Pre-Contractual Disclosure of Information in *Shari'ah* and Pakistani Law: A Comparative Study

Thesis submitted in partial fulfilment of the requirements for the award of Ph. D in *Shari'ah* (Islamic Law & Jurisprudence)

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Abstract

This research presents relative study of Islamic principles of *Khīyyārat* with its corresponding principles in common law system and analyzes its relationship between modern marketing/sales method. Effort has been made to examine the rights and duties of buyer and seller in Common law and Islamic Law. An attempt has also been made to find out similarities and dissimilarities between both legal systems regarding pre-contractual disclosure of information. The thesis commences with an outline of different routes to liabilities in Islamic law and Common law and goes on to present how these forms of liabilities were taken by both the systems. After introduction, the second chapter discusses the emergence of Islamic commercial law, which includes the discussion about origin of *Shari'ah,* tracing the effects of continuity and change and development of methodology of *Ijtihad.* It also covers the impact of emergence of systems of interpretation (schools of law) and legacy of this early progress of jurisprudential approach upon Islamic attitude towards commercial law in its future perspective. The theory of contract, in Islamic commercial law and the early development of contract law have been discussed in third chapter with reference to the freedom of contract and exclusion of seller's liability in case of defects. Chapter four delves into the conceptualization and formation of contract in Islamic commercial law through discourse of its development from basics, i.e. offer and acceptance, through making of a complex discipline. This chapter also contains the discussion about those prohibited practices which would vitiate the contract. Next, the fifth chapter undertakes evaluation and identification of *Khīyyārat* including the diversity of opinions among jurists in their application. The sixth chapter attempts to probe the discourse of common law towards the pre-contractual disclosure of information through the analyses of academic and practitioner perspective. It is concluded that though liability for sale of out of order items has existed in

various forms throughout; however, system of *Khīyyārat* is more comprehensive, practical and flexible.

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List of Abbreviations

ADR-----------"Alternative Dispute Resolution"

BSI--------------"British Standards Institution"

CPR------------------ "Consumer Protection Regulation"

CPUTR--------------- "Consumer Protection from Unfair Trading Regulation"

EU--------------------- "European Union"

LCIG ---------------- "Least Cost Information Gatherer Principle"

OFT------------------- "Office of Fair Trade"

SOGA -------------------"Sale of Goods Act"

TOPA --------------- "Transfer of Property Act"

UK -------------- "United Kingdom"

UN---------------- "United Nations"

UTCCR---------------- "Unfair Terms in Consumer Contracts Regulations"

Chapter No. 1

Introduction to Research

Chapter No.1: Introduction to Research

1. Introduction

A balance and smooth relationship with trust have certainly an important role in human life in terms of trade and transactions in the economic and financial realms. That's why, it is considered obligatory, to ensure fairness in any commercial activity, that purchaser may be given opportunity by the seller to check the properties or sale subject, in order to satisfy that they are not defective. With that recommended process, contractual parties can safeguard their interest in terms of due profit and loss. Assuredly lack of information causes material deficiencies and the role of these information deficiencies is vital for enforcement of valid contract.[1] For this, the Courts cannot enforce contractual terms unless it is not ensured that both the parties fulfill informational requirements and none of the parties lacks proper information (at the time of conclusion of agreement). The problematic query is how it could be dealt? Where to put a limit between information deficiencies, which the prevailing norms will consider and those beyond consideration.

In view of the above schemes of law, the Islamic law and the Common law, it has endeavoured to achieve fairness and certainty in contractual obligations by requiring precise definitions, suggesting clear terms and conditions and mentioning rights and obligations of contracting parties. Certain experts and writers on Islamic law have viewed that there is rare difference between the approaches of contracts as narrated by the two systems.[2] It is, however, practically, few of the basic values of Islamic commercial law that make the real difference. Those are limitations against usury (*Ribā*) and forbidding the transactions involving excessive

[1]Charles T. Le Vines, "Caveat Emptor versus Caveat Venditor", 7 Md. L. Rev, (1943), 177, p 382.
[2]Rosley, S. A, "Performance of Islamic and Mainstream Banks in Malaysia" International Journal of Social Economics, (2003), Vol 30 – 12, pp. 1249 – 1265.

uncertainty and gambling.[3] Although in relation to the area under discussion, these two systems have developed surprisingly distinct approaches toward duties of disclosure by the seller.

Thus, under Islamic commercial law, the vender in any commercial transaction is duty bound not to prevent customer to have fair inspection and check in order to confirm the fitness of the properties to be sold, not only earlier but also subsequent to the conclusion of the agreement. If there is any defect in the goods, regardless of whether this defect is discovered before or after the conclusion of the agreement, Islam grants the option to the buyer either to continue with the agreement or to rescind it. The Islamic doctrine, which allows such safeguards, is called in Islamic commercial terminology *Khīyyār*. *Imam Taqiuddin Abu Bakar bin Muhammad al Husaini* opined in his book that *Khīyyār* can be for both, seller and buyer, as long as *Khīyyār* is essentially designed to fulfill the interest of business transaction. These interests contain the preservation of benefits and desires of both the contractual parties and to provide protection from possible harm.[4] The most important feature of this frame work of *Khīyyārat* is its diversity. That is why, the jurists have divided it into several categories. *Hanafī* divides it into seventeen types; *Shāfi* in sixteen; and *Hanblī* in eighteen[5]. Overall, unquestionably, it can be implied as a rule that the buyer has right to investigate the fitness of the goods sold to him and thus, giving him the right of option (after the conclusion of the agreement). It also bestows him with rights of inspection and option (to be exercised by him) before the contract is concluded.

However, the task of this research is two-fold. Firstly, it seeks to give an accurate depiction of the approach of *Shari'ah* on pre-contractual liabilities. It has been done through study of the mechanism of formation of contract and primary developments in this regard,

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[3]Ibid.

[4]*Taqi üd dīn*, *A*, *Kifayāh al Akhyār fi Hal Ghāyatal- Ikhtisar*, (Baīrut: Dārr al Fikar, 1994), vol 1. pp.103-111.

[5]*Mohammed.O*, "Financial Engineering with Islamic Options", Islamic Economic Studies, (1998) 6 (1), p.77.

relying upon the fundamental conception of contracts and trading as a legal system, its interrelation with allied modes and forms of undertaking, the limits and space of the freedom of the parties to a transaction and the arrangement toward pre-contractual duties of disclosure under its legal systems.

Secondly, it carries out a relative study of Islamic principles of *Khīyyārat* with its corresponding principles in Common law system and with an analysis of modern marketing/sales methods, embracing the theoretical frame work of "*Al Darar Yūzāl*"[6] (*Haram* must be eliminated) or "*La Darar wa La Dirrār"*[7] "there should be neither harming nor reciprocating harm". Thus, to cater the requirements of the modern structure, the challenge for Islamic legal system is to adapt to this new change by enabling financing through markets and intermediaries and to create or develop a new set of financial contracts, which imitate the stagnant situation, observing the basic Islamic phenomenon of trade. These new contractual reforms would have to fulfill the needs of various sections of trade by carrying out a comparative approach. There should be neither harming nor reciprocating harm; especially the segment for pre-contractual liabilities to disclosure of information must be focused. Given the principle of "*Darar*", Islamic law can evolve as long as the limits imposed by *Shari'ah* are not traversed.[8]

1.1. Islamic Concept of Free Trade and Pre-Contractual Liabilities

Shari'ah has strictly prohibited all kinds of unfair and malicious moves and tactics that may inflict harm on the commercial activity, commerce, merchandising or contractual parties. The ideal of Islamic law is the establishment of free and fair market where chances of fraud and misrepresentation are fewer and the smooth running of economy is considerably assured.

[6]. *Saleem, Rustam Bāzz,* (d. AH 1304), *Sharah Mujallah al-Ahkām -Adliyyah*, Art 20 (Lahore Law Publishing Company, n.d), p. 29.
[7]*Sharh Mujallah* Art 19, p. 29.
[8]*Sarah Mujallah*, Art 20, p. 29.

Shari'ah has disapproved all commercial activities which results firstly, any overt or implicit harm or prejudice to parties to a contract, either vender or vendee. And secondly which confine or limit the freedom of contract. Besides this Islamic law forbidden those malicious tactics which could inflict the party's interest and to cause imperfections in smoot running of market. Accordingly, act of stockholding, speculation techniques, disguise in terms of vital information about the features, grad and fitness of products and promoting sale by dishonest declarations (like misleading advertising of current days) were not allowed in *Shari'ah*. Therefore, the code of conduct in Islamic trade fare is annulment of the outcome of economic camouflage on valuing mechanism, pricing schemes and unfair exploitation of the uninformed by the well-versed. So, *Shari'ah* demands particular fair type of behaviour from economic pillars; producer, vender vendee and even their agents are required to be vigilant to ensure economic justice in society. *Shari'ah* has given great emphasis to (*Halal*) earning through legitimate way, commercial dealing through fair mutual consent, truth, honesty, honoring and fulfilling business responsibilities, fair attitude and transparency in transactions are the binding norms for the genuine trade fare. Whereas impure earnings (*Harām*) and all the means that lead to its earning, like bribery, gambling, usury, cheating, misrepresentation, and gaining profit by misleading statement have been discouraged by *Shari'ah*. So then, a true Muslim believer must refrain himself from deceit, deception and other dubious ways for obtaining profit of his merchandise. It is an ideal in Islamic trade that pros and cons of commodity be disclosed to the vendee, so that he buys it in full satisfaction.

As verse in *Qur'ān* says:

> "Oh, ye that believe! Betray not the trust of Allah and the messenger, nor misappropriate knowingly thins entrusted to you."[9]

[9]*Qur'ān*, 8:27.

It is also required from Muslim traders that they must fulfill their contracts and promises to keep their integrity. As it is mentioned in *Qur'ānic* verse:

> "Oh, ye who believe! Fulfil (all) obligations. Lawful unto you (for good) are all four-footed animals, which the exceptions named; But the animals of the class are forbidden while ye are in the sacred precincts or in pilgrim grab; For God doth command according to his will and plan."[10]

Similarly, the Hadīth of Holy Prophet "ﷺ" directs; "The Muslims are bound by their traditions".[11] In a similar vein, another hadith also emphasizes the importance of keeping promises and declare promise breaking as the hallmark. In order to provide safeguard to contractual parties, it is recommended in Islamic law that all the attributes pertaining to very transaction like quality, quantity, the value, corresponding obligations and the payment schedule and mode should be clear and information about each said attribute should be revealed properly. Transparency is highly appreciated in all trade affairs. Above all, in a *Qur'ānic* verse (*ayah ul-dayn*) it is declared that all arrangements and covenants should be perfectly transparent. As it is stated:

"O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuses to write: as Allah Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord Allah, and not diminish aught of what he owes. If they party liable is mentally deficient, or weak, or unable Himself to dictate, Let his guardian dictate faithfully, and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (For evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is just in the sight of Allah, More suitable as evidence, and more convenient to prevent doubts among yourselves but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witness whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So, fear Allah; For it is Good that teaches you. And Allah is well acquainted with all things. If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose). And if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him Fear his Lord conceal not evidence; for whoever conceals it, - his heart is tainted with sin. And Allah knoweth all that ye do"[12]

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[10]*Qurʾān,* 5:1.

[11]*Imām Abu `Īsā Muhammad al Tirmidhī, Jam'ī at Tirmidhī , Edited & Referenced by Hāfiz Abu Tāhir Zubair 'Ali Za'i (Riyadh: Maktaba Dārr-us-Salam*, 2007) *Kitab al Būyu'* 14, no. 1352.

[12]*Qurʾān*: 2:282.

As a rule, this *Qur'ānic* verse deals with the business manners and attitude of Islamic trade in absolute manner, it is clearly directed that don't leave any room for ambiguities and confusion. Future obligations must be known and specified in writing, and verified by witnesses, in fact these tenants play vital role in establishing a healthy business trend for fair trade and protection of the right of the contractual parties by means of imposing certain pre-contractual liabilities, specially fairness, permissibility, equitability and mutual consent. One more element which Islamic law dislikes is its uncertainty *Gharar* that is obviously against the disclosure principle because it leads vendee towards indecisiveness in terms of product quality, since he is unaware whether it is good or bad, unless it is not disclosed properly at pre-contractual stage. Wherefore, there is every chance that contract may give rise to a conflict.

Since, any kind of trade or business transaction achieved via cheating or fraud is not recommended, rather disapproved in Islamic law whether during or pre-contractual stage, one must be fair in transaction all time. "The Holy Prophet" "ﷺ" in number of traditions guided Muslim traders to refrain from them. As it is stated:

> "It is narrated on the authority of Abu Huraira that the Messenger of Allah (peace be upon him) happened to pass by a heap of eatables (corn). He thrust his hand in that (heap) and his fingers were moistened. He said to the owner of that heap of eatables (corn): What is this? He replied: Messenger of Allah, these have been drenched by rainfall. He (The Holy Prophet) remarked: Why did you not place this (the drenched part of the heap) over other eatables so that the people could see it? He who deceives is not of me (is not my follower)"[13]

Along the same lines, another major frauds and dishonesty occurred in trading is in measuring, it is prohibited for traders in Islam

to take recourse in giving short measures. *Shari'ah* strictly condemned this practice and Muslim traders are ordered to scale properly and ensure measure in full. As the *Qu r̉ ān* states:

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[13] *Abu al-Husayn Muslim ibn al-Hajjāj ibn Muslim , Sahih Muslim, Edited & Referenced by Hāfiz Abu Tāhir Zubair 'Ali Za'i (Riyadh: Maktaba Dārr-us-Salam*, 2007) *Kitab al Imān 1,* no. 102.

> "Give full measure when ye measure, and weigh with a balance that is straight: that is the most fitting and the most advantageous in the final determination"[14]

Similarly, to warn the true believers while narrating in *Qur'ānic* verse the tale of the community of prophet *Shuai'ib,* those were known for this male practice, and Prophet *Shuai'ib* again and again warned them for the consequences, but at the end they were devastated and demolished for their stubbornness in dishonesty and fraudulence in Allah's command for the exactitude in measures, *Qur'ānic verse* stated;

> "To the *Medīyan* People (We sent) *Shu'aib*, one of their own brethren: he said: "O my people! Worship Allah: Ye have no other god but Him. And give not short measure or weight: I see you in prosperity, but I fear for you the penalty of a day that will compass (you) all round."[15]

Likewise, on another occasion *Qur'ān* mentioned another evil of the people, which is termed as "*Al- Mutafiffīn"* those who deal in such way that to give short measures while weight to others but to receive from them in full, these people were commanded not to do such malicious practice and assured for severe punishment. As stated in *Qur'ānic* verses;

> "Woe to those that deal in fraud, - Those who, when they have to receive by measure from men, exact full measure-But when they have to give by measure or weight to men, give less than due. Do they not think that they will be called to account? - On a Mighty Day"[16]

Further, Islamic law has discouraged all such tactics that results in ambiguity, uncertainty and any practice that ends in deceitful manners, Islamic law also discourages to sell what is not clear to the parties to contract and also disproves the practice of any sort of adulteration. As mentioned in a tradition;

> "Abu Huraira (Allah be pleased with him) reported that Allah's Messenger "ﷺ" forbade a transaction determined by throwing stones, and the type which involves some uncertainty."[17]

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[14] *Qurʾān*: 17:35.
[15] *Qurʾān,* 11:84.
[16] *Qurʾān*, 83:1-15.
[17] *Abu al-Husaiyn Muslim ibn al-Hajjāj ibn Muslim, Sahih Muslim, Edited & Referenced by Hāfiz Abu Tāhir Zubair 'Ali Za'i (Riyadh: Maktaba Dārr-us-Salam*, 2007) *Kitab al Būyu'* 21, no. 1513.

Along with all these narrations and verses we can find in Islamic jurisprudence that, '*Fuqahā'* the jurists, embody some very important principles on the basis of public interest (*Maslahā Mursal'ah*) after taking guidance from *Qur'ān* and *Sunnāh* and endeavored to develop an inclusive scheme to regulate the contractual affairs and dealings. This can be seen, that importance of disclosure duties along with rights of buyers and sellers is also being given under different chapters of Fiqh' captioned as *Khīyyārat Fiqh'ī* literature which render law of contracts in Shari'ah or fiqh' of commercial transactions as unique and well-developed discipline, due to the verity and expansion, in respect of all contractual aspects. These all rules rotate around *Muqāsid al Shari'ah* also known as objectives of *Shari'ah*. No doubt, the core objective in eye of *Shari'ah* is the wellbeing of the mankind. As it is explained by jurist;

> "It is essentially an expression for the acquisition of benefit or the repulsion of injury or harm, and that is not what we mean by it, because acquisition of benefit and the repulsion of harm represent human goals, that is the attainment of welfare of human through these goals." [18]

Furthermore, the majority of Muslim scholars accepted through the inductive survey of the sources of Islamic law that *Shari'ah* preordained to protect and to preserve the five basic objectives. These are preservation and protection of faith, life, posterity, intellect and wealth. There are so many rules and legal phenomenal principles that revolve around these objectives and the preservation of these objectives serve the ultimate goal of *Shariah* which is well-being of human life.

Assuredly, in the context of commercial transactions and in the scenario of contractual relation all the said objectives ensure the protection of each other's interests and promotion of fairness in these relationships as religious responsibility. Such as, the first objective preservation of faith stands for to believe on Allah and the prophethood of last Prophet, which require belief to speak truth and to do good deeds and to avoid any wrongful act that may cause harm to any

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[18] *Al Ghazāli, al Mustasfah (Baīrut: Dārr al Kutub al Ilmiīya*, 1993), vol.1 p.31.

other individual. This also makes him to determine that he would never enter into an unlawful business transaction or to render any harmful product. One should always prefer and follow the way of approved business affairs and refrain from unfair trade practices. Likewise, the theme of the objective of life is to preserve human life by ensuring the protection of individual's interests in terms of their wealth and properties. Therefore, it is not permitted to endanger human life through production of harmful, defective and flawed products in trade fairs. Another objective is called in *Shari'ah* as preservation of intellect, the primary concern of which is to enable people to take sound decision to consume their wealth. It helps parties to examine the quality of products to secure and safeguard their interests in commercial transactions. Sound judgments and rational decisions are only possible when person is sane. Islamic law renders contracts not binding when a minor or insane person is the party to contract. In addition, Islamic law has gone to the extent that the consumption of alcohol is prohibited, as it affects the human mind. Similarly, another objective of *Shari'ah* is the preservation of posterity which can be achieved through the maintenance of healthy families and institution of marriage. This objective promotes the values of clean healthy and fair dealings of human beings. Last but not the least is the preservation of wealth of the people. It regards the property of the people sacred and inviolable, so as the *Shari'ah* has permitted all fair and trust-based ways of production of wealth as lawful and approved. In brief, all unlawful and illegitimate ways of earning are dejected in *Shari'ah* like unlawful devouring of property, embezzlement fraud etc. Thus, taking undue advantage from any trade or commercial transaction by deceitful manners like giving defective products without disclosing it to the buyer and without giving his due right is strictly prohibited.

1.2. Concept of Free Trade and Pre-Contractual Liabilities in Common Law.

With that added understanding of the Islamic concept of free trade and pre-contractual liabilities, it may be now appropriate to proceed to the introduction of the same concept existing in the Common law. Numerous issues in medieval times were settled by the rules of the "lexmercatoriain" special courts, but for other than the basic obligations such as the obligations concerning payment, fitness of the sale subject and quality etc., private law was not very interested. Along the same lines, in the history of English law of transaction, record finds that in case of any deficiency in fitness or quality of sale subject vendee himself was liable such responsibility on the vender in Common law was known as "Caveat Emptor". As it is quoted that The principle of Caveat Emptor was the guideline for the adjudicators and the point was that the buyer had the chance to use his knowledge to be careful or accept the cost of his attention, no warranties were implied to assure the quality of the goods and only the seller making a false statement could be sued in tort for deceit, in such cases he was not simply assuming a fact, but giving a clear warranty to the buyer which arose cause of action and the seller could be sued even though he did not know about the falseness of his affirmation."[19]

Certainly, as a maxim in early period of English legal history, the principle was well suited to purchasing and trading matters, dealt on the common market bazaar or amongst relatives and neighbors. However, it should be noted that the doctrine of Caveat Emptor is not planned to inspire the sales persons or merchants to involve in fraudulent tactics with malicious conviction in commercial sealings. It only pursues the objective that the vendee has to fulfill their responsibility to be vigilant and to examine, evaluate the risk and double-check the merchandise before the purchase is done. In other words, it provides lead to determine the

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[19]WEinberger, A. M. , "Let the Buyer Be Well Informed- Doubting the Demise of Caveat Emptor", (1986), MD L, REV. vol 55 (2).

responsibility, either seller or the customer should bear the loss, who would be held accountable for the damaged or liable to faulty properties.[20] The jargon is in fact part of a lengthier statement: *"Caveat Emptorquia ignorare non debuit quod jus alienum emit"* ("Let a purchaser beware, for he ought not to be ignorant of the nature of the property which he is buying from another party.") With that, this statement carries an assumption that purchasers will make proper check or otherwise ensure that they are self-assured and satisfied with the integrity of the sale subject before concluding the deal.[21] Nevertheless, the analysis of existing disclosure regimes show interesting fact that in some jurisdictions the pendulum has swung to a great extent in favor of the customer at the expense of the vender, hence, it may be stated that austerity of legal proverb Caveat Emptor has been dumped. Promulgation of Sale of Goods Act 1893 significantly presents the initial phase towards the partial dilution of the said proverb.[22]

Notably, while recognizing the fact that in Pakistan most of the corporate and commercial statutes are inherited from Common law system as being colony of English Queen. Sales of Goods Act, 1930 was adopted by Pakistan after having slight amendment of nomenclature through, Federal Laws (Revision and declaration) Act,1951(26 of 51). It has been observed that growing multifariousness of modern commerce has put the buyer at a disadvantage as the buyer has no way out but to rely more and more upon the skill, judgment, and honesty of the other party or manufacturer. While earlier to this, the situation was different when he had no express warranty ensuring the quality of goods. In England, as under Section 15 of the said Act, it has been required by law that "the properties or sale subject must be fit for the particular purpose" and of "merchantable quality" but this implied warranty proposition can be problematic to apply

[20] Mitchell G. Bridge, The Sales of Goods (New York: Oxford University Press, 1997), p. 345.
[21]WEinberger, A. M. , "Let the Buyer Be Well Informed- Doubting the Demise of Caveat Emptor", (1986), MD L, REV.vol 55 (2) pp.390-95.
[22]W.H. Hamilton, "The Ancient Maxim Caveat Emptor", 40 YALE, L. J. 1133, (1931).

and may not apply for all products and same notion was revealed by the insertion of [(Sec 16-A) of Sale of Goods Act, 1930 (Pakistan)] in statute.[23] Therefore, buyers are still required to be alert.

However, an interpretation can be taken that the principle of "Caveat Emptor" persists limited by legislative and procedural reforms principally in certain transaction related to immovable property, but still be prevailing in transactions between private sellers, Shipping and Maritime Law Contracts[24] and the Sale of Antiques and other Items sold by auction.[25] The principle also enforceable to returns, though tempered by the claims of professional negligence[26], accordingly a purchaser is responsible to follow the supplier's policies, desiring time limitation for returning an item, which require a receipt or impose other conditions. Identically, in cases where transaction is to be done by samples, the legal requirement is that the entire stock will match with the sample given, and the vender should be given a reasonable opportunity to inspect entire stock to satisfy fitness and quality. In similar way, if the sale is being done and particular purpose for which the goods are required has made known to the vender, again in this situation law imposes a limitation on the vender that the products as sale subject is of average merchantable quality and appropriate for the intended purpose reasonably. With that, a legal presumption implied warranty of merchantability is attached with any sale purchase transaction unless contrary intention of the parties is shown or parties settled any term otherwise. To illustrate, if Mr. Robert purchases a washing powder, the implied warranty attached here is that it will do the needful and clean. Similarly, Mr. Tom dealing with an antique dealer and as vendee buy an antique dagger, or jewelry from a jeweler, in both the transactions their reliance on the vender's proficiency and

[23] Sale of Goods Act, 1930, Sec 16-A.
[24]Reeman v Department of Transport ,1997. 2. L R, 648.
[25]Thomson v Christie Manson & Woods Ltd ,2004. 1 A.C. 1013.
[26]AM. Weinberger, "Let the Buyer be Well Informed – Doubting the Demise of Caveat Emptor". Maryland Law Review, (1996) 55. (2), p. 389.

expertise is justified. The principle of Caveat Emptor would apply if negotiation of contractual parties is on equal level and they are negotiating from equal bargaining positions. Another interesting fact is that mostly the principle applies in those situations involving the sale of real estate.[27]

The rule of Caveat Emptor has today been all but distinguished from earlier, marketing circumstances indicates a new approach, this could be, if the misrepresentation had been involved or question arises about fraudulency, the applicant need to prove element reliance and there should be certain reasonable grounds to claim misrepresentation on part of seller while executing contract. As the verdict of a case titled Sykes *v. Taylor-Rose*, in a matter of house purchase dictate, "that failure to disclose that a murder had happened at a property was held not to constitute misrepresentation" and "Caveat Emptor" prevailed.[28] As a matter of fact it should be stated that the principle certainly has enjoyed a firm development. Clearly, the harshness of the rule has been tempered by legislation and particularly with regard to modern marketing trends in commercial transactions, yet *Caveat Emptor* remains prevalent within particular areas of the English legal system. Nevertheless, some subtleties of cross application do exist vis-a vis attention to the principle.[29]

Moreover, if one refers to another major debate which springs from the said discussion around obligations of the seller to make proper disclosure concerning to such particular cases, where the seller himself is not aware or not able to know the defect. The notion of proposition and approach, consequently leads on one hand that the seller cannot take the excuse on himself of not being aware about the defect in goods, and on the other hand suggests that where the buyer

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[27] Myerson, Roger B., and Mark A. Satterthwaite. "Efficient Mechanisms for Bilateral Trading." P 265-281, *Journal of Economic Theory* 29, no. 2, (1983).
[28] Sykes v Taylor-Rose , 2004. 2 P. & C.R. 30.
[29] Taylor v Hamer ,2003. 1 P. & C.R. DG .6.

himself has more expertise about the substance of sale than the seller, it would be wrong to suggest that the buyer could have the right to reject the substance sold to him on account of not being of the original made. Thus, in order to give proper recognition to the interrelation of the purchaser and the vender liabilities and to generate a scenario of transparency, wherein commercial transactions are encouraged by the means of proper checks the rules were subsequently modified.[30] Therefore, it may be true that both rules of Caveat Emptor and Caveat Venditor are not absolute facilitation in commercial transactions and dying a slow death and are being taken over by the subsequent rules.

With that, the principles that now are prevailing in commercial law is not *Caveat Emptor* or *vendito*r but the resort is being taken by jurist towards some other principles and rules like the "Least-Cost Information-Gatherer" (LCIG).[31] Interestingly, this principle suggests that information should be produced and communicated by either party that can do so with the least costs. In this situation, that can be the vendee sometimes, but it is usually the vendor, who may have in better position obtained information as a by-product being owner of the product, who may have more expertise, or who may have better acquaintance in providing information. As a matter of fact, this principle is also criticized by many others on different grounds. The change being attributed to a fairer and market oriented wherein commercial transactions are being encouraged. However, despite the arguable existence of quality spread discrepancies still we have identified the exceptions and corollaries of the LCIG principle. It should be noted that if this trend of change is taken too far, we might end up in retarding transactions due to the approach, which may lead to the wrong conclusions.

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[30] W.W. Buckland & Arnold D, McNair. Roman Law and Common Law, 2[nd]edit (Cambridge University Press, 1965), pp. 292-293.

[31] Mohammed, "The art of Pricing: How to Find the Hidden Profit to Grow your Business" (2005) p.141.

2. Significance, Scope and Limitation of the Research

Islamic commercial law, in Islamic literature known as '*Fiqh al-Mu'amalat',* constitutes an important branch of law dealing with issues of contracts and trade. In addition, it deals with the legal effects arising from their obligations thereof; that can be valid, void, or voidable transaction. For a valid transaction in *Shari'ah* law, certain conditions are to be fulfilled. A valid transaction will meet three conditions which are offer, acceptance and consideration. It further requires that offer must make an offer of valid subject matter, free from any defect and offeree must accept that with his free will and consent by giving adequate consideration. As for the parties to a contract, it is mandatory that they must have legal capacity to enter into contract. Along with all these essentials, Islamic law imposes many other pre-contractual and post contractual liabilities for a transaction to be valid.

Broadly speaking, the basis in *Shari'ah* regarding commercial matters, for its part, Islamic law focuses on the lawfulness, existence, deliverability and precise determination. Lawfulness requires that the object must be lawful, that is something which is permissible to trade and not of the nature which is prohibited in law e.g. wine, drugs etc. and must be of legal value, that is, its subject matter and the underlying cause *"sabab"* must be lawful. It means that same are not for any purpose harmful or against public welfare. The parties to a contract must legally own that object with its ownership characteristics. The subject matter must also be free from any defect in quality and should be precisely known in value. It must be in an absolute deliverable position. As for the consideration of price, Islamic law does not restrict it to a monetary price, but also permits barter. So, it may be in the form of another commodity. Apart from this, there are many other aspects concerning the subject to be justified, such as; (i) the

subject matter must exist; (ii) the subject matter can be delivered; (iii) the subject matter can be ascertained; and, (iv) suitability of the subject matter.

Apart from this introduction, the scope of thesis in hand is limited and aspiration of research will be the relative study of Islamic principles regarding pre-contractual liabilities with its corresponding principles in Common law system. And doctrine of *Khīyyārat* would be focused, by which Islamic law provides such safeguards against any defective products or goods in a sale agreement.[32] In essence, by virtue of the application of these principles, the vender in any commercial transaction is duty bound to provide fair opportunity for inspection and he has to ensure fitness of the sale subject not only earlier but also even contract get concluded. With that, suppose if later on it is appeared that goods are defective or appropriate to the purpose, in Islamic law vendee has option to continue with the terms of contract or to call of its conclusion, no matter whether this defect is exposed before or after the conclusion of the agreement. This also would be the focus of discussion to analyze the principles of Islamic law of contract and that of English law.

This research also questions the effectiveness of the current seller disclosure regimes in Common law and analyzes whether the legislatures have failed to achieve balance between the interests of buyer and seller in being appropriately informed in terms of disclosure. It has been considered that it is time for legislature to re-evaluate the balance between buyer and seller by considering not only what buyers actually want to know when buying a good but also the burden imposed on seller to disclose any defects in it. Moreover, this research seeks to analyze the gradual death of the rule of Caveat Emptor and its replacement with other rules, which have subsequent origin i.e. *Caveat Venditor* (Seller beware) and its dilution, too. With that, discussion

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[32]*M. al-Khin, Al-Fiqh al-Manhajī 'ala Madhhab al-Imam al-Shāfi'ī,* (Damascus: *Dārr al-Qalam*, 2008), p. 302.

would center around the balancing point of the necessity of disclosure of information by the seller on one hand and implications of reasonable inspections done by the buyer on the other. This study also looks into the fact that how this rule has gained prominence gradually; further how these obligations of the seller have been given proper shape along with various statutes and case laws, as an outcome, that limiting the rule of Caveat Emptor to reasonable examination. Again, when one examines the theory and practice of this principle, following issue strikes. If Caveat Emptor is no longer law on the books, why do purchasers often have the impression that Caveat Emptor governs the market? It has to, because of misuse, that many Common marketing and sale methods make use of informational advantages of vendor at the expense of purchasers. Again, the point is same that if sellers are the LCIGs, why do courts tolerate these methods? It would be argued that this is because there are inaccuracies found in the court in the implementation of LCIG principle and marketing persons and sales professionals have learned, rather we can say they became expert in dealing with how to exploit these errors.

Hence, the scope of this study is limited to the extent - by carrying out a thorough study of Islamic principles of *Khīyyārat* with the contemporary principles and to analyze the relationship between buyer and seller in terms of their pre-contractual obligations, embracing the theoretical framework of "*Al Darar Yūzāl*" [33] (Haram must be eliminated) or "*La Darar wa La Dirrār"*[34] (One must not harm himself or bring harms to others). With that, one may now turn to the research hypothesis, research problem and objectives of the thesis before commencing with the substantive foundations of research topic.

[33]*Sharah Mujallah*, Art 20, p. 29.
[34] Ibid., Art 19.

a) Hypothesis

In order to grasp the discussion in this research, we have to make three assumptions. One assumption is that the framework of *Khīyyārat* in Islamic law in order to safeguard the purchasers from implications of sale for pre-contractual duties is more comprehensive than the English law implemented in Pakistan; both are compatible with each other updating is possible with adoption of Islamic principles of *Khīyyārat* in an improved form to give an accurate depiction of the approach towards pre-contractual duties of disclosure in our legal systems. The second assumption is that the framework of *Khīyyārat* in Islamic law in order to safeguard the purchasers from implications of sale for pre-contractual duties is not ample; cannot fulfil the requirement and is not well-matched with Pakistani legal system and adoption of Islamic principles of *Khīyyārat* is likely to be rejected in *toto* .The third assumption is that the framework of *Khīyyārat* in Islamic law and legal system implemented in order to safeguard the purchasers from implications of sale for pre-contractual duties are partially compatible with each other and partially different from each other and 'harmonization' or 'synchronization' may or may not be possible.

b) Statement of Research Problem

Antecedent to the articulation of research objectives, it is perhaps also necessary to state that thesis will seek to respond certain fundamental and interrelated research questions namely;

1) What is the basis for the theory of contract and particularly transitional development of Islamic discourse of contractual liability? And what is the baseline for allowing corresponding benefits as result of contractual relationship in Islamic law?

2) What is the doctrine of *Al-Khīyyār*? How and why the Islamic legal principles of *Khīyyārat* to be applied in our legal system in order to safeguard the purchasers from implications of sale for pre-contractual duties of disclosure?
3) Whether this doctrine only safeguards the purchasers from the implications of the sale of the defective products before the agreement is being concluded or it also guarantees similar protection after the conclusion of the sale and purchase agreements, regardless of whether the discovery takes place before or after the conclusion of the said agreement?
4) What is the general perspective of current approach of English law and principle adopted in modern commercial transactions as regards to the incorporation of the doctrine of Caveat Emptor? And what is the perception on the doctrine of *caveat venditor* and its relevancy with (LCIG) principles in English law of transaction (i.e., Commercial)?
5) If "Caveat Emptor" no longer summarizes the law, why is it still occasionally mentioned as a legal principle by courts and commentators?

c) Objective

Succeeding to the forgoing conversation, it may be concluded that current research is formulated with the objective of advancing scholarship and understanding of the topic of pre-contractual liabilities in terms of disclosure of information in Shari'ah and law, through a comprehensive multi-layered examination of the judicial and Shari'ah discourse on the topic. In addition to the emerging points of relevant significance in order to seek proper understanding, this objective in turn is translated into two research aims. Firstly, the research seeks to give an

accurate depiction of the approach towards pre-contractual duties of disclosure in two legal systems, the Islamic law, and Common law. Secondly, it attempts to juxtapose these two systems so as to highlight their similarities and differences while discussing the *Shari'ah* principles like *Khīyyār al-Aib* and other with *Caveat Emptor*, Caveat *Venditor* and (LCIG) principles from the primary sources of *Shari'ah* analyzing views from different schools of Islamic *Fiqh* and to thereafter identify the preferred *Shari'ah* views on the same.

3. Research Methodology

Subsequent to the forgoing upbringing, it is to be said that current research is articulated with the aim of advancement of knowledge and acquaintance with the topic of pre-contractual disclosure of information in *Shari'ah* and law, by means of comprehensive and multi-layered examination of different aspects Islamic as well as Common law discourse on the subject matter in addition to exploration of new ways and ideas in order to arrive at proper understanding and implementation in our legislative system.

This research is basically a legal doctrinal research which is essentially a library-based work, which aims to elaborate a multidimensional perspective of the subject matter. In this perspective almost all the methods of doctrinal research have been adopted, analytical and critical research method is being used in the wide-ranging possible manner, through the examination of all the important angles, including the investigation into areas that have up till now been relatively important in the Islamic law on the subject.

In terms of methods for research, method for data collection and analyses, the work focuses on qualitative research methods rather than qualitative techniques due to the nature of subject matter which is deeply rooted and complexed in that combinations of Islamic jurisprudence and Common law phenomenon. As for the type of information which is collected here, that

information is generated from methods blend between primary and secondary information resources, more specifically fundamental and derived; original books and articles. With that qualitative research means any research that produces finding, not arrived at by statistical procedure or other means of quantification, but use of that research methods traditionally indicate a research that leads researcher to explain or to understand complex phenomenon as well as studying process that occur over -time, which brand it sort of contextual research, explanatory research, and generative research in nature. However, a variety of the comparative research methods from classical Islamic Law will be used to complete various component of this research. That is, the jurisprudential Opinion of Muslims Jurists which serves as the base of *Tanzimat* will be analyzed on the basis of methods such as *Istiqra* (induction) *Istadlal* (deduction) and other methods of *Usūl* al '*fiqh*. Their elaboration, explanation, interpretation and derivation of rulings from classical sacred Islamic texts will be done on the basis of textual research methods. The *Tanzimat* reforms are based on texts of *Qur'an*, Sunnah and classical manuals of Islamic law. The texts will be understood on the basis of Textual Methodology. Where ever it will be deemed necessary Rational Methodology and Experimental Methodology will be used to elaborate and use historical facts of the reforms of Islamic law regarding family laws

3.1. The Research Format

In the face of aforementioned task, and to provide an inclusive analysis of data in Islamic *Shari'ah* on precontractual disclosure of information in a systematic way and equate the same with English law, it is endeavoured to reflect the position of Islamic law on the point and reference is made to English law on it. While analyzing the issues pertaining to Islamic law the principles of Islamic jurisprudence have been adhered during interpretation of the text and process of derivation of rules from them. The views of Muslim jurist from major schools of *Fiqh,* in case of disagreement or their preference have been frequently quoted where it is needed.

While discussing the discourse of English law on the subject case law method is being followed and different relevant cases surveyed. Moreover, while using the Islamic legal terms of Arabic language the techniques of transliteration is followed, but in certain places where it is needed their English translation is also presented. For the purpose of citation of legal resources Chicago manual of style has been adopted in the thesis.

Apart from this introduction (chapter one) and conclusion (last), the research aims and questions have propelled the thesis, to be divide into five other chapters. After introduction the second chapter contains emergence of Islamic commercial law by tracing the origin of *Shari'ah* by adhering the effects of continuity and change and also the impact of emergence of systems of interpretations (schools of law) and development of methodology of *Ijtihad* and legacy of this early progress of jurisprudential approach upon Islamic attitude towards commercial law in its future perspective. The theory of Contract in Islamic Commercial law the early development of contract law will be discussed in third chapter with reference to the Freedom of contract and Exclusion of Seller's Liability in Case of Defects. Chapter four delves into the conceptualization and formation of contract in Islamic Commercial Law through the discourse of its development from basics as offer and acceptance in Islamic legal system to a complex discipline in both sense as its practical function and in its jurisprudential foundation. This chapter also contains the discussion about those prohibited practices which would vitiate the contract. Next, the fifth chapter of the thesis commences the substantial discussion with a wide view on the evaluation and identification of *Khīyyārat* as well as diversity of opinion among jurists in their application that was used in dealing with them. Then, the sixth chapter attempts to the depth of the discussion by probing the discourse of Common law towards the pre-contractual disclosure of

information through the analyses of academic and practitioner perspective including the analyses of design of the contemporary framework of Islamic law.

Wherefore, the journey of studying the rational, permissibility, and practices of pre-contractual disclosure of information liabilities for transparent contractual relations in Islamic law and adherence, those new contractual reforms would have to fulfill the needs of various sections of trade. It is essential an undertaking that pursues to involve in a wide-range and multi-layered examination of the theme as well as the exploration of new areas of relative significance. This in turn and subsequent to the examination of contemporary resources and discourse of development of law of contract, as in current research work in the context of Islamic jurisprudence overlaps many theoretical perspective, which can be conceptualized as a process of logic in the construction of transparent system in contractual relationship, especially when viewed from a mélange complex integrated approach that include element of correspondence consensus and pragmatic theories of truthfulness and fairness. This gave me a great motivation for this research by carrying out a comparative approach with theoretical framework of "*Al Darar Yūzāl*" *Haram* must be eliminated or "*La Darar wa la Dirrār*". Do not inflict injury nor repay one injury with another. Given the principle of "*Darar*" Islamic law can evolve as long as the limits imposed by *Shari'ah* are not traversed.

4. Review of Literature

Literature on the contract that forms the soul of commercial law includes the discussion regarding the issues to provide safeguards contractual parties from the implications of the sale of the defective products. In the literature, connected to Islamic law, we come across debates of different jurists in their manuals of *Fqih* about the concepts of *Khīyyār*. While in English law we find the discussion about doctrine of Caveat Emptorr and its correlatives. As well as in modern

legal literature much has been written about the obligations in commercial (sale-purchase) transaction that prior to entering into an agreement; the seller is to allow the buyer to inspect the goods, in order to ensure that they're free from any known and unknown defect. Such an obligation, on the seller, which is known in Common law as Caveat Emptor has been questioned by some scholars on various grounds and has been defended by many. But there is dearth of solid work which covers the comparative aspects of the subject between Islamic law and modern legal thoughts. Recently some of the Muslim writers have started working on the subject with this vision, as a few of these I have mentioned in the bibliography. But be deficient, still no exclusive material available nor is sufficient literature accessible on the subject, particularly which discusses the disclosure of information as pre-contractual liability by comparing both streams. However, this research will therefore be an attempt to compare the Islamic law and English law on the propositions regarding the pre-contractual disclosure of information and to present the arguments for synchronization of both the said principles. The focus of this piece of work is on the primary sources of *Shari'ah* in order to form the concept of pre-contractual liabilities in general and disclosure of information to safeguard the contractual parties in particular from an Islamic law prospective.

The Holy *Qur'ān* and the authentic sources on *Hadīth* such as *Sihāh e Sittāh* and *Ijma* have been wildly referred in this research work with a view to find out the position of Islamic law on the subject.[35] Along with these, other primary sources of Islamic law the classical *Fīqh*

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[35]*Abū 'Abdullāh Muhmmad ibn Ismā'īl, Sahih Bukharī, Kitab al Būyu'* 34 (*Cāirro*: *Al-Matabā al- Salafī'ah-wa Maktabatuhā*, 1403 A.H) *Kitab al Biyūh* 34,no.2047-2238: *Imām Muhammad Bin Yazīd ibn Māj'ah Al-Qazwinī, Sunan ibn Māj'ah, Edited by Hāfiz Abu Tāhir Zubair 'Ali Za'i (Riyadh: Maktaba Dārr-us-Salam*, 2007) *Kitab al Tijarāt,* no. 2137-.2304: *Abu al-Husayn Muslim ibn al-Hajjāj ibn Muslim, Sahih Muslim,Edited & Referenced by Hāfiz Abu Tāhir Zubair 'Ali Za'i (Riyadh: Maktaba Dārr-us-Salam*, 2007) *Kitab al Būyu'* 21, no.1511-1550 :*Imām*

literature has also been quoted to analyze the diversity and difference of different schools of thought on the issue in question. We find general discussion about the rights of both the seller and purchaser and general principle about their protection in *Fīqh* under various topics like '*Daman*' liability, '*Uqud*' contracts, '*Tadlīs'* and *Gharar'*, fraud and uncertainty and '*Khīyyār'* law of option providing the safety of parties to contract from adulteration, deception and misrepresentation. Besides these rules, Muslim jurists have described principles and rules in particularly for the protection from defected products to save the interests of contractual parties by imposing pre-contractual duties under the discussion of law of option or the *Khīyyārat* as specific chapter in classical literature. Assuredly, this study synthesis the principles of Islamic commercial law based on classical sources of *Fīqh* to provide the solid base for the safeguard of the seller and buyer.

In pursuance of that, from *Hanafi* school well-known work of an influential jurist, entitled Al-*Mobsūt* has been frequently consulted which is a well-organized manual[36], covers different aspects of *Fīqh* in a comprehensive manner and thoroughly explores the points of disagreement in a unique way. Likewise, a book of another well-known *Hanafī* jurist *Muhmmad Ibn Ābidīn*, titled *as Radd-al-Mukhtār*[37] is also quoted in many occasions during this work. Similarly, to understand the different notions under discussion the renowned work of *Hanafī School*

Abu `Īsā Muhammad al Tirmidhī, Jam'ī at Tirmidhī,, Edited & Referenced by Hāfiz Abu Tāhir Zubair 'Ali Za'i (Riyadh: Maktaba Dārr-us-Salam, 2007) *Kitab al Būyu'* 14, no.*1205-1321:Abu Dawūd, Sulaymān bin Al-Ash'ath, Sunan Abu Dawūd, Edited & Referenced by Hāfiz Abu Tāhir Zubair 'Ali Za'i (Riyadh: Maktaba Dārr-us-Salam*, 2007): *Abu Abdullah Mālik ibn Anas ibn Mālik ibn Abī 'Āmir Ibn 'Amr, Al- Muwaṭṭā Imām Mālik, bi'Riwayat Yahya bin Yahya al Laythī,Edited & Referenced by Dr. Bash*ār Awād (*Baīrut: Dārr al Arab al Islami*,1997)Kitab al Būyu' 17, no. 1781-2006.

[36]*Al Sarkhsī, al Mabsūt,* (*Baīrut: Dārr al-fikar al- Arbī,* 1977).

[37]*Ibn Ābidīn, Radd al- Mukhtār,* 2nd edit. (*Cāirro: Mustafa al- Bābi, al-Halbi,* 1966).

commonly known as *Al-Hidāyah* written by *Burhān al- dīn Farghanī alMurghinanī*[38] that has status of an authoritative guide in *Hanafī* Law is wildly referred during this research. The other work from *Hanafī* school during this research has also been consulted which includes *Kītab al-Kharāj and Kitāb al-Ā<u>th</u>ār* work of Imam *Abū yūsüf, Yaqoob bin Ibrāhīm*[39]. *Al Badāī' al-Sanāī' fi-Tartīb al-Sharia'* work done by *Al Kāsānī* is also consulted during this research[40]. Similarly, many other distinguished authors and books from Hanafī school is also consulted during research, mentioned herewith in bibliography. Moreover, the Ottoman Civil Code (*Mujallah Al Ahkām Al Adliyyah*) compiled by a committee constituted by Ottoman Caliph 1867-1877 consists of eminent jurist of that time, that is based on *Hanafi* jurist prudence and remained operative in courts until 1960, is wildly referred in this research to present the Hanafi approach towards different notions under discussion.

In *Shāfi* school while discussing different issues classical sources that have been quoted contains *Kitab al Umm* written by *Imam al Shāfi,* Similarly *Kitab al Wajīz fi fiqh al Madhhab al Imam Shāfi* and *Iyā'ūlūm al-Din* written by *Imam Abu Hamid Muhmmad al Ghazalī* are also widely quoted in this work. Some other work from *Shāfi* hat has also been consulted during research includes *Mughnī al-Muhtāj*the work of *Al-Sharbini*. Likewise, the book known as *Al Ahkām al Sultaniyyah* the work done by *Al Mawardi* is also referred and also the work of *Imam al Nawwawi* entitled *Minhāj al Talibīn* is also consulted to understand the *Shāfi* viewpoints. Further detail and complete index are given herewith in bibliography.

While to understand the viewpoint of *Hanblī* school several books were consulted during this research, among the most important one is the work of *Ahmad b. Qudāmah al Maqdisi* entitled al-*Mughnī* which is most commonly known text of *Hanblī* School. Other important resource

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[38]*Murghinanī, al Hidāyah*, 3rd edit (Cairo: *Mustafa al- Bābi, al-Halbi*, 1966).
[39]Abū yūsüf, Kītab al- Kharāj (Cairo:*Sharika al mtbuat al Ilmiīya* 1332, A.H).
[40]*Al-Kāsānī, Badāī' al-Sanāī' fi-Tartīb al-Shari'ah* (Cāirro: *Sharikh al mtbuat al Ilmīy'ah* 1910).

consulted from this school during this research includes *Al-fruq* written by *Al-Qarīfi, Al-qawanin al- Fiqhiyya Muhmmad b. Abdullah al-Gharnatī*, and *Al-Ashbah wa al- Nazayir* the work *of Jalalal- dīn Suyūtee*, besides all these, many other books from classical literature were consulted from *Hanblī Fiqh* to understand the viewpoint of their school concerning the under discussion issue. In the same way, the work of *Ibn-e-Tyimiyyāh, Al-ubudiyyah fi-al-Islam* and *Al-fatwah* etc. have been consulted too during this research work. Along with that, the work of Muhmmad *b. Abu Bakar* commonly known as *Ibn Al Qayyim I' lām al-Muwaqqī 'īn* is also referred widely in various discussions during this research, the complete index about this school's books are listed herewith in bibliography.

With that, for *Mālaki* school's viewpoint, *Al- Muwaṭṭå Imam Mālik* and another work *Al-Mudawwanāh* has been referred to understand issues pertaining to under discussion topic. The other work from *Mālikī* school also includes the work done by *Imam Al Qarīfi* entitled *Al Dhakhirah* and by *Imam Al-Shātibī muwafaqāt fi usūl al-Shari'ah*. Among other schools the famous book *Al-Muhallah* written by *Ali b. Ahmad b. Sa'īd b. Hazam* from *Zāhiri* School is also referred to bring out their opinion on the topic concerned and work of *Wahbā al-Zuhailee* is also consulted to undertake comparative approach on the issue.

Moreover, in attempt to address and to understand contemporary approaches the work of many contemporary scholars has been quoted including the *Al-Madkhal al-Fiqhi al-Āmm* written by famous jurist of the time *Mustafa Al-Zarqā,* likewise the book of *Al-Zarkashi* entitled *Al-Mansur fi al-Qawa'id* is also consulted. Similarly, the well-known book *Al 'Fiqh Al Islami Wa Adillatuhū* by*Wahbā al-Zuhailee* is also referred widely in this research. I have benefited to a great extent by this worthy work, however, there is nothing specifically addressing the issue in comparative manner in terms of Islamic and Common law perspective but, is a valuable work to

understand the various schools of Islamic law under discussion issue. Likewise, another book *Nażarīat ul daman* is also consulted during this research. As for as the modern-day work and write up on Islamic law is concerned that has covered several aspects of contractual liabilities other than the topic under discussion, there we have abundant literature that has been studied during this research work.

With that, consulted work includes the remarkable work of Prof. *Dr. Jathim 'ali Salim,* Chair of the civil law department of UAE presented a research article in international conference conducted by the faculty of *Shari'ah* & law UAE University from 6-7, December 1998. He discussed different types of transactions having innovative nature, and then paper provides various tools for the protection of the interests of contractual parties in these transactions. In this regard, he discussed the notion of *Khīyyār* with its various aspects like *Khīyyār al Aib*, in cases of defective goods, *Khīyyār al Wasaf* and *Khīyyār al Shart* in cases of guarantee and warrantee and breach of condition, and *Khīyyār al tadlis* etc. and also covered the cases where the subject matter is not present at the time of contract. This research paper is well formed and innovative in its nature but it is only covering one aspect of the contract that is related to the study of transactions made through electronic devices from perspective of Islamic law and no concern is taken out with other aspects of contractual liabilities. Another notable work, I studied during research is the paper entitled 'The "English Shell Rule" in case of Nervous Shock in Islamic Law of Tort' this paper is based on an analysis of "egg shell skull rule" written by Abdul Basir.[41] The focus of the paper is upon the analyses of the rule that person bears the liabilities for all injuries and damages resulting from his act which caused such injuries irrespective of the fact that the injuries are foreseeable or unforecastable in the light of Islamic jurisprudence in the context of

[41]Abdul Basir, Muhmmad. "The 'English Shell Rule' in case of Nervous Shock in Islamic Law of Tort". The Islamiyyat, international journal of Islamic studies, (2008).30.28.

nervous shock. The study is innovative and useful to understand the role of Islamic law of torts in case of pre-contractual liabilities to protect the rights of contractual parties.

Moreover, generally the literature consulted on Islamic law, in English language includes the work of *Rafik Issa Beekun* entitled as 'Islamic Business Ethics'.[42] The author discussed the main points of management and the ethical aspect of business from an Islamic perspective. However, the material is not focused on pre-contractual liabilities covering the right of the patties but I have benefitted a lot during my research. Another notable work is the book titled 'Understanding Islamic Finance' by *Muhmmad Ayyub* is also very helpful to understand the various business transaction of commercial and financial institutions.[43] The book has covered almost every aspect of Islamic commercial law on the contemporary application of its different modes. However, the subject under discussion is not the primary concern of the book and nothing has been found in solid form in particularly on the disclosure of information theme. Similarly, another worthy work done by Mushtaq Ahmad entitled 'Business Ethics in Qur'ān' unpublished thesis which he submitted to Temple university in partial fulfillment of the requirements of Ph.D., the work contains properly decorated arguments and valuable material from *Qur'ān* and *Sunnāh* thoroughly highlighting the ethical aspects of business from Islamic perspective, which is much advantageous to understand the *Qur'ānic* view towards business and commercial transactions.

Another important book 'Economic Justice in Islam' written by reputed author S.M Yusuf is also consulted during the research, a concise work that covers various aspects of Islamic economics in the light of Qur'ān and Sunnāh focusing on economic justice.[44] In the same way a very remarkable work entitled 'An introduction to Islamic Finance'. Author of this book a well-

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[42] Beekun, Rafik, Issa, Islamic Business Ethics (International Institute of Islamic Thought, 1997).
[43] Muhmmad Ayyub, Understanding Islamic Finance (West Sussex England: John Wiley &Son, Ltd, 2015).
[44] Yousaf, S.M. Economic Justice in Islam (Lahore: Sh. Muhmmad Ashraf Publisher, 1971).

known scholar Maulana Muhmmad Taqi Usmani has presented all the modes of Islamic finance discussing their legal requirements in the light of Islamic jurisprudence. I have benefited a lot from this book while doing this research to understand the very nature of the valid Islamic business transactions.

In this respect, one of the most valuable works that focuses on Islamic law of contract entitled 'Islamic Law of Contract and business Transaction' is a book written by worthy scholar Dr. Tahir Mansoori.[45] This book provides an overview of Islamic law of contract and is good effort to cover each and every aspect of Islamic Law of contract. This work can be helpful in legislation and preparing a comprehensive code of contract law from Islamic perspective. This valuable work was consulted to grab the idea of general principles of Islamic law of contract to understand the very nature of contractual liabilities. Likewise, Dr. Tahir Mansoori's another valuable work entitled 'Shari'ah Maxims: Application in Islamic Finances' has been studied. In this book all maxims relevant to Islamic finance are presented in solid form. This work has been consulted during my research, while understanding the nature, scope, and extent of application of these maxims in modern era. Another remarkable work is also very useful in order to comprehend the applicable structure of Islamic commercial law and contractual relation between the parties. The work done by prominent Islamic scholar Imran Ahsan Khan Niyazee, entitled 'Islamic Law of Business Organization: Corporations' and 'Islamic Law of Business Organization: Partnership' mainly focus on the development of an Islamic form of modern corporation as according to the Islamic principles and to eliminate the all infractions of Islamic principles.

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[45]Mansuri, Tahir, Islamic Law of Contract and Business Transaction (Adam publisher and Distributers, 2005).

In order to build a comparative approach regarding pre-contractual disclosure of information the variety of literature on the concept of Khīyyār, as well as the principles of English law on the topic has been reviewed. Further, it includes, European commission legislations, United Kingdom legislation i.e., different Statutes, statutory instruments, case laws, on the topic concerned, reports and articles and research papers addressing the issue of pre-contractual liability to disclose. The analyses are being taken on the assumption that some crucial points, important principles have been left unexplained on the subject in these writings as some of these I have mentioned in the bibliography and few of these writings may be considered accordingly as:

Specifically, *Parviz Bagheri, Kamal Halili Hassan* discussed in their article "The application of the *Khīyyār al -'Aib* (option of defect) principle in on-line contracts and consumer rights"[46] This paper examines the legal protection of consumer rights in on-line contracts through the application *of Khīyyār al-'Aib* (option of defect). It focuses *on Khīyyār al-'Aib* its legal Islamic mechanism by which one party, both parties or even a third party can nullify a contract, electronically or conventionally and left the other related concepts. He emphasizes on the fact; it is a given right to the purchaser to nullify the contract if it is appeared that the object has defect which reduces its value. He further argues that in on-line contracts, the party has no direct contact with the merchant and cannot easily verify the quality of the goods, thus creating a situation in which contracting parties are not at equal bargaining strength. Therefore, application of *Khīyyār al-'Aib* (option of defect) would be helpful in protecting consumer rights in the virtual world. He stressed in this paper on one aspect of *Khīyyār* framework and ignored the other aspects. This paper explores the Islamic principles giving only Iranian as well as the

[46] Parviz Bagheri, Kamal Halili Hassan, "The Application of *Khiyār al Aib* Principle in On-Line Contracts and Consumer Rights", The European Journal of Law and Economics, (n.d.).

European examples as a point of reference, while left over the huge Malaysian and UAE economies example.

Further, *Mohd Murshidi Mohd Noor*, Ishak Suliman, in his work "The Rights of Khīyyār (Option) in the Issue of Consumerism in Malaysia"[47] synthesized that *Khīyyār* or option is the right given by law to party to a contract whether to remain with the contract or to stop their transactions. The objective of this article is to analyze the types of *Khīyyār* and to uncover its applications in the right of consumerism. In addition, this article is a connection between Contracts Act 1950 and Consumer Protection Act 1990 with frame work of *Khīyyār*. It is an effort made by him to comparatively study between the laws of Islam in *Khīyyār* and the acts related to the right of consumerism. He argued that this mechanism can be applied due to its applicability with the existing laws in Malaysia. But his research is only confined to the situations and laws of Malaysia and he left over the general scenario, so he had bit narrow approach.

Similarly, Saiful Azhar Rosly Mahmood Sanus provides his viewpoint in his article entitled "The Role of *Khīyyār Al-'Aib* in *al-Bay' Bithaman Ajil Financing"*[48]. He tried to cover a debate about prevalent modes and implementations of Al-bay' *Bithaman Ajil* (BBA) transaction in the Islamic banking business which needs a serious re-examination, he argued that it is a right of the buyer to annul the contract when an imperfection or flaw is apparent in the item sold, namely *Khīyyār Al-'Aib*. Further this paper presents the criticism that this right was not granted by the Islamic bank that is acting as a selling party to the BBA contract against the spirit of the legal maxim *Al-*

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[47]M. Murshidi, "The Rights of *Khiyār* (Option) in the Issue of Consumerism in Malaysia", Middle-East Journal of Scientific Research 13 (2) (2013) 154-161.

[48]Saiful Azhar. "The Role of *Khiyār al-'Aib* in *al-Bay' Bithaman Ajil*Financing" International Journal of Islamic Financial Services Vol. 2 No.3. (n.d).

Kharāj bil- Daman. Hence, it is also a confined study which only focuses on the area of Islamic banking.

For this, another important reference is Dr. Md. Abdul Jalil and Muhammad Khalil ur Rahman in their article "Islamic Law of Contract is Getting Momentum"[49] debated in a beautiful work done by *Razali, Siti Salwani* entitled as Islamic Law of Contract which was printed by *Cengage* Learning from the United States in year 2010. Dr. Jalil nicely revised the work and attempted to discuss its facts and shortcomings and furnished new ideas for further development. For this, he pointed out certain things on the Islamic law for a better insight on the subject. Philosophy of law in *Shari'ah* differs from the western philosophy of law. Significantly, the work is highly informative legal information about the *Shari'ah* law of transaction in concerning legal perspective, but they also missed the point of comparison with other laws. Further, *Younes Elahi1*, and *Mohd Ismail Abd Aziz* in article "Islamic options (*al-Khīyyār*) Challenges and opportunities" unlike others opted different way to highlight entire scheme of Islamic law of options, the work is presented in three sections. One of them contains a review of rules regarding *al-Khīyyārat*. Other debated the challenges of *al-Khīyyārat*; finally he tried to address the chances of progress in the view of these options in contemporary Islamic law. But he also did not compare these with the concept of English law with relevant issue.[50]

With that overview, Habib Ahmed in his article "Islamic Law, Adaptability and Financial Development" discusses the adaptability features of Islamic law in relation to commercial transactions taking into consideration contemporary financial system. After discussing the nature and way of Common and civil law traditions, the paper discusses the history and the adaptability

[49]Md, Jalil and M, Khalil, "Islamic Law of Contract is Getting Momentum", International Journal of Business and Social Science Vol. 1 No. 2, (2010).
[50]Elahi and Mohd, "Islamic options (*al-Khiȳārat*) Challenges and Opportunities", International Conference on Information and Finance. IPEDR vol.21. (2011).

features of Islamic law. He emphasized the principle of permissibility, that Islamic commercial law can grow within the limits imposed by *Shari'ah*. Whereas Islamic law could do with other elements of the legal infrastructure like laws and statutes and dispute settlement institutions also need to be strengthened. But he did not discuss any mechanism for theses adaptability features of Islamic law in conjunction with strengthening the legal infrastructure are vital components of the development of the Islamic financial sector.[51]

In stressing the challenges posed by contemporary structure, Nicholas HD Foster in his article, Islamic Commercial Law: An Overview admits that Islamic law' covers all aspects of human behavior. It is much wider than the Western understanding of law, and governs their way of lives in literally every detail and of course, it also regulates commercial transactions. Then his discussion follows that the Islamic conceptual framework is quite unlike that of Christianity in which law is secular. He asserted that we cannot find Christian law of contract, no Christian law of property, whereas bodies of law dealing with such matters do exist in the *Shari'ah*. The Islamic law has long been abandoned and substituted by Western law. However, in his view as a result of the Islamic revival, the possibility of adapting the *Shari'ah* to the modern world is imperative but in his work, while discussing the significance of Islamic Commercial Law today, he often missed the current developments in the area of Islamic banking and he also missed to elaborate the mechanism of contractual obligations given by Islamic law.[52]

Moreover, the work of Dr. R. Ibrahim Adebayo1 and Professor Dr. M. Kabir Hassan**,** in their article "Ethical Principles of Islamic Financial Institutions"[53], underlined the fact that the

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[51]H. Ahmad, "Islamic Law, Adaptability and Financial Development", Islamic Economic Studies Vol. 13, No. 2, February, (2006).
[52]HD, Foster, "Islamic Commercial Law: An Overview", School of Law and School of Oriental and African Studies University of London: (I) (2006).
[53]R. Ibrahim and M. Kabir, "Ethical Principles of Islamic Financial Institutions", Journal of Economic Cooperation and Development, 34, (2013).

current global economic meltdown is a clear revelation of the inadequacies of the conventional financial set-up and the weakness of self-designed system and lack of fairness. They supported the Islamic system and argued in favor of the recent adoption and establishment of Islamic based financial institutions in many parts of the world has exposed the system to serious studies by scholars and economists, they also tried to compare the Islamic law of transaction with other operating legal system, but they also did not specifically made analysis of disclosure rules. Interestingly, Nabil Saleh states in his work "Unlawful Gain and Legitimate Profit in Islamic Law" the process of Islamization in Pakistan in relation to economic and banking system, with reference to the steps taken by Gen. Zia, he somehow appreciated the notion of legislature towards Islamization and gave opinion that this very formula later followed in Sudan is a good discussion about the mechanism adopted by regime. But he just focuses on basic principles and theory of profit and gain .and did not entered into further detailed discussion of sub principles like *Khiyara*t so this point need to be explored.[54]

Furthermore, another notable work referred is of Naveed Azeem Khattak and Kashif-ur-Rehman. In article "Customer satisfaction and awareness of Islamic banking system in Pakistan" the author writes about the customer's satisfaction and awareness level to the IBI and gives suggestions for betterment. For the study, it is a tremendous work, but just focused on operational side and theoretical side is left unexplored. Unfortunately, we hardly find work done in Pakistani perspective on the topic which explains the roots of the issue and gives an idea about the implementation of concept of *Khīyyārat* in Pakistani legal system.[55]

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[54]Nabil Saleh, "Unlawful Gain and Legitimate Profit in Islamic Law"', Middle East Studies Association Bulletin, Vol. 21, No. 2, (1987).
[55]N, Azeem and K. Rehman, "Customer Satisfaction and Awareness of Islamic Banking System in Pakistan", African Journal of Business Management Vol. 4, (2010).

In addition, different contemporary investigators presented their work about mapping economic theories on principles in order to safeguard the parties from implications of sale; it is very hard to summarize it but here some of their work we can discuss;

Most notably, Dean Anthony Kronman in his article presents an economic theory clearing up why unilateral mistake is allowed as a defense to preclude contract formation in some cases, but not others, as part of his argument, *Dean Kronman* debates when a party has a duty to disclose information to the other contracting party where the other contracting party does not ostensibly possess that information.[56] Similarly, Professors Cooter and Thomas Ulen in a write up "Economic treatise, Law and Economics", furnished theory about the disclosure of a material fact and their requirements from one party to another party. They attempt to draw a distinction between those facts which they determine are productive (wealth producing or enhancing), which are not required to be disclosed between contracting parties, and those facts which are merely redistributive, which the knower is required to disclose to the knower.[57]

Maurice Jamieson's paper Liability for Defective software discusses the ultimate legal remedies and consequences of such kind of software that often is used in specialized institutions and known as safety critical software. Their use in civil aviation services and in health to investigative purposes is being discussed, and an attempt is made to analyse. to judge the accountability of their manufacturer in this field.

Next, important work is done by Professor Scheppele on "the phenomenon of secret" he discusses the privileges of contractual parties that deals with a relative cost of each party's access to the material fact or suitable info and also discusses the issue of disclosure of secret

[56] Anthony T. Kronman, "Mistake, Disclosure, Information, and the Law of Contracts", 7 J. Legal Stud. 1, 1-2, (1978).

[57] Robert Cooter& Thomas Ulen, "Law and Economics", S.L. Rew ,4th edit, (2004) 281-86.

information, where its relevance with marginal cost of that information is much less for one party to the contract than for the other party to the contract.[58]

With that, another notable work is of Professor Rose's theory. In her article, "Crystals and Mud in Property Law"[59] Professor Rose, evaluated the growth of English law over judicial verdict and decisions, he synthesized these decisions with their effect and introduced a terminology "crystal rule-a rule which is subject to easy interpretation and apply because its contours are certain, like 'Caveat Emptor' and ultimately transforming it into a 'mud' rule-the antithesis of a crystal rule or a rule that is difficult to interpret and apply because of the rule's complexity or the fact-related nature of the rule which requires precise application of certain facts to a rule to produce a predictable outcome". He criticized the courts and judges approach to align the parties' duties to unveil information in the estate property especially the residential real estate transaction, it is a solid discussion but somehow he deviated from recent developments which changed the scene of LCIG.

Another leading scholar Alex M. Johnson, Jr. examines the economic theories in his famous writing 'An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine [60] He discussed certain rules demanding the disclosure of information and analyzed them with development and evolution of the doctrine of "Caveat Emptor". He articulated in his work;

> "If correct, these theories forecasting when information must be disclosed must account for the Common law usurpation of disclosure requirements in the purchase and sale of real estate, in other words, if the economic analysis is right and accurate, these theories must elucidate why" no disclosure of information is mandatory with respect to the sale of real estate at Common law".

[58] Kim Lane Scheppele, "Legal Secrets: Equality and Efficiency in The Common Law", (1988)109-26.
[59] Carol M. Rose, "Crystals and Mud in Property Law", 40 STAN, L. REV, (1988) 577, 580-83.
[60] M Johnson, "An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine", 23 journals of Economic Theory, (2007).

In his view the unconventional clarification is that the "Caveat Emptor" doctrine should not be practical rule subject to the sale of real property, its usage has been inaccurate since a long ago. Then he argued that conversely, if the economic theory dictates disclosure of certain information even with subject of land property sale, maybe the legal method of "Caveat Emptor" is unsuitable to meet requirements concerning the modem-time transactions pertaining to real state matters. Outcome of these economic philosophies on the canon of "Caveat Emptor" is, though, they manifest that it is no longer remained without problems and the legal canon has not kept on standing over time. So far, view point he presented about "Caveat Emptor" and its rational regarding those transactions involving lands or real property could have been fit when the rule was established. Yet, modifications and changing nature of these properties being subject of sale caused different scenario, it may have led to the need for rapid disclosure of material information.

With that added understanding, it can be concluded that this study tests different theories including theories given in *Shari'ah* regarding protecting *Harm* (*Darar*) and fair trade. In the light of all these phenomenal concepts and principles regarding when material facts should be disclosed or should not, it is an anticipation that the exceptions which have become prevailing, and their relation with disclosure requirements for contractual parties which bears prominence be explored such a way which was not been discussed earlier.

As part of the historical mediation in the quest for greater understanding, I will close my discussion by mentioning certain cases from judicial history of Pakistan. However, a lot of cases adhered on the subject, with this vision and a few of them I would like to mention here and rest of those I would bring up in the bibliography.

In a case *Haroon mandrha* v. *Abdul Rahim* Karachi-high-court-Sindh,[61] it is considered by high court that under the principle of Caveat Emptor it was the duty of occupants to have verified the title of the builder before purchasing and occupying the premises. For this, builder in the current case had no title and could not transfer any title in respect of the flats on the disputed floors to any person and sale agreement in respect of the flats on the disputed floors was void under S.23 of Contract Act, 1872. Similarly, in 2007 we find an interesting corporate matter where a case; International Multi Leasing Corporation and Others v. Capital Assets Leasing Corporation Ltd.[62]"In this case Caveat Emptor was applied and leave to appeal was granted by Supreme Court to consider; what was important and significance of provisions as enumerated in S.282-L of Companies Ordinance, 1984 and what effect it would have on the scheme of arrangement/merger of a Non-Banking Finance Company; whether such a scheme of arrangement/merger could have been sanctioned by High Court, pursuant to the provisions contained in S.282-L of Companies Ordinance, 1984, read with Part VIII-A and Part IX of the Ordinance No. CXXII of 2002 or by Security and Exchange Commission of Pakistan in view of the provisions as enumerate in said Ordinance; whether provisions as contemplated in S.282-L of Companies Ordinance, 1984 had been misconstrued and misinterpreted; whether question of limitation had been dilated upon and decided correctly by High Court and time for the purposes of limitation would commence from the date of merger order or when the merger order attained finality; whether "market value of shares" was the only criterion to determine "the scrap ratio" and other relevant factors such as "net assets value" and "profit earning capacity value" could be ignored; whether requisite statutory majority of share-holders of amalgamating companies had unfettered and unbridled powers and grievance of aggrieved party could not be redressed where

[61] Haroon mandrha vs Abdul Rahim, (2001), CLC 1312.

[62] International Multi Leasing Corporation and Others Vs Capital Assets Leasing Corporation Ltd (2007), Scmr 1102 Sc.

the scheme of arrangement/merger was not fair and crystal clear. Further, another case where applicability of this doctrine is also adhered is notable, entitled, International Multi Leasing Corporation and Others v. Capital Assets Leasing Corporation Ltd[63]. It was said that Proposed transferee other than the adversary in the suit had to remain bound by principle of Caveat Emptor and consequence of said doctrine was that transaction pendent, would not be allowed to affect rights under the decree Likewise, we have another case where court clearly admits the validity of this doctrine and stated; Transferee or vendee of a certain property has to be vigilant enough and cautious at the time of purchasing the property. Vendee has to make sure as to whether transferor had any valid or genuine title in the property or not, as the principle of Caveat Emptor was well-known in the judicial proceedings. Along with these example we have some other cases where higher judiciary put certain limitations on the application of the doctrine of Caveat Emptor due to different reasons like a case decided by Peshawar High Court, it is declared about its applicability---Son of vendor of land in dispute had set up a case under principle of Caveat Emptor Son of vendor who had stepped into shoes of his predecessor, could not avail said plea as same was opposed to all norms of fairness. equity and justice---Principle of Caveat Emptor could be used by a third person having a conflict of interest on same subject-matter with Vendee, but son of vendor could not legally articulate on said plea---Principle of Caveat Emptor was not approved by Injunctions of Islam as a vendor was required to disclose defects in sale commodities to the vendee In the way, in another case *Raees Amrohvi* Foundation (Regd.) v. *Muhammad Mossa*[64] High court put limits on its scope in transfer of property by ostensible owner and it is said; When an ostensible owner had transferred property for consideration and such transfer was questioned on ground that transferor had no legal power to

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[63]International Multi Leasing Corporation and Others Vs Capital Assets Leasing Corporation Ltd. (2007), Scmr 1102 SC.
[64]Raees Amrohvi Foundation (Regd.) Vs Muhammad Mossa*., (1999),* PLJ,633, Karachi.

alienate same, transferee could be exempted from its consequences, provided, he had established that he had taken reasonable care to ascertain power of transferor and had acted in good faith---Rule of Caveat Emptor required transferee, apart from acting in good faith to take all reasonable care to apprise himself of any defect in transferor's title or clog on his power to effect transfer.

Along with this I also got the opportunity to read the thesis of Muhmmad Akbar Khan Consumer Protection in *Shari'ah* and Law where he comparatively discussed the different aspects and diversities of consumer rights and liabilities.[65]

As part of the historical negotiation in the quest for greater understanding, the nutshell of the literature review is that so far no one has presented a comparative study of pre-contractual liabilities in the context of pre-contractual disclosure information in the perspective of Shari'ah and English legal system. There is no such academic research that evaluates and explores the different aspects of the relevant laws and theories on this issue. The researcher, though, it is a difficult task to achieve, aims to analyze critically the issues pertaining to pre-contractual disclosure of information in the context of both the English legal system and Shari'ah. The researcher has tried his level best by spending his all efforts to contribute to a productive and useful research. It is an attempt to present a useful research by adhering to the qualitative research standards during the compilation of research data.

[65]M. Akbar Khan, 'Consumer Protection in Shari'ah and Law, Unpublished Ph.D. Thesis.

Chapter No. 2

Emergence of Islamic Commercial Law

Chapter No. 2: Emergence of Islamic Commercial Law

1. Introduction

Having discussed the basic theme of the research and its design as an introductory discussion to the research, in this chapter, the research moves more prominently towards the discourse on development of Islamic law from its sources to shaping into a legal system with an almost exclusive focus on theory of adaptability of contemporary Islamic law and principles of modern legal system in contemporary transactions. Law in every society aims at maintenance of individuals conduct in their daily affairs, which effects social control and settlements of rights and liabilities. It is a mechanism which primarily is established to safeguard the rights of individuals particularly, and of society in general. Every legal system for apiece society has its distinct nature, characteristics and scope. Similarly, Islam also has its own unique legal system known as *Shari'ah*. Although, *Shari'ah* is not purely legal in the strict sense of its terminology, rather esemplastic, it embraces the different fragments of life i.e., ethical, religious, political and economic. It is different in the sense that the norms and all basic concepts of Islamic law have its origin in the *divine revelation*. The revelation determines the norms and the basic principles of Islamic law, and in many respects initiated a disruption with the customs and the other values of tribal legal system.

1.1 Basic Concepts and Scope of Islamic Commercial Law

With that forgoing, a comparative analysis indicates that there are certain basic differences between the purpose and scope of law in the modern sense and in the sense of *Shari'ah*. The scope of Islamic law includes rules of human conduct in all spheres of life. It covers every slice of human life, most importantly; it ensures man's wellbeing not only in

mundane life but also in hereafter by making it the liability of the state to enforce the Islamic laws ordained by *Qur'ān* and *Sunnāh.* The application of rules of moral conduct of individuals and its governing depend on two important factors. First, Muslim society's collective responsibility for observation of Islamic teachings; and second, the individual's relationship with Allah as well as with society where he lives in.

Markedly, according to wisdom laid down in *Qur'anic* teachings, it is obvious that the Muslim society is supposed to be under obligation for application of rules of moral behavior and mutual conduct as divine commandment for its own welfare in conjunction with the wellbeing of fellow human beings. Accordingly, the *Qur'ān* dignified the concept of law along with the ethical values of its principles by making the observance of the rules of the *Shari'ah* a matter of human conscience by appealing the human conscience toward the teachings of Islam. It is stated in *Qur'ān*:

> "Oh, you believe! Stand out firmly for God, as witness to fair dealing."[66]

Broadly speaking, the foremost function of law is the preservation of rights of those who submit their obedience to state and same is the case with Islamic law[67]. However, *Shari'ah* has broader scope and application. It can be truly termed as a social code which aims at establishing a society based on a deep sense of moral responsibility in which every citizen has equal and proper opportunity to endure for his wellbeing according to his own spiritual and moral values.

Thus, *Shari'ah* is the science of such principles of law which may concern itself with law in its various aspects through traditional analysis. Further, due to ideal character of *Shari'ah* and its historical origin and legal theory, it has direct relation with human conduct in their daily lives. Indeed, a precise legal theory springs from a legal system which already exists in society. To be

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[66]*Al-Qur'ān*, 5:8.

[67]Willis, John, "Review of Law in a Changing Society", Political Science Quarterly 76 (1), Academy of Political Science, Wiley, (1961): 140–42. http://www.jstor.org/stable/2145989.

certain in case of *Shari'ah*, the theory of law in Islam in its novelist form must have existed in the era of the companions of The Holy Prophet (pbuh). When they have come across certain new conditions, they must have resorted to sources of law and have pondered over same in terms of their method for reasoning to get solutions of fresh problems and glitches. That being said, in some cases they gave their own rulings and ignored the practices, which were existing at that time favoring legal reasoning. The classical legal theory; however, in the time of companions, in its technical and systematic form was not yet shaped. It was a phase where Islamic law started to be systematically construed from its basic form. The principles of law were derived from the law itself and it further developed and formalized during the period of second and third generation.

Therefore, in this context the fundamental difference between *Shari'ah* and law (in general) emerges that former is based on revelation and divine in nature and later is not. For this reason, *Shari'ah* does not agree with the idea that whatever human society determines fit for society, based on its usefulness is good. It is quite possible that, sometimes in changing circumstances, the 'good' of human society may turn out to be an evil in Islamic law.[68] For example, usury is allowed by modern law which, in *Shari'ah* is prohibited. Similarly, the secret liaisons/relationships based on free will between adults are permitted in modern law but in *Shari'ah* these are prohibited, rather they amount to be sinful acts.

Additionally, *Shari'ah*/Islamic law present the concept of *Maslahā*, which forms the basis of the philosophy of Islamic law in a more boarder sense as compared to the modern law. Islamic jurists have developed the concept of *Maslahā* as a fundamental characteristic of Islamic legal system, which makes it adaptable to social changes and needs. To this point, contemporary

[68]*Ibn Ashūr, Maqāsid al-Shari'ah Al-Islamiyah* (International Institute of Islamic Thought, n.d) p. 234.

Muslim reformists and jurists, such as *Subhi Mahmassani*[69], upheld that legal principles like consideration of *Maslahā* and *Istehhsān* (juristic preference), the flexibility of Islamic law in practice and utility of *Ijtihād* (legal reasoning) sufficiently demonstrate that *Shari'ah* is adaptable to social changes.

Interestingly, the relationship between legal theory and social change is vivacious and considered a basic problem of the philosophies of law. Social change here is used in a broad sense, to indicate that change in question has happened in society in response to social needs. A legal change, which interacts with such social needs, exhibits the adaptability of a particular legal system. More often, the impact of social change is so profound that it affects legal concepts or norms as well as legal structure and institutions, which creates a need for fresh and wider interpretation of philosophy of law. This problem of social change and legal theory is of particular significance in Islamic legal philosophy. It is an important question that how does Islamic law faces the challenge of change? Keeping in mind the rapid changes occurred in the scenario of modern trade advancements in respect of contractual liabilities, the problem could be formulated in the form of these words: is Islamic law adaptable to the extent that the change and modernization sought can be pursued under its aegis?

For drawing conclusive arguments, regarding the adaptability of Islamic law, the problem requires a great deal of spadework for achieving clear analysis. For this, primary task is to study the various phases of the development of Islamic law. Since, Islamic legal theory has developed through the writing of various jurists; it requires a detailed study of the developments that have taken place in earlier periods of the history of the Islamic law. Further, an analysis of Islamic law on the other hand requires a brief study of the essential phenomena in Islamic legal theory,

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[69]*Mahmassani, Subhi, Falasafåt al–Tashri 'fil-Islam: The Philosophy of Jurisprudence in Islam, Eng. Trans. Farhat I. Ziadeh* (E.J. Brill, Lieden, 1961).

especially those pertinent to the inquiry of adaptability, namely *Ijtihād, Maslahā* and *Istehhsān*. In terms of acquaintance, these concepts are having fundamental significance for the understanding of the issues. In the essence, Islamic law aims at the *Maslahā* of humankind, hence, logically it should welcome any social change. With such objectivity, Islamic law cannot be rigid and inert about social change to serve the purpose. Furthermore, last task is to study the various aspects of this problem, which should be distinguished from one another in conjunction with each other.

In a bid to understand this phenomenon, in attempting to formulate an understanding of the philosophy of the problem of adaptability of the Islamic legal theory to social change, the discussion concerns the analysis of certain indispensable concepts. The following, therefore, may be arranged according to these four aspects.

- *Shari'ah, fiqh* and their identical concepts
- Emergence of systems of interpretations (schools of law)
- Continuity and change and methodology of *Ijtihād*
- Philosophy of Islamic Law of Contract (Adaptability of Islamic Commercial Law)

2. *Shari'ah, Fiqh* and their Identical Concepts

As a part of analytical debate, in the quest of greater understanding, it may be important to examine the term *Shari'ah,* its development from its original meaning to its technical sense and incremental tremendous growth of term *fiqh* with other relevant concepts.

2.1.*Shari'ah*

Assuredly, it has been understood that Islam is principally a political systematic body of norms and rituals; it would only make sense that it has a legal code to apply. The Islamic legal code is called *Shari'ah;* means the path or road to be followed. The fundamental source of the *Shari'ah* is with the *Qur'ān* and the *Sunnah*. As for the term *'Shari'ah* is concerned, it was rarely

used in the beginning of the Islamic legal history. It was introduced to carry particular meaning of the law of Islam. Explaining this term, however, early literature reveals that the word '*Shari'ah* literally means a way leading to a watering place where people have access to this indispensable life ingredient, a course to the watering or resort of drinkers, which is permanent and clearly marked out for a beneficiary. The *Qur'ān* uses the phrase *Shari'ah* in this meaning and put to use religion, which states: "We made out of water every living thing." [70]As water is the essence of all the creatures living on this earth, so *Shari'ah* represents what is indispensable for a human being's spiritual and social growth. It is notable that the word has occurred in the *Qur'ān* in three places. First reference is, where it is stated that: [71]

> "In matters of *Shari'ah*, He (*Allah*) has ordained for you that which He had enjoined upon Noah — and into which We gave thee (*Oh Muhammad* "ﷺ") insight through revelation — as well as that which We had enjoined upon *Abraham* and *Moses* and *Jesus*: Steadfastly uphold the (true) faith, and do not break up your unity therein."

Here in this verse, linguistic conformity advances the position that *Shari'ah* stands for the essence of all revealed religions with regard to acknowledging God, being obedient to him and guided by him. Another reference which is to be quoted states:

> "And unto thee (*Oh* Prophet ﷺ) have we vouchsafed this divine writ, setting forth the truth, confirming the truth of whatever there still remains of earlier revelations and determining what is true therein. Judge, then, between the followers of earlier revelations in accordance with the *Shari'ah* that God has bestowed from on high, and do not follow their errant views, forsaking the truth that has come unto thee."[72]

Furthermore, a third place is found, in which it is said that:

> "And finally, (*Oh Muhammad,*ﷺ). We have set thee on a Sharia by which the purpose (of faith) may be fulfilled: so, follow thou this (way), and follow not the likes and dislikes of those who do not know (the truth)."[73]

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[70]*Qur'ān*, 21:30.
[71]*Qur'ān*, 42:13.
[72]*Qur'ān*, 5:48.
[73]*Qur'ān*, 45:18.

Ultimately, one should be cognizant that the above-cited references clearly demonstrate the true connotation; *'Shari'ah'* is referred to point out the practical course for a human being's development and well-being morally, socially, economically and otherwise. It also seems that the term *Shari'ah* refers to a straight and clear path, and also to a watering place where both humans and other animals come to get benefit.

With the forgoing, it is affirmed that *Shari'ah* means the clear path or 'highway' to be followed, in this sense it is the way ordained by God for human race or clear-cut way for all humankind. The phrase *Shari'ah* was used in early stages for the essentials of Islam in the meaning of '*din*' - religion. In a similar vein, within the realm of exposure, certain reports further reveal that on the request of newly converted Muslim tribes The Holy Prophet "ﷺ" deputed some companions to their locality to acquaint them with *'Shari'ah* of Islam', which meant in this sense the fundamentals and basic duties of Islamic religion. It indicates that the term *Shari'ah* here denotes the basic essentials of religion.[74]

2.2. '*Fiqh'*

Alongside *Shari'ah,* the term '*fiqh*' too was existing among the early Muslims. However, *Shari'ah* is much wider in meaning and application than the other allied terms like '*fiqh'*, which in literal sense means jurisprudence. Interestingly, often, the two terms are used in literature interchangeably; they are poles apart in meanings. It is of note that difference between both the terms is comparable to the difference between 'law' and 'jurisprudence' in literature of modern laws. The original meaning of term '*Fiqh*' denotes the meaning of understanding or knowledge of certain thing. Thus, in this sense, it is synonym of '*Faham'*. As the Arabian Bedouins people used saying "so and so neither understands neither comprehend"[75]. The word '*fiqh'* by its origin

[74]*Ibn.Sảd*، *Ṭabqāt al-Kubrā* (*Baīrut: Maktaba al Ilmiyya*, 1957) vol. I, p.333, 345, 355.
[75]. Al- jwahrī, al- Sihāh, (Nishapur: Mataba al elm, 1967), p. 234.

was used by Arabs for those camel experts who had possessed ability to distinguish the she-camel that were lusting from the pregnant. Accordingly, the expression (فخل الفقيه) was found in their literature. From this expression, *fiqh* means deep knowledge and understanding of anything.[76]

Surely, in more than one places the word *fiqh* in its general sense of 'understanding 'is found in *Qur'an*. The notion of the expression of *Qur'an* (ليتفقهو فى الدين) (that they may gain understanding in religion) suggests that during earlier period this term was not applied in the legal sense alone but it was covering the meaning of other aspects too, i.e., theological, political, economic, and logical, so it carries wider scope in its meanings.

2.2 Incremental Growth of Term *'Fiqh'* and Usage of *'Ilm'*, *Imān, Hikmat*

Furthermore, it is perhaps necessary to note, in early period, we came across with the usage of a number of terms which were common among Muslims. Usually, these terms were used in a broader sense, like '*Ilm'*, *Imān, Hikmat etc.* But, with the passage of time their original meanings got narrow and specific and then became different in their usage.[77] The Muslim society in the era of "The Holy Prophet" "ﷺ" was not as complexed as it got diversified in later periods. Wherefore, the diversity and difference of interpretations were not quoted generally. Thereupon, the begining of conquest of non muslim territories, assosiation with newly converted Muslims, the emergence of several theologies and legal schools, rapid growth and developments of Islamic learning were the major factors which caused this sort of diversity in the meaning of these simple terms from what were they understood in "The Holy Prophet's "ﷺ" lifetime by Muslims.

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[76]Ibn Manzūr, Lisān al- 'Arab (Baīrut: Dārr al Kutub 1956), vol. XIII, p.253.
[77]Al Ghazāli, īyā'ūlūm-Din (Cāirro: al Mataba 'ah al-Adabiyyah ,1989), vol.1. p. 638.

To this in quest for understanding, we shall focuss on the term *'fiqh'* with which we are concerned. It is noteable that the term '*fiqh*' and *'ilm'* were frequently used for understanding of Islamic knowledge in the early days of Islam, as it is a famous Hadīth that *The Holy Prophet* "ﷺ" is reported to have blessed 'Ib. Abbāass' "O God, give him understanding in religion"[78] (**اللهم فقه فى الدين**). From this it is quite obvious that in this Hadīth word '*fiqh*' does not carry exclusively the meaning of law, but rather a deeper understanding about Islam in general sense is indicated here.

Notably, on another occusion, it has been reported that once some bedouins had approached The Holy Prophet "ﷺ" and asked him to send someone to their tribe, who should instruct them in religion. Here in this report, we also found the expression (**يفقهوا نا فى الدين**) used and denotes the meaning of deeper understanding.[79] In this setting, above examples give us an idea that in early era, the term'*fiqh' was* used in its broader sense because the bedounis obviously did not meant to be t*a*ught mere legal rules. And setting aside other essentials of Islam, the reason for its general uesage in the early days of Islam appear to be that in that era emphasis was being given on fundamentals of religion and people were not used to engage themselves in minute details. Hence, this term signified the puerly intellectual understanding and as well as the depth and intensity of faith, *Qur'anic* wisdom and knowledge rules relating to rituals and all other injunctions of Islam.[80] It is to be noted that *fiqh* embraced both the theological as well as legal issues. Till the times of *al-Mamūn* (218.AH) in 2nd century, the term *kalam* and '*fiqh'* were also identical and had not been seperated yet. However, in early Islamic literature, we found a book known as al-*Fiqh al Akbar* arttributed to *Abu Hanīfa*h that deals with the basic

[78]*Ibn.Sảd, Ţabqāt al-Kubrā* (*Baīrut: Dārr al Kutub al Ilmiyya* ,1957), vol. II, p. 363.
[79]*Ibn. Hīsham, al-Syrah* (*Cāirro: al Mataba 'ah al-Adabiyyah*, 1329), A.H, vol.3, p.32.
[80]*Al Ghazāli, Īyā'ūlūm al-Din* (*Cāirro: Dārr al-Fikr Press*, 1989), p. 39.

fundamental tenets of religion, like faith, unity of God, life after death, hereafter and prophethood etc. These are the problems which could be subject of *kalām* and dealt within kalām and not in the subject of science of law. The title of said book, therefore, shows that in early stages of Islam, *kalām* too was covered by the term '*fiqh'*.

*Imam Abu Hanīfa*h has defined '*fiqh'* as 'a soul's knowledge of its rights and obligation', thus, prefering its comprehensive and generic meaning.[81] When theological problems came into question, and discussion about its varasity arose to begin among Muslims, subsequently Ummah was inflected with several sects. Wherefore, in result of this conflict, considerable attention towards these conflicting thoughts and beliefs was attached. It is reported that Abu *Hanīfa*h had declared the preference of Din over knowledge of ahkkam. He obviously meant by Din the basic belief of Islam. And as mentioned earlier, he included the *Towhīd* and other allied believes *al Fiqh al akbar* .[82]

It is also reported that when the Greek work on philosophy was transformed into Arabic in the era of *al-Mamūn*. At first, it was the beginning that the *Kalām* was introduced as an independent science by *Mu'tazilah*. In fact, it was the real separation between terminologies of *Kalām* and *'fiqh'*. It indicates that prior to the emergence of *Kalām* as an independent science *'fiqh'* covered all subjects of this science.[83]

Along the same lines, the term *Ilm* in early periods also has its comprehensive meanings. This can be seen in a statement reported from *Ibn Mas'ūd*, that he had passed remarkable statement, at the occasion of the death of Caliph '*Umar,* the nine-tenth of *Ilm* has gone away

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[81]*Abù Hanīfah, al- Fīqh al-Absat, quoted by Kmāl al Din Ahmad al-Bayādi in Īshārāt al Mārāmmin Ibārāt al-Imām* (*Cāirro: Maktaba le al derasah al arbia*,1949), pp.28-29.
[82]Ibid.
[83]*Al-Sharistānī , al-Milal waʾı-Nīhal* (*Baīrut: Dārr al Kutub al Ilmiyya,* n.d.) vol.1, p. 32.

with him[84]. Which shows that he did not mean just his knowledge about legal or Islamic *'fiqh'* but he meant by saying that *Umar* possessed a comprehensive knowledge of Islamic religion. It also directs that *Ibn Mas'ūd* used the word *Ilm* not for specific branch of knowledge but into its wider sense in a comprehensive manner. It is notable point that *Ilm* is a very unique term which carries the sense of knowledge by its meaning from beginning which comes through authority, it may be the God or the Prophet "ﷺ"; *Qur'ān* or *Hadīth*. While the other term *'fiqh'* involved the element of personal thinking and exercise of one's intelligence or the application of personal judgment by its very definition, both the terms were more or less interchangeable and being used in wider sense of their meanings. Yet, it is vibrant that *'fiqh'* never lost its intelligence character ever. It is reported from companions of The Holy Prophet "ﷺ", in the early stages right after the lifetime of The Holy Prophet "ﷺ" when the Muslims were confronted with new problems, the new cases emerged seeking the solutions and thus, they had to exercise their personal judgment. At this stage, the term *'fiqh'* came to be frequently known for the exercise of intelligence. In this context, literature also witnessed that the companions who gave legal judgment and were known for employing their reason and exercising intelligence in their judgment for solving legal cases were known as *Fuqahã'*.[85] Markedly once '*Umar*, the Caliph in his speech said about *Mu'ādh b. Jabbal,* "Let him who desire to seek *'fiqh'* to the *Mu'ādh b. Jabbal*" due to his ability to solving legal problems and his intelligence.[86] At the same time people endeavored to collect and record the traditions via chains of narrators, then the knowledge came through reports got description as *Ilm*. However, at the end of third century when the movement of collecting *Hadīth* got its peak, this term appeared generally to be used in the relation to the knowledge of traditions i.e., *Hadīth*, *Āthār*. Historical hermeneutics, for its part, roughly in this period, these two terms got separate

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[84]*Ibn. Sa'īd, Ṭabqāt al-Kubrā* (Peshawar: *Dārr al Kutub al Ilmiyya*, n.d) vol. II, p. 336.
[85]*Ibn. Sa'īd,* vol. II. p. 336.
[86]Ibid., p.348.

from one another, when jurists and specialists in *Hadith* emerged and new venues came into existence and there appears a need to signify and distinguish between these too. However, it is difficult to draw sharp line between both *Ilm* and *'fiqh'* especially in early periods.[87]

From the above analysis, it may be said that scope of the term *'fiqh'* was narrowed down gradually and with the passage of time reduced; to be used in the legal literature or body of laws which came into existence and this whole corpus comes to be known as *'fiqh'* as a systematic science of law.

3. Development of Legal Reasoning and Diversity of Opinion in '*Fiqh*'

The outcome of our inquest, in preceding debate so far is that, with the passage of time a body of systematic science of law came to emerge, and this whole corpus appears to be known as *'fiqh'*. Hence, during the lifetime of "The Holy Prophet" "ﷺ", such science, as that of jurisprudence, was not known. The Holy Prophet "ﷺ" did not categorize the *Ahkām* into these recent known categories namely *Wājib, Mandūb, Harām, Makrūh* and *Mubāh*.

Needless to say, that this classification is a result of the work of jurists based upon the deep study of *Qurʾ ān,* various traditions of The Holy Prophet "ﷺ" and the practices of the companions of "The Holy Prophet" "ﷺ" and early Muslims. But this was not the case with the companions in the life time of The Holy Prophet "ﷺ". To this point, it should be stated that the only 'ideal' for them was the conduct and the practices of The Holy Prophet "ﷺ". They learnt everything from The Holy Prophet "ﷺ" by observing or, even sometimes, they were taught directly or in response to a question they asked. So, they learnt everything through "The Holy Prophet's "ﷺ" normative actions under his instructions prayed, *Hajj*, *Zakat* and even trade and fiscal transactions etc. At that time, whenever any case was brought to The Holy Prophet "ﷺ"

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[87] Al- Shaybānī, al-Muwaṭṭả (Saharanpur: Maktaba Deoband, n.d), p.391.

for seeking decisions,[88] the people did not use to inquire about the particular points of law in terms of purely theoretical way. Following this, they would consider such decision as model for similar inference and used to request only serious matters as we learn from the *Qur'ān*.[89] In the course of that time, they were not apparently indulged in meticulous details of the entire matter and refrained from less important philosophical debates of minute issues. They just relied upon asking generally few questions. It is evident from *Qur'anic* text that once some people put unnecessary question to him, the *Qur'ān* asks them as a warning to refrain from doing so.[90]

All these things were reformatory in character. Later on, early Muslims interpreted them in different ways, while the basis of their interpretation was core principles and regulations laid down by The Holy Prophet "ﷺ". Thus, the law was neither inflexible nor as rigidly applied in early stages of Islam as deliberated in earlier discussion. Different and even contradictory views relating to different legal issues could be tolerated but only on the basis of arguments, which were obvious from the diversity found in the opinions of companions after the lifetime of The Holy Prophet "ﷺ" and from the conduct of early legists.[91] The Holy Prophet "ﷺ" provided a wide scope for differences. He had made endorsement in his commands for multiplicity and he left many things to the discretion of community according to given situations. Through the application of directives of broad nature, it is clearly understood that The Holy Prophet "ﷺ" sanctioned the employment of human reasoning/legal reasoning and common sense in diverse circumstance.[92]

[88]Cf. Shacht, An Introduction to Islamic Law, (Oxford, 1964), p. 20.
[89]*Qurʾ ān*, 2:189, 215 and 8: 1.
[90] *Qurʾ ān,* 5 :101.
[91]*Abū yūsūf, Kītab al- Kharāj* (Cāirro, al Mataba 'ah al-Adabiyyah, 1332, A.H), pp.13-20, 25, 106.
[92]*Ibn.Sảd, Ṭabqāt al-Kubrā* (Bairut: 1957) vol. II, p.76: *Ibn. Hazam, al-Ihkām usūl al-Ahkām (*Cāirro, al Mataba 'ah al-Adabiyyah 1947), vol. V, p 72 ff.

Furthermore, due to the extension of Islamic territories, in early period of Islamic history right after the lifetime of Prophet "ﷺ", companions were spread out in different areas of the Muslim world. Some of them came to occupy the positions of leadership and some other had occupied the positions of intellectual and religious distinctions. The people of their respective territories used to approach them for their judgments and decisions regarding various juristic issues. They gave their judgments sometimes according to their knowledge on the basis of the commandments of the Prophet "ﷺ". Sometimes they issued their decisions as they understood from the *Qur'ān* and *Sunnāh* by applying intellectual aptitude. Often, they interpreted the matter by looking to such *Shari'ah* value which led the Prophet "ﷺ" to take a decision. For instance, in case of Dower when *Ibn Ma'sūd* was reportedly approached by someone, that if husband died, without fixing amount of dower and without consummation of the marriage, in such situation whether a widow of that deceased person would be entitled to dower? In this case *Ibn Ma'sūd* first declared that he had not heard anything from Prophet "ﷺ" on the subject. But later on, he suggested two things, first that the women would be entitled for dower similar to which somewhat of her social standing might expect as average dower; second, he suggested that full share of inheritance from her husband's property also observes the *Iddah* period. It is also reported, that *Ma'qil b. Sinān* stood up on the occasion and endorsed the decision, and said that similar decision was given by the Prophet "ﷺ" on similar case. But in another case, it is also reported that two other companions *Ibn 'Umar* and *Zayd b. Thābit* are reported to have issued different verdict in similar case. In their opinion such a woman would be entitled only to her share in heritage.[93] The reason for the preference among *Iraqi* jurist may be that the view of *Ibn Ma'sūd* later on attributed to the Prophet "ﷺ" while the other is not. But on other hand, opposing views are based on claim that if there had been a clear decision made by Prophet "ﷺ" on such an

[93] *Abū yūsüf, Kitāb al-Āthār*, (*Baīrut: Dārr al Kutub al Ilmiyya,* 1356, A.H), p.132.

important issue and social institution as marriage, how could such difference of opinion ever arise leading in distinct direction. Further, ignorance of the authority of the tradition of Prophet "ﷺ" on the part of such prominent persons like *Ibn Umar, Zayd b. Thābit* and even *Ibn Ma'sūd* makes it extremely difficult to believe that the point in question is such an important and the decision of Prophet "ﷺ" on such an important social institution as marriage remained so private and isolated, that it was not known to anyone else except companion or two.[94] Therefore, the *Hadith* is not reliable and assumption that it might not have reached other companions, cannot be accepted.

Along the same lines, another reason for causing difference of opinion is that when some *Hadith* was adduced but not accepted because it was apparently contradicting to the verses of *Qur'ān.* There was an occasion when a woman *Fātimah bi. Qays* reported to have testified that she was given triple divorce, but was not given any residential accommodation during *Iddah* period to her. Moreover, she then concludes by saying that, Prophet "ﷺ" recommended expenses for my maintenance. As opposed to *Fātimah bi. Qays,* '*Umar* the second Caliph denied accepting this *Hadith* by arguing that he could not abandon the *Qur'anic* verse for the report of a woman,[95] when it is hard to judge about her truth. *Abū Yūsüf* follows the views of '*Umar* while *Mālik* and *Al Shāfi'ī* have followed this *Hadith*.[96]

Notably, another reason which caused difference of opinion among the companions is the interpretation of *Qur'ān* on such a point where the injunctions were either silent or ambiguous, in terms of interpretation, and needed explanations and interpretations. The interpretation was made in the light of traditions and sometimes on the basis of the Jurists' opinion wherever the

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[94] *Abū yūsüf, Kitāb al-Āthār*, p.133.
[95] *Abū yūsüf, Kitāb al-Āthār,* p.132., 133.
[96] *Mālik, al- Muwaṭṭả* (*Cāirro: Dārr al-Fikr* Press*,* 1951), vol. II, p. 581: *Al- Shāfi'ī, Kitāb al- umm* (*Cāirro: Dārr al-Fikr* Press, 1322 A.H), vol. V, p.219.

traditions were diverse. So, the differences were natural.[97]As an example, in *Qur'ān* a verse says, "Women who are divorced shall wait, keeping themselves apart, three courses".[98] In this verse word '*qurū'* needed interpretation. Thus, it has been taken in two meanings; (i) for menstruations, and (ii) for the state of purity *(Tuhr). 'Umar, Alī, Ibn Ma'sūd Abū Mūsā al Ash'ari* are reported to have interpreted the meaning of *qurū* as menstruations, on the other hand *'Ā'ishah, Zayd b. Thābit* and *Ibn 'Umar* are reported to have maintained the meaning of other period of purity between menstruations.[99]

With that realization, the same is the case, we found in early stages with *Hadīth*. Several factors caused the differences; e.g. sometimes two contrary traditions are reported and thus, some followed one and some preferred to follow other. In some cases, a tradition was not known to the companion; hence, he marked his decision on his own opinion. However, when relevant *Hadīth* was brought forward, his decision was withdrawn. The companions tried their best to base their judgments and decision on the *Qur'ān* and the *Sunnāh*. They tried to keep their decisions and personal opinions as much closer to those of the Prophet "ﷺ" as they could. Despite all this diversity in opinion, they did not, in any way deviate from the spirit of *Shari'ah* value, which led the Prophet "ﷺ" to take decision. [100]

During the time of second generation, the successors followed the opinions formulated by the companions of Prophet "ﷺ". Effectively, at this stage they made apiece attempts to reconcile the contradictions in opinions of companions on distinct issues. Nevertheless, they endeavored to exercise *Ijtihād* (independent interpretation) by different methods. Firstly, in terms of preference of view of one companion over the other, they did not get any influence and nor they got afraid

[97]*Al- Shāfi ī*, vol. VII, p. 245.
[98]*Qur'ān,* 2:228.
[99]*Al- Shāfi ī, Ikhtīlf al-Hadīth* (*Cāirro: Dārr al-Fikr Press* 1322 A.H.), vol. VII, pp.241-43; *Kītab al- Umm, vol*. VII, p.163 *Al- rīsālah* (Cāirro: Dārr al-Fikr Press 1322 A.H), p. 40.
[100]*Al- Shāfi ī, Ikhtīlaf al- hadith*, p .140.

in giving preference. Secondly, they freely exercised original thinking for legal reasoning, and from that point in fact formation of Islamic law begins in more or less professional manners.[101] Finally, variances in legal opinions were too small degree owing to local and regional factors. Hence, there emerged three great geographical divisions in the Islamic history, where independent legal activity started to grow on. With that prospect in mind, one could say that they were in *Iraq* (*Kūfa* and *Basrā*) under the influence of *Muslim b. Yasāir*, *Muhammad b. Sīrīn*, and *Alqam'āh b. Qays*, *Masrūq bi. al-Ajdȧ* and their companions. In a similar manner, *Hejaz,* including *Mecca* and *Medīnah,* were under the influence of '*Ata b. Abi Rabāh*, *'Amar b. Dinār, Sa'īd bi. al-Musayyib, 'Urwah bi. al-Zubayr,* besides their other companions. Also, Syria was under the influence of *Qabisāh bi. Dhuwayb, Mukhūl* and their companions. We found comparatively more about the legal and juristic developments of *Islamic* '*Fiqh'* in *Kūfa* than in *Basrā* and this was well established by *Abū Hanīfah* and *Ibrāhīm al- Nakha'ī,* the noticeable jurist and the celebrated companions of *Abdullah bi. Ma'sūd.* Similarly, as mentioned earlier, that *Hijaz* also had two conspicuous centers of legal activity, *Mecca* and *Medīnah*. To be sure, *Medīnah* of these two, was leading center for development of Legal thoughts in *Hijaz*, hence, prominent jurists in middle of second century, as known in the text of *Ibn Ma'sūd*, 'seven Jurists of al-*Medīnah*.'[102] Above and beyond, there were other celebrated names. Notably, *Mālik* and his contemporary fellow jurists were the major last exponents of the School of *Medīnah.*

Interestingly, the *Syrian* school is not so frequently mentioned in early texts, nevertheless its legal trend has been authoritatively known to us through the writings of *Abū Yoūsuf.*[103] However, every prominent town or locality had its own *shaikh* or head of opinions whose contribution in growth of legal activity and in development of legal thoughts is vital. These

[101]*Majid Khuddrī*, law in the Middle East (Washington: The William Byred press, 1955) p. 40.
[102]*Ibn. Sāȧd,* vol. V, p. 334.
[103]*Al-Shaybānī, al-Sīyar al-Kabir*, (*Cāirro, Sharikh Almatbuat Ilmiyya* 1957), vol. I, p.230

jurists of different region did tremendous effort to lay down their decisions, legal verdicts of their judgments and recorded opinions of the companions who reside in their respective places. To this, verdicts of the Jurist of *Medina* were derived from the reports of '*Umar' Ā'ishah* and *Ibn 'Umar*. The *Kūfī* jurists developed their legal doctrine from the opinions of *Ibn Ma'sūd* and '*Alī*. These were only general trends, otherwise they also considered several others in support of their legal judgments.[104] One has to admit that the dynamic impact of local element in the early schools, it cannot be ignored. Notably, one of the '*Abbassid* Caliph *Abū Jaf'ar al Mansūr* has reported to ask *Mālik* during his *Hajj* journey that he had intention to distribute the copies of *al – Muwaṭṭa'* the famous book of *Mālik* in the provinces with instruction that it should be followed as sole authority in law. *Malik* advised him adversely on the grounds that people already had their own divergent opinion for themselves founding on diverse traditions.[105] *Mālik*'s, reply is a solid justification for the existence as well as recognition for the difference of opinion in the legal field. It also shows that ever since early days, Islamic law remained flexible, allowing on wide range for adoptability, differences of opinion and acceptance for social changes. Quite a few other pieces of evidences can be traced which prove the contribution of factors like social changes and adoptability of Islamic law.

As part of the historical discourse in the quest for greater understanding, it should be recognized that the reasons and factors involved for difference of opinion among the jurist of this stage are almost the same as we have discussed earlier in the discussion of the period of companions.[106] At the end of period of the *Tabi'un* (successor), there began a period wherein the personal decisions of companions as well as of successors were in circulation in different localities. Now here is the emergence of another chaotic state of affairs. Eventually, besides the

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[104]*Al- Shāfi ī,* vol. VII, p.245.
[105]*Ibn. 'Abd al-Barr, Jāmī ' Bayān al- 'Ilm* (*Dmam: Dārr Ibn al- Jawzee*, 1994).,vol .I, p.132.
[106]*Abū yūsüf, Kītab al- Kharāj* (*Cāirro: Maktaba al Ilmiyya* 1332, A.H), pp.50, 51.

contradictory opinions about the traditions from Prophet "ﷺ", there were also contradictory reports from the companions about their own practices and conduct. In effect, jurists followed different methods to eliminate this chaos. *Mālik,* therefore*,* attempted to use emphasize on "practice"[107] for this; *Al-Awzā'ī* often used the phrase "practice of the past Leader of Muslims"; whereas, *Abu Yūsüf* warned against the isolated traditions and emphasizes on *Sunnāh* in order to check on this chaotic state of affairs and to save the *Ummāh* from disintegration. Remarkably, they tried to strengthen the institution of *Ijmāh*, leaving aside the stray opinions, the average gentle opinion from the basis of locality - considered as local *Ijmāh*.

To this point, among the early schools of law, we often come to listen the names of *Abu Hanīfah, Abu Yūsüf, al- Shaybānī, Malik*, and *al- Awzā'ī* according to their different respective regions, where they won their fame. Admittedly, it is thought that they got their fame and prominent status due to independent *Ijtihād*, based on pure reasoning in the arena of Islamic law. Thinking of this, it leads us to believe that these jurists were not influenced by the milieu in which they settled, or by general trend of their respective regions. But reality is that this is not entirely correct. In fact, they were influenced in two ways, by the practice and by the considerations of their respective regions, which reflected in their reasoning clearly. Similarly, in the region of *Hijāz,* particularly in *Medīnah* for instance, even before the appearance of *Imām Mālik*, a specific trend of opinion already did exist. There had lived a large number of people from the chain of companions as well as *Tabi'un* (successor) who had insight into the law, and they contributed much to the formation of legal opinion in *Medīnah*. They include *Ibn 'Umar, Ā'ishah, Ibn al-Mūsayib* and others among the known seven celebrated jurists of *Medīnah*. These predecessors of *Mālik* were those who originally exercised *Ijtihād* and left mass heritage in the shape of legal opinion behind them. Interestingly, *Mālik*, we found in history of Islamic legal

[107]*Al- Shāfi ̒ī, Ikhtīlaf al- hadith*, p .45; *Kītab al- Umm,* p. 47.

thought, exercised *Ijtihād* himself on several issues; nevertheless, he did not deviate from spirit of his predecessors. Similar was the case with Iraqi juristic approach on the scene. It is to be said that a trend of Iraqi opinion had already been formulated before the rise of *Abu Hanīfah*. The companions like '*Ali Abdullah bin Ma'sūd* and successors like *Alqam'āh, al-Aswad*, and *Shābī*, *Ibrāhīm* a*l Nakha'ī* who lived there left a handsome rich heritage, mass of legal opinions representing Iraqi tradition. Notably, *Abu Hanīfah,* like *Mālik,* exercised *Ijtihād* on the lines of his predecessors not deviating from their course but keeping alive the spirit and practices prevalent in region of Iraq. However, his influence spread far and wide and became a symbol around which the Iraqi tradition crystallized.

In short, these early schools of law owe their origins to a lengthy long process of independent interpretation of laws that contributed in different localities from the earliest times. As time passed, people started to depend mostly on the decisions and legal opinions of these early authorities and ultimately resulted to strict personal allegiance to one master (school of thought).

3.1 . Emergence of Islamic Schools of Law *(Madhāhib Fiqhiyya)*

Based on the above, it should be recognized that in the first two centuries of early Islamic calendar, there was not strict personal allegiance to one specific school or *Madhāhib*. Though, there existed some geographical division which we had mentioned previously. There were some common principles and the jurists in every region were more or less like-minded. These early schools however, focused their values around certain personalities, from whom they claimed to achieve their knowledge.[108] With that, it is being noted that *Abu Hanīfah* has been reported to have acquired his knowledge from *Ibrāhīm al-Nakha'ī* via his master *Hammād* and despite his erratic differences on some issues he often follows *Ibrahim.* Similarly, *Al-Shaybānī* refers to *Abu*

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[108]*Muhmmad bin Ali al Matrrī, Qissā al Madhāhib al Fiqhiyya al Mashhūra,* (Baīrut: Maktaba al Āaluka 2015).

Hanīfah, and typically concludes each chapter with his formula, and used the text "this is the opinion of *Abu Hanīfah* and our Jurists in general". Similarly, *Abu Yoūsuf* mostly refers to "our masters" 'our Jurists' in his text and in a similar vein, it is found that *Al Shāfi'ī* says in *Kitāb ul 'Umm* that a group in *Kūfa* followed *Abu Yoūsuf* while another followed *Ibn Abi Laylā,* somewhere he says about some people in *Kūfa* "The followers of *Abu Hanīfah"*.[109]

Along the same lines, in some way we found in case of *Medīnah*, where bulk of people relied generally on *Malik*, they had taken his opinion as the *Ijmāh* of *Medīnah*, even on some events some people have been reported to have cited expressly "we follow the opinion of our master while referring to *Imām Mālik* particularly" even *Al-Shāfi'ī* while debating with the *Median's* himself calls *Mālik* as "their master".[110] Needless to say, that these entire examples show, at that stage people get started to have some personal attachment to some prominent individual jurists, and people from far and wide, indeed from regions of Iraq, Africa and even from Spain flocked to them to attain knowledge from them. However, the above analysis indicates that the trend towards personal allegiance started from the middle of the second *Hijrāh* year. With that, apart from these grouping in distinct areas of Islamic world, people were generally engaged in independent thinking on legal issues, and *Ijtihād* remained open to every competent Muslim. Although, it came to be restricted to the minimum, when the regional character of the early schools began to be stained and influence of personal allegiance to one particular school and their principles prevailed generally.[111]

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[109]*Al- Shāfi'ī, Kitāb al- umm*. vol. VII, p.257.
[110]*Al- Shāfi ī, Ikhtīlf al-Hadīth,* vol. VII, pp. 34, 35,110, 170, 194, 275.

[111]*Ahmad al Hajji al Kurdi, Ali Khalid, AL Madhāhib al Fiqhiyya al Arba'a Āīmmatha wa Atwāruhā usūl u Hā wa Āsaruha* (Kuwait: Idārrah al Iftāh 2015).

3.2. The Four Leading Schools of Law *(Madhāhib)*

1) **The *Hanafī*'s *School***

The founder of this school *Abu Hanīfah Naumān bin Thābit* belongs to *Kūfa*, and got the knowledge of Jurisprudence in the hands of *Ibrāhīm al Nakha'ī and Hammād ibn Abi Sulaymān*. His [112] disciples or group of students built up this school on the basis of lectures given by him. To be certain, he has left no work in the shape of written document except a small volume as said '*Al-fiqh al -Akbar'* found in his literature left in dogmatic. Two of his eminent disciples known as *Abu Yūsüf* and *Al-Shaybānī* indeed complied and documented his teachings. Notably, Abu Yūsüf, who was honored with the place of Chief Justice and composed a book at the request of *Harūn*- the famous *caliph* of *Abbāsid* dynasty on fiscal and public law, known as *Kitāb al Kharāj*. His other disciple *Hasan al- Shaybānī* compiled the Corpus Jurist of the *Hanafi* School. Another well-known work done by him devoted to principle matters which became the base for many future scholarly efforts on Jurisprudence, which are collectively called the *Zāhir al-riwāyāh*. Later on, all of the six books combined again in one volume entitled *Al-Kāfi* by *Muhmmad* bin *Muhmmadal-Maruwzi* known in literature as *al-Hakim al Shahid*. Subsequently, explained by another scholar in thirty volumes entitled *Al-Mobsūt*. (The Extended)[113]

Broadly speaking, *Hanafi* law is considered to be more lenient, and most humanitarian amongst all schools of law. *Hanafi* jurists are known for their extensive reliance on *ra'y* and analogy (*Qiās*), on inclination or natural tendency which is also noted in somewhat theoretical bent of *Hanafi* jurisprudence. Compared to the *Hanblies*, they were inclined not only to pose real and actual problems but also to present theoretical issues which were based on mere presumptions upon supposition. Being a salesman by occupation, Abu *Hanifa*'s contribution

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[112]*Mustafa al- Zarqā, al- fiqh al- Islami* (*Damuscuss: Dārr al Qalam*, 1995), p.59-60.
[113]*Abū Zahra, Tārīkh,* (Cāirro: *Dārr al-fikar al- Arbī,* 1977) p.164.

towards development of law on trade and commercial matters (*Mu'amalat*) has been particularly significant. Remarkably, another noted feature of this school is their unique liberal stance for individual autonomy or if we put it differently is about freedom and liberty; they are reluctant to put on any unwarranted limitations or unjustified restrictions on any free individual. They have upheld their opinion that neither the public or any community nor the monarch have the power to interfere in the personal liberty of the individuals as long as law is not been violated, as they entitle a mature girl, who gain the age of majority to be rightful to get conclude her own marriage contract in absence or without the consent of her legal guardian.[114] To this point, *Ibn ʿĀbidīn* quoted one of the brief statements of *Abū Hanīfah* wherein he represent a leading principle not only of *Hanafi* School, but about which there exists a general agreement as; "When the authority of a *Hadith* is ascertain and established that is only *Madhāb*".[115] Another statement also strengthens this essence where it is stated with mere general way and statement also attributed to *Abu Hanīfah* "When you are faced with evidence then speak for it and apply it". The message here is sort of encouragement for independent enquiry and *Ijtihād*.[116] To be certain, that the *Hanafi* School has the largest following of all schools and also was adopted by the *Ottoman Turks* in the early sixteenth century as official code for Islamic state. It is now predominant in Turkey, Jordan Pakistan, and Afghanistan and among the Muslims of India.

2) **The *Malaki*'s School of Law**

Mālk'ī School named after its founder *Mālik bin Anas al- Asbahī* who lived in *Medīnah* spent his entire life in the city of Holy Prophet "ﷺ" except for a transitory pilgrimage to city of *Mecca.* He was distinguished from other jurists in different ways, more specifically due to the fact that he

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[114] *Abū Zahra, Tārīkh* (Cāirro*: Dārr al-fikar al- Arbī*, 19770, p.164.
[115] *Ibn ʿĀbidīn, Radd al- Mukhtār*, 2nd ed.(Cāirro :*Mustafa al- Bābi, al-Halbi*,1966), p.1, 68.
[116] *Al- Kharkhī, Usūl al- Kharkhī* (Cāirro: al Mataba 'ah al-Adabiyyah), p. 84.

added another source of law to those were known to others, namely the practice of the inhabitants of *Medīnah*. *(Amal ahl al Medīnah*).

To this, it may be simply stated that since each generation followed the preceding one, the generation immediately was preceding them, and process would have gone back to the people that were directly in contact with the teachings and actions of Holy Prophet "ﷺ". In the context of this philosophy, he has an opinion that the practice of inhabitants of *Medīnah* thus constitutes basic legal evidence. The major reference book of *Malik'ī* school is *Al-'Mudawwanāh* (The Enactment) which is compiled by the famous jurist *Asad al-Furāt*[117] and later edited and arranged by *Sakhnūn* and published by him again under the edited name *Al-'Mudawwanāh al Kubrā* (The Great enactment). *Imam Malik*'s reputation is borne out by his life, his long experience of residence and teaching in *Medīnah* especially by his renowned work *al-'Muwwatāh*, where *Hadīth* is arranged according to the Subjects of *Fiqh*,[118] *Imam Malik* included in *Sunnāh*, not only *Hadīth* from Prophet "ﷺ" but also included precedent of companions on common practice of *Medīnah*. To this, *Imam Malik* preferred the common practices of *Medina*'s to solitary report, *Hadīth ahād*, on the basis that it was a more authentic and reliable indicator than a solitary report by old individual. For example, in relation to the conciliation in contracts (*Khīyyār al Majlis*) *Imam Malik* did not accept the *ahād Hadīth* which validated the option of conciliation here "The parties to a sale are free to change their mind so long as they have not separated nor left the meeting of the contract." This *Hadīth* was found contrary to the practice of the common people of *Medīnah* which regarded a contract final upon agreement irrespective of the fact that parties separated or remained together.[119]

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[117]*Asad ibn al-Furāt* (759–828) He was the on of the disciples of *Mālikibn Anas*in Medina.
[118] *Al- Kharkhī, Usūl al- Kharkhī* (Cāirro: al Mataba 'ah al-Adabiyyah, n.d) p. 84.
[119] *Al- Shāfi ī, āl- rīsālah* (Cāirro: Dārr al-fikar al- Arbī, 1322 A.H), p.140.

Regardless of this from the viewpoint of its diversity and wilderness, the jurisprudence here may be said to be most dynamic or comprehensive in nature. This is borne out by the fault that *Mālaki* school literally validated the entire range of proofs. *Mālik* has added some other sources, one we mentioned earlier common practice of *Madinī*'s (*Ijmā ahl al-Medina*). The second is *istislāh* (consideration of public interest) and the third is *sadd al-dharaī* (blocking the means). Thus, the scope is opened then, it is in this respect distinguished by its openness and with comprehensive approach, which represent sources or materials of *Ijtihad* more widely to the understanding of *Shari'ah*. Furthermore, public interest is given due prominence in *Malaki*'s Jurisprudence and this school recognized it as an independent proof, while other schools do recognize it as a proof, but tend to additional subjectivity requirement, on which the *Shari'ah* is more explicit. That's why we find that on number of occasions the fatwa was issued by *Imām Mālik* solely on basis of *Istislāh*. To illustrate, *Shātibī* quoted the validation for imposing supplementary taxes on the rich people in situations in such circumstances where state reserves face shortage of funds to prefer the larger interest to safeguard the lives and properties of people.[120] However, *Imām Mālik* made his standings clear about his principles that 'I am human, maybe I wrong and maybe I am right' so examine my views and opinions: if found in agreement with the Book of Allah and the *Sunnāh* of his Prophet "ﷺ" accepts them otherwise reject them.[121] With that realization, he has opinion about disagreement and perception of diversity and dynamism of *Ijtihād*, he argued that companions had difference among themselves and they also showed tolerance towards disagreement in matters of *Ijtihād* and this should be allowed to continue.

[120] Al-Shātibī, al-I 'tīsām (Cāiro: Maktaba 'ah al Manar, 1914), vol. II, p.300, 303.
[121] Al-Shawkānī, al-Qawl al- Mufīd (Cāiro: Mustafa al Babi al Halbi, 1927), p.44.

3) **Al-Shāfī'ī School of Law**

In the context of Islamic jurisprudence, this is the third major prominent school of interpretation of *fiqh*. It is named after its founder, great *Imām Muhammad bin Idrīs Al-Shāfi'ī*. He was also the student of *Imām Mālik*. He had delivered and articulated the legal theory of '*usūl-fiqh'*, and then first time introduced a new approach by discussing methodological issues. Apart from such introduction, he formulated the legal theory of *Shari'ah* which says that Islamic law is based on certain basic roots, or in the term ('*usūl al fiqh*). The direct word of Almighty Allah in the shape of *Quran*, the divinely inspired conduct or *Sunnāh* of the last messenger Prophet "ﷺ" consensus of opinion (*Ijmā*) and reasoning by the way of enology (*Qiās*).[122] *Al- Shafi'ī*'s role in development and exclusive treatment of the methodology of '*usūl'* is obvious. Notably, he was the first to write on many new themes of '*usūl al fiqh* such as *Āam* (general) *Khās* (particular), *al-nasikh* and *al-mansūkh* and introduced different avenues of interpretation of *nusūss* (text). He had an ability to substantiate his views on the basic unity between *Qur'ān* and *Sunnāh*.[123]

However, *Al-Shāfi'ī* took an intermediate stance between the two of major dominant stakes of his time, the *Ahl al Ra'y* and *Ahl al Hadīth*. Interestingly, he tried to reconcile *fiqh* and *Hadīth* and stick a balance between both *Hanafi* and *Maliki*, while both traditionalists and rationalists were involved in vicious disagreements. For this, he stood critical to *Malik*'s opinion of endorsement of unrestricted *Maslahā* and *Abu Hanifa*'s persistent concessions at the cost of general principle. *Shafi'ī*'s attitude of reliance on evident or apparent evidence was also reflected in his refutation of the *Hanafi* doctrine of *Istehhsān,* which was based on the taking upon the spirit rather than letters of the text. Along the same lines, we find *al-Shāfi'ī* distinct approach in interpretation of contractual obligations, though, his approach almost based on the form rather

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[122]Z. Ansasari, "The Significance of Shaf ī's Criticism", Islamic studies,30 (1991), 485-500.
[123]*Abū Zahra, Tārīkh (Cāirro: Dārr al-fikar al-Arbī,* 1977), p .461.

than intent or object of the contract.[124] He thus ignored the enquiry into the intentions, object of the parties to the contract. With that realization, we find in his literature that he overruled this even in suspicious circumstances such as the double sale ‘īināh, which is prohibited among others and in case of *Nikah al Tehlil* and intervening *Nikah* even for the purpose of legalization device between divorced couple. Shāfi, however, further articulated his opinion and validated the both, as he advocated the first transaction and said, “If we on the basis of fear that it might become a source to some unlawful, we would have acted on conjecture”. To this point, in his opinion a man can buy sword if he intent to kill an innocent person with it. Thus, in contracts and sale transactions matter is apparently conformity to the law, as mere suspicion has no value. This reliance on the apparent form of contracts etc. tendency has been shown by as many others but in his part, it is exhibited more than most.[125] The *Shāfi'ī* school is now prevalent in lower Egypt, southern Arab States, Africa in its eastern coast, Palestine, Jordan, Malaysia, Indonesia etc.

4) **The *Hanblī* School of Law**

At the heart of dynamism of the quest for greater understanding, in ninth century there emerged another school, founded by *Ahmad bin Hanbl*. He was one of the orthodox opponents of rationalists, the *Ahl ra'y*, emphasis on the authority of *Hadīth* was taken by this school of thought. For that, as like *Al-Shāfi'ī,* his reliance on *Hadīth* was so total that some time was regarded mere traditionalist not as jurist. Effectively, his work is remarkable as he collected some forty thousand *Hadīth* known as *Al-Musnad* (The verified). In terms of principles, *Hanblī'* school practices *Qiās* very little and draw their opinion mainly upon the sacred text. If the fatwa of companions come into contradiction with *Hadīth* no matter if even *Hadīth* is weak, *Ibn Hanbl* abandoned that ruling or fatwa, he thus applied this principle in case of granting the right of

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[124]*Ibn. Qayyim, I'lām al-Muwaqqī 'īn* (Cāiro: Idārāh al-Dībā'ah Munīriyyah, n. d), vol. III, p. 139.
[125]*Abū Zahra, Al- Shāfi'ī, hayaātuhu wa 'Asruhāru'uh wa Fiqhuh,* 2nd ed (Cāiro: Dārr al-fikar al- Arbī, 1948), p.288.

maintenance to a divorced woman, he followed the reported *Hadīth* by *Fatima binte Qays* and abandoned the ruling of '*Umar bin Al Khitāb(RZ)*.

However, it is also notable and interesting that *Imām Hanbl* relied extensively on consideration of public interest or *Maslahā* too, we found many of his rulings validated on the basis of this principle. This is why *Imam Ahmad bin Hanbl* issued a fatwa, in which the possessor of a vast house was compelled to provide shelter to the displaced people. He also issued some ruling on issue of '*Ujra bi al mithal* regarding services in consideration of fair wages.[126] Moreover, another feature of *Hanblī* Jurisprudence is that, permissibility (*Ibāhah*) has meant much more as compared to other schools, especially with reference to contract. Apart from that, the *Hanblī* school of law differed from the majority, as to whether the norm in contract is permissibility or prohibition; they have maintained that norm in respect to contracts and stipulations therein (*al-'uqud wa al shariat*) is that, they are permissible in the absence of clear prohibition in *Shari'ah*. I may quote *Ibn. Qayyim* here:

> "The norm regarding *Ibadat* is prohibition, which means that they are null and void unless they are specifically validated and norm in contracts and transactions is permissibility unless there is evidence to contrary"[127]

To this point, in the contract the will and consensus of parties thus considered as of primary significance, in respect to requirements of contract. The thing which creates binding rights and obligations therefore is their agreement.[128] The *Imām* also at variance with the majority on the matter of suspended contracts (*al-uqūd al mu allaqah*), majority has viewpoint that contract which involves transfer of ownership must be prompt. While *Ibn Qayyim* argued on other hand that *Imam* validated suspended contract including a suspended contract of marriage indeed all

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[126] *Ibn. Qayyim, al- turuq al-Hukmiyyah, edit.M.J. Ghāzi (Damam: Maktaba 'ahal al-Madni*, n.d.).
[127] *Al-Qarafī, Shihab ad-Din, Kitab al-Furuq (Maktaba Dārr al-Īhyā al-Kutub al-'Adabiyyah*, 1346H), Vol. IV, p. 40.
[128] *Ibn. Tyimiyyah, Majmū 'ah Fatāwā (Baīrut: Mu'ssaasah al-Risālah*,1398H), vol .III , p.239.

kind of contract as such.[129]At the end another example of the *Hanblī* view is about the freedom of contract where majority of Muslim jurists differed over the legality of sale in which at the time of contract parties did not specify the price and they used to make reference to the prevailing market price. For this, Ibn *Qayyim* mentioned that *Imām* has validated it, in his viewpoint this kind of transaction has become customary among people and there is nothing in text to prescribe it. [130]

The above categorical analysis gives us a brief idea that the trend towards personal allegiance started roughly and many factors played vigorous role for the development of this sort of allegiance. Apart from this allegiance and sectarianism, however, in different regions inhabitants of these areas were generally engaged in independent thinking on law, people used to adopt reasoning and endowed with the necessary methodology to move up to the realities of social change. But one has to admit that unfortunately the long period of stagnation and colonialist dominion of Muslims by European supremacies created gap wide enough to put the relevance of *fiqh* to concern of modern society seriously in doubt. For these odd reasons, one could hardly expect *fiqh* and *Ijtihād* to remain viable forces in our changing circumstances and in so called liberal developed societies, where majority of the viable social factors are influenced by western liberal lobbies.

Interestingly, based on the above, it may become ostensible that decline of application of *Shari'ah* or *fiqh* to a large extent, caused by lack of governmental participation in the development for adaptability of *fiqh* and its capacity for growth. And it is also notable and observed fact that none of the tradition or report witnessed which to manifest the idea that the *Shari'ah* cannot be revitalized. Though, it is evident from its methodology of construction and

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[129] *Ibn. Qayyim, I'lām al-Muwaqqī 'īn* (*Cāirro: Idārāh al-Dībā'ah Munīriyyah*, n.d.) vol. III, p. 338.
[130] Ibid., vol. IV, p.3.

interpretation from, the very early periods of Islamic history that it is not stagnant nor redundant and static in nature entirely but capable of adaptability to accept and adopt new circumstances.

To this, the course of events in recently past decades has shown once again that when government intended to bring legal reforms in area of personal laws, they were appreciably able to find the resources of *Shari'ah* responsive to the prevailing requirements of community. The Islamic revivalism of post World War-II especially in recent decades has certainly accentuated the role and value of *fiqh*, it has in statutory legislation. In the pursuance or perusal of this favorable pattern of development, the scope of revivals interest may widen further, particularly in the area of law of contract, a mixed pattern of co-existence between *Shari'ah* and existing statutory law of western origin, especially in the compass of pre-contractual obligations, which has been dominated by the provisions of Sales of Goods or common law requirements, but which may see improvements and positive growth of *Shari'ah* based legislations.

With that forgoing, as a device for renewal and reforms, *Ijtihād* always remained dominated by its dual concern of continuity and change; continuity with the given fundamental basics of *Shari'ah* while keeping pace, also with the realities of social change. Upcoming lines will provide a review of basics of *Ijtihād,* its definitive functions and proposes certain adjustment in relation to its modern application. As well as, also presents briefly various formulas proposed under the leading schools, and review the problematical issue of *Ijtihād* in current times while making suggestions for reform under the circumstances.

4. Continuity and Change (*al t͟hawābit wa al mutag̃hiyyrāt*) in Islamic Commercial Law

As it is mentioned earlier that companions of Prophet "ﷺ" took their lead directly from the *Qur'ān* and *Sunnāh* in tracing public interest (*Maslahā*). It is found in their conduct that none of exclusive pretentious methodology and procedure was followed by them. Their precedent and

verdict often witness consultation and consensus among them which was a proper guideline for the next generation of jurists and their followers in coming age band, which consequently paved road map in turn, for the development of *Ijmāh* (general consensus) as a strong source of Islamic Jurisprudence and law after *Qur'ān* and *Sunnāh*. Then, gradually got more developed by the second generation of Jurists '*Ulma'* known as '*Tabi'un'* (successor) as legacy of companion. Nonetheless of the fact that they were faced with more complex progressive developments in state of metropolitan changes. Notably, Islamic world was manifested in the territorial expansion of the *'Umayyad* rule, by the influence of foreign traditions, proliferation an emergence of different schools on sectarianism and also the growth of sustainable competence of self-styled scholars. In time, these all circumstances and situations were in fact considered as a threat to the unity of Islamic community and integrity of Islamic legal system; hence the need for a methodology to manage *Ijtihad* was sought in different ways.[131]

To this point, confusion regarding the methods become quite ostensible that, every school of law has its own views; they differed extensively on the methods, scope which they acknowledged for *Ijtihād* and *ra'y* (personal opinion) therein.[132] For this, in the opinion of *Ahl al Ra'y*, most importantly, *Hanfi'ī,* show their tendency towards enquiry into the rational and ultimate objective of the text through the mode or logic of analogical reasoning (*Qiās*). With that, as a method *Qiās* functioned through the utility of "Effective Cause." The debate between *Ahl al Ra'y* and *Aha al Hadīth* was concerned mainly with the identification of that effective cause due to its inherent indefiniteness and indeterminacy.[133] As fundamental modes of *Ijtihād,* logical reasoning or *Qiās* ensured the acquiescence of Juristic opinion, with the textual ruling of

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[131]*Ibn. Qayyim, I'lām al-Muwaqqī 'īn* (Cāirro: Idārāh al-Dībā'ah Munīriyyah, n.d) vol. III p. 49.
[132]Iqbal, 'reconstruction of religious thought' Sh M Ashraf, reprint (1982): p. 174.
[133]*Al-turābi, Tajdīd Usūl al- Fiqr al Islami*, 2nd ed (*Jeddah: Dārr al-Su'udiyyah li al Nashar wa al-* tawzī' 1987), p.27-8.

the *Qur'ān* and *Sunnah*, while it sought to extend similar cases. No doubt, in this way it was considered the best device in terms of Shari'ah resources to construe the law according to the spirit of the manuscript or text. But *Qiās* was not altogether devoid of object, especially in situations, when the analogical extension of presented case to a similar but not to an identical-situation, that could lead to unwanted conclusions. In terms of remedial measure, to cure this, some jurists felt the need for some different formula to overcome the rigidities of *Qiās*. To this, for example the partisans of *Hanafi* school developed the doctrine of juristic preference (*Istehhsān*), which equipped them with ease, and make them able to search for an equitable solution in the stances where strict analogy thwarted the ideals of fairness and justice. *Al-Shāfi'ī* however, further articulates his opinion totally in against to the ideal of juristic preference and consider it as an arbitrary exercise in questionable opinion. Similarly, consideration of public interest (*Istislāh*) is also recognized as a source of law because of its high utilitarian tendency by leading jurists.

However, almost every major school profound a method or principle to regulate *Ijtihād* and to ensure its compliance with the authority of divine revelation, whereas the orthodox opponent of the *Ahl al Ra'y* (rationalist) the *Zāharī* school of *Dawood al Zāharī* restricted the sources only to the *Quran*, *Sunnah* and *Ijma* (consensus). Along the same line, *Hanafi* school's leaning to untie or join so as to increase analogy (*Qiās*) juristic preference (*Istehhsān*) and custom ('*urf*), while *Mālik* says further about public interest (*Istislāh*) and also *Sadd al Dharāi*, blocking the means, to serve as an addition. *Sadd al Dharāi* denotes the end of the rulings of *Shari'ah* by stopping the effort to use the lawful means toward and unlawful end, in other words, it is likely similar to English phrase. "The matter is good which ends good". *Mālaki* school

applied it more widely than most.[134] To this, the *Shāfi'ī* school acknowledged the doctrine of *Isteshāb* or presumption of continuity, which observe continuity and predictability in law by suggesting that the facts, rules of law and reason, be presumed to remain valid until there is a proof to establish a change.[135] The constituent or basic of doctrine of *Isteshāb* is that (*Al yaqeen la yazūlu bi Al shakk*) that certainty may not be overruled by doubt.[136] Certainty can in other words only be overruled by certainty, not by doubt. In this context, a different supplementary maxim here is to be considered as norm that presumes the continued validity of the *status quo ante,* until we know there is a change. "The norm is that the *status quo* remains as it was before" *(Al-aslu baqaa'u ma kaana 'ala ma kaana)* unless it is proven to have changed.[137] This principle derives its basic strength from the logic that, Islam did not aim at a total cut off with the values and traditions of the previous faiths and laws, nor did it target to nullifying or relinquishing or substituting all the laws and customs prevailed in Arabian society. It allows a lot of these practiced social values, and sought only to nullify or abandon and re-establish those which were oppressive and unjust. It is evident from *Qur'anic* teachings that when it is talked about the implementation of justice and beneficence, generous (*adl Wa Ihsān*) it referred *inter-alia*, to the fundamental principles of justice and good conscience.

> "We sent our messengers with clear sigh and sent down with them the Book and the Balance (of right and wrong) in order to establish the justice among the people"[138]

Certainly, it is also obvious that many things we find in *Shari'ah*, which their regulation left upon the general principle of equity and fairness. Thus, substance of this doctrine declares

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[134] *Ahmad al Hajji al Kurdi, Ali Khalid, AL Madhāhib al Fiqhiyya al Arba'a Āīmmatha wa Atwāruhā usūl u Hā wa Āsaruha* (Kuwait: IDārrah al Iftāh 2015).

[135] *Muhammad b. Abī Bakr ʿAbd al-Qadir al-Rāzī, Mukhtār aṣ-Ṣiḥāḥ, edited by Muhammad Khatir, (Baīrut: Maktaba Lubnān,* 1995), p.2219.

[136] *Ibn Nujaim, Z Ibrahim. Al-Ashbah wa al Nazayir (Damuscuss.: Dārr al-Fikr,* 2005), p. 47.*:*
As-Sabūni, 'Abd al-Rahman, al, Al-Madkhal al-Fiqhi wa Tarikh at-Tashri' al-Islami (Cāirro: Maktaba Wahba, 1402/1982), p.389.

[138] *Al Qur'an* .57.25.

permissibility to be the basic norm of Islamic law and confirm its validity with the principles of natural justice and good consciences.[139]

In essence, each of these rational sources in their broad outline is framed systematically, in its respective capacity to exercise *Ijtihād* and suggest systematic way for finding answers to new issues, preserving the basic principles and objectives of *Shari'ah*, with a limitation that law must evolve and develop within the framework of certain methodology, not contradicting the basic objectives of *Shari'ah*. It is in fact the main function of these doctrines that, these all are designed in their respective capacity to relate the *Shari'ah* with social reality. To act as an instrument of adaptation, and to offer formulae for discovering solutions to issues as they arise and these solutions must be in conformity to the basic principles and philosophy of *Shari'ah*. All of these, in turn rely on rational proof, celebrated opinions of competent scholars of *Shari'ah* and practicability of social custom.[140]

The underlying note about the function of these doctrines also conveyed the idea that *Ijtihād* in modern times can meet the much-accelerated pace of change. Still *Ijtihād* in modern times tends to be unlike to what it was in earlier time when these doctrines were flourished. *Mujtahid* in medieval times lived in different social environment of preoccupied issues, like marriage, divorce, usury. The society was not liable to swift change and *Ijtihād* could be conducted with a certain level of predictability that is no longer the case. For this, now situations and complexities of circumstances demand multi-disciplinary approach for *Ijtihād*, to come near in character, time, amount etc. For instance, issues pertaining to new economic realities, modern products in banking, swift e-transactions, it seems hard for jurists now to address without being properly equipped with the knowledge of all aspects of the issues. Technical issues in medicine

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[139] *Al-Turābi, Tajdīd Usūl al- Fiqh al Islami*, 2nd ed (Jeddah: Dārr al-Suʿudiyyah li al Nashar wa al- tawzī'. 1987), p.27-8.

[140] *Mūsā Muhmmad, Al- Madkhal*, 2nd ed (Cāirro: Dārr al-fikar al-'Arbi,1961), p.82.

and science also generate different demand on the skills of *Mujtahid*. Within contemporary Islamic thought, Ijtihad in modern era has taken place in three different shapes.

- Through statutory legislation
- In the shape of Fatwa by scholars and Jurists and
- Through the verdict of Shari'ah Courts

As we discussed afore that we could broadly classify the sources knowledge in two categories, first the revealed and second the derived. To this, the revealed knowledge is considered as the main source for construction of Islamic principles. When we are talking about the second it signifies the knowledge that is derived from human intellect through *Ijtihād.* It is important to note that *Ijtihād* is used only in such situations when revealed knowledge gives no explicit verdict upon the issue. To this point, the scholars, jurists come up with resolutions based upon *Shari'ah*, to expand the body of Islamic law.

4.1.“Philosophy of Islamic Law of Contract”

With that added understanding of Islamic concept of *ijtihad*, it may be appropriate to proceed further, to one of the important determinations of financial development is adaptability of law to changing conditions, which underscores the formalism of Islamic law and the ability of its legal framework to evolve. With that, the term adaptability focuses on the 'Process of Law making' and refers to the ability of the law to evolve in response to the changing socioeconomic conditions. To be certain, the inclusive goal of Islamic law is to promote the common interest welfare and goodwill of human being. This goal in broader general terms implies among others to ensure growth of consciousness (*Tazkiyāh*) and enforcement of justice and equity, which in specific terms links to objectives of *Shari'ah* (*Muqāsid al-Shari'ah*) implying the protection of religion, life, intellect, posterity and prosperity.[141] Thus, the objective of Islamic commercial law

[141]Al-Ghazali, Al-Mustasfah (Cāirro:Dārr al-Fikr Press, n.d) vol. 1, p. 172, 163.

would be to ensure one or several of these goals. Suppose the objective of prohibition of *ribā* is to ensure Justice and equity in respect to the distribution of wealth.[142]

4.2 Underlying Principle

Broadly speaking, over the centuries *Shari'ah* has evolved to great sophisticated systematic shape of regulations covering a large number of what the contemporary world describes as law. Assuredly, Islamic legal system divides its directions and regulations concerning human conduct broadly into two categories, devotional matters termed as (*Ibadat*) and dealings or transactions termed as (*Mu'amalat*).[143] With that prospect in mind, here we have couple of interrelated distinctions regarding both the categories. For this, the *Shari'ah* principle in respect to the first of these two categories which is *Ibadat*, specifically, in the permissibility sphere, it is given that "Anything not validated by *Shari'a*h is Prohibited". It means, everything is permissible unless it is proved by valid evidence from the sources of Islamic law, basically it is accepted fact, all that is considered as *Ibadat* is specified early in *Shari'ah*, and any addition to it or even slight variation into its prescribe format, way and manners are not allowed.[144] On the other hand, the principle is quite opposite or contrary in matters of *Mu'amalat*, where thing is permissible unless it is not proved forbidden by divine guidance. This is known as principle of permissibility in *Ibadat* and principle of prohibition in *Mu'amalat.* It is important to mention

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[142]Siddiqi, M. Nejat Ullah Keynote Address at the Roundtable on Islamic Economics: Current State of Knowledge and Development of the Discipline, held at Jeddah, May 26-27, 2004, organized by Islamic Research and Training Institute, Islamic Development Bank, Jeddah and Arab Planning Institute, Kuwait.
[143]Hassan, Hussain Hamid, "The Jurisprudence of Financial Transactions: Fiqh 'Al Mūamlāt", Ausaf Ahmad and Kazim Raza Awan (Editors), Lectures on Islamic Economics, Jeddah: Islamic Research and Training Institute, Islamic Development Bank, 1992.

[144]Dallah al baraka Fatawa: *Shari'ah* Rulings on Economics, Jeddah: Dallah al baraka Group, Research and Development Dept, Fatwa No. 1 of the First al baraka Seminar (1994), pp.75-76.

here that prohibitions are explicitly specified by divine guidance and one has to be cautioned (careful) not to expand the list of prohibitions. Particularly *ribā;* undue gain, and *Gharar*; speculation and uncertainty are forbidden in commercial transactions. Thus, in *Shari'ah* commercial law makes all contracts permissible that are devoid of these defects. Consequently, based on the above, the adaptation in dealing *Mu'amalat'* can be applied through the process of *Ijtihād* on the basic principles or doctrines given in Islamic law for matters pertaining to *Mu'amalat*, and their interpretation accordingly for various circumstances to address the needs of the people establish the efficiency in *fiqh* of *Mu'amalat.* Since, all the principles and doctrines of *Shari'ah* aim to bring about fairness and stability in affairs of individuals as well as collective.

4.3 . Adaptability of Contemporary Islamic Law and Principles of Modern Legal System in Contemporary Transactions

With that prospect in mind, to analyze the adoptability of Islamic law of commercial transaction it is important to make a comparison of the traditional *fiqh* rulings pertaining to contracts, applicable in contractual relation to the contemporary one. So then, traditional Islamic conception of contracts and agreement, in relation to the contractual obligations, can be classified under three major categories: Gratuitous, accessory and exchange.[145] However, in the category of gratuitous contract right to own or possess, right to use along with right to dispose of certain property are transferred without consideration (payment or compensation). Gratuitous include loan (*ariyā* and *qard*) deposit (*wadia'h*) gift (*hibāh* without *iwaz*) and contract of guarantee related to security (*damān* or *kafālah*). In contrast, accessory contracts are those where in a contract one party assigns certain obligations to other party in shape of work, capital for

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[145]Habib Ahmed, "Islamic Law, Adaptability and Financial Development", Islamic Economic Studies Vol. 13, No. 2, February 2006.

performance. In these contracts we find (*wakala'h* agency), partnership (*shirkā*) contracts in the form of *mudarabāh* and *musharkāh,* assignment *hawalāh* and pledge or mortgage (*rahn*) etc. Whereas, exchange contracts are consisting of simple spot sale (*bay*). [146]

Ordinarily, in modern financial system financial activities can be conducted through markets or intermediaries. Thus, cater to the requirements of the modern structure, the challenge for Islamic legal system is to adapt to this new change by enabling financing through markets and intermediaries and to create or develop a new set of financial contracts, which actuate the stagnant situation, observing the basic Islamic phenomenon of Islamic trade. To this, it is understandable that these new contractual reforms would have to fulfill the needs of various sections of trade by carrying out a comparative approach, perusing the essence of the framework of "*Al Darar Yūzāl*" *Haram* must be eliminated or "*La darar wa la dirrār*". There should be neither harming nor reciprocating harm, especially the segment for pre-contractual liabilities must be focused. With that realization, based on the principle of "*darar*" Islamic law can evolve as long as the limits imposed by *Shari'ah* are not traversed.[147]

In due course, one should be cognizant of the fact that most of the Muslim countries are subject of western adopted legal system, which resulted in lack of real legal infrastructure that can provide assistance to the application of Islamic commercial law during current times. In time, however, even if people agree or gradient to practice Islamic contracts, the rules and courts may not be there to interpret or make able the enforcement of these agreements. As we come across with an example of using traditional concept for pre-disclosure of information, the use of principle of Caveat Emptor and its parallel like LCIG principles etc. To this point, it may be simply stated that under Islamic commercial law, a seller, in its sale transaction is bound to allow

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[146]*Al-Dharīr, S. M. Al-Ameen*, "*Al-Gharar in Contracts and its Effect on Contemporary Transactions*", Eminent Scholars Lecture Series No. 16, Jeddah: Islamic Research and Training Institute, Islamic Development Bank, 1997.
[147]Mujallah al-Ahkām -Adliyyah, Art. 20, (Lahore law publishing company, n.d).

the buyer to inspect or check the fitness of the subject matter of sale agreement not only before the conclusion of the agreement but also after its decision, regardless of whether the fault is discovered earlier to the conclusion of the agreement or before it was processed. That very doctrine is known as "*Doctrine of Khīyyār*". Thus, through the comparison of said contemporary principles with Islamic law can give an accurate depiction of the approach towards pre-contractual duties of disclosure in two legal systems; the Islamic law and common law to attempt as juxtapose these two systems, in their similarities and differences. To put it differently, the positive thing that emerges from the features of Islamic law to provide such a safeguard, not only to buyer but also *Khīyyār* can be for both for the seller and for the buyer, as long as the *Khīyyār* is essentially designed to fulfill the interest of business transaction. With that, these interests contain the preservation of benefits and desires of both the contractual parties in addition to provide protection from possible harm.[148] The most important feature of this frame work of *Khīyyārat* which makes its applicability in time, possible and productive is its diversity that the jurists have divided it into several categories, *Hanafi* divides it into seventeen types, *Shāfi* in sixteen types and *Hanbli*s division is of eighteen types.[149] However, it is important to acknowledge that the Islamic doctrine, which allows the buyer the right to investigate the fitness of the goods sold (and thus giving him the right of option, after the conclusion of the agreement) also allows such rights of inspection and option to be exercised by the buyer before the contract is concluded is much closer to face market realities and to meet product development requirements.

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[148]*Taqī üd din, A, Kifayāh Akhyār fi Hal Ghayah al- Ikhtisar*, (Baīrut: Dārr a l Fikar, 1994), vol 1, pp.103-111.
[149]Mohammed, O, Financial engineering with Islamic options, Islamic Economic studies, (1998),6 (1), p.77.

5. Conclusion

This chapter delved into the discourse on the development of Islamic law from its source to shaping into a legal system. It has been shown that ultimate objective of development of legal reasoning is to increase humane welfare, as is always is in the case of *Muqāsid* al *Shari'ah*, which is achievable through stable and sustainable growth in wealth. By and large, with a particular reference to the concept of adaptability in contemporary Islamic law and the principle of modern legal system in contemporary transactions, that was examined in detail. On balance, having discussed the origin of *Shari'ah* and other allied terms like *fiqh*, *Ilm* and kalam etc., the discussion included the emergence of *Madhāhib Fiqhiyya* too. Certainly, the basis of their interpretation was core principles and regulations laid down by "The Holy Prophet" "ﷺ". This discussion also proved, that ever since early days, Islamic law remained flexible, allowing on wide range for adoptability, differences of opinion and acceptance for social changes. In brief, the law was neither inflexible nor as rigidly applied in early stages of Islam as deliberated in earlier discussion. Throughout the discussion, particular emphasis has been given to the conceptualization of (al-t̲h̲awābit wa al mutag̃hiyyrāt) continuity and change in *Shari'ah* and methodology of *Ijtihād*.

Suffice it to note at this stage that on the basis of definition and meaning, Islamic law is susceptible to adaptability from a conceptual and practical viewpoint, due to the changing nature of things along with the methodology of *ijtihad*. It was also endeavored to deduce that legal principles like consideration of *Maslahā* and *Istehhsān* (juristic preference), the flexibility of Islamic law in practice and utility of *Ijtihād* (legal reasoning) sufficiently demonstrate that *Shari'ah* is adaptable to social changes. Specifically, as a device for renewal and reforms, *Ijtihād* always remained dominated by its dual concern of continuity and change; continuity with the

given fundamental basics of *Shari'ah* while keeping pace, also with the realities of social change. Interestingly, this discussion had shown the flexibility of the Islamic law in the face of real commercial challenges that confronted the Muslim population across the globe. Apart from the issue of permissibility, the conceptualization of continuity and change it is recognized from the foregoing discussion that there are some aspects in the face of these commercial challenges that merit reform and innovation, these will be alluded to in the coming chapters and will hopefully make their way to the literature on the subject matter in the future. With this overview into the conceptualization, it is also demonstrated that theoretical framework, which is also outlined in research methodology as "*Al Darar Yūzāl*" (harm must be eliminated) or "*La darar wa la dirrār*" ("There is neither inflicting nor returning of harm"); in Islamic jurisprudence is an effective mean to lessen the chance of uncertainty and unfairness in trade.

Chapter No. 3

The Theory of Contract in Islamic Commercial Law

Chapter No. 3: The Theory of Contract in Islamic Commercial Law

1. Introduction

With that added understanding of the discourse on the development of Islamic law from its source to shaping into a legal system, it may be now appropriate to proceed to the theory of contract in Islamic commercial law. To this point, this chapter continuous with the discourse on the topic of description of the contract in *Shari'ah* with a focus on the freedom of contract in *Shari'ah.* Specifically, rules for exclusion of seller's liability in case of defects with their relationship to formation of contract under Islamic law. To this the views of different school of thought will be examined in a manner that moves the research more prominently to the discussion of pre-contractual liabilities (*Khīyyārat*) that will be the focus of upcoming chapters.

In the context of Islamic thought, Commercial law is a legal term which refers to as *Fiqhal- Mu'amalat*, constitutes a potential segment of legal field dealing with contractual affairs and subsequent legal effects, linked with the issues of contract: be it a valid or not valid or voidable contract appropriately. Contract in Islamic legal system is a complex discipline in both sense as its practical function and in its jurisprudential foundation. Above all, it also serves a variety of needs, issues and dealings to meet the requirements of society. This is because, problems and issues pertaining to commercial matter unlike devotional matters '*Ibadāt'* are ever-lasting and tied up with change due to changing circumstances and situations pertaining to object and subject of transactions.[150] Along the same lines, in regards to the idea that man is social by nature and the social life is necessary to him, the first article of the civil code of Ottoman Empire known as *Mujallah al-Ahkām al-Adliyyah* states:

[150]Alwi Hassan, A. Sale and Contracts in Early Islamic Law (Kuala Lumpur: The Other Press, 2007).

> "In view of the fact that man is social by nature, he cannot live in solitude like other animals, but is need of co-operation with his fellow men in order to promote an urban society. Every person, however, seeks the things which suits him and vexed by any competition. As a result, it has been necessary to establish laws to maintain order and justice."[151]

As mentioned earlier, the contract is a complex legal discipline and it is perhaps the most affording branch of law in practice. The mechanism of its formation relies upon the fundamental conception of contract under Islamic legal system, its interrelation with allied modes and forms of undertaking by which an obligation may be generated. Along the side, the limits and parameters pertaining to the freedom of the parties to which matters could be extended and the procedures of contracts have its own significance. So, it is perhaps necessary for understanding this mechanism and to untie the complexity, one could proceed with the depiction and conceptualization of the contract in *Shari'ah*.

1.1.Perception of the Contract in *Shari'ah*

Generally speaking, the word contract is decoded as *àqd* which literally means "the tying together of two or more things by rope"[152]. However, study reveals that contract in Islamic legal literature is used in two senses. The first in a general sense, where the contract is involved with actual phenomenon of every act undertaken in earnestness with stiff determination regardless of whether or not it arose or came forth from a unilateral intention such as trust etc. Decisively, the term is used not only to refer to covenants but also to refer to oaths and other kinds of promise like Nikah, Pledge or personal commitment.[153] Moreover, the word is also quoted in *Qurʾān* to refer the direction of personal obligations.[154]

The second in a particular sense, it is used for consequence and outcome of mutual agreement such as sale, hire, and agency. It is relevant to note that contemporary scholars are inclined to

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[151]*Mujallah al-Ahkām -Adliyyah*, Art. 1(Lahore Law Publishing Company, n.d).
[152] *Aljassāss Abu Baker, Ahkām al-Qur'an (Baīrut: Dārr al-Kutub al-Ilmiyya*, 1993).
[153] *Alā Eddin Kharofa,* Transactions in Islamic Law,2nd edit (Kuala Lumpur: A.S. Noordeen Press 2000) 1 -7.
[154]J Hussein, Islam: Its Law and Society, 2nd edit (Australia: Federation Press, 2004),178.

apply the contract to bilateral contracts as is the case in common law.[155] Number of *Qur'anic* verses supporting the opinion, that fulfillment of contract in all aspects of life contains faith and obligation. It is a moral as well as a religious obligation. These verses regulate the principles of contract through different terms namely contract, covenant and promise. For example:

> "O ye who believe fulfill the contractual obligation" [156]
> "And fulfill you covenant with me and as I fulfill my covenant with you"[157]
> "And they who keep their promises whenever they promise"[158]

Interestingly, overwhelming majority of specialists within the context of Islamic law is in attempt to define contract have turned their attention to explain the contract of sale, which they observed as model for all sort of contracts. The incipient definitions from major schools of Islamic Jurisprudence, each revolves around the idea of acquisitive exchange between parties. A sale contract within *Hanafi* schoo*l* for instance, the author of *Badāī al-sanāī* concluded that "The exchange of certain coveted items for another coveted item".[159] Such as exchange by words or by deed" and *Ibn Qudāma*h famous *Hanbali* jurist therefore, attempts to conclude by saying that "sale contract is the exchange of property against another property conferring and procuring possession".[160] Accordingly, as it is mentioned above that for these early scholars and their followers a contract is perceived as a mechanism for exchanging possession physically as property. Therefore, by this conception one party relinquishes the possession of an article to another in transfer for the other party who relinquish the possession from him. Thus, conferring of immediate possession with an instantaneous change in respect to counter values intended to be exchanged are its main effects.

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[155]Muhammad Mansuri, Islamic law of Contracts and Business, 4th edit (Islamabad: *Shari'ah* Academy 2008).
[156]*Qur̉ ān*, 5:1.
[157]*Qur̉ ān,* 2:40.
[158]*Qur̉ ān*, 2:177.
[159]Alā Eddin Kharofa, Transactions in Islamic Law,2nd edit (Kuala Lumpur: A.S. Noordeen Press, 2000).
[160]*Al-Kāsānī, Badāī al Sanāī Fi Tārif al Sharī* (Cāirro:Dārr al-Fikr *Press* ,1910), vol V, p.133.

Along the same lines, in regards to the modern Islamic literature on contract law, number of other definitions taken from classical Islamic Jurisprudence and modern law, for this *Mujallah* defines that "contract or *àqd* take place when two parties undertake obligation in respect of any matter"[161]. In the same way a contemporary scholar Dr. Tahir Mansuri quoted a definition through *Alsanhūry*, where the phrase contract is noted as being a "Connection of an offer emanating from one party with the acceptance of the other party in a manner which marks its effect and the subject matter of the contract."[162] Remarkably, further analysis of the above definition reveals that contract involves certain facts; the parties, internal willingness, the issuance of an outward act in shape of offer and '*Ijab'* Acceptance '*Qabūl'* and most importantly there must be a legal bond between the two declarations in respect of subject matter which is in fact regarded as contractual obligation.

With that realization, it is affirmed that contract therefore implies a legal relationship in consequence of the conjunction of two declarations which follow legal effects regarding subject matter. The above meaning and analysis make the sense that contract includes two parties and it is usually used for two party transaction with the mechanism of offer and acceptance to serve the interests and benefits of both parties, which arise from the exchange of subject matter, and it seems quite equitable that each party must show fairness in revealing the information about subject matter.

1.2. Progression of Islamic Law of Contract

Historical hermeneutics, for its part, before the advent of Islam in *Hijāz* people used to regulate the commercial and agricultural contractual affairs through customary law, enforced by

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[161]*Mujallah al-Ahkām -Adliyyah*, Art.103.
[162]Mansuri, Islamic Law of Contracts and Business ,4th edit (Islamabad: Shari'ah Academy, (2008), p.28.

businessmen amongst themselves including legal procedure dealing loan transactions with interest-based agreements. Whereas, some legal rules were issued in *Mecca* by Grand Council (*Dār al Nadwa*) although its authoritative character, practically was purely moral.[163]To be certain, according to academic literature it has been argued that Islamic law of contract is characterized, conceptually by general principles of law, as opposed to being characterized by general theories of contract unlike other legal systems.

Broadly speaking, principles commonly start with *Qur'an*ic verses, there were *Qur'an*ic injunctions, guiding Muslims to make their conduct in trustworthy ways. Coupled with number of Prophet "ﷺ" traditions those supplement the *Qur'anic* ground work, which already contain the fundamentals of different nominate contracts as well as certain contractual maxims with generality or sometimes detailed statements, enclosing the specific goals and objectives of *Shari'ah* law. To this point, certain of these maxims are derived directly from text and some of them are originated from the writings of leading Jurists that have subsequently been refined by different Jurists in later times.[164]

In due course, these eminent jurists among different Islamic schools of law later developed the principles of contract law. Interestingly, they did not discuss the rules of contract as separate body of law and the majority of Jurists have focused on the contract of sale, while discussing the principles of contract, which covers inter alia:

- The discussion about freedom of contract. (obligations by nature of contract and obligation obligatory by terms of contract)
- The discussion about the theory of offer and acceptance. (formation)

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[163]Abdullah Hassan, Sales and Contracts in Early Islamic Commercial Law (Malaysia: The Academic Art and Printing Service 2007), p.7.

[164]*Mohammad Kamāli, Shari'ah Law* an Introduction (Oxford One world Publication, 2008), p. 144.

- The discussion about the illegality of the contract. (prohibitions)

With that, this discussion proceeds to define a framework in which the transaction should take place with absolute fitness, so that fairness and justice are guaranteed for all concerned. Significantly it must be based on mutual consent of the participants. In order to ensure the existence of fairness and justice and to devoid the misrepresentation, the Muslim scholars observed that there are number of vitiating factors that may have effect on contractual relationship and its validity, such as *adlisIkrah Ghubn,* misrepresentation etc.

This research work however seeks only to focus on the concept of pre-contractual obligations, such as pre-contractual disclosure of information. In doing so, in this discussion, study will look into the main aim of contract in Islamic law which is a performance of contractual obligations. The parties should complete the performance of all their obligations according to agreed contractual terms. Islamic law is very firm about the performance of contract and decisively the performance must be precise and exact: that is contiguous; that there should not be any loop. Needless to say, the specific theory of contractual relationship derived directly from the tradition of Prophet "ﷺ" which is *"La darar wla dirrār" and Aldarar u Yūzāl"* it is in fact is the essence of Islamic law of contract. Accordingly, the contractual parties must perform the terms and condition depending upon the express and implied intentions of participants, judged from the nature of the contract observing the circumstances and custom. In this regard we may perhaps discuss the following concept which covers, *inter alia*:

2. Freedom of Contract in *Shari'ah*

According to Islamic law of contract in consequence of formation of any valid contract two types of obligations arise. First of these two types include certain basic obligations

understood from the very nature of that specific contract. To be sure, that could be equated to the term implied by *Muqtadā al-àqd,* or the nature and essence of the contract.[165] These terms may not require to be expressed in the contract by any of the parties to that very contract. With that understanding, perusal of Islamic literature on law of contract in case of sale contract finds certain examples, such as delivery of goods be free from defects, and consideration as price on delivery-keeping in mind, the practical example and other detail in this regard and particular purpose will be explained later under discussion of *Khīyyār al Aib* - Some jurists or researchers on Islamic law viewed from another angle, such terms are also called "*Āthār al-àqd*" or the effect arises from the contract.[166] The principle here applied is "*al-àqd asbab Jaliyyāh Shari'ah Le Ahkām e ha, wāātharīha wa muqtadayātīha*" which declares that "Contracts are the casual legal justifications for the operation of the set of rules, legal effects and implications preset by *Shari'ah*." Parties are free to enter into any contract, but it is *Shari'ah* to determine its "*Muqtadā*" as its legal effects, therefore the parties need not to mention for the same as stipulation of express terms.[167]*Muqtadā al-àqd* is creation of law linked with the nature of particular contract opt by parties and practically making of that contract has no concern in its determination. Whereas, the second type of obligations is; which must be stated expressly in the contract by the party relying upon it. In other words, these express terms are the stipulations for certain descriptions or particular objective which fall under the ambit of *Khīyyār al Wasaf.*

To this point, having discussed the above distinction, the next step in this discussion is to deal with the question of freedom of contract in the sense of the party's freedom to ascertain contractual terms, regulating the implications of the contract in terms of conditions implied by

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[165]*Imām al-Ġazāli, Fatĥ al-Àzīz or Sharĥ al-Wajīz* vol.8, pp.204-205.
[166]*Abu Zahra, al-Milkīyah wa Nażarīat al-Àqd*(*Cāirro: Dārr al-Fikr* Press, 1977) p.272.
[167]*Samarqandī, Tuĥfat al-Fuqahā'*(*Baīrut,: Dārr al Kutub al Ilmiyya*n.d.)vol.2, p.81**:** Al-*Kāsānī, Badāī' al-Sanāī' fi-Tartīb al-Shara'i'*(Cāirro: *Sharikh Almatbuat al Ilmiyya*, 1910),vol.2, p.176.

Shari'ah. However, in Islamic law there is controversy over this issue, which may be discussed into two main streams. The first group of jurists maintain the concept of freedom of contract as general rule while another school of Islamic law takes the opposite view, they maintain that it is the exception.[168] The following lines present a brief account of each view both the general rule and exception.

2.1. Freedom of Contract; As a General Rule

In a bid to understand this controversial phenomenon, of both the said steams, the first view is represented by the *Hanbali* School; general argument has been presented by the famous scholars the late Imam *ibn Taymiya* and *Ibn al Qayyim*. Along the same line, we find that the *Malaki* School also proceeds on similar arguments.[169] They argued that contracting parties are free to conclude contract by making any stipulation with their mutual consent, and the contractual terms thus made are considered legally binding, except in such cases where these stipulations stand contrary to the express principles of *Shari'ah* or its objectives. For this, they wrinkle this general theory about the freedom of contract relying on the text of *Qurʾ ān* and from the traditions of Prophet "ﷺ" along with applying analogical reasoning.[170] As it is stated in *Qurʾ ān*:

> "O ye who believe fulfill your undertakings"
> "And keep the covenants of the covenant it will be asked"[171]

And some of the traditions also support this view as it is stated:

> "An importer has four characteristics, one of which is that does not honor his undertaking".

And it is also stated:

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[168] Naser, K. Limits of Freedom of Contract on the Basis of Consumer protection' Journal of Law & Politics l Science, Tehran University, (2009). 38 (3) 328-333.

[169]*Ahmad al Hajji al Kurdi, Ali Khalid, AL Madhāhib al Fiqhiyya al Arba'a Āīmmatha wa Atwāruhā usūl u Hā wa Āsaruha* (Kuwait: Idārāh al Iftāh 2015).

[170]Ibn Hazām, al-Ihkām fi Usūl al-Ahkām (Cāirro, Sharikh Al mtbuat al Ilmiyya 1910), vol.5, p.593.

[171]*Qurʾ ān*,5:1,17:34.

"Muslims are bound by their undertakings"[172]

Ironically, the basis for aforementioned contention is built on the text of these injunctions that command to fulfill undertaking is unconditional and absolutely unqualified in its application, which infers the meaning that there is no prohibition by *Shari'ah*. The only necessary and obligatory condition for the validity of contracts and stipulations is the presence of mutual consent of the parties to a contract[173]. Thus accordingly, the general principle for contracts in context of stipulation is validity and permissibility, unless it contravenes the explicitly given text from *Qurʾān* and *Sunnah*. They, however, further argue that to enter into a contract and to put in the proper form of any stipulation is an integral part of human ordinary activities and the validity of these activities is the core presumption, as in this regard it is clear in *Qur'anic* verse;

"He Hath Explained to you that which is forbidden unto you."[174]

With that understanding, it is also argued by the saying of Prophet "ﷺ" that:

"Muslims are bound by their stipulations except for a stipulation which makes the lawful unlawful"[175]

Therefore, jurist of this stream do not limit the liberty of general principles and maintain their opinion that *Muqtadaal àqd* not to be a rigid bond or ligament for limiting the party's freedom to put forward any stipulation in pursuance of their mutual consent. Hence, *Shari'ah* has delegated the power to regulate the legal consequences of the contracts to the parties with their mutual consent, but unless it will not infringe the basic tenants of *Shari'ah*. For this, these jurists do not consider contractual stipulation invalid, merely on the ground that they are against *Muqtadā al Àqd*.

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[172] *Sahih Bukihari,* no. 3178**:** *SahihMuslim*, no. 58.
[173] *Ibn Tamiy'ah, Majmūàt, Fatawa Ibn Tamīy'ah* (Saudi Arabia: King Fahd Printing Complex 2006), vol.3, p. 239**:** *Ibn Tamiy'ah, Nażarīat al-Àqd* (Saudi Arabia, King Fahd Printing Complex 2006), pp. 15-16.
Ibn Tamiy'ah, al-Qawa'id al-Nawrãnīyah (Saudi Arabia: King Fahd Printing Complex 2006), p.188.
[174] *Qurʾān*, 4:119.
[175] *Sahih Bukihari*, no. 25229.

However, it is observed that these stipulations must not put any encroachment on the established rights of any of the party to contract. To this, they invalidate any sort of stipulation which deprive any party to contract irrespective of being offeror or offeree of their rights established by *"Muqtadā al àqd."* To illustrate with a focus on this sort of undue deprivation, if one party put forward a stipulation in the contract which limits the buyer capacity from dealings with the goods after sale by any means, in their viewpoint, this stipulation is not allowed. *Hanbali* school therefore, attempts dissociate this stipulation from contract arguing with the tradition reported from Prophet "ﷺ" such as:

> "How can man stipulate conditions which are not in the Book of Allah."[176]

Nevertheless, this viewpoint, in turn can be estimated to have manifested to itself in further slighter difference. Analogically speaking such a stipulation is considered irregular *Fāsid,* that it nullifies the entire transactions according to one of the opinions of that group. Though, according to another opinion reported from *Hanbali* school, only the condition is null and void without affecting the contract. In a similar vein, *Malaki* jurist also nullifies it by way of exception, alike as unjust condition, if attached to the contract will be invalidated according to them without spoiling the remainder of the contract.[177]

2.2. The Freedom of Contract; An Exception

As oppose to *First* stream's jurists 'notion of Freedom of Contract' *Zāhiri* and *Hanafi* school offers particularly a different conceptualization. The second group, therefore, attempt to maintain the freedom of contract as an exception. They however, further differed into two different opinions. The first of this group is the *Zāhiri* school, the founder of that school was *Ibn Hazam al-Zāhiri*, whose views have strictly been reinforced by his renowned disciple *Daud al-*

176*Abu Zahr*ā*, al-Milkīyah wa Nażarīat al-Àqd* (Cāirro: *Dārr al-Fikr* Press, 1977), p. 283.
177Ibid., p. 280.

Zāhiri.[178] They however, articulate their opinion with reliance upon *Hadīth* "Every stipulation which is not in the book of Allah is void".[179] To this, they further contended that any undertaking or stipulation put forward by the parties to contract notwithstanding the consent of the parties is ensured is considered not valid unless and until validated by the express provisions namely, *Qur'ān*, *Sunnah* or otherwise approved by valid consensus done over by companion of Prophet "ﷺ" . They also strengthen their views with the evidence of another Prophetic *Sunnah* which says:

> **"**How can man stipulate conditions which are not in the book of Allah, all conditions that are not in the Book of Allah are invalid, be they a hundred conditions. The judgment of Allah is truer and his conditions are more binding. [180].

With that realization on the understanding of this tradition, they split up the meaning of the Hadīth into two parts and derived twofold set-up from this Hadīth. They gave explanation in unique terms that person either undertakes to do what Allah has ordered or commanded to be done or otherwise undertakes to commit something which has not been so ordained by law giver to be fulfilled. In the latter case, either he may be promising to do lawful what he has been declared contrary, or undertaking to adopt unlawful, what has been maintained lawful or valid.

To this point, in both mentioned situations they viewed such undertaking is not valid because it will tantamount to a transgression of Allah's limits.[181] Hence, *Zāhiri* approach stands for just to validate few expressly sanctions as type of stipulations. On the other hand the other group of the jurists, *Hanafi* and *Shāfi'ī* maintain bit wider approach towards the tradition of Prophet "ﷺ" relied upon by the *Zāhiri* school.[182] To refer back to the core contention, they interpret the phrase

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[178] Goldziher, Wolfgang Behn, The Zāhiri's: Their Doctrine and Their History - A Contribution to the History of Islamic Theology (Leiden E.J. Brill, 1971).
[179] Sahih Bukihari, no. 2579.
[180] Sahih Bukihari, no.746.
[181] *Al- Mujallah,* Art, 412-413.
[182] *Ahmad al Hajji al Kurdi, Ali Khalid, AL Madhāhib al Fiqhiyya al Arba'a Āīmmatha wa Atwāruhā usūl u Hā wa Āsaruha* (Kuwait: IDārrah al Iftāh 2015).

in the 'Book of Allah' differently, as meaning comprise in addition to stipulations expressly provided by the *Qur'an*, *Sunna*h and *Ijmāh*, they widen the domain of the phrase and added in its application the stipulations validated by *Qiya*s or analogical reasoning.

With that prospect in mind, it could be argued that they based their position on the basis of Prophetic statement, where Prophet "ﷺ" was reported to have ruled the stipulation made to master in contract of emancipation. "Allegiance of the slavevest in the emancipator"[183] In other words the point of distinction here between *Zāhiri* and others is based upon the space and scope of freedom of contract by inclusion of *Qiyas,* hence, *Zāhiri* holds most stringent and restrictive position in this regard. To this, one may conclude that in above case the jurist other than *Zāhiri* interpreted the invalidation of the stipulation in said contract, based on the reason that it contradicted the prescribed outcome or objective of contract and in other contracts be like that on the basis of analogical reasoning. They further argued that *Muqtadā al Àqd* is prescribed in *Shari'ah* to maintain balance between rights and obligations for the sake of ultimate objective of *Shari'ah,* which is called justice and fairness among the contracting parties.[184] Along the same lines, in the absence of special provisions the *Shāfi'ī* maintain their viewpoint that any stipulation which is neither consistent with *Muqtadā' al àqd* nor consolidating prescribed outcome is not valid, and further invalidate the entire transaction if it is beneficial to make only and not to other party, but if it contain no benefit upon none of the parties than will be invalidated without the remainder of the contract.

Similarly, according to *Hanafi* Jurists in the absence of any explicit provision of law that any stipulation which is neither in accordance with *Muqtadā al àqd*, nor consolidating it is either

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[183]*Abu Zahrā*, p. 283.
[184]*Hashim Faris Abdūn, "Al Shart wa Asruhū fi 'Àqd al Bai", Aāfaq al Shari'ah Kuwait,* vol 4 (2015).

irregular if it confers additional benefit on the party creating it, or void if it does not confer benefit on any of the contracting parties. While an irregular stipulation will have effect on the entire deal but a void stipulation is merely unenforceable not vitiating the entire deal. However, there is distinction found in both opinions between *Hanafi* and *Shāfi'ī* jurists. Hence, Hanafi prescribe custom very widely and in consequence they hold validation about stipulations, notwithstanding their contradiction to the *Muqtadā alàqd* if such are established by custom.[185] To put it differently, it could be established that despite their varied opinions over the broad concept of freedom of contract; irrespective of the fact that in principle it is the general rule or the exception, yet all schools of *Shari'ah* agree up to varying degrees for the stipulating in contradiction of *Muqtadā al àqd*is not valid.

2.3. Contract of Sales and Freedom of Contract

Altogether, jurists of Islamic law agreed on established fact, that it is an implied term in a contract of sales of goods that the party who is selling must make sure that the goods delivered are free from defects. Otherwise, it is fair right of the buyer that he can revoke the contract or reject the goods, irrespective of the fact whether it was stipulated in the contract or not on behalf of excuse of freedom from defects. This basic implied term is said in Islamic law as "*Shart al Salamah minn al-ūyub.*" In other words, it is sort of condition in contract for freedom of contract. Such condition is also prescribed as term implied by *Muqtadā al àqd*.[186] With that realization, breach of this condition gives the other party to operate right of *Khīyyār al Aib* or option to reject

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[185] Ibid., p. 276.

[186] *Ibn al Hamām ,Fatĥ al-Qadīr* (Baīrut: Dārr al Kutub al Ilmiyya ,n.d.), vol.5, p.182**:** *Badāī' al-Sanāī'*, vol.5, p. 274 **:***Bahuti, Mansūr Ibn Yunūs , Kashāf al-Qinā'*(Cāirro:Dārr al-Fikr Press 1982)vol. 2, pp.36-37.**:***Al Sharbinī', Mughnī al-Muhtāj* (Baīrut: Dārr al-Kutub al-Ilmiyya, 1994),vol. 2, p. 33.*Ahmed ad-Dārrdīr, al- Sharĥ al-Kabīr* (Peshawar: Maktaba Dārr al- Qura1998), vol. 3, p. 108.: *Ibn al-Hazām, al-Muhallah*, ,vol. 8, p. 416.

or return the defective subject. This right of rejection is also known as *Khīyyār al radd bil Aib*. This right has reliance on the tradition as reported from Prophet "ﷺ" that:

> "It is unlawful for a Muslim to sell his brother defective goods unless he makes this known to him."[187]

It is worth mentioning that the said statement reported from Prophet "ﷺ" does cover patent or obvious defects or any defect otherwise visible or in the knowledge of the vendee at sale spot, alike it does in English law but conversely this statement also applies to the concept of latent defect. Similarly, the categories of defects which give the vendee the option to reject the goods are generally propose broader concept. The concept essentially, proposes that where the happening of such thing effect the value or price of the goods in the sense that it decrease the value or price of subject in the custom of traders.[188] In other words, it is as like the condition of merchantability found in English law but not exactly the same as it was decided by *Lord Ellen* Borough J. where he stated;

> "Seller cannot insist without warranty that the goods should be of any special kind or specific quality. However, the presumed intention of the parties must be that the goods should be merchantable under the name mentioned in the contract between them. The buyer cannot be supposed to buy goods to throw them away."[189]

Along the same lines, the other features or conditions prescribed for fitness and contract's discipline like samples etc. in English law are classified within Islamic law under the terminology known as "*Khīyyār al wasf*" in Islamic law of contract. Although Islamic jurist treat such terms as express terms.[190] However, in America the warranty of fitness in relation to the description is treated as type of implied term where breach of such terms results the same

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[187] *Shawkānī, Naīl al-Awt̓ār, 1st*, edit (Saudi Arabia.: *Dārr Ibn Jowzī,*1427),vol. 5, p. 212.
[188] *Al Kāsānī Badāī' al-Sanāī'*, vol.5, p.117; *Ibn al-Hamām, Sharĥ Fatĥ al-Qadir,* vol. 5, p. 153. *Kashāf al-Qinā'*, vol. 3, p.215; Al- Sharĥ al-Kabīr, vol. 3, p. 108: Ad-Desouki ibn Arafa Ĥãshiyat al-Dusũqi (Baīrut: Dārr al Kutub al Ilmiyya, n.d.) vol.3, p.150. *Mughni al-Muhtaj*, vol.2, pp.52/53; *Ibn Ābidīn Hãshiyat Radd al-Mukhtār*, (Lahore: Suhail Academy ,1396) vol.4, p.78.
[189] Gardiner V. Gray S. Ct. Mass. 1821, p.721.
[190] *Noman bin Mubarak Jgheem, "Hukam al-Shrūt al Muqtarenah B al 'Aqud fi Al Fiqh al Islami" Mujallah al Mehkamah*, (1998), no 16.

remedies for vendee in case of defective goods as it would be there as Khīyyār *al Aib* in Islamic law. In fact, it is a more realistic approach since it is redundant to mention in law that goods should be corresponding with their descriptions in all respect. This is because the express terms may be understood by their letters without the law intervenes to fill the slits. To this, parties must detail the express terms to invoke competent court jurisdiction in this regard, otherwise they cannot seek their due legal effects in order to have right to reject the goods for breach of description or to make function the notion of *Khīyyār al-wasf* in contract of sale.[191]

Moreover, the notion of concept and approach, consequently lead that the defects must be known in the subject of sale at the time when sale is going to be conducted or at least any time before it is delivered to the vendee.[192] In case where such breach of implied term or '*Shart al Salamah mina al-ūyub'* occurs, then vendee can operate his right or remedy in two ways. Following this, *Hanafi*, *Malaki* and *Shāfi'ī* jurists say that he either asks for ratification or may opt the option of recession of contract. Whereas, the *Hanbali* jurist add third option as well, which is compensation along with ratification and recession. For this, the further detail of all these options and the operation of their feasibility and non-feasibility would be discussed thoroughly in upcoming discussion in next chapter. Even so, this remedy of compensation is known in Islamic literature as "*daman al àqd*", and in *Shari'ah* that compensation applies in respect to subject property of contract only. Whereas, the commercial loss of profit and personal injury damage caused by these injury or other property losses of the vendee do not fall under the scope of contractual liability in *Shari'ah.*[193]

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[191]*Samarqandī, Tuĥfat al-Fuqahā* (Baīrut: *Dārr Al-Kutub Al-Ilmiyya*, n.d.), vol. 2, p. 117.
[192]*M. Qadrī Pasha, Murshid al-Ḥayrān* (Egypt. : *Mataba al-Kubrā al- amiriyya*,1891) Arts.381, 513-514. : *Ibn Ĥazm al-Zāhiri, Mu'jam al- Fiqh*', vol. 1, p. 177 : Al-*Shirazī, al Muhazab* (Baīrut: Dārr al Shamī,1992), vol. 1, p.290., Al- Mughnī, vol.4, p.218 *Mujallah al-Ahkām al-Adliyyah*, Art.310.
[193]*Abu Zahrā,* op.cit.,447.

3. Rule for Seller's Liability in Case of Defects

With that foregoing, it may be apparent at this stage, the freedom of goods from defect being an implied term based upon *Muqtadā al-*à*qd* of that very contract, but along the same lines another issue arises that whether Islamic law recognize any exemption or disclaimer clause which put limitations for such terms implied by law, or invalidating such limitations. However, Islamic jurists have different point of view on that issue as we discussed earlier. To this point the disagreement regarding their adherence to *Muqtadā al-àqd* becomes quite ostensible. Hence, they are not found with the equal degree of tenacity. Their respective views on the issue concern are as under:

3.1. *M*ā*laki*'s Opinion

In this setting, jurist of Mālaki school upheld that an exemption clause which affects the liability for defective quality as exclusion is invalid. They consider such an exception is not according to the core principle. In terms of evaluation, however, their view is better than the position taken by *Zāhiri'*s regarding putting forward invalid stipulations on the remedies which will be explained later. Jurists of this school consider remainder of the contract intact. [194]

3.2. S*hāfi'ī*'s Opinion

To this point, *Shāfi'ī* offers a particularly rich conceptualization, it is reported that jurists of S*hāfi'ī* school have three views on this matter. First that *Shart al-Barāah* is valid save as it does not apply to defects occurred after contracting. And the second view, it is valid regarding latent defect in cases of sale of animals only and third view is totally in negativity of *Shart al-Barāah*, because an exemption clause would always refer to such defects that are not known at

[194]Ibn Ahmed ad-Dārrdīr Al-Sharĥ al-Kabīr, vol.3, pp.112-119.

the time of transaction.[195] The last view is reported to be in harmony with Imam S*hafi'ī'*s own opinion regarding *Muqtadā al-àqd* as it is supported by known S*hāfi'ī* jurists *Shirazi* that it is indeed in line with the principles led down by their jurists regarding waiving and transferring of right.[196]

3.3. *Hanblī*'s Opinion

Along the same lines, *Hanblī* jurists also have their different views on the matter. In one of their opinions they validate *Shart al-Barāah* only in one situation where it refers to particular defect known to both parties to contract, vender and vendee. In second opinion they upheld that it is invalid where the defect exempted is not known to seller. Then, in third version they validate it only in respect of such defect that is shown to buyer. Though, in the light of previous discussion about the exceptions it is held that *Hanblī* jurists do not apply strictly the theory of *Muqtadā al-Àqd* but they delegated the powers to both the parties to a contract and linked it with the concept of encroachment on buyer right established by contract,[197] thus, the first view of jurists is seem more consonant with their conceded exception.

3.4. Zāhiri Opinion

As a part of critical negotiation in the quest for greater understanding, before entering into details of the Hanafi position on the matter it is better to give brief view of *Zāhiri* jurists. As we have noted before that this school does not consider *Qiyas*, so by dint of this, it is inferred that they do not consider semantics of *Muqtadā al-àqd* too, in relation to the question of validity

[195] Noman bin Mubarak Jgheem, "Hukam al-Shrūt al Muqtarenah be al 'Aqud fi Al Fiqh al Islami" Mujallah al Mehkamah, (1998), no. 16.
[196] Al-Shirazī, al Muhazab, ibid, vol.1, p. 295: Badāī' al-Sanāī', ibid., p.172.
[197] Noman bin Mubarak Jgheem, "Hukam al-Shrūt al Muqtarenah be al 'Aqud fi Al Fiqh al Islami" Mujallah al Mehkamah, (1998), no. 16.

of stipulations in general.[198] Obviously in their viewpoint, as there is no text from *Qurʾ ān* and *Hadīth* of Prophet "ﷺ" or any Ijmā authority expressly considering the matter of excluding or limiting the implied term "*Shart al-Barāah*" and it does not come under their prescribed valid conditions, they simply consider it invalid to stipulate because it is not found in the Book of Allah.[199] So, they invalidate the entire contract if it contains such an invalid exemption clause.

3.5. *Hanafi* Opinion

On the other hand, *Hanafi* jurists upheld that an exemption clause which excludes liability for any defect including patent or latent either known or not known to the vender or vendee is a valid stipulation.[200] Interestingly, this is a contradictory position, if we take into account their general view about the concept of freedom of contract where they maintained it as exceptional situation and more specifically their point of view that "*Shart al-Salamah mina al-ūyub*" is an implied term by *Muqtadā al-àqd*.[201] However, this diversity in this case is only apparent since they justify stipulations established by custom as an exception to their stand about the matter of freedom of contract and the theory of *Muqtadā al-àqd*. For this, in their opinion, where any such type of conditions or stipulations are established by recognized custom, notwithstanding of the fact that it might be in contradiction with *Muqtadā al-àqd*, be valued as rightful stipulation, and in the same way they consider the issue of "*Shart al-Salamah mina al-ūyub.*"[202] Through this recognition of custom in said matter, in fact, they have maintained a very mid view about exception which consequently would swallow up *Hanafi* general principle about freedom of contract. However, it is worth mentioning, that apart from this position taken by

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[198] I. Goldziher, Wolfgang Behn, The Zahiris: Their Doctrine and Their History - A Contribution to the History of Islamic Theology (Leiden E.J. Brill, 1971).
[199] Abū Dawūd al Zāharī, Al-Muhalla, vol. 9, p.44.
[200] M. Qadrī Bāsha, Murshid al-Ḥayrān, Art.512.
[201] Noman bin Mubarak Jgheem, "Hukam al-Shrūt al Muqtarenah be al 'Aqud fi Al Fiqh al Islami" Mujallah al Mehkamah, (1998), no 16.
[202] Al *Kāsānī, Badāī' a-Sanāī'*, vol.5, p.172.

majority of *Hanafi* Jurists at least one prominent scholar of *Hanafi* school opposed this point of view, and maintained contradictory opinion, that exceptional clause is invalid where the excepted defect is not known at the time of conclusion of the contract.[203]

4. Conclusion

With that, it is endeavored to demonstrate the discourse on the topic of description of the contract in *Shari'ah*, with a focus on detailed investigation of concept of the freedom of contract in *Shari'ah.* For this the views of different school of thoughts being examined, It is also endeavored to demonstrate that despite their varied opinions over the broad concept of freedom of contract; irrespective of the fact that, in principle it is the general rule or the exception, yet all schools of *Shari'ah* agree up to varying degrees for the stipulating in contradiction of *Muqtadā al àqd* is not valid. It has been contended throughout the chapter that contract therefore implies a legal relationship in consequence of the conjunction of two declarations which follow legal effects regarding subject matter. Further, it is argued that the mechanism of its formation relies upon the basic conception of contract under Islamic legal system, its relevance with allied modes and forms of undertaking by which an obligation may be generated. It is also concluded that the contract therefore implies a legal relationship in consequence of the conjunction of two declarations which follow legal effects and requirements regarding subject matter along with that the issue of these allied requirements as well as the conceptualization of freedom of contract (obligations by nature of contract and obligation obligatory by terms of contract) with the view point of eminent jurists among different Islamic schools of law was examined in detail. Moreover, rules for seller's liability in case of defects with their relationship to formation of contract under Islamic commercial law is debated and diverse opinions of jurists were examined

[203]Al Kāsānī, *Badāī' al-Sanāī'*, vol. 5, p.276 : *Hãshiyat Ibn Ābidīn*, vol.4, p.105; *Al-Fatāwā al-Hindīyah,* vol. 3, p.94.

in detail that the basis for the aforementioned contention is built on their adherence to *Muqtadā al-àqd,* they are not found with the equal degree of tenacity. Wherefore, that moves the research more prominently to the detailed investigation and elaboration of the discourse of formation of contract under Islamic commercial law. In doing so, in next chapter study will look into the main aim of contract in Islamic law, which is a performance of contractual obligations and formation of contract.

Chapter No. 4

Formation of Contract under Islamic Commercial Law

Chapter No. 4: Formation of Contract under Islamic Commercial Law

1. Introduction

With an overview into the conceptualization of the theory of contract and having discussed about the freedom of contract made up of obligations by nature of contract and obligation obligatory by terms of contract. For now, the next step is to probe into performance of contractual obligations as the theory of offer and acceptance (formation), and vitiating factors which cause the illegality of the contract. To commence with, it is evident that in Islamic law it is necessary for a binding agreement to take place; certain conditions are to be satisfied. With that realization, a valid transaction can be formed if elements laid down in Islamic law are to be met in order to consider it lawful. The majority of Islamic jurists hold that those essential elements upon which a valid contract bases itself are threefold. The formation; *Ijab* and *Qabūl* (Sighah) subject matter of contract and lastly the parties to the contract. While in *Hanafi* school, it is prevailing opinion that contract bases only on one element, namely the formation. This however implies the existence of further essentials too. From practical point of view, it appears that there is no difference. In fact, practically both the opinion of *Hanafi* jurists and the majority infers the same consequence. Because the element recognized by *Hanafi* jurists implies indirectly to all those elements considered by majority.[204] Therefore, in broad sense it also appears that contracts considered to be lawful if there exist six necessary rudiments. Formation cannot be made without offeror and offeree and this offer and acceptance must be for a subject matter in against valid

[204] *Zuhailee Wahbā, Al fiqh Al Islami Wa adillatuhu (Damuscuss: Dārr Al Fikr* 1984), vol.4, 94.

consideration.[205] Accordingly, it shows that in fact contract bases itself on six elements namely (i) Offer (ii) Acceptance (iii) Offeror (iv) Offeree (v) Subject matter (vi) Consideration. Moreover, Islamic law of contract distinct itself from other applicable legal systems in the world. Hence, it is insisted that for formation offer and acceptance to be jointly connected in the same meeting place '*Majlis al-àqd'*.[206] To this, Islamic law recognize the session of contract '*Majlis al-àqd'* in the sense that there must be a single session without any gape in time or stare in place, the session occurs in any normal place where parties desire to conclude the formation of any agreement. It, therefore creates the essential unity of time and spot as requisite for dual declaration of intention and consent. With prospect in mind, based on the above prescription, one more provision of Islamic law interconnected here which is also distinct from other legal systems and that is the notion of *Khīyyār al-majlis* option to revoke the offer and acceptance provided both the parties are still jointly connected in the session.

2. *Majlis Al-Àqd* (Meeting Place)

Having discussed the basics of formation of contract, it is relatively important to probe into the matter of majlis al àqd as it is a basic presumption that without any obvious agreement being taken place between the parties to a contract, no contractual obligation has to be considered legal one. And such an agreement deemed to be formed when a firm offer is given by one party and unequivocally accepted by the other one. Though, the mere happening of offer and acceptance not necessarily render a contract absolutely legitimate for any transaction between the party to take legitimate effects in the said phenomenal, certain additional essential things have got to be

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[205]Dr. Siti Salwani Razali "Critical Examination on the Legal Issues in the Formation of Electronic Contract – Comparative Concept under Common Law and Islamic Law", Proceedings of 20th International Business Research Conference (April 2013), Dubai, UAE, ISBN: 978-1-922069-22-1.
[206]Mansoori, op.cit.,25.42.

fulfilled. To be certain, significance of theses supplementary elements is vital in the Islamic law, if one or more of those elements are not taken into consideration, the contract will not be validly formed.[207] This is one of the unique characteristics of Islamic law. Those additional essentials are put as follows; the offer and acceptance must be so obvious in such a way that indicates the absolute will of parties to the contract, their willingness towards commercial relations. There should be a complete state of compatibility between offer and acceptance, to avoid communication errors of each party involving the transaction. Ultimately, the connection of the offer and acceptance must be carried out at the parties 'meeting place of transaction.' Assuredly, this concept of meeting place presents the absolute state of fairness in terms of communication, as it is applied in Islamic law of contract.

2.1. The Meaning of Meeting Place

With that realization, to properly understand the discussion of this concept we may initiate our description or debate about this unique principle of the meeting place with definitions. In the first place, I would like to quote the definition given in the famous Othman Justice Rules (The *Mujallah*). For this, its article 181 classifies the party's meeting place as; "The meeting that is convened for contract making." Along the same lines, another definition which gives further elaboration and clarification with precise detail is as; "The time span during which the involving parties are together to engage with the forming of contract without being busy by something else not related to the negotiated bargaining by any of them,"[208] adopted by many modern scholars. Thus, theory of meeting place seems as lone unit of time, according to this definition. This unity means that offer and acceptance must be uttered at the same time,

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[207] Aron Zysow, The Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law, Cleveland State Law Review, 34 (1) (1985),86, 69-77.

[208]Al-Shafiy Jaber, *Majlis al-Àqd fi al-Fiqh' al-Islami wa al-Qanoon al-Wadhei* (Alexandria: Dārr*al- Jami'ah al-Jadeedah*, 2001) pp. 90-92: *Al-Ibrahim Muhammad, Hokum Ejra'a al-Uqūd be-Wasā'īl al-Etisalat al-Haditha* (Jordan: Dārr al-Dahiya 1986), p. 50.

while parties to the contract are present there for conclusion of contract, without any such diversion which deviate their attention away from it. In other words, the contract must be carried out in the exact place where participants originally initiated the negotiations of the subject contract.[209]

Up to this point, it could be considered that the main objective for maintaining the theory of meeting place in the Islamic commercial law is to determine the given time length for the offer to legally stand for the acceptance, not putting potential harm to offeror and not damaging the offeree interest, as he had given more time to contemplate the benefit of the proposal, by virtue of the theory of meeting place to save them from making rushed decision. [210]

3. Application of the Theory of Majlis in Face-To-Face Transaction

Admittedly, according to Islamic law of contract, for a contract to have legal effect, it is necessary for contractual parties to communicate the offer and acceptance at the same place where both parties gather to form their agreement. For this, it is not legally permitted that the offer is initiated in one place and the acceptance is made in a different place, in the case where parties to contract are enjoying presence of each other. In time, however, when parties to a contract meet each other in a place, e.g. the place of work, wherever one party offers his vehicle with a certain price but the other party has not approved his offer before separation took place. With that case, unless it is agreed for relaxation that the offer to be extended for longer span of time, the transaction cannot be considered with valid conclusion. To this, it may be simply stated that in this case the theory of meeting place has not been observed properly because acceptance was not issued at the same time during which parties intended to negotiate the commercial

[209] *Jabir Abdul Hadī Salim, Majlis al Àqd fil al Fiqh al Islami wa al Huqūq al-Wadheī* (Al Iskan Dārriyah: Dārr al Jadeedah le al Nashar,2001).

[210] Zaidan Abdul-Kareem, *Al Madkhal le derashat al-Shari'ah al-Islamiyah* (Baīrut: al-Resalat Ltd, 1982), pp. 290-291.

bargaining. However, it should be mentioned that the application of the theory of meeting place in Islamic law as a norm is conditional, on the absence of party's mutual understanding to extend the validity of the offer to certain timeframe in which one party gave option to another for acceptance. It is also important that such an offer cannot be invoked until time period lapse without acceptance being done. But then again in the absence of such provision of extension for certain time period the offeror has right to cancel his offer at any time before acceptance is being made. In addition, under the option of meeting place both offeror and offeree have the right to cancel the contract, even after that it was concluded.[211] This option helps the parties to thoughtfully re-contemplate and rethink of their interests and benefits in deal, with opportunity of extra time. That being said, this theory of meeting place took its authority in the law from a tradition attributed to the Prophet "ﷺ", according to that tradition he recognized the importance of meeting place, once he said regarding the conclusion of contract as:

> **"**And if they are separated after they have made the bargain and none of them annulled it, even then transaction is binding."[212]

This reported tradition from Prophet "ﷺ" is clear indication or recognizing the authenticity of the concept of meeting place. It is plainly conferred upon both the contractual parties that option of right of annulling the sale at any time is protected but before separation as either or both contractual parties physically left the place of transaction, as an effective measure to avoid the harms of opportunity cost. The determination of what constitute physical separation is left to the prevailing trading practices and customs and according to customary practices the contract is legally deemed to be irrevocable.

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[211]Dr. Aqīl Fāzil al Dehān, *"Al Tabiah al Qanoonīya le Majlis al Àqd al Electronī", Mujallah Kulīya al Huqūq, Jamia al Nahrain,* (2007), no. 10, kh 18.
[212]Sahih Muslim, no. 3658.

4. Meeting Place Where Parties are at Distance

In due course, it does become self-evident that advent of modern technologies and trends affected the common practices of contracts. As usual, it happened that contracts are being conducted while parties were at distance from each other. This can be termed in academic sense as -Contracting Between Absentees-.[213] Of course, in this type of contract contracting parties are not together at one place of bargaining, the offeror initiates his proposal in one place and offeree receives in another location.[214]As it was discussed earlier, the idea of unity of meeting place is an essential condition in a contract which is concluded between present parties. Conversely, an actual compliance of above said principle is not conceivable in case of contracting between absentees. Although an idea of constructive unity was established for such contracting situations. The principle of constructive unity of meeting place denotes that the acceptance to the offer has to be shown in the very place where the proposal came to the knowledge of offeree. The unity of meeting is the attitude of receiver, if he issued acceptance before he physically departed from the place where he got the actual knowledge of offer, so it is constructive sort of unity of meeting but if he showed reluctance, it gives meaning otherwise.[215] In this setting, it is appropriate to say that in case of contracting between absentees, the acceptance and unity of place must be linked with time stipulations, acceptance must be made within reasonable time, taking into consideration the nature, circumstances, surrounding and trading customs. In case, where acceptance is not made properly in the view of above said points, in a reasonable time, then it would be considered that offer is terminated and no question of valid conclusion remains. As these are various interpretations surrounding the exact implication of *Majlis* or session of

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[213] Al-Shafiy Jaber, *Majlis al-Àqd fi al-Fiqh' al-Islami wa al-Qanoon al-Wadheī*, p. 252.
[214] Ibid.
[215] *Al-Qarehdagy Ali, Mabda' al-Ridha fi al-Uqūd (Baīrut: Dārr al-Basha'ir al-Islamiyah*, 2002), p. 1093.

contract, the further details we will discuss in coming chapter under discussion of *Khīyyār al Majlis*.

5. Offer and Acceptance

To refer back to the core idea, pertaining to offer and acceptance, it is understood that classical Islamic law seems to insist on the notion of mutual assent of the parties. The mutual assent of the parties to contract is of prime importance for the validity of the contract. This notion of mutual assent of parties finds expression in the text of *Qurʾ ān* and in the number of traditions of Prophet "ﷺ". The verse of *Qurʾ ān* says:

> "O ye who believe squander not your wealth among yourselves in vanity, except it be a trade to mutual consent."[216]

As for as, the formation of contract is concerned, it is simple that for validity it is required in order to ensure whether or not two contracting parties really intend to enter into a contract. For this, it is important to consider the declared intention of the parties or its kernel goal rather than any concealed one. Thus, without such formation, when the intention and consent are not revealed or declared in obvious manner, the contract will not come into existence. Suffice it to note at this stage that the validity of the consent in contract should be given free from any impediment such as fraud, duress misrepresentation or mistake.[217] With that, it is important to acknowledge that the formation of contract is expression containing its essential elements offer, Ijab and acceptance *Qabūl*, both are normally made in the same session *majlis al-àqd* between parties to contract.

The concept essentially proposes that once an offer has been made by offeror, it must be accepted by offeree with the same notion and letters for being legally constituted binding

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[216] *Qurʾān,* 4:29.
[217] Razali Siti, Islamic Law of Contract, Singapore Cengage Learning Asia Pte Ltd (2010), 4.

agreement. Besides, it is important that it must actually be communicated to the other party to be taken as effective, in the sense that contracting parties should bear other's declaration which is respectfully submitted, devoid of legal relevance in respect to proper communication.[218] Again, this point of view is agreeable by jurists of all four major schools. With that foregoing, it is affirmed that acceptance of an offer must be communicated to other contractual party in such a way that communication of acceptance is to be jointly connected to the offer without any gape in time and having no ambiguity in terms to form an effective acceptance. Moreover, it is considered to be a complete acceptance at the moment once it comes to the knowledge of the other party. If the acceptance is not being communicated in proper way to offeror, it would not be an effective acceptance and no contract will be formed. This is the view of majority of jurists, they also argued that in case of inter absentees the '*Majlis*' meeting session will continue until the offeree received the offer.[219]As mentioned earlier, in accordance with the *Shari'ah* doctrine, the offer and acceptance must be given at same session within same time too. Hence, if one party made an offer at a session and another party provides the acceptance at different session, the offer is then considered not valid but void within the paradigm of Islamic law.

Furthermore, it is perhaps necessary to note that there we have a number of minor distinctions in opinions between four major schools of thought on this issue. Nevertheless, their approaches seem identical. Notably, the discussion about the details of meeting place as what we say "Session of Contract" is debated *supra*. However, this unique aspect of contract law in *Shari'ah* has been criticized by many scholars for not being given time to show reflection or the space of time they require to finalize the terms and conditions of their contract by forcing

[218] *Ahmad al Hajji al Kurdi, Ali Khalid, Al Madhāhib al Fiqhiyya al Arba'a Āhmūiyatuha wa Atwāruhā usūl u Hā wa Āsaruha* (Kuwait: Idārāh al Iftāh 2015).
[219]A Jalil and M K Rahman, Islamic Law of Contracts is Getting Momentum (2010), 1 International Journal of Business and Social Science 2, 184.

business of participants to enter into contract. Since, it is quite logical that sometimes it is necessarily to fix suitable price through bargaining and compromise. Thus in their arguments they viewed that, sometimes it causes some disorder to a smooth business transaction in terms of making wise business decision in timeframe constraint**.** Whereas, many other see it differently and they hold that in many aspects, this rule has the same effect as the rule against the imposition of duty to negotiate in good faith; until and unless contract is properly concluded either party should be at will to leave away from the proposed deal.[220] That is simply alike risk of doing business and there is nothing preventing businessmen from preparing their agreements and, therefore, if the main aspect of transaction such as price have not yet been fixed, it does not seem sensible to argue that the firm offer to a contract has been made therefore argument is overstated.

Although, the Islamic concept of offer and acceptance is quite similar in various key aspects to the contemporary prevailing English legal doctrine of offer and acceptance. It has been observed that in *Shari'ah* the offer and acceptance has more vulnerable position than in the contract in common law. Therefore, the discussion on contract as the formation is pre-excellence, in particular, issues on offer and acceptance was greatly debated in Islamic legal literature. These two elements are the bases for the contracts to take place. In other words, contract is dependent on these two to give legal effects.[221] To this point, in all four major schools of Islamic Jurisprudence namely *Hanbali, Shāfi'ī, Malaki* and *Hanafi* it is unanimously argued that no

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[220] *Jabir Abdul Hadī Salim,Majlis al Àqd fil al Fiqh al Islami wa al Huqūq al-Wadhei,* (Al IskanDārriyah: Dārr al Jadeedah le al Nashar,2001):Dr. Siti Salwani Razali "Critical Examination on the Legal Issues in the Formation of Electronic Contract – Comparative Concept under Common Law and Islamic Law", Proceedings of 20th International Business Research Conference (April 2013), Dubai, UAE, ISBN: 978-1-922069-22-1.
[221] A, Zysow, Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic law and the Common Law (1986) 34 Clev. St. L. Rev. 69.

ownership of property can be transferred and become binding on another person to take legal effect in terms of legal obligations without the proper acceptance.[222]

5.1. Formation Phrase in Contract

In terms of formation phrase, conclusion of contract in *Shari'ah* may be accomplished verbally, in writing or by conduct. Interestingly, alike common law, Islamic law also recognize all types of contracts along with what has been recognized or done by conduct. To this point, it is commonly adopted by both the systems that the making of an offer either orally or by writing is suffice.[223] Remarkably, no apparent significant divergences have been found in legal literature between different major schools belonging to Islamic Jurisprudence on this specific issue. There are no special formalities required for contracting, certain customary words and phrases to be used for conclusion of agreements in general.

5.2.Verbal Offer and Acceptance

However, the Jurists of major schools of Islamic law are unanimously agreed in respect to the conclusion of contract through verbal offer and acceptance. It is obvious that words are recognized as the basic of all types of expression, and in case of necessity the other things can take their place for the purpose. As a basic rule in context of Islamic law, it is settled that the bases to be considered in contract is the meaning and not words and forms. No particular words can be affixed to the formation of particular contracts. Only necessary thing is that just wording should be clear so that the offeree can easily be able to understand them. However, any language whether local, standard or sometimes even slang, if understood by all the parties to contract, that words make any contract valid. It is for this reason any comprehensible phrase making the sense

[222] J Nasir, The Islamic law of personal status, 2nd edition, Brill Archive (1990), 282.
[223] H Ramadan, Understanding Islamic law: from Classical to Contemporary (USA, Rowman Altamira Publishing, 2006) 105.

of meaning of formation of contract can be permitted. Furthermore, if in a situation where one of the parties speak in a language which cannot be understandable by other party to the contract in such a situation, it must be interpreted. [224]

Notably, as a general rule some Muslim Jurists, keeping in mind the clarity of the statement hold the opinion that contract formation should be by both parties expressed in the past tense. The offeror may use the phrase "I sold you my house" the offeree may reply "I bought" the expression in the past tense is the clearest phrase, as it is mentioned in *Mujallah* that if the phrase reveals the meaning of future (future tense), contract will not be concluded. It is stated: "The past tense is usually employed in offer and acceptance." Then further it is clarified as:

> "A contract of sale may be concluded by employing the futurist tense if it imports the present: but if the future is meant, no sale is concluded. If the future tense is used is the sense of a mere promise, such as the statement" I will buy" or" I will sell" no sale is concluded"[225]

However, on the use of other tenses, such as present, indicative, or imperative state of agreement was not found among majority. As it is exemplified in Mujallah:

> "…. such as the expression "sell" or "buy". But when the present tense is necessarily meant a sale may also be concluded by the use of the imperative mood."[226]

In essence, it may very well be inferred that the effect is given to intention then meanings would be taken accordingly and not to the plain meaning of the words. Group of scholars believe these could be used in case, if there is an indication of the intent barring any different possibility of intending any different contract, showing the intentions of the parties quite obvious.[227]

5.3. Offer and Acceptance in Writing

In a similar vein, it is also declared proper that in certain situations parties can generate a contract by means of writing,for instance if for the purpose of an agreement contracting parties

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[224]Alauddin Kharofa, The loan contract in Islamic *Shari'ah*, Leeds Publication (2002), 11.
[225]*Mujallah*, Art, 169,170, 171.
[226]*Mujallah*, Art, 172.
[227]*Jaber Al-Shafiy, Majlis al-Àqd fi al-Fiqh' al-Islami wa al-Qanoon al-Wadheī*, 154.

are not doing in the presence of each other, in this case writing a letter sent by the offeror to the offeree is considered as a valid offer. The major requirements are, the words must be clear and include the pivotal elements of the offer, notably should be understood by both parties. An actual unity of meeting place is not conceivable -keeping in mind - the details of which discussed earlier in caption of meeting place. Hence, the requirement in due course is that the offeree has to declare his acceptance in the very place where the offer was communicated to him. While some Jurists of *Shāfi'ī* school holds distinct view, they maintained their opinion, that where one has capability to make contract through verbal communication, he must opt it and must not use writing as first mean. In terms of preference, they hold that writing as a mean for any proposal can be used or permitted where person is not capable of speaking but it is rare opinion.[228]

5.4. Offer and Acceptance through Gesture and Signs

It is permitted in all four schools of thought that in such a situation where ordinary means of proposal do not work and proper communication is impossible. If one of the parties to a contract either deaf or dumb, they can convey their intention to make contract through signing, and signs must be clear and obvious which are understood and recognized by concerned parties. However, the *Hanafi* and *Shāfi'ī* jurists have slight difference in the further details, to this, they argued that such a formation through signs is not a principle or foremost way of interpreting the intentions of parties but it is considered as an interpretation of intention only for them who are handicapped and not able to speak or write .[229] With that, if party is able to speak is not allowed to form a contract by interpreting his intention through signs instead of most powerful form of expression which could be spoken or written. While *Malaki* and *Hanbali* jurists allowed the usage of signs even in any case where parties are in comfort to speak or can convey it by means

[228] Ibid.
[229]Ibn Nujaim Z Ibrahim, Al Ashbah wa al Nazayir (Damuscuss. *Dārr Alfiker*.2005), p.197.

of writing simply because they consider this to be a valid form of contract in reflecting the consent and intentions of parties in full capacity**.** This is considered as an instrumental source for expressing the will of parties involved in transaction and such formation completely reveals the intention to generate a specific contractual obligation. Thus, in short it could be concluded that the essence of the validity of offer and acceptance is mutual consent. Besides, it is observed by many Muslim scholars that there must be three conditions for valid constitution of offer and acceptance.[230] First both must be clear and definite in terms of clarity secondly conformity, which means coherence or agreement between offer and acceptance and last and third is continuity that offer and acceptance must be connected. So, by clarity it is meant that a clear manifestation is necessary to show the real consent. In general, the rule which applies to constitute a valid transaction is however, that meanings should be taken into account and not words and forms, as it is mentioned in *Mujallah al Ahkām al Adliyyah*[231] "In contracts effect is given to intention and meaning and not to words and phrases." Therefore, no matter whether it is gesture or utterance of words, acceptance is allowed and just allusions are not considered valid for this purpose.

However, the Shāfi'ī allows only verbal manifestation as principle mode while *Hanbali* and *Malaki'* jurists hold whatever could be regarded customarily indicative of mutual consent is accepted. The conformity refers to the agreement of offer and acceptance in terms of all their details whether explicitly or by any other mean which solve the purpose. They see it as a sort of preventive evidence for mutual consent. In this setting, with continuity of offer and acceptance the connectedness of both offer and acceptance is meant. The supplementary details of connectedness we have already discussed in the discussion *supra*, but significance of this

[230]*Ibrahim Nassāat, al-trazi fi uqūd al Mubadilat al Maliyah (Dārr al shrūq*, 1984), pp.223-230.
[231]*Mujallah al-Ahkām Al-Adliyyah*, Art. 1

condition is that as long as bargain between parties continue and nothing indicative of reluctance to the contract proceeded from any of the parties is amount to be the continuity of the offer and acceptance.[232]

With that, these all three conditions indirectly prove and form the mutual consent which is an intangible mental fact and internal intention (*Irad*ā, *b*ā*tinah*), it is a matter of presumption; therefore it is looked for to have some external expression in order to indicate or identify existence or non-existence of the presence of consent. To this different *Shari'ah* scholars debated that there are four factors which could vitiate consent, even though the parties to a contract verbally uttered the offer and acceptance in an ordinary way but still not tantamount to be a valid formation.[233]

6. Factors Which Could Vitiate Consent

With this in mid to begin with, the first of these factors is *Khāta/galat*, it is the mistake related to the subject matter due to the false or inexact representation of reality. More specifically, subject matter is not bearing the physiognomies, what the party intends or the manifestation exactly not making the factual situation. To illustrate, that the contract is made for the sale of specific kind of super quality mangoes 'Alfanaso'[234] but it turns out to be ordinary kind of mango or a person buys jewels which he thinks are made of gold, but it is not matching the description, simply it is a proposition where a person invested for something which is different from the description 'Shown to him'. This factor attracts the options *Khīyyārat* namely Khīyyār al *Wasaf*, Khīyyār al Rūyah.[235] The following chapter, for their part will probe the detail discussion. Furthermore, the second factor which also caused vitiation is the duress or coercion,

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[232]Mansoori, 25.28.
[233]*Ibrahim Nassāat, al-trazi fi uqūd al Mubadilat al Maliyah*, pp.224-230.
[234] A classic kind of mangoes found in Punjab region.
[235]*Ibrahim Nassāat,* pp. 442.

it is a type of force used by one against another person, without lawful reason, compelling him to refrain from doing something legal or compelling him to do something without his will and wish. In fact, it results the infringement or encroachment on right of freedom. So that, in presence of duress or corrosion no free or voluntary consent can be made.[236] To this point, the third and important one is fraud, *Ghara*r or *tadlis*, which applies to any incorrect presentation of facts or of mixed facts and law, where one of the parties to a contract induces other to enter into a transaction with malicious objectivity. It may be done by fraudulent statement, by other attractive action or by concealment of real facts and figures regarding the defects of subject property. Similarly, it also can be made by misrepresentation which fall under the definition of *tadlis* in Islamic law; in fact, misrepresentation is slightly different from the first one in the sense that in misrepresentation one party intentionally intends to deceive another one. In this case contract is simply consider invalid.[237]

In this regard, the fourth vitiating factor is *Ghubn*, which literally means undue decrease, deduction or increase in selling price where one is offering a very high price for any subject matter which is not worth of such huge consideration. And it is further divided into two kinds, minor and major. Basically, the minor *Ghubn* means that difference in price is not at huge level and not causes major loss to the party. While the major *Ghubn* is a sort of excessive deception in value or quality of goods and affect the party's interest in the goods, it makes the contract voidable and victim may opt to terminate the contract.[238] It can be said that where there is any vitiating factor involves contract can be either void or voidable. However, if it is void it must be annulled and cannot be executed. Moreover, in case it is voidable and vitiating factor can be removed without damaging the res, then the contract can be executed at the option of the party

[236] Ibid, pp. 391-387.
[237] Ibid., pp. 406,408-426.
[238] Ibid., pp. 445-448-454.

which suffers the loss. In the Islamic contract law, we find in the discussion about *Ghubn* and other allied vitiating factors within a rich detailed manner, jurists normally touched in quite deliberately the different types and practices of it. These practices are certain prohibitions for causes *(illah*). Whereby a sale transaction is conducted in illegal demeanors, declared by *Shari'ah*, due to imperfect and deceptive nature of transaction and having affected by any undue loss to either of the parties fall under theses prohibitions. [239]

7. Prohibited Practices

The following headings, for their part will probe the examples of such prohibited practices as;

7.1. *Bay' al- Mulāmsa and al-Munābza*

Mulāmsa literally means to touch an object by hand. Technically, in this kind of transaction seller offers the buyer that 'if you touch any cloth it would be yours' through the payment of 'y' as consideration or price. Consequently, in this transaction the party was required just to touch the cloth without any examination of the sale subject. *Munābza* conversely is that form of transaction where seller should throw the cloth to the buyer without giving him any chance to have careful examination of the subject. In fact, the very act of throwing the cloth concludes the transaction. For this, the *illah* or cause of prohibition here is lack of inspection of subject property. In due course, purchasers in either case should have given opportunity to examine the subject matter sold to him and here in this case it lacks. As well as, it was not certain whether the transaction was likely to prove undue disadvantageous to one side. In the context of *Shari'ah* law

[239]Ali Abadi, A. Formation and breach of the liabilities in Islamic contracts (Tehran: DaneshPazir Publication, 2013).

theses both the forms are declared illegal. To this, Abū *Hūraira* (May Allah be pleased with him) reported a tradition from Prophet "ﷺ":

"Two types of transactions have been forbidden by "The Holy Prophet" "ﷺ" al- *Mulāmsa and al-Munābza."*[240]

7.2. *Bay' al-Hasatī*

This is referred to a kind of sale transaction conducted via throwing of pebbles. As a principle, in this transaction one party probably the buyer will throw a pebble towards the goods of the seller, upon whatever goods the pebble falls, the bargain is concluded. The *illah* cause for prohibition here is the lack of certainty and absence of proper inspection of subject matter. These both the factors may cause injustice or may result hardship and suffering of loss to any party. Therefore, it is not allowed in *Shari'ah* and considered invalid, as it is reported that prophet "ﷺ" has forbidden transaction determined by throwing stones and the type which involves some uncertainty.[241]

"Abu Huraira (Allah be pleased with him) reported that Allah's Messenger "ﷺ" forbade a transaction determined by throwing stones and the type which involves some uncertainty."

7.3. *Bay' al-Muzabna and Bay' al-Muhaqlah*

The basis for the prohibition of *Bay' al-Muzabna and Bay' al-Muhaqlah* is built on a hadith of Prophet "ﷺ".*Sa'īd bin Musayyib* reported a tradition from Prophet "ﷺ" ;

> "The messenger of Allah "ﷺ" prohibited *Muzabna* and *Muhaqlah* which are sale of fresh dates on the trees against dry dates and sale of field of wheat against wheat and taking or of land on rent against wheat (to be produced in it) respectively."[242]

With that *Muzabna* is such sort of transaction where parties agreed to exchange fresh fruits for dry fruits. In this case point debated is that quantity of dry fruits to be rendered for exchange is fixed and measured exactly while the quantity of fresh fruits to be rendered for exchange in

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[240] *Sahih Bukihari*, no.354, 355: *Sahih Muslim*, no.3612.
[241] *Sahih Muslim*, no. 1513.
[242] *Muwaṭṭā Imām Mālik, no* .1827, 1828.Sahih *Muslim*, no.1536.

consideration determined via a rough estimate or through guising while still on the date palms. *Illah* cause involved here is again the uncertainty. Since, such equation of fresh fruit on trees can hardly be determined correctly. To this point, it is just like dark transaction or blind hunch for buyer. Thus, stand prohibited in Islamic law.

7.4.Bay' al-*Mu'dhtarr*

However, it is sort of transaction where one of the parties apply the unjust force, duress or coercion for bargain, and other party faces the compulsion. Such a sale is void, thus prohibited in Islamic law.[243] As it is reported by Ali Ibn Abu Talib (RZ) that:

> "A time is certainly coming to mankind when people will bite each other and a rich man will hold fast, what he has in his possession (i.e. his property), though he was not commanded for that". Allah, Most High, said: "And do not forget liberality between yourselves." "Those who are under compulsion will be bought from, while the Prophet "ﷺ" forbade forced contract, one which involves some uncertainty and the sale of fruit before it is ripe."

Illah cause of prohibition is that duress has affected the true intention of victim, which ultimately vitiates the consent and might cause the suffering of loss.

7.5. *Bay al-Najash*

To understand this, it could be defined as a deceptive form of sale transaction; it is defined as an act of offering a higher price for a commodity with no intention to buy it. With that realization, the real motive is just to deceive the buyer who really wants to have it. Specifically, this is sometime a trick used by the seller which switches the market index to increase his offer to outbid the first offer. The practice is illegal since it is prohibited in *hadith*, quotation from the text of hadith is as;

> "One who practices Najash is ribā earning traitor …"

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[243] Tahir Mansuri, Islamic Law of Contract and business Transaction (Adam Publisher and Distributers, 2005): Sunan Abi Dawūd, no. 3382.

Needless to say, that such practice is forbidden because it is a false trick being used in deceptive manner. Along the same lines, as it is also reported from Sa'īd bin al-*Musayyib* that Prophet "ﷺ" prohibited deceptive sale.[244]

7.6. *Bay' Talaqqī al- Rukban*

To this, it refers to a situation where people go to the outskirts of the town to meet traders, before they reach the market and buy their merchandise for unfair low price or sometimes take stock of certain merchandise for dumping to hijack market index in their favor,with intent to get sole profit. For this, they deprive both the seller and the buyer from enjoying the real blessing of the market. *Shari'ah* forbids this practice because of its unfairness and unjustness. Quotation from the portion of tradition witnesses its illegality, as narrated by Ibn Umar (RZ);

> "Do not meet merchant in the way and enter into business transaction with him, and whoever meets him and buy from him, and if the owner of the merchandise comes into the market, he has the option".[245]

Wherefore, the Islamic law in its characteristic manner of equitable remedial conception gives such victim a right to rescind the contract with the person who bargained in lesser price upon learning the real value of his commodities in the market place.

7.7.*Bay' al-Īnāh*

Interestingly, this is different from all above-mentioned situations, it is sort of technique to coverup Ribā, this is referring to a situation where the seller sells the commodity on credit for for a fix period of time. To this, the seller then repurchases the same commodity from the same buyer but with reduction of the price for cash payment. This injurious nature of transaction is not allowed according to majority of jurists with the authority of tradition reported by Ibn Umar, as;

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[244]*Sahih Bukharī*, no.35161: *Muwaṭṭā Imām Mālik,* no.1941.
[245]*Sahih Muslim,* no.1517,1533.

"Narrated Abdullah ibn Umar that Holly Prophet "ﷺ" said: When you enter into the *Īnāh* transaction, hold the tails of oxen, are pleased with agriculture, and give up conducting jihad (struggle in the way of Allah). Allah will make disgrace prevail over you, and will not withdraw it until you return to your original religion."[246]

It could, therefore be conceivable that in all above situations, it is evident that the contract is not valid until it is not free from these vitiated factors. These factors affect the consent of parties and stand contradictory to the basic Islamic phenomenon of fair trade as mentioned supra in pervious chapter, taking on the theoretical framework of "*Al Darar Yūzāl*" "*Haram* must be eliminated or" "*La darar wa la dirrār*" "There should be neither harming nor reciprocating harm", especially the segment for contractual liabilities must be focused.

8. Conclusion

Throughout the whole discussion, it has been observed that in *Shari'ah* the offer and acceptance has more vulnerable position than in the contract in common law. Therefore, the discussion on contract as the formation pre-excellence, it has been argued that these two elements are the bases for the contracts to take place. In other words, contract is dependent on these two to give legal effects. The matter has been probed in the context of all four major schools of Islamic Jurisprudence namely *Hanbali, Shāfi'ī, Malaki* and *Hanafi,* it is unanimously argued that no ownership of property can be transferred and become binding on another person to take legal effect in terms of legal obligations without the proper acceptance.

In a similar vein, it is also concluded that the essence of the validity of offer and acceptance is mutual consent. Besides, it is also observed that majority of Muslim scholars agreed that there must be three conditions for valid constitution of offer and acceptance. First both must be clear

[246]*Sunan Abu Dawūd,* no.3462.

and definite, in terms of clarity, secondly conformity which means coherence or agreement between offer and acceptance and last and third is continuity that offer and acceptance must be connected. So, by clarity it is meant that a clear manifestation is necessary to show the real consent. In general, the rule which applies to constitute a valid transaction is however, that meanings should be clear free from any ambiguity.

Furthermore, the importance of the phenomena of *Majlis al-Àqd* is being debated thoroughly, and it is important to acknowledge that the formation of contract is expression containing its essential elements offer, Ijab and acceptance *Qabūl*, both are normally made in the same session *majlis al-àqd* between parties to contract. In this setting, it is appropriate to say that in case of contracting between absentees, the acceptance and unity of place must be linked with time stipulations, acceptance must be made within reasonable time, taking into consideration the nature, circumstances, surrounding and trading customs. Furthermore, it has been debated that there are certain factors which could vitiate consent, even though the parties to a contract verbally uttered the offer and acceptance in an ordinary way but still not tantamount to be a valid formation, it is perhaps, being argued that *Shari'ah* does not permits any transaction which would lead to uncertainty *'Gharar'* and ambiguity *'Juhāla'*. *Gharar* is an Arabic term that is associated with uncertainty, deception and risk in any arrangement, it denotes that subject of deal is not in effect to the level of misunderstanding, that exist between the parties, or to the level of uncertainty to the goods or payment which render them rather not obtainable. *Juhāl*a means that commodity certainly exists but its *Wasaf* description or identification is not clearly shown.

Having discussed, the conceptualization of contract formation and theory of contract, it is therefore endeavored to investigate remedial measures against tribulations of vitiating factors which impair the legal validity. It is being analyzed that the general idea is that the victim may

terminate the contract by using some legal framework, or he may be given any option or chance to repair his losses. The choices which possibly will provide a party to a contract a legal or contractual right to terminate the contract, or on the other way gives one of the parties, probably the vendee, the right to acquire discount, or right of settlement for defects, due to tribulations of these factors. Ultimately it is called the risk management.

Hence, the risk management is ample need of fair trade in any contractual relationship; the application of said framework makes a contract flexible by allowing the parties a reasonable timeframe to avoid the risk and damage. However, the general rule of Islamic law suggests that this framework is introduced for number of objects within the principles of Islamic law. For this reason, the need for options will differ, depending upon the time and commodity whereby providing the parties an opportunity in order to consider on the viability of the deal and acquire necessary information on the arrangement. To refer back to the core principle of *Darar 'Haram'* outlined earlier said opportunity is provided to avoid the risk in the context of fraud *'Ghubn'* misrepresentation and misconduct in compliance with the essence of the Islamic financial scheme which is affirmed in the prophetic traditions of "*Al Darar Yūzāl*" "*Haram* must be eliminated" or "*La darar wa la dirrār*". "One must not harm himself or bring harm to others."

With that, next chapter continues with the discourse on the topic of pre-contractual liabilities in Islamic law that commenced in this chapter but focus would be given to the framework of *Khīyyārat* as a tool, that facilitate transparent contractual transaction. Specifically, the formulation of designed framework to perceive the interests of businessmen along with their relationship which refers to certain rights of contractual parties which could be the Seller or buyer or both to make a choice between two opposing events; to verify or to cancel the transaction to be certain, it will be examined in a manner that anticipates the views of some of

the classical *Shari'ah* scholars as well as contemporary scholars and academics that will be the focus of this chapter. Moreover, the technicalities of utilization and application of *Khīyyārat* as risk management tools will also be explored in depth.

Chapter No. 5

The Doctrine of *Khīyyārat* (Options) in Islamic Law of Transaction

Chapter No. 5: The Doctrine of Khīyyārat (Options) in Islamic Law of Transaction

1. Introduction to *Khīyyār* in *Shari'ah* and its Significance in Financial Matters

1.1. Introduction

The previous two chapters discussed the topics of freedom of contract, that take in obligations by nature of contract and obligation obligatory by terms of contract and the theory of offer and acceptance as formation of contract. In doing so, it was endeavored to give an accurate depiction of the approach of *Shari'ah* through the study of the mechanism of its formation and primary developments relied upon the fundamental conception of contracts and trading as a legal system, its interrelation with allied modes and forms of undertaking, by which an obligation may be generated. The issues pertaining to limits and space of the freedom of the parties to a transaction has been examined properly. With the foregoing, the research moves more prominently to Islamic concept of pre-contractual liabilities with the detailed examination of the Doctrine of *Khīyyār* (Option) elaborated by the different leading schools of Islamic *fiqh.* Al-*Khīyyār* linguistically connotes choice or option, it usually refers to certain rights of contractual parties which could be the seller or buyer or both to make a choice between two opposing events; to verify or to cancel the transaction. Commonly the choice for *Khīyyār* is based on the consideration agreed upon.[247]

1.2.Concept of *Khīyyār* in Islamic Law

Within the context of Islamic law, *Khīyyār* was designed to perceive the interests of businessmen; in any kind of business transaction that requires to be done under the ethics and

[247]M Yoūsuf Musa, al Amwāl wa Naziriya al Àqd (Damuscuss: Dārr al fikar, n.d.). p. 466.

standard of Islamic Law. Broadly speaking, it sanctions a mechanism that serves the objectives of contracting parties and considers their interests and expectations. These interests follow the protection of benefits and incentives of contractual relationship and parties concerned in a deal from possible danger that will harm their future business.[248] Assuredly, by virtue of this mechanism the vender, in any commercial transaction is duty bound to give fair chance to vendee to have inspection or examination of merchandise for his own satisfaction, and there is no bar if this check is being done after or before the deal .If there is any defect in the goods, then under Islamic law he has fair chance to rescind the transaction, if he seems fit in case of defective merchandise. The doctrine which allows such safeguard is called in Islamic commercial terminology as *Khīyyār*.[249]

1.3. Significance of *Khīyyār* in Financial Matters

Basically, for the most part in financial matters, the *Shari'ah* scholars have widely recognized, and have indeed promoted the mechanism of mitigating risk of losses due to the misrepresentation and product defect, as *Khīyyārat* or options. In Islamic law, the different investigators presented numerous or several categories of these options. *Imam Abu Hanīfah* divides it into seventeen kinds, *Shāfi'ī* divides it into sixteen types, Hanmblī jurists increase it to eighteen. Conversely, in *Mālaki* school, we find the discussion restricted only into two major kinds.[250] Meanwhile *Fiqh'* manuals properly, in delicate fashion discussed this issue in a straight line "Is a sale rendered unlawful by a defect in the item sold?" One may find the response with

[248] *Al Sarkhsī Abi Sahal, al Mabsut* (Karachi: Dārr al Quran wa Uloom al Islamiyah, n. d.), vol 3.p.39.

[249] Mohd Murshidi Mohd Noor, "The Rights of Khiyār (Option) in the Issue of Consumerism in Malaysia", Middle-East Journal of Scientific Research (2013)13 (2): 154-161.

[250] Arbouna, M.B., Option Contracts and The Principles of Sale of Rights in *Shari`ah,* edited by Ali and Ahmad, (Jeddah: Islamic Research and Training Institute, 2007) p.51.

conviction a defect in kind, in quantity, or in quality, if obvious or known to the seller and was not revealed, is a fraudulent act and transaction is void. If in case, defect is unidentified, then it is different and not to be counted as fraud. Yet, the vendor must make well to the purchaser for his damage and similarly the purchaser should make repayment to the vendor if he has received more than agreed upon which he paid for.[251] Another significant discussion is "whether the vender bound to mention any defect in the item sold?" The argument is that the vendor is bound to ensure about absence of any defect that may cause loss by decrease in the worth of the item or cause danger by which the article offered for sale becoming harmful for usage.[252] But on the other hand, if the defect is patent, here seller is not liable to bound himself to reveal it "by any duty of fairness." [253]

Historical hermeneutics, for its part, as late as the time of companions and '*tabheen'* their immediate successors the mercantile presentments run; at the beginning life was very simple, people were enlivening very close to the soil. Particularly, the list of necessities which required protection was limited. Therefore, the merchandises which came to an unpredictable market and fell under control were very few. As the brick maker makes bricks too small, the horse dealer provides tiered jades unable to take journey with rider, miller cheats customer by putting into a sack of wheat, a bottle of sand of the sea. Later on, as the expertise augmented and appealed more followers, the need for the scrutiny of the community was progressively extended. Then, the quest about fair price, concerns of honesty in measures and quality goods was entertained; the intent was to ensure open and fair market. The foundations of the scheme of principle dealing '*bay'* trade made upon deep analyses of matters and communications pertaining to daily life to

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[251]*Ibn 'Ābidīn, Radd al- Mukhtā*r, 2nd edit (Cāirro: Mustafa al- Bābi, al-Halbi,1966), vol IV, p. 68-88.
[252]*Ibn' Arafa Ad-desouki, Hāshiyat al-Dusūqi* (Baīrut: Dārr al Kutub al Ilmiyya, n.d) vol.3, p.127.
[253]Dayani, A.A.R, "The comparison of the principles of *Khiyāral-'Aib* in '*Fiqh,* Civil law, European Law and French Law", Journal of Law & Political Science, Tehran, (2012) 37(3), 127-154.

the extent of public notice. Obviously, issues started to emerge, it was complained that someone buy measly '*Zabeeha*' an animal slaughtered, and sell the sausages and puddings, unfit for humans in the market of Muslim cities like Samarqand and Baghdad .Similarly, it was also seen that a person bought a drowned cow and sent it to market in small pieces. Somewhere it was also found in market that cooks and bread makers warmed up their stuff and used to sell on second or third day. These practices were considered condemned, as exhibiting a greater zeal for trade and having concern for customers in all matters. With the passage of time especially in glorious period of Spanish Muslim and early developed era of *Ottoman* dynasty to avoid malice practices, it is being witnessed by authoritarians that there must have been a great deal of patching up of bad bargains. The casual reference to brawls following a bargain and different measures to settle their concerns and to manage peace between seller and buyer were also found.[254] Wherefore, the weights and measures were presumed to meet established test. And attempts were made to suppress deception of all kinds and collective bargains, as it was also made forbidden to make tactics which might confuse the purchaser or tempt the seller to restrained deceit. Thus, the doctrine of *Khīyyārat* or principle of option got its place in trading system rather turned to the regulation of trade.

1.4. Classification of *Khīyyārat*

In this chapter at the outset, it is endeavored to present an overview of all-inclusive categories of these *Khīyyārat*, under the traditional *Shari'ah* laws '*Fiqh*', we can show the Islamic option's structure as in the following jargons.[255]

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[254]*Kotsiopoulos, Elektra "Autonomy and Federation within the Ottoman Empire: Introduction to the Special Issue" Journal of Balkan and Near Eastern Studies*. (2016) 18 (6): 525–532.
[255]*Zuhailee Wahbā. Al 'Fiqh Al Islamī Wa Adilah tuhū,* 2nd ed *(*Damuscuss: Dārr Al Fikar 1985), vol IV, p.250.

I. *Khīyyār al- Tadlīs*

Tadlīs denotes fraudulent concealment of facts and this type of *Khīyyār* gives buyer a right to save his interest. So, if one of the parties which most probably be a seller has buffed over the object of sale, showing features which are not actually or truly accessible in it, other party would exercise that right to resend the contract or to stay with its consummation.[256] This option or *'Khīyyār al-Tadlīs'* comes into effect when it is appeared that sellers concealed unattractive and unfavorable features under deceptively attractive and favorable approach.[257] This is insistently prohibited by *Shari'ah* with application of concept of *Tadlīs al-Aib*; the process whereby any of the parties to contract knowingly hides the defect of subject property so that an unsuspecting party would acquire then at designed consideration.[258] To this, it may also involve glossing the goods over, conferring more appealing appearance or functionality. To protect the parties to a contract *Shari'ah* equips buyer/seller with this option; whereby, the defrauded party is given the option to cancel the transaction and redeem the consideration paid on their part.

II. *Khīyyār al Kimmiyah*

Khīyyār al-Kimmiyah, quantity option comes into effect, whereby a buyer buys an object in barter for unobserved, unseen items in an ampule. The seller of those items do not make others aware of the quantity or class of the objects placed in the ampule. In such a situation the buyer has right after opening the ampule or package for checking its contents to opt between cancelation and conclusion of the sale transaction. The name *'Khīyyār al-Kimmiyah'* was set by

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[256]*Ahmad al Salusi, Fiqh al Bai wa Istislāh* (Qatar: Dārr al Saqafah, 2003), vol, I, p.654.
[257]Parviz Bagheri, &Kamal Halili Hassan "The Application of the *Khiȳār al-Tadlīs* (Option of Deceit) Principle in Online Contracts and E-Consumer Rights", Mediterranean Journal of Social Sciences, (2015).
[258]*Al Sarkhsī Abi Sahal, al Mabsut*: (Karachi, *Dārr al Qur'an wa uloom al Islamiyah*, n. d.), vol 3.p.39.

Hanafi's. Notably, it is slightly different from *Khīyyār al Rūyah* in the sense that latter doesn't apply in cases where the unseen object or item is money.[259]

III. *Khīyyār al Majlis*

Khīyyār al Majlis is translated in English language with different words, as session option or option of withdrawal. Whereby, this option is conferred on each of the contractual parties to a contract, giving them right to resend the transaction or not to proceed with the conclusion of sale (before they leave the session of contract assembly), i.e., before they physically or constructively separate. This principle derives its basis from an authentic *Hadīth* or known maxim of *Shari'ah*.

> "The two parties to a sale have the option to resend it as long as they have not parted, and one of them may give the other the option for a period".[260]

Accordingly, to the views of *Hanafi* and *Mālaki* jurists a sale is concluded and binding upon both the parties on the valid expression of offer and its acceptance. However, *Hanblī* jurists along with *Shāfi'ī* jurist differ and opined that each of the party retain the option to annul or withdraw the transaction as long as they have not left the contract.

IV. *Khīyyār al Naqd*

This is also an Arabic terminology which is translated in English translation as 'cash price option'. *Khīyyār al Naqd* is a special case of *Khīyyār al Shart*; whereby, it comes into effect when the parties in a contractual relation involves in case of sale transaction with deferred payment upon concurrence, the transaction shall be void unless the price is paid within a period

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[259]Ibid., p.632.
[260]Sahih Bukhārī, no.2107

of three days at the longest.[261] However, some jurists did not stick to the period of three days and considered any longer interval as valid subject to the mutual consensus of the parties for length of period, taking into account their best interest and ease.

V. *Khīyyār al Ta'yeen*

Khīyyār al Ta'yeen option of specification is a kind of *Khīyyār* which comes into effect, whereby, the parties to a transaction in a contract of sale, mutually agreed to defer the specification of the subject of sale for nominated period, conferring on either party the option of specifying the core object. For example, a person may purchase one out of five motor bikes owned by the same owner, with option to specify certain one within a period of two days.[262] *Hanafi* reliance for validity of this option is based on *Istehhsān* (Juristic preference) as it fulfills the legitimate need of parties to a contract. While other jurists namely *Shāfi'ī* and *Hanblī* differ with their opinion and opine that it is invalid due to state of ignorance *(Jīhālah)*.

VI. *Khīyyār al- Shart*

Khīyyār al-Shart may be translated as 'option by stipulation' or 'condition options.' which of course, constitute a condition stipulated in the contract. This option convenes the contractual parties both seller and buyer with the right to proceed with contract either by confirmation of contract or with its cancelation subject to pre-agreed period of time. So, they have right and opportunity of studying their respective positions in the transaction in order to reach their final decision regarding its confirmation or rejection. This option can attract any commutative transaction, for instance any transaction that involves the interchange in terms of

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[261]*Abdu al Rehman Al Jazairī, al-'Fiqh al- Mazahib Al Arba'a* (Baīrut: *Dārr Al Kutub al 'Ilmīyah*, ,2002), vol II, p.220-225: *Mujallah al-Ahkām l-Adliyyah,* Art .313: *Zuhailee Wahbā. Al 'Fiqh Al Islamī Wa Adilah tu hū, 2ndedit* (Damascus: Dārr Al Fikar 1985), vol. IV, p.275.

[262]*Mujallah* al-*Ahkām* l-*Adliyyah*, Art316: Ahmad al *Salusī*, *Fiqh'* al *Bai* wa Istisāq (Qatar: Dārr al Saqafah, 2 003), vol, I, p .538.

counter values and which is cancellable at any future date of time. Whereby, the buyer during the duration fixed for effectiveness of this option can assume his right to effectuate the deal by paying the price agreed upon and take delivery of the subject property object of sale.[263]

VII. *Khīyyār al Aib*

Khīyyār al Aib is called in English language as 'defect option' or option in case of defect. An option that comes into effect where the seller delivers the object of sale and later on it is revealed, that the object is defective one. In such a case buyer is entitled either to hand it back to the owner for full consideration or claim his right for price reduction corresponding to the defect and retain the object. However, the definition of defect varies among the jurists, *Hanafi* considered it as; any specification or attribute that is not customary part of that article being subject of sale, and would negatively impact on its value as compared to another.[264] For example, an electronic device that is malfunctioning partially being a subject of sale is attributed to be a defective one. While *Shāfi'ī* opined defect as any uncommon attribute that causes about a diminution in the object of sale and hampers its proper use. This right is only being taken as option, when the buyer should not be aware of the defect either at the stage of (*majlis al àqd*) contract assembly or after receiving the proper possession. Otherwise, that would be understood as implied acceptance by the buyer.[265]

VIII. *Khīyyār al-Wasaf*

In terms of definition, the phrase *Khīyyār al-Wasaf* can be construed as characteristics or features related option. This option is conferred upon the buyer in case, where it comes into the

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[263]Abdu al Rehman al *Jazairī*, *Kitāb* al *Fiqh'* al *Madhāhib* al Arba'a,, (*Baīrut*: Dārr al Kutub al *Ilmiyya*, n.d.), vol II,p158.

[264]*Kamāl al- Dīn, Ibn al Hamām. Fath̑ al-Qadir,(Baīrut: Dārr al Kutub al Ilmiyya, n. d.)* vol 6.p. 357.

[265]*Al Sharbinī, Mughnī al-Muhtāj,* (Baīrut: Dārr al-Kutub al- Ilmiyya, 1994), vol. 2, p. 50: *Mujallah al-Ahkām al-Adliyyah*, Art.336: *Ahmad al Salusi, Fiqh al Bai wa Istisāq* (Qatar: Dārr al Saqafah, 2003), vol, I, p. 649.

knowledge of buyer that the anticipated feature or specification of the item is actually missing or lost. The buyer in such case has right to accept or to reject it while the non-existing feature is one of a particular importance to him.[266] For instance, Mr. X purchased a motorbike based on description that, it has travelled a specific mileage and model is 2014 but later on it is revealed that this is not true. In this very case Mr. X has option to retain the object or call off the transaction altogether.[267]

IX. *Khīyyār al-Ghubn*

The right of *Khīyyār al-Ghubn* comes into effect to remove the injustice from any fraudulent deceptive trick that confers on either party to commutative contract like sale, rent etc. With that, *Hanafi* however, further articulate their opinion that when the fraud is based on deception, the source of that deception could be the seller or buyer by communicating unjust prices or by leading with untrue description by way of misleading presentation,[268] in any case this option is considered as remedial tool to make things right in favor of the sufferer.

X. *Khīyyār al –Isteshqāq*

Khīyyār al-Isteshqāq may be termed as entitlement option. It confers upon buyers if the buyer becomes entitled to entire object of sale, it may be effected before or after the buyer takes the entire or part of the sale subject in case of partial entitlement where the buyer is given the option of taking the remainder of it, for its corresponding exchange percentage in the price. It is also provided in this option that buyer has right in case of non-fungibles category of items and in cases of fungibles thing having characteristics of measurement by volume or weight, the option

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[266]Arbouna, M.B., Option Contracts and The Principles of Sale of Rights in Shari`ah, edited by Ali and Ahmad, (Jeddah, Saudi Arabia: Islamic Research and Training Institute, 2007.) p.51.
[267]Mujallah al-Ahkām al-Adliyyah, Art .336: Ahmad al Salusī, Fiqh al Bai wa Istisāq , vol , I, p .631.
[268]*Ahmad al Salusī, Fiqh al Bai wa Istisāq*, vol, I, p .641.

cannot be taken. However, it is also opined that the interest of the buyer should prevail in cases of division of the object of sale, if the division of sale will not be in the interest of buyers then he would have to choose, whether to keep the remaining part against its proportional price or to retain it.[269]

XI. ***Khīyyār al-Tafarruq-al-Safaqh***

It denotes in English as sale partition option. This option comes into effect, where object of sale is in different fragments, either to recover the price paid or to resend the contract or to obtain the remaining portions after deducting a specific amount, corresponding to the defective portion. To this, *Hanblī* jurists offer their opinion that the option gets effective if part of the object of sale perishes or gets damaged before possession was taken by the buyers. Irrespective of the fact, whether it occurs due to the operation of force majeure or because of mistake done by seller or his negligence. As such on the basis of its validity, the option provides the buyer a right to call off the sale. Furthermore, this option is also referred to the injury caused due to the third party, while holding that party responsible for the injury.[270]

XII. ***Khīyyār al Taghrīr***

Literally *Taghrīr* means 'deception or trickery' This option of *taghrir* comes into operation to revoke a contract on grounds of the deception, this right rest with purchaser to withdraw the contract because of deliberate act of deception by the vender. Furthermore, this option encompasses providing inaccurate description of the object of sale in order to persuade the buyer to pay a higher price.[271]

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[269]*Mujallah al-Ahkām l-Adliyyah*, Art.309: *Ahmad al Salusī, Fiqh al Bai wa Istisāq*, p .684.

[271]*Mujallah al-Ahkām al-Adliyyah*, Art 57.

XIII. *Khīyyār al-Qabūl*

This option relates to the very initial stages of contract. That both the parties to transaction have prior to the expression and statement of acceptance (*Qabūl*) and whereby both may or may not proceed to accomplish the transaction, this option can be availed by the parties before the contract is to be done.[272]

XIV. *Khīyyār Kashf al-Hāl*

Such a situation where the volume of sale subject is indefinite; this option is given to the party to a contract upon knowing the specification of the items of subject of sale or transaction having done without signifying its specifications, ab initio upon knowing about specifications. For instance, if a party purchases a hunk of almonds whose weight is equal to that of unknown measure or certain quantity livestock for specific price per measure of volume. To this, in any case, sale is considered lawful with option for buyer having the right to consummate or resend it.[273]option comes into effect in those cases where any buyer purchasing an object, whose measurement, weight or quantity is not known.

XV. *Khīyyār al-Faskh*

This option comes into effect where a party faces unforeseen hardships and difficulties which cause to hinder fulfillment of a party's obligation toward contract.

For instance, a contractor of a construction company found a situation where he may not be bound to continue the contract if the piece of land, the subject of construction proves not to be able for construction is being carried out, just contrary to what was initially concluded by

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[272]*Zuhailee Wahbā. Al 'Fiqh Al Islamī Wa Adilah tu hū,* 2nd ed (Damascus: Dārr Al Fikar 1985), vol. IV, p.250251.
[273]*Mujallah al-Ahkām al-Adliyyah*, Art.310.

inspection. This option gives to contractor a right to unilaterally terminate the contract and he is entitled to a portion of contractual amount in proportion to the percentage of work completion.[274]

XVI. *Khīyyār al-Khiȳanah*

This could be termed as breach of trust option or betrayal option. This option relates to a situation where, a purchaser in a trust sale known as '*bai al amanah*' comes to know that the other party betrayed him as the price or conditions settled in contract. These transactions include *bai a Murābah,* "*bai Wadee'ah or Hateeta Sale"* (below cost sale) *bai al Tulia* (at cost sale) and also attract the transactions where partner is in obligation to be honest and ensure transparency towards other partners like contract of S*hirkā* (partnership). However, in a situation where one party finds that the other party in his statement regarding consideration or about conditions agreed upon is not true, then the suffering party has option to accept the 'object or return it back because of lack of consent.'[275] While group of jurists including *Shāfi'ī* and *Hanblis* in majority opinion, whereof opined that the buyer has right to adjust the price downside to compensate corresponding misrepresentation.[276] It is mentioned in *Mujallah* that contractual rights belong to the contractual parties on the basis of trust and truthfulness, while they are working on the behalf of each other**.** But if one of the parties take transfer of property purchased by him in his favor and do the payment or recompense thereof, and concealed certain facts or showed deceptive behavior than he has liable for consequences alone.[277]

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[274]*Zuhailee Wahbā. Al 'Fiqh Al Islamī Wa Adilah tu* ,2nd ed (Damascus: Dārr Al Fikr 1985), vol. IV, p.376.
[275]*Ibn al rushed, Bidayāt alMujtahid* ,2nd ed (Karachi: *Dārr Kutub al Saadat*, n.d.) vol 2.
[276]*Mujallah al-Ahkām al-Adliyyah*, Art article 352.
[277]Ibn Arafā Ad-Dusūqī, Hāshiyat al-Dusūqī (Beīrut*: Dārr al Kutub al Ilmiyya,* n.d), vol.3, p.91: *Mujallah al-Ahkām -Al Adliyyah*, Art.1370.

XVII. ***Khīyyār al Rūyah.*** The option of inspection starts to operate after the subject of sale is being seen by the party, even in case if contract was validated prior to inspection it would not bind the parties.

2. Implication of *Khīyyārat* (Options) in Financial Matters

In reverence to previous discussion, it is clear that *Khīyyār* technically gives the power of choice or right of preference. Nonetheless, in legal terms it connotes the exercise of right to determine the best of the transaction by either implementing it or resending it. These options as we discussed varied and significant ones are those which are more practical and often involves in modern transactions. Particularly, the following seven of the main *Khīyyārat* are considered more important.

1- *Khīyyār al-Rūyah* (Option of Inspection)

2- *Khīyyār al-Shart* (Option of Stipulation)

3- *Khīyyār al-Aib*(Option of Defect)

4- *Khīyyār al-Majlis* (Option of the Meeting Place or Option of Withdrawal before Parting)

5- *Khīyyār al-Tadlīs* (Option of Deceit)

6- *Khīyyār al Thaman* (Option of Non-payment of Price)

7- . *Khīyyār al Ta'yeen* (Option of Choice)

3. The Role of *Khīyyār al-Rūyah* (Option of Inspection) in Financial Transactions

3.1. Concept of *Khīyyār al-Rūyah*

The concept essentially proposes that when a vendee get involved in such a contract where object of sale is not physically existing at the spot for inspection. It is however, considered as voidable sale if any attribute agreed upon is not matching. In such type of deal vendee has the

option, after taking careful examination of the subject of sale, either to confirm the deal or to annul it.[278] In this setting, examination is the act of having a careful viewing of the object as inspecting and discovering such errors or defects which will render that object unfit for being subject of that transaction. It is quoted in *Ottoman* code known as *Mujallah* for instance that if buyer buys a property without it is shown to him, he possesses a right as option until he has seen it and wishes to confirm the sale, this is known as option of inspection.[279]

3.2. Various Applications of *Khīyyār al-Rūyah*

Hanafi School[280] offers a particularly rich conceptualization; the official view of this school pertaining to option of inspection says that where in sale the goods are not readily available at the meeting place, and buyer had not given the inspection chance, the sale is not valid unless two queries are to be ensured.[281]

a) Where the goods belong to the vender

b) Where there is an adequate explanation on the goods by vender is ensured its certainty.

Furthermore, where the goods are available at the place of transaction but veiled from proper checking, then the venders are bound to describe it properly in such a way that make it clear to the vendee that specific item is the subject of sale. Such as; "I have sold to you what is in this box or carton.' For this, where the goods are not presently available at the same spot the vender should have to explain about and specify where the goods are kept, and should also describe the necessary specifications, quality, quantity, etc. [282] To illustrate, the vender may say, "I have sold to you the animal in Mr. 'Z' house." It is valid, provided that the House of Mr. 'Z' is known to

[278]Al-*Kāsānī, Badāī al Sanāī* (Cāiro: *Sharika Al Mtbuat al Ilmiyya* ,1910), Vol 5.p. 292: *Mujallah al-Ahkām al-Adliyyah*, Art. 320.
[279]Ibid., *Mujallah.*
[280]*Ibn al Rushed, Bidaya t al Mujtahid* ,2nd ed (Karachi: Dārr Kutub al Sadat, n.d), vol 2 p.178.
[281]*Kāsānī, Badāī al Sanāī,*vol. 5, p. 268:*Abdullah Ibn Qudāmah. Almughnī,* vol. 3, p. 579.
[282]*Al-Kāsānī, Badāī al Sanāī*, Vol 5.p.292: Ibn*ʿĀbidīn, Radd al- Mukhtār,* 2nded (Cāiro: Mustafa al- Bābi, al-Halbi, 1966), vol IV, p. 68.

the vendee and the animal is certain and significant to him. Further, it is also ensured that he has specific or the only one of that kind of sale property dumped in such specific dumping place. To illustrate, if Mr. 'G' says that "I have sold to you my car" provided that Mr. 'G' does not have any other car, by this way only the sale become valid. However, it is a comprehensive practice to safeguarde the interests of both the vender and the vendee. As well as that proposition carries another implication, that there is a corresponding duty on the vendee to insist to verify the particular property he is about to get and to protect himself from further complications.[283]

The *Hanafi* jurists further specify the circumstances where this option can arise. For instance, in a situation where the transaction becomes an obligatory debt, that vender get some quantity of rice without it get inspected physically, on condition that it will be delivered to him at later time. But with the understanding that payment made to the vender serves as debt on vender so there would be no option as it becomes *salam* sale.

Based on the above, another example is of hire, *Al-Ijāra*[284] that in such a case where a piece of land is got on *Ijāra* (hired) but inspection has not been done. Here he has a right of option to return after inspection. For this, further extension of its application could be found in cases of partition in co-ownership. In case of co-ownership when co-owner of property divided it without the other's inspection of his portion, then farmer can operate the option of inspection. Likewise, in cases of reconciliatory claim where anyone promises to any claimant, that he will give him some another property in reconciliation but without giving him opportunity to inspect that, here that claimant can use his right of option for inspection.

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[283] Mohd Murshidi Mohd Noor, "The Rights of *Khiyār* (Option) in the Issue of Consumerism in Malaysia" Middle-East Journal of Scientific Research (2013)13 (2): 154-161.

[284] Mujallah al-Ahkām al-Adliyyah, Art.499, 503.

3.3 Implication of ***Khīyyār al-Rūyah***

With that overview into the conceptualization of *Khīyyār al Rūyah*, the next step in this debate is its implication. That how this *Khīyyār* gives the party a right to annul a contract or to collect compensation to remove the unjust loss that he or she has suffered. Up to what extent this option provides the right to rescind the contract if seller cause loss to the buyer,manners of conducting the inspection and the termination of option of *Khīyyār al Rūyah,* these all issues will be probed as under*;*

a) When Does Option of Inspection Starts to Operate?

With that understanding, it can be argued that option of inspection starts to operate after the subject of sale is being seen by the party, even in case if contract was validated prior to inspection it would not bind the parties. The concerned parties entitled to this option have right to return the sale subject to buyer, where the subject matter of sale has not been checked initially at the beginning of the transaction or thereafter within time period, before the subject of sale got changed or converted into another form. Furthermore, it is also pertinent to mention that, where subject matter of sale is a known property, such as animals, lands, vehicles and description of the specifications are also described to remove any uncertainty for minimizing any risk. Thus, in these situations this option shall not arise.[285]

b) Manners of Conducting the Inspection

In terms of manners of conducting inspection, various methods have been provided by law to have inspection, as the goods or objects of sale differs in variety and extent. To this, for the purpose of the application of this option (*Khīyyār al Rūyah)* here we find distinct nature of

[285]*Kāsānī, Badāī al Sanāī*, vol 5.p.292.

goods. So, the inspection may differ from matter to matter. Up to this point, initially it is important to observe this fact that whether the goods will serve the purpose for which sale will be conducted. The examination of the object could be taken by any mean that will properly lead to actual detection of soundness of the object of sale is questioned in terms of the examination of the entire sale property or part thereof by way of sample.[286] However, if object of sale is an edible item and its fitness can be judged through tasting, then it is up to the buyer to taste it. Along the same lines, if certain goods require the sense of smell for instances perfumes, then he may satisfy himself by taking its fragrance. If the commodity requires touching then he has rightful to take his satisfaction about its fitness by touching it like in case of cloths, gown etc. With that, one may conclude this by stating that in any possible manner buyer has right to take careful sight of the object of sale up to the extent of possibility.[287] Whereas if a sale transaction is concluded through sample, the transaction is considered valid subject to the fitness of remaining uninspected goods. With that, if these remaining goods are of equivalent in standard with the sample shown, the transaction stands valid. However, there may be situations where one of the parties to a transaction may be in need of expert to have Judged the item, wherever he may be of abnormal sensory organs. In such a case the abnormal person should have a *wakil* or expert as legal representative to conduct the examination of goods and whatever applicable to principle party will apply to representative as well.

Perhaps matters relating to the sale of immoveable property where sampling does not satisfy the requirement of full inspection of the subject property and only the inspection on the whole of the subject could be satisfactory for the purpose such as in cases of 'House' and 'Farms'. For example, Mr. 'Z' wants to sell his eight bedrooms house. The requirement of the law here is that

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[286]*Zuhailee Wahbā, al fiqh al IslamiWa Adillatuhū,* vol. iv, p.271: *Hashim Faris Abdūn, "Al Shart wa Asruhū fi 'Àqd al Bai", Aāfaq al Shari'ah Kuwait,* vol 4 (2015).
[287]*Al-Kāsānī, Badāī al Sanāī,* vol 5.p.292-94.

the purchaser ‘Y’ has right to see and examine each room of the house. It is not enough for the satisfactory inspection that he says ‘Y’ to inspect four rooms and take the other four for granted. So far by this way it is not fulfilling the purpose of the application of *Khīyyār al-Rūyah*. Accordingly, in case of farm lands, these have to be inspected properly in the term of allocation, location and measures. Each of the farm land must be inspected separately. Similarly, in case of flock of sheep/goats the same principle will apply, all have to be inspected separately.[288] Along the same lines, in another situation where commodity is sold in numbers, for instances coconut, radish fruit etc. That being said, the rule is considered satisfied if all are inspected thoroughly, as inspecting randomly, but one out of them will not be considered well sufficient. In contrast, when one takes the case of other goods as the subject of sale transaction, such as wheat, crop, cotton, garlic etc., inspecting some parts thereof by way of sampling; if satisfies remaining is sound enough, this is considered valid sale.[289]

c) Termination of Option of Inspection (*Khīyyār al Rūyah*)

Having discussed the manners of conducting the inspection, the next step in this debate is termination of option of *Khīyyār al Rūyah,* this option comes to an end if any of the following incidents take place.

I. *Al-Tarādhi* (Mutual Agreement)

Whereby obvious and unequivocal term, or by explicit act, there accrue any consensus *Al-Ridha*, that a contract of sale has now been perfected by both the parties to contract in such a situation this option came to an end. To illustrate, if the vender says; now contract is ‘being done between us’ or any other phrase which indicates that the execution of contract has been perfected. In time, however, as for the act is concerned where vendee has put into use the goods

[288] *Mujallah al-Ahkām al-Adliyyah*, Art .326-327.
[289] *Al Zarqā, Àqd al-Bai*, p.46-50.

bought or consumed it properly with inspection or without inspection. It positively shows his consent to the maturity of contract such as usage, or disposing of the property through hire, mortgage or gift of the item.[290]

II. ***Itlāf Mal –Al-Aqad*** **(**Destruction of subject matter**;** goods**)**

Furthermore, another incident is that where the goods or the object of sale were destroyed, irrespective of the fact whether it was caused by the act of buyer, or due to interference of any third party or natural disaster, in all the above said situations the option of inspection is terminated.[291]

III. ***Mauwt Sahib 'Al-Khīyyār*** **(**Death of the option holder**)**

It may simply be stated that where a party holds the right of exercising the option of inspection dies, then according to opinion of *Hanafi* and *Hanblī* schools the option of inspection comes to its end, as it is not heritable or transferable. However, *Mālaki* school differs with this viewpoint and opined that it is like any other right transferable.[292]

IV. ***Tazyeed al- Ma'qud alie*** (Increase in subject matter)

One may conclude this section by stating that where any increase or addition is consciously put to the subject of sale, after possession is taken by vendee which render the subject matter unreturnable, as an example increasing a building on a plot of land, which render the right to exercising option of inspection is terminated.

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[290]*Al-Kāsānī, Badāī al Sanāī,* p.297:*Ibn al Hamām, Fatĥ al-Qadīr*, p.141.
[291]*Zuhailee Wahbā Al 'Fiqh Al Islamī Wa Adilah tu* ,vol. iv, p.274.
[292]*Kāsānī, Badāī al Sanāī*, vol. 5, p. 268: *Abdullah Ibn Qudāmah. Almughnī* vol. 3, p. 579.

Mālaki jurists however, further articulate their opinion about the *Khīyyār al-Rūyah* slight differently than *Hanafi* jurists, they opined that if purchaser purchases some items that he has not perceived or not shown to him, he has a right to exercise the option, relying on Hadith;

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

With that prospect in mind, *Mālaki* jurists have linked this option with two situations. The first situation is that where the goods are physically available at spot but not inspected by purchaser because they were in packing wrapped with protections and concealed such as sugar in sacks. In this situation sale is not valid unless the goods are opened to inspect, where the opening of sacks does not cause any damage to the object. For this, the second situation covers such transactions where the objects of sale or goods are not physically available at the same spot. Irrespective of the circumstances whether to make these goods available at the spot makes problem and even so, whether the goods are within or outside the town. The sale in this case is valid but after meeting two conditions:

(1) The goods or objects of sale must be described with such precision as relating to their nature and type.

(2) The option of inspection should be stipulated.

In case of similar goods inspecting some of their sample is sufficient; while in case of dissimilar goods mere inspection of sample does not fulfill the purpose because in this case the goods are not same ab initio.[293] This also could be applicable where description arises in written form of brochure.

[293]*Abdu al Rehman al Jazairī, Kitāb al Fiqh al Madhāhib al Arba'a* (Baīrut: Dārr al Kutub al Ilmiyya), 2003, vol II, p. 198.

Whereas in a case, if goods sheathed in proactive layer (cover) for instance almonds etc., the inspection of some selective quantity is sufficient for remaining others too. Nevertheless, where vendee finds the difference in excessive form, here he has the option of confirming the sale or to return the goods, then in case if he has already looked upon the deficiency but he has decided to waive it, he can not attract this right irrespective of the fact that bulk of the goods are defective, it is just like implied consent. It is to be noted that in similar situation where he was given a chance to examine top of a sack and presumption was built through that view or outlook, that rest of the part is not so affected or soaked but subsequently found contrary that remaining has been badly effected as such, then he has an option to return it.

In another assumption, if there arises any conflict between parties in a transaction where vendee claims that at the time of inspection the nature of goods was different and got change at the time of purchase and the vender denies the claim about this change in nature of goods thereafter in such a case the estimation or assessment from an expert should be called and he' will assess whether customarily the period between inspection and purchase is material enough to cause change in goods sold or not and judgment will go in favor of the rightful claim on the basis of experts opinion.[294]

4. The Role of *Khīyyāral-Shart* (Option of stipulation) in Financial Transactions

4.1 Concept of *Khīyyār al-Shart*

In terms of definition, *Al-Shart* stipulation denotes an act of stating firmly as requirement for ultimate happening or making any condition or any prerequisite for the fulfillment of any transaction. To refer back to the discussion about conditions outlined earlier, as it is pertinent to

[294]Ibid., p.199.

mention that the entire concept of option of stipulation revolves around the question, whether it is permitted in contract for parties to make stipulation pertaining to its execution?

It was also discussed that majority of the jurists having the opinion that contracting parties can make option of stipulations and even can also validly put any stipulation in favor of third party.[295] Suppose, "I have bought this item from you provided Mr. 'X' has the option to confirm or resend."

Whereas, *Khīyyār al -Shart* derives its authority form the traditions of Holy Prophet, in the first place is a famous *Hadīth* on *Habban ibn Muqiz* who reportedly committed cheating or attempted to defraud in his contractual relation, at that time people complained against his behavior to The Holy Prophet "ﷺ". The Prophet "ﷺ" said;

> "Whenever any of you carries out a sale transaction, he should say. 'No cheating and I have the option for three days." [296]

Just in the same way, another tradition of Prophet "ﷺ" transmitted by *Tirmidhi* from *Amr Ibn Auuf* which also declares: "The Muslims are on their stipulations." [297]

4.2. Various Views of Jurists on its Applications

The brief analyses of the views of different schools of Islamic Jurisprudence about various applications of the option of stipulation are as follows:

I. *Malik'ī* School

It could therefore be conceivable that the definition and meanings given to the concept of option in terms of stipulation according to *Malik'ī* school are susceptible to different implications from a linguistic and conceptual viewpoint, due to the variability in interpretation. The jurist of this school opined that this Khiỹār or option can be exercised validly by the buyer or the seller,

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[295] *Hashim Faris Abdūn "Al Shart wa Asruhū fi 'Àqd al Bai", Aāfaq al Shari'ah Kuwait,* vol 4 (2015).
[296] *Sahih Bukhārī,* no. 2117, 2407.6964.
[297] *Sahih Tirmidhī*, no. 1352.

and even for the third party it is permitted where right to annul or confirm the contract is contingent to the opinion of third party.[298] To illustrate if one of the parties to contract says:

"I have bought it for you at 'Y' consideration provided Mr. 'Z' consent or agrees." Here the conclusion of transaction is made contingent to the sole agreement of Mr. 'Z' who is given the right to do so, Mr. Z is now seizing of the agreement.[299] While in another transaction the implication could be different where purchaser says: "I have purchased it, pending consultation with Mr. Z." Here the principle party has to last say on whether to confirm or to reject the transaction and not Mr. Z. whereas in any situation if *Wakil* is appointed for deal, then both will share the option for confirmation, the representative and the principle party.

As for the period or timeframe is concerned within which the options to be exercise. The views of *Malik'ī* jurists vary from transaction to transaction according to subject of sale, in such cases where transaction concerns with dealing of perishable fruits, the period shall not be extended more than one day.[300] Though, in transaction dealing on animals and clothes, the period is extended up to three days. However, in case of house and farm lands the period is considered one month and period of computation of time starts immediately after the conclusion of the contract.[301]

II. Hanafī School

The principle enunciated by *Malik'ī* jurist pertaining to *Khīyyār al- Shart* for the most part, applicable and permitted among *Hanafi* school; nevertheless, jurists of this school went ahead to confer the participatory role, confirming or annulling the transaction extend the scope of its

[298] *Ibn Arafā Ad- Dusūqī, Ĥāshiyat al-Dusūqī*, vol.3, p.91.
[299] *Al Jazairī, A. Al- fiqh al- Mazahib Al Arba'a*, vol II, p.175.
[300] *Noman bin Mubarak Jgheem, "Hukam al-Shrūt al Muqtarenahbe al 'Aqud fi Al Fiqh al Islami" Mujallah al Mehkamah,* (1998), no. 16.
[301] *Al Sharbinī, Mughnī al-Muhtāj*, vol. 2, p. 47: *Al-Kāsānī, Badāī al Sanāī,* vol 5.p. 174.

legitimacy on any of the representative as well if there along with principal parties. On the contrary, the *Malik'ī* Jurists consider that either the representative or the party can exercise the option in case of stipulation.[302]

In terms of comparison *Hanafi* jurists divide it into two categories, first which susceptible to option of stipulation and second not susceptible to this option such as *Nikāh, Talāq, Bequest, Nadhar,* etc.[303] Whereas its period of commencement and termination is concerned, *Hanafi* jurists consider three days for its termination after the contract gets concluded. In case, if the period exceeds for more than three days, the contract becomes valid, except the *Muhammad al Shaybānī*, who holds a bit contradictory opinion. While in exceptional circumstances where the vendee takes possession of the sale subject and unfortunately it gets perished, in these situations he is liable to render it on assessed price. This assessment is to be considered from the date, when he got into the possession of the sale subject and not from the date the same got perished.[304]

III. Hanblī and *Shāfi'ī* School's Views

Broadly speaking, the views given on this issue by the jurists of these two schools are not varying fundamentally from the views of aforesaid jurists of other two schools. The difference lies on certain matters in their details, like period, or length of stipulation. With that, in their general opinion a transaction done with a condition in reverence of requirement of the contract is valid and condition is of force.[305] Similarly, any dealing done in pursuance of usage and custom prevailing in locality is right and condition is also valid. To refer back to the discussion outlined

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[302]Ibid., vol 5.p. 268.

[303]*Abdu al Rehman al Jazairī, Kitāb al Fiqh al Madhāhib al Arba'a,* vol II, p. 159-160.
[304]*Zuhailee Wahbā. Al 'Fiqh Al Islamī Wa Adilah tu, vol*. iv, p.255-256.
[305]*Abi Ishaq al Shirazī, Al Muhazab*, 1st edit (Beīrut: Dārr al Kutub al Ilmiyya, 1995), vol.2, p.7: *Al Sharbinī Mughnī al-Muhtāj*. 2, p. 47.

earlier, this attitude of generality of Muslim jurists about this issue as pointed out in discussion supra, one may conclude that *Shari'ah* law is a dynamic legal system, thus allows freedom of contract and stipulation thereof.[306]

5. The Role of *Khīyyāral 'Aib* (Option for Defect) in Financial Transactions

5.1 Concept of *Khīyyāral 'Aib*

Generally speaking, it can be argued that *Khīyyāral-'Aib* is an option or a right vested upon contractual parties, which mostly be buyer or seller might be to rescind the transaction when any of the parties discover defect in either the subject of sale or in the price paid but was unknown to him at the time of transaction, that makes to reduce its value, or makes fall short of its specifications. This sort of option comes into effect when the contract has been concluded. Wherever, the contract is being in the state of negotiation or still in process of discussion the affected party cannot exercise this option as right. For this, as it is known that to ensure about the subject's freedom from defect is the right of vendee in fair transaction. Thus logic or rational of this *Khīyyār* is to preserve the principles of fairness and justice in trade to build healthy commercial activity.[307] However, this doctrine of *Khīyyār al-Aib* renders the vendee power to revoke and not to adhere compliance with the contractual obligation as the subject matter is defected without his fault. It is made to afford protection or safeguard for vendee in term of such rights which were violated unduly.[308]

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[306] *Abdullah Ibn Qudāmah. Almughnī*, vol 3, p.585: *Ibn al Hamām,Fatĥ al-Qadīr* (Beīrut: Dārr al Kutub al Ilmiyya, n.d.) vol.5, p.111.

[307] Mohd. Yasin, "The role of *Khiyār* al *Aib in Bay' Bithaman Ajil*", Journal of Islamic financial service (2007) vol, II (3): Parviz Bagheri •Kamal Halili Hassan, "The application of the *Khiyāral- 'Aib* (option of defect) principle in on-line contracts and consumer rights" Eur J Law Econ (2012) 33:565–575.

[308] Dayani, A.A.R, "The comparison of the principles of *Khiyāral-'Aib* in '*Fiqh,* Civil law, European law and French law", Journal of Law & Political Science, Tehran, (2012) 37(3), 127-154.

5.2. The Legitimacy of *Khīyyār-Al 'Aib*

The legitimacy of this option lies with the fact that any transaction of sale purchase agreement must be done in pursuance of mutual consent in this sense both the vender and vendee give free consent to the condition and agrees willingly to make contract without effects of any undue influence, threat or fraud and any party can take revocation when the other party is not complying with; as it is noted in *Mujallah* in its Article:

> "Any buyer in Islamic law has an automatic implied warranty against latent defect in the goods purchased."[309]

Moreover, *Khīyyār al-Aib* has its source from different traditions reported form Prophet"ﷺ". As it was reported in *Hadith* narrated by *Hakim bin Hazam* that "The Holy Prophet""ﷺ"said:

> "The buyer and the seller have the option of cancelling or confirming the bargain unless they separate and if they spoke the truth and made clear the defects of the goods, then they would be blessed in their bargain, and if they told lies and hide some facts, their bargain would be deprived of Allah's blessing".[310]

Besides this there is another Hadith narrated by *Uzba bin Amir;* Holy Prophet "ﷺ" says:

> "A Muslim is the brother of a fellow Muslim. It is not lawful for a Muslim to sell his fellow-Muslim a deficient item unless he shows him this defect."[311]

So, the simple interpretation of theses quotations proves the existence and legitimizes the application of *Khīyyār al-Aib*in contractual relationship.

5.3. Classification and 'Effect' of '*Aib* (Defect)

Defect in object of sale renders it unfit to be a subject of another sale transaction. It is not valid for a Muslim to sell his fellow brother those items, goods etc. which are defective.

Even where in a contract, no condition is stipulated for the exercise of right of option of defect; there is an implied warranty that subject matter must be free from defect. In other words, it is

[309] *Mujallah al-Ahkām al-Adliyyah*, Art .336.
[310] *Sahih Bukhārī*, no.2079.
[311] Ibid., 2165.

compulsory that subject of sale should be sound and free from defects. Ultimately, one should be cognizant of the fact that an unsound subject matter may result agreements rendering void one.

'*Aib'* is an Arabic word and its plural is 'ūyub' means defects. Conventionally it can be classified as under:

I. Natural **II.** Artificial

(i) NATURAL Defects (*ūyub*):

As a rule, whichever defects form part of original structure are natural defect. Like, habit culture or trail of the subject matter, which is not caused or attached into subject matter under reference through an unnatural process or procedure such as alteration in subject matter caused by human effort. Natural defect further be divided into two types:

(i) *Zāhir* (Ostensible/Manifest)

(ii) *Bātin* (Hidden/Latent)

Zāhir or ostensible defects denote which is unusual to natural behaviour or any obvious uncaused fact which causes the diminution of value in subject matter of sale. For instance, disruptive, awkward behaviour of an animal which makes it uncomfort for his beneficial character like lameness, abnormal gait of an animal or inability of an animal to carry goods or make that animal less potential for transportation.

Whereas *Bātin* defect is such kind of defect which is not so obvious and not perceivable without proper checking, it is found in sheathed items, for instance defect in Almonds Kolanuts, Watermelon etc.[312]

[312]Abdu al Rehman al *Jazairī*, *Kitāb* al Fiqh al Madhāhib al Arba'a, 2nd ed (Beīrut, *Dārr al Kutub al Ilmiyya*, 2003) vol II,p. 171.

(II) Artificial Defect

A defect in any object or item is called artificial if it is attached into it through unnatural process such as by any alteration caused by any act done by human being or any external effect which alter the nature of subject matter of sale. To illustrate, if vender mixes pure natural cow milk with any substance like water, milk powder or mixes butter with oil or he ties the udder of a cow to store milk in order to deceive the vendee being udder appear big to attract the attention in market.[313]

Mālaki school offers particularly rich conceptualization, they opined that if the defect devalues the subject of sale, for instance the unruliness of the animal or where the animal found impotent or lame or it appears that animal is effected by some disease or suffering some ailment, then if that ailment/defect does not render the animal useless for the purpose to which it is bought, at that point it should be kept or retained by vendee.[314] But in case if the defect will make the vendee otherwise that he lose or forgo the benefit for which the subject was bought. Here in that case he has right to return it to vender. To illustrate, if Mr. 'X' buys a lame for the purpose to offer sacrifice and lame has cut on its ear, which render it not fitter or suitable to sacrifice then. Mr. 'X' has right to invoke the option of defect by returning it to vender. Similarly, if Mr. 'Y' buys a dress and later on he finds that it is not fit to wear, because it is too small or tight not to be fitting him, he can return it to vender. However, if the defect is of the nature that it can be easily fixed without vanishing the subject matter such as by washing or any other way, then that should be fixed without going into the exercise of the option.[315]

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[313]Ibid.
[314]Ibid., 172.
[315]Ahmad al *Salusi, Fiqh al Bai wa Istisāq* (Qatar: Dārr al Saqafah, 2003), vol, I, p.653.

It is important to note, there are certain circumstances where returning of the subject matter found defective becomes difficult. For example, the first situation arises where the object of sale is vanished after conclusion of contract. If this happens, it is immaterial whether the destruction caused after the vendee has taken possession of the object under reference from vender or not. It is also immaterial whether vendee was aware of the defect prior to the destruction of subject matter or not? And whether opted for it or not, for example, a vendee got an animal and he slaughtered that animal or animal died his natural death, even he discovered a defect, it is not possible for him to return the subject matter to the vender.[316]

Another situation may perhaps be that the vendee has consented to overlook the defect after he got aware of it. The vendee may have given his unconditional approval to the defect which he becomes aware of on time but later the conflict arose as to the possibility of giving back the subject matter to the vender or not, like, where the vendee in a case opted to put into use the dress he bought or animal he got in a sale, here vendee must deem to have forfeited his option of return. Same is the case where there is a clear consent to be given prior to the dispute arose. Whereas exceptionally to this rule supposed in a different case where a vendee made a purchase of a house, he got possessions, occupied it, or did anything which tantamount to his possession and defect is observed, such as cracks in building or any other fact which is not suitable for peaceful enjoyment of the house. In this case return is possible even though he stayed there or kept residing in the place after becoming aware of the defect. The difference lies in this situation for simple reason that the vendee's occupation of the house for certain time does not affect the value of the property; it does not reduce the worth of the house. This principle applies to all those

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[316]*Abdu al Rehman al Jazairī, Kitāb al Fiqh al Madhāhib al Arba'a*, p. 1774-77: *Ahmad al Hajji al Kurdi, Ali Khalid, AL Madhāhib al Fiqhiyya al Arba'a Āhmīiyatuha wa Atwāruhā usūl u Hā wa Āsaruha* (Kuwait: IDārrah al Iftāh 2015).

cases where reduction of value is not in question. Henceforth, in contradistinction to aforesaid principle it is different, if the vendee is aware of the defect and he has opted not to inform the vender and has continued to proceed in occupation of house without any complaint. Therefore, it is implied consent and no return is to be entertained from him. Similarly, whoever enjoys the usufruct of subject of sale, he consumed it in some way, and person is deemed to have rendered his consent, except in the following situations.[317]

In the first place a situation where the defect happened into subject matter of sale after the contract got concluded but caused due to certain doing of vendee, then the vender in such a situation has the right of option to either return the price or retain it with defect occurred but then the vender will forfeit some portion of price in order to balance the defect caused in the good sold.[318] The vendee shall have no excuse or make complain on aforesaid defect realized in the transaction.

In a similar vein, in another distinguished situation, if a defect is caused by the vendee, he is bound to render whole the price agreed upon for sale transaction; even if the delivery of possession has not taken place and yet price is to be fixed, the vendee is liable to pay without further excuses. While in the same transaction if the vendee comes to know about old defects, which attracted to the subject matter in period while it was in the passion of seller, here vendee has a right to return the subject of sale without any payment subject to the payment of damages for earlier said defect caused by him. To be sure, return will be essentially for only those defects which were not brought into vendee's knowledge during the said transaction.[319]

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[317]Ibid., 180.
[318]Ibid.
[319]Ibid., 177.

Comparatively, in another case where defect in subject matter of sale neither caused by the vender nor caused by the vendee, but happens due to natural disaster or by the subject matter itself, in this situation the vendee can exercise his right to return the subject matter of sale to vender and make complain to claim back the price paid, or he may be able to get a waiver of same part of the price from the seller. Just in same way, in second situation where the defect due to the subject matter itself, for instance a horse is bought and immediately thereafter, causes injury and breaks his leg and defect is caused to himself; the rule expatiated in above case governed the situation here too but to be dissimilar, if he departs from the session of contract and takes over the control of horse in this case he may have no right to return the subject matter of contract to the vender.[320]T he *Shāfi'ī* jurists however, further mentioned that if a defect occurrs after the vendee takes over the possession and an old defect has been also deducted in the subject matter and that happens to be attached with, while the subject is in possession of vender and new defect is essentially to the continuity of the previous defect. Moreover, if the vendee notices the new defect before deducting the old defect, at this point the option of buyer for defect can be dealt with subject to one the ensuing.

(1) Annulment of the sale transaction where new defect is befallen of old defect and is in the knowledge of the vender, without payment of any price form the vendee or the vendee should agree to give free consent for retaining the subject matter with old defect, though without taking compensation from vender.

(2) Agreement of both the parties on view, either to annul the sale transaction or to confirm it with compensatory payment from the buyer or from the seller as it deems fit to the situation.

[320]Ibid.

(3) Whereas in case of conflict when they do not agree, then the opinion of the one who wishes to execute the contract would be preferred and implemented whether it is a seller or buyer, and the liability of compensation may be determined thereof.[321] Generally it is implied warranty that a sale without any stipulation makes it necessary, the sold item should be free from defect known as *Bara'atunm mina al 'Aib*.[322]

6. ***Khīyyār Al-Majlis al-Àqd'*** (Option of the meeting place or Option of Withdrawal before Parting)

To refer back to the discussion outlined earlier in previous chapter, it is perhaps necessary for the sack of completeness to be concluded that *Majlisal-Àqd* is the meeting point where the offer and acceptance culminate into agreement with intention to develop a legal relation in terms of contractual liabilities between transacting parties. As it is considered in the preponderant view of the *Hanafī* and *Malakī* school. Besides, *Shāfi'ī* and *Hanblī* jurists opined that in spite of the concurrence of offer and acceptance, yet the transaction does not become final by mere construction per se.[323] In fact from this point arose the question of option of *Majlis al-Àqd* option of withdrawal before parting in relation to al-*Majlis* or contracting session. *Majlis al-Àqd* refers to the period of time which starts from issuance of an offer and continues till the contracting parties engaged in the conclusion of the contract and ends with the separation, whether it occurs by departing one of the parties physically from the place of the contract or agreement on the option or by any event which indicates negotiations are concluded or suspended. However, legally, option of meeting place or session of contract, termed in Arabic '*Khīyyār al Majlis al-Àqd',* means the option or right of withdrawal for the parties involved to terminate the legal act

[321]Ibid., 188-194.
[322]Ibid., 179.
[323]*Kāsānī, Badāī al Sanāī*, Vol 5.p.134: Abi Ishaq al Shirazi, Al Muhazab, vol.2, p.7: Abdullah Ibn Qudāmah Almughni, vol 1, p.797.

unilaterally. In any case, the contracting parties so long as they are not departed from contracting place or they are still into session of contract are legally endowed with right of option to rescind the transaction yet to be constituted or to confirm it before the termination of meeting.[324] The option of *Majlis al-Àqd* initially linked with the formation of contract, as so *Majli al-Àqd* deemed to be expired by constitution of contract according to *Hanafi* and *Malaki* schools. According to the jurists of these schools, the exercise of the doctrine of *Majlis al-Àqd* is questioned due to certain explanations.

The basis for the aforementioned contention is built on the fact that as it is given in *Qur'anic* verses that "Covenants should be fulfilled,"[325] so the option of *Majlis* would be a bar to such fulfillment, whereas convent are the outcomes of mutual assent by the way of normal offer and acceptance, which does not therefore need to wait till the meeting place ends. Despite the fact, that traditions reported to comment on *Khīyyār-al-Majlis* regarded by the preponed of this option as in conflict with the above-mentioned *Qur'anic* verse. And it is quite settled principle of Islamic Jurisprudence that no *Hadith* is in conflict with the verse of *Qur'an*, rather it must be elucidating the verse, hence they considered it valid before the completion of contract and rendered it *Khīyyār al Qabūl*.

Shāfi'ī and *Hanblī* schools, the exponents of doctrine of *Khīyyār al Majlis* opined that where on covenant formed by way of offer and acceptance, it remains valid but not binding. So long as, the parties to transaction remain present physically at meeting place as each of contractual participant reserve the option to confirm or rescind the contract.[326]As it was pointed out supra that *Majlis al-Àqd* is referred to in its legal sense as the time and place factor, within which offer

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[324]*Zuhailee Wahbā. Al 'Fiqh Al Islamī Wa Adilah tu* , vol, v p.3517.
[325]*Qur'an*, 4 .29:5,.1.
[326]*Jabir Abdul Hadī Salim,Majlis al Àqd fil al Fiqh al Islami wa al Huqūq al-Wadhei,* (*Al Iskan Dārriyah: Dārr al Jadeedah le al Nashar,* 2001).

and acceptance legally operate and finally develop into a contract, if offer is accepted in due course or rejected or withdrawn that would also take effect otherwise. When the offeror communicates his offer, he provides to offeree the chance to access the merits and demerits of the terms and conditions stipulated herewith. This chance continues until the offeree gives his assent or to deny it, provided that nothing vitiates the existence of the *Majlis al Àqd.*

6.1 Authority of the Option of Meeting Place

There are certain authorities quoted by Jurists in preponderance are as follows:

(i) Hadīth reported from Ibn Umar as said;

> "The Prophet "ﷺ" said; when two persons concluded a sale transaction each of them has right to annul it so long as they are not separated and are together (at the place of sale) are 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 in 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."[327]

(ii) *Hakim Bin Hazam* reported that the Prophet "ﷺ" said:

> "Thy buyer and seller have the option of canceling or confirming the deal unless they separated."[328]

(iii) *Ibn Umar* reported a tradition too as Prophet "ﷺ" 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 annual then the transaction becomes binding. *Ibn 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."[329]

(iv) Ibn Umar again narrated from Prophet "ﷺ" that:

> "No deal is settled and finalized unless the buyer and the seller separate except where the deal is made optional".[330]

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[327]Sahih al-Bukhārī, no.2109: Sahih Muslim, no.3658.
[328] Sahih Bukhārī 2110: Sahih Muslim, no. 3661.
[329]Sahih Bukhārī, no.2111: Sahih Muslim no. 3658.
[330] *Sahih Bukhārī,* no. 2112, *Sahih Muslim* no. 3659.

In addition to aforesaid traditions there are so many other traditions of this nature dealing with the subject in reference, as the summary of these authorities if put together will appear to mean that:

(i) Where a contract of sale is constituted, but contractual parties actually or legally presumed not to be departed from *Majlis al-Àqd*, then each party be legally endowed with the right of option to confirm or annul the transaction thereof.

(ii) Where the parties to a contract deported in the sense that *Majlis al-Àqd* is terminated, then they would no longer enjoy the option in reference.

(iii) Where in a situation, the parties are still together in the same *Majli*s (meeting) and one of the parties delegates the power to invoke right of option unto the other and delegate confirms the agreement, the contract is considered binding nonetheless the fact they are further staying together in the same *Majlis* (meeting) afterwards.

(iv) Whoever in a sale transaction agreed on having option of stipulation for any of the parties, the said transaction is not deemed final even if the meeting place over or terminated, unless after the expiry of the option of stipulation.

(v) Finally sale transaction may be of two types:

  a) First, where an option is stipulated (*Khīyyār al Majlis*) and;
  b) Second, where no option is stipulation which is termed as '*safaqatan'.* This is with reference to a tradition reported by *Umar* saying that;

"*Al-Bai Safaqatān aw Khīyyāran* that is either "*Safaqatān*" (free without conditions) or is with conditions.

However, the importance of operation of this option cannot be overemphasized. It is a proved reality that sale transactions are more often than not concluded in haste, hence with sale

is a process which requires close examination of the subject matter. As to its legality and genuineness, freedom from any defect and to ensure its fitness as to particular objectives of purchase. Either of the contracting parties can achieve their interest if this option is allowed.

7. ***Khīyyār Al-Tadlīs /Ghubn*** (Option of deception)

The concept essentially proposes that where either of the parties to a contract entails excessive deception, which may result to a fraud, at that point, effected party can bring into force the exercise of his right to return the soled item or its consideration paid as the case may be by operating the option of deception. Some of the jurists while writing on this legal proposition, try to draw some distinction between *Khīyyār al-Tadlīs, Khīyyār al-Ghubn* and *Khīyyār al Taghrīr*, but in generally the terms have the same legal implications on the subject matter.[331]

In this respect *Al-Ghubn* or *Tadlīs* is that act or expression which renders something to be real, whereas its value position is hidden and reality is somewhat different and by misrepresentation, one party got his interest in transaction.

7.1 Authority and Reliance

The basis for the aforementioned proposition is built upon the text of hadith, as it is reported form Prophet "ﷺ" that it is said:

"if any one of you transact a business he should say 'let there be no deceit."[332]

With that, authors on Islamic law quoted certain principles on *Tadlīs* or *Ghubn* in different ways. It is declared *Harām* in Islam to defraud or to make fraudulent transaction, where any party is defrauded in a transaction, he has this right to choose his option to rescind or confirm the transaction. He may retain the goods or return them to the vender. But in a situation where

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[331]Ahmad al Salusi, *Fiqh al Bai wa Istisāq (Qatar: Dārr al Saqafah,* 2003) vol , I, p .641 , 671: *Al Sharbinī*, *Mughnī al-Muhtāj(Baīrut :Dārr ahia al torāth al arbi*),vol. 2, p. 47.

[332]Zuhailee Wahbā. *Al 'Fiqh Al Islamī Wa Adilah tu,* p.275.

deceived party disposes off the subject of sale or consumes it on either way, he loses his right of option to annul the said transaction in which he is deceived. Similarly, if the subject matter purchased even if in a deceitful manner has been perished or destructed or any addition occurred, for instance any construction was built on land 'being subject of deceitful bargain' then the effected party has no right of option to annul earlier transaction.

8. ***Khīyyār Al-Thaman* (*Al-Naqd*)** (Option of nonpayment of price)

Apart from other contractual obligations, where it is settled during any transaction that the vendee will pay the price of the subject matter at certain given time, if party who is supposed to pay within due time fails to follow the limitation given, then there shall be no binding contract between the parties. If such a stipulation attached to any contract or if this is inserted as part of the sale agreement, the stipulation is valid and agreement is binding too. It is called 'nonpayment of the price option' or simply it is called '*Khīyyār al-Naqd*' that is money option."[333]

Hence, sale is considered complete if the purchaser pays the price within the limit of given timeframe, this should however differentiate from *bay al Salam* and also distinct from settlement for payment of debt is made as price on the buyer which he has to render gradually or on the happening of certain event. Thus, it is essential to ascertain the terms of the payment of price before finality of contract.

9. **Khīyyār*Al-Ta'yeen*** (Option of choice)

Khīyyār al-Ta'yeen may be termed as option of choice. This option would take effect in such a situation where the vendee has an option to choose from amongst the variety of object

[333]Mujallah al-Ahkām al-Adliyyah, Art.3; Zuhailee Wahbā. Al 'Fiqh Al Islamī Wa Adilah tu , p .275: *Noman bin Mubarak Jgheem, "Hukam al-Shrūt al Muqtarenah be al 'Aqud fi Al Fiqh al Islami" Mujallah al Mehkamah*, (1998), no 16 .

rendered for sale. Interestingly, it usually happens where quality and type of the subject dictates the price, the purchaser is given a chance to choose from different sets; one set having the best quality, another set having the superior quality and the third one is of inferior in quality comparatively. It is up to the vendee or purchaser to identify the desired one, once he identifies the subject matter the item is considered identified.

9.1 Essential Conditions

With that prospect in mind, to operate the maneuver of *Khīyyār al-Ta'yeen* the following should be met;

1. It would be applicable only in monetary dealings like sale.
2. The parties should choose on the basis of different grades best, superior, and inferior.
3. The quality and prices of the objects should not be the same, as it defects the choice.
4. The period of choice should be determined, that is, period should not be more than three days. [334]

10. Conclusion

Ultimately one should be cognizant of the fact that true intention of Islamic legal system is to ensure fairness and justice in mūamlāt. With that, it is important to acknowledge that the finality of contract or sale transaction may not rest wholly on the just essential requirement namely offer, acceptance and consideration which were prescribed for the validation of contract. In other words, and in the pertinent opinion of Islamic jurists, even though a contract of sale is

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[334]Mujallah, Chapter 6, Section, 4.

formed; the congruence of offer and acceptance does not become final by mere constitution of these requirements; it is still open to some other rights in form of options.

In this chapter, the issue of these allied requirements as well as the framework and tools that are available for contractual parties to deal with were examined in detail. The positive thing that emerges from the discussion in this regard is that the *Khīyyār*or option in *Fiqh'* al Mūamlāt is a framework which serves the objective of protecting the right of contractual parties.The notion of this framework in *Shari'ah* is essentially ethical as well as encompasses all kinds of rights without obligations that have financial implications, it mainly refers to a specific term of right of either or both contractual parties to meet or rescind the agreement. For this, these options are implemented into different ways, some are opted by consent of the contractual parties, while others are in the nature of right exciting for them due to the very operation of law, as it is revealed by discussion supra that contract may still be intact under circumstances where *Gharar* being linked with the subject of exchange, price etc., but then with a provision of options for the contractual parties to be affected by the same, the provision of this framework helps reduce *Gharar* and brings up into acceptable limits, it also reduces the risk of undue commission of any party deliberate or unintentional act. These options have justifications too on the basis of various larger benefits to the society, in this way parties are given a 'reassessment' or 'cooling off' period over which they can rethink about their contractual decisions by rational thinking to minimize possibility of risk or any other damaging factor.

However, it will become apparent that although these measures can mitigate some of the exposure to risks being faced by the parties. With this, one may conclude this section by adding some further essential characteristic for the right of customers that liability comes together with gain and risk. Mutual consent in a trade should be prevailing for both parties in order to evade

any bias action towards one party only. And to develop quality service and regular inspection for example, on the subject matter that meet the demand and requirements of customers and defects should be identified before conclusion of contract. Lastly, educate sellers' option will benefit them and retain their loyalty to the seller's company. The discussion has emphasized the way in which this branch of law promotes efficiency by encouraging the rightful disclosure of relevant and socially useful information, by granting the possessor of such information right to deal with others by disclosing what he knows. This right is in essence a flow of theory of contractual obligation as noted in chapter supra embracing the theoretical framework of "*Al Darar Yūzāl*" "*La darar wa la dirrār*", especially the segment for pre-contractual liabilities must be focused.

It is to be noted that in the next chapters object of research is two-fold. Firstly, it seeks to give an accurate depiction of the approach towards pre-contractual duties of disclosure in English legal system or common Law. Secondly, it attempts to juxtapose both Islamic law and common law systems so as to highlight their similarities and differences.

Chapter No. 6

Pre-Contractual Liabilities and the Rights of Parties in English Law

Chapter No. 6: Pre-Contractual Liabilities and the Rights of Parties in English Law

1. Introduction

The preceding chapters concentrated the discourse on the Islamic law of contract and its perception towards contractual liabilities. That embraces the theoretical framework of "*Al Dararl*"[335] "Haram must be eliminated" or in bit different terms but bearing same notion,[336] "There should be neither harming nor reciprocating harm", and *Khīyyārat* as tool within that framework to safeguard contracting parties. Throughout the discussion it has been shown that element of fairness and transparency is encouraged in Islamic law of contract, this especially includes the pre-contractual liabilities. Notably, in previous chapter it has been argued that these principles serve the very basic objective of Islamic legal system, that is to consider interest or expectations of contracting parties by providing certain measures that also serve the aim of the businessmen, because survival of business and protection of wealth rest upon the mechanism of mitigating risk of losses, misrepresentation or product defectiveness.

With that, it should be stated that this chapter continues with the discourse on topic of 'Pre-Contractual Liabilities and the Rights of Parties in English Law'. In this chapter research moves prominently with the detailed examination of the safeguard and protection provided in common law, elaborated in the two leading doctrines namely, "Caveat Emptor", caveat venditor and LCIG principles.

[335]*Mujallah,* Art 20.
[336]*Mujallah*, Art 19.

1.1. Concept and Significance of Pre-Contractual Liabilities in English Law of Transaction

Moving beyond Islamic thought, one should be cognizant of the fact that the main point in the discourse on the law of contract is its development from the maximum formalization through the maximum flexibility, there was a time when the agreement was considered to be properly made only by uttering of certain specific phrases by contractual parties. The agreements were initially considered to be only an auxiliary device helping people to reach their economic needs and goals, but it was relatively rare and uncommon at that stage. With the passage of time and by growth of changing goods, services and work agreements, contractual relations becoming the widest spread regulative tool, in so far that modern commercial market is primarily based on agreements. It is also a fact that due to deep influence by the commercialization of modern private law and changing trends, contemporary contract law got inevitably flexible in respect to the demands and trends of market and ready to borrow different concepts from other legal systems.

Thus, as some of the inevitable and logical consequences of developments of contract law, the procedure for conclusion of contractual relationship has also been modified, becoming on one hand more complicated and on the other hand flexible too. Which render it less standardized and more diverse. So as by the growth of variety of contracts with variety of modes, commercial activity is in need that law should be simpler, quicker, as well as with more reliable procedure for entering to a contractual obligation. Not only does the old emancipation practiced in English law nor even classic procedure for entering into contract used by other contemporary systems

does suit the needs of these developments of commercial market i.e., making an offer and its acceptance could not meet too much formal and complex requirements posed by market.[337]

It is affirmed that there are certain obligations to be fulfilled in every commercial transaction (sale purchase) prior to entering into an agreement. So, vender is to allow the vendee to inspect the sale items, in order to certify that the absence of any hidden or obvious defect; because information deficiencies play vital role in contract enforcement. If one of the parties lacks information, court could refuse to enforce the terms of agreement. Nevertheless, in newly upcoming developed commercial market, it is bit difficult to set question where the line is to be drawn or (should be drawn)? To determine the curve of information deficiencies of which the law will accept to disregard. For the perseverance of these basic rights of the seller and the buyer, private norms were not interested initially in English legal system. There were certain local policies regulating the trade fairs, along with that there were certain principles, those were guideline for the courts, like the key principle of Caveat Emptor etc., which is based on the theme factor that buyer had the chance to use his knowledge, to be careful or accept the cost of his inattention. The assumption was that buyer has to inspect the goods or otherwise ensure that they are suitable for transaction. Hence, with the passage of time in new developing era, the things got changed in this regard. The analyses of contemporary disclosure scenario portray that the information's liability pendulum has swung very much in favor of buyer. It could be said that seriousness of the maxim has been consign to history. With that increasing complexity of modern commerce has positioned the buyer at a hindrance. In the meantime, certain factors got increasing role, specifically to rely more and more upon skill, judgment and honesty of the seller etc.

[337] Myerson and Satterthwaite, "Efficient Mechanisms for Bilateral Trading". 29 Journal of Economic Theory (1983)

However, the rule survives limited by legislation and procedure. Predominantly in land transactions and somehow also found in contracts between private sellers, shipping and maritime law contracts.[338] The principle of *Caveat Emptor* has been employed in contractual sphere from centuries but yet distinguishes from its time of emergence reference to consumer contracts and in many aspects "*Caveat Venditor,* let the seller be aware" is prevailing which indicates a new approach. In time, however, it is apparent that Caveat Emptor principle certainly has enjoyed a steady evolution. Time witnessed that the the harshness of the rule has been tempered by legislation, yet remains prevalent within particular areas of legal regime even some subtleties of cross application do exist. The discussion in this chapter, however, aims to judge the gradual death of the Caveat Emptor principle and its substitution and conversion towards other rules, those emerged subsequently i.e., caveat venditor, and Least Cost Information Gatherer Principals etc. The Least Cost Information Gatherer states that information should be formed properly and communicated by such party who can afford to do so with the least expense that could properly balance the relationship between the vender and vendee.[339]

To this, another factor that adds to the dissatisfaction with the classic procedure for entering into agreements is complexity, in such way which does not always hold up to the particulars of the modern process of making agreement in respect to bit complex nature of transactions that attract huge amount of skills, time and money. Mostly, parties enter into lengthy negotiation process that take months, in addition it is more complicated than simple exchange through an offer and acceptance. Then, offers and counter offers crisscross etc., redeveloped the body of contract. In due course only at the end of lengthy technical evolvement of the constructing

[338]Royston, Miles Goods, Commercial Law (London: Penguin Books. 1995), p.138.
[339]S.J. Grossman, "The Informational Role of Warranties and Private Disclosure about Product Quality" Journal of Law and Economics 461 (1981), 24.

process effect the contractual formation from classic formation procedure into long negotiations pertaining numerous contractual provisions.

1.2. Implications of Various Approaches of Pre-contractual Liabilities in Legal Systems

With that realization to understand how the modern contract formation differ from the classic one lead towards changes of consumer-oriented market; these changes being attributed to more consumer-oriented market behaviour, wherein modern transactions are being encouraged and legal system is identifying exceptions and corollaries of modern developing rules like LCIG principle. In turn, it should be taken into account that if this trend of change is taken too far, it might end up slow down transactions due to approaches which may lead to wrong conclusions. In the long run, it would have major factor for running market to understand how the modern contract formation procedure distinct from classic one and balance the relationship between modern marketing sales methods and these principles, classical and developing together. With this in mind and to give an accurate depiction of the approach towards pre-contractual duties of disclosure in modern legal systems, discussion will also be taken along with other allied concepts covering the area. That starting with origin and historical development of "Caveat Emptor", its dilution towards caveat venditor and subsequently emergence of LCIG and also the status and practices of LCIG principles in decrees.

1.3 . Emergence of the Doctrine of Caveat Emptor

The phrase "Caveat Emptor literally means let the buyer beware", Emptor in Latin is the buyer and the verb Caveat connote as verb of carefulness or attentiveness.[340] It was the perfect

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[340] The term is actually part of a longer statement: *Caveat emptor, quiaignorare non debuit quod jus alienum emit*Let a purchaser bewares, for he ought not to be ignorant of the nature of the property which he is buying from another party .

principle for decades for any transaction which involves massive quantity of goods.[341] The expression, Caveat Emptor typically finds its placement in business related laws, the phrase was an easy focus for judicial thought, to be invoked or as a guide to be followed in cases where situation is difficult for consumer rights, and its role is to save the innocent sellers rights. The philosophy behind the rule was in fact the reliance placed by the buyer on his own skill or judgment. It actually set up on the premise that if buyer for suitability of the sale subject satisfies himself of the goods bought for his purpose, then he has no right to reject. This very Doctrine is enshrined in The Sale of Goods Act 1930, by way of section 16.[342] This provision matches the section 14 of previous legislation done in 1893, as English Act of 1893.[343] The Doctrine is based on the very basic principle that once a vendee is satisfied with the suitability condition of product, then he cannot claim subsequently the right to reject that particular product. The objective of the application of this rule/principle was to ensure that the vendee after he got assurance about the quality of the product, he has to stay with his own risk. The vendee has to use his personal skills or judgment except in the cases of misrepresentation or fraud. This is a sort of guideline to be followed amid baffling the uncertainties of litigation, all this reflect that law being is bent in the favor of the vender.

1.4. Concept of Caveat Emptor

As it was mentioned above that the philosophy behind the rule was in fact the trust placed by the purchaser on his personal ability or judgment. It is actually set upon the idea that if buyer for suitability, satisfied himself of the product for his purpose then he has no right to reject. Remarkably, in the early ages of English legal history, during medieval times enormously cases

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[341] Mitchell G. Bridge, The Sales of Goods (New York: Oxford University Press, 1997), p. 345.
[342] The Sale of Goods Act 1930.
[343] The Sale of Goods Act ,1893. 1894. http://www.legislation.gov.uk/ukpga/1893/71/enacted.

were decided in special courts by different rules, customs and local policies, but for other than the basic rights like right of vender to receive appropriate consideration in monetary transaction and the right of vendee to properties, private law was not much attracted. Interestingly, the criminal law and statute those prohibiting the use of false measures and tricks in transaction regulated the major claims about sales of goods and trade fair. Interestingly, there was no remedy available for breach of contract in the early developing periods of English common law.[344] The principle of Caveat Emptor was there as the guideline principle for the courts to deal with the sales transaction in medieval period, there were small fairs related to small quantities of limited types of goods to be sold. The vendee often had the ability to recognize the defective piece among the subject of sale and get the benefit by discussing the price with vender and acquire eventual reduction in price, instead of dealing a written warranty.

The case that clearly illustrates the situation up to seventeenth contrary is *channdelor* v. *Lopus*, in consort with that very case we have endeavored to search the early English cases upon the proposition concerned and to trace their subsequent changes.[345] In this case the plaintiff brought an action against a goldsmith for a stone which he said was a *Bezoa*r. It was however, a low-grade stone of another kind of cheap quality and value and was not that particular stone, found in the stomach of some animal. It was presumed that this special stone has medicinal properties. This case demonstrates evolving notions of 'warranty' as a contract legal theory under English law, it also specifically represents the scope of medieval principles like "Caveat Emptor" and implied term warranty.

As already noted, that defendant was a goldsmith and had a special skill about dealing precious gemstones. He sold out stone to Lopus for 100 pounds which he affirmed to him that

[344]Royston, Miles Goods, Commercial Law (London: Penguin Books. 1995), p.138.
[345]Mc, Murtrie, R. C. "Channdelor v. Lopus." *Harvard Law Review* 1, no. 4 (1887): 191-95. doi:10.2307/1321942.

stone was Bezoar. Subsequently *Lopus* came across to the fact that its medicinal properties were missing and the stone possessed no healing powers and filed a case against *Channdelor* before the King's Bench.

1.5. Implications of the Court's Ruling

Notably, in this case defendant pleaded not guilty, the court claimed that "the bare affirmation that it was a *Bezoar* stone, without warranting it to be so, is no cause of action; and although the defendant knew it to be no *Bezoar* stone, it is not material". As the learned judge says: "Everyone in selling wares will affirms them to be good, or the horse he sells to be sound".

Accordingly, this judgment declares two points:

1. The quality of *Bezoar* stone, which the owner (vender) had not expressly warranted is a risk the buyer must bear and;
2. That there was no fraud involved in selling the stone as *Bezoar*, so long as the seller did not expressly warrant it to be same and mere affirmation is not enough for it to be promise or warranty.

This rule was established that; false representation of goods by a seller is not actionable unless the seller made a warranty at the time of sale; one is not liable for failure to disclose information that is not requested. It was the scenario of the sales in the medieval times when the principle of Caveat Emptor was established on the guideline for the courts and the point was that the buyer has opportunity to apply his own skills carefully or accept the cost of his inattention.

2. The Role of Caveat Emptor and Scenario of the Sales in the Medieval Time

One should be cognizant of the fact that the scenario of sale in terms of warranties were very different than now, there was no implied warranties for buyer to assure the fitness of commodities he was going to have and only a seller making a false affirmation could be sued for fraud.[346] In this false affirmation case, written warranty was not needed. It was enough that vender got convinced to buy certain product due to the effects of false statement of vender. To implement this particular warranty even though the guarantee was not mentioned as contractual term. However, no implied term arose if the seller did not commit any false affirmation. As it was mentioned that this situation was perfect; when affairs were very small and small quantities of limited type of commodities to be sold. The venders often have chance to recognize defective subject of sale and be free to discuss the price with vendee who may instead of offering a written warranty can prefer on eventual reduction in price.

Furthermore, it is perhaps necessary to note that another case that also clearly illustrates the situation up to eighteenth century was[347]*Stuar*t v. *Wilkins* 1718, in this case the most extreme principle was formulated in endeavoring to escape from prevailing rule as established among trades' men. That a sound price was a warranty of soundness and it even expended so wide to set aside implied warranties entirely, explaining the rule that doctrine would apply in all cases where there was no deceit or an express warranty. In the after-math of these early decisions, the cases pertaining deceitfulness or express warranty were permitted without concerning to the seller's fate. To this, Judge Holt accelerated the lack of this condition by extending liability without

[346]Paul Michell. "The Development of Quality Obligations in Sales of Goods". LQR 117 (2001), p.650.
[347]Stuart vs Wilkins, 1718, 2 East 314.

intent of wrongness of seller to cases of implied warranty.[348] He favored the contractual approach by admitting basis of implied warranty for title; on the ground of vender's bare affirmation about the goods that he possessed is actually his own. Thus, to amount any claim of their fitness as a warranty, while the earliest cases regarding warranty were tortuous actions. In a similar vein, in year 1802 another case *"Parkinson v. Lee*"[349] formulated significance of this rule and endeavored to determine its scope widely. This case was decided unanimously and all the jury got consensus about the scope of the principle of Caveat Emptor, that the principle of Caveat Emptor applied to sales of all kinds of goods, commodities and that without an express type of warranty given by the vender the vendee or in absence of any fraudulent manner the vendee must bear his losses.[350]

Whereas with the passage of time disfavor upon these early cases and endeavored to again make the law change also noted clearly with intent to raise an implied warranty in certain cases. The cases like Hilbert v. Shea and Gardner v. Gray[351] decided in year 1807 and 1815 accordingly. It was announced by Lord Ellenborough that any case of sale by sample caused an implied warranty that the entire lot corresponded the sample provided. However, this verdict is based on the point that the vender had no opportunity to inspect the sale subject. This decision is an example of acceptance of implied warranty by English Judiciary.

Similarly, in case of Ward v. Hobbes[352] it was held by House of Lords, "seller is liable not to use deception or disguise to conceal the defect in the commodity being sold, that would amount to fraud on buyer". In this case it is also clearly said that yet the doctrine of Caveat Emptor does

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[348]McKendrick, Ewan. *Contract Law: Text, Cases, and Materials*, 298.(New York: Oxford University Press, 2018).
[349]Parkinson v. Lee, 1802, 2 East 314.
[350]Swain, Warren. *The Law of Contract 1670–1870*, (England: Cambridge University Press, 2015) p. 99.
[351] Gardner v. Gray, 1815, 4 Camp. R.144.
[352]Ward v. Hobbes ,1875, 4 Ac 13.

not reflect any duty on seller to disclose each and every fault in the product while it imposes such responsibility on buyer to use case and skill during transaction being done.

While, in Brown v. Edington,[353] it was held that the implied warranty existed in the sale of rope used for particular purposes. Similarly, in a case titled Smith v. Hughes where tin cans were bought and the purpose for which they were being ordered did not meet, here English court was pleased to decide that there was an implied warranty that the subject of sale was fit for use.[354] And so, we can mention innumerable cases which show the situation that how the rule was departed from English courts and how it drifted from the very strict rule towards implied warranties. Though the Caveat Emptor was still alive as a general rule but how courts were going in slightly different direction, will be discussed with the analyses of different approaches adopted by courts.

2.1 The Approach of the Courts and the Role of Caveat Emptor During the 18th Century

To refer back to the core discussion outlined earlier, the action for breach of liabilities did want at the time a written warranty and in case there is no such warranty the only redressal was available as; one can make suit for fraud. These particular circumstances continued up to seventeenth century and it was not until the later part of the eighteenth century, that the rule of Caveat Emptor embraced an environment much different from early period.[355] However, during this period the emerging approach of Laissez faire along with the revolt against authority together with a phase of natural law allowed a very different view in English law, to reconsider the approach towards the maxim Caveat Emptor and contributed its further developments. In fact, this was the era when friction could be observed between common Law and mercantile

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[353]Brown vs Edington,2 Mann. &Gr.279, N R,496.
[354]Smith vs Hughes ,1871, LR6QB597.
[355]Robert Bradgate, Commercial Law (London, Butterworth, n.d.), p.273.

custom.[356] This was the time when court used to start applying unwritten warranty but the situation was not proper and unclear up to the end of nineteenth century. While influence of land law was also there, which at that time dominated the English Law of sale, where the rule of Caveat Emptor was still considered as valid active norm for contractual relations.

It could therefore be conceivable that these were the causes why change was not rapid and the reason that court continued to make difference between the sale of specific goods capable of being checked by the vendee, and the purchase of such kinds of products where vendee was obliged to rely on the vender's view. As a matter of fact, such an approach might be quite justifiable in an era when sale properties were generally simple and were subject for normal trade at marketplace, that's why the vendee always had good chances to examine goods before buying.[357]

Whereas on the other hand, the industrial revolution and scale growth of massive quantities of products caused the instable approach of the courts. The vender and the vendee while doing any transaction, they happened to be actually in distinct places and they were no longer making contracts at fairs. Moreover, this fact has also actual importance for venders that the quality of their products for sale is key for success in order to remain alive in competitive market where different producers have the same product for sale.

Thus, as discussed earlier that the change was not rapid, even in 1862. The King's Bench decided in Parkinson v. Lee[358] Justice Gross of King 's Bench articulates, while denying the existence of an implied warranty concept. In this case vendee intended to purchased from the vender five packs of lops, where vendee had the chance to check or examine the sale's subject. Interestingly, in this transaction presumption was that the transaction supposed to be warranted

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[356]Paul Mitchell. "The Development of Quality Obligations in Sales of Goods". LQR 117 (2001)
[357]Robert Bradgate, commercial law p.274.
[358]Parkinson vs Lee 2 East 314, 99.

by a sample. The further goods later transferred conformed with the sample but had been treated with water to increase the weight. The court had opinion in the favor of consumer by saying that it was not possible for vendee to discover that the subject had become worthless. Assuredly, these verdicts given by courts were influenced by the rules that applied to the sales of horses, where the chances for implied warranty were not existed. Usually, in proposition related to horse-trading court denied the idea of implied warranties by considering the fact that the background of the horse traders and differences of these particular items had resulted a coherent and effective scheme in terms of quality obligations. It is an interesting fact that the value of horse considerably varies from cases with or without warranty cases. To this when vendee is accepting risk it provides him to avail cheaper price.[359] However, in any case the analogy with horses is not providing enough reasoning to refuse the existence of implied warranty for other type of commodities and due to the effects of great changes of the industrial development as revolution, and consequent boom of international trade a new sale of goods law gradually emerged.

Broadly speaking, massive industrial developments caused greater changes in the process of production. The case law of the first part of this era was not dealing with the sale of complex machineries or large-scale production items as we come across these days.[360] The majority of cases were about such dealings where raw materials is used in the manufacturing process such as bags of waste silk, packets of grains, wine etc.[361] It can also be evident, that certain important changes having impact as vital factor; venders started to build good will in wide market to secure their standing behind good will they resorted against risk factor to lessen the bad chances of solvency and to gain it as a sign of business respectability as the way forward to future profit.

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[359]Paul Mitchell. "The Development of Quality Obligations in Sales of Goods". LQR 117 (2001) .p.650.
[360] Michael G. Bridge. "The Evolution of Modern Sales Law" LMCLQ. (1991) p.53.
[361]Ibid.

Therefore, norms for seller's and vender's obligations had to change to meet these developments.[362] The analysis of these few cases revealed that cases involving the above-mentioned varieties of substances and as a result of those changes, caused origination of the rules derived from common law in the early part of this century.

Remarkably, in a case Jones v. Bright,[363] the court finally admitted the unwritten warranty regarding quality of goods and the key concept of the merchantability of goods was risen. Whereas, it is worth mentioning here that this rule was only about the contracts of sale for specific goods. No implied warranty was available in common law for the protection of buyer of unascertained goods. Along the same lines in another case Barr v. Gibson[364] and later on in Sutton v. Temple[365] this rule again about unwritten warranty was endorsed by the court and settlement of an advance platform in this area of law was to be on track.

3. Approaches and Development of Law in 19th Century

One may conclude that this was a brief discussion about the situation of case law up to the nineteenth century which is being discussed in previous head and this was the law that Sir Mackenzie Chalmers intended to reproduce to accomplish the task given in 1889 of writing the draft of Sales of Goods Act. Unfortunately, he was not successful as much in his purpose because statute did not reproduce the situation of common law and introduced some innovative concepts due to the great influence and changes operated by selected committee.

[362]Stoljar, Samuel Jacob. A History of Contract at Common Law (Canberra: Australian National University Press, 1975).
[363]Jones v. Bright,1829. 5 Bing. 533.
[364]Barr Gibson, 1838. 3 M. & W. 390.
[365]Sutton v. Temple, 1843. 12 M. & W. 52.

The approach towards principle of Caveat Emptor by the courts during this century was not consistent. It is reported that Court of Exchequer supported in favor of severity of the rule.[366] While at the other side court of Kings' Bench fluctuated in approach between implied warranty and the principle of Caveat Emptor. In year, 1913 a case titled Heilbut, Symons & Co. v. Buckleton, we find that in this case jury gives compelling authority to the principle of "Caveat Emptor."[367] It was held that one cannot rely merely on representations of person representing his employer. It is also interesting fact that findings of jury were different at court of appeal. And generally, after getting positive assurance against future contingencies one had to suffer the consequences. However, Atiyah an author on contract law claimed in his work 'The rise and fall of freedom of contract' that from this point in history rule of Caveat Emptor has not taken as vigorously in England as is considered before. It is observed that the denial overtime by courts and parliament to offer effective protection to vendee has caused strength to the principle of Caveat Emptor in English Law[368] Until the nineteenth century the judiciary got realized the sharpened wits of Caveat Emptor, that it taught self-reliance, it developed a man into the economic man out of vendee, and done well with its two wheels, business and justice. "Yet, it is not a historic rule but remains prevalent and, in its hybrid, form still allows purchaser to involve a degree of risk."[369]

It could be argued that during nineteenth century, the principle of Caveat Emptor got a stronghold in shipping and maritime law. Often in dealings regarding ships, it happens that ship was stranded on a rock in the gulf and was sold in London; other details could not be verified

[366]Atiyah, Patrick Selim, and Patrick S. Atiyah, "The Rise and Fall of Freedom of Contract", vol. 61. Oxford: Clarendon Press (1979), p.368.
[367]Heilbut, Symons & Co v Buckleton - 1913.AC. 30, HL.
[368]Atiyah, Patrick Selim, and Patrick S, "Atiyah. The Rise and Fall of Freedom of Contract", vol. 61. Oxford: Clarendon Press (1979), p.180.
[369]Walton H. Hamilton, "The Ancient Maxim Caveat Emptor", The Yale Law Journal, vol .40 No 8, (1931), p.1133-1177.

and the rule of Caveat Emptor prevailed.[370] In spite of the fact that the harshness of the rule has been tempered by legislation, rule certainly has enjoyed a cheered development particularly with regard to consumer contracts, but yet Caveat Emptor remains prevalent within particular areas of Common law. Although later part of nineteenth century paved way towards need for legislation. The Sale of Goods Act, 1893 introduced emerging concepts and supported the implied terms, etc. and the final consideration for the merchantability of goods which ostensibly instigated the first step towards the partial demise of the principle of Caveat Emptor but again I would say it is still alive.

[370]Ibid.

3.1. The Rule of Caveat Emptor After 1893 Act

In this heading attention will be paid to the approach of courts particularly focusing twentieth century case law to establish the value of the principle and its application in English legal system today. However, it is cognizant that the further major statutory protection affecting the rule of Caveat Emptor did not occur until 1973. When Supply of Goods (implied term) Act 1973 emerged and further in 1977 Unfair Contract Terms Act 1977 and Sales of Goods Act 1979 with the modernized notion of sales of good were passed. Along with that since January 1975 European Union has afforded further legislation. This is the historical review of the situation from the time of emergence of the concepts of implied term and Caveat Emptor until the later part of 20th century. Now one can discuss panoramic view of the recent situation and how it is evolving in development of business techniques. In due course, it does become self-evident that before 1973 in order to ensure and try to provide vendees more protection the courts anticipated the introduction of the concept of merchantable quality, while concept of sale by description also being changed. In a case titled Ashington Piggeries v. Christopher Ltd[371] the plaintiff intended to enter into a contract with a defendant (Mink breeder) for the compound and delivery of some specific food stuff particularly for mink nutrition. The central idea or major point of the matter was whether transaction amount as a sale by mere description; further as the vender was not expert in mink food or a professional trader in this regard, was he latter responsible for the breach of section 14 of Sale of Goods Act 1893? In this case Lord Wilberforce viewed “I would have no difficulty in holding that a seller deals in goods of that description if he accepts orders to supply them in a way of business, and this whether or not he has previously accepted orders for goods of that description is immaterial.”[372] This means that the vender can be dealt as an expert

[371]Ashington Piggeries LTD and Another Appelants v. Cristopher Hill, 1972, A.C 441.
[372]Ibid.

for the only reason that he was selling those objects and this is the reason why this was amount to be a sale by description.[373] And there is implied condition that the goods shall be of merchantable quality, and merchantable quality depends on two factors; marketability and reasonable fitness for general purposes. Marketability means that it shall be marketable at their full value and second factor that they must be reasonably fit for the purpose for they are being used generally. Further, Lord Diplock viewed in the same case that the swing of the Pendulum was going too far in favor of the new principle of caveat venditor, and it was the first time assumed, that the buyer has right to protect by newly developed concept, which we will discuss in next coming portion of this chapter.

Whereas, the Sale of Goods Act 1979 also with the same position did not produce any modification to implied terms. However, in this regard law commission's report published in 1987 suggested some modifications for implied terms in cases of their violation.[374] However, the Sale and Supply of Goods Act,1994 provided substitution for the concept of merchantable quality with the concept of satisfactory quality, which eventually caused pendulum to move further in the favor of the vendee. Moreover, on the subject of consumer guarantee a European Directive on Consumer guarantees was launched in 1999[375] covers certain aspects of the sale of goods and associated guarantees and is now likely to be implemented.[376]

The present situation is so far, the section 13 of Sale of Goods Act 1979 produced as; that where parties contracted by description there is an implied term and product as subject of sale must match the description. To this, it is clear that just description with satisfaction will assure

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[373] Sale of Goods Act 1979, Sec 14.
[374] Sale and Supply of Goods Act, 1994, sec .35.

[376] Directive 1999|\44\EC On Aspects of the Sale of Consumer Goods and Associated Guarantees (1999) OJCL 17\1\12 1999.

the vendee with an accurate protection. Nonetheless of the fact that even commodity, which is a perfect match with their description can be defective, so section 14 further solve this issue. Therefore, the product delivered in course of business must be satisfactory quality. The products as a subject of sale are considered satisfactory quality particularly when they are fit for their regular uses, free from slight faults, insured of safety and durable. Moreover, if the vendee needs any product for specific objective and makes it known to the vender the product must correspond to the objective of vendee. The implied terms have been set out that the commodity must be fit and corresponding to the vendee's legal legitimate expectations and sometimes it would be in accordance with the same facts. The vendee has right to make vender in the court for more than one or all of the implied terms. Here the most important point is that the section 14 is applicable only for contract of sale in course of the business. The term in the 'course of business' is vital. Assuredly, prior to 1973 the law relating to merchantable quality of goods is applicable when the type of product as a subject of sale has been supplied in the course of his regular business. As previously noted, that The Supply of Goods Act 1973 caused changing in the rule to guarantee a major protection for consumer. Further, the unfair contract terms Act, 1977 provides wide definition of term "acting in the course of business" and considering a case R&B Customs Brokers v. UDT Finance Ltd, which has been interpreted in a restrictive manner even for the application of sec 14 of the Sales of Goods Act.[377] The interpretation of this case practically reintroduces the requisite of the regularity of the transaction for the vender, reducing the protection level for vendee under The Sales of Goods Act. In another case Davies v. Summer

[377] R&B Customs Brokers V United Dominions Trust ,1988, 1 ALL ER,847 : R&B Customs Brokers V United Dominions Trust ,1998, 1 WLR, 321.

1984 it was passed by the court that a contract of sale was considered in the course of business if the vender selling commodities conforming to his regular business.[378]

In a similar vein, one more case Slater v. Finning Ltd [379] which was about the selling and replacing of Camshaft, the jury took a firm position to advantage the ancient rule of "Caveat Emptor". The decision is just not defending newly arising principle of Caveat Venditor and it is assumed that the rule was going too far and it was against the facilitation of commerce to impose strict liability on vender while he did not have real clue about the facts of the goods. It was also pointed out that the vender would be put in very vulnerable position and the expenses of checking every instance caused great burden and would be unaffordable. In this case it was also made clear that there must not be lack of information. If the vendee failed to clearly explain to vender the particular purpose of the goods, the principle will not be attracted. Whereas the problem of interpretation about the proposition, whether sale can be considered in the course of business of seller caused the pendulum swing in the favor of principle Caveat Venditor.

Along the same lines, in year 1999 a case Stevenson v. Rogers defining[380] the limits of Caveat Venditor in terms of interpretation of sec 14 (3) of The Sale Goods Act 1979, while discussing the lot of discrepancy on the interpretation of the words 'in course of business' on both the provisions of SOGA and Consumer law. To this, in facts of the case Mr. Stevenson was a fisherman, made a transaction of sale for second hand fishing boat to Mr. Rogers against 600.000 pounds. Mr. Rogers claimed that he was not satisfied with the quality of boat and brought a suit in court against him for breach of sec 14 (2) SOGA. Whereas, main point in this case was as declared earlier that Mr. Steven was a fisherman and this transaction for him was just

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[378]"Davies V Sumner: HL 1984.CAWLR1301: R& B Customs Brokers Co Ltd v United Dominions Trust Ltd,1988, CAWLR 321; All ER847.
[379]Slater v. Finning Ltd, 1997, A.C. 473.
[380]Stevenson and another v Rogers, 1999. 1 All ER 613.

an occasional thing, he just did that as in amateur way and before this incident he was not been charged for any breach of implied terms.[381]

> "The defendant was a fisherman. He sold his fishing boat to the claimant. The claimant brought an action against the defendant based on breach of S.14 of the Sale of Goods Act as the boat was not of satisfactory quality. S.14 only applies to the sale of goods sold in the course of a business. The defendant argued that the sale of the boat was not in the course of his business. His business was catching fish and selling them, he was not in the business of buying and selling fishing boats. It was held that the sale was in the course of the business and therefore the defendant did have to ensure the boat was of satisfactory quality."

Hence, in the court of appeal the phrase 'Course of Business' with reference to sec 14 (2) was debated and interpreted broadly and is now apparent that any contract made by any party will be attracted by provisions given of section 14, (2), (3) of the SOGA shall be in the course of business. As impact of this, every businessman concerned will have to take it into consideration, even business-oriented organization and companies involved in the sale of goods will be considered subject of the provisions, though the sale of goods is not their regular business. Interestingly, the prime phase of principle of Caveat Empto may now start to disappear in favor of the new principle of Caveat Venditor that is directed towards regime of new system of consumer protection.[382]

In this regard, another influential factor is arrival of The Unfair Contract Terms Act, 1977,[383] Prior to the enactment, the vender was able to eliminate the consequences of the implied conditions of The Sale of Goods Act with effect of an exclusion clause. After 1977 by virtue of this enactment vender can no longer avail himself of this option if the vendee is dealing as a consumer. So now consumer and normal customer for the purposes are distinct that the goods purchased must be of type that can be ordinarily supplied for private use and consumption.

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[381]Steven vs Rogers ,1999, Q.B 1039,1 All ER 613.
[382]John DE Lacy. "Business Seller's Liability for the Implied Terms under the Sale of Good Act", (1979). 200. L.P 27.
[383]The Unfair Contract Terms Act ,1977, *https://www.legislation.gov.uk/ukpga/1977/50.*

4. Role of Caveat Venditor and Development Toward Seller's Obligations

In brief, it is important to acknowledge that modification in English Sales of Goods Act in 1979 caused exceptions to the rule of Caveat Emptor that became more prominent than rule itself. Furthermore, due to the complex structure of modern products, the only vender himself can assure the contents and the quality of product. Consequently, these very developments gave reason to necessity to restrict the prime rule of Caveat Emptor and to graft certain exceptions upon its scope and ambit. Now by virtue of this law seller is bound to some extent to deliver appropriate goods and to provide appropriate information about the goods.

All these factors in turn resulted the death of old norm and led to the emergence of principle of Caveat Venditor, which in contrast to previous rule denote; let the seller beware. It has also been observed or is often supposed that the death of Caveat Emptor is not on outcome of an isolated event, but this death is thought to exemplify the death of freedom contract generally.

However, construal parties are no longer free to set their terms. They are not free to abuse their freedom by selling low standard object, except in precise forcefully imposed cases in market, relying on exclusion clause. The benevolent behavior of law turned the harsh rubrics of market, and replaced it.[384] Interestingly, concepts like fitness of goods and merchantability which could be caused to shift the burden as to quality and fitness on the seller were started to encourage. So, the approach which was being adopted, though, the rule Caveat Emptor was there in its absolute form was characterized as detrimental to the vendee's causes. To put it differently, twofold notable reason caused to dilution process of Caveat Emptor. At first, in a specific scenario where a vendee would not have any resort against a vender who has in spite of being knowledgeable of

[384]Steve Hedley, "Quality of Goods, Information, and the Death of contract", (2001). JBL 114.

a latent defect or discrepancy not warren the vendee about that latent defect which is of nature, that couldn't be detectable by ordinary examination. Another major reason was need for adequate protection to the vendee who buys the product in good faith.

With that, in order to give proper recognition to the relationship between buyer and the seller to encourage the commercial relation and activity, this imposition of obligation upon the seller can be traced by case of Priest v. Lost,[385] whereby this decision was just beginning of what could certainly be called as diminishing process of rule of Caveat Emptor. With the passage of time and by circumstantial development gradually the new rule has gained prominence and reliance upon the obligation of vendee have been placed in proper shape along with promulgation of various statues and judicial precedents limiting the previous rule to reasonable examination. However, the proposition of law which makes the reliance placed by the vender on vendee's skill and judgment as norms, trigger another debate in specific scenario, where on one hand the vender himself is not aware of the defect and on other hand in specific circumstances, in case of expert buyer if buyer is having better expertise in a given field than seller. Though, it would not be right to suggest that buyer can make rejection for the goods, as it was held in a case titled; Harling Done & Lieinster Enterprises Ltd v. Christopher Hull Kine Art Ltd.[386]

> "The claimant purchased a painting from the defendant for £6,000. The painting was described in an auction catalogue as being by German impressionist artist Gabrielle Munter. Both the buyers and the sellers were London art dealers. The sellers were not experts on German paintings whilst the buyers specialized in German paintings. The purchasers sent their experts to inspect the painting before agreeing to purchase. After the sale the buyers discovered that the painting was fake and worth less than £100. They brought an action based on s.13 Sale of Goods Act in that the painting was not as described., it was held that by sending their experts to inspect the painting this meant the sale was no longer by description. S.13 only applies to goods sold by description and therefore the buyers had no protection."

However, the expert buyer was not given right to throw away the deal of the painting sold to him on account of not being of the original painter. While discussing first part of proposition,

[385] Priest v. Lost, 1903, 2KB 148.
[386] Harling Done & Lieinster Enterprises Ltd v. Christopher Hull Kine Art Ltd, 1991, 1 QB 564.

where the seller does not possess the skill or knowledge, hereby, he cannot take the excuse of being unaware of the defects in goods. It is therefore, held that a responsibility does exist by virtue of law on the vender shoulder to have enough knowledge about the product being subject of sale and he is also bound to make buyer aware of the same.

Moreover, the two most important cases Grant v. Australian Knitting Mills[387] and Henry Kendall Sons v. William Lillico also made this much clear by making ‘Usability’ and ‘Merchantability quality’ as the core and basic tests for the conclusion of any transaction. Merchantable quality means that the goods should be in the form in which goods complied with the description under which these goods were sold normally to be used. Thus, by legislation the pendulum is moving in favor of vender. The old age rule is being taken over by subsequent rule of venditor, the transform is being recognized as new consumer protection system. In Pakistani courts this principle is casually applicable depending on the situation, historically and still to this day, but after the growing circumstances of changing business behavior even principle of Caveat Emptor is widely used but inconsistency is noted in its application. Of course, last few decades have seen major changes specifically because of commerce growth, where buyers are more protected and sellers are required to be more diligent in protecting customers and suppliers’ rights and now the principle of Caveat Venditor is getting its place. Certain examples herewith, are these:

With that, a case *Haroon Mandrha* v. *Abdul Rahim* in Karachi High court Sindh,[388] it is considered by High court that under the principle of Caveat Emptor it was the duty of occupants to have verified the title of the builder before purchasing and occupying the premises. Eventually, builder in the current case had no title and could not transfer any title in respect of

[387]Henry Kendall Sons v William Lillico Sons Ltd, 1969, 2 AC. 31.

[388]Haroon Mandrha vs Abdul Rahim, 2001 CLC. 1312.

the flats, subject to its disputed floors, to any person and sale agreement in respect of the flats on the disputed floors was void under S.23 of Contract Act, 1872. Just in the same way, another case in 2007 we find an interesting corporate matter in a case; International Multi Leasing Corporation and Others v. Capital Assets Leasing Corporation Ltd.[389] In this case, Caveat Emptor was applied and leave to appeal was granted by Supreme Court to consider Caveat Emptor as alive norm along the other side issues.[390]Likewise, in another case applicability of this doctrine is also adhered. International Multi Leasing Corporation and Others v. Capital Assets Leasing Corporation Ltd .,[391].it was said that proposed transferee other than the adversary in the suit had to remain bound by principle of Caveat Emptor and consequence of said doctrine was that transaction pendent, would not be allowed to affect rights under the decree. Similarly, we have another case where court clearly admits the validity of this doctrine and stated; transferee or vendee of a certain property has to be vigilant enough and cautious at the time of purchasing of the property. For this, vendee has to make sure as to whether transferor had any valid or genuine title in the property or not, as the principle of Caveat Emptor was well-known in the judicial proceedings. Along with these examples we have some other cases where higher judiciary put certain limitations on the application of the doctrine of Caveat Emptor due to different reason like in a case decided by Peshawar High Court it is declared about its applicability. [392] To this, son of vendor of land in disagreement had set up a case under principle of Caveat Emptor, the verdict reflected that the same son who had stepped into shoes of his predecessor could not avail said plea as same was conflicting to all norms of fairness, equity and justice. Rather, this

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[389]International Multi Leasing Corporation and Others Vs Capital Assets Leasing Corporation Ltd, 2007, Scmr 1102 SC.

[390]Percentage of failed materials that cannot be repaired or restored, and is therefore condemned and discard.

[391]International Multi Leasing Corporation and Others Vs Capital Assets Leasing Corporation Ltd.2007, Scmr 1102 SC.

[392](1999) PLD 75 Peshawar-High-Court.

principle could be used by a third person having a conflict of interest on same subject-matter with vendee, but son of vendor could not legally articulate on said plea .In addition, it was also argued in this case that principle of Caveat Emptor was not approved by injunctions of Islam, because vendor was required to disclose defects in sale commodities to the vendee and in other case *Raees Amrohvi* Foundation (Regd.) v. *Muhammad Mossa*,[393]High court put limits on its scope in transfer of property by ostensible owner. To this point High court declared;

> "That if an ostensible owner had transferred property for consideration and such transfer was questioned on ground that transferor had no legal power to alienate said property, transferee could be exempted from its consequences, provided, he had established that he had taken reasonable care to ascertain power of transferor and had acted in good faith, and rule of Caveat Emptor required transferee, apart from acting in good faith, to take all reasonable care to apprise himself of any defect in transferor's title or clog on his power to effect transfer."

Assuredly, courts a relying upon the principle but to some extent a change could be noticed, no doubt would help to ensure on proper balance between rights and liabilities of the vender and vendee. But it should be noted that although the rule was being given a solid shape but its exceptions are also growing with time. Therefore, it is pertinent to say here that this conceptual change would center around the balancing point of the necessity of disclosure of information by the vender on one side and implication of reasonable doubt by the vendee on the other part. However, this drift of change is taken too far, we might end up with certain different approaches or becoming pro buyer, which might result the misuse of the shield of law.

` For the most part, the ancient principle will be applied only in cases where vender is aware of all implied terms and warranties, and the vender will bear damage on such sale transaction, where properties require legal standard, even though the seller has taken all possible cautions and care. Whereas the subsequent principle of Caveat Venditor can be justified where there is disproportionate of power between the seller and buyer for example (contracts of big

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[393]Raees Amrohvi Foundation (Regd.) Vs Muhammad Mossa, 1999 PLJ ,633 Karachi-High-Court.

comprises with consumer). However, it is totally against the principle of Laissez Faire, when disproportion is not present and also subjected to many exceptions because the vendee is also interacting in the course of business. With that in mind, the rest of the detail and its other aspects and dimensions, we may discuss during the debate about LCIG principles as below.

5. The Least Cost Information Gatherer Principle, Explanation and Justification

As mentioned earlier "Caveat Emptor" is no longer a foremost leading norm in the law of transactions, it is still applicable but occasionally, rather as an exception. Interestingly, it is justified in certain narrowly defined cases. Hence, the principle is usually interpreted so as to include Caveat Venditor too. Wherefore, the situation in turn proposes that all parties are responsible for their own mistakes in fair contractual relationship.

Apart from that background it can be argued that the regulation or rule that now best serves as law is not "Caveat Emptor" or Caveat Venditor, but the "Least Cost Information Gatherer principle" (LCIG). This phenomenon proposes the idea that information should be rendered and communicated softly by such party that can do so with the least expense.[394] In due contractual relationship this can be the vendee but usually the vender, who may have pursued such information as by- product, maintaining the product as possessor or the holder of the product who may have more expertise or in better position to provide information. However, while analyzing the different aspects of modern marketing/sales methods, and in relation to LCIG principles it is evident that LCIG principles and its outcomes are inadequately judged not taken into account properly. Wherefore, a casual review of the cases where vendee's claim

[394] Aristides N. Hatzis, Nicholas Mercuro, Law and Economics: Philosophical Issues and Fundamental question (London & New York: Routledge Taylor & Francis Group, 2015).

vanished, may head towards the fact that Caveat Emptor still alive, which also indicates another factor that many communal marketing and sales methods misused information advantages of vender at the expense of vendee. Because courts make errors while applying these LCIG rules and Marketing and sales experts become aware that how to exploit and misuse these errors.

More specifically, some consistent application of LCIG principles as it should be can result significant changes in market. The application of LCIG implies that vender should have duty to publish prices via most efficient form of disclosure like internet, being vendees as the absolute LCIG, since price information is material. It implies also that sellers should take extensive quality tests of their goods not the vendee. And it is also up to sellers to reveal statistical information on fair. With that, it is considered inefficient to let vendee provide this information by any means or even by websites. Interestingly, LCIG also implies for insurance matters that insurer should disclose actually fair rates, and vendee should sometimes reveal their markup. Chiefly, this fabulous principle holds that party who can obtain information that can obtain information at least cost should obtain that very information and disclose it to the other party. In fact, this principle thought initially was expressed by the Dean Anthony Kronman,[395] he exemplified it with an example of sale of house infested with termites, where he stressed the issue, who was primarily responsible for disclosure of information? Whether vender? Suppose he got learned about infestation as a byproduct of living in house, he would unveil it, or the vendee spend some money for instance 5000 Rs for termite inspection of operation. In due course, Caveat Emptor rule would oblige the vendee to spend money for a wasteful operation to find out the information that was already known by the vender. For this, the best technique for obtaining better and equitable solution is hereby to oblige the vender to disclose information he possessed

[395]Anthony T. Kronman, “Mistake, Disclosure, Information, and the Law of Contracts”, 7 J. Legal Stud. 1, 1-2, (1978).

because it does not cost anything except uttering few words. In the context of LCIG, the vender is the least cost information gatherer because as compared to vendee he got the information at lower than the vendee at zero marginal cost. LCIG's spirit states that good information is such kind of information that has proper impact and has perfectly fulfill the need, in other words which need to be produced but it would be extravagant exercise to let both the parties render exactly the same information. Such an exercise would be alike one party reinventing the boil egg or wheel. With that, if it is convenient that one of the two parties can extract the info more economically, that one preferably should do it and disclose it to another one. The similar principle and its application in more general way we can trace in law of tort which is known as "Least Cost Avoider Principle". It is sort of alternative-care situation in this area of law in its pure application. Hence, care of one of the two parties is sound enough to prevent the expected harm. [396] For this, tort experts gave an example that swimming pool injury caused by divers hitting swimmers can be anticipated in two ways. One of them is to advise divers pay more attention while he makes dive. The second is to let the divers be defensive and move with defensive technique, always take care of themselves and need to be protective by their wings, which involves least cast? Obviously the first way it involves fewer exertions from other way to move with defensive technique. Here in this proposition the divers are the "Least Cost Avoiders" of the injury. Necessarily, LCIG rules does not make vender liable for seeking information, if party buys apartment for living and later, he made his mind that the structure is not suitable for him in this case vendee cannot put the responsibility upon vender's shoulder. It is obvious that the vendee is in the better position to know about his own preference. However, this fact also cannot be ignored that normally for major portion of sale transactions it is found, the vender who

[396]Calabrese, The Cost of Accident: A legal and Economic Analysis (New Haven, Yale University press .1970).

will be placed as best to get information for reasons of his attachment with the subject of sale being the manufactures or first owner of the subject. Further, the vender is usually the practiced one and the buyers are the laymen. However, the LCIG corresponds to ideal of economic and legal needs. For example, it is considered as responsibility of vender to furnish information about all relevant hidden flaws; court has even held that the info is necessary for vendee's satisfaction, that a house is haunted by ghost may need to be revealed. [397]

These LCIG principles propose that pharmaceutical companies are clearly the least cost information gathers. Since these entities need to disclose the side effect of the medicines they vend, while the buyers not, because they are the experts, and having economic scale. In this case it seems inefficient to ask that each individual buyer to perform that lab examining process or be vigilant by collecting experiences from different other resources, like websites etc. Moreover, to check the relative information gathering cost "reasonable reliance" is a way for courts, if they settle these facts in such way that there was no reasonable reliance, formerly in essence that vendee was LCIG.[398] Needless to say, that numerous other legal rules are also coming under ambit of LCIG. It deals with the Doctor's dealing towards patients -they have to reveal the risks of procedure. It also deals such situations where vendee applies for life insurance, since he has to fairly tell his or her health history. It also covers duties of disclosures and in surety ship. It explains many statutes and regulations where it is believed to be material for specific parties, e.g.

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[397]Leading cases Hill vs Jones, 151 Ariz. Ct. App,1986: Obde vs Schlemeyer353 P.2d 672 Wash,1960: Stambovsky vs Ackley,.169 A.D.2d 254 ,572 N.Y.S.2d 672,60 USLW207.1991.

[398] Considering the above proposition, a vendee who entered into the sheep herding business and intended to purchase land that was previously not used for sheep, he asked the vender, who happens to be a layman with respect to sheep herding, how many sheep could be put on field? The vendee later found out that fewer sheep could be put the field than the vender had mentioned, the vendee reply of that, was not considered actionable in this case the vendee, was the expert not the vender, case can be clarified on the basis of the LCIG .

The Securities Act, The Truth in Lending Act, The Interstate Land Sales Full Disclosure Act, and The Truth in Negotiation Act.

5.1. Various Applications of Mid-Level Principles, Absolute LCIG and Relative LCIG

With that realization, it is appropriate to proceed further to details of the concept, in terms of application the LCIG principles lies in two ways, first as duty to disclose and other as duty not to misrepresent. To illustrate, and with a focus on the element of interest, Mr. 'A' vender sells his apartment. He needs to reveal information about the termite infestation to the vendee. If his neighbor 'B' has also an apartment for sale simultaneously, with that, both of them having competition in the one marketplace for better interest, Mr. 'A' does not need to disclose all the possible information, he happens to know concerning 'B's apartment. It is A's competitor duty to reveal all characteristics to the buyer, and it is up to buyer to compare both the offers. But still Mr. 'A' may not misleadingly claim that B's apartment has been infected with such things, while he is aware that it has never been. Nobody is allowed to make misrepresentation about contending products either beneficiary or non-beneficiary.

It is, however, much possible if 'A' were to misrepresent, it would be sensible that the vendee believes those after all being neighbor, he is the best person to acquire information of such facts about the adjacent apartment but 'A' as a vendee does not. He is the LCIG as compared to any other one and this includes not only the case of intentional as well as negligent misrepresentation. Another practical situation could be; suppose if I make a claim to the buyer for the jewels, I am offering for sale of 24 carat gold, (which according to my best information is truly correct) while on contrary in real the weight is only 14 carat gold, vendee may take legal action against me in court for neglectful misrepresentation. In this situation vendee can be reasonable to rely on vender's claims. It is vender's responsibility to check the accuracy of

measurements to avoid such claims against products he may offer; after all being owner, he has more expertise and can check this more cheaply as compared to vendee, since he sells jewels to many customers. Therefore, I or vender here are the LCIG.

To understand the proposition that when the LCIG should have a duty to unveil, important is to distinguish what is known as the “Absolute LCIG” and the “Relative LCIG.” The absolute LCIG is the person that is considered rightest acquainted one in the whole locality to provide certain information. For example, in the fittest position for that in abovementioned case the owner of the apartment is the absolute LCIG with regard to information taking prospect, being a byproduct as living in the apartment. Just in the same way, if we take an example of any quotidian product, we find best of all concerned is the Absolute LCIG. Besides, the Relative LCIG is not in fittest one of all concerned but still placed in a better place as compared to any other concerned party. For example, as mentioned previously, I am not in the rightest place to reveal information about my fellow’s apartment (but my that fellow is) but still I am the better one in position as compared to any other individual as prospective purchaser who lives 1000 miles away. Likewise, “OLX” is not the absolute LCIG regarding material info[399] on “Google “items (but Google is). But in case, if “OLX” salespersons provide erroneous data about Google devices, one may rely on that information because the sales persons are relative LCIGs. So, for, being expert of selling strategies and tactics they are holding rightest position to obtain information about Google stuff as compared to me, if I am the vendee, because selling and

[399]“As a matter of fact, many regulations specify which information is material in specific areas for instance, FDA food -labeling rules require a listing of ingredients considered relevant enough. FTC, regulations that creates duty to disclose washing instructions of textile”.

dealing such things is their occupation, so they are in better place to gather information about said stuff.[400]

5.2 Importance of Efficient Disclosure

On balance, the principle of efficient disclosure signifies, as it is evident from its name, that if it is necessary that information is to be unveiled, it must be unveiled in the most efficient, well-organized manner. When the vender of an apartment needs to disclose the termite infestation, he must do it in obvious and clear manner; he may in obvious and in clear manner tell potential buyers about the fact. Assuredly not to use tactics, suppose by putting this information through a small post card by sticking on the back of a cabinet, or writing it like a footnote, suppose, 29 at page 16 of a 34-page file. With that, the principle manifests that without efficient disclosure, information exchange in practice is impossible, which may result that "Caveat Emptor" is re-introduced through backdoor. So, buyers indeed need to be cautious and alert to risk or in other words beware of sellers. If seller continues to hide such information and try to keep communication hurdles in a way to make other party fool, then it is not legal as long as seller formally reveal the information in some (not hard to find) way.

However, despite the arguable existence of quality spread discoveries, this principle is impliedly applied in many court's decisions and regulatory standards even it is not explicitly articulated in text books. [401] In so far, it is held that instructions to be attached in the form of standardized label and warranty disclaimers to be shown in open form.[402] Yet, noticeable flaws (such as broken window) do not have to be disclosed and that makes sense, the most efficient

[400]"Another category of statements that do not need to be disclosed but may not be misrepresented are statements that fall short meeting the materiality criterion, materiality is a condition thatmakes economic sense , either with regard to disclosure duties or to identifying negligent misrepresentation , it is not only a condition form is representation under contract law.it is also the principle behind many regulations".

[401] Williams vs Rank & son Buick Inc, 170 N.W.2nd 807, 1969, Wisconsin SC.

[402]"FTC regulations require washing instructions to be attached to the textile in the form of standardizedlabel the UCC S 2-316 need warranty disclaimer to be made in noticeable way."

way to reveal information here is letting the vendee to take a look. The vendee would find the information anyway, so that it would be a wasteful activity to repeat what he already had. Certainly, that makes sense; the most efficient way to reveal information here is letting the vendee to apply his skill to take a look.

5.3 Role and Impact of Unreasonable Reliance

In due course, it is being observed that requirement of "Reasonable reliance" is a factor best seen as proxy for the LCIG principle, vendors rely unreasonably on vendee's assertions when they themselve have more experience or best information access towards the subject of sale. In such a special scenario where vendors deliberately try to mislead vendee and vendees innocently fails to checks such deceitful act. In these situations, should vendor be the LCIG or the vendee for his negligence to check. In this case the vender should know at the top level, which declarations are not correct and he should be in better position to stop misleading. However, strictly speaking it costs vendee money to keep misleading. Yet it does not cost the vender anything to stop misleading because intentional fraud is an investment in lying. If vendee gets vigilant and still double check all the vendor statement and the vendors will realize that they may no longer try to mislead them. Even though, if the vendor held liable, they no longer try to misrepresent and vendee have no need to double check, and in this way putting vendor responsible is clearly optimal solution.[403] However, in practice courts occasionally put the burden upon vendee's shoulder in case of not checking intentional misleading from vender as it was argued in case, titled as William v. Rank and sons,[404] where a Chrysler was a subject of sale, and sold without air-conditioning and irrespective of the fact that it was assured by vender that

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[403] A. Kronman, "Mistake, Disclosure, Information, and the Law of Contracts" Journal of Legal Studies 1. (1978).

[404] William v. Rank & son Buick ,1969, Inc .170 N.W.2d.807 .

there was air conditioning, the vendee's reliance was not reasonable in the court's viewpoint. However, explanation for this view of court could be that they randomly apply the logic behind the rules on patent defects. Suppose, if someone sells house with a window broken, he does not have to explicitly mention that some window is broken, when the potential vendee has opportunity, he can examine the house. Wherefore, he does not have to explicitly disclose the fact, since there is no need of such formality. It is obvious that prudent vendee will notice it anyway. As a matter of fact, it would be wasteful to ask him to disclose what the vendor already knows or will know, this can be seen in 99% of the cases that the courts introduce a duty to inspect the obvious facts. Of course, some courts have erroneously intensified that to the extent of such situations, in which vendors deliberately set a trap for vendee. But interestingly, still the majority in number among common law benches does not go for this. With that added understanding, it is important to note here that a very clear principle was confirmed by 20th century courts, which states that no one can blame victim for being trapped, any trick that was prepared for him, as it is held in a case Spies v. Brandt "One who deceives another to his prejudice ought not to be heard to say in defense that the other party was negligent in taking him at his world."[405] However, it is important to mention here, that courts traditionally have made difference between statement of facts and opinion. Hence, statement of facts can cause mis-representation while statement of opinions is not considered actionable.

6. Practicability of LCIG Principles and Common Sales Practices

Practical implications of the "General" as well as "Mid-level" principles have been discussed briefly earlier. Though there are many other common sales practices that need to be explored which violate the LCIG principles. And these practices currently false through the gaps

[405]Spiess v. Brandt, 1950,230 Minn .246. N.W 2 d .

of the legal system, there are flaws in applying the principles. Why Courts face the problems? And why the absolute LCIG of efficient disclosure is still lack firm conviction in applying and why the materiality and impacts of the notion of the principle not yet flourished? With that prospect in mind, in this discussion study will look into the detail of all these aspects briefly under following points.

6.1. Lack of Standardized Quality Test and Lack of Publishing Statistical Information

In this setting, it is an observation that whenever a new product arrives at market, potential vendee needs its comparison with competing products. So, he is in need of relevant information. Suppose a new brand of vacuum cleaner is brought into the market. Vendee requires information, such as about its effectiveness for cleaning on carpets, and hard wood floors. He also wants to know that how earsplitting it is? What is its much energy consumption? And how hefty it is in moving? And whether it is durable in its structure or not? Without having these all type of information vendee is not in a good position to make decision. But problem is that, who has to reveal this information? The vendee has to obtain or the vendor has to provide. On aspect is that vendor should have a duty to reveal, so that venders are the Least Cost Information Gatherers, because they have not only more skill and know-how but also have absolute information about the quality of their own goods being the owner of these goods.[406] Courts however usually do not give them extensive duties to provide and reveal quality information but only bound them not to misrepresent. Thereby, in practice the vendees are the one who are liable for judging the qualities of products that are brought to the market. Vendees are supposed to do so by inspecting in the warehouse, by questioning the neighbors or by collecting information from websites as a normal source of information collection. Infact, that practice violates the principle of the LCIG because vendor is LCIG here, vendee is not the LCIG. Whereby it is to be

[406]Aristides N. Hatzis; Ibid.

recommended that the vendor should finance (If possible, standardized) quality test of their products. They need to provide only material information and to reveal it on possible way, it does not mean that they have to provide infinite amount of information etc. To this, what is material information; that is if its benefits outweigh its cost is the factual issue. But at mass level productions of goods these materiality requirements tend to be easily afforded due to economies of scales in the information process.

It is worth mentioning that the standardized testing is nothing new in market for vender, it already presents for many sales items.[407] For instance, in car financing business manufacturers are required to measure the mileage of each new model like vise manufacturers of airplanes must disclose safety information, food productions companies and pharmaceutical companies must conduct rigorous scientific and standardized nutritional test to ensure quality of their products before they claim something is, "clinically" "scientifically" proven. Of course, vender may not always have incentive to disclose their information this way, so the legal system must step in to fill this gap. Similarly, another flaw is that statistical information is needed to know the exact quality of sale item; vendee not only needs to get this but also to get its accurate price. Vendee needs information about the quality and price, but that is not easy particularly if information is statistical in nature. Which varies from case to case, suppose, how expensive is a machine? Contingent on the situation that which replacement is to be used as spare part in repairing and how much the mechanic overprices for his services and skills. How expensive is a vehicle itself if we take into account that vehicle itself as to determine price if comparatively spare parts are overpriced? It also depends on maintenance cost of repairing if needed in each of these cases because overhaling or fixing price vary from situation to situation with verity and value of

[407] S.J. Grossman, "The Informational Role of Warranties and Private Disclosure about Product Quality" Journal of Law and Economics 461 (1981) 24.

things. For all this one needs load of statistical information to avoid probabilities. Ordinarily, the venders are the LCIG, fact is obvious because it is easier for them to gather that information, additionally for the reason, they normally had this type of information as a by-product, being dealing these products. No doubt, they usually used to do in business, being dealer, one has to aware that how many of the items are returned for repair or how many spare components are demanded by concerned shops and how often product is sold. Therefore, in this regard legal system must step in to abolish the hurdles in true implementation of LCIG principles.

6.2. Not Efficient Disclosure in Respect of Full Price List

However, in certain situations where service providers are dentists, doctors, car repair shops, they upublish their price lists on different places like websites etc. However, regulators and courts do not require them to publish that. This ultimately reduces price competition. Though as a legal implication of LCIG principles, vender should have obligation to publish full price for three reasons; first these type of information vendee is usually interested in because prices are sort of material information. Second venders being provider of their products are the absolute LCIG of their own prices, this suggests that they should have obligations to reveal, rather than it is better to avoid any chance to mislead. They are least cost bearers because they already have this information as price list located somewhere on their hard drive. So that they would only reveal information that has already been given on the contrary for vender, it can be costly in certain situations impossible to reverse engineer the full price list. Lastly, publishing is the most efficient medium for such purposes, therefore it follows the principle of efficient disclosure. Ideally, price should be published in a standardized form being a logical implication of efficient disclosure. Since the courts are not well equipped to set standard mediums, rather courts may require to play role in this regard, that's why vender does not spontaneously publish

their full price list to avoid price competition. These all tactics violate the principle of efficient.[408]

6.3. Exceptions or Practical Limitations to the LCIG

One has to admit that there are some other narrow conditions under which exceptions to the LCIG principles could be justifiable. Among them most important one is "Protection of entrepreneurial information." This best-known exception was already identified by Kronman.[409]

Generally speaking, entrepreneurial information understands how certain resources could be utilized in better productive form. It may be awareness that land could be utilized for mining purposes, or valuable minerals other than farming. A specific piece of painting is a master piece so that could be hanged in the casement instead of drawing room of a person who is not aware of its value. However, entrepreneurial information implies three necessary points to justify a protection in violation of the LCIG principle. The first point is that information is costly to provide. The second relevant point is that, whether the protection, the information could be appropriated by the other party. So, no need to protect entrepreneurial insight if the goods in subject of sale are owned by the entrepreneurs. The third most important point is that information should be socially valuable. This exception is not only an economic ideal but also a rule that is positively applicable in effective way in common law courts.

The protection of Entrepreneurial information is not the only thing which caused deviation from the LCIG principles.[410] There are certain other policy reasons which can be resulted that information exchange is undesirable on the market. Still there may be stances at

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[408]Kotler, Philip, and Kevin L. Keller, *Marketing Management,* 14th edit (Upper Saddle River, New Jersey: Pearson Education, Inc., publishing as Prentice Hall, 2007).

[409] Geest D., and Roger V. Bergh, *Law and Economics and the Laboure Market,* edited by Jacq Gerritde Geest, J. Jacques J. Siegers, Roger van den Berghuis, (Gloucestershire, England: Edward Elgar Publishing, 1999), 38 -49.

[410]Farnsworth, Edward A. *Farnsworth on contracts*, 3rd edit (USA: 477. Aspen Publishers, 2004).

market where too much information is problematic for instance. The health insurance market that insured parties should have no duty to disclose personal characteristics, even when they are LCIG.

6.4. Concept of Non-Falsifiability

In due course, a statement is non-falsifiable when courts have no way to judge whether it is right or wrong, nevertheless, a misrepresentation is a statement that not according to the facts.[411] When courts fail to observe the facts then there is no way to prove misrepresentation, yet it is important to comprehend that non-falsifiability is a practical restraint to the LCIG rather than as deliberate exception. But in reality, it should not take so much value as true defense.[412] Similarly, it is also pertinent to say, that the only justification for Caveat Emptor here is the practical limitation of legal system, in absence of such limitations there is no reason to apply Caveat Emptor. For example, the owner of kid's toy shop suggests his customer that, Product "X" is better than product "Y" perhaps in true sense he does not believe that "X" is better than "Y", but he has recommended "X" because of his higher markup. In this case misrepresentation of opinion might be non-falsifiable. After all, what the shopkeeper truly believes is all in his head and there is no technique or method available to read his mind. Just in the same way, if we consider a high standard electronics outlet that trains its salespersons to convince customers to purchase the mediocre but higher-markup product X. At this point, the evidence of the misrepresentation is no longer rest with an individual's mind, but in written scripts. Hence, here it is no longer impossible to prove the misrepresentation. With that it can be stated, that Courts should not make a mistake in concluding these issues that parties could built perceptions of

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[411] Myerson and Satterthwaite. 1983. "Efficient Mechanisms for Bilateral Trading". 29 Journal of Economic Theory, P 265-281.
[412] Ibid.

making certain tactics leading misrepresentations because they were non-falsifiable in the past. Whereof, if those statements or declarations have become falsifiable in the present, there is no reason to keep a Caveat Emptor regime alive.

7. Conclusion

Throughout the discussion, it is endured to prove that Caveat Emptor principle certainly has enjoyed a firm development. The harshness of the rule has been tempered by legislation. Yet remains prevalent within particular areas of legal regime even some subtleties of cross application do exist. Caveat Emptor becomes redundant as a general legal principle and modern law is best explained by the Least Cost Information Gatherer Principles. It is argued that this fact cannot be denied in practice, Caveat Emptor keep alive in wider set of cases only due to the inconsistent application of the Least Cost Information Gatherer Principle. It is also argued that courts do not make as many disclosure measures in contract Law as LCIG's consistent application dictates about that. The consistent application of these principles would likely have positive impact on market to negate misleading tactics and to reduce misrepresentation and to take may negative common marketing methods.

Chapter No.7: Analysis

1. Introduction

In this chapter an attempt has been made to find out similarities and dissimilarities between both legal systems regarding pre-contractual disclosure of information". With that, discussion presents an outline of different routes to liabilities in Islamic law and Common law and goes on to present how these forms of liabilities were taken by both the systems.

2. Concept of Free Trade and Pre-Contractual Liabilities in Both Legal Systems

It is pertinent to say that the Islamic law and the Common law are not different on this point of law, it has endeavored to achieve fairness and certainty in contractual obligations by requiring precise definitions, suggesting clear terms and conditions and mentioning rights and obligations of contracting parties. On the basis of previous discussion, it has been observed that there is rare difference between the approaches of contracts as narrated by the two systems.[413] It is, however, practically, few of the basic values of Islamic commercial law that make the real difference. Those are limitations against usury (*Ribā*) and forbidding the transactions involving excessive uncertainty and gambling.[414] Although in relation to the area under discussion, these two systems have developed surprisingly distinct approaches toward duties of disclosure by the seller. Thus, under Islamic commercial law, the vender in any commercial transaction is duty bound not to prevent customer to have fair inspection and check in order to confirm the fitness of the properties to be sold, not only earlier but also

[413]Rosley, S. A, "Performance of Islamic and Mainstream Banks in Malaysia" International Journal of Social Economics, (2003), Vol 30 – 12, pp. 1249 – 1265.
[414]Ibid.

subsequent to the conclusion of the agreement. “If there is any defect in the goods, regardless of whether this defect is discovered before or after the conclusion of the agreement, Islam grants the option to the buyer either to continue with the agreement or to rescind it.” Interestingly, it has been shown that in both systems the ultimate objective of development of legal reasoning is to increase humane welfare, as is always is found in the objectives of the legislation, which is achievable through stable and sustainable growth in wealth.

2.1. Issues of Allied Requirements to Mitigate Risk Factor

With that, it is also apparent that although certain measures as allied requirements can mitigate some of the exposure to risk being faced by the parties. The issue of these allied requirements as well as the framework and tools that are available for contractual parties to deal with were examined in both the systems in detail .Comparatively in English legal system The discussion has emphasized the way in which this branch of law promotes efficiency by encouraging the rightful disclosure of relevant and socially useful information, by granting the possessor of such information right to deal with others by disclosing what he knows. This right is in essence a flow of theory of contractual obligation as presented in Sec 55 of Transfer of property Act 1882 as discussion of entitlements of seller and buyer. The positive thing that emerges from the discussion in this regard is that the *Khīyyār or* option in *Fiqh'* al Mūamlāt is a framework which serves the objective of protecting the right of contractual parties. The notion of this framework in *Shari'ah* is essentially ethical as well as encompasses all kinds of rights without obligations that have financial implications, it mainly refers to a specific term of right of either or both contractual parties to meet or rescind the agreement. For this, these options are implemented into different ways, some are opted by consent of the contractual parties, while others are in the nature of right exciting for them due to the very operation of law, as it is

revealed by discussion supra that contract may still be intact under circumstances where *Gharar* being linked with the subject of exchange, price etc., but then with a provision of options for the contractual parties to be affected by the same, the provision of this framework helps reduce *Gharar* and brings up into acceptable limits, it also reduces the risk of undue commission of any party deliberate or unintentional act. These options have justifications too on the basis of various larger benefits to the society, in this way parties are given a 'reassessment' or 'cooling off' period over which they can rethink about their contractual decisions by rational thinking to minimize possibility of risk or any other damaging factor.

3. Overview into The Conceptualizing of Pre-Contractual Liabilities in Both Legal Systems

With this, the discussion may be concluded that pre-contractual liabilities are one of the important aspects of contract law in modern age that is devoted to the cause of protection of rights of contractual parties from numerous unfair trade practices. The ultimate objective of such protection is to avoid and refrain from exploitation and to check all kinds of business malpractices. Today there are variety of modern transactions in which pre-contractual liabilities particularly disclosure of information is of prime importance. This sort of liability lies with the producers, manufacturers, retailers and sellers for their defective products that may cause injury to the interests of buyers or assets.

In this esteem, the classical as well as contemporary works of Islamic law and analysis of different schools of thought. As well as, the principles of English law and currently applicable legislations with their historical emergence, important case laws and reports etc. have been taken and reviewed and compared on the subject, which shows that the true intention or basic aim of every legal system is to ensure fairness and justice in trade.

“The data presented in this research viewed Islamic law as potential solution of existing problems facing contemporary sale transactions in general and in cases of defective sale items in particular. Islamic law is divine law revealed from Allah Almighty through His Messenger “ﷺ” laid in *Qur’an* and *Sunnah* as interpreted by jurists in their different *Fiqh* manuals. *Qur’an, Sunnah*, Ijma and *Qiyas* are considered its primary sources. This law is universal in nature and application and sovereignty rests with Allah Almighty.” It does not extricate between state and religion, between sacred and secular. Islamic law covers all aspects of human life – religious, social and family matters – considering ‘moral virtues’ as principle base of society. It regulates every area of life from dress code to finance and politics. For this reason, in *Shari’ah* every action that has been taken with ill-disposed to its moral value is viewed as culpable. Islamic commercial law evolved in seventh century in Arabian Peninsula with its inimitable notion of equality and fairness, embracing the theoretical framework of “*Al Darar Yūzā.l*”[415] *Haram* must be eliminated or “*La Darar wa La Dirrā.r”*[416] There is neither inflicting nor returning of harm.
While, it could therefore be conceivable that the presently known English common law began in eleventh century as a municipal law of Norman England; it is a man-made law which is subject of change and rules are frequently altered by while. Sovereignty is the prerogative of British parliament. Sources where it derives authority and stem validity are ‘Queen in parliament’ and the ‘European authorities’ case laws as interpreted by House of Lords and the courts. This law deals with all areas of life within the territorial jurisdiction of England providing them their human rights and fundamental liberty, although as contrary to Islamic law, other extents of life such as religious affairs and social relationship between adults, political and economic choices are left up to the individuals’ preferences. Irrespective of the variations mentioned in the Islamic

[415] Mujallah, Art 20.
[416] Mujallah, Art 1 9.

and English legal systems, both have certain importance meant for pre-contractual liabilities in prospect of pre-disclosure of information to protect the rights of seller and buyer in their transactions.

3.1. Legal Philosophy

In the crux of legal philosophy of Islamic law, it has been viewed and advocated that interests of the parties in their respective zones being seller, the owner of the subject, and as buyer, being direct beneficiary of subject, must be protected. There are numerous facets to pre-contractual liabilities and to safeguard the rights of contractual parties. Such as; firstly, the protection of each party from himself and his irrational attitude and to ensure the protection of his genuine interest via established fair and just trading system by cheering all the fair means of income; secondly, discouraging the business community to eat up wealth in vanity; and lastly, to educate them about the very nature and requirements for the formation of contracts according to Islamic law because our constitution recognizes Islamic way of life in accordance with teachings of *Quran* and *Sunnah* and it is given that it must be ensured in every sphere of life. A cursory view would suggest that this could be easily implementable while guiding them towards Islamic business ethics and by recognizing the implied warranties such as *Khīyyār* in favor of both, the seller and the buyer, since this mechanism concerning protection of contractual rights is flexible and capable to encounter the needs of changing society. *Shari'ah*, since the time of its commencement established, concretes on principles to protect the parties to a contract that can fit well in contemporary world. In case of civil liability for defective items or sale subject, Islamic legal theory thoroughly established on the basis of two vital principles extracted from *Sunnah* of "The Holy prophet" "ﷺ". One is "*Al Kharāj bi al-damān"* i.e., "Every profit has a corresponding liability" and "*Al darar Yūzāl*" i.e., "Harm has to be removed." Interestingly, the application of

first principle in contractual relation put liability in any transaction upon sellers, retailers and manufacturers etc. for selling any substandard, defective or adulterated items. The liability according to this rule can be extended to any individual whosoever comes to chain of business as producer or importer. The liability will be according to their proportionate share in the profit and there is no chance for the guaranteed investment that the seller must bear the risk in cases of defective goods.

The English common law from its beginning started to provide protection of the rights of contractual parties in Norman England. It was based on those laws which were enunciated by human beings, where authoritative control rested with 'Queen' in parliament and the authorities/case law, as interpreted by House of Lords and courts of appeal were later strengthened by emergence of equity. It was done through chancery with its own distinct Canon Law comprised with Clergy and Churchward with same principles of England and Wales – largely, the secular administration of state. In essence, as part of philosophical discussion on English Doctrines it may very well be inferred that "Caveat Emptor" principle certainly has enjoyed a firm development. The harshness of the rule has been tempered by legislation. Yet remains prevalent within particular areas of legal regime even some subtleties of cross application do exist. "Caveat Emptor" becomes redundant as a general legal principle and modern law is best explained by the Least Cost Information Gatherer Principles. It is argued that this fact cannot be denied in practice, "Caveat Emptor" keep alive in wider set of cases only due to the inconsistent application of the Least Cost Information Gatherer Principle. It is also argued that courts do not make as many disclosure measures in contract Law as LCIG's consistent application dictates about that. The consistent application of these principles would likely have

positive impact on market to negate misleading tactics and to reduce misrepresentation and to take may negative common marketing methods.

3.2. Precontractual disclosure

In the context of pre-contractual disclosure duties and to safeguard the interest of contractual parties, the English legal system remained subject to change over the years and rules were frequently altered and went through different phases and developed into a modern commercial law. However, in England, some jurists trace the roots of protection for pre-contractual liabilities of parties to *lex marcitorian* law like Walton etc.[417] In England officially it was the rule of "Caveat Emptor" that has dealt with this area of law for the first time in the pre-industrial era. This principle applied in English as leading rule and decisions were made upon this rule to resolve such type of issues. In fact, under both the systems, Islamic law and English law, there is an implied warranty of title on the sale of chattels but in the respect of seller's liability to answer for the quality there is a vast and irreconcilable dissimilarity. The English courts have drifted from the very strict application of this rule and have applied an implied warranty in different cases and thus, we have discussed a number of cases changing the early doctrine in English law. The English courts at present time follow these cases rather than those which so strictly enforced the rule of "Caveat Emptor." These courts' decisions put certain restrictions upon seller to limit and reduce the chances of unjust and unfair practice. Likewise, we also find the cases to be almost similar to the fact that another principle acquired place of this old doctrine as caveat venditor. Hence, it is also a part of that drift that in the sale of real property express warranty is in most cases granted, but in the cases of sale of personality the vender does not assure the warranty expressly. We find the fact that often in the absence of express warranties the

presumptions are raised in favor of the buyer and upon these presumptions rest the law of implied warranties. So, the old doctrine does no longer is dominant in English legal system. And, it is now settled in principles that there are implied warranties in the sale of personal properties, but it is also a fact that authorities are still unsettled as to what fact must exist in order that such a warranty can be implied. For example, we quoted earlier that in case of *Benniger* v. *Thomps* this was a suit for the price of defective horse and legal defense concealing some fact that horse was diseased. The decision was simply the outcome of the rule by the court of not interfering in matters where the personal vigilance and due exercise of care of person could safeguard himself. In no case a person may be given an advantage or the courts may aid him for the lack of care on his own behalf. On the contrary in Islamic law principle known as *Khīyyār al-aib* has its vast and comprehensive application. An option that comes into effect where the seller has already delivered the object of sale and the object is revealed to be defective one. In such a case buyer is entitled for proper remedy. This remedy is given in case where the buyer should not be aware of the defect either at the contract assembly or after receiving the proper possession. In English legal system the idea being to fasten self-reliance only in case where fraud has been executed with a ready hand to aid in replacing the owner. In these circumstances buyers easily get tricked by sellers where there is a false representation as to the market value by a seller who knows the person of buyer but buyer does not know the seller. The buyer has confidence in these statements, but courts established in these circumstances a different logic on the basis of the idea of 'general commerce' that as the article is one of general commerce and no particular knowledge was necessary to ascertain the price. This seems to be a very weedy law and had few adherents for if someone is not allowed to place confidence in the persons whom we trust our social and daily life matters would soon be unpleasant with nastiness and deceitfulness. Along

the same lines, in another situation where sale would be granted on the basis of same English law, it may provide an implied term warranty. Drastically, as compare to Islamic frame work of *Khīyyārat,* it is not so comprehensive.

Moving beyond Islamic thought, in English law, it is held that if the goods are sold by sample and delivery takes place and accepted by the vendee, he is now not able to return those goods. But if he does not completely accept them, that is, vendee has got consignment conditionally; he has a right to give them a fair trial to ascertain whether or not goods are corresponding with sample produced. Vendee may return them, in such situation, if goods are not corresponding with the sample. Another situation in case of latent defect is also not very much appreciated as compare to Islamic law phenomena, that there is no implied warranty against latent defects which exist in subject items and which appear in the sample and vendee got tricked for being unaware of the complications of the nature of goods.

Whereas in Islamic law *Khīyyār al- Rūyah,* along with *Khīyyār al-Wasaf* and *Khīyyār al- Tadlis* provide better solution for these types of complications with comprehensive measures that the parties can easily determine the appropriate remedy applying the theoretical framework of '*La darar wla dirrār'*. Nevertheless, it will be seen that it is an important proposition so that this would be essential at first to find out just what constitutes a sale by sample? Mere showing of the sample does not make it necessarily the sale by sample. Again, mere exhibition of certain items as sample from the bulk of goods offered as sale amount only to a representation. It is held that there must be an agreement to sell by sample at least an understanding that the sale is to be by sample. It is also an important subject that what amounts to be an opportunity to inspect the commodities, the courts would presume it as a sale by sample if the items as sample are exhibited and offer was made for inspection and warranty would be recognized of

correspondence of the sample with the items. Islamic law provides much wider protection to the vendee in these cases by expending the option's scope from *Khīyyār al Rūyah* to *Khīyyār al-Tadlis* to overcome the chances of deceit and misrepresentation. Our attention will next be occupied in considering that in what situation an implied warranty exists on the sale by description. Ordinarily, the courts will not be considered mere description to amount to a warranty until it is made in a very definite and obvious terms. While again, the protection provided under *Khīyyār al-Wasaf* along with *Khīyyār al-Ta'yeen* correspond this issue in an absolute and comprehensive manner to prevent the action of deceit especially where a sale provisions/supplies for immediate use in family and wishes to trust his own knowledge. The law would not interfere if the goods are sold as mere merchandise by dealer to dealer, no warranty is implied because the commodity is ultimately to be used as food, while in Islamic law situation can be settled by operation *of Khīyyār al -Kashf al hall* and *Khīyyār al taghrir.*

The compendium of the above discussion is that the mechanism serves the very basic objective of Islamic legal system that is to consider interest or expectations of contracting parties by providing measures that serves the aims of the businessmen because survival of business and protection of wealth rests upon the mechanism of mitigating risk of losses, misrepresentation or product defectiveness. We noted that jurists had discussed these measures and exemplified it in the number of traditional *Shari'ah* options, such as *Khīyyār al- Majlis Khīyyār al -Shart, Khīyyār al-Aib, Khīyyār al-tadlis* to mention but few. Rational behind allowing these measures is to grant the contractual parties a spell to think about the transaction and to refrain from harm that may devastate them when the transaction continues. These options also serve the interest of related parties in transaction in order to ponder on the feasibility of the deal and obtaining information on the deal. The basic features of these options suggest that the risk to be avoided in the context

of fraud (*Ghubn*) misrepresentation (*tadlis*) and misconduct as indicated in *Hadith Ibn Haban's* case.[418] As it is noted, this mechanism being consist of variety of options enabling to serve the wider range of aspects in term of interests of parties; which meant, to permit the parties to avoid risk and damage as tools for defeating loss as consequence of hastiness in exchanging offer and acceptance. It also covers the regret, damage of imprudent, ill-advised decisions and unpleasant effects of buying and selling by proffering them a legal or contractual right to terminate the deal after its conclusion when it appears not fulfilling the aim of such party. Then again, some of these options provide one of the contractual parties probably a vendee a right to obtain discount for defects or right of settlement.

3.3 Transparency and Fairness in Bargaining Process

Generally speaking, one of the significant ideas in *Khīyyārat* is the right/option given to the vender or vendee is the cancellation of transaction, whether it is bound by certain stipulated timeframe or due to the reason that goods are found defective. Both vender and vendee are provided simultaneous opportunity and right, according to this mechanism, to withdraw the deal as long as it is not prejudice to the due interest of contracting parties. Wherein, as per the provisions of the Contract Act, 1872, implemented in Pakistan, by Section 3, it is stated that, "*any proposal may be revoked at any time before its communication passed and it got acceptance in its complete form or according to proposal, and further mentioned that when it is put in a course of transmission to him and became out of the power of the party once it comes to the knowledge of other party.*" If this provision is to be applied or modified in context of *Khīyyārat*, its applicability would certainly have more comprehensive and wider scope. The mechanism refers to the bargaining process between contracting parties before the transaction is sealed. The right that is meant by here is *Khīyyār al-Qbul* and accordingly cancellation of

[418]Ibn Maja, vol.2 page .789.

transaction cannot be completed if the *Ijab* and *Qbul* (offer & acceptance) has been done (when it is referred to *Khīyyār al-Qbul*), and to *Khīyyār al-Majlis* in cases even though *Ijab* and *Qbul* has been perfected as long as the vender and vendee still present in that very sitting. This means that the principle of *Khīyyār al-Qbul* and *Majlis* can be applied, at the occasion of cancellation of deal, in the Contract Act, 1872. Similarly, the allocations in other relevant legislations like the Sale of Goods Act, 1930 its provisions related to express and implied conditions (see Section 7 to 16 (a)) are to be examined carefully wherein same can be said of *Khīyyār al-Shart.*

Moreover, in terms of implications another provision of the Contract Act, 1872 is also pertinent that is given in Section 25 which provides that if no time frame for performance is specified, the deal must be performed in a reasonable time. Further, in explanation reasonable time is denoted as a question of fact in each particular case. Whereas Islamic concept of *Khīyyār* has much clear notion, in *Khīyyār al- Shart* as described by the jurists. That is, the vender and the vendee are provided a certain period, such as three days to cancel the deal. In case, if prescribed period has expired and there is no sign for cancellation of deal by any of the parties, the deal itself becomes perfect and parties then have no space to cancel the deal without any previous commitment. However, based on the Contract Act, 1872, the scenario is different. That is, if the given time frame has passed the transaction is considered to be invalid as opposed to Islamic law where if the party does not make cancellation within given time the deal becomes valid. In the same way, based on the idea of *Khīyyār al-Aib*, there is much room for its practice in contemporary legislation, due to its comprehensiveness, like the law of Sales of Goods and laws for protection of consumers. The provisions in this law are manifested to ensure the quality and fitness of goods to be sold as it was elaborated in the discussion of “Caveat Emptor.” Same applies to online contracts, where the supplier himself has full information of every aspect of the products

and vendee has no chance to have sufficient information except, he can only assess the item sold to him upon information based on the vender's description. Furthermore, in online dealings, where vendee has no opportunity to see the sample and buys any item from its description, without having any opportunity to handle the goods physically, and finds on inspection subsequently, that it does not possess the description, he has no option to cancel the deal. Islamic framework of *Khīyyārat* can provide maximum solution in this situation, this type of situation can be handled through adaptation of *Khīyyār al-Aib* i.e., option of defect or *Khīyyār al-Shart.* In consort with these two *Khīyyār*/options, another slice of this Islamic legal mechanism, which guarantees the safeguard of rights of other contracting party in context of deceit or misrepresentation is also available in terms of *Khīyyār al- Tadlis.* As discussed earlier, the *Tadlis* (deceit) is framed by the vender when he represents the goods better in condition and quality but in fact they are not. It also includes the situation where vender hides the defects of subject of sale. E-seller, sometimes exaggerate about the subject in describing about its features; therefore, *Tadlīs* seems to be committed by e-seller unless another arrangement has been made, which typically never happens. However, the application of Islamic legal mechanism of *Khīyyār al-Tadlis* guarantees, to some extent, protection of the right of vendee in case of such deceit and ensures to maintain balance between the rights and liabilities of vender and vendee in online transactions.

Conclusion

With this, the discussion may be concluded as follow;

This discussion proved, that ever since early days, Islamic law remained flexible, allowing on wide range for adoptability, differences of opinion and acceptance for social changes. The law was neither inflexible nor as rigidly applied in early stages of Islam as deliberated in earlier discussion. In brief, particular emphasis has been given to the conceptualization of (al-t͟hawābit wa al mutaḡhiyyrāt) continuity and change in *Shari'ah* and methodology of *Ijtihād* which ensure that Islamic law can be adopted in any situation. With that, the legal principles like consideration of *Maslahā* and *Istehhsān* (juristic preference), the flexibility of Islamic law in practice and utility of *Ijtihād* (legal reasoning) sufficiently demonstrate that *Shari'ah* is adaptable to social changes. Specifically, as a device for renewal and reforms, *Ijtihād* always remained dominated by its dual concern of continuity and change; continuity with the given fundamental basics of *Shari'ah* while keeping pace, also with the realities of social change. Interestingly, this discussion had shown the flexibility of the Islamic law in the face of real commercial challenges that confronted the Muslim population across the globe. Apart from the issue of permissibility, the conceptualization of continuity and change it is recognized from the foregoing discussion that there are some aspects in the face of these commercial challenges that merit reform and innovation, these will be alluded to in the coming chapters and will hopefully make their way to the literature on the subject matter in the future. With this overview into the conceptualization, it is also demonstrated that theoretical framework, which is also outlined in research methodology as "*Al Darar Yūzāl*" (harm must be eliminated) or "*La darar wa la dirrār*" ("There is neither inflicting nor returning of harm"); in Islamic jurisprudence is an effective mean to lessen the chance of uncertainty and unfairness in trade. Suffice it to note at this stage that on the basis of

definition and meaning, Islamic law is susceptible to adaptability from a conceptual and practical viewpoint, due to the changing nature of things along with the methodology of *ijtihad*.

With that realization, it should be stated that the current system and framework governing pre-contractual liabilities should consist of fairness transparency of rules and conditions, suitability for both the parties to contract in terms of product delivery that should ensure the ability to repay, provision of grievance redressal process, vibrant conditions for liabilities (if things go off beam) and simplicity of procedure about the changing circumstances in case of updating. In current system of governing all these aspects, the principle of "Caveat Emptor" is being slowly taken over by caveat venditor. The transformation, being recognized to be more buyer-oriented than seller, would no doubt help to provide safeguard to the buyer interest. In such scenario, commercial transactions are being encouraged but inappropriately it would not help to create an appropriate balance between the rights and liabilities of vender and vendee. Whereas, in true sense, if the rule was being given a solid shape, this conceptual change must center around the balancing point of the necessity of disclosure of information by the vender on one side and implication of reasonable examination conducted by the vendee on the other. But, considerably, it is a fact that, if this drift of change is taken too far, we might end up in re-trading deals due to the approach, then certainly pro-buyer approach prevails, which causes misuse of law.

Ultimately, one should be cognizant of the fact that here and now, when this reality is taken on to surface that "Caveat Emptor" has no economic justification, why would the rule of "Caveat Emptor" survives, although predominantly limited in land transactions or sometimes it is seen to prevail in contracts between private sellers and in sale of antiques. Legal system may do so for some reasons that they tolerate other forms of socially undesirable behavior,

administrative costs etc. However, legal system with resource constraints cannot redress all market failures and focuses only most serious of it that's why still a version of "Caveat Emptor" is found in system on and off. As it was shown in earlier part of discussion that the approach to rule of "Caveat Emptor" in 19th century was inconsistent, the harshness of the rough trader did create the need for change and that change, as we discussed, 'Caveat Venditor' might not be a balancing approach which necessitates more flexible and appropriate line to untie the knot.

To be certain, despite the arguable existence of quality spread discrepancies, the principle that now best explains the law is not "Caveat Emptor" but the 'Least Cost Information Gatherer Principle' (later to be read as "LCIG"). But then again dilemma is that, as it was debated in earlier discussion in previous part, LCIG and its corollaries are insufficiently understood or applied. The reason is clear; the common marketing and sales methods exploits informational advantages of venders at the expense of vendees. Therefore, the relationship of common sales and marketing methods and LCIG has not yet determined their limits. Another factor of disappointment of LCIG is that courts make errors in applying LCIG principle. Consequently, market and people who deal in sale have learned how to exploit these conditions. Along with that many marketing and sales methods, such as price conditioning violate the LCIG principles and courts do not clearly redress it to the extent that these methods are in tension with the LCIG principles. Feasibly, courts should no longer tolerate this. Subsequently, in practice, rule of "Caveat Emptor" is kept alive in inclusive set of cases than it is economically defensible by the rough application of LCIG principle.

Though, the situation might end up that "Caveat Emptor" can be reintroduced through back door, not only by inconsistently applying LCIG, but it raises question that why should there be statements that one does not have to make, even if one makes them one has to be precise? If

someone rely on the LCIG for particular kind of disclosure, why he has to disclose that information in the first place (e.g. just as owner of the apartment that is infected by termites, as referred previously). Further, if LCIG principle explains both, disclosure duties and misrepresentation, it does not fully overlap i.e. the conditions for duty to disclosure are not identified.

Nevertheless, "Caveat Emptor" through or without its replacement as caveat venditor is no more sovereign as a general principle in commercial transactions. Modern law now is best understood as differently, even though, in practice, "Caveat Emptor" is kept alive in different ways; because, an alternative legal system in its true sense did not create as many disclosure duties in contract law by way of consistent application of LCIG rule's prescriptions. Courts do not always involve in the issue that the information be revealed in most efficient manner where there is duty to reveal it. On the other hand, Islamic law of transaction from the time of initial inspection prescribes detail rights and obligations for both the vender and vendee for contractual relationship through a distinct framework recognized as *Khīyyārat* i.e. options. This framework is designed to ensure balance in contractual transactions, providing protection to the weaker party from any harm and exploitation. Such as the option of defect, known as *Khīyyār al-Aib* is more extensive in its application than the notion of "Caveat Emptor." Its approach seems to be more consumer oriented and balanced as it places an obligation on the vender to disclose all known failings and defects in the subject to be sold before the agreement gets concluded. It even allows the vendee the right of option before or after the conclusion of contract. This is to be in contrast with the notion of "Caveat Emptor" that only achieves one aspect i.e., allowing the vendee the right to inspect before the contract is concluded and places no obligation of disclosure of the same on the vender.

To be sure, spirit of justice recognized in *Shari'ah* puts responsibility on the vender to disclose all the failings or flaws of the subject. Also, it recognizes the vendee's right to inspect the subject of sale. In fact, this doctrine provides an implied right to the party to carry out an inspection on the fitness and quality of the subject of sale to be made. However, it reserves the right of inspection to the vendee both after and before the transaction being concluded and as such it provides opportunity either to continue or to rescind the contract. It does allow the vendee not only to get compensation, but if he realizes at a later stage that there was another flaw which had occurred while the subject was in his hand, the rule requires him to bear loss. With that, it is important to acknowledge that the finality of contract or sale transaction may not rest wholly on the just essential requirement namely offer, acceptance and consideration which were prescribed for the validation of contract. In other words, and in the pertinent opinion of Islamic jurists, even though a contract of sale is formed; the congruence of offer and acceptance does not become final by mere constitution of these requirements; it is still open to some other rights in form of options.

Recommendation and Suggestion for Further Research

In terms of implications arising from the research, one may start with the recommendations based on the elaborations presented in the thesis, that is the linkage of right of *Khīyyār* with contemporary legislations governing contractual relationship needs to be analyzed and to comprehend a greater extent than it is currently present. This should be undertaken in the light of better understanding of the safeguards and protection for vender and vendee based on the legislations namely; the Contract Act, 1872, the Sales of Goods Act, 1930 in wide-ranging and statues governing consumer protections etc. specific to consumers. The steps should be taken to examine the statutes to determine the practicability/portability of *Khīyyārat* within the spaces of

these statutes in order to ensure the application of concept of *Khīyyārat* within legislative framework of current legal system and to foresee the adaptability of *Khīyyārat*.

With that added understanding one may conclude that one of the two measures should be taken to include the frame work of Khīyyārat as an operative part of statue governing contractual obligations. First of these ,we have prime piece of legislation of Ottomans time known as Mujallah al Ahkām al Adliyyah ,where general principles are given as Maxims in the beginning of the Code to this, it is possible to make room in very legislation governing contractual obligations, these models should carry such example and the framework of Khīyyārat to govern pre-contractual liabilities in a comprehensive way should be included as general principle to be part of interpretation clause of concerned legislation .Secondly, we have another example as CPC, Civil Procedure Code irrespective of the fact that this code covers mainly the procedural aspects, but example could be taken in legislative writing in contractual laws .However, CPC structure is divided in two parts , namely 158 sections and orders. For the further elaboration of execution of the sections of civil procedural law there are 51 orders which are explaining the detailed procedure in shape of rules. Part 'X' this code section 121 to 131 provides mechanism to make rules and empowered that High court make orders to take legislative measures in the elaboration of substantive law taking into account the practice and advancement., In the same way Contract Act may also provide Rules for implementation of the act generally and specifically providing chapter of Khiȳārat .

With this in mind, current reality needs to be considered in implementation of Islamic legal mechanism for practical purpose and to ensure the theoretical framework of *Muqāsid al-Shari'ah* which need to be implemented for achieving welfare of contracting parties and their interests and to remove harm from them. That is one of the objectives of trade, for profit of one

party at the cost of other is not what is sought for by the law rather it is wellbeing of both contracting parties. The equity, balance in dealing and no harm to anyone is subject of *Shari'ah* in commercial dealings – the gist of theory of '*La darar wla dirrār'*.

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