

The Nullity of Contracts in Civil Law and Islamic Jurisprudence

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Abstract: This study focus is on discussing contracts that are concluded with a defect in one of the elements which may affect its legality and validity, threaten its existence with abolition as well as affecting the parties of the contract and their rights and duties arising from the contract. One of the implications of such a defect in the contract is that the contract may be considered to be null or it is applicable to nullity. Islamic jurisprudence has the same principles on the validity of contracts in terms of the presence of the contract's entire elements, so as to be legally generated and become effective. In contrast, the presence of any defects in a contract will affect the validity of the contract and may lead to nullity or become a voidable contract. The aims of this study are the definition of nullity and to explain the types of nullity (absolute nullity and relative nullity) and its direct and indirect effects which may lead to invalidity, derogation, conversion, adjustment of the null contract in civil law and Islamic jurisprudence.

Key words: Nullity, contract, civil law, islamic jurisprudence, derogation

INTRODUCTION

In this study, the researcher will discuss whether a rule should be developed for the description of the nature and types of defects that accompany the process of concluding contracts. This will be achieved via examining and explaining the general legal principles contained in civil law relating to defects that can affect the elements of the contract (consent, subject, cause and form of the formal contracts) during its composition. As is commonly known, each contract has a number of elements that must be present in order for it to be legally concluded and for it to have legal effect.

The defects that may occur in the contract have an effect on its composition as well as the consequences that impact on the parties' rights and obligations. However, these effects may vary depending on the degree and level of the defect that affects the contract.

Moreover, the view of Islamic jurisprudence concerning the defects that affect the elements of a contract will be taken into consideration because it is

enriched with ideas and opinions regarding the nature of the defects, their consequences and how to treat them.

This study adopts an analytical approach with legal deductive reasoning. The analytical approach assists the researcher to conduct a profound analytical study for each part of the study. The researcher should not merely deliver what is available, he has to analyze every part of the research in order to determine its features and defects. This will allow the researcher to analyze and study the nullity of contracts, its types and its legal effects.

This study depends on both primary and secondary resources of data. The primary resources include civil laws and Islamic jurisprudence (Islamic Fiqh) whereas the secondary resources consist of authoritative books, journals, Internet sources and other related publications on this topic.

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If the elements determined by law (including consent, subject, cause and form of the formal contracts) with all

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the conditions provided in the contract then it is considered to be a valid contract and have legal effect and both parties are committed to implement it. However, some contracts may be concluded even though, there is a defect in one of these elements which may affect its legality and validity, threaten its existence with abolition as well as affecting the parties to the contract and their rights and duties arising from the contract. One of the implications of such a defect present in the contract is that the contract is considered to be null and void or it is voidable. The descriptions of the defects that could make the contract null, the type of nullity and its effects will be illustrated in the following paragraphs.

The definition of nullity in civil law: Nullity is identified as the cause that leads to the legal actions as a result of a defect in the elements of its composition or for violating a legal rule. This nullity will result in the non-implementation of the act, i.e., the contract or legal act is generally non-existent or have no legal effect because of the imperfection of its composition (Zohra, 2013).

According to the general principles of civil law, there must be elements provided by law for the conclusion of any contract including consent (offer and acceptance), subject, cause and formality as a fourth element if the law requires it to follow a specific form and procedures for the conclusion of the contract. By contrast, the general rules of law states that the lack of or defect in one of these elements will result in the contract having no legal effect. The term “nullity” is used to refer to these contracts because they are defective or lacking one of the elements. In other words, it is a description caused by law to the act or contracts contravening the rules of their formation or having a lack of or defects in the elements of their composition. However, there are degrees or levels of nullity that varies depending on the strength or importance of the contravention or the defect contained in the legal act or contract resulting in different effects and consequences, its effect on the contracting parties and the possibility of correcting this defect or lack of it. Based on the above, there will be explanations of the types of nullity how to adhere to it and its legal effects (Zohra, 2013).

The types of nullity in civil law: In law, nullity is divided into two types, namely absolute nullity and relative nullity.

Absolute nullity: Absolute nullity occurs when there is a lack of one of the contract elements. Thus, the contract is considered as null if one of the contract elements is

missing such as lack of consent, subject, cause or form in the formal contracts or all of these elements are present but there is a defect in one of them such as the subject is impossible or not determinable or the cause is illegitimate. Absolute nullity means that the contract was not concluded and each interested party may adhere to nullity and in addition to that the court will pass judgment on it accordingly. Furthermore, there are no implications for the contract of absolute nullity and it should not be allowed (Sanhooori, 2000).

On the other hand, though the contract of absolute nullity has no legal effect, it is a material act. This act may give rise to implications as it is considered to be a material act and not as a contract. For instance, under Islamic law entailing an invalid marriage, some implications such as the obligation of a waiting period for the woman and the dowry to the man besides the verification of lineage for the children of the marriage (Al-Hakim, 1974).

Relative nullity: The contract is relatively null or eligible for nullity if there is a defect in the description of the contract's characteristic or in other words there is a defect in a non-essential element of the contract as if the contractor's will has a defect like mistake, deception or coercion. Other features of eligibility may include insanity, ignorance or there is an unimportant defect in the contract. Unlike absolute nullity, a contract that is deemed to have been concluded in relative nullity is valid and remains so unless it is challenged by a party to the contract whereby it is in his interest to do so. In addition to that, in this case, the court may not revoke the contract on its own but this must be requested by the contractor who is an interested owner (Zohra, 2013).

The difference between absolute nullity and relative nullity: Absolute nullity is the consequence of the lack of one of the elements of the contract or it has a defect such as lack of eligibility, consent, subject, cause or form in the formal contracts whereas relative nullity is the consequence of the unavailability of one of its validity conditions such as improper agreement or there is an unimportant defect (Zohra, 2013).

The contract of absolute nullity makes the contract nonexistent so that there will be no legal effect in the present and in the future whereas the relative nullity contract has a legal existence and it is existent for all of its legal effects at that stage till the decision of its nullification then it becomes like the absolute nullity contract since, its legality comes into existent retroactively as if it was never existent originally (Sanhooori, 2000).

The null contract does not need the issuance of a judgment from the judiciary to decide its nullity that if it is handled by the court, the court will decide it on its own and besides each interested party may adhere to it. But, the contract that is applicable to nullity, its nullity is decided by mutual consent or litigation and no one can adhere to it except for whom the nullity has been proved to be in his interest as well as that the court may not pass judgment on it unless it is requested to do that (Al-Hakim, 1974).

The contract that is applicable to nullity can be amended by adding a new item to it legally to confirm its authenticity while the adjustment for a null contract is not envisaged but it is reorganized again in a new contract (Zohra, 2013).

The effects of nullity in civil law: There are certain effects of nullity which differs according to the type of nullity (absolute or relative nullity). These effects impact the existence of the contract legally and its effect on the contracting parties with the existence of the material effects of the contract as a material fact. Furthermore, there are direct and other indirect or accidental consequences of nullity and they are as follows.

The effects of absolute nullity: As explained earlier, nullity is a description of the effects of the lack of one of the contract elements or a condition of the related essential conditions. One of the main effects of absolute nullity is that the concluded contract is considered as null and non-existent with the backdating of the nullity effects to the date the contract was signed and returning the parties to the contract to the situation that they were in before the contract was concluded. There is no problem here if both contracting parties did not carry out their obligations since they have not been entailed, for example, to pay a sum, transfer something, use or loss of the contract subject. On the one hand, if both parties to the contract carried out their obligations, here there is a distinct possibility that each party returns what he has received or there is no problem in this case. On the other hand, if it is impossible to return both contracting parties to the situation that they were in, so the consequence of absolute nullity will be the payment of compensation to the affected party as in the case of the buyer's use of the thing he bought or a change in its situation or nature or other matters that make it difficult to return the parties to the situation that they were in before the contract was concluded (Zohra, 2013). However, even the absolute nullity that affects the contract as a material action may have some effects, such as an invalid marriage in Islamic

law, where the woman is obliged to observe the waiting period as well as the lineage implications of the children (Bakr, 2007).

The effects of relative nullity: Relative nullity is the result of a defect of the consent due to mistake, deception, coercion, one of the eligibility defects or an unimportant defect. Relative nullity differs from absolute nullity in terms of nullity implications as in the former, the contract remains valid, existent and its legal effects can be arranged till it is judicially decided to be null (Bakr, 2007).

Amongst the original effects of relative nullity is returning the parties to the contract to the position they were in before the contract was concluded. It entails the payment of compensation in the event that it is impossible to return the parties to the contract to the situation that they were in before the conclusion of the contract. Therefore, relative nullity (Sanhoori, 2000) is different from the absolute nullity in terms of. It organizes all of its legal implications, so that each contractor is required to fulfill his obligations caused by the contract till it is determined to be null.

The court may not issue a judgment nullifying the contract on its own but there should be a lawsuit or payment from the contracting parties containing a request to nullify the contract.

A contract with an unimportant defect may be acceptable by the interested party and it is considered to be valid at that time and the right of nullifying the contract is disregarded by explicit or implied permission and the permission is based on the date of concluding the contract.

It may entail certain effects though, it is considered as null by a material act. Amongst the effects, occasional effects represented by the so-called derogation of contract, i.e., a part of it is valid and its other part is null or the contract is converted into another contract which will be explained further in the next paragraphs.

Derogation of the null contract in civil law: Derogation of contract means the discarding of the null part of the act or contract and keeping the valid part as long as this act or contract is divisible. If it is indivisible, there will be no place for derogation. In addition to that, if the contract cannot be concluded without the other part which is considered to be null then derogation of contract cannot be applied and the entire contract is considered to be null (Bakr, 2007).

Based on the above-mentioned definition, derogation of contract requires the presence of a number of conditions, including that the contract is partially null, i.e.,

it is not entirely or absolutely null but it has a null part and the other is valid. The second condition is that the contract is divisible that is the contract consists of two parts while the third condition is that the aim or the main reason of the contract is not null. In other words, without this part or condition, the e parties to the contract would not have agreed to sign a contract because keeping the contract after the nullification of this part or the condition which is the main reason of the contract contradicts the contractors' will that must be respected. Moreover, the implications of the presence of these conditions is to consider the null part as non-existent and the legal implications will be on the valid part which has not been affected by nullity (Zohra, 2013).

The conversion of the null contract in civil law: The idea of contract conversion means that the act or null contract includes elements of another contract and then the null contract is converted into a valid contract whereby its elements are available if the contractors' will was directed to conclude the new contract.

So, if the contract is null and has the elements of another contract, the valid contract is the contract that its elements are available and in same time the contractors' intention is tended toward the conclusion of this contract (Zohra, 2013).

Based on the above, the conditions for contract conversion are: the first condition is that the original contract is null or applicable to nullity, the second condition is that the act or the original contract contains elements of another contract and, the last condition is that the intention of the contracting parties is to move towards a new contract. Then, the null contract is considered to be non-existent and the implications of a new contract is regarded (Shukri and Mohsen, 2005).

The adjustment of the null contract in civil law: In the beginning of the topic on nullity of contracts, it has been clarified that the contract which is affected by an important and essential defect in one of its composition elements is considered as having absolute nullity and the effects of this nullity are backdated to its conclusion date and it is considered as non-existent as well. Therefore, there is no room to adjust the contract of absolute nullity. However, from the jurisprudential point of view there is no objection for the conclusion of another contract based on the same topic but it satisfies the key elements of the contract. Thus, it becomes an independent legal act and differs from the first contract which was affected by nullity (Shukri and Mohsen, 2005).

On the other hand, the relative nullity contract is considered as a valid contract and has legal effects until

it is challenged by those interested parties and a judicial decision is issued to nullify it. But, before challenging, the legality of this kind of contract, the one who the nullity has been proven to be in his interest can agree to grant permission to continue with the contract because the defect which affected the contract is unimportant and did not affect its composition elements and it is within the power of the interested party of the nullity. For example, the defect has affected the contractor's will and the defect is a mistake or coercion. Thus, the contractor who is affected by one of these defects can permit and accept the contract after knowing the existence of the defect and the possibility of removing it. Or for example, the contractor is not an adult and concluded the contract and therefore the contract in this case is applicable to nullity unless permission is given by the ineligible contractor's guardian or that the contractor has become an adult and then agrees to continue with the contract. In such cases, the defect that affected the contract is removed by the permission of the one who the nullity has been proven for his interest and it is regarded as valid from its conclusion date (Bakr, 2007).

With regards to the above, the defective contract can be adjusted if certain conditions are present and they are an unimportant defect has affected the contract. the possibility of adjusting the defect or removing it and the amendment or adjustment does not change the nature and type of contract, i.e., the contract after the adjustment or the defect's removal must remain the same and its nature have not changed (Shukri and Mohsen, 2005).

THE DEFECTS OF CONTRACTS IN ISLAMIC JURISPRUDENCE

Islamic jurisprudence has no difference regarding its own judgment on valid contracts in terms of the availability of the entire elements of the contract which is legally generated and organized for its effects. Those elements are represented by offer and acceptance by both contracting parties and they have the required eligibility to conclude it as well as free of defects (coercion, mistake and deception). Furthermore, the other element is that the theme of the contract satisfies the conditions for its existence and assignment in accordance with the conditions of the contract for it to be legitimate and there is also a legal reason for the contract.

Muslim jurists defined four aspects underlying the legality and validity of the contract in Islamic jurisprudence (Khoja and Abu Ghd, 1993) and they are the contract is legal in its origin that is the contract has all the basic elements and they are the elements and conditions set by Islamic law including the formula, contractors, the

contracted subject and the contract theme. The contract is illegal in its origin that is the contract has a defect in one of its essential elements which are the elements and conditions that are set by Islamic law including the formula, contractors, the contracted subject and the contract theme.

The contract is legal in its description that is the contract is not related to any description that is contrary to Islamic law.

The contract is illegal in its description that is the contract that has a defect in one of its subsidiary elements or it has a related description that is contrary to Islamic law thus making it illegitimate.

The division of contracts in Islamic jurisprudence: There are two trends in Islamic jurisprudence in terms of dividing the contract in accordance with its legitimate judgment.

The first trend: It is represented by Hanafi who believes that the contract has four key phases. The first phase is called the conclusion phase that is, at this stage the contract should have all of its essential elements for its formation. Hence, the contract is known as the concluded contract. But, if there is a defect in the contract or one of these essential elements of a contract is missing, the contract will be considered null.

The second phase is called the contract validity phase. In the first phase, the contract may be formed when all its basic elements are present but it could be affected by a defect in one of its subsidiary elements or its description is contrary to the provisions of Islamic law. In this case, in accordance with the persons concerned in this section, the contract is invalid but is not null. However if all its essential and subsidiary elements are provided and it complies with the provisions of Islamic law, the contract will be considered as valid (Naji and Hamid, 2012).

The third phase is called the execution phase. If the contract is concluded and all its essential and subsidiary elements are present and it is concluded without requiring someone else's will or agreement, it is considered to be effective. But if the contract has its basic and subsidiary elements but it is only effective after someone else's permission or agreement has been obtained, in this case the contract is suspended.

The fourth phase is called the applicability or necessity of contract. After the contract is properly formed with all of its essential and subsidiary elements and becomes effective both parties to the contract must comply with it without having the right to unilaterally rescind the contract. In this case, it is considered as one

of the necessary or obligatory contracts to be applied. However if there is a condition or one of the parties to the contract have the unilateral right to rescind the contract, it is considered as one of the unnecessary or undue contracts (Naji and Hamid, 2012).

The second trend: It is a trend of most scholars of other doctrines not to differentiate between the defect that affects the contract in one of its key elements and the defect that affects one of its subsidiary elements. Under this trend, the conclusion of contracts does not require the two phases of conclusion and validity.

The contract is either formed properly and free of any defect that affects one of its key or subsidiary elements and is therefore considered valid or it has a defect in one of its key or subsidiary elements and is therefore considered null (Adjouri, 2013).

The term null or invalid contract has the same meaning and effect as contracts that become defective in one of its major or sub-elements which is then considered to be invalid contracts. The scholars concerned in this section do not differentiate between the null and invalid contracts as compared with Hanafi where they regard the contracts to be either valid or null.

Other jurisprudential doctrines did not recognize the applicable contract and the suspended contract as Hanafi's jurisprudence has defined them except for Maliki's jurisprudence. This will be explained in the section of the applicable and suspended contracts whereas the necessary and unnecessary contracts are fixed for all jurisprudential doctrines (Adjouri, 2013).

Types of defects in contracts in Islamic jurisprudence: As clarified earlier, the contracts can be divided in terms of their validity and the defects that affect them into.

The concluded and null contracts: The contract is concluded if the conditions of the key elements of the terms and conditions of both parties and place were present but if there is a defect in one of these conditions, the contract will be null and this is fixed for all Islamic jurisprudence doctrines (Khoja and Abu Ghd, 1993). The implications of the null contract are as follows:

- It is considered as non-existent, i.e., it has no legal existence and does not entail any consequences
- Any interested party can adhere to the contract nullity as well as the judge himself can declare its nullity even if it is not requested by one of the opponents

- He null contract may not be allowed or approved because it is fundamentally non-existent and the subsequent permission will be to suspend the valid contract but the contract may be formed again provided the parties to the agreement are agreeable (Asad, 2015)

The valid and invalid contracts: It is in the division of Hanafi scholars only as discussed formerly that the contract is valid if its key and subsidiary elements are available and it hasn't been declared as illegal.

In contrast, the invalid contract has the essential elements of its composition but it has a defect in one of its subsidiary elements or described as contradicting under Islamic law (Khoja and Abu Ghd, 1993). The implications of the invalid contract are as follows. It is concluded but it has no effects and any of the parties to the contract cannot force the other party to implement it until the invalid item or description that affects it have been removed. For example, the sale is concluded between two persons but its payment is deferred to an unspecified or unknown date or the concluded matter is uncertain, in this case, the basis of the contract is valid but it is described as invalid in one of its subsidiary elements and thus, it is not considered as null but as invalid and has no effect until the invalid description affecting it has been removed.

The invalid contract can be terminated on the request of one of the parties to the contract or by the judge if the invalid description affecting it is not removed (Naji and Hamid, 2012).

The applicable and suspended contracts: The jurisprudential doctrines were divided into two trends.

The first trend: It represents the opinions of Hanafi and Maliki. Within this trend, the valid contract is divided into applicable contract and suspended contract. Thus, some contracts are properly concluded and their effects are not directly implemented after the conclusion but they are postponed to another time as if one of the contractors does not have the required eligibility to conclude the contract. In this case, the contract is regarded as basically valid but it depends on the will of the ineligible contractor's guardian or the contractor is acting on a property that belongs to another person, thus the contract is not applicable and it is subject to the real owner's acceptance and he has the right to permit or reject the act. On the other hand, the contract becomes applicable if it is properly concluded has all elements and is released from the one who has the eligibility and will to form it (Mohammed, 2010).

The second trend: It represents the opinions of Shaafa'is and Hanbalis. The scholars of this group do not recognize the suspended contracts but they consider the contract that is properly concluded and has all its elements as a valid contract and has legal effect and can be implemented by the parties to the contract. However, if the contract is concluded but it is released by an ineligible person or a person who does not have the right to act, in this case it is considered as a null contract (Khoja and Abu Ghd, 1993). These were the most important bases on which the validity and invalidity of contracts in Islamic jurisprudence are based.

CONCLUSION

This study focused on discussing the contracts that were concluded with a defect in one of the elements which may affect its legality and validity; threaten its existence with abolition as well as affecting the parties to the contract and their rights and duties arising from the contract. One of the implications of such a defect present in the elements of the contract is that the contract is considered to be null or it is applicable to nullity and the description of the defect that could make the contract null.

Also, nullity is divided into two types, namely absolute nullity and relative nullity. The absolute nullity occurs when there is a lack of one of the contract elements and the effect of this nullity and its effect is to return the contractors to the situation that they were in before the contract was concluded. But, relative nullity occurs when there is a defect in a non-essential element of the contract elements and the effect of relative nullity differs from absolute nullity in terms of nullity implications. In this situation the contract remains valid, existent and it can be arranged so that it can have legal effect until and unless it is judicially declared to be null.

However, it may entail certain effects though it is considered as null by being a material act. Amongst these effects, occasional effects represented by the so-called contract derogation, i.e., it is valid in one part and null in its other part as well as the contract may be converted into another contract, meaning that the act or null contract including the elements of another contract and the contractors' will was directed towards the conclusion of the new contract.

On the other hand, the defective contract can be adjusted due to the availability of a number of conditions, including the presence of an unimportant defect has affected the contract; the possibility of amending or removing the defect and this amendment or adjustment

does not change the nature and type of contract, i.e., the contract after the adjustment and the defect's removal must remain the same and the nature of the contract that was concluded does not change.

In contrast, in Islamic jurisprudence the contract is concluded if the concluding conditions of the key elements of the formula, terms and conditions of both parties and place were present but if there is a defect in one of these conditions, the contract will be null and this is fixed for all doctrines under Islamic jurisprudence.

Also, the type of defects in contracts in Islamic jurisprudence divides them into concluded and null contracts, valid and invalid contracts and effective and suspended contracts. Muslim jurists defined four aspects underlying the legality and validity of the contract in Islamic jurisprudence and they are. The contract is legal in its origin: the contract was completed and all its basic elements were present and they are the elements and conditions set by Islamic law including the formula, contractors, the contracted subject and the contract theme.

The contract is illegal in its origin: the contract has a defect in one of its essential elements and they are the elements and conditions set by Islamic law including the formula, contractors, the contracted subject and the contract theme. The contract is legal in its description, the contract is not related to any description that is contrary to Islamic law.

The contract is illegal in its description: the contract has a defect in one of its subsidiary elements or it has a related description that is contrary to Islamic law that makes it illegitimate. The discussions above have dealt with the important legal and jurisprudential ideas about the doctrine of nullity in civil law and in Islamic jurisprudence.

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