5th International Conference on

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 المالانية الإسلامية وضرورة المراجعة في إطار المعايير الشرعية

23 – 25 سبتمبر 2014 | الجامعة الإسلامية العالمية بالبرازيل، كوالالمبور
Day 1: 23rd September 2014

**Parallel Session 1.1**
Venue: Room No. 1
Chairperson: Prof. Dr. Arif Ali Arif

### Keynote Address 1:
Chairman: Prof. Dr. Muhammad Amanullah
Speakers:
- i. Assoc. Prof. Dr. Aznan Hasan (AIKOL)
- ii. Assoc. Prof. Dr. Mohamed El-Tahir El-Mesawi (KIRKHS)

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| 11:30 a.m. | 1. Theories Of Profit And Juristic Understanding In Islamic Financial Transaction: An Approach In High Reflection  
Dr. Mek Wok Mahmud & Ibrahim Mohamed Haji Bulushi |
| 10:30 a.m. | 2. Dealing Of Wealth And Financial Transaction In Islam: Maqasid Al-Shariah Based Principles And Approaches  
Mohammad Monzur-E-Elahi & Md. Mahmudul Alam |
| 02:30 p.m. | 3. The Development Of Measuring Scale Items For The Constructs Of Specific Maqasid: The Case Of Malaysian Islamic Financial Institution  
Sahabah Mohammad Shah, Dr. Mohamad Sabri Hassan, Prof. Dr. Norman Mohd Saleh, Dr. Sanep Ahmad |
| 04:30 p.m. | 4. On the Limitation and Open-endedness of the Necessary Universals of the Share’ah  
Abdulhamied Yusuf Badmas |
| 02:00 p.m. | 5. Harmonizing Legality with Morality in Islamic Banking and Finance: A Quest for Maqasid al-Shari’ah Paradigm  
Dr. Luqman Zakariyyah |

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Day 2: 24th September 2014

**Parallel Session 2.1**
Venue: Room No. 1
Chairperson: Prof. Dr. Muhammad Amanullah

### Keynote Address 2:
Chairman: Dr. Luqman Zakariyyah
Speakers:
- i. Assoc. Prof. Dr. Aznan Hasan (AIKOL)
- ii. Assoc. Prof. Dr. Mohamed El-Tahir El-Mesawi (KIRKHS)

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Parallel Session 1.3
Venue: Room No. 3
Chairperson: Dr. Mohamad Sabri Zakaria

1. Ijihad Isstilah dalam Isu-Isu Zakat: Suatu Tinjauan  
Muhammad Ikhlas Rosele, Mohd Farhan Md. Ariffin, Mohamad Zain Isamail, Mohd Anuar Ramli

2. Strategi Pengentasan Kemiskinan Melalui Akad Pemberdayaan (Studi Pada Bmt Beringharjo Yogyakarta)  
Ferry Khusnul Marbokul, Ulya Afida Imanati, Roro Hindu

3. Zakat Peminiagaan Dalam Institusi Berbankan Di Malaysia  
Dr. Abdul Bari bin Awang, Dr. Amilah binti Awang Abd Rahman, Umni Fairuz binti Razak
3. Islamic Banking System And Mode Of Leasing: A Comparative Analysis In The Light Of Maqasid Al-Shari’ah
   Dr. Naseem Razi
4. Al-Ijārah (Islamic Financial Lease) And Its Applicability In Islamic Banking System In Nigeria In The Light Of Hire Purchase Act 1965
5. Al-Sarakhshi & Al-Ghazali on Riba Implications for Banking, Corporate & Public Finance
   Shahid Sultan
6. Replacement Of Short Selling By Bay Al-Aarban In Islamic Finance: Creative Innovation Or Blind Imitation?
   Sayyed Mohamed Mahsin & Mohammed Suhail Sinnalebbe

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   Md. Habibur Rahman & Abu Talib Mohammad Monawer
2. Divergence Of Ijtihad And Its Implications In Islamic Finance
   Adam Abdulmajed Auffainal, Abdelaziz Tahir Cherif Issa, Elmamy Ahmedsalem, Mohamed Saifas Maharoofdeen, Ruslan Sabirzyanov
3. Measuring the performance of Islamic Banks using Maqasid Index (MI)
   Kazi Md. Tariq
4. Economic Fiqh As Source Of Legal Development On Inclusive Economic In Indonesia
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Venue: Room No. 1
Chairperson: Dr. Mohd. Afandi Awang Hamat
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2. International Islamic Stock Exchange (IIS E) As A Creative and Efficient Islamic Financial Institution for Expand The Scope of International Capital Market Within The Framework of Maqasid Al-Shari’ah
   Nabella Rizki Al Fitri & Zulfana Rizki Danirmala
3. Islamic Principles For Investment In Stock Market
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4. Measuring the performance of Islamic Banks using Maqasid Index (MI)
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   Aishatu Abubakar Kumo

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Chairperson: Assoc. Prof. Dr. Hossam el-Din el-Saefy
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3. Sale/Khoof (Islamic Sale) - Its Applicability In Islamic Banking System In Nigeria In The Light Of Hire Purchase Act 1965
4. Al-Sarakhshi & Al-Ghazali on Riba Implications for Banking, Corporate & Public Finance
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   Sayyed Mohamed Mahsin & Mohammed Suhail Sinnalebbe

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2. Principle of Khiyar al-Ru’yah And Its Application According To Islamic Law As Proposed by Muslim Jurists
   Dr. Mohd Afandi Awang Hamat & Syakirah bt Abd Halim
3. Islamic Banking System And Mode Of Leasing: A Comparative Analysis In The Light Of Maqasid Al-Shari’ah
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Chairperson: Dr. Mohd. Fuad Md. Sawari
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   Nabella Rizki Al Fitri & Zulfana Rizki Danirmala
3. Islamic Principles For Investment In Stock Market
   Md. Mahmudul Alam, Chowdhury Shahed Akbar, Mohammad Monzur-E-Elahi, Shawon Muhammad
4. Sukuk: Development And Challenges In Bangladesh Capital Market
   Muhammad Nazmul Hoque
5. Legal And Regulatory Challenges Facing The Concept Of Sukuk (Islamic Bond) In Nigeria
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6. Measuring the performance of Islamic Banks using Maqasid Index (MI)
   Kazi Md. Tariq
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   Md. Anwar Ahmed, Aishatu Abubakar Kumo
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Venue: Room No. 3  
Chairperson: Assoc. Prof. Dr. Azman bin Mohd Nor  
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Venue: Room No. 1  
Chairperson: Dr. Luqman Zakariyah  
1. A Course On The Islamic Finance Ocean: A Survey Of Islamic Insurance  
   Dr. Azman Mohd. Noor & Lukman Ayinde Olorogun  
2. Shariah And Conventional Corporate Governance With Reference To The Framework In The Malaysian Financial Industry  
   Abubakar Aminu Ahmad

Parallel Session 4.2  
Venue: Room No. 2  
Chairperson: Dr. Ahmad Basri bin Ibrahim  
1. Charting A Course On The Islamic Finance Ocean: A Survey Of Islamic Insurance Literatures  
   Dr. Azman Mohd. Noor & Lukman Ayinde Olorogun  
2. Shariah And Conventional Corporate Governance With Reference To The Framework In The Malaysian Financial Industry  
   Abubakar Aminu Ahmad
Principle of \textit{Khiyār al-Ru’yah} And Its Application According To Islamic Law 
As Proposed by Muslim jurists.

ABSTRACT

By Dr Mohd Afandi Awang Hamat\textsuperscript{1} and Syakirah Bt Abd Halim\textsuperscript{2}

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 (\textit{faïlāh}) and good life (\textit{hayâh ṭayyibah}) is well understood and practiced. It is significant to mention here that the study of \textit{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 \textit{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 halāl. Thus, Allāh SWT did not allow any Muslim to seek properties through illegal (harām) means. \textit{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 \textit{khiyār al-ru’yah}, rationale behind the legality of \textit{khiyār al-ru’yah}, evidence on the legality of \textit{khiyār al-ru’yah}, view of Muslim jurists about the application of \textit{khiyār al-ru’yah}, the essence of viewing in respect to \textit{khiyār al-ru’yah}, condition of valid option in respect to \textit{khiyār al-ru’yah} and its Optional period in \textit{khiyār al-ru’nah}. Finally this paper will provide conclusion

\textsuperscript{1} Dr Mohd Afandi awang hamat is an Assistant Professor in the Department of Fiqh and Usul al-Fiqh, International Islamic University Malaysia.

\textsuperscript{2} Syakirah Bt Abd Halim is a BA student in the Department of English Language and Literature, International Islamic University Malaysia.
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.

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 the 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 place⁴. In this regard, the Prophet (ﷺ) is reported to have mentioned as follows:

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³ Ḥadīth Reported by Imām al-Bukhārī
⁴ 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
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. 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”.

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*.

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 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”.


7 Al-Kāsānī, *Bada‘i’ al-Sanā‘i‘*, vol. 4, p. 572. It is worth mentioning that both Ṣḥāfī‘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.

**Wisdom (Hikmah) 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.

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. 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 responses 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.

**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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11 *Uthmān, Consumer Protection*, p. 45.
the opinion that *khiyār al-ru’yah* is valid, Shāfī‘i 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. In the case, if the buyer does not see the object of the sale during 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. 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. 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.

(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. This means that in the Mālikī school of law, if the object of the sale in 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 is near 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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16 Al-Sanhūrī, *Maṣādīr al-Ḥaqq*, vol. 4, p. 166, Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, pp. 116-17, al-Ḥaṭṭāb, *Mawāhib al-Jallīl*, 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 Ḥanbali jurists also validate the doctrine of khiyār al-ruʿyah, 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\textsuperscript{17}. This means that before the buyer chooses to enter into any sale and purchase agreement of unseen commodity on the basis of khiyār al-ruʿyah, 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-ʿaqd, the buyer is given immediate legal privilege by the virtue of khiyār al-ruʿyah, 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 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\textsuperscript{18}.

(d) In the Shāfiʿi school of law, there are two opinions on the legality of khiyār al-ruʿyah. According to the old testament (qawl qadīm) khiyār al-ruʿyah 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-ruʿyah is invalid. This is because the seeing of subject-matter of the sale (ruʿyat al-mabīṭ) is an essential condition in order to validate any contractual agreement of sale and purchase the goods\textsuperscript{19}. It is important to note that the second opinion which invalidates the doctrine of khiyār al-ruʿyah is the established opinion in the Shāfiʿi school\textsuperscript{20}. This is also the second opinion of Ḥanbali jurists\textsuperscript{21}. In rejecting the doctrine of khiyār al-ruʿyah, opponents 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\textsuperscript{22}. They reinforce this with a ḥadīth of the Prophet (ﷺ) which is reported to have forbidden bayʿ al-gharar as narrated by Abū Hurayrah:

\begin{quote}
نهي رسول الله عن بيع الغرز
\end{quote}


\textsuperscript{19} Al-Shîrāzî, al-Muhadhdhab, vol. 1, p. 350.


\textsuperscript{22} See Ibn Qudâmah, al-Mughnî, vol. 3, p. 580, see also al-Marghînânî, al-Hidâyah, 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.]

Shāfi‘ī jurists opine that not seeing the subject-matter of the sale during the contract taking place would constitute the excessive uncertainty (\textit{gharar kathīr} or \textit{gharar fāḥis}) and ignorance (\textit{al-jahl}) which leads the ignorance or uncertainty of its attributes and quality.\footnote{Ibn Rushd, \textit{Bidāyat al-Mujtahid}, vol. 2, p. 117.} These \textit{gharar} and \textit{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 \textit{khiyār al-ru’yah} should not be allowed.\footnote{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, \textit{al-Majmū‘}, vol. 9, p. 348, see also Ibn Rushd, \textit{Bidāyat al-Mujtahid}, vol. 2, p. 117, Abū Zahrah, \textit{al-Mīkīyyah wa Naṣāriyyat al-Aqd}, p. 375.]}

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

\begin{quote}
لَا تبيع ما ليس عندك
\end{quote}

\textit{“Do not sell what is not in your possession.”}\footnote{Al-Shawkānī, \textit{Nayl al-Awṭār}, vol. 6, p. 238.}

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 (\textit{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.\footnote{Al-Shīrāzī, \textit{al-Muhadhdhhab}, vol. 1, p. 350.}

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

\begin{quote}
من إشترى شيئا لم يره فله الخيار إذا رآه
\end{quote}

\textit{“Whoever purchases an article (of goods), and he has not seen it, he has the right of option whenever he sees it.”}\footnote{Abū Dā‘ūd, \textit{Sunan Abū Dā‘ūd}, vol. 3, p. 254, al-Nahāfī, \textit{Nasb al-Rāyah}, vol. 1, p. 9, see also al-Kāsānī, \textit{Badā’i’ al-Ṣanā‘i’}, vol. 4, p. 571.}

According to proponents, this \textit{ḥadīth} shows in principal that a purchaser after having seen the article may decide, by the virtue of \textit{khiyār al-ru’yah}, either to ratify the sale and purchase agreement or revoke it.\footnote{Abū Dā‘ūd, \textit{Sunan Abū Dā‘ūd}, vol. 3, p. 254, al-Nahāfī, \textit{Nasb al-Rāyah}, vol. 1, p. 9, see also al-Kāsānī, \textit{Badā’i’ al-Ṣanā‘i’}, vol. 4, p. 571.}
In legalizing the doctrine of *khīyār al-ruʿyah*, proponents also refer to the verdict of Jubayr Ibn Mutʿīm (d. 59 A.H.), the companion of the Prophet (ﷺ) who was reported to have decided on the dispute between ʿUthmān Ibn ʿAffān (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 Mutʿīm 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. The complete text of this event is as follows:

An ʿUthmān Ibn ʿAffān purchased from Ṭalḥah Ibn Ubayd Allāh a piece of land in Madīnah and exchanged it with his land in Kūfah. ʿUthmān 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 (ʿUthmān) have seen what you have purchased”. Both of them went to Jubayr Ibn Mutʿīm for the decision. Jubayr Ibn Mutʿīm 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 *khīyār al-ruʿyah* from the Ḥanafī school of law point out that this particular event shows that the doctrine of *khīyār al-ruʿyah* 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. 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 Mutʿīm, and this is considered as unanimous.

In validating the doctrine of *khīyār al-ruʿyah*, 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 *sharīʿah*. 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 *khīyār al-ruʿyah* after viewing the subject-matter of the sale.

The essence of viewing in respect to *khīyār al-ruʿyah*

According to the majority of Muslim jurists, the actual meaning of viewing (al-ruʿyah) 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-ruʿyah sometimes means...
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\(^\text{35}\).

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\(^\text{36}\).

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\(^\text{37}\). 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 khyār 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 khyār 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 khyār 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 khyār 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-
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. In validating the right of option in khiyār al-ruʿyah, Mālikī jurists opine that the object of the sale must not available during the majlis al-ʿaqd, 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-ruʿyah. Ḥanbalī jurists, however, validate the right of option in relation to khiyār al-ruʿyah, 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-ruʿyah 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-ruʿyah.

**Optional period in khiyār al-ruʿyah**

As far as the optional period in khiyār al-ruʿyah is concerned, there are two opinion 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-ruʿyah 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. 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-ʿaqd. This implies that if both parties or one of them leave the venue of contract, then the right of option is over. Mālikī and Shāfiʿī jurists however do not explicitly mention about the optional period in khiyār al-ruʿyah.

**Conclusion**

*Khiyār al-ruʿyah* 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 contraction,

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or commodity still in its origin countries) during contract taking place. Through *khiyār al-ruʿyah*, 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-ruʿyah* 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-ruʿyah*, provided the object of the sale is precisely defined during *majlis al-ʿaqd*. Ḥanafī jurists however allow such doctrine *khiyār al-ruʿyah*, irrespective whether it is precisely defined or not during the *majlis al-ʿaqd*. Similarly, according to the majority of Muslim jurists, the right of option in respect to *khiyār al-ruʿyah* 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-ruʿyah* 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-ruʿyah* 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-ruʿyah* in both circumstances, either it is in conformity or not with the contractual stipulations.

Majority of  Shāfīʿī and some Ḥanbalī jurists however are of opinion that *khiyār al-ruʿyah* 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-ruʿyah*. 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-ruʿyah*.

(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-ruʿyah* 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.

References


