**Conversion and Authentication of Contracts**

**against Unforeseen Circumstances**

**- Comparative Study -**

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***The main purpose of this research is to honor the fundamental interests of contractual obligations:***

The mechanism of contract transformation plays a major role in saving contracts

from nullity in a way that ensures maintaining the stability of contractual

relations, and ensuring the interests of contractors. Given this importance, this

theory took its way to Arab and Western laws, even if it differed in the form of its

adoption, between those who stipulated it as a general rule as it did Some Arab

laws and legislations, the most important of which were in the explanation and

expansion of the Algerian civil law. And from the provision of some applications

or forms of contract transformation, such as the French law and the English law

, the attention that was taken by jurisprudential legislation in relation to the theory

of contract transformation in comparison with man-made laws, and a mechanism

for contract transformation was established by stipulating it as a general rule in

addition to the set of special texts, it came within legal conditions that the judge is

bound By searching for it, the condition of the necessity to search for the will of the

parties to the contract on the part of the judge is the hallmark of the theory of

contract transformation

ملخص البحث :

ان آلية تحول العقود في القانون المدني, لها دورا نافذا في عملية انقاذ العقود من البطلان , فكان لها الاثر الإيجابي على استقرار العلاقات التعاقدية , وضمان حقوق وواجبات المتعاقدين , ونظرا لهذه الأهمية القصوى فقد دأبت عدد من النظريات وانكبت على دراستها واخذت طريقها تدريجيا الى القوانين العربية والغربية حتى وان اختلف الفقهاء على كيفية تناولها والية تبنيها ,فكان من نص عليها بالقواعد العامة . مثال على ذلك بعض القوانين والتشريعات العربية وكان ابرز ما تناول هذه النظرية فقهاء القانون المدني في الجزائر , امام من ناحية الدراسات المقارنة فقد تناولها الاستاذ الدكتور عبد الحميد البعلي كدراسة متفردة . ولكن هنالك من نص على بعض التطبيقات او بعض صور التحول للعقد مثل ما تناوله القانون الفرنسي والقانون الانكليزي, وسوف نأتي في سياق هذا البحث على عدد من القواعد الدالة على ذلك .

ان الاهتمام الذي اخذ به التشريع الفقهي فيما يتعلق بنظرية تحول العقد مقارنة مع القوانين الوضعية ( بحث البروفسور الدكتور عبد الحميد البعلي نظرية تحول العقد دراسة مقارنه ) وضعت الية تحول العقد بالنص عليها كقاعدة عامه اضافة الى جملة النصوص الخاصة المشار اليها في القوانين الوضعية .وقد جاءت هذه النصوص ضمن شروط خاصة وشروط قانونيه التزم القاضي بالبحث عنها في معرض تطبيقه للقاعدة القانونية على واقعة مرتبطة بهذه القاعدة انطلاقا من ضرورة البحث عن ارادة أطراف العقد وهذا العمل مناط بصلاحيات القضاء , وهنا كانت الإشكالية المثارة في بحثنا هذا ومنطلقا للرد على هذه الاشكالية وهي ما السمة المميزة لنظرية تحول العقد بين التشريع الديني والقوانين الوضعية .

**Introduction:**

According to the law, whether the Islamic Sharia or the statutory laws and their intellectual and philosophical theories, the objective is uncompromisingly to protect the social values and the fundamental interests of obligations arising out of the legal ties, each according to their legal provisions and sources.

Thus, if these interests are jeopardized due to exceptional unforeseen conditions or circumstances[[1]](#footnote-1), whereby the applicable legal rules may no longer protect these interests, it is then indispensable to implement other alternative rules that are capable of achieving and protecting such interests.

Accordingly, the rules to be applied under unforeseen circumstances or exceptional conditions shall be considered an integral part of the legal system in general. Resorting to its provisions is thus required to preserve the interests generated from the obligations and that is the goal behind the application of these provisions which should therefore be appropriate and applicable to the risk resulting from the contingent circumstances and conditions.

Such risk may be economic, social, political, military or may have occurred as a result of natural disasters. It must be current, real, confirmed, unforeseeable and unusual in order to authorize the taking of unusual measures for the protection of threatened and fundamental interests. These interests differ from one legal sphere to another, such as for example, “the basic fundamental rights” within the scope of civil law.

This risk, as before, constitutes the essence of the exceptional circumstances and the unforeseen conditions that may be:

* Natural such as floods, earthquakes, volcanoes, torrents .... etc.
* Social such as epidemics, sectarian strife and class struggle.
* Economic related to the economic system and which impacts are reflected on the economic ties, relations and activities in general, such as high prices, inflation, insurrection, chronic recession, major economic crises, grinding unemployment, and accumulated debts, etc.

The foregoing depicts the unusual and unfamiliar situation that requires action to preserve interests in light of the powerlessness of the normal rules under these circumstances. It is these circumstances and conditions that turn unlawful depositions in normal conditions into legitimate ones. Transcending the regular rules is therefore the only way to meet these unforeseen conditions and circumstances, and to act accordingly.

**Unforeseen circumstances and conditions have multiple designations:**

They may be an unexpected event, force majeure[[2]](#footnote-2), exceptional accidents[[3]](#footnote-3), exceptional circumstances[[4]](#footnote-4), contingent circumstances or legal necessity[[5]](#footnote-5).

**State of necessity:**

The necessity forms essentially the legal basis of the theory of unforeseen circumstances and conditions with all its legal regulations as provided for and observed by the Islamic Sharia in the following articles: Article (211) of the Yemeni Civil Law stipulates that: “The contract is binding upon the contractors; it shall not be revoked or amended except with the agreement of the two parties, or for reasons determined by Sharia law, however, if unforeseeable exceptional public incidents occur such as wars and disasters, and such unforeseen changes of circumstance made the contractual obligation more burdensome and difficult than contemplated, if not impossible for the debtor, as a result of which he may incur an exorbitant loss which may drive him to rescind the contract, and this does not mean the increase of decrease of prices, the judge may, depending on the circumstances of poverty, wealth, etc., and after establishing the required equilibrium between the interests, decrease the exhausting obligation to a reasonable extent”.

Article (198) of Kuwaiti Civil Code states that : “If, after entering into the contract, and before its final execution, general unforeseeable exceptional circumstances occur causing the performance of the obligation arising therefrom to be onerous, if not impossible threatening the Contractor with excessive losses, then, after balancing the interests of the two parties, the judge may contain the onerous obligation to within reasonable limits by either reducing the extent of the obligation or increasing its consideration. Any agreement to the contrary shall be null and void”.

Article 205 of Jordanian Civil Law states: “If general unforeseeable exceptional circumstances occur causing the performance of the obligation arising therefrom to be onerous, if not impossible, threatening the Contractor with excessive losses, then, after balancing the interests of the two parties, the court may contain the onerous obligation to within reasonable limits. Any agreement to the contrary shall be null and void”.

Accordingly , We will divide the study into three **Chapter**

**The first Chapter :Conversion and Adaptation/Authentication of Contracts**

**against Unforeseen Circumstances**

**The second Chapter** : **The above interpretation of the contract conversion conditions is established according to the statutory law.**

**The third Chapter:**  **In addition to the foregoing, conversion of contracts in Islamic jurisprudence bestows the following:**

**The first Chapter :*Conversion and Adaptation/Authentication of Contracts***

***against Unforeseen Circumstances***

Pursuant to the detailed provisions and their sources in Islamic Sharia or statutory systems,the true problem of this research paper dwells fundamentally in the inevitability of preserving economic interests in contractual obligations as it is a legitimate objective and a fundamental obligation in contracts. Thus, if these interests are jeopardized by exceptional or unforeseen conditions or circumstances, whereby the applicable legal rules may no longer protect these interests, and it becomes necessary to implement other alternative rules that are capable of achieving and protecting the interests of obligations.

Such rules then become part of the legal system as a whole, and their provisions shall thus become required to preserve the interests generated by contractual obligations. It is crucial however, for these rules to be appropriate and applicable to the risk arising from the contingent circumstances and conditions, and for the risk to be real and actual not illusory, and established not improbable and unfamiliar. It is this same risk which constitutes the core of contingent circumstances and conditions and their impact on commitments.

Legists have therefore introduced different designations for these contingent circumstances ranging from force majeure as per the Syrian Civil Code, to unforeseen accident or accidents and exceptional circumstances in the Yemeni, Kuwaiti and Jordanian Civil Codes based on Islamic Laws or legal necessity.

However, when scrutinizing and looking thoroughly in the matter, it appears that the necessity and its regulations form the grounds of the legal and legitimate aspect of the theory of unpredicted circumstances, as well as of the theory of contract conversion in Islamic jurisprudence among others. In this context, it should be noted that the Jordanian civil law differentiated between the theory of unexpected circumstances and the theory of force majeure. Due to supervening circumstances, the performance of the contract becomes more cumbersome for one of the parties, though performance still remains possible. When loss is brought about by a change of circumstances in a contract, the loss must be shared equally by both parties from the point of the consideration of the welfare and good of others before one's own interest. In general, the remedy is to split the loss equally between the contracting parties. "Equity is equality" is a maxim deep-rooted in Islamic legal tradition. As for force majeure, it entails the termination of the obligation which the debtor sustains solely.

The explanatory note stipulates that this ruling is founded upon Islamic jurisprudence such as the principal of “Excuses” in the Hanafi jurisprudence and the “Hardship” in Maliki and Hanbali jurisprudence, with a difference in provisions, in the equality between the contractual parties, and in justice in general.

On the basis of the foregoing, it is evident that the state of necessity is the legal basis for the theory of unforeseen circumstances and conditions. But how does it impact contractual obligations in nominate and innominate contracts as well as the theory of contract conversion in Islamic jurisprudence?

According to some jurists, the necessity is more related to the circumstances of obligations. Imam As-Sousaity defines the necessity as a question of preference or priority. That is, in this case the question is that the lesser of the two evil is preferred. Public interest is to avoid more hardships or to give priority to necessity. Although it must be in accordance with the fundamental spirit of the Sharia, interest should be adopted for eliminating some general hardship in a community or for promoting the welfare of community. In other words, the essence of interest exists in discovering a preferable course by understanding the social context.

The jurists have accurately defined the concept of necessity from legitimacy aspect concordantly with the Qur’an and Sunnah, in terms of necessary tolerated prohibitions.

The notion of necessity is strictly associated with unforeseeable circumstances, taking into account its available means, the nature and characteristics of the specific project, and the good practice in the field in question. When necessity rules are available, circumstances that are unforeseen must be strictly interpreted. It is to prevent injury which necessitates affording facilities to those who are confronted with hardships.

Accordingly, it is judged by fully considering the total context of a contract in a society that the principle of equilibrium has priority over the rule of the binding a contract. In this case, this judgement is supported by the notion of public interest, because the priority of this principle eliminates hardships of the majority and contributes to the welfare of a community. Thus, the character of the attitude of Islamic legal system is expressed in fully considering the real meaning of the object in the total context of a society, not in mechanically applying it to a fixed rule.It is certain that there exists a consideration for the contractual interest behind this legal judgement, thus the Islamic Jurisprudence in this sense is deemed to be integral.

Some contemporaries define necessity as follows: “It is a state of danger or severe hardship, wherewith there is a risk of harm or detriment to oneself, to integrity, to mind, to soul and to wealth. It is when a person’s interest is threatened, according to which the prohibited is permitted and obligation is dismissed in accordance with the harm most likely within the restrictions and controls of Sharia.

Some argue that the criterion for what is permissible and not permissible **lies in the following**:

• If the harm resulting from resorting to necessity is less than the harm caused by the opposite, then it should be used. It must also be used in case of severe distresses or highly suspected harms.

• If the harm resulting from resorting to necessity is greater than the harm caused by the opposite, then it should be dismissed.

Imam Al-Ghazali, may God have mercy on him, holds that the difference between what must be done for necessity and what should not be done lies in the interests observed by the jurists.

One of the rules of necessity is that it is to be estimated as much as needed so it is not relied upon, that the original provisions are easy to refer back to, and that the constrained person shall endeavor to take necessity away.

**Accordingly, the necessity makes forbidden things permissible when:**

1. The necessity exists really and is not illusory in such a way that the person does not inflict harm and have threatened interests.
2. There will be no other permissible means for the constrained person to push the evil but those which contradict the sharia, by not fulfilling orders and committing inhibitions.
3. The constrained person should not contradict the rules and general fundamentals of the Islamic sharia, such as adultery, murder and infidelity[[6]](#footnote-6).
4. The constrained person should limit himself to what is permitted in case of necessity by using just the needed amount to drive the evil away. That is to say, the minimum, that is why the rule: “Necessity makes forbidden things permissible” is restricted by a secondary rule which is: “Necessities should be evaluated in a proper manner”, as the necessity is to be given the right significance as per the Almighty’s saying: “But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him”, Surat *Al*-Baqarah [verse *173*]”.
5. The necessity must observe the purposes of Islamic Sharia in bringing interest, preventing corruption and removing detriment.
6. The harm of the forbidden thing which is allowed is lesser than the harm of the case of necessity[[7]](#footnote-7), and in order that the use of the rule of Al-Sayouti which stipulates that: “Necessity makes forbidden things permissible”[[8]](#footnote-8) becomes valid, we should take into consideration those conditions and restrictions to avoid the rulings of forbiddance and obligation due to this rule.
7. The necessity should not be a cause of nullifying the rights of persons, as: “Harm should not be removed by a same harm” and: “Harm should be removed without harm”.
8. The condition of necessity is not allowed to give mitigated rulings by basing one’s judgment on expectation and imagination.

**Unusual hardship and Necessity Rule:**

If Necessity is the case of danger or extreme difficulty and forms the legal basis for unforeseen circumstances, by taking into account the conditions and norms of the sharia, then the unusual hardship is the basis for legal necessity and conversion of contracts in Islamic jurisprudence, as per the following doctrine: “hardship rule brings facilitations”. Therefore, some considered the hardship and its exclusion as the criterion upon which is based the theory of necessity in Islamic Jurisprudence. Hardship is meant here to be the unfamiliar or unusual circumstances which plunders the dispositions and the five necessary objectives: religion, soul, money, reason and honor.

This hardship may be a reason for legislating new provisions dissimilarly to the usual norms such as legislating unconventional contracts and acts like loan, lending, and leasing. These contracts allow the use of the money of others, inter alia the agency, deposit, and types of partnerships. They have permitted the use of efforts of others upon distress, such as the Hawala, so that the creditor can collect his debt from non-debtors, documentation contracts suchlike mortgages and financial guarantees to secure and document the creditor's right, discharges and acquittals to dismiss all or part of the debt, and right of cancellation, deceit, deception for delays, prevention of abuse, etc.

Hardship may also create a reason to prevent distress and introduce facilitations and authorizations in some provisions such as: 1) the prescription or expiration of term for which the judge refuses to hear the case in litigated rights in order to protect the acquired rights and the stability of transactions, and 2) the unawareness of the agent regarding the optional revocation by the principal, which constitutes an excuse for the agent to preserve his powers and the enforceability of his contracts in order to prevent any distress; which justifies as well the process of contract conversion in Islamic jurisprudence.

The rationale of alleviating hardship and preventing distress was diversely determined by the jurists. Some of them like (Ibn Qudamah) mentioned that the person with so much distress may have no rules. Therefore, it has to be shepherded by wisdom when possible, otherwise, it will be replaced by presumption whereby hardship is associated with excuses and defined accordingly.

Al-Ezz Ibn Abdel-Salam believed that the greatest, lowest and middling intensities of hardship could not be determined but approximated and rounded so that “what cannot be controlled must not be dismissed but approximated”.

Al-Qarafi associated hardship that requires alleviation with custom. Al-Shatbi, with whom we agree, confirmed that hardship is “additional not original”, which means it is defined according to what adds to it. It differs according to the people, conditions and times, but we think that: matters of worship are easily approximated because of the abundance of inference therein, contrary to transactions and contractual obligations.

Therefore, it is more appropriate to distinguish between them while referring to the same as guidelines, and to refer to customs in transactions as they are considered part of the customs vocabulary in Islamic jurisprudence, particularly if these transactions are commercial. For this reason, we initially tackled the theory of conversion of contracts in Islamic jurisprudence against unforeseen circumstances from this aspect.

This research is highly significant as it fulfills the legal capacity of contracts to respond to the legitimate legal and practical requirements and provide solutions.

It substantiates and displays the legitimate veracity of the conversion and reversal of contracts in Islamic jurisprudence, which is inherent in the conversion rules and conditions. This veracity must be extracted out of cases and partial detailed matters in accordance with jurisprudential arts, and is characterized by its unique objectivity within the framework of overall, sub-governing and regulating rules of contract conversion.

The theory of contract conversion in the statutory law is based on a single text transmitted from the German Civil Law, Article 140 thereof, and diffused by different Arab Laws. The German legal practitioners built their theory of contract conversion in the nineteenth century based on this same text.

According to its authors, the theory briefly elucidates that, in spite of its nullity, the void disposition may involve other valid elements which the contractors may shift to in lieu of this void disposition. Hence, the void disposition would have generated an intermittent statutory effect. The legal conversion must observe three conditions:

**First –** **The original disposition is void, voidable and annulled, thus:**

* It should not be a correct disposition.
* It is not void in one of its parts and valid in the other, but indivisible.

For example: A chattel mortgage contract is valid in an official document, and it turns out that the mortgagor and the mortgagee confirm that it is a pledge instrument, rather than a chattel mortgage. In this case, the chattel mortgage does not become a pledge instrument because the mortgage is valid and only the void disposition shall be transformed.

Another instance is the valid contract interrelated with a suspending condition or an abrogating condition. If the suspending condition fails or the abrogating condition is fulfilled, the contract is forfeited and does not transform into another disposition because the contract is valid. The contractors want to have the contract interrelated with this condition and not to have it converted into another contract should it be forfeited as a result to such condition.

In case the disposition is null and void in one of its parts, and valid in the other, yet divisible, no conversion of disposition shall be required but rather curtailed so that the valid part is reserved and the void is dismissed.

However, if the disposition is indivisible, it shall become null and void, and there may be a place in this case for the conversion of the disposition which is completely invalidated, into another. There may also be a place, in the case of curtailment, for the transformation of the invalid part alone into another disposition while retaining the valid part thereof.

**Second - The original invalid disposition includes elements of the other converted disposition:**

1. There must be another disposition for the original disposition to convert to, meaning that the elements of the new contract shall be all available in the invalid contract.

The contrast between the original and the other disposition is necessary for conversion, but merely adapting the disposition while maintaining the same in place is not considered conversion: for example, if a statement of will is mistakenly adapted to be a sale, then adjusting the wrong adaptation is not a conversion in itself, but an interpretation of the correct adaptation of disposition.

1. There must be a link between the two dispositions that makes the original one inherent in a group of elements from the other disposition, yet, the original disposition is not required to actually include the elements of the other disposition.
2. Nevertheless, the other disposition shall in no way include a new element not formerly incorporated in the original disposition. If a new element is added, it is not a conversion. The elements of the old contract remain the same and are legally adapted differently than the first adaptation, hence, the new contract is replaced by the old one.

As for the conversion of the contract, it is the replacement of a new contract with an old contract without introducing any new element to it. This non-introduction of any new element is what distinguishes the conversion of the contract from its correction and review.

**Third -** **The contractors may have a potential will to employ the other disposition** to which the original conduct was converted, however, this is not a real will, otherwise this would not be called a conversion, but an actualization of the real will by way of interpretation, because the conversion is not based on a real will, but rather an expression of a real, implicit, contradictory will concluded by judge and enforced by the law.

Once these three conditions are met, the conversion takes place, the original invalid disposition is replaced with another with immediate effect, and the conversion is enforced by the law not the judge who may rule out that the conversion took place in its own without the need to be requested by the litigating parties.

It should be noted that the voidable contract theory is a purely legal theory. According to the jurisprudence, it is: a void contract to the majority of jurists, and a valid contract, involving the irregular contract, to the Hanafi jurisprudence, as mentioned by Al-Qarafi when differentiating between them; despite the fact that Al-Malikiyah and Al-Shafiah embraced the Hanafi distinction between irregularity and voidance in some areas. Al-Kasani said: “Irregularity to us is another part of permissible and void.” This Hanafi jurisprudence, which some jurists of other doctrines have followed, **differs** from the voidable contract in the statutory law:

The irregular contract is tainted by a defect in an accessory attribute, and in the idiomatic sense of irregularity, there is an intermediate position between validity and voidance, which brings about important consequences as follows:

1. The irregular contract is entitled to annulment by choice of the parties and the judge’s ruling. Yet, the contract loses its mandatory power.
2. Rulings shall not be rendered by virtue of the contract document, but slackened until the contract is executed.
3. Irregularity shall not be rectifiable by virtue of the contractual parties’ permission or one of them, the contract remains eligible for annulment even if permitted until the cause of irregularity is rectified:

For instance, if irregularity was due to ignorance of one of the sales options, or of the profit rate of the speculation or the partnership, and the parties determine such options or unknown profit rate, irregularity is thus rectified and the contract becomes valid accordingly.

**The second Chapter** : ***The above interpretation of the contract conversion conditions is established according to the statutory law.***

**As for Islamic jurisprudence**:

***First* -** **It distinguishes between the term of Authentication that dominates the jurisprudence industry and the term of Adaptation that dominates the legal industry.**

**In terms of Authentication**, the jurist searches for the legal aspect of the matter and the proof of its validity attribute. Authentication is the disclosure of Sharia ruling by getting to the essence of its legal evidence, similar to the rule of matter-acts in Islamic jurisprudence.

**As for adaptation**, it focuses on the ‘process of law making’ and refers to the ability of the laws to evolve. It is about establishing the nature of the matter or disposition, therefore it is dominated by the redaction of the ruling, unlike the previous example. The judge’s role is to disclose the intention of the contractual parties and their objective of the disposition. Adaptation is always based on subjective rather legitimate objective consideration. Consequently, we recommend using the term Authentication in the research topic rather than Adaptation, which is subject, in the judge’s exertion, to the control of the Court of Cassation that involves amendment or cancellation, rather than conversion and transformation, and falls within the framework of interpretation as determined by the law practitioner. **Accordingly**:

The term “Adaptation” did not exist in the language of jurists in the past, and the term “Authentication” was rarely found in the language of legal practitioners. Nonetheless, we can always benefit from these terms while always differentiating between the methodology of each and its impact of its source law.

Transformation and conversion were mentioned in the Holy Qur’an, in the speeches of jurists and contracts of transactions. The jurists used the terms of transformation, conversion and inversion when moving from one contract to another which has met all legal conditions.

We have exerted efforts as much as possible to provide up to twenty-five models, cases and examples for the conversion of contracts in Islamic jurisprudence and demonstrate the origin and theory of contract conversion in Islamic jurisprudence. Hence, conversion and alteration are inherent in jurisprudence as per God Almighty’s statement:

“***With no desire to any alteration***” (Surah al-Kahf: Verse 108)

“***You shall find no alteration in our way***" (Al-Isra': verse: Verse 77)

This contradicts the opinion of some senior legal practitioners who state that:” It is difficult to say that Islamic jurisprudence defines the theory of contract conversion as found in German jurisprudence”. I rather believe that: conversion is governed by the characteristics of the jurisprudential research methodology funneled by the overall rules from which the detailed provisions in partial matters derive.

***Second*- The juristic consideration of the cases and conditions of contract conversion in Islamic jurisprudence proves that the conversion carries the following meanings:**

1. Moving from one topic to another.
2. Transformation and alteration as per God Almighty’s statement “***You shall find no alteration in our way***" (Al-Isra': Verse 77)
3. Alteration or transformation from one situation to another, from one form to another, and from one place to another: as per God Almighty’s statement: “***With no desire to any alteration***” (Al-Kahf: Verse 108)
4. Transfer or transformation into another type: as per God Almighty’s statement: “***They have no power to remove any affliction from you, nor can they transform it (to any other)***” (Al-Isra’: verse 56).

**We also conclude** that conversion is an effect of transformation and is obedient to it.

All such meanings were used by the jurists under the term “conversion” which has provisions that transcend it and differ according to their sources. The examples and models for transformative contracts that we have enumerated are only a [sliver of the full scope](https://www.powerthesaurus.org/sliver_of_the_full_scope/synonyms), and are not restricted to the examples mentioned by statutory law which only tackled the “Contract Conversion Theory” through the nullity and voidance of the contract, and as one the inadvertent effects of a void contract in law. Furthermore, this theory is transmitted from the German Law and Jurisprudence as previously stated, as per the following details.

***Third* - Among the differences between jurisprudence and law in this regard, we itemize the following:**

**A-** **In Islamic jurisprudence, the original contract does not have to be void, such as the following cases:**

1. Transformation of the loan into a will.
2. Transformation of the valid speculation into an agency, a partnership, and irregular contract of lease.
3. Transformation of the absolute public speculation into a restricted private one.

**In the previous examples among others**, **we notice** that there are matters that can be considered as regulations in the conversion of the contract in Islamic jurisprudence such as:

a-Converting from the first contract to a new one in terms of its description and depiction.

b-The other new contract meets its conditions in Islamic jurisprudence.

c-The matter here is due not to the will of the parties in the first place, but to the availability of legal conditions in the converted disposition.

This is in addition to the fact that there is an opinion in jurisprudence that indicates that the invalid contract is null and the inversion of nullity is impossible. Some comment that this is the apparent opinion in the Hanafi ijtihad, but in fact they believe that the rule of contracts is in their purposes and meanings, not words and sentences, the rule of achievement is better than desertion and the rule of allegory is to be perused when the truth is impossible.

In this framework, we conclude that - contrary to the statutory law in terms of its theory of contract conversion - the conversion of contract in Islamic jurisprudence does not necessarily require that the original or first disposition be null and void. It may even be valid, but it becomes and turns into another disposition with different description and depiction if it compiles its legal Islamic conditions.

By this condition, we mean that: the existence entails availability and absence does not entail non-existence.

**B - We have also demonstrated in Islamic jurisprudence that the contract transforms as to observe the intentions of its parties as shown below:**

**Conditional sale for the authorizing party:**

It is said that: the sale was not intended by the two parties, but rather to secure the debt of the buyer due upon the seller, and to keep the sale at the disposal of the buyer until full settlement of the debt. Therefore, the contract did not shift from being a mortgage contract subject to mortgage ruling. If it was a real sale, it would not be permissible to re-sell and recover the price unless the parties agreed to dismiss the sale.

**C - We also established in Islamic jurisprudence that the contract transforms for a legislative discretionary consideration, as per the cases below:**

If contractors negate the price in their sale contract and the rental fees in their lease contract, the contract is null and void, as the rule of compensation is dismissed, but does sale overturn into a gift and leasing into lending?

A group of jurists founded the transformation of the contract upon three juristic rules:

1. The rule of contracts is in their purposes and meanings, not words and sentences.
2. The rule of achievement rather than desertion.
3. The rule of allegory when the truth is impossible.

**D - Conversion of contract with unmet conditions into another in Islamic jurisprudence, such as:**

1. According to a group of jurists, when the gift is subject to compensation (gift of reward), the contract is valid and turns into a sale contract.
2. When the gift is interrelated with a condition, the contract becomes a promise.
3. When the agent violates and surpasses the set limits, the agency turns into a [Negotiorum gestio (or agency without authority](https://www.proz.com/kudoz/arabic-to-english/law-general/4662287-%D8%A7%D9%84%D9%81%D8%B6%D8%A7%D9%84%D8%A9.html#10398730)), and the contract depends on the authorization of the principal.
4. The deposit turns into a loan with permission to use.
5. Hawala turns into a bail and vice versa.
6. Wakala (agency) for a fee turns into Ijara (contract of lease) if the agency is against compensations and fees:

According to Rawdat Al-Talibin: **Whenever the agency is permissible, it shall be free of compensations. If a known compensation is required, the leasing conditions are then available and met and if the contract includes the term leasing, it becomes mandatory. If the term agency is included, then the contract may be authenticated by way of inference. But is consideration to be made to the form of contracts or their meanings?**

According to Mughni Al-Muhtaj: The agency even against remunerations is permissible by both parties: by the Principal, because he may see the interest in dismissing all his powers or in another agency, and by the agent, because he may not devote himself to perform his powers, therefore, the necessity will only do them harm. If the agency contract is not against a remuneration, when the contract includes the term leasing, it is thus mandatory, and this does not need to be excluded, and when it includes the term agency, it shall be against a known remuneration. Al-Rafii said: the contract can be founded on its form or meanings. These options were adopted by Al-Ruwaiyani who rectified the first according to the prevailing rule, which is approved as Ibn al-Juwayni asserted in his brief, because leasing is not established upon the term of agency and this as well do not need to be excluded”.

**E - By this way of investigation, tracking, induction and inference, the following was evidenced:**

a-• **The Cases of contract conversion in Islamic jurisprudence are various, divergent, and different.** Such cases are not limited to void or voidable contract as in statutory law.

b-• **The jurists used the terms of transformation, conversion, and inversion** when moving from one contract to another compiling its legal frameworks and conditions.

c-• **Conversion of contracts in Islamic jurisprudence is governed by juristic rules and regulations** such as:

1. The rule of contracts is in their purposes and meanings, not words and sentences.
2. The rule of allegory when the truth is impossible.
3. Means are forgiven but intentions are not.
4. When the inhibition is removed, the inhibited returns.

**The third Chapter*:*** ***In addition to the foregoing, conversion of contracts in Islamic jurisprudence bestows the following:***

1. It does not require the cancellation or invalidation of the original or first contract, as nullity and invalidity are analogous for some, and transformation means shifting from one contract to a new one with different description and depiction while observing its legal provisions.
2. The will of the parties is to be contemplated upon meeting the legal conditions of the contract, and their intentions may exhibit the genuineness of the contract and foster the transformation to such genuineness.

**A -** **By way of induction and inference, it becomes evident that there are Sharia common principles** between unforeseen circumstances and conversion of contracts in Islamic jurisprudence, and that both theories (necessity and conversion) are affected by the same, such as:

**First –** The preservation of wealth in Islamic law is an essential Sharia objective that commends the religious and worldly interests of the people. Disrupting such interests would lead to the disruption of lives while preserving them would lead to the preservation of existence and survival, as per Al-Shatbi. Preservation of wealth is a human interest and essential to the survival and spiritual well-being of individuals, to the extent that their destruction or collapse would precipitate chaos and the demise of normal order in society.

The Sharia, on the whole, seeks, primarily, to protect and promote these essential values, and validates all measures necessary for their preservation and advancement. For this purpose, it has commanded for the purpose of preserving human’s wealth the pursuit of earning a living and permitted transactions and exchanges and trade, such as forward buying (Salam Contract), leasing, share-tenancy and other facilitating transactions including the transformation of contracts from curtailed to efficacious ones which realize all the parties’ objectives. Therefore, there is no doubt that such transformation achieves the objective of wealth preservation if jurisprudential regulations were fulfilled during the transformation process.

**Second -** **One of those common legal principles is achieving the interest in general and the public interest in particular:**

In general, the legitimate interest, according to the terminology of fundamentalists, is to preserve the purposes of the Sharia in terms of preserving the people’s religion, souls, mind, offspring and wealth. So, everything that includes preserving these five principles is considered an interest. And everything that result in failure of these principles is a harm that should be fought and tuned to an interest. The prohibition of failing or restraining these five principles has always been included in all religions and Sharia, as Sharia comes for the interest of humankind.

Such particular meaning is found in necessity, unforeseen circumstances and conversion of contracts in Islamic jurisprudence. Therefore, if necessity requires to defer hardship pursuant to its legal regulations, then the conversion of contracts would benefit the parties by shifting from a contract that does not achieve their intentions to another realizing their intentions according to Sharia law.

The public interest is the specifications that fit the actions of the people and their purposes without having specific evidence of Sharia for consideration or cancellation. When ruling is linked to it, interest is generated and hardship is deferred. As such, it is necessary in the contract conversion to search for the appropriate description of the new transformed contract, when meeting all terms of Islamic jurisprudence.

This is primarily objective and fits the case of the public interest for which no specific evidence was taken for it to be considered, thus, it becomes taken into consideration, or to be cancelled, thus, it becomes canceled.

The conditional sale towards the person authorizing the same shall be described as a secured debt of the buyer towards the seller and the sold item shall be kept with the buyer until full settlement. Accordingly, the contract remains as a mortgage contract subject to the mortgage provision, and if it was a real sale, the return of the sold item would only be possible and the price refunded with the agreement of the parties.

**Third –** **These two theories have in common the power of eliminating hardship and instituting leniency:** which means that hardship would become a reason to introduce leniency and mitigate complications, such as substitution, change and authorization, which is the cornerstone of transformation and replacement of defective contracts with other contracts such as the following: the deposit becomes a loan with permission to use, the transfer (hawala) becomes a guarantee and vice versa, and the remunerated agency turns into leasing. On the other hand, the authorization resulting out of hardship includes the permissibility of contracts and dispositions that people need and their tolerability while violating the established rules such as: Forward-Buying.

**Fourth -** One of the common denominators between the two theories is Istihasn, or juristic preference, as the "abandonment of the opinion to which reasoning by the doctrine of systematic reasoning would lead, in favor of a different opinion supported by stronger evidence and adapted to what is accommodating to the people”.

Such juristic preference, as per Al-Sarakhsi, is greater and more convenient to people; it is to acclaim leniency of the rulings on the private and public levels, and uphold convenience over hardship which is an asset in religion.

**B -** The key in our view is that the theories of necessity and conversion of contracts in jurisprudence share the same legal basis. The legal authentication of a new contract based upon another contract is, in fact, a look into the legitimate aspect of the matter and its validity. With reference to transformation, authentication is contingent upon the correct legal ruling by way of inference from its legal evidence, as for the theory of necessity, the evidence of hardship which is the basis of the permissible necessity of the act or disposition is also a basis of the authentication process in contract conversion.

**The Most Important Recommendation:**

However, such authentication off the legitimate aspect produces conversion of the contract within the framework of conversion regulations, and searching for the availability of hardship in the necessity rule authorizes the act and amends its effects within the framework of Sharia necessity regulations.

As an embodiment of these previous common legal principles between the theories of conversion and necessity/unforeseen circumstances, the conversion of contracts for discretional legislative consideration appears in more clear cases at the top of the contract’s transformation and conversion as explained earlier, such as:

If contractors negate the price in their sale contract and the rental fees in their lease contract, the contract is null and void, as the rule of compensation is dismissed, but:

Does sale overturn into gift and leasing into lending?

A group of jurists founded the transformation of the contract upon three juristic rules previously mentioned:

1. The rule of allegory when the truth is impossible.
2. The rule of achievement rather than desertion.
3. The rule of contracts is in their purposes and meanings, not words and sentences.

The same applies to the transformation of the contract which terms may be concluded in another contract as previously mentioned.

**Research Results and Recommendations:**

**When setting the theory of contract conversion in Islamic jurisprudence, we conclude the following:**

1. Cases of contract conversion in Islamic jurisprudence are various, divergent, and different.
2. The jurists used the transformation, conversion, and inversion terms when moving from one contract to another, compiling its legal frameworks and conditions.
3. The conversion of the contract in Islamic jurisprudence is governed by the Fiqh pursuant to a research methodology such as:

* Means are forgiven but intentions are not.
* When the inhibition is removed, the inhibited returns.

1. The conversion of the contract in the statutory law was initiated first by the German law in one article which is Article (140). Subsequently, the German legal practitioners instated the theory of conversion of the contract. However, in the context of a void or voidable contract, the theory diverged, in many aspects of its structure and meaning, from the conversion of the contract in Islamic jurisprudence with its rules, regulations, meaning and scope, which makes Islamic jurisprudence more spacious, broad and flexible than the legal system in meeting the factual requirements and responding to people's practical needs in the most accurate and detailed manner.
2. There are common denominators between the theory of contract conversion in Islamic jurisprudence and the theory of unforeseen circumstances. The contract must be adapted to the changing circumstances if the performance of relevant obligations cannot be honoured by any party due to unfamiliar or unusual hardship which fundamentally alter the equilibrium of a contract resulting extreme burden to one of the parties. This is particularly acute with respect to financial transactions and civil contracts that are affected by one level of hardship as previously stated. In such a situation, adaptation of the contract to the new circumstances may come into play. Obligations should be reduced as much as needed to achieve the intentions of the transactions and the obligations laid upon the parties. The fundamental difference here is that the impact of unforeseen circumstances and their legal regulations is extended in the theory of contracts conversion to reach a state of stability and equilibrium of contracts converted into new ones to achieve the economic interest of the contract and the intentions of its parties in line with the legal terms and conditions of the new contract. However, the effect of necessity is to be estimated according to the circumstances themselves, and exceeding the legal inhibition therein shall only be restricted when the necessity is required whereby the legal inhibition indorsed by the necessity shall not become absolute.

**Our last prayer is all praise is due to Allah, the Lord of the Worlds.**

**References:**

- Article 165 of the Syrian Civil Code.

2 - Article 212 of the Yemeni Code extracted out of the Islamic Sharia and Article 205 of the Jordanian Civil Code based on Islamic Sharia.

3 -Theory of Legitimate Necessity by Dr. Jamil Mohamad Mubarak, Dar Al Forqan – Mansoura – Egypt.

4-Al-Zurkushi Rules – L 137 B – Wahba Al-Zuhaily – ibid page 70. The matter has a detail to refer to by way of review.

5 -Refer to the rules of provisions by Al-Ezz Ibn Abdel-Salam, Case 1 page 93.

- 6 [Al-Ashbah wa-Al-Naza'ir, page 93 – Refer as well to Al-Ashbah wa-Al-Naza'i by Ibn Njeim page 96.](https://books.google.com.lb/books?id=wYmnswEACAAJ&dq=%D8%A7%D9%84%D8%A3%D8%B4%D8%A8%D8%A7%D9%87+%D9%88%D8%A7%D9%84%D9%86%D8%B8%D8%A7%D8%A6%D8%B1+book+of+similar&hl=en&sa=X&ved=0ahUKEwiC0InmroHqAhVtwcQBHVmEBIIQ6AEISDAD)

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18 - WEHBE AL ZAHEL – P 164

19 – AL KARHE – KACHEF AL ASRAR – P 158

20 – SAED RAMADAN AL SEYOTE –P 240

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1. The last expression was used by the Kuwaiti Jurisprudential Encyclopedia in the framework of the discussion on the rule of necessity which is to be estimated as much as need and the following rule: a thing which is permissible out of excuse ceases to be permissible with the disappearance of that excuse. [↑](#footnote-ref-1)
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7. Refer to the rules of provisions by Al-Ezz Ibn Abdel-Salam, Case 1 page 93. [↑](#footnote-ref-7)
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