THE STATUS OF *MUWĀʿADAH* AND *WAʿDĀN* IN THE SYARIʿAH

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ABSTRACT

This article discusses the Syariʿah rulings for muwāʿadah and waʿdān by reviewing the views of classical and contemporary scholars. It argues that muwāʿadah which is a mutual promise is different from a contract (ʿaqd) even though the promise is binding on both parties. Therefore, it is allowed in the Syariʿah to make a muwāʿadah for executing a sales contract (al-bayʿ) on a future date. While a binding muwāʿadah is allowed in the Syariʿah, it is more likely that waʿdān which involves two independent promises should be permissible. A group of scholars however, does not allow muwāʿadah but this same group tolerate waʿdān. Although binding muwāʿadah and waʿdān are permissible in the Syariʿah, their practices in some Islamic financial products involve certain conditions, and in some cases, their usage can be restricted based on sadd al-dharāʾiʿ (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 Syari‘ah rulings for muwā‘adah.

Keywords: Wa‘d, Muwā‘adah, Wa‘dān, ‘Aqd (Contract), Syari‘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‘ātaynī fī bay‘ātin) 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

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-Jawhari 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-Jawhari 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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one of the two to the other as it is a mutual action which will not happen except by two persons.”\textsuperscript{5} This means that \textit{muwāˈadah} 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 (\textit{waˈd}), and when two persons promise to perform something good to each other then it is \textit{muwāˈadah} (mutual promise). A similar definition of \textit{muwāˈadah} 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).”\textsuperscript{6} This definition affirms that \textit{muwāˈadah} involves mutual promise by two individuals, and when the promise is made by only one person then it is \textit{waˈd} (unilateral promise).

Contemporary scholars have defined \textit{muwāˈadah} 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.”\textsuperscript{7} Similar to the classical scholars, this definition asserts that \textit{muwāˈadah} 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 \textit{muwāˈadah}. However, this might be due to Nazīh Kamāl Ḥammād’s focus on the contemporary practice of \textit{muwāˈadah} in Islamic banking contracts. Therefore, we can conclude that \textit{muwāˈadah} 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 \textit{muwāˈadah} 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 1\textsuperscript{st} of May, 2015 for RM 100,000. At the same time, B promises to A that he will purchase a car on 1\textsuperscript{st} of May, 2015 for RM 100,000.

\textsuperscript{7} Nazīh Kamāl Ḥammād, “al-Wafāˈ bi al-Waˈd,” 730.
The Status of \textit{Muwā'adah} and \textit{Wa'dah} in the \textit{Syarī'ah}

Figure No. 1. Illustration of \textit{Muwā'adah}

\begin{center}
\begin{tikzpicture}
\node (A) at (0,0) {A};
\node (B) at (2,0) {B};
\draw[->] (A) to (B);
\draw[<-] (B) to (A);
\node at (1,-1) {A promises to B that he will sell a car on 1\textsuperscript{st} of May, 2015 for RM 100,000};
\node at (1,-2) {B promises to A that he will purchase a car on 1\textsuperscript{st} of May, 2015 for RM 100,000};
\end{tikzpicture}
\end{center}

Source: Author’s Own

\section*{THE STATUS OF \textit{MUWĀ’ADAH} IN THE \textit{SYARĪ’AH}}

The classical and contemporary scholars have provided different viewpoints on the \textit{Syarī’ah} status of \textit{muwā’adah}. The contemporary scholars’ debate on this issue is more extensive and complicated as their views are based on the practice of \textit{muwā’adah} in Islamic banking operations. In this section, we first discuss the classical scholars’ opinions on \textit{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 \textit{Syarī’ah} status of \textit{muwā’adah}.

\subsection*{Classical Scholars’ Views}

We have reviewed the classical sources of Islamic \textit{fiqh} in different schools (\textit{madhāhib}) to identify the opinions of classical scholars. One a few scholars have discussed the \textit{Syarī’ah} ruling for \textit{muwā’adah}. Most of the classical scholars have discussed \textit{muwā’adah} which is non-binding on the promisor. However, Qādī Khān, a Hānafī jurist talked about the \textit{Syarī’ah} status of \textit{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 \textit{muwā’adah} mostly relating to \textit{bay‘ al-ṣarf} (money exchange). Al-Wansyariṣī mentioned two different opinions of Imām Mālik on the status of \textit{muwā’adah}. He states that \textit{muwā’adah} to perform something in the future is not allowed in the \textit{Syarī’ah} if that action is unlawful at the present. Therefore, Imām Mālik prohibited the
use of \textit{muwā'adah} to execute a marriage contract during the \textit{`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 \textit{muwā'adah} for \textit{bay} ‘\textit{al-ṣarf}’ (currency exchange), Imām Mālik’s first view is that it is prohibited. However, he has another well-known opinion that \textit{muwā'adah} for \textit{bay} ‘\textit{al-ṣarf}’ is disliked (\textit{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 \textit{muwā'adah}, al-‘Adawī, another Māliki scholar, clarifies that there is no harm in \textit{muwā'adah} for \textit{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 \textit{muwā'adah}. The \textit{bay} ‘\textit{al-ṣarf}’ (exchange contract) takes place after that.\(^10\)

Similar to the Mālikī scholars, Imām Syāfi‘ī allows \textit{muwā'adah} for \textit{bay} ‘\textit{al-ṣarf}’. He mentions in his prominent book \textit{al-Umm} that if two individuals mutually promise to each other to execute \textit{bay} ‘\textit{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 \textit{muwā'adah} to purchase gold with gold, or gold with silver, or silver with silver, or other \textit{ribaw} items regardless of whether the parties enter into the exchange contract after that or not. This is because \textit{muwā'adah} is not a contract.\(^12\)

\(^8\) \textit{`Iddah} is a waiting period for a woman after the death of her spouse, or after a divorce. According to Islamic \textit{Syarī‘ah}, a woman cannot marry another man during this period.


Finally, Qāḍī Khān, a Ḥanafi scholar views that muwāʿadah to execute a contract in the future is allowed in the Šyarīʿah and muwāʿadah can be binding on the promisors in case of necessity. He states, sometimes it becomes necessary to be involved with muwāʿadah and can be binding on the parties due to the necessity of the people. Unlike the previous scholars, Qāḍī Khān clearly points out the status of binding muwāʿadah in the Šyarīʿah, 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 muwāʿadah is permitted to conclude a contract in the future and in bayʿ al-ṣarf (currency exchange contract). However, they do not mention whether this muwāʿadah is binding on the promisor. In this regard, we can look into their opinions on the obligation of waʿd (unilateral promise). Imām Syāfiʿī, Ibn Ḥazm, and the Mālikī scholars did not allow the waʿd to be generally binding. Similarly, muwāʿadah should also not be binding. The Mālikīs allowed waʿd to be binding if the waʿd is attached to a cause (sabab) and the promisee has entered into an action based on the promise. Hence, a similar ruling should be applied in muwāʿadah as well. However, contrary to the previous scholars, Qāḍī Khān clearly provides his statement that muwāʿadah can be binding in cases of necessity.

Contemporary Scholars’ Views

Contemporary scholars unanimously agree with the classical scholars that muwāʿadah to conclude a contract in the future is allowed in the Šyarīʿah if it is non-binding on both or either one of the promisors. However, the contemporary scholars have different opinions on the status of muwāʿadah, 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 muwāʿadah is binding on both the parties then it becomes a forward contract (bayʿ al-ajal bi al-ajal). Hence, it should not be


allowed to conclude a contract in the future. The second group of scholars view that a binding μωά’dāh to conclude a contract in the future should be allowed in case of necessity. Finally, the third view is that even though μωά’dāh is binding on the promisors, differences remain between a binding μωά’dāh and a forward contract. Therefore, it should be allowed in general. 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 μωά’dāh 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 μωά’dāh is not permissible to execute a contract in the future.

Nazīh Kamāl Ḥammād argues that none of the classical scholars mentioned that μωά’dāh is binding on either or both parties. If both of the promisors in μωά’dāh agree that the promised contract that will be executed in the future is binding upon them from the time of μωά’dāh, then the μωά’dāh 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.” This means that when a μωά’dāh becomes binding on the promisors, it then turns into a contract in substance even though it appears as μωά’dāh.

Agreeing with Nazīh Kamāl Ḥammād, Marjan Muhammad et al. further clarifies that the economic effect of a binding μωά’dāh 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

both concepts. The nature, obligation, subject matter, and price are the same in a binding *muwāʿadah* and in a contract.\(^{17}\)

Subscribing to the above opinion, Bank Negara Malaysia (BNM) prohibits binding *muwāʿadah* to execute *bayʿ al-ṣarf* in a future date. It argues that binding mutual promise (*muwāʿadah mulzimah*) is prohibited for a foreign exchange transaction (*bayʿ al-ṣarf*), because it comprises selling debt for debt, which is termed by the classical scholars as ‘*bayʿ al-kāli bi al-kāli*.\(^{18}\)

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

*Bilateral promises are permitted in murābāḥah 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 murābāḥah 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 *muwāʿadah* in cases where there is a public need. It has allowed *muwāʿadah* to be binding in export and import transactions due to necessity. The details of that resolution are discussed in the next section of the article.

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\(^{18}\) 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 (mabīt) 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.  

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.

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

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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 Aḥmād 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’ 17\(^{th}\) 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,”


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.\textsuperscript{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 (\textit{i}jāb) 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.\textsuperscript{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 \textit{wa‘d} in sukuk musyārakah, Khairun Najmi \textit{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 (\textit{i}jāb) 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.

\textsuperscript{24} Islamic Fiqh Academy, 17\textsuperscript{th} Session, retrieved on 5 Jun 2013, http://www.fiqhacademy.org.sa/qrarat/17-6.htm
\textsuperscript{25} Ibid.
transfer of the ownership. *Muwāʿadah* means to promise mutually that a contract will be executed in the future.²⁶

Secondly, a future statement (*šīghah*) is used in *muwāʿadah* 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 (*šīghah*), 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 (*mabiʿ*) is not changed by *muwāʿadah*. 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 *muwāʿadah* and forward contract, this group of scholars conclude that it is permissible to make a binding *muwāʿadah* 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 *muwāʿadah* is not allowed to execute a sale contract in the future. This is because a binding *muwāʿadah* in substance resembles a forward contract. The second group of scholars opine that a binding *muwāʿadah* can be allowed to execute a contract in the future in cases of necessity. Even though *muwāʿadah* 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 *muwāʿadah* 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 *muwāʿadah* and forward contract. However, they differ from the second group in

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that they generally allow a binding *muwāʿadah* 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 *muwāʿadah* 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 *muwāʿadah*. 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 *muwāʿadah* and no negotiating the purchase price. In case of a sale contract (*‘aqd al-bay‘*), immediately after the offer (*i*jāb*) 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 (*i*jāb*) and acceptance (*qabūl*), 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.  

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

Secondly, we outweigh the point that there is no offer (*i*jāb*) and acceptance (*qabūl*) in *muwāʿadah* 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 *muwāʿadah*.

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The Ḥanafī scholars resolve that a future expression cannot be considered as offer (ijāb) and acceptance (qabūl). Besides, the majority of the scholars view that a future expression can be considered for offer (ijāb) 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 (ijāb) 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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Table no. 1: The Difference between Binding Muwā‘adah and Forward Contract

<table>
<thead>
<tr>
<th>No.</th>
<th>Subject</th>
<th>Forward Sale Contract (‘aqd bay‘ al-ajal bi al-ajal)</th>
<th>Binding Muwā‘adah (Muwā‘adah mulzimah)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Expression (Ṣīghah)</td>
<td>Past or Present Expression</td>
<td>Future Expression</td>
</tr>
<tr>
<td>2</td>
<td>Ownership of the Subject Matter (Milkiyyat al-Mabī‘)</td>
<td>Ownership Transferred</td>
<td>Ownership Not Transferred</td>
</tr>
<tr>
<td>3</td>
<td>Price (Thaman)</td>
<td>Price is Due on the purchaser</td>
<td>Price is Not Due on the Purchaser</td>
</tr>
<tr>
<td>4</td>
<td>Bindingness/Obligation (Ilzāmiyyah)</td>
<td>The Purchaser is Required to make the Full Purchase Price without any excuse</td>
<td>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</td>
</tr>
</tbody>
</table>

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
The Status of *Muwā’dah* and *Wa’dah* in the *Syarī’ah*

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 (*muqtadaď*) of that contract, or the noble objectives of the *Syarī’ah* (*maqāşid 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.

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THE CONCEPT OF *WA’DAN*

The term *wa’dān* is an innovation by the Islamic banking industry. 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.”

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.

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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The Status of *Muwā’adah* and *Wa’dah* in the *Syarī’ah*

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

<table>
<thead>
<tr>
<th><strong>Wa’d 1</strong>: A promises to B that he will sell a Honda Civic car on 1st of May, 2015 for RM 100,000, <em>if the market price goes higher.</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
</tr>
</tbody>
</table>

| **Wa’d 1**: 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.* |

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*).\(^{36}\)

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\(^{36}\)
However, what is important to discuss in this section is that there is a group of scholars who do not allow binding *muwāʿadah* but allow binding *waʿdān*. They argue that *waʿdān* is genuinely different from *muwāʿadah*. On the contrary, some scholars do not allow *waʿdān* at all claiming that *waʿdān* does not make any real difference from *muwāʿadah*. Finally, a few scholars conclude that even though *waʿdān* is generally permissible in the *Syariʿah*, its practice in some Islamic financial products should be prohibited based on the principle of *sadd al-dharāʾiʿ*. In the subsequent paragraphs, we discuss the views and arguments of these different groups of scholars.

**Waʿdān is different from Muwāʿadah**

While disallowing *muwāʿadah*, Marjan Muhammad et al. upholds the permissibility of *waʿdān* in the *Syariʿah*. They argue that *waʿdān* is a permissible legal trick (ḥilah syarʿiyyah) to avoid the non-permissible *muwāʿadah*. *Waʿdān* is different from *muwāʿadah* 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 *waʿdān* is permissible in the *Syariʿah*.37

Similarly, Aznan Hasan clarifies his position that when *waʿdān* 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 *Syariʿah*. In other words, if the two different conditions in *waʿdān* are fictitious, then it is not allowed.38

**Waʿdān is similar to Muwāʿadah**

Referring to the practice of *waʿdān* in some Islamic banking products, a number of scholars conclude that *waʿdān* does not make any difference from *muwāʿadah*. As the practice of *waʿdān* is

similar to *muwā‘adah* then it should not be allowed in the *Syari‘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 *Syari‘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 *Syari‘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


circumvent the prohibition of gambling in Islamic finance and legalising the prohibited forward sale contract.\textsuperscript{42}

**Discussion of the Opinions**

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

Reflecting on the above opinions, we observe that all scholars agree that \textit{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 \textit{wa dān} comprising two promises are really separated from each other. When the promises under the \textit{wa dān} do not have any genuine separation between each other, then some scholars consider it questionable. They argue that \textit{wa dān} in such a case has become analogous to \textit{muwā’adah}. In order to resolve this issue, we reiterate our argument that being similar with \textit{muwā’adah} does not affect the permissibility of \textit{wa dān}. This is because \textit{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 \textit{wa dān}, we notice that their prohibition of \textit{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 \textit{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 \textit{wa dān}. At this juncture, it should be agreed that whenever the usage of \textit{wa dān} leads to a non-legitimate

\textsuperscript{42} Chady C. Atallah and Wafica A. Ghoul, “The Wa’d-Based Total Return Swap: Sharia Compliant or Not?,” \textit{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.” 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

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be carried out on *muwāʿ adah/waʿ 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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