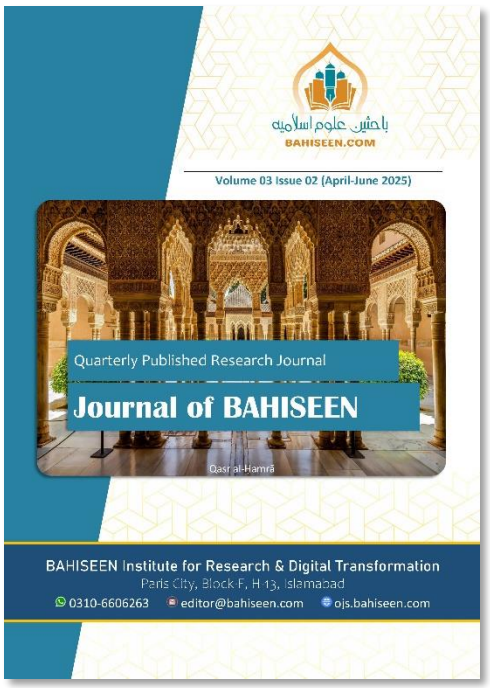

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Legitimate Expectations and Pre-Contractual Duties of Contracting parties: Reconciling Islamic-Law Minimalism with Doctrines of Pre-Contractual Good Faith

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Abstract

This article explores how the doctrine of legitimate expectation and the developing idea of pre-contractual good faith in English law can be better understood through the guiding principles of Islamic law, which has long emphasized honesty, transparency, and the avoidance of harm at the earliest stages of negotiation. While English law traditionally prioritizes contractual freedom and limits duties prior to agreement, its gradual recognition of reliance and fairness mirrors values already embedded in Islamic legal reasoning. By highlighting Islamic law's disciplined minimalism—offering clear ethical boundaries without overburdening parties, the article also suggests that its normative framework provides a subtle yet effective model for shaping modern pre-contractual duties. In doing so, it shows how Islamic legal principles can quietly enrich contemporary discussions on good faith, offering a coherent foundation for protecting legitimate expectations while preserving the autonomy of contracting parties.

Keywords: legitimate expectations, contractual duties, doctrine of pre contractual good faith , freedom of contract , caveat emptor

1. Introduction

The pre-contractual phase of any contract represents a critical stage in which contracting authorities engage with potential bidders through invitations to tender, negotiations, and preliminary communications. Despite the absence of a concluded contract, these interactions often generate reliance, expectations, and significant economic and strategic commitments by private parties. However, legal frameworks governing the duties and liabilities of contracting authorities during this phase remain fragmented and inconsistent across jurisdictions. Common-law systems typically emphasize negotiation freedom and minimal intervention, limiting civil liability for pre-contractual conduct, whereas civil-law traditions impose robust good-faith obligations that protect reliance and ensure fairness. This divergence creates doctrinal uncertainty, exposes bidders to unanticipated risks, and raises questions about the appropriate balance between administrative discretion and procedural accountability in public contracting.

This paper argues that the divergence between Islamic-law minimalism, grounded in contractual freedom, limited duties, and a reluctance to impose liability before contract formation, and English-law doctrines of pre-contractual good faith, grounded in reliance protection, fairness, and legitimate expectations, creates systemic incoherence in the regulation of public procurement and state contracting. The study also posits that a hybrid framework, built upon the doctrine of legitimate expectations, can offer a principled reconciliation of these traditions by providing a balanced model of pre-contractual protection without undermining administrative discretion or commercial efficiency in an hybrid model

legal system like Pakistan .The research seeks to reconcile these conflicting approaches by exploring the doctrine of legitimate expectations as a potential unifying framework. Rooted in administrative law but increasingly relevant in contractual contexts, legitimate expectations can provide structured reliance protection while preserving the flexibility and policy-making discretion of contracting authorities.. The conceptual framework for this study hypothesis is built on three foundational constructs

.a. Common-Law Pre-Contractual Good Faith

This concept represents a contrasting legal philosophy where good-faith duties arise at the initial stage of negotiations parties must avoid causing reliance-based harm ,fairness governs the entire contracting process .Liability extends to culpa in contrahendo (fault in contracting) Common-law jurisdictions therefore create broader grounds for pre-contractual liability, especially where an authority's conduct induces reasonable reliance.

c. Doctrine of Legitimate Expectations

This construct functions as a bridge doctrine, originating in administrative fairness but increasingly applied in pre-contractual contexts. It centers on: promises, representations, and procedural assurances given by contracting authorities protection of reasonable reliance preventing arbitrary withdrawal or conduct balancing reliance interests with administrative discretion The doctrine's hybrid nature makes it a potential harmonizing tool across legal traditions.

c. Islamic-Law Minimalism

This construct reflects a legal tradition in which pre-contractual relationships are governed by freedom of contract absence of general duties prior to agreement reluctance to impose liability for negotiations emphasis on autonomy over reliance This minimalism typically causes to some extent a weak or inconsistent protection of expectations created by contracting authorities during tendering or negotiation processes The finality of contract or sale transaction may not rest wholly on the just essential requirement namely offer, acceptance and consideration which were prescribed for the validation of contract. In other words and in the pertinent opinion of Islamic Jurists, even though a contract of sale is formed the congruence of offer and acceptance, yet it does not become final by mare constitution of these requirements, it is still open to some other rights in form of essential characteristic to be mentioned for the preservation right of consumers: that Liability comes together with gain and risk. Mutual consent in a trade should be prevailing in both parties in order to evade any bias action towards one party only. And, to develop quality service and regular inspection for example, on the subject matter that meet the demand and requirements of customers and defects should be identified before conclusion of contract. This right is in essence a flow of theory of contractual obligation as noted in chapter supra embracing the theoretical framework of "Al Darar Yūzāl" Haram must be eliminated or "La darar wa la dirrār". There should be neither harming nor reciprocating harm especially the segment for pre-contractual liabilities must be focused. Given the principle of "darar" Islamic law can evolve as long as the limits imposed by Shari'ah are not traversed.

In Islamic law of contract known as fiqh al mūamlāt herewith certain framework we have which serves the objective of protecting the right of contractual parties .the notion of this framework in Shari'ah is essentially ethical as well as encompass all kinds of rights without obligations that have financial implications, it mainly refers to a specific term of right of either or both contractual parties to meet or rescind the agreement .these options are implemented into different ways, some are opted by consent of the contractual parties ,while others are in the nature of right exciting for them due to the very operation of law.as it is revealed by discussion supra that contract may still be entered into under conditions of gharar linked with the object of exchange, price etc. ,but with a provision of options for the contractual parties to be affected by the same . the provision of this framework helps reduce

gharar and brings up into acceptable limits, it also reduces the risk of undue commission of any party deliberate or unintentional act. These options have justifications too on the basis of various larger benefits to the society, in this way parties are given a 'reassessment' or 'cooling off' period over which they can rethink about their contractual decisions by rational thinking to minimize possibility of risk or any other damaging factor .

2. Depiction of the Contract in Islamic Law

The word contract is decoded as aqd which literally means "the tying together of two or more things by rope"1**.** Study reveals that contract in Islamic legal literature used in two senses. The first in a general where the contract is involved with actual phenomenon of every act undertaken in earnestness, with stiff determination regardless of whether or not it arose or came forth from a unilateral intention such as trust etc. Decisively, the term is used not only to refer to covenants but also to refer to oaths and other kinds of promise like Nikah, Pledge or personal commitment.2

Moreover, the word is also quoted in Qur̓ ān to refer in the direction of personal obligations.3 The second in a particular sense, it is used for consequence and outcome of mutual agreement such as sale, hire, and agency. It is relevant to note that contemporary scholars are inclined to apply the contract to bilateral contracts as is the case in common law.4

Number of Qur̓ ānic verses supporting the opinion that fulfillment of contract in all aspects of life includes faith and obligations. It is a moral as well as a religious obligation. These verses regulate the principles of contract through different terms namely contract, covenant and promise. For example:

"Oye who believe fulfill the contractual obligation" 5

"And fulfill you covenant with me and as I fulfill my covenant with you" 6

"And they who keep their promises whenever they promise"7

Overwhelming majority of specialist within the context of Islamic law is an attempt to define contract have turned their attention to explain the contract of sale which they observed as model for all sort of contracts. The incipient definitions from major schools of Islamic Jurisprudence, each revolves around the idea of covetous exchange between parties. A sale contract within Hanafi school for instance, the author of badāī al-snāī concluded as the exchange of certain coveted items for another coveted item: 8such as exchange by words or by deed. And Ibn Qudāma a famous Hanbali Jurist purports sale contract as the exchange of property against another property conferring and procuring possession. 9Accordingly as it is mentioned above that for these early scholars and their followers a contract is perceived as a mechanism for exchanging possession physically property therefore by this conception one party relinquishes the possession of an article to another in transfer for the other party who relinquishing the possession for him. So conferring of immediate possession with an instantaneous change in respect to counter values intended to be exchanged are its main effects.

Contract therefore implies a legal relationship in consequence of the conjunction of two declarations which follow legal effects regarding subject matter. The above meaning and analysis make the sense that contract includes two parties and it is usually used for two parties transactions with the mechanism of offer and acceptance to serve the interests and benefits of both parties which arise form the exchange of subject matter and it seems quit equitable that each party must show fairness in revealing the information about subject matter.

3. Legitimate Expectations and Freedom of Contract

According to Islamic law of contract in consequence of formation of any valid contract two types of obligations arise. First of these two types includes certain basic obligations understood from the very nature of that specific contract. Such could be equated to the term implied by Muqtadā al-aqd, or the nature and essence of the contract. 10These terms may not require to be expressed in the contract by any of the parties to that very contract. For instance

perusal of Islamic literature on law of contract in case of sale contract finds certain examples such as delivery of goods be free from defects and consideration as price on delivery. The practical example and other detail in this regard and particular purpose will be explained later under discussion of Khiyar al Aib. Some Jurists or researchers on Islamic law viewed from another angle, such terms are also called "Āthār al-aqd**"** or the effect rises from the contract. 11 The principle here applied is "al-aqd asbab Jaliyyah Shara'iyah Le Ahkām e ha, waā ātharīha wa muqtadayātī ha" which says "Contracts are the casual legal justifications for the operation of the set of rules, legal effects and implications preset by Shari'ah." Parties are free to enter into any contract, but it is Shari'ah to determine its "Muqtadā" as its legal effects therefore the parties need not to mention for the same as stipulation of express terms.12Muqtadā al-aqd is creations of law linked with the nature of particular contract opt by parties and practically making of that contract has no concern in its determination.

The second type of obligations is; which must be stated expressly in the contract by the party relying upon it. These express terms are the stipulations for certain descriptions or particular objective which fall under the ambit of Khiya alwasaf. Therefore in view of the above distinction, it is now proposed to deal with the question of freedom of contract in the sense of the party's freedom to ascertain contractual terms regulating the effects of the contract or the conditions implied by Shari'ah.

In Islamic law there is controversy over this issue which may be discussed into two main streams. The first group of Jurists maintains the concept of freedom of contract as general rule while another school of Islamic law takes the opposite view ,they maintains that it is the exception. Brief account of each view is given as below:

4. Minimalism of Freedom of Contract: As an Exception

Another group of Islamic Jurist who maintains the freedom of contract as an exception further differed into two different opinions. The first of this group is the Zahiri School the founder of that school was Ibn Hazam al-Zahiri whose views have strictly been reinforced by his renowned disciple Daud al-Zahiri. They maintain their opinion upon reliance of Hadith **"**Every stipulation which is not in the book of Allah is void**".13** They further contended that any undertaking or stipulation put forward by the parties to contract notwithstanding , the consent of the parties is ensured, is considered not valid unless and until validated by the express provisions namely, Qur'ān, Sunnah or otherwise approved by valid consensus done over by companion of Prophet ﷺ. They also strengthen their views with the evidence of another Prophetic Sunnah which says:

"How can man stipulate conditions which are not in the book of Allah ,all conditions that are not in the Book of Allah are invalid, be they a hundred conditions. The judgment of Allah is truer and his conditions are more binding. 14**.**

On the understanding of this tradition they split up the meaning of the hadith into two parts and derived two apparatuses from this hadith. They gave explanation in the terms that person either undertakes to do what Allah has ordered or commanded to be done or otherwise undertakes to commit something which has not been so ordained by law giver to be fulfilled. In the later case, either he may be promising to do lawful what he has been declared contrary, or undertaking to adopt unlawful what has been maintained lawful or valid.

In both mentioned situations they viewed such undertaking is not valid because it will tantamount to a transgression of Allah's limits.15**.** Hence Zahiri approach stands for just to validate few expressly sanctions as type of stipulations. On the other hands the second group of the Jurists, Hanafi and Shāfi'ī maintain bit wider approach towards the tradition of Prophet ﷺ relied upon the Zahiri, they interpret the phrase in the Book of Allah 'differently' as meaning comprising in addition to stipulations expressly provided by the Qur'an, Sunnah and Ijmāh, they widen the domain of the phrase and added in its application the stipulations validated by Qiyas or analogical reasoning.

They based their position on the bases of Prophetic statement where Prophet ﷺ was reported to have ruled the stipulation made to master in contract of emancipation. "Allegiance of the slave vest in the emancipator"16 Point of distinction here between Zahiri and others is based upon the space and scope of freedom of contract by inclusion of Qiyas, while Zahiris holds most stringent and restrictive position in this regard. In above case the Jurist other than Zahiris interpreted the invalidation of the stipulation in said contract based on the reason that it contradicted the prescribed effect or objective of contract in other contracts too on the bases of analogical reasoning. They further argued that Muqtadā al aqad is prescribed in Shari'ah to maintain balance between rights and obligation for the sake of ultimate objective of Shari'ah which is called justice and fairness among the contracting parties.

In the absence of special provision, the Shāfi'ī maintain that any stipulation which is neither consistent with Muqtadā' al aqd nor consolidating prescribed effects is not valid and further invalidate the entire transaction if it is beneficial to maker and not to other party, but if it contain no benefit upon non of the parties to contract. It will be invalidated without the remainder of the contract.

Similarly according to Hanafi Jurists in the absence of any explicit provision of law that any stipulation which is neither in accordance with Muqtadā al aqd, nor consolidating it , is either irregular if it confers additional benefit on the party creating it or void if it does not confer benefit on any of the contracting parties. While an irregular stipulation will have effect on the entire deal, but a void stipulation is merely unenforceable not vitiating the entire deal. However there is distinction found in the both opinions between Hanafi and Shāfi'ī Jurists, Hanafi prescribe custom very widely and in consequence they hold validation about stipulation, notwithstanding their contradiction to the Muqtadā al aqad, in case if such are established by custom.17 Thus it could be established that despite their varied opinions over the broad concept of freedom of contract; irrespective of the fact that in principle, it is the general rule or the exception, yet all schools of Shari'ah agree up to varying degrees, the stipulating in contradiction of Muqtadā al aqd is not valid.

5. Contract of Sales and Doctrines of Pre-Contractual Good Faith

All Jurists of Islamic law agreed on established fact that it is an implied term in a contract of sale of goods that the party who is selling must make sure that the goods delivered are free from defects otherwise it is right of the buyer that he can revoke the contract or reject the goods whether it was stipulated in the contract or not on behalf of excuse of freedom from defects. This basic implied term is said in Islamic law as "Shart al Salamah min al-ūyub". It is sort of condition in contract for freedom of contract. Such condition is also prescribed as term implied by Muqtadā al aqd.18 Breach of this condition gives the other party to operate right of Khiyar al Ayeb or option to reject or return the defective subject. This right of rejection is also known as Khiyar radd bil ayeb. This right has reliance on the tradition of Prophet ﷺ as stated:

"It is unlawful for a Muslim to sell his brother defective goods unless he makes this known to him"**19.**

It is worth mentioning that the said statement reported from Prophet ﷺ does not cover patent or obvious defects or any defect otherwise visible or in the knowledge of the vendee at sale spot, alike in English law it applies to the concept of latent defect only.

Accordingly the categories of defects which gives the vendee the option to reject the goods are generally defined as where the happening of such thing effect the value or price of the goods in the sense that it decrease the value or price of subject in the custom of traders.20 In other words it is as like the condition of merchantability found in English law but not exactly the same as it was decided by Lord Ellen borough J where he stated,

"Seller cannot insist, without warranty that the goods should be of any special kind or specific quality. However, the presumed intention of the parties must be that the goods should be

merchantable under the name mentioned in the contract between them. The buyer cannot be supposed to buy goods to throw them away."21

While the other features or conditions prescribed for fitness and contract's discipline like samples etc. in English law are classified under the terminology known as "Khiyar al wasf" in Islamic law of contract. Although Islamic Jurist treat such terms as express terms. However in America the warranty of fitness in relation to the description is treated as type of implied term where breach of such terms results the same remedies for vendee in case of defective goods as it would be there under the implied term Khiyar al Ayb in Islamic law. In fact it is a more realistic approach since it is redundant to mention in law that good should correspond with their descriptions in all respects. Because the express terms may understood by their letter without the law intervene to fill the slits. Parties must detailed the express terms to invoke court jurisdiction in this regard other wise, they cannot sought their due legal effects in order to have right to reject the goods for breach of description or to operate the Khiyar al-wasf in contract of sale.22

Moreover the defects must be known in the subject of sale at the time when sale is going to be conducted or at least any time before it is delivered to the vendee. 23 In case where such breach of implied term or 'shart al Salamah mina al-u'yub' occurs, then vendee can operate his right or remedy in two ways. Hanafi, Malaki and Shāfi'ī Jurists say that he either asks for ratification or may opt the option of recession of contract. While the Hanbali Jurist add third option as well which is compensation along with ratification and recession, the detail of all these options and the operation of their feasibility and non feasibility would be discussed thoroughly in upcoming discussion in next chapter. However, this remedy of compensation is known in Islamic literature as "daman al aqad" unlike it is existed in English law as legal responsibility for compensation in contract. It applies in Shari'ah to compensation in respect to subject property of contract only. While the commercial loss of profit and personal injury damage caused by these injury or other property losses of the vendee are not fall under the scope of contractual liability in Shari'ah. 24

6. Concept of Pre-Contractual Liabilities in English Law of Transaction

Moving beyond Islamic thought, one should be cognizant of the fact that the main point in the discourse on the law of contract is its development from the maximum formalization through the maximum flexibility, there was a time when the agreement was considered to be properly made only by uttering of certain specific phrases by contractual parties. The agreements were initially considered to be only an auxiliary device helping people to reach their economic needs and goals, but it was relatively rare and uncommon at that stage. With the passage of time and by growth of changing goods, services and work agreements, contractual relations becoming the widest spread regulative tool, in so far that modern commercial market is primarily based on agreements. It is also a fact that due to deep influence by the commercialization of modern private law and changing trends, contemporary contract law got inevitably flexible in respect to the demands and trends of market and ready to borrow different concepts from other legal systems.

Thus, as some of the inevitable and logical consequences of developments of contract law, the procedure for conclusion of contractual relationship has also been modified, becoming on one hand more complicated and on the other hand flexible too. Which render it less standardized and more diverse. So as by the growth of variety of contracts with variety of modes, commercial activity is in need that law should be simpler, quicker, as well as with more reliable procedure for entering to a contractual obligation. Not only does the old emancipation practiced in English law nor even classic procedure for entering into contract used by other contemporary systems does suit the needs of these developments of commercial market i.e., making an offer and its acceptance could not meet too much formal and complex requirements posed by market.25

It is affirmed that there are certain obligations to be fulfilled in every commercial transaction (sale purchase) prior to entering into an agreement. So, vender is to allow the vendee to inspect the sale items, in order to certify that the absence of any hidden or obvious defect; because information deficiencies play vital role in contract enforcement. If one of the parties lacks information, court could refuse to enforce the terms of agreement. Nevertheless, in newly upcoming developed commercial market, it is bit difficult to set question where the line is to be drawn or (should be drawn)? To determine the curve of information deficiencies of which the law will accept to disregard. For the perseverance of these basic rights of the seller and the buyer, private norms were not interested initially in English legal system. There were certain local policies regulating the trade fairs, along with that there were certain principles, those were guideline for the courts, like the key principle of Caveat Emptor etc., which is based on the theme factor that buyer had the chance to use his knowledge, to be careful or accept the cost of his inattention. The assumption was that buyer has to inspect the goods or otherwise ensure that they are suitable for transaction . Hence, with the passage of time in new developing era, the things got changed in this regard. The analyses of contemporary disclosure scenario portray that the information's liability pendulum has swung very much in favor of buyer. It could be said that seriousness of the maxim has been consign to history. With that increasing complexity of modern commerce has positioned the buyer at a hindrance. In the meantime, certain factors got increasing role, specifically to rely more and more upon skill, judgment and honesty of the seller etc.

However, the rule survives limited by legislation and procedure. Predominantly in land transactions and somehow also found in contracts between private sellers, shipping and maritime law contracts.26 The principle of "Caveat Emptor" has been employed in contractual sphere from centuries but yet distinguishes from its time of emergence reference to consumer contracts and in many aspects Caveat Venditor, let the seller be aware" is prevailing which indicates a new approach. In time, however, it is apparent that "Caveat Emptor" principle certainly has enjoyed a steady evolution. Time witnessed that the the harshness of the rule has been tempered by legislation, yet remains prevalent within particular areas of legal regime even some subtleties of cross application do exist. The discussion in this chapter, however, aims to judge the gradual death of the Caveat Emptor principle and its substitution and conversion towards other rules, those emerged subsequently i.e., caveat venditor, and Least Cost Information Gatherer Principals etc. The Least Cost Information Gatherer states that information should be formed properly and communicated by such party who can afford to do so with the least expense that could properly balance the relationship between the vender and vendee.27

To this, another factor that adds to the dissatisfaction with the classic procedure for entering into agreements is complexity, in such way which does not always hold up to the particulars of the modern process of making agreement in respect to bit complex nature of transactions that attract huge amount of skills, time and money. Mostly, parties enter into lengthy negotiation process that take months, in addition it is more complicated than simple exchange through an offer and acceptance. Then, offers and counter offers crisscross etc., redeveloped the body of contract. In due course only at the end of lengthy technical evolvement of the constructing process effect the contractual formation from classic formation procedure into long negotiations pertaining numerous contractual provisions.

7. Conclusion

With this, the discussion may be concluded that pre-contractual duty is one of the important aspects of contract law in modern age that is devoted to the cause of protection of rights of contractual parties from numerous unfair trade practices. The ultimate objective of such protection is to avoid and refrain from exploitation and to check all kinds of business malpractices. Today there are variety of modern transactions in which pre-contractual

disclosure of information is of prime importance. This sort of liability lies with the producers, manufacturers, retailers and sellers for their defective products that may cause injury to the interests of buyers or assets. The study in hand is an attempt to present a research work with comparative approach on the subject in the context of pre-contractual disclosure of information.

However, Islamic law as potential solution of existing problems facing contemporary sale transactions in general and in cases of defective sale items in particular. Islamic law is divine law revealed from Allah Almighty through His Messenger "ﷺ" laid in Qur'an and Sunnah as interpreted by jurists in their different Fiqh manuals. Qur'an, Sunnah, Ijma and Qiyas are considered its primary sources. This law is universal in nature and application and sovereignty rests with Allah Almighty. It does not extricate between state and religion, between sacred and secular. Islamic law covers all aspects of human life – religious, social and family matters – considering 'moral virtues' as principle base of society. It regulates every area of life from dress code to finance and politics. For this reason, in Shari'ah every action that has been taken with ill-disposed to its moral value is viewed as culpable. Islamic commercial law evolved in seventh century in Arabian Peninsula with its inimitable notion of equality and fairness, embracing the theoretical framework of "Al Darar Yūzā.l"28 Haram must be eliminated or "La Darar wa La Dirrā.r"29 There is neither inflicting nor returning of harm.

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