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Conditions of Countervalues in Lease from Jurisprudential and Legal Perspectives

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Abstract

The present research aims to examine the conditions of countervalues in lease from jurisprudential and legal perspectives. The research method is descriptive-analytical using library sources. From the viewpoint of Islamic jurists, the two goods exchanged in a sale contract must possess certain characteristics. These characteristics include being tangible, having value, ownership, being unrestricted, ability to deliver, and being known. Studies have shown that the leased property, like the sold item, must be known. The first condition of countervalues is that each of them must be known. However, there is disagreement among jurists regarding the method of making the rent known. According to Sheikh Tusi's opinion, observation is sufficient in making the rent known, and its amount doesn't need to be specified. One of the conditions of the leased property is that it must be permissible to use. Therefore, hiring a mute person for teaching or hiring a menstruating woman to clean a mosque is not permissible. The leased item can be tangible, and this tangible item can be objects, animals, or humans, and it should have the ability to remain. The leased item should be something that can be utilized while its essence remains intact.

Keywords: Lease, Conditions of Countervalues, Being Unrestricted, Ability to Deliver, Being Known

Introduction

The term "sale" (bay' in Arabic) is used in two opposing meanings (selling and buying). It is both the opposite of purchase and also means purchase, payment of price, and receipt of the priced item or vice versa. It is the exchange of one property for another, which in English is called buying and selling or trading.[1] Although some of the definitions that jurists have given for sale appear different on the surface, they all aim to express the same concept referred to as "sale." We will mention a few examples of sale definitions: «البيعٌ هو انتقالٌ عينِ مملوكهٍ من شخصِ الى غيرهِ بِعوَضٍ مُقَدَّرٍ على وجِهِ التراضى.» "Sale is the transfer of ownership of a specific property from one person to another for a determined compensation based on mutual consent." "It is the creation of ownership of a specific item in exchange for property." "Sale is a contract that indicates the transfer of a specific item to another, arguing that this is what immediately comes to mind from the term 'sale'[2]." This definition is from Ibn Hamza.[3]

The reason these definitions do not mention the seller and buyer is to allude to the fact that the essence and nature of a sale is the exchange between two properties, and consequently, the exchange between two owners (the seller who owns the sold item and the buyer who owns the price) in their respective properties.[4] Sale (bay' in Arabic), derived from the word "ba't" and its derivatives, is one of the clearest customary concepts, meaning ownership transfer for compensation. It is known that sale does not occur directly but through causation, and therefore, to resort to sale, sometimes contracts or transactions and the like are used. Additionally, the cause of sale, whether through mutual agreement or contract, like other transactions, requires an offer, which is the creation of the sale. Therefore, it is better to define sale as the transfer of ownership of a specific item for compensation, and the creation of ownership transfer is not the sale itself. The action of the seller alone is also called sale.[5]

On the other hand, Article 338 of the Civil Code states: "Sale is the transfer of ownership of a specific item for a known compensation," meaning that the sold item and the price are set against each other like two sides of a scale, between which there must be economic balance and equilibrium. One of the effects of a sale contract is that as soon as the contract is concluded, the sold item becomes the property of the buyer and the price becomes the property of the seller, and such an action is called transfer of ownership. The sale contract makes the seller responsible for the sold item and the buyer responsible for the price, meaning the consequences and corruption and consequently the compensation for damages. The sale contract obliges the seller to deliver the sold item, meaning that after the sale contract is realized, the seller is committed and obligated to deliver the property sold to the buyer.

Today, the sale contract is one of the most important types of transactions in domestic and international trade relations. Therefore, the regulations and laws related to it have been constantly evolving. In addition to having its own special rules, the sale contract involves the rules of other contracts, and perhaps because of this importance, the sale contract has been the most important topic throughout the history of Islamic jurisprudence. Considering the

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[1] Feyz, Alireza, Principles of Jurisprudence and Fundamentals, p. 79.

[2] Allamah Hilli Abu Mansur Hassan bin Yusuf bin Mutahhar Asadi, Different Shiite Opinions on the Rules of Sharia, vol. 5, p. 51.

[3] Ibn Hamza, Imad al-Din Abu Ja'far Muhammad bin Ali, The Means to Attain Virtue, vol. 13, 223. (Within the series of Jurisprudential Sources).

[4] Feyz, Alireza, Principles of Jurisprudence and Fundamentals, p. 284.

[5] Jafari Langroudi, Mohammad Jafar, Terminology of Law, p. 118.

issues raised, this research uses a descriptive-analytical method and library resources to examine the conditions of the two exchanges in lease from a jurisprudential and legal perspective.

Theoretical Foundations of the Research

According to Islamic jurists, the two goods exchanged in a sale contract must possess certain characteristics. We will extract these characteristics from jurisprudential texts and explain each.

Being a Specific Object

As a precaution, it is required that the sold item be a specific object.[6] Therefore, it is not permissible for the sold item to be a benefit, such as the benefit of a house or animal, or an action, such as sewing clothes.[7] In a sale, the sold item is a specific object, while in a lease, it is a benefit. According to Articles 338 and 350 of the Civil Code, the following types of property can be considered as sold items:

First, tangible objects: A tangible object refers to property that exists externally at the time of the contract and can be physically pointed to, such as a table, book, or car. The fruit of a tree, before it appears (i.e., before the blossom leaves fall and the fruit becomes visible), cannot be the subject of a sale because, in addition to the fact that a sale is the transfer of ownership of a specific object, something that does not exist at the time of the contract cannot be transferred. Such a transaction would be speculative (gharar) and therefore invalid.

Second, general goods: This refers to a concept that applies to numerous individual items that exist externally, such as wheat, barley, and the like, as in the case of forward sales (salaf).

A debt, considering its attachment to the debtor's liability at the time of the contract, exists before the sale and is a type of general liability. It can be sold, such as when someone sells one hundred kilos of tea that they are owed by another. However, benefits such as the use of a house, actions such as tailoring a suit, and rights, even if transferable like the right of land development or exclusivity, cannot be sold. This is because Article 350 of the Civil Code states: "The sold item may be divided, shared, or a specific amount of a homogeneous object, and it may also be a general liability."

Property that can serve as a price - As understood from the general term "compensation" in Article 338 of the Civil Code, which states "Sale is the transfer of ownership of a specific object for known compensation," the range of properties that can serve as a price is broader. According to Articles 214 and 215 of the Civil Code, any property or action that has a legitimate rational benefit can be set as a price. Therefore, in addition to tangible objects, general goods, benefits, actions, and transferable rights can be set as a price. There is debate about waivable and non-transferable rights such as options and pre-emption

[6] Bohrani, Yusuf, The Blooming Gardens in the Rulings of the Pure Lineage, vol. 18, p. 374.
[7] Khomeini, Ruhollah Mousavi, Tahrir al-Wasilah, vol. 1, p. 473.

rights, but it seems that such rights can be set as a price against the sale of property by the person against whom the right exists, and can be transferred to them.[8]

Having Value

In the definition of sale, it was stated that it is the exchange of property for property.[9] Therefore, both the compensation and the compensated item must have value both customarily and legally.[10]

Therefore, the buying and selling of wine and pork, which have no legal value in Islamic law, is invalid.

For goods that customarily have no value, their lack of value is certain. In this case, the sale is invalid, as it would be consuming property unjustly, based on the principle لا تاكلوا اموالكم بينكم بالباطل "Do not consume your property among yourselves unjustly"[11]. Such a sale is forbidden.

The predominant opinion among jurists is that the criterion for determining if an item of trade has value is to refer to custom. That is, anything that custom and reason recognize as beneficial to exchange can be validly traded. Jurists have also claimed consensus in support of their view.

Moreover, explicit textual evidence from narrations has limited the permissibility of sale to owned property, such as the disconnected hadith: "Do not sell except what you own." Therefore, they do not consider it permissible to trade things that, from a customary and rational perspective, do not bring any benefit when owned. They have given examples for such items as selling scorpions, beetles, human nails, etc., as custom does not recognize any justification for trading such things with the intention of ownership. This is because no benefit or expediency is seen from a rational or customary perspective in trading such items, and consequently, they are not subject to ownership, and their buying and selling are not covered by evidence such as "Allah has permitted trade."

One should not limit the value of an item solely to custom and its material aspect. This is because the exchange of two items is not always done with one purpose, but sometimes the exchange is due to their value and worth, as is the superior purpose in most exchanges. Sometimes other purposes are also considered, which may not yet have gained widespread customary acceptance, but the motivation for the exchange is noteworthy. For example, a person whose house or farm is under attack by animals (e.g., mice) announces that they will buy any of these animals found in the house or farm at a certain price. In this case, a sale is valid.[12]

A sale contract cannot be concluded on a single grain of wheat. The intended meaning of value in examples like wheat is attention to their customary and conventional meaning, not their intrinsic meaning, and one should not mix intrinsic and conventional meanings.

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[8] Emami, Hassan, Civil Law, vol. 1, pp. 417-418.
[9] Ansari, Morteza, Al-Makasib, vol. 1, p. 236.
[10] Najafi, Mohammad Hassan, Jawahir al-Kalam fi Sharh Shara'i al-Islam, vol. 22, p. 343.
[11] Quran, An-Nisa: 4/29.
[12] Khomeini, Ruhollah Mousavi, Al-Bay' (The Sale), vol. 3, pp. 3-4.

Ownership

The goods being traded must be owned by the seller.[13] According to this condition, the sale of public (shared) property such as seas, pastures and forests, fish and wild animals before being caught, and conquered lands (lands that have come under Muslim control through military conquest) are not eligible for buying and selling. This is because such properties do not have a specific and private owner. Similarly, selling houses in Mecca is not permissible. If someone digs a well in unclaimed land or creates a canal and directs water into it, they become the owner of that water and have the right to sell it.

Regarding the buying and selling of houses in Mecca, Sheikh Tusi has claimed consensus on the impermissibility of selling houses in Mecca, as they are considered conquered lands. Some jurists attribute the prohibition of their sale to two reasons:

1- They have said that the Holy Mecca is considered as a mosque, as the Almighty says: **سُبحانَ الَذِی أَسرَی بَعَبدِهِ لَیلاً مِنَ المَسجِدِ الحَرامِ إلَی المَسجِدِ الاقصی...** "Glory be to Him Who took His servant for a journey by night from the Sacred Mosque to the Farthest Mosque..."[14]

Although the blessed presence of the Prophet (PBUH) was certainly in Mecca that night, staying in the house of Umm Hani, the use of the term "Sacred Mosque" for that house indicates that all the lands of Mecca are considered a mosque. It is an established rule that mosques cannot be bought or sold.

2- The narration of Abdullah ibn Amr ibn Al-As, who quotes the Prophet (PBUH): "Mecca is sacred, and selling its land is forbidden, and renting its houses is forbidden."[15] The Prophet (PBUH) has prohibited the sale of Mecca's lands because all of Mecca's lands are considered a mosque.

Selling land conquered by force, which is land taken from the hands of disbelievers by overpowering them and which was inhabited at the time of the conquest (by Muslims), is not permissible because this land belongs to all Muslims. Therefore, it remains in its state in the hands of those who cultivate it, and its tax (kharaj) is taken and used for the benefit of Muslims.

As for land that was barren at the time of Muslim victory and was later revived, such land belongs to the person who revived and cultivated it. This resolves the issue with houses, lands, and some parcels of these lands that are treated as property, as those who possess them may have become their rightful owners through legitimate means. Therefore, what is in their possession is judged to be their property as long as there is no known contradiction to their ownership.[16]

Being Unrestricted

Another condition for the exchanged items is that they should be unrestricted. Unrestricted means free and unencumbered, meaning the owner has complete, pure, and

[13] Allamah Hilli, Hassan ibn Yusuf ibn Ali ibn Mutahhar, Tahrir al-Ahkam, vol. 1, p. 164.
[14] Quran, Al-Isra: 17/1.
[15] Bayhaqi, Abu Bakr Ahmad ibn Husayn ibn Ali, Sunan al-Bayhaqi, vol. 5, p. 34.
[16] Khomeini, Ruhollah Mousavi, Tahrir al-Wasilah, vol. 1, p. 476.

exclusive authority over it. Therefore, the sale of endowed properties, mortgaged properties, and a female slave who is an Umm Walad (mother of a child) is not valid.

The condition of unrestricted ownership in the exchanged items is not a condition in itself to prohibit the sale of mortgaged or endowed property, but what is a condition is the absence of rights that would prevent the owner from disposing of the property in a sale (such as vows, mortgages, endowments). It is about the absence of obstacles rather than a condition. Therefore, the abstract concept referred to as unrestricted ownership in transactions is in the context of enumerating rights that prevent others from disposing of the property, not establishing a new condition to prohibit the sale of mortgaged, endowed properties, etc.[17]

According to the Prophet's saying, "There is no sale except in what you own,"[18] one cannot sell beyond the limits of one's property.

If the meaning of unrestricted ownership is complete and exclusive ownership of the subject of the transaction, meaning that the buyer and seller have complete ownership of the price and the priced item, and no other individual has rights to it, this condition is violated in the case of leased property. Although it is not complete ownership, one can buy or sell it, and consequently, the sale of leased property is permissible despite not being under complete ownership. Therefore, unrestricted ownership cannot be set as a condition for the exchanged items. As we know, the sale of endowed properties is not permissible; this refers to general endowments, which cannot be sold under any circumstances or in any case, except when they have disintegrated and been destroyed to the extent that they cannot be used for the endowed purpose, even at a very minimal and insignificant level, such as if the endowed property is an old mat that has worn out, in which case it is permissible to sell them.

Waqf (endowment) is of two types:

First, perpetual waqf, which is further divided into two categories:

a) Perpetual proprietary waqf

b) Perpetual non-proprietary waqf

Second, temporary waqf (specific)

The sale of waqf property is not valid except in cases where the endowed property is damaged or when discord arises among the beneficiaries of the waqf. The sale of waqf property is permissible when:

1. The endowed property is damaged to the extent that it cannot be used or becomes devoid of benefit.

2. The beneficiaries of the waqf are in dire need and under extreme necessity for the endowed property.

3. Leaving the endowed property in a state of disrepair would result in the violation of God's right and the right of the beneficiaries, and is therefore prohibited.[19]

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[17] Ansari, Morteza, Al-Makasib, vol. 2, p. 50.

[18] Nuri Tabarsi, Mirza Husayn, Mustadrak al-Wasa'il wa Mustanbat al-Masa'il, vol. 13, p. 230, Book of Trade, Chapters on Sale Contract and Conditions, Chapter 1, Hadith 3.

[19] Sheikh Mufid (Ukbari Baghdadi), Abu Abdullah Muhammad ibn Nu'man, Al-Muqni'ah fi al-Usul wa al-Furu' p. 652.

It is permissible to sell the endowed property when it becomes damaged, and also when there is fear of discord among the beneficiaries of the endowed property. The sale of the endowed property is not permissible unless it becomes damaged or leads to the destruction of the endowed property.[20]

Selling the endowed property is permissible when it leads to its deterioration and causes discord among its beneficiaries. It is also permissible to sell the endowed property due to the severe need of the waqf beneficiaries, as well as when the endowed property is damaged to the extent that it cannot be sufficiently utilized and is considered devoid of benefit by custom.[21] The sale of perpetual waqf is not permissible, but the sale of temporary waqf is allowed.[22]

Mortgage (rahn) is a factor that removes property from absolute ownership. The mortgagor cannot independently and arbitrarily proceed to sell the property that has been mortgaged to the mortgagee.[23] Sheikh Tusi has claimed consensus on this matter.[24] Additionally, a hadith has been narrated from the Prophet (PBUH) stating: "الراهِنُ و الُمرتهنُ مَمنُوعانِ من التَصَرُفِ" [The mortgagor and mortgagee are prohibited from disposing of (the mortgaged property)].[25]

The mortgagor and mortgagee cannot independently proceed to sell their property. Article 349 of the Civil Code states: "The sale of the endowed property is not valid, except in cases where discord arises among the beneficiaries to the extent that there is fear of bloodshed, or it leads to the destruction of the endowed property, as well as in cases stipulated in the section concerning waqf."

Ability to Deliver

Another condition for the validity of a sale is the ability to deliver the sold item to the buyer. The ability to deliver is a condition agreed upon by all jurists of Islamic schools of thought in the contract of sale.[26] Consensus has been made on this matter. Therefore, selling flying pigeons or other birds that the seller owns but is unable to deliver is an invalid transaction,[27] unless the birds habitually return, in which case the sale is valid.[28] Selling a runaway slave alone is not valid.[29] If it is coupled with something else, selling it alone

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[20] Hilli, Yahya ibn Sa'id, Al-Jami' lil-Shara'i p. 372.
[21] Sharif Sayyid Murtaza (Alam al-Huda), Abul-Qasim Ali ibn Hussein Musavi, Al-Intisar p. 468 and p. 469, Issue 264.
[22] Ibn Barraj Tarablusi, Qadi Abdul Aziz, Al-Muhadhdhab fi al-Fiqh vol. 2, p. 92.
[23] Ansari, Murtaza, Al-Makasib vol. 2, p. 70.
[24] Tusi, Abu Ja'far Muhammad ibn Hassan ibn Ali, Al-Khilaf vol. 3, p. 553.
[25] Nuri Tabarsi, Mirza Hussein, Mustadrak al-Wasa'il wa Mustanbat al-Masa'il vol. 13, p. 426, Book of Mortgage, Chapter 17, Miscellaneous matters related to the chapters of the Book of Mortgage, Hadith 6.
[26] Shahid Awwal, Ghayat al-Murad fi Sharh Nukat al-Irshad vol. 2, p. 30 - Bahrani, Yusuf, Al-Hada'iq al-Nadirah fi Ahkam al-'Itrah al-Tahirah vol. 18, p. 378.
[27] Fakhr al-Muhaqqiqin (Hilli), Abu Talib Muhammad ibn Hassan ibn Yusuf ibn Mutahhar, Idah al-Fawa'id fi Sharh Ishkalat al-Qawa'id vol. 1, p. 428.
[28] Ardabili, Ahmad, Majma' al-Fa'idah wa al-Burhan fi Sharh Irshad al-Adhhan vol. 8, p. 174.
[29] Muhaqqiq Awwal (Hilli), Abul-Qasim Najm al-Din Ja'far ibn Hassan, Shara'i' al-Islam fi Masa'il al-Halal wa al-Haram vol. 2, p. 17.

becomes valid.[30] Selling fish in water is not valid unless the fish is in an enclosed area in the water.

The scholar has mentioned three conditions in this regard:

1. The seller must own the property.
2. Mere observation is not sufficient; there must be the possibility of taking possession.
3. It must be enclosed, like a small pond.[31]

Being Known

The requirement that both countervalues be known is a condition agreed upon by all Islamic schools of thought in contracts. The known and specified nature of the price or value of the goods being transacted is essential to the transaction.

There is consensus among jurists on the prerequisite of knowledge of both countervalues. The specifications of the transaction price in terms of quantity, type, and characteristics must be known. Therefore, if a buyer tells a seller: "I bought this item at whatever price you say," such a transaction is not valid. The same ruling applies if it is said, "I sold or bought the item at whatever price so-and-so determines," or "at whatever price it has in the market," or "I bought this item of whatever type or with whatever characteristics it may have." In such scenarios, the sale contract is not valid, and all jurists agree on the condition of knowing the price.

If the transaction is such that the amount of the price is determined, for example, if the seller or buyer says: "I sold or bought this item at whatever price or characteristics you say," or "at whatever price and characteristics so-and-so determines," such a transaction is void. In this case, if the buyer takes possession of the item, they will be responsible for its equivalent or its value.

Knowledge of the quantity, type, and characteristics of the price is a condition in a sale contract. Therefore, selling based on the judgment of one of the contracting parties or a stranger is not valid. It is also not valid to sell at a price whose quantity is unknown even if it has been observed, or a price whose characteristics are unknown, or a price whose type is unknown.

This is because the price is one of the two countervalues on which the exchange is based. Therefore, knowledge of the price is a condition, just as knowledge of the priced item is a condition. Thus, if the seller and buyer transact an item for an amount that is unknown to both or one of them, or transact it on the assumption that it will be at whatever its price is, such a transaction is not valid because it involves uncertainty and ignorance.[32]

Knowledge of the priced item (the goods being exchanged) is one of the conditions for the countervalues that all jurists agree upon. Awareness of the characteristics of the priced item, like awareness of the price, is a condition in sale according to the consensus of jurists.

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[30] Najafi, Muhammad Hassan, Jawahir al-Kalam fi Sharh Shara'i' al-Islam vol. 22, p. 385.

[31] Al-Allama al-Hilli, Jamal al-Din ibn al-Hasan ibn Yusuf ibn Ali ibn al-Mutahhar, Tadhkirat al-Fuqaha, vol. 1, p. 465.

[32] Ibn Qudamah, Al-Mughni fi Fiqh al-Imam Ahmad ibn Hanbal al-Shaybani, vol. 4, p. 33.

This is because all jurists consider a transaction on an unknown type to be void. Therefore, for goods that are customarily sold by measure, weight, or count, etc., the buyer must have prior knowledge of the specifications and characteristics of the goods being transacted.[33]

Jurists consider the contracting parties' awareness of the subject of the transaction necessary in a sale contract. This awareness should be such that it prevents dispute and conflict. This is because, in the Prophet's (PBUH) tradition, sales involving uncertainty (gharar) and unknown items are prohibited. Knowledge of the goods being transacted is achieved either through indication when the goods are present, or by observing them at the time of the contract or before it, provided that no change has occurred by the time of the contract, or through descriptions of the goods in a way that prevents gross ignorance. Gross ignorance is that which leads to disagreement and conflict between the parties. A contract made with ignorance and lack of knowledge of the price or the priced item is considered, according to the Hanafi view, among the defective contracts, and according to other schools (Hanbali, Shafi'i, and Maliki), among the void contracts.[34]

Conclusion

This research aims to examine the conditions of countervalues in lease from a jurisprudential and legal perspective. The legislator, by using the word 'object' in the definition of sale in Article 338 of the Civil Code, has distinguished the concept of sale from lease. This is because, in a sale, ownership of the object is transferred for consideration, while in a lease, ownership of the benefit is transferred for consideration for a specific period (Article 466 of the Civil Code). An 'object' is a property that has a physical and tangible existence and is traded independently, not as a gradual product of another object. A 'benefit' is the property that is gradually utilized from an object and often does not have an external and tangible existence, although in some cases it may also have a tangible external existence, such as the fruit of a tree.

Given the definition of object and benefit, it becomes clear that one cannot separate an object from its benefit based on the intangibility of the benefit, as something that is called a benefit may also have a tangible external existence. Therefore, the only criterion that can distinguish an object from a benefit is the gradual nature of the benefit, meaning that something that gradually comes into existence from another object is called a benefit, even if it also has a tangible external existence.

The subject of the sale is objects, while the subject of the lease is benefits. Although the lease contract relates to an object, it differs in that the effect of the lease is the transfer of ownership of the benefit, unlike sale where the effect is the transfer of ownership of the object. In a sale, the buyer can use the sold item in any way they wish, but this is not the case in a lease contract. The lessee must not exceed or neglect the use of the leased property (inferred from clause 1 of Article 490 of the Civil Code). Also, the lessee must use the leased property

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[33] Ansari, Morteza, Al-Makasib, vol. 3, p. 121.

[34] Zuhayli, Wahbah, Al-Fiqh al-Islami wa Adillatuhu, vol. 4, p. 179.

in the manner agreed upon between the parties (clause 2 of Article 490 of the Civil Code). For example, if a person has acquired the benefit of a car for riding, they have no right to use it for moving household furniture.

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