ANALYSIS AND EFFECT OF CONSENT ON THE VALIDITY OF CONTRACT IN ISLAMIC LAW

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ABSTRACT

The purpose of this paper is to analyse legal effects of consent for the validity of contract in Shari'ah. The work began with the definition of concept of contract (aqd) in Islamic law. Consent is a basic requirement in every contract as it is a requirement for legalising one person's right to another in accordance with provisions of Shari'ah. The work shall thus focus on the element that represent consent which is the offer and acceptance and discuss matters that vitiate its validity. Using inductive, doctrinal and hermeneutical methodologies, the authors have attempted to review several works of jurisprudence. This implies Muslim jurists' approach to the definition and classification shall be adopted. It is observed that consent is central in validity of contract as each of coercion (*ikrāh*), mistake (*al-khaṭa'*), misrepresentation (*tadlīs*), fraudulent deception (*ghabn*), questions presence of consent; and therefore, such contract is in jeopardy as the non-consenting party can terminate it. The research concluded by recommended that Muslims in their dealing with individuals and corporate bodies in transactions that are governed by Islamic law- should be aware of injunctions related to consent as it can render the contract void.

1. Introduction:

Islamic law of contract is just like all other contracts, it has basic principles which guaranteed that the rights of all contracting parties have been protected. Consent is the basis for validating transfer of rights between people under Islamic law. Therefore, its presence is a requisite for validating any contract. This paper seeks to highlight its importance and define its scope and its effect in contracts.

The paper shall start by looking at the concept of contract in which the main element is identifier of consent in offer and acceptance. The work goes on to discuss effect of defects of consent on contract. These defects are: coercion (*ikrãh*), mistake (*al-khaṭa'*), misrepresentation (*tadlīs*), fraudulent deception (*ghabn*). The work concluded by highlighting the importance of observation of these legal issues in all contracts.

2. Concept of Contract (*Aqd)*:

Linguistically, the Arabic root verb *'aqada* means to tie a knot. It is the opposite of the root verb *halla*, which means to untie. It is originally used to mean tying a rope or any other tangible or intangible objects.[1] Such tying came to denote covenants and

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[1] Al-Baiḍāwī, N. A. S., *Anwār Al-Tanzīl wa Asrār Al-Ta'wīl*, vol. 3, (Dār Al-Fikr 1402H/1982), p. 201.

agreements as it is tying up of people mutual declaration. It is also used to express a firm determination like *aqĩdah* (creed), namely the ideology that a human being firmly determines to accept and act accordingly.[2] According to Ibn Fãris, "*The letters 'a q d together represent a root that denotes 'firm tying' to which all its related branches part belong, including the contract of marriage; the plural being 'uqũd."*[3]

In its general sense, the word *aqd* is used in referring to disposition (*taṣarrufãt*) in general. In its broader sense, *aqd* is defined as every disposition or conduct that initiates legal effect, either by one person such as making a vow to Allah (*nadhr*), oath (*yamĩn*) or gift (*hiba*); or between persons such as buying and selling, leasing, etc.[4] The common definition among Maliki, Shafi'i and Hanbali jurists is that a Contract (*aqd*) is Every conduct from which a legal obligation emanates.[5] Ibn Al-Arabi of the Maliki School specifically stated that *Aqd* is the connection of an oral declaration with intention of the heart.[6]

In its stricter sense on the other hand, Contract has been defined by Al-Dusũqĩ's as: "*that which is dependant upon offer and acceptance"*; and Ibn Rushd, the grandson simply puts it: "*Contract is offer and acceptance*."[7]

The Hanafi definition which is considered as the most encompassing by modern writers on contracts provides that "Contract (*Aqd*) is the connection between offer and acceptance that creates legal effect on the object."[8] They have also defined it as relating the statement of one of the two contracting parties to the other in a manner that its effect is established;[9] or binding different edges of (declarative) disposition (*taṣarruf*) with offer and acceptance in a legal fashion.[10]

From the above definitions, we can note that an offer and acceptance that are unrelated do not constitute a contract in Islamic law. This definition also excludes cross offers from being a contract as there must be an offer and an acceptance that directly relate to each other. In addition an agreement to carryout an illegal action, not sanctioned by *Sharĩ'ah*, does not constitute a contract in Islamic law.[11]

3. Requirement of consent in contract

Jurists are in consensus that Consent (Riḍã) is fundamental in formation of Contract.[12] Allah, the Most High has said:

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[2] Cf Ibn Fãris, A., *Mu'jam Maqãyĩs Al-Lughah,* vol. 4, (Harũn, A., ed, Al-Dãr al-Islãmiyyah 1410H) p. 86;

[3] ibid, p. 86.

[4] Al-Zuhailĩ, W., *Al-Fiqh Al-Islamĩ wa Adillatuhu*, vol. 4, (Damascus, Dãr al-Fikr 1428H/2007), p. 2918.

[5] Saleh, M. H., Uqũdu Idh'ãn wa Al-Mumãrasãt Al-Ma'ĩbah lahã In (No. 3) *Mujallat Al-Sharĩ'a wa Al-Dirãsãt Al-Islamiyyah*, (1424/2004,) p. 272 @ 277. Retrieved from <http://www.iua.edu.sd/publications/iua_magazine/sharuea_magazine/3/008.pdf> on 25/08/2016.

[6] Ibn Al-Arabi, A. M. A., *Ahkãm Al-Qur'an,* vol. 2, (Beirut, Dãr Al-Fikr, n.d.), p. 548.

[7] Ibn Rushd, M. A., *Bidãyat Al-Mujtahid wa Nihãyat Al-Muqtasid,* vol. 2, (Mustafa Al-Bãbĩ 1395H/1975), p. 171.

[8] Ibn Ãbidĩn, Op. Cit., vol. 2, p. 355; The Mejelle, Art. 103; 104.

[9] Al-Zuhailĩ, Op. Cit., vol. 4, p. 2918.

[10] Al-Jurjãnĩ, A. M. A., *Al-Ta'rĩfãt*, (Dãr al-Kitãb al-Arabi 1985), p. 196.

[11] Al-Zuhailĩ, W., Op. Cit., *vol. 4, 2918.*

[12] Al-Mausũ'a Al-Fiqhiyyah, , vol. 30, p. 220.

> "O you who believe, devour not your property among yourselves by illegal methods except that it be trading by your mutual consent."[13]

The Prophet, peace be upon him, has also said:

> "Buying and selling is but through mutual consent"[14]

However, because consent is a hidden element, it can only be represented by an external indicator. This indicator is known as formula (*sĩghah*) of contract which is represented by offer and acceptance. Formula (*sĩgha*) is the declaration or conduct of parties of a contract expressing their intent to form a contract. It is the main element through which consent to the contract can be established. This is the reason why the Hanafis recognise it as the one pillar of contract contrary to the majority of jurists. Though verbal expression is the norm in formation of contracts, it can however be through written correspondence, signs or mere conduct provided custom or convention had accepted such.[15]

The term *riḍã (*consent*)* has been defined by majority of jurists as one's intention in a condition without coercion[16] while Hanafis defined it as the absolute choice whose effect is clear on one's face showing pleasure and preference. They defined choice (*ikhtiyãr*) as intending something whose existence and non-existence is within one's ability of preference.[17] Base on this Hanafi differentiation, they consider consent (*riḍã*) as a condition for the validity of voidable contracts like sales and lease. According to this position, such pecuniary contracts may be formed but they are defective (*fãsidah*) like in the presence of coercion.[18]

Therefore, contracts of an errand (*al-mukhti*) or mistakenly entered are legally formed as the party made the statements by his choice though; it is *fãsid* (defective) due to absence of real consent. But disposition or contracts that are not voidable such as marriage, divorce, emancipation, revocation of divorce are valid even under coercion as consent is not a condition for their validity according to the Hanafis.[19]

The majority of jurists are however of the opinion that *riḍã* (consent) and *ikhtiyãr* (choice) are synonymous terms.[20] In their opinion, whether a contract is pecuniary or not, consent is a basic condition for their validity.[21] According to Al-Dusũqĩ and Al-Kharshĩ, the requirement for formation of sale is that which indicates consent. Thus, transfer of ownership is subject to consent"[22]. Al-Zanjãnĩ of the Shafi'ĩ School is also of the opinion that the basis upon which all pecuniary contracts are formed is mutual

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[13] Qur'an 4:29.
[14] Ibn Mãjah, A. A. Y. Q., *Sunanu Ibn Mãjah*, (Dar al-Fikr 1424H/2003), Hadith No. 2180. It is an authentic Hadith according to Ibn Hibbãn in his Sahĩh and Al-Albãnĩ.
[15] Al-Zuhailĩ, Op. Cit., p. 2932.
[16] Kuwaiti Ministry of Endowments and Religious Affairs*, Al-Mausũ'ah Al-Fiqhiyyah*, vol. 22, (Kuwait, Dhãt al-Salãsil 1412H/1992), p. 228.
[17] Al-Mausũ'a Al-Fiqhiyyah, ibid, vol. 2, p. 315; vol. 22, p. 229; vol. 30, p. 220.
[18] Qãḍĩ Zãdah, Shamsuddĩn bin Ahmad, Natã'ij al-Afkãr Takmilatu Fath al-Qadĩr, (Egypt, Al-Matba'ah al-Amĩriyyah al-Kubra, 1315H), vol. 7, p. 293-294.
[19] Bad Shah, Muhammad Amĩn, *Taisĩr Al-Tahrĩr*, (Dar al-Fikr, n,d.), vol. 2, p.3006
[20] Ibid.
[21] Al-Mausũ'a, Ibid, vol. 30, p. 221.
[22] Al-Dasũqĩ MAA, *Al-Hãshiyah Alã Al-Sharh Al-Kabĩr,* vol. 3, (Dãr Al-Fikr n.d.), p. 2-3; Al-Kharshĩ MA, *Al-Sharh al-Kabĩr 'alã Matn al-Ikhlĩl,* vol. 5, (Egypt, Al-Amirah al-Sharafiyyah, n.d.), p. 4.

consent.[23] Hanbalis too have opined that mutual consent is a condition for the validity of a contract unless the coercion is legal for a person forced by the Judge to sale his property to pay his debts.[24]

According to some researchers, consent (*riḍã*) and choice (*ikhtiyãr*) are concurrent in that one will not exist without the other. Ikhtiyãr (choice) is the intention to make the necessary expression initiating a contract which is the medium of knowing one's will and acceptance of the effect of contracting and it is the implication of consent.[25]

4. Defects of Consent:

Defect in consent take four forms according to jurists. These are: coercion (*ikrãh*), mistake (*al-khaṭa'*), misrepresentation (*tadlĩs*), fraudulent deception (*ghabn*). Each of these defects has different effect on the contract as we can see below:

4.1 Coercion (*Ikrãh*)

Ikrãh is defined as compelling a person to do a thing that he will otherwise not do it if left alone.[26] Hanafis have classified coercion into grave coercion (*ikrãh mulji'*) and minor coercion (*ikrãh nãqis*).[27]

Grave coercion (*ikrãh tãm* or *mulji*) is compelling an individual through threat of killing, damage to his organ or severe beating that may lead to death or permanent damage or destruction of the whole of victim's belongings and properties. This sort of coercion negates consent and renders any choice defective.

Minor Coercion refers to an intimidation with a thing that may not lead to death or permanent damage such as threat of detention, chaining or threatening with destruction of one's belongings. This sort of coercion negates consent but does not affect choice according to Hanafis.[28] Shafi'is are of the opinion that only grave coercion (*al-ikrãh al-tãm*m) that attracts legal facility and therefore renders conducts invalid while minor coercion is not *ikrãh* in their school.[29]

It should be noted that coercion in all its forms does not remove legal capacity (*ahliyyah*) rather invalidates consent (*riḍã*). It can also negate choice (*ikhtiyãr*) according to Hanafis. But the majority are of the opinion that it can invalidate both consent (*ridã*) and choice (*ikhtiyãr*).

4.1.1 Legal Conditions for Excusable Coercion:

1. The coercer must have the ability to inflict the threat.
2. The coerced must believe that failure to follow zthe coercion will endanger him.
3. The threat must be unbearable which differs from a person to person.

[23] Al-Zanjãnĩ, Mahmũd bin Ahmad Abu Al-Manãqib, *Takhrĩj Al-Furũ' alã Al-Usũl*, (Mu'assasatu Al-Risãlah: 1398H), p. 62

[24] Al-Buhũti MYI, *Kashshãf Al-Qinã' 'an Matn al-iqnã',* vol. 3, (Maktabat al-Nasr al-Haditha n.d.) p. 149-150.

[25] Al-Zuhailĩ W., *Al-Fiqh al-Islamiyy wa Adillatuhu,* vol. 4, (Dãr Al-Fikr 2007), p. 3063.

[26] Ibid.

[27] Al-Kãsãni, Abubakr bin Mas'ũd bin Ahmad, *Badã'i'us Sanã'i'*, vol. 7, (Al-Matbũ'ãt Al-'Ilmiyyah: 1327H), p. 175; Qãḍĩ Zadah, Op. Cit., vol. 7, p. 792.

[28] Al-Zuhaili, Op. Cit., p. 3064

[29] Al-Ansãrĩ, Abu Yahya, Zakariyya bin Muhammad, *Tuḥfat Al-Ṭullãb bi Sharh Matn Taḥrĩr Tanqĩḥ al-Lubab fĩ Fiqh al-Imam al-Shãfi'ĩ*, (Dar al-Kutub al-Ilmiyyah, 1418H/1997), p. 272.

4. The threat must be immediate according to Hanafis, Shafi'is and some Hanbalis. But Malikis are of the position that existence of fear is enough even if infliction of the threat is not immediate.
5. The coercion must be wrongful. In other words, its objective must be illegal. Legal coercion such as selling the property of a bankrupt to pay his debts is valid disposition or government's acquisition of private land for public purposes.[30]

4.1.2 Effect of Coercion on Contracts:

Malikis, Hanbalis and Shafi'is have held that a contract initiated due to coercion is void (*bãṭil*) as it negates consent which is the basis of all contracts.[31]

In the Hanafi School, contracts in which mocking declaration is treated with the same decree to serious declarations such as marriage and divorce, coercion is seen as the same as mocking and therefore, does not affect the validity of such contracts. They relied on the Saying of the Prophet, peace be upon him:

> "Every divorce is permitted with the exception of divorce by child and insane."[32]

However, the contracts that can be repudiated (*faskh*) by agreement like selling, hiring and gift are invalidated by coercion and the contract becomes defective (*fãsid*) among majority of Hanafis. The aggrieved party has the right to either ratify the contract or repudiate it after the disappearance of the coercion.

However, in the opinion of Zufar of the Hanafi School and Malikis, the effect of contract of a coerced is suspended (*mauqũf*) until ratification after the coercion just like the contract of an unauthorised agent. This shows that such a contract is not invalid (*fãsid*) as it can be executed by ratification of the aggrieved party while a defective contract (*fãsidah*) cannot be validated by ratification. This position has stronger viewpoint according to Al-Zuhailĩ.[33]

4.2 Mistake

This refers to erroneous perception of facts concerning object of contract or the personality of a party to contract. Mistake on the object of contract or a party to contract renders consent defective. On the object of contract, it can be a mistake on its essence or attribute. Example of mistake on essence is where a person purchases a wrist watch made of gold or diamond but turns out to be of cupper or glass; or purchase of a house built of cement but turns out to be of mud. Such a contract is essentially invalid (*bãṭil*) as the object is not what the buyer intends to buy. This makes it a contract on non-existent which is basically invalid.[34]

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[30] Al-Zuhailĩ, Op. Cit., p. 3065.
[31] Al-Dardĩr AMA, *Al-Sharh Al-Saghĩr*, vol. 2, (Mustafa Al-Bãbi Al-Halabi 1352H/1952H), p. 267; Al-Shirbĩni MA, *Mughnĩ al-Muhtãj ilã Ma'rifat Ma'ãnĩ al-Fãẓ al-Minhãj,* vol. 3, (Dãr Al-Fikr n.d.), p. 289; Ibn Qudãma, AA, M., *Al-Mughnĩ fĩ Fiqh Al-Imãm Ahmad bin Hanbal Al-Shaibãni*, vol. 7, (Beirut, Dãr Al-Fikr 1405H), p. 118; Ibn Juzai MAK, *Al-Qawãnĩn Al-Fiqhiyyah alã Talkhĩṣ Madhhab Al-Mãlikiyyah wa Al-Tanbĩhu alã Al-Madhdhab Al-Shafi'iyya wa Al-Hanafiyya wa Al-Hanbaliyyah*, (Dãr al-Ilm li al-Malãyĩn, n.d.), p. 246.
[32] The Hadith is gharĩb (strange) according to Al-Shaukãnĩ, Muhammad bin Ali, *Nail al-Autãr Sharh Muntaqã al-Akhbãr,* vol. 6, (Mustafã Al-Bãbĩ Al-Halabi: n.d.), p. 235.
[33] Al-Zuhaili, Op. Cit.,p. 3067.
[34] Ibid, p. 3068.

A similar mistake can occur of the essence if the object is similar but with grave disparity in its value. Example is purchase of a particular model of a car of certain year but turned out to be an outdated model.[35]

A mistake on a desired quality in an object of contract is failure of the object to meet the express or implied description. Example is if a buyer purchases something black in colour but turns out to be of different colour, or purchases a book of a particular author but turned out to be of a different author. The legal injunction of such a contract is that the contract is not binding on the aggrieved party. In other words, the aggrieved party has the right of option (*khiyãr*) to either accept the contract or repudiate it as it has rendered consent defective. But according to Hanafis, non-voidable contracts are not rendered void due to such mistakes. Imam Ahmad has however stated categorically stated that lack of desired attribute in a woman will give the husband the right of option. Such that where a man had stipulated that the wife should be beautiful, literate or should attain a particular level of education, but it turned that the wife is ugly, illiterate, etc, he has the right to rescind (*faskh*) the contract and the person responsible for the misrepresentation will be liable for his cost. If the misrepresentation came from the wife, she loses her right of dowry whether or not the marriage has been consummated.[36]

It should be noted that there is no legal excuse for hidden mistake. An example is where a man purchases a wristwatch thinking that it is made of gold without any enquiry or anything suggesting that but turned out to be fake or made of copper as Sharia only gives regard to the evident intention.[37]

4.3 Misrepresentation (*Al-Tadlĩs*) or Deception (*Al-Taghrĩr*):

Linguistically speaking, Ibn Faaris (d. 395 AH) states, "The verb *dallasa* denotes concealment and darkness. If someone is described as a *mudallis*, he then conceals some defect in the property subject of sale to keep the buyer in the dark about such defect.[38]" Therefore, *tadlĩs* is a form of misrepresentation by concealing something defective in the property such that a buyer is left in darkness. This act includes trickery, deception and cheating[39].

Tadlĩs refers to the act of deceiving a party to a contract that it is in his interest to contract though it is not. There are several types of misrepresentation which are: Declarative Misrepresentation (*Al-Tadlĩs Al-Qaulĩ*), Active Declaration (*Al-Tadlĩs Al-Fi'lĩ*) and Misrepresentation by hiding a truth (*Al-Tadlĩs bi Kitmãn Al-Haqĩqah*).

i. Active Misrepresentation (*Al-Tadlĩs al-Fi'lĩ*) is a conduct that cause the object of contract to appear in a form different from its actual form. In other words, it is an act of forging the object to deceive the other party. Example is arrange a commodity in which the attractive ones appear on top while defective ones are place at the bottom, painting furniture, cars to make them look new or tempering with care metre to make it appear to have travelled less.

The famous example of al-tadlĩs in works of fiqh is *al-shãt al-muṣarrãt* (a sheep or camel with tied udder to hold milk) making it appears that she produces a lot of milk.

[35] Ibid.
[36] Ibn Qudãmah, Op. Cit., vol. 8, p. 585.
[37] Al-Zuhailĩ, Op. Cit., vol. 4, p. 218.
[38] Ibn Fãris A, *Mu'jam Maqãyĩs Al-Lughah,* vol. 2, (Harũn, A., ed, Al-Dãr al-Islãmiyyah 1410H), p. 296.
[39] Al-Khallãf, J.A.K., Al-Ghaar Dhaamin Rule and its Juristic Applications in *Al-Adl*, No. 42, p. 96

The legal position of such conduct according to majority with the exception of Hanafis is that the deceived party has option of either accepting without the compensation (*ta'wĩd*) for the loss (*ghabn*) or return it to the seller in accordance with the saying of the Prophet, peace be upon him:

> "Do not tie up the udders of camels and goats; for he who buys them after that (has been done) has two choices open to him after milking them: he may keep them if he wishes, or may return them along with one *Sã'*[40] of dates"; Muslim added "he has option (*khiyãr*) of three days"[41].

This is the preferred (rãjiḥ) position according to Al-Zuhailĩ.[42]

Hanafis did not however apply the provision of the Hadith which according to them has contradicted the analogy that the liability of an aggression should be of the same type and value and date is neither. Thus, they assert that the buyer only has the right to request revaluing the commodity to its equitable price and not to repudiate it.[43] The opinion of the majority of jurists is however preferable as this is a specific case in which a textual provision has declared it to be an exception. In other matters where there is defect in the subject matter of contract, the aggrieved party can either repudiate the contract or accept any compensation for his lost from the transaction.

ii. Declarative Misrepresentation (*Al-Tadlĩs Al-Qaulĩ*): is a false statement of a party to a contract or his agent to make the other party to contract. Statements such as you cannot buy this item anywhere but at a higher price or it has no similitude in market or that I am offered a higher price but I decline to accept it. Such a conduct is prohibited in Islam and is regarded as a sinful conduct. The Prophet, peace be upon him was reported to have said:

> "Whoever that cheats us is not among us"[44]

Al-Tadlĩs Al-Qaulĩ does not however dent the validity of the contract unless there is a grave value difference in which case the aggrieved party has the right to repudiate the contract. In other words, his right of option is to due to deceptive cheating (*al-ghabn ma'a al-tahrĩr*) as we shall see shortly.

iii. Misrepresentation by Concealing Truth (*Al-Tadlĩs bi kitmãn al-haqĩqah*): This refers to hiding a defect in a commodity such as cementing and painting a cracked building or hiding a breakage in a car engine or sickness in a domestic animal; or a buyer hides a defect in the consideration, that is defective currency. Such deception is also forbidden in Sharia according to scholarship consensus[45]. They relied on the saying of the Prophet, peace be upon him: "Whoever that cheats us is not among us"[46]

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[40] Sã' (الصاع) is a measure that equals for mudd (3 kilograms approximately). (Bulũgh Al-Marãm: Attainment of the Objective according to Evidence of the Ordinances, (Dãr Al-Salãm Publications, Riyadh: 1416=1996), p. 572

[41] Al-Bukhãri, M.I.I.M., *Al-Jãmi' Al-Sahĩh,* (Riyadh, Darussalam 1997), Hadith No. 2148; Al-Naisãbũriy M.M.A.Q., *Sahĩhu Muslim*, (Beirut, Dãr Ihyã Al-Turãth Al-Arabĩ, n.d.), Hadith No. 3890.

[42] Ibn Juzai, Op. Cit., p. 264; Ibn Rushd M.A., *Bidãyat Al-Mujtahid wa Nihãyat Al-Muqtaṣid,* vol. 2, (Mustafa Al-Bãbĩ 1395H/1975), p. 174; Al-Ramlĩ M.A.H., *Nihãyat al-Muhtãj ilã Sharh al-Muhtãj,* vol.3, (Mustafa Al-Halabi 1357H), p. 136; Al-Shirbĩnĩ, Op. Cit., vol. 2, p. 63.

[43] Ibn Ãbidĩn, M.A., *Hãshiyat Radd Al-Muhtãr 'alã Al-Durr Al-Mukhtãr*, vol. 4, (Bũlãq n.d.), p. 101;

[44] Al-Naisaburĩ, Muslim, Op. Cit., Hadith No. 295.

[45] Ibn Abidĩn, Op. Cit., vol. 4, p. 102;

[46] Al-Naisãbũrĩ, Muslim, Op. Cit., Hadith No. 295.

And his saying:

> "A Muslim is Muslim's brother; it is not lawful for a Muslim to sell to his brother a defective sale and does not explain (the defect) to him"[47]

The aggrieved party has the right of option due to defect (*khiyãr al-'aib*) to either accept or repudiate the transaction.

4.4 Deceptive Fraud (*Al-Ghabn ma'a Al-Taghrĩr*):

The word *ghabn*[48] is literally translated as injustice or cheating. Among jurists, it refers to a transaction in which the value of the object and consideration are not equitable. In other words, selling a thing in lesser or greater than its real value. According to Al-Hattãb, *Al-Ghabn* refers to selling a property at a price more than its usual price of transaction among people within which they do not cheat each other. According to Malikis, it is where the price of an article is beyond a third of its value. [49] A recent definition of ghabn by Sheikh Ali Al-Khafĩfĩ is perhaps the most encompassing. He defined it as: where the value of one of the exchanged articles is not equal to the other during contracting.[50]

Al-Taghrĩr (Deception) is the use of deceptive techniques to make an object appear in a different manner than its reality.[51]

The jurists have two approaches in determining what *ghabn* is. There are two types of *Ghabn* which are Simple and Grave. A simple *Ghabn* is where the price of the commodity sold falls among estimation of evaluators. Example is where a buyer purchases a commodity at N100 which was then valued by an expert at N80 and another at N90 and another at N100.

A grave *ghabn* on the other hand is where the price does not fall within any expert's valuing. Example is where an object is sold at N50; while it was valued by some at N60, and some at N70. Such is considered a grave *ghabn* as none of the experts valued at the price bought.[52] Malikis have opined that ghabn is selling a commodity with a price that is more that its accustomed value among people such as increment with over a third of its price.[53]

4.4.1 Effect of Ghabn on Contract:

Simple ghabn has no effect on the validity of contract according to majority of jurists.[54] Therefore, it cannot be used as an excuse to repudiate a contract. The reason is that such simple ghabn is hardly avoided in people's transaction. Nevertheless, there are

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[47] Ibn Mãjah, Op. Cit. Al-Dhahabi has ruled that the Hadith is sound.

[48] The Mejelle 164. Deceit is cheating. 165. Flagrant misrepresentation is representation which is practiced with regard to no less than one twentieth in the case of merchandise; one tenth in the case of animals; and one fifth in the case of real property.

[49] Al-Hattãb, M.M.A, *Mawãhib al-Jalĩl li Sharh Mukhtasar al-Khalĩl,* vol. 4, (Beirut, Dar al-Fikr, 1398H), p. 470.

[50] Al-Khafĩf, A, *Ahkãm al-Mu'ãmalãt al-Mãliyyah*, (Beirut, Dar al-Fikr al-Arabĩ, 2008), p. 356.

[51] Al-Zuhaili, Op. Cit., p. 3072.

[52] Al-Fiqh Al-islãmĩ wa Adillatuh, vol. 4, p. 576

[53] Al-Hatṭãb, Op. Cit., p. 470

[54] Ibn Hubairah, W.I., *Al-Ifṣãḥ 'an Ma'ãnĩ al-Ṣiḥãḥ*, vol. 1, (Ahmad, F.A., eds, Riyadh, Al-Mu'assasat al-Sa'ĩdiyyah, n.d.), p. 324

exceptional instances in which even simple ghabn will have effect on the contract. These are:

i. where a bankrupt sells his property with simple ghabn, his debtors have the right to repudiate the contact.

ii. Where a terminally ill person sells his property with simple *ghabn*, his debtors or heirs have the right to repudiate the contract unless the other party to the contract agrees to correct the *ghabn*.

iii. Where a testamentary guardian (*al-waṣiyyu*) sells an orphan's property to someone whom he cannot testify in his favour such as his son or wife with simple ghabn, such a contract should be voided.

On the effect of grave, while it has effect on the consent of the other party, the jurists have differed on its effect on the contract. There are two approaches in the opinions of the jurists. The first approach taken by Hanafis based on the evident narration from their school, Shafi'is and Malikis based on the famous opinion in the school that grave ghabn does not give the right of option to repudiate to the aggrieved party.[55] Here too, there are certain exceptions as some disposition that involves grave ghabn is invalid.

i. According to Ibn Nujaim of Hanafi School, in the dispositions of a father, grandfather, testamentary guardian, administrator of *waqf*, entrepreneur in *muḍãraba*, an agent's purchase of a determinant commodity, simple ghabn is pardoned but not a grave ghabn.[56] This opinion has also been narrated from the Maliki School that where there is grave ghabn in a contract on another's behalf, such a contract is subject to repudiation.[57]

ii. Purchase of an advise seeker. Where a person fully trusts the seller and surrenders his option to him by telling him let him choose the best for him as he does not know the price of things, and the buyer sells the commodity through grave ghabn, the aggrieved party has the right to repudiate.[58]

The second approach taken by some Hanafis and some Malikis including Ibn al-Qaṣṣãr and Hanbalis is that the aggrieved arty has the right of option to either accept the contract or repudiate it.[59] A third approach also opined that the aggrieved party has the right of option if the ghabn is done deceptively. This is the opinion of some Hanafis which al-Zaila'ĩ preferred and it is also the fatwa of Sadr al-Islam and others.[60]

From the above different approaches, we can note that ghabn also has effect on validity of contract if it is done unknowingly or the right of another person is involved. The position of those who opined that it has no effect can be seen that from the perspective that the aggrieved party has seen the subject matter of the contract and has agreed to what he purchases and therefore has fully consented to what he is purchasing.

[55] Ibn 'Abidĩn, Op. Cit., p. 159; Al-Haṭṭãb, Op.. Cit., p. 470; Al-Nawawĩ, Y.S., *Rauḍat al-Ṭãlibĩn wa 'Umdat al-Muftĩn,* vol. 3, (Dar al-Kutub al-Ilmiyyah, n.d.), p. 270;
[56] Ibn Nujaim, *Al-Bahr al-Rã'iq Sharh Kanz al-Daqã'iq*, vol. 7, (Beirut, Dar al-Kutub al-Ilmiyyah al-Kubrã, n.d.), p. 169.
[57] Al-Mawwãq, Muhammad bin Abil Qãsim, *Al-Tãj wa Al-Iklĩl bihãmish Mawãhib Al-Jalĩl*, vol. 4, (Beirut, Dar al-Fikr, n.d.), p. 468
[58] Al-Dardĩr, Op. Cit., vol. 3, p. 190.
[59] Ibn 'Abidĩn, Op. Cit. vol. 4, p. 159; Al-Haṭṭãb, Op. Cit., vol. 4, p. 468; Ibn Qudãmah, Op. Cit., vol. 3, p. 584.
[60] Ibn Nujaim, Op. Cit., vol. 6, p. 126; Ibn Abidĩn, Op. Cit., vol. 4, p. 159.

5. Conclusion:

The work started with definition of contract in Islamic law and discussed its basic constituent which is offer and acceptance. Offer and acceptance is the tool through which consent of parties can be established. However, despite its external presence, other elements may suggest that a party's consent to the contract may be defective. These elements are coercion (*ikrãh*), mistake (*al-khaṭa'*), misrepresentation (*tadlĩs*), fraudulent deception (*ghabn*). Grave coercion which must be real and illegal negates consent and therefore renders a contract void in Islamic law. On the effect of mistake regarding subject matter of contract, the majority of jurists are of the opinion that the aggrieved party has the right of option to repudiate the contract. On the effect of misrepresentation which can either be declarative, active, or concealing the truth, the jurists are of the view that it gives the aggrieved party the right to either repudiate the contract or receive appropriate compensation for his lost. The last element among the defects of contract is where there is fraudulent deception (*ghabn*). All these shows the extent on which Islamic law of contract guarantees that consent and statement of parties are met in the major pillars of the contract. As the presumption of contracts of Muslims is that it is in line with the directive of the Lawgiver, Islamic courts should endeavour to identify that consents to contracts are not rendered defective by the elements that negate it as discussed in this work.

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37. Ibn Mãjah, Op. Cit. Al-Dhahabi has ruled that the Hadith is sound.
38. The Mejelle 164. Deceit is cheating. 165. Flagrant misrepresentation is representation which is practiced with regard to no less than one twentieth in

the case of merchandise; one tenth in the case of animals; and one fifth in the case of real property.

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