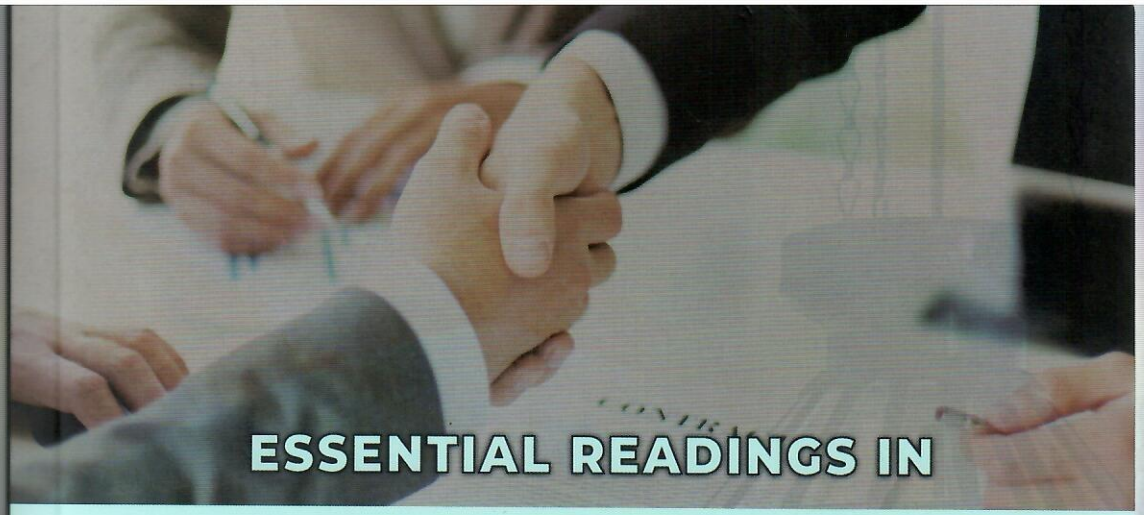
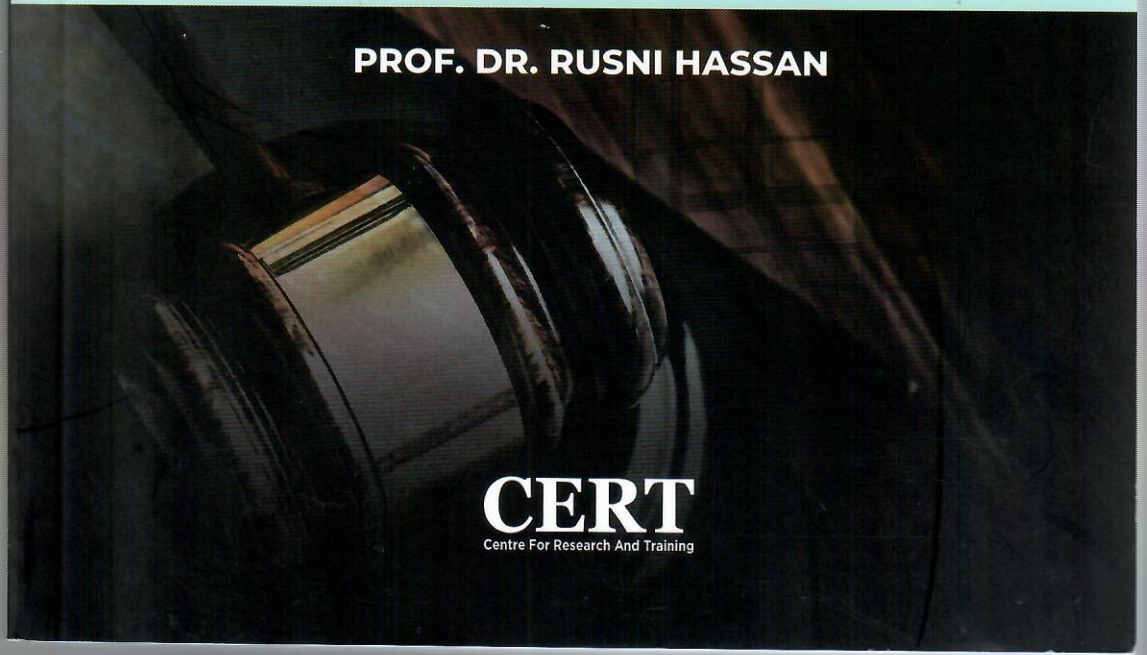


ESSENTIAL READINGS IN

TERMINATION OF CONTRACTUAL OBLIGATION IN ISLAMIC COMMERCIAL LAW

PROF. DR. RUSNI HASSAN



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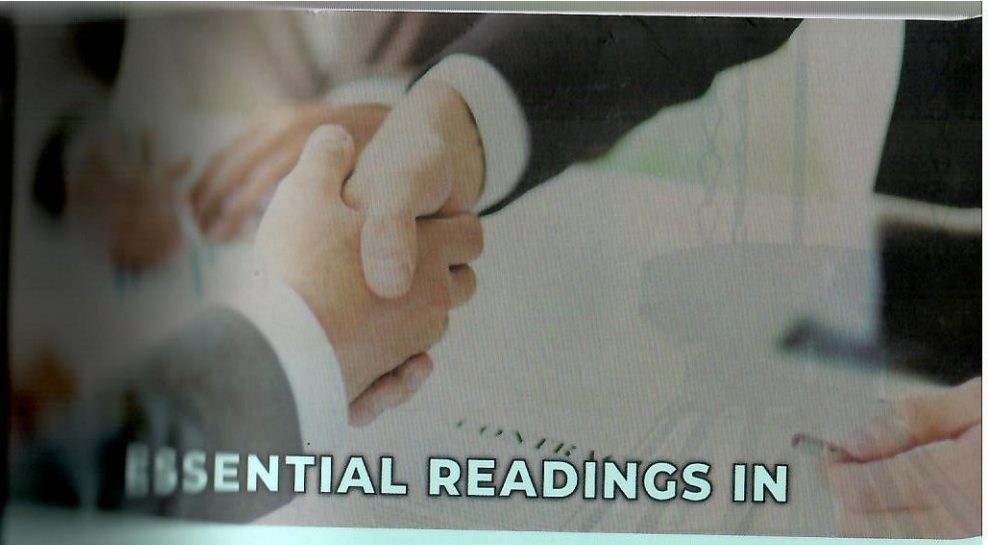
ESSENTIAL READINGS IN

TERMINATION OF CONTRACTUAL OBLIGATION IN ISLAMIC COMMERCIAL LAW

The content of this book is mainly on the modes and procedures of termination of contractual obligation from the Shariah perspective or known as suqut al mujabat. The discussion starts with the introduction on the concept of contractual obligation (iltizam) and its relevant concepts. This is followed by deliberation on the modes of termination of contractual liabilities that parties to a contract can use if they wish to relinquish or terminate their financial or contractual liabilities and/or obligations. The prescribed Shariah methods for this purpose includes the fulfillment or performance (al-ija'), the waiver or release (al-ibra'), novation (tajdid al-mujabat), set-off (tajdid al-muqassah), fusion of liabilities (ittibad al-dhimmah) and overdue of such obligation by means of limitation period (al-taqadum). The discussions examines and analyse the concepts by referring to the views of scholar that are available in the rich literature of early and contemporary Muslim scholars (fuqaha'). The book ends with the cerebration on the applicability of such principles and concepts into the contemporary commercial transactions particularly Islamic banking and finance.

Published by
CERT
PUBLICATIONS

ISBN 978-967-0175-16-4



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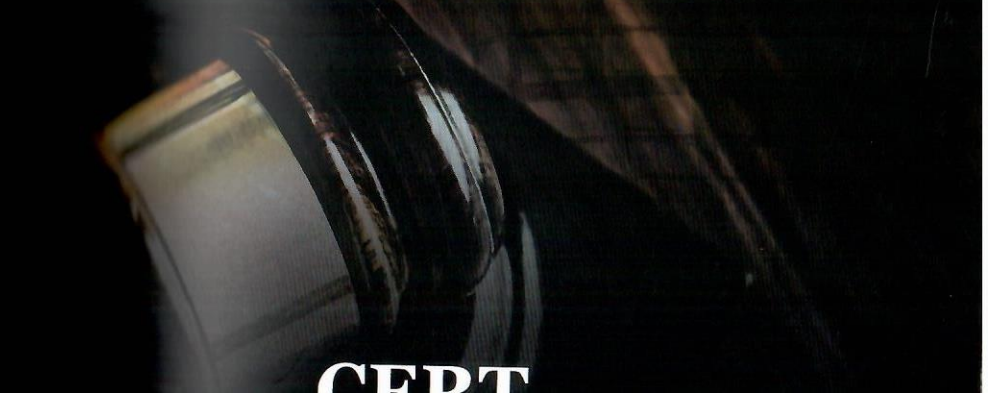

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ESSENTIAL READINGS IN

TERMINATION OF CONTRACTUAL OBLIGATION IN ISLAMIC COMMERCIAL LAW

by

RUSNI BINTI HASSAN

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Perpustakaan Negara Malaysia Cataloguing-in-Publication Data

Rusni Hassan, Prof., Dr.
ESSENTIAL READINGS IN TERMINATION OF CONTRACTUAL OBLIGATION IN ISLAMIC COMMERCIAL LAW / by: RUSNI BINTI HASSAN.
ISBN 978-967-0175-16-4
1. Commercial law (Islamic law).
2. Finance (Islamic law).
3. Economics--Religious aspects--Islam.
I. Title.
428.2

Published by
CERT Publications Sdn. Bhd. (612565-D)
277-B, Jalan Bandar 11
Metro Melawati
53100 Kuala Lumpur, Malaysia

Tel: (603) 4108 1439
Fax: (603) 4106 1549 / (603) 4147 5140
Email: info@cert.com.my / admin@certpublications.com
Website: www.cert.com.my / www.certpublications.com

ISBN: 978-967-0175-16-4

Publications & DTP Team
Executive Managing Editor: Abdul Aziz Abdul Jalal
Publication Coordinator: Nursyahriah Aini Khirudin
Designer & Layout: Mohd Hasmi Hamidi

Printed in Malaysia by
MASHI Publication Sdn Bhd

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Her works and contribution to Islamic Finance industry has been recognized internationally when she was listed among the Top 10 Women in Islamic Finance by CPI Financial in 2013 and been awarded as Most Talented Women Professional in Islamic Banking, Asia Islamic Banking Excellence Awards, CMO Asia, 2014; Women of Distinction (2016) in her contribution in the field of Islamic Finance and Law; and Distinguished Woman in Management (2018) by Venus International Women Awards (VIWA 2018). She is also listed amongst The 50 Influential Women 2017 in Business and Finance by ISFIRE which is an official publication of Islamic Bankers Association based in London; and been awarded as The Top 50 Most Influential Women in Islamic Finance 2018 by Cambridge International Financial Advisory.

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ABSTRACT

This research examines the modes and procedures of termination of contractual liabilities as prescribed by the Shari'ah. This concept is known as *suqut al-mujabat*. The Shari'ah provides certain specific methods to be used by the parties to a contract wishing to relinquish or terminate their financial liabilities and/or obligations. The common method is the fulfillment (*al-ifa'*), especially the payment (*qada'*) of a debt. A contractual obligation can also be discharged by inventing a waiver (*al-ibra'*), or novation agreement or compromise (*tajdid al-mujabat*). Apart from that, the Shari'ah provides that where two persons are mutually indebted to one another their obligations may be extinguished by action of set-off (*al-muqassah*). Fusion of liabilities (*ittibad al-dhimmah*) on the other hand, occurs when the capacities of creditor and debtor is merged into the same individual. On grounds of public policy, the existence of obligations is limited with respect to time. The institution of extinctive prescription (*al-taqadum*) defines the period within which the debts can be enforced as well as the cut off point for debt's extinction on account of the creditor's failure to demand within the time prescribed. The general principles of *suqut al-mujabat,* as provided by Shari'ah and expounded by the traditional Muslim jurists are examined and analyzed accordingly, to provide a better understanding on the Shari'ah principles of *mua'malat*, related to termination of contractual abilities. As such, the book also examines the practicability of these principles in the context of contemporary Islamic commercial transaction.

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CONTENTS

CHAPTER ONE

Introduction

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Islamic Commercial law, or *Fiqh al-Mu'amalat*, is an Islamic legal term constituting an important area of law dealing with contract and transaction issues. It covers a variety of dealings and transactions to meet the needs of society. Although this area of law is essentially governed by the Divine regulations and principles of Qur'an and Sunnah, this area of law generally remains open to rational considerations (*ijtihad*) and may be regulated, prescribed or proscribed on the basis of *maslahah* (public interest) and *'urf* (customary practice).

The foundation of Islamic law of contract lies firmly in the Quranic verse which reads as follows:[1]

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ أَوۡفُواْ بِٱلۡعُقُودِ

"O you who have believed, fulfill your obligations"[1]

In fact, this Quranic verse is considered the basis of general concept of obligations. The word *'uqud* covers the entire field of obligations, including those that are spiritual, social, political, and commercial. In the spiritual realm, *'uqud* deals with the individual's obligation to Allah; In social relations the term denotes the relations between men and women including the contract of marriage; in the political arena it encompasses treaty obligations of parties in regard to their respective undertakings.

1 Surah al-Ma'idah 5:1

Obligation (*al-iltizam*) is a temporary bond or tie which binds the parties who are subject to the obligation. It consists of contractual and tortuous liability. However Muslim scholars seem to accede that the contract is the dominant source that generates obligations. This is because the nature of the contract, be it a binding contract (*'aqd lazim*) or non-binding contract (*'aqd ghayr lazim*),[2] creates an obligation to the contracting parties. Thus, a promisor is under a legal duty to perform his contractual obligation. An obligation can be performed voluntarily or by force. Enforced performance is secured either specifically, if possible, or *in lieu*, that is by the way of damages. Accordingly, performance of an obligation (whether voluntary of by force) is basically the direct effect of such an obligation.[3]

OVERVIEW OF STUDIES ON *ILTIZAM AND SUQUT AL-MUJABAT*

Although there have been many studies by Muslim scholars on the topic of termination of obligations (*suqut al-mujabat*), the discussions of the principles and issues were very much peripheral. Very few have tried to develop and elucidate on a philosophy and methodology that are consistent with the practical economic transactions. Despite that, it is acknowledged that the need for understanding the philosophy and concept of the Islamic law of obligations that traces all the basic principles of obligations back to the sources of Qur'an Sunnah, is a fundamental requirement for the survival of the discipline. Having said that, these pioneering works can be main references for a more technical and rigorous work dealing with the issues of obligations and their termination.

2 *'Aqd lazim* or binding contract is a contract which cannot be revoked unless by the agreement of both contracting parties such as the contract of sale (*bay'*) and lease (*ijarah*). *'Aqd ghayr lazim* or non-binding contract, on the other hand, is a contract which can be revoked by either party at any time even without the consent/permission of other party. This type of contract includes partnership (*shirkah*), agency (*wakalah*), bequest (*wasiyyah*), deposit (*wadi'ah*), etc. However, there could be situations where a contract is binding on one party only, such as contract of mortgage (*rahn*) where the mortgagor can revoke the contract even without the mortgagee's consent, but the mortgagee cannot do so unless with prior consent of mortgagor. Zaydan, 'Abd al-Karim Zaydan, *al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah,* Mu'assasah al-Risalah, Beirut, 11th ed.,1989, p. 307.

3 'Abd al-Nasir Tawfiq al-'Attar, Nazariyyah al-Iltizam fi al-Shari'ah al-Islamiyyah wa al-Tashri'at al-'Arabiyyah, n.p., n.d., pp. 8-9 & 19-22.

Upon reviewing the writing of Muslims scholars on the issue of *suqut al-mujabat,* it is noted that the said discussion is always preceded by the discussion on the general concept of obligation (*al-iltizam*) in Islamic law. To understand the procedures and ways to terminate the obligations, we should first understand the meaning and nature of the obligations. Discussion on the topic of *al-iltizam* are normally followed by the discussion on its termination though a few books have treated *suqut al-mujabat* independently.

The approach adopted by the Muslim writers who study the issues of *al-iltizam* and *suqut al-mujabat* can be generally divided into four. First, the traditional approach which discussed the issues of *al-iltizam* as part and parcel of Islamic *fiqh* discourse, in the form of comments on the matter by the classical jurists. This approach is adopted by the early scholars of *fiqh* such as al-Shafi'i in *al-Umm*, Fath al-Qadir by al-Humman, *Bidayah al-Mujtahid* by Ibn Rushd, and *Kitab al-Mughni* by Ibn Qudamah. The second approach which is founded by al-Hattab in his book *Tahrir al-Kalam fi Masa'il al-Iltizam,* is the integral study of the problem of al-*iltizam* and the adaptability of the principles in human dispositions (*tasarruf*). This approach concentrates only on the subject of *al-iltizam* and the relevant issues. The third approach is the studies by modern jurists who discuss the Islamic principles of the law of obligations in a comparative analysis with the Western law concepts of the law of obligations. These are usually followed by the inquisitive and critical observations on the similarities and dissimilarities of both disciplines. Among the eminent writers who employ this method of discussion is al-Sanhuri who produces two significant books that are *Masadir al-Haqq* and *al-Wasit* respectively. While the third approach usually discusses the obligations in general which include the termination of obligation. The fourth and last approach is more specific where the modes and procedures of termination are independently discussed as a separate principle. Examples of these are, the book of *Tajdid al-iltizam* by Rida Mutawalli and *al-Suqut wa al-Taqaddum fi al-Awraq al-Tijariyyah* by Mahmud Muhammad Salim. This new legal approach of discussing obligations and its termination is generally a comparative study of the Islamic principles of *mu'amalat* and the commercial law adopted by Muslim countries.

The renowned scholars of *fiqh* have dealt with the issue of *iltizam* in passing when they were discussing the major problems of *fiqh*. The approach has been adopted by the most of the major *fiqh* books of the four schools of law. These classical Muslim scholars have discussed the issues of obligations as part and parcel of the vast body of Islamic law. They elaborated the subject of obligations (*al-iltizam*) as a whole concept, consisting of contractual or criminal dispositions committed by an individual. On contractual obligation, which is the concern of this study, the jurists have briefly discussed the issues of termination under the general concept of nullities of contract (*nazariyyah butlan al-'aqd*) or transfer of obligation (*intiqal al-iltizam*). Precisely, there is no specific discussion on the topic relating to methods of terminations of the contract and/or obligation.

The second approach, however, is an independent study on concept of *al- ilitizam*. Here, the we find a significant study by Abu Abdullah Muhammad ibn Muhammad al Maliki, known as al-Hattab, who has written a book entitled *Tahrir al-Kalam fi Masa'il al-Iltizam*[4]. This book explains the extensive concept of *al-iltizam* and its application in all matters of human disposition (*tasarruf*) including worship (*'ibadah*), commercial transactions (*mu'amalat*), criminal (*jinayah*) and other dispositions either verbal (*qawli*) of action (*fi'li*). Following the discussion on the essential features of obligations, the author proceeded to discuss the issues of termination (*isqat*) which is illustrated according to specific cases such as in marriage, freeing the slave (*'itq*), pre-emption (*shuf'ah*), etc. There is, however, no systematic discussion on the methods of termination of liabilities of the parties specifically to the obligation or contracts. The author seems to be following the traditional deductive approach adopted by the classical Muslim scholars in his discussion of the issues. This independent study of *al-iltizam*, even though scarce in number, is undoubtedly consequential as it procures a theoretical, or at least, conceptual framework on the general spectrum of Islamic law of obligation. In fact, this writing has been frequently referred to by the modern writers who have written on the topic of obligation on a more coherent and consistent manner.

4 Al-Hattab, Abu Abdullah Muhammad ibn Muhammad, *Tahrir al-Kalam fi Masa'il al-Iltizam,* Dar al-Gharb al-Islami, Beirut, 1984.

Analyzing the treatment of *al-iltizam* by modern Muslim jurists who study the Islamic concept of *al-iltizam* in comparison with the Western/Common law concept, it is observed that both Islamic law and the Common law are equally thorough in discussing the concept, nature and the scope of *al-iltizam*. However, the approaches adopted by the scholars in both streams are different. While the Common law adopted a more theoretical approach, Islamic law combines both theoretical and deductive approach. It is theoretical in the sense that it concerns the exposition of theoretical doctrines or principles; and deductive in the sense that the theory is formulated in light of its application to relevant issues. The former is concerned with the elucidation of principles, whereas the latter is concerned with the development of a synthesis between the principle and the requirements of a particular case.

The pioneering work in this modern approach is the work of Ahmad Ibrahim Bek who has written a comprehensive book on obligations adopting the systematic and organized approach similar to the Western method. His book *Al-iltizamat fi al-Shar'al Islami*[5] marks a significant approach by a Muslim scholar in discussing the issues of *fiqh* particularly in contractual dispositions His approach is more analytical compared to other earlier works on the same issues. Although this book did not discuss the Islamic concept of obligation *viz-a-viz* the Western concept, it has adopted the systematic Western approach of discussion. In fact, his methodology was followed by modern scholars such as al-Sanhuri, al-Zarqa' and Mahmassani who have studied the issues of Islamic law of obligations, including the modes and procedures for its termination on a comparative analysis between the Islamic law and the Western law.

The most significant books on comparative study of Islamic law of obligations are the books written by 'Abd al-Razzaq al-Sanhuri, one of the most eminent Egyptian scholars, entitled *Masadir al-Haqq fi al-Fiqh al-Islami*[6] and

5 Ahmad Ibrahim Bek, *al-Iltizam fi al-Shar'al Islami,* Dar al-Ansar, Cairo, n.d.
6 Al-Sanhuri, 'Abd al-Razzaq al-Sanhuri, *Masadir al-Haqq fi al-Fiqh al-Islami; Dirasah Muqaranah bi al-Fiqh al-'Arabi,* Dar al-Fikr, Damascus, 1985.

al-Wasit[7] respectively. The first consists of two volumes and lays down the discussion on the issues of contract which is the main generator of obligations. On the aspect of termination of the contractual obligations, the writer discusses them under the theory of nullities of contract. The discussion is made in a very clear and organized method following the Common law style, but highlighting the similarities or differences that are found in both laws, and at the same time emphasizing the far-reaching ability of Islamic law of obligation to accommodate all issues that arise in any pertinent matter.

In the 10 volumes of *al-Wasit*, al-Sanhuri has discussed all legal issues in Islamic *fiqh* according to prevailing rules and regulations in Egypt. As to the termination of obligations, he has dedicated the whole volume i.e. volume 3, to discuss the issues of *suqut* or *inqida' al-iltizam* in a very comprehensible manner. He classified the modes and procedures of termination of obligation into three i.e. the discharge by performance (*al-ifa'*) which is considered as the instantaneous effect of obligation; the discharge by substitution (*al-wafa' bi muqabil*) which specifically includes novation (*tajdid al-mujabat*), set-off (*al-muqassah*) and fusion of liabilities (*ittihad al-dhimmah*); and the discharge by means other than performance (*inqida' al-iltizam bi dun al-wafa'*) which includes waiver (*al-ibra'*) and extinctive prescription *al-taqadum*). All those modes on termination are discussed in detail with some analytical explanation on the issues relevant to each of them.

Another noted study on the topic of *suqut al-mujabat* is the work by Subhi Rajab Mahmassani in his book *Nazariyyah al'Ammah li al-Mujabat*[8] who represented the discussion on *al-iltizam* according to the Common law approach, as to "proffer the Islamic treasure of knowledge and *fiqh* (more specifically on *al-iltizam*) in a more comprehensive and systematic manner". Adopting the Common law mode of discussion, particularly,

7 Al-Sanhuri, 'Abd al-Razzaq al-Sanhuri, *al-Wasit fi Sharh al-Qanun al-Jadid,* Dar Ihya' al-Turath, Cairo, Vol. 1-10, 1985.

8 Mahmassani, Subhi Rajab, *al-Nazariyyah al-'Ammah li al-Mujabat wa al-'Uqud fi al-Shari'ah al-Islamiyyah,* Dar al-'ilm li Malayin, Beirut, 1983.

in this issue, does not mean to subordinate the Shari'ah. The Shari'ah is definitely more extensive and complete in its contents and application but unfortunately, it was not relatively put in a precise or systematic composition. Islamic Jurisprudence from the very beginning, was not established upon theories *per se*, but was developed through the exposition of the basic principles in conjunction with the practical issues or problems at that time. The Muslim jurists then discussed the issues in the light of these basic principles, removed any conflict if any, or made necessary exceptions to comply with the established principles of Islamic law in the relevant matter.

Mahmassani has pointed out that *al-iltizam* can be initiated from verbal legal dispositions (*tasarrufat al-shar'iyyah al-qawliyyah*) and actual legal dispositions (*tasarrufat al-shar'iyyah al-fi'liyyah*). Verbal dispositions consist of bilateral and unilateral contractual dispositions. On the other hand, actual disposition includes the performance or dispositions by way of action, whether in the form of positive or negative acts trespassing or destroying the property of others. All these dispositions, once performed, result in obligations.

Although all the four classifications of disposition (*tasarruf*) are the prevailing sources of *al-iltizam*, Mahmassani seems to elude discussing them farther. However, the concentration is focused on the contractual dispositions, as contract in its nature, is the prime generator of obligations. In fact, in most of the second volume of his book, he elaborates, relates and applies the general principles of contract in the light of the principles of obligations. A contract, when concluded, results in obligation where contracting parties are required to carry out the requirements agreed in the contract. In a contract of sale, for example, an obligation is created on the part of the seller to transfer the ownership to the buyer. Likewise, an obligation on the part of the buyer is to pay the consideration. This obligation remains until it is effectively terminated by the execution of the contract or by the revocation as the case may be.

Significantly, the author concludes the discussion on obligations imposed on *mukallaf* (discerned man), be it contractual obligation or otherwise. Accordingly, the performance of the obligation can be made either directly or in substitute. Thus, the relevant maxim says that "اذا بطل الأصل يصار الى البدل" which means "when the giving of the original thing has not been possible, its substitute is given."[9] On the modes and procedures for termination of the obligation, Mahmassani has not followed al-Sanhuri's arrangement but has treated the specifically in *al-ifa'*, *al-muqassah, al-ibra', murur al-zaman,* etc. It is observed that al-Sanhuri's classification is more systematic in this regard.

Another significant study on the law of obligations and *suqut al-mujabat* is that by Mustafa Ahmad al-Zarqa' in *Al-Fiqh al-Islami fi Thawbih al-Jadid.*[10] He starts the discussion on the concept of obligations in Islamic Law by explaining the concepts of rights (*huquq*) and its relation to *al-iltizam*. He distinguishes two different concepts of right; *haqq 'ayni* (proprietary right) and *haqq shakhsi* (personal right). While *haqq 'ayni* concerns the right of a man over a property, *haqq shakhsi* concerns the right of man over another man. *Haqq Shakhsi* can be positive (the right to do) or negative (the right not to do) in nature. *Haqq Shakhsi* is more relevant to *al-iltizam* in the sense that it creates a legal relation (usually contractual relationship) between two parties, where one party is responsible/obliged to fulfill the demand made by the other party. The party who receives the benefit (*manfa'ah*) from such relationship is said to be in possession of *haqq shakhsi*, whereas the other party is under an obligation to secure that the *manfa'ah* is duly transferred. Emphasizing on *haqq shakhsi*, al-Zarqa' describes it as "a physical or material relationship that exist between two parties which includes the power or right to be possessed by one party over the other. A party has the right to demand fulfillment of the obligation, as agreed in the contract, and at the same time, he is also under an obligation to act according to the agreement made in the contract".[11]

9 Art. 53 of *The Mejelle.*
10 Al-Zarqa', Mustafa Ahmad Al-Zarqa', *al-Fiqh al-Islami fi Thawbih al-Jadid,* Dar al-Fikr al-'Arabi, Damascus, 9th ed., 1967/1968.
11 Ibid., Vol. 3, pp. 15/16.

The obligation is created either by promise to pay the debt (*dayn*), the promise to deliver a specific subject matter (*'ayn*) or the promise to do/perform certain work (*'amal*). When a person is indebted to another, he is under a duty to pay the debt. When a contract or promise is made to deliver a specific thing, which is determined in its attributes or characteristics (*'ayn*) such as land, animal or the like, the person who has taken up the responsibility (*multazim*) is under a duty to deliver the *'ayn* to the person who receives the obligation (*multazim lah*). On the other hand, the *multazim* is under an obligation to perform the work specified, if the subject matter of the contract is *'amal*.

It is interesting to note that in the new publication of Volume 3 of his book,[12] al-Zarqa' has attached an appendix on the complete legislation pertaining to *mu'amalat* which was approved by the Council for the Uniformity of Law in Arab Countries in 1984. Chapter 4 (Art. 383-433) of the legislation provides an extensive ruling on the issues of termination of the obligation giving a comprehensive reference for discussion on the issues.

It is interesting to note that al-Sanhuri, Mahmassani and al-Zarqa', proceed to discuss the concept of rights (*haqq*) in Islamic law before discussing the concept of *al-iltizam*. The writer has observed that this approach is adopted by these learned scholars to emphasize on the importance of rights in Islamic law and thus to deny the claim of the orientalist who said that Islamic law only impose obligations and does not recognize the idea of individual rights.[13]

The efforts being made by these Muslim scholars deserved to be appreciated, because they have done their level best to push the frontiers of the discipline.

12 Al-Zarqa', Mustafa Ahmad al-Zarqa', *Madkhal ila Nazariyyah al-Iltizam al-'Ammah fi al-Fiqh al-Islami,* Dar al-Qalam, Damascus, 1999.
13 For example, a statement by Schacht who said that: "Islamic law is a system of duties of ritual, legal, and moral obligations, all of which are sanctioned by the authority of the same religious command". Similarly, Gibb has observed that: "The Islamic theory of government gives the citizen as such no place or function except as taxpayer and submissive subject". Schacht, Joseph, "Law and Justice", *The Cambridge History of Islam.* P.M. Holt (ed), Cambridge University Press, Cambridge, UK, 1970, Vol. 2, p. 541; Gib, H.A.R., "Constitutional Organisation", *Law in the Middle East,* M. Khadduri & H. Liebesney (eds), The Middle East Institute, Washington DC, 1955, p. 12.

During the period of European colonial empires, the commercial activities of the Muslims in many Muslim states have been very much influenced by the West. In fact, under Western influence, most countries adopted Western inspired banking systems and business models and abandoned the Islamic commercial practices. However, the end of colonialism and a rising tide of religiosity have sparked the revival of Islamic law in the lives of Muslims in general. A growing number of devout Muslims are seeking greater conformity between their lives in the modern world and the precepts of their faith. Islamic banking makes that conformity possible in the realm of banking and commercial activities. There appears to be an urgent desire to gobble up the concepts of the *Islamic Mu'amalat* and to absorb them within the modern practices of Islamic banking and finance and beyond.

However, if one critically examines the contemporary literature on Islamic law and finance, particularly the issue of termination of financial liabilities, one feels that many of the experts working in this area have problem to find comprehensive materials for references that provide an in-depth discussion on the basic issues and principles of *mu'amalat* in light of modern financial instruments and practices. What could be the reason for this lack of innovation? In response to this question, one could point out a number of reasons, but the foremost reason, is the defective approach to legal research in this field. There are works undertaken by some scholars, which are to be appreciated, but it is observed that most of these works are done by economists for whom the economic issues have naturally been given more emphasis than the legal issues.[14] The result is that some of the most important legal principles in this field have either been completely ignored or have not been given attention that they deserve. In certain cases, where work has been undertaken by traditional scholars, the issues and principles of modern law have not been fully appreciated, especially pertaining to modern business transactions.[15]

14 See for example, F.R. Faridi (ed), *Essays in Islamic Economic Analysis*, Genuine Publications & Media Pvt. Ltd., New Delhi, 1991.

15 See for example, al-Khafif, Ali al-Khafif, *Ahkam al-Mu'amalat al-Shar'iyyah*, Dar al-Fikr al-'Arabi, Cairo, 1996.

The scarcity of comprehensive literature and references in the subject of Islamic finance in general initiates the contemporary researchers to write and produce coherent and consistent independent studies with a more down to earth approach. These studies normally dictate the Islamic principles of transactions in relation to the financial and commercial practices with comparative analysis with the prevailing rules and regulations adopted by some Muslim countries (most of the writings compare the Islamic principle of termination with the law of Egypt and other Arab countries which adopted the Islamic law).[16] In the specific area of termination of liabilities (*suqut al-iltizam*) we find writings on a specific topic of termination such as *al-ibra'* (waiver), *al-tajdid* (novation), or *al-taqadum* (extinctive prescription). The approach adopted by these writers (which are mostly PhD thesis) is the legal approach i.e. by discussing the conception of principles in Islamic law with comparative analysis with the rules and regulations adopted in a particular state. To mention a few writings: *al-Muqassah Dirasah Muqaranah bayna al-Shari'ah al-Islamiyyah wa al-Qanun al-Wad'I fi al-Misr wa al-Iraq* by Layla 'Abdullah al-Haj Sa'id,[17] *Tajdid al-Iltizam* by Rida Mutawalli Wahdan,[18] *al-Suqut wa al-Taqadum fi al-Awraq al-Tijariyyah* by Mahmud Muhammad Salim,[19] *Inqida' al-Iltiizam bima yu'adil al-Wafa' fi al-Fiqh al-Islami wa al-Qanun al-Madani: Dirasah Muqaranah* by Rushi Shahatah Abu Zayd.[20]

16 For example al-Sanhuri in *al-Wasit*, Mahmassani in *al-Nazariyyah al-'Ammah* and al-Zarqa' in *al-Madkhal* compare the Islamic law of obligation with the law of obligation adopted in Egypt; al-Umran, 'Abdullah Muhammad, *al-Awraq al-Tijaryyah fi al-Nizam al-Sa'udi*, Maahad al-Idarah al-'Ammah li al-Buhuth, Riyadh, 3rd ed., 1995, who compared the Islamic law with the law of UAE; and Layla 'Abd Allah al-Haj Sa'id, *al-Muqassah Dirasah Muqaranah bayna al-Shari'ah al-Islamiyyah wa al-Qanun al-Wad'i fi Misr wa al-Iraq*, unpublished PhD thesis, Kulliyyah al-Huquq, Jami'ah al-Qahirah, n.d., who compared the Islamic law with the law of Iraq.

17 Layla 'Abd Allah al-Haj Si'id, *al-Muqassah Dirasah Muqaranah bayna al-Shari'ah al-Islamiyyah wa al-Qanun al-Wad'i fi Misr wa al-Iraq*, unpublished PhD thesis, Kulliyyah al-Huquq, Jami'ah al-Qahirah, n.d., who compared the Islamic law with the law of Iraq.

18 Rida Mutawalli Wahdan, *Tajdid al-Iltizam*, Dar al-Jami'ah al-Jadidah li al-Nashr, Alexandria, 2001.

19 Mahmud Muhammad Salim, *al-Suqut wa al-Taqadum fi al-Awraq al-Tijariyyah*, Maktabah Wahbah, Cairo, 1980.

20 Rushi Shahatah Abu Zayd, *Inqida' al-Iltiizam bima yu'adil al-Wafa' fi al-Fiqh al-Islami wa al-Qanun al-Madani*, n.p., 1999.

It is our contention that while studies like these are limited in number, there is still a vacuum existing in contemporary literature on the topic of termination of liabilities (*suqut al-mujabat*), which is an important aspect of Islamic banking and finance practice. What needs to be done, therefore is to produce a systematic study on the basic principles of *mu'amalat* pertaining to the procedures of terminating the contractual liabilities as developed by the earlier jurists. Once these principles have been identified and their operation fully understood, an effort should be made to apply these principles to the modern forms of termination of financial liabilities adopted by the Islamic financial institutions. If the modern procedures do not conform to the Islamic principles, it would be necessary to examine some changes and modifications that may render these forms and procedures Shari'ah compliant. This is to enable them to function smoothly in the modern world.

To sum up the observation on the literature on the topic of obligations in general and specifically the termination of liabilities, we find that some literature is still in the form of 'conceptual analysis', but others have moved into more empirical and theoretical discussions. Appreciating all this literature, we agree that they substantially contributed towards the development of a better formulation and implementation of Islamic law principles, particularly relating to the law of obligations in commercial activities in the Muslim societies.

It is noted that differences of opinions of the Muslim jurists on certain issues, but it is agreed that these differences are logical, coherent and consistent paths of thought within an Islamic framework. Indeed, the fundamental cause of differing opinions is differences in interpreting the sources of Islamic law of obligation. This is because only general guidelines are provided whereas details are left to the interpretation of man. In fact, there is a very important proof in Islamic scholarship for this in the form of several Prophetic traditions showing his support for the use of 'reason' and the acceptance of the opinions of 'experts' especially in matters of trade and commerce.

CHAPTER TWO

Nature of The Obligation (Al-Iltizam)