ARTICLES OF THE *MEJELLE* ON *ISTIṢNĀ‘* CONTRACT: JURISTIC EVALUATION AND APPLICATIONS

Md. Habibur Rahman
Senior Lecturer, Faculty of Business and Management
University Sultan Zainal Abidin (UniSZA)
Kampung Gong Badak, 21300, Terengganu.
habiburrahman@unisza.edu.my

Muhammad Amanullah
Professor, Kulliyah of Islamic Revealed Knowledge and Human Sciences
International Islamic University Malaysia (IIUM)
P.O. Box 10, 50728 Kuala Lumpur.
amanullah@iium.edu.my

ABSTRACT

The Majallat al-Aḥkām al-‘Adliyyah, known as the Mejelle, is the code of Islamic civil transactions which was prepared under the auspices of the Ottoman Caliphate. This code was established based on the Ḥanafī School of Islamic law. The paper intends to conduct a juristic evaluation of the articles of the Mejelle on istiṣnā‘ contract along with an investigation of its contemporary applications. Istiṣnā‘ is a contract to buy for a definite price something that may be manufactured later, under agreed specifications between contracting parties. The study finds that although articles of the Mejelle on istiṣnā‘ are known to be based on the Ḥanafī School, they generally are not contrary to the views of the majority of the Schools of Islamic law. It concludes that the contract of istiṣnā‘ is applicable as a modern tool to finance infrastructure development, high technology industries, and mega projects like highway construction, aircraft industries, locomotive, shipbuilding, and so forth.

Keywords: *istiṣnā‘, schools of islamic law, mejelle, ottoman, infrastructure development*

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INTRODUCTION

The *Mejelle* was composed between 1869 CE and 1876CE as part of the legislative process of the *tanẓīmāt* (a period of reformation of the Ottoman Empire between 1839 and 1876CE) initiated by the Ottoman Caliphate. It represents an attempt to codify that part of the Ḥanafī *fiqh* which deals with civil transactions (*mu'āmalāt*). The codification was the work of a Commission of Jurists, headed by Ahmad Djevdet Pasha, Minister of Justice of the Ottoman Caliphate (Rahman, 1967). The *Mejelle* contains 1851 articles that encompass legal (*shar'ī*) provisions for the various civil transactions, such as sale, rent, guarantee, agency, etc. with a compact pattern that organized the *fiqhī* issues, which were dispersed and scattered. Hence, it actualized a great legislative task and bridged a big gap in the judiciary and the lawful transactions that proved the greatness and prestige of Islamic jurisprudence in the face of Western laws and established its superiority on this. The *Mejelle* is considered as proof of the flexibility of Islamic law in the sense that it can accommodate the changes in time. Thus, it was a significant achievement for Islamic jurisprudence and its reformation, which rejoices the hearts of scholars and Muslims in general.

The *Mejelle* discussed many jurisprudential topics like Sales, Leasing, Suretyship, Transfer of obligation, Pledge, Deposits (*amānāt*), Gift, Wrongful possession and Destruction, Unlawful Compulsion and Pre-emption, Joint Ownership, Agency, Compromise and Release, Acknowledgment (*iqrār*), Actions, Proofs and Oaths and lastly discussion on a Judge and his duties. It contains what is known as civil law or civil code, lawsuits, evidence, i.e., means and proofs for prosecution, just as it discussed the principles and systematization of litigation, prosecution and judiciary, and so on. However, the *Mejelle* did not discuss the provisions of worship, family law, criminal law, punishments, and so forth. The First Book of the *Mejelle* is on Sales. It starts from the article (101) and ends in the article (403) and consists of an introduction and seven chapters. Under the book of sales, there is a section for *istiṣnā'* contract, where the *Mejelle* discussed the essence and conditions for *istiṣnā'* contract along with the difference between *istiṣnā'* and *salam* contracts within five articles (388-392).

The contract of *istiṣnā'* refers to ask to produce and manufacture something with a specified design either on the way of leasing or cooperation, donation, gift, and others. From the past, it has been very common that in a tribe, if someone has any special skill and can produce something unique, then everybody asks him to produce that thing for him. In return for that, the producer may ask the thing he intends and needs to obtain. Islam urges the people to work, to survive on one's work, and to do the best when one works.

The Prophet says: "Allah loves when one does his work; he does it with his best" (al-Bayhaqī, 2000: 5312). History says that the prophet Dāwud used to work and survive on his work. Working with one's hand encompasses many things like agricultural, industrial, manufacturing, etc.

The *Qur'ān* says:

وَلَقَدْ ءَاتَيْنَا دَاوُۥدَ مِنَّا فَضْلًا ۖ يَٰجِبَالُ أَوِّبِى مَعَهُۥ وَٱلطَّيْرَ ۖ وَأَلَنَّا لَهُ ٱلْحَدِيدَ ﴿١٠﴾ أَنِ ٱعْمَلْ سَٰبِغَٰتٍ وَقَدِّرْ فِى ٱلسَّرْدِ ۖ وَٱعْمَلُوا۟ صَٰلِحًا ۖ إِنِّى بِمَا تَعْمَلُونَ بَصِيرٌ ﴿١١﴾

"We bestowed Grace aforetime on Ḍāwud from ourselves, O ye Mountains! Sing ye back the Praises of Allah with him! And ye birds (also)! And we made the iron soft for him. So that he makes thou coats of mail, balancing well the rings of chain armor, and work ye righteousness; for sure I see (clearly) all that ye do.."

(Surah Sabā', 34: 10-11)

The Prophet (peace be upon him) also affirms it while he says that the best food one consumes which he earns by his work and the prophet Dāwud used to consume what he earns by his work" (al-Bukhārī, 15: 2072). Ibn Ḥajar mentions the nature of the work of Prophet Dāwud that he was an ironsmith and made armors, weapons, and so forth from iron. Before him, the Prophet Ādam was a plowman, Nūḥ was a carpenter, Idrīs was a tailor, and so on (Ibn Ḥajar, 1997, 4: 384).

History affirms that the Romans, Persians, the people of Yemen, and others were familiar with the industry, manufacturing, and the like. Even in the time of the Prophet (peace be upon him) the manufacturing arrangement (*istiṣnā‘*) was there, as it is found especially in some sources of the Ḥanafī School (al-Nashwī, 2007, 114). Al-Sarakhsī says that there is no dispute that the contract of *istiṣnā‘* has been practiced among the people from the time of the Prophet (peace be upon him) until today (al-Sarakhsī, 1989, 12:138).

Thus, this paper intends to evaluate the articles of *Mejelle* on *istiṣnā‘* contract in light of the prominent Schools of Islamic law. The paper further demonstrates the applications of *istiṣnā‘* contract into the contemporary context.

METHODOLOGY

This study is library-based research grounded on the profound induction in the classical and contemporary literature of Islamic jurisprudence. Methods followed in this research are as follows:

a) Analytical method: This study follows an analytical method in dealing with the articles of *Majallat al-Aḥkām al-'Adliyyah* on *istiṣnā'*. It focuses mainly on textual library research based on the *Mejelle* per se, along with other classical *fiqh* books and literature written on modern Islamic banking operations. Books and articles written both in English and Arabic are used as references.

b) Comparative method: It is used to deal with the stands of various Schools of Islamic law on the articles of *Mejelle*. The study objectively follows the research methodology of Islamic Jurisprudence properly, i.e., discussion of the sources, comparison among the evidence, and then giving preference to the opinion that is underpinned by strongest evidence and motives.

c) Critical method: This method is used to discuss the relevance of the articles of *Mejelle* to the modern context. The study critically evaluates the modern, relevant practices and then examines how the articles could apply to such contemporary operations.

DISCUSSION AND ANALYSIS

Definition of *Istiṣnā'* Contract

Lexically, *istiṣnā'* means asking to produce and request for manufacturing. Concerning the technical meaning, jurists differ in opinions concerning its nature and essence, whether it is just a promise from one person to another or a contract, which is concluded by the offer and acceptance. Those who consider it a contract have their views, whether it is an exchange contract which is binding for both parties once it is concluded validly, or it is a non-binding contract like power of attorney (*wakālah*), lending usufruct (*i'ārah*), depositing (*īdā'*), etc.

The article of *Majallat al-Aḥkām al-'Adliyyah* defines the *istiṣnā'* elaborately where it has discussed the *modus operandi* or the way of the conclusion of the *istiṣnā'* contract. Thus, the article (388) of the *Mejelle* elaborately states:

> *"If one requests any industry man to make for him such thing with such amount of money, and the industry man accepts it, the*

> *contract of istiṣnā‘ is concluded. For example, the buyer shows his foot to the boot-maker and requests him to make a pair of boots from such and such leather in return for such amount of money while the maker agrees on that; or one makes a manufacturing contract with a carpenter to build for him a ship or boat, with giving the exact measurement of length, width and other necessary features, while the carpenter accepts it, the istiṣnā‘ contract has been concluded. Also, if one makes a deal with a manufacturer to produce a certain number of needle guns, provided that each one is for such an amount, and he defines the length, size, and other requirements thereof, while the factory man agrees on that, the contract of istiṣnā‘ is concluded..”*
>
> (al-Majallah, 1302H: 67)

Thus, if anybody asks from a manufacturer to produce for him a well-defined product with precise features for a specified amount of money, and the producer accepts it, this deal will be concluded as *istiṣnā‘* contract. It is required in *istiṣnā‘* contract that both works and raw materials shall be provided by the seller (*ṣāni’*). If the buyer provides the raw materials (*mustaṣni’*), the contract will be concluded as hiring the professional. The subject matter of *istiṣnā‘* contract is the asset, not the work of the seller (*ṣāni’*). Thus, if the seller (*ṣāni’*) brings the product for the buyer (*mustaṣni’*), regardless of whether he or someone else made it, and the contracting parties accept it, such contract will be valid (Ḥaydar, 2003, 1: 422; Bāz, 1923: 220).

The Ḥanafī School of Islamic law considers *istiṣnā‘* contract as an autonomous contract with the distinct provisions from other contracts. Though there is something common between *salam* and *istiṣnā‘*, it is not *salam*; rather, it is an independent sale contract like *salam*, *ṣarf,* and other sale contracts. Alike the *salam* contract, this also could be considered as an exception from the prohibition of selling the non-existent items. Moreover, the Ḥanafī School claims to have a scholarly consensus on the validity of *istiṣnā‘* arrangement (Ibn Nujaym, 1997, 6: 283 & al-Zarqā, 1992: 234). Ibn ‘Ābidīn defines it as “an arrangement of requesting to manufacture a specific item on the way defined and known to the parties for a precise duration.” The duration here, however, is just for giving a respite to produce the item specified. Giving a duration is not to make him rush to settle the contract. If so, then it would be like a *salam* contract (Ibn ‘Ābidīn, 1998, 7: 365).

The other Schools, however, consider it similar to *salam* sale, and thus they do not provide any independent definition for *istiṣnā‘*; rather, they discuss it within *salam* contract as the sale of something which would be manufactured defined in the liability. According to them, this is just *salam* in the manufactured

products. They stipulate all the conditions of *salam* which are applicable here, among them the immediate delivery of the price (al-Zarqā, 1992: 234).

Referring to the sources of Mālikī School, it is found that they discuss *istiṣnā‘* within the discussion on *salam* (al-Dasūqī, 2003, 4: 350). Hence, in the discussion on *salam,* there is a title found in *al-Mudawwanah* which says, "*al-salaf fi al-ṣinā'āt*," i.e., *salam* in the industrial products (Ibn Anas, 2005, 4: 22). Ibn Rushd discusses in *Muqaddimāt* with the heading "*al-salam fi al-ṣinā'āt*," i.e., *salam* arrangement in manufacturing goods (Ibn Rushd, 1988, 2: 32). So, in the discussion on *salam,* this School specifies a heading for the *salam* in industrial merchandise (al-Sālūs, 1992: 262).

Similarly, the Shāfi'ī School also does not discuss *istiṣnā‘* in an individual chapter but rather discusses it within the discussion on *salam*. Al-Shīrāzī says, "*salam* is valid in each property which can be sold and specified with the attributes, like the things used as prices, seeds, fruits, clothes, irons, glasses, leads and so forth" (al-Shīrāzī, 1995, 2: 72). The Shāfi'ī School allows *salam* in the items that are manufactured from a single material only, like iron, copper, lead, and the like. But this School does not allow it in the items which are manufactured from multiple materials like a washtub from copper and iron, and so forth (al-Sālūs, 1992: 271).

Likewise, the Ḥanbalī School also discusses *istiṣnā‘* with the discussion on *salam* contract. Moreover, some scholars of this school do not permit *istiṣnā‘* at all. According to them, *istiṣnā‘* on a commodity is not valid because it is selling something non-existent to a way other than the way of *salam* (*Ibid.*: 269).

Nevertheless, the authors agree with the article of the *Mejelle* that if someone requests a manufacturer to produce any specified item for him and the manufacturer accepts the offer, the arrangement is called *istiṣnā‘*. Although other Schools name it *salam* in industrial items, it does not make any difference because all are the same in substance.

The Legality of *Istiṣnā‘* Contract

Though there is a disagreement on the legality of the *istiṣnā‘* contract among the Schools of Islamic law, in reality, all agree on its validity. The Ḥanafī School considers it as an autonomous contract and validates it accordingly, whereas the other Schools consider it *salam* contract in the manufactured items, and thus they discuss it within the discussion on *salam* and validate it accordingly. The article (388) of the *Mejelle* states:

"If one requests any industry man to make for him such a thing with such an amount of money, and the industry man accepts it, the contract of istiṣnā‘ is concluded…"

(al-Majallah, 67)

The Ḥanafī School opines that *istiṣnā‘* contract is valid based on the juristic preference (*istiḥsān*), as well as the unanimous practice of the people in all eras without any denial. So, this is considered the unanimous agreement of the people on its validity without refutation. Besides, the Messenger of Allah (PBUH) asked to make the ring and the podium. Also, He took treatment by cupping, though specifying the amount of the use of cupping, counting the time of putting the cup, etc. is not required for anyone. Similarly, drinking the water from water skin, using the public washroom, etc. are being practiced from the era of the Companions and their Followers until today without any rejection, though the amount of water consumed, the period of staying in the washroom, and so forth, are not specified. Thus, *istiṣnā‘* contract is made valid, because sometimes the non-existent is considered existent by law (al-Kāsānī, 2005, 7: 109; al-‘Aynī, 2000, 8: 373; Ibn Nujaym, 1997, 6: 283; Ibn al-Humām, 1995, 7: 108; *al-Fatāwā al-Hindiyyah*, 2010, 3: 195).

Nevertheless, the scholars of Ḥanafī School differ on the nature of *istiṣnā‘* contract, whether it is a sale, or a promise to sell, or leasing. If it is a sale, then it is observed whether the subject matter is the thing produced or the work done by the manufacturer. Some scholars opine that *istiṣnā‘* is a promise, and upon completion of work, it is concluded as the hand-to-hand sale (*bay‘ al-ta‘āṭī*). Therefore, unlike the *salam* contract, the manufacturer can stop working, and nobody can force him to continue the work. Likewise, the person requests to produce can turn back the contract and deny the merchandise, and thus the agreement is not binding. The majority of scholars of Ḥanafī School opine that *istiṣnā‘* is a sale contract provided that the work is stipulated, or it is the sale where the buyer enjoys the option of inspection. So, it is a sale but not like other typical sales, as it differs from other sales because the condition of working is not stipulated in others. Nonetheless, some Ḥanafī Scholars opine that the *istiṣnā‘* contract is purely a leasing arrangement, while others opine that initially it is leasing and ultimately it is sale (al-‘Aynī, 2000, 8: 373; Ibn Nujaym, 1997, 6: 284; *al-Fatāwā al-Hindiyyah*, 2010, 3: 195; *al-Mawsū‘ah al-Fiqhiyyah*, 1992, 3: 327 & al-Zuḥaylī, 1992: 308).

The majority of the schools of Islamic law, excluding the Ḥanafī School, opine that the analogy and general principles require that *istiṣnā‘* arrangement is not to be valid as it is the sale of the items which are non-existent like *salam*, and sale of the non-existent is not permissible. The Prophet (PBUH)

forbade the sale of the item, which is not possessed, due to which this sale is not to be valid as it is the sale of non-existent. Also, it is not to be the leasing arrangement because it is hiring someone to work in his possession, and that is not permissible. However, according to the majority, *istiṣnā‘* is valid if it were based on the *salam* contract, subject to all conditions of *salam* contract, in which the important condition is the immediate delivery of the full price in the contracting session. The Mālikī School, for example, validates the manufacturing agreement based on the *salam* contract. Also, In respect of the Shāfi'ī School, though the time to deliver the thing manufactured is not specified, the contract of *istiṣnā‘* is valid based on immediate *salam* (*salam al-ḥāll*) as it is permissible to this School (al-‘Aynī, 2000, 8: 374; *al-Kharshī*, 1997, 6: 102; al-Zuḥaylī, 1992: 310).

Besides, as mentioned above that Imam Mālik discusses the feature of *istiṣnā‘* under the title of *salam* regarding the industrial products, whereby he opines that such lending or advance payment is permissible. He mentions that if a person makes an order to manufacture something which is defined in the liability through specifying the attributes precisely, and then there is no fixed duration either for work or for the payment, and regardless of whether or not the payment is made upfront or will be made after few days, such form of advance payment is permissible. If the thing is manufactured according to the specifications stipulated, then it is binding on the person who makes the order (Ibn Anas, 2005, 4: 22). Nonetheless, the researcher prefers the validity of *istiṣnā‘* contract as it is a vital and inevitable contract for humankind. Moreover, all Schools of Islamic law agree upon its validity either explicitly or implicitly as a section of *salam* contract.

Thus, article (388) of the *Mejelle* which states that "a request to manufacture any industrial item which is defined is permissible regardless of whether it is named *istiṣnā‘* or not," is considered to be an accepted view by all the prominent schools of Islamic law.

The Conditions for *Istiṣnā‘* Contract

The validity of *istiṣnā‘* contract is subject to several conditions, as follows:

1. *Istiṣnā‘* Contract should be in the Common Items

The *istiṣnā‘* contract should be in something common in practice among the people. The article (389) of the *Mejelle* states:

> *"Generally, istiṣnā‘ is valid in everything the customary practice approves the conclusion of istiṣnā‘ therein. Concerning the*

> *thing where istiṣnāʿ is not practiced in the custom if a period is prescribed it would be the salam contract, and accordingly, the provisions of salam would be applied there; if no period is prescribed, the contract is considered istiṣnāʿ as well..”*
>
> (al-Majallah, 67).

The Ḥanafī School gives some examples like the iron, lead, copper, slipper, sole, boot, and so forth. Since the customary practice does not approve the conclusion of *istiṣnāʿ* in these items, they are referred to the general reasoning. So, the *salam* contract is concluded therein, and accordingly, the provisions of *salam* would be applied. Moreover, though the item is common to be manufactured in custom, it should be defined by attributes to enable its delivery (al-Kāsānī, 2005, 7: 110; al-Marghīnānī, 2000, 8: 376; *al-Fatāwā al-Hindiyyah*, 2010, 3: 195).

There is no disagreement between the article (389) of the *Mejelle* and the opinions of the Schools of the Islamic law that “*istiṣnāʿ* is valid and applicable to the things which are customarily common to be manufactured”. As mentioned above, the Ḥanafī School validates it as an autonomous contract, and the other Schools validate it as the contract of *salam* in the industrial items.

Thus, *istiṣnāʿ* is valid in something common to be manufactured, regardless of whether or not the duration and the price are mentioned. The real meaning of the word ‘*istiṣnāʿ*’ is to manufacture, and thus, that real sense shall be observed. If the duration is mentioned in something common to be manufactured in custom, according to Imam Abū Ḥanīfah it will be considered *salam* contract, and therefore the provisions of *salam* shall be observed, while Imam Abū Yūsuf and Muḥammad opine it will be considered *istiṣnāʿ* contract. Yet, if the duration is mentioned in something that is not common to be manufactured in custom, all agree that the contract will be considered a *salam* contract. However, in this regard, the statement of the *Majallah* does not conform to what is mentioned in the classical sources of *fiqh*. As mentioned, article of the *Majallah* states if the duration is not specified in the item that is not common to be manufactured it would be considered *istiṣnāʿ* while the classical Muslim scholars consider it *salam* contract (Ḥaydar, 1: 423).

2. *Istiṣnāʿ* Commodity should be Defined

The subject matter of *istiṣnāʿ* contract, i.e., the thing which would be manufactured, should be known in terms of determining the genus, type, magnitude, and others. *Istiṣnā’* requires two things, the merchandise and the

work, and both are demanded from the manufacturer. The article (390) of the *Mejelle* states:

> *"In the case of istiṣnā', an identification and description of the item manufactured must be given as required"*
>
> (al-Majallah, 67).

The essential requirement for the subject matter of *istiṣnā'* contract is that it shall be defined in such that it prevents any dispute related to the details of the item. The item manufactured in *istiṣnā'* contract is considered as the subject matter of a sale contract, and thus it shall be precisely defined as such as the subject matter of a sale contract (Ḥaydar, 1: 424).

The Ḥanafī School opines that the genus, type, amount and attribute of the *istiṣnā'* commodity should be defined. Since it is the subject matter of *istiṣnā'* contract, it must be known with the above specifications (al-Kāsānī, 2005, 7: 109).

The article (390) of the *Mejelle* conforms to the views of all the prominent Schools of the Islamic law that "the *istiṣnā'* commodity should be defined by precise description." Since all the Schools stipulate this condition for the *salam* sale, it would be applied to the *istiṣnā'* contract as well.

3. Duration of *Istiṣnā'* Contract should be Specified

The duration of *istiṣnā'* work should be specified, whether long or short, as the duration of the contracts which are concluded on the work need to be known and determined. Thus, the article (389) of the *Mejelle* states, "*Concerning the thing where istiṣnā' is not practiced in the custom if a period is prescribed, it would be the salam contract, and accordingly, the provisions of salam would be applied thereof. If no period is prescribed, the contract is considered istiṣnā' as well*" (al-Majallah, 67).

Nonetheless, the Ḥanafī School has different views on this. Abū Ḥanīfah opines that *istiṣnā'* contract should be free from any specified duration; otherwise, it would be a *salam* contract. He argues a *salam* contract is concluded on the commodity, which is defined in the liability and delayed until a period specified. So, if *istiṣnā'* is subject to a specified duration, it would be *salam* contract in substance, though in the form it is *istiṣnā'*. Also, the deferment is related to the debt as it is made to delay the claim on it, and the claim can be delayed only in the contract where there is a claim. However, his two disciples, Abū Yūsuf and Muḥammad, differ with him and opine that *istiṣnā'* contract should be subject to a specified duration. Since *istiṣnā'* with

a specified period is a common practice among the people, being subject to a specific duration does not convert it to *salam*. Also, as the deferment is made to delay the claim, it could be made to accelerate the work. So having these possibilities by simply stipulating a period does not convert the arrangement to a *salam* contract (al-Kāsānī, 2005, 7: 111; al-Marghīnānī, 2000, 8: 376; Ibn Nujaym, 1997, 6: 285; *al-Fatāwā al-Hindiyyah*, 2010, 3: 195).

The authors prefer here the stand of the two disciples and think that it is necessary to have a defined period in the contract. Since *istiṣnā‘* is concluded on the work and asset, which are usually deferred, and in a case like this, the duration should be specified so that it does not lead to the conflict and dispute among the contracting parties. Concerning this issue, the article of the *Mejelle*, however, conforms to the opinion of Imam Abū Ḥanīfah. With this, the researcher suggests that the respective article may be revised and modified accordingly.

The Nature of *Istiṣnā‘* Contract

Regarding the nature of the *istiṣnā‘* contract, the article (392) of the *Mejelle* states, "*Once the istiṣnā‘ contract is concluded, none of the contracting parties is allowed to revoke it. However, if the item manufactured does not conform to the specifications stipulated and required, the person who has asked to manufacture may exercise an option*" (al-Majallah, 67). So, *istiṣnā‘* is not a mere declaration or promise, rather is a sale contract. It means from the early stage of the agreement, it is concluded as a sale contract and not as a mere promise. However, the question can be made that *istiṣnā‘* agreement becomes terminated due to the death of the manufacturer, and that means it is not a sale contract because the death of the seller does not terminate the sale contract after it is concluded. Yet, *istiṣnā‘* is terminated by the death of the manufacturer because it resembles the lease (*ijārah*) contract which is terminated by the death of the lessor. As mentioned in *Zakhīrah*, a classical source of *fiqh*, at early stage *istiṣnā‘* is concluded as a lease contract, and at the final stage, before delivery is made, it is concluded as a sale contract. Once it is concluded, none of the parties is allowed to rescind it without consent from the other party. After that, the manufacturer will be forced to manufacture the desired item as he is not permitted to turn back from the agreement (Ḥaydar, 1:425; Bāz, 220).

There is a disagreement in the Ḥanafī School concerning the nature of the *istiṣnā‘* contract, as to whether it is an irrevocable or non-binding contract. The majority of scholars of Ḥanafī School are of the view that in general *istiṣnā‘* is a non-binding contract, irrespective of whether the item manufactured conforms to the qualities agreed thereupon or not. Accordingly, both parties

have the right to exercise the option of inspection. They argue that making the contract binding might bring hardship for everyone. If it is binding for the producer, then he might be obliged to produce something which he is not capable of. On the other hand, if it is binding for the purchaser, he would be obliged to buy something without inspection while he has the right to exercise the option of inspection.

However, Abū Yūsuf opines that it is a binding contract in general. So, once the contract is concluded, none of the parties has the right to exercise the option because applying the option is harmful to both parties. If the manufacturer has the option, he might not fulfill the agreement, and then the buyer would be harmed. On the other hand, if the purchaser has the option, he might then not buy the item and accordingly the producer would be harmed as he already has incurred the costs and spent time to produce the item (al-Kāsānī, 2005, 7: 110; al-Marghīnānī, 2000, 8: 375; Ibn Nujaym, 1997, 6: 285, Ibn al-Humām, 1995, 7: 109; *al-Fatāwā al-Hindiyyah*, 2010, 3: 195).

The authors prefer that once the *istiṣnā‘* contract is concluded validly, it would be binding. However, if the item manufactured violates the specifications stipulated, then the purchaser would have the right to exercise the option of inspection, and accordingly, he may either revoke or maintain the agreement. But, if there is no violation of the specifications stipulated, then the contract would be irrevocable, and thus, none of the parties have the right to exercise the option. Nonetheless, the respective article of the *Mejelle* advocated this stand, in which the article conforms to the stand of Imam Abū Yūsuf of the Ḥanafī School. Thus, concerning this, the related article of the *Mejelle* consents to the minority view of the Ḥanafī School.

Contemporary Application of *Istiṣnā‘* Contract

Concerning the present world, the *istiṣnā‘* contract has vital and significant applications. It has been practiced widely in the Islamic banks, Islamic financial institutions as well as other infrastructural development institutions. Some of the applications of *istiṣnā‘* contract are discussed as follows:

Istiṣnā‘ Contract in Infrastructure Developments

The *istiṣnā‘* contract is used in infrastructure developments like the construction of apartment buildings, hospitals, schools, universities, and so forth. It also can be applied in high technology industries like the aircraft industry, locomotive, and shipbuilding, as well as the different types of machines produced in the big factories and workshops. Furthermore, the *istiṣnā‘* contract is also

applicable to other industries as long as it can be monitored by measurement and specifications such as the food processing industry and the like. In short, *istiṣnā‘* contract can be utilized in the vast fields where Islamic banks have the opportunity to finance the public needs and the vital interest of the society (INCEIF, 2011, 258).

Istiṣnā‘ in Property Financing

Istiṣnā’ is applied to property financing to finance property under construction. The key differentiating feature of *istiṣnā‘* is that it is a contract of sale whereby the seller undertakes to construct, manufacture, or acquire an asset based on the specifications provided by the buyer and after that sells the asset to the purchaser at an agreed price and agreed method of settlement. The method of the settlement could be in the form of an advance payment, installment payment, or payment deferred to a specified future date. However, the application of *istiṣnā‘* in property financing is usually being structured with a parallel *istiṣnā‘* which encompasses two *istiṣnā‘* contracts. One is between the financial institution and the customer, while the other is between the financial institution and the property developer (Mustaffa, 2014, 83).

Istiṣnā‘ in Equipment Financing

Istiṣnā‘ is applied to equipment financing to finance the specialized equipment which has been made via order. It is a contract of sale whereby the seller undertakes to construct, manufacture, or acquire an asset based on the specifications provided by the buyer and after that sells the asset to the purchaser at an agreed price and agreed on the method of payment. The mode of payment could be in the form of an advance payment, installment payment, or payment deferred to a specified future date. Nevertheless, the practice of *istiṣnā‘* in equipment financing is typically structured with a parallel *istiṣnā‘* which includes two *istiṣnā‘* contracts. The first is between the financial institution and the customer while the second is between the financial institution and the equipment manufacturer (Mustaffa, 124).

Parallel *Istiṣnā‘* Contract

Another arrangement of *istiṣnā‘*, which is quite common nowadays in the Islamic finance industry, is called parallel *istiṣnā‘* contract. In this arrangement, two independent but inter-related contracts of *istiṣnā‘* are concluded. The first contract, for example, is between a bank as a seller or manufacturer who undertakes to manufacture specified goods and a customer as the buyer to

whom the goods would be delivered. In the second contract, the bank, as a buyer, requests another company or producer to manufacture the same goods specified in the first contract. The second *istiṣnā'* is independent of the first *istiṣnā'*, i.e. no liability arising from the first contract should be imposed on the parties of the second contract. Hence, the manufacturer in the second contract, for instance, is not liable to the end buyer of the first *istiṣnā'*. The parties are only responsible for those with whom they entered into a contract (INCEIF, 246). AAOIFI's *Sharī'ah* Standard (11) validates the parallel *istiṣnā',* whereby it says:

> *"It is permissible for the institution to buy items based on a clear and unambiguous specification and to pay, to provide liquidity to the manufacturer, the price in cash when the contract is concluded. Subsequently, the institution may enter into a contract with another party to sell, in the capacity of manufacturer or supplier, items whose specification conforms to the wishes of that other party, based on parallel istiṣnā', and fulfill its contractual obligation accordingly. The parallel contract is permissible on condition that the delivery date stipulated must not precede that stipulated in the original purchase contract, and the two contracts should remain separate from each other."*
>
> (AAOIFI, 2010, Shari'ah Standard no. 11)

Istiṣnā' Ṣukūk

The Islamic investment certificates (*ṣukūk*) can be issued by using *istiṣnā'* as an underlying contract therein. It is known that *istiṣnā'* involves the purchase of assets that are yet to be manufactured or constructed. For example, *istiṣnā' ṣukūk* have been issued to finance manufacture or construction projects. Generally, *istiṣnā' ṣukūk* can take two main forms: *ṣukūk* that represent the *istiṣnā'* sale price and *ṣukūk* that represent the *istiṣnā'* asset. Thus, *ṣukūk* that represent deferred *istiṣnā'* sale price would be the debt-based *ṣukūk*. However, theoretically, *istiṣnā' ṣukūk* can also be structured in a way that they would represent the *istiṣnā'* asset, i.e., asset under construction (Securities Commission Malaysia, 2009, 60).

Istiṣnā' Project financing with the Mortgage of Conventional Bond

An Islamic financial institution may be approached by a customer to provide *istiṣnā'* project financing for the renovation of his business premise. In this proposal, the customer provides a conventional bond as collateral to secure

the financing. This bond will be liquidated by the Islamic financial institution (only up to the principal value of the bond without interest) if the customer fails to repay the installment due according to the agreed terms and conditions. The Shari'ah Advisory Council (SAC) of the Central Bank of Malaysia has resolved this issue whereby it says:

> *"The proposed structure and mechanism for the project financing based on istiṣnāʿ contract are permissible. However, the usage of the renovated business premise shall comply with the Sharī'ah; and conventional bond as security for Islamic financing is permissible."*
>
> (Bank Negara Malaysia, 2010: 22)

Nevertheless, the authors are reluctant to accept a conventional bond as security for Islamic financing. The mortgage should be something that carries a value recognized in the Sharīah, so that the Islamic financial institution utilizes it to recover the financing amount once the customer defaults or breaches the agreement. In the case of being a conventional bond, which does not have any value accepted in Islamic law, the Islamic financial institution is not able to recover his financing upon necessity, and accordingly, the institution may have to forgo the amount financed to the client.

CONCLUSION

There is no discrepancy between the articles of the *Mejelle* and the opinions of all the prominent Schools of the Islamic law that "*istiṣnāʿ* contract is permissible." Although the Schools other than the Ḥanafī School name it *salam* in the industrial items, in substance it is the same as *istiṣnāʿ*. Imam Abū Ḥanīfah opines that no duration should be stipulated in *istiṣnāʿ*, whereas his two disciples opine that the duration of *istiṣnāʿ* should be defined. The related article conforms to the stand of Imam. The authors prefer the stands of two disciples, and with this, suggest that the respective article may be revised and modified accordingly.

The majority of scholars of the Ḥanafī School opine that the *istiṣnāʿ* is not a binding contract, whereas Imam Abū Yūsuf opines that it is binding. The authors prefer the stand of Imam Abū Yūsuf, which is advocated in the article of the *Mejelle* as well. Thus, concerning this, the related article of the *Mejelle* conforms to the minority view of the Ḥanafī School. The related articles comply with the stands of all the prominent Schools of the Islamic law that "generally *istiṣnāʿ* is valid in everything the custom approves the conclusion

of *istiṣnā'* therein, and the *istiṣnā'* commodity should be defined by required description."

In the present time, the *istiṣnā'* contract has vast applications to finance public needs and the vital interests of the society to develop the economy. It can be applied in high technology industries, such as the aircraft industry, locomotive, and shipbuilding, along with the different types of machines produced in the big factories and workshops. As a mode of financing, the modern application of *istiṣnā'* contract could be further developed by the operation of parallel *istiṣnā'* through Islamic financial institutions. However, such an application shall be subject to stern conditions so that it will not be tantamount to a usurious transaction.

REFERENCES

Al-'Asqalānī, Ibn Ḥajar (1997). *Fatḥ al-Bārī*. Bayrūt: Dār al-Kutub al-'Ilmiyyah.

Al-'Aynī, Badr al-Dīn (2000). *Al-Bināyah Sharḥ al-Hidāyah*. Bayrūt: Dār al-Kutub al-'Ilmiyyah.

Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) (2010). *Sharī'ah Standards for Islamic Financial Institutions*. Bahrain: Manama.

Bank Negara Malaysia (2010). *Shariah Resolutions in Islamic Finance*. Kuala Lumpur: BNM.

Al-Bayhaqī, Abū Bakr Aḥmad ibn al-Ḥusayn (2000). *Shu'ab al-Īmān*. Bayrūt: Dār al-Kutub al-'Ilmiyyah.

Bāz, Salīm Rustam (1923). *Sharḥ al-Majallah*. Bayrūt: al-Maṭba'ah al-Adabiyyah.

Al-Bukhārī, Abū 'Abd Allāh Muḥammad Ibn Ismā'īl (2002). *Ṣaḥīḥ al-Bukhārī*. Bayrūt: Dār al-Kutub al-'Ilmiyyah.

Al-Dardīr, Aḥmad (2003). *Al-Sharḥ al-Kabīr* with *Ḥāshiyat al-Dasūqī*. Bayrūt: Dār al-Kutub al-'Ilmiyyah.

Al-Dasūqī, Aḥmad ibn 'Arafah (2003). *Ḥāshiyat al-Dasūqī 'alā al-Sharḥ al-Kabīr*. Bayrūt: Dār al-Kutub al-'Ilmiyyah.

Ḥaydar, 'Alī (2003). *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*. Bayrūt: Dār 'Ālam al-Kutub.

Ibn 'Ābidīn. Muḥammad Amīn (1998). *Radd al-Muḥtār 'alā al-Durr al-Mukhtār.* Bayrūt: Dār Iḥyā' al-Turāth al-'Arabī.

Ibn al-Humām, Kamāl (1995). *Sharḥ Fatḥ al-Qadīr*. Bayrūt: Dār al-Kutub al-‘Ilmiyyah.

Ibn Anas, Mālik (2005). *Al-Mudawwanah al-Kubrā*. Qāhirah: Dār al-Ḥadīth.

Ibn Nujaym, Zayn al-Dīn Ibn Ibrāhīm (1997). *Al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*. Bayrūt: Dār al-Kutub al-‘Ilmiyyah.

Ibn Rushd, Abū al-Walīd Muḥammad ibn Aḥmad (al-Jadd) (1988). *Al-Muqaddimāt al-Mumahhidāt*. Bayrūt: Dār al-Gharb al-Islāmī.

International Centre for Education in Islamic Finance (2011). *Shariah Rules in Financial Transactions*. Kuala Lumpur: INCEIF.

Al-Kāsānī, ‘Alā' al-Dīn Abū Bakr (2005). *Badā'i‘ al-Ṣanā'i‘ fi Tartīb al-Sharā'i‘*. Qāhirah: Dār al-Ḥadīth.

Al-Kharshī, Muḥammad Ibn ‘Abd Allāh (1997). *Sharḥ al-Kharshī ‘alā Mukhtaṣar Khalīl*. Bayrūt: Dār al-Kutub al-‘Ilmiyyah.

Al-Marghīnānī, ‘Alī Ibn Abī Bakar (2000). *Al-Hidāyah: Sharḥ Bidāyat al-Mubtadī*. Qāhirah: Dār al-Salām.

Ministry of Awqāf and Islamic Affairs (1992). *Al-Mawsū‘ah al-Fiqhiyyah*. Kuwait: Ministry of Awqāf and Islamic Affairs.

Mustaffa, Mahsuri (2014). *Structuring Islamic Financing Facilities, A Guide for the Practitioner*. Kuala Lumpur: IBFIM.

N.a. (1302H). *Al-Majallah*. Bayrūt: al-Maṭba‘ah al-Adabiyyah.

N.a. (1992). *Majallat Majma' al-Fiqh al-Islāmī*. vol. 7, part 3.

N.a. (2010). *Al-Fatāwā al-Hindiyyah fī Madhhab al-Ḥanafiyyah*. Bayrūt: Dār al-Fikr.

Al-Nashwī, Aḥmad Ibrāhīm (2007). *‘Aqd al-Istiṣnā‘*. Alexandria: Dār al-Fikr al-Jām‘ī.

Rahman, S. A. (1967). "Foreword," in *The Mejelle, Being an English Translation of Majallat al-Aḥkām al-‘Adliyyah and A Complete Code on Islamic Civil Law*. Lahore: Law Publishing Company.

Al-Sālūs, ‘Alī Aḥmad (1992). "Aqd al-Istiṣnā'," *Majallat Majma‘ al-Fiqh al-Islāmī*, vol. 7, part: 2.

Al-Sarakhsī, Abū Bakr Muḥammad Ibn Aḥmad (1989). *Kitāb al-Mabsūṭ*. Bayrūt: Dār al-Ma‘rifah.

Securities Commission Malaysia (2009). *The Islamic Securities (Sukuk) Market*. Kuala Lumpur: Securities Commission Malaysia.

Al-Shīrāzī, Abū Isḥāq (1995). *Al-Muhadhdhab fī Fiqh al-Imām al-Shāfi‘ī*. Bayrūt: Dār al-Kutub al-‘Ilmiyyah.

Al-Zarqā, Muṣṭafā Aḥmad (1992). "Aqd al-Istiṣnā' wa Madā Ahmiyyatuh fī al-Istithmārāt al-Islāmiyyah al-Mu'āṣarah," *Majallat Majma' al-Fiqh al-Islāmī*, vol. 7, part: 2.

Al-Zuḥaylī, Wahbah Muṣṭafā (1992). "Aqd al-Istiṣnā," *Majallat Majma' al-Fiqh al-Islāmī*, vol. 7, part: 2.