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## Caveat Emptor's Current Role in Louisiana and Islamic Law: Worlds Apart yet Surprisingly Close

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# CAVEAT EMPTOR’S CURRENT ROLE IN LOUISIANA AND ISLAMIC LAW: WORLDS APART YET SURPRISINGLY CLOSE

Andrea Borroni\* & Charles Tabor†

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## ABSTRACT

Caveat emptor is one of the most well known maxims of the legal world. Interpreters from different countries have their own understanding of this doctrine. At first glance, Louisiana law and Islamic law have nothing in common. Louisiana, at least superficially, adheres to the great civil law tradition that the legislature is supreme. Its primary sources of law are legislation and custom. Islamic law is divine in origin, a direct manifestation

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of Allah's will. Its primary sources of law are the Koran and the wisdom of the Prophet Muhammad. Yet, in practice, these two systems have developed surprisingly similar approaches toward duties of disclosure and the doctrine of *caveat emptor*. The similarities between the above mentioned legal systems' approach to *caveat emptor* and duties of disclosure are uncanny. Regardless of whether the issue is dealt under the heading of mistake, misrepresentation, or error and fraud, there is a commonality of approach that cannot be missed. Despite this obvious diversity of methods, traditions and styles, it is possible to notice an element, or better, a tendency common to the examined regulations, that may be found more in operational rules than in principle statements.

#### I. INTRODUCTION

Looks can be deceiving. At first glance, Louisiana law and Islamic law have nothing in common. Louisiana, at least superficially, adheres to the great civil law tradition that the legislature is supreme. Its primary sources of law are legislation and custom. Islamic law is divine in origin, a direct manifestation of Allah's will. Its primary sources of law are the Koran and the wisdom of the Prophet Muhammad. Yet, in practice, these two systems have developed surprisingly similar approaches toward duties of disclosure and the doctrine of *caveat emptor*.

*Caveat emptor* means literally "let the buyer beware." Although stated in the language of the great Roman Empire, the phrase *caveat emptor* is not a product of Roman Law.<sup>1</sup> In fact, it

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1. It should be noted, however, that Roman law originally contained a rule similar to *caveat emptor*. See A. ARTHUR SCHILLER, *ROMAN LAW: MECHANISMS OF DEVELOPMENT* 22 (Mouton 1978). Yet the Roman law eventually moved towards a warranty based system to protect purchasers. In contracts of purchase and sale (*emptio venditio*) the seller (*venditor*) is in breach if the thing sold (*res vendita*) is defective. The edict of the *aediles curules*, the Roman officials or magistrates charged with the supervision of public markets, introduced a warranty against latent defects with a view to protecting the interests of the purchaser (*emptor*) who could not be expected to be aware of such defects. In terms of this *aedilitian* edict, the seller was liable for any defect that wholly or substantially impaired the utility or effectiveness of the thing sold. The purchaser could claim full restitution by means of the *actio redhibitoria* or a diminution of the purchase price by means of the *actio quanti*

was the common law of England that gave birth to this often used, yet widely criticized, Latin phrase. First appearing in legal use around the end of the 16<sup>th</sup> century,<sup>2</sup> the maxim eventually came to

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*minoris*. In later Roman law, the *actio empti* (the action arising from the purchase) could be used instead of the *aedilician* actions.

Specifically, during the Roman Republic, these magistrates in their edicts, made rules about the sale of slaves or beasts of burden in the public markets that required the seller to disclose any illness or defect (be it a physical defect or a character defect). Also, in regard to slaves, the seller had to disclose if the slave was a wanderer, fugitive, or suspected of some crime or delict for which his master might be liable.

The *actio redhibitoria* (to be brought within six months of the contract of sale) foresaw the *restitutio in integrum*, returning the object to the seller and receiving back the price. While the *actio quanti minoris* (to be brought within one year of the contract of sale) sought a decrease in the purchase price, retaining the object of sale but obtaining the return of part of the price to reflect the decrease in value of the object. The seller was liable whether or not he knew of the defect and also if he had made claims that were not true (i.e. that the object of the sale was free from particular defects or possessed particular qualities).

Under Justinian, these actions were available generally for all objects of sale, whether or not the item was sold in a public market. Moreover, the *actio empti* could be used to achieve the same result of these actions, making them superfluous though they still existed.

The first application of the *aedilician* remedies is based upon the general principle that the seller is under a duty to disclose, and assume liability for, all latent defects which make the thing sold unfit for its intended purpose. F. DE ZULUETA, THE ROMAN LAW OF SALE 50 (1957). For an account of the evolution and operation of this edict in Roman Law and its role in modern Roman Dutch Law, see A.M. Honoré, *The History of the Aedilician Actions from Roman to Roman Dutch Law*, in D. DAUBE, STUDIES IN THE ROMAN LAW OF SALE 132-159 (1959). A full discussion of Roman law is, however, beyond the scope of this article.

2. W.H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L. J. 1133 (1931); A.M. Musy, *Disclosure of Information in the Pre-Contractual Bargaining: A Comparative Analysis*, 1 CARDOZO ELECTRONIC LAW BULLETIN 16, 4 (1995), <http://www.jus.unitn.it/cardoza/Review/Contract/Musy-1995/musy1.htm> (last visited September 20, 2009); A. PROTON, FROM CAVEAT EMPTOR TO CAVEAT VENDITOR IN SALES OF DEFECTIVE HOMES: TOWARD A CONSENSUS BETWEEN CIVILIAN AND COMMON LAW TRADITIONS IN THE UNITED STATES? 13, 15 (1992). *Caveat emptor* first appeared in print in a discussion involving horse trading. Hamilton, *supra* at 1164. It was written that, "If [the horse] be tame enough and have been rydden upon, then *caveat emptor*," and referring to situations where a horse was sold with no warranty, then such a sale was said to be "at the other's peril, for his eyes and his taste ought to be his judges." *Id.* Apparently, around the same time, a Lancaster ordinance, while not

dominate English policy on the seller's duty of disclosure. That dominance can be said to have begun in the case of *Chandler v. Lopus* in 1603.<sup>3</sup>

In *Chandler*, a goldsmith sold a purported bezoar stone<sup>4</sup> to an uninformed buyer.<sup>5</sup> The buyer later discovered that the stone was not, in fact, a real bezoar.<sup>6</sup> The purchaser brought an action in trespass in the case<sup>7</sup> to recover the value he had paid for the stone.<sup>8</sup> The court held that "the bare affirmation that it was a bezar-stone[sic], without warranting it to be so, is no cause of action."<sup>9</sup> The court further stated that it was immaterial that the goldsmith knew that the stone was not a bezoar because so long as he does not warrant such a quality, a buyer does not have cause of action.<sup>10</sup>

*Chandler* is an example of *caveat emptor* in its purest form. A seller has no duty to disclose defects in the item he is selling (even if he knows of the defect); while the buyer has a right to inspect the item he is purchasing to ensure it is free from any defect. In effect, it is a policy choice on the burden of inspection. The buyer has the burden of making sure he is getting what he wants. If the buyer fails to fully inform himself about the item he is purchasing, it is his own fault if he gets something other than what he intended. While *caveat emptor* once reigned supreme in the Western legal

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employing the word *caveat emptor*, dealt with malt purchases by stating, "let their eye be their champion." *Id.*

3. Hamilton, *supra* note 2, at 1166. This, however, was not the first case to deal with the issue of *caveat emptor*. In fact, two years earlier it was argued in *Moore v. Hussey* that a law quoted incorrectly as "*Caveat emptor, qui ignorari non debuit quod alienum jus emit*" applied in a case dealing with the law of estates and the value of a marriage; the judge dismissed the claim as irrelevant. *Id.* at 1165.

4. A bezoar stone is any "various calculi found chiefly in the gastro-intestinal organs and formerly believed to possess magical properties." MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com> (last visited September 20, 2009).

5. *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (1603).

6. *Id.*

7. "At common law, an action to recover damages that are not the immediate result of a wrongful act but rather a later consequence. This action was the precursor to a variety of modern-day tort claims, including negligence, nuisance, and business torts." BLACK'S LAW DICTIONARY 1542 (8th ed. 2004).

8. *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (1603).

9. *Id.*

10. *Id.*

tradition, changing notions of fairness have softened its effect. Modern legal institutions, which include items such as implied warranties and pre-contractual duties of disclosure, have shifted much of the buyer's duty back onto the seller. Thus, *caveat emptor* is largely an echo of an age past.

The purpose of this article is two-fold. Firstly, it seeks to give an accurate depiction of the approach toward pre-contractual duties of disclosure in two legal systems, the Islamic law and Louisiana Law. Secondly, it attempts to juxtapose these two systems so as to highlight their similarities and differences. Overall, the authors hope to use this comparison to show that the rule of law has evolved in surprisingly similar ways through two drastically different legal systems.

## II. SOURCES AND APPLICATION OF LAW

Islamic law is generally called *Shari'a*, which refers to the set of divinely revealed rules that Muslims must comply with to perform their religious duties. The *Shari'a* aims to fulfil the spiritual and material welfare of the 600 million humans who follow Islam, nearly a sixth of entire population of the world.<sup>11</sup> At the same time, the *Shari'a* seeks to regulate the entire lives of those under its authority.

The crucial difference between the law in Islam and the law in the countries that follow the western legal tradition is their source of validity. In the western tradition, the legislator or judge is supreme, depending on whether a particular country belongs to the civil or common law tradition. For instance, in Louisiana, as in many systems belonging to the Western tradition, the primary sources of law are legislation and custom.<sup>12</sup> Legislation is the sole

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11. The academic publications regarding Islamic law are numerous. To quote the ones with a comparative approach see R. DAVID & C. JAUFFRET-SPINOSI, I GRANDI SISTEMI GIURIDICI CONTEMPORANEI (R. Sacco ed., 5th ed., 2004) and the original French text in R. DAVID & C. JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS (10th ed. 1992); and A. GAMBARO & R. SACCO, SISTEMI GIURIDICI COMPARATI (2d ed. 2002). Regarding the specific topic of the law of obligation see D. SANTILLANA, I-II ISTITUZIONI DI DIRITTO MUSULMANO MALICHTA CON RIGUARDO ANCHE AL SISTEMA SCIAFITTA (1926-1938).

12. LA. CIV. CODE art. 1 (2009). Louisiana is considered a mixed jurisdiction, made up of a combination of both civil and common law.

expression of legislator's will and custom, although a primary source of law, cannot trump a legislative mandate.<sup>13</sup> Islamic law, however, is the direct manifestation of the will of the Almighty; it is not given by a human lawmaker. Hence, Islamic law is immutable and because God is the source of authority and the sole sovereign lawgiver, all human legislation must conform to the divine will.<sup>14</sup>

The primary written source of Islamic law is the Koran, Islam's holiest scripture, which regulates both legal and non-legal issues. The second written source of Islamic law is the *Sunna*, a compilation of the conversations,<sup>15</sup> actions, affirmations, aphorisms, characteristics, and deeds attributed to the Prophet Muhammad.<sup>16</sup> Beyond these sources, the *Shari'a* as a discipline was formed over the centuries through the systematic scholarship developed by jurists of competing schools of law. In this sense, *Sharia* is a jurist's law just as the common law is a judge's law and the civil law is the law of a legislator.<sup>17</sup>

Islamic law is applied through a method very similar to the civil law. Through the science of *fiqh*, jurists determine a rule of law by first consulting the sacred sources and then by applying their own reasoning.<sup>18</sup> To prevent the risk of having a huge

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However, only in the absence of legislation and custom can a judge step in to make law, and in that instance the legislature requires him to rule based on the equitable notions of justice, reason, and prevailing usages. *See id.* at art. 4.

13. *See id.* at arts. 2, 3.

14. F. Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565 (2006).

15. The conversations are also known as the *hadith*.

16. The elements of the *Sunna* were reported after Muhammad's death by his companions and collected by scholars over the centuries. The process of *hadith* compiling for the Sunnis is restricted to the work of six main compilers: Bukhari (d. 256/870), Muslim (d. 251/865), Ibn Majjah (d. 273/886), Abu Dawud (d. 274/888), Tirmidhi (d. 279/892) and Nasa'i (d. 302/915). Kutty, *supra* note 14, at 585.

17. *See* U. MATTEI & P. G. MONATERI, INTRODUZIONE BREVE AL DIRITTO COMPARATO (1997).

18. *Fiqh* is case law and its products are the result of the jurist's intellectual construct. With English common law it shares the inductive method by adducing a number of examples out of which some more general principles can be drawn. It does not posit, as in the civil law tradition, a set of principles from which application derives. But *fiqh* is different from both in that it is eminently casuistic, whilst these cases are not necessarily based on precedents in real life.

number of opinions, a perpetual issue in common-law systems, As-Safi, a famous jurist,<sup>19</sup> created the doctrine of the four roots of Islamic law to give jurists a fix and common method of finding law.<sup>20</sup> The first root is, of course, the Qu'ran the second is the *Sunnah*; the third is the *Ijma* (the consensus reached by the Islamic community); and the fourth is the *qiyas* (analogy).<sup>21</sup> The four roots are widely accepted in the Islamic community and have suffered only slight changes through history. One such change has practical relevance: a proposition can be regarded as a rule of law if at any time legal scholars agreed on the issue (something like the Roman idea of the *communis opinio prudentium*).<sup>22</sup>

The Islamic tradition affirms that the Holy Law is not given to man ready-made, to be passively received and applied. Rather, it is to be actively constructed on the basis of those sacred texts, which are its acknowledged sources. The bulk of *Shari'a* is based on *al ijtihad*, the science of interpretation and rule-making based on the principle that if the *sunnah* and *Qur'an* are silent on an issue, local custom and scholarly opinion may be used as long as they are consistent with the *Qur'an* and the *sunnah*. It means, therefore, that it is permissible and possible to supplement religious-based law with customary law and interpretation.<sup>23</sup> The

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I. GOLDZIHNER, INTRODUCTION OF ISLAMIC THEOLOGY AND LAW 36 (1981). A.G. Muslim, *Islamic Laws in Historical Perspective: An Investigation into Problems and Principles in the Field of Islamization*, 31 ISLAMIC Q. 69 (1987). THE OXFORD DICTIONARY OF ISLAM 288 ( J.L. Esposito ed., 2003). *Fiqh* is "human efforts to codify Islamic norms in practical terms" and such "human generated legislation is considered fallible and open to revision."

19. As-Safi died in 820. See generally F. CASTRO, DIRITTO MUSULMANO (2006).

20. K. ZWEIGERT & H. KÖTZ, I INTRODUZIONE AL DIRITTO COMPARATO 378 (Barbara Pozzo trans., 1992) and the original German text in K. ZWEIGERT & H. KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS (2d ed. 1984).

21. A. Hasan, *The Definition of Qiyas in Islamic Jurisprudence*, 19 ISLAMIC STUDIES 1, 22 (1980); see also J. Makdisi, *Legal Logic and Equity in Islamic Law*, 33 AM. J. COMP. L. 63 (1985); W.B. Hallaq, *Legal Reasoning in Islamic Law and the Common Law: Logic and Method*, 34 CLEV. ST. L. REV. 79 (1985). See generally W.B. Hallaq, *Non-Analogical Arguments in Sunni Juridical Qiyas*, 36 ARABICA 286 (1989).

22. ZWEIGERT & KOTZ, *supra* note 20, at 378.

23. According to Bernard Weiss:

The Holy Law is the totality of rules which God has laid down for the



authority of the jurist is derived from the authority of God, but there is no authority in the jurist himself.<sup>24</sup>

*Shari'a* does not expound general principles in Islamic law and follow them with their detailed application but rather consists of a succession of separate issues and topics because it was recorded "exactly as it had grown up."<sup>25</sup>

In a certain sense, like Common law, Islamic law is not written law. "In the writings of Muslim jurists, the rules of law are rarely set forth directly and in abstract terms the way they are in a code elaborated in the civil law tradition or in a statute enacted in a common law country."<sup>26</sup> The rules of Islamic law are more often expounded upon in connection with specific cases, and for the deduction of a generally applicable rule to be expressed in abstract terms would call for a more or less full survey of the existing case law.<sup>27</sup> Indeed, it is when there is no appropriate legal authority or the texts are not clear on an issue, the Muslim judge is then authorized to apply an accepted principle or an assumption that in his opinion would fit best the issue at hand: *Qyas*.<sup>28</sup>

governing of Man's behaviour; it is the aggregate of *ahkam shai'ya*. Though ordained by God, few of these rules have been precisely spelled out for man's convenience; rather, man has the duty to derive them from their sources. In the standard Islamic metaphor, the rules themselves are "branches" (*furu'*) or "fruit" (*thamara*), which grow out of "roots" (*usul*), that is, from the sources. Only the roots are given; the branches or fruit are not - they must be made to appear; and for this to happen human involvement - we may call it, in keeping with the above metaphor, human husbandry - is required.

B. Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM J. COMP. L. 199, 201 (1978). The five main schools of thought are the *Hanafi*, *Maliki*, *Shafi'i*, *Hanbali*, and *Ja'fari* schools of jurisprudence. *Id.*

24. For a discussion on how *Shari'a* is slow to change in some respects, see A. E. Mayer, *Islam and the State*, 12 CARDOZO. L. REV. 1015 (1991). and D.B. MACDONALD, DEVELOPMENT OF MUSLIM THEOLOGY, JURISPRUDENCE AND CONSTITUTIONAL THEORY (1913).

25. N.J. COULSON, A HISTORY OF ISLAMIC LAW 47 (1978).

26. G.M. Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 AM. J. COMP. L. 187, 189 (1978).

27. *Id.*

28. C. Moccia, *The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of the Forms,"* 13 FORDHAM INT'L L.J. 649, 652 (1989/1990); see also ABDU'R-RAHIM, I PRINCIPI DELLA GIURISPRUDENZA MUSULAMANA SECONDO LE SCUOLE HANIFITA, MALEKITA, SCIAFEITA E HANBALITA (Cimino trans., 1922).

Likewise, a Louisiana lawyer would determine a rule of law studying a similar list of sources, or roots. First, he would consult the Civil Code or a relevant revised statute. He would then analyze the case law interpreting the pertinent article or statute. Next, he would study scholarly opinions on the issue. Finally, he would use analogy to advocate for, or against, a particular decision. Thus, just as the Islamic jurist works his way from the Koran to the *gysas*, the Louisiana lawyer starts at the civil code and ends with an analogy, be it a case or a law.

### III. GOOD FAITH, CONTRACTS, AND A DUTY TO DISCLOSE - MAYBE

An Islamic based contract is somewhat different from what we know in the West.<sup>29</sup> Under *Shari'a* principles, a contract is divine in nature and there is a sacred duty to uphold one's agreements:

O you who believe fulfil any contracts [that you make] . . .  
Fulfil God's agreement once you have pledged to do so, and  
do not break any oaths once they have been sworn to. You  
have set God up as a Surety for yourselves.<sup>30</sup>

This idea is best stated by the Islamic maxim, "*Al Aqd Shari'at al muta'qqidin*," which essentially states, "The contract is the Shari'a or sacred law of the parties." This makes it clear that the contractual relationship is viewed strictly under the *Shari'a* and

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29. See generally N. Saleh, *The Law Governing Contracts in Arabia*, 38 INT'L & COMP. L.Q. 761 (1989); Describing the concept of a contract in Islamic society. The list of specifications in the *Qur'an* covering commerce is long: it includes contracts, the necessity of their certainty, the central importance of ethics, the strict requirements of honouring one's obligations, of putting them in writing, the importance of trade, in addition to the famous sentence in the second chapter explaining how trade has been allowed by God, but *riba* (interest, usury) forbidden. "Honour your contracts," v:1, xvii:34; "put your debts in writing," ii:282, "woe to the fraudsters," lxxxiii:1; "God has allowed commerce and prohibited *riba*," ii:275. C. Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMP. L. 81, 91 (2000).

30. QUR'AN 5:1; see also QUR'AN 16:91. See, THE HOLY QU'RAN: TRANSLATION AND COMMENTARY (A. Yusuf Ali trans., American Trust Publication 2d ed. 1977).

clearly would disapprove of the “efficient breach” theory.<sup>31</sup> Indeed, all contractual obligations<sup>32</sup> must be specifically performed, unless it would contravene the *Shari'a* or some legitimate public policy devised in conformity with the *Shari'a*.<sup>33</sup> This approach is manifested in contemporary legislation in much of the Muslim world.<sup>34</sup> The practical effect is that a contract is enforceable if it is not contrary to Islamic norms.<sup>35</sup>

Although it is not supported by an express sanction from God, Louisiana law, like any other legislation following the French model of the Code Napoléon, takes a very similar approach to the sanctity of contract. Louisiana Civil Code article 1983 provides that “[c]ontracts have the effect of law between the parties and may be dissolved only through the consent of the parties or on grounds provided by law.” Like Islamic law, Louisiana law allows a person to contract with another for any reason or ‘cause,’ unless that reason is unlawful because performing the contract would produce a result that is illegal or against public policy.<sup>36</sup> Thus, Louisiana takes an equally strict view toward contractual

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31. S.H. AMIN, COMMERCIAL LAW OF IRAN 64-65 (1986). (Explaining that the *Shari'a* views a breach of contract as a religious breach; thus, it is a very serious matter).

32. See generally J.N. Anderson & N.J. Coulson, *The Muslim Ruler and Contractual Obligations*, 33 N.Y.U. L. REV. 917, 923-28 (1958); S. Habachy, *Property, Right, and Contract in Muslim Law*, 62 COLUM. L. REV. 450, 458-72 (1962); S.E. RAYNER, THE THEORY OF CONTRACTS IN ISLAMIC LAW: A COMPARATIVE ANALYSIS WITH PARTICULAR REFERENCE TO THE MODERN LEGISLATION IN KUWAIT, BAHRAIN AND THE UNITED ARAB EMIRATES 91-100 (1991); F.E. VOGEL & S.L. HAYES III, ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN 67-68, 97-102 (1998); M. Zahraa, *Negotiating Contracts in Islamic and Middle Eastern Laws*, 13 ARAB. L.Q. 265, 274-77 (1998).

33. AMIN, *supra* note 31, at 64.

34. See e.g., Egyptian Code Civil art. 89 (1958). (“[A] contract is created, subject to any special formalities that may be required by law for its conclusion, from the moment that two persons have exchanged two concordant intentions.”). Similar provisions are contained in the legislation of other Middle Eastern nations. See N. Majeed, *Good Faith and Due Process: Lessons from the Shari'a*, 20 ARB. INT'L 97, 103-04 (2004).

35. For example, the position in Saudi Arabia is derived from the *Hanbali* jurist Ibn Taymiya, who wrote, “The rule in contracts and provisions is that anything is permitted which is valid and that only that which is forbidden or set aside by one of the text or the ‘*Qiyas*’ (reasoning by analogy) is forbidden.” Mallat, *supra* note 29.

36. LA. CIV. CODE arts. 1967-68 (2009).

relationships; the only practical difference being that Louisiana does not give contracts a sacred or religious effect.

#### A. Good Faith

The duty to act in good faith is the essence of Islamic contract law. But over and above good faith, there is extensive legal scholarship elaborating clear principles of Islamic contract law. In fact, commentators have highlighted the inherent flexibility in Islamic law that allows it to accept modern transactions. Indeed, “the principle of *pacta sunt servanda* . . . is recognized by all Muslim jurist-theologians.”<sup>37</sup> Clearly the emphasis on the notion of freedom of contract and the stress on good faith are in line with Western conceptions. At the same time, the sanctity of contracts<sup>38</sup>

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37. M. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 204 (1955).

38. Similar reverence for the ideal of sanctity of agreements (covenants), designed to provide a secure transactional framework, informs all schools of Islamic jurisprudence: In fact, under traditional Islamic (*sharia*) law, there is a much stronger presumption than in most legal systems for leaving the contractually formalized bargain undisturbed. This is in accordance with the Chapter (*sura*) 5 of the *Qur'an*, sometimes called the Chapter of Contracts (*Surat al-Uqud*), begins “with an appeal to fulfil, as sacred, all obligations, human and divine . . .”

In defining obligation, Ali wrote:

The Arabic word implies so many things that a whole chapter of Commentary can be written on it. First, there are the divine obligations that arise from our spiritual nature and our relation to Allah . . . But in our own human and material life we undertake mutual obligations express and implied. We make a promise; we enter into a commercial or social contract; we enter into a contract of marriage; we must faithfully fulfil all obligations in all these relationships. Our group or our State enters into a treaty; every individual in that group or State is bound to see that as far as lies in his power, such obligations are faithfully discharged.

THE HOLY QU'RAN, *supra* note 30, at 276 n.682.

This is particularly so, because a large number of transnational transactions (for example, oil and mineral concessions, production sharing projects, joint ventures, transfer of technology, construction and operation of public utilities as well as loan and other financing agreements), on which the economy of the Western world so vitally depends, have been the subject-matter of many international commercial disputes and arbitrations. These have in turn involved an interplay of the notions of fairness with the Islamic veneration of the stipulations voluntarily inserted by the parties, that is, *ufu bil uqud* (honor your contracts). See generally P.N. Kourides, *The Influence of Islamic Law on*

in Islamic law and the public policy regarding which contracts are void and unenforceable may produce results that differ from Louisiana.

Under the pure doctrine of *caveat emptor*, the buyer is afforded the opportunity to examine the goods to be purchased to ensure the goods are free from defects). As a result, the seller is not obliged to disclose the item's defects; hence, let the buyer beware. In Islamic law, the pre-contractual stage is known as *Musawama*, "talks or bargaining," and is based on the principle of good faith and fair dealings.<sup>39</sup> During this stage of letter exchanges and drafting of future contracts, Islamic law limits some freedoms of contract that are familiar in Louisiana.<sup>40</sup> For example, in Louisiana a party can freely withdraw from contractual negotiations until he accepts a binding agreement.<sup>41</sup> In contrast, Islamic law provides for compensation under certain circumstances when one party breaks off negotiations.<sup>42</sup> Additionally, Muslims under the Islamic law are less free to determine the terms of their agreements.<sup>43</sup> They are limited by such principles as *riba*,<sup>44</sup>

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*Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts*, 9 COLUM. J. TRANSNAT'L L. 384 (1970).

39. D. Elkarkouri, "Pre-Contractual Liability in Islamic Construction Contracts," INT. CONST. L. REV. 545-6 (1992).

40. See THE CONFERENCE ON COMPARATIVE LINKS BETWEEN ISLAMIC LAW AND THE COMMON LAW, 34 CLEV. ST. L. REV. 1 (1986); see also for a more complete reference C. Chehata, *Islamic Law*, in 2 INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW 138-142 (1976); and H. Afchar, *The Muslim Conception of Law*, in 2 INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW, 84-106 (1976).

41. This rule also prevails in most common law countries. See generally P.N. Kourides, *The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The formation and Binding force of contracts*, 2 COLUM. J. TRANS'L L. 384 (1970).

42. Elkarkouri, *supra* note 39, at 546.

43. S.E. RAYNER, *THE THEORY OF CONTRACTS IN ISLAMIC LAW: A COMPARATIVE ANALYSIS WITH PARTICULAR REFERENCE TO THE MODERN LEGISLATION IN KUWAITI, BAHRAIN, AND THE UNITED ARAB EMIRATES* 23 (1991).

44. *Riba* (lit. increase) any increase in a loan or sale transaction which accrues to the lender, seller or buyer, without the provision of an equivalent counter-value to the other party. *Riba* encompasses various types of illicit gain, of which banking interest is one example. THE OXFORD DICTIONARY OF ISLAM, *supra* note 18.

*gharar*<sup>45</sup> or any other *Sharia* restrictions.<sup>46</sup>

Like under Islamic law, good faith is considered the foundation of all obligations under Louisiana law, especially contractual obligations. For instance, Louisiana Civil Code article 1759 provides that “[g]ood faith shall govern the conduct of the obligor and the obligee in *whatever pertains to the obligation*.”<sup>47</sup> Article 1983 then places good faith at the basis of the contractual relationship as “[c]ontracts must be performed in good faith.” However, for good faith to apply, there must be at least a pre-existing obligation. As yet, there is no general obligation under Louisiana law to negotiate in good faith. As a result, Louisiana courts have been unwilling to use the good faith principle to impose a pre-contractual duty of disclosure. Thus, good faith has a much more limited role in Louisiana than in Islamic law, having effect only after a contract or obligation has come into existence.

#### *B. A Duty of Disclosure and a Common Idea of Defects*

Islamic law has both jurisprudential and codal duties of disclosure. In Islamic jurisprudence, the idea of disclosure is embodied in the *Khiyar* or option. The option literally allows a party, under certain circumstances, to unilaterally decide whether to rescind or uphold a contract.<sup>48</sup> Within the realm of disclosure

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45. *Gharar* is uncertainty in a contract of exchange as to the existence of the subject matter of the contract and deliverability, quantity, or quality of the subject matter. It also involves contractual ambiguity as to the consideration and the terms of the contract. Such ambiguity will render most contracts void. There are a number of *Hadith* that forbid trading in *gharar*, often giving specific examples of *gharhar* transactions (e.g., selling the birds in the sky or the fish in the water, the catch of the diver, an unborn calf in its mother's womb, the sperm and unfertilized eggs of camels, etc.). K.M. Kahn, *Juristic Classification of Islamic Law*, 6 HOU. J. INT'L L. 23, 23-25 (1983). Contrast this with the aleatory contracts in Louisiana, such as the sale of a hope: “Thus, a fisherman may sell a haul of his net before he throws it. In that case the buyer is entitled to whatever is caught in the net, according to the parties' expectations, and even if nothing is caught the sale is valid.” LA. CIV. CODE art. 2451 (2009).

46. It is very interesting to consider the parallel with another religion oriented legal system. See J.R. Wagner, *Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts*, 1 AM. J. LEGAL HIST. 25 (1982).

47. LA. CIV. CODE ANN. art. 1759 (2007) (emphasis added).

48. Center of Muslim-Jewish Engagement at University of Southern California, Vol. 3, Book 34, Num. 322, available at

duties, there are two types of options: the option for defect (*Khiyar al-ayb*) and the option of inspection (*Khiyar al'Ru'yyah*). These options are available to buyers in sales contracts, as well as in other commutative contracts and function as an implied warranty against defects.<sup>49</sup> The option of defect is “a right given to a prospective purchaser to revoke or to accomplish a contract because of a defect discovered in the subject matter.”<sup>50</sup> Or, as stated by an Islamic jurist, “A purchaser has a right of option on account of defects in the thing bought, of which he has become aware only after taking possession, but which existed previously.”<sup>51</sup> This option is established without stipulation. When a person purchases a good with a defect, no matter if it is trivial or flagrant,<sup>52</sup> he may retain the object at its full price or reject it, but

<http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/034.sbt.html> (last visited on September 20, 2009). Narrator Ibn 'Umar states:

Allah's Apostle said, “The seller and the buyer have the option of cancelling or confirming the deal unless they separate, or one of them says to the other, 'Choose (i.e. decide to cancel or confirm the bargain now).’ Perhaps he said, 'Or if it is an optional sale.’” Ibn Umar, Shuraih, Ash-Shabi, Tawus, Ata, and Ibn Abu Mulaika agree upon this judgment.

The Prophet said, “The buyer and the seller have the option to cancel or confirm the bargain before they separate from each other or if the sale is optional.” Nafi said, “Ibn 'Umar used to separate quickly from the seller if he had bought a thing which he liked.” *Id.* at n. 320.

AL MUWATTA, *supra* note 71, no. 31.38.79 at 272. “Yahya related to me from Malik from Nafi’ from ‘Abdullah ibn ‘Umar that the Messenger of Allah, may Allah bless him and grant him peace, said, “Both parties in a business transaction have the right of withdrawal as long as they have not separated, except in the transaction called *khiyar*.” Malik said, “There is no specified limit nor any matter which is applied in this case according to us.”

49. A.Q. ZUBAIR, PRINCIPLES OF ISLAMIC LAW OF CONTRACT 122 (1991).

50. *Id.* at 137.

51. M.M. Billah, *Caveat Emptor versus Khiyar Al-Aib, a Dichotomy*, 13 ARAB. L. Q. 278 (1998).

52. N.E. BAILLIE, THE MOOHUMUNDAN LAW OF SALE, ACCORDING TO THE HUNEEFEEA CODE: FROM THE FUTAWA ALUMGEREEREE, A DIGEST OF THE WHOLE LAW 99 (1975). Defines a flagrant defect the one that happens if two valuers agree that the defect lowered the value of the item purchased. “. . . On the other hand, when one of them insists that the thing is still worth what the other alleges to be its full value in a perfect state, though he maintains its present worth to be somewhat less, the defect is said to be slight or trivial.” From page 100 to 119 Baille refers of a list of defects in the slaves and animals similar to

he cannot retain it and seek for compensation for the defect.<sup>53</sup> A defect is any cause that lowers the value of the object, according to the custom of experienced merchants and the like.<sup>54</sup> Additionally, Islamic law gives a party the option of pleading defect regardless if the buyer was ignorant of the defect when he concluded the contract.<sup>55</sup> The general principle of the *Khiyar al-'aib* provides the exercise of option in a way that the buyer might uphold the contract or rescind it by giving the defective goods back to the seller without the right to seek any compensation.<sup>56</sup>

*Aib* means a defect or a fault impairing the value of a contract. Had it been known, the contract would not have been concluded. Therefore, the agreement is not valid and the deceived party has the right to rescind the contract. Any party can rescind the contract by a *Khiyar* without recourse to a court.

As a corollary, a seller is under an absolute duty to correctly and honestly disclose known latent defects, a duty which is based on the ban against providing erroneous information that causes material loss.<sup>57</sup> Indeed, in article 336 of the *Mejella*, which is a

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the list included in the Digest: it is noteworthy to stress how two so distant legal worlds (Islam and Latin) faced the same problems. This inquiry, even if fascinating, is too broad for the scope of this work.

53. *Id.* at 98.

54. *Id.* at 100.

55. *Id.* Considering the right of the buyer to recover for defects if those defects were present before the period of sale are, by consensus, valid causes for litigation and recovery. Scholars differed to those that appear during the period of sale and before the sale are finalized. *Malik* established that the buyer has three days to raise the presence of a defect, after which time the claim must be dropped; while in the case that the defect is of the type that does not appear except seasonally (or except over a long period of time) he allotted one year. An example of this would be the sale of an animal with Mange, the mange having been treated before the sales period but as it is known that without re-treatment it will reappear. The three day period was substantiated by a *hadith* (judged weak by the opposing opinion) and the period of one year was affirmed by precedent found in the custom of the people of Medina. This application may be viewed as similar to the principle of *caveat emptor* in English Common Law, although not synonymous.

56. S.C. SIRCAR, AL-SHARI'S: SUNNO & IMAMIA CODES 496 (2006).

57. Elkarkouri, *supra* note 39, at 545. Under pre-contractual law, Islamic jurists made an important distinction between cases where pre-purchased merchandise is delivered for examination and cases where merchandise is delivered for agreement on a purchase price. In the former situation, the risk of defective merchandise is on the sender, especially in cases where the price is not



complete code on Islamic law dated of year 1876 and connected with the Ottoman Empire, there is an implied warranty that the thing sold should be free from any defect: “A sale, without any stipulation, makes it necessary that the thing sold should be free from defect.”<sup>58</sup> In article 339, the *Mejella* clarifies this point, stating that “an ancient defect is a fault which existed in the thing sold when it was in the hands of the seller.”<sup>59</sup> This duty to disclose exists regardless of whether the parties to the agreement have between them any fiduciary relationship or whether the disclosure<sup>60</sup> of such defects was requested by the seller. Thus, when the seller violates this duty, the injured party has the option to rescind the contract.<sup>61</sup> This idea is buttressed by the Holy Tradition, according to which it is illegal for a seller to sell a thing if he knows that it has a defect, unless the seller informs the buyer of that defect.<sup>62</sup> In addition, Muhammad warned against selling goods if defects were not disclosed: “if anyone sells a defective article without drawing attention to it, he will remain under God’s anger, or the Angels will continue to curse him.”<sup>63</sup>

Like its common and civil law counterparts, exercise of the *khiyar al-‘aib* is subject to several conditions. First, the defect in the goods must exist before the goods are given to the buyer.<sup>64</sup> Notice that the risk of loss passes with possession. For instance, Article 340 of the *Mejella* provides that a defect that arises after

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yet fixed. In the second situation, the risk of defective goods is on the buyer. Even if an Islamic court ensures that parties abide by the terms of the contract, the court would not compensate a party for damages a mere mistake causes. Under the principles of *Sharia*, victims cannot recover damages where the mistake is exclusive. Additionally, Islamic law does not grant any compensation for breaking off negotiations or for the loss of expectation interests.

58. THE MEJELLE, BEING AN ENGLISH TRANSLATION OF MAJALLAHEL-AHKAM-I-ADLIYA AND A COMPLETE CODE ON ISLAMIC CIVIL LAW 48, art. 336 (Tyser et al. trans., 1980) (1901) (Hereinafter THE MEJELLE).

59. “An ancient defect is a fault, which existed in the thing sold, when it was in the hands of the seller.” *Id.* at 49, art. 339.

60. A. Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. REV. 337 (1997).

61. Elkarkouri, *supra* note 39, at 547.

62. BILLAH, *supra* note 51, at 287.

63. *Id.* (quoting Ibn. Mayah).

64. *Id.* at 99.

the sale but before delivery, while the thing is in the hands of the seller, is a ground for rescission.<sup>65</sup> In other words, the seller is liable for all defects that arise before delivery of the goods to the buyer, even if the goods were in perfect or merchantable condition when the contract was concluded.<sup>66</sup>

In addition to the timing of the defect, in order to profit from the protection the buyer must not be aware of the defects in the goods.<sup>67</sup> This idea is connected with the option for inspection. The buyer must have an opportunity to inspect the goods, but if he becomes aware of the defect and still concludes the contract, he has tacitly waived his option to rescind. Also, the buyer cannot exempt the seller from liability through an express stipulation.<sup>68</sup> Finally, the defect must have existed at the time the buyer exercised the option.<sup>69</sup>

The buyer loses his right of option even if the goods are discovered to be defective in the following situations. First, if the seller tells the buyer (or otherwise gives him notice) that there is a defect in the goods.<sup>70</sup> This is a counterpoint of the Islamic law duty of disclosure. Since the seller has an absolute duty to disclose the defects in the product he is selling, when he discloses those defects, the buyer having bought with knowledge has no option to rescind the contract. Second, a seller has no liability for defects in his goods when he stipulates with the buyer that he will have no such liability.<sup>71</sup> Nevertheless, if the seller knows of the defects in

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65. THE MEJELLE, *supra* note 58, art. 340 at 49. The meaning of rescission in the Islamic contract law is a broad one; it encompasses the contract voidable and the contract valid but not binding. M.A. BAHARUM, MISREPRESENTATION: A STUDY OF ENGLISH AND ISLAMIC CONTRACT LAW 285 (1986).

66. W.F. Fratcher, *Uses of Uses*, 34 MO. L. REV. 39, 39 (1969).

67. *Id.*

68. *Id.*

69. S.R. RAYNER, THE THEORY OF CONTRACT IN ISLAMIC LAW: A COMPARATIVE ANALYSIS WITH PARTICULAR REFERENCE TO THE MODERN LEGISLATION IN KUWAITI, BAHRAIN, AND THE UNITED ARAB EMIRATES 331 (1991).

70. "If a seller, at the time of the sale, shews a defect in the thing sold, and the buyer accepts with that defect, he cannot have an option on account of that defect." THE MEJELLE, *supra* note 58, at 49, art. 341.

71. "When a seller sells a property with a condition that he is to be free from claims for all defects, there is no option for defect for the buyer." THE MEJELLE, *supra* note 58, at 49, art. 342.

See also IMAN MALIK IBN ANAS, AL MUWATTA OF IMAM MALIK IBN ANAS 248 (Aisha Abdurrahman Bewley Trans., 1989). (Hereinafter AL MUWATTA).

his goods and purposely stipulates with the buyer to protect himself from that defect, the stipulation is null. He who sells (with an exemption clause for the defects of the goods) will not be responsible for any defect unless he knew and purposely concealed it, the earlier exemption clause shall have no effect and he (the seller) shall still be responsible for the defects.<sup>72</sup>

Thirdly, the seller is not liable for defects if, after the contract is concluded, the buyer agrees to be deemed solely liable for such defects.<sup>73</sup> Fourthly, if the buyer consciously accepts the defects of the goods, the seller is exculpated from liability.<sup>74</sup> Likewise, the seller is absolved from liability if the buyer knows of the defect<sup>75</sup> and exercises ownership over the goods in any of the following ways: (1) eating any portion of the goods;<sup>76</sup> (2) keeping the goods in his possession for a reasonable period of time; (3) repairing or demolishing any part of the goods; or (4) disposing of the goods.<sup>77</sup> Finally, the seller is not liable if the defects occurred in the hands of the buyer.<sup>78</sup>

In the Islamic legal system, two principles coexist. The seller must disclose the defects in the goods he is selling. The buyer must also inspect the goods (interpreted as a right and also as a duty) as a sort of cooperative activity in the sale. Once the goods have been scrutinized, the Islamic solution focuses on the simplification of the transaction. In fact, the buyer has the right of option either to continue or to rescind the contract before or after the conclusion of the sale and purchase agreement with the aim of ensuring the quality of the goods.<sup>79</sup>

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72. AL MUWATTA, *supra* note 71, at 249.

73. "If there's a property saying 'it is accepted with all defects,' there is no longer a right of action for defect." THE MEJELLE, *supra* note 58, art. 343 at 49. For example, if a buyer purchases an animal stating it is accepted even if blind, lame and unsound or worthless maybe return it on the ground that it has an old defect.

74. RAYNER, *supra* note 69, at 340.

75. BAILLE, *supra* note 52, at 105.

76. K. BHAVAN, THE HEDAYA: COMMENTARY ON THE ISLAMIC LAWS, 2, at 415 (Charles Hamilton trans., 1985). (Hereinafter THE HEDAYA).

77. "If the purchaser dispose of the thing sold, in a manner, which is an exercise of the right of ownership in it, after he knows of a defect in it, he has destroyed his option for the defect." THE MEJELLE, *supra* note 58, art. 344 at 49.

78. See AL MUWATTA, *supra* note 71, no 31.4 at 249.

79. As it has already been pointed out the common law grants the right to inquire the goods only before the conclusion of the contract.

Louisiana, following the civil law tradition is very protective of purchasers when the things they buy contain some sort of flaw or defect. Because of this increased concern for protecting buyers, Louisiana extensively uses the duty to disclose in the context of redhibitory defects. The seller's obligation to provide an implied warranty is established in several code articles. First, article 2475 provides that "the seller is bound . . . to warrant to the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing. The seller also warrants that the thing sold is fit for its intended use."<sup>80</sup> Pursuant to Civil Code article 2520, "[t]he seller warrants the buyer against redhibitory defects, or vices, in the thing sold."<sup>81</sup> That article goes on further to explain that a defect is redhibitory in three situations: (1) where the defect renders the thing useless; (2) where the defect renders the thing so inconvenient that it can be presumed that the buyer would not have purchased it if he had known of the defect; and (3) the defect diminishes the purchased item's usefulness so that the buyer would have only purchased it at a lesser price.<sup>82</sup>

Louisiana creates a duty on the seller to disclose any defects through the imposition of heightened remedies for the purchaser. For instance, if a seller does not know of the defect in the thing sold, Civil Code article 2531 allows him several options. First, the seller has the right to repair the thing, and it is only when he cannot or refuses to do so that he will be liable for a return of the purchase price.<sup>83</sup> In addition, the seller will have to pay interest starting from the time that the price was paid as well as reimburse the buyer for sales expenses and perseveration costs.<sup>84</sup> Finally, a seller in this context has a right to have his liability to the buyer reduced by the use that the buyer made of the thing.<sup>85</sup>

Contrast the remedies listed above with those afforded to a buyer when the seller is in bad faith (i.e., knew of the defect in the thing sold). To begin with, the seller in this context has no right to

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80. LA. CIV. CODE ANN. art. 2475 (2007). This article is similar to the concept contained in the English Sale of Goods Act of 1979, which contains both a warranty of quality or fitness as well as a warranty of description. Sale of Goods Act, 1979, 2, §§ 13-14 (Eng.).

81. LA. CIV. CODE ANN. art. 2520 (2007).

82. *Id.*

83. *See id.* at art. 2531.

84. *Id.*

85. *Id.*

repair the defective product and is immediately liable for a return of the purchase price.<sup>86</sup> In addition to being responsible for the buyer's reasonable sales and preservation expenses, the seller will also have to pay damages and attorney's fees.<sup>87</sup> Finally, the seller has no right to seek a reduction in his liability for the value of the buyer's use of the defective thing. This ability to reduce his liability is left to the sole discretion of the court.<sup>88</sup>

The buyer's ability to recover damages against a bad faith seller is of significant importance. Pursuant to Louisiana's general contract rules, non-pecuniary damages (mental anguish) can only be recovered in two circumstances: (1) when the contract is intended to gratify a non-pecuniary interest and the obligor either knew or should have known that his failure to perform would cause non-pecuniary damage and (2) when regardless of the nature of the contract, the obligor breached the contract with the intent of aggravating the obligee's feelings.<sup>89</sup> Nevertheless, Louisiana courts have allowed buyers to recover non-pecuniary damages in the context of redhibition, even if the claim does not meet the general contractual standards for non-pecuniary loss.

For instance, in *Bourne v. Rein Chrysler-Plymouth, Inc.*,<sup>90</sup> the plaintiff was allowed to recover mental anguish damages after buying a defective automobile from a dealership.<sup>91</sup> The plaintiff claimed that the seller failed to disclose any mechanical defects in the car.<sup>92</sup> After the car was purchased it began to act sluggish and the engine frequently died.<sup>93</sup> Subsequently, the horn began to spontaneously activate and the engine began to race.<sup>94</sup> In addition, the door panel fell off and the vinyl roof began to bubble up.<sup>95</sup> The cruise control then broke and a portion of the engine became disconnected and created a hole in the hood.<sup>96</sup> Finally, the air

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86. *See id.* at art. 2545.

87. *Id.*

88. *Id.*

89. LA. CIV. CODE ANN. art. 1998 (2007).

90. 463 So. 2d 1356 (La. App. 1st Cir. 1985).

91. *Id.* at 1361.

92. *Id.* at 1357.

93. *Id.* at 1357-58.

94. *Id.* at 1357.

95. *Id.*

96. *Id.*

conditioner broke and flooded the interior of the car with water.<sup>97</sup> To add insult to the plaintiff's injury, her frequent trips to the repair shop invoked taunting and laughter by the service personnel.<sup>98</sup> The court deviated from the general, strict requirements for the recovery of non-pecuniary damages<sup>99</sup> and found that when a seller delivers a defective product it creates not only contractual but also delictual liability.<sup>100</sup> Therefore, the court allowed the plaintiff to recover for her emotional damage as well as her contractual redhibition claim without instituting another action in tort.

Nevertheless, Louisiana stands by the notion, even in its articles on redhibition, that it will not save a buyer from a bad bargain. Thus, pursuant to Civil Code article 2521, a seller is not liable to the buyer for any defects which are either made known (disclosed) or "should have been discovered by a reasonably prudent buyer."<sup>101</sup> Therefore, if the defect is such that the buyer should have discovered it with a reasonable inspection, the law will afford him no remedy and it will relieve the seller of any duty to disclose.<sup>102</sup>

The importance of Louisiana's use of redhibition to create a duty of disclosure in sales cannot be overstated. Whereas general Louisiana contract theory does not always require the seller to disclose his knowledge about the thing sold, the state's law of redhibition steps up to fill the gap. Thus, through the imposition of increased liability on the part of a seller who knew the item being sold contained a defect and failed to disclose it, Louisiana creates a duty of disclosure that provides an extreme sense of protection to purchasers.

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97. *Id.*

98. *Id.*

99. *Id.* at 1360.

100. *Id.* at 1359-60 (citing *Phillippe v. Browning Arms Co.*, 395 So. 2d 310 (La. 1981)).

101. LA. CIV. CODE ANN. art. 2521 (2007).

102. This is not a deviation from the civil law tradition, according to which the guarantee arises only for hidden defects (the buyer should show some care in buying: the so called principle of auto-responsibility). In many legislations there are provisions excluding the remedy for obvious/apparent defects (but the seller is liable if he expressed some appreciation on the soundness of the good, or if he hid the defect).

## IV. THE VICES OF CONSENT

A. *The Louisiana Perspective*

Louisiana does not have a general duty to disclose. In that sense, it is no different than any of the forty-nine other American states. Louisiana does, however, create specific duties of disclosure in certain instances. The formation of consent is the first place Louisiana courts have found a specific duty of disclosure. More specifically, Louisiana's law on error and fraud overlap, so that when a person knows another is contracting under an error, it is very possible that the requirements of fraud may be met. It is in this gray area where the laws of fraud and error intertwine that Louisiana creates a contract law based duty of disclosure.

In Louisiana, error and fraud are seen as vitiating, or creating a defect in, consent; nevertheless, a contract based on either error or fraud still produces some legal effects.<sup>103</sup> Pursuant to civil code's article 1949, error vitiates consent only if the following two elements are met: (1) the error concerns a cause without which the obligation would not have been incurred<sup>104</sup> and (2) the other party

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103. According to theory, error should prevent a contract from ever coming into existence. However, such a rule totally disregards the reality of business practice; therefore, in an effort to inject stability in transactions, Louisiana law views error as a reason for allowing a party to get out of a contract instead of the prevention of the contracts formation. *Id.*

104. The first requirement, when an error concerns a cause, is governed expressly by the code. Pursuant to article 1950, an error concerns a cause in five different situations: (1) when it bears on the nature of the contract; (2) when it bears on the thing that is the object of the contract or a substantial quality of the contractual object; (3) when it bears on either the person, or a substantial quality of the other party; (4) when it bears on the law; or (5) when it bears on any other circumstances that the parties either actually or should have regarded in good faith as the cause. LA CIV. CODE ANN. art. 1950 (2007). It bears noting that this formulation is almost exactly the same as the Italian rules governing when a mistake is considered essential. Note, however, that having an error fall into one of the categories is necessary but not determinative of the issue. The party in error must still show that they would not have contracted had they not been in error; this is a heavier burden than just that they would have contracted on different terms. LA. CIV. CODE art. 1950 cmt. (g) (2007). *See also* Litvinoff, *Vices of Consent, Error, Fraud, Duress and Epilogue of Lesion*, 50 LA. L. REV. 1, 12-13 (1989). In addition, there are specific cases where the party will not be allowed to take advantage of his error regardless of whether it meets the

either knew or should have known of that cause.<sup>105</sup> Professor Litvinoff describes error as creating an impairment that “results from a sort of accident that takes place in a person’s subjective process of assembling an act of volition,”<sup>106</sup> or more specifically, “a false or inexact idea that a party to a contract has of an element of that contract.”<sup>107</sup>

Pursuant to article 1950, the first requirement for error, that concerns the principle cause, is met if the error:

[B]ears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstances that the parties regarded, or should in good faith have regarded, as a cause of the obligation.<sup>108</sup>

The second requirement, that the non-mistaken party either knows or should have known of the cause, is an objective reasonableness test, determined on the facts and circumstances of each individual case.

If the error is one that concerns the principle cause, it is very likely that the circumstances will be such that each party will know, by evaluating the circumstances, the principle cause behind

elements: these situations include transactions or compromise made and based on an error of law and payment of a civil obligation when the party was only bound by a natural obligation. LA. CIV. CODE art 1950 cmt. (h) (2007).

105. LA. CIV. CODE ANN. art. 1949 (2007). *See also* Litvinoff, *supra* note 104, at 12. A distinction should be made with respect to the non-mistaken party’s knowledge: it is not knowledge of the error that is important in determining that consent is vitiated, it is the knowledge of the cause itself- the reason why the party obligated himself. The non-mistaken party’s knowledge of the error only becomes important in the determination of who pays damages. *See* LA. CIV. CODE art. 1952 (2007).

106. Litvinoff, *supra* note 104, at 6. Error is basically a situation in which a party to a contract is acting under a false sense of reality. *Id.*

107. S. LITVINOFF, *THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE* 234 (5th ed. 2000).

108. Surprisingly, this is very similar to the English common law’s notion of a “fundamental mistake,” which is defined as a mistake “as to the substance of the whole consideration . . . going . . . to the whole root of the matter.” G.H. TREITEL, *AN OUTLINE OF THE LAW OF CONTRACT* 100 (4th ed. 1989) (1975). For a more in-depth discussion of what types of mistakes are considered fundamental in the English Common Law, *see* S.A. SMITH, *ATIYAH’S INTRODUCTION TO THE LAW OF CONTRACT* 172-175 (6th ed. 2005) (1961).



the other's consent. In these situations, the test will be met because objectively the circumstances allowed the parties to know each other's principal reason for contracting. However, this is not always the case, and in some circumstances a party may have a particular subjective reason for binding himself. In those instances it would be necessary for that party to take steps to inform the other party of his unique principal cause; otherwise, the right claim of operative error will be lost.

For instance, in *Bordelon v. Kopicki*, a Louisiana appellate court refused to rescind a contract for the sale of a house based on the buyer's unilateral error.<sup>109</sup> The purchasers' principal cause for binding themselves to buy the house was to convert it into a larger four bedroom home; the problem was that they did not tell the seller what they had in mind.<sup>110</sup> A short time before the sale was to close, the purchasers discovered that the house could not be converted into a four bedroom home because of a right of way held by the city; thus, unsurprisingly, they refused to buy and conclude the actual sale.<sup>111</sup> The court stated that the apparent, objective reason for the purchase was for the buyers to get a suitable home.<sup>112</sup> The seller was neither made aware of nor should he be presumed to have been aware of the buyer's purpose of converting the home.<sup>113</sup> Thus, the seller had no way of knowing that the servitude would affect the buyers' consent, so the requirements of article 1950 were not met and consent was not vitiated—no operative error.<sup>114</sup>

As stated above, there is no general duty of disclosure in Louisiana, so merely meeting the requirements for error will not create any duties of disclosure between the parties. This is shown by looking at article 1952, which states that a party who has a contract rescinded based on *his own* error is liable to the non-

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109. 524 So. 2d 848 (La. App. 3d. Cir. 1988).

110. *Id.*

111. *Id.*

112. *Id.* at 849.

113. *Id.*

114. Professor Ronald Scalise sees this case in a somewhat different light. He thinks that because the servitude was recorded in the public records, the buyer has constructive knowledge. Therefore, the buyers lost because their error was inexcusable. This is definitely a valid reading of this case. However, the court did not discuss either the public records doctrine or duties of disclosure.

mistaken party for any loss sustained.<sup>115</sup> Obviously the law would not allow a non-mistaken party to recover damages if he violated a duty he owed to the party in error. Thus, Louisiana's error rules do not in and of themselves create disclosure requirements.

Disclosure requirements in Louisiana begin to emerge when the non-mistaken party's actions start to approach the level of fraud. In fact, as alluded to earlier, there is quite a bit of overlap between Louisiana's rules of fraud and error. Louisiana defines fraud as "a misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other."<sup>116</sup> But more importantly, "*fraud may also result from silence or inaction.*"<sup>117</sup> It is this silence or inaction language that is at the heart of Louisiana's pre-contractual duty of disclosure.

It is common knowledge that silence or inaction does not always constitute fraud. Louisiana is no exception to this rule; it does, however, uniformly punish a party who remains silent when he knows the other is acting under an error, just under different sets of rules. For instance, when one party knows another party is operating under an error and remains silent *and that silence is not fraudulent*, Louisiana sanctions him by denying him the right to recover damages when the contract is rescinded for error. Specifically, article 1952 states that in such a circumstance, the non-mistaken party is barred from recovering damages from the other party's error if he "knew or should have known of the error."<sup>118</sup> Thus, for non-fraudulent non-disclosures, Louisiana does not create an express, positive duty of disclosure but does impose a negative sanction.

The sanction contained in article 1952 presupposes that if a party knows another is operating under an error there is something wrong with not bringing it to his attention. This presupposition is not new; in civil law, if a person had knowledge that another party

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115. LA. CIV. CODE ANN. art. 1952 (2007) (emphasis added). One of the main factors that go into both the court's decision of whether or not to rescind the contract and whether it will award the non-mistaken party damages is whether the error is excusable. LA CIV. CODE ANN. art. 1952 cmt. (d) (2007). Thus, if the buyer makes an error which is based on his own negligence, the court will be very hostile to his claim for rescission.

116. LA. CIV. CODE. ANN. art. 1953 (2007).

117. *Id.* (emphasis added).

118. LA. CIV. CODE. ANN. art. 1952 (2007) (emphasis added).

was making an error at the time the contract was formed, he is guilty of fraud.<sup>119</sup> Obviously, Louisiana does not have such a broad definition of fraud; however, it recognizes that something is not right in knowing someone is acting in error and remaining silent. Louisiana law begins to get interesting when that silence starts to look fraudulent.

Three things happen when a party knows another is acting in error and his silence looks like fraud. First, the requirements for an operative error are lowered.<sup>120</sup> Specifically, the error no longer has to concern the contract's principal cause,<sup>121</sup> but the lesser standard of only "a circumstance that has substantially influenced the contract."<sup>122</sup> Second, the silent party will be liable for damages.<sup>123</sup> Damages for fraud include attorney's fees and so called "bad faith obligor" damages, which consist not only of the generally allowed foreseeable damages but also of all damages that are a direct consequence of the silence, regardless of foreseeability.<sup>124</sup> And third, it is much more likely that the court will find a positive duty of pre-contractual disclosure. This last item mentioned, obviously, requires further discussion.

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119. LA. CIV. CODE ANN. art. 1949 cmt. (d) (2007).

120. LA. CIV. CODE ANN. art. 1955 (2007).

121. Louisiana refers to the reason why a party obligates himself as the "cause" on the contract. See S. Litvinoff, *Still Another Look at Cause*, 48 La. L. Rev. 3, 26 (1987). Professor Litvinoff provides an example of an error vitiating consent with the following hypothetical:

For example, in need of information on a particular subject, a person may walk into a bookstore and, after advising the attendant of his interest, buy a book that, in spite of its misleading title, does not deal with that subject. It is clear in such a case that the reason that prompted the person to bind himself to pay a price was to obtain a book on a certain subject and that an error was made concerning the subject treated in the book he bought. Such an error should entitle that person to obtain rescission of the contract of sale he made at the bookstore. On the other hand, if the book actually deals with the subject of his interest, the purchaser should not be allowed to obtain rescission on ground of an error in the quality of the paper of that book, as it can be readily concluded that the quality of the paper was not the reason why he bought the book.

Litvinoff, *supra* note 104, at 13.

122. LA. CIV. CODE ANN. art. 1955 (2007).

123. LA. CIV. CODE ANN. art. 1958 (2007).

124. LA. CIV. CODE ANN. art. 1997 (2007).

A good example of how “fraudulent” looking silence will lead a Louisiana court to find a pre-contractual duty of disclosure is evident in *C.H. Boehmer Sales Agency v. Russo*.<sup>125</sup> In *Russo*, a partnership was in need of a commercially zoned property to continue its business.<sup>126</sup> The partners were made aware of a piece of property for sale that was formerly operated as a service station, but was currently empty and up for sale.<sup>127</sup> Unbeknownst to the partnership, the service station was in a non-commercial zone even though an iron works operation was located directly across the street.<sup>128</sup> The station itself was zoned “industrial non-conforming,” which meant that only the service station could be operated on the property; if the station was either altered or sat unused for six months, its zoning would convert into purely residential.<sup>129</sup> When the partners inspected the property, they informed the seller that they would need to alter the building to make it larger.<sup>130</sup> The seller, who knew of the particular zoning issue, failed to disclose this fact to the partners and accepted \$200 in return for the partners’ option to purchase the property.<sup>131</sup>

The court rescinded the option contract on the grounds of error. More importantly, the court held that the seller was under a duty to disclose the true status of the property to the partners.<sup>132</sup> The court stated that the partners were reasonable in the belief that the service station was zoned commercial it was across the street from a commercial operation and was not located in an obvious residential area.<sup>133</sup> That, in conjunction with the fact that they made their purposes known to the seller, imposed upon him a duty to disclose the zoning issue to the partners.

Another example of when Louisiana courts found a duty to disclose is *Deutschmann v. Standard Fur Company, Inc.* In *Standard Fur*, a lady ordered a fur coat made to her specifications.<sup>134</sup> She gave the furrier instructions that the coat be

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125. 99 So. 2d 475 (La. App. 1958).

126. *Id.*

127. *Id.*

128. *Id.* at 476.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 476-77.

133. *Id.*

134. 331 So. 2d 219 (La. App. 4th Cir. 1976).

made of horizontally running, continuous female furs of the same width as a sample coat she had been shown.<sup>135</sup> The furrier, which had forty years of experience, failed to inform the buyer that it was impossible to make a coat pursuant to her specifications.<sup>136</sup> As a result, the lady refused to accept the coat upon delivery because it was different than what she thought she was going to receive.<sup>137</sup> The court rescinded the sale on the grounds of error. Specifically, the court held that the store was the expert and as such had a duty to tell the buyer that it could not make the coat in the manner she specified.<sup>138</sup>

Both of these cases together shed some light on Louisiana's view of pre-contractual duties of disclosure. While there is no general duty of disclosure, when one party knows that the other is operating under some error, the courts will take a much closer look at the situation. At a minimum, if the non-mistaken party knows of the mistake being made (and of course that mistake meets the error requirements) and fails to inform the other party of his error, he will be punished by losing his ability to recover damages when the contract is rescinded.<sup>139</sup> However, depending on the

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135. *Id.*

136. *Id.* at 221.

137. *Id.* at 220.

138. *Id.* at 221.

139. It is vital to understand that the error rules have to be met for this result, courts have a lot of room to manoeuvre here. For instance, an error in fair market value of an object is not actionable under the rules of error in Louisiana. In *Dixon v. Bohn*, the seller of an automobile was found not to have a duty to disclose certain information to the buyer. 04-503 (La. App. 5 Cir. 11/30/04); 890 So. 2d 613. The buyer purchased a vehicle for the price of \$20,874.86. *Id.* at 614. The retail price that was suggested by the manufacturer was only \$17,467.00. *Id.* Believing that he had been overcharged, the buyer petitioned the court asking it to award him both damages and attorney's fees. *Id.* The court refused, stating that the purchaser had no cause of action because there was "no requirement in our law that the seller informs the buyer of the fair market value of property." *Id.* at 615.

This same result was obtained in the context of the sale of an immovable. In *Pioneer Valley Hospital, Inc. v. Elmwood Partners*, the court held that the purchaser of a hospital could not rescind the sale based on the seller's failure to disclose the fair market value. 01-453 (La. App. 5 Cir. 10/17/01); 800 So. 2d 932, 935-36. The buyers claimed that a restrictive covenant in the sale contract lowered the fair market value and being that the sellers had been involved in similar sales in the past knew of the covenant's effect on the market value. *Id.* at 934. The court rejected the claim that the sellers had any duty to disclose. *Id.* at 935-36. The court stated that "as long as all facts bearing on the nature of a

circumstances, the non-mistaken party may find himself liable for fraud, which has the effect of lowering the standards necessary for an error to be operative and allowing for the recovery of attorney fees and other bad-faith based damages.

Like all things in the realm of law, this is not an absolute rule. Louisiana courts are not so friendly to persons who just fail to make reasoned decisions or take reasonable steps necessary to protect their interests. Parties in contractual negotiations are working to protect their own interest and obtain the best deal possible. Thus, as a general rule, failing to provide a party with information which he should have found by himself does not constitute fraud.<sup>140</sup> This is expressly stated in Civil Code article 1954, which provides, "Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill."<sup>141</sup>

property are disclosed, the effect of those facts is left of a buyer to determine. "[E]rror as to the value of land, which is the object of the contract, is not error of fact, but error of judgment, for which the law furnishes no relief." *Id.* at 936.

140. *Id.* LA. CIV. CODE ANN. art. 1954 (2007).

Where the means of knowledge are as hand, and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say . . . that he was deceived by the vendor's misrepresentations.

LA. CIV. CODE ANN. art. 1954 cmt. (a) (2007) (citing *Rocchi v. Schwabacher & Hirsch*, 33 La. Ann. 1364, 1368 (1881)). Nevertheless, this rule does not apply when there is some special relationship of confidence among the parties and because of such a relation a person is induced to rely on the others representations. LA. CIV. CODE ANN. art. 1954 cmt. (b) (2007).

141. Louisiana courts will, however, punish a person when their "failure to inform or to disclose [ ] is a flagrant abuse of the other party's ignorance. Litvinoff, *supra* note 104, at 57. However, if this abuse of ignorance is not present and the party merely remains silent, there is no duty imposed. *Id.* at 57-58. Professor Litvinoff points out:

[R]eticence . . . does not occur in a void. Strange as it may seem, silence has a way of exteriorizing itself through the circumstances that surround it, circumstances that do not consist of an omission, such as silence, but are positive acts or facts. It is in the light of such circumstances that silence may appear tainted with fraudulent intent and therefore becomes fraudulent reticence. *Id.*

The professor provides the following example and commentary:

Thus, if in the course of negotiations one party states his impression of the contractual object and asks from the other, "Tell me if I am wrong,"

The similar jurisprudential based rule that has emerged in the context of error is called “inexcusable error” and is consistent with the approach used in fraud.<sup>142</sup> Basically, if the party in error did not take reasonable steps to prevent the mistake, the court will not save him. While its application is not limited to situations where someone has failed to speak up when they know another party is operating under an error, it will act to prevent a court from imposing any duty of disclosure in those situations. Thus, inexcusable error is an exception to Louisiana’s willingness to impose disclosure duties.

The classic Louisiana example of inexcusable neglect is the case of *Watson v. Planter’s Bank*.<sup>143</sup> In *Watson*, the plaintiff contracted with a bank to invest in cotton but did not read the contract to make sure it reflected his understanding of the terms.<sup>144</sup> Unsurprisingly, the contract he signed materially differed from the agreement he thought he had entered.<sup>145</sup> The plaintiff filed an action in error, asking the court to rescind the agreement and the court refused.<sup>146</sup> In rejecting his claim of error, the court stated, “In this case the plaintiff has no one but himself to blame for signing an agreement different from the one which he says he agreed to make.”<sup>147</sup>

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the other’s silence amounts to an assertion that the asking party is right, and will constitute fraudulent reticence if the one who remains silent knows that the other’s impression is false and resorts to silence to confirm that impression to this own advantage. Courts should enjoy great discretion in deciding whether a party was under a duty to speak or to disclose information to the other, and it has been suggested that in reaching such conclusions the courts should not hold parties to a very high moral standard beyond what is necessary to see to it that honesty and decency prevail in legal transactions. *Id.*

142. LA. CIV. CODE ANN. art. 1952 cmt. (d) (2007) (citing 6 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 227-229 (2d ed. Esmein 1952)). For a much more in-depth analysis of inexcusable error in Louisiana, see Saúl Litvinoff, “Error” in the Civil Law, in ESSAYS ON THE CIVIL LAW OF OBLIGATIONS 222, 226-269 (Dainow ed. 1969).

143. 22 La. Ann 14 (La. 1870). *Watson* is not a recent case. In fact, the money used in the transaction was Confederate treasury notes. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

Overall, Louisiana is not completely averse to using its rules of conventional obligations, specifically its rules on error and fraud, to impose duties of disclosure in certain circumstances. It is true that Louisiana does not have a general duty of disclosure. It is, also true, however, that a party remains silent at his own risk if he knows the other party is operating under an error. In such situations, it is very possible that he will lose the right to recover damages if the contract is rescinded for error. It is also likely that if his silence borders upon fraud, he may be found to have violated a duty of disclosure and thrown into fraud based liability.

### *B. The Islamic Perspective*

The free consent and truthfulness of the parties to a contract is a moral obligation which underpins the law of Islam relating to contract. Thus, the consent of the parties to a contract is a basic requirement of a valid contract that must be given voluntarily and free from the impediments of error, misrepresentation and fraud. If one of these impediments is present a contract is voidable because the full consent is barred. Therefore, the enforceability of a contract is based on the integrity and genuineness of consent. Mistake (*al-ghalat*) is a cause of pollution of this genuineness and it is defined as “a state of mind that inspires an erroneous impression or unrealistic imagination.”<sup>148</sup> Islamic doctrine divides the mistakes into two categories: hidden and apparent mistakes. The hidden mistake is a situation remaining in the mind of a party making him believe a different reality. For example, the contracting party does not show his believed and erroneous ideas about the item he is buying. The hidden mistake cannot invalidate the contract and the hidden impressions that are not revealed cannot be considered. Also the apparent mistake regards a situation of imagination that exists in the mind of a contracting party but, in this case, it is expressly revealed (the purchaser stated that he wants to buy a ring made of gold instead he received a ring of brass). Muslim jurists agree on the avoidance of the contract in this case.<sup>149</sup>

The Islamic world does not have a definition of misrepresentation that can cover all species of misleading conduct

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148. ZUBAIR, *supra* note 49, at 240.

149. *Id.* at 241-242.



and statements; there is also a lack of systematic approach on the point.<sup>150</sup> Misrepresentation is otherwise defined according to the specific types. It is generally defined as a false assertion of fact, either by word or conduct, or as the prevention of an existing defect in the subject-matter from being disclosed, which induces another to enter into a contract.<sup>151</sup>

The traditional English classification of misrepresentation as innocent, negligent and fraudulent is not relevant for the Islamic world because here the effect of any misrepresentation is the same. In any case, the way in which the misrepresentation is made is more important than its effect. So, the classification in Islam distinguishes between active fraud, false statements, and concealment of defects of the subject matter (which covers the contracts *uberrimae fidei*).<sup>152</sup>

On the other side, the fact that a party has been induced to enter into a contract by the misrepresentation of the other contracting party is not enough to grant the remedy of rescission. Some other requirements must be fulfilled.

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150. A.A. FYZEE, *OUTLINES OF MUHAMMADAN LAW* 1 (3 ed. 1964) (1947) states:

Islamic law is not a systematic code: but there is amongst its different schools a large measure of agreement, because the starting point and the basic principles are identical. The differences that exist are due to historical, political, economic and cultural reasons, and it is, therefore, obvious that this system cannot be studied without a proper regard to its historical development.

The impossibility to create a parallel between English and Islamic law derives from the different methods of approach. Under English law, misrepresentation vitiates consent and so includes both acts and statements, in so far as they induce the state of mind of the parties to the contract and renders the apparent agreement unreal. Islamic law, on the other hand, accepts the apparent agreement as valid but gives the injured party the option to rescind it. See N.J. COULSON, *COMMERCIAL LAW IN THE GULF STATES: THE ISLAMIC LEGAL TRADITION* 72 (1984).

See generally J. SCHACHT, *THE ORIGINS OF MUHAMMADAN JURISPRUDENCE* (1959); A. HASAN, *THE EARLY DEVELOPMENT OF ISLAMIC JURISPRUDENCE* 7 (1970).

151. In the traditional *Shari'a*, the authorities contain only several examples of fraud which gives the injured party the right to rescind the contract. BAHARUM, *supra* note 65, at 54.

152. *Id.* at 57.

First of all, the representation must be false. In general there is no duty to disclose any fact, except that of a known defect<sup>153</sup> or, in the *uberrimae fidei* contract, all material fact. If such a duty exists, anything that is less than a full disclosure amounts to a deliberate concealment and then the representation must be one of fact. The statements of opinion, the advices, the laudatory or puffing statements or the ones made jokingly, are irrelevant except when the promisor says he will bear the responsibility of his promise. A peculiar feature of the Islamic legal system is that all statements of law are considered as statements of fact on the basis that all the Muslims have a duty to know the law, given its holy origin. Again, what is needed is an inducement, i.e. the contracting party would have not entered into the contract without the misrepresentation; if, on the other hand, the deceived party discovers the misrepresentation and enters the contract regardless, he cannot invoke rescission but he may have relief under the option for defects if the thing is defective.<sup>154</sup> Furthermore, the misrepresentation must be operative, i.e. an average man would have suffered a real misunderstanding. The lack of diligence may bar the availability of the remedy (it is said that proof that the party was deceived must be shown in addition to the proof of the inducement). Terein lies one of the main differences with the English system: while in common law the inducement is the decisive factor, in the Islamic legal system the accent is posed on the diligence of the deceived party in attempting to ascertain the truth of the fact (according to the standard of an average man). In this sense, any loss due to this lack of diligence is not recoverable. Finally, we must consider the deceived party's injury being compensated with damages. In the *uberrimae fidei* contracts and

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153. Imam Malik clarified this point saying, "Who sells with an exemption clause exempting himself (the seller) from liability of any defects of the goods will be not responsible for that defect unless he knew about it and concealed it. If the seller knew and concealed the defect, such an exemption clause will not exempt him from the liability of such defective product." AL MUWATTA, *supra* note 71, no. 31.4 at 249.

154. BAHARUM, *supra* note 65, at 166. According to the Hanabali school, the intention to deceive is not taken into account in giving the right of rescission it is more important to measure the effect of the contract. The contract can be rescinded if the representee can prove he suffered damages.

concealment of defect, the proof of the injury is not required. In such cases the evidence of the existence of fraud is enough.<sup>155</sup>

The idea of deception (Al-Ghabn) is defined as “a situation where one of the two considerations in commutative contracts is unequal in value to another during the construction of the contract.”<sup>156</sup>

Al-Ghabn is divided into two kinds: significant and insignificant. These two kinds are defined in two different ways according to the schools. The first interpretation defines the significant Ghabn as the kind that comes under the appraisal of the experts of the field.<sup>157</sup> Another school of thought says that the Ghabn is significant if the thing sold is worthy more of the 5% of the price of purchase according to the appraisal of an expert.<sup>158</sup> If the deception is insignificant the contract remains valid. If the deception is significant we still have two lines of thoughts. The majority of the jurists (Hanafi and Handbali schools) maintain that a significant Ghabn impairs the contract and causes an injury and, therefore, the deceived party has the right to rescind it.<sup>159</sup>

The Shafi'i school holds that a contract is validly formed and that commutative contracts upon which the Ghabn insisted are established and executed *ab initio*. The granting to the deceived party of the right to rescind it will destabilize the commercial transactions. Furthermore, the protection of the contracting parties from Ghabn is balanced with their duty to take care and precaution. Zubir said that the deceived party is liable for his failure because he acted inadvertently, therefore, he alone shall bear the consequences of his carelessness.<sup>160</sup> In conclusion, contracts which are concluded with concealment of defects, false statements

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155. *Id.* at 85-93.

156. ZUBAIR, *supra* note 49, at 246. The example, that sounds strange to the ears of a western jurist, is the sale of a book for one hundred naira when its market value was of two hundred naira. The vendor, in this case, is the deceived party. On the other side, the buyer would be the deceived party if he buys for a higher price compared to the market value.

157. *Id.* at 246-247.

158. *Id.* at 247. Specifying that not all the things sold are under the same percentage rule; the 10% for example is the rate required to be significant difference of price for the sale of animals.

159. *Id.* at 248.

160. *Id.* at 248-249.

when accompanied with *lesio enormis*, and active fraud are considered as voidable contracts.<sup>161</sup>

If fraud (Al-taghrir), i.e. “the use of fraudulent means to induce a person to enter into a contract in which he has been made to believe that it will serve his interest but which in actual fact is detrimental,”<sup>162</sup> is successful (i.e. without the fraud the party would never have concluded the contract) the victim of the trickery (Al-Maghur) has a right to rescind the contract.<sup>163</sup> The rescission is granted even if the Ghabn is insignificant.<sup>164</sup>

As stated before, it is a general principle that the contracting parties are not obliged to disclose all the information about the bargain if the silence of the fact does not mislead the other contracting party.<sup>165</sup> Precisely, silence is allowed on knowledge related to unimportant facts within the exclusive knowledge of the party, for instance the original price of the thing sold<sup>166</sup> Disclosure (*Katman*) is, however, necessary when it is a prerequisite of the validity of the contract; the two main exceptions are the knowledge of defects and the contract *uberrimae fidei*.<sup>167</sup> Under Islamic law reticence on facts is allowed only to the extent that it does not affect the article's value or the purpose of the contract.<sup>168</sup> For

161. BAHARUM, *supra* note 65, at 133.

162. ZUBAIR, *supra* note 49, at 252.

163. *Id.* at 254.

164. *Id.* at 255.

165. In the small group of *uberrimae fidei* contracts in Islamic law (resale of goods for the exact price originally paid, or with an agreed profit, percentage or at an agreed discount) the original price paid is essential; so, the seller has the duty to disclose all the facts that affected the price. COULSON, *supra* note 150, at 73.

166. Therefore, the literal truth of the statements is not a defense if they convey a misleading idea upon the reader. In brief, misleading statements or advertising depend on the category of person addressed. These liability rules are the outcome of a religious system that has the aim of protecting moral values. It is a subjectivity test the one applied to see if the person addressed has been misled. *Id.*

167. In English law the scope of the disclosure is less stringent according to the maxim of the *caveat emptor*. Regard to the *uberrimae fidei* contracts, the differences with the common law lies only in some details.

168. COULSON, *supra* note 150, at 72-73. Where is narrated a peculiar case relates to the disclosure topic. There is an offense called “meeting riders out of town.” This regards the practice to intercept a caravan which had not reached its destination. Due to the caravan ignorance of the local prices the tradesman

example, failing to disclose the color of a car is not a frustration of the purpose of the contract and it does not affect the car's value.

The disclosure of defects is required even if the other party would not have entered into the contract or the acquired knowledge would have lowered the price because the free consent is one of the prerequisites for the validity of the contract and the existence of defects prevents this state of mind. This duty arises during the pre-contractual stage. Therefore, it is a tortious and non-contractual claim. This reticence, regarded as fraud, renders the contract void. The defrauded party may rescind or affirm the contract for the full price. This option (in the form of *khiyar al'-aib* or *khiyar at taddis*, i.e. option for fraud) has the purpose to restore the defrauded party to the position he was in before the contract was made. The Islamic concept of fraudulent misrepresentation also covers the deliberate silence of facts which the representor is obliged to discover, above all the defects on the thing sold.<sup>169</sup>

The duty to disclose is a moral one and it is not a prerequisite to invoke the option; the only thing that matters is the existence of the defect.<sup>170</sup> The law of Allah was given to man and society must adapt itself to the law rather than creating new laws to changing needs.

The products of the original agrarian society, normally uncomplicated and produced locally, were dealt with between

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could elevate profits. Such activity is condemned as cheating and the injured party can rescind the contract. *Id.* A similar case is analyzed by Cicero.

In his work *De Officiis*, Cicero provides the example of a grain merchant who had imported a large cargo of grain to Rhodes during a period of severe famine. Because of the famine, prices had risen to extremely high levels. The merchant knew that there are other shipments of grain being sent to Rhodes, having passed them on his voyage. Being an honest man, he is faced with the dilemma of disclosing the fact that other shipments of grain are coming, and selling his cargo at a lower price, or withholding the information, and selling his cargo at a greater profit. Cicero, after analyzing both arguments, concludes that the information should be disclosed, for otherwise the merchant would be "shifty, artful, shrewd, underhand, cunning, one grown old in fraud and subtlety." Cicero believed in a general duty of disclosure based in a sense of morality. MARCUS TULLIUS CICERO, 3 DE OFFICIIS sec. 12, at 319 (Walter Miller trans. 1913).

169. COULSON, *supra* note 150, at 65.

170. The defect is not limited, of course, on the value of the good. If A buys a pair of shoes of a different size he cannot use them and the contract failed for the purpose even if the value is not lower of what was estimated.

sellers and buyers on a relative equal arms length. Nowadays the products become every day more complex, produced far from the place of the sale and put in the market through adhesion contracts. This change in trade methods, sophistication of products, and the increasing amount of quantity and quality in the “things” sold creates a challenge for the Shari’a, which stopped developing at the tenth century.<sup>171</sup>

From a national perspective, legal systems such as the Egyptian, Syrian, Iraqi, Mauritanian, Morocco and Algerian<sup>172</sup> have been receptive to both foreign and customary legal principles.<sup>173</sup> These legal systems followed a movement of modernization that has occurred in most Islamic countries through the influence of European law and has gradually separated commercial law from the Shari’a. This separation has occurred by application of two separate bodies of law referred to as “*droit modern*” and “*droit musulman*” (modern law and Islamic law). The “*droit modern*” is based on the French civil law codes and practices.<sup>174</sup> It covers civil and commercial areas in general.

Commercial law is the area where the European pattern is most prevalent because of the need to communicate with the rest of the world. Commercial and financial transactions by their nature require flexibility, rapidity, and evolution, which probably cannot be met in the rigidity of some Islamic rules. But Islamic precepts in any case require the observance of good faith and they include disclosure of defects relating to goods sold and also refraining from misrepresentation, concealment, and fraud in commercial transactions.

The needs of evolution are mostly required in the transnational context. But the Islamic law had the solution inside its own nature. Islamic laws governing business dealings substantially comply with transnational law notwithstanding the secular imprinting of

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171. N. J. COULSON, A HISTORY OF ISLAMIC LAW 25 (1978). See also CASTRO, *supra* note 19, at 13-14.

172. Tunisia adopted a uniformed legal system abolishing the Islamic courts governing the law of personal status. See J.N. Anderson, *The Tunisian Law of Personal Status*, 7 INT’L & COMP. L.Q. 262 (1958).

173. See *passim* CASTRO, *supra* note 19.

174. This is true above all for Algeria and Morocco. See ZWEIGERT & KOTZ, *supra* note 20, at 338; and DAVID, *supra* note 11, at 391-396.

state laws.<sup>175</sup> In particular, business law benefits from the Shari'a's power of adaptability that makes treaties like the United Nations Convention on Contracts for International Sale of Goods<sup>176</sup> fully compatible with Islamic law principles.

## V. CONCLUSION

The classic Islamic legal tradition is now facing the advance of the western legal tradition. But there is a strong resistance.<sup>177</sup> The scholars were able to implement the Islamic doctrine of religious duties in a complete legal system. The fact these rules were formulated a long time ago and traced back, with some *fictio*, to the divine authority supported the opinion that they are immutable; they do not need governmental approval and they cannot be abrogated.<sup>178</sup>

The Islamic principles are directed towards the creation of a fairer business market. The same *Qur'an* affirms "o ye who believe! Eat not each other's properties by wrongful means."<sup>179</sup> *Khiyar al-'aib* rises a shield in defence of the buyer, ensuring a social welfare in the trade market. The same Holy prophet put on the businessmen a sort of meta-legal protection for the fair dealing transactions when is said that: [I]f both parties spoke the truth and describe the defects and quantities (of the goods) then they would be blessed in their transactions and if they told lies or

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175. F. Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries. Is the CISG Compatible with Islamic Law Principles?*, 13 PACE INT'L L. REV. 1, 31-34 (2001). See also DAVID, *supra* note 11, at 399.

176. The United Nations Convention on Contracts for International Sale of Goods (CISG) applies to international transactions involving the sale of goods and aims to promote international trade by removing legal barriers in transactions between international traders.

177. See P.J. Riga, *Islamic Law and Modernity: Conflict and Evolution*, 36 AM. J. JURIS. 103, 103-117 (1991); and D. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 GEO. WASH. J. INT'L L. & ECON. 131 (1992); see also Mallat, *supra* note 29, at 81-90.

178. B. Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM J. COMP. L. 199, 210 (1978); B. Hallaq, *Legal Reasoning in Islamic Law and the Common Law: Logic and Method*, 34 CLEV. ST. L. REV. 79 (1985).

179. QUR'AN ch. 4:29.

concealed anything then the blessing of their transactions will be blotted out.<sup>180</sup>

*Khiyar al-'aib* and *Caveat emptor* share the aim of saving the business society and the trade market<sup>181</sup> from the unfair dealings around defective products.<sup>182</sup> They both have the task to ensure the quality of the goods.

The Islamic solution, once the goods have been scrutinized, focuses on the simplification of the transaction. When a person purchases a good with a defect, no matter if trivial or flagrant,<sup>183</sup> if it is not easily removable he may retain the object at its full price or reject it; but he cannot retain it and seek for compensation for the defect.<sup>184</sup> Islamic commercial law implies the goods sold to be free from defects, Islamic courts may consider the silence of the seller fraudulent because Sharia seeks to assert the preclusion of unjustified enrichment.<sup>185</sup> Then in any transaction "there must be honest and free consent from both parties to ensure that they both enjoy maximum benefits from the transaction and that nobody

180. It is a sort of precognition of the prisoner dilemma. *See also* Al-Bukhari, *supra* note 48, Volume 3, Book 34, Number 323: Narrated Hakim bin Hizam:

The Prophet said:

The buyer and the seller have the option of cancelling or confirming the bargain unless they separate, and if they spoke the truth and made clear the defects of the goods, then they would be blessed in their bargain, and if they told lies and hid some facts, their bargain would be deprived of Allah's blessings.

181. G.M. Badr, *A Survey of Islamic International Law*, 76 AM. SOC'Y INT'L L. PROC. 56, 59 (1982).

182. The first element is the centrality of trade, the universal respect it carries in Muslim civilization, and the importance of commerce as the nerve of the city and of regional or international exchange. The free movement of goods is a key element in the intellectual structure of early Islam through to the present period. The fact that the Prophet Muhammad started his career as a caravan merchant is unique to the Islamic Prophecy. The original textual tradition of Islam and of Islamic law acknowledges the importance of commerce, including the security of long-distance trade and market sanctity, both on the ethical and the practical level. Whatever the reality of emporia in the early Islamic Hijaz, the tradition of an Islamic Prophet-merchant is firmly received and developed across the centuries. The contract of sale, since early Islam, is the measuring rod for all its "contractual sisters." *See* Mallat, *supra* note 29, at 93.

183. BAILLIE, *supra* note 52, at 99.

184. *Id.* at 98.

185. RAYNER, *supra* note 69, at 229.



should suffer from any injustice or dishonesty.”<sup>186</sup> Allah said to this effect, “. . . Eat not up your property among yourself in Vanities . . .”<sup>187</sup>

Maybe the western legal tradition and the Louisiana Civil Code of course are more rationality based while the Islamic tradition focuses more on supreme principles with a scent of natural law embodied in the ancestral times. I am wondering, is it not the same way in which the common law started?

The similarities between the above mentioned legal systems' approach to *caveat emptor* and duties of disclosure are uncanny. Regardless of whether the issue is dealt with under the heading of mistake, misrepresentation, or error and fraud, there is a commonality of approach that cannot be missed. And yet, despite this obvious diversity of methods, traditions and styles, it is possible to notice an element, or better, a tendency common to the examined regulations, that may be found, as usual, more in operational rules than in principle statements.

Interestingly, *caveat emptor* is no longer the default rule in either Louisiana or Islam. And this is also true under most modern domestic rules, as well as under the CISG. Today's international buyer is entitled to expect the goods to possess certain basic qualities, even if the contract does not expressly so state. Indeed, it would seem that *caveat venditor* has also become the supplementary CISG rule.<sup>188</sup>

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186. Billah, *supra* note 51, at 295.

187. QUR'AN 4:29.

188. E. Visser, *Favor Emptoris: Does the CISG Favor the Buyer?*, 67 UMKC L. REV. 77 (1998).