

## **SALAM (FORWARD SALE) AND ISTIṢNA' (MANUFACTURE CONTRACT) IN MODERN APPLICATIONS: A MAQĀSID AL-SHARĪ'AH PERSPECTIVE**

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### **ABSTRACT**

*The modern application of Salam such as parallel Salam and combination of Salam with wa'd (promise) exposes Islamic financial institutions (IFIs) to risks—credit risk, market risk, and operational risk. Modern applications of Istiṣna' by financing houses and projects in the form of parallel-Istiṣna' and Istiṣna' based BOT (buy, operate and transfer) has exposed the IFIs to hazards such as delayed and incomplete projects. This paper explores the extent to which modern applications of Salam and Istiṣna' support the maqāsid al-Sharī'ah. The study suggests new terms and conditions to minimise the risks if not eliminate them. It advises IFIs to become Istiṣna' contractors in the real economy rather than on paper only. Salam should not be a near-replica of speculative and risky future contracts. If adjustments are not made in modern application of both contracts, the contracts risk jeopardising the very purpose of the Sharī'ah.*

Key words: *Salam, Istiṣna', maqāsid al-Sharī'ah, specific purpose, essential purpose, was'īl (means), terms and conditions, option of viewing (khiyār al-ru'yah).*

### **Introduction**

Nominal contracts (*al-'uqūd al-musammāt*) of the *Sharī'ah* are one of the backbones of Islamic financial Institutions (IFI's). The question still remains unanswered when asked why IFI's rely so much on nominal contracts instead of constructing new contracts from scratch (non-nominal contracts). Is it because nominal contracts will make their financing-products more *Sharī'ah* compliant, or because it is more convincing, or because of some other reason? Whether we can answer these questions or not, one point is obvious and i.e. the IFI's are not applying the nominal contracts for its traditional purposes. This point is the primary objective of this paper. The traditional purpose was to apply those contracts as exchange-trades (*mu'āwadhāt*). The IFI's either with or without modifications are applying these contracts for financing purposes. This is a great transition and requires a different type of study to evaluate the *Sharī'ah*-value of the new/modern applications of these contracts. Then in this transition, some nominal contracts are utilised more compared to the others. Here again a different type of study is required to explain which type of the contract is suitable for a specific circumstance. Applying one or two nominal contracts for all different circumstances under the heaven will lead to misappropriation of the contracts. The best study which can evaluate the values of the modern applications and which can select a contract for certain circumstance is *maqāsid*-study. Having said this, one paper is not capable to do a detailed investigation of all the nominal contracts. Case by case study will be a more logical way to go. Thus this paper concentrates on two contracts namely *Salam* (forward sale) and *Istiṣna'* (manufacture) contracts. Using *maqāsid*-study, the paper tries to solve two problems; evaluation of the modern application of the two contracts and explanation of suitable circumstances these contracts can be applied for.

The standard *Sharī'ah*-ruling in exchange-contracts is spot delivery—handing over the commodity upon receiving the payment. An exception to this rule is given to *Salam* (forward sale) and *Istiṣna'* (manufacture contract) in which payment is received before delivery. This paper begins by discussing the definitions of the contracts presented by the major legal schools to identify the *maqāsid* (purposes) of the *Sharī'ah* that secured this special status for these contracts. These purposes are discussed against selected modern applications of the contracts, against the purpose of terms and conditions of the contracts, and against the purposes of sales and transactions.

Modern applications of *Salam* and *Istiṣna'* have surpassed the traditional modes and forms of contracts. This is particularly so where the contracting parties are institutions rather than individuals, and where both contracts are applied for financing rather than treated merely as an exchange trade contract. The drift from the traditional to modern forms of both contracts has produced inconsistency within the substance of the contracts. This is where *maqāsid*-studies intervene. It plays the role of yardstick to measure and understand the gulf between form and substance of the contracts in modern applications. The *maqāsid* approach offers Islamic financial institutions (IFIs), *Sharī'ah* committees, and consultants, better command to improvise or compromise to maintain the *Sharī'ah* compliance of modern applications.

### **SALAM AND ITS MAQĀSID AL-SHARĪ'AH**

#### **(a) Definition of Salam**

*Salam* is defined according to the Shāfi'i legal school as, "Sale of a well-defined commodity to be delivered by the seller in the future". For the Hanbali School, *Salam* is, "to pay at present a price for a well-defined commodity that remains a liability on its seller until he delivers it at a definite future time". According to the Hanafī legal school, *Salam* denotes, "sale of a deferred commodity for a present price or purchase of a deferred commodity for a present price". The Maliki School defines *Salam* as,

“An exchange contract according to which one of the two parties becomes indebted to the other, while his indebtedness is neither linked to a good that exists at present nor to a usufruct, and the contract involves exchange of two dissimilar commodities” (M. A. Halim Umar, p. 18).

### (b) *Maqāsid of Salam*

These definitions converge on the point that *Salam* is a contract in which the payment of the price is made in advance, while the delivery of the commodity is deferred. The purpose of all sales is to exchange benefit for an asset in possession. *Salam* deals with a situation where the buyer and seller can exchange benefit in return for something not in possession. The general purpose of *sharī'ah* in sale is realisation of benefits (*maṣāliḥ*) for the people. This purpose benefits the *Salam* contract, but to understand the specific and essential purposes of *Salam*, one needs to look into the legal justifications of the contract in question. When the Prophet <sup>sallāllāhu</sup> <sub>alayhi wa sallam</sub> migrated to Medina, the Arab traders used to pay in advance the price of dates to be delivered within two to three years. The Prophet <sup>sallāllāhu</sup> <sub>alayhi wa sallam</sub> refined their contract and said to them, “Whoever signs a *Salam* contract for something, should sign it for a specified measure, specified weight and specified period” (al-Baghwi, 2003, hadith no. 2118, p. 328).

There is a general ruling prohibiting a sale due to absence of the goods which is the exact benefit for the purchaser. This ruling is based on a hadith quoted by Alā' al-Dīn al-Kasānī (d. 587 A.H.) that, “The Prophet <sup>sallāllāhu</sup> <sub>alayhi wa sallam</sub> prohibited sale of goods not available with the seller and permitted (*rakkkhasa*) the *Salam*” (al-Kasani, vol. 4, p. 430). The word “*rakkkhasa*” derived from the root-verb *tarkhīs* means to give concession. Despite the general prohibition due to absence of the goods, the Prophet <sup>sallāllāhu</sup> <sub>alayhi wa sallam</sub> gave concession to the *Salam* contract, but with conditions. The earlier hadith shows that he stipulated the permission with two conditions. One condition relates to the goods and the other to delivery. The legal interpretation of these conditions unwinds the *Sharī'ah purposes* and the conditions the *Salam* serves or is supposed to serve. Hence the jurists opine that not specifying the measurement and the weight of the commodity, and not specifying the delivery date will lead to uncertainty.

Uncertainty opposes clarity (*wuḍūḥ*) and lack of clarity in ownership, contracts, and transactions can lead to loss of life and property (‘Izz al-Dīn Ibn Zaghībāh, 2001, Chapter 3). Clarity in transactions is vital for the preservation of property (*hiḏz al-māl*) which is one of the essential purposes of the *Sharī'ah*. Without clarity, conflict will arise amongst the contracting parties leading to confusion in ownership of the goods and inflicting other forms of harm (*maḡāsīd*). The great Yemeni scholar al-Shawkānī's (d. 1834) supported this when he said that the reason why the Prophet <sup>sallāllāhu</sup> <sub>alayhi wa sallam</sub> subjected the *Salam* contract to such conditions was in order to prevent *al-gharar* (uncertainty) (al-Shawkānī, 2005, vol. 1, pp. 5-6). What should be noted here is that by prohibition of *riba*, the companions of the Prophet could not borrow usurious loans, but they still needed money in order to trade, grow crops, and feed their family. A complete illegalising of any form of borrowing including *Salam* would have imposed intolerable hardships, so the *Sharī'ah* permitted them to sell their goods yet to deliver and use the advance money for their needs (M. T. Usmani, p. 2). This shows that if *Salam* was not permitted, the essential purpose which is protection of life and property would not have been secured.

Through the *Salam* contract, the essential purpose is realised, not only by serving the needs of the seller, but also serves the buyer by allowing him to buy the goods for a cheaper rate. The buyer would have had to pay more for the same goods in a spot sale. This purpose can be understood by a quotation from *al-Mughni* which states:

... and because people need *Salam* as, for instance, owners of farms, orchards, and trade undertakings need to make personal spending as well as spending on their business, they are permitted to deal in *Salam* so that they can benefit from the finance while the financier gets a cheaper commodity (M. A. H. Umar, p. 25).

### (c) *Salam as a Means (wasīlah) for the Preservation of Wealth*

*Salam* as a sale contract is a means by which the end i.e. essential purpose of *Sharī'ah* can be achieved namely preservation of wealth which caters for marketability, transparency, preservation, durability, equity, and development (*tanmiyah*). Basing on Ibn Ashur's (2007) proposition, “the means to the best ends are the best means, the means to the worst ends are the worst means” one needs to see how far these six sub-headings of wealth preservation can be realised by *Salam* (p. 224). M. A. H. Umar (p. 97) in discussing the economics of *Salam* writes that *Salam* has the potential for short-term financing such as financing the agricultural products which has the cycle of “one year production”, long-term financing such as financing fixed assets, “possibility of indirect liquidation of a *Salam* operation before maturity” where the buyer/IFIs can sell the same commodity purchased on *Salam* in a separate *Salam* contract, obtaining reasonable profit because price in a *Salam* contract is less than the price in a spot sale.

*Salam* reduces the financial burden compared to the burden the borrower bears in interest-based borrowing such as deduction of predetermined interest from the principle loan and no consideration if unforeseen circumstances befall the borrower (M. A. H. Umar, 2007, p. 97). *Salam* promotes just distribution because both parties in a *Salam* contract mutually agree on their rights without exploitation in contra to interest-based financing (Ibid.). *Salam* financing encounters inflationary effects especially the deterioration of the purchasing power of the cash during the period between lending the loan and its repayment (Ibid., p. 99). It enhances production, because the producer is financed in advance to produce the goods on time. It can also boost “productive units” which will add to the capacity of the national economy, and secures the stability of production, minimises the production costs, and activates the commodity markets (Ibid., p. 100-101). These factors support that *Salam* is a good means to assist in preserving wealth. And since *Salam* has its roots in the Qur'an and the Prophetic traditions, one could say that it is a legal means (*al-wasā'il al-Sharī'ah*) by which the purpose of the *Sharī'ah* can be manifested.

### (d) *Maqāsid Pertaining to the Terms and Conditions of Salam*

Preservation of wealth is the essential purpose of *Salam* as it is for other sale contracts. Terms and conditions (*shurūṭ wa qayūd*) are two mechanisms which protect and realise this purpose and the specific purpose of each contract including *Salam*. For this reason, the two are also known as the ‘means of the means’ (*wasā’il al-wasā’il*). Both assist the *Salam* to sustain its purpose and protect it from opposing elements.

One of the central conditions in *Salam* contract is related to price payment (*ra’su l-māl*). The price has to be paid before the separation of the two contracting parties. This is because the specific purpose of *Salam* is to fulfil the instant need of the seller (*muslam ilayhi*). If the price is not paid on the spot, the seller’s instant need would not be met. The Hanafī, Shafī’i, and Hanbali schools hold to this opinion except some Maliki jurists. They allow delaying the payment of the price up to three days or more. However, deferment in the Maliki School has to be within a period counted as part of the contract signing session. A deferment period of the commodity is not accepted (M. A. H. Umar, 2007, 30; M. T. Usmani, p. 3; Securities Commission Malaysia, p. 9; al-Zuhayli, 2007, vol. 5, p. 3608). Non-compliance with this condition will lead to sale of debt in exchange of debt (*dayn bi dayn*) (al-Kasani, vol. 4, p. 433). Ibrāhīm al-Nakha’ī (d. 96 A.H) commented of a person who was owed money decided to put the amount owed as the price in a *Salam* contract, “There is no goodness in this contract...” Muhammad b. Hassan al-Shaybani (d. 189 A.H.) while commenting on this said that this is the opinion preferred by our school because such a contract comes under the rubric of debt in exchange of debt (al-Shaybani, report no. 740, p. 173).

Another central condition in a *Salam* contract, which is clearly taken from a hadith is, “specific measurement and weight (*fi kayl ma’lūm wa wazn ma’lūm*).” This condition has two purposes. The first purpose is to ensure that the *Salam* contract is not on a commodity which is ambiguous. It should be something that can be specified in terms of quality and quantity—weight, measurement, number, quality, type, etc. If this condition is fulfilled, it will eliminate ignorance arising from the material attributes of the commodity (*ma’lūm’an al-majhūl*). While answering an inquiry (*istiftā’*) about *Salam* in olive oil, Ibn Taymiyah (d. 1328) commented that it is permitted in olive oil and other like goods as long as it can be weighed and measured. I am not aware of any juristic conflict in this matter. If there is any conflict, then it is regarding those goods which cannot be weighed or measured like animals. According to the famous opinion of Ahmad Ibn Hanbal, Imam Malik, and Shafī’i, *Salam* in such goods is permitted.

In contrast, Imam Abu Hanifah did not permit *Salam* in goods not measurable or weighable especially when it came to animals (Ibn Taymiyah, 2005, vol. 5, p. 501). This is because animals change in time along with its specifications. Here the basis of conflict is the possibility of ignorance and ambiguity in the *Salam* goods. Another point here that should not be ignored is that the word *kayl* and *wazn* in the *hadith* does not advocate that the *Salam* commodity should only be specified by the latter two measurement units; instead any local mode of measurement used by the contracting parties that can assist in specifying the commodity can be taken into consideration. The second purpose is to prevent the parties from concluding their contract on a particular commodity (*al-a’yān* sing. *al-‘ayn*) or product of a particular tree, field, or farm for instance. If the parties are not prevented to do so, the delivery of the commodity will become uncertain. Any unseen circumstances can befall a particular product or its source. The great Yemeni scholar al-Shawkani (d. 1834 CE) reported a hadith that states, “The people of Medina when the Prophet arrived used to sign *Salam* contracts on dates of particular trees; the Prophet prohibited them from it” (al-Shawkani, vol. 5-6, p. 240).

The third central condition and its purpose is that the *Salam* contract must be concluded “to a specific time (*ilā ‘ajal ma’lūm*).” The Hanafī, Maliki, and Hanbali schools base the validity of deferring the date of delivery on this statement of the hadith. They also argue that spot *Salam* is not permitted and that the main purpose of permitting a *Salam* contract was clemency (*al-rifq*) which can only be obtained by deferment (*al-ajal*). In not allowing deferment in delivering the *Salam* commodity there will be no clemency. In contrast, the Shāfī’i legal school argues that when *Salam* with deferment can be permitted with all possible complications, why can it not be permitted on a spot basis. The meaning of the *hadith*, Imam Shāfī’i argues, is the knowledge of the date of delivery, not the deferment itself (al-Shawkani, p. 240; al-Zuhayli, 3611).

The clemency argument presented by the three legal schools can be professed in the opinion of the Shāfī’i school as well. In a normal sale, the commodity has to be delivered on the spot, while in spot *Salam* the commodity does not have to be present in the contract session. This is clemency for the contracting parties. The outcome of this juristic difference highlights the purpose of the condition which is to know the date of delivery contracting parties agreed with. The conflict of the scholars in the period of deferment unveils another purpose behind the statement of the hadith “to a specific time (*ilā ‘ajal ma’lūm*).” It points to a time-frame in which the commodity could be produced or prepared for delivery. The time-frame should not be so short that producing the goods becomes impossible. It should also not be so long that the availability or the price of the commodity is affected (al-Shawkani; al-Zuhayli; M. T. Usmani, p. 5).

#### **(E) Human Purposes (*Maqāṣid Al-Mukallaḥ*) and *Salam***

The intent (*qaṣd*) of human beings should be in line with the intent of the Law-giver (*Shāri‘*). The Law-giver designed the legal means (*wasā’il al-shar‘iyyah*) to reach its ends, which are essential purposes (al-Shatibi, 1997, vol. 1-2, p. 494). The individuals or institutions cannot alter or use the means in ways that will disharmonise with the essential purposes of the Law-giver. Returning to *Salam*, it is a legal means on the authority of Qur’an and *Hadith*. Individuals or institutions can either use it in its original form (exchange trade) or they can use it in combination with other methods to permeate their contemporary market needs. For instance, IFIs use *Salam* as a financing tool after combining *Salam* with other *Sharī‘ah* or conventional modes of transactions. Some of the common combinations are parallel *Salam* i.e. *Salam* with *Salam*, *Salam* with promise (*wa‘d*), *Salam* with guarantee, *Salam* with mortgage, *Salam* with *murābahah* etc. (M. T. Usmani, p. 6-7; A. H. Umar, p. 92-96).

Contemporary IFIs mostly use *Salam* in two methods. On top of the *Salam* contract they signed with the first party as a purchaser, they sign another *Salam* contract with a third party as a seller. This is known as parallel *Salam*. The second method is where they take a promise from a third party to purchase the commodity of the first party. In both these methods, as soon as the IFI will receive the commodity, they will sell it to the purchaser. In doing this, the intent of the IFI has to be in line with the intent of *Shari'ah*. Combining *Salam* with *Salam* or *Salam* with promise exposes the IFIs to risks such as credit risk, market risk, and operational risk (A. M. El Tiby, 2011, p. 49). The institutions will have to take measures in drawing conditions and stipulations in order to reduce the risks if not eliminating it entirely. Conditions such as both *Salam* contracts to be signed independently of each other, not to be contingent on each other, and selling the commodity to the third party only after possessing it from the first party are some of the calculations the IFIs have to formulate to have a *Salam* that meets its essential and specific purposes.

Misappropriation of good means (*wasā'il*) will inculcate bad results. This happens when a contract is used against its primary purpose, such as acquiring a *Salam* contract to exploit advance payment and not deliver the commodity on time or at all. This has been seen in the experiences of Sudanese banks. Many of their clients using *Salam* contracts took money and did not deliver the commodity, not because they could not deliver, but because they wanted the money by any means. To control this type of exploitation, the individuals and institutions furnish a security in the form of a guarantee or in the form of mortgage or hypothecation (M. T. Usmani, (2008), p. 133; Securities Commission Malaysia, p. 12). This is an example of combining *Salam* with guarantee or *Salam* with mortgage. Although new, the intent of these combinations is to attain the primary purpose of *Salam* (Ibid.).

Bearing in mind, despite a certain risk inherent in *Salam*, the *Shari'ah* declared it legal. The *Shari'ah* provided space and tolerated the minor risks for the sake of removing hardship (*mushaqqah*). On the other hand, major risks will invoke altogether a different response. Major risks disturb the circulation and marketability of wealth (M. H. Kamali, 2002, p. 87). *Salam* in contemporary markets has to be in forms and modes that should minimise the risk element in order to maintain *Shari'ah* legality.

IFIs have shown interest to use *Salam* as an alternative for futures contracts, some of which are exceedingly speculative and risky, which is why *Salam* is proposed as an alternative, as *Salam* will reduce the exorbitantly risky features of futures contracts. Yet it is not an easy transition due to the *Shari'ah* requirement of full payment of the price of the *Salam* goods in advance. If *Salam* is used in order to reduce market risk, this is a good purpose and will meet the *Shari'ah* goal to protect wealth (*māl*) against uncertainty and speculations. But if *Salam* was to be adjusted as to make it a near-replica of futures contracts, this purpose would be jeopardised.

#### THE MAQĀSID OF ISTIṢNA' (MANUFACTURING CONTRACT)

Having earlier discussed the *maqāsid* of *Salam*, we now turn to the *maqāsid* of *Istiṣna'* (manufacturing contract), the second type of contract in which the object of sale has yet to come into existence. To this end, we survey (a) the various definitions of *Istiṣna'*, (b) how it has been legally justified (in the light of a *hadith* which seems to preclude it), as well as (c) the conditions attached to the validity of an *Istiṣna'* contract. It is from the scholarly deliberations on these points that the *maqāsid* of *Istiṣna'* can be inferred.

##### (a) Definition of *Istiṣna'*

To begin with the definition of *Istiṣna'*, according to *The Mejelle* (Art. 124), it is: "To make a contract with a skilled person to make something". For the Hanafi scholar al-Kasāni (d. 1191), it is "a contract on a commodity on liability with the condition to work/manufacture" (al-Qarrah Daghi, 2010, vol. 5, p. 105-107). Mustafa al-Zarqa's (d. 1999) definition is perhaps more precise, it is "a contract of selling a thing [which needs manufacturing] with an undertaking by the seller to present it manufactured from [the seller's] own materials, with specified descriptions and at a determined price" (M. al-Amine, 2001, p. 6-8). From these definitions it can be deduced that *Istiṣna'* refers to the contract in which the buyer commissions the seller to manufacture a good using the seller's own materials. The buyer/commissioner (*mustaṣni'*) pays the price either in full or in instalments to establish a liability on the seller/manufacturer (*ṣāni'*) to deliver the product (*maṣnū'*) according to the descriptions in the contract at a future date. Modern examples of such a contract are contracts for the construction of houses, bridges, buildings, and highways. Some of the traditional examples, though not extinct, are contracts for making shoes, bags, garments, etc.

##### (b) The Legal Justification for *Istiṣna'*

While such a contract appears common enough, its legality seems to be precluded by the *Shari'ah* on account of the *hadith*, "Do not sell what is not with you" (*Sunan Abi Dawud*, *hadith* no. 2187). Consequently, much scholarly ink has been spilled to establish the legality of *Istiṣna'* or otherwise circumvent the said *hadith*. The majority of jurists have legally justified *Istiṣna'* by resorting to the juristic methods of consensus (*Ijmā'*), juristic preference (*istiḥsān*), custom (*'urf*) and public interest (*maṣlahah*). By consensus, the general commercial practice of a people (*ta'āmul*) qualifies as a basis for the legality of a contract (al-Kasani, p. 444; M. al-Harwi, vol. 2, p. 383). The same grounds were also invoked by the Hanafi jurist Ibn 'Abidin (d. 1836) to preclude *Istiṣna'* from the general prohibition of the said *hadith*. Such commercial practice, he claimed, constitutes custom (*'urf*) which can specify or qualify a general (*'amm*) legal text by way of the recognised method of *takhṣiṣ al-naṣṣ* (M. Farid Ali, 2006, p. 29).

##### (c) Specific and Human Purposes of *Istiṣna'*

The arguments—*istiḥsān*, *ijmā'*, *custom*—reveal the specific purpose of the *Istiṣna'*, which is the fulfilment of societal needs. Muslim scholars saw the need for *Istiṣna'* because they realised that some goods would never be produced if no one demanded or guaranteed their production, manufacture, and purchase (H. Visser, 2009, p. 63). This explains that social need for a transaction facilitates the permissibility of *Istiṣna'* because this contract can generate benefits for the society and contribute to the economic wellbeing of the people.

In the era of industrialisation and developments in technology and finance, *Istiṣnaʿ* serves a variety of additional purposes. It has acquired wider applications in the creation of industries, business start-ups, manufacturing, and project development. *Istiṣnaʿ* has consequently become an important tool for economic development and creation of employment opportunities. Whenever house building projects are created on a large scale, contractors and workers are employed to undertake a large variety of construction and manufacturing tasks that need to be completed along the line. The same applies to building roads, bridges, airports, ships, cars, aeroplanes, and to all aspects of industrialisation. *Istiṣnaʿ* thus fulfils the purpose of creating employment opportunities in the economy.

An even wider purpose of *Istiṣnaʿ* is economic development in itself which heavily depend on manufacture of a wide range of products where multiple *Istiṣnaʿ* contracts need to be employed to facilitate timely manufacture and delivery according to specifications. Timely delivery and coordination in a series of chain events often entail a number of *Istiṣnaʿ* contracts in its course. The wider range of applications of *Istiṣnaʿ* on a massive scale requires large scale investment and financing. This stimulates creation and well-organised development and flow of business financing and well-managed flow of investment funds. Industrialisation, manufacture, and construction also stimulate training of skilled labour force and creation of facilities to generate branches of specialised knowledge that produce specialists to undertake the necessary tasks for project development, delivery, and completion. Hence *Istiṣnaʿ* contributes to knowledge and skill development, education, scientific research and training in universities and centres of higher learning. In this capacity, *Istiṣnaʿ* contributes significantly either as a purpose in itself which is manufacture, but more often as a means or instrument (*wasāʾil*) toward the fulfilment of other purposes.

**(d) Hadith: “Do Not Sell What Is Not With You”**

Other scholars, however, followed a different line of reasoning from that taken by the majority. The Hanbali jurist Ibn Taymiyah (d. 1327) and his disciple, Ibn al-Qayyim (d. 1349), maintained that nothing in the *Sharīʿah* can be contrary to *qiyas*, thus *Istiṣnaʿ* which can be traced back to the Prophet <sup>ṣallāhu ʿalayhi wa sallam</sup> is a valid sale contract in its own right. The *hadith* “Do not sell what is not with you” does not apply to *Istiṣnaʿ* because it does not refer to the lack of physical possession of subject matter, but rather to the risk (*gharar*) involved in such a contract due to the possibility of non-delivery (M. al-Amine, p. 20-25). Similarly, the Sudanese scholar, al-Shaykh al-Darīr argued that the non-availability of a commodity is one thing, while the inability to deliver is another. In the case of *Istiṣnaʿ*, though the subject matter is non-existent, its availability is nevertheless certain (Ibid., p. 27). The subject matter of *Istiṣnaʿ* is always something which can be manufactured such as cars. After its manufacture it is deliverable. In contrast, if someone orders certain types of trees in the off-season for instance, one will be unable to deliver it. This course of argument in no way contradicts the position of the majority.

Notwithstanding variations in the legal grounds adduced by the jurists to validate *Istiṣnaʿ*, the substance of the contract is still the same. The substance maintains the specific purpose of the contract which is to fulfil the needs of society. However, their differences highlight the weak point of *Istiṣnaʿ* and that it is vulnerable to high risk. On the one hand, the manufacturer may worry lest the commissioner refuses to purchase the product after it has been manufactured or after so much material and energy has been spent to manufacture it. On the other hand, the commissioner may be concerned that the manufacturer fails to complete the product on time or according to the specifications of the contract. Such risks run counter to the purpose of *Istiṣnaʿ* for the simple reason that the *Istiṣnaʿ* contract builds or manufactures products needed by society. Such needs can hardly be fulfilled without the complete commitment of the contracting parties to complete the product.

**(e) Conditions for a Valid *Istiṣnaʿ* Contract**

To safeguard the contracting parties against such risks, the *Istiṣnaʿ* contract comes with certain conditions. Some conditions relate to the product while others relate to the time of delivery. Amongst the former is that the quality, quantity, and particular features of the product sold in *Istiṣnaʿ* must be clearly specified. Al-Kasani (d. 1196), like other early jurists, said that the product sold should be known (*al-maʿlūm*), i.e. familiar in commercial practice (p. 444), thereby precluding *Istiṣnaʿ* when the product is not familiar in the market. Such prohibition is not meant to be applicable indefinitely. A product which becomes familiar to the market at any point in time can then be contracted in *Istiṣnaʿ*.

People’s needs differ according to time and place which means different products will be needed at different times hence becoming customary and familiar to the market. For instance, highways, houses, bridges, machines, factories, etc. are the familiar products of our contemporary time which were not so in the pre-industrial age. The condition that the product be familiar or customary is aimed at achieving two things. Firstly, to ensure that the product one commissions to manufacture is necessary for society or for an individual. Secondly, to familiarise the contracting parties with the details of the product lest any unknown aspects may lead to dispute or risk as mentioned earlier. The condition, however, has its shortcoming. It may stifle creativity, innovation and talent because what is novel and original by definition will not be familiar to the general commercial practice of the people. Shaykh Mustafa Ahmad Al-Zarqa thus claimed that this condition can be dispensed with today, owing to the common place nature of manufacturing contracts in the industrial age (M. al-Amine, p. 50). The risk discussed earlier can be mitigated or eliminated by the application of technologies to visualise the product in all its details even before its production thereby familiarising the contracting parties with the final product.

**(f) The ‘Option of Viewing’ (*khiyār al-ruʾyah*) in Sale Contract**

In a normal sale contract the buyer can exercise his ‘option of viewing’ (*khiyār al-ruʾyah*) if he bought something without seeing it. The option gives him the right to either conclude or cancel the contract. Imam Abu Hanifah extended this right to both the commissioner and the manufacturer in *Istiṣnaʿ*, which means that the commissioner is not bound to buy the product until he sees it and the manufacturer is not bound to sell the product to the commissioner until the latter confirms his intention to buy it. The manufacturer has the freedom to sell the product to anyone he wants before the commissioner confirms the purchase. The

Imam's companion Abu Yusuf disagreed with this opinion, claiming that neither party has the right to 'option of viewing' if the manufactured product conforms to the specifications. Thus both parties are bound to carry out their contractual obligations. Had the ruling been otherwise, there is harm for the manufacturer if the contract is cancelled after he has committed his energy and resources as there is no guarantee that he will find a buyer for the manufactured product (al-Kasani, p. 444; al-Marghinani, vol. 5, 242). Abu Yusuf's *fatwa* is thus meant to protect the manufacturer (The Mejelle, Art. 392; M. T. Usmani, 2008, 197), and his *fatwa* is the prevalent opinion of the Hanafi school in this matter.

Commenting on this *fatwa*, al-Zarqa held that an important point still remains, which is the liability for defects. Abu Yusuf's opinion is only applicable as long as the product follows the specifications. If it does not, then it is not binding on either party to sell and buy. Al-Zarqa said this was possible during the classical age, where the products were commissioned and meant for individual needs. In this age, however, products are manufactured in bulk or large quantities for markets where various parties invest large sums. Liability for defect should be imposed on the manufacturers if they do not follow the specifications. They should not be allowed to escape by waiving their liability for defect by using his 'option to view'. Liability for defect helps maintain market stability which is one of the objectives of Islamic transactions (M. A. al-Zarqa, p. 27 & 35).

The condition in relation to time of delivery is that it cannot be deferred in *Istiṣna'*. This was the position of the earlier scholars (Ibn 'Abidin, vol. 7, p. 501). Their concern was to draw a line of distinction between *Salam* and *Istiṣna'*. Mentioning a deferred time of delivery would change the *Istiṣna'* contract to *Salam* thus requiring it to follow the terms and conditions of the latter. However, it was acceptable to the jurists to specify a future time to expatiate (*isti'jāl*) the completion of the product instead of deferring the delivery. The famous hadith and fiqh scholar, Maḥmūd Ibn Aḥmad al-'Aynī (d. 1451) elaborated that expatiating time is acceptable in *Istiṣna'* because it is meant for the completion of the product and not for deferment (al-'Aynī, vol. 7, p. 481).

Looking at present industrial practices, if the manufacturer does not complete the product on time, he can jeopardise the possible agreements of the commissioner with third-parties. The purpose of the condition of timely delivery is due to fulfilment of contract in affirmative sense and prevention of harm (*darar*) in the negative sense. Specifying the time of delivery will help achieve its specific purpose and maintain market stability. The former chief justice of Pakistan Taqi Usmani proposed that to ensure delivery on time a daily penalty can be implemented starting from the due date – an idea taken from the *Ijarah* contract. Like in *Ijarah* when someone is hired to do a job, the amount of the payment for the job depends on the job completion—completion on time deserves higher payment while delayed job deserves reduced payment. Similarly, in *Istiṣna'* the manufacturer can be penalised with the reduction of the product price on a daily basis if he did not deliver on the specified date (M. T. Usmani, 2008, p. 198). Stipulation with such conditions is legal as far as these conditions accomplish the purpose of the *Shari'ah*. Such conditions are not contrary to the *hadith* which says, "All those conditions which are not mentioned in the *Shari'ah* of Allah are void." Al-Zarqa in his interpretation of this *hadith* said that it is only prohibiting those conditions which violate the *maqāṣid al-Shari'ah* (M. A. al-Zarqa, 1998, p. 543).

#### (g) Contemporary *Istiṣna'*

Upholding the *maqāṣid* of *Istiṣna'* is also challenging when looking at its application as a financing tool by IFIs. *Istiṣna'* is used for house and project financing. An IFI can be a commissioner in ordering a manufacturer/builder to build projects such as a road, bridge, building, etc. Or the IFI can be a manufacturer/builder in accepting the order from a commissioner. In the latter case, the IFI after accepting the order from a customer, conclude a contract with a third party (the contractor) who will undertake the project (M. T. Usmani, 2008, p. 198–200; S. A. al-Dunya, p. 44-45). This is known as parallel *Istiṣna'*. Another application is the conventional BOT (Buy, Operate and Transfer) on the basis of *Istiṣna'* is formalised to serve as an Islamic financing tool. A government commissions a concessionaire/private company to build a project, for example. The concessionaire/private company will build and operate the project in order to redeem its price (profit + cost). After the concession period, the ownership of the project asset is transferred to the government (R. Markom, E. Rabiah, A. Hasan, 2012, p. 73-85). These applications of *Istiṣna'* are different from past application wherein *Istiṣna'* contracts typically involved only two parties (the manufacturer and the commissioner), with the commissioner paying for the product. Today, *Istiṣna'* contracts can involve multiple parties and are financed, not necessarily by the commissioner, but also by the IFIs (or in the case of BOT, by the concessionaires).

The changing nature of social needs plays an important role demanding the *Istiṣna'* to evolve. Projects for the construction of modern infrastructures for developments such as airports, railways, roads, and bridges invariably require different types of expertise and hefty sums of money, which are generally beyond the capacity of individuals. Thus unlike in the past, *Istiṣna'* contracts are today commonly entered into by organisations and companies. From the standpoint of the *maqāṣid*, the present form of *Istiṣna'* fulfils societal needs in a more organised manner, but by involving many parties and massive financial ventures. It is also exposed to risks such as missing deadlines and incomplete projects. To protect the contracting parties against such risks, conditions can be stipulated, e.g. agreement on the details and specifications, including time for delivery and liability for defects. In addition, new security measures have been added to *Istiṣna'*. For instance, IFIs require the commissioner/customer to comply with the condition of pledging a conventional bond as collateral to secure their financing. The Shariah Advisory Council (SAC) of Bank Negara Malaysia in their resolution declared that, "project financing based on *Istiṣna'* with pledging of conventional bond" is permissible (Bank Negara Malaysia, 2010, p. 21-23). Other IFIs also use mortgages and guarantee for security purposes.

Other aspects of the contract are also important and have to be taken into consideration. For instance, in parallel *Istiṣna'* the IFIs have to make sure that their contract with the customer and the contract with the manufacturer are entered into independently. IFIs have to play an active role in facilitating the manufacture and delivery of the product to their customers. They should share any possible loss and profit with other contracting parties. This means that IFIs have to diversify their business to include

manufacturing or at least consultancy in relation to the project ordered by the customer (M. al-Amine, p. 95). IFIs should not ask the customers to contract directly with the manufacturers as this is likely to lead to the same problems as that encountered in *Murābahah* financing (Ibid., p. 96). Previously we saw while discussing the *maqāsid* of *Murābahah* that IFIs' frequent application of *Murābahah* as a mode of financing suppressed its primary purpose as a trading tool. The IFIs minimised their active role in *Murābahah* to the extent that they ignore the actual or constructive possession of an item which is an important *Sharī'ah* requirement. They shifted the risks which they themselves should assume to the purchase orderer, yet they markup over the original price of the item. Their profit in this manner resembles the conventional interest which is made without any risk-liability. Similar problems will arise if IFIs will sit back and order the customer to deal directly with the manufacturer in an *Istisna'* contract.

The above discussion shows that the classical *Istisna'* contract has evolved into a new type of *Istisna'*. Accordingly, the terms and conditions attached to the *Istisna'* contracts which were once relevant to address the needs of the people, if applied to the contemporary setting without necessary amendments, may compromise the very essence of *Istisna'*, as the *maqāsid* approach ably demonstrates. The form of transactions may vary at different times but to ensure that *Istisna'* achieves its *maqāsid*, a new set of conditions (*wasā'il*) needs to be formulated. The discussion also shows that IFIs' involvement in *Istisna'* financing requires them to become contractors and consultants in the real economy instead of contractors on paper only.

## Conclusion

This research is limited to some common modern applications of the two contracts. If the IFI's apply the two contracts in any other application not discussed in the paper, then those applications will have to be investigated in the light of *maqāsid*-study as well. Similarly the study of the *Sharī'ah* purposes of the two contracts and the purposes of the terms and conditions of the latter two are undertaken succinctly. There is a need to read through the *fiqh* literature of various legal schools comprehensively in order to search for other purposes of the two contracts. Different legal schools, beside common terms and conditions suggested surplus conditions, which can altogether give a different insight. An important factor in reading the *fiqh* literature is to relook at the arguments (Qur'an and Sunnah) made by the various schools. This is because; the jurists not only derived the legality of the contracts from the Qur'an and Sunnah, but they also derived terms and conditions for the contracts from the latter two. We have shown some instances of this in the discussion. This approach is essential for uncovering the *Sharī'ah* purposes embedded in the two principle sources of the *Sharī'ah*.

We did not limit the *maqāsid*-study of the modern applications of the contracts to one specific country. General practices of the IFI's in various countries are taken into consideration. This means this work is beneficial for all those countries where Muslims are operating IFI's or any other equivalent institutions such as cooperation, trading businesses, etc. Scholars, consultants, advisors all can work in this line to relook at their practices in the light of *maqāsid Sharī'ah*. One of the major obstacles of running IFI's irrespective of whether Muslims are majority or minority is the conflict arising out of people's inclination to a certain legal school (*madhab*). The *maqāsid*-study approach shows that *maqāsid Sharī'ah* is superior to a *madhab*. The concern in this approach is the holistic message of Islam which supersedes any school or individual's opinion. The *maqāsid*-study of *fiqh*-issues can reconcile the conflicts and allow the Muslims to work together from any corner of the world. These are some of the general remarks based on this study. Now we would like to present an exhaustive summary of the two contracts:

### Summary and Conclusion of Salam and Its Sharī'ah Purposes

In this research, we discovered that the *Salam* contract technically should be void due to absence of the goods. Despite this, the *Sharī'ah* legalised this contract to meet certain *Sharī'ah* purposes. The purposes are:

1. Realisation of benefits (*maṣāliḥ*) for the people.
2. Exchanging benefits for something not in possession.
3. Clemency (*rifq*) through deferment of the goods delivery.
4. Tolerating minor risks for the sake of removing hardship.
5. Cheaper price for the buyer compared to price in spot sale.

*Salam* through these purposes also serves the higher essential purposes of the *Sharī'ah* especially the protection of life and the protection of property. The *Salam* successfully manages to serve the latter purposes by securing its self within the fortifications of terms and conditions. Thus *Salam* is a means (*wasīlah*) in itself when it is serving the essential purposes, and the terms and conditions are means of the *Salam* when serving the purposes of its own (*wasā'il al-wasā'il*).

Terms and conditions of *Salam* are two, each serving a set of purposes. One is pertaining to the goods (subject of the contract) and the other is the time of delivery. Goods in *Salam* contract have to be with specific measurement or weight. The purpose of this condition is:

1. To avoid uncertainty in specifications of the goods purchased, yet to be delivered. Ambiguous and ignorance in specs of the goods sold or bought is in contra to clarity (*wuḍūḥ*)—a crucial constituent of protection of wealth.
2. Risks control: Already *Salam* is standing on risky grounds by allowing spot payment and delayed delivery of goods. The condition of specified specs of the goods controls the risks such as delivery of goods against the agreement in terms of quantity and quality.

The second condition of *Salam* is specific time of delivery. The purposes of this condition are as follows:

1. To avoid uncertainty in terms of time of delivery. This uncertainty is an anti-matter of clarity.
2. To impart clemency through specified time for deferred delivery.
3. To allow production or preparation of the goods by providing specified time for deferred delivery.
4. To maintain the risks at a minimal level by offering specified time of deferred delivery.

The third condition in *Salam* pertains to the price (*ra'sul al-māl*). The price has to be paid within the session of the contract-conclusion. The purpose of this condition looks simple but does not mean that it is trivial. The purpose is to prevent the *Salam* contract from becoming debt sale (sale of debt for debt (*bay' al-dayn bi al-dayn*)).

Up to here, the discussion of *Salam* with its purposes is according to its original form—an exchange trade prescribed by the *Sharī'ah*. When we look at the human purposes in modern application of *Salam*, we find that *Salam* is applied as a financing tool with various combinations rather than traditional exchange trade. Some combinations are purely for financing purposes such as parallel *Salam*. While some combinations are meant for security purposes such as *Salam* with guarantee or mortgage. These contemporary human purposes are proposed and designed by IFIs based on the needs of their clients and the market. Islam as a dynamic religion does not condemn innovation in contracts because of economic development. So the challenge is not to create new forms of *Salam* with new set of terms and conditions, but to cultivate new forms of contracts while maintaining the permanent values of Islam. In other words, the innovative *Salam* is supposed to serve the same purposes of the original *Salam*.

In this innovation, the purposes of the *Sharī'ah* and the conditions we discussed can provide solid guidelines to IFIs. We also saw that there is a level of inherent risk in *Salam* contracts. The *Sharī'ah* permitted the contract by controlling the risks through terms and conditions. Some of these conditions, especially those supported by legal text (*naṣṣ*), cannot be compromised while applying *Salam* as a financing tool. By the same token, new conditions can be introduced in order to control and prevent risks from arising.

### Summary and Conclusion of *Istiṣna'* (Manufacturing Contract) and its *Sharī'ah* Purposes

As far as *Istiṣna'* is concerned, our study found that the *Sharī'ah* legalised *Istiṣna'* based on the following general and specific purposes. Were it not for these purposes, the *Istiṣna'* would have been long declared illegal. The purposes are:

1. Realisation of benefits for the people.
2. It fulfils the societal and individual needs through manufacturing.
3. Economic wellbeing and development.
4. Creation of industries.
5. Creation of employment opportunities.
6. Stimulating trained skilled labour force.
7. Creation of facilities to generate branches of specialised knowledge.
8. Means to other purposes of the *Sharī'ah*.

The *Istiṣna'* since it is legalised by the *Sharī'ah*, it is a legal means to essential purposes of the *Sharī'ah*. It protects life because through *Istiṣna'* materials of food, clothing, and shelter are produced. Similarly, it protects property by realising the six sub-elements namely marketability, transparency, preservation, durability, equity, and growth.

Like the *Salam*, *Istiṣna'* effectively serves the essential and its own purposes through terms and conditions. There are two sets of conditions, one pertaining to the product and the other to the time of delivery. Condition pertaining to the product is the product ordered in *Istiṣna'* should be specified in terms of quality, quantity, and particular features. The purpose behind this condition is:

1. To assure that the product is familiar in the market (*ma'lūm*).
2. To assure that the product is necessary for the market and the consumers.
3. To assure familiarity with the specs of the product to avoid dispute and risks.

Another condition in relation to the product is the liability of defect if the product did not follow the specifications. If the liability of defect is not provided, the right of the commissioner will not be protected. He will be forced to buy the defected products. On the other hand, there will be no “option to viewing” if the product followed the specifications. This is to protect the manufacturer's right; otherwise the commissioners would not buy the product resulting loss of resource and energy of the manufacturer. In both cases, the purpose of these conditions is to protect the rights of both the commissioner and the manufacturer. The protection of these rights is an important element in maintaining market stability the constituent of essential purpose of the *Sharī'ah* (*protection of property*).

The condition in relation to delivery of the product/project is specified time of the delivery. This condition is also meant to serve market stability, for the latter is not possible without timely delivery of the products. Some scholars suggested retribution in order to secure delivery on time, such as reduction of price if the product/project is delayed. The *Istiṣna'* we discussed up to here is according to its original application as an exchange contract; a sort of contract in which a consumer commissioned an individual with skills for a personal product. A common example found in *fiqh* books and relevant in our time is commissioning a tailor to stitch a pair of garment for one's self.

Looking at the human purposes of *Istiṣna'* in our contemporary market, the contract has taken on a totally different garb. Some of the new applications of *Istiṣna'* with changes in its traditional characteristics are:

1. A financing tool such as parallel *Istiṣna'* or *Istiṣna'* applied as BOT contract.
2. Organisations and companies as commissioners and manufactures.
3. Bigger projects due to changing nature of the human needs.
4. Securing risks in contemporary *Istiṣna'* with bonds, mortgages, and guaranties.

The challenge of IFIs is to maintain the purposes served by the traditional *Istiṣna'* and develop it into a contract which can cater the contemporary market and consumer needs. Another challenge for IFIs is to become real manufacturers meaning to become owners and dealers of real assets (factories etc.). To be facilitators on paper will not realise the real purposes of the contract.



We also saw that in traditional *Istiṣna'*, the risks are controlled by the terms and conditions stipulated with the product and the time of delivery. In the case of products, the conditions are meant to assure that a product is really needed and producible. Contemporary organisations or IFIs can add a new condition or modify the previous conditions as far as these conditions can serve the same purpose. Modern technology is capable to visualise or stimulate a product before its real production. It can assure that a product is not speculative. Similarly, new conditions can be designed to secure timely delivery.

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