ISLAMIC LAW OF BUSINESS TRANSACTIONS WITH PARTICULAR REFERENCE TO SALE OF GOODS

BY

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DECLARATION

I hereby declare that this Thesis has been produced by me. It it has not been presented on any previous application for a higher degree. All references and quotations are indicated in the footnotes and sources of information are duly acknowledged by means of list of references.

IBRAHIM TANKO MUHAMMAD

CERTIFICATION

The Thesis entitled: "ISLAMIC LAW OF BUSINESS TRANSACTIONS WITH PARTICULAR REFERENCE TO SALE OF GOODS" by Ibrahim Tanko Muhammad, meets the Regulations governing the award of the degree of DOCTOR OF PHILOSOPHY IN LAW of the Ahmadu Bello University, and is approved for it's contribution to knowledge and literary presentation.

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IBRAHIM TANKO MUHAMMAD

ABSTRACT

In the name of Allah, the Merciful, the Compassionate. This Thesis, "Islamic Law of Business Transactions with particular reference to Sale of Goods", is a humble attempt from my side to put my contribution, though dismal, along the line of those who have genuine interest to uncover the rich culture of Islamic Law, albeit, in a language other than the Arabic Language (Original Language of the Sharia), praying that Allah, in His infinite Mercy, will forgive our misdeeds and condone our mistakes.

The Thesis is only an attempt to state Islamic Law as it relates to Sale of Goods. I should not be seen as blowing any trumpet, but it is the first of its kind. Accordingly, it is hard to free the work from human errors. And as no one person has monopoly of knowledge except Allah alone. I implore readers, in the spirit of Sharia, to take every necessary steps to get proven mistakes corrected and I should be forgiven for my inadequacies. Knowledge, certainly, is not the preserve of anyone. It is for the whole humanity. Those who conceal it will have some questions to answer on the Reckoning Day why they did so. I would not like to be a companion to such people. My belief is that unless a person makes a pronouncement and he is shown to have made a mistake or mistakes, his mistakes will continue to be in him and in any other person he indoctrinates. But once he is made to understand his mistakes, he is fully redressed and encapsulated. He should, on reciprocal basis, admit such mistakes and accept the corrections gratefully. That forms part of culture of learning in Islam.

In Chapter one of the Thesis, I found it necessary to give a general

introduction, though in brief, on Islamic Law, its sources and gradual development. I also attempted to define Islamic Law of Transactions (MU'AMALAT). I particularly considered the genesis of Islamic Law of Business Transaction in Nigeria and its subsequent development.

Chapter Two deals with the subject matter for the contract of Sale Under Islamic Law. These, principally are two: (a) the goods and (b) the price. I devoted this chapter on the goods alone. I attempted to define goods in Islamic law in comparison with what constitutes goods under the English Law. There is a mild distinction between the classification of goods under Islamic Law and as is provided by the English Law. In Islamic Law all goods must pass the validity test before they qualify for merchantable transactions. I have considered such conditions of validity. I have considered things regarded as controversial by many jurists, examples, the position of selling or buying dogs, musical instruments, contaminated oil, trading on gold and silver et cetera.

Legal capacity in Islamic Law, like in any other law, is essential for contracting parties. Where one or both of the contracting parties lacks capacity, there is no valid contract ab initio. This is treated in Chapter three. In this Chapter, legal capacity in its ramifications has been considered. A doctrine, unique only to Islamic Law, MAJLIS AL-AQD has been treated along the other segment of Chapter three that is, Formation of Performance of the Contract.

Chapter four is divided into two: (1) Optional conditions in a Sale Contract and (2) Prohibited Forms of Sale Under Islamic Law. Many contracting parties to a

sale do not resort to options open to them by Sharia while conducting sales. There are several options which if utilised will cure a lot of commercial imperfections and will minimise litigation. Of the prohibited forms of sales, some were JAHILIYYA in form and nature and others perpetrate injustice on one of the contracting parties or on the community in general. They are for that reason prohibited. They are so many but I only picked up the prominent ones, most of which, despite the prohibition, are embarked upon by some Muslims even today, for example, arresting goods and buying them from the villagers before getting to the market forum.

Price, is the major topic discussed in Chapter five. This is another component part of subject matter of contract. Topical issues such as whether prices of goods in the market forum should be controlled or not and the Sharia view on some have been considered. Considered also are the relevance of the Price Control Board in the present market situation; the Role of the Hisba Institution and the Muhtasib.

The Institution of Agency both under Islamic and the English Laws enjoys same recognition. The principles governing agency in both laws are generally the same. Fine distinctions in matters of details are noticeable on some points. Chapter six deals with Agency Contract in Islamic Law.

Chapter seven is the last Chapter. It compares on fair notes the general principles of Islamic and English Sale of Goods Laws. This Chapter closes by considering the problems and prospects of Islamic Law in application in a heterogenous society with several laws governing the citizens.

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Sharia Court of Appeal Law, 1960.

ABBREVIATION

All E.R.	All English Law Report.
Ch.D.	Chancery Division.
C.J.S.	Corpus Juris Secundum
h.h.s.	how-high-soever.
h.l.s.	how-low-soever.
K.B.	Kings Bench.
N.C.L.R.	Nigerian Constitutional Law Report.
N.L.R.	Nigeria Law Report.
N.N.L.R	Northern Nigerian Law Report.
N.W.L.R.	Nigerian Weekly Law Report.
PBUH	Peace and Blessing of Allah be Upon Him.
Q.B.	Queens Bench.
S.A.W.	Salla Allahu Alaihi Wa Sallama (Peace of Allah be upon Him).
S.C.N.J.	Supreme Court of Nigeria Judgment.
S.L.R.N.	Sharia Law Report of Nigeria.
S/T	Subhanahu Wa Ta'ala.

CHAPTER ONE

1.0. Introduction to Islamic Law of Sale of Goods

1.1. General introduction to Islamic Law

The Arabic term "SHARIA" means Islamic Law. In this writing, reference to SHARIA means reference to Islamic Law and vice-versa. SHARIA is defined literally, to mean way or "road" leading to a watering place(1). That was the connotation of the word during the JAHILIYYA period (Period before the advent of Islam). The compiler of the GHIYASUL-LUGHAH defines SHARIA as:

> "The way or road in the religion of Muhammad, which God has established for the guidance of His people, both for the worship of God and for the duties of life.(2)"

This means that it is a path, road or way leading to Allah. It leads the Muslims to that which Allah, the High, has legalised and that which He has made illegal. It also connotes that it Allah alone, in Islam that has sovereignty and He alone has the right to ordain a path/way/road for guidance of mankind. Allah has decreed:

> "Then We put thee (Muhammad) in the right way concerning the affairs. So follow it and not follow the whims of those who know not.(3)"

Commenting on the above verse, Abdullahi Yusuf Ali states:

> " SHARIAT is best translated the right way of religion, which is wider than the mere formal rites and legal provisions, which mostly came in the Medinan period, long after the Meccan verse had been revealed.(4)"

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(1) See: Hughes & Hughes, (1885) Dictionary of Islam, p. 285; Doi, A. Shariah: The Islamic Law, First Edition 1990 London.

(2) Hughes, op cit., p. 285.

(3) Qur'an: XLV:18.

(4) Ali, A.Y. (1973) The Holy Qur'an: English translation of the Meaning and Commentary.

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Viewed from the technical point of view however, SHARIA is interpreted to mean the totality of Allah's Law which regulates the conduct of human affairs. It is, according to Qadri:

> "The totality of Gods commandments relating to the activities of man, as given by Him, are based upon His will bounded by no limit. The duty of mankind is to follow it and not to judge it for causes through human intellect."(1)

It is thus, a legal system which regulates the conduct of all human affairs of its subjects - the Muslims - revealed by Allah to His Prophet Muhammad (PBUH) for the establishment of Islam among all peoples irrespective of their customs or history. This means that it is only what is stated in the Message to the Prophet or what is inferred from it, that comes properly under the SHARIA. It means also, in other words, that matters determined by intellectual processes, except as are agreed upon by consensus, are outside the scope of the sacred Law. Islamic Law of Sale of Goods forms a branch of this Divine Law.

1.2.0. SOURCES OF ISLAMIC LAW:

There are two main sources of Islamic Law which can nearly be classified into (a) Primary Sources and (b) Secondary Sources.

1.2.1. Primary Sources:

The Primary Sources of Islamic Law as generally accepted are four. These are:

(a) The Holy Qur'an,

(b) The Sunnah (practice) of the Prophet,

(c) The Ijma' (Consensus of Jurists) and

(d) The Qiyas (Analogical deduction).

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(1) Qadri, A.A. (1986) Islamic Jurisprudence in the Modern World, Taj Printers, New Delhi, p. 16.

1.2.1. (a) The Holy Qur'an:

(i) Definition:

The Qur'an or Kur'an as is variously called, according to the definition of the great Imam Abu Hanifah is:

> "The word of God and is His inspired word and Revelation. It is a necessary attribute (Sifah) of God. It is not God but still it is inseparable from God. It is written in a Volume, it is read in a language, it is remembered in the heart, and it's letters and it's Vowel Points, and it's writing are all created, but God's WORD is UNCREATED (GHAIR - AL-MAKHLUQ). It's letters and it's arrived at by their use, but the WORD of GOD is fixed in the essence (ZAT) of God, and he who says that the word of God is created is an infidel."(1)

The Qur'an therefore, in other words, is the Divine Book of Allah, revealed through the Angel, Jibreel to the Holy Prophet Muhammad (PBUH) for the guidance of mankind.

It is not therefore within the power of any human being to effect any alteration, change, amendment or defacement of any verse of the Holy Qur'an. As seen earlier from its standardisation to date, only one copy is in circulation throughout the universe.

The Holy Qur'an contains 114 Chapters (suras). Some of the chapters are long, others are medium and others are short. About 2/3 of the Qur'an was revealed in Makka and about 1/3 revealed in Madina. The nature of the Makkan chapters

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(1) See: Hughes' op. cit p. 484. This definition conforms with the unletteredness of the Holy Prophet (PBUH). The letters, vocalisation and fixation of the verses were necessary as followers of the Prophet required them for guidance.

appear concise and rhythmic. They essentially deal with matters of faith and the forbearance of immoral acts.

The Madinan Chapters, on the other hand, are long and detailed. They deal with matters on societal welfare mostly on civil affairs, commerce, international relations et cetera. They also elaborate on some criminal aspects such as theft, brigandage and homicide.

1.2.1. (a) (ii) The Qur'an as Sharia:

The Holy Qur'an ranks the first in authority. A Muslim does not resort to any other source except where no authority exists in the Holy Qur'an. The Holy Qur'an enjoys this universal acceptability. Dr. Habibi(1), in defining the Qur'an as the first primary source of the Sharia has this to say:

> "The Qur'an is the original, primary and sovereign source of Islamic Law from which all the principles, ordinances, teachings and practices of Islam are drawn. The Qur'an is actually the real foundation on which the whole superstructure of Islam rests. The authority of the Qur'an is supreme and paramount and it is the first source of law not only in point of time but also in point of importance."

In Islam, sovereignty belongs only to Allah alone. He alone has the sovereign authority to enact laws. Thus, He alone has the supreme legislative power as the Law-giver. The chronology of legislation since the days of Adam is that Allah alone promulgates laws and ordinances on earth from time to time through His Messengers and Prophets with Prophet Muhammad who came as the last Prophet with the last message. In Islamic Law the doctrine of covering the field never shifts from the

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(1) Habibi, M. (1975) Muslim Law, Allahbad Publishers.

Supreme Being. Whatever He legislates upon, it shall remain for ever. No one can alter it because of incompatibility or irrelevance. Qur'an contains the last message and it addresses the whole humanity. The contents of the 114 chapters of the Qur'an are of mixed dealing with various subject matters. The major portion of the Qur'an deals with Divine exhortations and moral principles.The legal verses generally embody broad principles and fundamental laws without necessarily explaining or expounding on them. One verse may explain another or the Tradition (Hadith/Sunnah), the Second Source, expounds or supplements. The AYAT AL-AHKAM, or legal injunctions, form the source of SHARIA. They form the Code of Conduct for every Muslim. They make distinction between what is permitted or lawful (Halal) and what is not permitted or unlawful (Haram).

Now, the characteristic universality and adaptability of the SHARIA having no preference to time or tribe, makes the above principles, as well as other principles laid in the Holy Qur'an, applicable to all manner of people, Arabs and non-Arabs. Easterners or Westerners once they are Muslims. Such principles shall continue to apply unamended up to the end of life on earth, the principles are all-encompassing, adaptive, and equitable for all times and people of the Faith. The Omnipresent, Omnipotent and Omniscient Allah has Himself taken care of the needs of His servants for all times. Wherever there is a lacuna, the Sunnah (Hadith/Tradition of the Prophet) fills in the gab. That is why the saying goes: 'When the Qur'an is silent, the Sunnah speaks:

1.2.1. (b) Sunnah of the Prophet:

(1) Definition:

The Arabic terms: SUNNAH and HADITH, in etymology, indicate: the doings of the Prophet as for the former and 'the sayings of the Prophet' in the latter's case. The terms are generally referred to as 'the practice and sayings of the Prophet'. Others add the tacit approval of the Prophet(1). The words are co-extensive but cover in effect the same ground and are applicable to the Prophet's actions, practices and sayings, HADITH being the narration and record of the SUNNAH though containing in addition, various prophetical and historical elements(2). The words are used interchangeable, and the same approach is adopted in this writing.

As observed above, three kinds of Sunnah exist:

(a) Sunnah Al-Qauliyyah refers to saying of the Prophet which has a bearing on a religious question; example "Things are judged according to intention".

(b) Sunnah Al-Fi'iliyya refers to an action or practice of the Prophet, example he used to wash his hands and mouth before and after meals.

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(1) See: Al-Muzaffar: (n.d.) Usul Al-Figh: Vol. III, p. 61; Ali: (1973) The Religion of Islam, Lahore, Pakistan.

(2) Ali, The Religion of Islam, Ibid. page 50. See also: Qadri: Islamic Jurisprudence in the Modern World, 1986, Taj Printers, New Delhi; pp. 189-190.

(c) Sunnah Al-Taqririyya refers to the silent or tacit approval of the Prophet, example, where the Prophet performed an act or said something and was asked and he kept quiet: or a companion did something by act or saying and the Prophet kept quiet (approval by silence).

In relation to Hadith, it is worthy to observe that it is classified in the following categories:

(a) MUTAWATIR (Continuous). This comprises of those traditions which are narrated by numerous companions of the Prophet, their followers and the followers of the followers (TAB AL-TABIEEN). They are continuous due to concurrence of narration. Such traditions are held absolutely authentic in view of the large number of narrators and their reliability such that it is impossible that they should have all agreed on falsehood. Such a Hadith is universally accepted for legal purposes.

(b) MASHHUR: This is a well known and wide spread tradition. It comprises of those traditions reported by a limited number of companions in the first instance and secondly by their fulfilling the conditions of a Mutawatir hadith.

(c) AHAD: This is a tradition which is isolated. It is reported only by one narrator, and not fulfilling the conditions of either of the above.

Thus depending on the authenticity of a tradition it can be either be SAHIH (sound); HASAN (good) or DHA'IF (weak).

The Prophet (PBUH) was not only the transmitter of the Holy Qur'an but was also the interpreter of it. The difference should however be understood that whereas the Qur'an is both in content and form, Divide, Sunnah is Divine in content only.

Meaning: in the former, both the message and wordings of the message were from Allah, the High, whereas in the latter; the message or idea was from Allah the High, mostly through intuition, and the wordings were by the Prophet himself. The essence here is that as the message or idea was divinely revealed, the Sunnah, accordingly, assumed divine authority. The Holy Qur'an has stated:

> "Nor does he say (aught) of (his own) desire. It is no less than inspiration sent down to him."(1)

Again, Muslims are urged to accept whatever the Prophet brought to them and refrain from whatever he forbids them. The Qur'an states:

> "So take what the Messenger gives you and refrain from what he prohibits you."(2)

(V) The Sunnah as Sharia:

Upon examining the SUNNAH of the Prophet, one will find that:

(a) Some of them relate to the religious devotions,

(b) Others relate to the peculiar circumstances of Prophet's personal life

(c) Some relate to the society in general,

(d) Others relate to art of government and

(e) many relate to legal matters.

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(1) Qur'an: LIII: 3-4.
(2) Qur'an: LIX: 7.

During the life time of the Prophet, often questions arose for decision, for the solution of which no direct revelation was forthcoming, or certain points had to be explained and made clearer. Such explanations or supplementary decisions, whether in a form of practice, saying or approval by silence, form another source of the Sharia, only second in importance to the Qur'an. Below are few instances:

(i) In the Holy Qur'an, Allah has made clear what should be lawfully consumed of the good things such as meat of animals like cow, camel, sheep, goat but has forbidden clearly the meat of pig as unlawful. Between the two extremes that is the lawful and the unlawful, there are other animals and birds such as those with claws and the carnivorous animals. The Prophet prohibited the latter birds and animals. He also prohibited the eating of the flesh of domestic donkeys. These are all associated with bad (unlawful) creatures.(1)

This means that the Qur'an has not made a provision regarding beasts such as leopard, hyena, tiger, EJUS DEM GENERI: birds such as eagles, hawk, EJUS DEM GENERI, but the Sunnah of the Prophet has taken care of that. The Sunnah, in this regard has provided the law on such animals and birds.

Second example is that Allah has made lawful for drinks all that which is not intoxicant. But there are drinks which are not completely intoxicating, yet there is fear that such may intoxicate, example is NABIZ (a fermented date juice).

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(1) Al-Khadhari, M. (1967) Tarikh Al-Tashri'i Al-Islami, Dar Al-Fikr, p. 31.

The Prophet prohibited such fermented juices. The prohibition is to guard against falling into the prohibited acts (LI SADD AL-ZARIAH). The Prophet stated:

> "I forbade you making fermentations, therefore do not do it. (Know that) every intoxicant is unlawful."(1)

Other examples run as follows:

On inheritance: The Prophet (PBUH) laid the following rules, among others:

(i) "A Muslim, cannot inherit a non-Muslim and a non-Muslim cannot inherit a Muslim.

(ii) A murderer cannot inherit.

(iii) Give to the heirs their shares and the remainder should be given to the nearest male agnate."

(iv) The Sunnah made several policies on inheritance too copious to be reduced down in this work. But it is its policy that the following persons do not inherit: The son of the uterine brother, the maternal grandfather, the mother of the mother's father, uterine brothers where they co-exist with the paternal grandfather or agnate descendants. The siblings do not inherit in the presence of the paternal grandfather et cetera.

On matters of Commerce: the Prophet made the following policies among others:

> "Sale is based on the mutual assent of the parties."

On matters relating to evidence: the Prophet, among other things stated:

> "Establishment of evidence is on the plaintiff and taking the oath is on the defendant."

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(1) Ibid. page 31.

Several policies were made by the Sunnah on Constitutional/Administrative Law, Criminal Law; Law of Torts (Dhaman) and on several fields covered by the Sharia. These and many other policy pronouncements were made by the Holy Prophet (PBUH) in course of either interpreting a verse of the Holy Qur'an or when trying to provide a solution to a problem not apparently covered by the TEXT of the Qur'an. This is what makes the Sunnah to assume the second position to the Qur'an as a Primary Source of the Sharia in point of time and importance. Where, a new situation emerged after the death of the Prophet, then the companions were left with two options: either to solve the new problem through the process of IJTIHAD (exertion of ones efforts to find a solution) through the application of QIYAS (analogical deduction).

1.2.1. (c) IJMA'

(i) Definition:

In tracing the origin of the process of Ijma', one cannot but relate the word to IJTIHAD. As defined by lexicologists, IJTIHAD, is derived from the root word JAHADA which means "exerting of oneself to the utmost or to the best of one's ability". IJTIHAD therefore means:

> "A lawyers exerting the faculties of mind to the utmost for the purpose of forming an opinion in a case of law respecting a doubtful and difficult point>"(1)

In other words, it is the logical deduction on a legal or religious question by a MUJTAHID or a learned and enlightened jurist. Where so many jurists put their heads together to find a solution to a prevailing problem, the result of their efforts

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(1) Ali, M. (1973) Religion of Islam, Lahore, quoting from Lane's Arabic-English Lexicon.

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is known as IJMA' that is, the collective or consensus opinion of such jurists. Thus, in Islamic Law dispensation, where a new issue arises for which no solution was readily forth coming from the Qur'an or the Sunnah, then the jurists are permitted to provide a solution to that problem through consensus of opinion (Ijma'). Ijma' is therefore recognised as the third source of Sharia. It is resorted to for solving new problems within the society in accordance with the requirements of time and conditions by providing a process of exertion to adopt the law to legal development as provided by the Sharia.

(ii) Classification of Ijma':

Ijma' can generally be classified into three:

(a) Ijma' of the companions of the Prophet. This class is universally accepted as the companions were strict devotees and observers of the Sunnah of the Prophet and adopted the same method of reasoning as the Prophet used to do.

(b) Ijma' of the Jurists. In this class, a jurist, before participation, must have acquired some standard of qualifications required of a Mujtahid. Uniformity of opinion of all the Jurists of a given period is among the features of this class of Ijma'.

(c) Ijma' of people. This is where the whole society as one, takes a beneficial decision.

Abu Bakr Al-Siddiq, 1st. Caliph was reported to have inclined to this.(1)

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(1) Al-Khadhari: Ibid page 96.

This is regarded as a sort of 'communal' legislation. Generally, where there is a valid Ijma' that cannot be re-opened or questioned or challenged by an individual Mujtahid. However, the Ijma' of one age may be repealed by a subsequent Ijma' of another age except, of course, that of the companions.

(iii) Ijma' as Sharia:

Ijma' as a source of Islamic Law traces its validity from the Qur'an and the Sunnah. For instance, the Holy Qur'an states:

(a) "Obey Allah and obey the Messenger and those of you charged with authority".(1)
(b) "If you do not raise, then ask those who possess knowledge or wisdom."(2)

From Sunnah, the Prophet (PBUH) is reported to have said:

"My people shall never be unanimous in error."

"What Muslims agree to be good is also good in the sight of Allah".

It will be recalled that during the life time of the Prophet (PBUH), he delegated a Sahabi, Mu'az ibn Jabal to go to Yemen and be the governor there. Mu'az was asked by the Prophet as to the rule by which he would abide. he replied: "By the Law of the Qur'an. 'But if you do not find a direction therein,' asked the Prophet, 'Then I will act according to the practice, (Sunnah) of the Prophet', 'but if you do not find any direction therein,' he was again asked by the Prophet. Then he replied, 'I will exercise my judgement and act on that'. Then the Prophet thanked Allah for guiding Mu'az. These show that Ijtihad/Ijma' as a juristic principle under the

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(2) Qur'an: IV: 59.
(3) Qur'an: XVI: 43.

Sharia, has its source from the Qur'an and the Sunnah.

Ijma' is only resorted to, where there is no apparent solution to a new problem from the Qur'an or the Sunnah. It is then the jurists of that given age that put heads together to come up with a solution to such a new problem. The following may serve as example:- In the family status, it was agreed that since the Holy Qur'an prohibited marriage with mothers and daughters, then grandmothers (how-high-soever (h.h.s.) and grand daughters (how-low-soever (h.l.s.)) by the same token fall within the prohibited degrees. The minimum period of gestation is six-months according to the Schools of Law(1) but as to the maximum period of gestation, this is a subject of Ijma' of the jurists of a particular school; for instance Maliki School fixes it at four (4) years, Shafi'i fixes it at nine (9) months. In the field of succession, it was agreed that a grandmother is entitled to one sixth of the estate of a deceased. This was arrived at on the decision of Mughirah Ibn Shu'bah (who died 50 A.H.). In the field of commerce, a non-existent subject matter is not valid for sale because of uncertainty. This was arrived at by consensus of the jurists in order to provide a practical solution to such issue.

1.2.1. (d) Qiyas:

Qiyas means analogical deduction. This is where several principles of law are deducible from the texts of the Qur'an, sunnah or Ijma' to support the command or prohibition of a particular religious act. Several others lay the legal foundation for

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(1) Schools of Laws emerged during the periods (132-656 A.H.) that is (750-1258 A.D.) Outstanding among such Schools are (1) Hanafi School, headed by Imam Abu Hanifah in Kufah (80-156 A.H.). (2) Maliki School headed by Imam Malik bn Anas in Madinah (95 A.H.); (3) Shafi'i School, headed by Imam Shafi'i in Egypt (150-204 A.H.); (4) Hanbali School, headed by Imam Ahmad Ibn Hanbal in Baghdad (164-241 A.H.).

some unprescribed punishments. Few examples will suffice as follows:

(1) Strong drinks are prohibited such as wine/alcohol by explicit Qur'anic/traditionary texts. This is so because of their intoxicating nature. There are some intoxicating substances which are not explicitly mentioned by the Qur'an or Sunnah such as opium cannabis, hard drugs et cetera. By the application of analogy, these substances are ipso facto prohibited. They fetch same punishment as are provided for wine drinkers.

(2) The Prophet (PBUH) solved an interesting problem brought before him by one man by the application of Qiyas. Once a person submitted before the Prophet that he had disclaimed the child of his wife because the child was dark complexioned. The Prophet asked him whether he had camels. He replied in the affirmative. then the Prophet asked him what was the colour of these camels? He replied that the colour was red. Then the Prophet asked him whether there was any of the grey colour. The person replied in the affirmative. Then the Prophet asked him whether he knew from where the grey colour came. The person replied that probably there was some grey camel in the line of it's ascendants. Then the Prophet remarked that the same reason was possible in the case of his black son and prevented him from disclaiming the boy.

(3) In matters of inheritance, Abu Bakr Al-Siddiq the first Caliph, used Qiyas. The Holy Qur'an prescribes the share of the father. Abu Bakr extended this right to the father's father.

(4) On commerce, the Prophet said that one who purchases cereal should

not sell it before taking delivery. Ibn Abbas, a Jurist and a SAHABI (companion of the Prophet), by analogy extended this provision to all other goods sold/purchased.

Qiyas as a fourth source of Sharia is very important especially with the present technological developments. There are indeed so many developments. Many things cannot trace their laws to Qur'an or Sunnah. For instance the use of television, radio, photography, telephone system, the exact value of currencies as legal tenders to warrant the payments of poor dues, dowry, blood money and so on. No doubt their equivalence were provided in one way or the other, if not directly, indirectly, either by the Qur'an, Hadith, Ijtihad or Ijma'. many books on Islamic Law Jurisprudence have tackled several aspects on such new inventions. The main bone of contention now militating against easy acceptability of such Ijtihad or Ijma' is the apparent lack of unanimity, or consensus. Each individual jurist, almost, each school of thought tries to project and protect its own view point, even where an issue touches on some settled laws.

But the whole idea on making an allowance for the continuance of Ijtihad and Qiyas is that the Overall Creator knows that there shall arise issues which will require intelligence and industry. Muslims must resort to the best use of their intelligence especially in collective form so as to benefit the society in general, constructively. Reference must of course be made in the determination of who is a Mujtahid. These requirements which qualify one to be a Mujtahid and thereby making one to be competent to participate in drawing policy on a new issue, are

richly provided in almost all the books of Islamic Jurisprudence.

1.2.2. Secondary Sources of Sharia

The Secondary Sources of Islamic Law (Sharia) are the sources which supplement or expound the primary sources. They reflect in the main, the differences of opinion amongst the schools of law or individual jurist in matters of direction. Among the secondary sources, the following are regarded most prominent:

1.2.2. (a) ISTIHSAN: This is known as juristic preference or the exercise of private judgment not on the basis of analogy but on the basis of public good or the interest of Justice. it is essentially a Hanafi doctrine.

1.2.2(b) ISTISLAH: This refers to public interest, that is, deduction of law based on consideration of public good. It is sometimes referred to as MASALIH-AL-MURSALAH (matters for public interest). It is chiefly a Maliki School doctrine.

1.2.2.(c) ISTIDLAL: This refers to reasoning. it means, inferring one thing from another closely interwoven for example, sale is a contract. The basis of every contract is consent. According to the principles of Istidlal, it is necessary that consent be the basis of every contract of sale.

1.2.2.(d) URF: This is the custom of a given society. It assumes the force of law in some circumstances. Islamic Law recognises the force of custom and usage in establishing rules of law. Some of the beneficial pre-Islamic customs which were in consonance with the spirit of the Sharia were recognised, such as

principles of transfer of property, Muqayadha (barter); sale of goods for money (bay'), (Salam) payment of price in advance; (Tawliyya) sale at cost price; (Musawama) sale by bargaining et cetera. The requisite condition for the validity of custom are that it should be reasonable, certain, frequent and common and not in conflict with a text of the Qur'an, Sunnah, Ijma' or valid Qiyas.

This briefly is the comprehensive and universal nature of Islamic Law of which Mu'amalat forms part thereof. Mu'amalat or Islamic Law of transactions is regarded generally by Jurists to relate to business transactions including sale of goods. This is the next topic treated below.

1.3.0. ISLAMIC LAW OF TRANSACTIONS (MU'AMALAT).

1.3.1. Definition of Mu'amalat:

The term 'MU'AMALAT', is the abstract noun of the word 'TA'AMALA' which connotes "to deal with one another".(1) This meaning is capable of encompassing almost all dealings which take place between human beings. Such dealings may include among others; marriage (Nikah), divorce (Talaq), distribution of estate of a deceased person among his legal heirs (mirath), bequest (wasiyyah), gifts (hiba), Wakaf (endowment), custody of children (Hadhana), fosterage (Radha'a), maintenance of: wife, children and parents (Nafaqah), security (Rahn): compromise (Sulh), transfer of debts (Hawala), suretyship (Dhaman), partnership (Sharikah). Bailment (ariya; preemption (Shufah), letting of gardens (musaqah),

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(1) See: Al-Munjid Fil-Lughati Wal-A'Alami 21st. ed., Dar Al-Mahsriq Publishers, Beirut, p. 530.

hire (Ijarah), pledge (Rahn), trust (amana), deposit (Wadiah), agency (Wakala), sales (buyu) and many other related matters falling within the province of Islamic Civil Law.

In restricted sense however, MU'AMALAT is regarded as pecuniary transactions, that is, all those dealings which have a direct and indirect reference to contract of sale(1).

Be that as it may, each of the above transactions within the contemplation of MU'AMALAT, has its own sets of rules governing its operation under Islamic Law. This sub-topic will examine those transactions which relate to commerce, or buying and selling of goods (Sale of Goods) and their Practice particularly in Nigeria.

1.3.2. Source of Sale in Islamic Law:

Allah the High has stated in the Holy Qur'an:

> "God hath permitted trade and forbidden usury."(2)

From the Hadith of the Prophet (PBUH) it has been reported that the Prophet (PBUH) said:

> "The best means of acquisition is what man strives for by his own hand and every valid transaction."(3)

From its nature, trade can be classified as FARDH KIFAYA (An obligation which by its nature can be delegated). So, it is not mandatory on every Muslim that

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(1) Eliss, A. E., et al (1969) Elias' Modern Dictionary Arabi-English (9th. ed. Reprint), Elias Modern Press, Cairo, p. 317.

(2) Qur'an: II: 275.

(3) Sabiq, S. (1992) Figh Al-Sunnah, Vol. III, dar Al-Fikr, page 127.

he has to be a trader/businessman, though it is obvious that the society cannot function without traders. Therefore, some members of the society have to be so engaged. It should be noted though, that from the moment one selects to be a trader or a businessman of any kind, it now becomes necessary on one to acquire the knowledge of the Sharia as pertains to trade or the business chosen. Imam Al-Ghazali, is reported to have commented that a Muslim who makes up his mind to adopt trade as a profession or to set up his own business should first acquire thorough understanding of the rules of business transactions codified in the Sharia. Without such understanding he will go astray and fall into serious lapses making his earning unlawful.(1)

1.3.3. DEVELOPMENT OF ISLAMIC LAW OF BUSINESS TRANSACTION:

The daily requirements of human being make it necessary for him to interact with other human beings either interpresences or through agents in order to afford himself a balanced living. The rules of nature have made human Co-existence inter-dependent. In other words, some human beings have certain basic life requirements in surpluses while others do not have them but have, in their stead, other valuable things such as money or other commodities.

For instance, Mr. X may want to make soup but does not possess all the necessary ingredients to make the soup palatable such as salt. Mr. Y, on the other hand, who lacks some essentials too, has some quantity of salt in his possession. It apparently becomes desirable that some kind of understanding has to be struck

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(1) Al-Sabiq: Kitab Biyu'u of Sahih Muslim (English translation) Vol. III, Dar Al-Arabiyya, Lebanon.

between Mr. X and Mr. Y so that one can benefit from the other. It is such type of mutual understanding or benefits drawn as a result of mutual needs of the two parties that give rise to business transaction within a society. Such a transaction can be struck by way of exchange of money for goods (bay'); it can be by exchange of goods for goods (barter) (Muqayadha) and or in other forms of exchange.(1)

Bay' (Law of Sale and Purchase) or business transaction is a civil transaction through which transfer of ownership is effected. Even before the advent of Islam, the Arabs of the Jahiliyya period recognised the institution of bay' (Sale and Purchase). Some of the principles of sale and purchase practised before advent of Islam such as Salam sale where the price was paid in advance before taking delivery of goods; were sanctioned by the Sharia. Others, such as Bay' Mulamasa where sale was conducted through the touching of cloth even without seeing it, were prohibited by the Sharia because of their exploitative nature.

Here in Nigeria, Islamic Law of sale is as old as the religion of Islam in the country(2). Islam, according to some historical sources, came to the Northern parts of Nigeria as early as the 14th. century A.D. Some authorities suggest even a much

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(1) Two authors: Ibn Qudamah in his Al-Mughni and Christopher Fyfe in his paper in West African Trade (A.D. 1000-1800), epitomised the above analysis as follows:-

> "Give me cake worth this Dinar. He (the cake maker) offers to offeree what satisfies him or; in the alternative the offeror will say; take this apparel for a Dinar and he took it. This is valid sale." Ibn Qudamah.

Fyfe states: "few communities are completely self-supporting. some have commodities that others lack, so they trade with one another. there may be two neighbouring villages. One is by a river full of fish. The other has no river, but is built on clay soil which can be used to make pots. Each has something the other lacks, and the inhabitants can make an exchange-clay pots for fish."

(2) Reference to Nigeria is this study may only mean reference to the Northern parts of the country as these were the only provinces where before the advent of the colonialists and even thereafter, that Islamic Law was in full swing application.

earlier period as "KANEM BORNO EMPIRE", according to them, "made it's first contact with Islam through trade(1). Kanem Borno Empire had trade links with Tripoli in North Africa through Kawar and Fezzan. It is believed that it was this trade route that paved the way for Islam to enter Kanem Borno. "Muslim raiders", quoted the same authority, "led by Uqba b. Nafi' came along this trade route as far as Kawar region in 666-7 A.D.... A more permanent Muslim presence was established on the Kanem. North Africa trade route in the second half of the 8th. Century..."(2).

Furthermore, the famous Kano Chronicle indicates that there was a Muslim community in Kano by the middle of the 14th. Century. It is also said that the Muslim clerics and traders from Mali did visit and establish a Muslim settlement in Kano in the second half of the 14th. Century A.D.(3) The mercantile activities by the indigenous traders were mainly centred around important market centres such as Birnin Ngazargamu, Katsina, Kano, Wukari, Raben Nupe and Agadez. Others such as Birnin Kebbi, Birnin Yawuri, Nunkoro, Old Oyo and Nikki grew important as mercantile transit camps. The main merchandise used during the trade were; copper and brass pieces, silver rings and bracelets; red woolen cloth; Baize and barakans; small Turkey Carpets; small Mesurata carpets; gold dust; slave (up to the fourth decade of the 19th. Century when it was legally and finally, abolished); horses; ostrich feathers; salt; civet; neutron; Hausa woven clothes; metal goods made in Hausaland; Kolanuts; camels; cotton; hides and skin; groundnuts; leather goods; beads; condiments (onions, garlic, DADDAWA, Ivory) just to mention a few.

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(1) Clarke, P. (1982) West Africa and Islam, Edward Arnod Publishers Ltd., London.
(2) Ibid.
(3) Ibid. page 61.

The main means of transporting such goods from one market centre to another was by foot, animals or through the waters(1). One could notice for instance, a caravan of donkeys transporting heavy loads in sacks or TEIKI, or CHALI (bigger sacks made of skin or rope) from one market centre to another. They had to move in caravans under the leadership of one the transporters identified and called as JAJI, mostly during the day time in order to avoid encounter with the local robbers and pirates. Such caravan were the professional carriers of goods at that time. Members of the caravan were known as FATAKE (travellers) and the trade called FATAUCI (transportation of goods) from one place to another.

As time progressed, the above tedious transportation means started giving way to modern and faster means of transport and carriage such as the bicycle, lorries, trains, trucks. With their arrival carriage of goods was made easier and less hazardous.

Such commercial activities as enumerated above continued to flourish among the indigenous traders and some neighbouring border towns. The Commercial potentials of the trading centres attracted even some foreigners such as the LEBANESE, the EGYPTIANS, the ALGERIANS, the MOROCCANS, the SUDANESE, the BRITISH, just to mention a few to participate in the forms of commercial business available. Even some of these foreigners, nicknamed KWARAS (white men) acquired permanent settlements in some of the big cities especially Kano, in the North. They were indeed given recognition as great traders dealing on groundnuts, hides and skins, and cotton. They traded throughout the North, in the bigger towns and the

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(1) Adamu, M. Distribution of Trade Centres in the Centres in the Central Sudan in the 18th. century - in studies in the History of Sokoto Caliphate by Bala Usman, 1975, A.B.U. Zaria.

villages. They usually appointed indigenous merchants as their agents(1). During the harvest period, the Kwara gives out money to the agents for general purchase of such commodities from the locality of the agents and the same was later transported to the main centre. A casual visitor to such cities, towns and villages could notice such buying centres as scales and other measurement instruments were conspicuously placed at such centres. One could also notice the heaps of such commodities collected waiting to be transported to the main centre which used to be at Kano for onwards exportation to various countries all over the world. The famous Kano groundnut pyramids (DALA) were associated with the fame of Kano City. Such activities kept on actively up to around the middle of 1970's when such practices began to face out gradually as there were less production of such commodities like groundnuts and cotton and as new commodities were imported massively into the country which tended to yield more profit with less labour.

1.4.0. ESSENCE AND DESIRABILITY OF THIS STUDY:

It has been observed somewhere in this writing that some of the legacies bequeathed to the people of this country by the colonial master are his culture, language, laws and religion in almost all walks of life in spite of the country being a multi-lingual, multi-cultural, multi-tribal and multi-religious. Quite admittedly, a lot of efforts have been exerted by different intellectuals in bringing out some knowledge in forms of text books, articles, write-ups and monographs in the English language. Books on Nigerian History, Geography, Languages, law are readily

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(1) Notable among such renowned agents were: Mamman Nagoda, Ali Darman, Maikano Agogo, Nasidi bn Liman, Adamu Jakada.

available in English Language. Subjects of Islamic Law however, which forms part of the sources of law and Culture in this country are not as numerous as those on other subjects translated into English Language. The ones readily available are mostly based on the Hanafi School of thought, whereas the Muslims orientation in the Northern Region of the country is mostly confined to the Maliki School of thought. majority of the Maliki School texts remain untranslated from their original Arabic Language (the official language) of the Sharia. Majority of the Muslim population for whom the Sharia is meant to guide and control, does not understand the Arabic language. There is therefore a huge obstacle between the Sharia and its subjects. This obstacle which accentuates into language barrier, should and ought to be removed in order to afford every non-Arab Muslim to appreciate properly the quality of and force of the Sharia. This can only be done through massive translation of some of the primary books on Islam as well as publishing some important works on the Sharia into other languages. This writing, on Islamic Law of Sale and Purchase is a humble attempt to fulfil such obligations.

Islamic Law of commerce, as pointed out earlier, seeks to regulate the business transactions of the daily affairs of all Muslims. This branch of Islamic Law is comprehensive enough that it has made provisions for the parties to a contract of sale to be aware of all the requirements of a contract of sale from the period of inspection of the goods to be purchased to the finality of the contract. It is the responsibility of the Muslims to explore the richly blessed provisions governing the law of sale and purchase under the Sharia which can only be done through the process of learning. This is the only way to assure the Muslim that he is not cheated and nor does he cheat in transactions of this nature. Islamic Law principles relating

to sale and purchase can compare favourably with any modern commercial law as relating to assurance to the parties of their rights and obligations. It may even be said to excel others as its principles and application are interwoven with TAQWA (fear of God).

Thus, if this study is to be of any assistance, it will certainly be to the seller And the buyer. Secondly, it will serve as a source material for students of Islamic Law and other casual readers/researchers. It may as well assist the Islamic Law Courts especially the lower courts as they are empowered by the Area Courts Edict 1968 to apply and enforce the principles of Islamic Law to Muslim litigants. One cannot predict the stability of the jurisdiction of Sharia Court of Appeal. One hopes however that the jurisdiction of the court should not be anything less than on matters of Islamic civil law. Further, the writing will also compliment the few books in existence on Islamic Law of Sale and Purchase. Till now, the writer was only able to come across two books written by indigenous authors specifically on the subject of Sale and Purchase.

The first is just in scroll titled:

"KIFAYATU AL-AWWAMI FIL-BIYU'I"

by Sheikh Abdullahi bin Fodio. The book is a 25-page and written in a poetic form in the Arabic Language.

The second is the one titled:

"KASUWANCI DA HARKAR DUKIYA A MUSULUNCI"

by one Muhammadu Musa Isa. It is a 1994 edition. It is written in Hausa Language. The author laid down the general principles of the law of commerce and other transactions under the Sharia.

It is hoped that more authors will emerge with works that will enhance the understanding and application of Islamic Law of Commerce in particular and Islamic Law in General.

1.5.0. CHAPTERISATION:

It is not unusual in a writing of this nature to introduce its scheme of chapterisation. The work has been schemed into seven chapters as follows:

CHAPTER ONE : - This is the chapter that introduces the general frame work of Sharia as a complete Code of life for the Muslim. The nature, scope and application of Sharia has been examined. Sources of Sharia Primary and Secondary have been briefly considered. The position and application of Islamic Law in Nigeria has been examined and it is found that Sharia enjoys a truncated jurisdiction in the Law Courts. Why topic of this study has been selected and the desirability to write on it, has been stated.

CHAPTER TWO: - This chapter treats goods in general under Islamic Law. The subject matter of sale and its conditions for validity have been examined.

CHAPTER THREE: - It deals with capacity of the parties to contract of sale. The general AHALIYYAH doctrine and its classification has been examined. Also, circumstances affecting the AHALIYYAH (Legal Capacity) have been considered. Then the actual contract formation and its paraphernalia have been examined.

CHAPTER FOUR: - This chapter is divided into two sections. The first section treats the option in a sale contract. The second examines some of the prohibited forms of sale under the Sharia and the reasons for the prohibition.

CHAPTER FIVE: - This chapter examines the price of goods; its conditions; whether prices of commodities can be fixed or not. It also examines the proscribed price control board. Some modes of payment of price have also been examined; the market supervisor (the Muhtasib) has been examined; his roles in the market identified.

CHAPTER SIX: - This chapter treats Agency Contract.

CHAPTER SEVEN: - This chapter comes up with the conclusion and comparison on the general law and practice of sale and purchase conducted by the Muslims.

CHAPTER TWO

2.00. SUBJECT MATTER (GOODS) FOR THE CONTRACT OF SALE UNDER ISLAMIC LAW

2.1.0. Meaning of Goods Under Islamic Law:

In Islamic Law of Sale, terms such as "MABI'"; "MA'QUD 'ALAIHI"; "SIL'A" are oftenly and interchangeably used to denote goods or subject matter of sale. Goods generally are considered as those non-fungible but determinate things which are capable of being exchanged for some value called price(1). This definition contemplates of all legally permissible things or articles which are moveable and immoveable properties such as farmland or house. They form the corpus of what is known as MAL. Mal in Islamic Law, is that thing which can be owned or possessed. The author of Radd Al- Muhtar defines MAL as follows:

> "The name for things other than human beings which have been created for the benefit of man, and which a man can hoard and dispose of at his option, hence, a slave which has some of the attributes of property is not property, as it is not lawful to kill him".(2)

In the Mejelle, MAL has been defined as:

> "A thing which naturally is desired by man, and can be stored for times of necessity."(3)

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(1) Abdur Rahim, M.A. (1978) Muhammadan Jurisprudence, All Pakistan Legal Decisions Publishers, Lahore, pages 290-291; Joseph Schact (1964) Introduction to Islamic Law, Oxford University Press, pages 152-153.

(2) Abdur Rahim, M.A. op. cit. p. 263.

(3) Tyser, C.R. et al (1967) The Mejelle (Re-print) All Pakistan Legal Decisions Publishers, Lahore.

Thus in Islamic Law, the term MAL is used to refer to all articles, things or goods without restricting the meaning to landed properties.(1)

In a comparative manner the 1893 English Sale of Goods Act (which largely remains a residual statute of General Application in Nigeria), section 62 thereof defines "goods" to include(2) -

> "all chattels personal other than thing in action and money .... the term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the Contract of Sale."

What should fundamentally be noted in the definition of "goods" under both Islamic and English laws is that in the former, there is no such dichotomy of goods as almost all rules are applicable to the sale of all classes of goods or property whether moveable or immoveable with, in some cases, additional rules or conditions applicable to one particular class of goods. For instance, it is an additional condition in sale of fruits generally that they must ripen to maturity, it should also be noted that standing crops on farmland for the purposes of sale of the farmland do not constitute part of land for the purposes of sale.(3) Wherever the term 'goods', 'things' or 'property' is used in this writing, unless specially used, it connotes a subject matter of sale which is valuable in the eyes of Sharia. This however is where it specifically applies to Muslims inter se. Where a transaction involves other persons than Muslims, the law regards such goods which are otherwise not recognised as valuable goods for a Muslim to be valid and valuable for the non-

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(1) See: Abdur Rahim Ibid. page 129.

(2) Many states in Nigeria have enacted their own Sale of Goods Edict (Laws) example: Kaduna State Sale of Goods Edict No. 15 of 1990.

(3) Abu Al-Azhari, S. (n.d.) Jawahir Al-Iklil, Dar Al-Fikr, pages 273-274.

muslims for instance wine or pork. Thus, if a Muslim, without justification destroys it for them, he shall be made to make good to the non-muslims its compensation or value. But things which are of no use to any such as dead bodies or human blood cannot be regarded as goods for sale. Equally, where a particulAr thing cannot be acquired due to manifest difficulty of inability of the acquirer to sub-due it, that thing cannot be described as goods which can be a subject matter of sale. Examples are: birds in the air, fish in the ponds, a run-away slave; common pasturage and forest; public roads, mosque and institutions dedicated to public utility.

2.2.0. Classification of Mal:

Mal (goods) are broadly classified into MANQUL or NAQLI (movable) and GHAIR MANQUL or AQAR (immoveables). It is also divided into tangibles (MITHLI) and non-tangibles (QIMI). Tangibles are again divided into things that can be measured (MIKYALI or KAYLI) or weighed (MAUZUNI or WAZNI) or counted (MA'DUD MUTAQARIB) belonging to same kind, that is homogeneous. Goods like wheat, barley, dates and salt belong to the category of MIKYALI whereas gold and silver belong to the category of MAUZUNI. A part from this, custom (URF) decides to which category any given article of commodity belongs. The last and not the least in the classification is whether a thing is MUTAQAWWAM (valuable) or GHAIR MUTAQAWWAM (indeterminate goods having no market value at all). The former refers to that specific, determinate thing, the acquisition and enjoyment of which are permitted by the Sharia example, any goods recognised by Sharia to be lawful such as camel or date. The latter refers to that thing which is non-specific or indeterminate on which no specific claim can be made. It is, in other words, goods

which fetches no recognition of the Sharia such as wine or pork.

The legal connotation of such classification is that only those valuable things recognised by the Sharia are inviolable. Others not so recognised and protected by the law such as fish in the pond, birds in the air do not enjoy the coverage of the doctrine of inviolability. Example is that if a person shoots a flying bird or destroys fish in the pond, no one will hold him responsible for compensation.

The Usufructuary right (MANFA') of a thing under the law of sale signifies the right of enjoyment of anything for the life span of the party which is entitled to the benefit of the usufruct. MANFA' (usufruct) is therefore generally regarded as forming part of goods which are the subject matter of a sale contract. This is because goods are obtained for the usufruct or benefit which can be driven from them after purchase.

2.3.0. Condition of Validity for Goods:

In the context of the general description given to goods in the preceding paragraphs, it can safely be concluded that all valuable goods, by whatever name or description known and in whatever form, can be subject matter for a contract of sale under Islamic Law except as otherwise excluded by the Sharia. But before such goods can qualify as subject matter of a contract of sale under the Sharia, it has to satisfy some conditions of validity.

The following are the conditions to be satisfied:

2.3.1. Goods Must be in Existence at the Time of Contract:

Existence connotes physical or actual existence (EXISTENCE DE-FACTO). The term actually has various definitions including absolute, or being in existence or

action now, existence at the time; existing in fact, present, substantial, true, visible or apparent.(1) In this legal context however, the phrase 'actual existence' excludes what is merely fictitious or supposed. It has a definite and well understood meaning having reference to something completed, not simply contemplated or possible. Something real as opposed to constructive, imputed, possible, virtual, speculative, conceivable, theoretical hypothetical or nominal. The above definition therefore, rejects any principle or doctrine of potential existence as obtainable at common law.(2) This is because the doctrine of potential existence may, in Islamic Law, mean nothing more than the doctrine of GHARAR (uncertainty) which vitiates, ab initio, the validity of a contract of sale. Islamic Law insists always that there must be no doubt concerning the obligation undertaken by the contracting parties. Essentially therefore, the subject matter of sale must be known, determined, certain and identifiable with visible existence.

Sequel to the above definition, the following cannot form part of a subject matter of sale under Islamic Law so long as they remain in that condition:-

(i) foetus in the womb of animal,

(ii) a run-away slave or animal,

(iii) a bird in the sky,

(iv) fish in the pond or sea,

(v) any object premised on deceit.

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(1) Corpus Juris Secundum Vols. 18, 19, 27B and 35.

(2) Formally, at common law, only property actually in existence at the time could be sold or mortgaged. As trade grew space this doctrine was found to hamper commercial transactions and means were found to evade or modify it. Accordingly, the courts invented this doctrine (potential existence) in order to permit the mortgagor or vendor as an incident of other property than in existence and actually belonging to him. (C.J.S.).

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Example of which is where a man lost his animal or any article of value. The value of that animal or article is about N200. Another man comes and offers to purchase the animal or article at N100. If the latter finds the animal or article, the former suffers a loss of about 50% of the actual value and if he fails to find the animal or article, the purchaser suffers a loss of 50% of his price. This is a deceptive sale which is prohibited.(1)

Actual existence of an object for sale therefore determines ab initio whether there can be a contract or not. As usual however, that for every general rule there is an exception. the exception to this condition is the contract of sale conducted under SALAM SALE.(2)

The dominant view of the schools of law is that a sale of non-existing subject matter is void. It is noteworthy, that this kind of subject matter of sale which is non existing should be differentiated from the sale of a subject matter which is not physically existing or visibly present at the place of sale that is, the MAJLIS AL-AQD, but it is existing somewhere else. Views of the schools of law are divergent on the latter form of sale. For instance, the MALIKI School is of the view that such a sale if concluded becomes legal. The school limits it however to some articles such as lost article, houses, provided that payment of the price should not be made at once. But where the articles are merchandise (URUDH), payment thereof can be effected even though they are conspicuously absent at the MAJLIS AL-AQD (meeting place for the contract), so long as they are sufficiently described, for instance, cucumber. That is also premised on another condition, that the merchandise must be within a

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(1) Maliki, Muwatta Malik: Kitab al-Buyu'i Book XIX, Hadith No. 1356. See also: Al-Fawakihu Al-Dawwani Vol. II pages 137-138.

(2) For details on this form of sale see: infra.

nearby area. If otherwise, the sale is a void one.(1) The Hanafi School is of the view that sale of article conspicuously absent fro the MAJLIS AL-AQD, whether sufficiently described to the buyer or not is legal and payment can be made soon thereafter. The Hanafis however gave an option of choice to the buyer at any time he inspects the subject matter purchased, to either confirm the sale or withdraw from it depending on how the subject matter fits the description given by the seller.(2)

The Shafi'i School is of the view that such a sale is generally void. But in another statement of the school, the sale is legalised provided the buyer is allowed the option of inspection. If after inspection, he finds the subject matter fits the description given, he can confirm the sale. If otherwise, he can rescind the sale. For instance where the buyer bought a house and he only inspected it from outside and not from within. The sale is perfected and his option of inspection ceases. He cannot ipso facto, rescind the sale except where a defect has been identified.(3)

The above principles of law are laid down to guide the practicalities of life. During data collection, it was found out in various places that some forms of business practices have grown where people overreach the provisions of the Sharia. They rely and give support to transactions on subject matters that are not at all in existence and nor is their existence contemplated. For instance, in most of the Hausa/Fulani settlement, there is the practice of selling and buying of young plantations (SAYEN YABANYA). This is where a farmer sells some part or the whole of the crops which have started growing but have not yet got to the stage of laying the

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(1) Ibn Hazam, (n.d.) Al-Muhalla Vol. VII, Dar Al-Fikr, Lebanon, p. 337.
(2) Ibid.
(3) Ibid. p. 337.

ears not to say that the ears have ripen into edible cereals. This is applicable to sorghum, millet and maize. The same applies sometimes to cotton, groundnut, cassava, potatoes, fruits such as mango, dates and banana. If one goes to other areas, such as Plateau State, the Federal Capital Territory, Abuja, Niger State, one will find that yam tubers, potatoes are the main substance crops. The practice of sale of large farm of yams or potatoes when these are still in ridges, thrives(1). So the buyer buys the number of ridges at a cheaper price but he will have to wait till the harvesting period is due when he will start opening the ridge-heaps to realize the produce if any. He may find some tubers big others small whereas others got rotten away. In a way therefore, the buyer has entered into a bargain of uncertainty (Gharar) which the Sharia prohibited. Such a contract is illegal and unenforceable. In his book, KIFAYATU AL-AWWAMI FIL-BUYU'I, Sheikh Abdullahi bn. Fodio, has commented:

> "It is a condition precedent for the sale of fruits that they begin to ripen. It is equally the same in crops and other plantations."

In a number of conditions, the prophet has prohibited the sale of unripe things. he is reported to have said:

> :Do not buy fruit until it's good condition becomes clear and the danger of blight is no more.... It's good condition becoming clear implies that it becomes red or yellow".(2)

Again, one may wish to ask: what is the position of transactions carried out on unfinished goods purchased from existing companies such as sugar company or cement company through the help of documents but before actual possession of

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(1) Interview conducted from 10/9/90 - 5/11/90 in Abuja, Suleija and Jos.

(2) Muslim: Sahih Muslim, Ibid; Reported by Ibn Umar.

such goods is taken by the buyer? Such sales are prohibited by Sharia. This poser is important because of the present day rampant practices of sales through documents. Nowadays, one finds so many papers of allocation from cement companies, sugar factories, fertilizer factories in the name of Mr. A for example. But even before inspecting the goods consigned to him, Mr. A goes ahead to sell the allocation paper to Mr. B. Mr. B too, without taking delivery of the goods, resold the allocation paper to Mr. X. This practice continues to circulate up to the last person who may decide to wait and bring out the allocation in its actual consignment and sell it. In all these processes the original cost price is heavily tampered with to the detriment of the final consumer who is compelled to pay an artificially inflated price. This practice is categorically prohibited by the Sharia because:

i. there is uncertainty in the whole process;

ii. it causes hardship to the final consumer through its inflationary trend: and

iii. it makes an opening for easy fortunes to speculators.

During the early stages of Islam, some people used to practise the purchase of commodity through making entry of a document of purchase even without taking delivery of the commodity. This document of purchase was then sold in the market to a third party who also sold it further to a fourth party whereas the goods sold bay where they were before and their possession did not shift from one purchaser to another. The Holy Prophet declared the practice as void. A conversation between two companions of the Prophet (PBUH) Abu Huraira and Marwan brings out clearly this prohibition. Abu Huraira (Allah be pleased with him) is reported to have said to Marwan, "Have you made lawful the transaction involving interest?", thereupon Marwan said, "I have not done that." Abu Huraira then said "you have made lawful

the transactions with the help of documents only, whereas Allah's Messenger (PBUH) forbade the transaction of food grains until full possession is taken of them." Marwan then addressed the people and forbade them to enter into such transactions (as are done with the help of documents). Suleiman said: "I saw the sentinels snatching (these documents) from the people."(1)

The practice is detrimental to the society in general as it encourages the concentration of wealth in few hands at the expense of the greater majority. Where a nation is so permissive in such practice, the economy of that nation is bound to suffer some set-backs.

2.3.2. Goods must be a Thing of some Value (Mal Mutaqawwam):

Mal Mutaqawwam or a thing of value is that specific or determinate thing the acquisition and enjoyment of which is permitted by the Sharia. In other words, such a thing enjoys protection and recognition by Islamic Law. The examples of this class are all animals or birds legalised by Islamic Law; landed properties, cloth (with the exception of gold, silver dresses for the males). all foods and drinks legalised by Sharia. The list is inexhaustive. valid transactions of sale and purchase can be conducted freely by the Muslims on such valuable and determinate things. Other legal or permissable articles include the following:

2.3.2.(a) All marine animals and locusts. These are pure and lawful (Halal). In other words, all animals by whatever name called, living in water and which cannot survive otherwise are lawful. They can be eaten. They can be sold or purchased by a

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(1) Reported in Vol. III (English Translation by Siddiq) p. 803 Hadith No. 3652 of Sahih al-Muslim.

Muslim. It does not matter in whichever manner they are obtained and whether acquired by a Muslim or otherwise. These include animals such as fish, whales, crab, crocodile. The list also contemplates of all sorts of locusts. The Prophet (PBUH) has in this respect commented when asked about the position of the sea and its water that:

> "Its water is pure and its dead are halal (Lawful)"(1)

The confirmation of the above Hadith is in the Holy Qur'an, where Allah the High says:

> "The game of the sea is permitted to you and so is its food."(2)

Both Umar Ibn Al-Khattab and Abdullahi Ibn Abbas (May Allah be pleased with them) defined the above verse to mean that the game of the sea is what is caught from the sea and it's food is what is thrown out from it, or it's food is it's dead animals.

Dar Qutni reported from the Prophet (PBUH) as follows:-

> "Two dead articles are made halal (lawful) for us: marine animals and locust and two types of blood are also made lawful: Kabdu (liver) Tuhhal (spleen)."(3)

Another Hadith reported in Sahih Muslim by Abdullahi bin Abi Aufa narrated that:

> "We fought seven wars with Messenger of Allah and we used to eat locust with him."

The Maliki School holds the view that if the locust dies a natural death it cannot be consumed as it is regarded as a terrestrial animal.

Such marine animals and locusts are regarded by the Sharia to be valuable

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(1) Ahmad: Musnad Ahmad Ibn Hanbal.
(2) Qur'an: V: 99.
(3) Qurtubi: (1966) Al-Jami' Li Ahkam al-Qur'an, Vol. II, Dar Al-Fikr, Beirut, p. 217.

things (Mal Mutaqawwam) once brought into possession and are proper subjects of contract of sale.

2.3.2.(b): In a situation of necessity, carrion is legalised. Sometimes, a Muslim may find himself in an extreme situation where he has to choose between death and eating carrion. Where such a situation arises, the simplistic and equitable nature of the Sharia permits a Muslim to choose the lesser of the two evils. He is therefore permitted, so long as he cannot find any better food than the carrion around him, to eat the carrion and make some reserve pending the getting of a better alternative in order to save his human existence. All jurists are in concurrence that necessity in this situation means the dire need for food to alleviate hunger and there is no other food in such a circumstances than the prohibited carrion, and eating it becomes the only apparent option otherwise death might result. This necessarily means that if such carrion is offered to him as free gift or for sale by a non-muslim, (and that was the only apparent solution for him to survive) then he has to accept or purchase it to save his life. Conversely however, he is prohibited to make same as a free gift or sell it to another Muslim (except where the other Muslim too, is befallen by the same calamity) or even to a non-muslim. The prohibition is based on the principle that what one cannot initially eat, one cannot sell.

On this doctrine of necessity, the Holy Qur'an has stated:

> "But if any is forced by hunger, with no inclination to transgression, God is indeed oft-forgiving, most merciful."(1)

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(1) Qur'an: V: 3.

Allah the High sayeth again:

> "But if one is forced by necessity, without wilful disobedience, or transgressing due limits, then he is guiltless. For God is oft-forgiving, Most-Merciful"(1)

The Holy Prophet (PBUH) is reported to have mentioned three categories of persons who are blameless for the acts they commit if they find themselves in certain conditions. Among them is the compelled person till the compulsion exists no more. The pangs of hunger can indeed force one to do anything.(2) Compulsion can be physical or circumstantial. Both can apply in this situation, but the latter is the one mostly contemplated.

2.3.2.(c): DRINKS

In its nominative character the word "drink", connotes, "any liquid which is swallowed, as to quench thirst or for nourishment."(3)

All drinks are made lawful to a Muslim and thus, subjects of transaction within the contemplation of Islamic Law of Sale and Purchase in so far as they have not fallen within the following prohibited categories of drinks which are discussed infra:

(1) Intoxicants.

(2) Fermented Juice(4)

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(1) Qur'an:XI: 173, cf Qur'an: VI: 119.

(2) Some categories of people are not entitled to partake in this liberal principle because they lack capacity to do so. They are treated in Chapter 3 infra.

(3) Lexicon Webster Dictionary, Vol. I, 1980 Edition page 302.

(4) Umar Ibn Al-Khattab is reported to have said "Khamr (liquor) is that which befogs the mind".

2.3.2.(d): DRESS AND ORNAMENTS:

"Dress" means, "clothing", "apparel" or "attire". It is lawful for a Muslim to use dress or ornament for public outing or worship provided it has not fallen within the prohibited stuff.(1) The prohibited stuff include: (a) Gold, (b) pure silk for men. They are discussed under the prohibited goods infra.

2.3.3. Goods Prohibited by the Sharia:

For the purposes of a valid sale under Sharia the following goods are regarded indeterminate or invaluable (Ghair Mutaqawwam), and cannot be subject of sale. They include the following:

2.3.3.(a) Illegal Food Items:

All kinds of food declared illegal or unlawful by the Sharia cannot be a subject matter of sale for the Muslims. Such foods include:

2.3.3.(a) (i) CARRION

This is defined as the flesh of a dead animal. It refers to the beast or bird which dies of natural causes without being slaughtered or hunted. It therefore confers no usufructuary right on any Muslim. It is not a Mal Mutaqawwam and does not confer any right of sale or purchase on any Muslim. Other types of dead animals prohibited include:

1. the strangled. This refers to that animal which has been strangled by a rope around its neck or suffocated by any other means;
2. the beaten. This is the animal or bird that has been beaten to death;

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(1) The Holy Qur'an enjoins Muslim to cover themselves with clothing. Qur'an: VII: 26; VII: 27; VII; 31-32.

3. the fallen from height - this is that animal which has fallen from height and died as a result;

4. the gored - refers to that animal which died as a result of piercing by horn of another animal. this also includes a bird that died as a result of piecing by the beak of another bird.

5. that which has been devoured by wild beasts. Its remains cannot be used, nor sold.

In the process of data collection, a lot of information have been stumbled over. It was gathered that some people were in the habit of selling to innocent Muslims, the meat of dead animals such as cows, sheep, goats which died naturally either at home or in the bush or have fallen from the herd of animals in transit to market centres and are thrown off into the bush. Such people usually cut away the carrion into pieces to carry to market for potential buyers. A lot of innocent people fall victims to this crude and unethical practice of such people. Reports of such unethical practices were often made to the authorities. The authorities however seemed unable to wipe out such practices despite the fact that the heavy responsibility to protect and preserve the ethics, religion and above all, health of the citizenry is squarely on the shoulders of the authority. After all, the penal laws of the land have made provisions, to deal with such obscenity. Section 187 of the Penal Code of the Northern Nigeria (Cap. 89 of the Laws of Northern Nigeria, 1963) provides:

> "Whoever sells or offers or exposes for sale as food or drink any article which has been rendered or has become noxious or is in a state unfit for food or drink knowing or having reason to believe that the same is noxious as or unfit for food or drink shall be punished with imprisonment for term, which may extend to two

years or with fine or with both."

The discharge of this responsibility falls squarely on the sanitary inspectors, the law enforcement agents and indeed every good citizen to help arrest such obscenities.

Another important question in relation to carrion is whether the other component parts of the dead animal such as milk, skin, hair, hoof, horn are permitted by the Sharia to be used or sold? The general rule in the Maliki School is that these components of a dead animal are regarded as NAJASAT (impure things) therefore, they cannot be put into any use. Accordingly, they cannot be subjects of sale and purchase under the Sharia. The Malikis opine that the whole of it (dead animal) is haram (unlawful), it is illegal to use it or any part of it. They quote the Prophet as having said: "Do not draw any benefit from carrion.(1) Differences have been noted somewhere even among the Maliki disciples on some of these components for instance the skin and the hair. These, according to some disciples are regarded as pure if the skin is tanned and the hair is washed.(2) They relied on the Hadith of the Prophet (PBUH) which permits the two components to be used as such.(3) But as for the milk of an animal and egg of a hen, they are pure even after the demise of the animal/hen. But as they are now harboured in a contaminated frame (the dead object) they too get contaminated as a result and are treated as impure. They can neither be used nor sold. Generally, one is permitted to use carrion's skin, hair and bones. Ibn Abbas reported that one day, the Prophet was passing bye And he saw a

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(1) Al-Qurtubi, M. (n.d.) Al-Jami' Li Ahkam Al-Qur'an, Dar Ihya' al-Turath Al-Araby, Beirut, p. 218.
(2) Ibid. p. 219.
(3) Umm Salama reported the Hadith.

goat belonging to Maimunah (his wife) dead. He then asked why its skin was not removed and tanned for usage.(1) Other schools have gone to the extent to legalise such component parts of pig, dog. For example, the ZAHIRI School. Equally Abu Yusuf and Al-Shaybani, the most prominent disciple of Abu Hanifah, legalise such components.(2)

It should be noted further that with the exception of a small number of scholars, an overwhelming majority (JAMHUR) of the scholars, is of the opinion that in case of a Halal (lawful) animal, there is no harm in using its fat if it dies naturally. But as for the sale of such fat, there is a prohibition. Hafiz Ibn Qayyim discussing this issue at length concluded that:

> "Its (the fat of carrion) sale is forbidden but its use is permissible. The fact is that the Holy Prophet (PBUH) by declaring the sale of carrion or carcass unlawful, did not mean its use as unlawful, except in case of that which Allah and His Messenger declared unlawful....."

It should also be borne in mind that the benefitting factor has a wider scope than sale. One should not therefore think that the use of a thing, the sale of which is forbidden, is itself forbidden. There is no casual connection between the two.

2.3.3. (a) (ii) LIQUID BLOOD

This is more generally known as flowing or gushing blood for example the spleen or the blood that clings to muscle or meat after it has been severed from slaughtered animal. Ibn Abbas a companion to the Prophet and a great commentator of the Qur'an was once asked about the spleen. He replied.

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(1) Al-Qardhawi, Y. AL-Halal Wal Haram Fi Al-Islam.
(2) Ibid.

"You can eat it"

The questioners further said,

"But is was blood."

Ibn Abbas further commented,

"Only gushing blood is prohibited to you:(1)

It is certain therefore, that gushing blood cannot be a subject of sale in Islamic Law.

2.3.3. (a) (iii) PORK

It is also known as the flesh of swine. In ordinary language, it is the flesh of pig. Its meat includes also its fat. The two are inseparable.

It is settled law that there is no dissension amongst the schools of law that the totality of pig, except its hair, is HARAM (unlawful). But for its hair, it is legal to use it for curb. A person once asked the Prophet (PBUH) about the legality of a curb made out of pig's hair. The Prophet (PBUH) replied: "There is no blame in that."

It is conclusive therefore, that nothing except the hair of pig, can be a subject of sale, in Islamic Law.

2.3.3. (a) (iv) ANIMAL DEDICATED TO OTHERS THAN ALLAH:

Dedication in this context means to set aside and consecrate to a divine being or to a sacred purpose. The animal dedicated to any other deity than Allah is the one referred to here. It is the one slaughtered through the invocation of a name of a monster or idol. This practice was in vogue during the Jahiliyya (ignorance) period.

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(1) This is confirmed by the Hadith reported by Dar Qutni on liver and spleen (supra).

The Jahiliyya (ignorance) Arabs used to invoke the name of their deities such as LAT, MANAT, UZZA. This act was a devotional one to other deities than Allah. Any flesh obtained by invoking of any other name than that of Allah is Haram and cannot be used, or sold by a Muslim. Revelation by empirical data shows that there are famous practices of BORI (Juju play) and TSAFI (Magic/Divinity) among the HAUSA people of the Northern States of Nigeria. The Juju players and the Magicians were in the habit of slaughtering animals or birds in the name of some evil spirits or idols. They then distribute the meat of such dedicated animals or birds to some people. Such meat is Haram (unlawful). It certainly cannot be used nor can it be sold.

2.3.3. (b) Prohibited Drinks:

Some drinks are made unlawful (haram) for a Muslim. They are not for the purposes of sale under Islamic Law, valuable goods. There are many of them. The following are prominent:-

(i) All Intoxicants

(ii) Fermented Juice

2.3.3. (b) (i) Intoxicants:

An intoxicant is that which intoxicates. To intoxicate means to make one drunk as with alcoholic liquor. It can also figuratively mean to excite the spirit to a very high pitch, to elate to enthusiasm or frenzy, to poison as by a serum or drug.(1)

For the purpose of this discussion, intoxicants can fall into three main classes, viz:-

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(1) Umar Ibn Al-Khattab is reported to have said "Khamr (liquor) is that which befogs the mind."

i. Alcoholics

ii. Fermented Juices and

iii. Drugs

(i) Alcoholic: Any drink which is alcoholic in nature is clearly and unequivocally declared Haram (unlawful) by the Sharia. It is prohibited. The prohibition was revealed in the Holy Qur'an in the following sequence:

(a) Chapter 2 verse 291, Allah the High says:

"They ask thee concerning wine and gambling. Say: 'in them is great sin, and some profit for men, but the sin is greater than the profit."

(b) In chapter 4 verse 43, Allah says:

"O yee who believe, draw not near unto prayer when ye are drunken, till, ye know that which ye utter ...."

(c) Lastly, Allah says, in chapter 5 verse 90:

"O ye who believe! Intoxicants and gambling and game of idols and divining arrows are only an infamy of Satan's hand work. Leave it aside in order that ye may succeed."

The Arabic metonym for alcoholic is KHAMR and Khamr (wine, alcohol, intoxicant) includes any substance that intoxicates under whatever guise. The Holy Prophet (PBUH) is reported to have made the following pronouncements in respect of Khamr:

"Every intoxicant is Khamr and every Khamr is Haram (unlawful)" Imam Muslim reported this tradition.

"Of that which intoxicates in large amount a small amount thereof is Haram (unlawful) - Ahmad, Abu Daud and

Tirmidhi reported this tradition.

Again he says:

"If a bucketful intoxicate, a sip of it is Haram (unlawful)".

Reported by Ahmad, Abu Daud and Tirmidhi.

So the question of quality or quantity of anything alcoholic under Islamic Law of business transaction is a non-issue, whether between the Muslims inter se or between a Muslim and a non-muslim. Neither can it be a subject of gift. It is absolutely not permissible for a Muslim, for whatever reason, to produce, sell, buy, serve, drink, import, export or transport alcohol or own or work in a brewery or hotels that engage in the sale of alcohol. The Prophet (PBUH) has cursed eight categories of persons who in any way transact on alcohol. The text of the Hadith runs as follows:

"Verily Allah has cursed:

i. Khamr (alcohol).

ii. the one who produce it,

iii. the one for whom it is produced

iv. the one who drinks it,

v. the one who serves it,

vi. the one who carries it,

vii. the one for whom it is carried,

viii. the one who buys it or the one for whom it is bought."(1)

Another Hadith reported by Al-Tabrani states that if a Muslim stocks grapes during harvest and holds them with a view to selling them to a Jew or a Christian or

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(1) Reported by Tirmidhi and Ibn Majah.

indeed anyone also for that matter, who produces Khamr (alcohol), he will be leaping into the fire with his eyes open(1).

This brings into focus the present rampant practices of sales or purchases of locally produced grains, guinea corn, millet, maize to or by the breweries. This practice thrives in most of the Northern States where these cereals are grown in large quantity, especially in some parts of Bauchi (Bauchi & Gombe), Kaduna, Plateau (Plateau & Nassarawa), Niger States and the Federal Capital Territory, Abuja where a special species of guinea corn, having all stalk, red and long ear or grains has been identified as the source material for making of BURUKUTU (local wine). It is produced for the breweries. It may well be that the areas of production of such special species of grain are mostly occupied by non-muslim indigens of the States. As observed in the Hadith reported by Tabrani above, the position of a Muslim who grows any cereal purposely for sale to breweries is very clear. It is prohibited and Muslims should in no way involve themselves in the aiding of producing anything alcoholic. The final dictum is however given by the Prophet (PBUH) on any usage of alcohol when a man one day, brought to the Prophet as a gift, a cask of wine. The Prophet (PBUH) told the man that Allah the Almighty had prohibited it. Then the man asked the Prophet "shall I sell it?" The Prophet (PBUH) replied "The one who prohibited drinking it has also prohibited selling it." The man asked further, "shall I give it out to a jew as a free gift?" The Prophet (PBUH) further replied, "The One who has prohibited it has also prohibited that it be given out to the Jew as a gift." "Then what shall I do with it?" inquired the man.

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(1) Al-Faqi, M.H. (n.d,) Bulugh Al-Marami Min Adillati Al-Ahkam, EEF Publishers, Lebanon.

The Prophet (PBUH) finally replied that you should "pour it down to the ground."(1)

As to whether alcohol/wine can be used in extreme circumstances as medicine. Opinions of the jurists differ on interpretation but certainly the Prophet (PBUH) has said:

> "It is not a medicine but disease."

He further warned:

> "Allah is He who sendeth disease and cure for every disease there is cure. You are free to take medicine but do not take anything Haram as medicine."(2)

2.3.3. (b) (ii) Fermented Juice:

The Sharia does not prohibit vegetable foods or beverages with the exception of what is fermented whether it be grapes, dates, barley or any other substance as long as it remains unfermented.(3)

Fermentation is that process or act brought about by a ferment. A ferment is anyone of various agents or substances as yeast, enzymes or certain bacteria capable of producing chemical changes or reactions as effervescence or decomposition in other substance. When any of the above substances or their likes is used in such a

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(1) Musnad Ahmad bn Hanbal.
(2) Reported by Muslim, Ahmad, Abu Daud and Tirmidhi.
(3) Al-Qardhawi: Al-Halal Wal Haram Fil Islam, Ibid.

way, then the process of fermentation is complete. Example is where grape sugar is converted into ethyl alcohol in the presence of yeast. In some parts of the States mentioned earlier, empirical research conducted has shown that sorghum (DAWA), maize (MASARA), millet (GERO) are fermented for a period of two or three days to make the local wine (BURUKUTU) which intoxicates. Some people interviewed in these States mentioned above, volunteered to state local names of BURUKUTU as (PITO), (JANGIYA), (KAINKAIN), (GOGORO), all referring to local wine. It comes about as a result of fermentation. It has the same effect with real alcohol. In other words, it intoxicates. It is therefore Haram (unlawful) for the Muslim, to consume it, produce or assist in its production by whatever means. It is not a subject matter of sale or purchase by a Muslim.

It is reported in the MUWATTA IMAM MALIK, by Ata bin Yasr that the Apostle of Allah (PBUH) forbade the mixing of ripe and half-ripe dates and soaking them in water. It is also reported that the Prophet (PBUH) prohibited Nabidh made of dates(1).

2.3.3. (b) (iii) DRUGS:

In ordinary usage "DRUG" is defined to mean "any medicinal substance for internal or external use." In this context, drug refers to any substance which has the effect of befogging or beclouding one's mind, impairing ones faculties of thought. perception and discernment. Such drugs are at times described as DANGEROUS

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(1) Imam Malik: Muwatta (English Translation by Rahimuddin, 1981 ed.) p. 364.

DRUGS and at times as HARD DRUGS. They include among others, MARIJUANA, COCAINE, CANNABIS, RAISIN, COCALEAVES, POPPY STRAW. They are all declared to be hard or dangerous drugs. They are harmful to the person who takes them or even to others who are "forced" by circumstances to inhale their smoke. They are accordingly declared by the SHARIA as HARAM and are prohibited. Any transaction on them is also HARAM (illegal) and void.

It is saddening to note the velocity with which Muslim youth nowadays join the bandwagon of "World Drug Barons". They must have been pushed by the urge to make "quick money". Such youths or any adult for that matter who associated with these unethical and, ruinous practices whether he smokes, consumes, sells, purchases has deviated from the path of Sharia. The practice is illegal and cannot yield anything legal as illegal ladder cannot be used to attain legality. A corresponding local practice amongst the Hausa-Fulani settlements is the use of some tiny seeds called ZAKAMI (local hard drug) when a youth takes it, it causes him temporary hallucination. The use of it or sale thereof is prohibited.

2.3.3. (b) (vi) Gold or Pure Silk; Dress or Ornaments:

All ornaments made out of gold and all clothing made out of pure silk are prohibited for the Muslim males. It has been reported that Caliph Ali Ibn Abi Talib, once narrated that the Prophet (PBUH) took some silk in his right hand and some gold in his left hand and declared:

"these two are HARAM for the males among my followers"(1)

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(1) Reported by Ahmad, Abu Daud, Al-Nasa'i, Ibn Majah and Ibn Hayyan with an additional comment that, "it is Halal for the females", See further, Riyadh Al-Salihin.

The issue has been stated further in the following traditions:-

> "Do not wear silk for those who wear it in this life shall not wear it in the Hereafter."
>
> "This is the dress of a man who has no character."(1)

On this issue of sale of silken cloth, Abdullahi Ibn Umar reported that Umar Ibn Al-Khattab saw a silken cloth on sale at the gate of the mosque. He told the Prophet (PBUH) whether he (the Prophet) would buy it and wear it on Fridays or on days when people come to him. The Prophet (PBUH) said:

> "That cloth would be worn by one who has no stock or share on the last Day."(2)

Then came other clothes to him of same stuff. He (the Prophet) gave one of them to Umar Ibn Al-Khattab. Then Umar reminded the Prophet of his previous prohibition on that. Then the Prophet indicated that the cloth was not given for his own use but to give it to his (Umar's) infidel brother in Mecca, Usman Ibn Hakim, for his use.(3)

The above general prohibition thus encompasses things like gold rings, gold pen, gold watch, gold cigarette case and lighter and gold teeth.(4)

Women, on the contrary, are permitted the use of gold and silver ornaments and apparels. This is perhaps due to the feminine lust for jewelry and ornaments to add to their beauty.

Utensils made out of gold and silver are prohibited generally for use by both men and women alike.

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(1) Bukhari and Muslim are unanimous on this Hadith. It is reported by Umar Ibn Al-Khattab.

(2) Imam Malik: Muwatta (English translation by Rahimuddin).

(3) Ibid.

(4) The Prophet allowed the use of silver rings as reported in Sahih al-Bukhari on the chapter of clothing.

2.3.3. (b) (v) Other Prohibited Goods:

There are other articles too numerous to be mentioned in this work which are IPSO FACTO illegal AB INITIO or whose illegality is revealed later through the transaction. Such are the cases of SANAM (idols/sculpture/statue); the SALIB (Cross). there are yet others on which opinions differ as to the legality of their usage such as dogs and cats. Imam Abu Hanifah for instance, considers their sale as legal, Imam Shafi'i said none of them can be sold as none is regarded pure. Imam Maliki School's opinion on dogs are divergent. Some legalise its sale others considered it illegal. Others include musical instruments. Some jurists consider sale of musical instruments as legal such as Abu Hanifah who is of the view that there is no text clearly prohibiting its sale and if destroyed illegally, the owner will be compensated.(1)

The other view is that sale of such instruments is prohibited because they are play instruments. They cited a Hadith in support which states that Abdullahi Ibn Zayd Ibn Al-Azraqi reported that the Prophet (PBUH) has said:

> "Any pastime instrument is illegal except where one engages in shooting with bow and arrows or where one trains ones horse or where one plays with ones wife."(2)

Same treatment of the issue is given by Ibn Rushd in his Bidayat Al-Mujtahid Wa Nihayat al-Muqtasid Vol. II page 94 and the author of Fiqh al-Sunnah, under the sub-title of (Bai Alat al-Ghinai) sale of musical instrument.

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(1) Ibn Al-Hazm: (n.d.), Al-Muhalla, Vol. I, Dar Al-Fikr, Lebanon, p. 55 topic No. 1555.

(2) Ibid. Some weakness has been attributed to this tradition by the author of Al-Muhalla as he said: "the reporter of the tradition was not of any fame (not known)".

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There are several practices today, embarked upon by some Muslims, though prohibited by the Sharia. The sale of dogs, donkeys and horses for consumption purposes is a case in point. Several market centres thrive for that throughout the country. There is the UJILE market in Anambra State where Hausa people transport donkeys, horses, dogs foe sale. The practitioners find it a lucrative trade. Others embark on the sale of sculptures, the Christian Cross and several other related things. As far as a Muslim is concerned, it is illegal for him to sell anyone of such items to a fellow Muslim or to a non-muslim. But rivalry in worldly increase distracts the attention. But money or worldly riches do not save. It is piety and good work that save.

2.3.4. GOODS MUST BE PURE:

Purity, in Islam, has acquired an eminent position such that the Prophet (PBUH) once described it as "half of Iman".

One of the conditions for a subject matter of sale in Islamic Law is that it has to be PURE. This is irrespective of whether it is the subject matter of sale or its corresponding price. The Jurists say, for instance, it amounts to an illegal transaction, where a purchaser buys a subject matter and pays to the seller in turn with an impure thing such as pig or alcohol. This is because pig and alcohol are impure things. The same rule applies to any subject matter or price which can hardly be purified. It is stated in the Fiqh Al-Sunnah:

> "It is a pre-condition for a subject matter and its price that it has to be pure. If one buys an impure article which can hardly be purified one's purchase becomes invalid. Equally, something impure or that which contaminates and which can hardly be purified cannot be offered as price. So

> if one buys an article which is pure and offers as its price alcohol or pig one's purchase is rendered invalid.(1)

The authority for this prohibition is the Hadith reported by Jabir which is recorded by both Bukhari and Muslim. The Hadith runs as follow:

> "Verily, Allah and His Messenger have prohibited the sale of alcohol, the carcass of a dead animal, pig and idols. It was then said: O! Messenger of Allah, have you not seen that the fats of dead animals are used by ships to light on their lamps? The Messenger of Allah said: Allah has cursed the Jews who buy it (the fat) and consume it's prices despite it's prohibition", and as for alcohol, the Prophet said: Verily the One who prohibited drinking it, has prohibited it's sale."(2)

The jurists, as a result of the above tradition and many other related ones, have classified NAJASAT (impure things) into two:-

(a) Those articles upon which the Muslims have consensus that sale of them is void. These are: alcohol, dead animal; including every part thereof; pig; including every part thereof; (except where opinions differ as to the use of its hair) as these are all regarded as impure things (Najasat).(3)

(b) This class is that which is regarded to be a bye-product of the jurisprudential doctrine of AL-DHARU-RATU TUBIHUL MAHZURATU, the doctrine of NECESSITY. Under this class are found the human excrement. the animal dung et cetera, of such prohibited articles. Whether these can be sold for the purpose of manure for farms? Majority view of the Hanafi and Zahiri Schools are in favour of

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(1) Sabiq,S. (n.d.) Fiqh Al-Sunnah Vol. II Dar Al-Fikr, pages 163-164.

(2) Reported in the Bidayat Al-Mujtahid Vol. II page 94.

(3) As for the fat of dead animals, some schools opine that usage in lightening lamps or as it is applied to hides/skin (to soften them) is permitted. So only sale and consumption of its price are prohibited. Refer: Fiqh Al-Sunnah By Sayyid Sabiq, Vol.II, page 130.

such sales. It has been stated:

> "And they said: The sale of animal dung which is impure, but necessity requires that it be used on farms as manure, is permitted."(1)

Other things falling under this class include ivory of an elephant. Some regard it as a dead thing therefore as Najasah, whereas others regard it as a horn in reserved shape. And if so, then the rule applicable to horns of animals generally, applies to it. This is the position as recorded in the Bidayat, a Hanafi text book, essentially.(2)

As for dogs and cats, opinions vary as to whether they are NAJASAT or not. For instance, Imam Abu Hanifah does not consider dog as a Najasah. He therefore legalises its sale. Imam Shafi'i, on the other hand, declared that dog is a Najasah, and cannot therefore be sold. He relied on the Hadith of the Prophet (PBUH) which prohibits the price of dog and that dog, like pig, is a Najasah in itself. In the Maliki School, the companions differ. Some say: If taking a dog is for the purposes of guarding a house or other important objects or for hunting, then it is allowed. But where it is meant for consumption of its meat, it is prohibited. (3) As a result, they deduced the rule that whatever is not lawful to be eaten is not lawful for sale. Or whatever is not lawful for consumption is not lawful for sale.(4)

Other articles worth mentioning are contaminated oil and the human milk. As for the former, it might initially be pure but somehow got contaminated with an impure thing. According to the Maliki and Shafi'i School, it is illegal to sell such

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(1) Ibid.

(2) Ibn Rushd: Bidayat al-Mujtahid Wa Nihayatu al-Muqtasid Vol. II, page 95.

(3) Ibid. But as for beasts of prey such as cat, lion, tiger et cetera, the skin of these are lawful for sale. See Khalil: Mukhtasar, Vol. II p. 5.

(4) Ibid.

contaminated oil, but they allow its usage (by the owner) in lightening up lamps and in making soap. But according to Abu Hanifah, it is lawful to sell it. They reason that if an object has many advantages outweighing the disadvantages therein, the rule favours its use than disuse.(1)

They also cited a Hadith reported by Ali, Ibn Abbas and Ibn Umar which confirms the sale of contaminated oil for lightening lamps.(2)

As for the milk of human being the Maliki and Shafi'i Schools allow its sale. Abu Hanifah, on the other hand, prohibits its sale. The former schools rely on the fact that it is milk whose consumption is lawful like that of other lawful animals, therefore, it's sale is also lawful. As for the latter school, it reasons that it is milk whose consumption is legalised in situations of necessity for the sustenance of a baby, otherwise it is prohibited. The school further reasons that milk follows meat in application: where meat is declared illegal for consumption, milk is equally illegal for consumption and therefore illegal also for sale.(3)

2.3.5. GOODS SHOULD BE KNOWN TO THE CONTRACTING PARTIES

The transitive verb "to know", has been variously defined as meaning: "to have knowledge", "to posses information", "instruction" or "wisdom"; "to be informed of", "to be thoroughly acquainted", "to perceive", "to recognize", "to apprehend", "to understand"(4). When the word is employed as meaning "to have

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(1) Alcohol, dead animal, pork and other related edibles are excluded from this rule. Ibn Wahhab, a disciple of Maliki is also of this view.

(2) Reported in the Bidayat of Ibn Rushd, Vol. II p. 95. The author ascribed weakness to the tradition, though, as there is another tradition in the Mazhab that prohibits even this usage in the lamps.

(3) See: Bidayat Al-Mujtahid - Vol. II pages 95-96.

(4) C.J.S. No. 51 J - LP 534.

knowledge" or "possess information", as it is meant to be portrayed here, it implies at least the possession of information affording reasonable grounds to believe and in some cases imports actual as distinguished from imputed knowledge of the subject matter or its corresponding price. It may also give full assurance and belief to the exclusion of doubt or uncertainty of a reasonable and prudent man, based on convincing evidence addressed to his intelligence or senses.

So where a party or parties enter into a contract of sale whose subject matter or price is unknown, the contract is a FASID (voidable) one.

The subject matter of transaction must therefore be well known to the contracting parties. If there is any ambiguity in the subject matter of a contract of sale such a contract will be rendered a FASID (voidable) contract(1). The JAHALA (ambiguity) can affect the subject matter in any of the following ways:-

2.3.5. (a) AMBIGUITY OF THE GOODS:

This is a situation where the seller sells to the buyer goods that has been mentioned. There is no specification however as to the quality, size and content of the goods. This happens where sale is conducted while the subject matter is not present at the Majlis al-Aqd or in case of landed properties, where the sale was conducted by description. For instance Mr. A. purchased a bag of sugar from Mr. B. when the sugar was delivered to Mr. A. he found that it was "brown" sugar in a smaller bag than the one he anticipated. Here, there is ambiguity right from the start as the

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(1) Fasid (voidable) contract is a defective/voidable contract that is, a contract whose asl (nature) corresponds with the law but not its wasf (circumstances). This should be distinguished from Batil (void) contract which is invalid, null and void with no effect whatsoever.

parties did not agree on the colour, quantity, quality of the sugar. This can give rise to litigation. The Sharia gave option of choice to the buyer to accept the goods or reject same. Also, where a house was sold to Mr. A. on description that it contained four rooms. On inspection (after purchase) the buyer observed that each of the rooms was so tiny such that it beats his imagination. Here also, litigation may arise as there was no inspection before purchase where the buyer would have got satisfied as to the size an quality of each room. He is therefore given the option of choice to confirm the sale or reject it.

2.3.5. (b) Ambiguity in the Kind of the Goods:

This is a situation where the kind (Nau') of the subject matter is not disclosed to the buyer. For instance where a car dealer of Peugeot offered to sell a Peugeot car from his show room without naming the specific brand whether 504, 505, 605 saloon or station wagon. So here the size or capacity of the car and its type is not disclosed but it certainly is a Peugeot car. In other words, the subject matter is known but the kind is not known. There is therefore a Jahala (ambiguity) of the kind of goods. This can bring a dispute between the parties as the seller will be ready to deliver the lowest brand of Peugeot car available in his showroom whereas the buyer will demand for the best kind. But where there is specific mention of the brand, kind, colour, capacity, then the buyer will have no reason to reject the brand so long as it corresponds with the specification given by the seller. Where the kind does not correspond with the specification, then the buyer can reject the brand given by the seller. Another example is where the seller sold cake to the buyer on the pretext that it was made out of barley whereas it was made of sorghum. The buyer can reject it.

2.3.5. (c) Ambiguity in the Description of the Goods:

Description arises where the subject matter of sale is conspicuously absent at the place where the contract took place (Majlis Al-Aqd). Description is generally defined as the act of representing a thing by words or signs or the account or writing containing such representation by visible signs, marks or colour. It is fair portrayal of the main features of a proposed goods in words of plain meaning so that it can be understood by those entitled to act therein. So description helps in furnishing the manner of identification by the aid of which the subject matter intended can be singled out from all others. For instance, the Peugeot car dealer wants to sell a particular Peugeot car to Mr. X. It is the duty of the seller, that is, the car dealer to disclose all the relevant facts relating to the said car. This may include the size, engine capacity, body, make, the engine and chassis numbers, the colour and whether it is a saloon 304, 504, 505, 605 and whether SR or GR brand, with or without A/C. These are all relevant information in the description of the car and each has a relevant bearing on the price or value of the car. Where such relevant description is missing, the sale, even if concluded is fasid (voidable) one as non-disclosure of such facts will naturally cause MUNAZA'AH (dispute) between the contracting parties.

Under the English law of sale of Goods, S.13 thereof treats sale of goods by description. It states:-

> "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale is by sample as well as by description. It is not sufficient that the goods do not also correspond with the description(1)"

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(1) S.14 of the sale of Goods Law of Western Nigeria 1959 corresponds with S.13 of the 1893 Sale of Goods Act.

2.3.5. (d) Ambiguity in the Nature of the Subject Matter:

It is not sufficient that the seller should tell the buyer, "I will sell something to you for N10,000". This is too vague, indefinite and deceitful as the undisclosed something can be a needle, a bicycle, an animal, a box or a food item. Thus it can be anything. It is a grave Jahala (ambiguity) which is capable to set the mind of the buyer at a state of uncertainty and confusion.

2.3.5. (e) Ambiguity as to the Quantity of the Goods:

Quantity indicates the size, extent, measure, amount, bulk or aggregate of a subject matter of sale. The quantity of a subject matter of sale under the Sharia has to be known or determined before a sale is struck. Where it is lacking, there is a Jahala (ambiguity) which renders the contract a Fasid (void) one. Examination of the subject matter where the contract takes place is enough to determine the quantity otherwise proper knowledge of the subject matter must be had to remove doubt, as to its quantity. the buyer is not bound to accept lesser quantity. He is equally both morally and legally bound to return excess found over the purchased quantity except where the excess is (tafi') inconsequential. Islamic Law implores Muslims to comply with the Prophet's equitable rule expressed in "LA DHARARA WALA DHIRARA" that is one should neither cheat, nor should he be cheated.

The exception to the rule of goods to be quantified before purchase, the jurists discussed the position of the following sales:

(1) Bay' Al-Muzabanah/Muhaqalah (Sale of fresh dates for dry dates and selling of threshed for the unthreashed wheat).

In the book of MISHKAT, MUZABANAH has been defined as an exchange of fresh fruit for dry ones in a way that the quantity of the dry fruit is actually measured and fixed, but the quantity of the fresh fruit to be given in exchange is not determined but guessed while it is still on the tree. Muhaqala on the other hand, is defined as the selling of the wheat in its ears, unthreashed against the threshed or pure wheat.

These two forms of exchange are generally prohibited by the Sharia. But Bay' Al-Ariya (exchange of equal quantities of fresh dates with dried ones) is an exception from the prohibition. The prohibition is found in the following traditions:

A Hadith narrated by Abu Said Al-Khudri states that, "the apostle of Allah (PBUH) forbade MUZABANAH and MUHAQALA. Muzabanah means the selling of ripe dates for dates still on the trees and MUHAQALA means the selling of wheat in ears for pure wheat."(1)

The idea behind this prohibition, observed Siddiq, is to make the business transaction fair and eliminate the element of conjecture and chance from it as far as possible.(2)

(2) Bay' Al-Juzaf (Sale of Undetermined Goods)

Bay' al-Juzaf refers to the bargain of goods which are undetermined in quantity. In other words, it is a bargain in a limp sum. This particularly applies to goods which can be measured or weighed. For instance where the seller invites the buyer to buy a big heap of cotton without weighing; it is very difficult in this situation to determine the quantity of the cotton.

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(1) Al-Bukhari: Sahih Al-Bukhari, Vol. IV (English Translation by Khan) Hadith No. 391.
(2) The translator of Sahih Muslim (to English) in footnote No. 1987 of p. 801, Vol.III.

The Jurists, generally, are not very strict in making such a bargain void especially where the element of the uncertainty can be removed. If the bargain is struck, it is a good one. The Malikis however insist that:

(i) The subject matter must be present at the Majlis al-Aqd for inspection.

(ii) The owner of the subject matter cannot say with certainty the exact quantity of it.

(iii) The subject matter should be in abundance

(iv) If the subject matter is placed on the ground, the surface on which it is placed must be flat.(1)

The Hanafis, from their own point of view, state that the sale of things measured by the Kayl, things which are weighed, things which are counted and things which are measured by Zira', by the Kayl, weight or number, is good, and so also is their sale by lump bargain. They further cite an instance of a person selling a heap of corn and a shed full of chopped straw, and a heap of bricks and a bale of merchandise by the lump sum, it is a good sale.(2)

2.3.5. (f) Ambiguity as to the Time of Payment:

Ordinarily, a sale entails an exchange of commodities for money simultaneously. There are circumstances however, where payments for the commodities purchased is done at a later date. Where such a payment is deferred and

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(1) For further details, refer to Section II, pages 29-32 of the MEJELLE (English version - 1967 Reprint), Lahore.

(2) See: The Mejelle Art. 217-218. Refer also for Shafi'is view to pages 429-431 of Al-Muhalla Vol. VII, Dar Al-Fikr.

the exact period for the settlement of the price is not known to the contracting parties, there is an ambiguity (Jahala).

According to the Hanafis, two types of Jahala exist in such a transaction: a grave Jahala and a simple Jahala. A grave Jahala refers to the time in the future for payment on the price which cannot, from the expression of the buyer, be determined. For instance, where the buyer accepts to effect payment only, "when I become wealthy" or "till Mr. X arrives" where it is known that Mr. X has been away for long. Such an expression goes to the root of the contract of sale. It therefore renders the contract Fasid (voidable) one. Imam Malik concurs with Imam Abu Hanifah on this point.

As for the simple Jahala, it is determinable through expression also such as where the buyer accepts to pay, "on the return of the pilgrims from Saudi Arabia" or, "until the time of harvest". This period can be determined even though there is no specific date. But, generally, the time for the return of the Pilgrims from Saudi Arabia in each year can be determined immediately the Pilgrims start travelling to Hajj. Also, the period for the harvest of crops in each year is determined anytime the rains start falling. So in this situation the Jahala is so simple and can easily be removed anytime the particular eventuality occurs. For this reason both Imam Abu Hanifah and Imam Maliki regard such a contract a valid one on the perfection of the event.

The Shafi'is on the other hand, reject such generalisation to timing the payment of the price. They further adopt a more definite time. They accept for instance the reckoning to be based on lunar months, the sun rise or set; the appearance of the moon or its disappearance; the appearance of a particular star or its disappearance. They cite as authority three (3) verses of the Holy Qur'an and some Hadith. These verses are as follows:

(1) Chapter II verse 189 which states:

> "They ask thee (O! Muhammad) of new moons. Say They are fixed seasons for mankind and for the pilgrimage."

(2) Chapter II verse 292 where Allah says:

> "O ye who believe when ye contracted a debt for a fixed term, record it in writing."

(3) Chapter IX verse 36 which states:

> "Lo! the number of the months with Allah is twelve months by Allah's ordinance in the day that He created the heavens and the earth."

As for the Hadith they cited the one which states that, "Muslims are always resolute on their stipulations".(1)

2.3.6. DELIVERY OF THE GOODS:

Ordinarily, the word "delver" connotes the act of carrying and turning over to the intended recipients things such as letters or goods. In other words, it is an act

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(1) Ibn Al-Hazim; (n.d.) Al-Muhalla, Vol. Vii, Dar Al-Fikr, Lebanon, pages 144-145.

of giving something into another's possession or keeping.(1)

Legally however, delivery has been defined to mean the transferring of possession from one person to another. It may be actual or physical or it may be constructive or symbolical. For instance where a buyer is already in possession of goods before sale, and afterwards pays for them.

In the above context therefore, the goods for sale under Islamic Law should be capable of delivery. Majority of the Muslim jurists stipulated that the owner of the goods must be capable of delivering the same to the other contracting party. If for any reason he cannot do so then such a contract is a "Fasid" (voidable) one. For this reason, it is invalid for the seller to sell a "run-away slave", "a run-away camel", "fish in the sea", "a bird in the air". This is because of the inability to delver any of the above subject matters to the purchaser even if the latter has taken the risk of getting hold of the subject matter. The Fasada (invalidity) is removed if the subject matter is brought under control. Reason for the prohibition is clear and that is the uncertainty (gharar) involved in the transaction. It is on this basis that the Mu'awama sale that is sale of farm produce in two to three years to come is prohibited by the Prophet.

It is stated in the Jawahirul Iklil(2) that:

"It is a condition for the subject matter whether the price or the object for sale that it becomes susceptible to delivery by the seller to the buyer."

Stated also in another book is that:

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(1) Lexicon Webster Dictionary Vol. I, page 264.

(2) Commentary on the Mukhtasar Al-Khalil, Vol. II page 5.

> "The conditions for a subject matter of sale are as follows .... that the seller should be able to deliver the subject matter (as) the sale of a bird in the air, fish in the sea, and a usurped article is invalid."(1)

sale transactions on things which are pledged; things under WAKF are prohibited as such things cannot legally be delivered to the buyer.(2)

In Kifayatul Awwami fil Biyu'i Abdullahi bn Fodio has reduced the prohibition of sale of a subject matter not susceptible to delivery as follows:

That, sale is possible:

> "Where the subject matter is susceptible to delivery, but not like a run-away slave,
> Or a stray camel
> Or a usurped article
> Or a pawn or fish in the water
> Or a bird in the air all are unpossessed things by you.
> But as for the honey in its hive and its like that is among the permissible (for sale)"

By way of recapitulation the conditions set by Sharia under which goods should pass to qualify for a contract of sale are that:

(a) there should be no ambiguity of the goods per se

(b) there should be no ambiguity in the kind of the goods

(c) there should be no ambiguity in the description of the goods

(d) there should be no ambiguity in the nature of the goods.

(e) there should be no ambiguity in the quantity of the goods

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(1) Al-Jazairi, (n.d.) Kitabul Figh ala Mazahibil Arba'a Vol. II, Dar Al-Fikr, Lebanon, p. 166.
(2) For further reading refer: Figh al-Sunnah, Vol. III, pages 134-135.
(3) Ibn Fodio, A. (n.d.) Kifayat Al-Awwami Fil Biyu'i (unpublished) p. 5.

(f) there should be no ambiguity as to the time for payment of the price and

(g) Goods as a condition precedent, should be susceptible to delivery.

Some of the above requirements in Islamic Law are also found in the English or Nigerian Law of Sale of Goods. Some are treated under the conditions, warranties and exclusion clauses and performance. Section 10 of the 1893 Act treats stipulation as to Time; Section 13 deals with correspondence with description; Section 14 deals with quality and fitness for purpose; Section 15 treats correspondence with sample; Section 55 treats exemption clauses. Delivery of goods whether in right or wrong quantity and quality, time and place of delivery are all dealt with under the Act by Sections 27, 29, 30.

CHAPTER THREE

3.0. PARTIES TO CONTRACT OF SALE UNDER ISLAMIC LAW

3.1.0. CONTRACTUAL CAPACITY OF PARTIES TO A CONTRACT OF SALE UNDER ISLAMIC LAW

3.1.1. The General Rule Pertaining to Legal Capacity (The Ahliyyat Doctrine):

Legal Capacity in Islamic Law, like in any other set of laws governing human conduct, is an essential requirement for the fulfilment of a valid contract. Under Islamic Law, legal capacity (Ahliyyat) begins, generally with birth. In other words, it does not come into existence abruptly. It undergoes a gradual development along with the human mind. So all the factors affecting the growth of human mind from birth to death, do affect the legal capacity or Ahliyyat. The coming into operation of the Ahliyyat doctrine imposes some rights, obligations, duties and liabilities and responsibilities on the human soul that has fallen within the operation of the Ahliyyat doctrine. That is why the jurists on an indepth analysis of the doctrine, have classified legal capacity, (Ahliyyat) broadly into two:-

Ahliyyat al-Wujub (Receptive Capacity) and

Ahliyyat al-Ada (Active Capacity)(1)

Of the two categories of Ahliyyat indicated above, this study will concern itself more with Ahliyyat al-Ada, the active capacity of the parties to enter into contract of sale. In passing however, Ahliyyat al-Wujub (the Receptive Capacity) has been defined as

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(1) Joseph Schact terms them, "Capacity of Obligation" and "Capacity of Execution", respectively. See Chapter 18 of his Introduction to Islamic Law, 1964 Edition.

"a person's fitness to acquire rights and to be subjected to obligations"(1) or as put by Schact, it is the "capacity to acquire rights and duties"(2). The reason on which this definition is premised is the DHIMMA that is, the quality which renders a person to become fit for his rights and be subject to his obligations. 'Person', here, may have the natural and artificial or juristic connotation.

Ahliyyat al-Wujub is divided into two:

3.1.1. (a) (i) Ahliyyat al-Wujub al-Naqisah (Partial Receptive Capacity) and

(ii) Ahliyyat al-Wujub al-Kamilah (Complete Receptive Capacity).

The former deals with the capacity of an embryo. The embryo, from conception to the final delivery, enjoys the protection of the Dhimma. Thus, the unborn child can inherit and receive a legacy. This notwithstanding however, its Dhimma is considered curtailed as it is still in the womb and it's life joined to that of it's mother; it is still quite a feeble creature and hence the curtailment of the Dhimma.

In spite of this curtailed capacity, the embryo enjoys the following limited rights:-

(a) Right to legitimacy that is, it should be attributed to its father if born within wed-lock that is within the limits of the minimum and maximum periods of gestation.

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(1) Ahmad Ali Abdallah (1978) Legal Capacity in Islamic Law - quoting from Amir Bad Shah's Principles of Muhammadan Jurisprudence, p. 217 C.I.L.S. ABU Zaria Monograph Series No. 1.

(2) Schact: (1964) Introduction to Islamic Law, chapter 18 p. 124, London.

(b) Right of ownership that is, it can own property through inheritance, gift; bequest or even usufructuary rights where given charitable donations.

(c) Ghurra Right - that is payment of some compensation for the destruction or abortion of a child in the womb payable by causer. This compensation is known as Ghurra. It belongs to the still-born child.

Of important notice is that whereas the embryo is entitled to enjoy such rights as enumerated above and many others, it is not, conversely, to be subjected to any corresponding obligations. This is perhaps due to the fact that the embryo cannot do any thing in the realm of human beings through which it can be held liable. Further, the embryo has not yet acquired any way of expressing itself nor has it any guardian to act for it in that behalf. So if the embryo's father, mother or any relation of it bought or hired anything for it, even with the intention of charging it, the embryo would nevertheless be under no obligation to pay back the price, rent or whatever form the claim entered in that behalf.

Query:

What is the position of this embryo's physical existing properties? Can they be subjected to liabilities where they have caused damages to others? The answer seems to be in the affirmative.

3.1.1. (a) (ii) Ahliyyat Al-Wujub Al-Kamilah (Complete Receptive Capacity)

The complete Receptive Capacity of a person begins from birth and extends to death. This is because as soon as an embryo comes out from its mother's womb this category of Ahliyyat starts to function. By then, the child becomes competent to acquire rights and at the same time be liable to corresponding liabilities or

obligations. In other words, he is now competent to enter into contracts, dispose his property off and can fulfil all obligations undertaken. This Ahliyyat covers a person whether an adult or an infant; sane or insane; healthy or unhealthy.(1) It imposes upon its possessor the utmost obligation whether he is a tender infant (Sabiy) or a Mumayyiz (one who can differentiate beneficial from detrimental) or even a sound adult (Rashid). It should be concluded that whereas the Mumayyiz and the Rashid can conclude contracts personally, an infant of tender age (Sabiy) (below Tamyiz) and the insane (Majnun) are accountable for all that is possible to be done on their behalf by their guardian. This means that an infant is liable to pay for all his contractual obligations which have been legally entered into and concluded on his behalf. If for instance a house is rented for his occupation, he is liable to settle the rent. So although the infant is the one liable yet the duty of implementing the obligation is on his guardian. This shall continue in almost all respect until such a time when he has fully grown up and taken the stewardship of his properties and self, henceforth the Ahliyyat al-Ada begins to operate.(2)

3.1.1. (b) Ahliyyat Al-Ada (Active Capacity).

Ahliyyat Al-Ada is defined to mean the competence of a person which renders him or his actions to be governed properly by rules of Islamic Law. In other words, it is such a capacity that entitles one to the exercise and discharge of rights and obligations. Modern writers such as Joseph Schact (though orientalist) defines this

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(1) Where one is unhealthy, one can be represented in that behalf by a guardian. Some jurists opine that the Ahliyyat survives one after one's death in order to settle (resolve) some unresolved legal issues.

(2) It should be observed that discussion on tortious, criminal and religious liabilities of an infant has been omitted here for relevancy sake.

Ahliyyat to mean "Capacity of Execution" which is the capacity, according to the writer, to contract, to dispose and validly to fulfil one's obligations.(1)

When does this Ahliyyat start? it comes into operation after the attainment of TAMYIZ. Tamyiz is the acquisition of the discerning faculty of what is beneficial and what is detrimental. So a MUMAYYIZ is that person who has the faculty of discrimination, or who is intelligent and can be presumed to understand the meaning and connotation of words and deeds.

In the Maliki School of thought, Tamyiz is attainable by a minor either at the age of seven, after the age of seven or even before the age of seven. It thus, has no fixed age. IN Hanafi School, on the other hand, Tamyiz is attainable only at the age of seven. So no minor should be presumed to be a Mumayyiz by whatever measure unless he has attained the age of seven. Thus, every child is presumed to be a Mumayyiz at the age of seven years under this school.

Now that the operation of this Ahliyyat has been defined it is pertinent to briefly look at the categories of ACTIVE LEGAL CAPACITY.

AHLIYYAT AL-ADA, too, is divided into two:-

(i) Ahliyyat Al-Ada Al-Naqisah (Partial Active Capacity)

(ii) Ahliyyat Al-Ada Al-Kamilah (Complete Active Capacity)

3.1.1. (b) (i) Ahliyyat Al-Ada Al-Naqisah (Partial Active Capacity):

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(1) Schact (1964) Introduction to Islamic Law, page 124, London.

This is the capacity of a Mumayyiz in the period beginning from Tamyiz to the inception of majority. Even though the minor at this stage of life has acquired the faculty of discernment, he is still regarded to be suffering from some disabilities in relation to his utterances and deeds. In other words, even after attaining Tamyiz, the child will continue to bear both the Ahliyyat Al-Wujub Al-Kamilah and the Ahliyyat Al-Ada Al-Naqisah. So, the child's capacity to exercise this Ahliyyat is initially confined to specific fields of transactions, though not limited. The developmental scope of the Ahliyyat however, gradually widens in course of the child's mental and physical growth up to such a period when all legal impediments to the full operation of the Ahliyyat are removed. This is obviously attained when the child fully matures. Before then however, the child (Mumayyiz) should be allowed unfettered dispositions (Tasarrufat) in the field made specific for him. So the Mumayyiz is treated as a person between two capacities. In other words, he is put in between one who is devoid of Ahliyyat al-Ada, that is the case of a minor of tender age and the Rashid, that is one whose capacity is perfected. It can thus be safely concluded that a Mumayyiz is not a mature person neither is he a tender infant. The relationship of a Mumayyiz and the Ahliyyat al-Ada al-Naqisah is that the Ahliyyat accounts for validating and legalising accomplished dispositions (Tasarrufat) of a Mumayyiz, rather than subjecting him to personal obligations. It is pertinent to look briefly at situation where such accomplishments may arise:-

(a) Beneficial Transactions: Where all transactions are wholly beneficial to the Mumayyiz and have been accomplished by him without the permission of his guardian, such transactions are considered valid by the Sharia. Examples of such transactions are; any offer of gratuitous nature made to the Mumayyiz for instance,

gift, Wakf, will et cetera. In accepting such transactions, permission of the guardian is immaterial.

(b) Labour Contract: The general rule here is that a Mumayyiz is not permitted to employ himself to any person without the prior approval of his guardian ad litem. Certainly this prohibition aims at negating the chance of exploiting or endangering the Mumayyiz. But where he has so entered the Maliki School declares such a contract a voidable one (Fasid) and its execution can be stayed (Tuqif). Where the guardian is unaware of such contract and the Mumayyiz has fulfilled his own part of the contract, the law entitles the Mumayyiz to be paid the agreed wage or price for the services rendered. But where the guardian was fully aware of the contract and did not stop the Mumayyiz from performance, the contract is still treated as a voidable one. In the Hanafi School, on the other hand, the Mumayyiz should be paid his quantum merit where he entered such a contract and performed some substantial part thereof or all, where his guardian ad litem was unaware. The whole concept of such a contract with the Hanafis however is that it is void.

(c) Agency Contract:

With regard to agency transactions entered into by Mumayyiz, the general rule, under the Maliki law is that whatever one is competent to transact for oneself, one is equally competent to transact it on behalf of others(1). This means that a Mumayyiz can be agent for another provided the subject matter of the agency has fallen within the permissible dispositions of the Mumayyiz. This, further means

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(1) cf. Ibn Juzay, (n.d.) Qawanin al-Ahkam Al-Fighiyyah, p. 356.

that he cannot be an agent on dispositions outside his competence. Where the agency borders on matters outside his scope the permission of his guardian is required as for instance in case of indeterminable contract for example, contract of sale. It should further be noted that even where he has been authorised to enter into a contract as agent, he should not be entrusted with the duty of executing the contract, nor should he be made to pursue the disputes which may arise consequently. Such executions of the contract and any legal disputations, in case they arise, should be pursued by the principal. In this case therefore, it seems that whereas the agency contract is entered into by one person, it's pursuance is done by another. The situation however differs where the Mumayyiz enters into the agency transaction with the express permission of his guardian. In this respect, every action of the Mumayyiz is treated and governed by the general rules of agency as applicable to an adult sui juri.

Critically viewed therefore, one may say that the concept of a Mumayyiz's agency is more of theoretical importance than practical. However it serves as a basis for future undertakings where the sole aim is to train the Mumayyiz rather than to have him serve his principal's interest. This will help the Mumayyiz acquire proficiency and develop his business acumen.

(d) Detrimental Transactions:

Under this category, the Mumayyiz (minor) is completely disqualified to enter into such transactions as are likely to cause loss to his property, if, in contravention to such a general rule, the Mumayyiz so enters into such a transaction, it is deemed to be absolutely void and whether with the consent of his guardian or not, as guardianship is meant to protect not to injure the interest of the

minor. Clear instances of such transactions are:

(i) Property: the Mumayyiz is forbidden to dispose his property without adequate consideration thereof. He is precluded from making out Hiba (gift) or donation (Waqf). Accordingly, he cannot: (a) lend out his money, (b) loan out his property (Ariya) or (c) make an undertaking of suretyship (Kafala/Hamala).

(ii) Marriage Contract: The Mumayyiz is not allowed to dissolve his marriage contract. But his determining the marriage through Khul' (consideration paid by the wife to the husband in order to get a divorce) is acceptable.

(iii) Bequest: The Mumayyiz, according to some schools of thought cannot make a bequest as the detriment to the property is regarded as corporeal. Others validate his bequest provided he understands that his act brings him nearer to his Creator.

(iv) Indeterminable Transactions: In this category of transactions the question of gain accruing to the minor or loss suffered by him cannot easily be discernable. Such transactions when entered by the minor are regarded as voidable (Sahih Mawquf) (lit. valid but suspended). They can be ratified by his guardian or on his attainment of maturity. If any of the above contingencies happens, the contract or transaction so ratified becomes valid and operative (Sahih Nafiz). This is in accord with the Hanafi, Maliki and Hanbali Schools of thoughts. In all these circumstances, the other party is bound by all it has entered into. This seems to confer more contractual 'benefits' on the minor than on the other contracting party. But where the other party insists

on a more certain deal by avoiding the vissicitudes of Tamyiz, he should insist on the minor getting the consent of his guardian. This can lessen the chances of dispute and establish instead, stability of the transaction entered.

Nature of the Permission on Indeterminable Contracts:

Opinions of the jurists differ on the nature of the permission or consent to be given to a Mumayyiz when he intends to enter into indeterminable contracts. According to the Hanafi School, the permission/consent to be granted in this circumstances should be of a general nature. By general nature, it is meant to comprehend all kinds of transactions falling within the purview of indeterminable contracts. It may also be of a special nature that is, one that relates to a specific or definite object. The Maliki School, on the other hand, advocates that such a permission or consent can only be of a specific nature(1). This may ease the supervisory role of the guardian as against the Hanafi generalisation. In the Hanbali School, three views emerge in relation to this type of contract:-

(i) the consent or permission of the minor's guardian should be obtained even before entering into transaction. This is the only base for ratifying the dealings of a Mumayyiz vis-a-vis indeterminable contracts. This seems to be the popular view of the school.

(ii) the Mumayyiz is prohibited ab initio from entering into contracts of indeterminable values. If he so enters, the contract is a nullity and void. The Shafi'is support this view.

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(1) Al-Hattab (1978) Mawahib Al-Jalil, Vol. IV, page 247, Lebanon.

(iii) that the contract so entered by the Mumayyiz can be Sahih Mauquf or Sahih Nafiz that is, valid but suspended or valid but operative depending on whether the consent of the guardian was had before or not.

The Shafi'i School considers the contract or dispositions of a Mumayyiz as null and void as he has, according to the school, no complete capacity neither has he authority over his property. The school does not classify infancy period into tender infancy (Sibah) and Tamyiz. To this school, Ahliyyat al-Ada commences not from Tamyiz but from Rushd that is, maturity in its perfection. So they do not recognize the partial active capacity (Ahliyyat al-Ada al-Naqisah) at all.

Other issues of importance pertaining to the Mumayyiz's capacity are: tortious; criminal liability; faith; apostasy and other religious obligations of the Mumayyiz. These, certainly, are issues outside the scope of his treatise and are therefore omitted.

3.1.1. (b) (ii) Ahliyyat al-Ada al-Kamilah (Complete Capacity):

The next formative stage after Tamyiz in the life of a minor is that of RUSHD. Legal writers ascribe variety of expressions to denote such a period. They cite for instance RUSHD, BULUGH, TAKLIF. In a narrow sense, these expressions may appear synonymous but may mean, in a wider sense, different things at different stages and circumstances. The derivative subject name of the minor at each of the above stages is RASHID, BALIGH, MUKALLAF respectively. A Rashid has been defined as a "person who busses himself in looking after his own property and does not desire prodigality and extravagance"(1) Baligh has been defined to mean a person who has attained

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(1) Section 947 of the Mejelle.

"years of legal maturity".(1) And a Mukallaf has been defined to mean, a "fully responsible person".(2) We are not going into the semantics of the above defined words, but in active legal parlance, Rushd connotes "maturity", Bulugh connotes "puberty" or "majority" and Taklif also connotes "maturity". It should further be noted that they are not interdependent on each other, even though Bulugh for instance may concur with Rushd. A person may fairly attain majority without necessarily and simultaneously attaining the mental maturity. To cut clear this distinction, the Law-Giver (Allah Subhanahu Wa Ta'ala) directs the remitting of the property of an orphan to him when mental capacity is discerned out of him. The Holy Qur'an states:

> "And go on observing and testing the orphans till they reach the marriageable age; then if you find them of sound judgment, deliver over unto them their fortune; and devour it not by squandering and in haste lest they should grow-up"(3)

In another verse, Allah the High sayeth:

> "And do not touch the wealth of an orphan save to improve it, before he comes of age"(4)

The Prophet (PBUH) is reported to have said three categories of persons are guilty-free unless they have found themselves in different situations. Among them the Prophet mentioned a minor who has not got to maturity and he said:

> "The pen is dried against three (3) persons ..... a small child (minor until he experiences wet dreams."(5)

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(1) Hughes' Dictionary of Islam, page 35.
(2) Schact (1964) Introduction to Islamic Law, London.
(3) Al-Qur'an: IV: 6.
(4) Ibid. VI: 152.
(5) (n.d.) Bulugh al-Maramı.

The key words or phrases from the above authorities are: "till they reach marriageable age". If you find them of "sound judgment", "lest they should grow up"; "before he comes of age; and "until he experiences wet dreams".

Marriageable age, sound judgment, growing-up or coming of age and wet dreams, are expressions in law which aim at one thing, that is the attainment of legal maturity. The fundamental question then is when does a child attain legal maturity? This question appears to have no clear-cut answer but some writers assume that by attaining puberty, legal maturity is signalled.(1)

PUBERTY has been defined as 'the period' in both male and female marked by the functional development of the generative system, the age at which persons become capable of "reproduction".(2) In other words, it is the period when a man develops masculine characteristics and a woman develops feminine characteristics(3). The author of As'halu Al-Madariki puts its definition in the following words:

> "Maturity or puberty is a phenomenon which occurs to a minor that removes him from the circumstances of being a child, making him into adult. That phenomenon it seems is not completely known to anybody. That is why the Law-Giver has provided signs for it to be understood."(4)

The conventionally acceptable signs for this masculinity and femineity as in boys and girls respectively are generally (a) growth of the pubes (b) menstruation and pregnancy. As for the specific age in both sexes, it is a matter of divergent views among the jurists.

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(1) Abdallah, (1978) Legal Capacity in Islamic Law, Ibid.
(2) Lexicon Webster Dictionary, Vol. II.
(3) Abdallah: Ibid.
(4) Al-Kashnawi, (n.d.) As'halu Al-Madariki, Vol. III page 5.

The Hanafi and Maliki Schools for instance on the question of attainment of puberty state that: generally two criteria are used in ascertaining puberty in a young person; these are: (i) the conventional signs and (ii) age.

(i) Conventional Signs in Ascertaining RUSHD (Puberty)

On the conventional signs the Malikis expounded about eight issues:

(a) the emission of sperm whether awaken or asleep;

(b) menstruation and pregnancy in case of females.

(c) the growth of the pubes. Here, they have excluded soft hairs, beard, moustache (as oftenly) these appear on a person much later after attainment of Bulugh(1).

(d) Odour of armpit.

(e) growth of tip of the nose.

(f) broken voice.

(g) growth of the breast in females(2).

The Hanafis stated as for males that there are three signs: (a) emission of sperm, (b) wet-dreams and (c) impregnating of woman(3). In case of the females the circumstances are: (a) menstruation and (b) pregnancy(4).

The Shafi'iyya is of the opinion that maturity is discernable from minor when he attains the minimum age of nine years for males and females. Any sign noticed on the minor such as sperm or menstruation before the age of nine years in each case is disregarded as it may be a sign of some sickness. But in a normal

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(1) Al-Jazairi, (n.d.) Kitab Al-Fiqh ala Mazahib al-Arba'a, Vol. III, p. 351.
(2) See: Al-Kashnawi, (n.d.) As'halu al- Madarik, Vol. Ii, page 5.
(3) See also: S. 985 of the Mejelle.
(4) Al-Jazairi: Ibid.

situation, majority starts in either case at the age of fifteen years(1).

The Hanbaliyya is of the opinion that a minor attains maturity whether male or female when three circumstances occur:

(a) Emission of sperm, whether awaken or asleep and as a result of actual sexual intercourse or dream or otherwise.

(b) Growing of Pubes.

(c) Attainment of fifteen years of age. In case of a female, two more signs are added:

(d) Menstruation and (e) Pregnancy.

In case of a haemorprodite, he too should attain the age of fifteen in addition to the above signs of which he may bear one or both of them from the masculine or feminine characteristics.(2)

(ii) Age Factor in Ascertaining RUSHD (Puberty)

The second aspect in determining whether a minor has attained puberty or not is AGE. Each of the Schools of law prescribed some age limit at which a minor is deemed, even in the absence of the conventional signs, to have attained legal maturity. Abridged below is the official view of each of the Schools on this matter:

(a) The Maliki School:

This school holds that where a minor attains eighteen (18) years he is deemed to have attained puberty, Al-Jazairi stated:

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(1) Ibid: page 352.
(2) Ibid.

"If any of the (conventional signs) does not show, the method of ascertaining the puberty is by age. That is: he should be of eighteen complete years of age. It is also said that mere entry into the eighteenth year qualifies (the minor) to puberty"(1).

(b) The Hanafi School:

The official view of this school is that both male and female minors are deemed to attain puberty when each gets to his fifteenth year of age(2).

But the personal view of Imam Abu Hanifah is that the male minor should attain the age of eighteen years and the female should attain the age of seventeen years(3).

In the Mejelle, which is essentially a Hanafi book, the beginning of the time of arrival at puberty is, for males, exactly twelve years of age, and for females, exactly nine years of age and the latest for both is exactly fifteen years of age(4). And if a male, who has completed twelve, and, a female who has completed nine, has not reached a state of puberty, until they reach a state of puberty, they are called "Murahiq" and "Murahiqah".

(c) Others:

The view of the Shafi'i and Hanbali School on age factor, have already been seen earlier.

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(1) Ibid. page 351.
(2) Ibid. 350.
(3) Ibid. 350.
(40 Section 986 of the Mejelle.

In ascertaining the mental Capacity of a minor, it has been seen that the laid down rules are the conventional signs and age. The Schools differ on age of maturity. There is consensus however amongst the schools of law on conventional signs as a means of determining majority of a minor. It is a phenomenon which enjoys universal acceptability. On the age factor, what appears to be more reasonable as age of maturity to the present writer is eighteen years of age for both males and females as stipulated by the Maliki School.

3.2.0. FORMATION OF THE CONTRACT OF SALE:

It is very pertinent to point out from the outset that unlike the common law, Islamic Law, strictly speaking, knows neither a general theory of contract nor a definition of what a contract is. This is largely due, perhaps, to the diversity of contractual undertakings under Islamic Law. The classical jurists of Islamic Law thus consider each contract under a separate and detailed examination(1) The word denoting a contract under Islamic Law is Aqd, literally, the word is used in the Arabic Language to mean, an "act of tying a knot or strengthening of a robe". This necessarily involves a physical exercise in performing that very act. If metaphorically translated, the word is capable of connoting the non-physical tying or strengthening, for example strengthening or tying through a promise or resolve to effect a particular undertaking. In other words, it connotes the connecting of two statements together to effect a bilateral disposition such as a contract of sale and hire or in the form of unilateral disposition such as making a promise or a vow.

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(1) Hamid, F.A. paper on "Islamic Law of Contracts" Published in the Journal of Islamic and Comparative, Vol. III, C.I.L.S., Zaria, 1969.

In the legal terminology, the meaning of the word 'Aqd' co-relates to its etymological meaning through the scope of its technical meaning is confined to the bilateral dispositions. It is the establishment of a legal relationship between IJAB (offer) and QABUL (acceptance) in such a way as it affects the situation of the subject matter of contract not derogating from the legal requirements of the SHARIA. By far therefore, the most common and consistent use of the word in the sphere of Islamic Law transactions is in relation to transactions that are concluded by offer andacceptance.(1) Be that as it may, it must be noted that the formation of a contract under Islamic Law does not require any unreasonable or complicated formalities such as found in the Roman or English law dispensations. That is why a contract is simply constituted by exchange of mutual assent and intent between the contracting parties. The intent as well as the assent expressed in IJAB and QABUL which form the basis of the contract that is, AGREEMENT.

3.2.1. Elements of Contract of Sale:

(a) Agreement:

A contract of sale, like any other contract, depends on agreement. An agreement is the consent or joining together of two minds in respect of a particular undertaking. It is loosely referred to as CONTRACT. It exists either where promise is made on one side and assented to on the other; or where two or more persons enter into an agreement with each other by promise on either side. In concrete terms, this is represented by the principles of OFFER and ACCEPTANCE. The Islamic Law principle of offer and acceptance (Agreement) is based on AL-TARADHI that is

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(1) Other views expressed by some jurists include transactions concluded unilaterally by one party only such as gift, bequest and guarantee. Others describe it as a mere juristic act, example divorce, manumission and release of debts.

mutual consent of the contracting parties. Thus, where the contracting parties are not agreed on the terms of contract. There is clearly no binding contract between them. For instance 'A' has offered for sale his wrist watch for N500 to 'B'. 'B' has not indicated his assent to pay that price. There is no contract of sale between them as the important ingredient which ties their minds - the mutual Agreement (consensus Adidem) - is absent.

The institution of AL-TARADHI (mutual assent) agreement is eminently recognised in Islamic Law by the highest authority. The Holy Qur'an has stated:

> "O ye who believe: Squander not your wealth among yourselves in vanity, except it be a trade by mutual consent ....."(1)

The Holy Prophet is also reported to have said:

> "Verily sale transaction is based on mutual assent of the contracting parties"(2)

In Al-Dasuqi, it was further stated as follows:

"The contract of sale is constituted by all means of correspondence known to the people as expressing the mutual assent of the contracting parties. Such a Sigha is acceptable whether it is a plain literal expression or a customarily known construction amongst the people."(3)

The institution of Al-Taradhi in Islamic Law thus corresponds with the phenomenon of offer and acceptance under the English law of contract.

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(1) Holy Qur'an: IV: 29.
(2) Reported by Ibn Majah and Baihaqi from Abu Sa'id (may Allah be pleased with him).
(3) Al-Dasuqi: (n.d.) Hashiyat al-Dasuki ala Sharh Al-Kabir, Vol. III p. 3, Dar Al-Fikr, Lebanon.

OFFER AND ACCEPTANCE:

1. Offer is what is denoted in the Sharia parlance as "IJAB" whereas acceptance is denoted as "QABUL". OFFER is the declaration of the first of the two parties at the time of initiating the sale. The term 'Ijab' is given to it because it obliges the offeror or promisor and gives rise to the option of acceptance for the second contracting party that is, the offeree or the promisee. Acceptance (Qabul) on the other hand is the second declaration of the offeree or promisee at the time of initiating the sale. It is commented in the Fiqh Al-Sunnah:

> "Offer is what emanates firstly from anyone of the two parties. Acceptance is what emanates secondly, it is immaterial whether the offeror is the seller and the offeree is the buyer or vice-versa."(1)

As for instance, where A says to b, "I have sold you my wrist watch for N500". And in response, B says; "I have bought your wrist watch for N500". In this case the speech of A amounts to an offer and the speech of B amounts to an acceptance.

If on the contrary, B should first say to A "I have purchased your wrist watch for N500," and A should then say; "I have sold the same to you for the said price," the speech of B in this case is the offer whereas that of A is the acceptance. In this case then, B is the offeror and A is the offeree. Offer and acceptance in either case may be giving rise to the formation of contract of sale between the parties. A, who is the seller (AL-BA'IU) is the offeror and B who is the buyer (AL-MUSHTARI) is the offeree in this regard or as the case may be.(2)

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(1) Sabiq, S. (1977) Fiqh Al-Sunnah, Vol. III, p. 127 F/note 3; 5th. Ed. Darul Bayan, Kuwait. Further see, Arts 101 & 102 of the Mejelle ch. 1 of the Book XVI at p. 241 of Hamilton's Hedaya.

(2) Under the general Islamic Law of Contract the offeror is called MUJIB and the offeree is called QABIL.

2. Secondly, as observed above, the expression denoting an offer or acceptance has to be in the past (preterite) tense, for example, "I sold to you" or "I have sold to you" and the acceptance: "I bought from you." Ibn Rushd stated:

"A valid contract is the one which is expressed in the preterite tense"(1)

3. The expression can also be in the present tense indicative. Example: "I am buying" or "I am selling."(2)

4. The expression cannot be in the future tense, for example, if a buyer should say: "I have sold this article to you for N10" and the purchaser should reply: "I will purchase the said article for N10", the sale shall not be binding as there is no definite acceptance. The acceptance is in futurity with no definite period. Where this happens, it is only an intention to buy or sale as the case may be, not a binding agreement(3).

5. It cannot also be expressed in the imperative tense for example, "take this" or "buy this".

6. Offer and acceptance can also be indicated through an expression calculate to convey the same meaning as spoken words; for example, "I am contented with this price", or "I have given you this article for a certain price." They may be in writing; through a messenger, by custom, by gesture et cetera. These are all contained in the various forms of expressions - SIGHA.

7. Once an offer is made, acceptance can be made soon thereafter before departing the Majlis al-Aqd, that is the Meeting Place for the contract. In other words, the offeree has the option of acceptance or rejection as long as the parties

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(1) Ibn Rushd: (n.d.) Bidayat al-Mujtahid, Vol. I p. 128, Dar Al-Fikr.

(2) Sabiq. (1977) Fiqh Al-Sunnah, Vol. III, p. 128.

(3) Ibid. This also corresponds with S. 2 of the Sale of Goods Act 1893 which provides for an agreement to sell.

have not departed the meeting place. This is premised on the Hadith of the Prophet which allows for option. Ibn Umar (may Allah be pleased with him) said:

"The Prophet (PBUH) said:

> 'If two people decide to enter into a sale transaction; each one of them is entitled to an option of choice so long as they remain physically together at the meeting place or one of them may allow the other to exercise the option of choice. Where one allows the other to exercise such an option and both enter into a sale contract, the contract becomes valid and enforceable. Both Bukhari and Muslim are agreed on this Hadith'."(1)

Two issues emerge from the above tradition:-

(a) Where offer and acceptance are expressed absolutely without any stipulations in a sale contract, the sale becomes binding. None of the parties can rescind his undertaking except where there is a defect in the subject matter.

(b) Where time allowed to lapse and the acceptance has not been expressed timeously before departing the Majlis al-Aqd (Meeting Place), then the offer is rendered null and void.

3.2.1. (b) Other Forms of Making Offer and Acceptance (SIGHA):

(i) VERBAL EXPRESSION:

The commonest mode of making offer and acceptance is through verbal expression of intentions of the parties. In furtherance of this principle, the jurists are of common opinion that due to the technological advancement of the present day Muslim World and as the Sharia is dynamic and grows with time, offer and acceptance verbally made through some modern sophisticated means between people

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(1) The option is termed Option of Acceptance.

in different places such as through telephone, telegram, telex, facsimile transmission (fax), et cetera, should be deemed, for all legal purposes as if they were verbally made inter presences, except of course for the rules relating to the Majlis al-Aqd. The natural questions in these circumstances are: where is the meeting point? At what point in time can the parties be said to depart physically from the meeting point? It appears that these and other related issues are taken care of by the Majlis al-Aqd De Jure (infra). From general statements of law however, it can be gathered that while dealing with offer and acceptance via the modern means of communication: telephone, telex, radio message, wireless, fax, telegram, or any other, the Majlis al-Aqd (Meeting Place) can be the particular place where the offeree accepts the offer and it becomes operative the moment the offer gets to the offeree. As for the point in time when departure from the meeting place (Majlis Al-Aqd) can be regarded valid, it is the time immediately the offeree drops the phone or finishes that very communication of his acceptance. Thus no offer and acceptance can be deemed to be completed where there is breakage of communication between the offeror and the offeree via such system. As for instance, 'A' telephones 'B' saying that he offers to sell his wrist-watch to him at N500. But before 'B' pronounces his acceptance, 'B' dropped the telephone from his end or the telephone went dead. Certainly there is no corresponding acceptance or outright rejection of the offer, there is therefore no consensus ad idem (ittifaq) between the parties and as such no contract is formed. It is further suggested that if any of the contracting parties wants to exercise the option given him, he cannot do it later than the very time the parties were in communication viva voce via the telephone or other system akin to it. This will counter-act the effect of after thought when the contract must have been concluded and validated.

The position of the Hanafi School generally on Sigha is that it is an essential part of a contract of sale. Sigha or offer and acceptance can be expressed through speech or action(1).

The general view of the Shafi'is is that sale can only be concluded when words or anything that can stand in place of words such as writing or messenger or the known signs of a dumb person are used to express Sigha (offer and acceptance)(2).

This disposition under the Maliki Law is that sale is concluded through speech which shows agreement via the process of offer and acceptance. It is indicated in the JAWAHIR AL-IKLIL that:

> "Sale is concluded through any process that will indicate AGREEMENT even if it be through reciprocal gift(3).

In the commentary on the above text, it has been further explained that once the property in the goods has been transferred to the buyer and the price has got to the seller, sale has been concluded provided an agreement has been struck whether through speech or action emanating from one of the contracting parties to the other and even through reciprocal gifts(4).

Abdullahi bn Fodio in his book on buying and selling, stated:

"Of its (buying and selling) essentials is Sigha which is premised on agreement through speech or action which portrays agreement"(5).

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(1) Al-Jazairi: Kitab al-Figh alal Mazahib al-Arba'a, Vol. II Dar Al-Fikr, Beirut, Lebanon, p. 155.
(2) Ibid. p. 155.
(3) Khalil, (n.d.) Jawahir Al-Iklil, Vol. II, Dar Al-Fikr, Beirut, Lebanon, p. 2.
(4) Khalil: Op cit. p. 2.
(5) Ibn Fodio; (n.d.) Kifayat al-Awwami Fil Buyu'i.

Generally, almost all the Jurists consider spoken words (Qawl) as the most obvious way of manifestation assent in a contract of sale. Be that as it may, assent should not be inferred from a verbal offer and acceptance unless the words used portray a definite agreement from the contracting parties.

(ii) KNOWN SIGNS OF A DUMB PERSON

Generally, the known signs of a dumb person are legally recognised as forming valid declarations. Such known signs therefore, can validly constitute offer and acceptance in respect of a dumb person's transactions.

The Holy Qur'an accords recognition to such gestures. For instance, Allah the High says:

> "He said, 'Lord, give me a sign.' Your sign is that you shall not (be able to) speak to anyone for three days but by gestures."(1)

A sign or a gesture, connotes a motion or action intended to express an idea or feeling through movement of the body or limbs. Such a sign or gesture should be properly understood by the party to whom it is intended(2).

It is held under the Maliki School that a contract is constituted ordinarily through verbal offer and acceptance. Equally, it can be concluded through any similar forms of Sigha such as (ta'ati) and known signs which signify the mutual consent of the contracting parties.(3)

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(1) Qur'an: III: 41.

(2) For the purpose of facilitating smooth conduct of business transactions, if any of the contracting party does not understand the signs, a professional interpreter of such signs should be of immense importance.

(3) See for instance Hashiyat Al-Adawi, Vol. II p. 22; Hashiyat Al-Dasugi, Vol. III, p. 5; Mawahib Al-Jaleel, Vol. IV, p. 229.

Al-Nafarawi, while commenting in his book says:(1)

> "A contract of sale is concluded through spoken words or through non-spoken acts which indicate agreement even if by gesture from the parties or anyone of them and even where that is coupled with the ability to speak in the case of the deaf, dumb and blind whose business or nuptial transactions cannot be valid (through such a method)".

This is suggestive in the Maliki Law, that conspicuous signs whether made by a dumb person or a normal person are valid and whether such usage is occasioned by necessity or not. Al-Hattab, a famous Maliki Jurist, is of the view that the known signs of a non dumb person are legally treated as valid as those of a dumb person(2).

In the Hanafi School of thought, the views expressed are almost the same as in the Maliki School, save where transactions of non dumb person through gesture are sought to be validated. The Hanafis outrightly rejected such transactions as valid as, according to them, there is no necessity for that. Perhaps that is why it is stated in the Mejelle that an admission made by the known signs of a dumb person are held good but that of a person who can speak is not considered good(3). This rule applies to a dumb literate person.

In dealing with a dumb person the responsibility of fair deal entirely lies with the other party contracting with him such that there must be a clear understanding of the signs used by the dumb person. This may look simple but it is actually difficult as the signs or gestures may vary from one individual to another

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(1) Al-Nafarawi: (1955) Al-Fawakih Al-Dawani, Vol. II 3rd. Ed. 55 Al-Halabi Publishers, Cairo, p. 157.
(2) Al-Hattab: Mawahib Al-Jaleel.
(3) The Mejelle, Op cit.

or from one community to another. At any rate, the services of a person who knows very well the gestures/signs of a particular dumb person in such a community should be engaged in order to minimise uncertainties, mistrusts or any other obstacle that may hinder the striking of a valid contract of sale between a dumb and non dumb persons. Where a dumb person is literate, it is better to insist that the transaction be conducted in writing for the contentment of both parties.

(iii) CONDUCT (AL-TA'ATI)

It is permissible for a person to transact his sale business by means of conduct only, provided that the speech-free actions are clear enough to express the parties intention. This method of Sigha is known as AL-TA'ATI or AL-MURADHAH. It is defined as 'the silent give and take'. It further means that while a person gives the consideration, if ever, he takes the subject matter of a contract or the vice-versa, without necessarily uttering any word in connection with the deal.

To a large extent, this method is commonly resorted to by people who are accustomed to dealing with one another for sometimes and who have mutual trust, respect and confidence. Thus, in a place where 'A' usually buys his needs, he takes the required articles and pays the equivalent price which is known to him to 'B' without uttering a word. The Sigha is wholly good and the contract is valid. This kind of transaction is in other words described as MU'ATATU which has been described as a reciprocal purchase. So give and take, or take and deliver is an acceptable mode of making Sigha, because like spoken words, it expresses the will of the contracting parties. For these reasons, majority of the Jurists have validated the formation of offer and acceptance by way of AL-TA'ATI. Almost all the schools of law are

unanimous except the Shafi'i School which considers as invalid the making of offer and acceptance in that form as it does not allow, according to them, satisfactory expression of the mutual consent of the parties, as effectively does speech. It is in this connection that Imam Al-Zinjani, a Shafi'i Jurist, is recorded to have commented that as Ridha (consent) is hidden act of hearts, the objective and realistic attitude of Islamic Legislature necessitates that people should have recourse to an overall criterion which tangibly manifests Ridha, and this is no more and no less than the verbal offer and acceptance as connoting the mutual consent of the contracting parties. The Shafi'is did not therefore accord any recognition to any form of Sigha except the verbal Sigha. But reacting to this dissenting opinion, Ibn Qudamah, a prominent Hanbali Jurist sharply criticised the Shafi'i School's view on its non recognition of Ta'ati as a form of Sigha. He observed that as Allah has permitted sale without prescribing hard and fast rules as to what forms it should take, people should be allowed to have a free resort to their own practices. Al-Ta'ati in sale/purchase is similar to other criteria resorted to in other unprescribed disposition such as what constitutes delivery of the subject matter of sale and the departure from the meeting place. Secondly, sale was common and known to people even before the advent of Islam, only that the Sharia has associated some rules to govern it and beyond that limit, it remains to be formulated and perfected within that frame work, by people's practices. It is not permissible therefore for anyone to restrict or modify the known forms without any clear authority to the contrary.

Furthermore, during the Prophet's life time, he and his companions used to deal in sale and purchase without leaving behind any record that they were using the word's 'offer' and 'acceptance', let alone restricting Sigha to the verbal words. The

people that followed also used to deal by way of Ta'ati without any record which denied it. Therefore, if the aim of verbal offer and acceptance was to express and spontaneously disclose the mutual consent of the contracting parties, Al-Ta'ati should equally be valid, if that objective is achieved, when it is resorted to as a form of Sigha.

Al-Ta'ati, as conceived by this writer, is a clean procedure of making offer and acceptance giving rise to a valid sale/purchase without uttering a word by any of the parties. In the pre-Islamic period, the Arabs had two forms of conducting a sale without anyone of the parties uttering a word. These were, the Munabaza and the Mulamasa sales. Whereas the former was concluded when a seller threw the cloth (to be purchased) to the buyer, the latter was concluded when the buyer touched the cloth (to be purchased). In both, it should be observed, the buyer was never allowed to exercise the option of inspection or examination. The very act of throwing the cloth at the buyer and the very act of touching the cloth by the buyer in each case concluded the sale transaction without uttering a single word from any of the parties. The parties understood it by conduct that such an act constituted offer and acceptance and a bargain thereby struck. When Islam came, it prohibited such a custom because none of the parties was allowed any option. This, more often than not, gave rise to so many frauds putting the party at the receiving end at a disadvantage. Had there been no this sort of disadvantage to one of the parties. Islam could have recognised it as a form of making Sigha albeit by Ta'ati.

Equally, in the modern forms of business, a practice has grown up in most shopping centres where goods are sold by display of prices attached to the goods: A

prospective purchaser concludes his acceptance by paying the stated price to the cashier without necessarily uttering a word. This is a good example of sale by Ta'ati which for all purposes is held to be valid. What of course differentiates this one with the ancient form of prohibited sale by conduct as pointed out above, is the mere fact that, ample opportunity has been allowed to the buyer to inspect the goods before making his payment to the cashier. There is therefore no fraud or deceit associated with this form of sale and it is readily acceptable to the Sharia.

It is further viewed that since the object behind any expression as far as the constitution of a contract of sale is concerned is to disclose the hidden Ridha (agreement) then, whatever form of expression that clearly and reasonably brings to the fore the hidden Ridha must unreservedly be accepted, Al-Ta'ati inclusive.

(iv) SILENCE (AL-SUKUT)

It is trite under the general rules of Islamic Law that silence constitutes an agreement.

Query: does the same rule apply in contract of Sale? It appears that Islamic Law of Sale is one exception to the general rule. This is because mere silence in a contract of sale cannot be construed to establish a legal declaration. Hence, offer and acceptance as a declaration of a hidden will of the contracting parties should not be inferred as a rule, from the mere fact that a person keeps silent. There may, nevertheless, arise a situation in which it becomes absolutely necessary for a person to speak to express himself and yet he responses only in keeping quite, for example where there is a bargain on a certain article between 'A' and 'B'. 'A' prises the article at N50, 'B' insists that it has to be sold at N100, 'C', who is a friend to

'A' comes into the bargain, he urges 'B' to add something. 'B' adds N25. Now 'C' collects the sum of N75 and handed it over to 'A'. 'A', even though reluctantly, collected this sum and kept quite. The silence of 'A', even though influenced by 'C', can be interpreted to mean tacit acceptance of the price offered by 'B', again, to a person who keeps silent, no word is imputed but where there is necessity shown, silence is a declaration. In other words, it is not said of someone who keeps silent that he said such a thing. But where there is no reason why he should not speak then his keeping silent is regarded as an admission and amounts to a declaration.

(v) WRITING (AL-KITABA)

It is permissible to reduce offer and acceptance in writing so as to record and document the deal even where the parties are transacting inter presences or through a messenger. In the Mejelle, it is stated that correspondence by writing is like talking to another(1). This is the majority view of almost all the schools. The only exception is the Shafi'i School which does not recognize the validity of any contract concluded in any other form except by verbal speech.

The advantage of writing down a contract cannot be over-emphasised especially at this moment, when some people may decide to rescind verbal agreements already reached through a number of techniques and ploys. The written contract becomes necessary therefore as it lessens disputes which are likely to emerge between the contracting parties. Where eventually such disputes arise, the written contract will finally decide where the truth lies.

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(1) The Mejelle, chapter 1, S. 1, Art: 173.

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(vi) AGENT (WAKIL)

A contract of sale can be concluded through an agent. In fact, sending a messenger to convey offer or acceptance by contracting parties has been a common practice. This form of making Sigha is also unanimously agreed upon among the Jurists. Some jurists however differ as to whether an acceptance for offer communicated through a particular messenger has to be despatched through that same messenger, or another person who volunteers to convey, can validly do so? The answer may appear ambivalent. This is because if the offeror authorises a particular person to communicate his offer, his offer can be communicated by the particular person or any other person who volunteers to do so. But where he does not authorize a particular person then the effort of the volunteer is futile.

But looking at the legal rules connected with offer and acceptance, such as withdrawal of offer or acceptance; privity of contract between the parties and or agents, it will appear that the communication of an offer or acceptance by an unauthorized person (volunteer) (al-Fudhuli) may not hold good.

3.2.1. (c) OFFER DISTINGUISHED FROM INVITATION TO TREAT

The doctrine of invitation to treat is fully recognised in the general Islamic Law of Contract and sale contracts. It is known as AL-TASAWWUR. These are mere negotiations with no definite agreement to enter into legal relations between the contracting parties. They are not actual offers nor actual acceptances per se, but they lead to such actual offer and acceptance which finally bind the parties. It is akin to a MUZAYADA sale where the seller allows his goods in the hands of an agent who states its price. Anyone who comes up with the price is bound by it if the owner accepts the price. Where the owner rejects the price the sale is rendered

void.(1)

The day to day practice in most of the markets is that sellers are reluctant to state the actual (last) price of their goods. They prefer entering into such negotiations which lead the contracting parties to the price of the goods. Once the price is agreed on, then there is Ittifaq or Khulta (consensus) ad idem and the sale assumes legal status thereby becoming enforceable.

3.2.1. (d) INTENTION TO CREATE LEGAL RELATION IN THE SALE CONTRACT

It has been seen supra that offer (Ijab) is so called because it obliges the offeror and gives rise to an option of acceptance from the offeree. Thus offer is the declaration of the first of the two contracting parties whereas acceptance is the second declaration of the other contracting party (the offeree). This forms the very basis of any contract of sale.

It must at any rate, be borne in mind that where the intention to create legal relation is lacking, there is basically no contract, and the mutual declaration should either be interpreted to mean a mere invitation to treat or mere social courtesy. Each of the two alternatives may be morally binding but is not enforceable legally.

In their attempt to formulate a clear cut distinction between intention to create legal relation and an invitation to treat, the jurists have diagnosed the Arabic Language and brought out some general principles in that regard:

(i) That if a past tense is used to convey offer/acceptance, it is clear indication that the parties intend to be bound legally.

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(1) Al-Nafarawi (1955) Al-Fawakihu Al-Dawani, Vol. II, p. 109, Muzayada sale should be distinguished from AUCTION SALE where the goods goes to the highest bidder.

It is decisive and excludes any signs of future promises. So any claim that a contracting party did not intend to create legal relation after using the past tense should be unheeded.

(ii) Where the present tense is used, if there is no indication of future promise, then the offer and acceptance are conclusive in indicating the intention to create legal relations. If a person contends, however, that though he used the present tense, he did not intend to bind himself by making a final offer or acceptance. In this case, his claim is only acceptable if he takes an oath of rebuttal to that effect otherwise he is held bound by his declaration.

(iii) Jurists differed over the connotation of an imperative tense. Some regarded it as decisive as the past tense whereas others regarded it as present tense.

(iv) Future tense does not indicate a firm intention to be bound by the declarations, hence a legally binding contract cannot be spelt out of it.

The efforts of such jurists who worked out these rules is highly commendable as they proffered solutions to numerous disputes arising from the use of the tense. It is certain however, that as of today, such techniques could not be applicable as the prevailing socio-economic atmosphere differs from that of their time. It is a fact that the Muslim communities today have undergone radical changes which have a lot of bearings on the Muslims. Again looking at the tense formula of the then classical Arabic Language from the point of view of diversity of languages

and dialects, it will appear impracticable as the tenses are not standardised form for all languages and dialects spoken and written all over the world and through which innumerable contracts are made every day. After all, language as a living art has to undergo the same change which is experienced by the people who speak it and hence, the customary practices of yester years might cease to be prevalent in the modern times allowing modern expressions which can connote agreement between the contracting parties.

3.2.1. (e) THE DOCTRINE OF MAJLIS AL-AQD IN THE SALE CONTRACT

The doctrine of Majlis Al-Aqd or meeting place in the general law of contract is an important phenomenon that cannot be under-estimated. This is for the simple reason that offer and acceptance which are legally engineered to express the free will of the contracting parties to create a binding agreement,ought to take place and hence coincide with each other in one and the same place for the purposes of constituting a contract. The meeting place for effecting the contract is known as MAJLIS AL-AQD. It is refereed to in other words as the time and place factors within which offer legally operates and finally culminates into a contract,if accepted in due course; or destroyed or rejected or withdrawn. It commences by the very time the offeror communicates his offer and continues to give the offeree the chance to access the merits and demerits of the terms stipulated in the offer(1). The chance or option continues until the offeree accepts or rejects the offer provided that nothing vitiates the existence of the Majlis al-Aqd(2). In the main therefore, the theme of

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(1) The chance or option is termed as option of acceptance.

(2) Factors affecting the continuance of the Majlis Al-Aqd are discussed infra.

Majlis Al-Aqd should be visualised in a practical perspective, that is giving rise to the option of acceptance in order that the offeree may have ample time to look into the whole deal and subsequently judge freely and wilfully whether to accept or reject the offer. It also permits the offeror the option of withdrawal so as to review his offer before it is finally accepted. Such options, it is said, should be made use of within a reasonable time so as not to vitiate the will and consent of the offeree by making it too short nor keep the offeror in suspense by making it unreasonably long.

It is to be noted that all that has been stated above is the MAJLIS AL-AQD HAQIQI (Meeting Place in Fact). In other words, it is the factual or actual Meeting Place proper where all the contracting parties are physically transacting the business in real face to face deal. The related Majlis to it is the MAJLIS AL-AQD HUKMI that is, the Meeting Place in Law. This is the notional Meeting Place. It takes place between people who are transacting business through correspondence. It id termed HUKMI - notional or de jure because it notionally combines offer and acceptance which emanate from contracting parties who are poles apart in different places. It comes into being immediately the factors briefly considered below are satisfied:-

(i) Khiyar al-Qabul (option of Acceptance): The main purpose of a Majlis al-Aqd is to enable the offeree (Qabil) to examine and hence judge within a reasonable time the advantages and disadvantages of the offer made to him so as to come out with mature, concrete decision on the offer. The period allowed him to inspect the goods to be purchased should be properly utilised as an option of inspection (Khiyar al- Ru'yah) so that he can detect any visible fault in the offered

goods. If this goods satisfies his desire, then he is free to exercise his option of acceptance to communicate his acceptance. Where this option is not allowed, consent of the offeree may be vitiated as he is not afforded an opportunity to inspect and decide as he may likely, under the influence of needs, be forced to accept the offer in such a haste what may later appear to be his own detriment. Where all has been examined and accepted, now a legally binding contract of sale has been formed between the parties and the Majlis al-Aqd has come to an end. Equally, where he rejected the offer, that is the end of the Majlis al-Aqd.

The importance of exercising this option of acceptance cannot be overemphasised. However, rarely to contracting parties avail themselves to it. Sale transactions are more often than not concluded in a haste whereas sale is a process which requires close examination of the subject matter for self contentment as to its legality, freedom from defects and fitness as to particular purpose of purchase. Either of the contracting parties can drive benefits if this option is allowed. The offeror has the option to withdraw his offer before the acceptance by the offeree. The offeree has the option to reject the offer out-rightly or make a counter offer. But where the transaction is rushed to conclusion, there may be some hidden motives behind the party's rush-action and may be on the side of the offeree or from both sides. Where the offeror is in dire need to sell his property, delay may seem to be detrimental to him, he may say, or where he intentionally wants to take advantage to make some material concealment of some defect in such that the buyer or his accredited agent who may not immediately reveal the concealed defect attached to the property. And if the sale is concluded in that respect without making further options that in the event of revealing a concealed defect (Khiyar al 'Aib), then the purchaser should resort to another option of return Khiyar al Ruju' of the defective goods, the

sale is held to be good. This occurs on daily basis in the present market arenas. The purchaser (offeree) should therefore feel free to insist on his rights to exercise his options of inspection and acceptance. Where that is not allowed, the sale should be avoided as it does not allow for free consent.

(i) Khiyar al Ruju' (Option of Withdrawal): The offeror, according to the Hanafi School, has the right to withdraw his offer even after communicating with the offeree provided the latter has not accepted the offer. This is Khiyar al Ruju'(1). Thus where 'A' has offered to sell his car to 'B' but withdrew before 'B' signalled his acceptance, that withdrawal is effective, as no injury has yet been caused to 'B' as no meeting of the two minds has been struck. This option allows the offeror time perhaps to review his premature offer as well as take into account new occurancies which were not taken into consideration before. While the withdrawal meets all these circumstances, it does not, as pointed out above, infringe any considerable and established legal right of the offeree as acceptance has not yet been made. Where withdrawal of the offer takes place, the Majlis al-Aqd is terminated.

(iii) Implied Termination of Majlis Al-Aqd: Majlis al-Aqd can come to an end through implicit withdrawal, acceptance or rejection of the offer. The meeting place is primarily to enable the contracting parties to assess and weigh their various interests, if, instead, the contracting parties or anyone of them occupies himself with anything other than the appraisal of the transaction in question, his action can be deemed as an implied rejection and as such it amounts to termination of

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(1) This Khiyar al Ruju' should be differentiated from Khiyar al Ruju' of the option of Return of a defective goods.

the Majlis al-Aqd. Whether a specific disposition constitutes a divergence or deviation from the objective of the Majlis al-Aqd, must reasonably and objectively be assessed in the contract of the commercial conventions prevailing within the environment of the contracting parties.

In the Majma'a al-Anhur, the author mentioned some examples of what can constitute deviation from the object of the Majlis al-Aqd such as:

(i) If one of the contracting parties speaks to a third person while considering the formation of the contract, or answers a question of third party or a telephone call, whereas it is not part of the deal, such an act constitutes a deviation from the purpose of the Majlis al-Aqd and terminates the Majlis al-Aqd.

(ii) If the Majlis al-Aqd comes into operation while the contracting parties are sitting down then if both or one of them stands up, that will vitiate and terminate the Majlis al-Aqd irrespective of whether they still discuss some aspects of the sale contract before them.

(iii) If both or any of the contracting parties eat(s), drink(s) or even says his prayer, that act is capable of terminating the Majlis al-Aqd.

(iv) If the Majlis al-Aqd comes into operation while the contracting parties are standing or walking, then if they start walking or continue walking, this act too is capable to terminate the Majlis al-Aqd(1).

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(1) Majma'a al-Anhur Vol. II, pages 460 & 461.

Such formal and of course unreasonable examples, which may appear impracticable go to show the myopic conceptualisation of the existence and essence of the Majlis al-Aqd. The Majlis al-Aqd to their view, is only created and restricted to a place or rather the situation in which the contracting parties find themselves when the contract starts to operate, that is why they viewed any movement from the Majlis or any change in that situation amounting to termination of the Majlis al-Aqd. That may not totally be the correct position. The significance of the Majlis should be viewed from the circumspection of the goods and benefits it sets to achieve.

In his book, Al-Mughni, Ibn Qudamah says:(1)

> "The termination of Majlis al-Aqd by the separation of the contracting parties is governed by the customs and conventions of the people. Hence, what is conventionally known among them as a separation, amounts to termination of Majlis al-Aqd. Because the legislature has based a legal rule on the separation without laying hard and fast rules as to how it should be. This is therefore an implication that the legislature is delegating this to be judged according to the customary practices of the people".

Thus the basic rule to be applied is the assessment of the particular transaction which arises within the continuance of the Majlis al-Aqd. Does it make the parties or any of the parties indifferent or disinterested in the subject matter of the contract now at the particular Majlis al-Aqd? If it does, then customarily, it ought to bring the Majlis al-Aqd to finality. If it does not, the Majlis al-Aqd should be deemed to be in continuance uninterrupted.

3.3.0. Elements Vitiating Legal Capacity:

In a normal situation, every person is free to enter into any form of

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(1) Ibn Qudamah: (n.d.) Al-Mughni, Vol. II, page 565.

permissible contracts with another person. This is the general rule. There are exceptions however to the general rule. Some persons are precluded or restricted to enter into contracts with others because of the special circumstances they find themselves in. Such special circumstances are (a) Sibah (minority), (b) Junun (mental retardation/disorder) (c) Ut'hu (imbecility/idiocy); (d) Taflis (bankruptcy); (e) Ikrah (duress); Kufur (belief in other religion than Islam).

Minority has already been seen above. The remaining circumstances (b) - (e) are the ones considered below:

3.3.1. (b) JUNUN: (Lunacy)

Lunacy; insanity; unsoundness of mind; madness; MANIA or DEMENTIA, are all terms in reference to JUNUN. A lunatic or an insane person is the one referred to as MAJNUN that is, a madman. And a madman is that person, in ordinary terms, who is mentally deranged, foolish or imprudent affected with or characterised by wild excitement; a wild guy always furious in violence. In legal parlance however, he is the one who suffers from mental illness, attested of incompetent development of mind, psychopantic disorder and any other disorder or disability of the mind.(1)

The Malikis categorise lunatic into three:

(i) Chronic madman

(ii) Intermittent madman

(iii) Epileptic madman

A chronic madman is a person who is perpetually in the state of madness. He hardly regains his mental order. An intermittent madman is a person who is not continually mad and enters into state of convalescence at times. An epileptic madman

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(1) Op.cit.

is the person who suffers from epilepsy.

The legal position of anyone of the classes of madmen above, is held to be the same by the Maliki, that is they are treated like an infant. They have no power to enter into any form of contract of sale and purchase. Restriction continues on each one of them from the time he is affected to such a time when he regains his senses.

Where the lunacy affects a minor before attaining maturity, the responsibility of restricting him is on his father or father's executor. Where it befalls him after the attainment of maturity then the duty of restricting him falls squarely on the ruler(1).

But as for the intermittent madman, if he enters into contract of sale and purchase in his period of convalescence, such dispositions are held valid under the Hanafi law. He is in this situation treated like a major(2).

As for the epileptic madman the same rules as are applicable to an intermittent madman, apply to him. Only that the Maliki view is that there should be no restriction on him because of the nature of how often he regains his senses(3).

3.3.1. (c) UT'HU - (Idiocy/Imbecility):

The Mejelle has given the definition of a Ma'tuh as,

> "The person being so deranged in mind that his understanding is small, his speech confused, and his plan of action bad"(4)

Such a person is in ordinary usage referred to as an imbecile or an idiot. The definitions of an imbecile and an idiot seem to have agreed and culminated into one

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(1) Al-Jazairi: (n.d.) Al-Fiqh ala Mazahibil Arba'a, Vol. II p.366. Almost all the schools are in agreement to this view.

(2) Ibid.

(3) Khalil: (n.d.) Jawahir Al-Iklil, Vol. II, p. 97.

(4) The Mejelle; Book IX, Art. 945.

and the same thing that is, one who is mentally deficient(1). The definition goes further to describe him as a person whose intelligent quotient (I.Q.) is between 25 and 50. His mental age resembles that of a child of between 3-7 years. In business transactions all those persons who come to be deceived, in not knowing the ways of work and profit by reason of their being very stupid and simple, are also regarded as Sufaha'u(2). All such persons are legally, of themselves prohibited from dealing with their property as they are equated to infants in relation to transacting business.

The Maliki School defines idiocy in the following words:

"Idiocy is the squandering of wealth lavishly. Any person whether male or female associated with that trait qualifies to be put to restrictions."(3)

The general rule here is that where the idiocy befalls the person immediately after attaining puberty, for instance within a period of one year after puberty, then the right of restriction is within the powers of his father, as he can still be regarded to be a minor. But where it befalls him in a period longer than one year after attainment of puberty, then it is only the judge who is empowered to put him under restriction.(4)

Where such a person made transactions before idiocy befalls him, two main rules govern the transactions:

(a) Where the idiocy befalls him before puberty and continues after the attainment of puberty and his father is

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(1) The Lexicon Webster Dictionary.
(2) The Mejelle: Art. 946. Sufaha'u is the plural of Safih.
(3) Al-Jazairi: (n.d.) Al-Fiqh ala Mazahibil Arba'a Vol. III, p. 369.
(4) Ibid.

alive or has an executor (Wasi) the restriction continues and the father or the executor is the one having right in determining such transactions;

(b) Where it befalls him while a minor and attains majority still in idiocy and has neither a father nor an Executor and the judge did not appoint a guardian for him then; all his dispositions conducted after attaining majority but before restriction is placed on him can be executed according to the majority view. The minority view annuls such dispositions.(1)

The Hanafi School puts the responsibility of restricting the Safih solely on the Judge. If the Safih made transactions before placing the restriction, his transactions are executed and are valid. The rule relating to a Safih who is restricted in matters of sale and purchase is the same as the rule applicable to a Mumayyiz(2).

Views of the Shafi'i and Hanbali Schools are not much different from the above views.(3)

3.3.1. (d) TAFLIS (BANKRUPTCY):

A person is regarded as insolvent if he possesses no money or estate sufficient to pay all his debts. In other words, he is a person with debts he cannot pay. When a debtor is insolvent, that is when his debts are equal to or greater to his

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(1) Ibid: As for a female of that status, the Jurists add further qualification of marriage and consummation of that marriage.

(2) Ibid. p. 368.

(3) Ibid.

property, if his creditors are afraid of there being waste of his property, or of his smuggling away of his property, or of his passing it to the benefit of another, they can make an application to the Judge demanding that he be prohibited (restraining) from making any disposition of the property. he is then declared as a bankrupt (MUFLIS). it is the duty of the Judge then to sell the MUFLIS property in order to satisfy the creditors(1).

Thus in a Taflis situation three things must be kept in mind:

(i) the Muflis must be declared so by a competent court,

(ii) there must be a demand from the creditors for the prohibition of the MUFLIS from disposing of his property,

(iii) it is the responsibility of the court to sell the MUFLIS property and distribute the proceeds to the creditors.

Thus where a person found himself in a state of insolvency and becomes ultimately bankrupt, any further transaction with his property including sales and purchases should be interdicted, thereby loosing the capacity to deal freely with his property.

3.3.1. (e) DURESS (Ikrah):

Ikrah, in Islamic Law generally has the same meaning with coercion or compulsion. It is the act of taking or making somebody to submit to a certain course

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(1) See the Mejelle: Section IV Arts. 998-1002; Bidayat Al-Mujtahid, Vol. II pp. 2113-2201, Muhammadan Jurisprudence, p. 246; Al-Figh ala Mazahibil Arba'a Vol. III pp. 372-376; Al-Bahja Fi Sharh al-Tuhfa, Vol. II, pp. 293-310.

of action against his will. It is an act that involves the negation of choice or consent. Thus, all acts of the nature of utterance which require consent for their validity such as sale, are regarded invalid generally. They can however become valid if ratified later. As to the degree of apprehension, it is stated in the Mejelle that it is a condition that the Mukrih (compelled) should be afraid of the taking place of the thing which causes his fear. In other words, he should form a preponderant opinion that the compeller would translate to reality his threats if the compelled act is not done. If that coerces the compelled to do the compelled act then coercion, compulsion or duress has taken place. But if otherwise, no compulsion is regarded.

A sale which is conducted under coercion is bad ab initio. Al-Nafarawi observes(1).

> "The sale of a minor, an imbecile and coerced or compelled (where the coercion is unjustified) is valid and not binding."

But where compulsion was necessitated by circumstances, if a sale is conducted in that respect, it is held to be good. In the commentary of Jawahir al-Iklil, it is stated:

> "A sale or purchase is not binding where it was conducted through an unjustified process. But where coercion was considered justified like compelling a debtor to sell his property with a view to satisfying; sale of land in order to expand a mosque, path or graveyard that is valid and binding. Equally sale of food to the needy, where compelled, is held valid and binding."(2)

3.3.1. (f) KUFUR:

Sales and purchases between Muslims and Kuffar (non-muslims) are lawful. However, a non-muslim is restricted or rather prohibited from purchasing the

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(1) Al-Nafarawi; (1955) Al-Fawakih al-Dawani, Vol. II, Al-Halabi Publishing Corporation, p. 110.
(2) Abu Al-Azhari. S. (n.d.) Jawahir al Iklil, Vol. II, p. 3.

Holy Qur'an.

Sheikh Abdullahi Ibn Fodio, in his Kifayat al-Awwam, stated:

> "Sale and purchase with non-muslims is lawful as (stated) in Bukhari. But sale of the Holy Qur'an to them and the minor is from the prohibited form of sale."(1)

Such prohibition shall continue as long as the person remains a non-muslim. In other words, he loses his capacity to contract a sale or purchase of the Holy Qur'an so long as he remains a non-muslim. There is a restriction therefore on him and on the other contracting party not to sell or buy the Holy Qur'an to or from him as the case may be.

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(1) Ibn Fodio: (n.d.) Kifayat al-Awwami Fi Al-Buyu'i.

4.0. OPTIONAL CONDITIONS AND PROHIBITED FORMS OF SALES:

1. The finality of a contract of sale may not rest entirely on the above essential requirements which validate the formation of the contract. In other words and in the opinion of the Shafi'i and Hanbali, even though a contract of sale is formed through the congruence of offer and acceptance, yet it does not become final by mere Constitution. It is still open to some options, particularly the option of Majlis Al-Aqd. It is true that options or optional conditions in a contract of sale have become inevitable as more often than not some binding agreements are entered into in a hasty manner without exercising the due care of inspection, delivery and other considerations. This, lands the aggrieved party into a state of regret and frustration pushing him sometime to resorting to some taking unnecessary and fruitless legal steps in order to get a redress or redresses which are never forthcoming. It is in order to cater for such human frailties and omissions, that the Sharia legal system developed the doctrine of options in which each of the contracting parties is allowed ample opportunity to make observations, inspections, considerations and arrive at decisive, final and irrevocable commitment in respect of the subject matter of the contract. Options provide easy solutions without necessarily resorting to legal steps for redress. They serve as arbiters or reconciliators in an agreement which embedded them. Options or Optional Conditions are many and varied but the significant ones are those considered in this chapter.

The second leg of this chapter deals with those types of transactions or sales practised in the Muslim Society but are declared void by the Sharia. If one examines each one of them, one will find that it is because of the uncertainty, deceit and

cheating contained therein that is why the Sharia declares it illegal and prohibited. The options are treated firstly and the prohibited forms of transactions, secondly.

4.1.0. OPTIONS (AL-KHIYAR):

Al-Khiyar, literally connotes the power of choice or preference. But as a legal terminology in business transactions it connotes the exercise of right to determine the best of a contract by either implementing it or annulling it(1).

There are generally about seventeen options. The following are considered more important:

1. Khiyar Al-Majlis - Option of the Meeting Place
2. Khiyar Al-Ru'yah - Option of Inspection
3. Khiyar Al-Shart - Option of Stipulation
4. Khiyar Al-Aib - Option of Defect
5. Khiyar Al-Tadlis - Option of Deceit
6. Khiyar Al-Thaman - Option of non-Payment of Price
7. Khiyar Al-Ta'yin - Option of Choice

4.1.1. KHIYAR AL-MAJLIS: (Option of the Meeting Place)

It had been seen in the previous Chapter that Majlis al-Aqd is the Meeting point where the offer and acceptance culminate into an agreement with intention to create a legal relation between the transacting parties. This is the preponderant view of the Hanafi and Maliki Schools. Other Schools such as the Shafi'i and Hanbali

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(1) Saudi Arabian Government Press: Mugarrar Al-Fiqh lil-Saf al-Mutawassit, Second ed. 1976. See also: Al-Zuhayly: Al-Fiqh Al-Islami Wa Adillatuhu, Vol. IV p. 250.

are of the view that in spite of the concurrence of offer and acceptance, yet the contract does not become final by mere constitution per se. The contract is still open for the option of the Majlis Al-Aqd. What then is this option of the meeting place?

Option of Meeting Place (Khiyar al-Majlis Al-Aqd) connotes that the contracting parties, so long as they are still staying in the meeting place, are legally endowed with the option to rescind the constituted contract or confirm it before the termination of the meeting(1). If however, the Majlis is terminated before taking any positive action, the contract will be deemed as having been confirmed. The option of Majlis Al-Aqd commences with the formation of a contract. So Majlis Al-Aqd expires by Constitution of Contract according to the Hanafi and Maliki Schools. According to the two Schools, the doctrine of option of Majlis is unnecessary because of the following reasons:

(i) God has decreed that Covenants should be fulfilled (Holy Qur'an III:1). Option of Majlis becomes a bar to such fulfilment whereas Covenants are arrived at by way of mutual assent through the normal offer and acceptance. This does not therefore require parties to wait to the end of the Meeting Place.(2)

(ii) Narrated traditions which comment on Khiyar Al-Majlis Al-Aqd were regarded by the Schools as in conflict with the above Qur'anic Verse.(3)

It is quite settled in jurisprudence that no Hadith is in conflict with any verse of the Qur'an. Rather, Hadith elucidates Qur'anic verses.

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(1) Al-Zuhayly: (1989) Al-Fiqh Al-Islami Wa Adillatuhu, Vol. IV p. 250.
(2) Ibid.
(3) Ibid.

The Shafi'i and Hanbali Schools are regarded to be the exponents of Khiyar Al-Majlis. the are of the view that where a contract is formed through the process of offer and acceptance, the contract remains valid but not binding so long as the contracting parties remain physically present at the Majlis Al-Aqd, as each of them reserves the right of confirmation or rescission of the contract, even if they keep on standing, for instance, for a year. They relied on the Hadith reported by Bukhari and Muslim (The Hadith quoted immediately below (as reported by Ibn Umar)). Thus, according to the Shafi'i and Hanbali Schools, Khiyar al-Majlis al-Aqd survives the Constitution of the contract. Particularly emphatic is the Shafi'i School which does not practically recognize the concept of Majlis Al-Aqd except after the formation of a contract.

LEGALITY OF THE OPTION OF MAJLIS AL-AQD

The Option of Majlis Al-Aqd derives its legality from the following authorities:-

(a) "Reported from Ibn Umar (May Allah be pleased with him) who said: the Prophet (PBUH) said: 'When two persons concluded a sale transaction, each of them has the right to annul it so long as they are not separated and are together (at the place of sale), or if one of them gives the other the right (to annul the sale). But if one gives the other the option, the transaction is made on this condition, it becomes binding. If they are separated after they have made the contract and none of them annulled it, the transaction is binding.'"(1)

(b) Hakim bn Hizam reported that the Prophet (PBUH) said: "The buyer and the seller have the option of cancelling or confirming the deal unless they separated"(2)

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(1) Sahih Bukhari, Vol. III, p. 184; Sahih Muslim, Vol. III, p. 804. Both Bukhari and Muslim are agreed on this.

(2) Sahih Bukhari; Ibid.

(c) Ibn Umar reported the Messenger of Allah (PBUH) as saying:

"When two persons concluded a contract, each one of them has the right to annul it so long as they are not separated, or their transaction gives one another (as a condition) the right to annul. If the transaction has the right to annul then the transaction becomes binding. Ibn Abi Umar made the condition that whenever he (Ibn Umar) entered into transaction with a person with the intention to confirm it, he would walk some distance and return to them."(1)

(d) Ibn Umar, again reported from the Prophet (PBUH) that:
"No deal is settled and finalised unless the buyer and the seller separate except where the deal is made optional."(2)

In addition to the above traditions there are so many traditions of this nature dealing with the subject matter of the option of the Meeting Place. The import of these authorities, if put in a summary, will appear to mean that:

(1) If a contract of sale is constituted, but the parties are still actually or legally presumed to be in the same Majlis Al-Aqd, then each of them is legally endowed with the option to confirm or rescind the deal;

(2) Where the parties separate in the sense that the Majlis Al-Aqd is terminated, then they would no longer enjoy the option of Meeting Place.

(3) But where they are still together in the same Majlis Al-Aqd and one of them devolves unto the other the option of Majlis Al-Aqd, and the devolvee confirms the agreement, the contract is deemed binding notwithstanding their further staying together in the

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(1) Sahih Muslim, Vol. III, p. 804; Sahih al-Bukhari, Vol. III, p. 181.
(2) Bukhari; Sahih al-Bukhari, Vol. III, p. 184.

same meeting place afterwards;

(4) If the contracting parties agree on having the option of stipulation for one or both of them, the contract thereof is not deemed final even if the Majlis Al-Aqd is terminated, except after the expiry of the option of stipulation.

(5) Finally, sale may be in two forms:

(a) One in which an option is stipulated (khiyar Al-Majlis) and

(b) One which no option is stipulated which is termed as 'SAFAQATUN'

This is related to the Hadith reported by Umar (may Allah be pleased with him) saying that ("Al-Baiu Safaqatan aw Khiyarun") that is either 'Safaqatun' (free without conditions) or it is with conditions.

As it might be observed, the four Sunni Schools of law are not unanimous on the concept and legality of the Khiyar al-Majlis al-Aqd. The Hanafi and Maliki Schools on one hand do not see any reason why there should be the option of the Meeting Place. This is in view of the fact that the offer and acceptance phenomenon has already been translated at the same Majlis al-Aqd into a firm and irrevocable agreement, giving rise to a binding contract, henceforth, between the parties. But the Shafi'i and Hanbali Schools are unanimous in validating the concept and existence of the Majlis Al-Aqd even after the congruence of the offer and acceptance.

It must be noted that such difference of opinion amongst human beings is inevitable and it is allowed. the only situation where one does not find such difference is where the Divine doctrine of Covering the fields has already dealt with the subject matter in question in which case it is only the interpretation and

unalloyed application that remains to be carried out(1). The Prophet is reported to have said that "difference of opinion among my people is a blessing". This is therefore to finally settle all unnecessary wranglings and differences that may crop-up between people and a particular subject matter. Sharia is essentially a religious law. Religion eases things for its followers.(2) By this, the Sharia allows its followers to adopt any view which is legally sanctioned or recognized by it in arriving at a solution.(3) If any school should at all be given prominence, it should be the school of the Prophet and Messenger of Allah (Prophet Muhammad PBUH) on whom the law was revealed and who, under the Divine guidance interpreted and applied the law. His School, undoubtedly is the whole Religion of Islam. Once an opinion however remote, can properly be linked to the Prophet (PBUH), it should be allowed as a source of law to solve human problems.(4) Difference should be seen as mere replica of the broad spectrum of Islamic Law where they do not result in deviating from the spirit of the Law. Where they do, the one that is traced to be weaker, through the process of screening should be jettisoned in preference of the more authoritative.

4.1.2. KHIYAR AL-RU'YAH (Option of Inspection)

Where a buyer purchases a subject matter not physically existent at the Majlis Al-Aqd for inspection, the sale is held to be good and valid. it is however a

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(1) Divine sources of the Sharia, treated supra in chapter one Al-Bukhari, Vol. II, p. 59.

(2) The Holy Qur'an: II: 185.

(3) The process of TALFIQ (engrafting) of a rule is also permitted in arriving at a solution.

(4) Imam Malik is reported to have commented:
"Compare my report with the Qur'an, if it opposes the Qur'an throw it away."

SAHIH MAUQUF, that is Voidable Sale. It is voidable because the buyer has the option after inspecting the subject matter to confirm his purchase or annul it(1).

Inspection is that act of having a critical examination or careful viewing of the subject matter with a view to discovering errors or defects which will render the subject matter unfit for the purpose for which it is purchased. It is stated in a book called the Mejelle for instance that if someone purchases a property without seeing it, he has an option until he has seen it. When he has seen it, if he wishes, he annuls the purchase, if he wishes, he confirms it. This is called option of inspection(2).

MALIKI SCHOOL

The Maliki School views the Khiyar al-Ru'yah (Option of Inspection) as follows:

If the purchaser buys some goods that he has not seen, he has two options and the relied on this Hadith(3).

"He who buys a thing he has not inspected has his option after inspecting it".

The first option is that if the goods are physically available at the Majlis al-Aqd but not inspected by the buyer because they are concealed such as wheat in sacks, sugar in cartons. In this situation, the sale is invalid except where the goods are opened for inspection, if opening the sack or carton does not occasion any damage (to the goods). The second situation is where the goods are not physically available at the Majlis al-Aqd, irrespective of whether the goods are within the town or outside the town (of transaction) and irrespective of whether making it available at the

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(1) Al-Zuhayly (1989) Al-Figh Al-Islami Wa Adillatuhu, Vol. IV, p. 267.
(2) The Mejelle - Section V Article 320.
(3) Reported from Abu Huraira. See Zuhayly op cit.. Vol. IV, p. 269.

Majlis al-Aqd causes problem or not. Sale in this condition is valid. Before validating such a sale however, two conditions are present:

(i) The goods must be described with such exactitude as relating to their nature and type;

(ii) the option of inspection should be stipulated.

Where Mithli goods (similar goods) are the subject matter of sale, inspecting some sample of it suffices the remaining. For instance, if it is Kayli/Mikyal (measurable by kayl) like wheat; Wazni (measurable by weight) like cotton; or Adadi (articles subjected to counting or numbering) like eggs. But where the goods are Qimi (Dissimilar goods), inspection does not arise because the goods are ab initio not the same.(1) This is also the case where the description comes in a form of written brochure.

Where the goods are sheathed in protective layer (cover) such as pomegranate, coconut, almonds, eggs et cetera. Inspecting some of it suffices the remaining quantity, without necessarily breaking open to see the inner part of it. If the buyer collects the remaining and notes a slight difference, that should not disturb the sale. But where the difference is great, he has the option of confirming the sale or returning the goods. Also, where there is defect with sample of the goods already inspected by him but he has decided to waive it, he will not be heard to complain even if the bulk of the goods appears to be like that as he has consented to such sale or returning the goods. Also, where there is defect with sample of the goods already inspected by him but he has decided to waive it , he will not be heard to complain even if the bulk of the goods appears to be like that as he has consented to

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(1) Al-Jazairi; (n.d.) Kitab al-Fiqh ala Mazahib al-Arba'a, Vol. II, p. 220.

such sale. But where he thought that what he saw for instance the top of a sack is soaked and presumes that this does not go down to affect the remaining part, but found that even the remaining has been badly affected as such, then he has an option of retaining it or returning it.

Where the buyer saw the goods long before the initiation of the contract of sale and the goods are not susceptible to change (by passage of time), the purchaser of such goods unconditionally is held to be good. but where goods are susceptible to change (through passage of time) then the sale is not valid.

Now supposing there arises a dispute between the parties to such a sale where the buyer claims that the nature of the goods at the time of inspection and time of purchase has changed and the seller claims that there is no change in the nature of the goods as at the time of inspection and purchase or thereafter. This is purely a procedural matter. Experts on dealing with such goods should be asked to assess whether customarily, the period between inspection before purchase and inspection after purchase is material enough to cause a change in the goods or not. If it is proved that such a period between inspection before purchase and after purchase can cause the change, then the purchaser will be given judgment. If it is the reverse, then judgment goes to the seller. Oath is unnecessary here on anyone of them. But had the expert thought either the period will cause a change or not, then in which ever case his thought appears weightier, the purchaser will have to swear to an oath to compliment the evidence of the expert. If he expresses doubts and has nothing more to over-weight whether the period can cause a change or not then the seller shall subscribe to an oath of rebuttal and the sale confirmed in his favour.

In the case of sale through written brochure, if the buyer claims that he got the goods contrary to the description given in the brochure and the seller asserts

that the goods corresponds with the description in the brochure and the buyer came along without the goods purchased, judgment shall be entered in favour of the seller if he takes an oath that the goods sold corresponds with the description given in the brochure. If he refuses to swear, then the buyer swears and judgment shall be entered in his favour and the goods shall be returned to the seller.

HANAFI SCHOOL

The official view of this School pertaining to option of inspection is that sale of goods not readily available at the Meeting Place or where the goods are available at the Majlis al-Aqd but not inspected by the buyer, is void. Such a sale will only become valid if two conditions are fulfilled:

(1) Where the goods belongs to the seller;

(2) Where there is adequate explanation on the goods by the seller that removes any uncertainty.

Where the goods are available at the Majlis al-Aqd but veiled from inspection, then it is the obligation of the seller to describe it by gesture such as: "I have sold to you what is in this box or carton." Where the goods is not made available at the Majlis Al-Aqd, it is the obligation of the seller to explain the place where the goods is kept or he should describe the goods and its quantity. As for instance, the seller should say: "I have sold to you the animal in Mr. 'X'; house." It is valid provided the house is known to the purchaser and that the animal is the only one in the house. Another example is: where he alleges ownership of the property to be sold, such as where he says: "I have sold to you my car." This is also on the proviso that the seller does not have any other car, then only the sale shall become valid.

However, as comprehensive as the provision of the law is, taking into consideration and safeguarding the interests of both the seller and the buyer, it will appear to be that there is a corresponding duty on the buyer to insist to verify the particular property he is about to purchase. This has become very necessary especially nowadays when people invent all sorts of tricks with a view to defrauding others.(1) In other words, this is rather sounding a warning to prospective purchasers to be aware of the transaction where goods are not made available for proper inspection.

The Hanafi went further to categorise the circumstances under which the option of inspection can arise. They listed them as follows:-

(1) Obligatory Debts: that is in circumstances where the transaction does not become an obligatory debt, for instance where the purchaser bought some quantity of wheat which he has not physically inspected but that it will be delivered to him at a later date. But where he purchased the wheat from the seller, albeit not inspected, but with the understanding that payment made to the seller serves as debt on the seller then here, there shall be no option as it becomes a Salam Sale. And there is no option in a Salam Sale.

(2) Al-Ijara - Hire - that is where a piece of land is hired but which he has not inspected, he has an option of return on inspection.

(3) Partition: If he is a co-owner of a property and the other co-owner divided it without the former inspecting his portion, he has an option of return on inspection. Option however, does not arise in cases

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(1) The notorious modern method to defraud nowadays is christened "419" which operates in large scale in this country.

of similar goods such as MIKYAL or MAUZUNI such as wheat.

(4) Reconciliatory Claim: That is, where a person claims that he has his property with another and he reconciled with that person that he will give him another property not inspected by the claimant, the claimant has an option of return on inspection.

WHEN DOES OPTION OF INSPECTION COMMENCE:

Option of inspection for the purchase starts to operate on seeing the subject matter of the contract and not prior to that period. Even where the contract was validated before inspection, it would not bind the parties. The option of inspection cannot be lost in this circumstance. The party entitled to it has the option to return the subject matter to its owner, as the Prophet (PBUH) confirmed the option of inspection to start operating on the buyer after inspection. Thus, where the contract is nullified before inspection takes place the nullification is valid, as the contract is not binding at all.

Three conditions govern confirmation of option of inspection. These are:

(i) Where the subject matter of sale has not been inspected at the beginning of the contract or thereafter within a period in which the subject matter does not change. But where he had seen it, Option of Inspection will not arise.

(ii) That the subject matter of sale is a known property for instance, landed properties, animals, vehicles, provided it is described with description that removes any uncertainty which may result to litigation. Thus, no Option shall arise in situation of obligatory debts.

(iii) That the contract is such that is susceptible to being nullified such as sale and hire as return of the subject matter nullifies the contract not contracts that are not easily susceptible to such nullification through return of the subject matter such as marriage Khul'i et cetera.

MANNER OF CONDUCTING THE INSPECTION:

As goods differ in variety and extent, various methods in conducting the inspection have been provided by the law as is herein below summarised:

(1) Inspection on the whole subject matter of sale or part thereof, (inspecting a sample). The important thing here is to see whether the goods will fit the purpose for which it will be purchased. that can of course be carried out through any sensory organ that will properly lead to the actual detection of the sound condition of the subject matter purchased. If it is food for instance, which requires tasting to afford the buyer know whether it is good or bad, then it is his right to taste it. If the goods requires the sense of smell, such as perfumes, then he has to smell it to satisfy himself; if the goods requires touching then he has to touch it to satisfy himself; such as in case of cloth/gown; if the goods requires sighting only like a farm or a house or cereals, then he has to see it to satisfy himself.(1)

Where such a sale is conducted by sample, the sale is valid provided the remaining uninspected goods are of equal standard with the sample. This is in a

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(1) Al-Zuhayly (1989) Al-Figh Al-Islami Wa Adillatuhu, Vol. IV, p. 271.

situation contemplating sales between persons of normal sensory organs. There may however be situations where one or all of the parties may be of abnormal sensory organs. What then happens in this situation? It is suggested that in such a situation, the abnormal person should have a WAKIL, that is legal representative who is a normal person to conduct the inspection for and on his behalf. But where the abnormal person reacts to some sensory organs, then in that situation, whatever is applicable to a person of normal sensory organs applies to him equally. For instance, in the case of a blind person, whatever is applicable to a person capable to see, applies to him except those circumstances which require seeing. Thus, where the subject matter of sale is susceptible to seeing (as in most cases), and one of the parties especially the buyer is blind, then the nature of the subject matter such as quality, quantity, age, size et cetera, have to be explained to the full satisfaction of the blind man. It is more preferable however, if the blind man can appoint a WAKIL for that purpose(1).

In matters relating to sale of landed properties such as a house or farm, sample does not satisfy full inspection of the subject matter of sale. What is required is inspection on the whole subject matter. For instance, 'A', wants to sell his ten bedroom house. The requirement of the law here is that the buyer 'B' has the right to inspect each and everyone of the ten rooms in the house. It is not enough for 'B' to inspect say, five rooms and take the remaining five for granted. Likewise farmlands. All the farmlands have to be inspected that is, in terms of length, width and where each farmland starts and ends. If there are two farmlands, each must be inspected separately, in case of flock of sheep/goats, inspecting one or two of them is

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(1) The Hanafi School allows even a man with normal sensory organs to appoint a WAKIL. See page 271 of Vol. IV of Al-Zuhayly's Al-Fiqh al-Islami Wa Adillatuhu.

is not enough, all have to be inspected(1).

(2) Where goods are sold in numbers, for example coconut, radish fruit, et cetera, the law is satisfied if all are inspected as inspecting one out of them will not suffice.(2)

(3) Where similar goods are sold through weighing or measurement such as cereals, cotton, garlic, onion et cetera, inspecting some parts thereof (sample) or one of them satisfies the remaining. This is sale by sample.(3)

TERMINATION OF KHIYAR AL-RU'YAH:

Khiyar al-Ru'yah (Option of Inspection) comes to an end if any of the following events takes place:

(1) AL-RIDHA: (Agreement) Where by clear and unequivocal terms or through action, there is an agreement (al-Ridha) that a contract of sale has now been perfected by the parties, then option of inspection comes to an end. As for instance where the buyer says: :I have now perfected the contract" or "I have executed the contract". As for an action to indicate termination of contract is for instance where the buyer has put into use the goods purchased after the inspection and not before it(4) which positively indicates that he has now consented to the contract such as by possession, usage, sale, hire, mortgage or gift of thegoods.

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(1) See Al-Zuhayly: Ibid.
(2) Ibid.
(3) Ibid.
(4) The reason for qualifying it to be after inspection is that option is a right sanctioned by the Law Giver only after inspection and rights in law are never forfeited before acquisition.

(2) HALAKU MAHAL AL-AQD: Destruction of the subject matter (goods). Where the goods are destroyed, beyond return to the seller whether caused by the buyer or a third party or by natural disaster, then option of inspection is terminated.

(3) MAUT SAHIB AL-KHIYAR: Death of the party exercising option of inspection. If the party exercising the option of inspection dies then, according to some schools, notably the Hanafi and Hanbali, the option of inspection comes to an end as it is not transferable. The Malikis however opined that option of inspection like any other right is transferable and heritable. Al-Zuhayly stated in his book:

> "Maliki said: Option of Inspection is heritable as option of defect and choice are heritable. This is because where there is right, there is inheritance be it in corporeal or incorporeal .... as the heir enters into the shoes of the deceased on whatever he left in terms of corporeal or incorporeal property including the right to option"(1).

(4) ZIYADATUL MA'QUD ALAIHI: Increase in subject matter. Where the subject matter increases after possession is taken and that increase renders the subject matter unreturnable to the seller, then the option is terminated. The increase contemplated here is an increase or addition consciously put to the subject matter such as erecting a building on a plot of land and not a natural increase of a subject matter by way of a natural growth in size.

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(1) Al-Zuhayly, op. cit. page 274.

4.1.3. KHIYAR AL SHART: (Option of Stipulation)

Stipulation connotes an act of stating very clearly and firmly as a requirement a particular condition or conditions. Does Islamic Law allow for stipulations to be made in a contract of sale? Who is better entitled to it: the seller or the buyer? In an attempt to answer these questions, it becomes necessary to review the concept of KHIYAR AL-SHART or Option of Stipulation.

The whole concept of option of stipulation revolves around the question whether it is permissible for a contracting party or parties to make stipulation(s) in a contract pertaining to execution or nullification of the contract. Majority of the jurists is of the view that the seller or the buyer or both can make option of stipulation. Both can also validly make stipulation in favour of a third party to the contract. As for instance, the buyer can stipulate as follows:

> "I have bought this goods from you provided I have the option to confirm or rescind the sale within a day or three days."(1)
>
> "I have bought this goods from you provided Mr. 'X' has the option to confirm or rescind."

AUTHORITY:

Khiyar al-Shart derives its authority from the following traditions:

(a) The famous tradition of the Prophet (PBUH) on Habban Ibn Munqiz who used to defraud or cheat in his buying and selling. Then his people complained to the Holy Prophet (PBUH) of his habit. The Prophet said, "Whenever any of you carries out a sale transaction, he should say: 'No cheating, and I have the option for

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(1) Al-Zuhayly op. cit. p. 254; Al-Jazairi, op cit. page 174.

three days'."(1)

(b) The tradition of the Prophet (PBUH) transmitted by Tirmidhi from 'Amr Ibn Awf, which states:

"The Muslims are on their stipulations."

VIEWS OF THE SCHOOLS OF LAW

(1) MALIKI SCHOOL:

This School is of the opinion that option of stipulation is valid either from the buyer or the seller and even for a third party. Where it is made in favour of a third party, then he is the person who has the right to annul or confirm the contract. For instance, where the buyer/seller says:

> "I have bought it from you, or I have purchased it from you at X price provided Mr. 'A' agrees." Here, the sale is made contingent to the sole agreement of Mr. 'A'. The offeree/offeror has no say on the agreement as Mr. 'A' is now seizes of the agreement.(2)"

It is different where the contracting party says: "I have bought it pending consultation with Mr. 'A'". Here, the party has the last say on whether to confirm or rescind and not Mr. 'A'(3). Where he has appointed a WAKIL, then both share the option of confirmation or annulment where the representative had bought some goods with conditions. The one who takes precedence in exercising the option will, at any rate, have his option executed except where the other person had already taken possession of the goods(4).

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(1) This Tradition is reported by chain of transmitters; Hakim, Al-Baihaqi, Bukhari, Muslim; Abu Daud; Nasa'i and Malik Ibn Anas in his Muwatta. See Subhu al-Salam, III: 35; Nailul Awtar, V: 182.

(2) Al-Jazairi (n.d.) op. cit p. 175.

(3) Ibid.

(4) Ibid.

As for the period within which to exercise the option, the Malikis opine that:

(a) In case of transactions dealing on fruits the period shall not be extended beyond one day.

(b) In case of transactions on animals and clothes, the period is three days;

(c) In case of a farmland which is at far distance, more than three days;

(d) In case of a house, the period is one month.

The period of computation of time starts immediately after the conclusion of the contract(1). The School is also of the opinion that the seller should not collect the price of the goods till after expiry of the option period(2).

(2) HANAFI SCHOOL:

The principles enunciated in Maliki School pertaining to Option of Stipulations are almost all applicable in the Hanafi School. This School however went ahead to confer the participatory role of confirming or rescinding the sale made subject to option of stipulation on any of the parties to a contract as well as his representative, unlike in the Maliki School where only either the party or his representative could exercise the option depending on the context of the contract. However, where there is no consensus between the party and his representative, as for instance where the representative confirms the contract but the party to the contract nullifies it, the view expressed firstly is the valid decision in this

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(1) Al-Zuhayly op, cit. p. 257.
(2) Al-Jazairi, op. cit, p. 175.

Circumstance(1).

The Hanafis went ahead to categorise contracts into two generally; (a) those susceptible to option of stipulation. They are up to sixteen including sale contracts and (b) those not susceptible to option of stipulation and are seven in number(2).

As for period of its commencement and termination, the Hanafis stipulate three days from the time of concluding the contract. If the period exceeds three days, the contract becomes valid. This is the personal view of the great Imam Abu Hanifah(3).

In case it is the seller who exercises the option of stipulation, then obviously the subject matter does not get out of the hands of the seller, but the price gets out of the hands of the buyer. Where however, the buyer takes possession of the subject matter in this situation and it gets perished, he is bound to pay the seller an assessed price. The assessment is to be reckoned from the date he came into possession of the subject matter not the date the subject matter perished(4).

(3) - SHAFI'I AND HANBALI SCHOOLS:

The views held on option of stipulation by these two Schools are not very fundamentally different from the Maliki and Hanbali Schools. They differ on matters of details such as the length or period of stipulation; whether the subject matter or the price should exchange hands before the termination of the period of option of

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(1) Al-Jazairi (n.d.) Al-Fiqh ala Mazahib Al-Arba'a, Vol. II, p. 175.

(2) For the proper classification, please refer to the volume and page referred to in the book mentioned in Footnote (1) above.

(3) The two famous disciples of the Imam Abu Yusuf and Muhammad al-Shaybani had a contrary view. See Al-Zuhayly's Fiqh Al-Islami Wa Adillatuhu, Vol. IV, p. 257 for details.

(4) Al-Jazairi (n.d.) Al-Fiqh ala Mazahib Al-Arba'a, Vol. II, p. 181.

Stipulation[1].

On general note, it should be observed that:-

(a) A sale with a condition in support of a requirement of the contract is good and the condition is of force.

(b) Similarly, as a sale with condition which is by use and custom current in town, is good and the condition is good and valid.

(c) A sale with a condition which does not confer on anyone of the parties is lawful but the condition is bad. For instance where it is stipulated that, 'A' sold his goat to 'B' but the latter should not resell or let it loose on the pasture. The condition does not benefit either but seems to be void for unlawful restriction[2].

As pointed out in chapter 1 supra, that Islamic Law is a dynamic and liberal legal system, thus allows for freedom of stipulations in a contract. A stipulation has been defined above as an act of stating very clearly and firmly as requirement a particular condition or conditions before the contract finally comes into being.

The attitude of the generality of the Muslim Jurists differ as to such exercise of freedom of making stipulation in a contract. the points of difference of such opinions are mainly graded into two:

(i) Some are of the view that the contracting parties shall have the freedom to make their own contracts and stipulations so long as there is no text prohibiting that.

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(1) See: Vol. II, Al-Fiqh ala Mazahib al-Arba'a, pages 174-185; Vol. IV, Al-Fiqh al-Islami Wa Adillatuhu, pages 254-259.

(2) See: The Mejelle, Chapter 1 Section IV.

(ii) Others are of the view that the general rule is that the making of contracts and their stipulations is prohibited unless it is made permissible by text.

The general principles under the Hanafi Law pertaining to valid stipulations are limited to the following situations:

(a) Stipulations for the prescribed effect of the contract such as to stipulate that the buyer should be the owner of the subject matter after purchase.

(b) Stipulations which consolidate or re-enforce the prescribe effect of a contract such as to stipulate that the buyer should produce a surety or should give a pledge or make an assignment of the price.

(c) Stipulations sanctioned by custom are valid albeit on the principle of preference, for instance stipulation by the seller of a piece of leather, that the buyer should make it into shoes.

As for INVALID stipulations, the Hanafi School is of the view that apart from the three categories of stipulations above, any stipulation made by the parties is invalid. Of these invalid stipulations, two categories exist:

(a) Invalid stipulations which are unseverable contract. An invalid stipulation is regarded unseverable if it has the following elements:

(i) Where the stipulation confers an additional advantage on one of the contracting parties such as where a seller stipulates that

he should occupy the house after it sold for a certain period of time or that the buyer should marry the seller's daughter.

(ii) Where the contractual relationship is based on exchange of property for property not on contracts such as that of marriage.

The Maliki School differs from the Hanafi of those stipulations which they term as :stipulations beneficial to the contract". And by this, they mean the stipulations neither support nor run counter to the prescribed effect of the contract after purchase for a short time.

A stipulation is invalid with the Malikis when:

(a) It is inconsistent with the prescribed effect of the contract. For instance where the seller stipulates that the buyer shall not resell or make a gift of the subject matter of sale.

(b) Where the stipulation makes the price of the goods uncertain.

The Hanbali and Shafi'i Schools are almost in full agreement with the main principles as expounded by the Hanafi and Maliki Schools with regard to valid and invalid stipulations.

In advocating the principles of prohibition of making invalid stipulations, the Zahiri School has supported its argument with the prophetic tradition credited to Aisha (peace be upon her) wife of the Prophet, reporting that the Prophet has prohibited people making stipulations not found in the Book of Allah. Such stipulations, even if made, and even if they number up to hundred, are void stipulations. This is because the Book of Allah is more authoritative and GOD's

stipulations are more binding.

The Zahiris extend the effect of such stipulations to the Sunnah of the Prophet (PBUH) as it is the second source of the Sharia.

4.1.4. KHIYAR AL-AIB (Option of Defect):

Option of defect arises where anyone of the parties discovers a defect in either the subject matter sold or the price paid, as the case may be but the defect was unknown to him at the time of the contract.

Meaning of Defect:

In ordinary English Language a defect, connotes a fault simplicita(1). In Law, defect means the want or absence of something necessary for completeness or perfection; a lack or absence of something essential to completeness; a deficiency in something essential to the proper use for the purpose for which a thing is to be used(2).

This is what is simply reduced in Islamic Law terminology as "AIB". An "AIB" is defined as:

. "That which reduces the value of a subject matter of sale in the market."(3)

The Mejelle, in chapter six Article 338 defines 'Aib' to mean:

"Anything wrong, which reduces the value of property, in the opinion of persons competent to judge of the property, is called defect."

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(1) Hornby, A.S. (1989) Oxford Advanced Learner's Dictionary, 4th. Edition Oxford University Press, page 313.

(2) Black, M.A. (1979) Black's Law Dictionary, fifth edition, West Publishing Co., p. 376.

(3) Muqarrar Al-Fiqh, 2nd. edition, p. 32. See also p. 261 of Al-Zuhayly: Al-Fiqh al-Islami Wa Adillatuhu, Vol. IV; Al-Jazairi, Fiqh ala Mazahib Al-Arba'a, Vol. IV, p. 189.

AUTHORITY:

Khiyar al-Aib has its source from many traditions of the Prophet (PBUH). Below are some of them:

(a) Ibn Majah narrated on the authority of Uqbah bn Amir who reported the Prophet (PBUH) as having said:

> "A Muslim is a brother to a Muslim and it is unlawful for him to sell property to another which has defect, unless the defect has been explained to.' Reported also is that the Prophet passed, one day by a person selling food. He put his hand into the food and it became full of water. Then he said: "anyone who cheats us is not part of us."(1)

(b) A man purchased a slave during the life time of the Prophet (PBUH). The slave was having what Allah had wanted him to have (a defect) then the man returned him for the defect he found with him, and the Prophet ruled that he should be returned for the defect found in him. Then the owner complained that the purchaser had used the services of the slave then the Prophet (PBUH) said:

> "Abscess caused must be damnified."(2)

EFFECT OF A DEFECT:

Defect in a subject matter renders it unfit for sale. It is void for a Muslim to sell to a buyer a subject matter which is defective. The sale is a void one even if concluded. But where the seller has unambiguously explained to the buyer that the subject matter in question has some form of defect and yet the buyer has agreed to purchase it with its defect, the sale is held to be valid.

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(1) Nailul Awtar; V: 211.

(2) Five of the narrators reported this from Aisha (wife of the Prophet - peace be on her); Tirmidhi, Ibn Khuzaimah, Ibn al-Jarud, Ibn Hibban, Ibn al-Qitani, Hakim regarded the Hadith as sound whereas Al-Bukhari, Abu Dauda regarded it as a weak Hadith.

Equally, may the buyer decide to fall back to the option of Aib (defect) offered to him by the Law where he made the purchaser not being aware of the defect at the time of the purchase, then he has two options: He should -

(i) Either RETURN the subject matter to the seller and collect the price paid, or
(ii) RETAIN the subject matter and bear with the defect by claiming damages(1).

Thus even where in a sale, no condition is stipulated for the exercise of Khiyar al-Aib there is an implied warranty or freedom of the subject matter from defect. It is necessary in other words, that the subject matter should be sound and free from defect. An unsound subject matter may go into the heart of agreement rendering the agreement into a void one(2).

Classification of 'Aib' (Defect):

'Aib' (sing) or 'Uyub' (plural) means defect(s). Defects can conveniently be classified into two:

(a) Natural; and

(b) Artificial

(a) Natural Defect:

A defect is natural if it forms part of the original structure, habit, trait or culture of the subject matter under reference and not introduced into the subject matter through an unnatural process such as alteration of the subject matter by a human being.

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(1) This applies to the price of the goods. If the price is defective the seller has that option too. see: Mugarrar Al-Fiqh, 2nd. edition, Ibid, page 22.
(2) Al-Zuhayly (1989) Al-Fiqh Al-Islami Wa Adillatuhu, Vol. IV, p. 261.

A natural defect is of two types:

(i) ZHAHIR (manifest/ostensible) and

(ii) BATIN (Hidden/Latent).

The Zhahir (ostensible) defect is like unruly behaviour of an animal which makes it uncontrollable, lameness of an animal; inability of an animal to carry goods to a given place et cetera.

The Batin (Latent) defect is found in sheathed goods for example, defect in kolanuts, almonds, pomegranate, water melon and so on.(1)

(b) Artificial Defect:

A defect is artificial if it is introduced into the subject matter through an unnatural method such as by a human being altering the nature of the subject matter; for instance where the seller mixes pure natural cow milk with water, or mixes butter with oil; or he ties the udder of an animal to store milk in order to make the udder appear big to deceive the buyer(2).

The Maliki School is of the opinion that where the defect devalues the subject matter for instance in animal, such as the unruliness of the animal or that the animal is impotent or lame or it suffers gastric ailment, then if the sickness/defect does not render the animal useless for the purpose for which it is purchased, then it should be retained by the buyer. But a situation where the defect will make the buyer lose or forgo the benefit for which the subject matter is purchased then he is free to return it to the seller as for instance where he bought a ram for the purpose of offering the DHAHIYYA sacrifice and the ram has a cut on its ear which renders it unfit for the sacrifice, then the buyer has the option of returning it to the seller.

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(1) Al-Jazairi op cit. page 188.

(2) Ibid:

Equally where he purchased canvas or dress and he found it too small or tight not befitting his size, he has the option to return it of the seller. However, where the defect can be easily removed without destroying the subject matter such as by washing a dirty garment bought, then that should not be a subject of return(1).

There are situations however, where returning the goods found to be defective becomes difficult, for instance:

(1) Where the subject matter is destroyed after conclusion of contract. Where this happens, it is immaterial whether the destruction happened after the buyer has taken possession of the subject matter from the seller or not. It is immaterial also whether he was aware of the defect previous to the destruction or not and whether he opted for the destruction or not for instance he slaughtered an animal after purchase or someone killed the animal or the animal died naturally. Even if he discovered a defect, it is impossible for him to return the subject matter to the seller. Similarly situations are where he made a gift of the subject matter either as a free gift or as a charity. He may be compensated for new defect by way of IRSHI (damages) after purchase.

(2) Secondly, where the buyer has consented to the defect after becoming aware of it. The buyer may have given his unconditional consent to the defect which he becomes aware of at

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(1) Al-Jazairi op. cit, pages 190-191.

the time the dispute arose as to the possibility of returning the subject matter to the seller or not for instance where the buyer, in that situation opted to put into use the dress or the animal purchased. here, he must deemed to have forfeited his option of return. Equally, where there is a clear consent to the defect prior to the time of dispute. No return of the subject matter is possible. There is an exception to this rule. This is where the buyer bought a house; occupied the house or put someone else in the house and a defect is observed such as crack in the wall, or there is a defect which reduces the peaceful enjoyment of the house. Here, return is possible even where he resides in the house after becoming aware of the defect. This is for the simple reason that the buyer's occupation of the house for that period, does not reduce the value of the house. This rule applies to all those situations which do not occasion a reduction in value of the subject matter. In contradistinction to the above rule, it is different where the buyer is aware of the defect and has not informed the seller, has proceeded to reside in the house with no complaint, then he has consented to the defect and no return is entertained from him. Equally, wherever he enjoys the usufruct of a subject matter, he is deemed to have given his consent, except in the following situations:

(i) where on a journey, he bought an animal and he discovers a defect on it, he has the option of return after he disembarks from his journey provided the animal

has not suffered the effect of emaciation. If it emaciated, he will have to compensate the seller for the emaciation; and then he takes back his price. But may he decide to retain it, then he should collect his IRSH from the seller.

(ii) Where both the seller and buyer reside within the same locality and the buyer bought the animal with a defect but with a view to putting it on a test to return it, then that ride could not constitute a bar to return it of the seller.

(iii) Where the defect disappears before return except where experts confirm that the defect will resurface(1).

The Hanbali School stated that the yardstick on the return or retention of the subject matter of sale alleged to be defective is that an assessment of the defect shall be taken; where the defect is so grave for example breakage in the subject matter then option of defect should be invoked. But where the defect is so light and infinitesimal such as small dirt on the cloth to be purchased, then this should be overlooked by the buyer(2).

The Hanafi School stated that in a situation where the defect occurred to the subject matter while still in possession of the buyer; five issues arise:

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(1) Al-Jazairi op. cit. p. 194.
(2) Ibid: Op cit.

(a) that the defect happened after conclusion of the contract but caused through the act of the seller, then the buyer in this situation has the option of defect to either return the goods or retain it with the defect but the buyer will forfeit some portion of the price in order to ameliorate the defect caused in the subject matter. The buyer then shall have no cause to complain on this defect or on any other defect whatsoever as he may later come to realize.

(b) Where the defect is caused by the buyer, the buyer is bound to pay for all the price agreed on the subject matter. And even where delivery of the goods has not taken place due to non-settlement of the agreed price by the buyer, the buyer has to pay without further complaint. But where the buyer found out an old defect which happened while the subject matter was in possession of the seller, then the buyer will have the right to return the goods with no payment of the price. He is however bound to pay for the damages he caused (as a new defect) to the subject matter. Return of the subject matter here, essentially, is occasioned by the old defect which was not brought to the buyer's attention during the contract.

(c) Where a third party caused the defect to the subject matter, the buyer has a choice of retaining the subject matter and paying all the price and then claim for compensatory damages from the third party for the defect he caused to the subject matter, or the buyer can return the subject matter to the seller without

payment of the price. Is the seller then to bear the damage caused by the third party? It is suggested that the seller should be redeemed by the third party.

(d) Where the defect is caused by natural disaster, then the buyer can exercise his right of return of the subject matter to the seller and claim back the price paid. But where the buyer decides to return it, he can do so and may get a waiver of some part of the price from the seller.

(e) Where the defect is caused by the subject matter itself such as where a servant is bought and immediately thereafter he caused a defect to himself for instance he broke his hand or leg, the situation is governed by the rule expatiated in (d) above.

Where the defect occurred after the buyer has taken possession, five issues here too arise:-

(a) that the defect is occasioned by the purchaser's act;

(b) that the defect is caused by natural disaster;

(c) the defect is caused by the personal act of the subject matter;

(d) that the defect is caused by the act of the seller; and

(e) the defect is caused by the act of a third party's act.

The rule applicable in issues (a), (b) and (c) is that if there exists an old (previous) defect in the subject matter in addition to the new defect now caused by the buyer, the subject matter is not returnable to the seller as the new defect clashes with the (previous) old defect. What the buyer will do in such a situation is to seek for replacement in value caused by the old defect except where he has decided

to take the subject matter as it is with its new defect(1). As in issues numbers (d) and (e), the rule is that the subject matter is not returnable to the seller. The buyer will have been contented if he gets a substitute/replacement of the defect caused by the old defect from the causer of the defect whether in the person of a seller or the third party(2).

The Shafi'i School's view is that, where a defect occurred while possession of the subject matter is taken by the buyer and an old defect has been noticed which occurred while the subject matter was in possession of the seller and it is not because of the old defect that the new one comes about and whereas the buyer noticed the new defect before noticing the old one, then the option of the defect for the buyer is lost except where the seller has consented for the return of the subject matter. In a situation where the defect occurred with the knowledge of the seller, three issues may arise:

(i) annulment of the sale which is consented to by the seller but without the seller accepting any price from the buyer or the buyer should agree to retain the subject matter with the old defect though without taking the IRSH from the seller,

(ii) that both parties should agree on either annulling the agreement or confirming it with compensatory payment from the buyer or from the seller as the case may be,

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(1) Al-Jazairi (n.d.) Al-Figh ala Mazahib al-Arba'a, Vol. II, Dar Al-Fikr, p. 192.

(2) In order to make up the difference, the value of the subject matter when it was not deformed should provide the difference when the value in its deformed form is taken away, for example the original price was N6,000 but because of the defect it is now N5,000, the difference is N1,000 which shall be paid back to the buyer. This is known as IRSH. The valuation should be done by experts on the subject matter.

(iii) where they do not agree, then the views of the one who wants the contract to be executed would be implemented whether the seller or the buyer and the buyer will have to make up the IRSH payment to the seller.

Generally, it is an implied warranty that a sale without any stipulation, makes it necessary that the subject matter sold should be free from defect (Bara'atun minal 'aib). According to the Malikis, even where a seller makes a condition freeing himself from any defect that may be found in a subject matter after sale, that condition will not benefit the seller. Where the defect is found, the buyer reserves the option of return. The only exception is in sale of slave. Where a slave is bought on the condition that he is free from any defect and the buyer took him and lived with him for a time which will afford the buyer to experience the slave's habit, then even if a defect surfaces in him later, the buyer has lost his option of return(1).

As for the time within which the subject matter shall be returned after a defect has been noticed, there is no consensus of opinion among the jurists: some say it should be returned immediately thereafter, others say, it is not necessary to effect the return soon after the object has been noticed(2).

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(1) Al-Jazairi (n.d.) Al-Fiqh ala Mazahib Al-Arba'a, Vol. II, Dar Al-Fikr, pages 196-198. See the views of Hanafi, Hanbali and Shafi'i Schools on this issue elaborately treated in the referred pages above.

(2) Ibid: Op cit.

Above are only the general principles. Examples of subject matters given such as animals, cereals, clothes et cetera, form only part from the varieties obtained in an open market. More so, with the modern technological and other developments the modern man of today realises a world totally different from the one in which the examples were given.

Where a new situation crops-up, it is an extension of a rule which dealt with a previous matter of like nature that needs to be applied to cover the new situation (Qiyas). For instance, presently, vehicles and not animals are vogue for the purposes of journeys. Most of the rules applicable to animals used on journeys will conveniently apply on vehicles. More conveniently now, most of these vehicles and modern equipments are sold with written brochure which makes clear the conditions of the sale.

4.1.5. KHIYAR AL-TADLIS/GHABAN (Option of Deception):

Where a sale entails excessive deception which may result to a fraud, the deceived party can exercise this option to return the goods or their price as the case may be. Some legal writers try to draw some distinctions between Khiyar al-Tadlis; Khiyar al-Ghaban and Khiyar al-Taghrir. The terms have the same legal effect on the subject matter.

Al-Ghaban or Tadlis, in this respect, is that act which renders a subject matter to be real whereas its value position is hidden.

SOURCE:

The Prophet (PBUH) is reported to have said:

"If anyone of you transacts a business, he should say: 'let there be no deceit'."(1)

The general principles on Tadlis or Ghaban are:

(a) It is illegal (HARAM) to defraud;

(b) Where a party is defrauded in a transaction, he has the option of returning the goods or retaining it as such;

(c) Where a party disposes of the subject matter for which he was deceived, he loses his option to annul the previous transaction;

(d) Where the subject matter bought albeit in a deceitful manner has been destroyed or perished or something new has been added, for instance by putting up construction on a land, then the party deceived has no right to exercise its right to rescind the earlier transaction.

4.1.6. KHIYAR AL-THAMAN/NAQD: (Option of non Payment of Price)

Where the buyer and seller agree that the price of the subject matter of transaction shall be paid at a given time and that it is not paid at that given time, then there shall be no binding sale between the parties. If this is made as part of the sale agreement, it is valid and binding agreement. It is known as "non-payment of the price option" or simply it is called "Khiyar al-Naqd that is Money option".(1)

But the sale is complete if the buyer pays the price within the time limit agreed. This should however be differentiated from a sale contracted where payment of the price is made as a debt on the buyer which he is to settle gradually or on the

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(1) Al-Zuhayly, W. op. cit. p. 275. See also: The Mejelle: Ibid. Chapter VI Section III.

happening of certain event. It is thus always advisable to ascertain the terms of payment of the price before concluding the contract to its finality.

4.1.7. KHIYAR AL-TA'YIN (Option of Choice):

This is an option where the buyer has an option to choose from among the variety of subject matter in transaction. Usually, as quality and type of the subject dictate the price, the buyer is given a choice to choose from among three sets; one having the best quality, one having a superior quality and one which is of inferior quality. If the buyer identifies the one he wants, the subject matter is now identified.(1)

Necessary Conditions:

For the Khiyar al-Ta'yin to operate, the following should be fulfilled:

(1) applicable only in monetary transactions such as sale,

(2) the choice should be based from among the three grades: best, superior and inferior,

(3) the quality and prices should not be equal as equality of prices or quality defeats choice,

(4) the period of choice should be known, that is, it should not be more than three days(2).

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(1) Al-Zuhayly, W. op. cit. p. 252.

(2) Imam Abu Hanifah is the chief exponent of this option. His disciples Abu Yusuf and Al-Shaybani opined that the period can be extended beyond three days. See: the Mejelle Ibid, chapter Vi, Section IV.

4.2.0. PROHIBITED FORMS OF SALES (AL-BUYU' AL-MAMNU'A/AL-BUYU' AL-MUNHA ANHA)

Prohibition simplicita, in jurisprudence, is an act of inhibition or interdiction. Both inhibition and interdiction aim at one thing that is preventing somebody from doing something that should be done.

There are four main causes for the prohibition of a sale transaction. They are as follows:

4.2.1. Prohibition due to lack of capacity of a party to the contract of sale.

4.2.2. Prohibition due to lack of SIGHA (Offer and Acceptance and the Majlis al-Aqd).

4.2.3. Prohibition due to illegality of the subject matter of sale.

4.2.4. Prohibition due to presence of illegal stipulations in the contract of sale or where the sale is conducted in a manner declared illegal by the Sharia.

Items (1) - (3) above have already been treated in the proceeding chapters. Item (4) is the one intended to be considered briefly below.

4.2.4. PROHIBITION DUE TO PRESENCE OF ILLEGAL STIPULATIONS IN THE CONTRACT OF SALE OR WHERE THE SALE IS CONDUCTED IN A MANNER DECLARED ILLEGAL BY THE SHARIA:

The principal requirement of Islamic Law of Business transaction is that the subject matter of business should be legal. The price payable for the subject matter should be legal and the parties involved in the contract of sale should acquire the legal capacity to enter into such a contract. Where there is a vitiating factor to the legality of any of the above, the contract of sale cannot be valid (Sahih) one. It can

either be void (Batil) or voidable (Fasid) one. Where it is void, it cannot be executed even if contracted. It can only be annulled. Where it is voidable however, if the vitiating factor can be conveniently removed without damaging the Res that is the subject matter of sale, then the contract can be executed when the vitiating factor exists no more.

As seen previously illegal stipulations are those stipulations which run counter to the provisions of the QUR'AN, Hadith and Ijma'. The examples cited are sufficient enough for elucidation, for instance, where the stipulation confers an added advantage on anyone of the contracting parties, or that the buyer, after purchase shall have no right to re-sell or give out the subject matter. This certainly, diminishes the right of the buyer without any justification. It is a void stipulation and shall have no effect on the transaction entered.

The other prohibition is where a sale is conducted in a manner declared illegal by the Sharia. Example of such prohibited forms of sale are:

4.2.4. (1) BAY' AL-MULAMASA AND AL-MUNABAZA:

MULAMASA means the act of touching an object by the hand. In this form of sale the seller will tell the buyer: "If you touch any cloth it belongs to you through the payment of 'X' price". So in this situation, the buyer was just to touch the cloth without any examination and the bargain was concluded.

MUNABAZA sale on the other hand, is that form of sale where the seller should throw the cloth to the buyer before he has carefully examined it. The very act of throwing the cloth concludes the bargain.

These two forms of sale were in vogue before the advent of Islam. But when

the Sharia was revealed, the Holy Prophet (PBUH) declared such practices illegal. Abu Huraira (may Allah be pleased with him) reported:

"Two types of transactions have been forbidden (by the Holy Prophet) al-Mulamasa and al-Munabaza. As far as Mulamasa transaction is concerned it is that everyone of them (the parties entering into transaction) should touch the garment of the other without careful consideration, and al-Munabaza is that everyone of them should not see the cloth of his friend."(1)

The (Illah) cause for prohibition is because of lack of inspection of the goods as the purchaser, in either case was allowed to examine the subject matter sold to him. It was not certain also whether the bargain was likely to prove unduly disadvantageous to one side.

4.2.4. (2) BAY' AL-HASATI:

This is a sale conducted through the throwing of pebbles. In such a situation the buyer will throw a pebble at the goods of the seller and on whatever goods the pebble falls, the purchase is concluded. This form of sale is prohibited by the Sharia. The Prophet (PBUH) as reported to have forbidden a transaction determined by throwing stones, and the type which involves some uncertainty(2). The (Illah) cause for the prohibition is that it lacks certainty. Secondly, it does not allow for proper inspection of the goods. These may cause hardship and injustice to a party to

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(1) Siddiqi: Sahih Muslim, Vol. II (rendered into English). Hadith No. 3612. See also Ahadith nos. 3608, 3610, 3611, 3613 of chapter DXCIII of the same book. Ahadith nos. 354, 355 & 357 of the English version of Sahih al-Bukhari, Vol. III by Dr. Muhsin Khan 2nd. Edition.

(2) Siddiqi, A.H. (n.d.) Sahih Muslim, English Rendition V. III, Dar Al-Arabiyya Publishers, p. 798.

the contract. It is therefore prohibited since the advent of Sharia.

4.2.4. (3) BAY' AL-MUZABANA AND BAY' AL-MUHAQALAH:

MUZABANA sale is the exchange of fresh fruits for dry fruits. What is involved in this type of sale is that the quantity of the dry fruits is measured and fixed whereas the quantity of the fresh fruits to be given in exchange is determined through rough estimation or guessing while still on the date palms. Because of the uncertainty involved, as the quantity of the fruits on the trees can hardly be determined with precision so as to equate it with the dry ones, this may lead the buyer to enter into a dark transaction. It is prohibited by the Sharia. The Prophet (PBUH) is reported by Bukhari via Anas to have prohibited this form of sale. He reported:

> "The Prophet (PBUH) has prohibited the sale by MUHAQALAH, sale by MUZABANA, MULAMASA sale and MUZABANA sale(1)".

Equally, the Holy Prophet (PBUH) prohibited sale by MUHAQALAH. A MUHAQALAH sale is the sale of a field of wheat against dry wheat and the taking of land against wheat.

Sa'id b. al-Musayyib reported that the Apostle of Allah (PBUH) prohibited MUNABAZA and MUHAQALAH which are the sale of fruits against dates and the sale of field of wheat and taking or rent of land against wheat respectively(2).

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(1) See: Muqarrar al-Fiqh, 2nd. Edition, pages 26-27.

(2) See ch. 398, Ahadith nos. 1308, 1309, 1310 of Muwatta Imam Malik, English translation by Prof. Rahimuddin, 1st. Ed. See also chp. DCVII of Sahih Muslim (English translation), Ibid.

4.2.4. (4) BAY' AL-URYAN OR BAY' AL-URBAN:

This is a form of sale in which a nominal advance is given on condition that if the bargain is struck the advance will be adjusted and if the bargain fails, the seller will not return the advance. Imam Malik (may Allah be pleased with him) gave an example of a person who purchases a slave or hires a beast and then tell the seller:

> "I give you one dinar or less than one dinar or more on condition that if I buy this slave the dinar would be accounted towards the sale price. Likewise if I ride the beast it will be considered as his. If however, I return the slave to you or if I do ride the beast, the dinar would be yours; I would not take it back(1)."

In any case as the advance is being nominal, the buyer, it appears, has no practical liability. He will abide by the contract if it is advantageous and will withdraw from it, if it is disadvantageous.

Amr b. Al-As reported that the Apostle of Allah (PBUH) prohibited the URBAN sale(2).

4.2.4. (5) BAY' AL-MURTAR:

Where a subject matter is bought through the use of unjustified force, coercion or compulsion, such a sale is void and thus prohibited. This sub-topic has been treated in chapter III under the topic of IKRAH (compulsion)(3).

4.2.4. (6) BAY' AL-NAJASH: (Kore)

This is the deceptive form of sale. Najash is defined as a process of offering high price for something without having the intention to buy it but just to deceive

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(1) See: Sahih Muslim (English) Ibid. p. 796; Muwatta Imam Malik, Ibid. p. 287.

(2) Hadith No. 1285, chp. 386 of Muwatta Imam Malik, (English Translation). This practice resembles, slightly the present day payment of non-refundable deposit for one to qualify for a particular thing.

(3) See p. 124 Supra.

another person who really wants to buy it. Such a person may agree with the seller to offer high prices before the buyer in order to cheat the actual buyer. Or, the seller may falsely tell the buyer that he (the seller) has previously bought the goods at a certain price which is higher than the actual price. Where the seller tells the purchaser that cost price of article 'X' with him is N200 whereas he actually bought it at N150. This is pure deception. If the article is sold to the buyer under such a pretext it becomes cheating. Islamic Law has declared such a transaction illegal and is prohibited. It is reported in the Sahih al-Bukhari that a bargain carried on in such circumstances is not valid. Ibn Abi Aufa said: "One who practices Najash is a Riba-earning traitor." And such a practice is A false trick which is forbidden and the Prophet (PBUH) said: "Deception would lead to the Hell (fire) and whoever does a deed which is not in accord with our tradition, then that deed will not beaccepted(1)". In the Muwatta(2), it is reported by Sa'id b. Al-Musayyib that the Apostle of Allah (PBUH) prohibited deceptive sale. The local equivalent to this form of sale is the YAN-KORE practice which thrives in our present day markets. Yan-kore are those people who move from one place to another to deceive buyers, buy falsely, pricing a commodity very high with no intention of buying same but luring the actual buyer to pay more.

4.2.4. (7) BAY' HABAL AL-HABALA:

Habal al-Habala was a kind of sale during the JAHILIYYA period where one would pay the price of a she-camel which was not born yet but would be born by the immediate offspring of an extant she-camel. The Sharia prohibited this form of sale

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(1) Khan, M.M. (1976) Sahih al-Bukhari, Vol. III Arabic - English, Yayinlari Publishers, p. 198, Hadith No. 351:61.

(2) Muwatta Imam Malik: English translation Ibid. p. 302 chp. 415 Hadith No. 1356.

as it involves gharar. Abdullahi bn Umar narrated that the Prophet (PBUH) forbade this kind of sale(1).

4.2.4. (8) BAY'AL-GHARAR:

This kind of sale in which one sells a subject matter one does not possess such as fish in the river, birds in the air and so on. This has been treated in chapter two of this thesis.

4.2.4. (9) BAY' AL-MUKHADARA: (Cinikin yabanya)

This is the sale of grains or vegetables before they are ripe and that they are free from diseases and blight and their benefit is evident. Anas bn. Malik reported that the Apostle of Allah (PBUH) forbade MUHAQALAH, MUKHADARA, MULAMASA, MUNABAZA and MUZABANA(2). The Local form of this sale is known as "SAYEN YABANYA" treated in chapter two of this thesis.

4.2.4. (10) BAY' AL-INAH:

This is a situation where the seller sells the subject matter on credit for a fixed period of time. The seller then re-purchases the subject matter from the purchaser at a reduced price against cash payment. This kind of sale is injurious in nature and is considered by Abu Hanifah, Malik bn Anas and Ahmad bn Hanbal as HARAM(3).

Ibn Umar narrated thAt he heard the Prophet (PBUH) saying:

> "If you transact business on the basis of INAH, if you give preference to tilling the soil over JIHAD; if you allow permissiveness and forsake the JIHAD, Allah will descend on you humiliation which shall continue till when you go back to your proper religion(4).

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(1) Sahih Al-Bukhari (Eng) V.II Ibid p.199; Sahih Muslim (Eng) V.II Ibid p.798 ch. DXCV No. 3615.

(2) Sahih Al-Bukhari, (English) Vol. III Ibid p. 224 Ahadith nos. 409 &410; Sahih Muslim (English) Vol. II chapter DCVII. See page 44, chapter two of this thesis.

(3) Siddiqi; Muwatta Imam Malik, (English) Ibid. Chapter 402.

(4) Reported by Abu Daud. See: Muqarrar Al-Tauhid Li Saf al-Mutawassit, 2nd. Ed. p.22.

Bay' al-Inah is therefore a prohibited form of sale. It was in practice in the Jahiliyya period. Its reminiscence are still noticeable in the present day society despite the categoric prohibition, through sales of textile materials, cereals et cetera. The owner of the goods who advances them on credit and re-purchases it from the debtor is always at the beneficial end.

4.2.4. (11) BAY' AL-RAJULI ALA BAY' AKHIHI:

These are transactions initiated by others but not abandoned or completed by them. An example is where 'A' is negotiating to purchase a house from 'B'. While this negotiation is on 'C' now comes in to purchase the house. This is prohibited. Both Bukhari and Muslim reported that the Holy Prophet (PBUH) has said:

"Some of you would not conduct sale on the sale of others".(1)

Ibn Umar (may Allah be pleased with them) reported the Messenger of Allah (PBUH) as having said: "One amongst you should not enter into a transaction when another is bargaining(2).

The tradition which is regarded as the omnibus one on this and other related issues is the one which is narrated by Abu Huraira (may peace be upon him). The Hadith runs as follows:

> "Do not go out to meet riders to enter into transaction with them; none of you must buy in opposition to another, nor must you bid against one another a townsman must not sell for a man from the desert, and do not tie up udders of camels and sheep, and he who buys them after that has been done has two courses open to him; after he has milked them he may keep them if he is pleased with them, or he may return them along with a measure (sa'i) of dates if he is displeased with them".

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(1) Ibid. page 18.

(2) Sahih Muslim, (English) Vol. III page 799 chapter DXCVI. In another tradition, it is said (unless the original proposer permits the second proposer).

It should be noted that the prohibition of this type of sale is to restrain people from wanton contest and show of financial power. So long as the first original negotiator (offeree) and offeror have come to a point of reliance on proposal (Tarakana, or Litis Contestatio) then it is illegal for another person or the seller to enter into a new negotiation with another person. Where the seller allows himself to be carried away by another person into selling the subject matter of transaction, without valid or justifiable cause, such transaction so conducted is a nullity. This situation should however be differentiated from the one where the seller wanted an increase in price (Muzayada Sale) and the original negotiator (offeree) cannot meet up with the increase and he opts out of the transaction either expressly or impliedly, then another person interested in the subject matter can lawfully negotiate. It should also be noted that the processes of (AL-TASAWWUR), invitation to treat, should be seen as a means to arriving at AL-TARAKUN that is firm commitment to buy/sell the subject matter. It has been stated in the Fiqh al-Sunnah:

> "This is with the exception of a MUZAYADA sale which is lawful, as the contract has not concretised. An authority has been laid by the Prophet (PBUH) who once, displayed some goods for sale and invited those who could make increase (in the price)"(1).

This kind of sale is locally referred to as CINIKI BISA CINIKI, that is sale upon sale.

4.2.4. (12) BAY' AL-HADHARI LIL-BADI:

It is forbidden for townsman to sell on behalf of the man from rural area. This is in a situation where the townsman acts as a SAMSAR that is broker.

Abu Huraira (Allah be pleased with him) reported it directly from Allah's Apostle (PBUH): "The townsman should not sell for a man from desert (with a view

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(1) Sabiq, S. (n.d.) Fiqh Al-Sunnah, Vol. III 5th. Ed., Dar Al-Fikr, p. 140.

to taking advantage of the ignorance of the market conditions of the city)". And Zuhair reported from the Holy Prophet (PBUH) that he forbade the townsman to sell on behalf of the man from the desert.

Ibn Abbas (may Allah be pleased with them) reported Allah's Messenger (PBUH) as saying: "The riders (carrying merchandise) should not be met in the way, and townsman should not sell for a man of the desert". The narrator reported: I said to Ibn Abbas: What do these words really imply - "The townsman for the man of the desert?" He said: That he should work as a broker on his behalf. And this is irrespective of whether the townsman is a father or brother of the desert man. He should not act as a broker for his goods. Another tradition added that you should leave people alone. Allah will give them provision from one another, meaning by allowing the desert man and the townsman to arrive at a fair deal, favourable to each of them(1).

It is sad to note that about 65% of the business transactions taking place in some commercial centres, nowadays are carried out through brokerage. In a number of situations, the brokers take undue advantage by exploiting the situation; depriving the contracting parties from the enjoyment of the market blessing. The brokers are some of the factors causing the sky-rocketing of commodities in the markets as they must, as it were, make a living out of properties that do not belong to them. They operate in different forms. They are locally known as YAN-BARANDA, YAN CHORI.

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(1) See generally, chapter DCXVII of Sahih Muslim, (English) Vol. III. It should be noted that brokerage is not completely forbidden by the Sharia, it is permitted and is lawful, if the middleman helps both the buyer and the seller in arriving at a fair deal of the transaction. It is prohibited however, when the broker/middleman takes undue advantage of the ignorance of the buyer and the seller with a view to deceiving them to enrich himself.

4.2.4. (13) BAY' TALAQQA AL-RUKBANA:

This is a situation where people go to the outskirts of the town to meet those who bring goods for sale to the market. In other words, they do not wait for goods to be brought to the market. They buy goods from the outskirts of the market to re-sell at exorbitant price. They aid and abet the escalation of prices. They deprive both the original seller and the buyer from enjoying the blessing of the market. This form of sale is also prohibited.

Abu Huraira (may Allah be pleased with him) reported the Messenger of Allah (PBUH) as having said:

> "Do not meet the merchant in the way and enter into business transaction with him, and whoever meets him and buys from him (and in case it is done) if the owner of the merchandise comes into the market (and finds that he has been paid less price) he has the option (to declare the transaction null and void)".(1)

There are today, a number of commercial activities in our local markets such as, YAN WAZA people running after soup ingredients or vegetables, such as tomatoes before their arrival to the market. The first to receive the goods from the owner shall lay his claim from the next receiver. This continues in a successive form till the goods get to the final consumer. It also happens in the area of sale of animals such as cattle which practice is locally referred to as 'YAN-NAKAMA'. The aim of people promoting these practices is for the sake of making a living through the easiest way.

The Sharia in its characteristic manner of equitable remedy, allows the owner of the goods, on getting to the market and finding that the person who bought

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(1) Sahih Muslim (English) Vol. III Ibid Chapter DXCII.

the goods from him at the outskirts of the town, offered him lesser price than the current one in the market, the option of rescinding the sale or confirming it. But do people stick to this rule? The answer is in the negative. In any event, the ideal thing is that the seller should be allowed to go to the market at his own will and dispose of his goods at his own will, free of any influence from market intruders or swindlers.

4.2.4. (14) BAY'ATANI FI BAY'IN:

This is a situation where two sales are conducted within a sale. For instance where the seller tells the buyer: I shall sell this cloth to you for N50 cash-down or for N70 on credit.

It is reported in the Muwatta that it reached the ears of Malik that the Apostle of Allah (PBUH) forbade two sales within a sale(2). Qasim b. Muhammad was asked about the case of a man who purchased a thing for ten dinar on cash or for fifteen dinar at an appointed date on credit and he considered it bad business and prohibited it(2). This type of business is in vogue in wide dimension despite the prohibition among the Muslim Ummah. The sellers, who are shylocks anyway, are in a firm grip of the goods to be sold. The poor buyers, who are often compelled by unbearable financial disability have no option but to take the value of goods as dictated by the seller.

4.2.4. (15) BAY' BA'ADA NIDA'I AL-JUM'ATI:

This is a situation where any contract of sale conducted by a person possessing legal capacity, after the second call for the JUM'AT service is declared

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(1) Muwatta: (English) Ibid. Hadith No. 1353 of chapter 414.
(2) Ibid. No. 1355.

illegal. Ahmad bn Hanbal supports this reason for the prohibition with what Allah has stated in Surat Al-Jum'at:

> "O ye who believe: when the call is heard for the prayer of the day of congregation, hasten unto remembrance of Allah and leave trading ...."(1)

Many Muslims pay less attention to this prohibition. They transact business even when the Friday prayer is on. All they do in that hour is a void transaction in law.

4.2.5. SUMMARY:

Each of the four main causes of prohibiting a sale transaction has been treated in its respective chapter. However, one would still want to observe that the general practice in many Islamic societies is in consonance with the law. Usually, sale and purchase are conducted freely without making for stipulations. Stipulations are thus rarely resorted to and are applicable to extreme situations where the purchaser has some reservations on the genuineness of the goods to be purchased or the goods is just newly introduced to the market. Even here, one finds the problem of accepting the sale to be governed by stipulations. usually the seller refuses to accept any conditions made. The true legal position however is that valid stipulations are acceptable in law and where stipulated in a contract of sale, they have to govern that contract. But invalid stipulations, even if made, and consented to by the contracting parties, remain invalid and unenforceable.

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(1) Holy Qur'an: LXI: 9. Some Jurists make some exceptions such as where one purchases water to perform ablution in order to join the Jum'at prayer. Generally, see Fiqh al-Sunnah Vol. III page 149.

The prohibited forms of sales discussed are not exhaustive. the kinds of sales described above from No. 1-10 are a reminiscence of the old Arab customs before the advent of Islam. When Islam came, it denounced such practices and declared them illegal. Despite the present day awareness and development in the society, yet one may find some of these practices in a reformed or renewed form. It should be noted however that whatever reform is introduced into such a type of sale, unless the (Illah) cause of the prohibition is removed it shall still remain illegal and unenforceable. Prohibited sales numbers 10-15, are practiced in many Muslim communities of today. Research had shown generally that it is the zest of money making that makes people resort to such illegal deals. Such people perhaps have forgotten that Islam is not only a religion but a COMPLETE WAY OF LIFE, spelling out the minutest deal of how that life should be led through the fear of Allah; love and kindness to fellow being(1). Both the seller and the buyer should allow one another to enjoy the blessing of Allah the High which He bestows on the markets. They should be considerable to each other in order to reduce the hardships they unwittingly cause to the ultimate consumer of the goods. They should put into practice the Prophetic Traditions which states: "Let there be no cheating in Islam", "let there be no deceit when you conduct business transaction amongst yourselves." Finally a Muslim should recall the address of Prophet Shu'aib to his people when he said:

> "And, O my people give full measure and weight justly, and defraud not men of their things, and act not corruptly in the land making mischief. What remains with Allah is better

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(1) Hadith of the Prophet which states: "Anyone who believes in Allah and the Day of Judgement should love unto others what he loves unto himself.:

for you if you are believers"(1).

This may allow commerce to flourish under sane conditions of peace, security and contentment. Absolute honesty, sincerity and magnaminity, rather than greed, zest for wealth and all sorts of fraud, should teleguide the parties to a contract of sale. If there is sincerity and honest dealing amongst the businessmen, there shall be peace, security and tranquility in the market arenas. There shall, as a result, be peace, security and contentment throughout the nation.

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(1) Holy Qur'an: XI: 85-86.

CHAPTER FIVE

5.0. THE PAYMENT OF PRICE FOR GOODS:

5.1. What is Price for Goods?

In a sale contract, two elements constitute the subject matter of sale: (a) the goods which are to be sold and (b) the price which is to be offered in exchange of the goods purchased. Chapter two supra, has elaborately treated the subject matter of a contract of sale albeit the first leg of the two elements above that is the goods to be purchased and their conditions of validity. This chapter seeks to treat the remaining component part of the subject matter of sale, that is the price for the goods.

It seems that the general understanding of the term PRICE in the market is that amount of money payable for goods purchased or sold. Legally however and under Islamic Law, price means "THAMAN" or "SI'IR".

THAMAN has been defined by legal writers as follows:

> Price is that which the contracting parties agreed upon in exchange for goods(1).

The author of the Mejelle described price as "Semen", which is "the price of things sold and is a thing depending on the obligation arising from the contract"(2).

The above definitions, it should be observed, have by no means restricted the definition of "Thaman" to only the exchange of money for goods. It exceeds that and

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(1) Al-Zuhayly, W. (1989) Al-Figh al-Islami Wa Adillatuhu, Vol. IV, Dar Al-Fikr, p. 403.
(2) The Mejelle: The Preface: Art. 152.

can include an exchange of goods for goods(1). In the Black's Law Dictionary, the definition of the word price has been stated as follows:

> "Price; something which one ordinarily accepts voluntarily in exchange for something else. The consideration given for the purchase of a thing. Amount which a prospective seller indicates as the sum for which he is willing to sell(2)."

Thus, price of goods can be in the form of money, goods, chattels et cetera.

5.2. Condition of Validity for Price:

Like the goods to be purchased, before anything can be offered as a price, it has to satisfy some minimum conditions of validity. These conditions are as follows:

5.2.1. Purity of the Price:

It is a condition that the money or goods to be given as a price in exchange for goods purchased MUST be pure. The jurists say, for instance, it will amount to an illegal transaction for a purchaser to buy some goods and offer as its price alcohol or pig, or something that is hard to be purified.

Al-Jazairi stated:

> "Equally, something impure or that which contaminates and which can hardly be purified cannot be offered as a price. So if one buys an article which is pure and offers alcohol or pig, one's purchase is rendered invalid."(3)

5.2.2. Price Must be Known:

The price payable in exchange for goods purchased must be made known to the

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(1) SHACHT, in his Introduction to Islamic Law, 1964 ed. says that "price consists of fungible things (normally gold or silver)"

(2) Black, M.A. (1979) Black's Law Dictionary, fifth edition, West Publishing Co. p. 1070.

(3) Al-Jazairi, (n.d.) Kitab Al-Fiqh ala Mazahib Al-Arba'a, Vol. II, Dar Al-Fikr, p. 164.

seller. There must be a disclosure of the type, nature, kind, quantity of what shall amount to be the price of the goods. If there is any ambiguity, the sale shall be rendered void.

Dr. Wahabah Al-Zuhayly stated in his book:

> "A sale which does not state the price is void one."(1) For instance it is a void sale to say:
>
> > 'I have sold this shirt to you at a price equivalent to the shirt's value.'"

It is void for lack of knowing the exact price. Secondly, the value of the shirt may differ from one to another.

5.2.3. Price Must be Susceptible to Delivery:

The purchaser must be in a position to deliver the price to the seller except where the sale is made as a special condition(2).

Thus delivery of the goods to the buyer is among the obligations of the seller from the beginning of the contract as it is among the obligations of the buyer to deliver the price to the seller from the beginning of the contract. This is because delivery of the two items on exchange is necessary on the parties in order to confer reciprocal ownership on each one of them on the items exchanged(3).

5.2.3. (a) Obligation of the Buyer to Deliver the Price to the Seller before taking the possession of the Goods:

In a sale where exchange of goods and its price, which is in monetary value,

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(1) Al-Zuhayly, W. (1989) Al-Fiqh Al-Islami Wa Adillatuhu, Vol. IV, Dar Al-Fikr, p. 406.
(2) Such as credit sales.
(3) Al-Zuhayly, W. Ibid. page 413.

the buyer is obliged to deliver the price before taking possession of the goods purchased. This seems to be the majority view. The Maliki School, for instance, states:

> "It is obligatory on the buyer to deliver the price as it is obligatory on the seller, equally to deliver the goods. Should anyone of them say: 'I shall not depart possession of what is with me until I get what I have exchange (it) for,' the buyer will be compelled to surrender the price then he shall take possession of the goods purchased from the seller, Malik said: 'The seller shall be in possession of the goods till when he receives the price'."(1)

Hanafi School held the same view and they stated:

> "The Hanafis prefer the logical sequence: that it is an obligation upon the buyer to deliver the price first on demand by the seller except where he invoked the option of Ta'yin. This is in consonance with the saying of the (Prophet) May peace be upon him that: '(Payment of the price) is obligatory."(2)

The Hanafis however went ahead to add that even where the payment of price is delayed against the delivery of the goods, the debt in this circumstance cannot constitute an obligation, it becomes obligatory on the seller to deliver the goods on demand by the buyer(3).

The position with the Shafi'i and Hanbali Schools is that where the price is understood to be a debt, the seller will be compelled to deliver the goods to the buyer and then the buyer will be compelled to settle the debt to the seller. This is because possession of the right in the goods has passed to the buyer and the right of the seller, in this circumstance, is an obligation upon the buyer. The Jurisprudential

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(1) Al-Zuhayly, W. Ibid. page 414.

(2) Op cit.

(3) Ibid. The Hanafis exempted two types of transactions here. Salam sale and a sale where the price is a deferred one.

rule here is that, obligation of the price takes precedence over the obligation of the goods. If anyone of the contracting parties has discharged his obligation, then the other will be compelled to equally discharge his own. The Shafi'is however limited the application of this rule to where the seller does not entertain the fear of loss of the price and consequential litigation. If he fears loss of the price, he has the right to retain the goods till he takes possession of the price. Equally, the buyer can exercise the right of retention of the price if he fears loss of the goods purchased(1).

5.2.3. (b) Retention of the Goods by the Seller where the Price is not Settled:

Where a sale has been concluded, it has been seen, that the buyer has the obligation of settling the price of the goods first before the seller delivers the goods. Where the buyer fails to settle the price, then the seller reserves the right to retain the goods till when the price or a portion thereof has been settled by the buyer(2).

The above rule can only be applied under two conditions:

(i) That one of the two items of exchange (that is the price and the goods) should be free from debt whereas the other should be debt; for instance where the goods is bought with Dinars or Dirhams. But where both goods and the price are not subject of debt, or where they subjected to debt, then the exercise of the right of retention does not arise both should be delivered simultaneously.

(ii) That the price should be prompt and not deferred. If it is deferred (MU'AJJAL) then the right of retention does not exist as the deferment defeats retention.

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(1) Ibid. pages 414 -415.

(2) Ibid. page 415.

From the above therefore, if the whole price, except one Dirham, shall be deferred, the seller reserves the right to retain the whole of the subject matter as right of retention of goods is wholesome and cannot be fragmented(1).

Equally, where the buyer should settle all price except a Dirham or the buyer frees himself from the price except a Dirham, the seller can still exercise his right of retention(2).

Imam Malik is reported to have said:

"The seller should retain the goods till when he receives the price."

The Hanbali School is also of the same view that:

"The seller has no right to retain the goods on receiving the price."

The Shafi'is say:

"The seller reserves the right to retain the goods till he receives the price if he fears its loss, equally, the buyer reserves the right to retain the price if he fears loss of the goods."(3)

5.2.3. (c) Loss of the Right of Retention:

There are circumstances where the right of retention is lost. For instance, where the buyer introduces an element of mortgage, or a surety for the price, the right of retention of the goods cannot be lost by the seller, as mortgage and suretyship do not absolve the buyer from the obligation of the price(4).

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(1) Ibid. This right of retention slightly differs from the English law detinue/conversion. This is because in detinue the possessor of the goods retains it without right. The actual owner can claim an action for recovery and damages here, both the seller and the buyer have equal rights so long as the price is not delivered. No action can arise.

(2) Ibid. p. 415.

(3) Op cit: p. 416.

(4) Op cit.

But as for HAWALAH[1], the right of retention is lost according to Abu Yusuf[2].

5.2.4. Price Must be Mal Mutaqawwam:

It has been defined supra in chapter two, that Mal Mutaqawwam is a 'specific or determined property, the acquisition and enjoyment of which is permitted by the Sharia'. It follows therefore, that MAL GHAIR MUTAQAWWAM that is an indeterminate property cannot be a price per se.

It is stated as a general rule that:

> "Whatever does not qualify to be a subject matter of sale (goods), does not qualify to be a price."[3]

In comparison with conditions affecting goods, the following points should be noted with regard to condition of the price:

(i) Whereas it is a condition for the goods to be present and owned by the seller, that cannot be a condition for the price.

(ii) In Salam Sale[4]; it is unlawful to defer payment of price, but it is lawful to defer delivery of the goods. In an ordinary sale contract except mutually agreed, payment of price cannot be delayed.

(iii) The provision of affecting delivery of the price is on the buyer whereas the provision of affecting delivery of the goods is on the seller.

(iv) A sale without mentioning the price is a voidable one whereas a sale without mentioning the goods is a void one.

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(1) Hawalah is defined to mean a transfer of a debt from one debtor to another - see the Mejelle Book IV; Art. 673.

(2) Al-Zuhayly - Op cit page 416.

(3) Al-Jazairi (n.d.) Kitab al-Fiqh ala Mazahib Al-Arba'a, Vol. II, Dar Al-Fikr, page 169.

(4) See infra page, 193.

(v) Where the goods has perished after reciprocal exchange, no rescission of the purchase can be entertained but perishing of the price does not prevent rescission of purchase.

(vi) Where the goods perished before delivery, the sale can be avoided but the perishing of the price does not avoid the sale.

(vii) It is illegal for a buyer to dispose of moveable goods before taking delivery of it whereas it is legal for the seller to dispose of the price before receiving it.

(viii) It is the obligation of the buyer to deliver the price first in order to justify delivery of the goods purchased except where the seller agrees otherwise(1).

5.3. Perishing of the Price and the Price Stagnation:

Under the Hanafi School, if the price perishes at the Meeting Place of the contract (MAJLIS AL-AQD) and before it is delivered to the seller, two situations arise:

(i) If the goods is corporeal and MITHLI, the sale contract shall not be annulled, as its equivalent can be delivered. Where the goods is QIMI, the contract can be annulled.

(ii) Where it perished and its equivalent cannot presently be obtained as it is out of stock, but was available during the contracting period and perishes thereafter before delivery of it is taken, then Imam Abu Hanifah is of the view that the contract can be annulled. His two disciples however, Imam Yusuf and Imam Al-Shaybani are of the view that the contract shall not be annulled(2).

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(1) See generally pages 405-406 of Al-Zuhayly's Fiqh Al-Islami Wa Adillatuhu Vol. IV, Ibid.
(2) Ibid. page 410.

The great Imam, Abu Hanifah is of the view again that where a purchaser bought some goods with the currency in circulation but the currency stagnates that is, because no more a legal tender due to the emergence of new legal tender, the sale contract shall be annulled and the buyer shall return the goods if still available. Where the goods perished, then it's equivalent or it's value should be made good. This is because when the currency ceases to be legal tender, it cannot be used as a price. The rule is that there shall be no sale without price(1).

The two disciples of the Imam held contrary view that the contract should not be annulled. Rather, the seller should be allowed the option to confirm or annul the sale. The currency (money) becomes an obligation on the buyer. And whatever is an obligation does not perish. Stagnation in this respect should not be regarded as perishing of the price but as a defect and the seller should be allowed the option to accept the value of the price or annul the sale(2).

However, where the value of the currency has risen or devaluated the sale shall not be annulled, as rising or devaluing the currency should not occasion annulment of the price(3).

5.4. PRICE PROPOSAL:

5.4.1. Who Suggests Price?

One may begin by asking who suggests price of the goods to be purchased? Is it the seller or the buyer?

It is pertinent, in an attempt to answer the above question, to start by

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(1) Ibid.
(2) Ibid.
(3) Ibid. page 410.

quoting a Hadith from the Book of Imam Al-Bukhari where he states:

> "Narrated Anas (may Allah be pleased with him). The Prophet (PBUH) said, 'O Bani Najjar suggest a price for your garden.' Part of it was a ruin and it contained some date palms.(1)"

From the above Hadith, it is clear that the normal practice in a sale contract is that it is the seller, presumably the owner of the goods, that suggests the price of his goods which he intends to sell. The buyer then, after taking everything about the goods into consideration then makes his offer of the price. Where the minds of the contracting parties meet in consideration of the price, and the offer of the price is accepted by the seller, then the sale contract is said to have been effected.(2) Where the owner (seller) rejects the offer and demands for an increase, then the buyer may review his offer by increasing it or may withdraw his offer and vacate the sale proposal for other person who can make up increase(3).

Where sales are conducted through brochure and the price is suggested in the brochure, sale is conducted if the buyer pays for the stated price of the goods. This also holds good for self-service shop purchases where prices of goods are pasted on the goods and no further negotiation is entertained(4).

Sheikh Salih Abdul-Sami'i Al-Azhari observes as follows:

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(1) Dr. Khan, M. (1976) Sahih Al-Bukhari, (Arabic/English) Vol. III, 2nd. Ed. Turkey.

(2) This form of sale is known as the MUSAWAMA sale.

(3) This form of sale is known as the MUZAYADA sale. This form should be differentiated from the Najash sale discussed supra which is illegal as it offends reason and is ill-motivated.

(4) Refer to AL-TA'ATI Sale, supra. Imam Abu Hanifah and Shafi'i favour the use of spoken words to effect the agreement. See Jawahir-al-Iklil, Vol. II, page 2 commentary.

> "Or (where) the seller says, I have sold to you (the goods) at so much (price) and the buyer agrees. (Here) the seller is the first (in proposing the price) and the buyer is the second.(1)"

This does not however, render the proposal of the buyer from the start (as he is the one who proposed the price firstly) invalid. In other words, where the buyer suggests the price first and it is acceptable to the seller, then sale is effected. It is also stated in the same Jawahir-al-Iklil:

> "Where the offer precedes the acceptance or vice-versa, as if the buyer should tell the seller: 'sell me this thing at the price of 'X' Dirhams' and the seller should say: 'I have sold it to you at the price.' (Here) the buyer is bound even if he turns to reject that later.... or where the buyer says: 'I later .....' or where the buyer says: 'I have purchased it from you at (so much) price'.(2)"

Thus, there is no hard and fast rule as to who should suggest price of goods first.

5.4.2. AL-TAS'IR (Fixation of Price):

Al-Tas'ir is the process of setting down a targeted price on goods which is open for sale in the market where the seller (owner) should not be cheated and the buyer should not be oppressed(3).

During the period of the Prophet (PBUH) one day, some people told him,

> "O Messenger of Allah, the price has gone high may you set down the price for us. Then the Prophet (PBUH) replied them:
>
> > 'Verily,it is only Allah who fixeth price; He is the Restrainer; the Spreader; the Provider. I am indeed hoping to meet God without a claim from anyone of you that I have cheated him in his blood or property'."(4)

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(1) Al-Azhari, S. (n.d.) Jawahir-al-Iklil, Vol. II, Dar Al-Fikr, page 2.

(2) Ibid.

(3) Sabiq, S. (n.d.) Fiqh al-Sunnah, Vol. III, Dar Al-Fikr, page 160.

(4) Anas reported the Hadith. See Sabiq, Fiqh Al-Sunnah, Vol. III, page 160 and Al-Kashnawi, As'hal al Madariki, Vol. II, pages 305-306.

Jurists interpret this Hadith to mean that the Authority should not interfere in the freedom of transaction between Muslims by controlling the price of goods in the markets as that gives room to suspect that cheating thrives. Moreover, as people are allowed to conduct business transactions freely, any curtailment will infringe on such freedom.(1)

Secondly, fixation of price will cause the disappearance of goods from the market which will have the consequential effect of raising the price. When the price rises, it is the common man that suffers as he cannot afford to buy the goods.(2)

But in a situation where there arises a dire need for the Authority to interfere, then the law allows such interference in order to maintain the equilibrium of the market forces to protect the rights of the individuals, to prevent hoarding and cheating through the galvanising monetary power of the rich people. Perhaps that is why the Malik and Shafi'i Schools sanction the process of price control especially during price escalation period.(3)

With regard to the setting down of a fixed (targeted) price for goods in the market, the Prophet (PBUH) has set a precedence wherein he did not favour the fixation of definite prices for goods in the market. During the period of Umar, the second Khalif, it is reported that he once told a man he found selling goods in the market who used to lower down his price; that "you either increase your price or you leave our market."(4) So the general practice even was that any seller who reduced his price below what was obtainable in the market should be made to meet

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(1) Sabiq, S. op. cit. p. 160.

(2) Sabiq, S. op. cit. p. 160.

(3) Ibid.

(4) Malik reported it through Ibn Al-Musayyab that was Hatib Abi Baltah who was selling raisins in the market at a lower rate with the intention of putting his competitors to loss. See: Muwatta malik (English) chapter 407, Hadith 1340.

up with the market situation or that he should leave the market(1).

Ibn Juzay, a famous Maliki jurist, in his AL-QAWANEEN AL-FIQHIYYA stated:

> "It is unlawful to fix definite prices for people in the market. Anyone who increases or reduces his price (upon the normal practice of the people of the market) should be ordered to meet up with the price of the people (in the market). Where he declines (to do so), he should be shown the way out of the market."(2)

This is how the ideal condition of a market should be. Such practice brings uniformity and stability in the market; it brings about fair deal and understanding amongst the sellers inter se; it reduces wanton trade competitions.

But as it were, when things start to assume different dimensions; when practices in the markets start changing; no more that cohesion amongst the traders and everyone cares only for himself; then the Sharia, under the doctrine of NECESSITY, allows the Authority to interfere into the market affairs to restore sanity. That is why Imam Malik allows the exercise of AL-TAS'IR. Some of the Shafi'i jurists also allow AL-TAS'IR from among the ZAIDIYYA sect of the Shia, jurists like Sa'id bn Al-Musayyab, Rabi'ah bn Abdul Rahman, Yahaya Ibn Sa'ad al-Ansari. legalise the institution of TAS'IR. The author of the HEDAYAT AL-TULLAB observes:

> "It is undesirable for the leader to determine prices for the people. But where the food merchants are despotic and transgressing (the value of the food items) wildly, and the Judge is unable to restrain them but only through the process of price curtailment, there then, he shall incur no blame. If he so does in consultation with people of reason and vision, so as to restore sanity to the Muslims."(3)

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(1) Al-Kashnawi; (n.d.) As'halu Al-Madariki, Vol. II, Dar Al-Fikr, page 305.

(2) Ibid.

(3) Sabiq, S. (n.d.) Fiqh al-Sunnah, Vol. III, Dar Al-Fikr, page 161.

5.5.1. MODE OF PAYMENT OF PRICE:

It has been stated supra that "there shall be no sale without price". This is so, as it is the payment of price of the goods purchased that differentiates a contract of sale from other civil contracts such as gift, Waqf; deposition, donation, trust, loan et cetera. So, payment of price of goods purchased is a quintessence or rather, is of essence of contract of sale. A contract is not executed until the price is agreed upon. In a more restricted legal sense however, payment is the performance of a duty, promise or obligation or discharge of debt or liability, by delivery of money or other value by a debtor to a creditor, where the money or other valuable thing is tendered and accepted as extinguishing debt or obligation in whole or in part(1). In a tighter relationship with a contract of sale therefore payment of price may mean a delivery of money or it's equivalent in either specific property or services by one person from whom it is due (known as the buyer), to another person, (the seller) to whom it is due.

As observed in the definition above, goods purchased can adequately be paid in money or in goods. There are situations where goods are sold on credit or where the price is paid in advance of the delivery of the goods purchased. Some of such modes of payment are considered below:-

5.5.2. SALAM/SALAF SALE

5.5.3. SARF SALE

5.5.4. MUQAYADHA SALE

5.5.5. CREDIT SALE

5.5.6. MUZAYADA SALE

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(1) Black, M.A. (1979) Black's Law Dictionary. (Ibid), p. 1060.

5.5.2. SALAM SALE:

(i) Definition: This is a special kind of sale, although sometimes regarded as a separate contract. It is also called SALAF. The speciality of this kind of sale is that there is a payment of the price and goods to be delivered later. So payment of the price here is always in advance. A modern legal writer observes as follows:-

> "In Salam, the price must be paid in cash at the conclusion of the bargain. A bargain must be for definite payment at a definite future date of a RES FUNGIBILIS. (Something which is not specific but is sold quantity by quantity)"(1).

Al-Zuhayly defines Salam as follows:-

> "Al-Salam or Al-Salaf is a sale with a deferred delivery (of goods) with an advance payment; or it is the sale where a known obligation (money capital) is advanced and the delivery of goods is deferred to sometime. In other words, it is (a process in which) where an existing counter-value is delivered in exchange of a counter-value described whose obligation (discharge of) is deferred to sometime(2)."

(ii) General Conditions Governing a Salam Sale:

For Salam to operate, the following conditions should be fulfilled:-

(a) It should take effect in respect of goods the kind of which is known such as wheat, dates and the species and which can be fixed(3).

(b) It's quantity should be known in terms of measurement or weight;

(c) The payment of the price at the Majlis al-Aqd is effected

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(1) Qadri, A. (1986) Islamic Jurisprudence in the Modern World, Taj Printers, New Delhi, p. 325.
(2) Al-Zuhayly, W. (1989) Al-Figh Al-Islami Wa Adillatuhu, Vol. IV, Dar Al-Fikr, p. 596.
(3) Ibid: page 599-600; The Mejelle: chapter VII; Section III, Art. 386.

before the Majlis al-Aqd comes to an end.

(d) The place of delivery of the goods purchased to be mentioned.

(e) The period of delivery should be known.

(f) The goods should be described with a known description(1).

(g) Details of the kind of payment should be given, example it is Dirham, Dinar, Dollar, Naira et cetera. If it is from the Mikyal, or Mauzun such as wheat, rice, cotton or iron such fact should be furnished vividly.(2)

(h) Where there are different currencies or moneys in use in a country, the type should be made clear example it is in "American Dollar". But if only one currency is in circulation as the legal tender such as Naira, then this poses no problem. Where the price is to be given in goods, such as wheat, it should be stated whether it is a product of dry season farming or is a product of natural rain.

(i) There should be an explanation of the prices quality such as, it is good, medium or low.

(j) Notice of the quantity of the price where it is susceptible to measurement (Mikyal, Mauzunat or Ma'adudat) should be given in accordance with the way it is measured for instance Salam is invalid where the buyer just pointed at

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(1) Al-Zuhayly, Ibid. pages 599-600; The Mejelle chapter VII, Sect. III, Art. 386.

(2) Al-Zuhayly, Ibid.

certain Dinar (unmeasured) or wheat (unmeasured) and offered it as the price.

(k) That the money should be examined carefully that they are the valid ones in circulation. This is in order to remove any ambiguity which may lead to litigation(1).

5.5.3. SARF (EXCHANGE OF CASH FOR CASH):

5.5.4. (i) Definition: This is another form of sale and where payment is effected by cash and the subject matter of sale itself is cash. It is called exchange of cash for cash, example buying the american Dollars in Nigerian Naira or the vice-versa. It is stated in a book that:

> "It is the sale of gold or silver for silver or the sale of one(of them) for the other"(2).

The author of the HEDAYA defines SARF as:

> " BEEYA SIRF means a pure sale; of which the article opposed to exchange to each other are both representatives of price. This is termed Sirf. Sirf also means a superiority; and in this kind of sale a superiority is the only object; that is, a superiority of quality, fashion, or workmanship; for gold or silver being with respect to their substance, of no use, are only desirable from such superiority.(3)"

5.5.5. Conditions of Validity: For the Sarf to take place properly, four conditions are necessary:

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(1) The two companions of Abu Hanifah do not consider this as a required condition.

(2) Al-Jazairi: (n.d.) Al-Fiqh ala Mazahib Al-Arba'a, Vol. II, Dar Al-Fikr, page 260. See also Al-Zuhayly's Fiqh Al-Islami, Vol. IV, page 636.

(3) Hamilton, C. (1979) The Hedaya (Commentary on Islamic Laws) Kitab Bhavan Publishers, India, page 312.

(a) The Exchange must take place before departing the MAJLIS AL-AQD.

It is a condition indispensable that each of the parties prior to their departure from the meeting place, take possession of the article respectively given in exchange, this is in order to avoid the transaction falling into usurious one because, if one of the parties has given his seisin and the other withholds his, the transaction may have the elements of RIBA AL-NASI'A. The Prophet (PBUH) has said:

> "Sell gold for gold, from hand to hand, at an equal rate, according to weight. For any inequality in point of weight is usury."(1)

Ibn Shihab, narrated Malik bn Anas to have said:

> "I was in need of change for one hundred Dinars. Talha bin Ubaidullah called me and we discussed the matter, and he agreed to change (my Dinars). He took the gold pieces in his hands and fidgeted with them, and then said, 'wait till my storekeeper comes from the forest'. Umar was listening to that and said, 'By Allah! you should not separate from Talha till you get the money from him, for Allah's Apostle (PBUH) said, 'The selling of gold for gold is Riba (Usury) except if the exchange is from hand to hand, and similarly, the selling of wheat for wheat and dates for dates is Riba unless it is from hand to hand, and the selling of barley for barley is usury unless it is from hand to hand, and dates for dates is usury unless it is from hand to hand.(2)"

(b) The Articles of Exchange must be Exactly Equal in Point of Weight: If the Articles are the same.

The sale of gold for gold, or silver for silver, is permitted only when they are exactly equal in point of weight: even though one may look superior to the other.

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(1) Al-Zuhayly, Ibid. p. 637. See also Hamilton's HEDAYA, p. 312, Book XVII.

(2) Reported in Sahih Al-Bukhari (English Translation) Vol. III, chapter 78, p. 211. See also Hadith No. 1321 of Muwatta Imam Malik (English).

In this circumstance since weight is same the quality is as well deemed to be same(1).

Abu Bakr narrated that Allah's Apostle (PBUH) said:

> "Don't sell gold for gold unless equal in weight, nor silver for silver unless equal in weight, but you could sell gold for silver or silver for gold as you like.(2)"

Abdullahi Ibn Umar narrated that Abu Sa'id narrated a similar narration of Allah's Apostle (PBUH) and when Abdullahi Ibn Umar met him, he said:

> "O Abu Sa'id: what is the (narration) which you narrate from Allah's Apostle (PBUH). Abu Sa'id said: 'It is concerning exchange; I heard Allah's Apostle (PBUH) saying, "Do not sell gold for gold unless equal in weight, and do not sell silver for silver unless equal in weight.(3)"

(c) Should be free of Khiyar al-Shart (Option of Stipulation).

In a sale through Sarf (exchange of cash for cash) Khiyar al-Shart (option of stipulation) shall have no effect either on both or on anyone of them. This is because taking possession of the article given in exchange before departure from the meeting place is a condition is Sarf contract. Option of stipulation is a bar to taking absolute possession of the article purchased. So if option of stipulation forms part of the contract of Sarf, it is void ab initio. This is however to the exclusion of Khiyar al-Ru'yah (option of inspection) and Khiyar al-Aib (option of defect) as none of the two creates a bar to taking of absolute possession of the article sold or exchanged.

(d) There shall be no Deferment of the Exchange:

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(1) Al-Zuhayly, W. (1989) Al-Fiqh Al-Islami Wa Adillatuhu, Vol. IV, Dar Al-Fikr, p. 638.
(2) Bukhari: Sahih Al-Bukhari (English) Vol. III, pages 211-212, chapter 79.
(3) Op cit. page 212. See also further: No. 385.

It is a condition precedent that the Sarf Contract shall be free from deferment of exchanged goods. Where there is deferment, the Sarf is rendered void ab initio as reciprocal exchange of the articles, the subject matter of exchange before the parties depart the meeting place is a condition precedent(1).

Generally, exchange of gold for gold or silver for silver or either interchange is known as AL-MURATALAH and it is lawful(2).

It should be observed that the Sharia has permitted the sale of gold for silver at an unequal rate as these articles are of different genus. In such a case too, taking of mutual seisin is indispensable because of the Hadith of Malik bn Anas quoted supra. Also, in the sale of article having any gold or silver upon it, the price paid down is for the gold or silver. For example, if a person sold for N100, a sword of which the silver ornaments amount to N50 and the purchaser paid immediately N50 of the price in prompt payment such a sale is considered to be for the price of the ornaments(3). It should be noted however, that in this circumstances, the sale of a sword with silver ornaments in exchange for Dirham (Naira) is lawful only where the silver or the Dirham exceeds that of the ornaments and that if the silver or the Dirham be either barely equal to, or less than that of the ornaments, or if it be not known whether it be more or less, the sale is invalid. The reason of the invalidity is because of the JAHALA (uncertainty), whether it be more or less.

Where the article, on each side, consists of two species of money, the sale at an unequal rate is lawful, for example, the sale of two Dirhams and one Dinar, in

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(1) See generally; Al-Zuhayly: Ibid pp. 636-647; Al-Fiqh ala Mazahib Al-Arba'a Ibid pp. 270-272; Al-Bukhari (English) Vol. III; Muwatta Imam Malik (English Translation) Book XIX chps. 399, 400 & 401. pp. 293-297; Bidayat al-Mujtahid Vol. II pp. 146-151; The Mejelle Bk. I p. 17, Art. 121.

(2) Ibn Rushd; Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid, Vol. II page 149.

(3) Ibid. page 148.

exchange for two Dinars and one Dirham is valid because in this case, the Dirhams are considered as opposed to the Dinars and as they are of different genus; an inequality in the proportion is therefore admitted. Imams Shafi'i and Ziffar maintain that this form of Sarf is unlawful(1).

So, money exchange is purely legal where it is not adulterated by the Sarraf (money exchanger). Although people resort to money exchange mostly as a necessity, others carry it as a usual business of Sarf. It happens usually when one embarks on a journey involving exchange of one currency to the other from one domain to another. At any rate one has to know the exact value of that domain currency before one can insist to get one's legal right in the exchange.

5.6. MUQAYADHA SALE (BARTER):

5.6.1. Definition: Barter is the exchange of goods or services without using money. In other words, it is a sale where the subject of sale (goods) is goods and price also is goods. This form of sale involving goods offered as price is valid under the Sharia.

The author of the Mejelle calls it "Bey Muqayaza". He defines it in Article 122 as: "'Bet Muqayaza' is to exchange specific property (Ayn) for specific property, that is to say, property (Mal) for property without either of the two parties paying money".

Example of that is where 'A' took his bag of guinea corn to the market for sale, 'B' who brought his bag of millet wanted a bag of guinea corn. Both 'A' and 'B' agreed to exchange their commodities. It is good sale, once they are equal in value.

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(1) Hamilton, C. (1979), The Hedayat, (commentary on Islamic Laws), Vol. II, Kitab Bhavan, pages 312-317.

As observed in the Mejelle, since the two things bartered are looked upon as the price of one another, with regard to these conditions about things which are sold are force(1).

5.6.2. Authority:

(a) Sulaiman b. Yasar reported: "The animal fodder of Abdul-Rahman b. Aswad b. Abd Yaguth had exhausted and he asked his slave to take wheat from the house and bring barley in equal measure."(2)

(b) Hasan b. Muhammad b. Ali b. Abi Talib reported that Ali b. Abi Talib sold his camel named Usaifir in return for twenty camels (on credit)(3).

(c) Nafi reported that Abd Allah b. Umar bought a she-camel in exchange for four camels and arranged that those four camels should be delivered to the owner at Rabdhan(4).

(d) Malik asked Ibn Shihab whether it was proper to sell one animal in lieu of two at a future appointment time. He replied that there was no harm(5).

It should be noted that the Sharia prohibits the sale of animals in return for meat(6).

Even though barter is permitted, the parties involved in it have to exercise every bit of care in order to avoid running into usurious transactions especially on cereals, dates et cetera. A standard for exchange has to be known such as weights, quality, quantity, measurements, so that no one will be duped of cheated.

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(1) Art. 379 of the Mejelle.
(2) Muwatta Imam Malik (English) page 298.
(3) Ibid. Hadith No. 1342, page 299.
(4) Ibid. page 299 Hadith No. 1343.
(5) Ibid. Hadith No. 1344.
(6) Ibid. Hadith nos. 1347 - 1349.

5.7. CREDIT SALES:

5.7.1. Definition: Credit sales are sales contracted between the contracting parties where the seller, known as creditor advanced the goods to the buyer known as the debtor, with the understanding that payment of the price of the goods so advanced will be effected in a given time.

As explained earlier, where no time of payment is fixed, the time for payment expires within a month from the time of delivery. This means that a sale is good if it is agreed for any fixed delay for payment which is clear in the minds of the parties, for instance "price or part thereof to be paid within so many days, or months or years". A sale for deferred payment or for installmental payments (credit) is there fore good.

5.7.2. Authority:

(a) Narrated by Aisha (may peace be upon her):

"The Prophet (PBUH) purchased food (grains) from a Jew on credit and mortgaged his iron armour to him"(1).

(b) Selling animal on credit - see Ahadith nos. (1342 - 1344) of Muwatta Imam Malik quoted supra.

(c) Where the debtor becomes insolvent or dies: Where a debtor could not settle the price of goods he took on credit, the creditor can reclaim his goods once found intact.

Abu Bakr b. Abd-al-Rahman b. Harith b. Hisham reported that the Apostle of Allah (PBUH) said:

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(1) Bukhari: Sahih Al-Bukhari (English), Vol. III p. 161 Hadith No. 282 (repeated in No. 90, p.211).

> "When a man sold his goods to someone and the buyer became bankrupt and the seller did not realize his money but found his article intact with the buyer, he has better claim to it. If the buyer dies, the seller and other creditors will have equal rights(1).

Again, Abu Huraira reported that the Apostle of Allah (PBUH) said that if a man sold his goods and the buyer became bankrupt and the seller found his article intact with the buyer, he is better entitled to it than others(2).

That is the strict provision of the law. As the Sharia is a religious Law, it encourages respite and remission. So one is exhorted to treat both the solvent and the insolvent leniently. If the debtor is in a straitened position and insolvent, he should be given remission in debt and respite in demanding repayment from him. And even if he is solvent, leniency should be shown to him. The saying of the Prophet should be remembered that, Allah shall not be Merciful to he who is not merciful to his fellow beings. Hudhaifa (may Allah be pleased with him) reported the following Hadith from the Prophet (PBUH) saying:

> "A servant from amongst the servants of Allah was brought to Him (Allah) whom Allah had endowed with riches. He (Allah) said to him: What (did you do) in the world? (They cannot conceal anything from Allah). He (the person said: O my Lord, You endowed me with Your riches. I used to enter into transaction with people. It was my nature to be lenient to (my debtors). I showed leniency to the solvent and gave respite to the insolvent. Whereupon Allah said: I have more right than you to do this to connive at my servant. Uqba b. Amir al-Juhani and Abu Mas'ud said: This is what we heard from Allah's Messenger (PBUH).(3)"

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(1) Muwatta Imam Malik (English) No. (1365).

(2) Ibid: No. 1366. Reported in Sahih Muslim, Ahadith nos. 3782 - 3787 (English version) Vol. II pages 822 - 823.

(3) Reported in Sahih Muslim (English) Vol. III, Hadith No. 3791 of chapter DCXV. See further Ahadith nos. 3788 - 3795 of the same chapter, same book.

5.8. MUZAYADA SALE (SALE BY INCREASE):

5.8.1. Definition: Muzayada is the method of selling things in which each item is sold to person who offers the most money for it(1).

5.8.2. Authority:

(a) It is reported in Sahih Al-Bukhari that Ata said, "I saw the people seeing no harm in selling war booty by increase.(2)"

(b) Jabir bin Abdullahi narrated: "A man decided that a slave of his would be manumitted after his death and later on he was in need of money, so the Prophet (PBUH) took the slave and said: "Who will buy the slave from me?" Nu'aim bin Abdullahi bought him for such and such price and the Prophet (PBUH) gave him the slave.(3)"

This form of sale, by way of increasing the price (Muzayada) should however be differentiated from the NAJASH sale treated in chapter IV supra. Whereas the former is free from any deception and therefore legal; the latter is based purely on deception and is thus declared illegal. It should also be noted that the owner can appoint an agent on his behalf.

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(1) Hornby, A.S. (1989) Oxford Advanced Learner's Dictionary, Oxford University Press.
(2) Bukhari (English) Chapter 60, page 198.
(3) Bukhari: Sahih Al-Bukhari (English) Vol. III, p. 198.

5.9. Time for Payment of Price:

There are several kinds of payments such as lump-sum payment, installmental payment, compulsory payment, constructive payment, down payment et cetera. This sub-topic examines briefly the general rules relating to one time of payment of price.

Unless it is stipulated by parties, the usual practice in sales is that price is delivered to the seller before departing the meeting place for the contract. In other words, the payment of the price is effected immediately when it is agreed upon. It has been stated in the Mejelle as follows:

"A sale without stipulating as time is an agreement for ready money.(1)"

In Hamilton's HEDAYA it is stated:

"A sale is valid either for ready money or for a future payment.(2)

Where it is agreed by the parties that payment shall be deferred or shall be by instalment, then it is incumbent to fix the time in which each shall respectively be effected. Where time for effecting payment is not fixed, the sale is Fasid (void). Where a sale is understood to be made on credit from the start, with no time fixed, the time for payment expires within a month from the date the buyer takes delivery of the goods purchased. Equally, in a situation where time is fixed the time begins to run from the time of delivery of the goods sold.

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(1) Tyser, C.R. et al (1967), The Mejelle, Punjab Educational Press, Lahore, Book III Article 251.

(2) Hamilton, C. (1979) The Hedaya - Commentary on the Islamic Laws, Kitab Bhavan Publishers, New Delhi.

5.10. Pricing Phenomenon in Nigerian Markets:

5.10.1. Empirical Study:

All that has been seen above is the provision of the Sharia pertaining to price of goods. It has been said several times that the law is revealed to educate, guide and fashion a Muslim to be moderate, happy and successful in his life both here and Hereafter. It is to be observed that anytime the provision of the Sharia is taken in contrast with the practice in the society, one will undoubtedly see clear deviations. Are the Muslims not given clear revelations to guide them? Answer to this question will be proffered with lucidity towards the end of this treatise. But in a short and precise manner, the answers are not far fetched. Firstly, Muslims are a chosen community and the Almighty Allah has richly blessed them with a clear guide(1). The guide has made clear what is right and what is wrong. The choice is entirely left to the individual(s)(2). Secondly, deviations arise due to some factors: (a) preference of personal lust or interest: (b) desire to become rich overnight; (c) absence of pious responsible leadership.

Research conducted in our markets show that in about 98% of cases, it is the buyer who asks the seller for the price of the goods he intends to buy. The seller will then tell him the selling price in so many ways. Through the process of negotiations, if both are patient, they then arrive, ultimately, at an agreed price and the contract is effected. Hardly do sellers state with all honesty the actual selling price of goods. Where some opt to do so, the buyer then suggests a lower price. This naturally

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(1) Qur'an: XVI: 89. "We have sent down to thee the Book explaining all things, a Guide, a Mercy and Glad Tidings to Muslims." See also chapters III: 138; X:57; XXVII:2; XXXI:3; XL:20 et cetera.

(2) Qur'an: LXXVI:3 - "We showed him the Way; whether he be grateful (rests on his will)."

offends the seller. It makes him vow not to sell the goods to that particular buyer, "even if he is the only buyer existing". This therefore disrupts the process of buying/selling. It should be appreciated that in a process of sale and purchase, one need not offend another. The seller and the buyer ought to assimilate the Islamic principle of "LA DHARARA WALA DHIRARA" (let there be no offence against one another). The parties have to cultivate the spirit of diplomacy, patience and mutual love, trust and confidence. Trade should be seen as a necessary means of mutual exchange of not only goods and prices but exchange of mutual cordiality and brotherliness as well. What happens to the buyer today is what may happen to the seller tomorrow on the same or even different premise. It is the saying of the Prophet (PBUH) that a believer is he who loves unto others what he loves unto himself(1). And a good Muslim is he who frees others from the evils of his hand and tongue(2).

An empirical study of the Nigerian markets reveals that the situations of the commodities in the markets are most unpredictable. Prices of the goods are always fluctuating. Below is a random sampling of what some of the people interviewed during data collection, said:

(i) A teacher by profession:-

> "Goods in the market today are very expensive, very unstable and unbearable with general upward trend."

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(1) Khan,M.Z. (1985) Riyadh al-Saliheen (English) 1st. ed. EEF Publishers, Beirut, Lebanon, p. 158.

(2) Abdullahi Ali, in his Translation and Commentary on the Holy Qur'an observes: "All bounties proceed from God. They may be by physical gifts, e.g. food, clothing, houses, gardens, wealth etc. or intangible gifts e.g. influences, power, birth and opportunities flowing from it, health, talents etc. or spiritual gifts, e.g. insight into good and evil, understanding of men, the capacity of love etc. We are to use all in humility and moderation. But we are also to give out everyone of them something that contributes to the well-being of others. We are to be neither ascetics nor luxurious, neither selfish misers nor thoughtless prodigals." Footnote No. 27 on page 17 of the Translation referred to above.

When asked about causes for the above, he replied:

(1) "Government policies especially devaluation of the Naira, high import duties and ban on importation.

(2) Nigerians inability to control prices and general avarice towards money."

(ii) Another person interviewed who was a farmer by profession and farming consumable products stated:

"Condition of goods in our markets today is not something to talk about because of their high prices. A common man finds it difficult to afford three square meals a day. You find that instead of price of foodstuff falling during the season of harvest, they start to increase."

As to the causes of the above, he opined:

"Their causes are due to shortage in the supply of fertilizer, farming implements and equipments."

He observed further:

"That it would be difficult for any fixed price on sale of cereals by either the state or local government without Government improving on the supply of fertilizer, farm implements and inputs."

(iii) Another interviewee was a labourer on a salary of N125 per month. He said:

"No scarcity in the market but goods are very expensive and unbearable."

He traced the cause to the leaders:

"Leaders are responsible. They refuse to control prices. They refuse to use their powers to ease difficulties."

(iv) The fourth interviewee was a Senior Statistic Officer, he observed that:

"Quality of the goods in the market today are below expectation. Prices are too high that is, unbearable. Some goods are scarce, for example automobiles."

On causes, he said:

"I personally feel it is because of government policy that is, SAP, SFEM. Few machination of middlemen and government lack of checking excesses."

He opined that:

"Government should supervise the buying and selling of cereals by either setting up Price Control Board or set up a Committee to see to the sale and also ban middlemen in the sale. Marketing Board should be reviewed."

(v) The fifth interviewee was a dispenser. His observation is as follows:

"Goods as I know and as I can explain to you here is that things have changed totally for I can give you one example on maize. Maize was forty kobo per measure but now a measure is one Naira ninety kobo (N1.90). So the prices are unbearable."

Concerning his opinion on the causes, he said:

"Well, to my opinion, I can say that, that of maize in particular, I have mentioned is caused by the breweries that are using it for high production of beer."

His suggestion is that:

"To my own suggestion, I think it is better for government to take action on taking a uniform price of commodity because we have a variety of goods. If government means to correct the errors it will be very important so hat consumers will feel free and feeling of self-government in the country."

Almost all the questionnaires returned seem to agree on the following major issues:

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(a) Prices of goods in the markets are fluctuating and almost unbearable.

(b) There are several causes to that:

(i) government insensitivity to the cause of common man;

(ii) the nefarious activities of the rich/middlemen who cause hikes in the prices:

(iii) some fiscal policies introduced by the government such as SAP, SFEM and FEM et cetera.

Many of the interviewees went on to suggest among other things, the setting up of a Price Control Board and other related bodies. Many of the questionnaires used, were responded to at the initial stage of this research. That was 1987. As at the time of writing this topic however, a world of dramatic events, worsening the price situation in the markets, have taken place; embargo on importation of some essential commodities such as rice, wheat and some raw materials used by some commercial companies to produce some of the essential commodities, increase in tariffs generally, lack of fertilizer or its unbearable cost which affect large production of food items and above all increase in the petroleum which indirectly affected everything in the country including transportation and costs of transporting goods from the place of production or delivery to the market. These, naturally, affect the stability of goods in the market. It is certain that the common man cannot but yield to the situation and as one of the interviewees exclaimed, "If such practices continue, people may die of hunger, because some prices, are far beyond the reach of the buyers."

5.11. THE PRICE CONTROL BOARD:

This was a Board first established for Nigeria in 1970. It commenced

operation on the 25th. day of May, 1970. Section 2 of the Decree established a Committee for each of the then 12 States of the Federation.

5.11.1. Powers, Aims and Objectives of the Board:

Even though the Price Control Decree, No. 31 of 1970 (hereinafter referred to as "The Decree") did not specifically mention the powers, aims and objectives of the Price Control Board (hereinafter referred to as "The Board"), it is clear from section 3 that the Board could fix controlled price on some specified goods. Schedule 1 listed about 23 items as specified and termed them "Controlled Commodities". They are as follows:

"1. Textiles and clothing
2. Cement
3. Roofing Sheets
4. Beer and Stout
5. Soft Drinks
6. Sugar
7. Tyres and Inner Tubes
8. Flour
9. Matches
10. Bicycles and Spare Parts
11. Salt
12. Tinned Meat
13. Tinned Fish
14. Kerosene
15. Petrol

16. Diesel Oil

17. Fuel Oil

18. Motor Vehicle and Spare Parts

19. Milk

20. Building Materials

21. Tobacco

22. Pharmaceuticals

23. Educational Materials"

These were the items specified to be controlled by the Board and its Committees at the State level although sub-section 2 section 3 states:

> "The Board may by order, add any goods to the said schedule or delete any goods thereof."

The main powers of the Board as earlier on stated were contained in section 4 which states:

"4 - (1) The Board may order -

(a) Fix a basic price for any controlled commodity in accordance with sub-section 2 below, and

(b) Fix the permitted increase for the commodity in respect of any state in accordance with sub-section (3) below, and the basic price plus the permitted increase shall then constitute the controlled price (which shall be the retail price unless the Board in the order otherwise directs)

for the commodity in the state.(1)"

In section 5, the Decree conferred the Supervisory power of enforcement of the orders of the Board on the Board's Secretary.(2) The Board's orders were enforced by the Enforcement Staff mentioned in the section, who could:-

> "(a) enter and inspect any premises in the occupation or under the control of any manufacturer, wholesaler or retailer, or
>
> (b) examine any books, accounts or other documents relating to the trade or business of any manufacturer, wholesaler or retailer, or
>
> (c) require any manufacturer, wholesaler or retailer to furnish any information in relation to his trade or business, or
>
> (d) do any other thing necessary or expedient for the proper discharge of his functions."

By the Enabling Amendment Decree of 1971, the Board in November, 1972, passed some regulations which threw more light on some aspects of the main Decree by compelling sellers to display controlled price and mark the goods; keeping of record of stock and keeping and issuing of invoice.

Section 6 of the Decree prohibiting sales above controlled price whereas section 6 of the Regulatory Decree of 1972 stipulated that controlled prices were to

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(1) Underlining is supplied. The Decree defines 'Basic Price' to mean in the case of goods produced in Nigeria, the 'price ex-factory' and in the case of imported goods, 'the duty-paid' landed cost in Nigeria. Whereas, 'Permitted Increase', in relation to any particular controlled commodity and sate, is the amount representing transport and other costs which in the opinion of the Board ought properly to be added to the basic price in order to represent a fair price (wholesale or retail, as the case may be) in the State.

(2) Formation of the membership of the Board and its Committees had been given in Sections 1(1); 1(2); 2(2); 2(3) and Section 5(2) and (3) gave powers of employment of Staff called generally as inspectors who worked under "The chief Price Controller" who was responsible to "The Chief Price Controller".

be the maximum prices only.

> "It is hereby declared that whenever the price of any controlled commodity is fixed by the Board, such price shall be treated as the maximum price chargeable and it shall be lawful for any person to sell such commodity at any price below that fixed by the Board."

The Decree and its Regulations created offenses and penalties for those who transgressed against the stipulations of the Decree or the Regulations. The penalties range from seizure of goods and subsequent forfeiture by owners; selling of premises of business; disposal of seized goods on fulfilment of some conditions (Schedule 2 of the Decree), prosecution before a Court of Law where if found guilty, a person may be sentenced to a fine which did not exceed 1,000 (One thousand pounds) or an imprisonment term, the longest not exceeding three years; or both fine and imprisonment. Among such offenses is HOARDING which is treated under Section 7 of the Decree.

This is a brief analysis of the nature and activities of the Price Control Board as introduced into the country during the period popularly referred to as "Oil-boom period".

5.11.2. COLLAPSE OF THE PRICE CONTROL BOARD:

The Price Control Board had almost operated for about five years then there was a change of Government (Gowon to Murtala). Gen. Murtala, in his drive to sanitise the whole Nation particularly curbing the excesses of bribery and corruption, fraud and all other dishonest dealings, felt that the Price Control Board needed to be reviewed. he set up a Panel under ONITIRI, the panel was popularly known as "ONITIRI COMMISSION". The Commission carried a surgical operation on

the activities of the Price Control Board. The Commission recommended to Government that the Price Control Board should be reviewed and a new Commission or Agency if Government felt it necessary should replace or complement the Price Control Board. It was sequel to this that a new Agency known as PRICE INTELLIGENCE AGENCY was set up by the Murtala regime.

Unfavourable complaints started mounting against the Price Control Board/ Price Intelligence Agency. Immediately Alhaji Shehu Usman Aliyu Shagari took over as a civilian head of State, he abolished in 1980, the Price Control Board. In his 1981 Budget Proposal to the National assembly, and while re-counting the reasons for the abolition, the President said, inta alia:

> "In my last Budget Speech, I announced the abolition of the Price Control Board. This decision was due to a variety of reasons. It was influenced by the realisations that, given the best of intentions, a rigid price control mechanism cannot be effective in a situation of acute shortage. In our present stage of economic development, where suppliers and manufacturers are in near-monopoly-positions and that the distribution system is deficient and characterised by long chains, competition is bound to be severely limited. In these circumstances some measure of price administration, in the interest of the common man cannot be avoided. During the year, many manufacturers and distributors assumed that with the abolition of Price Control Board, they were free to increase prices without due regard to cost factors and public interest. The administration cannot accept such a situation. We shall continue to issue flexible guidelines that will ensure fairness to consumers and reasonable level of profit to investors."

What was more was that the President promised to ameliorate the deteriorating condition of price by -

> "facilitating the importation of those food items for which there is identified gab between local production and demand."

As a result, the President removed the shortcomings of the prevailing system

of issuing import licences for certain types of food items such as rice. He announced:

> "Henceforth, licences will no longer be issued to individuals but direct to Government Agencies adjudged competent to import and sell item at controlled prices. In addition, I have set up a Special Task Force to monitor the new system for the importation and distribution of essential commodities."(1)

Three main reasons were identifiable from the President's speech, for the abolition of the Board:

(i) There were acute shortages of essential commodities in the markets;

(ii) Suppliers and manufacturers were in monopoly positions to the disadvantage of ordinary buyer/consumer;

(iii) The distribution system was deficient and was characterised by long chains before the commodity got to the final consumer.

These were the reasons. But of more cognate and profound, was the reason which the President veiled or rather glossed over, that is the corrupt practices of the officers enforcing the policies of the Price Control Board/Intelligence Agency who no sooner than later, turned into self enrichment.

having this at the back of one's mind, one may ask: can the Price Control Board be of any relevance, with the present set-up of things; same people, same conditions and perhaps same authority in the country?

The situation may change with a re-orientation in society, Allah the High says:

"Verily never will God change the condition of a people until they

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(1) Budget Speech for the year 1981 presented to the National Assembly by President Alhaji Shehu Usman Aliyu Shagari.

change it themselves (with their own souls).(1)

Again:

"Because God will never change the Grace which He hath bestowed on a people until they change what is in their (own) souls."(2)

Thus, as people are the chief architects of their own perdition through callous acts of disregard to the laid down rules which govern their mutual co-existence and throwing away the Grace Allah bestows freely on them, He may not change their states of affairs and circumstances for them. As Allah gave each human being intelligence and knowledge of the condition such a human being finds himself, then let him change it. It goes without saying therefore, if the Nigerian people desire a change in their markets, their habits have to drastically change, as re-introducing the Price Control Board alone is not enough to bring the desired change.

5.11.3. THE WAY OUT:

In line with several suggestions offered during the process of data collection, reviving the Price Control Board cannot be the ultimate solution to the escalation of prices in the markets. Some interviewees have come up with the suggestion of self-purification first which is essential to a Muslim's life. This shall then be accompanied with the fear of God (TAQWA)(3). If these two occupy the minds of Muslims all those factors which give rise to price escalation such as the nefarious activities of the rich/middlemen shall give way to more sane and humane practices in the markets. The Authorities should come up vigorously with consumer protection

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(1) Qur'an: XII: 11.
(2) Qur'an: VII: 53.
(3) Al-Qur'an: XXV: 2-3.

mechanism(1)

However, before the anticipated consumer protection Board/Agency is introduced, it is pertinent for Government to review the activities of the Price Control Board with a view to assessing its successes and failure and so as to serve as a spring board to the anticipated Consumer Protection Board.

5.12. ROLE OF MUHTASIB IN THE MARKET:

5.12.1. Brief Introduction of the Hisba Institution:

Hisba is one of the vital organs of running an Islamic State. The institution was set-up by the Prophet (PBUH) himself. It flourished well during the period of the (Sahaba) Companions and their followers (Tabi'un). It is in existence in many Muslim countries as at today. It is charged with commanding the good and prohibiting the wrong. It thus essentially preserves Islamic social morality.

5.12.2. Authority:

Legal writers agreed(2) that Hisba has its origin from the Qur'an. For instance, the provision of verse 104 of chapter III of the Holy Qur'an is cited to give legal support to the institution.

> "Let there arise out of you a band of people inviting to all that is good, enjoining what is right and forbidding what is wrong. They are the ones to attain felicity."

The Hadith of the Prophet (PBUH) which states that anyone who sees an

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(1) In his 1997 Budget Broadcast to the nation the Head of State and Commander of the Nigerian Armed Forces, General Sani Abacha, has promised to introduce Consumer Protection Mechanism.

(2) See for instance: Islamic Jurisprudence in the Modern World, page 308, by Qadri: Introduction to Islamic Law by Schact, page 52; The Islamic State and the Challenge of History by Suleiman; page 48.

abomination committed should try to correct it by his hand or by his tongue or should hate it in his mind, that being the weakest part of one's Iman, is another authority.

It is therefore the responsibility of the Government to appoint an officer whose office shall take care of the enforcement of the commandments of Allah pertaining to religion, morality, economy and so on. The officer mandated to the office is called Muhtasib.

5.12.3. The Role/Duty of the Muhtasib:

Broadly, the Muhtasib's functions can be classified into three:

(i) Regulating the market practices.

(ii) Promotion of Justice in Society relating, essentially to economic dealings.

(iii) Prevention of Public Immorality.

This treatise is mainly concerned with the classification of Muhtasib's functions under (i) above that is Muhtasib's function in Regulating Market Practices:

The Muhtasib has three fundamental functions in controlling market practices:

(a) Controlling the goods being sold: It is his duty to ensure that only acceptable goods to the Sharia are sold in the markets. The quality of goods also should be controlled so that the NAJASH practice should not thrive. On this, Sheikh Usman bn Fodio was quoted to have complained that some tradesmen were in the habit of embelling copper and passing it for silver, others refused to separate gold dust

from sand, others increased the weight of meat by means of aeration, others mixed milk with water. It was the duty of the Muhtasib to put an end to all these practices. Sheikh Muhammadu Bello decided that all adulterated, ill-prepared or substandard commodities should be destroyed, the offenders be apprehended and that all commodities should bear the stamp and name of their respective manufacturers(1).

(b) The Muhtasib is Responsible for Preventing Monopoly in the Market:

He should prevent monopoly of trade by wealthy people at the disadvantage of the poor ones; he should ensure unhindered flow of goods to the market, he should prevent artificial and unwarranted price rise, without, however, imposing artificial price of his own. He should try to eliminate all forms of Riba or unjust enrichment in commercial transactions(2).

(c) The Muhtasib should ensure the use of standard weights and Measures:

All measures and weights used in the market should be standardised. The Muhtasib should not allow any trader to deviate.

This is the only way to ensure that all forms of fraud in this respect are eliminated. Sheikh Usman agreed with al-Maghili: that the Country should be divided into economic zones, each zone having one standard of weights and measures, which should be checked constantly. The Sheikh demanded that the Muhtasib should prevent ignorant people from acting as tradesmen or agents in Muslim markets, only those acquainted with the basic Islamic rules guiding transaction should be permitted(3).

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(1) See: Sulaiman, I. (1987) The Islamic State and the Challenge of History, Mansell Publishing Ltd. London and New York.

(2) Ibid. page 48.

(3) Ibid.

CHAPTER SIX

6.0. AGENCY CONTRACT IN SALES (WAKALA)

6.1.0. Definition of (Wakala) Agency:

It is instructive to draw attention from the outset that the institution of Agency as viewed by the Sharia does not differ much, save in some details, from the institution of Agency as recognised by the English Law.

In the Sharia dispensation, Wakala or agency has been defined by Ibn Arafa to mean that relationship which arises between two or more persons; one the Principal and the other, the Agent where the Principal authorizes the Agent to replace or represent him in the exercise of civil rights. The act of authorization to represent has now by law invested the latter with legal authority to alter relationships of the former with third parties(1). According to the great Imam Abu Hanifah, agency:

> "Is the act of some placing another in his position in a known, lawful transaction. Or, it is the delegation of a transaction and taking care of it by agent."(2)

According to Imams Maliki, Shafi'i and Hanbali, agency, means:

> "The authorization or delegation of an act by one person to another where such act can be delegated with a view to perform it."(3)

In the Mejelle Agency has been defined as follows:-

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(1) Hughes, T.P. (1885) Dictionary of Islam, The Book House Publishers & Booksellers, Lahore - Pakistan, page 663.

(2) Al-Zuhayly, W. (1989) Al-Fiqh Al-Islami Wa Adillatuhu, Vol. IV, Dar Al-Fikr, Lebanon, p. 150.

(3) Al-Zuhayly, Ibid. An act can be delegated if the Principal can do it directly, (p. 151 Op cit).

"'Vekyalet' is for someone to put business of his on another, and to make him stand in his place in respect of that business."(1)

In recognition of the fact that it may by difficult for every person to conduct all his affairs by himself personally, the Sharia sanctions the institution of Agency (Wakala) so that one person can stand in place of another. Below are few instances where the Prophet (PBUH) made delegation:

(a) He delegated Hakeem bn. Hizam to buy for him a goat for ID-AL-ADHHA Sacrifice.(2)

(b) The Prophet (PBUH) did make delegations in matters of running state affairs such as governance, he appointed MU'AZ IBN JABAL to be the Governor of Yemen. He made delegations on the collection of Zakat (poor dues); in police and the army et cetera.(3)

6.2.0. CONSTITUTIONS OF AN AGENCY CONTRACT:

In an agency contract, offer and acceptance constitute the elements of the contract. The MUWAKKIL or Principal will say to the WAKIL or Agent:

"I have delegated you to do such and such, or I have given you permission to do such and such".(4)

The agent will then say:

"I have accepted"(5)

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(1) Tyser, C.R. et al (1967) The Mejelle (Re-print) Punjab Educational Press Lahore, Bk. XI, p. 239.
(2) Al-Zuhayly, Ibid. page 151.
(3) Ibid.
(4) Al-Zuhayly: Vol. IV, page 152.
(5) Ibid.

It should be noted however that the acceptance does not have to necessarily be in spoken words, it can as well be through action. The concept of Majlis Al-Aqd has no role to play in the agency contract. What is important is the knowledge of the agent that he is acting in that capacity. It should also be noted that where the agency is without any consideration (commission), then such a contract is valid but each of the parties can annul it at will(1).

The Agency contract can be limited or unlimited. This depends on the will of the Principal, the nature of the subject matter of agency, or the occurrence of a particular event.(2)

6.3.0. CONDITIONS FOR AN AGENCY:

In an Agency the MUWAKKIL (Principal), the WAKIL (Agent) and the MUWAKKIL BIHI (subject matter of Agency) each has to satisfy some minimum conditions.

6.3.1. THE MUWAKKIL (PRINCIPAL):

The Principal must possess the power to transact with the subject matter of Agency. This is for the simple logic that he who possesses no power to transact cannot delegate another to transact on his behalf(3).

Equally therefore, a person who has no legal capacity, like the madman, an infant not a MUMAYYIZ cannot delegate another to act on his behalf. But a MUMAYYIZ, even though does not possess full capacity, can delegate another in transactions

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(1) - Ibid. page 152.

(2) This view is expressed by Imam Abu Hanifah and Hanbali: Imam Al-Shafi'i differs. See page 102 of Al-Zuhayly: Ibid.

(3) Al-Zuhayly: Ibid, page 153.

beneficial to him such as the acceptance of a gift. Likewise in transactions which may be beneficial or detrimental of the Agency by his guardian. he cannot however appoint a WAKIL (Agent) on transactions which are purely detrimental such as making gift or divorcing his wife.(1)

6.3.2. THE WAKIL (AGENT):

As for the Agent, it is a condition that he has to be a sane person. A MUMAYYIZ whether permitted or restricted to conduct transactions, can be an agent. Thus, a madman, an imbecile, and an infant below TAMYIZ cannot be agents in transactions as they lack clear expressions. The Malikis opine that an infant's Agency is void as he is not yet responsible for his actions in law. As such he cannot stand as an agent for another.(2)

6.3.3. THE MUWAKKIL BIHI (The subject matter of Agency):

The subject matter of agency should satisfy the following conditions:

(i) It must be known to the agent.

(ii) That the transaction must be a lawful one as agency on an illegal transaction, for instance, extortion is void under the Sharia.

(iii) It should be one of such matters that can be delegated for example, selling and buying, hiring, return of deposit, payment of loans and so on(3).

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(1) Ibid: This is Hanafi view. The Maliki, Shafi'i and Hanbali prohibit delegation by an infant. See also the Mejelle Book XI Chapter II, pages 241 - 242.

(2) Al-Zuhayly: Ibid. Vol. IV, page 154. The Sharia allows a Principal to appoint more than one agent on a transaction.

(3) Ibid: page 154.

6.4.0. CLASSIFICATION OF AGENTS:

Agents are classified as follows:

(1) Specific (Restricted) Agent.

(2) General (Unrestricted) Agent.

6.4.1. SPECIFIC (RESTRICTED) AGENT (KHASS):

Where an agent has been delegated to undertake some special, specific, limited or restricted transaction, the agency becomes a specific (Khass) one. For instance, the principal may say to the agent:

> "I have delegated you to sell my land at such a price payable instantly or payable at such a deferred period."(1)

It's governing rule is that the agent is restricted to deal only on what the principal limits him to. He should watch the limitation as far as possible whether in connection with the person with whom he contracts or the subject matter of contract. Where the agent exceeds the limit set for him by the Principal, the Principal is not bound to accept or ratify it. Example is where the Principal appointed an agent specifically to purchase for him sheep. If the agent buys any other animal, goat, cow or camel, the Principal shall not be bound to accept or ratify that contract of sale. This is for the simple reason that the general rule provides that where a specific commercial agent contravenes the stipulation of his Principal, his purchase is in suspense pending ratification by the Principal(2).

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(1) Al-Zuhayly, W. (1989) Al-Fiqh Al-Islami Wa Adillatuhu, Vol. IV, Dar Al-Fikr, p. 155.
(2) Ibid page 156.

6.4.2. GENERAL (UNRESTRICTED) AGENT (AMM):

As the name suggests, this is a delegation in general without specification, limitation or restriction to a particular transaction, as for instance where the Principal says to the agent:

> "I have delegated you on the sale of this land with no fixed price and with no particular method of payment."(1)

The applicable rule under this class of Agency is that the agent possesses every power to transact whatever the Principal himself can transact personally except of course transactions which are detrimental to the Principal such as free gifts. It is a settled principle of law that a general agent lacks power to make gifts from the Principal's property except where there is clear authority to that effect(2).

The Maliki School went further to say that even though the unrestricted agent is empowered to conduct any transaction freely, yet custom of the people (URF) should restrict him. Thus where he contravenes the custom, he becomes an intruder (AL-FUDHULI). Execution of contract is dependent on the ratification of his Principal. For instance, cheating is not only illegal but offends the custom or habit of a Muslim. Consequently, a general Agent should not make purchases or sales where there is clear fraud(3).

Generally, the following rules should be noted in dealing with the above classes of Agents:

(i) In the case of a specific Agent, where the Principal

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(1) Ibid. page 156.

(2) Ibid. page 155.

(3) Ibid. This view is agreed to by Imams Shafi'i, Hanbali, Muhammad Al-Shaybani and Abu Yusuf (the two disciples of Abu Hanifah). Imam Abu Hanifah (the great Imam) differs a little in that he recognises transaction by Agent even where there is clear fraud.

delegates him to buy some indefinite thing, it is necessary for him to explain to the agent, the kind and quality of the thing and its price.

(ii) When a Principal appoints a general Agent, explanation as to kind, nature of price is necessary. This is because the Principal, in this instance, charges the Agent with a discretionary exercise of his interest. So whatever the agent purchases is in obedience to the Principal's order.

(iii) Where a Principal appoints an Agent to deal on some types of goods can be specific or general, such as cereals or textile materials without restricting the Agent to a specific species of the cereal such as "sorghum, short, white variety" or "Shadda Broçade" the Agent will be acting without authority if in the cause of his assignment he purchases any cereal or textile material and the Principal has no complaint.

6.4.3. AL-FUDHULI (unauthorized Agent):

Al-Fudhuli in law has been defined as the one who transacts on matters without any authority for doing so. He is regarded as an unauthorized "Agent"(1), but legally speaking, he is not an Agent.

So, where a person without authority (Al-Fudhuli) buys or sells goods without clear, specific or general authority, he is responsible for what he transacts.

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(1) Al-Zuhayly, W. (1989) Al-Figh Al-Islami Wa Adillatuhu, Vol. IV, Dar Al-Fikr, p. 167.

The Applicable rules governing the situation are two:

(1) According to the Hanbali and Maliki Schools, the transactions of an intruder remain valid contracts but suspended till ratified by a person interested. If the person interested ratifies, the contract is executed. If he refuses to ratify the contract becomes voidable as it were before.

(2) According to the Shafi'i, Hanbali and Zahiri Schools, the transaction of an intruder is a void one. It cannot be valid even if ratified by the person interested. Their reason is that ratification is done on an existing contract. The unauthorized contract of the intruder is not a contract in existence ab-initio. So, one cannot ratify a non-existing act(1). They relied on the rule that the transaction of a person on what he does not possess is prohibited under the Sharia.

On the whole however, there are three conditions generally for ratifying the act of an intruder.

These are:

(a) Where there is benefit derivable from the contract, it can be ratified by an interested party.

(b) The ratification should take place while the contracting parties, that is, the intruder and the seller, the subject matter are still existing. If anyone of them is missing, the contract is rendered void and the ratification will be inconsequential(2).

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(1) Op cit page 168.

(2) Op cit page 170.

The effect of ratifying the act of an intruder is that it makes the contract valid and executory. It also makes the intruder to be an Agent(1).

6.5.0. RELATIONSHIP BETWEEN PRINCIPAL AND AGENT:

The law of Agency in Islamic Law has imposed some duties and obligations on the Principal as well as on the Agent. These obligations/duties are known as WAJIBAT.

As already seen under the classification of Agents that the Principal is responsible to a third party on almost all transactions or acts of the Agent whether specific or general, committed while performing his assignment of Agency.

This sub-topic shall consider the following:

(1) Duties of the Principal (WAJIBAT AL-MUWAKKIL)

(2) Duties of the Agent (WAJIBAT AL-WAKIL)

(3) Contractual liability of the Principal to a third party.

(4) Tortious liability of the Principal (vicarious liability) for torts of the Agent.

(5) Whether criminal acts of the Agent make the Principal liable criminally.

6.5.1. DUTIES OF THE PRINCIPAL (WAJIBAT AL-MUWAKKIL)

The Principal as the hirer or employer is bound to render some duties to the Agent. Such duties are implied by the general law, such as duty to remunerate.

Other duties of the Principal to his Agent include the following:

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(1) Op cit. page 170.

(a) To pay to the Agent an agreed remuneration for the services rendered. Such remuneration may take the form of agreed commission, wages or other benefits.

(b) To reimburse or indemnify the Agent for all losses, damages, liabilities incurred by the Agent in due course of performing the Agency. These however can be expressly excluded by the parties if they mutually agree to that.

6.5.2. DUTIES OF THE AGENT TO HIS PRINCIPAL:

The Agent owes to his Principal the following duties:

(a) Duty to be honest, loyal and obedient:

The law imposes on the Agent to show his full honesty, loyalty and obedience to the Principal in their contractual relationship. The Qur'an directs that those charged with authority should be obeyed(1). The mere fact that it is the Principal that has control over the Agent, that ipso facto makes him in charge of the Agent. The Prophet (PBUH) is reported to have said:

> "A Muslim is a brother to a Muslim, he should not cheat him, nor despise him nor deride him."(2)

Therefore, when executing the terms of the Agency, the Agent is duty bound to carry out all instructions that may be given to him by the Principal relating to the Agency contract. He should not deviate from such instructions even where he has reasonable belief that such a deviation is in furtherance of the Principal's interest.

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(1) Qur'an: IV: 59.

(2) Khan, M.Z. (1985) The Gardens of the Righteous (Riyadh As-Saliheen of Imam Nawawi), EEF Publishers, Beirut; Hadith No. 1578, page 726.

Failure to carry out such instructions may make the Agent liable to his Principal, for instance where the Principal instructed his Agent in the following words:

"Do not sell my 'X' goods unless its price of N500 is paid in cash."

Thus, where the Agent decides to sell it at a lower price, or sells it on credit or by barter the agent will be liable for damages. It has been stated in the JAWAHIR AL-IKLIL that:

> "An Agent is bound to comply with the directives of his Principal concerning either the subject matter or the time and place of the purchase or sale. He must neither sell at a lower nor buy at a much higher price than the limits fixed by the Principal"(1).

In all the Agent's undertakings in respect of Agency, he must be guided by uttermost honesty and sincerity(2).

(b) Duty to Perform:

Where the Agency agreement has specified some assignments to be performed, it is the duty of the agent to perform the assignments to the best of his ability. Where he fails, he is then in breach of the Agency agreement and he remains liable in damages. he is not however bound to perform any duty which is prohibited by the Sharia. For instance where he is appointed a general Agent and asked by the Principal that he should buy or sell the Principal alcoholics or pork. This is irrespective of whether the performance is to be done by the agent himself or through another Agent.

(c) Duty to Account:

The Agent is under duty to account for whatever transaction he does in

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(1) Abu Al-Azhari, S. (n.d.) Jawahir Al-Iklil: Sharh Mukhtasar Al-Khalil, Vol. II, Dar Al-Fikr.

(2) Islamic Law as a religious law, attaches sanctity to the principle of accountability on the Day of Reckoning.

pursuance of the Agency contract. All monies, goods or properties had and received in that behalf must duly be accounted to the Principal.

6.6.0. Contractual Liability of the Principal:

The general principle of liability in Islamic Law is that no person shall bear the burden of another. Or put in other words, no person shall be punished for acts committed by another(1). Because of the contractual relationship between the Principal and his Agent, this forms one of the exceptions to the general rule of liability. Thus, the act of an agent can properly bind his Principal once the agent acted within the scope of authority given to him by the principle in the discharge of the Agency. In transactions involving sale and purchase, the Principal is bound by the acts of the Agent. Whether the Principal is a disclosed or not. In the matters such as personal loan, pledge, bailment, partnership and so forth, before the Principal can be liable for the act of his Agent, it must be established by the Agent that he entered into such contracts on behalf of the Principal otherwise his acts will not bind the Principal(2).

6.7.0. Tortious/Vicarious Liability of the Principal:

Where the Agent commits a tort in course of discharging his contractual duties which are within the scope of his employment, the Principal shall be vicarious liable. For instance where the Principal authorised the Agent to buy for him cows. If any of the cows escapes from the Agent and causes destruction to the

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(1) Qur'an: XXXV:18.

(2) Abdur Rahim, M.A. (1978) Muhammadan Jurisprudence, All Pakistani Legal Decisions Publishers, Lahore, page 321.

goods of another person, the Principal shall be vicarious liable. Such tortuous acts should be distinguished however, from frolic acts of the Agent, or where Agent acted outside the scope of his employment unless ratified by the Principal. If the Principal ratifies then he remains vicariously liable.

6.8.0. Crime Committed by the Agent:

The general principle of Islamic Law that no person shall be charged with a liability other than his own, admits of exceptions as seen above(1). However, in a situation where an Agent commits a crime, even while performing an act in the course of his employment, the Principal shall not be liable unless it can strictly be shown that he had prior knowledge or consent thereof. for instance, where the Principal delegates his agent to go to a village market and purchase beans for him. In course of the bargain a misunderstanding ensued between the Agent and another person. The dispute resulted into a fight and the agent stabbed the other person to death. It is the agent alone that will be liable, unless it can be shown that the Principal instigated the fight.

6.9.0. Brief Comparison of Agency Contracts Under Islamic Law and English laws:

As stated earlier, the institution of agency in the English law does not materially differ in essence from the Islamic Law principles. This sub-topic compares the salient features of the two laws herein below:-

Like Islamic Law, the English Law of Agency has imposed on the Principal,

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(1) Qur'an: XXXV:18. In the translation of the Holy Qur'an, Yusuf Ali commented on this principle: "In religious matters, bearing the burden of another is strictly personal and cannot be transferred to another".

the duty to remunerate his Agent under such terms, conditions agreeable to the parties. he has a duty also to reimburse and indemnify the agent for lawfully incurred losses or expenses. See Thacker v. Hardy (1878) 4 Q.B. 685; Adams vs. Morgan & Co. (1924) 1 K.B. 751.

Agents right to be reimbursed or indemnified is not absolute. It can be curtailed in the following circumstances:

(a) Where the Agent acted without express or implied authority unless the transaction is subsequently ratified by the Principal. See: Baning v. Stanton (1876) 3 Ch.D. 502.

(b) Where the agent incurred the expenses, loss or liability in consequence of his own negligence, default or insolvency.

(c) Generally, under the English law, the Principal is responsible to third parties for all acts, contractual or tortious of his Agent performed while discharging the obligation of his Agency. The Principal is not liable for the crime of his Agent unless he consented or ratified. See: Tesco Supermarket Ltd. v. Natrass (1971) 2 All E.R. 127 where Diplock L. J. stated:

> "Save in cases of strict liability where a criminal statute exceptionally makes the doing of an act a crime irrespective of the state of mind in which it is done, criminal law regards a person as responsible for his own crimes only. It does not recognize the liability of a Principal for a criminal act of his Agent because it does not ascribe to him his Agent's state of mind".

The principles of Islamic Law seen above are the same with the English law.

(d) Where the Agent has acted in breach of his duty including

violation of Principal's instructions. see: Thomas v. Athertan (1878) 10 Ch.D. 185.

(e) Where the Agent acted in respect of a transaction which is manifestly or to the knowledge of the Agent, unlawful or contrary to public policy. See: Burrows v. Rhodes (1899) 1 Q.B. 816.

(f) Where the Agent acted in respect of any transaction rendered null and void by the Gaming Acts. See: Tatan v. Reeve (1893) 1 Q.B. 44.

Other provisions detailed by the English law in relation to Principal - Agent relationship are REMEDIES available to each of them. remedies available to the Principal include (i) dismissal of the Agent without notice when the Agent misconducts himself, (ii) rescission and damages, for example, Principal can rescind contracts made on his behalf by the Agent without authority. He can also claim damages for breach of terms of the agency, (iii) he may take action to compel Agent to give account of all his dealings in respect of the Agency, (iv) he may take action for conversion where property received by the Agent on his behalf has been misappropriated, (v) the Agent can be prosecuted where he commits criminal acts or commissions.

The Agent enjoys the following remedies: (i) action for damages for the enforcement of his right to reimbursement or indemnity for losses or expenses incurred in course of the Agency, (ii) right of set-off or counter claim against the Principal (iii) right of lien on property, goods, chattels of his Principal in respect of and up to the amount he has been remunerated by the Principal, (iv) right of stoppage in transitu where Agent serves as an unpaid seller, he can exercise this

right against the goods of his Principal.

These remedies as obtainable in the English law, are equally provided by the SHARIA. The Sharia makes such provisions in the general law. Furthermore, as a religious law, Sharia encourages peaceful settlement between parties in any event of misunderstanding. Parties may resort to other options where the principle of (SULH) and TAHAKUM, settlement or conciliation fails. many of such principles are taken care of by the termination of Agency (infra).

6.10. Relationship between Agency and other Forms of Transactions:

There are other classes of persons that serve almost same purpose with Agents but different capacities and modes of operation. Such as a Trustee, a Bailee, a Vendor, a Solicitor, a Broker and several others. These persons are not Agents per se. The aim of this sub-topic is to compare, briefly, the functions of some of such cadre of professionals.

6.10.1. Bailee/Trustee is not an Agent:

In Islamic Law, anyone who is entrusted with goods, money or property for safe-keeping or for certain purpose such as transferring the thing or property to a third party has become a trustee of a Bailee (al-ameen) as the case may be. He may be described as a CESTUI QUE TRUST.

The fine distinction between the relationship of an Agent and his Principal on the one hand and a trustee and his trustor or bailee and bailor is that in relationship created by trust, no consensual relation is created. Again, a trustee cannot serve as an Agent of the trustor. Likewise, a bailee is not an Agent of the bailor as no authority is given by the bailor/trustor to the bailee/trustee except in accordance

with his instruction.

6.10.2. Agent is not a Vendor:

The concept of a vendor under the English law is that he is the person who transfers landed property by sale, particularly real estate. he is better known today as "estate agent". In Islamic Law, such an Agent or vendor is still regarded as an Agent. He is however classified as a specific Agent as he deals on a specific or special thing which is landed property. The rules relating to specific Agent relate to him as well under the Sharia. In the English law, there is no obligation on the estate Agent/Vendor to do anything for the Principal. The contract with such an Agent is merely a promise binding on the Principal to pay a sum of money upon the rendering of specified service by the estate agent(1). An Agent, in accordance with the general rule of Agency on the other hand is bound by the obligations/duties of his Principal.

6.10.3. An Agent IS NOT A SOLICITOR:

A solicitor (whose interpretation herein includes a barrister) in Islamic Law is a MUHAMI; a lawyer, a counsel or a legal representative. He is a special kind of Agent engaged for special purpose. Rules relating to a special Agent relate to him. However he differs from ordinary Agent because in conducting his assignment he cannot rely on the institution of his Principal. He relies on his expertise in carrying the assignment to its logical conclusion. There is no disagreement between the principles of Islamic Law and the English law in this respect.

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(1) Igweike, K.I. (1980) Nigerian Commercial Law, St. Hanbal & Co. Publishers Ltd. Lahore, p. 48.

6.10.4. An Agent is not a Broker:

Brokerage has been defined to be the business or occupation of a broker, or his wages or commissions.(1)

A broker is defined in the following terms:

> "An Agent employed to make bargains and contracts for a compensation .... A middleman or a negotiator between parties. A person dealing with another for sale of property. A person whose business it is to bring buyer and seller together. The term extends to almost every branch of business, to reality as well as personality. An Agent of a buyer or a seller who buys or sells stocks, bonds, commodities or services, usually on a commission basis."(2)

Ordinarily, the term is thus applied to one acting for others but is as well applicable to one in business of negotiating purchases or sale for himself.

In Islamic Commercial Law terminology, such a person is called "SAMSAR". Thus all such persons like the ARKOMI, DILLALI and DAN-CHORI(3). Operating in our various markets can be regarded as brokers. These classes of persons are not agents. strictly speaking.

6.11.0. TERMINATION OF AGENCY:

Contract of Agency between a Principal and his Agent can be determined in several ways:

6.11.1. Death of one of the Parties:

Agency is determined by death of the Principal provided no right of other

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(1) Black, H.C. (1979) Law Dictionary, 5th. Edition.

(1) Ibid.

(2) Local/Vernacular terms used to denote different kinds of brokers of different goods as revealed by research conducted.

person is involved in the Agency. He is not discharged from it when right of another is dependent at the date of his death. If the Agent dies the Agency is also determined. Agency is not heritable as to allow his heirs to subrogate him(1).

6.11.2. Dismissal of an Agent:

The Principal can dismiss his agent from the Agency contract between them, at will, provided no right of another person is dependent. For instance, if a debtor pledged his property and at the time of the contract or before the expiry of the time for payment of the dept, appointed an Agent to sell the pledge, he cannot afterwards dismiss him without the consent of the pledge(2).

6.11.3. Resignation of the Agent:

An Agent can voluntarily resign from the Agency contract and that will bring the Agency to an end.

In the two immediate paragraphs above, notice of the dismissal or resignation is necessary from the Principal to the Agent or from the Agent to the Principal as the case may be.

6.11.4. Completion of Assignment for which an Agent was Appointed:

On the completion of the work or assignment for which the Agent was appointed, the Agency comes to an end and the Agent is accordingly discharges from that Agency, for instance where he was appointed to buy for his Principal a house of

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(1) See: The Mejelle: Bk. XI, ch. II, sect. VI, p. 254, Jawahirul Iklil, Vol. II chp. on Agency.

(2) See: Abdur Rahim, M.A. (1978) Muhammadan Jurisprudence, Lahore, p. 322, Hamilton's Hedaya, chp. IV; The Mejelle, Op cit.

four bedroom say, in Kaduna. The contract of Agency comes to an end immediately the Principle takes possession or receives title of the house.

6.11.5. Where Principal Takes Over the Function for which the Agent was Appointed:

If a Principal may take function such as sale or purchase of a certain thing, which he earlier appointed an Agent to do it for him, the Agent is discharged of the Agency(1).

6.11.6. Perishing of the Subject Matter of Agency:

Where the subject matter of Agency perishes before concluding the sale or purchase, the Agency contract is determined(2).

6.11.7. Where Principal Becomes Bankrupt:

Contract of Agency comes to an end where the Principal becomes bankrupt, where the Agency is exclusively financed by him. This is because once he is adjudged bankrupt, his capital goes to his creditors in settlement of their debts(3).

6.11.8. Affluxion of Time:

Where time has been fixed for the performance of an Agency, such as "Go and buy me a Mecedes Benz car 500 within seven days from today", the contract comes to an end on the eighth day after first day of the contract.

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(1) Al-Zuhayly, W. (1989) Al-Fiqh Al-Islami Wa Adillatuhu, Vol. V, Vol. Dar Al-Fikr, Dimashq, p. 127.
(2) Ibid.
(3) Ibid.

These are some of the methods an Agency can be terminated under Islamic Law. There are other methods such as where a husband divorce his wife. If he is appointed by her to conduct some sales or purchases, that is the end of the contract. This however should include the waiting period where the marriage was not irrevocably determined.

Under the English law, there are several methods of termination of Agency, These include inter alia, the following: By agreement of the parties: By revocation of the Principal: By performance: By affluxion of time: By frustration, for example when there is a change of circumstances which render the Agency or its object unlawful or impossible to accomplish. This can be equated with perishing of the subject matter under Islamic Law: By death of the Principal or Agent: By insanity of the Principal or Agent: By bankruptcy of the Principal or Agent et cetera(1). each of these methods has same consequential effect on the parties as provided by Islamic law. Both Islamic Law and the English law, it seems, are almost agreed on the law and application of Agency.

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(1) For further reading, see: Fridman (1968) Establishing Agency; Dorwick (1954) The Relationship of Principal and Agent; Bowstead on Agency (14th. Edition) Art. 1.

CHAPTER SEVEN

7.0. COMPARISON AND CONCLUSION

7.1.0. ISLAMIC LAW OF SALE OF GOODS: A UNIFORM AND UNIVERSAL CODE OF SALE FOR THE MUSLIMS:

Islamic Law of Sale of Goods forms a branch of the general Islamic Law. Accordingly, it shares the same characteristics and attributes of the latter. Discussing the uniformity and universality of Islamic Law in general, Abdul Qadir Audah,(1) described Islamic Law as a Jurisprudence which is characterised by its unique universality and comprehensiveness. It applies to all Muslims without distinction, Arabs and non-Arabs, Easterners and Westerners, from all walks of life and irrespective of their customs and history. It is a system of legislation relevant to each family, each tribe, each community, each state. It is indeed a universal legislation which human canon of law perceive but could not make. This is very true of Islamic Law of Sale of Goods. In applying this Law, same rules govern transactions between Muslims wherever they may find themselves. Whether in the Kingdom of Saudi Arabia, the U.S.A., Russia, the Kingdom of Great Britain, the Sudan, Nigeria, Zambia, Israel, Ghana and so forth. When a Muslim comes to buy or sell any goods, chattels or property, he must be guided by the conditions of validity such as purity and legality of the subject matter of sale, before he can competently enter into the sale contract.

The parties entering into the contract must also, wherever they may be,be

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(1) Audah, A. (1971) Islam between Ignorant followers and Incapable Scholars (I.I.F.S.O.) Publication.

of full capacity though the barometer of determining legal Capacity differs from one school of thought to another, yet they are all unanimous that persons lacking capacity have no power to enter into a contract of sale. These provisions of Islamic Law and all others considered in this thesis are universally applicable on all Muslims in matters of sale.

7.2.0. ISLAMIC LAW OF SALE OF GOODS COMPARED WITH THE ENGLISH LAW OF SALE OF GOODS (THE 1893 SALE OF GOODS ACT)

The heterogeneous nature of this country has been mentioned in chapter one of this thesis. The three types of laws governing this country are: (i) The English Received Law (ii) The Islamic Law and (iii) The Customary Law.(1) Sale of goods in this country is accordingly governed partly by statutes, partly by common law and equity and partly by customary law (which has wrongly been defined to include Islamic Law(2). The law which governs the sale of goods for instance in the former Eastern Region(3) is the Sale of Goods Act, 1893, a pre-1900 English statute of general application. In the former Western and Mid-Western Regions, the Sale of Goods Law of 1958 applies(4). In the Northern region, some states have promulgated Edicts to govern Sale of Goods. The 1893 Sale of Goods Act, applies fully in some states but as a residuary law in others. Islamic Law of Sale of Goods co-exist with

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(1) Anderson, J.N.D. (1967) Islamic Law in Africa, Cass Publishers, London.

(2) See my LLM thesis: Maintenance of Wife under Islamic Law (1984) A.B.U. Zaria.

(3) Now comprising of Abia, Akwa-Ibom, Anambra, Bayelsa, Cross River, Enugu, Ebonyi, Imo and Rivers.

(4) In Lagos State, the Sale of Goods Law 1973 replaces the Sale of Goods Act 1893. Majority of the enactments in the two laws of the West were a mere replica of the Sale of Goods Act 1893.

tribal customary laws, though prominence was given to the Sale of Goods Act, 1893. It is this 1893 Sale of Goods Act which is regarded as the residual law on Sale of Goods which shall be briefly compared with the principles of Islamic Law of Sale of Goods discussed in the previous chapters with casual cross reference to some state laws on Sale of Goods.

Chapter two of this work deals with goods under Islamic Law in general, it is a matter of interest to note that the definition of "goods" given in Section 62(1) of the 1893 Sale of Goods Act, applicable in Nigeria, does not in essence differ substantially from the Islamic Law definition of "goods". The point of distinction however is in the classification of goods. The Sale of Goods Act classified "goods" into "existing goods" and "future goods". Existing goods may either be specific or unascertained goods. Future goods include goods not yet in existence and goods in existence but not yet acquired by the seller. They are never specific goods within the meaning of the Act.(1) Islamic Law has recognised "existing goods" but regarded "future goods" as falling within the doctrine of "Gharar" that is, uncertainty and does not form proper subject matter of sale. This is for the simple reason that Islamic Law does not want to take chances as uncertainty may cause litigation in the event the 'expected' does not happen. Another salient point of distinction is that, Islamic Law does not value any non-valuable or harmful object for instance, alcohol or opium as "goods" for the subject matter of sale. This is not the position under the Act. The definition of goods by S.62(1) of the Act clearly puts sales of real property or chattels real such as leasehold and chooses in action such as shares or bills outside the scope of definition.

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(1) Atiyah, P.S. (1975) The Sale of Goods, The Camelot Press Ltd. Southampton, p.32.

of goods by the Act.(1) The exclusion of goods which does not form part of goods under Islamic law is based either mainly on health and morality whereas the exclusion by the Act is based on technicalities, for instance "goods" are distinguishable from "property".

Again sale by sample, delivery of goods purchased, quality and quantity of goods as treated under conditions of validity of contract of sale in chapter two and duties and obligations of parties to a contract of sale can fairly contrast with the provision of the sale of Goods Act 1893. For instance: Section 15 of the Act deals with sale by sample. The section states that a contract of sale is a contract of sale by sample where there is a term in the contract, express or implied, to that effect. So where a contract of sale is conducted through sample and no term has been provided expressly or which can be deduced impliedly, the contract cannot be regarded to be by sample. The mere fact that a sample has been shown to the prospective buyer is not sufficient evidence to warrant an assertion that there has been a sale sample. Further, if the agreement is reduced to writing after a sample has been shown and makes no reference to this fact, if it is valid and enforceable, it cannot be a contract of sale by sample.(2) See the case of: Friendrechdorf & Co. v. Faja. (1967) LLR 115: Boshall v. Allied Commercial Exporters Ltd. (1961) All N.L.R. 917.

This provision and the Islamic Law provisions on sale by sample are almost at par. The difference is only in the provision of reducing the term stipulating sale by sample, as required in English law. As already seen under subhead (C) of the conditions for validity of contract of sale in chapter two, the goods sold by sample

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(1) Igweike, K.I. (1980) Nigerian Commercial Law, St. Hanbal & Co. Pub. Ltd. Lahore, p.32.
(2) Ibid.

and by description must match the one described or shown as sample otherwise the contract of sale is voidable. Sub-Section (8) of Section 15 of the Act which treats "Implied terms", is in perfect accord with Islamic Law provision on sale by sample. The Subsection provides:-

> "In the case of a contract for sale by sample:
>
> (a) There is an implied condition that the bulk shall correspond with the sample in quality.
>
> (b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
>
> (c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which should not be apparent on reasonable examination of the sample."(1)

S.62(2) of the 1893 Act defines delivery to mean, a "voluntary transfer of possession from one person to another". The definition includes actual and constructive. S.29 treats the methods or manners of delivery including place and time of delivery. Among the duties of the seller is to deliver the exact quantity contracted for, no more nor less. delivery of a wrong quantity may entitle the buyer to reject the incorrect quantity and consider the contract as repudiated(2). But where he accepts the goods in such condition, he shall have no cause to complain. Section 30 of the Act entitles the seller to demand for repayment of excess goods delivered, once accepted. All these provisions are in perfect accord with the Islamic law provisions as treated in chapter two.

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(1) S.15(2) of the Sale of Goods Act, 1893, Section 1b(2) of the Sale of Goods Law (West) 1958. Cap. 115 and Lagos, Cap. 125 of 1973.

(2) Igweike, K.I. (1980) Nigerian Commercial law, Ibid.

Thus the areas of similarities in respect of goods, conditions and warranties performance of the contract are common in both Islamic Law and the English Law of Sale of Goods. The dissimilarities are only in matters of details. In Islamic Law RUSHD (maturity) is the sole barometer for determining the capacity of a person. It is attained either at 15 years of age in general or by physical growth of certain features in a person. This is the general position of the law in some Muslim countries except in the Maliki School which stipulates 18 years for both males and females.(1) In Nigeria for instance, in LABINJO VS. ABAKE.(2) It was held that contractual capacity in Islamic Law begins at puberty. In FALATA VS. DOWOMA.(3) Where a youth sold a family house, it was held by the High Court on appeal, that under "Moslem" Law, majority is determined by the physical maturity, or a declaration of the youth in question or falling this by reaching the age of fifteen lunar years. In India, under the Muslim Law, any person who has attained puberty is entitled to act in all matters affecting his or her status or puberty, but that law has been materially altered by the Indian Majority Act and the only matters in which a Muslim is now entitled to act on attaining the age of 15 years are marriage, dowry and divorce. In all other matters his minority continues until the completion of at least 18 years.(4)

Under the English Act and the Common Law, capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property. This is also subjected to the provision that where NECESSARIES are sold and delivered to an infant or minor, he must pay a reasonable price therefor

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(1) This is the major topic discussed in chapter III of this thesis.
(2) (1944) 5 NLR 33.
(3) (1970) NNLR 105.
(4) Habibi, M. (1975) Muslim law, Allahbad.

the age requirement for a minor to enter into a valid contract of sale (or other contracts) begins at 21 years. Any person below that age is regarded as an infant. The English Infants Relief Act 1874 which is a statute of general application states that all contracts, whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants, shall be absolutely void.(1) This provision corresponds with the provisions on SABIY, that is, an infant under Islamic Law. Perhaps the only aspect not parallelled by the English law is the position of a MUMAYYIZ (a minor, who has the ability of discernment of beneficial from detrimental contracts). An analogous to the Infants Law 1958 of Western Nigeria in the Northern part of the country is the Children and Young Person Law, Cap 21 of the laws of Northern Nigeria, 1963. In that law, a "child" was defined to mean "any person who has not yet attained the age of fourteen years" whereas, a "young person", means a "person who has attained the age of eighteen years."(2) Even though this law has principally provided for the procedure to be adopted while trying a juvenile which includes a child and a young person in criminal matters, it appears, that the law considers a person of eighteen years and above to be an adult; for instance, Section 18 of the law states that no mandate shall remain in force after the person to whom it relates shall have attained the age of eighteen years.

Having stated all these, what appears to be more reasonable in assessing the legal capacity-age wise-of a person is eighteen years as stipulated by the Maliki School for both males and females. The following reasons have convinced the writer

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(1) See Infants Law 1958 Laws of Western Nigeria S. 4.

(2) S. 2 of the Children and Young Persons Law, Cap.21, laws of Northern Nigeria 1963.

to arrive at such a conclusion: While interpreting verse 15 of chapter 56 of the Qur'an, Ibn Abbas is reported to have stated on the portion which states "till when he attaineth full strength" to mean "attainment of eighteen years".(1) It is also reported that Abu Bakr Al-Saddiq, be-friended the Prophet when he was eighteen years while the Prophet was twenty years then they both went to Sham for commercial transaction.(2) The Prophet got married when he was 25 years to Khadijah and except A'isha, he married his remaining wives when all had experience of marital life.

So the decisions in Labinjo v. Abaka and Falata v. Dowoma (supra) were based on the other schools of law whereas Maliki School of thought is the officially applicable principle of law in the Northern states. Also, if one considers the mental and the chronological development, eighteen years of age appear to be more convenient in tallying with the physical and mental growth of a person.

In the case of a lunatic, the position under the English law is that where a person suffers from such a degree of mental disability as to be incapable of appreciating the nature of his act, he lacks capacity to enter into a contract. A lunatic has been defined to include, "an idiot and any other persons of unsound mind."(3) The general position of the law is that where a lunatic enters into a contract of sale such contract is not valid, but it is voidable at the instance of the lunatic if his mental condition was known or ought to have been known by the other contracting party. Likewise, where the lunatic makes a contract during lucid interval, the contract binds him. Equally, where necessaries are supplied to him or

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(1) Qurtabi: (n.d.) Al-Jami' Li Ahkam Al-Qur'an, Vol. 16 Dar Ihya'i Al-Turath Al-Arabi, Beirut p. 194.
(2) Ibid.
(3) Lunacy Law, Cap.73, Laws of Western Nigeria, 1959.

to his wife he is under an obligation to pay whether or not the other party knew of his condition and in the case of necessary goods sold and delivered to him, he must pay a reasonable price, the disposition under Islamic Law is that once a person suffers mental disorder he is treated like an infant and has no capacity to enter into any form of sale contract. The restriction continues until he regains his senses. Both Islamic Law and English law are agreed on the disposition of an intermittent mad man if done during the period of his lucidness, that is he is bound by such a contract or disposition.

The position of a bankrupt person (Muflis) under Islamic Law of Sale is that he lacks capacity to enter into any form of contract of sale, soon after the declaration of his 'bankruptcy'. It is the Court that concludes his sales and purchases on his behalf. His incapacity is not perpetual. He can regain his capacity after the satisfaction of his creditors and the remainder of the proceeds of the sale of his goods shall be returned to him. Taking this in contrast with Section 61(1) of the English Sale of Goods Act, which provides that "the rules in bankruptcy relating to contracts of sale shall continue t apply thereto, notwithstanding anything in this Act contained."(1) The effect of the bankruptcy of a party to a contract of sale is, in the main, the same as that in regard to contracts generally. It is important to note however that in consideration to Islamic Law, English law does not consider the bankruptcy or insolvency of a person to affect his capacity to contract or operates of itself to terminate a contract already made by him. The general position however is when an adjudication in bankruptcy is made, all the property vested in the bankrupt

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(1) The relevant statute in force in England is the Bankruptcy Act 1914, which is a statute of general application in Nigeria. However, the Bankruptcy Act of 1979, Cap 30, Laws of the Federation of Nigeria 1990, has made provisions for the sale, transfer of bankrupts properties/and goods Section 51, 53, 54, 55.

at the commencement of the bankruptcy or accruing to him thereafter - including debts due to him and his rights under any contract - passes by law to his trustee in bankruptcy. Primafacie, therefore, it may be crucial to establish whether the property in the goods, the subject matter of a contract of sale, has passed to the buyer at the commencement of the bankruptcy of one party or the other, since a claim to the goods themselves is likely to be of greater value than a demand for payment or the return of a sum of money.(1) of importance also is that the English Sale of Goods Act 1893 does not consider the capacity of a compelled person, people of different religions buying holy scriptures of other religions, people who lack capacity because of the special circumstances they put themselves into for instance 'Adin' and 'Baghin' (transgressors). But because law and morality go together in Islamic Law, as a religious law, that law makes comprehensive provisions on such persons as seen earlier in chapter three.

In relation with the actual formation of a contract in general and the contract of sale in particular, all the necessary elements such as agreement, which is represented as AL-TARADHI in Islamic Law consisting of offer (Ijab) and acceptance (Qabul); intention to create legal relation and consideration, are the same.

One peculiarity of Islamic Law however is the doctrine of MAJLIS AL-AQD that is, the meeting place for concluding the contract. Islamic Law has laid a lot of premium on meeting place, such that if parties to a contract of sale have departed the meeting place without cancelling the sale, then the sale is regarded to be valid and binding provided there is no stipulation as to the option of the meeting place. Another peculiarity is the known signs of a dumb person which represent the spoken

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(1) Benjamin Sale of Goods (1974) Sweet and Maxwell, London (No. 11) page 245, Section 51 of the Bankruptcy Act, Cap. 30, Laws of the Federation, 1990.

words of the dumb person. They are, in Islamic Law, as effective as the spoken words. Some of the schools of law however prefer that where a deaf or dumb person effectively communicates in writing it is better to transact with him in writing. Under the English law of contract generally, no provision is specifically made in dealing with such class of persons. In dealing with such persons reliance is made on interpreters who can translate the signs of such a dumb person.

Another form of making Sigha (offer and acceptance) is by conduct of the parties. The rules of sale by conduct in Islamic Law are very much the same as those obtainable under the English law of contract generally. Of all the Sunni Schools of law, it is only the Shafi'i School that considers making of offer and acceptance through Al-Ta'ati (conduct) as illegal and void.

The general rules governing intention to create legal relation both in Islamic law and English law, are almost the same. The language used in conducting the sale and the conduct of the parties will generally reveal whether the contract was intended to bind the parties or not.

The next question for consideration is that of compensation or QUID PROQUD, in English law of contract it is a necessary condition to make binding every contract not under seal. It need not be adequate but must be of some value. What is necessary in Islamic Law of sale is the agreement (Al-Ridha) or consent. Sale can thus be conducted so long as there is consent whether there is a prompt payment of the price or deferred payment. What is important is the agreement between the parties.

In chapter four conditions and warranties have been treated. Also, some of the prohibited forms of sales under Islamic Law were discussed. It has been seen that freedom of contract is fully permitted in Islamic Law. Parties can make any valid stipulation which is not injurious to any of the contracting parties. Thus, where a

party feels the urge to make stipulations, such stipulations must strito sensu comply with the requirements of Islamic law. In a situation where conditions or warranties have not been spelt out, it must be taken, in so far as they affect the subject matter of the sale contract to render it defective or not fit for the purpose for which it is purchased, that such necessary conditions or warranties are implied in the contract, example is stipulation as to defect in the goods purchased. There are several optional conditions in Islamic Law of sale of goods. Chapter IV considered among others, the following:-

(i) Khiyar Al-Majlis - optional condition of meeting place

(ii) Khiyar Al-Ru'yah - optional condition of inspection

(iii) Khiyar Al-Shart - optional condition for stipulation

(iv) Khiyar Al-Aib - optional condition for defect

(v) Khiyar Al-Tadlis - optional condition for deceit

(vi) Khiyar Al-Thaman - optional condition as to payment of price

(vii) Khiyar Al-Ta'yin - optional condition of choice of subject matter of sale.

Many of such conditions have their authority from the Qur'an or the Sunnah or even from the Ijma'. Suffice it to say however, each of these conditions has a varying effect on a contract of sale of goods. Firstly, as has been seen, any condition which is illegal renders the obligation imperfect and the contract entered can be avoided, except of course where the law provides to the contrary. In certain conditions it can render a contract voidable, for instance, where the price is to be fixed at a later date by reference to the market price, or subject to the decision of a third party but a secondary condition providing for guarantee or for a pledge is permissible. Where the seller imposes a condition on the buyer which is

specifically in former's favour, such as a sale on condition that the buyer lends him a sum of money, the contract will be invalid.(1) If a condition is inserted in a contract of sale which is merely advantageous to one party, or is repugnant to the object of the contract, the contract, even if entered into, will be avoided, unless permitted by URF (custom/usage) such as where shoes are bought unsown on condition that the seller sews them.

In the English law, on the other hand, there are no restrictions for instance on the sale of goods by description or by sample. However, where there is sale by description, there is an implied condition, that the goods will correspond with the description and if by sample as well, they must correspond with both (Section 13 of the Sale of Goods Act). Where there is a sale by sample, there is an implied condition that the bulk will correspond with the sample and that the buyer shall have a reasonable opportunity to compare them and that the goods will be free from any defect which will render them unmerchantable, which defect is not apparent on reasonable examination of the sample.(2) Under Islamic Law, certain goods can be sold by description such as RES FUNGIBILES and goods which are located at a distance of more than a days journey.(3) In Salam Sale however, all the qualities of the goods must be specifically described such as length, quality, and weight.(4) A sale is voidable if the description of the goods is totally inaccurate, for instance, where two pieces of cloth are sold together as being of a certain brand and one piece is later discovered to be of a different brand. The sale will be avoided even though one piece

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(1) A comparison of this provision with the English law whereby a written transfer of property by way of security for a loan, whether in a form of sale or not, will be void unless registered under the Bills of sale Act, 1878.

(2) Section 15 of the Sale of Goods Act, 1893.

(3) Al-Azhari, S. (n.d.): Al-Jawahir Al-Iklil, Vol. II, Dar Al-Fikr, page 32.

(4) Ibid pages 335 - 336.

matched the specification and this will be so even where the pieces of the individual items have been specified.(1) However, in the absence of any proof to the contrary, the seller's oath will be accepted as to the accuracy of the description of the goods, and that they conform with those agreed upon by the buyer.(2) Again, under the English law of Sale of Goods, where there is a breach of condition the buyer will have the option of rejecting the goods or accepting them if they do not correspond with the description unless where property in the goods has already passed to him. In the latter case, his remedy will be in the damages only. Where the goods are mixed with goods with a different description which are not included in the sale, the buyer will have a choice of either accepting those goods which are in accordance with the contract description and rejecting the rest, or alternatively to reject the whole. Under Islamic Law, such a situation would avoid the whole contract and no distinction is drawn between goods matching the description being mixed with goods of a different description and the complete failure of any of the goods to comply with the contract. Such a contract is not void under the common law principles but it is rather voidable, where there is an inaccurate description of the goods unless this, in fact, amounted to failure of consideration on the grounds that there had been a total failure to perform the contract at all. It seems therefore, that this provision in Islamic Law should be equated with the latter situation rather than with the provision relating to sale by description as provided in the Sale of Goods Act, 1893.

As to the quality of the goods, the conditions in the English law, are implied as provided by Section 14 of the Sale of Goods Act 1893, unless otherwise excluded. The general rule is contained in the Latin Maxim CAVEAT EMPTOR, that is let the

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(1) Ibid. page 245.

(2) Ibid. page 31.

buyer be aware. But if the buyer may expressly or impliedly make known the purpose for which he requires the goods and by that he relies on the seller's skill and judgment and the goods are of a type normally traded by the seller, there is therefore, in the contract, an implied condition that the goods will fit the purpose for which they are purchased, unless sold under a patent trade name.(1) In Islamic law dispensation on the other hand, the seller is bound to declare all defects of which he is aware, and should describe them with some amount of certainty. This is in contradistinction with the Common Law rule of CAVEAT EMPTOR which is of course now limited by the Sale of Goods Act of 1893 as provided in section 14 of the Act. The Islamic Law principles are, in this respect, more in keeping with the modern notions of consumer protection. As seen in chapter IV in Khiyar Al-Aib (option of defect), it is a condition of the contract of sale that the goods should be free from any defect. Where a buyer discovers a defect which existed in the goods at the time of the sale, he can reject them even after he has taken possession of them, if he is aware of a defect, either at the time of the sale or on taking possession of the goods, and still knowingly and intentionally completes the sale or takes possession, he will lose his right of rejection, as he must be taken to have assented to the defect. The buyer's position under the common law is less favourable as he will lose his right of rejection whether he knows of the defect or not once he has accepted the goods, whereas under Islamic Law his position depends entirely on his knowledge of the defect.(2) Further, in Islamic Law, where the buyer discovers that the goods which he has bought either by weight or by measure are partly defective, he can either return all the goods or retain them all, but cannot return the defective part alone.

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(1) Section 14(1) of Sale of Goods Act, 1893.

(2) Section 11(1) and 35 of the Sale of Goods Act, 1893.

retaining them and claiming back a proportion of the price by way of compensation, or else to rescind the contract and return the goods to the seller together with the sum to cover the description which has resulted since the risk passed to the buyer (IRSH).(1) But where the goods have further degenerated in the hands of the buyer beyond use for the purpose for which they were intended, the right of rescission is lost, though right to damages remains. On the other hand, where the buyer has increased the value of the goods by some process such as dyeing the cloth, he will have the choice of either retaining the goods and claiming repayment of a proportion of the price by way of (IRSH) compensation for the original defect or else of rescinding the contract while remaining part owner of the goods with the seller. Next, where there is a release of defective goods to a third party who returns them to the re-seller because of the defect, the re-seller can return them to the original (first) seller if it has been proved that the goods were defective at the time of the initial sale. Also, where the seller is in bad faith and the goods have perished through a concealed defect (Batin) or through an accident which has directly resulted there from, either the buyer or the third party to whom the latter has sold the goods can sue for return of the whole price without prejudice to the latter's right of recourse against the former.

The other arm of chapter Iv is the prohibited forms of sales under the Sharia. Four main causes, for the prohibition have been identified these are:-

(i) Prohibition due to lack of capacity of a party to the contract of sale. This renders the contract either void or voidable depending on the nature, capacity and circumstances of the

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(1) Al-Azhari, S. (n.d.) Jawahir al-Iklil, Vol. II, Dar Al-Fikr, page 189.

The analogous position at the common law disposition is very similar, as there can only be partial rejection of the goods when the contract of sale is for separate instalmental deliveries. Furthermore, under Islamic Law, the general rule is that a buyer cannot retain the goods and demand for (IRSH) compensation for the defect. This is because no part of the price is related to the actual quality of the goods, nor does the seller agree to transfer ownership for less than the agreed price. This rule is contrary to the common law rule where it is the normal remedy for a defect in goods where the buyer has accepted the goods, then his only remedy will be damages while he retains the goods.(1) In certain circumstance however, the buyer is entitled to IRSH (Compensation) in Islamic Law such as in the case of perishable goods and foodstuffs if he discovers a defect after opening them and they are totally unfit for use. The buyer, in this circumstance, can claim, complete repayment of the price as the sale is avoided on the ground that the perishable goods were in fact not true commodities. So in the eyes of common law, there is a total failure of consideration. But where the perishables are still fit for use, the buyer cannot return them as he has created a further defect by opening them, as seen earlier, but can claim compensation. Also, it is disputed under Islamic Law by jurists where food or clothing is bought and consumed or worn out, and defect then discovered. Whether the buyer can claim any damages by way of compensation. The Hanafi denied such a right on grounds that there is no possibility of returning any of the goods as at all. It has been seen in Chapter IV that where the buyer causes deterioration to a moderate degree to goods after the sale whilst they are in his possession, and later learns that there was a defect in the goods at the time of sale, he will have the option of either

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(1) Section 11, Sale of Goods Act, 1893.

parties involved in the contract such as infants, minors, madman, bankrupt, compelled, an idiot and a transgressor.

(ii) Prohibition due to lack of Sigha (offer and acceptance) and the meeting point for concluding the contract. The three elements, offer, acceptance and the meeting place for the contract, are the necessary components of a contract of sale. If any is missing then there is no contract.

(iii) Prohibition due to illegality of the subject matter of sale. Where the subject matter is illegal, then the subject matter of the sale is avoided.

(iv) Prohibition due to illegal stipulations in the contract of sale where the sale is conducted in a manner declared illegal by the Sharia. This is where several forms of sales as practised by the Arabs before the institutionalisation of the Sharia were declared illegal by the Sharia. They comprised of, among others: Al-Munabadha (sale conducted through throwing cloth); Mulamasa (sale conducted through the touch of a garment); Muzabana (exchange of fresh fruits for dry ones); Mu'awama (sale of fruits on trees for a period of one year or more even before the fruit is ripe); Al-Gharar (sale of unpossessed goods); Al-Uryan (sale through getting of an article against a normal advance on some conditions). Al-Murtar (where an article is bought forcefully); Bai alal bai (sale upon another sale); Al-Hasat (sale by means of throwing pebbles) others are Bai al-Najash (a deceptive sale); Habal al-Habal (payment of a

foetus of she-camel before delivery); Al-Mukhadara (sale of unripe) vegetables; Al-Inah (sale of a subject matter on credit for a fixed period of time and the seller repurchasing same with a reduced price from the buyer); Al-Hadhiri lil Badi (sale by the townsman on behalf of the villager); Talaqqa al-Rukbana (meeting the merchandise before getting to the market place); Ba'ada Nida'il Jum'a (after second call for the Jum'at prayers any sale conducted by Muslims bound by the Jum'at is illegal).

It is to be noted that the Sharia or Islamic Law, has sanctioned prohibition on such forms of sales with a view to protecting the public from exploitation by few individuals. The prohibition, in other words, is for the public good. On the other hand, English law, on a general note, does not lay any restriction on the sale of goods generally provided that the subject matter of the contract is not illegal. The most important aspect of this problem relates in practice to those contracts declared illegal as being contrary to public morality or public policy, or which otherwise the law or government regulations of a given country, example of which is the sale of anything injurious or dangerous to human beings or animals such as dangerous drugs, toxic wastes, weapons and ammunition (except where the authorities permit) are all declared illegal. Thus in such circumstances, a sale will be void if the subject matter is tainted with illegality. It can thus be concluded in a way that the fundamental aim of both Islamic Law and the English law is the consumer protection from harm and exploitation in all respect.

Chapter V of this work discusses price in general under the Sharia. It considered among others conditions of validity for the price; price proposal, fixation of targeted price (al-Tas'ir). It also considered the essence or desirability of

controlling prices in markets where it has been seen that the Sharia does not favour controlling prices of commodities in the markets except where disposition and wanton transgression of the known norms have overtaken control of the markets. In such circumstances the authorities can control the prices of commodities with a view to bringing relief to the generality of the people; modes or forms of payment of prices, including the SALAM sale have been discussed. Finally, the Hisba institution in relation to markets and the role of the Muhtasib (market supervisor) have been considered.

In Islamic Law, as it has been seen, the price must be ascertained at the time the contract is made, in contrast with English law provisions, it will be found that in the latter, the parties to a contract of sale of goods are given freedom to ascertain the price. It can either be agreed upon as a term of the contract, determined by the course of dealing between the parties, or merely a reasonable price which would be arrived at by reference to market conditions.(1) Similarly, the parties can agree to sell goods on the basis of a price to be fixed by a third party, although if the seller fails to do so, the contract will be avoided unless all or part of the goods have been delivered, in which case a reasonable price will be paid.(2) In Sharia, the price cannot be fixed at a later date by reference to the market price nor shall it be subjected to the decision of a third party. Furthermore, it is illegal to enhance the price of goods by mere tendering for them without any intention to buy just to incite other parties to offer a higher price. This is NAJASH (deceptive form of sale) which is prohibited by the Sharia. Any advantage accruing to one party in relation to

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(1) Section 8 of the Sale of Goods Act, 1893.
(2) Section 9 of Sale of Goods Act, 1893.

payment will be usurious unless it is gratuitous. Discount can however be made as well as payment can be effected in other currencies if undue profit is not to be occasioned in the process.

In connection with question of time of payment of price, Islamic Law has made detailed provisions regulating time of payment. Thus, a sale can be negotiated either on the basis of prompt payment or in return for payment at a specific future date (credit) which of course must be fixed. The place of payment of prices has been a matter of dispute among jurists.(1) It is already settled however, as in the case of SALAM sale that payment of the price must immediately be made.(2) If the payment is delayed further, it will then become a debt. If it becomes a debt, then it is not permissible as it now becomes debt against debt. It therefore becomes a matter of mutual promise, that is the consideration is executory on both sides. Though permitted under the English law, it is not so under Islamic Law.

The consideration of price under Islamic Law has revealed some peculiarities of the Sharia (Islamic Law) which are uncommon to the English law principles of sale of goods. Instances of such peculiarities which are unparallel by the English law are Al-Tas'ir (fixation of targeted price); Salam (sale where price is advanced but delivery of goods deferred to another time). Sarf (exchange of money for money); Muqayadha (barter, or exchange of goods for goods in place of money as the price); Muzayada (auction sale). These admittedly, are not treated by the Sale of Goods Act 1893.

In its attempt to beat down the escalation of prices of goods in the Nigerian

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(1) The Hedaya, Vol. II, page 302.

(2) Three days extension is however allowed in consonance with the Sunnah that confirmation or rescission of a contract can be made within three days of the contract.

markets, the federal Military Government of General sani Abacha has, in its 1995 Budget, introduced some Consumer Protection Mechanism in order to bring relief to the suffering masses.(1) But the question to be asked is whether such boards will be able to perform as expected. may the Almighty God guard such boards against failing into the same mistakes and consequences as befell the Price Control Board and the Price Intelligence Agencies of the Murtala/Obasanjo Administration.

An institution of public importance which takes care of the welfare of the society including the supervision and control of market centres, is the HISBA Institution. It is among the functions of the MUHTASIB (market supervisor) to control the market so that traders do not cheat their customers and the vice-versa. Islamic law, has made adequate provision for the function of the MUHTASIB. The functions of the MUHTASIB, as seen earlier, are far wider and more encompassing than that of a price control worker or that of a member of the Consumer Protection Board as the former's functions include enforcement of strict compliance with Islamic Religious principles not only those bordering on MU'AMALAT (transactions) but even those on IBADAT (worship) such as the regular establishment of prayers, the payment of the poor due et cetera. This provision is virtually unparalleled in the whole English Commercial law dispensation. Such provisions are left to flow within the province of municipal laws of a State or Local Administration.

Chapter six treats Agency Contract as provided by Islamic Law. Sales or Purchases can lawfully be conducted by authorised agents. Though it may amount to an independent contract Agency, contract on matters of sales and purchases is so

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(1) Consumer Protection Board; such Boards have started taking shape in some States: Bauchi, Kano, Kwara, Kaduna, Oyo and Cross River.

closely related to the contract of sale of goods. Agency contract in both Islamic and English Laws, is a special kind of contract or fiduciary relationship or as a grant of authority between the Principal and his Agent. Both laws also postulate the relationship as pertains to the contractual rights, liabilities to third persons who dealt through the Agent. As seen already under Islamic Law, Agency is the act of someone placing another in his position in a known, lawful transaction. It is the delegation of a transaction and taking care of it by an Agent. Under the English law, the general definition of Agency, seems to be that it is a relationship which subsists between one person called the Principal and another called the Agent by which the latter is by law conferred with legal authority to alter relationship of the former with third parties.(1) In Islamic Law, we saw that Agency can arise through the process of Offer and Acceptance (consent). This also holds good under English law. It was seen also that agents in Islamic Law were mainly classified into three: (a) specific (Khass) (b) general (Amm) and (c) Al-Fudhuli (intruder) Agent. The role of each one of them can be restricted or left open. Under the English law, the determining factor of whether the contract of Agency exists or not is the consensual factor which is exhibited through (i) consent of the parties and (ii) authority of the Agent. Agency under this law has many classes as (a) general and specific (b) mercantile agent (c) commission agent (d) del credere Agent. Generally however, no formalities are required for the creation of Agency under the English law. It can be by word of mouth, conduct of by a written agreement. Agency relationship can come about under this law by ratification, estoppel or necessity. Necessary operational rules or requirements are made available, in details in any work on the law of

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(1) Igweike, K. I. (1980) Nigerian Commercial Law, Lahore, page 4.

Agency. The next important issue is that of the duties of an Agent to his Principal. Briefly, they consist of (i) Duty to perform the business he has undertaken (ii) Duty of obedience and loyalty (iii) Duty of care and skill while executing the terms of his Agency (iv) Duty to act in good faith and (v) Duty to account to his Principal. The Principal, on his part, has the following duties: (i) Duty to pay remuneration for the service rendered by the Agent (ii) Duty to re-emburse and indemnify all losses, damages or liabilities suffered by the Agent in his authorised duties.

As for the relationship of Principal and Agent with regards to contracts generally, this is dependent on two factors: (i) Whether the agent acted within the scope of his authority express be it or implied, (ii) Whether the Principal is "disclosed" or "undisclosed". So, generally where the agent's act was outside the scope of his authority, unless subsequently ratified and the identity of his Principal disclosed, the latter incurs neither right nor liability under the contract unless made a party to it. Where the Principal is undisclosed however, the contract may still be enforced by or against the Principal where the agents act was authorised. Personal liability of an agent can arise where he contracts personally, or where the Principal is a foreign body, where the Principal is a fictitious one and other such circumstances too numerous to be mentioned here. The whole point is only to show the similarities and dissimilarities between Agency as postulated by Islamic Law and the common law. As is clear, the similarities outweigh in proportion the dissimilarities. An "Agent" with no authority (Al-Fudhuli) under Islamic Law is no more than describing an Agent under the English/Common law as an Agent with no authority as well.

The institution of Agency contracts thrive very well in our markets or business arenas. It has been found in this writing (chapter VI) that the activities of

the people known as brokers of today, are not in anyway helping healthy situations in the markets. They perpetuate a lot of ills and crisis. They are a catalyst to escalation of prices. Strictly speaking, they are not Agents in Law.

This writer is of the view that it is the responsibility of the authority to monitor the activities of Agents and brokers in business transactions. It may of course be difficult to effectively monitor or control the activities of the Agents and brokers as they can change their operational strategies, yet, if the authority makes a general rule of practice publicised to the generality of the people in a given society as to the MODUS OPERANDI of an Agent or broker, the Agent's or broker's nefarious activities will drastically minimise. In Islamic Law, honesty and the fear of Allah are the best policy. Let the Agent and broker inculcate the fear of Allah and deal with people honestly and sincerely. That is the only way to demoralising them from wanton zest of wealth accumulated through fraud and price escalation. It was suggested earlier on that:

(a) Government should not allow a particular class of people such as the ARKOMIS (a class of brokers) to hold the market activities to ransom, and that

(b) Government may engage the ARKOMIS and their cohorts on official basis. Their wages should be fixed and they should be given clear-cut guidelines as to what to do in their business, now serving as official brokers.

(c) Where private Agency exists between a Principal and his Agent, the former should monitor the activities of the latter by setting for him clear guidelines, as to modalities of operation. Any breach thereof should not be condoned as condonation brings

about injustice to the generality of people who deal with the Agent or broker.

It is beyond any dispute that the brisk business of Agents and brokers in our markets today seem to defy any solution by any one individual, Government, in whatever name so called, is directly in control as shepherd of the society. Persons afflicted with leadership today are saddled with a herculean task, the proper discharge of which will only save them from the doubtless accountability of the Reckoning day. The followers have a duty too, and that is to try to change the condition of things by themselves.

7.3.0. CONCLUSION

Application of Islamic Law In Nigeria: Problem and Prospect:

7.3.1. Problems in the Application of Islamic Law:

Nigeria is a geographical entity "comprising of people who believe in and practise different kinds of religion."(1) It is a fact well acknowledged that in what constituted the defunct Northern Nigeria, Islam was (and still is) the predominant Religion. Sharia was well entrenched into the lives and affairs of the Muslims who formed over 80% population of that region. Sharia was the law of the region. History bears testimony that Sharia had been in application in this part of the country since around the 10th. Century.

On the arrival of the British Colonialists to this part of the country that is, soon after it's declaration as a protectorate in January, 1900, Lugard was made the first High Commissioner of this protectorate. In the processes of introducing his policies of administration, it became evident to him that any attempt by his administration to meddle directly with Islam and the Sharia Legal System would not easily be tolerated by the people. Consequently, he entered into a treaty with the Emirs, who were of course powerful and commanded a lot of respect from their subjects, that the religion of Islam and its legal system would be allowed to continue(2).

No sooner had the colonial administration got established than the

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(1) Report of the Political Bureau, march, 1987.
(2) This was one of the mechanisms used in operating the Indirect Rule Policy.

administrators started to undermine the treaty entered with the Emirs. They introduced a lot of changes which not only maimed the Sharia as the ultimate legal system and the sole test of legitimacy but it's very existence or rather application became dependent on the Colonial laws which the colonialists carried along with them. Thus, the present truncated form of Islamic Law in this Country and the overall attitude towards it, is the end result of the colonial tyranny. It is pertinent to bring to focus few examples of the antecedents that gave Islamic Law the present 'apologetic' or compromising status:

1. - When Frederick Lugard was appointed the first High Commissioner for the protectorate of Northern Nigeria, in 1900, the first thing he did in maiming the FULL application of Islamic Law, though in a disguised form that, that was only done purely, "for the better regulation and control of Native Courts was the promulgation of Native Courts Proclamation No. 5 of 1900. Among the salient provisions of this proclamations are that:

   a - "The Resident was empowered to establish in his province by 'warrant' under his hand, such native courts as deemed fit;

   b - The courts were to administer native law and customs prevailing in the area of Jurisdiction of each court in both civil and criminal matters. In criminal matters, they might award any punishment, and in civil matters they might make any order, that native law and custom authorised subject to the condition that no inhuman treatment could be inflicted. And they could not inflict

the penalty of death.

c - The Emir of Chief was to appoint the Judges, subject to the Resident's approval. Where there was no Emir or Chief, the Resident appoint the Judges.

d - The Resident had power to enter the Courts at anytime and to inspect them. he could transfer a case from one court to another, he could review the sentence (or the order) of the Courts.

e - The practice and procedure of the Courts were to be governed by native law and custom subject to Rules that may be made by the High Commissioner(1).

Subsequent amendments to this 1900 proclamation were made in 1906, 1915 - 1918 up to 1956 when Native Courts law was promulgated, continued to incorporate the substance of the 1900 proclamation. All these proclamations and their subsequent amendments occasioned unnecessary interference by the colonialists in one way or the other in our traditional court system, as against the treaty they entered into initially. For instance, it is an interference where, as shown in paragraph (a) above 'that the Resident was to establish a native court at will'. The establishment of native court should have been left with the Emirs and Chiefs who were fully acquainted with the desire of their subjects as to which location deserved a native court. In other words, the popular will of the people would have been the determinant for establishing such a court.

Secondly, the scope of applying the native law and custom was narrowed down

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(1) Keay, E.A. et al (1966) The native and Customary Courts of Nigeria, Sweet & Maxwell Publishers, London pages 22 - 28.

to simple offenses and civil actions. The Courts were divested of Jurisdiction, since then, to inflict capital punishments such as death penalty or a penalty the colonialists classified as dehumanising. These native courts, as seen earlier, were Islamic Law Courts in their form and application. The Islamic Law empowers any person, once appointed as a Judge, to inflict any punishment however grievous or declare any order however cumbersome on all persons. The curtailment of the jurisdiction by excluding some offenses from a native court's jurisdiction was an unnecessary interference by the colonialists. It was this curtailment which signalled the complete removal of Criminal Jurisdiction of the Islamic Law Courts (properly called). And this has since then, remained the position to date. On the method of appointment of Judges, especially where no Emir or Chief existed, the Resident could straight away appoint any person of his choice to be the Judge. The fear here was that anyone could have been appointed whether qualified or not and whether a Muslim or not to preside over Islamic Law Cases. This was an uncalled for interference. A Committee of learned persons whose integrity was unquestionable should have been charged with that responsibility. The appointment of a Judge was such a delicate issue that ought not to have been concentrated in one man's hand, the Resident. Further, the meddling into Judicial work by the Resident in the transfer, review or modification of cases and others was unnecessary interference. The Resident as far as legal matters were concerned, especially SHARIA matters was a stark lay man. Then what qualified him to review Islamic Law Cases before a Native Court? How did he determine the Jurisdiction of the Court on subject matters or individuals? On practice and procedure which the resident had power to make Rulers, one wonders also whether the Islamic Law Rules of Practice and Procedure were not "forced" to give way to the Rules made by the Resident. It is quite trite

under Islamic Law of practice and procedure that courts were to administer all laws in conformity with the Islamic Law of procedure. Such laws may not necessarily pass the test as might laid by the Resident.This necessarily means that Islamic Laws of procedure had to be jettisoned in favour of the Residents own. This could cause miscarriage of justice and was a detrimental interference by the colonialists(1).

Whatever was the motive or interest of the colonialists, it has been pointed out by some European authors that:

> "In the Moslem Emirates there was a clearly defined system. The Alkali Courts administered the SHARIAH, which included the all-embracing Civil Code of Islam and some specific Criminal offenses .... These Alkalis were often men of great prestige and learning. The law they administered .... and the rules of evidence and procedure by which they administered it, were well defined in writing of the Moslem Jurists of the MALIKI School and were backed by the injunctions of the Holy QUR'AN and SUNNAH.(2)

That truncated position of Islamic Law in the Native Courts continued up to 1956 when the 1956 native Courts law and the 1948 Brooks Commission, were brought to bear on the system. Both served as fore-runners to the creation, for the first time, of the Muslim Court of Appeal(3).

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(1) The statutory definition given to "Native Law and Custom" or "Customary Law" includes Islamic Law. See S. 2 of the 1945 Evidence Act. S. 2 of the High Court Law, S. 2 of the District Courts law (1963): S. 2 of the 1968 Area Courts Edict. This writer has disagreed with that definition and regards it as "totally misleading and blasphemous." See his LLM. thesis: Maintenance of Wife under Islamic Law and its Application in the Northern States of Nigeria, 1984, ABU: his paper (unpublished) "The States and the Sharia Court: what other Jurisdiction can be conferred upon the Court as envisaged by the Constitution, may, 1990, C.I.L.S., ABU, Zaria.

(2) The co-authors of the book; The native and Customary Courts of Nigeria: E.A. KEAY and S.S. RICHARDSON. Dr. S. Kumo in his paper: "historical Perspective of Sharia in Northern Nigeria" Published by the Sunday new Nigerian Newspaper of 15/4/90, observed that: "Any shortcomings and any miscarriage of Justice and any misapplication of the Sharia were solely the responsibilities of the Alkalis and Emirs."

(3) See: Moslem Court of Appeal law, 1956.

The establishment of this Court, according to Keay and Richardson, gave "sense of jubilation to the Northern Chiefs and Moslem Jurists," as the Court was regarded to be a "means of protecting Moslem Law from encroachment as a result of appeal to English Court"(1). The Moslem Court of Appeal was conferred with appellate jurisdiction, "in case governed by Moslem law". And a case was regarded to be governed by "Moslem Law", if it was a case to the determination of which it was lawful and appropriated that the principles of "Moslem Law" should be applied to the exclusion of the principles of any other system of law or of Native law or Custom. If there was any appeal from the decision of the Moslem Court of Appeal, it was to go to the then High Court. This was another stumbling block. How could an appeal emanate from the decision of persons learned in Islamic Law and then going on appeal to the High Court with apparently no learned Judge in Islamic Law? How would that appeal be determined without a miscarriage done? It was really not possible. This situation too, continued up to attainment of independence by Nigeria.

On attainment of self-Government in 1960, the "moslem Court of Appeal Law of 1956" was repealed and replaced by the 1960 SHARIAH COURT OF APPEAL LAW. It is note-worthy that even this law did not in any material particular introduce any change or departure from the former law. The preamble to the 1960 SHARIA Court of Appeal law specified that the law is:

> "A LAW FOR THE HEARING OF APPEALS FROM NATIVE COURTS IN CASES GOVERNED BY MOSLEM PERSONAL LAW AND MATTERS ANCILLARY THERETO."(2)

For the purpose of the 1960 Shariah Court of Appeal law, "MOSLEM

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(1) Keay & Richardson, Ibid. page 56.

(2) Sharia Court of Appeal, 1960, Cap. 122, laws of Northern Nigeria, 1963, Vol.III.

PERSONAL LAW" means, "Moslem Law of the MALIKI School governing the matters set out in paragraphs (a), (b), (c) and (d) of Section 11 of the Law,(1) it states:

> "(a) Any question of Moslem Law regarding a marriage concluded in accordance with that law including a question relating to the dissolution of such marriage or a question that depends on such marriage relating to family relationship or the guardianship of an infant;
>
> (b) Where all parties to the proceedings are Moslems, any question of Moslem Law regarding a marriage, including the dissolution of that marriage or regarding family relationship, a foundling or the guardianship of an infant.
>
> (c) Any question of Moslem Law regarding a Wakf, gift, will or succession where the endower, a donor, testator or deceased person is a Moslem;
>
> (d) Any question of Moslem Law regarding an infant, prodigal or person of unsound mind is a Moslem or the maintenance or guardianship of a Moslem who is physically or mentally infirm; or
>
> (e) Where all the parties to the proceeding (whether or not they are Moslems) have by writing under their hand requested the Court that hears the case in the first instance to determine that case in accordance with Moslem Law, any other question."

Such were the provisions of the Sharia Court of Appeal Law, 1960, which principally limited the jurisdiction of the Court to matters of Moslem Personal law on appeal.

This means that, the court, as it were, lacked any original jurisdiction on any matter. Secondly, the law that was to be in application whether substantive or

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(1) S. 2 of the Law. The definition given to the phrase, "matters ancillary thereto" by the Chief Judges of the Ten Northern States of Nigeria in their deliberation on a paper titled: SHARIA COURT OF APPEAL - ADDITIONAL JURISDICTION - VIEWS OF THE HON. CHIEF JUDGES OF THE TEN NORTHERN STATES OF NIGERIA" is that the phrase is confined to "matters that relate to Muslim Personal Law".

procedural ought to be the principle of "Moslem Law of the Maliki School"(1) as customarily interpreted at the place where the trial at first instance took place. This limitation was regarded to be "a serious and totally inexplicable diminution of what ought to be the jurisdiction of the Sharia Court of Appeal".(2) This had virtually remained the position on the application of the Sharia both in the 1963 Regional Constitution of Northern Nigeria and the 1979 Constitution of the Federal Republic of Nigeria. There were no remarkable progress in the two Constitutions as against the provision of the 1960 Sharia Court of Appeal Law. The 1979 Constitution of the Federation limited the application of Sharia to Islamic Personal Law (Section 242 thereof). This Section has not only marred the full scale application of the Sharia but trivialised the whole essence of the Sharia Court of Appeal. All other matters relating to Islamic Civil and Criminal law were to be determined, in so far as they did not relate to Islamic Personal Law,(3) if on appeal, by the High Court. This limitation of application of the Sharia was viewed by the operators of the Sharia Courts of Appeal and some informed Muslims as diminutive. It diminishes the scope of the Sharia as many cases litigated upon in the Area Courts, even though in accordance with Islamic Law, such as cases on landed properties, commercial transactions, would have to be referred to the High Court for determination under the High Courts general jurisdiction provided by section 236 of

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(1) A.M. Hajj Nour, a former Senior Lecturer with the C.I.L.S. ABU Zaria, quoted the author of the Hidayat Al-Tullab that "it is well settled in Islamic Jurisprudence that there is nothing sacred about restricting SHARIA within the confines of a particular school, "Sheikh Uthman Ibn Fodio (the Jihadist) is also reported to have said, 'all that which was received from the Prophet cannot be called a MAZHAB of anybody, it is binding Law.'"

(2) Kumo, S. "The Application of Islamic Law in Northern nigeria: Problems and Prospects" (a paper presented at the International Seminar on Islamic Law held in Zaria, 1976.

(3) Islamic Personal Law has the same meaning as assigned to it by S. 11 of the 1960 Sharia Court of Appeal law. See Section 242(2) (a)-(e) of the 1979 Constitution of the Federation.

the 1979 Constitution. Hitherto, there was a practice which was provided by section 51 (3) of the 1963 Regional Constitution(1) that whenever the High Court was exercising jurisdiction on appeals from a decision of a Native Court, a member of the Sharia Court of Appeal may sit as an additional member of the High Court. This was with a view to ameliorating the truncated scope of the Sharia application. This practice was declared invalid by the Federal Court of Appeal in the case of Mallam Ado vs. Hajiya Rabi & 1 Anor, appeal No. CA/K/69/82 reported in (1984 5 NCLR p.260. That was in 1982. The 1979 Constitution was also silent on that practice. In 1986, Decree No. 26 was promulgated which conferred wider jurisdiction on the Sharia Court of Appeal of a State. This necessarily entailed wider application of Islamic Law. The Decree allowed the application of Islamic Civil Law simplcita. The amendment brought by this Decree was declared inconsequential by the Courts.(2)

The 1989 Constitution of the Federal Republic of Nigeria made a better provision for the application of Islamic Law. It lifted, entirely, the provision made by Decree No. 26 of 1986. This Constitution, unfortunately, never saw the day light. It was never implemented.

However, the then Military Administration, under General Ibrahim Badamasi Babangida (IBB), made a Decree which they tagged, "State Government (Basic Constitutional and Transition Provision) Decree No. 50 of 1991", Section 135 of the Decree provided:

> "The Sharia Court of Appeal of a State shall, in addition to such other Jurisdiction as may be conferred upon it by law of the state, exercise such appellate and supervisory Jurisdiction in Civil Proceedings involving questions of Islamic Law where all the parties are Muslims." (Underlining supplied for emphasis).

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(1) The Section correspond with Section 63 of the High Court Law.

(2) See: Kaduna State High Court case (Unreported); Bisi vs. Abuja.

This Decree thus expanded the scope of Sharia application. It came into effect on the 6th. day of December, 1991.

On November 17th. 1993, there was another change in administration, the new administration promulgated Decree No. 107 tagged "Constitution (Suspension and Modification) Decree 1993". Part B of the second scheduled thereof introduced some amendments to wit: Section 217, 223(1), 226(a), 241(3) and 244 of the Constitution of the Federal Republic of Nigeria 1979, have been amended by deleting the word "personal" wherever it occurs after the word "Islamic" in the referred Sections of the Constitution. This amendment is certainly fundamental in scope. It now expands the application of Islamic Law in the Sharia Court of Appeal of a State and of the Federal Capital Territory Abuja, the Court of Appeal and the Supreme Court to cover all questions relating to Islamic Law simplicita.

7.3.1. (a)NON APPLICATION OF ISLAMIC LAW IN THE SOUTHERN STATES OF NIGERIA:

Another important observation is that throughout the length and breadth of Southern Nigeria Islamic Law has not been furnished the fertile cradle to grow.

This is in spite of the large percentage of the Muslim population living there.(1)

Professor Anderson, writing in 1967, observed:

> "As a consequence, its (Sharia) Judicial application is confined to the Muslim Emirates of the North; and no specific Muslim Court nor any formal application of Islamic Law is known throughout the South, even in those areas where the proportion of Muslims is high (as, e.g. among some sections of the Yorubas"(2)

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(1) These States include: Abia, Akwa Ibom, Anambra, Bayelsa, Cross River, Delta, Edo, Enugu, Ebonyi, Ekiti, Imo, Lagos, Ondo, Ogun, Oyo and Rivers.

(2) Anderson, J.N.D. (1967) Islamic Law in Africa, Frank Cass Library of African Law Publishers, London, page 222.

The pathetic situation facing the Muslims in these states is that all disputes relating to Islamic Civil law, such as divorce of a wife, succession, contracts, are settled informally by reference to the local headman of the community or ALFA (one learned in the religion) or alternately they refer such matters to customary courts. (These customary courts) are not Islamic in anyway. They apply the general Yoruba customs applicable in the area concerned.(1)

Disturbed by this sordid situation, some Muslim individuals and organisations felt bitterly and began to ask for their right from the authority. For instance, the "Muslim Congress of Nigeria", addressed the Government on the issue, complaining that:

> "Muslims in the southern provinces of Nigeria have long been deprived of the use of just and moral code prescribed for use by our Holy Prophet Muhammad .... for our guidance from generation to generation. We felt it was high time that this should be changed. Our religion has been greatly corrupted .... and many of our Muslim brothers have gone astray, while the "al-Qur'an" the Holy Book of Islam "has been badly and wrongly used by men who have no knowledge of it".

They therefore requested for the establishment of a "Muslim Judiciary (Sharia) for southern Nigeria"(2)

When the Brooks Commission was set up in 1933, the Muslim Congress wrote a longer letter to the commission that they would wish such Judiciary, to deal, initially with matrimonial causes and questions of inheritance as these were tried mostly by the native courts. They cited an instance with Ibadan town where they maintained, over four thousand cases of divorce, twenty-five percent of them between Muslims, were handled annually by two native courts which separated

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(1) Ibid.

(2) Ibid. pages 222 & 223.

couples "like dogs without regard to the instructions laid down by the Holy Qur'an". They ended their petition to the Commission with the following:

> "We therefore pray this Commission to grant our request for a separate Muslim Court ... The condition of our courts is even worse in the case of the law of inheritance. Our Native Authority civil court that grants letters of administration does not know any Muslim Law governing this matter .... In conclusion, we have to say here that in almost all the towns and villages in the western provinces Muslims are in the majority. For this fact, we request you kindly to consider our case sympathetically and to grant our request."(1)

Over sixty years have elapsed since then, the position has not improved. It is sympathetic indeed! Absence of Islamic Law Courts to interpret and enforce the Sharia is a tragedy to the Muslims wherever and in at whatever percentage they may be. At a seminar conducted at the University of Lagos on Sharia, Chief M.K.O. Abiola, emphatically stated that:

> "If Sharia court system is good for Muslims in the North it is equally good for Muslims in the South."(2)

Several Committees on Sharia had thereafter been set by some concerned Muslim philanthropists and organisations with a view to making efforts to secure the establishment of Sharia Courts of Appeal especially in the Yoruba speaking States with a view to getting the Sharia implemented in such States. The struggle is yet to produce any result. So many obstacles have been listed as the forces against

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(1) Ibid.

(2) M.K.O. Abiola in his "Welcome Address", at a one-day seminar on Sharia held at the University of Lagos on the 18th. October, 1992.

the establishment of Islamic Law Courts in such States,(1) one of them being the interference by the non-Muslim adversaries. In his presentation at the one-day conference on Sharia at the Lagos University, Muhammad Bello, CJN made the following observations:-

> "Although millions of Muslims in Ogun, Ondo, Oyo and Lagos States contract marriages in accordance with Sharia, there are no Sharia Courts in these states to adjudicate on any question for Islamic Personal Law regarding such marriages, including a question relating to the validity or dissolution of such a marriage or relating to family relationship or guardianship of an infant. The same applies to any question of Islamic Personal law regarding a Wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim. All these matters which are all matters for Sharia, are decided in the Ogun, Ondo, Oyo and parts of Lagos State by Customary Courts where the Judges are not learned in Sharia. It is for these foregoing reasons that the advocates for the establishments of Sharia Courts in these States are vigorous in their campaign. In concluding, I may emphasize the fact that the demand for the Sharia Courts is only to satisfy the need of the Muslim communities. It will not affect any other person who is not a Muslim."

The general call by the entire Yoruba Muslim Communities in the South to the authorities concerned is as summed up by Justice (Dr) M.A. Okunola in the following words:-

> "On behalf of the entire Ummah in Southern Nigeria, in the name of Allah I passionately appeal to the conscience of each and every one of you to accede to the request of the Muslims by implementing the provision of S. 259(1) of the 1989 Constitution by establishing the Sharia Courts in the various States that make up the Southern Nigeria at least to allow the Muslims to have full compliance with S. 35(1) Cap. IV of the same Constitution which guarantees freedom of worship."

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(1) See papers delivered by Justice (Dr) M.A. Okunola, "The relevance of Sharia in Nigeria with particular reference to Southern Nigeria", (18/10/92) "Sharia and non-Muslims. A moment of Truth," a paper produced by National Council of Muslim Youths Organisations of Nigeria (NACOMYO) Lagos State Chapter, Release No. 14/3/001.

Nothing can be far from the truth. Refusing the southern Muslims practice SHARIA tantamounts to depriving them from their constitutional rights. This is diminutive to the Muslims and the Sharia Legal System. It is high time something positive in that regard was done.

7.3.1. (b) PROSPECT OF ISLAMIC LAW IN NIGERIA:

As a law of universal application and as a law for all time, Islamic Law emerged as a fully developed legal system that has left no stone un turn.(1) The history of development and application of Islamic Law is always a lesson which teaches the Muslims resistibility in spite of mounting attacks and challenges in order to establish Justice and fairness amongst human beings. This is so, as Islamic Law is fashioned to ensure that Justice prevails in every facet of human existence.

To those who do not understand it, Islamic Law is no more than a conglomeration or "barbaric" rules and principles which were "repugnant to natural Justice equity and good conscience."(2) But how correct is such an assessment will depend, as put by Dr. Kumo S., upon a person's "cultural Milieu."(3)

The prospects or future of Islamic Law has been forecast by various legal writers. Some focussed that Sharia application as time goes on will phase out by gradual process and merge into the English Legal system. A.E.W. Park, is one of such

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(1) Qur'an: VI: 38.

(2) See Park, A.E.W. (1963) The Sources of Nigerian Law, Sweet & Maxwell Publishers, London; Keay & Richardson (1966) The Native and Customary Courts of Nigeria, Sweet & Maxwell, London; Kumo, S. (1976) The Application of Islamic Law in Northern Nigeria: Problems and Prospects In Journal of Islamic and Comparative Law, ABU Zaria, Vol. I, 1977.

(3) Kumo, S. Ibid. page 28.

advocates. He stated in his book "The Sources of Nigerian Law", while discussing the future of Islamic Law, inter alia:

> "When English law was first established as a source of the law of Nigeria it would have been quite impracticable to eliminate the pre- existing customary system, and that still remains largely true. In the present social and economic conditions of the country it is entirely necessary for the two types of system to continue in joint operation. But the duality will not, and should not, last for ever. For reasons of certainty and simplicity it is clearly preferable for a modern state to have as unified legal system as possible and the future trend in the jurisdictions of Nigeria will inevitably be towards unification. It can also be predicted that this process will be more at the expense of customary than of English law. For it should be recognised that customary law, despite its remarkable adaptability, is basically not suited to the type of development and industrialised society which it is the earnest hope of Nigeria to become. It will of course be a pity for the indigenous institution, which has its roots formally fixed in Nigerian soil, to disappear, but any attempt to preserve customary law merely for its own sake and alter it has ceased to perform the valuable functions it still performs at present would be useless and potentially harmful antiquarianism."(1)

Despite his scepticism, still Mr. Park went ahead to suggest the modality of how the unification can come about, he states:

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(1) Park (1963) The Sources of Nigerian Law, Sweet & Maxwell, London, pages 132-143. It should also be remembered that various enactments interpreted "Customary Law" to include Islamic Law, though an unfortunate interpretation.

"However the rules of internal conflicts alone will not unify the law on any topic, and clearly the most important method of achieving that result is by legislation. A local statute may abolish both received law and the customary law on a particular subject, and replace them by the rules it enacts itself. Alternatively, the statute could abolish customary law on the subject leaving the introduced English law, together with any additions by local statutes, in force alone so as to govern all persons within the jurisdiction. With regard to criminal law, indeed, a statutory unification has already been effected, and in the urban districts it cannot be very long before uniform rules of land law are introduced."(1)

That is the dream of Dr. A.E.W. Park. A lot of Nigerians contemplate the same dream. But as Dr. park himself asked: When will it become a reality? That also is the question of the writer. Our answer is relatively simple: If it did not happen before, it does not happen now, then it will never happen. Our reasons too, are simple. Nigeria, as a Sovereign Nation under God is blessed with many tribes, cultures, languages and religions. Islamic Law is a religious Law. Wherever a Muslim goes, he must carry along with him his religion, which is his Sharia. Any attempt to dichotomise his life practices from his religion is to destroy him to finality. If in the name of unification of laws, Mr. A (who is a Muslim) is compelled to surrender to the jurisdiction of the law of intestacy of non-Muslims. Mr. A is subjected to the jurisdiction of a law, which should ordinarily not be applicable to him, then he is cheated. This is what happened in the unification of the criminal law, Muslims have a better Criminal Law which ensures justice and equality before the

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(1) Park: Ibid. page 140.

Law and was applicable to all Muslims. But as a result of the unification which resulted in the emergence of the Criminal Code and the Criminal Procedure Act in the South and the Penal Code and the Criminal Procedure Code in the North, these became the Laws applicable to all and sundry. These laws cannot match with the provisions of Islamic Law of crime and procedure in terms of scope, effectiveness and deterrence.

It is suggested that the Law Reform Commissions, should at all times have in view, and keep in constant contact with persons learned in Islamic Law so that valid and authoritative advice should be given to them. Just recently, there was a conference convened at Lagos, 1995, by the Nigerian Law Reform Commission to consider proposal with a view to amending the existing Evidence Act. Not a single view was taken from any Islamic Law Jurist to hear the Islamic law version of the law of evidence. the present Nigerian law of Evidence, as contained in Cap. 112, Laws of the federation of Nigeria, 1990 applies to all citizens including the Muslims. The Muslims are entitled to be heard.

The comprehensive and universal character of Islamic Law makes it adaptive to all conditions a Muslim may find himself in. it is not rigid and it grows with time. It is not the character of Islamic law to compel one who does not believe in its principles to surrender to its jurisdiction.

J.N.D. Anderson, a Professor of law at the London School of Oriental Studies in his book, "Islamic Law in Africa," in which he conducted a general survey of the application of Islamic Law in British Colonial Territories in Africa and Aden, four years after Park wrote his "Sources of Nigerian Law" was somewhat pragmatic on the future of Islamic Law. This is what he said:

"On any long term view it seems clear that Northern Nigeria

> must eventually come into line with the rest of the Muslim world in the establishment of two distinct sets of courts..... Sharia courts concerned almost EXCLUSIVELY with MATTERS OF PERSONAL STATUS AND FAMILY LAW in respect of Muslim litigation and "civil" courts administering a criminal code (whether Western or hybrid in it's origin) and a law of CONTRACT, TORT and COMMERCE ADAPTED to the complications of modern life and applied under rules of procedure and evidence free from RIGIDITY OF THE SHARIA. This will be fostered in Nigeria not only by expansion of trade and industry and increasing use of bills of exchange and similar refinements, but also by the paramount need as the unification of the country grows, for a CRIMINAL LAW applicable to all Nigerians without distinction."(1) (Emphasis supplied).

It was unfortunate that none of the two authors had the right vision of the ideal position Islamic Law was to assume in the future. This is because, roughly thirty years thereafter, Islamic Law has recorded enviable progress and achievements. Few among such achievements are:

(1) More institutions were opened by Government at Federal/State level which run courses on Islamic Law. Examples are; Ahmadu Bello University, Zaria (ABU); the University of Abuja; bayero University, Kano; Dan Fodio University, Sokoto; University of Maiduguri; University of Jos; Lagos State University (LASU); Colleges of Legal and Islamic Studies at Adamawa, Bauchi, Borno, Jigawa, Kano, Kaduna, Katsina, Kwara, Niger and Sokoto States. Others include, School for Arabic and Islamic Studies at Oguta in Imo State.

These institutions train persons to become learned in Islamic Law qualifying them to take posts as Judges or teachers which facilitates the enhancement of the

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(1) Anderson, J.N.D. Ibid, page 219.

applicable of Islamic Law throughout the length and breadth of Nigeria.

(2) Despite the unsteady position of Islamic Law in the Constitution or Decrees, as the case may be, it is certain now, going by the amendments introduced by Decree 107 of 1993 and the 1995 Constitution (yet to come into effect) that the application of Islamic Civil Law is no more limited to personal Law. Other subjects of Islamic Civil Law such as contract, commerce and landed matters shall be competently treated by the Sharia Courts of Appeal, the Court of Appeal and the Supreme Court, in exercise of their powers to hear and determine questions relating to Islamic Civil Law whole-hog.

(3) Before the year 1979, the Sharia Court of Appeal of a State was the final Court to hear appeals on matters of Islamic Personal Law ("Moslem" personal law). The position as today is that the Court of Appeal and finally, the Supreme Court are empowered to entertain appeals on Islamic Civil Law cases.(1)

(4) There is growing enthusiasm among legal practitioners the country wide including the non-Muslims to learn Islamic law in order to broaden their knowledge and area of practice, especially those practising in the North.

(5) Law reporting system on Islamic Law was conspicuously absent in the past. hardly had any Islamic Civil law case been reported by either law reports in circulation. Nowadays, however, there are several law reporting Agencies such as the Nigerian Weekly Law Reports

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(1) See: Section 223 and 252 of the 1979 Constitution.

(NWLR); the Sharia Law Report (SLRN) and the Supreme Court of Nigeria Judgments (SCNJ) do report Islamic Law discussions of the Court of Appeal and the Supreme Court.

These instances, undoubtedly, go to show that Islamic Law is gradually getting the attention it deserves. That also is an indicator that the future of Islamic Law in Nigeria is bright and assuring.

It is on record that of the civil cases heard by the Area Courts (which are largely and principally Islamic Law Courts), over 75% is governed by Islamic Law. There has never been any complaint that Islamic Law provisions being applied caused any injustice to anyone. If there was any complaint, that has to do with the conduct of the proceedings of the trial judge.(1)

In respect of the Southern States where Sharia is conspicuously absent, it is gratifying to note the renewed vigour, zeal and dedication put by some Muslim indigens of such States with a view to realising one day, the application of Sharia in such States. After all, no law stops any State of the Federation that desires it, from the establishment and application of Islamic Law to govern the civil practices of the Muslim citizenry(2). As there is a lot of awareness on the rights of an individual, it shall not be at a distant future when Muslims in the South shall have their civil affairs effectively governed by Sharia as Sharia Courts, both of lower and higher grades, which are quite distinct from English model courts, must, as of right, be established in such States. It is only a question of time.

Consequent upon that, Islamic Law, already a unifying law, shall effectively

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(1) See; generally: Suleiman Kumo's Ph.d Thesis: "Organization and Procedure of Sharia Court of Northern Nigeria".

(2) See: Section 240, Constitution of the Federation, 1979.

govern the civil conduct of Hausa, Yoruba, Ibo and all other adherents of Islam wherever they may be. Thus, instead of opting for the English Sale of Goods Act, 1893 and Edicts enacted by various states on sale of Goods Law or the customary Sale of Goods as is applicable in some communities (though of Islamic faith), Muslims all over the country shall prefer to fall back to the principles of the Islamic Law of Sale ofGoods.

In as much as Islamic Law in general and Islamic Law of sale of Goods in particular do not require any new legislation or codification, time has come when the Legislative Houses and the Law Reform Commissions should take serious interest in incorporating the relevant provisions of Sharia to form part of the prevailing laws in the country. It is not enough to just mention the name "Islamic Personal law", as there is nothing "personal" in what is termed to be "personal". What ever a Muslim does under the Sharia must be seen to be done in compliance with what Allah the Creator has commanded. In truth therefore, Allah's injunctions necessitate the application of all the laws and the absolute belief in all that is implied by the entire system of Islamic Law and any deviation thereof would be subject to divine indictment.(1) It should be appreciated that Islamic Law contemplates of the past, the present and the future. It is certain that Islamic Law shall never be a failure but a source of joy, peace, progress and prosperity for its adherents. Abdul Qadeer Audah, summed it up in the following words:

> "Islamic jurisprudence was not revealed for limited application to a specific age and not to any other. It is a system of legislation for every age and time. It is forcefully valid and shall continue to be, till the end of this life on earth. It's injunctions were coined in such a manner that they are not affected by the lapse of time. They do not become absolute, nor do their general principles and

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(1) Qur'an: II: 85.

basic theories need to be changed or renovated. Their generalised construction and elasticity allows even for bringing under their jurisdiction any unprecedented new case, even though it was not possible to expect it's occurrence at the beginning of revelation. Hence, the provisions of Islamic Jurisprudence are not susceptible to change or substitution as are other laws and legislations."(1)

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(1) Audah, A. (1971) Islam Between Ignorant Followers and Incapable Scholars, I.I.F.S.O. Publication, page 22.

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