

REVIEW ARTICLE

COMPARISON OF THE LAW OF CONTRACT BETWEEN ISLAMIC LAW AND INDONESIAN LAW

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ABSTRACT

In every legal transaction, contract is the crucial things that must be made between all the parties. Because the contract is the realization of the agreements between the parties. and that contract are binding the parties inside the agreements. The purpose of this paper is to analyze the law of contract from two different laws, which are Islamic Law and Indonesian Law. It can be found that there are some similarities as well as differentiation between Islamic Law and Indonesian Law when it comes to governing about contracts.

Keywords: *Contracts Law; Islamic Law; Indonesian Law*

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INTRODUCTION

In every legal transaction, contract is the crucial things that must be made between all the parties. Because the contract is the realization of the agreements between the parties. and that contract are binding the parties inside the agreements. Or it is safe to say that the contract can be said as the “rule of the game” between all the parties. In a business, contract is one of the vital importance to a business organization. Most of their business performed by the making of contracts, be they 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 consideration in return for any benefit derived from the agreement (Lucas, 1998).

Charles L. Knapp and Nathan M. Crystal defined 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 or performance, such as the competence of property (tangible and intangible), the performance of services, and the payment of money (Knapp & Crystal, 1993; Nachatar, Hussin, & Omran, 2010; Smits 2017; Khairandy 2011; Ningsih & Disemadi, 2019; Mahmud, Azmi, Islamil, Daud, & Napiah, 2019; Sulistyarini, Budinono, Winarno, & Koeswahyono, 2018; Muhammad, Saoula, Issa, & Ahmed, 2019; Ilmih & Zulkarnain, 2019).

The definition from Charles L. Knapp and Nathan M. Crystal on above is defining the law of contract from the mechanism aspect or the law procedure point of view. The aim from this mechanism is to protects the hopes that arise from the making of an agreement between the parties, such as on the performance of services.

In a sum, contract can be defined as an act of law, where one or more people are binding himself or binding himself to the other person to do something or to give something (Hernoko, 2018). And there are rights and obligation for the parties to be fulfill which are arise from the contract.

No matter which law is being applied, contract is still one of the vital importance in legal transaction, even in Islamic and Indonesian law. Because without contract, every legal transaction can be considered as an illegal act. So, in this paper I will writes about how Islamic and Indonesian Law regulating the contract, what are the comparison between the Islamic Law and Indonesian Law in terms of the law of contracts and also reviewing one case about the dispute in contract which happens in one of the Syariah bank in Indonesia.

THE LAW OF CONTRACT IN ISLAMIC LAW

I. DEFINITION OF CONTRACT IN ISLAMIC LAW

At least there are 2 terms on Al-Qur'an which are related to agreement, the first one is *al-'aqdu* (Akad) and the other one is *al-'ahdu* (promise). From the terminology point of view, Akad means bond, or binding. It was said bond (*al-rabth*) because it was means to gather two of the end of the ropes and binding one end to another end so both of them can be united and becomes like a complete rope (Mas'adi, 2002). The word *al-'aqdu* is being mentioned in Surah *Al-Maidah: verse (1)* which said:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ...

that means "O you who have faith! Keep your agreements..."
From the translation we can get explanation that human (especially for those who have faith) are being asked to fulfill their *Akad*."

Meanwhile for the word *al-'ahdu* it was being stated on Surah *Ali Imran verse (76)* which have said:

بَلَىٰ مَنْ أَوْفَىٰ بِعَهْدِهِ وَاتَّقَىٰ فَإِنَّ اللَّهَ يُحِبُّ الْمُتَّقِينَ

That means "Yes, whoever fulfills his commitments and is wary of Allah —Allah indeed loves the Godwary." 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” (Mas'adi, 2002). Abdoerraoef (1970) said that contract is happens through three stages, which are:

1. *Al- 'Ahdu* (promise), which are statement from someone to do or not to do something and have no connection with someone else's will. This promise is binding someone who are stated that he or she will fulfill their promise.
2. Consent, which is the statement from the second party to do or not to do something as a reaction to the promise that was being stated by the first party. Those consent must be according to the promise from the first party
3. If there are two promises already runs by both parties, then something that called '*akdu*' from Surah *Al-maidah* is being happens.

II. ELEMENTS OF THE CONTRACT

From the definition of *Akad* which are described previously, we can get that there are 3 elements in *Akad* as emphasized by Mas'adi (2002), which are:

1. 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.
2. Can be accepted by *syara'*
The *Akad* which are being conducted can't be against the things that are being arranged by Allah SWT in Al-Qur'an and also can't be against the things that are being arranged by Prophet Muhammad SAW in Hadits. The implementation, goals even the object of the *Akad* can't be against the *syara'*. If the *Akad* is against the *Syara'*, then that *Akad* is invalid.
3. Having legal consequences to the object
Akad is one of the legal action or it was called *tasharruf* in Islamic Law terms. The existence of an *Akad* causing legal consequences to the legal objects which are being promised by the parties and also giving some rights and obligations which are binding all the parties.

III. THE SOURCE OF THE LAW OF CONTRACT IN ISLAMIC LAW

As a part of Islamic Law, so the source of the law of Contract in Islamic Law is same as the sources of the Islamic Law. Islamic Law is originated from 3 law sources as emphasized by Dewi, et.al (2013), which are consist of:

1. Holy Quran

As one of the main sources of Islamic Law, most of the law inside the Holy Quran only regulating about the general rules, for examples:

Surah Al-Baqarah verse 275:

...وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا...

which means: "...While Allah has allowed trade and forbidden usury..."

Surah Al-Maidah verse 1:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

which means: "'O you who have faith! Keep your agreements..."

2. Hadith

As the second main sources of the Islamic Law, Hadith can be defined as one of various reports describing the words, actions, or habits of the Islamic prophet Muhammad. In a hadith, the law of *Muamalat* is being more detail if we compare with the law in the Holy Quran, but still regulating the general rules. For example:

Hadith of Ahmad Ibn Hanbal that said:

"It is not just for a man to sell his merchandise without disclosing its defects. It is proper for the vendor to tell the buyer of any defects of which he is aware. "

3. *Ijtihad*

In English, the word *Ijtihad* can be translated as an attempt to drive the legal ruling from Koran/Holy Quran. *Ijtihad* must be done using *ar-ra'yu* or human minds. Mohammad Daud Ali defined *Ijtihad* as truly effort or *ikhtiar* which being done by using all of someone's (usually a legal scholar) capabilities which passing all of the requirements to regulating rules which are not being regulated clearly or not being regulated yet in Holy Quran or in *Hadith* (Hasan, 2003). For example of *Ijtihad* is in Indonesia, since April 2000 there are new body emerge that called Dewan Syariah Nasional (DSN) as a part of Majelis Ulama Indonesia (MUI). This body has the responsibilities to making a *fatwa*¹ which are related to the activities of the Islamic Financial Institution in Indonesia. So, all the *fatwa* that are made by the DSN in Indonesia can be called as the results from *Ijtihad*.

IV. THE PRINCIPLE OF THE CONTRACT IN ISLAMIC LAW

Fathurrahman Djamil said that there are at least 5 Principle that are known for Contract in Islamic Law, as explained by Harso (2007), which consist of:

1. *Al-Huriyyah* (Freedom)

¹ According to the definition from <https://en.oxforddictionaries.com/definition/fatwa>, the word *fatwa* means a ruling on a point of Islamic law given by a recognized authority.

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 element of force, mistakes and scam in a contract. This principle is according to the *fiqh* that said:

الأَصْلُ فِي الْمُعَامَلَةِ الْإِبَاحَةُ إِلَّا أَنْ يَدُلَّ دَلِيلٌ عَلَى تَحْرِيمِهَا

which means that all of transaction is permitted, except there are law that makes the transaction becomes *Haram*.

2. *Al-Musawah* (Equality)

This principle means that all the parties have the same position in order to determine the terms and condition of an *Akad*.

3. *Al-Adalah* (justice)

Implementation of this principal in a contract is demanding all the parties to do the right thing in order to implementing the contract and also all of the parties must fulfilling their obligation in the contract. This Principle is according to *Surah Al-Maidah* verse 8, which said:

...وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوٓا...

which means "...and ill feeling for a people should never lead you to be unfair. Be fair..."

4. *Al-Ridha* (Willingness)

This principle stated that all the transaction that being made must be based on the willingness from all the parties.

5. *As-Sidq* (Honesty)

This principle means that a contract or an *Akad* must be made based on the honesty from all the parties and must avoids what the Islamic Law call as a *Gharar* or scam.

V. LEGAL REQUIREMENTS OF A CONTRACT IN ISLAMIC LAW

There are 3 Legal requirements of a Contract in Islamic Law, which consist of:

1. Two or more Parties who are conducting the Contract or *Akad* (Subject of the contract)

Two or more parties in here are two people or more who are directly involving in the contract. Both parties must be passing all the requirements so that they can be considered having the capacity in order to make their contract becomes legitimate in the eye of Islamic Law. Some of the requirements to be considered having the capacity 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 having their minds works and also already *akil baligh* (or passing the puberty).

- ii. Free to choose. Contract will not be legitimate if that contract are being made under force, if that force can be proven
- iii. Contract can be considered happens if there are no *khiyar*. Like *Khiyar Syarath* or *Khiyar ar-ru'yah*.

2. The Object of the contract

It means that the things that are made as an object inside the contract, it can be the things that are being sell 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 object of the contract, which are consist of:

- i. The object of the contract must be in a holy condition, or if the object are in a profane condition, that things must can be cleaned. So, we can make an proven object, such as a dead body, as the object of our contract.
- ii. The object of the contract must be useful and according to *syariah*. Because the legal function of that object will be the based to measuring the value of that object.
- iii. The object of the contract must be available to handed over. The contract will not being legitimate if the object of the contract can't be handed over to the other party because that can categorized as *Gharar*².
- iv. The party in the contract must have the (legitimate) ownership of the object of the contract.
- v. All the parties must know the form of the object of the contract

3. The statement of the *Akad* or Contract (*shighat*)

It can be defined as the statement from the parties in the contract to shows ther 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:

- i. At least *Ijab* and *Qabul* must be stated by someone who are reaching *tamyiz* who are realizing and knowing what they said so they can really declare their willing. Or in other words, it should be done by someone who are having the capacity to make a legal action.
- ii. *Ijab* and *Qabul* must be fixed to the object that becomes the object of the contract
- iii. *Ijab* and *Qabul* must be done in one place where all the parties are attending.
- iv. *Shighat al-aqad* is the way that the statement or agreement are being made. For example it can be written or orally.

² based on the article from <https://en.wikipedia.org/wiki/Gharar>, *Gharar* literally means uncertainty, hazard, chance or risk.

- v. *Al-Ma'qud alaih / mahal al'aqad* or the object of the contract. 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 are usually goods and services.
- vi. *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 word the parties must be old enough (mature enough) and have healthy mental and mind to make a contract.
- vii. *Maudhu' al'aqd* or The aim or goal of the contract must be according to the *syaria'* or otherwise that contract can't be legitimate.

THE LAW OF CONTRACT IN INDONESIAN LAW

I. DEFINITION OF CONTRACT IN INDONESIAN LAW

In Indonesian Law, the law of contract is regulated under the *Kitab Undang-Undang Hukum Perdata* (KUHPer or Indonesian Civil Code, *hereinafter as KUHPer*). KUHPer is the adaptation from Dutch's old civil code or called *Burgerlijk Wetboek* (BW). KUHPer or BW is divided in four categories, which are:

1. Buku I: Perihal Orang (Book I: About individual)
2. Buku II: Perihal Benda (Book II: About property)
3. Buku III: Perihal perikatan (Book III: About Obligation)
4. Buku IV: Perihal Pembuktian dan Daluarsa (Book IV: Concerning Evidence and Prescription)

From the categories mentioned above, The Law of contract is being regulated on Book III.

According to the article 1313 BW or KUHPer (Mas'adi, 2002) defined contract or engagement as an act pursuant 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 promise to another person where both of them are promising to do something (Subekti, 1996). Another law scholar, KRMT Tirtodiningrat defined that contract and engagement as an act of law which based on n agreement between two or more people to cause legal consequences which can be enforced by law (Meliala, 1985).

A lot of legal scholars in Indonesia thinks that the definition of contract on the article 1313 BW is not complete or can't describe what is contract in detail. One of the scholars that agree to this is Suryodiningrat, (1985), he thinks that Article 1313 BW is not enough to describe contract because:

1. Law is have nothing to do with every engagement
2. The word "acts" can be interpreted in so many way, so it can cause a legal consequences without even being mentioned.

3. The definition from article 1313 is only about the unilateral agreement, only one party that have the obligation to do or give something
4. Article 1313 BW is only about *obligatoir* agreement and cannot be use for other type of agreements.

Setiawan (1987) thinks that Article 1313 BW not only not complete but also too wide to be interpreted. Not enough because it only mentioning about unilateral agreement. And too wide to be interpreted because by using the word “acts” it also containing the acts against the law and voluntary representation. According to that he recommends:

1. The word of “acts” must be defined as an act of law, which is an act that was aim to causing a law consequences
2. Adding the words “or to binding each of themselves” to the article 1313 BW
3. So, 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 a change in their old BW in form on *Nieuw Burgerlijk Wetboek* (or NBW). So, article 1313 BW also have some changes, which are regulated in Book 6, Chapter 5, Article 6:213 that said “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” (Haanapel & Mackaay, 1990). Based on that NBW perspective, Hartkamp & Tillema (1995) assumed that contract is one of the species from act of law genus. Generally, they are defined contract as “a juridical act, established – in compliance with possible formalities, required by the law – by the corresponding and mutually interdependent expressions of intent of two or more parties, directed at the creation of juridical effects for the benefit of one of the parties and to the account of the other party, or for benefit and to the account of both parties.”

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

II. THE ORIGIN OF THE LAW

Hadisoeparto (1984) explained concerning to the origin of the law—Indonesian Contract Law— that can be reviewed from many subjects, such as historically, material or formally. The origin in this topic is meaning where are the rule of law is coming from.

From the historically subject, law can be found from the old rules that being applied in the past, but that law still included in deciding the formation of the law that being applied in a specific place and at a specific time. Or it can be found from the old documents which contains the law that being applied in the past.

Material subject is the factors that deciding the contents of law, which actually being determined by *Idiil* Factor and *Maatschappelijk* factor. *Idiil* factor is the base of the law which never change, which being followed by the body that responsible to making constitution. Meanwhile *maatschappelijk* factor is the reality in the society which is really happens.

Formally, law can be found inside the constitution, jurisprudence, treaty and custom. Constitution can be defined as the law that are made by government and the legislation (in a narrow sense). Or constitution can be defined as a regulation that binding the public (in a broad sense). Jurisprudence or Caselaw is the decision of the judge which already being a law. Treaty is an agreement between the countries who are making engagement so the results from that treaty is being applied by the law of the country which made that treaty. Custom that mentioned in here is means all of the regulation which are not being made by the government, but still being obey by the public because they are believe that regulation can becomes a law that protecting the public interests.

From the explanation above, we can see that both historically and formally the law of contract in Indonesian law is based on Dutch Law which are expressed in the form of BW. Because historically, we are being colonized by the Dutch for 350 years and all of our law is being adopted from the Dutch law. And Formally speaking, for the law of the contract is still being regulated under the old Dutch BW or called KUHPer in Indonesia.

III. THE PRINCIPLE OF THE CONTRACT IN INDONESIAN LAW

There are a lot of arguments between the law scholarship in Indonesia about the principle of the law of contract, but main principle of the law of contract in Indonesian Law are:

1. Consensualism

Consensualism are often defined as that consent (between the parties) is needed to make an agreement/contract. It means that if there is an agreement that reach between the parties, so contract is born, even though that contract is not yet started at that time (Muru, 2007). In BW, this principle is mentioned in the article 1320 paragraph (1) that said:³ “There must be consent of the individuals who are bound thereby”

2. Freedom of Contract

In BW, this principle is mentioned in the article 1338 paragraph (1) that said: “All valid agreements apply to the individuals who have concluded them as law.” This principal is a principle that are giving the freedom for the parties to:

1. Whether the parties are making or not making the contract

³ The translation of *Burgerlijk Wetboek* or Indonesian Civil Code in 3 languages, according to the translation from <http://www.kuhper.com/Trilingual%20Indonesian%20Civil%20Code.pdf>, Article 1320.

2. Making contract with anyone
 3. Deciding the content, the execution and the terms of the contract
 4. Deciding the form of the contract, whether in form of written or orally.
3. *Pacta Sunt Servanda* (The binding power of the contract)

The binding power of the contract is appeared along with the Freedom of Contract principle which are the manifestation of the patterns of human's relationship which are showing the value of trust inside. Substantially, turns out the binding power of the contract not only binding the parties for the things that are expressly stated inside the contract, but also for everything that are being required by the custom, norms or the law (Hernoko, 2018).

In BW, this principle is mentioned in the article 1315 and article 1340. Article 1315 said: "In general, an individual may only commit to or agree to something for and on behalf of himself." Article 1340 said: "An agreement applies only to the parties thereto."

Both of article 1315 and article 1340 above are showing that the binding power of the contract is only reaching to the parties who are made the agreement. So, this principle is focusing on "who are being bind by the contract" not "what is the content of the contract".

4. Good Faith

In BW this principle is mentioned on Article 1338 paragraph (3) that said: "They must be executed in good faith." Black's Law Dictionary defined good faith as: "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 concept of his own 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 means being faithful to one's duty or obligation" (Garner, 2009).

IV. LEGAL REQUIREMENT OF CONTRACT IN INDONESIAN LAW

The legal requirement of the contract in Indonesian law are regulated based on Article 1320 BW, which are said:

In order to be valid, an agreement must satisfy the following four conditions:

1. There must be consent of the individuals who are bound thereby
2. There must be capacity to enter into an obligation
3. There must be a specific subject matter
4. There must be a permitted cause

The first and second requirements can be said as the subjective requirements or the requirements which regulating about the parties in the contract. And for the third and fourth requirements can be said as the objective requirements or the requirements which are regulating about the object of the contract.

If the parties in the contract can't fulfill the first and second requirements, so the contract can be cancelled or one of the parties can ask for the contract to be cancel. But the contract that already being made still binds the parties as long as judge didn't cancel the contract (Wicaksono, 2008; Nachatar, Hussin, & Omran, 2010; Smits 2017; Khairandy 2011; Ningsih & Disemadi, 2019; Mahmud, Azmi, Islamil, Daud, & Napijah, 2019; Sulistyarini, Budinono, Winarno, & Koeswahyono, 2018; Muhammad, Saoula, Issa, & Ahmed, 2019; Ilmih & Zulkarnain, 2019)..

Meanwhile, if the parties in the contract cannot fulfill the third and fourth requirements, so the contract becomes *Void ab initio*. It means that the contract is never be made and there is no engagement between the parties since the beginning. So, the parties didn't have the legal standing to make a sue in front of the court (Wicaksono, 2008).

1. Consent

Wicaksno (2008) explained that consent in a contract is a feeling of willingness between the parties who makes the contract about the things that are mentioned in the contract. Consent can never be acclaimed if the contract was being made based on scam, mistake, force, and misuse of the condition.

2. Capacity

Capacity means the parties in the contract must be approved by law as a subject of law. Basically, everyone has the capacity to make a contract. People who did not have the capacity to make a contract is people who are appointed by law which are:

- i. Those who aren't mature

In Indonesian law, there are 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 basically they are not mature yet, but by the law they can be announced as mature.

Based on Indonesian BW, someone is not mature when they are not yet reach 21 years old and yet to be married. For those who are yet to reach 21 years old, but they already married and then already divorced, they cannot go back to the condition where they are called not mature.

Based on Indonesian criminal code, someone can be called mature if they are already reach the age of 21 years old or they are already married before they are reach the age of 21 years old.

Indonesian Customary law (*Hukum Adat Indonesia*) did not recognize any age for someone to be called mature. Indonesian Customary law only can recognize someone's maturity based on case by case. Capacity in

Indonesian customary law means that someone can calculate and protecting their own interests (Wicaksono, 2008).

ii. Those who are under guardianship

Someone who are under the guardianship means that based on law assessment, someone is considered cannot protecting their own interests, so they need someone to be their guardian (Wicaksono, 2008).

iii. Women, under some certain things that are being mentioned on the law, and everyone based on law who are banned to make some certain contracts.

A long time a go, women is considered not have the capacity to make a legal action. But, as the time progress and also the improvement of the gender equality movement, that law has being withdrawn and now women have the right and capacity to make a legal action (Wicaksono, 2008).

3. Specific Subject Matter

Specific Subject matter means that the objects that are being ruled in the contract must be clear or at least it can be determined. This is very important to do for giving a guarantee (or certainty) to all the parties and to do perform the contract. Besides that, it also important to prevent the emergence of fake contracts (Wicaksono, 2008). This requirement is mentioned on article 1333 BW which said: “An Agreement must at least have as a subject a matter property whose nature is determined.

The quantity of the matter needs not be ascertained, insofar such quantity can be determined or calculated at a later date.”

4. Permitted cause

Permitted cause means that the agreement which are stated inside the contracts can't be against the law, public order and decency (Wicaksono, 2008). This requirement is being mentioned on article 1336 BW which said: “In the event that 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.”

V. LEGAL CONSEQUENCES OF THE CONTRACT

A birth of a contract is emerging a legal relationship between the parties in form of rights and obligations of the parties. 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 the contract. The obligations of first party is the rights of the second party, *vice versa* the obligations of second part is the rights of the first party. In other word, the legal consequences of the contract is the fulfillment of that contract itself by the parties (Wicaksono, 2008).

COMPARASION BETWEEN THE LAW OF CONTRACT IN ISLAMIC LAW AND INDONESIAN LAW

I. COMPARISON ON THE PROCESS OF MAKING THE CONTRACT

According to Dewi, et.al (2013), the differences between Contract in Islamic Law and in Indonesian Law is happens in the engagement process. On Islamic Law, the promise from the first party is separated from the promise from the second party (it is a 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 differentiate contract in Islamic law with contract in other law is the importance of *Ijab* and *Qabul* in every transaction or every contract. When the promise from the parties are being agreed and continue with *Ijab* and *Qabul*, then the '*Aqdu* (or engagement) was made.

II. COMPARISON BETWEEN THE LEGAL REQUIREMENTS OF THE CONTRACT IN ISLAMIC LAW AND IN INDONESIAN LAW

A. The Subject of The Contract

There are differences between the requirements of the subject of the contract if we see from Islamic Law and from Indonesian Law. The differences is how Islamic Law and Indonesian Law define the 'capacity' of the subject of the contract. In Islamic law, the age restriction for someone to be recognized having the 'capacity' is based on '*urf*'. But In Indonesian Law, someone is recognized having the capacity if they are reaching the age of 21 years old, or they already married before 21 years old.

Besides those differences, both Islamic law and Indonesian Law are obligating for all the parties in the contract must having the 'capacity' in order to make the contract.

B. The statement of Will

Both of Islamic Law and Indonesian Law are obligating mutual consent between all the parties to make a contract. And based on that mutual consent, there must be

statement of will from both of the parties. In Islamic Law this term is called *Ijab* and *Qabul*. Generally, both of Islamic Law and Indonesian Law 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 extra requirements to make the statement of will becomes perfect. Those extra requirements are:

- i. Both of *Ijab* and *Qabul* must stated the aim of both parties clearly
- ii. Both of *Ijab* and *Qabul* must be aligned to each other
- 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*).

C. Object of the Contract

Basically, both of Islamic Law and Indonesian law have the same substance in order to regulating the object of the contract. But in Islamic Law, the object of the contract cannot be against the *Syaria*.

For example, in Indonesia Law we are allowed to make a selling-buying contract which the object of the contract is an alcoholic drink. But in Islamic Law we are not allowed to make the same contract, because Alcohol is being prohibited under Islamic Law. Other than that, there are some requirements in Islamic Law that regulating about the object of the contract, which are

- i. Can be handed over
- ii. Can be determined
- iii. Can be transacted

Meanwhile in Indonesian Law, object of the contract can be determined as the rights and obligations between the parties, which are consist of:

- i. To give something
- ii. To make something
- iii. To not to do something

D. The Aim of the Contract

About the aim of the contract, in Indonesian Law it was recognized as the permitted cause. Permitted cause in here is meaning that the aim of the contract can't be against the law, public order and decency. Meanwhile in Islamic Law the aim of the contract are 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 for the contract is *al-Musyarri'*. Or in other word, every legal consequences which are made from the contract must be known by *Syara'* and can't be against the *Syara'*, or it must be followed all the rules in Holy Quran and Hadith.

Table 1. The differences between the legal requirements of contract in Islamic Law and in Indonesian Law

No	Variable	Islamic Law	Indonesian Law
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1	Subject	The capacity of the parties is based on 'Urf	The capacity of the parties is decided based on maturity or aged. In <i>Buergelijk Wetboek</i> , someone is mature and have the capacity when they are 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 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 consequences which are made from the contract must be known by <i>Syara'</i> and can't be against the <i>Syara'</i> , or it must be followed all the rules in Holy Quran and Hadith.	the aim of the contract can't be against the law, public order and decency.

Furthermore, the main difference on the principle of contract between Islamic Law and Indonesian Law is the origin of the law. In Islamic Law, the law of contract is come from Holy Quran and *Hadith*. Meanwhile the law of contract in Indonesian Law is come from the Indonesian Civil Code which are the same exact with the Dutch's *Burgerlijk Wetboek* (The old BW) (Nachatar, Hussin, & Omran, 2010; Smits 2017; Khairandy 2011; Ningsih & Disemadi, 2019; Mahmud, Azmi, Islamil, Daud, & Napiyah, 2019; Sulistyarini, Budinono, Winarno, & Koeswahyono, 2018; Muhammad, Saoula, Issa, & Ahmed, 2019; Ilmih & Zulkarnain, 2019).

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[...] Holy Quran.