

# LEGAL ISSUES IN THE SALE OF SALAM IN ACCORDANCE WITH THE PROVISIONS OF JORDANIAN CIVIL CODE-COMMENT ON ARTICLE 538

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## ABSTRACT

*Article 538 of the Jordanian Civil Code stipulates special provisions in the sale of salam, representing it as when a buyer takes advantage of a farmer's need, the buyer may ask the court to amend prices and eliminate unfair conditions. At the same time, the buyer is left with the option of not accepting the amendment as deemed appropriate by the court and of recovering the real price that it had handed over to the seller, and the latter could then sell his/her crop to whomever he/she wished. The provisions of this text show us that there is a breach of the principle of binding force of contract and of the obligation of judicial decision. This research based on the question of whether the Jordanian legislative authority has squandered the principle of binding force of the contract and the obligation judicial decision, or is there another purpose realized by the text?*

**Keywords:** Sale Contract, Islamic Law (Shari'a), Jordanian Civil Law.

## INTRODUCTION

Article 532 of the Jordanian Civil Code defines sale of salam as “*the sale of deferred delivery merchandise where the price is prepaid*”. And Article 538 states that:

*“1- If the buyer takes advantage of the farmer's need and buys a future crop from the farmer at unfair price or unfair terms, while the seller, when the time of payment comes, he/she has the right to request the court to modify the price or terms in a manner that would eliminate the state of unfair or prejudice. The court shall take into account the circumstances of the time, place, the level of general prices and their differences between the date of the contract and salam, in accordance with what has been done in practice. 2- The buyer has the right not to accept the amendment as the court deems necessary and to recover the real price it has handed over to the seller, the seller shall then be entitled to sell his/her crop to whomever he/she wishes. 3- Any agreement or term intended to extinguish this right shall be null and void, whether it is a clause in the salam contract itself or whether it is in the form of another obligation of any kind”.*

Sale of Salam is a name of sale contract where the sold object will exist in the future while the price is prepaid.

A body of fundamentalist principles that governs the branches of law, either absolutely or specifically, prevails in the science of law. Some of these principles are applied in the field of legal science in general, such as the personality of laws, the territoriality of laws, the

inadmissibility of an apology due to ignorance of the law and others. Some principles are specific to a specific legal branch, such as the principle of the contract is law of the contractors, the principle of contractual freedom in the field of contracts. These principles are fundamental in the science of law and influence the understanding of different legal aspects.

The sale of salam contract is a sale of deferred merchandise of salam at an accelerated price. It is a contract that its object is future event that may not exist at the time of the conclusion of the contract, but it is capable of being exist, such as agricultural product before it is cultivated. The contract shall be concluded in accordance with the circumstances and time of its conclusion and not with the circumstances and time of its implementation. Purchase shall be made at the contracted price at the time of conclusion of the contract. If this value increases or decreases at the time of execution for reasons related to the market, this shall not reflect or affect the contract as a public principle provided that injury at the time of conclusion of the contract is no longer existed.

We note that this text has three important legal points: first, it breaches the principle of the binding force of the contract; second, that there is an infringement on the binding force of the judicial decision; and third, that it talks about the exploitation, bearing in mind that the Jordanian legislative authority did not regulate the exploitation as a vice of consent in the general rules of civil code. In this comment, I will examine these three points referred above and then discuss whether the Jordanian legislative authority has wasted these legal principles in this text? Or are we facing another legal interpretation?

## LITERATURE REVIEW

In an effort to provide an extensive study of sale of salam contract, the researcher has reviewed the available sources relevant to the subject. In fact, there are no specialized studies in the contract of sale of salam.

In her attempt to study the contract of sale of salam, (Al-Zahrani, 2015) presents a general study which comes as part of the talk about sale of salam in Islamic jurisprudence. Hamza (2008) in his study, he just conducts a comparison between the provisions provided in the Jordanian civil code and the ones in the Islamic Jurisprudence.

## METHODOLOGY

This research is based on the descriptive analytical approach as it deals with the legal texts related to the subject in accordance with the provisions of the Jordanian civil code. The same applies to most laws that have been adopted in French civil code, such as the Egyptian, Lebanese, Syrian, and Iraqi laws in the Arab world. It can also be said in the Latin direction in European countries.

## FINDINGS AND DISCUSSION

### Breaching the Principle of Binding Force of Contract

Legal jurisprudence has long questioned the source of binding force of the contract. Legal jurisprudence is incorporated through civilizations, from formalism (Malkawi, 2017) to the given promise expressed in canon law "*Toute parole lie celui qui La prononcee*", and then the principle

of autonomy of will appeared (Ranouil, 1980) to which there were a lot of criticism. And theory of jurist Duguit (Al-Zein, 1993) and (Kelsen, 1945) appeared. And then Ghestin had his theory of interest and equity (Ghestin, 1982). Finally, some believe that the binding force of the contract is a new understanding of the elements of the contract (Malkawi, 2020).

Jurisprudence may differ in the interpretation of the source of binding force of the contract or legal schools may differ in understanding and dealing with this issue (There are legal differences between legal schools in the world, especially Latin and Anglo-Saxon, in dealing with some legal theories) (Rieg, 1961; De-Lamberterie, 1987). However, we do not ignore this principle in any legal school or in attempts to interpret the principle of binding force of the contract.

Some question the essence of the contract itself, is it real or myth? (Savaux, 1997). I believe that the contract itself is a real, and some aspects of the interpretation of legal matters may have the legal illusion. The misinterpretation of certain legal phenomena -whether they are wrong or inaccurate- should not be reflected on the theory of the contract itself by saying that it is myth.

The Jordanian legislative authority did not grant the court the power to amend the contract by maintaining its economic balance (Malkawi, 2017) or removing abusive clauses (Al-Derini, 1982; Saad, 2002). However, it left the buyer the choice between respecting the court's decision or failing to abide by it. The role of the court shall normally be within the scope of contracts in intervening in the contract in order to protect the force binding on the contract and not to derogate from it.

It is noted from the text that the term contract Resolution was not used, but the term Retreat was used, as if we were facing enrichment without cause. The principle in the law is that in the case of an abusive clauses, the judge may annul or reduce them without prejudice to the existence and validity of the contract.

### **Breaching Obligatory of the Court's Decision**

The second paragraph of this article provides the legal provision that the buyer in the sale of salam has the option of accepting or not accepting the amendment made by the court (Al-Zahrani, 2015; Hamza, 2008), and accordingly refraining from applying the judicial decisions is a punishable offense (Murad, 2007). The text referred to above provided a choice between accepting the court judgment or rejecting the contract and receive the actual price handed to the seller. Therefore, does this consider a breach of the principle of binding force of judicial decisions?

It can be argued that the text allows the buyer to reject the court judgement by revoking the contract and receiving the price. However, the question remains about the role of the court in the case of the contractual relations. The principle is that the court intervenes to protect the contract and not to disrespect its binding force. The other thing is that the court intervenes and decides to amend the price and eliminate unfair conditions as a rule for this case. Therefore, on what basis does the buyer have the choice to not comply with this judgement and take the other option of not accepting the court's decision to amend the contract.

Procedural laws protect substantive rules, with the aim of achieving procedural justice to protect substantive justice (Tanago, 1965). It would have been better if the text had stopped at the limits of the first option, meaning that the court could have modified the unfair conditions or

modified the unfair price. The court intervention aims at protecting the binding force of the contract and restoring its economic balance. However, adding the buyer's choice in the text so that he/she has the right of resolution the contract and recover the price, it follows that we have ignored the principle of binding force of the contract, and there is an encroachment of the court's role in interfering in the economic rebalancing of the contract.

### **Exploitation is a Vice of Consent**

Article 160 of the Jordanian civil code stipulates in its first paragraph that, "*Future matters may be subject to compensation if deception is no longer exist*". It should be noted that the Jordanian legislative authority does not regulate in the general rules the vice of exploitation as a disadvantage of consent, but it is stated in the text of article 538, which is the subject of this discussion.

The relationship between exploitation and injury is achieved in the differences between the value of the item in the price paid and its market value (Asran, 2012). However, exploitation results due to certain circumstances to which one party is faced. So, the other party shall make use of it through the difference between its value and the value paid. Both exploitation and injury cause breaching of the economic balance of the contract. To consider injury, Jordanian Legislative authority stipulated that deception shall be existed as a restriction and used as deception whether it is verbal or actual means in order to push the other contracting party to accept what he would not have accepted without them (Malkawi, 2016). Therefore, if injury is not accompanied by deception, it cannot be offered as an excuse except when there are exclusive cases such as the capability of the interned, state funds, mortmain funds, and the act of a patient who is dying.

Based on the above discussion and since injury is not accompanied by deception, I believe that the Jordanian legislative authority wanted to indicate the significance of exploitation, but not to indicate it as a defect or vice of consent. He legislative authority aims at considering it as a circumstance that causes breaching of the economic balance of the contract without legal justification. With reference to the text of article 538, I believe that this exploitation must be accompanied by a presence of a price or unfair conditions.

### **CONCLUSION**

Jordanian legislative authority has set serious legal provisions on the realization of exploitation, in accordance with the provisions of the aforementioned article 538. These legal provisions represented by wasting the principle of the binding force of the contract and breaching the binding force of the judicial decision. They are the effects of exploitation where legislative authority has not relied upon it as a vice of consent and has not regulated it in the general rules, nor has it set forth its terms or its legal provisions such as the resolution or nullity of the contract.

I think it would have been better to deal with it as a material circumstance that would have affected the economic balance of the contract through which it authorizes the court to restore this economic balance of the contract in order to protect the principle of binding force of the contract and to maintain the obligation of the judicial decision.

I also believe that exploitation and injury are not a vice of consent, but rather a breach of the agreed material, in other words, the object.

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