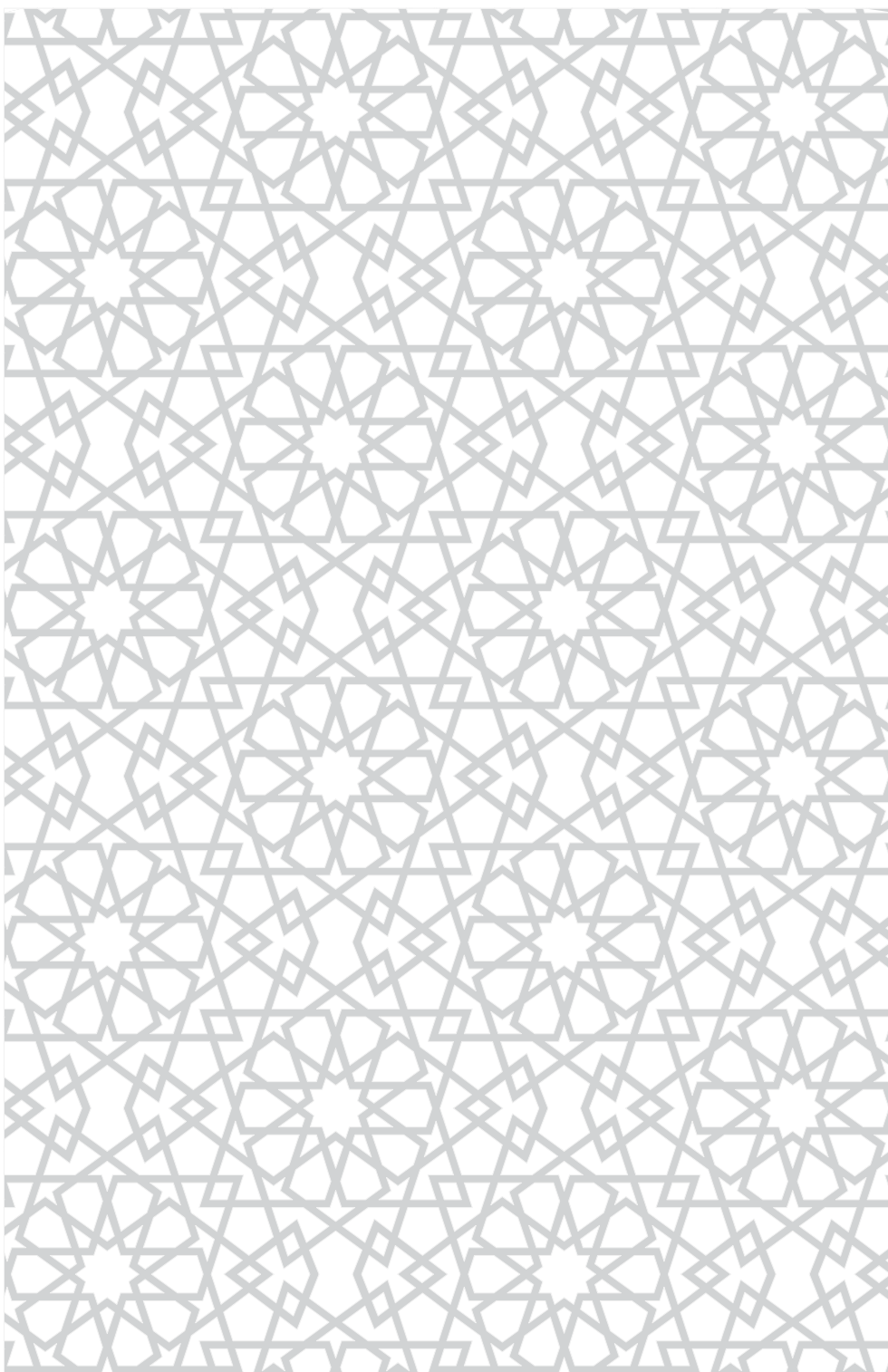


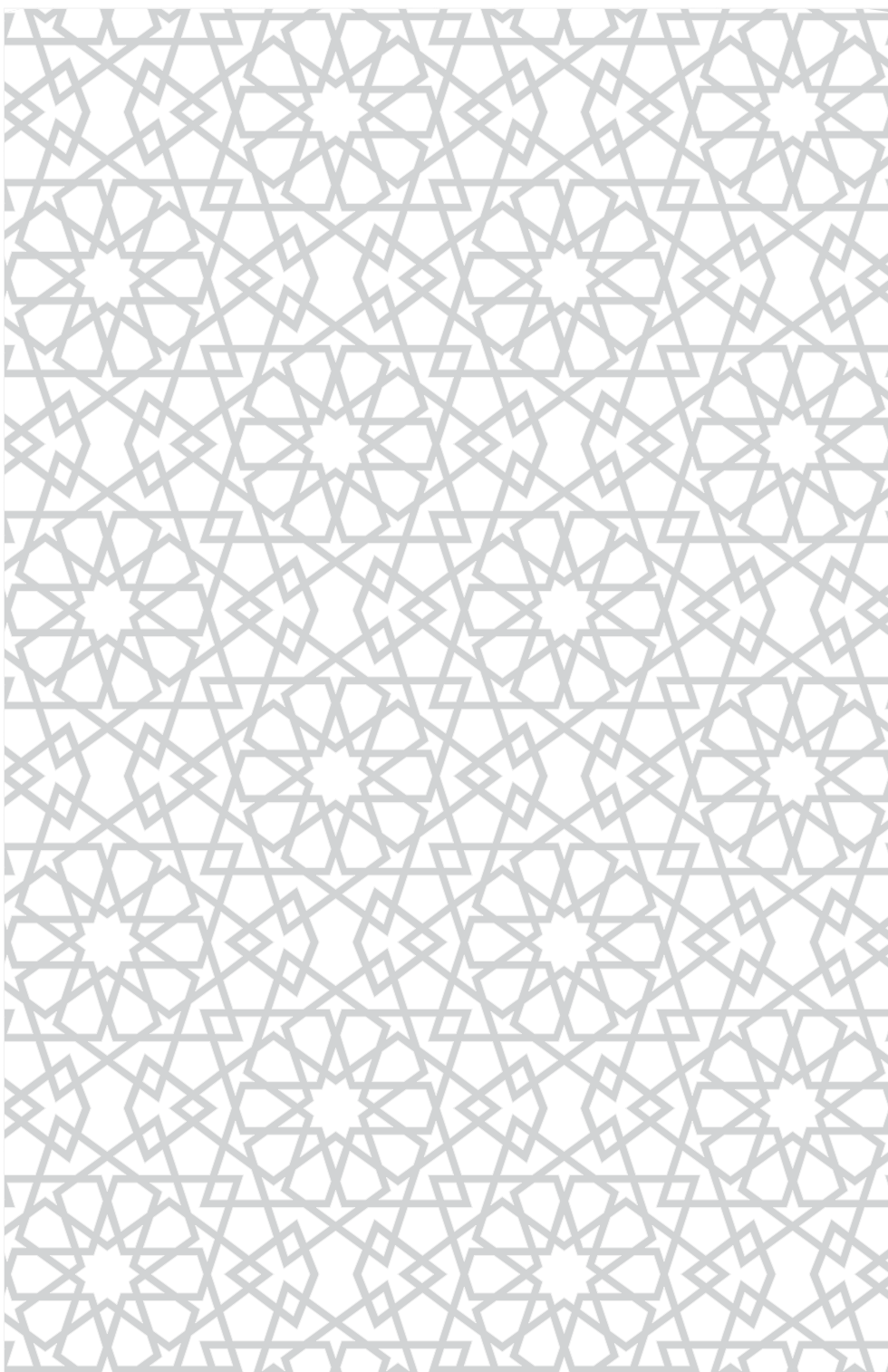
Shari'ah Standard No. (42)

**Financial Rights and How They
Are Exercised and Transferred**



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IN THE NAME OF ALLAH, THE ALL-MERCIFUL, THE MOST MERCIFUL

All praise be to Allah, the Lord of all the worlds, and blessings and peace be upon our master, Muhammad, and his household and all his companions

Preface

This Standard aims to describe the rules relating to financial rights, how they are exercised and transferred and the mechanisms used to protect them as well as to highlight certain rights exercised in the transactions of Islamic financial institutions.⁽¹⁾

(1) The word (Institution/Institutions) is used here to refer, in short, to Islamic financial institutions including Islamic Banks.

Statement of the Standard

1. Scope of the Standard

This Standard provides a description of financial rights, their types, rules, conditions, parameters, the way they are exercised and transferred and the mechanisms used to protect them. It also addresses the most important rights exercised in the transactions of financial institutions.

This Standard does not cover non-financial rights; *Khiyarat* (options to terminate a contract); e.g., *Khiyar al-Shart* (an option stipulated by the parties giving one or both of them the right to revoke the contract within a specified period of time) and *Khiyar al-Naqd* (an option giving the seller the right to revoke the contract for non-payment within a specified time etc.); or rights relating to Waqf (endowments), as they have already been covered in separate standards.

2. Definition of Financial Rights

A financial right is the prerogative of a (natural or artificial) person recognized by the Shari'ah to have rights and responsibilities and the legal capacity to enter into transactions.

3. Types of Financial Rights

Financial rights are of three types:

- 3/1 Personal rights (rights in personam): These are rights arising from the liability of another person, such as debts payable by a debtor.
- 3/2 Proprietary rights (rights in rem): These are rights attached to specific property conferring to the owner direct authority over it without interference from another person, whether such rights are primary or secondary.
 - 3/2/1 Primary proprietary rights, such as rights arising from full and complete ownership, are independent rights that do not rely on the existence of any other right.

- 3/2/2 Secondary proprietary rights; these are proprietary rights that have no purpose of their own except to protect the fulfillment of personal rights, such as the rights of a creditor in security provided by an obligor.
- 3/2/3 The distinction between proprietary and personal rights: The owner of a proprietary right is able to directly enforce his right to specific property using permissible means. The owner of a personal right, on the other hand, cannot enforce his right by claiming any specific property.
- 3/3 Rights to intangible assets:
 - 3/3/1 These are financial rights to intangible assets, whereby the owner is exclusively entitled to their output.
 - 3/3/2 Types of rights to intangible assets: Rights to intangible assets are of many kinds, including rights to trade name, trading addresses, trademarks, commercial licenses; intellectual property, technical and industrial know-how, patents and copyrights.
 - 3/3/3 Rules governing rights to intangible assets:
 - 3/3/3/1 Rights to trade names, trading addresses, trademarks, copyrights, inventions and patents are the rights of their respective owners. These possess recognised monetary value in contemporary business and commercial custom. Since these rights are recognised and protected by the Shari'ah , it is not permissible to violate them.
 - 3/3/3/2 Since rights to intangible assets are recognised as financial rights, it is permissible to dispose of or transfer them for consideration provided that such transactions are free of Gharar (ambiguity), deception and fraud.
 - 3/3/3/3 Commercial license: A commercial license is a right given by the relevant authority to certain businesses to engage in specified activities. It is permissible for the license holder to dispose of it for or without consideration unless specifically prohibited by law.

3/4 Financial rights can be acquired by contract, stipulated conditions, inheritance or court order. Financial rights may be established by long-standing continuous use without objection or first use subject to fulfillment of all the Shari'ah conditions required for the acquisition of such rights.

4. Rights Resulting from Ownership

4/1 Ownership of an asset or usufruct gives the owner the right of complete disposition, either by a complete transfer or the transfer of usufruct only, for or without consideration, except what is prohibited by the Shari'ah.

4/2 Ownership of usufruct entitles the owner to use it (whether directly or indirectly through another person) subject to compliance with the terms stipulated by the owner of the asset and bearing liability for the asset in case of misuse, negligence or breach of condition.

4/3 Ownership of a license to use gives the licensee the right to personal use only which cannot be transferred to a third party.

5. Easements

5/1 Private easements are established rights attached to one real estate property over another, such as irrigation rights, watercourse rights, drainage rights and rights of passage.

5/2 Public easements are the rights of the general public to benefit from public utilities provided by the state and similar entities.

5/2/1 The right of an individual to a public easement is restricted to personal use only.

6. Financial Rights Arising from Neighbourhood

6/1 The rights of neighbourhood based on the ownership of different floors of a building prohibit each owner to act in a manner that will definitely or most likely cause harm to others.

6/2 Since the owners of different floors of a building co-ownership in the underlying land, the following apply:

6/2/1 If a lower storey collapses due to any fault of its owner, he is liable to reconstruct it so that the owners of the upper-storeys are not harmed.

6/2/2 If the owner of the lower storey is not responsible for the collapse, the courts have decisive authority to settle the matter in the best interests of both parties and to avert harm from them.

6/2/3 The owners have the right to enjoy use of common facilities and services.

7. Right of Shuf'ah (Preemption)

7/1 Definition of Shuf'a (preemption): Shuf'a is the right given to a neighbour or co-owner of real estate property to acquire a sold property from its buyer with or without their consent for the price at which it was sold.

7/1/1 The right of Shuf'ah exists only in relation to immovable property or movable property attached to it.

7/1/2 The right of Shuf'ah enjoyed by a neighbour is applicable only when the two properties share common easement rights.

7/2 Rules of Shuf'ah

7/2/1 The Shafi' (preemptor) takes the place of the buyer and, subject to circumstances being equal, enjoys the right to purchase the property on the same terms as contracted with the buyer, such as deferred payment. The Shafi' (preemptor) assumes all also the liabilities of the buyer such as the usual conveyancing costs.

7/2/2 If in a jointly owned property, there are more than one Shu-fa'a' (preemptors), each has the right of Shuf'ah proportionate to his share in the property.

7/2/3 Rights of Shuf'a are not extinguished upon the death of the Shafi' (preemptor) but are inherited by his heirs.

7/2/4 Rights of Shuf'ah must be claimed immediately upon becoming aware of the sale in accordance with custom or law, failing which they lapse.

7/2/5 The Shafi' (preemptor) is entitled to invalidate all the dispositions of the preempted property that were made prior to the exercise of the right of Shuf'ah , even if it has changed hands.

7/2/6 There is no right of Shuf'ah where ownership is transferred without a sale or a transaction having the effect of a sale. Therefore, there is no right of Shuf'ah where transfer is effected by inheritance, bequest or gift without consideration.

8. Right of Occupancy

Occupancy is a right based on the right of the tenant to retain his tenancy in property or commercial unit.

Occupancy has a number of forms:

8/1 The Shari'ah does not prohibit the owner and the tenant agreeing that the tenant will pay a lump sum of money over and above the periodic rental amount, on condition that it is considered part of the agreed rent for the entire lease period. If the lease is terminated early, the rules applicable to rental payments apply to this amount.

8/2 It is permitted by the Shari'ah for the owner and the tenant to agree during the lease period that the owner will pay an amount to the tenant in exchange of the tenant waiving his contractual right to the ownership of the usufruct for the remaining period on the basis that such payment compensates the tenant for waiver of his right to the usufruct that he purchased from the owner. However, if the lease period expires and the contract is not renewed, either expressly or by operation of a provision for automatic renewal, then it is not permitted to take payment for vacating the premises, and the owner has the right to take back his property after expiry of the term.

8/3 The Shari'ah permits an agreement between the incumbent tenant and a new tenant during the lease period to assign the lease for an amount exceeding the regular rental amount for release of occupancy subject to the requirements of the terms and conditions of the original lease

contract and applicable laws that are compliant with the rules of the Shari'ah.

In long-term lease contracts, contrary to contractual terms that are based on what is permitted by the laws of some jurisdictions, the Shari'ah does not permit the tenant to sub-lease or assign the property to another tenant in return for payment except with the agreement of the owner.

If the incumbent tenant agrees to hand over occupancy to a new tenant after the end of the lease period, the Shari'ah does not permit him to take any payment because the right of the incumbent tenant in the usufruct has expired.

9. Right of Tahjir

- 9/1 Tahjir means taking possession of a piece of land and marking it with certain recognised markers with the permission of the government.
- 9/2 Tahjir results in exclusivity and priority over others, but it does not on its own confer ownership.
- 9/3 A person who has carried out Tahjir on a piece of land is permitted to waive his entitlement in favour of another person for consideration, but he is not allowed to sell the land as he does not yet own it.
- 9/4 The right of Tahjir expires if the land is not utilised for three years, or as provided by applicable regulations.

10. Transfer of Rights for Consideration

- 10/1 It is not permissible to take consideration for transfer of put or call option rights, whether by means of sale or otherwise.
- 10/2 It is not permissible to take consideration for transfer or waiver of rights granted only to prevent harm, such as the right of Shuf'ah (preemption).
- 10/3 It is permissible to take consideration for transfer or waiver of easement rights, by means of sale or otherwise.
- 10/4 It is permissible to sell rights to use and rights arising from first use.

11. How Rights Are Exercised and Transferred

11/1 All financial rights are in principle disposable, and the owner of a financial right has the absolute right to exercise and transfer his right in accordance with the rules and principles of the Shari'ah and in particular, the following:

11/1/1 Rights should not be exercised in a manner abuse to others.

11/1/2 The public interest is given priority when it conflicts with the exercise of a private property right.

11/2 Subject to the provisions of this Standard, the constructive methods of disposal of rights include all types of contracts of exchange, donations, waivers, partnerships, and assignments of rights. [see Standard No. (7) on Hawalah]

12. Protection of Rights

12/1 Rights are to be protected from any violation.

12/2 In addition to the provisions of Shari'ah Standard No. (5) on Guarantees, the methods of protecting financial rights include:

a) Rights do not extinguished by passage of time but there can be a limitation period after which a claim cannot be made in court.

b) Right of lien: A creditor has the right to retain the debtor's property already in his possession until he receives payment of the due debt from the debtor. This may take several forms:

I. The right of the seller to retain the sold item until he receives the due price.

II. The right of a manufacturer or worker to retain the product of their work until they receive the payment due.

III. The right of the lessor to retain the lessee's property inside the leased asset until he receives the rent due, because the lessor has possession of the leased asset which contains the lessee's property.

IV. The right of a courier to retain the dispatched property until he receives his fees.

V. The right of a bailee to retain the bailed property until he receives his fee.

VI. The right of an agent to retain the property of the principal until he receives his agency fee.

- c) If the buyer of an item becomes insolvent and the seller finds that specific item in the insolvency assets, the seller has a priority proprietary right to it if the applicable regulations of a jurisdiction allow it. Refer to Shari'ah Standard No. (43) on Insolvency.

13. Some Rules Governing Contemporary Applications of the Transfer and Exercise of Financial Rights

13/1 It is permitted for corporate bylaws to give existing shareholders priority over third parties to subscribe for shares upon a decision to increase the company's share capital. Each shareholder is entitled to subscribe in proportion to his respective share prior to the share issuance.

13/2 It is permissible to assign a right of priority referred to in item 13/1 to a third party without consideration, subject to the provisions of the law and the rules of company supervisory bodies.

14. Date of Issuance of the Standard

This Standard was issued on 4 Dhul-Qa'dah 1430 A.H., corresponding to 23 October 2009 A.D.

Adoption of the Standard

The Shari'ah Board has adopted the Standard on Financial Rights and How they are Exercised and Transferred in its meeting No. (25) held during the period of 2-4 Dhul-Qadah 1430 A.H., corresponding to 21-23 October 2009 A.D.

Appendix (A)

Brief History of the Preparation of the Standard

On 13 Shawwal 1425 A.H., corresponding to 25 November 2004 A.D., the General Secretariat decided to commission a Shari'ah consultant to prepare a juristic study on Financial Rights and How They Are Exercised and Transferred.

In its meeting held on 4 Sha'ban 1426 A.H., corresponding to 8 September 2005 A.D., the Shari'ah Standards Committee discussed the draft of a Shari'ah Standard on Financial Rights and How They Are Exercised and Transferred and made necessary amendments.

The revised draft of the Shari'ah Standard was presented to the Shari'ah Board in its meeting No. (16) held in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia, during the period of 7-12 Jumada I, 1427 A.H., corresponding to 3-9 June 2006 A.D. It became clear that the issue needed further study to deal with some Shari'ah aspects.

The General Secretariat commissioned a Shari'ah consultant to prepare a juristic study on Financial Rights and Their Disposition (to be presented) on 14 Jumada II, 1430 A.H., corresponding to 7 June 2009 A.D.

The General Secretariat held a public hearing, and all the comments made in the public hearing were listened to, and the members of the Shari'ah Board answered these comments and made commentary on them.

In its meeting No. (25) held in Bahrain during the period of 2-4 Dhul-Qadah 1430 A.H., corresponding to 21-23 October 2009 A.D., the Shari'ah Board discussed the draft of the Standard, incorporated the necessary amendments that it deemed appropriate, and adopted the Standard.

Appendix (B)

The Shari'ah Basis for the Standard

- The basis for the recognition of financial rights is recognised jurisprudential evidences from the Qur'an, Sunnah, Ijma' and Qiyas that indicate the right of ownership.
- The basis for the rules governing rights to intangible assets is the Resolution of the International Islamic Fiqh Academy No. (43) 5/5 affirming, from established proofs, their existence and the rules governing them, which are the basis for the resolution.
- The basis for the distinction between proprietary rights and personal rights is the view of contemporary jurists that Islamic jurisprudence has recognised this distinction in all matters that require such distinction.⁽²⁾
- The basis for the recognition of rights, whether to tangible or intangible assets is the saying of the Prophet (peace be upon him): *"No harm and no reciprocal harm"*.⁽³⁾
- The basis for the right of Shuf'ah enjoyed by a partner or a neighbour is the practice of the Prophet (peace be upon him). Jabir Ibn Abdullah (may Allah be pleased with him) narrated: *"Allah's Messenger (peace be upon him) ruled in favor of the right of Shuf'ah so long as the property is not divided"*.⁽⁴⁾ Abu Salamah Ibn Abdul-Rahman narrated: *"The Prophet (peace be upon him) ruled in favor of the right of Shuf'ah in property that has not been divided among the partners. If boundaries have been assigned between them and the paths have been demarcated, then there is no right of Shuf'ah"*.⁽⁵⁾ In the narration related by Muslim: *"The Prophet (peace be upon him) ruled in favor of the right of Shuf'ah in any undivided co-ownership, whether in a*

(2) See Mustafa Al-Zarqa: *"Al-Madkhal Ila Nazariyyat Al-Iltizam"*.

(3) The Hadith has been related by Malik in *"Al-Muwatta'"* (P. 464); *"Musnad Ahmad"* [1: 313], and *"Sunan Ibn Majah"* [2: 784].

(4) *"Sahih Al-Bukhari"*, (H: 2257).

(5) *"Al-Muwatta'"*, (H: 1420).

piece of land or an orchard. A co-owner is not allowed to sell his share unless permitted by the other co-owners. If the co-owner wants, he can buy it. If he wants, he can leave it. But if one co-owner sells it without permission of the other co-owners, then they have a greater right to it".⁽⁶⁾ Qatadah narrated that the Prophet (peace be upon him) said: *"The neighbour of the house has a greater right to the house"*.⁽⁷⁾ These two Hadiths are reconciled by ascribing the last Hadith to a neighbour who is also a co-owner or shares easement rights.

- The basis for the right to a share of water is Allah's Statement in the Qur'an: ***{“Here is a she-camel: It has a right to drink (water), and you have a right to drink (water), (each) on a day, known”}***.⁽⁸⁾ There is also Allah's Statement in the Qur'an: *"And inform them that the water is to be shared between them. Each one should drink in turn"*.⁽⁹⁾ In Shari'ah, it means a turn to utilise water for land or trees or crops. Related Shari'ah terms are the right of Shirb, which is specifically for watering crops and trees; the right of Shafah, which is specifically the right of humans and animals to drink as well as using water for purposes like ablution, bathing, etc.⁽¹⁰⁾ There is a special set of rules for water in the Shari'ah based upon the statement of the Prophet (peace be upon him): *"People share in three things: water, pasturage and fire"*.⁽¹¹⁾
- The basis for the right of Tahjir and the rights established by first use is the Sunnah. Ibn Qudamah states: *"Anyone who carries out Tahjir of previously unappropriated land and begins to make it productive but did not complete it, he is more entitled to it than others, based upon the statement of the Prophet (peace be upon him): “Anyone who first uses what no other Muslim has previously used is more entitled to it”*. If he transfers it to someone else, then the second person is more entitled to it than others because the first owner of the right has granted it to him. If the owner of the right dies, it transfers to his heirs, based on the statement of the

(6) *"Sahih Muslim"* (H: 1608).

(7) *"Sahih al-Bukhari"* with *"Fath Al-Bari"* [12: 345].

(8) [Al-Shu'ara (The Poets): 155].

(9) [Al-Qamar (The Moon): 28].

(10) Al-Kasani, *"Bada'i' Al-Sana'i"* [6: 188-192].

(11) *"Musnad Ahmad"* [5: 364].

Prophet (peace be upon him): *"The heirs of a deceased person inherit his estate"*. However, it is not permitted for the owner of a right of Tahjir to sell it because his entitlement is confined to his personal use like the right of Shuf'ah (preemption). [An alternative view is that] its sale could be considered valid because he is more entitled to it.⁽¹²⁾ Al-Mardawi states: "Anyone carrying out Tahjir over previously unappropriated land will not own it...but he is more entitled to it than others, as well as his heirs after him and whomever he transfers it to, without any dispute. However, he cannot sell it, and this is the position of our School. It has also been said that he may sell it. Abu Khattab mentioned it as a possibility, and he referred to its permissibility as the correct position without any qualification in *"Al-Muharrar"*, *"Al-Ri'ayatayn"* and *"Al-Hawi Al-Saghir"*."⁽¹³⁾

- The basis for the prohibition of abusive exercise of rights is deduction from the Qur'an and Sunnah. There are many Verses in the Qur'an which indicate the obligation of justice, fairness and refraining from exercising one's rights in a way that harms others. Allah commands: ***"Show forgiveness, enjoin what is good, and turn away from the foolish"***.⁽¹⁴⁾ As for the Sunnah, we find the following Hadith: *"May Allah bless the person who is lenient in selling and buying and when demanding his right"*.
- The basis for the invalidity of a condition stipulating that the seller retains ownership in a sale contract is that the transfer of ownership is a legal effect of the sale contract. Therefore, it is not permissible for a sale to take place without it. This has also been stressed in Resolution No. (51) 6/2 of the International Islamic Fiqh Academy held in Jeddah, which states: "The seller is not entitled to retain ownership of the sold item after the sale, but it is permissible for him to stipulate a condition on the buyer to retain possession of the item as security against deferred installments."
- The basis for the right of retention is the Qur'an and Sunnah. As for the Qur'an, it is stated by Allah: ***"And if you punish, then punish them with the like of that with which you were afflicted. But if you endure patient-***

(12) Ibn Qudamah, *"Al-Kafi"* [2: 394].

(13) Al-Mardawi, *"Al-Insaf"* [6: 373 and 374].

(14) [Al-A'raf (The Heights):199].

ly, verily, it is better for those who are patient".⁽¹⁵⁾ The Glorious Verse indicates the permissibility of reciprocal treatment. Based on this, it is permissible for a person to retain his property unless he receives his own rights from others. As for the Sunnah, it was narrated that the Prophet (peace be upon him) said: "*The best amongst you is the one who is best in settlement of his obligations*".⁽¹⁶⁾

- The basis for the impermissibility of taking consideration for sale or transfer of put or call options is Resolution No. (63) 7/1 of the International Islamic Fiqh Academy, which is based on recognised evidences.
- The basis for the impermissibility of selling the abstract rights mentioned in item 10 is the lack of monetary value [according to Shari'ah] as well as the presence of Gharar (uncertainty) and Jahalah (ambiguity).

(15) [Al-Nahal (The Bees): 126].

(16) "*Sunan Al-Nasai*", printed with Suyuti's Commentary, (P. 318).

Appendix (C)

Definitions

Right of Easement

It is the established right over one piece of real estate for the benefit of another piece of real estate.

Right of Irrigation (Shirb)

Shirb literally means a share in water. The Shari'ah definition is a turn to irrigate land or trees or crops.

Right of Watercourse (Majra)

It is the right of an owner of land distant from a watercourse to bring it via the property of his neighbour to his land to irrigate it.

Right of Drainage (Masil)

It is the right of a person to get rid of excess water in his property via the property of another person. Watercourse is different from drainage in that watercourse is in order to bring water whereas drainage is to get rid of water not needed for the land.

Right of Way Easement (Murur)

It is the right of the owner of an interior piece of land (land surrounded by other persons' lands) to access his land by means of a road/path. It makes no difference if the road/path is public, not owned by anyone, or is privately owned by someone.

Right of Ascendancy (Ta'alli)

The right of ascendancy means one person's right to have his structure be physically located above the structure of another person. This happens in multi- storey buildings in which one person owns a unit in a lower storey and another owns a unit in the storey above it.

Preemption

Preemption in the terminology of jurists means the entitlement of the partner to buy what his partner has sold for the price at which he sold it.

Intangible Rights

Intangible right is the authority of a person over something that is abstract, e.g., ideas and inventions. The International Islamic Fiqh Academy, headquartered in Jeddah, issued its Resolution No. (43) 5/5 on the subject of intangible rights, which include; Trade Name, Title, Trademark, Authorship, and Invention. The Academy considered these to be rights particular to their respective owners which have established financial value. Consequently, these rights are recognized by the Shari'ah and they should not be violated.

Right of Utilization (Intifa')

The right of utilization is a juridical concept that refers to a person's temporary right over the asset of another person, who authorizes him to use it, exploit it, and dispose of its usufruct, but not the asset itself, during the period of utilization. The majority of jurists, including the Shafi'is, Malikis and Hanbalis, distinguish between the ownership of usufruct (Manfa'ah) and ownership of utilization (Intifa'). Granting ownership of utilization (Intifa') only allows a person to directly utilise [the asset]. Granting ownership of usufruct (Manfa'ah) is more general and comprehensive; it allows its owner to use the asset himself or to enable others to use it, either for compensation, as in a lease, or without compensation, as in gratuitous lending of the asset.

Right of Exclusive Lease (Hikar)

Hikar is the right to lease the land of an endowment for a long period of time. The Mustahkir (exclusive lessee) makes an advance payment to the endowment which is nearly equal to the price of the land that is used to develop it or for the maintenance of its premises. Another, insignificant, amount is arranged to be paid annually to the endowment by the Mustahkir (exclusive lessee) or by whosoever this right has been transferred to.

Right of Priority in Subscribing to an Increase in a Company's Capital

It is the stipulation that the existing shareholders will have the right of priority in subscribing to an increase in the company's capital by purchasing shares at their nominal value

Vacating Houses or Shops

It refers to the right to stay in a house or shop.

Business License

It is a right granted by the authorities to some traders to deal in specific activities.

Right of Demarcation

It means taking possession of a piece of land and marking it with markers or a wall. Demarcation confers privilege and precedence over others. It means that whosoever demarks land is more entitled to develop it; however, it does not confer ownership.

Disposal

Disposal is the competence approved by the Shari'ah , or custom, or law that enables the owner of rights to dispose of them. This disposal can either be by transferring his right to others for recompense; e.g., sale or barter, or without recompense; e.g., gift, will, or by relinquishment.

Abusive Use of a Right

It the use of a right in such a way that it is likely to cause serious extraordinary harm to another.

Expiry

It is the lapse of a right due to the passage of time. However, in the Shari'h, rights do not lapse due to the mere passage of time.

