

***DEFINITION OF SALE CONTRACT IN ISLAMIC
SHARIA AND POSITIVE LAWS - ANALYTIC
COMPARATIVE ORIGINATING STUDY***

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Abstract

The definition of the sale contract, as the most important nominate contract ever, has received a great deal of attention in Islamic Sharia and its jurisprudence as well as in Arab and foreign civil laws. The importance of the definition manifests itself, as a general principle, in considering it as the key to the legal provisions subsequent thereto, since it by far reflects the philosophy of the legislator and the jurist dealing with the same through the

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terms and expressions contained therein indicative of the meaning and the legal position with respect to certain matters.

The key point of this definition reveals itself in the difference it has raised and the extensive controversy it has caused, whether amongst the Muslim jurists or in laws with the various trends and philosophies thereof. We weren't to address this specific component by research if such differences were merely formal and of no value in the legal conclusion, yet the subtlety of these differences and their effects on the provisions of the sale contract as a whole have led us to tackle the same by rooting and analysis to reach a new definition consistent with the importance of the sale contract and its role in the day to day transaction, irrespective of our position whether or not it is necessary to principally have such a definition in place in the core of the legislative action.

Keywords: Sale contract – Islamic Sharia – Islamic Jurisprudence – Jordanian Civil Code

1- Introduction

The sale contract is one of the most important nominate contracts, and has priority over all other contracts. The jurisprudence and various laws sought to develop a definition thereto which usually takes the first article in the sequence of provisions thereof. In general, it is noted that the definitions involve evident difference between themselves, except for the Arab laws which are actually reproduced from each other.

The Islamic jurisprudence, which provided us with a variety of definitions of the sale contract does not deviate from the scope of this difference, the matter that as a result reflected on the legal definitions set out in this contract in both the Journal of Judicial Rulings and *Murshid Al Hairan* Book, in spite of drawing on the same Islamic jurisprudential source.

The stance of the Islamic jurisprudence further reflected on some of the modern Arab laws, some of which modeled after the Islamic jurisprudence without any substantial change, while others attempted to mix between the Islamic jurisprudence and some other modern laws, while there are some Arab laws that made a separate path at addressing the definition of the sale contract.

The same could be said with respect to the foreign laws with their various trends; as they also adopted different positions as to the definition of the sale contract, which we will actually reveal at exploring the details of this paper. This particular part may prima facie appear to entail no such importance that require such a profound research, yet the one who delves into this subject would realize that the definition is not limited to the abstract boundaries thereof, but rather it goes beyond that in terms of effects to other legal articles, since the definition is considered as a miniature of the defined matter, and a preliminary step to reach the legal details and provisions thereof, which must be consistent with the nature and content of the definition that assumes the top position thereof.

Researchers, when studying this matter, attempt to the extent possible to explore the definitions of the sale contract, and to analyze the same to reach the strengths and weaknesses therein with a view to select the suitable definition for this contract away from blind imitation or transfer or even the unproductive mixing between more than a law, believing that the legislator was drawing up a more developed definition in harmony with the spirit of the age, yet they soon find out that such a development did only tackle the surface of this definition rather than the content or the effects resulting there from.

2- Stance of Islamic Sharia and its Jurisprudence on the Definition of Sale Contract

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Islamic Sharia, through the Holy Book and Sunna, emphasized the legitimacy and importance of the sale contract as one of the best means for dealing between people, by which people avoid other means forbidden by Sharia such as usury.

The evidence on legitimacy of this contract, as well as the determination of the nature thereof in the Islamic Sharia is established by the Koran verses, as well as by Prophet's Hadith in terms of limits and scope of this contract. The Islamic jurisprudence elaborated on the definition of the sale contract and on drawing up the features thereof, in a juristic language different from that of the Holy Koran revealed by the Almighty God (Surely We have revealed the Koran and We shall surely safeguard it). [Al-Hijr: 9], and from the language of the Prophet's Hadith the source of which is the Almighty God (Nor does he speak from [his own] inclination; It is not but a revelation revealed; Taught to him by the One Powerful) [An-Najm: 3, 4, 5].

To shed the light on this topic, we have divided it into two themes, the first of which addresses the stance of the Islamic Sharia towards the definition of the sale contract and drawing up the features thereof, while the second theme is devoted for exploring the stance of the Islamic jurisprudence towards this subject.

2-1 Stance of the Islamic Sharia towards the definition of the sale contract

Sale in language is: handing over the subject of sale and receiving the price, or taking possession of the subject of sale and paying the price. Purchase, however, falls within the meaning of taking possession for a compensation, or acquisition of a property for property, yet in [Arabic] language both acts of sale and purchase are synonymous; thus the act of the seller can be called as: sale and purchase, and the same applies to the act of the buyer, an example

of which is the saying of the Almighty God (They had him bought) [Yousef: 20], where the meaning of (had him bought) in this noble verse is sold. Moreover, both terms of purchase and sale are given to the act of the seller and the buyer in [Arabic] language. However, it the customary practice designates the subject of sale by separating it from the seller, i.e. taking the subject out of the ownership, while it designates the purchase and buying by the act of the buyer, i.e. adding the subject to the ownership.¹

The legitimacy, limits and foundations of sale are clear in the Holy Book, Sunna and Consensus, as Allah says in his Book: (But Allah has permitted trade and has forbidden usury) [Al-Baqara: 275], and says in An-Nisa Surah (O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent.) [An-Nisa: 29]. When the Prophet (God's blessing and peace be upon him) prohibited sales on which both parties to the transaction agreed, the jurist deduced that the Almighty God permitted sales except for those prohibited by the statement of his Prophet (God's blessing and peace be upon him) or having the meaning thereof; thus, in case of concluding a permitted sale contract after which they leave each other by mutual consent, neither party may return the same but for a defect or an option clause.² Furthermore, Allah says: (And let there be witnesses whenever you conclude a sale) [Al-Baqara: 282], and He says:

¹ Abdul Rahman Bin Mohammed Awadh Al-Jaziri, *Al-Fiqh ala Al-Mazaheb Al-Arba'a (Jurisprudence in the Four Doctrines)*, V. 2, Ed. 2, Book of Rules of Sale and its related matters, Sale and its Definition, Scientific Book Publishers, Beirut, 2003.

² For more, see: Imam Abu Abdullah Mohammed Bin Idris Al-Shafi'e, *Al-Um*, V. 5, Al-Fiker Publishers and Press, Beirut, 1990, p. 172.

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(By men who neither trading nor commerce distracts them from God's remembrance.) [An-Nour: 37] ¹

In Prophet's Sunna (tradition of the Prophet), the Prophet carried out sale, and saw the people deal in sale and purchase, which he confirmed and did not forbid them to do so. ²

The foregoing falls within the meaning of Hadith (saying) of the Prophet (God's blessing and peace be upon him): (To have one of you to gather firewood and carry the same on his back is better than begging someone for charity, whether the latter gave or prevent it), his (God's blessing and peace be upon him) saying: (May Allah have mercy upon a man at selling, at buying and at completing the deal), and his saying in the matter of man's breadwinning and hand working: (No one would ever eat any food better than that earned by his own work, and even God's Prophet David was eating from what he earned by working.)

As for payment, God's Prophet (God's blessing and peace be upon him) said: (If it was a straight acceptance and delivery transaction, then it is accepted, but if it was deferred then it is invalid). ³

In this respect, there is a narration from God's Prophet (God's blessing and peace be upon him) that he said: (gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt in equal proportions, and

¹ In Sahih Al-Bukhari: (They used to conclude sales and trade, but if they had one of the rights of the Almighty God, the trade or sale did not distract them from reminding themselves of Allah until they have performed the same to Allah), Sahih Al-Bukhari, V. One, P. 3, Al-Jalil Publishers, Beirut, no publication year, p. 72.

² Ali Haidar, Durar Al-Hukkam fi Sharh Majalet Al-Ahkam (Jewels of Rulers in Exposition the Journal of Rulings), V. 3, Al-Jeel Publishers, Beirut, 1991, p. 101.

³ Recited by Al-Bukhari in his Sihah, ibid, pp. 72, 74, 75.

in similar amounts, on a straightforward basis, and this who adds or increases the amount commits usury, and if these sorts were different then sell as you want); thus, his saying (sell as you want) is an express statement permitting the sale. ¹

The Prophet (God's blessing and peace be upon him) preferred sale as means of transaction between people, as he said (best earning is an accepted sale and best work is that done by the man himself), recited by Ahmad, Al-Tabarani et al. The accepted sale here is soundly done where the seller does not cheat, deceive or disobey the Almighty God, and it is legitimate because of the exchange of benefits between the people and the cooperation achieved amongst them. ²

To this end, At-Tirmidhi also related from Sakher Al-Ghamedi that the Prophet (God's blessing and peace be upon him) said: (O God! invoke a blessing on my nation in its early pursuit of subsistence), he said: if he dispatched a detachment or an army he did so in the early morning, and Sakher was a merchant who used to send its merchandise for sale in the early morning, and therefore he became wealthy. Furthermore, Ali the Companion related that the Prophet (God's blessing and peace be upon him) said: (The Almighty God likes to see the servant of God in pursuit of lawful livelihood), recited by Al-Tabarani. Rafe'a Bin Khadij related that some said: O Prophet of God, which earning is more blessed, he said: "Man's hand work and every

¹ Recited by Muslim in his Sihah, related by Abi Hurairah (may God be pleased with him), Dr. Muthanna Al-Nu'aimi, Definition of Sale, its Legitimacy and Elements, www.alukah.net, date of subject addition: 31/03/2015, accessed on 20/11/2018.

² *ibid.*

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accepted sale," recited by Ahmed and Al-Bazzaz, and recited by Al-Tabarani from Ibn Omar. ¹

Within the contract sale in Islamic Sharia falls what is known as (Bai' Assalam) or (forward or future sale or sale for advance) as in Sahih Al-Bukhari ² the following was reported: (The Prophet (God's blessing and peace be upon him) came to Madina and found the people give yield of tree in advance for a year or two, or said two years of three according to Ismail, so he said: let this who gave dates in advance do so using a fixed measure and a fixed weight), and in another narrative the Prophet said: (using a fixed measure and a fixed weight for a fixed term). Sahih Al-Bukhari also reports: [We were giving advance at the time of the Prophet (God's blessing and peace be upon him), Abu Bakr and Omar in wheat, barley, raisins, and dates]. ³ Furthermore, Sahih Al-Bukhari also reports: [... said I asked Ibn Abbas (may God be pleased with him) about advance sale of dates, and he said that the Prophet (God's blessing and peace be upon him) prohibited the sale of palm until the produce thereof could be eaten and until weighing the same; the man said: what is to weigh? A man who was standing next to him said: until gathering.]⁴

The legitimacy of future sale (as a type of sale contracts) is consistent with the requirements of the Islamic Sharia and in accordance with the rules thereof, and is not in violation of the juristic reasoning (deduction), because

¹ Al-Sayyed Sabeq, Jurisprudence of Sunna (Prophet's Rubric), P. 3, Ed. 21, Al-Fateh Publishers for Arab Media, Cairo, 1999, p. 88.

² Al-Sayyed Sabeq, ibid, p. 11 and sb.

³ Some add oil in certain narrations reported in Sahih Al-Bukhari.

⁴ Sahih Al-Bukhari, ibid, p. 112

as it is permissible to defer the price in sale, it is also permissible to defer the subject of sale in future sale without differentiating between both, as Almighty God says: (O you who have believed, when you contract a debt for a specified term, write it down.)¹

Debt is the deferred amount of guaranteed payable property; thus, when the subject of sale was described, known and guaranteed to be paid, and when the buyer is certain that the seller would deliver the subject of sale on time, the subject of sale shall be then deemed as debt that can be deferred within the meaning of the Quran verse. As Ibn Abbas (may God be pleased with him) said: Selling what one does not have does not fall within the prohibition by the Prophet (God's blessing and peace be upon him) about which he said to Hakim Bin Hizam: (Do not sell what you don't have)², since the purport of this prohibition is that a man should not sell what he cannot deliver, since what he cannot deliver actually implies that he does not have it, and thus such sale is nothing but a jeopardy and adventure.³

As for consensus as a source of Islamic Sharia, all Imams of the four doctrines agreed on the legitimacy of sale, and as means of acquisition.⁴

2-2 Disagreement of Islamic Jurisprudence in Defining the Sale Contract

Definition of the sale contract perhaps is one of the topics in which the disagreement of Islamic jurisprudence significantly appears, due to the importance and ancientness thereof on the one hand, and because it is

¹ Al-Baqara Sura: 282.

² Hadith documented by Ahmed, As'hab Al-Sunan, and revised by At-Termizi and Ibn Habbab.

³ Al-Sayyid Sabeq, *ibid*, pp. 120-121.

⁴ Ali Haidar, *Durar Al-Hukkam*, *ibid*, p. 101.

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considered as one of the best means for transacting and dealing between people on the other hand. Thus, *Bidayat al-Mujtahid wa-Nihayat al-Muqtasid* Book ¹ stated: (Every transaction is made between two parties, thus it could be executed by an object for an object, an object for a liability, or a liability for a liability, and each of these three methods is either a sale on credit or an immediate sale, and each of these also is either immediate by both parties, or immediate by one party and on credit by the other; thus, there are nine types of sale. The sale on credit by both parties however is not permitted by consensus not in an object nor in a liability, because the debt for a debt is prohibited. The names of these sales are: Some of which before entering into contract and at contracting, and some relating to the subject of the sale; thus, if the same was by an object for an object, it would definitely be a price for a priced item or a price for a price, so if the same was a price for a price it shall be called a sale of exchange, and if the same was a price for a priced item it shall be called an absolute sale, and the same applies to a priced item for a priced item on the terms to be set out hereunder; yet if the sale was by an item for a liability, it shall be called as a forward sale, if it was on an option, it shall be called as an option sale, if it was on Murabaha, it shall be called as Murabaha sale, and if it was by auction, it shall be called as sale by auction.) The author of Al-Sara'ir defined it as (the transfer of an owned object from a person to another for an estimated compensation by mutual consent). ² The author of Subul Al-Salam defined it as (transfer of ownership of a property

¹ By Imam Abu Al-Walid Mohammed Bin Ahmed Bin Rush Al-Qurtubi, AKA Ibn Rushd the Grandson, p. 2, Al-Fiker Printing, Publishing and Distribution, Beirut, 1995, p. 102.

² Abu Jaafar Mohammed Bin Idris Mohammed Al-Ajali, Al-Sara'ir, P. 14, Al-Yanabe'a Al-Thahabiah Series, no publication year, p. 289.

for a fund by consent). Furthermore, Al-Maqdisi, the author of Al-Iqnaa, defined it as (an exchange of a property, even if as a deferred liability, or permitted benefit, such as the right of way, for an equivalent amount of either of them in perpetuity without a usury or loan), while Al-Haskafi defined it as (the exchange of a desired item for an equivalent), while Al-Shalabi defined it as (the exchange of a property of a permitted benefit for a property of a permitted benefit by means of transfer of ownership and acquisition). Al-Nawawi defined it as (the exchange of a property for a property or the like by means of transfer of ownership), while Abu Qudamah concluded in his definition of the sale contract to that (it is the exchange of a property for a property by means of acquisition or transfer of ownership.)

It is noted that each of these definitions sheds the light on a certain point different from the others; as some of the scholars focused on the effects of the sale contract which lead to transfer of ownership from a person to another, while others introduced the definition thereof with the term (transfer of ownership) because this contract entails mutual transfer of ownership and acquisition of the subject of sale and the price. In addition, some of these definitions focused on describing the sale process as (exchange of property for a property), in addition to the focus on the element of mutual consent of the parties to the sale contract. It is also noted that part of the Islamic jurisprudence in this matter focused on the necessity of having such an exchange relating to a property of permitted benefit, i.e. which may be dealt with by Sharia, where anything to the contrary would not be included in the scope of this contract.

In conclusion, these definition do not differentiate between sale and bartering, because the sale in Islamic jurisprudence can take place by selling an object for cash, i.e. the absolute sale, an object for an object, i.e. the bartering, a cash

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for a cash, i.e. the exchange sale, or a deferred object for an immediate price, i.e. the future sale. ¹

Some of the concerned in Islamic jurisprudence argues that the term sale is given to both, as they both are of the common words for antonyms. The sale by Sharia means (the exchange of a property for a property by mutual consent, or the transfer of a property for a compensation as permitted). God permitted the sale as a facility by Him to his servants, as every human being has necessities to meet such as food, clothing, etc, which are indispensable as long as the human is alive, and which a man cannot provide on his own because he is forced to obtain them from others. Thus, there is no way better than bartering, as he would give what he can dispense with for a compensation for which he stands in need to be taken from another person. ²

The Journal of Judicial Rulings followed the tracks of the Islamic jurisprudence in defining the sale contract, where Article (105) thereof provided for that (Sale is the exchange of property for a property whether or not under a contract.

This means, according to the interpretation of the author of *Durar Al-Hukkam fi Sharh Majalet Al-Ahkam* that the sale is particularly the transfer of ownership for a property, which can be divided, as an absolute sale, into a sale under contract and a sale without a contract.

This definition is the same for purchase as well, and all that applies to the sale also applies to the purchase in all aspects. Thus, when we say exchange of a property for a property, this would exclude the lease, marriage, donation and

¹ Tareq Kazem Ajil, *Al-Wasit in the Sale Contract, Comparative Study*, Al-Hamed Printing Press, Amman, 2009, pp. 37- 39.

²Al-Sayyed Sabeq, *ibid*, p. 89.

lending. However, when we say (particularly), this would exclude the donation and gift on the condition of compensation. The particular aspect of sale is the use of the term (sell and buy) or dealing, for example: if a person donated a property to another and delivered the same thereto, and if the donee donated and delivered another property to another, this cannot be deemed as a sale and deviates from the definition of the sale contract although there is an exchange of a property for a property since both terms (sell and buy) relating to the sale were not used in the contract.

The concluded sale is divided into valid, defected, effective and conditional¹, yet the sale without a contract is the invalid sale.²

There is another argument in another elucidation of the Journal of Judicial Rulings³, at addressing the provisions of Article (105) of the Journal, that the wording did not contain mutual consent to address the simulated sale since it is concluded even if not binding and not limited as of specific benefit so to address the sale of Dirham for a Dirham of equal weight and description which is deemed as concluded even if defected, and it further address the bartering by a partner of the share thereof in a house for the share of the other

¹ Article 106 of the Journal

² Article 107 of the Journal. The valid sale means the permitted sale which is legitimate in origin and description. The defected sale is the a legitimate sale by origin rather than description, i.e. it is valid per se yet defected considering some of the unlawful description therein. The invalid sale is that which is by origin invalid and is not originally permitted, while the conditional sale is a sale to which the right of a third party is attached, such as the *Negotiorum gestio* sale. Refer to Articles 108, 109, 110 of the Journal of Judicial Rulings.

³ Salim Rustum Baz Al-Libnani, Exposition of the Journal, V. 1, Ed. 3, Scientific Book Publishers, Beirut, no publication year, p. 65.

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partner in case of condominium and equal shares, since the same is considered concluded even if defective, where it is evident that generalization has precedence over limitation in all the foregoing because if we intend to have a definition for sale in general

Murshid Al Hairan Ila Maarefat Ahwal Al-Insan Book ¹ was influenced by Hanafi Jurisprudential doctrine in the definition of the sale contract, which stated in Article (343) thereof that: (Sale contract is the transfer by the seller of ownership of a property to the buyer for a property that is the price for the subject of sale).

This definition does not deviate from the definitions in the Islamic jurisprudence in general, such as in using the term transfer of ownership and naming the parties to this contract, i.e. the seller and the buyer. This definition entails a broad meaning for the sale contract which covers the absolute, bartering, exchange and future sale. ² The author of this book confirmed what some jurists stated that the subject of the contract must be a property of a permitted use capable of being delivered and duly known to the buyer which knowledge prevents invoking lack of knowledge. ³

3- Legal Nature of the Definition of Sale Contract in Arab and Foreign Laws

The positive laws, whether Arab or foreign, differ in their definition of the contract sales. As for Arab laws, we can divide the definitions thereof the sale contract into three parts, some of which influenced by the Islamic

¹Mohammed Qadri Pasha, *Murshid Al Hairan Book*, Ed. 1, Arab Publishers and Distributors, Amman, Jordan, 1987, p. 93.

² Note Article 352 of *Murshid Al Hairan Book*.

³ Article 366, 382 of *Murshid Al Hairan Book*

jurisprudence and *verbatim* copied there from, some attempted to mix between the Islamic jurisprudence and the contemporary laws, while some sought to modernize this definition under the influence of western laws.

As for the foreign laws, they also vary in their trends and philosophies, whether Latin, Germanic, or Anglo-Saxonic (Anglo- American).

In order to better touch on this topic, we will divide it into two themes, in the first theme we will address the legal nature of the definition of the sale contract in Arab laws, and will devote the second for exploring the difference in defining the sale contract in some foreign laws.

3-1 Legal Nature of the Definition of the Sale Contract in Arab Laws

The Egyptian civil code was influenced by the French law, avoiding the criticism thereto as to the role of the sale contract in transfer of ownership from the seller to the buyer, as Article (418) of the Egyptian Civil Code defined the sale as (A contract under which the seller undertakes to transfer to the buyer the ownership of a thing or other financial right in return for a cash price).¹

This definition is derived from the old civil Egyptian law as well as from the Polish law, yet it is distinguished from the old Egyptian law by that it does not limit the sale to the ownership of things, but rather goes beyond that to cover the other financial rights such as the easements and usufructs, where the personal rights, such as the transfer of rights, and the moral, technical and industrial property right, can be subject of the sale. This definition is also distinguished from the former one in designating money as the price in the

¹ Arab Republic of Egypt, Ciivil Law, Ed. 6, General Organization of State Printing Press, Cairo, 1996.

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sale contract to distinguish the sale contract from the bartering contract.¹ However, some criticizes this definition for discarding the most important effect of the sale in the Islamic jurisprudence and modern laws, i.e. the transfer of ownership upon concluding the contract. It seems that the reason that made the Egyptian legislator adopt this trend is that the ownership of things identified by their type rather than by themselves cannot be transferred under the contract itself where they must be first partitioned.²

The Iraqi civil code followed the steps of the Journal of Judicial Rulings in definition thereof of the sale contract, where it made the sale inclusive of the general sale, exchange sale and bartering, and it did not deem it necessary to refer to (Bai' Assalam) future sale after permitting the sale of the future things in general, not only in the future sale, although the sale of future things is not exactly identical to Bai' Assalam and the terms thereof as established by the Islamic jurisprudence which avoid jeopardy and gross unawareness. This is exactly what Article (506) of the Iraqi Civil Code embodied, which defined

¹ Some of those who interpreted the Egyptian Civil Code consider that the Egyptian legislator was successful in defining the sale contract in Article (418) thereof; one of those who adopt this point of view is : Khamis Khudur, Sale Contract in Civil Law, Al-Fikr Al-Arabi Publishers, no publication year, p. 10.

² Our professor Saadoun Al-Ameri, Al-Wajiz in Exposition of Nominate Contract, P. 1, in Sale and Lease, Ed. 3, Al-Ani Printing Press, Baghdad, 1974m pp. 9-10. Some of the Arab texts which are identical to the Egyptian text, Articles (386) of the Syrian Civil Code, Syrian Civil Code enacted by Decree Law No. 84 dated May 18th, 1949, prepared by Mamdouh Utri, Al-Nouri Est. for Printing, Publishing and Distribution, Damascus, 2009; Article (407) of the Libyan Civil Code, Libyan Arab Jamahiriya, Administration of Law, Civil Code and its Complementary Laws, Ed. 1, 2003; Article (351) of the Algerian Civil Code, Civil Code in the Light of Judicial Practice, Birti Publications, Algiers, (2009- 2010).

the sale as (Sale is the exchange of one property for another property) ¹. Then Article (507) of the Iraqi Civil Code provided for that (Sale as regards the object of sale is the sale of a property for a currency which is known as the general sale, the sale of a currency for a currency which is known as the exchange, or the sale of a property for another property which is known as bartering.) Some of those who explained the civil code criticize this definition for not being deterring because it includes bartering and exchange, and is limited to describing the sale process itself without addressing by its provisions the persons or effects thereof. ²

The Sudanese Civil Transaction Law of 1984 ³ was influenced by the Islamic jurisprudence which provided for that (Sale is the transfer of a property or a financial right in return for a compensation). The phrase (transfer of a property in return for a compensation) or as called in the Jordanian Civil Code (for a consideration) as will be indicated hereunder, was taken as we noted from the Islamic jurisprudence, which means that the Sudanese legislator adopted the sale contract in its broad meaning which includes the general sale, exchange and bartering. Moreover, the Sudanese legislator adopted the (Bai' Assalam) future sale in articles (217- 221), in which manner the Sudanese legislator permitted the sale of future things on the terms established by the Islamic jurisprudence, in spite that there is a general

¹ This article copied from Article (105) of the Journal of Judicial Rulings.

² Said Mubarak, Saheb Ubaid Al-Fatlawi, Taha Malahweish, Al-Wajiz in Exposition of the Iraqi Civil Code (Sale, Lease, Contracting), Al-Hikma Printing and Publication, Baghdad, 1993, p. 9.

³ Issued by the Ministry of Justice of Sudan, no publication year.

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provision permitting having the subject of contract a future thing if it was designated in a way not allowing for unawareness and jeopardy.¹

The reliance of the Sudanese legislator on the Islamic jurisprudence at addressing the definition of the sale contract as to the compensation therein is confirmed by the provisions of Article (185/b) which states: (The nominated price must be known at the time of sale, where it is to be known by indicating the amount, type and description thereof if it was not present). This implies the permissibility of using currency as compensation by designating the type and amount thereof, or as similar items by designating the type, description and amount or as items of value provided that to designate the descriptions.

The Civil Transaction Law of the United Arab Emirates defined the sale contract in Article (489) thereof which provided for that: (Sale is the exchange of a non- monetary property for a monetary property). This definition seems to be clearly influenced by the Islamic jurisprudence and the Journal of Judicial Ruling, yet it stipulated for the compensation to be performed in cash. In this particular part, it followed the provisions of Article (418) of the Egyptian Civil Code and some other laws which stipulated for the price to be performed in cash, as in the English, as we will note. Thus, it has adopted one form of sale in the Islamic jurisprudence, i.e. the general sale without expanding to cover other forms of sale such as bartering and exchange. As for bartering, this law has regulated it in a separate contract,

¹ Article (79/2) of the Sudanese Civil Code. The influence of the provisions of Article (418) of the Egyptian Civil Code is evident in definition of the sale contract in Article (178) of the Sudanese Civil Code through the phrase (or a financial right) set forth in the Egyptian text.

although it appears that the UAE legislator sensed that it is not completely independent as he regulated the same along with the sale contract in one chapter under the title (Sale and Bartering) instead of regulating the same in a separate chapter as he did with respect to other nominate contract.¹

The Kuwaiti Civil Code preferred the customary practice, i.e. the general sale, in defining the sale in Article (454), where the definition thereof included the most important characteristics of the sale contract; the transfer of ownership of the property, i.e. the transfer of ownership of the financial right for a monetary compensation, since it is an ownership transferring action distinguished from the lease, and further since it is a compensatory action distinguished from the gift contract, and since the compensation therein is an amount of money distinguished from the bartering contract.²

A distinguished example of the definition of the sale contract is that provided for in Article (372) of the Lebanese Law on Obligations and Contracts³ which provided for that (Sale is a contract under which the seller undertakes to transfer the ownership of an object, and under which the buyer undertakes to pay the price thereof). This definition is close to the Egyptian codification,

¹ Law on Civil Transactions of the United Arab Emirates, Lawyer Society, 1980, Adnan Sarhan, Exposition of the Provisions on Nominate Contracts in the Law on Civil Transactions of the United Arab Emirates, P. 1, Sale Contract, Ed. 1, Wael Publishers, Amman, 2005, pp. 24- 25.

² Article (454) of the Kuwaiti Civil Code defined the sale contract as : "Transfer of the ownership of an object or transfer of another financial right in return for a monetary compensation." See : Kuwaiti Legislations No. (3), (5), Kuwaiti Civil Code, Decree Law No. 67 of 1980, Interpretative Memo, Ed. 2 Kuwaiti Bar Association, Edition of 2004 and Edition of 1987, p. 143.

³ Enacted on 09/03/1932, Zein Law and Literature Library, Ed. 6, Beirut, 2012.

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as it does not mention with respect to the subject of the sale but the ownership of the object, and does not state for a cash compensation as a price. ¹

3-2 Legal Nature of the Definition of the Sale Contract in Foreign Laws

Foreign laws also some way or another differ in their definition of the sale contract. The French Civil Code, which disposed of the forms and signs which were known in the Romans, and by which the legislator of the French law (Napoleon Law) in 1804 was influenced, yet it maintained the delivery and considered the same as the usual way for transfer of ownership. The development of this law however resulted in having it suffice with the formal delivery, as it is sufficient for completing the delivery to indicate the delivery has taken place in the contract, although if such a statement is inconsistent with the reality.

Jurists disagree in interpreting Article (1582) of the French Civil Code which defined the sale as: (A sale is an agreement by which one person binds himself to deliver a thing, and another to pay for it. It may be made by an authentic instrument or by an instrument under private signature) ², as some of them consider that the sale contract does not transfer the ownership to the buyer because Article (1582) of the French Civil Code binds the seller to deliver the subject of sale, while the predominant opinion sees that other articles of the French Civil Code complement the provisions of Article (1582)

¹ Abdul Razzaq Ahmad Al-Sanhuri, *Al-Wasit in Exposition of the Civil Law and Contracts on Ownership, Sale and Bartering*, Al-Halabi Law Publications, Ed. 3, Beirut, 2009, p. 20.

² (A sale is an agreement by which one person binds himself to deliver a thing, and another to pay for it. It may be made by an authentic instrument or by an instrument under private signature). French Civil Law, Translated by Georges Rouhette, Professor of law, with the assistance of Dr. Anne Rouhette, Berton, Assistant Professor of English, 2009, p. 186

and assert that the sale contract is an act of transfer of ownership such as Article (1138) of the French Civil Code which states that the obligation of transferring the ownership takes place when the volitions of both parties meet¹, as well as Article (1583) which stipulate that the ownership is transferred to the buyer as of the time of agreement of both parties on the subject of sale and the price, even if the subject of sale has not yet been delivered or the price has not been yet paid to the seller.²

As for the position of the German Civil Code, Article (433) thereof provided for that: (Under the sale contract, the seller of a thing undertakes to deliver the same to the buyer, and to transfer the ownership of such thing thereto). The position of the German law is criticized for connecting the transfer of ownership since as the delivery to the buyer allows for taking possession of the subject of sale and gives rise to the right to ownership at the same time. The Swiss Code of Obligation followed the example of the German law in describing g the nature of the sale contract as Article (184) thereof defined the sale as (a contract whereby the seller obligates himself to deliver to the buyer the object of the purchase and to transfer title thereto to the buyer, and the buyer obligates himself him to pay the purchase price to the seller).

¹Art. 1138 : (An obligation of delivering a thing is complete by the sole consent of the contracting parties. It makes the creditor the owner and places the thing at his risks from the time when it should have been delivered, although the handing over has not been made, unless the debtor has been given notice to deliver; in which case, the thing remains at the risk of the latter), op. cit., p. 148.

² Art. 1583 : (It is complete between the parties, and ownership is acquired as of right by the buyer with respect to the seller, as soon as the thing and the price have been agreed upon, although the thing has not yet been delivered or the price paid). op. cit., p. 186.

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Sale in the English law does not transfer the ownership but rather it results in obligation upon the seller to transfer the same to the buyer, as this law defines it as (a contract under which the seller transfers or undertakes to transfer the ownership of the commodity to the buyer for a monetary compensation known as the price).

The American jurisprudence take on the same approach by defining the sale as (transfer of the right to ownership from the seller to the buyer for a certain price), while the US Uniform Commercial Code defines the sale as (transfer of the ownership of the commodity from the seller to the buyer for a price paid by the latter.)¹

The position of the English and the American laws represent what it known as the Anglo-Saxon Law or the (Common Law), and sometimes as the public law. The most notable countries that adopt this trend (the Common Law) are the United Kingdom, the United States of America, Canada, Australia and New Zealand.²

It is noteworthy to indicate that Article (418) of the Egyptian Civil Code was influenced by Article (294) of the Polish Law which provided for that the

¹ Tareq Kazem Ajil, *ibid*, pp. 41- 42.

² Common Law (Anglo - American) : Is a system of principles and rules grounded in universal custom or natural law and developed, articulated, and applied by courts in a process designed for the resolution of individual controversies. In this general sense, the common law is the historic basis of all Anglo - American legal system. It is also an important element in the origin and plan of the United States Constitution.
www.encyclopedia.com

sale contract is "A contract under which the seller undertakes to transfer the ownership of a thing or another financial right to the buyer who undertakes to pay the set price." ¹

An example that we attempted to use in defining the sale contract is Article (1458) of the Philippines Civil Code which provided for that: (By the contract of sale, one of the contracting parties obligates himself to transfer the ownership and to deliver a determined thing, and the other to pay therefore a price certain in money or its equivalent). ²

In such a definition, the sale contract does not transfer the ownership but rather incurs an obligations upon the seller to transfer the ownership, which transfer of ownership, according to this definition, must be coupled with the delivery of the thing to the buyer, while this definition did not refer to the financial rights as a subject matter of the sale contract. The most importance feature of he sale contract in this definition is the obligation of the buyer to pay the agreed upon price or the equivalent thereof, whether the same meant an equivalent in another currency or an equivalent by delivery of a property in the form of a commodity or right of a financial value in transaction. What leads us to this interpretation is the general nature of the text which should be taken as such unless there is an evidence of limitation either by provision or indication.

Due to the development of the technology and computer science, the sale contract has become more difficult. In a poll conducted in 2018 for sale

¹ Saadoun Al-Ameri, *ibid*, p. 11, Footnote No. (2).

² Art. 1458 : (By the contract of sale, one of the contracting parties obligates himself to transfer the ownership and to deliver a determinated thing, and the other to pay therefore a price certain in money or its equivalent). The civil code of the Philippines

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representatives, the sale contract faced several difficulties in the recent years due to the changes in technology and reaching in general to potential clients.¹ In the light of the contemporary variables, the sale contract is defined as (the general system of work required for developing, managing, enabling and executing the exchange of benefits of goods or services with a view to realize an equitable value.²

Some defines the sale contract from the point of view of management and economics as (part of the marketing).

Nowadays, many consider that (sale is a kind of mastering the art, to the contrary of the common belief, the systematic work in sale refers to a systemic process of recurrent and measurable milestones, through which a seller connects with his offer, product or service to a compensation allowing the buyer to economically achieve his goal).³

4-Approach of the Jordanian Law and Jurisprudence to Definition of the Sale Contract

The Jordanian Civil Code defined the sale contract when it replaced the Journal of Judicial Rulings in 1976⁴, as Jordan was governed, in terms of regulating all transactions, to the provisions of the Journal of Judicial Rulings

¹ Sales statistics you need to know about right now! [INFOGRAPHIC]. Sales speaker Marce Wayshak. Retrieved 20-7-2018. [https : www.marcewayshak.com/sales-statistics](https://www.marcewayshak.com/sales-statistics)

² American Society for Training and Development (ASTD). Sales competency project. Archived from the original on 21-9-2008. Retrieved 7-3-2017. [https ://web.archive.org/web/20080921095003/http](https://web.archive.org/web/20080921095003/http)

³ Greening, Jack (1993). Selling without confrontation. The Haworth press, Inc. p. 23

⁴ This law was enacted as a provisional law published in the Official Gazette Issue (2645) dated 01 /08 /1976 then it became a standing law under the Constitutional Declaration published on page (829) of the Official Gazette Issue (4106) dated 16 /03 /1996.

issued in 1286 AH, which implies that the former definition of the sale contract was based on the provisions of Article (105) of the Journal.

The current Jordanian Civil Code for the most part and as whole builds on the Islamic jurisprudence of all doctrines thereof, without failing to grasp what age requires as to dealing with and drawing up modern texts to keep up with the spirit, articles and concept of the law and be governed by the provisions thereof, and without having such texts give rise to any consequential effects deviating this law from the key source and Islamic jurisprudential nature thereof. ¹

The Definition of the sale contract in Article (465) was evidently influenced by the Islamic jurisprudence and the relevant Arab laws, such as the Egyptian and Iraqi civil codes. This definition however was subject to criticism and notes by those who assumed the task of explanation thereof and elaboration thereupon. We will address this topic in two themes, the first of which is devoted for clarifying the approach of the Jordanian Civil Code to defining the sale contract, while the second explores the opinions and notes of the interpreters of the Jordanian Civil Code relating to this definition.

4-1 Approach of the Jordanian Civil Code to Definition of the Sale Contract

The Jordanian Civil Code, in Article (465) defined the sale contract as : (transfer of the ownership of a property or a financial right in return for a consideration). The influence of the Islamic jurisprudence is noted in this definition and its historical sources, since the sale in the jurisprudence of the Islamic Sharia is based on transfer of ownership and taking possession; thus,

¹ Jordan Bar Association, Expository Notes to the Jordanian Civil Code, P. 1, Ed. 2, Al-Tawfiq Printing Press, Amman, Jordan, 1985, pp. 15 - 20.

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the transfer of ownership of the subject of sale is what meant by the sale contract and taking possession of the price serves as the means thereto. Article (343) of *Murshid Al Hairan Ila Maarefat Ahwal Al -Insan* Book defined the sale contract as follows: (Sale contract is the transfer by a person of the ownership of a property to another for a compensation estimated by mutual consent). Furthermore, some of those concerned in Islamic jurisprudence and its jurisprudence defined it as : (The transfer of a property for a compensation as permitted therein).¹ This definition was clearly influenced by Article (105) of the Journal which defined the sale as (Sale is the exchange of property for a property whether or not under a contract), which is the same definition adopted by the Iraqi Civil Code in Article (506) thereof.²

The Jordanian text further followed some of the features of the Egyptian text in Article (418), where the latter has referred to (the financial right), which was taken by the Jordanian legislator without thorough examination, while other laws have considered the same and avoided mentioning it as in Article (489) of the Civil Transaction Law of the United Arab Emirates.

It is of importance for us in this occasion to indicate that this definition was overall and unrestricted as it covers the general sale, bartering, exchange and future sale, which emphasizes that the Jordanian legislator has followed the tracks of the Islamic jurisprudence which clearly manifested the same.³

¹ See in this respect : Al Hassan Bin Al Mutahhar, AKA Scholar Al Helli, *Tazkeratul Fuqahaa*, Contract of Sale, p. 3, as referred thereto by out Professor Saadoun Al-Ameri, *ibid*, p. 12; Al-Sayyed Sabeq, *ibid*, p. 89.

² Jordan Bar Association, *Expository Notes to the Jordanian Civil Code*, P. 1, Ed. 2, Al-Tawfiq Printing Press, Amman, Jordan, 1985, p. 495.

³ See : Ibn Rushd the Grandson, *ibid*, p. 102, to which was have already referred.

The provisions of the Journal of Judicial Rulings clarifies to the us the purport of this definition, as Article (120) of the Journal provides for that : (Sale, considering that the subject of sale is divided into four parts, the first of which is the sale of a property for a price, and since this is the most common part, it is called as sale; the second part is the exchange, the third part is the bartering and the fourth part is Bai' Assalam, i.e. future sale). Article (121) of the Journal defined the exchange as (sale of a cash for a cash), while Article (122) of the Journal defined the bartering sale as (sale of an object for an object, i.e. exchange of a property for a property without using the two moneys).¹ As for the future sale, it is (a sale of deferred commodity for an advance), since (the sale of a deferred commodity for an advance in future sale is valid under the conditions thereof).²

The Jordanian legislator continued to follow the steps of the Islamic jurisprudence and use the terms thereof not only in the sale contract, but also in other contracts, where these terms were clear in its definition of the bartering contract which the Jordanian legislator covered under the broad sense of the sale contract in Article (465), but then it later designated Articles (552 - 556) which were put under the title of sale and as a paragraph therein, rather than covering the same under a separate chapter as it did with respect to other nominate contract. Thus, Article (552) of the Jordanian Civil Code provides for that (Bartering is the exchange of a property or a financial right for a compensation other than moneys)³, which was repeated by the

¹ Moneys is the plural for money, which means gold and silver, Article 130 of the Journal.

² Article 123 of the Journal; Article 352 of *Murshid Al Hairan*.

³ The Egyptian legislator designated a separate chapter for bartering in Articles (482 - 485).

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Jordanian legislator in Article (557) of the Jordanian Civil Code which the legislator drawn up using the same terms of the sale contract by providing for that (donation is the transfer of ownership of a property or another financial right while the owner is alive for no consideration.)

Moreover, the Jordanian Civil Code mentioned the term (general sale) in several places such as, for example, in Article (499) of the Jordanian Civil Code which provides for that : (General sale requires the delivery of the subject of sale at the place of existence thereof at the time of concluding the contract), as well as in Article (566) of the Jordanian Civil Code which states (The provisions of general sale shall apply to bartering as to matters not inconsistent with the nature thereof).

Although the Egyptian and Iraqi Civil Codes do not contain special provisions for the future sale for absence of the need thereto since they both permitted the sale of future objects if they were sufficiently designated which prevents gross unawareness and jeopardy, as manifested in Articles (131 / Clause 1 of the Egyptian Civil Code, 514 / Clause 2 of the Iraqi Civil Code), the Jordanian legislator has designated separate articles, (Articles 532 - 538) for this type of sale. We are in favor of the Jordanian legislator in its distinction between the sale of future objects and conditions thereof and the future sale (Bai' Assalam) in Islamic jurisprudence and conditions thereof; since the future sale (Bai' Assalam) is the sale of a non - existing thing for a price immediately collected, provided that such an object is to be created and delivered to the buyer within a set term, and this what is known as the sale by bankrupts as jurists call it. The subject of sale in this sale is called as the delivered item, the seller is called as the recipient, the price is called as the capital, and the buyer is called as the owner of the future item or the giving party. In future sale (Bai' Assalam), the kind, type and nature of the subject

of sale must be known, where a term must be designated for delivery thereof, and a similar object must be available in the markets at the time of contracting to the time of scheduled delivery, where the existence thereof in markets must not cease between both times. Moreover, in future sale (Bai' Assalam) no different countable items may be contracted on, such as animals and jewelries.¹

4-2 Opinions and Notes of the Interpreters of the Jordanian Civil Code Relating to the Definition of the Sale Contract

The interpreters of the Jordanian Civil Code unanimously agree on that the definition of the sale contract set forth in Article (465) of the Jordanian Civil Code was transcribed from several sources, one of which is the Islamic jurisprudence which is the second source for this law, and the other was Article (418) of the Egyptian Civil Code, in addition to being influenced by the Iraqi Civil Code as both codes are related to the historical source thereof (Islamic jurisprudence).

This definition was subject to criticism and various evaluation, as it is distinguished from the Egyptian definition by absence of reference to the obligation of transfer of the ownership. In our opinion, this difference can be held in favor of this definition rather than against it, since the term (transfer of ownership) is deemed as sufficient and adequate for the purposes of the sale contract.²

Furthermore, the Jordanian law, and as part of its adoption of the Islamic jurisprudence, does not impose an obligation upon the seller to transfer the

¹ See : Al-Sanhuri, *ibid*, p. 223; Al-Ameri, *ibid*, p. 71; Al-Sayyed Sabeq, *ibid*, p. 120.

² Transfer (n.) is the nomen verbi of transfer (v.); promised to transfer the ownership :- conveying the ownership to (someone), www.almaany.com, accessed on 10 /12 /2018.

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ownership, but rather it transfers the ownership at the time of the contract if the subject of sale was an item that can be designated by itself or if the sale was in a lump. The ownership of a thing identified by its type rather than by itself cannot be transferred under the contract itself where the same must be first designated in accordance with the law.¹ Additionally, lack of a reference in the definition to the parties to the contract (the seller and the buyer) is clarified by two things, one of which is the other legal texts that clarify the transfer of the ownership to the buyer as set forth in Articles (485, 486, 487), and that the ownership may be transferred to a person other than the buyer when the contract contains a stipulation in favor of a third party.² The most controversial point with respect to the definition of the sale contract in the Jordanian Civil Code is the nature of the consideration, i.e. the price or compensation to be performed by the buyer to the seller to procure the agreed upon subject of sale, as the Jordanian legislator in Article (465) of the Jordanian Civil Code used the phrase (in return for a consideration). Some of the interpreters are in favor of this definition in its broad sense, and consider it as the most comprehensive definition adopted by laws of Latin origins, including some of the Arab laws which limit the sale contract to the transfer of ownership of the property for a monetary price. According to this opinion, leaving the (consideration) open in this way would include the monetary price (general sale), bartering, exchange and future sale. There is however another opinion that tends to see that the sale contract set out in Article (465) of the Jordanian Civil Code means the general sale, i.e. the

¹ Articles 485, 486, 1146 and 1146 of the Jordanian Civil Code.

² Ali Hadi Al-Ubaidi, *Nominate Contracts, Sale and Lease*, Ed. 5, Al-Thaqafa Publication and Distribution, Amman, 2011, p. 16.

case in which the seller assigns the subject of sale in return for a monetary price. The proponents of this approach justify their stance by holding that the Jordanian legislator has defined the bartering and future sale and drawn up necessary provisions thereon, and further has determined to apply the provisions of the general sale to bartering in a manner that is non inconsistent with the nature thereof in Article (556).¹ Some add to this trend, as they believe to be a proof on the validity thereof, that the reality and customary practice is that the compensation for sale is either money or an object valued in money, which is the applicable practice in our today's world with respect to the compensation for the sold property, where the reality serves instead of words, i.e. statement, since if it was not the case then it cannot be called as a sale in the legal sense.²

The difference and multitude of these opinions are attributed to the nature of the legal text in Article (465) of the Jordanian Civil Code, as well as to the multiple sources, the matter that renders it subject to criticism, analysis and evaluation, that require reconsideration as we would propose.

If the foregoing applies to the consensual contracts, which are deemed as the origin of contracting, there are contracts in which the form prescribed by law must be fulfilled, one of the most important of which is the sale contract. Article (485) of the Jordanian Civil Code provides for that : (The ownership of the subject of sale shall be transferred to the buyer at concluding the sale

¹ Note these opinions in the work of : Abbas Al-Abboudi, Exposition of the Provisions of Nominate Contracts in the Civil Code (Sale and Lease), Ed. 2, Al-Thaqafa Publication and Distribution, Amman, 2011, p. 29.

² Adam Wahib Al-Naddawi, Exposition of the Civil Code, Nominate Contracts (Sale and Lease), Ed. 1, Al-Thaqafa Publication and Distribution, Amman, 1999, p. 19.

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unless otherwise required by law or agreed upon).¹ Furthermore, Article (1146) of the Jordanian Civil Code provides for that : (The ownership and other moral rights to the subject of transfer and property shall be transferred by contract whenever it satisfied the elements and conditions thereof in accordance with the provisions of the law), while Article (1148) of the Jordanian Civil Code which stipulates that : (Neither the ownership nor other moral rights shall be transferred between the contracting parties and in relating to third parties but by registration in accordance with the provisions of the laws related thereto).

The provisions of Article (16 /3) of the Law on Land and Water Settlement² can be viewed as a good example on the foregoing in relation to the sale contract and definition thereof which article provides for that : (In places in which a settlement has been made, the sale, bartering, or sharing of the land or water shall not be deemed valid but if the transaction was made at the Department of Registration).³

¹ The law may stipulate for a certain form for the sale contract which must be satisfied since such a form is considered as a matter of public order. However, the same does not prevent the contract to remain consensual provided that to be made in writing whether such a condition was made to establish the contract or as a requirement for conclusion thereof. In case that the subject of sale is a future item not made yet, the ownership thereof shall not be transfer to the buyer at concluding the contract since it does not yet exist. For more: Saadoun Al-Ameri, ibid, pp. 16, 100.

² No. (40) of 1952, as amended, published in the Official Gazette Issue 1113 dated 16 /06 /1952.

³ As opposed to the text of Article (508) of the Iraqi Civil Code which states : (The sale of a real property shall not be concluded but if it was registered at the competent department and fulfilled the form provided for by law),

We believe that what is meant by sale as provided for in Article (16 /3) is the general sale in which the consideration is a monetary price, because this type of sale is one of the most common sales in our time. As for the bartering set forth in the article, we believe it means (bartering a property for a property)¹, i.e. bartering a land for a land based on the phrase (sale, bartering and sharing of the land), not to mention the title of the law itself which indicates that it deals with the settlement of lands and waters.²

The Jordanian judiciary followed the same approach of the Jordanian legislator in terms of taking the term (general sale) to mean the term (sale) in laws which stipulated for a monetary price as a consideration in the sale contract, where a ruling of the Court of Cassation stated that (the price in the general sale is immediately payable unless settling the same was deferred or made in installment for a defined term by agreement or customary practice)³

¹ Article (105) of the Journal.

² Noting that the existence of a building erected on the land does not prevent the application of the provisions of Article (16 / 3). For more details, see : Mohammed Yousef Al-Zu'bi, Nominate Contracts, Exposition of the Sale Contract in the Jordanian Law, Ed. 1, Amman, 1993, p. 279.

³ Court of Cassation, Ruling in equity No. 1986 /846 dated 13 /12 /1986, published in the Journal of the Jordan Bar Association, 1989, p. 1745. We could not find rulings by the Jordanian Court of Cassation related to the subject of our research other than this one.

4- Conclusion

Addressing a very specific point such as the sale contract is not an easy task due to the narrow space in which the researcher can move. Such limitedness however, in spite of the criticality that it entails, creates in the researcher the motive for further research, investigation and use of the slightest and smallest piece of information to accomplish the research and complete the shape and plan thereof. Jurists principally disagree on the existence of a definition to this or that matter in the law, since the definition cannot at best be overall and all inclusive, because it is necessarily incomplete and subject to criticism and assessment. The definition of the sale contract however became an accepted fact as it exists in all laws which we have reviewed and some of which we used in this paper. It also exists in all Muslim jurists of different doctrines, and even within the same doctrine.

The importance of the definition of the sale contracts is manifested by that the definition is considered as a smaller picture of this contract and a key to the subsequent legal terms which should be consistent therewith and not contradictory to the content thereof, whether in the same civil code or in other laws that may one way or another deal with the sale contract.

In the light of the foregoing, this paper reached to a set of findings and recommendations :

5-1 Findings :

- (1) The Muslim jurists in all doctrines, and even in the same doctrine, disagreed on the definition of the sale contract, which disagreement was deep to reach the elements of the sale contract such as the mutual consent which some stipulated in their definition while others did not

as we clarified in the researcher; thus, Article (105) of the Journal was explained as follows : (the wording did not contain mutual consent to address the simulated sale since it is concluded even if not binding), and even some of the interpreters of the Journal did not limit the same as to (be of a specific benefit).¹

- (2) All laws differ in their definition of the sale contract except for some Arab laws originating from the same source such as the civil laws in Egypt, Syria, Libya and Algeria. As to other Arab laws, they differ in their definition even those laws influenced by each other or which are in neighboring geographic regions, such as the definition set out in the Kuwaiti Civil Code which differs from that set out in the Law on Civil Transactions of the United Arab Emirates.
- (3) The difference in definition also reached the laws which adopted the same source, as in the civil codes of Iraq and Jordan whose came from the same source (Islamic jurisprudence), but varied in developing a definition to the sale contract.
- (4) Reliance on a more than source to draw up a definition or to formulate a legal article would certainly lead to having the legislator fall in contradiction and error, especially if he fails to note the nature of the law from which he copied and the philosophy of the legislator that he attempted to rely on, which we have actually noticed in the details of this papers.
- (5) It is especially necessary to harmonize between the definition that comes in top of the subject and the subsequent legal articles, because any difference between them would lead to more interpretation and

¹ Saleem Rustum Baz, *ibid*, p. 5.

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construction that would overburden the jurist at interpretation and encumber the judge in application thereof.

5-2 Recommendations :

- (1) We wish for the legislator to be attentive at copying the definition or another wording from another law, because every law has its own historical and material sources, in addition to the circumstances that surrounded the promulgation thereof. Otherwise, the legislator would fell in the trap of contradiction and criticism, which actually happened with the Egyptian Civil Code which transcribed the definition thereof from the old Egyptian law and the Polish Civil Code as it referred to the obligation of the seller to transfer the ownership to the contrary of the basic rule which transfers the ownership of the object to the buyer at concluding the sale contract. It also used the phrase (the ownership of an object or another financial right) although it entails the same meaning, the matter that led other laws to deal with this defect by using the word (property) only without referring to the financial right, as happened with Article (489) of the Law on Civil Transactions of the United Arab Emirates.
- (2) If copying in such a form would inherit such a defect, copying from a copied is even more painful, as actually happened with Article (465) of the Jordanian Civil Code which combined the Islamic jurisprudence and the Egyptian Civil Code, and thus it contained the phrase (transfer the ownership of a property) which came from the Islamic jurisprudence, then copied the phrase (the financial right) from Article (418) of the Egyptian Civil Code, while there is no difference between the property and the financial right as established by Article (53) of the Jordanian Civil Code which provides for that (Property is any object or

right of a material value in transaction). Other laws, such in Article (454) of the Kuwaiti Civil Code, were similarly entrapped.

- (3) Consistency and harmony between the definition and the following or related articles even if they appear in other places is a matter of great importance, as we have observed herein. The basic rule or origin in the sale contract is the transfer of ownership in the same contract which principle is derived from the Islamic jurisprudence with certain exceptions to the rules which do not exceed the rule, as confirmed in Article (485) of the Jordanian Civil Code and Article (531) of the Iraqi Civil Code. The legislator however turned this rule into an exception and turned the exception into a rule as a result of the unsuccessful mixing between various sources of law, as clearly manifested in Article (247) of the Iraqi Civil Code and Article (1148) of the Jordanian Civil Code, both of which are of western origins.

- (4) As a result of our study of and comparison between several definitions given to the sale contract, along with observing the effects thereof, taking into consideration the requirements of the present time and what is consistent with the nature of dealing nowadays, in which the sale for a monetary price is mostly common at all levels, we propose the following definition : (Sale contract is the transfer by the seller of the ownership of a property permitted to be dealt in to the buyer for an agreed upon monetary price or an equivalent thereto).

Such a definition would remove all reasons of weakness and ambiguity in the definition of the sale contract, as it clearly refers to the parties to the contract and to transfer of ownership by using the eloquent term (transfer of ownership) in its true meaning as we noted in the research. It does clarify the consideration in the contract, i.e. the monetary price

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with which people usually transact in our country and in other country. If the origin of such a monetary price is the national currency, the contracting parties may for whatever reason agree upon paying an equivalent to this monetary price in the national currency, if the consideration therein was written in a foreign currency and vice versa as permitted by the applicable laws of the country.

- (5) By such a definition, a set of other sales and contracts, such as bartering, exchange and future sale, will be reconsidered by regulating the same under separate provisions consistent with the nature thereof, as in the case of bartering and exchange, or by discarding some others such as the future sale (Bai' Assalam) which became rare nowadays and can be governed by the provisions permitting the sale of future objects, as some laws actually did such as the Egyptian and Iraqi Civil Codes, in spite that the latter is highly influenced by Islamic jurisprudence, and despite our understanding of the difference of conditions on sale of future objects in the modern meaning from the future sale (Bai' Assalam) according to the Islamic concept, yet the rarity or nonexistence of transaction in the latter sale requires such a change.

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