts of interest - based loans, contrary to the interest-free reciprocal loans which are based on the rule of the mutual *Qard Hasan* (interest-free loan).

21- In this context, it is incorrect to argue that as long as the interest- based loans do not result in actually taking or giving usury, there will be no impact for the banking account entries of credit and debit interests in view of the fact that these entries will automatically fall away by means of a set-off. This view is not correct because the accounting entries of financial amounts in the bank are deemed in the *Sharî`ah* and custom as de jure possession, which is the same as actual possession regarding rulings and consequent effects as stated in the resolution of the Islamic *Fiqh* Academy no. 53 (4/6) issued in Jeddah. In addition, the subject matter of the set-off between credit and debit interests is fixed, proven debts in the liabilities of two persons, and it is *shar`î* prohibited to stipulate or obligate these debts in the first place.

22- In consequence, if an Islamic bank concluded an agreement or mutual understating of interest-based reciprocal loans with a traditional bank, and this resulted in registering credit and debit interests of an equal kind, amount and description in its bank account in this traditional bank, this would be sinful because it means the committing of a *shar`î* prohibited transaction; namely interest-based lending and borrowing. Also, these interest payments are deemed as being cancelled on both sides, according to the *Sharî`ah*. The consequence is the same for the set-off between credit and debit interests in traditional banks; however, it is based on an Islamic perspective which considers the usurious condition in these reciprocal loans as being invalid and consequently void, according to the *Sharî`ah*, even if it is physically existent. Moreover, this usurious condition does not necessitate any commitment or obligation, as is the case in all shar`î invalid contractual conditions.

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Research (9)
Sukûk Al-Ijârah

Topic One: Economic and Financial Importance of *Sukûk Al-Ijârah*

Topic Two: Definition and Characteristics of *Sukûk Al-Ijârah*

Topic Three: Types and Rulings of *Sukûk Al-Ijârah*

Topic Four: Contemporary Applications of *Sukûk Al-Ijârah*

Conclusion

Appendix

Topic One
Economic and Financial Importance of *Sukûk Al-Ijârah*

1- Some economists point out that *Sukûk Al-Ijârah* have become a distinctive instrument for monetary policies these days. Governments need financial papers of relatively stable value to use them in their monetary policies which aim at managing the amount of money in the market. The government sells such financial instruments to reduce the amount of money in the market, and buys them to increase it. However, governments do not often manage to use the shares of stock companies for this task due to the great fluctuations in their values in the financial markets. On the other hand *Sukûk Al-Ijârah* enjoy relative, or in some cases complete, stability with regard to their net revenues. Moreover, the *Sukûk* issued by the governments are more reliable and are guaranteed by the government, and ensure stable revenues. This makes *Sukûk Al- Ijârah* a more suitable option than the treasury bonds issued by the central bank in conventional open market operations.(1)

2- With regards to the supply, many governments found *Sukûk Al-Ijârah* to be useful in raising funds for their financial needs and for financing large public non-profit utility projects, such as the construction of bridges, tunnels, highways, airports, railway stations...etc.

(1) *"Sanadât Al-Ijârah Wa Al-A`yân Al-Mu'ajjarah"* by Dr. Mundhir Qahf (p. 103); and *"Al- Ijârah Al-Muntahiyah Bit-Tamlîk Wa Sukûk Al-A`yân Al-Mu'ajjarah"* by Dr. Mundhir Qahf [1: 398 and after] (*Majallat Majma` Al-Fiqh Al-Islâmî*, Issue 12).

They can also be used as an alternative for public loan bonds or treasury bonds to raise funds for the ownership of fixed assets in both profit (production) and non-profit (service) government projects. Accordingly, a great amount of the government expenditures for purchasing fixed assets and constructing urban facilities, including infrastructure projects, can be funded by *Ijârah* bonds instead of the conventional treasury bonds.

Moreover, *Sukûk Al-Ijârah* can be issued for machines, equipment and facilities, whose value is paid in foreign currencies, which means that it is possible to issue *Sukûk Al-Ijârah* in foreign currency. This makes *Sukûk Al-Ijârah* a suitable alternative for foreign currency bonds. Accordingly, foreign currency *Sukûk Al-Ijârah* can be a strong rival to the foreign loan policy, especially with the possibility of floating them in the international markets; however, public interest may require that some projects should not be open for ownership by foreign institutions.(1)

3- In addition, *Sukûk Al-Ijârah* can be used to raise funds for Islamic banks so that they can meet their finance needs. In such a case, the Islamic bank can issue *Sukûk Al-Ijârah* in return for the finances they provide through lease transactions. By so doing, the bank can retrieve the amount of funds it has paid to reuse them in new financing projects.

The following is an example to illustrate this point:

The bank may conclude a financial *Ijârah* contract with, say; a maritime transport company which needs to lease a ship whose purchase price is 16,120 million dollars. In this case, the bank buys the ship and then leases it to the company for 15 years in return for one million dollars per year, plus the US$ 100,000 Islamic insurance installment, which the lessee pays directly to the insurance company. Insurance in this case covers all risks the ship my face in a way that helps the lessee to benefit from its usufructs, either wholly or partially (that is, the basic maintenance cost, which is unknown at the time of the contract, is also covered by the insurance).

This implies that the ship will remain in the possession of the bank during the *Ijârah* period, and the net rent revenue from this financing operation is 9% annually. In this case, if the bank wants to raise funds from the individual

(1) *"Sanadât Al-Ijârah Wa Al-A`yân Al-Mu'ajjarah"* by Dr. Mundhir Qahf (p. 100).

investors and let them take its place in the financing operation through *Sukûk Al-Ijârah*, it may issue 10,000 *Sakk*, each of which represents a share out of 10,000 shares in the ship. Therefore, the bank offers the ship for sale, and the ownership of the ship goes to the new owners once they buy the *Sukûk* of this leased asset. Also, all rights and obligations of the lessor, i.e. the bank, stated in the *Ijârah* contract will be transferred to the *Sukûk* holders, and at the same time, they become entitled to the net rent revenue on their share in the ship.(1)

4- Moreover, the financial and monetary markets are always in need of diversification of financial papers, especially those that have regular revenue and lower risks. These financial instruments can be used as a benchmark in financial markets to determine the revenue of high risk projects, or venture capitals, which are usually represented in the shares.(2)

(1) *"Sanadât Al-Ijârah Wa Al-A`yân Al-Mu'ajjarah"* by Dr. Mundhir Qahf (p. 104).

(2) *"Al-Ijârah Al-Muntahiyah Bit-Tamlîk Wa Sukûk Al-A`yân Al-Mu'ajjarah"* by Dr. Mundhir Qahf [1: 398].

Topic Two
Definition and Characteristics of *Sukûk Al-Ijârah*

a) Definition of *Sukûk Al-Ijârah*

5- The concept of *Sukûk Al-Ijârah* is based upon the principle of securitization (*Taskîk*, *Tawrîq* or *Tasnîd*), i.e. the issuance of financial certificates open to circulation, based upon a low-liquidity investment portfolio.(1) Some economists define it as: "Assigning revenue-generating assets as a guarantee or basis against the issuance of *Sukûk*, which are considered as financial assets."(2)

The aim of *Sukûk Al-Ijârah* is, then, to convert the tangible assets and usufructs that are the objects of *Ijârah* contracts into financial certificates (*Sukûk*) that can be exchanged in a secondary market. Based upon that, they have been defined as: "Certificates of equal value that represent common shares (*Hisas Shâ'i`ah*) in the ownership of tangible assets or income-generating utilities."

Sukûk Al-Ijârah do not represent a fixed amount of money, nor are they debts owed by a certain entity, whether natural or legal. They are only financial certificates that represent common shares, out of say 1000 shares, in the ownership of a tangible asset being put to use, such as real estate, an airplane or a ship, or a pool of such assets, whether of the same or differing specifications, when they are leased and, thus, yield a defined revenue as a result of the lease

(1) *"Al-Aswâq Al-Mâliyyah"* by Dr. Muhammad Al-Qurrî (p. 116).
(2) *"Sanadât Al-Ijârah Wa Al-A`yân Al-Mu'ajjarah"* by Dr. Mundhir Qahf (p. 34).

contract. *Sukûk* are different from the document of real estate registration (the ownership document of such fixed assets) in that the asset which the *Sukûk Al-Ijârah* represent a share of, are tied to an *Ijârah* contract, meaning that the *Sukûk* have a revenue, represented by their share in the rent income.(1)

Sukûk Al-Ijârah may bear the name of their owners, in which case a transfer of ownership is accompanied by an entry in a specific registry or by writing the name of the new owner on the certificate each time ownership is transferred; or on the other hand, they may be anonymous (bearer) certificates, so that a transfer of ownership is simply effected by a physical transfer of the certificate to the new owner, like the shares in stock companies.(2)

b) Characteristics of *Sukûk Al-Ijârah*

6. According to economists, *Sukûk Al-Ijârah* have many features, which makes them able to play an important role in Islamic financial markets. These features depend on the nature of the *Ijârah* contract and its *shar`î* requirements, and on the *shar`î* characterization of such *Sukûk*, which represent shares in the ownership of the leased assets. Here are the most important characteristics:

First: *Sukûk Al-Ijârah* Are Affected by the Factors of the Market

7. *Sukûk Al-Ijârah* are affected by the various factors in the market because they represent the ownership of tangible assets being put to use, and the value of assets are affected by market factors. Their market value is affected by supply and demand. This means that when the market value of such assets increases, the value of their *Sukûk* increases accordingly, and vice versa.

Second: Flexibility of *Sukûk Al-Ijârah*

8. It is well known that *Sukûk Al-Ijârah* are very flexible with regard to the projects they finance, the entities benefiting from this finance, the financial mediation involved, the diversified options they provide for the entities that need finance, the types of assets and projects they finance, and the various forms in which they can be issued...etc.

(1) *"Al-Ijârah Al-Muntahiyah Bit-Tamlîk Wa Sukûk Al-A`yân Al-Mu'ajjarah"* [1: 377] (*Majallat Al-Majma`*, Issue 12).
(2) *"Sanadât Al-Ijârah Wa Al-A`yân Al-Mu'ajjarah"* by Dr. Mundhir Qahf (p. 38).

a) *Sukûk Al-Ijârah* can be issued by the private, public and charitable sectors; because they can be used to fund government projects (whether central, regional, or local), private sector projects, and charitable sector projects.

b) *Sukûk Al-Ijârah* can be issued directly by the finance beneficiary, or by a financial intermediary, such as Islamic banks, or by companies designed specially for finance-through-*Ijârah* operations.

The role of the financial intermediary can be expanded or diminished according to the desires and interests of the parties involved, or the instructions of the supervisory authorities. For example, the intermediary may play the role of a promoter, dealing with the sale and circulation of the *Sukûk* in return for a specific fee, which he receives from the *Sukûk* holders or from the finance- through-*Ijârah* beneficiary, or from them both. On the other hand, the intermediary party may be charged to carry out the arrangements of the initial lease contract, and the issuance and sale of the *Sukûk*, or the management of the relationship between the lessee and *Sukûk* holder on behalf of the latter...etc.(1)

Third: Stable Price and Fixed Revenue

Compared to other financial instruments, *Sukûk Al-Ijârah* enjoy a great deal of stability regarding the price, and they have fixed revenue, which can be estimated to a great extent at the time of purchasing the *Sukûk*. They are also connected to the assets and usufructs, i.e. the circulation of the production and distribution of economic commodities. Moreover, some *Sukûk Al-Ijârah* enjoy a great deal of flexibility, which makes them a suitable financing source for immediate cash needs, and a suitable instrument for raising funds for the capital of the projects they initiate.(2)

To conclude, the above mentioned characteristics of *Sukûk Al-Ijârah* make them a distinctive financing instrument, which lies midway between shares with their risks, and bonds with their flexibility and security, and at the same time, they do not imply dealing in interest- based loans, which are forbidden by the *Sharî`ah*.(3)

(1) *"Al-Ijârah Al-Muntahiyah Bit-Tamlîk Wa Sukûk Al-A`yân Al-Mu'ajjarah"* [1: 398 - 405].
(2) *"Sanadât Al-Ijârah Wa Al-A`yân Al-Mu'ajjarah"* by Dr. Munhdir Qahf (p. 112).
(3) Ibid. (p. 113).

Topic Three
Types and Rulings of
Sukûk Al-Ijârah

10- *Sukûk Al-Ijârah* are divided into two types:

First: *Sukûk* of Ownership of Leased Assets, which are of three types:

a) *Sukûk* of ownership of assets (in a conventional *Ijârah* of assets).

b) *Sukûk* of ownership of assets (in *Ijârah Muntahiyah Bit-Tamlîk*).

c) *Sukûk* of ownership of assets (in forward *Ijârah* '*Ijârat Adh-Dhimmah*').

Second: *Sukûk* of Ownership of Leased Usufructs, which are of two types:

a) *Sukûk* of usufructs of defined assets (in conventional *Ijârah*).

b) *Sukûk* of described future usufructs (in forward *Ijârah*).

Thereupon, we have five types of *Sukûk Al-Ijârah*:

First Type: *Sukûk* of Ownership of Defined Assets in a Conventional *Ijârah*

11- One of its simple forms can be illustrated through the following example; an asset is owned by someone, who has an ownership bond for such an asset, and the asset is leased to another party for a specific period

at a specific rent, which is paid regularly according to the conditions the two parties previously agree upon, for example, at the beginning of every month. In this case, the *Sakk Al-Ijârah* (singular of *Sukûk*) represents the title of the property of the leased asset, which can be issued by a certain government authority, namely the Real Estate Registration Office, or by the lessee who possesses and utilizes the usufructs of the property, or by the owner of the property. Such a title includes a description of the property, the name of its owner, a statement of its lease conditions, the name of the lessee, and any other administrative information.

12- According to the opinion of the majority of scholars, the owner of the leased property has the right to sell it to a third party, without affecting the rights and obligations of the lessee. In such a case, the ownership of the property, along with its *Sakk Al-Ijârah*, are transferred to the new owner, and the *Sakk* should be registered in the real estate register, or the name of the new owner should be written on it (the *Sakk*), or the formal documentation should be recorded in the registers of the lessee or the first owner, in case the latter is the issuer of the *Sakk*.

13- By the same token, it is permitted to issue *Sukûk* that represent ownership of a leased tangible asset, when the conditions are met for property that may validly be the subject of a rental (*Ijârah*) lease, such as an airplane, a ship, a railway line, an electricity network, or a machine. The same applies to a pool of assets, whether of the same kind, such as five airplanes of the same kind, or of different kinds, such as a group of machines and equipment for a hospital, or a university, or a company...etc, as long as the *Sukûk* represent ownership of real tangible assets that are being leased and, thus, yield a defined revenue. The revenue here represents the rent payment minus the expenditures borne by the lessor. It is acceptable, according to the *Sharî`ah*, for the *Sakk* (bond) to be sold at the price agreed upon by the two parties, whether it is the same as, less than, or more than the price at which it was bought by the second owner (the lessor).

14- The *Sakk Al-Ijârah* can be divided into equal shares (stocks), and issued as a number of *Sukûk* of equal value, each one of them representing a common share (*Hissah Shâ'i`ah*) in the ownership of the leased asset or assets, which

can be 1% or 0.1%...etc. Then these *Sukûk* can be sold separately to many persons on the basis that every *Sakk* holder will be entitled to a share of the rent income, according to the method and at the times which were agreed upon in the *Ijârah* (lease) contract. It is also permitted for the owner of the *Sukûk* to sell them on the secondary market to any buyer at a price agreed upon between them. It does not matter if the price is the same as, less than, or more than the price at which these *Sukûk* were bought. This is because the majority of scholars stated that it is permissible to sell shares which represent a common right in an asset which is jointly owned,(1) and that it is permissible to sell a leased asset to a third party, who then becomes entitled to the rent payments.(2) They also stated that it is permissible to lease a common asset, provided that all partners lease their shares to a third party.(3)

Second Type: *Sukûk* of Ownership of Assets in an *Ijârah* Ending with Ownership of the Assets *(Ijârah Muntahiyah Bit-Tamlîk)*

15- *Ijârah* ending with ownership of the assets (hire-purchase or *Ijârah Muntahiyah Bit-Tamlîk*) represents a transaction consisting of a number of successive and connected contracts and obligations that aim to achieve a specific financial purpose. It begins with renting the asset, and ends with transferring the ownership of such an asset to the lessee at the end of the *Ijârah* period. Here, transfer of ownership is done either automatically in return for the rent payments made during the *Ijârah* period (i.e. at the end of the period, *Ijârah* converts automatically into a sale), by a separate *Hibah*

(1) *"Al-Mughnî"* [6: 209]; *"Kashshâf Al-Qinâ`"* [3: 157]; *"Badâ'i` As-Sanâ'i`"* [4: 187]; *"Hâshiyat Al-Qalyûbî"* [2: 161]; and *"Mughnî Al-Muhtâj"* [2: 13]. Article (214) in *"Al-Majallah Al-`Adliyyah"* states; "It is permissible to sell a defined common share, such as a third, a half, or a tenth of an asset which is jointly owned." Also, article (215) states, "It is permissible for one partner to sell his defined common shares without obtaining the permission of the second partner." In the same respect, article (294) in *"Majallat Al-Ahkâm Ash-Shar`iyyah Al-Hanbaliyyah"* states; "It is permissible for one partner to sell his common share, even without the second partner's consent."

(2) *"Al-Mughnî"* [8: 48]; *"Sharh Muntahâ Al-Irâdât"* [2: 375 and 376]; *"Al-Badâ'i`"* [4: 207 and 208]; *"Al-Muhallâ `Alâ Al-Minhâj Ma`a Hâshiyat Al-Qalyûbî"* [3: 87]; and *"Al-Kâfî"* by Ibn `Abdul-Barr (p. 370).

(3) *"Badâ'i` AS-Sanâ'i`"* [4: 187]; *"Bidâyat Al-Mujtahid"* [2: 227]; and *"Al-Ma`ûnah"* by Judge `Abdul-Wahhâb [2: 1103].

(gift) contract subsequent to the *Ijârah* contract, by sale contract at a set real or nominal price, which is conditional upon the payment of all rent sums agreed upon between the two parties or whose implementation is deferred until the date of expiration of the *Ijârah* contract, or by any other means. This transaction has many forms in the international financial markets, some are permissible and others are prohibited according to the rules of the *Sharî`ah*.

16- What concerns us in this regard is the ruling on the issuance of *Sukûk* for ownership of assets rented by the permissible form of *Ijârah* ending with ownership of the assets (hire-purchase or *Ijârah Muntahiyah Bit-Tamîlk*). The permissible form of *Ijârah* ending with ownership has been defined by the Islamic *Fiqh* Academy in its resolution no. 110 (4/12) in its 12th meeting held in Riyadh during the period from the 23rd of September to September 28, 2000. This form is as follows: "A lease contract that enables the lessee to make use of the leased property against a specific amount of rent and for a specific period of time, along with a separate contract offering the property as a gift to the lessee. The latter contract becomes effective at the end of the lease period and when the lessee has paid all the amounts of the agreed upon rent. A promise is thus made by the owner to give the property as a gift to the lessee, after the lease period and full payment of the due rent."

17- In fact, this form of *Ijârah* represents a financial process performed through a contractual agreement consisting of a number of contracts and obligations to be performed in a specific manner and according to a number of successive stages. In this agreement, both parties agree that the owner of an asset or property will lease such an asset to the second party for a specific period and at a determined rent, with a preceding condition that the ownership of the leased asset will be transferred to the lessee (the second party) through a subsequent *Hibah* (gift) contract contingent on a future event (i.e. the end of the *Ijârah* period) and pending on the full payment of the due rents, or through a binding promise to transfer the ownership of the asset to the lessee after the end of the *Ijârah* period and the full payment of the specified amounts of rent.

Therefore, *Ijârah* ending with ownership of the asset (*Ijârah Muntahiyah Bit-Tamlîk)* is a new type of transaction that aims at achieving a given financial purpose. It begins with leasing the asset, and ends with the transfer

of its ownership to the lessee in the way mentioned above. Accordingly, it can be said that it provides a permissible alternative to interest (*Ribâ*)-based financing. Moreover, this form of transaction can be regarded as a stratagem (*shar`î* means) to transfer the title of a property at a deferred price that is paid in installments over a given period. By so doing, the seller (or the lessor in the first contract) is protected against the loss of the deferred installments in case the second party becomes insolvent, delays the payment, or fails to pay due to any other reason, since the asset remains in his possession until he obtains the full installments. Accordingly, when full payment is made of the rent installments at the end of the lease, the title of the asset is transferred to the lessee through a separate *Hibah* (gift) contract that will be effective after the end of the *Ijârah* contract.

18- In my opinion, this transaction is permissible when it meets the regulations stated by the Islamic *Fiqh* Academy in its relevant resolution, which are:

a) The presence of two contracts that are totally separate and independent with respect to the timing of their conclusion and in which the *Hibah* (gift) contract, or the binding promise to present the asset as a gift, is concluded after the lease contract.

b) There should be a genuine desire from the two parties to conclude the lease contract and not just to use it as a mere veil for the sale contract.

c) The leased property should be guaranteed by the owner, and not the lessee.

d) If the contract includes insurance of the property, insurance should be made according to Islamic methods and at the expense of only the owner.

e) Throughout the lease period the contract should be subject to *Sharî`ah* rulings of *Ijârah*.

f) The cost of maintenance, excluding operational expenses, should be borne by the lessee throughout the lease period.

19- Thus, according to the *Sharî`ah*, it is permissible to use such a contractual agreement as a means to transfer the title in the property in return for a deferred price (rent installments), with a guarantee of the full payment of the rent installments in case of bankruptcy, delay or failure to pay on the part of the lessee. This is done through a lease and a subsequent *Hibah* (Gift) contract, combined in a contractual agreement comprising many connected parts which are to be implemented in successive stages according to a specific system that governs it as a single, indivisible transaction that aims to achieve a given purpose which is intended by the two contracting parties. In other words, such an agreement does not permit what is prohibited by the *Sharî`ah*, nor does it unjustly waive any right or obligation, or imply seizing other people's property wrongfully. Rather, it helps in achieving considerable interests for the contracting parties, and in guaranteeing their rights and compensations in case one party fails to fulfill his obligations towards the other. This is why it is considered as one of the acceptable stratagem (*Hîlah Maḥmûdah*) and *shar`î* means permitted by the *Sharî`ah*. In this respect, Ibnul-Qayyim said; "stratagems are of two kinds; one is performed for the sake of doing what Allah, the Almighty, ordered us to do, avoiding what Allah, the Almighty, ordered us not to do, avoiding the committing of sins, extracting one's right from the usurper, or releasing the wronged from the hands of the unjust. This kind is permissible and is worthy of a reward. The second type is practiced for the sake of escaping duties, permitting the practice of prohibited matters, or confusing between the wronged and the wrongdoer and between the right and the wrong. This type is dispraised by the *Salaf* (predecessors)."(1) He also said; "A stratagem (*Hîlah*) is to be judged according to the purpose it is used for, with regard to permissibility or prohibition, being good or corrupt, and obedience or disobedience. That is, if the purpose is something good, the stratagem will also be so, and vice versa."(2)

20- Based upon the above point, and due to the fact that the *shar`î* rulings on this form of *Ijârah* ending with ownership of the assets is the same as those applied to conventional *Ijârah*, as stated in the resolution by the Islamic *Fiqh*

(1) *"Ighâthat Al-Lahfân"* [1: 339].
(2) Ibid. [1: 385].

Academy,[1] it can be concluded that issuance of the *Sukûk* for ownership of assets leased through *Ijârah* ending with ownership is permissible, according to *Fiqh*, as is the case with the first type, i.e. issuance of the *Sukûk* for assets leased by conventional *Ijârah*.[2]

Third Type: *Sukûk* of Ownership of Assets in Unspecified *Ijârah*

a) Definition of Unspecified (Forward) *Ijârah*

21- '*Ijârah*' is a term in Islamic *Fiqh*. Lexically, it means to hire, or to employ the services of a person.[3] It is also used to describe the contract of *Ijârah* itself. In the *Sharî`ah*, however, it refers to the transfer of a usufruct of a property to another person in exchange for a rent, which could be an asset, debt or benefit.[4]

The majority of scholars divided *Ijârah* into two kinds with regard to the leased usufruct, or the object of the *Ijârah*. These two kinds are *Ijârah* of assets and unspecified (forward) *Ijârah*.

In *Ijârah* of assets, the usufruct which is the object of the *Ijârah* contract is dependent on the rented asset itself, as in the case when someone rents a given house or car. Regarding this form of *Ijârah*, the consensus of scholars agree that payment of the rent at the session of the contract is not a prerequisite for the validity or binding nature of the contract, or for the transfer of the ownership of the usufruct of the property to the lessee. This is because the lease of an asset is the same as selling it in view of the fact that *Ijârah* represents the sale of a usufruct in exchange for a given rent or compensation. Therefore, since the sale of an asset is valid whether the price is paid on the spot or on a deferred payment basis, the same applies to *Ijârah*.

In forward unspecified *Ijârah*, however, the rented usufruct represents an obligation on the part of the lessor, as in the case when someone rents a car with defined specifications for the purpose of traveling or carrying goods...etc. It is so called because the rented usufruct is not tied to a specific asset but to an asset to be provided by the lessor.

(1) See: Note (18) in the Research.
(2) See: Notes (11 – 14) in this Research.
(3) *Al-Mughrib"* by Al-Muṭarrizî [1: 28]
(4) *"Al-Qawâ`id Al-Kubrâ"* by Al-`Izz Ibn `Abdus-Salâm [2: 149]; *"Radd Al-Muḥtâr"* [6: 4]; and *"At-Ta`rîfât"* by Al-Jurjânî (p. 8).

b) *Fiqhî* Ruling on Forward Unspecified *Ijârah (Ijârat Adh-Dhimmah)*

22- The *fiqhî* scholars are of different opinions regarding the validity of unspecified *Ijârah*. In this regard, the majority of *Shâfi`î*, *Mâlikî* and *Hanbalî* scholars are of the view that, in general, it is permissible. The *Hanafî* scholars, however, hold that it is not permissible at all. This is because, according to them, a condition for the validity of the *Ijârah* contract is that the rented object should be determined, which means that it is not permissible to conclude an *Ijârah* contract for a usufruct not tied to a certain asset but to an asset to be determined and provided by the lessor. In this respect, article (580) in *"Murshid Al-Hayrân"* states; "Mutual consent and specification of the rented object are necessary for the validity of the *Ijârah* contract." Also, article (449) in *"Majallat Al-Ahkâm Al-`Adliyyah"* states; "The rented object in *Ijârah* contracts have to be specified, and, therefore, it is not permissible to lease one of two shops without determining and specifying which one of them."

23. Concerning the scholars who permit unspecified (forward) *Ijârah*, they disagree over whether the payment of the rent at the session of the contract is a condition for the validity of *Ijârah*. In this regard, they are of three opinions, which are as follows:

First: The opinions of the *Shâfi`î* scholars

They hold that it is a condition for the validity of unspecified *Ijârah* that the lessor should receive the rent at the session of the contract, setting the same condition that they set for the *Salam* contract. According to them, it is necessary for the validity of the *Salam* contract that the buyer should receive the price of the commodity at the session of the contract. Thus, if the two parties to an unspecified *Ijârah* separate before the payment of the rent, the contract will be invalid. This is because an unspecified *Ijârah*, according to them, is a form of a *Salam* contract where the usufruct of an object, but not the object itself, is sold, and accordingly it is subject to the same *fiqhî* ruling of a *Salam* sale, whether it is referred to as *Ijârah*, *Salam* or anything else.(1)

(1) *"Fath Al-`Azîz"* [12: 205]; *"Mughnî Al-Muhtâj"* [2: 334]; *"Rawdat At-Tâlibîn"* [5:176]; *"Al-Muhadhdhab"* [1: 406]; *"Nihâyat Al-Muhtâj"* [4: 208 and 301]; *"Hâshiyat Ash-Shabrâmullisî `Alâ An-Nihâyah"* [4:418]; and *"Al-Ashbâh Wa An-Nazâ'ir"* by As-Sayûtî (p. 281).

Second: The opinion of the *Mâlikî* scholars

According to them, the payment of the rent should be speedy, otherwise the contract might convert into another transaction, namely selling a debt for a debt, or delaying a debt against a debt, which is banned by the *Sharî`ah*. Yet, if the lessee starts using the usufruct, as in the case when he gets into the car determined by the lessor and begins driving to the place stipulated in the agreement, the rent can be delayed. This is because the element of selling one debt for another debt is not present in such a case, and also because the commencement of using a usufruct implies that it has been delivered, which removes the element of delaying that would invalidate the transaction. Moreover, it does not matter whether the contract is referred to as *Ijârah* or *Salam*.

According to *Mâlikî* scholars, the speeding up of the payment of the rent implies that it should be paid within two or three days, since matters (periods) which are close to each other fall under the same ruling, as is the case with *Salam*.(1)

Third: The opinion of the *Hanbalî* scholars

The *Hanbalî* scholars hold that if the unspecified (forward) *Ijârah* is concluded using the term '*Salam*' or '*Salaf*' (which means payment in advance), as in the case when someone says to another: "I give you this dinar (in advance) in return for the usufruct of a car with such and such specifications to drive me to such and such a place, or in return for the service of someone with such and such specifications to build a wall with such and such specifications", and the lessor accepts, it will be necessary for the validity of the transaction that the rent should be paid at the session of the contract. This is because *Ijârah* in this case is a form of selling usufructs by means of a *Salam*. In such a case, if the rent is not paid before the two parties to the *Ijârah* separate, the transaction as a whole will change into another transaction, namely selling a debt for a debt, which is prohibited by the *Sharî`ah*. Yet, if *Ijârah* is concluded without the term '*Salam*' or '*Salaf*' (payment in advance), there will be no necessity to specify the payment of the rent in advance as a condition

(1) *"As-Sharh Al-Kabîr Wa Hâshiyat Ad-Dusûqî `Alayh"* [4: 3]; *"Al-Furûq"* by Al-Qarâfî [2: 133]; *"Sharh Mayyârah `Alâ At-Tuhfah"* [2:98]; *"Al-Qawânîn Al-Fiqhiyyah"* (p. 302); *"Sharh Al-Khurashî"* [7: 3]; and *"Sharh Al-Ubbî `Alâ Sahîh Muslim"* [4: 245].

for its validity. In this case, *Ijârah* will not be a form of a *Salam* contract, and thus, will not be subject to its ruling.(1)

24- Concerning my personal opinion, I adopt the view that regards unspecified *Ijârah* as being permissible and that the payment of the rent at the session of the contract as not being a condition for its validity if it is concluded without the term '*Salam*' or '*Salaf*' being used, i.e. for this I adopt the opinion of the *Hanbalî* scholars. The point behind this opinion lies in the fact that permitting the above mentioned form of unspecified *Ijârah* facilitates a type of financial transaction for people in need of it. This agrees with the opinion of Judge Abû Yûsuf in which he said; "Every act which promotes leniency for the people can be adopted as long as there is no *shar`î* constraint on such leniency."(2)

25- As for issuing *Sukûk* of ownership for assets leased by unspecified *Ijârah*, it is not permissible due to the ignorance of the asset leased to the lessee, which provides the usufruct stated in the contract and which is determined solely by the lessor. This is because the usufruct that is the subject of the contract is not related to any tangible specified asset, unlike the lease (*Ijârah*) of assets. That is, if it were like the lease of assets, it would be permitted. The usufruct in such a case, however, represents an obligation on the part of the lessor, which can be settled according to the rules of the *Shar`îah* by presenting any asset that could provide the usufruct which is determined and specified by the lessor in the contract. However, the assets that can provide such a usufruct vary extremely with regard to their species and value in a way that makes it impossible to determine the asset which *Sukûk* would be issued for. This is a significant kind of ignorance or unknowability (*Jahâlah Fâhishah*) that renders the contract invalid, according to the rules of *Fiqh*. In this regard, Imam As-Sarakhsî said; "Ignorance about the subject matter of the contract renders the contract invalid."(3) He also said; "Ignorance invalidates the transfer of possession."(4) Here, he refers to ignorance in the compensation or exchange

(1) "Sharh Muntahâ Al-Irâdât" by Al-Buhûtî [2: 360]; and article (539) in *"Majallat Al-Ahkâm As-Shar`îyyah `Alâ Madhhab Al-Imâm Ahmad"*.
(2) *"Al-Mabsût"* by As-Sarakhsî [11: 25].
(3) Ibid.[16: 59].
(4) Ibid. [11: 133].

contract since the buyer, in this case, is not acquainted with the object he is going to buy.[1] This is also backed by the opinion of Ash-Shawkânî, as he said; "Mutual consent, which is a prerequisite for the validity of the sale and purchase contract, cannot be achieved when any element of ignorance is present in the contract."[2] Also, Ibnul-Qayyim said; "The sale depends on mutual consent, which cannot be reached except with full knowledge."[3]

c) *Ijârat Adh-Dhimmah Al-Muntahiyah Bit-Tamlîk (Ijârah* of Described Future Assets That Ends with Ownership)

26. This form of *Ijârah* is not permissible by any means. This is because the usufruct that is the object of the contract in such a case represents, as we said before, an obligation on the part of the lessor, which is not related to a specific asset. This means that the lessor can discharge his obligation by presenting any asset that can provide the described future usufruct. In such a case, the lessee can take possession or make use of the usufruct stated in the contract without being entitled to demand another asset as long as the one presented by the lessor is capable of providing the usufruct agreed upon in the unspecified (forward) *Ijârah* contract. This opinion depends on the following two features of this form of *Ijârah*:

First: Specifying the object of *Ijârah*, i.e. the usufruct, which represents an obligation on the part of the lessor, through the description stated in the contract, as in the case of the object sold in a *Salam* contract, which also represents an obligation or debt owed by the seller, since unspecified *Ijârah* is a form of selling usufructs by means of *Salam*.

Second: Significant ignorance (*Jahâlah Fâḥishah*) about the asset presented by the lessor, which provides the agreed upon usufruct, to the lessee. Such a form of ignorance about the asset, which will be transferred to the lessee at the end of the *Ijârah*, results in inevitable disputes and conflicts between the contracting parties. This is because the asset in an unspecified *Ijârah* is not specified, and, thus, not known to both parties. Specifying the usufruct that is the object of the contract in unspecified *Ijârah* does not necessitate specifying the asset that

(1) *"I`lâm Al-Muwaqqi`în"* [3: 354].
(2) *"As-Sayl Al-Jarrâr"* [3: 94].
(3) *"At-Turuq Al-Hukmiyyah Fî As-Siyâsah Ash-Shar`iyyah"* (p. 221).

provides such a usufruct. Accordingly, the asset remains unknown to such a great extent that disputes between the contracting parties can easily arise and so the *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership) becomes invalid if unspecified *Ijârah* is involved.

This can be clarified through the following two examples:

a) Suppose that a merchant concludes an *Ijârah* contract with a shipping company, whereby he leases three unspecified trucks on a daily basis for one month, starting from (date) to (date) in return for 100,000 Emirate dirhams. Based on this contract, every truck will transport a 144 cubic meter container that weighs 15 tons from the Port of Dubai to the merchant's stores in, say; Dubai, Sharjah or Ajman, as stated in the contract. In such a case, the shipping company is obligated to present any three trucks that can provide the usufruct stated in the contract, which represents the obligation of the company towards the lessee. It goes without saying that the trucks that can provide such usufruct differ largely in terms of their types and market values. For example, there are modern expensive trucks whose market value may reach 300,000 dirhams, and other old or inferior-quality trucks whose market value may not exceed 100,000 or 50,000 dirham, for instance, though they are all capable of providing the usufruct stipulated in the contract. Based upon this example, it can be said that if *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership) is permissible in such a case, the lessee would demand the ownership of the most expensive and best trucks, while the lessor would offer for transfer of ownership the cheapest and worst trucks as long as they can provide the usufruct stated in the contract as his obligation dictates. Surely, this would lead to an inevitable dispute between the contracting parties, which reflects the corrupting factor implied in *Ijârah Muntahiyah Bit-Tamlîk*.

b) Suppose that the Saudi Airlines, for example, leases from another air company an airplane that has 300 seats to transport this number of passengers, during the season of Pilgrimage, from Jeddah to London two days (Monday and Thursday) per week for one month, starting from the date (Y) to the date (S), in return for a specified

rent. In this case, the lessor company may present any airplane that has such a number of seats and can provide the usufruct stated in the contract, namely to transport the passengers of Saudi Airlines from Jeddah to London during the period of unspecified *Ijârah* (*Ijârat Adh-Dhimmah*). To illustrate, to fulfill its obligation the lessor company may present a modern $ 100-million Boeing 777 airplane that can provide the usufruct stated in the contract. It may also present an old airplane of the same model, or of another model such as Boeing 747 or Airbus 323, whose market value is 50 or 30 million dollars, as long as such an airplane can deliver the usufruct stipulated in the contract. Until now, there is no problem. However, the problem appears in case such an unspecified *Ijârah* represents *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership). This raises the question, which one of the above mentioned airplanes will be transferred to the Saudi Airlines at the end of the *Ijârah* period? Is it the one priced at $ 100 million, or $ 50 million, or $ 30 million? Is it the Boeing 777, or the Boeing 747, or the Airbus 323? Is it the one aged 1 year, or 10 years, or 20 years? This is despite the fact that all of them are equal in terms of their capability to provide the usufruct stated in the contract, which represents the obligation of the lessor. Undoubtedly, this form of *Ijârat Adh-Dhimmah Al-Muntahiyah Bit-Tamlîk* (*Ijârah* of described future assets that ends with ownership) will lead to disputes between the contracting parties. This is because it is in the interest of the lessor to transfer to the lessee the ownership of the cheapest and oldest airplane, however, the interest of the lessee lies in taking possession of the best, most expensive and most modern airplane. Thereupon, the interests and desires of both contracting parties are conflicting and contradictory, since the profit on one side surely represents a loss on the other. The nature of *Ijârah* (*Ijârat Adh-Dhimmah*) has no mechanism that can end such an inevitable dispute between the contracting parties in case this contract belongs to the form of *Ijârah* that ends with ownership (*Muntahiyah Bit-Tamlîk*). This goes back to the vast diversification in terms of value, type and age between the assets that can provide the same usufruct described in the contract. All this explains why such a form of *Ijârah* is prohibited by the *Sharî`ah*.

27- Therefore, it can be concluded that since it is not permissible in the view of the *Sharî`ah* to conclude *Ijârat Adh-Dhimmah Al-Muntahiyah Bit-Tamlîk* (*Ijârah* of described future assets that ends with ownership), it will not be permissible as well to issue *Sukûk* for assets leased in such a prohibited form of *Ijârah*.

Fourth Type: *Sukûk* of Ownership of Usufructs of Assets in Conventional *Ijârah*

28- In the view of the *Sharî`ah*, the *Ijârah* contract of specified assets represents a contract whereby the ownership of the usufructs of such assets is transferred from the lessor to the lessee. Accordingly, the majority of Muslim scholars, such as *Mâlikî*, *Shâfi`î* and *Hanbalî* scholars, hold the view that it is permissible for the lessee to lease the asset to a third party. This means that he can sell the usufruct transferred to him by the first *Ijârah* contract to a third party through a new *Ijârah* contract for a rent that is lower, the same or higher than the rent he pays. All this implies that *Ijârah* is a form of sale transaction where the usufructs of an asset are the object sold.(1)

29- Since the lessee has the right to sell the usufructs of the leased asset to a third party for the same, lower or higher rent, and the same applies to the second, third, fourth...etc lessee, then it is permissible to issue *Sukûk* for the usufructs of the leased asset or assets, and the ownership of these *Sukûk* can be circulated at the same, lower or higher rent value. This is because the *Sukûk* in such a case represent the ownership of the usufruct or usufructs that are the object of the contract.

Fifth Type: *Sukûk* of Ownership of Usufructs of Assets in Unspecified (Forward) *Ijârah*

30- We pointed out before that the majority of *Shâfi`î*, *Mâlikî* and *Hanbalî* scholars permitted the unspecified *Ijârah* (*Ijârat Adh-Dhimmah*)

(1) *"Al-Mughnî"* [8: 56 and 57]; *"Al-Ikhtiyârât Al-Fiqhiyyah Min Fatâwâ Ibn Taymiyyah"* (p. 152); *"Bidâyat Al-Mujtahid"* [2: 229]; *"Al-Kâfî"* by Ibn `Abdul-Barr (p. 270); and *"Al-Ma`ûnah"* by Judge `Abdul-Wahhâb [2: 1096].

contract, whereby the lessee takes possession of the future usufructs described and undertaken to be provided by the lessor, which represent the object of the *Ijârah* contract.(1)

Since the usufructs of specified tangible assets can be securitized in the form of *Sukûk* and circulated (that is, by selling the *Sukûk* that represent the ownership of the usufructs agreed upon in the *Ijârah* contract), then it is permissible to issue *Sukûk* for usufructs of described assets, which represent an obligation on the part of the lessor. These *Sukûk* can be circulated through sale transactions. This is because the specified usufructs can be sold (through the *Ijârah* contract) and circulated by being re-leased to a third, fourth, fifth...etc party for the same, lower or higher rent. This is regardless of whether the first *Ijârah* contract represents a conventional *Ijârah* of assets or an unspecified *Ijârah* contract. That is, According to the rules of *Fiqh*, there is no difference between whether the usufruct that is the object of the contract is related to a specified tangible asset or to a described asset (which represents an obligation on the part of the lessor) as long as such an usufruct is well defined and specified by describing it in a way that meets the degree of knowledge required for the validity of its sale and circulation.

(1) See: Notes (22 and 23) in the Research.

Topic Four
Contemporary Applications of *Sukûk Al-Ijârah*

31- On September 4, 2001, the Government of Bahrain issued 100 million dollars in Islamic *Sukûk Al-Ijârah* (leasing bonds) with a fixed annual rent rate of 5.25% of the value of the assets representing these *Sukûk*, which would be payable every six months, at a 5 years maturity, ending on September 4, 2006. This issuance was deemed valid and *Sharî`ah*-compliant based on the Fatwa issued on February 5, 1999 by a *shar`î* Control Board consisting of Sheikh `Abdullâh Al-Manî`,[1] Sheikh `Abdul-Husayn Al-`Asfûr, Sheikh `Abdus-Sattâr Abû Ghuddah, and Sheikh Muhammad Taqî Al-`Uthmânî.

The following are some of the regulations and conditions that governed the issuance of such *Sukûk*:

> *Sukûk Al-Ijârah* is a financial instrument representing ownership of tangible shares in sovereign assets (government stores) issued by the Bahrain Monetary Agency on behalf of the Government of Bahrain, in order to find new areas for investment of surplus financial resources in the community, and to raise funds for various development projects. Under this issuance, the Government of Bahrain offers these *Sukûk* for

(1) Yet, Sheikh `Abdullâh Al-Manî` recanted his Fatwa stated above and announced a new opinion prohibiting dealing in these kind of *Sukûk* in the fourth *fiqhî* Forum of *Ar-Rajhî* Investment Company held in Riyadh, on 23-24/10/1424 A.H. corresponding to 17-18/12/2003 A.D.

investors to purchase, and then, the investors lease them to the government for the rent installments shown below. This is done through a contract of an *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership or a hire-purchase arrangement) whereby the government makes a binding promise to purchase the assets at maturity against their nominal value (the same price for which the investors bought the asset from the government). The Bahrain Monetary Agency (BMA) issues these *Sukûk* on behalf of the Government of Bahrain based on the following regulations and conditions:

i) **Guarantee of *Sukûk:*** The Government of Bahrain provides direct, unconditional guarantee for these *Sukûk*, whereby it undertakes to purchase back the assets leased at the maturity date for the nominal value of these *Sukûk*, and to continue leasing the assets during the period of the issuance determined in this announcement.

ii) **Period of issuance and maturity date:** These *Sukûk* will be issued on September 4, 2001 for five years, ending on September 4, 2006.

iii) **Expected return on the *Sukûk:*** The rent returns of the assets representing these *Sukûk* will be paid every six months, on March 4 and September 4 every year during the period of the issuance. This return will come into effect on the date of issuance, i.e. September 4, 2001, and will stop on the maturity date, i.e. September 4, 2006. The first rent payment will be on March 4, 2002, and the last one will be on September 4, 2006. The expected rent return is 5.25% annually.

32- I think that there is a *shar`î* problem in the issuance of such *Sukûk* which is attributable to the fact that *Sukûk* of ownership of assets in an *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership or hire- purchase) can be legally issued, possessed and circulated only when the *Ijârah* contract they are based upon is permissible and valid according to the rules of the *Sharî`ah*. However, if it is invalid and prohibited, the *Sukûk* issued based on it will be prohibited as well.

After examining the agreement of issuance of such a financial transaction, which is based on one deal (a contractual system) that comprises a group

of successive, connected contracts and undertakings designed in a specific manner according to a series of conditions that govern them as one, indivisible unit, which aims at achieving a specific financial purpose intended by the contractual parties, it became clear that such a financial transaction is a form of *`Înah*, which is used as a stratagem to conclude an interest-based loan. This stratagem is based on the ploy that the owner of an asset sells it to someone else for an advance price, while the asset remains in the possession of the original owner for five years against an annual rent representing 5.25% of the asset price under an *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership) contract, whereby the owner (the original seller) purchases the asset back for the same value of the first sale.

33- Many of the earlier scholars knew the idea behind this financial transaction, and realized what it truly was and what its purpose was, and accordingly, prohibited it. They classified it under the category of what is known in *Fiqh* terminology as "*Bay`ur-Rajâ*'" (*Rajâ*' Sale), whereby the seller has the intention to buy back the commodity he sold. According to them, one of the most famous forms of this type of sale is when one party, who wants to obtain an interest-bearing loan, agrees to sell an income-earning asset to the lender (the nominal buyer). The lender will thus become entitled to the income of the asset as long as it remains in his possession. The buyer then undertakes to return the sold asset to the original seller whenever the seller pays back the price which was originally charged for the asset. In this manner, the lender (formally the 'buyer') regains the amount lent along with the payment of the surreptitious interest.(1)

In this respect, Ash-Shawkânî said; "*Rajâ*' sale has many forms, some of which are categorically invalid, namely those intended to set an increase or interest on the amount lent. An example is when the lender wants to take an increase on the loan, but he and the borrower try to avoid the sin resulting from being implicated in an interest-based transaction. In this case, they agree that the lender buys an asset from the borrower in return for the loan amount, of say 100 dirham, on the basis that the lender is entitled

(1) *"Fatâwâ Siddîq Hasan Khân"* (pp. 783 and 784); and "*`Uqûd Az-Zabarjad Fî Jîd Masâ'il `Allâmah Damad"* by Ash-Shawkânî (pp. 225 and 226).

to the income of the asset against the loan. Thus, the intended goal of such a transaction is not the sale, but the interest."[1] Ash-Shawkânî added; "If the sale transaction is used as a stratagem to charge an interest on the loan, then it is invalid, because both parties, in such a case, did not agree to execute the sale according to the conditions set forth by Allah (the Almighty), but rather they sought to perform a stratagem to do something forbidden by Allah (Glorified be He). Therefore, the sale transaction is invalid, and the lender must give the income of the asset back to the borrower, and take back the original price of the asset, i.e. the loan."[2]

Ibnul-Qayyim said; "The great corruption in *Ribâ* (usury) cannot be removed by just changing its name from *Ribâ* to 'transaction', or by changing its form to another form, while both parties agreed to carry out such a *Ribâ*-based transaction before they concluded the contract. In fact, they agreed on a purely usurious transaction before concluding the contract, and then changed its name and form to a sale transaction. It is not a sale transaction at all, but rather a stratagem meant to do something forbidden by Allah, the Almighty, and His Messenger (Peace be upon him)."[3] He also said; "The purpose of a legally permitted form of a sale is to exchange the price and commodity, but not to be used as a stratagem to practice excess usury (*Ribâ Al-Fadl*) or delayed usury (*Ribâ An-Nasâ'*), where the ultimate aim of the concluding parties is the usurious transaction, not the exchange of the commodity and the price."[4]

In another position, he said; "It is well know that *Ribâ*-based transactions are not prohibited due to their form or the terms used to conclude them, but rather, they are prohibited due to the real meaning and objective behind them, which are existent in the usurious stratagems the same way they are in direct *Ribâ*-based transactions. This is a fact known by both parties who resort to such a usurious stratagem and by whoever witnesses their transaction, and Allah, the Almighty, knows that their ultimate aim behind such a stratagem is *Ribâ*. They, however, use an unintended contract to reach such an aim, i.e. to practice *Ribâ*, and give it another name to

(1) "*`Uqûd Az-Zabarjad*" (p. 225).
(2) Ibid. (p. 227).
(3) *"Ighâthat Al-Lahfân"* [1: 350].
(4) *"I`lâm Al-Muwaqqi`în"* [3: 250].

hide such an intention. It is well known that such a or fake contract does not render the transaction valid nor does it remove the cause behind its prohibition, but rather it strengthens such a cause."[1] In the same respect, he said; "If their real intention is *Ribâ*, then both parties to the contract conclude the contract only so that the seller returns to the buyer the same price and keeps the compensation (or excess payments in the form of rent), which implies a prior agreement between them at the time of concluding the contract to cancel it. If the contract is concluded only to be cancelled later on, then the contract itself is not the final objective of the transaction and, accordingly, it becomes of no relevance."[2]

In the book *"Majmû` Fatâwa Ibn Taymiyyah"*, it is sated; "If this transaction implies that one party, i.e. the borrower, takes the dirham, i.e. the loan, while the other party, i.e. the lender, benefits from the borrower's asset during the period of the loan, and when the borrower pays back the dirham, the lender returns back the asset, then such a transaction is undoubtedly prohibited. This is because in this transaction the income of the asset taken by the lender is an interest, which changes the whole transaction into a clear form of *Ribâ* (usury). Another form of this transaction implies that both parties agree that the borrower sells his asset to the lender for a specific price, and the lender then rents it to the borrower for a certain period on the basis that the lender will return the asset back to the borrower once he takes back the price, i.e. the loan. In this transaction, it is clear that the borrower paid an increase on the loan represented in the rent he paid to the lender during the period of the loan, which turns the transaction into an interest-based loan. Thus, both forms of this transaction are forbidden."[3]

34- Based upon the above analysis, I see that this financial transaction is *shar`î* invalid, and that the issuance and circulation of *Sukûk* that are based on it should also be banned, according to the *fiqhî* Maxim stating: "What is based on an invalid matter is also itself deemed invalid."[4] Moreover, the contract of leasing the asset (*Ijârah* contract) in this transaction is the basis

(1) *"Ighâthat Al-Lahfân"* [1: 352].
(2) *"I`lâm Al-Muwaqqi`în"* [3: 240].
(3) *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 333, 334, and 335].
(4) *"Al-Ashbâh Wa An-Naẓâ'ir"* by Ibn Nujaym (p. 465); and *"Hâshiyat Ad-Dusûqî `Alâ Ash-Sharh Al-Kabîr"* [3: 483].

of the usurious stratagem which is used to achieve the real hidden goal of the whole transaction, i.e. an interest-based loan. In other words, the property in this case is the same as the commodity used in *`Înah* transactions, referred to in the *hadith* narrated by Ibn `Abbâs (may Allah be pleased with him), which states; «*`Înah represents a transaction whereby dirham are exchanged for extra dirham using a piece of silk (a commodity).*»[1]

35- This fact can be further clarified by uncovering the element of ambiguity included in the formulation of the announcement of the issuance (of *Sukûk*), which is meant to hide the stratagem it involves. This announcement said; The government floats these *Sukûk* for the investors to purchase them from the government, and then they lease them to the government at a rent installment of 5.25%, under an *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership) contract whereby the government makes a binding promise to purchase the assets at maturity (after five years) for a price representing the same value for which the assets were originally bought from the government. The government provides a direct, unconditional guarantee for these *Sukûk*, whereby it undertakes to purchase back the assets leased at the maturity date for the nominal value of these *Sukûk*, and to continue leasing the assets during the period of the issuance determined in this announcement.

The announcement of the issuance stated that the seller (the government), in this transaction, promised to purchase the commodity (the asset) back at the end of the *Ijârah* period (after full payment of the rent installments) for the same price it was sold. It, then, reveals that the seller's intention behind such a promise was that it (i.e. the promise) represented a guarantee for the purchase by the seller, which means that it is a binding promise or obligation, according to one of the two linguistic meanings of the term 'guarantee'.[2] The announcement later made the intention clearer by pointing out that the aim behind the promise and guarantee (made by the seller) was the seller's undertaking to re-purchase the asset, and the term 'undertaking' also means obligation or commitment.

(1) *"I`lâm Al-Muwaqqi`în"* [3: 178].
(2) *"Al-Miṣbâḥ Al-Munîr"* [2: 430].

Here I pose the question, what is the return of this promise, guarantee or commitment made by the seller (the government) to re-purchase the asset for the same price he sold it for (in this financial transaction) if there is no equivalent promise or commitment on the part of the buyer to sell the asset to the first seller at such a price? Accordingly, the buyer has the right to abstain from selling the asset to the first seller, since he did not make any promise or commitment in this regard. This raises the question, if the buyer exercises his right of abstention, what will be the fate of such a hire-purchase (the compound transaction)?

Undoubtedly, there is an undeclared agreement (*Muwâṭa'ah*) that obliges the buyer to sell the asset to the first seller at the same price after he has paid all rent payments during the period of *Ijârah*, otherwise this financial transaction would be of no purpose. At the same time, this transaction serves a specific financial purpose, as was stated in the announcement. However, this obligation on the part of the buyer was not declared and the aim was to hide the stratagem behind the interest-based loan, which is the main objective of the whole process.

Moreover, the guarantee made by the seller (the subsequent lessee in the *Ijârah* contract) to continue to lease the asset during the period of the issuance confirms the above-mentioned argument. In other words, the lessee (the government) undertook to pay all rent installments during the period of *Ijârah* under any circumstances (even if the asset leased is destroyed during the period of *Ijârah* by any act of God, such as an earthquake, war... etc.). This unconditional obligation or commitment deprives the *Ijârah* contract from its content, since it changes some of its original rules in such a way that turns it into a mere nominal contract that can be used to cover the financial purpose that is based on the hidden interest-based loan. This is the same as the cursed *Muḥallil* (the man marrying a triple divorced woman with the intention to divorce her so as to be lawful for her former husband) in *Taḥlîl* marriage.

36- In addition, it is worth mentioning that the *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership or hire-purchase) used in this transaction (*Sukûk Al-Ijârah*), whereby one party leases an asset to another at

a specific rent and for a specific period on the basis that he will sell the asset to the lessee at the end of the *Ijârah* period (after full payment of the rent installments) for an agreed upon price, is not permitted by any of the scholars. This is due to *shar`î* and *fiqhî* problems related to this transactions which we have no space to discuss in detail here.

Conclusion

Here are the most important conclusions of our study about *Sukûk Al-Ijârah*:

1- *Sukûk Al-Ijârah* have become a distinctive instrument for monetary policies these days. Governments need financial papers of relatively stable value to use them in their monetary policies that aim to manage the amount of money in the market. The government sells such financial papers to reduce the amount of money in the market, and buys them to increase such an amount.

2- On the supply side, many governments have found *Sukûk Al- Ijârah* useful in raising funds to meet their financial needs and to finance large, non-profit projects, such as the construction of bridges, tunnels, main roads, airports, railway stations...etc.

3- They can also be used as an alternative for public loan bonds (treasury bonds) to finance the purchase of fixed assets in government projects or for the construction of urban facilities and infrastructure projects, whether these are revenue-generating or non-profit projects.

4- Also, they can be used to raise funds for Islamic banks so that they can meet their financial needs. In this case, the Islamic banks can issue *Sukûk Al-Ijârah* in return for the finance they provided by using lease transactions. By so doing, the bank can retrieve the amounts of finance it has paid in order to re-use them in further financing projects.

5- The concept of *Sukûk Al-Ijârah* is based upon the principle of securitization (*Taskîk*, *Tawrîq* or *Tasnîd*), i.e. the issuance of financial certificates amenable to circulation, based upon a low-liquidity investment portfolio.

6- The aim of *Sukûk Al-Ijârah* is to convert the tangible assets and the usufructs that are the objects of *Ijârah* contracts into financial certificates (*Sukûk*) that can be exchanged on a secondary market. Based upon this, they have been defined as: "Certificates of equal value that represent common shares (*Hisas Shâ'i`ah*) in the ownership of tangible assets or their income-generating utilities."

7- *Sukûk Al-Ijârah* do not represent a fixed amount of money, nor are they debts owed by a certain entity, be it natural or legal. They are only financial certificates that represent common shares in the ownership of a tangible asset such as a real estate, an airplane or a ship, or a pool of such assets, whether with the same or differing specifications, which, when leased, yield a defined revenue as a result of the lease contract.

Owing to subjecting the prices of properties to the market variables (supply and demand), the value of their *Sukûk* is affected by the marketing value of these properties. That is, the more the value of these properties increases, the more the value of their *Sukûk* increases, and vice versa.

8- *Sukûk Al-Ijârah* may bear the name of their owners, in which case a transfer of ownership is accompanied by an entry in a specific registry or by writing the name of the new owner on the certificate each time ownership is transferred; or they may be anonymous (bearer's) certificates, such that a transfer of ownership is simply effected by a physical transfer of the certificate to the new owner, like the shares in stock companies.

9- It is permitted to issue *Sukûk* that represent ownership of a leased tangible asset, when the conditions are met for real estate that may validly be the subject of a rent (*Ijârah*) lease, such as an airplane, a ship...etc as long as the *Sukûk* represent ownership of real tangible assets that are being leased and that yield a defined revenue.

It is permissible for the *Sukûk* holder to sell his *Sukûk* on the market to any buyer at the price they agree upon, be it the same, lower or higher than the price he bought them for.

The *Sakk* holder is entitled to a share in the revenue, which represents the rent payment minus the expenditure borne by the lessor, according to the fashion and the period stated in the *Ijârah* contract.

10- It is permissible to issue and circulate *Sukûk* for ownership of assets rented under the permissible form of an *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership or hire-purchase), which has been defined by the Islamic *Fiqh* Academy in its resolution no.110 (4/12), 3rd/a. This form is as follows: "A lease contract that enables the lessee to make use of the leased property against a specific amount of rent and for a specific period of time, along with a separate contract offering the property as a gift to the lessee. The latter contract becomes effective at the end of the lease period and when the lessee has paid all the amounts of rent agreed upon. A promise can also be made by the owner to give the property as a gift to the lessee, after the lease period and full payment of the due rent."

11- It is not permissible to issue *Sukûk* for ownership of assets that contain a described usufruct in unspecified *Ijârah* due to the ignorance about the asset which the lessor may present to the lessee and which contains the usufruct stated in the contract, which is an obligation on the part of the lessor. This is because the assets that can provide such usufruct vary extremely with regard to their species and value in a way that makes it impossible to determine the asset to be securitized. This grave form of ignorance leads to disputes and invalidates the contract.

13- *Ijârat Adh-Dhimmah Al-Muntahiyah Bit-Tamlîk* (*Ijârah* of described but non-specified assets that ends with ownership) is not permissible by any means. This is because the usufruct that is the object of the contract represents an obligation on the part of the lessor, which is not related to any specified asset. This means that the lessor can discharge

his obligation by presenting any asset that can provide the described future usufruct. In such a case, the lessee can take possession or make use of the usufruct stated in the contract without being entitled to demand another asset as long as the one presented by the lessor is capable of providing the usufruct agreed upon in the unspecified *Ijârah* contract. This implies that it is not necessary to specify the asset which the lessor can present to the lessee and which will be transferred to the lessee at the end of *Ijârah* contract. This is a form of grave ignorance (*Jahâlah Fâḥishah*) that would lead to inevitable disputes between the contracting parties, and also invalidate the *Ijârat Adh-Dhimmah Al-Muntahiyah Bit-Tamlîk* (*Ijârah* of described but non-specified assets that ends with ownership).

Therefore, it can be concluded that since it is not permissible to conclude *Ijârat Adh-Dhimmah Al-Muntahiyah Bit-Tamlîk* (*Ijârah* of described but non-specified assets that ends with ownership), it will not be permissible as well to issue *Sukûk* for assets leased in such a prohibited form of *Ijârah*.

13- It is permissible to issue *Sukûk* for the usufructs of the leased asset or assets, and the ownership of these *Sukûk* can be circulated at the same, lower or higher rent than that paid by the first lessee. This is because the *Sukûk*, in such a case, represent the ownership of the usufruct or usufructs that are the object of the *Ijârah* contract.

14- It is permissible to issue *Sukûk* for (securitized) usufructs of described but non-specified assets, which represent an obligation on the part of the lessor. These *Sukûk* can be circulated through sale transactions. This is because specified usufructs can be sold (through *Ijârah* contracts) and circulated by being leased to a third, fourth, fifth... etc party for the same, lower or higher rent. This is regardless of whether the first *Ijârah* contract represents a conventional *Ijârah* of specified assets or whether it is an unspecified *Ijârah* contract. According to the rules of *Fiqh*, there is no difference between whether the usufruct that is the object of the contract is related to a specified tangible asset or to a described but non- specified asset

(which represents an obligation on the part of the lessor), as long as such usufruct is well defined and specified by describing it in a way that meets the degree of knowledge required for the validity of its sale and circulation.

15- It is not permissible to issue *Sukûk Al-Ijârah* representing ownership of assets if there is an agreement that these assets will be leased to their seller at a specified rent payable on installment basis and for a specified period through a contract of an *Ijârah Muntahiyah Bit- Tamlîk* (*Ijârah* ending with ownership or hire-purchase) whereby the lessee undertakes to purchase these assets back at the end of the *Ijârah* period for the same price he sold them. This is because the issuance of *Sukûk*, in this case, is based on a deal (contractual system/ transaction) which is prohibited due to it being a new form of *`Înah* which is meant to involve an interest-based loan through using a malicious stratagem. This stratagem represents a ploy whereby the owner of an asset sells his asset to a second party against an advance price, while he keeps the asset in his possession for a specified period in return for an annual rent stated in a contract of an *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership or hire-purchase), whereby the seller re-purchases the asset from the second party for the same price of the first sale.

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Appendix
(Documents)

In the Name of Allah, the Most-Merciful, the Ever-Merciful

And Peace and Blessings Be Upon the Messenger of Allah

KINGDOM OF BAHRAIN
BAHRAIN MONETARY AGENCY

Announcement of Issuance

US$ 100 million Islamic ***Sukûk Al-Ijârah***, with a fixed annual rent rate of (5.25%)

Date of Issuance: September 4, 2001

Maturity Date: September 4, 2006

Rent Returns are paid on March 4 and September 4 every year

بسم الله الرحمن الرحيم

والصلاة والسلام على رسول الله

دولة البحرين

مؤسسة نقد البحرين

بيان الإصدار

١٠٠ مليون دولار أمريكي صكوك تأجير إسلامية اسمية بمعدل تأجير ثابت (٥,٢٥٪) يدفع سنويًا

تاريخ الإصدار: ٤ سبتمبر ٢٠٠١م

الاستحقاق: ٤ سبتمبر ٢٠٠٦م

تدفع استحقاقات التأجير في ٤ مارس و ٤ سبتمبر من كل سنة

GOVERNMENT OF BAHRAIN

ENTRUSTS

BAHRAIN MONETARY AGENCY

to issue

US$ 100 million

Islamic *Sukûk Al-Ijârah* at a fixed rent rate
under the supervision of the *Shar`î* Board for Islamic *Sukûk*

Date of Maturity: 2006

Date of Issuance: September 4, 2001

Fixed annual rent rate of 5.25%, payable every six monthsIssue

Price: 100% of *Sukûk* value

Date of Declaration: August 25, 2001

حكومة دولة البحرين

بوكالة

مؤسسة نقد البحرين

تصدر

١٠٠ مليون دولار أمريكي

صكوك تأجير إسلامية حكومية بمعدل تأجيل ثابت

بإشراف الهيئة الشرعية للصكوك الإسلامية

مستحقة الدفع في عام ٢٠٠٦م

تاريخ الإصدار: ٤ سبتمبر ٢٠٠١م

٢٥ , ٥٪ معدل تأجير ثابت، تدفع كل ستة شهور

سعر الإصدار: ١٠٠٪ من قيمة الصك

تاريخ بيان الإصدار: ٢٥ أغسطس ٢٠٠١م

Sovereign Islamic *Sukûk Al-Ijârah* Kingdom of Bahrain

Regulations and Conditions of the Issuance

Sukûk Al-Ijârah is a financial instrument representing ownership of tangible shares in sovereign assets (government stores) issued by the Bahrain Monetary Agency on behalf of the Government of Bahrain, in order to find new areas for investment of surplus financial sources in the community, and to raise funds for various development projects. Under this issuance, the Government of Bahrain offers these *Sukûk* for the investors to purchase from the government, and then to lease them to the government at the rent installment indicated below. This is done through a contract of an *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership or hire-purchase) whereby the government makes a binding promise to purchase the assets at maturity for a price representing the same value for which the assets were bought from the government. The Bahrain Monetary Agency (BMA) issues these *Sukûk* on behalf of the Government of Bahrain based on the following regulations and conditions:

1- **Guarantee of *Sukûk:*** The Government of Bahrain provides direct, unconditional guarantee for these *Sukûk*, whereby it undertakes to purchase back the assets leased at the maturity date for the nominal value of these *Sukûk*, and to continue leasing the assets during the period of the issuance determined in this announcement.

2- **Period of Issuance and Maturity Date:** These *Sukûk* will be issued on September 4, 2001 for five years, ending on September 4, 2006.

3- **Expected Return on *Sukûk*:** The rent return of the assets representing these *Sukûk* will be paid every six months, on March 4 and September 4 every year during the period of the issuance. This return will be payable starting from the date of issuance, i.e. September 4, 2001, and will stop on the maturity date, i.e. September 4, 2006. The first rent payment will be on March 4, 2002, and the last one will be on September 4, 2006. The expected rent return is 5.25% annually. If the payment date falls on an official holiday, the amount will be paid on the following working day.

4- **Issue Price:** the issue price of *Sukûk* is 100% of the value of *Sukûk*.

5- ***Sukûk* Denomination:** *Sukûk* will be issued in US$ 10,000 denomination, and will be sold against US$ 10,000 or multiples thereof.

6- **Underwriting Period**: Requests for *Sukûk* will be received starting from Sunday, August 26, 2001, to Wednesday, August 29, 2001.

7- **Issue Size:** Issue size is US$100m.

8- **Oversubscription:** In case the value of subscriptions exceeds the specified issue size, the government of Bahrain, represented by the Ministry of Finance and National Economy, may: (I) increase the issue size by assigning additional *Sukûk* within the actual value of the assets and distribute them to the applicants to wholly or partially meet the oversubscription, or (II) not increase the issue size, and assign *Sukûk* to participants proportionally.

9- **Form of Issue:** *Sukûk* certificates which are assigned will be recorded under the name of the applicanst .The *Sakk* holder shall inform the agency in case his address changes.

10- **Repayment of *Sukûk* Value**: In case of fulfillment of the promise to transfer the ownership, the nominal value of *Sukûk* will be paid back on the maturity date, and the issuer can pay back the *Sukûk* value before the date of maturity, as stated in Note (15) below.

11- **Submitting Applications:** Applications shall be submitted to the Bahrain Monetary Agency at its address stated in Note (21) below, and may be submitted by hand during the period of underwriting stated in Note (6) above. Any incomplete or unsigned applications will be ignored.

12- **Refusing Applications:** The Bahrain Monetary Agency has the absolute right to wholly or partially refuse an application, without giving any reason.

13- **Payment of the *Sukûk* Value:** Payment shall be in American Dollars by transferring the *Sukûk* value to the underwriter of the bank accounts of The Bahrain Monetary Agency stated below:

Chase Manhattan Bank, New York

SWIFT ID: CHASUS33

CHIPS ABA: 0002

FED WIRE021000021

A/C Gulf International Bank, New York

ACCOUNT No. 400-057271

CHIPS UID: 159997

For further credit to Bahrain Monetary Agency, Bahrain

Account No. 13266622410

14- ***Sukûk* Certificates:** Upon the assignment of *Sukûk*, the agency will issue *Sukûk* certificates and send them to the participants directly, or deliver them by hand upon the request of the participants.

15- **Payment of Return:** The semi-annual returns on *Sukûk* will be paid by direct transfer of the amount to the bank account of the *Sukûk* holder in American Dollars on 4 March and 4 September of every year during the issuance period. Accordingly, details of the holder's bank account are required. On maturity date, and after receiving the *Sukûk* certificates, the agency will pay the full value of the leased asset plus the last semi-annual return amount to the *Sukûk* holder.

16- **Returning *Sukûk* Certificates:** The investors should return the *Sukûk* certificates, whether by hand or through registered mail, to the Bahrain Monetary Agency one month before the end of the issuance, so as to perform the necessary arrangements. The agency will issue a receipt for the original certificates received. At the end of the issuance, and after receiving *Sukûk* certificates in the manner stated above, the nominal value of *Sukûk* will be paid to the

registered *Sukûk* holders, as mentioned above, by means of direct transfer to their bank account.

17- **Loss/Damage of *Sukûk* Certificates:** In case of loss or damage of the *Sukûk* certificate, the *Sukûk* holder should immediately notify the Bahrain Monetary Agency in writing and follow the directions set by the agency before being able to obtain a new version of the *Sukûk* certificates.

18- **Eligible Investors:** Commercial banks and Islamic financial institutions authorized in the Kingdom of Bahrain are eligible to investment in these *Sukûk*. Also, the clients of these banks and institutions may subscribe through the participating banks and institutions.

19- **Applicable Law:** This issuance and all relevant documents will be subject to the laws of the Kingdom of Bahrain that do not contradict with the principles of Islamic *Sharî`ah*.

20- **Confirming *Shar`î* Legality of the Issuance:** Subject to the Fatwa issued on 19 Shawwal 1419 A.H., corresponding to February 5, 1999 A.D., by the *Shar`î* Control Board consisting of Sheikh `Abdullâh Al-Manî`, Sheikh `Abdul-Husayn Al-`Asfûr, Sheikh `Abdus-Sattâr Abû Ghuddah, and Sheikh Muhammad Taqî Al-`Uthmânî, this issuance is deemed legal and *Sharî`ah*-compliant.

21- **Address of Bahrain Monetary Agency:** Inquiries about this issuance can be sent to the Bahrain Monetary Agency at the following address:

Administration of Banking Services- Department of Issuance

Bahrain Monetary Agency

P.O Box: 27

Manama-Bahrain

Tel: 547752

Fax: 532050

Telex: 9144-9145

Research (10)
Sharî`ah Boards in Islamic Banks (Characteristics and Standards)

Topic One: The Concept of *Sharî`ah* Board and Description **of** Its Jurisdiction

Topic Two: Duties and Jurisdictions of *Sharî`ah* Boards, and Management's Responsibility towards Them

Topic Three: *Shar`î* and Legal Obligations and Liabilities of *Sharî`ah* Boards

Topic One
The Concept of *Sharî`ah* Board and Description of Its Jurisdiction

1- The idea of forming *Sharî`ah* boards in Islamic financial institutions goes back to the unanimously agreed upon *shar`î* maxim mentioned by Imam Al-Ghazâlî in *"Iḥyâ' `Ulûm Ad-Dîn"* and other books, stating: "It is not permissible for a person to take an action before knowing the ruling of Allah concerning it."(1)

In his book *"Qawâ`id At-Taṣawwuf"*, Zarrûq said; "It is not permissible for anyone to take an action before knowing the ruling of Allah concerning it. Ash-Shâfi`î said; 'This maxim is unanimously agreed upon.'"(2)

In his *"Al-Qawâ`id"*, Al-Ba`lî said; "Ibn `Aqîl and others confirmed that it is not permissible to take an action before knowing its ruling. Some *Mâlikî* scholars reported that such impermissibility is unanimously agreed upon."(3)

Accordingly, in *"Al-Furûq"*, Al-Qarâfî said; "Whoever conducts a sale contract must learn the *shar`î* rulings legislated by Allah on sales, and whoever conducts a lease contract must learn the *shar`î* rulings legislated by Allah on leases, and whoever conducts a *Qarâḍ* (*Muḍârabah*) contract must learn the *shar`î* rulings legislated by Allah on *Qarâḍ*,… etc"(4)

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(1) *"At-Tarâtîb Al-Idâriyyah"* by Al-Kattânî [2: 16]; and *"Iḥyâ' `Ulûm Ad-Dîn"* [2: 59 and 84].
(2) *"Qawâ`id At-Taṣawwuf"* by Sheikh Zarrûq Al-Mâlikî (p. 48).
(3) *"Al-Qawâ`id Wa Al-Fawâ'id Al-Uṣûliyyah Wa Mâ Yata`allaq Bihâ Min Al-Aḥkâm Al-Far`iyyah"* by Al-Ba`lî Al-Ḥanbalî, known as Ibnul-Laḥḥâm (p. 14).
(4) *"At-Tarâtîb Al-Idâriyyah"* [2: 16].

It is reported that `Umar Ibnul-Khaṯṯâb used to send someone to the market to expel those who did not know the *shar`î* rulings on sales and purchases.(1)

Also, it is reported that Imam Mâlik used to instruct Emirs (Local Sheriffs) to bring the traders and the common people before him. If he found among them any who were unfamiliar with the rulings on transactions or could not distinguish between what is lawful and what is unlawful, he would expel them out of the market, saying; "Learn the rulings on sales and purchases, then sit in the market."(2)

2- In view of the fact that the managers of businesses and financial investments in contemporary Islamic financial institutions are not acquainted with the *shar`î* rulings relevant to contracts, dealings and current financial transactions they are practicing, there is an urgent need to form specialized *Sharî`ah* boards in these institutions to undertake the task of acquainting them with the lawful and unlawful aspects of their business, and directing them to comply with *shar`î* permissible issues and revoke the prohibited and invalid ones. This can be done by giving these institutions the *shar`î* opinions (Fatwas) and resolutions related to their operations, activities and businesses, and also checking and reviewing all their transactions in order to verify that all the contracts, activities and operations of the financial institution supervised by these boards are compliant with the rulings of the Islamic *Sharî`ah*.

3- It is worth mentioning here that this concept was well-known and practiced in previous times, in spite of the fact that the financial transactions, at that time, were not so complicated or mixed, and the *shar`î* rulings related to them were well-defined, easy-to-understand and readily available in the books of *Fiqh* (Islamic Jurisprudence), Fatwas (*shar`î* opinions) and records of events of the time. In *"Al-Fatâwâ Al-Bazzâziyyah"*, the author said; "It is not permissible for anyone to work in trade unless he understands the *shar`î* rulings regarding various types of sales. In earlier times, merchants used to travel in the company of a *Faqîh* to refer to him for their business affairs."(3)

(1) *"At-Tarâtîb Al-Idâriyyah"* [2: 18]; *"Iḥyâ' `Ulûm Ad-Dîn"* [2: 59]; and *"`Iqd Al-Jawâhir Ath-Thamînah"* by Ibn Shâs [2: 385].
(2) *"At-Tarâtîb Al-Idâriyyah"* [2: 19].
(3) Ibid.

At present, financial transactions and productive investment activities have become enormous, complicated and advanced. As a result, they have largely departed from their previously known counterparts about which *Faqîhs* were concerned with setting forth the relevant rulings in their records. This necessitates partial and complicated *fiqhî Ijtihâds* (legal reasoning and discretion), which are difficult to be properly and correctly conducted by any single *Faqîh*, however well-versed he may be in the *Fiqh* of financial transactions, so as to deduce *shar`î* rulings which are correct and convincing. For all these reasons, it has become urgent to optimally perform this difficult task by forming a board of masterful and erudite juristic experts versed in different kinds of financial transactions to answer the questions raised.

4- As for the determination of the *shar`î* and legal responsibility of the members of *Sharî`ah* boards, this depends on the determination of the function of the *Sharî`ah* board in Islamic financial institutions, the nature of their role, and the consequent tasks, duties, powers and jurisdiction which enable them to perform their work, and fulfill the purpose behind their establishment; namely, the actual compliance of financial institutions with *shar`î* rulings in all contracts, activities, relations and transactions, beginning with their articles of association, and then moving to their tools and methods of conducting their activities, be they banking services or methods of investment and financing, and ending with accounting, distributing profits and bearing losses.(1)

5- It is obvious that any slogan raised by the Islamic financial institution has no value unless it is actually put into practice. That is, the Islamic identity of the institution is not fulfilled merely by the name, appearance or system having "Islamic" in its title, but it should actually comply, in its essence, content, operations, relations and practices, with the rulings of Islamic *Sharî`ah*.(2)

Accordingly, the role of the *Sharî`ah* board is not limited to giving advice and guidance, or to just expressing an opinion and *shar`î* Fatwa regarding the operations and activities of the institution, but its resolutions and *shar`î*

(1) *"Tahawwul Al-Masraf Ar-Rabawî Ilâ Masraf Islamî"* by Dr. Su`ûd Ar-Rabî`ah [2: 365]; and *"Ad-Dawâbit Ash-Shar`iyyah Li-Masîrat Al-Masârif Al-Islâmiyyah"* by Dr. Abû Ghuddah (p. 429).

(2) *"Ad-Dawâbit Ash-Shar`iyyah Li-Masîrat Al-Masârif Al-Islâmiyyah"* by Dr. Abû Ghuddah (p. 429).

opinions should be binding on the institution, and it should also follow up, check, audit and monitor any system, contract and financial transaction intended to be conducted by the institution in order to correct any *shar`î* error before it occurs, avoid any defect before it takes effect, and immediately amend any mistake in compliance with the rulings of Islamic *Sharî`ah*. The discharging of this role requires that the board assumes, in its work and relation with the board of the financial institution and its different bodies, the same methods and jurisdictions used by the (independent external) auditor.

According to Dr. Ar-Rabî`ah, to ensure the success of the *shar`î* course of the Islamic financial institution and its compliance with the proper approach, the following regulations should be fulfilled:

- The task of directing the *shar`î* course of the Islamic financial institution should be assigned to the righteous scholars of *Fiqh*, pursuant to Allah's Saying:

  {"So ask of those who know the Scripture [learned men of the Tawrât (Torah) and the Injîl (Gospel)], if you know not."}

  [An-Nahl (The Bee): 43]

- There must be some *Sharî`ah* control which is completely independent of the control of the management, because it plays such a highly important role in any Islamic financial institution in terms of the great responsibility it assumes, and its multiple jobs, tasks and burdens. Accordingly, the *Sharî`ah* control board should be an independent body connected directly to the highest level of management. This will give the resolutions and opinions of the *Sharî`ah* control board the importance necessary to apply *Sharî`ah* rulings in the banking system, to correct any deviation from these rulings and to amend any defect that may occur in the operations of the bank related to the responsibilities of the *Sharî`ah* control board.

- The general assembly should select and appoint this board so that it would monitor the board of directors, as is the case with any independent external auditor.

- The *shar`î* Fatwas and resolutions of the board, after being approved by the majority of its members, should be enforceable and binding.(1)

(1) *"Tahawwul Al-Masraf Ar-Rabawî Ilâ Masraf Islâmî"* by Dr. Su`ûd Ar-Rabî`ah =

Dr. Ar-Rabî`ah added: "To achieve its tasks, the *Sharî`ah* control board should perform two kinds of control, which are:

a) **Preliminary Control:** This is to consider and give the *shar`î* opinion on the issues and methods submitted to the *Sharî`ah Control Board* related to the operations and activities of the bank, so that any formula, activity or new form of contracts would be put into practice only after submitting them to the board for consideration and receiving an opinion concerning them. This also includes studying the agreements which the bank intends to conclude with its correspondents, brokers, other banks, or companies, to ensure that they are compliant with the rulings of the *Sharî`ah*.

b) **Subsequent Control:** The members of the *Sharî`ah* Control Board should review all operations, activities, transactions and contracts of the bank to ensure that they are *shar`î* valid and compliant with the *Sharî`ah*. This can be carried out through the probability sampling method, which is to randomly pick some operations and contracts to ensure that the workflow is operating in compliance with the *Sharî`ah*.

Moreover, the *Sharî`ah* control board should also work to find further *shar`î* formulas suitable for the activities of Islamic banking so as to cope with developments in banking methods and services."(1)

Accordingly, through the preliminary control, on the one hand, the board reviews and approves the contracts and methods carried out by the Islamic financial institution in its operations, including *Mushârakah* (Partnership), *Mudârabah*, *Murâbahah* (Sale for a profit), *Sarf* (Money exchange), *Salam* (Payment in advance), *Ijârah* (Lease), and *Istisnâ`* (Manufacturing) contracts, so as to ensure that they are compliant, in both content and formula, with the rulings of the Islamic *Sharî`ah*. On the other hand, through the subsequent control, the board ensures the soundness of all operations and activities of the institution from any defect or error.(2)

= (quoting non-literally) [2: 364 – 367].

(1) *"Tahawwul Al-Masraf Ar-Rabawî Ilâ Masraf Islâmî"* by Dr. Su`ûd Ar-Rabî`ah [2: 367].

(2) *"An-Nizâm Al-Qânûnî Lil-Bunûk Al-Islâmiyyah"* by Dr.`Âshûr `Abdul-Jawwâd (p. 222).

6- Based on the facts and principles mentioned above, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) in Bahrain defined **"the *Sharî`ah* Control Board"** as: "An independent body of *Faqîhs* specialized in the *Fiqh* of transactions. Some of the members of this board may not be a *Faqîh*; however, they should be specialists in the field of Islamic finance, and versed in the *Fiqh* of transactions."(1) Certainly, including members who are specialists in economy and banking in the *Sharî`ah* board achieves the required combination between both *shar`î* and modern cultures and experiences, a matter that facilitates reaching an accurate inference, or collective *Ijtihâd* (legal reasoning and discretion), regarding the new developments in financial transactions.(2)

Further, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) specified the function and role of the *Sharî`ah* Control Board as: "Directing, monitoring and supervising the activities of the institution to ensure that they comply with the rules and principles of the Islamic *Sharî`ah*." Then, the Organization pointed out that "Its Fatwas (*shar`î* opinions) and resolutions should be binding on the institution." This binding status should not stop at the clarification and explanation of the *shar`î* ruling, but it also should make the Fatwas and resolutions as authoritative as judicial judgments regarding their effects. This is because it is known that the difference between a Fatwa and a judicial judgment lies in the fact that *Iftâ'* (giving a *shar`î* opinion/Fatwa) means to expound the *shar`î* ruling to the questioner, but the judiciary ruling means both to expound the judgment and make it binding.(3) In this respect, Al- Buhûtî said in *"Kashshâf Al-Qinâ`"*: "The **Mufti** is the one who gives the *shar`î* ruling on an issue and gives information about it, without making it binding, but the **Judge** is the one who gives the judgment and makes it binding, thus the judicial judgment is distinguished by enforceability and authority."(4)

(1) Governance Standard no. (1), issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) dated in 11/12/1418 A.H., corresponding to 16/6/1997 A.D.
(2) *"Al-Bunûk Al-Islâmiyyah"* by Dr. Jamâlud-Dîn `Aṭiyyah (p. 72).
(3) *"Sharḥ Muntahâ Al-Irâdât"* [3: 456 and 459].
(4) *"Kashshâf Al-Qinâ`"* [6: 294].

Topic Two
Duties and Jurisdiction of *Sharî`ah* Boards, and Management's Responsibility towards Them

Item (1): Duties and Jurisdiction of the *Sharî`ah* Boards

7- The tasks, duties and jurisdiction of the *Sharî`ah* boards in Islamic financial institutions are the following:(1)

First: To audit and examine the financial institution's law, articles of association and other systems, regulations, statutes and internal procedures to verify that they are *shar`î* permissible.

Second: To study the formulas of contracts, agreements and applications run by the institution, so as to give the *shar`î* opinion regarding them, and suggest necessary corrections and amendments as well as rejecting and cancelling *shar`î* objectionable matters.

Third: To assist the executive management of the institution in preparing required standard forms of contracts and agreements, and in revising and developing new contracts and agreements based on the *Sharî`ah* requirements.

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(1) *"Ar-Riqâbah Ash-Shar`iyyah Fî Al-Maṣârif Al-Islâmiyyah"* by Ḥasan Yûsuf (pp. 22 - 24); *"Ar- Riqâbah Ash-Shar`iyyah Fî Al-Bunûk Al-Islâmiyyah"* by Dr. Abû Ghuddah (pp. 12 - 15); *"Al-Maṣârif Al-Islâmiyyah"* by Dr. Rafîq Al-Miṣrî (pp. 4 - 6); *"An-Niẓâm Al- Qânûnî Lil- Bunûk Al-Islâmiyyah"* by Dr. `Âshûr `Abdul-Jawwâd (p. 223); and *"An- Niẓâm Al-Maṣrafî Al-Islâmî"* by Dr. Rafîq Al-Miṣrî (pp. 215 - 216).

Fourth: To present *shar`î* alternatives to traditional financial products which are non-compliant with the rulings of the *Sharî`ah*, set the basic principles of drafting and formulating contracts, agreements and documents, and contribute to developing such contracts and agreements to enrich the experience of the Islamic financial institutions in this area.

Fifth: To study all agreements, contracts, ideas and viewpoints submitted to the board by the board of directors or the executive manager regarding businesses and activities of the institution, and express the related *shar`î* opinion.

Sixth: To answer the questions and inquiries submitted to the board from the management of the institution, its various departments, any dealers or others who have relations with the institution.

Seventh: To take part in developing the employees' awareness of Islamic banking, and promoting their understanding of the Islamic- perspective- based principles, rulings and values relating to financial transactions. This could be done by suggesting some training programs for the employees, and participating in the implementation of these programs.

Eighth: To work on defining important *fiqhî* topics relevant to the business of Islamic banking, and coordinating with the relevant authorities in the institution to invite a group of eminent scholars of *Sharî`ah* and economy to participate in conferences or scientific symposiums organized by the institution. The aim of these conferences would be to discuss such important *fiqhî* topics and issue Fatwas, resolutions or appropriate recommendations regarding them.

Ninth: To resolve disputes occurring between the financial institution and other entities in case the two parties of the dispute agree to resort to the judgment of the *Sharî`ah* board. In this case the judgment of the board is to be decisive and binding on the parties to the dispute. In *"Al-Aḥkâm"*, Judge Ibnul-`Arabî said; "The regulation is that each right disputed over by two disputants can be subject to arbitration, and the judgment of the arbitrator should be decisive and binding."(1)

(1) *"Aḥkâm Al-Qur'ân"* by Ibnul-`Arabî [2: 622].

Tenth: To regularly review the operations and activities of the institution so as to verify the validity of applying and implementing these operations and activities, and to ensure that they are compliant with the rulings of the *Sharî`ah* and consistent with the Fatwas and resolutions issued by the board. This can be done by checking and examining the files and documents of the operations, contracts and agreements concluded by the institution.

To achieve this, the board can agree with the managerial staff of the institution to arrange an appropriate system for *shar`î* control and review the data and documents generated throughout the work process.

Eleventh: To present a full annual report to the Board of Directors for submission to the General Assembly. This report should include the *Sharî`ah* board's evaluation of the compliance of the institution with the rulings of the Islamic *Sharî`ah*, in the light of the opinions, Fatwas, resolutions and guidelines issued by the board, as well as a list of the transactions, formulas and documents it reviewed and examined.

The Basic Elements of the Report of the *Sharî`ah* Board

8- The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) in Bahrain has set standards for the form and content of the report to be issued by the *Sharî`ah* board. These standards include the following:(1)

a) **Title of the report:** The title of the report issued by the *Sharî`ah* control board must be relevant.

b) **The recipient of the report:** The report of the *Sharî`ah* control board must be sent in the appropriate way (sent to the appropriate person/ department) according to job allocation, and local laws and regulations.

c) **Introductory section**: The *Sharî`ah* control board must explain the purpose of its relation with the financial institution. This purpose is to

(1) According to the Governance Standard for the Islamic financial institution no. (1), issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), dated in 10 - 11 Safar 1418 A.H., corresponding to 15 - 16 June 1997 A.D. under the title: ***"The Basic Elements of the Report of the Sharî`ah Board."***

be explained in an introductory section (introductory statement) as follows:

"According to the letter of assignment, we shall present the following report":

d) **Section on the relevant board jurisdiction:** It contains the description of the work performed. This shall be explained as follows:

"We have monitored the principles adopted and contracts relevant to the transactions and applications run by the institution during this period. We have performed the due control by expressing the opinion on whether the institution has complied with the rulings and principles of the Islamic *Sharî`ah*, as well as the Fatwas, resolutions and guidelines issued by us."

This section should contain the following:

i) The confirmation that the *Sharî`ah* control board has performed the relevant examination and procedures, and monitored the work properly.

ii) Where appropriate, the documents confirming the compliance of the operations and transactions concluded by the institution with the rulings and principles of the Islamic *Sharî`ah* should be checked by examining each type of the operations conducted.

These matters are to be set out as follows:

"We have performed our control activity, which entailed the examination of the documentation and the procedures adopted by the institution, by examining each type of operation concluded. We planned and performed our control activity in order to obtain all information and explanations necessary to provide us with sufficient evidence and facts to reasonably confirm that the institution does not violate the rulings and principles of the Islamic *Sharî`ah*."

iii) Where appropriate, the report must include a clear statement indicating that the financial statements have been checked in terms of the appropriateness of the *shar`î* basis according to which the institution distributes the profits between the holders of property rights and the holders of investment accounts.

iv) Where appropriate, the report must include a clear statement revealing that all profits made by the institution through any sources or means that contradict the rulings and principles of the Islamic *Sharî`ah* are spent in charitable purposes.

v) If the institution has prepared a list of sources and uses of the funds of *Zakâh* and charities, the *Sharî`ah* control board should explain whether the *Zakâh* has been calculated in compliance with the rulings and principles of the Islamic *Sharî`ah*.

e) Section on the responsibility of the management: The report must include a clear statement indicating that the managerial staff of the institution is responsible for the proper compliance with the rulings and principles of the Islamic *Sharî`ah*.

This matter should be set out as follows:

"The managerial staff undertakes the responsibility to make sure that the institution operates in compliance with the rulings and principles of the Islamic *Sharî`ah*. As for our responsibility, it is limited to expressing an independent opinion based on our supervision of the operations run by the institution and preparing a report regarding it."

f) The judgment: It should include expressing an opinion regarding the institution's compliance with the rulings and principles of the Islamic *Sharî`ah*, as follows:

1- The *Sharî`ah* control board indicates in its report whether the contracts of the institution and the documents related to them are compliant with the rulings and principles of the Islamic *Sharî`ah*.

This matter should be set out as follows:

In our opinion:

i) The contracts, operations and transactions concluded by the institution during the year ending (...) and reviewed by us have been carried out in compliance with the rulings and principles of the Islamic *Sharî`ah*.

ii) The method of allocating profits and bearing losses among investment accounts comply with the basis approved by us in accordance with the rulings and principles of the Islamic *Sharî`ah*.

(The opinion section includes the following phrases, where appropriate):

iii) All profits made by the institution through sources or means that contradict the rulings and principles of the Islamic *Sharî`ah* have been spent in charitable purposes.

2- If the *Sharî`ah* control board finds out that the managerial staff of the institution have violated the rulings and principles of the Islamic *Sharî`ah*, or the Fatwas, resolutions, or guidelines issued by the *Sharî`ah* control board, it should indicate that in the opinion section of its report.

g) The date of the report:

1- The *Sharî`ah* control board should specify the period covered by the report and the date of completion of supervision.

2- The *Sharî`ah* control board must not date the report at a date earlier than the date the financial statements were signed or approved by the managerial staff.

h) The board signature: The report submitted by the *Sharî`ah* Control Board should be signed by all its members.

i) Publishing the report: The report submitted by the *Sharî`ah* control board should be included in the annual report of the institutions.

Item (2): The Management's Responsibility towards the *Sharî`ah* Board

9- The *Sharî`ah* board's performance of its tasks and duties in the financial institution necessarily depends on the executive management's performance of its responsibilities towards this board. These responsibilities can be summarized as follows:

First: A commitment to acquaint the board with the new operations and products that the institution intends to conduct in good time before the meeting of the board to discuss and issue the *shar`î* opinion on such operations. This commitment also includes submitting all new forms of

contracts and agreements that the institution plans to issue and transact to be considered, reviewed and approved by the board before their issuance and circulation.

Second: The commitment not to implement any transaction in any contract or form concerning which the board gave *shar`î* objections except after amending, correcting or changing the contract, in accordance with the guidelines of the board, and after its approval.

Third: The commitment to provide the *Sharî`ah* board with all data and documents needed to assist it to perform its task and role, and also provide any explanation or statement required by the board, particularly regarding the operations or contracts which the board fears may not be compliant with the rulings and principles of the Islamic *Sharî`ah*.

Fourth: The commitment to provide the *Sharî`ah* board with information about all documents, contracts and agreements concerning any new operation which has been offered to the institution by entities or other institutions, so that the *Sharî`ah* board can review, discuss and give the *shar`î* opinion on them before they are concluded.

Topic Three
Shar`î* and Legal Obligations and Liabilities of *Sharî`ah Boards

10. Due to the absence, in the countries having Islamic financial institutions, of official laws and legislations that define and organize the relationship between the financial institution and its *Sharî`ah* board, we cannot define the legal obligations and liabilities of the *Sharî`ah* boards.

Also, due to the absence of such boards in the past, it is not surprising that a researcher cannot find any *fiqhî* rulings in the records of Islamic *Fiqh* that define the *sharî* obligations and liabilities of these new boards which started to emerge during the last two or three decades of the twentieth century.

However, this does not mean the absence of any liability or obligation on the part of the *Sharî`ah* boards.

11. In this regard, we can deduce and establish the following four principles:

First: Each member of the *Sharî`ah* board is to be held legally and contractually responsible for performing the duties, tasks and functions stated in the contract of work concluded between him and the financial institution (or in his appointment order). This is because the *shar`î* rules and the laws in force in all countries obligate each party of any valid contract or agreement to perform his commitments and obligations towards the other party or to serve the latter's interests in accordance with the terms and provisions of the contract concluded between him and the second

party. It is obvious that as the financial institution is *shar`î* and legally committed to pay the salary and allowances agreed upon to the *Sharî`ah* boards in return for their performance of the work entrusted to them, these boards are also *shar`î* and legally committed to perform and fulfill the terms and provisions of the contract. In case of any dispute between the two parties in this regard, the *shar`î* and ordinary courts would definitely issue judgments according to the contract concluded between the two parties. That is, the *shar`î* requirement regarding contracts is what the two parties made obligatory on themselves by mutual consent. Similarly, the rule in force in man-made laws and regulations states; 'Pacta Sunt Servanda' (the agreements and stipulations of the parties to a contract must be observed)."

If the board or one of its members abstained from fulfilling its/his commitments which were set forth in the contract without a *shar`î* excuse not to fulfill them, this would serve as a good reason to dispense with his services, following a decision that should be made by the general assembly.

However, if this abstaining from fulfilling the commitments set forth in the contract is on account of the executive management failing to observe its obligations and commitments towards the board (set forth in Note 9 of this research), the management alone shall be liable for the consequences, since the *Sharî`ah* board cannot exercise the task entrusted to it, or fulfill its duties unless and only if the executive management fulfills its own obligations and commitments.

Second: If the *Sharî`ah* board finds that its *Ijtihâd* (legal reasoning and discretion) or inference on a *shar`î* ruling on which it issued a Fatwa or resolution to the institution is incorrect, and thus withdraws it, so inflicting damage or financial loss upon the institution, there shall be two different cases upon which the *Sharî`ah* board shall be judged with regards to bearing the financial liability resulting from its mistake:

Case (I): If the issue submitted to the board is *Ijtihâd*-based and not an indisputable one (and the resolution of the board does not contradict an indisputable canonical text with indisputable import in the *Sharî`ah*,

or a matter of the religion which is known by necessity), and the board spared no effort in investigating the *shar`î* ruling of this issue, the board, in this case, shall not bear any financial liability arising from committing its mistake in a Fatwa or resolution. This is because:

a) This is supported by the legal rule derived from the statement of the *Faqîhs* to the effect that the ruler and the judge shall not be held liable for the damage or financial loss resulting from their error in consideration, *Ijtihâd*, or *fiqhî* inference regarding undecided (i.e. not clearly defined) issues.(1)

Imam Al-Qarâfî clarified this saying: "The public interest requires that the rulers shall not be held liable for the unintended errors they make. This is because if they had to shoulder such a liability, and because of the frequent change of governments and disputes that arise, the righteous people would abstain from assuming authority and jurisdiction, and this would result in the corruption of people's lives and affairs due to the absence of suitable rulers."(2) We have previously pointed out (in Note 6 of the research) that the Fatwas and resolutions of the *Sharî`ah* boards have the same strength and enforceability with regards to the financial institution supervised by the board as any judicial ruling, since both are binding on the institution.

b) This is also supported by the legal rule derived from the statement of the *Shâfi`î* and *Mâlikî* scholars to the effect that the *Muftî* (the one who gives Fatwas) does not shoulder any financial liability if it is found that his Fatwa, based on *Ijtihâd*, was incorrect and inflicted losses upon the questioner who acted according to this Fatwa.(3)

(1) *"Al-Qawâ`id Al-Kubrâ"* by Al-`Izz Ibn `Abdus-Salâm [2: 322]; *"I`lâm Al-Muwaqqi`în"* [4: 226]; *"Al-Muhadhdhab"* [2: 213]; *"Al-Mubdi`"* [9: 18]; and *"Kashshâf Al-Qinâ`"* [6: 60]. One may ask if the guarantee, in this case, is the responsibility of the treasury or the ruler? The juristic scholars have two opinions concerning this.

(2) *"Al-Furûq"* by Al-Qarâfî [2: 208].

(3) *"Rawḏat Aṭ-Ṭâlibîn"* by An-Nawawî [11: 107]; *"Al-Majmû` Sharḥ Al-Muhadhdhab"* [1: 45]; *"Manâr Uṣûl Al-Fatwâ"* by Al-Qânî (p. 295); *"Adab Al-Muftî Wa Al-Mustaftî"* by Ibn Aṣ-Ṣalâḥ (p. 110); *"Dhukhr Al-Muḥtî Min Âdâb Al-Muftî"* by Ṣiddîq Ḥasan Khân (pp. 121 and 122); and *"Al-Fatwâ Fî Al-Islâm"* by Al-Qâsimî (p. 76).

However, there are two conditions stipulated for the non-liability of the *Sharî`ah* board in this regard:

First: The error made by the board should not have resulted from any negligence on the part of the board regarding studying the issue and reviewing its references, or making the necessary efforts required to know and realize the *shar`î* ruling related to the matter at hand.

If the error resulted from any negligence on the part of the board, it shall bear the financial liability for the damage and loss caused by such a mistake. This is based upon the view of the later *Mâlikî* scholars stating that the Mufti who neglects to perform *Ijtihâd* shall guarantee the damage and loss caused by his Fatwa if he was appointed to issue Fatwas and takes a salary for this appointment. In his *"Hâshiyah `Alâ Ash-Sharh Al-Kabîr"*, Ad-Dusûqî said; "This is because it is a job in which he was negligent," so he should guarantee any damage that was inflicted,[1] i.e. based on tort liability.

Second: The board should be fully qualified and competent in issuing Fatwas and *shar`î* resolutions related to the operations and activities run by the Islamic financial institution. If it lacks the adequate qualifications and knowledge necessary for issuing Fatwas, it shall guarantee the damage and financial loss arising from any error in the Fatwa. This is based upon the opinions of Al-Mâzarî (a *Mâlikî* scholar) and Ibnul-Qayyim (a *Hanbalî* scholar) stating that the Mufti (the one who gives Fatwas) shall guarantee the damage and financial loss inflicted upon the questioner as a result of his (the Mufti's) incorrect Fatwa if he lacks the adequate qualifications and knowledge necessary for issuing Fatwas.[2] This is also based on the principle of liability for *Taghrîr* (practicing deception) expressed by Ibnul-Qayyim in his saying: "If the questioner acted according to the Mufti's Fatwa, without being obliged to do so by the ruler or the Imam, and imperiled the lives or properties of the people, then the Mufti shall guarantee the lives and properties that were

(1) *"Ad-Dusûqî `Alâ Ash-Sharh Al-Kabîr"* by Ad-Dardîr [3: 444]; *"Sharh Az-Zarqânî `Alâ Khalîl"* [6: 138]; and *"Manâr Usûl Al-Fatwâ"* by Al-Qânî (pp. 295 and 296).

(2) *"Mawâhib Al-Jalîl"* by Al-Hattâb [1: 33]; and *"Al-Mi`yâr"* by Al-Wansharîsî [2: 413].

damaged if he lacks the adequate qualifications and knowledge necessary for issuing Fatwas, as the Prophet (Peace be upon him) said:

> *«Whoever practices (any) medical treatment without knowledge shall bear the liability.»*[(1)]

Case (II): If the issue submitted to the board is covered by an indisputable canonical text with indisputable import (this means that the resolution or Fatwa drawn up by the board contradicts a matter of religion which is known by necessity or an indisputable canonical text with indisputable import which is not subject to *Ijtihâd*), the board shall guarantee any damage or financial liability arising from committing its error in the Fatwa or resolution, be it fully qualified to issue Fatwas or not. This is because:

a) This is supported by the legal rule derived from the statement of Abû Ishâq Al-Isfarâyînî (a *Shâfi`î* scholar) and Ibn Hamdân (a *Hanbalî* scholar) to the effect that the Mufti shall guarantee the financial damage inflicted upon the questioner as a result of the Mufti's incorrect Fatwa that contradicts an indisputable canonical text with indisputable import, even if he is qualified to issue Fatwas. In *"Al-Majmû`"*, An-Nawawî reported: "If the questioner acted according to the Mufti's incorrect Fatwa, and then it is found that this Fatwa is incorrect and contradictory to an indisputable canonical evidence with indisputable import, Abû Ishâq is reported to have said that the Mufti should then guarantee the damage inflicted as a result of his Fatwa, even if he is qualified to issue Fatwas." [(2)] In this regard Ibn Hamdân said; "If the questioner acted according to the Mufti's incorrect Fatwa, and then it is found that this Fatwa is incorrect and contradictory to an indisputable canonical evidence with indisputable import, the Mufti shall guarantee the damage inflicted as a result of his Fatwa."[(3)]

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(1) *"I`lâm Al-Muwaqqi`în"* [4: 226]; the *hadîth* is related by Abû Dâwûd, An-Nasâ'î, Ibn Mâjah, Ad-Dâraqutnî, Al-Bayhaqî and Al-Hâkim in *"Al-Mustadrak"*. Al-Hâkim said; The chain of transmitters of the *hadîth* is authentic. (*"Mukhtasar Sunan Abû Dâwûd"* by Al-Mundhirî [6: 378]; *"Sunan An-Nasâ'î"* [8: 53]; *"Sunan Ibn Mâjah"* [2: 1148]; *"Sunan Ad-Dâraqutnî"* [3: 195 and 4: 215]; *"Al-Mustadrak"* [4: 212]; and *"Sunan Al-Bayhaqî"* [8: 141]).

(2) *"Al-Majmû`"* [1: 45]; *"Rawdat At-Tâlibîn"* [11: 107]; and *"I`lâm Al-Muwaqqi`în"* [4: 225].

(3) *"Sifat Al-Fatwâ Wa Al-Muftî Wa Al-Mustafti"* by Ibn Hamdân (p. 31).

b) This is supported by the legal rule derived from the statement of both the *Shâfi`î* and *Hanbalî* scholars to the effect that the Mufti shall guarantee any damages or financial losses inflicted upon the questioner as a result of the Mufti's incorrect Fatwa if he is not qualified to issue Fatwas and accordingly contradicts an indisputable canonical text with indisputable import.(1) Ibn Hamdân said; "This is because he engages in what he is not fully qualified to do, and inflicts harm and deception upon the questioner by his Fatwa."(2)

It is obvious that if the *Sharî`ah* board is not fully qualified and competent in issuing Fatwas related to the affairs of the financial institution, it will be deceiving the institution by accepting the institution's offer to be appointed as its *Sharî`ah* board while it does not have the necessary knowledge and qualifications required to accomplish the work entrusted to it. Further, the board will be deceiving the institution when it issues an incorrect Fatwa or resolution and binds the institution to comply with it, and thus the board should guarantee the result of such a deception in accordance with the principle of the liability for *Taghrîr* (practicing deception). This is based on the legal rule derived from the statement of *Faqîhs* to the effect that whoever practices medical treatment without being qualified should guarantee the damage caused by his error (which is not sanctioned by the code of ethics of the profession), because he engaged in what he is not qualified or competent in and deceives the patient by convincing him that he is qualified, a matter which inflicts damage and harm to the patient, and thus he should be liable for damages.(3)

In this respect, it is worth mentioning that in case of any lack of appropriate qualifications, competence and knowledge of the *Sharî`ah* board to perform the work entrusted to it, the financial institution should terminate the contract of the board because the *shar`î* conditions necessary for those who assume the responsibility of issuing Fatwas and *shar`î* resolutions to the Islamic financial institution are not met.

(1) *"Rawdat At-Tâlibîn"* [11: 107]; *"Al-Majmû`"* [1: 45]; *"I`lâm Al-Muwaqqi`în"* [4: 22]; and *"Sifat Al-Fatwâ Wa Al-Muftî Wa Al-Mustafti"* (p. 31).
(2) *"Sifat Al-Fatwâ Wa Al-Muftî Wa Al-Mustafti"* (p. 31); and *"I`lâm Al-Muwaqqi`în"* [4: 225].
(3) *"Dhukhr Al-Muhtî Min Âdâb Al-Muftî"* by Siddîq Hasan Khân (pp. 122 and 123); *"Zâd Al-Ma`âd"* by Ibnul-Qayyim [4: 140]; and *"Hâshiyat Ad-Dusûqî`Alâ Ash-Sharh Al- Kabîr"* [3: 444].

Third: The *Sharî`ah* board is to be responsible before the general assembly and shareholders for any shortcomings in its work, provided that the executive management of the institution meets all its previously mentioned obligations (mentioned in Note 9 of the research) towards the board.

Fourth: If the executive management of the financial institution does not fulfill its obligations and duties towards the *Sharî`ah* board, the board should inform the management of the institution about the occurrence of such violations, and include them in its annual report. This is in order to fulfill the trust and clear itself from any responsibility for such violations, or, otherwise, it would be betraying the trust placed in it and neglecting the performance of its duties and obligations, a matter for which the board is *shar`î* and legally responsible.

Fifth: Some researchers are of the view that because the *Sharî`ah* board has the same legal status as the (independent) controller, it acts as an agent for all shareholders in having *Sharî`ah* control over the Board of Directors. Accordingly, the board is accountable to the general assembly, or any shareholder, for any negligence on its part in fulfilling its duties and thus negligence in maintaining its trust.(1)

Meanwhile, others view that the *Sharî`ah* Control Board bears the same legal liabilities as the external auditors, since it has the authority and rights of the auditor as a minimum legal liability in front of those who bear damage or loss. However, one may resort to the ordinary courts competent in such matters, because the legal provisions related to tort liability are general, and they place the liability of guarantee upon whoever inflicts damage or harm upon others, whether deliberately or due to negligence.(2)

And the last of our prayers, is that all Thanks and Praise is due to Allah, Lord of the Worlds

(1) *"An-Niẓâm Al-Qânûnî Lil-Bunûk Al-Islâmiyyah"* by Dr. `Âshûr `Abdul-Jawwâd (p. 223).
(2) *"Ar-Riqâbah Ash-Shar`iyyah Fî Al-Maṣârif Al-Islâmiyyah"* by Ḥasan Yûsuf (p. 26).

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Research (11)
Leasing the Bought Asset to Its Seller

Preface

Topic One: Leasing the Asset Explicitly to Its Seller

Topic Two: Leasing the Asset Implicitly to Its Seller

Conclusion

Preface

All praise is due to Allah, the Lord of the Worlds, and Peace and Blessings be upon our Prophet Muhammad who has been sent as a mercy for the worlds, and upon His Household, Companions and those who follow his example until the Day of Resurrection.

Leasing the bought asset to its seller can take place either explicitly or implicitly. An example of the first case is when someone sells to another a tangible asset, which can be made use of, such as real estate, a car or an airplane, and then leases it from him for a specific period, i.e. one month, one year, three years...etc. An example of the second case is when someone sells such an asset to another with the condition that he keeps the possession of its usufruct (or the right to make use of the asset) for a specific period, i.e. one month, one year...etc. In this case, excluding the usufruct of the asset from the sale transaction for a specific time can be regarded as a compensation contract.

This will be discussed in two topics, as follows:

Topic One
Leasing the Asset Explicitly to Its Seller

Leasing the bought asset to its seller can be in one of two forms: An operating *Ijârah* and an *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership or hire-purchase). This will be discussed as two items, as follows:

Item (1)
Leasing an Asset to Its Seller through an Operating *Ijârah* Scheme

This form of *Ijârah* can take three different forms, as follows:

First Form: Concluding an *Ijârah* without a prior agreement (*Muwâṭa'ah*) or any condition being stated in the sale contract

1- There is no disagreement among the *Fiqh* scholars regarding the permissibility of this form of *Ijârah* if concluded in such a way. This is based on the fact that it is, in principle, permissible for one to rent the asset he bought (since it can be used or benefited from without being consumed) to the one who sold it or to someone else using a separate *Ijârah* contract concluded after the sale contract, provided that there is no prior agreement or condition included in the sale contract regarding the *Ijârah* transaction.

Second Form: Concluding an *Ijârah* based on a condition stated in the sale contract

2- An example of this form is when someone sells his property, car or airplane for a specific price on the condition that he leases it from the buyer for, say, 5 years for a specific rent payable on installment basis, i.e. every month, or six moths...etc.

The scholars are of two opinions regarding this form of *Ijârah* concluded in such a way:

3- The majority of the *Hanafî*, *Shâfi`î* and *Hanbalî* scholars hold the view that this form of *Ijârah* is not permissible since it represents a transaction whereby one contract is made contingent on another contract, which is a form of 'two sales in one sale' prohibited by the *Sharî`ah*.(1)

4- The *Mâlikî* scholars as well as Ibn Taymiyyah, from the *Hanbalî* School, disagree with the first party of scholars regarding the interpretation of 'two sales in one sale' and, consequently, differ regarding the prohibition of the forms of transactions that fall under this category, i.e. 'two sales in one sale'. Thus, according to them, it is permissible to stipulate an *Ijârah* transaction in a sale contract, or a sale transaction in another sale contract, or an *Ijârah* transaction in another *Ijârah* contract, or a marriage contract in a sale contract...etc. This is because, according to them, it is permissible to make one contract conditional on another contract in one transaction if such a transaction is advantageous for the people and does not contradict with the *Sharî`ah* in anyway. In principle, the conditions in all contracts are to be deemed valid as long as they do not violate the principles of the *Sharî`ah*. Not only that, but also all actions that are not prohibited by Allah and His Messenger (Peace be upon him) and that bring some benefit to the people are deemed permissible and cannot be prohibited by anyone.(2) I view this as being the most correct opinion.

In this respect, Judge Ibnul-`Arabî said; "If someone says to another; 'I will sell you my slave for one thousand pounds on the condition that you sell me your house for one thousand pounds', the transaction will be valid. But if the first party sells the second party a slave on the condition that the second party sells the first party another slave against the price of the first slave, Abû Hanîfah said; 'This transaction is not permissible. ' However; I see that it is permissible in all ways. This is because one party sells his slave to a second party in return for another specific slave, a transaction which has no *shar`î* problem."(3)

(1) *"Al-Mughnî"* [6: 332 and 333]; and *"Kashshâf Al-Qinâ`"* [3: 181].
(2) *"Nazariyyat Al-`Aqd"* by Ibn Taymiyyah (p. 277); and *"Al-Ikhtiyârât Al-Fiqhiyyah Min Fatâwâ Ibn Taymiyyah"* (p. 123).
(3) "*`Âridat Al-Ahwadhî*" [5: 241].

In the book *"Al-Mudawwanah"*, it is stated that, "I said; 'What is your opinion in case I offer to buy a slave from another person for 10 dirhams provided that he sells me his slave for 10 dirhams? ' He said; 'Mâlik said that it is permissible. '[1] I said; 'What if I offer to sell him my slave for 10 dirhams provided that he sells me his slave for 20 dirhams?' He said; 'Mâlik said that there is no problem in this. It is a transaction whereby one slave is exchanged for another slave with a difference of 10 dirhams.'"[2]

In this regard, Ibn Taymiyyah said; "If one says to another; 'I will sell you my garment for 100 dirhams on the condition that you sell me yours for 100 dirhams,' and they agree on that, the sale shall be concluded. It is the same as *Shighâr* Marriage (exchange of daughters or sisters for marriage with no mandatory gift to a bride from her groom). The same applies also to the agreement in which one party says to another; 'I will lease you my house for 100 dirhams provided that you lease me yours for 100 dirhams.' Here, each house is leased in return for 100 dirhams in addition to leasing the second house. This applies also to the sale transaction where each commodity is sold for 100 dirhams in addition to selling the other commodity. In fact, prohibiting this form of transaction requires a *shar`î* text, or a unanimous opinion after drawing a *Qiyâs* (analogical deduction) upon it."[3]

He also said; "According to the most correct of the two opinions (regarding this issue), it is permissible to combine between a sale and a marriage contract in one deal, which implies making one contract conditional on the other in a way that the second party cannot accept one contract without the other, since the first party does not consent unless both contracts are combined (implemented) together. This is the same as when one offers to sell two commodities for one price. In this case the buyer cannot accept one commodity and leave the other."[4]

In another place, he said; "If the seller combines two contracts, each of which has a different ruling, and sets a different price for the object sold

(1) *"Al-Mudawwanah"* [9: 126].
(2) Ibid.
(3) *"Nazariyyat Al-`Aqd"* by Ibn Taymiyyah (p. 189).
(4) Ibid. (p. 191).

in each contract, the buyer will not have the right to buy one commodity (for the price specified for it) and leave the other."[1]

5. It is apparent that the above examples given by the *Fiqh* scholars confirm the validity of making one contract conditional on another (since the subject matter is not the same in both contracts). An example is when someone says to another; "I will sell you my house for such and such a price provided that you sell me your car for such and such a price," or "I will lease you my house for such and such a rent provided that you lease me your house for such and such a rent" ...etc. This ruling, of course, can be applied to the form of transaction (*Ijârah*) we are discussing, where the subject matter in both contracts is related to the same property (the object), such as when someone says to another; "I will sell you my house for such and such a price on the condition that you lease it to me for such and such a rent." This depends on the fact that the act which is deemed permissible, namely making one contract conditional on the other, is the same in both transactions and there is no effective difference between the two contracts.

This can be confirmed by the following opinions:

a) The opinion of Ibn Rajab, in his book *"Al-Istikhrâj Li-Aḥkâm Al-Kharâj"*, concerning the land of *Kharâj* (tribute) whose owners agreed with the Muslims for the ownership of the land to be transferred to the Muslims provided that they (the original owners) were able to make use of it in return for a tribute they would give to the Muslims. Ibn Rajab said; "The lands of *Kharâj* in the hands of the disbelievers are of two types: The first type is the land regarding which they (the disbelievers) made a reconciliation with us on the basis that the ownership of the land would be transferred to us (the Muslims) provided that they would make use of it in return for a certain tribute. This means that we took possession of this land from them provided that we lease it to them. Sheikh Abul-` Abbâs Ibn Taymiyyah said; 'The same applies to sale transactions. That is, since we permit purchasing the land and leaving its usufruct with the seller for no return, then the same should apply when the usufruct is left with the seller for a return. However, this is regarded as a combination of two contracts.'

(1) *"Al-Ikhtiyârât Al-Fiqhiyyah Min Fatâwâ Ibn Taymiyyah"* by Al-Ba`lî (p. 122).

Also, Ibn `Aqîl mentioned an opinion that permits selling a commodity and then leasing it from the buyer for a specific period using one contract for both the sale and *Ijârah* transactions. This is based on the fact that the seller excludes the usufruct of the sold object from the sale and then leases it from the buyer. This means that the buyer is also allowed to lease the object he bought to the seller."[1]

b) There is the opinion adopted by some *Mâlikî* scholars, such as Judge `Abdul-Wahhâb Al-Baghdâdî, Judge Ibnul-`Arabî, Al-Wansharîsî, in which they permit the sale of a riding animal which is conditional on the seller being entitled to use it (for riding) for a period that is not short. They argue that this form of sale can be deemed permissible based on the assumption that the seller makes a condition that he may lease the animal for such a period. This is because, according to them, there is no *shar`î* problem in making a sale of an asset conditional on leasing it to the seller.[2]

The following paragraph from the book titled *"Al-Furûq"* by Judge `Abdul-Wahhâb states:

> "Regarding the transaction in which one who sells a riding animal and excludes using it (for riding) for a period of time, Imam Mâlik said; 'If the period is short, such as one or two days, the transaction will be permissible, and if it is long, it will not be permissible. And if the seller makes a condition giving him the right to use it (for riding) for a period of time, the transaction will be permissible whether such a period is short or long. In both cases, the use of the animal (for riding) is associated with the sale.'"

The difference between the two cases can be revealed as follows:

If the seller excludes the use (riding) of the animal for a long period of time, the sale will be affected by *Gharar*, since the buyer in such a case cannot take delivery of the animal until the period is over, though it has been transferred to his possession. This is not the case; however, if the seller makes a condition that he may use the animal for a period of time.

(1) *"Al-Istikhrâj Li-Aḥkâm Al-Kharâj"* (pp. 246 and 247).
(2) "`*Uddat Al-Burûq*" by Al-Wansharîsî (p. 418); *"Al-Furûq Al-Fiqhiyyah"* by Abûl-Faḍl Ad-Dimashqî (p. 80); and "`*Âriḍat Al-Aḥwadhî*" [6: 10].

This is because in such a case, the buyer takes delivery of the animal, making the whole deal as if it were a combination of a sale and *Ijârah*, which is a permissible transaction because sale and *Ijârah* contracts are not contradictory. This is the difference between the two cases."[1]

Third Form: Concluding the *Ijârah* based on a prior agreement (*Muwâṯa'ah*) to lease the asset to its seller

6- Here, this form of *Ijârah* can be defined as follows: An agreement between the two parties, in the stage of preparatory negotiations that precede the contract, that the first party sells the asset he owns to the second party, and then leases it from him, using a separate *Ijârah* contract, at a specific rent and for a specific period of time.

Here, I think it is necessary to briefly discuss *Muwâṯa'ah* and its definition before discussing the *fiqhî* ruling and opinions pertaining to this form of *Ijârah*.

7- Linguistically, '*Muwâṯa'ah*' means agreement.[2] Ibn Fâris said; "*Muwâṯa'ah* means an agreement on something which each party prepares or facilitates for the other."[3]

In *fiqhî* terminology, '*Muwâṯa'ah*' has several meanings, the most important of which are:

- Explicit or implicit intention of the parties to a contract to use a certain stratagem to practice forbidden *Ribâ* using a *Sharî`ah* accepted contractual form.
- An apparent agreement between both parties to produce a fake contract, which is called *'Talji'ah'*.
- An undisclosed prior agreement between the two parties to perform a *Sharî`ah*-permissible act or deal for the sake of finding a *Sharî`ah*-accepted solution to problematic situations (i.e. an acceptable 'stratagem').

(1) *"Al-Furûq"* by Judge `Abdul-Wahhâb Al-Baghdâdî (p. 85).
(2) *"An-Nihâyah"* by Ibnul-Athîr [5: 201 and 202]; *"Al-Qâmûs Al-Muḥîṭ"* (p. 71); and *"Al-Miṣbâḥ Al-Munîr"* [2: 830].
(3) *"Mu`jam Maqâyîs Al-Lughah"* [6: 121].

- A coincidence of the intentions of the parties to the contract in the preparatory negotiations that precede the signing of an agreement (deal) [which comprises a group of contracts, successively linked together according to a set of conditions that govern them as one unit to achieve one intended goal] to fulfill such an agreement after its conclusion according to the conditions and terms agreed upon beforehand.

8. *Fiqh* scholars have stated that the *Muwâṯa'ah* can take place explicitly using unequivocal words and statements, or implicitly by ways known by convention or indicated by custom and practice. In this regard, Ibn Taymiyyah and Ibnul-Qayyim said; "If one sells a commodity to another while he intends to use the price to buy from the same person a commodity of the same kind, then there are two possibilities; first, the two parties had agreed explicitly or implicitly, according to custom, on the second purchase. Second, they did not agree, either explicitly or implicitly, on this type of transaction. In the case of the first possibility, the transaction will be invalid. This is because the aim of this transaction is not to exchange the commodity for the price, but rather, to exchange a commodity for another commodity of the same kind. Also, in such a transaction, the price is used only as a stratagem to practice *Ribâ*, which makes it similar to the cursed *Muḥallil* (the man marrying a triple divorced woman with the intention to divorce her so as to be lawful for her former husband) in the *Taḥlîl* contract. If they did not agree previously to conclude the deal in this way, but still the buyer knew that the seller intended to practice a *Ribâ*-based purchase, the transaction will also be invalid, since the buyer's knowledge in such a case indicates an implicit agreement (*Muwâṯa'ah*), according to customary practices."(1)

9- It is also important here to point out that *Muwâṯa'ah* (prior agreement) on contracts and undertakings has three features:

First; it is an agreement between two parties to fulfill contracts and undertakings in the future.

Second; this agreement has the same effect as any condition preceding these contracts and undertakings, and the *Fiqh* rulings with regard toper-missibility and prohibition, validity and invalidity, obligation and enforce-

(1) *"Bayân Ad-Dalîl `Alâ Buṭlân At-Taḥlîl"* by Ibn Taymiyyah (p. 284); and *"I`lâm Al-Muwaqqi`în"* [3: 242].

ability etc. applicable to such a condition also apply to it. In this respect, Ibn Taymiyyah said; "If both parties agree on something prior to the contract, and then they conclude it, the contract will be applicable to the preceding agreement."(1)

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(1) *"Nazariyyat Al-`Aqd"* (p. 204).

There are many *fiqhî* texts that refer to such an issue, especially in the case of *Muwâṭa'ah* on stratagems and usurious means.

In the book *"Ma`ûnat Ulî An-Nuhâ"* [4: 277], it is stated that, "Either party of the exchange transaction may buy from the other the same currency the latter bought from him if there is no previous agreement between them on such a transaction. This is because in such a transaction the commodity is sold for another commodity of a different species, which makes the transaction valid, as though the other party was a different one in the second transaction."

In the book *"Al-Mughnî"* [6: 114 - 116], it is stated that, "If one sells half a bushel of bad dates for some dirhams, and then buys good dates with these dirhams, or sells a complete dinar (*dinâr ṣaḥîḥ*) for some dirhams, and then buys *Qurâdah* (a small piece of golden and silver) with these dirhams, the transaction is valid. This is because the person, in such a transaction, sold a commodity, i.e. bad dates, for a commodity of another species, i.e. dirhams, without any condition or *Muwâṭa'ah* (agreement), which makes the transaction valid as if he bought the good dates from someone else. However, if the two men agreed previously to conclude the transaction in such a way, then it would be invalid and regarded as a forbidden stratagem. This opinion is adopted by Imam Mâlik."

Also, in his book *"I`lâm Al-Muwaqqi`în"*, Ibnul-Qayyim said; "This opinion is also supported by the Prophet's saying, *'... but sell the mixed dates (of inferior quality) for money, and then buy the good dates with that money.'* This means that a second sale contract should be initiated and executed after finishing the first. However, if both parties agree, from the beginning, to conclude the two sale contracts, then the second contract cannot be regarded as a separate contract, but rather as being complementary to the first one. According to the literal meaning of the *ḥadîth*, the Prophet (Peace be upon him) ordered the two contracts to be separate and independent from one an other, not to be integral to and dependent on each other." [3: 283].

Article (753) in *"Majallat Al-Aḥkâm Ash-Shar`iyyah `Alâ Madhhab Al-Imâm Aḥmad"* states; "It is permissible for the borrower to repay the loan with an increase or decrease in terms of quantity or quality, but only if there is no condition or previous agreement stipulating this."

In the book *"Al-Kâfî"*, Ibn Qudâmah said; "If the borrower repays the loan with an increase in quality or quantity, the loan transaction is permissible."

In the book *"Majmû` Al-Fatâwâ"* [29: 334], Ibn Taymiyyah said;"If the borrower repays the loan with an excess, whether in terms of quality or quantity, or gives the lender a gift after repaying the loan, it will be permissible.

In the book *"Al-Muqhnî`"* and its explanation *"Al-Mubdi`"* [4: 209], it is stated that, "It is not permissible, in loan transactions, to stipulate what may possibly procure a benefit for the lender, such as allowing him to dwell in the borrower's home, or giving him an increase on the loan amount. However, if such a benefit or increase is given =

Third; The enforceability or binding authority of the *Muwâṯa'ah* (prior agreement) is the same as the enforceability of the conditions preceding contracts. Moreover, according to the most acceptable *fiqhî* opinion and the correct opinion in the *Mâlikî* and *Ḥanbalî* Schools regarding this issue, the preceding condition has the same validity, binding nature and effect of a normal condition within the contract. That is, if the contracting parties agree on something, and then they conclude the contract, the contract will be dependent on the parties' preceding agreement, since there is no difference between the condition stated in the contract, and the condition agreed upon in advance and not stated in the contract, as long as the contract depends on such a preceding condition. In other words, the implicit condition is the same as the explicit one, and the condition observed customarily is the same as that expressed clearly, and the intentions in acts are to be taken into consideration.(1)

In the book *"Al-Fatâwâ Al-Kubrâ"*, by Ibn Taymiyyah, it is stated that the well-known opinion in Imam Aḥmad's writings and original books, which is adopted by his early pupils, and which is the same as the opinion of the people of Medina regarding this issue, is that; "The preceding condition is the same as the condition stated within the contract; meaning, that if the contracting parties agreed on something, and then concluded the contract, the contract will be dependent on, and interpreted according to whatever they agreed upon, exactly the same as when dirhams and dinars that are mentioned in contracts are interpreted according to the current value of currencies, and the same as when contracts are interpreted according to what is known between the contracting parties."(2) Moreover, in the book *"Naẓariyyat Al-`Aqd"*, it is stated that; "The basic opinion in *Fiqh* is that the conditions that precede the contract are the same as those included therein; that is, if the contracting parties agree on something, and then they conclude the contract, the contract will be dependent, in its implementation, on such a preceding agreement."(3)

= without any previous condition or agreement between the two parties, then it is permissible, according to the soundest opinion concerning this issue."

(1) *"I`lâm Al-Muwaqqi`în"* [3: 105, 145, 212, and 241]; *"Kashshâf Al-Qinâ`"* [5: 98]; *"Bayân Ad-Dalîl `Alâ Buṭlân At-Taḥlîl"* (p. 533); *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 36]; *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [4: 108]; *"Al-`Uqûd Wa Ash-Shurûṭ Wa Al-Khayârât"* by Aḥmad Ibrâhîm (p. 711); and *"Al-Madkhal Al-Fiqhî Al-`Âmm"* by Az-Zarqâ [1: 487].

(2) *" Al-Fatâwâ Al-Kubrâ"* [4: 108].

(3) *"Naẓariyyat Al-`Aqd"* (p. 104).

10. Consequently, leasing an asset to the one who sold it upon a prior agreement (*Muwâṭa'ah*) between the two parties is subject to the same *fiqhî* ruling as leasing the asset to its seller upon a condition stated in the sale contract, which is a permissible form of *Ijârah*, according to the *Mâlikî* scholars and Ibn Taymiyyah, of the *Hanbalî* School, as we pointed out previously.(1)

(1) See: Note (4) in the Research.

Item (2)
Leasing an Asset to Its Seller through an *Ijârah Muntahiyah Bit-Tamlîk* Scheme

This form of *Ijârah* can take place in two different forms, as follows:

First Form: Using a prior agreement (*Muwâṯa'ah*) or a condition stated in the sale contract.

11- We pointed out previously that '*Muwâṯa'ah*' represents an agreement preceding the contract, and it has the same effect as any condition preceding the contract, which in return has the same legal characteristics of a condition stated in the contract with regard to validity, binding nature, fulfillment, invalidity and cancellation. This is according to the most acceptable *fiqhî* opinions.(1)

12- In this regard, it is worth mentioning that an '*Ijârah Muntahiyah Bit-Tamlîk*' (*Ijârah* ending with ownership) is a transaction consisting of a number of contracts and obligations that are successive and connected to each other and aimed at achieving a specific financial purpose. It begins with renting the asset, and ends with transferring the ownership of such an asset to the lessee at the end of the *Ijârah* period after full payment of the rent installments. Here, transfer of ownership is done

(1) See: Note (9) in the Research.

either automatically, in return for the rent payments paid during the *Ijârah* period (at the end of *Ijârah* period, *Ijârah* converts automatically into a sale), by a separate *Hibah* (gift) contract subsequent to the *Ijârah* contract, by a sale contract at a real or nominal price, which is defined and conditional upon the payment of all rent amounts agreed upon between the two parties or which is deferred in terms of implementation until the date of expiration of the *Ijârah* contract, or by any other means. This transaction has many forms in international financial markets, some are permissible and others are prohibited in the *Sharî`ah*.

In our discussion, we will focus on the permissible form of *Ijârah Muntahiyah Bit-Tamlîk*, which is defined by the Islamic *Fiqh* Academy in its resolution no. 110 (24\12) in its 12th meeting held in Riyadh during the period from the 23rd September to 28th September 2000. This form is as follows: "A lease contract that enables the lessee to make use of the leased property against a specific amount of rent and for a specific period of time, coupled with a separate contract (*Hibah* contract) offering the property as a gift to the lessee, which becomes effective when the lessee has paid all the amounts of the agreed upon rent, or coupled with a promise from the owner to give the property as a gift to the lessee, after full payment of the due rent."

13- In fact, this form of *Ijârah* represents a financial process which is performed through a contractual agreement consisting of a number of contracts and obligations to be performed in a specific manner and implemented in a number of successive stages. In this agreement, both parties agree that the owner of an asset or property will lease such an asset to the second party for a specific period and at a determined rent, with a preceding condition that the ownership of the leased asset will be transferred to the lessee (the second party) through a subsequent *Hibah* (gift) contract contingent on a future event (i.e. the end of the *Ijârah* period) and conditional upon the full payment of due rents, or through a binding promise to transfer the ownership of the asset to the lessee after the end of the *Ijârah* period and full payment of the rent amounts.

Thus, the *Ijârah* ending with ownership (*Ijârah Muntahiyah Bit-Tamlîk* or hire-purchase) is a new transaction that aims at achieving a given financial purpose. It begins with leasing the asset, and ends with transferring its ownership to the lessee in the way mentioned above. Accordingly, it

can be said that it provides a permissible alternative for interest-based (*Ribâ*-based) financing. Moreover, such a form of deal can be regarded as a stratagem (*Shar`î* solution to problematic situation) to transfer the title of a property at a deferred price that is paid on an installment basis during a given period. By so doing, the seller (or the lessor in the first contract) is protected against the loss of the deferred installments in case the second party becomes insolvent, delays the payment, or fails to pay due to any other reason, since the asset remains in the lessor's possession until he obtains the full installments. Accordingly, in case of full payment of the rent installments at the end of the *Ijârah*, the title of the asset is transferred to the lessee through a separate *Hibah* (gift) contract that will be effective after the end of the term of the *Ijârah* contract.

14- In my view, this transaction is permissible when it meets the regulations stated by the Islamic *Fiqh* Academy in its relevant resolution, which are;

a) The presence of two contracts that are totally separate and independent with respect to the duration of their conclusion and in which the *Hibah* (gift) contract, or the binding promise to present the asset as a gift, is subsequent to the lease contract.
b) There should be a genuine desire from the two parties to conclude the lease contract and not just to use it as a mere veil for the sale contract.
c) The leased property should be guaranteed by the owner, and not the lessee.
d) If the contract includes insurance of the property, insurance should be made according to Islamic methods and at the expense of only the owner.
e) Throughout the lease period the contract should be subject to *Sharî`ah* rulings on *Ijârah*.
f) The cost of maintenance, excluding operational expenses, should be borne by the lessee throughout the lease period.

15- Thus, according to the *Sharî`ah*, it is permissible to use such a contractual agreement as a means to transfer the title of the property against a deferred price (rent installments), with a guarantee for the full payment of the rent in case of bankruptcy, delay or failure to pay on the part of the

lessee. This is done through an *Ijârah* and a subsequent *Hibah* contract combined in a contractual agreement that comprises connected parts, and that is to be implemented in successive stages according to a specific system that govern the entire agreement as one, indivisible transaction that aims at the achievement of a given purpose intended by the two contracting parties. In other words, such an agreement does not permit what is prohibited by the *Sharî`ah*, nor does it waive a right or obligation unjustly, or imply seizing other people's property wrongfully. Rather, it helps in achieving legitimate interests for the contracting parties, and in guaranteeing their rights and compensations in case one party fails to fulfill his obligations towards the other party. This is why it is considered as one of the acceptable stratagems (*Ḥîlah Maḥmûdah*) and *shar`î* solutions to problematic situations permitted by the *Sharî`ah*. In this respect, Ibnul-Qayyim said; "The stratagem are of two kinds; one is performed for the sake of doing what Allah, the Almighty, ordered us to do, avoiding what Allah, the Almighty, ordered us not to do, avoiding committing sins, extracting one's right from an unjust person, or releasing the wronged from the hands of an aggressor. This kind is permissible and reward-worthy. The second type is practiced for the sake of escaping duties, permitting the practice of prohibited matters, confusing between the wronged and the wrongdoer and between the right and the wrong. This kind is dispraised by the *Salaf* (righteous predecessors)."(1) He also said; "A stratagem (*Ḥîlah*) is to be judged according to the purpose it is used for with regard to permissibility and prohibition, good and evil, and obedience and disobedience (to God). That is, if the purpose is something good, the stratagem will be also, and vice versa."(2)

16- As for leasing an asset to its seller through an *Ijârah Muntahiyah Bit-Tamlîk* based on a prior agreement (*Muwâṭa'ah*) or a condition stated in the sale contract, it is a critical issue that should be studied carefully, especially with regard to its contemporary forms and applications in Islamic financial institutions, and its compatibility with the principles of '*Sadd Adh-Dharâ'i*'' (Blocking the means which may lead to an expected evil) and '*Ibṭâl Al-Ḥiyal Ar-Rabawiyyah*' (the prevention of usurious stratagems).

(1) *"Ighâthat Al-Lahfân"* [1: 339].
(2) Ibid. [1: 385].

After a careful study of this integrated contractual system, its purposes and consequences, I reached the following conclusion: This form of *Ijârah* represents a prior agreement (*Muwâṭa'ah*) between the parties to the contract to the effect that one party sells his tangible property (that can be used without being consumed) to the other party against an advance price on the basis that the buyer will lease such a property to the seller by means of an *Ijârah Muntahiyah Bit-Tamlîk* against a specified rent (divided into installments) that is higher than the price of the property which was paid in advance. Thereupon, it is an agreement aimed at hiding the two parties' intentions to use a usurious stratagem represented in combining two contracts, i.e. an *Ijârah* and sale, which are permissible on their own, yet prohibited when combined together due to their turning, in such a case, into a modern form of what is called 'Reverse *`Înah*' in *fiqhî* terminology.(1) In this form of *`Înah*, the seller keeps the intention to re-purchase the asset from its buyer, using a stratagem embodied in an *Ijârah Muntahiyah Bit-Tamlîk* scheme, for a deferred price higher than the cash price for which he sold such an asset, and this according to a prior agreement between the seller and the buyer. For this reason, it is regarded as an invalid transaction because it represents nothing but a means for contracting an interest-based loan. This is based on the *fiqhî* maxim stating: "Contracts are to be judged according to their purposes, regardless of their forms."(2)

(1) According to the majority of scholars, *`Înah* takes place when one party sells a commodity to the other on a deferred payment basis, and then buys back the same commodity from the other at a lesser amount of money, payable on the spot. *"Al-Inṣâf"* by Al-Mirdâwî [11: 191]; *"Al-Mughnî"* by Ibn Qudâmah [6: 260 - 262]; and *"Ash-Sharḥ Al-Kabîr `Alâ Al-Muqni`"* [11: 191 - 194]. It is *shar`î* prohibited and invalid.

'Reverse *`Înah*', however, takes place when one party sells the commodity to the other party for a price paid on the spot, and the seller re-purchases the same commodity from the buyer for a higher, deferred price. Al-Buhûtî said; "'Reverse *`Înah*' refers to a transaction whereby one party sells the commodity to the other party for a price paid on the spot, and the seller, then, re-purchases the same commodity from the buyer or from his agent at a higher deferred price."

'Reverse *`Înah*' is prohibited, just like *`Înah*, because both transactions involve the same object and there is no significant difference between them. *"Al-Inṣâf Ma`a Ash-Sharḥ Al-Kabîr `Alâ Al-Muqni`"* [11: 195]; *"Sharḥ Muntahâ Al-Irâdât"* by Al-Buhûtî [2: 158]; *"Al-Mughnî"* [6: 263]; *"Kashshâf Al-Qinâ`"* [3: 174]; and *"Majmû` Fatâwâ Ibn Taymiyyah"* [29: 30].

(2) *"Al-Qawâ`id Al-Kubrâ"* by Al-`Izz Ibn `Abdus-Salâm [2: 230].

In this regard, Ibnul-Qayyim said:

> "It is well known that *Ribâ*-based transactions are not prohibited due to their form or the wording used to conclude them, but rather, they are prohibited due to the real meaning and objective behind them, which exist in the usurious stratagems the same way they exist in a direct *Ribâ*-based transaction. This is a fact known to both parties who resort to such a usurious stratagem and to whoever witnesses their transaction, and Allah, the Almighty, knows that their ultimate aim behind such a stratagem is *Ribâ*. They, however, use a fake or front contract to reach such an aim, i.e. practicing *Ribâ*, and give it another name to hide such an intention. It is well known that such a stratagem or fake contract does not render the transaction valid nor does it remove the cause behind its prohibition, but rather it strengthens such a cause."(1)

Second Form: Without a prior agreement (*Muwâṭa'ah*) or any condition being stated within the sale contract

17- We pointed out previously that the transaction whereby one party sells his tangible property to the other for an advance price on the basis that the buyer would lease such a property to the seller by means of an *Ijârah Muntahiyah Bit- Tamlîk* against a specified rent divided into installments, and that these overall rent payments would be higher than the price of the property paid in advance, subject to a prior agreement or a condition stated in the sale contract, is a modern form of 'Reverse *`Înah*'.(2) This is because the seller, in such a transaction, has the intention to re-purchase the asset from its buyer though an *Ijârah Muntahiyah Bit-Tamlîk* scheme, for a deferred price higher than the cash price for which he sold such an asset, subject to a prior agreement between the seller and buyer. This makes it the same as *`Înah* with regard to the *fiqhî* ruling, which is prohibited. In other words, both transactions have the same cause of prohibition, namely being used as a means for contracting an interest- based loan.

(1) *"Ighâthat Al-Lahfân"* [1: 352].
(2) See: Note (16) in the Research.

18- If such a transaction, however, is entered into without any condition or prior agreement (*Muwâṯa'ah*), it would be subject to the same ruling of 'Reverse *`Înah*' exercised without a prior agreement or any stratagem, regarding which the scholars have two different opinions:

First opinion: It is prohibited for the sake of blocking the ways to an interest- based loan. This opinion is attributed to Imam Aḥmad in the narration of Ḥarb from him, and also adopted by other scholars.(1)

Second opinion: It is permissible. This opinion is attributed to Imam Aḥmad in the narration transmitted by Abû Dâwûd, and adopted by Ibn Qudâmah in his book *"Al-Mughnî"*, where he said; "It may be permissible for the seller to re-purchase the commodity (he sold for a cash price) on a deferred payment basis for a higher price if such a transaction is not engaged upon through a prior agreement (between the seller and the other party) or as a means of stratagem, where it would be impermissible. That is, if the transaction is exercised through an unintended agreement, it would be permissible."(2)

The more acceptable opinion, in my view, is to permit this transaction. This is because there is no *shar`î* text-based evidence, or other evidence of the same credibility, prohibiting it. Moreover, the scholars prohibiting this transaction depend, for their opinion, on the principle of '*Sadd Adh-Dharâ'i*'. However, it is well known that this principle should not be applied to an act (that is permissible in principle) unless it is frequently used as a means for doing something prohibited, as stated by the scholars of *Uṣûl*. That is, unless such a requirement is met, this principle should not be applied.(3) Moreover,

(1) *"Al-Mughnî"* by Ibn Qudâmah [6: 263]; *"Al-Qawânîn Al-Fiqhiyyah"* (p. 276); *"Bidâyat Al-Mujtahid"* [2: 142]; *"Kashshâf Al-Qinâ`"* [3: 175]; and *"Al-Inṣâf"* [11: 195].

(2) *"Al-Mughnî"* [6: 263]; *"Al-Inṣâf"* [11: 195]; and *"Ash-Sharḥ Al-Kabîr `Alâ Al-Muqni`"* [11: 196].

(3) In his book *"Al-Muwâfaqât"* [4: 198], Ash-Shâṭibî said; "'*Sadd Adh-Dharâ'i*'' is the principle that Imam Mâlik resorted to in most *fiqhî* topics. This is because *Dharî`ah* is used as a means to do something prohibited or void by using something permissible or valid...however, such a principle should be applied based on specific requirements; namely, that it should be clear that the people intend to use such a permissible act to do an impermissible act, and that the use of such means (*Dharî`ah*) should be that which is resorted to very frequently and excessively." In his book *"Al-Ma`ûnah"* [2: 996], Judge `Abdul-Wahhâb Al-Baghdâdî said; "The principle '*Sadd Adh-Dharâ'i*'' =

it is clear that such a transaction, if practiced without any prior agreement or condition, cannot be described (or accused) of being a means frequently used (in normal practice) for contracting interest-based loans. Therefore, I think that it is not reasonable to apply this principle to this form of transaction. This can be confirmed by the opinion of the great scholar Muhammad At-Tâhir Ibn `Âshûr. He stated; "One thing that should be pointed out and stressed in the field of *Fiqh* and *Ijtihâd* is the difference between exaggeration in religion (or in applying *fiqhî* rules) and the principle of *'Sadd Adh-Dharâ'i`'* (blocking the means which may lead to an expected evil), which is a minute difference. The principle of *'Sadd Adh-Dharâ'i`'* aims at preventing a cause of corruption (*Mafsadah*), while exaggeration in religion refers to the extreme practice of attaching something permissible to something that is enjoined or prohibited by the *Sharî`ah* or to the process of practicing a *shar`î* act in a more excessive manner than is required by the *Sharî`ah* under the pretext of avoiding any slackness. This is called 'extravagance' in the Sunnah. Extravagance, according to *Fiqh*, is of different degrees, some of which fall under the category of piety regarding personal acts, which sometimes leads to undue difficulty, or piety regarding public acts which sometimes causes confusion or perplexity for the common people. Some of these acts fall under the category of being dispraised obsessions. Thus, the Muftis and scholars should avoid any exaggeration and extremism in their Fatwas and opinions which are related to people's activities and acts of worship."(1)

= (blocking the means) refers to the prohibition of permissible practices that are frequently used as a means for accomplishing *Shar`î*-prohibited objectives."

In his book, "*`Iqd Al-Jawâhir Ath-Thamînah*" [2: 441], Ibn Shâs said; "If this is confirmed, the scholars of that *fiqhî* school agree on accepting this principle and on the necessity of canceling the contract, if it is frequently used as a means to do prohibited practices, such as the transaction where a sale is combined with a loan, or a loan which causes benefit to the lender."

In the book *"Al-Ishrâf"* [2: 560], Judge `Abdul-Wahhâb said; "*Dharâ'i`* refers to something permissible in principle but frequently used as a means to do something prohibited."

(1) *"Maqâṣid Ash-Sharî`ah"* by Ibn `Âshûr (p. 370).

Topic Two
Leasing the Asset Implicitly to Its Seller

19- This form of *Ijârah* represents a transaction whereby one party sells his tangible asset to another party, and excludes (from the sale) the usufruct of this asset for a specific period, i.e. one month, one year, five years...etc. The exclusion of the asset's usufruct in such a case represents an implicit form of leasing the asset from its buyer. This is because such an excluded usufruct is against a portion of the price.(1) Thus, the price of the asset along with the exclusion of the usufruct becomes lower than its normal price, i.e. without the exclusion, and the difference between the two prices represents the price allotted for the excluded usufruct. In this regard, some scholars said; "The usufruct in question is allotted a portion of the price of the commodity sold, and the sale is effected against the remaining portion of the commodity's price."(2) In the same respect, the great scholar As-Sâwî said; "The excluded usufruct represents an implicit form of *Ijârah*. For example, if someone sells a house for 100 dirhams on the basis that the delivery will be one year later, then, in fact, he will be selling it for a price that equals 100 dirhams plus making use of the usufruct of the house during such a period. That is, as if the price was really, 110 dirhams,(3) but the buyer really bears the rate of the

(1) *"Fath Al-Qadîr"* [6: 80]; *"Tabyîn Al-Haqâ'iq"* by Az-Zayla`î [4: 59]; and *"`Ârîdat Al-Ahwadhî"* [6: 10].
(2) *"Fath Al-Bârî"* [5: 319].
(3) *"Hâshiyat As-Sâwî `Alâ Ash-Sharh As-Saghîr"* by Ad-Dardîr [4: 30].

usufruct of the house (for such a period) with the 10 dirhams he did not pay immediately at the sale."

20- The scholars are of three different opinions regarding the transaction whereby one sells an asset and excludes its usufruct (from the sale) for a specified period of time. Here are the three opinions:

First opinion: This transaction is void. This opinion is adopted by the *Hanafî* scholars and is the more acceptable of the two opinions adopted by the *Shâfi`î* scholars. In their opinion, those scholars depend on the Prophetic *hadîth* prohibiting a conditional sale and the Prophetic *hadîth* prohibiting '*Thunyâ* sale' (exception-based sale, i.e. the sale in which a part of the object sold is removed or excluded from the sale). They also depend on the argument that the exclusion of the usufruct represents a condition contradictory to the requirements of the contract and that the exclusion turns the whole transaction into 'two deals in one deal',[1] which is prohibited by the *Sharî`ah*.[2]

Their arguments, however, are refuted as follows: (I) the *hadîth* prohibiting a conditional sale has not been confirmed to have been said by the Prophet (Peace be upon him), as stated by many scholars, such Imam Ahmad, Judge Ibnul-`Arabî, Al-Hâfiz Ibn Hajar, Ibn Qudâmah and Ibn Taymiyyah.[3] (II) The *hadîth* prohibiting '*Thunyâ* sale' cannot be used as an argument to support their view on this issue, because it states; *"The Prophet (Peace be upon him) prohibited excluding a part of the object sold unless this part is well-defined."*[4]

(1) The *hadîth* prohibiting 'two deals in one deal' has been narrated by Ahmad, Al-Bazzâr and At-Tabarânî from Ibn Mas`ûd as a *Marfû`* (traceable) *hadîth*. Ibn Al-Haythamî said; "Ahmad's chain includes transmitters who are trustworthy." *"Musnad Ahmad"* [1: 198]; *"Majma` Az-Zawâ'id"* [4: 84]; *"Fath Al-Qadîr"* [6: 81]; and *"Nayl Al-Awtâr"* [5: 152].

(2) *"Mukhtasar Ikhtlâf Al-`Ulamâ'"* by At-Tahâwî [3: 136]; *"Fath Al-Qadîr"* [6: 80]; *"Tabyîn Al-Haqâ'iq"* [4: 59]; *"Rawdat At-Tâlibîn"* [3: 406]; *"An-Nawawî `Alâ Sahîh Muslim"* [11: 30]; *"Al-Majmû`"* by An-Nawawî [9: 369 and 378]; *"Al-Mabsût"* by As-Sarakhsî [13: 14]; *"Fath Al-Bârî"* [5: 314]; and *"Al-Istidhkâr"* [5: 306].

(3) *"Fath Al-Bârî"* [5: 315 and 319]; *"Al-Mughnî"* [6: 166]; *"`Âridat Al-Ahwadhî"* [5: 250]; and *"Al-Fatâwâ Al-Kubrâ"* by Ibn Taymiyyah [5: 145].

(4) Narrated by Abû Dâwûd, At-Trmidhî and An-Nasâ'î. And its chain of transmission is authentic, as stated by Al-Hâfiz in the book *"Al-Fath"*. *"Sunan Abû Dâwûd"* [2: 235]; *"`Âridat Al-Ahwadhî"* [5: 290]; *"Sunan An-Nasâ'î"* [7: 260]; and *"Fath Al-Bârî"* [5: 315].

This means that the prohibition here can be applied only if the part excluded from the subject matter is not defined. However, in this transaction the part excluded, i.e. the usufruct of the commodity sold, is well-defined as the period of such usufruct is specified."[1] Also, it is possible for the exclusion of the usufruct to be imposed upon the buyer by the *Sharî`ah*, as in the case when someone buys a pollinated palm tree, a cultivated piece of land or a married woman slave. In this case, the buyer accepts the sale as it is, i.e. with the usufruct excluded, as in the case when the seller makes a condition entitling him to the fruits (usufruct) of the tree before pollination.[2] (III) Including this form of *Ijârah* in the category of 'two deals in one deal' is not acceptable. In the book *"At-Tanbîh `Alâ Mushkilât Al-Hidâyah"*, Abûl-`Izz Al-Ḥanafî said; "In such a case, the part excluded from the object of the sale is well-defined, and thus cannot lead to any ignorance, dispute or *Gharar*. Thereupon, even if the *ḥadîth* narrated by Ibn Jâbir (May Allah be please with him) did not exist, this form of exclusion-based sale (which does not lead to any dispute or *Gharar*) would have been permitted based on drawing a *Qiyâs* (analogical deduction). The *ḥadîth* itself is not contradictory to, but in line with, this form of *Qiyâs*, making such a form of sale, where a part is excluded from the object, belong not to 'two deals in one deal' but to '*Thunyâ* sale' (exception-based sale)."[3]

This can be confirmed by the explanation of 'two deals in one deal' given by Samâk, who is the narrator of the *ḥadîth* prohibiting such a form of transaction. According to him, 'two deals in one deal' takes place when one party says to the other: "This commodity is for such and such price on credit, and for such and such price on cash,"[4] and then they conclude the sale and separate without the buyer determining the price he chose. Ash-Shâfi`î, Aḥmad, and Abû `Ubayd Al-Qâsim Ibn Sallâm agreed with Samâk concerning this explanation.[5] Also, Imam Ibnul-Qayyim explained

(1) *"Al-Mughnî"* [6: 168]; and *"Fatḥ Al-Bârî"* [5: 315].
(2) *"Al-Mughnî"* [6: 168].
(3) *"At-Tanbîh `Alâ Mushkilât Al-Hidâyah"* by Ibn Abûl-`Izz Al-Ḥanafî [4: 384].
(4) *"Tahdhîb Mukhtaṣar Sunan Abû Dâwûd"* by Ibnul-Qayyim [5: 106]; and *"Nayl Al-Awṭâr"* [5: 152].
(5) *"Fatḥ Al-Qadîr"* by Ibnul-Humâm [6: 81]; and *"As-Sayl Al-Jarrâr"* by Ash-Shawkânî [3: 61].

that 'two deals in one deal' is a transaction whereby one party sells to the other a commodity for, say, 100 dirhams payable after one year on the condition that the seller re-purchases it from the buyer for 80 dirhams payable on the spot. Ibnul-Qayyim (May Allah have mercy on him) said; "By doing so, the seller combines between a credit sale and a cash sale in one deal or one sale, while his real intention is to give an amount of money payable on the spot in return for a larger amount payable at a future date. In such a case, the seller should take only the capital, because any increase will be regarded as an interest on the amount he paid."(1) This explanation is supported by the *ḥadîth* narrated by Ibn Ḥibbân, Ibn Abû Shaybah, Aṭ-Ṭabarânî, and other scholars, as a *Mawqûf* (discontinued) *ḥadîth*, stating: *"Two deals in one deal is Ribâ."*(2)

Second opinion: This transaction (implicit *Ijârah*), according to the *Mâlikî* scholars, is not permissible if the usufruct is excluded from the object of the sale and it was large in terms of quantity, period...etc, however, if the usufruct was small, as in the case when one sells a house and excludes its usufruct for a short period, such as three days, or a month, or a year or other periods as stated by other scholars, the transaction would be permissible. This is because insignificant *Gharar* can be tolerated.

If the usufruct (implicit *Ijârah*) is made upon a condition, it is permissible, whether the usufruct is large or small.(3) In this respect, Imam Mâlik said; "There is no problem if the seller of a house makes a condition that he will dwell in such a house (after the sale) for a specified period, i.e. a year or a number of successive months. He may even make a condition that he will dwell in the house for the rest of his life."(4)

(1) *"Tahdhîb Mukhtaṣar Sunan Abû Dâwûd"* [5: 106].

(2) *"Mawârid Aẓ-Ẓam'ân"* by Al-Haythamî (p. 272); *"Al-Muṣannaf"* by Ibn Abû Shaybah [5: 12]; *"Al-Mu`jam Al-Awsaṭ"* by Aṭ-Ṭabarânî (2: 169]; *"Muntakhab Kanz Al-`Ummâl"* [2: 229]; *"Ṣaḥîḥ Ibn Ḥibbân"* [3: 331]; *"Fatḥ Al-Qadîr"* [6: 80 and 81]; *"Al-Mughnî"* by Ibn Qudâmah [6: 333]; and *"Sharḥ Muntahâ Al-Irâdât"* by Al-Buhûtî [2: 163].

(3) *"Bidâyat Al-Mujtahid"* [2: 161]; *"`Uddat Al-Burûq"* by Al-Wansharîsî (p. 418); *"Al-Furûq"* by Judge `Abdul-Wahhâb (p. 85); *"Al-Istidhkâr"* by Ibn `Abdul-Barr [5: 306]; *"Fatḥ Al-Bârî"* [5: 314]; *"Al-Mughnî"* [6: 167]; *"An-Nawawî `Alâ Ṣaḥîḥ Muslim"* [11: 30]; *"Al-Majmû`"* by An-Nawawî [9: 378]; *"Al-Qawânîn Al-Fiqhiyyah"* (p. 264); and *"Iḥkâm Al-Aḥkâm"* by Ibn Daqîq Al-`Îd [3: 171].

(4) *"Al-Istidhkâr"* [5: 306]; and *"An-Nawâdir Wa Az-Ziyâdât"* by Ibn Abû Zayd Al-Qayrawânî [6: 330].

The scholars who permit making such a condition depend on the following *hadîth* narrated by Al-Bukhârî, Muslim, An-Nasâ'î and Ahmad from Jâbir (May Allah have mercy upon him):

> *«The Prophet (Peace be upon him) purchased a camel from him (Jâbir) with the condition that he (Jâbir) might ride it until (he reaches) Medina.»*[1]

Judge `Abdul-Wahhâb Al-Baghdâdî, Al-Wansharîsî and other scholars pointed out the difference in the *fiqhî* ruling between excluding the usufruct and making a condition regarding it, as follows:

> If the seller excludes the use (riding) of the animal for a long period of time, the sale will be affected by *Gharar*, since the buyer in such a case cannot take delivery of the animal until the period is over, though it has been transferred to his possession. This is not the case; however, if the seller makes a condition that he may use the animal for a period of time. This is because in such a case the buyer takes delivery of the animal, making the whole deal as if it were a combination of a sale and *Ijârah*, which is a permissible transaction because the sale and *Ijârah* contracts are not incompatible. This is the difference between the two cases.[2]

Third opinion: It is permissible to sell an asset and make a condition to have (or exclude) its usufruct for a specified period. This is the opinion adopted by the *Hanbalî* scholars, who depend on the *hadîth* narrated from Jabîr:

> *«The Prophet (Peace be upon him) purchased a camel from him (Jâbir) with the condition that he (Jâbir) might ride it until (he reaches) Medina.»*[3]

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(1) *"Sahîh Al-Bukhârî Ma`a Al-Fath"* [5: 314]; *"Sahîh Muslim Bi-Sharh An-Nawawî"* [11: 30]; *"Sunan An-Nasâ'î"* [7: 261 - 263]; and *"Musnad Ahmad"* [3: 229].

(2) *"Al-Furûq"* by Judge `Abdul-Wahhâb Al-Baghdâdî (p. 85); *"`Uddat Al-Burûq"* by Al-Wansharîsî (p. 418); and *"Al-Furûq Al-Fiqhiyyah"* by Abûl-Fadl Ad-Dimashqî (p. 80).

(3) *"Ash-Sharh Al-Kabîr `Alâ Al-Muqni`"* [11: 214]; *"Al-Insâf"* by Al-Mirdâwî [11: 214]; *"Fath Al-Bârî"* [5: 314]; and *"Al-Majmû`"* [9: 369].

In this regard, Ibn Qudâmah said; "It is permissible for the seller to make a condition to use the commodity sold for a specified period, such as when he sells a house and excludes its usufruct (dwelling) for a month, or a camel and makes a condition to ride it to a specified place, or a slave and excludes his usufruct (service) for, say, one year."(1) This opinion has been adopted by Al-Awzâ`î, Ishâq and Ibn Shubrumah.(2) An-Nawawî said; "It has been adopted by four of our scholars of *Hadîth*, namely Abû Thawr, Muhammad Ibn Nasr, Abû Bakr Ibn Khuzaymah, and Ibnul-Mundhir. Also, Ibnul-Mundhir transmitted it from the scholars of *Hadîth*. Moreover, a similar opinion is said to have been adopted by `Uthmân and Suhayb (May Allah have mercy upon them both)."(3)

In his comment on the *hadîth* narrated about Jâbir, Judge Ibnul-`Arabî said; "Al-Awzâ`î, Ahmad and Ishaq see that it is permissible, and it will be like a sale and *Ijârah*." He then added; "If it is a sale and *Ijârah*, there would be no problem."(4)

In the book *"Majmû` Fatâwâ Ibn Taymiyyah"*, it is stated that, "The seller may have a reasonable purpose behind delaying the delivery of the object sold, as in the case when Jâbir sold his camel to the Prophet (Peace be upon him) and excluded its usufruct (riding) until he reached Medina. This is why it is permissible for the selling party to exclude the usufruct of the object of the sale for a reasonable purpose, such as when one sells a house and excludes its usufruct (dwelling) for a specified period, or a camel and excludes its usufruct (riding), or gives an asset as a gift and excludes its usufruct, emancipates a slave and excludes his usufruct (service) for a specified period or for the rest of his (the master's) life, or endows a property and excludes its income (for himself) throughout his life. This is the opinion adopted by Ahmad and other scholars."(5)

(1) *"Al-Mughnî"* [6: 166].
(2) *"Mukhtasar Ikhtilâf Al-`Ulamâ'"* by At-Tahâwî [3: 136]; *"Fath Al-Bârî"* [5: 314]; *"Al-Mufhim"* by Al-Qurtubî [4: 501]; "*`Âridat Al-Ahwadhî"* [6: 10]; and *"Ash-Sharh Al-Kabîr `Alâ Al-Muqni`"* [11: 214].
(3) *"Al-Majmû` Sharh Al-Muhadhdhab"* [9: 378].
(4) "*`Âridat Al-Ahwadhî"* [6: 10].
(5) *"Majmû` Fatâwâ Ibn Taymiyyah"* [20: 545].

In the same regard, Ibnul-Qayyim said; "If one party sells his house or slave to another party, and excludes the usufruct of the object sold for a specified period, the transaction is permissible, as stated by the *fiqhî* texts and confirmed by sound *Qiyâs* (analogical deduction)."[1]

The Chosen Opinion

21- After a careful examination of the three opinions stated above and their arguments, I think that the most correct opinion is that adopted by the *Hanbalî* scholars and the other scholars who agree with them, due to the strength of their arguments and also by drawing an analogy between this issue and that of the permissibility of selling a leased house, since its use by the buyer is certainly excluded. Moreover, the disagreement between these scholars and the *Mâlikî* scholars, on this issue, is a nominal or verbal disagreement, which can be attributed to the different ways of understanding and interpreting the *hadîth* narrated from Jabîr (May Allah have mercy upon him). It is not a real disagreement with regard to the main ideas and arguments introduced by both parties.

My last words are; Allah Knows Best.

(1) "*I'lâm Al-Muwaqqi'în*" [3: 389].

Conclusion

After a detailed analysis of this important *fiqhî* issue and examining the relevant *fiqhî* opinions and arguments, I reached the following conclusions:

1- Leasing the bought asset to its seller can take place either explicitly or implicitly. An example of the first case is when someone sells his house to another, and then leases it from him for a specific period. An example of the second case is when someone sells an asset to another and excludes its usufruct for a specific period. This is because excluding the usufruct in this case represents an implicit form of leasing the asset from its buyer since the usufruct excluded is allotted a portion of the price. Thus, the price of the asset along with the exclusion of the usufruct becomes lower than its normal price, i.e. without the exclusion, and the difference between the two prices represents the price allotted for the excluded usufruct.

2- Leasing the bought asset to its seller can be in one of two forms: An operating *Ijârah* and an *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership or hire-purchase).

3- In the case of an operating *Ijârah*, it can be concluded through three different forms: (a) Without a prior agreement (*Muwâṯaʾah*) or any condition being stated in the sale contract, (b) With a condition being stated in the sale contract, or (c) With a prior agreement (*Muwâṯaʾah*).

a) If it is concluded without any prior agreement (*Muwâṯaʾah*) or any condition being stated in the sale contract, it is permissible, according to the consensus of scholars.

b) If it is concluded upon a condition stated in the sale contract, it is judged according to two *fiqhî* opinions. The first opinion, which is adopted by the majority of scholars, is that it is not permissible. The second opinion, which is adopted by the *Mâlikî* scholars and Ibn Taymiyyah, is that it is permissible. I believe that the second opinion is the more acceptable of the two opinions.

c) If it is concluded through a prior agreement (*Muwâṭa'ah*) between the seller and the buyer, it is permissible, according to the *Mâlikî* scholars and Ibn Taymiyyah of the *Ḥanbalî* school. This is based on the argument that prior agreement (*Muwâṭa'ah*) has the same effect as the condition which is stated within the contract with regard to the binding nature and enforceability, as long as the contract depends upon it, and even if it is not stated in the text of the contract, according to the most acceptable *fiqhî* opinion in this regard.

4- In the case of an *Ijârah Muntahiyah Bit-Tamlîk* (*Ijârah* ending with ownership or hire-purchase), it can be concluded through one of two forms: (a) With a prior agreement (*Muwâṭa'ah*) or a condition being stated in the sale contract, or (b) Without either of them.

a) If it is concluded upon a prior agreement (*Muwâṭa'ah*) or a condition being stated in the contract, and the deferred rent of the object is higher than the cash price for which it was sold, the transaction is void. This is because, in such a case, it turns into a modern form of what is called 'Reverse *'Înah*' in *fiqhî* terminology. In other words, in this form of *'Înah*, the seller has the intention to re-purchase the asset from its buyer (using the subterfuge embodied in the *Ijârah Muntahiyah Bit-Tamlîk* scheme) for a deferred price higher than the cash price for which he sold the asset, which is nothing but a means for incurring an interest-based loan.

b) If it is concluded without a prior agreement (*Muwâṭa'ah*) or any condition being stated in the sale contract, it is subject to the same ruling on 'Reverse *'Înah*' exercised without any prior agreement, trickery, or condition, regarding which the scholars have two different opinions. In my opinion, the view permitting this transaction is more correct.

5- As for leasing the asset implicitly to its seller, such as when one sells his property and excludes its usufruct for a specific period, it can be judged according to three different *fiqhî* opinions, as follows:

First Opinion: It is not permissible in any way. This is the opinion adopted by the *Hanafî* and *Shâfi`î* scholars.

Second Opinion: It is not permissible if it is concluded based upon exclusion, and the excluded usufruct was large. However, if it is concluded with a condition (which is stated in the sale contract regarding the *Ijârah*), it is valid and binding. This opinion belongs to the *Mâlikî* scholars.

Third Opinion: It is permissible in all cases. This is the opinion adopted by the *Hanbalî* scholars Abû Thawr, Ibn Khuzaymah, Muhammad Ibn Nasr, Ibnul-Mundhir, and from the *Shâfi`î* School Al-Awzâ`î, Ishâq, Ibn Shubrumah, and other scholars. In my view, this is the more acceptable opinion.

And Allah (Glorified be He) Knows Best

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Research (12)
Instruments of Investment in Managing and Funding Public Utilities (Proposals for Islamic Banks)

Preface

Topic One: Proposed Investment Formulas

Topic Two: Controls of Legitimacy for the Contractual Systems of the Proposed Investment Formulas

Preface

All Praise is due to Allah, the Lord of the Worlds, and Peace and Blessings be upon our Prophet Muhammad, upon his Household, upon his Companions, and upon those who follow him.

This is a brief paper I delivered at the 5th Conference of Islamic Financial Institutions held in Kuwait, from 5 to 6 March 2005, under the title ***"Instruments of Investment in Managing and Funding Public Utilities"***. I hope that researchers and people concerned with the Islamic banking sector will find new and useful ideas and proposals that will help in developing the contemporary Islamic financial services.

May Allah guide us to the Right Path

Topic one
Proposed Investment Formulas

a) Extension of Public Utility Lines and Networks

This includes building and extending the networks of electricity, telephones, water pipes, sanitation, railroads, etc.

1- It is possible for the Islamic bank to finance the projects of building and extending networks of electricity, telephones, water pipes, sanitation, and the like by means of *Istiṣnâ`* (manufacturing) contracts in return for a determined deferred price paid in full on a specific date or in installments on agreed- upon dates, on the condition that the seller (Islamic bank) should exclude the usufructs of the network contracted upon in the *Istiṣnâ`* contract for ten years, for example. During this period these usufructs should be possessed by the seller (Islamic Bank), who can invest them by means of an *Ijârah* (lease) contract by leasing them to the buyer (the government entity possessing the assets, without their usufructs, under the manufacturing contract) during this excluded period for a pre-determined rent paid annually or monthly. The guarantee of these leased assets during this period of *Ijârah* is shouldered by the lessee (the buyer or the government entity that owns the items), but not the lessor (the seller or the Islamic bank).

2- The basis for the legitimacy of this investment formula is that:

a) This formula is based on the *shar`î* approved *Istiṣnâ`* contract. This is pursuant to resolution no. 65 (3/7) issued by the International Islamic *Fiqh* Academy:

First: That the *Istiṣnâ`* contract which has been mentioned with regard to work and goods on credit is binding on both parties if it meets the basic requirements and conditions.

Second: The *Istiṣnâ`* contract must stipulate the following:

i) The nature, kind, amount and required specifications of the product to be manufactured.

ii) The time limit involved.

Third: In the *Istiṣnâ`* contract, payment may be deferred in full or scheduled according to pre-determined installments and specific due dates.

Fourth: The *Istiṣnâ`* contract may include a penalty clause, if so agreed by the two contacting parties, subject to the case of "force majeure."

b) This formula is based on the legitimacy of the seller excluding the usufructs of the sold object for a specific period of time. Ibnul-Qayyim said; "It is permissible for a person to sell to another a house, a slave or a commodity with the stipulation of excluding the usufructs of the sold object for a specific period of time, as stated in the *shar`î* texts, traditions, and according to *Maṣlaḥah* (interest) and sound *Qiyâs* (analogical deduction)."(1) Ibn Qudâmah said; "It is allowed for the seller to stipulate the exclusion of the usufructs of the sold object for a specific period of time, such as when he sells a house and stipulates dwelling in it for a month, a camel and stipulates that he uses it until he reaches a specific place, or a slave and stipulates employing his services for a year. Aḥmad, Al- Awzâ`î, Isḥâq, Abû Thawr and Ibnul-Mundhir held the same view. This is stated in the *ḥadîth* narrated by Jâbir which states that he sold the Prophet (Peace be upon him) a camel and stipulated using it until he reached Medina. In another narration Jâbir said; "So I sold it to him (the Prophet) for an ounce of gold, and made a stipulation that I should be allowed to ride it back to my family." This is an agreed upon *ḥadîth*.(2) In another narration related by Muslim,(3) Jâbir said; "I sold it (to the Prophet) for five

(1) *"I`lâm Al-Muwaqqi`în"* [3: 389].
(2) *"Ṣaḥîḥ Al-Bukhârî"* [3: 248]; and *"Ṣaḥîḥ Muslim"* [3: 1221].
(3) *"Ṣaḥîḥ Muslim"* [3: 1223].

ounces of silver." Jâbir added; "I said; 'Provided that I ride it back to Medina.' The Prophet (Peace be upon him) replied; 'You have its ride until (you reach) Medina.'" Moreover, the Prophet (Peace be upon him) forbade *Thunyâ* (exclusion sale) unless the excluded part is well-defined,(1) and the part excluded here is well-defined. Further, it is possible for the exclusion of the usufruct to be imposed upon the buyer by the *Sharî`ah*, as in the case when someone buys a pollinated palm tree, a cultivated piece of land, a leased house, or a married female slave. In this case, the buyer accepts the sale as it is, i.e. with the usufruct excluded, as in the case when the seller makes a condition entitling him to the fruits (usufruct) of the tree before pollination."(2)

c) This formula is based on the permissibility of the seller (who stipulated the exclusion of the usufruct of the sold object for a specific period) to rent the usufruct of the sold object to its buyer or to someone else during the period the usufruct is excluded, according to the soundest opinion of the *Hanbalî* School. This is because such a transaction conforms to the general *shar`î* rules on contracting. This is also the case because of the absence of any contradiction and inconsistency in the rulings and effects in terms of the combination between a sale and a lease for the same person in this transaction, due to the fact that the two contracts were not concluded on the same object at the same time.

In his *"Al-Mughnî"*, Ibn Qudâmah said; "If the seller stipulates excluding the usufruct of the sold object for himself, and the buyer wants to give him an equivalent usufruct or a compensation in exchange for it, he (the seller) is not forced to accept this offer and he should receive the usufruct of the sold object itself, as stated by Ahmad. This is because this usufruct, in particular, is the right of the seller, and accepting another will be like when one party leases an object but the other gives him something else which is similar. Moreover,

(1) Related by Abû Dâwûd, At-Tirmidhî and An-Nasâ'î. (*"Sunan Abû Dâwûd"* [2: 235]; *"`Âridat Al-Ahwazî"* [5: 290]; and *"Sunan An-Nasâ'î"* [7: 260]).

(2) *"Al-Mughnî"* [6: 167]; *"Ash-Sharh Al-Kabîr `Alâ Al-Muqni`"* [11: 214]; and *"Al-Insâf"* by Al-Mirdâwî [11: 214].

the seller may have a specific purpose behind the use of this particular usufruct, and thus he should not be forced to accept its compensation. However, if they (the seller and the buyer) agreed to such an offer, it would be permissible, because this is their undeniable right."[1] "If the seller said to the purchaser: 'I sell you this house and rent it to you for a month,' it would be impermissible because the buyer should possess the usufructs of the sold object once it has been sold to him. Accordingly, if he rents the house to the buyer, then the seller stipulates for himself a compensation in exchange for an object already possessed by the buyer, this is impermissible. However, it would be permissible if there was a condition stipulating that the seller receives the usufructs of the sold object."[2]

In *"Al-Mubdi`"*, it is stated; "The seller may lease or lend the usufructs he excluded from the sold object."[3]

In *"Kashshâf Al-Qinâ`"* by Al-Buhûtî, it is mentioned: "Judge `Iyâḍ said; 'If the seller said to the buyer: 'I sell you my house, and rent it to you for a month at one thousand dirhams', the two transactions are invalid because the one who owns the object possesses its usufructs too. Accordingly, it is invalid for someone to rent a usufruct which is actually in his possession. But I say: 'This transaction may be valid if the usufruct is excluded from the sold object as stated by Sheikh Taqiyyud-Dîn in *"Sharḥ Al-Muḥarrar"*'."[4]

In *"Al-Istikhrâj"* by Ibn Rajab, it states; "Ibn `Aqîl mentioned an opinion that permits selling a commodity and then leasing it from the buyer for a specific period, using one contract for both the sale and *Ijârah* transactions. This is based on the fact that the seller excludes the usufruct of the sold object from the sale, and then leases it to the buyer."[5]

It is clear that the view of Al-Buhûtî and the argument of Ibn Qudâmah and Ibn `Aqîl are based on a rule which is held to be effective in their School, namely when the seller excludes the usufruct of the sold object for

(1) *"Al-Mughnî"* [6: 169]; and *"Ash-Sharḥ Al-Kabîr"* [11: 219].
(2) *"Al-Mughnî"* [6: 170]; and *"Ash-Sharḥ Al-Kabîr"* [11: 220].
(3) *"Al-Mubdi`"* [4: 54].
(4) *"Kashshâf Al-Qinâ`"* [3: 168].
(5) *"Al-Istikhrâj Li-Aḥkâm Al-Kharâj"* (p. 247).

a specific period, he is allowed to rent this usufruct to the buyer during this period. This view is supported in *"Kashshâf Al-Qinâ`"* as follows:

> "The third type of valid condition is when the seller stipulates for himself a lawful specific usufruct, other than sexual intercourse or foreplay, of the sold object, such as dwelling in the sold house for a month or for more or less than that, and using the camel or the like until reaching a specific place; this is valid. Further, the seller may lease or lend the excluded usufruct to anyone else, such as when the lessee of an object leases or lends it to someone else. If the buyer wants to give the seller another usufruct which is equivalent to the usufruct of the sold object, or to give him compensation in exchange for it, the seller is not forced to accept this offer and he should receive the usufruct of the sold object itself, because this usufruct, in particular, is the right of the seller. However, if they (the seller and the buyer) agreed to such an offer (of the seller receiving another usufruct or its compensation), it would be permissible, because this is their undeniable right."(1)

d) The guarantee of the rented assets during the period of the lease is carried by the lessee who has possessed these assets through the first sale contract, because they are in his possession and under his control.

b) Building and Managing Airports and Seaports

3- It is possible for the Islamic bank to finance the projects of building airports and seaports by means of an *Istiṣnâ`* (manufacturing) contract, so that the price consists of: A principal amount of cash which is specified and deferred to a specific date, or scheduled for pre-determined installments paid in accordance with the installment system set forth in the agreement, and the fees and revenues of these ports for five or ten years, for example, or a percentage of the total amount of these fees and revenues during the period agreed upon.

4- The Islamic bank can finance the projects of building and managing these assets by means of *Istiṣnâ`* (manufacturing) contracts in return for a determined deferred price paid in full on a specific date or in installments on particular dates according to the agreed upon system of installment,

(1) *"Kashshâf Al-Qinâ`"* [3: 179 and 180].

on the condition that the seller (Islamic bank) excludes the usufructs of these assets for ten years, for example. During this period these usufructs should be possessed by the seller (Islamic Bank), who can invest them through one of two ways, as follows:

a) The seller (the Islamic bank) collects fees in return for the use of these usufructs.

b) The seller (the Islamic bank) can lease these excluded usufructs for a specific period it stipulates to the government entity possessing these assets through an *Istiṣnâ`* contract in return for a pre-determined rent paid annually or monthly. After that, the government entity undertakes the task of managing and operating these airports and seaports, and their revenues are the right of the government entity. Moreover, the guarantee of these leased assets should be shouldered by the lessee (the government entity), because it possesses these assets and has control over them by means of the *Istiṣnâ`* contract concluded before the lease contract.

5- The basis for the permissibility of financing the projects of building and managing these ports (as illustrated in Note 3) by means of an *Istiṣnâ`* (manufacturing) contract, despite the fact that the contract involves *Gharar* and ignorance regarding the price (occurring in the total amount of fees and revenues of these ports which the buyer deserves in full or a percentage thereof during the period of the contract) is that the significant *Gharar* in financial commutative contracts is the one which relates originally to the object of the sale, but not to a subsidiary object, since the *Gharar* involved in subsidiary and implied objects is *shar`î* pardonable. Yet, the issue discussed here involves no *Gharar* or ignorance about the original determined or deferred price paid in full on a specific date or in installments on agreed- upon dates; rather, the ignorance or *Gharar* is involved in the subsidiary part of the price relating to the fees and revenues of operating and managing these ports during the period set forth in the agreement, a matter which is *shar`î* pardonable, as stated in the general *fiqhî* Maxims: "Things that cannot be excused in original matters can be pardoned in subsidiary ones",(1) "Things

(1) Article no. (54) of *"Majallat Al-Aḥkâm Al-`Adliyyah"*; and *"Al-Ashbâh Wa An-Naẓâ'ir"* by As-Sayûṭî (p. 120).

that cannot be pardoned in independent matters can be pardoned in implied ones",[1] "Things that cannot be excused in principal and appurtenant matters can be excused in implied and subsidiary matters",[2] "Purposes that cannot be allowed independently can be allowed when only implied in a contract",[3] and "What can be permitted when it is an implicit object may not be permitted when it is the main intended object".[4]

The proof of pardoning the *Gharar* and ignorance involved in the subsidiary object of a sale is the *ḥadîth* related by Al-Bukhârî, Muslim, Abû Dâwûd, At-Tirmidhi, An-Nasâ'î, Ibn Mâjah, Mâlik and Aḥmad from Ibn `Umar which states that the Prophet (Peace be upon him) said:

> *«He who buys a tree after it has been fecundated; its fruit belongs to the one who sells it, except when a provision has been laid down by the buyer (that it will belong to him).»*[5]

This *ḥadîth* indicates that the reason behind pardoning *Gharar* and ignorance about the fruits purchased before the appearance of their ripeness, which the buyer stipulated for himself, is that the fruits are subsidiary. That is, the fruits are implied in the contract, but they are not the original object of the sale.

Ibn Qudâmah pointed this meaning out, after citing the consensus on permitting the sale of the fruits (before the appearance of their ripeness, without the condition that they be harvested straight away) in combination with the tree as stated in the *ḥadîth* narrated by Ibn `Umar, saying: "Because if he sold it (the fruits) with the tree, it will be only implied in the sale contract. So the *Gharar* involved is pardonable because it is insignificant, just as excusing the ignorance in selling the milk in the sheep's udder along with the sheep, and in selling the seeds inside the dates along with the dates, and in selling the (hidden) foundations of the house along with the house.

(1) *"Fatâwâ Ar-Ramlî"* [2: 115].
(2) *"Zâd Al-Ma`âd"* [5: 825].
(3) *"Al-Manthûr Fî Al-Qawâ`id"* by Az-Zarkashî [3: 376].
(4) *"Radd Al-Muḥtâr"* [4: 170].
(5) *"Saḥîḥ Al-Bukhârî Ma`a Al-Fatḥ"* [5: 49]; *"Saḥîḥ Muslim Bi-Sharḥ An-Nawawî"* [10: 191]; *"Sunan Abû Dâwûd"* [2: 240]; *"`Âriḍat Al-Aḥwadhî"* [5: 252]; *"Sunan An-Nasâ'î"* [7: 260]; *"Al-Muwaṭṭa'"* [2: 617]; *"Sunan Ibn Mâjah"* [2: 745]; *"Musnad Aḥmad"* [2: 6, 9, 54, 63, 78, 102, 150, and 5: 326].

Further, *Gharar* relating to the original object of the sale invalidates the contract. However, if they (the tree and the fruits) are sold together, the fruits become subsidiary; and the *Gharar* involved in the subsidiary, but not the original object of a sale, may be pardoned."(1)

An-Nawawî said; "The scholars unanimously permit the sale of an animal with the milk in its udder even if the quantity of this milk is unknown, because it is subsidiary to the animal."(2) Ibn Qudâmah confirmed the permissibility of selling the animal with the milk in its udder, saying; "The milk is the reason for buying the animal and it takes a part of the price… it is not allowed to sell it independently only due to the unknowability involved, but unknowability about subsidiary objects is pardonable."(3)

The basis for the permissibility of the second investment formula set forth in Note (4) has been previously mentioned in Notes (2/b, 2/c, and 2/d) of this research.

c) Building and Managing Plants for Water Desalination and Electricity Generation

6- It is possible for the Islamic bank to finance the projects of building plants for water desalination and electricity generation by means of an *Istiṣnâ`* (manufacturing) contract, so that the price consists of: A principal amount of cash which is specified and deferred to a specific date, or scheduled for pre-determined installments paid in accordance with the installment system set forth in the agreement, and the fees of the water and electricity collected from users for five or ten years, for example, or a percentage of the total amount of these fees during the period agreed upon.

7- The Islamic bank can finance the projects of building and managing these assets by means of *Istiṣnâ`* (manufacturing) contracts in return for a determined, deferred price paid in full on a specific date or in installments on agreed-upon dates, on the condition that the seller (Islamic bank) excludes

(1) *"Al-Mughnî"* [6: 150].
(2) *"Al-Majmû`"* [9: 236].
(3) *"Al-Mughnî"* [6: 239].

the usufructs of these assets (i.e. the produced water and electricity) for ten years, for example. During this period these usufructs should be possessed by the Islamic Bank, which can invest them in one of two ways, as follows:

a) The seller (the Islamic bank) collects fees from users during the agreed upon period in return for the water and electricity provided.

b) The seller (the Islamic bank) leases these excluded usufructs for a specific period it stipulates to the government entity possessing these assets or these plants through *Istiṣnâ`* contracts in return for a pre-determined rent paid annually or monthly. After that, the government entity undertakes the task of managing and operating these plants, and sells the water and electricity produced to the customers. The revenues generated during the agreed upon period of lease go to the government entity as a compensation for the usufructs it owned under the lease contract. Moreover, the guarantee of these leased assets should be shouldered by the lessee (the government entity), because it possesses these assets and has control over them.

The basis for the legitimacy of the two formulas set forth in Notes (6 and 7) is the same basis for the permissibility of the two formulas set forth in Notes (3 and 4) and illustrated in Note (5) due to the absence of any difference between them, so there is no need for any repetition here.

8- It is worth explaining here that the usufruct of the electricity generation plants is the electricity produced therefrom. This usufruct is real because it is the product which is dependent on the plants and independent assets.

As for the usufruct of water desalination plants, it is the desalinated water produced therefrom. In the view of the *Sharî`ah*, they are both constructive usufructs, such as the milk in the breast of a nursing woman which, in spite of being considered as an asset, is a constructive usufruct, and leasing the nursing woman for her milk is permitted by Allah's Saying:

> ***{"Then if they give suck to the children for you, give them their due payment,..."}***
>
> [At-Talâq (The Divorce): 6]

The rule here, as stated by Ibn Taymiyyah, is: "The benefit generated progressively from a continuous source is to be considered as a usufruct";[1] and "The Principles of Islamic *Fiqh* confirm that the benefits generated steadily from a renewable asset take the ruling of usufructs, such as the fruits generated from trees and the milk generated in the udder of animals."[2]

d) Building and Managing Bridges and Tunnels

9- It is possible for the Islamic bank to finance the projects of building and managing bridges and tunnels by means of an *Istiṣnâ`* (manufacturing) contract, so that the price consists of: A principal amount of cash which is specified and deferred to a specific date, or scheduled for pre-determined installments paid in accordance with the installment system set forth in the agreement, and the fees received from the vehicles using these tunnels and bridges for three years, for example, or a percentage of the total amount of these fees during the period agreed upon.

10- The Islamic bank can finance the projects of building and managing these assets by means of *Istiṣnâ`* (manufacturing) contracts in return for a determined, deferred price paid in full on a specific date or in installments on agreed-upon dates, on the condition that the seller (Islamic bank) should exclude the usufructs of these assets for three years, for example. During this period these usufructs should be possessed by the Islamic Bank, who can invest them through one of two ways, as follows:

a) The seller (the Islamic bank):

1- collects fees from the vehicles using these bridges and tunnels during the agreed upon period.

2- in this case, may issue *Ijârah* (lease) *Sukûk* for these usufructs during this period and float them to the public to obtain their value in advance. The revenues of these *Sukûk* go to their owners and these *Sukûk* should be negotiable in secondary markets.

(1) *"Al-Qawâ`id An-Nûrâniyyah Al-Fiqhiyyah"* (p. 150).
(2) *"Majmû` Fatâwâ Ibn Taymiyyah"* [20: 550].

b) The seller (the Islamic bank) leases these excluded usufructs for the specific period stipulated to the government entity possessing these assets through an *Istiṣnâ`* contract in return for a pre-determined rent paid annually or monthly.

11- The basis for the legitimacy of the two formulas set forth in Notes (9 and 10) has been previously mentioned in Note (5) of the present research, excluding the issue of the *Ijârah Ṣukûk* of the usufructs of the bridges and tunnels explained in Note (10/a). The basis for the legitimacy of this issue is: It is established in the *Sharî`ah* that the requirement of selling the usufructs in the contract of leasing assets is to transfer the ownership of these usufructs from the lessor to the lessee. The majority of *Faqîhs*, including Mâlik, Ash-Shâfi`î, Aḥmad and others, hold the view that it is allowed for the lessee to rent the asset to a third party (i.e. sell the usufructs of the asset possessed by the first lease contract under a new lease contract) in return for a rent which could be more, less or equal to the rent he paid for them in the first contract.(1)

Consequently, if it is allowed for the lessee to sell the usufructs of the rented asset to a third party for a rent which could be more, less or equal to the rent he paid for them in the first contract because he has possessed these usufructs under the lease contract, and if it is allowed for the second/third/fourth...etc lessee to sell these usufructs as well, then it is permitted to issue *Ijârah Ṣukûk* for the usufructs of the leased asset to the users of these bridges and tunnels, and to transfer the ownership of the *Ṣukûk* of these usufructs by selling them for a price which could be more, less or equal to the price at which the lessee (the owner of *Ṣukûk*) bought these *Ṣukûk*. This is because these *Ṣukûk* represent the ownership of contracted upon usufructs. The owner of each *Ṣakk* deserves his common share of the revenues and fees received from the users of these bridges and tunnels starting from the purchase date of the *Ṣakk*, according to the provisions and period set forth in the issuance agreement. This is due to the fact that each *Ṣakk* represents a specific common share of the ownership of the lease usufructs for which these *Ṣukûk* have been issued, such as 1%, ¼% or the like.

(1) *"Al-Mughnî"* [8: 56 and 57]; *"Al-Ikhtiyârât Al-Fiqhiyyah Min Fatâwâ Ibn Taymiyyah"* (p. 152); *"Bidâyat Al-Mujtahid"* [2: 229]; *"Al-Kâfî"* by Ibn `Abdul-Barr (p. 370); and *"Al-Ma`ûnah"* by Judge `Abdul-Wahhâb [2: 1096].

Topic Two
Controls of Legitimacy for the Contractual Systems of the Proposed Investment Formulas

12- In the methods of operating Islamic banks, it is known that the investment formulas proposed for managing public services, set forth in Notes (1, 4/b, 7/b, 10 (a/2), 10/b), should be effected through modern contractual systems in which each transaction (agreement) includes a group of contracts and undertakings that are successive, linked together and designed to perform a specific function according to a set of previously agreed upon conditions that cannot be changed. The overall aim is to achieve the intended goal or interest of the contracting parties.

13- These contractual systems are subject, in terms of formulation, provisions, requirements and conditions, to the general *shar`î* rules of contracting, since they are newly-invented independent transactions, and should conform with the *Sharî`ah* controls regarding concluding more than one contract in one deal. When these conditions and controls are fulfilled, these transactions are valid, enforceable and binding, because the original ruling for combining more than one contract or obligation in one transaction is that it is permissible as long as each contract or obligation is permissible on its own. However, if there is a *shar`î* proof prohibiting any one of the combined transactions, the

combination as a whole will be deemed prohibited, as an exception to the original ruling. The *Sharî`ah* controls regarding combining contracts are four:

First: The contracts shall not be combined when there is any *shar`î* prohibition for such a combination, as the prohibition of the Prophet (peace be upon him) to conclude a sale conditional on lending, or conclude two deals in one.

Second: The contracts shall not be combined as a means of a stratagem to take *Ribâ*, such as colluding to practice an *`Înah* (buy back) sale or *Ribâ Al-Fadl* (excess usury).

Third: The contracts shall not be combined as a pretext for practicing *Ribâ*, as in combining between loan and commutative contracts, or as in lending someone money provided that the borrower allows him to dwell in his house, grants him a present or pays the debt off with an increase in terms of quantity or quality.

Fourth: The contracts shall not be combined when they contain any disparity or contradiction with regard to their provisions and effects, as in the case of granting an asset to somebody as a gift and at the same time selling/leasing it to him, or combining *Mudârabah* with lending the *Mudârabah* capital to the *Mudârib*, or currency exchange with *Ja`âlah*, or *Salam* with *Ja`âlah* for the same value.

Since these *Sharî`ah* controls are fulfilled and their requirements in the proposed investment formulas are observed, the contractual systems (agreements) representing the practical aspect of these formulas are valid, enforceable and binding, as long as the general *shar`î* rules of contracting are maintained. Also, the undertakings set forth in the agreements are *shar`î* binding on the two parties because they rank as conditions linked to the contract, and because if these undertakings were not binding, the goal of concluding this transaction would be uncertain and contingent on the occurrence of an uncertain event, and accordingly the two parties would not have taken the risk to become involved in them.

Further, the modern commercial banking practice (acceptable to the *Sharî`ah*) has been established on the fact that prior agreement (*Muwâṯa'ah*) preceding the transaction is enforceable and binding to the two parties. This is because violating any term or provision of its structure defeats its purpose and inflicts severe damage upon either or both of the two parties.

Transliteration System

Arabic Character	Symbol	Example
ء	’	*`Ishâ’*
أ	*a*	*Amen*
ب	*b*	*Bad/Bilâl*
ت	*t*	*Tap/Tasmiyah*
ث	*th*	*Think/Thaqîf*
ج	*j*	*Jew/Janâbah*
ح	*h̲*	*Muh̲ammad*
خ	*kh*	*Al-Bukhârî*
د	*d*	*Day/Diyah*
ذ	*dh*	*Dhul-H̲ijjah*
ر	*r*	*Far/Ribâ*
ز	*z*	*Zero/Zayd*
س	*s*	*Say/Sura*
ش	*sh*	*Show/`Ishâ’*
ص	*s̲*	*`As̲r*
ض	*d̲*	*Ifâd̲ah*
ط	*t̲*	*T̲awâf*
ظ	*z̲*	*Z̲uhr*
ع	`	*Rak`ah*

Arabic Character	Symbol	Example
غ	*gh*	*Maghrib*
ف	*f*	*Faith/fatwa*
ق	*q*	*Qur’ân*
ك	*k*	*Kill/Ka`ba*
ل	*l*	*Qiblah*
م	*m*	*Man/Marwah*
ن	*n*	*Noah/Nasî’ah*
هـ	*h*	*Has/Hilâl*
ة	*h/t*	*Zakâh/Zakâtul-Fit̲r*
و	*w*	*Way/Witr*
ي	*y*	*Yard/Talbiyah*
ـَ	*a*	*Fad̲l*
ـِ	*i*	*Fiqh*
ـُ	*u*	*Sunnah*
آ	*â*	*Âdam/Siwâk*
ـُو	*û*	*Dâwûd*
ـِي	*î*	*H̲adîth/H̲anafî*
ـَو	*aw*	*`Awrah*
أي	*ay*	*Ayman*

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