The Promissory Theory of Contracts in Islamic Law

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1 INTRODUCTION

The conception of "contract as promise" or what is sometimes called the promise theory of contract dominates mainstream contract theory. According to the promise theory of contract, one looks to the institution of promising to discover why and what commitments should be legally enforceable.

It is Chehata who seems to have introduced the idea, now widely accepted, that in Islamic law a promise is not legally binding.1 Recently Vogel suggested that promises in Islamic law are like social promises in common law,2 which may have moral force in that breaking such promises may provoke opprobrium, but which do not entail legal obligation or legal sanction for non-fulfilment. This is an incorrect view based on two failures of understanding. The first is the failure to distinguish between the enforceability of promises because they are promises (i.e. bare promises) and the enforceability of promises on the basis of some other value. I will argue that in Islamic law a promise is legally enforced not because it is a promise as such, but because doing so protects the values of commutative justice and liberality.3 I will show that this does not mean that the source of the obligation is therefore commutative justice or liberality. The law will normally intervene on behalf of these two values only after a promise has been made and not in the absence of a promise. The second failure of understanding

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3 For an extended discussion of these terms and the necessary references, see my "Islamic Contract Law: Between Commutative Justice and Liberality", 13 (3) Journal of Islamic Studies (2003).
arises from the want of a clear definition of promise and what distinguishes promise from contract in the work of early jurists, and the consequent confusion among later scholars. Confusion is evident in the agreement of all those who write on contracts in Islamic law that consent is a requirement, indeed a pillar, of the law of contract, while most of them also argue that promises are not binding in Islamic law. They take no notice at all of the very close relationship between consent and promise, a relationship so close that one can argue (as some have) that "promising may be reducible to a species of consent". Had they taken notice of this relationship they would surely have realized that promises, which they say are not legally enforceable, are narrower than consents, which they say are legally enforceable. As Atiyah puts it, "consent is a broader and perhaps more basic source of obligation". The jurists' failure to articulate clearly the concepts of consent and promise is the basis of the assertion that the one clear distinction between contract and promise is that the latter is not enforceable as a contract. This may be true only if one means that the jurists argue that bare promises are not contracts and are not legally enforceable.

In an extended analysis of consent, Qaradaghi has recently shown that, for the majority of the jurists, contracts are the most serious types of promises. This is another way of saying that only some promises are contracts. The question then is which ones are, and what about them makes them legally enforceable as contracts. To address the issue the following questions will have to be answered: (a) What exactly is a promise and how is it unique ("the nature of promise")? (b) Why are promises binding ("the obligation to keep a promise")? (c) Are all promises legally enforceable and if not, which ones are and why ("the different nature of contract")?

I have already analysed elsewhere at some length part of the third question (the part seeking to answer the question which promises are legally enforceable as contracts and why) as far as Islamic law is concerned. There I showed that it is the values/virtues of commutative justice and liberality which tell us

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6 Ibid., at p. 174.


8 The stress is on "may be" because Islamic contract law does at times enforce bare promises such as the bay bil-wafa' and istisna' by the hanafis. Usmani asserts that the shari'a will enforce a promise that the contracting parties have agreed to be binding although he is not clear whether he means that such promises will be enforced even where they are bare. The example he gives is that of bay al-wafa' in which the promises are clearly not bare being part and parcel of the sale of the house. See M. Taqi Usmani, An Introduction to Islamic Finance (The Hague, 2002) 32.

9 There is also a tendency in the literature to confuse two issues by equating them: the prohibition of selling a debt for a debt (bay al-dayn bil-dayn), which is based on the Prophetic prohibition of al-kali' bil-kali' backed by the wide consensus of the jurists, with the exchange of a promise for another.

10 A. Qaradaghi, Mabda al-Rida' fi 'l-'Uqud (Beirut, 1985) especially vol. I, pp. 105-134.