

SHARIAH ISSUES IN ISLAMIC CAPITAL MARKET

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ABSTRACT

Islam considers the property of people as sacred and inviolable as their life and honour. To ensure this, it forbids the unlawful devouring of others' property by way of theft, embezzlement, usurpation, bribery, cheating and all other unlawful means of acquiring wealth. These proscriptions are in addition to the main prohibitions like Riba', Gharar and Qimar, which are considered major causes for usurpation of others' property. In addition, different transactions have different features that need to conform to the tenets of the Shari'ah. Contracts that do not conform to these tenets or that involve any of the above prohibited elements are regarded as invalid. As Islamic banks and financial institutions are dealing in goods by entering into contracts like sale, leasing, partnership, suretyship, agency, assignment of debt, mortgages, etc. it is worthwhile discussing in brief the overall framework of the Islamic law of contracts to ascertain the permissibility/validity or nonvalidity of their operations.

Keywords: Unilateral Promise, Bilateral Promise, 'Aqd, Mithaq, Muwaada, Wa'd.

1.0 INTRODUCTION

All commercial transactions must be governed by the respective rules and norms of Islamic ethics, as enunciated by the Sharia'ah. The Islamic system disapproved of any exploitation or injustice on the part of any of the parties involved. To achieve this objective, the Shari'ah has advised some prohibitions and recommended some ethics. Study of the rules and norms reveals that Islamic finance is, in essence, an ethical system and ethics need to be an inseparable part of the system. What is not prohibited is permissible. Therefore, all contracts are valid unless they violate the text of the Holy Qur'an or Sunnah of the holy Prophet (phuh), or are in conflict with the objectives of the Shari'ah.

A property is either a specific existent object ('Aya), e.g. a house, or an object defined generically or abstractly by an obligation (Dayn). One can subdivide sale according to the types of Mabi' being exchanged. The mode of Murabaha can be used in trading of 'Ayn and merchandise and not in credit documents or Dayn.

The prohibition of sale of a debt for a debt affects when obligations (to perform or to pay) are delayed, and when such obligations may be bought, sold or otherwise transferred. In a transaction any of the two counter values can be postponed, i.e. payment of the price, or delivery of the commodity. While the former is a credit sale or Bai'Mu'ajjal, the later refers to a future sale wherein the goods sold are to be supplied later against prepaid price (Salam).

2.0 TRANSACTIONS AND CONTRACTS

In Islamic finance there are many Arabic terms used to denote transactions and contracts as well as conveying the meaning of undertaking a contractual obligation and these terms are: *"Mithaq, 'Aqd, Muwaada, and Ahd or W'adah or Wa'd."*

Mithaq – is a covenant and refers to an earnest and firm determination on the part of the concerns parties to fulfill the contract obligations; it has more sanctity than ordinary contracts. The term Mithaq has been used in the Al Qur'an in a number of places.

‘Aqd (Contract) – it means conjunctin or to tie is synonymous with the word “contract” of modern law. Murshid al-Hayram has defined it as the conjunction of an offer emanating from one of the two contracting parties with the acceptance by the other in a manner that it affects the subject matter of the contract. When refers to Majallah al-Ahkam al-Adliyyah, an ‘Aqd takes place when two parties undertake obligations in respect of any matter. Any contracts must be made as explicit as possible in order to avoid Gharar and injustice to any of the parties. A clause in the contract allowing a change in liability beyond the control of the liable party would be unjust, for example, the client in Murabaha agrees that the bank can change his liability whenever the later likes, or the client agrees to automatic compensation for the bank in case of his failure to meet the liability. Commercial contracts have to be concluded at a price that is agreed mutually without uncertainty or hazard (Gharar) with regard to the subject matter and the counter value or consideration and the seller’s ability to deliver.

There are two types of contract (Uqud al Mua’wada and Uqud Ghaer Mua’wadha):

(1) *Uqud al Mua’wada*: compensatory/commutative contracts as result of which one party can get remuneration or compensation for example, sale, purchase, lease and Wakalah contracts. Further, sale contracts can be classified as follows:

Classification according to object:

- Barter sale (Bai’ Muqayadhah).
- Simultaneous exchange of goods for money, spot sale (Bai’ al Hal).
- Exchange of money or monetary units (Bai’ al Sarf).
- Sale with immediate payment and deferred delivery (Bai’ Salam).
- Deferred payment sale or credit sale (Bai’ Mu’ajjal).
- Normal sale of goods for money or absolute sale (Bai’ Mutlaq).

Classifications according to price:

- Resale at cost price (Bai’ Tawliyyah).
- Resale at cost price plus profit – bargaining on profit margin (Bai’ Murabahah).
- Resale with loss (Bai’ Wadhi’ah). Note: the above three forms of sale are termed Buyu’ al Amanat or trust sale.

- Sale without any reference to the original cost price-bargaining on price (Bai' Musawamah).
- Ijarah or the contract of hiring is divided into: Ijarat al Ashkhas (rendering service) and Ijarat al Ashya (letting things).
- Istisna'a (contract of manufacturing).
- Wakalah can be both commutative and noncommutative contracts.

(2) *Uqud Ghaer Mua'wadha*: non-compensatory/noncommutative contracts, wherein one cannot get any return or compensation such as contracts of loan (Qard), gift (Tabarru/Hibah), guarantee (Kafalah) and assignment of debt (Hawalah). The main feature of these contracts is the donation of property, the donor transfers ownership of any property to a party without consideration. The following contracts fall under this category: Hibah (gift); Wasiyyah (bequest); Waqf (endowment); Kafalah (guarantee); Ariyah (loan of usable item free of any charge); Qard (Loan); Hawalah (assignment of debt).

Among these contracts, Kafalah, Qard, and Haalah are directly relevant to Islamic banking operations, but they cannot charge any profit against these contracts *per se*. However, they can charge fees for other services provided on the basis of Wakalah or Ju'alah. For example, while issuing LCs guarantees, etc., banks can charge for their services depending upon expenses incurred for issuing guarantees. These charges can be amount base (possibly slabs) but not time-based.

Any consideration in the contracts of loans, guarantee, against guarantee *per se* and assignment of debt would be illegal. With regard to the legal status of commutative and noncommutative contracts, compensatory/commutative contracts like sale, lease and other remunerative agreement become void by inserting any void condition. On the other hand, noncommutative/noncompensatory agreements do not become void because of a void condition. The void condition itself becomes ineffective. For example, Ahmad Sulaiman enters into an interest-based loan; the condition of charging interest on the loan would be void but the loan contract will remain effective, the debtor will have to repay the loan/debts as it become due. Similarly, Gharar (uncertainty) does not invalidate noncommutative contracts; for example, scholars indicate that donation of a stray or unidentified animal or

fruit before its benefits are evident or a usurped commodity is permissible, but their sale is invalid. Therefore, for valid contracts, the following conditions must be met:

- Two parties.
- Offer and Acceptance (this must relate to the same price and subject matter).
- Material Effect in exchange of subject matter.

Thus, it is important to note that the contracting parties to the above contract need to be mature and sane. Further, with regards to the subject matter or the object, the following conditions need to be satisfied:

- *Value*: the subject matter needs to be consistent with Islamic teachings, for example, a contract involving wine, pork, and military would not be valid, as these subjects have no value or some are prohibited (haram) as well.
- *Existance*: the subject matter needs to be in existence, for example, a contract involving the sale or purchase of a house yet to be built would be invalid. There are of course two exceptions to this: salam and istisna.
- *Ownership*: the seller needs to have ownership of the object.
- *Deliverability*: the seller is able to deliver the goods to the buyer. Of course this condition does not apply to certain objects, for example, houses.
- *Specific*: in this case, the subject must be clearly defined, for example, “I will sell you two lots of my land ...”

If the contract is one of sale, it must be noncontingent and effective immediately, because the sale of goods attributable to the future is void in the opinion of the majority of scholars. In addition, the arrangement of “two contracts into one contract” is not permissible in Shari’ah; therefore, we cannot have the agreement of hire and purchase in one contract, we can only undertake or promise to purchase the leased asset.

Promise in commercial transaction can be binding or nonbinding. It can be legally enforceable, particularly if the promise incurs expense or liability as required by the promise. Therefore, if the promisor backs out from fulfilling the promise, the other party can claim for the actual loss that could arise due to nonfulfilment of the promise. The validity of the

contract requires that its motivating and underlying cause should be according to the requirements of the Sharia'ah. All contracts that promote immorality or are against public welfare are harmful to a person or property of a third party or which are forbidden by law are deemed to be void.

Voidable Contracts (Fasid)

A contract that is legal in its 'Asl, i.e. it has all the elements of a contract, but is not legal in its Wasf, i.e. with respect to external or nonessential attributes of the contract, will not necessarily be void, rather it will be voidable or Fasid, and can be regularized or validated by removing the cause of irregularity. Causes of invalidity are of two types:

- a) Intrinsic causes which relate to the basic elements of the contract, such as unlawfulness or nonexistence of the subject matter, or the absence of contractual capacity in any of the parties.
- b) Extrinsic causes that relate to Wasf, i.e. external attributes such as Riba' or Gharar contained in the contract.

It is pertinent to note that Riba' and Gharar are causes of irregularity of a contract in Hanafi law, while in other schools they are causes of invalidity of a contract. However, even in Hanafi law, a Riba-or Gharar-based contract is not enforceable and only removal of the term involving Riba' or Gharar would validate it. The following may be the major factors rendering contracts irregular or voidable:

- *Defective consent*: the majority of jurist hold that a contract made under coercion is a void or Batil contract. But, Hanafi jurist consider it a voidable or Fasid contract which can be regularized by rectification. Rectification of an irregular contract is possible before possession as well as after it.
- *Lack of any value-relevant information (Gharar or Jahl)*. If the contract lacks any such information for any of the parties that may lead to dispute, the contract is Fasid. The lack of information affecting the validity of contracts can be from the following types: relating to the subject matters; lack of information about the consideration; lack of information

about the time of performance in sale, lease, and other binding contracts; and lack of information about the guarantee, surety, and pledge.

- Defect due to any invalid condition not being collateral to the contract or not admitted by the commercial usage or which gives benefit to one of the parties at the cost of another. Invalid and defective conditions may make a transaction voidable. The following types of conditions may be deemed to be invalid or not permissible: When it is against the purpose of the contract; When it is expressly prohibited by the Shari'ah; When it is against the commercial usage; and When it is advantages to one party at the cost of the other party.

It is pertinent to note here that these irregular conditions affect only compensatory contracts, such as contracts of sale, hiring, etc., and do not affect gratuitous contracts, such as loan, gift, donation, Waqf, or contracts of suretyship, such as Kafalah, mortgage, Hawalah (assignment of debt) or the contract of marriage.

Forms of Voidable Contracts

Hanafi jurist have identified some forms of Fasid or voidable contracts and these are:

- Lacking any material information (Bai'al-Majhul).
- Contingent contract, for example, Ahmed says to Faroq: "I sell to you my car if Kassim sells to me his car".
- Sales contract effective from a future date. If a contract says that the sale will come into effect from a future date, it will be voidable and will be of no effect.
- Bai'al-Ghaib. This is a sale of an item which is not visible at the meeting of the parties; the seller has title over the subject matter but it is not available for inspection of the parties because it is elsewhere. This has to be regularized by seeing. But, the parties are satisfied with the description of the item of sale and there is no chance of Gharar, then the contract is valid.
- Sale contract with unlawful consideration such as wine or pork.
- Two sales in one. Such as selling one commodity for two prices, one being cash and the other a credit price, thus making the contract binding against one of the two prices without specifying either.

Legal Status of the Fasid (Voidable) Contract

A voidable contract must be revoked without the consent of either party. Therefore, no rights or obligation arise. However, if the cause of defect or irregularity is removed, the contract becomes valid. The legal position of such a contract depends upon whether the goods have been delivered or not. For example, if a lender has put the condition of interest in a loan contract, the condition of charging interest is invalid and if this condition is removed, then the loan contract becomes valid and the debtor has to pay only the principle sum of the loan. Here, the rule may be kept in mind that noncommutative contracts (like the contract of loan) do not become void with a void condition. Only the condition has to be removed.

If the buyer in a voidable sale (due to unidentified subject matter for example) takes possession of an item with the consent of the seller, ownership will pass on to him and he will be liable to pay the value agreed with mutual consent or the market value and not necessarily the price fixed in the earlier agreement. Majallah points out: “In Bai’ Fasid, where the buyer has received the subject matter with permission of the seller, he becomes the owner.” However, the parties can still revoke it if the buyer has not disposed of it. In such a case, if the seller wishes to get the commodity back, he must first pay the purchase money to the buyer. Until such recompense, the subject matter is held by the purchaser as a pledge.

As such, a valid contract can be differentiated from a voidable contract in the following manner:

- Ownership in a valid contract is transferred from the seller to the purchaser by mere offer and acceptance, whereas in a voidable contract it is transferred to him by possession taken with the consent of the seller.
- In a voidable sale, the value of the commodity i.e., its market price, is admissible, whereas in a valid contract, an agreed price is paid. In a voidable lease contract, the lessor is entitled to equitable and proper rent (according to the market rate) and not to the rent specified in the original lease agreement. Similarly, in a voidable partnership, each partner gets the profit in proportion to his capital and not according to the agreement.

Void Contracts (Batil)

Contracts that do not fulfill the conditions relating to offer and acceptance, subject matter, consideration and possession or delivery, or involve some illegal external attributes are considered void (Batil). In other words, if major conditions relating to the form of the contracts for example, acceptance does not conform to the offer, or the offer does not exist at the time of acceptance, parties to the contract such as sane and mature, possession and deliverability of the subject matter are not fulfilled, the contract is Batil.

The sale of a thing having an element of absolute uncertainty or speculation is invalid. For example, selling milk in the udder of a cow is invalid sale. Similarly, a sale with unknown consideration and until unknown period, the sale of a RM10.00 for RM20.00, bidding over the bid (after the two parties have reached an agreement on the price) and contracts actuated by fraud or deceit are example of invalid contracts. In contrast, permissible forms of Bai' include Salam or Salaf, selling through bidding, Bai' al Khiyar (option to rescind), Musawamah (bargain on price), Murabahah (bargain on profit margin), etc.

A Batil contract does not give rise to any effect, for example, the buyer will not have the title to the subject matter; the seller will not have the title to price or the consideration; ownership will not transfer and the transaction will be null and void. If delivery of the goods has already been made, the same would have to be returned to the other party regardless of whether such illegality was known to the parties. If the buyer sells the goods to a third party after taking delivery, the original seller cannot be prevented from claiming the goods. The reason is that ownership cannot be transferred through a contract that is Batil. This Hukm is clearly different from that of a Fasid contract, which has been discussed above. In addition, as a general rule, conditional/contingent contracts are invalid. However, this requires some detail and some conditions could be acceptable. The Fiqh literature discuss on three types of conditions/stipulations as follows:

- T'aliq – conditions which suspend a contract to any future event.
- Idafa – an extension that delays the beginning of any contract until a future time.
- Iqtiran (concomitance) – that varies the terms of the contracts.

3.0 SHARIAH ISSUES ON CONTRACTS

In all these cases the contract may or may not be void even if the condition is void. Various scholars differ with regard to the result of condition/stipulation. Both Hanafi and Hambalis allow some delay in beginning contracts like lease of agency (where property is transferred only over time) until any future event, but not for sale. As regards to concomitant conditions, all schools consider whether the condition agrees to or is in conflict with the purpose of the contract. For example, a stipulation that the buyer pays the price or the seller transfers full title is a valid stipulation. They also approve the condition that buyer will pay in certain currency or provide a pledge as security.

However, they do not approve a condition that the buyer will never resell the object. The conditions that pose problems are those by which any of the parties gets an additional benefit. Here, scholars differ but Ibn Taymiyyah has taken a practical approach by rejecting only those conditions which are in contradiction with the Qur'an or Sunnah or the Ijma'a, or which contradict the very object of the contract.

The Hanafi, Shafi'I and Maliki scholars divide conditions into valid, irregular, and void. Valid conditions are those that confirm the effects attributed to juridical acts by the Shari'ah and which are admitted explicitly by it, such as the option of stipulation reserved for a party to revoke or rectify a contract within specified days. A condition which is not of advantage to either party is regarded as superfluous and cannot be enforced. A condition which is repugnant to a contract or transfer of ownership but is of advantage to one of the parties will make the transaction debauched if made an inseparable part of it.

A void condition is any condition which directly infringes any rule of the Shari'ah, or inflicts harm on one of the two contracting parties or derogates from completion of the contract. We can therefore conclude that the subject of conditions in contracts by stating that a condition or stipulation which is not against the main purpose of the contract is a valid condition. Similarly, a condition which has become a normal practice in the market is not void provided it is not against any explicit injunctions of the Holy Qur'an or Sunnah.

4.0 MUWAADA (BILATERAL CONTRACT/PROMISE)

Is two parties performing two unilateral promises on the same subject. For example, Mubarak promises to buy Khalid's land for RM250,000.00 in the next 6 months. In return Khalid agrees to buy Mubarak house for RM250,000.00 in the next 6 months.

Shariah Issues in Application of Muwaada

Here, the majority of Islamic jurist look less favourable at Muwaada, compared to unilateral promise (Wa'd) since the use of two unilateral promises can lead to a forward contract, which is impermissible. We can summarize the two main schools of thought as follows:

- *School One:* AAOIFI, Islamic Fiqh Academy and the majority of scholars. Muwaada is only permissible when it can be validly executed.
- *School Two:* Hanafi jurists. Forward contracts can be based on the Muwaada principle, as long as there are no other prohibitions for example, excessive gharar and short selling.

5.0 'AHD OR W'ADAH OR WA'D (UNILATERAL CONTRACT/PROMISE)

Is a unilateral promise or an undertaking and sometimes it also covers a bilateral obligations. The Al Qur'an has used this term in both senses. The Holy Qur'an says: "And fulfill every 'Ahd, for every "Ahd will be inquired into (on the Day of Judgement)" or "(But righteous) are those who fulfill the contracts, which they have made". "Ahd is also termed W'adah in the Fiqh literature. Of the above three terms, Islamic law relating to business generally deals with "Ahd/W'adah/Wa'd (promise) and 'Aqd (contract). Islamic financial institutions presently enter into promises in respect of a number of transactions, some of which are:

- *Murabaha to Purchase Orderer:* wherein the client places an order with the bank to purchase for him a well defined asset and promises to buy the same at cost plus the bank's profit margin.
- *Ijarah Muntahia-bi-Tamleek:* which the bank or the client promises with the other party to sell or purchase the asset at the end of the lease period or transfer the ownership to the

client through the contract of Hibah (gift) and similarly the concept of W'adah is used while issuing Sukuk on the basis of Ijarah.

- *Sale and lease-back* is allowed subject to the fulfillment of certain conditions and in this transaction, promise is a crucial ingredient.
- *Diminishing Musharakah*: in which case the client promises to redeem the bank's investment by periodically purchasing the bank's share in the joint asset or the bank promises to sell its part of ownership in the asset.
- Disposal of good purchased through *Salam*: in which case an Islamic bank, after executing a Salam contract for forward purchase of a well-defined product, gets a promise from any trader that the later will buy it on stipulated terms and conditions. Islamic banks also take promises from their clients to sell the banks' Salam assets when received as their agents at any given price.
- Similarly, for disposal of assets manufactured/constructed under *Istisna'a*, banks take promises to buy from other parties.

'Aqd (contract) is the most crucial tool for Islamic banks for both deposits and asset sides. They enter into Amanah Qard (loan), Shirkah, or Wakalah contracts with savers or depositors and Bai', Ijarah, Ujrah, Shirkah, Wakalah, Kafalah, Ju'alah, and Hawalah contracts with those who avail themselves of the financing facility from them. It is, therefore, pertinent to discuss in details the concepts of W'adah (promise) and 'Aqd (contract).

Unilateral promise (Wa'd) relates to a promise by an individual or a party to do or not to do a particular action. Such as agreement would consist of a promisor (promises to buy/sell) and promisee (enters into a promise with the promisor). For example, Hanifa (promisor) promises to sell his house to Abu Hassan. This is a unilateral or one-sided promise, which only binds the promisor (Hanifa).

Shariah Issues in Application of Wa'd

As a result, the above example is not considered to be a contract, which would involve an offer and acceptance (bilateral). Here, there are four main schools of thought on unilateral promise (wa'd), which are summarized as follows:

a) **School One:** consist of Imam Abu Hanifah, Imam Al-Shafai' and some Maliki scholars. They concur that satisfying a unilateral promise (wa'a) is honourable, but not obligatory.

b) **School Two:** According Ibn Shubrimah and others, fulfilling unilateral promise (wa'd) is an obligatory except where otherwise justified.

c) **School Three:** According to Maliki school of thought, fulfilling it is an obligatory, if the case entails difficulties for the unilateral promise, e.g. in case he incurs a cost. For example, if the promisor says to the unilateral promise: married her, I unilaterally promise (wa'd) you a one hundred thousand Malaysian Ringgit (RM) and the man married the lady, then, the promisor is duty-bound to fulfill his unilateral promise (wa'd).

d) **School Four:** Islamic Fiqh Academy of the OIC has made the promise in commercial dealings binding if the following points are met:

- The promise should be unilateral promise (one-sided promise).
- The promisor must have caused the promisee to incur some liabilities or expenses.
- If the promise is to purchase something, the actual sale must take place at the appointed time by the exchange of offer and acceptance. Mere promise itself should not be taken as the actual sale.
- If the promisor backs out of his promise, the court may force him either to purchase the commodity or pay actual damages to the seller. The actual damages will include the actual monetary loss suffered by him, but will not include the opportunity cost.

This divergence on the plain unilateral promise (wa'd) is a logical and reasonable one, which falls under "permissible controversy issues." Nonetheless, some modern jurists have moved such a unilateral promise (wa'd) from the category of voluntary offer (tabarru'at) to that of commutative contracts, so as to replace the contract. That is because these proponents have found that such as murabahah, i.e., a resale contract with specification of gain (cost-plus original price) is not permissible, since it falls under the sale of goods that are not in one's possession for example, the goods are not in the possession of the Islamic Financial Institutions (IFIs). So they replaced the contract with the unilateral promise (wa'd), that is to say, they made the contract a unilateral promise (wa'd).

Had they stopped at that point, and had the unilateral promise (wa'd) remained non-binding, there would not have arisen any problems; but in fact they went on to say, and herein lies the gravity of their position: we will make the unilateral promise (wa'd) binding – and so they went a long way in elaborating, amplifying, dissecting, and subcategorizing, until they filled people with the fear of not fulfilling a unilateral promise (wa'd) so much so that the binding unilateral promise (wa'd), which for them is permissible, came to replace the contract which is proscribed by Islamic law. Is this admissible? And is there any difference in this case between the contract and the binding unilateral promise (wa'd)?

Some Islamic Financial Institutions (IFIs) claim that their unilateral promise (wa'd) is non-binding. However, if the client breaks his unilateral promise (wa'd), then the IFI charges him/her for the loss incurred as a result of not fulfilling his/her unilateral promise (wa'd). So how could it be a non-binding unilateral promise (wa'd)?

The first proponent who instituted the practice of the binding promise in commutative contracts was probably Sheikh Mustafa Al-Zarqa in his *Introduction to Jurisprudence (Al-Madkhal Al-Fiqhi*, Vol. II, pp. 1032). That stance filtered into his book on *Insurance (Nizam Al-Ta'min*, pp. 58 & 131) where he adopted the position that if it was admissible, for some jurist, for the unilateral promise (wa'd) to be binding in donations, then, in his view, it was even more justifiable for the unilateral promise (wa'd) to be binding in commutative contracts!

Al-Zarqa was followed by Dr. Yusuf Al-Qardawi in his book on *Resale Contracts (Al-Murabahah*, pp.85). He was followed by Dr. Hassan Al-Shazli in *The Academy Journal (Majallat Al-Majma'*, Vol. V, Part IV, pp. 2720). In *Al-Murabahah*, pp. 105, Al-Qardawi attributed to the *Hanafi* School of thought a divergent on *Istisna'* for example, a contract for the manufacture and sale of a product according to a pre-specified design, deadline, and price – as to whether it was binding or non-binding? In fact, of the matter, they differed on whether it was a contract or a unilateral promise (wa'd)? Had they decided that a unilateral promise (wa'd) was binding, then their divergence would be meaningless.

The binding unilateral promise (wa'd) permeated the rulings of jurists on IFIs, such as Sheikh Mohammed Al-Mokhtar Al-Salami, Sheikh Mohammed Taqi Othmani, Sheikh

Abdullah Al-Manee, Sheikh Abdul Sattar Abu Ghudda, Sheikh Ali Al-Qurrah Daghi, and Sheikh Hasan Al-Shazli, all concur as follows: we decree that a contract is a unilateral promise (wa'd) and we decree that a unilateral promise (wa'd) is binding.

The result of such a direction in adopting the ruling is the decision of the Islamic Fiqh Academy of 1409H as follows:

- i. “That a *unilateral promise* (wa'd) (which is issued unilaterally by either the orderer or the client) is by religion binding upon the promisor except where otherwise justified. It is also judicially binding if it is made contingent upon a reason and if the unilateral promise (wa'd) entails a cost for the unilateral promise (wa'd). In such cases, the consequences of the binding character of the unilateral promise (wa'd) are determined by either the fulfillment of the unilateral promise (wa'd) or by reparation for losses actually incurred as a result of the non-fulfillment of the unilateral promise (wa'd) without justification.”
- ii. “That a *bilateral promise* (muwa'ad) is admissible in murabahah upon the condition that the bilateral promise (muwa'da) is optional for both or either parties. If the bilateral promise (muwa'da) offers no choice, then it is inadmissible because a binding bilateral promise (muwa'da) in murabahah is comparable to an ordinary sale where it is required that the seller be in possession of the goods sold in order not to violate the prohibition by the Prophet (PBUH) of “the sale by as seller of that which is not in his possession.”

6.0 THE DRAWBACKS OF THE DECISION

The drawbacks of the decisions can be summarized as following:

- a) “The Academy relied on researches into the unilateral promise (wa'd) that were carried out separately from the issue of murabahah, where the writers ignored the link between the unilateral promise (wa'd) and the resale contract, even though the provisions governing the plain unilateral promise (wa'd) are completely different from those governing the unilateral promise (wa'd) in resale and other commutative transactions.”

b) “After the decisions was issued, if the scholars are the supporters of requiring the unilateral promise (wa’d) to be binding, they would refer to Paragraph (i) of the decision, but if the scholars are not the supporters of that stance, they would refer to Paragraph (ii) of the decision.”

c) “The decision distinguishes the unilateral promise (wa’d) from the muwa’adah, or bilateral promise (muwa’da). However, despite the fact that the purpose of the unilateral promise (wa’d) is voluntary offer and the purpose of the muwa’adah is commutative operations, supporters of the binding bilateral promise (muwa’da) refer, as we mentioned above, to Paragraph (i) of the Decision on Unilateral Promise (wa’d), even though they should refer to Paragraph (ii) on muwa’adah.”

d) The Decision prohibited the unilateral promise (wa’d) to be binding on both parties but allowed it to be so on one of them. This arbitrariness does not make sense either. One should treat the unilateral promise (wa’d) either binding on both parties or optional for both parties. Making it binding upon one to the exclusion of the other, is illogical, unacceptable, and denotes a misinterpretation of some jurisprudential texts, such as *Al-Um by Imam Al-Shafi’I* (Part III, p.33). The position is also surprising in view of the fact that the research and contribution of the Academy on the matter do not point to this result, except for the view expressed by Dr. Al-Sadiq Al-Darir -

7.0 CONCLUSION

Generally, Islam prohibits all transactions that depend just on chance and speculation, those in which the rights of the contracting parties are not clearly defined and those that enable some to amass wealth at the expense of others and which could result in litigation. Such transactions involve appropriation of other’s wealth without right or justice.

Practices like Riba’, Gharar, fraud, dishonesty, false assertions and breach of contracts and promises also lead to injustice. In every instance of prohibited business conduct one can discern an element of injustice, either to one of the contracting parties or to the general public. In some such cases, the injustice may not be apparent, yet it is always there. In order to nip evil in the bud, Islam seeks to block all those channels that eventually lead to injustice.

In short, it is not admissible for the unilateral promise (wa'd) as an alternative to a proscribed contract, such as selling goods that are not in one's possession, to be binding, because a binding unilateral promise (wa'd) is analogous to a contract. Any views for making it binding upon both or either parties, explicitly or implicitly, by virtue of a Memorandum of Understanding (MOU), a sideline agreement, or any other circumvention, are not founded on any legitimate basis.

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