

## **The Achievement of Both Justice and Consent in Financial Transaction Contracts**

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### **Abstract**

This study clarifies that the basis on which contracts are established is mutual consent, whereby property shall not be taken away from a person without their consent. The indication of mutual consent is the apparent wording of offer and acceptance under the condition of the absence of coercion that cancels consent. This coercion is illegal coercion that is unjust and that unlawfully infringes the right of others to exercise free will.

However, if the opposite occurs, namely, if the right of agreement and consent in a contract leads to injustice or harm to others, then achieving both justice and consent by using coercion is the right thing to do. This type of coercion aims to achieve a rightful purpose that ensures justice and eliminates injustice and provides for restitution as well.

**Keywords:** financial transaction, jurisprudence of transactions, coercion, agreement, contracting.

### **Introduction**

This research addresses the subject of achieving both justice and consent in financial transaction contracts and asserts that contracts cannot be valid unless mutual consent is reached, which is indicated by the apparent wording. However, if there were clear evidence of the absence of consent, such as coercion that unlawfully infringes on the right of others to exercise free will, this indicates that

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the wording of the contract does not truthfully express consent nor indicate it. This type of coercion affects the contract; therefore, it is prohibited and illegitimate and is considered a commission of injustice against others.

However, the opposite can occur, where a person does not honor a contract whose purpose is to fulfill an obligation that is owed to others, to avoid causing harm or damage, or to protect the public interest. In such cases, rightful coercion is allowed, and it is considered necessary to achieve justice and consent.

Islamic Fiqh provides enough evidence and application in branches of jurisprudence to make the principle of achieving both justice and consent a generally meaningful principle. The legislator gives the just ruler broad authority in determining the procedures and the means that he uses to achieve justice and the best interest.

An example of an application of this principle is compelling a procrastinating debtor to sell assets to pay back his debt; Fiqh scholars have agreed on the legality of coercion to pay the debt. They also have agreed on coercion on contracting to pay the debt; however, they have disagreed on a third procedure, which is the state's use of compulsory procurement to sell the property of the debtor in order to pay his debt. Fiqh scholars have disagreed on the legality of the state's selling the debtor's property to pay the debt on his behalf. Whereas Abu Ḥanīfa's opinion was that this procedure is illegal, the majority of scholars from the Mālikī, Shafī'I, and Hanbali schools and scholars from Ḥanafī's School considered it legal.

Abu Ḥanīfa believes that the power of the state over the debtor who has assets from a different kind of debt is limited to attempting to compel him to sell some of his property himself to pay his debts; however, Abu Ḥanīfa believes that the sale of the debtor's property by the state is an interdiction on the debtor and

should not be practiced, because it invalidates his competency, which is considered awful.

The majority of scholars have considered that procrastination by a rich debtor is one of the reasons to interdict his money. If his procrastination is proved to the judge and his creditors request the judge to sell his assets to pay his debts, then the judge can sell some of the debtor's assets by force to pay the exact amount of the debt.

The paper aims to explain that if the terms of agreement and consent in a contracts lead to injustice or harm to others, then achieving both justice and consent by using coercion is the right thing to do. This type of coercion is intended to achieve a rightful purpose that ensures justice and eliminates injustice, and provides for restitution as well.

The aim of this study is to answer important questions such as these: If mutual consent in Islamic jurisprudence is the basic principle in making a contract, do we accept it without constraints, or should it be restricted to not doing injustice and not causing damage to others?

If the right of consent leads to injustice or damage, does the judge have the right to intervene and force the parties to make and sign the contract to achieve a balance between both justice and agreement?

If the wording of the contract is affected by illegal coercion, is it also affected by coercion that has rightful purposes that aim to achieve justice and restitution, and does the consent of the legislator in cases of rightful coercion replace the consent of the contractors?

To answer these questions and others, and due to the lack of independent research on achieving justice and consent in financial contracts, the researcher decided to research this subject as a way to serve Islamic Sharia law.

The researcher could not find any research in the literature about the achievement of both justice and consent in the context of financial transaction contracts; however, there are previous studies that relate to the topic of rights and mutual consent:

- 1- A master's thesis entitled "The Impact of Coercion on Financial Transaction, Comparative Jurisprudence Study," prepared by Iyad Ibrahim Odeh, supervisor Dr. Mazen Sabah, al-Azhar University, Gaza, 1433 H\ 2012 AD.
- 2- A paper entitled "The Impact of Coercion on Financial Transaction," prepared by Mohammad Mahmud al-Mohammad, published in *The Social Studies Journal*, Issue 12, July-December, 2001 AD.

This study adopts a descriptive approach, using the deductive and analytical approaches to clarify the meaning of consent and its impact on contracts. It then addresses the achievement of justice and consent, demonstrates some applications of jurisprudence (*Fiqh*), and offers some examples on the subject.

### **The Lexical and Contextual Definition of a Contract**

The lexical meaning of a contract is "to attach and to fasten."<sup>2</sup> The lexical meaning is used in expressions such as "tying the rope," and the metaphorical meaning is used in expressions such as "selling contract." Also, oaths and vows may be parts of contracts that demonstrate confirmation and commitment.<sup>3</sup>

In terms of a contract's contextual meaning, some language scholars define a contract in a general way to include anything involving a human vow, whether

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<sup>2</sup> Ibn Manzūr, 'The Arab Tongue' (Lisān al-'Arab), 3\296. Ibn Fāris, Dictionary of Language Standards, 4\68.

<sup>3</sup> Ar-Razi, Mukhtār al-ṣiḥāḥ, 1\214. Az-Zubaidi, Mohammad bin Abd al -Razzaq, *TajAl-A'roos min Jawaher Al-Qamous*, 8\401.

it be an individual intention, such as a divorce and oath, or an agreement between two people, such as a sale, lease, or mortgage.<sup>4</sup>

However, most scholars have defined a contract in terms of its specific meaning, namely, an arrangement involving two intentions, which has both apparent and implicit qualities. The implicit quality is the agreement of the contractual intentions of both contractors, while the apparent wording is the offer and acceptance, which dictates that the contract cannot be accomplished unless there is mutual consent between both parties. Nevertheless, the consent is veiled and cannot be determined without proof. Thus, the apparent wording of offer and acceptance serves as proof of mutual consent between the two parties.<sup>5</sup>

The Mecelle (*Aḥkām-i 'Adlīye*) journal defines the making of a contract as “committing to and undertaking a thing or a situation, and it is a relation between offer and acceptance.”<sup>6</sup> The contract is a legitimate relation between offer and acceptance, in which legitimacy is a condition that makes the contract valid.<sup>7</sup>

The contract is a legal commitment between two parties as a result of consent in regard to their choices. The way hidden choices are revealed is by the contractors' mutually expressing their choices through offer and acceptance. Whenever there are offer and acceptance under Sharia terms, there is a contract that expresses the consent of two parties concerning the issue at hand. Thus, each party becomes obligated to honor the rights of the other party under the contract.<sup>8</sup>

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<sup>4</sup> Al-Jaṣṣāṣ, *Quran Provisions (Aḥkām al-qur'ān)*, 3\285. al-Qurtubi, *Al-Jami li Ahkam al-Qur'an*, 6\32.

<sup>5</sup> Al-Nawawī, *Rawdat al-Talibeen*, 4\229.

<sup>6</sup> Article 103 from Mecelle journal: Hiadar, *drr alhakam shrh majlah al'ahakam*, 1\105.

<sup>7</sup> Article 104 from Mecelle journal: Hiadar, *drr alhakam shrh majlah al'ahakam*, 1\105.

<sup>8</sup> Al-Zarqa, *A General Introduction to Islamic Law*, 1\383.

## The Definition of Consent and its Impact on Contracts

The lexical meaning of *consent* is to express a favourable opinion or choice, such as *I consent to [something]*, namely, *I choose it*.<sup>9</sup> Consent and dissent are internal characteristics.<sup>10</sup> Also, if two people consent to something, it means they agree on it.<sup>11</sup>

What can be concluded from the statements of the majority of Sharia scholars is that the contextual meaning of *consent* is to intend to do something by choice.<sup>12</sup> According to most scholars, *consent* and *choice* are synonyms, where the choice of the person is “his intention to do something with consent and desire and without forcing or coercion.”<sup>13</sup>

The Ḥanafīs distinguished between choice and consent, stating, “Choice is to something and consent is to prefer something and favour it, therefore, if someone is forced on a thing then he chooses it but does not consent to it.”<sup>14</sup> Consent according to Ḥanafīs is to prefer something and not object to it, hence, it is more specific than choice; a person might choose something that he objects to, for instance, one might fight for self-defence and not out of a desire to fight.

The preponderant opinion is what the majority of scholars have believed in, which is that there is no difference between consent and choice. Consent is

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<sup>9</sup> Al-Fayomi's, *The Luminous Lantern*, 1\229.

<sup>10</sup> Ibn Manzūr, 'The Arab Tongue' (*Lisān al-‘Arab*), 14\323.

<sup>11</sup> Al-Zabīdī, *Taj al-Arus* ('The Bride's Crown from the Pearls of the Qamus (Dictionary)), 8\160.

<sup>12</sup> Al-Dasūqī, *Hāshīyat al-Dasūqī*, 3\3.Ar-Ramli, *Nihayat Al-Mohtaj*, 3\375. Al-Mardawi: *Al-Inssaf*, 4\265

<sup>13</sup> As-Suyutti, *al-Hawilil-fatawi*, 2\166.

<sup>14</sup> Ibn 'Abidin, *Radd al-Muhtār*, 5\507.

“choosing something with intention knowing its consequences;”<sup>15</sup> thus, consent is achieved by doing something with full intention. If intention is lacking, then the consent which is the basis of contracts is absent, and as a result, the contract is unreliable unless mutual consent is reached. Therefore, the verses of the Quran and Sunnah clarified that peoples’ money is made lawful only by bringing mutual consent and consent into effect -“O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent”<sup>16</sup>- and the Prophet Mohammad (peace be upon him) said, “Transactions may only be done by mutual consent.”<sup>17</sup>

The Quranic verse and the Sunnah text clarify the importance of consent and mutual consent in contracts, in which it is prohibited to take property from someone without his consent.<sup>18</sup> Because consent is internal and cannot be perceived, the wording of a contract has been adopted to replace real implicit consent, as, on principle, it furnishes clear evidence of consent.<sup>19</sup> The wording is the source of the contract, and there is no sign of lack of consent because the wording of offer and acceptance stands in for it, by which the ordinances of the worldly life are executed according to clear and explicit evidence that the judiciary can access.<sup>20</sup>

However, a case on which Fiqh scholars differ concerns the absence of consent because of coercion. In this case, coercion is a reflection of an

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<sup>15</sup> Ali al-Qaradaghi, the principal of consent in contracts, 2\1006.

<sup>16</sup> Surat An-Nissa, verse 29.

<sup>17</sup> Ibn Majah, Sunan Ibn Majah, Trade chapter, section of sale with choice, 2\737, Hadith (2185), authenticated by al-Albani in Irwa al-Ghalil, 5\125, Hadith (1283).

<sup>18</sup> Ibn Muflih, El-Mübdi', 4\7.Al-bahūfī, Kashshāf al-qinā', 3\149.

<sup>19</sup> An-Nawawi, Rawdat al-Talibeen, 4\229.

<sup>20</sup> Al-Zarqa, A General Introduction to Islamic Law, 1\384.

incompatibility between the wording and the consent and of the fact that the wording is not indicative of consent. Hence, according to the majority of Fiqh scholars, the contract is void, for they consider implicit consent the basis of all personal or transactional contracts, without distinguishing between contracts that can be terminated and those that cannot. If the contractor did not intend by his words or his actions to make a contract, then his utterance will be void and have no consequences, since real consent is absent.<sup>21</sup>

Nevertheless, the Ḥanafīs considered the wording the only basis for a contract, and they differentiated between the contracts that can and cannot be terminated, for instance, sale and lease contracts, and marriage and divorce contracts. According to the Ḥanafīs, contracts that cannot be terminated do not only accept real implicit consent, but they need an utterance from an adult of sound mind; hence, it is valid without implicit consent, which is not a condition for the validity of the contract.<sup>22</sup> In contrast, for the validity of contracts that can be terminated, implicit consent is important; however, it is not the only basis, or even a condition for their validity. A contract might be made under conditions of coercion that affect consent, but the contract itself may be considered false, due to the absence of real implicit consent.<sup>23</sup> A false contract is a contract that has the right basis and conditions but lacks one of the conditions that make it valid. The unavailability of consent falsifies the contract, but does not void it, because if consent is achieved upon the removal of coercion, the contract again becomes valid.<sup>24</sup>

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<sup>21</sup> Al-Hattab, *Mawaheeb Al-Jaleel*, 4\22. Ash-Sherbini *Moghni Al-Mohtaj*, 3\318. Al-bahūtī, *Kashshāf al-qinā'*, 3\149.

<sup>22</sup> Az-Zayla'I, *Tabieen al-Haqae'q*, 2\194. Ibn Mawdood, *Al-Ikhtiyar*, 2\106.

<sup>23</sup> Almargennani, *Al-Hidaya*, 3\272. Al-Kashani, *Bada'i' al-Sana'i'*, 6\128.

<sup>24</sup> As-Sarkhasi, *Al-Mabsoot*, 24\55.

## Coercion and its Impact on Consent

The lexical meanings of *coercion* are “forcing” and “compelling,” which goes against consent<sup>25</sup>; thus, *coercion* means forcing someone to do something using threats.<sup>26</sup>

According to Fiqh scholars, the Ḥanafīs explained in detail the meaning of coercion, which eliminates consent and impacts the validity of a contract, whereas the majority of scholars define *coercion* in general terms. According to the Ḥanafīs, the meaning of *coercion* is “forcing someone to do something he refuses using threatening until he becomes scared to the extent of giving direct consent.”<sup>27</sup>

The definition of coercion, according to an article (948) in Mecelle journal is “forcing someone to do something without right and consent.” The expression “without right” is precautionary, because rightful coercion is not considered coercion according to the definition of *coercion* in this article nor according to the definition given by the Ḥanafīs.<sup>28</sup>

The majority of Fiqh scholars from the Mālikī, Shafī'I, and Hanbali schools<sup>29</sup> defined *coercion* in general, and then they divided it into coercion without right and rightful coercion, whereby coercion without right is to violate someone's free will unjustly in a way that eliminates consent and impacts the contract, and rightful coercion is coercion that is meant to achieve a lawful

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<sup>25</sup> Ar-Razi, Mukhtār al-ṣiḥāḥ 1\269

<sup>26</sup> Al-Zabīdī, Taj al-Arus The Bride's Crown from the Pearls of the Qamus (Dictionary), 36\435.

<sup>27</sup> A'la Eddeen Al-Bukhari, Kashf Al-Asrar a'h Osool Fakhr al-Islam Al-Bazdawi, 4\383

<sup>28</sup> Hiadar, drr alhakam shrh majlah al'ahakam, 2\659.

<sup>29</sup> Al-Dasūqī, Hāshiyat al-Dasūqī, 2\145, Ash-Sherbini, Moghni Al-Mohtaj, 2\333, Al Uthaymeen, 'Al-Sharh al-Mumti, 8\109.

purpose, in which the consent of the legislator replaces the consent of the contractor. That is because it is the compulsion to perform an obligatory deed that the compelled has refrained from doing, and it is set by the judge in a way that achieves justice, dispels trouble, and restores peoples' rights.

### **Achieving Both Justice and Consent in Financial Transaction Contracts**

We clarified above that coercion that eliminates consent and affects the contract is illegitimate coercion that unjustly attacks the free will of others, while rightful coercion is legal coercion that does not affect or negate the provisions of the contract.<sup>30</sup> Thus, Fiqh scholars have agreed on the validity of a contract involving a rightfully compelled contractor. They also have agreed on the fact that the wording of a contract cannot be affected by this kind of coercion because the consent of the legislator replaces the consent of the rightfully compelled contractor. Hence, the Ḥanafīs stated that rightful coercion does not interfere with the rights of the compelled contractor and does not eliminate his legal free choice.<sup>31</sup>

The Mālikīs also stated that rightful coercion has the same status as voluntary consent, since it is a type of lawful coercion that makes the contract valid.<sup>32</sup>

The Shafi'īs also stated that rightful coercion does not terminate judgment on the actions of those under contract, so that an action that is forced is the same as an action of voluntary consent, since the consent of the legislator replaces the consent of the contractor.<sup>33</sup>

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<sup>30</sup> Al-Qaradaghi, *The Principal of Consent in Contracts*, 2\1279.

<sup>31</sup> Ibn Amir Hajj, *Al-Taqrirwa al-Tahbbir* 2\207.

<sup>32</sup> Al-Khurshi, *Sharh Mukhtasar Khalil*, 4\34.

<sup>33</sup> Ash-Sherbini, *Moghni Al-Mohtaj*, 2\333

The Hanbalis also stated that rightful coercion preserves the validity of the contract because it is a legitimate way to attain rights without injustice and discretion.<sup>34</sup>

As the Fiqh scholars of the four religious schools of Islamic jurisprudence stated, Islamic Sharia achieves a balance between justice and consent. Islamic Sharia does not approve a contract that forces the contractor to do something he has never agreed to, except for that which he is obligated to do by the rules of justice and interest or by the compulsory contracts issued by the state to achieve justice. Rightful coercion in these cases is considered necessary to achieve both justice and consent in the contracts.<sup>35</sup>

The principle of consent in Islamic jurisprudence is the basis of a legitimate contract, unless it leads to injustice or causes damage. This means that in Islamic Sharia, mutual consent should be restricted to not causing injustice and damage to others. Thus, if consent or mutual consent leads to damage or helps the oppressor to increase his oppression, the principle of consent is invalidated. However, another principle should be implemented, which is that of rightful coercion, because it is not acceptable to take consent as an excuse for actions that lead to injustice and damage. That is because the wise legislator issues judgments positively or negatively with the public's best interest in mind.<sup>36</sup>

When the right of the individual leads to oppression or harm, the state has to intervene and stop it; hence, the compelling of a contract becomes a right for the state that is authorized by the wise legislator to eliminate oppression or to achieve the public's best interest.<sup>37</sup> This means the state can intervene in an

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<sup>34</sup> Al Uthaymeen, 'Al-Sharh al-Mumtī, 8\109.

<sup>35</sup> Al-Zarqa, A General Introduction to Islamic Law, 1\538.

<sup>36</sup> Ad-Durini, contrastive studies in the fundamentals of Islamic Jurisprudence, 1\580,

<sup>37</sup> Ministry of Awqaf, Kuwaiti Encyclopedia of Islamic Jurisprudence, 1\313.

actual right that is revealed by Allah within the limitations set by the legislator. These limitations are bounded by the necessity to secure the public interest and eliminate corruption and exploitation from society. This intervention does not mean attacking the consent right unjustly; however, it means that the state has the power to coordinate conflicting rights and give preponderance to the public's best interest. Otherwise, the conflict between rights will predominate, and the best interest for all will be wasted, which is rejected by Sharia and its purposes and conflicts with Sharia's arbitrary rules.<sup>38</sup>

The provisions of a contract are not enforceable if there is unrightful coercion, because the compeller practices injustice against the compelled. However, rightful coercion is the complete opposite; it is a legal action by which the compeller intervenes to achieve justice; thus, the provisions can be enforced to eliminate injustice and achieve justice.<sup>39</sup> Therefore, the state has the right to compel the parties to a contract on every circumstance that is more likely will lead to injustice if there was not coercion.

Islamic Fiqh provides enough evidence and applications in branches of jurisprudence to make the principle of achieving both justice and consent a general meaningful principle. The legislator grants the ruler broad authority in assessing the procedures and the means to be followed to achieve justice and pursue the public's best interest; otherwise, the ruler would be considered negligent in his duties.<sup>40</sup>

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<sup>38</sup> Ad-Durini, *The Extent of the Power of the State that Restrict the Truth*, 228.

<sup>39</sup> Ibn al-Qayyim, *At-Turuq al-Hukmiyah*, 207.

<sup>40</sup> Ash-Shatibi, *al-I'tisam*, 2\619. Ad-Durini, *contrastive studies in the fundamentals of Islamic Jurisprudence*, 1\562.

### **Applications on the Achievement of both justice and Consent:**

The applications on the achievement of both justice and consent in the branches of Islamic Fiqh form a realistic and fundamental rule for the policy of just legislation. That is because it gives the state broad authority to achieve justice and eliminate harm and restores people's rights.

Some of the examples of applications: compelling a procrastinating debtor to sell his assets to pay back his debt; forcing a mortgagor to sell the mortgage if the debt becomes due and he still abstains from paying; compelling someone, at the demand of one of the parties, to sell property that cannot be divided or might suffer damage upon being divided, since this would violate the interest of the one making the demand; forcing the owner of a water supply to sell to people in need whatever exceeds his needs; forcing someone to sell at cost food that exceeds his needs; compelling a monopolist on sell products that he monopolizes at one-eighth of the price; regulating extravagant prices if there is a public need for the goods; compelling someone to sell private property to serve the public interest, such as selling a plot of land to broaden a street or build a mosque, and so forth.

This study cannot address all of these examples; therefore, it will have to do to clarify only one, the issue at hand, which is coercing a procrastinating debtor to sell assets to pay back his debt.

Islamic legislation distinguishes between the affluent debtor and the indigent debtor. On one hand, if the debtor is poor, then not repaying a debt in time is not considered procrastination and injustice; instead he should be given time to acquire the means or should receive charity, as Allah the Almighty has said, "If someone is in difficult circumstances, then defer until a time of ease. But to remit it as charity is better for you - if you only knew".<sup>41</sup>

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<sup>41</sup> Surat al-Baqarah, verse 280.

On the other hand, if the debtor is rich and can repay the debt, but procrastinates and abstains from paying due debts, then this is forbidden and is considered unjust.<sup>42</sup> In this case, there is a set of procedures that the state has to follow to eliminate this injustice and to end the procrastination and rescue the lender from harm. These procedures are examples of the achievement of both justice and consent, and Fiqh scholars have agreed on the legality of coercion to force the borrower to pay the debt. They also agreed on coercion to contract to pay the debt; however, they disagreed on a third procedure, that the state could confiscate and sell the property of the debtor to pay his debt. The procedures are clarified as follows:

1. If the debtor owns an asset that is of the same kind as that of the debt he owes, then Fiqh scholars agree that the state has a legal right to compel him to pay his debt; therefore, the state can take part of the debtor's money by force and pay it to the creditor.<sup>43</sup>
2. If a procrastinating debtor has assets that are not of the same kind as those of the debt, the state can compel him to sell part of his propriety to pay his debt. Fiqh scholars have agreed on the validity of the sale contract in regard to this coercion because it is rightful coercion. The Ḥanafīs stated, "If the judge has compelled the debtor to sell some of his assets then his sale is legitimate."<sup>44</sup> According to the Mālīkīs, there is "[I]awful coercion such as the judge compelling the debtor to sell his property to the creditors."<sup>45</sup>

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<sup>42</sup> Al-Qarāfī, *Ad-Dhakira*, 8\160. An-Nawawi, *al-Minhag*, 10\227. IbnḤajar, *Fath al-Bārī*, 1\189.

<sup>43</sup> Ibn 'Abidin, *Radd al-Muhtār*, 5\380. al-Qarāfī, *Ad-Dhakira*, 8\213, Ash-Shirazi, *Al-Mohazab*, 2\113. Al-bahūtī, *Kashshāf al-qinā'*, 3\418.

<sup>44</sup> DamadAfandi, *Majma' al-Anhur*, 2\430.

<sup>45</sup> Al-Hattab, *Mawaheb Al-Jaleel*, 4\252.

According to the Shafi'is, rightful coercion has no impact on the illegality of the sale, as evidenced by reference to “the validity of the sale of the debtor who is compelled by the judge to sell his assets to pay his debts.”<sup>46</sup>

According to the Hanbalis, “If the debtor was rightfully compelled by the judge to sell his assets to pay his debts, then his sale is valid.”<sup>47</sup>

3. If the debtor hesitates to sell some of his property to pay his debt, Fiqh scholars disagree over whether it is legal for the state to sell the debtor's property on his behalf. Whereas Abu Ḥanīfa considers this procedure to be illegal, the majority of scholars from the Mālikī, Shafī'i, and Hanbali schools, and other scholars from Ḥanafī's school, considered it to be legal.<sup>48</sup>

Abu Ḥanīfa believes that the power of the state over the debtor who has assets of a kind different from that involving the debt is limited to attempting to compel him to sell some of his property on his own in order to pay his debts. The state might jail him and keep him imprisoned until he sells on his own; however, Abu Ḥanīfa believes that the state's selling of the debtor's property is an interdiction on the debtor and should not be practiced because it invalidates his competency and is considered awful, as it cannot be seen to eliminate a particular harm.<sup>49</sup> Also, Abu Ḥanīfa believes that the selling of the debtor's assets by the state is a transaction without mutual consent, which is different from jailing the debtor, because compelling the debtor to sell his property himself involves an explicit acceptance by the debtor, by which the apparent wording that is the basic element of the contract is revealed. The rightful coercion in this instance does

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<sup>46</sup> As-Suyutti, *Al Ashbah Wa Al Nazair*, 211.

<sup>47</sup> Al-Shaibani, *nayl al-matalib fi Sharḥ Dalil al-talib*, 1\333.

<sup>48</sup> As-Sarkhasi, *Al-Mabsoot*, 14\164. Al-Khurshi, *Sharḥ Mukhtasar Khalil*, 5\271. Ash-Shirazi, *Al-Mohazab*, 2\113. Ibn Muflīḥ, *El-Mūbdi'*, 4\296.

<sup>49</sup> Ibn Amir Hajj, *Al-Taqrirwa al-Tahbbir* 2\207

not affect consent and does not eliminate choice, so that the apparent wording, in this case, serves as the consent.<sup>50</sup> However, if the state sells the debtors assets, there is no explicit acceptance by the debtor; thus, there is no apparent wording that serves as consent, which leads to a transaction without mutual consent.<sup>51</sup>

The majority of scholars considered that procrastination on the part of a rich debtor justifies interdicting his money, so that if his procrastination is proved to the judge and his creditors request the judge to sell his assets and pay his debts, then the judge can sell some of the debtor's assets by force to pay the exact amount of the debt.<sup>52</sup> Since the procrastination of the rich debtor is an unjust act that should be prevented, for the debtor himself could sell some assets to pay his debt and undo the injustice, and the state should compel him to do so. Nevertheless, if the debtor refuses to sell by himself, the state can sell on his behalf, because the payment of a debt is a duty, and whatever it is necessary to do to fulfill a duty is also a duty, so if the debt can be paid only by selling, then the sale is a duty,<sup>53</sup> whether this is by the debtor himself or by the state on his behalf if he refuses to sell on his own.

The preponderant opinion one that the majority of scholars hold because Abu Hanifa agreed with them on the validity of the coercing the debtor to sell some of his property himself to pay off his debt, and agreed that this coercion is rightful and does not affect consent nor eliminate choice; instead, he saw it as legitimate to jail the debtor until he sells some of his assets by himself. The basic principle is that the debtor agrees to the legality of the state's selling some of his

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<sup>50</sup> Damad Afandi, *Majma' al-Anhur*, 2\430.

<sup>51</sup> *Al-Kāsānī, Bada'i al-Sana'I*, 7\169.

<sup>52</sup> *As-Sarkhasi, Al-Mabsoot*, 24\146, *al-Dasūqī, Hāshīyat al-Dasūqī*, 3\265, *al-Haytami's Tuhtat al-Muhtaj*, 10\206, *Ibn Qudamah, Al-Kaafi*, 2\96.

<sup>53</sup> *Al-Subki, Al-Ashbāhwa'l-naza'ir*, 2\88.

property to pay the debt, because the result is the same, and because the judge's procuration in such cases replaces the seller's consent.

### **Conclusion**

This research produced important results, one of which is that the basic principle in Islamic Sharia is that a contract can only be valid if it is based on the mutual consent of both contracting parties, and on the principle that property shall not be taken from a person without his consent. The indication of mutual consent is the apparent wording of offer and acceptance under the condition of the absence of any coercion that might compromise consent. Such coercion is illegal coercion, which is unjust and which unlawfully infringes the rights of others to exercise free will.

According to the majority of Fiqh scholars, this means that unjust coercion is an attack against the will that eliminates consent, and thus makes a contract null and void, and according to Hanafi, makes it false in contracts that accept annulment and valid in contracts that do not.

As for the rightful coercion, it is legitimate coercion by legal provision, in which the consent of the legislator replaces the consent of the contractor, because it is coercion to fulfill a duty that the contractor refrains from doing, and the judge is entitled to do this to the extent that it achieves justice, eliminates injustice, and prevents damage.

The study also concludes that Islamic legislation combines and balances justice and consent; however, it did not address contracts that obligate a person with a mandate that he did not consent to, except in terms of the rules of justice and the public interest, such as imposing compulsory contracts to achieve right and justice. Therefore, the coercion of right in such cases is one of the necessary supports of fair legislation and country development.

Research has shown that in Islamic jurisprudence, there are applications and examples in the branches that make the principle of achieving both justice and consent a general moral principle that the legislator has observed in the provisions for these issues. The legislator gave the ruler broad powers to determine the procedures he takes to achieve justice and protect the public interest.

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