MUDHARABAH

Definition

Mudharabah is a contract between a capital provider (*sahibul mal*) and an entrepreneur (*mudharib*) in which the former contributes the capital and the latter contributes his effort in managing the business. The parties will share the business profit according to an agreed ratio. However, if the business incurs loss, it shall be borne by the capital provider alone while the entrepreneur would have just wasted his time and efforts.[41]

Mudharabah may also be defined as a contract between two parties, whereby one of the parties provides the capital to the other for business purposes, with an agreed profit sharing ratio according to predetermined terms and conditions.[42]

The Hanbalites define *mudharabah* as an arrangement between a person who places his capital with another who later trade with it, with the purpose of sharing the profit on an agreed distribution ratio.[43]

Mudharabah is also known as *qirad* or *muqaradhah*. The term *muqaradhah* is used by people of Hijaz (Maliki and Shafii schools) whereas the people of Iraq (Hanafi and Hanbali schools) used the term *mudharabah* with the same meaning.[44]

According to Al-Jarjani of the Hanafi school, *mudharabah* is a profit sharing contract with capital from one side and work from the other. It is initially deemed as a *wadiah*, then a *wakalah* while the business is in progress and finally a partnership upon accrual of profits.[45]

A *mudharabah* contract is a traditional practice of the Arab community. Islam has recognized it as a contract which is in line with its principles. Although *mudharabah* consist of an element of *jahalah*, it is still allowed since it facilitates business and trade for the community.[46]

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41 Wahbah al-Zuhaili, *Fiqh al-Islami wa Adillatuhu*, v. 5, p. 3924.

42 Al-Juzairi, *Kitab al-Fiqh 'ala Mazahib al-Arba'ah*, v. 3, p. 34.

43 Wahbah al-Zuhaili, *Fiqh al-Hanbali al-Muyassar bi Adillatihi wa Tatbiqihi al-Mu'asarah*, v. 2, p. 414.

44 Ibn Qudamah, *Al-Mughniy*, Dar al-Fikr, Beirut, 1994, v. 5, p. 134-135.

45 Abdul Hamid Mahmud Tohmaz, *Fiqh al-Hanafi fi Thaubihi al-Jadid*, v. 5, p. 67.

46 Ibn Rushd, *Bidayah al-Mujtahid*, Dar Ihya' al-Turath al-Arabi, Beirut, 1992, v. 2, p. 303.

The Legal Status of *Mudharabah*

The four leading schools of jurisprudence (*Mazahib*) have unanimously agreed that *mudharabah* is permissible in Shariah based on evidences in Al-Quran, Al-Sunnah and *Ijmak*. The evidences are as follows:

i. Evidences in Al-Quran
   a. Allah SWT says:

وآخرون يضربون في الأرض يبتغون من فضل الله

Meaning: "…and others who are traveling through the land seeking the bounty of Allah …"[47]

   b. Allah SWT says:

فاذا قضيت الصلوة فانتشروا في الأرض وابتغوا من فضل الله واذكروا الله كثيرا لعلكم تفلحون

Meaning: "Then when the prayer is finished, you may disperse through the land and seek the bounty of Allah and remember Allah much, that you may be successful."[48]

ii. Evidences in Al-Sunnah
   c. It is reported by Ibn Majah from Suhaib r.a. that the Prophet PBUH had said:

حدثنا الحسن بن علي الخلال حد ثنا بشر بن ثابت البزارحد ثنا نصر بن القاسم عن عبد الرحمن عبد الرحيم بن داود عن صالح بن صهيب عن أبيه قال قال رسول الله صلى الله عليه وسلم : (ثلاث فيهن البركة البيع إلى أجل والمقارضة وأخلاط البر بالشعير للبيت لا للبيع).

Meaning: "There are three blessed transactions: deferred sale, muqaradhah and mixing of barley and wheat for home use and not for sale."[49]

iii. *Ijmak*

A group of the Companions invested orphans' property based on *mudharabah*, and no one objected to such a practice.[50]

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47 Surah al-Muzzamil: 20.

48 Surah al-Jumu'ah: 10.

49 A hadith reported by Ibn Majah

50 Wahbah al-Zuhaili, *Fiqh al-Islami wa Adillatuhu*, v. 5, p. 3925.

Types of *Mudharabah*

Mudharabah contract may be divided into two main categories:

i. *Mudharabah mutlaqah*

   In a *mudharabah mutlaqah* contract, the entrepreneur is allowed to trade in any kind of business, which is deemed profitable according to the normal trade practice.

ii. *Mudharabah muqayyadah*

   This *mudharabah muqayyadah* contract limits the types of business, which could involve entrepreneurs.[51] Muslim jurists differ in their views in relation to the limitation of duration or limitation of individuals. According to Imam Abu Hanifah and Imam Ahmad bin Hanbal, such limitation is permissible, while Imam Malik and Imam Shafii view otherwise.[52]

The Pillars of *Mudharabah*

According to the Hanafi school, the pillars of *mudharabah* contract is *ijab* and *qabul*, which may be in the form of terms that indicate offer and acceptance. However, the majority of Malikites, Shafiites and Hanbalites view that the pillars of *mudharabah* are:

i. contracting parties (capital provider and entrepreneur)
ii. subject matter (capital, business and profit)
iii. *sighah* (*ijab* and *qabul*)[53]

The Conditions of *Mudharabah*

Generally, the conditions of *mudharabah* contract cover the conditions of the contracting parties, the capital and the profit.

i. The conditions of the contracting parties (capital provider and entrepreneur)
   Both parties must have legal capacity (*ahliyyah*) to execute a *wakalah* contract.

51 Dr. Abdul Sattar Abu Ghuddah, *Buhus fi al-Mu'amalah wa al-Asalib al-Masrafiyyah al-Islamiyyah*, p. 136.
52 Wahbah al-Zuhaili, *Fiqh al-Islami wa Adillatuhu*, v. 5, p. 3928.
53 Ibid.

Since the business is run by the entrepreneur using the capital provider's property, a *mudharabah* contract contains elements of *wakalah*.

ii. The conditions of capital
    a. The capital must be in the form of currency. The majority of the Muslim scholars views that the capital must be in the form of absolute currency and should not be in the form of movable or immovable asset.[54] According to al-Syirazi, currency in this context is limited to gold and silver money.[55] However, Dr Wahbah al-Zuhaili views that the present paper money undertakes the functions of gold and silver money, hence, the rulings on gold and silver money is applicable to paper money accordingly.[56]
    b. The total amount of capital must be known to the parties.
    c. The capital must be in cash (*'ainan*) and should not be accrual (*hadhiratan*).
    d. The capital must be delivered to the entrepreneur. By having such condition, the entrepreneur must take possession of the capital and trade with it based on the concept of *wadiah yad amanah.*

iii. The conditions of profit
    a. The distribution of profit must be clearly determined.[57]
    b. The distribution of profit must be determined in terms of its ratio or percentage.[58]

Legal Rules on the Guarantee of *Mudharabah* Capital

In principle, the capital should not be guaranteed unless the loss of capital is caused by the negligence of the entrepreneur. If the negligence is proven, the loss shall be borne by the entrepreneur by refunding the capital to the investor (capital provider).[59]

The classical jurists reached a consensus on the prohibition of stipulating a guarantee clause that makes the entrepreneur liable for losses in *mudharabah* business. If there

54 Ibid. p. 3932.

55 Abu Ishak al-Syirazi, *al-Muhazzab fi Fiqh Imam al-Syafii*, v. 3, p. 475.

56 Wahbah al-Zuhaili, *Fiqh al-Hanbali al-Muyassar bi Adillatihi wa Tatbiqihi al-Mu'asarah*, v. 2, p. 414.

57 Wahbah al-Zuhaili, *Fiqh al-Islami wa Adillatuhu*, v. 5, p. 3928.

58 Ibid.

59 Al-Kasani, *Bada'ie al-Sana'ie*, Dar al-Kutub al-Arabiah, Beirut, v. 6, p. 87, Al-Nawawi, *Al-Majmuk Syarh al-Muhazzab*, Maktabah al-Irsyad, Jeddah, p. 194-195, 198, Ibn Rushd, *Bidayah al-Mujtahid*, v. 2, p. 303, 305, Ibn Qudamah, *Al-Mughniy*, v. 5, p. 147-148, 192, Ibn Najjar, *Muntaha al-Iradat*, v. 1, p. 460, 466, Ibn Juzay, *Al-Qawanin al-Fiqhiyyah*, Dar al-Qalam, Beirut, p. 186.

is such a clause in the agreement, the jurists have different views on the status of the contract.[60] According to Hanafi and Hanbali schools, if the capital provider stipulates such clause, the clause will have no effect and the contract remains valid. However, Maliki and Shafii schools view that the presence of such a clause renders the contract void.[61]

According to the AAOIFI standards, the capital provider is permitted to obtain guarantees that are adequate and enforceable from the entrepreneur. This is allowed provided that the capital provider will not enforce these guarantees except in cases of misconduct, negligence and breach of contract on the part of the entrepreneur.[62]

Solutions for Issues on the Guarantee of *Mudharabah* Capital

A few alternatives have been proposed in order to solve issues on the guarantee of *mudharabah* capital. The solutions are as follows:

i. Third party guarantee
ii. *Mudharib yudharib*
iii. Guarantee by a special fund

Third Party Guarantee

A third party guarantee may be exercised by two different approaches:

i. Guarantee based on *tabarru'*
ii. Guarantee based on *qardh*

The first approach is a third party guarantee that is based on *tabarru'* concept. Such a guarantee is exercised by a third party who does not involve or does not have any relationship with the entrepreneur.

According to contemporary jurists, such a guarantee is permissible in Shariah whereby a party spends certain amount of money as a *tabarru'*. Since this is a conditional

60 Ibn Rushd, *Bidayah al-Mujtahid*, v. 2, p. 305, Ibn Qudamah, *Al-Mughniy*, v. 5, p. 187, Ibn Juzay, *Al-Qawanin al-Fiqhiyyah*, p. 186.
61 Ibid.
62 AAOIFI, Shari'a Standards, Bahrain, 2004, p. 232.

tabarru', the party who makes the *tabarru'* must execute the *tabarru'* upon the fulfillment of the condition.[63] Thus, in a *mudharabah* contract, such a conditional third party guarantee could be possibly exercised in the event of total or partial loss of capital.

The second approach refers to a guarantee by a third party that is based on the principles of *qardh*. By this approach, the third party will bear the capital loss by refunding the capital. Any amount paid by the third party for this purpose shall be deemed as a loan owed by the entrepreneur to the third party.

Mudharib Yudharib

Mudharib yudharib means the entrepreneur reinvests the *mudharabah* capital with a third party. By this approach, the entrepreneur becomes the middle person between the capital provider and the actual entrepreneur. In this situation, the first entrepreneur is liable to guarantee the capital since he has reinvested the capital with another entrepreneur.[64]

Guarantee by a Special Fund

This is a kind of guarantee whereby a portion of the profit of the *mudharabah* investment is channeled to a special fund, which will be used to guarantee any future loss in the *mudharabah* investment. This arrangement may be done by mutual agreement of all parties involved in the *mudharabah* contract.[65]

Legal Status of *Ujrah* (fee) for *Mudharabah* Capital Guarantee

Generally, there is no discussion on issues relating to a charge of *ujrah* for capital guarantee in *mudharabah* as yet. Contemporary jurists however, have discussed and differed in their views relating to the permissibility of *ujrah* in *dhaman* or *kafalah* contract.

63 OIC, *Majallah Majma' Fiqh al-Islami*, no. 4, v. 3, p. 1875-1876, 2164.
64 Wahbah al-Zuhaili, *Fiqh al-Islami wa Adillatuhu*, v. 5, p. 3950-3951.
65 *Qararat wa Tausiyyat Majma' al-Fiqh al-Islami*, p.70.

A group of the jurists view that it is allowed to charge *ujrah* for a *dhaman*.[66] Since it is possible to charge *ujrah* for *dhaman*, such a charge is also possible in capital guarantee of *mudharabah* capital (third party guarantee). A charge of *ujrah* for capital guarantee is permissible as it is a kind of *dhaman* that is allowed in Shariah. The only forbidden guarantee in *mudharabah* is the one made by the entrepreneur himself. Thus, the Middle Eastern jurists resolved to introduce *mudharabah* capital guarantee by a third party and to allow a charge of *ujrah* for such guarantee.

66 Wahbah al-Zuhaili, *Fiqh al-Islami wa Adillatuhu*, v. 5, p. 161.

Definition

Musharakah Mutanaqisah is a form of partnership in which one of the partners promises to buy the equity share of the other partner gradually until the title to the equity is completely transferred to him. The transaction starts with the formation of partnership, after which buying and selling of the equity take place between the two partners. It is therefore necessary that this buying and selling should not be stipulated in the partnership contract. In addition, the buying and selling agreement must be independent of the partnership contract. It is not permitted that one contract be entered into as a condition for concluding the other.[67]

Features or Characteristics of *Musharakah Mutanaqisah* Contract

In Islamic commercial law (*fiqh muamalat*), the Muslim jurists have classified contract into binding and non-binding contract. Binding contract is a contract whereby the contracting parties are not allowed to withdraw from the contract except with the agreement of the other party. On the other hand, non-binding contract is a contract that allows the parties to terminate the contract unilaterally, even without the agreement of the other party.[68]

The Muslim jurists have categorized partnership contract (*musharakah*) as a non-binding contract (*`uqud ghayr lazimah*). This means that the partners of the contract have the right to terminate the partnership contract at any time, after giving proper notice to the other partners.[69]

Even though the partnership contract is classified as non-binding contract, but it may become binding when it is combined with other obligations. Al-Zarqa' in his book has explained that a contract which is initially a non-binding contract may transform into a binding contract when it is attached with other binding obligations. For example, the contract of loan (*`ariyah*), which is originally a non-binding contract, becomes a binding contract by virtue of other binding obligations that are attached to it such as when there is a requirement of payment or fee (*al-ajr*) is involved in the contract.[70]

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67 AAOIFI, *Al-Ma'ayir Al-Syar'iyyah*, Bahrain 2004, p. 220.

68 *Undang-Undang Sivil Islam*, Section 114 and 115, translated by Md Akhir Haji Yaacob, Dewan Bahasa dan Pustaka, 1990; Wahbah al-Zuhaili, *Al-fiqh Al-Islami Wa Adillatuh*, Dar al-Fikr, 3rd ed, 1989, vol. 4, p. 241.

69 *Undang-Undang Sivil Islam*, Section 1353 and 1424, *Wahbah Al-Zuhaili*, vol. 4, p. 241 – 242.

70 Mustafa Ahmad Al-Zarqa', *Al-Madkhal al-Fiqhi al-Am*, Dar al-Fikr, Beirut, vol. 1, p. 449-450.

The same principle is also applicable in *Musharakah Mutanaqisah*, whereby it becomes binding in the presence of other binding elements that constitute part and partial of the agreement.

The Direct and Indirect Consequences of Obligation in a Contract

There are two direct effects or consequences of a contract. Firstly, when a contract of sale is concluded, then the ownership of the subject matter is transferred automatically to the buyer. Secondly, obligation that is resulted from the contract such as the delivery of subject matter, payment of price and so on.

In this context, al-Zarqa' has explained that the direct and indirect effect or consequences of the contract as follows:

i. The original ruling of a contract (*al-hukm al-asl li al-`aqd*) or known as *al-athar al-naw`i* of a contract; such as the transfer of ownership in exchange of a consideration (*`iwad*) in sale contract, or transfer of ownership without consideration in the contract of *hibah* and so on (depending on the nature of the contract concluded).
ii. The obligation resulting from a contract (*al-iltizamat al-nasyi'ah bi al-`aqd*) that is the obligation to perform something or certain tasks as agreed in the contract, such as delivery of the sale object, guarantee against the defect or damage of the sale object, payment of the price and so on.[71]

In relation to *Musharakah Mutanaqisah*, an agreement of one of the partners to buy the shares of the other partner (who is also a financier) is considered as an obligation, which is binding and must be performed accordingly. Besides, the customer is also required to pay the rental of the leased asset.

The Obligation Created in the Contract of *Musharakah Mutanaqisah*

In *Musharakah Mutanaqisah* contract, the customer normally agrees to buy the share of the other partner gradually with the aim of having a complete ownership of the asset. On the other hand, the financier also agrees to sell his share of the partnership to the customer cum partner progressively.

71 Ibid. p. 440-441.

In this context, the obligation is created on the party who has agreed to buy the share of his partners and therefore he is required to pay the price of the shares. The financier, on the other hand, is also obliged to sell his share to the customer according to the ratio that has been agreed upon at the beginning of the contract.

The Elements of Obligation in *Musharakah Mutanaqisah* Contract

Musharakah Mutanaqisah in general comprises the elements of sale and lease (*ijarah*) contracts. These two elements of contract are initiated as integral part of *Musharakah Mutanaqisah* to ensure that no element of riba is involved in the transaction.[72]

With the existence of the two elements, the binding effect of the contract of *musharakah mutanaqisah* is imposed on the contracting parties. The contract of sale and lease (*ijarah*) are binding contracts which create a constructive obligation on the contracting parties; and when these contracts are appended together as essential part of the structure of *musharakah mutanaqisah*, the contract also becomes binding. Consequently, the contracting parties in *musharakah mutanaqisah* are expected to perform certain obligations that accrued from the sale and lease contract such as the obligation (of the seller) to deliver the subject matter to the buyer, and the obligation (of the buyer) to make payment of the purchased price to the seller. Similarly, in the contract of lease, the lessor is obliged to deliver the usufruct and the lessee is to pay the rental to the lessor.[73]

Binding Features in a Contract Must be Performed

The scholars of Islamic law (*fuqaha'*) have consensus that the contracting parties in a binding contract are not allowed to withdraw from the contract without agreement from the others.[74]

The Muslim jurists view that the contracting parties in a binding contract must be responsible to perform their obligations based on the following:

72 OIC, *Majallah Majma' al-Fiqh al-Islami*, no. 10, vol. 2, p. 554.

73 Mustafa Ahmad Al-Zarqa', *Al-Madkhal al-Fiqhi al-Am*, Dar al-Fikr, Beirut, vol. 1, p. 443.

74 Ibid., p. 445.

i. The Quranic verse which states:

يا أيها الذين آمنوا أوفوا بالعقود

"O you who believe, fulfill your obligation in contracts"[75]

ii. The basis of the contract of exchange that requires the mutual consent of the parties as an essential element for the validity of a contract. Therefore, when one party terminates or revokes the contract without the consent or agreement of the other party, he is in breach of the Shariah principle laid down in the Quran, which states that:

يا أيها الذين آمنوا لا تأكلوا أموالكم بينكم بالباطل إلا أن تكون تجارة عن تراض منكم

"*O ye who believe, eat up not your property among yourselves in vanities: but let there be amongst you traffic & trade by mutual goodwill*"[76]

The above authorities have been primarily referred by the Hanafites and Malikites to justify the extension of the period for option (*khiyar*) in a contract besides the same authorities have also been used to assume certain obligations be performed by the contracting parties in a binding contract according to the agreement made.[77]

In this context, Ibn Taimiyah has also urged that it is the duty and responsibility of the contracting parties to perform their obligations in an exchange contract. The obligation to perform the contract is therefore an obligatory requirement according to the Shariah. [78]

The Inclusion of Promise (*Wa`d*) in *Musharakah Mutanaqisah*

The AAOIFI standard states that any contracting party in *Musharakah Mutanaqisah* is allowed to make a binding promise to transfer his ownership portion to his partners gradually through sale contract at the market price for every stage or at the price that they have agreed in the contract. However, it is not allowed to stipulate that the sale must be on the nominal value.[79]

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75 Surah al-Maidah : 1.

76 Surah al-Nisa' : 29.

77 Abu Zuhrah, *Al-Milkiyyah wa Nazariyyah al-Aqd fi al-Syari'ah al-Islamiyyah*, Dar al-Fikr al-Arabi, p. 188-189; Mustafa Ahmad al- Zarqa', *Al-Madkhal al-Fiqhi al-Am*, Dar al-Fikr, Beirut, vol. 1, p. 446.

78 Abu Zuhrah, *Al-Milkiyyah wa Nazariyyah al-Aqd fi al-Syari'ah al-Islamiyyah*, Dar al-Fikr al-Arabi, p. 230.

79 AAOIFI, *Al-Ma'ayir Al-Syar'iyyah*, Bahrain 2004, p. 220.

According to Dr Othman Shabir, contracting parties in *Musharakah Mutanaqisah* must perform all obligations that accrue from the contract of partnership and sale contract. He is of the opinion that the promise to purchase the financier's share that stipulated in the contract, has made it an obligation which are binding on the parties to the contract.[80]

80 Dr Muhammad Othman Syabir, *al-Mua'amalat al-Maliyyah al-Mu'asirah*, Dar al-Nafa'is, Jordan, 1996, p. 294 – 295.

TAWARRUQ

Definition

Tawarruq is a sale of an asset to a purchaser with deferred payment. The purchaser then sells the asset to the third party on cash with a price lesser than the deferred price, for the purpose of getting cash.[81]

This transaction is called *tawarruq* because when the purchaser bought the asset with deferred payment, he has no intention of using or getting benefit from it, but merely to facilitate him to obtain cash (*waraqah maliyyah*).

Discussion among the majority of classical Muslim scholars on *tawarruq* was done simultaneously with *bai` al-`inah*. In fact, they do not differentiate the discussion on *tawarruq* and *bai` `inah*; except the scholars of Hanbalis who have distinguished it.

Generally, *tawarruq* and *bai` `inah* are similar in terms of its objective to obtain cash through the selling and buying transactions, but they are different in two aspects. Firstly, *bai` `inah* does not involve third party as purchaser of the object of sale (asset/ commodity), while *tawarruq* involves third party. Secondly, the sale object in *bai` `inah* is returned back to the original owner, whereas in *tawarruq*, there is no such condition.

The Ruling of *Tawarruq*

Most of the Muslim scholars have cited the same authorities on the legality or permissibility of *tawarruq* and *bai` `inah*, looking into the similarities of both transactions. Only the scholars of Hanbalites have stated the terminology of *tawarruq* and deliberate it separately.

Those Who Reject *Tawarruq*

There is a view from Imam Ahmad ibn Hanbal which states that *tawarruq* is prohibited (haram).[82] Another view from Imam Muhammad bin Hasan al-Shaibani a Hanafites held that *tawarruq* is discouraged (*makruh*).[83] Imam Ibn Taimiyyah has considered

81 Wizarah al-Awqaf wa al-Syu'un al-Islamiah, *Al-Mawsu'ah al-Fiqhiyyah*, vol. 14, p. 147.

82 Ibn Qudamah, *al-Mughn*i, p. 195 – 196.

83 Ibn al-Hummam, *Fath al-Qadir*, vol. 7, p.212.

tawarruq as an exceptional dealings which is permitted in the case of necessity (*dharurat*), where the person is really in need of cash. The authorities used by those who reject *tawarruq* are as follows:

i. Hadith of the Prophet PBUH:

قال على: قال ابن عيسى هكذا حدثنا هشيم قال: " سيأتى على الناس زمان عضوض يعض الموسر على ما فى يديه ولم يؤمر بذلك قال الله تعالى: " ولا تنسوا الفضل بينكم " ويبايع المضطرون وقد " نهى النبى صل الله عليه وسلم عن بيع المضطر وبيع الغرر وبيع الثمرة قبل أن تدرك

Meaning: *"Ali has stated: Ibn Musa has said that this is what we have been told by Hushaim. The Prophet PBUH has said : A time is certainly coming to mankind when people will bite each other and a rich man will hold fast what he has in his possession (his property), though he was not commanded for that. Allah the Almighty said: (and do not forget liberality between yourselves), and then those who are forced will contract sale while the Prophet PBUH forbades forced contract, one which involves some uncertainty and the sale of fruit before it is ripe."*[84]

Imam Ahmad ibn Hanbal has envisaged that *bai` `inah* is allowed in the case of necessity when people are really in need of cash and the rich are reluctant to lend it to them. As such, the needy people who are in need of money will perform *bai` `inah* and *tawarruq*. With the transactions, they will be getting cash by putting higher price on the deferred payment against the lower price in cash.

Those Who Accept *Tawarruq*

The majority of Muslim scholars including the Hanbalites who have approved *tawarruq* viewed that it is a permissible mode of transaction.[85] Their view is supported by the following authorities:

i. Al-Quran

وأحل الله البيع وحرم الربا

Meaning: *"Allah has permitted sale and prohibited riba"*[86]

Based on the general understanding of the above verse, *tawarruq* is also permitted as it is considered a sale transaction, which is allowed in the Shariah. Such a transaction

84 Hadith narrated by Abu Daud.

85 The deduction that the majority of jurists have allowed *tawarruq* is affirmed by the *Mawsu'ah al-Fiqhiyya*h, vol. 14, p. 147.

86 Surah al-Baqarah : 275.

may be exercised with the intention of getting cash with the knowledge of all the parties concerned or without the knowledge of the parties who have sold the object with deferred payment. This transaction may also be employed because of need and necessity or because it is an accepted mechanism of commercial dealing, which is normally practised in the society or institution.

The Recent Fatwa

Dr Rafik Yunus al-Misri has stated that some of the Muslim scholars have approved the *tawarruq* without any justification in details on its permissibility. In his view, the ruling of *tawarruq* may vary depending on the following circumstances:

i. If all of the three parties involved have known that the main objective of the customer for entering the *tawarruq* transaction is to obtain the cash money, then all of them are sinful.
ii. If two of the parties have known that the seller has used the transaction for getting the cash, both of them are sinful. However, if they do not know the real intention of the seller, then they are not sinful.
iii. A person is allowed to do *tawarruq* in the case of necessity.[87]

Majma' Fiqh Islami in its 15th meeting has permitted the practice of *tawarruq*. The decision on the permissibility of *tawarruq* was actually arrived on the basis that the *tawarruq* is executed without prior arrangement of the parties involved. However, in its 17th meeting, the decision made was to prohibit the practice of *tawarruq*. The latest decision is applicable to the practice of *tawarruq* that are adopted by the financial institutions which is known as *al-tawarruq al-munazzam* or *al-tawarruq al-masrafi* (pre arranged *tawarruq*). The justification for disallowing such *tawarruq* is that its modus operandi resembles *bai` `inah*; whereby the financial institution who is acting as an agent to the customer (*mustawriq*) who need the cash is selling the asset commodity which was initially purchased from the same institution to the third party. This practice bears resemblance to the practice of *bai` `inah* and does not represent the true *tawarruq* which has been approved by the classical jurists.

87 Dr. Rafik Yunus al-Misri, *Bai' al-Taqsit Tahlil Fiqhi wa Iqtisadi*, p. 120.

On the other hand, the Shariah Supervisory Council of ABC Islamic Bank in their decision has approved *tawarruq* for liquidity purposes.[88]

Furthermore, the practice of *tawarruq munazzam* has also been approved by a few contemporary scholars such as Syeikh Abdullah b. Sulaiman al-Mani', Dr Musa Adam Isa, Dr Usamah Bahr and Dr Sulaiman Nasir al-Ulwan.[89]

88 ABC Islamic Bank, *Al-Fatwa al-Masrafiyyah al-Sadirah 'an Hai'ah Riqabah al-Syar'iyyah li Bank al-Muassasah al-'Arabiyyah al-Masrafiyyah al-Islamiyyah*, 1986 – 2000, p. 122.

89 Shamsiah Mohamad, *Isu-Isu Dalam Penggunaan Bai' Al-Inah dan Tawarruq: Perspektif Hukum*, Kertas Kerja tidak diterbitkan.

BAI` `INAH

Definition

Bai` `Inah conceptually refers to a sale of an asset, which is later repurchased at a different price, whereby the deferred price is higher than the cash price.

According to the Muslim scholars, *bai` `inah* may be defined as follows:

i. Imam Shafii: "It is a credit purchase of an asset which is later sold to the original owner or a third party, whether at a deferred or spot , higher or lower price than the first contract, or for an exchange of goods."[90]
ii. Al-Haskafi: "It is a deferred sale of an asset with a motive to generate profit. The debtor, then, resells the asset to the original seller at a lower price in order to settle his debt."[91]
iii. Al-Zaila`i: "It is a deferred sale of an asset with a subsequent repurchase of the same asset at a lower cash price."[92]
iv. Al-Dardir: "It is a sale by a person who is asked for something which is not owned by him."[93]
v. Al-Rafi`i: "It is a sale of an asset to someone with deferred price. The asset is delivered to the purchaser, but before the seller receives the first payment of price, he repurchases the asset at a lower cash price."[94]
vi. Ibn Qudamah: "It is a sale of an asset with a deferred price, and buys back the same asset at a lower price."[95]

Legal Status of *Bai` `Inah*

Generally, the Muslim scholars have different views on the legality of *`inah* sale. The majority view that such a sale is forbidden. However, a group of the scholars are of the opinion that this sale is not contradictory to Shariah principles.

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90 Imam Syafii, *al-Um*, v.3, Dar al-Fikr, Beirut, p. 79
91 Al-Haskafi, *al-Durr al-Mukhtar fi Syarh Tanwir al-Absar* (dicetak bersama Hasyiah Ibn Abidin), v.5, Beirut: Dar al-Fikr, p.325.
92 Al-Zaila`i, *Nasb al-Rayah li Ahadith al-Hidayah*, vj.4, Muassasah al-Rayyan, 1997, p. 279.
93 Al-Dardir, *al-Syarh al-Saghir*, v.3, Dar al-Ma`arif, Egypt 1973, p. 129.
94 Al-Rafi`i, *Fath al-Aziz Syarh al-Wajiz* (dicetak bersama al-Majmu`), v. 8, p. 231.
95 Ibn Qudamah, *al-Mughniy*, v. 4, Maktabah al-Riyad al-Hadithah, al-Riyad, p.193-195.

Those Who Reject *Bai` `Inah*

The first group of scholars who reject *bai` `inah* are, scholars of Imam Abu Hanifah school, Imam Malik and Imam Ahmad and some Shafiites. They view that this kind of sale is forbidden.

On the other hand, the second group of scholars, among others Imam Shafii, Abu Yusuf and some Shafiites are of the opinion that this sale is legal and permissible.[96]

Arguments for Rejection

Among the arguments given by the first group are:

Based on the Concept of Sadd Zari`ah

Ibn Rusd states in his book[97] under the chapter on 'deferred sales' states that the applicable method in prohibiting this transaction is *sadd zari`ah*. Imam Malik's school rejects *bai` `inah* because it is deemed as a contract which is apparently allowed but it leads to an unlawful practice according to Shariah (*riba*).

A Narration from Saidatina Aishah

A mother once asked Saidatina Aishah, she said "O Ummu al-Mu'minin! I have sold a slave belongs to Zaid bin Arqam to `Ata' at 800 dirham. Since `Ata' needed some money, I have bought back the slave before it is due for me to receive 600 dirham". Saidatina `Aishah replied, "how could you execute such a bad sale. You should inform Zaid bin Arqam that his conduct has extingushed all his rewards for participating in *jihad* with the Prophet PBUH if he does not repent. The mother said: "What is your opinion if I forgo the profit and take the principal sum only?" `Aishah then recited the verse which means: "*Whoever receives an admonition from his Lord and stops eating riba shall not be punished for the past, his case is for Allah (to judge)*."[98]

The scholars view that the above sayings and fatwa of Saidatina Aishah shows that it is necessary to take certain precaution and abstain from conducts that would lead to unlawful result in Shariah (*sadd zari`ah*).

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96 Al-Syawkani, *Nailil Awtar*, v.5, p.294, al-Riba wa al-Qard, p.60

97 Ibn Rusd, *Fatawa Ibn Rusd*

98 Surah Al-Baqarah:275

There are a few hadith that indicate the prohibition of *bai` `inah*:

First hadith

حديث ابن عمر مرفوعا: "اذا تبايعتم بالعينة، وأخذتم أذناب البقر، ورضيتم بالزرع، وتركتم الجهاد، سلط الله عليكم ذلا لا ينزعه حتي ترجعوا إلى دينكم"

Meaning: "*if you sell and purchase based on `inah, and you cultivate, and you are satisfied with the cultivation, and you ignore the duty to do jihad, Allah SWT will curse you and He will not remove the spell until you return to your religion*".[99]

Second hadith

عن ابن عمر(بطريق الأعمش بن ابي رباح) بلفظ " اذا يعني ضن الناس بالدينار والدرهم تبايعوا بالعينة، واتبعوا أذناب البقر، وتركوا الجهاد في سبيل الله، أنزل الله بهم بلاء، فلا يرفعه عنهم حتي يراجعوا دينهم "

Meaning:"*Narrated from Ibn Umar (as reported by al-A'masy bin Abi Rabah) as he was saying: "if the people count every single dinar and dirham, and sell and purchase based on `inah, and cultivate the land, and abandon the duty of jihad for the sake of Allah SWT, Allah SWT will befall misfortune on them, and will not remove it from them until they return to their religion*."[100]

Those Who Accept Bai` *`Inah*

The second group of Muslim scholars, which consists of Imam Shafii, Abu Yusuf, Abu Daud, and Abu Thur, including a report from Ibn Umar are of the view that this contract of sale is not contrary to Shariah principles, thus, it is allowed. They argument, among others, is that the hadith relied on by the first group, as narrated from Saidatina Aishah above is weak in terms of its sanad (transmission). This is because of one of the narrators of the hadith named al-`Aliah binti Anfa` is unknown (*majhulah*). Al-Dar Qutni regards her as an unknown figure, thus, the hadith cannot be a proof.
Besides having a weak *sanad*, the hadith is also weak in terms of its *matan* (wordings). They claim that Saidatina Aishah is not in a capacity to determine status and to invalidate the rewards for *jihad* that Zaid had involved together with the Prophet

99 Reported by Abu Daud
100 Reported by Imam Ahmad

PBUH in the battle fields since Zaid had conducted an *ijtihad* and was of the view that such a sale is permissible.

Imam Shafii says, in his book al-Umm, as following:

> " if we are going to assume that someone's sale and purchase contract is forbidden whereas he believes that the contract is permisible, we are not allowed to judge his past good deeds as have been wiped off by Allah SWT."[101]

Should the above report from Saidatina Aishah is authentic and accepted, it is not more than a saying or an opinion of her which is certainly not the saying of Prophet PBUH.[102]

Some of the Muslim scholars indicate that there are 24 kinds of *bai` `inah*. Among the permissible bai` `inah are:

i. A sale which is followed by a subsequent sale but without any intention to have *`inah* arrangement.
ii. *`Inah* that involves two contracts of sale in which the price of each contract (either cash or deferred) is similar to the other.
iii. *`Inah* which is concluded on an asset with a gap of time between the two contracts, the purchase and sale contracts.
iv. *`Inah* which is concluded on an asset which has changed in certain aspect.

The underlying issue on *bai` `inah* is the difference between the *muqtada al-`aqd* and the actual motive of the contracting parties, whether to have a real contract of sale or as *hilah* for liquidity or monetary purposes.

The polemic in the issue of permissibility of *bai` `inah* is the status of *hilah*. *Bai` `inah* transaction aims to obtain liquidity or cash money but with an underlying contact of sale. Apparently, it resembles a *hilah*. Whether a *hilah* is allowed or not, this issue has been a topic that is debated by the scholars ever since. Imam Shafii and Hanafites, such as al-Sarakhsi, views that *bai` `inah* in general, is allowed and in line with Shariah principles as long as it does not violate human's right or carry unlawful elements.
As far as *hilah* is deemed as demeaning the religion, *bai` `inah* will not be acceptable. However, if *hilah* is regarded as a mode to solve problems (*makhraj*) that is much

101 Imam Syafii, al-Umm, v.3.p.68,69
102 Mohd Parid Bin Sheikh Hj Ahmad, *Bai Al-Inah & Tawarruq Kaedah Dan Pendekatan Penyelesaian*. Unpublished paper.

needed by the people, *bai` `inah* transaction or its alike may be acceptable, provided that necesary conditions are duly followed in order to avoid any abuse of such contract which may lead to unfairness or injustice.[103]

103 Engku Rabiah Adawiah Engku Ali, *Bay` Al `Inah & Tawarruq: Kaedah & Pendekatan Penyelesaian*. Unpublished paper.

HIBAH

Definition

Hibah means giving away the ownership of an asset with mmediate effect without any return.[104] It is a unilateral benevolent contract in which a party transfers the ownership of an asset to a person without any consideration during the lifetime of the giver. In principle, *hibah* is a commendable act.[105]

Conditions of *Hibah*

The contract of *hibah* is permissible in Islam with the following conditions:

i. The party who makes the *hibah* must have the legal capacity to execute a *tabarru'*.
ii. The object of *hibah* must be owned by the one who executes the *hibah*.[106]
iii. The party who makes the *hibah* has the right to withdraw his *hibah*.[107]

Hibah is considered valid if the following basic requirements are satisfied:[108]

i. *Sighah*
ii. The person who makes the *hibah* (*al-wahib*)
iii. The recipient (*al-mawhub lahu*)
iv. Object of *hibah* (*al-mawhub*)

Generally, the Muslim scholars agree that the above requirements are necessary for the validity of a *hibah*, except the requirement of *sighah*, that is, the *ijab* and *qabul*. The scholars differ in their opinion on the status of *qabul*, whether it is an essential element of *hibah* or not.

The difference of opinions among the scholars is due to different approaches of the scholars in determining the necessity to have *qabul* in *tabarru`at* contracts. According to some Hanafites, *qabul* is not considered as an essential element of *hibah*.[109]

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104 Wizarah al-Awqaf wa al-Syu'un al-Islamiah, *Al-Mausu'ah Al-Fiqhiyyah*, 1993, v. 42, p. 120
105 Wahbah al-Zuhaili, *Fiqh al-Islami wa Adillatuhu*, v. 5, p.3980-3981
106 Ibid., v. 5, p.3988-3990
107 Al-Juzairi, Abdul Rahman, *Kitab Al-Fiqh `Ala Al-Mazahib Al-Arba`ah*, Dar al-Fikr, v.3 p.303
108 Ibn Juzai, *al-Qawanin al-Fiqhiyyah*, Dar al-Qalam, Beirut, p.241
109 Abd al-Rahman al-Juzairi, *Kitab al-Fiqh `Ala al- Mazahib al-Arba`ah*, al-Maktabah al-Tawfiqiyyah, Kaherah, v.3, p.257-258

Al-Kasani views that the rule which says *qabul* is not a pillar of *hibah* is based on *istihsan*.[110] In supporting his opinion, al-Kasani relies on the following hadith of the Prophet PBUH that reads:

" لا تجوز الهبة الا مقبوضة محوزة "

Meaning: "*Hibah is not allowed unless the object of hibah can be delivered and owned". This hadith becomes a proof for al-Kasani's view on the validity of hibah without a qabul*.[111]

Legal status of *Hibah Al-Ruqba* and *Al-`Umra*

Hibah al-ruqba is a conditional *hibah* in which the party who makes *hibah* stipulates certain condition that must be met by the recipient, that is, the latter shall becomes the owner of the object of *hibah* upon the death of the former. However, should the latter die before the former, the object of *hibah* shall be returned to the former.[112]

Al-Zaila`i states that all scholars are of the view that such *hibah* that requires a transfer of ownership of the object of *hibah* at a stipulated date in future (*mudhafan ila zaman fi al-mustaqbal*) is not allowed.[113]

Hibah al-`umra, according to the scholars, is a temporal *hibah* that is subjected to the lifetime of the person who makes the *hibah* or the recipient.[114] If the latter died, the object of *hibah* is returned to the former. However, if the former died, the object shall be returned to his heirs. Shariah recognizes this kind of *hibah al-`umra* but the above conditions shall have no effect.[115]

Majority of the scholars view that temporal *hibah*, like *hibah al-ruqba* and *hibah al-`umra* are valid *hibah* but the conditions shall have no effect.[116] On the other hand, some of the scholars say that *hibah al-`umra* and the conditions are valid provided that the one who makes the *hibah* does not stipulate that the object of *hibah* shall be

110 Al-Kasani, *Badaie al-Sanaie*, Dar al-Kutub al-Ilmiyyah, Beirut, v.6, p.115

111 ibid, v.6, p.115

112 Al-Syawkani, *Nail al-Awtar*, Dar al-Fikr, Beirut, 1994,v.6,p.112-113; Ibn Qudamah, *al-Mughniy*, Dar al-Fikr, Beirut, 1994,v.5,p.335; Dr. Wahbah al-Zuhaili, *al-Fiqh al-Islami Wa Adillatuhu*, Dar al-Fikr, Damsyik, 1989,v.5,p.10; Wizarah al-Awqaf wa al-Syu'un al-Islamiah, *al-Mawsu`ah al-Fiqhiyyah*, Kuwait, v.23,p.5-6

113 Al-Zaila`i, *Tabyin al-Haqai'q Syarh al-Haqa'iq*, Dar al-Kitab al-Islami, Cairo,v.5,p.104

114 Wizarah al-Awqaf wa al-Syu'un al-Islamiah, *al-Mawsu`ah al-Fiqhiyyah*, v.30,p.311

115 Dr. Wahbah al-Zuhaili, *al-Fiqh al-Islami Wa Adillatuhu*, v.5,p.8

116 Al-Kasani, *Badaie al-Sanaie*, v.6,p.116; Al-Zaila`i, *Tabyin al-Haqai'q Syarh al-Haqa'iq*, v.5,p.104; Ibn `Abidin, *Hasyiah Rad al-Muhtar*, Dar al-Fikr, Beirut, 1992,v.5,p.707; Ibn Qudamah, *al-Mughniy*, Dar al-Fikr, Beirut, 1994, v.6,p.339-340

inherited by the heirs the recipient upon his death.[117] This means that the object of *hibah* shall be returned to its original owner after the death of the recipient. This view is shared by Shafii school (*fi al-qadim*), a few Hanbalites, Imam Malik, Imam al-Zuhri, Abu Thur, and a few others. However, some of the scholars see that such temporal hibah is not a true *hibah* but it is actually an *`ariyah*.[118]

According to al-Kasani, *hibah al-`umra* is a valid *hibah* but the conditions are invalidated. As such, if a person would like to make a *hibah* to someone based on *hibah al-`umra*, the object of *hibah* becomes a property owned by the recipient, whereas the stipulated period shall have no effect.[119]

Hanafites and Malikites allow *hibah al-`umra* but disallow *hibah al-ruqba*. They base their opinion on a hadith of the Prophet PBUH that permits *hibah al-`umra*, but forbids *hibah al-ruqba*.[120] However, this hadith has been criticized by Imam Ahmad by saying that the authenticity of the hadith is questionable.[121]

The Maliki school categorise *hibah al-`umra* as *hibah al-manafi`* or *hibah* of the usufructs of the object of *hibah*. According to Ibn Rushd, *hibah al-`umra* is a gift that is contingent to the age of the lifetime of the recipient. If the recipient died, the object of the *hibah* shall be returned to the one who made the *hibah* or his heirs.[122]

Some of the Shafiites, Hanbalites dan Hanafites view that *hibah al-`umra* is actually *hibah `ayn* (item) and it is not *hibah manfaat*.[123] Ibn Hajar states that majority of the scholars view that the object of *hibah al-`umra* becomes the recipient's property.[124] Ibn Qudamah describes two opinions that concern with a situation in which a person makes a *hibah* of an object based on *hibah al-`umra* whereby he stipulates that the object shall be returned to him. The first opinion says that the *hibah* and its condition is valid, while the second opinion claims that the *hibah* is valid but the condition is

117 Ibn Qudamah, *al-Mughniy*, v.6,p.338-339

118 Al-Ramli, *Nihayat al-Muhtaj ila Syarh al-Minhaj*, Dar al-Fikr, Beirut, 1984, v.5,p.410; Al-Nawawi, *al-Majmu` Syarh al-Muhazzab*, Dar al-Fikr, Beirut, v.15,p.395

119 Al-Kasani, *Badaie al-Sanaie*, v.6, p.116

120 Al-Hattab, *Mawahib al-Jalil*, Dar al-Fikr, Beirut, 1992, v.6, p.61; *al-Nawawi al-Majmu` Syarh al-Muhazzab*, v.15, p. 395-396; Dr.Wahbah al-Zuhaili, *al-Fiqh al-Islami Wa Adillatuhu*, v.5, p.3984-3985

121 Al-Nawawi, *al-Majmu` Syarh al-Muhazzab*, v.15, p. 396

122 Ibn Rushd, *Bidayah al-Mujtahid*, Dar Ihya' al-Turath al-`Arabi, Beirut, 1992, v.2, p.426

123 Al-Kasani, *Badaie al-Sanaie*, v.6, p.117, Wizarah al-Awqaf wa al-Syu'un al-Islamiah, *al-Mawsu`ah al-Fiqhiyyah*, v.30, p.312

124 Al-Nawawi, *al-Majmu`*, v.15, p.394

void.[125] Al-Kasani of the Hanafites views that *hibah al-`umra* represents an immediate (*fi al-hal*) transfer of ownership of the object of *hibah*, because a temporal transfer of ownership of the object would contradict with *muqtadha al-`aqd*.[126]

Al-Zarqa' classifies such a temporal hibah as *`ariyah*. This is due to the nature of the *hibah* that allows transfer of ownership of the usufructs of the object only and not its *`ayn*. However, al-Zarqa' classifies *hibah al-`umra* as *hibah* which allows the recipient to own the object on permanent basis. A proof that indicates that the recipient is entitled to this permanent ownership is a hadith of the Prophet PBUH, which clearly states that "*whoever makes a hibah based on al-`umra, it shall belong to the recipient and also his heirs after his death*".[127]

Thus, it may be concluded that the focused issues that lead to different opinions among the scholars on *hibah al-`umra* and *hibah al-ruqba* are, firstly, the temporal nature of these *hibah*, and secondly, the conditional *hibah* is subject to the lifetime of a person. Both issues raise different reactions among the scholars.

Those who reject *hibah al-`umra* and *hibah al-ruqba* base their opinion on the hadith of the Prophet PBUH:-[128]

قال النبي صلى الله عليه وسلم: لا تعمروا و لا ترقبوا

Meaning: *The Prophet PBUH said: "Do not practice `umra and ruqba."*

The scholars who allow *hibah al-ruqba* and *hibah al-`umra* cite the following hadith as their proof. The Prophet PBUH said:-[129]

قال رسول الله صلى الله عيه وسلم: العمرى جائز لأهلها والرقبى جائز لأهلها

Meaning: "*`umra is permissible to its owner and ruqba is permissible to its owner*"

Those who accept *hibah al-`umra* but reject *hibah al-ruqba*, claim that *hibah al-ruqba* is a kind of *hibah ta`liq* that is contingent to an uncertain factor. In fiqh terminology, it is known as *amr ghair muhaqqaq*.[130]

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125 Ibn Qudamah, *al-Mughniy*, v.6, p.338-339
126 Al-Kasani, *Badaie al-Sanaie*, v.6, p.116
127 Mustafa Ahmad Al-Zarqa', ***al-Madkhal al-Fiqhiy al-`Am***, Dar al-Fikr, Damsyik, v.1, p.273
128 Ibn Qudamah, *al-Mughniy*, v.6,p.335
129 Ibn Qudamah, *al-Mughniy*, v.6, p.335
130 Abd al-Rahman al-Juzairi, *Kitab al-Fiqh `Ala al- Mazahib al-Arba`ah*, v.3, p.258

The scholars who view that *hibah al-`umra* and *al-ruqba* are allowed but the conditions are void, argue that maintaining the conditions would mean the *hibah* has violated its own *muqtadha al-`aqd* and required legal purpose of Shariah. They also rely on the following hadith of the Prophet PBUH that reads:[131]

" أمسكوا عليكم أموالكم لا تعمرواها فإن من أعمر شيأ فإنه لمن أعمره "

Meaning: *"Protect your property and do not practice `umra with it, verily, the one who practice `umra with something, it belongs to the recipient of `umra."*

Rules on Revocation of *Hibah* (*al-ruju` fi al-hibah*)

Hanafites view that *al-ruju` fi al-hibah* is permissible even though after the delivery of the object of *hibah*. They argue that the one who makes the hibah is entitled to revoke the *hibah* at his discretion. However, they are of the view that *al-ruju` fi al-hibah* is not encourage or *makruh*.[132]

Ibn `Abidin and al-Zaila`i view that *al-ruju` fi al-hibah* is permissible since the contract of *hibah* is a kind of contract which is not binding on the parties (*ghayr lazim*).[133] Al-Zarqa' also agree with the view of Hanafites, that is, *hibah* is a conract which is not binding. Therefore, revocation and return of the *hibah* property or *al-ruju` wa al-istirdad al-mauhub* is permissible in Shariah.[134]

Generally, revocation of *hibah* as viewed by the Hanafites is allowed as long as the *hibah* is free from any impediments or *mawani`* that may disable the possibility of revocation of *hibah*. These *mawani`* are as following:-[135]

i. The recipient of *hibah* is the spouse of the one who makes the *hibah*.
ii. Death of any of the parties.
iii. A *hibah* with *`iwad* or return.
iv. Transfer of ownership of the *hibah* property to a third party or sale of *hibah* to the recipient.
v. The recipient of *hibah* is a relative who is legally forbidden from marrying the person who makes the *hibah*.

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131 Al-Kasani, *Badaie al-Sanaie*, v.6, p.116
132 Ibn `Abidin, *Hasyiah Rad al-Muhtar*, v.5, p.698
133 Ibn `Abidin, *Hasyiah Rad al-Muhtar*, v.5, p.688; Al-Zaila`i, *Tabyin al-Haqai'q Syarh al-Haqa'iq*, v.5, p.97- 98
134 Al-Zarqa', *al-Madkhal al-Fiqhiy al-`Am*, v.1,p.452 Ibn `Abidin, *Hasyiah Rad al-Muhtar*, v.5, p.692
135 Al-Zaila`i, *Tabyin al-Haqaiq Syarh al-Haqaiq*, v.5, p.98

vi. The *hibah* property is destroyed or out of order.
vii. The recipient has caused certain alteration to the *hibah* property, and such alteration cannot be removed from the original state of the property.

Hanafi rule the permissibility of *al-ruju` fi al-hibah* based on a report in which Saidina Umar al-Khattab said: "Whoever makes a *hibah* to his relative or (the gift) is based on *sadaqah*, verily he should not ask for the return of the property, and whoever makes a *hibah* with the hope to receive any consideration, then he may request for the return of the property if he did not consent to the *hibah*."[136]

Shafiites, Hanbalites, and a few of Malikites generally, view that *al-ruju` fi al-hibah* is allowed as long as it is done before the delivery of the object of *hibah* or before the recipient takes it into his possession. Once the object has been delivered to the recipient, the *hibah* becomes binding, thus, *al-ruju` fi al-hibah* is not allowed except a *hibah* made by parents to their son or daughter.[137]

Shafiites stipulate certain conditions in allowing the parents to revoke their *hibah* or *al-ruju` fi al-hibah* to their son or daughter. Among the conditions are:

i. The son or daughter must not be a slave
ii. The *hibah* property must be in a form of *`ayn* or a corporeal property, and not in a form of debt
iii. The *hibah* property must be under the control of the son or daughter
iv. The son or daughter must be free from any impediment that is due to mismanagement of property (*as-safih*).
v. The *hibah* property must not be a kind of perishable item or *mustahlikah* (for example, food item).
vi. The *hibah* property must have not been sold (by the recipient).

Imam Ahmad and Zahiri scholars do not allow *al-ruju` fi al-hibah*.[138] They argue that it is not permissible based on a hadith which means: "Whoever gave a property to someone and take the *hibah* property back, he is similar to a dog which licks its vomit".[139] This is a valid and authentic hadith as agreed by the scholars.

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136 Ibn Rushd, *Bidayah al-Mujtahid*, v.2, p.428
137 Abd al-Rahman al-Juzairi, *Kitab al-Fiqh `ala al-Mazahib al-Arba`ah*, v.3, p.267-272
138 Ibn Rushd, Bidayah al-Mujtahid, v.2, p.428
139 Ibn Rushd, Bidayah al-Mujtahid, v.2, p.428-429

In conclusion, even though apparently the scholars have different opinions on the permissibility of *al-ruju` fi al-hibah*, they have actually agreed to allow *al-ruju` fi al-hibah* if it is done by mutual agreement between the parties. Al-Zaila`i mentions in his book that the validity of *al-ruju` fi al-hibah* originally depends on the mutual consent of both parties or a court's order.[140] Ibn `Abidin adds that *al-ruju`* is not valid without mutual consent of the parties or an order given by a judge.[141]

Al-Sanhuri also takes a similar approach with al-Zaila`i's. He is of the view that the permissibility of *al-ruju` fi al-hibah* must be depending on mutual consent of both parties.[142]

Hibah al-`umra* and *hibah al-ruqba* become debatable issues among the scholars since these issues relate to a few fundamental *fiqh* concepts of each school. Hanbalites are quite lenient and flexible in examining *hibah al-ruqba* and *al-`umra since they hold to the principle "*al-muslimun `ala syurutihim*". Whereas, scholars other than the Hanbalites, they rely their view on their understanding of the textual provision of the hadith of the Prophet PBUH that relates to *al-`umra* and *al-ruqba*.

In relation to *al-ruju` fi al-hibah*, a study has found that although the scholars in their views on the permissibility of revocation of *hibah*, in general, they agree on its permissibility if it is done through mutual agreement or a court judgment. This means that the mode of *al-ruju` fi al-hibah* is at the discretion of each individual as long as it does not lead to a dispute between the contracting parties.

140 Al-Zaila`i, Tabyin al-Haqai'q Syarh al-Haqa'iq, v.5, p.101
141 Ibn `Abidin, Hasyiah Rad al-Muhtar, v.5, p.704
142 Al-Sanhuri, *Nazariat al-`Aqd*, Dar al-Fikr, Beirut, p.724

KAFALAH

Definition

Majority of Muslim scholars view that the terms *dhaman* and *kafalah* carry the same meaning. They do not differentiate between these two term and another. However, some scholars confine the definition of *dhaman* to only guarantee of property while the term *kafalah* means guarantee of *al-nafs* or oneself.[143]

Kafalah may be defined as a contract that combines a *zimmah* (obligation) of a person and a *zimmah* of another person.[144] Majority of Hanafites define *kafalah* as a contract that combines the *zimmah* of a guaranteed person to the *zimmah* of the guarantor in a claim against the self of an individual, debt or an asset.[145]

According to the *fiqh* theories on contracts, a contract of *kafalah*, in terms of its *ghayah* (objective) falls under the category of *'uqud al-tauthiqat*.[146] While in terms of its exchange of right (*tabadul al-huquq)* feature, it may be considered as a *tabarru'* initially, and a *mu'awadat* at the end of the contract.[147]

Legal Status of Kafalah

The scholars have debated at length on the permissibility of guarantee contract relying on the sources of Shariah; Al-Quran, Al-Sunnah, and *ijmak*.

The permissibility of *kafalah* can be derived from provisions of Al-Quran, for instance, in the following verse Allah SWT says:

قالوا نفقد صواع الملك ولمن جاء به حمل بعير وانا به زعيم

Meaning: *Some of the ministers reply: "We have missed the royal bowl and for him who produces it is a camel load, I will be bound by it*".[148]

143 `Ali al-Khafif, Al-Dhaman Fi Al-fiqh Al-Islami, Dar Al-Fikr Al-Arabi, Kaherah, 1997, p.5
144 Ali Haidar, Durar al-Hukkam, Beirut, Dar al-Jil, 1991, v. 1, p. 724
145 Wizarah al-Awqaf wa al-Syu'un al-Islamiah,Al-Mausu'ah Al-Fiqhiyyah, 1993, v. 34, p. 287
146 Mustafa Ahmad Al-Zarqa', Al-Madkhal al-Fiqhi Al-Am, Dar al-Fikr, Beirut, 1968, v.1, p. 583
147 ibid. p. 579
148 Surah Yusuf : 72

Another proof that indicates the permissibility of *kafalah* is the following hadith:-

حديث سلمة بن الأكوع قال : "كنا عند النبي (ص) فأتي بجنازة فقالوا: يا رسول الله صل عليها. قال: هل ترك شيئا؟ قالو:لا. قال هل عليه دين؟ قالوا: ثلاثة دنانير. قال: صلوا على صاحبكم فقال أبو قتادة: صل عليه يا رسول الله وعلي دينه. فصلى عليه." وفي رواية: "أنا اتكفل به"

Meaning: "*Narrated from Salamah bin al-Akwa', he says: "Once we were with the Prophet PBUH, then a group of people came with a funeral procession and said: O Prophet , please conduct the funeral rites for this corpse, He asked: Has he left anything? They replied: None. Then he asked: Has he left any debt? They replied: Yes, three dinar, then the Prophet PBUH said: You should pray for him. Then Abu Qatadah said: O Prophet, please pray for him, I bear the liability of the debt, then the Prophet PBUH pray for the corpse. In another narration, it is said "I will guarantee for the settlement of the debt*".[149]

Types of *Kafalah*

In general, *kafalah* contract may be classified into two categories :

i. *Kafalah bi al-mal*, it is a guarantee for property or finance.
ii. *Kafalah bi al-nafs*, it is a guarantee for one's self.[150]

As this discussion relates to a guarantee for property, that is, settlement of debt, the following explanation will not cover any description on guarantee for one's self.

Classification of *Kafalah Bi al-Mal*

Kafalah bi al-mal may be divided into three main categories as follows:

i. *Kafalah bi al-dayn*, it is a guarantee for a debt owed by a party. It is meant to guarantee for the settlement of the debt by the guarantor should the guaranteed party is in default.
ii. *Kafalah bi al-`ayn* or *kafalah bi al-taslim*, it is a guarantee for a tangible property or for the delivery of an object of a contract. In a contract of sale, for instance, a guarantor may need to guarantee for the delivery of the object of the contract to the purchaser. If the seller fails to perform his contractual obligation as stipulated

149 Hadis riwayat Al-Bukhari, Al-Nasai, Ibn Majah dan Al-Baihaqi

150 Mustafa Ahmad Al-Zarqa', *Al-Madkhal al-Fiqhi al-Am*, v.1, p. 542, Ali Haidar, *Durar al-Hukkam*, v.1, p. 732-734, Ibn Rushd, *Bidayah al-Mujtahid*, Beirut, Dar al-Jil, 1992, v.2, p. 378

in the terms of the agreement, the guarantor is liable to furnish the delivery.

iii. *Kafalah bi al-darak*, it is a guarantee for a property that is free from any encumbrance or claim. This guarantee is meant for guaranteeing an object of a contract is free from any claim that could hinder the transfer of ownership of the property in a particular contract. If there is any claim against the property, the guarantor is liable to bear the loss suffered by the beneficiary.[151]

Legal Rule on *Ujrah* in *Kafalah* or *Dhaman* Contract

A number of the classical scholars are of the view that charging a fee for a guarantee is not allowed. This view is based on the argument that *kafalah* contract is classified among the *uqud al-tabarru'at* which is voluntary in nature. As such, it is not allowed to charge a fee for the guarantee.[152]

Views That Disallow *Ujrah* in *Kafalah* or *Dhaman* Contract

The OIC Fiqh Academy has debated the issue on charging of *ujrah* for *dhaman* or *kafalah* in its second meeting on 22nd-28th Disember 1985. This issue has been debated at length by the Academy members because they have two contradicting views; one view allows the charge of *ujrah* and the other view forbids it. At the end of the meeting, the Academy resolve to forbid the charge of *ujrah* for *kafalah* since it is a kind of *aqd tabarru'* (voluntary). By charging an *ujrah* for *kafalah* may consequently change this contract to a *qardh* contract with stipulated benefit, and this is forbidden in Shariah. However, the Academy allows the guarantor to claim for any cost incurred for the purpose of the guarantee contract.[153]

The AAOIFI Shariah Board has also discussed the same issue and resolved to disallow a charge of *ujrah* for *kafalah* or *dhaman*. However, the guarantor is entitled to claim for reimbursement of actual cost incurred which is resulted from the guarantee.[154]

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151 Mustafa Ahmad Al-Zarqa', *Al-Madkhal al-Fiqhi al-Am*, v.1, p. 542, Ali Haidar, *Durar al-Hukkam*, v.1, p. 732-734

152 Al-Hattab, *Mawahib al-Jalil*, Beirut, dar al-Fikr, 1992, v.5, p. 111, 113

153 OIC, *Majalah Majma` al-Fiqh al-Islami*, Jeddah, no.2, v.2, p. 1209-1210

154 AAOFI, *Al-Ma'ayir al-Syar'iyyah*, Bahrain, 2002, p. 75 dan 88

Views That Allow Ujrah in *Kafalah* or *Dhaman* Contract

Prof. Dr. Wahbah al-Zuhaili views that charging an *ujrah* for *dhaman* or *kafalah* is permissible. According to the original rule, it is advisable to offer guarantee free of charge since *kafalah* or *dhaman* falls under the category of *aqd al-tabarru'*. However, due to *maslahah* and needs of the community, charging *ujrah* for *dhaman* should be allowed based on the needs of the people.[155]

Syeikh Ahmed Ali Abdalla expressed his opinion in his presentation to the OIC Fiqh Academy that charging *ujrah* for *dhaman* is permissible. He acknowledged the original rule of *dhaman* is *tabarru'*, but if the contract has been stipulated with a charge of fee, the stipulation must be regarded as a valid and enforceable condition. He also argued that a contract of *dhaman* is a kind of *Istithaq* not a kind of *qardh*. Thus, taking *ujrah* for a guarantee service does not fall under the category of forbidden practice, that is, **(كل قرض جر منفعة فهو ربا)**[156] since a contract of *dhaman* is different from a contract of *qardh*.

He has supported his view with an application of *qiyas* on the permissibility of **akhz** *al-ajr `ala al-jah* (taking a fee for using one's good reputation) and *akhz al-ju`l `ala ruqyah min al-Quran* (taking a fee for a spell from the verses of al-Quran). Some of the classical scholars have allowed these two factors for charging a fee, thus, the same rule may be applicable to a fee charged for providing a guarantee since it has the same nature of work or service with the above permitted situations.[157]

According to Dr. Nazih Hammad, the rule for a charge of *ujrah* for any guarantee service or *kafalah* by the guarantor is subject to various scenario of the guarantor's liability towards the debt, which are categorised as following:[158]

i. If the guarantor did not make any payment for the settlement of debt to the creditor, either because of the debtor has settled the debt or the creditor writes off the debt, it is allowed to charge *ujrah*.
ii. If the guarantor settles the debt, while at the same time the guarantor also

155 Wahbah al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuhu*, Dar al-Fikr, Damsyik, 1989, v. 5, p. 161
156 OIC, *Majalah Majma` al-Fiqh al-Islami*, Jeddah, 1986, no.2, v.2, p. 1146-1147
157 OIC, *Majalah Majma` al-Fiqh al-Islami*, Jeddah, no.2, v.2, p. 1134-1135
158 Nazih Hammad, *Qadhaya Fiqhiyyah Mu`asirah Fi al-Mal wa al-Iqtisad*, p.310-311, Dar al-Qalam, Damsyiq 2001

indebted to him and the amount of the guarantor's debt is equivalent to the amount he has paid for the settlement of debt, it is permissible for him to charge *ujrah*. This due to the occurence of *muqasah* between the guarantor and the guaranteed party.

iii. If the guarantor is in the same situation as (ii) above, but the amount of guaranteed debt that is paid to the creditor forms part of the amount of debt owed by the guarantor to the guaranteed person, charging an *ujrah* is allowed. However, the guarantor must settle the balance of his debt to the guaranteed person.

iv. If the guarantor settles the debt of the guaranteed person and the guarantor does not owe to the guaranteed person, it is allowed to charge a fee for the guarantee, provided that the guaranteed person must not delay in refunding to the guarantor the guaranteed amount paid by the guarantor.

v. If the guarantor settles the debt of the guaranteed person and the guarantor has no debt owed to the guaranteed person, but the guaranteed person fails to pay the guarantor the guaranteed amount paid by the guarantor within reasonable time, then it is not allowed to charge any fee or *ujrah*. This is due to the *ujrah* charged in this situation is deemed as a *hilah* for *riba al-nasiah* since it involves deferment in settling the debt owed by the guaranteed person to the guarantor.

Based on the above classification of *kafalah*, it is clear that a guarantee for a debt is a recognised practice in Shariah. However, the issue on charging *ujrah* (fee) for a guarantee service for a debt remains a debatable issue among the scholars. The difference of views among them is mainly caused by their perception towards *kafalah* contract as a *tabarru`* per se. Some of the scholars add that if a *kafalah* or *dhaman* is stipulated with a charge of *ujrah*, it is tantamount to a practice of riba.

On the other hand, a group of scholars view that even though the original rule of a *kafalah* contract is similar to a *tabarru`* contract, but it does not hinder the guarantor (*kafil*) from charging a fee for the service rendered by him, especially at present, it is difficult to get a service which is free of charge.[159] This opinion is supported by the evidence that the features of *kafalah* or *dhaman* are different from the features of *qardh*, thus, impliedly it indicates that such fee is not similar to the practice of riba.

159 Nazih Hammad, *Qadhaya Fiqhiyyah Mu`asirah Fi al-Mal wa al-Iqtisad*, p.299

Based on the views of the scholars as mentioned above, a charge of *ujrah* for a contract of *kafalah* or *dhaman* is not a practice which is contrary to the principles of Shariah. This is based on the fact that many of those contracts which are originally of *tabarru`* nature are no longer relevant at present. For instance, a *wakalah* contract was originally being offered free of charge but now it becomes one of the sources of income for Muslims. There are many other examples that indicate the permissibility of charging a fee in a *tabarru`* contract which is previously forbidden. Now, the scholars recognise the need to allow it based on the current needs of the community.[160]

160 Ibid.

QARDH

Definition

Qardh means giving a property to a party who shall benefit from it and return its replacement.[161] Hanafi School defines *qardh* as something, which is given from *mithli* item and repaid with its equivalent.[162]

Dr Wahbah al-Zuhaili explains that *al-qardh* in Arabic, literally means 'a portion' while a property given to a debtor known as *qardh* since the property is part of the creditor's property. It is also termed as *al-salaf*.[163]

Qardh literally means giving a property by a party to another different party with something conditioned (*thabit*) to *zimmah* in the form of homogeneous property (*mumathil*) with the acquired property. The property is to be benefited by the recipient (debtor).[164]

Qardh Hasan

Based on review of *fiqh* books, it is found that the previous scholars did not specifically elaborate the *qardh hasan* term. Rather they only discussed the principles of *qardh* and its permissibility from Shariah ruling.

The discussion on *qardh hasan* principle is elaborated in depth and more specific after it has become a tool to facilitate short-term needs of individual as practiced by charitable organizations, cooperatives and Islamic financial institutions. Thus, the term *qardh hasan* (in the form of *mudhaf wa mudahafun ilayhi*) was not appeared in any previous books of Islamic jurispridence schools, except in tafsir books. This is because there are Quranic texts referring to the term, which is generally about those who spend (*infaq*) their properties in the way of Allah.

In al-Fatawa book, *qardh hasan* is referring to reduction (discount) on a matured debt given by creditor to debtor.[165] For example, a debtor owes a debt from a creditor for

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161 Wizarah al-Awqaf wa al-Syu'un al-Islamiah, *Al-Mausu`ah Al-Fiqhiyyah*, 1993, v.33, p.111.

162 Abdul Hamid Mahmud Tohmaz, *Al-Fiqh Al-Hanafi Fi Subihi Al-Jadid*, Dar al-Qalam, Damsyik, 2001, Vol.4, p.213.

163 Wahbah al-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuhu*, Dar al-Fikr, Damsyik, 1997, v.5, p.3786: Mohammad Hussein Abu Yahya, *Al-Istidanah Fi Al-Fiqh Al-Islami*, Thesis published by Jami`ah al-Azhar, 1990, p.35.

164 Ibid.

165 Al-Imam Al-Ba`Li, *Kitab Al-Fatawa, Dar Al-Jil, Beirut*, 1987, v.370. The actual text is as follow:

اذا كان له علي رجل دراهم مؤجلة. فباعه بأقل منها حالة. فهذا ربا. وان كانت حالة فأخذ البعض وأبرأه من البعض فقد أحسن. وأجره على الله

Meaning:"If a creditor possesses a debt on deferment, then he sells the debt at a lower value, which he receives the payment early, such an act is deemed to be a riba. But if the debt matured and creditor only acquires half of the total value of the debt, of which another half is treated as ibra', then it is a praiseworthy act which will be rewarded by Allah the Almight."

RM100 for a period of one month. When the debt has matured, the creditor only asked for repayment of RM50.

The word '*hasan*' if referring to the verse of Al-Quran, means *infaq*, which is given with sincerity, and hoping to obtain rewards from Allah the Almighty.[166] It also means paying a debt in a better way without having any predetermined condition. This is mentioned by the Prophet PBUH:

(.....خيركم أحسنكم قضاء)

Meaning: "the best amongst you are those who pay their debt in a better way"[167]

The Ruling of *Qardh Hasan*

The scholars are unanimous in ruling that *qardh* is permissible. The permissibility is based on a justification (*dalil*) from Al-Sunnah and *ijma'*. In general, there is no evidence of *qardh* permissibility from the Quran in the context of borrowing with an expectation of getting repayment from borrower. Only al-Jaziri who mentioned in his book that there is an opinion from Shafii school that permitting *qardh* based on the Quranic source. However, some of the Shafiites opine that the word '*qardh*' used in the Quran means *hibah* or giving something which is not expected to be returned.[168]

Dr. Wahbah al-Zuhaili states that the ruling for *al-qardh* is permissible based on hadis and *ijmak*. The Prophet PBUH said:

روى ابن مسعود ان النبي صلى الله عليه وسلم قال: ما من مسلم يقرض مسلما قرضا مرتين، الا كان كصدقة مرة.

Meaning: "Ibn Mas`ud narrated that the Prophet PBUH said, whoever, amongst the Muslim gives a loan to someone else twice, he is considered giving charity (*sadaqah*) for once."[169]

166 Al-Suyuti, *Al-Dur Al-Manthur Fi Al-Tafsir Al-Ma'thur*, Dar al-Kutub Al-Ilmiyyah, 2000, v.1, p.554-556.

167 Hadith narrated by Ahmad and Muslim

168 Al-Juzairi, *Kitab Al-Fiqh `Ala Al-Mazahib Al-Arba`ah*, Dar al-Fikr, Vol.2, p.339.

169 Hadith narrated by Ibn Majah.

عن أنس قال : قال رسول الله صلى الله عليه و سلم : رأيت ليلة أسري بي على باب الجنة مكتوبا: الصدقة بعشر أمثالها، والقرض بثمانية عشر، فقلت: يا جبريل، ما بال القرض افضل من الصدقة؟ قال : لان السائل يسأل وعنده، والمستقرض لا يستقرض الا من حاجة.

Meaning: It is narrated on the authority of 'Anas that the Messenger of Allah PBUH said, "On the day I ascended to heaven (Laylatul-qadr), I saw a writing on the door of paradise that read: 'Every charity is rewarded ten-fold and every loan is rewarded eighteen-times'. So, I asked the angel, 'O Jibrail, why is a loan rewarded more than charity? The angel replied, "Because a person may ask for charity when he does not need it, but the borrower only borrows in cases of dire need."[170]

Benefits or *Hibah* on *Qardh*

Any benefit, *hibah* or added value, which is conditioned on a loan, is prohibited. This is mentioned in the following hadith:

عن علي رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: (كل قرض جر نفعا فهو ربا)

Meaning: "...from Ali r.a said: mentioned that the Prophet PBUH said: Any benefit derived from all kind of loans is one form out of various forms of *riba*."[171]

Nevertheless if such a benefit, *hibah* or any added value, which is given without, pre-conditioned, then it is permissible. The permissibility is based on the hadith of the Prophet PBUH:

حدثنا خلاد حدثنا مسعر حدثنا محارب بن دثار عن جابر بن عبد الله رضي الله عنهما قال : (أتيت النبي صلى الله عليه وسلم وهو في المسجد قال مسعر أراه قال ضحى فقال صل ركعتين وكان لي عليه دين فقضاني وزادني).

Meaning:"...from Jabir r.a. said: I came to the Prophet PBUH when he is in a mosque (Mis`ar said Jabir came during dhuha), the Prophet PBUH asked me to pray two *rakaah* and then repaid the loan which he owed me and gave me additional amount."[172]

170 Hadith narrated by Ibn Majah.
171 Hadith narrated by Baihaqi.
172 Hadith narrated by Bukhari.

The payment of loan with added value or benefit is permissible if it is not precondition and as long as it is not becoming a clear norm (`*urf*). However, if it has become a norm and practice in loan transaction, then it should be avoided since anything that becomes a norm is treated as condition.[173]

173 Abdul Hamid Mahmud Tohmaz, *Al-Fiqh Al-Hanafi Fi Sawbihi Al-Jadid*, 2001, Dar al-Qalam, Damascus, Vol.4, p.220-221.

TA`WIDH

Definition

Ta'widh in general means giving compensation on losses incurred resulting from harmful incidences.[174] Majma` Fiqh defines *ta`widh* as payment of financial compensation or counter value which is obligatory as a result of harm causes to other parties. *Ta`widh* is more specific than compensation for losses (*dhaman*) which is stipulated by Shariah sources like *diat* and *yad dhaman*.[175]

The Permissibility of *Ta`widh*

The permissibility of imposing *ta`widh* is based on the following arguments:

Hadith

The Prophet PBUH rebuked those who delay the payment of a debt:

حدثنا مسدد حدثنا عبد الأعلى عن معمر عن همام بن منبه أخي وهب بن منبه أنه سمع أبا هريرة رضي الله عنه يقول قال رسول الله صلى الله عليه وسلم : (مطل الغني ظلم).

Meaning: "The rich (solvent) who delay the payment of a debt are committing tyranny."[176]

There is also other hadith that contend this matter, that is:

لا ضرر ولا ضرار

Meaning: "Neither harming nor reciprocating harm (in Islam)."[177]

Based on this hadith, the debtor's act of delaying payment is a loss (harmful) to the creditor. This situation has to be avoided so that businesses are conducted according to the principle of *istiqrar ta`amul*, that is the smooth running of the market.

Qiyas

The delay in paying off a debt can be compared with *ghasb* (usurpation) of valuable property. This is because of the similarity of *`illah* between the two, that is obstructing

174 Wizarah al-Awqaf wa al-Syu'un al-Islamiah,Al-Mausu`ah Al-Fiqhiyyah, 1993, v.13, p.35.
175 OIC, Majalah Majma` Fiqh Al-Islami, No. 14, v.4, p.510.
176 Hadith narrated by Bukhari.
177 Hadith narrated by Ibn Majah.

the use of property and exploiting it in a tyrannical way. According to Shafii and Hanbali School, in the case of *ghasb*, the usurper has the benefit of using the property he has seized and therefore must pay compensation to the owner.[178] In the case of a delayed payment of debt, the creditor stands to lose because he is deprived of the opportunity of using the funds for other trading purposes, which he could if the debt is settled within the stipulated time frame. Therefore, this loss should be compensated by the debtor based on *qiyas*.[179]

Fiqh Maxim

Besides the hadith, the permissibility of *ta`widh* is also supported by a maxim in Islamic jurisprudence, that is:

الضرر يزال

Meaning: "Whatever loss should be removed".[180]

In the context of this discussion, losses which are borne by a creditor must be removed by the provision of a suitable approach. Imposing *ta`widh* on a delayed payment of debt is a suitable approach for covering the loss borne by the creditor and it encourages the debtor to settle the debt within the stipulated time frame.

Inclusion of *Ta'widh* Condition in Sale and Purchase Contract

According to Ibn Hajr, there is a narration from Ibn Sirin who mentioned about a potential customer who said to the owner of some animals for hire: " Prepare for me one of your animals. Should I not hire it on such a date, I will pay you of 100 dirham." Apparently, the customer did not proceed with the deal, and so, according to Qadhi Syuraih: "Whoever imposes a condition upon himself voluntarily, then that condition is binding."[181]

The contemporary scholars when discussed on *ta`widh* as a mechanism to overcome delay in debt repayment, also discussed on *al-syart al-jaza'i*.

178 Al-Syirazi, *al-Muhazzab fi Fiqh Imam Syafii*, Vol.3, p.412, Wahbah al-Zuhaili, *Fiqh al-Hanbali Al-Muyassar*, Vol.3, p.7.
179 Majmu`ah Dallah Barakah, *Fatawa Nadwat al-Barakah*,1997, p.55,91. Fatwa No. (2/3) & (8/6).
180 Al-Suyuti, *Al-Asybah Wa al-Nazair*, p.83-84.
181 Ibn Hajar, Fath al-Bari, v.5, p.707.

Al-syart al-jaza'i or penalty clause is an agreement made by one party to do something if he fails in meeting his obligation.[182] The scholars opine that imposition of a condition, in principle, is permissible. Any condition, which is not contradictory to sources from Al-Quran, Al-Sunnah and *Ijmak*, is an acceptable condition. Therefore, *al-syart al-jaza'i* is acceptable in principle. However *al-syart al-jaza'i* can be classified into two types and each has different specific rulings. The classifications of *al-syart al-jaza'i* are as follow:

i. *Al-Syart al-jaza'i* which contains the imposition of compensation for late fulfillment of work or assignment.
ii. *Al-Syart al-jaza'i* which contains the imposition of compensation for late repayment of debt.

The use of *al-syart al-jaza'i* on late repayment of debt in many cases involved Murabahah contract and deferred price sales. The ruling for using *al-syart al-jaza'i* in this context need to be scrutinized based on categories of debtors. In general, debtors can be categorized into two:

i. Debtor who late in payment due to financial difficulties (insolvent).
ii. Debtor who late in payment while he is solvent.

The first category of debtor should be given more time to settle his debt. However, level of financial solvency should be determined and defined.[183]

The scholars are unanimous to consider second category of debtor as one who commits injustices. Therefore *ta`zir* ruling is permissible to be imposed on this type of debtor.[184]

Al-Zarqa' endorses the permissibility of *al-syart al-jaza'i* because this agreed condition aims to curb attitude of delaying in fulfillment of obligations (*tanfiz al-iltizam*) by the contracting parties. According to him, the principle of *al-syart al-jaza'i* is similar to al-Qadhi Syuraih opinion on the practice of *dhaman al-ta`widh `an al-ta'attal wa al-intizar* (compensation for late and delay).[185]

182 Dr. Ali Muhyiddin al-Quradaghi, *Musykilah al-Duyun al-Mutaakhirat Wa Kayfiyyatu Dhamaniha Fi Bunuk Al-Islamiyyah*, p.19.
183 Resolution of Majlis Majma` Fiqh al-Islami al-Duwali, 7th Session, 1990.
184 Dr. Ali Muhyiddin al-Quradaghi, *Musykilah al-Duyun al-Mutaakhirat Wa Kayfiyyatu Dhamaniha Fi Bunuk Al-Islamiyyah*, p.23.
185 Al-Zarqa', *Al-Madkhal Al-Fiqhi Al-'Am*, Dar Al-Qalam, Damsyik, 1998, v.1, p.556.

Muhammad Qal`ahji states that *al-syart al-jaza'i* is permissible because it contains the meaning of *ta`widh* (compensation) for the losses incurred. If contracting parties agreed on this condition, they must obey and fulfill their obligations.[186]

Other scholars like al-Siddiq Dharir, Abdullah bin Mani', and `Abd al-Hamid al-Sa'ikh also agreed on the permissibility of *al-syart al-jaza'i*. They attributed the compensation imposed on the debtor based on losses suffered by creditor (*dharar al-dain*) due to debtor delay in fulfilling his obligation according to the stipulated time is acceptable and has a basis.[187]

The approach of *al-syart al-jaza'i* also accepted by the contemporary scholars such as prominent scholars of Saudi Arabia, Lujnah Al-Fatwa Fi Al-Masraf Al-Islami Al-Dawli, Egypt and Lujnah Al-Fatwa Fi Majmu`ah Dallah al-Barakah. They resolved that *al-syart al-jaza`i* which is currently practiced is a valid and *muktabar* condition.[188]

Nevertheless, the scholars in general are still having differences in opinion pertaining to the permissibility of using *al-syart al-jaza'i* in aspects related to delayed or late payment of debt.

Most of the scholars are more inclined to impose *ta`widh* on debtors who delayed in paying their debts. However, the scholars stipulate that imposition of *ta`widh* must be based on the actual losses suffered.

Contemporary Fatwas

There are justifications in Islamic law showing that *ta`widh* can be used in certain transaction. For example, a fatwa resolved by Qadhi Syuraih stipulated that the imposition of *ta`widh* in certain transaction is permissible. The permissibility is referring to a case whereby a hirer agrees to be imposed with compensation if he fails to fulfill his promise.[189]

186 Muhammad Rawwas Qal`ahji, *Al-Mawsu`ah Al-Fiqhiyyah Al-Muyassarah*, Dar Al-Nafa'is, Beirut, 2000, v.2, p.2235.

187 Muhammad Sulaiman al-Asyqar et al., *Buhus Fiqhiyyah di Qadhaya Iqtisadiyyah Mu'asirah*, Dar al-Nafa'is, Jordan, 1998, v.2, p.864.

188 Ali Muhammad Hussein Sowa, "*Al-Syart al-Jaza'i Fi Al-Duyun Dirasah Fiqhiyyah Muqaranah*" article in *Majalah Al-Syariah Wa Al-Dirasat al-Islamiyyah*, Jami`ah al-Kuwait, No. 58, p. 249-250.

189 Ibn Hajar Al-`Asqalani, *Fath al-Bari*, v.5, p.707.

Elgari in his article stresses a precise Shariah compatibility rule (with regards to this issue) is by imposing compensation for late payment because it will teach creditor a lesson and act as a deterrent to avoid attitude of delay in paying the compensation. The proceeds from that compensation payment must then be channeled to charitable organization to avoid involvement in *riba*.[190] His argument is based on the opinion of Imam Ibn Qayyim who mentioned that the imposition of penalty in the form of property is allowable in certain situation in Maliki, Hanbali and one of the opinion of Shafii school.[191] The differences are due to *maslahah*, and according to *ijtihad* of jurists based on certain location and time.[192]

Shariah Supervisory Council of ABC Islamic Bank has also issued a fatwa on this matter as following:

i. Fatwa No. 17/1 – Late payment penalty can be imposed by stipulating it as a condition in *murabahah* contract (*al-syart al-jaza`i*) as a deterrent to delay in payment, provided that it is channeled to charity. Bank is not allowed to receive any profit out of this penalty.[193]
ii. Fatwa No. 17/2 – Any proceeds of late payment penalty either through the stipulated condition in a contract (*al-syart al-jaza`i*) or from a judgment must be channeled to charity.[194]

Late Payment Debtor can be charged in Court

The scholars in general agreed that if debtor deliberately delays in payment of debt, they could be charged in court.

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190 Mohamed Ali Elgari, *Matlu al-Ghani wa Turuq Mua`lajatihi fi al-Iqtisad al-Islami*, p.13.
http://www.elgari.com/article91.htm:
فكيف يمكن تحقيق مقصود الشارع في معاقبة المدين المماطل بالطريقة التي تحقق الزجر عن المطل. ومعاقبة المذنب حتى يفئ إلى جانب العدالة بطريقة قابلة للتطبيق بيسر وسهولة وبدون تدخل مباشر من الجهات القضائية؟ فكان الطريقة إلى ذلك فرض الغرامات التأخيرية على هذا المدين لأن ذلك هو السبيل إلى تحقيق الردع والعقاب ولمنع الوقوع في الربا المحرم توجه هذه الغرامات إلى أغراض البر والخير والجمعيات التي تعني بحاجات الفقراء ..الخ .

191 Ibn Qayyim, *al-Turuq al-Hukmiyyah*, p.273.
وأما بالتعزير بالعقوبات المالية: مشروع أيضاً في مواضع مخصوصة في مذهب مالك وأحمد وأحد قولي الشافعي...»

192 Ibn Qayyim, *I'lam al-Muwaqqi`in*, v.2, p.98.
والصواب انه (أي التعزير بالمال) يختلف باختلاف المصالح ويرجع فيه إلى إجتهاد الأئمة في كل زمان ومكان حسب المصلحة إذ لا دليل عل النسخ ...»

193 Shariah Supervisory Council of ABC Islamic Bank, *Al-Fatawa Masrafiyyah*, p.142.

194 Ibid. p.143
السؤال: إذا حكم للبنك بفوائد تأخير من المحاكم فهل يجوز للبنك أن يضمها إلى أمواله؟
الجواب: لا فرق بين الحصول على غرامة التأخير عن طريق الاشتراط في العقد أو عن طريق الحكم القضائي. ويجب في الحالتين صرفها في الخيرات. والله أعلم

Az-Zaila`i opines that those who deliberately delay in paying their debts though they are capable, creditor can take an action by bringing the case to court, and if found guilty, judge can decide to imprison those who refuse to pay.[195]

195 Al-Zaila`i, *Tabyin al-Haqaiq, Dar al-Kitab al-Islami*, Cairo, v.4, p.181-182.

IBRA'

Definition

Ibra' means surrendering one's claims and rights on certain thing. That right is other people's obligation (*zimmah*) to him which needs to be fulfilled.[196]

The Pillars of *Ibra'*

The majority of scholars state that *ibra'* has four pillars, that is:

i. Party who grants *ibra'* (party who possesses the right or creditor)
ii. Party who receives *ibra'* (debtor)
iii. Subject matter of *ibra'* (object of *ibra'* like debt, good or right)
iv. *Sighah* (offer and acceptance)

Hanafites view that *sighah* is the only pillar of *ibra'*. In the context of *sighah*, *ijab* for *ibra'* can be expressed in whatever forms which mean the owner of rights surrenders his rights. However, there are debates among Hanafites and Malikites on *sighah* for *ibra'* which has various specific forms.

The scholars have different views on the need for *qabul* to complete the *ibra'*. Majority of scholars (Hanafi, Shafii and Hanbali Schools) view that *ibra'* contract is deemed to be completed even though there is no *qabul* taken place. The preferred opinion among Malikites and other opinions from Shafiites is that *ibra'* contract is deemed as completed only if *qabul* has already taken place.[197]

Conditions of *Ibra'*

The implementation of *ibra'* has certain conditions. These conditions relate to the recipient of *ibra'* and object of *ibra'*. The conditions are as follow:

i. The recipient of *ibra'* must be determined
   For example, in the case of *ibra'* on debt, when the creditor has rights to be demanded from more than one debtors, the debtor who will be receiving *ibra'* need to be determined. This condition is unanimously agreed by majority of the jurists except scholars from Hanbali school.

196 Wizarah al-Awqaf wa al-Syu'un al-Islamiah, *Al-Mausu`ah Al-Fiqhiyyah*,v.1, p.142.
197 Ibid, p.150-152

ii. Object of *ibra'* must be identified
The scholars have different views regarding the need for this condition. In general, there are three main opinions. Majority of scholars view that *ibra'* is valid although the subject is not determined. One of the narration from Hanbali school mentioned that *ibra'* is valid without identifying the subject matter, if there is a difficulty to determine the *ibra'* subject.[198]

The Legal Rules on *Ibra'*

The rules of *ibra'* can be deemed as *wajib*, *haram*, *makruh* (abominable), *mandub* (commendable) or permissible according to situation in which it is implemented.[199] The rulings of *ibra'* are as follow:

i. *Wajib* (Obligatory)
`Ibra' in certain contract is deemed to be obligatory, if it is preceded by *istifa'* (discharge) by party who has the obligation. For example in *salam* sales, when a seller has delivered the goods early, buyer is obligated to release (*ibra'*) him from the delivery obligation.
ii. *Haram* (prohibited)
Ibra' is prohibited if it is applied on a defective contract or invalid contract from Shariah point of view.
iii. *Makruh*
An example of *ibra'* being a reprehensible is when a person suffers a severe illness or very near to die, he surrenders his rights (*ibra'*) on his properties that constitute more than one third of the total value of his property.
iv. *Mandub*
Most of *ibra'* implementation context is *mandub*. This is because it is a form of benevolence act. Most of the time, *ibra'* refers to the act of surrendering one's rights onto other party who is in dire needs of support and facing difficulties due to burden of debts.
v. *Permissible*
The ruling of *ibra'* is permissible in certain situations except the one that has been mentioned above.

198 Ibid. p.155-156
199 Ibid. p.147

Types of *Ibra'*

There is a discussion amongst scholars in Islamic law on the various types of *ibra'*. Among this *ibra'* type is *ibra' al-taqyid bi al-syart*, and *ibra' al-taqlid `ala syart*. An illustration of *ibra' al-taqyid bi al-syart* is as one says: "I grant you *ibra'* if you do this and this…". An example of *ibra' al-taqlid `ala syart* is,as one says "If you do this and this.. I shall grant you *ibra'*".[200]

The use of *adat al-syart* in the given example or in English, the use of a conditional 'if' in *ibra' al-taqyid bi al-syart*, and *ibra' al-taqlid `ala syart*, show that it is a form of *ibra'* which is conditional upon other factors. This means if other factors are fulfilled, then only *ibra'* is granted.

Scholars have different views in respect to the above types of *ibra'*. The scholars from Hanafi, Shafii and some from Imam Ahmad school do not permit it. Some Hanafites view that it is permissible if the condition attached to *ibra'* is *muta`rifan `alaih* (a common practice by the current society). The third opinion is an absolute permissibility. Those include scholars from Maliki and Imam Ahmad school.[201]

With reference to the permissibility of *ibra' ta`liq* as illustrated in the examples given by scholars of Islamic jurisprudence, it is found that it almost resembles the approach of granting *ibra'* on monthly basis. This is because *ibra'* which is given on monthly basis also depends on the changes of certain rates.

Change in the Tenure Due to Implementation of *Ibra'*

According to the majority of scholars of Islamic jurisprudence, based on the explanation given by Muhammad Solah al-Sowi, *riba al-duyun* will only happen if an extension in

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200 Wizarah al-Awqaf wa al-Syu'un al-Islamiah, *Al-Mausu`ah Al-Fiqhiyyah*, 1993, v.1, p.165, Mustafa Ahmad al-Zarqa', *Al-Madkhal al-Fiqhi al-Am*, Dar al-Fikr, Beirut, 1968, v.1, p.482-491, Al-Buhuti, *Kasysyaf al-Qina`*, Dar al-Fikr, Beirut, 1982, v.3, p.188-192.

201 Ibid, the following is the actual text:

...فللفقهاء فى حكم الإبراء المعلق عليه آراء:

أ. عدم الجواز ولو كان الشرط متعارفا عليه. وهذا مذهب الحنفية والشافعية. والرواية المنصوصة عن أحمد. لما فى الإبراء من معنى التمليق. والتعليق مشروع فى الإسقاطات المحضة لا فى التمليكات. فانها لا تقبل التعليق.

ب. جواز التعليق اذا كان الشرط متعرفا عليه. وعدم الجواز فى عكسه. وهو رأي لبعض الحنفية.

ت. جواز التعليق مطلقا. وهو مذهب المالكية ورواية عن أحمد. وذلك لما فى الإبراء من معنى الإسقاط.

the debt tenure results in extra price or debt.[202] In the context of *ibra'* application, the changes of tenure that happened in implementing *ibra'* is different from the extension of tenure in the context of *riba* since the former does not involve any additional price or debt.

The discussion of scholars of Islamic jurisprudence with respect to *gharar* in price and time period is of different nature than the approach of granting *ibra'* which is practiced in *mu`awadhat* contracts. Besides that, most scholars of Islamic jurisprudence are more open on the issue of determination of price and time period for payment in certain *mu`awadhat* contract. *Ibra'* is a unilateral contract. The existence of *gharar* element in unilateral contract will not affect the contract.

In general, *ibra'* clause in Islamic financing contract may be construed as a form of inclusion of conditions in a contract. Under Islamic law, the inclusion of a condition in a contract, such as a sale and purchase contract, is permissible if the inclusion is for the purpose of protecting the interests of the parties under the contract and it does not contradict the principle of sale and purchase.[203]

202 Muhammad Solah al-Sowi, Musykilat al-Istithmar Fi al-Bunuk al-Islamiyyah, Dar al-Wafa', 1990, p.356;
The following is the text:
إن ربا الديون : هو الربا فيما تقرر فى الذمة. من بيع او سلف او غير ذلك : فهو الزيادة فى الدين نظير الأجل.

203 Mustafa Ahmad al-Zarqa', *Al-Madkhal al-Fiqhi al-Am*, Dar al-Fikr, Beirut, 1968, v.1, p.482-491, Al-Buhuti, *Kasysyaf al-Qina`*, Dar al-Fikr, Beirut, 1982, v.3, p.188-192.

WA`D

Definition

Wa`d in Islamic law of transaction's perspective means a promise. The concept of promise is employed in a few modes of Islamic transactions such as in sale contract.

The Responsibilities of The Promisor in Religious and Legal Perspective (*diyanatan wa qadhaan*)

The Muslim scholars have different views as to the responsibilities of the promisor who makes the promise.[204]

The Malikites have held that a promisor is religiously and legally responsible (*diyanatan wa qadhaan*) to perform his promise, whereas the Shafiites have considered that the promisor is only religiously binding (*diyanatan*) to fulfill his promise made.

The majority of scholars including the Hanafites, Malikites, Shafiites and Hanbalites have held that promise made by a person to another person is considered as religious obligation (*mulzim diyanatan*) which must be performed by the promisor; but it does not creates legal obligation (*mulzim qadha'an*) which must be performed according to the rules of law. The reason of their view is that promise is considered as voluntary contract (*tabarru'at*).[205]

Some of the Malikites view that promise is legally binding and the promisor is obliged to honour the promise when it is related or connected (*taklik*) with another cause (*sabab*) even though it does not relate with commitment from another person. For example, when a person says :"I will travel to a place and lend me your riding animal. When the riding animal is lent to him, then he must travel."

Ibn Qasim, a Malikites held the view that *wa`d* (promise) must be fulfilled when it is related to a cause (*sabab*) and there is commitment from the promisor. For example, a person who wishes to buy a slave if someone has lend him one thousand dirham. Then one person says: I will help you and lend you one thousand dirham, then you can buy the slave." In this case, the promise made is binding on the promisor.[206]

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204 Dr Muhammad Othman Syabir, *al-Mua'amalat al-Maliyyah al-Mu'asirah fi al-Fiqh al-Islam*i, Dar al-Nafa'is, Jordan, 1996, p. 265-266.
205 Al-Qarafi, Kitab al-Furuq, Dar al-Salam, n.d., v.4, p. 1141; al-Mardawi, al-Insaf, v.4, p. 152.
206 Dr Muhammad Othman Syabir, *al-Mua'amalat al-Maliyyah al-Mu'asirah fi al-Fiqh al-Islami*, Dar al-Nafa'is, Jordan, 1996, p. 265-266.

Ibn Syubrumah, Ishak bin Rahawaih and Hassan al-Basri opined that promise is legally binding and must be fulfilled accordingly. This view is based on the Quranic verse that states:

> "O you who believe, why do you say that which you do not do? Most hateful it is in the sight of Allah that you say that which you do not do"[207]

In addition to that, the Prophet PBUH has stated that among the characteristics of *munafiq* is that "when they make a promise, they will break it".

Some of the contemporary Muslim scholars who have agreed with the view of the traditional scholars are:

i. Dr Muhammad Sulaiman al-'Asyqar who said that promise is not binding because if the promise is binding then the contracts that is concluded afterward is considered as null and void.[208]

ii. Al-Syinqiti has also agreed that promise id not legally binding but it is religiously binding.[209]

Al-Zarqa' is of the view that promise originally does not carries a binding effect to the promisor, and it does not confer any right to the person on whom the promise is made. However, in the perspective of religion, the promisor is required to fulfill the promise made otherwise he is considered sinful. As such, the original notion of promise does not convey any legal effect to the person who made the promise, whereby they are not obliged to fulfill the promise and they will not be liable in the case where they fail to fulfill the promise made to the promisee.

Dr Yusuf al-Qardawi has observed that promise is binding from the perspective of religion and law. His view is based on rationale that promise can be made binding in the legal and religious perspective especially in cases where there is *maslahah* (public interest) in doing so. This view is supported by the resolution which was made in Dubai pertaining to the same issue.[210]

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207 Surah al-Saff: 2-3.

208 OIC, *Majalah Majma' al-Fiqh al-Islami*, no. 5, v.2, p.957.

209 Dr. Mohammed Mustafa al-Syinqiti, *Dirasah Syar'iyyah li ahammi al-Uqud al-Maliyyah al-Mustahdathah*, v.1, p. 376.

210 OIC, *Majalah Majma' al-Fiqh al-Islami*, no.5, v.2, p.957.

Majma' Fiqh Islami in its 5th Meeting in 10th – 15th December 1988 has resolved that since promise is binding in the religious perspective, it should also be made binding in the legal perspective, especially in the case where the promise requires performance of specific act and it result to certain commitment or obligation from the person on whom the promise is made.

The Rulings on 'Promise to Sell' and 'Promise to Purchase'

There is no comprehensive discussion of the Muslim scholars on the issue of promise made on promise. However, the scholars do discuss on the issue of the promise to sell and promise to purchase.[211]

The Maliki school have distinguished between promise made to sell or purchase and the promise made for the purpose of fixing the profit. In the first case, they are of the view that the promise, which is made solely for the purpose of selling or purchase, is permissible. On the other hand, if the promise is used to fix a profit rate, then it is prohibited. Similarly, the Hanafi and Shafii school also allow the promise which is made to sell or purchase.

However, there are some scholars who do not allow the promise made even for the purpose of selling or purchase based on the perception that, the inclusion of promise in sale contract resembles the practice made in *bai` `inah* transaction. *Bai` `inah* is prohibited by the scholars on the basis that the transaction of selling and buying is made based on prior agreement (*tawatu'*) between the parties.[212]

The fatwa made by Sheikh Abdul Aziz bin Baz, the mufti of Kingdom of Saudi Arabia states that the promise to sell (*al-wa`d bi al-bai`*) is permissible when the property which is the subject matter of the promise has been in the posession of the promisor.[213]

The contract of sale that is stipulated with the condition that the parties must sell or buy back the asset is not valid. However, the parties (seller and purchaser) may promise to sell or purchase the asset back. If one of the parties breach the promise made, the other party has the right to claim against the former. In such transaction, the contract is valid.

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211 Dr Mohammad Sulaiman al-Asyqar, *Bai' al-Murabahah Kama Tajrihi al-Bunuk al-Islamiyyah*, working paper presented in the Second Conference on Islamic Finance held in Kuwait on 21 – 23 March 1983.

212 Ibn Qayyim, *I`lam Al-Muwaqqi`in*, v.3, p.323

213 Dr Mohammad Sulaiman al-Asyqar, *Bai' al-Murabahah Kama Tajrihi al-Bunuk al-Islamiyyah*, working paper presented in the Second Conference on Islamic Finance held in Kuwait on 21 – 23 March 1983.

The Malikites held that the promise is not binding and cannot be enforced in court of law, unless when it is proven that the party has suffered loss as a result of non-performance of the promise. The negligent party who break the promise must pay the compensation for the harm and loss caused.

The Rulings of Mutual Promise (al-Muwa`adah)

The fatwa issued in the First Conference of Nadwah al-Barakah which was held in Madinah al-Munawwarah in 1981 stated that if promises in business are made in such a way that it is binding to all parties, then it is not allowed as it is considered as *bai` al-kali' bi al-kali'* which is prohibited. However, if the promise is made in a way that it does not bind all the parties in the contract, then it is permissible.[214]

The Shariah Committee of AAOIFI decided that the promise which is made binding on all contracting parties is similar to a contract (aqad), and it is not allowed by majority of scholars. If the promise is made unilaterally by one party, then it is permitted even though it is binding.[215]

Majma' Fiqh Islami in its meeting no.5 held on 10th – 15th December 1998 has distinguished the promise made by one party (unilateral promise) and the promise agreed by both parties (bilateral). The differences are as follows:

i. If the promise is made unilaterally by one party, it binds on the person who made the promise in the perspective of religion. Similarly it is also binding in the legal perspective and the promisor is obliged to fulfill the promise, especially when the promise relates to the performance of certain act, or when it requires certain commitment from the promisee.

ii. If the promise is made by both parties (*muwa`adah*), it is permitted but it should not be binding on them. If the promise is made binding, then it becomes a contract (*aqad*).[216]

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214 Majmu'ah Dallah Barakah, *Fatawa Nadawat al-Barakah* 1981 – 1997, Jeddah, 1997, p. 28.

215 Majmu'ah Dallah Barakah, *Fatawa Nadawat al-Barakah* 1981 – 1997, Jeddah, 1997, p. 25.

216 OIC, *Majalah Majma' al-Fiqh al-Islami*, no. 5, v. 2, p.1600.
«المواعدة (وهي التي تصدر من الطرفين) تجوز في بيع المرابحة بشرط الخيار للمتواعدين كليهما أو أحدهما. فإذا لم يكن هناك خيار فإنها لا تجوز. لأن المواعدة الملزمة في بيع المرابحة تشبه البيع نفسه»

However, the Majma' Fiqh Islami in its 17th meeting has revised their earlier rulings. The new decision is as follows:

i. The promise which is made bilaterally is considered as binding in the religious perspective but it is not binding in the legal perspective.

ii. The bilateral promise made by both parties in a contract is considered as legal device (*hilah*) to pratice riba as in the case of *bai` `inah* and promise made in *bai` salaf*. This is prohibited in the Syariah.

iii. In the case where a sale and purchase contract cannot be enforced because seller does not posses the goods, but there is a public interest to make sure that both parties performs their obligation by a provision of law or by the general practice of commercial dealing of a state, such as issuance of documentary credit for import, then binding bilateral promise is permitted either by virtue of law or by agreement of parties in the contract.

iv. The promise made in the above case (iii) will not take effect as future or forward contract. Consequently, there is no transfer of ownership between the seller and the purchaser, and there is no debt or obligation created as a result of promise made. The sale and purchase will only be effective and enforceable at the time stipulated by the parties, where at that time the offer and acceptance is considered to be concluded satisfactorily.

v. In the case of (iii), if one of the parties break the promise, they are legally responsible to fulfill the contract and liable for any damages occurred as a result of the breach.[217]

The fatwa of Islamic Bank of Jordan states that the bilateral promise made in currency exchange where it bonds both parties to the contract, is generally prohibited (*umum al-nahyi*) as it amounts to *bai` al-kali' bi al-kali'* (sale of debt with debt). However, if the promise is made unilaterally i.e. binding only on one party who made the promise, then the transaction is allowed.[218]

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217 Decision of *Majlis Majma' Fiqh al-Islami al-Duwali*, Meeting no. 17 on 24-28 June 2006, deciosion no. 157 (17/6).
218 Jordan Islamic Bank, a*l-Fatawa al-Syar'iyyah*, 2001, v 2, p. 29..

Dr Rafiq al-Misri states that the Islamic banks are generally using the principle of promise (*wa`d*) in *al-murabahah li al-amir bi al-shira'* (*murabahah to the purchase orderer*). Some of the Islamic banks used the binding bilateral promise to execute the transactions, whereas the other used the unilateral promise. In view of this widespread practice, Dr Rafiq al-Misri is of the view that the binding bilateral promise that binds both contracting parties is not allowed.[219]

Based on the research conducted in this area, there is no specific view of the classical scholars who discussed and elaborated on the issue of binding bilateral or unilateral promise. Therefore, it is difficult to say that the majority of scholars held the view that the binding bilateral promise is similar with contract (*aqad*).

However, there is almost an agreement of the contemporary scholars that the binding bilateral promise carries the same effect as a contract. This is evidenced from the recent fatwas made on the issue and also the writings of the contemporary Muslim scholars.

Promise in Sale of Currency

Maliki school does not allow the promise in sale of currency unless the transaction is done on the spot or immediate.

Imam Shafii in his book al-Umm allows the sale of currency and states that : "If two men promise to sell the currency, there is no harm for them to buy dirham, and then they agree on either of the price until they conclude the contract …".[220]

Ibn Hazm has also allowed the promise made to sell and purchase of currency with an agreed price on the same day followed by actual conclusion of the contract afterward. The parties is also given the choice to proceed or not to proceed with the agreement made and thus do not conclude the actual contract. This is permissible according to Ibn Hazm as the promise is not binding on the parties.[221]

219 Dr Rafiq Yunus al-Misri, *Bai' al-Taqsit: Tahlil Fiqhi wa Iqtisodi*, Dar al-Qalam, Damsyik, 1997. p.33-34.
220 Imam al-Syafii, *al-Umm*, Dar al-Fikr, Beirut, 1990, V.3, p.27.
221 Ibn Hazm, *al-Muhalla*, Dar al-Turath, Cairo, V.9, p.583.

The AAOIFI Shariah Board has explained the currency exchange is permissible as it is considered as a type of sale which is generally permissible in the eyes of Shariah. The currency exchange can be used as a source of income as long as the manner it is exercised does not contravene the Syariah principles.[222] At the same time, the Committee has also agreed with the view of majority scholars to prohibit the use of binding promise in currency exchange as it carries the same effect of a contract (*aqad*). However, if one party makes the promise unilaterally, it is permissible even if it is binding.[223]

Nadwah al-Barakah in 1981 has stated that the promise in currency exchange which is binding on both parties is not allowed because it amounts to *bai` al-kali' bi al-kali'*. However, if the promise is not binding then it is allowed and permissible.

The Practice of Promise in Islamic Banking

In the practice of Islamic Banking system, the promise is normally carries a binding effect to the parties because:

i. The banking system is a regulated system governed by specific rules and regulation and normally the breach of promise in this system cause severe effect to the reputation of a financial institution.
ii. All transactions or commercial dealings are supported by comprehensive documentations as well as online computerized system to minimize the mistake or error that may cause dispute between the parties.
iii. The banking transactions or commercial dealings are normally involving a large amount of money or property, and thus it is impractical to base such a transaction on the promise which is not binding.
iv. The breach of promise in banking transactions normally results in the material damage or loss on the deprived party.

222 AAOIFI, *al-Ma'ayir al-Syar'iyyah*, 2001, p. 23.
223 Ibid., p. 25.

ACCEPTANCE OF FUND FROM UNLAWFUL SOURCES

Striving for Lawful Earnings is a Requirement in Islam

A huge amount of funds, which is traded in the contemporary market, is actually a result of *riba* transactions. The total Islamic funds is only amounting to hundreds of billion USD, which is comparatively very small or minimal compare to the funds which is based on *riba* transaction that amounts to trillion of USD. With the huge amount of funds, the market is flooded with the *ribawi* funds which is prohibited, and it is not possible to distinguish between the funds which is pure (*halal*) and prohibited (*haram*).

Imam al-Ghazali and Imam Ibn Qudamah state that the Muslims are obliged to strive for legal earnings or to acquire asset lawfully. This is based on the principle that "Acquiring halal is an obligation of every Muslim."[224] This view is in line with the Quranic verse which requires the Muslims to eat only the halal and to avoid all things (asset) which is not halal (*batil*).[225] The Prophet PBUH has also said that : "O mankind! Verily Allah is good and He will not accept except what is good (halal)".[226]

Category of the Prohibited (Haram) Asset in The Shariah

The asset or mal is essential in the life of human being, and it can be used as a means to get the blessing of Allah (*mardatillah*). Mal is considered as one of the five essential need of people (*darurat al-khams*) which is protected according to the *maqasid shar`iyyah* (objective of the shariah).

The Shariah has strongly restricted any person from acquiring or taking possession of other's mal wrongfully. This is evidenced from the imposition of *hudud* penalty on the person who steals or robs the asset of others. This severe penalty is imposed as a caution or reprimand to all human being not to take away the asset of another person without due consent or agreement of the owner. It also shows the Shariah recognition on individuals right over the asset and due protection is given to them. Islam also distinguish between the lawful and prohibited asset and lays down specific rules and guidelines in dealings or transacting with prohibited asset. The scholars have

224 Wizarah al-Awqaf wa al-Syu'un al-Islamiah, *al-Mawsu'ah al-Fiqhiyyah*, v. 34, p. 244; Ibn Qudamah, *Mukhtasar Minhaj al-Qasidin*, al-Maktab al-Islami, Damsyik, p. 82.

225 Surah al-Baqarah, verses: 168, 172 and 188.

226 Ibn Qudamah, *Mukhtasar Minhaj al-Qasidin*, p. 82.

classified prohibited asset into two types that is *haram lizatihi* (intrinsic prohibition) and *haram lighoirihi or al-muharram li wasfihi* (prohibited due to other reason). Money is intrinsically not prohibited, however when it is acquired through the wrong way, then it becomes prohibited due to that reason (*haram lighoirihi*).

According to Ibn Taimiyyah, the asset which is *haram lighoirihi*, can be of two types:

i. The asset which is acquired without the permission of its owner, which includes the acquisition by way of stealing, confiscate, criminal breach of trust and so on; and
ii. The asset which is acquired with the consent of its owner but through the means which is not allowed by the Syariah such as *riba*, fraud, gambling and the likes.

Views of Scholars on Dealings With Parties Who Holds Haram Asset

The scholars have categorized the persons who own haram property into three groups:

i. Those who owns all *haram* property;
ii. Those who owns a mixture of *haram* and *halal* property; and
iii. Those who owns property which is of unknown status whether *halal* or *haram*.[227]

Those Who Owns Asset Which Is Entirely *Haram*

Some of the scholars have distinguished between the person who acquires *haram* property with or without the consent of the original owner. According to Ibn Taimiyyah, it is not permissible to enter into transaction or dealing with the person who entirely owns the property by way of stealing, robbery, fraud or other prohibited or unjustified means, if the person knows of the fact that the property was wrongfully acquired.[228] Ibn Rushd held that it is not permissible for any Muslim to deal with anyone who owns *haram* property if he knows of the fact. In such a case, he is considered to be the accomplice of the former.[229]

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227 Dr. Abbas Ahmad Muhammad al-Baz, *Ahkam al-Mal al-Haram wa Dhawabit al-Intifa' wa Tasorruf bihi fi al-Fiqh al-Islami*, Dar al-Nafa'is, Jordan, 1999, p. 228.

228 Ibn Taimiyyah, *Majmu' al-Fatawa*, v. 29, p. 323.

229 Ibn Rushd, *Fatawa Ibn Rushd*, v. 1, p. 645.

Dr Abbas Ahmad Muhammad al-Baz in his thesis has submitted that the property which is acquired illegally does not affect the intrinsic status of the property (from being good or permissible property) but the person who acquires it is liable. They are considered as sinful unless they repent of their wrongdoing. This view is adopted based on the Shariah principle that no one will bear the sin of others as stated in the Quran where Allah the Almighty says, which means: "that no burdened person (with sins) shall bear the burden (sins) nof another. And, that man can have nothing but what he does (good or bad)".[230]

This means that one is not responsible or liable for the wrong of the other person, and the liability of a person does not restraint another from entering or concluding a contract with him. A person is only liable or sinful when he is helping or assisting another to do the prohibited thing.[231]

Those Who Own Asset Which is Mixed Between Halal and Haram

The classical scholars held different views on the rulings on the transactions that are entered into with a person who owns property that is mixed between *haram* and *halal*.

i. Hanafi school and some of Malikites view that it is permissible to do the transaction with them if the *halal* property that he owns is more than the *haram* property.[232]
   Al-Samarqandi who is a Hanafi scholar said that a person is not allowed to receive gift from another who acquire it (the gift) by way of riba or when the gift is given by a cruel person, and it is known that the latter owns property which is *haram* more than the *halal* property.[233]
ii. Shafii school and some Malikites and Hanbalites held that it is discouraged (*makruh*) for a person to enter into transaction with another person who owns property that is mixed between *haram* and *halal*, even though the *haram* property is lesser than *halal* property.[234]

230 Surah al-Najm: 38 & 39.

231 Dr. Abbas Ahmad Muhammad al-Baz, *Ahkam al-Mal al-Haram wa Dhawabit al-Intifa' wa Tasorruf bihi fi al-Fiqh al-Islami*, Dar al-Nafa'is, Jordan, 1999, p. 232-233.

232 ibid., p. 240..

233 Ibid.

234 Al-Nawawi, *al-Majmu'*, v. 9, p. 417.

iii. Al-Syaukani and al-Muhasibi, on the other hand, allows the transaction with the person who owns mix property without looking into the portion of *halal* or *haram* property. The justification forwarded by them is that the Prophet PBUH and His companions do transactions with the non-Muslim Badwi in Madinah despite of the fact that they generally acquired the property or asset through unlawful means such as *riba*, robbery and so on.[235]

iv. Maliki school and minority of Hanbalites opined that the transaction entered into with a person who owns mix property is prohibited (*haram*).[236]

Those Who Own Asset Which Is Not Known Whether It is *Halal* or *Haram*

The scholars generally held the same view that the transaction entered into with this category of people is permissible.

235 Dr. Abbas Ahmad Muhammad al-Baz, *Ahkam al-Mal al-Haram wa Dhawabit al-Intifa' wa Tasorruf bihi fi al-Fiqh al-Islami*, Dar al-Nafa'is, Jordan, 1999, p. 25.

236 Al-Qurtubi, *al-Jami' li Ahkam al-Quran*, v. 3, p. 366.