

PROMISE (WA'AD) AND CONTRACT ('AQAD) ACCORDING TO ISLAMIC LAW: A COMPARATIVE STUDY

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Abstract

It is reckoned that the key to competitiveness in any industry is research and innovation. Islamic finance industry – which is recognized as one of the fastest moving sector with an estimated annual average of 15% to 20% – has resorted to various approaches to cater for this pursuit. *Wa'ad* which means a promise has turned out to be a vital tool, and it is gaining prominence as the industry players use it in conjunction with other Shariah-compliant products to achieve a desirable economic result. However, the application of *wa'ad* together with an *'aqad* creates a polemic in the industry as the Muslim scholars are of different views with regards to the binding effect of *wa'ad*. The majority of the classical views ruled that *wa'ad* is not binding. However, the contemporary views inclined towards making *wa'ad* as *'aqad* in terms of its bindingness. Thus, this article seeks to analyze this polemic by addressing the issue through a comparative study between a *wa'ad* and an *'aqad*.

Keywords: Islamic finance, promise, contract, Shariah-compliance, financial tools.



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Introduction

Ibn Khaldun- the father of sociology - in his famous masterpiece *al-Muqaddimah* expounds that man is sociable by nature. As a social being who lives in community rather than in isolation, his existence within a group of people is basically based on mutual interests and the exchange of services.¹ Both elements are the derivatives of the spirit of trust and confidence, and honouring one's word and adhering to mutually agreed upon commitment are the pathway to be trusted by others.

The significance of keeping promises and fulfilling mutual obligations should not be underestimated for scores of verses of the *Quran* and Prophetic traditions lay great emphasis on these virtues. In 16:91, Allah says to the effect: "...and fulfill the covenant of Allah when you have made a covenant." A comparable emphasis can be observed in 17:34, translated thus: "...and fulfill the promise; surely (every) promise shall be questioned about." In another verse, the stress is more evident as the most hateful in the sight of Allah is those whose rhetoric appears to vary from his actual deed. Allah says in 61:2-3, to this effect: "O you who believe! Why do you say that which you do not do? It is most hateful to Allah that you should say that which you do not do."

Perhaps the most quoted *Hadith* on keeping promise is the one which is narrated by Abu Hurairah, in which the Prophet (p.b.u.h.) said: "The signs of a hypocrite are three: Whenever he speaks, he tells a lie;

¹ Abdel Wahab Tazi Saoud, *Islamic Moral*, trans. Mohammad Abu Talib (Rabat: The Islamic Educational Scientific and Cultural Organization, 1988), 53.

*and whenever he promises, he breaks his promise; and whenever he is entrusted, he betrays (proves to be dishonest)."*²

The above verses and *Hadith* epitomize the concern of Islam in regards to moral imperative among Muslims. Islam them to respect their commitments and when bound with someone by an agreement, they must observe it with rigour. Given the significance of both virtues – on top of other moral righteousness promulgated by Islam – in human life, each and every Muslim should think very seriously before making any promise or entering into any contract because failure to fulfil any prior commitment made – whether it is a promise or a contractual agreement – will not only be considered as sinful according to Islam but also put at risk the interactions among individuals of the community he lives in.

With the modernity and progress achieved by the mankind in various aspects of life, the concept of promise and contract which previously nestled within the scope of morality and sociocultural life become a more complex notions. This complexity increases in its intensity when both concepts are together applied to the conduct of business especially in the Islamic finance industry. From a mere moral and social obligation which implies the commitment made by one person to another to undertake a certain actual or verbal disposal beneficial to the second party,³ the concept of promise has now encroached on the legislative domain. Consequently, they create polemics and discussions among Shariah scholars, practitioners of Islamic banking industry as well as other stakeholders.

Zaher Barakat and Allen Youssef Merhej⁴ for example argue that promise (or *wa'ad*) and its variations have great flexibility and greater potential for developing new products which are yet to be uncovered. Others such as Siti Salwani Razali (2008), Ahmad Suhaimi Yahya (2008), Rafic Yunus Al-Masri (2002), Noor Adila and Mohd Ashraf (2010), Nudianawati Irwani Abdullah (2008), Azizi Che Seman (2008), Ahmad Muhammad Khalil Al-Islambuli (2003), and Muhammad Akram Laldin (undated) discussed about the

² Imam Al-Bukhari, *Sahih Al-Bukhari*, Vol. 8, Book 73, No. 117, Center for Muslim-Jewish Engagement, University of Southern California, accessed April 11, 2014, <http://www.usc.edu/org/cmje/religious-texts/hadith/bukhari/073-sbt.php>.

³ Ala'eddin Kharofa, *The Loan Contract in Islamic Shari'ah and Man-Made Law: A Comparative Study*, trans. Abd Al-Wahid Lu'Lu'a (Kuala Lumpur: Leeds Publications, 2002), 29.

⁴ Zaher Barakat and Allen Youssef Merhej, "Waad," *Islamic Finance in Practice*, Issue Three, 2009, accessed April 10, 2014, <http://www.ism.edu/images/stories/publications/IFP-Q1-2009-The-Structure-and-use-of-Waad.pdf>.

concept of promise (*wa'ad*) and its application in the banking industry. In addition, most of their deliberations focusing on the questions of the binding effect of *wa'ad* and whether it is legally enforceable so that the party in interest has the right to seek legal enforcement of the promise in the court of law.

In order to deliberate the above issues, first we need to understand the concept of *wa'ad* and *'aqad* and their *hukm* (injunction) from an Islamic perspective. Perhaps by having a general conception of both at the initial stage of the discussion, it will ease the process of connecting the issues with the present development that takes place in the Islamic finance industry.

Definition of *Wa'ad* in Islamic Law

There are several terms in Arabic that connote the idea of promise. However, the most commonly used and relevant to this discussion is *wa'ad*.⁵ In fact, Allah extensively uses the word *wa'ad* in explaining the concept of promise in the *Quran*. For instance, the word *wa'ad* and the derivatives of *wa'-a-da* such as *mau'id*, *mi'ad*, *mau'ud* and *wa'id* are repeated 147 times in the *Quran*.⁶ *Wa'ada* as a verb means to predict, promise or threaten. While *wa'ad* or *'idah*⁷ as the infinitive or noun of *wa'ada* carries the meaning of a promise, threat, prediction, and provision (from God). On the other hand, *mau'id* or *mi'ad* mean a

⁵ Another term which occurs frequently in the *Quran* to refer to the concept of promise is *'ahd*. *Ahd* has many meanings such as injunction, command, thence (i.e agreement, covenant, treaty), obligation, and engagement. *Ahd*, the term for obligation or covenant occurs 29 times in the *Quran*. It is the infinitive (*masdar*) of *'ahida* which means "to entrust, empower, obligate," a verb that appears 11 times in the *Quran* in its third verbal form *'ahada*, "to make a covenant, to pledge oneself to," a meaning which stresses the bilateral aspect of covenant. See: *The Encyclopaedia of the Qur'an* Vol. 1, s.v. "*'ahd*." In the *Quran*, the term *'ahd* is used over the whole range of its meanings, of Allah's covenant with men and His commands, of religious engagement into which the believers have entered, of political agreements and undertaking of believers and unbelievers towards the Prophet and amongst each other, and of ordinary civil agreements and contracts. Later usage of the word *'ahd* is generally restricted to political enactments and treaties, in particular to the appointment of a successor, a *wali al-'ahd* by a ruler and to treaties of alliance with non-Muslims outside the Islamic state, who are therefore called *ahl al-'ahd*. See: *The Encyclopaedia of Islam* Vol. 1, s.v. "*'ahd*."

⁶ Muhammad Hassan al-Hamsi, *Quran Karim: Tafsir wa Bayan ma'aa Asbab al-Nuzul li al-Sayuti ma'aa Faharis Kamilah li al-Mawadi' wa al-Alfaz* (Damsyik: Dar al-Rashid).

⁷ The plural of *'idah* is *'idaat*, and there is no plural for *wa'ad*. As such the word *wa'ad* can be applied for both plural and singular. See: Ibn Manzur, *Lisan al-Arab* Vol. 3 (Beirut: Dar Sadr, 1991), 462.

promise, time or place of fulfilment of a prediction, promise or threat; an appointment for a meeting; while *mau'ud* connotes the predicted, promised, prescribed or stipulated; and *wa'id* implies a threat or threatening.⁸

The meaning of *wa'ad* as stated above, i.e. a promise, threat, prediction, and provision (from God) can be observed in numerous verses of the *Quran*. In 10:4, Allah says to the effect that: *"To Him is your return, of all (of you); the promise of Allah (made) in truth; surely He begins the creation in the first instance, then He reproduces it, that He may with justice recompense those who believe and do good; and (as for) those who disbelieve, they shall have a drink of hot water and painful punishment because they disbelieved."* Further, in 10:55, Allah says, thus: *"Now surely Allah's is what is in the heavens and the earth; now surely Allah's promise is true, but most of them do not know."*

In another verse of the *Quran*, i.e. 13:31, Allah says to the effect: *"And even if there were a Quran with which the mountains were made to pass away, or the earth were travelled over with it, or the dead were made to speak thereby; nay! The commandment is wholly Allah's, Have not yet those who believe known that if Allah please He would certainly guide all the people? And (as for) those who disbelieve, there will not cease to afflict them because of what they do a repelling calamity, or it will alight close by their abodes, until the promise of Allah comes about; surely Allah will not fail in (His) promise."* While in 40:55 of the *Quran*, Allah says, translated thus: *"Therefore be patient; surely the promise of Allah is true; and ask protection for your fault and sing the praise of your Lord in the evening and the morning."*

Among the attributes that relates to the promise of Allah in the above verses are the elements of reward and punishment attached to the promise. For all Allah's promises are true, those abide by His commands will be rewarded while for the non-believers and those who engaged in bad deeds will be punished accordingly.⁹

⁸ *A Dictionary and Glossary of the Koran with Copious Grammatical References and Explanations of the Text*, 160.

⁹ However, in the banking industry, the element of "reward-punishment motivation" or "carrot and stick approach" does not exist. What is only in the practice is a one-sided outcome whereby the party with vested interest, i.e. the Islamic bank will take advantage of *wa'ad* (which is unilateral in nature) to exercise to the fully its position to ensure legal enforceability of the promise on the client.

Technical Meaning of Wa'ad

Technically the word *wa'ad* means to make oneself under obligation on what is not obligatory in the first place.¹⁰ The consequence of this obligation is referred to as *mau'idah*. Allah says in 9:114 to the effect: "*And the prayer of Abraham for the forgiveness of his father was only because of a promise he had promised him.*"

Ibn 'Arafah, a Maliki jurist, defines *wa'ad* as a notification made by a person to carry out a good deed in the future.¹¹ A Hanafi jurist, al-'Aini also gives a similar description to *wa'ad* as he defines it as a notification (made by someone) to perform a good act in the future.¹² Another scholar, Abd. Al-Razzak al-Sanhuri illustrates *wa'ad* as an action which a person make it obligatory upon him to do so for others, whilst the performance of such act shall be in the future and not on immediate basis.¹³

The Hukms of Wa'ad in Islam

There are three *hukms* (legal injunctions) of *wa'ad* from the Islamic point of view:

1. *Haram* (prohibition):

Those who promises (himself or others) to do something against Shariah is prohibited from fulfilling his word. As a matter of fact it is obligatory for him to avoid such action. For example, those who promises to commit crime or adultery, he need not fulfill it at all.¹⁴

2. *Wajib* (Obligatory):

Those who promises to do something which is religiously obligatory such as carrying out the duties as a Muslim, he therefore must keep the promise that he has made.

¹⁰ Abdullah Ibn Sulaiman, *Buhuth fi al-Iqtisod Al-Islami* (Beirut: al-Maktab al-Islami, 1997), 105.

¹¹ Ahmad Muhammad Khalil Al-Islambuli, "Hukm al-Wa'ad fi al-Fiqh al-Islami wa al-Taqqiqat al-Mu'asirah," *Majallah Jamiah al-Malik Abd. Aziz: al-Iqtisod al-Islami* 16(2) (2003): 43-57.

¹² Al-Islambuli, "Hukm al-Wa'ad," 43-57.

¹³ Al-Islambuli, "Hukm al-Wa'ad," 43-57.

¹⁴ Al-Islambuli, "Hukm al-Wa'ad," 43-57.

3. *Mubah* (permissible):

Those who promises to do something permissible (*mubah*) or recommended (*mandub*), he must make an effort to fulfil them. The basis for this *hukm* is that the fulfilment of any promise takes place in the future and a man does not know what will happen next in the life for Allah s.w.t says in 31:34 to the effect that: “*Verily the knowledge of the Hour is with Allah (alone). It is He Who sends down rain, and He Who knows what is in the wombs. Nor does any one know what it is that he will earn on the morrow: Nor does any one know in what land he is to die. Verily with Allah is full knowledge and He is acquainted (with all things).*”

In sum, the original *hukm* of promise falls under the category of *mubah* (permissible). This is based on the general message of the *Quran* and the Prophetic traditions pertaining to keeping promises. On this basis, each Muslim individual can make good promises to whomsoever he wishes. However, he must keep his promise because it is a determinant of trust in his sociocultural relationship with the members of community.

In a simple explanation the *hukm* of promise in Islam is *mubah* (permissible) and the promisor must fulfill his promise for religious reasons only. Besides, breaching such promise may give rise to social displeasure or ethical demerit but not enforcement at law.¹⁵

The Attachment of *Wa’ad* in Transactions

What is meant by transactions here are those fall under the category of “*tabarru’at*” or charity like *al-qard* (loan), *al-i’arah* (lending), *al-hibah* (gift), and the likes. On the other hand, in all transactions which is under the category of *al-mu’awadat* (exchange) such as sales, leasing or marriage, promise has no binding effect and therefore, fulfilling it is not obligatory.¹⁶

Imam al-Hatab in *Tahrir al-Kalam* explains: “Literally what is referred to as obligatory is when an individual obligate himself to perform something which is not obligatory on him previously.” This definition covers *al-bay’* (sales), *al-ijarah* (leasing),

¹⁵ Frank E. Vogel and Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (The Hague: Kluwer Law International, 1998), 125.

¹⁶ Khalil, “*Hukm al-Wa’ad fi al-Fiqh al-Islami wa al-Ta’biqatih al-Mu’asirah.*”

al-nikah (marriage), and all types of other *'uquds*. On the other hand, in the *'urf* (customs) of Muslim jurists when a person pledges or promises to perform a good deed or *ma'ruf* (whether it is an unconditional or conditional good deed), it is referred to as *al-'athiyah* (gift).

Al-Aini who was a Hanafi jurist and Ibn 'Arafah who was a Maliki jurist make their point when they imply that *wa'ad* is a notification (made by someone) to carry out a good deed in the future. The Malikis, when they talk about *al-ma'ruf*, actually refer to *al-'uqud al-tabarru'at*. As such, the contract of sales, leasing, marriage are excluded from the category of *tabarru'at*, and the attachment of promise to these contracts are not binding.

In section 171, *al-Mejelle* states: A sale (*bey'*) is not concluded by words in the future tense such as 'I will take' or 'I will sell,' which mean merely a promise. For this reason, when the jurists discuss the *hukm* of keeping promises whether the *hukm* is obligatory, recommended or prohibited or permissible, the scope of their discussion is actually pertinent to the *hukms* of promises of *al-tabarru'at* (contracts of charity). According to them, promises attached to contracts of exchange (*al-mua'wadat al-maliyyah*) are not binding for these transactions are only enforceable via the method of *'aqad*, i.e. not *wa'ad*.¹⁷

The Degree of *Hukm al-Wujub* (Obligatory) in Keeping *Wa'ad*

As mentioned earlier, promise is a form of commitment made by oneself to do good deeds towards others. It must be fulfilled for religious reason and it is one of the hallmarks of good character of an individual. According to Imam Al-Nawawi, the jurists have made an *ijma'* (consensus of jurists' opinions) that whenever a person promises something permissible to someone, he must fulfil it. However, they are not in consensus in respect of the degree of obligatory in fulfilling the promise.

The majority who consists of the Shafi'is, the Hanafis and the Hanbalis have ruled it as recommended acts. Those who breach his promise is said to commit something which is *makruh* or discouraged but he is not considered sinful. Nevertheless, the rule is only valid for those who make promise with a solid intention to keep his word but he has failed to do so due to some unforeseen circumstances. In one of his sayings, the Prophet

¹⁷ Khalil, "Hukm al-Wa'ad fi al-Fiqh al-Islami wa al-Ta'biqat al-Mu'asirah."

(p.b.u.h.) said: “When a man promises with his brother and has got the intention to fulfil it but afterwards it is broken, he will not commit sin thereby.”¹⁸ This may be the reason why Ibn Mas‘ud did not make any promise without uttering the phrase “*Insha-Allah*.”

Conversely, if the promisor in the beginning had an intention not to perform his promise, he therefore clearly has committed a *haram* act. More importantly however, the keeping of the promise is a special sign of faithful Muslim, and failure to fulfil promises leads to an individual possessing some of the elements of hypocrisy (*nifaa*). According to a Prophetic tradition, he remains as a hypocrite (*munafiq*) until he leaves it (breaking promise).

The second opinion has the inclination to deem it as an absolute obligatory (*wajib mutlaq*). Among the jurists who hold to this position is Ibn Syabramah and his opinion has been asserted by Ibn Hazm in *al-Muhalla* as he states: “All promises are binding and the promisor can be forced to honour his promise.”

Ibn Hazm is not only the one who opines that *wa‘ad* carries is *wajib mutlaq*. As a matter of fact, al-Imam Nawawi (in *al-Azkar*) and Ibn ‘Arabi are in the same pronouncement, and they attribute their views to the opinion of ‘Umar ibn al-Khattab who has ruled that promise must be fulfilled. Al-Bukhari also mentioned the same in his *Sahih* except he relates it with the saying of al-Hasan al-Basri who said that al-Qadhi Said ibn al-Aswa’ al-Hamdani had come out with the ruling that fulfilment of the promise is obligatory. Further, al-Bukhari also supported his statement with an opinion by Ishak ibn Rahawaih who also backed his argument with the same hadith reported by Ibn al-Aswa’.¹⁹

However the third group namely the Malikis have ruled it as obligatory if the promise is tied together to certain conditions as in marriage. For example, if a man says to someone, “Get married and I will pay your *mahar* (dowry)” or “I swear if you don’t say bad things about me, I will give you something;” then it is obligatory on him to fulfil the promise because promises when they take a conditional form are binding and the promisor can be enforced by law to fulfil his promise. Another comparable scenario to the above is as stated in *al-Mejelle* when someone says: “You sell this property to such a person, if he does not give the money, I will give it,” and the person who buys the property does not give the money, the payment of the money by the person who made the promise

¹⁸ See Al-Ghazali, *Ihya’ Ulum al-Din* Vol. 3, trans. Fazl ul Karim, accessed April 11, 2014, <http://www.ghazali.org/ihya/english/ihya-vol3.htm>.

¹⁹ Khalil, “Hukm al-Wa‘ad fi al-Fiqh al-Islami wa al-Ta’biqat al-Mu‘asirah.”

become necessary.”²⁰ However, if it is an unconditional promise (*wa’ad mutlaq*), then it is not compulsory to be fulfilled.

The Preferred Opinion (*al-Ra’y al-Rajih*) on *Wa’ad*

The majority’s stand on the issue of *wa’ad* is the preferred opinion. In fact, this view seems more reasonable based on the following arguments:

1. The majority in their ruling takes into consideration a good faith of promisor that he in the first place does want to fulfill his promise and not the other way round, i.e. no intention to keep his words.
2. Promise has a future attribute and it may subject to certain circumstances in the future which can deter the promisor from fulfilling his promise. In fact, although the jurists agreed in consensus that *‘aqad* is religiously and legally binding, when there exists certain excuses (*al-a’zaar*), it can be delayed. For example, in a contract of loan, Allah suggests leniency to the creditor in collecting debt by the means of deferring the payment on the loan taken by the debtor. Allah says this to the effect in 2:280 in the *Quran*: “*If the debtor is in a difficulty, grant him time till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if you only knew.*”

In addition to the above, a promise necessitates an exception to the general rules as it is constrained by future element, and man does not have knowledge of what will happen next in his life. Allah says in 18:23-24 translated thus: “*And do not say of anything: Surely I will do it tomorrow, unless Allah pleases; and remember your Lord when you forget and say: Maybe my Lord will guide me to a nearer course to the right than this.*”

3. Sometimes there are valid excuses hampering the promisor from fulfilling their promises. By making the *hukm* of promise an absolute obligatory – religiously and legally – there is no room for error for an individual as he must fulfil it. This *hukm* will definitely deter the Muslim from making any good promise to others and those in need will get less benefit from the legality of promise in Islam.

²⁰ *Al-Mejelle*, under Preface- Part II, item 84 “conditional promises.”

4. The main reason behind the Malikis' ruling is to protect the interest of the promisee (*al-mau'ud lah*) from suffering of any difficulty or incurring any financial cost that might arise from the promise made to him. The original *hukm* of promise is not binding. Yet, when it is attached together with the cause (*al-sabab*) or condition (*al-syarat*), the *hukm* changes to binding and obligatory. Perhaps, what they mean by saying that a mere promise (which is not tied to any cause or condition) is not binding, they actually are in consonant with the direction adopted by the majority.
5. Fulfilment of promise is recommended by the Shariah and when the jurists deliberate the *hukm* of promise, they are referring to the promise in charitable matters (*tabarru'at*) not in contracts of exchange (*mu'awadat*). In actual fact, promises have no binding effect on the contracts of exchange. As such, fulfilment of promise in *mu'awadat* is not obligatory as these transactions are only concluded and become binding by means of '*aqad* not *wa'ad*.

After much deliberation on *wa'ad*, below are the discussion concerning the '*aqad*. Here the focus will be mainly on the literal and technical meaning of '*aqad* and the synthesis derived from both definitions particularly with regards to conditions required in order to make '*aqad* goes into effect.

Definition of '*Aqad* in Islamic Law

'*Aqad* is the Arabic word for contract that means "tying" or "tightening" like "tying a rope" or "tightening it".²¹ It is the root verb of '*aqada* which means to join, to tie or to bind. The Arab used the root verb to derive a noun meaning "firm believe" or "resolution". They say "he tied a contract" or "tied an oath".

This in tandem with the explanation by Tahir Mansuri that the term '*aqad* has an underlying idea of conjunction as it joins the intentions and declarations of two parties.²² The usage of the word '*aqad* based on the aforementioned meaning can be observed in a numerous occasions in the *Quran*. For example, in 2:235 the word '*uqdah* is used to refer to the bond of marriage: "*There is no blame on you if you make an offer of betrothal or hold*

²¹ Ala'eddin Kharofa, *The Loan Contract*, 3.

²² M. Tahir Mansuri, *Islamic Law of Contract and Business Transactions* (New Delhi: Adam Publishers and Distributors, 2007), 19.

it in your hearts. Allah knows that you cherish them in your hearts: But do not make a secret contract with them except in terms Honourable, nor resolve on the tie of marriage till the term prescribed is fulfilled. And know that Allah Knoweth what is in your hearts, and take heed of Him; and know that Allah is forgiving, Forbearing."

In 5:1, the *'uqud* (the plural of *'aqad*) refers to obligation or covenants. Allah says to the effect: "*O you who believe! Fulfil all obligations.*" The same meaning is observed in 5:89 when Allah says: "*Allah does not call you to account for what is vain in your oaths, but He calls you to account for the making of deliberate oaths; so its expiation is the feeding of ten poor men out of the middling (food) you feed your families with, or their clothing, or the freeing of a neck; but whosoever cannot find (means) then fasting for three days; this is the expiation of your oaths when you swear; and guard your oaths. Thus does Allah make clear to you His communications, that you may be grateful.*"

Technical Meaning of 'Aqad in Islam

In Islamic legal literature, *'aqad* is used in two senses namely general and specific. In the general sense, *'aqad* is applied to every act which is undertaken in earnestness and with firm determination regardless of whether it emerges from a unilateral declaration or mutual agreement. In view of this we notice that the concept *'aqad* covers unilateral intention such as *waqf*, remission of debt, divorce, undertaking an oath as well as agreement of two declarations as in sale, hire, agency and mortgage.²³

In the specific sense, it is a combination of an offer and acceptance which gives rise to certain legal consequences.²⁴ Once an offer (*ijab*) is accepted, *'aqad* or contract is final and it binds both contracting parties as sanctioned in 5:1 where Allah says to the effect: "*O You who believe! Fulfil all obligations.*"

It is pertinent to note that modern Muslim scholars is inclined to apply *'aqad* only to bilateral contracts as it is in the case of Western Laws.²⁵ Therefore, it is appropriate here to analyze a few definitions of *'aqad* in the modern sense of bilateral obligations so that we can make a better analysis between *wa'ad* and *'aqad* in the next discussion. For

²³ Mansuri, *Islamic Law of Contract*, 20.

²⁴ Mansuri, *Islamic Law of Contract*, 20.

²⁵ Mansuri, *Islamic Law of Contract*, 20.

this, M. Tahir Mansuri has listed down several definitions of *'aqad* explained by a few prominent Muslim jurists. Among them are as follow:

1. Definition by Murshid al-Hayran: "Conjunction of an offer emanating from one of the contracting parties with the acceptance of the other in a manner that it affects the subject matter of the contract."
2. Definition by al-'Inayah: "Legal relationship created by the conjunction of two declarations from which flow legal consequences with regards to subject matter."
3. Definition by Shaykh Abu Zahrah: "*'Aqad* is a conjunction between two declarations or that which substitutes them" (i.e. conduct creating a legal effect).

Based on the definition given by the Muslim jurist, M. Tahir Mansuri has come out with his own definition as he defines *'aqad* as an obligation arising out of mutual agreement. It is a legal relationship created by the conjunction of two declarations from which flow legal consequences with regard to subject matter.

The synthesis of the above is that, in order for a contract to go into effect, it must constitute the following:²⁶

1. Agreement based on offer and acceptance:

Both manifest the willingness of the contracting parties to enter into a contract and it can be in the form of speech, an action or any indication.

2. Contracting parties:

In any contract there must be an offeror and offeree. Otherwise it becomes a unilateral declaration which can't be called a contract (though it has legal consequences) on the basis of the modern jurists' definition. It is important to note that in order to conclude a valid *'aqad*, the contracting parties must possess legal capacity or *al-ahliyyah*. There are two types of *ahliyyah* namely *ahliyyah al-ada'* (capacity for execution) and *ahliyyah al-wujub* (capacity for acquisition of rights). In transactions, *ahliyyah al-ada'* is necessary. It is the capacity for the issuance of words and the performance of deeds the legal effects of which are the

²⁶ Mansuri, *Islamic Law of Contract*, 22-23.

exercise of rights and the fulfilment of obligations for contracts and other transactions. The basis of the *ahliyyah al-ada'* is '*aql* (intellect) or *rushd* (discretion), and attaining *al-bulugh* (attainment of age of puberty).

3. Completion of offer and acceptance in a legal manner:

Both offeror and offeree must agree with each other in a manner prescribed by the Shariah. For example, the offer and acceptance must be held in a *majlis*, both must conform to each other and the existence of the offer till the acceptance is linked with it.

4. Subject matter:

Formation of contract produces legal effect in the subject matter. The effect may result the legal status of the subject matter either stands modified or shifts from one state to another. In the contract of sale for examples, ownership of a subject matter is transferred from the seller to the buyer, while in mortgage the possession of the property is passed from the mortgagor to the mortgagee.

Comparisons between *Wa'ad* and '*Aqad*

Based on the aforementioned discussion, it is clear that:

1. *Wa'ad* is just a notification made by a person to carry out a a good deed (*al-ma'ruf*) in the future. *Al-ma'ruf* here refers to *al-uqud al-tabarru'at* such *al-qard* (loan), *al-i'arah* (lending), or *al-hibah* (gift); not *al-'uqud al- mu'awadat*.
2. *Wa'ad* has a future attribute. Therefore the result of will only appear in the future i.e not immediately during the time of promise was made.

On the other hand, in '*aqad* we notice that:

1. It joins the intention of two parties.
2. The intention is to establish an obligation between them which emerges from a unilateral declaration or mutual agreement. As such it cover contracts of exchange.
3. Formation of '*aqad* produces legal effect in the subject matter.

In further elaboration of the above comparisons, it is imperative to make it clear that *wa'ad* is just a notification or a mere declaration of a promisor about his future intention whereas the '*aqad*' is a relationship created by the conjunction of two intentions. Unlike the '*aqad*' which normally establishes an obligation between two parties especially with regards to *al-'uqud al-mu'awadat*, the scope of *wa'ad* seems more suitable to be confined to cover only *al-'uqud al-tabarru'at* or *al-ma'ruf* for it does not carry any binding effect. Therefore, if it were to be attached to *al-uqud al-mu'awadat*, it could not impose any legal rights or obligation on contracting parties.

The result of *wa'ad* could materialize in the future. However in an '*aqad*', according to the opinion of the majority of Muslim jurists – whenever its pillars (*arkan*) and conditions (*syurut*) are fulfilled, it creates an immediate effect. This is rationalized on the basis that the offer (*ijab*) and acceptance (*qabul*) in '*aqad*' are expressed in the past or present tense, denoting an immediacy of time sequence between intention and contract.²⁷

In addition, Muslim jurists have different opinions regarding the *hukm* of fulfilling the *wa'ad*. The majority goes by the rule that the promise must be fulfilled for religious reason only. As a matter of fact, it is a question of morality and breach of promise does not entail any legal consequence.

However, this is not the case with '*aqad*'. All jurists are in consensus that the contracting parties must deliver or fulfill whatsoever matter that resulted from the '*aqad*'. In the event any of the contracting parties had refused to execute his obligation without a valid Shariah excuse, the *qadhi* or the court of law can force him to go through with the deal.

Furthermore, the Shariah also provides for considerable intervention by a judge to reconstruct or re-adjust an existing contractual obligation. Thus, extra contractual obligation may be imposed upon the parties by this judicial intervention. For example, in a *bay' al-muajjal* (deferred payment sale), a buyer who fails to meet his contractual term would not be ordered to settle his outstanding payment agreed upon in the contract, but may be allowed by the court to make payment at a later date or by rescheduling his installments.²⁸ Similarly in the case of *istighlal* (unfair advantage) where a disproportion

²⁷ S.E. Rayner, *The Theory of Contracts in Islamic Law* (London: Graham & Trotman, 1991), 163.

²⁸ Rayner, *Theory of Contracts*, 93-94.

of obligation exists between the contracting parties. A court could also intervene to readjust those obligations in a more “equitable manner.”²⁹

Modern Application of *Wa’ad* in Islamic Finance

Prior to the emergence of modern Islamic finance, the classical jurists inclined to opine that *wa’ad* is only a mere promise and it has no binding effect. As a mere promise neither oaths before God nor reciprocity for goods – the law sees it as lacking legal significant, not appropriately compelled by the process of law.³⁰

However, this scenario has changed. In modern Islamic banking and finance industry which is propelled by the incentive to profit, industry players have resorted to various approaches to achieve a desirable economic result. One of those approaches is the incorporation of *wa’ad* into Shariah-compliant products. The attractiveness of the *wa’ad* to Islamic finance institutions stems from its unilateral nature. In relation to any *’aqad*, Shariah requires the knowledge of the price and the possession of the subject matter as necessary prerequisites to ensure legitimacy. However in *wa’ad*, these requirements need not be strictly adhered to. Due to its inherent flexibility, the concept of *wa’ad* has gained a wide acceptance among industry players.³¹

Today , the concept of *wa’ad* can be found in a large number of Islamic banking product ranging from plain retail products such *al-ijarah thumma al-bay’* and *murabahah* financing to complicated structured products such as *sukuk* and forex option.

In Murabahah to the Purchase Orderer (MPO) for instance, the *wa’ad* is an important element that constructs the deal whereby the purchase orderer promises to purchase the asset from the financial institution upon the latter’s acquisition of the asset. The promise must be duly signed by the former during the purchase requisition and it shall be binding on him. In the event the purchase orderer refuses to enter into the Murabahah transaction upon purchase made by Islamic finance institutions (IFIs) as per agreed terms, he shall be held liable for breach of *wa’ad* and shall compensate for related

²⁹ Rayner, *Theory of Contracts*, 94.

³⁰ Vogel and Hayes, *Islamic Law and Finance*, 125.

³¹ Priya Uberoi, *et al.*, “The Wa’ad on the Street,” *Risk Magazine*, August 01, 2009, accessed April 14, 2014, <http://www.risk.net/risk-magazine/feature/1530759/the-wa-street>.

actual costs incurred by the IFIs for the disposal of the asset to a third party and the shortfall in the disposal price compared to the purchase price.³²

The element of *wa'ad* also presents in *al-ijarah*. In Draft of Shariah Parameter Reference 2: Ijarah Contract, BNM, there is an item deliberating this concept. Item 97 of the Draft for example explains that *wa'ad* is a unilateral promise that shall be executed before the Ijarah contract and binding on the lessee. Here we observe that the parameter goes with the opinion that says *wa'ad* is a binding agreement whereas for the majority of the jurists, fulfilling *wa'ad* is just a recommendation. Regarding the sale of the leased asset, item 113 states that the lessor has the right to sell the leased asset to any other party/third party during the lease period without any prior consent from the lessee except agreed otherwise or when he had made a promise to sell it to the lessee.

The most apparent use of *wa'ad* is in *sukuk* structures where the *sukuk* holders are promised by the relevant entity to buy their *sukuk* for a certain price (usually the normal value of the *sukuk*). Effectively in certain *sukuk* structures, the *wa'ad* is used as a guarantee to investors to receive an amount equal to their initial investment when their *sukuk* are redeemed.³³

Besides the abovementioned products, the Islamic project financing currency option, total return swap, short selling also rely heavily on the concept of *wa'ad*.

Some Contemporary Opinions on *Wa'ad*

Even though the concept of *wa'ad* has been widely applied to products and services of Islamic Financial institutions and it binds the contracting parties as the *'aqad* does, not all contemporary Muslim scholars reach to the same conclusion. They also differ in their opinion from one another.

1. Muhammad Akram Laldin is of the view that fulfilling *wa'ad* is obligatory. He argues that breach of promise in financial dealing usually leads to harm and financial loss. His justifications are based on verse 2:195 which Allah says to the effect: "*Do not contribute to your own destruction with your own hands, but do good for Allah loves those who do good.*" According to him, this also consistent with the

³² Bank Negara Malaysia, "Draft on Shariah Parameters: Murabahah Parameter," accessed April 11, 2014, <http://www.bnm.gov.my/documents/conceptpaper/MurabahahCP.pdf>.

³³ Barakat and Merhej, *Waad*, 14-16.

statement of the Prophet (p.b.u.h.): “*Harm should neither be initiated nor reciprocated.*” Thus, he asserts that making promises legally binding will go a long way to reducing financial harm that result from breach of promise.³⁴

2. Rafic Yunus Al-Masri observes that the binding unilateral promise (*wa’ad*) permeated the rulings of jurists such as Sheikh Mohammed Al-Mokhtar Al-Salami, Sheikh Mohammad Taqi Usmani, Sheikh Abdullah Al-Manee, Sheikh Abdul Sattar Abu Ghudda, Sheikh Ali Al-Qurrah Daghi and Sheikh Hasan Al-Shazli on Islamic banking. They proclaimed that *wa’ad* is a contract and as such it is binding.³⁵
3. Muhammad Sulaiman al- Asyqar and Al- Syinqiti are of the view that *wa’ad* is not binding (*mulzim*) because if it is considered as *mulzim*, the *’aqad* which takes place after that would be meaningless and revoked (*batil*).³⁶
4. Al- Zarqa’ opined that promise basically would not create a liability to those who makes it and also does not confer any right to the promisee. However, from religion point of view, it is recommended to fulfill the promise as promised. If they fail to do so, they are considered as sinful. Therefore, based on the basic understanding of promise, the promisor cannot be forced to be put any fine or penalties on him.³⁷

Aside from individual opinions, there are also opinions from institutions. These include:

1. Majma’ Fiqh Islami:

In its 5th meeting held on December 10-15, 1988, the Majma’ had decided that a unilateral promise (*wa’ad*) in *murabahah* sale either made by the purchase orderer or the seller is religiously binding (*mulzim diyanatan*) upon the promisor except where there is a valid excuse. It is however legally binding if made conditional upon the fulfilment of an obligation or entails a cost to one of the

³⁴ Mohamad Akram Laldin, “The concept of promise and bilateral promise in financial contracts: A fiqhi perspective,” accessed April 11, 2014, www.isra.my.

³⁵ Rafic Yunus Al-Masri, “The binding unilateral promise (wa’d) in Islamic banking operations: Is it permissible for a unilateral promise (wa’d) to be binding as an alternative to a proscribed contract?” *J.KAU: Islamic Econ* 15 (2002): 29-33.

³⁶ Siti Salwani Razali, “The Concept of *Wa’ad* in Islamic Financial Contract” (paper presented at Islamic Banking, Accounting and Finance Conference, organised by Faculty of Economics and Muamalat, Universiti Sains Islam Malaysia, July 28-29, 2008, at The Legend Hotel, Kuala Lumpur).

³⁷ Siti Salwani, “The Concept of *Wa’ad*.”

contracting parties.³⁸ As for a binding mutual promise (*muwa'adah*) in *murabahah* sale, it is permissible if the option (i.e. the option not to enter into the sale) is given to one or both contracting parties. In the absence of option, it is impermissible because a binding *muwa'adah* is like the sale itself in which the good sold must be in the possession of the seller.

2. Jordan Islamic Bank:

The bank laid down a ruling that *muwa'adah* which binds both parties is prohibited as the contract will fall under '*umum al-nahyi* (general prohibition). However, if it only binds one party, the transaction is permissible.³⁹

3. Bank Negara Malaysia:

The Shariah Advisory Council (SAC) of Bank Negara Malaysia has approved the application of *wa'ad* (a unilateral promise) in Forward Currency Transactions for hedging purposes. The SAC gave the initial go-ahead for the application at its 102nd meeting held in June 2010, but they were officially introduced by Bank Negara Malaysia at the end of August 2010. According to the SAC, Islamic financial institutions are allowed to enter into a forward foreign currency transaction for hedging purposes based on an unilateral *wa'ad* (promise) that carries a binding effect on the promisor.⁴⁰

4. The Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI):

The institution has not issued a standard governing the *wa'ad*. Nevertheless, it was referred to in many of the standards. Below are some guidelines provided by AAOIFI:

- a. In Shari'a Standard No. 1, Trading in Currency, the organisation resolved that a binding bilateral promise to purchase and sell currency is prohibited not even for the purpose of hedging against currency

³⁸ Islamic Development Bank and Islamic Research and Training Institute, *Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1985-2000*, 1st ed., (Jeddah: Islamic Fiqh Academy, 2000), 86-87.

³⁹ Razali Nawawi, *Islamic Law on Commercial Transaction*. (Kuala Lumpur: CERT Publications, 2009).

⁴⁰ Mushtak Parker, "Bank Negara says no fee for wa'd currency hedging," accessed April 11, 2014, <http://www.muslims.net/news/newsfull.php?newid=414548>.

devaluation risk. However a promise from one party is permitted even if the promise is binding.⁴¹

- b. Shari'a Standards No. 8, Murabahah to purchase orderer of the AAOIFI provides further clarification on how *wa'ad* can operate. The main points are the following:⁴²
 - i. It is not permissible that the document of promise to buy signed by customer should include a bilateral promise which is binding on both parties.
 - ii. A bilateral promise is permissible whenever it includes an option to cancel the promise. This option may be given to both parties or to one of them.
 - iii. It is possible to change the terms of the promise if both parties agree to such change. No parties can solely change the terms of promise. However such change cannot be effected if the parties have executed their obligations under the *murabahah* (or the relevant agreement).

Conclusion

Islamic finance institutions should not equate *wa'ad* with *'aqad* or give the same weightage of *hukm* to both concepts. For the classical jurists, their opinion pertaining to the *hukm* of fulfilment of *wa'ad* is basically built upon religious ground and moral values. Breach of promise is just a sinful act and sign of lack of moral values in an individual. In addition, when the jurists deliberate the *hukm* of *wa'ad*, they are referring to the promise in charitable matters (*tabarru'at*) and not in contracts of exchange (*mu'awadat*). In actual fact, promises have no binding effect on the contracts of exchange. As such, fulfilment of promise in *mu'awadat* is not obligatory as these transactions are only concluded and become binding by means of *'aqad* not *wa'ad*.

⁴¹ Razali, *Islamic Law on Commercial Transaction*, 7-8.

⁴² Accounting and Auditing Organisation for Islamic Financial Institutions, *Shari'a Standards for Islamic Financial Institution* (Manama: Accounting and Auditing Organisation for Islamic Financial Institutions, 2008), 117.

However, in modern Islamic finance and banking, a great deal depends on *wa'ad*. Due to its flexibility and risk mitigation features, the concept of *wa'ad* has been used to innovate new way of doing '*aqad*' in the Islamic finance industry. Now, it has departed from a mere promise with no binding effect to a new height that comes together with legal enforceability. As a result, many Muslim scholars opine that *wa'ad* is religiously and legally binding. Most of them argue that breach of promise in financial dealing usually leads to harm and financial loss. Therefore, to protect the interest of the contracting parties, promise should be binding. Some of them seemed to go to an extreme position and concluded that *wa'ad* should be binding under all circumstances.

The Shariah protects the interest of the contracting parties. However, to say that *wa'ad* is equal to '*aqad*' in term of binding effect is untenable because it will make a *wa'ad* is analogous to an '*aqad*'. Trying to compare them is like trying to compare an apple with an orange. In fact, by making *wa'ad* binding, it would equate the *hukm* of *wa'ad* with the status of promise in common law. In common law, promise should be binding especially when it involves some form of exchange whereas in Islam, transactions are only concluded and become binding by means of '*aqad*' not *wa'ad*.

Besides, in deliberating the issue of *wa'ad*, we should also be concerned about the question whether in certain circumstances, does the application of *wa'ad* violate "*muqtada al-'aqad*"? The question deserves an honest answer from contemporary Muslim scholars because any transgression of "*muqtada al-'aqad*" would make the '*aqad*' itself becomes null and void.

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