



الجامعة الإسلامية العالمية ماليزيا  
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA  
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

# THE PRINCIPLES OF CONTRACT IN ISLAM

*(A comparative analysis with  
the common law)*

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## MOTTO

"واوفوا بالعقود"  
إن العهود هناك مسبوقاً  
(٣٤-١٧ القرآن)

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## Preface:

Being the absolute leader of the Muslim Ummah, the Holy Prophet (s.a.w) was the true benefactor and educator of mankind. He (s.a.w.) left no stone unturned in bringing the mankind out of the darkness of ignorance into the light of knowledge, wisdom and truth. The Holy Prophet (s.a.w.) provided guidance for all walks of life - individual and social, material and moral, economic, political, legal and cultural, national and international. He (s.a.w.), more than fourteen hundred years ago introduced an enunciated the concept of law of contract (العقد). The Islamic Law of contract is one of the most important branches of commercial laws Islam caters for human welfare through the establishment of harmony between the moral and the material needs of the mankind and the maximum actualisation of socio-economic justice in the society.

A number of scholars have done pioneering work in Arabic in the field of Islamic Law of contract, such as Dr. Wahbatul Zuhaili, Dr. Abdul Razzaq Samhuri, Dr. Hussain Hamid Hassan, Ahmad Zarga, Imam Muhammad Abu Zharra, e.t.c. In the development of the Islamic law of contract, most of the works were done in Arabic. Unfortunately, very little work was done in English by the so-called orientalist such as Anderson, N.J. Coulson, Joseph Schacht, Baillie, Dr. E.S. Rayner, e.t.c. There are also very little work done by the Islamic scholars in English such as Prof. Dr. Abdur Rahman Idoi, Dr. Liaqat Ali Khan Niazi and so on.

However, I have tried my level best to get a help from the work done by the Islamic scholars as well as the Orientalist in highlighting the principles of contract in Islam. I also have to refer to various common law books on the law of contract, various statues as well as dictionaries in order to make a comparative analysis between the Islamic Law of contract and the Law of Contract under the Common Law.

Finally, by the Blessings of Allah (s.w.t.), I have managed to complete my dissertation which covers the Islamic Law of Contract which may be suitable for the modern society today. A comparative analysis between the Islamic Law and the common law on the issue of contract has also been adopted which may give a comparative picture on the law of contract to the readers.

It is very true that I was only able to complete this dissertation by the Blessings of Allah (s.w.t.) I thus would like to express my thorough and sincere gratefulness to Almighty Allah (s.w.t.) I would also like to express my sincere and warmest gratitude to my beloved supervisor, Prof. Dr. Mohd. Zain b. Haji Othman for his kind, sincere and careful supervision throughout the course of my dissertation. Furthermore, I would like to express my special thanks to Prof. Dr. Syed Mishabul Hassan and Dr. A. Mohaimin for their sincere advice towards my research for this dissertation. My sincere thanks also goes to my sincere colleague Bro. Ahmad Azam Shariff for his kind and sincere help towards the completion of this dissertation. I also must pay my sincere thanks to Sis. Khaliza for her sincere contribution throughout the preparation of this dissertation.



I would like to express my sole gratitude to my beloved teachers and lecturers from whom I have acquired knowledge directly or indirectly.

Finally, I have tired my level best to project a comparative analysis between the Islamic Law and the Common Law on Contract. My work may have many shortcomings. It is very much appreciated if anyone could come up with a sincere comments towards its improvement.

May Allah (s.w.t.) Bless us and all the Muslims in this world and in the hereafter, alive and dead. "Amin".

31st. May, 1993

(Mohd. Ma'sum Billah)

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## Abstract:

This study deals with the principles of contract in Islam and the comparative analysis with the principles of contract under the common law.

The introduction of this thesis presents a general idea of the law of contract in Islam and its development and significance to the human life. It also touches on the position of the law of contract under the common law and also its significance to the society in general.

The study of this thesis, has been divided into Four Chapters and Final Remarks.

Chapter 1 deals with the general idea of a contract in Islam. Among the areas covered under this chapter is the meaning of contract, its basis, rational, development, nature and scope. It also touches on the aspects of freedom of contract, the nominate contracts, the relationship between contract and belief and also the idea of the different terms related to contract. All of the above-mentioned aspects covered by this chapter are compared with the Common Law.

Chapter 11 deals with the various kinds of contract. The classifications covered by this Chapter is based on the nature of the contract, its circumstances and also legal consequences. These classifications are also compared with <sup>the</sup> position under the Common Law.

Chapter III touches on the elements of contract under the Islamic Law such as the offer, the acceptance, the parties to the contract, the consideration and the possibility of performance of the contract.

Chapter IV, which is the final Chapter, mainly covers two parts: the impediments to the contract in Islam and the various legal remedies for breach of contract, such as rescission, injunction, damages, specific performance and also restitution.

The last part of this thesis consists of the Final Remarks and it deals with the comparison between the Islamic Law of Contract, their possible solutions as well as the future prospect for the Islamization of the Islamic Law of Contract in the society today.

Finally, this thesis ends with the index of various important words and names, the glossary of various words given and last but not least, the bibliography of the references that have been used in this thesis.

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## Abbreviations:

### Abbreviations

Art.  
Ch.  
Dr.  
ed.  
e.g.  
ff.  
i.e.  
Id  
Ibid  
Loc. cit  
Mr.  
Nd.  
op. cit  
P.  
PP.  
Q  
R.  
S.W.T  
S.A.W  
Sect.  
trans.  
viz  
vol.  
v.

### Meaning

Article (s)  
Chapter  
Doctor  
editor  
exempli gratia, For example  
the pages following  
I. dest, that is  
Idiem  
Ibidem  
loco citato, local citation  
Mister  
no date of publication is given  
opere citato  
page  
pages  
Question  
Radiallah Taala Anhu  
Subhanahu wa Taala  
Sallallahu Alaihi wa sallam  
Section  
translation  
namely  
volume  
versus, against

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## RESEARCH METHODOLOGIES:

In the course of this research towards the completion of this dissertation, the following methods have been adopted.

### (i) Library research:

A Library Research has been conducted which includes the collection of various materials from both aspects, the Islamic Law as well as the Common Law. These materials are as follows:

- (a) Al-Quran
- (b) Tafasir
- (c) Ahadith with commentaries
- (d) Books on Fiqh
- (e) Relevant books on the Islamic Law
- (f) Relevant books on the Common law
- (g) Various statutes on the Islamic Law and the Common Law
- (h) The commentaries of the statutes
- (i) Various Islamic and conventional dictionaries.

### (ii) Field Research:

A field research has also been made and this includes:

- (a) Consultations with the Supervisor
- (b) Consultations with the experts
- (c) Discussions with fellow colleagues
- (d) An interview with the staff from Takaful Sdn. Bhd., Kuala Lumpur and the Islamic Bank, Kuala Lumpur.

(iii) Analytical approach:

The approach which I have tried to use in this dissertation is based on the idea of developing any aspect of a legal matter by using the analytical approach which is not contrary to the Quran and the Sunnah and which may be suitable for today's society. It is immaterial whether we can find the direct basis from the Quran and the Sunnah or not, as long as these analytical approaches are not contrary to the Quran and the Sunnah.

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## بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ

### INTRODUCTION:

Islam is a beautiful religion. Its beauty not only lies on its theories but also on its applicability, practicality and comprehensiveness. This is because, Islam is not only a mere religion which sphere is too rigid and restricted. On the other hand, it is a complete and comprehensive system of life which provides the principles and solutions in all aspects of humans life. Islam not only covers the aspect of belief (إيمان) and specific worships (عبادة الخصوصية) but also the other aspects as well which also include the aspect of transaction among the human beings. In fact, any form of action (which also includes the performance of any kind of transaction among the people) if done in accordance with the Divine Principles will be considered as a general worship (عبادة العمومية) as well which will be rewarded by Allah (s.w.t.)

The aspect of transaction (المعاملة), being one of the aspect covered by the beautiful religion of Islam also includes the field of commercial transactions, which operation evolves around the formation of contracts and covenants. Being an integral part of commercial transactions which features prominently in man's daily life, the aspect of contract is undoubtedly covered by Islam. Allah (s.w.t.) has revealed the Divine Injunctions in the Holy Quran and the Sunnah of the Prophet (s.a.w.) which not only deal with

the theoretical side of the contractual dealings, but also the practical side of it

The Holy Prophet (s.a.w.) , despite being the Messenger of Allah (s.w.t.), had involved himself in the field of trade and commerce and had also involved on numerous occasions in contractual dealings. In fact, the Prophet (s.a.w.) had also encouraged his companions to practice it widely in order to be economically independent. History has also proven how many great religious personalities such as Imam Abu Hanifa (R) and many others who had seriously involved themselves in the field of trade and commerce besides their outstanding contributions on their research work on the Holy Quran and the Sunnah. Hence, no one can deny the necessity of involving in the trade and commerce and, simultaneously, contractual dealings in one's daily life.

The Common Law has also come up with certain principles and regulations regulating contractual dealings. However, there are still some differences between the Law of Contract under the Islamic Law and the Common Law. For instance, the basis of the Islamic Law of Contract is the Divine Sanctions which can be found in the Holy Quran and the Sunnah while the basis of contract under the Common Law is the human thinking and practice. Moreover, in terms of the nature, practice and scope of the Law of Contract, there are also some dissimilarities in certain areas between the Islamic law and the Common Law.



It is thus the sincere and noble intention of this dissertation to highlight the basic principles regarding contract under the Islamic Law which, no doubt, suit the society of today and the future. It is also my sincere and humble hope to make comparative evaluations, whenever necessary between the Islamic Law of Contract and the Law of Contract under the Common Law.



## CHAPTER I

### INTRODUCTION TO 'CONTRACT' (تمهيد العقد)

1. THE MEANING OF THE 'CONTRACT' (العقد)
2. THE LEGAL BASIS OF 'CONTRACT'
3. THE RATIONALE BEHIND THE LAW RELATING TO CONTRACT
4. THE RELATIONSHIP BETWEEN 'CONTRACT' IN THE COMMERCIAL TRANSACTIONS AND THE 'RELIGION'
5. THE HISTORICAL DEVELOPMENT OF THE LAW OF CONTRACT
6. THE NATURE OF THE LAW OF THE CONTRACT
7. THE SCOPE OF THE LAW OF THE CONTRACT
8. FREEDOM OF CONTRACT
9. NOMINATE CONTRACTS
10. THE IDEA OF THE TERMS 'CONTRACT', 'PROPOSAL', 'PROMISE', 'AGREEMENT', 'INTENTION', 'COVENANT' AND 'TREATY'.
- \* CONCLUDING REMARKS ON CHAPTER I

## 1. THE MEANING OF THE TERM 'CONTRACT' (معنى العقد)

The term "العقد" is an Arabic word which is derived from ع-ق-د - which literally means conjunction,<sup>4</sup> to tie, knot,<sup>5</sup> contract, e.t.c. In the Legal terminology, the term "العقد" means a contract between two parties on a particular subject matter which is to be concluded upon "إيجاب" (offer) and "قبول" (acceptance) of the parties. There are however, various definitions of "العقد" or contract which are given as follows:

According to the dictionary of commerce the term (العقد) or "contract" is "a transaction involving two or more individuals whereby each becomes obligated to the other, with reciprocal rights to demand performance of what is promised".<sup>6</sup> According to Hassan S. Karmi, the term "العقد" means "contract."<sup>7</sup>

According to A Dictionary of Business Terms, the term (العقد) or "contract" is defined as "a legally binding agreement between two or more parties in which, for a consideration, one or more of the parties agree to do something."<sup>8</sup>

4 Dr. Liaquat Ali Khan Niazi, *Islamic Law of Contract*, (1991), p. 9

5 See "العقن" in Edward Elias Elias, *Qamusul Elias Al-Jamei*, (1963)

6 See "Contract" in D.P. Gupta, et.al. (eds) *Dictionary of Commerce*, (1989)

7 As cited by Dr. Niazi, *op. cit* p. 9

8 See "Contract" Alexander Hamilton Institute, *A Dictionary of Business terms*, (1987)

Meanwhile, to Hashim Maaruf al-Hussaini defines (العقد) (contract)

as below:

"العقد هو عبارة عن المعاهدة الحاصلة من الالتزام والالتزام  
الذى لا بدله من طرفين"<sup>9</sup>

"A contract is an agreement and the consequence is an obligation and binding  
upon the contracting parties."

According to Mawlana Mohd. Abu Hussain, the technical term of the  
word (البيع) means:

"مبادلة المال بالمال على سبيل الترضى"<sup>10</sup>

(an exchange of goods by goods upon mutual consent among the contracting  
parties)".

At the same time, Edward William Lane describes the term "العقد" as  
a contract, a compact, a covenant, an agreement, a league, a treaty or an  
engagement.<sup>11</sup>

According to the Sharki Yiqaya, the term "العقد" is defined as  
follows:

"العقد هو ربط اجزاء التصرف اى الايجاب والقبول شرعا لكن هنا  
يريد بالعقد الحاصل بالمصدر وهو الارتباط"<sup>12</sup>

9 Hashim Maaruf Al-Hussaini, *Nazristul Aqd Fi Fiqh Al Zafari*, (n.d.) p. 100

10 Malwana Abul Hussain, *Tanjimul Ashtat*, (Urdu) vol. II (1402H) p. 115

11 as cited in Dr. Liaquat, *op. cit* p. 9

12 Mawlana Mowlavi Abdul Hai, *Sharhul Fiqsyah*, vol. II (n.d.) p. 5

"A contract which is combined with two elements i.e. offer and acceptance. The idea of "العقد" or contract here is a combination (between offer and acceptance)."

In *Murshidul Hainan*, the term "العقد" means "a conjunction of offer emanating from one of the two contracting parties with the acceptance of the other in a manner that it may affect the subject matter of the contract."

13

Muhammad Abu Zahrah defined the term "العقد" as follows

"العقد هو ربط بين كلامين ينشأ عنه حكم شرعي بالتزام لاحد الطرفين ولكليهما"

"Aqd is conjunction between two sayings from which an order of the Shariah is deduced, which is applicable to one party or both of them"<sup>14</sup>

According to the *Mejelle* the term "العقد" and the term "الإنعقاد" are defined as follows:

"العقد" (concluded bargain) is the two parties taking upon themselves and undertaking to do something. It is composed of the combination of an offer (إيجاب) and an acceptance (قبول)<sup>11a</sup>. "الإنعقاد" (The making of "العقد") is the connecting, in a legal manner, the offer (إيجاب) and acceptance

13 As cited in Dr. Niazi, *op.cit* p. 10

14 *Id.* p.p. 10 - 11

11a Art. 103. The *Mejelle*

(قبول) the one with the other, in a way which will be clear evidence of the being mutually connected. <sup>11b</sup>

Thus a contract or "العقد" in Islamic Law means an agreement of a particular transaction between two or more parties, which is binding upon the contracting parties provided that the parties to the agreement, the terms and the nature of the agreement and the subject matter of the agreement should not be contrary to the Quran and Sunnah or Islamic Fiqh.

### Analysis:

The basic difference between the Islamic Law and the common law relating to definition of "العقد" or contract is that under the Islamic law, an agreement between two parties should be in line with the Divine Sanctions whereas an agreement under the common law is not be based on in line with the divine sanction but based on the positive law e.t.c.

In other words, the main difference between the definition of "العقد" (contract) under the Islamic Law and the common law can be illustrated by the following chart:

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<sup>11b</sup> Art 104, Id

## ISLAMIC LAW

Any aspect of the contract should be in line with the Divine Laws and any other secondary source which is recognized by the Divine Sanctions

## COMMON LAW

The contract need not be based on Divine Sanctions or but based on the positive law, natural law, case law, etc

### 2 THE LEGAL BASIS OF CONTRACT (الأداة للعقد)

The idea of "العقد" or contract is an agreement between two parties on a particular subject matter which is binding upon both parties. Thus there are many Quranic injunctions and Sunnah of the Prophet (s.a.w.) which regulate the principles of contract by different terms like "العقد", "الميثاق", "العهد" and "الوعد".

Thus the basis of the Islamic law of contract can be seen from the Quranic injunctions and Sunnah of the Holy Prophet (s.a.w.) which are as follows:

"يا أيها الذين آمنوا أوفوا بالعقود"

"O ye who believe! fulfil the contractual obligations"<sup>15</sup>

As regards to the fulfilment of the contract of marriage Allah (s.w.t.) says

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<sup>15</sup> Al-Quran Ch. 5:1

"ولا تعزموا عقدة النكاح حتى يبلغ الكتاب أجله"

*"... nor resolve on the tie of the marriage till the term prescribed is fulfilled..."<sup>16</sup>*

"Bar" is a contract of sale, and Allah (s.w.t.) had advised people to involve in contractual transactions except when there is a proclamation for Friday prayer. Allah (s.w.t.) says to the effect:

"يا ايها الذين امنوا اذا نودي للصلاة من يوم الجمعة فاسعوا الى ذكر الله وذروا البيع . ذلكم خير لكم ان كنتم تعلمون"

*"O ye who believe! when the call is proclaimed on Friday for prayer has been earnestly to the remembrance of Allah (s.w.t.) and leave off business and traffic: that is best for you if ye but knew!"<sup>17</sup>*

Allah (s.w.t.) also advises people to sustain the contractual covenant. He (s.w.t.) says to the effect:

"وأوفوا بعهدى اوف بعهدكم"

*"... And fulfil your covenant with me and as I fulfil my covenant with you..."<sup>18</sup>*

Allah (s.w.t.) again commanded to the effect:

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16 *Id.* 2:235  
17 *Id.* 62:9  
18 *Id.* 2:40