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THE PROBLEM OF OFFER AND ACCEPTANCE: A STUDY OF IMPLIED-IN-FACT CONTRACTS IN ISLAMIC LAW AND THE COMMON LAW

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I. IMPLIED-IN-FACT CONTRACTS IN ISLAMIC LAW

Every student of Islamic law is familiar with the formation of contract by offer (*îjāb*) and acceptance (*qabūl*). Of the rules of *îjāb* and *qabūl* one can quote Karl Llewellyn's statement about their common law counterparts: they "have been worked over; they have been written over; they have been shaped and rubbed smooth with pumice, they wear the rich deep polish of a thousand class rooms."[1] The apparent prominence of offer and acceptance in the two legal systems, however, should not mislead one into seeing similarity where there is significant difference. Some of these differences are the subject of this paper.

This paper will argue two things: one that offer and acceptance play a vastly more important role in the Islamic than in the common law of contract, the other that the Islamic law of contract bears a more significant resemblance to the medieval action of debt than to our modern law of contract. For reasons that will become apparent, this paper will focus on the implied-in-fact contract, that is, the contract formed without an express verbal exchange of offer and acceptance. An example of this type of contract is that which we make when we pay for an item at the checkout counter of a supermarket.

Such implied-in-fact contracts are not problematical for our modern authorities on the law of contract. "Contractual duty," Corbin writes, "is imposed by reason of a promissory expression. As to this, there is no difference between an express contract and an implied contract; all con-

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[1] Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance, I*, 48 YALE L.J. 1, 32 (1938).

tracts are express contracts. But there are different modes of expression."[2] The logic of this position is undeniable. If the basis of contractual liability is mutual consent, what does it matter how this consent is manifested?

The unanimity of modern Anglo-American contract scholars on this point distinctly contrasts with the diversity of Muslim opinion. For centuries, Muslim jurists acrimoniously debated the validity of implied-in-fact contracts. Their debate can be dated back as far as the tenth century and traced up through the nineteenth century, with an extensive array of arguments on both sides of the issue. Compromise solutions between full validity and invalidity were developed. Only the briefest outline of this complex doctrinal history, one that completely passes over the theological and polemical dimensions of the legal debate, will be given here.

The general development of Muslim teaching on the implied-in-fact contract can be simply summarized. Of the well-known schools of law, only Malikism appears to have recognized the full validity of such contracts throughout its history; classical Hanafism and Hanbalism held the same position. For a long time, the Shafi^{c}ites and Shi^{c}ites would not recognize the validity of implied-in-fact contracts. This remained the teaching of these schools until the eighteenth and nineteenth centuries, respectively. The fullest surviving discussions of the subject come, in fact, from Shi^{c}ite works of the past century.[3]

In view of the fact that the Qur'an and its traditions contain virtually no textual support for the requirement of an express offer and acceptance, and because the Qur'an itself bases the legitimacy of commerce on mutual assent (*tarāḍī*),[4] persistent opposition to implied contracts for so many centuries is surprising. This opposition to the implied contract must, at least in part, be explained by the sheer weight of school tradition. Clearly, enormous pressure to bring legal doctrine into conformity with actual practice existed.[5]

The basis for requiring that contracts be formed by a verbal exchange of offer and acceptance is not entirely clear. An unusually explicit statement

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[2] A. CORBIN, CONTRACTS ¶ 18 (1963). The same view is taken in 1 WILLISTON, CONTRACTS ¶ 3 (3d ed. 1957). The prevailing tradition is that the implied-in-fact contract "is not an interesting phenomenon at all." *See* F. KESSLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS 117 (1970).

[3] The following account draws upon an unpublished paper of mine, *Implied-in-Fact Sales in Islamic Law: The Formalism of Offer and Acceptance.*. Full documentation for the statements in the text can be found therein. For a clear historically inadequate treatment, see 1 Y. LINANT DE BELLEFONDS, TRAITÉ DE DROIT MUSULMAN COMPARÉ 135-40 (1965). Some notion of the Shi^{c}ite discussion can be gathered from A. AMIR-SOLEYMANI, LA FORMATION ET LES EFFETS DES CONTRATS EN DROIT IRANIEN COMPARÉS AVEC LE DROIT FRANÇAIS (1936).

[4] QUR'AN 4:29.

[5] The leading statement of this tension is 2 AL-GHAZZĀLĪ, IḤYĀ ^{c}ULŪM AL-DĪN 85-87 (1967).

of the underlying policy is, however, provided by a Shiᶜite jurist of the eighteenth century:

> Sale [the paradigmatic Islamic contract] is not formed by gesture, writing or handshaking or by the likes of *mulāmasa*, *munābadha* and *ḥaṣāt*, even when these are not conjoined with anything that renders the contract conditional or aleatory. None of these operates as a conveyance or even a license to use by virtue of legal principle, consensus and the inadequacy of action to express inner intentions such as that of passing title . . . . They do not rise above mere probability, which is not enough . . . . Furthermore, civil transactions were ordained for the proper ordering of this life, which is desired in itself and for the sake of the world to come. These transactions are a fertile source of dissension, so that they had to be regulated in accordance with something external that could serve to express the inner purposes thereby intended.[6]

The point being made is, to quote a contemporary Romanist, that "delivery is in law a colourless act. It derives its legal colour from the circumstances in which it is made."[7] Those Muslim jurists who required an express offer and acceptance regarded only these acts as sufficiently unambiguous to demarcate the legal character of the transaction in question.

The reference to *mulāmasa*, *munābadha* and *ḥaṣāt* in the Shiᶜite passage quoted above is interesting, for it may shed light on the original motivating force behind the demand for an express offer and acceptance, a force that did not expend itself for a millennium. These terms, which I have left untranslated, refer to pre-Islamic transactions, all of which were prohibited by the Prophet. Unfortunately, we cannot readily grasp what these transactions involved, for our Islamic sources are already unclear about them.[8] Consequently, we do not know what led to their prohibition.

Important for our purposes is the Muslim jurists' belief that these prohibited transactions had involved formal conveyances effected by symbolic, irrational actions. The jurists who demanded an express offer and acceptance based this requirement on the premise that recognizing the passage of title by delivery alone would amount to condoning the survival of these pre-Islamic practices in a new form. For them, implied-in-fact

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[6] Muḥammad Mahdī al-Ṭabāṭabā'ī (d. 1212/1797-8), quoted by his student al-Jawād al-Ḥusaynī in K. AL-MATĀJIR MIN MIFTĀḤ AL-KARĀMA 160 (Cairo 1905).

[7] B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 117 (1962).

[8] Some of the common explanations are already collected in 2 AL-QĀḌĪ AL-NUᶜMĀN, DAᶜĀ'IM AL-ISLĀM 21-22 (1961). F. ARIN, RECHERCHES HISTORIQUES SUR LES OPÉRATIONS USURAIRES ET ALÉATOIRES EN DROIT MUSULMAN (1909) (summarizing the traditional material).

contracts were not informal at all, but represented the recrudescence of formalism.[9]

The dispute surrounding the validity of implied-in-fact contracts concerned the Islamic standard imposed upon parties to a contract for articulating their intent. The disagreement was essentially over applying a broad or a restrictive interpretation of the prophetic prohibitions.

Although put forward as a rejection of formalism, the requirement of an express offer and acceptance cannot itself escape entirely the label of formalistic. In its most rigorous version, this requirement attains a distinctly religious cast which, among other things, calls for the use of fully inflected classical Arabic.[10] Contracts at the time of the Prophet were, after all, concluded in this language.[11] Notably, an oral offer and acceptance were required; writing was not sufficient.[12] This suggests, although it hardly demonstrates, that the prohibited pre-Islamic contracts may have had a religious significance which Islam could not countenance and that the starting point for the centuries-long legal debate was the confrontation of religions.

II. Implied-in-Fact Contracts in the Common Law

The essential elements of the Islamic debate over implied-in-fact contracts are found in the earliest discussion of the problem, with later writers providing a more refined analysis. The common law development is quite different and reflects the stages, or the layers that constitute the history of the common law of contract. Two of the old forms of action are of direct relevance to our inquiry: debt and *assumpsit,* the origin of our modern law of contract.

Debt, which appeared in the twelfth century, was, in the form of debt *sur contract*, the leading contractual action of medieval law.[13] This action was available to enforce an obligation to pay money or to deliver goods sold. To sue in debt the plaintiff was required to point to some transaction, such as a loan or a sale, in which he had already performed his part. The plaintiff also had to show that the debt arose from the transaction; that is, from the conduct of the parties and not from their words. A significant qualification was the requirement that money claimed had to be a sum certain. In the first place, however, this was a rule of pleading and does not indicate much about the transactions that precipitated the institution of

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[9] 5 AL-ᶜASQALĀNĪ, FATḤ AL-BĀRĪ' 263 (Cairo 1959).

[10] 3 MUHSIN FAYD AL-KĀSHĀNĪ, AL-MAḤAJJA AL-BAYḌĀ' FĪ TAHDHĪB AL-IḤYĀ 156-58 (Tehran 1339-40/1960-63).

[11] ᶜALĪ AL-KARAKĪ, JĀMIᶜ AL-MAQĀṢID (unpaginated)(Tehran n.d.).

[12] *See supra* note 6 and accompanying text; 1 ABŪ ISḤĀQ AL-SHĪRĀZĪ, AL-MUHADHDHAB 257 (Cairo ᶜĪsā al-Bābi al-Ḥalabî n.d.).

[13] S. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW 7, 10-11 (1975).

the action. Secondly, there were cases in which the sum could be rendered certain by circumstances, such as via market regulations.[14]

The situation in medieval common law was practically the inverse of that in Islamic law. Implied-in-fact contracts (a singularly inappropriate term in this context), enforced by the action of debt, were at the center of the stage. Oral agreements were without sanction in the royal courts; these consisted "but in fleeting words, and no action was allowed in the royal courts for mere breath."[15] An undertaking to do something had to be enforced by the action of covenant, which required a sealed writing.

Debt had a significant drawback which led to its demise, namely, wager of law. A defendant could escape liability by swearing an oath supported by oath-helpers. The increasingly popular action of *assumpsit*, on the other hand, provided for trial by jury. *Slade's Case*, decided in 1602, established that *assumpsit* could be brought in those cases where debt also lay. This crucial step was achieved by importing into every executory contract a promise to perform; it was for the breach of this implied promise that *assumpsit* provided a remedy.[16]

Although the holding in *Slade's Case* refers to executory contracts, the implication of a promise did not require an exchange of words. General allegations of conduct, as in the common counts of *indebitatus assumpsit*, were sufficient. Such allegations were always coupled with the nontraversable allegation of a promise, and in theory, the action was brought for breach of this subsequent promise to pay the amount already owed. The implication of promises reached past the boundary of debt and included those transactions in which no price had been fixed by the parties. The law implied a promise to pay the amount the services rendered or the goods delivered were worth, e.g., *quantum meruit* or *quantum valebant*. The same process of implying promises was further extended to cases of unjust enrichment to create the law of quasi-contract.[17]

Throughout these developments, implied-in-fact contracts retained their place at the center of contract law. Although it was established that a promise given for a promise would maintain an action on the case, the way in which mutual promises provided consideration for each other remains something of a puzzle in the common law tradition.[18] It is significant that contracts of sale in which performance had taken place fell outside the Statute of Frauds so as to be enforceable without a signed writing.[19]

At this stage in the development of contract law we have not encountered any sharp line drawn between implied-in-fact contracts and those

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[14] A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 64-65 (1975).

[15] J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 268 (2d ed. 1979).

[16] *Slade's Case* (1602), Rep. 92a, 76 Eng. Rep. 1073.

[17] On these developments see J. BAKER, *supra* note 15, at 306-14.

[18] J. MURRAY, MURRAY ON CONTRACTS ¶ 75 (1974).

[19] The Statute of Frauds, 29 Car. 2, ch. 3 (1677).

formed by the exchange of offer and acceptance. At this stage, it is too early to properly speak of implied-in-fact contracts, which were identified and labeled as such only after offer and acceptance had appeared on the scene in the nineteenth century. Professor Simpson has shown how in the nineteenth century "a doctrine of offer and acceptance was superimposed upon the sixteenth-century requirement of consideration and made to perform some of the same functions and some new ones generated principally by the problem of written contracts by correspondence."[20] The formation of contract, previously a question of fact for the jury, became subject to rules designed to provide certainty for businessmen in the area of commercial law.[21] Simpson finds the source of this new doctrine in the civil law.[22] Offer and acceptance, if he is correct, are not only late-comers but foreign imports.

The innovation of offer and acceptance has been so successfully absorbed that few scholars are puzzled by the relation between offer and acceptance and the promises that the law of contract is supposed to enforce. For nineteenth century legal theorists like Langdell, however, the transformation of an offer into a promise upon acceptance was a question worth addressing.[23]

Some of the difficulties created by the superimposition of the doctrine of offer and acceptance upon that of promises supported by consideration are still with us. In our own day, Karl Llewellyn has attempted to turn back the clock of legal history.[24] Llewellyn's goals included obliterating the sharp distinction which had developed between bilateral and unilateral contracts, a distinction which he traced to excessive preoccupation with the doctrine of offer and acceptance.[25]

III. GRANTS, NOT PROMISES

Although the allegation of a promise required for bringing *assumpsit* was often fictitious, this did not prevent development of the view that the basis of contractual liability lay in the sanctity of promises. Modern lawyers have almost entirely lost sight of the fact that "promise" in the law of

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[20] Simpson, *Innovation in Nineteenth Century Contract Law*, 91 LAW Q. REV. 247, 258 (1975).

[21] J. BAKER, *supra* note 15, at 291.

[22] Simpson, *supra* note 20, at 259.

[23] C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS (1879). "Everything," Langdell admitted, "except the original offer and the acceptance of it is implied." *Id.* at 993.

[24] I owe this observation to S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981), who writes that "common law jurisdictions elsewhere have found it simpler to turn history back, and state the law in terms which give remedies according to the facts without reference to this 'passing of property'." *Id.* at 266. I take this to be a clear reference to the treatment of title in Article 2 of Uniform Commercial Code.

[25] Llewellyn, *supra* note 1, at 33-36. Llewellyn was entirely conscious of the nineteenth-century roots of the doctrine of offer and acceptance.

contract is a term of art going back to *assumpsit*.[26] Associating contract with promise has become so strong that it is not rare to find "promise" used anachronistically with respect to the action of debt.[27] The basis of debt, however, was non-promissory. This feature is shared with the Islamic law of contracts.

The contract (and the word "contract" was a term of art used in conjunction with debt) that underlies the bringing of the debt action was not conceived by medieval lawyers as arising from an exchange of promises. It was not future-oriented as is our modern law. Simpson explains,

> [t]his was not at all the way in which a consensual debt transaction was looked upon in the old law; such transactions were thought of as giving, granting or transferring a thing to the creditor. This 'thing', the debt, he could claim by writ of debt because the transaction had entitled him to it.[28]

So too, for the Muslim jurists, the exchange of offer and acceptance is not an exchange of promises, even implied promises. Offer and acceptance are understood as performatives, that is, as constitutive, dispositive utterances (*inshā'*). For this reason, the law requires that both offer and acceptance be couched in the past tense to indicate finality, rather than in the future tense, which is promissory (*ᶜida*).[29] Analyzing offer and acceptance as performatives is directly related to the notion that the parties are creating immediate entitlements in each other. In the case of sale, the property in the goods ordinarily passes to the buyer as soon as the contract is formed—that is, upon the exchange of offer and acceptance.

Unfortunately, the jurists do not dwell on the question of why the contract of sale operates as an immediate conveyance, nor on the larger question of why contracts are formed by performatives and not promises. Jurists appear to have regarded sale as synonymous with the transfer of title to goods.[30] Possibly, although this is only speculation, such a view of sales represents an Islamic transformation of pre-Islamic law. *Ījāb*, the word for offer in Islamic law, seems to reflect a stage of law in which sales were effected by unilateral conveyances, perhaps by those mysterious formal acts, already mentioned, which were prohibited under Islam.[31] If this theory is correct, the verbal offer and acceptance of Islamic law repre-

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[26] An exception was E. HARRIMAN, ELEMENTS OF THE LAW OF CONTRACTS 13-14 (1896). P.S. Atiyah has even gone so far as to suggest that legal usage sheds light on the institution of promising. *See* P.S. ATIYAH, PROMISES, MORALS AND LAW (1981).

[27] *E.g.*, L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 61 (3d ed. 1972). On this point, *see* J. BAKER, *supra* note 15, at 267.

[28] A. SIMPSON, *supra* note 14, at 79.

[29] 2 ᶜABDALLĀH AL-MAWṢILI, AL-IKHTIYĀR LI-TAᶜLĪL AL-MUKHTĀR 4 (Cairo 1951).

[30] 2 AL-SHĪRĀZI, *supra* note 12, at 259.

[31] This was already noted by Joseph Schacht. *See* Schacht, *Bayᶜ* in ENCYCLOPEDIA OF ISLAM (2d ed. 1960).

sent the superimposition of a consensual view of sale on a system of formal conveyances. The conveyance (*ījāb*) of the seller became an offer that would only have its traditional effect when coupled with an acceptance (*qabūl*). Words became fully capable and, in some instances, uniquely capable of effecting a transfer of property. An inherited understanding of sale, the paradigmatic contract, as necessarily involving a conveyance, would then have determined the way in which offer and acceptance were analyzed throughout the law of contract.

Apparently, consensualism and the passing of title were also features of the medieval common law of sale, the transactions enforced by the action of debt. Professor Milsom contends that consensualism was already a part of the law of sale in the fifteenth century.[32] According to Milsom, consensualism preceded the doctrine that property passed upon the formation of the contract. "The passing of property idea" arose as a means of rationalizing the enforceability of consensual sales,[33] although one effect was to retard the spread of consensualism generally. Consensualism, now understood in light of the passing of property, could not be extended to transactions in which there could be no question of property passing without a distinct conveyance, notably the sale of land.[34] If Milsom's account is correct, then the order of development in the common law is once again the inverse of that of Islamic law, in which consensualism was superimposed upon conveyancing.

IV. CONCLUSION

Offer and acceptance are the most obvious tokens of the commitment of Islamic law to consensualism. The repugnance of Islamic law for anything suggesting formalism even led a substantial number of Muslim jurists to reject the validity of implied-in-fact contracts. In so doing, they ended up espousing a sort of verbalism.[35] By contrast, offer and acceptance are late-comers to the common law of contract. Their roles in contract formation tell us relatively little about the underlying principles of our law of contract.

Although consensual, the Islamic contract is not promissory. It is not formed by an exchange of promises but by an exchange of grants, which may reflect a pre-Islamic stage in which sales were unilateral conveyances. The prohibition of aleatory contracts in Islamic law confirmed this tendency to confine transactions as much as possible to the here and

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[32] Milsom, *Sale of Goods in the Fifteenth Century*, 77 LAW Q. REV. 257, 272 (1961).
[33] *Id.* at 275.
[34] *Id.* at 283-84; S. STOLJAR, *supra* note 13, at 26.
[35] C. CARDAHI, LA VENTE EN DROIT COMPARÉ OCCIDENTAL ET ORIENTAL 44 (1968).

now.[36] In this respect, the Islamic law of contract is reminiscent of the old common law action of debt, which was also non-promissory. The transactional foundation of debt has survived in our modern law of contract, although the notion of contract as formed by an exchange of grants has been completely lost.

This paper has focused on the nature of offer and acceptance rather than the rules of offer and acceptance. Law is more than rules. No one should be more acutely aware of this than the legal historian, whose task it is to study law as a product of human culture in the widest sense.[37] The comparativist must beware of too quickly making himself comfortable in a foreign legal system, particularly one with a very different history from that of his own. Adequate comparison inevitably involves contrast as well as similarity. Precisely because the rules of offer and acceptance in Islamic law and the common law invite comparison, the lesson to be learned is all the more valuable.

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[36] W. BUCKLAND & A. MCNAIR, ROMAN LAW AND COMMON LAW 282 (1952)(the authors observe that "in all ancient laws Sale is essentially a market transaction," in which the goods are thought of as on the spot. *Id.*)

[37] For what is still an eloquent profession of the significance of this task, see Radin, *On Legal Scholarship*, 46 YALE L.J. 1124 (1937).