THE VALIDITY OF CONTRACTS WHEN THE GOODS ARE NOT YET IN EXISTENCE IN THE ISLAMIC LAW OF SALE OF GOODS

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The legal language, rules, principles and norms in a Muslim society are the product of continuous dialogue between Islamic Sharī‘a rules and principles, on the one hand, and the social norms and contemporary technological means, facilities and knowledge available in the society, on the other. The role of Muslim jurists and scholars is to initiate, facilitate and develop this dialogue in the direction that to the utmost of their knowledge is the correct direction. In this process, lack of relevant knowledge and the discrepancy in the scholars' abilities to uphold as wide a perspective as possible will inevitably result in differences of opinions. As time passes and as new developments change some of the components of the dialogue, defective opinions and views lose their credibility and correct opinions flourish. This article is a witness to this process where the majority opinion is defeated by the minority opinion, simply because the majority fail to base their opinion on a wider perspective which takes into account a deeper analysis of legal texts and the evolving nature of technological innovations.

A fair majority of Muslim scholars opine that the subject matter of a sale contract must be in existence at the moment the contract is concluded.¹ Other Muslim scholars challenge this view and propose that the sale of an object that does not exist at the time of the contract is not always invalid. Both sides provide evidence to prove their viewpoint. This article aims to analyse and discuss the two views and critically assess their evidence in the light of modern development.

¹ This view also seems to have been adopted by the Mejelle, the Ottoman Civil Code. Article 197 of the Code provides that: “the thing sold must be in existence”. Article 205 further provides that: “the sale of a thing not in existence is void”. See also comments on the two articles in Haidar, ‘Ali, Durar Al-Hukkam, Sharh Majallet Al-Ahkam, Beirut: Dar Al-Kutub Al-‘Ilmiyyah, (n.d.), Book 1, pp. 152 and 156.

Arab Law Quarterly, [2002]
While discussing the subject matter of the contract of sale, Al-Kāsānī, an Ḥanafī scholar, rules that the goods must be already in existence at the time the contract of sale is concluded and that the sale of a not-yet-existing (ma‘dūm) object is void. In his well-known Ḍa‘ī al-Sanā‘ī he elaborates his view saying:

There are several conditions for the contract of sale to be validly concluded. The first condition is that the subject matter must be in existence. The sale of non-existent [goods] and the sale of anything, which is susceptible to the hazard of non-existence, is void. Examples can be found in the sale of offspring of a future-born animal and the sale of a foetus of an animal before its birth, of which the former is considered the sale of a non-existent object whilst the latter involves the hazard of non-existence.  

Ibn Nujaym,3 Al-Shīrādhī,4 Al-Maqdisī5 and Al-Sarkhasī6 also come to the same conclusion. In his al-Mabsūt, Al-Sarkhasī, therefore, concludes that: “There is no other reason to invalidate the sale contract stronger than the fact of the non-existence of the subject matter”.7

However, Ibn Taymiyyah and Ibn Qayyim opine that the sale of a not-yet-existing (ma‘dūm) object is not necessarily invalid. Ibn Taymiyyah, therefore, does not hesitate to write that:

There is no indication in the book of Allah or in the Sunnah of the Prophet (pbuh) or in the practice of the companions that the sale of what is non-existent is prohibited. What was narrated was the prohibition of the sale of some particular not-yet-existing articles, in as much as there was also prohibition of selling some other articles, which actually were already in existence. The effective cause (‘illah) of the prohibition of sale of some articles that have not yet existed, is not the state of their non-existence, in as much as the effective cause of the prohibition of the sale of some article that actually exists is not the state of being in existence.8

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4 Al-Shīrādhī, a Shafī‘ī’s scholar, emphasises that the sale of a not-yet-existing object is unlawful, see his Al-Shīrāzī, al-Muhadhdhab, published together with al-Majmū‘, Beirut: Dār al-Fikr, (n.d.), Vol. 9, p. 257.
5 When talking about the sale of offspring of an unborn animal (ḥābal al-ḥabalah), Al-Maqdisī argues that this kind of sale is invalid based on the ground that the subject matter does not exist yet; see Al-Maqdisī, Shamsuddin, al-Sharḥ al-Kabīr, published together with al-Mughnī, Beirut: Dār al-Kutub al-‘Ilmiyyah, (n.d.), Vol. 4, pp. 27–28. For the meaning of ḥābal al-ḥabalah see the discussion on the Sale of Future Animals below.
7 Ibid.
8 Ibn Taymiyyah, al-Qiyās fi al-Shar‘ al-Islāmī, pp. 26–27. In fact, Ibn Taymiyyah’s view is the preponderant view of the Ḥanbalī school. However, Al-Qārī, a modern scholar who attempted to codify the Ḥanbalī school’s views, has failed to see the view articulated by Ibn Taymiyyah, Al-Qārī, therefore, stipulates that “the object of sale must be in existence, [and] the sale of non-existent is invalid . . .”. See Al-Qārī, Ahmad BA, Majallat Al-Ahkam al-Shar‘iyyah, Jeddah: Tuhama Publication, (n.d.), Art. 266.