

# FORMATION OF CONTRACT

Tutorial 4

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## MEANING OF CONTRACT

- Allah says about the contracts: “O you, who believe, fulfill your contracts.” (Al-Ma'idah: 1) ( يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ )
- The Arabic equivalent of the word “contracts” is uqud, plural of ‘aqd.
- The literal meanings of this word are “to tie,” “to knot,” “to join,” “to lock,” “to hold,” “to contract” etc.
- Among these meanings, the last one is closely related to its technical meaning.
- Technical term in Islamic law of aqd (contract), is: “Conjunction of a proposal or ijab and an acceptance or qabul.”



## MEANING OF CONTRACT

- According to Majallat al-Ahkam al-‘Adliyyah , “contracting is the connection of an offer with an acceptance in a lawful manner, which marks its effect on the subject of that connection.”
- An offer (ijab) in this definition means what is proposed first by one of two parties indicating his intention to go into a contract.
- An acceptance (qabul) means what is stated secondly by the other party following an offer, expressing his / her consent to the offer.



## PILLARS OF THE CONTRACT AND THEIR CONDITIONS

- In order to form a Shariah contract, certain conditions must be fulfilled.
- Most of these conditions are related to each of the three pillars (arkan), which are:
  1. statement (sighah),
  2. two contracting parties ('aqidan),
  3. and the subject of contract (ma'qud 'alayhi ).



## STATEMENT OF CONTRACT (SIGHAH)

- Without the statement or sighthah a contract cannot be formed. Sighthah is formed through offer and acceptance.
- According to the majority of jurists, statement and two other aspects, that is, two contracting parties and the subject matter are also included among the pillars.
- Since the consent of the parties is the primary condition of a contract, and it is an internal and intangible aspect, offer (ijab) and acceptance (qabul) are considered as external proof of the contract.



## STATEMENT OF CONTRACT (SIGHAH)

- The majority of jurists maintain that offer is what is stated by the one who transfers the ownership, irrespective of whether it occurs firstly or secondly.
- While acceptance is what is said by the one to whom the ownership is to be transferred, indicating his/her consent to what is offered by the other party.
- According to a number of contemporary jurists, the view of the Hanafi School in this regard is preferred because it is precise and also, by this standard, differentiation between offer and acceptance becomes easier



## CONDITIONS OF THE SIGHAH

### 1: Use of Past Tense

- Jurists prefer the past tense for verbal expression for forming an offer and an acceptance, such as “I sold,” and “I bought.”
- This is because although the past tense is originally for the past, according to linguistic uses, this tense is utilised for instant offer and acceptance.
- According to most jurists, other tenses such as present, future, or the command form of a verb, could be utilised for forming a contract depending on the intention circumstances, and custom of the parties.



## CONDITIONS OF THE SIGHAH

- In a contemporary context, an offer and acceptance are allowed to be made through fax with the parties attesting their signatures.
- Using the telephone for verbal expression or using it with an instant view of the photos of the parties, is also allowed to form an offer and acceptance.





## CONFORMATION OF OFFER TO ACCEPTANCE

- An acceptance must conform to an offer.
- If this conformity does not exist, there will be no consent.
- This conformity could either be explicit or implicit.
- For instance, if someone offers and says to another: “I sold my house to you for one hundred thousand dollars,” and the second party says: “I bought it for that price,” this is considered as explicit and real conformity of an acceptance to an offer because both conform to each other completely.



## 2: TWO CONTRACTING PARTIES AND THEIR CONDITIONS

- The parties who have legal capability to enter into a contract must have the following attributes:

### **1: Puberty**

- Both contracting parties must attain puberty.
- There is no text of the Quran or Hadith with regard to puberty age.
- As there is no direct reference to it in any text, an authority in a given jurisdiction is empowered to adopt a puberty definition based on the circumstances of a particular country.



## 2. Sanity

- Both parties must be sane.
- If both or one of them is insane, no contract is to be made.
- If someone temporarily becomes insane and later regains sanity, he is allowed to conclude a contract when he remains sane, but he is not allowed to do so when insane



### 3. Maturity

- Both parties must also attain maturity (rushd).
- According to jurists, maturity is: “Good and proper dealings with wealth from a worldly viewpoint”.
- The majority of Muslim jurists did not determine the age of maturity.
- There is no text on the age of maturity, relevant authorities are empowered to determine the guiding principle pertaining to maturity.

# SUBJECT MATTER OF A CONTRACT AND ITS CONDITIONS

- The subject matter of a contract (mahall al-‘aqd ) can either be a tangible thing (such as money, wealth, goods, etc.), a utility, or a work.
- In all these cases the subject matter must fulfill the following conditions:
  - A. Suitability of a Subject Matter for a Contract**
  - Muslim jurists have unanimously maintained that a subject matter must be suitable for concluding a contract on it.
  - If it is not suitable, the contract will be invalid.
  - Many reasons can make a subject unsuitable for a contract



## SUBJECT MATTER OF A CONTRACT AND ITS CONDITIONS

- Some of these reasons are as follows:
  - i. If a subject matter is not considered property of value to one of the parties, it is not suitable for forming a contract. For instance, the flesh of a dead animal is not considered a property of value to a Muslim. Therefore, this flesh is not suitable as a subject matter for a contract.
  - ii. If a subject matter is not owned by any of the parties, such as fish in the sea or a bird in the air, it is not a suitable subject matter for a contract
  - iii. If a subject matter is forbidden by the Shariah, it is not suitable for a contract. For instance, a contract is not allowed to be concluded when the subject matter is liquor



## **SUBJECT MATTER OF A CONTRACT AND ITS CONDITIONS**

### **B. Being of a Subject Matter Known to both Parties**

- Jurists basically agree that the subject matter of a contract must be known to both parties.
- It should be noted that a subject of a contract can be known and identified by the contracting parties through physical viewing at the time of the contract or before the contract or viewing a similar object with the same description.



# **SUBJECT MATTER OF A CONTRACT AND ITS CONDITIONS**

## **C. Capability of a Subject Matter to be Handed Over**

- All jurists agree that for contracts that involve the exchange of property, their subjects must be capable of being handed over at the conclusion of the contract
- Likewise, a prey is not allowed to be sold, if it has escaped following its capture because it is not possible to be handed over.
- It is not legal to conclude a contract for performing a job, which is not possible to be accomplished. For instance, a sick person is not allowed to conclude a contract with a doctor, by paying him if he is cured of a disease because nobody is capable of curing except Allah.





# SUBJECT MATTER OF A CONTRACT AND ITS CONDITIONS

## **D. Presence of a Subject Matter at the Time of Contract**

- If the subject of a contract is a tangible thing, it should normally be present at the time of the contract.
- The Prophet (pbuh) forbade the selling of a good, which does not exist.
- Therefore, a contract for the sale of an animal embryo, which is still in the womb of its mother, cannot be concluded because there is no surety that it will be born alive.
- Likewise, selling grains or fruits before their perfect appearance is not allowed because there is no surety that they will really appear and grow
- If the subject of a contract is a utility or work, its presence at the time of contract is not required.