

INTENTION TO CREATE LEGAL RELATIONS IN ISLAMIC LAW OF CONTRACTS

Mohammad Tahir Sabit Haji Mohammadⁱ & Mohammad Naqib Ihsan Janiⁱⁱ

ⁱ (*Corresponding author*). Associate Professor, Civil Law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia (IIUM). tahir0316@gmail.com

ⁱⁱ Professor, Civil Law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia (IIUM). naqib@iium.edu.my

Abstract	<p><i>This paper addresses the issue of the intention to create legal relations in Islamic contract law, whether it recognises it or otherwise. The difference in terminologies and the unconsolidated nature of Islamic law in line with English law created a negative impression that is incorrect in the eyes of Islamic law experts. Due to the lack of comprehensive literature on this point, this study was seen as needed. The research methodology chosen for this paper was integrated content analysis. The literature on the lexical and legal aspects of the topic was reviewed, which included the law of contracts, <i>usul fiqh</i>, and the maxims of <i>fiqh</i>. It was found that the inward intent of contracting parties is significant, which sometimes is inferred from express words and statements of parties and no evidence to the contrary is entertained except in specific areas of law. Where the inner intention of the parties is doubtful, literal and logical reasonings are recognised to determine the parties' intent in a contract.</i></p> <p>Keywords: <i>Law, Contract, Intention, Legal, Relations.</i></p>
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INTRODUCTION

This paper concerns the position of parties' intention to enter into a contract in Islam. In English law, it is called intention to create legal relations. Intention as such is the third element of a contract in English law after offer and acceptance. The fourth element of a valid contract is consideration besides consent, legality, certainty and formality of contracts to some scholars provided parties to the contract have the capacity to enter into a legally binding agreement. These elements are close to those in Islamic law but all of them do not apparently correspond entirely. Among these elements, the intention to create legal relations has attracted controversy in English law which has an effect on common law countries including Malaysia. The problem therefore is the lack of works highlighting the difference between the Islamic and English contracts law concerning the intention of the parties which gives rise to several questions about the fairness of the law to both parties. fairness of a contract ought to be centred around actual consent (*rida*) of parties as much as possible and if not there should be a limit within which courts could explore the possibility of the actual intent of the offeror and offeree. These questions may arise to the reader of English law are the following: Does Islamic law recognise the intention to create legal relations, and if so, does it give effect to the actual inner intention of the promisor or does it presume a lack of the intention in social contracts until such presumption is rebutted?

Every law has its methods of expressing its rules and concepts, including Islamic law and Common law. This difference gives the impression that Islamic law lacks some conceptions discussed in English law of contracts. For Islamic law experts, however, there is no concern when comparing the former with the latter, for they could interconnect the principles. The problem is that when a scholar in Islamic law discusses the formation of a contract in Islamic law, a Common law expert may need to comprehend the interrelated

concepts outright. Such a work may be assumed to be incomplete, for in his eyes, it does not cover the essential elements of an enforceable agreement in Common law. The gap is not because the necessary elements are missing in Islamic law; the lack of common language and terminology creates such misconceptions. One such miscomprehension exists about the contracting parties' intent while forming a valid contract. In common law, a necessary element is an intention to create legal relations, discussed after the offer and acceptance in traditional textbooks. Scholars, however, also discuss the parties' intent during the discussion of offer and acceptance. This position needs to be addressed. It, therefore, contributes to confusion about Islamic law which has emphasised the need for the intent of the offeror and offeree but not the intention to create legal relations. Practically, the intention to create legal relations in common law merely treats social and domestic contracts distinct from commercial ones. Does Islamic law agree with the above treatment of domestic contracts? This paper explains it according to the view of classic scholars discussed in a different related discussion of legal principles.

The paper therefore does not discover new ideas either in Islamic law or English Common law. The different sections of the paper highlight the position of Islamic law on the issues of the inner intention of the offeror, and the lack of discrimination between social, domestic and commercial contracts in Islamic law when discussing the intention to create legal relations of the parties. For this, the paper merely explains the position of Islamic law. To do so the paper considers the various concepts relating to the intention of parties. The element of intention is viewed in terms of offer and acceptance, the consent and consensus of parties, and the significance of these agreements in domestic and commercial spheres.

Literature in English investigating or comparing Islamic law principles of contracts with common law regarding the intention to create legal relations is also scarce. Some works are vague¹, misleading², and too brief³, and others are indirect.⁴ Besides, there are few detailed works on the concept of *niyah* (intent/intention)⁵. These works have consolidated the discussions of early scholars in different disciplines and analysed the effect of *niyah* from different perspectives but have yet to give attention to the legal implications of the intent in a way that can be helpful for a student of comparative legal systems.

The Arabic literature on the intent or *niyah* is vast and needs to be more consolidated. Muslim scholars of Hadith, Akhlaq, and Sufi dimensions as well the scholars of the principles of jurisprudence (*usul al-fiqh*) and jurisprudence (*fiqh*), have written about the centrality of intent and intention in the daily affairs of Muslims for religiosity and transactions but discussed when they have seen it needed. Two dedicated works were found on the topic. However, they needed to be more comprehensive to include the discussion on the theory of intention to create legal relationships in Common law, as these works had some reference to continental laws.

This paper, therefore, addresses questions related to the significance of the intent of parties to a contract in Islamic law and the inference of it by courts based on established tests. The paper attempts to an extent to restate the principles of Islamic law in a language understood by a Common law lawyer related to the enforceability of an agreement. It looks

¹ Saidu Mohammed. (2020). A Comparative Analysis of the Contractual Capacity of Infant under the Common and Islamic Laws. *International Journal of Science and Research*, 9 (11), 1384.

² Powers, P R. (2006). *Intent in Islamic law. Motive and meaning in Medieval Sunni Fiqh*. Studies in Islamic Law and Society, 25. In: Ruud Peters and Berbard Weiss (Edt.) Leiden and Boston : Brill, xii, 236; Md. Abdul Jalil & Muhammad Khalilur Rahman. (2010). Islamic Law of Contract is Getting Momentum. *International Journal of Business and Social Science*, 1(2), 175-192.

³ Mahmood M Sanusi. (2006). Al-Qawa'id Al-Fiqhiyyah: Its Relevance to Malaysian Islamic Financial Products. *3 ShLR I*; Aishath M. (2022). *Harmonisation of Contract law: How Far Have We Gone -and Where We are Going*. In: Adnan Trakic (Edt.). *Shari'ah and Common Law: The Challenge of Harmonisation*. Germani: Walter de Gruyter GmbH & Co KG), 11.

⁴ Hasbullah Hj Abd Rahman. (2000). Offer and Acceptance in Islamic Law of Contract. *Jurnal Syariah*, 8(2),15-32.

⁵ Al Qarafi, Ahmad bin Idris. (1984). *al Umniyah fi Idrak al Niyah*. Bayrut: Dar al Kutub; al Swisi, Muhammad bin Yunus. (2010). *Majal al Niyyah bi al Fiqh al Islami*. Tunis: Dar Suhnun; Dubyan, Muhammad. (n.d). *al Niyah, Tarifuha wa Bayan Hukmiha wa Dhikr Mahaliha*. <https://bit.ly/3oIvnoP>

at the origins of *niyah* and other related words, literally and as Muslim scholars use it in different disciplines.

The paper results from content-based research that is theoretical at the core and analytical. The concepts of Islamic law and Common law are captured and interrelated, and accordingly, the study descriptively explains Islamic concepts of intention to create legal relations. Therefore, the descriptive methodology of Islamic law in explaining rules in classical and contemporary order does not apply. Opinions of scholars that are relevant to the topic are relied on.

To explore the above issues, the paper first explores the concept of intent in various disciplines, including *fiqh mu'amalat* (contracts), in Islamic law, the limits of intent manifesting the consent of the contracting parties, which includes the discussion of their subjective and objective intention. Second, the paper discusses the criteria that the courts of Islamic law could use to reach decisions regarding the consent and intention of parties. The paper ends with a brief discussion and conclusion.

INTENT OR INTENTION

The term intention in Arabic is *niyah*, one of the most debated topics in Islamic literature, as the hadith of the Prophet (pbuh) about the significance of intention is the first to be reported by the scholars of hadith. The hadith is general, and its scope covers the religious and legal validity and consequence of a Muslim's religious and secular actions. We will focus on the definition of *niyah* and its effect on the validity of a contract. We will also explain how Muslim jurists infer the intention of parties from a collection of words, written or spoken, and the surrounding circumstances, including the parties' conduct and community customs.

The Etymology of *Niyah* (Intent or Intention)

Literally, the word has several meanings. According to Ibn Manzur, *niyah* means the intent to do something or the direction one chooses to move. It also means to achieve something or the thing to be obtained.⁶ Al Jawhari⁷ explained it as of *azm*. Contemporary dictionaries, including al *Mu'ajjam al Wasit*, show that *niyah* is the intent to do something, object, need, distance, or the place a traveller wants to reach. The contemporary dictionary *al Lughah al Arabiyah al Mu'asir*, states that *niyah* means the state when one is directing himself to do something with will (*iradah*), eagerness (*raghbah*) and deliberate decision (*tasmim*), objective, and others.

Niyah, to the scholars of hadith, does not go beyond the literal meanings. Al Khitabi⁸ said it is *qasd*, or the desire for something in a person's mind, that demands seeking it. According to al Baidawi, it is the feeling in mind about the objective, good or evil, to be achieved. Al Juwaini stated that *niyah* means *qasd* and *irada*, which may relate to a current matter or one in the future. The former is *qasd* (intent), and the latter is *azm* (deliberate decision to do).

In *fiqh*, *niyah* is generally used for an act, the objective of which is to serve Allah swt and get His pleasure. It is the determination to do something. Hence, the term *niyah* is related to several words that indicate the state of an agent's mind, decision, and action. The related terms are *iradah*, *azm*, and *qasd*. All these terms relate to the *niyah* from the inception of an idea until the execution of an act pertaining to the incepted idea.

Niyah is a term that can be translated as intention generally, though *niyah* contains more than what intention can reveal, which is clear from different accounts given by scholars of *fiqh*. Some asserted that it is the will to do something to conform with Allah's command. To al-Qarafi, in one of his opinions, it is the inner intention to achieve something through the performance of an act.⁹ To al-Nawawi, it is the *azm* of the heart (mind) to do a

⁶ Fairuzabadi. (2005). *al Qamus al Muhit*. Bayrut: Muassasah Risalah, 4, 397; al Jawhari. (1987). *al Suhah*. Bayrut: Dar Ilm lil Malayin, 6, 2516.

⁷ Al Jawhari. *op.cit*, 6, 2516; *A'lam al Hadith Sharh al Bukhari*.

⁸ Al Khitabi, Abu Sulaiman. (1988). *A'lam al Hadith*. Mecca: Jami'ah Ummul Qura, 1, 112.

⁹ al Qarafi. (1994). *al Dhakhirah*. Dar al-Gharb al-Islami, 1, 20.

mandatory action or something else.¹⁰ Al-Nawawi also said that *niyah* is *qasd* is *azm*. But al Kirmani objected to this, for *qasd* refers to something about to be performed, while *azm* has to exist before *qasd*, which may be strong or weak. Al Iraqi opinionated that *niyah* is seeking something (*talab*) or seriously seeking it. It does not involve action, for it is not committed yet. *Niyah* is a way to perform it. To al Zarkashi, it is the connection between the will with a specific objective. Yet, for al Mawardi, it is the will followed by an action. If an action does not follow it, it is *azm*.¹¹

It is also said that a general term related to intention is *iradah*. Some thought *niyah* is a synonym of *iradah*, but it is not an accepted view. According to al-Qarafi,¹² *iradah* is the genus which is more general than *niyah*. *Iradah* has various forms, such as *azm* (determination or deliberate decision), *hamm* (inclination, worry, inspiration), *niyah* (intention), *shahwah* (desire), *qasd* (purpose and aim), *ikhtiyar* (choice), *qada* (decision), *qudrah* (ability or capacity), *azimah* (resolve), and *mashi'ah* (will). *Iradah* with *azm* refers to the will to do a preferred thing based on inclination. Al Hamm is similar to *azm*.¹³ It is also said that *niya* is related to the act of the intending person, but *iradah* includes the action of another person too. For example, we refer to the *iradah* of Allah's pleasure and blessing, which is not our action.¹⁴ It is also said that it refers to the stage when things are not deliberated, and certainty of an option is not discussed or thought over.¹⁵ Besides, al Ghazali thought it is the arousal of the mind with desire and inclination towards that is in line with an objective. To al Ghzali, both *niyah* and *iradah* are the same forming part of a deliberate action realised with three things: pre-existing knowledge, *iradah*, and the ability to perform and act. Without pre-knowledge about the good and negative of a thing, its scope and restriction, the effect of its performance and obstinance, the intention will remain a desire if one cannot execute and realise the objective with the needed ability to do it. When one is convinced, based on his knowledge, that the act or abstinence from it is in accordance with his objective and decides to act on his knowledge after finding no obstacle, there will be arousal of intention and fulfilment of desire. As the mind is aroused, the body moves, so the ability to do something (*qudrah*) serves human intention, and intention needs pre-existing knowledge.¹⁶ This variety of understanding of the *niya* has an effect on the juristic rules, which may depend on how jurists interpret the *niya*.

Besides, related terms are explained close to the above definitions of *niyah*. *Azm* is the unreluctant decision to execute an act after ascertaining the need for its execution (Ibn Ashur), the voluntary or coercive implementation of the intention (al-Hirawai), or that deliberate act viewed rationally to do and then executed.¹⁷ *Qasd* is the way towards some place (Ibn Sidah). It is a type of *azm* or the will to do something¹⁸. *Qasd* is the *iradah* reached a stage of the strength of *azm* when the implementation of the *iradah* is seen as needed. *Qasd* is higher compared to *azm*. The *iradah* is an action or a preferred option executed and attached to an effort. According to Ibn Qayyim¹⁹, there is a difference between *niyah* and *qasd*. The former refers to the intention of the person who commits an act, not of someone else. *Qasd* can refer to an act he commits himself or someone else's act. Similarly, *niyah* may refer to the intention to do possible or impossible things, while *qasd* refers to the commission of a possible thing.

¹⁰ al Nawawi. (n.d). *al Majmu'*. Bayrut: Dar al-Fikr, 1, 310

¹¹ On the collection of various views about *niyah* see al Sayuti, Jalal al Din. (1998). *Muntaha al Amal*. Bayrut: Dar Ibn Hazzam, 82-85.

¹² Also see al Zuhaili. (1984). *al Fiqh al-Islami wa Adillatuhu*. Bayrut: Dar al-Fikr, 1, 167.

¹³ al Sayuti. (1998). *op.cit.* 81.

¹⁴ See al Aini. (n.d). *Umdatul Qari Sharh Sahih al Bukhari*. Bayrut: Dar al Fikr, 1, 23.

¹⁵ See al Ashqar, Umar Sulaiman. (1981). *Kitab al Maqasid al Mukallifin fima Yta'abbdu bihi Li Rabbal Alimin*. Kuwait: Maktabah al Falah, 28.

¹⁶ Al Ghazali. (n.d). *Ihya al Ulum al-Din*. Bayrut: Dar al-Ma'rifah, 4, 2689-2690.

¹⁷ Anonymous. (n.d). *Mawsu'ah al Akhlaq*. al Durar al Sunniyyah, Online. (accessed on 22/3/23).

¹⁸ Mahmud 'Abd Rahman. (1999). *Mu'ajjam al Mustalahat wa al Alfaz al Fiqhiyah*. Cairo: Dar Fadilah, 3/96.

¹⁹ Ibn Qayyim. (n.d). *Bada'i' al Fawa'id*, 3. Cairo: Dar al Tiba'ah al Munirah, 190.

One can observe that the use of *niyah* in Islamic literature indicates desire, strong resolve, and deliberate action. Not only these, but *niyah* also implies voluntary action, with choice, free will, and others, as etymologically explained by al-Qarafi and psychologically specified by al-Ghazali. In contrast to its counterpart in English law, i.e., intention (aim or plan) and intent (a reasoned and strong resolve), the term *niyah* has broader implications. In Islamic law, the various collateral conceptions are read together with *niyah*. In contrast, in English law, some collateral conceptions of intention are ignored in the case of coercion and mistake.

We rely on the etymological description of al-Qarafi. His ideas are in line with the contract law. The following sections will elaborate on how and why an agreement is enforceable in Islamic law.

The Intention Of The Parties To Enter Into A Contract

The intention of parties is the foundation of contracts in Islamic law. The words and actions of parties are interpreted based on the objective of a party intended by parties from the conclusion of a contract. This objective (*maqсад*) of a contract is seen as a benefit (*maslaha/manfa'ah*) that each party seeks to obtain, reflected in bilateral contracts.²⁰ In the current language, it is the intention to create legal relations or the intention to be bound by the agreement. We consider it to be the intention to transfer rights and titles to another by the promisor or/and promisee.

The general rule in fiqh is that when a person enters into a contract with another, its validity is based on the intent or the intentions, and the intrinsic, not the apparent, and what the contracting party wants.²¹ This is in line with the Hadith of the Prophet (pbuh) reported by al-Bukhari, who said that human 'actions are judged based on their intentions' or what they mean to accomplish with them.²²

The various explanations of *niyah* by Muslim scholars show clearly that *niyah* (intention), in one or another sense, together with each of its collateral meanings, to enter into an enforceable agreement is relevant. For example, Ibn Ashur²³ mentions that *rida* and *ikhtiyar*, are needed for a contract and bargains, which is based on the command of the lawgiver, as mentioned in the Quran²⁴. His view aligns with concepts proposed by Hanafi scholars, expressed in the context of *ikrah* (coercion) relating to the formation of contracts which imply *rida* (*mashi'ah*) and *ikhtiyar* as discussed by al-Qarafi above too. Ibn Ashur referred to intention (*qasd*) and choice (*ikhtiyar*) when defining a voidable (*fasid*) contract in which choice is present, but willingness (*rida*) is missing. According to the Hanafi school, when consensus is reached, a contract is valid and enforceable if free choice (*ikhtiyar*) and willingness (*rida*) are present in a contract. If there is a choice, but the willingness of the party to enter into a contract is missing, the contract is voidable. This opinion is held by Ibn Ashur when he divided all transactions into *sahih*, *batil* and *fasid*. This view implies that an agreement's enforcement, suspension, and non-enforcement depend on the contracting parties' intention.

²⁰ Juristic rule is: { العبرة في العقود بالمقاصد والمعاني لا بالألفاظ والمباني }

²¹ { العبرة في العقود بالمقاصد والمعاني لا بالألفاظ والمباني }.

²² { إنما الأعمال بالنيات }

²³ Ibn Ashur, Muhammad al Tahir. (2004). *Maqasid al Shariah al Islamiyyah*. Qatar: Wizarah al Awqaf, 2, 423.

²⁴ See chapter 5, verse 29: ﴿ يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالِكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ ﴾. Various hadith of the Prophet pbuh also clarified the conclusion of the sale contract to be with the parties' consent. Three words related to each other are mentioned in the hadiths of the Prophet pbuh: *taradi* (mutual consent), *tieb al nafs* (permission and consent) and *takhyir* (the choice to take or leave the deal). Accordingly, see al Tabari's explanation regarding trade and donation is included in the scope of the consensual trade, sale and the taking of someone's property. Therefore, in Islamic law, mere assent (agreement) is invalid unless the agreement is informed, voluntary, and with free choice.

For Muslim jurists, the connection between offer and acceptance is the same as in English law; the latter considers acceptance to mirror the offer. Common intention or concurrence of the parties' intentions is the main element of the enforceable contract.²⁵ Therefore, if one offers to sell a car to another and the other party accepts the sale on the terms of the offeror, the moment the acceptance is made, the contract is concluded, provided the parties are not under legal disability, or the sale is not against the law. The ownership of the subject matter is transferred to the purchaser, and the purchaser is obliged to pay the purchase price of the subject matter.²⁶ This means that the parties have to have the intention to create legal relations, the effect of which is recognised soon after the conclusion of the agreement. This means that if a dispute arises, courts will recognise and enforce the contract based on the parties' original intention.

However, the issue is more complex than it seems. There are instances where the intention or objectives of promisors are clear by the use of explicit words manifesting the promisor's intent and where the objectives are not clear because the terms of the agreement are not clear. There may be cases where the needed words are missing, thereby making parties' intentions on a particular matter unclear. For this reason, we will divide our discussion about intention into two: intention in an express contract and where it is implied or can be established by reference to clues in the express contract or the conduct of parties and others.

Intention to Create Legal Relations in Express Contracts

According to Ibn Qayyim, words are indicators of the inner intent of the parties among humans. When one desires something to be done by another, the other will know his intent or what is in his mind by his words. The inner intent and objectives are given effect through the words. No inner intent is effective in law without words or action, and no words are legally effective without intention. When both inner intent and the words spoken or the agent's actions are in harmony, they will have a legal effect (*hukm*). This requirement is the rule of Shariah, and divine justice requires so. Because of this, intent, choice and willingness must exist. When the intent is not coupled with the choice and option to do something and such intent is given a legal effect, it will cause hardship, which God's justice denies. Hence, mistakes (*ghalt*), forgetfulness (*nisyan*), omissions (*sahw*) and a slip of the tongue are things one does not want to do, and speaking about something that the speaker is forced to do or who does not understand the contents of what he spoke about have no legal effect. Otherwise, it will cause hardship.²⁷

The finding of intention to create legal relations in Islamic law depends on the nature and contents of the words expressed by parties in their agreements. Jurists look at the meaning of words for which they are used with or without intention. The meaning may be understood from a word explicitly (*sarih*), almost explicitly, or metaphorically (*kinayah*). All these types of words indicate the intention of the parties. An explicit word is used only for a particular meaning. In this category, words may have several meanings, but the context of the speech may specify a specific meaning. They are included. Though such words do not directly manifest the intended meaning, it still shows the inner state of mind of the speaker. The courts will construe the speech of the parties only. Words that almost explicitly state the inner state of mind of the parties or are treated like explicit words are those words which people use for a different purpose but cannot be intended by the parties in the context of the agreement. Jurists and courts give them contextual meaning to find the parties' intentions. Such a contextual meaning is then treated like explicit words. Courts also prefer metaphorical meanings (*kinayah* and *majaz*), provided the word is used for such meaning. The rule, according to Abu Hanifah, is that the words of a religious and reasonable man

²⁵ See al Quran, al-Nisa: 29.

²⁶ al Zuhaili. (1984). *op.cit.* Vol. 4, 81.

²⁷ Ibn Qayyim. (1994). *Zad al Ma'ad*. Bayrut: Muassasah Risalah, 4, 539.

should be understood as what he meant whenever it is possible to do so.²⁸ Additionally, where words in their literal sense do not manifest the parties' true intention, customary use may be preferred. Expressed words should not be given contrary meanings. Things not spoken about may be subject to customary usage, and general terms may be specified by customary usage.²⁹ The above is the manner whereby vague statements have to be rectified if the parties' intentions could be inferred by giving words a different meaning, literal, metaphorical and customary.

The Intention Of Parties In Social, Domestic And Commercial Agreements

In general, the presumption in Islamic law is the existence of an intention to create legal relations in all agreements unless such presumption is rebutted or contrary to Shariah. According to Abu Hanifah,³⁰ the legal presumption in contracts is that every religious and reasonable man speaks of what is in his mind. Therefore, there is no difference between contracts between people in business or otherwise. In other words, there is no difference in whether one promises in return for a promise or the promise is without consideration. In either case, words ought to be taken seriously, despite the two views reported in Islamic law. First is that the law enforces the terms that were non-serious. The second view is that the law does not implement the statement in cases of mistake and non-serious utterance (*al hazl*), except in a few cases, e.g., marriage, divorce and its revocation.

Islamic law does not treat the intention to create legal relations between the offeror and offeree as an independent element. The intent is part of the offer and acceptance. When an offer is required to be intentional, they mean that it is the condition for enforceability of the offer and, if accepted, then for enforceability of the contract. If intentional, offer and acceptance form a conclusive contract, binding and enforceable in the eyes of the law, provided other conditions of bilateral and unilateral contracts are fulfilled. As long there is intention coupled with choice, words are strictly enforced against the speaker. This is true whether words are spoken to a family member, wife, or friend. In unilateral contracts, for example, acceptance and/or delivery of possession are required, which may strengthen the existence of a promisor's intention to create legal relations.

The second view regarding a gift by a non-serious donor is that it is not binding. This is a view in Shafi'i school, which is not preferred.³¹ Similarly, it is a correct view in the Hanbali school,³² which Ibn Qayyim does not prefer. The first view is of Hanafis, subject to other conditions, e.g., acceptance and/or delivery of possession³³, a preferred view in Shafi'i school³⁴ and Hanbali, which Abu Khattab and seemingly Ibn Qayyim have chosen. Ibn

²⁸ See al Kasani. (n.d). *al Bada'iy' al Sana'iy' fi Tartib al Shar'iy'*. Dar al Kutub al 'Ilmiyyah, 4, 46-51.

²⁹ See the following article of Majallah al Ahkam that can be used for interpretation of agreements:

{الاصول في الكلام الحقيقيه (الماده ١٣) لا عبره للدلاله في مقابله التصريح (الماده ١٤) لا مساع لاجتهاد في مورد النص (الماده ١٥) العاده محكمه (الماده ٣٧) الحقيقه تترك بدلاله العاده (الماده ٤١) انما تعتبر العاده اذا اطردت او غلبت (الماده ٤٢) العبره للغالب الشايع لا للنادر (الماده ٤٣) المعروف عرفا كالمشروط شرطا (الماده ٤٥) التعيين بالعرف كالتعيين بالنص (الماده ٤٦) }.

See the meanings of these guidelines in the section on the rules of interpretation, below.

³⁰ Al Kasani. *op.cit.* 4, 51.

³¹ Rafi'I, Abd al-Karim. (1997). *Al Aziz Sharh al Wajiz*. Bayrut: Dar al-Kutub al-'Ilmiyyah, 8, 553;

³² Ibn Taymiyah. (2019). *Al Ikhtiyarat*. Maktabah Shamilah, 170; al-Suyuti. (1961). *Matalib Aulu al Nuha*. Al-Maktab al-Islami, 4, 378; Ibn Duyan. (1989). *Manar al Sabil*. Al-Maktab al-Islami, 2, 23; Maqdisi. (2004). *Dalil al Talib*. Riyadh: Dar Taibah, 193.

³³ Ibn Nujaim. (n.d). *Al Bahr al Ra'iq*. Dar Kitab al-Islami, 7, 248; Ibn Abidin. (1999). *al Ashbah wa Nazair*. Bayrut: Dar Kutub Ilmiyyah, 1, 24; Ibn 'Abidin. (1966). *al Dur al Mukhtar wa Radd al Muhtar*. Egypt: Mustafa Babi Halabi, 5, 257; al Hirawi. (2002). *Mirqat al Mafatih*. Bayrut: Dar Fikr, 5, 2140; Zabidi. (1322H). *al Jawharah al Nayirah*. al Matba'ah al Khairiyyah, 3, 287; Ibn Mazah. (2004). *al Muhit al Burhani*. Dar Kutub Ilmiyyah, 2, 262; Ali Haidar. (1991). *Durar al Ahkam*. Dar al Jail, 2, 356.

³⁴ Al Nawawi. (1991). *Rawdatul Talibin*. Al Maktab al Islami, 6, 51; al Zarkashi. (1402H). *Khabaya al Zuwaya*. Kuwait: Wizarah Awqaf, 1, 25; al Ansari. (1994). *Fath al Wahhab*. Bayrut: Dar al-Kutub 'Ilmiyyah, 2, 129; al Sharbini. (1994). *Mughni al Mutaj*. Cairo: Maktabah al-Qahirah, 3, 288; Bakri. (1997). *I'nanah al Talibin*. Dar al-Fikr, 4, 5; al Ramlī. (1984). *Nihayatul Muhtaj*. Bayrut: Dar al-Fikr, 6, 443; Ibn hajar. (1938). *Tuhfatul Muhtaj*. Al Maktabah al Tujariyyah al Kubra, 8, 29.

Qayyim has spoken about the seriousness of a speaker in case of marriage, divorce, and its revocation (*raju'*) according to the hadith of the Prophet, and accordingly has divided the words of a speaker into four: where one has no intention to do and has not spoken about it, and where he speaks about something but neither has the intention of doing the thing he speaks about or its effect. The other two are where one has the intention to speak but has no intention regarding its effect and where he has the intention to speak and has the intention of its effect to occur. The first two are ignored or not legally enforceable, and the second two are binding or enforceable against the speaker, according to the reported texts and their effect.³⁵

According to Ibn Qayyim³⁶, the words of a person who spoke them without the intention to be bound by them have legal effect; that is, under the law, his words bind him even though he had no intention to be bound by them. According to Ibn Qyaim, the law recognises transactions when the causes of their enforcement exist. Such recognition is not automatic when the parties to a transaction conclude a contract. Therefore when a party to a transaction provide the cause of enforcement, the law requires the transaction to be binding on the parties, regardless of their intention, willingness and choice or otherwise. The law looks at the speaker's words and finds his words indicating his intention to speak in such a way, despite his knowledge about its meaning and effect in law. The law treats the intention to express in words of a specific meaning as the indicator of his intention to do or not to do something. Therefore the rule is that the speaker is bound by his words unless evidence contradicts his intention, such as that of coerced and deceived person. In the case of coercion, the act may be performed with an intention, but the intention remains without the choice to avoid torture. There the coerced is not to be bound by his words then. Non-serious words of a speaker should be interpreted as serious ones in cases of gift inter vivos too. Where the non-serious speaker uses the word *hibah*, the court has to give it its general meaning, which includes donation regardless of being intended or otherwise, as long words are clear and other conditions of *hibah* are fulfilled.³⁷

It is clear that all jurists agree that words are the conveyers of inner intent. The Hanafis follow the rule strictly, while the others, in some cases agree with Hanafis, in others, they allow the presumption of no intention if such a presumption is supported by evidence. This makes Islamic law different from English and Malaysian laws.

Implied Intention

Implied intention means that which is inferred from clues, and circumstances surrounding the agreement, indicating the inner intention of parties though it may not be exactly the inward intention of parties. Jurists do not allow any additional thing that is not covered by the text, clues and surrounding conditions.

Despite the difference of opinions on the literal meaning and concept of intention, all jurists agree that an intention is followed by action. If related to a transaction, this action will constitute a contract, binding on parties and enforceable in a court of law. Where the tools of interpretation are inapplicable, jurists look at the transaction as a whole. They ascertain the purpose of the transaction and construe the parties' words accordingly. This is to say that they prioritise intention instead of words, sentences and grammar rules.

There are two maxims in Islamic law on interpreting the statements made by the parties to a contract. The first is that things or *human actions are valid based on the intended objectives*,³⁸ as understood from the hadiths of the Prophet.³⁹ The second related maxim is

³⁵ Ibn Qayyim. (1994). *op.cit*, 5, 204; Ibn Uthaimin. (1428H). *al Sharh al Mumati'*. Dar Ibn Jawzi, 13, 61.

³⁶ Ibn Qayyim. (1994). *op.cit*, 4, 539.

³⁷ Al Zuhaili. (1984). *op.cit*, 1, 61; Ibn Mazah. *op.cit.*, 2, 262; Ibn Nujaim. (1999). *al Ashbah wa al Nazair*. Bayrut: Dar al Kutub al Ilmiyyah, 1, 34.

³⁸ {الأمر بمقاصدها}

³⁹ {إِنَّمَا الْأَعْمَالُ بِالنِّيَّاتِ، وَإِنَّمَا لِكُلِّ امْرِئٍ مَا نَوَى} (Bukhari and Muslim);

that *the rule in the law of contracts is based on the intention (iradah, niyah, and azm followed by a related action) and the meanings of words (ma'ani), not the words or their grammatical structures (mabani, phrases and sentences)*. This means that when a contract is concluded between parties, its legality and enforceability depend on the intention and that which is hidden behind words, not the words and sentences or what a promisor exactly had in his mind.⁴⁰ An example can be assumed to explain this principle in two connected transactions. The first is the sale of a car when the price is not paid, but the car is taken. The price is ascertained during the negotiation but not paid. The second has followed the conclusion of the first agreement. After the first contract, a bag of gold coins is given. At this point, the purchaser tells the seller that he is entrusting him with the bag. The term *amanah* is used. The issue would be is the bag given for safekeeping or if it was given as collateral for the car. If we follow the word's literal meaning, then it should be for safekeeping. The seller of the car then would have no right to sell the coins and take the purchase price from the proceeds of the coins. The seller has the duty to return the coins to the purchaser of the car. But in this case, the seller will have to wait and may not get the price of the car. A jurist interprets the words in this context differently, considering the words, the conduct, and the surrounding circumstance. The jurist will conclude that the purchaser pledged the coins for the price of the car. In other words, it was a *rahn*. The transaction of *rahn* is a trust transaction. The trustee has to return the trusted property when the loan is paid. Until then, the trustee has no right to use the pledged asset for his benefit, and the trustee is not liable for any damage provided it is not due to misappropriation of the trustee. The jurist interprets the above scenario based on the usage of the business community. An asset, when sold, would not be delivered to the purchaser unless the price is paid or collateral given. In this scenario, if the word is given a natural meaning, it will contradict the purchaser's purpose or context of the transaction. Jurist presumes that the purchaser wanted to give the coins or ought to have given the coins to the seller as collateral. In case required, the seller could sell the coins to deduct his purchase price of the care from the proceeds of the sale.

Intention (Niyah) and Volunteering (Rida/Mashi'ah)

The intention seems to be coupled with the willingness (*rida*) and choice to do something. Following the Quranic verse (5:29), *rida* or volunteered transfer of property in a transaction requiring consideration is a condition for the enforceability of the transaction. Nevertheless, all jurists do not agree upon whether the transaction is invalid *ab initio*, suspended or voidable. To Abu Hanifah, Abu Yusuf, and Muhammad, the contract is voidable, to al Shafi'i, it is invalid *ab initio*, while according to Zufar, it is suspended. To all, the reason is the lack of volunteer action (*rida*). The effect is that according to Abu Hanifah and his two disciples, the contract can be repudiated or enforced if the negatively affected party wishes to do so.⁴¹

An example of a contract without the willingness of a party is when the seller or purchaser is coerced to enter into a contract. Where the seller is coerced to enter into an agreement, two points are important to be noted. Coercion to agree to sell and coercion to sell and deliver possession of the subject matter. They make the contract unenforceable. Where the property is sold under coercion, but the possession of the subject matter is delivered voluntarily, or the price is accepted, the agreement is enforceable for the delivery of the subject matter may be treated as a sale by conduct cancelling the coerced sale, or it can be understood to have been coerced initially but then later delivered with free will. For either reason, the agreement is enforceable. This rule does not apply to gifts and donations. The same can be said about the purchaser. Note that where the subject matter is sold to a

{أن النبي صلى الله عليه وسلم جاءه رجل فقال: يا رسول الله! أ رأيت الرجل يقاتل شجاعة، يقاتل حمية، ويقا تل غنيمه، ما له؟ قال: لا شيء له، ثم ذكر له السؤال مرة ثانية فقال: لا شيء له، ثم ثالثة فقال: لا شيء له، إن الله لا يقبل من العمل إلا ما كان صالحاً وابتغى به وجهه} (النسائي والدارمي).

⁴⁰ Muhammad Hasan Abdul Ghafar. (n.d). *Kitab al Qawaid bain Isalah wa al Tawjih*. 3, 3, <https://bit.ly/42xJ1br>.

⁴¹ See al Kasani. *op.cit.*, 7, 186.

third party and has been damaged at the hand of the third party or the coerced purchaser has done something to the subject matter, the contract is not voidable for the reason of free will being implied by the dealing of the party in the subject matter or the damage to it.⁴² It is therefore inferred that consent or lack of it may be modified by the conduct of the victim or third party. In the latter, it may be the full execution of the agreement or the difficulty of restitution in the original state.

Subjective and Objective Intention of Parties in Islamic Law

Before discussing whether, in Islamic law, the objective or subjective intention of parties is legally recognised, we need to recall and understand some other related terms, such as *iradah* and *niyah*, and *maqsad*, which manifest the willingness directed at something, or the aim achieved through a strategy. A *maqsad* is said to be understood from verbal communication, not that it is exactly on the speaker's mind (subjective and inner state of mind). The term used for describing the inner state of mind is *niyah*, if used for the desire to do something, while it is *azam* if the desire is deliberated and a decision is made accordingly. Intention or *irada*, whether in the stage of desire, deliberation and the setting of an objective, has to be manifested by words or actions of the parties to the contract. The construction of a phrase or sentence in this has to follow the grammar of the language and its lexical usage if the intention can be clarified with it. However, where words are vague and lexical or grammatical tools are ineffective, courts have to determine the meaning of a term (*ma'na*, or that which a speaker means). It is said that *maqsud* implies the intention to achieve something that implies comprehension (*fiqh*) and basic understanding (*fahm*), while *ma'na* implies mere understanding (*fahm*).⁴³ Nevertheless, observing the discussion of some prominent scholars such as al Kasani, Ibn Rushd and others who explain rules based on reported authorities, and rational analogical reasoning, one finds the second way of reasoning goes beyond purposive interpretation. It is a mix of lexical, analogical and strict compliance with the Shariah principles.

According to al Zuhaili,⁴⁴ jurists of the past are divided into two on whether the intention is objectively discovered or subjectively. An objective test of intention is based on the willingness (*iradah*) manifested by words and actions, and subjective intention is a party's inner state of mind to a transaction. To some, this division of jurists is over the objective and subjective test of the parties' intention to the contract. This paper, however, adds legality of consideration (*badalain*) and object often described in terms of compliance with the Shariah principles, which override the inward or outward intentions of parties. The group who are understood to be insisting on subjective intention have no difference from the jurists supporting objective intention. Compliance with Sharia principles agreed upon by both groups. The difference between them is seen only in the declaration of the contract as valid or otherwise, with or without interpretation of the agreement. One may say that some jurists choose strict lexical interpretations others opt for a mix of lexical and logical interpretations. The latter we call liberal in the sense that there is a synthesis of various methods of interpretation.

An example of liberal interpretation is the validity of a marriage or otherwise, where a woman's brother marries the sister of another and allows him to marry his sister in exchange. It seems like one marries a woman for a woman, which is prohibited in Islam (i.e., *Nikah Shighar*).⁴⁵ A man can validly marry a woman in exchange for a dower (the right to intercourse with her in consideration for the dower he pays). Such consideration is missing

⁴² See al Kasani. *op.cit*, 7, 186-188.

⁴³ On the literal and technical meaning of terms see al Razi. (1999). *Mukhtar al Sahah*. Maktabah Asriyyah, 560, 467, 612, ; Ibn Faris. (1979). *Maqayis al Lughah*. Dar al Fikr, vol. 5, 95, vol. 4, 146, vol. 5, 259; Fairuzabadi. *op.cit*. 1061, 1182, 1632; al Tahanawi. (1996). *Kashaf Istilahat al Funun*. Bayrut: Maktabah Lubnan, vol 2, 1249; Qadi. (2000). *Dustur al Ulama aw Jami al Ulum fi Istilahat al Funun*. Bayrut: Dar Kutub Ilmiyyah, vol 3, 198; Ali Haidar. *op.cit*. Vol 1, 18; Abdul Aziz al Bukhari. (n.d). *Kashf al Asrar an Usul al Buzdawi*. n.p: n.pb, vol 1, 43.

⁴⁴ Al Zuhaili. (1984). *op.cit*, 1, 216.

⁴⁵ See the details in the next section.

in marriages where a woman for a woman is apparently exchanged. Therefore to some scholars, these marriage contracts are void for lack of consideration in compliance with the hadith of the Prophet (pbuh)⁴⁶. They seemingly considered the contract invalid because they thought it was one transaction and followed the hadith strictly; therefore, they did not allow the marriage and considered it a voidable contract for the lack of dower or consideration. The Hanafies allowed marriage but imposed a dower to be paid to each of the women. The rule to Hanafis is that the term (shart/condition) is invalid, but the contract is valid without such a condition⁴⁷ so that compliance with Shariah and with the parties' intention is achieved. In other words, by this interpretation, the Hanafi scholars give contractual or marriage efficacy to the agreement, resembling the rule in the common law, business efficacy.

Despite the above categorisation of jurists, it is also agreed by all that the communication and stipulations of the contracting parties should be addressed, and their contracts have to be analysed lexically first so that the parties' intention is discovered. To discover the intention of the parties to create legal relations, they prefer the parties' objectives, preferably according to the inner intention of the parties, as long such is ascertainable from the words used in the agreement. Where terms are less clear, an effort has to be made by jurists and courts to determine the intention according to the methods that will be discussed, in due course, so that objective and subjective intentions are consistent.

The Subjective Intention and Requirement

Jurists have divided human action into *ibadat* (spiritual obligations) and human transactions. Subjective or the inner state of mind is important in *ibadat* but not so much so in contractual matters. In *ibadat*, the intention to perform is vital for knowing the nature and type of prayer, such as mandatory or otherwise, which can be determined based on intention. Such an intention distinguishes between the type of prayers and whether the performance of the act of prayer was for religious purposes or sport. With an inner intention, Muslims believe, one changes an areligious act into a religious one and vice versa.

Some jurists take an approach in matters affecting human relations between individuals and others and between them and the state, similar to *ibadat*. These jurists require the inner state of mind (subjective *niyah*), a condition for the validity of transactions. The Malikis, the Hanbalis, and others⁴⁸ look at the inner state of mind, which is considered to invalidate the transaction provided the promisee knows the promisor's unlawful purpose from circumstance and clues indicating the promisor's intention. Therefore, the transactions in some cases are invalid to Malikis and others due to the inner intention of a party.

These jurists validate a transaction based on its object and the contracting parties' intention. An agreement is invalid if its object or purpose is unlawful. Examples of such unlawful intention are a gift to the commander of an army or government officials, for the presumption is that the gift, in fact, is a bribe to them. A woman's gift to her husband, her dower, is invalid if her intention is to prolong her marriage to her husband. Thus, if divorced, she can claim her dower back⁴⁹ in a court of law. The Malikis invalidate agreements of the sale of land for a church, of wood to the maker of a cross, employment for singing, the sale of weapons to the enemy, of grapes to a winery, for the objective of the agreement is

⁴⁶ {عَنْ عَبْدِ اللَّهِ بْنِ عَمْرٍو: أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ نَهَى عَنِ الشُّغَارِ}. رواه البخارى (حديث: ٥١١٢)؛ المسلم (حديث: ١٤١٥).

⁴⁷ See al Kasani, *op.cit*, 2, 278. Ibn Hajar commented on the hadith that the majority consider the marriage voidable, except the Hanafies. However, the Hanafi interpretation is not contrary to the view of the majority as the former imposed dower or consideration in order not to be against the prohibition.

⁴⁸ See Ibn Rushd. (2004). *Bidayatul Mujtahid*. Dar al Hadith, 2, 140; Hattab. (1992). *Mawahib al Jalil*. Dar al-Fikr, 4, 404; Shatibi. (1997). *al Muwafaqat*. Dar Ibn Affan, 2, 261; Qarafi. (n.d). *al Furuq*. 'Alama al-Kutub, 3, 266; Ibn Qudamah. (1968). *al Mughni*. 4, 174; 222; Ibn Qayyim. (1991). *I'lam al Muwaqi'in*. Dar Kutub Ilmiyyah, 3, 106, 108, 121, 131, 18; Ibn Hazm. (n.d). *al Muhalla*. Bayrut: Dar Fikr, 9, 36.

⁴⁹ Ibn Rajab. (1419). *al Qawaid*. Saudi: Dar Ibn 'Affan, 322.

unlawful in Islam, it is immoral, a sin, and against the objective of a contract such is the case of marriage of women temporarily for the purpose of enabling the woman to marry her former divorcee husband. In Islam, marriage is perpetual for making family and human regeneration. Therefore a temporary marriage is against such purpose, and at the same, a device for defeating the legal rule on the prohibition of the marriage of a divorcee woman to her former husband, which is to prevent men from divorcing their wives unintentionally and or for no good reason.⁵⁰ This view seems to resemble the illegality of the object of a contract in English and Malaysian law, something different from the intention to create legal relations.

As mentioned in the previous section, Hanafi jurists look at the apparent structure of the agreement and validate it accordingly unless there are clues to contradict the apparent inner intention of a party. It has to be noted that the strict liability rule is applicable to a few limited cases where the lawgiver has excluded the *niyah*.

The Objective Intention Of The Parties

The Hanafi jurists strictly follow the objective test. To provide stability in the market or certainty of transactions. A contract is required to have specific language that if it shows and reveals the inner state of mind (*iradah*) of the parties to a contract, a court must enforce it. As a rule, clear words express the intention of parties. They need no proof. Unclear words, e.g., *kinayah* (metaphorical use of words), need proof of intention.⁵¹ This approach is taken by Hanafi and Shafi'i⁵² schools, who therefore prefer objective tests to discover parties' intentions toward an agreement for the certainty of the transaction. The purpose and objective of a transaction are significant in Hanafi school to which Malikis agree. The intention of parties affects marriage agreements. Every marriage agreement concluded through any term implying ownership, specification, gifts and donation results in a valid contract. It is so if the parties intend to marry, and a clue to the parties' intention as such is found in their words and understood by witnesses present during the conclusion of the agreement. This transaction is valid if the parties' words show intention and voluntary agreement to the transaction (willingly and with *rida*). Thus any word that can manifest the intention and willingness of the parties will suffice to form the agreement.⁵³ To Ibn Ashur⁵⁴, the inner intention or *iradah* of mind is hidden that can be revealed by words or that which has a similar effect whereby offer and acceptance takes place. Ibn Ashur defined the *sighah* (the formate or formula) of a contract as the words and sentences that reveal the desire and intention of the parties. For this, jurists have specified terms for individual contracts that could be used as evidence of the parties' intention in creating a contract. In this, jurists relied on that which discloses the intention of parties, such as words, conduct, in some cases to some jurists, the community's custom and the usage of people in transactions with each other.⁵⁵ According to al-Nawawi, Shariah did not require the use of words alone. Therefore reference to custom is permissible.⁵⁶ The intention may be inferred from circumstances. For

⁵⁰ See al Zuhaili. (1984). *op.cit*, 1, 219.

⁵¹ See the Shafi'i and Maliki jurists' view who required no *niyah* when the husband refuses to take an oath about his intention while pronouncing his divorce: *Ibid*, 1, 221.

⁵² Tahawi. (n.d). *Mukhtasar al Tahawi*. India: Lajnah Ihya al Ma'arif al Nu'maniyyah, 280, Qadi Zadah. (1970). *Takmalah Fathul Qadir*. Dar Fikr, 8, 127; al Kasani. *op.cit*. 4, 189; Zaila'i. (n.d). *Tabyin al Haqiq*. Dar al Kitab al-Islami, 2, 135.

⁵³ Al Zuhaili. (1984). *op.cit*, 1, 217, 220; See the discussion in the primary sources of fiqh: Ibn Humam. (1970). *al Fath al Qadir*. Lubnan: Dar al-Fikr, 2, 346; Ibn 'Abidin. (1966). *al Dur al Mukhtar wa Radd al Muhtar*. Egypt: Mustafa Babi Halabi, 2, 368 (Hanafi school); Dardir. (n.d). *al Sharh al Kabir lil Dardir*. Dar al-Fikr, 2, 220; Ibn Rushd. *op.cit*, 2, 168; Ibn Jazi. (n.d). *al Qawanin al Fiqhiyyah*. Maktabah Shamilah, 195 (Maliki School).

⁵⁴ Ibn Ashur. *op.cit*, 2, 422.

⁵⁵ *Ibid*.

⁵⁶ Al Hisni, Taqi al Din. (n.d). *Kifayatul Akhyar fir Hal Ghayah al Ikhtisar*, 233. <https://shamela.ws/book/6140/225#p1>

example, the Hanafis infer intention if a sharp tool was used that had cut the body of the victim. In such a case, it is murder (*qatl amad*); otherwise, it is manslaughter (*qatl khata*).⁵⁷

The point to be noted is that the expression by the parties has to be clear in such a way that the witnesses during the communication have to understand that the parties to the agreement have the intention to enter into the given agreement. This shows a clear rule in fiqh that the intention discovery is proven based on an objective test, similar to English and Malaysian laws. The idea is supported further by the view of Hanafi school regarding the contracts of sale, contract termination by mutual consent (*iqalah*), *ijarah* contracts, and gift inter vivos which are concluded without investigating the parties' inner intention (*niyah*). In other words, jurists recognise such contracts being concluded even if a party has no intention of creating legal relations. For instance, when one communicates his willingness to make a gift jokingly, the transaction is valid based on the communication, not based on the true intent of the party to the contract, provided the communication is made in the usual manner recognised by jurists, i.e., in the past tense. Suppose the party to the contract uses the future tense in a sale transaction, which is to be executed at present. In that case, the transaction is valid if the inner intention of the promisor is proven coupled with the communication. A sale contract without *niyah* or jokingly is invalid, for the consent of the contracting party is mandatory to exist.⁵⁸

PRINCIPLES OF OBJECTIVE CONSTRUCTION OF AGREEMENT IN ISLAMIC LAW

The words of every sane and trustworthy are enforceable. His words are his intent and, therefore, must be taken to the letter sometimes and based on the parties' overall intent (*qasd*) in others. This last method may require linguistic and logical construction. When the words are unclear, they must be construed based on the intention of the parties. The intention of parties may be discovered through an appropriate method of construction. The methods of construction can be divided into linguistic and logical. The evidence and clues can be found in the documentation or verbal presentations of the parties. The evidence to prove the existence of intention can be found in the context of the specific clause or the agreement as a whole. If needed, a witness may be called, additional documentary evidence can be adduced, and the claimant's sworn testimony can be taken in the absence of both.

Methods of Linguistic Construction

The intention of parties may be found objectively or subjectively depending on circumstances. However, one has to focus on the difference between the inference of intention and compliance with higher principles of Shariah on one side. On the other, whether the intention is inferred by courts in clear cases or the court needs to do so after the intention of the parties is disputed by one of them. Accordingly, the court will look at (a) the language, (b) the legality of the terms, and (c) the dispute over the terms of the agreement.

In Islamic law, the declaration of the intention of the parties to get an objective (getting a car or getting the purchase price) is through express and implied offer (*ijab*) and acceptance (*qabul*). Courts must consider the language used in the agreement and whether or not it gives clues about the parties' intentions.⁵⁹ Jurists state that court must find the intention of parties in explicit, semi explicit and metaphorical terms.⁶⁰ Hence, courts must consider the language of offer and acceptance, the agreement, or the language of the document containing the confession (*iqrar*) by the seller based on the criteria used by al Kasani above. In following the views of the jurists in the four schools, the consensus (the

⁵⁷ Al Zuhaili. (1984). *op.cit*, 7, 5617. <https://shamela.ws/book/384/5452#p1>

⁵⁸ *Ibid*, 220-221; Ibn Nujaim. (1999). *op.cit*, 18, 20. See the exceptions in case of termination of the agreement, and divorce, where proof of intention is required and where words are unclear, according to the four schools of law.

⁵⁹ Al Zuhaili. *op.cit*, 4, 81.

⁶⁰ Al Kasani. *op.cit*, 4, 46.

parties' common intention) and consent (choice and willingness), as the foundation of contract law, has to be found in all the above forms of communication of the parties.

To Ibn Qayyim, there could be an instance of speech contradictory to the speaker's intention. Two types of such speech can be found. First, the speech may be communicated without the intention of doing something or not doing something. For example, the speech of coerced, sleeping person, insane, drunk, or one who speaks in anger⁶¹ is aimless as the person is incapable of understanding his speech. The second is speech, in which the speaker does not mean what he talks about. He also identifies a speech containing metaphorical words, which may have a clear primary and secondary meaning, but which of them was intended by the speaker is not known. The word may be used for either of the meanings. The speaker's intention cannot be recognised from it, and there is no clue for clarification.⁶² Therefore, the language used by parties may or may not be clear. Court has to use an appropriate method of interpretation.

Explicit and clear terms

Explicit terms of a contract are those which are communicated in words that have no different meaning. Words that have several meanings may not be clear, apparently. However, the context and the surrounding circumstances can be used to identify the relevant meaning. Al Kasani called such words connected to explicit words.⁶³ According to Ibn Qayyim⁶⁴, clear speech indicates the intention of the speaker. However, such clarity may depend on the sentence structure (*siġha al kalam*) conveying the speaker's intention, or clues found in surrounding circumstances, speech, how the speaker has communicated and others.

The guiding principles for a jurist or court are related maxims of fiqh. The first maxim is that clues are ignored if there exists expressed and declared statement. Maxims 12-14 of The *Majallah al Ahkam al Adliyah* are guides for the interpretation of contracts when the need for inference of intention to create legal relation arises. Maxim 12⁶⁵ states that *الكلام الحقيقة الأصل في الكلام الحقيقة* (*It is a fundamental principle that words shall be construed literally*). Maxim 13⁶⁶ is *لا عبرة للدلالة في مقابلة التصريح* (*No attention shall be paid to inferences in the face of obvious facts*). Maxim 14 further states that *لا مسأع للإجتهد في مؤرد النص* (*Where the text is clear, there is no room for interpretation*). The term *nas* means text. Though it is true about Shariah texts, the same rule ought to apply to the texts of agreements.

If the words are clear, the parties' intention is what their words indicate unless it is disputed by one of the parties. In such a case, preference is given to words as understood by the witness to the communication of the parties unless the law prohibits it (see the view of those who invalidate a contract based on the inner intention of parties), and there is no room for the intention in the speech to make it compliant with legal rules (see the view of Hanafis who validate the contract but impose an implied condition on the parties such as in the case of *Nikah Shighar*).

If the terms of an agreement are given in clear and explicit language, all jurists do not require finding proof of the inner state of the parties' minds. Courts must consider the agreement's content from the perspective of the above types of speech and words. Clear speech must be understood as what it means and be enforced accordingly. Where the words are clear, and the speaker of the words claims otherwise, ethically, it may be correct, but the courts have to reject such a claim by treating it as a lie, for it is against the apparent meaning of the speech.⁶⁷

⁶¹ Ibn Qayyim. (1991). *op.cit*, 3, 108

⁶² *Ibid*.

⁶³ Al Kasani. *op.cit*, 4, 46.

⁶⁴ Ibn Qayyim. (1991). *op.cit*, 3, 108.

⁶⁵ al Zuhaili. (2006). *Kitab al Qawa'id al Fiqhiyyah wa Tatbiqatiha fi Madahib al Arba'ah*. Damascus: Dar al Fikr, 1, 154-55; Maxim 54.

⁶⁶ *Ibid*, 1, 154-55; Maxim 8,

⁶⁷ al Kasani. *op.cit*, 4, 46.

The parties' speech in the agreement may be subjected to logical and lexical construction. The grammatical rules of interpretation in the *usul fiqh* regarding the interpretation of al Quran and Sunnah can be extended to contracts. The logical rules will apply through *dalala al isharah* (inference from the indication of text), *dalala al iqtiza* (implication required by the text), *dalala al nass* (inference from the rationale of a rule), which may be consistent with the text (a *mafhum al mawafah*) or contradictory with the meaning of the text (*mafhum al mukhalafah*). These methods can be used to find the parties' will in their express communication of offer and acceptance or the text of an agreement.

Metaphorical and Unclear Terms

The rule in Islamic law is that all words, speeches and representations are understood according to their primary meaning. The maxim⁶⁸ *الأصل في الكلام الحقيقة (It is a fundamental principle that words shall be construed literally)*⁶⁹ that is a statement be understood according to its original meaning. The literal or original meaning of words is considered the truth; therefore, it is certain and cannot be removed by doubt (اليقين لا يزول بالشك).⁷⁰ This rule is subject to a further rule that the previous rule applies only when the original meaning is impossible to be adopted. A case when the statement can be understood in its metaphorical meaning (إذا تعذرت الحقيقة يُصار إلى المجاز)⁷¹. This rule is used because the maxim is that *words better be relied on than neglecting them* (إعمال الكلام أولى من إهماله).⁷²

The inference of the inner intent of the parties may be complicated by the use of metaphorical language or the grammatical structure of the presentation. Metaphorical words such as lion used for a brave man may be pronounced by one of the parties. Therefore it could be difficult to understand whether the speaker has intended the primary literal or secondary metaphorical meaning. This then fits in one of the instances of the classification of speech by Ibn Qayyim. The words may be clear, but it will be difficult to infer the intention of the parties. Jurists in this situation have to be guided by the maxim (إذا تعذرت الحقيقة يُصار إلى المجاز)⁷³ that *when the use of the primary meaning of the statement become impossible, then recourse be made to the secondary meaning*. Jurists and courts have to analyse statements in the agreement or offer and acceptance based on this maxim and conclude based on whichever option (of primary or secondary meanings) is preferable in the given case.

There could be other cases of the obscurity of representation that the court and jurists of *fiqh* may need to address; metaphorical and other uncertainty are discussed below.

1. In the case of metaphorical vagueness, a jurist may search for the inner intention of the parties, especially in divorce cases. For Hanafi and Hanbali scholars, a divorce will not be ordered by the court if the chosen words for the communication of divorce are metaphorical.⁷⁴ This means that the proof of intention has to be provided in the court of law. The proof of intention can be circumstantial or contextual or by the claim made by the husband, which may need additional proof, such as a witness or sworn testimony by the husband. For Shafi'is and Malikis, divorce is effective by mere inner intention, therefore, if metaphorical words are coupled with *niyah* or intent, then the divorce is effective. But the husband has to prove his intention by sworn testimony, if he refuses to swear, then divorce is not effective, similar to the two schools. Nevertheless, Shafi'is requires the speaker to prove his intention all the way through the presentation. If the

⁶⁸ On maxims accepted by all jurists, see al Zuhaili. (2006). *op.cit*, 1, 365-375; Ibn Nujaim. (1999). *op.cit*. (Hanafi maxims); al Subki. (1991). *al Ashbah wa al Naza'ir*. (Shafi'i maxim). Bayrut: Dar al Kutub al Ilmiyyah.

⁶⁹ Maxim 54 (al Zuhaili. (2006). *op.cit*, 1, 365); Maxim 13 (Majallah al Ahkam al Adliyyah).

⁷⁰ al Zuhaili. (2006). *op.cit*, 1, 368; Maxim 3: *Certainty is not dispelled by doubt*. (Majallah al Ahkam al Adliyyah).

⁷¹ al Zuhaili. (2006). *op.cit*, 1, 367; Maxim 61 (Majallah al Ahkam al Adliyyah).

⁷² Maxim 53 (al Zuhaili. (2006). *op.cit*, 1, 365) Maxim 60 (Majallah al Ahkam al Adliyyah).

⁷³ al Zuhaili. (2006). *op.cit*, 1, 368; Maxim 55; Majallah al Ahkam al Adliyyah: maxim, 61 (*When the literal meaning cannot be applied, the metaphorical sense may be used*).

⁷⁴ al Zuhaili. (1984). *op.cit*, 1, 221.

speaker cannot prove his intention at the last stage of the conversation, divorce will not be effective.⁷⁵

All jurists use grammatical methods of interpretation too. To Hanafi, Maliki, and Hanbalis, for instance, if the husband pronounces *anti al talaq*, or *anti talaqun*, using the root word. Or *anti taliqun talaqan*, then in all these, the pronunciation of one divorce is effective, which implies only a revocable divorce. To them, these pronunciations have no metaphorical use. If one claims to have intended three talaq, then it will be so, but Hanafis do not recognise two talaqs in the case of free women.⁷⁶ To Shafi'is the above pronunciations are metaphorical, and therefore the ruling of metaphorical representations applies to them.⁷⁷

2. In case of grammatical obscurity, jurists must understand the contracting parties' statements based on their intention (*maqsad*) or the objective of their agreement. They will need the use of logical arguments based on which have to solve a linguistic problem. They must be guided by the general principle of *qawaid al fiqhiyah*⁷⁸:

{ العبرة في العقود بالمقاصد والمعاني لا بالألفاظ والمباني }

*In contracts, an effect is given to intention and meaning and not to words and phrases*⁷⁹

The principle or method is general and covers all linguistic instances of construction or interpretation of an agreement. The explanation of the express language in this context was discussed early. The second part of the principle is related to unclear language, which is discussed here.

An example of the above maxim is a sale and purchase transaction during which some clear words are spoken but contradict the context of the sale and purchase transaction. Here the parties' intention can be inferred from the terms of the offer and acceptance, which show the objective and benefit aimed to be attained by the parties. The contradictory words then have to be understood in a way consistent with the aim of the transaction. For instance, after the conclusion of the sale and purchase agreement, the purchaser hands over to the seller a briefcase with gold coins inside. The purchaser tells the seller that he entrusts him with the briefcase and leaves with the purchased property. The words of the purchaser here can be understood based on the purpose of the transaction and therefore manifesting the transaction of security (*rahn*), or they can be understood to imply the transaction of safekeeping. Both transactions, in fact, are trust-based transactions. Under the former, the seller can sell the gold and realise his purchase price from the trusted property because the gold coins were collateral for the payment of the purchase price of the goods sold to the purchaser by the seller. Suppose the words of the purchaser are taken to imply a safekeeping contract. In that case, the purchaser will suffer loss by being unable to recover the purchase price for his goods, as the gold coins can be claimed by the purchaser or his representative, and the seller will have no claim to it. Therefore, the court will not strictly enforce the purchaser's words; instead, it will give contextual meaning based on the surrounding circumstances of the previous transaction.⁸⁰ It is, therefore, clear that sometimes words used are ignored if their literal meaning contradicts the purpose of a transaction as a whole. The maxim is that when a statement cannot be used is neglected (إذا (تعدّر أعمال الكلام يُهمَل).⁸¹

⁷⁵ *Ibid*, 1, 221.

⁷⁶ *Ibid*, 1, 221.

⁷⁷ *Ibid*, 1, 222.

⁷⁸ al Zuhaili. (2006). *op.cit*, 1, 403, Maxim 66.

⁷⁹ Al Majallah (the Ottoman Courts Manual (Hanafi). Maxim, 3. The Translation by pdf

⁸⁰ See Muhammad Hasan Abd al Ghafar. *op.cit*. <https://shamela.ws/book/37692/22#p1> (accessed on 12/12/2022).

⁸¹ al Zuhaili. (2006). *op.cit*, 1, 368; Maxim 62, Majallah al Ahkam al Adliyyah.

Other Unclear Terms and Terms Ought to be Included

The Muslim jurists seem to interpret words and actions to infer the parties' intentions. They consider the words and give meaning to them by choosing one of their literal possible implications. Otherwise, they will refer to community usage (*urf*) and others.

1. Intention of parties can be found based on reference to the usage of the community (*urf*). Reference to community usage is regulated by maxims of fiqh enacted by al Majallah (36,38, 40 -45). As a general rule, the specific and general custom of people is reliable and can be the basis of legal rules in Islam. Maxim 36⁸² provides that الْعَادَةُ مُحَكَّمَةٌ (*Custom is an arbitrator*); that is to say, custom, whether public or private, may be invoked to justify the giving of judgement). The rule applies as long there is no specific Shariah text against it, and it is reasonable and does not contradict morality.⁸³ Subject to restriction on the validity of custom, a court can use custom as a tool to interpret the words of contracting parties, or where there is a gap in the agreement court can use custom to fill the gaps in the agreement, provided it does not add new terms. A custom can restrict the general rule of law⁸⁴; therefore, it can also be used in constructing a contract to find the parties intent.⁸⁵

A custom can modify the explicit text of a contract but not add to it⁸⁶. Accordingly, courts can interpret a contractual text using the secondary meaning of the words according to the custom of the society. Maxim 40 of Majallah states that الْحَقِيقَةُ تُرَكُّ بِدَلَالَةِ الْعَادَةِ (*In the presence of custom no regard is paid to the literal meaning of a thing*). Similarly, maxim 45⁸⁷ states that التَّعْيِينُ بِالْعُرْفِ كَالْتَّعْيِينِ بِالنَّصِّ (*A matter established by custom is like a matter established by law*). A similar effect can be given to maxim 43 of Majallah, الْمَعْرُوفُ عُرْفًا كَالْمَشْرُوطِ شَرْطًا (*A matter recognised by custom is regarded as though it were a contractual obligation*). This may also include specific usage of business community as stated in maxim 44 of Majallah that الْمَعْرُوفُ بَيْنَ التَّجَارِ كَالْمَشْرُوطِ بَيْنَهُمْ (*A matter recognised by merchants is regarded as being a contractual obligation between them*). But a custom requires notoriety. This is provided in maxim 41, إِنَّمَا تُعْتَبَرُ الْعَادَةُ إِذَا اطَّرَدَتْ أَوْ غَلَبَتْ (*Effect is only given to custom where it is of regular occurrence or when universally prevailing*). A rare usage is not effective: maxim 42 of Majallah, الْعِزَّةُ لِلْغَالِبِ الشَّائِعِ لَا لِلنَّادِرِ (*Effect is given to what is of common occurrence; not to what happens infrequently*).

The practice of the community is used when the words are not clear. The inner intention of the parties can be investigated if the words and the language used by the parties are not clear literally. In place of literal or metaphorical meaning, jurists would try to understand the words of the parties according to the usage of the community in general or of the particular society, e.g., the business community. And the meaning of them is then given priority if it is in line with the practice of the community.

2. The intention of parties may be inferred from surrounding circumstances. The leading maxim⁸⁸ is الْمُطْلَقُ يَجْرِي عَلَى إِضْلَافِهِ إِذَا لَمْ يَكُنْ دَلِيلُ التَّقْيِيدِ نَصًّا أَوْ دَلَالَةً (*The absolute is construed in its absolute sense, provided that there is no proof of a restricted meaning either in the text of the law or by implication*). Here the general rule is that absolute or general terms are given general application unless a text or circumstances demand modification of the term.⁸⁹ The authorisation of a person to purchase a computer will allow the agent to buy any computer, but if the term of authorisation is restricted, for instance, the agent is told to purchase a MacBook, then such authorisation is restricted to the named computer only due to the express authorisation to do so. Circumstances restrict general terms.

⁸² al Zuhaili. (2006). *op.cit*, 1, 298-307

⁸³ *Ibid*, 1, 300.

⁸⁴ *Ibid*, 1, 302.

⁸⁵ *Ibid*, 1, 314: Any name which does not have a definition in Sharia or literally, recourse is made to the custom of people.

⁸⁶ *Ibid*, 1, 306.

⁸⁷ *Ibid*, 1, 349, maxim 50.

⁸⁸ Majallah al Ahkam al Adliyyah, Maxim 64; al Zuhaili. (2006). *op.cit*, 1, 378, maxim 58.

⁸⁹ See al Zuhaili. (2006). *op.cit*, 1, 404-8

Therefore where a poor man orders another to buy him a car, a traveller asks an agent to rent a house for him for a stay, or one goes to sell his harvest to use the proceeds for his daily expenses, in all these cases, the authorisation of the agent if not expressly restricted, will be limited by circumstances surrounding the deal. Time, space, and need, for instance, will determine the modification of the terms of the contracting party. A luxury car for the poor, a rented house after leaving the city, and the sale of the produce on credit will not be allowed, for the intention of the party would not be so. The circumstances require so because all the above could not be in contemplation of the principal.

3. Mixed method may be used to remove the obscurity of terms used in an agreement. For instance, where the inner intention of the parties is in line with the apparent meaning of the speech or where the speaker implies one thing but the context of the speech shows another, both are recognised. For instance, in old times, if A intended to free a specific slave B, but during his speech, A addressed C, not B, that he is free, according to Hanafi jurists, both B and C are free. B, because it was he who was in the speaker's mind, and C is free because the speaker addressed him at the time of speech that you are free.⁹⁰

Where the terms and conduct of the parties are not clear

Where the word needs no interpretation, Muslim jurists have criteria for settling disputes between parties by using sworn testimony or witnesses. A similar approach is used if one alleges contradictory intention. It is always that a claimant has to prove his claim, and the defendant to provide sworn testimony. Where there are witnesses, jurists expect judges to decide accordingly. In case of conflicting testimony, Muslim jurists have further criteria for prioritising the testimony of one over another. They will look at the circumstance and analyse the claims, the nature of the dispute regarding the subject matter, and whether it relates to the formation or subsequent to the formation of the contract. If they could be distinguished, each claim has to be proven, and for each, relevant witnesses' testimony must be considered.⁹¹ Where witnesses are impeached, their testimony may be disregarded.

DISCUSSION

This study confirms that Islamic law has discussed inward, outward, subjective, and objective intention to create legal relations⁹² and that Muslim jurists have done it far earlier than that discussed in German jurisprudence (inward intention) and English jurisprudence outward or objective intention.⁹³

CONCLUSION

Islamic law is keen on the inner intention of parties to see parties achieve their objective with willingness and free consent. The court has to avoid imposing its assumption on contracting parties that they have not contemplated.

The inner intention to create legal relations is a cardinal element of agreements. The difference between the jurists appears to be on whether the outward or inward intention of parties to a contract is significant. In fact, the difference is in their presumptions: clear representation or communication of the contractual terms are presumed to carry the inward intention of parties. On this, they all agree. What they do not agree with is the presumption in less clear representations. The Hanafis, subject to grammatical and shariah principles, presume words carry the intention of the parties unless denied. Others presume otherwise. Where this presumption is doubted, evidence has to be adduced to prove or disprove the above presumption. Terms, the contents of which are clear linguistically and logically, carry the intention of the parties. Where there is some vagueness, the agreement

⁹⁰ Al Kasani. *op.cit*, 4, 47.

⁹¹ *Ibid*, 4, 219.

⁹² al Zuhaili. (1984). *op.cit*, 1, 217-19

⁹³ Muqni Bin Ammar. (2008). *al Qawaid al Ammah lil Tafsir, wa Tatbqatuha fi Munazhat al Amal wa Diman al Ijtima'i, Dirasah Muqaranat*. Doctoral Thesis, Faculty of Law, University of Wahran. pdf.

will be enforceable if that can be removed by circumstances surrounding the agreement. Otherwise, the inner intention of the parties has to be discovered by evidence and construction of the language used by the parties in such a way as to be compliant with the general principles of Shariah. Schools of law may have to arrive at varied conclusions based on their general rules of logical and linguistic principles of construction. Overall, the presumption is that parties intend to create legal relations regardless of the agreement being between family members, friends or businessmen.

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