DEFINITION AND FORMATION OF CONTRACT
UNDER
ISLAMIC AND ARAB LAWS

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LACK OF AN EARLY DEFINITION

Until the 19th century no definition of a contract as such is to be found in the treatises of Islamic law. Indeed nominate contracts were depicted in concise terms but the basic concept of contracting remained unspecified. The reason is that Islamic fiqh (jurisprudence) is casuistic not dogmatic, it is meant to solve cases which could well be theoretical at times yet fiqh has constantly declined to devise theories from the solution given to those cases. That is the reason why, as a substitute for a General Theory of Contract, the overwhelming majority of specialists in Islamic jurisprudence have turned their attention to the contract of sale which they regarded as the model for all sorts of contracts. A sale contract for Kasani, the Hanafi author of Bada'i', purports the exchange of a coveted article against another coveted article; such an exchange takes place either by words or by deed. For Kasani the binding effect of the sale contract and the conferring of immediate possession of the countervalues intended to be exchanged are its two main effects. The Hanbali Ibn Qudama sees a sale contract as the exchange of a property against another property conferring and procuring possession. That leaves no doubt that for these early scholars and their followers, a contract was supposed to be completed immediately. Its subject-matter or more commonly the legal status of that subject-matter was supposed to undergo an instantaneous change with no need for the creation of an obligation which would precede such a change.

The reasons why a contract under Islamic law is expected to exhaust all its purposes as soon as it is concluded is to be found in the Shari'a requisite that transactions should be devoid of riba (unlawful advantage by way of excess or deferment) and gharar (uncertainty, risk, speculation). Whenever a transaction involves the exchange of two countervalues, it was strongly advised that this exchange should be made forthwith in order to eliminate any possibility of riba and gharar. It was also taught that such countervalues should be in existence, in their essence at least, and known to the contracting parties. That was the ideal, if not idealistic way to secure a just balance between the contracting parties and to prevent exploitation of the weak. By necessity the focal points of a contract in this system are its concrete elements, i.e. its subject-


1 Kasani, Badar'i, al-sana'i'fi tartif al-shara'i', vol. V, p. 133, (Cairo, 1910).
2 Ibid. p. 243.
matter and the countervalue for that subject-matter, if any, rather than any obligation arising out of the contract. That was the theory of the system which strongly appealed to scholars and learned jurists who overlooked the concept of obligation arising out of contract, and focused their attention, instead, on its immediate implementation.

In practice, however, the system did not work the way it was intended for; from the outset numerous exceptions and qualifications were dictated by business exigencies and found accommodation with an evolving legal system. Most of these exceptions and qualifications were the subject of intense studies by scholars and acquired an unqualified legality and respectability. For instance, in *bay' salam* (a sale with advance payment for future delivery) the vendor has no title over the sale object but undertakes to make it available to the purchaser. The subject-matter of a *bay' salam* is a promise given against payment and not an object in rem, an undertaking and not an object in kind. Under strict *Shari'a* rules this kind of sale would be unlawful, for the vendor deals with an article which is not in his possession. Nevertheless *bay' salam* was admitted in the *Shari'a* on the ground of a tradition attributed to the Prophet himself, as well as on the ground of consensus (*ijma*) and public need. *Istisna'* (contract of manufacture) is another of these exceptions: this contract means, to take one example, that an order is passed to a shoemaker to make a pair of shoes for a price fixed in advance with the price to be paid only when the pair of shoes is ready for delivery. The theoretically unsatisfactory aspects of this contract are obvious, for nothing changes hand immediately; not only is the subject-matter non-existent at the time the contract is concluded but also payment of the price is deferred. Yet remarkably enough, *fiqh* admitted the validity of *istisna'* on the grounds of a custom which has prevailed from the time of the Prophet himself, and justified it by the necessity of business and by equity (*istihsan*). Whether *istisna' is a hire contract, a sale contract or a contract having features of both, no exchange of properties takes place at the time it is concluded. Instead the contract creates an obligation for the manufacturer to manufacture the ordered article and an obligation for the client to pay the price once the article is manufactured to the order.4

A third exception worth mentioning is the assignment of debt, (*hawalat al-dayn*); that is the operation of substituting for the person of a debtor the person of another. The definition given by the *Majalla* (the Ottoman compilation of the Hanafi law of transactions completed in 1876) to *hawalat al-dayn* is that it amounts to the transfer of a debt from one *dhimma* to another *dhimma* (Art. 673). One function of *dhimma* is to be the recipient of obligations *dayn* (fungible articles and incorporeal properties). *Dayn* is opposed to ‘*ayn*, which corresponds to a property determined in its individuality such as a piece of land, animals and the like. Because *hawalat al-dayn* is the transfer of a debt from one *dhimma* to another *dhimma*, such a debt cannot be other than an incorporeal property or fungible articles (*dayn*). In principle it cannot be property ‘*ayn* which is normally transferred by the handing over of the tangible prop-

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4 Only Abu Hanifa did not consider *istisna' as a binding contract while his disciple Abu Yusuf and nearly all schools of law did so.

5 In Islamic law *dhimma* has two related meanings: from a subjective angle it is the qualification to bear obligations and enjoy rights recognized in each human being by right of birth; it is also from an objective angle the recipient of incorporeal properties.