

The Binding Unilateral Promise (*wa'd*) in Islamic Banking Operations: Is it Permissible for a Unilateral Promise (*wa'd*) to be Binding as an Alternative to a Proscribed Contract?

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Past jurists have three distinct positions on the unilateral promise (*wa'd*):

1. For the majority of jurists, fulfilling it is recommendable.
2. For Ibn Shubrimah and others, fulfilling it is obligatory except where otherwise justified.
3. For the *Maliki* school, fulfilling it is obligatory, if the case entails difficulties for the unilateral promisee, i.e., in case he incurs a cost. For instance, if the promisor says to the unilateral promisee: Get married, I unilaterally promise (*wa'd*) you 10 thousand Riyals and the latter does marry, then, the promisor is duty-bound to fulfill his unilateral promise (*wa'd*).

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

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

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

The first proponent who instituted the practice of the binding promise in commutative contracts was probably Sheikh Mustafa Al-Zarqa in his *Introduction to Jurisprudence (Al-Madkhal Al-Fiqhi)*, Vol. II, p. 1032). That stance filtered into his book on *Insurance (Nizam Al-Ta'min)*, pp. 58 and 131) where he adopted the position that if it was admissible, for some jurists, for the unilateral promise (*wa'd*) to be binding in donations, then, in his view, it was even more justifiable for the unilateral promise (*wa'd*) to be binding in commutative contracts! Al-Zarqa was followed by Dr. Yusuf Al-Qardawi in his book on *Resale Contracts (Bay' Al-Murabahah)*, p. 85). He was also followed by Dr. Hasan Al-Shazli in *The Academy Journal (Majallat Al-Majma')*, Vol. V, Part IV, p. 2720). In *Bay' Al-Murabahah*, p. 105, Al-Qardawi attributed to the *Hanafi* School a divergence on *Istisna'* (i.e., a contract for the manufacture and sale of a product according to a pre-specified design, deadline, and price)—as to whether it was binding or non-binding? In fact, of the matter, they differed on whether it was a contract or a unilateral promise (*wa'd*)? Had they decided that a unilateral promise (*wa'd*) was binding, then their divergence would be meaningless.

The binding unilateral promise (*wa'd*) permeated the rulings of jurists on Islamic banking, such as Sheikh Mohammed Al-Mokhtar Al-Salami, Sheikh Mohammed Taqi Othmani, Sheikh Abdullah Al-Manee, Sheikh Abdul Sattar Abu Ghudda, Sheikh Ali Al-Qurrah Daghi, and Sheikh Hasan Al-Shazli, all of whom proclaim: we decree that a contract is a unilateral promise (*wa'd*) and we decree that a unilateral promise (*wa'd*) is binding.

The consequence of such a direction in adopting rulings is, in my view, to make “Islamic” banking operations conform to traditional banking transactions and render them even more complicated, obscure, and costly.

I can argue that if a contract is proscribed in a given case, then a binding unilateral promise (*wa'd*) is equally proscribed therein; and so this is a global rule in which I rest my case with those who would substitute the binding unilateral promise (*wa'd*) for the contract and thus turn that which is prohibited or unlawful (*Haram*) into that which is lawful (*Halal*)!

The difference of opinion among jurists on the plain unilateral promise (*wa'd*) should not be extrapolated to the unilateral promise (*wa'd*) that substitutes for the contract, since in this case the unilateral promise (*wa'd*) may not be binding under any circumstances. Hence, divergence is inadmissible thereon and must be given up altogether in favor of non-binding as one consistent position.

Due to the prevalent controversy among modern jurists on unilateral promises (*wa'd*), the decision of the Islamic Fiqh Academy of 1409H reflected the tension of the debate, thus expressing the ebb and flow between the two camps on both sides of the divide. The Academy decided:

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

The drawbacks of this decision can be summarized as follows:

1. The Academy relied on researches into the unilateral promise (*wa'd*) that were carried out separately from the issue of *murabahah*, where the authors ignored the link between the unilateral promise (*wa'd*) and the resale contract, even though the provisions governing the plain unilateral promise (*wa'd*) are completely different from those governing the unilateral promise (*wa'd*) in resale and other commutative transactions.
2. After the decision was issued, I noticed that, for a number of scholars and researchers in Islamic banking jurisprudence, if they happened to be supporters of requiring the unilateral promise (*wa'd*) to be binding, they would refer to Paragraph

One of the Decision, and if they happened to be among the detractors of that stance, they would refer to Paragraph Two.

3. The decision distinguished the unilateral promise (*wa'd*) from the *muwa'adah*, or bilateral promise (*muwa'da*). However, despite the fact that the purpose of the unilateral promise (*wa'd*) is voluntary offer and the purpose of the *muwa'ada* is commutative operations, supporters of the binding bilateral promise (*muwa'da*) refer, as we mentioned above, to Paragraph One of the Decision on Unilateral Promise (*wa'd*), even though they should refer to Paragraph Two on *muwa'adah*. Nevertheless, I am of the opinion that, from a scientific perspective, this distinction between unilateral promise (*wa'd*) and bilateral promise (*muwa'da*) simply does not make sense. It would have been preferable to assert that the plain unilateral promise (*wa'd*) provides an area where there may be divergence among jurists as to whether it is binding or not and that where the unilateral promise (*wa'd*) is an alternative to a proscribed contract, under no circumstance can it then be binding, because if the contract is proscribed in a given eventuality the binding unilateral promise (*wa'd*) is equally proscribed therein. In addition, a plain unilateral promise (*wa'd*) and a bilateral promise (*muwa'da*) are one and the same thing in that in the unilateral promise (*wa'd*), a man could not be said to be promising himself, since in both cases two parties are involved: the party making and the party accepting the offer.
4. The Decision prohibited the unilateral promise (*wa'd*) to be binding on both parties but allowed it to be so on one of them. This arbitrariness does not make sense either. One should treat the unilateral promise (*wa'd*) either binding on both parties or optional for both parties. Making it binding upon one to the exclusion of the other, is illogical, unacceptable, and denotes a misinterpretation of some jurisprudential texts, such as *Al-Um* by Imam Al-Shafi'i (Part III, p. 33). The position is also surprising in view of the fact that the research and contributions of the Academy on the matter do not point to this result, except for the view expressed by Dr. Al-Sadiq Al-Darir—even though the debate generally went in the opposite direction (cf. the antithetical views of Sheikh Abdullah bin Baya, and Sheikh Yusuf Al-Qardawi, Sheikh Abdullah Al-Bassam in *The Academy Journal (Majallat Al-Majma'*, Volume V, Part II, pp. 1551, 1066, and 1592 respectively)).

In summary, it is inadmissible for the unilateral promise (*wa'd*) as an alternative to a proscribed contract, such as selling goods that are not in one's possession, to be binding, because a binding unilateral promise (*wa'd*) is analogous to a contract. Any views for making it binding upon both or either parties, explicitly or implicitly, by virtue of a Memorandum of Understanding (MOU), a sideline agreement, or any other circumvention, are not founded on any legitimate basis. (Cf. *Ibtāl Al-Hiyal* by Ibn Battah; *Iqamat Al-Dalil Ala Ibtāl Al-Tahlil* by Ibn Taymiya; *Adab Al-Talab* by Al-Shawkani, pp. 169-180; *Rudud Ala Abātil* by Mohammed Al-Hamid, pp. 512, 535, 539, 548, and 563; *Al-Hiyal fi Al-Sharia Al-Islamiya* by Mohammed Abdulwahhab Bahiri; *Al-Hiyal Al-Fiqhiya fi Al-Mu'amalat Al-Maliyah* by Mohammed bin Ibrahim).

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