

AL- 'URF and Its Applicability in Islamic Deposit Products

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Abstract

Over the last decade Islamic banking has clear taken root. What began as novelty has made major strides. The main purpose of this paper was to explain the applicability of 'urf in Islamic deposit products. This study set about the application of 'urf in Islamic law briefly, moreover, the concept of deposit products in conventional bank just analysed while it in Islamic bank effectively analysed. The types of deposit products in both banks are chiefly current, saving and investment accounts. Moreover, the basis of each production from primary and secondary sources was explained to shows how they compliant with *Sharī'ah*. In addition, it mentioned the model of deposit products in Islamic banking that represented as *wadī'ah*, *qard Hassan* and *muḍārabah* that are replicate of conventional banking. Furthermore, it highlights the relationship between the depositor and depositee, as well as the obligations of both parties. The study argued that the adoption of the conventional banking structural practices by the Islamic banking is valid especially area of deposit and investment, since this account can be devoid of the interest element, Islamic banks are permitted by *Sharī'ah* to offer similar facilities.

Keywords

'Urf, Deposits Products, Wadī'ah, Qard Hassan, Muḍārabah

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1. Introduction

'Urf or Customary law is one of the most important supporting sources in Islamic law. This can be seen through many legal rulings (*ahkam*) in Islamic law, which was based on 'urf in which most of these *ahkam* will change according to the change of circumstances, place and time. As for basis of 'urf or custom, it is the product of the nature of the people and their culture, it grows in strength and popularity by means of imitation that transfers and implants it in the lives of people. Normally these 'urf or customs will be inherited

by generations until the come of other customs that can overrule the earlier ones.

'Urf has played a significant role in the formation of Islamic law. Many cases indicate the change of law when the 'urf of people has changed. For instance, Malik bin Anas (d.179AH/1795CH) the founder of the Maliki School, has considered the practice of al-Madinah people (*'Amal ahl al-Madinah*) as a source in making law. This indicates the importance of the 'urf of al-Madinah people to him. Similarly,

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Al-Shafi'i (d.204 AH/ 820CE) has made *ijtihad* on many problems that arose when he was in Iraq, but when he moved to Egypt he changes some of his earlier opinions because of the different circumstances and custom in Egypt.¹ Indeed, the Qur'an considers '*urf*' of the early '*Arab*' community as sources of law. As an example, the doctrine of *qisas*, which was practiced in the early community, has been approved by the Qur'an, although with some modification in terms of evidence and amicable settlement.

'*Urf* played a crucial role in business development in Islam during the period of the Prophet (*p.b.u.h*). The history of *Salam*² contract is enough to illustrate this point. In the Islamic law of transactions, the general rule is that parties are not allowed to contract with each other where subject matter is non-existent to avoid anything that can lead to *gharar*, or uncertainty, which can result in one party benefiting at the expense of the other unfairly. This rule is based on a *Sunnah* of the Prophet (*p.b.u.h*) that states, "Do not sell things that you do not own".

Therefore, this study argues that under the principle of '*urf*' which is a source of Islamic law, the adoption of the template practices of the conventional banking by the Islamic banking. As opposed to the underlying contracts is not contrary to the intent of Islamic law, since this does not contradict any of the fundamental *Sharī'ah* principles. For instance, the availability of current account, savings account and investments account in the process of ('*urf*') in the both banking system is not contrary to *Sharī'ah*, since the underlying principle are different. The practices are adoptable under '*urf*' in Islamic law. The project is important because it aims to solve the problem of whether the adoption of the conventional banking structural practices by the Islamic banking is valid or not especially area of deposit and investment. It argues that it is valid.

2. Statement of Problem

There are many aspect of conventional banking that has been applied in Islamic banking particularly in the area of deposit and investment, as there are a lot of criticisms against the practices of Islamic banking in term of its modeling operation that replicate the practices of conventional banking. Like conventional banks, Islamic banks rely on depositors' funds as well as their own capital as major sources of funds. Deposits are mainly in the form of demand deposits (current accounts), saving and time deposits. The hypotheses of the research are as follows:

¹ Abu Zahrah M. (1997). *Usul al-Fiqh*, Cairo: Dar al-Fikri al-'Arabi., at 128. See also, Kamal M.H. (2006). *Principle of Islamic Jurisprudence*, UK: Islamic Text Society of Cambridge, at 361.

² Means (Sale with deferred delivery of exchanged goods but with advance price payment).

- 1) The practices of banking are tantamount to '*urf*' under Islamic law.
- 2) The practice is lawful so far it does not contradict any fundamental principle of *Sharī'ah*.
- 3) The application of conventional banking products may be adopted in Islamic banking, particularly in the area of deposit and investment products on the basis of '*urf tijari*' since it does not violet any fundamental principle of Islamic law.

For instance, in Malaysia, some commercial banks provide current account facilities that pay interest. There are, however, certain conditions to be fulfilled before account holders are entitled to receive interest. Since this account can be devoid of the interest element, Islamic banks are permitted by *Sharī'ah* to offer similar facilities.³

3. Objective of the Research

The study will conduct with the following objectives:

- (1) To examine and identify the '*urf*' and its application in Islamic law of banking as the operational structure of the conventional banking system in term of the mobilisation of the deposit and investment products, which is function of banks as financial intermediary.
- (2) To determine ways in which the '*urf*' can solve the problem of the permissibility or non-permissibility Islamic banking replicate conventional banking.

4. Islamic Deposit Accounts

Islamic banks offer products for consumers who are looking for financial product based on the *Sharī'ah* principles, which are the current, savings accounts and investment deposits and structural to comply with *Sharī'ah* principles. There are two dominant views within the Islamic banking community based on the *Sharī'ah* principles that applied for the current accounts. One is to treat it as '*wadī'ah-yad-amānah*'⁴ (trust). The other view is to treat current accounts as '*qard hassan*'⁵ (interest-free loan). The system of *qard hassan* also adopted for savings account. However, for investment accounts *muḍārabah* product has been used to manage the account.

³ Lee, M.P., & Detta I.J. (2007) *Islamic Banking & Finance Law*. Selangor, Malaysia: Pearson Longman, at 59-60.

⁴ Savings with guarantee. Refers to goods or deposits, which have been deposited with another person, who is not the owner, for safekeeping. As *wadī'ah* is a trust, the depository becomes the guarantor and therefore guarantees repayment of the whole amount of the deposits, or any part thereof, outstanding in the account of the depositors when demanded. The depositors are not entitling to any share of the profits but the depository may provide returns to the depositors as a token of appreciation.

⁵ Benevolent loan. An interest-free loan given mainly for welfare purposes. The borrower is only required to repay the principal amount borrowed, but he may pay an extra amount at his absolute discretion as a token of appreciation.

5. WADĪ'AH Deposits

Al-Wadi'ah comes from the root-word *wada'a*, which literally means 'leave'. *al-Wadi'ah* literally means, "the thing left with a person who is not its real owner for the purpose of safe-keeping". The act of leaving the thing is termed as *al-Ida'*.⁶ In legal terminology, it means "the authorisation of a person to keep the property of another in his safe custody by explicit or implicit terms".⁷ The owner of the property who gives the property to another for safe-keeping is termed as *al-Muwaddi'* and the person who receives the property is termed as *al-Muwadda'* or *al-Wadi'*. *Wadi'ah* is considered as a form of contract or *'aqd*. In a *wadi'ah* deposits, the bank safe-keeps money and pays it back to the customer on demand. Unlike a conventional deposit, a *wadi'ah* account does not promise a fixed return, although the bank has the discretion to provide customer with *hibah* (gift). Because the bank has discretion, you may theory get no returns at all.⁸

5.1. The Basis of *al-Wadi'ah*

Al-Wadi'ah is authorised and encouraged by the *Sharī'ah*. The Qur'an says:

"Allah does command you to render back your trusts to those whom they are due".⁹

In the Sunnah, it was reported that the Prophet (*p.b.u.h*). says: discharge the trust to the person who entrusts it to you, and do not betray the one who betrays you.¹⁰

It is also agreed upon by all jurists of all ages by *ijma'* that the placing of deposits as *wadi'ah* is permissible, especially because of the need and necessity of the people for making such deposits.¹¹ There are four essential elements of *al-wadi'ah*, which are:

- i) The goods.
- ii) Owner of goods.
- iii) Custodian of goods.
- iv) Contract- Offer and acceptance (*ijab & qabul*).¹²

However, the jurists have laid down certain condition for the two contracting parties and the property that is being deposited. Concerning the parties, namely, the depositor and the depositee. The *Jumhur* require that the depositor and depositee must be of age of majority, have sound mind and

attain the capacity of maturity. About the deposited property, all the jurists require that the property must be capable of being subjected to physical possession.¹³ There are two types of *wadi'ah* accounts:

- i) *Wadi'ah yad amānah*; and
- ii) *Wadi'ah yad ḍamanah*.

5.2. *Wadi'ah Yad Amānah (WYA)*

With such an account, the bank performs a pure safekeeping function for deposits. For example, if depositor deposited RM10, 000 in cash, the bank has to keep the money in its vaults. As a safe-keeper, the bank:

- i) Is not allowed to utilise the funds for profit generation or any other purpose; and
- ii) Does not charge any fees for safekeeping

As a result, no returns in any form can be expected. Client as depositor also face the risk that the bank does not guarantee the return of client money, in the event of a loss such as theft, fire or some unforeseen mishap. The bank is not obligated to make it up to him, unless it was due to the bank's negligence or fault.¹⁴

5.3. *Wadi'ah Yad Ḍamanah (WYD)*

The main characteristics of this contract are as follows.

- i) the custodian is trustee and guarantor to safeguard deposited asset.
- ii) the deposited asset need not be separated or segregated.
- iii) the deposited asset can be used for trading and other purposes.
- iv) the custodian has the right to any income derived from utilisation of deposited asset.
- v) the depositor can take back the asset at any time. It is like *qard* (loan), that is, it cannot generate any pre-agreed benefit or income to depositor, over and above principal amount of deposit (if not, it is *ribā*).¹⁵ In this case, the bank guarantees the return of the money, even if the money is stolen. In return, the bank:
 - e custody) is not used anymore.
 - t up to him, unless it was due to the bank's return he evnet is allowed to utilise the funds; and
 - enjoys all profit/enjoys all profits and absorbs all losses.

This *wadi'ah yad amānah* is adopted by the Jordan Islamic Bank, which operates as "Trust Account" instead of a current

⁶ Al-Zuhaili Wahab. (1985). *Al-Fiqh al-Islami wa Adillatuhu*. Damascus: Dar al-Fikri 2nd edn., vol. 5, at 37.

⁷ Sabiq, S. (1987). *Fiqh as-Sunnah*. Beirut: Dar al-Kitab al-'Arabi, vol. 3, at 223.

⁸ Abdullah, D.V., & Chee, K.. (2010). *Islamic Finance why it makes sense*, at 121

⁹ Qur'an 4:58.

¹⁰ Narrated by Abu Daud and Trimizi

¹¹ Id., 12, at 38.

¹² Saat, M.K., Ramli, R., & Aminuddin, H. (2011). *Islamic Banking Practices from the practitioner's Perspective*. Kuala Lumpur: IBFIM, at 47.

¹³ Id., 18, at 39.

¹⁴ Abdullah D.V., & Chee, K.. (2010). *Islamic Finance why it makes sense*. Singapore: Marshall Cavendish Business, at 121

¹⁵ Lee, M.P., & Detta, I.J. (2007). *Islamic banking & Finance Law*, at 73.

account. A trust deposit is defined by the Jordan Islamic Bank as cash deposits received by the bank where the bank is authorised to use the deposits at its own risk and responsibility in respect to profit or loss and which are not subject to any conditions for withdrawals or deposits.¹⁶ Thus, depositors hand over these deposits to the bank as a Trust and the bank does not have the authority to use them without first obtaining the specific permission of the owner of the funds. Notwithstanding the above aforesaid is based on the legal maxim that decrees of transaction goes around based on custom of a particular state and environment of a place, (*Al-mu'amalah tajri 'ala 'adah ah'alu al-balad wa 'urfu*).¹⁷ However, the other view is to treat demand deposits as '*qard hassan*' (interest-free loan). This shows that the practice and viable of Islamic and conventional bank are synonyms.

6. Qard Hassan (Lending and Borrowing) Deposit

Lending and borrowing were highly important factors in business transactions in pre-Islamic times. Borrowing played a risky role in the general lives of pre-Islamic Arabs, due to the needs of traders or merchants and consumers or buyers in transaction of loans. In such obligations, the lenders gained a multitude of profits out of each contract of loan.¹⁸ During these periods, loans were highly usurious¹⁹ and without any proper procedure, i.e. without fixing time of payment and without written agreement and witnesses or security. In this situation, many injustices occurred which Islam endeavoured to eradicate.²⁰

Qard terminologically means giving of property by one person to another with something subjected to the liability of the debtor in form of property with the same value (*mumathil*) of the property that was loaned to him. It is means to be benefited by the recipient (debtor).²¹ According to Ibn Hazm, *al-qard*, which also implies future obligation (*al-Dayn*), is a good deed, involving the lending of a fungible object, such as money, by someone to another person, on condition that the borrower is responsible to return the same object either immediately or at a specified time.²² It was also known as *al-*

salaf.²³ There some basis on this subject (*qard hassan*) which are as follows:

The scholars have unanimously agreed that *qard* is permissible based on Qur'an, Sunnah and *Ijma'*.²⁴ The following Qur'anic verse is regarded as a basis for permissibility of *qard*:

Who is that will grant Allah a goodly (sincere) loan so that He will repay him many times over? And (remember) it is Allah who decreases and increases (sustenance), and to Him you shall all return.²⁵

The legality of *qard* was in accordance with the tradition of the Prophet, (*p.b.u.h*) as it was recorded by Ahmad bin Hanbal in which the Prophet is reported to have said:

God will place a servant of him under His shade on the day when there will be no shade except His shade, who waits (patiently) (any debt) from a borrower who lives in straitened circumstances (poor or impoverished) or relinquishes (the debt altogether) for the debtor.²⁶

The view that regards current deposit as *qard hassan* has been adopted by Iranian Islamic banks, which call the current account *qard hasan*.²⁷ According to this view, money deposited in these accounts is a benevolent (or interest free) loan (*qard hassan*) from the depositor to the bank. The bank is free to utilise these funds at its own risk without any return to the depositor and without any authorisation because in the case of *qard hassan*, the debtor does not need the specific permission of the creditor to use the borrowed funds. The debtor owes the creditor only the principal amount borrowed. This condition is fulfilled as the amount deposited in these accounts is fully underwritten by the bank.²⁸

In contrast to this, the Bahrain Islamic Bank calls these accounts "Savings Accounts with Authorisation to Invest". Depositors provide the bank with an authorisation to invest their money. Depositors have the right of withdrawal, but profits are calculated based on the minimum balance maintained for a month.²⁹

The Iranian Islamic banks include saving accounts in "*Qard Hassan Accounts*" and call them "*Qard Hassan*" deposits. The operation of these accounts is similar to that of savings accounts in the conventional system as far as the deposit and withdrawal of money by means of a savings account passbook is concerned. Although no dividends are due in the

¹⁶ The Jordan Islamic Bank for Finance and Investment Law. (2nd edn.,) (n.d) *Amman*: The Jordan Islamic Bank, at 4.

¹⁷ Ali Ahmad al-Nadwi. (2000). *Jamharah al-Qawa'id al-Fiqhiyyah fi al-Mu'amalat al-Maliyyah*, Sharikah al-Rajhi al-Masrafiyyah l- al-Istithmar, v. 2, at 951.

¹⁸ 'Ali Jawad. (1993). *Al-Mufasssal fi Ta'rikh al- 'Arab qabl al-Islam*. Baghdad: Jami'at Baghdad vol.7, at 404.

¹⁹ Al-Tabari Ibn Jarir. (1999). *Jami' al-Bayan 'an Ta'wil ayah al-Qur'an*. Beirut: Dar al-Kutub al-'Ilmiyah, vol.4, at. 90. Ibn Kathir, (1969) *Tafsir al-Qur'anal-Azim*, (Beirut: vol. 1, at 331 & 404.

²⁰ Qur'an, 2: 282-283.

²¹ Al-Zuhaili, Wahabah. (1985). *Al-Fiqh Islami wa Adillatuh*, (2nd edn., vol. 4, at 720-730.

²² Ibn Hazm 'Ali bin A'Imad bin Saeed al-Andalus. (2001). *kitab al-Muhalla Shar al-Majala*. Beirut: Dar al-Ihya' al-Turath al-'Arabi, vol. 8, at 77.

²³ Ibn al-Athir Majdu Deen al-Mubarak bin Muhammad. (2002). *kitab al-Nihayah fi Gharib al-Hadith wa al-Athar*. Beirut: Dar al-Kutub al-'Ilmiyah, vol. 2, at 390.

²⁴ Abdullah, D.V., & Chee, K. (2010). *Islamic Finance why it makes sense*, at 121

²⁵ Qur'an, 2: 245.

²⁶ Ahmad ibn Hanbal. (2005). *Al-Musnad*. Cairo: Dar al-Hadith, vol. 2, at 5. Hadith No. 532.

²⁷ State Bank of Iran. (1984). *Annual Report*, (Tehran: State Bank of Iran,

²⁸ Ahamd, A. (1993). *Contemporary Practices of Islamic Financing Techniques*, at 4-5.

²⁹ Bahrain Islamic Bank, Goals and Functions (Arabic).

case of *qard hassan* depositors, Iranian banks use different promotional methods in order to attract and mobilise deposits. These include giving the following incentives to depositors:

- i Non-fixed bonus either in cash or in kind.
- ii Exempting depositors from or granting discount thereto, in the payment of commissions and/or fees.
- iii According to priority of customers in the use of banking facilities.³⁰

The Jordan Islamic Bank has adopted yet another way to operate savings accounts. It includes the savings deposits into an investment pool called joint investment accounts.³¹ The foregoing discussion makes it clear that Islamic banks adopt one of the following practices in operating savings accounts:

- a) Accepting savings deposits on the principle of *al wad'ah* (trust) requesting depositors to give permission to the bank to use these funds at its own risk, but guaranteeing full return of deposits and sharing any profits voluntarily.
- b) Accepting savings deposits with an authorisation to invest and share profits in an agreed manner for the period in which a required balance is maintained.
- c) Treating savings deposits as *qard hassan* from depositors to the bank and granting pecuniary or non-pecuniary benefits to depositors.
- d) Accepting savings deposits as part of an investment pool and treating them as investment deposits.³²

In this regard, what common and known to the people of those countries based on the *'urf* as mentioned by *Badran* which is what is established and common in a group of people (*jumhur*) from their saying and doing, and is consistently repeated until it influences them and is therefore accepted by their reasons.³³

Nonetheless, Malaysia adopted for the both current and saving accounts *Wad'ah Yad Dhamanah*, *Muḍārabah* & *Qard*.³⁴ In a *wad'ah* arrangement, the customer will deposit cash or other assets in a bank for safekeeping. The bank guarantees the safety of the items kept by it.³⁵ Here is how it works:

- i The customers place money in a bank and the bank guarantees to return the money to you.
- ii The customers are allowed to withdraw the money

anytime.

- iii Bank may charge customer a fee for looking after his/her money and may pay *hibah* (gift) to customer if it deems fit.
- iv This concept is normally used in deposit-taking activities, custodial services and safe deposit boxes.³⁶

However, *Muḍārabah* is a profit sharing arrangement between two parties, that is, an investor and the entrepreneur. The investor will supply the entrepreneur with funds for his business venture and gets a return on the funds he puts into the business based on a profit sharing ratio that has been agreed earlier. The principle of *Muḍārabah* can be applied to Islamic banking operations in 2 ways: between a bank (as the entrepreneur) and the capital provider, and between a bank (as capital provider) and the entrepreneur. Losses suffered shall be borne by the capital provider.³⁷ Here is how it works:

- i The customer supply funds to the bank after agreeing on the terms of the *Muḍārabah* arrangement.
- ii Bank invests funds in assets or in projects.
- iii Business may make profit or incur loss.
- iv Profit is shared between customer and the bank based on a pre-agreed ratio.
- v Any loss will be borne by customer. This will reduce the value of the assets/ investments and hence, the amount of funds that customer supplied to the bank.³⁸

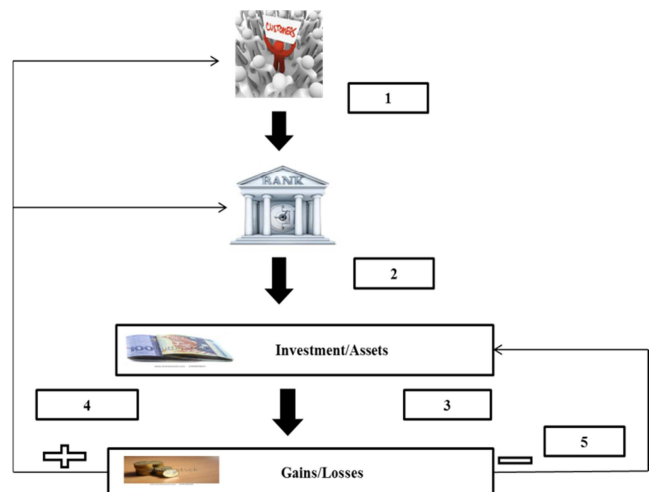


Figure 6.1. Illustrate on how the qard hassan is works.

Under the purview of *qard*, an Islamic finance is given for a fixed period on a goodwill basis and the borrower is only

³⁰ State Bank of Iran. (1984). *Annual Report*. Tehran: State Bank of Iran.

³¹ Jordan Islamic Bank. (1981). *Annual Report*, at 25.

³² *Id.*, 30, at 8

³³ Badran. (1984). *Usul al-Fiqh al-Islami*. Alexandri: Muasasa Shabab al-Jami'ah, at 224.

³⁴ Islamicfinance info. Retrieved from <<http://www.islamicfinanceinfo.com.my/discover-islamic-banking/know-your-islamic-banking-products> accessed> on 25/12/2014.

³⁵ BNM. *Shari'ah Resolutions in Islamic Finance 2nd Edition* (Kuala Lumpur: Bank Negara Malaysia, 2010), at 101-102.

³⁶ *Ibid.*

³⁷ BNM/RH/GL 012-4. The Principles and Practices of *Shari'ah* in Islamic Finance *Shari'ah* Standard on *Muḍārabah*. *Islamic Banking and Takaful Department Bank Negara Malaysia*, 2012, at. 4-14.

³⁸ Islamicfinance info. *Shari'ah* Concepts in Islamic Banking. ,Retrieved from <<http://www.islamicfinanceinfo.com.my/discover-islamic-banking/shariah-concepts-islamic-banking>> Viewed on 25/12/2014.

required to repay the amount borrowed. However, the borrower may, if he/she so wishes pay an extra amount (without promising it) as a way to thank the lender. For example, a lender who lent RM5, 000 to a borrower on *qard* will expect the borrower to return exactly RM5, 000 to him at a later date. Similarly, as mentioned above that decrees of transaction goes around based on custom of a particular state and environment of a place, (*Al-mu'amalah tajri 'ala 'adah ah'alu al-balad wa 'urfuh*).³⁹

7. MUḌĀRABAH Deposit

The *muḍārabah* contract can be defined as a 'aqad between two persons that consists of the asset from someone to another for doing business by sharing the profit and loss according to certain conditions. The main purpose of *muḍārabah* contract is cooperation between the owner of the asset that can be used as a capital but does not have the skills to do the business, with someone who has the skills but does not have the capital. Through *muḍārabah* contract, the skills and the wealth can be benefited. From the finance perspectives, those with capital are known as surplus units and those with skills are as dearth units. This surplus unit and dearth unit can work together to make full use of these funds.⁴⁰

When the principle of *muḍārabah* is applied, the bank becomes an entrepreneur or 'muḍārib' and the savings account customers becomes investors or 'sahib al-mal', or 'rabbul al-mal' banks then employ the deposited funds into various business activities and share any profit which based on a pre-agreed ratio. In the case of loss, the entire loss will be borne by depositors.⁴¹ Like current accounts, various elements of contracts are applied between the bank and the savings account holders. These elements include specification on the type of contract between the bank and the customer, procedures relating to deposits and withdrawals and regarding rewards distributed to customers.

Similarly, some of the features imposed upon current account facilities are applicable to savings accounts. For example, the bank is entitled to establish a minimum balance of deposit required to open an account, the types of customers acceptable and other operational procedures. A minor sometimes is allowed to open a savings account with the bank but account is opened in the name of his or her parent or guardian.⁴² This contract can be traced back as early as the time of the Prophet (*p.b.u.h*) and it could be observed

through the recognition of certain pre Islamic practice of transaction by the Prophet.

Moreover, in that period the *Quraysh* sent caravans to *Syria* and *Yemen* and on this trip, those who had money would give it to the traders to do business in order to share the profit and Islam approved this kind of practice as it's become 'urf (custom) that "The behavior of a group of people in their saying or doings", or recurring practices that are acceptable to people of sound nature,⁴³ and not contradict *Sharī'ah* principle. Also, legal maxims under 'urf referred to it which are effect is only given to custom where it is of regular occurrence of when universally prevailing (*Inamah- tu'tabar al-'adah idah taradat aw aghlabat*),⁴⁴ in addition, effect is given to what is of common occurrence, not to what happens infrequently (*Al- 'Ibrah Lil-galib al-shi' la lil nadir*).⁴⁵

7.1. Categories of Muḍārabah

In term of the powers or authority given to the entrepreneur: *muḍārabah* may be categorised into two types:

- 1 *muḍārabah Mutlaqah* (Unrestricted *muḍārabah*). The bank has the freedom to utilize the funds without restrictions. (Without restrictions means the restrictions of *muḍārabah muqayyadah* are not in force, not that the bank can invest in anything it likes).
- 2 *muḍārabah Muqayyadah* (Restricted *muḍārabah*). The bank is limited by how it can deploy the funds. Such limitations could be on the period of time, the type of business location or the kinds or service.⁴⁶ Nevertheless, these are the essential elements of *muḍārabah*,
 - i) The capital.
 - ii) Capital provider.
 - iii) Entrepreneur.
 - iv) Utilisation of funds.
 - v) Profit.
 - vi) Contract – Offer and acceptance (*ijab & qabul*).⁴⁷

7.2. Condition of Muḍārabah Contracts

The investment account normally operates under the contract of *muḍārabah* (Trustee Profit Sharing). The bank will accept deposits from its customers who look for investment opportunities. It acts as the 'entrepreneur'. Both parties need to agree with the profit distribution or the sharing ratio. The

³⁹ Ali Ahmad al-Nadwi. (2000). *Jamharah al-Qawa'id al-Fiqhiyyah fi al-Mu'amalat al-Maliyyah*, Sharikah al-Rajhi al-Masrafiyyah I- al-Istithmar, v. 2, at 951.

⁴⁰ *Husniyati Bte 'A., Jaizah bt O., & Hasbullah Bin O.* (2008). *Islamic Financial Services*. Shah Alam: Upena, Malaysia, at 71-2.

⁴¹ Lee M.P., & Detta I.J. (2007). *Islamic banking & Finance Law*, at 65.

⁴² Ibid.

⁴³ Al-Zarqa. (1967). *Al-Madkhal al-Fiqh al-'Amm*. Damascus: Matbai 'Alif Ba', vol.1, at 131.

⁴⁴ Majallah Al-Ahkam: Article: 41.

⁴⁵ Majallah Al-Ahkam: Article: 42.

⁴⁶ Abdullah D.V. & Chee K. (2010). *Islamic Finance why it makes sense*, at 124.

⁴⁷ Saat M.K., Ramli R. & Aminuddin H. (2011). *Islamic Banking Practices from the practitioner's Perspective*, at 48.

customer does not participate in the management of the funds. In the event of a loss, the customer bears all the losses. Profits generated from the use of the customers' funds will be distributed according to the predetermined ratio. Only the distribution ration is predetermined and not the actual amount of return. The return will only be known upon maturity or the agreed ratio and not less. If the *muḍārabah* venture results in a loss, the owner of capital bears the loss entirely, namely the amount invested or the principal amount. On the other hand, the entrepreneur does not get anything from the venture.⁴⁸

7.3. The Basis of *Muḍārabah*

Majority of 'Ulam' unanimously agree that *muḍārabah* contract is permissible in Islamic law based on evidences from Qur'an, Hadith, and *Ijma'* as follows:

7.4. Qur'an

ī "...and others travelling in the earth in quest of Allah's bounty".⁴⁹

Based on the first verse cited above, the word (يَضْرِبُونَ) means permissibility to travel in managing wealth to seek the bounty of Allah (SWT).

7.5. Hadith of Prophet (p.b.u.h)

Reported by Solih bin Shu'ayb from his father, he said: Rasulullah (p.b.u.h) once said: there are three blessed things; deferred sale, *muqāradah* and mixing barley and wheat (for household consumption) and not for sale.⁵⁰

The above *hadith* states three things, which are deemed as, blessed and one of them is *muqarāah*.⁵¹ The term *muqaradah* originates from the word *qiradh* that is commonly used by scholars in Hijaz while 'Iraqi scholars termed it as *mudarabah*. Thus, *muqaradah* and *muḍārabah* are two synonymous terms having the same meaning. The word *al-mudarabah* is synonymous with two other 'Arabic terms, which are used to designate this contract: *al-Qirad* and *al-Muqaradah*. These three terms are interchangeable, there being no essential difference in meaning or connotation between them.⁵² The divergence in terminology was probably originally due to geographical factors.

The terms *al-Qirad* and *al-muqaradah* apparently originated in the 'Arabian Peninsula, especially al-Hijaz,⁵³ while the term *al-mudarabah* was of 'Iraqi provenance.⁵⁴ According to

as-Sarakhsi, the term *al-muḍārabah* is derived from the expression *al-Darb fi al-Ard* (making a journey). This term is used because the agent-manager (*al-Mudarib*) has the right to claim the profit by virtue of his effort and work. Indeed, he is regarded as the investor's partner in matters relating to the profit and capital used on the journey and for arrangements or ancillary expenses.⁵⁵

7.6. *Ijma'*(Consensus of Jurists)

It was reported that some of the companions of Rasulullah (p.b.u.h) invested property of the orphans based on *mudarabah*.⁵⁶ There was no dissenting view among them and it is considered as *ijma'*.⁵⁷

8. Conclusion

From the forgoing discussion, it can be decided that only three deposit products accepted under Islamic bank, which are *wadi'ah*, *qard hassan* and *muḍārabah*. The *wadi'ah* is a contract between the owner of a property and the person responsible to safeguard the said product. The contract is established order to safeguard the owner's property from being stolen, destroyed or any other reasons by imposing certain terms and conditions. The *qard hassan* is the contract based on loan in developing economy, having to secure loan is very important for existence or growing a business. Islamic bank acknowledges the need to borrow but the debtor needs to pay back the same amount of the similar property that he/she has borrowed. Any additional amount imposed on the debtor that is predetermined in the contract is considered *ribā*. The *muḍārabah* is a contract that is based on partnership between two parties. one part acts as a provider (*rabbul-mal*), giving specific amount of capital to another person, worked as *muḍārib* (entrepreneur) to make use of the capital given for the benefit of the business. Any profit from the business will be divided accordingly to the terms and conditions of the contract. However, any losses will be only borne by the capital provider, while the entrepreneur (*muḍārib*) suffers disappointment due to pointless effort. If there are evidences that the losses are due to negligence of the *muḍārib*, he will be then responsible to pay for the loss. Moreover, Islamic bank forbids *ribā*, unjustness and earning a return without taking risk, but encourages profit and risk sharing at the end.

⁴⁸ Ibid.

⁴⁹ 'Abdullah Yusuf 'Ali, English Qur'an Translation, 73:20.

⁵⁰ Ibu Majah Muhammad Bin Yazid. (2003). *Sunan ibnu Majah*. Beirut: Dar al-Fikr, vol. 2, at 768, Hadith No. 2289.

⁵¹ Refers to *Muḍārabah*.

⁵² Udovitch, A.L. (1980). *The Encyclopaedia of Islam* (2nd edn., vol. 5, at 130.

⁵³ Al-Qurtubi Abu 'Umar Yusuf Bin 'Abdullah Bin Muhammad. (1978). *Kitab al-Kafi fi Fiqh Ahl al-Madinah al-Maliki*, (Murtani Ahid Walid Madik, Mohammad Mohammad Ed). Riyadh: Maktabah Al-Riyadh al-Hdithah, at 771.

⁵⁴ Al-Zurqani Muhammad Bin 'Abdul al-Baki Bin Yusuf. (1997). *Sharh al-*

Zurqani 'ala Muwatta' al-Imam Malik. Beirut: Dar-Ihya' al-Turath al-'Arabi, vol. 3, at 345.

⁵⁵ Al-Sarakhsi Shamsu Deen, (1993) *al-Mabsut*, (Beirut: Dar al-Ma'rifah, vol. 20, at 18-19.

⁵⁶ Al-Zuhaili, Wahabah, (1985) *Al-Fiqh Islami wa Adillatuh*, (2nd Ed, vol. 4, at 838.

⁵⁷ Bank Negara Malaysia, (2010) *Shari'ah Resolutions in Islamic Finance*, (Malaysia: CBNM, 2nd Ed., at 25-26.

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