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THE STATUS OF *MUWĀ'ADAH* AND *WA'DĀN* IN THE *SYARĪ'AH*

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ABSTRACT

This article discusses the Syarī'ah rulings for muwā'adah and wa'dān by reviewing the views of classical and contemporary scholars. It argues that muwā'adah which is a mutual promise is different from a contract ('aqd) even though the promise is binding on both parties. Therefore, it is allowed in the Syarī'ah to make a muwā'adah for executing a sales contract (al-bay') on a future date. While a binding muwā'adah is allowed in the Syarī'ah, it is more likely that wa'dān which involves two independent promises should be permissible. A group of scholars however, does not allow muwā'adah but this same group tolerate wa'dān. Although binding muwā'adah and wa'dān are permissible in the Syarī'ah, their practices in some Islamic financial products involve certain conditions, and in some cases, their usage can be restricted based on sadd al-dharā'i' (blocking the means). This study is set benefit the Islamic finance

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industry with regards to developing products based on muwā'adah and wa'dān, while also encouraging academics to reconsider the Syarī'ah rulings for muwā'adah.

Keywords: *Wa'd, Muwā'adah, Wa'dān, 'Aqd (Contract), Syarī'ah*

INTRODUCTION

Muwā'adah is derived from *wa'd*, which means promise while *muwā'adah* means mutual promise. *Wa'd* is a crucial term in Islamic financial jurisprudence as it forms the basis of a number of Islamic financial products. However, the usage of *muwā'adah* in Islamic financial products remains highly limited. This is because a number of studies conclude that if *muwā'adah* is practiced as binding on both promisors then it is similar to *'aqd* (contract).[1] Thus, in so long as *muwā'adah* itself is a contract then it cannot be combined with an *'aqd* due to the Shari'ah prohibition that combining two contracts in one (*bay'atayni fī bay'atin*) is prohibited.

This article argues that there is a difference between a binding *muwā'adah* and an *'aqd* even though they appear similar. This is because *muwā'adah* does not transfer the ownership of the commodity and therefore the price of the commodity is not a debt on the promisor. On the other hand, when a sale contract (*'aqd al-bay'*) is concluded the ownership of the commodity is immediately transferred to the purchaser, and the price of the commodity becomes a debt on the purchaser.

Nevertheless, considering the restriction on binding *muwā'adah*, the Islamic finance industry has innovated a concept termed as *wa'dān*, which means two independent promises. *Wa'dān* is introduced to avoid the restriction on *muwā'adah*. It

[1] Nazīh Kamāl Ḥammād, "al-Wafā' bi al-Wa'd fī al-Fiqh al-Islāmī," *Majallah al-Majma' al-Fiqhi al-Islāmī*, session 5, vol. 2, 831; Islamic Fiqh Academy, 5th session, resolution no 40-41, 1988, retrieved on 28 May 2013, http://www.fiqhacademy.org.sa/qrarat/5-2.htm; Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance* (Kuala Lumpur: Bank Negara Malaysia, 2010), 139.

is claimed that *wa'dān* is a different concept from *muwā'adah* as it involves two promises related to two different conditions. However, the practice of *wa'dān* is often questioned and criticised for not differing from *muwā'adah*. This is because, in practice, *wa'dān* involves two promises related to the same condition. Thus, an investigation on the *Syarī'ah* ruling for *wa'dān* is necessary.

The first section of this article discusses the *Syarī'ah* ruling of *muwā'adah* including the classical and contemporary scholars' opinions on this topic. Following this, we shed some light on the *Syarī'ah* appraisal of *wa'dān*.

DEFINING *MUWĀ'ADAH*

It is important to be clear with the concept of *muwā'adah* before we discuss its status in the *Syarī'ah*. *Muwā'adah* can be defined both literally and technically. Literally, *muwā'adah* means mutual promise.[2] It is derived from *wa'd*. Tha'lab mentions that *wa'd* is made by one person while *wā'ada* is made by two persons.[3] Al-Jawharī mentions that *wa'd* can be used for good and bad deeds, meaning it can be used in the manner of 'I have promised him good, or I have promised him bad'. When any adjective e.g. good/bad is omitted then *wa'd* and *'iddah* is used in reference to a good deed and *wa'id* and *i'ād* is used in reference to a bad deed. Al-Jawharī added that *wā'ada* means mutual promise e.g. "*tawā'ada al-qawm*" means a group has made a promise among themselves.[4]

The technical definition of *muwā'adah* can be discussed according the definition of classical scholars, or those by the contemporary scholars. Among the classical scholars we have found two Mālikī jurists who attempted to define *muwā'adah*. Ibn Rusyd, a prominent Mālikī jurist defined it as. "To promise each

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2 Abū Manṣūr Muḥammad al-Azharī, *Tahdhīb al-Lughah*, ed. Muḥammad 'Awḍ Mur'ab (Bayrūt: Dār 'Iḥyā al-Turāth al-'Arabī, 2001), 3:85-86.

3 Muḥammad bin Mukarram Manẓūr, *Lisān al-'Arab* (al-Qāhirah: Dār al-Ma'ārif, n. d.), 55:4871.

4 Ismā'il bin Ḥammād al-Jawharī, *al-Ṣiḥḥāh Tāj al-Lughah wa Ṣiḥḥāh al-'Arabiyyah*, ed. Aḥmad 'Abd al-Ghafūr 'Aṭṭār (Bayrūt: Dār al-'Ilm li al-Malāyīn, 1984), 2:551-552.

one of the two to the other as it is a mutual action which will not happen except by two persons."[5] This means that *muwā'adah* is a mutual action where two parties promise to each other. If only one person promises to the other then it is a unilateral promise (*wa'd*), and when two persons promise to perform something good to each other then it is *muwā'adah* (mutual promise). A similar definition of *muwā'adah* is provided by another Māliki scholar but in relation to marriage as he states, "To promise each of the two to the other for marriage. It is a mutual action therefore, it will not occur except by two persons. In addition, if only one person has promised then it is called *'iddah* (unilateral promise)."[6] This definition affirms that *muwā'adah* involves mutual promise by two individuals, and when the promise is made by only one person then it is *wa'd* (unilateral promise).

Contemporary scholars have defined *muwā'adah* mostly in relation to financial affairs. Nazīh Kamāl Ḥammād defined it as a, "declaration by two persons on their interest to make a contract in the future which consequences will fall onto them."[7] Similar to the classical scholars, this definition asserts that *muwā'adah* is a declaration by two persons to perform something in the future. However, this definition is limited to making a contract. Based on this definition, only the declaration to conclude a contract in the future should be called *muwā'adah*. However, this might be due to Nazīh Kamāl Ḥammād's focus on the contemporary practice of *muwā'adah* in Islamic banking contracts. Therefore, we can conclude that *muwā'adah* is a mutual promise made by two individuals to perform something good to each other regardless of whether it is made for a contract or for other purposes.

The figure below shows an example of *muwā'adah* to conclude a sale and purchase in the future. In this example, A promises to B on 25 March that he will sell a car on 1st of May, 2015 for RM 100,000. At the same time, B promises to A that he will purchase a car on 1st of May, 2015 for RM 100,000.

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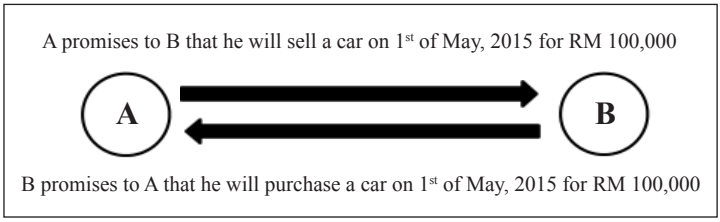
5 Muḥammad bin Yūsuf al-Gharnāṭī, *al-Tāj wa al-'Iklīl li Mukhtaṣarīn Khalīl* (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1994), 5:314.

6 Abū 'Abd Allāh Muḥammad bin Muḥammad al-Ḥaṭṭāb, *Mawāhib al-Jalīl li Syarḥ Mukhtaṣarīn Khalīl*, ed. Zakariyā 'Umayrāt (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1995), 5:33.

7 Nazīh Kamāl Ḥammād, "al-Wafā' bi al-Wa'd," 730.

Figure No. 1. Illustration of *Muwā'adah*



Source: Author's Own

THE STATUS OF *MUWĀ'ADAH* IN THE *SYARĪ'AH*

The classical and contemporary scholars have provided different view points on the *Syarī'ah* status of *muwā'adah*. The contemporary scholars' debate on this issue is more extensive and complicated as their views are based on the practice of *muwā'adah* in Islamic banking operations. In this section, we first discuss the classical scholars' opinions on *muwā'adah*, followed by our reflection on the contemporary scholars' debate on this matter from which we attempt to ascertain the most substantial opinion on the *Syarī'ah* status of *muwā'adah*.

Classical Scholars' Views

We have reviewed the classical sources of Islamic *fiqh* in different schools (*madhāhib*) to identify the opinions of classical scholars. One a few scholars have discussed the *Syarī'ah* ruling for *muwā'adah*. Most of the classical scholars have discussed muwā'adah which is non-binding on the promisor. However, Qāḍī Khān, a Ḥanafī jurist talked about the *Syarī'ah* status of *muwā'adah* which is binding on the promisor. The details of the opinions of the classical scholars are provided below.

Among the classical scholars, some Mālikī's discussed *muwā'adah* mostly relating to *bay' al-ṣarf* (money exchange). Al-Wansyarīsī mentioned two different opinions of Imām Mālik on the status of *muwā'adah*. He states that *muwā'adah* to perform something in the future is not allowed in the *Syarī'ah* if that action is unlawful at the present. Therefore, Imām Mālik prohibited the

use of *muwā'adah* to execute a marriage contract during the *'iddah*[8] period, for the sale of food before taking possession, for the sale of something during the call for Friday prayer, and for sale of something that someone does not own. In the case of *muwā'adah* for *bay' al-ṣarf* (currency exchange), Imām Mālik's first view is that it is prohibited. However, he has another well-known opinion that *muwā'adah* for *bay' al-ṣarf* is disliked (*makrūh*) based on the grounds that if it is performed at present then it is allowed. Pertaining to this opinion, al-Wansyarīsī doubts that it may become a forward contract.[9] While Imām Mālik's opinion is contradictory on *muwā'adah*, al-'Adawī, another Māliki scholar, clarifies that there is no harm in *muwā'adah* for *ṣarf*. If someone says to another, "Let us go to the market with your silver money; if it [price] is good, then we will exchange it," and the other party accepts then it becomes *muwā'adah*. The *bay' al-ṣarf* (exchange contract) takes place after that.[10]

Similar to the Mālikī scholars, Imām Syāfi'ī allows *muwā'adah* for *bay' al-ṣarf*. He mentions in his prominent book *al-Umm* that if two individuals mutually promise to each other to execute *bay' al-ṣarf* in a future date then there is no harm for them.[11] In agreement with Imām Syāfi'ī, Ibn Ḥazm remarks that it is permitted to make *muwā'adah* to purchase gold with gold, or gold with silver, or silver with silver, or other *ribawī* items regardless of whether the parties enter into the exchange contract after that or not. This is because *muwā'adah* is not a contract.[12]

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8 *'Iddah* is a waiting period for a woman after the death of her spouse, or after a divorce. According to Islamic *Syarī'ah*, a woman cannot marry another man during this period.

9 Aḥmad bin Yaḥyā al-Wansyarīsī, *Īḍāḥ al-Masālik ilā Qawā'id al-Imām Abī 'Abd Allāh Mālik*, ed. al-Sādiq bin 'Abd al-Raḥmān (Bayrūt: Dār Ibn Ḥazm, 2006), 114.

10 Abū al-Ḥasan 'Alī bin Aḥmad al-'Adawī, *Hāsyiyah al-'Adawī*, printed with Muḥammad bin 'Abd Allāh al-Khurāsyī, *Syarḥ Mukhtaṣarīn Khalīl li al-Khurāsyī* (Misr: al-Maṭba'ah al-Khayriyyah, 1890), 3:421.

11 Muḥammad bin Idrīs al-Syāfi'ī, *al-Umm*, ed. Rif'at Fawzī 'Abd al-Muṭṭalib (al-Manṣūrah: Dār al-Wafā', 2001), 4:58.

12 Abī Muḥammad 'Alī bin Aḥmad bin Sa'īd bin Ḥazm, *al-Muḥallā bi al-Āthār*, ed. Aḥmad Muḥammad Syākir (Misr: Idārāt al-Ṭibā'ah al-Munīriyyah, 1352H), 8:513.

Finally, Qāḍī Khān, a Ḥanafī scholar views that *muwā'adah* to execute a contract in the future is allowed in the *Syarī'ah* and *muwā'adah* can be binding on the promisors in case of necessity. He states, sometimes it becomes necessary to be involved with *muwā'adah* and can be binding on the parties due to the necessity of the people.[13] Unlike the previous scholars, Qāḍī Khān clearly points out the status of binding *muwā'adah* in the *Syarī'ah*, which is allowed in his opinion only in cases of necessity.

Based on the above opinions, we can resolve that the classical scholars agreed that use of *muwā'adah* is permitted to conclude a contract in the future and in *bay' al-ṣarf* (currency exchange contract). However, they do not mention whether this *muwā'adah* is binding on the promisor. In this regard, we can look into their opinions on the obligation of *wa'd* (unilateral promise). Imām Syāfi'ī, Ibn Ḥazm, and the Mālikī scholars did not allow the *wa'd* to be generally binding. Similarly, *muwā'adah* should also not be binding. The Mālikīs allowed *wa'd* to be binding if the *wa'd* is attached to a cause (*sabab*) and the promisee has entered into an action based on the promise.[14] Hence, a similar ruling should be applied in *muwā'adah* as well. However, contrary to the previous scholars, Qāḍī Khān clearly provides his statement that *muwā'adah* can be binding in cases of necessity.

Contemporary Scholars' Views

Contemporary scholars unanimously agree with the classical scholars that *muwā'adah* to conclude a contract in the future is allowed in the *Syarī'ah* if it is non-binding on both or either one of the promisors. However, the contemporary scholars have different opinions on the status of *muwā'adah*, which is binding on both the promisors. In this regard, scholars' opinions can be divided into three categories. The majority of the scholars opine that if *muwā'adah* is binding on both the parties then it becomes a forward contract (*bay' al-ajal bi al-ajal*). Hence, it should not be

[13] Fakhr al-Dīn Ḥasan Qāḍī Khān, *Fatāwā Qāḍī Khān*, printed with Niẓām al-Dīn al-Balkhī with others, *al-Fatāwā al-Hindiyyah* (Būlaq: al-Maṭba'ah al-Kubrā al-Amīriyyah, 1892), 2:165.

[14] Ibn Ḥazm, *al-Muḥallā*, 8:28; Mālik bin Anas, *al-Mudawwanah al-Kubrā* (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1994) 3:270.

allowed to conclude a contract in the future. The second group of scholars view that a binding *muwā'adah* to conclude a contract in the future should be allowed in case of necessity. Finally, the third view is that even though *muwā'adah* is binding on the promisors, differences remain between a binding *muwā'adah* and a forward contract. Therefore, it should be allowed in general.[15] The details of the opinions and arguments of the scholars are provided in the following sections.

Binding Muwā'adah is Non-Permissible

Nazīh Kamāl Ḥammād, a prominent contemporary Islamic jurist disallows a binding *muwā'adah* to conclude a contract in the future. Moreover, Bank Negara Malaysia, the Central Bank of Malaysia and the Islamic Fiqh Academy of the Organization of Islamic Conference (OIC) issued a resolution that a binding *muwā'adah* is not permissible to execute a contract in the future.

Nazīh Kamāl Ḥammād argues that none of the classical scholars mentioned that *muwā'adah* is binding on either or both parties. If both of the promisors in *muwā'adah* agree that the promised contract that will be executed in the future is binding upon them from the time of *muwā'adah*, then the *muwā'adah* itself turns into a contract. Therefore, all the *Syarī'ah* rulings pertaining to a contract will come into effect. This is based on the Islamic legal maxim (*qā'idah*) that reads, "In contracts, effect is given to intention and meaning and not words and forms."[16] This means that when a *muwā'adah* becomes binding on the promisors, it then turns into a contract in substance even though it appears as *muwā'adah*.

Agreeing with Nazīh Kamāl Ḥammād, Marjan Muhammad *et al*. further clarifies that the economic effect of a binding *muwā'adah* and a contract are the same. There are similarities between them in terms of documentation, as in both of the cases only one documentation is used. Furthermore, two parties are involved in

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15 'Abd Allāh bin Muḥammad, "al-Wa'd wa al-Muwā'adah fī al-Tabarru'āt wa al-Mu'āwadāt," *Journal of Islam in Asia* 7 no. 1 (2010), 46.

16 Nazīh Kamāl Ḥammād, "al-Wafā' bi al-Wa'd," 831.

both concepts. The nature, obligation, subject matter, and price are the same in a binding *muwā'adah* and in a contract.[17]

Subscribing to the above opinion, Bank Negara Malaysia (BNM) prohibits binding *muwā'adah* to execute *bay' al-ṣarf* in a future date. It argues that binding mutual promise (*muwā'adah mulzimah*) is prohibited for a foreign exchange transaction (*bay' al-ṣarf*), because it comprises selling debt for debt, which is termed by the classical scholars as '*bay' al-kāli bi al-kāli.*'[18]

Finally, the Islamic Fiqh Academy prohibits binding *muwā'adah* to execute a contract in the future arguing that a binding *muwā'adah* is itself a contract. The resolution of the academy reads:

> *Bilateral promises are permitted in murābaḥah sales on the condition that either or both parties have the option to annul the sale; however, if there is no such option, such a promise is not allowed because a binding bilateral promise in a murābaḥah sale bears a similarity to the sale transaction itself. In that case the condition is laid down that the seller must be the owner of the commodity being sold in order that no dispute arises [based upon the prohibition of the Prophet (peace be upon him) of people selling what they do not possess].*[19]

However, in a later resolution, the Islamic Fiqh Academy has become flexible with *muwā'adah* in cases where there is a public need. It has allowed *muwā'adah* to be binding in export and import transactions due to necessity. The details of that resolution are discussed in the nest section of the article.

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17 Marjan Muhammad, Hakimah Yaacob and Shabana Hasan, "The Bindingness and Enforceability of A Unilateral Promise (Wa'd): An Analysis from Islamic Law and Legal Perspectives." (Research paper no. 30, International Shari'ah Research Academy for Islamic Finance, Kuala Lumpur, 2011), 27.

18 Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*, 139.

19 Islamic Fiqh Academy, 5th session, resolution no 40-41, 1988, retrieved on 28 May 2013, http://www.fiqhacademy.org.sa/qrarat/5-2.htm

Binding Muwā'adah is Allowed in Case of Necessity

This group of scholars hold the middle position among the three group of scholars. The well-known contemporary Islamic jurist al-Qāḍī Muḥammad Taqī Uthmānī, 'Abd al-Sattār Abū Ghuddah and others view that in cases of necessity, it is allowed to make a binding *muwā'adah* to conclude a contract in the future. Referring to classical Hanafi jurists, al-Qāḍī Muḥammad Taqī 'Uthmānī argues that *muwā'adah* can be binding in the Hanafi School of jurisprudence if it is a necessity for the people. As an example, in the context of export/import business (*'aqd al-tawrid*), it is necessary to make the *muwā'adah* binding on both parties.

In response to the argument that a binding *muwā'adah* is a forward contract, Taqī Uthmānī elucidates that there are some differences between a binding *muwā'adah* and a forward contract. In a forward contract, the ownership (*milkiyyah*) of the subject matter (*mabī'*) is transferred to the purchaser immediately after the contract is concluded. At the same time, the purchase price (*thaman*) of the asset becomes a debt on the purchaser. On the contrary, there is no transfer of ownership between the promisors in a binding *muwā'adah*. Consequently, there is no debtor and creditor relationship between the promisors.[20]

Furthermore, the obligation of *muwā'adah* is not the same as that of a contract. If one of the promisors cannot fulfil the promise due to a valid excuse (*'udhr syar'ī*), then he will not be obliged to conclude the contract in the future date. When the promisor does not fulfil his promise without any valid excuse then the judge may ask him to fulfil the promise. If he does not fulfil his promise at that time, then he is obliged to pay the amount of loss incurred to the promisee due to the breach of the promise. Only the actual loss incurred to the promisee will be paid but not the total contract price. In contrast, in a forward contract, the purchaser is obliged to pay the total contract price to the seller.[21]

Referring to the classical Ḥanafī and Mālikī scholars, Abū Ghuddah argues that when a *wa'd* (unilateral promise) or

[20] Al-Qāḍī Muḥammad Taqī 'Uthmānī, "'Uqūd al-Tawrīd wa al-Munāqaṣah," *Majallat Majma' al-Fiqhī al-'Islāmī* 12, (2000), 675.

[21] *Ibid*.

muwā'adah (mutual promise) is attached to a cause (*sabab*) then it is binding on the promisor. However, if the promise is free from any indication that makes it compulsory or otherwise, then we should refer to whether it is a necessity. If there is necessity to make the *wa'd* or *muwā'adah* binding on the promisor then it should be binding.[22]

'Abbās Aḥmad Muḥammad al-Bāz holds a different view. He opines that *muwā'adah* can be binding when breaching the promise harms the promisee. To support his position, he argues that all scholars have agreed that a non-binding *muwā'adah* is dissimilar to a forward contract. If the non-binding *muwā'adah* would be similar to a forward contract then the classical scholars would not have allowed it for *bay' al-ṣarf*. However, the non-binding *muwā'adah* can be binding on both parties in cases wherein breaking the promise will cause harm to the promisee. In that case, the *muwā'adah* can be binding to remove the harm. If the *muwā'adah* becomes binding just to remove the harm from the promisee then it does not change the *muwā'adah* to a forward contract. In such a way, a *muwā'adah* is different from a forward contract and the real contract takes place at a future date after the *muwā'adah* is made.[23]

The resolution from the Islamic Fiqh Academy strengthens this position. While the academy prohibited binding *muwā'adah* totally in its 5th session, it revised the resolution in its' 17th session to the effect that *muwā'adah* can be binding on both parties in cases of necessity. The resolution reads:

> *There may be cases where it is impossible to conclude a sale agreement due to the commodity not being in the possession of the seller while a general need exists to oblige both parties to implement a contract in the future, either by legislation or some other means,*

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22 'Abd al-Sattār Abū Ghuddah, "Ta'ahhudāt Mudīrī al-'Amaliyyāt al-Istithmāriyyah," *Nadwah al-Barakah li al-Iqtiṣād al-Islāmī*, 31st Session, 2010, retrived on 6 Jun 2013, http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?NawazelItemID=1182

23 'Abbās Aḥmad Muḥammad al-Bāz, *Aḥkām Ṣarf al-Nuqūd wa al-'Umlāt fī al-Fiqh al-Islāmī wa Taṭbīqātuhu al-Mu'āṣirah* ('Ammān: Dār al-Nafā'is, 1999), 130-131.

> *such as the recognized practices of international commerce. An example of the latter would be opening a letter of credit in order to import goods. In such cases, it is permissible to oblige both parties to fulfil their promises, either through governmental legislation or by the agreement of both parties to a clause in the agreement that will make the promises binding on each of the two parties.*[24]

The Islamic Fiqh Academy clarifies that this binding *muwā'adah* is not a forward contract. This is because, the ownership of the commodity is not transferred to the buyer, and the purchase price does not become a debt on the purchaser. The actual sale contract will be executed on the agreed upon date through offer (*īj*ā*b*) and acceptance (*qabūl*) between the buyer and the seller. In case the promisor does not fulfil his promise without any valid excuse, he is obligated to either fulfil the promise or compensate the actual loss incurred to the promisee due to the breach.[25]

Binding Muwā'adah is Permissible in General

The third view is that it is generally permissible to practice a binding *muwā'adah* to conclude a contract in a future date. While the second group of scholars allow binding *muwā'adah* only in cases of necessity, this group of scholars allow it in general irrespective of whether it is a necessity. We have found only one contemporary study that advocates this view. In investigating the application of *wa'd* in sukuk *musyārakah*, Khairun Najmi *et al*. argued that binding *muwā'adah* is different from a forward contract in many ways. Firstly, a contract is concluded through the connection of offer (*īj*ā*b*) and acceptance (*qabūl*) that implicates some legal effects on the subject matter. However, a binding *muwā'adah* is a promise made by two persons reciprocally that does not have any legal implications on the subject matter e.g.

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[24] Islamic Fiqh Academy, 17th Session, retrieved on 5 Jun 2013, http://www.fiqhacademy.org.sa/qrarat/17-6.htm

[25] *Ibid*.

transfer of the ownership. *Muwā'adah* means to promise mutually that a contract will be executed in the future.[26]

Secondly, a future statement (*ṣīghah*) is used in *muwā'adah* e.g. "I will purchase your house in the next month." The scholars unanimously agree that this type of expression is not a contract but a promise. This is because, the contract requires either past or present expression (*ṣīghah*), e.g. the buyer says, "I bought your house" and the seller replies, "I agreed."[27] Finally, unlike a contract, the possession of the commodity (*mabī'*) is not changed by *muwā'adah*. If the promisor to purchase a commodity fails to pay the purchase price then it is not considered a debt on his liability. He is only required to pay for the loss incurred to the promisee. Conversely, in a sale contract, if the purchaser fails to pay the purchase price then the total purchase price becomes a debt on his responsibility.[28] Based on these differences between binding *muwā'adah* and forward contract, this group of scholars conclude that it is permissible to make a binding *muwā'adah* to execute a sale contract in the future without any restriction.

Discussion of the Arguments and the Weightiest Opinion

The first group of scholars view that a binding *muwā'adah* is not allowed to execute a sale contract in the future. This is because a binding *muwā'adah* in substance resembles a forward contract. The second group of scholars opine that a binding *muwā'adah* can be allowed to execute a contract in the future in cases of necessity. Even though *muwā'adah* is binding on the promisors, it is different from a forward contract because there is no transfer of ownership and no handing over of purchase price. Besides, the obligation of *muwā'adah* is not similar to a contract as the breach of the promise requires the promisor to pay only the amount of loss incurred to the promisee. The third group of scholars provides similar arguments to differentiate between binding *muwā'adah* and forward contract. However, they differ from the second group in

[26] Khairun Najmi Saripudin et. al, "Application of Promise in Sukuk Musharakah Structure," *Middle-East Journal of Scientific Research* 12, no. 2 (2012), 163.

[27] *Ibid*.

[28] *Ibid*.

that they generally allow a binding *muwā'adah* for a sale contract in the future irrespective of whether it is a necessity.

First, we would like to assess the first group's argument that a binding *muwā'adah* is similar to a forward contract in substance. They argue that the economic benefit is the same for both of the terms. Both of the concepts involve two parties, the same subject matter, price, and a similar obligation. The Islamic Fiqh Academy adds that when none of the promisors has the option to cancel the contract then it is similar to *muwā'adah*. However, we would like to oppose these arguments because there are some substantial differences between these two terms.

Firstly, we advocate the argument mentioned by the second group of scholars that there is no transfer of ownership of the subject matter in *muwā'adah* and no negotiating the purchase price. In case of a sale contract (*'aqd al-bay'*), immediately after the offer (*ījāb*) and acceptance (*qabūl*), the purchaser has obtained the ownership of the subject matter and the seller has obtained the ownership of the purchase price. The scholars are unanimous on this matter. *Al-Mawsū'ah al-Fiqhiyyah*, the encyclopaedia of Islamic jurisprudence remarks in this regard:

> *A sale [contract] for example is executed with offer (ijāb) and acceptance (qabul), which entails its effects: transfer the ownership of the sold asset to the purchaser, and transfer of ownership of the price to the seller regardless of whether they have taken possession on these items or not. This is based on the unanimity of the scholars.*[29]

However, none claim that a binding *muwā'adah* to execute a sale contract in the future results in the similar effect on the subject matter. It is agreed that a binding *muwā'adah* does not have any immediate effect on the subject matter.

Secondly, we outweigh the point that there is no offer (*ījāb*) and acceptance (*qabūl*) in *muwā'adah* while these are the fundamental pillars (*arkān*) for a sale contract. Usually, a future expression (e.g. I promise to purchase/sale in the future) is used in *muwā'adah*.

[29] *Al-Mawsū'ah al-Fiqhiyyah* (al-Kuwayt: Wizārah al-Awqāf wa al-Syu'ūn al-Islāmiyyah, 1983), 30:231.

The Ḥanafī scholars resolve that a future expression cannot be considered as offer (*ījāb*) and acceptance (*qabūl*). Besides, the majority of the scholars view that a future expression can be considered for offer (*ījāb*) and acceptance (*qabūl*) but with the condition that the contracting parties (*'āqidān*) have intended to execute the contract on the spot. In *muwā'adah*, the intention of the parties is not to execute the contract on the spot but in a future date. Therefore, this type of expression cannot be considered as offer (*ījāb*) and acceptance (*qabūl*).[30]

Finally, we do not agree with the claim that the obligation for binding *muwā'adah* and the sale contract are the same. Some prominent Muslim scholars namely al-Ghazālī and Ibn 'Arabī opine that a promise is not obligatory on the promisor when he cannot fulfil it due to a valid excuse.[31] Therefore, the promisor has no liability to the promisee if he breaches the promise due to a valid excuse, e.g. bankruptcy, death etc. However, when the promisor breaches the promise without any valid excuse, then he is obliged to compensate the promisee only the amount of loss incurred, not the total contract price. This differs significantly from a forward sale contract where the full purchase price has become a debt on the purchaser. The table below summarises the above discussion on the differences between a binding *muwā'adah* and forward sale contract.

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30 'Alā' al-Dīn Abū Bakr bin Mas'ūd al-Kāsānī, *Badā'i' al-Ṣanā'i'*, ed. 'Alī Muḥammad Mu'awwad and 'Ādil Aḥmad (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 2003), 6:528-529; Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 6:16; Syams al-Dīn Muḥammad, *Nihāyat al-Muḥtāj* (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 2003), 3:375-380; Abū Muḥammad 'Abd Allāh bin Aḥmad bin Muḥammad bin Qudāmah, *al-Mughnī*, ed. 'Abd Allāh bin 'Abd al-Muḥsin and 'Abd al-Fattāḥ Muḥammad (al-Riyād: Dār 'Alam al-Kutub, 1997), 6:7-9.

31 Abū Bakr Muḥammad bin 'Abd Allāh bin 'Arabī, *Aḥkām al-Qur'ān*, ed. Muḥamamd 'Abd al-Qādir 'Aṭā' (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 2003) 4:243; Abū Ḥāmid Muḥammad bin Muḥammad al-Ghazālī, *Iḥyā' 'Ulūm al-Dīn* (al-Qāhirah: Dār al-Sya'b, n. d.) 9:1580.

Table no. 1: The Difference between Binding *Muwā'adah* and Forward Contract

No.	Subject	Forward Sale Contract (*'aqd bay' al-ajal bi al-ajal*)	Binding *Muwā'adah* (*Muwā'adah mulzimah*)
1	Expression (*Ṣīghah*)	Past or Present Expression	Future Expression
2	Ownership of the Subject Matter (*Milkiyyat al-Mabī'*)	Ownership Transferred	Ownership Not Transferred
3	Price (*Thaman*)	Price is Due on the purchaser	Price is Not Due on the Purchaser
4	Bindingness/ Obligation (*Ilzāmiyyah*)	The Purchaser is Required to make the Full Purchase Price without any excuse	The Promisor is Required to Either Execute the Contract or Pay for the damages incurred to the Promisee unless he (promisor) has any valid excuse

Source: Author's Own

While evaluating the second group of scholars' position, we agree with their arguments that a binding *muwā'adah* is different from a forward sale contract. However, we disagree with their position to allow binding *muwā'adah* only in cases of necessity. We argue that if the binding *muwā'adah* is practically different from a contract then there is no basis to make the *muwā'adah* binding upon both parties only in cases of necessity. Usually, an action is allowed in cases of necessity when it is normally prohibited by the *Syarī'ah*. Necessity makes the prohibited action permitted until the necessity is eliminated. When the necessity is removed, then that action becomes prohibited once again. However, when an action is generally permissible in the *Syarī'ah* from the beginning then we should not allow it only in necessary circumstances. Thus, we

would like to outweigh the view that a binding *muwā'adah* should be generally allowed to execute a sale contract in the future.

However, we agree with the resolution of the Islamic Fiqh Academy that when it is apparent that the binding *muwā'adah* is used as an artificial arrangement to get around the restriction of *ribā* (interest), then it should be prohibited based on the legal concept of *sadd al-dharā'i'* (blocking the means).[32] Considering this factor along with the discussion above, we offer the following conditions that should be followed in practicing binding *muwā'adah*.

i. *Muwā'adah* should not be used as a trick to legalise *ribā* (interest). Whether the *muwā'adah* is a trick or not, should be decided based on what is apparent in the product structure and documentation. Furthermore, the regulatory body may decide on this.

ii. Similarly, *muwā'adah* should not be combined with other contracts in such a way that it violates the objective (*muqtaḍā*) of that contract, or the noble objectives of the *Syarī'ah* (*maqāṣid al-Syarī'ah*).

iii. The promisor should not be forced to fulfil his promise if he has any valid excuse, e.g. bankruptcy, duress, insanity etc.

iv. In case the promisor breaches the promise without any valid excuse, he is required to compensate the promisee only the amount of loss incurred.

v. In order to conclude the promised contract in a future date, all the mandatory conditions prescribed by the *Syarī'ah* to execute a contract i.e. existence of the subject matter, legal competence (*ahliyyah*) of the contracting parties etc. should be fulfilled during the time of concluding the contract.

[32] Islamic Fiqh Academy, 17th Session, retrieved on 5 Jun 2013, http://www.fiqhacademy.org.sa/qrarat/17-6.htm

THE CONCEPT OF *WA'DAN*

The term *wa'dān* is an innovation by the Islamic banking industry.[33] The concept was developed to avoid the debate of *muwā'adah* as well as gaining more confidence from the *Syarī'ah* perspective. As discussed earlier, the permissibility of *muwā'adah* in the *Syarī'ah* is debated among the contemporary scholars. Therefore, wa'dān was introduced with the objective of providing a similar benefit of *muwā'adah* but at the same time compliant with the *Syarī'ah* principles without any major dispute.

Literally, *wa'dān* is an Arabic term which means two promises. In the Islamic banking context, it is most commonly translated as two independent promises. Technically, Aznan Hasan defines *wa'dān* as, "Two unilateral promises given by two parties to each other, which are not interrelated and their application relies on two different conditions."[34] It may seem that *wa'dān* is similar to *muwā'adah* but the difference between them is that the two promises are not related to each other in *wa'dān*. This means there is no mutual relation between the first and second promise. Both of the promises are independent. Pertaining to this, Marjan Muhammad *et al*. pointed out that *wa'dān* has two important characteristics, which are: (1) the promises are not dependent on each other and (2) their application depends on two separate conditions.[35]

Therefore, we can sum up that *wa'dān* is different from *muwā'adah*. In *wa'dān*, two independent promises are made by two persons to perform something good to each other which is related to two different situations. The figure below provides an example of *wa'dān* to make the concept clearer. The example is taken from the practice of the Islamic finance industry.

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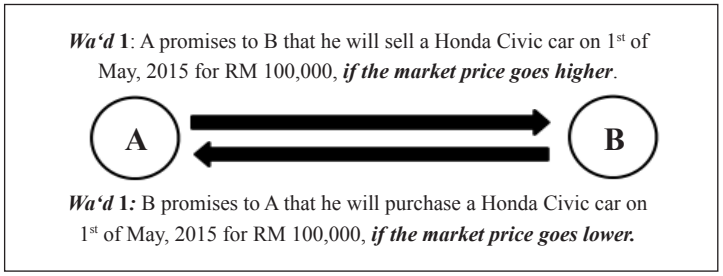
33 Marjan Muhammad et al., "The Bindingness and Enforceability of A Unilateral Promise (*wa'd*)," 31.

34 Aznan Hasan, "Pengertian al-Wa'ad, al-Wa'dan dan al-Muwa'adah" (paper presented in *Muzakarah Cendekiawan Syariah Nusantara,* International Shari'ah Research Academy for Islamic Finance (ISRA), Kuala Lumpur, 27-28 February 2008), 1.

35 Marjan Muhammad et al., "The Bindingness and Enforceability of A Unilateral Promise (*wa'd*)," 31.

Figure No. 2: Illustration of *Wa'dān*



Source: Author's Own

In the above example, A promises to B in the beginning that he will sell a Honda Civic car on 1st of May, 2015 for RM 100,000, if the market price goes higher. This is the first *wa'd*. After that, B promises to A that he will purchase a Honda Civic car on 1st of May, 2015 for RM 100,000, if the market price goes lower. This is the second *wa'd*. In this example, both of the promises are independent, which are based on two different conditions. The two different situations are (1) when the market price of the car is higher than the price fixed earlier and (2) when the market price is lower than the price fixed earlier. Eventually, only one of the two promises will be fulfilled in the future.

THE STATUS OF *WA'DAN* IN THE *SYARI'AH*

As we have concluded earlier that a binding *muwā'adah* is permissible, it is more reasonable that *wa'dān* should be permitted in the *Syarī'ah*. While *muwā'adah* comprising mutual promise is allowed in the *Syarī'ah*, it is more likely that *wa'dān* which includes two independent promises should be compliant with the *Syarī'ah* principles. Affirming this, Khairun Najmi *et al*. concludes that whether *wa'dān* is practically different from *muwā'adah* or not, it should be allowed in the *Syarī'ah*. This is because both *muwā'adah* and *wa'dān* are just promises and different from a contract (*'aqd*).[36]

[36] Khairun Najmi Saripudin, et al., "Application of Promise in Sukuk Musharakah Structure." 165.

However, what is important to discuss in this section is that there is a group of scholars who do not allow binding *muwā'adah* but allow binding *wa'dān*. They argue that *wa'dān* is genuinely different from *muwā'adah*. On the contrary, some scholars do not allow *wa'dān* at all claiming that *wa'dān* does not make any real difference from *muwā'adah*. Finally, a few scholars conclude that even though *wa'dān* is generally permissible in the *Syarī'ah*, its practice in some Islamic financial products should be prohibited based on the principle of *sadd al-dharā'i'*. In the subsequent paragraphs, we discuss the views and arguments of these different groups of scholars.

Wa'dān is different from *Muwā'adah*

While disallowing *muwā'adah*, Marjan Muhammad *et al*. upholds the permissibility of *wa'dān* in the *Syarī'ah*. They argue that wa'dān is a permissible legal trick (*ḥīlah syar'iyyah*) to avoid the non-permissible *muwā'adah*. *Wa'dān* is different from *muwā'adah* because it consists of two different promises related to two different conditions, and between these two promises only one of them will be fulfilled in the future. Therefore, they ascertain that wa'dān is permissible in the *Syarī'ah*.[37]

Similarly, Aznan Hasan clarifies his position that when *wa'dān* includes two promises which are truly related to two distinct conditions, and they result in two different effects, then it is permissible. However, if those conditions are practically the same and have similar effects then it is not acceptable in the *Syarī'ah*. In other words, if the two different conditions in *wa'dān* are fictitious, then it is not allowed.[38]

Wa'dān is similar to *Muwā'adah*

Referring to the practice of *wa'dān* in some Islamic banking products, a number of scholars conclude that *wa'dān* does not make any difference from *muwā'adah*. As the practice of *wa'dān* is

[37] Marjan Muhammad et al., "The Bindingness and Enforceability of A Unilateral Promise (*wa'd*)," 36.

[38] Aznan Hasan, "Pengertian al-Wa'ad, al-Wa'dan dan al-Muwa'adah."

similar to *muwā'adah* then it should not be allowed in the *Syarī'ah*. Muhammad Ayub argues that some banks are using *wa'dān* in Islamic swaps, hedge funds, and short selling. However, the promises used in those products are reciprocal but not unilateral. This type of promise should not be allowed because no party has the option to cancel the promise. If either one of the parties wishes not to execute the contract (*'aqd*) which is promised, he/she is required to pay compensation.[39]

Furthermore, while analysing the practice of *wa'dān* in an Islamic derivative instrument i.e. FX Forward, Asyraf Wajdi Dusuki remarks that the practice of *wa'dān* looks similar to *muwā'adah*. Nevertheless, a number of *Syarī'ah* scholars have allowed *wa'dān* with the understanding that it is different from *muwā'adah*. Therefore, a number of financial institutions have been using *wa'dān* in their products despite some disparagements.[40]

Wa'dān is a prohibited legal trick (*ḥīlah*)

Yusuf Talal DeLorenzo opines that *wa'dān* is permissible in the *Syarī'ah*. However, in relation to its practice in total return swap, he remarks that *wa'dān* should be prohibited based on the concept of *sadd al-dharā'i'* which denotes that if a legitimate means is employed to achieve an illegitimate end then it is unlawful.[41] Similarly, after analysing the characteristics of total return swap, Chady C. Atallah and Wafica A. Ghoul concluded that the usage of *wa'dān* is a prohibited legal trick (*ḥīlah muḥarramah*) to

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[39] Muhammad Ayub, "Use of W'ad and Tawarruq for Swaps in the Framework of Islamic Finance," (paper presented in *Eighth International Conference on Islamic Economics and Finance*, Doha, Qatar, 19-21 December 2011).

[40] Asyraf Wajdi Dusuki, "Principle and Application of Risk Management and Hedging Instruments in Islamic Finance", retrieved on 9 Jun 2013, http://www.asyrafwajdi.com/v25/index.php/article?start=20.

[41] Yusuf Talal DeLorenzo, "The Total Returns Swap and the "Shariah Conversion Technology" Stratagem, retrieved on 17 Jun 2013, http://uaelaws.files.wordpress.com/2012/06/delorenzo-copy.pdf.

circumvent the prohibition of gambling in Islamic finance and legalising the prohibited forward sale contract.[42]

Discussion of the Opinions

Having mentioned the opinions of the scholars, we can sum up that some scholars believe that *wa'dān* is different from *muwā'adah* because *wa'dān* includes two separate promises connected to two different conditions. However, another group of scholars disallows *wa'dān* arguing that it does not differ from *muwā'adah*. Finally, some scholars remark that even though *wa'dān* is initially permissible in the *Syarī'ah*, it should be prohibited in some Islamic financial products i.e. total return swap based on *sadd al-dharā'i'*.

Reflecting on the above opinions, we observe that all scholars agree that *wa'dān* including two different promises that are connected to two different real conditions is allowed. This means that if the two promises are really separated, then it is permitted by all scholars. However, the debate is whether *wa'dān* comprising two promises are really separated from each other. When the promises under the *wa'dān* do not have any genuine separation between each other, then some scholars consider it questionable. They argue that *wa'dān* in such a case has become analogous to *muwā'adah*. In order to resolve this issue, we reiterate our argument that being similar with *muwā'adah* does not affect the permissibility of *wa'dān*. This is because *muwā'adah* is simply a mutual promise that does not have any effect on the subject matter of the contract.

Furthermore, reflecting on the opinions of the scholars who prohibit *wa'dān*, we notice that their prohibition of *wa'dān* is based on their case studies on specific Islamic financial products e.g. total return swap. However, it is unfair to generally prohibit the *wa'dān* concept due to its ill-use in certain Islamic financial products. Rather, it is more appropriate to set some parameters to prevent the misuse of *wa'dān*. At this juncture, it should be agreed that whenever the usage of *wa'dān* leads to a non-legitimate

[42] Chady C. Atallah and Wafica A. Ghoul, "The Wa'd-Based Total Return Swap: Sharia Compliant or Not?," *The Journal of Derivatives* 19, no. 2 (2011), 80.

end then it should be prohibited. Affirming this, an Islamic legal maxim reads, "Matters are determined by intention."[43] Therefore, we can conclude that *wa'dān* should be allowed in the *Syarī'ah* with the condition that it is not used as a means to reach to a non-permissible goal.

CONCLUSION

We conclude that *muwā'adah* is a mutual promise made by two individuals to perform something good to each other in the future. While the classical and contemporary scholars hold different opinions on the permissibility of practicing binding *muwā'adah* for a sale contract, this article resolves that it should be permitted. This is because there are some significant differences between a binding *muwā'adah* and a contract (*'aqd*) i.e. unlike the contract, there is no transfer of ownership of the subject matter in *muwā'adah*. However, another term called *wa'dān* is introduced by Islamic banking industry to avoid the debate of *muwā'adah* as well as gaining more confidence on its *Syarī'ah* permissibility. In *wa'dān*, two independent promises are made by two persons to perform something good to each other, which are related to two different situations. Scholars also fall into different groups on the permissibility of *wa'dān*. We resolve that while *muwā'adah* comprising mutual promise is allowed in the *Syarī'ah*, it is more likely that *wa'dān* which includes two independent promises should be permitted in the *Syarī'ah*. However, a number of conditions should be followed in practicing *muwā'adah* and *wa'dān* so that their practices do not lead to an illegal end.

We expect that *muwā'adah* and *wa'dān* would be crucial means to innovate many Islamic financial products. They will ease for the practitioners to come out from strictly adhering to the tenets of the contract (*'aqd*). This article is limited to discussing the concepts of *muwā'adah* and *wa'dān*. In order to achieve a profound understanding on their practices, further case studies can

[43] Zayn al-Dīn bin Ibrāhīm bin Nujaym, *al-Asybāh wa al-Naẓā'ir*, ed. Muḥammad Muṭī' al-Ḥāfiẓ (Dimasyq: Dār al-Fikr, 2005), 1:22; Muḥammad Ṣadqī bin Aḥmad al-Burnū and Abū al-Ḥārith al-Ghazzī, *Mawsū'ah al-Qawā'id al-Fiqhiyyah* (Bayrūt: Mu'assasah al-Risālah, 2003), 1:120.

be carried out on *muwā'adah*/*wa'dān*-based products especially on the derivative instruments e.g. Islamic profit rate swap, Islamic cross currency swap and *ijārah* rental swap etc.

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