

# Comparing the Contract Between Islamic and Indonesian Laws

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**ABSTRACT.** In the common transaction, the contract plays a crucial element made between the parties with their consent. Its importance reflects that the contract realizes the parties' agreements and that contracts are binding the parties inside the agreements. This study aims to review the contract law by analyzing the law of contract from two different laws, which are Islamic and Indonesian laws. This study finds some similarities and differences between Islamic and Indonesian laws when they come to governing contracts. Every contract in Islamic law must comply with sharia aspects, and the law derived from the Quran and Hadith. Meanwhile, based on Indonesian law, a contract can be deemed legal when it complies with the requirements stated in Article 1320 of the Indonesian Civil Code, and every Contract in Indonesian Law comes and is derived from the Indonesian Civil Code.

**KEYWORDS:** Contracts Law, Islamic Law, Indonesian Law.

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## I. INTRODUCTION

In the common transaction, the contract plays a crucial element made between the parties with their consent. Its importance reflects that the contract realizes the parties' agreements and that contracts are binding the parties inside the agreements. As a result, the contract will be binding to the parties inside the agreements. In other words, the contract becomes the rule of the game between all the parties. In a business, a contract is one of the vital importance of a business organization. Most of their business performed by making contracts are with the customers, suppliers, or employees. A contract may be defined as an agreement, enforceable at law, between two or more persons to do or refrain from doing some act or acts; the parties must intend to create legal relations and must have given something or promised to give something of value as a consideration in return for any benefit derived from the agreement.<sup>1</sup>

Charles L. Knapp and Nathan M. Crystal defined the law of contract as Our society's legal mechanism for protecting the expectations that arise from the making of agreements for the future exchange of various types of performance, such as the compliance of property (tangible and intangible), the performance of services, and the payment of money.<sup>2</sup> The definition from Charles L. Knapp and Nathan M. Crystal defines the law of contract from the mechanical aspect of the law procedure point of view. This mechanism aims to protect the hopes that arise from agreeing to the parties, such as services' performance.

In sum, the contract can be defined as an act of law, where one or more people are binding themselves or binding themselves to the other person to do something or to give something.<sup>3</sup> Moreover, there are rights and obligations for the parties to be fulfilled, which arise from the contract. No matter which law is being applied, the contract is still vital in legal transactions, even in Islamic and Indonesian law. Because without a contract, every legal transaction can be considered an illegal act. This paper aims to review the contract matters by examining how Islamic and

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<sup>1</sup> Neil Lucas, *LLB Learning Texts: Law of Contract* (Great Britain: Blackstone Press Limited, Second Edition, 1998) at 3.

<sup>2</sup> Charles L. Knapp and Nathan M. Crystal, *Problems in Contract Law Case and Materials* (New York: Aspen Legal and Business Publisher, 1993) at 4.

<sup>3</sup> Agus Yudha Hernoko, *Hukum Perjanjian: Asas Proporsionalitas dalam Kontrak Komersial* (Jakarta: Penerbit Kencana, 2010) at 18.

Indonesian laws regulating the contract, the comparison between Islamic and Indonesian laws in terms of the law of contracts.

## II. THE LAW OF CONTRACT IN ISLAMIC LAW

### *A. Definition of Contract in Islamic Law*

There are at least two terms on Al-Qur'an, which are related to the agreement, the first one is *al-'aqdu* (Akad), and the other is *al-'ahdu* (promise). From the terminology point of view, Akad means a bond or binding. It was said bond (*al-rabth*) because it affirms to gather two of the ropes' end and bind one end to another end so both of them can be united and become like a complete rope.<sup>4</sup> The word *al-'aqdu* is being mentioned in Surah *Al-Maidah: verse (1)*, which stated, "O you who have faith! Keep your agreements..."<sup>5</sup> From the translation, we can get an explanation that humans (especially for those who have faith) are being asked to fulfill their *Akad*."

Meanwhile, for the word *al-'ahdu*, it is stated on Surah *Ali Imran verse (76)*, which is outlined, "Yes, whoever fulfills his commitments and is wary of Allah —Allah indeed loves the Godway."<sup>6</sup> From the translation, we can get the explanation from that verse is Allah is like people who are keeping their promise and being devoted.

All of the *jumhur ulama* or the Islamic law scholar defined *akad* as: "connection between *ijab* and *qabul* which can be accepted by *syara'* and it caused legal consequences to the object."<sup>7</sup> Abdoerraoef said that a contract is happening through three stages. First, *Al- 'Ahdu (promise)*, which is a statement from someone to do or not to do something and have no connection with someone else's will. This promise is binding to someone who is stated that he or she will fulfill their promise.<sup>8</sup> Second, *consent*, which is the statement from the second party to do or not to do something

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<sup>4</sup> Ghufiron A. Mas'adi, *Fiqih Muamalah Kontekstual* (Jakarta: Raja Grafindo Persada, first edition, 2002) at 75.

<sup>5</sup> The Quran, Surah Al-Maidah verse 1, with the translation from <http://al-quran.info/#3>.

<sup>6</sup> *Ibid*, Surah Ali-Imran verse 76.

<sup>7</sup> Ghufiron A. Mas'adi, *supra* note 4 at 76.

<sup>8</sup> Abdoerraoef, *Al-Qur'an dan Ilmu Hukum: A Comparative Study* (Jakarta: Bulan Bintang, 1970) at 122-123.

as a reaction to the promise that was being stated by the first party.<sup>9</sup> Those consents must be according to the promise from the first party. Third, if both parties are already run two promises, then something called '*akdu*' from Surah *Al-maidah* is being happen.<sup>10</sup>

### *B. Elements of the Contract*

From Akad's definition, which is described earlier, we can understand three elements in *Akad*. First, binding between *Ijab* and *Qabul*. *Ijab* is the statement of will from one party (*mujib*) to do or not to do something. *Qabul* is the statement from the second party (*qaabil*) to accept or approve *mujib*'s will.<sup>11</sup> Second, it can be accepted by *syara*'. The *Akad* which are being conducted cannot be against the things arranged by Allah SWT in Al-Qur'an and cannot be against the things that are being arranged by Prophet Muhammad SAW in Hadits. The implementation, goals, even the object of the *Akad* cannot be against the *syara*'. If the *Akad* is against the *Syara*', then that *Akad* is invalid.<sup>12</sup> Third, having legal consequences for the object. *Akad* is one of the legal actions, or it was called *tasharruf* in Islamic Law terms. The existence of an *Akad* causes legal consequences to the legal objects promised by the parties and gives some rights and obligations that bind all the parties.<sup>13</sup>

### *C. The Source of the Law of Contract in Islamic Law*

As a part of Islamic law, the law of Contract in Islamic Law is the same as Islamic law sources. Islamic Law originated from three sources, consisting of the Quran, Hadith, and Ijtihad.<sup>14</sup> First, the Quran becomes one of the primary sources of Islamic law. Most of the law inside the Quran only regulating the general rules. Second, Hadith is the second primary source of Islamic law. Hadith can be defined as one of the various reports describing the words, actions, or habits of the Islamic prophet Muhammad. In a hadith, the law of Muamalat is more detailed if we compare it with the law in the Quran but still regulating the general rules. Third, *Ijtihad*. In

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Ghufron A. Mas'adi, *supra* note 4 at 76-77.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Gemala Dewi, *et. Al.*, *Hukum Perikatan Islam di Indonesia* (Jakarta: Prenada Media Group, 4<sup>th</sup> edition, 2013, at 39-46.

English, the word *Ijtihad* can be translated as an attempt to drive the Quran's legal ruling.<sup>15</sup> *Ijtihad* must be done using *ar-ra'yu* or human minds. Mohammad Daud Ali defined *Ijtihad* as trullu effort or *ikhtiar*, which uses all of someone's (usually a legal scholar) capabilities that pass all of the requirements to regulating rules which are not being regulated clearly or not being regulated yet in Holy Quran or *Hadith*.<sup>16</sup> An example of *Ijtihad* is in Indonesia. Since April 2000, a new body emerge called Dewan Syariah Nasional (DSN) as a part of Majelis Ulama Indonesia (MUI). This body has the responsibility of making a fatwa<sup>17</sup> Which are related to the activities of the Islamic Financial Institution in Indonesia. So, all the *fatwa* made by the DSN in Indonesia can be called the results from *Ijtihad*.

#### D. The Principle of the Contract in Islamic Law

Fathurrahman Djamil said that at least five principles are known for a contract in Islamic law. First, *Al-Huriyyah* (freedom). This is the basic principle for Contract in Islamic Law, which means that everyone has the freedom to make a contract or *Akad*. There cannot be an element of force, mistakes, and scam in a contract.<sup>18</sup> Second, *Al-Musawah* (equality). This principle means that all the parties have the same position to determine the terms and conditions of an *Akad*.<sup>19</sup> Third, *Al-'Adalah* (justice). Implementation of this principle in a contract requires all the parties to straightforward implementing the contract. They must also fulfill their obligation in the contract.<sup>20</sup> Fourth, *Al-Ridha* (Willingness). This principle stated that all the made transactions must be based on all the parties' willingness.<sup>21</sup> Fifth, *As-Sidq* (Honesty)<sup>22</sup>. This principle means that a contract or an *Akad* must be made based on all the parties' honesty and avoid what the Islamic Law calls a *Gharar* or scam.

<sup>15</sup> Collins Dictionary, online:

<<https://www.collinsdictionary.com/dictionary/english/ijtihad>>.

<sup>16</sup> M. Ali Hasan, *Berbagai Macam Transaksi dalam Islam (Fiqh Muamalat)* (Jakarta: RajaGrafindo Persada, 1<sup>st</sup> edition, 2003) at 145.

<sup>17</sup> Oxford Dictionaries, online: < <https://en.oxforddictionaries.com/definition/fatwa>, the word *fatwa* means a ruling on the point of Islamic law given by a recognized authority>.

<sup>18</sup> H. Arso, *Kumpulan Makalah Ekonomi Syari'ah*, (Jakarta: Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung Republik Indonesia, 2007), 10.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> H. Arso, *supra* note 18 at 11.

<sup>22</sup> *Ibid.*

### *E. Legal Requirements of a Contract in Islamic Law*

There are three legal requirements of a contract in Islamic law, which consist of two or more Parties who are conducting the Contract or *Akad* (the subject of the contract). Two or more parties here are two people or more who are directly involving in the contract. Both parties must pass all the requirements to be considered having the capacity to make their contract legitimate in the eye of Islamic law. Some of the requirements to be considered to make a contract are: (i) The ability to differentiate which one is bad and which one is a good thing. It means that the person already has their minds works and already *akil baligh* (or passing the puberty); (ii) Free to choice. A contract will not be legitimate if that contract is being made under force if that force can be proven; and (iii) Contract can be considered if there are no *khiyar* like *Khiyar Syarath* or *Khiyar ar-ru'yah*.

The Object of the contract. It means that the things made as an object inside the contract can be the things sold in the selling-and-buying contract, or it can be the things that are being rented in a rent contract. There are some requirements for the contract's object, consisting of (i) The object of the contract must be in a holy condition, or if the object is in a profane condition, that things must be cleaned. So, we can make a proven object, such as a dead body, as our contract object; (ii) The contract's object must be useful and according to *sharia*. Because the legal function of that object will be based on measuring that object; (iii) The object of the contract must be available to hand over. The contract will not be legitimate if the contract's object cannot be handed over to the other party because that can be categorized as *Gharar*; (iv) The party in the contract must have the (legitimate) ownership of the object of the contract; and (v) All the parties must know the form of the object of the contract.

The statement of the *Akad* or Contract (*shighat*). It can be defined as the contract's statement in the contract to shows their willingness to the contract. It was known as *Ijab* and *Qabul*. *Ijab* is the statement of will from one party (*mujib*) to do or not to do something. *Qabul* is the statement from the second party (*qaabil*) to accept or approve *mujib*'s will. The requirements of *Ijab* and *Qabul* are at least *Ijab*, and *Qabul* must be stated by someone who is reaching *tamyiz* who are realizing and knowing what they said so they could declare their willingness. In other words, it should be done by someone who is having the capacity to take legal action.

*Ijab* and *Qabul* must be fixed to the object that becomes the object of the contract. *Ijab* and *Qabul* must be done in one place where all the parties are

attending. *Shighat al-aqad* is the way that the statement or agreement is being made. For example, it can be written or orally. *Al-Ma'qud alaih / mahal al'aqad* or the object of the contract. The object of the contract will be so much, depending on the contract that will be made. For example, in a contract of selling-and-buying, the object is usually goods and services.

*Al-Muta'qidain/al'-awidain* or the parties who are involved in the contract. All the parties must be having the capacity to make a legal action, or in other words, the parties must be old enough (mature enough) and have a healthy mental and mind to make a contract. *Maudhu' al'aqd* or The aim or goal of the contract must be according to the *sharia'* or otherwise that contract cannot be legitimate.

### III. CONTRACT LAW IN INDONESIAN LAW

#### *A. Definition of Contract in Indonesian Law*

In Indonesian law, the contract law is regulated under the Kitab Undang-Undang Hukum Perdata (KUHPer or Indonesian Civil Code). KUHPer is the adaptation from Dutch's old civil code or called *Burgerlijk Wetboek* (BW). KUHPer or BW is divided into four categories, which are Buku I: Perihal Orang (Book I: About individual), Buku II: Perihal Benda (Book II: About property), Buku III: Perihal Perikatan (Book III: About Obligation), and Buku IV: Perihal Pembuktian dan Daluarsa (Book IV: Concerning Evidence and Prescription). From the categories mentioned above, The Law of the contract is being regulated in Book III.

According the Article 1313 of the Indonesian Civil Code or KUHPer<sup>23</sup> defined contract or engagement as an act according to which one or more individuals bind themselves to one another. Meanwhile, Subekti, one of the law scholars from Indonesia, defined contract or engagement as an event where someone is promising to another person who promises to do something.<sup>24</sup> Another law scholar, KRMT Tirtodiningrat, defined contract and engagement as an act of law based on an agreement between two or more people to cause legal consequences, which can be enforced by law.<sup>25</sup>

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<sup>23</sup> Gufron A. Mas'adi, *supra* note 7.

<sup>24</sup> Subekti, *Hukum Perjanjian* (Jakarta: Intermedia, 16<sup>th</sup> edition, 1996) at 1.

<sup>25</sup> A. Qirrom Meliala, *Pokok-Pokok Hukum Perikatan beserta Perkembangannya* (Yogyakarta: Liberty, 1985) at 8.

Many of Indonesia's legal scholars think that the definition of contract on Article 1313 of the Indonesian Civil Code is not complete or cannot describe a contract in detail. One of the scholars that agree with this is Suryodiningrat. He thinks that Article 1313 of the Indonesian Civil Code is not enough to describe the contract because<sup>26</sup> Law has nothing to do with every engagement. The word "act" can be interpreted in so many ways, causing legal consequences without even being mentioned. The definition from Article 1313 is only about the unilateral agreement, only one party that must do or give something, and Article 1313 of the Indonesian Civil Code is only about obligatoir agreement and cannot be used for other types of agreements.

Scholars like Setiawan think that Article 1313 of BW not only not complete but also too comprehensive to interpret. Not enough because it only mentioned the unilateral agreement. Moreover, it is too vast to interpret because using the word "act" also contains acts against the law and voluntary representation. According to that, he recommends<sup>27</sup> The word "act" must be defined as an act of law, which aims to result in legal consequences; Adding the words "or to binding each of themselves" to the Article 1313 of BW. Thus, the article should be written as "engagement is an act of law, where one or more individuals bind or binding themselves to one individual or more.

Nowadays, in Netherland, they already made changes in their old BW in the form of *Nieuw Burgerlijk Wetboek* (or NBW). So Article 1313 of BW also has some changes regulated in Book 6, Chapter 5, Article 6:213 that outlines, "a contract in the sense of this title is a multilateral juridical act whereby one or more parties assume an obligation towards one or more parties."<sup>28</sup> Based on that NBW perspective, Arthur S. Hartkamp and Marianne M. M. Tillema assumed that contract is one of the species from the act of law genus. Generally, they have defined a contract as "a juridical act, established – in compliance with possible formalities, required by the law – by the corresponding and mutually interdependent expressions of the intent of two or more parties, directed at the creation of juridical effects for

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<sup>26</sup> R. M. Suryodiningrat, *Asas-Asas Hukum Perikatan* (Bandung: Tarsito, 1985) at 72-74.

<sup>27</sup> Setiawan, *Pokok-Pokok Hukum Perikatan*, (Jakarta: Bina Cipta, 1987) at 49.

<sup>28</sup> P.P.C. Haanapel & Ejan Mackaay, *Nieuw Nederlands Burgerlijk Wetboek (Het Vermogensrecht)* (Netherlands: Kluwer Law and Taxation Publisher, 1990) at 325.



the benefit of one of the parties and to the account of the other party, or for the benefit and to the account of both parties."<sup>29</sup>

Even though the BW origin already has some changes in the old BW in the Netherlands, there are still no old BW changes in Indonesia. That means Indonesia is still using the old Civil Code with all of its shortcomings, especially the shortcomings in contracts law.

### *B. The Principle of the Contract in Indonesian Law*

Many arguments deal with Indonesia's contract law. The main principle of the law of contract in Indonesian law can be outlined as follows—first, consensualism. Consensualism is often defined as that consent (between the parties) is needed to make an agreement/contract. It means that if there is an agreement that reaches between the parties. Thus, the contract is born, even though that contract is not yet started at that time<sup>30</sup> In BW, this principle is mentioned in Article 1320 (1), states, “there must be the consent of the individuals who are bound thereby.”

Second, freedom of contract. In BW, this principle is mentioned in Article 1338 (1) of the Indonesian Civil Code:<sup>31</sup> “All valid agreements apply to the individuals who have concluded them as law.” This principle provides the parties' freedom<sup>32</sup> Whether the parties are making or not making the contract; Making a contract with anyone; Deciding the content, the execution, and the terms of the contract; and Deciding the form of the contract, whether written or orally.

Third, *pacta sunt servanda* (the binding power of the contract). The contract's binding power appears along with the Freedom of Contract principle, which manifests the patterns of human relationships that are showing the value of trust inside. Substantially, it turns out the contract's binding power binding the parties for the things that are expressly stated inside the contract and for everything required by the custom, norms, or law.<sup>33</sup> In BW, this principle is mentioned in Articles 1315 and 1340 of the

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<sup>29</sup> Arthur S. Hartkamp and Marianne M. M. Tillema, *Contract Law in The Netherlands*, (Netherlands: Kluwer Law International, 1995) at 12.

<sup>30</sup> Ahmadi Miru, *Hukum Kontrak & Perancangan Kontrak* ( Jakarta: PT Raja Grafindo, 2007) at 3.

<sup>31</sup> *Ibid.*, Article 1338 Paragraph (1).

<sup>32</sup> Salim H.S., *Hukum Kontrak: Teori & Teknik Penyusunan Kontrak* (Jakarta: Sinar Grafika, 6<sup>th</sup> edition, 2009) at 9.

<sup>33</sup> Agus Yudha Hernoko, *supra* note 3 at 128.

Indonesian Civil Code. Article 1315 outlines:<sup>34</sup> “In general, an individual may only commit to or agree to something for and on behalf of himself.” Article 1340 said:<sup>35</sup> “An agreement applies only to the parties to it.” Both Articles 1315 and 1340 above show that the contract's binding power is only reaching the parties that are agreed upon. Thus, this principle focuses on “who is being bound by the contract,” not “what is the content of the contract”<sup>36</sup>

Good Faith. In BW, this principle is mentioned in Article 1338 (3):<sup>37</sup> “They must be executed in good faith.” Black’s Law Dictionary defined good faith as:<sup>38</sup> “Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it compasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and individual's personal good faith is the concept of his mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. ... In common usage, this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation.”

### *C. Legal Requirement of Contract in Indonesian Law*

The legal requirement of the contract in Indonesian law are regulated based on Article 1320 of the Indonesian Civil Code, which stated that in order to be valid, an agreement must satisfy the following four conditions: (i) There must be the consent of the individuals who are bound thereby, (ii) There must be the capacity to enter into an obligation, (iii) There must be a specific subject matter, and (iv) There must be a legal cause.<sup>39</sup> The first and second requirements can be said as the subjective requirements or the parties' requirements in the contract. Moreover, the third and fourth requirements can be said as the objective requirements or the requirements that regulate the contract's object.

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<sup>34</sup> *Burgerlijk Wetboek*, Article 1315.

<sup>35</sup> *Ibid*, Article 1340.

<sup>36</sup> Agus Yudha Hernoko, *supra* note 3 at 130.

<sup>37</sup> *Burgerlijk Wetboek*, *supra* note 34 at Article 1338 (3).

<sup>38</sup> Bryan A. Garner, *Black's Law Dictionary*, (USA: West Publishing Co, 9<sup>th</sup> edition, 2009).

<sup>39</sup> *Burgerlijk Wetboek*, *supra* note 34 at Article 1320.

If the contract parties cannot fulfill the first and second requirements, the contract can be canceled, or one of the parties can ask for the contract to cancel. Nevertheless, the contract that is already being made still binds the parties as long as the judge did not cancel the contract.<sup>40</sup> Meanwhile, if the contract parties cannot fulfill the third and fourth requirements, the contract becomes *void ab initio*. It means that the contract is never made, and there is no engagement between the parties since the beginning. So, the parties did not have the legal standing to make a sue in front of the court.<sup>41</sup> First, consent. Consent in a contract asserts willingness between the parties about the object mentioned in the contract.<sup>42</sup> Consent can never be acclaimed if the contract was being made based on the scam, mistake, force, and misuse of the condition.

Second, capacity. Capacity means the parties in the contract must be approved by law as a subject of law. Everyone can make a contract. People who could not make a contract are people who are appointed by law.<sup>43</sup> Third, those who are not mature. In Indonesian law, there is a difference in terms of "mature," which are in a condition where someone already passed all the requirement to be called "mature" by law and those who are "maturity" which they are not mature yet, but by the law, they can be announced as mature.

Based on the Indonesian private law, someone is not mature when they do not yet reach 21 years old and yet to be married. For those who are yet to reach 21 years old, but they are already married and then already divorced, they cannot go back to the condition where they are called not mature.<sup>44</sup> Based on the Indonesian criminal code, someone can be called mature if they already reach 21 years old or are already married before they reach 21 years old.<sup>45</sup> *Adat* law did not recognize any age for someone to be called mature. Indonesian Customary law only can recognize someone's maturity based on a case by case. Capacity in Indonesian customary law means that someone can calculate and protect their interests.<sup>46</sup>

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<sup>40</sup> Frans Satriyo Wicaksono, *Panduan Lengkap Membuat Surat-Surat Kontrak* (Jakarta: Visimedia, 1<sup>st</sup> edition, 2008) at 7.

<sup>41</sup> *Ibid* at 8.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid* at 9.

<sup>44</sup> *Burgerlijk Wetboek*, *supra* note 34 at Article 330.

<sup>45</sup> Article 294 and 295 *Indonesian Criminal Code*.

<sup>46</sup> Frans Satriyo Wicaksono, *supra* note 40 at 13.

Fourth, those who are under guardianship. Someone under guardianship means that someone cannot protect interests based on law assessment, so they need someone to be their guardian.<sup>47</sup> Under some specific elements mentioned in the law, women were banned from arranging the individual contract. A long time ago, women were considered not to have the capacity to take legal action. However, overtime, following the gender equality movement, the law has been withdrawn, and now women have the right and capacity to take legal action.<sup>48</sup>

Fifth, specific subject matter. Specific Subject matter means that the object that is being ruled in the contract must be clear. This is very important to guarantee (or certainty) to all the parties and perform the contract. Besides that, it also essential to prevent the emergence of fake contracts.<sup>49</sup> These requirements are mentioned in Article 1333 of the Indonesian Civil Code, which states as follows:

“An Agreement must at least have as a subject a matter property whose nature is determined. The quantity of the matter needs not to be ascertained, insofar such quantity can be determined or calculated at a later date.”<sup>50</sup>

Sixth, permitted cause. Permitted cause means that the agreement stated inside the contracts cannot be against the law, public order, and decency.<sup>51</sup> These requirements are being mentioned in Article 1336 of the Indonesian Civil Code:

"If no cause is specified but that there is an existing permissible cause, or if there is a permissible cause other than one specified, the agreement shall be valid."<sup>52</sup>

#### *D. Legal Consequences of the Contract*

The advent of a contract-based law encourages a further legal relationship between the parties in rights and obligations. The fulfillment of those rights and obligations is the legal consequences of the contract. Those rights and obligations are the reciprocal relationships between the parties of

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<sup>47</sup> *Ibid* at 14.

<sup>48</sup> *Ibid* at 15.

<sup>49</sup> *Ibid* at 17.

<sup>50</sup> *Burgerlijk Wetboek, supra* note 34 at Article 1333.

<sup>51</sup> Frans Satriyo Wicaksono, *supra* note 40 at 17.

<sup>52</sup> *Burgerlijk Wetboek, supra* note 34 at Article 1336.

the contract. The obligations of the first party are the rights of the second party. *Vice versa*, the obligations of the second part are the rights of the first party. In other words, the contract's legal consequences are the fulfillment of that contract itself by the parties.<sup>53</sup>

#### IV. COMPARING THE CONTRACT IN ISLAMIC AND INDONESIAN LAWS

##### *A. The Process of Making the Contract*

According to Gemala Dewi, the contract's differences between Islamic and Indonesian laws deal with the engagement process. On Islamic Law, the first party's promise is separated from the promise from the second party (it is two different stages of engagement), and then after that, the engagement between the parties was made. Meanwhile, in Indonesian law, according to the *Burgerlijk Wetboek*, the promise between the first and second party is happens at the same stage, which later the engagement between those party was being made based on that promise. The most critical point that differentiates a contract in Islamic law from a contract in other law is *Ijab* and *Qabul* in every transaction or contract. When the parties' promise is being agreed upon and continue with *Ijab* and *Qabul*, then the *'Aqdu* (or engagement) was made.<sup>54</sup>

##### *B. Legal Requirements of the Contract in Islamic and Indonesian Laws*

###### 1. The Subject of the Contract

There are differences between the requirements of the subject of the contract if we see from Islamic and Indonesian laws. The differences are how Islamic Law and Indonesian Law define the 'capacity' of the contract subject. In Islamic law, the age restriction for someone to be recognized as having the 'capacity' is based on *'urf*. Nevertheless, In Indonesian Law, someone is recognized as having the capacity to reach 21 years old or already married before 21 years old. Besides those differences, both Islamic law and Indonesian Law obligate all the parties in the contract to have the 'capacity' to make the contract.

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<sup>53</sup> Frans Satriyo Wicaksono, *supra* note 40 at 18-19.

<sup>54</sup> Gemala Dewi, *supra* note 14 at 52-53.

## 2. The Statement of Will

Both Islamic Law and Indonesian Law are obligating mutual consent between all the parties to make a contract. Furthermore, based on that mutual consent, there must be a statement of will from both parties. In Islamic law, this term is called *Ijab* and *Qabul*. Generally, both Islamic and Indonesian laws have the same criteria if we are talking about the statement of will from both of the parties in the contract, but in Islamic law, there are some additional requirements to make the statement of will becomes perfect. Those additional requirements are: (i) Both of *Ijab* and *Qabul* must be stated the aim of both parties clearly; (ii) Both of *Ijab* and *Qabul* must be aligned to each other; and (iii) Both of *Ijab* and *Qabul* must be *muttashil* (must be continuous), which must be done in the same place (or in one *Majlis 'aqd*).

## 3. The Object of the Contract

Basically, both Islamic and Indonesian laws have the same substance to regulate the object of the contract. However, in Islamic law, the object of the contract cannot be against sharia. For example, in Indonesia law, we are allowed to make a selling-buying contract in which the object of the contract is an alcoholic drink. Nevertheless, in Islamic law, we cannot make the same contract because Alcohol is being prohibited by Islamic law.

Instead, some requirements in Islamic Law regulating the contract's object can be handed over and can be determined and can be transacted. Meanwhile, in Indonesian Law, the contract's object can be determined as the rights and obligations between the parties: *to give something, to make something, and to not to do something*.

## 4. The Aim of the Contract

About the aim of the contract, in Indonesian law, it was recognized as the permitted cause. Permitted cause here means that the aim of the contract cannot be against the law, public order, and decency. Meanwhile, in Islamic law, the aim of the contract is recognized as *Maudhu' al-'aqd*. It is one of the most important things that must be there in every contract. According to Islamic Law, the aim of the contract is *al-Musyarrri'*. In other words, every legal consequence made from the contract must be known by *Syara'* and cannot be against the *Syara'*, or it must be followed all the rules in Holy Quran and Hadith.

**Table about the differences between the legal requirements of the contract in Islamic and Indonesian laws.**

No.	Variable	Islamic Law	Indonesian Law
1	Subject	The capacity of the parties is based on ' <i>Urf</i> '	The capacity of the parties is decided based on maturity or age. In <i>Buergelijk Wetboek</i> , someone is mature and have the capacity when they reach the age of 21 years old or they already been married before that age
2	Statement of Will	According to <i>Ijab</i> and <i>Qabul</i>	Mutual consent or statement of the agreement
3	Object	a. can be handed over b. can be determined c. can be transacted	a. To give something b. To make something c. To not do something
4	The aim of the contract	every legal consequence made from the contract must be known by <i>Syara</i> ' and cannot be against the <i>Syara</i> ,' or all the rules must follow it in the Quran and Hadith.	the aim of the contract cannot be against the law, public order, and decency.

### *C. Comparing the Principle of Contract in Islamic and Indonesian Laws*

The first main difference in the principle of a contract between Islamic Law and Indonesian Law is its origin. In Islamic Law, the law of contract comes from the Quran and *Hadith*. Meanwhile, the law of contract in Indonesian Law comes from the Indonesian Civil Code, which is the same as the Dutch's *Burgerlijk Wetboek* (The old BW).

## V. CONCLUSION

Both Islamic and Indonesian laws have it is own set of requirements regarding the matters of contract. Every Islamic law contract must comply with every sharia aspect, and the law can be derived from Al-Quran and Sunnah. Meanwhile, based on Indonesian law, a contract can be deemed legal when it complies with the requirements stated in Article 1320 of the Indonesian Civil Code, and every Contract in Indonesian Law comes and is derived from the Indonesian Civil Code.

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