

al-'Aqd



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DEFINITION

- Literally, the word "al-'Aqd" means to tie (between two ends), to fasten, to link together.
- In legal view, it has two interpretation either general interpretation or specific interpretation.
- In general term, it means anything that is intended by a person to do/perform; either based on his own will, eg, endowment (waqaf), divorce (talaq); or depended on wills of at least two [arties, eg, sale (al-bay'), marriage (nikah)
- Specifically 'aqd means a connection of the words of one party (ijab) to the words of the other party (qabul) which constitutes legal implication on the subject matter.

'AQD v. CONTRACT

- From the definition, the term 'aqd is more or less the equivalent of the technical term of 'contract' in Western Jurisprudence.
- However, 'aqd does not necessarily involve agreement (which is a necessary element in a conventional contract) because the term is also used to describe a unilateral juridical act which is binding and effective without the consent of the other party. For example: Talaq.
- Furthermore, in Western Jurisprudence a contract is only enforceable if there is a consideration that moves from the promisee. On the other hand, in Islamic Law an 'Aqd does not necessarily involve consideration. For example: Wasiah (wills), hadiah (gift).

'AQD v. CONTRACT

- Additionally, the Western Jurisprudence defines contract as a promise or set of promised. According to Islamic Law a promise may not be legally enforced although it is strongly recommended by religious and moral values to be fulfilled. (Surah al-Saf 61:2) (However Hanafi School of Law is of the view that a promise coupled with condition is legally enforceable)
- Therefore a breach of promise to marry does not give a cause of action according to Shari'a but may be enforceable by civil law (see Article 50 of the Civil Code)

LEGAL AUTHORITY

Among the legal authority that show the recognition of 'aqd in Islamic Law as follow:

- "O ye who believe! Fulfill all obligations (Surah al-Maidah 5:1)
- Similarly in surah al-Taubah 9:4, it states that "... So fulfil your engagements with them to the end of their term, for Allah loves the righteous."
- From the hadith, the Prophet (PBUH) expressly stated that "Muslims are bound by their conditions (Narrated by Al-Bukhari), ... except condition to make lawful what is unlawful and to make unlawful what is lawful (narrated as the continuance to the first hadith by al-Asqalani)

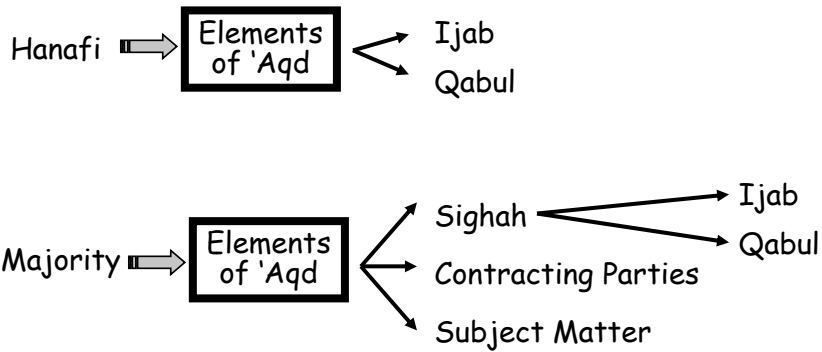
ELEMENTS OF 'AQD

Element or Pillars (Arkan) ? { : what is considered as the main element of the subject matter, i.e., part of the thing (Hanafis)
: what is considered to be necessary for a thing to exist, whether it is part of it or merely related to it (Shafi'is, Malikis and Hanbalis)

Note:

- According to Hanafis, the elements of 'aqd include anything that manifests the meeting of two intentions either through conduct, gesture or writing.
- Therefore the elements of contract include only Ijab & Qabul. Some other matters are not considered as elements of a contract however their existence is necessary. For example it is necessary that there must be contracting parties in order to have ijab & qabul. Similarly there must be the subject matter upon which the parties have the agreement to indicate that there is the meeting of two intentions.

ELEMENTS OF 'AQD



SIGHAH

- Mutual consent of parties is the basis for formation of a contract.
- This is emphasised in the Qur'an, eg, in surah al-Nisa 4:29 where it says: "O you who believed! Eat not up your property among yourselves in vanity, but let there be among you trade by mutual consent."
- Similarly the Prophet is reported to have said: "It is unlawful to take the property of a Muslim except by his consent."
- However consent is an intangible mental fact. Therefore this intention must be manifested in sufficient form of words/conduct that indicates a definite intention to contract.

SIGHAH

- Sighah is a method to manifest the intention to contract. It consists of Ijab & Qabul.
- Sighah is defined as the utterances that indicate the between the contracting parties.
- Prof. Dr. Ala' Eddin Kharofa defines it as the utterances expressing the wills of two parties, showing the purpose of contract and bringing it into existence after it had been a hidden and unknown thing or intention.
- The contract is said to be concluded when the connection between the ijab (offer) and qabul (acceptance) takes place. (Article 104 of the Mejlle)

SIGHAH

- It is unanimously agreed that verbal communication will be the best way to manifest the consent of the contracting parties.
- The Malikis & Hanbalis accept as a sufficient manifestation of consent anything that is customarily regarded as indicative consent.
- The Shafi'i accepts writing as manifestation of consent.
- The Hanafis are of opinion that writing, conduct and even gesture are acceptable to manifest consent.

IJAB

- The party who first manifests his willingness, by the use of the appropriate formula, to make a contract is said to be making an ijab. (**Hanafis**) This definition is similar to the word "offer" as used in conventional contract.
- **Others** are of the view that ijab is the utterance that manifests the consent of the owner of the property (subject matter of the contract) either it comes first or later.

↩ Hence if a buyer in a sale of goods transaction offers to buy the goods from the seller by saying: " I bought this book from you for 100". To which the seller replied: "I sold that book to you for 100". In this situation, according to Hanafis' view, it was the buyer who has said the ijab being the first person who manifested the intention/willingness to contract. On the other hand, according to the others' view, the word of seller is the ijab since he was the owner of the book, though his utterance came later.

IJAB

- When the ijab is made **verbally**, the classical jurists unanimously agreed that both present and past tense may be used to express a valid offer while words used to show intention to offer in future or to ask for confirmation are not enough.
- The reason given is because the contract for sale shall have immediate effect and this may not be reached unless the word used can accommodate this purpose
- However it need not be strictly interpreted especially as contract proposals need not take place through the use of Arabic language. Words such as "I have sold" is not the only word to be considered as valid offer. Other words may be used so long as they reflect the intention of the offeror to make an offer

IJAB

- This is especially in the light of the principle that in contracts, attention is given to the purpose and meaning, and not to the words and form.
- The same principle will be applicable when an offer is communicated by **writing** as it is simply a mere substitution of verbal communication.
- Thus, when an e-mail sent offering a specific object for sale for a specific price, this amounts to a valid offer which will be binding on the offeror upon its acceptance by the offeree.

IJAB

- **Gestures** represent an exception that may be used by dumb people. Article 70 of the Mejjelle stipulates that for dumb people, a sign or gesture is equal to speech.
- By **conduct**, a person may intimate his intention to contract. In Fiqh it is better known as "mu'âtaḥ", "ta'ât" or "murâwadah". This simply refers to the conduct of a seller, displaying commodities for sale attached to them its price and a simple statement such as "first come first served" (offer to sell). (Ijab according to all jurists) Likewise is the conduct of a buyer who takes the commodity and pays its price (offer to buy) (Qabul, according to Hanafis) and in return to this, the seller delivers the commodity to the buyer without any expression of words. (Ijab, according to Others)

QABUL

- What is uttered later by the other contracting party that indicates his agreement upon and consent to accept the offer made by the first party is termed as qabul (**Hanafis**) This definition is similar to the word "acceptance" as used in conventional contract.

- **Others** are of the view that qabul is made by the buyer or the person to whom the subject matter of the contract is addressed regardless as to whether this comes first or later

↪ Hence if a buyer in a sale of goods transaction offers to buy the goods from the seller by saying: " I bought this book from you for 100". To which the seller replied: "I sold that book to you for 100". In this situation, according to Hanafis' view, it was the seller who has said the qabul being the later person who manifested the intention/willingness to contract that is by accepting the offer. On the other hand, according to the others' view, the word of the buyer is the qabul since the ownership of the book will be transferred to him although he was the first party to indicate the willingness to contract.

QABUL

- Basically there is no specific proclamation or utterance that needs to be used to signify acceptance. Except in contract for marriage where the jurists are differed in opinion, generally there is no specific words or terms required to constitute acceptance (Art. 3 of the Mejlle)

- When the acceptance is made **verbally** or in **writing**, it is necessary that it does correspond to each element of the offer without any condition, limitation or modification (Art. 177 of the Mejlle) Otherwise it will unlikely be considered as acceptance although it may be so if the proposed modifications do not materially alter the terms of the offer.

QABUL

- Acceptance may also be made through **conduct**
- For example, where there is an offer to buy, acceptance may take place by supplying the goods and likewise where there is an offer to sell and the commodity thus delivered, acceptance will be presumed once the commodity is used.
- But conduct will not constitute acceptance unless it is clear that the offeree does the act with the intention (actual or apparent) to accept the offer
- Silence may not however constitute acceptance. So, when the goods have been delivered, the offered is not obligated to return them to reject the offer. The offeror cannot bind the offerree owing to his failure to return the goods.

IJAB & QABUL

- The above difference is merely the difference in the terminology which does not lead to any different legal consequence.
- This difference may have been the result of the normal practice whereby normally the seller, being the owner of the goods, will be the first person to make the offer to sell his goods and in replying to this offer, the buyer will agree to buy. In this situation, the difference of opinion will result in the same interpretation.

COUNTER OFFER

- Counter offer is defined as a statement by the offeree which has the legal effect of rejecting the offer and of proposing a new offer to the offeror.
- When an acceptance is communicated containing some modification to the original offer, this will amount to a counter offer rather than acceptance of the original offer
- Islamic law similarly requires that acceptance shall "correspond" to all the elements of a standing offer. However, unlike the position under common law or the law as applicable in Malaysia, Muslim jurists view that compliance may be either explicit or implicit. (Art. 177 of the Mejlle)

COUNTER OFFER

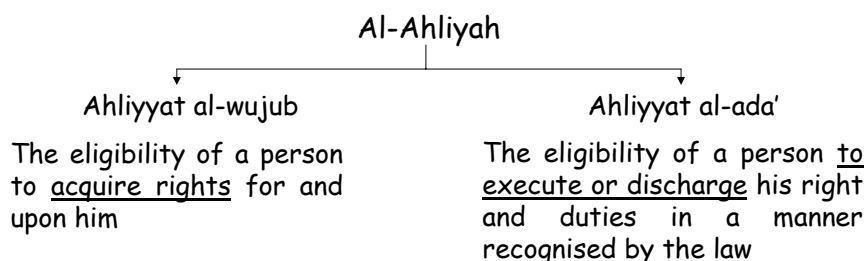
- By explicit it means the acceptance corresponds exactly to the offer, i.e. when the offeree absolutely accepts the offer in conformity with the terms of the offer.
- Acceptance is also made implicitly when it gives a better option to the offeror. For example when the seller offers to sell his goods for 500 and the buyer accepts this saying that "I took it for 550"

COUNTER OFFER

- As regards the latter, the common law position and that of the law generally see this kind of acceptance as a counter offer and there will be no contract at all formed on the basis of such communication.
- On the other hand, Muslim jurists are in the agreement that as long as the difference is for the betterment of the offeror, acceptance is taken for granted and effective. However, the contract only covers the terms as offered, i.e. from the above example, the price will be for only 500. This is binding upon both parties. The extra 50 is considered as another offer from the original offeree/buyer that will only bind him once it has been accepted by the seller.(See Art. 178 of the Mejjelle)

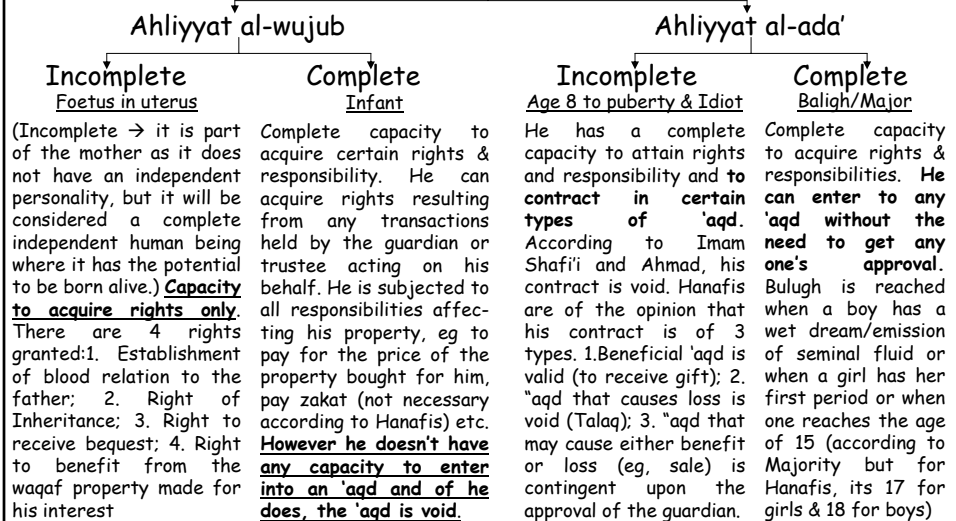
CONTRACTING PARTIES

- The contracting parties are the parties who exercise the sighah of ijab & qabul. In order to conclude a valid contract, the contracting parties must have legal capacity
- Al-Ahliyah/legal capacity has been defined by Muslim jurists as the 'eligibility of a person to establish right for and obligation upon himself".



CONTRACTING PARTIES

Al-Ahliyah



CONTRACTING PARTIES

There are some factors that may impede someone's legal capacity. It can be categorised to two categories.

1. **Involuntary Impediments** or known as 'Awaridh Samawiyyah that is the factors beyond one's control. The factor exists without the affected person's choice. Eg insanity, imbecility ('atah), unconsciousness, sleeping, death illness. Due to lack of legal capacity makes these people cannot enter a valid 'aqd.
2. **Voluntary Impediments** or also known as 'Awaridh Muktasabah that is the factors within one's control. They exist due to the person's own act and his choice. Eg drunkenness, prodigality (safah), insolvency. Since these factors exist due to these people's own desire, their 'aqd is valid although in some situations it may be suspended.

SUBJECT MATTER

Muslim jurists had laid down four conditions for the subject matter:

1. It must be in existence at the the time of the contract
2. It can be delivered
3. It can be ascertained
4. It must be suitable for transactions according to Shari'a

SUBJECT MATTER

1. The subject matter must exist.

- Islamic law requires that subject matter must be in existence at the time when an 'aqd is concluded. Otherwise an 'aqd is void, even if the subject matter would exist in the future.
- Therefore the sale of the animal foetus yet to be born while it is still in the mother's womb is void if the mother is not part of the sale.
- Exception is given to bay al-salam (ale by advance payment for the future delivery), bay al-istisna (contract of manufacture), ijarah (contract of hire) and musaqat (contract of irrigation) based on necessity and customs.

SUBJECT MATTER

2. The subject matter can be delivered.

- Islamic law requires that subject matter must be able to be delivered to the contracting parties. Otherwise an 'aqd is void. Furthermore the delivery must be possible without causing any damage to the subject matter, otherwise the 'aqd becomes voidable. If the parties tolerate the damage, then the contract is valid.
- Hence, it is void to sell a bird on the sky, fish in the sea or runaway horse.

SUBJECT MATTER

3. The subject matter must be ascertainable.

- Islamic law requires that subject matter must be ascertainable and known to contracting parties. Sufficient knowledge about the subject matter is necessary to avoid future disputes.
- If the subject matter of the 'aqd is of different kinds or articles, it is necessary to determine individually. But if it is of similar articles, it is sufficient to determine one to these articles in order to attain knowledge of the subject matter.

SUBJECT MATTER

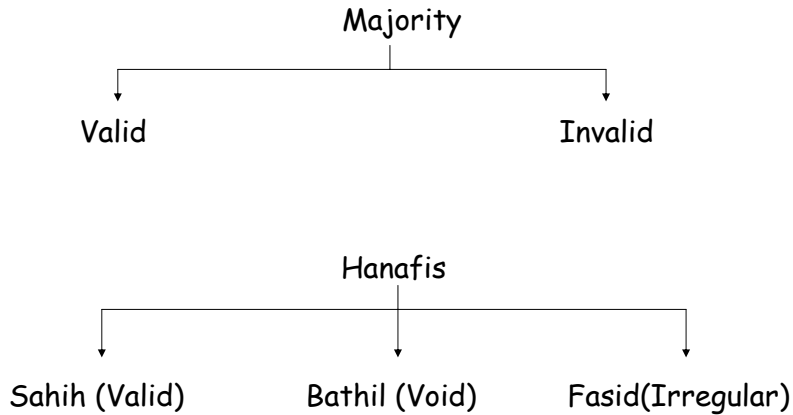
4. The subject matter must be legal.

- Islamic law requires that subject matter must be of commercial value, otherwise an 'aqd is void.
- Therefore the sale of the wine, blood, pork is void even if these articles are of value to others or according to civil law.
- Similarly, the sale of items that can be acquired gratuitously without purchase, such as fish in the sea, bird in the air, etc, But once acquired, it can become the subject matter of transaction.

TYPES OF CONTRACT

- Contracts, looking at its characteristics, may be divided into 2 types, namely valid contract and invalid contract. This division depends on the existence or non-existence of its pillars, foundations and conditions.
- For Hanafis, however, the validity of legal contracts assumes the tripartite distinction between: Shahih (valid) if both its foundations (Asl) and attributes (Wasf) are in accordance with the law; Bathil (invalid, null and void) if one of its Asl is not in accordance with the law; and Fasid (irregular or voidable) if its Asl is in accordance with the law but not its wasf.

TYPES OF CONTRACT



TYPES OF CONTRACT

- Contract is considered **valid** when all of its pillars (elements) and conditions are satisfied. A valid contract has the legal effects whereby the contract is binding upon the parties with immediate effect after the contract has been concluded.

- **Invalid contract** as a contract which its foundation is not legally recognised. When one of the necessary elements of a valid contract is missing the contract will be then invalid. Hence, when one of the pillars of contracts or its conditions is not satisfied, the contract will have no legal effect. No title may be passed neither the ownership or price of the goods. The best example of this kind of contract is the sale of dead animals, blood, liquor and pork.

TYPES OF CONTRACT

• **Bey'** is **Bathil** when the pillars of the contract are breached, or when its cause is imperfect. If one or more of the pillars are breached, such as when the contract issues from an insane person or a person lacking in competence, the contract is Bathil as though it has never been formed (*Ghayru Muta'qqid*). Similarly, if the underlying cause (*Sabab*) of the contract is dissolved, and it concerns the object of sale as, for example, when it constitutes one of the unlawful objects, then the contract will also be considered as Bathil.

Void contract has no legal effects at all and it can never be validated.

TYPES OF CONTRACT

• **Fasid contract**, on the other hand, is defined as when something in the contract, other than the pillars or the foundations, is defective. In other words, the contract is lawful in respect of its essence, but not with respect of its quality. An example of this is when a defect or imbalance (*Khalal*) occurs in the price. Thus a Fasid sale of a commodity is binding (*Shahih*) except for the irregular condition which constitutes the price; this renders the contract valid upon the passing of possession. The buyer must pay its value in a lawful form .

Fasid contracts can be validated through their ratification by the interested party, or because of prescription of the action which obstructs their validity. It can also be invalidated through the nullification of contract by either of the parties to the contract before the invalidating factor is removed.

TYPES OF CONTRACT

- It shall be noted that the distinction is only applicable in contracts having the effect of transferring the ownership/title; or the contract establishing the duty upon both parties to the contract. For example in a contract of sale, contract of employment, gift, loans, hiwalah, partnership, etc..
- On the other hand, no distinction is drawn between a void and irregular contract where the contract does not relate to the transfer of ownership. The best example for this will include the contract of agency, wills and marriage. Similarly the contract relating to the transfer of ownership which does not give rise to obligation from both parties to the contract, e.g., divorce, waqaf, guarantee and oath, as no distinction may be drawn in these examples between the void and irregular contract.

CONCLUSION

- From the above, it is clear that 'aqd may have similar interpretation to contract. However, its general definition governs wider scope than that of contract.
- Elements/Arkan of 'aqd has been interpreted as the element that must exist for an existence of an 'aqd. However, the majority jurists and Hanafis have different opinion in this regard whereby the former considers anything necessary either as part or merely relates to an 'aqd hence include sighah, contracting parties and subject matter. On the other hand, the later only requires only the part of the thing itself, ie sighah.

CONCLUSION

- The Muslim jurists also differ in interpreting the word 'ijab' and 'qabul'. However the difference merely relates to terminology and does not lead to any different legal consequence.
- As regard to counter offer, the position of Islamic law is similar to civil law where the counter offer substantially modified the original offer. However, implicit acceptance is acceptable in Islamic law as when the offeree has accepted an offer with additional in favour of the offeror. Civil law regards any modification as counter offer, hence terminates the original offer without distinction if the modification made is in favour of the offeror or otherwise

CONCLUSION

- Unlike civil law that simply distinguish one's capacity as a major and minor, Islamic Law distinguish the capacity to four categories depending on the stage of one's age/maturity.
- Besides the capacity, it is also important to ensure the absence of any impediments as any of the factors may affect the validity of the 'aqd.
- Finally, there are four conditions that must be satisfied in a subject matter for an 'aqd to make it valid 'aqd. The subject matter must exist, must be capable of delivery, must be ascertainable and must be legal/suitable according to Shari'a.

CONCLUSION

- The distinction is drawn between valid contracts and invalid ones is clear. Once the conditions for a valid contract are satisfied, obviously it is enforceable and legally binding upon the parties to it.
- It was in their treatment of conditions of substantive law upon which depended the validity of contracts that Muslim jurists made the distinction between void and voidable contracts. They analysed the constitutive elements which they called the foundation, without which a contract could not be validly concluded, and taught that when a basic or "intrinsic" condition was lacking, there could only be the external form or similitude of a contract, but that contract would be non-existent in law. Such an act would be absolutely null and void

CONCLUSION

- On the other hand, the basic constitutive elements of a contract may be there; but one of them may be imperfect or vitiated by an initial weakness. That contract would then be only voidable. The vice may be subsequently cured, the contract may be strengthened later on, and the cause of relative nullity would disappear. Or, the person with whom it rests the action to challenge the validity of the contract, may choose to expose the vice or the weakness, and the contract would be voided.
- From the above discussion, it is obvious that the majority of Muslim jurists had adopted quite strict interpretation in determining the validity of a contract. They viewed that one a contract is not valid, it will be rejected altogether. While the Hanafi jurists have adopted more flexible interpretation

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