

## ARTICLES OF THE *MEJELLE* ON SALAM CONTRACT: JURISTIC EVALUATION AND APPLICATIONS

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### ABSTRACT

*The Majallat al-Ahkām 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 Hanafī School of Islamic law. However, people, who follow other than the Hanafī School, are reluctant to rely on the Mejelle even though they are interested to know the stands of their respective School of Islamic law on the articles of the Mejelle. Thus, considering the importance and relevance of Salam contract to the contemporary context, the paper attempts to conduct a juristic evaluation of the articles of the Mejelle on salam contract along with an investigation of its contemporary applications. Salam is a sale contract in which the commodity’s delivery is deferred until a defined period, while the buyer must settle the payment upon the contract’s conclusion. Although the general principle says that sale of something which is not possessed and not present is not permissible, salam contract is made valid as an exception from this, considering the need of the people. The study follows a qualitative approach and uses the content analysis method to*

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*achieve the objectives. For data source and analysis, the study consults with related classical and contemporary literature. The study finds that in general, the articles of the Mejjelle on salam contract conform to the prominent Schools of Islamic law. Among the notable contemporary applications of salam contract are salam financing, parallel salam, salam şukūk, salam in short selling, and so forth.*

**Keywords:** *salam, schools of Islamic law, the Mejjelle, parallel salam, salam şukūk*

## INTRODUCTION

The *Mejjelle* was composed between 1869 and 1876CE as part of the legislative process of the *tanzīmāt* (a period of reformation of the Ottoman Empire between 1839 and 1876CE) initiated by the Ottoman Caliphate. It represents an attempt to codify 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.<sup>3</sup> The *Mejjelle* contains 1851 articles that encompass legal (Shariah) provisions for various civil transactions, in an organized legal form containing *fiqhī* issues which were dispersed and scattered in *fiqh* books. Actually, in *fiqh* books the Shariah provisions are discussed with long details of arguments and evidence, while they are not organized and presented as like the legal codes. Hence, the *Mejjelle* 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 fact, the *Mejjelle* is considered as a proof of the flexibility of Islamic law in a sense that it can accommodate the changes of time. Thus, it was a significant achievement for Islamic jurisprudence and its reformation which rejoices the hearts of scholars and Muslims in general.<sup>4</sup>

The *Mejjelle* discussed many jurisprudential topics like sales, leasing, suretyship, transfer of obligation, pledge, deposits, gift, wrongful possession and destruction, unlawful compulsion and pre-emption, joint ownership, agency, compromise and release, acknowledgment, actions, proofs and oaths

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<sup>3</sup> Tyser, C. R., Demetriades, D. G. & Effendi Ismail Haqqi, ‘Forward’, by S. A. Rahman, H. Pk., in *The Mejjelle: being an English Translation of Majallah al-Ahkām al-‘Adliyyah and A Complete Code on Islamic Civil Law* (Lahore: Law Publishing Company, n.d.), ii.

<sup>4</sup> Mūsā, Īthār, ‘Nūşūş wa Mawārid Majallat al-Ahkām al-‘Adliyyah fī Sūriyā’, <https://www.mohamah.net/law>, accessed on 12 November 2020.

and lastly discussion on a judge and his duties. The first Book of the *Mejelle* is on sales. It starts from the article (101) and ends at the article (403) and consists of an introduction and seven chapters. Under the book of sales, there is a section for *salam* contract, where the *Mejelle* discussed the essence and conditions of *salam* contract along with the related issues within (article 380 - article 387) 8 articles.

Basically, *salam* is one kind of sale. Thus, similar to any other sale contract, in *salam* also the ownership is transferred in return for a counter value. In an exchange contract, the asset could be either present or absent in the contracting session. Also, it could be established under the liability with detailed description and that is the subject matter of the *salam* sale.<sup>5</sup>

It is worthwhile to mention here that in the *salam* contract the buyer is known as “*rabb al-salam*”, or “*al-muslim*”, the seller is named as “*al-muslim ilayhī*”, the subject matter is known as “*al-muslim fīhī*” and the price is named as “*ra’s māl al-salam*”. This paper makes a juristic evaluation of the articles of the *Mejelle* related to the *salam* sale.

As mentioned earlier, the *Mejelle* had been drafted based on the Hanafi School of law only. Generally, people who follow other Schools of Islamic law are reluctant to rely on the *Mejelle* while they are interested to know the opinion of other Schools on the articles of the *Mejelle*. Hence, due to the significance and present-day applications, this effort is made to make a juristic investigation and evaluation of the articles of the *Mejelle* on *salam* contract.

## METHODOLOGY

This is a qualitative study and a method of content analysis is used to accomplish this study. The study is carried out based on the profound induction in the classical and contemporary literature of Islamic jurisprudence.

The study analyzes the articles of the *Mejelle* on *salam* contract and evaluates them along with other classical sources of different Schools of Islamic law, as well as with other contemporary literature written on modern Islamic banking operations.

Actually, the study investigates the articles of the *Mejelle* on *salam* contract making a comparison with the stands of various Schools of Islamic law. In this regard, the study follows the research methodology of Islamic Jurisprudence,

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<sup>5</sup> Ibn Rushd, Abū al-Walīd Muḥammad ibn Aḥmad, *al-Muqaddimāt al-Mumahhidāt*, vol. 2 (Bayrūt: Dār al-Gharb al-Islāmī, 1988), 19.

i.e. discussion of the sources, comparison among the evidences and then giving preference to the opinion relies on the strongest evidence.

Finally, the study demonstrates some contemporary applications which are pertinent to the articles of the *Mejelle* on *salam* contract as an evidence on the relevance of the *Mejelle* to the present-day context.

## **JURISTIC EVALUATION OF ARTICLES OF THE *MEJELLE* ON *SALAM***

### **Definition of *Salam***

Lexically, *salam* gives the meaning of giving, providing credit, lending and others. The word “*salam*” is widespread to the people of Hijāz whereas the word “*salaf*” is common to the people of Iraq and both of them refer to the same contract.<sup>6</sup> *Salam* is a form of sale in which the payment is settled in advance while the seller undertakes to supply some specific goods at a future date. It is named *salam*, derived from *taslīm* which indicates the essence of this contract, and that is “*taslīm ra’s al-māl*”, i.e. paying the capital in advance.<sup>7</sup>

The article (123) of the *Mejelle* defines *salam* as, “*A sale by immediate payment against future delivery.*”<sup>8</sup> The article (380) of the *Mejelle* further explains, “*The contract of salam is like the sale which is concluded by offer and acceptance. So, if the purchaser says: “I have paid you one thousand dollars immediately against one hundred kilos of wheat which would be delivered in future,” and the seller agrees, then the contract of salam is concluded.*”<sup>9</sup>

According to the Ḥanafī School, *salam* is, “the purchase of something on credit (*ājil*) in exchange for something in advance (*‘ājil*).”<sup>10</sup> So, “*ājil*” refers to the commodity of *salam* (*muslam fihī*) which is delivered in future and “*‘ājil*”

<sup>6</sup> Al-Sharbīnī, Shams al-Dīn Muḥammad Ibn al-Khaṭīb, *Mughnī al-Muḥtāj ilā Ma’rifat Ma’ānī Alfāz al-Minhāj*, vol. 3 (Qāhirah: Dār al-Ḥadīth, 2006), 5.

<sup>7</sup> Ibn ‘Ābidīn, Muḥammad Amīn, *Radd al-Muḥtār ‘alā al-Durr al-Mukhtār*, vol. 7 (Bayrūt: Dār Iḥyā’ al-Turāth al-‘Arabī, 1998), 347; Ibn Nujaym, *al-Baḥr al-Rā’iq Sharḥ Kanz al-Daqā’iq*, vol. 6 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 1997), 258.

<sup>8</sup> *Al-Majallah* (Bayrūt: al-Maṭba‘ah al-Adabiyyah, 1302H), 35.

<sup>9</sup> *Al-Majallah*, 66.

<sup>10</sup> Ibn ‘Ābidīn, *Radd al-Muḥtār*, vol. 7, 348; al-‘Aynī, Badr al-Dīn, *al-Bināyah Sharḥ al-Hidāyah*, vol. 8 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 2000), 327; Ibn Nujaym, *al-Baḥr al-Rā’iq*, vol. 6, 258; Kamāl Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 7 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 1995), 66; *Al-Fatāwā al-Hindiyyah fī Madhhāb al-Ḥanafīyyah*, vol. 3 (Bayrūt: Dār al-Fikr, 2010), 171.

refers to the capital of *salam* (*ra's māl al-salam*) which is paid in advance. The Ḥanafī School stipulates that for the validity of *salam*, the capital must be delivered in the contracting session, and the commodity must be on credit, so that there is no *salam* on spot.

The Mālikī School does not permit *salam* contract with immediate delivery. Also, they do not stipulate that the delivery of the price should be in the contracting session; rather they allow deferment of the price for two or three days. Hence, they define it as “a sale in which the payment is made in advance and the delivery of the commodity is deferred until the duration specified.”<sup>11</sup> Al-Ḥaṭṭāb says, *salam* is an exchange contract of the good which is liable on the seller with something that is neither a tangible asset nor a benefit. In *salam* contract both subject matters shall not be deferred as it becomes the same as the sale of debt with debt.<sup>12</sup>

The Shāfi‘ī School stipulates that for the validity of *salam*, the capital must be delivered in the session while the commodity can be deferred or can be immediately delivered.<sup>13</sup> So, they define *salam* contract as a contract which is concluded on something what the seller is liable to deliver in exchange for a price that is immediately settled.<sup>14</sup> Thus, this School opines, as *salam* contract is permissible with the deferred delivery of the commodity, it is also permissible in which the commodity is delivered immediately.<sup>15</sup>

The Ḥanbalī School agrees with the Ḥanafī School, and thus it defines *salam* as “the contract which is concluded on something deferred and described in the liability, against the price which shall be settled in the contracting session.”<sup>16</sup> In another words, “Making the delivery of return (price) immediately in return for another return (goods) defined in the liability until a period.”<sup>17</sup>

<sup>11</sup> Aḥmad Ibn ‘Arafah al-Dussūqī, *Hāshiyah al-Dussūqī ‘alā al-Sharḥ al-Kabīr*, vol. 4 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 2003), 315.

<sup>12</sup> Al-Ḥaṭṭāb, Abū ‘Abd Allāh Muḥammad, *Mawāḥib al-Jalīl li Sharḥ Mukhtaṣar Khalīl*, vol. 6 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 1995), 476.

<sup>13</sup> Al-Māwardī, Abū al-Ḥasan, *al-Hāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi‘ī*, vol. 5 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 1999), 389.

<sup>14</sup> Al-Nawawī, Yaḥyā Ibn Sharf al-Dīn, *Rawḍah al-Ṭālibīn*, vol. 3 (Qāhirah: al-Maktabah al-Tawfiqiyyah, 2000), 245; al-Sharbīnī, *Mughnī al-Muḥtāj*, vol. 3, 5.

<sup>15</sup> Ministry of Awqāf and Islamic Affairs, *al-Mawsū‘ah al-Fiqhiyyah*, vol. 25 (Kuwait: Ministry of Awqāf and Islamic Affairs, 1992), 191.

<sup>16</sup> Al-Bahūtī, Manṣūr, *Kashf al-Qinā‘ ‘an Matn al-Iqnā‘*, vol. 3 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 1997), 336; al-Mardāwī, ‘Alā al-Dīn, *al-Inṣāf fī Ma‘rifat al-Rājiḥ min al-Khilāf ‘alā Madhhab al-Imām Aḥmad ibn Ḥanbal*, vol. 5 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 1997), 71.

<sup>17</sup> Ibn Qudāmah, Abī Muḥammad ‘Abd Allāh Ibn Aḥmad Ibn Muḥammad al-

As discussed above, unlike the Shafi‘ī School, majority of the Schools of Islamic law define *salam* as a sale by immediate payment against future delivery of the commodity. The authors prefer the stand of majority as it reflects the essence of *salam* which has been legalized to facilitate an advance payment in exchange for a future delivery of the commodity after it becomes available. Nevertheless, in the definition of *salam* contract, the stand of articles of the *Mejelle* is in line with that of the majority Schools of Islamic law.

### The Evidence of *Salam* Sale

According to all prominent Schools of Islamic law, the *salam* sale is valid and permissible.<sup>18</sup> The validity of the *salam* sale is verified by the *Qur’ān*, *Sunnah*, the consensus of the Muslim jurists and by an analogy. Allah SWT says:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ

“O ye who believe! When you contract a debt for a fixed term, record it in writing.”

(Surah al-Baqarah, 2: 282)

This verse is the evidence on the legality of *salam* sale.<sup>19</sup> Reciting this verse, Ibn ‘Abbās said: “I assure that Allah SWT has permitted the advance payment in this verse.”<sup>20</sup> Also, this verse validated the debt, and *salam* sale is one form of debt. The debt refers to each transaction where one consideration is on spot and another consideration is on credit. Everything that is present is

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Maqdisī, *al-Mughnī al-Sharḥ al-Kabīr*, vol. 5 (Qāhirah: Dār al-Ḥadīth, 2004), 642.

<sup>18</sup> Al-Marghīnānī, *al-Hidāyah with al-Bināyah*, vol. 8 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 2000), 328; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. 6, 476; Ibn Rushd, Muḥammad ibn Aḥmad ibn Muḥammad, *Bidāyah al-Mujtahid*, vol. 2 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 2003), 311; al-Shīrāzī, Abū Ishāq, *al-Muḥadhdhab fi Fiqh al-Imām al-Shāfi‘ī*, vol. 2 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 1995), 71; al-Māwardī, *al-Ḥāwī al-Kabīr*, vol. 5, 389; Ibn Qudāmah, *al-Mughnī*, vol. 5, 642; al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 336; Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 7, 66.

<sup>19</sup> Al-Marghīnānī, *al-Hidāyah with al-Bināyah*, vol. 8, 328; al-Shīrāzī, *al-Muḥadhdhab*, vol. 2, 71; al-Māwardī, *al-Ḥāwī al-Kabīr*, vol. 5, 388; al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 336; Ibn Nujaym, *al-Baḥr al-Rā‘iq*, vol. 6, 259; al-Sharbīnī, *Mughnī al-Muḥṭāj*, vol. 3, 5; Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 7, 66.

<sup>20</sup> Al-Marghīnānī, *al-Hidāyah with al-Bināyah*, vol. 8, 328; al-Shīrāzī, *al-Muḥadhdhab*, vol. 2, 71; al-Māwardī, *al-Ḥāwī al-Kabīr*, vol. 5, 388; Ibn Qudāmah, *al-Mughnī*, vol. 5, 642; Ibn Nujaym, *al-Baḥr al-Rā‘iq*, vol. 6, 259.

called *‘ayn* and what is not present is called *dayn* (debt).<sup>21</sup> Also, *salam* sale is validated by the verse which says:

وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا

“Allah has permitted the sale.”

(Surah al-Baqarah, 2: 275)

This encompasses all forms of sale except which are proven otherwise. Since *salam* is a form of sale, it is valid.<sup>22</sup>

With regard to the *Sunnah*:

عن ابن عباس - رضى الله عنهما - قال قدم النبي - صلى الله عليه وسلم - المدينة، وهم يسلفون بالتَّمَرِ السَّتِينَ والثَّلَاثِ، فقال من أسلف في شيء ففى كيل معلوم ووزن معلوم، إلى أجل معلوم

“Reported on the authority of Ibn ‘Abbās RA, when the Prophet (pbuh) came to Madinah people used to sell the dates with advance payment for two or three years. Then the Prophet said: Whoever sells the dates with an advance payment must do it in a specified volume, and defined weights, for a known period of time.”<sup>23</sup>

This *ḥadīth* has validated the *salam* sale since it is an exchange contract of deferred commodity with an immediate payment.<sup>24</sup> Also, the validity of *salam* sale is inferred from another *ḥadīth* whereby the Prophet (pbuh) forbade the sale of something which is not available to the seller and permitted the *salam* sale.<sup>25</sup>

<sup>21</sup> Ibn al-‘Arabī, Abū Bakr Muḥammad ibn ‘Abd Allāh, *Aḥkām al-Qur’ān*, vol. 1 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 1996), 327.

<sup>22</sup> Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. 6, 476.

<sup>23</sup> Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 2 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 2002), 52, “Bāb al-salam ilā ajal ma‘lūm,” *ḥadīth* no. 2253.

<sup>24</sup> Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, 311; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. 6, 476; Ibn Qudāmah, *al-Mughnī*, vol. 5, 642; al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 336; al-Sharbīnī, *Mughnī al-Muḥtāj*, vol. 3, 5.

<sup>25</sup> Al-Marghīnānī, *al-Hidāyah with al-Bināyah*, vol. 8, 329; Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 7, 67; al-Zayla‘ī, Jamāl al-Dīn Abū Muḥammad, *Naṣb al-Rāyah li Aḥādīth al-Hidāyah*, *Bāb Khiyār al-Ru‘iayh*, vol. 4 (Bayrūt: al-Maktab al-Islāmī, 1393 AH), 45.



In addition, the *salam* sale is validated by the unanimous agreement of the Muslim jurists.<sup>26</sup> Actually, *salam* sale is permitted considering need of the people and removing harm from them. The farmer, for example, might not have enough funds to look after the land and cultivation till the harvest. Also, he might not get someone who is willing to lend him the necessary funds. Thus, he needs a type of transaction that enables him to manage the necessary funds to continue the plowing and cultivation, otherwise he would be in trouble and hardship. In this light, the *salam* contract is made valid and lawful.<sup>27</sup> However, it is mentionable that the reasoning does not allow the *salam* sale as it is the sale of what is not in existence. Despite this the analogy is overlooked due to the *ḥadīth* that has been mentioned above.<sup>28</sup>

### The Conclusion of *Salam* Sale

The *salam* sale is concluded with the offer and acceptance. Muslim jurists agree upon that the offer is valid by the word *salam* or *salaf*, and any word deriving from them since both denote the same sense. For the acceptance, any expression that indicates the consent suffices, such as “I have accepted”, “I agreed” and the like. Thus, article (380) of the *Mejelle* states:

*“The contract of salam is like the sale which is concluded by offer and acceptance. So, if the purchaser says: ‘I have paid you \$100 immediately against 100kg of wheat which would be delivered in future (using the word salam)’, and the seller agrees, then the contract of salam is concluded.”*<sup>29</sup>

However, there is dispute among the scholars as to whether *salam* sale is concluded with the word *al-bay’* or not. This dispute is discussed as follows:

The Ḥanafī School opines that *salam* sale is concluded with the word *al-bay’* as well as with any expression derived from it. This is because *salam* is a form of sale, due to which it is valid with the word *al-bay’* as long as the intention of *salam* is obvious and the respective conditions are fulfilled.<sup>30</sup> In

<sup>26</sup> Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. 6, 476; Ibn Qudāmah, *al-Mughnī*, vol. 5, 642; Ibn Nujaym, *al-Baḥr al-Rā’iq*, vol. 6, 259.

<sup>27</sup> Ibn Qudāmah, *al-Mughnī*, vol. 5, 643; al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 336.

<sup>28</sup> Al-Marḡhīnānī, *al-Hidāyah with al-Bināyah*, vol. 8, 329; Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 7, 67.

<sup>29</sup> *Al-Majallah*, 66.

<sup>30</sup> Al-‘Aynī, *al-Bināyah Sharḥ al-Hidāyah*, vol. 8, 328; Ibn ‘Ābidīn, *Radd al-Muḥtār*, vol. 7, 348; Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 7, 66; *al-Fatāwā al-Hindiyyah fī Madhhāb al-Ḥanafīyyah*, vol. 3, 171.



the *ḥadīth*, the contract of *salam* has been deemed a form of sale because the Prophet (pbuh) forbade the sale of something which is not possessed and permitted the *salam* as an exception.<sup>31</sup> Thus, *salam* sale is an exception from the ordinary sale. Although *salam* is the sale of something which is not possessed, it is made permissible.<sup>32</sup>

According to the Mālikī School, *salam* sale is concluded with the word *al-bay'* and any expression derived from it, since it is a sale contract in substance.<sup>33</sup>

The Shāfi'ī School has two opinions in this respect. One is that the *salam* sale is concluded with the word *al-bay'* as it is one kind of sale. Second is that even though *salam* is a form of sale, it is not ordinary but rather an exclusive form of sale, and thus it is not concluded with the word *al-bay'*. It should be confined to the word *salam*, without exceeding to any other word.<sup>34</sup>

According to the Ḥanbalī School, the *salam* sale is concluded with the word *salam*, *salaf*, *bay'* and every expression through which the sale is concluded.<sup>35</sup> Ibn Taymiyyah says that this is a general principle that as long as the intention of contracting parties becomes clear to each other, the contract is concluded accordingly. Thus, with any word which makes the respective purpose evident, *salam* sale is concluded with that.<sup>36</sup>

Nonetheless, the authors prefer that the *salam* contract be concluded with the word *salam* or any word from the same root, which denotes what the contracting parties intend to perform such an arrangement. In substance, *salam* is a sale contract though it is named as *salam* exclusively. In addition, concerning the dealings and transactions, the substance is considered, not their forms, as far the Islamic legal maxim is concerned.

It is notable to mention that the article (380) of the *Mejelle* conforms to the views of all the prominent Schools of Islamic law that “the *salam* sale is concluded with the word *al-bay'* and/or any expression derived from it”.

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<sup>31</sup> Al-Zayla'ī, *Naṣb al-Rāyah li Aḥādīth al-Hidāyah*, vol. 4, 45.

<sup>32</sup> Al-Kāsānī, 'Alā' al-Dīn Abū Bakr, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, vol. 7 (Qāhirah: Dār al-Ḥadīth, 2005), 88.

<sup>33</sup> Aḥmad Ibn 'Arafah al-Dussūqī, *Ḥāshiyah al-Dussūqī 'alā al-Sharḥ al-Kabīr*, vol. 4, 315.

<sup>34</sup> Al-Māwardī, *al-Ḥāwī al-Kabīr*, vol. 5, 389.

<sup>35</sup> Al-Buhūtī, *Kashf al-Qinā'*, vol. 3, 336.

<sup>36</sup> Ibn Taymiyyah, *Majmū'ah al-Fatāwā*, vol. 20 (Miṣr: Dār al-Wafā', 1997), 533.

## The Items in Which *Salam* Sale is Applicable

*Salam* is not applicable to all the items and it is subject to certain conditions. All the Schools of Islamic law agree upon that the *salam* is valid in the things which are measured by volume or weight. On the other hand, all jurists agree that in the things which are not established in the liability, *salam* is not valid for them, such as the houses and real properties. In the case of performing *salam* in animals, scholars differ in opinion. The Māliki, Shāfi‘ī and reliable stand of Ḥanbalī School validate this whereas the Ḥanafī School invalidates.<sup>37</sup>

In this respect, the articles (381-385) of the *Mejelle* state, “*salam sale is valid only in the things that can be determined by amount and attribute, like the highest and lowest. Things that are measured by volume, weight, length and magnitude would be determined by volume, weight and the yard. Things that are estimated by enumeration, and which closely resemble each other, may be measured by counting, and by the volume and weight as well. Nevertheless, in the case of things that are measured by counting, like burnt bricks and sun-dried bricks, the mold thereof should be made known as well. Moreover, things that are measured by length, their length, breadth and thickness must be specified. Also, the material they are made from, and the place in which they were made, must be mentioned.*”<sup>38</sup> So, according to the articles, the *salam* arrangement is applicable only to the items which would be specified either by amount or attribute.

Ḥanafī School opines that the *salam* contract is valid in those things which are measured by volume and weight, except the dirham and dinar. Since these are considered the price, *salam* is not valid there because the subject matter of *salam* should be something which would be against the price. Also, *salam* is valid in those things that are measured by counting and which closely resemble each other like the nuts, eggs and so forth. Since things that are countable and close to each other are specified by description, and are deliverable and defined, *salam* is valid there. Moreover, here the small and big are equal as there is little difference which is usually ignored in the custom of the people. But, if something in which the difference of one from another is excessive, like watermelon, pomegranate and so on, the *salam* contract is not valid there. Thus, according to this School, *salam* in animals is not valid because these are not measured by volume, weight, counting and the like.<sup>39</sup>

<sup>37</sup> Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, 312.

<sup>38</sup> *Al-Majallah*, 66.

<sup>39</sup> Al-Marghīnānī, *al-Hidāyah with al-Bināyah*, vol. 8, 330; Ibn ‘Ābidīn, *Radd al-Muhtār*, vol. 7, 348; Ibn Nujaym, *al-Baḥr al-Rā‘iq*, vol. 6, 259; Ibn al-Humām, *Sharḥ Fath al-Qadīr*, vol. 7, 68; *al-Fatāwā al-Hindiyyah fī Madhhāb al-Ḥanafīyyah*, vol. 3, 173.

Mālikī School opines that *salam* is valid in the items which are measured by volume and weight. The animals can also be the subject matter of *salam* sale. However, in things which are not established in the liability, like houses and real assets, *salam* is not permissible there. The *salam* arrangement is also permissible in the utility of the things specified like the dwelling of house, riding of animal, service of the slave, and so forth.<sup>40</sup>

According to the Shāfi‘ī School, *salam* is valid in everything which is eligible to be the subject matter of the sale. Also it is permissible in everything which can be specified by amount and attribute, as well as measured by volume, weight, counting and yard. So, fruits, seeds, cloths, animals, slaves, timbers, stones, iron, lead, glasses, etc. can be the subject matter of the *salam* contract.<sup>41</sup>

According to the Ḥanbalī School, *salam* sale is valid in the items which are measured by volume and weight. Also, in something which can be determined by any measurement, *salam* is permissible there. Moreover, *salam* is valid in the countable items which are not different from each other excessively. Likewise, *salam* is permissible in the animals as well, as far as the reliable stand of this School is concerned.<sup>42</sup>

As mentioned above, all agree that the *salam* is valid in the items which are measured by volume, weight, counting, yard and so forth. Also, *salam* is permissible in the things which can be determined by attributes and specifications. However, the scholars dispute in the case of animals whereby the majority opines that *salam* in animals is permissible and the Ḥanafī School opines that it is not permissible.

The Ḥanafī School argues using the *ḥadīth* which says that:

عن ابن عباس أنّ رسول الله - صلى الله عليه وسلم - نهى عن السلف في  
الحيوان

<sup>40</sup> Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, 312; al-Dussūqī, *Hāshiyah al-Dussūqī*, vol. 4, 317; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. 6, 480; al-Kharshī, Muḥammad ibn ‘Abd Allāh, *Sharḥ al-Kharshī ‘alā Mukhtaṣar Khalīl*, vol. 6 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 1997), 63.

<sup>41</sup> Al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 72; al-Māwardī, *al-Ḥāwī al-Kabīr*, vol. 5, 399; al-Qalīyūbī wa ‘Amīrah, Shihāb al-Dīn, *Hāshiyat al-Qalīyūbī wa ‘Amīrah*, vol. 2 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 2003), 396; al-Nawawī, *Rawḍah al-Ṭālibīn*, vol. 3, 258; al-Sharbīnī, *Mughnī al-Muḥtāj*, vol. 3, 18; al-Shāfi‘ī, *al-Umm*, vol. 4, 70.

<sup>42</sup> Ibn Qudāmah, *al-Mughnī*, vol. 5, 646; al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 337; al-Mardāwī, *al-Insāf*, vol. 5, 72.

“Reported on the authority of Ibn ‘Abbās RA, the Prophet (pbuh) forbade doing salam in animals.”<sup>43</sup>

So it encompasses all types of animals, even the sparrows.<sup>44</sup> However, the majority says that this *ḥadīth* is very weak and not eligible to establish the argument.<sup>45</sup>

On the other hand, the validity of the *salam* in animals is inferred from the *ḥadīth* narrated by Ibn ‘Umar which says that the Prophet (pbuh) ordered him to prepare the camels for the army, but camels that were available did not suffice for them. Then the Prophet instructed him to take from the animals of the charity. Thereafter the camels were taken from the charity fund provided that two camels will be returned for the one.<sup>46</sup> Also, as reported that the Prophet performed *salam* contract in the animals.<sup>47</sup> So, such narrations indicate that the animals can be specified and established in the liability.<sup>48</sup>

Furthermore, the reason for this disagreement among the scholars is the conflict of the narrations in this issue. In addition, scholars also differ in the view on whether the animals can be determined and defined by attributes or not. Those who think that they are identical in creation and can be defined by attributes are with the opinion of validity of the *salam* in animals. However, those who think they are dissimilar in creation and cannot be determined by specifications are with the opinion of invalidity of the *salam* in animals.<sup>49</sup>

Hereby the authors prefer the stand of the validity of *salam* sale in animals. Though the animals are dissimilar in nature and in creation, they can be defined by specifications and determined with the attributes. Nevertheless, there is no article in the *Mejelle* on the issue of the legality of *salam* sale in animals. Thus, the authors suggest an article or articles could be provided in the *Mejelle* resolving the issue of the validity of *salam* contract in animals.

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<sup>43</sup> Al-Dār Quṭnī, *Sunan al-Dār Quṭnī*, vol. 2/3 (Bayrūt: Dār al-Kutub al-‘Ilmiyyah, 2003), 60, “Kitāb al-Buyū’,” *ḥadīth* no. 3040.

<sup>44</sup> Al-Marghīnānī, *al-Hidāyah with al-Bināyah*, vol. 8, 335.

<sup>45</sup> Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, 312.

<sup>46</sup> Al-Dār Quṭnī, *Sunan al-Dār Quṭnī*, vol. 2/3, 58, “Kitāb al-Buyū’,” *ḥadīth* no: 3035.

<sup>47</sup> Ibn Ānas, Mālik, *al-Muwattā’*, vol. 2 (Morocco: Dār al-Āfāq al-Jadīdah, 1998), 205, “Kitāb al-Buyū’, Bāb Mā Yajūzu min al-Salaf”, *ḥadīth* no. 93.

<sup>48</sup> Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, 312; al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 72; al-Māwardī, *al-Ḥāwī al-Kabīr*, vol. 5, 399.

<sup>49</sup> Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, 313.

Nevertheless, the related articles conform to the views of all the prominent Schools of Islamic law that “*salam* sale is valid in the things which can be determined by amount and attribute”. So, all concur that “the items which are measured by volume, weight, yard, and counting, could be the subject matter of a *salam* sale”.

### **The Condition for the Validity of the *Salam***

Apparently *salam* is the sale of something which is not in existence and is legalized as an exception from the general requirements of the sale contract in Islamic law. However, the validity of the *salam* sale is subject to some conditions which are discussed in the articles of the *Mejelle*, as follows:

### **Condition related to the Subject Matter of the *Salam***

The article (386) of the *Mejelle* states, “*It is essential for the validity of salam sale that the genus of the thing sold should be specified; for example, corn, rice or dates. Also, the particular type of the subject matter, such as whether produced by rain or by irrigation; the quality, for example, the highest or the lowest; the volume of the price and the thing sold; as well as the time and place of delivery thereof should be mentioned.*”<sup>50</sup>

However, it is not mandatory to define all the attributes, as it is not possible and it might lead to the impossibility to deliver the subject matter. Hence, it is enough to define only the apparent and desired attributes that are important and mostly lead to the change in the price.<sup>51</sup>

According to the Ḥanafī School, the subject matter of *salam* should be known precisely by attributes and whether deliverable. Also, it should be available throughout the duration between the contract and the delivery. The Prophet says:

لا تسلفوا في النخل حتى يبدو صلاحه

“Do not perform *salam* in the fruits until their goodness appears.”<sup>52</sup>

<sup>50</sup> *Al-Majallah*, 66.

<sup>51</sup> Ibn Qudāmah, *al-Mughnī al-Sharḥ al-Kabīr*, vol. 5, 648; al-Kharshī, Muḥammad ibn ‘Abd Allāh, *Sharḥ al-Kharshī ‘alā Mukhtaṣar Khalīl*, vol. 6, 83.

<sup>52</sup> Al-Sajistānī, Sulaymān Ibn al-Ash‘ath, *Sunan Abī Dāwūd*, vol. 3 (Bayrūt: Dār Ibn Ḥazm, 1997), 479, “Bāb fi al-*salam* fī thamarat bi ‘aynihā”, *ḥadīth* no. 3467.

Also, it would be deliverable by collection and thus must be available throughout the duration for the one to be able to collect it.<sup>53</sup> Also, the time and place of the delivery of the subject matter shall be specified. In fact, as far as the Ḥanafī School is concerned, there are seven things which must be known and specified for validity of the *salam* sale. These are the genus, type, attribute, amount, duration, amount of the capital and finally the place of delivery of the commodity, which must be known and specified upon conclusion of the *salam* sale. However, the two disciples of Imam Abū Ḥanīfah opine that it is mandatory neither to mention the capital if specified, nor to name the place of delivery and it would be delivered at the contracting place.<sup>54</sup>

According to the Mālikī School, there is no dispute if the subject matter of *salam* is something which is measured by amount then it must be specified either by volume or weight or counting or the like. If the subject matter is something which is determined by attributes then it must be specified by attributes that are desired in the contract.<sup>55</sup> Regarding the duration, like the Ḥanafī School, this School also stipulates that the duration shall be deferred and specified.<sup>56</sup> Unlike the Ḥanafī School, this School opines that it is not mandatory that the subject matter of *salam* shall be available upon the contract. Also, the place of the delivery of *salam* commodity is not necessarily be specified.<sup>57</sup> Moreover, the subject matter of *salam* should be the debt which is defined in the liability.<sup>58</sup>

The Shāfi'ī School agrees with others that *salam* commodity must be known by volume, weight, counting, yard and the like.<sup>59</sup> The *salam* commodity

<sup>53</sup> Al-Marghīnānī, *al-Hidāyah with al-Bināyah*, vol. 8, 338; Ibn Nujaym, *al-Baḥr al-Rā'iq*, vol. 6, 266; Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 7, 78.

<sup>54</sup> Al-Marghīnānī, *al-Hidāyah with al-Bināyah*, vol. 8, 346; Ibn 'Ābidīn, *Radd al-Muḥtār*, vol. 7, 355; Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 7, 103; Ibn Nujaym, *al-Baḥr al-Rā'iq*, vol. 6, 269; Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 7, 83; *al-Fatāwā al-Hindīyah*, vol. 3, 172.

<sup>55</sup> Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, 313; al-Dussūqī, *Hāshiyah al-Dussūqī*, vol. 4, 325; al-Qarāfī, Shihāb al-Dīn, *al-Dhakhīrah fi Furū' al-Mālikiyyah*, vol. 4 (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 2001), 436; al-Kharshī, Muḥammad ibn 'Abd Allāh, *Sharḥ al-Kharshī 'alā Mukhtaṣar Khalīl*, vol. 6, 83.

<sup>56</sup> Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. 6, 499; Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, 314; al-Qarāfī, *al-Dhakhīrah*, vol. 4, 446; al-Kharshī, Muḥammad ibn 'Abd Allāh, *Sharḥ al-Kharshī 'alā Mukhtaṣar Khalīl*, vol. 6, 77.

<sup>57</sup> Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, 315; al-Qarāfī, *al-Dhakhīrah*, vol. 4, 472.

<sup>58</sup> Al-Kharshī, Muḥammad ibn 'Abd Allāh, *Sharḥ al-Kharshī 'alā Mukhtaṣar Khalīl*, vol. 6, 91.

<sup>59</sup> Al-Shīrāzī, *al-Muḥadhdhab*, vol. 2, 72; al-Qalīyūbī, *Hāshiyat Qalīyūbī*, vol. 2, 396; al-Nawawī, *Rawḍah al-Ṭālibīn*, vol. 3, 255; al-Sharbīnī, *Mughnī al-Muḥtāj*, vol. 3, 12.

must also be precise with the attributes that are desired and make the price fluctuates.<sup>60</sup> Also, the subject matter should be deliverable upon the maturity of the contract and is not required to be available upon the contract.<sup>61</sup> Regarding the duration, if it is deferred then it must be known. However, *salam* contract is also valid if it is concluded on spot, as far as the Shāfi‘ī School is concerned.<sup>62</sup> In respect of the place of delivery, in general *salam* contract is permissible without determining the place of delivery. However, if making the delivery incurs the cost, or in a place which is unusual like the desert and so on, then it must be specified upon the contract.<sup>63</sup>

The Ḥanbalī School also agrees with other Schools that the *salam* commodity should be known and specified in terms of the genus, amount, attribute, duration and the like. If the commodity is something which is measured or weighed then the volume, weight, amount, yard, etc. should be known accordingly.<sup>64</sup> If the subject matter is something which is determined by attributes that make the price fluctuates, then such attributes must be known and specified.<sup>65</sup> With regard to the duration, it should be deferred and known. According to this School, the *salam* contract with immediate delivery is not permissible.<sup>66</sup> Furthermore, the *salam* commodity must be available and deliverable upon maturity and it is not required to be available upon or throughout the contract period.<sup>67</sup> Another important condition is that the *salam* commodity should be the debt defined in the liability, and if it is the physical asset then *salam* contract is invalid.<sup>68</sup> Regarding the place of the delivery,

<sup>60</sup> Al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 75; al-Nawawī, *Rawḍah al-Ṭālibīn*, vol. 3, 256; al-Sharbīnī, *Mughnī al-Muhtāj*, vol. 3, 15.

<sup>61</sup> Al-Qalīyūbī, *Hāshiyat Qalīyūbī*, vol. 2, 394; al-Sharbīnī, *Mughnī al-Muhtāj*, vol. 3, 11.

<sup>62</sup> Al-Qalīyūbī, *Hāshiyat Qalīyūbī*, vol. 2, 393; al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 76; al-Nawawī, *Rawḍah al-Ṭālibīn*, vol. 3, 248; al-Sharbīnī, *Mughnī al-Muhtāj*, vol. 3, 9.

<sup>63</sup> Al-Qalīyūbī, *Hāshiyat Qalīyūbī*, vol. 2, 392; al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 77; al-Sharbīnī, *Mughnī al-Muhtāj*, vol. 3, 8.

<sup>64</sup> Ibn Qudāmah, *al-Mughnī al-Sharḥ al-Kabīr*, vol. 5, 658; al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 347; al-Mardāwī, *al-Inṣāf*, vol. 5, 72.

<sup>65</sup> Al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 340; Ibn Qudāmah, *al-Mughnī*, vol. 5, 648.

<sup>66</sup> Ibn Qudāmah, *al-Mughnī*, vol. 5, 662; al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 349; al-Mardāwī, *al-Inṣāf*, vol. 5, 85.

<sup>67</sup> Al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 354; Ibn Qudāmah, *al-Mughnī*, vol. 5, 668; al-Mardāwī, *al-Inṣāf*, vol. 5, 90.

<sup>68</sup> Ibn Qudāmah, *al-Mughnī al-Sharḥ al-Kabīr*, vol. 5, 677; al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 357; al-Mardāwī, *al-Inṣāf*, vol. 5, 93.



it is not mandatory to mention the place of delivery since it will usually be delivered in the contract place. However, if it is not possible to make delivery in the contract location then the place of delivery must be determined and agreed upon.<sup>69</sup>

So, in the issue of the conditions of *salam* commodity, it is found that all the Schools agree upon that the *salam* commodity should be known and specified by volume, weight, counting, yard and the like, pursuant to the nature of the commodity. Also, all agree that the commodity should be specified with the attributes, particularly when the attributes lead to the price fluctuation. Regarding the duration, the majority opines that it should be deferred and known, except the Shāfi‘ī School who opines that *salam* is valid with the immediate delivery as well. In the issue of being available, unlike the majority, the Ḥanafī School opines that it should be available in the whole contract period until maturity whereas the majority opines that being available and deliverable upon maturity is adequate. Moreover, concerning the place of delivery, the Ḥanafī School opines that it should be determined upon the contract while the majority opines that if delivery incurs the cost or it is not possible to make delivery in the contract place, then it should be specified earlier, otherwise the contract place is determined as the place of delivery.

It should be noted that the related articles of the *Mejelle* which stipulate that “the *salam* commodity should be known and defined by volume, weight, counting, yard etc.”, is considered to be the agreed upon view of all prominent four Schools of Islamic law. However, concerning the issue of being available, the majority opines that it is sufficient to be available upon maturity, whereas the Ḥanafī School opines that it should be available upon conclusion of the contract till the maturity. The authors prefer the stand of majority and opine that it is adequate to be deliverable upon maturity. Nevertheless, the respective article of the *Mejelle* has not resolved this issue. Also, there is no discussion in the articles on the condition of the debt as well as on the performance of *salam* contract with the immediate delivery. Hereby the authors suggest the required article(s) could be provided resolving the aforementioned issue and discussing the condition of the debt as well as the issue of *salam* contract with the spot delivery.

### **Condition related to the Price of the *Salam***

The article (387) of the *Mejelle* states, “*It is essential for continuation of the validity of salam sale that the price should be settled in the meeting where*

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<sup>69</sup> Al-Buhūtī, *Kashf al-Qinā’*, vol. 3, 357; Ibn Qudāmāh, *al-Mughnī al-Sharḥ al-Kabīr*, vol. 5, 678; al-Mardāwī, *al-Inṣāf*, vol. 5, 94.

*contract is concluded. If the contracting parties disperse before the settlement, the contract is revoked.*"<sup>70</sup>

According to the Ḥanafī School, the *salam* is not valid until the price is possessed before dispersal of the contracting parties. If the price is in the form of currency, then the absence of the price makes it the sale of debt with debt, which is not permissible. If the price is in any other form except currency it is not then the *salam* contract. Since the *salam* is the exchange of something immediately settled with something deferred, the absence of the settlement causes to make it something other than the *salam* contract.<sup>71</sup>

According to the Mālikī School, the price of the *salam* contract should be paid fully in the contracting session. However, it could be delayed, but for not more than three days, with or without stipulation.<sup>72</sup> The Shāfi'ī School opines that the capital of *salam* must be settled and possessed in the contracting session, otherwise the *salam* is invalid.<sup>73</sup> According to the Ḥanbalī School, the possession of the capital of *salam* should be made in the contracting session. If the parties in the contract disperse before that, then the *salam* is invalid.<sup>74</sup>

Nevertheless, all the Schools agree that the settlement of the *salam* capital should not be deferred until a long period. However, according to the majority, the price of the *salam* should be settled before dispersal of the contracting parties. Since this is an exchange contract, the condition of deferment of the price is not permissible there, and accordingly the dispersal before settlement is impermissible. The Mālikī School is with the view that the settlement of *salam* could be delayed up to not more than three days. Since deferment of three days or less is considered the immediate settlement it could be delayed up to that.

<sup>70</sup> *Al-Majallah*, 66.

<sup>71</sup> Al-Marghīnānī, *al-Hidāyah with al-Bināyah*, vol. 8, 353; al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 7, 92; Ibn Nujaym, *al-Baḥr al-Rā'iq*, vol. 6, 271; *al-Fatāwā al-Hindiyyah*, vol. 3, 171.

<sup>72</sup> Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. 6, 476; Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, 313; al-Dussūqī, *Hāshiyah al-Dussūqī*, vol. 4, 315; al-Qarāfī, *al-Dhakhīrah*, vol. 4, 425; al-Kharshī, Muḥammad ibn 'Abd Allāh, *Sharḥ al-Kharshī 'alā Mukhtaṣar Khalīl*, vol. 6, 62.

<sup>73</sup> Al-Shīrāzī, *al-Muḥadhdhab*, vol. 2, 78; al-Qalīyūbī, *Hāshiyat Qalīyūbī*, vol. 2, 389; al-Māwardī, *al-Ḥāwī al-Kabīr*, vol. 5, 403; al-Nawawī, *Rawḍah al-Ṭālibīn*, vol. 3, 245; al-Sharbīnī, *Mughnī al-Muḥtāj*, vol. 3, 5.

<sup>74</sup> Ibn Qudāmah, *al-Mughnī al-Sharḥ al-Kabīr*, vol. 5, 671; al-Buhūtī, *Kashf al-Qinā'*, vol. 3, 355; al-Mardāwī, *al-Inṣāf*, vol. 5, 91.

Concerning this issue, the authors prefer the opinion of giving a grace of not more than three days for the settlement. This would ease the flow of transactions and eliminate the possible harm in this regard. Moreover, delaying up to three days does not contradict any fundamental tenet of Islamic law since the settlement within three days is almost as same as the settlement on spot. Nonetheless, in this issue, the article of the *Mejelle* conforms to the stand of the Majority Schools of Islamic law.

## **CONTEMPORARY APPLICATIONS OF *SALAM* CONTRACT**

In the present world, the *salam* contract is being practiced widely in Islamic banks and Islamic financial intuitions. It has been used primarily to provide financing in the agricultural sector. An agricultural country like Sudan has a huge demand for the arrangements based on the *salam* contract. Some applications of the *salam* contract are as follows:

### ***Salam* Financing in Modern Islamic Banking System**

*Salam* is made valid in the Islamic law to satisfy the necessity of farmers and traders. It provides financing facilities to the small farmers and traders. However, this mode of financing can be utilized by modern financial institutions to provide financing in all sectors, particularly the agriculture sector. It is needless to say that *salam* contract would be concluded on a lower rate compared to the price of those commodities when bought and delivered on the spot. Thus, the difference between two prices is considered a valid profit for the financial institutions.

In respect of the mode of payment of *salam* sale, the majority of jurists argue that payment must be made immediately upon conclusion of the contract, so that the arrangement does not convert to the sale of debt with debt, which is prohibited. In the banking system, however, payment in cash is not done and moreover it is not practical. The bank may credit the amount to the seller's account, or in the case of long-term financing, it may grant a line of credit. It may also issue a pay order in favor of the seller which may be cashable on demand. In all such cases money remains in the bank but is placed at the disposal of the seller.

Furthermore, in *salam* sale, since the delivery of commodity would be made in future, financial institutions may request the seller to provide a security, which can be a form of a guarantee or in the form of a mortgage, to cover the risk of non-delivery. In the case of default, the guarantor may be asked to deliver the same commodity. If there is a mortgage, the buyer or the financier

may sell the mortgaged property and the sale proceeds can be used either to realize the required commodity by purchasing it from the market, or to recover the price advanced by him.<sup>75</sup>

### **The Concept of Parallel *Salam* (*Salam al-Muwāzī*)**

Another possible solution to lessen the risk of non-delivery or incomplete delivery of the *salam* commodities is by exercising the parallel contract of *salam*. After purchasing a commodity through *salam*, the bank may sell it through a parallel contract of *salam* for the same date of delivery.

In the parallel *salam* arrangement, the bank makes two different contracts. In the first one, the bank is the buyer while in the second one the bank is the seller. Obviously these two contracts must be independent from each other. They cannot be interrelated to each other in a way that the rights and obligations of one contract are dependent upon the rights and obligations of the parallel contract. The parallel *salam* is allowed with a third party only. The seller in the first contract cannot be made purchaser in the parallel contract of *salam*, because it will be tantamount to a buy-back agreement, which is not permissible in Shariah. Even if the purchaser in the second contract is a separate legal entity but is fully owned by the seller in the first contract, such an agreement is not allowed, as in practical terms it will amount to a buy-back contract. For instance, A has purchased 1000 bags of wheat by way of *salam* from B, a joint stock company. B has a subsidiary C, which is a separate legal entity but is fully owned by B. A cannot contract the parallel *salam* with C. However, if C is not wholly owned by B, Then A can contract a parallel *salam* with it, even if some shareholders are common between B and C.<sup>76</sup> The Shariah Standard (10) of AAOIFI validates the parallel *salam*, whereby the standard says:

*“It is permissible for the seller to enter into a separate, independent salam contract with a third party in order to acquire goods of a similar specification to those specified in the first salam contract, so that the first salam obligation will be discharged by delivering these goods. Hence, the seller in the first salam contract becomes the buyer in the second salam contract.”*<sup>77</sup>

<sup>75</sup> International Centre for Education in Islamic Finance, *Shari'ah Rules in Financial Transactions* (Kuala Lumpur: INCEIF, 2011), 230-231.

<sup>76</sup> *Shari'ah Rules in Financial Transactions*, 233.

<sup>77</sup> AAOIFI, *Shari'ah Standard No. 10, salam and Parallel salam*, 6/1 (Bahrain: Manama, 2010).

### **Issuing *Ṣukūk* based on the *Salam* Contract**

Using *salam* as an underlying contract, *salam ṣukūk* can be issued. *Ṣukūk* issuance that utilizes *salam* arrangement has become a popular structure in Bahrain. It has been used by the central bank of Bahrain as short-term Islamic liquidity instruments, with tenures ranging from 3 months to 9 months. The transaction normally involves a *muḍārabah* investment followed by a purchase of commodities by using *salam* contract. *Salam ṣukūk* are issued to evidence the rights of the investors over *salam* receivables. The commodities will then be sold to the end-users for a profit. Nevertheless, the *salam ṣukūk* are not tradable.<sup>78</sup> The Shariah Standard (10) of AAOIFI states that it is not permitted to issue tradable bonds based on the debt from a *salam* contract.<sup>79</sup>

The ground of this impermissibility is that in this case the subject matter of *salam* contract is a debt and not any ascertained thing. While the articles (381-385) of the *Mejelle* advocate, as mentioned above, the *salam* sale is valid only in the things that can be specified by amount and attribute. If *salam* contract is concluded on debt then it would be the sale of debt against debt which is not allowed. Also, the continuous existence of the stated *ṣukūk* in the market and the capacity of purchaser to deliver them upon maturity of the contract is something that cannot be assured.<sup>80</sup>

### ***Salam* as an Alternative to Short Selling**

Nowadays *salam* contract may be used to structure an Islamic derivative instrument as an alternative to short selling. In the *salam* contract, the existence of the goods is not required upon entering the contract. An investor in stocks can hedge part of his exposure to cover the downside risk by selling the stock as *salam*. In the case of conventional short selling, there are two distinct transactions: borrowing of stock at interest and selling the stock. In *salam*, there is a sale but no borrowing of the stock. The sale price may incorporate the time value of money (financing cost) but early delivery of goods will not reduce the price as the full price is paid in advance. For short selling, dividend during the borrowing period belongs to the lender. In *salam*, it needs to be estimated and factored into the price.<sup>81</sup>

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<sup>78</sup> Securities Commission Malaysia, *The Islamic Securities (Sukuk) Market* (Kuala Lumpur: Securities Commission Malaysia, 2009), 64.

<sup>79</sup> AAOIFI, *Shari'ah Standard No. (10), Salam and Parallel Salam* (7).

<sup>80</sup> AAOIFI, *Shari'ah Standard No. (21): Financial Paper (Shares and Bonds)*.

<sup>81</sup> Khairi Saat, Mohamad, *Understanding Islamic Capital Market* (Kuala Lumpur: IBFIM, 2014), 348.

The short selling structure with *salam* contract includes a concurrent cash sale and *salam* purchase of a stock. Under this arrangement, the owner sells his stocks to a short seller for cash. At the same time, the owner buys on *salam* the same amount of stocks from the short seller at an agreed price. AAOIFI's Shariah standard (21) does not allow the use of *salam* contract in shares on the ground that they are not autonomous rather they represent the company's assets. Since, a company's assets are changing; a seller cannot deliver the same stocks requested by the buyer. However, the Shariah Advisory Council of the Securities Commission Malaysia allow the use of *salam* in shares on the ground that shares are eligible to be the subject matter of *salam* contract as long as they are available in the market. In this context, the Regulated Short Selling (RSS) ensures that the shares are available in the market and can be delivered upon the time of delivery.<sup>82</sup>

## CONCLUSION

Though the general principle says that the sale of something that is not possessed and not present is not permissible, the sale of *salam* is made valid as an exception from this, considering the need of the people. *Salam* is defined as the sale of something that is described and specified in the liability, subject to certain conditions. The related article conforms to the opinions of all the prominent Schools of Islamic law that "the *salam* sale is concluded with the word *al-bay'* and/or any expression derived from it". In commercial dealings, the substance, not the form, is taken into consideration.

The respective articles of the *Mejelle* which stipulate that 'the *salam* is applicable to the item which could be defined by amount and attribute' conform to the views of all the prominent Schools of Islamic law. Unlike the view of the Hanafi School, the majority opines that the *salam* in animals is valid. Concerning this issue, no discussion is made in the articles of the *Mejelle*. The authors prefer the stand of the majority and hereby suggest that such issue may be resolved in the *Mejelle* by providing the required article(s) in the related section.

There is no disagreement between the related articles and the stands of all the schools of Islamic law that the *salam* commodity should be defined and known by volume, weight, yard, counting, etc. The majority opines that the *salam* commodity should be available upon maturity, while the Hanafi School

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<sup>82</sup> Al-Yahri, Wafa'a Bader, Elsiefy, Elsayed & Abdulazeem, Abozaid, 'Shari'ah Issues in Short Selling and Its Potential Implementation in Qatar Stock Exchange,' *International Business and Management*, vol. 11/1 (2015): 62-78.

opines that it should be available upon conclusion of the contract till the maturity. The articles of the *Mejelle* have not resolved this issue. The authors prefer the stand of the majority and hereby suggest that, if possibility arises, this issue may be discussed in the *Mejelle* by adding the necessary article(s) to the related section.

The related article consents to the stands of the majority Schools of Islamic law that the *salam* capital should be settled on spot. The Mālikī School, however, permits to give a grace of not more than three days for the settlement. The authors prefer the opinion of Mālikī School and suggest that the relevant article may be reviewed and modified accordingly. *Salam* contract has some notable applications in contemporary Islamic financial system, such as *salam* financing, parallel *salam*, *salam šukūk*, *salam* in short selling and so forth.

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