Duress, generally speaking, is the exercise of an unlawful pressure on a person to create in him a fear which causes him to enter into a contract. In Shariā according to all Sunni Schools duress will denude the contract of its binding force, because it nullifies the consent.

There are two elements in duress, the first is under what circumstances does duress operate? The second is what is the effect of a contract made under duress?

Only the Hanafi jurists divided duress into constraining (mulji) and non-constraining (ghayr mulji); both types nullify the consent, but only the former vitiates choice. The Hanafis require freedom of choice, and freedom of consent as a basis to conclude a valid contract.

Choice is defined as the intentional taking of one of two possible courses of action by preferring one to the other.

Consent is defined as the real willingness and consent with which the choice is made.

The objective element concerns the material act of duress itself, and the subjective element concerns the psychological effect of the act on the mind of the person under duress.

Hanafi jurists illustrate this distinction by an amusing example, i.e., a man who divorces his beautiful wife because she does not observe the Islamic rites is making a choice although he may not be happy about divorcing his wife.

A person concluding a contract under compulsion is making a choice. He is choosing between suffering what is threatened and making a contract which he does not want.

But he does not truly consent to make that contract since he cannot be happy or satisfied with the choice he has made. Or to put it more strongly, he has no alternative.

The Hanafi view is that although duress nullifies consent, it does not negate choice.

So constraining duress leaves to the duressed no way for freedom of choice, and it therefore vitiates his choice, whereas in non-constraining duress the duressed can choose between suffering or doing what he was asked to do.
(1) WHAT IS THE OPERATIVE DURESS IN ISLAMIC LAW?

The first condition to set up the situation of duress is the fear which the threats engender in the mind of the duressed, who acts under such fear so that the consent is nullified.

Second, such fear must be well founded, and reasonable for the area of operative duress.

What types of threats constitute duress? Firstly, it is threat to life or limb or, secondly, a threat of long confinement or severe beating.

The fear must be well founded so as to engender fear in the mind of the duressed person. The presumption should arise that the person subject to duress believes there is a real threat which will be carried out against him and he is unable to repel or otherwise avoid it. Also, the danger must be imminent.

The final characteristic is that the object of duress must be unlawful, i.e., a judgment of execution on things which become liable for attachment and are sold to justify a debt is not unlawful compulsion; so it does not constitute duress so as to nullify a contract of sale.

To whom is the duress directed?

In the Hanafi School the operative duress should directly threaten the contracting party or someone close to him, such as his relatives, and his lineal descendants and ascendants, all of whom he is prohibited to marry.

What is the effect of duress, by its prescription on the contract?

In Hanafi theory the most important factor is choice, not the existence or otherwise of consent, in their view the contract made under duress was treated as irregular (fasid) and not void (bati'il). Duress does not affect the essence of contract. The contract is properly concluded, but it needs subsequent ratification, by the party subject to duress. Likewise, in the situation where a marriage contract is concluded by a guardian, it can be only in the marriage of minors where there is no place for a proper choice, like the adult woman. One of the Hanafi jurists (Zufar) took another view and considered the consent as a condition of enforceability of the Contract (Shart Nafaz).

The conclusion from the Hanafi view is that the contract under duress is voidable but it can be ratified so as to be valid, if subsequently the person subject to duress approved the contract.

(II) DURESS IN THE SUDAN: LAWS AND CASES

Section 42 of the Sudan Law of Contract of 1974 defined duress as follows: “Duress is to compel a person unlawfully to conclude a contract without his consent”.

7 Al Mabsut (Al Sarkasi), Vol 24, p. 50.
8 This attitude is notable in Hanafi also in the powers of a guardian to conclude a marriage contract (ijbar). See Professor Coulson, Succession in Muslim Family, as to how invalid marriages (Fasid and Batiil) are treated.
9 Badii al Sanai, p. 186.