Investigating the nature of "Istisna Contract" from the view point of Shia’te

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Definition

The jurists of the various schools defined *istisna’* as a contract containing the purchase of goods which is recommended by a customer. According to a perfect definition; *istisna’* is a contract held about a goods about which the transactors agree that it be made according to the characteristics and conditions determined in this contract and in return for it, the recommender pays the maker a sum. Therefore the pillars of this contract are the maker (*sani’*), the recommender (*mustasni’*), the recommended goods (*masnoo’*), the price. Of course, that istisna’ is allotted to the industrial recommendations so it isn’t employed in the commercial (business) or agriculture fields, therefore it should be regarded as facing Muzara’a and Musaqat and Mudharaba.

Importance of Istisna’ in the Economy and banking

Undoubtedly, in these days the make of the great industrial commodities is often caused by the state or the private companies. Because the companies and the organizations buy such commodities in conformity the characteristics they consider, therefore The great factories usually don’t produce the commodities involve high cost, until the purchaser recommends one of them with all its characterize based on a confirmed contract. As the greatest part of the production units are connected together, and in the other side as the most basic element in the activity of that units is provision of the needful capital, in addition to the securing of the suitable market to sell the produces thus istisna’ can secure all these requests well.

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1 - Terminology-e-huqooq 1/334, alju’ala wa alistisna’, p 29,
2 - Terminology-e-huqooq 1/334, alju’ala wa alistisna’, p 29,
Furthermore, in the banking system of the various countries the banks apply istisna’ to provide the tools and machinery that the artisans need, so against the past time, that the consumers were referring to the producers and the makers directly, nowadays the banks play the role of the broker in istisna’ deals, thus, this contract is concluded between the banks and the producers and the clients of the banks don’t have hand in it. Of course that they recommend the bank to provide the commodities considered by them and deliver up them. Therefore the contract concluded between the banks and the clients is the selling not istisna’. The importance of this role of the bank manifests in the case we accept that use of Mudharaba leads the economy of a country towards the case of the dealership and trade economy! This leads to the economic dependence. For this reason the banks should be active in the industry and production fields to provide the facilities for the artisans and in this manner step to facilitate the occupation and progress the development operations. Finally, as the duty of the banks is absorption of the various deposits and applying them in the profitable field so the importance of istisna’ in the banking activities manifests itself more and more. Because the profitable operations are fulfilled by giving the financial facilities to the industrial companies which are active in the industry part.

Of course, we should not neglect that the banks may play one of two roles in istisna’ i.e, they sometimes play the role of the recommender (mustasni’), so in this case they are regarded as the attorney of the clients if the stock needed for producing be provided by the clients of the banks. But if this stock is provided by the banks and the banks interfere in istisana’ personally, in this case the recommended commodity is possessed by the banks and then they are transferred to the clients through the selling or one of the other contracts.

**The Nature of Istisna’**

As we intend to debate about istisna’ in shia’a viewpoint, thus we’ll introduce the viewpoints of the other Islamic schools briefly. The jurists have dispute with each other about the nature of istisna’, some of hanafites said that this contract is promise, Hakem shahid and Saffar and Mohammad ibn salama are in this group³.

But the majority of Hanafites believe that istisna’ is an independent contract included in one of the known contract like baj’ or ijara⁴. Malikites believe that this contract is bai’ wether the known “bai’ or bai’ salam”⁵. Shafiites regard istisna’ as bai’ salam like the Hanbalites⁶.

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³- Mabsoot,sarakhsi,12/139
⁴- Mabsoot,sarakhsi,12/139
⁵- Mulhaq almudawwana alkobra,muqaddimat ibn rushd 5/385
⁶- Alfiqh almanhaji 3/53,alju’ala wa alistisna’ p.37
At last in connection with that if *istisna’* is a revocable contract or an irrevocable, *Hahafites* consider it as an irrevocable contract for both transactors against the jurists of the other schools that regard it as a revocable contract.

**Istisna’ in Shia’a viewpoint**

Although it seems that nobody of Shia’a jurists in the beforehand of *Shaikh Tousi* has discussed about *istisna’* and he is the first jurist who has discussed in this field in his known books i.e. *Al-khilaf* and *AL-Mabsoot*, but it is very necessary to investigate about this claim, perhaps it proves to be against the reality. *Shaikh Tousi* said in *Alkhilaf:* “*istisna’* is not lawful in recommending the high boot or shoes or the wooden or zinc or copper or iron dishes, *Shafiite* believes this too, but *Abu-hanifa* allows it, because the people do it habitually. The reason of our belief is the consensus (ijma’) on that is not incumbent on the maker to deliver the recommended commodity to the client after it be made, and the client isn’t obligated to take possession of that commodity, whereas if *istisna’* was lawful the transactors be obligated to fulfill it.

The second reason is that the recommended commodity is unknown for the client at the time of the contract." He too said in *AL- mabsoot:* “*istisna’* is not lawful in recommending the shoes and high boot and all the wooden or zincic or copper or iron dishes, so if the two parties do it, the contract won’t be correct, and none of them be obligated to fulfill it.”

We can regard some points in *shaikh Tousi’s* words:

The first point is that he claimed the consensus (ijma’) as the first reason of the invalidity of *istisna’*, whereas it is claimed that nobody of Shia’a jurists has discussed in *istisna’* before *shaikh Tousi*!!

The previous books of Shia’a like”*Muqni’*”, from *shaikh Sadouq*, “*Muqni’i’a*” from *shaikh Mufid* , “Intisar*” and “masail Alnasiriat*” from *Saied Murtaza* and at last, “*Kafi*” from *Abulsalah* prove that fact, because these known- jurists of Shia’a didn’t mention anything about *istisna’*. But I think that there are some probabilities about *shaikh Tousi’s* claim, i.e he maybe considered istisna’ as a promise (Muwa’ada), and as the renowned fatwa of Shia’a jurists consider the promise as non- obligatory, therefore he mentioned this renowned says here as a consensus. The following traditions of *Imam Ja’far al-sadiq* confirm this fawa:

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7.-Alfatawa alhindia 3/208  
8.-Mabsoot sarakhsi12/139,almuhazzab,alshirazi 1/297  
9.-Alkhilaf,3/215,kitab alsalam  
10.-Mabsoot 2/194,bab alsalam  
11.-Paper of bai’-e-istisna’,jamshid ja’far pur (Persian)
1. *Imam sadiq* said about one who asks the seller to provide a goods for him for a profitable price: “If the two parties consider the client free in taking possession of that goods, the contract will be lawful.”\(^{12}\)

2. “*Mansour Ibn Hazim* questioned *Imam sadiq* about one who orders another one to buy a goods for him and then sell it to him; *Imam sadiq* answered that it is lawful because the ordered man can sell that goods or refrain from that after buying it.”\(^{13}\)

Occasionally, what *shaikh* has said in the end of his phrase in *Al-Mabsoot* confirms this probability because he has mentioned that the maker (*sani’*) is free in delivering up the goods to the recommender. Therefore he intended that as *istikna’* is a promise (*Muwaada*) thus *sani’* is free in giving the goods just as is the recommender.

Among the contemporary jurists of shia’a there is one scholar named Ayat – ullah Mumen that regards *istikna’* enforceable as a promise as we mentioned above. For example the recommender says to the maker: “Do make a certain thing! May I buy it.”\(^{14}\) The second probability about the consensus mentioned in *shaikh Tousi*’s phrase is that maybe he has regarded *istikna’* as a primary commitment (*Iltizam ibtidai’e*) which is not obligatory in the majority of shia’a jurist’s viewpoint, according to this probability the claim of *ijma’* is acceptable about *istikna’*. The third probability in this field is that maybe *shaikh* has considered *istikna’* as a “*salam bai’*”. Because one of the conditions of “*salam bai’*” correctness is determining the due date of delivering up the goods and existence of that goods in that time. Whereas the two parties of *istikna’* don’t determine a due date for making and delivering up the goods. Therefore the deal is null and void, (*Mu’amala ghararriia*), and this fatwa is supported by shia’a *ijma’*.

*Sahib-ul – jawahir* a jurist of shia’a said:

“the renowned fatwa of shia’a regards determining the due date in “*salam bai’*” as a condition of this contract correctness”\(^{15}\).

The second reason mentioned by *shaikh* in regarding *istikna’* null and void is that the goods is unknown in the time of the contract. According to this reason it seems that he may accept this contract if the characteristics of the recommended goods be known or determined by the client, specially that nowadays the transactors are very careful in determining and describing the characteristics of the goods so that as if that goods is ready and made in the time of the contract. Of course that the goods and its characteristics should not be described and determined perfectly so that it becomes scarce!

\(^{12}\)*Wasai’l alshia’a’, bab 7 abwab ahkam alu’qood,tradition No.3

\(^{13}\)*Wasai’l alshia’a’, bab 7 abwab ahkam alu’qood,tradition No.6

\(^{14}\)Paper of istisna’,Ayatullah Mumen (Persian)

\(^{15}\)*Jawahir alkalam 24/267
In addition to these points it should be mentioned in this field that some of the contemporary author of shia’a has claimed in their works that nobody of the shia’a jurists in the period next to Shaikh Tousi has discussed in istisna’ whereas we see some of those jurists like Ibn zohra, Tabatabie, Muhammad najafi and Muhaqiq hilly have discussed in making some goods like cooking the meat or breath, although they mentioned this in the “salam” section.16

And finally, one of the scholars has claimed that it seems that istisna’ is null and void in the jurists’ viewpoint especially who were after shaikh Tousi. Because they have mentioned some conditions in salam which istisna’ can’t be valid under considering that conditions.

In meeting this claim we should say that they considered salam void about selling meat and breath and jewelry or bow and arrow in order to the description of these goods so that they be determined is impossible,17 thus they didn’t intend to say that istisna’ is void although the description is possible!!

What is the difficulty?

The main challenge meeting istisna’ is that the current custom doesn’t consider this contract as a commitment of selling, because no contract is concluded after making the recommended commodity, unless it is delivered up to the client according to istisna’, furthermore the maker regards himself entitled to the price just as the client do it about the goods, and he may sell it to a third person! To meet this challenge the contemporary scholars of shia’a present five idea as follows:

1. Istisna’ is a revocable and independent contract.
2. It is a kind of bai’.(selling)
3. It is a kind of “ijara” or “ju’ala”.
4. It is combined of several contracts.
5. It concludes order make so that the commander is regarded as the security of the commodity.18

To analyze these views, we should say that what was current as the past times which is applied nowadays in the wide level of deals can’t fall under bai’ or ijara or each one of the current contracts in fiqh. On the contrary the current custom considers it as a independent contract. Istisna’ is not bai’, because in bai’ the goods (mabi) is taken possession for a certain return (thaman), whereas, in istisna’ the transactors deal the making operations, thus they consider

16-Jawahir alakalam 24/280
17-Refer to:JawaHIR ALKALAM 24/275
18-Paper of istisna’-sefaresh-e-sakht,Ayatullah shahroodi (Persian)
taking possession of the recommended commodity as a result of the transaction.

In the other hand, *istisna’* is distinguished from *ijara* by the main differences , i.e; although, *ijara* is sometimes concluded in the industrial field, but in this contract, the raw materials are provided by the tenant (*musta’jir*) and the labourer changes them into a goods by the making operations, thus, the labourer doesn’t vest the goods to the tenant, furthermore if the raw materials be provided by the maker (*ajir*), the made goods is not taken possession as soon as the making operations finish, because in this case the transactors, conclude an other contract.

Regarding *ju’ala*, it should be mentioned that in this contract the object is the worker’s action therefore there is not any goods taken possession by the commander (*ja’il*). The jurists have defined *ju’ala* as a contract concluded about a worker’s labour for a certain return. Let us suppose that the *ja’il* says: “each one makes that goods for me, I’ll give him this return (*ju’l*)”. In this case if the *ja’il* provides the raw materials by himself it will be distinguished from *istisna’*, because in the current *istisna’* these materials are provided by the maker not the recommender. And if these materials are provided by the worker in *ju’ala*, the *ja’il* will take possession of the made goods after concluding another contract like *bai’* whereas in *istisna’* the recommender takes possession of the goods as soon as it be made.

Regarding the view considers *istisna’a* as a combined contract i.e; it combines of three contracts including the attorney ship (*wakala*), buying based on attorney ship (*shira’-bil- wakala*) and finally *ijara*. It means that the recommender gives the maker power of attorney to buy the raw materials, and then the maker buys these materials based on the attorney ship and finally the maker is regarded as a labourer (*ajir*) to make the recommended commodity. We should criticize this claim and say it should be regarded that the price given to the waker (*sani’*) is for both the making operations and the made goods whereas, that view mentioned above requires that the return of each one of the three contracts forming *istisna’* is determined separately!

Otherwise, non- separation of these returns leads to the ignorance of the return and the transaction will be fall under “*gharar*”! Because maybe one of the three contracts proves to be void or cancelled, therefore we can’t distinguish its return from the others. In addition to this there is not any combined contract among the current contract in *fiqh*, and what seems to be combined like *Mudharaba*, it – in fact – is a simple contract, of course that it may result in several effects belonged to the various contract but it is not related to its nature just as is claimed!!

Some of shia’a jurists this days have claimed that *istisna’* should be regarded as a guarantee contract, they said: “*istisna’* is ordering to make a goods just as the commander becomes the guarantor of the goods as soon as it made, thus, he (*mustasni’*) is guarantor of the price for
taking possession of the goods.”

This group of jurists want to solve two challenges related to istisna’, i.e; the permanence of the goods under the maker’s possession until it be delivered to the client. And the second challenge is the guarantee of the client about the recommended goods after making and delivering it up to him.

It seems that this view meets several problems as follows:

This view is based on the rule of the guarantee based on order (dhaman- bil- amr) whereas this juristic rule is related to wasting the labour or the property (itlaf – ul – a’mal, almal), whereas in istisna’ the recommended goods is not wasted and although the labour is wasted in making operations but the price given to the maker is for both the labour and the goods! In addition to this, that view requires that the client is guarantor for the waste of the goods if it be wasted before delivering it up to him although it happens without encroachment or dissipation, whereas this is in opposition to the current custom!

In addition to this, in istisna’ the guarantee imposed on the client is not caused by the wast or (itlaf), on the contrary, it is caused by the transactors’ satisfaction and their agreement. Of course it should be regarded that if the rule of guarantee(Qa’idat-ul-dhaman) is the base of the price it requires that the client is guarantor according to the price of the day the wasting happens which means that he should pay the likeness price not determined price! (thaman-ul-mithl, not, thaman-ul- musamma).

Conclusion

There are two ways to correct the novel contracts (U’quod mustajidda):

1. We can correct them through the “narrations – generality” (asl-ul-u’moom) and “the rule of inclusion” (Q ai’dat-ul-itlaq), which are supported by the verse of the Quran kerim (awfu’o- bil- u’quod), because the verses like this include confirming all the contracts excepting those which are claimed as null and void by shari’.

2. It is not necessary to use the rules mentioned above in correcting the novel contracts, because we believe that shari’ has ceded meeting the needs to the intelligentsia (al – u’qala’) that have been allowed to establish new or novel contracts given their daily needs, thus we can consider each one of this contracts as a lawful transaction until shari’

19. Qira’at fiqhiia mu’asira 2/265
20. Soura Almai’da/1
doesn’t prevent it, although it is a novel. Of course, we can deduct shari’ ‘s satisfaction through the lack of his prevention, thus we aren’t obliged to prove that shari’ has confirm each one of these novel contracts.

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Imam Ali- ibn- Abitalib said in this field: “Indeed God has left something unsaid just as he has made something incumbent upon us, thus you should not get yourself into trouble to know what the commandments of the first group are!!”

3. In addition to this, the messenger Muhammad (p.b.u.h) has said to the muslims: “you are more learned in your mundane affairs”22. Allah said in the Quran karim: “Oh believers! Don’t question about something that if their commandments appear for you, you will be sad.”

Given this, istisna’ is an independent contract and its nature is that the client wants the maker to make a certain commodity with special characteristics for paying a certain price to him, just as the commodity is possessed by the client as soon as it made and is presented to him and for this, he becomes guarantor of its price.

Thus, the client’s guarantee is considered as formality, i.e: the client (mustasni’) becomes guarantor of the maker labour gradually as soon as the making operations start until it finish. Of course, that this guarantee is suspended (ta’liqi) not peremptory (tanjizi) namely, it becomes fixed as soon as it is delivered up to the client. The result of such suspended guarantee appears when the commodity is wasted before the delivery; in this case we can regard the maker as guarantor of that commodity.

This suspended guarantee is distinguished from that is caused by the rule of guarantee (Qa’idat-ul-dhaman), because it is caused by the nature of the contract not any thing else. The origin of this suspended guarantee is the current custom in addition to the implicit commitment (shart-irtikazi) i.e” the nature of istisna ‘includes an implicit commitment requires that the client will be guarantor of the price as soon as the maker delivers the goods up to him and this price is for sum of both the raw materials and the making operations.

Finally, maybe one makes difficulty and says: “How can the commitment (shart) cause to a juristic effect whereas the transposition of the possession in fiqh is limited to the contract and unilateral obligation (Al-a’qd- wal- iqa’)?”

21. Tafsir almizan, Allama Tabatabaie 5/157
22. Azwa’ ala alsunna almuhammadiia p.93
23. Soura Almai’da /101
To respond this difficulty we should said that there are many items that in these the conditions or commitments cause to the transposition of the possession like the “Result condition (shart-ul-natija)" for example, if the seller says to the buyer that I sell this car to you on condition that you give me power of attorney to sell your house.

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In this case the jurists say that the attorney is finalized as soon as the bai', concluded, and the two parties don’t need to conclude an agency contract.

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