



Mutual Consent in Formation of Financial Contracts: A Juristic Analysis

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Abstract

As per the ruling of Islamic law, any kind of exchange in wealth, acquisition, possession, and the like will not be valid unless it is grounded on mutual consent of the contracting parties. This paper aims to study the issue of mutual consent and its function in the formation of contracts from the viewpoints of prominent Schools of Islamic law. This is a theoretical study and qualitative in nature. Classical sources of Islamic jurisprudence as well as understanding of the primary texts of Islamic law are used as the key tools in the process of drafting this paper. The paper discusses the various ways to express the consent along with the juristic analysis thereof. Also, this study explicates the practices lead to the invalidity of contracts due to lack of demonstration of assent. The paper concludes that no agreement will be considered sound in Islamic jurisprudence unless there is sufficient manifestation of mutual consent of parties concerned in the contract.

Keywords: Mutual Consent, Contracts, Juristic Analysis, Islamic Law.

Introduction

Preservation of the wealth is one of the five necessities protected strongly by Shari'ah. Any kind of exchange, acquisition, and possession of wealth will not be valid unless it is grounded on the mutual consent of contracting parties. The Qur'an gives the apparent stipulation on this while it says: "O ye who believe eat not up your property among yourselves in vanities: but let there be amongst you traffic and trade by mutual good will" (al-Qur'an, 5:29). This verse very clearly indicates that under Islamic law the mutual consent of the parties is the base for the formation of the contract. Thus, any kind of transaction must be carried out by the free will of the contracting parties. The hadith of the Prophet (pbuh) also stipulates on this condition which says that, "verily trade is based on the mutual consent" (Ibn Majah: 2185). Pursuant to this verse and hadith, the fundamental base of the civil transactions is the mutual agreement of the proprietors (Abu Ghuddah, 1993: 6). Therefore, an Islamic legal maxim says: "none is allowed to deal with another's property without his/her permission", and hereby another maxim says: "any order given for dealing with the property of others is void" (Ismail & Rahman, 2013: 217).

1. Definition of Mutual Consent

The Arabic word for mutual consent is *rida'*, *taradi*, etc. which literally means pleasure of heart and soul, opposite of discontent, will (*ikhtiyar*), consent (*muwafaqah*), and so forth (al-Fayyumi). So, when consent happens between two or more persons, it is called '*taradi*', i.e. mutual agreement, as it is based on '*tafa'ul*', which requires the participation of more than one party since usually trade and commerce are concluded between two and more parties. Therefore, the mutual consent of both parties is required for conclusion of the contract (al-Qurtubi, 5/153).

Muslim jurists have undertaken two approaches in the definition of the consent. The Hanafi School defines it as contentment which reaches at its end in a way that its effect is apparent such as a smile in the face and the like. In other words: *rida'* is to like something and having preference for that (Kashf al-Asrar, 1997: 4/536). On the other hand, other Schools define consent (*rida'*) as the intention of doing something without being vitiated by coercion (al-Mawardi, 1997: 4/253; al-Kharshi, 1997: 5/261; al-Hattab, 1995: 6/13, al-Ibadi, 1996: 5/396). So, the consent according to the Hanafi School is more specific than that of the other Schools. Thus, although the choice does not peak at its end and the pleasure does not actualize, the mere intention to attain the effect in the subject matter is named as consent according to the majority, while to the Hanafi School it is not called the consent unless, at least, the preference is fulfilled and the pleasure is actualized (al-Mawsu'ah al-Fiqhiyyah, 1992: 22/228). Nonetheless, the authors prefer the stand of the Hanafi School on the definition of consent, as it emphasizes the essence of consent and satisfaction, the symptoms of which would be evident in the expressions of the contracting parties.

2. Ways to Express the Consent

Islamic law emphasizes that the consent of the two contracting parties should be the main pillar in any contract. Thus, mutual agreement is the basis of a contract. The Prophet (pbuh) says: "It is unlawful for a person to take his brother's property unless he offers it willingly" (Ahmad: 15569). However, since the consent is a hidden matter of the heart, the scholars have agreed that such consent does not have any effect on the contract unless it is expressed. Moreover, since the consent

is the real motive of the ruling and it defines the judgment, it cannot remain hidden as the consent which is not known to the other party cannot be the basis and reliable for any judgment. So there must be some action to express this consent and such expression is named as formation (sighah) of the contract. Nevertheless, Muslim jurists mention several ways to express this consent, as follows:

2.1 Oral Declaration

Oral declaration is the ideal indication from which the mutual agreement may be objectively ascertained. This oral declaration would be the expression of offer and acceptance between the contracting parties. It means that a contract cannot exist unless one party makes an offer to enter into a legal relationship and the other party responds to it. An offer states what the offerer wishes to do and expects in exchange, while an acceptance shows an offeree's willingness to be bound by the terms of the offer. Hence, without the offeree's assent to the terms of an offer the parties have not agreed upon, so there can be no contract (Haqqi, 2009: 75). The articles (167 & 168) of the Majallah (the full name is 'Majallat al-Ahkam al-Adliyyah, the Ottoman Courts Manual) state that "Sale is concluded by offer and acceptance. In sale, offer and acceptance are made by the use of words commonly employed in the particular locality in making a contract of sale" (al-Majallah, 38).

The articles (169-172) of the Majallah have discussed various modes and forms of offer and acceptance. These articles state, "The past tense is usually used in offer and acceptance. A contract of sale may be concluded by using the future tense if it means the present, but if the future is meant, no sale is concluded. If the future form is used in the sense of a mere promise, such as the statement: 'I will buy' or 'I will sell', no sale is concluded. No sale is concluded by using the imperative mood, such as the expression 'sell' or 'buy'. However, if the present tense is necessarily meant, a sale may also conclude by using the imperative mood" (al-Majallah, 38).

The acceptance should comply with the offer. The articles (177 & 178) of the Majallah state that, "The acceptance of any of the contracting parties should be exactly in accordance with the offer of other party with regard to the price or subject matter. Such party has no power to separate or divide either the price or the subject matter. However, it is sufficient if the acceptance agrees with the offer by implication" (al-Majallah, 39). So, to have a valid sale arrangement there must be communication between offer and acceptance. The acceptance must be from the person receiving the offer since the acceptance from third person will not be considered as valid. If the acceptance matches with the offer in a valid manner the sale may be concluded instantly and conclusion of the sale thereof will not be contingent upon the consent and permission of any other person. Yet to have a valid acceptance several conditions must be fulfilled. They are as follows:

- a. The consistency between offer and acceptance.
- b. Person making offer shall be alive upon acceptance.
- c. Person making offer shall not withdraw the offer before acceptance.
- d. Person receiving the offer shall not reject the offer.
- e. Both of the contracting parties must hear the statement of offer and acceptance.

- f. Offer and acceptance shall be from two different persons.
- g. Both of the contracting parties shall be serious in the sale arrangement without taking it lightly (Afindi, 2003: 1/133).

Nonetheless, to conclude a sale using the word of 'sale' and 'buy' is not mandatory. Rather, the sale is concluded with any word that connotes possession, acquisition, transfer of the ownership and others. For example, if the seller says that 'I gave it you', or 'I made it your property', while the buyer says 'I have made acceptance', or 'I consented', etc. the sale is concluded (al-Majallah, 38).

The Stand of the Schools of Islamic Law

According to the Hanafi School, the sale is concluded by offer and acceptance in the form of either past or present tense. With regard to the past tense, though it is made for the past time according to customary practice it is understood that the offer is at the present moment. However, the sale is not concluded by the offer and acceptance in future or imperative form unless the purchaser confirms 'I have purchased', or the seller confirms 'I have sold'. The Hanafi School argues that the offer and acceptance in imperative mode is not the offer and acceptance in reality. Rather, it is a request for the offer and acceptance, and seeking the offer and acceptance would not amount to the final offer and acceptance. In this case both conditions of the contract are not met, and hence the contract is not concluded (al-Kasani, 2005: 6/468; Ibn Abidin, 1998: 7/10). Nevertheless, if the future form associates with the intention of immediate offer the sale would be concluded with that (al-Ayni, 2000: 8/5; al-Fatawa al-Hindiyyah, 2010, 3/7).

According to the Maliki School, sale is concluded by offer and acceptance, which refers to anything from the contracting parties that demonstrates their consent to the contract, whether by word or by deed (al-Hattab, 6/13; al-Kharshi, 5/261). Imam al-Shafi'i similarly opines that sale is concluded by the offer and acceptance with future and imperative expressions. He argues that, by this form, generally half of the contracts are fulfilled. Hence, a contract, such as marriage contract, would be concluded by the future and imperative modes. This is because both sale and marriage are the same in terms of their pillars for conclusion, which are offer and acceptance (al-Ramli, 1993: 3/378; al-Qaliyubi, 2003: 2/244; al-Sharbini, 2006: 2/409). According to the Hanbali School, the sale is also concluded by offer and acceptance. This can be made by any form and any word that connotes the sense of exchange and expresses the consent of the parties (Ibn Qudamah, 2004: 5/220; al-Bahuti, 1997: 3/167; al-Mawardi, 4/249).

Discussion

The Hanafi School opines that the sale is not concluded by the offer and acceptance in future or imperative forms unless the parties confirm that they have sold or purchased; because the offer and acceptance in this case is not the offer and acceptance in reality, but rather it is a request for the offer and acceptance. This opinion and evidence could be argued further that, the sale can be concluded by any form and any tense, as long as the offer and acceptance are understood by the respective customs and circumstances. In fact, the substances, not their forms, are considered in transactions and dealings.

The other Schools opine that the sale is concluded by any word in any form, and then the Shafi'i School mentions the case of marriage contract as an example. However, it could be argued that comparing the sale with the marriage is not accurate. Unlike the sale, in the case of marriage the future and imperative mode cannot be understood as bargaining. Since there is no bargaining in the marriage, essentially these forms would be understood as offer and acceptance and the marriage is concluded accordingly (al-Kasani, 6/469).

The authors agree with the stand of the Schools other than the Hanafi School and opines that, the sale is concluded by any word in any form, as long as it is realized as offer and acceptance in the customary practices. In fact, the case depends on the custom of the respective place and city. So in any custom if the future form (mudari') is used for present tense and has no likelihood thereof to be used for the future tense then the sale will be concluded without intention. Likewise, if the future form (mudari') attaches with something that specifies present tense the sale will be concluded without intention, such as when the seller says ' I will sell it now', the sale is concluded (Afindi, 1/139).

2.2 Writing

The consent of the contracting parties can be expressed in written format as well. Hereby article (173) of the Majallah states: "The offer and acceptance are also made by writing, in the same way as they are made by word of mouth" (al-Majallah, 39). The article (69) of the Majallah also states: "Correspondence by writing is like talking to one another" (al-Majallah, 31).

The Stand of the Schools of Islamic Law

According to the Hanafi School, the sale is concluded with the offer and acceptance written in a letter and the like. This is because letter is in fact the word of the person in his absence, as if he attends and makes the offer, and the other party accepts in the session (al-Kasani, 6/479; al-Fatawa al-Hindiyyah, 3/12). Ibn Nujaym says: "sale is concluded and valid by the written offer and acceptance" (Ibn Nujaym, 1999: 292). Al-Marghinani says: "Both the writing and sending the messenger are the same as the oral speech. So, the session in which the letter is received or the message is delivered would be considered and effective" (al-Marghinani, 2000: 8/8). Ibn al-Humam says that the ruling on the writing would be according to the form of the word which is written. So if it is written in imperative form the contract will not be concluded. Yet, another opinion says writing is a sign that indicates the intention of the contract not towards haggling, and hence the contract will be concluded thereof (Ibn al-Humam, 1995: 6/236).

The Maliki School considers all the ways to express the consent as being equal and similar. Hence, they allow the conclusion of the contract by any method which indicates the consent and approval. Al-Dardir, al-Dasuqi and others mentioned that anything which indicates the consent, such as the words, writing, sign or any action and others, the sale is concluded with that (al-Dasuqi, 2003, 4/4; al-Dardir, 2003: 4/4). As to the Shafi'i School, the reliable stand is that the sale is concluded by writing both in the presence and absence of the contracting parties. Imam al-Nawawi says: the correct stand is that the sale is concluded by writing as the consent actualizes with that. Imam al-Suyuti, al-Ramli et al. also mentioned the same (al-Nawawi, 2000: 3/6; al-Ramli, 3/375; al-Suyuti, 2001: 2/142). According to the Hanbali School, the sale is concluded also by writing (al-

Bahuti, 3/169). Ibn Qayyim says that everything which indicates the intention will be considered and followed. The words are not intended per se; rather they are the evidences which indicate the intention of the speaker. So, whenever the intention of the speaker becomes known and clear by any means of writing or sign or any action and the like, this shall be considered and taken into effect (Ibn Qayyim, 1991: 1/167).

So, all these Schools have agreed upon the view that everything which indicates the consent of the contracting parties, would lead to the conclusion of sale. Hence, the sale is concluded with the offer and acceptance in written format, and the tenses of the words written would be considered accordingly.

2.3 Sign

The article (174) of the Majallah states: "By the known signs of a dumb man a sale is completed" (al-Majallah, 39). Also, the article (70) says: "The well-known signs of a dumb man are like an explanation by speech" (al-Majallah, 31). Unlike the Jew and Roman law, Islamic law has validated all the transactions of a dumb person concluded by the known signs of him (al-Darini, 1982: 152).

The Stand of the Schools of Islamic Law

The Hanafi School allows the dumb person to make deals by the sign, provided it is known and understood, as it replaces his statement. The reliable stand of them is that using sign is permissible for him even if he is able to write. The same ruling is for the tongue-tied person. Al-Kasani says: utterance is mandatory neither for conclusion nor for execution and validation of the contract. Hence, transaction of the dumb man is valid if the sign is understood and known as it replaces his words (al-Kasani, 6/474). Ibn Nujaym says: the writing of the dumb is like his sign. However, there is disagreement in Hanafi School about whether the sign of the person, who is not dumb but tongue-tied and so on, would be considered or not. The reliable stand of the School is that his sign is considered if there is despair over his speech permanently. Nevertheless, if the person is not tongue-tied, his sign will not be considered at all except in four cases of atheism (kufr), faith (Islam), lineage (nasab) and giving the legal opinion of Islamic law (ifta') (Ibn Nujaym, 296).

According to the Maliki and Hanbali Schools, generally the sale is concluded with the sign (Ibn Qudamah, 5/297; al-Hattab, 6/14; al-Kharshi, 5/261). As mentioned earlier, Al-Dardir and al-Dasuqi opine that anything that demonstrates the consent concludes the sale, whether by word, writing, sign, or actual delivery and so forth (al-Dasuqi, 4/4; al-Dardir, 4/4). Al-Hattab says that the sale is concluded by everything that indicates the consent of the parties. So it is concluded by the sign as long as understood and known and thereof the dumb and others are the same (al-Hattab, 6/14). Ibn Taymiyyah and Ibn Qayyim from Hanbali School also opine the same, as mentioned above in the case of writing, where it was said that everything that demonstrates the consent of relevant parties concludes the sale thereof. With the exclusion of some cases, the Shafi'i School, like the Hanafi School, does not consider the sign of the one who is not dumb. However, according to the Shafi'i School, the sign of the person who is dumb is considered in all transactions if it is understood and known, and in such case his script and sign would be treated equally (al-Nawawi, 3/8; al-Ramli, 3/385; al-Qaliyubi, 2/248; al-Ibadi, 5/393; al-Sharbini, 2/416; al-Suyuti, 2/148).

So, the authors found that basically the Hanafi School has differentiated between the one who is dumb and who is not, so that his sign would be considered in conclusion of the sale. Yet, the sign of the tongue-tied person is considered as well but with the condition that there is despair in his utterance. The other schools, however, did not stipulate so. According to them, everything that demonstrates the consent of the parties, such as the sign, etc. would be considered to conclude the sale. There is no difference whether the person is dumb or not, and whether there is despair over the utterance or not.

The authors, however, agree with the stand of the majority which says that the sign of everyone is considered to conclude the sale, as long as it is understood and known. Since the consent is the basis of the sale, whatever demonstrates the consent concludes the sale thereof. Moreover, the difference between dumb man and others, as the Hanafi School advocates, is not grounded on any evidence. Also, there is no specific method prescribed by the Shari'ah to get the consent. So whatever is considered the way and means customarily to obtain the consent, the sale is concluded thereof.

2.4 Delivery (*al-ta'ati*)

Since mutual consent is the basis for a contract, a sale contract is concluded by an actual exchange carried out in a way that demonstrates the consent of the parties on the contract, and such arrangement is called bay' al-ta'ati, i.e. sale by delivery. The article (175) of the Majallah states: "If, without bargaining and without a word the buyer gives money and the baker gives him bread, the sale is concluded. Likewise, if the buyer gives money and takes a water-melon and the seller keeps silence the sale is concluded (al-Majallah, 39).

The Stand of the Schools of Islamic Law

Although Imam al-Quduri and al-Karkhi opine that the sale is concluded by the actual delivery (ta'ati) in the low and ignoble (khasis) things and is not concluded in the valuable (nafis) things, the known and authentic stand of the School is that the sale is concluded by ta'ati in both types of khasis and nafis (al-Marghinani, 8/6; Ibn Abidin, 7/20; al-Fatawa al-Hindiyyah, 3/12). Al-Kasani says: as long as ta'ati demonstrates the consent of the parties, which is the basis of a contract, the sale is concluded thereof without having any difference between khasis and nafis. Moreover, the stand of Imam Muhammad in al-Asl also did not differentiate between these two in conclusion of sale by al- ta'ati (al-Kasani, 6/470).

According to the Maliki School, as long as the principle is that, the sale is concluded by everything which demonstrates the consent customarily, it will be concluded by al- ta'ati both in khasis and nafis with the possession of both or one subject matter, yet the contract will not be binding without the delivery from both side, and by one side delivery the contract is concluded but is not binding (al-Dasuqi, 4/4; al-Dardir, 3/3; al-Hattab, 6/13; al-Kharshi, 5/262).

The Shafi'i School and its majority scholars opine that the sale is not concluded by al-ta'ati. Nevertheless, this School has three opinions pertaining to the conclusion of the contract by actual delivery (ta'ati). Imam al-Shafi'i and most of the Shafi'i scholars are with the opinion that in general the sale is not concluded by al- ta'ati, whereas Imam al-Nawawi and others opine its

validity in everything that is considered sale in custom. The third stand is that the sale is concluded by al- ta'ati in degrading and ignoble items and this is advocated by Imam al-Ghazali (al-Nawawi, 3/4; al-Ramli, 3/376; al-Ghazali, 4/765; al-Qaliyubi, 2/245; al-Ibadi, 5/377; al-Sharbini, 2/410).

The Hanbali School also allows the conclusion of the sale by al-ta'ati both in ignoble and valuable things, such as if one says: 'give me bread with this dinar' and then he gives what the person wants, or says: 'take this cloth with a dinar' and he has taken, in this case Imam Ahmad opines that such sale is valid. However, according to this School, one of the forms of this arrangement is to make the price known customarily and then receiving the goods, even if the owner is not present thereof (Ibn Qudamah, 5/220; al-Bahuti, 3/169; al-Mawardi, 4/252).

Arguments and Discussion

Those who are with the opinion that sale is not concluded by al-ta'ati argue that only the word allows, forbids, and concludes the contract; as contracts that are permitted by Allah (swt) through offer and acceptance basically refer to the use of the word. On the other hand, al- ta'ati refers to the consent through actual exchange which is not in fact the contract, since the consent is considered only when it is through the usage of words. Imam al-Shafi'i says that from the Shari'ah perspective the sale is the word of offer and acceptance, whereas al-ta'ati is not sale in the custom of the Shari'ah (al-Nawawi, 3/338; al-Ghazali, 4/765).

Furthermore, the sale with al-ta'ati is considered among the sales forbidden by the Prophet (pbuh) such as the sale by tossing (munabadhah), the sale by touch (mulamasah), etc. which are concluded without any word. The sale by delivery (ta'ati or mu'atat) does not have any distinctive feature to differentiate its position among the contracts as it is an inclusive category which is common in all contracts. So, giving and taking can be sale, lease, mortgage and so forth. Moreover, each contract has its own characteristics and features, so it must be defined and known by identifying the specific name of the contract. Thus, once the transaction is concluded what is in mind and intention of the contracting parties must be spoken out; otherwise it might bring a wrong judgment (al-San'ani, 1927: 3/205).

However, the proponents of the conclusion of sale by al-ta'ati argue that, mutual consent is the basis of the contracts proved by the Qur'an and the Sunnah. Allah swt says: "O ye who believe! Eat not up your property among yourselves in vanities, but let there be amongst you traffic and trade by mutual good-will" (al-Qur'an, 4:29). Trading means making the thing for others with a specific return, and this is the interpretation and meaning of al-ta'ati. In another verse "but their traffic is profitless" (al-Qur'an, 2:16), Allah (swt) named it trade despite the absence of any typical sale arrangement (al-Kasani, 6/470). The Prophet says: "Verily trade is based on the mutual consent" (Ibn Majah: 2185). Since the consent is a hidden matter, which indicates that would also be considered. Since al-ta'ati indicates the consent in custom, it may be considered like the word. Actually, in the contract the word itself is not considered but it is a way to demonstrate the consent. So, the actual delivery shall also be considered as a way which demonstrates the consent (al-Hattab, 6/13).

With regard to the contracts stated in the Qur'an and Sunnah; it does not mean that these contracts are not concluded without the use of word, but rather the respective legal provisions are

discussed thereof. For instance, the verse of the Qur'an (ahalla Allah al-bay', al-Qur'an, 2:275) and the verse (illa an takuna tijaratan an taradin, al-Qur'an, 4:29) do not mean that the ruling thereof is related to the word al-bay' and al-tijarah, but rather the intention thereof is to discuss the validity of al-bay' and al-tijarah. The Actual meaning, definition and the essence of these names and contracts would be more accurately known either from lexicon or from the Shari'ah, and if it is found neither in the lexicon nor in Shari'ah then it is required to be referred to the customary usage and practice (al-Hattab, 6/14).

Al-Kasani says that in lexical and legal (shar'i) sense al-bay' refers to the exchange, and the real exchange is made through al-ta'ati, while tijarah refers to make the thing for the other against the return which is the explanation of al-ta'ati (al-Kasani, 6/470).

Also, they argue with what has been practiced by the Prophet (pbuh), Companions, Followers, et al. that there were a number of sales, exchanges, leases, donations and so forth, where it is known essentially that utterance of the word was not binding from both sides. For instance, when the Prophet bought the camel from Umar ibn al-Khattab, He told Abd Allah ibn Umar: "this is for you", and He did not utter any word of acceptance. Moreover, in each and every era people have been dealing through al-ta'ati without having any denial or objection thereof from anyone, which could be considered as a consensus. In addition, regarding contracts the norm is the permissibility unless otherwise is proven by Shari'ah. If so, people can deal, exchange and conduct business in whatever manner they want as long as it does not contradict the provisions of the Shari'ah. Furthermore, stipulating the utterance of the word in contracts may cause hardship as it might make most of the dealings invalid and most of the properties prohibited. Moreover, comparing the nonverbal sale (bay' al-mu'atat) with the sale by tossing (munabadhah) and the sale by touch (al-mulamasah) is not correct. This comparison is not in right place because al-mu'atat is not any kind of touching (lams), etc. Making the sale contingent on touching involves risk and ambiguity. Moreover, touching does not have any relevance to the sale contract whereas al-mu'atat is the delivery and receipt which are requirements of a valid contract. So when the parties execute and fulfill the requirements of the contract, it essentially demonstrates their consent to the contract which is the basis for a contract to be concluded (Ibn Qudamah, 5/221; Ibn Taymiyyah, 3/411).

The authors prefer the conclusion of the sale contract with al-ta'ati, as it is the delivery and receipt which are the essentials of the contract which demonstrate the consent of the contracting parties in custom. So what demonstrates the consent of the parties will be considered for conclusion of the contract.

2.5 Sending Messenger (al-risalah)

If someone sends a messenger to another, and tells the messenger: I have sold this slave of mine to so and so who is absent against such and such amount, so you go to him and tell him: "so and so has sent me to you and told me to tell you that he has sold his slave to you for such and such amount"; and then the messenger went to him and delivered the message, and the buyer replied in the session: I have accepted, the sale is concluded. This is because the messenger is like an ambassador that represents the person who has sent him, as if the sender presents in the session and offers the sale while other party accepts in the session and accordingly the sale is concluded (al-Kasani, 6/479; al-Fatawa al-Hindiyyah, 3/12).

All the Schools have agreed upon the fact that the sale is concluded with the offer and acceptance sent by the messenger. The researcher has mentioned earlier the statements of al-Kasani, al-Dardir, al-Dasuqi, al-Bahuti et al. who opine that the verbal offer and acceptance is not required in conclusion of the contract, and anything that demonstrates the consent of the respective parties sale would be concluded with that. Al-Marghinani says: "Writing is like addressing and the same is sending the messenger" (al-Marghinani, 8/8).

2.6 Silence (al-sukut)

Silence carries both the consent and the otherwise. So, the mere silence should not be paid attention because what carries more than one possibility cannot be used as evidence for argument. However, if silence associates with something which indicates the consent, in that case it will be considered. Generally such case is, for example, the silent person is in a situation where he must talk yet he keeps silent instead. In this case such silence and refusal to talk is considered as an indication of his consent. The article (67) of the Majallah states, "No statement is attributed to a man who is silent, but silence is equivalent to a statement where there is an absolute necessity for speech" (al-Majallah, 30).

Ibn Nujaym has listed 37 issues where silence replaces the speech (Ibn Nujaym, 129). Nevertheless, an offer cannot be made through silence, since offer is a constructive action directed to the third party. In the case of sale, for instance, the offer encompasses the description on the subject matter of sale and so forth, and essentially this cannot be done through silence. However, mere silence is not considered as acceptance as it could be both the consent or otherwise, and the action which carries more than one likelihood cannot be the basis of the argument. Yet the silence with relevant indication could be considered as acceptance (al-Darini, 177).

3. Correspondence between Offer and Acceptance

Consent is an insubstantial internal fact that has to be demonstrated before its existence is understood. Before demonstration it is mere intention which is not enough to conclude the contract. Also, the objective expression of assent is desired. However, the spoken word is recommended as a way of expressing the consent, and the subject-matter of assent would not be inferred from a verbal acceptance unless the words used indicate a specific and present intention to have a contract (Shimizu, 1989, 71). So, in order to have an objective mutual assent there should be correspondence between offer and acceptance. Hence, the article (177) of the Majallah states, "If one of two contracting parties makes an offer for something in any manner whatsoever, the other party must make his acceptance of it, so as exactly to correspond with the offer. He has no right to separate or divide either the price, or the subject matter of the sale" (al-Majallah, 39).

For example, the seller said to buyer: "I will sell you these two animals for \$3,000." If the buyer accepts he takes the two of them for \$3,000. However he cannot take one of the two for \$1500 (al-Majallah, 39). Nevertheless, for valid conclusion of a contract the acceptance must be in accordance with the offer in five things: the magnitude of the price, the type of the price, subject-matter that is valuated, the attribute of the price and lastly the right of option, so that the sale contract is not broken off. This is because in this case if the buyer is given right to separate, then the seller would be harmed as it is the custom of the merchants to combine both good and bad

merchandise together in order to circulate the bad one in the market. So, if the buyer is given option to separate he might choose the good one only and leave the bad merchandise. Then the seller would be harmed as those goods with low quality will be left in his custody. Also, if the sold object is one and then the buyer is given option to divide this, it would be like a joint possession and the seller would be harmed accordingly. The same will be for the buyer that he might be harmed by having joint possessions if the seller is given right to divide the sale agreement. Nonetheless, the article (178) of the Majallah states: "the implicit correspondence between offer and acceptance is enough for the conclusion of the contract." For example, if the seller says I have sold you this property for \$1000, while the buyer says, I have bought this from you by \$1500; the sale is concluded on \$1000. However, if the seller accepts this increase in the session of the contract then the buyer has to pay extra \$500 which he has increased (al-Majallah, 40).

Furthermore, article (179) of the Majallah states, "If there is one offer and includes several items with a lump sum price the acceptance should be single and include everything mentioned in the offer with the whole price said thereof, and the other party may not divide up the lot agree to buy any item he wishes at the fixed price" (al-Majallah, 40). For example, if the seller says: I have sold you these two animals for \$3000, while this one is for \$1000 and the other is for \$2000, or each of them is for \$1500, the buyer has to take all two animals with \$3000 and he cannot take anyone of them only for the price specified thereof. However, article (180) of the Majallah states, "If there are multiple offers, and includes several items where the price for each item is specified individually then the other party can take whatever he wants with the specific price mentioned thereof (al-Majallah, 40). For example, if the seller makes multiple offers and says I have sold you this for \$1000 and sold you that for \$2000, in this case the buyer has option to accept whatever he wants with the price determined thereof.

The Stand of the Schools of Islamic Law

The Hanafi School opines that the condition required for the contract itself is that the acceptance should be in accordance with the offer. So the purchaser shall accept what the seller offers him. If the acceptance differs from the offer, such as the purchaser accepts other than what he is offered, or he accepts the offer partially, the sale is not concluded unless there is new offer that matches the acceptance (al-Kasani, 6/476; al-Fatawa al-Hindiyyah, 3/5). The contracting parties have no right to split up the offer and acceptance. For example, if the seller accepts the offer partially in some merchandise or the purchaser accepts the offer in some portions of the price, the sale is not concluded. Since in this case the contract has been separated, the consent of respective other party would be absent unless the price of each item is mentioned individually in the offer, and hence it would be two different independent agreements (al-Marghinani, 8/9).

According to the Shafi'i School, the correspondence and conformity between offer and acceptance are required for a valid sale arrangement (al-Nawawi, 3/7; al-Qaliyubi, 2/247; al-Ibadi, 5/392; al-Sharbini, 2/415). Al-Bahuti of the Hanbali School says that the sale is concluded by any expression, whether verbal or actual delivery, which denotes the sense of sale and demonstrates the consent of the contracting parties, provided that the acceptance shall be made in accordance with the offer in terms of magnitude, currency, attribute, cash or credit, and so forth (al-Bahuti, 3/167).

4. The Impediments of Mutual Consent

For a valid transaction mutual consent of the contracting parties is must. The mutual consent also shall be sound and perfect in a way that it comes from the person that is legally competent and shall it not be vitiated by any factor that causes defect and imperfection in the mutual consent, and such factors are as follows:

1. **Ignorance (jahalah):** ignorance is one of the blemishes that affect the intention of the contracting parties. The excessive ignorance is considered one of the defects that make the contract invalid if it is exchange contract. Hence, in financial contracts the subject matter shall be known in terms of its attributes, quantity, price and the date of maturity in the contract concludes on credit. The rationale behind that in the presence of ignorance the mutual consent is not available, and moreover it leads to the dispute among the parties, hence the contract is invalid. However, if there is any way to remove the ignorance in the contracting session the contract turns valid. The prophet (pbuh) said: "when you sell anything on credit the measure, weight, and maturity date shall be known and defined" (Abu Ghuddah, 1993, 12).
2. **Non-existence of the subject matter:** selling of non-existent item, whether it is not existent in fact or it is not available in the custody of seller, is prohibited; since how do the parties agree while the subject matter is absent and not available with exclusion of the case of Salam contract. Hakim ibn Hizam asked the Prophet that people come to me to buy from me what I do not have, and then I buy it from the market and sell them, the Prophet said: do not sell what you do not have. So, the forbidden case is to sell something that the seller does not own and then he buys it from the market and makes delivery of that; since in this case the seller makes money without taking any liability such as the possession cost, holding risk, and damage risk and so on, as he receives and makes delivery immediately (Abu Ghuddah, 14).
3. **Coercion (ikrah):** coercion is one of the impediments and defects of the mutual consent (al-Darini, 362). Some defines it, to force someone to do something that he/she dislikes and does not do if he would not be forced. It is also defined that to force someone to do something which he does not do with the frightening from a person who is able to execute what he has threatened and people usually be frightened of this (Zaydan, 2003: 58). However, there are some conditions for duress to be considered an impediment to the consent such as the person exercising the duress must be capable of implementing his threat, the threat must be realistic, must be one of serious injury to the person threatened, must be immediate, and the threat must be unlawful or for an unlawful purpose (Haqqi, 104).
4. **Mistake:** mistake constitutes an impediment to consent and a cause for avoiding the contract if it affects the nature of the contract in terms of subject matter or its chief attributes or its character or its value of its legal rule. One of the contracting parties, for example, thinks that the subject matter is from a certain genus but it is not so, as for example if a person buys a piece of jewelry which is supposed to be gold or diamond but it

is copper or glass. In such a transaction, there is no contract simply because the supposed subject matter of the contract has not been properly ascertained (Haqqi, 101).

5. **Tadlis or Tagrir:** this is also among the impediments to the consent. *tadlis* or *tagrir* means to cheat. It is commonly known as fraud. This means that some people may try intentionally to deceive other people so that they enter into a contract. Fraud occurs whenever a party knowingly makes a false representation of a past or present material fact with the intention of causing the other party to enter into contract and the other party justifiably relies on the representation and suffers damages. In this case the victim has the option whether or not to continue the contract without any request for compensation or to return the subject matter to the offeror, unlike *ḥanafī* who opined that the offeree has no right to cancel the contract but is allowed to request compensation (Haqqi, 107).
6. **Ghabn:** this is also one of the impediments to the consent. It has been translated by deceit or cheating, and it also refers to *naqs* or decrease. It is defined by the jurists as being one of the subject matter not equivalent to the other, such as where an item being sold for less than its market price or more (Haqqi, 108).

6. Contemporary Applications

As per the provisions of Islamic law, concerning the conclusion of a sale contract, the offer and acceptance could be made by using the words in various forms and tenses. The Shari'ah stresses that the sale arrangement shall be based on the mutual consent of the contracting parties. As discussed above, there are various ways to express this consent, such as using verbal expression, writing, sign, and so forth. The contracting parties may make offer and acceptance by using any of these tools in face-to-face interaction. However, nowadays they can make it also by using other media such as talking over phone, sending short messages, using icons that denote approval or otherwise, chatting on the social networks, etc.

The offer can be made towards a specific individual, so if there is acceptance from such person the contract is concluded. Nevertheless, the offer can also be made for the public such as the offers made nowadays in the supermarkets and shopping malls where price for each item is respectively displayed and exchange is concluded thereof accordingly. Moreover, some other tools are also being used currently to make the offer for the public such as catalogs, indexes, prospectus, brochures and others, where companies announce features of their merchandise along with the price specified for every item. In fact, these are some valid forms to make the offer, so if anyone accepts such offers and buys the goods with the price given thereof, the sale contract is concluded validly. However, in order to make a valid contract such offer should include all the necessary details of the goods and price to prevent any adverse selection. Also, to remain such an offer the goods must be available and once the stock of the goods is finished the offer becomes canceled. In addition to that, if the duration of the offer, given or known in the custom of the traders, is elapsed, the offer will be ineffective and invalid.

Concerning the principle of mutual assent, the electronic and online contracts are equal to all other typical contracts. In electronic and online contracts also the intention of the contracting parties should be expressed because consent is the fundamental element for conclusion of the

contracts. While in typical contracts the intention is expressed in various ways like verbal, written, sign, actual delivery and so on, in online contracts it will be different since it might be expressed through website, email, electronic chat, etc. The fundamental underlying issue here is that there is no specified way to express the intention. The contracting party can express his/her intention in whatever way he/she wants, provided that it shall be understood by the other party. Everything that demonstrates the consent and intention is accepted legally as a way to express the intention of the contracting parties for each other. The Islamic scholars agree that if the contracting parties are absent from each other, contract may be concluded through written offer and acceptance since communication through writing among those who are absent is like the use of speech among those who are present. So, the internet is nothing but a means to convey the writing and such means can be taken into account as it does not fall under any legal prohibition. If we compare accordingly, in fact it is like the conclusion of contract over telephone except that in this case the computer undertakes to express the consent in place of the man who holds this intention, and hence this system is mixed between the conclusion among the people that are present and conclusion among those that are absent.

The Shari'ah Scholars opine that the fundamental element in the contract is the issuance of offer and acceptance from the parties concerned. The offer and acceptance should be expressed through the way that is accepted in the Shari'ah, along with the contracting parties should understand the intention of each other. All these are realized in conclusion of contract through internet, whether on website, email, online conversation or video chat and so forth, and accordingly such a conclusion is valid and legally accepted in the Shari'ah.

Nevertheless, the Islamic Fiqh Academy at OIC has studied the issue of performing the transactions by modern communication tools and issued the resolution (6/3/52) on this issue, whereby it says: "if the contract is concluded between the parties that are not present in the contracting session while they do not see each other and do not listen to each other, and the means of communication between them is writing or letter or messenger and so on, like telegraph, telex, fax, computer screen and others; in this case the contract is concluded once the offer reaches at the addressee and he/she accepts it" (al-Huda, 2012: 16; al-Salus, 2006: 28).

Furthermore, another contemporary mode of offer and acceptance is, for example, Sukuk al-Muqaradah, which is discussed in the Islamic Fiqh Academy at OIC and is announced in the resolution of the Academy no: 30 (5/4) as an alternative tool for the conventional usurious bonds. In Sukuk al-Muqaradah the contract would be concluded on the basis that the respective prospectus will define the conditions of the contract, subscription from the investors would be considered as offer, and approval from the issuing institutions would be considered as acceptance. The same could be applied in the subscription to the shares of the joint-stock companies, as they have brochures which would be considered as the conditions of the contract, the subscription of the purchasers would be considered as the offer and the approval of the companies would be considered as the acceptance (al-Salus, 29).

7. Conclusion

No doubt that any kinds of exchange in wealth, acquisition, possession and so on is not valid except with the mutual consent of the contracting parties concerned. As to the Hanafi School of law

consent is not mere intention to do something rather it is something more than that which is preference or mental satisfaction in a way that its effect will be demonstrated such as a smile in the face and the like, while to the majority it is mere intention of doing something without being vitiated by coercion and so on. Nevertheless, mutual consent can be expressed by several ways, such as oral statement, writing, sign, actual delivery and possession, silence and so forth. There are some factors are considered impediments to the mutual consent, such as ignorance, non-existence of the subject matter, coercion, mistake, deceit, cheating and so on.

Nowadays, the mutual consent can be expressed and the sale can be arranged accordingly by using the modern tools of communication. For example, the sale can be concluded through phone calls, messages, emails, fax, telex, respective icons which denote approval and disapproval, sign languages, etc. Moreover, as the offer can be made individually, it could also be made publicly, such as prices nowadays are given in the brochures, prospectuses, leaflets, etc. and once the consumer buys this, it would be considered the acceptance from him.

8. References

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