

## **THE EFFECTS OF DURESS ON CONTRACT UNDER ISLAMIC LAW**

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### **ABSTRACT**

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*This paper seeks to discuss the effect of duress on contracts under Islamic law. It will first touch on the meaning of duress both from literal and legal points of views. The classification of the concept is equally important to be explained. Finally, the question of whether the existence of duress will have any effect on the validity of a contract would be dealt with. In doing so, opinions from various school of Islamic law will be consulted and examined accordingly.*

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## Introduction

Freedom to enter into contract is one of the features of Islamic law of contract. According to this principle, every person is entitled and eligible to be part of the contracting party as long as certain requirements are fulfilled. A person is said to be competent when he is fully possessed of legal capacity. However, there is a limitation imposed upon certain parties from entering into a contract if there is impairment in legal capacity, so imposed either to protect one of the contracting parties or both. Under Islamic law, classical jurists especially those of the Hanafi, consider duress as one of the various factors which affect legal capacity. On the other hand, Modern scholars seem to include duress under an umbrella term “defects of consent” when discussing this concept. Whatever the case may be, the effect of duress is significant to the extent that some judges throughout Islamic history would reject any contractual document unless the phrase “absence of duress” is clearly stated therein. This is despite the fact that there is a general maxim which states that the apparent situation in a contract is that it is made voluntarily. This paper will thus be devoted to studying duress and its effects on contract purely from Islamic law point of views.

## Meaning of Duress

As a matter of fact, there is not much evidence from the primary sources expounding the meaning and concept of duress. Perhaps the most frequently quoted Quranic verse concerning duress can be found in (2:256) which reads: “ No compulsion in religion”. However, this verse is not clearly directed at the effect of duress on contract. Similarly the Arabic word for duress i.e. *ikrah* and its derivatives are also to be found in (16: 107) and (24:33). In addition, the *Hadith* “ liability is exempted from a duressed person”(narrated by Ibn Majah) is regarded as the most reliable source concerning the legal rules of duress. Apart from this textual evidence however, there is no conclusive text on this concept. This in turn has prompted the jurists to discuss the subject mostly from their own perspectives.

Literally, *ikrah* is derived from the root word *ka ra ha* which is constructed as *akrahahu* meaning ‘to force someone to do something against his wishes’. The word *kurh* is also the antonym of *hubb* (love) (Bardisi, 1960) as such, these two terms are used in an opposite sense, as in for example in the Qur’an (2:216) which reads: “But it is possible that ye dislike a thing which is good for you and that ye love a thing which is bad for you”

Technically, jurists have offered various definitions of duress. Sarakhsi(1978) for example, defines this as follows: “ by duress one designates the action of one person against another suppressing the consent of this latter person or vitiating his free will”. Zayla`i (1315 H) on the other hand considers duress as an action directed against a person which suppresses his consent while Bukhari (1995) defines it as forcing a person to perform an act against his wishes by way of any threat of which the person exerting duress (*mukrih*) is capable, so that the duressed person (*mukrah*) is intimidated and deprived of free consent. A more precise definition is given by Asqalani (1407 H) by stating that duress is to force another person to do what he does not wish while other definitions are found to be almost identical to those previously given. Contemporary jurists for their part give no differing definition of duress , except by either modifying or accepting those offered by their predecessors. For instance, Abu Zahrah(1977) states that duress is an order from one person to another to commit an act or utter words under

threat of the infliction of evil in the case of non-compliance. Zarqa'(1968) refers to duress as a physical or moral constraint directed against a person in order to compel him to ratify or not ratify a juridical act, while Madkūr(n.d) sees it as to force a person to do something, be it verbal or in deed without his consent other than by way of the *Shari`ah* .

It is observed that jurists emphasize through these definitions the important elements of duress according to their own priority. Sarakhsi, for instance, identifies the elements of duress, i.e the person exerting duress and the duressed person. In the same way, Zarqa's definition to some extent highlights the act to be done under duress (*mukrah alayh*). Nonetheless, none of these definitions are sufficiently comprehensive to connote the actual meaning of duress regarding contract; hence as suggested by some authors, duress should be defined as the exercise of an unlawful pressure on a person to create in him the kind of fear which causes him to enter into a contract(El-Hasan, 1986).

### **Types of duress**

Generally speaking, the jurists have classified duress into two categories; unjust duress and just duress.

#### **Unjust duress ( *ikrah bi ghayr haq* )**

Jurists are not agreed in classifying the types of duress falling within this area. According to the Hanafi, duress can be divided into constraining (*mulji'*) and (non-constraining (*ghayr mulji'*) which are also known as a complete duress and incomplete duress respectively. Both types nullify consent (*rida*), but only the former vitiates choice. These kinds of duress are established when the threat is either directed against the person under duress himself or against his properties. Here, Bazdawi (1995), one of the Hanafi jurists has added another type of duress known as 'moral duress'(*ikrah adabi*)in which a threat is not directed against the person under duress but rather against to his relatives, such as a threat to imprison his father or his son. However this kind of duress is included under non constraining duress by most Hanafi scholars, due to the fact that it negates only consent but does not in their opinion negate choice.

On the other hand, the majority of the jurist amongst them the Shafi'i, (Ghazali, 1417 H) the Hanbali ( Murdawi, n.d) and the Maliki (Hattab, 1978) although concurring with Hanafi in classifying duress into constraining and non constraining, nevertheless differ in other aspects of interpretation. This is because according to them, 'constraining duress' is so called when a person under duress has no power or choice, such as in the case of a person being thrown onto another person resulting in the killing of that person. In this example, the person thrown has no power to avoid such an act, as if he is in effect a tool of a person exerting duress. As for non constraining duress this occurs when the situation does not amount to the constraining one and this may include some aspects of duress as understood by the Hanafi.

Apart from this, the Zahiri have divided unjust duress into duress on utterances and duress on deeds, thus the former causes no effect unless it is accompanied by the consent of the *Shariah* done intentionally, such as forcing to pronounce cause to abandon Islam (*kalimat al kufr* )As for deeds their effect very much depends on the types of act to be done under duress (*mukrah alayh*)) as to whether this act is permissible in a state of

necessity or not. Thus, what is permissible under the rule of necessity such as drinking wine, will also be permissible under duress. Likewise, if a thing is not allowed under the rules of necessity such as the act of killing, this will also be forbidden under duress.(Ibn Hazam, n.d)

A deeper study of these various classifications has led to the following conclusion. Firstly, concerning the Hanafi's classification, as far as contract is concerned, there is no significance in dividing duress into constraining and non constraining as evident from the works of jurists when they discuss the law relating to a contract made under duress(Madkur, n.d). Furthermore, the impression of the word constraining (*mulji*) used by the majority of jurists such as throwing a person a high place does not support Hanafi's classification. Secondly, with regard to the Zahiri their classification is more concerned with the acts to be done under duress not duress itself. It seems that the classification of the majority of jurists is preferable since it clearly puts a limitation on what is considered to be duress and what is not. Furthermore this classification is more concerned with the field of contract.

### **Justified duress (*ikrah bi haq*)**

Justified duress also known as 'legal compulsion' (*ijbar shari*), is an action taken by the authorities to force a person to carry out a valid act relating either to another person or to public interest such as forcing a debtor to repay his debt(Muhammad Shaqrah, 1986). The jurists are unanimously agreed that in order for duress to be justified, the acts to be done under duress must be in conformity with *Shari`ah* rules. Thus, when this requirement is fulfilled, then duress is enforceable despite the absence of the consent of the person under duress. This is because in the case of contradiction between his consent and the consent of *Shari`ah*, the latter will prevail.

Legal compulsion can take several forms; namely compulsion to avoid harm or enforce special rights and compulsion for the sake of public interest. With regard to the first, this refers to a person who has been asked to fulfil certain obligations towards others but who has refused to do so resulting in the need to invoke the authority of the *Shari`ah*. For example, the judge has the power to compel a debtor to sell his properties in order to repay his creditors. The same is true in the case of tax collectors appointed by the ruler (*umm al sultan*) whereby they are forced to return what has been collected unjustly from the people. However, the inclusion of legal compulsion under the category of duress is not accurate (as maintained by the Hanafi) since the most important factor in determining duress is not regarded. The reason behind its inclusion by most jurists is perhaps the apparent similarity between the two types of duress. Despite this, it should be noted that in the case of legal compulsion there are two conflicting kinds of consent, one is that given by the person under duress while the other is granted by the *Shari`ah*, but the consent of *Shari`ah* must prevail by necessity. Thus, gravity of compulsion used in this regard should not be excessive in conformity with the maxim "necessity is judged on its degree" (*al-darurah tuqaddaru bi qadariha*). Therefore, for example, the judge cannot impose the selling of the most valuable properties of a debtor (in order to settle his debts) if there is a lesser property whose value is sufficient to repay the debt.

The second type of legal compulsion concerning public interest is utilized to protect the public in a case where there is conflict of interest between the individual and the public interest that cannot be harmonized as for instance, to force land owner to sell his land in

order to build a mosque (Muhammad Shaqrah, 1986). Another example cited by Malik is that if the price of a particular food is artificially very high, then the ruler may ask whoever is responsible to bring it to the open market. Likewise, the ruler is permitted to make personal property public property, with reasonable compensation; he is also allowed to force his subjects to carry out certain actions in order to preserve public interest. In imposing this policy, the doctrine of committing the lesser of two evils (*irtikab akhaf al-dararayn*) has to be carefully observed, so both individual and public interest are balanced and not at the expense of one another in compliance with the *Hadith* “*la darar wa la dirar*” (narrated by Malik)

From above discussion, it is quite clear that legal compulsion cannot be classified under duress except on the basis of apparent similarity i.e. the use of force by the authorities for instance to sell a debtor's property in order to settle the debt. However, this force should not amount to causing injury to the debtor as it would have been in the case of unjust duress. Realizing this perhaps has led some jurist to prefer the term *ijbar* rather than *ikrah* although this preference is still not convincing enough since both terms are synonymous from a literal point of view

### **Contracts made under duress**

Prior to a discussion of the effect of duress on contract some important points related to the presence of duress on a person should be noted. To begin with, jurists are unanimously agreed that duress does not completely remove legal capacity. This holds true if reason (*aql*) is regarded as the basis for active legal capacity. As the duressed person is still capable of responding to legal commandment (*khitab shari*) since his acts will be judged by the *Shari`ah* as sinful, deserving of reward, valid or void, this leads directly to a consideration of exactly what effect duress does in fact have on the duressed party. Jurists have attempted to address this question by focusing on two problems; namely the effect of duress on intention (*qasd*) and consent (*rida*), and on whether the person who exerts duress or the duressed person should be held liable for an act carried out under duress (Bukhari, 1995).

As far as the first issue is concerned, jurists have used the term choice (*ikhtiyar*) and intention (*qasd*) interchangeably, terms which imply the intention to carry out an act which wavers between realisation and non realisation which is within the doer's power to achieve by preferring one alternative to the other (Ahmad Hasan, n.d). On the other hand, consent (*rida*) indicates feeling pleasure by someone at doing something in which his interest lies. Although the majority of jurists maintain that both terms are identical, the Hanafi hold that there are nevertheless disparities between the two. This is due to the fact that choice refers only to the intent underlying the cause upon which the effect of the deed depends, whereas consent is the desire to achieve that effect. Hence, according to the Hanafi, duress can influence either of these two elements, that is, its effect can either negate consent and will (*ikhtiyar*), negate consent but not will, or lastly, it may not negate either consent or will (Bukhari, 1995). However, the majority of jurists opine that choice refers to intention, which in turn encompasses consent.

With regard to an act carried out under duress as to whether liability should be related to the person exerting duress or the duressed party, originally any act whatsoever should be attributed to its doer in accordance with the Quranic verses (53: 38-41) which read: “That no bearer of burden can bear the burden of another, that man can have nothing

but what he strives for, that the fruit of his striving will soon come in sight, then will he be rewarded with a reward complete”. However, in a case where duress involves contract, liability for the act carried out will lie with to the person exerting duress ,as maintained by the Shafi'i(Muhammad Shaqrah, 1986).

This said, jurists are not agreed as to the validity of a contract made under duress. According to the Maliki, and some Hanafi like Zufar, (Kasani, 1973, Mubarak, n.d )a sale contract, for instance,concluded by a person under duress is upheld valid, but its effect is suspended (*mawqūf*). Zufar argues that this kind of sale is valid because it resembles the sale made by an unauthorized agent(*fuduli*) in the sense that both instances do not fulfil the requirement of a proper contract; therefore, if the sale made by an unauthorized agent is suspended, the effect of duress on the sale will accordingly be the same. In other words, Zufar, having no direct textual evidence to support his view, has resorted to analogy (*qiyas*) in his argument. However, this analogy between the unauthorised agent and the duressed person seems untenable, for a deeper analysis shows that there is 'disparity' between the two, terminologically known as analogy between two different things (*qiyas ma al-fariq*). This is because in the case of an unauthorised agent the seller does not possess the sold item (*mabi'*) whereas this is not the case in the sale made by the duressed person. Thus the use of analogy itself is invalid.

On the other hand, the majority of jurists such as Shafi and Hanbali (Sharbini, 1958 Murdawi, n.d) opine that the existence of duress in a sale contract renders it null and void (*bati'l*),and thus carries no effect whatsoever. They base their opinion on the Qur'an (4:29) .This verse clearly indicates that every kind of property exchange will not be lawful unless it is carried out by mutual consent of the parties concerned. The Qur'an has considered void every act carried out without consent; as such, undoubtedly , consent is 'absent' if a contract is concluded under duress, rendering such a contract as void. In this regard, Ibn Arabi (n.d)states: “ this verse is evidence of the voidance of the sale carried out by a duressed person, due to the absence of consent ” Moreover, their view is also supported by a Prophetic tradition “Allah has lifted from my followers ( the liability of) mistake, forgetfulness and duress,” (Ibn Majah) which shows that every act issuing from a person under duress is not considered lawful. Apart from this evidence, the majority of jurists also argue that a sale by a duressed person is similar to that of a jesting person (*hazil*) in the sense that both of them in reality do not intend to conclude that contract. Therefore, accepting that the sale by a jesting person is void, in the same vein the sale made by the duressed person should also be void according to the rule of analogy (*qiyas*) (Bardisi,1960).

In addition, according to the Qur'an if a person is forced under duress to abandon Islam, this abandonment is regarded as void; he is still therefore a Muslim in the eyes of the *Shari`ah* . This is because his consent was not given. Similarly, if he is forced to enter into a contract under duress such a contract should in the same way be voided. In addition to these views, the majority of Hanafi (Sarakhsi, 1978) hold that a sale made under duress is irregular (*fasid*), but can be ratified by the consent of the duressed person himself. They maintain that consent is a condition for a contract to be valid, and not a condition for its conclusion (*in'iqad*). According to this, in the case of the absence of conditions for validity, such absence will not make the legal rule (*hukm*) absent similar to other kinds of irregular sales. The only difference between a sale carried out by a duressed person and other irregular sales is that in the former the doctrine of ratification (*ijazah*) applies, whereas this is not the case in the latter. This is because the

irregularity in other sales such as usurious sale (*bay ribawi*) is for the right of *Shari`ah* that cannot be removed by the consent of the contracting parties. On the contrary, in a sale made by a duressed person, the right of the contracting parties prevails; hence duress can be removed through their consent (Ibn Abidin,1326 H).

In other words duress in their view does not prevent the concluding of contract as long as its elements are fulfilled . However, duress will only make the sale unenforceable in the absence of ‘complete consent’. Therefore, if the duressed person gives his consent, the sale will be enforceable. If duress involves only concluding a sale( offer and acceptance) not delivery (*taslim*), and the duressed person delivers the sold item with full consent, this delivery can be considered as ratification. If duress is on the buyer alone, then both the buyer and the seller have the right to revoke a contract before taking possession; however, if duress involves the buyer and the seller, both of them have the right to revoke regardless of the fact of taking possession (Kasani, 1973).

Having discussed the evidence put forward by the above jurists, it seems that the view which upheld that the contract made under duress is suspended is more preferable. This is because event though such a contract is concluded in the absence of consent of the duressed party, this consent can later be obtained through ratification.

### **Revocation of contracts made under duress**

In Islamic law, the concept of revocation applies only within the Hanafi and Maliki schools of law. Other schools, such as the Shafi'i and the Hanbali, -due to their views in invalidating a contract made under duress- did not discuss this problem in their works. For this reason, discussion of the rights of the contracting parties to revoke a contract made under duress will refer only to the Hanafi and Maliki. Generally, the Hanafi and Maliki are agreed that the right of revocation rests with the duressed person; however, the question then arises as to whether the person exerting duress also enjoys the same right. According to the Maliki, the duressed person has absolute right to revoke the contract; however, the person exerting duress may revoke it only with the approval of the duressed person. The Hanafi concur with the Maliki's view provided that taking possession (of the sold item) is completed. Nevertheless , if ‘possession’ has yet to take place, both the duressed person and the person exerting duress have an equal right to revoke the contract. They contend that the legal force of a contract before taking possession is considered to be very weak. Thus, either party has the right to terminate a weak contract, whereas this is not the case after taking possession of property by which a contract has been confirmed ( Sarakhsi, 1978).

### **Conclusion**

From the above discussion it can be seen that Islamic law has identified duress as a factor that may affect free will of a person concluding a contract. In the case of justified duress (*ikrah bi haq*) it is exerted by the judge in order to uphold justice, thus, it has no consequences whatsoever to invalidate the contract. However, if the duress is unjust (*ikrah bi ghayr haq*) then the jurists are not agreed as to the its legal implications. While some opine that a contract made under duress is suspended pending the approval from the duressed party while others considered it null and void *ab initio*. As to how the presence of duress is established, this has not been highlighted in this paper as it can be a specific topic for further research.

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