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# Islamic Jurisprudence in the 21st Century 2014

Islamic Financial Industry and the Need for Revision  
within the Framework of Maqasid al-Shari'ah

23rd - 25th September 2014 | IIUM, Gombak Campus, Kuala Lumpur

الندوة العالمية الخامسة عن

الفقه الإسلامي في القرن الحادي والعشرين

صناعة المالية الإسلامية وضرورة المراجعة في إطار المقاصد الشرعية

23-25 سبتمبر 2014 | الجامعة الإسلامية العالمية باليزنها، كوالالمبور

International Islamic University Malaysia

Day 1: 23 <sup>rd</sup> September 2014	
11.30 a.m. – 01.00 p.m.	<b>Keynote Address 1:</b> <i>Chairman: Prof. Dr. Muhammad Amanullah</i> <b>Speakers:</b> i. Prof. Dr. Mohamad Akram Laldin (ISRA) ii. Mr. Mohamed Rafe bin Mohamed Haneef (HSBC)
02.30 p.m. – 04.30 p.m.	<b>Parallel Sessions 1.1:</b> <b>Venue: Room No. 1</b> <b>Chairperson: Prof. Dr. Arif Ali Arif</b> ١. تفعيل المقاصد الشرعية في المالية الإسلامية التأصيل والتطبيق د. صالح بن محمد الفوزان ٢. الصورية والمقصدية (أو المباني والمعاني) في المعاملات الجارية في الصناعة المالية الإسلامية ع كاشة راجع ٣. ضرورة الاجتهاد المقاصدي في المعاملات المالية: دراسة فقه الشيخ يوسف القرضاوي المقاصدي ناصر الحق مارلينج ٤. المقاصد الشرعية في المصارف الإسلامية أ. د. أحمد بن صالح آل عبدالسلام ٥. المقاصد الشرعية في فقه المعاملات خالد محمد مفتاح ٦. المقاصد الشرعية في قاعدة "الأصل في المعاملات الإباحة" ومستثنياتها د. زين الدين إسماعيل ود. محمد فؤاد سواري
02.30 p.m. – 04.30 p.m.	<b>Parallel Session 1.2</b> <b>Venue: Room No. 2</b> <b>Chairperson: Assoc. Prof. Dr. Mohamed Tahir El-Mesawi</b> 1. Theories Of Profit And Juristic Understanding In Islamic Financial Transaction: An Approach In Fiqh Reflection Dr. Mek Wok Mahmud & Ibrahim Mohamed Haji Bulushi 2. Dealing Of Wealth And Financial Transaction In Islam: Maqasid Al-Shariah Based Principles And Approaches Mohammad Monzur-E-Elahi & Md. Mahmudul Alam 3. The Development Of Measuring Scale Items For The Constructs Of Specific Maqasid: The Case Of Malaysian Islamic Financial Institution Sabarina Mohammed Shah, Dr. Mohamat Sabri Hassan, Prof. Dr. Norman Mohd Saleh, Dr. Sanep Ahmad 4. On the Limitation and Open-endedness of the Necessary Universals of the Sharī'ah Abdulhameed Yusuf Badmas 5. Harmonizing Legality with Morality in Islamic Banking and Finance: A Quest for Maqāsid al-Sharī'ah Paradigm Dr. Luqman Zakariyyah

02.30 p.m. – 04.30 p.m.	<b>Parallel Session 1.3</b> <b>Venue: Room No. 3</b> <b>Chairperson: Dr. Mohamad Sabri Zakaria</b> 1. Ijtihad Istislahi Dalam Isu-Isu Zakat: Satu Tinjauan Muhammad Ikhlās Rosele, Mohd Farhan Md. Ariffin, Mohamad Zaim Ismail, Mohd Anuar Ramli 2. Strategi Pengentasan Kemiskinan Melalui Akad Pemberdayaan (Studi Pada Bmt Beringharjo Yogyakarta) Ferry Khusnul Mubarak, Ulya Afida Ianati, Roro Hindun 3. Zakat Perniagaan Dalam Institusi Perbankan Di Malaysia Dr. Abdul Bari bin Awang, Dr. Amilah binti Awang Abd Rahman, Umami Fairuz binti Razak
02.30 p.m. – 04.30 p.m.	<b>Parallel Session 1.4</b> <b>Venue: Room No. 4</b> <b>Chairperson: Dr. Abdul Bari Awang</b> ١. الوظيفة التنموية لمؤسسة الزكاة وآليات تفعيلها بناء على مقاصد الشريعة نازلة (استثمار أموال الزكاة) نموذجاً د. محمد بن عبد الرحمن الحفظاوي ٢. مقاصد الزكاة التنموية (المجال الاجتماعي نموذجاً) د. محمد فتحي محمد العتري ٣. تنمية الوقف المعاصر في ضوء مقاصد الشريعة د. عبد الودود مصطفى مرسى السعودي ٤. الصكوك الوقفية ودورها في تحقيق مقاصد الشريعة مقصد حفظ العقل نموذجاً د. محمد إبراهيم نقاسي ود. محمد ليبيا ٥. إشكالية تحديد أرباح الصكوك الإسلامية رؤية فقهية معاصرة أ. د. علي علي غازي
Day 2: 24 <sup>th</sup> September 2014	
09.00 a.m. – 10.30 a.m.	<b>Keynote Address 2:</b> <i>Chairman: Dr. Luqman Zakariyah</i> <b>Speakers:</b> i. Assoc. Prof. Dr. Aznan Hasan (AIKOL) ii. Assoc. Prof. Dr. Mohamed El-Tahir El-Mesawi (KIRKHS)
11.00 a.m. – 01.00 p.m.	<b>Parallel Session 2.1</b> <b>Venue: Room No. 1</b> <b>Chairperson: Prof. Dr. Muhammad Amanullah</b> ١. تأهيل المراقب الشرعي في البنوك الإسلامية بين الواقع والمأمول د. حسام الدين الصيفي ومحمد غالب دخني ٢. هيئات الرقابة الشرعية ودورها الرائد في صناعة التكافل مصباح رمضان الشلتات ٣. الهيئة العليا للرقابة الشرعية ودورها في تطوير الصناعة المالية إشارة خاصة لتجربة السودان أ. د. الحاج محمد الحاج الدوش

	<p>٤. الرقابة الشرعية في المصارف الإسلامية تقييم الواقع وآفاق التطوير اليمن نموذجاً</p> <p>د. لطف محمد السرحي</p> <p>٥. الرقابة والمراجعة الشرعية بين الاستقلالية والتبعية</p> <p>د. فهمي أحمد إدريس محمد زين</p>
11.00 a.m. – 01.00 p.m.	<p><b>Parallel Session 2.2</b> <b>Venue: Room No. 2</b> <b>Chairperson: Prof. Dr. Sayed Sikandar Shah</b></p> <ol style="list-style-type: none"> <li>1. <i>Marketing for Islamic Finance Products: An Analysis from Maqasid Point of View</i> Md. Habibur Rahman &amp; Abu Talib Mohammad Monawer</li> <li>2. <i>Divergence Of Ijtihad And Its Implications In Islamic Finance</i> Adam Abdulmajeed Alufanla, Abdelaziz Tahir Cherif Issa, Elmamy Ahmadsalem, Mohamed Safras Maharoofdeen, Ruslan Sabirzyanov</li> <li>3. <i>Measuring the performance of Islamic Banks using Maqasid Index (MI)</i> Kazi Md. Tarique</li> <li>4. <i>Economic Fiqh As Source Of Legal Development On Inclusive Economic In Indonesia</i> Khotibul Umam &amp; Dian Agung Wicaksono</li> </ol>
11.00 a.m. – 01.00 p.m.	<p><b>Parallel Session 2.3</b> <b>Venue: Room No. 3</b> <b>Chairperson: Assoc. Prof. Dr. Hossam el-Din el-Saefy</b></p> <ol style="list-style-type: none"> <li>١. التورق صورة من صور التمويل الإسلامي دراسة فقهية مقارنة د. عبد الرحمن بن رباح بن رشيد الراددي</li> <li>٢. حكم السّفنجة و تطبيقاتها المعاصرة أ. د. عارف علي عارف وخالد ديرشوي</li> <li>٣. الضوابط الشرعية لاغتفار الغرر في العقود المالية وتوابعها مراد جبار سعيد</li> <li>٤. الوعد وتطبيقاته في المعاملات الماليّة الإسلاميّة محمد الأمين محمد سيلا</li> <li>٥. منتج التمويل الأصغر عن طريق المراجعة رؤية مقاصدية: مصرف الادّخار والتنمية الاجتماعية بالسودان أنموذجاً د. محمود محمد علي محمود إدريس</li> <li>٦. التأمين علي السيارات رؤية مقاصدية د. علي محمد علي الصادق</li> </ol>
11.00 a.m. – 01.00 p.m.	<p><b>Parallel Session 2.4</b> <b>Venue: Room No. 4</b> <b>Chairperson: Assoc. Prof. Dr. Younes Soualhi</b></p> <ol style="list-style-type: none"> <li>1. <i>Absolute Assignment in Takaful Industry: Shariah Contracts, Issues and Solutions</i> Dr. Ahmad Basri Ibrahim, Ahmad Fadhil Hamdi Mohd Ali, Mohd Hafizal Elias, Ahmad Murshidi Ahmad Mukhtar</li> <li>2. <i>Principle of Khiyar al-Ru'yah And Its Application According To Islamic Law As Proposed by Muslim Jurists</i> Dr. Mohd Affandi Awang Hamat &amp; Syakirah bt Abd Halim</li> </ol>

	<ol style="list-style-type: none"> <li>3. <i>Islamic Banking System And Mode Of Leasing: A Comparative Analysis In The Light Of Maqasid Al-Shari'ah</i> Dr. Naseem Razi</li> <li>4. <i>Al-Ijārah (Islamic Financial Lease) And Its Applicability In Islamic Banking System In Nigeria In The Light Of Hire Purchase Act 1965</i> Shafi'i Abdul Azeez Bello, Tijani Fatai Abdul, Mohd. Yazid Bin Zul Kepli, Norhashimah Mohd. Yasin</li> <li>5. <i>Al-Sarakhsi &amp; Al-Ghazali on Riba Implications for Banking, Corporate &amp; Public Finance</i> Shahid Sultan</li> <li>6. <i>Replacement Of Short Selling By Bay Al-Aarbun In Islamic Finance: Creative Innovation Or Blind Imitation?</i> Sayyed Mohamed Muhsin &amp; Mohammed Suhail Sinnalebbe</li> </ol>
02.30 p.m. – 04.30 p.m.	<p><b>Parallel Session 3.1</b> <b>Venue: Room No. 1</b> <b>Chairperson: Dr. Mohd. Afandi Awang Hamat</b></p> <ol style="list-style-type: none"> <li>1. <i>Murabaha Financing Revisited: The Contemporary Debate On Its Use In Islamic Banks</i> Dr. Necmeddin Guney</li> <li>2. <i>International Islamic Stock Exchange (IISE) As A Creative and Efficient Islamic Financial Institution for Expand The Scope of International Capital Market Within The Framework of Maqasid Al-Shari'ah</i> Nabella Rizki Al Fitri &amp; Zulfana Rizki Danirmala</li> <li>3. <i>Islamic Principles For Investment In Stock Market</i> Md. Mahmudul Alam, Chowdhury Shahed Akbar, Mohammad Monzur-E-Elahi, Shawon Muhammad</li> <li>4. <i>Sukuk: Development And Challenges In Bangladesh Capital Market</i> Muhammad Nazmul Hoque</li> <li>5. <i>Legal And Regulatory Challenges Facing The Concept Of Sukuk (Islamic Bond) In Nigeria</i> Aishatu Abubakar Kumo</li> </ol>
02.30 p.m. – 04.30 p.m.	<p><b>Parallel Session 3.2</b> <b>Venue: Room No. 2</b> <b>Chairperson: Dr. Mohd. Fuad Md. Sawari</b></p> <ol style="list-style-type: none"> <li>١. المعاملات الشرعية والأخلاقية للصناعة المالية الإسلامية وتطبيقاتها المعاصرة أ.د. محمد بن منصور ربيع المدخلي</li> <li>٢. المشاركة في المصارف الإسلامية بين الصورية والمقصدية أ. د. عبد الرحمن بن عثمان الجلعود</li> <li>٣. مراعاة بُعد "التدرج" في قيام المالية الإسلامية وتطويرها دراسة تحليلية في ضوء مقاصد الشريعة الإسلامية د. غالية بوهدة</li> <li>٤. دور التدقيق الشرعي الداخلي في تفعيل المسؤولية الاجتماعية للمؤسسات المالية الإسلامية سهيل الثايتي</li> <li>٥. الفتاوى المعاصرة في التعامل بالذهب والفضة بين تطبيق النصوص وتوظيف المقاصد عثمان بن إبراهيم غُرْغُود. د. محمد صبري بن زكريا</li> <li>٦. تبادل القروض بين المؤسسات المالية الإسلامية والتقليدية بين المحيزين والمانعين يوسف آدم البدني</li> </ol>

02.30 p.m. – 04.30 p.m.	<b>Parallel Session 3.3</b> <b>Venue: Room No. 3</b> <b>Chairperson: Assoc. Prof. Dr. Azman bin Mohd Nor</b> 1. <i>Criteria of Shari'ah Supervisory Board: A Comparative Study between Guidelines of Bangladesh Bank and Bank Negara Malaysia</i> Prof. Dr. Muhammad Amanullah 2. <i>IVDB Performance Of Islamic Banks In Malaysia: A Pilot Study With Saidin-Index Application</i> Siti Manisah Ngalm & Abdul Ghafar Ismail 3. <i>Maqasid Of Waqf: Rendering Social Welfare Services In The Context Of Social Entrepreneurship</i> Shawon Muhammad Shahriar, Md. Mahmudul Alam, Mohammad Monzur-E-Elahi 4. <i>Mutual Consent in the Formation of Contracts in Islamic Law: A Juristic Analysis from Maqasid Perspective</i> Md. Habibur Rahman 5. <i>Advancing The Cause Of Maqasidu Ash-Sharia Through Adr: An Over View</i> Muhammad Bashir Alkali, Alhaji Umar Alkali, Umar Yunus
	<b>Day 3: 25<sup>th</sup> September 2014</b>
09.00 a.m. – 10.30 a.m.	الجلسة الرئيسية ٣: رئيس الجلسة: الأستاذ المشارك الدكتور محمد الطاهر الميساوي i. الأستاذ الدكتور مسفر بن علي القحطاني (جامعة ملك الفهد للبترو والمعادن) ii. الأستاذ المشارك الدكتور يونس صوالحي (الجامعة الإسلامية العالمية ماليزيا)
11.00 a.m. – 01.00 p.m.	<b>Parallel Session 4.1</b> <b>Venue: Room No. 1</b> <b>Chairperson: Dr. Luqman Zakariyah</b> ١. صناعة المال في ضوء المقاصد الشرعية محمد فتحي محمد عبد الجليل وروحيزان بارو محمد زين ٢. قضايا فقهية حية في أدوات التمويل الإسلامي مصطفى بسام نجم ود. محمد صبري زكريا ٣. القضايا القانونية بشأن الصناعة المالية الإسلامية وتسوية نزاعاتها من خلال التحكيم عبد الحنان العيسى بن محمد ٤. المخاطر القانونية في بعض عقود المصرفية الإسلامية أ. د. عارف علي عارف وخالد عقيل سليمان العقيل ٥. البنوك الإسلامية ودورها في تعزيز القطاع المصرفي هدى أحمد البراك
11.00 a.m. – 01.00 p.m.	<b>Parallel Session 4.2</b> <b>Venue: Room No. 2</b> <b>Chairperson: Dr. Ahmad Basri bin Ibrahim</b> 1. <i>Charting A Course On The Islamic Finance Ocean: A Survey Of Islamic Insurance Literatures</i> Dr. Azman Mohd. Noor & Lukman Ayinde Olorogun 2. <i>Shariah And Conventional Corporate Governance With Reference To The Framework In The Malaysian Financial Industry</i> Abubakar Aminu Ahmad

	3. <i>Legal Framework On Islamic Finance In Nigeria: A Critical Appraisal Of Hurdles Against The Effective Shari'ah Governance</i> Magaji Chiroma, Mahamad Bin Arifin, Mohamad Asmadi Abdullah, Abdul Haseeb Ansari 4. <i>Repositioning And Strategizing Islamic Banking Industry In Nigeria For Socio-Economic Effectiveness And National Development</i> Ndagi Gbate
02.30 p.m. – 05.00 p.m.	<b>Forum:</b> Chairman: Assoc. Prof. Dr. Younes Soualhi Panellists: i. Assoc. Prof. Dr. Azman Mohd. Noor (KIRKHS) ii. Assoc. Prof. Dr. Mohamed El-Tahir El-Mesawi (KIRKHS) iii. Assist. Prof. Dr. Zaharuddin Abdul Rahman (KENMS)

# **Principle of *Khiyār al-Ru'yah* And Its Application According To Islamic Law As Proposed by Muslim jurists.**

## **ABSTRACT**

By Dr Mohd Afandi Awang Hamat<sup>1</sup> and Syakirah Bt Abd Halim<sup>2</sup>

Islamic Law is the law that was revealed by Allah SWT to the entire mankind in order to make sure that all mankind shall live peacefully among them within their society. Therefore in commercial transactions for example, Islamic Law always provides a very practical solution in each contract engaged by human beings. As it is understood that the goals of Islamic law in every transaction is different from secularist system which is primarily selfish and materialistic. In Islamic Law consent and justice are two main elements which must be observed in every transaction. The objective of Islamic Law is to make sure that the concept of human well-being (*falāḥ*) and good life (*ḥayāḥ ṭayyibah*) is well understood and practiced. It is significant to mention here that the study of *khiyār* (option) in business transaction is one of the most important issues in Islamic Law, since it represents one of the central themes of legal and economic thought in legal economic study. It is also considered one of the legal rights of men which is principally granted by the Islamic law. The study of optional theory becomes more significant especially in modern times where there are various codes or patterns of business transactions that provides the seller opportunities to take advantage of the buyer's ignorance and weakness. In Islamic Law, with regard to business transaction, the seller and the buyer are equally similar in the eyes of Sharī'ah. Therefore, if any party of the contract cheating the other, there shall be curse and anger from Allah, which is finally comes in the form of punishment and hell-fire in Ākhirah.

This paper examines the right of Consumers according to Islamic Law in their business transaction in the light of *Khiyār al-Ru'yah*. Islām as the religion revealed by Allāh SWT demands mankind to work hard in order to gain livelihood in this worldly life. However, they must make sure that properties obtained by them must be legal and ḥalāl. Thus, Allah SWT did not allow any Muslim to seek properties through illegal (*harām*) means. *Khiyār al-ru'yah* or option at sight or option on inspection is generally defined in Islamic law as a right of purchaser either to confirm the sale and purchased agreement or to reject it after having seen the subject-matter of contract. This implies that if a person purchases from the vendor an article without having seen it during the time of contract, the sale of such article is valid, and the purchaser after seeing it has the option of accepting or rejecting that article. This paper shall highlight the definition of *khiyār al-ru'yah*, rationale behind the legality of *khiyār al-ru'yah*, evidence on the legality of *khiyār al-ru'yah*, view of Muslim jurists about the application of *khiyār al-ru'yah*, the essence of viewing in respect to *khiyār al-ru'yah*, condition of valid option in respect to *khiyār al-ru'yah* and its Optional period in *khiyār al-ru'yah*. Finally this paper will provide conclusion

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<sup>1</sup> Dr Mohd Afandi awang hamat is an Assistant Professor in the Department of Fiqh and Usul al-Fiqh, International Islamic University Malaysia.

<sup>2</sup> Syakirah Bt Abd Halim is a BA student in the Department of English Language and Literature, International Islamic University Malaysia.

for the various issues discussed in this topic. It is hoped that this paper will insa'Allah provide some benefits for the Muslim in order to understand their rights in regard to *khiyār al-ru'yah*,

## Introduction

It is significant to mention here that the study of *khiyār* (option) in business transaction is one of the most important issues in Islamic Law, since it represents one of the central themes of legal and economic thought in legal economic study. It is also considered one of the legal rights of man which is principally granted by the Islamic law. The study of optional theory becomes more significant especially in modern times where there are various codes or patterns of business transactions that provides the seller opportunities to take advantage of the buyer's ignorance and weakness. This is in accordance with the *ḥadīth* as narrated by Abū Hurayrah (d. 59 A.H.) the Prophet (SAW) is reported to have affirmed that a time will come when one will not care how one gains one's money, legally or illegally.

قال النبي صلى الله عليه وسلم:

((يأتي على الناس زمان لا يبالي المرء ما أخذ منه، أمن الحلال أم الحرام))<sup>3</sup>

In daily transaction, one might purchase some items without knowledge of a complete picture, or without knowing of defect or fault, or due to excessive promotion. In these circumstances, it is essential for the buyer to know what rights that he has as a buyer. One common reaction is to rush back to the shop or person and demand a replacement for the defective merchandise. If he or she is angry, he or she may even demand his or her money back and threaten to take legal action. In this situation, Islām provides buyer the right of option either to continue with such contract or to revoke it. Thus, the theory of option offers a very practical solution to this problem as well as it becomes a useful mechanism to protect the legal right of buyer in business transaction.

Basically speaking, in Islamic commercial law, the seller in a sale and purchase agreement is under the obligation to allow the buyer to inspect or to examine the quality and fitness of the goods to be purchased. This privilege is given to the buyer, not only before he or she enters into such contractual agreement, but also after the conclusion of the contract. In Islamic law, the seller is also obliged to ensure that the commodities to be sold are free from any defects or imperfections. Thus, if there are defects or imperfections found on those commodities, regardless of whether such defects are discovered before or after the conclusion of the agreement, Islām then grants the privilege of option to the buyer, either to continue with such agreement or to revoke it, provided such defect or imperfection is originally rooted in the goods, prior to the contract taking place<sup>4</sup>. In this regard, the Prophet (ﷺ) is reported to have mentioned as follows:

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<sup>3</sup> Ḥadīth Reported by Imām al-Bukhārī

<sup>4</sup> In Malaysian law, the right of buyer to inspect the goods in order to ensure that they are free from any latent defect is called *caveat emptor* 'Let the buyer beware'. The Maxim '*caveat emptor*' implies that the buyer must be

المسلم أخو المسلم، لا يحل لمسلم باع من أخيه بيعاً وفيه عيب إلا بينه له وفي رواية إلا أخيره.

“A Muslim is a brother to another Muslim. It is illegal for a Muslim to sell his brother a defective thing unless he makes it clear to him” and in other report “unless he informed him”.

### ***Khiyār al-Ru'yah* defined**

*Khiyār al-ru'yah* or option at sight or option on inspection is generally defined in Islamic law as a right of purchaser either to confirm the sale and purchased agreement or to reject it after having seen the subject-matter of contract<sup>5</sup>. This implies that if a person purchases from the vendor an article without having seen it during the time of contract, the sale of such article is valid, and the purchaser after seeing it has the option of accepting or rejecting that article. *Khiyār al-ru'yah* is precisely defined in *Mejelle* as follows :

“if somebody purchases a property without seeing it, he has an option until he has seen it. When he has seen it, if he wishes, he annuls the purchase, if he wishes he accepts. This is called option on inspection”<sup>6</sup>.

In Islamic law, *khiyār al-ru'yah* happens in a case where parties are contracting in *absentia*, or the subject-matter of the contract is not present at the *majlis al-'aqd* and the buyer has agreed to purchase the commodity without seeing it. The buyer in this circumstance is granted special privilege in respect to *khiyār al-ru'yah* either to confirm the contract or annul it. However, according to all Muslim jurists, if a purchaser buys an article whilst it is present during the contract taking place, such transaction is considered as binding and the both parties of the contract have no right to revoke the deal on the ground of *khiyār al-ru'yah*<sup>7</sup>.

It is essential to note that *khiyār al-ru'yah* is one of the legal option in which the purchaser does not have to stipulate it during the contractual agreement, instead such privilege of option is

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cautious, particularly to the sale of goods where the buyer has to examine and ascertain the quality and condition of the goods, and, if necessary protect himself by warranty. The doctrine of *caveat emptor* is clearly mentioned in Malaysian Sale of Goods Act 1957, under Section 16 (1) (b):

“...Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examined ought to have revealed”.

<sup>5</sup> Ibn Nujaym, *al-Nahr al-Fā'iq*, vol. 3, p. 380, al-Marghīnānī, *al-Hidāyah*, vol. 3, p. 34, al-Samarqandī, *Tuḥfat al-Fuqahā*, p. 81, Ibn 'Ābidīn, *Radd al-Muḥtār*, vol. 7, p. 149, Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 117, al-Dusūqī, *Ḥāshiyat al-Dusūqī*, vol. 3, p. 24.

<sup>6</sup> See Tyser, *The Mejelle*, article 320, see also Madkūr, *al-Fiqh al-Islāmī*, p. 548.

<sup>7</sup> Al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. 4, p. 572. It is worth mentioning that both Shāfi'ī and Ḥanbalī schools of law have allowed the parties to the contract to revoke the contract so long they did not physically separate from the *majlis* where the contract taking place. Nevertheless, Ḥanafī and Mālikī jurists opined that the contract is soon concluded and binding after the buyer has announced his or her acceptance.

certainly granted by the Islamic law to the buyer, upon discovery that the subject-matter of the sale does not match the contractual specifications as stated during the contractual agreement<sup>8</sup>.

### **Wisdom (Ḥikmah) Behind the Legality of *Khiyār al-Ru'yah***

Broadly speaking, the rationale behind the legality of *khiyār al-ru'yah* is to assist a buyer, after the object is eventually delivered into his possession, to decide whether or not to proceed with the sale and purchase agreement, if he or she discovers that the newly delivered commodity does not correspond to the contractual expectations as mutually agreed by both parties when the contract is taking place<sup>9</sup>.

The legality of *khiyār al-ru'yah* is also corroborated with the needs and requirements of both parties of the contract to facilitate their business transaction. Since there are large numbers of business transaction where the seller is not capable of providing and delivering them promptly to the buyer. Thus, the buyer needs to make an order, prior to the commodity is eventually delivered into his possession<sup>10</sup>. In this context, the legality of *khiyār al-ru'yah* could be regarded as an important tool and an effective means to tackle this problem. In our modern time, the example of imported auto parts which normally not sold or manufactured locally, is a good illustration of how the doctrine of *khiyār al-ru'yah* could be applied as a useful mechanism to facilitate the life of mankind. For example, a purchaser may have to import certain auto parts for his or her car, without being able to see them during the *majlis al-'aqd*. In this case the doctrine of *khiyār al-ru'yah* responds to this predicament.

The doctrine of *khiyār al-ru'yah* promotes to establish justice to the buyer. This is because, the purchaser or in modern term 'consumer' finds it difficult to observe the quality and fitness of certain commodity adequately prior to the item eventually being delivered to him or her. Therefore, by the virtue of *khiyār al-ru'yah*, the buyer or consumer is granted to have an option after the subject-matter of the sale being delivered and after the buyer has seen it. Consequently, if the buyer is satisfied with the goods, he or she may proceed with such contract and accept the goods with full payment. However, if the buyer is dissatisfied with such merchandise, or such merchandise does not meet his or her contractual expectations, then the buyer is given the right to revoke such contractual agreement and ask the seller to refund his or her previous payment<sup>11</sup>.

### **Legality of *Khiyār al-Ru'yah***

As far as the legality of *khiyār al-ru'yah* is concerned, the opinion of Muslim jurists from four schools of law are manifested differently. Their different opinions are primarily based on the ground of the legality of selling and buying of unseen commodity during the contract taking place. In relation to this, majority of jurists from the Ḥanafī, Mālikī and Ḥanbalī schools are of

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<sup>8</sup> Al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 4, p. 160.

<sup>9</sup> *Ibid.*, vol. 2, p. 249.

<sup>10</sup> Madkūr, *al-Fiqh al-Islāmī*, pp. 548-9.

<sup>11</sup> 'Uthmān, *Consumer Protection*, p. 45.



the opinion that *khiyār al-ru'yah* is valid, Shāfi'ī jurists however invalidate it. The details of their discussion are as follows:

(a) According to the Ḥanafī school of law, *khiyār al-ru'yah* is valid, provided the buyer does not see the object of the sale, during the contract taking place<sup>12</sup>. In the case, if the buyer does not see the object of the sale during the time of contract, but he has seen it sometimes, prior to the contract taking place, the buyer may revoke the contract if the object of the sale that has been delivered to him or her, is different from what have been seen earlier. However, in the case if the object of the sale is precisely similar, the buyer should accept the article and he or she is not entitled to the right of option<sup>13</sup>. Similarly, if the buyer purchases the object of the sale without seeing it, the buyer is entitled to the right of option, provided the quality, value and fitness of the article which is delivered is lower than his specifications. Nevertheless, if the quality of the article so delivered is similar or higher than his contractual expectation, then the buyer is not allowed to revoke such contract<sup>14</sup>. Some jurists from the Ḥanafī school however, are of the opinion that the right of option in *khiyār al-ru'yah* is an absolute right of the buyer. Thus, the buyer is entitled to the right of option, irrespective whether the delivered commodity is in accordance with the contractual specifications as agreed during the time of contract or otherwise<sup>15</sup>.

(b) Mālikī jurists are of the opinion that the sale with condition of *khiyār al-ru'yah* is valid, if the object matter of the sale is far away from the place where the contract taking place and also difficult to access, provided the object of the sale has been precisely described prior to the contract taking place. The buyer in this occasion is allowed to revoke the contract, if the object of the sale does not comply with his contractual specifications. Nevertheless, if the object of the sale is exactly in accordance with the contractual specifications, then the buyer is bound to accept the goods and he is not entitled to the right of option<sup>16</sup>. This means that in the Mālikī school of law, if the object of the sale is nearby and of easy access, such sale on condition of *khiyār al-ru'yah* is not allowed. Perhaps the reason is that in the event of the object of contract is nearby and of easy access, it is essential for the buyer to observe it personally and to determine either to agree with such article or otherwise, prior to the contract taking place. Nonetheless, in the case if the object of the sale is very far away or of difficult access, then the buyer is allowed to purchase such article on the basis of *khiyār al-ru'yah*.

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<sup>12</sup> Ibn Nujaym, *al-Nahr al-Fā'iq*, vol. 3, p. 379, al-Marghīnānī, *al-Hidāyah*, vol. 3, p. 34, Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 6, p. 335.

<sup>13</sup> See al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 4, 161, see also al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 4, p. 573.

<sup>14</sup> Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 4, p. 572.

<sup>15</sup> Ibn Qudāmah, *al-Mughnī*, vol. 3, p. 582, Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 117, al-Nawawī, *al-Majmū'*, vol. 9, p. 364, al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 4, pp. 167 -71.

<sup>16</sup> Al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 4, p. 166, Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, pp. 116-17, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. 4, p. 294. In respect to buying unseen article Ibn 'Abd al-Barr mentions as follows: "If the buyer found that the article exactly as specified during the time of contract, the buyer then obliged to accept that, nevertheless, if he discovered the article was different from what has been specified, the buyer may exercise the right of option either to ratify the contract or to revoke it". [See Ibn 'Abd al-Barr, *al-Kāfī*, 329.]

(c) Majority of Ḥanbalī jurists also validate the doctrine of *khiyār al-ru'yah*, provided subject-matter of the sale is precisely defined during the *majlis*, or the buyer has seen it, prior to the contract taking place. If the object of the sale which is delivered is precisely similar with the contractual stipulation, such contract is binding and the buyer is not entitled to the right of option. On contrary, if the object of the sale is different from contractual specifications, the buyer is allowed to revoke such contract<sup>17</sup>. This means that before the buyer chooses to enter into any sale and purchase agreement of unseen commodity on the basis of *khiyār al-ru'yah*, the seller must precisely specify its attribute, quality and fitness to the buyer. Thus, if the buyer is satisfied with such specifications, the buyer may enter into the contractual agreement. Consequently, if the purchaser discovers that the article delivered does not comply with his or her contractual expectations as agreed by both parties during the *majlis al-'aqd*, the buyer is given immediate legal privilege by the virtue of *khiyār al-ru'yah*, either to continue with such contract or otherwise. In the case if the buyer opts to proceed with such contract, he or she must pay the full price of the commodity. Nevertheless, if the article delivered is precisely similar to what as has been specifically defined during the contract taking place, the buyer is bound to accept such commodity and the contract is soon binding upon each parties of contract<sup>18</sup>.

(d) In the Shāfi'ī school of law, there are two opinions on the legality of *khiyār al-ru'yah*. According to the old testament (*qawl qadīm*) *khiyār al-ru'yah* is valid, thus the parties of the contract is entitled to the right of option, if he or she has purchased something, without seeing the subject-matter of the contract, prior to the contract taking place. Nevertheless, based on the new testament (*qawl jadīd*), *khiyār al-ru'yah* is invalid. This is because the seeing of subject-matter of the sale (*ru'yat al-mabī'*) is an essential condition in order to validate any contractual agreement of sale and purchase the goods<sup>19</sup>. It is important to note that the second opinion which invalidates the doctrine of *khiyār al-ru'yah* is the established opinion in the Shāfi'ī school<sup>20</sup>. This is also the second opinion of Ḥanbalī jurists<sup>21</sup>.

In rejecting the doctrine of *khiyār al-ru'yah*, oponents have based their opinion on the ground that such contractual agreement that is concluded without having seen the subject-matter of the contract constitutes uncertainty (*gharar*) and it is forbidden<sup>22</sup>. They reinforce this with a *ḥadīth* of the Prophet (ﷺ) which is reported to have forbidden *bay' al-gharar* as narrated by Abū Hurayrah:

نهی رسول الله عن بيع الغرر

<sup>17</sup> Al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 4, p. 170, al-Khirshī, *Ḥāshiyat al-Khirshī*, vol. 5, p. 312, Ibn Qudāmah, *al-Mughnī*, vol. 3, p. 582.

<sup>18</sup> This is also the opinion of Ibn Sirīn, Ayyūb al-Sakhtiyānī, Imām Mālik, 'Abd Allāh Ibn Ḥasan al-'Anbarī, Aḥmad Ibn Ḥanbal, Abū Thawr, Ibn Naṣr al-Marwazī and Ibn al-Mundhir. [See Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 117, al-Dusūqī, *Ḥāshiyat al-Dusūqī*, vol. 3, p. 24, Ibn Qudāmah, *al-Mughnī*, vol. 3, p. 580, al-Nawawī, *al-Majmū'*, vol. 9, p. 349, al-Iḥsā'ī, *Tabyīn al-Masālik*, vol. 3, p. 301, Abū Ghuddah, *al-Khiyār*, p. 497.]

<sup>19</sup> Al-Shīrāzī, *al-Muhadhdhab*, vol. 1, p. 350.

<sup>20</sup> Al-Nawawī, *al-Majmū'*, vol. 9, p. 348, see also Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 117.

<sup>21</sup> Ibn Qudāmah, *al-Mughnī*, vol. 3, p. 580.

<sup>22</sup> See Ibn Qudāmah, *al-Mughnī*, vol. 3, p. 580, see also al-Marghīnānī, *al-Hidāyah*, vol. 3, p. 34. The literal meaning of the word *gharar* is fraud, but in contract of sale, the word *gharar* often refers to uncertainty, and the ignorance of one or both parties of the substance of attributes of the object of sale, or doubt over this object's existence at the time of contract. [See for detail Kamali, *Islamic Commercial Law*, p. 84.]

“The Prophet forbade a transaction which involves uncertainty<sup>23</sup>”

Shāfi‘ī jurists opine that not seeing the subject-matter of the sale during the contract taking place would constitute the excessive uncertainty (*gharar kathīr or gharar fāḥis*) and ignorance (*al-jahl*) which leads the ignorance or uncertainty of its attributes and quality<sup>24</sup>. These *gharar* and *jahl* finally may lead to dispute between the parties of the contract, despite of the fact that Islamic law comes to safeguard the interest of the people and to preclude disputes and reasons leading to such event. Thus, the Shāfi‘ī jurists observe, such doctrine which allows the parties of the contract to proceed with the contractual agreement on the basis of *khiyār al-ru’yah* should not be allowed<sup>25</sup>.

In addition, another reason forwarded by opponents of *khiyār al-ru’yah* is because the sale of an object which is not present at the *majlis* during the contractual agreement. This is forbidden based on the Prophetic *ḥadīth* which prohibits such a sale. The Prophet (ﷺ) is reported to have stated:

لا تبع ما ليس عندك

“Do not sell what is not in your possession<sup>26</sup>”

On this basis, they insist that to achieve the fundamental goal of certainty in the nature and quality of the goods, the ideal sale is where the goods are available at the contracting session (*majlis*). This is to ensure that the purchaser or his agent on his behalf, may eventually observe the subject-matter of the contract and promptly decide whether or not to proceed with such sale and purchase agreement<sup>27</sup>.

Proponents of the *khiyār al-ru’yah*, on the other hand claim that the legality of *khiyār al-ru’yah* is primarily based on the ground of the *ḥadīth* in which the Prophet (ﷺ) mentioned as follows:

من إشتري شيئاً لم يره فله الخيار إذا رآه

“Whoever purchases an article (of goods), and he has not seen it, he has the right of option whenever he sees it”<sup>28</sup>.

According to proponents, this *ḥadīth* shows in principal that a purchaser after having seen the article may decide, by the virtue of *khiyār al-ru’yah*, either to ratify the sale and purchase agreement or revoke it<sup>29</sup>.

<sup>23</sup> See Ibn Hajar al-‘Asqalānī, *Bulūgh al-Marām* (trans), p. 279, see also al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, p. 464.

<sup>24</sup> Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 117.

<sup>25</sup> They mean by uncertainty is that when a buyer purchases certain article without seeing it, he or she does not know whether that article is comply with his requirement or not, whether he or she likes it or not. Therefore, this type of sale is not allowed by the Islamic law. [See al-Nawawī, *al-Majmū’*, vol. 9, p. 348, see also Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 117, Abū Zahrah, *al-Milkiyyah wa Naẓariyyat al-Aqd*, p. 375.]

<sup>26</sup> Al-Shawkānī, *Nayl al-Awtār*, vol. 6, p. 238.

<sup>27</sup> Al-Shīrāzī, *al-Muhadhdhab*, vol. 1, p. 350.

<sup>28</sup> Abū Dā’ūd, *Sunan Abū Dā’ūd*, vol. 3, p. 254, al-Naḥāfī, *Nasb al-Rāyah*, vol. 1, p. 9, see also al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, vol. 4, p. 571.

In legalizing the doctrine of *khiyār al-ru'yah*, proponents also refer to the verdict of Jubayr Ibn Muṭ'im (d. 59 A.H.), the companion of the Prophet (ﷺ) who was reported to have decided on the dispute between 'Uthmān Ibn 'Affān (d. 35 A.H.) and Ṭalḥah Ibn 'Ubayd Allāh (d. 36 A.H.) on the matter related to the issue of selling and buying the land without seeing it, prior to the contract taking place. In this event, it was reported that Jubayr Ibn Muṭ'im decided that the sale was valid and the right of seeing was given to Ṭalḥah on the basis that he purchased the land without seeing it<sup>30</sup>. The complete text of this event is as follows:

أن عثمان ابن عفان ابتاع من طلحة ابن عبيدالله أرضا بالمدينة، ناقله بأرض له بالكوفة، فقال عثمان : بعثك ما لم أراه، فقال طلحة : إنما النظر لي، لأنني ابتعت مغيبا، وأنت قد رأيت ما ابتعت، فتحاكما إلى جبير ابن مطعم، فقضى على عثمان أن البيع جائز، وأن النظر لطلحة لأنه ابتاع مغيبا<sup>31</sup>.

Uthmān Ibn 'Affān purchased from Ṭalḥah Ibn 'Ubayd Allāh a piece of land in Madīnah and exchanged it with his land in Kūfah. 'Uthmān said: "I sold you a land in which I did not see it". Ṭalḥah then said: "The right of seeing is mine, because I purchased something which I did not see it. And you ('Uthmān) have seen what you have purchased". Both of them went to Jubayr Ibn Muṭ'im for the decision. Jubayr Ibn Muṭ'im decided that the sale is valid and the right of seeing is for Ṭalḥah because he purchased the land without seeing it, prior to the contract taking place.

Proponents of *khiyār al-ru'yah* from the Ḥanafī school of law point out that this particular event shows that the doctrine of *khiyār al-ru'yah* is valid and it is an absolute right of the buyer, when he or she purchases an article like a piece of land as indicated in above event, to decide after having seen it, either to accept the deal or to cancel it<sup>32</sup>. They also claim that this incident took place in the presence of a group of Companions of the Prophet (SAW), and none of them rejected the verdict issued by Jubayr Ibn Muṭ'im, and this is considered as unanimous<sup>33</sup>.

In validating the doctrine of *khiyār al-ru'yah*, proponents from the Mālikī school of law opine that such *gharar* that occurs in the event of buying and selling of unseen commodity is a minor *gharar* and it is permitted in the *sharī'ah*. Ḥanafī jurists on the other hand, claim that the *gharar* that happens in such contractual agreement on the basis of selling and buying of unseen commodity would be eliminated, provided the buyer is granted the right of option in respect to *khiyār al-ru'yah* after viewing the subject-matter of the sale<sup>34</sup>.

### The essence of viewing in respect to *khiyār al-ru'yah*

According to the majority of Muslim jurists, the actual meaning of viewing (*al-ru'yah*) does not simply mean looking to the object of the contract with the naked eye. The essence of viewing could be either with the naked eye or other means. In this context, *al-ru'yah* sometimes means

<sup>29</sup> Al-Marghīnānī, *al-Hidāyah*, vol. 3, p. 34.

<sup>30</sup> Al-Nawāwī, *al-Majmū'*, vol. 9, p. 350.

<sup>31</sup> Al-Marghīnānī, *al-Hidāyah*, vol. 3, p. 34, al-Shīrāzī, *al-Muhadhdhab*, vol. 1, p. 350, Ibn Qudāmah, *al-Mughnī*, vol. 3, p. 580, al-Nawawī, *al-Majmū'*, vol. 9, p. 348.

<sup>32</sup> Ibn Nujaym, *al-Nahr al-Fā'iqa*, vol. 3, p. 381.

<sup>33</sup> See al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 4, p. 572, al-Nawawī, *al-Majmū'*, vol. 9, p. 348, al-Dusūqī, *Ḥāshiyat al-Dusūqī*, vol. 3, pp. 24-5, Abū Zahrah, *al-Milkiyyah wa Nazariyyat al-'Aqd*, p. 375.

<sup>34</sup> Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 117, al-Marghīnānī, *al-Hidāyah* vol. 3, p. 34.

seeing, touching, smelling, examining, experiencing and tasting. This depends entirely on the nature and attribute of the commodity to be purchased and the condition of potential buyer of such commodity. In the case if the nature of the commodity to be purchased is from a type of an article that needs to be examined by using the naked eye (*i.e.*, buying a land), the meaning of viewing is sufficient by looking to it with the naked eye. Nevertheless, if the nature of the commodity is required experiencing and testing of such article (*i.e.*, a motorbike, car or other type of vehicles), the actual meaning of viewing occurs when the buyer is allowed to experience or drive those vehicles. If subject-matter of the contract is a house for example, viewing means in this context, seeing all its room, structure and roof. The Muslim jurists added other examples of this nature by saying that if subject of the contract is a kind of fire-proof product, the actual meaning of viewing is by throwing it into the fire. If the goods purchased is a kind of water-proof products, the viewing means placing it inside the water. If the subject of the contract is perfume, viewing means smelling it. In the case that if the potential buyer is blind, the real meaning of viewing is by touching, or smelling or testing the goods. In the case that the goods is not from the type that could be observed by either touching, or smelling or testing, the blind buyer may bring along with him or her some other experts, so that he or she can describe to the blind buyer the nature and the attributes of the goods<sup>35</sup>.

From those examples, it is clearly spelled out that the actual meaning of viewing is applied to any means of viewing, examination and inspection, in which the object of the contract could be precisely observed. Thus, in Islamic law, any viewing (*al-ru'yah*) that reflects such essence is regarded as valid, and the buyer after viewing the object of the contract may exercise his or her right of option either ratify or revoke the contract<sup>36</sup>.

It is worth mentioning that if the vendor and purchaser dispute on whether the goods is precisely similar or not with the contractual specifications as agreed during the contract taking place, then the purchaser has the burden of proof, the jurists in this regard say that if the buyer fails to prove his or her case, then the vendor statement is justified after delivering an oath<sup>37</sup>. This means that it is importance to write a letter highlighting each requirement that both parties of the contract have agreed upon in respect to *khiyār al-ru'yah* prior to the contract taking place. This is because, such letter of agreement could be referred in the case of dispute after the goods eventually being delivered.

### **Condition of valid option in respect to *khiyār al-ru'yah***

According to the majority of Muslim jurists from Ḥanafī, Mālikī and Ḥanbalī schools of law, a purchaser is authentically entitled to the right of option in respect to *khiyār al-ru'yah*, if he or she discovers that subject matter of the sale does not match the contractual specifications as agreed by the both parties during the contract taking place. This means that if the buyer on the ground of *khiyār al-ru'yah* stipulates the subject-matter of the contract should be so and so, but upon delivery, the article is found not to be in conformity with such contractual expectations, the buyer is allowed to revoke the contract. On contrary, if the purchaser discovers that the subject-

<sup>35</sup> See al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 4, p. 573, al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 2, 255, see also 'Alā' Eddīn Kharofa, *Transaction in Islamic Law*, pp. 113-4.

<sup>36</sup> Al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 2, p. 255.

<sup>37</sup> A-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 4, p. 573, al-Dasūqī, *Hāshiyat al-Dasūqī*, vol. 3, p. 25, al-Samarqandī, *Tuḥfat al-Fuqahā'*, p. 92.

matter of the contract is in accordance or better than the contractual specifications, the buyer is legally bound to accept such article and he or she has no right to revoke the contract<sup>38</sup>. In validating the right of option in *khiyār al-ru'yah*, Mālikī jurists opine that the object of the sale must not be unavailable during the *majlis al-'aqd*, either it is far away from the majlis or of difficult access. In this context, if the object of the sale is available nearby and of easy access, but the buyer deliberately does not want to see it, such contract is void and the buyer is not allowed to exercise the right of option in respect to *khiyār al-ru'yah*. Ḥanbalī jurists, however, validate the right of option in relation to *khiyār al-ru'yah*, if the buyer has seen the object of the sale sometimes, prior to the contract taking place. Both Mālikī and Ḥanbalī jurists agree that *khiyār al-ru'yah* is a valid ground to revoke the contract, provided the object of the sale has been precisely defined its specification including its quality, value and fitness, during the contract taking place. This implies that in the Mālikī and Ḥanbalī schools, if the object of the sale is not precisely defined, during the contractual agreement, such sale is void and the buyer is not entitled to the right of option by the virtue of *khiyār al-ru'yah*<sup>39</sup>.

### Optional period in *khiyār al-ru'yah*

As far as the optional period in *khiyār al-ru'yah* is concerned, there are two opinions in the Ḥanafī school. According to the first opinion, the buyer is bound to revoke the contract within the reasonable time. The buyer, however, based on a second opinion, is allowed to exercise the right to revoke the contract in respect to *khiyār al-ru'yah* in no specific time. Thus, it means that the buyer is allowed to revoke the contract at any time, provided there is no evidence which indicates that the buyer has consented with such commodity, or the commodity has defected, or the buyer has disposed it<sup>40</sup>. In the Ḥanbalī school of law, there are two opinions: Based on the first opinion, the buyer is entitled to exercise the right of option, soon after the commodity is eventually being delivered. Nevertheless, according to second opinion, the buyer is allowed to revoke the contract as long as they are physically together within the *majlis al-'aqd*. This implies that if both parties or one of them leave the venue of contract, then the right of option is over<sup>41</sup>. Mālikī and Shāfi'ī jurists however do not explicitly mention about the optional period in *khiyār al-ru'yah*.

### Conclusion

*Khiyār al-ru'yah* renders possible protection of contracting parties, especially the buyer, from any risk of aleatory elements arising if the contract is concluded when the object of the sale is not available or incomplete during the time of contract. This option is of great practical usefulness for facilitating commercial activities since many of contractual objects are not present or not yet manufactured or still in progress (*i.e.*, the buildings or flats that are in the course of construction,

<sup>38</sup> See al-Maghīnānī, *al-Hidāyah*, vol. 3, p. 34, Ibn Nujaym, *al-Nahr al-Fāiq*, vol. 3, p. 381, al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. 4, p. 571, Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 117, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. 4, p. 294.

<sup>39</sup> Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 117, al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. 3, p. 24, Ibn Qudāmah, *al-Mughnī*, vol. 3, p. 580, al-Nawāwī, *al-Majmū'*, vol. 9, p. 349, al-Iḥsā'ī, *Tabyīn al-Masālik*, vol. 3, p. 301, al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 4, p. 167, Abū Ghuddah, *al-Khiyār*, p. 497.

<sup>40</sup> Ibn Nujaym, *al-Nahr al-Fā'iq*, vol. 3, p. 372, al-Maghīnānī, *al-Hidāyah*, vol. 3, p. 34.

<sup>41</sup> Ibn Qudāmah, *al-Mughnī*, vol. 3, p. 581.

or commodity still in its origin countries) during contract taking place. Through *khiyār al-ru'yah*, the purchaser retains full liberty on later inspection to confirm the contract or to cancel it, if he considers himself misled or exploited after discovering the fact that the object of the sale differs from what have been promised. Thus, the majority of Muslim jurists from the different schools of law are of the opinion that *khiyār al-ru'yah* is valid, provided the buyer does not see the object of the contract during the contract taking place. Majority of Mālikī and Ḥanbalī jurists allow the doctrine of *khiyār al-ru'yah*, provided the object of the sale is precisely defined during *majlis al-'aqd*. Ḥanafī jurists however allow such doctrine *khiyār al-ru'yah*, irrespective whether it is precisely defined or not during the *majlis al-'aqd*. Similarly, according to the majority of Muslim jurists, the right of option in respect to *khiyār al-ru'yah* is given to the buyer after seeing the object of the contract, provided that the commodity delivered does not match his or her contractual stipulations. This implies that if the commodity delivered satisfies all contractual expectations, the right of option in respect to *khiyār al-ru'yah* is no longer valid, and the buyer is bound to accept such commodity. On contrary, some Ḥanafī jurists are of the opinion that the right of option in *khiyār al-ru'yah* is an absolute right of the buyer. Thus, the buyer is given full privilege, upon seeing the object of the sale, either to continue with such contract or revoke it. They allow the buyer to exercise the right of option in respect to *khiyār al-ru'yah* in both circumstances, either it is in conformity or not with the contractual stipulations.

Majority of Shāfi'ī and some Ḥanbalī jurists however are of opinion that *khiyār al-ru'yah* is not legitimate from very beginning since it involves excessive uncertainty (*gharar*) in which the Prophet (ﷺ) explicitly prohibited it. Therefore, the doctrine of *khiyār al-majlis* is rejected in any circumstances.

Based on above survey, it is submitted here that the preferred opinion is one that is proposed by both Mālikī and Ḥanbalī jurists. This justification is based on the following reasons:

- (a) There is *ḥadīth* in which the Prophet (ﷺ) was reported to have allowed such doctrine of *khiyār al-ru'yah*. In addition to this, it is unavoidable need of the people to purchase some articles without being able to see them during the contract takes place, consequently, it could be done in light of *khiyār al-ru'yah*.
- (b) The articles purchased must be precisely defined prior to the contract takes place. This is to avoid any exploitation, fraud or mistake, after the article eventually being delivered that lead to the dispute between parties of the contract.
- (c) In the case that if the purchaser discovers the subject-matter of the sale differs from its previous description or sample, the contract may be annulled by the buyer on the ground that the subject-matter of the sale does not comply with the seller's contractual promises as specified, prior to the contract taking place. However, in the case that if the subject-matter of the sale that is delivered into the buyer's possession is precisely similar with his or her contractual expectations, the buyer should not be allowed to annul the contract. This is to ensure that the seller would not suffer of loss due to the buyer's rejection. Nevertheless, if the buyer continues to revoke the contract, after finding the commodity delivered into his or her possession is precisely similar to the contractual promises, the purchaser should be obliged to compensate the seller for his or her possible loss that has been caused as a result of buyer's revocation. The actual cost of the seller possible loss may be determined by an expert or an authoritative party that is agreed by both parties of the contract. Thus, based on the doctrine of *khiyār al-ru'yah* as proposed by both

Mālikī and Ḥanbalī schools, the ultimate justice of contractual agreement on the ground of unseen article could be applied on both parties of the contract.

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