CAMBRIDGE
UNIVERSITY PRESS

Principles of Islamic Contract Law

Author(s): Noor Mohammed

Source: *Journal of Law and Religion*, 1988, Vol. 6, No. 1 (1988), pp. 115-130

Published by: Cambridge University Press

Stable URL: https://www.jstor.org/stable/1051062

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms

*Cambridge University Press* is collaborating with JSTOR to digitize, preserve and extend access to *Journal of Law and Religion*

JSTOR

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

# PRINCIPLES OF ISLAMIC CONTRACT LAW

*Noor Mohammed* *

Heightened awareness in the United States about Islam and Muslims presents an opportunity to explore issues in Islamic Law, and particularly to examine the concepts that underlie Islamic law. This study is an effort to present briefly the controlling principles of Islamic Contract Law. In view of the monumental growth of trade between the Western and the Muslim worlds and projected increase in the coming century, the subject should continue to be of particular interest.

The doctrinal basis of Islamic law is the point of departure for this study. A brief historical sketch reveals the doctrinally-based components that have evolved into Islamic law.[1] Islamic belief begins with Prophet Muhammad, the Messenger of God (Allah). The Prophet's mission was to establish an order in this world based on divine revelations made to him by God (Allah). These divine revelations are recorded in the *Quran*, the sole scripture of the Muslims. The spiritual and secular practices of the Prophet came to be known as *Sunna*. These two sources constitute the main guidelines for spiritual as well as temporal Muslim conduct in this life as a preparation for the hereafter, and are called *Sharia*. The word *Sharia* means the highway to good life. Over a period of time two additional sources of *Sharia* came into existence. They are: 1) *Qiyas*, or analogical reasoning, and 2) *Ijma*, or consensus of the Islamic community on a point of law. According to *Sharia*, sovereignty vests in God (Allah), requiring the state to act within the limits of divine law, or *Sharia*. This sovereignty is recognized by incorporation of *Sharia* into the Islamic legal system and community. In this sense *Sharia* is the constitutional law of a Muslim society.[2]

This umbrella of *Sharia* in Islamic society covers the entire spectrum of Islamic life and ethical values in both temporal and spiritual activity. *Sharia* addresses itself to spiritual (*Ibadat*) matters as well as to the temporal (*Muamlatt*) transactions. In the field of spiritual

* Professor of Law, University of Baltimore School of Law, Baltimore, Maryland. LL.M., 1961, Minnesota; LL.M., 1962; J.S.D., 1968, Yale; et al.

1. Readers unfamiliar with Islam will find useful a chapter by the author entitled *In Introduction to Islamic Law*, V MODERN LEGAL SYSTEMS CYCLOPEDIA 681-92 (Redden ed. 1985).

2. F. RAHMAN, ISLAM 100 (1979).



This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

(*Ibadat*) life, the control of *Sharia* is unfettered. But its role in temporal transactions (*Muamlatt*) is less pervasive, but still vital.

Like other legal systems, *Sharia* classifies human conduct into three categories. These are: 1) Mandatory 2) Prohibited and 3) Permitted. The last category is further subdivided by *Sharia* as: a) Praiseworthy b) Repulsive and c) Permitted.[3]

*Sharia* becomes of importance when temporal transactions are caught within its prohibitions or come under its disapproval. In brief, *Sharia* requires the accomplishment of a number of collective duties by Muslims. These can be summarized as "enjoining the good and forbidding the evil": "ya amroona bil-maruf wa ya—nahoona an al-munkar"[4]

## SHARIA & CONTRACT

The initial source of Islamic contract law is apparent through the Quranic revelation in these words:

> 0 ye who believe!
> Fulfil (all) obligations.[5]

This Quranic verse is the basis of the sanctity of a wide variety of obligations. The arabic word '*uqud*' covers the entire field of obligations, including those that are spiritual, social, political, and commercial. In the spiritual realm '*uqud*' deals with the individual's obligation to Allah; in social relations the term refers to relations including the contract of marriage; in the political arena it encompasses treaty obligations, and similarly, in the field of commerce, it covers the whole spectrum of obligations of parties in regard to their respective undertakings. Hence the generic word '*uqud*' forms the foundation of contract and attendant liabilities.[6]

This short background of *Sharia* as the root principle of Islamic law must be kept in mind for an analysis and understanding of Islamic contract law. In contrast to Islamic law, the Western common law of contract, which developed during the eighteenth and nineteenth centuries, grew out of the economic and legal theories of the period in which it was formulated. In its nascency it was formulated

3. Badr, *Islamic Law: Its Reaction to Other Legal Systems*, 26 AMERICAN JOURNAL OF COMPARATIVE LAW 183 at 189.

4. Al-Quran, S 9:71.

5. *Id.*, S V.1.

6. A.Y. ALI, THE HOLY QURAN (1946), note 682. *See also* S.H. AMIN, REMEDIES FOR BREACH OF CONTRACT IN ISLAMIC & IRANIAN LAW 11-12 (1984); ABDUR RAHMAN I. DOI, SHARIAH THE ISLAMIC LAW 355-56 (1984).

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

by natural law theories and later by *laissez faire* economic theory. Both these theories have undergone considerable revision over time.[7]

Islamic contract law, by contrast, started taking its shape in the seventh century. It is fair to assume that at this time in human history commerce was limited to market overt and that goods consisted of surplus farm products or handicrafts. The Islamic law of contracts reflects and addresses the transactional reality of this period. The Anglo-Saxon common law of contracts was reshaped in the wake of the industrial revolution of the eighteenth century. The Muslim world in general did not experience the challenges of the Industrial Revolution. But in recent years the sudden oil-based prosperity of some Islamic lands has put the Islamic law of contract in full gear. We find that through its history its responses are reminiscent of the common law tradition. Hence its growth should also be responsive to changing needs and times, as has been the common law.[8]

## THE TWIN DOCTRINES OF *SHARIA* AND CONTRACT

It has been recorded that in the immediate pre-Islamic era life in Mecca was decadent and this decadence was reflected in trade practices as well. The Prophet was himself a merchant before he embarked upon his career as the Messenger of God (Allah). Mecca was a trade center and reforming trade practice was a natural focus of his attention. To redress the unconscionable and abusive commercial practice of pre-Islamic times, he insisted that transactions be required to comply with the evolving principles of *Sharia*.[9]

Two cardinal *Sharia* doctrines have held sway in the development of Islamic contract law through history. These are: 1) *riba* 2) *gharar*. Looking at these doctrines and their juristic interpretations enables us to understand the past and to project the future of Islamic law of contract.

## DOCTRINE OF *RIBA* IN ISLAM

Muhammad's monotheism was linked with a humanism that had as its goal, social and economic justice.[10] The Prophet seemed to insist: One God—one humanity. The objective of economic and social

7. P.S. ATIYAH, THE LAW OF CONTRACT 1-19 (1961). *See also* H.C. HAVINGHURST, THE NATURE OF PRIVATE CONTRACT (1961).

8. Makdisi, *Legal History of Islamic Law & English Common Law; Origins & Metamorphosis*, 34 CLEV. ST. L. REV. 3-18 (1985-86).

9. F. RAHMAN, ISLAM 14 (1979).

10. *Supra* note 9, at 13. *See also* SAHIH AL-BUKHARI, XXXIV-Sales, chapters 24-26.

This content downloaded from 149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

justice presupposes the existence of oppressive economic practices. The *Quran* in one of the earliest revelations insists that "God hath permitted trade and forbidden usury."[11] The Arabic word in the Quran referring to the prohibited act is *riba* which roughly translates to "usury." Yusuf Ali in his commentary explains that *riba* is any increase sought through illegal means, such as usury, bribery, profiteering, and fraudulent trading.[12] It includes economic selfishness and many kinds of sharp practices, including those that are individual, national and international in character. Irving in his remarkable commentary on the *Quran* translates a verse on usury:

> You who believe, do not live off usury which is compounded over and over again. Heed God so that you may prosper: heed the fire which has been prepared for disbelievers; obey God and the messenger so you may find mercy.[13]

Through centuries of juristic interpretation the prohibition of *riba* has maintained broad vitality except that different schools of interpretation have continued to interpret it differently. A contemporary commentator has brought together various strains of thought by the leading jurists and explains the term *riba* in its *Sharia* context as follows:

> an unlawful gain derived from the quantitative inequality of the countervalues in any transaction purporting to effect the exchange of two or more species . . . which belong to the same genus, and are

---

11. The Holy Quran S-ii, 274.

12. *Supra* note 6, *A.Y.Ali.*, footnote 3552:

> The term *riba* in the Arabic language connotes any increase or augmentation. In Islamic legal jurisprudence, it is often defined as the increase which has no consideration, as stipulated in loan transactions or in the exchange of goods of the same kind. *Riba* was commonly practiced in pre-Islamic Arabia mainly in the form of extension of loan repayment periods against the doubling of the principal amount of the loan. This particular form was prohibited first by the Quran (Surat Al-i-'Imran, III, Verse 130) before the general prohibition of all *riba* was established (*Surat the Cow*, II, Verses 278-281) and elaborated on in the Prophet's last address in his Farewell Pilgrimage. Subsequent jurisprudence distinguished between the *loans' riba* (known also as *riba an-nassi'a* and as the *riba* prohibited by the Koran) and the *Sales' riba* which takes the form of either the spot sale of one of six items (gold, silver, wheat, barley, dates and salt) against an item of its own kind but with an increase in amount or value (*riba al-Fadhl*) or the exchange of any goods with goods of the same kind or of another kind which serves the same purpose when the latter are delivered in the future in an augmented quantity or value (*riba an-nassa*).

*See also* Ibrahim F.I. Shihata, Legal Aspects of Islamic Bank, Concluding Remarks in International Conference of Islamic Banking & Finance, 26 September 1986. Dr. Shihata is Vice-President & General Counsel, World Bank, Washington, D.C. A copy of his remarks could be obtained upon request.

13. T.B. IRVING, THE QURAN, THE FIRST AMERICAN VERSION, TRANSLATION & COMMENTARY 34 (1985).

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

> governed by the same efficient cause. Deferred completion of the exchange of such species, or even of species which belong to different genera but are governed by the same (efficient cause)[14] is also *riba*, whether or not the deferment is accompanied by an increase in any one of the exchanged countervalues.[15]

Usurious transactions were classified by the jurists into two classes: (1) *riba al-fadl*, which produced unlawful excess in exchange of countervalues in a contemporaneous transaction and (2) *riba al-nasi'a*, which produced unlawful gain by deferring the completion of exchange of countervalues, with or without an increase in profit. A third category was also added by some scholars called *riba al-jahilyya* or pre-Islamic *riba* exemplified by the lender asking the borrower at maturity date if he will settle the debt or increase it. Increase occurred by charging interest on the debt initially accrued.[16]

*Riba al-Jahilya* relates to pre-Islamic *riba* also described as usury.[17] But *riba al-fadl* and *riba al-nasi'a* apply to the exchange (whether concurrent or deferred) of two precious metals (gold or silver) and four commodities (wheat, barley, dates and salt). The application of the doctrine of *riba* to these articles is based on the Prophet's tradition. It was further extended by analogy (*qiyas*), to the products of these six articles if their present or future exchange could have the smell or taint of *riba*.

It is not difficult to imagine that the seventh century economy was not monetized and that trade mostly consisted of face-to-face exchange as a result of some negotiation called contract or barter. Islamic law did not permit exchange of unequal values of the enumerated articles and by analogy to a variety of their products. These articles happened to be the basic necessities of life and were a convenient means of exploitation. The promises for future perform-

14. "Efficient-cause" is possibly the nearest English translation for "*illa*."

15. N.A. SALEH, UNLAWFUL GAIN & LEGITIMATE PROFIT IN ISLAMIC LAW 12-13 (1986). A common "illa" should connect together two elements of analogy, namely the object of the analogy and its subject, in order to produce the analogical reasoning. The following example will throw more light on this method of legal reasoning: drinking wine (*khamr*) is forbidden by Quranic injunctions; the drinking prohibition was extended to all kinds of alcoholic drink (*nabidh*) apparently by a *hadith* but also by analogy because of the common "*illa*" of wine and alcoholic drink, which is the capacity to produce intoxication.

16. *Id.* 13. The author gives what appears as a final breakdown of *Riba*:
*riba*: unlawful advantage by way of excess or deferment.
*riba al-fadl*: *riba* by way of excess of one of the exchanged countervalues.
*riba al-nasi'a*: *riba* by way of deferment of completion of an exchange.
*riba al-jahiliyya*: pre-Islamic *riba*.
*mal ribawi*: property susceptible of *riba*.

17. *Id.* 14.

This content downloaded from 149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

ance were clearly forbidden if goods comprised the enumerated articles as the transactions were suspected to contain *riba*.[18]

Over the centuries the concept of *riba* has held a firm ground in Islamic contract law, but its interpretation has continued to be revised under the changing economic setting. By the turn of the century, the leading Islamic scholars Abduh and Rida held the view that *riba al-Jahilya* (pre-Islamic *riba*) was manifest *riba* and hence forbidden and made the transaction void.[19] But *riba al-fadl* and *riba al nasi'a* are under a rebuttable presumption of prohibition. In other words the extension of the time of payment on the maturity of a loan, conditioned on an additional increase, was manifest *riba* and forbidden. But it could be deemed lawful under extreme necessity. As to *riba al-fadl* and *riba al-nasi'a*, they held that these be looked at with aversion and are not prohibited. Their thinking helped opening the door for sale of unequal quantities of the enumerated articles or their product.

Contemporary thinkers have examined further the time-honored Islamic Law of *riba*. Daoualibi, a noted commentator, holds that *riba* applied to unproductive loans borrowed in the Prophet's time by the needy for subsistence. But today people borrow money to make money. Hence, Islam should make a distinction between productive and unproductive *riba* (interest) and allow the former.[20]

Yet another process underway in Islamic societies is the direct effort to abolish the role of interest in Islamic economy[21] and thus devitalize *riba*.[22] Several Islamic countries have mounted efforts in this direction. Two in particular should be noted: Pakistan and Iran. These countries are attempting to establish an interest-free Islamic economy through Islamic banking.[23]

## DOCTRINE OF *GHARAR*

Along with the doctrine of *riba* the other pervasive principle affecting the validity of contract is *gharar*. The relevant verses in the *Quran* dealing with the prohibition of *gharar* are Sura II verse 219

18. *Id.* 14-27, the author very ably collects the positions of all the different schools on the issue of present or deferred exchange of goods.

19. *Id.* at 28.

20. *Id.* at 29.

21. S.N.H. NAQVI, ETHICS & ECONOMICS, AN ISLAMIC SYNTHESIS (1981).

22. *M.N. Siddiqi, Muslim Economic Thinking, A Survey of Contemporary Literature* (1981). *See also* by the same author, ISSUES IN ISLAMIC BANKING (1983); *S.H. Homoud, Islamic Banking* (1985).

23. Z. Igbal & A. Mirakhor, International Monetary Fund, Islamic Banking (unpublished and undated research paper).

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

and Sura V verse 93 & 94.[24] These verses refer to gambling. The arabic word "*maisir*" literally means getting something too easily, getting a profit without working for it, hence gambling. The initial prohibition against gambling in the light of the Prophet's tradition of cleansing commerce of unconscionable practices, gives a wider meaning to the principle. This expanded scope has been ably summarized:

> this idea of protecting the weak against exploitation by the strong led to the elaboration of a rule of general application, commanding that any transaction should be devoid of uncertainty and speculation, and thus, according to learned men and legal scholars, could only be secured by the contracting parties' having perfect knowledge of the countervalues intended to be exchanged as a result of their transaction, otherwise there is an unacceptable degree of *gharar*. Thus, what was intended to be a religious precept was transformed into a wordly rule which affects a great proportion of secular transactions.[25]

Thus, *gharar* prohibition applies to a whole range of commercial activities involving speculative activities and aleatory contracts. The doctrine becomes applicable if the subject matter of contract the price or both are not determined and fixed in advance.[26] Thus, in a stroke, the doctrine strikes at the very root of common law exchange of promises for future performance.

Muslim jurists continued to interpret the concept in the light of commercial reality.[27] In its early development the concept was applied to transactions where the goods were not in existence at the time the parties were contracting for them. In other words future goods could not be made a subject of sale under the doctrine. But the leading jurist Ibn Qayyim explained the concept applied to uncertainty of availability of the subject matter and not merely to nonexistence at the time of contract.

Later, lack of knowledge about the existence or nonexistence of the subject matter, or concerning its quality, quantity, or date of performance, was held to trigger *gharar*.[28] One jurist came up with a list

24. A.Y. ALI, *supra* note 6, at 86, footnote 241. *See also supra* note 13, at 18 and 60.
25. *Supra* note 15, at 49.
26. *Id.* 50.
27. *Id.* 50.
28. *Id.* 51.

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

of ten cases which constituted as examples of *gharar*.[29]

*Ibn Rushd*[30] gave a helpful formula for the application of *gharar*. According to him material want of knowledge in either the subject matter or in price can produce *gharar*. But if the subject matter could be adequately described and price could be clearly fixed then it would eliminate the speculative risk and hence, *gharar* would become inapplicable.

Contemporary thinking on *gharar* in contracts has been summarized as follows:[31]

(1) There should be no want of knowledge (*jahl*) regarding the existence of the exchanged countervalues.

(2) There should be no want of knowledge (*jahl*) regarding the characteristics of the exchanged countervalues or the identification of their species or knowledge of their quantities or of the date of future performance, if any.

(3) Control of the parties over the exchanged countervalues should be effective.[32]

The ongoing refinement of the doctrine of *gharar* has continued over time and has been narrowed down to the presence or absence of uncertainty about future performance and not to the existence or non-existence of the subject matter at the time of contract. It does not

29. *Id.* 51, Ibn Juzay's list is as follows:

(a) Difficulty in putting the buyer in possession of the subject-matter; such as the sale of a stray animal or the young still unborn when the mother is not part of the sale.

(b) Want of knowledge (*jahl*) with regard to the price or the subject-matter, such as the vendor saying to the potential buyer: "I sell you what is in my sleeve."

(c) Want of knowledge with regard to the characteristics of the price or of the subject-matter, such as the vendor saying to the potential buyer: "I sell you a piece of cloth which is in my home' " or the sale of an article without the buyer inspecting or the seller describing it.

(d) Want of knowledge with regard to the quantum of the price or the quantity of the subject-matter, such as an offer to sell "at today's price" or "at the market price."

(e) Want of knowledge with regard to the date of future performance, such as an offer to sell when a stated person enters the room or when a stated person dies.

(f) Two sales in one transaction, such as selling one article at two different prices, one for cash and one for credit, or selling two different articles at one price, one for immediate remittance and one for a deferred one.

(g) The sale of what is not expected to revive, such as the sale of a sick animal.

(h) *Bay' al-hasah*, which is a type of sale whose outcome is determined by the throwing of a stone.

(i) *Bay' munabadha*, which is a sale performed by the vendor throwing a cloth at the buyer and achieving the sale transaction without giving the buyer the opportunity for properly examining the object of the sale.

(j) *Bay' mulamasa*, where the bargain is struck by touching the object of the sale without examining it.

30. *Id.* 52.

31. *Id.* 53.

32. *Id.* 79-80.

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

apply to business risk. But it applies to speculative or unconscionable risk. If the nonexistent article or subject matter is certain to be delivered or performed at a future date the prohibition of *gharar* does not apply. The risk in such transactions is minimal and does not attract the prohibition imposed by *gharar*.[33]

It must be pointed out that the concept of *riba* has held sway in Muslim societies from inception. Since *riba* typically applied to deferred transactions, any contract dealing with future performance was suspected to have the double taint of *riba* and *gharar*. The effectiveness of these two concepts has been moderated under the overriding doctrine of necessity; however, they continue to be alive and well and a subject of debate for Muslim scholarship.

The stage is now set for us to look at the contract prototypes developed in early Islamic society described by some commentators as "nominate contracts."[34] These nominate contracts comprise the following:[35]

(i) *bay'*, or sale is transfer of the corpus for a consideration

(ii) *hiba*, or gift, is the transfer of the corpus without a consideration

(iii) *I'jara*, or *hire*, is the transfer of the usufruct for a consideration

(iv) *'ariyya*, loan, is the transfer of the usufruct without a consideration.

We shall limit our inquiry to the contract of sale. We have already seen the pervasive hold of *Sharia* both in spiritual and secular matters. In the realm of commerce the twin concepts of *riba* and *gharar* were at work to confront the unconscionability and commercial overreaching. These principles laid down what was a valid contract of sale. Thus, contract required a concurrent[36] sale (*bay'*) and exchange for a fixed price in cash or kind. The delivery of the goods could not be postponed. It seems that transaction was akin to barter. But it had the merit of preventing *ribah* (usurious price) and *gharar* (speculative uncertainty). It has been ably commented[37] that although consensual, the Islamic contract is not promissory. It is not

33. *Id.* 52-78.

34. S.H. AMIN, REMEDIES FOR BREACH OF CONTRACT IN ISLAMIC LAW AND IRANIAN LAW 11 (1984).

35. J.J. COULSON, COMMERCIAL LAW IN THE GULF STATES 11 (1984).

36. *Id.* 19-20.

37. Zysow, *The Problem of Offer & Acceptance: A study of Implied in fact Contracts in Islamic Law & the Common Law*, 34 CLEVELAND ST. L. REV. 69 at 77.

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

formed by an exchange of promises but by an exchange of grants. The prohibition of aleatory contracts in Islamic law confirmed this tendency to confine transactions as much as possible to the here and now.

In its purity a completed exchange not in violation of *riba* principle is a prototype contract envisaged by *Sharia*. But soon the necessities of life began asserting themselves. Thus we notice the development of *Bay' salam* or the sale of subject matter not available at the time the parties enter into the contract. According to the Prophet's (*hadith*) statement, "whoever pays money in advance for dates (to be delivered) later should pay it for known specified weight and measure of the dates."[38] It is obvious that the transaction departs from the earlier *Sharia* principle of contemporaneous exchange, but it developed as a modification of the *Sharia* by the Prophet and as such it is firmly in place. In a typical *salam* transaction the buyer was required to pay in advance in return for the promise of the seller that the goods would be delivered at some future date. At the time of sale these goods did not exist and hence, to avert *gharar*, a description of the goods was required. *Salam* dealt with goods such as fruits or crops. Along with *salam* came *istisna*, or contract of manufacture. *Istisna* contract is a contract by a laborer or artisan to manufacture an article for an agreed price. In *istisna* payment and delivery had to await until the product was ready. This form of contract was subject to a right of inspection. But once the goods were made the contract could not be revoked. *Istisna*, like *salam*, was upheld during the time of the Prophet and justified under the rule of necessity.[39]

The development of *salam* and *istisna* responded to the commercial need of the time and is a short step away from the transactional realities of our present age. This development brings us to the basic questions: (1) How does the common law of contract formation fare on the scale of Islamic law or *Sharia*? and, (2) Is Islamic law malleable enough to encompass changing contractual and business relationships in the modern commercial world?

## PRINCIPLES OF INTERPRETATION OF *SHARIA*

A brief mention of the development of the principles of *Sharia* interpretation[40] will help our study further. The first forty years of

38. Sahih-Al-Bukhari, Vol. 3, pp 243-250.
39. *Supra* note 15, at 61-62. *See also supra* note 35, at 21.
40. J.L. ESPOSITO, ISLAM & POLITICS 3-15 (1984).

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

Islam, from 622 to 661 A.D., is regarded as the spiritually golden era of Islam. During this period from 622-632 A.D. the Prophet set up an Islamic City State in Medina in which Islam developed as a socio-political force. It also became the backdrop of Quranic revelations of the principles along with the Prophetic traditions on spiritual and secular matters. These revelations and practices became the doctrines and sources of further application and development of laws during the regimes of the first four Caliphs, from 632 to 661. These four Caliphs are regarded by Muslims as rightly guided. After the fourth Caliph, the Ummayyad Dynasty took over the leadership of Islam under Muawiyah, a dynamic statesman. But this dynasty departed from Islamic ideals resulting in soul-searching by leading Muslim scholars who launched an effort to study the *Quran* and the tradition of the Prophet to lay down a comprehensive text of Islamic *Sharia* for Muslims to follow. After the fall of Ummayyad (661-750), the mantle of Islamic leadership was taken over by Abbasid (750-950) who gave renewed vigor to this effort which began in the eighth century and continued through the tenth century. During the two centuries Muslim scholars set up schools of law at major Islamic centers and developed Islamic law. Islamic law, unlike the common law, developed[41] through scholarly writing and polemic and not through judicial decision. In the tenth century, Muslim scholarship came to a consensus that the Islamic law or *Sharia* was finalized as laid down in juristic writings. The task of the forthcoming generations was to follow these laws. This consensus also announced that further individual, independent reasoning or personal interpretations would not be necessary or permissible. The doors of *ijtihad* (independent or personal interpretation) were henceforth closed.

The ban on *ijtihad* may have served well in a medieval, static and agrarian economy with relative political stability and prosperity. But it was not to survive for long. We come across great Muslim[42] scholarship pursuing *ijtihad* through the centuries to ensure that Islamic law ideals of *Sharia* are applied to the changed socio-political and economic circumstances. The question has arisen whether the Islamic law of contract under *Sharia* covers the vast varieties of commercial contracts of the present day and age or permits only the types of contracts (nominate) noted earlier and practiced in early Muslim societies.

41. *Id.* 15-19.
42. *Id.* 19-57.

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

We have seen above that Islamic law or *Sharia* developed systematically through the efforts of Muslim jurists laying out detailed texts explaining conduct which conforms to the Islamic ideal. In this effort they were guided by the doctrines of *Sharia* noted earlier.

The questions to be asked are: 1) Whether Islamic scholarship would have remained mute in earlier periods had Muslim lands gone through Industrial Revolution? and 2) How should Islamic scholarship face the commercial reality of the marketplace of present day and age? It can be argued that the scholars who gave the principles of the *Sharia* if confronted with the present day commercial problems would have developed a timely theory of contract. Islamic jurists through history followed the principle *al-masalih al mursala*. (Wherever and whenever the interest of the people exists, it should be considered.)

In his effort to outline a general theory of contract, Musa has argued that the theory of contract should be guided by the state of the time, public interest and overriding spirit of Islamic law or *Sharia*. This makes Islamic law adaptable to transactional reality and yet keeps it within the limit of Islamic ideals. It would free transactions from conforming to strict forms which have no relevance to current world trade and commerce.[43]

In Western legal thinking two concepts have played a role in contract formation and have been applauded for their contribution in facilitating contracts. These are: 1) the autonomy of the will and 2) freedom of contract. The first deals with the idea that everyone is perfectly free to enter into a contract for the transfer of whatever one wishes. The second means that one is perfectly free to enter into a contract with whomsoever one wishes. Under *Sharia* the autonomy of will is subject to the Islamic prohibitions against *riba*, *gharar* and dealing in certain articles specifically forbidden in *Quran*, such as wine and pork. Thus the concept of freedom of contract operates as it does in common law except that autonomy of will is modified by the requirement to comply with limits set by Islam. Within these limits one is free to enter into a contract with whoever one wishes.

As to the enforceability of contracts in general, another well known juridical principle to be considered is: *Al-ibaha asalan fil-ashya*:[44] "Lawfulness is a recognized principle in all things." Ex-

43. Musa, *The Liberty of Individual in Contracts and Conditions According to Islamic Law*, 2 ISLAMIC QUARTERLY 70 (1955).

44. *Doi, A.R.I., Shari 'ah, The Islamic Law* 406 (1984).

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

pressed in more Western fashion, this means that everything is presumed to be lawful, unless it is definitely prohibited by law.

According to Ibn Taymiya, a creative and liberalizing Islamic thinker,

> "If . . . demands . . . made by men of good sense are introduced into contracts, and if they are as suitable as they ought to be, they are never in vain and are not directly wasted; for example, credit, certain qualities in the commodities sold . . . ."[45]

In developing a general theory of contract under *Sharia*, Musa points out the traditional positions held by followers of Zahiris, a literalist school which would not permit any contract not mentioned in the *Quran* and the *Sunna*, and by other schools of the middle ground represented by Shafii and Maliki. Then he points to the liberal position held by the Hanbali school further developed by Taymiya.

The Hanbali school's position has promoted the recognition of transactional reality. As noted earlier, *al-masalih al mursala*, or the principle of public interest of the people in the field of *Muamlat* transaction, has kept the Islamic law of contract responsive to the changing commercial reality. It is not limited to nominate contracts.[46] As Musa suggests, then, there is in existence an outline of theory of contract under Islamic law. It is not based on Western principles of economics but on those of *Sharia*. Under these principles we find that trade or commerce has been blessed. But the parties to pursue the trade must keep in mind certain prohibitions. Outside these prohibitions, the transactions could be either:

1) Contemporaneous exchange of goods and payment of price, called *bay'*, or

2) Contemporaneous exchange of promises for performance at some future date.

It is the absence of the second form of transactions or exchange in the early and medieval Islamic scene which has generated disillusioned and hasty comments. Despite the absence of the promises for future performance under Islamic law, we note that this new reality was not ignored. *Majalla*, the Ottoman civil code, included the Islamic law of contract in the mid-nineteenth century. It defined "contracts" as "the obligation and engagement of two parties with reference to particular matter. It expresses the combination of offer and acceptance. In the conclusion of the contract both the offer and

45. *Supra* note 43, at 263.
46. *Id.* 79-80, 251-263.

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

acceptance are inter-related in a legal manner, the result of which is seen in their mutual relationship."[47]

In recent times the definition of "contract" in the Egyptian Civil Code deserves mention: "A contract is created, subject to any special formalities that may be required by law for its conclusion, from the moment that two persons have exchanged two concordant intentions."[48]

Also of interest is the definition in the Iranian Civil Code (as amended 1983) which states that a contract is "an agreement between two or more persons concerning certain subjects to which they consent."[49] Offer and acceptance, therefore, can be expressed in any form.

The government of Bahrain enacted the Contract Law in 1969. In defining "contracts" it stated in section 12: "All agreements are contracts if they are made by free consent of parties, competent to contract, for a lawful consideration and with lawful object, and are not hereby declared to be void."[50]

## EXPRESS & IMPLIED CONTRACT[51]

Islamic contract law recognizes both express contracts as well as what has been described in common law as contract by conduct. It presupposes the making of an offer either orally or by writing or by conduct. The acceptance of the offer creates the contract. The parties entering into contract are also required to be competent.[52]

## CONSIDERATION[53]

As in the common law there is a requirement of consideration under Islamic law. Consideration has an analogous meaning and implies what the parties give in exchange for or in performance of their promise. The concept of consideration implies the bargain, or value given in return for value received. But the consideration is required to be lawful under *Sharia*. This would make exchange of forbidden goods and services illegal and unenforceable. Examples of such ex-

47. S.H. AMIN, REMEDIES FOR BREACH OF CONTRACT IN ISLAMIC & IRANIAN LAW 12 (1984).
48. *Id.* 13.
49. *Id.* 13.
50. Govt. of Bahrain, The Contract Law 1969, Section 12 at p 4.
51. *Supra* note 44, at 356-57.
52. *Id.* 357-358.
53. *Id.* 356-57.

This content downloaded from
149.10.125.20 on ffff:ffff on Thu, 01 Jan 1976 12:34:56 UTC
All use subject to https://about.jstor.org/terms

changes are sale of alcohol, pork or lending money which has an implication of *riba*.

## CONCLUSION

Our study attempts to outline for the reader the underlying concepts or doctrines governing the Islamic law of contract under *Sharia*. One is heartened to find that its objectives are the same as those of the common law or civil law, namely the enforcement of promises. But Islamic Law prohibits contracts which *Sharia* disallows. Its evolution has continued with the progress of Muslim societies in the field of commerce and industry. It would be a vain exercise to look for a doctrinal facsimile of the Western law of contract while studying Islamic law. But the refinement and development of the law of Islamic contract has kept pace to suit the transactional needs of the times.

Berman points out that the Western law of contract has originated from moral theology going back to Christian and pre-Christian eras.[54] Its moorings were cut off from its past, however, in the eighteenth and nineteenth centuries and were supplanted by the secular theories of autonomy of will and considerations of social utility. Berman's remarkable study helps us to understand the foundational kinship between Islamic and Western laws of contract. As Berman has commented elsewhere: "society moves inevitably into the future. But it does so by walking backwards, so to speak, with its eyes on the past."[55] In the field of *Muammlat* transactions Islamic law will continue moving onward while keeping in view the historic themes of Islamic morality.

It is safe to say that the overriding principles of *Sharia* will continue to guide the general direction of Islamic contract law. The doctrines of *riba* and *gharar* discussed earlier have continued to draw lively debate in Islamic societies and will continue to be asserted if a matter in dispute happens to come before the *Sharia* Courts. Both Saudi Arabia and Iran have *Sharia* Courts which abide by these substantive principles. It is possible to suggest that a *Sharia* Court in adjudicating a contract dispute which also has an element of *riba* in it will limit the enforcement of the contract. It will grant recovery due on the contract except for the amount of recovery ascribed to *riba*. Similarly the contracts of *gharar* would not be enforced by the *Sharia*

54. Berman, *The Religious Sources of General Contract Law: A Historical Perspective*, 4 J. LAW & RELIG. 103-124.

55. H.J. BERMAN, LAW & REVOLUTION 41 (1983).

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms

Courts. But if the parties resolve their dispute outside the *Sharia* forum, the *Sharia* Courts will not interfere with the parties' private settlement.

This content downloaded from
149.10.125.20 on Sun, 13 Mar 2022 23:51:54 UTC
All use subject to https://about.jstor.org/terms