الخلاصة المعاصرة

لبحوث في قضايا فقهية معاصرة

Summary of Contemporary Juristic Resolutions

Imran Faruk

Research Paper – Thesis

Student, Darul Iftaa Mahmudiyyah

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Summary of Contemporary Juristic Resolutions

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A thesis submitted in conformity with the requirements
for the authorization of Iftaa

Department of Iftaa

Head Mufti and Supervisor: Mufti Ebrahim Desai
Darul Iftaa Mahmudiyyah

بسم الله الرحمن الرحيم

السلام عليكم ورحمة الله وبركاته

Thesis Abstract

The purpose of this dissertation was to provide a brief summary of Mufti Taqi Uthmani's **بحوث في قضايا فقهية معاصرة** in the English language.

بحوث في قضايا فقهية معاصرة is a series discussions written by Mufti Taqi Saheb *[Madha Zilluhu]* on various contemporary issues, their relation and application in the modern world, and their respective Shari'ah rulings and principles.

A liberal and idiomatic translation was adopted to simplify and summarize each discussion. Much deliberation was paid to the notion of adopting brevity in the translation as well. The name of this paper is:

الخلاصة المعامرة

لبحوث في قضايا فقهية معاصرة

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Summary of Contemporary Juristic Resolutions

والله المستعان، وهو اعلم بالصواب، واليه المرجع والمآب

وما توفيقي الا بالله عليه توكلت واليه متاب

Declaration of Authorship

I, Imran Faruk, declare that this thesis titled,

الخلاصة المعامرة

لبحوث في قضايا فقهية معاصرة

–

Summary of Contemporary Juristic Resolutions

and the work presented in it are my own. I confirm that:

- This work was done wholly while in candidature for Ijazah in Iftaa at Darul Iftaa Mahmudiyyah.
- Where I have consulted the published work of others, this is always clearly attributed.
- Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work.
- I have acknowledged all main sources of help.
- Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself.

Signed: _____

Date: 29 – Rabi' al-Thani – 1437

25 – January – 2017

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1) PURCHASING THROUGH INSTALMENTS:

This is a transaction where goods are purchased in a way where in the commodity is accessed immediately and the payment is done over a fixed intervals.

Commodities purchased in this manner usually have a higher price than when purchased on cash therefore the question arises whether a particular item can have a lower cash price and a higher credit price. This type of transaction is permissible on condition that the transaction is concluded on either price and not left incomplete.

One may ask what the difference is between having a higher fixed credit price and charging interest. The difference is that if the customer defaults on the credit price there is no extra charge above that whereas if a customer defaults in an interest based transaction, than the interest gets compounded. For instance, if an item costs R10 cash and R20 if you pay in a month's time, R30 if you pay in two months' time. Now if a person concludes the deal with the two month grace period, he has to pay R30 after the elapsing of two months. However if he defaults after this, there is no extra payment or charge over this.

On the other hand an interest based transaction is such that that you are charged over time. Therefore if an item is worth R10, there will be an interest charge of R10 per month, so every month you default, you pay an extra R10. Whereas in the first case, you do not pay anything extra after you default time.

The payment is a debt upon the purchaser. The seller therefore requires a guarantee from the buyer that he will pay the amount due. This guarantee can be done in the following ways:

1) Collateral: the buyer can give the seller something he owns as security against his debts and the buyer can keep it until he receives his payment. However the buyer cannot use the item. In this case the laws of rahn will apply.

   Can the seller withhold the purchased commodity itself until the buyer pays the entire amount or some installments?

   If he merely holds on to the commodity until the buyer makes payment, then this is not permissible. This is because holding on to the commodity is only in a cash transaction. However if he holds on to the items in the form of rahn than this is permissible. The difference between the two is that if he merely holds on to the commodity then it will be *mazmum bi thaman*. It has been held back in lieu of thaman, therefore if the commodity is destroyed, the buyer is no liable to pay and the transaction is terminated. If it the commodity was held back in the form of rahn, and then it gets destroyed then the transaction is not terminated. The buyer is responsible to pay the seller according to the relevant laws of *rahn*. Therefore if the commodity is kept buy the seller in the form of *rahn*, this should be executed correctly. The correct method being the buyer should take possession and then give it to the seller as collateral.

Another question that comes about is that can this collateral be a condition. *Ibn Qudama* has quoted a difference of opinion but the correct view is that it is permissible as well.

a. <u>Floating mortgage:</u>

Another scenario common in today's business practices is that the seller (holder of the collateral) allows the owner of the collateral to use the item but can still demand payment in case of default. For instance if the debtor places his car as collateral, the black book remains by the creditor and the debtor is not free to sell it. Is this permissible *sharia* wise?

There remains an objection from the *fiqh* point because the *fuqaha* have stipulated that the creditor needs to have possession for the rahn to be correct and this does not take place in a floating mortgage.

However, although this is possession is a condition they have given permission for the debtor to use the collateral and the creditor will have the right to demand it whenever he wishes. However this can only be possible if the creditor took possession for the collateral at least once. If he didn't take possession even once then it is not permissible. However there are several points that should be considered:

a) Although the creditor does not take possession of the actual item placed in collateral, he takes possession of the certificates of possession (title deeds etc.)

b) The *illah* behind the condition of possession is so the creditor is able to sell of the item and recover his debt. This is possible in this situation because the debtor is legally binded.

c) The creditor has the right over the collateral so that it can be a deterrent for the debtor from defaulting payment. If the creditor himself waives of this right, there should be no *shariy* problem.

d) Both benefit in this situation, the debtor isn't deprived from using his item. The creditor gets the benefit of a *rahn* without becoming responsible for the item in case of destruction etc.

e) Possession cannot be possible in international trade and the possible way for collateral is through this method.

b. <u>Guarantee from a third party:</u>

This is known as ***kafala***. Usually the bank does this but requires you pay them a sum of money for this service which is usually a percentage of the loan.

Kafala in shariah is gratis type of transaction. Some people argue that *kafala* in today's time plays a pivotal role in trade, so much that there are special institutions that have been established to render this service. Therefore in cannot be counted a mere gratis transaction. This argument is baseless as the same can be argued for interest.

It is noteworthy that both lending money and giving a guarantee on another behalf are both gratis transactions in nature. One cannot take remuneration for either. In fact the impermissibility in *kafala* is more severe that is because in lending money where an actual lending takes place one cannot take money(interest), then how can take money when one merely undertakes to pay the money on another's behalf without actually spending any money?

Substitute?

The bank can make a profit in either two ways:

1) Charge for admission costs in providing a letter of credit.

2) Charge for being an agent between two parties.

c. Guarantee by Bills of Exchange:

Sometimes a debtor signs a document in which he acknowledges the debt and specifies a date wherein he will pay. This date is referred to as the date of maturity. The problem is these documents have become negotiable instruments and sometimes are sold below the value of the debt earlier than the maturity date. Usually the bank purchases these. This isn't permissible.

The alternative is that the holder of the bill of exchange (creditor) should appoint the bank as his agent to collect his debt from the debtor and should pay him for that. Then the creditor should borrow the value of the bill of exchange from the bank and allow the bank to collect this owed money from the debtor at the date of maturity.

These are two separate transactions. However the transactions should not be conditional to one another and the charge should not be a percentage proportionate to the maturity date.

d. Discount for early payment.

Zaid tell Bakr you pay early. I give you X amount as discount.

Fuqaha have a difference of opinion in this. The preferred view is that it is impermissible to discount in lieu of an early payment. However this impermissibility is when the discount is conditional to earlier payment. If the creditor gives discount from his side without any condition then it is permissible.

e. Discount on debts already due.

The above was regarding debts whose time has not yet set in. as for debts that are already due wherein time is not a condition or part of the transaction and the debtor is delaying for other reasons, it is permissible to make *sulah*.

Is it permissible for the installment to become due immediately if the debtor defaults in payment of any given installment?

This condition is permissible as mentioned in books of *fiqh*.

f. <u>Penalty for defaulting payments.</u>

Some contemporary scholars have allowed this kind of penalty for the loss of business due to the debtors defaulting in payments. If there is a loss of profits the debtor is charge if not there is no penalty.

These scholars have cited the following differences between interest and a penalty for the default:

1) Interest is incumbent in every situation whether the person is rich or not. The penalty is only for those who can afford and are negligent.

2) Interest becomes incumbent immediately after default whereas in the penalty the person is cautioned until four times.

3) The penalty is only charged if there is a profit in the deposit accounts at the bank whereas interest is charged in all situations.

They make *istidlal* from the *la zarara wala ziraara riwaayah*.

The notion of loss of profit is outsourced from the interest based systems whereas *Shariah* does not uphold this notion. A *ghasib* or thief is not

required to compensate the probable profits although the hand of a thief may be cut off. The person defaulting is definitely not worse than a *ghasib* or a thief.

If someone says that a lot of *fuqaha* have ruled that the *ghasib* is liable to compensate for the usage of maghsub item, then too this is only in commodities and not in currency.

2) TRANSACTION BY TA'ATIY AND PURCHASE BY DEBITING OR CREDITING.

a. Definition

Ta'atiy is where both the parties don't say anything during purchase. This can take place in two ways:

1) One makes ijaab and the other makes qabool by action.

2) Both don't say anything.

Majority of the fuqaha have permitted both.
However, this transaction becomes impressible if it results in an impermissible action or similar.

For instance, in a Murabahah finance case, the bank purchases an item and then sells it to the client at a profit. Most banks however appoint the client as the *agent* to purchase the item. Thereafter the bank takes possession of the item. The client has to make a proposal to purchase the item and the bank has to accept. The bank then sells the item to the client. The vital thing is that the bank should take the item in its responsibility.

However some people suggest that the Murabahah transaction between the bank and client can take place through *ta'atiy* without *ijaab* and *qabool* afresh. So it's as if after the client took hold of the item on behalf of the bank, it a though he purchased it by default.

This is not permissible because the Murabahah financing is an alternative of the interest based financing and there should be a clear difference. The difference is that in the conventional finance there is no risk involved. In a Murabahah finance, there is fixed assets involved. Therefore there should be a time that should pass wherein the risk of the item must be on the bank otherwise the profit the bank makes will fall under the ambit of *ribhu malam yazman*.
Also in *ta'atiy* both parties are present whereas in this case only one person is involved.

b. Purchase using a credit/debit account.

i. Purchase using a credit account/crediting:

The general principles show impermissible of this transactions:

1. The *thaman* is *majhool*. If you say the bay will be concluded during accounting time, then at that time the commodities will be already used and nonexistent which will result in *istihlak* form the buyer before the transaction and the selling of something that is nonexistent. This is the view of the *shawafiy*. The *malikis* view is similar in the fact that the thaman is *majhool*. The later *hanafis* have given permission even if the thaman is not mentioned.

The gist of the matter is that if they trade in way where there is no way of defining the thaman then it is impermissible. However, if the thaman is noted every time a transaction takes place or they are mechanism in place that both use to determine the thaman with a mutual understanding then the transaction is permissible.

2. **<u>Purchase using a debit account/debiting:</u>**

What is the ruling of the money debited in the account?

If you consider it an advanced payment then:

1. The commodity should be specified.
2. The commodity should be of such that *salam* is possible with it.

But this doesn't take pace usually. The money cannot also be considered as an *amanah* because then the seller cannot make use of the money and this also doesn't take place.

We cannot also consider the debited amount a loan to the seller and then this will be a loan with condition of sale. However this condition is permissible because it is *muta'araf* and the point is not loaning rather the buyer wants to free him from the responsibility of payment. If the money is lost, the seller is responsible unless the seller keeps the money by him as *amanah*.

Suscriptions to different magazines program fall under the same laws as above. The transaction is complete when the client receives the monthly magazine if he has paid a yearly subscription. The money will be a debt on the seller which will be setoff with every purchase.

This method of crediting can be used in the Murabahah financing. The bank can have an understanding with the suppliers. Whenever a client requires a commodity the bank can purchase from the suppliers using the crediting method.

3) BUYING AND SELLING OF INTANGIBLE RIGHTS.

A lot of rights presently have become tradable commodities eg franchise, goodwill, trademarks, copyright etc. and the law has stipulated that certain rights can be bought/sold while others cannot.

Is this permissible in Shariah?

There is a lot of detail.

a. Types of rights

There are two types of *huqooq*:

1) *Huqooq shariy*: Shariah has stipulated this rights. One cannot draw analogy from these types of rights like the right of *shufa*, the right of *meerath*, right of *nasab*, right of *talaq*.

2) Huqooq urfiy: these have come about due to the practice of the time.

   Each of these can be classified into two again:

   1) Those rights that are there to avert harm.

   2) Those that are there on their own.

The rights that stand on their own are of different types as well.

i) Rights that are inherent to certain items like the right to pass on a road or the right to drink water from a water source.

ii) Rights that come about because one go there first for example when one collects water from a pubic source in his container.

iii) A right that comes about from a transaction such as usufruct.

The transaction of these rights can be done by:

a) By normal sale and purchase.

b) By settlement.

1. **Huqooq shariy.**

These have been stipulated by shariah like *qisas*, *had*, *talaq, meerath* etc.
These are of two types as well.

a) There are not rights on their own. They come about to avert harm.eg the right of *Shufa*. This comes about to avert harm. For example when two people conclude a deal, a third person cannot interfere however shariah has given the right of *shufa* to avert harm from the neighbor. These type of rights cannot be bought or sold.

b) These rights exist on their own. Like for example the right of qisas. However one can change it by *sulah* and settlement.(there can be settlements only if the right is existing at present, if the right is only a possibility in the future, then settlement cannot be made for example the right of inheritance)

2. Huqooqe Urfiy.

These are rights that have come about because of time and the habits of people changing over time. And Shariah upholds these rights because shariah uphold the time and the habits of people (*urf* and *adat*) examples of these are the right to pass, the right to use a road.

These rights also fall in different categories:

a) Rights that come about by making use of a tangible item. If making use of this item is for a fixed period of time then it permissible to rent or lease it for example the usufruct of a house can be rented to someone for a fixed period.
Can the usufruct be leased for good? This is known as the buying and selling of *huqooqe mujarrada*.

Some fuqaha have allowed this while others have deemed it impossible.

The whole contention boils down to the definition of '*bay* in their respective terminologies.

The summary regarding these rights is that although the Ahnaf have stipulated that the commodity should be tangible, they have allowed the sale of the rights that come about because of the use of tangible items.

Those rights that don't come about through tangible items e.g. *Haqq ta alliy* cannot be sold. However a settlement can be made.

In consideration of the above, we can say the *Ahnaf* have not permitted sale of such rights. However, this ruling is not absolute. But the jurists have made exceptions of certain rights that have to do with tangible items. And the *urf* (habit of the people) plays an important role in determining what can be considered as a *maal* (saleable commodity).

So if certain items fall under the ambit of Maal, and people deal with them as if they are maal, then the buying and selling of such rights is permissible with the following conditions:

1) The right should be present at that time.

2) It can be transferred from one ownership to another.

3) It can be accounted for precisely.

4) It should exist on its own, not to avert any harm.

Conclusion:

In the above, the following conclusions can be made:

1) All those rights that exist to avert harm and do not exist on their own cannot be sold or settled like the *haqq shufa*.

2) Those rights that will come into existence in the future cannot be sold or settled upon.

3) Those shariy rights that exist on their own but cannot be transferred cannot be sold but there can be a settlement made for them.

4) All those *huqooqe urfiy* that have to do with the usage of tangible items can be sold according to the latter Hanafis. And those that that don't have to do with tangible items cannot be sold only settled upon.

5) The habits of the people play an important role in determining the Maliyah of certain times.

b. **Franchise and trademark.**

Is it permissible so sell this?

This is not a tangible item, it is a right to use this name. This right exists on its own because of registering it with the government. It is present and its ownership can be transferred. However it is not linked to any tangible items, therefore it cannot be sold however a settlement can be made.

According to Mufti Taqi, it is similar to a right linked to a tangible item and it is considered as *maal* according to the traders. Therefore it should be permissible to sell these items. For example items like gas and electricity are not tangible items but are considered *maal* although they cannot be encapsulated. Hence in the same way franchise and trademarks etc.

c. Commercial License.

It is permissible to sell these and the same discussions take place as above.

d. Copyright.

This is also considered *maal* because of the *urf* and so it permissible to sell this right. Also keep in mind that this is a legitimate right.

4) THE RULING OF PAPER MONEY.

a. Evolution of money.

Currency and money has gone through many phases to be where it is today.

- People used the barter system for a period.

- Thereafter certain commodities took the role of being the mediums of exchange.

- Thereafter gold and silver became the mediums of exchange.

- Thereafter people started entrusting their monies to certain trustworthy individuals and these individual would hand over a receipt acknowledging these deposits by them.

- Thereafter people instead of using the gold by these individuals decided to merely hand over these receipts to sellers and save themselves form all the trouble of paying in gold or silver.

- Slowly paper money came into existence.

- Countries then made these bank notes to legal tender

b. The Fiqhi ruling.

A lot of the Indian Ulama considered these notes to be guarantees for a debt. However an overwhelming number of Ulama consider it to *thaman urfiy*.
Therefore paper money it terms of sharia has got two aspect:

1) These notes are thaman urfiy and can be used when dealing in all transactions.

2) This is a guarantee from the government.

However the fact of the matter is that the government want these notes to be used as *thaman urfiy*. The paper notes do not have value intrinsically. The government puts the value in this by announcing the circulation.

Among the contemporary scholars there are three rulings:

i) These are *thaman* because of *istilah* like *fuloos*. It is for this reason that some people claim that *Riba* cannot take place in this.

ii) It is a *haqeeqi thaman* like gold and silver. In fact it is a genus on its own. Therefore all the laws of *sarf* shall take place in it like in gold and silver. This is according to the view of the Islamic Fiqh Academy.

Therefore the Islamic Fiqh Academy ruled that:

In light of the previous discussions on paper money and amongst other things the following have been decided:

1) It will be considered as *thaman* intrinsically because thamaniya is not only limited to gold and silver. Also due to the fact that legal tenders are considered as *thaman* and it has replaced gold and silver. Also the reason for *Riba* in gold and silver is *thamaniya*, this is also present in paper notes. Therefore it will have the ruling of gold and silver. Therefore *zakat* is necessary and *Riba* with all its consequences also takes place.

2) Every countries respective note is a genus on its own. Therefore for instance, the Saudi currency is a genus. The American currency is a genus on its own.

3) Therefore it isn't permissible to exchange a currency with another without making a cash payment.

4) It is not permissible to exchange currency of the same genus with an increment on either side.

5) It is permissible to exchange currency of different genus at whatever amount they mutually agree on provided it is a cash deal.

6) It is necessary to pay *zakat* on this money if it reaches either *nisabs* (the *nisab* of gold or silver).

7) It is permissible to make these bank notes as capital in *Bay Salam*.

iii) The third opinion is based of Imam Muhammad's view that it is *thaman urfiy* or *istilahiy* and the currency of every country is a genus on its own.

Zakat is necessary on the paper money and *Riba* also takes place. If it is exchanged with the same genus, then equality is necessary and taking possession by both sides is necessary, not because it is *bay sarf* but because genus on its own prevents deferred payment. However other laws of *sarf* don't apply in the sense that *taqabuz* is not necessary and deferred payment is allowed if the exchange occurs in a different currency.

Although there is a huge debate regarding the permissibility to exchange with *tafazul*, they all agree that the changing of *fuloos* with *fuloos* is not *sarf*. It is for this reason that some fuqaha have said it is not necessary to make *taqabuz* however it is necessary to make *qabda* from either side at least so that it cannot be *bay dayn bi dayn*.

However, it is better not to allow *tafazul* as this will lead to widespread use of interest and *Riba* and if the *fuqaha* of the past where present they definitely would not have allowed this as well.

Also the *tafazul* that is talked about refers to the value of the notes and not the count of the notes.

c. <u>Foreign exchange:</u>

1) Currencies of the same country are considered to be from one genus because of the underlying economic condition that fosters the strength of the currency. Therefore a Rand and its cents will be considered to be of one genus because they have a common thing that determines there strength.

2) When currency of the same country is being changed there should be equality on both sides.

3) One side should take possession of the money in the same *majlis*.

4) Currencies of different countries are considered different genuses. The reason being each country's currency is determined by its respective economic situation. Therefore one can exchange currencies at any rate provided both parties agree. The question comes about when a country pegs its currency with another and there is a fixed exchange rate. For example the Saudi riyal against the US Dollar or the Hong Kong Dollar against the US Dollar. Is it permissible to exchange at a different rate?

Mufti Taqi says that it is fine from a Shariy point of view however if it is illegal according to the laws of the country, then one should abide by them.

A question arises as to whether it permissible to sell currencies on credit. For example, one sells US$1000 to Zaid and tells him to make payment in Saudi Arabia at a later date?
This is permissible and it is like one was purchasing another item by deferred payment.

Another question that arises is that for instance Zaid borrows R1000 from Amar? He pays back after a year. However the value of the R1000 has gone lower. Does Amar have to pay Zaid the amount he borrowed or does he have to pay him the actual value he had borrowed?

This question has a lot of underlying issues that need to be determined to be fully comprehend the question at bay.

A currency is determined by the price index. The price index is alternatively calculated using estimation to determine the value of a basket of goods. The basket of goods is an estimation of how much a certain value of goods cost. All this is based on estimations by economists and it is extremely difficult to ascertain a definite figure for this.

Therefore tying down a debt to the basket of goods is not permissible as this puts the creditor at an unfair advantage. In any case, Sharia clearly stipulated that in debts, the face value of the item is important and not the value.

Mufti Taqi has gone to lengths explaining the price index and how it works. He has proven how difficult it can be to tie down a debt to the price index and has rebutted the claims of the people who give permissibility.

A similar question arises as to whether it is permissible to exchange currencies at a differed date. For example the current rate is US$1 for R10. Zaid borrows Amar R1000 and asks Amar to pay US$100 after one month. However the rate is $1 for R20. This is not permissible. However Amar will pay $50.

In certain countries, one is not allowed to hold on to foreign currency. Therefore when he returns from a business venture, the state bank takes the foreign currency and gives him a certificate. He can use this certificate to repurchase foreign currency when he travel out of country. The other benefit is that he can

use this certificate to purchase shares at the stock exchange and after the one year, the state bank also exchanges this certificate with an additional 12%. Because of this people sometimes sell this certificate for more than its worth, is this permissible?

When the person returns from his business venture, it is as though the state has purchased his shares. The state owes him **X** amount and in lieu of the debt, the certificate issued is as a guarantee. It is not permissible to purchase this certificate from the holder to gain excess to the benefit of 12% on maturity or to sell it at a higher price at the stock exchange.

If one purchases it for the simple reason that he can excess foreign exchange whenever he requires then it is permissible to purchase the certificate, however he should not use the certificate for the other benefits it has with it.

5) BUYING AND SELLING OF SHARES.

The classical getting together of two or more people is known as "partnership." In the past couple of hundred years there is a new concept of or partnership which is known as the joint stock company. The company issues shares which are purchased to become a partner.

However it is important to understand what these shares are. They are supposed to represent he assets of the shareholders in the company.

When initially a company issues shares after presenting its prospectus, this is not an actual purchase but rather a mere subscription into the company because the company does not yet have any assets. The company or the partnership in other is merely being formed. The certificates represents his share in the company proportionate to capital injection.

When a new company is formed, it is permissible to buy shares if its main business does not involve any haram.

The buying and selling of shares in the stock market in terms of shariah is that when a shareholder sells his shares, he is simply selling his share of the company.

a. Is it permissible to invest in shares?

There are four conditions if one wants to purchase shares:

1) The company should not be involved in haram businesses for example it should not be a conventional bank or an insurance company or a pornographic company etc. if so it is neither permissible to buy shares when the company floats its shares or to purchase through the stock market.

2) The assets of the company should not only consist of illiquid assets. There should be a significant amount of fixed assets for example there should be buildings, machinery, motor vehicles etc. in such a case the shares can be sold more than their purchase value. Otherwise the shares have to be sold par their purchase value. In the latter case if the shares are sold above purchase price it will lead to the surplus being interest which haram. In the former case when there are fixed assets with the company, the surplus above the purchase will be considered in lieu of the fixed assets.

3) Because a majority of theses company deal with interest a group of Ulama say it is not permissible to buy shares. However the other group say it is permissible however in the annual general meeting he should raise his s concerns and although they will be overruled, he has done whatever he can in is ability to overcome the problem.

4) Whatever amount of the dividends re proportionate to the interest dealing of the company should be allocated for Sadaqah.

Also noteworthy is that shares are purchased for two reason primarily:

1) Investment returns
2) Capital gains.

A lot of people purchase shares for capital gains however, the trend of investing in shares with a risk where a chance is taken in the investment is similar to gambling and is not permissible as neither receiving the shares is the purpose nor delivering them is intended.

b. Selling shares with the intention of repurchase.

Another common trend in the stock markets is that when a person requires liquid cash, he approaches an investor and requests him to purchase his shares and then later sell them back at a higher price. This is not permissible as this falls under the ambit of *bay was shart* and technically is just a heela for interest.

c. *Zakah* on shares.

Zakah is *wajib* on shares that an individual purchases. If the intention of investing was capital gain then one has to pay Zakah on the market value on the *zakatable* date.

If the purpose of the investment was returns and dividends, then Zakah has to be paid on the value representing *zakatable* assets.

For instance the market value of his shares is R100. R60 from this represents fixed assets etc. and R40 represents cash etc. Zakah is *wajib* on the R40

The summary of the entire discussion is that it is permissible to invest in shares or purchase shares with all the above conditions keeping all the above laws and regulation in mind.

6) THE FIQHI RULING OF BANK DEPOSITS.

BANK DEPOSITS refers to the amount of money that one puts in a bank as a trust and can withdraw at any required time.
The bank does not keep every individual depositors money separately. Instead the bank pools all the money and at any required time using it to invest in its portfolios.

There are four types of deposits in contemporary banks.

i. **Current account.**

The person who places his money in this account does so with the condition that he can withdraw at any given time he wishes. Therefore he has full discretion to remove any given amount. The bank is responsible to ensure this and the account holder does not require to inform the bank beforehand. In certain cases bank might charge administration fees to the account holder.

ii. **Fixed Deposits.**

This is an amount that is kept at a bank for a certain period and the depositor cannot withdraw before the due date. Bank uses this to invest in its relevant portfolios. The bank does pay its clients a proportionate amount of interest.

iii. **Savings account.**

These kind of deposit have no fixed period however withdrawal can only take place with regulated. The account holder can only withdraw a limited amount of money and he has to inform the bank beforehand regarding the withdrawal if the amount is big.

iv. <u>Lockers.</u>

The bank rents out very secure lockers to clients wherein the client can deposit whatever he wishes. The bank has nothing to do with this. In fact the bank might not even know what is kept inside these lockers. The lockers are an *amanat* however the details of the first three account are discussed below:

a. <u>The Fiqhi ruling regarding these deposits.</u>

- A majority of the *Ulama* consider the deposits as *qarz*. So although (in Urdu) these are called *amanat* in reality there are a *qarz* (*al ibra lil ma'aniy*). The reason for this is that the risk of the money of these deposits is upon the bank. In the case of *amanah* the risk is not on the bank.

- Another group of *Ulama* say that the deposits of the fixed and current accounts are different. The deposits of a fixed account are a *qarz* because the depositor has no option to withdraw as he wishes. This removes it from being an *amanah*. Similarly is the case with the savings account.

In the current account, despite being in the risk of the bank the money is an *amanah*. This is because the account holder can withdraw at any time and he has no intention to participate in the business of the bank neither does he want the bank to use the money as a *qarz*. As for the bank mixing the monies of the depositors, this is done with their permission according to *urf* and it is permissible to make *tasarruf* with the permission of the owner.

- According to Mufti Taqi the above view is incorrect. The ruling of such deposits is that of *qarz*. The reason being the layman does not know the technicalities of *amanat* or *qarz* etc. He just wants the benefits of keeping the money by the bank. Therefore if the depositor gets to know that his money is being kept as an *amanah* he will not deposit. Similarly, if the bank announces that the deposits will be kept as an *amanah*, then too people will stop depositing. Therefore it is evident that people actually want their monies to go into the risk of the bank. From this, we can deduce that the depositors do not want their money to be kept as *amanah*, they want the bank to take responsibility and although they do not intend to make *tabaru* on the bank. This does not negate it from being a *qarz*.

b. <u>Is it permissible to deposit money in the bank?</u>

Because banks use these deposits to generate interest, the question arises as to whether it is permissible to deposits ones money in such banks?

Because the fixed deposits account and saving pay the depositor interest and it is a *qarz* transaction, whatever the surplus he receives is interest without doubt. The Islamic Fiqh Academy has therefore decreed that it is not permissible to deposit in these two accounts.

Some people allow depositing in these two accounts if one gives the excess interest money in Sadaqah. However, this is incorrect because from the very onset, one is engaging in an interest generating transaction.

The above ruling of giving interest money in charity can be a solution for one who deposited money in these accounts out of ignorance or someone who made transactions in non shariah complaint ways and then realized and wants to get rid of the haram aspect in his wealth.

The current account does not involve interest generation, therefore it should be fine to deposit money in such an account.

However a group of Ulama object and say that although this is not a direct interest generating transaction the depositors are helping the bank in its interest generating programs. How is this permissible?

1) The answer to this is that a significant of the amount of monies from the current accounts are kept separately by the bank because of daily withdrawals. Therefore one cannot ascertain as to whether his money has been used to finance an interest bearing transaction.

2) Banks do not always invest these monies in haram portfolios, therefore once again one cannot say with certainty that his money has been used in a *haram* business venture.

3) Whatever the bank does with the money has nothing to do with the depositor and therefore the sin cannot be linked to the depositor.

4) The depositor is not a *sabab* or *muharrrik* for the sin to take place as is technically not allowed.

5) Money does not become *muta 'ayyan* with *ta'yeen*. Therefore even if the bank used his money in a *haram* ventures, we shall say that the money he withdraws is from the deposits that were kept aside.

c. <u>The Fiqhi ruling of monies in Islamic Banks.</u>

The laws of the current account of an Islamic Bank are exactly like that of a conventional bank. This means that the deposits are a *qarz* to the bank and the bank is responsible for the deposits.

In so far as Savings and Fixed deposits accounts are concerned, the money kept in them are kept as *Ra'sul Maal* and the depositor is a partner in the profits the money might generate and if there is a loss, then he has to bear the loss in that as well. Therefore neither is the bank responsible for the money nor is the bank responsible for the profit.

As for the shareholders, they are partners (shuraka) to each other. However in so far as the depositors and the bank are concerned, the *ilaqa* between them is that of *Mudarib and Rabbul Maal. Fuqaha* have stated that if a *Mudarib* mixes the *Rasul Maal* with his money, then he is a *Mudarib* in one half and in the other half he is the owner.

After we ascertain that the deposits are a *qarz*, they are in the risk of the bank. It is incumbent upon the bank to return the deposits whether the banks realizes profits or not.

A question comes about that is the risk and responsibility only on the partner (of the bank) or on the depositors as well?

The responsibility is only upon the partners of the bank. As for those accounts where the depositors receive a profits then in that case, the responsibility is shared.

d. <u>Using the current account as collateral.</u>

The majority of the fuqaha disallow a receivable to debt to be kept as a *rahn* because a person cannot sell a debt to a third party and the deposit in a current account is a debt upon the bank therefore it is not permissible.

However according to the Malikis it is permissible to keep a debt as *rahn* by the *madyun* and *gher madyun*. They add the condition that if it kept by a *madyun*, then the maturity date of the *rahn* and the debt should be the same or at least the

maturity date of the debt is later than that of the *rahn*. There is a lot details which have been left out for the sake of brevity.

e. Freezing the accounts.

At certain times a person goes into overdraft and owes the bank money, can the bank withdraw from his deposits or freeze his deposits accounts altogether?
If they have an agreement, then the bank can do so. However all the laws of rahn will kick in. Similarly if the bank takes out money from his current account this is referred to as *muqasa*.

If the depositor does not allow this then can the bank still retrieve what it is owed?

This is referred to as the *Masalatu Zafar* in the book or *fiqh*. The summary of this *masala* is that can the creditor retrieve whatever the debtor owes him if he comes across his wealth?

The answer to this is that if a debtor has legitimate reasons for not paying for instance the due date has not yet arrived or there is some other genuine excuse, then the creditor cannot take the wealth of the debtor. Also if the creditor can retrieve his wealth through the court then too he cannot take the debtors wealth.

However in the instance where the creditor cannot retrieve his debt through the court then there is a difference of opinion:

1) Imam Shafi (and one riwayah of Imam Malik) say that if the creditor comes across the property of the debtor he can take it whether it from the same genus as his debt or not.

2) Imam Ahmad bin Hambal's preferred view is that he should return the amount and then demand. One *riwayah* from Imam Malik supports this view.

3) Imam Abu Haneefa states that if a creditor comes across the wealth of a debtor then he should see what genus the belongings of the debtor are from. If the belongings are from the same genus as the debt, then he can retrieve his amount otherwise not. This is the *Asal* Mathhab. However the later Ahnaf have given Fatwa according to the *Mathhab* of Imam Shafi.

4) Imam Malik says that if the creditor knows that the debtor only owes him then he can retrieve his amount and if there are other creditor to whom he owes then he cannot retrieve his money because if the debtor goes bankrupt all the other creditors are equally deserving.

In light of the above *ikhtilaf*, it is permissible for the bank to retrieve whenever the client defaults according to the conditions of the bank.

It would be ideal for the bank to add a clause allowing the bank to set off the arrears of the client. This will no longer be *masalatu zafar*. When the client signs the contact it will become *muqasa bi taraziy* which is permissible all across the board.

7) HOUSE FINANCE ACCORDING TO SHARIAH.

There are three basic ways for house financing:

1) Use the *zakat* funds for the deserving and build them a house
2) Fund him with the cost price
3) Give him a *qarz hasanah*.

However this is only possible for a very rich government and also there is a huge boom in population. Therefore the government has to adopt a method that is convenient and does not strain the government or the people.

a. Bay Muajal.

A house finance company should purchase a house. After taking responsibility and bring in the house into its liability, the company should sell the house to the client as *bay muajal* according to whatever conditions they both mutually agreed upon. This can work in a number of scenarios for instance if the finance company identifies the house themselves or they can tell the client to do so and make him the *wakeel* to purchase it or they can appoint him to supervise the construction of the house from scratch.

However if a person has got some capital, he can buy a certain portion of the house as a joint venture with the bank, thereafter the bank can sell the client its share more than the cost value(with an added profit).

The problem comes for the finance company when the client decided not to buy the part of the house finance company. Now because we cannot engage in future sales the solution here would be to make the client sign a unilateral promise whereby he commits to purchasing the house.

b. **<u>Diminishing Musharakah.</u>**

Another way of finance is the diminishing Musharakah model wherein both the finance company and the client buy a house. Thereafter the client can stay in the house but still pay rent proportionate to the capital of the finance company.

This has to take place in a special procedure:

6) Both of them purchase the house and entail into a shirkah.
7) The company should determine its monthly rental and handover to the client.
8) The company should divide its share in fixed units.
9) Over a fixed period of time, the client has to buy the share of the company for a fixed sum that they should agree upon.
10) The more units the clients purchases will proportionately reduce his shares.
11) When all the units are purchased the client becomes the complete owner of the house.

This type of financing is a three stage process:

12) They both entail into a shirkah. This is perfectly fine ad in consistence with Shariy laws
13) The client rents out the share of the Company. This is also fine that the client be a partner and rent the house simultaneously.
14) The company sells its unit's to the client.

One should keep in mind that all these should be done separately and should not be conditional to one another. If they are done conditionally they fall under the ambit of *safaqa* fi *safaqa* and are not permissible.

However if the promise is kept completely separate from the deal and it is unconditional then there is no problem

The problem comes about because promises are not binding. However according to the *Maliki Mathhab* they can be made binding legally as well.

There is *ibarat* that say it is permissible to make a promise binding at times of need and necessity.

Therefore in view of the above discussions one can entail into a house finance deal using the above methods.

8) THE PRINCIPLES OF INCENTIVES & PRIZES

What is an incentive?

An incentive is gift given with the purpose of motivation.

The Shariy ruling on incentives.

The incentives given at the completion of an action fall under the category of *tabaru* and *Hiba*. There are two reasons for this:

1) There is no requital or remuneration for it.

2) The action that prompted the incentive was not based on *Ijarah* or *Jualah*.

Therefore one cannot say that this incentive is par to ujrah for an amal.

Also, categorizing this under Hiba consequently makes it from *Tabarruaat* and not *Muaawathaat*.

Hence, it is such a tabaru from the giver wherein the gifted makes no commitment (*iltizaam*) of recompensation (*badal*) for the incentive.

Incentives are of two types:

1) Those that are not based on any commitment or previous assurance.eg gifting a child for passing exams.

2) Those that are based on a previous assurance or commitment wherein the giver makes an undertaking that he will give an incentive over an action/event which might or might not take place (event based on chance). For this to be correct it should be a *tabarru mahz* from *mujeez*

and the *mujaz* shouldn't be required to pay any monetary sum for becoming a prospective recipient. Otherwise it will fall under the definition of Qimar.

What is Qimar?

Briefly we will look at Qimar to understand the concept properly.

Qimar has four conditions

1) It is a transaction comprising of exchange between two parties.
2) Each party puts his *milkiyyah* (possession) at risk
3) The receiving of extra money from this *Aqd* is based on an uncertain event.
4) The possession that was placed at risk will be lost completely or bring forth a very lucrative return.

Qimar is of two types:

1) The first is where one party does not put anything into the deal/bet while the other party will surrender something of his at the occurrence of an uncertain event. In short a one sided bet.

Note: If both sides put money then this will fall under the definition of Qimar.

2) One party has to pay some money while the other will only pay when an uncertain event takes place. The first party puts his money at risk in the sense that he may lose everything or may receive more than the invested amount.
This is the norm of casinos and lotteries where numbers are handed out for gambling games or wherein tickets and coupons are purchased for a fixed price and then prizes are distributed according to the lottery or lots drawn through a gaming machine etc.

Hence from the above discussion we deduce that conditional (*mashrut*) incentives should

i) Be given as *tabaru* without any recompense/monetary exchange (*badal*) otherwise they will be classified as *Qimar* or at least fall under the category of dubious transactions.
ii) There should not be promised to a creditor otherwise they will fall under *Riba*.

Henceforth, modern day incentives and prizes can be understood and categorized accordingly.

A) <u>Competitions and Prizes on Products.</u>

A lot of companies in order to promote their products or advertise them carry out these competitions for their customers. The winner is chosen either through drawing lots or he finds a number (in the product) that matches the winning no. or any other method for that matter. This types of competitions are permissible with the following conditions:

1) The price for the product should remain regular. There should be no increase in the price because of the competition. Otherwise the extra money above the regular price will in reality be in exchange for the prize, thus remove it from being a *tabaru* and this action will resemble gambling. However if the product maintains its regular price than the buyer receives the products for its normal price and does not place any of his money at a risk therefore the price he receives will be considered a *tabaru*.

2) These competitions should not be used to get rid of defected products which the customers are not aware of because this will be deception and fraud which is *Haram*.

3) The customer buys the product solely for using it and not to try his luck and get hold of the prize. Otherwise in reality he will be spending his money for the prize and although this won't be exactly gambling but it will be similar to gambling (*shibhatul Qimar*).

The competitions or promotion by airlines or big hotels also fall under this wherein the customer is given points and after receiving a certain no of points one receives a gift or upgrade in service.

B) <u>Incentives on Prize Bonds</u>

These are a special type of bond as explained in the footnotes. The *shariy* ruling depends on how it is defined.

The reality of these bonds is that every creditor is given a certificate representing the amount borrowed. These certificates are interest based in nature because normally there is an additional amount paid above the principle. However at times these certificates are issued and the additional amount is not conditional but the government undertakes that it will distribute monetary incentives for the certificate holders based on drawing lots. These monetary incentives can at times be much more than the additional amount one would receive in interest based bonds.

Some say this is permissible as the government does not stipulate a condition (*gher mashrut*) of handing out these incentives to any certificate holder. There this is a simple credit transaction without any benefit, hence, a simple tabaru which is not conditional to the transaction in which there is no interest involved.

This deduction is incorrect because the government has committed to handing out the incentives and although these are not stipulated for any isolated individual certificate holder, they have been stipulated for the entire batch of certificate holders. They have been put conditionally in the sense that the government openly advertises these incentives and are legally binding (which means these incentives are conditional- mashrut fil aqd) failure to hand out these incentives gives every creditor the right to drag the government to court. Therefore once we prove that these incentives are conditional to the transaction, this makes the deal into Riba.

In a nutshell these prize bond certificates are similar to interest based bond certificates. Only difference is that in interest based bonds, every creditor is entitled to an additional benefit while in prize bonds all the benefits are handed over to one of them according to the draws or lots. Therefore every individual creditor might either lose his benefit or receive a much larger benefit.

Someone might say that these incentives are similar to lending a person who is known for *Husnul Qadha* (a debtor who pays more than borrowed form his own accord without anything binding on him). This analogy is faulty in the sense that a person who is known for *Husnul Qadha* does not undertake to pay any additional amount or benefit neither to one creditor or the whole lot while these bonds are based on a commitment.

And for the *Husnul Qadha* Ibn Qudama says

لانه لم يجعل تلك الزيادة عوضا في القرض ولا وسيلة الي القرض ولا الي استيفاء الدين فانه في معني الربا

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This show that if the incentive is to encourage the advancement of the loans or to prompt the payment of a debt then this will fall under the broader definition of *Riba*.

C) <u>Incentives on Current Accounts.</u>

Banks have the tendency to gives incentives when opening a current account. Because one keeps on depositing and withdrawing, the deposits will be

considered a loan given to the bank and when the banks gives an incentive, this will be like an additional "conditional" (Mashrut) benefit above the loan if the bank advertises these incentives when opening the account.

Only if the bank out of its own accord without prior notice or condition and without demand by the account holders decides to give an incentive than this will be permissible. This will fall under Husnul Qadha (However this should not be done with the motive of encouraging people to deposit.)

D) Investments on Profit Accounts in Islamic Banks.

Profit accounts in Islamic banks in reality are not loans forwarded to the banks but the account holder actually entails into a Musharakah or Mutharabah. Can such account holders receive any incentives if these accounts have been advertised with these incentives? We have to look at this issue form tow aspects?

a. Do this incentives lead to Qimar?

They do not lead to Qimar because they do not place their monies at risk for a prize or incentive and the profits of the Musharakah or Mutharabah have nothing to do with the incentives. Therefore if they do not receive the incentives, their monies do not go to waste. Therefore they definitely do not fall under Qimar.

b. Do they lead to Riba?

I do not clearly understand the taleel of Mufti Taqi however I feel is that what he means is that….

Money in the profit accounts is not actually a loan to the bank rather it is money that goes into a joint pool which is used for transactions. Therefore this money is like the "principle" and any money made above the principle other than the profit is Riba. Mufti Taqi feels that if the value of the (monetary) incentive is a significant amount or equal or more than the principal capital invested than this will be tantamount to Riba.

The *taleel* he makes is that if it is an equal or significant amount compared to the capital investment than because the bank is paying the incentive from its share in the pool, there will have to recompense the capital(because they paid money from this pool).

E) INCENTIVES ON CREDIT CARDS.

(needs to be completed)

Are incentives legally binding?

All the incentives mentioned above are not legally binding.

9) CHALLENGES OF AN ISLAMIC BANK AND ITS SOLUTIONS.

a. Can the Service Charge for loans be fixed?

The Islamic Development Bank (IDB) offers non-Interest bearing loans to its member states. However there is a fixed service charge to cover up the costs.

The thing is that these loans are long term which are paid over 20-30 years. All the principle of Shariah are upheld in this. The bank does not charge interest. However the bank has to cover up for the administrative costs and thus a service charge.

Now it is extremely difficult for the bank to determine the service cost of each project as different projects have obviously different administrative costs. Therefore to overcome this the bank decided to stipulate a fixed service charge for instance X percentage of the loan. Is this permissible?

The bank can charge a service fee/charge to cover its costs incurred in giving the loan etc. on condition that these expenses are actually in lieu of the mentioned indirect costs and do not exceed the indirect costs. The better option would be of course to calculate the costs for each project separately.

If this is difficult, the bank can charge them administrative costs for the work before the loan and the work after the loan on condition that this charge is no more than *ujrat mithl*. The reason being that in giving a *qarz* in which any benefit can be demanded is not permissible.

In short, the bank cannot charged a fixed sum for the expenses incurred in giving out the loan. However the bank can charge a percentage for the costs on condition that this is not a *heela* for interest and that the costs are not inflated beyond the norm (*ujrat mithl*)

This is similar to a mufti who cannot charge for the *fatawa* but he can charge for the costs incurred in issuing *fatawa* etc.

If someone may object that why is there no difference in the service fee whereas there should be no difference in the service fee in proportion to the amount borrowed?

The answer is that *ujrat mithl* is never always proportionate to the stress or amount of the work. There are other underlying reasons which cause the ujrat mithl to fluctuate. Therefore it is not necessary that *ujrat mithl* be proportionate to the work.

There are scores of *fiqh ibarat* to prove this and a similar scenario is that of the agent in our classical books.

However one must keep in mind that this service charge must be equal to how much a person would get paid for doing such work(*ujrat mithl*) and should not abused to generate interest otherwise this would fall under the ambit of *Kullu Qarzin Jarra Naf an.*

The best thing would be the administrative fees for a year be averaged. In that way it can be safe for all.

b. <u>Can the bank make its client an agent to purchase the supplies, then have a deal of Ijarah and then sell the supplies?</u>

The Islamic Development Bank also has operation for leasing out machinery vehicles e.g. oil tankers, ships etc. It does so by purchasing the required supplies and then renting them out. These operations are carried out to finance member states with industrial projects etc.

This is done in the following steps:

1) Whenever the bank is convinced that financing a certain a project will yield benefits, the Bank will entail into an agreement with the interested company (mustajir) or the client. The bank allows the client company to purchase the required equipment on its name from the suppliers. The conditions of these will have been stipulated in the agreement. The bank will pay the suppliers directly and this too is stipulated in the agreement.

2) The client then acts as an agent of the bank and receives the equipment. He inspect s the equipment and if it requires installation and assemble he does so as well.

3) The bank and the client do not immediately entail into an Ijarah agreement. The bank and the client take the advice of the experts in determining the time it would take to install the equipment and only that pre-determined time elapses do they start the rent payment.

4) The client will pay rent at regular intervals and also undertakes the responsibility of safekeeping and insuring the equipment.

5) At the termination of the lease the bank will sell the equipment at a very minimal price to the client.

Is this process shariah complaint?

There are two ways leasing works

1) The Bank buys the equipment on its own and then takes possession and then leases it out. This is correct.

2) The bank should lease out such items which are not even in its ownership at the time of the *Ijarah* agreement. This is exactly what happens in the referred scenario. The bank makes the *Ijarah* deal and then allows the client to purchase on its behalf and then make it an agent to collect the equipment, assemble and install it and the banks determines a date in which it finalizes the sale and start the *Ijarah*.

There are a few aspects that need to be considered in this second way.

1) When the bank entails into an *Ijarah* the equipment is not even in its possession. Anything one does not have in possession cannot be leased out otherwise this falls under the ambit of *ribhu malam yalzam*.

The solution to this is that when the bank and client sign the agreement there should not entail into an *Ijarah* just then. A promise for *Ijarah* can be done. Then whenever the client receives examines/assembles and he installs the equipment, then they should make the Ijarah by word of mouth or by some sort of correspondence etc. In all this time, the equipment will be in the risk and responsibility of the Bank.

2) The *mustajir* client will not be responsible for any harm that affects the equipment as long as there is no neglect from his side. Therefore the Bank is responsible to insure the item on condition that it is halal insurance.

3) At the termination of the lease the bank will sell the client the machinery at a very minimal price. This can be done in two ways:

   a) The sale can be made *mualaq* to the Ijarah. This is not permissible as by cannot be made *mualaq*.

   b) The sale is not made conditional to the *Ijarah*. However, a promise to purchase should be made by the client at the time of the *Ijarah* which will be conditional to the *Ijarah*.

Now this is such a condition which goes against the aqd and this type of condition makes the *aqd fasid* according to the *Ahnaf* and the Shawafiy. As for the *Malikis* and the *Hanabila* there are a lot of conditions that might be against the aqd but do not make the *aqd fasid*. Therefore according to them it is permissible to make sale conditional to the *aqd* of *Ijarah*.

However this condition according to them is only possible when the sale will be immediate and the condition of *Ijarah* is also immediate. In our case although the *Ijarah* is immediate while the sale is not. Therefore although there is no clear indication in the books of the Malikiyyah and the Hanabila regarding this, by the apparent *ibarat* one understand that in principle it is permissible to put any condition except in two scenarios which make the *aqd fasid*.

1. When the condition is contrary to the aqd for instance you sell an item with the condition that the buyer cannot use it.
2. Any condition which leads to the *thaman* being *majhool*.

In our situation it is apparent that the condition of sale is nothing like the above. Therefore in light of the above we can say that this is promise to purchase which is conditional to the Ijarah. However the sale will only take place after the lease period terminates. Thereafter the *ijaab* and *qabool* must take place.

Another solution is that the purchase should not be made conditional and should be done unilaterally in this way all the above will be done one after the other. Therefore there will be three steps in this:

1. The bank will make the client its agent to purchase the equipment.
2. The client promises to sign a lease contract.
3. The bank promises to sell this equipment at the end of the lease period.

The whole discussion of promise to purchase has been discussed previously and will also apply here.

a) In summary the bank and the client agree that the client is the agent in purchasing the equipment. However the leasing and sale should not be finalized here and should be merely a promise
b) After the client buys the items and assembles them, the Ijarah should take place and the bay should not be discussed
c) The equipment will be in the responsibility and zaman of the bank during the entire period
d) After the *Ijarah* the *bay* should be carried out.
e) The promise to lease and sell by each party should be upheld respectively.

c. Loans by the Islamic Development Bank with member states.

The IDB entails gives out loans to its member states for industrial project etc. or other supplies. The way this is done is that the bank makes those member stats its representative in purchasing the required items. The bank pays the suppliers directly and orders the required items be shipped directly to its clients. Thereafter when the representative receives the goods on behalf of the bank. The bank sells the goods to the client with a profit on condition that the client shall pay the due amounts timeously.
Is this permissible?

There is one problem with this whole thing and that is the sale of something before possession.

The thing is that for a bay to be correct the seller or his agent should have possession of the item. The *Hanabila* limit this to foodstuff and the *Maliki's* limit this to *makili* and *mawzuni* items. However because of a lot of explicit hadith

against this concept the safer view is that it is incorrect to sell anything without possession.

The ideal thing is that the bank should take possession of the items or have an agent collect them. It is even possible that the bank should have its representative in that respective state who can take possession for the bank and then sell it to the client,

Another possible solution is that the bank can make the fright company its representative in collecting the items and thereafter the bay can be concluded. Alternately if the bank made the client it agent in collecting the goods at the respective client's port, then in that case the bank will have to make the *bay*' after the collection of the goods. This may be done through telephone or some correspondence. The deal before this will only be a promise to purchase which the client has to uphold.

10) QUESTIONS BY THE ISLAMIC CENTRE OF WASHINGTON.

a. Staying in a Non-Muslim Country.

Is it permissible to apply for citizenship of a non-Muslim country like USA etc.? The reason many do so is that they claim they have been unjustly treated in their native countries. Others say that there is no difference between the Islamic and Non Islamic countries as the Islamic counties do not apply the Shariah law. What is the ruling on this?

To adopt a nationality of a Non-Muslim country can be done for a number of purposes. These purposes determine what the ruling can be:

1) If a person is unjust sentenced in his native Muslim country or his assets are seized or he is oppressed for any other reason, then he can leave his native country and adopt the citizenship of a non-Muslim country on condition that the uphold his *deeni* practices and he does not let *deen* go in jeopardy and on condition that he does involve himself in the vices prevalent in these places.

2) If a person is in search of employment but cannot find it in his native country and finds a shariah compliant job in a Non-Muslim country then with the above two condition she can adopt its nationality. The reason being earning Halal is another *farz* amongst many *faraiz*.

3) If a person adopts the citizenship of a non-Muslim country for the sake of giving them *dawat* and inviting towards Islam or to correct the Muslims already leaving there and enjoin them to do good and stay on the straight path, then in fact this will be a commendable thing to do and they will be rewarded. A lot of Sahaba also stayed in non-Muslims lands for the same reason.

4) If a person in living a good life in his native land but still decides to go to a non-Muslim country to improve then this is not free from *karaha* because one is unnecessarily exposing himself to vice and sin.

5) Someone adopts a nationality of a certain country simply to boast and for name then this is *haram*.

b. <u>Nurturing children in a non-Muslim country.</u>

The Muslim who stays in America and Europe their children might have a few benefits. However the harms are many especially intermingling with the children of the Jews and Christians. This exposes them at a risk of adopting their habits esp. if parents show neglect. Now if this is the case does it still affect the ruling of adopting a nationality? Some resident Muslims claim that in the Muslim countries their children are exposes to kufr and there is fear some might leave deen as they are taught all this in their schools etc.?

The nurturing of a child in non-Muslim environments is a difficult issue. Now in those cases where it is permissible to migrate and adopt citizenship, there is a necessity. Therefore one must give special attention in bringing up their child and create an ambience and atmosphere of deen for other who might come.

c. A Muslim woman marrying a non-Muslim man.

Is it permissible or Muslim woman to marry a non-Muslim man more so if the woman thinks that by the marriage he will become a Muslim?

Also the Muslim woman is having problems finding a compatible Muslim partner and because of financial strain so there is a fear the woman herself will stray away from deen?

If a woman becomes a revert while her husband does not, should they keep their marriage? The woman has hope that by keeping the marriage intact she might convince him to accept Islam. Also keep in mind she has children from this husband. If the marriage is terminated then there is huge possibility of completely losing her children.

Also the man is very good hearted and she fears that by leaving him she will not find a compatible partner. Can she still keep the marriage?

A Muslim woman can never get a married to non-Muslim in any circumstances. Therefore even if there hope that he might accept Islam, something that is haram will not bring about halal.

As for when she bring s Islam and overwhelming majority of Ulama consider the Nikah broken. Imam Abu Haneefa says the Nikah does not break immediately. The spouse will be invited to accept Islam and then, if he accepts the Nikah remains intact. If he refuses the Nikah will break.

If the husband does bring Islam then we have to see whether that woman's Iddah has passed or not if she is still in her *iddah* then the Nikah remains and if iddah has passed then Nikah is gone however they two should redo the Nikah

d. Can Muslim be buried in a Non-Muslim graveyard?

Is these Non-Muslim countries we do not get special graveyards to bury Muslims? In such circumstances can a Muslim be buried in their graveyard?

It is not permissible to burry a Muslim in their graveyard in normal circumstances but under the above mentioned circumstances it is permissible.

e. Selling a Masjid.

If after migrating to these want to sell of the masjid when migrating can they do so for the fear of it remaining empty and deserted. Sometimes non-Muslims take control of the masjid and start doing as they please. If the masjid property is sold the Muslim can repurchase a masjid at their new place?

In western countries usually Muslim perform Salah in two types of places:

1) Some places are reserved for salah and other deeni gatherings these places. However they are not made waqf but are merely used as places of congregation. They are not even called masjids. They are called *daru salah, musallah* etc. in this case the owners can sell their properties whenever their wish.

2) Sometimes Muslims make certain places waqf for the masjid. According to the Jurist these places remain masjids until the day of Qayamah. Now these can never be sold nor can they be repossessed after the waqf. This is according to Imam Malik, Imam Shafi, Imam Abu Haneefa and Imam Abu Yusuf. However according to Imam Ahmad, if the Muslims leave that place they can sell the Masjid. Imam Muhamad also has a similar view that if the use of the waqf land ceases completely it returns into the possession of the owner. Therefore it will be even be permissible to sell it.

The view of the majority is given preference therefore it will not be permissible to sell the property of the masjid that has been made waqf. If permission is given, people will commercialize the sale of masajid.

However because this is *afaslun mujtahadun fee* therefore if the Muslims leave a place in a Non-Muslim country and there is a fear the Kuffar will take control and disrespect the place and the possibility of the Muslims returning is not there, then in these circumstances we can adopt the view of Imam Muhammad or Imam Ahmad and give permission. The return of the sale should not be used in any other avenue but another masjid.
If there is a few Muslim still there, then it is not permissible to sell the masjid.

f. Travelling without a mahram.

A lot of women travel to seek education or for financial reasons. They do not have any *maharim* with them nor do they have any other women accompanying them. Is this permissible?

It is not permissible for a woman to travel without a *mahram*. There are clear *ahadith* on the topic. A woman cannot even travel for hajj without a *mahram* then how can she travel for education and other things. Also the responsibility to take care of her is up the father before marriage and after marriage upon the husband.

If a woman does not have a shariy mahram nor does she have a husband or father and she is in financial strain, then she can according to her need leave her house.

g. A woman residing in Non-Muslim country on her own.

Some women for the purpose of education or other reasons stay in non-Muslim countries sometimes on their own and sometimes with other women. Is this permissible?

The answer to this has already been given above. However if a woman travel with their mahram and she reaches this place thereafter her husband passes away or leaves her there, then she can stay there on condition that she upholds all the laws of shariah.

h. Working on hotel that sell pork and wine.

Some students have to work in order to cover up costs. Sometimes they have to work in hotels in which they sell wine and pork is this permissible? Some adopt the profession of making and selling alcohol to non-Muslims is this permissible?

It is permissible to work in a non-Muslim hotel that sells pork and wine on condition that he himself does not serve these things.
There are very clear and explicit ahadith explaining the impermissibility of this.

As for making the alcohol and selling it is completely impermissible. In fact having the slightest bit of connection with the process can render on sinful.

i. Medicines that contain alcohol.

In western countries a lot of medicine contain a percentage of alcohol. These medicines are usually prescribed for coughs and cold etc. and almost 95% of medicines contain alcohol. What is the ruling of such medicines?

This problem is not only limited to non-Muslim countries but even Muslim countries are affected. According to Imam Abu Haneefa the solution is simple because according to Imam Abu Haneefa and Imam Abu Yusuf if the alcohol is not derived from grapes and dates then it is permissible to consume for strength or medicine to a level where one does not get intoxicated.

Also a majority of these medicines do not derive their alcohol from dates or grapes. Therefore according to Imam Abu Haneefa and Abu Yusuf it permissible to consume these medicines as long as they do not intoxicate you.

If the alcohol is derived from dates or grapes then it is impermissible to use. However if an expert doctor has advised that here is no alternative, then one can adopt this.

According to Imam Shafi it is not permissible to use anything that is pure alcohol as medicine.

If the medicine and intoxicant are mixed in such a way that the intoxicant ceases to exist and the purpose is to derive medicinal benefit which is not possible form other pure medicines, then it is permissible.

Therefore using the *Shafi* or *Hanafi Maslak* it is permissible to use these medicines.

Also if after mixing the alcohol, the alcohol undergoes a metamorphosis and does no longer exist as alcohol, then according to all it is permissible to use. For example if wine becomes vinegar.

j. Gelatin.

In western countries, there is a lot of things that contain gelatin. What is the ruling of gelatin?

If there is a complete metamorphosis occurs through chemical processes and the *najasat* and impurities are done removed, it is permissible to consume such products. However if traces remain then it is not permissible.

k. Nikah ceremony in the masjid.

The Muslim in the west hold the Nikah functions in the masajid. On the other hand dancing takes place. Is this permissible?

The aqd of Nikah can be done in the masjid but dancing etc. cannot take place in the masjid in any condition. If the Nikah function consists of such practices they should not be held in the masjid.

l. Naming with a Christian name.

Some governments have made it incumbent upon its citizens to keep names form a list prepared by the government. What should the people do?
They should adopt such names which are common between Muslims and Christian for example Adam, Ishaq or they can keep two names. The official one and one for the home.

m. Nikah for a short period.

Some young men and women who come here from abroad make the intention they will remain married throughout their courses and when they return they shall break the Nikah. What is the ruling of such a Nikah?

If the Nikah is done with all its conditions and they do not utter anything which indicates that the Nikah is mua'aqqat, then the Nikah is fine. However the Nikah is supposed to be permanent. Therefore they shall be advised to keep it intact.

However to keep things in perspective, further explanation is required.

1) Mutah:

This is when a man and a woman stay together for period. In here they don't use the words of Nikah and neither are there two witnesses present because this is not a condition in Mutah. This is haram.

2) Nikah Muwaqqat:

When the ijaab and qabool is done in front of two witnesses but they specify that the Nikah will be for a short while only.

3) The third situation is that they do not mention it in the Nikah but keep the intention in the heart that they will only be married for a short while, the Nikah is correct and the intention does not affect the Nikah, however they should try and keep their marriage forever.

n. Going to the workplace.

Can a woman go to the office wearing makeup etc.?
A woman cannot come out of the house for work etc. if there is need she can but she should do so observing the rules of *hijab*.

o. Can a woman make shake hands to non-mahram men?

Some women are faced with the situation where they have to shake hands with men and vice versa?
There is explicit impermissibility of this in the hadith and all the fuqaha have ruled it impressible in all situations.

p. Renting churches for salah?

Sometimes the Muslims are required to rent churches for salah. These churches contain idols etc. and these are sometimes given to us for free. Is it permissible to pray salah in them?

It is permissible however the statues etc. should be removed. Umar RadhiyAllahu Anhu used to prevent entry in churches due to the idols and statues.

q. Zabeeha of the ahle Kitaab.

It is permissible to consume meat products that have been derived from animals slaughtered by Christians and Jews. What is the ruing? Also one does not whether they actually take the name of Allah during slaughter.

According to Mufti Taqi it is not permissible as most of the conditions of correct slaughter are not found. If these conditions are met then the slaughter will be permissible.

r. Attending gatherings that consist of haram actions.

Sometimes Muslim are invited to gathering that have non Shariah things in them for example intermingling of both sexes and wine and drinking is common. Is it permissible?
It is not permissible to attend such gatherings
Is it permissible to work for government organizations in non-Muslim countries?
Is it permissible to work for government agencies which also consist of departments dealing with warfare and atomic bombing etc.?
It is permissible to work for such however if they are made in charge of harming Muslims then one should stay way and not take part whether one has to resign.

s. Can a Muslim Engineer design a church?

If a Muslim is employed by a company where he has to design buildings etc. which also consists of churches. If he denies he may lose his job. Can he go on with designing them?
It is not permissible to do

t. Can a Muslim sponsor a church?

A Muslim cannot do so.

u. What is the ruling for the wife and children when the husband brings in Haram income?

A lot of men deal in haram businesses, what is the ruling for his wife and children?

They have to by all means try and stop him. If they fail and have other means, then they should stay away from his money. If not they can take from him and the sin will be on the man. However the mature children should earn their own income.

11) TAWARRUQ:

This refers to the practice of a buyer purchasing an item on credit and then selling it to a third party at a loss so that he can get hold of liquid cash.
These terminology of Tawaruq has only come in the books of the Hanabila.
Ibn Jawzi has reported Umar ibn Abdul Aziz saying that
At Tawaruq Akhiyatur Riba.
If it is so then this word exist form the first century.

Difference between Tawaruq and Ina:

Ina is the practice of purchasing an item on credit and then the seller repurchases the item for a cheaper price. For instance Zaid sells a car worth R10 to Amar for R20 and hen he buys the car back for R10. Amar still owes Zaid R10.
In Tawaruq the second purchase is done by a third party whereas in Ina the repurchase is done by the seller himself.
In both cases the purchaser requires immediate liquid cash.
However they have a few things in common:

1) The initial seller sells the item in both cases at a much higher price

2) The purpose of the buyer is to get immediate cash.

3) Both are *heelas* from interest bearing transactions.

The Ruling of Tawaruq according to the Fuqaha:

1) The Hambali Mathhab:

There are two opinion in the Mathhab. One of Karaha. The preferred view is that of permissibility.

2) <u>Shafi Mathhab</u>

There are clear Ibarat that show permissibility of Ina (Ina has been explained above) Imam Shafi has gone to length proving its permissibility and there is no mention of karaha form him. The later Shawafiy have also adopted this stance. Some later fuqaha have mentioned that there is karaha although the aqd is correct.

As for Tawaruq there is no clear mention, however when Ina is allowed then Tawaruq should be no problem at all in their Mathhab.

3) <u>Maliki Mathhab:</u>

As for the Malikis, the transaction that the Shawafiy and Hanabila refer to as Ina they (the Malikis) have listed it in those long term transactions which are apparently permissible, but can lead to impermissible actions.

Looking at their *ibarat*, it seems that *Tawaruq* is fine without any *karaha*.

4) Hanafi Mathhab.

Most Hanafi's refer to Tawaruq as Ina. There are those who consider it *makruh* like Imam Muhammad. Some have adopted a slightly less strict approach and have allowed it like Imam Abu Yusuf.

However it seems that what Imam Muhammad has considered as makruh is *Ina*.

As for the Tawaruq there is no mention of karaha from the Hanafi Fuqaha. In fact a number of Ahnaf fuqaha like ibn Humam, Ainiy, ibn Nujaym, and Shurumbulali have said it is permissible without any *karaha*.
In fact, Qadhi Khan hasn't listed it from amongst the transactions that people do trying to make a *heela* for *Riba*.

The summary of the opinions.

In light of the above, it seems that all the four schools of thought have a scope for permissibility except that the Ahnaf and Hanabila have a view of *karaha*.

The Malikis don't mention Tawaruq clearly but because they mention that Ina is *makruh* when the repurchase is made by the seller, Tawaruq comes out of the *karaha* by default.

The Shawafiy have clearly allowed Ina and although some later Shawafiy do accept that there is some form of *karaha,* they do not discuss Tawaruq.

The condition laid down by those who say there is karaha is that the initial buyer should not make the repurchase otherwise it is interest with the face of a transaction used to fog the interest deal.

In Tawaruq, the role of the seller is simply to sell the item at a higher price which is completely fine. As for what the purchaser does or intends to do with the purchased item has nothing to do with him. Therefore this should not be considered a replacement for *Riba*.

In interest a person who gives less receives a higher payment. The same happens in Ina with the transaction being a mere front. In Tawaruq there is entirely a third person involved who has nothing to do with the first transaction.

The reality of the Tawaruq allowed by the Fuqaha.

Keeping the above in mind it seems that Tawaruq itself is fine. At the very least it might be makruh if the seller knows that the purchaser is in dire of funds. In this case, the buyer should just give him a qarz hasanah instead of trying to make money out of the others predicament.

Alternatively, if he does want his money to bring returns, he can finance him through Mutharabah or Shirkah etc. Leaving these primary modes of financing these and adopting Tawaruq is not the preferable thing to do.

Also the Tawaruq that the fuqaha mention is when the seller has actual items in his possession and then he sells it, transfers the ownership and all the laws of a *bay* are adhered to. If there is any other flaw, then this becomes problematic and the *karaha* increases.

The Islamic Fiqh Council has decreed the following:

1) Tawaruq should be the sale of items that the initial seller has for a deferred price. Then the purchases sells it to someone other than the seller for cash.

2) The basic (noncommercial) Tawaruq is permissible according to Shariah.

3) It should be sold to a third party and not to the initial seller otherwise this falls under *Ina*

4) The council also decrees that we should mutually help one another in terms of giving *qarz hasanah* etc. (instead of trying to make money out of others predicament)

Application of Tawaruq by the Banks:

The banks seeing that Tawaruq has been decreed as permissible have started using it as a tool for finance. The rate at which it is being deployed as a finance mechanism is increasing drastically. This calls for the Ulama responsible for the implementation to pause and think about this.

Although Tawaruq is a *heela* to get hold of cash, its permissibility does not remove it from being a *heela*. A *heela* is only deployed to get past a dead lock situation on an individual level and sometimes at an intuitional level. It cannot be used as the primary mode of finance and nor should it be used to replace the systems *Shariah* allows and endorses. Allowing it to happen at such a scale impedes the progress of the ideal Islamic Finance.

The ideal ways of Finance according to Shariah are Shirkah and Mutharabah. These systems lead to fair distribution of wealth among all the people. If Murabahah and Tawaruq etc. become widespread, this narrows the field of Mutharabah and Shirkah. More so if the evaluation of profits in Murabahah and Tawaruq are established on Interest based indexes. This promotes the interest based mindset and cannot cause a revolutionary change in the capitalist system.

The Islamic Institutions have given Islamic Banks permission to use Murabahah and Tawaruq as financing tools due to compelling reasons permission so they can compete in the competitive markets.

However this was never in the minds of the fuqaha who gave permission that it would spiral out of control and that the Islamic Banks will use it as the primary too of finance.

A couple of decades have passed and Islamic banks have a substantial standing in global markets. It is time for the management committees of these institutions to order the respective institutions under their supervision to slow down and ultimately halt the implementation of Tawaruq and Murabahah and encourage the implementation of Shirkah and Mutharabah.

A percentage of the activities of these banks should always be under strict supervision so as to replicate the ideal Islamic finance without appearing in the world markets as institutions of heelas. This will give Islamic Finance a negative reputation.

Making the Mutawariq a representative to purchase the item

The process of *Tawaruq* consists of two transactions:

1) The seller the purchaser an item that the seller has in his possession for a deferred date.

2) The buyer then resells the item to a third party.

However Islamic Banks have added another step to the process and that is *Tawkeel*.

For example if one of the clients of the banks requires finance. The bank will not sell him something that it already owns. Rather it will make him an agent to purchase the item on its behalf. Thereafter the *Mutawariq* will purchase the item from the bank and then resell it. The bank does not forward the cash directly to the supplier but gives the *thaman* to the *Mutawariq* due to him being the *wakeel*.

This makes the entire process similar to a *riba* transaction because the *Mutawariq* withdraws a small amount and pays back a large amount at the due date. (This is similar to how *Riba* is where one withdraws a small amount and pays back a bigger amount.) Although the *Mutawariq* withdrew as an agent, it still apparently looks like an interest based transaction. This does not distance it from the similarity.

Further is the item is purchased on behalf of the bank and then he buys it from the bank without returning it to the bank, then in principle this is not allowed. One person cannot represent two sides of a *bay*. It is also necessary for there to be a difference in the *Zaman*.

If the *Mutawariq* brings back the items to the bank and the bank takes possession and then resells it to him, then too there is some sort of *karaha*.

The Mutawariq makes the seller his representative to sell to a third party:

Sometimes the *Mutawariq* (client) himself makes the bank his representative in selling the item.

For example Zaid approaches the bank, the bank sells him an item. After purchasing the item, Zaid asks the bank to sell it to third person. The bank sells it to a third person and then gives the money to Zaid. Zaid has receives the much needed cash but he still owes the bank and will pay back this amount at a later date.

If this *wakala* is a condition of the *bay* then this is not permissible according to the majority of the *fuqaha*. If the *wakala* is done unilaterally, then too there is still some *karaha* because of the similarity with an interest based transaction.

Tawaruq in the Global Stock Market.

Another practice adopted by the banks is that it has an agreement with a few agents it deal with. These agents purchases stocks for the banks and then sell the stocks to a third party on behalf of the bank whenever bank orders.

When a client approaches the bank for finance through *Tawaruq*, the bank asks the agent to purchase the stocks on its behalf from the stock market. The bank then sells the stocks to the client for a higher price and a deferred date. Then the bank order the agent to sell the stocks to a third party on behalf of the client. In this way the client receives the required liquid cash.

For example,

- A company sells stocks to the bank through the banks agent.

- The bank pays for the stocks immediately at a price of $100.
- The bank sells this to the client for $120.
- Then the client sells the stocks to a third party via the agent of the bank for $100.
- So the client receives $100 and owes he bank $120.

This practice requires to be analyzed from a *shariy* point of view.

1) A number of transactions that occur in these stock market are speculative by nature. A number of future sales are conducted and a number of transactions take place where there are no actual goods involved. In short the transactions that take place in the stock exchange are contrary to *shariy* principles.

   A Shariy transaction cannot occur in such places unless there is strict control to follow shariy guidelines and principles under the supervision of specialized jurists. This cannot happen unless the supervising institutions put up a provision for checks and balances.

2) Even if checks and balances where in place, then too the client has to take possession of the goods; directly or through an agent. The stocks have to come into his risk and liability before he can sell them to a third party.

3) The agent who buys the stocks for the bank cannot be the same agent representing g the client in terms of possession. As he is representing

the bank it is as though he has replaced the bank. The bank cannot represent the person it is doing the deal with.

One cannot come out of this situation unless there is *takhliyah* from the bank on the client. When there is *takhliyah*, then the client can order the bank or the agent to sell it to the third party.

Also bear in mind that if the *Tawkeel* is a condition of the process then the aqd is fasid as explained earlier.

An alternative solution might be that the agents of the bank and the agent of the client in the stock market should be different altogether

The above are solution to correct the problem that have crept into the system. Ideally there should prevent the implementation of Tawaruq as a mode of finance. This would be better in the long run and also not impede the progress of Islamic Finance.

12. MUTHARABA MUSHTARAKA.

Although Mutharabah Mushtaraka is a modern mode the fuqaha have mentioned certain examples of it in the classical texts.
There are ibarat that show that having a number or Rabul maal is not a new concept. There is no problem in having a number of Rabul maal and there is nothing against it as well in terms of *shariy* evidences.

Takyeef of this Mutharabah.

The first *ilaqa*: Between the Rabul maal themselves.
The second *ilaqa*: Between the *Mutharib* and the *Rabbul maal.*

The Rabul maal are partners between themselves and the *ilaqa* between them and the administration is that of the Rabbul Maal and the *Mutharib*.

The investors (Rabbul Maal)

The *ilaqa* between them is of *Shirkatul Aqd* on the basis of *Inaan*. However according to the Malikis this is *Shirkatul Milk*. The reason is that the Malikis have stipulated upon the Mutharib that when he takes the money from two separate investors he has to seek permission. This permission is Mustahab. Therefore if he doesn't ask for permission and mixes the monies of two investors he will not be zaamin.

This shows that the *shirkah* between investors is a *shirkah* due to compelling circumstances. This only takes pace in *shirkatul milk*. All the partners have to receive an equal amount proportionate to capital injection and nothing more.

If we make this a *shirkatul aqd* through some contract or verbally then the ratio of profits can be different according to the Hanabila and Ahnaf.

Imam Abu Haneefa and Abu Thawr and Qadhi have allowed profits to be shared in different ratios amongst the investors and have made it a *shirkatul aqd*.

Imam Abu Haneefa and Abu Thawr have allowed this in the situation where there is no effort form the investors as well and they consider the action of dealing with the Mutharib to be sufficient as an amal. Therefore there can be a difference in profits based on this. This is similar to the practice of two partners hiring a man to do business on their behalf, the act of hiring the man is enough to be counted as an *amal*.

As for the Hanabila, although they allow a difference in profits. It is only when the shurakah themselves take part in the dealings. This does not happen in Mutharabah as there is no work from the side of the investors.

Therefore the concept of weightages that the bank give is permissible wherein profits are not proportionate to the deposits.

Can a legal entity exist as a Mutharib?

Although the books of fiqh have discussed *masail* where the Mutharib is a real person, in present times the concept of a legal entity has become quite rife. A lot of contemporary fuqaha have acknowledged this concept and they have applied

the laws of a real person upon it as well. Therefore a question arises that can a legal entity exist as a Mutharib?

Apparently there is no significant reason to not allow this.

This is similar to the case in a joint stock company where in the shareholders own the company. The affairs are however run by an administration.

Now when investors pool their monies, who is the Mutharib in real?

If you the administration is the Mutharib, then the administration can be replaced. Therefore the administration cannot be considered as the Mutharib. The administration simply represent the legal entity and works on its behalf. The manager as well cannot be the aaqid because the board of directors can also replace him while the Mutharabah continues. Therefore the legal entity can be a Mutharib and the company becomes the Mutharib.

The Tenth Fiqh Assembly reached the following conclusions:

1) The Mutharib in Financial institutions that collect funds for investing in the form of Mutharabah and being a legal entity is the bank or partnership itself. This is because it is entrusted with an independent autonomous responsibility. The board of directors are not the Mutharib and nor is the manager who is a mere representative of the legal entity.

2) The ilaqa between the investors and the Mutharib shall not be affected if they is a major change in the board of directors or when the manager

is replaced because this is part of the primary rules governing the system. If there is any loss due to the change, the responsibility shall be borne by the responsible party.

The above is when there is no clear clause from any investor. If an investor stipulates a condition stating that they will only entail into the Mutharabah on the basis that there are certain specific individuals running the Mutharabah then they have the right to leave and this will be considered a *Mutharabah Muqayyada*.

3) When it has been established that the institute or the bank is the Mutharib because it is considered a legal entity in its own right, it cannot carry out functions by itself and therefore will operate through its employees. The wages and salaries of these employees will not be paid by the Mutharabah funds. Neither shall the Mutharabah funds bear any expenses except those which come about due to the investment operations. As for office maintenance, furnishing, electricity bills and other expenses, these are the responsibility of the Mutharib. In accounting terms. The Mutharabah funds the bear direct expenses.

   Indirect expenses are borne by the Mutharib (legal entity.)
   This is because this is the very action of it which make it a Mutharib and it only receives its share from the profit in lieu of this action.

As for expenses that the Mutharib does not have to take care of, the depositors' accounts will bear them according to the stipulations of the rules of Mutharabah.

Mixing the Mutharabah funds with the funds of the Mutharib.

Sometimes the bank (Mutharib) pools its own funds with the investors' funds. In fact in certain countries this is a law. There is permissibility in shariah if it is with the owner's permission whether the permission is specific or general.
As for the impermissibility recorded from the Shawafiy refers to the case when there is no clear permission otherwise it is permissible according to them as well. So what the financial institutions do is not a problem especially if they announce this is their meetings

Setting a timeframe for the Mutharabah.

Is this permissible?
If the Mutharabah is tied down to a date with which it terminates isn't permissible according to a majority of fuqaha. The Shawafiy do not allow this. Neither do the Malikis. The Hanabila and Ahnaf have say the Mutharib can be stopped from entering into new transactions but cannot be denied form clearing the accounts.

Can the Mutharabah be nullified before the timeframe?

The fuqaha state that a person can leave the Mutharabah whenever he wishes. There is discussion that will ensue in detail.

Continuous Mutharabah.

In principle, the Mutharabah takes place wherein all the wealth is invested then the return are shared among investors according to their agreement.

If this was applied to banks and Islamic Institutions that would mean that deposits in the investment accounts could only take place on a single day because the period of Mutharabah is fixed.

This suggestion would make it very difficult for the bank, because the nature of the modus operandi of the bank requires that the deposits and withdrawals accounts always remain open otherwise this would create a host of problems for modern days fast paced business and trading. This would put a huge sum of money to just lie away from business activity.

Also because to place funds into a business venture is according to the *maqasid* of shariah, this point should be consider.

Never the less it is extremely difficult to close down a Musharakah running facility because this will be against the motives of all the investors.

Distributing products on the basis of daily products:

The solution to this problem is that profits should be distributed on a daily basis. At the end of every accounting period, the total derivable profit should be determined. This profit should be divided by the total funds invested. In this way the bank will know how much every unit of investment yielded in profits. Thereafter every investor will be given his share of profit proportionate to the number of days his money was used in investors' accounts. The longer period the unit of money stayed in the investor account, the more the profit it will yield. For example. If the account show that every rand is yielding 1 cent daily, the yield for one rand for a hundred days will be 100 cents. Whether these hundred days are consecutive or not. Therefore the owner will receive a 100 cents.

In this way investors can keep on depositing and withdrawing and their share in profits will be determined on the basis of the number of days their moneys were in the investment.

This is the only way to keep the investment account open. However this has to be evaluated from a Fiqhi point as well.

1) To evaluate the exact profits requires that the total assets are made liquid (made to cash). Any profits paid before this will have to be accounted for and will have to be kept in consideration when clearing the accounts.

   Now in banking operations, it is impossible to liquefy completely because the operation of finance always continue.

   A solution to this can be that the account can be cleared after every investment period for instance every month on the basis of an evaluative liquefaction.

   Therefore all the assets of the bank that are involved in the finance operation will be purchased by the shareholders using the money in the deposits accounts and this will be added to the other liquid cash and the profits will then be distributed and the yearly Mutharabah will terminate.

   During the following year, a new Mutharabah will be set up between the depositors and the shareholders and the price of the sold assets will be considered as rasul maal for this new partnership because they purchased them for the Mutharabah facility to continue and hence they own the assets now. This will lead to *shirkah bil urooth* which is permissible according to the Malikiyyah.

2) Classical Mutharabah requires that all wealth is handed over at once whereas in current Mutharabah this is not practical.

   However the Hanafi's have allowed this if the Rabbul maal gives permission.

   The problem comes about when one person invests later than the other. How can he have a share in the profits as these were yielded during a period in which he was not yet a partner?

   The answer to this can be that when *shirkah* is formed by mixing the monies, we do not look at the money of each investor on its own. This is also the case in *Shirkatul Wujooh*.

   If the partners or investors are happy with this setup then it is according to the maxim

   Ar ribhu baynahuma ala mashtarata.

3) The third problem is that the *rasul maal* is not known at the beginning of the period. However according to the Ahnaf it is permissible because only that *jahalat* that can lead to dispute is impermissible.

<u>An investor wanting to terminate his partnership and retrieve all his funds.</u>

The distribution of profits though the daily products system is only possible if the accounts of investment are kept running and he has an amount in the account. In short there should be monies kept in the account at al times. Although this amount keeps fluctuating varying on the deposits and the

withdrawals. Now if an individual wants to withdraw all his monies. This is referred to as *istirdad*.

The ruling of *istirdad* is that if the accounts consist of assets and liabilities then a complete retrieval is impossible before the accounting period. The most the bank can do is to return his total deposits with an estimated share of profits proportionate to his deposit. This payment should be considered when clearing the books and the actual profit/losses are calculated. If the payment he received was less than his actual share in the profits, then he will be reimbursed. If he was paid more, then he has to return the amount to the bank.

If the accounts consists of more fixed assets or a mixture of cash and fixed assets and the fixed assets are more then a complete retrieval is possible. The method of doing this is that the pool should purchase his share and the purchase price can be determined on the basis of calculating the estimated profits of the day. The fuqaha have clearly mentioned this in their ibaraat.

The bank cannot buy the share of the investor with the amount of money he deposited or for a fixed price otherwise this will be considered a zaman of rasul maal.

To summarize the entire discussion:

1) *Mutharabah* can be done on an individual basis as well as collectively.

2) There are two *ilaqa's*; one between the *Rabul maal* and the other between the *Rabul maal* and the *Mutharib*.

3) The *ilaqa* between the *Rabul maal* is of *shirkatul aqd*, and their *amal* in the *shirkah* is dealing with the *Mutharib*. Therefore according to the Hanafi's the profits do not have to be proportionate to their capital injection.

4) Also on the basis of the Shafi and Hambali Mathhab, it is permissible for each investor to have a different share for the profit than the other.

5) The Mutharib can be real person or exist as a legal entity as well.

6) If the Mutharib in a financial institution then the indirect expenses shall be borne by the Mutharib and not the funds of the investors

7) The Mutharabah cannot be tied to a timeframe meaning it is not permissible for the Mutharib to sell the invested assets however it is permissible to restrict the Mutharib to stop entering into new transactions.

8) It is not permissible to not allow either partners to leave the transactions before time.
9) It is important to consider the new type of shirkah based on distributing profits on a daily basis.

10) If the *Mutharabah* funds consist of assets and liabilities, then it is not possible for a person to close down his account and completely retrieve his money. If he does it should be accounted for.

11) If the *Mutharabah* funds consists of fixed assets and the fixed assets are more, then the *Mutharabah* funds can purchase his share on the basis of estimating the daily profit and there should not purchase it for a fixed price as this will add to the *zaman* of the *Rasul maal*

13. TENDERS AND CONTRACTS:

Aqdu tawreed refers to the agreement between the buyer and the seller that the supplier will arrange merchandise for the buyer which the buyer will purchase. The payment and delivery will take place at a future date. This is signed by both parties.

These type of transactions have become a necessity in current business practices. However a huge problem arises from a Fiqhi point of view and that is this is considered as a *bayul kali bil kali* or at least *bay mala yamlikuhul insan.*

If the merchandise has to be manufactured, this can come under *istisna*. Islamic Fiqh Academy has decreed that this is permissible.

However if the supplied goods are other than that, the following questions arise form a fiqh point:

1) This is a transaction……

2) Both the exchanges will be made in the future so this is *bay kali bil kali*

3) The suppliers are sometimes not even in the possession of the seller, so it is a transaction of selling something which one does not own.

4) Sometimes the goods do not even exist which makes this bay *madoom.*

Some contemporary scholars have called for this to be allowed although the transaction is against the above mentioned *usool* because there is a *zarurah* and there is nothing in here which leads to *Riba* or *Qimar* or *Gharar* which is the illah for *bay kali bil kali* or *bay madum*.

This opinion is flawed in multiple ways and this will lead to ignoring the principles of Islamic fiqh that have been preserved over the centuries. This will open doors to legitimize a lot of transactions invented by the capitalist system like futures etc.

The best thing is that this should be considered a bilateral promise. The actual transaction should only take place at the fixed date. The only question then is that can bilateral promises be binding?

The Islamic Fiqh academy has decreed that one sided promises are binding. Bilateral promises are not binding. However some fuqaha have stated that bilateral promises can be binding if there is a need. For example in *bayul wafaa* like the Ahnaf state.

The Malikis have allowed *bayu thunya* which is similar to *bayul wafaa* that it is not allowed in principle. However if the transaction take place without a condition of making a promise and the buyer unilaterally makes a promise, then the promise becomes binding.

There also remains no doubt in the necessity of a unilateral promise in today's commerce is huge necessity especially in international trade.

Many a times one side has to purchase a huge contingent of goods which requires the supplier to deliver immediately. To protect the interests of both parties there needs to be a contract binding the two otherwise any party can unilaterally decide to end the deal at any given time harming the other.

For instance a steel fabricating company requires a 1000 tons of steel. They place the order. The supplier does not have that quantity. So they ask for some grace. In this period of one week the supplier invest his capital and time to acquire this. The time comes and the purchaser refuses to purchase. This will cause harm to the seller.

The same can apply with the buyer. He places an order and he requires the steel after one week. When the time comes the supplier refuses to sell and cuts the deal loose. This will cause harm to the buyer.

There is some quotes form Jasas which state that promises to do with… have to be made binding.

What is the difference then between a futures sale and this?

This is not a concluded transaction. It is an agreement from both sides to conclude a transaction on the required dates. On the agreed dates the *ijaab* and *qabool* will take place.

When a *bay* is concluded, the risk of the *mabiy* is transferred to the buyer and the *thaman* has become a responsibility on him. This transfer of

responsibilities takes place after the *ijaab* and *qabool*. In short, the *mushtariy* becomes indebted to the *baiy*.

As for the case of muwa'ada, the transfer of risk and responsibility does not place.

In both cases the implications are different. In muwa'ada the implications of a concluded deal do not take place by default. On the particular date, they will have to do the *ijaab* and *qabool*. Also if a genuine reason prevents one from fulfilling his side of the deal, then he will not be binded to complete the transaction.

In a futures sale, when one side defaults, the transaction does not become void automatically. There has to be *iqala*.

Now when the muwa'ada is *binding*, the *hakim* has to enforce it. If one party backs out without any excuse, it has to bear the expenses it has caused.

Therefore there is a big difference between the two although apparently they do look similar. *Muwa'ada* might look like an *aqd* and a concluded transaction but it is not.

Therefore the *muwa'ada* should be made binding like how Qadhi Khan states when there is a need.

However the contract should be clear and defined without any ambiguities and if any clause is vague and can be a cause of dispute then the muwa'ada and won't be binding.

Sometimes, the purchaser is required to deposit a certain amount as a guarantee when signing the agreement. This deposit is not considered as *urboon* because this is not a concluded deal.

Urboon is usually a bay in which there is an option for the purchaser to back out. However the purchaser has to make a deposit. So if the bay is concluded then this will be part of the thaman. If the bay is not concluded, the deposit has to be returned to the owner. Ibn Qudama has mentioned this. This shows that in *urboon*, there is *khiyar* if the *bay* is not concluded.
In our situation the *muwa'ada* is not a concluded deal. Therefore this deposit cannot be considered an *urboon*.

However there is nothing wrong in the the seller asking the buyuer to make a deposit and prove his seriousness. This deposit will be considered an amanah. If he mixes this with his wealth or spends it, he will have to compensate it.

If the buyer does not fulfil the *muwa'ada* agreement and the jugje orders him to compensate, then there can be *muqasa* between the *zaman* and the deposit. The *zaman* can set off the deposit and the balance can be paid off.

Tenders and contracts.

Munaqasa is a bidding system deployed by government and corporations wanting to purchase goods or services. It is somewhat opposite to auctions. Auctions are carried out by sellers and they seek the highest price possible. In Munaqasa the bidding is carried out by the purchasers and they seek the cheapest or best price in the market.

The process.

The purchaser announces that he requires certain goods and services which it specifies. This announcement is made on various media platforms and the requirements/conditions are also outlined.

Different companies will show up for the invitation and make proposals. All the proposal are reviewed and the most cost effective bidder is awarded the contract. This can also take place in the purchase of goods or services.

The Fiqhi Takyeef of tenders.

This type of transaction is not found in classical books of Fiqh because this is a new types of transaction of the modern age.

However this does not mean that it is not permissible from a *shariy* point of view. As long as it does not contradict the principles of *shariah* it will be fine and permissible.

Its *Takyeef* will vary with the motive of the tender's issuers. If they intend it to be an aqd, then the announcement is merely an invitation. Some people

consider the invitation to be the *ijaab* and the awarding of the bid as a *qabool*. This is incorrect because in a shariy *ijaab* the price has to be stipulated. In these invitations, the price is not determined

Also some sort of negotiating can still take place. The *ijaab* will take place by the seller proposing and the *qabool* will be when the issuers make the *qabool* of awarding him the bid. This will be so if the motive is to have an immediate *bay/Ijarah/istisna* etc.

This is the preferred view of the fuqaha.

Now since the proposal is considered an *ijaab*, the seller who has proposed has the right to withdraw before the *qabool* takes place.

However, according to the laws of the Malikis in Muzayada once one engages in the bids, he cannot withdraw. Now because the laws of Muzayada and Munaqasa are similar therefore it seems that according to the Maliki Mathhab a withdrawal would not be permissible.

As this is a *faslun mujatahadun fee*, an easier stance can be adopted.
Mufti Taqi say that he feels that to give the bidder a right to withdraw is more fair and logical. The reason to this is that we have considered his bid to be *ijaab* and we cannot prevent the rights of *ijaab* and deny him his right to withdraw.

As for what the Malikis have stated in their books regarding *Muzayada* the bids become irreversible and binding because every person comes forward

with complete knowledge of what the others are offering and the award (*qabool*) is immediate.

In the case of *Munaqasa*, the negotiations and dealings take place discreetly and a decision is reached after a period of review. In the meantime, complications may arise and the bidder may have compelling reasons to withdraw his bid. For instance market prices may have fluctuated. Therefore we cannot make *qiyaas* of Munaqasa on Muzayada.

Does the tender issuer have to accept the lowest bid?

As the bidding is considered as an *ijaab*, the issuer can accept or deny whosoever he pleases. In other words he can make qabool of whatever satisfies him. This has been stated by Malikis in Muzayada. Therefore because we have based Munaqasa on Muzayada, the issuer can accept any bid he wishes. Sometimes the issuer does not always accept the cheapest bid for external and variant factors. Due to this a lot of collusion and malpractices take place. Therefore this whole review process should be under controlled legislation to ensure transparency. The above is related to when the motive of the bids is to conclude an immediate deal.

As for when it is cases like tawreed, then there is no *ijaab* and *qabool* as mentioned earlier. The invitation on the various media platforms is a mere invitation to enter the *muwa'ada*. However all the above procedures can also be implemented in this process too.

Selling the bid invitation manuals:

Sometimes certain manuals are specifically prepared showing the requirement of the issuer. However these are sold. Is this permissible?

The profits of these manuals are forwarded to the issuer and there is no reason why the book should be sold.
However from another aspect, the issuer has to research and has to endure printing costs and as well. Furthermore, these books reduce the effort of the bidding companies. Otherwise every contractor would have to research on his own. Keeping this is mind it seems permissible to sell their manual.

If they do not contain any research than the issuer cannot profit from them because this are simple conditions mentioned and it is not permissible to take some compensation for that.

The issuer demands for deposits

In most cases the issuer asks the bidding company to deposit an amount as a guarantee:

1) The initial deposit: The bidding company is asked to pay a deposit to prove its seriousness. This deposit is confiscated if the company withdraws its bid.

2) The Final Deposit: This is demanded from the one who is awarded the contract. This is there to demand from the awarded company that it carries out the contract with diligence.

The ruling

The initial deposit is fine. There is no problem in the issuer cannot asking for a guarantee from the bidder to prove hiss seriousness so long as this don't lead to unnecessary usurping of the bidding company's money. This is only possible if this deposit stays as an *amanah* by the issuer. If they use it, they have to reimburse the depositor. If they invest it they have to pay the profits. Therefore anyone who does not get the contact should be reimbursed.

As for the confiscation of funds this is against the dictates of shariah. Because the bidding as mentioned earlier is merely an *ijaab* which he can revoke whenever he wants. Therefore there is no reason his money should be confiscated on the grounds of him withdrawing his bid. This is a right which shariah has given him. A lot of time there are genuine grounds for withdrawal.
Therefore if the initial deposit is being confiscate then it this is not permissible.

Somebody might argue what the benefit of this deposit is then.

The answer is that this is mere guarantee of the seriousness of the bidders and it's not a *zaman* in *Fiqhi* terms. *Zaman* is usually proceeded by debt. A mere deposit does not make this a debt on the bidder therefore there is benefit.

The other deposit for the person who wins the bid is to ensure that the company completes its responsibility. Some people consider this to be from *urboon*. However, this is not the case. *Urboon* is issued by the purchaser whereas in this case it is the seller issuing. The laws of the previous *zaman* also apply here.

14. BUILD, OPERATE/OWN TRANSFER INITIATIVE.

Sometimes the government requires to build or improve on existing infrastructure. For this the government does not want to involve itself. It therefore assigns member of the private sector to involve themselves.

These contracts are given to interested companies which undertake the project and undertake to complete in a certain timeframe. Thereafter the project is not immediately handed over to the government. The government allow the contractors to levy fees or other taxes and recover its cost and earn some profits. Thereafter it is handed back to the government.

For instance the government requires to build a bridge, the interested company will do so. After the completion of the project, the company will be allowed to run the bridge for 10 years as an example. It will levy a certain toll fees (or any fee) and through this it will recover the capital invested with good returns.

The Fiqhi Takyeef.

This depends on the type of *aqd* it is and the activities of the desired project.
Let us take projects that are planned to set up buildings or equipment that can be leased or where a levy can be taxed for example bridges or power stations or paving roads or setting up a telecommunication network. The land upon which this takes place belongs to the state and the contracting company uses it for the named project and use to recover the funds it has invested. Thereafter he land with the project is handed over to the state.

There can be two Takyeef's of this:

1) The state has leased the land to the company for a fixed period to work on the project. The payment of the lease will be the project itself that will be handed over. In this case the project will be considered the property of the company till it hands over. The *ilaqa* between the two is of *mujir* and *mustajir*.

2) The state has made an *istisna* deal with the company. The basis of the transaction is istisna. The price the *mustasni* (state) will pay are the taxes that the company will envy in the fixed period. The ilaqa is of *mustaasni* and *saani*.

Who owns the project during the concession period where in the company can levy taxes to recover.

If the contract stipulates that the company will own the project after completion than the first Takyeef will be used. This is referred to as Build. Own. Transfer.

If the contract stipulates that the state will own it immediately after completion, then the second Takyeef will be used. This is called build. Operate. Transfer.

Build, own, and transfer.

The first type that is done on the basis of Ijarah is contrary to the principles of shariah. The reason is that the ujrat is given after a period. Now in terms of

shariah the Ijarah is an aqd that keeps renewing itself meaning every day has its fixed portion from the ujrah.

For example if Zaid gives out his house on rent to Amar for one year for R36000 therefore Zaid get R100 for each day. If the Ijarah is terminated before the end of the year for any reason say before two months, mar is liable to pay proportionate to the time he has occupied the place. This show that the ujrah has to be such that it can be cleared or paid proportionately at the end of the period.

These projects cannot be paid proportionately. If the Ijarah is terminated, they cannot clear the balance etc. For instance the Ijarah continued for four months but only one eight of the project has been completed. Therefore the project itself cannot be the ujrah.

This cannot be made according to the *shariy Ijarah* unless a price is fixed for the lease. However at the end they can mutually agree and the project can be handed over to set off the rent. However the contract cannot stipulate such a clause making it necessary for the company to hand over the project.

Therefore this type of contract is not shariah complaint.

Buid, operate, and tranfer.

In this case the company does not own the project. It does recover profit from running the project and it can recover its profits with the capital invested.

Several question come about regarding this:

- Can the *manfa'ah* be a *thaman*?

- Can the *manfa'ah* that was through the efforts of the *mustasni* be *thaman*?

- Why can't this aqd be considered as *Gharar*? The contractor wants to profits from the taxes that can be levied but these are unknown.

Can the manfa'ah be a thaman?

This is permissible like ibn Nujaym mentions. Thaman can also be a *manfa'ah* in *Ijarah* as long as it is not from the same manfa'ah he used. This is according to the Hanafi's. The others have given a permission for this.

Someone can ask the permissibility for the *manfa'ah* as *ujrah* …… present during the time of the *aqd*. In this case the *ujrah* is not present.

The answer is that *istisna* is unlike *bay* and *Ijarah* because in both the iwaz is present. In istisna the item is not present. It comes after a while. Therefore the objection that the *iwas* is not present at the time of the *aqd* is not a valid *ishkal*.

However can the manfa'ah that came about by the action from the *mustasni* be a thaman?

Mas'alatu Qafeezu Tahhaan.

The majority of the Fuqaha have ruled that the ujrah that comes about from the actions of the ajeer is null and void. This is known as *Qafeezu tahhaan.*

This has been discussed in detail in sharh uqqod rasmul mufti as well as nashral arf.

On the basis of those discussions, the *Qafeezu tahhaan* does not affect the running and profiting of the project after completion.

However because the *mustasni* cannot make *tasarruf* in the project before handing it over, the company should hand over the project to the *mustaasni* so that the risk is transferred to the *mustasni* and thereafter they can transfer the fees to the company.

Is there Gharar?

There is an aspect of *Gharar* because they want returns from the running the project and the amount of the fees that will be received is not known.

The thaman is not the fees received. It is the benefit of using the project itself.

The concession to charge levies and fees.

The contractors are allowed to charge fees. This can be because they undertook the project or simply because the government does not want to run the project.

So sometimes the government might make the project but handover the running to someone one else.

It is better to consider this as a lease and sublease. Meaning the government allows the company to operate and pay the government.
The government then collect fees from the cars etc. the Shawafiy, Hanabila and Malikis have allowed this. The Ahnaf say that if the ujrah from the original lease is of a different genus from the *ujrat* of the sublease. Also, the item that is being leased should have some fixtures or fittings attached to it. The companies do usually add a lot of stuff therefore it is permissible according to the Ahnaf as well.

There is much more detail but I have left it out for the sake of brevity.