

Applications of Combining Qarḍ and Commutative Contracts in Financial Institutions in Malaysia

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ABSTRACT

It is well-known in Islamic financial institutions that *Ribā* is prohibited under *Shari'ah* due to various reasons, such as to ensure equity in exchange and to protect the wealth from unjust and unequal exchanges. In the Islamic financial industry, there are many contracts which are debatable among the scholars. Combining *Qarḍ* and commutative contracts is one of the contracts in which scholars hold different views. This is due to the *Hadīth* of Prophet (PBUH) “two conditions in one sale are not allowed, nor combining loan and sale, nor selling what is not in one’s charge”. Thus, this paper aims to investigate whether this type of contract is permissible according to *Shari'ah* or not, as it remains to be an issue of debate. By doing so, the paper aims to analyse the above-mentioned *Hadīth* through a qualitative analysis, extracting the correct interpretation with specific reference to Malaysian experience. The paper concludes by evidencing that the meaning of loan in the mentioned *Hadīth* is *Qarḍ*, while this *Hadīth* also includes all commutative contracts since they are similar to sale. The paper also elucidates several forms pertaining to the combination of *Qarḍ* and commutative contracts such as: a) combining *Qarḍ* and commutative contract by a stipulation in the contract, b) combining *Qarḍ* and commutative contract without a stipulation in contract, c) combining *Qarḍ* and commutative contract without a stipulation, prejudice or collusion. At the end, the paper provides some recommendations for Islamic financial institutions.

ملخص

معلوم أن الربا محظور في المؤسسات المالية الإسلامية بموجب الشريعة لأسباب مختلفة، مثل ضمان العدالة في معاملات التبادل وحماية الثروة من المبادلات غير العادلة وغير المتكافئة. وفي الصناعة المالية الإسلامية، هناك العديد من العقود المتنازع عليها بين العلماء. ويعتبر الجمع بين عقود القرض والتبادل أحد العقود التي تختلف فيها آراء العلماء. وذلك راجع لما جاء في حديث النبي صلى الله عليه

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وسلم «لَا يَحِلُّ سَلْفٌ وَبَيْعٌ، وَلَا شَرْطَانِ فِي بَيْعٍ، وَلَا رِبْحٌ مَا لَمْ تَضْمَنْ، وَلَا بَيْعٌ مَا لَيْسَ عِنْدَكَ» وبالتالي، تهدف هذه الورقة البحثية إلى معرفة ما إذا كان هذا النوع من العقود مسموحاً به شرعياً أم لا، حيث لا يزال موضع نقاش. وبهذا، تهدف إلى تحليل الحديث المذكور أعلاه تحليلًا نوعيًا، واستخراج التفسير الصحيح مع إشارة محددة إلى التجربة الماليزية. وتختتم بإثبات أن معنى الائتمان في الحديث المذكور هو القرض، بينما يشمل الحديث جميع العقود التبادلية لأنها تشبه البيع. كما توضح الورقة البحثية عدة أشكال تتعلق بدمج القرض والعقود التبادلية مثل: (أ) الجمع بين عقد القرض والعقد التبادلي بنص في العقد، (ب) الجمع بين عقد القرض والعقد التبادلي دون شرط في العقد، (ج) الجمع بين القرض والعقد التبادلي بدون شرط أو تحيز أو تواطؤ. وفي النهاية، تقدم الورقة البحثية بعض التوصيات للمؤسسات المالية الإسلامية.

ABSTRAITE

Il est bien connu dans les institutions financières islamiques que la *Ribā* est interdite par la *Sharī'ah* pour diverses raisons, notamment pour assurer l'équité dans l'échange et pour protéger la richesse des échanges injustes et inégaux. Dans l'industrie de la finance islamique, il existe de nombreux contrats qui font l'objet de débats entre les érudits. La combinaison des contrats *Qard* et commutatifs est l'un des contrats pour lesquels les érudits ont des opinions différentes. Ceci est dû au *Hadīth* du Prophète (PBUH) " deux conditions dans une même vente ne sont pas autorisées, ni la combinaison du prêt et de la vente, ni la vente de ce qui n'est pas à sa charge ". Ainsi, cet article a pour but d'étudier si ce type de contrat est permis selon la *Sharī'ah* ou non, car il reste un sujet de débat. Ce faisant, l'article vise à analyser le *Hadīth* susmentionné par une analyse qualitative, en extrayant l'interprétation correcte avec une référence spécifique à l'expérience malaisienne. L'article conclut en démontrant que le sens du prêt dans le *Hadīth* mentionné est *Qard*, tandis que ce *Hadīth* inclut également tous les contrats commutatifs puisqu'ils sont similaires à la vente. L'article élucide également plusieurs formes relatives à la combinaison du *Qard* et des contrats commutatifs telles que : a) la combinaison du *Qard* et du contrat commutatif par une stipulation dans le contrat, b) la combinaison du *Qard* et du contrat commutatif sans stipulation dans le contrat, c) la combinaison du *Qard* et du contrat commutatif sans stipulation, préjudice ou collusion. Enfin, l'article fournit quelques recommandations aux institutions financières islamiques.

Keywords: *Ribā*, *Qard*, Commutative Contracts, *Sharī'ah*

JEL Classification: G21

1. Introduction

It is believed that the method of Islamic economics in the fields of trade, business and investment is to be worthy of appreciation and admiration, and it is considered that the approach of Islamic economics is a competitive and valuable in the area of business. This trend along with the development of the Islamic market, is cherished by the extreme favorite of Muslim fraternity to deal with the harmony of the *Sharī'ah*'s rules and principles considering what are permissible and prohibited. It is clearly mentioned in authentic *Ḥadīth* that explains, "What is lawful is clear, and what is unlawful is clear, but between them are certain doubtful things which many people do not know. One who guards against doubtful things will keep his religion and his honor blameless, but one who falls into doubtful things will fall into the prohibited" (Al-Muslim, Ḥadīth no: 1599).

Significantly, this attitude demands that each and every contract and product of Islamic finance and banking must be permissible under *Sharī'ah* clearly and unambiguously. In this light, there are *Ḥadīths* of Prophet (PBUH) which apparently show that certain type of contract is not permitted. For Example, "It is not lawful to lend and sell, nor two conditions in a sale, nor to profit from what is not possessed, nor to sell what one does not have" (Al-Sajistānī, n.d., v. 4, p.182; Al-Hākīm n.d., v. 2, p.17). Further, the *Ḥadīth* of Prophet (PBUH): "two conditions in one sale are not allowed, nor combining loan and sale, nor selling what is not in one's charge" (Al-Nasa'i, 2001, v. 5, p. 53; Ibn Ḥibbān, 1988, v. 10, p.161). According to these two *Ḥadīth*, combining Qarḍ and commutative contracts is not allowed in Islamic law. However, jurists have different views on the matter. Therefore, the paper has discussed different *fiqhi* interpretations of the above Hadith and formulated following questions to address the juristic debate.

- How to define and determine combination of Qarḍ and cumulative contracts in the above-mentioned Hadith?
- Is it allowed or not to combine both Qarḍ and commutative contracts in Sharī'ah?
- What are the forms of combining Qarḍ and commutative contracts in present practice of Islamic banking?

To answer the above questions, the paper has developed the following objectives:

- To define and determine the combination of Qard and cumulative contracts as prohibited in the Hadith
- To analyse permissible and impermissible combination of Qard and cumulative contracts.
- To evaluate forms of combining Qard and cumulative contracts in present Islamic banking industry with specific reference to Malaysia

0.1 Research Methodology

The paper is result of a library-based research. It employs the classical jurisprudential discourses on the application of combining *Qard* and commutative contracts in Islamic finance institutions along with an objective to examine the *Sharī'ah* principles and premises of the subject. Though the paper covers the classical books and treatises on the application of *Qard* and commutative contracts, applies contemporary practices on the subject by employing a textual analysis method.

2. The Fiqhī Origins of the Combining of Qard and Sales

2.1. The Essence of Combining Qard and Sales

Its mentions in the scriptures

- 1) Abdullah bin Amr said that the Prophet (PBUH) said:
“It is not lawful to lend and sell, nor two conditions in a sale, nor to profit from what is not possessed, nor to sell what one does not have” (Al-Sajistānī, n.d., v. 4, p.182; Al-Hākim, n.d., v. 2, p.17).
- 2) Abdullah bin Amr said:
Oh messenger of Allah, we hear from you some talks do you permit us to write them. Prophet e said: yes. The first thing to be written was the prophet’s message to people of Mecca “two conditions in one sale is not allowed, nor combining loan and sale, nor selling what is not in one’s charge” (Al-Nasa’i, 2001, v. 5, p. 53; Ibn Ḥibbān, 1988, v. 10, p.161).

2.1.1. The Meaning of Loan and Sale Mentioned in the Ḥadīth

It is noteworthy that *Qard* here is defined as “the transfer of ownership in fungible wealth to a person upon whom it is binding to return wealth similar to it (AAOIFI, 2017). Unlike loan contract where any excess for the lender whether is in terms of quality, quantity, tangible things, benefits etc. is deemed prohibited as it amounts to *riba* (ISRA, 2016). The meaning of loan and how it is different from *Qard* has been further explicated in ISRA (2010) any benefit obtained by the lender from his loan is usury of a loan. Thus, there is equal exchange of the same genus in *Qard* while an excess from the same genus is loan or usury of loan. They also agree that sale in the Hadith means all commutative contracts because they are sales. In *Mawāhib Al-Jalīl* it is stated that “every commutative contract cannot be combined with loan” (Al-Ḥaṭṭāb, 1992, v. 6, p.146; 'Ullaysh, 1299, v. 4, p.501). All jurists’ opinions corroborated that notion until it became a rule that commutative contracts are benevolent contracts cannot be combined by a stipulation. Ibn Taymiyah said: “the central meaning of the hadith is to not combine a commutative and benevolence as then benevolence will be a part of the commutative not a pure benevolence” (Ibn Taymiyah 1995, v. 29, p.62).

ISRA (2010) defined sale as “the exchange of any property of value (i.e. lawful) *mal mutaḳawwam* for another such item so that ownership of each item is transferred to the other party or to permanently exchange the ownership of a tangible asset or a permissible benefit for financial compensation.

2.2. The Forms of *Qard* and Commutative Combination and Their Rulings

The combination of *Qard* and commutative contracts into three forms will be detailed in the following paragraphs with its *Sharī‘ah* rulings:

1. Combination of *Qard* contract and commutative through a stipulation in the contract form: One contract is a condition to the other in a way that a sale will not be concluded unless a *Qard* is advanced or the other way around. It can be in two cases:

First: the case of prejudice. For example, if he loans him with the condition that he leases him a usufruct with a higher price.

Second: without prejudice. For example, a stipulation in the contract that he leases him a usufruct for the same price.

The first case is unanimously prohibited by all scholars. Ibn Qudāmah said: “if he sold him with a condition that he loans him even if the condition is coming from the buyer it is prohibited and the sale is nullified. This is the Madhhab of Mālik and Shāfi’ī which I know of no differing opinion regarding” (Ibn Qudāmah, 1968, v. 4, p.177). Nawawī said: “If he loaned him with a condition that the collateral’s benefit belong to the creditor, the *Qarḍ* is nullified” (Al-Nawawī, 1991, v. 3, p. 302). Ibn Taymiyah said: “If he loaned him with a condition that he rents his shop with a price higher than the market, it is disallowed by all Muslims” (Ibn Taymiyah, 1995, v. 30, p.162).

For the second case, the four Madhāhib; Ḥanafī, (Al-Qarī, 2001, v. 6, p.79; Asshabī, n.d., v. 4, p.54) Mālikī (Al-Nafrawī, 1997, v. 2, p.144), Shāfi’ī (Al-Shāfi’ī, 1990, v. 5, p.42; Al Māwardī, n.d., v. 5, p.352) and Ḥanbalī (Al-Ruḥaybānī, 1961, v. 3, p.73) disallowed the stipulated combination of *Qarḍ* and commutative contracts irrespective of the situation. Some scholars even reported a consensus on this. For example, Ibn Abdubarr said: “scholars have a consensus that if one made a sale contract with a stipulation of *Qarḍ* to be received or advanced, this sale is void and nullified” (Ibn 'Abdubarr, 1967, v. 17, p.90; Al-Bājī, n.d., v. 5, p.29; Al-Qarāfi, 2003, v. 3, p.405). Ibn Qudāmah alluded to these two cases. He said: “if he stipulated in the *Qarḍ* that he rents him his house or sells him something or that he loans him back, it is disallowed as the prophet prohibited a sale and a loan... if he stipulated that rents him his house with price less than the market or that the debtor rents the house of the creditor with a higher price or that he gives him a gift or does him a work, it will be more prohibited” (Ibn Qudāmah, 1968, v. 6, p.437).

Some contemporary scholars allowed the combination of *Qarḍ* and commutative contracts if there is no favoring for the debtor even if it was a contractual stipulation (Al-Qārī, 2001, pp.23-25; Asshubailī, n.d., v. 2, p.454), it has been attributed to Ibn Taymiyah (Al-Qārī, 2001, pp.23-25; Asshubailī, n.d., v. 2, p.454)

and has been adopted by the *Sharīʿah* committee of Al-Bilād Bank (2013, p.181). They evidenced this with the following:

First evidence: the prohibition in the *Ḥadīth* is when there is a favoring of the creditor and if the aim of the creditor is to benefit from the *Qarḍ* using the contract as a circumvention. Therefore, Ibn Taymiyah said after mentioning the *Ḥadīth* prohibiting a sale and a loan: “it is only -Allah knows best- because he sold him something and loaned him with an increase in price because of the loan which makes the *Qarḍ* with a premium which is *Ribāʿ*” (Ibn Taymiyah, 1998, p.264).

Second evidence: *Sharīʿah* allowed benefiting from the collateral to the extent that the holder of the collateral incurs a cost spending on it as mentioned in the *Ḥadīth* reported by Abu Huraira t that the prophet r said: “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 spend on it. The one who rides the animal or drinks its milk should provide the expenditures” (Al-Bukhārī, 2004, v. 2, p.888). Therefore, if the holder of the mortgagee benefits from that and the debt was due to *Qarḍ*, it will be a combination of *Qarḍ* and a benefit similar to commutative contracts (Asshubailī, n.d., v. 2, p.455).

This second opinion allowing the combination of *Qarḍ* and commutative contracts without a prejudice is considerable, as the purpose of the prohibition is to block the means of the debtor benefiting from *Qarḍ*. Therefore, if the combination of sale and *Qarḍ* does not bring a benefit solely to the debtor, then there is no clear objection in this regard.

2. Combination of *Qarḍ* and a commutative without a contractual stipulation with the existence of prejudice (Ḥammād, 2004). Jurists have differed regarding the ruling of prejudice in the combination of *Qarḍ* and sale and they have two opinions:

First opinion: It is not allowed to combine *Qarḍ* and a commutative if there is a prejudice even without a contractual stipulation. This is the opinion of Ḥanafī (Ibn Māzah, n.d., v. 8, p.115) and Ḥanbalī and Ibn Taymiyah (Ṣāleḥ, n.d., v. 3, p.40)

reported it to be the opinion of the majority (Ibn Taymiyah, 1995, v. 30, p.162).

Second opinion: Allowing the combination of *Qarḍ* and Commutative contract without a stipulation in the contract even if prejudice exists. It is the opinion of Shāfi'ī madhhab (Al- Shāfi'ī, 1990, v. 3, p.75; Assharwānī, n.d., v. 5, p.75).

They built this on their precept that contracts are not affected by intentions and motives unless it is apparent in the contract. Shāfi'ī said: “the basis of my opinion is that any contract that is valid in appearance will not be invalidated by a doubt or a common practice between contracting parties and will be allowed because of the allowance of the apparent. I dislike for them to have a bad intention that if manifested will invalidate the sale” (Al-Shāfi'ī, 1990, v. 3, p.75).

In the Ḥāshiyah (commentary) of Assharwany and Alabbādi on *Tuḥfat Al-Muḥtāj* by Al-Haytamī it is said that: “It is well known that the invalidation of a contract is only if the stipulation is in the contract, but if they agreed on it without stipulation in the contract, there will be no invalidation” (Assharwānī, n.d., v. 5, p.74).

The evidence for the first opinion: the increase in the commutative contract is a form of *Ribā* that is disallowed because when a man lends another a thousand and sells him an item that costs five hundred for a thousand, the increase in the price of the item will have no basis except the loan. It is as if he lent him a thousand and got a thousand five hundred back. It becomes a loan that generates a benefit. Without the loan, the debtor would not have accepted the expensive price of the item (Ibn Māzah, v. 8, p.115, and v. 10, p.351).

The evidence for the second opinion: the precept dictates that the original assumption in transaction is permissibility. The prohibition in the *Ḥadīth* is taken to mean the case when there is a stipulation and this is built on a precept in the Shāfi'ī that the rulings concerns the apparent while aims and intents are left to Allah the almighty.

2.2.1. The Weighing of Evidences

The opinion with a stronger basis –Allah knows best- is the first one as the intentions of people is known not only by their utterances but also by surrounding circumstances. Therefore, if any of these intentions become apparent through a considerable method, it will be accepted and the ruling will be based on it. Disregarding intentions and motives and only considering apparent utterances and actions will lead to confusion and chaos and hardships especially when it comes to the dearest for people which their dignity and property (Elroughui, n.d., 179).

1. The combination of *Qard* and commutative contracts without a stipulation nor prejudice nor collusion. Jurists differed regarding this into two opinions:

First opinion: It is not allowed to combine *Qard* and commutative contracts even without a stipulation or prejudice or collusion. This is the opinion of Some Mālikīes (Al-Mālik, n.d., 155) and the opinion of Ḥanbalīes (Al-Buhūtī, n.d., v. 8, p.146).

Second opinion: It is allowed to combine *Qard* and commutative contracts if no stipulation, prejudice or collusion occurs. It is the opinion of the Ḥanafī (Al-Zayla'ī, 1313 AH, v. 4, p.54), Mālikī (Al-Kharashī, 1317 AH, v. 4, p.54), Shāfi'ī (Al-Shāfi'ī, 1990, v. 5, p.42) and some of Ḥanbalīes (Al-Mārdāwī, 1995, v. 12, p.351).

Evidence for the first opinion: The Prophet (PBUH) said: “The proviso of a loan combined with a sale is not allowable” (Al-Mārdāwī, 1995, v. 12, p.351).

The deduction: the wording of the *Ḥadīth* is general in terms and didn't specify whether the combination is stipulated in the contract or otherwise.

Evidence for the first opinion: the original assumption is that financial transactions are allowed unless otherwise stated. The prohibition only applies when the combination brings about a benefit solely to the creditor as stated above.

2.2.2. The Weighing of Evidences

After laying out the opinions of jurists in this issue, the evidence with a higher weightage is – Allah knows best- that the combination of *Qard* and commutative contracts is allowed if there is no stipulation, prejudice or collusion that makes the benefit given to debtor intentionally. This is

because the reason for the prohibition of the combination of *Qard* and commutative contracts is getting benefit exclusively from the contract, and in this case, the same reason no longer exists. Hence, it will be allowed to combine *Qard* and commutative contracts without having any previous stipulation.

3. Contemporary Applications of Combining Qard and Sale Contracts in Financial Institutions

3.1. Banks Charging Fees for Safekeeping of Collaterals

The Islamic bank provides the customer with a loan without charging interest with a condition that the customer pledges a valuable property such as gold which the bank will charge a fee for safekeeping of. This fee will be similar to that charged to a customer not taking a loan but higher than the market rate (other than banking sector). In this situation, a *Qard* is being combined with a commutative contract. This is a common practice in many Malaysian banks and non-banking financial institutions especially in the context of the Islamic pawnshop/al-rahn scheme or and rahn-based Islamic microcredit lending facilities by Bank Kerjasama Rakyat and Pos Malaysia (Ahmad et al., 2019 and Hassan & Faakihin, 2018).

The Shari'ah ruling: To arrive at the ruling, it is important to know the main factor that could influence the permissibility and otherwise of this practice. Therefore;

- I. *Qard* in this case is linked to the collateral which is allowable. Creditors can ask for collaterals to guarantee their loans.
- II. It is established that the party receiving the collateral should not benefit from such collateral without a counter value. The bank in this situation does not benefit from the collateral. Therefore this form is permissible from that angle.
- III. The bank will stipulate in the contract that a fee is to be paid for the safekeeping of the collateral. In this case, a *Qard* is combined with a commutative contract which is usually carried out in single contract that can't be segregated so we need to look whether this situation involves a prejudice.

Considering the fact that the bank charges a fee similar to that charged to safekeeping without taking a loan, it can be concluded that this situation does not involve a prejudice if we consider the market price to be that of the banking sector.

If the market price means the price in the entire market however, usually referred to in the financial vernacular as (market price), the bank is charging way more than the market price. In this case, prejudice can be seen. Supporting this view:

Depositing gold in banks is quite rare as a worker in a Malaysian bank has told me. Most people deposit their gold in the market as its price is significantly lower than banks. Which indicates that banks intend to benefit from the loan.

- a. Banks don't accept any collateral other than gold which might be significantly higher in value than gold (for example a real-estate property) because they cannot charge a safekeeping fee on such collateral.
- b. If the value of gold decreases significantly bank will not require customers to top up their collateral which is usually the case in other types of financing which raises the doubt that charging a safekeeping fee is not a mere collateral to guarantee the loan.

Viewing these circumstantial evidences, the researcher leans toward the opinion that banks should not charge more than the actual cost of safekeeping which is the opinion of the Islamic Fiqh Academy and AAOIFI.

In its resolution 13 (1/3) in the third conference held in Amman 1407H the Islamic *Fiqh* Academy ruled that: "Firstly, it is allowed to charge fees on the services accompanying *Qard* not exceeding the actual costs" (Resolution No.13 (1/3)).

In AAOIFI Sharia standard 57 on gold and the criteria of dealing in gold it is unequivocally stated that fees charged should only amount to the actual cost of safekeeping (AAOIFI, Shari'ah standards 55).

3.2. The Bank Stipulating That the Customer Opens an Account and Depositing Monies in it.

Some commercial banks stipulate that customers applying for financing facilities should open current account and use it to perform transactions before the bank can provide financing facilities. Banks intend from this stipulation to ensure that customers' accounts reflect their actual cash flows reflected in their financial statements which informs the bank about the liquidity situation of the customer indicating his ability to pay back his financing facilities. To deliberate on the ruling of this stipulation, it is crucial to understand the nature of current accounts and their *Fiqhī* adaptations.

The definition of current account: AAOIFI Sharīah standards defined current account as the money deposit by the customer in the bank which the customer can withdraw at any time (Islamic Fiqh Academy, n.d., 9/1/730, 777, 802, 883).

The Fiqhī adaptation of current account: There are numerous *Fiqhī* opinions regarding the adaptation of current account. I will mention the most prominent of these opinions briefly.

First: adapting it as a *Qard* with the bank as a debtor and the customer as a creditor. It is the opinion of the majority of *Sharīah* researchers (Resolution No. 90/3/9,1995) and the Islamic *Fiqh* Academy which states in its resolution "on-demand deposits (current accounts whether in Islamic banks or *Ribawī* banks are *Qrads* from a *Fiqhī* perspective with the bank required to pay back the full amount of deposit when requested. This doesn't change when the bank is solvent" (AAOIFI, Sharīah standard 19). It is also the opinion of AAOIFI (Al-Mutrik, p.346; Asshubailī, p.6).

This opinion is evidenced by:

- I. The fact that the bank owns these monies, has the right to dispose it off, owns the profit arising from it, and is required to pay it back in full amount which the meaning of *Qard*.
- II. The bank is required to guarantee the amount whether or not a negligence or misconduct is involved.

Second: which is the opinion of Dr. Hassan Al- Amīn in his book “bank deposits and its investment in Islam” (Al-Amīn, p.199). It is also deliberated by Maliki scholars under the topic of taking a loan from a trusted amount (*Wadī’ah*) whereby they opined that if the trustee is solvent and was able to return the amount he will not be required to pay it back irrespective of negligence or misconduct and it will remain as a trust (*Wadī’ah*) (Al-Māzarī, 2008, v. 2, p.1130).

This means that if current account is a trust will not be affected by the bank using a part of it for his own benefit. The bank will only be required to pay back that part and the rest will remain as trust. It is well known that banks don’t take the full amount as a loan, rather they keep a part of it, deposit another part with the central bank, and uses the rest as a loan.

Third: current account is a complex contractual structure and not a single contract. It includes elements of *Qard*, trust, agency and maybe other elements of other contracts with every contract having its own rulings and conditions. Those who opined for this relied on the general wording of evidences indicating that transaction are presumed to be allowed unless otherwise stated by Allah or his messenger (Ḥammād, 2008).

The opinion which the researcher leans towards the researchers find it less likely that current account is a form of complex contractual relation because if the contract can be adapted, there is no need to make it a new contract.

Likening current account to trust, although carries some merit as the intention is to safekeep the money and ease the access to it, overlook many differences between current accounts and trust like the following:

- a. The bank is permitted to use the money.
- b. The bank guarantees the money.
- c. The bank is required to pay a similar amount and not the actual currency notes whether or not the money is consumed.
- d. The recourse of the customer is to the obligation of the bank not to the actual currency notes.
- e. The profit arising from the money belong to the bank not to the customer (Ḥammād, 2008).

Also, trust is not to be disposed of, and if so is allowed under the permission of the owner, it becomes a loan as mentioned by Mālikīes.

In addition, the legal perspective on current account is that it is a loan and not a trust as mentioned in the Egyptian civil law article (726): “If trust is an amount of money or anything else that is consumed by utilization and the trustee is allowed to use it, it is considered a loan” likewise in the Iraqi, Syrian, Jordanian, Kuwaiti, Emirati, and Algerian civil laws (Shaḥādah, n.d.).

This is also the customary banking practice as bank receive and give loans with interest.

Considering current accounts, a form of trust because some characteristics of loans don’t manifest in it does not negate the adaptation as it is not practically possible to deduct from the account for the purpose of loaning out then adding it back.

It is also well known that banks seek to increase their deposits to reduce its financing costs by giving out gifts and rewards.

Based on the above, it can be said that current accounts resemble *Qarḍ* more than trust (*Wadī’ah*) but there are differences as there was no intention of benevolence upon opening the account especially considering that both parties benefit from the contract.

The Sharī’ah ruling: If the bank stipulates opening an account and creating a movement for the customer to be eligible to receive a financing and the intention of the bank of such stipulation is to benefit from the amounts, it is becomes similar to the issue of (loan me and I loan you) which is not allowed by majority of scholars Mālikīes (Al-Ḥaṭṭāb, v. 4, p.391), Shāfi’īes (Al-Shirāzī, 1992, v. 2, p.83) and Ḥanbalīes (Al-Buhūtī, n.d., v. 3, p.317; Najeeb and Lahsasna, 2013; Al-Hzza', 2019).

If the banks didn’t intend to benefit from the monies deposited and only wants to verify the cash flows of the customer and his liquidity situation, there seems to be no objection from a *Sharī’ah* perspective to such practice as actions are presumed to be allowable unless otherwise stated and there is no clear statement disallowing this practice especially considering that banks allow customers to withdraw the amount and transfer it at any time

which indicates that the intention of the bank to benefit from the contract is insignificant (Al-Hzza', 2019).

3.3. The Bank Stipulating that the Customer Receives his Salary on his Account with the Bank

Some commercial banks stipulate that customers applying for financing facilities receive their salaries on their accounts with the bank. This usually happens when the customers applies for financing facilities and the bank will not start the process of financing before it ensures that the customer receives his salary on his account with the bank.

The Shari'ah ruling: To arrive at the *Shari'ah* ruling we need to know the intention of the bank from such stipulation which can be divided into two cases as follows:

First case: the bank's intention is to benefit from the salary of the customer received on his account with the bank. This will carry a similar ruling to the one mentioned above i.e. the prohibition of (loan me and I loan you).

Second case: The banks intention is not to benefit from monies but to guarantee the payment of financing facilities by deducting the installments from account once the salary is received without referring to the customer. In this case it is allowed (Asshubaili, v. 2, p.454) as conditions are presumed to be allowed unless otherwise stated. There is no evidence to disallow this practice as the bank allows the customer full freedom to withdraw from his account and only deducts the installment.

4. Conclusion

The study concludes that scholars agree that the meaning of loan mentioned in the *Hadith*: "The proviso of a loan combined with a sale is not allowable" is *Qard* and that this *Hadith* includes all commutative contracts as they are similar to sale. Also, the combination of *Qard* and commutative contract can be in several forms. Firstly, combining *Qard* and commutative contract by a stipulation in the contract. If it carries a prejudice, it unanimously disallowed. If there is no prejudice and the contract does not give an exclusive benefit to the creditor it is permissible. Secondly, combining *Qard* and commutative contract without a stipulation is not allowed if a prejudice is involved. Finally, combining

Qard and commutative contract without a stipulation, prejudice or collusion is allowed as the rationale for disallowance is absent.

5. Recommendations

The following is recommended for banks;

- It is not allowed for banks to charge a fee for the safekeeping of collateral above the actual cost as decided by Islamic Fiqh Academy and AAOIFI.
- It more likely that monies deposited in current account are *Qard* and not trust (*Wadi'ah*)
- It is not allowed to stipulate opening bank accounts if the intention is for the bank to benefit from the monies deposited.
- It is allowed to stipulate opening bank accounts if the intention is to verify the cash flows mentioned in the financial reports.
- It is not allowed for the bank to stipulate receiving the customer's salary on his account with bank if the intention is to benefit from the monies transferred.
- It is allowed for the bank to stipulate receiving the customer's salary on his account with bank if the intention is to ensure that bank can deduct the installments.

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Lorem Ipsum is simply dummy text of the printing and typesetting industry. Lorem Ipsum has been the industry's standard dummy text ever since the 1500.

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