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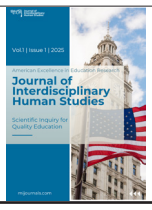

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SALAM, ISTIṢNĀʿ AND RAHN CONTRACTS IN ḤĀFIẒ AL-DĪN AL-NASAFĪ'S KANZ AL-DAQĀʾIQ: THE FIQH OF TRANSACTIONS IN NON-EXISTENT GOODS AND THEIR SECURITY

Abstract. *On the basis of textual and comparative legal analysis, the article examines the treatment of salam (sale with advance payment and deferred delivery), istiṣnāʿ (manufacture to order) and rahn (pledge) in Kanz al-Daqāʾiq by Ḥāfiẓ al-Dīn al-Nasafī (d. 710/1310), one of the core teaching texts of the Ḥanafī school. The study draws on the Beirut (2010) and Karachi (2010) editions of the text, the commentaries of al-Zaylaʿī and Ibn Nujaym, and modern works on Islamic commercial law. It is shown that al-Nasafī requires for salam a precise description of the genus, type, quality and quantity of the goods, a delivery term of at least one month, payment of the full price before the parties leave the session (majlis), and the continuous availability of the goods on the market throughout the term of the contract, which distinguishes the Ḥanafī position from that of the other schools. For pledge, the pledgee is held liable within the lesser of the value of the pledge or the amount of the debt. Textual discrepancies between the editions are identified: the omission of a phrase on the place of delivery of goods that require no transport, and the replacement of the word qarya (village) by qurba (kinship). The article concludes that the rules of Kanz al-Daqāʾiq remain practically relevant for modern Islamic financial products based on advance financing, manufacturing to order and collateral.*

Keywords: *Ḥanafī school, fiqh of property relations, Ḥāfiẓ al-Dīn al-Nasafī, Kanz al-Daqāʾiq, salam, istiṣnāʿ, rahn, pledge, textual criticism, Islamic finance.*

INTRODUCTION

Ḥāfiẓ al-Dīn Abū al-Barakāt ʿAbd Allāh ibn Aḥmad al-Nasafī (d. 710 AH/1310 CE), a native of Nasaf (present-day Qarshi), is among the most authoritative jurists of the later Ḥanafī school (Ibn Quṭlūbughā, 1992; Yaman, 1996). His work Kanz al-Daqāʾiq, composed largely on the basis of his own earlier treatise al-Wāfī, was used for centuries as a teaching manual in madrasas from Egypt to India and Central Asia thanks to its brevity, systematic arrangement and high authority, and it became the basis of numerous commentaries, among which Tabyīn al-Ḥaqāʾiq by Fakhr al-Dīn al-Zaylaʿī and al-Baḥr al-Rāʾiq by Zayn al-Dīn ibn Nujaym occupy a special place (al-Zaylaʿī, 2000; Ibn Nujaym, 1993; Yaman, 1996). A significant part of the book is devoted to the fiqh of property relations (muʿāmalāt), that is, to the norms governing contracts of sale, lease, partnership, agency and the securing of obligations (Syukiyaynen, 1986).

Of particular interest among these norms are transactions whose subject matter does not exist at the moment the contract is concluded. The general rule of fiqh prohibits the sale of non-existent goods; the Ḥanafī doctrine, however, relying on the Sunna and the consensus of the scholars, admits exceptions: the salam contract, in which the buyer pays in full for goods to be delivered in the future, and the istiṣnāʿ contract, in which an article is manufactured to order. Since in such transactions one party performs its obligation in advance, the institution of pledge (rahn), which secures the performance of obligations, is closely connected with them (Desai, 2021; Oziev & Yandiev, 2015). These contracts today underlie the advance-financing and production-financing products of Islamic financial institutions, which makes the study of their classical exposition practically relevant.

The aim of the article is to disclose the distinctive features of the exposition of the salam, istiṣnāʿ and rahn contracts in Ḥāfiẓ al-Dīn al-Nasafī's Kanz al-Daqāʾiq, to identify their place in the system of the Ḥanafī fiqh of property relations, and to establish the textual discrepancies between modern editions of the text that bear on a correct understanding of these norms.

MAIN PART

The principal source of the study is the text of Kanz al-Daqāʾiq in two editions: the Beirut edition (al-Maktaba al-ʿAṣriyya, 2010) (al-Nasafī, 2010a) and the Karachi edition with the glosses of Muḥammad al-Nanūtī (Maktabat al-Bushrā, 2010) (al-Nasafī,

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2010b). For the interpretation of the provisions of the text, the classical commentaries of al-Zaylaʿī (2000) and Ibn Nujaym (1993) were drawn upon, together with the modern Uzbek-language exposition of Ḥanafī fiqh Kifoya by Muḥammad Ṣādiq Muḥammad Yūsuf (2019) and works on Islamic commercial law and on the contractual basis of Islamic banking (Bekkin, 2012:99-112; Desai, 2021; Oziev & Yandiev, 2015). In order to relate the classical norms to contemporary practice, the standards of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI, n.d.) were used.

The historical-legal, textual and comparative legal methods were applied. The textual analysis involved comparing the wording of one and the same provision in different editions and commentaries in order to identify omissions and distortions. The comparative legal method was used to compare the Ḥanafī position with the opinions of the other schools, as well as to compare positions within the Ḥanafī school itself – those of Abū Ḥanīfa, Abū Yūsuf and Muḥammad al-Shaybānī.

Al-Nasafī places the topic of salam after the chapter on sales and before the chapter on currency-exchange transactions (ṣarf); in an edition of about 150 pages it occupies the central part of the book. The author permits salam in goods measured by volume (makīl), by weight (mawzūn) and by length, and in countable goods of closely similar characteristics (ʿadadiyya mutaqāriba) such as eggs and nuts. By contrast, salam is not permitted in countable goods that differ substantially from one another – animals, their parts and hides, and ornaments. The word musamman ("subject to designation by price") is explained by the commentators as a qualification that excludes silver dirhams and gold dinars from the subject matter of salam, since they themselves serve as a means of payment (al-Nasafī, 2010b).

The conditions for the validity of salam in Kanz al-Daqāʾiq include the precise indication of the genus of the goods (jins), their type and description (ṣifa), their quantity, the term of delivery (ajal) – not less than one month – the amount of payment, and also the place of delivery if the goods require transport. A fundamental condition is that the seller receive payment before the parties leave the place where the contract is concluded (majlis): salam is recognised as valid only if the advance payment is handed over in time and in full (al-Nasafī, 2010a; Muḥammad Ṣādiq Muḥammad Yūsuf, 2019). Modern researchers supplement these requirements with the need to determine precisely the currency or the goods serving as the means of payment, together with their kind and quality, so as to exclude disputes at the stage of performance (Oziev & Yandiev, 2015).

E-ISSN 3069-8375

A distinctive feature of the Ḥanafī position is the requirement that the goods be continuously available on the market. Al-Nasafī uses the term al-munqaṭiʿ ("unavailable") to designate goods in which salam may not be concluded. The commentators consider three situations: the goods are available when the contract is concluded but absent at the moment of delivery; they are absent at the conclusion of the contract but expected by the date of delivery; and they are available on both dates. In the opinion of the Shāfiʿīs, Ḥanbalīs and Mālikīs, what matters is the presence of the goods at the moment of delivery, the intervening period playing no role; the Ḥanafīs, however, require the presence of the goods (muslam fīh) throughout the whole term of the contract, grounding this in the ḥadīth transmitted by al-Bukhārī on the authority of Ibn ʿUmar concerning the prohibition of selling fruit before its fitness becomes apparent (Muḥammad Ṣādiq Muḥammad Yūsuf, 2019). The practical sense of this requirement is that, in the event of a failed harvest, the supplier will be able to purchase the goods on the market and perform his obligation.

Al-Nasafī also regulates in detail the consequences of partial payment. If the parties conclude a salam at a price of 200 dirhams per measure (kurr) of barley but only 100 dirhams are handed over at the moment of conclusion, the remainder being left as a debt, the contract is not regarded as salam with respect to the debt, and the transaction is confined to the sum actually transferred. The buyer is not entitled to dispose of the goods before actually receiving them (qabl al-qabḍ), nor is the seller entitled to dispose of the money before receiving it; subsequent transactions in goods not yet received are likewise not permitted, whether in the form of co-ownership (shirka), resale at cost (tawliya) or resale with a mark-up (murābaḥa). This is reflected in the formulation characteristic of Kanz al-Daqāʾiq, "neither in the form of co-ownership nor in the form of tawliya" (shirkatan wa tawliyatan), which is absent from a number of other Ḥanafī works (al-Nasafī, 2010a; al-Nasafī, 2010b).

Finally, the author gives a list of goods in which salam is permissible or impermissible. Salam is permitted in unbaked and baked brick where the size of the mould (milban) is known, and in textiles where the length, thickness, quality, composition and place of manufacture are precisely stated. It is not permitted in ready-made clothing, footwear, fur articles, bundles of firewood or ornaments, nor in fresh fish in localities where fishing ceases in winter; salted (dried) fish is permitted provided it is measured by weight. Opinions differ with regard to meat: Abū Ḥanīfa did not permit salam in it,

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whereas Abū Yūsuf and Muḥammad al-Shaybānī considered it possible where the kind and age of the animal, its place of origin and its weight are recorded in detail. Salam is also impermissible in produce restricted to a particular source, for example wheat from a specified village, since a failed harvest there would render the obligation impossible to perform (al-Nasafī, 2010a; al-Nasafī, 2010b).

Continuing the subject of salam, al-Nasafī turns to istiṣnāʿ, a contract by which a customer commissions a craftsman to manufacture an article at a known price – for example boots or vessels such as a basin or a jug – on condition that the article can be precisely described in terms of size and quality. The commentators ground the admissibility of this practice in consensus (ijmāʿ) and point out that the minbar and the signet ring were made in this way in the time of the Prophet (peace and blessings be upon him). Istiṣnāʿ is permitted only in articles for which there is a settled customary practice among people (taʿāmul); where no such practice exists, the contract is not concluded. The text of Kanz al-Daqāʾiq grants the customer an option (khiyār al-ruʾya): having inspected the finished article, he may accept it or refuse it. The commentators note the disagreement between Abū Ḥanīfa and Abū Yūsuf on this question, as a result of which three positions took shape within the school, of which the one granting the customer the right of refusal is recognised as the principal view (al-Zaylaʿī, 2000; al-Nasafī, 2010b).

The chapter on pledge is placed by al-Nasafī after the chapter on hunting and before the chapter on offences (jināyāt); the commentators explain this arrangement by the fact that both hunting and pledge involve the acquisition of property. Pledge is defined as the retention (ḥabs) of a thing by virtue of a right that may be satisfied out of its value, such as a debt; without a debt a pledge cannot exist. As proofs the commentators cite verse 283 of Sūrat al-Baqara and the practice of the Prophet (peace and blessings be upon him), who left his coat of mail in pledge (al-Nasafī, 2010a; Oziev & Yandiev, 2015). The contract is concluded by offer (ījāb) and acceptance (qabūl) and is regarded as effected from the moment of the delivery (qabḍ) of the object of pledge, which must be free of the rights of third parties (mufragh), determinate (mumayyaz) and set apart (maḥūz). Before delivery the pledgor is entitled to withdraw from the pledge.

The central provision of the chapter concerns liability for the loss of the object of pledge. The pledgee is liable within the lesser of two amounts – the value of the pledge, determined as at the day of delivery, or the amount of the debt. If a pledge worth 100

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dirhams perishes while the debt is 100 dirhams, the debt is deemed discharged; if the pledge was worth 150 dirhams, the excess of 50 dirhams is treated as property held in trust (amāna) and is compensated only where the pledgee is at fault; if the pledge was worth 90 dirhams, the debt is discharged to the extent of 90 dirhams and 10 are subject to repayment (al-Nasafī, 2010a; Oziev & Yandiev, 2015). The pledgee is not entitled to use the object of pledge without the pledgor's permission; the costs of maintaining the thing (watering a garden, pasturing livestock) are borne by the pledgor, while the costs of safekeeping are borne by the pledgee. A pledge of an undivided share in a common thing (mushāʿ) is not permitted, since such a share cannot remain continuously in the possession of the pledgee. Pledge may also be used to secure salam and ṣarf (al-Nasafī, 2010a; al-Nasafī, 2010b).

A comparison of the editions has made it possible to identify discrepancies that are significant for the interpretation of the norms. First, the Beirut edition of 2010 omits, in the chapter on salam, the sentence stating that goods requiring no transport may be delivered to the buyer in any place by mutual agreement ("wa mā lā ḥamla lahu yūfīhi ḥaythu shāʿa"). In the Karachi edition with al-Nanūtī's glosses this sentence is given as part of the base text to be commented upon, that is, as belonging to al-Nasafī himself (al-Nasafī, 2010b). Second, in the provision on the impermissibility of salam in the produce of a particular locality, a number of modern editions render the word qarya (village) as qurba (kinship); the context, the commentaries and the manuscripts establish that the correct reading is qarya (al-Nasafī, 2010a). Third, in the chapter on pledge several commentators adduce arguments in favour of replacing the word lazima ("becomes binding") with yanʿaqidu ("is concluded"). These examples show that, in working with the laconic texts of Ḥanafī fiqh, it is necessary to allow for the possible loss of words, phrases and even whole sentences.

The analysis carried out shows that al-Nasafī, for all the extreme brevity of his exposition, consistently builds up a system of guarantees protecting the parties to a transaction in non-existent goods from uncertainty (gharar) and from disputes. The requirements of a precise description of the goods, of full advance payment in the majlis, of the prohibition of disposing of goods not yet received, and of the continuous availability of the goods on the market are all directed towards making the supplier's obligation performable and the buyer's rights protected. The Ḥanafī requirement that the goods be available throughout the term of the contract is stricter than the position

E-ISSN 3069-8375

of the other schools, but it is precisely this requirement that reduces the risk of non-performance in the event of a failed harvest or a seasonal disappearance of the goods.

The norms of Kanz al-Daqāʾiq have direct parallels in the contemporary practice of Islamic finance. The salam and parallel salam contracts, istiṣnāʿ and parallel istiṣnāʿ, and collateral security are governed by separate Sharīʿa standards of AAOIFI (n.d.) and are used by Islamic banks for the advance financing of agriculture and for manufacturing to order (Desai, 2021; Oziev & Yandiev, 2015). The provision on the admissibility of pledge as security for salam, to which modern specialists also point (Desai, 2021), corresponds to the financing party's need to protect itself against non-performance by the supplier. The principle of the pledgee's liability within the lesser of the two amounts, in its turn, retains its significance for the assessment of risk where pledge is used in Islamic financial products.

At the same time, a number of provisions of the classical text call for reconsideration in modern conditions. The list of goods admissible as the subject matter of salam was determined by the possibility of standardising their characteristics; the development of standardisation and certification widens the range of such goods, while the requirement of the availability of goods on the market acquires a new content in conditions of global trade. The textual discrepancies identified testify to the need to prepare a critical edition of Kanz al-Daqāʾiq that takes account of the manuscripts preserved, among other places, in the collections of Uzbekistan (Abushev, 2015).

CONCLUSION

The study has shown that in Ḥāfiẓ al-Dīn al-Nasafī's Kanz al-Daqāʾiq the salam, istiṣnāʿ and rahn contracts are set out as an interconnected system of norms that makes it possible to conclude transactions in goods absent at the moment of the contract and to secure their performance. For salam al-Nasafī establishes strict conditions – a precise description of the goods, a term of not less than one month, full advance payment before the end of the majlis, the prohibition of disposing of goods not yet received, and the continuous availability of the goods on the market, which distinguishes the Ḥanafī position from the opinion of the other schools. Istiṣnāʿ is permitted in articles for which a settled customary practice exists, with the customer granted an option after inspection. Pledge is treated as the retention of a thing to secure a debt, with the pledgee liable within the lesser of two amounts – the value of the pledge or the amount of the debt.

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The textual analysis has revealed discrepancies in modern editions – the omission of the sentence on the place of delivery of goods requiring no transport, the replacement of the word qarya by qurba, and variation in the terminology of the chapter on pledge – which must be taken into account in interpreting the norms and in preparing a critical edition of the text. The provisions of Kanz al-Daqāʾiq on salam, istiṣnāʿ and pledge retain their practical significance for modern Islamic financial products of advance and production financing, and their study contributes to the formation of a scientifically grounded basis for the development of Islamic financing, including in Uzbekistan.

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