

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Series of Questions Addressed to the Eminent Scholar Ata Bin Khalil Abu Al-Rashtah,
Ameer of Hizb ut Tahrir through his Facebook Page (Fihi)

Answer to Question

Is it Permissible to Buy a House Before it is Built under the Sale of Salam or Istisna'a (Manufacturing)?

To: Yuce Ulfa - Hafid Munasir - Faraz Muhammad Fateh

(Translated)

Yuce Ulfa's Question:

Assalam Alaikum Wa Rahmatullah Wa Barakatuh:

Our honourable Sheikh, may Allah protect you and aid you with His victory.

I have a question: is it permissible to sell the house by Istisna'a contract? For example, a man has a land and sells the house that will be built in his land by the Istisna' contract. This house is accurately described in terms of its area, number of rooms, building materials etc., and this house will be delivered after a certain agreed period, and the price will either be given all in advance at the time of the contract, or some of it in advance as a deposit and some as postponed payment, or will be given all as postponed payment. Is this transaction permissible?

Jazak Allah Khair, Wa Assalam Alaikum Wa Rahmatullah Wa Barakatuh

Hafid Munasir's Question:

Assalam Alaikum Wa Rahmatullah Wa Barakatuh

Our honourable Sheikh, I need an explanation on Istisna'. Is it a kind of sale? Is it permissible for us to contract someone to build (Istisna') a house on a land owned by the manufacturer provided that we buy that land together?

Jazak Allah Khair in abundance

Assalam Alaikum Wa Rahmatullah Wa Barakatuh

Faraz Muhammad Fateh's Question:

Assalam Alaikum Our Amir

I hope you are fine and in good condition.

I wanted to know about a query which is very much related to the case you have recently answered in below link:

<https://www.facebook.com/AmeerhtAtabinKhalil/posts/768605850003155>

Well if someone goes into an agreement of buying a car or land on installment basis, so what is the hukm if he is given the possession after completion of payment only or in some cases if the possession is given just after signing the contract whilst the payment continues.

Considering the above condition another issue is that: if someone wants to sell off his car or land during middle of his payment schedule and then the third person completes the remaining payment, then what is the Shari' Hukim of selling in such cases?

Jazak Allah Khair.

Your Brother. Faraz

And in a different version: **«إِنَّا كُنَّا نُسَلِّفُ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَأَبِي بَكْرٍ وَعُمَرَ فِي الْحِنْطَةِ وَالزَّبِيبِ وَالرَّيْبِ وَاللِّبْنِ إِلَى قَوْمٍ مَا هُوَ عِنْدَهُمْ»** رواه أبو داود. **«We used to pay in advance (salaf) during the time of the Messenger of Allah (ﷺ), Abu Bakr and 'Umar in wheat, barley, dates and raisins. to those people who did not possess these things.»** [Abu Dawud]

These Hadiths are all clear evidence of the permissibility of Salam sale. As for what are the things in which Salam sale is permissible, and what are things in which Salam sale is not permissible, they are clear from the Hadith and the consences. Salam is the sale of what is not possessed, and the sale of what is not founded, which are forbidden. The Salam has been excluded from them in the text and the prohibition specified in others. It is therefore imperative that the things permitted in Salam sale are stipulated. By reference to the texts, we find that the Salam sale is permissible in all that is measured and weighed as it is permissible in every thngs counted (number).

The permisibility of the Salam sale for the measured and weighed is proven by the Hadith of Ibn Abbas, he said: **«قَدِمَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الْمَدِينَةَ وَهُمْ يُسَلِّمُونَ فِي التَّمْرِ السَّنَتَيْنِ وَالثَّلَاثِ، فَقَالَ: «رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: مَنْ أَسْلَفَ فَلْيَسَلِّفْ فِي ثَمَنِ مَعْلُومٍ، وَوَزْنِ مَعْلُومٍ إِلَى أَجَلٍ مَعْلُومٍ»** **«When the Messenger of Allah (ﷺ) came to Medina, they were paying one, two and three years in advance for fruits, so he said: Those who pay in advance for anything, must do for a specified measure and weight with a specified time fixed.»**

(Bidayat Al- Mujtahid Wa Nihayat Al-Muqtasid by Ibn Rushd Al-Hafeed". In another narration of Ibn Abbas, he said: The Messenger of Allah (saw) said: **«مَنْ أَسْلَفَ فِي شَيْءٍ فِي كَيْلٍ مَعْلُومٍ وَوَزْنِ مَعْلُومٍ إِلَى أَجَلٍ مَعْلُومٍ»**. **«Those who pay in advance for anything, must do for a specified measure and weight with a specified time fixed.»** [Bukhari]

This indicates that the money delivered will be from the measured and weighed things. As for the permissibility of what is counted, there was a consensus that Salam sals in food is permissible,

This consenses is reported by Ibn Al-Munthir. Bukhari narrated, he said Shu'ba told us: Muhammad or Abdullah Ibn Abi Al-Majalid told me, he said: **«اخْتَلَفَ عَبْدُ اللَّهِ بْنُ شَدَّادِ بْنِ الْهَادِ وَأَبُو بُرْدَةَ فِي السَّلْفِ فَبَعَثُونِي إِلَى ابْنِ أَبِي أَوْفَى رَضِيَ اللَّهُ عَنْهُ فَسَأَلْتُهُ فَقَالَ: إِنَّا كُنَّا نُسَلِّفُ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَأَبِي بَكْرٍ وَعُمَرَ فِي الْحِنْطَةِ وَالشَّعِيرِ وَالزَّبِيبِ وَالرَّيْبِ»**. **«Abd Allah b. Shaddad and Abu Burdah disputed over salaf (payment in advance). They sent me to Ibn Abi Awfa and I asked him (about it) and he replied: We used to pay in advance (salaf) during the time of the Messenger of Allah (ﷺ), Abu Bakr and 'Umar in wheat, barley, dates and raisins.»**

This indicates that Salam sale in food is permissible. And food is always either measured, weighed or counted. The attachment of the ruling on all estimated food, measured, weighed or counted is like the attachment of holding on to it, because it is from the things that need to be held, like the attachment of riba of fadhl (increase) to it, in terms of the increase in the measure, weight or number is riba. The Salam is also attached to it from being measured, weighed, and counted. The Hadith has a text permitting what is measured and weighed but did not mention the numbered. The consensus of the permisibility of Salam sale in food makes the number included in Salam sale. However, things to be sold by Salam must be accurate in description like: Hourani wheat, Bereni dates, Egyptian cotton, Indian silk, and Turkish figs, and must be accurate in measure or weight as the weight of Ash-Sham, and Iraqi pound, and kilogrammes and liters. That is, it is necessary that the measure and weight are known and described.) **End of what is stated in the book the Islamic Personality Part II.**

Therefore, Salam sale is permitted in what is measured, weighted and numbered only.

2 - As to know how to measure and weigh and count is by recognising of the reality of funds that they are *Mithly* (measured, weighed etc.) money and Qaimi (value) funds:

Mithly money are those sold and bought by measure, weight or number, i.e., sold in the market wth th saa' measure or by weight in Kilograms for example, or counted like apples, oranges or watermelons. These are allowed to be sold by Salam, as explained above in the

book, the Islamic Personality. Also in Rawdhat At-Talibeen by Nawawi, under the title "Wa Fi Dhabt Al-Mithly Awjuh" Part 5 page 18 and 19, in which Nawawi mentions five aspects to regulate the Mithly (fund), and said at the end (the second method is correct, but it is better to say: the Mithly is what is limited by measure or weight, and Salam sale is permitted for it) end

The Qaimi value money is money that is not bought or sold in measure, weight and number, such as the house, but each house is sold according to its location and the quality of its construction and proximity to the markets or beyond... etc. Therefore, the houses can not be sold by Salam because they are not measured weighed and counted; they are not Mithly money that can be sold by Salam.

Therefore, the sale of an unbuilt house is not included in the Salam sale and its evidence does not apply to it. This is why the Hadiths of selling what you don't own still applies to it.

Second: Manufacturing (Istisna')

[Istisna'a (Manufacturing) in the Language: is a masdar (source) Astana' (to ask for the manufacturing) of a thing. It is said: So and so Astana' a door, if a man asked someone to make him a door, as it is said: Iktatab, i.e. he ordered someone to write to him. (Lisan Al-Arab, As-Sihah and Taj Al-A'roos, subject" Sana'). That is the request to manufacture, the person wants something to be manufactured (Mustasni') goes to the manufacturer to make a specific thing and agree with him on the price and how to pay before the manufacturer starts making the manufacture. This sale is excluded from the sale of what you do not have and the evidence of this is what the *Economic System Book* stated about Istisna'a (Manufacturing):

(Manufacturing is where a person requests another to manufacture for him a vessel, a car or anything that is included in industry. Contracting manufacturing is allowed and proved in the Sunnah. The Messenger of Allah (saw) requested the manufacture of a seal (the ring used for a seal or a stamp). Anas said: «صَنَّعَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ خَاتَمًا» **“the Messenger of Allah (saw) manufactured a ring”**. Bukhari reported from Ibn Masoud who said: «أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ اصْطَنَعَ خَاتَمًا مِنْ ذَهَبٍ» **“the Messenger of Allah (saw) manufactured a ring of gold”**. The Messenger of Allah (saw) also requested the manufacture of the minbar (pulpit). Bukhari reported that Sahl said that the Messenger of Allah (saw) sent to a woman to and said: «بَعَثَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِلَى امْرَأَةٍ أَنْ مُرِّي غُلَامَكَ النَّجَّارَ يَعْمَلُ لِي أَعْوَادًا أَجْلِسُ عَلَيْهَا» **“Order your servant, the carpenter, to make me some board to sit on.”**

"People used to manufacture at the time of the Messenger of Allah (saw), and he kept silent about this," so his silence and action is his (saw) approval regarding manufacturing. The agreement and the action of the Messenger of Allah (saw) are divine evidences like his sayings. The matter contracted for manufacturing is the manufactured thing such as the seal, pulpit, cupboard, car and the like. From this angle, manufacturing is a form of selling not hiring. However, if someone were to bring the raw material to the manufacturer and ask him to manufacture a particular thing, then this would be a form of hiring. Industry, by itself, is an important pillar of the economic life in any nation and to any people in any society. Industry drive, in the past, was limited to the manual labour alone. When man started using steam to move machines, mechanical factories started to gradually replace the manual ones. When the new inventions came about a great revolution in industry occurred, thus production increased beyond expectation, and the mechanised factory became one of the pillars of economic life.

Rules pertaining to the mechanised and manual factories are rules of partnership, hiring, selling and foreign trade. With regard to establishing the factory, it could be by an individual property, which happens rarely, but is more generally by the property of many individuals who share in establishing it. Therefore, the rules of Islamic companies apply upon it. However, with respect to the work in the factory whether in management, manufacturing or other than these, the rules of hiring apply to it. With regard to the distribution of its production, the rules of selling and foreign trade apply to it. In this way, cheating, fraud and monopoly are prevented, as is the fixing of prices, as well as the other rules of selling. With

regard to making orders for the production of the factory, whether little or great, before it

is made, the rules of manufacturing apply to it. Shari' has to be consulted regarding whether the client is obliged or not of what was manufactured for him) End.

The Fuqaha' differed on Istisna'a (Manufacturing), some of them focused on the materials of industry to be used in industry according to manufacturing experts, and did not focus on the material manufactured whether they are Mithly, or of a value, Qaimi i.e. whether it is a shield or a tank, or a wardrobe or a car, and thus the Shariah rule is focused on materials of manufacturing that must be known to industry experts that these materials are from manufacturing materials, and therefore Istisna' is not included in the chapter of Salam (advanced payment), but it is a special kind of sales contracted before the existence of the manufactured product.

This is the saying on Istisna' (that it is not Salam) by: the Hanbalis and Hanafis with some disagreement:

- The Hanbalis, say that Istisna': is the sale of a commodity that the person does not have, but unlike the Salam. All of this according to them comes back to selling and its conditions when talking about selling by craftsmanship. (Kashaf Al-Qina' 3/132 T Ansar al-Sunna Al-Muhammadiyah).

- As for Hanafi's, there is a difference in opinion; some of them do not classify it under Salam but as Istisna': (... If one person says to another person of the people of Sana'i (craftsmanship): Make me this thing for such Dirhams, and if the manufacturer accepts, then this contract of Istisna' is concluded according to Hanafi. (Al-Mabsoot by Surkhasii 12 / 138 T happiness),

Some of them consider it as Salam with the difference in term (Istisna' is consistent with Salam significantly, what is described in the Zhimma is the Salam's term, what confirms this is that the Hanafis made the subject of Istisna'a within the subject of Salam. This is also done by Malikis and Shafi'is, but the Salam is general for what is manufactured and others. Istisna is specific to what was required in manufacture, and Salam requires speed (in payment) of the price, while speed of paying Istisna' – according to many Hanafis - is not a condition... [Fath Al-Qadeer 5/355, and Al-Bada'i 6/2677, and Al-Mabsoot 12/138 and others.]

- The Malikis and Shafi'is: made it part of Salam, so it takes its definition and provisions from Salam, when talking about paying in advance (Salaf) for something manufactured given to others. [Rawdat At-Talibeen 4/26 and those after it (Al-Maktab Al-Islami, and Al- Muhazab 1 / 297-298 Issa Al-Halabi edition).

It is clear from the above answer that Istisna', whether its ruling is focused on industrial or manufactured materials, it does not apply to buildings, because the linguistic and customary truth of the word industry does not apply to buildings.

Therefore, the buildings remain before they are built, indicating their existence, such as if their foundations, pillars, or ceilings were not built.

The prohibition ruling of selling what you don't have applies here on these buildings; therefore, the sale's contract of such buildings are prohibited in Shariah.

This is what I outweigh and Allah Knows Best, He is Most Wise.

Your brother,

Ata Bin Khalil Abu Al-Rashtah

5 Rabi' Al-Akhar 1441 AH

2/12/2019 CE

The link to the answer from the Ameer's Facebook page

<https://web.facebook.com/AmeerhtAtabinKhalil/photos/a.122855544578192/1214843032046099/?type=3&theater>