Contemporary Applications in Islamic Law

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IJAAZAH

TRANSLATION OF CERTIFICATE BY MUFTI TAQI USMANI

I personally know the honourable Shaykh Mahomed Shoaib Omar (May Allah Protect him) for over thirty years. I found him to be an ardent seeker of knowledge, from an early age. He first graduated in Law, and has practised as a well-known Attorney. Thereafter, his strong desire to acquire Islamic knowledge and Arabic, caused him to travel to Pakistan, where he studied under reliable and competent teachers. I am honoured to state that I assisted him in the study of fiqh (jurisprudence) for a period exceeding two years. I found him quick of mind, constantly devoted to the study of the books of fiqh, across the four established schools of Law (Mazaaib), together with undertaking a comparative analysis between Islamic and secular law, more especially modern contemporary issues and problems. He has read and considered all that has been written by contemporary scholars, in relation to contemporary issues, more particularly, he has had due regard to the papers submitted to contemporary fiqh academies and their relevant resolutions. He himself has written a number of papers on contemporary issues in both English and Arabic. He has been amongst the foremost participant in drafting the Muslim Personal Law for South Africa, so that it may be enforced there; and the majority of local Ulama have endorsed this. He has a good character. I do not praise anybody, for Allah. I

hope that Allah, the Absolute, Glorious will give him Tawfiq to serve the Muslim Ummah, in accordance with His Will and Pleasure.

Your Brother
Muhammad Taqi Usmani

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بسم الله الرحمن الرحيم

الحمد لله رب العالمين. والصلاة والسلام على رسوله الكريم، وعلى آله وأصحابه أجمعين، وعلى كل من تبعهم بإحسان إلى يوم الدين.

إلى كل من يهمه:

إني أعرف فضيلة الشيخ محمد شعيب عمر حفظه الله تعالى منذ أكثر من ثلاثين سنة، ووجدته حريصا على طلب العلم منذ نشأته. تخرج أوّلا من كلّيّة الحقوق واشتغل محاميا معروفا في جنوب إفريقيا، ثمّ إنّ حرصه الشّديد على طلب العلوم الإسلاميّة جعله يسافر من أجل تحصيل العلوم الدّينيّة والعربيّة من مشايخ موثوقين في باكستان؛ وإنّي أعتزّ بأنّي ساعدته في دراسة الفقه لمدّة سنتين أو أكثر، ووجدته سريع الفهم مكبّا دائما على مطالعة الكتب الفقهيّة على المذاهب الأربعة، ومقارنة الفقه بالقوانين الوضعيّة، وخاصّة في المسائل المستحدّة الّتي حدثت في عصرنا الأخير، فإنّه يتابع كلّ ما كُتب أو يُكتب في هذه المسائل من قبل العلماء المعاصرين، وخاصّة البحوث الّتي قُدّمت من قبل المجامع الفقهية والندوات العلمية والقرارات الّتي أصدرت منها، وإنّه كتب عدّة بحوث في مثل هذه المسائل باللّغتين العربيّة والإنجليزيّة، وهو من مقدّمة من ساهم في صياغة قانون الأحوال الشخصيّة في جنوب إفريقيا لتُنفّذ هناك، و اعتمد عليه في ذلك معظم علماءُ بلاده. وله سيرةٌ حسنةٌ، ولا أزكّي على الله أحدا. أرجو الله سبحانه وتعالى أن يُوفّقه لصالح الأمّة الإسلاميّة حسبما يحبّه الله ويرضاه.

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FOREWORD

The different topics addressed in this book deal with critical contemporary applications of the Shariah. The writer, as a humble student, has endeavoured to provide the essence and conclusions on each topic, derived from authentic classical sources , as elucidated, where appropriate, by reliable contemporary fiqh bodies, exercising through combined efforts , collective ijtihad (ijtihad jamai), such as the well known global Fiqh Academy, based in Jeddah, consisting of leading jurists. The detailed arabic references from the classical authorities, across the four schools (mazaaib), have been omitted to facilitate speedy ease of reading.

This book represents an ongoing analysis by the writer of key contemporary, modern, new issues and their resolution from a Shariah perspective. Due to the writers busy practice schedule, time did not permit the writing of a number of further articles on crucial relevant issues, which Insha Allah will be addressed in a future edition.

The Shariah challenges and modern issues arising from dynamic, evolving societal developments, and technological innovations are serious, sensitive, complex and demand special expertise in the field

of inter alia fiqh al muaamalah and comparitive law. (Fiqh al muqarin) I am eternally grateful to two distinguished contemporary global authorities in the field of Islamic law, for their ongoing guidance and incisive input. First, my noble teacher Mufti Taqi Usmani, with whom I have had the privilege and benefit of ongoing constructive engagement and inspiration on pivotal and varied Shariah matters over the past thirty years, since this esteemed personality first taught me fiqh and usul al fiqh privately at Darul Ulum Karachi. The other is the venerable Shakyh Abdul Satar Abu Guddah, with whom I have personally exchanged, and had continuous positive interactions for some thirteen years on seminal matters of Islamic jurisprudence applications to new situations, including Islamic finance.

I however accept full responsibility for errors and omissions. I welcome comments for improvement with an open mind. May Allah grant the writer the Tawfiq to sincerely serve solely for His Pleasure.

CONTEMPORARY APPLICATIONS IN ISLAMIC LAW

CONTENTS

THE MEANING OF IJAARAH

CHAPTER 1

1. A contract of Ijaarah (lease) is a bilateral commercial contract, in terms of which the ownership of benefits is transferred in return for a counter value. (Iwad). This definition is agreed by all schools.

2. In the Hanafi school, the party that first makes an offer is treated as the offeror, and the other party, who accepts, is the offeree. For example, the lessee offers to hire specified premises, at a stipulated rental, for a fixed period, and the lessor accepts. The majority jurists, (jumhur), however, state that the offer must be made by the lessor, as the owner and transferor of the benefits, being the subject matter of the lease, and must be

accepted by the lessee, as the recipient user of the benefits.

3. The contract of Ijaarah (lease) is concluded by offer and acceptance. It may be concluded orally, in writing, or by way of tacit conduct. (Ta'ati). A common example of the latter is where a person hires a bus, and pays the conductor, without a formal oral exchange of offer and acceptance. In the case of a tacit contract, the rental payable is that which is fixed, but failing stipulation, the market rental will apply.

4. The majority (jumhur) are of the view that a contract of lease is binding. A party may not unilaterally cancel a lease, unless the cancellation is founded upon a recognised cause, such as a defect, which deprives the lessee of the use of the thing let, or otherwise impairs its utility. On the other hand, in the

Hanafi school, a lease is automatically cancelled for a valid excuse, in a situation where the enforcement of the incidents of the lease, is contrary to its essence, thereby causing personal or financial harm to the lessee, (as defined by the Hanafi jurists), or otherwise where the purpose of the contract falls away. For example, a person hires a dentist to remove his teeth, for a fixed fee, but thereafter the pain in question disappears on its own. (Article 443 of Majallah)

5. The jurists are unanimous that the suspension of the incidents of a lease, including the passing of ownership of the benefits, upon the occurrence of a future uncertain event is prohibited. For example, "if I obtain a loan from a financial institution, then, in such event, I lease you my shop for an agreed fixed rental and upon defined terms." This is described as Taaliq, that is, the lease itself is

suspended on an uncertain future event or condition, which may or may not occur.

6. On the other hand, a contract of lease, validly contracted, but which takes effect on a determined future date is valid. Neither party is entitled to withdraw from or cancel the lease. For example, "I lease you my shop premises at a monthly rental of R 10 000,00, such lease to commence on the 1 January next year." (Article 440 of Majallah)

7. If the lessee becomes the owner of the thing hired, by way of valid sale, inheritance or donation, the lease is automatically terminated, without affecting the lessor's accrued right to recover payment of accrued rent.

8. The Hanafi school draws a distinction between a lease which is void *ab initio* (baatil) and a

lease, which complies with the essentials, but is invalid (faasid) for failure to comply with a quality (wasf).

9. In the case of an invalid lease (faasid) the invalidity arises from, either uncertainty as to rental, or, the stipulation of a condition which is contrary to the essence of the contract. In this situation, the lessee is obliged to pay the market rental, provided that such market rental does not exceed any rental stipulated in the lease, if the invalidity arises from an invalid condition. However, if the invalidity arises from uncertainty as to rental, then the lessee is obliged to pay the market rental, without limitation. In both categories of invalidity, the lessee must have the use of the thing let.

10. The question arises whether the rental received by the lessor, pursuant to an ijaarah

which is faasid (but not void at inception) is permissible for the lessor, if it is the equivalent of the market rate. There is a difference of opinion on this point. The preferred opinion is that it is permissible.
(see Raddul Muhtaar, together with Allaama Raafii's commentary thereon: on the section of Ijaarah Faasidah.)

11. Turnover rent is permissible because the lease stipulates a clearly determined formula or benchmark which does not lead to dispute between lessor and lessee. In this case, a certificate by an independent auditor setting out the turnover of the lessee for the relevant financial year is final and acts as the trigger for determining the turnover rent, which is normally paid over and above the basic rent.

12. It is not permissible for the lessor to pass to the lessee the risks and liabilities arising from,

and associated with, the ownership of the leased asset. This normally applies to a full maintenance lease, whereby the lessee contractually assumes liability for all the maintenance of the leased asset including major structural maintenance. In this situation, the lease is invalid (faasid), with the result that the market rent will apply. The lessee is only liable for operational maintenance directly connected to the use of the leased asset. (see paragraph 10 above). See also, AL Mughni of Ibn Qudama, Rule 4257

13. If the lease expires by effluxion of time, and the tenant remains in unlawful occupation, such trespass amounts to usurpation. (gasb). In this situation, the unlawful occupier is liable to pay a market rental (ujrah al mithl), calculated as from date of unlawful occupation

until date of vacation, according to the opinion of the jumhur majority of jurists.

14. Ijaarah Muntahia bi al-Tamlik refers to a lease which ultimately, upon its expiration, leads to a transfer of ownership of the leased asset to the lessee. This transfer is effected by a separate, independent contract of sale at a mutually agreed price, or by way donation, which is concluded between the parties after the termination of the lease.

15. The ordinary particularized Ijaarah, referred to above, refers to the lease of a specific asset existing and owned by the lessor at the time of the contract of lease. However, another category of ijaarah is known as Ijaarah Mawsufah fi al-Zimmah, as recognized by the Shafei, Maliki and Hanbali schools. This refers to the lease of a clearly described generic asset, with precise specifications,

which need not exist or be owned by the lessor at the time of the contract of lease. Accordingly, if the leased asset is destroyed, the lessor is obliged to provide a substitute/ replacement which conforms to the agreed specifications. The reason is that the subject matter of the contract is not a specific thing, generating the usufruct, but it constitutes a debt obligation to provide a leased asset on a fixed date in accordance with the agreed specifications. For example, "I lease to you a car with the following specifications (describing it fully) for a period of 3 years, commencing on 1 January 2015 at a monthly rental of R 5000." If the car is destroyed, the lessor is obliged to provide a replacement car conforming to the agreed specifications.

16. Intellectual property such as trademarks and patents constitute property of value in terms of commercial practice and usage, and

accordingly may legitimately be sold, leased or disposed off. (see for example, AAOIFI Shariah Standard 42: paragraph 3.3 and Global Fiqh Academy Resolution 43 (5/5). On this basis, a franchisor may permissibly lease a store together with the brand and associated intellectual property.

17. The holding or possession of the leased asset by the lessee is that of trust (amaanah). It follows that the lessee is only liable to the lessor for damage or impairment attributed to misconduct, negligence or material breach of contract on the part of the lessee.

THE SALE OF DEBTS AND THEIR CONTEMPORARY APPLICATION

CHAPTER 2

1. Bai-al-dain refers to the sale of a debt. A debt in this context means something (whether money or thing or services) that is owed, is discharged by payment or performance, may be secured by a pledge or suretyship, and is capable of transfer by delegation. (hawaala) This should be compared to a right to claim a specific thing. (ain). For example, in a contract of sale, the price in money is a debt. The price is not specific, and may be substituted by payment of an equivalent amount in money. On the other hand, the subject matter of the sale is a specified existing commodity, in the ownership of the seller, and capable of immediate delivery, at the time of sale, and is therefore not treated

as a debt. (Ibn Qudama, Al Mugni, Rule 3250). The word "debt" also includes the obligation of the seller in a salam sale to deliver a commodity, specified by description, to the buyer at a fixed date in the future, in exchange for a fixed price, that is paid in advance at spot.

2. The sale of a debt for a debt is prohibited. This applies to the case where the seller and the buyer agree that the commodity to be sold, is to be delivered, and the price is to be paid, at a future time. For example, "*I sell you ten tons of wheat (not existing at time of sale) to be delivered in thirty days. You (the buyer) undertake to pay me (the seller) the price of 5000 dollars in sixty days."* This transaction of credit on both sides should be distinguished from the normal valid sale (bai-al ain - bil naqd), where the agreed specific commodity (owned by the seller) is existing

and capable of delivery at the time of the sale.

3. The Muslim jurists are unanimous that the sale of debts in money must be effected at face value. Any premium or discount to the face value is impermissible. This applies in all circumstances, irrespective of whether the debt is sold by the creditor to the debtor himself, or otherwise sold to a third party.

4. It follows that the discounting of a bill of exchange, for an amount less than its face value is impermissible. Similarly, factoring, which takes the form of buying the trade debts of an enterprise, at a discount to its invoice value, is not permissible. The exchange of money for money must be at face value.

5. A debenture is a document that acknowledges and contains the terms of a loan, usually to a company. The sale of debenture at a premium or discount to its face value in the secondary market is impermissible.

6. A bond is a debt instrument issued by borrowers, such as governments, parastatals, and companies, that need large sums of money to finance substantial projects. The issue of a bond at interest is impermissible. Similarly, the sale of a bond in the secondary market at a discount or premium to its face value, is prohibited.

7. The Hanafi and Hanbali schools, and one view of the Shafii school, absolutely prohibit the sale of a debt to a third party, because of the uncertainty (gharar) of recovering payment of the debt. The Maliki school however permits the sale of a debt to a third party, in

exchange for a specific commodity. (for example, a specific car or house). Amongst the conditions stipulated by the Maliki school, is that the debtor must acknowledge the debt. On this basis, the government may issue bonds, free of interest. The holder of a bond may sell the bond to a third party for a specified commodity, and not for money/cash. Similarly, murahaba debt owing to a financier, may be sold to a third party, in exchange for specified commodity. (*see Shaykh Taqi Usmani, Buhus, vol. 2, paper on sale of debts*)

8. The sale of a debt to the debtor himself, is valid. If the consideration is money, then the sale must be at par value. The exchange may be validly effected for a commodity, for example: "*sell me this car in exchange for the debt, which you owe me."*

9. A monetary debt, arising from a credit sale, may be discharged by mutual agreement in a different currency. In such a case, the payment must be effected at the ruling market rate of exchange as at the date of payment.

10. A monetary debt, which is due and payable, may be compromised on the basis that the creditor agrees to release the debtor from a portion of the debt. (*Hidayah, chapter on compromise of debts*)

11. The International Fiqh Academy (OIC) has resolved as follows, on the question of debts:

"The sale of a debt due on a future date (dain muajjal) to a third party, other than the debtor, against advanced upfront cash of the same currency, or different currency, is not permissible, because it leads to riba. Similarly,

the sale of debt due on a future date, against money (of the same currency or different currency) due and payable on a future date, is not permissible, because it constitutes the sale of a debt for a debt. There is no difference, whether the debt arises from a loan or credit sale." (resolution 92/ 4/ 11).

THE MEANING OF RIBA AND ITS CONTEMPORARY APPLICATION

CHAPTER 3

1. The word "riba" literally means, "increase". In its technical sense, it means any contractually stipulated amount, or, benefit, over and above, the principal debt, which is payable on a future specified date.

2. The debt may be created, through a contract of loan, or, a contract of sale, or lease, or, other commercial contract of gain.

3. In all these situations, the agreed stipulated excess, over and above the principal debt, is absolutely prohibited.

4. This original form of riba, is referred to as Riba - al nasia. It should be distinguished from another category of riba, known as Riba - al fadl.

5. The latter (riba - al fadl), relates to those commodity exchange transactions, where the same commodity, is exchanged for more, without reference to the consideration of quality.

6. For example, if wheat were to be exchanged for wheat, the quantity on both sides must be equal to each other. If the quantity on one side is more or less, than the other, then the transaction of exchange, falls within the ambit of riba - al fadl, and is therefore prohibited. The reason for this, is that, in the tribal system of Arabia, certain commodities, such as, wheat, barley, dates, and salt, were used as a medium of exchange. (that is, money) For example, the exchange by way of sale, of one kilogram of wheat, for two kilograms of wheat, would represent the exchange of one dirham for two dirhams.

7. The rationale for the prohibition, (of riba - al fadl), is that, the exchange, by way of sale, should not be used as a means, that lead to trade in money itself, resulting in the attainment of the original prohibition of riba - al nasia: the common feature whereof, as stated above, was the charging of interest, or an increased amount, over and above the principal debt, in lieu of time, in commercial transactions of gain. (*see Ibn Qayyim , Ilaam -al Muaqqeeen, vol 2, page 133 to 135*)

8. In prohibiting the riba - al fadl, the Holy Prophet (saw) had identified only six commodities, as the subject matter of an exchange by way of sale: gold, silver, wheat, barley, date, and salt.

9. The Muslim jurists have extended the application of this prohibition, to all commodity sale - exchange transactions,

which has the same underlying cause or reason. They have however differed, in deriving the cause or reason, underlying the prohibition. (of riba - al fadl) For example, in relation to the exchange of gold and silver, Imams Al Shafie and Maalik are of the opinion, that the underlying cause or reason, is that these metals represent universal legal tender. On this basis, a transaction of exchange of money, for money, at a premium or discount, whether at spot or deferred, is prohibited.

10. It is however not necessary to discuss in detail the differences of opinion here, because the modern forms of interest, fall within the ambit of the riba - al nasia. Commodity exchange transactions, in the form of barter, resulting in riba-al fadl, are rare.

11. It is important to distinguish between interest and the price in a contract of sale, in terms of which the price is payable on a specified future date. Such a credit sale is referred to as bai muajjal.

12. In a credit sale, the agreed fixed price, is, upon conclusion of the sale, converted to a debt, payable by the purchaser, on the future due date. The price, once fixed, is attributable to the commodity. As such, any return on the price (debt) constitutes riba.

13. A related issue is the question of granting a rebate or discount, in respect of a debt, arising from a contract of sale, which is due and payable on a specified future date.

14. Such a discount for earlier payment of a debt, due and payable on a future date, is not permissible, if the grant thereof is

incorporated as a term or condition of the contract of sale itself.

15. However, if the creditor, in the absence of a contractual stipulation, or prior agreement, voluntarily and gratuitously grants a discount, at the relevant time, then the same is permissible.

16. This conclusion accords with the resolution of the Islamic Fiqh Academy, Jeddah, which inter alia held as follows:

"A rebate granted on a debt due and payable on a fixed future date, whether at the instance of the creditor or the debtor, is permissible, and does not constitute riba, provided it is not based on a prior agreement, and provided that, the relationship between the creditor and debtor remains bilateral. If a third party intercedes (by purchasing the

debt, at a discount) the same constitutes an impermissible discounting of bill arrangement." (resolution number 66/2/7 1992)

SHARIAH RULING ON THE INHERITANCE OF A RUNNING BUSINESS

CHAPTER 4

1. The general rule is that, upon death, the prescribed heirs of the deceased, determined at time of death, succeed automatically, by operation of Shariah, to the estate of the deceased in the specified proportions fixed by the Shariah.

2. This is subject off course to the payment of debts of the deceased, as a first prior charge against the estate. The preferable view is that such debts operate to prevent an automatic devolution of the estate, at death, to the prescribed heirs. However, this is a matter on

which there is a difference of opinion amongst the classical jurists.[1]

3. It follows that ordinarily the main business that was owned and conducted by the deceased, in his capacity as sole proprietor, during his or her lifetime, is deemed, as from time of death, to be owned by the deceased's prescribed heirs, determined at the time of death, in the specified proportions.

4. Such a mandatory legal devolution takes the form of compulsory co-ownership of the estate in undivided shares. This co-ownership is known as shirka al milk. Its legal effect is that, although it is not based on mutual

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[1] see , for example, Mugni of ibn Qudama, Rule 3445, chapter on insolvency; Badai al Sanaai, Khasaani , vol 5, page 90.

agency or contractual consent,[2] profits and losses are at all times shared by the co-owners, pro rata to their ownership, calculated as from the date of death. In addition, one co-owner cannot deal with the pro rata share of another co-owner, without the latter's consent, express or implied.

5. The problem that commonly arises in practice is that one or more of the heirs continue, after the death of the deceased owner, to actively manage and operate the business as a going concern for a substantial period, without actually effecting a distribution of the estate, according to the rules of the Shariah.

6. For example, the sole surviving relatives of the deceased are two major adult daughters (who take a quarter share each), and a major

[2] A regular partnership is based on mutual agency of the partners. Such agency gives one partner the right to deal with and dispose of common partnership property.

adult son (who receives a half share). The son takes over and continues to run and grow the deceased's business after death, for say, a term of at least five years, without paying out, or otherwise acquiring, the shares of the daughters in the business. This situation in turn raises the following critical Shariah issues, that require proper resolution.

7. The first issue is whether or not the daughters, as co-owners, who have not at all participated in the running of the business, are entitled at time of settlement to a pro rata share of the current market value of the business, including accrued profits; or, whether they are entitled, as co-owners, only to a return of their proportionate share of capital, retrospectively calculated to the time of death of the deceased, without receiving a return on the increased value arising from the growth of the business, during the interim

period as from date of death to the date of settlement.

8. The answer to this question is as follows: if the daughters, as co-owners, had authorized, expressly or tacitly, the son to manage and operate the business, after the death of the deceased, then, they (the daughters) are entitled to their pro rata share, based on the current market value of the business, plus profits accrued on their shares, up to the date of settlement. This is the logical result of co-ownership of an asset.

9. In this situation, however, the further question arises: Is the son, in his capacity as manager of the business, entitled to a market rate of remuneration for his efforts, skills and services in growing the business? or, should his services for the relevant period be treated

as purely gratuitous, without payment or reward? (described as, tabarru)

10. Generally, the payment of salary or remuneration is the subject matter of a voluntary arms length contract of Ijarah or lease, arrived at by mutual agreement.

11. It is apparent that the son, as manager of the business, would reasonably expect a remuneration for his services. The classical jurists have recognised that, the custom and practice of a specific market may require that a market rate of remuneration be paid to persons, similarly placed, who would not otherwise work without reward.[3]

12. In these circumstances, it is fair and equitable that the son, as manager, be paid a market-

[3] see Radd al Muhtaar , the leading Hanafi authority, on what falls within the scope of permissible Ijarah.

related rate of remuneration for the relevant period of management.

13. In the alternative, it is desirable that all the interested heirs enter into a contract of compromise and settlement, (sulh) in terms of which they may resolve the dispute, on the basis of treating the business as a partnership of all the heirs, with the result that the son, as the active partner, may take a larger share of the profit, in lieu of his efforts and expertise, and the daughters a smaller pro rata share. In the case of a regular partnership, profits may be shared in any ratio that is agreed, whereas losses must always be shared pro rata to capital.

UNAUTHORISED TRADING WITH ANOTHER'S CAPITAL

14. The aforegoing case must be distinguished from the situation where the son continues the business of the deceased, against the will of the two daughters, as the remaining heirs. The daughters demand their shares in the business, after the death of the deceased, but the son refuses to pay them, and continues to run the business, without their permission or consent.

15. In this case, the son in conducting the business has usurped the proportionate shares of the daughters. He is entitled to the profit accruing on his own half share only. As regards the profit realized on the capital of the two daughters, this constitutes milk al khabith, that is, it is a gain not deemed legitimate for the son to use for his own

benefit, because it results from unauthorised trading with another's property without the owner's permission. (Gasb)

16. In the Hanafi school, the son must pay this profit, accrued on the capital of the daughters, to them, if he is able to, or, he must pay the same to charity.[4] If he pays the profit to the daughters, it is legitimate for them to appropriate such profit for their own benefit. (Majma al Damaanaah, page 234)

17. However, according to one opinion of the Shafei school, and the accepted view of the Hanbali school, the profit accrued on the daughter's capital/shares, must be returned

[4] see Allama Atasi, Shar al Majallah, Ottoman Code, commentary to article 1075.

to each of them, as a legitimate return on their respective pro rata shares of capital.[5]

18. In the light of the aforegoing, it is critical that all issues relating to the estate of a deceased person must be addressed and resolved, speedily as soon as possible after his or her death.

[5] see, the authoritative juristic work, Mugni of Ibn Qudama, vol 5, page 416, on ghasb)

SHARIAH CRITERIA THAT ARE APPLIED BY THE PORTFOLIO IN THE SELECTION OF COMPANIES ON THE STOCK EXCHANGE

CHAPTER 5

1. General Principles

1.1 Ownership of a share in a company represents a pro rata undivided share in the underlying assets of that company.

1.2 The investors in the fund are treated in Shariah as partners, amongst themselves. The return on the investment is linked with the actual pro rata profit earned, or, loss suffered by the fund, and is accordingly not guaranteed. The basic Islamic principle is that, the capital or principal invested by a partner cannot be guaranteed. An

investor cannot make a profit, without assuming a corresponding loss.

1.3 Any incidental trading, in interest bearing securities or impermissible borrowings, cannot be attributed to the shareholder, who does not authorise same, bearing in mind that the company arrives at its decisions by majority resolution, and provided that the main trading activity of the company is halal.

1.4 The parameters set out below are applied from a Shariah perspective, in the selection of appropriate companies on the local stock exchange, as a concession, based on genuine need, granted by contemporary Shariah experts, provided that the main trading activity of the relevant company is at all times permissible. A company which

does not meet any of these criteria, is excluded from the universe.

2. **Borrowings on interest**

Ratio 1: total loan borrowings on interest must not exceed 30 per cent of market capitalisation, or, the total asset value of the relevant company. The principal amount so borrowed, may be permissibly used by the borrower, because the loan amount is owned by the borrower. Anything purchased with this loan is therefore legitimate gain, in the hands of the relevant company.

3. **Impermissible dealing arising from Incidental Trading**

Ratio 2: total loan deposits/investments in interest bearing securities, arising from incidental trading, must not exceed 30 per cent of market capitalisation, or, total asset value of the relevant

company, provided that the main trading activity of the relevant company is at all times halal.

4. **Liquid- Illiquid Combination**

Ratio 3: illiquid tangible assets of the relevant company must not be less than the 30 per cent of total market value of assets, inclusive of cash, debt and gold inventories, if the main object of the relevant company is not to trade in cash, debts and equivalents (because the liquid assets in this situation are deemed to be subordinate, in relation to the tangible assets). If all the assets of a company are cash or debts, then a sale of its shares must be effected at par value, any excess or discount constituting riba (interest).

5. **Impermissible Income**

Ratio 4: the quantum of income generated by impermissible incidental trading of the relevant

company, must not exceed 5 per cent of the total income of the company for the latest financial period, provided that the main trading activity is at all times halal.
(Compare AAOIFI standard)

6. **Purification of Impermissible Income**

The subject matter of purification is the share itself: this is done by dividing total impermissible income for the relevant period by the number of issued shares, of the relevant company. Capital gains, arising from sale of the investment, need not be purified, because no part of the price can be allocated to any impermissible income received by the company. The Shariah obligation to purify is against the fund, which must deduct the impermissible income at source, and mandatorily pay the same over for charitable purposes.

7. **Sarf Contract of Sale of Gold and Silver**

Gold and silver must not be sold on deferred basis because they are governed by the rules of the contrac of sarf: that is, the sale of gold for gold, or silver for silver, must be effected at spot, in equal quantities, on both sides, on the basis of mutual exchange and possession. Even if gold is exchanged for its equal quantity of gold, without any addition, but the payment on one side is delayed, this is also prohibited, as falling within the ambit of Riba Alfadl.

It is not permissible to sell shares of gold producing companies on deferred murabahah. (AAOIFI)

8. **Subsidiary Companies**

The fund must not invest in an entity, whose subsidiary's core activity is prohibited, irrespective of its size, relative to the parent company. The

reason is that, the fund is not permitted to engage directly in a prohibited activity, according to the Shariah.

9. It may be contended that the person who buys shares through a stock exchange is not a real partner in the underlying company, with the result that, when a share is sold via the exchange, this represents the sale of only a "right to profits".

10. The answer is as follows.

11. The core function of an exchange is to ensure fair and orderly trading, by inter alia matching willing sellers and buyers, as well as efficient dissemination of price information for the shares trading on that stock exchange.

12. The core function of an exchange is to ensure fair and orderly trading, by inter alia matching

willing sellers and buyers, as well as efficient dissemination of price information for the shares trading on that stock exchange.

12.1 Take the following example: Zaid buys 100 shares in MTN, which is a listed company on the Johannesburg stock exchange. Assume that the total issued share capital of MTN at the time of the purchase is 1000 shares. This acquisition of ten per cent by Zaid means inter alia that:

12.2 Zaid's name is entered in the register of issued securities of MTN, as the new beneficial owner of the 100 shares.

12.3 Zaid as beneficial shareholder is entitled to exercise all the rights including voting rights associated with the 100 shares, on

every matter that may be decided by shareholders of the company.

12.4 Zaid as shareholder is entitled to ten per cent of the dividends declared by the company.

12.5 Zaid as beneficial shareholder is entitled to receive ten per cent of the net assets of the company upon its liquidation. If the assets of the company are destroyed for whatever reason, Zaid loses his total investment.

13. The correct Shariah characterization, as approved by the majority of contemporary Shariah experts, is that Zaid owns a pro rata undivided share (mushaa) equal to ten per cent of all the underlying movable and immovable assets of the company. Custom and trade usage also regards the shareholder

as the real, true proportional owner of the company. If Zaid in turn elects to sell his pro rata undivided share (in the underlying tangible and intangible assets) on the stock exchange to a new third party buyer, Amr, the sale falls within the scope of the sale of an undivided share (mushaa), and the new buyer Amr steps into the shoes of Zaid, as the new registered owner, with all the rights, entitlements and privileges associated with his shareholding, including a pro rata right to the net assets upon liquidation. Article 215 of the Hanafi code Majallah states: "It is permissible to sell a specified undivided share (in property) without the permission of the co-owner".

14. The Global Fiqh Academy, based in Jeddah, at its 7th session in 1992 dealing with Financial Markets passed inter alia the following resolution 63:

"The subject matter (mabih) of a share held by a shareholder is an undivided share in the assets of a company, with the result that the share certificate represents proof to establish this pro rata entitlement (to the underlying assets). There is therefore no impediment in Shariah to issue share certificates in this form which are tradable. The subject matter of a sale of a share is the proportional undivided share in the underlying assets of the company, and the share certificate is evidence of the right to such entitlement to an undivided share."

15. One should be careful so as not to apply the rules of a regular partnership, which is based on mutual agency, to a company. The shareholders as true owners make decisions on all matters, reserved for shareholders, through voting by ordinary or special

resolution at a general meeting. It is the shareholders who control the company, and who appoint and remove the board of directors whose core function is to manage the business of the company in the best interests of all the shareholders and the company.

16. It is significant to note that the well-known Indian jurist Imam Ashraf Ali Thanvi (ra) permitted the sale of shares, provided that the essentials of a sale contract were complied with. (Imdaadul Fataawah, volume 3 page 486 to 505) And Allah Knows Best.

LANDLORD INTENDS LESSEE TO USE PREMISES FOR PROHIBITED PURPOSE

CHAPTER 6

1. In order to understand the position of Imam Abu Hanifah (ra) on the issue of leasing of premises for a prohibited activity, two different situations must be clearly distinguished: The first situation is where the landlord **expressly authorizes** the letting for a prohibited activity, and accordingly **intends** that the premises will be so used for a prohibited purpose. For example, the lease explicitly stipulates that the tenant shall use the premises for the sale of liquor/wine, or a conventional bank or insurer. In this case, the overwhelming majority of the jurists (Jumhur) are of the opinion that the lease is null and void at inception, with the result that the stipulated rental income is impermissible. The

reason for this is that the subject matter of the lease is a direct prohibition or direct sinful transgression, and accordingly contrary to the express prohibition enshrined in the Quranic verse: "*Do not co-operate with one another in sin and transgression". "Al Maidah 5:2, see the authoritive juristic text, Mugni of Ibn Qudamah vol4 p306".*

2. The second situation covers the case where the landlord leases the premises for a permissible activity as stated in the lease (eg. general dealer). The tenant however voluntarily, and without the consent of the landlord, uses the premises for a prohibited activity. Such conduct of the tenant is a new independent cause which breaks the chain of causation, and therefore cannot not be attributed to the landlord; bearing in mind that the intention of the landlord was not to let the premises for a prohibited activity,

because only a permissible use is stipulated in the lease. It is only this situation, that gave rise to a difference of opinion in the Hanafi school between Imam Abu Hanifah, on the one hand, and Imam Abu Yusuf and Imam Muhammad, on the other. The latter still held that the lease was void, and the rental specified impermissible. *(see the well known juristic text, Al Mabsut, Sarakhsi, vol 16).*

3. Against this background, the relevant fatwas of the Indo Pak scholars must be considered in proper context. They only deal with the second situation referred to in paragraph 2 above, where the landlord does not expressly authorize the letting and use of his premises for a prohibited haraam activity, and therefore does not **intend** to commit a prohibited act. On the contrary, as stated above, the act of the tenant is an independent one, not explicitly authorised by the lease contract,

which in turn breaks the chain of causation. As was stated by Allama Zafar Ahmed. Thanvi (ra), Imam Abu Hanifah (ra) only permitted a contract that was a means to escape from haram conduct, (and not vice versa): see his well known work: ila al Sunan vol 14 p172.

4. In short, therefore, any conventional lease which expressly specifies and stipulates that the tenant is entitled and authorized to use the premises leased, for a prohibited activity, such as a conventional bank, or conventional insurance, or sale of liquor, is null and void, with the result that the rental is impermissible, in accordance with the opinion of the overwhelming majority of jurists. In this situation, the landlord and tenant by contractual arrangement collude and co-operate with each other, to use the premises for a prohibited purpose or actitivity.

5. The aforegoing opinion is consistent with the standpoint of the contemporary Shariah experts including the recognised international fiqh academies.

ARE PENSION AND PROVIDENT FUND DEATH BENEFITS PAYABLE INTO THE ESTATE OF THE DECEASED MEMBER?

CHAPTER 7

1. The central question is: how are the pension and provident fund death benefits payable to a member to be dealt with, on his death, in terms of the Shariah? Are the death benefits payable into the deceased estate to be distributed amongst his or her heirs, determined at death, according to the rules of the Islamic Law of Succession? How are such payments characterised according to Shariah law?

2. The Muslim jurists are unanimous that monetary rights which attach to the property of the deceased are transmissible to the heirs of the deceased upon his or her death. (for

example, the right of the creditor to hold the pledged thing (rahn) is transmitted to the creditor's heirs).

3. There is however a difference of opinion on the category of rights per se, which are transmissible to the heirs of the holder of the rights. (for example, a stipulated right of option of a party to a contract of sale to cancel the contract within an agreed period. (Khiyar al Shart) In the Hanafi school, the option lapses upon the death of the holder. In the other schools, the option is transmissible to the heirs of the deceased holder of the right, because it is a monetary right. [6]

4. On the other hand, there is unanimity, across all the schools, that a valid debt (dain sahih)

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[6] See for example, Kitab-Al-Mugni, IBN Qudama, on sale. Kuwait Fiqh Encyclopaedia on Definition of an Estate (Tarika)

owed to the deceased at the time of his death, forms an asset in his or her estate.

5. The crucial question therefore is: Did the deceased member, at the time of his death, have a valid, legally enforceable entitlement against the Fund for the payment of the death benefits? If so, the value of the benefits clearly and indisputably form part of the deceased's estate, to be dealt with according to the Shariah.

6. The answer to this question is found in the provisions of section 37C of the Pension Funds Act, 1956. (hereafter referred to as "the Act"), which is the applicable law.

7. This section creates a statutory order of precedence for the payment of death benefits to the dependants of the deceased member, who were legally and factually dependant on

the deceased for support at the time of his death. Section 37C (1) expressly provides that the benefits payable "shall not form part of the assets in the estate" of the deceased member. The trustees of the Fund are, in terms of section 37C (1)(a), given the discretion to allocate the death benefits between the dependants of the deceased, in such proportions as they may deem equitable. In doing so, they may override the nomination of any person who the deceased may have designated in writing as a beneficiary to receive the proceeds of the death benefits.

8. The following was stated in a Court case, Mashazi v African Products Retirement Benefit Provident Fund,[7] on the objects of the section:

"Section 37C was intended to serve a social function. It was enacted to protect

[7] Per Hussan J : 2003 (1) WLD at page 632 H - J

dependancy, even over the clear wishes of the deceased. This section specifically restricts freedom of testation in order that no dependants are left without support. Section 37C (1) specifically excludes the benefits from the assets in the estate of a member. Section 37C enjoins the trustees of a pension fund to exercise an equitable discretion, taking into account a number of factors. The fund is expressly not bound by a will, nor is it bound by a nomination form. The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion...".

9. The Fund is a juristic person, a body corporate, which is vested with its own assets, and it is responsible for its own liabilities, capable of suing and being sued in its corporate name, and capable of doing all such things as may be necessary for or incidental

to the exercise of its powers or the performance of its functions in terms of its rules. (Section 4B read with section 5)

10. The contributions paid by the member to the Fund are accordingly owned by the Fund as a separate legal person.

11. The member is bound by rules of the Fund. In terms of section 13 of the Act, the rules of the Fund shall be binding on the fund and its members and on any person who claims under the rules.

12. The member acknowledges and agrees, through subscribing to the Fund, that the death benefits will be dealt with as provided in section 37C.

13. In these circumstances, it is apparent that the deceased member has no legal entitlement or

claim against the Fund, for payment of the benefits at the time of his death, with the result that the death benefits are excluded from his estate, according to the Shariah.

14. In my view, the death benefit payments made by the trustees, in the exercise of their discretion, to the dependants of the deceased, in terms of section 37C of the Act, should be characterised as gratuitous payments in the nature of tabarru. On this basis, it makes no difference whether or not the Pension or Provident Fund in question is voluntary or compulsory.

15. A similar conclusion was reached by certain fataawa,[8] and appears to be the view of

[8] see Contemporary Fataawa, by Mufti Muhammad Taqi Usmani, "Entitlement to Death benefits Payable by Pension Funds", page 165 – 167 - Fataawa Mahmudia (20 : 402); Fataawa Haqaania (6 : 541); Ahkaam Mayyit (page 261); Mufid Al Waariseen (page 29)

certain contemporary Shariah experts in the field of Islamic finance.[9]

[9] In a recent telephonic discussion, the distinguished contemporary jurist, Shaykh Abdul Satar Abu Guddah confirmed that the proceeds do not form part of the deceased estate. According to him, this view has also been adopted by various Shariah Boards of Islamic Financial Institutions.

PRIZES AND REWARDS ON BANKING ACCOUNTS

CHAPTER 8

1. I however summarize below the relevant rules, as adopted by AAOIFI: *(qard, sharia standard 19: 10/2)*, and the contemporary experts in Islamic finance, (*see also resolution no. 2/23 of Albaraka Academy on Islamic Economics, 23rd session, November 2002),* in this regard.

2. A current account[10] is by consensus characterised as a loan by the depositor to the

[10]The funds in a current account, which represents loans, the bank guarantees their repayment on demand, without any additional increase. The bank owns the funds, and may invest them for its own benefit. On the other hand, the funds held in an investment account, are held in trust, and bank does not guarantee the repayment, except in the case of misconduct, negligence, or material breach of contract. *see AAOIFI shariah standard 40 : 2/2/1*

bank. This is also the legal position. It follows that any legally enforceable rewards, incentives, or prizes given by the bank (as borrower) to depositors (as lenders) on these loan accounts is treated as a contractually prohibited stipulated return, in the form of interest, on the loan, representing the amount of the deposit at the relevant time.

3. In relation to investment accounts, structured on mudarabah basis, it is permissible for the bank to grant incentives or rewards or prizes on these investment accounts, because the depositors' primary object, as the owner of the funds, is to share in the profit and loss, arising from their investment by the bank, as mudarib, in Shariah compliant instruments. This is subject to two conditions:

   (a) the net effect and benefit of the reward or incentive must not under any circumstances **guarantee** the return of

the capital of the investor/depositor. This will apply where the value of the reward will equal or exceed the capital contributed by the relevant investor. It is established that the guarantee of the return of capital of a partner is prohibited.

(b) The amount of the reward or incentive must be paid by the bank from its own resources, and not from the mudarabah pool/portfolio. The reason is that the bank in its capacity as mudarib does not have the power to make gratuitous payments from the mudarabah pool.

4. In relation to incentives granted in respect of credit cards, these are permissible, because the credit card transaction is treated as hawaalah or assignment or transfer to the bank, of the relevant debt, due and payable by the client to the merchant. The relationship

between the bank and the client is that of creditor and debtor. On this basis, the bank is in effect a lender/creditor to the cardholder. Any incentive granted, to the cardholder, is therefore given by the bank as creditor or lender. Hence, the question of interest does not arise, in the situation where the incentive or reward is granted by the lender/creditor, to the debtor.

PURCHASING A LETTING ENTERPRISE WITH IMPERMISSIBLE LETTING UNITS : SHARIAH CRITERIA

CHAPTER 9

1. What are the criteria from a Shariah perspective in acquiring commercial property for letting purposes?

2. In many cases, a commercial letting enterprise has individual shops or units, which have been leased to tenants who conduct impermissible activities, according to the Shariah. For example, take a conventional bank or a liquor store, which is already trading, in terms of a pre- existing lease, at the time of purchase and transfer of the whole letting enterprise. (hereafter, "the impermissible leases")

3. Such impermissible leases are by majority of jurists null and void (baatil), because they

expressly and unconditionally stipulate that the tenant is authorized by the landlord to conduct the prohibited activity. Simply put, the landlord is a direct immediate party in deliberately engaging in the conduct of the impermissible activity, effectively colludes, and acts in concert with, the tenant to do so, with the result that the rental, received in return for the prohibited use, is by majority of all schools, impermissible, according to the Shariah. [11]

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[11] The Shafei, Maliki and Hanbali schools are unanimous that the rental is impermissible as a result of the invalidity of the impermissible lease. On the other hand, Imam Abu Hanifah (ra) appears to have expressed the view that, in certain specific situations, the impermissible lease is not necessarily invalid, although prohibited. However, the contracting parties are obliged to terminate the lease, and the resultant rental is treated as impure gain, (Kasb Khabees), which should be paid to charity. (see: Fatwa of Darul Uloom, Karachi on the Hanafi view issued on 12 May 2014, obtained by the writer).

4. The purchaser of the letting enterprise has, in these circumstances, two options, as set out below.

5. The first option is that the purchaser may acquire the whole property, inclusive of all the lettable units, including the impermissibly leased premises. The purchaser is obliged in law to honour the impermissible leases, because the new owner / landlord automatically steps into the shoes of the old landlord, with effect as from the date of legal registration of transfer of the property in the relevant Deeds Registry. ("the first option")

6. If the landlord exercises the first option, then the landlord is obliged to pay the purported rental received, as consideration for the prohibited use, under the void lease, to charity. If such impermissible rental amount is paid, and gratuitously transferred to a

charitable trust, in the nature of a waqf, as a separate entity, then, such transferred amount is deemed to be converted to an halaal receipt in the hands of the waqf, and is deemed to be owned by the waqf, as such. This is in accordance with the Shariah maxim to the effect that a change in the cause of ownership transfer, constitutes a deemed conversion of the character of the underlying subject matter of the transfer, in the hands of the recipient. (See article 98 of the Majallah, together with the commentary of Allama Attasi, ra). The latter (waqf) in turn may distribute such amount in accordance with the charitable objects of the waqf. It must however be noted that such impermissible rental, constituting prohibited haraam return in the hands of the lessor, arising from a void baatil contract of lease, cannot be used by the lessor, in its capacity as owner of the premises, to pay a valid, legitimate debt, such

as utilities, rates and taxes, and maintenance expenses of the building. Once the impermissible lease agreement expires, it cannot be renewed or extended, and the premises must then be let to a new tenant, who is contractually obliged to conduct Shariah compliant activities therefrom.

7. The second option is to legally segregate the impermissibly leased units, that is, those units or individual premises, from where the respective tenants conduct prohibited activities. This may be done through a sectional title or shareblock structure, or other legally enforceable mode of ownership separation, and transfer of risk. In this situation, the purchaser will only acquire those units which have tenants conducting Shariah compliant activities, thereby excluding the legally segregated impermissibly leased units from the acquisition and resultant ownership.

8. In the case of a sectional title structure, for Shariah purposes, the purchasing company would own all the units or premises in the complex, which are used for conducting Shariah compliant activities. Another company, beneficially owned by a third non-Muslim party, would hold all those units, which are used for purposes prohibited by the Shariah. The two sectional title owners would be involved in overall management, and their relationship would be regulated in terms of a bilateral agreement. Sectional Title confers legal ownership of the units, together with undivided share in the use of common property. The sectional title unit is a capital investment, and an asset that can be given as security to raise finance. The insolvency of the one company would not affect the insolvency of the other company, as creditors of the insolvent company can only have recourse to

the units legally owned by the insolvent entity.

9. On the other hand, in a shareblock investment, governed by the Share Blocks Control Act, 59 of 1980, the property is registered in the name of the share block company. Each unit is allotted a certain number of shares in the company, based on its size and quality. A shareblock confers a personal right to exclusively use and occupy a specified unit, in accordance with the use and occupation agreement. In this context, the one company would hold all the shares which confer a right to use all those units which are leased for Shariah compliant purposes. The other company would hold all the shares which confer a right to use only those units which are leased for prohibited activities. As there would be only two shareholders, they would enter into an appropriate shareholders

agreement regulating their relationship. The risk of insolvency is low, quite apart from the fact that a shareblock company, in terms of section 14 of the Act, is prohibited from increasing its loan obligation or encumbering any of its assets, unless the increase or encumbrance has been approved by a resolution of at least 75 per cent in number of the members of the company, excluding from such members the share block developer, entitled to vote and holding in the aggregate at least 75 per cent of the total number of votes of all those members, but excluding from such number of votes, the votes held by the share block developer. Upon winding up of the share block company, any surplus, after payment of creditors, would normally be divided pari passu between the two shareholders in proportion to the nominal value of the shares.

10. In the light of the aforegoing, the remaining issue that arises for consideration, relates to the situation where premises are leased by the landlord to a tenant whose major trading activity is Shariah compliant. However, a small part of its trading activity, carried on from the premises, comprises the sale of liquor and/or pork products. An example is Woolworths or Spa. In this case, the leading international contemporary Shariah experts have applied the five per cent benchmark. This means that it is permitted to lease premises to such a supermarket, provided that the quantum of income generated by the prohibited component (alcohol or pork) does not exceed 5 per cent of the total revenue of that business, so conducted from the leased premises. Put differently, 5 per cent or more of the income of the tenant, generated from the leased premises in question, must not be derived from impermissible components, or

sources, such as the sale of liquor or pork products. This percentage may be obtained from the relevant tenant, or, otherwise estimated, on a balance of probability assessment. Once the landlord determines the appropriate percentage, not exceeding 5 per cent, the corresponding proportion of the rental received from the tenant, must be deducted at source, and unconditionally paid to charity. This concession, in the form of the 5 per cent benchmark, has been granted by contemporary Shariah experts in order to avoid hardship and difficulty, having regard to the well known Shariah maxim, described as Umum Al Balwa, that is, widespread unavoidable affliction is excused in certain defined circumstances

WAQF AS AN INSTRUMENT OF POVERTY ALLEVIATION AND SOCIAL TRANSFORMATION

CHAPTER 10

1. What can we do to alleviate the widespread global poverty? How can we assist in the uplifting and empowering of the poor and needy? A significant proportion of the world's population live in abject poverty, that is, a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. In South Africa, where the income gap, measured in terms of the Gini Coefficient, is one of the highest in the world, (0.63), some 13 million individuals were unable to get enough food into their stomachs every month. In 2008 - 2009, close to 11 per cent of the South

African population fell below the world bank's extreme poverty line of living on 1.25 dollar a day or less.

2. Against this background, the waqf, as an original, unique, perpetual charitable endowment, is one of the most effective voluntary endowment instruments to alleviate poverty and effect genuine social transformation, whilst at the same time securing for the founder, perpetual, ongoing, recurring reward (sadaqah jariyyah) in the Hereafter. Its object is to exclusively achieve Divine Proximity, (qurbah) through benefiting all classes of pious, benevolent and charitable works. The first charitable waqf was created by the Holy Prophet (saw) in Madina, when he settled seven orchards for the benefit of the poor and needy. Umar (ra), the second caliph received a valuable garden of date palms in Khayber. He sought the advice of the Prophet

(saw). The Prophet (saw) replied: "if you like, you can detain the corpus, and distribute the fruits in charity, provided that the corpus is not sold, donated or inherited". (Muslim: 4200) Umar (ra) acted on this advice and created a waqf for the benefit of the poor, wayfarers, relatives, liberation of slaves, guests, and in the path of Allah. Thereafter, all the companions, who were able to do so, created waqf endowments. (Ibn qudamah, Mugni). The Holy Prophet (saw) stated: "when a man dies, all his actions terminate, except for three categories: sadaqah jaariyah, (that is, recurring charity in the form of waqf), or knowledge left behind by which people benefit, and a righteous child who prays for him. (Muslim : 4199).

3. In short, waqf means an immediate gratuitous relinquishment of ownership (isqaat), or, immediate gratuitous transfer of ownership

(tabarru), of specified unencumbered property, on the basis that the corpus thereof is held in perpetuity, and the benefits or fruits or income derived therefrom is distributed by the trustees to the class of beneficiaries specified by the founder, in accordance with the terms and conditions specified by him or her.

4. The main characteristics of a waqf may be summarized as follows:

4.1 the founder (waaqif), of competent legal capacity, must be the complete owner of the relevant property, earmarked for the waqf, at the time of the creation of the waqf, whether fixed immovable, and otherwise customarily recognized movable, incorporeal property, including cash. ("the waqf property")

4.2 the specified waqf property, constituting the subject matter of the waqf, is held in perpetuity, and cannot be sold, alienated, donated, pledged, or otherwise be capable of being owned by inheritance. In other words, the waqf property, as the corpus, is held intact in perpetuity, the income to be used to provide ongoing continuous, ongoing benefit to the poor and needy.

4.3 Once validly created, either by appropriate oral declaration (Abu Yusuf), or, by delivery of the waqf property to the trustees, the founder irrevocably loses complete ownership of the waqf property, and all consequential powers of disposition, as the usual incidents of ownership. Ownership of the waqf property in a binding waqf, according to the preferable view, however, does not

pass from the founder to the beneficiaries, but is held metaphorically in the ownership of Allah. To the extent that there is a difference of juristic opinion as to whether a binding irrevocable waqf has been created in a particular case, a decree of a judge confirming its irrevocability removes the difference, and is final as to its being binding and irrevocable, according to all schools.

4.4 The net income of the waqf property must be distributed by the trustees (mutawallis) to the designated beneficiaries or otherwise ultimately for the specified charitable purpose of benefiting the poor and needy.

4.5. Acceptance on the part of non specific beneficiaries, such as the class of poor

and needy, is not a requirement. However, a specified beneficiary may repudiate the stipulated benefit, in which event, subject to the directions and provisions of the waqf deed, the benefit devolves upon the poor and needy. (Allamah Ibn Aabideen, Radd al Muhtar)

5. The waqf is in substance a legal person, with power to contract, acquire its own rights and incur its own obligations. Any subsequent donations made to the waqf are owned by it, as a separate legal entity, do not form part of the founding waqf property, and may accordingly be used for the furtherance of the objects of the waqf or for its purposes. (Fataawa Hindiyah)

6. The founder has wide powers to stipulate the terms and conditions of the waqf, including the appointment of trustees and their

removal. The founder may stipulate in the waqf deed that a part or whole of the income may be paid to him, his spouse and children for the period of their lives in specified proportions, or otherwise at the discretion of the trustees. The founder may even specify that his debts must be paid from the income of the trust. The founder may reserve to himself or the trustees (for the time being) the power to amend the waqf and vary the identity of the beneficiaries and their entitlements. The wide latitude of the founder to specify the terms of the waqf, as having the status of express Shariah rulings, is encapsulated in the well known maxim: shart al waaqif ka - nass al - shar. As a general rule, the founder's stipulations must be strictly honoured, subject always to the overall supervision of the Court, to prevent mismanagement, to remove an unfit trustee, or otherwise the Court intervention is directed

to promote the best interests of the trust and beneficiaries.

7. Although waqf property is held in perpetuity, the classical jurists have recognized that in specified circumstances, more particularly where the waqf property has declined or become unproductive, it needs to be sold and replaced. The proceeds of the sale is then correspondingly used to acquire a viable property in substitution, and such substituted property enjoys the status of waqf property, to be dealt with in accordance with the terms of the waqf deed. This is technically known as istibdaal. If the founder (waaqif) has reserved in the waqf deed the power of substitution, then this power may be exercised in accordance with its terms. Even if the founder has expressly prohibited a sale and substitution, the Court has the power to intervene, and order a sale and substitution, if

this is more beneficial to the waqf. (Ibn Nujaym, Al - Ashbah wa al Nazaair)

8. A person can create a waqf of specific property to take effect upon his or her death. In this situation, the waqf has the effect of a wasiyah. This means that the scope and application of the waqf will be limited to one - thirds of the estate of the deceased founder, the remainder of the two - thirds to devolve automatically upon the prescribed heirs of the deceased, determined at time of death, in the specified ownership proportions. If the value of the waqf at time of death, exceeds one - thirds of the estate, then, the excess may be consented to and ratified by the interested heirs, in proportion to their shares. (Ijaazah)

9. It should be noted that, if impermissible income, such as interest, is paid to a waqf, such income changes its character and

constitutes a halal accrual of ownership in the hands of the waqf, because the cause of ownership transfer, (from donor to donee) has changed. **This accords with the fatwa of the contemporary Shariah experts, including Mufti Taqi Usmani and Shaykh Abdul Satar Abu Guddah.**[12] On this basis, the waqf, as owner thereof, is entitled to use the money for its objects, including operational expenses. This rule is supported by the following hadis: Barirah received some meat as sadaqah. The Prophet (saw) asked her for a portion thereof. She replied that, she had received the meat as sadaqah, charity. The Prophet (saw) replied: "For you, it is (received as) sadaqah. For us, it is (received as) a gift. "(see Majallah, article 98: in line

[12] This was reconfirmed to the writer by both distinguished jurists telephonically on the 20 April 2014.
see also: Fataawah Usmani, vol 3, pages 128 to 140. Fataawa of Unified Shariah Board of Albaraka, vol 1, page 315 – 316.

with the commentary of the great Syrian Mufti, Khaled al Atassi, ra)

10. A waqf qualifies as a trust within the wide meaning of article 2 of the Hague. Convention on the Law applicable to Trusts and on their Recognition. The term "trust" refers to the legal relationships created - inter vivos or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. Article 6 provides that a trust shall be governed by the law chosen by the settlor. On this basis, a waqf would appear to be a trust within the meaning of article 2, in those countries, (example, Australia) which have adopted the convention without qualification. Whilst South Africa has not adopted the convention, the Trust Property Control Act, 57 of 1988, has introduced a broad definition of trust. A waqf

fits into this definition, with the result that it falls to be regulated by this Act. There is accordingly no difficulty in incorporating clear provisions which comply with waqf principles, including the perpetuity rule, and a choice of law provision to the effect that the waqf will be governed by Shariah law. The waqf will also qualify for an income tax exemption, provided it complies with the requirements of sections 10 (1) (cN) and 30 of the Income Tax Act of 1962.

11. The Founder should identify the broad empowerment objectives, having regard to an objective level of priorities and needs, designed to ensure that every poor individual is granted the tools, means and opportunity to realize his or her full potential, and human dignity, for the benefit of society, and directed at achieving a more equitable distribution of wealth. The needs are many, but those that

enjoy the highest priority, within a particular society, should be selected, so that resources are effectively, qualitatively, utilized for empowerment and poverty alleviation. Education and skills development are off-course, amongst the highest priority objectives.

12. Waqf funds must obviously be invested in Shariah compliant modes of investment. These include income generating immovable properties, Shariah compliant equities, Shariah compliant unit trust funds, appropriate sukuk instruments, and Mudarabah Investment accounts with Islamic Financial Institutions. The waqf itself may also conduct the relevant benevolent activity, such as the provision of specified essential services.

TRUST INTER VIVOS: SHARIAH CHARACTERIZATION AND GUIDELINES

CHAPTER 11

1. A trust inter vivos ("the trust") is essentially a lifetime arrangement, whereby the true founder transfers or delivers his or her asset/s to named trustees, appointed by him, to be held in trust, for the sole benefit of the designated beneficiaries, normally the spouse, children and descendants of the true founder, as is stipulated in the trust deed. The trust may be discretionary or vesting. It is discretionary when the appointed trustees, acting in a fiduciary capacity, are conferred the unfettered discretion to allocate income or capital to one or more beneficiaries selected from a defined group, in such proportions as they deem appropriate. The trust is vesting, when the specified beneficiaries enjoy a legal vested right to the income and capital of the

trust in fixed proportions, as is specified in the trust deed.

2. The trust is generally created to legitimately minimize estate duty and income tax, in accordance with the conduit principle: that is, any income vested to or accruing to a beneficiary within the same tax year, such income will retain its nature, and will be taxed in the hands of that beneficiary at his or her tax rates. In relation to estate duty saving, take the simple example: the founder buys a commercial property for 10 million rands. He transfers the property to a family trust. The property grows in value to 15 million rands, over a period of time. The additional growth in value of 5 million rands is a growth in the trust, and is accordingly exempt from estate duty. Similarly, the net income generated by the property, after providing for an acceptable market-related return on the founder's loan

account, is split between the beneficiaries in the books of the trust, thereby potentially significantly reducing income tax, which would otherwise have been paid at a much higher rate in the hands of the founder, if the trust was not created.

3. From a legal perspective, the essence of such a trust is that enjoyment and control are functionally separate. The trust is for all practical purposes treated as a separate ring fenced legal entity, although not regarded as a separate legal person. It has been described as a legal institution sui generis. (*see: Braun v Blann and Botha NNO 1984 (2) SA 850 (A) at 859 E)* The trustees have no beneficial interest in the trust assets. They have a fiduciary responsibility to act in the best interests of the beneficiaries, in accordance with the provisions of the trust deed. They may be held liable for damages suffered by

the beneficiaries, in the case of misconduct, negligence or material breach of trust. The Master of the High Court exercises supervision to restrict or prevent abuses in terms of extensive powers under the Trust Property Control Act. The Courts however exercise overriding jurisdiction to prevent abuse of the trust form.

4. What then is the correct Shariah characterization of a trust inter vivos? It is obvious that the trust inter vivos does not fall within the scope and ambit of a recognized contract in Shariah, in terms of which ownership, and damaan (risk) of the asset, constituting the underlying subject matter of the relevant contract, passes from one person to another, subject to the conditions governing the relevant contract. For example, in a contract of sale, ownership of the specific asset (subject matter) passes from seller to

buyer, immediately upon conclusion of the contract, whilst the risk (damaan) in the asset only passes from the seller to the buyer upon actual or constructive possession thereof by the buyer. On the contrary, the founder ordinarily has no real intention of unconditionally and absolutely transferring ownership of the asset, which is, for convenience, held in the name of the trust for purposes of effective estate planning and tax savings and benefits.

5. In substance, therefore, the trust is ordinarily, from a strict Shariah perspective, simply the alter ego of the founder, who exercises de facto control over the assets and activities of the trust. The trust represents a flexible special purpose vehicle designed to achieve optimal estate duty and tax benefits, unless there is clear evidence to the contrary to the effect that the true founder has entered into a

prior Shariah compliant contract, in terms of which the trust is by consent used as a pure conduit to give effect to such Shariah compliant arrangement. Ultimately, the true founder retains overriding control via the board of trustees, of which he or she is a member, the remaining trustees simply give effect to the founder's directions.

6. On this basis, applying substance over form, the true founder remains the real owner of the assets held or registered in the name of the trust, according to Shariah principles, unless there is clear and compelling evidence to the contrary, that the founder has transferred ownership of the underlying assets to the beneficiaries of the trust in terms of a prior recognized Shariah compliant contract, and consequently the beneficiaries as true owners have elected to use the trust as a

conduit and vehicle to achieve optimal tax and estate duty benefits.

7. This means that, in the normal situation, the trust deed must be structured appropriately to ensure that, upon the death of the true founder, his or her assets, held nominally in the name of the trust, represented by capital and accrued income, must be distributed to the heirs of the true founder determined at the time of his or her death, strictly in accordance with, and in the proportions fixed by the Islamic Law of Succession.

8. The final question remains: how does one characterize the treatment of trust income which has been credited to, and legally vested in, the designated beneficiaries in the books of the trust, by the founder in his lifetime (acting through the board of trustees)? Should such legally vested amounts (reflected in the

trust financials as loans owed by the trust to the specified beneficiaries) be treated as pure book entries for tax purposes, and be accordingly brought into account, upon the death of the founder, and redistributed at the relevant time amongst the founder's heirs determined, at time of death, in accordance with the Islamic Law of Succession?

9. In my view, it is preferable to treat such past credited amounts of income, which have legally vested in a beneficiary, but have not been actually paid out, as a completed donation made by the founder to the relevant beneficiary/recipient. The founder may however direct, in a side agreement, that all such credited amounts were in fact pure book entries for tax purposes, and must accordingly be brought into account and adjusted upon his death, to be redistributed amongst his

prescribed heirs, in the proportions fixed by the Shariah.

CONSTRUCTIVE DELIVERY OF LISTED SHARES ON THE JOHANNESBURG STOCK EXCHANGE

CHAPTER 12

INTRODUCTION AND ISSUES

1. This matter relates to Shariah issues arising from the buying and selling of ordinary shares in approved public companies, as listed on the Johannesburg Stock Exchange in South Africa. (hereafter referred to as "the shares")

2. It should be noted at the outset that the shares traded on the stock exchange are not evidenced by a certificate, and are transferable in electronic form by way of book entry without a written instrument. They are described as "uncertificated equity securities".

3. The crucial Shariah question to be answered is precisely at which stage, is the buyer of the

shares deemed to have taken constructive delivery of the shares, so as to enable the buyer in turn to sell the shares to a third party, and thereby make a legitimate (halal) profit thereon.

4. In order to answer this central question, the following Shariah issues arise for consideration:

4.1 What is the nature (juristic characterization) of the shares? ("First Issue")

4.2 When is the contract of purchase and sale of the shares concluded, so that ownership of the shares passes to the buyer? ("Second Issue")

4.3 When does constructive delivery of the shares pass to the buyer, so as to enable the buyer, in turn, to sell the shares to a third party? ("Third Issue")

5. I point out that the prospects of a failed trade are extremely rare because the trade is guaranteed. The stockbroker is obliged (as a pre-trade obligation) to ensure that the equity securities to be sold are held in uncertificated form by the stockbroker's CSDP (JSE Equity Rule 10.50.2.2.1). At the same time, the stockbroker and ultimately the JSE effectively guarantee payment, if the buyer is not able to settle a transaction. We understand that in the last ten years, there occurred only one failed trade.

THE FIRST ISSUE: CHARACTERIZATION OF SHARES

6. The contemporary shariah experts are unanimous that the owner of shares, in substance, owns a pro rata proportionate undivided share in the underlying assets of

the relevant company, (in which the shares are held).[13]

7. On this basis, the sale of shares represents, in substance, the sale of a pro rata proportionate undivided share in the underlying assets of the relevant company. In other words, the subject matter of the sale is the pro rata proportionate undivided co-ownership in the underlying assets of the relevant company. (which is normally evidenced by a share certificate).

THE SECOND ISSUE: DATE OF CONCLUSION OF SALE

8. In terms of the JSE Equities Rules, read with the Equities Directives, there is an electronic settlement timetable fixed for transactions conducted in shares ("equity securities")

[13] See resolution 63/4 and 63/5 of the global Islamic Fiqh Academy, based in Jeddah, which is an organ of the Organization of Islamic Conference. See also AAOIFI Shariah Standard mo.

which spans a period of five business days, (T+1 to T+5) after the trade date.

9. A "transaction" is defined in section 2 of the enabling Securities Services Act[14], 2004 as follows:

"*a contract of purchase and sale of securities*[15]"

9.1 The trade date is the day when the stockbroker:

9.2 Concludes a contract on behalf of a buyer or seller of the shares; (when a trade is matched on the JSE trading system)

[14] The term "securities" in section 1 of the Act is defined to include "shares, stocks and depository receipts in public companies" (see (a)(i) to the definition).

[15] Every transaction in shares effected by a stockbroker on behalf of a buyer or seller of shares, is subject to the Act, the Rules and the Directives

9.3 Electronically allocates to a buyer of shares, through the central order book of the JSE trading system, the quantity, identity, description and price of the shares, so purchased, including the trade date and time of transaction.

9.4 Issues a contract note to the client, confirming the transaction. The contract note sets out *inter alia* the quantity, description and price of the shares purchased by the client on the trade date, and contains the notation:" *This transaction is guaranteed by the JSE".*

10. It follows that ownership of the shares (according to the shariah), pass to the buyer on the trade date. This is supported by the following:

10.1. The risk, benefits and profit and loss in the shares pass to the buyer on the transfer date of the transaction.

10.2. If the shares so purchased suffered, for whatever reason, a decline in value[16] between T+1 and T+5, the risk of loss is borne by the buyer.

10.3. The buyer has the right between T+1 and T+5 to sell or dispose of the shares to a third party, without any legal or other impediments, and is accordingly entitled to the benefit of the proceeds of such sale.

[16] Say, for example, the underlying assets of the relevant company are substantially destroyed, thereby reflected in the share price.

THIRD ISSUE: CONSTRUCTIVE DELIVERY OF THE SHARES

11. In the light of what is stated in paragraph 11 above, the question arises as to what interpretation should be given to T+5, that is, the electronic settlement date, which is the fifth business day[17] immediately after the trade date.

12. The expression "settlement date" means[18] "*in respect of a transaction in equity securities, the date on which the transaction is due to be settled".*

13. It appears to the writer that the electronic settlement of the transaction through strate[19] on the settlement date constitutes the

[17] Means any day except a Saturday, Sunday, public holiday or any other day on which the JSE is closed.
[18] See section 1 of the JSE Equities Rules
[19] Strate means Strate Limited which is licensed as the Central Securities Depository under the Securities Services Act, 2004

administrative formalities of the relevant electronic book entries in the relevant CSDP, which must be effected and completed by T+5, (at the latest). This could be brought forward to T+1, if the automated computer systems permitted this mechanism.

14. Constructive delivery, taking the form of TAKLIYAH, is the situation, where the seller empowers the buyer to take possession of the shares, without any impediments thereto, and to dispose of the same. It takes the place of actual delivery, with the result that, if the thing is destroyed before actual delivery, the risk is borne by the buyer. The form of constructive delivery differs, having regard to the nature of the underlying commodity, which is the subject matter of the sale[20], and

[20] See for example, articles 263, 264 and 265 of the Ottoman Code, Majallah. See also Resolution 53 (6/4) of the Global Fiqh Academy on possession, including constructive possession.

its attributes may even be sourced in convention or commercial practice ("URF").

15. In short, constructive delivery of the shares to the buyer has two consequences according to the Shariah: firstly, it serves to transfer the risk ("damaan") to the buyer. Secondly, it empowers the buyer to sell the shares to a third party at a legitimate profit.

16. The critical question arises: at which stage between the trade date and T+5, can it be properly contended that constructive delivery has taken place?

17. In the light of the aforegoing analysis, I am of the opinion that constructive delivery of the shares is effected to the buyer on the trade date, *alternatively*, on the date that the contract note is issued to the buyer.

18. In arriving at this conclusion, I wish to express my gratitude to all those who gave valuable inputs in relation to the technical operations of the JSE, including the legal department of the JSE.

THE SHARIAH STATUS OF MEDICAL AID IN SOUTH AFRICA

CHAPTER 13

1. Medical Schemes are the primary funders of private health care in South Africa.

2. A medical scheme is not a profit - driven insurance company, which is established under insurance legislation. It is a not-for-profit organization, in the form of a separate legal person, established and registered in terms of the Medical Schemes Act, 1998 read with the regulations made thereto. (hereafter referred to as "the Act") It is subject to regulatory oversight by the Council of Medical Schemes.

3. Only a medical scheme, registered in terms of section 24 (1) of the Act, is entitled to carry on the business of a medical scheme. This, in

turn, is defined in section 1 of the Act to include the business of undertaking liability, in return for a contribution, "to grant assistance in defraying expenditure incurred in connection with the rendering of any relevant health service."

4. In terms of section 26 of the Act, a registered medical scheme is "a body corporate capable of suing and being sued and of doing or causing to be done all such things as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules."

5. The medical scheme, as a juristic person, owns its assets, and in terms of section 26 (1) (b) of the Act, assumes liability for and guarantees the benefits offered to its members and their dependents in terms of its rules.

6. All contributions received by a medical scheme are paid into its bank account. They are used to pay operating costs, benefits to members under the rules, and thereafter net operating surpluses are invested by the board of trustees in accordance with section 35 (7) of the Act. (for the benefit of all members)

7. The rules of a medical scheme, as approved by the Registrar, are binding on the medical scheme concerned and its members, officers and any person who claims any benefit under the rules. (Section 32 of the Act)

8. The trustees of a medical scheme are responsible for the overall governance and strategic management of the scheme. They are responsible for ensuring that the affairs of the scheme are properly conducted, in the best interests of members, and that the scheme at all times maintains its business in a financially sound condition, as is contemplated

in section 35 of the Act. In terms of section 57 (6) (a) of the Act, the board of trustees must take all reasonable steps to ensure that the interests of beneficiaries in terms of the rules, and the Act, are protected at all times. In this regard, a medical scheme must have at least a 25 per cent reserve level at all times, commonly known as solvency ratio.

9. Against this brief background, the crucial Shariah issue relates to the correct characterization of the relationship between a medical scheme and its members. Is the relationship based on a bilateral reciprocal commercial contract for gain, (aqd muawada) or, is the nature of the relationship akin to a gratuitous arrangement, known as tabarru?

10. On a careful examination of the Act, the regulations and the model registered rules of

a medical scheme, it appears to the writer that the relationship between the members and the scheme is in the nature of a gratuitous arrangement based on the principles of cross-subsidization, mutual assistance, social solidarity, and open non-discriminatory enrolment. There is no profit motive, and reserves and surpluses are held by the scheme for the benefit of members. If the medical scheme were to be wound-up and liquidated for any reason, any net surplus after payment of all legitimate claims and liabilities, would be returned to members, in accordance with its rules. In addition, the principle of community rating applies; that is, all members on a particular benefit option pay the same level of contribution, for the same benefits, irrespective of their age, health status or any other arbitrary ground, but otherwise they access benefits based on genuine need.

11. The contributions paid by a member may be treated as akin to gratuitous payments. These contributions are owned by the medical scheme, as a juristic person. The Scheme in turn, as a body corporate, pays the legitimate claims of members, in respect of the relevant benefit option, approved by the Registrar, in accordance with the rules, and not in terms of a commercial reciprocal contract of gain.

12. It may be argued that the arrangement is prohibited by reason of the basic Shariah principle of gharar, that is, reimbursement of a medical expense incurred by a member is contingent on the occurrence of an uncertain future event, which may or may not occur. For example, it is uncertain whether or not the member will fall ill, and if so, the time, nature and extent of illness, including uncertainty as to the quantum of expense incurred.

13. The answer is that, in terms of the Maliki school of jurisprudence, gharar or what may be described as manifest uncertainty of outcome, has a material effect on the validity of a commercial contract of gain, such as sale. For example, a conventional contract of insurance is prohibited because the undertaking to pay the indemnity by the insurer is based on the contingent occurrence of a chance future event, which may or may not occur. (the insurer definitely receives the full monthly premium due by the insured).

14. On the other hand, gharar (manifest uncertainty of outcome) has no effect on a gratuitous contract of tabarru. For example, A donates the fruits of his trees which will mature next spring to B. This donation is subject to a gharar contingent event, which

may or may not occur. If the fruits do not mature on the future date, the donee recipient suffers no harm. On the other hand, if A sold the fruits to mature on a future date to B, and the fruits do not mature, B as the buyer will suffer prejudice because he has paid the seller A the price, but receives nothing in return. (see for example, Al - Furuq of the well known Maliki jurist, Shihab al Din al - Qarafi).

15. It follows, in our view, that a medical scheme as described above and not conventional medical insurance is permissible in the Shariah. The writer's Arabic analysis and discussion paper on this subject as published in his Arabic book on contemporary issues, was approved by his teacher Mufti Muhammad Taqi Usmani, the distinguished contemporary jurist in the following terms: *"If the situation is as mentioned in your write-up,*

the conclusion drawn by you seems to be correct." (email written by Mufti Taqi Usmani of 26 November 2007).

SOME CONTEMPORARY APPLICATIONS RELATING TO TRANSACTIONS OF HALAAL AND HARAAM

CHAPTER 14

1. The great Maliki jurist Abul Walid Muhammad ibn Ahmad ibn Ahmad ibn Rushd (famously known as Ibn Rushd, the grandfather) has in his fataawah, published in 1987, dealt clearly with the rules and situations relating to wealth consisting of commingled halaal and haraam elements, and matters connected thereto. The distinguished contemporary jurist Mufti Taqi Usmaani has dealt with the subject in his valuable arabic work on the jurisprudence of sales (fiqh al buyu), which is in the process of being published. What follows is a short summary of some rules and practical applications.

2. At the outset, all the jurists are unanimous that money or property acquired from all unlawful and impermissible sources must be removed and returned to the rightful owner or his or her heirs. If the true owner cannot be identified or traced, the illegitimate gain must be transferred on his or her behalf to charity, including public welfare benefits. This also applies to interest received from a conventional bank which must be distributed to charity on behalf of the real owner thereto. (who obviously having regard to the nature of conventional riba based money lending banking business cannot be identified). In the case of unlawfully acquired property, if the exact same cannot be returned for whatever reason, its available equivalent (mithli), or, failing that, its market value must be returned and paid to the entitled owner as compensation for the actual loss.

3. A trader whose sole source of wealth and earnings is haraam. For example, a business enterprise which sells alcoholic liquor as its core activity. In this case, it is not permissible knowingly to enter into a transaction of sale or purchase or otherwise transact with, or receive benefits from, such trader because all his wealth is haraam and must be returned to the true owners or transferred to charity, as the case may be.

4. If the halaal and haraam components are in fact segregated and not commingled, then it is permissible to enter into economic transactions with the transferor concerned on the basis that his or her majority wealth is halaal, provided that the recipient transferee is not aware that the property transferred is in fact derived from halaal or haraam sources. However, if it is certain that the precise property being delivered is itself the

prohibited exact separate usurped or stolen property per se, then it is not permissible knowingly to receive it, because it is the usurped property itself (ain al magsub which must be obligatorily returned to the rightful owner.

5. If the halaal and haraam components are not segregated but in fact commingled and mixed inseparably, (as in the case of liquids) then, according to Imam Abu Hanifah (ra) the usurper owns the whole by reason of the commixture and resultant destruction. In this situation, the usurper is obliged to pay compensation equivalent to the market value of the usurped thing, which is converted to a debt. The usurper is prohibited from using or deriving any benefit from the prohibited component until he or she first discharges the debt due to the rightful owner. If the usurper made a profit by trading with the usurped

property, and thereafter paid the due compensation to owner, then the profit is permissible, according to Imam Abu Yusuf (ra). Imams Abu Hanifah and Muhammad (ra) state that the profit earned by the usurper prior to payment of compensation must be distributed to charity. It is however permissible to conclude commercial transactions with the usurper to the extent of his halaal holding only, and not more.

6. In the case of a combination of halaal and haraam, it is frequently not known whether the halaal component is segregated from the haraam, or, whether or not both halaal and haraam are commingled without distinction, and if in fact commingled, what is the proportion of the halaal component therein. In such a situation, the original position of permissibility (al - ibahah) applies, namely that it is permissible to enter into economic

transactions with the other contracting party concerned, unless it is established that the property sought to be transferred is in fact the actual prohibited haraam component, per se.

7. In relation to restaurants, airlines and hotels, which offer an intermixture or combination of halaal and haraam products and services, it is permissible to transact with them by way of buying and selling permissible mubah products, but only to the extent of that proportion which constitutes halaal holding and ownership, and not more. This obviously is based on an estimate of probabilities. If a person is already employed in such a business offering a combination of halaal and haraam products, then the following will apply:

7.1 if the underlying service rendered by the employee is solely a permitted mubah

activity, then the reciprocal return in the form of wages is permissible.

7.2 On the other hand, if the underlying service is solely a prohibited activity, such as selling liquor, then the employment concerned is prohibited, with the result that the corresponding remuneration is haraam.

8. What is the position of an employee whose services and job description consist of a combination of halaal and haraam activity? In certain cases, it is difficult to objectively apportion the salary between the halaal and haraam activities, because the salary is normally paid for the whole of the services. In the absence of objective apportionment, the ijaarah service contract is invalid, (faasid) in which event the market rate of remuneration shall apply. (Ujrah al mithl). In either case,

because a proportion of the salary, which is equivalent to permitted services is halaal, it is permissible to deal with him or her, but limited to an estimate of the proportion of the halaal component and holding (forming part of the commingled whole) see Al Mughni of Ibn Qudama: Rule 4260

9. However, it is not permissible to buy shares in such hotels, restaurants and airlines, which offer a commingled combination of halaal and haraam products and services. The reason is that ownership of a company share represents a pro rata undivided share in all the underlying assets of the company including the haraam products and services. In the result, the shareholder is deemed to be directly engaging in the specific prohibited activities, which itself is a major transgression, unrelated to the separate issue of purification of the share itself.

10. It is correct that borrowing money on interest from a conventional bank is per se a serious sin. However, the loan is valid, and the amount borrowed passes into the ownership of the borrower upon possession, save that the interest stipulation is deemed to be severed from the gratuitous contract, and treated as void, without affecting the remainder of the loan contract. It follows that any asset or property bought with the loan proceeds is halaal and may accordingly constitute subject matter of dealings and commercial transactions.

11. A conventional bank holds a common pool of funds comprising of a commingling of halaal and haraam money. The halaal portion is represented by deposits of customers and the proceeds of other legitimate services, such as administration fees, letters of credit, bank

transfers etc. The haraam component is represented by interest income derived from loans made to its borrowers and other financing transactions, contrary to the Shariah. On this basis, it is permissible for a third party trader to transact with a conventional bank, for example, by selling a mubah product, such as a motor vehicle, provided that the transaction is limited to, and in proportion with the halaal funds held and owned by the bank. In this regard, the following points should be borne in mind:

11.1 It is not permissible to buy shares in a conventional bank, because its core money lending activity is prohibited.

11.2 It is permissible to open a current account with a conventional bank in the case of need. Such an account is characterized as a loan advanced by the

depositor to the bank. However, it is not permissible to open a savings or investment account with a conventional bank, because this constitutes a voluntary contractual transaction of interest.

11.3 It is permissible to purchase a mubah permissible product from a conventional bank. Provided that it is prohibited to sell a product to the bank which can only be used exclusively for a prohibited purpose or is otherwise directly connected to its interest based loan transactions. For example, the sale of a dedicated computer programme or facility used for calculating or computing interest or directly connected with its money lending transactions is prohibited.

11.4 It is prohibited to work in a conventional bank if the underlying services of the employee concerned are directly connected with its interest-based operations and activities. The return in the form of salary is accordingly impermissible. However, if the underlying services comprise a combination of halaal and haraam activities, then, in such event, an apportionment should be objectively effected on the basis set out above.