

# BENEFITING FROM LOAN CONTRACTS

BY

DR. MOHAMMAD YUSUF SALEEM,  
DR. ABDULAZEEM ABOZAID

## Abstract

This article discusses the prohibition of Riba and its legal consequences and applications. It focuses on the different possible ways by which a debtor can benefit from the loan stating and comparing between the different opinions of the schools of Fiqh (Islamic Jurisprudence). It is the first chapter of an on-going research conducted by the two writers.

## 1. Definition of Loan (qardh)

Islam encourages helping others by way of giving loan as the lender is very likely to be wealthy and the borrower poor. Islam commands that the creditor should demonstrate benevolence and charity and grant the debtor a beautiful loan (qardh al-hasan). The word qardh or qirdh is an infinitive word which literally means cutting off. It is called qarḥ, as through this contract a certain part of the lender's property is cut off and given to the borrower in order to be repaid. Alqardh also refers to whatever good deeds a person does for the sake of Allah swt as the Quran states: “and (thus) lend unto God a goodly loan”.<sup>1</sup> Technically, qarḥ refers to a contract where a lender gives a certain property gratuitously to a borrower who will benefit from it and return a similar property immediately upon a demand.<sup>(2)</sup>

## 2. Legitimacy of the Loan

Islam has prohibited riba and allowed lending (qard). It is an interest-free loan intended to alleviate the sufferings of the needy. It enables Muslims to help fellow Muslims who are in need of financial assistance. Both the Sunnah and consensus of the scholars (Ijma') are explicit on the permissibility of a loan contract. Abu Rafi' reported that the Prophet (saw) had borrowed a young female camel from someone and when he received zakat of camels, he ordered me to send a young female camel to the man as settlement of the loan. I said to him, “I could not find among the camels except a female

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<sup>(1)</sup> - from verse 20 in suratul Muzzammel. See also the aforementioned linguistic definition of Alqardh in Mukhtar Sihah of Razi.

<sup>(2)</sup> - Khashaf qana' of Bahuti: 312/3.

camel which is ready for pregnancy”. The Prophet (s.a.s) said, “Give it to him, indeed, the good person among you is he who settles loan with something better”.<sup>(4)</sup> It is also narrated by ibn mas’ud (r.a.) that the Prophet (saw) said: A Muslim never gives loan twice to another except that it is counted as a one time charity.<sup>(5)</sup> The Muslim jurists are also unanimous on the permissibility of the loan contract.<sup>(6)</sup>

### **3. The Legal Status of Loan**

Qardh is a praiseworthy act for which a Muslim is rewarded by Allah s.w.t. It is reported that the Prophet s.a.w. said: “in the night of the journey, I saw on the gate of heaven written, ‘reward for sadaqah is ten times and reward for qard al-hasan is eighteen times’. So, I asked the angel, how is it possible? The angel replied: “Because beggar who asked had already had something but a borrower did not ask for loan unless he was in need.” [Ibn Hisham & Ibn Majah]. In another hadith reported by Abu Hurairah (r), the Prophet pbuh said: “whoever relieves a believer from a difficulty in this world, Allah will relieve him from his difficulty and Allah will facilitate him in this world and world hereafter”. (Muslim). The provision of loan is a recommended (mandub) act for which a creditor is rewarded. It is not obligatory (wajib) on the creditor to provide a loan to a debtor as such he is not committing sin if he refuses to give loan. It is permissible (mubah) on the part of a borrower to ask for a loan. There is no evidence to suggest that seeking loan is considered abominable (makruh). On the contrary there are traditions which state that the Prophet pbuh himself borrowed from others. It is because in qardh the property taken from others is returned later. There is no begging in it at all.<sup>(7)</sup>

### **4. The Difference between Loan (qardh) and debt (dayn)**

Debt (dayn) is a broader concept than loan (qardh). Dayn may arise in different ways. It may arise out of a contract such as the price of a sold item in a sale contract or the rental in a rent contract. It may also arise when a person transgresses, destroys or consumes another’s property. Dayn can also arise when a person lends his money to another. Whereas Qardh is more specific that may arise only through a loan contract. Evey qardh is a dayn but not vice versa.<sup>(3)</sup>

### **5. The Subject matter of a Loan Contract**

The majority of jurists agree that a loan contract can validly be created with regard to both ribawi and non-ribawi properties. However, the Hanafies argue that similar or homogeneous (mithli) properties are the only proper object for the loan contract. According to them homogeneous properties are also ribawi properties. Similar or homogenous (mithli) properties are aggregates of minute parts, which are exactly alike and resemble each other. If perished they can be replaced by an equal quantity of a similar property without any difference in the constituting units. The examples of homogeneous properties are gold, silver, money, rice, wheat, corn, barley, salt, oil, etc.

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<sup>(4)</sup> – Narrated by Moslem in his authentic Hadith:1224/3, kitab musaqah 22, bab man istaslafah shayan. See also al-Muwatta of Imam Malik, volume 3, Book 47, Number 777.

<sup>(5)</sup> sunan ibn majah:812/2, kitab sadaqah 15, bab qardh 19, number 2430.

<sup>(6)</sup> – almughni for ibn qudamah:382/4.

<sup>(7)</sup> –almughni for ibn qudamah:383/4.

<sup>(3)</sup> – Hashiya ibn A’bideen: 169/4.

Homogeneous properties are usually sold by weight or measure, by scales of capacity, or by numbers. Dissimilar or non-homogenous (qimi) properties are those the like of which could not be found in markets or when it is 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 books, etc. The Hanafies argue that a loan contract cannot validly be concluded with regard to non-homogeneous properties such as books and cars as in these cases it is the same book or car that is returned and not their similar.<sup>(8)</sup>

The majority of the jurists agree 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 objects for a Salam contract. This argument is based on the Hadith narrated by Abu Rafi' which states that the Prophet pbuh borrowed a camel. The majority of the jurists also argue that weighable, measurable, and countable items could also become the objects of a loan contract as salam contract is also valid with regard to these properties.<sup>(9)</sup> It is therefore concluded that a valid loan contract could only be created with regard to ribawi properties.

## 6. Essence of Usury or Interest (*Riba*) in Loans

Loan is an independent contract and for its existence and validity does not depend on the opposite of analogy (khilaf al-qiyas).<sup>10</sup> Usury is of two types: usury on credit loans or debts and usury in cash or sale. Usury in sale is not the basis for the usury of loan. when talking of interest in business transaction, so interest in transaction can not be considered as basic foundation for interest of the Loans so as to say that the loan is based on analogical difference under pretext that the loan was permitted in it procrastination despite the streaming of the loan also in the usurious money, in which is allowed unconditioned increment; even what was mentioned is merely of ruling of the loan that stress the isolation of the loan from transactional interest, talk less of the view that interest in loan can also be in every money unlike that in interest of transaction, so it can only be in a particular money.

By the way, interest of loan had already been prohibited before interest of transaction, so interest of Loan is the place of pre Islamic era, is a kind of interest on which the verses of Riba was revealed. As to interest of transaction, it was later on prohibited, whereby it was prohibited by Sunnah, this kind of interest was not known to Arab.<sup>(11)</sup>

*Riba* literally means increase in anything or an addition. There are two varieties of *riba* which are *Riba* on credit (*riba al-nasiyyah*) and *riba* on cash (*riba al-fadhl*). Technically, *riba al-nasiyyah* refers to the additional fixed amount, which a debtor agrees to pay to his creditor in consideration of the time he was given to use the creditor's money. This type of *riba* is prohibited by the Quran (30:39; 4: 160-1; 3: 130; and 2: 275-

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<sup>(8)</sup> – hashiyah ibn a'bideen:171/4.

<sup>(9)</sup> –Dhakheah for Qarafi:287/5. Mughni muhtaj for sherbene:119-118/2, mughni ibn qudamah: 386-385/4, hashiyah dasuqi:223-222/3.

<sup>(11)</sup> see detail of that in "Fiqh al-Riba", by Abdulazeem Abozaid, page 466 and afterward.

281). The hadith of the Prophet p.b.u.h. states: “Jabir said that Allah's Messenger (may peace be upon him) cursed the acceptor of interest and its payer, and one who records it, and the two witnesses, and he said: They are all equal.”<sup>2</sup>

*Riba al-Fadhl* is prohibited by the hadith of the Prophet p.b.u.h. The hadith states:

“Abu Sa'id al-Khudri (Allah be pleased with him) reported Allah's Messenger(may peace be upon him) as saying: Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, salt by salt, like by like, payment being made hand to hand. He who made an addition to it, or asked for an addition, in fact dealt in usury. The receiver and the giver are equally guilty”.<sup>3</sup>

In another hadith it is narrated:

“Abd Sa'id reported: Bilal (Allah be pleased with him) came with fine quality of dates. Allah's Messenger (may peace be upon him) said to him: From where (you have brought them)? Bilal said: We had inferior quality of dates and I exchanged two sa's (of inferior quality) with one sa (of fine quality) as food for Allah's Apostle(may peace be upon him), whereupon Allah's Messenger (may peace be upon him) 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)”.<sup>4</sup>

Gold, silver, wheat, barley, dates, and salt are also called ribawi properties. The Zahiris have maintained that *riba al-fadhl* may only happen with regard to these six specific commodities. They do not extend the hadith to other commodities. All other Fiqh Schools are of the opinion that the hadith is of general application and is not necessarily confined to these six items but could be extended to other commodities through *qiyas*. However, they differ among themselves as to the reason (*'illah*) for the prohibition. According to the Malikis the unequal exchange of gold against gold and silver against silver is prohibited as they belong to the class of moneys. They also say that the four other commodities which are mentioned by the hadith are types of foodstuffs, which can be stored or preserved. They argue that the *'illah* is the quality of storability therefore all foodstuffs that can be stored are covered by the hadith. The Shafiis and Hanbalis while agree with the Malikis on gold and silver contend that storability is not necessary and the hadith could be extended to all foodstuffs. The Hanafis, however extended the hadith to all commodities that are normally sold by weight or measurement.<sup>5</sup>

The combined effect of these two hadith is that when ribawi properties are exchanged against each other they should be exchanged on equal basis and any such exchange should be immediate. *Riba al-fadhl* arises when one of these commodities is exchanged for an unequal amount of the same commodity or when the amounts are equal the delivery of one of them is deferred.

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<sup>2</sup> Abdul Hamid Siddiqui, *Translation of Sahih Muslim*, Book 10, Number 3881.

<sup>3</sup> Abdul Hamid Siddiqui, *Translation of Sahih Muslim*, Book 10, Number 3854.

<sup>4</sup> Abdul Hamid Siddiqui, *Translation of Sahih Muslim*, Book 10, Number 3871.

<sup>5</sup> See Muhammad ibn Ahmad ibn-Rushd, *Bidayatul Mujtahid wa Nihayatul Muqtasid*, 3<sup>rd</sup> ed. (Beirut: Dar al-Kotob al-Ilmiyah, 2003) vol. 2, pp. 209-15.

## **7. Prohibition of Riba on Credit**

The Quran and the Hadith have forbidden usury in the strongest terms. The Quran has warned those who practice usury that they “are at war with God and His Apostle” (2: 279). The significance of this prohibition could be judged from the fact that the Prophet pbuh in his final sermon and farewell hajj again stressed it.<sup>(14)</sup> Riba discourages people from doing good to one another. The needy person will be required to pay back more than what he has borrowed without giving him something in exchange. It leads to exploitation and poverty whether the creditor is an individual, countries, or institutions. It also concentrates the wealth in few hands and widens the gap between the rich and the poor.

## **8. Different Benefits of Loan**

Loan as was argued could be in usurious and non usurious properties in accordance with some jurists. Is it possible to say that it is permissible for a creditor to benefit from his loan in any possible way if the object of loan is a non-usurious property and it is prohibited for him if the object of the loan is a usurious property?

As a matter of fact, the issue of Loan is more elaborated than that of interest.

Loan as Imam Nawawi has said could be both with regard to ribawi or non-ribawi properties.<sup>(16)</sup> Ibn Hazm says: that riba on credit may arise in all types of properties. It is unlawful to give loan so as to be returned in lesser or higher quantities or in another type. Rather it must be returned in the same quality and quantity).<sup>(17)</sup>

The reason behind prohibiting a creditor to benefit from any stipulated addition is that the loan contract is in essence a gratuitous contract. Thus it is prohibited for a creditor to benefit from his loan at the cost of the debtor as this would deprive the loan contract from its benevolent and gratuitous nature.<sup>(18)</sup>

In the following, we will discuss different possible ways by which a debtor can benefit from the loan:

### **1. Benefiting from the Loan by stipulating any Increase**

All jurists agree that any condition that stipulates that a debtor should return any additional property besides the loan is unlawful. Whether the additional property belongs to the same type as the loan property or comes from a different type. It also does not matter whether the additional amount is excessive or minimum. As any such condition totally contradicts with the main purpose of the loan contract which is benevolence Qurtubi says: (there is a consensus among Muslim jurists based on the tradition from the

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<sup>(14)</sup> – Narrated by: Abu Dawud in his sunan: 244/3, kitab buyu’, bab fi wadh’ riba5, number3334.

<sup>(16)</sup> – sunan Albayhaqi:106/9, kitab siyar 72, bab bay’ud Dirham bidirhamayn fi Ardh alharb 86, number 17993.

<sup>(17)</sup> – Almuhammad for ibn Hazm:467/8, almas-alah 1479.

<sup>(18)</sup> – this can be referred to in line with what is in mughni muhtaj sharbini:119/2.

Prophet pbuh that any stipulation for increase in a loan contract is usury even though it is fistful of forage as mentioned by ibn Mas'ud or a seed).<sup>(19)</sup>

Both the Qur'an and the Sunnah have prohibited any increment on the loan. The Quran states: "O you who have attained to faith! Remain conscious of God, and give up all outstanding gains from usury, if you are [truly] believers, for if you do it not, then know that you are at war with God and His Apostle. But if you repent, then you shall be entitled to [the return of] your principal. You will do no wrong, and neither will you be wronged".<sup>(20)</sup> This verse clearly prohibits collecting any increment besides the capital in a loan contract and commands that only the capital should be collected.<sup>(21)</sup> The Prophet pbuh also prohibited any increment on a loan in his last sermon during farewell Hajj. Both the Quranic verse and the hadith are emphatic that the creditor is only entitled to receive the principal amount without any increment.

According to the Hanafies any condition by a creditor in a loan contract for any increase is void while the contract itself remains valid. According to the Shafies both the condition and the loan contract are void.<sup>(23)</sup>

### **Is it obligatory to pay the same amount or a lesser amount is also acceptable**

Payment of a lesser amount by a debtor is in line with the purpose of the loan contract which is showing kindness to the debtor. Thus apparently it is permissible to stipulate payment of a lesser amount. However, there are scholars who oppose this condition. The Hanabilat argued that it is prohibited, whether the loan of usurious or non usurious properties. The Shafites rule that the condition is void while the contract is valid. A similar view is also held by ibn Hazm. Those who disagree with this condition despite its compatibility with the reason behind the loan contract contend that in loan contract it is a requirement that a similar property should be returned. A stipulation to return less is in contradiction with this requirement. Thus they argue that it is not acceptable just like a stipulation to demand more is not acceptable. In contrast those who are for the validity of the stipulation to return less argue that the purpose of the contract is to show kindness to the debtor and any stipulation to return less does not deprive the contract of this character but rather strengthens it.<sup>(24)</sup> In our opinion since any unconditional increase is permissible it is also possible to argue that any unconditional decrease is also acceptable. The condition requiring similarity is not put merely for the sake of similarity but to avoid usury and exploitation of the debtor. Thus it is possible to argue that a debtor may lawfully stipulate to pay less. It is similar to a case where a person who gave loan of RM 100 and stipulates that he should be returned RM 90. In this case the loan is considered for RM 90 while the remaining RM 10 is considered as a gift.

## **2. Benefit Derived by stipulating Increase in the Quality**

The principle prohibiting any increment in a loan contract is also applicable here. Any condition stipulating the return of a loan property in a higher quality is prohibited as it defeats the purpose of the loan contract to show kindness to the debtor. It also benefits the creditor at the expense of the debtor. According to the Hanafis any condition that

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<sup>(19)</sup> – Aljami'u Ahkam Qur'an for Qutubi:241/3.

<sup>(21)</sup> see Jami'ul bayan A'n tawil Ayil Qur'an for tabari:109/3,

<sup>(24)</sup> – almughni for ibn qudamah: 394/4, rawdatu talibeen of nawawi: 276/3.

stipulates the return of a higher quality property in a loan contract is void while the contract itself remains valid. While according to the Shafis the contract itself is void. If a creditor stipulates that the debtor should return a property of a lower quality, such as wheat of a lower quality the contract is valid while the condition is void in accordance with the Shafis. The Hanbalis who argue for the prohibition of a lesser amount of property by analogy should come to the same ruling that prohibits any condition which stipulates for the return of a lower quality property.<sup>25</sup>

### **3. Benefit by Stipulating a particular city for Settlement of the Loan**

A creditor by stipulating that the debtor should settle the loan in another country/city can benefit from this condition in two ways. First, he wants to transfer the fund from one place to another without taking the risk of insecurity that involves when large sum of money is transferred from a place to another. Second, the creditor wants to avoid the payment of fees that he otherwise has to pay for the transfer of his money from a place to another. Is one or both of these benefits prohibited to the creditor?

The Shafis and Malikis have prohibited any condition that can benefit the creditor in any of these two ways. Thus 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. According to the Shafis the contract is void. The Malikis exempt a situation where fear and insecurity is prevalent and widespread. In such cases they argue that a creditor can stipulate another place for the settlement of his loan.<sup>(26)</sup>

The Hanbalis argue that a creditor may benefit from the loan contract provided this does not harm the debtor. According to them the contract of loan in such cases is valid.

Thus it is valid to stipulate the settlement of loan in another place if this does not cause any inconvenience to the debtor and there is no risk of insecurity while transferring money to the stipulated place.<sup>(27)</sup>

The Hanafite have taken a middle ground. They argue that it is prohibited (haram) to stipulate the second type of benefit. However, as to the first type of benefit in their view any such condition is strongly disliked to the extent of prohibition (karahat tahreem).<sup>(28)</sup> The reason why they have not ruled it prohibited (haram) 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 the following pages we will undertake a detailed discussion of these issues.

### **Saftjah**

The Muslim jurists used the term “Saftjah” when referring to the issue of requiring another country as the place of settling a loan. This word is a Persian in its origin but was incorporated into the Arabic language.<sup>(29)</sup> The Hanafite defined it in the following

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<sup>(26)</sup> – Hashiyah Dasuqi:226-225/3.

<sup>(27)</sup> – almughni for ibn qudamah: 391-390/4.

<sup>(28)</sup> – Hashiyah ibn A'bideen:296/4.

<sup>(29)</sup> – its origin root is saftah, which means the perfect thing in Persian, so this transaction was called this name due to the perfection that is in loan. See Hashiyah ibn A'bideen:295/4.

manner: a man giving a loan to another man on the condition that the loan is settled in a country specified by the lender so that he will not be burdened by the dangers of the road. This means that the borrower will return the money as a loan, which in turn means that the responsibility of making sure the money reaches safely to the designated place will fall on the borrower and not on the lender. Thus, the Hanafite limited the meaning of Saftjah and stated that it is disliked.<sup>(30)</sup>

Its meaning according to the Shafis is similar to that of the Hanafis however; they ruled that it is prohibited and not allowed to do such a thing.<sup>(31)</sup>

As for the Hanabilas they generalize the meaning by saying that: it is the condition of settling a loan in another country<sup>6</sup>. And they did not prohibit it if it will not result in any harm befalling the borrower.

Finally the Malkis said: it is 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. The Malkis prohibit such deed unless the purpose behind it is to avoid probable danger.

We are inclined to say that the opinion of the Hanblis regarding the issue of Saftjah is the preponderant one. 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, which means that the loan which can bring benefit to the two parties and no harm to any one of them, and doesn't contradict with any Shariah principle will not be prohibited especially when we know that Shariah dose not prohibit interest which will not harm any one. Moreover there is no clear evidence that prohibits Saftjah.

As for the juristic saying (any loan which results in a benefit is considered usury) is a general rule, which cannot be applied to the issue of Saftjah. The reason for that is the jurists themselves have allowed the borrower to give more than what he borrowed on the condition that it is not a condition of the lender, and that he gives it wholeheartedly.

Epigrammatic impermeable.

Based on the above, we do not see a reason to prohibit the act of requiring the borrower to settle the loan in a country different from that where the loan took place unless this act causes harm to the borrower such as the road leading to that country is not safe or the borrower will have to pay money in order to fulfil this condition, and the lender refused to supply the borrower with that money. In these circumstances there is no doubt that the Saftjah is prohibited.

#### **Asking for the loan in a country different from that where the loan took place:**

If the lender managed to find the borrower in a country different from that where the loan took place, and asked him to settle the loan, then the books of Fiqh have stated that it is within the right of the borrower to do so. 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.

In other words, if there was no equivalent to the money borrowed in that country where the lender managed to find the borrower, or the value of the loan in that country

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<sup>(30)</sup> – Hashiyah ibn A'bideen: 295/4

<sup>(31)</sup> – almuhatthab of shirazi: 304/1.

<sup>6</sup> Al-Muqni li Ibn Qudamah: 4/390.

was more than its value in the country where the actual loan took place the borrower will be required to settle the loan according to its value in the country where the loan took place, because it is the country where the loan happened that is why the value of that loan is associated with that country.<sup>7</sup>

**Benefiting from the contract of the loan by demanding the formulation of another contract:**

This chapter will focus mainly on this type of benefit, due to its complexity. However, before elaborating on this matter, we will talk about other issues related to what we have mentioned earlier.

**Issues related to the topic of benefiting from a loan:**

**The First Issue: The legal rule regarding unconditional benefit.**

From the above we clearly know that any conditional benefit that the lender gets from the loan is prohibited if the benefit is mentioned as a condition attached to the contract of the loan. This rule is also applied if receiving benefit from the loan is something customary. This is because the lender would not have given the loan if he had not known that he will receive a benefit from it, and this in itself is contradictory to the whole concept of giving a loan, which is leniency with the borrower.

As for unconditional benefit that the lender receives upon receiving his loan, it can be divided into two types:

1. It could be customary such as the borrower given a gift to the lender, or the borrower being lenient with him in buying or selling something because of the loan that he received from him.
2. It could be uncustomary such as the existence of a habit between the two parties prior to the loan.

Both of these types are permitted according to the Islamic legal system.

**Evidence that support the legality of such benefit:**

1. The narration of Abu Rafi which stated that “the prophet saw borrowed a young camel from a man, then the prophet received a number of camels that were given as a charity, so he order red Abu Rafi to give back to the man his young camel. However, Abu Rafi returned to the prophet and said, “I could only find a camel which is seven years old. So the prophet said “give it to him, the most virtuous people are those who excel in settling their loan”<sup>8</sup>.

2. The narration of Jabir bin Abdullah who said “ I came to the prophet while he was in the mosque, to settle a loan that I had given him earlier, so he settled it and gave me extra”.<sup>9</sup>

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<sup>7</sup> Al-Muqni li Ibn Qudamah: 4/396. Rawdhat al-Talibeen li al-Nawawi: 3/278. Kashaf al-Qina' li al-Bhwati: 3/319. Hashiyat Ibn Abdeen: 4/172.

<sup>8</sup> Taqadam Takhrijuh.

<sup>9</sup> Akhrajahu al-Bukhari fi al-Sahih: 2/786, Kitab al-Istqradh 48, Bab Husn al-Qadha' 7, Hadith No. (2264). Wa Muslim fi al-Sahih: 1/495, Kitab al-Salah, Bab Istihbab Tahiyat al-Masjid bi Raka'tayen wa Karahat al-Julus Qabla Salatihma wa Anha Mashrua' fi Jamee al-Awqat, Hadith No. (715).

3. Abu Hurariah narrated that a man wanted to settle a loan with the prophet so he talked rudely and aggressively, as a result the companions wanted to stop him. However, the prophet did not allow them, instead he told them that the possessor of a right has the right to ask for it, and he instructed them to buy a camel and give it to him. They said we could only find a camel better than the one you borrowed from him. The prophet said “buy it and give it to him, because the best among you are those who excel in settling their loan”<sup>10</sup>.

Based on the above evidence, there is a consensus among the jurists on the permissibility of the lender receiving some form of benefit, which is unconditional. This is in line with the benevolence that the prophet encouraged strongly.

Al-Qurtubi said “the Muslims are in total agreement based on what was transferred from their prophet that to request an increase in the loan when it is returned is usury even if that increase is a handful of hey as Ibn Masud said or a single grain. However, the borrower can return a loan which is better or more than what he borrowed, if it was not stipulated in the contract of the loan, because this is a good deed based on the narration of Abu Hurariah in which the prophet said “the best among you are those who are benevolent in settling their loans”.<sup>11</sup>

However, even though Muslim jurists agreed on the permissibility of the lender receiving some form of unconditional benefit we can still find within the pages of the books of Fiqh examples of an unconditional benefit being prohibited by some Muslim jurists.

Among such prohibited unconditional benefits is the gift from a frequent borrower which is prohibited by the Maliks, but not by the Shafis who allow it, as for the Hanblis they prohibit any form of gift before the loan is settled unless the lender will return the gift or deduct it from the loan, or if giving such a gift is an established habit between the lender and the borrower.

Moreover, there are many narrations transferred to us from the generation of al-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 al-Salaf to prevent the lender from receiving any unlawful extra return from the loan, or that it is directed only to the cases where there is a custom allowing the lender to receive something extra from the borrower, or the existence of a prior agreement allowing the lender to benefit from the loan.<sup>12</sup>

In short, we can say that any form of benefit that the lender receives from the borrower is permissible according to the consensus of the Jurists, provided that such benefit is not mentioned as a condition in the contract of the loan, or it is not part of a custom that is followed. However, we do find some exceptions to the above-mentioned rule within the books of Fiqh<sup>13</sup>.

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<sup>10</sup> Al-Hadith Mutafq Aleehi Akhrajahu: al-Bukhari fi al-Sahih: 2/785, Kitab al-Istqradh 48, Bab Istiqradh al-Ibil 4, Hadith No. (2260). Wa Muslim fi al-Sahih: 3/1225, Kitab al-Musaqah, Bab man Istaslaf Shaya'n Faqda Khayran minhu wa Khayrukum Ahsnukm Qada'n, Hadith No. (1601).

<sup>11</sup> Al-Jami li Ahkam al-Quran lil Qurtubi: 3/241.

<sup>12</sup> Hashiyat Ibn Abdeen: 4/175. Hashiyat al-Dusuqi: 3/224. Rawdhat al-Talibeen li al-Nawawi: 3/279. Al-Muqni li Ibn Qudamah: 4/391.

<sup>13</sup> Muqni al-Muhtaj lil Sharbini: 2/119. Hashiyat Ibn Abdeen: 4/174 – 296. Hashiyat al-Dusuqi: 3/225 – 226. Al-Muqni li Ibn Qudamah: 4/391 – 392.

**Is giving a loan to a person who is known to be benevolent in settling his loans discouraged:**

According to the Shafis and Hanblis it is not discouraged, and that is due to the fact that Prophet Muhammad was known to be benevolent in settling his loans. Thus, it is not logical to discourage people from loaning a person who follows the example of the prophet in settling his loans. In fact, such a person should be given priority over others, because he is from the best of people as mentioned by Ibn Qudamah.<sup>14</sup>

However, the lender should purify his intentions, 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 he follows the example of al-Salaf by spending it on charity projects.

**The second issue: the legal rule regarding the issue of receiving a fee for acquiring a loan for someone.**

Some people might not be able to find someone who can give them a loan, due to the fact that they lack acquaintances. This will put them in a position whereby they need the assistance of someone who is of prominence in the community to help them acquire a loan. Doing so is permitted with the condition that the middleman informs the lender of the financial status of the person seeking the loan.

**The main question is: is it permissible for the middleman to ask for a fee from the seeker of the loan?**

Muslim jurists have disagreed on this issue. However, before reviewing their various opinions it is necessary to review the issue itself, so that we know where exactly does the disagreement in this issue lies?

**There are a number of cases related to this issue:**

**The first case:** is whereby the middle man takes a loan for himself, then he loans it to someone else with the condition that the borrower will pay more when settling the loan. In this case, there is no doubt that the benefit received by the middleman is considered usury. Thus, it is clearly prohibited and outlawed.

**The second case:** is whereby the middle man receives a loan in the name of the loan seeker and at the same time acts as his guarantor, with the condition that the lender gives him a fee for doing so. This case is also prohibited, because taking a fee for being a guarantor is not permissible. The reason behind that is the fact that when the guarantor pays the loan on behalf of the loan seeker he has the right to claim the same amount from the loan seeker. Therefore the fee taken by him from the lender will be something extra, which will be considered usury<sup>15</sup>.

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<sup>14</sup> Al-Muqni li Ibn Qudamah: 4/393. Rawdhat al-Talibeen li al-Nawawi: 3/276.

<sup>15</sup> See the details of this issue in page 355 in the book “Fiqh al-Riba” (The Jurisprudence of Usury) by Abdulazeem Abozaid.

**The third case:** is whereby the middleman is not a guarantor of the loan seeker. However, he does receive the loan in the name of the loan seeker. In this case the jurists disagreed whether it is permissible for the middleman to receive a fee for his effort in acquiring the loan or not.

The Maliks prohibited the middleman from receiving such a fee. They justified their stance by saying that it is not permissible to receive money for performing charitable duties, which are obligatory. However, the Maliks added that this prohibition only applies if the middleman acquired the loan without exerting any efforts.<sup>16</sup>

On the other hand, the Shafis and Hanblis stated that such a fee is permissible. As for the Hanfis it is presumed that they have the same opinion. As for them prohibiting the use of a representative by the loan seeker to receive the loan, it is due to the fact that this will mean the loan will be for the representative, and not for the loan seeker himself. This is because the Hanfis consider the act of getting a loan as a donation, which means that the loan will be for the representative who requested it just like the case in all other types of donations, unless the sentence used by the representative is a sentence which shows that he is acting as a middle man and not as a representative of the loan seeker. In this case the Hanfis consider him as a messenger, which means he has the option of being regarded either as an employee, which gives him the right to receive a fee for his effort, or as a donator who did this out of the goodness of his heart<sup>17</sup>.

Based on the above, if the middleman acquired the loan for himself with the intention of loaning it to the real loan seeker, then he is prohibited from receiving any form of benefit from him. This is because the contract of the loan is between the lender and the middleman. Thus, giving the loan to the real loan seeker will mean the creation of a new contract between the middle man and the real loan seeker, which means that the middle man can not receive any form of benefit from this contract, for it would be considered usury.

In short, we can say that charging a loan seeker a specific amount of money as a fee for acquiring him a loan using the loan seeker's name and not acting as his guarantor is not prohibited. This is because the fee taken from the borrower will go to the middleman and not to the lender. Thus, it can be considered as a part of the fees that the borrower has to pay in order for him to receive the loan. It can be compared with the money spent by a loan seeker who has to travel to receive his loan. However, if there was a pre-arranged plan between the lender and the middleman, then obviously the fee taken from the borrower will be considered usury.

As for the Maliks they prohibited such a fee because they believe that it is not permissible to receive money for performing charitable duties, which are obligatory, and not because they consider the fee taken by the middleman as usury.

**The permissibility of charging a loan seeker a fee does not mean the permissibility of the method used by conventional banks:**

It could be argued that banks act as middlemen between the lenders and borrowers, and that they take a fee from both parties for their effort as middle men. This is because

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<sup>16</sup> Hashiyat al-Dusuqi: 3/224.

<sup>17</sup> Al-Muqni li Ibn Qudamah: 4/396. Kashaf al-Qina' lil Bahwati: 3/319. Hashiyat Ibn Abdeen: 4/275. Bada' al-Sana' lil Kasani: 6/23. Muqni al-Muhtaj lil Sharbini: 2/120 – 121.

the money of depositors will go to the borrowers, and the role of the bank is to overlook this transaction. Thus, this method should be permitted since charging a loan seeker a specific amount of money as a fee for acquiring him a loan is permitted also.

However, we can refute this argument by saying that the bank is in fact the real borrower from those who deposit their money in it, and he is the real lender to those who request loans from it.

What proves that the bank acts as a borrower and as a lender at the same time, and does not act as a middle man is the fact that it acts just as a borrower when it guarantees the safety of what is deposited in it, and promises an increase in the form of interest to the owners of these deposits regardless of whether it lends it to others or not. Moreover, it acts as a lender when it lends a portion of what it borrowed to people who are required to pay more interest on their loans than the interest that the bank pays to its depositors. In this way the bank ensures profitability.

Even if we assume that the bank acts as a middleman between the lenders and borrowers, it cannot charge a fee, since the whole transaction is based on interest.

And if we assume that what the bank takes from the borrower is a permissible fee, because of the bank's effort in getting the borrower the loan, then how are we going to explain the interest paid by the bank to its depositors.

### **The third issue: is compensating the lender for a drop in the value of the loan's currency a form of usury?**

Several Muslim jurists talked about the above-mentioned issue, and they theorized that the drop in the value of the loan's currency could happen with a currency that was called Fulus, which was a currency with a weak purchasing power, used along side the silver dirhams and the golden dinars. Al-Fulus were either made from bronze or iron, and were used to buy things of trivial value. So, the jurists theorized that the value of al-Fulus could drop because it does not have a fixed value, unlike the silver dirhams and the golden dinars, which have a stable value.

Currencies of nowadays are similar to al-Fulus in that they do not have a fixed value. In fact they are more susceptible to recession, and change of value. Thus, what the jurists said about al-Fulus can be applied on the currencies of nowadays.

In short, the jurists said the following about the issue:

#### **The first opinion:**

The change in the value of the loan's currency whether does not affect the loan at all. Therefore, the borrower is obliged to pay only the exact amount taken from the lender regardless of the changes that affected the value of the loan's currency. Similarly if the loan was a certain amount of wheat, and it happened that its price as a commodity decreased or increased, the borrower is obliged to return the exact same amount of wheat that he borrowed regardless of the changes that affected its value, and this is what the majority of Muslim jurists follow when encountering an issue of this nature<sup>18</sup>.

#### **The second opinion:**

The change in the value of the loan's currency affects the amount of money the borrower has to pay back, which means that the borrower has to pay back the current

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<sup>18</sup> Al-Muqni li Ibn Qudamah: 4/396. Hashiyat Ibn Abdeen: 4/24. Al-Hawi lil Fatwa lil Sauti: 1/151.

value of the loan. This opinion is one of two opinions brought forward by Abu Yusuf, a jurist who subscribes to the Hanafi school of thought, and is the opinion that the Hanafis subscribe to. In this regard Ibn Abdeen said: “I have not come across a Hanfi who followed the opinion of the Imam” referring to the opinion of Abu Hanifa which states that the value of the loan’s currency cannot be changed<sup>19</sup>.

With regards to the day during which the value of the loan is determined, Abu Yusuf said that: “it is the day the borrower receives the loan from the lender”<sup>20</sup>.

However, the assembly of jurists which is based in Jeddah has stated in its decision number 4 taken in the year 1409 that any change affecting the value of the loan’s currency bears 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 assembly reasserted its stance on the matter in another decision issued in the year 1414<sup>21</sup>.

However, we consider that the opinion adopted by the Hanafis is reasonable, as it protects the rights of lender, especially in the possible scenario of a sharp depreciation in the value of the loan’s currency. Thus, we recommend the implementation of this opinion by considering the buying power of the loan’s currency during the day of giving out the loan, and during the day of returning it by the borrower.

This consideration will not be associated or connected in any way to usury since the value of the currency is only symbolic and subject to fluctuations. Therefore, if we were to return a loan, we must consider its buying power at the time of collecting the loan and the time of returning it.

#### **The fourth issue: The legal rule of contracts, which stipulates the payment of interest.**

Often Muslims get involved with certain financial establishments that are not bound by the prohibition of usury. This involvement is in the form of contracts that stipulate the payment of interest to the concerned financial establishment particularly in specific circumstances, or for particular financial services such as the ‘overdraft’ service, whereby a client is allowed to withdraw a certain amount of money for free, after which he has to pay interest on the withdrawn amount<sup>22</sup>.

Another scenario is whereby a governmental financial institution offers interest free loans to investors, which have to be settled or paid back within a stipulated period of time. However, if the investor fails to pay the amount in the due time he has to pay an interest on the loan.

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<sup>19</sup> Hashiyat Ibn Abdeen: 4/24. Al-Hafsaki did not mention in al-Dur al-Mukhtar any disagreement in this issue; instead he mentioned that there is a consensus in the Hanafi school of Jurisprudence 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-Hafsaki. See Hashiyat Ibn Abdeen (Rad al-Muhtar ala al-Dur al-Mukhtar): 4/242.

<sup>20</sup> Fath al-Qadeer li Ibn Hamam: 6/279. Hashiyat Ibn Abdeen: 4/242.

<sup>21</sup> See the decision no. (4) regarding the issue the change in the currency’s value, the fifth conference in Kuwait, 1409/1988, and the decision no. 79 regarding several issues related to currency, the eighth conference in the sultanate of Brunei, 1414/1993. Both decisions were mentioned by Dr. Wahbah al-Zuhayli in his book al-Fiqh al-Islami wa Adilatuhu: 9/558 – 624.

<sup>22</sup> The legality of the overdraft service will be discussed in another part of this study.

**What is the legal rule regarding the signing of contracts, which stipulates the payment of interest in specific exceptional circumstances?**

There is no harm in signing such contracts as long as the person involved is certain of the fact that he can settle the loan within the interest free period. And in that case, the interest mentioned in the contract will be a formality dictated by the financial institution and not by the borrower who can not in fact challenge it especially when dealing with government or corporate financial institutions which control the livelihood of the people.

However, if the borrower doubts his ability in settling the loan within the interest free period then, signing such contracts becomes prohibited since the probability of him having to pay interest becomes very strong.