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Talfīq in Financial Matters in the Resolutions of International Islamic *Fiqh* Academy: A Critical Evaluation

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Abstract

Industrial development not only proved to be the forerunner of revolutionary development in financials, it also opened new avenues in Islamic Financial *fiqh*. In fact, the industrial revolution has created new challenges for Islamic *fiqh*, which need to be addressed. Now the world has become a global village and business has expanded from a small scale to very large scale in the form of multinational companies. Thus, people from different geographical backgrounds, religious affiliations and *fiqh* interact with each other. Therefore, due to this mutual trade among traders having different *fiqh* backgrounds, sometimes face issues due to different *fiqhi* background. Jurists have difference of opinion in financial matters like Imam Abu Ḥanīfa, Imam Mālik, Imam Shāfiʿī and Imam Ahmad bin Hanbal have different opinions on permissibility or impermissibility of different financial matters. Therefore, it is a challenge to do business and financial dealings with persons having different followings. Many *fiqh* bodies (institutions) worldwide are working to resolve such issues. These institutions set the standard for Islamic Financial Institutions (IFIs) by addressing such issues by combining different *fiqh* on predefined parameters. Therefore, the objective of this study is to critically discuss and evaluate the *talfīq* with respect to financial matters in light of the resolutions of International Islamic *fiqh* Academy. Being qualitative in nature, this study uses content analysis to achieve its objective.. To resolve the issues faced in financial matters, abandoning one *fiqh* and adopting another is called "*talfīq*". Different bodies are working for this in the world and locally in Pakistan as well. They are all working as *Sharīʿah* standard setting bodies, for all aspects of the life of the Muslim *ummah,* including financial matters. One of the standard setting bodies is International Islamic *Fiqh* Academy Jeddah. Since its inception, the academy has passed resolutions on hundreds of important financial matters, most of which adopted a consolidation approach. Some of these important financial issues are discussed in this paper. The purposes of this academy which is giving a ruling in financial matters, are also discussed in detail. A critical review of *istiṣnāʿ* (It refers to a contract under which an item is purchased before it comes into existence and an order is given for its manufacture.), as a binding contract and penalty clause in case of delayed delivery is particularly presented in this paper.

Keywords: *Talfiq*, Islamic financial Institutions, International Islamic *Fiqh* Academy, Penalty, *Istiṣnāʿ*

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1. Introduction

A deep study of the literature of Islamic *Fiqh* reveals that there are two types of juristic issues that arise in dealings. One of them are the type on which *Sharīʿah* status is clear and explicit rulings are given in the Qur'an and *Sunnah;* and there is no need to interpret them (Nasir, 2001).These include the rulings on the prohibition of wine[1], *Ribā*[2], validity of partnership and trade of halal goods among others. Due to their explicit position, there is no room for interpretation and it is mandatory to follow them on as it is basis. Therefore, it is easy to decide regarding their validity or invalidity by the scholars of all times. This type of juristic issues are called "*mansūs 'alaihi*". On the other side, there are some issues for which no clear injunctions are found in the *Qur'ān* and *Sunnah* or they are silent on their *Sharīʿah* status. These are the issues on which *Ijtihad* is needed to find out the status of their legitimacy based on the principles of primary sources of *Sharīʿah*. This area remains a topic of discussion among jurists. Such types of *Sharīʿah* issues are called "*ghair mansūs 'alaihi*" or "non-explicit issues".

Therefore, when different jurists seek solutions to such non-explicit issues resultantly, the difference of opinion occurs among them in many issues of life especially in trading. Islamic *fiqh* is full of such types of financial matters where something is permissible as per the opinion of one jurist and the same thing is impermissiblein views of another jurist. As a result of this difference of opinion, four schools of thought came into being in the area of *fiqh*. And it was decided by scholars that every Muslim has to follow only one *fiqh* out of these four. Therefore, the adoption of more than one jurisprudence at the same time is not allowed. In case of non-compliance to this rule, a person is considered to be following their own desire, not the injunctions of the *Sharīʿah*. This is a general principle which is followed by *Ahl al-Sunnah* in the world. There are four *fiqh* of *Ahl al-Sunnah* in practice in the Muslim world, these are *Ḥanafī, Mālikī, Shāfiʿī* and *Ḥanbalī*.

On many instances, it becomes inevitable to follow the principles of a particular *fiqh* due to the diversity of business affairs contrary to the set principle of following one *fiqh* at one point in time. Therefore, where the solution of a specific issue is not found in a particular *fiqh* but found in another one, leaving the first *fiqh* and adopting the second one is called *talfīq* (Aziz & Yousaf, 2022). Alternatively, it can also be defined as combining two or more opinions of different *fiqh* to achieve a particular goal in a certain contract like *Murabaha*, *Salam* and *Istisna* etc. (Mansoori, 2008). On the other hand, if a mufti/*Sharīʿah* scholar gives a *Fatwa* on a non-preferred view (*marjuh*), leaving out the preferred one (*rajah*) and the purpose of this is to facilitate the questioner (*mustafti*), it is also a *talfīq* (Mansoori, 2008).

There is a difference of opinion among the jurists regarding the permissibility or impermissibility of *talfīq*. According to some, it is absolutely permissible and some say it is impermissible (Shah & Yousaf, 2020). However, a large number of contemporary jurists justify it with a few defined parameters. Therefore, there are many *fiqh* institutions which have adopted the same methodology of *talfīq* on the basis of predefined parameters to solve the issue in a better way. One of them is the International Islamic *Fiqh* academy, Jeddah.

1.1 Shah Wali Ullah Dehlvi's View's Regarding Talfiq

[1] Al Quran: 5:90
[2] Al Quran: 2:271

The famous scholar Shah Wali Ullah Dehlvi was in favor of merging the different schools of thought to achieve big goals. He said this in order "To pave the way for awareness and knowledge of *Sharīʿah* rulings through inference and extraction from *Sharīʿah* texts, and to create *Ijtihad* intellectual awareness in the Muslim *ummah* and to stand on collectivity (Shah, 2019)".

Highlighting the importance and necessity of *talfīq*, Shah Waliullah writes:
The well-being and salvation of Muslims depends on the fact that they know the truth of the four schools of thought and follow them. He was of the opinion that in international affairs, the Muslims of Arab and Non-Arab world must agree upon in one *fiqh* based on Moatta Imam Mālik. He said that *Ḥanafī, Mālikī,and Shāfiʿī* schools of thought originated from *Moatta* and *Moatta* is based on the *fiqh* of Madina. Scholars agree upon that the central point of *fiqh* of Madina is Hazrat Umer Farooq (May Allah Almighty pleased with him). Likewise, the Ḥanafī *fiqh* depends on the *fatāwá* of Hazrat Umer Farooq as well as Hazrat Abdullah bin Masood (May Allah Almighty pleased with them). Resultantly, it is said that *Ḥanafī, Mālikī, and Shāfiʿī fiqhs* depend on the *fatāwá* of Hazrat Umer Farooq originally (Shah , 2018).

It is obvious that in the statement of Shah Waliiullah, there is an indication that if all Muslims follow only one *fiqh* at a time and do not accept others in any case, then conflicts will start between them in many issues at the international level. He says that the origin of all *fiqh* is the same law, that is, the *Sharīʿah.*Different schools of *fiqh* are its branches. Therefore, leaving one and accepting the other does not lead to any kind of sin and misleading, rather it is adoption of another area of the same *Sharīʿah*. According to him, this behavior will discourage the idea that has arisen among the *ummah*, that considers it extremely wrong to leave one *fiqh* and adopt another. On this basis, Muslims often impose *fatwá* of misguidance on each other.

1.2 The International Islamic *Fiqh* Academy, Jeddah

It is an important and well-recognized scholarly organization among the standards-setting bodies for IFIs. Originally, it is a subsidiary of the Organization of Islamic Cooperation (OIC), which was established by the Third Islamic Summit Conference in 1981. Its head quarter is located in Jeddah, the capital of Saudi Arabia. After two years of its establishment, its inaugural program was held in 1983. The procedures for deliberating on the governance of the Academy and ensuring its practical implementation were determined in the first meeting held from 19th to 22nd November, 1984 in the holy city of Makkah. The OIC finalized its administrative structure, including one representative from each of the OIC members. The scope of this academy is not limited to financial jurisprudence (*Fiqh al-muʿāmalāt*) like Accounting and Auditing Organization for Islamic Financial Institutions (AAIOFI), but it extends to all spheres of life. That is why, its members include experts from *Sharīʿah*, Law, Culture, Accounting, Education, Economics, and all other walks of life. The Academy organizes meetings on an annual basis at different locations. One of its special features is that apart from the Muslim countries, scholars living in non-Muslim countries are also invited to present their opinions and make the academy aware of the issues of the people living in non-Muslim countries (Ghazala, 2019). In the meeting, after a detailed discussion on contemporary issues, a resolution was presented unanimously. Since its inception, the Academy has held 24 sessions[3], in which 238 resolutions have been passed and they have been published in a book form for the utilization of the general public. It has also been translated into many languages of the world (Islam,2015).

[3] https://iifa-aifi.org/en/sessions

1.3 Adoption of *Talfīq* as a Methodology of Ruling by the Academy

The International Islamic *Fiqh* Academy is currently one of the few institutions in the world where decisions are made under the principle of collective *Ijtihad*, and the approach adopted in its decisions is the methodology of *talfīq*. Prominent scholars from different schools of thought are members of this academy. The issues presented to them are discussed openly with all aspects of *fiqh* and then the decision is made in the form of a resolution in the best interest of the *ummah*. This approach of the Academy is mentioned under its objectives in the following words:

- "Achieve intellectual harmony and integration among jurists from recognized schools of Islamic jurisprudence and experts in the field of human, social, natural, and applied sciences to elucidate the positions of *Sharīʿah* towards contemporary life issues;
- Promote collective Ijtihad (*Ijtihad jama'e*) on contemporary life questions and issues, in order to elaborate *Sharīʿah*-based solutions, and clarify valid preferences among several legal opinions on the same issue, in accordance with the interests of Muslims -whether individuals, communities, or States- and in full harmony with the legal arguments and ultimate purposes of *Sharīʿah*.
- Coordinate between authorities of *Ifta* and institutions of jurisprudence inside and outside the Muslim world to avoid contradictions and hostilities between opinions on the same issue, especially on general issues that may cause conflicts.
- Promote cooperation, rapprochement, and complementarity between scholars of different schools of law regarding the fundamental principles of religion, reinforcement commonalities, respect for differences, and maintaining ethics of the jurisprudence of divergence while giving due weight to the opinions of the different schools of law when the Academy issues fatwas and resolutions.
- Renew the science of Islamic jurisprudence by developing it from within and through the rules of legal deduction, principles, rules, and objectives of Shariah".[4]

The Academy uses several means to achieve its goals, including issuing *fatāwá* and resolutions on important issues of *ummah*, translating them into different languages and disseminating them to Muslims around the world.

Similarly, it organizes symposiums and conferences in different countries of the world to discuss important issues. Besides, it is also to organize healthy discussions and debates among experts in universities and educational institutions around the world. The most important work of this institution is that it has done extensive work for the promotion and publication of Islamic jurisprudence, among which the preparation of jurisprudence encyclopedia is worth mentioning. Therefore, this institution is moving towards an excellent way of working in collective *ijtihad*, which is creating closeness between different jurisprudential schools of thought on all aspects of life including commercial issues.

1.4 Resolutions and Recommendations Passed by the Academy

Since its inception, the academy has started a series of negotiations on the important issues of the Muslim *ummah* and has issued hundreds of *fatāwá* in the form of resolutions and recommendations through collective *ijtihad*. Hence, from 1985 to 2019, it passed 238 resolutions, providing jurisprudential guidance on hundreds of issues. These resolutions are originally in Arabic, which have been translated into the major languages of the world for publications .Today, these resolutions are available in all corners of the world, and are being used at every level[5].

[4] https://iifa-aifi.org/en/objectives

[5] Resolutions and Recommendations of the International Islamic *Fiqh* Academy, Second Issue, 2021/1442 H

These resolutions and recommendations contain the results of research and studies related to various contemporary issues and answers to the questions and queries presented by various entities on different matters *i.e.* worship, personal law, dealings, economics and medicine.
Most of these resolutions are related to the issues of IFIs and they are working in the light of these resolutions for uniformity and smoothness. While passing any resolution, the Academy adopts the most appropriate and preferable ruling out of the four *fiqh*.. Few examples of *talfīq* used in rulings by the academy are given below:

2. Ḥanafī School as a Base for *Talfīq*

A base is very important for the critical evaluation of the resolutions of the International Islamic *Fiqh* Academy in the light of the defined parameters of *talfīq.* There are four dominant *Sunni* schools of *Fiqh* in the world. Although the followers of these schools are found all over the world, however, region-wise dominance of one another exist. Geographically, there are four regions according to these schools of thought. The majority of Muslims in Pakistan, India, Afghanistan, the Central Asian Republics, Chechnya, northern Iraq, Bosnia, Albania, Skopje, Persia, Egypt, Sudan, Eritrea, and Syria follow Ḥanafī *fiqh*. While the presence of the Hanfi School is also found in Egypt, Sudan, Eritrea, and Syria,the Mālikī School is dominated in Egypt, Libya, Algeria, and Morocco. Ibn e Khaldun claimed that the acceptance of the Mālikī School in Libya and the Maghrib (The West) was also influenced by the shared cultural heritage of the nomadic Berbers of North Africa and the Bedouins of Arabia. The Mālikī School originated in North Africa and later expanded to Spain. It was the sole school recognized by the Umayyad Empire in Cordoba. Through trade routes, Islam spread from the Maghreb into sub-Saharan Africa, and the Mālikī School also migrated to nations like Mauritania, Chad, Nigeria, and other places. *Shāfiʿī Fiqh* prevails in Egypt, Sudan, Eritrea, East Africa, Malaya, and the Indonesian Islands. Followers of Ḥanbalī *fiqh* are dominant in Arabia and Western Iraq. Among all of these schools, the Ḥanafī *fiqh* is the most popular and dominant. Especially in the subcontinent, the majority of Muslims are followers of this *fiqh.*

2.1 The Methodology of Legal Rulings and Main Features of Ḥanafī *fiqh*

Although Imam Abu Ḥanīfa's *fiqh* was composed of logic and reasoning, the Qur'ān and Sunnah had priority over them, thus Dr. Wahbat al-Zahaili had written that Imam Abu Ḥanīfa used the following sources as the basis of his jurisprudence, and it compiled within their scope. These sources are the Holy Qur'ān, Sunnah, *ijmāʿ*, *qiyās*, *istiḥsān*, *maṣālīḥ mursalah*, *Istisahab ʿurf*, opinions of the companion of the Holy prophet (ﷺ), Sharia-e-min-Qablina (Shari'ah of previous religions) and Al-Zara'ee (Zuhaili and Mustafa, 2006). The main and important feature of the Ḥanafī *fiqh* is a consultation to finalize the matter. Before finalizing any matter, it was presented to the *Majlis-e-Shura* (house of consultation), where there was extensive discussion and debate and then it was finalized through mutual consultation. It is a form of collective *Ijtihad* where everyone had the freedom to present their opinion and everyone's opinion was also given importance. Among the important members of this *Majlis-e-Shura* were intelligent and juristic people like Imam Abu Yusuf, Imam Muhammad bin Anas Shaibani, Imam Zufar, Imam Dawud Tai, Habban bin Ali, Qasim bin Maan, Ali bin Mashar and Asad bin Umar (Nawaz, 2023).

Similarly, one of the unique features of this *fiqh* is that it is the first codified *fiqh* in Islamic jurisprudence. Its rules and regulations were first codified in written form.[6] Imam Muhammad bin Anas collected the basic principles of this jurisprudence from Imam Abu Ḥanīfa in his six books. These

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[6] Suyuti, Jalaluddin, Tabya zul Sahifa fi manaqib e Abu Hanifa, Page:19, Dar al Kutub al Ilmiyah Bairut, 1404 H

six books gained widespread popularity aroundthe world and Ḥanīfa's *fiqh* is totally based on these books of Imam Muhammad.

These features caused Ḥanafī *fiqh* to be universally accepted. It is so extensive that other jurists also adopted the principles of Ḥanafī *fiqh* in matters of divorce, marriage and trading. Allama Tantawi's writes:

"Today, the Ḥanafī school of thought is the most widespread school of thought and the most broad branches and sayings. It is the most useful school of thought in devising new laws and judicial jurisprudence. It is followed in many branches by the Mālikī school of thought, and I learned this in the years in which I worked. The draft of personal status law was established, and the reason for this was that the Ḥanafī *fiqh* became the *fiqh* of the state during the period of the Abbasids and the Ottomans, which is three-quarters of Islamic history. Mālikī was the *fiqh* of the Maghrib (west) throughout this period, and branches and discussions abounded in it. As for the Shāfiʿī school of thought, it was not an official school of thought except for a short period during the days of the Ayyubeen. While the Ḥanbalī school of thought was limited to *Najd* and Hajaz today," Encyclopaedia Britannica describes these characteristics of Ḥanafī *fiqh* in the following words:

"The school of Abu Ḥanīfa acquired such prestige that its doctrines were applied by a majority of Muslim dynasties. His legal acumen and juristic strictness were such that Abu Ḥanīfa reached the highest level of legal thought achieved up to his time. Comapred with his contemporaries, the Kufan Ibn Abi Layla (d. 765) the Syrian Awzai (d. 774) and the medicines Malik (d. 795) his doctrines are more carefully formulated and consistent and his technical legal thought more highly developed and refined[7]".

2.2 Basis of Using Ḥanafī School as a Standard

In light of these details about four schools of thought, it can be concluded that Ḥanafī *fiqh* has always been accepted and dominated in the world compared to other schools of *fiqh* and even today following of this *fiqh* is dominant Therefore, by making Ḥanafī *fiqh* the basis of this evaluation of *talfīq*, the result would be more reliable.

3. Methodology

We evaluate the *talfīq in the financial matters in the light of resolution of the International Islamic Fiqh Academy* theoretically. We use the defined parameters of talfīq extracted from literature to evaluate the resolution passed by the academy.

4. The Defined Parameters for evaluation of Talfīq

It was a difficult task to find out the parameters for the validity of the *talfīq* by digging up the literature. However, going through the literature, more than ten parameters were found some of which are semantically similar to each other. Because of this similarity, it is better to describe them together rather than separately, so in this research, a few of these parameters are taken which cover more or less all of them. Those are as under:

1. *Sharīʿah* Injunctions' Compliance
2. Dire Need (*Al-dururah*)
3. Common Utility
4. Collective Wisdom

[7] https://www.britannica.com/biography/Abu-Hanifah

Non-Profit Oriented

In light of the above mentioned parameters, the resolutions of the International Islamic *Fiqh* Academy are critically evaluated. Through this critical review, a conclusion is drawn about a product whether the parameters and principles laid down in its adoption have been kept in view in all aspects or whether the *talfīq* is permitted only superficially assuming the above-mentioned parameters. However, looking at the result, the obstacles in IFIs can be resolved easily and the perceptions about IFIs among the general public and some people can also be found to be true or false. Looking at them, it can be easy to make a better plan for the future of IFIs.

5. *Istiṣnāʿ* as a Binding Contract?

The Council of International *Fiqh* Academy has declared a resolution in its seventh meeting held in Jeddah, Kingdom of Saudi Arabia, from 7-12 Dhul Qa'dah 1412 corresponding to 9-14 May, 1992 that *Istiṣnāʿ* is a contract which is binding for both parties. So it writes:

"That the *Istiṣnāʿ* (manufacture) contract which has been mentioned with regard to work and goods on credit is binding on both parties if it meets the basic requirements and conditions".[8]

Similarly, *Sharīʿah* Board of the AAOIFI has also owned this resolution of the Academy. So, the *Istiṣnāʿ* becomes binding after setting all required matters between the parties. Therefore, none of the parties has the right to terminate the contract unilaterally. As stated in *Sharīʿah* standards of *Istiṣnāʿ*:

"Since a contract of *Istiṣnāʿ* is binding, the parties to the contract are inevitably bound by all obligations and consequences flowing from their agreement. In other words, the contracting parties need not to renew an exchange of offer and acceptance after the subject-matter is completed. This is different from the promise in a contract of *murābaḥah* (cost plus profit sale), which requires the signature of a sale contract though a new offer and acceptance by the parties when possession of the items to be sold is taken by the Institution".[9]

Now, it is to be seen what are the opinions of the jurists on the binding or non-binding of *Istiṣnāʿ* contract. So the opinions of four jurists are presented in the following table.

Table 5.1: Opinions of Jurists on Status of *Istiṣnāʿ* contract

School of thoughts	Opinion
Ḥanafī	The *Ḥanafī* jurists have the opinion that after the conclusion of offer and acceptance between contracting parties and before work begins, *Istiṣnāʿ* is not a binding contract. And there is no disagreement between *Ḥanafī* jurists. In this regard, the well-known *Ḥanafī* scholar Ibn-i-Abidin Shami (may Allah have mercy on him) writes: "فَهِيَ أَنَّهُ عَقْدٌ غَيْرُ لَازِمٍ قَبْلَ الْعَمَلِ مِنْ الْجَانِبَيْنِ بِلَاخِلَافِ حَتّٰى كَانَ لِكُلِّ وَاحِدٍ مِّنْهُمَا خِيَارُ الِامْتِنَاعِ مِنْ الْعَمَلِ كَالْبَيْعِ بِالْخِيَارِ لِلْمُتَبَايِعَيْنِ، فَإِنَّ لِكُلِّ مِنْهُمَا الْفَسْخَ"[10] It is a non-binding contract before work by both sides, without disagreement (between *Ḥanafī* jurists), to the extent that each of them had the option to refrain from work, such as a sale by option for the two parties, so each of them has the right to annul it. In *Ḥanafī Fiqh*, the scope of non-binding of *Istiṣnāʿ* is too wide. Even after the process has started and the goods are ready to

[8] Resolution No. 65/3/7 Page: 137
[9] *Sharīʿah* Standard No. 11, Page: 297
[10] Ibd e Abideen, Muhammad Ameen bin Umer, Radd ul Muhtaar, Vol:5, P:224, Dar ul Fikr Bairut, Edition: 2, 1992/1412H

	deliver, the seller has the option to cancel the contract, but in this case, the option is only for the seller and not for the buyer. However, if the manufactured goodsare not in accordance with the described attributes, the buyer also has the option to revoke.[11]
Mālikī Shāfiʿī Ḥanbalī	Since, Imam *Shafi'i*, Imam Ahmad bin Hanbal and Imam *Mālikī* do not recognize *Istisn'a* as a separate contract but consider it under Salam contract, therefore, all rules which are obligatory for the validity of Salam also applied in *Istiṣnāʿ*. *Istiṣnāʿ* is valid according to the *Mālikī*, *Shāfiʿī* and *Ḥanbalī* on the basis of the *Salam* contract and custom of the public. It is stipulated with all those conditions which are stipulated in *Salam* (Zuhaili, 1989). And it is a binding contract according to all jurists.
Abu Yousuf	Although, Abu Yusuf is a *Ḥanafī* jurist, he disagrees with other *Ḥanafī* jurists in this matter, so according to him, *Istiṣnāʿ* is a binding contract, which must be fulfilled after the contract. Therefore, the Academy, declared this contract as binding for parties.

From the above table, it is extracted that there is a difference of opinion regarding *Istiṣnāʿ* contract whether it binding or not. *Ḥanafī* jurists have the opinion that it is non-binding at all, but as per the resolution of the Council of International *Fiqh* Academy, it deviates from the unanimous opinion of *Ḥanafī Fiqh* by declaring it as a binding contract. Therefore, the methodology of *talfīq* is adopted here.

Now the question is whether this *talfīq* is in accordance with the defined parameters or not to determine its validity. Therefore, its evaluation is being done in light of the predefined parameters in the table below.

Table 5.2: Parameters of *Talfiq* Used for Ruling for *Istiṣnāʿ*

Parameters	Critical Evaluation
Sharīʿah Injunctions' Compliance	It has been written before that the proof of *Istiṣnāʿ* is not found directly in the Holy Qur'an. However, there are a few verses that clearly indicate it. Therefore, no ruling in the Qur'an is found regarding whether it is a binding or non-binding contract. As far as *Sunnah* of the Holy Prophet (peace be upon him) is concerned, there are a few hadiths in this regard, from which it is known that the Messenger of Allah ﷺ made his ring and pulpit by order. However, there is no detail about whether it is binding or not.
Dire Need	Now, it has to be seen whether it is necessary to declare the agreement of *Istiṣnāʿ* binding, and there is no other option than this. For the evaluation of this parameter, it is necessary to see how many stages of *Istiṣnāʿ* are there, what is its status, and on which stage it is, so that each stage can be evaluated separately. So, according to the *Ḥanafī* jurists, it has three stages: I. After the contract but before the commencement of work

[11] Sharīʿah Standard No. 11, Page: 297

	II. From commencement to completion of the work, but before the inspection of the buyer. III. After the inspection of the buyer (Nada and Ali). According to the *Ḥanafī Fiqh*, *Istiṣnāʿ* will remain a non-binding contract in all these three stages. Even the buyer may refuse to take the goods after the inspection of the goods. But in the third stage, there is also a difference of opinion between *Ḥanafī* scholars.[12] The *Ḥanafī* jurists are of the opinion that it is non-binding in all these three stages, however, in the first case, it is non-binding for both parties, while in the second stage, it is non-binding only for the seller and in the third stage, it is non-binding for the buyer only. While other jurists and the Academy declared it binding from the inception of the contract, Imam *Abu Yousuf* has also same opinion in this regard. In the view of these scholars, the nature of *Istiṣnāʿ* has changed radically in the present time, where orders of millions of rupees are placed and based on these orders, several business matters have to be carried forward where both the parties have incurred various expenses. Therefore, if it is declared non-binding despite thebinding, then both parties will be at high risk in the form of cancellation of the contract by either party. Therefore, there is a dire need to declare *Istiṣnāʿ* as a binding contract, without which the purpose of the validity of this contract can be lost.
Common Utility (*maslihat e ammah*)	It is clear that the contract of *Istiṣnāʿ* was legalized for a specific purpose apart from the general principles of sale and purchase. Since the main aspect of this objective is public interestthat is basically common utility, it is also mentioned in the declaration of International Islamic *Fiqh* Academy Jeddah. It declared it in the following words: "Having listened to the discussions held about it, taking into consideration the purposes of *Shari'ah* regarding the interests of people, and the rules of *fiqh* regarding the contracts and transactions; and considering that *Istiṣnāʿ* contract plays an important role in simulating industry and in opening up vast opportunities for financing and promoting Islamic economy".[13]
Collective Wisdom	This parameter is observed to be fully complied in declaring *Istiṣnāʿ* as a binding contract. It is declared not only by International *Fiqh* Academy Jeddah, the AAOIFI, but also *fiqh* Academy India and other standards-setting bodies for IFIs are issuing fatwas. So it can be said that this decision has been made unanimously with collective wisdom.
Profit Oriented *Talfiq*	Making the *Istiṣnāʿ* as a binding contract is of an administrative nature whose purpose is to protect the parties from any kind of

[12] ibid

[13] Resolution No. 65/3/7 Page: 137

	financial loss and to promote the sale of the *Istiṣnāʿ*. Therefore, there is no suspicion of being profit-oriented in this *talfīq,* and it can be said that it is permissible *Talfiq* from this parameter's point of view.

In prima facie, there is no issue in this *talfīq* as it is in accordance with all the defined parameters. But when it is studied at the micro level, it is realized that *Istiṣnāʿ* must not be binding absolutely. There must be an option for both the parties to terminate the contract unilaterally after the formulation of the contract but before the commencement of the work. However, a condition must be imposed here that in case of unilateral cancellation of the contract, the canceling party is bound to bear all actual expenses incurred during the execution of the contract.

But after the manufacturing of goods, neither the seller nor the buyer should have the right to cancel the contract. However, if the goods do not conform to the specified attributes or are defective, the buyer has the right to cancel the contract by exercising his option of quality or defect.
It is also understandable for declaring *istisna'a* non-binding, before the commencement of production of the goods. That is, the prices of commodities in the market today are increasing very fast. Many times, this price increase becomes unbearable which becomes difficult for the manufacturer to bear. If he starts the work, it will take a lot of loss. So, before starting the work, he should have the option to terminate the contract by saying sorry. Similarly, sometimes, the buyer also has to face different situations. That is, after booking the order, he no longer needs the goods. Therefore, if the manufacturer has not started the work, then the buyer can cancel the contract to avoid any loss, as in this case, there is no loss to the manufacturer.

5.1 Agreed Compensation or Penalty Clause in the Contract of *istiṣnāʿ* in case of Late Delivery of the Goods

Agreed compensation or penalty clause in the contract of *istiṣnāʿ* in case of late delivery of the goods is an important element in the contract of *Istiṣnāʿ*. Penalty clause refers to a condition in the *istiṣnāʿ* contract, under which, if the manufacturer fails to deliver the goods to the buyer within the stipulated time, he can be fined at a mutually agreed upon rateprovided that this delay is not due to any unforeseen circumstances. So, it is in the standard of *istiṣnāʿ* that:
"It is permissible for the contract of *istiṣnāʿ* to include a fair penalty clause stipulating an agreed amount of money for compensating the ultimate purchaser adequately if the manufacturer is late in delivering the subject-matter. Such compensation is permissible only if the delay is not caused by intervening contingencies (force majeure). However, it is not permitted to stipulate a penalty clause against the ultimate purchaser for default on payment".[14] It is also mentioned in *Sharīʿah* standard No. 3 of AAOIFI in the following words:
"It is permissible to include penalty clauses in contracts for construction, *istiṣnāʿ* and supply contracts. In case of a refusal to pay the amount due under a penalty clause, the rulings relating to default by a debtor would be applicable. It is permitted to deduct the amount from outstanding amounts due to the contractor".[15]

This provision of International Islamic *Fiqh* Academy permits to include penalty clauses in contracts for construction, *istiṣnāʿ* and supply contracts. In case of a refusal to pay the amount due under a penalty clause, the rulings relating to default by a debtor would be applicable. So, it is permitted to

[14] AAOIFI Sharīʿah Standards, Standard 11, Article 6/6, Page:306
[15] AAOIFI Sharīʿah Standards, Standard 03, Article 2/3, Page: 89

deduct the amount from outstanding amounts due to the contractor. According to Dr. Al Siddiuqe Muhammad Al Ameen, this concept is unknown for the traditional books of *Fiqh*. However, there are numerous examples of this in Western laws, which is the reason why all contracts containing modern Western laws must include a penalty clause. And it is accepted in the court of law where courts pass a verdict accordingly.[16] Deduction of a certain amount from the wages of workers due to violation in any regulation of the company, specifying a certain amount in the tariff of railway authority in case of any damage or loss in the goods and letters and the requirement that all debt installments be due if the debtor is late in paying one of them are the examples of penalty clause. It is also pertinent to note that in Western law, this penalty is being imposed in case of late payment in all types of contracts, irrespective of a delay in loan payment or in manufacturing of goods or in building construction, etc.

This Western concept of penalty was later adopted in various Muslim countries. Egypt adopted it first and other Islamic countries implemented it later on. So in the collection of preparatory works for Egyptian law, it is mentioned :

"The contracting parties may determine in advance the value of compensation by stipulating it in the contract, or in a subsequent agreement, in this case taking into account the provisions of Articles from 215 to 220. In Article 224, it is written that conventional compensation is not due if the debtor proves that the creditor has not suffered any harm. Further, the judge may reduce this compensation if the debtor proves that the estimate was greatly exaggerated, or that the original obligation has been partially fulfilled".[17]

5.2 *Sharīʿah* Status of Financial Penalty

It is clear from this brief description about the condition of punishment (الشرط الجزائی) that it is a form of pecuniary penalty, so it has to be seen here what the opinion of the jurists about pecuniary penalty is. In case of disagreement between them, which *fiqh* has been adopted and does it fall within the scope of *talfīq*? So, in the table below, a summary of the opinions of the jurists about pecuniary penalty is presented:

Table 5.3: Summary of the Opinions of the Jurists about Pecuniary Penalty

Schools of Thought	Opinions
Ḥanafī	Imam Abu Ḥanafī, Imam Muhammad (May Allah Almighty have mercy on them) have the opinion that penalty with money is not permissible in *Sharīʿah (Hummam et al,)*.
Shafie	He is of the opinion that the fine can be imposed only in the bodies, not in the money (Shafie & Idrees, 1990).
Ḥanbalī	He said that punishment is only through beatings, arrests and reprimands. It is not permissible to cut off anything from the body, nor to interrogate, nor to extract wealth, because the *Sharīʿah* does not permit them (Qudama & Muhammad, 1968).
Mālikī	As for punishment by taking money, it is not permissible according to consensus.[18]
Abu Yousuf	Imam Abu Yusuf, disagreeing with the majority, allows penalty with money under certain conditions. One condition is the

[16] Majallah Majma ul Fih al Islami, Session No. 12, Page:493
[17] Mejellah Majma ul Fih al Islami, Session No. 12, Page:492
[18] Al Savi, Ahmed bin Muhammad Al Khaloti, Hashiy al Savi alash Sharh al Sagheer, Vol:4, Page:504, Dar al Maarif

> punishment should be temporary. Second, the penalty amount should be taken care of so that when the person on whom penalty was imposed makes himself punctual,after which, this money should be returned to him. Qazi cannot keep it forever or deposit it in *Bait ul Mal*. Apart from this, there is also a condition that this financial punishment can be given only by the judge or ruler, not by all.[19]

It is evident from above that the four imams (Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī) were of the opinion that it is not permissible because the punishment can only be imposed on the body, not on the money of the offender. Despite this, the infallibility of a Muslim's wealth and the prohibition of consuming it unjustly are established by the Qur'an[20] and Sunnah, and appropriation of a Muslim's wealth is not permissible except with his own will.

Although Imam Abu Yusuf is of the opinion of its validity, but he placed two strict conditions for its validity:

1. Punishment can only be imposed by the *Qazi* or *Hakim* (legislator).
2. It should be temporary, not permanent. That is, after his correction, his amount should be returned to him.

Therefore, in IFIs, the condition of penalty in *istiṣnāʿ* is in conflict with the opinions of the majority of the jurists. At the same time, it is also not according to the permission given by Imam Abu Yousuf. In IFIs, the penalty charged in *istiṣnāʿ* is conditioned by time, so, along with the delay, the price of the goods also decreases. Similarly, the penalty, once imposed, is not returned to the manufacturer in any case but becomes part of the income of the financial institutions. Therefore, there is a need to evaluate this clause again and to try finding actual status of it.

As it has been discussed earlier, the term of *Shart e Jazaie* (condition of punishment) is not found in the traditional books of Islamic *fiqh*. Basically, it has been incorporated into Islamic *fiqh* from Western laws. Therefore, it is a new term for most contemporary jurists (Usmani, 2015). While many jurists have declared it similar to earnest money (Arabun)[21] with some minor differences, while some said, it looks like a mortgage (*Rahn*). But after a thorough study of the literature, it is found that there is a significant difference between the terms of *Shart e Jazaie* and these terms, so it is not correct to call the *Shart e Jazaie* similar to them (Al Dhareer, 2004). However, the opinion which seems to be closest to *Istisna'a*, is in *Ijarah*. If he sews the cloth today, he will get one dirham and if he sews tomorrow, he will get two dirhams. It is permissible according to Imam Abu Yusuf, Imam Muhammad and according to one opinion, Imam Ahmad. While Imam Shāfiʿī and Imam Mālik considered it illegitimate, Imam Abu Ḥanīfa opinion is also similar to them (Usmani, 2025).[22]

5.3 Is it a *Talfiq* or the Creation of Third Saying (الاحداث قول ثالث)

[19] Ibn e Nujaim, Zain un Din bin Ibrahim bin Muhammad, AL Bahr al Raiq, Vol:5, Page:44, Dar al Kitab al Islami

[20] Al Qur'ān 4:29

[21] Arabun is a type of sale, in which the buyer advances some money to his seller on the condition that if he keeps the sale, the advance will be added to the price. But if he refuses to take the goods, the money will become the property of the seller. Apart from Imam Ahmad bin Hambal, the other three jurists declared it invalid sale.

[22] Usmani, Mufti Muhammad Taqi, *Fiqh* al Buyu, Vol: 1, Page: 609, Maktafa Maarif al Qur'ān, Karachi, 2015/1436 H

The International Islamic *Fiqh* Academy has declared the origin of *Shart e Jazaie* (compensation for late delivery) to the *hadith* in which the Messenger of Allah (peace be upon him) said:
"Muslims are bound by their contractual conditions, except those that render impermissible what is permissible or render permissible what is impermissible[23]". It is also mentioned providing the *Sharīʿah* basis of this clause that:
"This is based on the statement of Shurayh (may Allah confer mercy upon him) saying: whoever has bound himself by a contractual condition voluntarily without any coercion, is bound by that condition[24]". In the same way, Imam Ahmad bin Hanbal considers every condition in the contracts of sale and rent etc. to be permissible, which is done with mutual consent, and is not against any explicit command of the *Qur'an* and *Sunnah*.

From all these details, it can be concluded that *Shart e Jazie* is a new concept, which IFIs have incorporated into *Istiṣnāʿ* contract and other contractual agreements. In Islamic Jurisprudence, it may be under the definition of the creation of a third saying (الاحداث قول ثالث) in which a new point of view is adopted in view of the circumstances, leaving the existing views of *Sharīʿah* scholars.

The jurists have allowed the *Talfīq* under extreme needs and to ease the burden of the *ummah*. Similarly, it allows for introducing a new way to resolve a problem in a new case. There are many examples of the concept in *Sharīʿah*.

Table 5.4: *Shart e Jazaie* in Accordance with Parameters of *Talfīq*

Parameters	Critical Evaluation
Sharīʿah Injunctions' Compliance	According to most of the jurists of Islamic finance, the *Shart e Jazaie* is a new concept, which is not against the explicit injunctions of the Qur'an and *Sunnah*. According to them, it is permissible to impose any condition in sale, *Ijārah* and others contracts whose sanctity is not prohibited. This approach is taken by many of the researchers who have worked on this issue.
Dire Need	As far as its need is concerned, it has become very important to have a condition of *Shart e jazaie* in the *Istiṣnāʿ*. Due to this, the manufacturer avoids to fail willfully in delivering the goods and the buyer would receive the goods on time. Without it, there is a risk of many defaults in providing goods to end users.
Common Utility (*maslihat e amaah*)	The contents of this condition show that the purpose of making it mandatory is to protect the interest of the business community.
Collective Wisdom	It is also established here as the *Sharīʿah* Board of AAOIFI, the greatest scholars of Saudi Arabia and *Sharīʿah* Board of all IFIs allowed to include this clause in the agreement. Further, a majority of *Sharīʿah* scholars, who are not working in IFIs, adopted it without any objection
Profit Oriented *Talfiq*	In case of non-receipt of funds at the scheduled time, although IFIs benefit from the reduction of price under the penalty clause, sometimes the loss caused by the delay is more than this benefit.

[23] Sunan Ibne Maja, Musnad e Ahmed

[24] AAOIFI Sharīʿah Standards, Standard 03, Page:98

Now we need to know whether the *Shart e Jazaie* is in accordance with those parameters which are also necessary for the correctness of the *Talfīq* or not. In the above table, it is being evaluated.

6. Conclusion

The Academy has adopted the concept of *talfīq* in many issues related to Islamic finance according to the circumstances. However, we discussed only two instances in this study on *talfīq*. , The decision-making process of the Academy is very strong and collective in nature, therefore, its decisions are adopted by other standards-setting bodies around the world. In most of the standards that AAOFI has issued so far, decisions have been made in accordance with the Academy's resolutions. Almost, the methodology of *talfīq* have been adopted in all issues, which are not "*mansūs 'alaihi*" or "explicit text" and scope for *ijtihad* exists. Therefore, there is no question of violating the *Qur'an* and *Sunnah* in this type of *talfīq*. Moreover, after deliberation, it is concluded that where *talfīq* is taking place, the dire need and public utility aspect has been given the most importancewhich is very much needed in today's circumstances. Likewise, *Talfīq* is adopted in issues which are administrative in nature, that is, there is no tendency to earn maximum profit through them. However, the important point is to minimize the scope of *talfīq* in order to cease the misuse in future. Nonetheless, there are some resolutions that need to be revised. As time and circumstances have changed, these resolutions need to be revisited according to the circumstances.

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