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Khīyyār Al'Aib: A Tool for Achieving Fairness in Financial Transactions

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ABSTRACT

It is important to acknowledge that the finality of a 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 the contract. In this paper, the issue of these allied requirements as well as the framework and tools that are available for contractual parties to deal with losses occurred by defective commodities or products. The positive thing that emerges from the discussion in this regard is that the Khīyyār-Al 'Aib option of a defect in Fiqh' al Mūamlāt is a framework which serves the objective of protecting the right of contractual parties. This right is in essence a flow of theory of contractual obligation as discussed with detail embracing the theoretical framework of "Al Darar Yūzāl" "La darar wala dirrār", especially the segment for pre-contractual liabilities must be focused.

Keywords: *Khīyyār*, Riba, Islamic Law, Economics, *Al Darar*,

Introduction

Commonly the choice for Khīyyār is based on the consideration agreed upon.1 However, in legal terms, it connotes the exercise of the right to determine the best of the transaction by either implementing it or

resending it. These options as elaborated by the different leading schools of Islamic fiqh varied and significant ones are those which are more practical and often involves in modern transactions, this research focused on the more significant one which deals with defective goods and is termed as Khīyyāral-aib.

Statement of the Research Problem

Whether the concept of Khīyyāral-aib 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?

Research Methods

"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."

Significance 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 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 the possible danger that will harm their future business."2 Assuredly, by this, mechanism the vendor, in any commercial transaction is duty-bound to give fair chance to the vendee to have inspection or examination of merchandise for his 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

a 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 Khīyyār.3

Concept of *Khīyyār al 'Aib*

Generally speaking, it can be argued that Khīyyāral-it is an option or a right vested upon contractual parties, which mostly be the buyer or seller might be to rescind the transaction when any of the parties discover a defect in either the subject of a sale or in the price paid but was unknown to him at the time of the 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 in the state of negotiation or still in process of discussion the affected party cannot exercise this option as right. For this, it is known that to ensure about the subject's freedom from the defect is the right of the vendee in a fair transaction. Thus logic or rationale of this Khīyyār is to preserve the principles of fairness and justice in trade to build healthy commercial activity.4 However, this doctrine of Khīyyār al-Aib renders the vendee power to revoke and not to adhere to compliance with the contractual obligation as the subject matter defects without his fault. It is made to afford protection or safeguard for vendee in terms of such rights which were violated unduly.5

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

Basically, for the most part in financial matters, the Shari'ah scholars have widely recognized, and have indeed promoted the mechanism of mitigating the risk of losses due to 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, and Hanmblī jurists increase it to eighteen. Conversely, in Mālaki school, we find the discussion restricted only to two major kinds.6 Meanwhile Fiqh's manuals properly, in a 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 conviction a defect in kind, in

quantity, or quality, if obvious or known to the seller and was not revealed, is a fraudulent act and the transaction is void. If in case, the 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.7 Another significant discussion is "whether the vendor is bound to mention any defect in the item sold?" The argument is that the vendor is bound to ensure about the 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.8 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." 9

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 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.10 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.

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."11

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".12

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."13

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

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 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.14

(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.15

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.16 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.17

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.18

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 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.19

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.20 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.21

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.22T 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.

"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 vendor".

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

"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.23 Generally, it isan implied warranty that a sale without any stipulation makes it necessary, the sold item should be free fa from a defect known as Bara'atunm mina al 'Aib".24

Khīyyār-Al 'Aib and its relation with -*Tadlīs /Ghubn* (deception)

The concept essentially proposes that where either of the parties to a contract entails excessive deception, which may run to fraud, that poiaffectedeffected 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 for 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 Taghr but in general, the terms have the same legal implications on the subject matter. 25Rather some of them considered all these malicious tactics as a defect in the transaction and include them in the ambit of Khīyyār-Al 'Aib.

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 a transaction which technically is a defect or Aib.

Authority and Reliance

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

"if any one of you transact a business he should say 'let there be no deceit."26

With that, authors of Islamic law quoted certain principles on Tadlīs or Ghubn in different ways. It is declared Harām in Islam to defraud or to

make the fraudultransactionstion, where any party is defrauded in a transaction, this right to choose his option to rescind or confirm the transaction. He may retain the goods or return them to the vendor. But in a situation where deceived party disproof off the subject an of sale or consumed 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 deceitfully has perished or destructed or any addition occurred, for instance, any construction was built on land 'being subject of the deceitful bargain' then the affected party has no right to option to annul earlier transaction.

Conclusion

Ultimately one should be cognizant of the fact that the true intention of the Islamic legal system is to ensure fairness and justice in mūamlāt. With that, it is important to acknowledge that the finality of a 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 the contract. In other words, and 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 the mere constitution of these requirements; it is still open to some other rights in form of options.

In this paper, the issue of these allied requirements as well as the framework and tools that are available for contractual parties to deal with losses occurred by defective commodities or products. The positive thing that emerges from the discussion in this regard is that the Khīyyār-Al 'Aib

The option of a defect 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 redressing either or both of the contractual parties to meet or rescind the agreement. For this, these options are implemented in different ways, that contract may still be intact under circumstances that are being linked with the subject of exchange, price etc., and the provision of this framework helps reduce zarar and brings up acceptable limits, it also reduces the risk of undue commission of any action deliberate or unintentional. This option has justifications too based on various larger

benefits to the society, in this way parties are given a 'reassessment' or 'cooling-off period over which they can rethink their contractual decisions by rational thinking to minimize the 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, the discussion has emphasized thowlaw 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 discussion supra embracing the theoretical framework of "Al Darar Yūzāl" "La darar was la dirrār", especially the segment for pre-contractual liabilities must be focused.

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