Comments

THE SYSTEM OF NULLITIES IN MUSLIM LAW

I. Conditions of Validity of Legal Acts; Form and Substance; A Comparison

In all systems of law, certain conditions of form and substance are required for the validity of juristic acts which produce effects that are legally binding on the parties. These conditions vary from time to time and from one system of law to another. For instance, in the early period of Roman law, emphasis was laid on the external formalities which had to accompany an act, rather than on the motivation and other conditions of substantive law which made it legally binding.[1] Subsequently, in the later stages of development of Roman law and in the more modern legal systems based upon it, the emphasis shifted from the legal formalities to the real intention of the parties. Thus, in the seventeenth century, Loysel could write in his Customary Institutes that "One binds oxen by their horns and men by their words; and a simple promise or a covenant is worth as much as the stipulations of Roman law."[2]

This saying is true under Muslim law, as it is true under the more modern civil codes which are fast superseding it in various Islamic countries. Muslim jurists of the classical schools had a clearly defined idea of the conditions of validity and binding force in legal transactions concluded by word of mouth. They called these transactions Al Tasarrufat Al Qawlia which literally means transactions by word of mouth (*verbis*). These transactions were, in the vast majority of cases, contractual arrangements (*inter vivos*). However, they also included acts of disposal of property by will (*mortis causa*); as well as the constitution of a trust (*waqf*). Like modern systems of law, the Shari'a of Islam has reduced the requirements of form to a minimum and has focused attention on substantive conditions. These conditions of substantive law now furnish the criterion between void and valid manifestations of the human will. Thus, Article 3 of the Majalla[3] lays down the following important principle that "In contracts effect is given to the intention and meaning and not to the words and phrases."

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[1] See for the *mancipatio* in early Roman law Jolowicz, Historical Introduction to the Study of Roman Law, (2d ed. Cambridge, University Press 1952) p. 145; and for the *in iure cessio*, the same work, p. 150 and the Appendix, p. 557.

[2] Institutes Coutumières, liv. III tit. 1, max. 2: "On lie les boeufs par les cornes et les hommes par les paroles, et autant vaut une simple promesse ou convenance que les stipulations du Droit Romain."

[3] The Majalla is the best and most authoritative codification under the former Ottoman Empire of that part of Islamic law which deals with Mu'amalat or commercial transactions. It has survived as the civil law of Jordan and Kuwait. The quotation of Article 3 in the text is from the English translation of the Majalla by C. A. Hooper in The Civil Law of Palestine and Trans-Jordan, Vol. I (London, 1938) p. 17.

While this is primarily a rule of interpretation of contracts and legal documents, it is also significant as an indication of the fact that the legislator goes beyond the external manner of expression to the immaterial intention to which effect should be given.

II. Nullity as a Sanction of Faulty Contracts and Legal Acts Under Muslim Law

The classical Muslim jurists had a clear concept of juristic acts which produced a legal effect. In their treatment of that part of the Sacred Law which is concerned with dealings among men, (*Muamalat*), they laid down a distinction between material acts *"Al Tasarrufat Al Fi'lia,"* which are the basis of the theory of civil responsibility for torts (*Daman*) and "verbal" legal acts *"Al Tasarrufat Al Qawlia"* which can be literally interpreted as transactions concluded by word of mouth. However, the latter expression must be construed *lato sensu* to cover any intelligible manifestation of the human will. This is in contradistinction to formal acts which require certain ritual performances for their validity, regardless of intention. Contracts, whether written or unwritten, constitute the vast majority of legal acts. The Qor'an exhorts the believers, when they deal with each other in transactions involving future obligations, to reduce them to writing.[4] However, this was not intended as a condition of form, but rather as a sure mode of proof as the text of Verse 282 of Chapter II shows.

In dealing with the system of nullity under the Muslim law, attention shall be focused on contract. Nevertheless, practically the same rules apply, *mutatis mutandis,* to other legal acts whether they are *inter vivos,* such as the constitution of a *Waqf,* or *mortis causa,* such as disposal of property by will.

A study of contracts under Muslim law will point out the close similarity between the system of nullities in Muslim law and the corresponding doctrines in more modern systems based on Roman law. The concepts, and even the legal terminology are practically identical. This fact is among the reasons which have given rise to speculation whether this resemblance is merely due to fortuitous coincidence, or whether it is the result of deliberate borrowing by Muslim jurists from the general theory of obligations and contracts in Roman law.

In their treatment of the more usual contracts, such as sale, lease, hire, partnership, pledge, and so on, Muslim jurists, like their Roman predecessors, distinguished between the essential conditions on which the valid conclusion of the contract depended, and those which were regarded as less basic and which might affect its binding force on one of the parties only. Depending on the nature of the legal requirements which have not been complied with, Muslim law, like modern law, made a distinction between absolute (*Mutlaq*) and relative (*Nisbi*) nullity and between contracts which were void *ab initio,* and contracts which were merely voidable. Muslim jurists even went as far as some of their modern counterparts and spoke of nonexistence of

[4] Qur'an Surat II, Verse 282. See Yusuf Ali's Translation, Vol. I (Cambridge, Mass., 1946) p. 113.

the contract as a radical form of nullity under which the contract was considered as if it had never been concluded (*Ka'an Lam Yakun*). In contrast to this last category, they also recognized contracts the effects of which were merely suspended (*Mawquf Ala-L-Ijazat*), depending on the choice of the party whose intention was not validly expressed, and for whose protection the nullity was prescribed.

But, however striking the resemblance may be between the system of nullities in Muslim law and in more modern systems of law, the parallel should not be drawn too far. Unlike the Roman and modern jurists, the learned Ulama of Islam have failed to elaborate a logical theory of obligations and contracts, and much less, a general theory of nullity. However, the neo-Hanbali jurist Ibn Taimiya (661 A.H./1262 A.D.—728 A.H./1328 A.D.) devoted a chapter in his *Fatawa* to the principles governing contracts in general;[5] while these principles are to be found scattered under titles dealing with specific contracts in the vast majority of other treatises on Muslim law. Ibn Taimiya and his eminent disciple Ibn Qaim Al Jawziyah have contributed greatly to our understanding of the general rules governing the validity of contracts in Muslim law, and consequently, their authority will be frequently cited in the following comments.

III. First Category of Nullities; Lawful and Unlawful Contracts

Like Roman law, Muslim law soon got rid of the distinction between nominate and innominate contracts. It was very early that the general rule was laid down that in civil and commercial transactions (*Muamalat*), *any* contract which was not specifically prohibited by the Divine Law was lawful and binding. That rule found eloquent expression in the *Fatawa* of Ibn Taimiya who wrote as follows some seven centuries ago:

> "If proper fulfilment of obligations and due respect for covenants are prescribed by the Lawgiver,[6] it follows that the general rule is that contracts are valid. It would have been meaningless to give effect to contracts and recognize the legality of their objectives, unless these contracts were themselves valid."

Ibn Qaim Al Jawziah, the eminent disciple of Ibn Taimiya, severely criticized the rigid stand taken by some earlier jurists who were inclined to follow a strict and narrow interpretation of the Divine Law:

> "Certain authors believe," says Ibn Al Qaim, "that contracts, stipulations and transactions of Muslims, as a general rule, are to be treated as null and void, unless some evidence is found in the Divine Revelation to the effect that they are to be considered valid. These authors are in error, and they have been led unduly to invalidate many contracts and transactions of their fellowmen without any supporting proof from God or justification in His Law. The vast majority of jurists hold the contrary view, and teach that in principle contracts and stipulations are valid,

[5] See the Fatawa of Shikh-Ul-Islam Taki-D-Din Ahmad Ibn Taimiya; Mabhath Al Uqud (Chapter on Contracts), Vol. III, Cairo, 1326–1329 A.H., p. 387 ff.

[6] See, for example, the Qor'an, Chapter 5, verse: "O ye who have believed, fulfill contracts." Bell's Translation, Vol. I (Edinburgh, 1937) p. 92.

unless they are specifically prohibited or invalidated by the Lawgiver. This is the right opinion. Nothing is unlawful, unless it is declared to be so by God and His Apostle. The reverse is true in matters of religion, where the rule is that acts of worship must be the object of a specific command; whereas in human transactions and contracts, the general rule is that they are valid, unless there is legal evidence that they are unlawful or forbidden. Contracts, and transactions among men are mercies from God. Where the law is silent about them, the transaction or the contract is valid."[7]

It was thanks to this important principle of Islamic law that an international arbitration tribunal was in position to find the contract as modern as an oil concession agreement concluded with the head of a Muslim State perfectly lawful and binding. In its Geneva Award of August 23, 1958, in the Arbitration between Saudi Arabia and the Arabian American Oil Company, the Arbitration Tribunal held as follows:

"Hanbali Law contains no precise rule about mining concessions and 'a fortiori' about oil concessions. Owing to this lacuna in Muslim law, as taught by the Hanbali School, the Iman, i.e. H.M. the King, in his capacity of theocratic ruler, has the power to adopt such solutions as he deems most appropriate to the general interest. To this end, he can resort to a regime of mining concessions, based on a contract, provided that this solution is not contrary to the rules of the Shari'a. The concession contract does not conflict with these rules, since it is in conformity with two fundamental principles of the whole Muslim system of law, i.e. the principle of liberty to contract within the limits of the Divine Law, and the principle of respect for contract. The first principle is stated by Ibn Taimiya as follows: 'The following rule shall be obeyed: men shall be permitted to make all transactions they need, unless these transactions are forbidden by the Book or by the Sunna' (Laoust, Le Traité de Droit Public d'Ibn Taimiya, traduction annotée de la Siyassa Shar'iya, Beyrouth, 1948, p. 167; Milliot, Introduction à l'Etude du Droit Musulman, p. 205 who stresses the principle of freedom to contract as one of the basic rules of the Law of Obligations in Islam)."[8]

However, every system of law has a set of mandatory rules of public order and good morals. These rules, which are meant to protect the interest of the community, cannot be contravened by private contract. In case they are, such infringement of the law carries the sanction of the absolute nullity of the offending contract.[9]

The Shari'a requires conformity to this rule in no uncertain terms. Private contracts involving acts which are contrary to the Divine Law are null

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[7] See I'Lam Al Muwaqi'in 'An Rab Al Alamin, Vol. 1 (Cairo, Muniriah Press) p. 299 ff.

[8] The Geneva Award of 23 August 1958 has been deposited in the Archives of the Republic and Canton of Geneva. The quotation in the text is to be found on pp. 55 and 56 of the printed version.

[9] See, for example, Article 6 of the French Civil Code which provides that: "On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes moeurs."

and void. For instance, a contract to commit a crime or to do any other unlawful or immoral act would be invalid under Muslim law, as it would be under any other system of law. However, there is a basic difference between the Shari'a and more modern systems of law with regard to the concept of illegality. In man-made law, the yardstick according to which the unlawful or immoral character of an act is to be measured, is the public interest and the morals of the community looked at from a purely human angle. In Muslim law, on the other hand, the yardstick is the Revealed Law of God. Consequently, according to the Shari'a, an illegal or an immoral contract is not merely an antisocial act. It is also a sin, and constitutes an offense against God, as well as against God's creatures. It should be borne in mind that, while modern legal institutions have achieved complete separation of church and state, the Shari'a is still a religion, an ethic, and a law all in one. It is natural therefore that this difference should be reflected in variations between the system of nullities under Muslim law and the corresponding rules in secular legislation. The Muslim law of obligations and contracts had to take into consideration the prohibition on religious grounds of certain transactions among Muslims. Consequently, we should expect the list of unlawful contracts under Muslim law to be longer and more detailed. This is apparent in the following three instances:

(a) Islam prohibits the use of wine and pork. Consequently, these commodities do not qualify as "goods" in the Muslim classification of "things." Being *extra commercium*, any transaction between Muslims which has wine or pork for its object is stricken with absolute nullity.

(b) Before the advent of Islam, in the "period of ignorance," the merchants of Mecca used to lend money at usurious rates of interest, often exceeding the capital. As a reaction against this abuse, the Qor'an prohibited usury.[10] Muslim jurists of the classical period took a narrow view of this prohibition, and condemned as unlawful all contracts implying interest, however reasonable. Nevertheless, the necessities of modern economic life have brought about a relaxation of this narrow interpretation of the Divine Revelation. A fair return on capital and a moderate rate of interest are justified by the present generation of Muslim jurists who saw their co-religionists deprived of the banking business which, until recently, was practically monopolized by Dhimmi Christians and Jews living in their midst. A distinction came to be made, similar to that which was familiar to the Canon lawyers of Christendom throughout the period of the Middle Ages, between legitimate interest and *usura vorax* which ate up the substance of the debtor in a short time and reduced him to penury. This modern formulation of Muslim doctrine concerning interest finds support in other verses of the Qor'an, where only exorbitant interest is condemned.[11]

(c) Islam fixed high ethical and legal standards of fair dealing in commutative contracts. This led Muslim jurists to require equivalence of chances, if not of values exchanged. Aleatory contracts of sale involv-

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[10] Qor'an, Chapter II, Verse 275: "Allah permitteth trading and forbiddeth usury."

[11] Qor'an, Chapter III, Verse 131: "O ye who believe! Devour not usury, doubling and quadrupling (the sum lent). Observe your duty to Allah, that ye may be successful."

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[12] Hooper, *op. cit.*, p. 47
[13] See the Fatawa of Ibn
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tions of the Prophet generally open with a basic saying attributed to him which puts the emphasis in human behavior on intention rather than form. According to this saying, acts shall be appraised in the light of the intention which inspires them; and each man shall be judged according to what he had intended by his actions.

Very few contracts in Muslim law require a special formality over and above a valid expression of an offer by one party and its acceptance by the other party. The following are illustrations of the few contracts which, under Muslim law, would be devoid of effect without recourse to the specifically prescribed formalities:

(a) Muslim law looks on marriage as an ordinary contract. According to the authorized opinion in the classical orthodox schools, marriage is concluded by the use of a form of words which unequivocally express the intention of the future spouses to become huband and wife. In order to be valid, the contract of marriage has also to be concluded in the presence of a minimum number of witnesses.[14]

(b) The contract of pledge does not become binding, unless the thing pledged passes into the possession of the pledgee. Thus, Article 706 of the Majalla provides: "A contract of pledge is concluded by the offer and acceptance of the pledgor and the pledgee. If the pledge is not transferred to the effective possession of the pledgee, however, such contract is incomplete and revocable. The pledgor may, therefore, denounce such contract before the delivery of the pledge."[15]

(c) The same rule applies to the contract of donation, which, under Muslim law, becomes complete and binding only upon delivery of the thing donated to the donee. Article 837 of the Majalla provides: "A contract of gift is concluded by offer and acceptance. Upon taking delivery, the contract becomes complete."[16]

But, apart from these exceptional cases in which a legal formality, other than the *nudum pactum,* is made a condition *sine qua non* on which the binding effect of the contract depends, freedom from form has never been expressed more forcefully than in the following opinion of the Hanbali jurist, Ibn Taimiya, who wrote in his Fatawa:[17]

"All contracts are automatically concluded by every word, or every act, which expresses their object beyond any possible doubt. The flexibility of Ibn Taimiya's teaching admits as valid an infinite variety of forms which contracts may take."[18]

"Whatever men consider as a sale or a lease," Ibn Taimiya goes on to say, "should be legally so considered. In a given community, a contract is concluded by every term and every act which that particular social group recognizes as capable of concluding the specific transaction. No

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[14] See on the formalities necessary for the validity of marriage, Professor Sobhy Mahmassani's work, The General Theory of the Law of Obligations and Contracts under Muhammadan Jurisprudence, Vol. 2 (Beirut, 1948) pp. 31 and 32.

[15] See Hooper's translation of the Majalla, *op cit.,* pp. 171 and 172.

[16] Hooper, *op. cit.,* p. 211.

[17] Fatawa, *op. cit.,* Vol. III, p. 267.

[18] See Henri Laoust, *op. cit.,* p. 442.

> limits can be fixed to the diversity of means of concluding binding transactions, neither from considerations of law, nor of language. The terms of "sale" and "lease" in Arabic are not the same as those employed in Greek, or Turkish, Berber or Ethiopian. Moreover, within every language, there is a variety of expressions. Men cannot be held to the use of a limited category of technical terms in the conclusion of their transactions. They are by no means precluded from concluding their contracts in manners which are different each from the other, provided however that the modalities they use in these contracts clearly express their objectives."[19]

No doubt, it would be preferable and easier for the parties to have recourse to certain formulas consecrated by usage and to follow trodden paths rather than to improvise or create a special terminology of their own. But this is recommended as a facility and is not imposed as a condition. Where no precedent could be found, innovation becomes a necessity. In proclaiming freedom of choice by the parties of the language best adapted to express their intention, Ibn Taimiya quotes the authority of the school of the Imams Malek and Ahmad Ibn Hanbal.[20]

This teaching, which introduces simplicity in the law by reducing the necessity of specific forms in legal acts to a minimum, marks a step forward in the science of jurisprudence. It is in sharp contrast with the rather tardy development in this particular respect of the great system of Roman law which maintained its formal symbolism for a considerable time. In the words of the historian Edward Gibbon:

> "The jurisprudence of the first Romans exhibited the scenes of pantomimi; the words were adapted to the gestures, and the slightest error or neglect in the *forms* of proceeding was sufficient to annul the *substance* of the fairest claim. The communion of the marriage-life was devoted by the necessary elements of fire and water; and the divorced wife renounced the bunch of keys, by the delivery of which she was invested with the government of the family. The manumission of a son or a slave was performed by turning him around with a gentle blow on the cheek; a work was prohibited by the casting of a stone; prescription was interrupted by the breaking of a branch; the clenched fist was the symbol of a pledge or deposit; the right hand was the gift of faith and confidence. The indenture of covenants was a broken straw, weights and scales were introduced in every payment."[21]

In Muslim law, on the other hand, even the contract of Bai'a of a Caliph, which invests him with a supreme authority over the Muslim community, is an informal legal act which does not require a special set of words.[22]

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[19] See Fatawa, *op. cit.,* Vol. III, p. 268.

[20] Henri Laoust, *op. cit.,* p. 443.

[21] The Decline and Fall of the Roman Empire, Chapter XLIV (Edition of the Modern Library, New York, Vol. II, p. 680).

[22] Henri Laoust, *op. cit.,* p. 287. See also Emile Tyan, Institutions du Droit Public Musulman, Vol. II, Sultanat et Califat, (Paris) p. 353.

V. Third Category of Nullities; Void and Voidable Contracts; Conditions of Substantive Law; Fundamental and Incidental Conditions of Validity

It was in their treatment of conditions of substantive law upon which depended the validity of contracts that Muslim jurists made the distinction between void and voidable contracts. They analyzed the constitutive elements which they called the foundation (*Arkan*), without which a contract could not be validly concluded, and taught that when a basic or "intrinsic" condition was lacking, there could only be the external form or similitude of a contract, but that contract would be nonexistent in law. Such an act would be absolutely null and void. On the other hand, the basic constitutive elements of a contract (*Arkan*) may be there; but one of them may be imperfect or vitiated by an initial weakness. That contract would then be only voidable. The vice may be subsequently cured, the contract may be strengthened later on, and the cause of relative nullity would disappear. Or, the person with whom rests the action to challenge the validity of the contract, may choose to expose the vice or the weakness, and the contract would be voided.

It is hoped that this simplification will make the Muslim division of contracts into the three categories of valid, void, and voidable contracts more easily understandable. That division is referred to mainly in Article 106–109 of the Majalla in the Book of Sales. However, the rules which apply to sale also apply *mutatis mutandis,* to other commutative contracts.

Thus, Article 108 defines a valid sale as a contract which is lawful, both "in itself" (*Dhatan, in se,* or in its essence) and "as regards matters incidental thereto" (*Wasfan,* in its qualifications).[23]

While I am using the terminology to be found in Hooper's translation of the Majalla, I would like to point out that the two Arabic words (*Mashru'un Dhatan*) convey the sense of "intrinsically, or essentially lawful," and therefore legally existent and valid.

To a contract of sale lawfully concluded and binding, Article 107 of the Majalla opposes a "non-concluded sale," which it defines "as a sale which is void."[24] This makes "nonexistent" and "void" contracts interchangeable terms which equally stand for absolute nullity. One is reminded of the argument in modern French law concerning the difference or similarity between "*inexistence*" and "*nullité absolue.*" To the Muslim jurists, these terms mean one and the same thing.

In between the two categories of valid and void contracts stands the third category of voidable contracts. Article 109 of the Majalla in the Book of Sales defines them as follows: "A voidable sale is a sale which, while valid in itself, is invalid as regards certain external particulars."[25] What are these "external particulars"? Article 109 of the Majalla refers us to Chapter VII for the answer.

However, before referring to this, let us look at the constitutive elements without which a contract would be an absolute nullity.

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[23] Hooper, *op. cit.,* p. 31.
[24] *Ibid.,* p. 31.
[25] *Ibid.,* p. 32.

The first element is the agreement of the parties. That agreement consists in a meeting of the minds as expressed in an offer by one side and the acceptance of that offer by the other side.[26]

The second element or condition is the capacity of the parties. The contract of a child who has not yet reached the age of reason, or the contract of a person who is completely insane, is nonexistent, or absolutely null and void. Thus, Articles 361 and 362 of the Book of Sales of the Majalla provide in part as follows: "Article 361: It is a condition precedent to the conclusion of the sale that the parties thereto should be of sound mind and perfect understanding . . . Article 362: A sale which is defective in any essential condition such as the sale of a lunatic, is void."[27]

The third element or essential condition of validity has to do with the object of the contract. That object must be in existence, and must be capable of being the lawful object of a transaction according to Muslim law. We have seen above that wine and pork are not *"in commercium"* according to the teaching of the Shari'a. Consequently, they cannot be objects of a lawful contract among Muslims.[28]

Is there a fourth element of cause in the Muslim theory of contract? According to some authors, such as Professor Sanhouri, the cause of a contract in Muslim law is not a separate condition of its validity. He argues that the Muslim concept of the validity of the cause is objective rather than subjective, and that it merges with the object of the contract.[29] Other authors, like Professor Sobhi Mahmassani, believe that, while the Muslim jurists did not elaborate on the necessity of a valid cause in contracts, such a theory can nevertheless be deducted from their writings on the science of jurisprudence (*Usul-L-Fiqh*).[30] At any rate, this much is certain: To be valid under Muslim law, a contract must not have for its object the commission of an unlawful or an immoral act.[31]

Turning now to the causes which do not bring about the absolute nullity of the contract, but merely vitiate one of its elements and make it voidable, these can be summed up under the following headings: (a) insufficient capacity of one of the parties; and (b) defective acceptance vitiated by constraint, error, fraud, or lesion.

(a) According to Article 967 of the Majalla, "In case of contracts where it is not certain whether they will be to the benefit of a minor of perfect understanding or to his disadvantage, such contracts are concluded subject to the permission of his tutor."[32] A person interdicted for prodigality is treated like a minor of perfect understanding.[33]

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[26] See for the contract for sale, Chapter I, Article 167–185, Hooper, *op. cit.*, pp. 37–43; and for the conditions of the conclusion and validity of the contract generally, Professor Sobhi Mahmassani, *op. cit.*, Vol. II, p. 22 ff.

[27] See Hooper's translation, *op. cit.*, p. 84.

[28] See for a detailed discussion of the object of the contract, Professor Sobhi Mahmassani, *op. cit.*, Vol. II, pp. 68–82.

[29] The Theory of Contract, by Professor Sanhouri (Cairo), No. 562.

[30] See Mahmassani, *op. cit.*, Vol. II, p. 90 ff.

[31] See *supra*, Section II.

[32] Hooper, *op. cit.*, p. 249.

[33] Article 990 of the Majalla, *ibid.*, p. 254.

(b) Constraint is another cause of relative nullity. According to Article 1006 of the Majalla:

> "Contracts of sale, purchase, hire, gift, transfer of real property, admission, release, postponement of debt, and renunciation of a right of pre-emption, if entered into as a result of constraint, are invalid, whether caused by major constraint or minor constraint. If the person subject to the constraint ratifies the contract after the cessation of the constraint, such contract is valid."

Error as to a desirable quality of the object of the contract makes the contract voidable. This is called in Muslim law "option for misdescription." Article 310 of the Majalla provides: "If the vendor sells property as possessing a certain desirable quality and such property proves to be devoid of such quality, the purchaser has the option of either cancelling the sale, or of accepting the thing sold for the whole of the fixed price."[34]

The examples given by this Article are those of the sale of a cow described as giving milk when it is proved that she has ceased to give milk, and of the sale of a stone at nighttime as a red ruby when it is proved to be a yellow ruby. These are individual applications of the general principle laid down in Article 72 of the Majalla to the effect that "No validity it attached to conjecture which is obviously tainted by error."

Fraud is another cause vitiating the will of one of the parties to a commutative contract and making such contract voidable at the choice of the defrauded party. Article 164 of the Majalla defines fraud as cheating,[35] and Article 357 provides that: "If one of the two parties to the sale deceives the other, and flagrant misrepresentation is also proved to be present in the sale, the person so deceived can cancel the sale."[36]

Shabn, which corresponds to the notion of *lésion* under French law is translated by Hooper as "flagrant misrepresentation without deceit." It makes the contract voidable only in case the victim is an orphan. Property belonging to a pious foundation (*Waqf*) and to the Treasury (*Beit-Al-Mal*) is treated on the same basis as the property of orphans.[37]

Finally, contracts of a debtor in a state of insolvency, which would prejudice his debtors, and contracts of the deceased in his last illness which aim at depriving his heirs of their legal rights to a share in his succession can be voided by the creditors or heirs in whose favor the relative nullity is provided.[38]

VI. Other Classifications of Contracts; Cancellation or Termination for Supervening Causes Apart From the System of Nullities

Muslim jurists were fond of elaborate and all-embracing logical classifications and distinctions. In connection with void and voidable contracts, they

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[34] Hooper, *op. cit.*, pp. 310, 311.
[35] *Ibid.*, p. 37.
[36] *Ibid.*, p. 83.
[37] See the Majalla, Article 356; Hooper's translation, *op. cit.*, p. 83.
[38] See for the acts of disposal of an insolvent debtor, Professor Sobhi Mahmassani, *op. cit.*, Vol. II, p. 151; and for acts of disposal in the last illness of the deceased, the same work, Vol. II, p. 133.

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[39] See Article 111 of
[40] Majalla, Article 11
[41] Falsafat Al-Tashr
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