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PHILOSOPHY OF THE ISLAMIC LAW OF CONTRACT

A COMPARATIVE STUDY OF CONTRACTUAL JUSTICE

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Contents

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Hideyuki Shimizu
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Preface

Contract is believed in general to be one of the important factors which govern man's economic activities. It is even considered by some western philosophers to be a fundamental constituent of human society. But, the concept of contract is not always the same all over the world. It is considered to vary with culture. It may reflect the basic characteristics of a culture.

Now, contract is simply defined as an act or set of acts which is established between the two parties or more, creating obligation by which one may exact some performance of another and the other is bound to that performance. And, when the performance is to be one-sided only, the contract is said to be unilateral. On the other hand, when the performance is by both sides, it is said to be bilateral. The author of this book explains that the bilateral contract is recommended and common in the Islamic society

in contrast with the Christian world in which unilateral contract is basic and customary. He also clarifies with scrupulous documentation the reasons why the bilateral contract is preferred by muslims to the unilateral contract. It is common knowledge that the Islamic world view based on the *tawhīd* theory has a practical aim to promote the public interests and welfare. The bilateral contract is believed by muslims to be more helpful for promotion of the public interests than the unilateral contract. In the muslim commercial law, there are plenty of clauses supporting the bilateral form of contract. The author of this book has succeeded in making clear the fundamental characteristics of the Islamic contract law and its nature and purpose through his minute investigation into original materials.

Mr. Hideyuki Shimizu, the author of this book, is a research fellow of IMES. He is a sincere and diligent researcher of Islamic law with expertness in handling Arabic materials.

Akiro Matsumoto
General Editor

Introduction

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, --- and nothing else. (O. W. Holmes)[1]

Mr. Justice Holmes, a famous judge and thinker in America, recommended distinguishing legal ideas from moral ones, and also asserted that the breaching, in itself, of contract is not wrong. Moreover, recently some scholars in the study of "Law and Economics" have even encouraged the breaching of a contract as a result of economic analysis. In other words, they insist that it is better to breach it from the viewpoint of

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1 O. W. Holmes, "THE PATH OF THE LAW," *Harvard Law Review*, Vol. X, No. 8, 1897, p. 462.

economic efficiency. [1] In a sense, American law seems to have lost sight of the underlying meaning of contract by having put too much importance on economic efficiency.

However, these views are found only in America so far. European countries such as England, France and Germany still maintain the sanctity of a contract. It is natural that they hold fast to it, putting into consideration the history of "Western law"[3] in which the sanctity of a contract has been persistently respected. But even in these countries, since the rise of Capitalism, the law of contract has been changing, rapidly. That is, the principle of freedom of a contract was emphasized under Capitalism. The meeting of wills under this principle was considered absolute. Moreover, the contractual relationship was regarded as being within the exclusive realm of private ordering where no authority can interfere with. However, recently these countries are attempting to regulate contractual relations gradually in order to protect the contractual justice. This means that the freedom and sanctity of contract must be respected while the contractual justice should be esteemed.

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2 See Barton, "The Economic Basis of Damage for Breach of Contract," *Journal of Legal Study*, Vol. 1, 1972, p. 277; Linzer, "On the Amorality of Contract Remedies --- Efficiency, equality, and the Second Restatement," *Columbia Law Review*, Vol.81, 1981, pp. 111-115.

3 cf. In this thesis, the term "Westen law" is used in contrast with Islamic law from a broader perspective, though it is almost impossible to discuss a variety of law in the West together.

"The Traditional law"[4] in Europe is faced with the dilemma between them.

The Western law, whether American law or Traditional law, is now at its wit's end and is groping for the ideal image of contract.

On the other hand, Islamic law has always sought the ideal image of contract by interpreting the underlying meaning of contract in consideration of the total context of the society. It is said that Islamic law, as well as American law , has a tendency to accept cancellation easily. Since the reason for this cancellation reflects the fundamental legal attitude of Islamic law, it is worth discussing it in this thesis. If "economic efficiency" justifies it in American law, what kind of philosophy justifies it in Islamic law. This is the first problem that this thesis has to grapple with.

In order to grasp the philosophy, the central notions which governs the Islamic law of contract, must be examined. By examining them, the underlying meaning and the substantial mechanism of the binding-force in Islamic law will be understood. In particular, it is indispensable to investigate what kind of contract is given the binding-force by Islamic law in order to know the philosophy. In addition, it may be necessary that these discussions refer to the quality of the

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4 cf. In this context, the term "Traditional law" indicates Common law or Continental law.

culture and society in order to understand the character of the philosophy more deeply.

Thus, an examination of the philosophy of the Islamic law of contract will lead us to recognize not only the underlying meaning of contract and the ideal image of contract but also the characteristics of Islamic culture and society.

In this thesis, I do not intend to have a systematic description of the Islamic law of contract. This study will attempt to grasp the philosophy and the fundamental legal attitudes of this law by examining three central notions; *ribā*, *gharar*, and changed circumstances. As one of the methodologies, the anthropological approach will be used in order to clarify the reason why the notion of *ribā* was prohibited, because the nature of contract can be easily found in a primitive society, and a primitive law is not influenced by the ideology of the times. For example, the studies of Malinowsky, Mauss, and Radcliffe-Brown provided good suggestions for this thesis. Likewise, a sociological analysis will be used in order to examine the function of society and the relationship between a part and a whole. In particular, the analyses of Durkheim and Simmel are beneficial for examining the relationship between contract and society.

This paper is divided into two parts; a part which is a general explanation i.e. Chapter I and II, and a part which is a detailed discussion i.e. Chapter III to VI.

In the first chapter, I will first define the character of a contract in Islamic law and show the well-known characteristics of the Islamic law of contract in order to call the attention of readers to the question why Islamic law involves these characteristics. This reason will be clarified , as you read this thesis more deeply.

In the second chapter, I will explain the fundamental framework of the Islamic system and the essential elements that influence the law of contract in order to make the latter part easier to be understood.

From the third chapter, I will go into a detailed discussion. To begin with, the notion of *ribã* will be examined in order to grasp the essence of this law which influences other notions. It is important to understand how this notion has been developed in order to know the framework of the Islamic law of contract. This examination shows that there is the principle of equilibrium in a contract in Islamic law as well as in Western law. At the same time, it shows that the prohibition of *ribã* is not a peculiar rule to Islam but rather a natural and universal one.

In the fourth chapter, the notion of *gharar* will be examined by explaining how this law avoids *gharar* or the risk of causing an unjust imbalance in a contract. Islamic law prepares the system of options and recommends communication

in order to avoid gharar. In particular, the mechanism of the binding force of contract will be investigated more definitely.

In the fifth chapter, the notion of changed circumstances will be examined by understanding how this law overcomes the uncertainty in future. Chapter four and five show that there exists a big difference in the legal attitudes to the effects of contract between Islamic and Western law, irrespective of having a similar principle like that of equilibrium. Western law gives the priority to the sanctity of contract or the order of economic market, while Islamic law to the equilibrium or equality in a contract. It is indicated that this difference derives from that of the views on positioning of individuals in a society.

In the last chapter, these views, namely, individualism and communalism, will be examined by clarifying the character of the fundamental views behind legal attitudes. Moreover, one of the main merits of communalism such as the creation of a sense of brotherhood will be referred to. It will also show that the prominence of Islamic law consists in the framework of Islamic system. At the same time, this chapter shows that the equilibrium and unity in a contract brings to a society the equilibrium and unity and that the relationship between contract and society is interdependent.

At the end of this introduction, I have to appraise the readers of some notices. This study is focussed on the

philosophy expressed in Islamic law. Accordingly, to my regret, the reality of Islamic countries at present has to be distinguished from the ideal discussions written in this thesis. It is dangerous to identify the latter with the former. However, it is certain that most of the Muslims have the philosophy of Islamic law in mind and that it often influences their activities. In such a sense, this paper will be stimulating and helpful to those who are engaged in commercial activities with Islamic countries and completely accustomed to Western legal thinking. I hope that it will dispel their misunderstandings of Islamic law.

Chapter I.

Contract in Islamic Law

A. The meaning of contract in Islamic law

The corresponding Arabic word for contract is *'aqd* which literally means tie or bond. This term *'aqd* has a much wider connotation than the term 'contract' in Common law. For example, this term involves a personal relationship in matrimonial law. Although this wider connotation must be kept in mind, this thesis seeks to focus on the contracts of property in particular.

To begin with, I will examine the meaning of contract in Islamic law in order to make the character of Islamic contract clear.

(1) Disposition of "usufruct"[1]

The definition of a contract in Islamic law is similar to that in Western law in that a contract can be defined as a conjunction of proposal and acceptance or mutual agreement. But the big difference between them is in that the subject matter of Islamic contract as well as Islamic private ownership, is considered a sort of usufruct , for there is a religious belief that *Allãh* is the real owner of all things and man only a trustee with usufructary rights.[2] Correspondingly, contracts in Islamic law could be said to be "the disposition of usufruct." The owner has to dispose of this right effectively so that it may be used for the welfare of the community. This character of Islamic contract has a significant meaning in all aspects of social life. This issue will be examined in more detail in the following chapter.

(2) Exchanges through negotiations

The essential factor of Western law, in general, and Continental law in particular, is a mutual agreement, which forms and controls a contract. On the other hand, the essential part of the Islamic contract is the fair fulfillment of an exchange through negotiation. In other words, the stress is on

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1 This term means the right to use and enjoy the property vested in another, or the property of God in this context.

2 Abdur Rahman I. Doi, *SHARI'AH: THE ISLAMIC LAW*, (London: Ta Ha Publisher,1984), p. 355.

exchanging one goods for another's fairly when a contract is entered into. Although the mutual agreement is an important factor in the Islamic law of contracts and contractual relations, it is one of the factors and rather a start for entering into a contract. Exchanging fairly through negotiation or communication should be considered the most essential factor of contract in Islamic law.[3] Islamic law considers that this sort of exchange leads to mutual satisfaction. That is, Islamic law lays stress on the underlying purpose of contract rather than its formality or its objective conditions.

In the Islamic economy, as Baqir as-Sadr pointed out, exchanges or distributions are regarded as a sort of productive activity, because a vendor keeps or prepares a merchandise so that a purchaser can get it whenever he needs.[4] Islamic law encourages the vendor to move his goods to one who needs truly in order to satisfy the demand in a community. Exchanges are recommended because they are productive and useful for the welfare of the community. In fact, unless it involves any productive elements at all, Islam never encourages them. In this sense, "an exchange" also has a meaning of great importance in Islam.

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3 See M. Villey, "Keiyaku No Kannen," Trans. by Eiichi Hoshino, In *Rikkyo Hougaku,* Vol. 11, 1969; Eiichi Hoshino, "Keiyaku Shisou: Keiyakuhou No Rekishi To Hikakuhou," *Iwanami Kouza; Kihon Hougaku 4 Keiyaku,* 1983.

4 As-Baqir Sadr, *Iqtisadna, Dar-t-Ta'aruf li-l-Matbu'at,* Trans. Toshio Kuroda, (Islam Keizairon. Niigata: The Institute of Middle Eastern Studies. International University of Japan, 1981) , p. 269.

(3) Social bond

The essence of contract in Islamic law exists in its function as a social bond, which bind members of a community to one another. First of all, a contract in Islamic law establishes a personal tie in a community from the consent of the minds of two persons who deal with each other with respect to certain rights of theirs.[5] Both parties experience a mutuality of benefit through the exchange and are satisfied with it. Consequently, they generate a mutual reliance in their relationship.

The community cannot be maintained without contracts. One member requires another to acquire something he does not have. In a community, there is a social solidarity based on interdependence between members. Moreover, in the Islamic community, since every member has a common faith and goal, this social bond between them is more stable and spontaneous. This will be examined in Chapter VI.

B. Characteristics of Islamic law of contract

Most western jurists tend to regard the Islamic legal system as not only different from that of the West but also an unreasonable one. It is said that the characteristic principle of Islamic law are inconsistent as if Islamic jurists made

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5 Abdur Rahim, *The principle of Muhammadan Jurisprudence*, (Connecticut: Hyperion Press, 1981), p. 283.

arrangements to suit his own convenience. Although it is apparent in the following Chapters that the principles of Islamic law are, in fact, consistent and reasonable, I will, to begin with, mention several characteristics of the Islamic law of contract as an illustration.

(1) Simplicity of formality

In Islamic law, all contracts are automatically concluded by a valid expression of an offer by one party and its acceptance by the other party. Unlike Roman law, it was freed from the fetters of formalism in the early stages of its development.[6] Roman law maintained its formal symbolism for a considerable time. The slightest error or neglect in the forms of proceeding was sufficient to annul the substance of the fairest claim.[7]

As Ibn Taimiyah stated in his Fatawa, a contract is concluded by every term and every act which that particular social group recognize as capable of concluding the specific transaction.[8] In Islamic law, all contracts are automatically concluded by every word, or even every act, which expresses the intentions of purchasers or vendors.[9]

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6 Saba Habachy, "The System of Nullities in Muslim Law," *American Journal of Comparative Law*, Vol. 3 , 1964, p. 66.
7 *Ibid.* , p.68.
8 *Ibid.*, p. 67; See the Fatawa of Shikh- Ul-Islam Taki-D-Din Ahmad Ibn Taimiyah; Mabhath Al Uqud, Vol. III, p. 267.
9 *Ibid.*, p.67.

(2) Immediate transfer of ownership at the meeting

The ownership must be transferred as soon as a contract is formed in principle. This principle is closely related to "prohibition of *ribā*." In Islamic law, a future transfer should be avoided, for there are elements of speculation or risk in future, which produce a kind of unforeseeable gain or loss. For example, in a sale contract, if you said you have bought something and got it, you have to pay the price immediately at the meeting. The opposite is also true. If you said that you have sold something, you cannot defer the delivery of goods until tomorrow.

On the other hand, Western law encourages such a transaction that involves a future transfer, which is indispensable for modern business activity.

(3) Stress on oral testimony

Unlike modern laws, documents were not required as a condition of contract in principle. In Islamic law, the personal word of an upright Muslim was deemed worthier than an abstract piece of paper or a piece of information subject to doubt and falsification. This reliance on religious standards is also apparent in the judicial oath, for the priority of oral testimony is based on the assumption that no Muslim would lie

under oath. Documents, says Wakin, are only a useful support for oral testimony in Islamic legal system.[10]

(4) Prohibition of *ribã*

Islamic law prohibited *ribã* (interest), which is considered indispensable for modern economic activity. This notion governed the entire law of contract in a broader meaning of the word. As the law regards *ribã* as of considerable importance and lies at the root of many of the restrictions which hamper the freedom of contract in Islamic law, it is necessary to understand the true meaning of prohibition of *ribã*. This will be examined in "Chapter III."

(5) Easiness in rescinding contracts

The difference between Western and Islamic law is in that the latter regards unilateral rescission of such a contractual relationship as quite natural and acceptable in circumstances where the former would insist upon its continuation.[11] Compared to the Western law, it is true that Islamic law has a tendency to allow the cancelation easily. Although some Orientalists often attribute this tendency to the fatalistic

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10 J. Wakin, *The Function of Documents in Islamic Law*, (New York: State University of New York Press, 1972), p.6.

11 Noel J. Coulson, *Commercial Law In the Gulf States*, (London: Graham & Trotman, 1984), p. 81.

attitude in Islam, is it true? This issue will be examined in the Chapter in V.

C. Positioning of the Islamic law of contract

A number of scholars referred to the superficial characteristics of the Islamic law of contract as explained in the preceding section, but there are few who discussed, the positioning of this law from a broader perspective. In this section, I would like to clarify the positioning of this law from three viewpoints.

(1) Moral law; the respect for subjectivity and substance

This law, a divine law, is strongly affected by ethics. The rigid observance of the prohibition of *ribã* seems to point to this fact. The law seeks to eliminate the unfair and unequal factors of contracts completely. Consequently, it regards the transactions which include such factors as not only unjust but also invalid. As a result of the stress on morality, the real intention or motive (*nĩyah*) of a contract is considered as one of the most important elements. Accordingly, the Islamic judges, in particular, of Hanbalĩ and Mãlikĩ schools, consistently seek for the reality of the inner side.[12] According to the Ibn Qayyim:

12 *Ibid.*, p. 46.

"The motive behind contracts is an essential consideration and affects their validity."[13] Accordingly, for example, it is forbidden to buy grapes for the purpose of producing wine. A contract which in itself fulfills all the criteria of validity and to all appearances contains no element of illegality may yet be a nullity on the ground that it is inspired by an improper motive.[14]

A religious system of law has always been naturally concerned with the matter of the individual conscience. It is the subjective approach of seeking a genuine accord of wills which dominates the Islamic notion of mutual agreement rather than the more objective criteria of Western law. Islamic law stresses more on the subjective aspect than other legal systems. In other words, the attitude of Islamic jurists endeavors to understand the total context or the real situation by examining the real intention of the individual. That is to say that it seeks for substance, and is not overly concerned with formalism. Concerning contracts, it attempts to find not a formal consent but a substantial and real one.

The question of intent and motive(*niyah*) particularly in "contracts or transactions" is stressed because morality is most required in this area.

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13 *Ibid.*, p. 45.
14 *Ibid.*, p. 45.

(2) Law for the efficiency of economic activity

One of the most important purpose of commercial law is efficiency. Although the *Sharī'ah* is famous for its rigid law, it does not necessarily lack consideration for the efficiency of economic activity. It is easy to see that Islamic law lays stress on it if one realizes that Islam has a basic idea that private ownership should be effectively used and that exchange is a sort of productive activity. For example, even the abolition of *ribā*, which is perceived to hinder economic activity, is said to aim at greater economic efficiency, because one of the main reasons for it is to prevent hoarding by the rich and circulate currency efficiently in a community.[15] In other words, if only possessing currency creates a gain, everyone attempts to save it, instead of using it positively. Moreover, the easy formation or cancellation of a contract is also a contribution to efficiency, since there is then a natural increase in the number of those people who are willing to enter into contracts if restrictions on them are decreased. The law encourages to enter into a contract by omitting formalities in the formation of a contract, or freeing contractors from the binding-force as they want. The Islamic law of contract is thus the law that shows due consideration for the efficiency of economic activities.

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15 Baqir Al-Sadr, p. 96.

(3) Community law

Although the above two characteristics seem to be opposed, it is not necessarily so. In Islam, law is more closely connected to the economy than in other legal systems. Both the law and economy are one unit, and naturally have a common goal. They should not be considered separate ones.

In the West, on the contrary, they are regarded as independent, even opposites. It is difficult to harmonize and adjust them in such a system.

On the other hand, in Islam, since they are one unit, they seek for the same purpose, which is the interest of the community. Whether law or economy, the interests of the community have priority over that of individuals. The law eliminates activities that disturb a stable balance of the community or a social solidarity in a community. In other words, so far as individuals do not hamper the interests of the community, they enjoy their rights.[16] No economic activity that impedes the welfare of the community is, however, never justified in Islamic law. It is a consideration for the interests of a community that governs the Islamic law of contract.

In Western legal system, law was divided into public and private ones. Contract law in this system is defined as a private law. The realm of contract law is restricted to the private realm

16 Ayatullah Sayyid Muhmud Taleghani, *Society and Economics in Islam*, Trans. by R. Cambell, (Berkeley; Mizan Press, 1982), p. 25-30.

or the relation between individuals. And, the discussion of contract is mostly kept separate from that of society.

On the contrary, this separation is considered to be meaningless in Islamic legal system. Islamic law is one unit. Each part of law is closely is connected and inseparable. Even if a part is torn out of the whole and examined, it must be considered by keeping the interrelation with the whole in mind. That is, if the Islamic law of contract is to be examined, the interrelation with a community or a society must be considered as the most significant factor.

The point to be noted before discussing the Islamic system in the following chapter is that the expression of "community" in Islam does not mean a narrow community such as a village or tribal one but a universal community beyond the concept of a state as it is understood in the Western sense which, in a wider sense, implies the whole of mankind. In general, the term Islamic community (*'Ummah*) includes all believers in *Allāh* . This issue will be examined in the following Chapter.

Chapter II.

Basis of Islamic Contract

A. Islamic network system

In Islam, every part of the total system is justified as a link in the chain of interrelations, as explained in the preceding chapter. If it is taken isolated or torn out of its setting, it is very difficult to understand the real meaning and function of each part. A contract in Islamic law is just a part built into the whole Islamic network system. Accordingly, it is important to examine the entire Islamic network system in order to understand the real meaning of a contract in Islamic law.

Islam is never a simple religion but a whole body of culture and civilization, involving all aspects of human life such as legal, economic, political, philosophical and religious one. Every activity of the total system is based on the principle of "*Tawhīd*," guided by "*Sharī'ah*," and practiced in "*'Ummah*." These three vital elements are closely related and interacted.

They should be never considered independently. Besides, by putting them into a magnetic field, they are integrated into one. At the same time, this magnetic field produces specific forces at every level of life. Consequently, the triadic structure of the magnetic field functions in every aspects of the life of people directly or indirectly. It has also been shaping and reshaping every facet of individual and communal life into new forms tinged with a strong Islamicity. Thus, it has formed a whole network system of *Islam* in the long run. In this section, each vital element of this triadic structure will be examined a little more definitely.

(1) *Tawhīd*

a. Meaning

The doctrine of *Tawhīd* is the core of Islam, by which the culture and civilization of Islam was, first of all, determined. Ali Shari'ati explained it as follows:

> *Tawhīd* represents a particular view of the world that demonstrates a universal unity in existence, a unity between three separate hypostases --- God, nature, and man --- because the origin of all three is the same. All have the same direction, the same spirit, the same motion, and the same life.[1]

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1 Ali Shari'ati, *On The Sociology of Islam*, Trans. Hamid Algar, (Berkeley: Mizan Press, 1979), p.83.

Although all monotheists regards *Tawhīd* as the doctrine of the oneness of God, he insists that it means "regarding the whole universe as a unity, instead of dividing it into this world and the hereafter, the natural and the supernatural, substance and meaning, spirit and body." It is not too much to say that the uniqueness of this concept distinguishes Islām from other religions.

b. Dual aspects

The concept of *Tawhīd* has a wide connotation. The character of this concept is explained as follows:

> *Tawhīd* is coin with two faces: one implies that *Allāh* is the Creator and the other that men are equal partners or that each man is brother to another man.[2]

The above explanation shows the dual aspect of *Tawhīd*: a relationship between God and man, and a relationship between man and man.

i) Relation between God and men

In a relationship between God and men, the doctrine of *Tawhīd* shows that God is the Creator or the real owner of all things and men the trustee of God. The *Qur'ān* expresses this

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2 Muhammad Nejatullah Siddiqi, *Muslim Economic Thinking*, (London: The Islamic foundation, 1981), p. 5. ; Abu-Sulayman, "The Theory of Economic of Islam," *Contemporary Aspects of Economic Thinking in Islam*, (New york: American Trust Publication, 1976)

relation when it says: "Believe in *Allāh* and in His messenger; and spend of that of which He has given you the stewardship."[3] This verse means that men are the stewards of the property rather than its masters,[4] or the ownership of men is a sort of usufruct different from an absolute and unconditional right. That is to say that it must be used in accordance with the will of God and on behalf of God or the Islamic community because God entitled only men to benefit from a given asset. They are responsible for making use of their property for the welfare of the community. Accordingly, it is prohibited that they just store their property for themselves without using it. This teaching recommends men to circulate their property in such a manner that it is more effectively utilized for the welfare of the community. That is the reason why hoarding and *ribā* is strongly condemned in Islam. At the same time, this teaching also means to identify one's own interest with those of others and to exploit the trust as if it is an act of devotion. As pointed out in the study of Takuma Abe,[5] the notion of Islamic ownership reflects this aspect of the principle of *Tawhīd*. Islamic contract as well as Islamic ownership, as far as it is the disposition of His trust, must be fulfilled in such a manner that

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3 The Qur'an, 57: 7

4 Sayed Kotb, *Social Justicem in Islam*, (New York, OCTAGON BOOKS, 1980), p. 105.

5 See Takuma Abe, *A Comparative Study of Islamic Ownership*, Working Papers Series No. 10, (Niigata: The Institute of Middle Eastern Studies, International University of Japan, 1987); Atsushi Okuda, *Islam Shoyukenron Jyosetsu*, (Tokyo: Chuo University, 1985).

it is transferred to one who utilized more effectively for the interest of a community as well as individuals.

ii) Relation between man and man

On the other hand, in a relation between man and man, the principle of *Tawhīd* shows the concept of equality and brotherhood. The Holy *Qur'ān* says:

> O, mankind, verily We created you from a single male and female, and rendered you nations and tribes for knowing. Surely, the noblest of you in the sight of God is the most pious one. Thereupon God is Omniscient and Expert.[6]

Man is equal in the sight of God, regardless of any natural differences (sex, color, character, traits, natural endowments) and institutional variation (citizenship, religion, and social rank).[7] The concept of Brotherhood, as well as that of equality, is deduced from the principle of *Tawhīd* in a relation between man and man. The common faith in God and the common goal to realize the will of God binds Muslims together. The concept of brotherhood has a crucial role in the dynamics of Islamic value system. It enables a positive movement towards an ideological unity, irrespective of race, language, place and so forth. This principle seeks to compensate for the likely

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6 The Qur'an, 49:13.

7 A. A. Kurdi, *The Islamic State*, (London: Mansell Publishing Limited, 1984), p. 43.

hardship that can be created by ruthless operation of the principles of Justice and equality.

c. Some reflections on legal system

As I indicated in the preceding Chapter, the principle of *Tawhīd* if reflected in the legal system. First of all, the action of human is regarded as a synthesis of subjective and objective elements and is judged basically from this point of view. That is to say, the intention or motive of actions is also fully inspected because the subjective element of an action is inseparable from the objective fact.

Second, Islamic law is never divided into public and private one, as I wrote before. This idea also originated from the principle of *Tawhīd.*

Third, the division of formality and substance is thought to be meaningless. Although Western legal system is willing to use this technical expression, Islamic legal system has no use for it because formality and substance are one unit and indivisible. In further consideration of this issue, this division will be recognized as a contradiction in Western legal system. This issue will be examined in Chapter IV.

If I begin to take examples of its reflection, it is limitless. Thus, the doctrine of *Tawhīd* influences the whole culture of Islam, including the principles of Islamic legal system.

(2) *Sharĩ'ah*

a. Meaning

The literal meaning of the *Sharĩ'ah* is "the way to a watering place." It means the path not only leading to *Allãh* but also the path for realizing an ideal community (*'Ummah*). The *Sharĩ'ah* has much wider scope and purpose than an ordinary legal system in Western sense of term. It aims at regulating the relationship of man with *Allãh* and man with man. Since man is weak, easily led astray and ungrateful, it is necessary both in the interests of the individual and those of the community to set certain limits to human freedom of action. This limits constitute the law.[8]

b. Sources

Although the term "*Sharĩ'ah*" is often used as a synonym of Islamic law, the contents and sources does not seem evident. In order to understand the entire structure of *Sharĩ'ah* in a wider meaning, it is necessary to know its sources clearly. Said Ramadan showed the following classification of its sources:

(1) Chief sources, which cover:
   a) The *Qur'ãn*, or the Holy Book of Islam.
   b) The *Sunnah*, or the authentic Traditions of Muhammad.

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8 H. A. R. Gibb, *Mohammedanism*, (Oxford: Oxford University Press, 1949), p.68.

c) The *'Ijma'*, or the consent.
d) The *Qiyas*, or judgment upon juristic analogy.

(2) Supplementary sources, which include:
a) *Al-Istihsan*, or deviation on a certain issue from the rule of a precedent to another rule for a more relevant legal reason that requires such deviation.
b) *Al-Istislah*,or the unprecedented judgment motivated by public interest to which neither the Qur'an nor the Sunna explicitly refer.
c) *Al-'Urf*, or the custom and the usage of a particular society, both in speech and in action.[9]

The first two of chief sources, namely the *Qur'ãn* and *Sunnah*, are the primary sources of the *Sharĩ'ah*. In a narrow sense, their contents are called *Sharĩ'ah*. Although the *Sharĩ'ah* has two scopes, narrow and wide ones, of the meaning, the latter is the core rather than the part of the former. In other words, "Islamic law," namely the *Sharĩ'ah* in its wider sense consists of the *Sharĩ'ah* in a narrow sense' and *fiqh* (Islamic jurisprudence) which is the human judicial efforts for the interpretation of primary sources. If the game theory is adopted to this term, the *Sharĩ'ah* in a narrow sense corresponds to the primary rule, while *fiqh* to the secondary rule. It is important to distinguish the former from the latter in order to understand the character of Islamic legal system.

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9 Said Ramadan, *Islamic Law*, (Copyright, 1970), p. 33.

c. Four schools of *Sunnĩ fiqh*

The sayings of the Prophet stated: "Difference of opinion in my *'Ummah* (Islamic community) is blessing." As the sayings show, Islamic jurisprudence (*fiqh*) has been branched off into four schools: Hanafĩ, Mãlikĩ, Shãfi'ĩ, and Hanbalĩ schools.

Hanafĩ and Mãlikĩ schools were formed earlier than other schools. The Hanafĩ school which Abu Hanifa founded in Kufa, and the Mãlikĩ school which Mãlik Anas established in Medina, stemmed from the recognition of different local customs in the end of the eighth century. On the contrary, the Shãfi'ĩ and Hanbalĩ schools stemmed from the legal controversy centered on the sources of law in the middle of the ninth century.

Although it is natural that there exist differences between them, they mainly arise around the tiny branches of theology rather than the fundamental principles of belief.

In principle, this thesis is intended to center around the fundamental principles considered in isolation from the four schools, though the opinion of each school is referred to if there is a big difference between them.

d. Guides of action by classification

Since the *Qur'ãn* is not a code of law, it contains only a general injunction such as observance of promises and good-faith in obligations. The majority of actions, in fact, do not enter the scope of law at all. If there is no revealed information

about actions, it is legally indifferent. Such actions are therefore technically permitted. The remainder are either good or bad in themselves, but in both cases the law recognizes two categories, an absolute and a permissive one. Thus, the full scheme comprises five categories:

(1) Actions obligatory on believers.
(2) Desirable or recommended (but not obligatory) actions.
(3) Indifferent actions.
(4) Objectionable, but not forbidden, actions.
(5) Prohibited actions.[10]

This classification clearly shows man where the good or evil lies and guides him to act properly.

There also exists a classification of legal validity in transactions:

(1) Valid (*sahih*) if both its nature (*asl*) and its circumstances (wasf) correspond with the law.
(2) reprehensible (*makruh*) if its asl and wasf correspond with the law, but something forbidden is connected with it.
(3) defective (*fasid*) if its asl correspond with the law but not its wasf.
(4) invalid(*batil*), null and void.[11]

10 Gibb, p.69.
11 Shachat, p. 121.

This classification shows whether the legal obligation in contracts or transactions exists or not. In case of examining the validity of contracts, this classification takes a significant role.

e. Justice

The main objective of the *Sharī'ah* is "justice." Any actions towards the securing of justice will get the approval of the *Sharī'ah*. Justice in Islamic law is a comprehensive term and may include all the virtues. The *Qur'ān* says: " God commands justice, the doing of good, and liberality to kith and kin, and he forbids all shameful deeds, and injustice and rebellion." Justice in *Islām* is applied to the deeds which are never demanded by "justice in Western sense," such as fulfilling the desire of the needy. It implies something flexible and more humane. It is based on the norms of vice and virtue which are supported by a strong faith in God. Justice in *Islam* is a good synthesis of law and morality. As Muslehuddin wrote "justice is the bond which holds members of community together and transforms it into the unity of brotherhood"[12] and "justice is affection and mercy to the creature of God (the' *Ummah*) which demands of us fulfilling all the claims that are recognized in social life."[13]

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12 Muhammad Muslehuddin, *Philosophy Of Islamic Law and The Orientalists*, (Lahore: Islamic Publication LTD., 1979) , p. 103.
13 *bid.*, p. 104.

(3) *'Ummah*

a. Meaning

'Ummah is moulded according to the *Sharĩ'ah.* It is the ideal community created by the prescriptions of the *Sharĩ'ah.* The concept of the *'Ummah* is deduced from the principle of *Tawhĩd.* This concept consists of *islam* (submission) and *wahdah* (unity), which are interrelated theoretically.[14] ,The *'Ummah* is considered the original collectivity of believers. Each believer accepts the obligation, by means of a sort of contract, to obey the will of God. When the believers accept the leadership of the Prophet, the *'Ummah* is born.

It is true that the blood relationship such as a family is most desirable for creating a solidarity, as the *Qur'ãn* says. But it is clearly impossible to unify a variety of men in the world by the blood relationship. Accordingly, instead of it, by using a tie based on a religion, an ideological relationship similar to a blood relationship is sought to be developed within the Islamic community, or "*'Ummah.*"

The Holy Prophet said: "All mankind is a fold, each member of which shall be a keeper or shepherd to every other, and be accountable for the entire fold."

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[14] Manzooruddin Ahmed, "UMMA: THE IDEA OF A UNIVERSAL COMMUNITY," In *Islamic Studies,* Vol. XIV. No. 1., 1975.

Thus, Islam created an ideological community based on a common faith in *Allāh*.

b. Priority of Interests of community

When it is written that "God is the real owner of all things," as you know, it means that they belong to the community (*'Ummah*). Although man has a right to use them as a trustee of God, this right is guaranteed in so-far-as he does not hamper the interests of the community (*maslahah*). If a conflict between the interests of individual and community does exist, then the latter has priority over the former.[15] In principle, however, there can be no conflict between them in Islam, because the individual is considered to be offered full opportunities to develop his personality so that he may be better qualified to serve the interests of community. In examining the control over the right of individuals or contracts, it is indispensable to consider the public interest, or *maslahah*. This will be examined more definitely in the following section.

c. Place of training ; Self-sacrifice or altruism

'Ummah is a place of training for the purification of soul as well as that of ordinary life. In general, desires of men lead to the possession of some object from which pleasure is expected. These desires often bring them to the deviation from

15 Takuma Abe, p. 27.

the right path. The prescriptions of the *Shariĩah* such as the five pillars of Islam, or, belief in God, prayers (*Salat*), fasting (*Sawm*), poor-due (*Zakãh*), and pilgrimage(*Hajj*) are contrived in such a manner that they purify the soul and divert the attention of man from self-seeking to self-sacrificing at the individual level. The *Qur'ãn* says:

> The men who stayed in their own city and embraced the Faith before them love those who have sought refuge with them; they do not covet what they are given but rather prize them above themselves, though they are in want. Those that preserve themselves from their own greed shall surely prosper.[16]

Thus, they in the city showed a spirit of self-sacrifice so much so that the solidarity of brothers was established between the Helpers and the Refugees. *Islam* recommends self-sacrifice or altruism because it bring prosperity to the community. The spirit of self-sacrifice or altruism, which develops social relations, is very important in promoting contractual relations.

d. Brotherhood

The *Qur'ãn* said: "Cling firmly together by means of God's rope, and do not be derived. Remember God's favor towards you when you were enemies; He united your hearts so that you became brothers because of His favor."

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16 The Qur'an, 4: 29.

The Prophet also says: "All members are like one body: if one of its part is ill, the whole body suffers from sleepless and fever." Thus, Islam emphasizes the significance of a sense of brotherhood between them, and encourages them to have it.

The Holy *Qur'ãn* says: "Co-operate with one another for virtue and heedfulness and do not co-operate with one another for the purpose of vice and aggression."(5:2) This means that the man who undertakes noble and righteous work, irrespective of whether he is living at the North Pole or the South Pole, has the right to expect support and active co-operation from Muslims.

As well, the *Hadīth* added: "*Allãh* will help you if you help your brethren." "Your faith is not complete until you like for others what you like for yourself."

The *Qur'ãn* and *Hadīth* are filled with a variety of verses that encourages believers to have a sympathy for others and cooperate with one another.

The mechanism of the *'Ummah* brings the individual to create not only a sense of self-sacrifice or altruism but also mutual solidarity or a sense of brotherhood. In understanding the significance of Islamic legal system, the concept of brotherhood is crucial. That is to say, the idea of justice and equality is never flexible and merciful. Accordingly, the principle of brotherhood plays a significant role in order to moderate the strict principle. Since this function is very

important, this issue will be examined in more detail in Chapter VI.

These three poles, namely, "*Tawhīd*," "*Sharī'ah*," and "*'Ummah*" are closely interconnected with one another. The *Sharī'ah* and *'Ummah* originated from the principle of "*Tawhīd*." The *'Ummah* is an ideal community formed by practicing the *Sharī'ah*. And, the *Sharī'ah* aims at the embodiment of "*Tawhīd* ." In the triadic structure, these elements have interacted, inter-supported, and inter-supplemented one another. By way of it, this triadic structure has formed "Islamic network system." Every institution in this system has been formed in the triadic structure. Accordingly, it is natural that the character and function of a contract in Islamic law has been also determined by this triadic structure.

B. Other essential elements of Islamic concept of contracts

Although the triadic structure gives effect to contracts, there are several elements that must be taken into a consideration as a determinant one of contracts. These dominant elements such as *'ijtihād*, *maslahah*, and *taqwā* will be analyzed.

(1) *'Ijtihãd*

As explained in the preceding section, *fiqh* (Islamic jurisprudence) has a significant function in the absence of an applicable text in the *Qur'ãn* and the *Sunnah*. In fact, since cases directly applied to them are very few and limited, judicial works are indispensable.

A. Z. Yamani, an able jurist as well as the former minister of Petroleum in Saudi Arabia, regarded the *Sharĩ'ah* in wider meaning as "an organic creature, growing, developing, and evolving; attached with a strong link of interdependence to its society, adapting to its needs, and changing with different circumstances."[17] He, furthermore, continued; "its intrinsic value is not in this monetary adequacy, but in its capability to satisfy the requirements of an everchanging society." Although the flexibility of *Sharĩ'ah* was highly estimated, What possesses "its capability" in his phrases is, above all, judicial works like "*'ijtihãd*."

The Islamic law of contract is said to be a collection of customs (*'Urf*) before Islam, because it is not systematized as a legal science. It is true that most acceptable types in Islamic law originated from the customs before Islam. Needless to say, however, all transactions before Islam were not necessarily allowed, though this issue will be investigated in Chapter IV.

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17 Ahmad Zaki Yamani, *ISLAMIC AND COMTEMPORARY ISSUES*, (JIDDA: THE SAUDI PUBLISHING HOUSE, 1967), P.8.

'Ijtihad took a significant role as an "Islamic filter" which eliminates evil transactions against the spirit of *Islãm*. So to speak, it is possible to say that the Islamic law of contract is the outcome of the conjunction of *'Urf* and *'ijtihãd*.

This method of jurisprudence, or *'ijtihãd*, consists of different technical forms; *qiyãs* (analogy), *istihsãn* (preference), and *istislãh* (consideration of public interest). The injunctions relating to contracts in the *Qur'ãn* and *Sunnah* are extremely limited. Certainly, there are a great deal of verses about the prohibition of *ribã*;

> He who devours riba shall arise on the day of resurrection only as one whom Satan has infected by his touch. (IV, 161)
> O you who believe, fear God and relinquish what has remained of riba if you are believers. (II, 278)

Jurists endeavored to examine what "*ribã*" means and interpreted the real meaning of *ribã* by way of analogy (*Qiyãs*). Although the notion of "*ribã*" will be examined in chapter III, this notion has a wider meaning, which formed the core of the Islamic law of contract.

There is the following verse relating to contracts: " O ye who believe! Eat not up your property among yourselves in vanities: but there be amongst you traffic and trade by mutual consent.[18] This verse means that contracts should be based on

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18 The Qur'an, 4: 29.

a real consent, which eliminates from them such elements as fraud, false representation and duress. Besides, this verse is also thought to mean that your property should be never wasted but should be disposed of in such a manner that the property can be effectively used. Thus, the extension of Qur'anic verses by process of analogy led to establishing a new rule.

Although analogy means to discover a new rule, there happen some cases in which this rule is not necessarily suitable. In other words, a mechanical application of analogy results in unjust judgments. In order to avoid such a judgement, a specific method of reasoning is prepared in Islamic law. That is, Islamic law recommends a method of discovering the hidden or underlying reason (*hikmah*) of the matter behind its revealed cause (*illah*). Abdul Wahhāb Khallāf explains the difference between *illah* and *hikmah* : "Illah is the cause of action that is objectively recognizable and clearly defined. On the other hand, *hikmah* is act of wisdom that represents the true motive for enactment of the ruling. *Hikmah* is the main thing and the underlying reason without which *illah* will serve no purpose." This means that the nature of the matter is not clarified without a full consideration of the ultimate grounds and that a proper judgement cannot be formed without it. From this reasoning, Islamic law regards the ultimate purpose of a bilateral contract

as a mutual satisfaction. In this manner, Islamic law avoid forming an unjust judgement by using this method.

At the same time, in using this method, Islamic jurists often employed the notion of public interest (*maslahah*) as one of standards. This method is a sort of *'ijtihãd* and is called *istihsãn* or *istislãh* . *Istihsãn* is said to be "preference." That is to say, the rule by way of analogy cannot accept a given activity, but if another rule exists, it become permissible through preference. For example, the sale of a non-existing thing at the time of contract is invalid. Accordingly, by analogy, the contract of hire must be also invalid. But since this contract was guaranteed by the *Qur'ãn* and *Sunnah*, this was considered permissible through "preference." That is to say, it is possible to choose a better one by considering the necessity of society.

On the other hand, the term *"Istislãh"* is thought to be a consideration for public interests (*maslahah*). While *Istihsãn* means considering it better to follow a different one in spite of the fact that the analogy clearly pointed out to one course, *Istislãh* means choosing a free course under same conditions for the purpose of the interests of the community. Although there are some differences between them, they are similar in the sense that both Istihsãn and Istislah are considered for the need or welfare of the community. In other words, there is no difference between them in that what is behind the considerations is the notion of public interest. This notion is

the most important in order to understand the character of Islamic contract. This notion will be investigated more deeply in the following section.

(2) *Maslahah* (public interest)

The notion of public interest has been the most famous principle of Islamic jurisprudence. That is to say, public interest is regarded as a source of law. The jurists of different schools use different expressions: it is called "*Istihsãn*" by Hanafi school; *"al-Masalih al-Mursalah"* by Mãlikĩ school; *"Istislãh"* by Hanbalĩ school. Although the expressions of it is different, all schools but the Shãfi'ĩ accepted it as the basis of law. The jurists of Mãliki school are said to have first employed the idea of public interest (*al-Masalih al-Mursalah*).[19] They approved the priority of public interest positively when the significance or the authority of the provision is not certain.

The Imam Ghazzali defines the legal term *'maslahah'* as "consideration for what is aimed at for mankind in the law." By this he means five things: maintenance of religion, of life, of reason, of descendants and property. The preservation of these five interests is the objective of the public interest, according to him.[20]

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19 Muslehuddin, p. 156.
20 *Ibid.* , p. 163.

Al-Izz Ibn Abd al-Salam stated the relation with the *Sharī'ah* as follows:

> A thorough study of the objectives of the Sharī'ah with regard to the conception of al-maslaha leads to the firm conviction that wherever and whenever al-maslaha exists, it should be considered even in the absence of a specific text. This is the inevitable aim of the Shari'ah. [21]

Al- Tufi, a scholar who is said to have adopted the most positive view, furthermore contended that public interest is the source of law. His explanation is based on the saying of the Prophet: Do not inflict injury, nor repay one injury with another.[22] According to him, it is to prevent injury which necessitates affording facilities to those who are confronted with hardships.[23] In fact, as Ibn al-Qayyim stated, *maslahah* is considered for the purpose of resolving many economic issues such as fixing equivalent wages on artisans, price-control on stocks, de-control on import, and accepting contracts involved some risk.

He, furthermore, explained this concept by quoting the following episode of Ibn Taimiyah:

> Ibn Taimiyah passed a group of Tatar drinking wine. His disciples wanted to forbid them from doing so, but Ibn Taimiyah did not allow this, his reasoning being that God prohibited wine because it distracts them from prayer and

21 Ramadan, P. 97.
22 Yamani, p. 10
23 *Ibid.*, p.11.

> devotional rituals, but in the case of the Tatars, wine distracts them from murder, loot, and rape, which is an excellent example of public interest consideration.[24]

This case is the question of preference or priority. That is, in this case the question is that the lesser of the two evil is preferred. Public interest is to avoid more hardships or to give priority to necessity.

Although it must be in accordance with the fundamental spirit of the *Sharĩ'ah*, *maslahah* should be adopted for eliminating some general hardship in a community or for promoting the welfare of community. In other words, the essence of *maslahah* exists in discovering a preferable course by understanding the social context.

(3) *Taqwã*

"*Taqwã*" is defined as the fear of God, namely piety. In Islam, *taqwã* is the standard for the judgement of human actions. The *Qur'ãn* says:

> Men, We have created you from a male and a female and divided you into nations and tribes that you might get to know one another. The noblest of you in Allah's sight is he who fears Him most. Allah is wise and all-knowing.[25]

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24 *Ibid.*, p.10.
25 The Qur'an, 49:13.

In the first place, *taqwã* has a significant meaning in the point that it determines the worth of believers. It means that any believers not involving '*taqwã*' is not a real believer. It also means that any performance of prayer not involving *taqwã* is meaningless, even if it is loyal to a given method of the *Sharĩ'ah*. As stated in the explanation of *nĩyah*, Islamic law lays stress on the subjective side of actions, not the objective one.

In the *Qur'ãn*, "God knows what the soul of man whispereth to him and that He is closer to him than his jugular vein." Taqwa functions in such a manner that the fact makes all believers with a God-fearing heart avoid evil thinking as well as evil doing that God knows what is in his mind. In other words, *taqwã* is what creates a subconscious respect for compliance even in those beyond the reach of external enforcement.

Although *taqwã* , primarily means a piety to God, it also mean a faithfulness or a desire to love all things universally in a social aspect. The latter one is more significant of the two connotations in considering the function of community, because the most precious relationships of human beings in a community are those founded on the basis of love or brotherhood. These relationships create a voluntary regard for

others more than one's self.[26] It leads a community to unity and stability.

Taqwã always involves a sense of love and sympathy for others. Without this sense, it is never a real *taqwã*. Because *taqwã* is the fruit of the purification of soul, a faith without purification is never *taqwã*. In other words, *taqwã* or purified soul creates a love and sympathy for others as the natural extension of *taqwã*. The saying of the Prophet shows this fact: "you will recognize the faithful by their mutual compassion, love and sympathy."

Thus, Islamic law demands believers to love each other as well as to accomplish social duties. The chief importance of *Sharĩ'ah* lies in this that it builds the minds and particularly the character of man in such a manner that he takes pleasure in doing good to others. This is most effective in establishing order and unity in the community.

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26 Toshio Kuroda, "Ijyo o Kaku," *Bulletin of the Institute of Middle Eastern Studies*, International University of Japan, Vol. III.

Chapter III.

Ribã

A. The meaning of *ribã*

The Arabic word, *ribã* is generally translated into English as "usury" or "interest" but in fact has a much broader sense in Islamic law. The literal meaning of *ribã* is "increase" or "gain." Although the gain itself is accepted in Islam, an unjustified gain in Islamic law or a gain received without giving a countervalue is forbidden under a number of verses in the *Qur'ãn*. Nabil Saleh defined *ribã* as an unlawful gain derived from the quantitative inequality of the countervalues in any transaction.[1]

1 Nabil A. Saleh, *Unlawful gain and legitimate profit in Islamic law*, (London: Cambridge University Press, 1986), p. 13.

B. The reason why *ribã* is prohibited

In Islam, so to speak, interest means "enrichment of currency by itself." Islamic ethics cannot tolerate "income without the labor" which is the only cause of ownership in Islãm. Accordingly, in the Islamic law of contract, interest is regarded as "an unjust consideration," and thus a transaction that implies *ribã* is invalid. It is natural that a borrower returns the equivalent of that he has received to a lender. In other words, interest is regarded as a surplus gain that destroys the equilibrium of the countervalues.

One kind of reasoning concerns itself primarily with the individual and social evils that result in a society which allows *ribã*. These evils, first of all, will be examined separately. Then, this institution will be analyzed from two points of view; anthropological and historical ones.

(1) The individual level

It is argued that at the individual level *ribã* creates selfishness, miserliness, greed and malevolence.[2] The very act of lending money on the basis of *ribã* reflects the fact that the lender only cares for the principal and *ribã* on it that has to be paid by the borrower under all circumstances. The argument

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2 Waqar Masood Khan, *Towards an Interest-free Islamic Economic System*, (London: The Islamic Foundation, 1985), p. 25.

gets ever stronger when the borrowing party is a person who needed the loan to meet an unforeseen accident or emergency. In this situation, the borrower is economically at his weakest. He is in an unequal position without any option to choose. [3] This relation is never fair and equal because only one party covers the risk and the other enjoys a fixed profit.[4] It is unjust for the lender to demand a fixed return over the principal loan irrespective of what happens with the loaned money. It is unfair to demand a reward without participating in the risk enterprise.

(2) The social level

The same argument carried to the social level implies that a society consisting of people who have the above-mentioned characteristics, is bound to produce an atmosphere where most of the individuals have not only diametrically-opposed social interests but also their individual interests are divergent. In such a society, there will be a class of people that accumulates most of the society's wealth and is hostile towards the rest of the people. Accordingly, a mutual solidarity within their community will be destroyed. As a result, because it upsets the

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3 Muhammad Nejatullah Siddiqi, *Partnership and Profit-Sharing in Islamic Law*, (London: The Islamic Foundation,1985), p.5.

4 Hamidullah, *Islam Gaisetsu*, Trans. Miyoko Kuroda, (Tokyo: Islamic Center Japan, 1983), p. 214.

equilibrium of a society, the institution of *ribã* leads to a highly unstable society.[5]

In a society based on mutual solidarity, where the welfare of the community is the first consideration, this institution can not be accepted.

(3) The historical point of view

An examination of the reason for its prohibition makes us doubt the reason why interest is paid in our society. Therefore, this question will be examined in a brief manner.

This investigation makes it clear that it is not until recent times that it was regarded as natural. That is to say that most people with good sense regarded it as an unjust one through history. From the age of Aristotle to the Middle Age, most great thinkers like Aristotle and Plato, the Roman Empire and other numerous scholars condemned this institution.[6] However, it was not until the rise of Capitalism that most economists have accepted it, giving different reasons, since Adam Smith first justified it. But it seems that no reason can justify it clearly. For example, the productive theory explains that interest is paid on the ground of the productivity of capital. But if capital is productive or variable, the rate of interest

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5 Khan, p.26.

6 M. A. Mannan, *Islamic Economics: Theory and Practic*, (Cambridge: Hodder and Stoughton, 1986) , p. 120.

should be varied.[7] It is difficult to clearly explain the reason why it was fixed.

I have no intention to investigate this question in more definite terms here. My intention is to explain that the prohibition of interest is not unique and that the institution of interest was justified in order to meet the demands of Capitalism. It therefore seems to me that this institution is only an ideology of Capitalism in this sense. There is, however, no doubt that interest was never a universal institution that has existed through history.

(4) The anthropological point of view

The above-mentioned idea was strongly encouraged by the following explanation of Marcel Mauss, a famous anthropologist:

> Now a gift necessarily implies the notion of credit. Economic evolution has not gone from barter to sale and from cash to credit. Barter arose from the system of gifts given and received on credit, simplified by drawing together the moments of time which had previously been distinct. Likewise purchase and sale --- both directed sale and credit sale --- and the loan, derives from the same source.[8]

He wrote that the loan as well as a sale, originally derives from a gift. That is, the loan is only a form of combination of a

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7 *Ibid.*, p. 121.
8 Marcel Mauss, *The Gift*, (Tronto: W. W. Norton & Company, 1967), p.35.

gift and the return beyond time in a primitive community. In other words, lending something basically means giving or transferring something to another for a given time interval in this context. If it is supposed so, it is natural that a borrower or a receiver return the equivalent to the lender or a giver without adding any surplus. In such a community, there is no room for the concept of interest. This anthropological study makes us recognize that interest is essentially only a surplus in the light of the long history of mankind.

C. Classification of *ribã*

The prohibition of *ribã* was justified by analogical reasoning, for which was classified into two categories: *ribã al-fadl* and *ribã al-nasi'a.*

(1) *Ribã al-fadl*

This type of *ribã* is the unlawful excess of one of the counter-values in a hand-to-hand transaction. This is based on the following *Sunnah*: "Gold for gold and silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt of the same kind for the same kind and the quantity for the same quantity, from hand to hand and if they differ from each other in quality sell them as you like but from hand to hand."[9]

9 Hadith, Quoted. Saleh, p. 34.

Though this *Hadīth* had various interpretations, absolute equality of the exchanged counter-values was, in short, stressed. This was the principal rule that governed the Islamic law of contract.

Keishiro Sato asserted that the principle of the equilibrium of countervalues in Islamic law was based on that of Aristotle and, furthermore, the principles of Islamic law were influenced by him.[10] It might be certain that the framework of the principle as a study was influenced by him, but it is possible to say that such a consciousness in which people naturally keep the equilibrium of countervalues in an exchange would have arisen even if people had not known the ideas of Aristotle. Radcliffe-Brown, a famous social anthropologist, proved that there is such a consciousness in primitive communities. As he explained in his book, it is natural that the giver expects the receiver also endeavors to come up to the expectation.[11] It could be restated that such a consciousness naturally arises in a community where mutual solidarity is sought to be, or is maintained. Accordingly, it is natural that Islamic law endeavors for an equilibrium of countervalues in an exchange. It is here that the significance of the notion of riba in the Islamic law of contract exists.

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10 K. Sato, *Historical Study of Muslim Commerce*, (Tokyo: DOHOSHA, 1981), p. 61. ; J. Klaus, *Kaikyo No Keizai Rinri*, (Tokyo: Meijishobou, 1943), pp. 90-91.

11 A. R. Radcliffe-Brown, *The Andaman Islanders*, (Glencoe: The Free Press, 1948) , p. 83.

(2) *Ribã al-nasi'a*

There is another sort of *ribã* that arises when the exchange of countervalues is delayed. This is "*ribã al-nasi'a*". This kind of *ribã* is also based on the *Sunnah* stated in the section of *ribã-al fadl.* The phrase "a hand-to-hand transaction" in the *Hadĩth* express a immediate delivery. A deferred exchange has the possibility that it produce a gain in one of the countervalues because of delayed payment or delivery. Accordingly, it is considered unlawful whether or not it is accompanied by a profit.

This sort of *ribã* is not peculiar to Islamic law and nor in *ribã al-fadl.* The sale rule can be found in a primitive society. For example, M. Sahlins, an economic anthropologist, indicated: "In precise balance, the reciprocation is the customary equivalent of the things received and is without delay."[12] Likewise, some anthropologists asserted the importance of returning the equivalent without delay.[13] This rule is not unique but rather a general one.

The notion of the prohibition of deferred payment or delivery is closely related to the factor of *gharar* (risk, uncertainty) examined in the following section. The principal rule that a projecting exchange into future should be avoided as thoroughly as possible originated from the abolition of *ribã.*

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12 Marshall Sahlins, *STONE AGE ECONOMICS*, (London: Tavistock Publications, 1974), p.194.
13 B. Malinowski, p. 21.

Moreover, this idea explains the characteristics of the law that the ownership must be transferred immediately at the time of formation of a contract.

D. The development of the notion of *ribã*

The notion of *ribã* is not identical with that of usury or interest itself. If the former is restricted to the latter, the notion of *ribã* is not unique. The characteristics of this notion rather lies in extending it by interpreting the true meaning in the total context of a society. That is to say, Islamic law laid a stress on keeping the equilibrium of countervalues or the equal position of contracting parties in a contract by eliminating the elements of *ribã*. For example, any contract that cannot realize the equilibrium of the countervalues is considered invalid.

The notion of *ribã*, furthermore, was extended ever more by linking with the notion of prohibition of gambling. Accordingly, it implied all sorts of gain that were risky in the sense that there is a possibility that any party might suffer a great deal of loss in future.

All existing transactions and customs before the advent of *Islãm* were scrutinized by confirming whether they involved elements of *ribã*, and through it they were divided into lawful and unlawful ones.

Thus, the notion of *ribã* formed the framework of Islamic law of contract, developing and putting it in the core of the law. Coulson indicated the significance of this principle as follows:

> At the same time the notion of riba is diametrically opposed to that of bay' (selling or trading) in the Qur'an itself. The relevant verse (II,276), as quoted at the head of this chapter, declares the former to be prohibited and the latter permissible; and it is this fundamental contrast between legality and illegality which provides the key to the early activities of the jurists. They saw their basic task to lie in deciding whether any given transaction, actual or proposed, fell into the category of bay', and therefore permissible and valid, or of riba, and therefore forbidden and invalid. In essence it was the process of the interpretation of this basic distinction drawn by the Qur'an and its application to contemporary commercial practices that governed the formation of Islamic contractual law. [14]

He explained that the basic contract was formed in a sale contract by contrast with the notion of *ribã*. The formation of different types of contracts will be examined in the following sections.

E. Comparative approach to some sorts of contracts

In this section, four types of contract; *bay'* (sale), *qard* (gratuitous loan), *hibah* (gift), and *mudarabah* will be examined from the viewpoint of eliminating *ribã*.

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14 Coulson, p. 12.

(1) *Bay'* (sale)

As explained before, the sale contract has taken an important role in the formation of the Islamic law of contract, as well as the concept of *ribã*. The various categories of contracts have been evolved into a sale contract. For example, the contract of hire (ijara) is also as a sort of sale, because it is a exchange between labor and remuneration. The study of a sale has formed the core of the Islamic law of contract.

The contract of sale (*al-bay'*) means the delivery of a definite object which possesses legal value in exchange for something "equivalent" in value. The concept of sale also include barter (i.e. exchange of one thing for the other "equivalent" value). This contract is concluded by reciprocally taking possession. It is important in a sale that the performance of one party is equivalent to that of another, or the price is the just countervalue of the goods. No profit except countervalue is accepted. The principle of prohibition of *ribã* highlighted the concept of "unjust enrichment." Accordingly, in a sale, the notion of a just consideration" is esteemed. As well as the notion of equality of a contract, "immediate delivery" must be kept. In other words, the price must be paid immediately. For a deferred delivery have a possibility of producing an unlawful gain or unjust enrichment. Thus, the law, first of all, attempts to eliminate the elements of riba completely and to realize the equality of one value and the countervalue in a sale contract.

(2) *Qard* (gratuitous loan)

Qard means the gratuitous loan of commodities such as currency. In this contract, the borrower undertakes to return the equivalent that he has received without adding any surplus.[15] This contract is the recommendable contract naturally deduced from the abolition of *ribã*.[16]

As mentioned before, from the point of view of anthropology, a loan is a combination of a gift and its return. This type of contract is concluded by returning the equivalent of what one received, to the lender. This is also a contract that maintains the equilibrium of countervalues in the real sense.

In this contract, the equilibrium of countervalues is the base on which it is concluded. That is to say, it is considered unlawful to provide the lender with any advantage, because every loan entailing benefit is usury.[17] For example, it is unlawful that a qard agreement should stipulate conditions to the lenders advantage, such as lending imperfect wheat with the proviso that good quality shall be given back.[18] It is also forbidden that the lender should accept a gift from the borrower for the reason of having borrowed money. The law prohibited such a surplus factor because these transactions

15 Abraham. L. Udovitch, *Partnership and Profit in Medieval Islam*, (Princeton: Princeton University Press, 1970), p.106.
16 Saleh, p.36.
17 *Ibid.*, p.37.
18 *Ibid.*, p.42.

destroy the equilibrium of the counter-values. The principle of *ribã* is thoroughly observed.

This type of contract is formed in a society where mutual solidarity exists between members. In such a community, one can expect himself to receive help in distress, as long as he does not break the rule of the community. They do not regard such a *qard* loan as a concluding act, but rather a part of the total activity in the community projected into future.

(3) *Hibah* (gift)

In this law, the gratuitous transfer of a determinate property without any return or gift is termed "*hibah*." This contract is recommended in the Holy *Qur'ãn* and *Hadîth*, because it increases affection and friendship between givers and receivers. At the same time, there is the moral obligation of gratitude on the part of receivers towards the giver as well as God.[19] In a sense, it is possible to say that this sort of gratitude is "the sentiment which, for inner reason, effects the return of a benefit where there is no external necessity for it," as Simmel explained.[20]

Besides, the *Hadîth* of the Prophet lays more stress on exchanging gifts as follows: "Exchange gifts among yourself and

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19 Rahim, p. 283.

20 Robert Nisbet and Robert G. Perrin, *The Social Bond*, (New York: Alfred A. Knopf, 1945), pp. 57-58.

thus strengthen mutual love, with each other."[21] This means that exchanging gifts is beneficial in generating mutual relationships and strengthens solidarity and mutual reliance. In other words, it is possible to think that there is the obligation of giving a return on the part of receivers in Islamic law.

Just as the above statement suggests, there exists a form of gift contract on condition of giving a return in Islamic law.[22] This type of contract stipulates in advance to return. This contract is what make a sense of obligation more evident.

Thus, it is certain that a sense of equilibrium or reciprocity exists in a gift contract. Since burdens are laid upon one of them alone, a sense of reciprocity is not entirely absent from a gift. It is merely gratuitous or unilateral. A gift is an exchange without bilateral and absolute obligations in this context.[23]

(4) *Mudārabah*

Udovitch defined this contract in the following sense: "The commenda [mudaraba contract] is an arrangement in which an investor or group of investors entrust capital or merchandise to an agent-manager, who trades with it and then returns to the

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21 A. Rahim, p. 334, quoted in Musnad Abu Yala and Jami Saghir, Vol. 1, p.454.
22 *Ibid.*, p. 335.
23 Durkheim, *THE DIVISION OF LABOR IN SOCIETY*, (NEW YORK: THE FREE PRESS, 1933), p.79.

investors the principal and a previously agreed-upon share of the profits."[24]

In this contract, the profit must be shared by all the participants on a proportional basis. At the same time, any loss must be paid by the amount of the capital he has paid. The agent manager does not share the loss, but he loses time and effort instead. In other words, any profit and risk are equitably shared by both parties, because the investor risks his capital and the agent risks his time and effort. In this sense, it may be said that a valid *mudārabah* contract constitutes the alienation of the investor from his capital.[25]

The significant merit of this contract can be found by comparing it with the notion of *ribā* transactions. In *ribā* (interest), the lender always takes the fixed profits, even if the effort of the borrower is in vain. One of the most evident reason why *ribā* is prohibited exists in unfair or unjust relations between the lender and the borrower: fixed profit for the lender, risks for the borrower. The significance of *mudārabah* contract lies in its eliminating one of the worst elements of *ribā* or the inequality between them. In other words, *mudārabah* is a contract that realizes the equality between lenders and borrowers.

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24 Udovitch, p. 170.

25 Satoshi Iwai, *A New Approach to Human Economics*, Working Papers Series NO. 2, (Niigata: The Institute of Middle Eastern Studies, International University of Japan, 1985), p.53.

Furthermore, the most significant ideology of the *mudãrabah* contract is that Muslims can maintain the quality of equilibrium by defining labor as of equal value to capital.[26]

It is often said that, in the *mudãrabah* contract, the amount of work that the borrower will be required to do is uncertain. However, in this case, it is rather desirable that it is uncertain and flexible, because this contract has much possibility that the inequality of the counter-value arises in future if the sum is fixed. At the time of mutual consent, which is too early to determine its consideration, it is risky to determine the reward to the investor, though Western law often forces to determine it in even this situation. In *mudãrabah* contract, the rewards are are paid according to the productivity of the labor. Accordingly, the equilibrium of the labor and rewards is always maintained. In this sense, the element of *ribã* is completely eliminated in *mudãrabah* too.

Apart from these merits, this contract is helpful in solving other problems. For example, it often happens that a person possesses capital but is unable to engage in business, or the other way around --- willing to engage in business but without disposable capital.[27] It is possible through *mudãrabah* for both these parties to attain a common objective by mutual co-operation.

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26 *Ibid.*, p. 55.

27 Muhammad N. Siddiqi, *Partnership and Profit-sharing in Islamic Law*, (London: Islamic Foundation, 1985), p. 14.

In *mudãrabah* contracts, this relationship between them is really equal because they have a chance to produce profits and share risks, when the equilibrium of labor and rewards is maintained. Accordingly, this contract is regarded as a lawful and desirable one in the Islamic jurisprudence.

F. Secondary effects of the notion of *ribã*

As mentioned before, Islamic law endeavored to eliminate elements of *ribã*, or inequality and unfairness, from contracts in order to reach the equilibrium of countervalues or the equality between parties. At the same time, another problem lies in its inequality where the borrower is too much at the mercy of a lender. Accordingly, the equilibrium of countervalues is never maintained. In other words, the borrower is too weak to receive the just reward for his service. In such a situation, even if they reach an agreement, it is never a real agreement. Is this type of contract fulfilled spontaneously? Durkheim stated its significance as follows:

> The contract is not fully agreed to unless the services exchanged are equivalent in social value. In these conditions each person will receive the object that he desires and hand over what he gives in return --- what both are worth. This equilibrium of wants that the contract proclaims and embodies therefore happens and is maintained of its own accord, since it is only a consequence

> and a different form of the very equilibrium of things. It is truly spontaneous.[28]

Islamic law has sought for a real agreement, which always leads to the equilibrium of countervalues, in a contract. As a result, this attitude of Islamic law makes parties fulfill a contract spontaneously. That is to say, the elimination of the elements of *ribā* from a contract also play a significant role in the spontaneous fulfillment of contracts.

Although Islamic law aims at the equilibrium of countervalues in a contract, there arises cases where it cannot be maintained. In such cases, how does this law deal with it? In the following chapter, this issue will be examined.

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28 Durkheim, p.317.

Chapter IV.

Gharar (Risk)

A. The meaning of *gharar*

Classical jurisprudence came to formulate a general doctrine of the prohibition of *gharar,* which is translated as risk or uncertainty, as an integral part of its abhorrence of *ribã*.[1] The notion of *gharar* is too comprehensive to be defined. In fact, since some jurists were aware that it is difficult to define *gharar*, they described the outline of *gharar* by giving a list of the various cases of gharar. Although it is difficult to describe it briefly, Ibn Rushd explained *gharar* in sale contracts as follows:

> Gharar in sale transactions causes the buyer to suffer damage (ghubn) and is the result of a want of knowledge (jahl) which affect either the price or the subject-matter. Gharar is averted if both the price and the subject-matter are known to be in existence, if their characteristics are

1 Coulson, p. 43.

> known, if their amount is determined, if the parties have such control over them as to make sure that the exchange shall take place and, finally, if the date of future performance, if any, is defined.[2]

The notion of *gharar* was formulated by linking the notion of *ribã* with the prohibition of gambling. Accordingly, it was formulated so that contractual relations may not result in inequality, namely a profit for one party and a corresponding loss for the other.[3]

Briefly stated, it is possible to describe *gharar* as a possibility or risk where the equilibrium of countervalues is upset or that an unjust or inequitable gain or loss is produced.

B. The reason why *gharar* is avoided

As stated in the preceding chapter, it is the principle of equilibrium that governed the law of contract. In order to judge the equilibrium in a contract, a fixed obligation will be needed as a precondition. That is to say that some goods can not be weighed on a scale without determining the real content of the subject-matter definitely. If the substance of the contract is not determined, there will be no data for judging it. One of the reasons why *gharar* should be eliminated is that it is a precondition for confirming the equilibrium in a contract. That

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2 Saleh, p. 52.
3 Coulson, p. 44.

is, one of problems of *gharar* lies in uncertainty which makes parties err in judging the equilibrium of countervalues.

The second reason is that there is a possibility or risk of causing an unjust or inequitable contract. The abhorrence of the notion of *gharar* is any risk between the parties which is built into the contract at its inspection and which must result in inequality like a relation of *ribã*, or a profit for one party and a corresponding loss for the other.[4]

From these reasons, Islamic jurists persisted in contriving to avoid *gharar* as well as *ribã*. In the following sections, it will be examined how they endeavored to avoid *gharar*.

C. The development of the method for avoiding *gharar*

In the history of the Islamic law of contract, the methods for avoiding *gharar* have been sought persistently. Firstly, the transactions contrary to provisions was eliminated. Then, Islamic law has still pursued the safest way to avoid *gharar*.

(1) Elimination of prohibitory transactions

Islamic jurists, first of all, endeavored to divide customary transactions before Islam into lawful and unlawful ones according to *gharar* as well as *ribã*. That is to say, all forms of transactions involving too much *gharar* (risk) were eliminated

4 *Ibid.* , p. 44.

from the range of lawful contracts and prohibited. In order to understand the notion of *gharar*, some forms of prohibitory transactions will be examined.

a. *Bay' mulamasa*, where the bargain is struck by touching the object of the sale without examining it.[5]

b. *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.[6]

According to the *Hadîth*, these transactions involve much risk because they have no process to confirm the substance of the object. It is indispensable to have a process to examine the object and to make use of it in a meeting in order to pursue the true value of goods. In Islamic law, a full knowledge of goods on the part of the buyer is required to eliminate *gharar*.

c. *Bay' al-gharar*, or the sale of a bird in the air is also invalid, whether or not it is the vendor's property and whether or not it is accustomed to return to its nest; that is, according to Ibn Qudama, the teaching of all schools of law.[7] Such a bird in the air cannot be handed over because of lack of control over it. That is, the vendor must be in a position to hand over to the buyer.

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5 Saleh, p. 51.
6 *Ibid.*, p.51.
7 *Ibid.*, p.80.

d. A *mussarat* is "any female animal whose teats have been tied up for some time in order to give the prospective purchaser an unduly optimistic impression of the animals normal milk-yield."[8]

e. There is one transaction known as "meeting riders out of town." This transaction means the practice of tradesmen intercepting a caravan, which had not yet reached its destination, and making vast profit from dealing with the caravan members because of their little knowledge of local prices. Such activity is condemned as "cheating" and "deceit."[9] This manner of transaction is unfair because the caravan members are not in a position to have a full knowledge of the price.

Thus, these forms of transactions were prohibited by Islamic law, because they involved *gharar* too much in a sense that they result in inequality or upsetting the equilibrium; a profit for one party and a damage for the other.

(2) Pursuit of the safest way to avoid *gharar*

Islamic jurisprudence (*fiqh*) has persistently emphasized that the exchanged countervalues in a bilateral transaction should be in existence at a meeting in order to examine them and hand them over to the other immediately. Moreover, the

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8 Coulson, p.70.
9 *Ibid.*, p. 72.

object of the contract must be precisely determined and must be examined through inspections and communication.[10] At the same time, both parties must have choices based on a genuine intent without any exploitation in entering into contracts. In short, the safest way to avoid *ribã* and *gharar* would be to have the exchanged countervalues in existence at the time of the formation of the contract, to inspect them, decide to enter into a contract during the session, and transfer their ownership before they leave there. In other words, the concluding of a contract must be immediate. In this manner, the abhorrence of *ribã* and *gharar* made a commercial rule of Islamic law a strict and severe one.

Although it is ideal to observe this rule, this observance also involved some demerits. For example, in a sale contract, the purchaser has no room to examine the contractual conditions of the sale fully and calmly, to arrange necessary finance, and to investigate the real content precisely. Islamic law prepared the system of options for these difficulties. However, on the other hand, needless to say, Islamic law recommend a communication to satisfy both parties.

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10 Saleh, p.63.

D. Concrete methods for avoiding *gharar*

Two concrete methods were recommended in order to avoid *gharar*; the system of options and communication. In this section, these method will be examined.

(1) The system of options

The system of options (*khiyar*) aimed at getting rid of as much risk as possible and realizing the fundamental aspiration of Muslim Jurisprudence --- the highest possible degree of certainty in the rights and obligations arising from a contract.[11] That is to say, that a contract will not be legally binding without ascertaining the equality of countervalues. It often happens that an apparently lawful and voluntary contract involves a latent flaw or defect unknown to the parties at the time of formation.[12] It is not acceptable, in the Islamic legal system, to enforce such a defective agreement. Unless the defect is removed, the agreement cannot be binding. Ibn Taimiyah wrote in the Fatawa as follows: "If proper fulfillment of obligations and due respect for covenants are prescribed by the Law-giver, it follows that the general rule is that contracts are valid. It would have been meaningless to give effect to contracts and recognize the legality of their objectives, unless

11 *Ibid.*, p. 58
12 *Ibid.*, p.57.

these contracts were valid."[13] In order to cancel such a defective and invalid agreement lawfully after it is concluded, the system of options exists.

This system has six different options at most: option of the session (*khiyar al majlis*), option by stipulation (*khiyar al-shart*), option for fault (*khiyar al-'aib*), option after inspection (*khiyar al-ru'ya*), option of description (*khiyar al-wasf*), option by fraud (*khiyar al-tadlis*). Although the system of options in Islamic law is similar to the corresponding system in modern law, the former is more extensive than the latter. For example, option of the session (*khiyar al-majlis*) is an option not so easily accepted by modern law. This option means that the parties to a sale have the option as long as they have not separated, even if the agreement is concluded by mutual agreement.[14] The existence of this option in Islamic law shows that a mutual agreement is not an essential part of the Islamic contract. The equity of a contract is essential in Islamic law. Accordingly, an act of inspection or investigation, such as wearing clothes or riding a camel, is recommended in order to ascertain the equality of consideration.

This Islamic system is remarkably in favor of the purchaser. Goods or services must fulfill the proper

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[13] See the Fatawa of Shikh-Ul-Islam Taki-D-Din Ahmad Ibn Taimiah; Mabhath Al Uqud (Chapter on Contracts), Vol. III, Cairo, 1326-1329 A. H., p. 387ff, quoted in "THE SYSTEM OF NULLITIES IN MUSLIM LAW," *American Journal OF Comparative Law*, Vol. 13, p. 63.

[14] Coulson, p.59.

expectations of the purchaser or he has the right to rescind the contract. It is striking that the Islamic law of contract has assumed a consumer protectionist character since more than ten centuries ago.[15] Thus, this idea of protecting the weak against exploitation by the strong led to the elaboration of a rule of general application, commanding that transactions should be devoid of uncertainty and speculation, and this could only be secured by the parties' having a perfect knowledge of the countervalues intended to be exchanged as a result of their transaction, otherwise the purchaser can use a due option for a respective reason.

(2) Communication

"Consent" is an intangible mental fact which has to be manifested before its existence could be known. Before it is so manifested, it is a mere intention (*nĭyah*) which, by itself, is not sufficient to conclude the contract.[16] Accordingly, the objective manifestation of consent was stressed. There was, however, no agreement in Islamic jurisprudence as to what should be regarded as a sufficient manifestation of consent. Although it is obvious that the way of manifesting assent by spoken words is recommended, the subject-matter of assent would not be inferred from a verbal acceptance unless the words used

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15 *Ibid.*, p. 67.

16 Mohmed A. Hamid, "Mutual Assent In The Formation of Contracts in Islamic Law," *Jounal of Islamic and Comparative Law* 7, (1977), p.41.

indicate a definite and present intention to contract. Accordingly, communication between parties in a meeting seems to be required to ascertain true intentions, because the formation of a contract without any communication involves much risk (*gharar*). Although most of scholars in Islamic jurisprudence are silent as to whether such a communication is essential for the formation of the contract, the Hanafī school recognized the necessity of communication to some extent by making it a condition for the conclusion of the contract that the offeree must hear the offer and offeror must hear the acceptance.[17] The juristic basis for the necessity of this mutual hearing is not clear. But whatever the true juristic basis of this requirement is, it seems clear that, as far as the Hanafī school is concerned, there will be no contract without such mutual hearing where the parties are contracting in the presence of each other.[18] The real consent is not an apparent but substantive one in which parties are satisfied and committed to the fulfillment of their mutual and legitimate expectations. Islamic jurisprudence recommended the absolute conjunction of an offer and its acceptance and the immediate transfer of goods in a meeting, as a condition of an ideal contract. Consequently, it is necessary to encourage that an apparent or formal consent

17 Hamid, p. 47.
18 *Ibid.*, p. 47.

lead to a real one before parties separate. Thus, it is a communication that take an important part in promoting it.

It is not so easy for a formal consent to lead to a real one because it involves the work of drawing the real intention or the definite explanation of subject-matter from each party. In other words, it must be ascertained by each party through their communication what the real expectation is and what the real content of goods is.

According to the *Hadīth*, "Negotiate, as it is the greatest of blessings" or "When you negotiate do it well as this bring goods results and many blessing. Do not quarrel as this is the work of the devil." [19] Thus, the significance of negotiation or communication is much stressed.

Furthermore, some *Hadīth* asked the vendor to explain the true nature of goods honestly without covering their defects. The other *Hadīth* emphasized the significance of communication by prohibiting such a transaction without communication as "*Bay' mulamasa* and *munabadha.*" Deducing from the *Hadīth*, it seems possible to say that communication (or negotiation) is recommend because it is very useful in eliminating some sort of risk (*gharar*).

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19 Abu Naj-ih al-Irbad Ibn Sariya; quoted in Saleh, Legal Aspects of Business in Saudi Arabia, (London: Graham & Trotman, 1984), p.13.

E. Mechanism of binding force

An examination of these methods makes us recognize that the mechanism of providing a binding force for a contract is a little different from the western one. That is, communication is one of methods which seeks a real consent satisfying both parties. On the other hand, contracts are never legally bound until the real equilibrium is ascertained or both parties are satisfied. Thus, the attitude of Islamic law is not always formal but very substantial. This attitude is also expressed in the manner that the law provides contracts with a binding force. This mechanism will be investigated by comparing it with other legal systems.

In any system of law, all promises do not have legal binding force. You will understand the notion if you imagine that the promise of killing someone is never given a binding force by any law. Such an example is common to every law, but the range of binding contracts in each law is varied. It depends on the cultural and social background of legal systems how they divide contracts into legally-binding ones or not binding ones. Durkheim explained this in the following sentences:

> Yet we must bear in mind that, if a contract has binding force, it is society which confers that force. --- Every contract therefore assumes that behind the parties who bind each other, society is there, quite prepared to intervene and to enforce respect for any undertakings

entered int. Thus it only bestows this obligatory force upon contracts that have a social value in themselves.[20]

As in other legal systems, Islamic law never recognize any contract which has a apparently illegal purpose such as the commitment of an unsocial act like killing.[21] The Islamic law of contract shows fundamentally that there is a distinction between a contract, or *'aqd*, which is valid (*sahih*) and one which is legally binding (*lazim*).[22] Between the two extremes of a void contract and a legally binding contract there is an intermediate category of contracts which have been soundly formed, but which are not enforceable in strict accordance with the terms of the agreement expressed (*fasid*).[23] But there is quite a considerable gap between validity and enforceability. This law provides the binding force to the contracts which are allowed as valid and equal ones; namely contracts where the equilibrium of both countervalues is maintained. In other words, contracts can be protected by law only when the equilibrium in a contract is maintained

Thus, Islamic law lays stress on the equilibrium of countervalues in a contract and provides a binding force only for contracts satisfying this requirement, because this law always respects the real intent in the context of a society. This

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20 Durkheim, p. 71.
21 Coulson, p.43.
22 *Ibid.*, p.42.
23 *Ibid.*, p.42.

attitude of Islamic law is expressed more strikingly in the notion of changed circumstances. In the following Chapter, this issue will be examined by comparing it with Western legal system.

Chapter V.

Changed Circumstances

A. The meaning of changed circumstances

There is a notion of changed circumstances in Islamic law. What is called "*gharar*" is generally considered to be built in a contract at its inception. On the other hand, the risk in the notion of changed circumstances arises after the formation of a contract. In this Chapter, the attitude of Islamic law towards changed circumstances will be examined.

As Coulson stated, Islamic law did not necessarily form the system of changed circumstances as one clear unit.[1] The notion of changed circumstances like "frustration" can be found in the context of the various nominate contracts. This notion in Islamic law is defined as a right to dissolute a contract when unforeseen changes of circumstance made the contractual obligation more burdensome and difficult than expected at the

1 Coulson, p.83.

time of the formation of a contract. For example, in *Ijara* (contract of hire) the renter has the right to dissolute the contract if there has been a material change in his personal or external circumstances.

B. The Background of permitting projecting contracts into future

As mentioned in the preceding Chapter, Islamic law requires, in principle, that the concluding of a contract from consent through transfer of ownership should be immediate and that the subject-matter is in existence at the time of the formation of contracts. However, Islamic law accepted these projecting contracts into future as a result of considering the real meaning of a contract in the total context of a society. The reason why this type of contract was accepted will be checked by investigating two examples of contracts; *ijara* (hire) and *istisna* (contract of manufacture).

(1) *Ijara* (hire contract)

Needless to say, the subject-matter of hire contract is not in existence at the time of the formation of contracts and this contract cannot be concluded immediately. Accordingly, this contract seems unlawful by analogy (*Qiyãs*). However, Islamic law regarded this contract as a valid one. One of the reasons

why it was accepted was that this type of contract is supported by the *Qur'ãn*, the *Sunnah*, and Consensus (*Ijmah*). Since the *Qur'ãn* and the *Sunnah* is the primary source of *Sharĩ'ah*, they have priority.[2] Accordingly, this contract was regarded as unlawful. However, this reason is the technical reason in the interpretation of law. In other words, there exists another reason behind this technical reason.

As mentioned before, this law always takes the real, and ultimate reason of this transaction into consideration. The consideration is taken in the total context of a society. That is, this contract was accepted because it is supported by the majority in a society and it is useful for promoting the interests of a society and satisfying both parties. Thus, hire contract was considered permissible through preference (*istihsãn*).[3]

(2) *Istisna* (contract of manufacture)

Istisna means a form of transaction in which a person requests another to make a product like a boat for certain time. In this contract, the subject-matter is not in existence at the time of the formation of a contract and the conclusion of a contract cannot be immediate. However, this contract was also regarded as lawful, because this transaction was supported by the *Sunnah* and accepted by the majority in a society as a

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2 Muslehuddin, p. 154.
3 *Ibid.*,p. 154.

custom. However, even if it is a custom accepted by the majority, the transaction which is against the interest of a society (*maslahah*) is never accepted. Since this transaction promotes the interest (*maslahah*) and even eliminates hardship, this contract was considered lawful through preference (*istihsān*).[4]

Thus, Islamic law accepted projecting contracts into future in the light of the interest of society (*maslahah*). However, this acceptance involved another problem. That is to say, in projecting contracts into future, there is a possibility that two important notions of Islamic law stand in opposition. In the following section, it will be investigated how this law overcomes a clash between the rule of binding contracts and the principle of equilibrium, by comparing it with the Western legal system. This comparison will make the character of the Islamic legal system more clear.

C. Comparative approach to different attitudes of the two legal systems

As explained in the preceding chapter, there is the problem of a clash between the sanctity of contract and the principle of equilibrium. However, the difference of the attitudes between two legal systems is more clearly expressed

4 *Ibid.*, pp. 154-155.

at a change of circumstance. To begin with, this issue will be examined. Then, I would like to refer to its reason and the issue of binding system.

(1) Relation between the rule of binding contracts and the principle of equilibrium

In the preceding chapter, it was stressed that Islamic law had a respect for equilibrium of countervalues in contracts. As some anthropologists and Durkheim indicated, it is natural for law to have such a respect. Western society is not exceptional. It is a fact that Western legal system recognized the theory of equilibrium. However, the Classical law did not regard this theory as the most valuable one, because it had a more important rule, which had priority over the principle of equilibrium.

In the world of capitalism, Individuals are required to anticipate the legal consequences of their conduct and precisely calculate the profit that they will acquire in future.[5] In other words, the Classical contract law provided the security necessary to encourage capital investment in needed enterprises at their requests. When a breach occurs, it violates the expectation created by the agreement. Naturally, the damages caused by its violation must be fixed objectively by

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5 Jay M. Feinman, "Critical Approach to contract law," *UCLA Law Review*, Vol.30, p.832.

quantifying that expectation and be compensated by the violator.[6] It is most important to make parties keep a contract and meet the expectations without exception in such a society.

At the same time, Classical contract law regarded contracts as a field of private order in which parties created their own law by agreement.[7] This idea is undoubtedly based on the doctrine of "freedom of contract." In contracts, each liability was imposed only through their consent. This notion of consent was grounded in the conception that the society consists of independent, freedom-seeking individuals, each of whom seek his own self-interest.[8] Therefore, as long as both parties agreed, the contract must be fulfilled.

Thus, the traditional law in the West should take the form of abstract, formal rules that define the elements that give rise to a contract right.[9] Faithful and mechanical application of these rules would protect parties autonomy from judicial invasion. The strict classical rules of contracts in Western law followed from this requirement. The binding force is , accordingly, absolute. The sanctity of contracts has priority over any principles in order to protect the right of individuals, in particular, capitalists.

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6 *Ibid.*, p. 832.
7 *Ibid.*, p. 831.
8 *Ibid.*, p. 832.
9 *Ibid.*, p. 832.

In Islamic law as well as Western law, the principle of the sanctity of contract is a significant one. The stress on this principle is clearly expressed by the *Qur'ãn* in the following phrases: "Be sure of the obligations which you have undertaken --- your obligation which you have taken in the sight of *Allãh* . For *Allãh* is your witness."[10]

A well-known illustration of this concept is also found in a different section of the *Qur'ãn*, which describes the contract concluded between the Prophet and the first believers who rallied to his call. Thus we read in chapter 48 (*Sũrah-Fath*), verses 10 and 18 .

> Verily those who swear allegiance to thee, swear, allegiance really to Allah, the hand of Allah is above their hands; so whoever breaks faith, to his own hurt he breaks it, and to those who fulfill what they have pledged to Allah, He will one day give a mighty reward. (verse 10)

> Allah was satisfied with the believers, when they were swearing allegiance to three under the tree, and knew what was in their hearts, so He hath sent down the assurance upon them and hath recompensed them with a clearing-up near at hand. (verse 18)

It is a fact that the rule of the binding force of contract as the law of the parties is of vital importance in any system of law, ancient or modern.[11] Islamic law is not exceptional. But in

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10 Saba Habachy, "property right, and contract in MuslimLaw," *Columbia Law Review* 62 (1962), p.464.
11 *Ibid.*, p. 467.

this law, the principle of equivalence has priority over that of the binding force, when two principles stand in opposition. In other words, the law protects the equilibrium in a contract, or the justice in a contract rather than the right of the individuals.

(2) The reason why the principle of equilibrium has priority

Although we understood that the principle of equilibrium has priority in Islamic law, why does this principle have priority? As mentioned before, Islamic law always takes a substantial approach. That is, it is most important to consider what the real and ultimate purpose of a contract is from the viewpoint of public interest. As mentioned in the Chapter II, the real and ultimate purpose lies in a mutual satisfaction created by meeting necessities, which promotes the interests of the community. If this is to be explained by using the legal term, or *hikmah* and *illah*, the *hikmah* (the act of wisdom) of a bilateral contract is a mutual satisfaction, while *illah* (cause) is a mutual agreement.[12] Although a mutual agreement is a cause of contracts, Islamic law regards the cause not based on the real and ultimate reason as meaningless. In other words, the mutual agreement which never brings mutual satisfaction is not respected. Accordingly, it is judged by fully considering the total context of a contract in a society that the principle of

12 Khallah, p. 85.

equilibrium has priority over the rule of the binding a contract. It is certain that there exists a consideration for the public interest (*maslahah*) behind this legal judgement.[13] If this legal judgement is against the interest of a community, it is not accepted. In this case, this judgement is supported by the notion of public interest, because the priority of this principle eliminates hardships of the majority and contributes to the welfare of a community. Thus, the character of the attitude of Islamic legal system is expressed in fully considering the real meaning of the object in the total context of a society, not in mechanically applying it to a fixed rule as in the Western legal system.

Although Coulson was an able scholar of Islamic law and most of his analyses were useful, his analysis concerning the notion of changed circumstances is not necessarily acceptable. Coulson explained the reason of this dissolution as follows:

> Briefly, therefore, the reluctance of the jurists to hold a contracting party to his promise in the face of changed circumstances may appear as a natural expression of an attitude of resignation or fatalism, deriving from that total submission to the will of Allah which the faith of Islam itself demands.[14]

It is true that there is an idea in Islamic law that future circumstances are neither predictable nor controllable.

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13 Muslehuddin, p. 156.
14 Coulson, p. 75.

However, the main reason for this idea is derived from the high degree of uncertainty or risk in future. It is easy to attribute the reason of dissolution to the fatalism of Islam. However, the essence of the Islamic legal system lies in not a simple religious character but a reasonable and flexible legal mechanism based on public interest (*maslahah*). Yamani indicated the pitfall of Orientalists as follows:

> The religious essence and value of the Shari'a(h) must never be overestimated. Many Western Orientalists who wrote about Shari'a(h), failed to distinguish between what is purely religious and the principles of secular transactions. Though both are derived from the same source, the latter principles have to be viewed as a system of a civil law, based on public interest and utility, and therefore always evolving to an ideal best.[15]

As Yamani asserted, the religious character should be never overestimated. That is to say, it is natural to explain that the rule of a binding contract was put aside because the principle of equilibrium is considered to have priority by fully considering the total context based on public interest.

An examination of this reason made us recognize that there is a big difference between Islamic and Western legal systems in the attitude as to the time of binding a contract, as is explained a little in the preceding Chapter.

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15 Yamani, p. 13.

(3) Time of binding a contract

If the theory of equilibrium is one of the most important principles in Islamic law, then, when is it better to judge the condition in a manner that the equilibrium of countervalues is maintained? Since certainty and precise foreseeability of the rights and duties of the parties is a basic doctrine of the traditional contract law, it is at the moment of formation of a contract that parties decide to enter into it after examining its equilibrium. In other words, parties have to decide whether they enter into it or not, in spite of not examining the equilibrium, when the contract is projected into future. This decision is similar to gambling. It depends on luck whether they win or lose, or whether the results come up to their expectation or not. As long as they make a bet on a contract, they can never give it up halfway, because it is a rule of gambling. The concept of the western contract seems to be applied to the idea of gambling, if the binding force is given even when the equilibrium is drastically destroyed.

Thus, classical Islamic jurists based their theory of gharar on the Qur'anic interdiction of gambling (*maysir*).[16] They extended the sanction of absolute nullity to all contracts where risks were accepted in a spirit of speculation, or where the extent of the obligations undertaken by one of the parties and

16 Saba Habachy, "The system of nullities in muslim law," *American Journal of Comparative Law*, Vol. 13, 1964, p. 66.

of the advantages which would accrue to the other party were not clearly defined at the time the contract was entered into.[17] It is a natural conclusion then that this law never gives a binding force to a contract at the moment of its agreement, or at too early a time.

Although the Islamic legal system creates a valid contract by mutual agreement, the contract does not have a binding force until parties can ascertain that their proper expectation can be substantially realized. That is, Islamic law provides the binding force to the contract where a just and apparent agreement at the beginning of a contract is not realized, but a real agreement after ascertaining their satisfaction is realized. It is at the time of ascertaining the equilibrium of countervalues, that the contract become legally binding in Islamic law. The law always pursues the realization of a substantial mutual agreement.

In this manner, the character of the Islamic legal attitude would be gradually made clearer by comparing it with Western legal system, but I would like to make it more striking by introducing some examples of dissolution of contract.

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17 *Ibid.*, p. 66.

D. Dissolution on the ground of changed circumstances

Although the equilibrium of performances was maintained at the time of entering into it, it was completely destroyed later by a change of circumstance. In this situation, a contracting party who suffers an foreseen burden by frustration could be given a remedy by the law. This remedy is the dissolution of contract.

There is a similar concept of the doctrine of frustration in modern law. But this concept of Islamic law is much more extensive than that of modern law. That is, a contract can be rescinded in Islamic law, even because of a change in personal circumstances. For example, the following case is mentioned in HEDAYA:

> If a person let to hire a house or shop, and afterwards become poor and involved in debt to degree which he is unable to discharge but by the price of the house or shop, the Kazee must dissolve the contract of hire, and sell the place for payment of the debt: because in the endurance of the contract the lessor sustains a superinduced injury not incurred by the contract, --- which superinduced injury, in this instance, is that the Kazee will otherwise seize and imprison him on account of the debts.[18]

This notion in Islamic law is never identified with "the theory of frustration in modern law," and it is clearly outside

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18 Charles Hamilton, *THE HEDAYA*, (Lahore: Premier Book House, 1982), p.511.

the realm of the modern concept. This principle, however, can not be applied unconditionally. The absolute condition required is that if the contract were put in force, he might be subjected to injury. In the view of the classical jurists, any excuse (*uzr*) which makes the performance of the contract impossible without damage resulting to the contracting party at the time of agreement and which render performance more difficult and burdensome than contemplated allow that the contracting party who establishes the fact of such "damage" to rescind the contract.[19] When "exorbitant loss" is brought about by a change in circumstances in a contract, though the other party suffers some loss because of dissolution, the loss must be shared equally by both parties from the point of the consideration of the welfare and good of others before one's own interest. In general, the judicial remedy was to split the loss equally between the contracting parties. "Equity is equality" is a maxim deep-rooted in Islamic legal tradition.[20]

The following case shows the character and significance of this principle more clearly:

> A contract of hire for the digging of a well is valid. It is essential the work is defined in terms either of a period of time or of a specific job. In this contract, if the contractor strike hard rock or mineral or which makes normal digging impossible, then he is not bound to continue the dig, because this is a situation different from that which was

19 Coulson, p.86.
20 *Ibid.*, p.90.

> assumed from his inspection of the terrain, or was not identified with the condition mutually-agreed at the time of entering into a contract.[21]

In other words, although the equilibrium of countervalues was maintained at the time of agreement, it was drastically destroyed by a changed circumstance. Regardless of such a situation, it is unfair to put the aggrieved party in force. The principle of "no unfair loss" is strongly emphasized in the performance of contractual obligations.

In short, a summary of the traditional principle of "changed circumstances" is that any supervening circumstances which were unforeseen by the contracting party at the time of agreement and which render performance more difficult and burdensome than expected allow the aggrieved party who establish the fact of such damage to rescind the contract.[22] Since this principle stems from the notion of *ribā*, this principle means that Islamic law freed the aggrieved party from the binding of a contract if the contractual relation resulted in inequality; a profit for one party and a damage for the other, or if the equilibrium of countervalues is upset unfairly.

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21 *Ibid.*, p.84.
22 *Ibid.*, p.86.

E. Implications of different attitudes between two legal systems

The Western legal system which has been regarded as perfect, is not necessarily reasonable, because such natural standards as the theory of equilibrium are disregarded under the pretext of maintaining a market economy or keeping the sanctity of contract. Although the reasons for nullity and dissolution seem too extensive for those who are accustomed to Western legal system, this multiplicity of reasons in Islamic law is not unreasonable nor strange. Furthermore, the attitude of modern law to a party who suffers damages by changed circumstances is inhumane. This is based on the doctrine of freedom of contract , or the idea that a third party cannot interfere with it because a contract is concluded within the exclusive realm of private ordering.[23]

On the other hand, in Islamic law, the theory of equilibrium has the priority over the rule of binding a contract. At the same time, the law demanded that one contracting party share another's losses by accepting the dissolution of the contract. That is, another party should accept some loss spontaneously from a sense of solidarity in order to avoid a larger loss to a party in distress. This idea is certainly based on

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23 Feinman, p. 834.

the idea of the Islamic community. This issue will be examined in the following chapter.

Chapter VI.

The 'Ummah and Contract

A. Individualism and Communalism

The examination of the legal attitudes of the Islamic and Western legal systems towards the aggrieved party at the time of a change of circumstances, leads us to realize that the difference of the attitudes may be closely related to different views on how individuals should be in a society. That is, the Western legal system is based on the view of individualism, while Islamic legal system is supported by the philosophy of Islamic community (*'Ummah*), or communalism. Accordingly, these two views will be examined in this section.

(1) The Western legal perspective; Individualism

In modern law, private legal justice consists in the respect for rights, never in the performance of altruistic duty. The law acts through private law only to protect rights, not to enforce

morality.[1] This law is one for individualism. The form of conduct associated with individualism is self-reliance. This means an insistence on defining and achieving objectives without help from others. It means accepting that they will neither share their gains nor losses. And it means a firm conviction that one is entitled to enjoy the benefits of one's efforts without an obligation to share or sacrifice them to the interest of others. In such law, even if unforeseen losses arises on one contracting party, they will be undergone by only one party in almost all cases.

In contemporary America, there is a new movement, or the Critical Legal Studies Movement (CLS), which criticizes a variety of problems in modern legal systems. Duncan Kennedy, a scholar in CLS movement, criticized the attitude of traditional American law from the point of view that too extreme individualism causes disorder in modern society. At the same time, he emphasized the significance of the notion of altruism based on the concept of community in private relations. He defines the notion of altruism as follows:

> The simplest of the practices that represent altruism are sharing and sacrifice. Sharing is a static concept, suggesting an existing distribution of goods which the sharers rearrange. It means giving up to another gains or wealth that one has produced oneself or that have come to one through some good fortune. It is motivated by a sense of

1 Duncan Kennedy, "Forms and Substance in Private law," *Harvard Law Review*, Vol. 89, p.1719.

> duty or a sense that the other's satisfaction is a reward at least comparable to the satisfaction one might have derived from consuming the thing oneself.[2]

Thus, he asserted that such a sense of altruism is indispensable in order to avoid disorder in liberal society. He, however, did not define what creates a sense of altruism clearly.[3] Then, how does Islamic system create it?

(2) Islamic legal perspective; Communalism

The concept of the individual and the emphasis on his achievement is not the product of modern Western thought, as many people have tried to make the world believe.[4] The individual has always been the cornerstone in the Islamic total scheme and plan of justice, though in a way fundamentally different from the Western concept.[5] Needless to say, the individual in Islam also has been given a free will, a moral sense and the knowledge of right and wrong.[6] It is, accordingly, important that he should be fully enabled to achieve his purpose and realize his potential. This seems to be the primary thread running through the entire fabric of the Islamic legal system.[7]

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2 *Ibid.*, p. 1721.
3 *Ibid.*, p. 1717.
4 Khurram Murad, *Shari'ah: The way of Justice,* (London: Islamic Foundation, 1981), p. 7.
5 *Ibid.*, p. 7.
6 *Ibid.* ,p. 8.
7 *Ibid.* ,p. 8.

It is also important to recognize that the individual lives in a community without which he can neither survive nor find fulfillment. In Islam, the individual is offered full opportunities to develop his personality so that he may be better qualified to serve the interests of community. That is to say, the individual should aim to promote the unity and stability of the community. The common goal of community members binds them together and creates a communal solidarity. Consequently, it is natural in the Islamic community (*'Ummah*) that one member sets his affection to the other and become considerate spontaneously to them. In such a community where every member has a sense of altruism in common, even if great losses occurred to one member suddenly, the others will try to share the loss voluntarily.

Likewise, in the Islamic law of contract, if one party suffers unfair damage on the ground of a change of circumstances, another party must free the affected party from contractual obligations upon his request of rescission.

Moreover, Islamic law even encourages both parties to share the loss equally out of a sense of brotherhood, for Islamic legal tradition has fostered a maxim that "Equity is equality."[8] This means that Islamic law requests the other party to take a equal share of the loss as long as they have formed a cooperative relationship for their purpose. The attitude of

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8 Coulson, p.90.

Islamic law is in contrast with that of the Western law which forces the affected party to perform the obligation and suffer all the loss only by himself, as long as he has entered into a contract on his own will. In this aspect, the characteristics of the philosophy of Islamic law are more clearly expressed.

B. The function of the *'Ummah* to contracts

It is certain that the philosophy of the Islamic law of contract is supported by certain important functions of the Islamic community (*'Ummah*). In this section, these functions will be examined.

(1) The creation of a sense of brotherhood or altruism

As mentioned in the preceding section, one of the remarkable values of Islamic legal system lies in adopting altruistic obligations even in a contractual relation. Certainly, these obligations are meaningless if they are not accepted by members of community. In the Islamic community (*'Ummah*), however, it is natural for one member to be considerate on the basis of a fraternal feeling to the weaker party. One of the functions of the *'Ummah* to contract is to create a sense of brotherhood, altruism, and self-sacrifice. In examining it, it is first necessary to understand what forms the *'Ummah*.

a. Common faith and goal

It is a common faith and common goal, that contribute most to creating a sense of brotherhood or forming the Islamic community (*'Ummah*).

Ali Shari'ati defined the *'Ummah* as follows:

> The world umma(h) derives from the root amm, which has the sense of path and intention. The umma is, therefore, a society in which a number of individuals, possessing a common faith and goal, come together in harmony with the intention of advancing and moving toward their common goal.[9]

As he wrote, a common faith is the essential part of *'Ummah* in a sense that the *'Ummah* itself is unified on it. Without it, *'Ummah* is never formed. As regards a common goal, it is possible to say that the goal is to realize the will of God, such as the equilibrium (a balanced system of social justice) and the unity of the *'Ummah*. The former naturally involves the latter. This conjunction of two factors binds Muslims together, and creates a communal solidarity.

There are a variety of verses that lay stress on unity and a sense of brotherhood. For example, the Holy Prophet said: "All mankind is a fold, each member of which shall be a keeper or shepherd to every other, and be accountable for the entire fold."

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9 Ali Shari'ati, Trans. *On the sociology of Islam,* (Berkley: Mizan Press, 1979), p.119.

The *Qur'ãn* also said: "Cling firmly together by means of God's rope, and do not be derived. Remember God's favor towards you when you were enemies; He united your hearts so that you became brothers because of His favor."

Thus, these verses proposed that the members of the community have a strong sense of brotherhood or a communal solidarity which is inspired by a sense of unity that they possess a common faith and goal. At the same time, this sense involves a consideration for others at distress, as if one sympathize for one of his real brothers.

Besides, the famous *Hadĩth* explains the relation between the individual and the *'Ummah* as follows: The faithful are like one man: if his eye suffers, his whole body suffers: and if his head suffers, his whole body suffers."

All members are like one body: if one of its part is ill, the whole body suffers from sleepless and fever. Islam emphasizes the significance of social bond between them, and encourages them to have a sense of altruism or communal solidarity.

The Holy *Qur'ãn* says: "Co-operate with one another for virtue and heedfulness and do not co-operate with one another for the purpose of vice and aggression."(5:2) This means that the man who undertakes noble and righteous work has the right to expect support and co-operation from other Muslims.

Likewise, the *Hadĩth* added: "Allah will help you if you help your brethren." "Your faith is not complete until you like for others what you like for yourself."

The *Qur'ãn* and the *Hadĩth* are filled with a variety of verses that explain the necessity of altruism and solidarity between members of *the'Ummah*. This fact proves that Islamic law encouraged the members of the community to have a sense of brotherhood or altruism.

b. Methodology for unity

R. M. Unger as well as D. Kennedy, a philosopher of law at Harvard University, asserted that a social consciousness and the institution which accept the uniqueness of individual and create a value of the community are indispensable in order to overcome the serious problems of liberalism. And he presented a community of God as well as a married couple, as a few possible examples to realize an ideal community.[10] However, he also did not put forward a concrete methodology for realizing it. Although I sympathized with his idea, it is disappointing that he did not present a real methodology. If taken the other way round, it means that it may be impossible to work up any method in a fixed framework of liberal society.

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10 R. M. Unger, *Law in Modern Society*, (New York: Free Press, 1976), pp. 168-169.

On the other hand, the Islamic community is supported by a concrete methodology based on the *Sharĩ'ah*. That is, the well-organized methodology or theory in Islam that realizes an ideal community is most highly esteemed. This method in Islam will be examined in brief.

The Islamic system has a variety of method in all aspects of life, based on the *Sharĩ'ah* as a primary rule, the work of *fiqh* and so forth. For example, the concept of private ownership that shows how individuals should be positioned in a community is a sort of method.

As a more concrete example, there are the Five Pillars of *Islam*. Although Islãm enjoins prayer as do other religions, it encourages Muslims to perform prayer in a group. The *Hadĩth* confirms that the collective prayer is superior to the individual prayer, for it functions to promote communal solidarity between Muslims. In other words, it naturally creates a solidarity where each member turns to the same direction, says the same phrases, performs the same actions, and promotes communication between them.

Pilgrimage also develops the sense by traveling to the same place and doing the collective performance in the same place and at the same time, transcending nationality, race, and language.

The same is good for the *sawm*, namely a fast for a definite period. The function is not only to grow the sense of solidarity

by experiencing a common hardship together, but also to have a consideration and sympathy for the needy by having an experience of hunger. In other words, fasting is contrived to develop a sense of brotherhood with other members of the community.

H. Sato explained one of the functions of *Zakãh* as follows:

> Thus, under these hard circumstances they can feel the pain which poor and hungry people endure. In addition, fasting purifies their bodies. In short, whenever Muslims perform Zakat and Sawm, they endure discomfort and can experience the pain of poor people and this makes them purified.[11]

Furthermore, *Zakãh* and *Ramadãn*, he continues, are closely related to communal solidarity, or the sense that they both promote unity in the *'Ummah*.

The Five pillars of *Islam* are contrived in such a manner that they lead the attention of man from self-seeking to self-sacrificing. The chief importance of Islamic legal system lies in the functioning as a device that it builds up such a sense of communal solidarity that one takes pleasure in doing good to others.

Besides, this system is supported by a strong network of the community which can constantly reinforce and perpetuate

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11 Hideki Sato, *Understanding Zakat*, Working Papaers Series No. 11, (Niigata, The Institute of Middle Eastern Studies, International University of Japan, 1987), p. 50.

its power and influence, as mentioned before. Since the network is closely interconnected in all aspects of communal life, this sense is more strengthened.

Apart from the before-mentioned solidarity, it is natural that the Islamic community involves the kind of social solidarity that Durkheim and Dugui indicated.[12] It is a solidarity in an economic sense, based on economic interdependence in any society. That is to say that Individuals have different needs and different abilities, and these different needs can be satisfied by an exchange of services among members of a community, whether they have a common faith and goal or not. It is also certain that such there is a sort of solidarity based on the interdependence of economic life in the Islamic community (*'Ummah*).

The relationship between the two sorts of solidarity; social and economical solidarity, is a relation in which the former ensures the latter. Thus, it is possible to say that the communal solidarity in *'Ummah* is much strengthened by the conjunction of two solidarities. Accordingly, every member can enjoy a stable communal life. As a result, they endeavor to keep the communal solidarity and observe rules of the community spontaneously.

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12 See E. Durkheim, p. 68. ; L. Dugui, *le Droit Objectif et la Loi positive*, (Paris, 1901).

(2) The third contracting party for approving a contract

As explained in the Chapter IV, it is a society or a community that provides a contract with a binding-force. That is, a contract is never concluded by a mutual agreement of two contracting parties. Moreover, the agreement of the community or the *'Ummah* is required. The *Qur'ān* said;

> O ye firmly for God, as witness to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just; that is next to piety and fear of God. (5:9)

In this verse, it is possible to think that the community is a witness because God usually means the *'Ummah* (the Islamic community). Although Durkheim indicated this fact, this character of Islamic community is much more striking than any other society. In the Islamic community, this character is expressed in most of aspects of Islamic legal system. This law was formed in the light of the notion of public interest (*maslahah*). Concerning contracts, the validity of a contract is judged from the viewpoint of contribution to the interest of the community, as mentioned in the Chapters III to V. That is, if the transaction is accepted as customary by the majority of the community, this is considered valid as long as this is not against the ultimate goal.

Thus, a contract is greatly influenced by this character of a community. Accordingly, the' *Ummah* (the Islamic community) plays a immense role as an approver of contracts.

(3) The promotion of spontaneous fulfillment

Durkheim asserted it in his earlier time as follows:

> Contracts must be spontaneously kept. If contracts were observed only by force or the fear of force, contractual solidarity would be in a extremely parlous state. A wholly external order would ill conceal a state of contestation too general to be contained indefinitely. Yet it may be argued that for this danger not to be feared, it is enough that contracts should be freely agreed.[13]

Although the significance of the spontaneous performance of contracts is well understood, it is most difficult to put it into practice. It might be impossible to encourage parties to do so without an effective mechanism. It will be examined what kind of mechanism the Islamic legal system prepared here.

Needless to say, a faith in God (*taqwa*) has a very important role in making them observe the law spontaneously. Since the sphere of contract law is dependent on the mental or subjective aspect, it is valuable. And, it is more encouraged by involving a sense of brotherhood created by the framework of the *'Ummah*, as mentioned in the preceding section. Needless to say, the solidarity is supported by the necessity of economic

13 Durkheim, p. 317.

interdependence. This sense is also very useful in making the members of the community fulfill a contract spontaneously.

At the same time, the mechanism of equilibrium of the *'Ummah* is noteworthy. That is, in such a mechanism, if the individual is to violate this equilibrium or breach a valid contract, he will be put outside the community and cannot get any benefit from it. This fear make members keep a contract naturally.

W. M. Watt explained the spontaneous performance of communal rules as follows:

> This sense seems to have made a man want to be the same as his fellow and to feel that there was something wrong with him if he behaved or thought differently. To belong to the community meant so much to him --- life apart from the community was unthinkable --- that everything which threatened to separate him from his fellows was to be avoided.[14]

Although this character is not peculiar to the *'Ummah*, it expresses the universality of the community.

As regards this character of a community, some anthropologists such as Malinowsky also indicated this tendency. He explained it in the following way:

> If we designate the sum total of rules, conventions, and patters of behavior as the body of custom, there is no

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14 W. M. Watt, *Islamic Political thought*, (Edinburgh: Edinburgh at the university Press, 1968), p. 98.

> doubt that the native feels a strong respect for all of them, has a tendency to do what others do, what everyone approves of, and, if not drawn or driven in another direction by his appetites or or interests, will follow the biddings of custom rather any other course.[15]

This conformism is one of elements in a community that make people conform to rules spontaneously, though it is not a essential part.

Thus, the *'Ummah* encourages every *Muslim* to keep contracts voluntarily because of varied reasons. This function of the *'Ummah* to create a sense that everyone observes a contract spontaneously without any sanction, is extremely important in the sphere of contract law, because there exist few sanctions to enforce the law otherwise.

C. The function of contracts to the *'Ummah*

While the *'Ummah* influences contract, contract also influences the *'Ummah* at the same time. Contract contributes to maintaining the equilibrium of the *'Ummah* and forming the unity of the *'Ummah*.

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15 Malinowsky, pp. 51-52.

(1) The contribution to the equilibrium of the *'Ummah*

G. Simmel, a famous socialist, indicated that the equilibrium of a society cannot be maintained without maintaining the equilibrium of service and return service in an exchange.[16] Some anthropologists such as Malinowsky also supported this idea.[17] As mentioned before, the Islamic law of contract endeavors to maintain the equilibrium of countervalues in a contract. Accordingly, the fairness of a bilateral contract is judged by ascertaining the equilibrium of countervalues in a contract. Since Islamic jurists thought that the equilibrium of a contract led to that of the *'Ummah*, the imbalance of countervalues was prohibited. That is, all contracts which involved *ribā*, or an unjust profit, always cause an imbalance in the distribution of gains between parties. The imbalance in a contract leads to excessive wealth of one party, which is hoarded without utilizing. Moreover, the gap between the poor and the rich in the community make the whole community unstable. In a sense, contracts is a minute *'Ummah*. Therefore, the equilibrium in bilateral contracts must be maintained in order to keep the equilibrium of the community.

However, if members are never equal in wealth, is this principle fair? It may be possible to think that some intense

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16 G. Simmel, *The Sociology of Georg Simmel*, Trans. and Edit. K. H. Wolff, quoted in Y. Atoji, Shirarezaru Koukanron, *Gendai Shisou*, Vol. 11-4, 1983, p. 168.

17 Malinowsky, p.24.

social bond encourages a more altruistic activity such as *zakãt* and *sadaqa* when a great difference of wealth between parties exists.[18] Likewise, gratuitous contracts such as *hibah* (gift) and *qard* (gratuitous loan) play a role that makes up for the difference.

Although they seems unilateral, this type of contract does not upset the equilibrium of the community, though a gift is unilateral and gratuitous if it is considered a discrete one. This contract is also reciprocal because it is considered the type of contract circulated within a community for a considerable period of time if a communal bond exists. As explained in Chapter III, if a big difference in wealth between both parties does not exist, it is natural to expect the receiver to return the equivalent to the giver in future. However, even if the giver cannot expect the receiver to do so, it is possible to expect that the former will receive corresponding benefits in such a community in the long run.

But it is not certain to receive the equivalent from the community. It is impossible to say that something given by the community is absolutely equal. This sort of contract involves a vulnerability to non-reciprocity. Further, this vulnerability is undergone out of a sense of solidarity: with the hope of a return but with a willingness to accept the possibility that there will be none.

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18 Sahlins, p. 211.

In the *'Ummah*, however, one can at least expect himself to receive a benefit in distress as long as he does not break the rules of the community. It is certain that Islamic network system, closely interconnected to all aspects of a community, relieve the faithful performer of communal obligations when unforeseen ill-fortune has befallen him. Thus, since gift contract functions as a part of the total network system in the community, the reciprocity of gift must also be considered in the total activity projected into the future, of the community.

The same is for *qard* (loan for consumption). Although this contract must be gratuitous, the lender can expect the borrower or the community to relieve himself sometime in the future in case of distress as long as he performs communal obligations faithfully.

Thus, two types of contracts, the bilateral type such as a sale, and gratuitous type such as a gift, are interrelated and supplement each other. In such a mechanism, the equilibrium of the *'Ummah* is maintained.

Contracts are a part of the *'Ummah* or an ingredient of ummah. Both a whole (*the' Ummah*) and a part (contracts) aims at common goals in a well-organized Islamic network system. Both pursue equilibrium. Disorder in contracts cause disorder in the *'Ummah*. Needless to say, the same is true of the reverse. Accordingly, if the equilibrium of performances in a contract is kept, a gap between the poor and rich in a society will have no

room to arise. Thus, the equilibrium in the *'Ummah* is sought to be maintained firmly. In other words, the equilibrium of contracts is indispensable in order to keep the *'Ummah* stable. That is to say that the fair fulfillment of contractual obligations realize the ideal community in which every member is equal.

(2) The contribution to the unity of the *'Ummah*

The essence of contract in Islamic law lies in an instrumental function for intensifying the communal bond. This character is more clearly expressed in gratuitous contracts. The sayings of the Prophet emphasize making a habit of exchanging gifts since it is beneficial in generating mutual relationships which strengthens love and solidarity.

If the receiver is in distress, he will thank the giver all the more and intensify the solidarity, as the proverb "a friend in need is a friend indeed" shows.[19] As mentioned before, the receiver attempts to return the corresponding benefit to the giver over a long period from the gratitude and a sense of brotherhood created by this altruistic activity. That is, their relationship is a projecting one into future. Islamic law encourages this type of contract.

However, only gratuitous contracts do not create solidarity. Bilateral contracts such as a sale also create it. As explained before, the real and ultimate purpose of a bilateral contract

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19 *Ibid.*, p.213.

lies in satisfying a mutual necessity. This mutual satisfaction or reciprocity create a sense of solidarity as well as a mutual reliance. This sense of solidarity leads to another cooperation or relation. This means that reciprocal contracts create a social relation apart from the exchange itself in the network system of *the 'Ummah*. This relation must be respected and maintained in "the system of total presentation"[20] of the community over an indefinite time period time. By respecting each chain of the relationship, a sense of solidarity between all members in the entire community is strengthened.

Thus, contracts in Islamic law, whether they are gratuitous or not, must promote a sense of solidarity by satisfying their necessity. Contracts are a part of total system of the *'Ummah* or an ingredient of the *'Ummah*. Therefore, it is possible to say that the a sense of solidarity or unity created in a contractual relation plays an important role in realizing the unity of the *'Ummah*.

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20 Mauss, p. 3.

Conclusion

In the Western legal system, the legal terms "formality," "formal consent," and "formal justice," are often used in contrast with "substance." The Western jurists seem willing to use such a dichotomy. What makes them use these terms? There is no doubt that this usage derives from the attitude of attaching undue importance to objectivity.

In the West, the objective or formal fact has been emphasized in the first place. There are countless cases where the formal fact has priority over the real meaning. For example, the validity of a contract in Western legal system is determined by the formal conditions that both parties had mutually agreed upon. As a result, they are legally bound, whether the real intention is realized or not. This character is more clearly expressed in the case of a change of circumstances.

On the other hand, Islamic law always searches the substance. In the first place, it endeavors to seek the real

meaning of a particular matter. As regards contracts, the real and ultimate purpose of a contract is fully considered in the light of public interest (*maslahah*). Accordingly, if it is impossible to realize the real purpose, the contract is never legally bound and can be dissolved even if there exists a formal consent. That is, in Islamic law, it is almost meaningless to distinguish a real consent from a formal one as in the Western system. The truth is one. This notion also reflects the doctrine of *Tawhīd*.

Durkheim criticized the dichotomy of Western legal thought from another viewpoint as follows:

> It is customary to distinguish carefully justice from charity: that is, simple respect for the right of another from every act which goes beyond this purely negative virtue. We see in the two sorts of activity two independent layers of morality: justice, in itself, would only consist of fundamental postulates; charity would be the perfection of justice. The distinction is so radical that, according to partisans of a certain type of morality, justice alone would serve to make the functioning of social life good; generous self-denial would be a private virtue, worthy of pursuit by a particular individual, but dispensable to society. Many even look askance at its intrusion into public life. We can see from what has preceded how little in accord with the facts this conception is. In reality, for men to recognize and mutually guarantee rights, they must, first of all, love each other, they must, for some reason, depend upon each other and on the same society of which they are part. Justice is full of charity.[1]

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1 Emile Durkheim, p. 121.

He suggested certain problems in the Western legal system where too much emphasis on justice causes inequality in reality. That is, since justice in the West is determined by mechanically applying a particular fact to a general and fixed rule without the full consideration of the total context involving the true motive of the party and personal environments, the weaker such as an affected party at a change of circumstance, comes to suffer all of the damage while the other gets a corresponding profit. It means that it is more important to protect the law or the right of individuals even if the judgement is formed unjustly. Under such a legal framework, people attempt to evade the clutches of the law for self-interest. It does not seem to me that this atmosphere creates a sense of brotherhood or altruism.

On the other hand, justice in Islamic law is never separable from charity. Islamic justice is a comprehensive term and includes all the virtue. Under this legal framework, Justice is determined at a concrete level by observing an individual matter as it is and interpreting the truth in consideration of the total context. That is, the judge must find out the truth at an individual level by extracting the real motive and considering the personal environment. It is possible to say that the truth at an individual level is Justice in Islamic law. Accordingly, it is said that different judgments in Islamic courts are given to seemingly similar cases, but they can, both, be justified in

Islamic law, because there is an individual truth or justice in an individual case.

The afore-mentioned notions such as *ribā* and *gharar* were contrived in order to realize contractual justice. It is certain that transactions involving *riba* and gharar result in inequality; a great deal of damage for one party and a corresponding profit for the other. These notions were formulated in order to avoid inequality or injustice in advance. That is to say, that contractual justice is accomplished by eliminating the elements of *ribā* and *gharar* and maintaining the equilibrium of countervalues in it. If the equilibrium is upset unfairly, options should be used. In such a situation, it is justice to use such options. Likewise, if the equilibrium has become unjustly imbalanced causing a change of circumstances, Islamic law recommends the affected party to dissolve the contract. Moreover, it encouraged the other party to share the loss with the affected party out of a sense of brotherhood. In this situation, it is justice to take a equal share of the loss.

Durkheim asserted that it is charity or a sense of brotherhood that overcomes the formalism of Western justice. He, furthermore, added that the present situation in the Western society is far from creating a sense of brotherhood.[2] However, in the Islamic community (*'Ummah*), justice, in a real

2 Emile Durkheim, *Lecons de sociologie: Physique des moeurs et du droit* , Trans. Takashi Miyajima, (Tokyo: Misuzu Shobou, 1974), p. 265.

sense, can be accomplished, thanks to the social framework which creates a sense of brotherhood.

A general survey of the Islamic law of contract also leads us to recognize that the law rooted in its own culture reflects the character of the culture or society and that the law and society are closely interconnected. It suggests that it is more desirable to adopt the law rooted in its own culture in order to keep a society in a harmonious condition. That is to say that the consistent application of Islamic law to the Islamic countries is best. Unless Islamic law is applied consistently, it is evident that it will cause countless disorders because a missing part causes the Islamic system to lose its equilibrium. It does not seem to me that a mixture of Islamic and Western laws in Islamic countries is irrelevant to the disorders of the societies at present.

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