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Benefitting from a Loan (*Qarḍ*) Contract: An Analysis of Juristic Opinions

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Executive Summary

Benefitting from a Loan (*Qarḍ*) Contract: An Analysis of Juristic Opinions

In Islam, a loan (*qarḍ*) is considered a gratuitous contract, and providing a loan to a person in need is a recommended (*mandūb*) act for which a lender is rewarded. The gratuitous nature of the loan contract is emphasised in various *ḥadīths* which also prohibit the lender from deriving any stipulated benefit from the loan he has provided. Loans that generate conditional benefit to the lender are considered usurious. The practice of usury (*ribā*) is inextricably tied to the loan and debt where a lender charges the borrower an additional amount. The main focus of this research paper is to provide a critical discussion on the ruling that prohibits the lender from deriving conditional benefit from the loan, and its related issues. We have examined, in the light of juristic opinions, the status of different types of stipulations that would entitle the lender to various types of pecuniary and non-pecuniary benefits.

Regarding the stipulation that a borrower should compensate the lender for inflation, we have argued that a creditor is entitled to the return of his money based on the original purchasing power of the currency at the time when the loan was provided. However, this should be resorted to only in cases of hyper-inflation when the value of the currency is drastically depreciated.

Suftajah is a classic example where a lender provides a loan on the condition that the borrower should return it at another place. In this case the lender benefits by the transfer of his money to another place and the borrower is not harmed when he has an arrangement in place to settle the loan in the stipulated locality. Furthermore, the borrower ideally also prefers to settle the loan in the stipulated place. As such, there is a mutual benefit to the lender and the borrower. After examining the various juristic opinions, we found that the opinion of Ḥanbalī jurists that argues for the permissibility of *suftajah* is preferable.

The idea of a reciprocal loan in its various forms is then examined in detail. We have argued that providing a loan on the condition of receiving another loan provides benefit to the lender and is not acceptable. We next discuss the arrangement among members of a certain group (*jamʿīyah*) who agree to provide loans to each other. Under this arrangement members of a group agree to contribute a certain amount of money on specific periodical dates. The combined amount in each period is given to a member of the group based on rotation. Hence, a member is lending a certain amount of money to another member and in turn receives a loan from other members. Consequently, the loan he provides is on the condition that other members of the group should provide him with a loan. A critical appraisal is made, and it is found that the arrangement is valid as it does not impose any condition on the borrower but requires the other members of the group to provide loans.

The paper critically examines the practice of combining a loan and a sale contract. We have argued that providing a loan on the condition that the borrower should sell or purchase something to the lender may result in benefit to the lender and is therefore not allowed. The paper also discusses combining a loan with a pledge and found that various juristic opinions prohibit the utilization of pledged property by the pledgee. In this context we have discussed the promise sale (*bayʿ al-wafā'*) and its various forms. These include providing a loan on the condition that the borrower sells his property, which will then be resold to the borrower upon the settlement of the loan. *Bayʿ al-wafā'* may also take another form where a seller sells a certain property to a purchaser on the condition that the purchaser should resell it to the seller if the latter gives back the full price to the former. The paper discusses juristic opinions and arguments from various *fiqh* schools on the permissibility or otherwise of *bayʿ al-wafā'*. We found *bayʿ al-wafā'* in substance similar to the pledge where the pledgee utilizes the pledged property. The latter Ḥanafī jurists argued in favour of *bayʿ al-wafā'* in cases of necessity and as an alternative to a usurious loan where a lender would not provide loan to a person in need of cash without pecuniary benefit. The last contract delineated is the sale of exploitation (*bayʿ al-istighlāl*), which is closely related to *bayʿ al-wafā'*. *Bayʿ al-istighlāl* takes place when a property is sold through the sale of *wafā* on the

condition that the seller of the property should lease it from the purchaser and pay rentals. *Bayʿ al-istighlal* is a variety of *bayʿ al-wafā'* and is therefore subject to the same ruling.

The loan contract is one of the principal vehicles through which usury is practised. The *ḥadīths* therefore emphasise the gratuitous nature of the loan contract and prohibit the lender to derive any pecuniary or non-pecuniary benefit from the loan he has provided. A conditional benefit imposed by the lender on a borrower not only deprives the loan contract of its gratuitous nature but is also considered usurious. Muslim jurists have therefore devoted extensive discussions to the loan contract and in particular to the conditional benefit that a lender may receive from the borrower. Stipulating a conditional benefit to the lender will change the effect of the loan contract and deprive it of its gratuitous nature. However, it is permissible if a borrower voluntarily provides such benefits to the lender.

Keywords:

loan contract, stipulated benefit, *suftajah*, *bayʿ al-wafā'*, combined contracts, reciprocal loans, mortgage

Section 1

INTRODUCTION

Islam strongly prohibits the lender not only from charging interest but from deriving any other conditional benefit from the loan, whether the loan is for investment or consumption purposes. Stipulating that a borrower should provide a pecuniary or non-pecuniary benefit to the lender is considered usurious. On the other hand, a person is strongly discouraged from borrowing money. Although the Prophet (ﷺ) used to settle the debts of those Muslims who would die indebted, he disliked that a person dies while indebted and does not leave behind sufficient wealth to pay his debts. This indicates that a person should not incur debts which he is not reasonably able to settle. Islam has also emphatically, and in the strongest words, prohibited usury or interest (*ribā*). Usury guarantees a certain fixed return to the lender while the benefit to the borrower is not certain. The Sharīʿah's prohibition of usury and any other benefit to the creditor and its discouragement of borrowing money necessarily indicate that an interest-free loan (*qarḍ*) is intended to alleviate the sufferings of the needy. It also indicates that the Sharīʿah intends that the loan contract should not be used as a vehicle for investment or financing. This is one of the objectives of the Sharīʿah: that the risk and rewards of an investment should be shared between a fund owner and its user.

This research paper discusses the benefit that a lender may obtain as a condition for providing a loan to a borrower. The paper explains the gratuitous nature of the loan contract and discusses the Sharīʿah prohibition of all those conditions that would entitle the lender to benefit from the loan. The purpose is to acquaint the readers with the basic concept of prohibiting conditional benefit to the lender as well as the different interpretations of that prohibition and its implications in the light of juristic opinions.

> *"a person should not incur debts which he is not reasonably able to settle"*

> *"the loan contract should not be used as a vehicle for investment or financing"*

A descriptive, comparative and analytical methodology is used in this research. Both primary and secondary sources are referred to. While the basic concept is taken from the Qur'ān and Sunnah, the views of jurists from various *fiqh* schools are cited to provide a comparative discussion. A critical analysis is made to evaluate different juristic opinions, make preference and, where necessary and appropriate, to state our opinion.

This paper is divided into three sections. In section one the loan (*qarḍ*) contract is defined and its important conditions are discussed. The meanings of other related terms such as simple loan (*iʿārah*), debt (*dayn*) and charity (*ṣadaqah*) are explained. The paper also discusses the key feature of the prohibited practice of *ribā*, that it provides the lender with an additional amount over and above the principal. Section two provides an analysis of the *ḥadīths* which state that all loans which provide conditional benefit to the lender are usurious. The paper next discusses unstipulated benefits. References are also made to *ḥadīths* that prohibit combining a sale with a loan and two contracts in one contract. The discussion is conducted in the light of juristic opinions from the various *fiqh* schools. Section three presents a critical examination of various issues, including composite contracts. These include a stipulation to compensate the lender for inflation, a stipulation to settle the loan in a different place, reciprocal loans, combining a loan and a sale, combining a loan and pledge, and *bayʿ al-wafā'*.

For the sake of accuracy and convenience we have provided both the original Arabic and the English translation of the Qur'ānic verses and *ḥadīths*.

LOAN AND ITS LEGALITY

Definition of Loan (Qarḍ)

The word *qarḍ* or *qirḍ* is an infinitive which literally means cutting off. It is called *qarḍ* because it is as if, by this contract, a certain part of a lender's property is cut off and given to the borrower in order to be repaid. *Qarḍ* also refers to whatever good deeds a person does for the sake of Allah (ﷻ); as the Qur'ān states:

﴿ وَأَقْرِضُوا اللَّهَ قَرْضًا حَسَنًا ﴾

"...And lend unto God a goodly loan" (al-Qur'ān, 73:20).

Qarḍ refers to a gratuitous contract in which a lender gives a certain fungible property to a borrower who will return a similar property to the lender immediately upon demand (al-Buhūtī, 1402 AH; al-Rāzī, 1981). Its effect is to unconditionally transfer the ownership of the loaned property to the borrower. A loan is a gratuitous contract and a praiseworthy act for which a lender is rewarded by Allah (ﷻ). The gratuitous nature of the loan contract is established by *ḥadīths* which have promised rewards to the lender.

Legality of the Loan (Qarḍ) Contract

The loan is an independent contract whose legality is explicitly attested to by the Qur'ān, the Sunnah and the consensus of Muslim scholars (*ijmā'*) (Ibn Qudāmah, 1404 AH). It is narrated by Ibn Mas'ūd (ﷺ) that the Prophet (ﷺ) said:

«ما مِنْ مُسْلِمٍ يُقْرِضُ مُسْلِمًا قَرْضًا مَرَّتَيْنِ إِلَّا كَانَ كَصَدَقَتِهَا مَرَّةً».

"Whenever a Muslim gives a loan twice to another, it is counted as a one-time charity" (Ibn Mājah, 1980, *ḥadīth* no. 2430).

Qarḍ is a praiseworthy act for which a Muslim is rewarded by Allah (ﷻ). It is reported that the Prophet (ﷺ) said:

«رَأَيْتُ لَيْلَةَ أُسْرِيَ بِيْ مَكْتُوْبًا عَلَى بَابِ الْجَنَّةِ الصَّدَقَةُ بِعَشْرِ أَمْثَالِهَا وَالْقَرْضُ بِثَمَانِيَةَ عَشْرَ، فَقُلْتُ: يَا جِبْرِيْلُ مَا لِلْقَرْضِ أَفْضَلُ مِنَ الصَّدَقَةِ؟ قَالَ: لِأَنَّ الْإِنْسَانَ يَسْأَلُ وَعِنْدَهُ الشَّيْءُ، وَالْمُسْتَقْرِضُ لَا يَسْتَقْرِضُ إِلَّا مِنْ حَاجَةٍ».

"During the Night Journey, I saw written on the gate of heaven, 'The reward for *ṣadaqah* is ten times while the reward for *qarḍ* ḥasan is eighteen times.' I asked the angel how that is possible. The angel replied, 'Because a beggar may ask while already having something, but a borrower does not ask for a loan unless he is [truly] in need.'" (Ibn Mājah, 1980, *ḥadīth* no. 2422).

In another *ḥadīth* reported by Abū Hurayrah (ﷺ), the Prophet (ﷺ) said:

«مَنْ تَفَّسَ عَنْ أَخِيهِ كُرْبَةً مِنْ كُرَبِ الدُّنْيَا تَفَّسَ اللَّهُ عَنْهُ كُرْبَةً مِنْ كُرَبِ يَوْمِ الْقِيَامَةِ».

"Whoever relieves a believer from a difficulty in this world, Allah will relieve him from a difficulty on the Day of Judgment." (Siddiqi, 1976, *ḥadīth* no. 6505).

Accordingly, providing a loan is a recommended (*mandūb*) act for which a lender is rewarded. However, it is not obligatory (*wājib*) on the lender to provide a loan to a debtor. Thus a person does not commit a sin if he refuses to provide a loan to another. It is permissible (*mubāḥ*) on the part of a borrower to ask for a loan. There is no evidence to suggest that seeking loan is considered abominable (*makrūh*). On the contrary, there are traditions which state that the Prophet (ﷺ) himself borrowed from others. Since in *qarḍ* the borrowed property is returned later, the question of begging does not arise (Ibn Qudāmah, 1404 AH).

> ***"Accordingly, providing a loan is a recommended (mandūb) act for which a lender is rewarded. However, it is not obligatory (wājib) on the lender to provide a loan to a debtor"***

The Subject-matter of a Loan (Qarḍ) Contract

The majority of jurists argue that a loan contract can validly be concluded with regard to both *ribawī* and non-*ribawī* properties. This argument is based on the *ḥadīth* narrated by Abū Rāfiʿ in which the Prophet (ﷺ) is reported to have taken a camel as a loan and then repaid it with a different camel (Muslim, 1967, no. 4192). They also contend that a loan is valid with regard to every property on which *salam* is valid. Accordingly, they argue that loan is valid with regard to animals as they can become the object of a *salam* contract. They also argue that weighable, measurable, and countable items could also become the objects of a loan contract, as it is possible to conclude a *salam* contract with regard to these properties (al-Qarāfī, 1994; al-Shirbīnī, 2003; Ibn Qudāmah, 1404 AH; al-Dasūqī, 1900).

The Ḥanafīs, on the other hand, argue that only fungible (*mithlī*) properties are the proper object for the loan contract. According to them, fungible properties are also *ribawī* properties.[1] They argue that a loan contract cannot validly be concluded with regard to non-fungible properties such as books and cars, as in these cases it is the same book or car that is to be returned and not a similar item of the same class (Ibn ʿĀbidīn, 1987). Based on this understanding, an animal such as a camel could be borrowed either for its service or its meat. In the former case the contract is iʿarah while in the latter case it falls under *qarḍ*.

Important Conditions for a Loan (Qarḍ) Contract

(1) Both the lender and the borrower should have complete legal capacity to enter into a *qarḍ* contract.

(2) The money (since that is the most common object of a loan contract) should be transferred to the borrower and should come to his possession. There is no loan contract if the borrower does not take possession of the money.

(3) The borrower should acquire an absolute and unconditional right to use and appropriate the borrowed money.

(4) The borrowed and repaid money must be equal and belong to the same currency. The borrower is under obligation to return an equal amount of the same currency. For instance, a person who borrows money in Malaysian ringgits must return it in the same currency.

(5) The condition concerning the spot exchange of *ribawī* properties is not applicable to a *qarḍ* contract. This exception is made to enable the person in need to borrow money and return it later.

(6) Any stipulation in a *qarḍ* contract that benefits the lender is prohibited. The *qarḍ* contract must be free of any expected return or benefit to the lender. However, if the borrower voluntarily returns the borrowed money in higher quality, quantity or value, such an act is commendable. Similarly, if the lender is willing to take back the loaned money in lesser or lower quality, quantity or value, this act is also regarded as commendable if it is based on his free will.

(7) According to the majority of *fiqh* schools, the settlement of *qarḍ* should not be confined to a certain stipulated date in the future. The Mālikīs, on the other hand, allow this. The majority of jurists have differentiated between *dayn* and *qarḍ*. They define *dayn* as an obligation to be settled at a certain known date while *qarḍ*, on the other hand, is an obligation that could be settled at any time. This, they argue, is due to the gratuitous nature of the *qarḍ* contract. The Mālikīs, however, do not distinguish between *qarḍ* and *dayn*. They argue that Muslims are free to put any condition in a transaction except a condition that makes the permissible forbidden or the forbidden permissible. According to the Mālikīs, when the time for the settlement of a loan is specified, the lender is not allowed to request the borrower to return the loan prior to the fixed specified time.

(8) The loan should be settled in lump sum upon demand by the lender.

(9) There should be no stipulation concerning the place where the loan should be settled.

> *"Any stipulation in a qarḍ contract that benefits the lender is prohibited"*

Loan (Qarḍ), Debt (Dayn), Simple Loan (Iʿārah) and Charity (Ṣadaqah)

A term related to qard but wider in concept is *dayn*, which is not necessarily gratuitous. While *qarḍ* is created by the provision of cash to the debtor, a *dayn*

comes into existence when the settlement of a certain financial right created through a contract is postponed to the future. For instance, a deferred or unpaid price in a sale contract, a deferred or unpaid rental in a lease contract, an unpaid *mahr* (the husband's obligatory marriage gift to his bride), or unpaid damages are all considered *dayn*. Dayn can also arise when a person lends his money to another. Thus, *dayn* is more general than *qarḍ*, as *dayn* can arise from many different contracts while *qarḍ* may arise only through a loan contract. Every *qarḍ* is a *dayn* but not vice versa (Ibn ʿĀbidīn, 1987).

Iʿārah is a contract where an owner gives a certain usable property to a borrower without consideration. The borrower of the property temporarily and gratuitously owns the usufruct. This contract is encouraged and recommended as a form of charitable deed. The property is held on trust by the borrower, who is therefore not liable for its destruction, loss, or diminution of value, unless it is caused intentionally or by his fault and negligence. In *iʿārah* the ownership of the borrowed item is not transferred to the borrower. He has to return the same item at a stipulated time. In *qarḍ*, the ownership of the borrowed money is transferred to the borrower. He does not have to return the same notes he received; it can be any other notes. *Qarḍ* is also different from *ṣadaqah* (which is sometimes referred to as *qarḍ ḥasan* in the Qur'ān). Both *qarḍ* and *ṣadaqah* are recommended (*mandūb*) acts. However, in *qarḍ* the borrower, who could be wealthy or poor, is under obligation to settle the loan while in *ṣadaqah* the needy donee is not obliged or expected to return the donation to the donor.

Usury (Ribā) and its Types

The loan contract is closely related to usury (*ribā*). It is therefore necessary to briefly discuss usury and its types. *Ribā* literally means increase, addition or excess. There are two varieties of usury: usury on credit (*ribā al-duyūn*), which is further divided into *ribā al-qarḍ* and *ribā al-nasīʾah* (debt arising from a deferred sale, as per the *ribā al-jāhiliyyah*); and usury in sales (*ribā al-buyūʿ*), which is further categorised into *ribā al-faḍl* (if there is unequal amount of exchange) and *ribā al-nasaʾ/nasīʾah* (if there is deferment). Usury on credit (*ribā al-duyūn*) refers to a stipulated increase over the loan which a debtor agrees to pay to his creditor in relation to a specific period of time. According to Ibn Ḥazm, usury on credit may arise in both *ribawī* and non-*ribawī* properties. It is unlawful to give a loan with an arrangement that it be returned in lesser or higher quantities or in another type of wealth. Rather it must be returned in the same quality and quantity (Ibn Ḥazm, 2001). Usury on credit was a pre-Islamic practice that was prohibited by the verses of the Qur'ān (30:39; 4: 160-1; 3: 130; and 2: 275-281) and the Sunnah.

عَنْ جَابِرٍ: «لَعَنَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ آكِلَ الرِّبَا، وَمُوكِلَهُ، وَكَاتِبَهُ، وَشَاهِدَيْهِ»، وَقَالَ: «هُمْ سَوَاءٌ».

Jābir (ﷺ) stated that Allah's Messenger (ﷺ) cursed the accepter of interest and its payer, and also one who records it and the two witnesses, and he said, "They are all equal." (Abū Dāwūd, 1950, no. 3334; Siddiqi, 1976, no. 3881) The significance of this prohibition can be judged from the fact that the Prophet (ﷺ) stressed it in his sermon at the Farewell Pilgrimage.

> ***"Usury on credit (ribā al-duyūn) refers to a stipulated increase over the loan which a debtor agrees to pay to his creditor in relation to a specific period of time"***

Usury in sale (*ribā al-buyūʿ*), which had not been known to the pre-Islamic Arabs, was prohibited by the *ḥadīth* of the Prophet (ﷺ) (Abū Zaid, *Fiqh al-Ribā*, 2004). *Faḍl* literally means surplus. Abū Saʿīd al-Khudrī (ﷺ) reported Allah's Messenger (ﷺ) as saying:

«الذَّهَبُ بِالذَّهَبِ، وَالْفِضَّةُ بِالْفِضَّةِ، وَالْبُرُّ بِالْبُرِّ، وَالشَّعِيرُ بِالشَّعِيرِ، وَالتَّمْرُ بِالتَّمْرِ، وَالْمِلْحُ بِالْمِلْحِ، مِثْلًا بِمِثْلٍ، يَدًا بِيَدٍ، فَمَنْ زَادَ أَوْ اسْتَزَادَ فَقَدْ أَرْبَى، الْآخِذُ وَالْمُعْطِي فِيهِ سَوَاءٌ».

"Gold paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, salt by salt, shall be like by like, payment being made hand to hand. He who made an addition to it or asked for an addition has, in fact, dealt in usury. The receiver and the giver are equally guilty" (Siddiqi, 1976, no. 3854).

In another *ḥadīth*, Abū Saʿīd reported:

جَاءَ بِلَالٌ إِلَى النَّبِيِّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ بِتَمْرٍ بَرْنِيٍّ، فَقَالَ لَهُ النَّبِيُّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: «مِنْ أَيْنَ هَذَا؟»، قَالَ بِلَالٌ: كَانَ عِنْدَنَا تَمْرٌ رَدِيٌّ

فَبِعْتُ مِنْهُ صَاعَيْنِ بِصَاعٍ لِنُطْعِمَ النَّبِيَّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ، فَقَالَ النَّبِيُّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ عِنْدَ ذَلِكَ: «أَوَّهْ، عَيْنُ الرِّبَا عَيْنُ الرِّبَا, لاَ تَفْعَلْ، وَلَكِنْ إِذَا أَرَدْتَ أَنْ تَشْتَرِيَ فَبِعْ التَّمْرَ بِبَيْعٍ آخَرَ ثُمَّ اشْتَرِ به».

Bilāl (ﷺ) came with dates of fine quality. Allah's Messenger (ﷺ) asked him, "Where are these from?" Bilal said, "We had dates of inferior quality, and I exchanged two *ṣāʿ* [of inferior quality] for one *ṣāʿ* [of fine quality] as food for Allah's Apostle (ﷺ), whereupon Allah's Messenger (ﷺ) said: Woe! It is in fact usury; therefore, don't do that. But when you intend to buy dates [of superior quality], sell [the inferior quality] in a separate bargain and then buy [the superior quality]" (Siddiqi, 1976, no. 3871).

The combined effect of these two *ḥadīths* is that when *ribawī* properties are exchanged against each other they should be exchanged on an equal basis, and any such exchange should be immediate. Usury in sale takes place when a *ribawī* commodity is exchanged for an unequal amount of the same commodity or when the amounts are equal but one of the counter-values is delivered later.

"Usury in sale takes place when a ribawī commodity is exchanged for an unequal amount of the same commodity or when the amounts are equal but one of the counter-values is delivered later"

Ribā al-duyūn is prohibited by both the Qur'ān and the Sunnah while *ribā al-buyūʿ* is prohibited by the Sunnah only. *Ribā al-duyūn* exists where a debtor is required to pay an additional amount over and above the principal while *ribā al-buyūʿ* may happen in an unequal or deferred exchange of *ribawī* properties. A debtor may voluntarily return an additional amount to the creditor; however, in an exchange of *ribawī* commodities against each other, any addition by one of the parties is prohibited. *Ribā al-duyūn* is prohibited in itself (*ḥarām li-dhātihi*) while *ribā al-buyūʿ* is prohibited as it leads to *ribā al-nasī'ah* (*ḥarām li-ghairihi*).

Section 3

ANALYSIS OF THE RELEVANT *ḤADĪTHS* AND JURISTIC OPINIONS ON BENEFITS IN A LOAN

In this section we present various *ḥadīths* and analyse juristic opinions from different *fiqh* schools. It begins with a discussion on the *ḥadīths* and the general principle which prohibits the lender to derive benefit from a loan. The section next presents an analysis of juristic opinions on both stipulated and non-stipulated benefits that a lender may obtain from a loan. Other *ḥadīths* that prohibit a lender from combining a loan and a sale contract are also discussed. Providing a loan and stipulating that the borrower should purchase or sell something to the lender may benefit him at the cost of the borrower. Finally, the *ḥadīth* that prohibits combining two contracts in one contract, and in particular two sales in one sale, is discussed with a view to examining the implications of compound contracts.

The Loan that Provides Benefit to the Lender

It is prohibited to provide a loan on the condition that the borrower should return the loan in greater quantity, higher quality or in another type of property (Ibn Ḥazm, 2001). Both the Qur'ān and the Sunnah have prohibited the lender from charging the borrower any additional amount. The Qur'ān emphasizes that the lender is entitled to receive the principal amount. It states:

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِنْ كُنْتُمْ مُؤْمِنِينَ فَإِنْ لَمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِنَ اللَّهِ وَرَسُولِهِ وَإِنْ تُبْتُمْ فَلَكُمْ رُؤُوسُ أَمْوَالِكُمْ لَا تَظْلِمُونَ وَلَا تُظْلَمُونَ﴾

> "O you who believe! Fear Allah, and give up what remains of your demand for usury, if you are indeed believers. If you do it not, take notice of war from Allah and His Messenger. But if you turn back, you shall have your capital sums: Deal not unjustly, and you shall not be dealt with unjustly" (al-Qur'ān, 2:278-279).

This verse clearly prohibits charging any addition over and above the principal in a loan contract and commands that only the principal should be collected (al-Ṭabarī, 1954). A *ḥadīth* states:

«كُلُّ قَرْضٍ جَرَّ مَنْفَعَةً فَهُوَ رِبًا».

> "Any loan which results in a benefit is considered usury" (Ibn Abī Shaybah, 1980, no. 436).

However, the authenticity of this *ḥadīth* is questioned due to problems in the chain of narrators. Al-Amīr al-Ṣanʿānī has the following comment on it: "The *ḥadīth* is narrated by al-Ḥārith ibn Abī Usāmah. Its chain of narrators is useless because it contains Sawwār ibn Musʿab al-Ḥamdānī, and he is disregarded (*matrūk*)" (al-Ṣanʿānī, 1998: vol. 3, pp. 104-105,). However, al-Bayhaqī narrated from the companion Fudhālah ibn ʿUbayd:

«كُلُّ قَرْضٍ جَرَّ مَنْفَعَةً فَهُوَ وَجْهٌ مِنْ وُجُوهِ الرِّبَا».

> "Any loan which results in a benefit is considered a form of usury" (al-Bayhaqī, 1414 AH, no. 10705).

A similar narration is also mentioned on the authority of the Tābiʿī scholar Ibrāhīm al-Nakhaʿī by Ibn Abī Shaybah, and ʿAbd al-Razzāq in their two compilations (Ibn Abī Shaybah, 1980, no. 731; ʿAbd al-Razzaq, 1403AH, no. 731). Ibn Nujaym adapted the statement as a legal maxim (*qāʿidah fiqhiyyah*) by the wording:

«كُلُّ قَرْضٍ جَرَّ نَفْعًا حَرَامٌ».

> "Any loan which results in a benefit is prohibited" (Ibn Nujaym, 1983: p. 316).

Muslim scholars from different *fiqh* schools while discussing these *ḥadīths* deduced from them the general principle that any benefit gained from the loan by the lender is considered usury (al-Shirbīnī, 2003). All jurists agree that any condition that a debtor should return any additional amount over and above the loan is prohibited. This rule applies whether the additional property is of the same type as the loan property or of a different type. It also does not matter whether the additional amount is great or small. A lender is prohibited to stipulate any condition that would

provide him with a benefit as it amounts to usury. It also negates the gratuitous nature of the loan contract (al-Shirbīnī, 2003). Qurṭubī (1967 vol. 3, p. 241) states, "There is a consensus among Muslim jurists, based on the tradition from the Prophet (ﷺ), that any stipulation for increase in a loan contract is usury even if it is a fistful of forage, as mentioned by Ibn Masʿūd, or a single grain". According to the Ḥanafīs, any condition by a creditor in a loan contract for any increase is void, but the contract itself remains valid. According to the Shāfiʿīs, both the condition and the loan contract are void. The rule that prohibits conditional benefit in a loan contract is also applicable to a situation where receiving benefit from a loan is widely practised as a custom. In such cases a lender would not have given the loan if he had not known that he would receive a benefit from it. Such a custom is not valid as it conflicts with the rules of the Sharīʿah.

> ***"There is a consensus among Muslim jurists, based on the tradition from the Prophet (ﷺ), that any stipulation for increase in a loan contract is usury even if it is a fistful of forage, as mentioned by Ibn Masʿūd, or a single grain"***

Unstipulated Benefit to the Lender

It is a well-established principle that a lender may accept a non-contractual or non-customary unstipulated benefit from the borrower. A borrower may voluntarily return the loan with an additional amount or in a better quality. This is not only allowed but is recommended. Abū Hurayrah quoted the Prophet (ﷺ) as saying:

«إِنَّ خِيَارَكُمْ أَحْسَنُكُمْ قَضَاءً».

"The best amongst you is the one who pays the rights of others generously." (al-Qurtubī, 1967).

There are also other narrations that support the legality of unstipulated benefit to the lender. Abū Rāfiʿ reported:

أَنَّ رَسُولَ اللهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ اسْتَسْلَفَ مِنْ رَجُلٍ بَكْرًا فَقَدِمَتْ عَلَيْهِ إِبِلٌ مِنْ إِبِلِ الصَّدَقَةِ، فَأَمَرَ أَبَا رَافِعٍ أَنْ يَقْضِيَ الرَّجُلَ بَكْرَهُ، فَرَجَعَ إِلَيْهِ أَبُو رَافِعٍ فَقَالَ: لَمْ أَجِدْ فِيهَا إِلَّا جَمَلًا خِيَارًا رَبَاعِيًّا، فَقَالَ: «أَعْطِهِ إِيَّاهُ , إِنَّ خِيَارَ النَّاسِ أَحْسَنُهُمْ قَضَاءً»

Allah's Messenger (ﷺ) took from a man a young camel (below six years) as a loan. Then the camels of *ṣadaqah* were brought to him. He ordered Abū Rāfiʿ to return a young camel to that person [as a return of the loan]. Abū Rāfiʿ came back to him and said, "I did not find among them anything but better camels, above the age of six." The Holy Prophet (ﷺ) said, "Give one to him for the best men are those who are best in paying off the debt." (Muslim, 1967, no. 4192).

Jābir ibn Abdullah reported:

«وَكَانَ لِي عَلَيْهِ دَيْنٌ فَقَضَانِي وَزَادَنِي».

The Prophet (ﷺ) "paid me the debt he owed me and gave me an extra amount" (al-Bukhārī, 1981, no. 2264; Muslim, 1967, no. 715).

عن أبي هريرة رضي الله عنه أَنَّ رَجُلًا تَقَاضَى رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَأَغْلَظَ لَهُ، فَهَمَّ بِهِ أَصْحَابُهُ، فَقَالَ: «دَعُوهُ فَإِنَّ لِصَاحِبِ الْحَقِّ مَقَالًا، وَاشْتَرُوا لَهُ بَعِيرًا فَأَعْطُوهُ إِيَّاهُ». وَقَالُوا: لَا نَجِدُ إِلَّا أَفْضَلَ مِنْ سِنِّهِ، قَالَ: «اشْتَرُوهُ فَأَعْطُوهُ إِيَّاهُ، فَإِنَّ خَيْرَكُمْ أَحْسَنُكُمْ قَضَاءً».

Abū Hurayrah reported: A man demanded his debts from Allah's Apostle in such a rude manner that the companions of the Prophet intended to harm him, but the Prophet said, "Leave him for, no doubt, a creditor has the right to demand his right. Buy a camel and give it to him." They said, "What is available is older than the camel he demands." The Prophet said, "Buy it and give it to him, for the best among you are those who repay their debts handsomely" (al-Bukhārī, 1981, no. 2260; Muslim, 1967, no. 1601).

Based on these *ḥadīth*, there is a consensus among jurists on the permissibility of unstipulated benefits to the lender. This is in line with the benevolence that the Prophet (ﷺ) encouraged strongly.

Although Muslim jurists agreed on the permissibility of an unstipulated benefit to the lender, there are still some juristic opinions that ruled on its prohibition in certain situations (al-Shirbīnī, 2003; Ibn ʿĀbidīn, 1987; Ibn Qudāmah, 1404 AH). For instance, the Mālikīs ruled that it is prohibited for a lender to receive gifts from a frequent borrower. The Ḥanbalīs argued for the prohibition of any form of gift prior to the settlement of the loan unless the lender returns the gift by another gift or deducts it from the loan, or when there is a longstanding habit of exchanging gifts between the lender and the borrower prior to the loan contract. Moreover, there are many narrations from the generation of the Salaf that reflect their strictness in the issue of getting any extra benefit from the borrower, to the extent that they prohibited the borrower from receiving the lender as a guest. However, this rigidity can be explained as a precaution taken by the *Salaf* to prevent the lender from receiving any benefit from the loan, or that it is directed only to the cases where there is a custom allowing the lender to receive some type of benefit from the loan, or where there is a prior agreement allowing the lender to benefit from the loan (Ibn ʿĀbidīn, 1987; al-Dasūqī, 1900; al-Nawawī, 1992; Ibn Qudāmah, 1404 AH).

According to the Shāfiʿīs and Ḥanbalīs, it is not discouraged to give a loan to a person who is known to be benevolent in settling his loans. They argue that the Prophet (ﷺ) was known to be benevolent in settling his loans. Thus, it is not logical to discourage people from lending to a person who follows the example of the Prophet (ﷺ) in settling his loans. In fact, such a person should be given priority over others because he is from the best of people (Ibn Qudāmah, 1404 AH). However, the lender should purify his intention so that he will be driven by the desire to help the borrower and not by the expected benefit that he will receive later on. As for the benefit that the lender will receive from the borrower, it is strongly advised that he refrains from taking it or that he follows the example of the Salaf by giving it as charity.

> ***"every loan which provides a conditional benefit to the lender is considered usury"***

Thus, we can limit the abovementioned legal rule by modifying it to mean that every loan which provides a conditional benefit to the lender is considered usury. The Sharīʿah has allowed the borrower to pay the lender an excess over the loan amount if the excess is not stipulated in the loan contract. It shows us that prohibiting the lender from receiving a benefit from the borrower was to protect the right of the borrower rather than to prohibit the benefit itself that the lender receives from the borrower. Otherwise the borrower would be prohibited from paying something extra to the lender even if it was in the form of a gift. Thus, it should not be understood that it is prohibited for the lender to benefit from the loan if that benefit will not harm the borrower, and this is the understanding of the Ḥanbalīs. Based on it, they allowed the lender to specify a place for the settlement of the loan if doing that will not result in harming the borrower by, for example, making him incur extra cost.

Ibn Qudāmah in the following text clearly allows the lender to receive a benefit which will not harm the borrower. He says:

> Ahmad stated that requiring *suftajah* (settling a loan in a different country) is not allowed in a loan contract. However, it was narrated that he allowed it because he considered it as a benefit for both the lender and the borrower. ʿAṭāʾ said: Ibn al-Zubayr used to borrow silver dirhams from certain people in Makkah, and then he would inform Musʿab ibn al-Zubayr, who was in Iraq, about the loan that he had taken, and the lenders would then take their money from Musʿab in Iraq. Ibn ʿAbbās was asked about this, and he did not see anything wrong in it. It was also narrated that ʿAlī (رضي الله عنه) was asked about something similar and, just like Ibn ʿAbbās, he did not see anything wrong in it. Other scholars who allowed it include Ibn Sīrīn, and al-Nakhaʿī. Qāḍī Abū Yaʿlā mentioned that it is allowed for a guardian to loan the money of an orphan under his care in another country in order to avoid the dangers of travelling on the road. The correct opinion is to allow such a practice because both parties will benefit from it and neither of them will be harmed. The Sharīʿah does not forbid benefits which do not cause harm. In fact the Sharīʿah permits such benefits. In addition there is no clear text that prohibits the above-mentioned condition. Thus, it should be permitted (Ibn Qudāmah, 1404 AH, vol. 4, pp. 390-391).

Thus we can further limit the legal rule regarding loans by modifying it so that it becomes "Every loan which results in a conditional benefit that will harm the borrower is considered usury." Perhaps

the understanding that the lender cannot gain any benefit from giving someone a loan, even if it does not harm the borrower, is due to the extreme caution that is taken when dealing with the issue of usury. The concept of a benevolent loan in which the lender does not expect any benefit or gratitude from the borrower can be gleaned from this verse:

﴿إِنْ تُقْرِضُوا اللَّهَ قَرْضًا حَسَنًا يُضَاعِفْهُ لَكُمْ وَيَغْفِرْ لَكُمْ وَاللَّهُ شَكُورٌ حَلِيمٌ﴾

> "If you loan to Allah a beautiful loan, He will double it to your [credit], and He will grant you Forgiveness: for Allah is most Ready to appreciate [service], Most Forbearing" (al-Qur'ān, 64:17).

Some might have interpreted this verse to mean that a loan cannot be benevolent (*ḥasan*) if it benefits the lender in any way. However, lending to Allah (ﷻ) is different from lending to people. The meaning of lending to Allah (ﷻ) is to have a pure intention while giving charity (*ṣadaqah*) and not expecting anything except reward from Allah (ﷻ), and this is a condition for receiving a multiplied reward and forgiveness (al-Qurṭubī, 1967). In contrast, it is not prohibited for the lender to receive any reward or gratitude from the borrower if it is voluntarily provided by the latter or it does not cause any harm or financial cost to him. For example, ʿUmar (ﷺ) did not sit under the shade of a house mortgaged to him because in his opinion it amounted to deriving benefit from the mortgaged house. However, he did so because of his piety and not because he was under any obligation to do so.

> ***"in cases of loan it is possible that the borrower may voluntarily return an additional amount to the lender while in an exchange of money for money any inequality, even if it is not stipulated in the contract by any of the parties, is prohibited"***

It is important to highlight that the absence of gratuitous intention on the part of the lender does not alter the gratuitous nature of the loan contract into an exchange contract and thus subject it to the application of *ribā* in sale. It is due to the fact that *ribā* in a loan differs in its legal rulings from *ribā* in a sale. For instance, in cases of loan it is possible that the borrower may voluntarily return an additional amount to the lender while in an exchange of money for money any inequality, even if it is not stipulated in the contract by any of the parties, is prohibited.

Combining a Sale with a Loan (*Salaf*)

Linguistically, *salaf* means loan. Technically, it has two meanings: loan and *salam*.[3] *Salaf* in this context refers to the first meaning. The prohibition of combining a sale contract with a loan is stated in the *ḥadīth* narrated by ʿAmr ibn Shuʿayb who narrated from his father (Shuʿayb) who narrated from his father (ʿAmr's grandfather) that Prophet Mohammed (ﷺ) said:

«لَا يَحِلُّ سَلَفٌ وَبَيْعٌ، وَلَا شَرْطَانِ فِي بَيْعٍ، وَلَا رِبْحُ مَا لَمْ يُضْمَنْ، وَلَا بَيْعُ مَا لَيْسَ عِنْدَكَ».

> "A loan combined with a sale is not lawful; nor is a sale with two added conditions; nor is profit from something for which one takes no liability; nor is a sale of [a specific item] one does not possess." (Abū Dāwūd, 1950, *ḥadīth* no. 3504; al-Tirmidhī, 1999, *ḥadīth* no. 1234; al-Nasā'ī, 1991, *ḥadīth* no. 6204; Ibn Ḥanbal, 1983, *ḥadīth* no. 6689; al-Dāraquṭnī, 1996, *ḥadīth* no. 3054; al-Bayhaqī, 1414 AH, *ḥadīth* no. 10189) .

Giving a loan on the condition that a contract of sale be concluded with it could be a way to charge usury by the lender who will benefit from his loan at the expense of the borrower. This type of composite transaction may take two forms.

In its first form a prospective lender asks the borrower to sell him, for example, his car for a certain price. The lender would say, "I will lend you RM 10,000 on the condition that you sell me your car for RM 20,000," a price which is lower than the market price. The same prohibition is applicable to any commutative contract when combined with a loan; for example, a lender stipulating that a loan can only be provided if the borrower leases him an asset for a price lower than the market price, or leases from the lender an asset for a price higher than the market price; or it could be that the lender stipulates that a loan can be provided only if the borrower contracts from him the service of safekeeping of valuable items for a fee.

The reason for the prohibition of combining a loan and a commutative contract is the benefit that a creditor may derive from the loan at the expense of the borrower. By stipulating a sale contract he can

compel the prospective borrower to sell a certain commodity for a price lower than its market value or to buy from the lender a commodity for a price higher than the market price. It is also possible that the lender stipulates that the borrower purchases a certain property which the latter does not need. The same may also be applicable to a currency exchange contract; the lender will stipulate an exchange rate that suits him. For instance, a lender provides a loan in dollars and stipulates that the borrower should purchase ringgits from him at an exchange rate which he dictates. There is a consensus among Muslim jurists that all these forms and the like are prohibited as they amount to tricks that enable the creditor to indirectly charge the prohibited usury.

The second form takes place when a person stipulates a loan contract while concluding a sale contract. For example, one person would say to another, "I will sell you my car at the market price on the condition that you lend me an amount of money." Muslim jurists prohibited this form of transaction. The Ḥanafīs justified the prohibition of stipulating a loan when arranging for a contract of sale by saying that such a condition is not required by the contract and can benefit only one of the contracting parties. The Ḥanbalīs were of similar view when they justified the prohibition by saying that stipulating a loan when selling something is an example of stipulating one contract in another contract, and thus the transaction will contain two contracts in one contract, a practice that the Prophet (ﷺ) prohibited.

Imām al-Shāfiʿī has given a different reason for the prohibition that deserves much pondering and consideration. This is because al-Shāfiʿī did not justify the prohibition of such an arrangement because it contains a condition which is not required by the contract or because it consists of two contracts, as the Ḥanafīs and Ḥanbalīs stated. Rather, he justified the prohibition due to the existence of ambiguity. He argued that stipulating a loan when concluding a sale will create an ambiguity in the price. This is because the seller would take the benefit of the loan into account while fixing the price of the commodity. However, the benefit from the loan is not certain as the borrower has to settle the loan upon demand by the lender. Since the benefit from the loan is not certain, consequently the price of the commodity is not known. Therefore such a sale is prohibited (al-Marghīnānī, 1980; Ibn Qudāmah, 1994; Ibn Qudāmah, 1404 AH; al-Shāfiʿī, 1393 AH). According to al-Shāfiʿī, the seller did not agree to sell his commodity unless the buyer gave him a specific price for it plus a loan to be given to him. This means that the value of the commodity has become the combined total of both the price and the loan. And since the lender can demand the settlement of his loan at any time, it creates an ambiguity in the total price, which is the specified price and the economic benefit that the seller will gain from the loan that he requested from the buyer. The reason for such an ambiguity is the fact that the economic benefit of the loan is unknown or it might not even exist at all, due to the right of the lender to take back his loan any time he wants. This leads to the creation of ambiguity in the total price of the commodity, which renders the sale invalid. Imām al-Shāfiʿī said in his book al-Umm:

> The prohibited arrangement of having a contract of sale with a loan contract is best illustrated when a seller says to a buyer, "I will sell you this commodity at a certain price on the condition that you give me a specific amount of loan." The reason for such a prohibition is related to the legal rule of loans, which stipulates that any loan can be requested by the lender at any time he desires. Thus, if such a sale is allowed, it would have both a known and unknown price, and such sales are totally prohibited because valid sales cannot be implemented unless the price is known (al-Shāfiʿī, 1393 AH, vol. 3, p. 76).

In conclusion, Imām al-Shāfiʿī, who prohibited the previously mentioned first form due to the existence of usury, realized that there is no usury in the second form, which led him to prohibit it due to the existence of ambiguity in the total price.

The Ḥanafīs and Ḥanbalīs also did not see any kind of usury in the second form. However, they prohibited it based on the fact that it consists of two contracts in a single contract. On the other hand, Imām al-Shāfiʿī prohibited it not because it consists of two contracts in a single contract but because of the existence of ambiguity in the total price. This means that the purpose behind the prohibition of having a sale and a loan in the same contract is to prevent any form of trickery or cheating to gain usury by increasing the price of the commodity or decreasing it, and not because the contract consists of two sub-contracts. Some Muslim jurists seemed uncertain in the matter of two contracts in one; when they were able to justify the prohibition because of the existence of usury, they used such justification; and when they could not rely on such justification, they would prohibit it based on the apparent structure of having two contracts in one contract. This means that there is uncertainty in using the latter justification as a reason for the prohibition of such contracts.

> *"The Ḥanafīs and Ḥanbalīs also did not see any kind of usury in the second form. However, they prohibited it based on the fact that it consists of two contracts in a single contract. On the other hand, Imām al-Shāfiʿī prohibited it not because it consists of two contracts in a single contract but because of the existence of ambiguity in the total price"*

Two Sales in One Sale

Another related issue is the prohibition of a sale contract that comprises two sales. The following discussion is devoted to the prohibition of two sales in one sale in particular and the prohibition of two contracts in one contract in general. Abū Hurayrah said, "The Prophet (ﷺ) prohibited having two sales in one sale" (al-Bayhaqī, 1414 AH, *ḥadīth* no. 10651).

«نَهْيِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ بَيْعَتَيْنِ فِي بَيْعَةٍ».

Abū Hurayrah also quoted the Prophet (ﷺ) as saying:

«مَنْ بَاعَ بَيْعَتَيْنِ فِيْ بَيْعَةٍ فَلَهُ أَوْكَسُهُمَا أَوْ الرِّبَا».

> "Whoever contracts two sales in one sale, he will have either the lesser of the two prices or usury" (Abū Dāwūd, 1950, *ḥadīth* no. 3461; al-Bayhaqī, 1414 AH, *ḥadīth* no. 10651)

Ibn Masʿūd said:

«نَهَى رَسُولُ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ عَنْ صَفْقَتَيْنِ فِي صَفْقَةٍ وَاحِدَةٍ».

> "Prophet Muhammad (ﷺ) prohibited having two transactions in one transaction" (Ibn Ḥanbal, 1983, *ḥadīth* no. 3783).

The first *ḥadīth* of Abū Hurayrah was authenticated by al-Tirmīdhī who said, "This *ḥadīth* is sound and authentic" (al-Tirmidhī, 1999). As for the second *ḥadīth* of Abū Hurayrah, al-Ḥafiz al-Mundhirī said in Mukhtaṣar al-Sunan, "In its chain of narrators is Muḥammad ibn ʿAmr ibn ʿAlqamah, and more than one has doubted his credibility." Al-Shawkānī said something similar (al-Shawkānī, 1419 AH, *ḥadīth* no. 2179). As for the third *ḥadīth*, it was narrated by ʿAbd al-Raḥmān ibn ʿAbd Allah ibn Masʿūd from his father, and there is a doubt about whether ʿAbd al-Raḥmān heard *ḥadīths* from his father, as the son mentioned that his father died when he was six years old. Ḥāfiz Ibn Ḥajar mentioned the *ḥadīth* in Talkhīs al-Ḥabīr, and did not comment on it (al-ʿAsqalānī, 1986). Al-Haythamī said in Majmaʿ al-Zawāʿid, "The transmitters relied on by Aḥmad in this *ḥadīth* are all acceptable authorities" (al-Haythamī, 1414 AH, *ḥadīth* no. 6382 – 6384; Ibn Ḥanbal, 1983). Thus the texts that mentioned the prohibition of having two sales in one sale are accepted in general.

The Meaning of Two Sales in One Sale

There are many explanations about the meaning of having two sales in one sale; some of them are as follows:

(1) The seller will mention two different prices for one commodity—either because of the differences in the characteristics of the price itself or because one price is paid in cash and the other in instalments—and the parties separate before agreeing on a specific price or mode of payment. For instance, a seller says, "I will sell you this commodity for ten broken dirhams or nine perfect dirhams" (Ibn Qudāmah, 1404 AH); or a seller says, "I will sell you my house for 1000 cash or 2000 in instalments." This is the explanation of Imām al-Shāfiʿī (al-Ṣanʿānī, 1998, *ḥadīth* no. 752; Ibn al-ʿArabī, 1995). It also happens if the seller offers a buyer more than one commodity for sale at the same time; for instance, when a seller says, "I will sell you this book for 100 or this pencil for 10."

(2) One of the parties involved in the transaction stipulates that the other party shall enter into another transaction that will benefit him, such as a loan contract or currency exchange or lease. For example, a seller says, "I will sell you this house on the condition that you will lend me 1000 dinars." This is another interpretation by Imām al-Shāfiʿī (al-Shirbīnī, 2003; al-Ṣanʿānī, 1998).

(3) A seller says, "I will sell you a certain commodity for 100, and you can pay the price in instalments for a period of one year; however, you have to sell it back to me at a price of 80 in cash."

This is what Ibn al-Qayyim thought to be the preponderant interpretation (Ibn al-Qayyim, 1415 AH). Or the seller would say, "I will sell you a certain commodity at 80 in cash on the condition that I have to buy it back from you for 100 in instalments."

(4) A seller sells someone, for example, 10 tons of wheat on the condition that he has to pay the price in instalments for a period of one year, and when the time of full settlement comes the buyer says, "Sell me the wheat that I owe you for the price of 15 tons of wheat with the condition that you delay the payment for another year." (Prolong the period of instalments and I will increase the price).

(5) A seller says, "I hereby sell you a certain commodity for 10 dinars on the condition that you give me its equal value in dirhams." It means the sale contract will include another contract for currency exchange. Thus, it will be two contracts in one contract. This form of two transactions in one transaction was suggested by al-Shāfiʿī, Abū Ḥanifah, Aḥmad, Ishāq, and Abū Thawr (Ibn al-ʿArabī, 1995).

Juristic Opinions on Two Sales in One Sale

We mentioned previously the different possible meanings of having two transactions in one transaction, and perhaps the most suitable of these meanings is the one in which a seller will give two different prices for one commodity. This is because this meaning is in line with the *ḥadīth* of the Prophet Muhammad (ﷺ) in which he said:

«مَنْ بَاعَ بَيْعَتَيْنِ فِيْ بَيْعَةٍ فَلَهُ أَوْكَسُهُمَا أَوْ الرِّبَا».

"Whoever has contracted two sales in one sale, he will have either the lesser of the two prices or usury" (Abū Dāwūd, 1950, *ḥadīth* no. 3463).

The text of the *ḥadīth* implies the existence of two different prices for one sold item. For instance, a seller says, "I will sell you my house for RM 100,000 cash or 200,000 in instalments," and then they separate without agreeing on one of the two prices. This was prohibited by the majority of Muslim jurists because of the ambiguity surrounding the price of the house. However, the Mālikīs prohibited it for a different reason: the possibility of receiving usury if the contract is binding. They explained their opinion by saying that a buyer might choose buying the house for one of the two prices, and then he might change his mind and decide to buy the house at the other price. In this case he would be considered to have sold one of the two prices for the other price. It is because when the buyer has decided to buy the house at one of the two prices on offer, it is as if he has possessed the commodity according to that price; and then when he chose to buy the house at the other price, it is as if he has substituted the price based on paying cash for the price based on paying instalments, or vice versa. This exchange between the two prices is considered usury. However, if the choice was given to the buyer without obliging him to conclude the sale of the house, then there will be no possibility of usury, because the contract itself is not binding, which means that there would be no consequences on the buyer if he decided to change from one price to the other since the implementation of the contract is not mandatory for the buyer (Ibn Rushd, 2003). This opinion of the Mālikīs is extreme in its nature. However, not all the Mālikīs endorse it. For example, Ibn Juzay' of the Mālikī School has supported the interpretation of the majority of Muslim jurists that the prohibition of two sales in one is due to the ambiguity surrounding the price and not because of the possibility of receiving usury (Ibn Juzay', 1989; Abū Zayd, 2004).

> ***"the prohibition of two sales in one is due to the ambiguity surrounding the price and not because of the possibility of receiving usury"***

There is also a possibility that the meaning of having two sales in one sale might be the third explanation that was mentioned earlier, in which a seller says, "I will sell you a certain commodity at RM 100, and you can pay the price in instalments for a period of one year; however, you have to sell it back to me at a price of RM 80 in cash. This is what the majority of Muslim jurists call an *ʿīnah* sale, or what the Mālikīs call *buyūʿ al-ājāl*. Moreover, there is also the possibility of interpreting the concept of having two sales in one sale according to the fourth explanation that was mentioned earlier, which would be similar to the usury that was practiced during the pre-Islamic period (Abozaid, 2004).

Based on the above information, the majority of Muslim jurists do not interpret the prohibition of two contracts in a single contract as applying to every transaction involving two transactions. There are, however, some jurists such as al-Shāfiʿī who did uphold

the more literal view that the prohibition covers all combined contracts. The implication of this latter view is that there is no logical reason for the prohibition of having two contracts in a single contract, which is a problematic assertion in *muʿāmalāt* issues. We hold the view that the prohibition of combining two sales in one sale does have discernible reasons: it applies to cases where the combination leads to ambiguity regarding the price and to cases where the combination is used to circumvent the prohibition of *ribā* or leads to *ribā* irrespective of intent.

However, if there is no attempt to charge usury directly or indirectly, and there is no ambiguity or risk or harm that may affect one of the two contracting parties, then there is no reason to understand and interpret the prohibition of two contracts in one contract in an absolute and general way. This interpretation is strengthened by the scholarly consensus that it is permissible to require a mortgage or guarantee in a loan or sale contract, which provides an indisputable exception to the general wording of the prohibition. Moreover, the nature of today's transactions requires contracts to be connected with other contracts and dependent on one another. Thus, adopting the opinion which prohibits combined contracts in general will cause unnecessary hardship without the existence of a clear text that supports such a prohibition.

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AN ANALYSIS OF THE RELATED ISSUES AND TRANSACTIONS

1. Stipulating Compensation for Inflation when Providing a Loan

Some Muslim jurists were of the opinion that depreciation of currencies could happen with regard to *fulūs*. *Fulūs* comprised a currency with weak purchasing power that was used alongside gold dinars and silver dirhams. *Fulūs* were made from base metals like bronze and iron and were used to buy things of trivial value. The jurists were of the opinion that the value of the *fulūs* could drop as it does not have an intrinsic value unlike the silver dirhams and the golden dinars, which have intrinsic value. Currencies that are now in circulation are comparable to *fulūs* as in both cases their values fluctuate. In fact currencies are more susceptible to inflation, and change of value. Thus, juristic opinions expressed about *fulūs* are equally applicable to currencies. The following is a discussion of the juristic opinions on this issue.

The majority of Muslim jurists are of the opinion that changes in the value of a currency do not affect the amount of the loan itself. Accordingly, the borrower is obliged to pay the exact amount taken from the lender regardless of the changes that later affect the value of the currency. Similarly, if the loan was a certain amount of wheat, and it happened that its price decreased or increased, the borrower is obliged to return the exact amount of wheat that he borrowed regardless of its price (Ibn Qudāmah, 1404 AH; Ibn ʿĀbidīn, 1987; al-Suyūṭī, 1411 AH).

On the other hand, there are jurists who are of the opinion that the changes in the value of the currency decide the amount of money that the borrower has to pay. As such the borrower has to settle the loan based on the current value of the currency. This is one of the two opinions put forward by the prominent Ḥanafī jurist Abū Yūsuf, and it is the opinion that is generally followed within the Ḥanafī School. Ibn ʿĀbidīn, a Ḥanafī jurist, states, "I have not come across a Ḥanafī who followed the opinion of the Imām," referring to the opinion of Abū Ḥanifah that a loan should be settled at the exact amount in which it was taken irrespective of the changes in the purchasing power of its currency (Ibn ʿĀbidīn, 1987).[4] With regards to the time at which the value of the loan is determined, Abū Yūsuf is of the view that it is the day the borrower receives the loan from the lender (Ibn Ḥumām, 1921; Ibn ʿĀbidīn, 1987, vol. 6, p. 279).

However, the OIC Fiqh Academy, which is based in Jeddah, has stated in its Resolution No. 4 taken in the year 1409H that any change affecting the value of the loan's currency has no effect on the amount of the loan and that loans must be settled with the exact same amount of money, regardless of the fluctuations in the value of the loan's currency. The Academy reconfirmed its stance on the matter in another decision issued in the year 1414H (Resolution no. 42, 1409).[5]

We would like to argue in favour of the Ḥanafī opinion as it protects the right of the lender, especially in cases of high inflation when the value of a currency depreciates sharply. The purchasing power of a currency on the date when the loan takes place may not be the same as its purchasing power on the date when the loan is settled. It is not in any way associated or connected to usury since the value of the paper currency is only symbolic and subject to fluctuations. Therefore, a borrower while settling a loan has to consider the purchasing power of the currency at that time that the loan was given and its purchasing power at the time that the loan is settled. Verse 2: 279 of the Qur'ān states that a creditor who repents from usury is entitled to the return of his "principal" without interest. The verse further states: "Do no wrong, and no wrong will be done to you." It is therefore possible to argue that a creditor is entitled to the return of his "principal" in cases of hyper-inflation where the value of the currency drastically fluctuates.

> *"It is therefore possible to argue that a creditor is entitled to the return of his "principal" in cases of hyper-inflation where the value of the currency drastically fluctuates"*

2. Stipulating a Place for the Settlement of a Loan

Muslim jurists are of the opinion that a creditor can exercise his right to demand the loan if he happens to meet the debtor in a city/country other than the city/country in which the loan was granted. However,

the lender cannot compel the borrower to settle the loan if the value of the loan in that country is more than its value in the country where the loan took place. For instance, the debtor may not have the same type of currency in which the loan was borrowed. Consequently, he may incur extra cost as a result of fluctuation in the exchange rate. He may have the same type of money but it is of higher value than the value of the loan in the country where it was incurred. The value of the loan is more frequently closely associated with the place where the loan was granted (Ibn Qudāmah, 1404 AH; al-Nawawī, 1992; al-Buhūtī, 1402 AH; Ibn ʿĀbidīn, 1987).

> ***"Muslim jurists used the term "suftajah" to describe a loan contract in which a creditor stipulates another place for its settlement"***

However, the issue takes a different dimension when a creditor stipulates another place for the settlement of the loan. Muslim jurists used the term "*suftajah*" to describe a loan contract in which a creditor stipulates another place for its settlement. The word *suftajah* originates from Persian and was incorporated into the Arabic language (Ibn ʿĀbidīn, 1987).[6] A creditor by stipulating another city or country for the settlement of the loan can benefit in two ways. First, he can transfer the fund from one place to another without taking the risk usually associated with the physical transfer of a large sum of money. Second, the creditor can avoid the payment of fees that he would otherwise have to pay to transfer his money from one place to another. Is one or both of these benefits prohibited to the creditor?

The Shāfiʿīs and Mālikīs have prohibited any condition that can benefit the creditor in either of these two ways. According to them, any condition stipulating the settlement of loan in a place other than the one in which the loan is given benefits the creditor and is prohibited. The Mālikīs defined *suftajah* as the instruction sent by the borrower—upon the order of the lender—to his representative in a certain country to settle the loan with the lender in that country (al-Dasūqī, 1900). The Shāfiʿīs, who have given a similar definition to *suftajah*, also ruled on its prohibition (al-Shīrāzī, 1995).

The Ḥanbalīs argue that a lender may benefit from the loan contract provided this does not harm the borrower. Accordingly, they argue that it is valid to stipulate the settlement of loan in another place provided it does not cause any inconvenience to the debtor and there is no risk of insecurity (Ibn Qudāmah, 1404 AH).

The Ḥanafīs defined *suftajah* as a loan contract where a lender stipulates another place for the settlement of his debt with the intention to transfer his money there without taking the risk of insecurity normally involved in such a transfer. Subsequently, the borrower will be liable and will have to guarantee the settlement of the loan in the stipulated place. By giving this limited definition to *suftajah* without referring to the cost that the debtor may incur, the Ḥanafīs ruled that it is strongly disliked to the extent of prohibition (Ibn ʿĀbidīn, 1987). The Ḥanafīs have taken a middle ground. They argue that it is prohibited to stipulate that the borrower should pay for any cost that involves the settlement of debt in the designated place. However, as to the benefit that the creditor may derive by transferring his money to the designated place without taking the risk of insecurity, the Ḥanafīs view this condition as strongly disliked to the extent of prohibition (*karāhah taḥrīm*) (Ibn ʿĀbidīn, 1987). The reason why they have not ruled on its prohibition could be attributed to the fact that the benefit of avoiding the risk of insecurity is not tangible. Furthermore, the existence of this risk is not certain.

In our opinion the stand of the Ḥanbalīs on *suftajah* is preferable. This is because any benefit that the lender gets without harming or burdening the borrower should not be prohibited. As for the issue of prohibited benefit, it is the benefit that can cause harm to the borrower. This means that the loan which can bring benefit to the two parties without harming either of them and which does not contradict any Sharīʿah principle will not be prohibited, especially when we know that the Sharīʿah does not prohibit a benefit which will not harm anyone. Moreover, there is no clear evidence that prohibits *suftajah.*

The juristic rule that any loan which provides benefit to the lender is considered usury is a general rule which cannot be applied to *suftajah.* It is permitted that the borrower may voluntarily return the loan to the lender with an excess over and above the value of the loan. This means that the benefit to the lender per se is not prohibited provided it does not harm the borrower. It is therefore argued that a lender may stipulate that the borrower should settle the loan in a place different from that where the loan was granted. However, *suftajah* is prohibited if the condition causes any harm to the borrower such as travel risk or causes the borrower to incur extra cost and the lender refuses to compensate him.

3. Stipulating a Reciprocal Loan in Order to Receive a Loan

When a lender stipulates that a borrower can only receive a loan if he provides a loan to the lender, either prior to the first loan or at a later date, this loan is called a reciprocal loan. This raises a number of questions: Is giving a loan on the condition of receiving another loan considered a benefit for the lender, and thus prohibited? Is the possible prohibition of such a contract due to the fact that it consists of two contracts? The following are some statements of the Muslim jurists on a loan made conditional upon another loan.

Al-Ḥaṭṭāb in his book *Mawāhib al-Jalīl* stated, "There is no disagreement that it is not allowed for a person to lend to another on the condition that the borrower will lend him money later" (al-Ḥaṭṭāb, 1987). In *al-Sharḥ al-Kabīr*, al-Dardīr said, "[The statement] 'Lend to me and I will lend to you,' is a loan that will result in a benefit" (al-Dasūqī, 1900). Ibn Qudāmah (1404H, vol. 4, p. 211) stated:

> If the lender stipulated in a loan contract that the borrower should rent him his house or sell him something or lend him an amount of money, this contract is prohibited, because Prophet Muhammad (ﷺ) prohibited a sale and a loan in the same contract. This is because it is the stipulation of a contract in a contract just like someone selling his house on the condition that the buyer sells his house to him.

Al-Buhūtī said:

> If a borrower stipulated in a loan contract that he will give back an amount less than what he had borrowed, the contract will be prohibited. This is because the amount borrowed is not equivalent to the amount returned; and if either the borrower or the lender stipulated in the contract of the loan that one of them should sell or rent or lend to the other as a condition for receiving the loan, this contract will be prohibited as well. This is because it will be that same as having two transactions in one transaction, which is prohibited" (al-Buhūtī, 1402 AH).

Also, al-Bujayramī (n.d., vol. 2, p. 356) stated in his commentary that giving a loan on the condition of receiving another loan will result in a benefit for the lender and is prohibited.

As discussed, some jurists argued for the prohibition of a reciprocal loan on the grounds that it amounts to gaining benefit from a loan while others argue that it is because it consists of two contracts in one contract. Thus, our discussion of the legality of reciprocal loans will be limited to these two main issues. Those who argue for the prohibition of a reciprocal loan view it as a form of benefit to the creditor. They argue based on the *ḥadīth* that states:

«كُلُّ قَرْضٍ جَرَّ مَنْفَعَةً فَهُوَ رِبًا».

> "Any loan which results in a benefit is considered usury."

> ***"since giving a loan with the condition of receiving another loan from the borrower will cause harm to him, such a condition is not allowed"***

It is also possible to examine this issue from the borrower's perspective. Does a reciprocal loan where a loan is provided on the condition of receiving another loan harm the borrower? If a lender stipulates in the loan contract that the borrower must lend him a loan, it will cause harm to the borrower. It will oblige the borrower to give away money that is in his possession to another; and by doing that he will not be able to benefit from that money. Thus, a lender has no right to stipulate that the borrower should lend him another loan, so that he can get compensation for the economic loss that results from not being able to use the money of the loan throughout the loan period. It is due to the fact that giving a loan to another is a form of donation. Therefore, the extent to which a lender can benefit from his loan is restricted as it should not cause harm to the borrower. And since giving a loan with the condition of receiving another loan from the borrower will cause harm to him, such a condition is not allowed. In short, the lender cannot give a loan with the condition that he must receive one from the borrower to compensate for his economic loss. This is because such a condition will cause harm to the borrower even if he is not going to pay an extra amount of money to the lender. If such a condition is prohibited, then there is all the more reason to prohibit giving a loan with the condition of receiving one to acquire economic gain. That is because it will cause greater harm to the borrower.

Reciprocal Loans in Different Currencies

This type of a reciprocal loan involves two different types of currencies. For example, an individual might possess an amount of a certain currency but be in need of an amount of another currency that is available with another individual, and the latter is in need of the currency which the former has. Both of them feel, due to unfavourable exchange rates, that it is not preferable to convert the currencies they have with the currency that they need. Subsequently, they can enter into reciprocal loans in different currencies. At the time of settlement each side will get back the loan in the same currency in which they provided the loan. This arrangement is mutually beneficial as both parties have managed to avoid conversion of their currencies (al-Liḥyānī, 2002; al-Maṣrī, 1987). The purpose behind providing a loan on the condition of receiving another loan in a different currency is not to borrow money but the need of each party to obtain money in a different currency. Accordingly, the issue of harm to the borrower does not arise provided the value of the two loans remains equal. If the value of one of the two loans is higher or one of the two loans is given for a longer period of time, the transaction is not allowed. For example, if one Malaysian ringgit is equal to fourteen Syrian liras, and two traders agree to borrow money from each other in ringgits and liras, a transaction where one of them lends the other RM 1000 for one year on the condition that he receives SL 20,000 for a similar period of time, is not permitted. In this case the lender of RM 1000 will benefit as he would receive an extra loan of SL 6,000. Thus, providing reciprocal loans in different currencies is allowed if the purpose of the parties is to avoid the exchange of their currencies and when both loans are of equal value.

Reciprocal Loans among Members of a Society (Jamʿiyah)

The idea of a mutual loan society is based on an agreement among members of a group to contribute a certain amount of money on specific periodical dates. The combined amount in each period is given to a member of the group on a rotation basis. The rotation takes place in accordance with an agreed upon list or in accordance with the result of a draw conducted by them, or in accordance with the pressing needs of the members. The contractual relationship between members of the group is based on a loan contract. A member lends a certain amount of money to other members and in turn he receives loans from other members. Consequently, the loan he provides is on the condition that other members of the group will provide him a loan. For instance, in a society of four members where each member lends RM 1000 monthly, the first member will receive a loan of RM 3000. He is a borrower from the other three members. The second member will also receive RM 3000. However, of this amount, RM 1,000 comes to him as the settlement of the loan paid by the first member whereas RM 2,000 is given to him as a loan by the third and fourth members. The third member will also receive RM 3,000, of which RM 2,000 would be the settlement of the loans by the first and second members and RM 1,000 would be a loan given to him by the fourth member. The fourth member will receive RM 3000, which is the settlement of the loans by the first, second and third members of the society. Thus, the first member is a borrower to all other members while the fourth member is a lender to all of them. The second member is a lender to the first member and a borrower from the third and fourth members while the third member is a lender to the first and second members and a borrower from the fourth member. Every member is a lender to those who preceded him, and a borrower from those who followed him. Members may agree to continue the rotation for another complete cycle with a different order.

Although this arrangement is based on a loan contract, the purpose behind the idea is not to lend and borrow money. Such societies enable members to periodically receive cash which they can subsequently utilise for investment purposes and other needs. Societies also force the members to periodically save a portion of their income and to receive by rotation an amount of money which is the total sum of their savings for a certain period. Moreover, the arrangement of societies is different from conditional reciprocal loans in two ways. First, in a society a member provides a loan to another not on the condition that the borrower should give him a reciprocal loan but on the condition that the other members should provide him with a loan. The condition is not imposed on the borrower and it does not cause him any financial loss. Second, the lenders in each stage do not get any benefit from the loan they provide to the borrowers. The borrowers too are not harmed in any way as they only settle their loans. In his commentary al-Qalyūbī has stated "The principle of one woman taking a specific amount of money from each member of a group of women every Friday or every month, and then giving it to one member of the group, and repeating the cycle until every woman of the group gets the same amount, is permissible, as the Iraqi jurists said" (al-Qalyūbī, 321). The idea is based on social solidarity and mutual cooperation. However, if the members are dissatisfied with the arrangement and the elements of mutual cooperation and social solidarity disappear, then the arrangement should be discontinued.

4. Providing a Loan and Stipulating a Sale

Giving a loan through a transaction—which was mentioned by later Ḥanafīs—refers to a sale contract between a prospective lender and a borrower in which a certain item is sold for a price higher than its market price without stipulating this sale as a condition for the subsequent contract of loan. Ibn Qudāmah compiled a summary of statements of Muslim jurists concerning the legal rule of increasing the price of a certain item for the purpose of giving a loan, whether the sale transaction takes place prior or after the loan. He states that in matters of religion all types of tricks (*ḥiyal*) are prohibited. According to him, it is a trick if a permissible contract is concluded with the intention of committing a sin such as committing an act which is prohibited by Allah (ﷻ), or desecrating His commands, or omitting an obligation, or depriving a person from his right. He next cited several examples of tricks. His last example concerns giving a loan to someone and then selling him a commodity at a price higher than its real value, or buying from him a commodity at a price less than its real value as a way to receive a compensation for the loan he has provided. He then concluded that it is a trick and is prohibited, and this is the opinion of Mālik. On the other hand, Abū Ḥanīfah and al-Shāfiʿī said that everything of this kind is valid provided that it is not mentioned in the loan contract (Ibn Qudāmah, 1404 AH).

In fact, the Ḥanafīs and Shāfiʿīs regard both contracts of loan and sale as valid. Their position is not surprising because, according to them, the validity of a contract is judged based on its apparent form, and in form both contracts are proper and remain separate as there is no condition that connected the contract of sale with the loan and vice versa. This is the stand taken by the later Ḥanafīs, but it does not necessarily mean that the opinion is generally accepted in the School. In order to elaborate we will discuss the two forms which this transaction can take.

The first form is when a sale takes place prior to advancing a loan. For instance, a person sells a car valued at RM 10,000 for a price of RM 15,000 and then provides the purchaser with a loan of RM 35,000. In this case, the purchaser-cum-borrower owes the lender a total of RM 50,000. However, he received RM 45,000 only, comprised of RM 35,000 as a loan and RM 10,000, which is the actual value of the car. Such a deal was permitted by some later Ḥanafī scholars such as al-Khassāf, Muḥammad ibn Muslimah, the Imām of Balkh, and Shams al-A'immah al-Ḥalwānī. However, all of their contemporaries prohibited it. They justified their prohibition by saying that it is a loan that creates a benefit to the lender. This is because the borrower would not have bought the overpriced car had it not been for the loan. Therefore, this loan brought about a monetary benefit to the seller-cum-lender, which is the difference between the actual value of the car and the price for which it was sold, which in this case is RM 5,000. However, al-Ḥalwānī defended his stance on a technical basis by arguing that the benefit to the lender did not come from the loan but from the sale. There are also those who argued that this arrangement is prohibited if the sale and loan contracts are concluded at the same meeting as this would provide the lender with a benefit.

The second form is when the sale takes place after the loan contract. In this case the financial consequences will be identical to the first type. This means that the purchaser-cum-borrower will owe the lender a total of RM 50,000, and the seller-cum-lender will receive a monetary benefit of RM 5,000, which he could not have gained had it not been for the loan he provided to the purchaser-cum-borrower. Al-Karkhī argued for the permissibility of such a transaction. However, al-Ḥalwānī argued for its prohibition. He contended that the borrower may think that by refusing to purchase the item from the lender the latter may immediately demand the settlement of his loan (Ibn ʿĀbidīn, 1987).

It seems that during the period when this type of transaction was concluded the difference between the actual value of the sold item and the price for which it was sold to the borrower was substantial. This led some scholars to issue a religious decree (fatwa) which was supported by a decree by the ruler that required that the profit gained from the contract of sale should not exceed 1/20 or 5% of the total amount of the loan given to the purchaser-cum-borrower. Another religious decree permitted a profit ratio not exceeding 3/20 or 15% of the total amount of the loan. For example, if a person lends another 100 dinars, then the profit he gains from the sale of an item to the borrower must not exceed the true value of that item by more than 5 dinars according to the first decree, and must not exceed it by more than 15 dinars according to the second decree. Any seller-cum-lender who violated these profit ratios was subjected to *taʿzīr* punishment and imprisoned until he repented and showed regret for his his action (Ibn ʿĀbidīn, 1987).

These decrees, however, are not representatives of the general stand within the Ḥanafī School. In fact, they are based on juristic opinions of later Ḥanafīs which were opposed by most of their contemporaries. Moreover, what we mentioned earlier about the benefit that the lender receives from such loans is a proof that such loans are unlawful, and there is no difference if the loan took place before or after the sale as long as

the fulfillment of one is a condition for the execution of the other. A condition may not necessarily be expressly stipulated and written, but the parties may agree upon it, or it is implicitly understood. As the Ḥanafīs themselves say:

الْمَعْرُوفَ عُرْفًا كَالْمَشْرُوطِ شَرْطًا

> "What is known customarily is just like what is stipulated explicitly in the contract" (Ibn ʿĀbidīn, 1987).

It is therefore argued that such a decree (fatwa) is not valid. Furthermore, what points to the invalidity of such decrees is the fact that it required those scholars who issued it to set ratios for permissible profit margins gained from the sale that takes place before or after the loan is given to the buyer-cum-borrower. This meant that the scholars have opened a back door for people to use these decrees as a pretext to increase the margin of profit gained from the sale. In addition, the decrees which were issued later to define the permissible profit margins were not a practical remedy at all due to the fact that there was a need to issue an order from the ruler himself to guarantee the enforcement of such decrees, which meant that people at that time did not follow such decrees. Instead they chose to adopt a previous decree which did not limit the margin of profit, as greed does not know any limit.

A not uncommon practice nowadays in some societies is that a trader lends a farmer an amount of money to help him with his farming activities on the condition that the farmer sells to him the crops at a lower price or at the market price upon harvesting. The lender benefits as he has ensured the supply of the crops that are essential for his trade, especially if the type of the crop is of a certain quality which will be less available in the market. This practice is prohibited if we adopt the opinion that prohibits any transaction that contains two contracts or if we prohibit any form of transaction that consists of a sale and a loan. However, if we consider what we regarded earlier as the preponderant view, which does not prohibit such transactions merely because it has both a sale and a loan but because of the negative consequences such as usury or exploiting the borrower that might come out of joining both contracts in a single transaction, then there is no harm in this issue. To make sure that usury or exploitation will not take place, the following conditions must be met:

(1) The two parties must not decide on a price for the crop before the arrival of its season. This is because the price of the crop might go up, which will harm the farmer and benefit the trader in this particular form of transaction. In other words, there should not be a sale transaction but a promise to sell the commodity at the market price.

(2) The way the trader treats the farmer should not be different from the way he treats other farmers who did not receive a loan from him with regards to the price of purchase or the method of payment for any product that the trader is selling to the farmers.

(3) The selling of the crop by the farmer to the trader should not lead to an increase in the cost for the farmer or the loss of a bigger profit that was available to him.

With these three conditions, usury and exploitation will not take place, and no reason for the prohibition of such transaction will remain except for the fact that the transaction will contain a loan with a sale, for those who believe in such justification. And we have mentioned earlier, we do not consider such justification warranted. Moreover, we have stated earlier the opinion of the Ḥanbalīs which permits the lender to benefit from loan if it does not harm the borrower.

In this case there is no harm to the borrower. It does not matter to him whether he sells the commodity to trader A or B as long as they offer the same market price. Thus, in this case having a loan with a sale will benefit both parties without inflicting harm on either of them. And since this is the case, the Sharīʿah will not prohibit a benefit that will be realized by both parties. Based on these conditions, the arrangement is also different from a *salam* sale. Under this arrangement, the commodity price is not decided in advance but would be determined at the time of delivery, and the farmer is free to sell to others if they offer a higher price.

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5. Providing a Loan and Stipulating a Mortgage

It is permissible for the creditor to require the debtor to provide a mortgage or a guarantor in order to strengthen the claim of debt and to guarantee its payment. The Qur'ān has referred to the permissibility of taking a pledge in the following verse:

﴿وَإِنْ كُنْتُمْ عَلَى سَفَرٍ وَلَمْ تَجِدُوْا كَاتِباً فَرِهَانٌ مَقْبُوْضَةٌ﴾

> If you are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose) (al-Qur'ān, 2:283).

However, the pledge taken must be for a loan for which the pledge is stipulated. There should not be any stipulation in the loan contract that would require that the pledge, guarantee or collateral should be extended to cover preceding debts. That would mean that the lender has benefitted from the present loan by using it to require collateral for a previous loan. Al-Nawawī considered it similar to a stipulation that would enhance the quality of the loan whereby the lender stipulates that the borrower must settle the loan in a type of money of better quality than the loaned money (al-Nawawī, 1992; Ibn Qudāmah, 1404 AH).

Utilization of the Mortgaged Property

As mentioned earlier, there is no harm in stipulating a mortgage that can be a form of collateral for loan. However, is it permissible or forbidden for the lender-cum-mortgagee to benefit from the mortgaged property? Muslim jurists looked into the matter of the mortgagee benefiting from the mortgaged property from the aspects of whether the mortgage is taken as a result of a loan or as a result of a sale contract. We are concerned here with the former. There are three different opinions from Muslim jurists regarding this issue.

The Mālikī scholars argue that it is prohibited for the mortgagee to utilize the mortgaged property. The prohibition applies without any consideration of the types of mortgaged property and regardless of whether or not such utilization was mentioned in the contract. They justify their opinion by arguing that a contract of mortgage that entitles the mortgagee to utilize the mortgage property enables the lender to benefit from the loan, which is prohibited. If the contract of mortgage is silent on this issue but the mortgagee is verbally given the permission to utilise the mortgage property, it amounts to receiving a gift from the borrower, which is also prohibited. According to this opinion, any stipulation that entitles the mortgagee to benefit from the mortgage property is prohibited even if such a benefit is calculated and deducted from the amount of the loan. Such a stipulation, they argue, combines a loan contract with a lease contract, which is a contract for the sale of usufruct. Accordingly the arrangement is prohibited as it combines a loan and a sale contract. If the utilisation of the benefit is not stipulated and the mortgagee uses the mortgaged property and later deducts the amount payable for the use from the loan, it is still prohibited if the borrower charges the lender a price lower than the market price. If the mortgagee is charged to pay the market price for the use of the mortgaged property, then there are two opinions; one forbids this as well, and the

other considers it disliked (*makrūh*). These Mālikī scholars justified their arguments against the utilisation of the mortgaged property with reference to the occurrence of usury (al-Dasūqī, 1900).

The Shāfiʿīs concur with the Mālikīs in prohibiting the mortgagee from benefiting from the mortgaged property. However, their argument for the prohibition is based on a different reason. The Shāfiʿīs argue that the ownership of the mortgaged property and its benefit belong to the mortgagor. Accordingly the mortgagee cannot benefit from the mortgaged property regardless of the type of the mortgaged property. Thus, any contract that stipulates that the mortgagee should benefit from the mortgaged property violates the ownership right of the mortgagor and is therefore void. Their argument is based on the following *ḥadīth*:

«لا يُغْلَقُ الرَّهْنُ مِنْ صَاحِبِهِ الَّذِي رَهَنَهُ، لَهُ غُنْمُهُ وَعَلَيْهِ غُرْمُهُ».

> "The owner of mortgaged property does not forfeit it when he has mortgaged it; he will continue to receive its benefits and bear its expenses" (al-Bayhaqī, 1414 AH, *ḥadīth* no. 10982; ʿAbd al-Razzāq, 1403AH, *ḥadīth* no. 15033; cf. Ibn Mājah, 1980, *ḥadīth* no. 2441).

The Shāfiʿīs also argue that a condition which entitles a mortgagee to benefit from the mortgaged property is not a valid condition of the mortgage contract and is therefore not allowed (al-Shirbīnī, 2003; al-Nawawī, 1992; al-Bujayrimī; al-Ghazālī, 1997).

The Ḥanafīs argue that, since the mortgaged property and its benefit belong to the owner, the mortgagee cannot use it except with the permission of the mortgagor. For instance, even if a book is mortgaged,

the mortgagee cannot read it except with the permission of the mortgagor. However, some Ḥanafīs argue that it is prohibited for the mortgagee to use the mortgage property even with the owner's permission as, in substance, it becomes a loan that provides benefit to the lender. Some other Ḥanafī scholars consider the mortgagee benefitting from the mortgaged property to be strongly disliked (*makrūh taḥrimī*) but not prohibited (*ḥarām*) (al-Kasānī, 1982; Ibn ʿĀbidīn, 1987).

The Ḥanbalīs differentiate between a mortgaged property which needs provisions such as food and maintenance—for example, cows, horses and sheep—and a mortgaged property which does not need provisions such as a house. Mortgaged properties which need provisions are subdivided into two types. The first type includes those animals that can be milked or ridden and the second type includes those animals that cannot be milked or ridden. According to this opinion, the mortgagee can benefit from the mortgaged animal that can be milked or ridden without the need to get permission from the mortgagor provided that the value of the benefit is equal to the amount spent on it. The reason for its permissibility is its compensatory nature where the mortgagee pays for the maintenance of the animal and in return is permitted to benefit from it. However, if the mortgaged animal cannot be milked or ridden and needs provisions, the mortgagee cannot use it except with the permission of the mortgagor. If the mortgaged property is not a living being but a house that is about to collapse, the mortgagee is not bound to repair the house. If the mortgagee repairs the house, the cost cannot be claimed from the mortgagor nor is he allowed to use the house as a compensation for the cost. As for other mortgaged properties that do not need any provisions, the mortgagee cannot benefit from them without giving the mortgagor a fair market price as compensation. The absence of compensation or paying the owner a lower price than the market price would mean that the lender is benefiting from the loan at the expense of the borrower (al-Buhūtī, 1402 AH; Ibn Qudāmah, 1404 AH).

The reason why a mortgagee can utilize a mortgaged animal which can be milked and ridden without getting permission from the mortgagor, and cannot utilise a mortgaged animal that cannot be milked and ridden—despite the fact that the element of compensation exists in both cases—is the existence of a special text which permits the utilization of the former. Abū Hurayrah quoted Allah's Apostle (ﷺ) as saying:

«الرَّهْنُ يُرْكَبُ بِنَفَقَتِهِ إِذَا كَانَ مَرْهُونًا، وَلَبَنُ الدَّرِّ يُشْرَبُ بِنَفَقَتِهِ إِذَا كَانَ مَرْهُونًا، وَعَلَى الَّذِي يَرْكَبُ وَيَشْرَبُ النَّفَقَةُ».

"The mortgaged animal can be used for riding as long as it is fed, and the milk of the milch animal can be drunk according to what one spends on it. The one who rides the animal or drinks its milk should provide the expenditures." (al-Bukhārī, 1981, *ḥadīth* no. 2377; al-Tirmīdhī, 1999, *ḥadīth* no. 1254; Ibn Mājah, 1980, *ḥadīth* no. 2440; al-Dāraquṭnī, 1996, *ḥadīth* no. 2905).

Other Muslim jurists do not agree with the Ḥanbalīs on this issue. They argue that this *ḥadīth* is referring to the mortgagor, who as the owner is responsible for providing any expenditure that the mortgaged animal needs. Otherwise they contend that the *ḥadīth* would contradict another *ḥadīth* which is narrated by Ibn ʿUmar in which the Prophet said:

«لَا يَحْلِبَنَّ أَحَدٌ مَاشِيَةَ امْرِئٍ بِغَيْرِ إِذْنِهِ».

> "No one may milk an animal without the permission of its owner" (al-Bukhārī, 1981, *ḥadīth* no. 2303; Ibn Mājah, 1980, *ḥadīth* no. 2304; Abdul Razzāq, 1403AH, *ḥadīth* no. 6958).

The Ḥanbalīs argue that it is mentioned in the *ḥadīth* that if the animal is mortgaged, the mortgagee has to provide hay for it, and the milk of the animal can be taken. And the one who drinks the milk of the animal should provide the expenses, and can ride it (Ibn Ḥanbal, 1983, *ḥadīth* no. 7153; al-Dāraquṭnī, 1996, *ḥadīth* no. 2906; al-Ṭaḥāwī, 1979):

«إِذَا كَانَتِ الدَّابَّةُ مَرْهُونَةً فَعَلَى الْمُرْتَهِنِ عَلَفُهَا، وَلَبَنُ الدَّرِّ يُشْرَبُ، وَعَلَى الَّذِي يَشْرَبُ نَفَقَتُهُ، وَيَرْكَبُ».

Thus, if the hay of the animal is provided by the mortgagee, he can benefit from it as a compensation for what he spends on it. They further say that the term بِنَفَقَتِهِ, which means "according to what one spends on it" in the abovementioned *ḥadīth* proves that the benefit is a compensation for the expenditure. The benefit that the mortgagor gets from his animal is not a compensation for what he spends on it. Thus, they argue that the *ḥadīth* is referring to the mortgagee. They also contend that the *ḥadīth* that allows such a benefit has specified the general meaning of the second *ḥadīth* in which the Prophet said, "No one should milk someone's animal without his permission."

«لا يَحْلِبَنَّ أحدُكم ماشِيَةَ أحد إلا بإذنه».

Thus, there is no contradiction between the two *ḥadīths*.

In conclusion we can say that the mortgagee's utilization of the mortgaged item is totally prohibited according to the Mālikīs, whether the mortgagor gave permission for such a benefit or not, and it is also prohibited according to the Shāfiʿīs. As for the Hānbalīs, it is completely allowed for the mortgagee to benefit from the mortgaged animal if it needs provisions and can be milked and ridden. Such benefit will be a compensation for whatever he spends on it. However, if the mortgaged item needs provisions and cannot be milked or ridden, then the permission of the mortgagor is needed. As a result, the Hānbalīs see the benefit of the mortgagee as a compensation for what he spends on the mortgaged item, but that does not mean the value of the benefit can exceed the amount he spends on the mortgaged item regardless of whether the permission of the mortgagor was obtained or not. This is to prevent the lender from benefiting from the loan he provided to the borrower. What supports this argument is the fact that the mortgagee is prohibited to benefit from the mortgaged property if it does not need any provisions, even if the mortgagor allows it, unless a fair compensation is given to the mortgagor.

For the Ḥanafīs it is necessary for the mortgagee to obtain the permission of the mortgagor in order to utilize the mortgaged property. Although it is the preferable opinion among the Ḥanafīs, there is no consensus among the Ḥanafī jurists on the issue of benefiting from the mortgaged property by the mortgagee. Some Ḥanafīs argue that it is prohibited due to the probability that it may lead to usury as the mortgagor may give permission out of compulsion. Other Ḥanafī scholars argue that the act is highly disliked (*makrūh taḥrimī*). Al-Ṭaḥāwī has stated that what is common among the people is to provide a loan to the borrower and take his property as a mortgage in order to benefit from it, without which the lender would not have provided the loan in the first place. This means that it is a condition because what is well known (*maʿrūf*) is just like what is stipulated (*mashrūt*), which in turn means that such benefit is prohibited (Ibn ʿĀbidīn, 1987). In this regard it can be stated that the Shāfiʿīs have a similar stance to the Ḥanafīs. This is because the only reason they prohibit the mortgagee from stipulating the use of the mortgaged item in the contract is the fact that the benefits of the mortgaged item belong to the mortgagor and not because of the possibility of it leading to usury. Thus, if the mortgagee obtained a benefit without stipulating it and with the consent of the mortgagor, then we do not think that the Shāfiʿīs would have argued for its prohibition due to usury because such a benefit is no more than a gift by the mortgagor, and the Shāfiʿīs just like the rest of the Muslim jurists allow the benefit that the lender gets such as an increase in the amount of the loan or an improvement in its quality if it is not stipulated in the contract.

Finally, we can say that it is permissible for the mortgagee to benefit from the mortgaged property provided he gives the fair market value of such a benefit to the mortgagor, as the Ḥanbalīs stated, or obtains a genuine permission from him to benefit from the mortgaged property, as some of the Ḥanafīs stated. The reason for the permissibility of such a benefit, according to the Ḥanbalīs, is the compensatory nature of the arrangement while, to the Ḥanafīs, such a benefit could be considered as a gift from the mortgagor that should be permissible, similar to a gift given by a borrower to a lender. They add the caveat, however, that such a benefit or a gift must not be stipulated in the contract and that there is no custom that would sanction such a benefit or a gift. Accordingly, the contemporary practice in some Muslim countries where the lender takes the borrower's land or a house as a mortgage and then benefits from it does not conform to the opinions of the Ḥanbalīs and Ḥanafīs and is therefore a prohibited act (Ibn ʿĀbidīn, 1987). The borrower or mortgagor is not provided with a fair compensation in exchange for the benefit that the lender derives from the mortgaged land or house as the Ḥanbalīs stipulated. Furthermore, there is no permission from the mortgagor to allow the mortgagee to benefit from the mortgaged land or house. Even if such a permission exists, it is not genuine as the mortgagee will not provide the loan if the permission is not granted. In essence such a loan is provided for the sole purpose of taking the land or a house as a mortgage and benefiting from it.

6. Sale with Promise (Bayʿ al-Wafāʾ)

Bayʿ al-wafāʾ may take the form of a conditional loan where a lender provides a loan on the condition that the borrower should sell him certain property, usually land, for a deferred price that corresponds with the amount of the loan. The price is not paid on the spot but is deferred. However, the lender would have to resell the item to the borrower when the later returns the loan. This means that the buyer-cum-lender can use the item and benefit from it until the loan is settled. *Bayʿ al-wafāʾ* can also take another form. In this form a seller sells a certain property to a purchaser on the condition that the purchaser resells it to the seller if the latter gives back the full price to the former. In the second form of this sale there is no contract of loan. Instead, the seller who is in need of cash will sell an item to a purchaser on the condition that the purchaser should resell it to the seller for the same price whenever he pays it. In this form the buyer will

become the owner of the item and will benefit from it until the seller repurchases the item for the same price.

The reason this type of sale was called *bayʿ al-wafā'* is that the buyer gives a solemn pledge to the seller that the item will be resold to him when he gives back the full price of the item. *Bayʿ al-wafā'* was used as an alternative to a usurious loan when a person in need of cash could not find someone willing to lend him money without getting something in return. This transaction has numerous names. When it first appeared in Greater Syria it was called *bayʿ al-ʿiṭā'ah* while in Egypt it was called bayʿ al-amānah. Some Ḥanafīs call it *bayʿ al-muʿāmalah*. The Shāfiʿīs call it *bayʿ al-ʿuhdah* and *bayʿ al-maʿād*; the Ḥanbalīs call it *bayʿ al-amānah*; and the Mālikīs call it *bayʿ al-thunyā* (al-Ḥaskafī; Ibn Nujaym, 1990; al-Dasūqī, 1900; al-Ḥaṭṭāb, 1987; al-Sharawīnī & Ibn al-Qāsim; al-Buhūtī, 1402 AH).

> *"Most of the latter-day Ḥanafīs therefore were of the opinion that bayʿ al-wafā' is in substance a mortgage contract and is thus subject to all of the rules and conditions that apply to that contract"*

Juristic Opinions on *Bayʿ al-Wafā'*

The latter-day Ḥanafī scholars discussed this sale in more detail as they introduced it and argued for its permissibility. They differed over its *takyīf fiqhī* (jurisprudential classification). Some of them argued that it is a mortgage and not a sale. Therefore the item that the borrower gives to the lender is not the latter's property, and he cannot use and benefit from it unless he gets permission from its owner. The borrower can ask for the return of the mortgaged property if he settles the loan. A second group contended that it is an invalid (*fāsid*) sale with regards to some of its aspects and accordingly both the seller and buyer can revoke it. A third group argued that *bayʿ al-wafā'* has the characteristics of a valid sale with regards to some of its aspects such as the right of the buyer to possess and benefit from the bought item. They also say that it has the characteristics of a mortgage with regards to some other aspects; for example, the buyer cannot sell or mortgage it, and if it is destroyed then the loan will be cancelled. Despite their differences, these scholars agree on its permissibility due to people's need. Some Ḥanafīs considered the second opinion the preferable one while others chose the third opinion. However, Ibn ʿĀbidīn and the majority of latter-day Ḥanafī scholars decided that the first opinion is the preferable view (Ibn ʿĀbidīn, 1987).

The Rule (*Ḥukm*) of *Bayʿ al-Wafā'*

Although many of the latter-day Ḥanafīs argued in favor of *bayʿ al-wafā'* due to people's need, the Mālikīs, Shāfiʿīs, and Ḥanbalīs did not agree with them. As for the Mālikīs and Hānbalīs, they argue for its prohibition on the ground of intentions in contracts and the blocking of any means that can lead to usury. Although the Shāfiʿīs do not agree with the Mālikīs and Hānbalīs on the question of intention and on the use of blocking the means in contracts, they still argue that *bayʿ al-wafā'* is invalid. Their argument is based on the invalidity of the condition that the purchaser should resell the item to the seller as it contradicts the effect of the sale contract. According to them, *bayʿ al-wafā'* is considered void due to the existence of this condition (al-Ḥaskafī; Ibn Nujaym, 1990; al-Dasūqī, 1900; al-Ḥaṭṭāb, 1987; al-Sharawīnī & Ibn al-Qāsim; al-Buhūtī, 1402 AH).

Bayʿ al-wafā' is similar in substance to a type of mortgage contract where the mortgagee benefits from the mortgaged property, an issue that has been discussed in the previous section. In contracts, consideration is given to the purposes and the substance rather than words and forms. Most of the latter-day Ḥanafīs therefore were of the opinion that *bayʿ al-wafā'* is in substance a mortgage contract and is thus subject to all of the rules and conditions that apply to that contract. This means that the mortgagee-cum-buyer cannot benefit from the item unless he gets permission from the mortgagor-cum-seller. However, as we mentioned earlier, there is no consensus among the Ḥanafī scholars on the issue of a mortgagee who benefits from the mortgaged property even with the permission of the mortgagor. Some of them have argued for the prohibition of such a benefit due to the fact that it might be a form of usury, as more frequently a mortgagor is under compulsion to grant permission. Accordingly, it is not allowed for the buyer-cum-mortgagee in *bayʿ al-wafā'* to benefit from the property.

Ibn ʿĀbidīn mentioned in his commentary that some Ḥanafī scholars suggested to al-Māturīdī that, due to the inherit evil in *bayʿ al-wafā'* and its widespread use among the people, it would be advisable to have a consensus among Muslim jurists that would declare *bayʿ al-wafā'* in substance as a mortgage contract. He replied, "The current practice of *bayʿ al-wafā'* is based on our fatwa which is well-known to the people. Those with a different opinion should give their verdict and

support it with the necessary evidence" (Ibn ʿĀbidīn, 1987). In our opinion, *bayʿ al-wafā'* is in substance a mortgage contract. The International Islamic Fiqh Academy of the OIC decided that *bayʿ al-wafā'* is in substance a loan that provides a benefit to the lender and that it is a means to usury and is therefore not valid (Zuḥaylī, 1989). It is relevant here to mention that *bayʿ al-wafā'* was known earlier in Europe as a way to gain usury during the time of its prohibition by the church. The French law defined it as a sale that provides the seller with the right to buy what he had sold within a period of time not exceeding five years (al-Maṣrī, 1987).

> ***"Bayʿ al-istighlāl takes place when a property is sold through the sale of wafā' on the condition that the seller of the property should lease it from the buyer"***

The sale of *wafā'* is closely related to the sale of exploitation (*bayʿ al-istighlāl*). *Bayʿ al-istighlal* takes place when a property is sold through the sale of wafā' on the condition that the seller of the property should lease it from the buyer (The Mejelle, 1967). This means that the buyer will benefit from the property by leasing it to the seller and charging him rentals. At the same time the seller has the right to purchase the property whenever he gives back the price to the buyer. Thus, *bayʿ al-istighlāl* is a type of *bayʿ al-wafā'* with an additional condition that the seller has to lease the property from the purchaser. Some of the latter-day Ḥanafīs permitted such a sale as well. However, based on the preponderant opinion within the Ḥanafī School, as mentioned by Ibn ʿĀbidīn, *bayʿ al-wafā"* is in substance a mortgage contract and is therefore subject to the same rules and conditions. Thus, the sale of exploitation (*bayʿ al-istighlāl*) is accordingly considered prohibited. The reason for the prohibition is the fact that the mortgagor owns the mortgaged property and its usufruct or benefit. Hence, it is not valid to require the mortgagor to pay rental for the property and the usufruct that he owns. Moreover, the mortgagee cannot lease the mortgaged property to a third party and benefit from its rental. If the property is leased to the third party with the permission of the mortgagor, the rental must go to him. If the property is leased to a third party without the mortgagor's permission, the rental may either go to charity or to the mortgagor. In conclusion, the buyer in the sale of exploitation cannot lease the mortgaged property either to the seller or to a third party as this will render the sale void (Ibn ʿĀbidīn, 1987).[7]

CONCLUSION

In Islam, a loan (*qarḍ*) is considered a gratuitous contract, and it is commendable (*mandūb*) for a lender to provide a loan to a borrower who is in need of money. Both the Qur'ān and Sunnah promise reward to a lender who provides a loan to a person in need. The fact that the Sharīʿah prohibits the lender to derive any conditional benefit from the loan further emphasises its gratuitous nature. It also implies that the loan contract should not be used for profiteering purposes. The Sharīʿah, by prohibiting usury (*ribā*) and any other benefit to the lender, implies that a fund provider who seeks a profit should use other debt- or equity-based contracts such as a sale or a profit-loss-sharing arrangement.

A statement attributed to the Prophet (ﷺ) prohibits a lender from stipulating any condition that would benefit him at the cost of the borrower. It is still open to further discussion and research to find out whether the intention of the ḥadith is that the lender should not benefit from the loan contract or that the borrower should not be harmed. According to the first understanding, a condition that does not benefit the creditor but harms the debtor could still be accepted. An example of a condition that does not benefit the creditor but harms the borrower is provided by the current practice of Islamic banks where a procrastinating debtor is charged a penalty (*gharāmah*) which does not go to the creditor but is channelled to charities. If the *ḥadīth* is interpreted to mean that the creditor should not benefit from the loan or debt, then the practice of charging a penalty does not fall within the ambit of the prohibited practices, particularly when it discourages procrastinating debtors to delay the payment of their instalments. However, if the *ḥadīth* is interpreted to mean the protection of the debtor, then imposing a penalty in the absence of any justification may pose problems. The act of a debtor that harms the creditor is an equally significant issue since the Sharīʿah prohibits both the infliction and reciprocation of harm.

There could also be conditions that benefit the lender without harming the borrower either financially or non-financially or a condition that is of mutual benefit to both the lender and the borrower. The classical examples of these types of conditions are where a loan is provided on the condition that the borrower should return the loan in a certain place. In this case the lender benefits by the transfer of his money to another place and the borrower is not harmed as he has arrangement in place to settle the loan in the stipulated place. Furthermore the borrower ideally also prefers to settle the loan in stipulated place. There is a mutual benefit to the lender and the borrower. Such a condition is approved by the Ḥanbalī jurists.

The debate over the derivation of benefit by a lender from a loan contract, which was inspired by the prophetic *ḥadīth*, is rich with arguments to which numerous scholars from different *fiqh* schools have contributed. It touches on the gratuitous nature of the loan contract and the practice of usury as well as the extent of the contractual parties' liberty to impose conditions. It also led Muslim jurists to come up with innovative albeit controversial contracts such as *suftajah*, *bayʿ al-wafā'* and *bayʿ al-istighlāl*. The contract of *suftajah* provides a useful insight on how the Ḥanbalī jurists were in favour of stipulating a condition that would be of mutual benefit or a condition that would not harm the borrower. The contracts of *bayʿ al-wafā'* and *bayʿ al-istighlāl* show how early Muslim jurists in their efforts to avoid a loan that provides conditional benefit to the lender, attempted to deal with the accommodation of call and put options in a sale contract. Certain features of these contracts are currently employed in structuring various *ṣukuk* products, particularly *ṣukuk al-ijarah*.

Some of the contracts discussed in this research paper are relevant to contemporary issues in Islamic banking and finance. We hope that this research will be of help to both academia and the practitioners in Islamic banking industry as it presents the basic concept and the surrounding juristic debates. We also hope that more innovative deposit, financing and *ṣukuk* products can be structured that comply with the Sharīʿah not only in form but in substance and spirit.

> ***"We also hope that more innovative deposit, financing and ṣukuk products can be structured that comply with the Sharīʿah not only in form but in substance and spirit"***

End Notes

[1] Fungible (*mithlī*) properties are aggregates of minute parts which are exactly alike and resemble each other. If they are destroyed they can be replaced by an equal quantity of a similar property without any difference in the constituent units. Examples of fungible properties are gold, silver, money, rice, wheat, corn, barley, salt, oil, etc. Fungible properties are usually sold by weight, measure, volume, or by numbers. Dissimilar or non-fungible (*qīmī*) properties are those the like of which could not be found in markets or, when they are found, dissimilarities would still exist. They include all those properties which cannot be exchanged by weight or measurement of capacity such as land, houses, animals, trees, precious stones, used cars or equipment, etc.

[2] A *ṣāʿ* is a measure of volume.

[3] *Salam* is a sale transaction in which the price of a specified amount of a commodity deliverable at an agreed upon future time is paid immediately upon signing the contract.

[4] Al-Ḥaskafī did not mention in *al-Durr al-Mukhtār* any disagreement on this issue; instead, he stated that there is a consensus in the Ḥanafī School that the amount of the loan will not be affected by the change in the value of its currency. This statement is an error on the part of al-Ḥaskafī.

[5] See Resolution no. 24 (4/5) regarding changes in currency value, the 5th Conference, Kuwait, 1409/1988, and Decision no. 79 regarding several issues related to currency, the 8th Conference, Brunei, 1414/1993.

[6] Its origin root is *saftah*, which means a perfect thing in Persian; it was called *saftah* due to the perfection that is in the loan.

[7] As mentioned earlier we can argue that attributing the permissibility of both the sale of *wafā'* and sale of exploitation to the Ḥanafīs in general is a mistake because it is the opinion of some of their latter-day scholars, and it is not the preponderant view within the School, as we have mentioned earlier.

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Notes

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