

**SUBJECT-MATTER OF CONTRACT UNDER ISLAMIC LAW  
AND COMMON LAW: A COMPARATIVE ANALYSIS**

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**FACULTY OF SHARIAH AND LAWS  
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**1438H / 2017M**

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

**SUBJECT-MATTER OF CONTRACT UNDER ISLAMIC LAW  
AND COMMON LAW: A COMPARATIVE ANALYSIS**

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**14MR605**

A thesis submitted in fulfilment  
of the requirements for the degree of  
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**FACULTY OF SHARIAH AND LAW  
SULTAN SHARIF ALI ISLAMIC UNIVERSITY  
BRUNEI DARUSSALAM**

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# **SUPERVISION**

**SUBJECT-MATTER OF CONTRACT UNDER ISLAMIC LAW AND  
COMMON LAW: A COMPARATIVE ANALYSIS**

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## DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this thesis is my own except for quotations and summaries that have been duly acknowledged.

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## **ABSTRACT**

### **SUBJECT-MATTER OF CONTRACT UNDER ISLAMIC LAW AND COMMON LAW: A COMPARATIVE ANALYSIS**

This thesis exhaustively analyses the legal principles and opinions found in Islamic law and Common law pertaining to the subject-matter of contract as an essential element. In considering this element, both legal systems have their own conditions respectively, bearing some similarities and differences. The thesis revolves around various problems such as certainty of subject-matter, ownership, deliverability and purity of the subject-matter of contract under both legal systems. For instance, the subject-matter may be acceptable in Common law whereas unacceptable in Islamic law. The main objective of this thesis is to examine the issue of subject-matter of contract under both legal systems. The thesis adopts a doctrinal research methodology/library based research. As part of the findings, the thesis finds that there are different approaches in terms of forms and conditions of subject-matter of contract under both legal systems. For example, the issue of debt as the subject-matter of contract is a contentious one under both legal systems due the element of usury/*riba*. As to the recommendations, one of the recommendations put forward in the thesis is that there is a need to relook into the issue of subject-matter of contract in terms of its legality, ownership, certainty, deliverability and purity. Hence, looking at the issue of the certainty of subject-matter of contract, the thesis recommends that if the subject-matter happens to be in form of personal labour provided by one of the parties to a contract, it should not be treated lightly in order to avoid exploitation. This is inhuman in either formal or informal contract.

## **ABSTRAK**

### **PERKARA POKOK DALAM KONTRAK DI BAWAH PERUNDANGAN ISLAM DAN *COMMON LAW*: SATU ANALISIS PERBANDINGAN**

Kajian ini secara mendalam menganalisa prinsip dan pendapat hukum yang terdapat dalam hukum Islam dan common law berkaitan dengan perkara pokok (*subject-matter*) kontrak sebagai salah satu elemen penting pembentukannya. Dalam mempertimbangkan elemen ini, hukum dalam kedua-dua sistem memiliki keadaan masing-masing yang membawa kepada beberapa persamaan dan perbezaan. Kajian ini membincangkan berbagai masalah seperti kepastian perkara pokok, kepemilikan, keboleh-serahan dan kemurnian atau kesucian perkara pokok (*subject-matter*) yang dikontrakkan, berdasarkan kedua-dua sistem hukum ini. Tujuan utama dari kajian ini adalah untuk mengkaji perkara pokok kontrak dalam kedua sistem hukum tersebut. Tesis ini menggunakan kaedah metodologi penyelidikan doktrinal atau penyelidikan berasaskan perpustakaan. Dapatan dari kajian ini telah menemukan bahawa terdapat pendekatan yang berbeza dalam bentuk dan syarat pada perkara pokok kontrak di bawah kedua sistem hukum tersebut. Misalnya, masalah hutang sebagai perkara pokok kontrak adalah suatu isu perbalahan di bawah kedua sistem hukum kerana ia mengandungi unsur riba. Salah satu di antara cadangan-cadangan yang diajukan dalam tesis ini adalah keperluan untuk menilai kembali isu perkara pokok dalam kontrak berkaitan hal kesahihannya di sisi undang-undang, kepemilikannya, kepastiannya, keboleh-serahannya dan kemurnian atau kesuciannya. Oleh kerana itu, melihat kepada isu kepastian pada perkara pokok kontrak, tesis ini mencadangkan bahawa jika perkara pokoknya adalah dalam bentuk khidmat peribadi yang diberikan oleh salah satu dari pihak dalam kontrak, hal itu seharusnya jangan dipandang ringan untuk menghindari eksploitasi. Perkara sebegini adalah tidak berperikemanusiaan baik dalam kontrak formal maupun kontrak tak-formal.

## ملخص البحث

### عقد المعقود عليه في إطار الشريعة الإسلامية والقانون العام: تحليل مقارنة

يُحلّل هذا البحث بشكل شامل المبادئ التشريعية، والآراء الموجودة في الشريعة الإسلامية والقانون العام بخصوص عقد المعقود عليه بوصفه عنصراً رئيساً مهماً. وعند النظر في هذا العنصر نجد أن لِكِلا النظامين التشريعيين ظروفه الخاصة مع وجود بعض أوجه الشبه وأوجه الاختلاف بينهما. يدور البحث حول مشكلات مختلفة، مثل: يقينية عقد المعقود عليه، وملكيته، وتسليمه، ونقائه في إطار كلا النظامين التشريعيين. على سبيل المثال، قد يكون عقد المعقود عليه مقبولاً في القانون العام بينما يكون غير مقبول في الشريعة الإسلامية. والهدف الرئيس من هذا البحث هو دراسة قضية عقد المعقود عليه في إطار كلا النظامين التشريعيين. يتبنّى البحث المنهجية البحثية المكتبيّة. وأمّا من حيث الاستنتاجات، فيرى البحث أن هناك مناهج مختلفة من حيث أشكال عقد المعقود عليه وشروطه في إطار كلا النظامين التشريعيين. وعلى سبيل المثال، مسألة الدين إذ عقد المعقود عليه مسألة مثيرة للجدل في إطار كلا النظامين التشريعيين بسبب عنصر الربا. وفيما يتعلق بالتوصيات، فإن إحدى التوصيات الواردة في البحث هي أن هناك حاجة إلى إعادة النظر في مسألة عقد المعقود عليه من حيث شرعيته، وملكيته، وثباته، وإمكانية تسليمه، ونقائه. وبالتالي، بالنظر إلى قضية يقينية عقد المعقود عليه، يوصي البحث أنه إذا حدث عقد المعقود عليه في شكل عمل شخصي قدّمه أحد الأطراف في العقد، فإنه لا ينبغي أن يعامل بخفة من أجل تجنّب الاستغلال. وهذا أمر غير إنساني سواء في عقد رسمي أو غير رسمي.

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## GLOSSARIES

VOCABULARY	CONNOTATION
<i>Abbassid</i>	The third of the Islamic caliphates to succeed the Prophet Muhammad.
<i>AkhlÉqi</i>	Means morality or behaviours.
<i>Al-IjÉra</i>	Is the contract of lease with payment in Islamic transaction.
Allāh	It is the perfect name for God as it truly denotes the absolute Oneness of God.
<i>Al-Muatah</i>	Means the Display of goods in sale.
<i>Al-MuzÉyadah</i>	Means the Auction in sale.
<i>Al-Najsh</i>	Means a Tricky
<i>Al-Qur 'ān</i>	It is the Holy Book, the Living Miracle, revealed from Allāh as guidance to mankind through the Holy Prophet Muhammad (PBUH)
<i>Al-Tirmidhī</i>	One of the six major <i>aḥadīth</i> collections that were collected by Abū 'Īsā Muḥammad ibn 'Īsā al-Tirmidhī.
<i>'Amaliyyah</i>	Means the practice or conduct.
<i>'AqÉdah</i>	The law concerns with the faith
<i>AqÉdain</i>	Two parties of contract.
<i>Aqil</i>	Means a sane person.
<i>'Ardh-l biĪÉi wal-khidmÉt</i>	Means the display of goods and services
<i>Aṣl</i>	Principle / origin, the point where something begins or arises.
<i>bÉligh</i>	The bodily matured person
<i>Diyah</i>	The form of reparation/damage upon strict liability paid toward the injured party
<i>Far</i>	The object to deduct new analogy in Islamic law
<i>Ḥadīth</i> (pl. <i>Aḥādīth</i> )	Are traditions of the Holy Prophet Muhammad (ﷺ), giving important information about his life. They are usually narrations about a certain incident in which he said or did or allowed something.
<i>Ḥalāl</i>	Is something that is lawful and permissible to use/consume in Islam by Muslims.
<i>Hukm</i>	The final rule attained by the means of <i>QiyÉs</i>
<i>Huquuq al-ma'nawiyyah</i>	Means the ownership through intellectual property right.
<i>'IbÉdah khasĪah</i>	Means conducting specific ritual.
<i>'IbÉdat</i>	The act of being submissive to <i>Allah</i> and doing good deeds with intent to get reward in it.
<i>'Atah</i>	The state of mind of person who has temporary mind illness.
<i>ÔjÉb</i>	Means the offer proposed from one party to another
<i>Ijārah</i>	A leasing agreement whereby an investor lease an asset to a customer over a specific period of time under consideration.

<i>Ijma'a</i>	The consensus of legal opinion held by the Muslim jurists, it is applied as the source of Islamic law
<i>Ijtihād</i>	Means effort made by the Scholars to find the solution.
<i>Ikrāh</i>	Means the action of coercion or threat.
<i>Ibn</i>	Means “the son of”
<i>Illah</i>	The reason to find the deduction of new analogy.
<i>Istihṣān /Maslah mursal</i>	The decision made by Muslim jurists where there is no reference from the previous authorities, but it bases in justice and public interest and welfare. It is applied as the source of Islamic law.
<i>Istis-hāb</i>	The legal presumption of continuance of past legal rule existed. Its implication continues until the contrary is proved. It is applied as the source of Islamic law.
<i>Istiṣnā</i>	A contract of acquisition of goods by specification or order where the price is paid progressively in accordance with the progress of a job.
<i>Junūn</i>	The state of mind of person who has permanent mind illness
<i>Kadhi</i>	Judge ruling in accordance with the Islamic law, Sharia.
<i>Khilabah</i>	Misrepresentation of fact or law.
<i>Ma'qūd 'alayh</i>	Means the Subject-matter of contract.
<i>Madrasa</i>	The Arabic word for an educational institution. Usually refers to an Islamic school.
<i>Majlis</i>	Means whatever agreed place for the contractual parties to meet, conduct and conclude the contract.
<i>Makrāh</i>	Disapproved conduct, but it is not mentioned in the punishment of Islamic law.
<i>Maradh al-maut</i>	The condition of illness of person nearly to death.
<i>Mu'amalat Ammah</i>	Means conducting general practice.
<i>Muḍārabah</i>	A commercial association whereby an investor ( <i>rab al-māl</i> ) entrusts capital to an agent ( <i>muḍārib</i> ) who trades with it and shares with the investor a pre-determined proportion of the profits. Losses incurred in the venture are the responsibility of the investor; the agent loses his time and effort.
<i>Mukallaf</i>	A person who is subjected to the law by being imposed the part of Allah's obligations.
<i>Mumayyiz</i>	The age of person who is capable of reasoning
<i>Murābahah</i>	A mark-up contract, a permissible form of sale in Islam that allows a purchaser to buy with the intention of subsequently reselling to a designated buyer with a fixed profit rate.
<i>Mushārahah</i>	A contractual partnership, committed to commercial operations traditionally known to Islamic jurisprudence, as opposed to a proprietary partnership.
<i>Mushārahah</i>	A contract of partnership that allows one or more partner to give a right to gradually own his share of the asset to the remaining partners based on agreed terms.

<i>Mustahab/Mandub</i>	Means the optional recommended things when done is rewarded, but its omission is not punishable.
<i>NisyĒn</i>	The person who has problem of forgetfulness.
<i>Ottoman Empire</i>	The political and geographical entity governed by the Muslim tribe in Turkey after 1071.
Prophet Muhammad(ﷺ)	The name of the Last Messenger of Allāh to mankind.
<i>QabĒl</i>	The Acceptance from the one to whom the offer is made.
<i>Qiyas</i>	The analogical deduction applied by the Muslim jurists to reach decision in new inference alike in the law from the previous one. It is applied as the source of Islamic law.
<i>Ra'y</i>	Means an opinion.
<i>Ribah</i>	Means any form of illegal interest.
<i>Rushdi</i>	Means the prudence of person
<i>Shāfīī</i>	Is the school of religious jurisprudence founded by Muḥammad ibn Idrīs al- Shāfīī.
<i>Sharia</i>	Means the rules and regulations of Islam, the divine Law. Sharia is the totality of Allāh's Commandments relating to man's activities.
<i>Sighah</i>	Any form in contract whereby the wishes of every party are represented.
<i>SakrĒn</i>	The state of person who deliberately has consumed intoxicant substance and become affected.
<i>Sunnah</i>	The deduction of rule from the saying or observation presented to a Muslim from Prophet Muhammad (PBUH).
<i>Takaful</i>	Mutual insurance based on Islamic laws.
<i>The Mejelle/Al-Majallah</i>	The complete code of Islamic civil law of Ottoman Empire in the late 19 <sup>th</sup> and early 20 <sup>th</sup> centuries.
<i>Tufulah</i>	The minor age who is incapable of reasoning, especially below seven years.
<i>'Ulamā /'Alim</i>	Islamic religious scholars
<i>Umayyad</i>	The second of the four major Islamic caliphates established after the demise of Prophet Muḥammad.
<i>Ummah</i>	Muslim community, it is a special name given to Muslim brotherhood and unity.
<i>Urf</i>	The customs possessed by a particular community or society.
<i>WEjib</i>	Means the compulsory duty in Islam.
<i>Zakāh</i>	A charity tax (a compulsory contribution to those who obliged to pay), and one of the five pillars of Islam.

### TRANSLITERATION

CONSONANTS		CONSONANTS	
Arabic	Roman	Arabic	Roman
ء	'	هـ / هـ	h

ب	B	و	w
ت	T	ي	y
ث	Th		
ج	J		
ح	H / ħ	<b>SHORT VOWEL</b>	
خ	Kh	<b>Arabic</b>	<b>Roman</b>
د	D	ـَ	a
ذ	Dh	ـِ	i
ر	R	ـُ	u
ز	Z		
س	S		
ش	Sh	<b>LONG VOWEL</b>	
ص	Ṣ / ṣ	<b>Arabic</b>	<b>Roman</b>
ض	Ḍ / ḍ	ـَ / ـِ	ā
ط	Ṭ / ṭ	ـِ	ī
ظ	Ẓ / ẓ	ـُ	ū
ع	‘		
غ	Gh		
ف	F	<b>DIPHTHONG</b>	
ق	Q	<b>Arabic</b>	<b>Latin</b>
ك	K	ـَ و	aw
ل	L	ـِ ي	ay
م	M	ـِ ي	iyy
ن	N	ـُ و	uww

## LIST OF ABBREVIATIONS

A.C	Appeal Cases
A.I.R	All India Reporter
A.L.R	Australian Law Reports
A.M.R	All Malaysian Reports
All E.R	All England Law Reports
Anor.	Another
AS	<i>'Alayhi al-Salām</i>
CA	Court of Appeal
CAP	<i>Capitulus</i> “Chapter”
Ch. D	Chancery Division
e.g.	<i>exempli gratia</i> “ for example”
E.R	English Reports
Ed.	Editor
Ed.	Edition
<i>et al.</i>	<i>et alia</i> “and others”
etc.	et cetera “ and other things”
FC	Federal Court
H	After Hijrah
H.LR	House of Lord Reports
i.e.	<i>id est</i> “that is”
IBFIM	Islamic Banking and Finance Institute Malaysia
<i>ibid</i>	<i>ion beam induced deposition</i> ‘in the same place’
Inc	Incorporation
K.B	Kings Bench
km	Kilometre
M	After the Death of Christ
n.d	no date / no year
n.pb.	no publisher
n.pl.	no place
N.Z.L.W	New Zealand Law Reports
No.	Number
<i>Op. cit.</i>	<i>opus citatum est</i>
p.	Page
PBUH	Peace Be Upon Him
pl.	plural
pp.	Pages
Q.B.D	Queen Bench Division – Law reports
Sq.	Square
TZS	Tanzania Shilling

UNISSA	Sultan Sharif Ali Islamic University
Vol.	Volume

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The Penal Decree Act (Cap. No.6) of 2004, Laws of Zanzibar;

The Contract Act (Cap No. 149) Laws of Zanzibar;

The Sale of Goods Act (Cap No. 150) Laws of Zanzibar;

The Clove Act (Cap. No.11) of 1985, Laws of Zanzibar;

The Land Tenure (Amendment) Act of 2003, Laws of Zanzibar;

The United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980.

# CHAPTER 1

## INTRODUCTION

### 1.1. Introduction

This first chapter has focused on a preliminary introduction of the subject concerned with this research. The general overview is followed by analysis of the whole study. This chapter has been subtitled into nine segments. The first segment concisely touched on the background of the study. After that, segment of definition of the terms which have been mostly argued throughout analytical discussion of this research paper. The segment after is the scope of the research which has shown the boundaries in terms of law and areas covered in the relevant materials for this research. The fourth segment is the research problem which has acted as a catalytic spark to establish and develop this research paper. The next segment is the research questions which have addressed the relevant issues which is discussed later concerning with Common law contract and Islamic law contract, historical development of contract and subject-matter of contract. The research objectives segment has been specified in correspondence with research questions. The literature review as well has flashed back the review of the previous materials studied to improve this research. The segment of methodology has come after that showing the type of research, the technicality of data collection, and method which has been applied in this research. Finally, it ended up with the segment of significance of the study. This has shown the importance of this research. It has a very prominent connection to the whole analysis of this study, because when we examine the general overview of this research, we will see that the Islamic law and Common law has a proximity, and Islamic law possesses winning remarks and Common law has been influenced by the Islamic law, and it has been in close relation as we try to find in this thesis, as far as we have gone into in-depth investigation as to what is the contract under Islamic law and Common law.

When we come to the analysis of this research paper as well, we find that Common law also having the trend of the Islamic law and some of the influence of Islamic law, mostly developed during the several periods mainly during the era of Sicily and Norman Conquest. Currently, in the analysis of this research we have tried to find out the relationship between Islamic law and Common law in law of contract, and furthermore, the critical analysis of similarities and dissimilarities in terms of the subject-matter of

contract in respect to both legal systems. Reliable references from the applicable laws in respect to the subject-matter from the scope of countries research area coverage, particularly Zanzibar and Brunei Darussalam. From the legal systems of these countries we have found the position of Common law contract and Islamic law contract essences in respect to importance of subject-matter, the weak points and strengths, double standard in considering the subject-matter of contract, external/physical and internal/spiritual features which are regarded in choosing the subject-matter of contract.

## **1.2. Background of the Study**

A contract is a legal agreement of two or more people or entities, which contains specific terms, in which there is a promise to do something in return for valuable benefit, and that we can call it as a consideration.<sup>1</sup> Strictly speaking, it is an agreement between two or more parties that is legally binding on them.

Under the Islamic law point of view, the term contract means legal transaction which involves any bilateral declaration generally must consists of offer and acceptance.<sup>2</sup>

In Common law view, in order for the contract to be completed, the elements such as competent parties, offer and acceptance, agreement, intention to create legal obligation, subject-matter, and consideration are to be taken into account in establishment of a rightful contract.<sup>3</sup>

This research has discussed the concept of contract and elements of contracts under Islamic law and Common law. In a way of dealing with several legal concepts and perceptions about law of contract, there are some legal principles and aspects from those two laws are relatively shared by both legal systems in their aspects and even in their application, and also there are those which they partially or totally differ from one to another.

Subject-matter is among an essential element of valid contract which comprises of a something on which both contractual parties tend to focus to it while creating a contract.

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<sup>1</sup> Collins H. (2003). *The Law of Contract*. (4<sup>th</sup> ed). London: LexisNexis. p. 58.

<sup>2</sup> Baamir Y. A. (2016). *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*. London: Routledge Taylor & Francis Group. p. 67.

<sup>3</sup> Collins H. (2003). *The Law of Contract. Op. Cit.* (4<sup>th</sup> ed). p.59.

It can be goods or services, depending upon a type of contract. Both Islamic law and Common law regard the subject-matter as the important element of a contract.

However, the researcher has chosen this topic and tried to lay down foundation by describing several elements of the contract, then critically analysed the subject-matter in both legal systems. This has been regarded so because of its affiliation with other elements and its important position in contract, as it presents an inner core element of any contract in both Common law contract and Islamic law contract.

Basically, in this era we are going through a revolutionary and evolutionary age. In relation to the subject-matter of the contract, numerous changes have taken place. Some of the changes are really positive and help us in dealing with our day to day activities. However, there are also changes of negative nature which are hardly acceptable by any of the two legal systems.

The comparative analysis of the subject-matter as the element of contract will help us locate the law which excels. In other words, an effort has been made to see whether Islamic law or Common law is comparatively better to deal with new emerging situations in relation to the subject-matter of a contract.

The study is indeed timely as it will create awareness among the readers to understand the relationship between Islamic law and Common law in respect of Contract Law. Also, the readers will know the importance in terms of similarities and differences of subject-matter of contract as an essential element under both legal systems, especially by looking at some contemporary legal positions and developments.

### **1.3. Definitions of Terms**

**Contract under Common law:** it is an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration.<sup>4</sup>

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<sup>4</sup> Rundell M. (2002). *Macmillan English Dictionary for Advanced Learners*. London: Macmillan Education, p. 293.

**Contract under Islamic law:** it is an engagement and agreement between two parties in a legally accepted, impactful and binding manner.<sup>5</sup>

**Subject-matter under Common law:** The subject-matter of a contract is the issue presented for consideration, the thing in which a right or duty has been asserted, or the thing in dispute.<sup>6</sup>

**Subject-matter under Islamic law:** The subject-matter of a contract includes everything which is in existence at the time of the contract, and can be delivered, and be ascertained, and be suitable for transaction according to Sharia.<sup>7</sup>

**Brunei Darussalam national context:** Brunei Darussalam, a Malay Islamic Sultanate, lies on the northwest coast of Borneo island where it faces the South China Sea. Brunei has approximately a land area of 5,765 square kilometres, it shares a common border with Sarawak, an east Malaysian state, which divides Brunei Darussalam into two; the eastern part is the Temburong District while the western portion consists of Brunei-Muara, Tutong and Belait districts.<sup>8</sup>

The 570 square km Brunei-Muara District, where the capital Bandar Seri Begawan is located, is the smallest but the most important and populous of the four districts.<sup>9</sup> Brunei gained its total sovereign independence on 1<sup>st</sup> January 1984.<sup>10</sup> The total population of Brunei Darussalam according to 2011 census was 393,372 persons, male population was 203,149 and female population was 190,223.<sup>11</sup> The majority number which is 78.8% of the population are Muslims, they are 309,963.<sup>12</sup> The huge race group is Malay which consists of 258,465 persons, then followed by Chinese 40,534 persons and other races 94,373 persons. The annual rate of increase was 1.7 per cent.<sup>13</sup>

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<sup>5</sup> Aun W. M, & Vohrah B. (2004). *The Commercial Law of Malaysia*. Petaling Jaya: Longman Malaysia. p. 6.

<sup>6</sup> Garner B.A. (2007). *Black's Law Dictionary* (8<sup>th</sup> ed). Thomson West: West Publishing Com. p.1466.

<sup>7</sup> Kamali M.H. (1999). *Principles of Islamic Jurisprudence*. (2<sup>nd</sup> ed). London: Islamic Text Society. P.22.

<sup>8</sup> International Business Publications. (2015). *Inc Brunei Country Study Guide: Strategic Information and Developments*. (Vol. 1). p.10. Retrieved August 20, 2014 from International Business Publications Inc. Web site: [http://www.bruneidirecthys.net/about\\_brunei/geography.html](http://www.bruneidirecthys.net/about_brunei/geography.html).

<sup>9</sup> Ibid.

<sup>10</sup> Department of Statistics. (2011). *Brunei Darussalam Statistical Yearbook*. Bandar Seri Begawan: Prime Minister's Office. pp. 2-21.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

**Zanzibar National Context:** Zanzibar comprises of two islands of Unguja and Pemba with a number of islets adjacent thereto. Zanzibar is located in the Western Indian Ocean (East Africa) just of a coast of Tanzania. It lays between Latitudes 4 and 5 degrees south and longitudes 39 and 40 degree East.<sup>14</sup> Unguja Island, its area is about 1660 square km (640 square miles). The Pemba Island possesses the area of 985 square km (380 square miles). The 99% percents of people who are inhabitants of Zanzibar are Muslims.<sup>15</sup> According to 2012 census, the current population is approximately 1,303,569.00; of which 630,677.00 are male while 672,892.00 are female.<sup>16</sup> The population growth rate increased from 2.7 percent in 1967 to 3.1 in 2002 and then turned down to 2.8 percent in year 2012.<sup>17</sup> Zanzibar is part of the United Republic of Tanzania which was formed through independent states, that is Zanzibar and Tanganyika.<sup>18</sup> Administratively Zanzibar has an autonomous Government for matters that are not part of the union agreement, inclusively Islamic law matters.<sup>19</sup> Zanzibar is composed of five Regions. There is North Region Unguja, South region Unguja, Urban region Unguja. North region Pemba, and South region Pemba.<sup>20</sup>

#### **1.4. Scope of the Research**

This research focused on the issue of subject-matter of contract under Islamic law and Common law, specifically touching on various transactions such as buying, selling, hiring, pawning, mortgaging, service provision and other related things. The laws covered in this research are Islamic law and Common law in the context of contract law. Although both legal systems in this research/study covered only portion of formation of contract, however, it did not touch on the issue of discharge of contract, because the study was mainly concerned with the preliminary formation of contract.

In this research, the area coverage included only Muslim countries, and other Common law countries with special reference to Brunei Darussalam and Zanzibar. These were

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<sup>14</sup> National Bureau of Statistics (NBS) and Office of Chief Government Statistician (OCGS), Zanzibar, (2013). *2012 Population and Housing Census: Population Distribution by Administrative Units; Key Findings*. Dar es Salaam: NBS and OCGS. pp.1-10.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Kassim A. A, Hassan O. A. (2004). *Zanzibar*. Retrieved November 11, 2015, from Zanzinet Forum Web site: <http://www.zanzinet.org/zanzibar/visiwa.html>.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

the places where the researcher could access the information from primary and secondary sources. In case of secondary sources, information could also be obtained from various countries where the relevant materials or facts concerned with this research were available.

Besides Islamic law and Common law, the research also focused on contemporary changes in relation to subject-matter of contract especially in regard to this modern world. For example, issue of the legality of selling of human organs for medical transplantation as a subject-matter of contract.

### **1.5. Research Problem**

Modern legal systems have incorporated several changes regarding to contract law. Nations including Muslim nations have also developed and reformed many concepts in relation to contract and its elements. New meanings have been assigned to Shariah originated concepts. Therefore, the following are the research problem:

Firstly, understanding the operation of contract under both legal systems; failure to identify how Islamic law and Common law operate lead to confusion. For example, Haqqi in his research mentioned that the subject-matter in Islamic law is related to consideration in Common law as far as the contract is concerned.<sup>21</sup> Therefore, there is a needed to understand the historical development of contract law.

Secondly, Rights as a form of subject-matter of contract;<sup>22</sup> some forms especially those associated directly with human being endanger the status of contract law. For instance, involves of human organs to be the subject-matter of contract. Novelli in his paper mentioned that, more than five thousand human organs were taken from convicted and sentenced criminals for purpose of transplantation in China.<sup>23</sup> He added that human law solely could never be able to link the law with justice.<sup>24</sup> Therefore, there is the need to discuss the legality of the Rights as the form of subject-matter of contract.

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<sup>21</sup> Aji Haqqi A. R. (2009). *The Philosophy of Islamic Law of Transactions*. Kuala Lumpur: CERT Publications Sdn. Bhd. p.38.

<sup>22</sup>Benson P. (2001). *The Theory of Contract Law: New Essays*. London: Cambridge University Press. p.199-200.

<sup>23</sup>Novelli G. (2007). *Is Legalizing the Organ Market Possible?*. New York: Elsevier Inc. 360 Park Avenue South.

<sup>24</sup> Ibid.

Thirdly, certainty of subject-matter of contract; upon an ascertainment of the subject-matter when a part of subject-matter is forbidden or indistinct thing and other part is legal or lawful, there is a controversial legal position to this circumstance as far as Islamic law and Common law is concerned. The problem is whether to take all or leave all, or to take part which is legal (pure) and to leave the forbidden (impure) one. For example, soft drinks contained 0.1% of alcohol was decided by Mufti Haji Awang Abdul Aziz bin Juned of Brunei Darussalam that is not *halal* drink and not permissible to be subject-matter of contract based on Islamic law, while in Common law it was decided in the case of *Pitts v. Highland Construction. Co*<sup>25</sup> that the legal part of the subject-matter prevails. Therefore, there is importance to substantiate and analyse this legal status.

### **1.6. Research Questions**

- a) What is the historical development of contract under Islamic law and Common law?
- b) What are the issues related to the subject-matter of contract under Islamic law and Common law?
- c) How far is the subject-matter of contract similar and different under Islamic law and Common law?
- d) What holistic approaches can be adopted regarding the issue of subject-matter of contract under Islamic law and Common law?

### **1.7. Research Objectives**

- a) To study the historical development of contract under Islamic law and Common law.
- b) To analyse the issues of subject-matter of contract under Islamic law and Common law.
- c) To examine the similarities and differences regarding subject-matter of contract under Common law contract and Islamic law contract.

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<sup>25</sup> 1953) 1 All E.R 324 20. 25.

- d) To recommend holistic approaches on the issue of subject-matter of contract under Islamic law and Common law.

### 1.8. Literature Review

Numerous works have been written about contractual agreements, different authors have done their efforts diligently on the issue of subject-matter of contract. However, the most related works are;

Razali in the book “*Islamic Law of Contract*” (2010)<sup>26</sup> has shed light on issues relating to formation of contract, and explained in detail the subject-matter as an element of contract in Islamic law. For instance, Islamic law insists that the subject-matter must actually exist at the time of conclusion of contract. If the subject-matter is not in existence, then contract is void even though it could exist in future.

In the light of this basic rule regarding the subject-matter, the author discussed other features of the subject-matter of a contract in Islam. However, this work has dealt with only one legal system whereas this research focuses on two different legal systems.

Haqqi in his book “*The Philosophy of Islamic Law of Transactions*” (2009)<sup>27</sup> has explained the conditions in relation to the subject-matter of a contract (*Al-Ma’qĒd Alayh*). The author is in the view that subject-matter of a contract in Islamic law perspective is a substance which the parties to an agreement promises to do or the thing one party gives in return for the act or promise of another. In this book, the author also mentioned that the subject-matter of contract is similar to consideration in Common law, but there is no discussion to show how far they are similar and different from both legal systems. In this research, the researcher is going to analyse the relationship in term of similarities and differences in the aspect of contract as far as they are essential elements of contract in both legal systems.

Obeid in the paper “*Particularity of the Contract's Subject-Matter in the Laws of the Arab Middle East*”<sup>28</sup> (1996), the author mentioned the element of subject-matter under

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<sup>26</sup> Razali S. S. (2010). *Islamic Law of Contract*. Singapore: Cengage Learning Asia Pte Ltd, 5 Shenton Way, UIC Building Singapore. p.36.

<sup>27</sup> Aji Haqqi A. R. (2009). *The Philosophy of Islamic Law of Transactions*. Kuala Lumpur: CERT Publications Sdn. Bhd. p.24.

<sup>28</sup> Comair-Obeid N. (1996). *Particularity of the Contract's Subject-Matter in the Laws of the Arab Middle East*. Arab Law Quarterly: Brill (Vol. 11). No. 4. p.233.

Western laws, particularly French law. Under such legal system, he has explained that anything can be subject-matter of a contract provided that parties of contract willingly agree on it.

This work, however, did not deal with contemporary issues relating to subject-matter. It mainly dealt with the law as it was and not with the law as it is or should be according to the environment, for instance, those conditions of the subject-matter to be legal and enforceable by the law. Moreover, there were no distinguishable factors to determine between legal systems mentioned therein with other legal systems in order to identify the potential of that condition. This research paper provides with two legal systems in this contemporary time, that is Islamic law and Common law in respect of the contract and its potentialities of their essential conditions, especially the subject-matter of the contract.

Abdullah in the paper "*Fraud And Deceit: Comparative Law Issues Islamic Law Of Contracts*" (2013), this paper has dealt with the concept of fraud and deceit with reference to legal theories i.e. Islamic law and Common law. However, he highlighted several angles on the issues of uncertainty of subject-matter which render the contract void or voidable under Islamic law of contract.

The researcher has explained uncertainty in relation to quantity, quality, and place of delivery. The researcher mentioned all these uncertainties. This study however, does not deal with the aspect such as the position of hoarding of commodities in order to monopolize market price under Islamic law and Common law perspective. Through this research, the subject-matter of a contract under both laws are analysed and concluded with the standing position of both legal systems as far as the certainty of the subject-matter is concerned.

El Islamy in her study "*Al-Aqd*"<sup>29</sup>(2008) has explained the conditions of Islamic contract laid down by Muslim jurists, and described them. In relation to Subject-matter of contract, the article has emphasized that it must be in existence at the time of the contract, it must be deliverable, ascertainable, and suitable for transactions according to

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<sup>29</sup>El Islamy H. (2008). *Al-Aqd*. (n.pl). p.13. Retrieved December 03, 2014, from Kantakji Web site: <http://www.kantakji.com/media/8285/n317.pdf>.

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