FREEDOM AND SANCTITY OF CONTRACT : COMMON LAW AND SYARIAH — SOME REFLECTIONS

The concept of freedom of contract and sanctity of contract can be traced to the eighteenth and nineteenth centuries when the theories of Natural Law and the doctrine of *Laissez-faire* held sway over human affairs and conduct in England.[1] The judges of the eighteenth century influenced by natural law thinking considered that "men had an inalienable right to make their own contracts for themselves." Likewise, the common law judges of the nineteenth century too regarded the philosophy of *Laissez-faire* as leaving individuals free to conduct their own affairs in the manner most suited to their interest and that law and state should interfere with the people as little as possible. As early as 1875, Sir George Jessel emphatically declared:[2]

> "... if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice."

It is the purpose of this paper to investigate against the backdrop of common law whether concepts such as freedom of contract and sanctity of contract exist in Islamic Syariah. And if so, the manner and the extent to which these concepts are recognised and approved under the Islamic legal system.

Common Law

The idea of freedom of contract meant in the first place that contract was based on mutual agreement and secondly, the cre-

[1] P.S. Atiyah, *An Introduction to the Law of Contract* (3rd. ed. 1981) 4-5. For a detailed study see by the same author, *The Rise and Fall of Freedom of Contract* (1979).

[2] *Printing and Numerical Registering Co.* v. *Sampson* (1875) L.R. 19 EQ. at p. 465.

ation of a contract was the result of a free choice unhampered by external control such as government or legislative interference.[3]

Freedom of choice can operate at different levels and in different contexts.[4] For example an individual is not at all bound to enter into a contract or if he chooses to enter into a contract he can do so with any person of his choice. It was only in an exceptional case that the law imposed an obligation to enter into a contract. For example a person carrying a trade of 'common calling' such as the innkeeper or a common carrier was bound to contract with any member of the public to render services.[5] Lastly, freedom of contract also meant that a person can make any kind of contract on whatever term that pleases him and which is acceptable to the other party who is inclined to enter into a contract. But of course, freedom of contract does not mean absolute freedom. Contracts which are illegal, immoral or against public policy or agreements, which contravene any statutory law cannot be enforced in the law courts.

The fortunes of the legal doctrine -- freedom of contract --have been fluctuating. It took birth and flourished in the nineteenth century, it declined in the mid-twentieth century and has re-emerged in the nineteen eighties as a part of 'neo-liberal ideology'.[6] The economic and social upheaval that took place in the later part of the nineteenth century made a large dent on this concept. With the expansion of industrial and commercial world and the growing needs of the society the individuals are left with little choice than to enter into contract with big companies or multinational corporations. Several reasons have been advanced for the decline of freedom of contract in the twentieth century. The notable among them are:[7] (a) The growth of standard-form contracts as a result of growing monopolisa-

[3] See Atiyah *supra* n. 1 at p. 8. See also Anson, *Law of Contract* 26th ed. (1985) 4-5.

[4] See Atiyah n. 1 at p. 8.

[5] *Ibid* at p. 8.

[6] See Julian S. Webb, *Contract Capitalism and the Free Market: The Changing Face of Contractual Freedom in the Law Teacher*, Vol. 21, No. 1 (1987) 23-24.

[7] *Ibid* at p. 24.

tion; (b) the development of collective bargaining in employment and (c) the institutionalisation of contract as an aspect of social and economic policy. Freedom of contract as stated by Anson "is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large."[8] He further states that in the more complicated social and industrial conditions of a collectivist society it has ceased to have much idealistic attraction except, perhaps, to the proponents of a completely free market economy.[9]

However much the freedom of contract concept 'has ceased to have much idealistic attraction' there are of late certain judicial pronouncements by the House of Lords which buttress the ideal of freedom of contract. For example, Lord Wilberforce in *Photo Production Ltd.* v. *Securicor Transport Ltd.*[10] observed that at the time when parties negotiate as to the consequences of breach 'there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made.' Lord Diplock in that case also stated that the 'basic principle of the common law of contract, to which there are no exceptions ... is that parties to a contract are free to determine for themselves what primary obligations they will accept.'[11]

Again, way back in 1966 Lord Reid in *Suisse Atlantique Societe d' Armement Maritime S.A.V.N.* v. *Rotterdamsche Kolen Centrale*[12] denounced the substantive rule of law which laid down that an exclusion clause cannot operate where there is a fundamental breach of term of the contract. He said that this proposition which is applied as a rule of law would restrict the general principle of English Law that parties are free to contract as they may think fit.[13]

[8] Anson, *supra* n. 3 at pp. 4-5.

[9] *Ibid.*

[10] *Photo Production Ltd.* v. *Securicor Transport Ltd* [1980] A.C. 827, 843.

[11] *Ibid* per Lord Diplock at p. 848.

[12] *Suisse Atlantique Societe d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

[13] *Ibid* at 399.

Sanctity of contract is also a cardinal principle of English Common Law because 'it suits the needs of a commercial community.'[14] As stated by Atiyah, sanctity of contractual obligations is merely an expression of the principle that once a contract is freely and voluntarily entered into, it should be held sacred, and should be enforced by the Courts if it is broken.[15] But right from the beginning the law recognised certain limitations on the sanctity of contracts. Contracts tainted with fraud, entered into by duress or under undue influence or vitiated by mistake or misrepresentation have always been held to be unenforceable both in common law and in equity.[16] A further limitation on the principle of sanctity of contract is the doctrine of frustration. Under this doctrine parties to a contract are relieved from performance of their obligations where "the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."[17] Yet further limitation placed on the sanctity of contract is the recognition in recent years of the principles of "economic duress"[18] and "inequality of bargaining power."[19]

Meaning and Theory of Contract in Syariah

The Arabic word for contract in Islamic law is 'aqd' the literal meaning of which is 'tie' or 'bond'. But the concept of contract in Islam is wider than that in English law. Even a unilateral juristic act may produce legal consequence and become binding between the parties. It is not necessary that the two parties should

[14] See *Chitty on Contracts*, vol. 1. *General Principles* 25th ed. (1983) 4-5.

[15] Atiyah, *supra* n. 1, at p. 12. Lord Devlin says that "For the common law the sanctity of contract means the sanctity of the written words in the form in which it is ultimately enshrined." See Patrick Devlin, *The Enforcement of Morals* (1965) 44.

[16] See Anson, *supra* n. 3 at p. 6. For a detailed study on the subject see Hughes Parry, *The Sanctity of Contract in English Law* (1959).

[17] Per Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham V.D.C.* (1964) A.C. 696 at p. 729. For a good account of the development of the doctrine of frustration see Anson, *supra* n. 3, pp. 440-456.

[18] See Anson, *supra* n. 3 at 241-242 and the cases cited therein.

[19] See Anson, *supra* n. 3 at p. 249. See *Lloyds Bank, Ltd.* v. *Bundy* [1975] Q.B. 326; see also *National Westminister Bank* v. *Morgan* [1983] 3 All. E.R. 85.

have consented or that there should have been an agreement or consideration which are the two most essential ingredients of contract in English law. A gratuitous loan, a gift or a bequest is well within the confines of 'uqud' in the Islamic legal system. As rightly pointed out by Coulson, 'while *Uqud* may be translated as contracts, because the term normally refers to legal transactions which are concluded by an offer from one party and acceptance from the other, it must be emphasised that an *aqd* or contract in Islamic jurisprudence means no more or no less than a legal undertaking, the essentials of which are very different from the binding promise which constitutes a contract in Western law.'[20]

There is a difference of opinion among the writers on whether there is a general theory of contract in Islamic Law.[21] For example, according to Hamid, Islamic Law knows neither a general theory of contract nor a definition of what a contract is.[22] He further states that the lack of a definition of contract is matched only by the corresponding lack of a general theory of contract.[23] The learned writer maintains that the separate treatment of contracts by jurists is more a reflection of the process by which Islamic law has been developed than of any conscious desire to limit the sphere of contracts.[24] That there is such a view prevalent among the writers is due to the fact that under the traditional Islamic Law only specific or nominate contracts (*Uqud-e mo' anyana*) have been dealt with.

There are others, however, who maintain that there is both a definition and general theory of contract in the Islamic Legal System. For example, Amin states that the fact that there are certain general rules of the law of contract over and above the special rules of individual contracts, should be evident from the primary sources of Islamic Law.[25] The learned writer while

[20] N.J. Coulson, *Commercial Law in the Gulf States*, (1984) 18.

[21] See Joseph Schacht, *An Introduction to Islamic Law*, (1964) 151-160. See also Ameer Ali. *Mahommedan Law*, vol. I, 5th ed. (1976) 744-746 for the contract of *ijara* see generally the chapters dealing with gifts and debts.

[22] See M.E. Hamid, *Islamic Law of Contract or Contracts*, *Jl.* of Islamic And Comp. Law, Vol. 3-4 (1969-72) p. 1. See, J. Schacht, *Introduction to Islamic Law* (1964).

[23] Hamid. *Ibid.* at p. 2.

[24] *Ibid* at p. 2.

[25] S.A. Amin, *Remedies For the Breach of Contract in Islamic Law* (1984) 11.

maintaining this position draws support from the work of the following jurists.

According to Sheik Isma'il el-Jazaeri the Quranic principle embodied in the verse *'ufu bil uqud'* (perform your contracts or fulfil your obligations) covers all agreements which parties might enter into however diverse and different because there is no limitation on the application of this maxim except where the Holy Quran itself prohibits such acts or agreements and declares them to be void.[26]

Sayed Abdul Fattah Maragi states that 'there can be no doubt that transactions in general are matters essential for human life and as such, they (transactions) are not innovations introduced by the faith.'[27] There are also other agreements used by people which do not strictly fall into any single category of the nominated contracts such as sale, partnership, gift or lease. Since those agreements have not been prohibited by the lawgiver they should be considered as tacitly approved.

Ayatolla Sadeq Rouhani referring to the relevant Quranic verse states that the principle laid down therein applies not only to those contracts which were in vogue at that time when the Quran was revealed but also apply to any new contractual obligation that may arise in relation to the future.[28]

Lastly, Amin states that the principle of propriety (*asahut al-senha*) and the principle of admissibility (*asalat al-ibaha*) point to the validity of any freely formulated private agreement whether or not it is a nominate contract.[29]

Freedom and Sanctity of Contract under Islamic Law

The following specific verses of the Qur'an embody the concept of freedom of contract as well as sanctity of contract.

[26] Al-Jazani, Sheikh Islam'il, *Ayat-al-Ahkam*, Arabic text, p.124 as cited by Amin, *supra* n. 25.

[27] Maraghi, Meer Abdul Fattah, Anavin, *Principle of Propriety of Contract*, as cited by Amin in *supra* n. 25.

[28] Rouhani, Sadeq, *Al-Masa'el al-Mos-tahdasa* Vol. 1, p. 71 as cited by Amin supra n. 25.

[29] See Amin *supra* n. 25 at p. 12.

> O ye who believe! Fulfil (all) obligations.[30] (But it is righteousness) ... to fulfil the contracts which you have made.[31] And fulfil every engagement, for every engagement will be enquired into (on the Day of Reckoning).[32]

Divergence of opinion exists among the various schools of Islamic law respecting the freedom of the contracting parties to make stipulations. The jurists differ in their interpretation of the Quranic texts and Sunnah on the subject. The reasons for their difference of opinion lies in the interpretation of two propositions relating to the freedom of contract. The first is that law determines the effects of the contract and secondly, parties have no freedom to make stipulations which are contrary to an express rule of law.[33] The Hanafi and the Shafii jurists have taken the view relating to the first proposition that not only are the parties to a contract prohibited from entering into stipulations which are inconsistent with the prescribed effects but also they cannot add to or modify the prescribed effects of the contract. In their opinion, therefore, any stipulation which is inconsistent with or modifies or adds to the prescribed effects of the contract will, as a general rule be "contrary to the prescribed effects of the contract."[34]

The jurists belonging to these schools draw support from the verse of Quran which says "Those who transgress the limits of Allah are evil doers."[35] The general direction contained in this verse, applied in the context of the law of contract is supported by a tradition related to Prophet Mohammad (s.a.w.) which states "How can men stipulate conditions which are not in the Book of Allah? All stipulations which are not in the Book of

[30] Sura *Maida*, Ch. V verse 1 (Translation by A. Yusuf Ali, The Holy Qur'an).

[31] Sura *al-Baqarah*, Ch. II verse 177.

[32] Sura *Bani Ismail*, Ch. 17 verse 34.

[33] For a detailed analysis of the Hanafi, Shafii, Maliki and Hambali views see Mohamed El Fatih Hamid, *The Freedom to make stipulations in the Islamic Law of Contract*. JI. of the Islamic and Comparative Law, Vol. 6 (1976) 22 ff.

[34] *Ibid* at pp. 22-23.

[35] Sura *al-Baqarah*, Ch. II, verse 229.

Allah are invalid be they a hundred in number. Allah's judgment alone is true and His stipulations alone are binding."[36] The Zahiri jurists have also taken the view that any condition or stipulation which has not been approved according to the Qur'an and tradition is invalid.[37] Support for this principle is also drawn by other verses of the Qur'an which state:

> When He hath explained to you in detail what is forbidden to you. Sura VI Anam, verse 119.
>
> If any do transgress the limits ordained by Allah, such persons (wrong Themselves as well as others). Sura II Baqara, verse 229.

The Hambali jurists on the other hand interpret the verse "O ye who believe! Fulfil (all) obligations" as imposing a duty to fulfil contracts in obsolute terms qualified only by particular and specific exceptions and prohibitions.[38] The verses which we have referred to above directing not to transgress the limits ordained by Allah and the verse Allah 'has explained to you in detail what is forbidden' are viewed by Hambali jurists as qualifying the exceptions and prohibitions. In other words all stipulations or conditions in agreements are valid unless expressly forbidden by Qur'an and Sunnah.

Islamic Law does not in general sanction contractual stipulations which are contrary to the essence of the contract. For example, the seller after selling the property can not impose conditions on the buyer that the property should be enjoyed in a particular manner. This would be regarded as contrary to the prescribed effect of the contract. That is, in a contract of sale, transfer of an ownership, is of the essence of the contract and therefore any condition which imposes a restriction or operate as a restraint upon the buyer's power of enjoyment will be

[36]See Sahih Al-Bukhari, Vol. 3 (1984) at p. 209. (Arabic- English Translation by Dr. Muhamad Muhsin Khan, Kitab Bhavan, New Delhi).
[37]See Hamid quoting *al-Muhala*, Vol. 8, p. 412, *supra* n. 22.
[38]See Coulson, *supra* n. 20 at p. 102.

held null and void. Of course, stipulations that consolidate or reinforce the prescribed effects of the contract, stipulation sanctioned by custom or stipulations which confer an additional advantage to one of the parties are recognized as valid.[39]

Special mention must be made of the contribution of the Hanbali school respecting freedom of contract. This is the most liberal of all the schools in so far as it regards freedom to make stipulations a rule rather than an exception subject of course to the principle that no stipulation is valid which contravene the Syariah.

Under the doctrine of *Ibaha* (tolerance or permission) the Hambali school recognises certain stipulations in a marriage contract which are not valid according to Hanafi or Shafii school.[40] For example stipulations which are against the essence of marriage such as restricting cohabitation or preventing procreation are invalid, whereas conditions that the husband shall not take a second wife or an agreement between the husband and the second wife that he would allow her to live in her parents house and pay her maintenance would be valid and not regarded as contrary to the essence of marriage. They are also not illegal or against public policy. Such agreements would be invalid according to the Hanafi school of Law.[41]

In order to understand the concept of freedom of contract, in Islamic Law one has to bear in mind that Muslim jurists consider that the legal effect of a contract is determined not by the will of the parties but by Allah. The existence of the contract is a direct result of the wishes of the contracting parties

[39] For details see Mohamed El Fatih Hamid, *supra* n. 33 at p. 26.

[40] The principle of *Ibaha* rests on the Qur'an which says "It is He who hath created for you all things are on earth; moreover His designs comprehend the heavens for He gave order and perfection to the seven firmaments; and He knows all thing" Sura al-Baqarah, II verse 29. See Anwar A. Qadri, *Islamic Jurisprudence in the Modern World*, (2nd ed.) (1973) 221-222. Coulson says that 'while, even in traditional Hambali Law, the doctrine (of *Ibaha*) was never extended in a consistent fashion to cover other contractual relationships generally, there is no reason why this should not came about in the present climate of legal opinion. The juristic arguments of Hambali scholars in favour of *Ibaha* must have a compelling appeal for contemporary advocates of the notion of freedom of contract in the Islamic System.' See Coulson *supra* n. 20 at p. 101.

[41] For details see Ameer Ali, *Mahommedan Law* Vol. II (7th ed. 1976) 283-288; see also Tahir Mahmood, *Muslim Law*, (1982) p. 85.

but its legal consequences such as transfer of ownership as in a contract of sale or the usufruct as in the case of lease are determined by the nature of the contract as determined by the law giver—Allah. As stated by Mohd. Salam Madkur, in most cases the desires of the contracting parties and the legal consequences of the contract coincide because of the coincidence between Islamic Law and authentic human reasoning.[42] Acts produce effects. So does the act of entering into a contract. Autonomy of will of the contracting parties is recognised by the Islamic law.[43] But the will of man is limited in the sense that it is only Allah who determines the effects or controls the consequences of the conditions in agreements in order to protect others from being unjustly treated. For example, in a contract even if parties agree by offer and acceptance to have interest (i.e., Riba or Usury) yet the contract will have no effect at all because Allah has rendered it invalid.[44] Therefore, a contract which stipulates usury is null and void in Islamic Law and the courts would not enforce such a stipulation in the contract.

In theory as well as in juristic thought it is Allah who makes the contract and determines the legal consequence. The author of *kash al Asrar* says, "The legal causes do not result in effects by themselves, but Allah causes these effects and contracts are of these legal causes.[45] Ibn Taymiyyah states that "the legal consequences which follow from our actions such as ownership in a contract of sale ... we have moved the causes of such legal consequences and the law giver confirms the legal consequences because of the causes we made."[46] Al Ghazali says "Allah is

[42]Mohd. Salam Madkur, *Al-Fiqh-Al-Islamia* (2nd. ed. 1955, Cairo) 417. The writer wishes to acknowledge Ustad Razali Nawawi, Dean, Kulliyyah of Laws, International Islamic University, Malaysia for pointing out this extremely useful work on the subject. I am also grateful to my colleague Dr. Ata Sit, who translated the chapter on Freedom of Contract from Arabic to English and for having a useful discussion on the subject.

[43]See Amin *supra* n. 25 at pp. 15-16.

[44]Qur'an, sura *al-Baqarah*, II verse 275. "Those who devour usury will not stand except as stands one whom the evil one by his touch hath driven to madness. That is because they says: "Trade is like usury." But Allah hath permitted trade and forbidden usury." (Translation, the Holy Qur'an by A. Yusuf Ali, Vol. I at pp. 111-112).

[45]See Al Bazdavi, *Kashf al Asrar* p. 1921.

[46]As quoted by Mohd. Salam Madkur, *supra* n. 42 above.

the one who related the legal effects to their causes, because causes themselves do not produce such effects but only by Allah's will."[47]

Although contracts which are not in conformity with the Syariah are prohibited and declared invalid by the jurists, economic necessity justified the recognition of certain contracts which would otherwise fall under the categories of prohibited contracts. *Bay al-wafa* is one such example.[48] Under this transaction, the borrower sells his property to another party and obtains the money being the price on the condition that the buyer will resell the property to the owner on repayment of the price. This transaction obviates the necessity of stipulating usury or interest in a contract of loan. The transaction of *Bay al-wafa* can be equated with mortgage with conditional sale of the common law. The contemporary system of Islamic banking is based on the contract of *mudaraba* where one party provides the capital to the other party who carry on a trade and the profits are shared according to the agreement.[49] This Islamic banking is considered to be "riba free."[50]

Again, the principle that no contract can be validly concluded which is in derogation of Syariah is embodied in the Iranian Civil Procedure Code 1936, Article 6. Under the provisions no note will be taken by the court of any agreement which is either detrimental to public policy or is contrary to good moral principle.[51] Article 10 of an earlier Civil Code, 1927 of Iran

[47] Al Ghazali. *Al Mustafa*, Vol. I, p. 93.

[48] Abdur Rahim says that its immediate origin is traced to the time when the inhabitants of Bukhara got largely into debts and could not liquidate them in ordinary way and the lawyers had to resort to the well-known maxim of Muhammadan law that needs of men whether general or particular stand on the same footing as absolute necessity i.e. justifying relaxation of the rigour of law. See Abdur Rahim, *Muhammadan Jurisprudence* (1911) 296.

[49] *Ibid.* Abdur Rahim at p. 324. See further Subhi Mahmasani, *Transactions in the Shari'a, in the Law in the Middle East*, Vol. 1 (1955) 179.

[50] For a short and precise account of system of Islamic Banking see A.B.M. Hossain, *Commercial Laws in Islam*, Ch. 9 entitled "Islam and Banking Business" (First ed. Islamic Foundation, Bangladesh, (1983) 54 ff.

[51] S.H. Amin, *Remedies for the Breach of Contract in Islamic and Iranian Law*. (Royston Ltd. (1984) 14.

had provided in similar terms that private agreements are binding against contracting parties unless they are expressly against the law.[52]

We have noted above that according to the general tenor of the Islamic Law, parties are not allowed to make contractual stipulations which are contrary to Syariah which restricts the freedom of the parties to choose any form or content of the contract is considerably relaxed by legislative intervention. For example Article 277 of the Iranian Civil Code 1983 provides that the court can order a contractual debt to be paid, either at a date later than the date it was originally contracted for, or to be paid by instalment.[53] Another example is that of "option of Lesion." According to this, a court can allow a party who has agreed to pay a high price for the goods to withdraw from the contract if he realises that the price paid was too high.[54]

Concluding Remarks

The idea of freedom and sanctity of contract in Common Law owes its origin to the secular development of the law inspired by the doctrine of *Laissez faire*, individualistic philosophy and economic expediency; whereas these concepts are ingrained in the religion itself in Islam. Therefore, the scope and the role these concept have played in the socio- religious setting in Islamic society are different and in a sense limited and restricted in their operation.

The prohibition of usury in Syariah and the restriction placed on contracts involving risks greatly controlled the freedom of choice in early Islamic society. It is because of this that the early Muslim jurists recognised only contracts which were sanctioned by Syariah namely (a) *bay* or sale (b) *Hiba* or gift (c) *Ijara* or hire and (d) *ariya* i.e. loan.[55] These were the only contracts that were in vogue, and they satisfied the then needs of the society. As circumstances and the need of the society

[52] *Ibid.* at p. 1.
[53] *Ibid.* at p. 14.
[54] *Ibid.* at p. 14.
[55] See Abdur Rahim *supra* n. 48 at p. 290.

changed, the jurists recognizing the economic necessity and wants validated other types of agreements which do not strictly fall into the category of nominated contracts. They were recognized by way of exception. Partnership, *baya'l wafa, istima* and *Salam* are the examples.[56] Juristic interpretation based on *Qiyas* and *Ijma* have all contributed to the recognition of freedom of choice. But it must be pointed out that freedom of choice given to the parties to the contract was a freedom within the confines of Syariah. Any stipulation contrary to the text or tradition has been held null and void.

Freedom of contract does not mean absolute freedom either in Common Law or in Syariah. The Common Law too declares that all contracts which are against public policy or in derogation of morals are void. Under English Law contracts which are expressly prohibited by a statute are also void.

In both Common Law and Syariah free consent has been made the basis for the conclusion of a contract. The Qur'an says:[57]

> "O Ye who believe! Appropriate not one another's wealth among yourselves in falsehood, except it be as a trade by mutual consent."

This clause postulated in the seventh century, says, Said Ramadan, the principle of mutual consent as being enough to conclude a contract at a time when formalities were abounding in Roman Law.[58] Nallino states that "it is well known that in the Hellenistic environment the purchase-sale is a 'real' contract, whereas all the Muslim schools are unanimous in considering it a purely 'consensual' contract, and this neither by a return to the original Roman conception or because they have always posed the problem of the distinction between 'real' and 'consensual' trade, but simply on the basis of a passage of the Qur'an ... where it is ordained that commercial acts (tijarat) should take place in virtue of consensual contracts (an taradin): mutual consent."[59] The

[56] *Ibid.* at p. 296.

[57] Surah *Nissa*, IV verse 29.

[58] Said Ramadan, *Islamic Law: Its Scope and Equity* (1970) 64.

[59] Nallino, *Influence of Roman Law on Muslim Law, Islamic Review* as cited by Said Ramadan, *ibid* at p. 64.

Prophet is reported to have said; "Muslims have to abide by their conditions except one that makes the unlawful lawful or the lawful unlawful."[60] This saying of the Prophet butresses the principle of conditions in contracts which are not prohibited.

Sanctity of contract is a cherished ideal both in Common Law and in Syariah. It is much more pronounced in the Qur'an when it says "fulfil your obligation." Professor Ahmad Ibrahim records that if the Holy Qur'an gives so much sanctity to simple promises and obliges the Muslim to fulfil them it must of necessity accord even more sanctity to bilateral promises.[61] He further points out that the emphasis on the fulfilment of the contract is such that a man is not absolved of a contract of debt even after death.

The learned writer draws support from the verse in Qur'an[62] to the effect that debt remains as a first charge on the properties of the deceased person.

It may not be out of context to mention that Common Law does not stipulate good faith as a necessary condition for the enforcement of a contract. As observed by Lord Devlin, good faith flowing out of equity is still the exception rather than the rule in the law of contract.[63] *Caveat emptor* is the general rule. Good faith is required only in contracts *uberrimae fidei* such as contract of insurance etc.[64] Albeit, in Syariah all contracts are contracts in good faith.

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[60]This Hadith is related by *Al-Tirmidhi* and supported by *Ibn Taymiya* in *Fatawi Ibn Taymiya*, iii 333 as quoted by Muhammad Yusuf Musa in his *The Liberty of the Individual in Contract and Conditions According to Islamic Law in Islamic Quarterly* Vol 2 (1955) 79 at p. 84.

[61]See, Ahmad Ibrahim, *Quranic Verses on Contract*, at p. 3. (Hand-out for private circulation in the International Islamic University, Malaysia).

[62]Ibid at p. 3.

[63]See Patrick Devlin, *supra* n. 15 at p. 46. In French and German Legal System, good faith in a contract is a general rule. See Powell, Good Faith in Contracts, *Current Legal Problems* (1956) p. 16.

[64]See *Chitty on Contracts*, Vol. 1 (25th ed.) (1983) 259-265.