The Customary Practice of Gerawee in Afghanistan: A Case For Transitioning to Real Equity-Based Finance

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Abstract
The customary practice of Gerawee, in principle, refers to a specific form of synthetic loan. It is a pledge-lease transaction that enables owners of immovable properties to obtain financing based on the market value of those properties in exchange for either paying regular payments in form of rent or transferring the right to lease those properties to a financer. The practice has been developed to help debtors and creditors avoid the prohibition of interest bearing loans under Shari’ah. Despite the efforts of some Muslim jurists to justify the practice under Shari’ah, it is widely criticized. In particular, Afghan muftis generally consider the practice of Gerawee “un-Islamic,” and under Afghan civil code, the practice has no formal standing. Nonetheless, it has been used, and unfortunately, has created problems such as fraud, and ineffective legal protection for financiers.

This article recommends that Afghans adopt a modified Islamic finance product known as the “Musharakah Mutanaqisah Partnership (MMP).” The MMP is a joint-ownership arrangement created by a sales contract, which was developed in Muslim countries to solve the housing problem. The modified MMP (MMMP), as prescribed in this paper, can deliver the expectations of the parties, and address the legal and Shari’ah-related objections by transforming the practice from debt-based finance to equity-based finance under which the parties share the risk. This solution eliminates the main causes of criticism of an MMP, which are the lack of a bona fide sale contract and risk sharing.

Keywords: Gerawee, Musharakah Mutanaqisah Partnership, Islamic Mortgage, Customary Financing, Prohibition of riba, Afghanistan Civil Code.
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Introduction

Afghans have historically had limited formal mechanisms to obtain individual financing; as such, they have turned to customary financing practices—most commonly Gerawee. The customary practice of Gerawee, in principle, refers to a specific form of synthetic loan: a pledge-lease transaction that enables owners of immovable properties to obtain financing based on the market value of those properties in exchange for either paying regular payments in form of rent or transferring the right to lease those properties to a financer. This practice has been common in most Muslim countries, with some variation, helping debtors and creditors to avoid the prohibition of interest bearing loans under Shari’ah.

To satisfy economic and practical imperatives, some Muslim jurists have developed stratagems to justify this form of practice under Shari’ah; however, the practice is still widely criticized. In particular, Afghan muftis generally consider the practice of Gerawee un-Islamic, and under the Afghan civil code the practice has no formal standing. Nonetheless, it is used, and unfortunately, has created problems such as fraud, and ineffective legal protection for financier. This article recommends that Afghans adopt a modified Islamic finance product known as the “Musharakah Mutanaqisah Partnership (MMP).” The MMP, sometimes called Islamic mortgage, is a joint-ownership created by a sales contract, a practice developed in Muslim countries to solve housing problems.

This recommendation assumes that when parties engage in Gerawee, the Creditor/Gerawee-ee wants to turn her limited assets into safe revenue-generating assets with equity protection; at the same time, the lender/Gerawor wants to acquire short/medium term credit against value of the property. The modified MMP (MMMP), as prescribed in this article,
can meet both of these expectations, while addressing the legal and Shari’ah-related objections by transforming the practice from a debt-based finance to a real equity-based finance under which the parties share risk. Thus, under MMMP, the main causes of criticism of MMP namely the lack of a bona fide sales contract and risk sharing are eliminated.

This article begins by describing the Shari’ah doctrines pertaining the prohibition of *riba*, including their modern development. It also describes the doctrine of legal stratagem (*hiyal*) as developed by Islamic jurists in the pre-modern period—mostly jurists associated with the Hanafi school of jurisprudence (otherwise known *fiqh*)—to legitimize/legalize certain financing practices by avoiding the appearance of *riba*. Next it provides a description of the customary practice of *Gerawee* and its variations and an analysis of how the practice interacts with Afghan law. Subsequently, the article provides an overview of the *Musharakah Mutanaqisah* Partnership as it has developed, and as it is currently practiced in Pakistan, Indonesia, and Malaysia. Finally, it suggests that a Modified *Musharakah Mutanaqisah* Partnership could be adopted as a reform to preserve the benefits of *Gerawee* through a legally recognized financing mechanism.
I. Background

This section provides background on the legal landscape in Afghanistan, particularly regarding the civil and Shari’ah laws and jurisprudence that affect the practice of Gerawee. Ultimately, it reveals how the Afghan civil law governing statutory Bai al-Wafa (Troth Sale) is less consistent with Gerawee than some scholars may have previously thought—examining both the language of the statute and past court decisions. Through this discussion, it reveals a need for reform—a way to enable equity based finance while complying with Afghan civil law and Shari’ah.

A. Prohibition of riba under Shari’ah

The term “Shari’ah” (often translated into English as “Islamic law”) refers to commands, prohibitions, and guidelines that God (Allah) has addressed to humankind concerning their conduct in this world and salvation in the next. It is understood to have been revealed in two scriptural sources: the Qur’an, which Muslims believe is literally God’s word, and the records of the Prophet’s actions, known as the sunnah. Muslim scholars try to uncover the rules of Shari’ah by studying scriptures and applying a number of hermeneutical and logical tools—attempting a process called ijtiahd. Understanding that human reason is fallible, Muslim jurists consider their interpretations to be only presumptive and do not equate them with the authority of divine revelation.

Scholars have distinguished generally between Shari’ah (God’s word as God himself understands it) and Fiqh (“jurisprudence” or humans necessarily imperfect understanding of God’s Shari’ah). The latter is considered understanding of Shari’ah, and not

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2 Id. at 16.
3 Id.
4 Id.
Shari’ah itself. The process of interpreting Shari’ah and recording human understanding of it (fiqh) was institutionalized during the medieval period through guild-like juristic institutions called madhabs. Five dominant madhabs survived into modern times: the Hanafi, Malaki, Shafai, Hanbali, and Shi’ah.

Islamic jurists have uncovered in the Qur’an a prohibition on something called “riba.” The prohibition of riba was discussed in several Quranic verses, most famous of which are 2:275-280; in those verses Qur’an says the following: "They say: 'buying and selling is but a kind of riba' - while God has made buying and selling lawful (halal) and riba unlawful (haram)."

The term riba literally means “increase,” but there is universal agreement among Muslim scholars that not all increases resulting from trade fall within the prohibition of riba. According to Muhammad Fadel, under classical doctrine of Fiqh, the rules of riba can be best understood as ex-ante and ex-post restrictions on freedom of contract. However, through writing of Islamic reformists like Muhammad Iqbal in India, and Sayyid Qutb in Egypt, the riba became synonymous in the minds of many people with interest bearing loans.

Some thinkers who called for revival of Islam blamed the interest-based financial system for exploitation of poor, and spread of poverty in Muslim countries; they have called for an

\[\text{Sources:}\]

5 Id.
6 Id. at 68-98.
7 Id.
11 Id.
interest-free financial industry based on Islamic law. The modern theory of Islamic economics was introduced which has social justice, as its basic tenant. Around the same time, another group of modernist jurists has emerged in the Islamic world, scholars like Rashid Rida in Egypt who with the same claim, the need for a revival of Islam, reached the exact opposite conclusion. These thinkers applying new methods of juristic reasoning concluded that interest-based finance is not necessarily irreconcilable with Islamic law. The view of latter group, however, is in the minority, and today a majority of Muslim scholars and lay-Muslims consider riba to prohibit any form of interest bearing finance.

1. Classical doctrines

Muhammad Fadel argues that the classical doctrine of Fiqh concerning riba can be best understood as ex-ante and ex-post restriction on the certain contracts. Ex-ante part of the doctrine restricts the ability of the parties to enter into certain contracts while the ex-post part prohibits parties from settling their contractual obligations in certain ways.

a. Ex-post riba

Ex-post restriction on settlement of obligations is the core of doctrine of riba expressly proscribed by the Quran. According to early jurists and exegetists, the transaction referred to in the prohibitive verses of the Qur’an occurred when a debtor failed to pay a debt upon its maturity. In such case, a creditor would agree to defer the maturity date of the debt in exchange for an increase in the amount of debt. According to Reza Aslan, this practice was very common

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12 Id.
13 See 3 MUHAMMAD AL-ZURQANI, SHARH AL-ZURQANI ‘ALA MUWATTA’ AL-IMAM MALIK [The Explanation of Al-Zurqani on Muwatta of Imam Malik] 324 (Dar alma’ rifa 1987) (17th Century) (quoting an early authority as saying “In the days before Islam, riba would occur in cases where one man owed another a debt maturing in the future, and when that debt matured, the creditor would ask his debtor ‘Shall you pay or shall you increase?’ If the debtor paid, he would take [his debt], but if the debtor did not pay, he would defer the maturity date and increase the debt.”); 3 MUHAMMAD B. JARIR AL-TABARI, JAMI’ AL-BAYAN ‘AN TA’WIL AY AL-
among Meccans. In Mecca, where tribal solidarity was weak, the poor, orphans and widows had no option but to borrow money to maintain themselves. When they could not repay their debts, the lenders would increase the amount of debt in exchange for postponing the repayment. Finally, unable to repay the large amount of incurred debts, they would loose their freedom and become their lenders’ slave. The Qur’anic verses applied directly to this kind of insolvent debtor.

In addition to being closely related to the insolvent debtors, the majority of classical Muslim jurists have also extended the rule to prohibit settlement of one debt with a future debt on the terms different than original debt—particularly without regard to insolvency of the debtor. In addition to the prohibition of this pre-Islamic practice of *riba*, a majority of Muslim jurists have developed another corollary to this principle. According to this corollary, a creditor cannot agree to provide a discount on an amount owed in exchange for pre-pay of obligation by his debtor.

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QUR’AN [Compilation of Statements and Interpretation of the Quran] 101 (Maktabat mustafa albaby al-halabi, 3rd ed. 1968) (9th Century) (quoting an early authority as saying that “The riba of the people before Islam would occur when a seller sold on credit, with the debt maturing on a specific date in the future. When the debt matured, but the debtor had no means to discharge the debt, the creditor would defer payment and increase the debt.”); 1 ABU BAKR MUHAMMAD B. ‘ABDALLAH IBN AL-‘ARABI, AHKAM ALQUR’AN [The Rulings of Quran] 241 (Ali Muhammad al-Bijawi ed., Dar al-Ma’rifa n.d.);

14 REZA ASLAN, NO GOD BUT GOD 32 (2011) (Mecca, also transliterated as Makkah, is a city in the Hejaz, and the capital of Makkah Region in Saudi Arabia. The Mecca is the city where the Prophet Muhammad first started his call to a new religion, which is now know as Islam.)

15 Id.

16 Id.

17 Id.


19 Id.
b. Ex-ante riba

In addition to prohibition on settlement of exiting obligations, the doctrine of riba, as developed by classical jurists, also puts restrictions on the formation of a contract. Unlike ex-post riba, Muslim jurists differ on the scope of these ex-ante restrictions, restrictions that can be divided into two categories: riba of excess, and riba of delay, which are discussed below.

i. Ribab of excess

The doctrine of riba of excess is based on the tradition of the Prophet Muhammad. However, Muslim jurists disagree about the scope of the prohibition of riba of excess. In principle, riba of excess disallows trade of a genus of goods when the quantity of the traded commodities changes. However, when the commodities are of a different genus the prohibition does not apply. For example, trading one quantity of good dates (the fruit) with two quantities of perished dates would violate the prohibition of riba of excess. Whereas the trade of one quantity of good dates with two quantities of perished grapes, and then trading the perished grapes with perished dates would not violate the principle. Although the result is the same, the intermediary transaction (trading dates with grapes) circumvents the prohibition of riba of excess. Muslim jurists were not only unconcerned about these kinds of transactions (sometimes referred to as back-to-back transactions), which circumvent the prohibition of riba, but they also encouraged

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20 For a discussion of difference of opinions in classical Figh on question of riba of excess see Muhammad Fadel, Supra note 10, at 10.

21 The proscription of Riba of excess comes from a tradition of Prophet Muhammad in which he “prohibit[ed] the sale of gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, unless it is the same [quantity] for the same [quantity] or the thing [itself] for the thing [itself], and that whosoever gives an increase or receives an increase, has committed riba [of excess].”
them. According to Muhammad Fadel, the rationale behind this prohibition can be best understood as prevention of price manipulating in a society with scared resources.23

ii. Riba of delay

In classical fiqh, in addition to the restriction of the trade within a genus of goods Islamic jurists have also reasoned that Islamic law restricts the terms on which certain commodities could be traded on a deferred basis.24 This prohibition is also based on the traditions of the Prophet Muhammad.25 The doctrine of the riba of excess prohibits trade within a genus of goods when the counter-value was equivalent; however, under the riba of delay, even if the counter-value is equivalent, if the trade is on a deferred basis, the trade is prohibited.26 Muslim jurists differ about the scope of the riba of delay, too.

As was explained above, the prohibition of riba primarily relates to the settlement of debts and the terms of sales. However, any increase (whether monetary or non-monetary) with regard to a legal loan (loan for consumption or qard) has also been included in the prohibition of riba. The reason for this inclusion is that under Shari’ah, unlike in contemporary usage, qard is a charitable act. Therefore, according to the majority of classical Muslim jurists, neither a stipulated date of repayment nor a condition that would give any benefit to the person making the qard would be enforceable.27 Although this prohibition is drawn from the charitable nature of

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22 3 AHMAD IBN MUHAMMAD AL-DARDIR, supra note 18, at 48.
23 Muhammad Fadel, Supra note 10, at 10.
24 Id.
25 ([Trading] gold for gold is riba unless [delivery is] hand-to-hand; [trading] wheat for wheat is riba unless [delivery is] hand-to-hand; [trading] dates for dates is riba unless [delivery is] hand-to-hand; [trading] barley for barley is riba unless [delivery is] hand-to-hand.)
26 Muhammad Fadel, Supra note 10, at 11.
27 Id. at 15.
qard, not the *riba* of delay, it has become the center tenant of prohibitive doctrine of *riba* in modern *fiqh*.

2. Modern doctrines

Modern doctrine concerning *riba* can be generally categorized in two main doctrines: general prohibitions and general permissibility of interesting bearing loans or finance. Before explaining these doctrines in greater detail, a brief description of the environment in which these doctrines are formulated, is presented.

The “modern Islamic world” generally refers to the condition that was created in the seventeenth century as a result of the creation of the modern nation state in a majority of Muslim countries.\(^{28}\) Closely tied to the experience of colonialism, the creation of the modern state and its accompanying socio-economic and socio-political changes have radically affected the reality of the Muslim world.\(^{29}\) The apparatus of the state has progressively asserted control over the juridico-legal aspects of Muslims’ life, and has compelled Muslim jurists to seek out and negotiate a new role in the new juridico-legal reality of Muslims. In this new juridico-legal reality, state law became the main venue for incorporation of Islamic values and rules in the society, i.e. Islamization of law.\(^{30}\) However, in the twentieth century, creation of Islamic finance has provided an autonomous domain for development of Shari’ah outside the realm of state law. It is in this new environment that the modern Islamic doctrines of *fiqh* have developed; therefore, they are reflective of the tension between the west and Islam, a tension that has its roots in colonialism.


\(^{29}\) *Id.*

\(^{30}\) *Id.*
a. General prohibition of simple interest bearing loans

A majority of modern Muslim jurists interpret the doctrine of riba to render any kind of lending at interest as unlawful.\textsuperscript{31} For these jurists, the doctrine of riba is a means to achieve economic justice, and interest-bearing loans are tools of economic exploitation. Jurists like al-Zuhayli, Abu Zahra, and Islamic thinkers like Muhammad Iqbal, and Sayyid Qutb, to name a few, are among the proponents of this view.\textsuperscript{32} This view diverges from the more classical doctrine where the charitable nature of qard was the only concern with regard to prohibition of interest-bearing loans. The development of Islamic finance can be directly attributed to the dominance of this modern view. It renders interest-bearing finance practices, the foundation of conventional banking, unlawful (haram) under Shari’ah, creating a demand for interest-free finance, or “Islamic finance.”

In part this divergence can be understood as an attempt to form a distinct Islamic identity—distinct from west in societies where social and economic injustice is rampant.

b. General permissibility of interest bearing loan

Some Muslim jurists challenge the idea that there is a general prohibition of interest-bearing loans. Although this view is in the minority, it has some significant support. Proponents of this view, utilizing new utilitarian methodology, hold that interest-bearing loans are not necessarily prohibited under Islamic law.\textsuperscript{33} For example, Rashid Rida and Abdul Raziq Ahmad al-Sanhuri,


\textsuperscript{32} Id.

\textsuperscript{33} Id.
both from Egypt, are among the supporters of this view.\textsuperscript{34} Scholars in other Muslim countries, such as Indonesia, also support this view.\textsuperscript{35}

**B. Legal Stratagem (Hiyal) developed to avoid violation of prohibition of riba under Shari’ah**

After a discussion of the doctrine of riba, in this section, another set of doctrines called hiyal are discussed. The hiyal doctrines are developed as legal stratagem to mitigate, inter alia, the restrictive effects of doctrine of riba.

According to Satoe Horil, “[h]iyal (sg. hila) in Islamic jurisprudence are ‘legal devices’ or skills used to achieve a certain objective, lawful or not, through lawful means.”\textsuperscript{36} Ibn Qayyim al-Jawziyya (d. 751/1350) also defined hiyal as a subtle management of aspects of legal transactions in ways that they were not intended.\textsuperscript{37}

The status of hiyal in Islamic jurisprudence remains an open question. Hanafis are among those who systematically used hiyal.\textsuperscript{38} Systematic use of hiyal by Hanafis led to the development of a specific field within their jurisprudence called makharij (“exits”).\textsuperscript{39} Despite the primary association of hiyal with Hanafis, Horil argues that Malakis too paid great attention to the underlying aim of hiyal in creating their doctrine of sadd al-dhara’i’, which is the prevention or avoidance of the evil consequences of legal acts.\textsuperscript{40} The function, legitimacy, and scope of these

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Satoe Horil, *Reconsideration Of Legal Devices (Hiyal) In Islamic Jurisprudence: The Hanafis And Their "Exits" (Makharij)*, 9 ISLAMIC LAW AND SOCIETY, 313 (2002).
\textsuperscript{37} 4 IBN QAYYIM AL-JAWZIYYA, I’LDM AL-MUWAQQI’IN [A Study of Both Sides]111, 252-253 (Matba’at al- Sa’ada, 1374/1955).
\textsuperscript{38} Satoe, *Supra* note 36, at 313-314.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 316.
hiyal are the subject of great debate in Islamic jurisprudence, with a majority of non-Hanafi jurists opposing the practice as mere disguises for allowing the practices that fall under the prohibition of riba.

The hiyal has become even more criticized by the rise of modern doctrines that claimed Islamic financial theories were inherently different from their western counterparts. Proponents of this view criticize Islamic financial institutions (IFIs) for not genuinely adhering to the principles of Shari’ah. However, after a thorough examination of the hiyal (makharij) within Hanafi jurisprudence, and its analogous in Malaki jurisprudence, Horil concludes the following:

*Hiyal* were solutions drawn from the materials of jurisprudence in accordance with the spirit of the law, as interpreted by the jurists. The Hanafis were not properly "formalists" but rather "utilitarians" who defined the law as providing remedies for those who sought them. “The Hanafis … called [hiyal] … makhdrij, i.e. ‘exits’ from anything that places a constraint upon daily life.”

In other words Horil argues that *hiyal* are consistent with the spirit of Islamic transaction law, as understood by Hanafis, which is to remove unnecessary constraints from beneficial transactions sought by Muslims.

*Hiyal* (Makharij) covers a wide range of practices and legal transactions; however, this article discusses only those that were developed to avoid violation of riba in Gerawee-like practices. As such, it examines *Bay’ al-Wafa*, and *Bay’ bil-Istighla*, noting that there are many other *hiyal*-based transactions in Islamic jurisprudence. *Hiyal* are also the basis upon which an

41 Id. 357.
entire industry of Islamic finances functions. Accordingly, the next sections also briefly discuss the hiyal in context of Islamic finance.

1. Bay’ al-Wafa: Sale with a Right of Repurchase

Rahn (commonly translated into English as “pledge”) is the sole formal security mechanism over assets in Islamic law.\(^{42}\) The Majalla\(^{43}\) gives the following definition of rahn: “A pledge [that] consists of setting aside property from which it is possible to obtain payment or satisfaction of some claims. Such property is then said to be pledged, or given in pledge.”\(^{44}\) Under rahn, the possession of the property must be transferred to the creditor. According to article 706 of Majalla, “If the pledge is not transferred to the effective possession of the pledgee, … such contract is incomplete and revocable.”

Rahn was never intended to be used as an income-generating transaction. Under Islamic law, rahn is merely a security contract (’aqd altawthiq) that serves as a legitimate guarantee of a debt, whether the debt arose from a loan contract (qard) or a deferred exchange contract (bay’ \(mu'ajjal\)).\(^{45}\) In addition to rahn, using hiyal, other mechanisms were also commonly used.\(^{46}\) These alternative hiyal-based mechanisms were more commercially effective, and in some cases income-generating.\(^{47}\) These mechanisms draw upon contracts and property rights in order to


\(^{43}\) AL-MAJALLA AL AHKAM AL ADALIYYAH [The Ottoman Courts Manual (Hanafi)], (last visisted Feb. 19, 2015, 05:32 PM), http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf, [hereinafter “Majllah”](Majalla is a manual of Hanafi jurisprudence that was developed by Ottoman to be used by judges in Ottoman courts. The Majalla is considered to be an authoritative collection of the rulings of Hanafis on most issues.)

\(^{44}\) Id. Article 701.


\(^{46}\) Nicholas Foster, supra note 42, at 145.

\(^{47}\) Id.
create security without violating the prohibition of *riba*.

It also should be noted that the use of this mechanisms, historically, has varied from place to place and from time to time; it cannot be assumed, therefore, that these mechanisms, as discussed below, were common in all places and in all times. *Bay’ al-Wafa* is one of these mechanism (perhaps the most common and famous one).

Under *Bay’ al-Wafa* (sale with right of repurchase), debtor A might “sell” an asset to creditor B. Then B would “pay a price” for it, $1000 for example. The contract would contain a repurchase condition, which would allow A to repurchase the asset by paying back the same price (the $1000) at a later date. During the term of this contract, the title in the property would remain with creditor B, but B could not make any change to the title or property that would render the repurchase condition ineffective. Thus, the property is, in effect, a security for the debt.

Some jurists have accepted this kind of contract as valid because of what they deem as “economic imperatives.” The *Majalla* acknowledges this position in Articles 396-403.

However, *Bai al-Wafa* has some weakness as security contract. First, like rahn, it is a possessory security meaning the position of the property must be transferred to the creditor. Second, according to art. 397 of the *Majalla* the creditor could not sell the property without the consent of the debtor even if the time of contract elapses. Finally, because of the resemblance to *riba*, the opinion of the jurists was widely divided on the question of which party is entitled to

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48 *Id.*

49 *Id.*

50 *Id.*

51 Like selling the property without the consent of seller/debtor A.

52 Nicholas Foster, *supra* note 42, at 159 citing Santillana.

53 *Id.* (this is consistent with both Hanafi and Maliki jurisprudence.)
the revenue of the assets. Art. 398 of the *Majalla* allows the parties to agree that a portion of revenue goes to the creditor. This version of Bai al-Wafa, which allowed for revenue sharing, was widely practiced in Egypt, Algeria, Turkey, also restrictedly was practiced in Syria and Lebanon.  

2. *Bay’ bil-Istighla*: the sale with right of redemption plus lease or borrow back by the vendor

It is suggested that *Bay’ bil-Istighla* was developed as a response to the problems with Bai al-Wafa. Under *Bay’ bil-Istighla*, the debtor A can “sell” an asset to the creditor B. Then B can “pay a price,” such as $1000 for it. Having taken possession, the creditor then can lease back the asset to the debtor. As in the Bai al-Wafa, the contract contains a repurchase condition, which allows A to repurchase the asset by paying back the same price (the $1000) on later date. The difference between the two contracts is that in *Bay’ bil-Istighla*, the debtor remains in possession of the property (it is a non-possessori security). Accordingly, the *Bay’ bil-Istighla* is remarkably similar to a mortgage. Since the *Bay’ bil-Istighla* is an obvious hiyla for allowing interest based-loan, majority or Muslim jurists have regarded it as unlawful under Shari’ah. Some jurists, however, have found it permissible for the practical reason that it helps those needing credit to obtain a loan. As such, the practice has become common in Egypt, Tunisia, and Algeria.

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54 *Id. at 147.
55 *Id. at 148.
56 *Id. 148.
57 *Id.*
58 In Egypt the Bay’ bil-istighla was recognized as the *gharuqa*
3. *Hiyal in Islamic finance*

This discussion examines the doctrine of *hiyal* in the context of the contemporary debate over the legitimacy of Islamic finance and banking. The aim is to show that debate over the legitimacy of *hiyal*-based financing is not limited to Afghanistan; rather it is a transnational one. Hence, Afghans can use the experience of other Islamic countries in regard to Islamic finance practices to address the problems associated with the local practice of Gerawee.

“Islamic finance” is commonly understood as a Muslim financial operation or *riba*-free banking. However, technically, the definition is broader. It includes not only finance that avoids *riba*, but also practices that avoid *excessive uncertainty* (which in Islamic term is referred to as *gharar*) and *excessive risk* (known as *maiser*). Islamic finance also tends to be committed to ensuring that profits are earned through investment in activities that are religiously permissible (halal), and consistent with Islam’s broader ethical and religious goals. To avoid the violation of doctrinal prohibitions of Islam, Islamic finance institutions (IFIs) have developed a range of diverse financial products, or “Shari’ah-compliant” products, to provide financial services to their Muslim clients in a way that is consistent with their religious

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60 *Id.*
61 *Id.*
62 *Id.* at 5.
63 *Id.*
64 *Id.*
65 *Id.*
66 Islamic financial institutions are those which operate based on principles of Shari’ah.
The legitimacy of various Islamic finance products, however, is being widely debated among Muslim jurists.

The nature of the debate is illustrated by the conflicting fatwas released after a 2008 meeting of scholars on Islamic finance in Pakistan. On 28th August 2008, the Shari’ah scholars at Dār al-Iftāy Jāmi’ah al-‘Ulūm al-Islamiyyah (Center of Fatwas of Association of Islamic Scholars) in Karachi issued a fatwa (non-binding ruling pertaining to the rules of Shari’ah), which declared present Islamic banking un-Islamic. The fatwa was followed by a number of fatwas favoring and opposing Islamic finance. In these fatwas, and more broadly in the literature about Islamic finance, the primary debate over the legitimacy of present Islamic finance revolves around the permissibility of using hiyal to circumvent Shari’ah restrictions on credit financing. Some argue that Islamic finance is heavily relying on hiyal to circumvent the prohibition of riba. They are discontent with the fixed rate mode used in products such as murabahad, ijara, and musharaka, which in their view are not really “Islamic.” They call for a “true” Islamic finance, which is based on the risk-sharing rather than fixed return.

Others argue that hiyal are an integral part of Islamic jurisprudence designed to answer difficult legal problems and alleviate hardship in Muslim lives. Most proponents of this position support current Islamic finance mechanisms. A third group, whose position lies in the

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69 Id. at 384; see also Valentino Cattelan, Shari’ah Economics as Autonomous Paradigm: Theoretical Approach and Operative Outcomes, 1 JISTECS, 3-11 (2013); Haider Ala Hamoudi, Jurisprudential Schizophrenia: On Form And Function In Islamic Finance, 7 CHI. J. INT’L L., 605-622 (2007).

70 Id.

71 Id.

72 Id.
middle, accepts the validity of use of *hiyal*, but argues that current Islamic finance goes too far in applying the *hiyal* to develop “Islamic” counterpart of conventional financial product.\(^73\) The latter group differs on the exact line between proper and improper use of *hiyal*, however, they agree with an emphasis on risk-sharing finance.\(^74\)

C. Gerawee

This section examines *Gerawee* in context of Afghanistan. It illustrates the various forms of *Gerawee* practices through hypothetical examples. The aim is to highlight the underlying economics of *Gerawee* as well as the nuances of its various practiced forms in Afghanistan. The understanding that is achieved in this section will be used in the last section of this article to show how the Modified *Musharakah Mutanaqisah* Partnership (MMMP), if adopted, is compatible with various forms of the *Gerawee*, and can effectively minimize Shari’ah and legal objection without altering the underlying economics of the practice.

1. *Gerawee* and its variations

The *Gerawee* is the most common customary micro-financing practice in Afghanistan. The following examples introduce the most common variation of this practice.

Example 1. A *Gerawee* transaction may proceed as follows. A, who needs credit (*Gerawor*), may enter into an agreement with B, who is willing to provide him with credit (*Gerawe-ee*). Under the terms of their agreement, B agrees to provide A with an amount of money to be fully repaid at a later date in exchange for the right to live in A’s house. The amount of money paid by B usually is much lower than the market value of the house. It is common for the agreement to specify the length of the contract (i.e. the date of repayment), however, B

\(^73\) Id.
\(^74\) Id.
usually will have the right to live in the house until the debt is fully repaid, even if the term of the contract elapses.

Example 2. *Gerawee* may also include scenarios like the following. Under this agreement, B agrees to provide A with amount of money to be fully repaid in a later date, in exchange for the right to lease A’s house for considerably lower rent than market price. Like the previous scenario, the amount of money paid by B is usually much lower than the market value of the house. Similarly, it is common for the agreement to specify the length of the contract (i.e. the date of repayment). However, under this arrangement, B usually has the right to retain the lease to the house until the debt is fully repaid, even if the term of the contract elapses.

Example 3. Another *Gerawee* agreement could involve the scenario where B agrees to provide A with amount of money to be fully repaid in a later date in exchange for the right to lease A’s house to a tenant. Under that scenario, B will receive the rent from the tenant. Like the previous scenarios, the amount of money paid by B usually is much lower than the market value of the house. It is common for the agreement to specify the length of the contract (i.e. the date of repayment); however, like the other arrangements described above, B usually will have the right to receive the rent from the tenant until being fully repaid, even if the term of the contract elapses.

Example 4. Another example of *Gerawee* is an agreement under which B agrees to provide A with amount of money to be fully repaid in a later date, in exchange for the right to lease the A’s house to a tenant. However, unlike the previous scenario, B will lease back the A’s house to A (meaning A will retain the possession of the house). B will receive the rent from the A. Like the previous scenarios, the amount of money paid by B usually is much lower than the market value of the house. Similarly, it is common for the agreement to specify the length of the
contract (i.e. the date of repayment); however, B usually has the right to receive rent from A until the debt is fully repaid, even if the term of the contract elapses.

In order to thoroughly understand the practice of Gerawee in its social context, one must be acquainted with the four main characteristics of Gerawee. These characteristics illuminate the dynamic of Gerawor–Gerawee relationship. They also show the role of local real estate brokers in conclusion of Gerawee agreement, and their economic interests in continuance of the practice. These brokers are the pivotal players in decreasing the Shari’ah frictions in the practice.

First, houses are the most common subject or property in Gerawee; however, shops and agricultural land are also being subjected to the Gerawee, although with less frequency. Movable properties, on the other hand, are not subject of the Gerawee.

Second, a creditor/Gerawee-ee is usually an unsophisticated party. Creditor/Gerawee-ee are those who have small and medium size savings, but are not capable of conducting their own venture. They seek Gerawee as a supplement to their usual income, or in some cases their sole source of income, or a way to save on paying rent. Hence, widows, orphans, elderly, and low ranking governmental employees are common creditors/Gerawee-ee. On the other hand, the debtor/Gerawor is usually an entrepreneur or small venture owner who needs credit, and is capable of making profit on the received amount of money that exceeds the amount of money he is paying in rent, or the amount of rent that he forgone. However, it is not uncommon for the Gerawor to use the money for livelihood purposes such as, repaying an overdue debt, paying for a son’s wedding, or paying medical expenses.

Because of the unbalanced power dynamic between the Gerawor, who usually is not a business-minded person, and Gerawee-ee, who usually is, fraud has become common among Gerawee practices, decreasing its popularity and efficiency. Other issues that can perpetuate
fraud include a lack of a robust registration system and lack of effective formal enforcement mechanisms. For example, a common form of fraud in Gerawee is when a Gerawor enters into multiple Gerawee agreements with multiple Gerawee-ee for a cumulated amount of money that exceeds the value of the property. In essence by engaging in such fraudulent practice, the Gerawor is hoping to acquire disproportionately larger amount of money against lower valued property. In another example, the Gerawor may refuse to pay back money owed and stop paying rent after only paying few installments. In this case, after a while, a Gerawor may pay back money owed but not the unpaid rent. In this way, the Gerawor uses the weakness of the enforcement system when the Gerawor is in possession of the property.

Third, Gerawee agreements are usually concluded through local real estate brokers called “Rahnamya Mua’malat.” Local real estate agents usually own a small office where the Gerawor registers the property, and Gerawee visit to find out about potential Gerawors, and properties. These agencies are usually small in size and cover a local geographical area. They usually charge both parties for a fee (1% to 2%) of the amount Gerawee for their services. They draft the Gerawee agreements, and keep a copy of the agreement. These agreements are usually standardized, and are signed on the governmental issued contract form. These agencies are licensed by the Department of Justice, and have an obligation to report their deals to the Department of Justice, and Department of Finance for taxing purposes.

Fourth, in response to objections from local muftis, who tend to believe that the practice violates the prohibition of riba (and is therefore un-Islamic), real estate brokers are increasingly concluding Gerawee agreements under the title of Bai al-Wafa. This designation is an attempt to justify the legitimacy of the practice under Shari’ah by relying on the Hanafi jurisprudence. As
will be discussed below, however, this attempt has not been successful. In fact fatwas condemning the practice have been increasing.

2. Gerawee in Fatwas issued by the Afghan muftis

Traditionally *fiqh* has developed in a gross-root bottom-up way. Muslims have referred their concrete questions to the Islamic scholars *muftis*, who have been recognized through an informal system of peer evaluation as competent to answer them. These scholars are called *mufti* (sing), *Muftis* (plural). *Muftis* then answer those questions in a non-binding ruling called (*fatwa*). Although non-binding, these *fatwas* carry significant religious authority for Muslims who try to be faithful to the teachings of their religion.

This section explores the reasoning of the contemporary *fatwas* issued by Afghan *muftis*, some of which favor the practice of *Gerawee* and some of which oppose it. The *fatwas* favoring the practice rely heavily on Hanafi jurisprudence that has allowed *Bai al-Wafa*, and similar transactions.

Other *fatwas*, on the other hand, oppose *Gerawee*. Specifically, they criticize *Gerawee* for the following reasons: (1) the practice is an obvious *hila* to circumvent the prohibition of *riba*; 2) the practice discourages preferable Islamic practices such as benevolent loans (*qard al–hasana*), *mudaraba* (trust financing contract), and *musharakah* (partnership); and 3) the practice further increases social injustice. This opposition responds to the part of Hanafi tradition that favors the practice by arguing that parties engaging in the *Gerawee* do not have the genuine intention to conclude a sale contract (*bai*). These critics believe that a bona fide intention of

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76 The *fatwas* discussed in this sections are generally retrieved from these online sources of fatwas: [http://www.islampp.com/](http://www.islampp.com/) (Web: Sunni Tradition Fatwa [Juristic Legal Ruling] Collection); [www.eslahonline.net](http://www.eslahonline.net) (Web: Afghanistan Rectification Society). The discussion is also informed by the authors many discussions with local muftis in Afghanistan.
transfer of title in the property is a salient characteristic of the bai and is key to legitimization of the practice.


In addition to Shari’ah based objection to the Gerawee, the practice does not have standing under Afghan civil law. Gerawee as a customary practice does not conform to the Afghan civil law. Relevant provisions of Civil Code of 1977 [“ACC”] are arts. 1136-1153, which deal with Bai al-Wafa. These provisions are reflective of religious concerns with prohibition of riba. In most cases, these provisions are consistent with the arguments of those muftis who oppose the practice of Gerawee. Art. 1136 defines statutory Bai al-Wafa as “… having the right of taking back the object of sale by seller and that of taking back price by buyer.” The mandatory provisions of statutory Bai al-Wafa, set forth in ACC, contradicts the common practice of Gerawee on several points.

According to art. 1137 of ACC, the right of a seller and buyer to “take back” cannot be conditioned and limited to a period of time. In particular, the agreement cannot specify that the seller (i.e. debtor/Gerawee-ee) cannot take back his property for a period of time. Even if parties agree to such a term, the second clause of the same article states that such agreement will be void. Furthermore art. 1151 of ACC explicitly states that, in contracts involving immovable properties, if the parties intend the agreement to be a pledge with right to use the property (i.e. mortgage), the sale and pledge both are voided. Under this provision, the parties cannot use the statutory Bai al-Wafa as a means to secure credit for a loan. The parties must have the intention to transfer the title in the property: they must have the intention of concluding a bona fide sale contract.

4. *Gerawee* cases before Afghan courts

Because of the legal and Shari’ah related uncertainties associated with the customary practice of *Gerawee*, the courts have had difficulty in adjudicating the legal disputes that arise out of the practice. Hence, the opinions of the courts vary on the issue of *Gerawee*.

Some judges do not recognize the *Gerawee* agreement as valid on the ground that it violates the prohibition of *riba*. They cite to the art. 3 of 2014 Afghan Constitution that reads: “[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.” However, they usually compel the *Gerawor* to repay the amount received based on the notion of fairness. Other judges may recognize the *Gerawee* contract as valid invoking the Hanafi jurisprudence on Bai al-Wafa, and the provisions of Afghan civil law of 1977. They usually rely on the stipulation of the parties in in the agreement, that it is a Bai al-Wafa, and refrain from further inquiry which may render the agreement void. In a case where the creditor/*Gerawee*/buyer request to take back the price, and the debtor/*Gerawor*/seller fails to repay the price, these judges may order to sell the property. The creditor/*Gerawee*/buyer will receive the price from the amount for which the property is sold by court order.

In case of the insolvency of the debtor/*Gerawor*/seller, judges’ opinions differ. Some recognize a priority for the creditor/*Gerawee*/buyer in the property against other unsecured creditors. Others treat the debtor/*Gerawor*/seller as a simple creditor with no priority.

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78 This section is informed by the author’s many personal discussion with Afghan judges. For the purpose of this paper, in particular, two prominent judges in Herat have been interviewed via skype: Judge Basir Ahmad Sediqi, seating judge in Herat Primary Court, Civil Division, and Judge Kamali, sitting Judge in District of Gozara and former head of Civil Division Of Herat Primary Court.

II. Musharakah Mutanaqisah Partnership

The Perbadana Ushawan National Berhad\(^{80}\) in Malaysia and the Lariba Institute in London\(^ {81}\) developed the Islamic finance product, *Musharakah Mutanaqisah* Partnership (MMP), which has acquired attention in both Muslim and Western countries, and appears to offer a promising alternative or supplement to *Gerawee* in Afghanistan. This section examines this diminishing partnership concept to identify its strengths and weaknesses and to help find solutions for the Afghan context.

MMP, in essence, consists of two contracts: first the customer enters into a *musharkah* (partnership) with a bank through a ‘*Shirkat-al Milik*’ (joint ownership) agreement.\(^ {82}\) For instance, customer pays 15% of the value of the joint-owned property whiles the bank pays the remaining 85%.\(^ {83}\) Then, the customer, based on this agreement, periodically redeems the 85% share of the bank in the property until the property is entirely owned by the customer.\(^ {84}\)

In the second contract, the bank leases its 85% of the ownership to the customer under concept of *Ijara* (lease) for an agreed rent, and the customer agrees to pay the rent for using bank’s share of property.\(^ {85}\) The rent will gradually decrease as the bank’s share of ownership decreases.\(^ {86}\)

\(^{80}\) For the website of institution see http://www.punb.com.my

\(^{81}\) For the website of institution see http://www.plariba.com


\(^{83}\) Id.

\(^{84}\) Id.

\(^{85}\) Id.

\(^{86}\) Id.
Muslim economists have found MMP effective in house financing and machinery financing.\(^8^7\) In Islamic jurisprudence, all four major Islamic schools of jurisprudence accept the joint-ownership as valid under Islam.\(^8^8\) Because of its economic and jurisprudential appeals, IFIs have employed The MMP and its variation in Muslim countries such as Pakistan, Indonesia, and Malaysia. IFIs have also offered the MMP as Islamic substitute for fixed rate mortgage contracts in countries like Canada, the U.S., and the U.K. The MMP involves some key disadvantages for IFIs, too, primarily those related to a conceivable increase in risk to the participatory financier.\(^8^9\)

The following is a summary of the studies of MMP in Pakistan, Indonesia, and Malaysia. It shows, although the MMP is found to be a good alternative to mortgage, its use is curtailed by the Shari’ah objections. These objections are essentially similar to those cited by opponents of Gerawee in Afghanistan, namely: lack of real risk sharing, and the practice being s disguise for mimicking riba-based financing.

**A. MMP in Pakistan**

In Pakistan, the MMP is employed by IFIs—primarily to tackle the problem of housing, as Pakistan has an increasing population.\(^9^0\) Pakistan’s Islamic bank, like the Meezan Bank, recently has been implementing MMP Partnerships for house financing.

Muhammad Hanif and Tahir Hijazi studied the effect of IFIs using MMPs in Pakistan and found them to be important to solving the problem of housing in Pakistan.\(^9^1\) However, they criticized the existing model of MMP in Pakistan from the Shari’ah standpoint. They argued that

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\(^8^7\) See Boualem Bendjilali and Tariqullah Khan, *Economics of Diminishing Musharakah*. Islamic Research and Training Institute (IRTI), Research Paper No. 31; see also MUHAMMAD TAQI USMANI, *ISLAMIC FINANCE* (2002).

\(^8^8\) *Id.*

\(^8^9\) *Id.*

\(^9^0\) Muhammad Hanif & Tahir Hijazi, *supra* note 82.

\(^9^1\) *Id.*
the existing model is not based on real risk sharing as required under Musharaka because the bank does not bear the risk of the change in value of the house, and rental variation.\textsuperscript{92}

B. Malaysia

Like in Pakistan, MMP is common in Malaysia for home financing, and it faces similar criticisms. *Al-Bay’ Bi-thaman Ajil* (sale against differed payment) (BBA) and MMP have been the two most common tools for Islamic home financing in Malaysia.\textsuperscript{93} Meera and Razak compared BBA and MMP and concluded that MMP home financing, economically, is a better alternative for comparing BBA\textsuperscript{94} because, they argued, that the profit rate in BBA is fixed, and it follows a similar computation as the interest-based system.\textsuperscript{95} Conducting a similar study in 2008, Nor compared the structures of BBA and MMP, including the problems and risks faced in practicing the contracts and also their acceptance in the Shari’ah.\textsuperscript{96} She also concluded that MMP is a better alternative and that it is fairer to the customer.\textsuperscript{97} In 2010, Osmani and Abdullah found that many Islamic banks in Malaysia today accept MMP home financing as an alternative to BBA.\textsuperscript{98}

Similar to the case of Pakistan, the IFIs in Malaysia have been criticized for determining the rental fee in accordance with market interest, and not engaging in real risk sharing.\textsuperscript{99}

\begin{flushleft}
\textsuperscript{92} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Mohd Nor, *Musharakah Mutanaqisah as an Islamic Financing Alternative to BBA*. MIF Monthly, 22-24 (September 2008).
\textsuperscript{97} Id.
\textsuperscript{99} Id.
\end{flushleft}
C. Indonesia

The statute of MMP in Indonesia is similar to the Pakistan and Malaysia: the MMP is gaining popularity while it is criticized, inter alia, for lacking genuine risk sharing, and fixed rate rental.

In 2007, Dodik Siswantoro and Hamidah Qoyymah studied the feasibility of MMP in Indonesia for house financing. According to their study, there are several external and internal problems with the use of MMP by Indonesian IFIs, including the criticism based on lack of genuine risk-sharing. However, the studies have shown that MMP is the second most known products among customers of IFIs in Indonesia after murabaha, which is the most known Islamic product.

III. A Modified Musharakah Mutanaqisah Partnership: a solution for the legal and Shari’ah-related problems of Gerawee

As it is shown thorough discussion of MMP in Islamic countries, and the opinions of Afghan muftis and judges toward Gerawee, the shared basis of objection to MMP and Gerawee is the lack of risk sharing, and genuine intention to depart from debt based financing—which is ostensibly prohibited under modern doctrine of riba. Accordingly, this section argues that in order to solve legal and Shari’ah-related problems with practice of Gerawee, Afghans should transform the practice of Gerawee from a debt-based finance to a real equity-based finance under which the parties share risk. In order to do so, the article suggests adopting a modified Musharakah Mutanaqisah Partnership (MMMP). The MMMP, as prescribed in this article, can

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100 Dodik Siswantoro & Hamidah Qoyymah, Analysis on Feasibility Study of Musharakah Mutanaqisah Implementation in Indonesia, in Advances in Islamic Economic and Finance (Munawar Iqbal and others) 471-489 (2007).

101 See Dodik Siswantoro, The Awareness, Preference And Distinctiveness Of Islamic Home Financing Type In Indonesia, 17 BULETIN STUDI EKONOMI (2012).
deliver the expectation of the parties—meaning it will not alter the underlying economic of Gerawee—in a way that complies with Shari’ah and Afghan law.

To make its argument, I will first analysis the MMMP under Afghan law to show that it will be in compliance with the Afghan law. Next, I will analysis the economic consequence of adopting the MMMP as equity based financing practice.

A. Legal Analysis of MMMP under Afghan law

This section studies MMMP under Afghan law. This article suggests that MMMPs would be permissible under Afghan law, and they would also provide sufficient flexibility under the Afghan rules of joint ownership, making MMMPs economically beneficial for the parties.

In order to study the MMMP, first, I will provide the basics of an MMMP. Under MMMP, prescribed here, a creditor would enter into a bona fide sale contract with an owner under which she will buy a share of the property under the concept of joint-ownership. The contract will prescribe how the rights and obligations associated with the property are to be distributed among the parties. It will also specify the power of each party in management of the property. Finally, the contract will provide for a date for the termination of the joint ownership. Now, I will turn to the interaction of these terms with Afghan law.

Under Afghan law, it is permissible to create joint-ownership by contract.\textsuperscript{102} The division of the profit of the jointly owned property is also permissible.\textsuperscript{103} The parties are free to agree on how the benefit of the joint-ownership is to be divided among them.\textsuperscript{104} As long the parties freely agree, there is no requirement that a party’s entitlement of the benefit (e.g. rent, or lease right)

\begin{footnotes}
\item[102] Art. 1935 ACC.
\item[103] Art. 1974 ACC.
\item[104] Art. 1975 ACC.
\end{footnotes}
corresponds to its share in the property. The parties can also agree on how to manage the joint property. ¹⁰⁵ Similar to the rule regarding the benefits of the property, there is no requirement that a party’s management right be proportionate to her share of ownership as long as the parties freely agree on the arrangement. ¹⁰⁶ The rules on the cost and maintained of the jointly owned property also recognize the contractual autonomy of the party. According to art. 1948 ACC, parties can agree on the distribution of cost of maintenance, and tax. The ACC adopts a pro rata rule for distribution of the property risk among the co-owners. Therefore, throughout the life of joint ownership, the risk associated with the property will be born by the parties collectively according to their share for the period of joint-ownership pro rata. ¹⁰⁷

The autonomy of the co-owner of the property is not only limited to the creation, and maintained of the jointly owned property, it also extends to the termination of the joint ownership, as well. Therefore, the parties can agree on the time of termination of the joint-ownership as long as their agreement is limited to five years. ¹⁰⁸

The ACC also protects the co-owner against the potential harm that may be caused by the ability of other party to sell his/her property share to an unsuited buyer, forcing the him into a unwanted joint ownership; or the harm that may stem from the mere fact of continuing the joint ownership. This protection is afforded through the right of preemption. Under the right of preemption, a party will have the right to acquire ownership of the part sold by another party in return for its price and the expenses made, even if by coercion. ¹⁰⁹

¹⁰⁵ Art. 1937 ACC.
¹⁰⁶ Arts. 1974-1976 ACC.
¹⁰⁷ Art. 1971 ACC.
¹⁰⁸ Art. 1953 ACC.
¹⁰⁹ Arts. 2213-2214 ACC
As it can be seen the Afghan law on the joint ownership is both flexible and facilitative of the economic arrangements currently conducted via Gerawee. For example it allows for the following terms that could be included in the contract:

1) The creditor/joint-owner can agree to lease her share of the jointly owned property to the original owner for a rent (fourth hypothetical example);

2) The creditor/joint-owner can lease the original share of the jointly owned property for a rent considerably lower than full rent (second hypothetical example);

3) The creditor/joint-owner can live in the jointly owned property without paying rent under the concept of 'Iryat (it is a charitable contract under which a person empowers another person to utilize his property without compensation) (hypothetical example).

4) The creditor/joint-owner can lease the property to the third party (a tenant), and subject to the agreement, receive the full rent, or a portion of the rent (fourth hypothetical example).

As it is indicated above by referring to the aforementioned hypothetical examples the rules of joint ownership allows for contractual arrangements that accommodate all various forms of the Gerawee practice in compliance with Afghan law and opinion of the majority of Shari’ah jurists.

The MMMP, in essence, uses the rules of joint ownership to transform the Gerawee into an equity sharing arrangement, which is a joint ownership. This, on the one hand, allows the parties to achieve substantially same economic results as Gerawee, and on the other hand, removes the source of both Shari’ah-based and Afghan law-based objections to the practice namely the lack of a bona fide sale contract and the absence of risk sharing. However, in this reformed practice, the creditor/Gerawee will become an equity holder, thus, presumes the risk
and benefits as an equity holder, therefore, we need to analysis the consequences of this change in economic position of the parties under MMMP. I will do this in the next section.

B. Economic Analysis of MMMP

After showing that MMMP will be in compliance with Afghan law, in this section I will examine the economic consequence of adopting MMMP in Afghanistan. The core of MMMP is that it is a real equity based finance under which parties share the risk. MMMP provides legal protections and risks that are afforded to an equity holder. This core characteristic stems from the fact that MMMP is a joint ownership that is created through a bona fide contract of sale.

MMMP is created through a bona fide contract of sale. Since it would be a bona fide sale contract under Afghan civil law, the creditor/joint owner in an MMMP would have all guarantees available under a sale contract against the debtor/original owner. She would also have a real rights in the property protected by the law. Accordingly, when a debtor/original-owner is not able or willing to purchase the creditor share per agreement, she can sell it to a willing buyer. In turn, the creditor/joint-owner cannot misuse this right because, if she is able to match the offer of a willing buyer under the concept of preemption, the debtor/original-owner can forcefully purchase the share. However, since it is a bona fide ownership the value of the property at the time of termination will be based on the market value. This qualification is necessarily in order to turn the practice to a really equity-based finance where parties bear the risk. The real risk sharing is crucial to ensure the Shari’ah-compliance of the practice as understood by local Muftis, and opponents of MMP. Therefore, the question is whether this qualification is compatible with the underlying economic of the Gerawee, which ostensibly drives its popularity. I think it is.
This qualification doesn’t significantly delude the incentives of the parties to engage in the practice. Under MMMP, the creditor/joint-owner should be able to successfully achieve its goal namely turning its limited asset into a safe revenue-generating asset with equity protection. The revenue, which includes rent discount, rent-exemption, and collecting rents, will not differ from the customary practice. The only additional risk would be the possible fluctuation in the market value of the property. But this additional risk would not be substantial, and can be easily outweighed by the additional benefit that will come to both parties if the MMMP is adopted. The following analysis of the effects of the MMMP, if implemented, illustrates this point.

First, under MMMP, the chance that market value increases (benefiting the original owner at the cost of the joint-owner), or decreases (benefiting the joint-owner at the cost of the original owner) can offset each other. Second, given the fact that the joint-owner’s share in the property is limited, even in case the market value decreases, her loss will be limited. Lastly, the legal certainty in enforcement of the obligation that is created by ownership of the joint-owner in share of the property, which can be freely sold, will offset the limited additional risk.

The MMMP would also be acceptable to the debtor/original owner. She would be able acquire credit against the market value of the property. If the market value of the property doesn’t change, the partial ownership of the creditor would not change her financial obligation. On the other hand, in the case that the market value does change, the previous analysis holds up meaning that the change of increase in the value benefiting her would off set the potential losses resulting from possible decrease in value. When there is no change in market value of the property, assuming she negotiated the creditor share in the property correctly, she would only have to pay back the money received for repurchase of the share. The joint-owner cannot refuse a resale based on the agreement that sets the date for termination of joint-ownership. Similarly
the joint-owner would not be able to refuse to sell back the share to her under the concept of preemption. Finally, since the practice would no longer contravene the principle of Shari’ah as understood by majority of local muftis, presumably the number of people willing to engage in the practice as creditor would increase, which would potentially benefit debtors.

Therefore, the additional risk that is created by transforming the practice to an equity-based finance under MMMP does not alter the economic of Gerawee, thus, the popularity of the practice will only increase due to the additional protections, and Shari’ah and legal compatibility which will be achieved through MMMP.

Finally, the transmission to MMMP is possible because of the system in place, namely real estate agents, can adopt the practice of Gerawee to MMMP because of two main reasons. First, as it is proven by the use of Bai al-Wafa, the religious objection of local muftis does have a great impact on the finance market of Gerawee. These agents will have economic incentive to adopt MMMP as a Shari’ah-compliant practice because it would expand their markets through inclusion of the customers who otherwise would not engage in the practice for religious reasons. Secondly, the example of Bai al-Wafa proves that the system is sophisticated enough to implement the changes required for adoption of MMMP.

C. Robust Registration System

Although MMMPs will likely minimize the chance of the fraud to some extend by creating a marketable right in the property for the creditor, a robust registration system would enhance this effectiveness. Currently, 1999 Law of Real Estate Agency\textsuperscript{110} requires a real estate agent to keep the record for all the transaction that he/she brokers including Gerawee/Bai al-Wafa. Ministry of

Justice, which is charged with the regulation of real estate agencies,\textsuperscript{111} periodically receives a copy of these records through its provincial and sub-provincial departments. However, because the records are not digitalized, there is no way to detect fraudulent practices before they happen. The fact that real estate agents are most often perpetrator or complicit in these fraudulent practices further exacerbates the problem. Hence, the Afghan government would need to digitalize real estate records to minimize the chance of fraud. This would also reinforce the effectiveness of the MMMP to provide legal protection to the parties involved.

\textsuperscript{111} For official website of Ministry of Justice see http://moj.gov.af/fa/page/7943/9493.
Conclusion

Shari’a influences every aspect of Muslims’ life. And in the area of finance, the Shari’ah doctrine of *riba*, has been most influential. The modern doctrine of *riba* has been developed in context of west–Muslim tensions to idealize the idea of social justice in Islam. The theory of interest-free economy not only has helped Muslims to form a distinct economic theory but also to blame imported western economic theories for economic and social injustices that Muslims face. In Islamic countries with established financial industry the doctrine resulted in creation of Islamic finance institutions (IFIs). In Afghanistan, however, modern *riba*-based *fatwa* has targeted the customary practice of *Gerawee*.

The customary practice of *Gerawee*, in principle, refers to a pledge-lease transaction, which enables owners of immovable properties to obtain financing based on the market value of those properties in exchange for either paying regular payments in form of rent or transferring the right to lease that property to a financer. Afghan *muftis* have argued that the practice is un-Islamic because: 1) the practice is an obvious *hila* to circumvent the prohibition of *riba*, 2) the practice discourages preferable Islamic practices such as benevolent loan (*qard al –hasana*), *mudaraba*, and *musharakah*, and 4) the practice further increases social injustice. The IFIs have been subject to similar criticism in countries like Pakistan, Indonesia, and Malaysia. I have argued that Afghans, in order to solve the sharia-related and legal impediment, should adopt a modified *Musharakah Mutanaqisah* Partnership (MMMP) to reform the practice of *Gerawee*.

The MMMP, proposed in this article, is a joint-ownership created by the sale contract that allows the parties to share the risk and revenue of the property. I have proposed that the only way to solve the problems of *Gerawee* in Afghanistan is to transform the practice from a debt-based finance to a real equity-based finance under which the parties share risk and revenue. My
argument is based on the assumption that by engaging in Gerawee, the Creditor/Gerawee-ee wants to turn her limited assets into safe revenue-generating assets with equity protection, and the Gerawor wants to acquire short/medium term credit against value of its property. The MMMP, if implemented, can deliver the expectations of the parties and solve the Shari’ah and legal problems associated with customary Gerawee.