ORIGINAL ARTICLES

The Implications of *Ghubn* in Islamic Contracts: An Analysis Of Current Practices

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ABSTRACT

Mutual consent is one of the important elements in Islamic law of contracts. However, the consent itself may be disrupted by defects that can affect parties to the contracts. There are a number of vitiating factors that may have effect on the validity of contract such as *tadlis*, *ikrah*, *ghubn* etc. This article however seeks only to focus on the concept of *ghubn* and its effects on contracts. In doing so, the study will look into the meaning of *ghubn*, its classification as well as its effect on the consent of contracting parties. Juristic views of renowned school of Islamic laws will be consulted. On the issue of contemporary practices, there are types of contract whereby, one of the contracting parties has no choice, but to agree to the prices as stipulated in terms and conditions imposed by the other party. In this case, even though the contracts are considered as legally valid by the presence of offer and acceptance (‘aqd), the question may arise whether what appears in the contracts really reflects the actual consents of the parties. This issue will also be discussed in this paper, together with a few other related concepts, such as, *talaqqi al-rukban*, *najash*, *khiyar*, *mustarsil* etc. It is found that in general, any party affected by *ghubn* may seek remedy through *khiyar al-ghubn*. In order to invoke this type of *khiyar* certain conditions must be fulfilled inter alia, the contracting party is ignorant of the market price and the *ghubn* is excessive.

Key words: Islamic contracts, *khiyar*, *ghubn*, consent, revocation

Introduction

‘Aqd or a contract in Islamic law literally means to bind, to tie, to fasten or to link together. Technically it is defined as a relationship of the speech of one of the contracting parties with that of the other according to the *Shari‘ah* in a way that its effect appears in the object. The examples of ‘aqd are contracts of sale, hire, mortgage etc. From this definition, it is understood that there are four essential elements of a contract as found in this technical definition namely the existence of two parties, the proceeding of what indicates the consent of both contracting parties i.e. *ijab* (offer) & *qabul* (acceptance), the connection of offer & acceptance and the appearance of the effect of tying the acceptance to the offer in the object, i.e., transfer of ownership of the subject matter.

The most important requirement of a valid contract is the mutual consent of the two contracting parties. This is based on the Qur’anic verse “O you who believe, devour not your property among yourselves by unlawful means except that it be trading by your mutual consent” and the Hadith: “The contract of sale is valid only by mutual consent”. However, neither the Qur’an nor the Hadith explains how to ascertain the mutual consent. Mutual consent between the contracting parties is necessary to constitute a contract. It is the basis of mutual contract and the cause of the binding force of a contract which exists with its existence and is negated by its negation.

Mutual consent is an intangible mental fact which needs to be manifested in order to identify its existence. It is the internal intention (*iradahbatinah*) and is hidden and cannot be known and proven before the court. In other words, it is a matter of presumption. Therefore, it is necessary to have the external expression (*iradahzahirah*) in order to indicate the presence of consent. Spoken words are therefore needed in order to manifest sufficiently the definite and present intention of consent of the contracting parties to the contract i.e. verbal offer and verbal acceptance. Other means such as allusion, writing and gestures are also acceptable as long as they could manifest the presence of consent. However, there arises a juristic discourse on the reason why the contracting parties opt for other means instead of spoken words.

It is the offer and the acceptance which constitute the external expression that become the proof of the consent of the contracting parties. However, this external expression is not a definite proof and this is evident from the cases of a sleeping person, a lunatic, a jester and a person under coercion. According to the Shafi‘is, the external expression (*iradahzahirah*) is sufficient as long as the word is clear to indicate the intention. In

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other words, a contract is constituted even though he who pronounces it does not mean the accrual of the effects from it such as a jester. However, the majority states that the internal intention (iradah hatinah) is more emphasized. Therefore, a contract by a jester is invalid on the basis of the nature of the pronouncement which is a joke.

In order to ensure the existence of mutual consent, the Muslim scholars observe that there are three conditions that are necessary in order to constitute a valid contract i.e. offer and acceptance must be clear and definite (clarity), the agreement between offer and acceptance (conformity) and the connection of acceptance to the offer (continuity).

The clarity of offer and acceptance means that there must be clear and definite manifestation to show the consent of the contracting parties. It is a consensus that uttering of words is acceptable because it is the original means to declare one’s intention. Generally, to constitute a contract, meanings are taken into consideration and not words and forms, therefore allusion is allowed. However, in contract which requires testimony like marriage, it is constituted only by the words which clearly indicate their meaning, and not by allusion. To the Shafi’is, only a verbal manifestation of consent is sufficient. To the Hanafis, written offer and acceptance, as well as by conduct (mu’atah) are accepted, and even from gesticulative signs (isharah) of a mute, is also accepted. Whereas, the Hanbalis and Malikis view that whatever which is regarded as customarily indicative of mutual consent is accepted.

The conformity between the offer and acceptance means that the acceptance should agree with offer in all its details whether this agreement is explicit or implicit. The example of the explicit conformity is that if A said: “I sold this house to you for RM100,000” and B said: “I accepted its purchase for RM100,000.” However, if A said: “I sold this house to you for RM100,000” and B said: “I accepted its purchase for RM110,000.” It is also valid because both conform implicitly. The difference does not invalidate the contract because it is more beneficial to the seller. However, only the amount offered by the seller is binding. The seller has the choice either to accept the additional amount or not. If he accepts, the buyer is under obligation to pay. The contract will not be constituted if the acceptance disagrees with the offer. The significance of this condition: agreement of offer and acceptance becomes presumptive evidence for mutual consent.

The continuity of the offer and acceptance means the connectedness of the two in the meeting i.e. majlis al-`aqq if both parties present in the meeting. If one party is absent, meeting of knowledge is acceptable like in the cases of offer and acceptance through letters or messengers who deliver the messages. The Shafi’is view that the acceptance must be made immediately after offer and if some lapse of time or any unrelated business which separates the two, there is no connection. The majority of jurists on the other hand view that times are not important as long as anything which is considered reluctance to the contract does not separate the two. In other words, to the majority the offer stands as long as the meeting of the parties continues, and nothing indicative of reluctance to the contract proceeds from any of the parties.

There are four factors that vitiate consent even though the contracting parties verbally pronounce the offer and acceptance. The first is the duress which is a kind of force used by one against another unlawfully compelling him to do or abstain from doing something. According to Sarakhsi it is compelling or forcing a person to do something without his consent. It is an infringement of a man’s right of freedom of action. There is no free and voluntary consent if duress is present. The second is the mistake or the sale of wheat but it turns out to be flour or bread, or a person buys jewels which he thinks made of gold, but the subject matter is not what he intends while entering into the contract. The example is that the contract is for the sale of wheat but it turns out to be flour or bread, or a person buys jewels which he thinks made of gold, but it is not or a person intends to buy a car of 2007 but was given 2005 model or a person paid for something which is different from the description given to him.

The third is fraud or tadlisozgharar which is an incorrect statement of fact, or of mixed fact and law, made by one party to another with the object, and having the result of inducing the other to enter into a contract. It may be made by statement or other actions, or by concealment of material facts or defects in the subject matter of a transaction. The examples are hiding bad items by putting them in the bottom and displaying good items at the top, or hiding the defects of the subject matter or describing the subject matter is highly demanded in the market. The fourth is -ghubn which is generally the offering of a very high price for a thing, which is not worth of such a high price. It is divided into two types i.e. minor (yasir) and major (fahish). The minor ghubn means that difference of the price is small and it has no effect on the validity of the contract. This ghubn commonly occurs in the society and it is hard to avoid. The contract remains valid. The major ghubn however is an excessive deception in value of goods and generally the society cannot tolerate with the excessiveness. It causes major loss to the party.

The major ghubnaffects the consent of the party. It is therefore the objective of the paper to investigate further the nature ghubn and its effect on the consent of the contracting parties. The general idea is that the victim may terminate the contract. This paper will examine in depth the concept of ghubn and the classical examples of the transactions in which ghubn is present. It will then highlight the contemporary issue which involves ghubn.
Definition:

Literally ghubn means decrease or reduction in selling or buying price. Technically it has been defined as the diminishing of the value of the subject matter of a commutative contract where the value of one of the object is lesser or higher than the actual value at the time of contract. Ghubn can be divided into two namely ghubn-fahish and ghubn-yasir.

Ghubn-fahish means excessive loss suffered by a party to the contract as a result of concealment or misrepresentation, or deception or fraud practiced by the other. Whether the loss is excessively/exorbitant or not is to be ascertained in view of the market value of the subject matter. Article 146 of Jordanian Civil code states: “Evaluation concerning ghubn-fahish in real estate or other property is a matter for the estimators alone.”

Ghubn is regarded light (yasir) if the difference between the price at which goods were sold and their real market is so small that the merchants do not generally take it into account in their dealings. For instance a book worth RM100.00 is sold for RM110.00, it will not be a ghubn-fahish but if it is sold for RM150.00 it will amount to ghubn-fahish.

Effects of Ghubn-Fahish:

The Hanafi jurists are of the view that excessive loss suffered by a party alone is not a cause of nullity of contract. It annuls the contract only when it is caused by a fraud, or misrepresentation. For example, A sells a watch worth RM300.00 for RM600.00 to B claiming that market value of such watch is RM700.00. B relying upon the words of A purchases it for RM600.00. B has suffered from ghubn-fahish, which a result of fraud. Such ghubn-fahish gives him right to revoke the contract. In this respect the Mejelle states:

The existence of flagrant misrepresentation in a sale, but without actual deceit, does not enable the person who has been the victim of such misrepresentation to cancel the sale.

There are, however, certain cases in which excessive loss of a party alone without fraud affects the contracts such as the sale of waqf property or the property of treasury (bayt al-mal) or the property of minor, insane or orphan. If the property of these people and institutions is sold with ghubn-fahish, i.e., at as much lower price as compared to its market value, the sale will be revoked. But if the sale of the property of orphans is tainted by flagrant misrepresentation, although there is no actual deceit, such sale is invalid. Property belonging to a pious foundation and to the treasury is treated on the same basis as the property of orphans.

According to Hanbalis ghubn-fahish affects the contracts and makes it voidable at the option of the party which suffered loss irrespective of the fact that it is a result of fraud or otherwise. The Shafi’i jurists do not admit the right of revocation for the buyer. They say that the loss has occurred because of the negligence of the buyer. Thus, he alone is responsible for the loss.

Common practices containing ghubn:

When discussing the effect of ghubn on contract jurists will normally touch in quite detail three types of practices namely: Talaqqi al-Rukban, Najash and Mustarsil.

Talaqqi al-rukban:

This refers to meeting traders before they reach the market whereby a city merchant would meet those traders in the outskirts of the city and buy their merchandise for unfairly low prices as they do not know the real market prices. The Prophet P B U H was reported as saying “Do not meet riders and a city dweller should not sell to a desert dweller. Thus, the majority of jurists consider this act to be unlawful while the Hanafi render it reprehensible even if the person did not intentionally go out of the city to meet the traders. It appears that the reason of disapproving this type of practices lies in the ignorance of the market price which could lead to injustice especially to the traders. As a remedy they have the right to rescind their unfair contracts with the riders upon learning the real value of their commodities in the market place. This is based on the Hadith “Do not meet incoming traders outside the market and if they do trade with someone and then reach the market, they have the option”

Najash:

It is an act of offering a higher price for a commodity with no intention of buying it. The real would be buyer will then increase his offer to outbid the first offer. This practice is unlawful since it deceives the buyer, and the buyer in this case has the option if he bought at an unusually high price. It should be notice that the sale in not considered najash unless the buyer was ignorant of the price. The practice najash normally occurs either when the seller agrees with the buyer to increase the bid or when the buyer acts in collusion with his competitors.
to defraud the seller whereby his fellow bidders would not offer high bids so that they may buy the goods at a reduced price. Both forms *najash* give the right of option to the defrauded party when he learns of fraud and ownership has passed to the buyer.

*Bayʾ al-Mustarsil:*

This is a type of sales concluded by a person who is ignorant of the price. It occurs when the buyer for instance discloses secret about himself indicating that he has no knowledge pertaining to a particular object of contract, thus putting his trust in the seller that this latter would sell the good at the market price. However, should the seller be fraudulent the buyer is granted the option to rescind the contract.

*Ghubn in Contemporary Practices:*

It is well accepted in Islamic transactions that it must be based on mutual consent of the parties. Having said that, Islam proceeds to define a framework in which the transactions should take place so that justice and fairness are ensured for all concerned. It should be highlighted that this framework comprises of prohibitions and recommendations. This article will only highlight with regards to prohibitions in which there are more relevant to contracts inter-alia *riba*, *maysir*, *ikrah*, *najash*, *gharar*, *jahalah*, *bayʿ al muttarr*, and *ghubn*. Briefly, *riba* (interest) is referred also to the exchange of unequal quantities of similar fungibles. The prohibition of *riba* is clearly implied in the text of Al Qur’an. *Maysir* is referred to the activities that involved gambling, betting and wagering.

The essence of gambling is taking a risk that is deliberately created or invited and which is not necessary in economic activities to gain thereby. The prohibition against gambling is aim to promote justice in distribution. *Ikrah* is another type of impediment to consent. It is well defined as coercion, the example of which includes the imposition of a contract or a contract therein on an unwilling party. Whereby, *ihitkar* could mean hoarding or withholding supplies of essential goods and services with a view to raising prices. *Al-najash* is also prohibited because it involved raising prices by manipulating false bids. *Gharar*, which is the most crucial, includes hazard or uncertainty surrounding a commodity, its price, time of payment, time of delivery, quantity, etc. causing a deal invalid. *Jahalah* referred to such lack of information about a commodity, its quantity, price, etc., which normally lead to dispute. The exploitation of need e.g., by charging an exorbitantly high price is known in Islamic transaction as *bayʿ al muttarr*, which also one of the factor that affect the consent. In addition to that, *ghubn*, which is the core discussion in this article, is referred to fraud, deception, inequity as already discussed above.

The above prohibitions should be seen in the perspective of the numerous positive injunctions that enshrine the spirit of caring for other human beings and sharing with them. It is important to mention that the term *ghubn* has been commonly used to denote the concept of fraud, trickery, lesion and misrepresentation leading to imbalance. However, there are different terms which are used synonymously whereby the most among these are *tadlis*, *taghrir*, *ghish* and *ghishandgharar*. Sometimes, all these terms are used interchangeably and inconsistent by generations of Muslim jurists. This is believe due to several speculative reasons which not necessary perspicuous. Rayner classified the reasons into: i) the concept is not originally Islamic, ii) reluctant of early classical theory to recognize non-Islamic elements of the law, and iii) failure to solicit any official formulation until quite late times.

Whatever the case maybe, jurists agreed that *ghubn* became the impediment to the true consent of the parties of the contract and it is forbidden in Islamic law. However the jurists differ on the effects of *ghubn* based on the different types of contract, which the detail could be found in *Fiqh* textbooks. It may be summarized that some of the jurists opined that *ghubn* or *ghubnfaahish* should in all cases be accompanied by *tadlis* or -*taghrir*, in order to constitute the nullification of the contract. In addition to that, *trickery* (*tadlis*) and *ghubn* can arise from false statements as well as from active fraud.

Even though a contract is in the proper form, it may have other defects which will affect its validity. People may wonder whether the element of *ghubn*also occur in contemporary transactions even though they were tighten by legal documentation. Probably it may arise in the case of disparity between the two exchanges in value or better known in economically oriented analyses as the issue of equity in exchange. Thus, IbnRushd argued that it is clear from the law that what is targeted from the prohibition of *riba* is the excessive inequity (*ghubnfaahish*) that it entails. Accordingly, equity in trading commodities should be determined through equality of amount or otherwise through market prices.

*Ghubn* may also exist and be regarded as sufficient cause for nullifying a contract in the case of being deceived in respect of goods, animals and real property. However, to be considered as *ghubnfaahish*, the deception in respect of animals must reach to the extent of one-tenth, one-fifith in respect of real property and to the extent of one-twentieth in respect of goods.
**Ghubn may be perpetrated also by other various means such as manifestations or advertisements which delude the general public or laymen; the production of forged documents; claiming assumed quantities and qualities and so on. Sometimes, party to contract might experience that some condition was not put in clear manner, misleading and inappropriate which relates to any of the instances leading to nullity of the contract.**

Justice, fairness and equity are the main feature of a model of financial intermediation. A just system of financial intermediation will contribute to a more equitable distribution of income and wealth. The establishment of several Islamic financial institutions throughout the world is an initiative towards realizing the above feature. In addition, the requirement to have Shari’ah departments and Shari’ah advisors within the framework are to ensure that such features could be materialized. Meanwhile, there has been vast progress in the regulation of Islamic financial institutions by the respective national authorities. Better understanding of Islamic finance by the monetary authorities and continuous efforts to standardize Islamic financial products, for example by Audit and Accounts Organization of Islamic Financial (AAOFI) can be considered better prospect for a more transparent, justice and fairness for both customers and players in the market.

Finally, as far as possible, transactions must be based on complete and transparent information in order to ensure that neither party is under any misapprehension. But given mutual consent, some uncertainty can be tolerated in order to secure greater advantages.

**Conclusions:**

Many a time some people simply accuse transactions from Islamic point of view as of no different from conventional one, due to the fact that both can determine the selling price of a commodity sold. They consider this as ghubn. However, clarification has to be made on the difference between ghubn which is allowed and ghubn that cause the contract invalid. Ghubnalone will have no effect to the validity of a contract, and it cannot be the reason for one of the parties in the contract to rescind it. It must be accompanied by concealment of fact, misrepresentation and so on. To say that selling a commodity with the price higher than purchasing price without more is ghubnfahish is not correct.

**References**


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