

Studying concept of fraud from the jurisprudential and legal linguistic viewpoints: comparative study of fraud in domestic and international law

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Abstract: Islam religion has instructions in all functional and behavioral fields of human which have been studied in the jurisprudential books. Subject of options which the transacting parties have is one of the important jurisprudential sections which include broad scope. Some legal jurisprudential subjects have not been mentioned in comprehensive and integral form and in independent discussion and have caused numerous problems such as no access of people in society to legal rules with easy method, as a result, this method has not executed them and caused different conflicts in society. On the other hand, dispersion of issues and no comprehensiveness of some statutes led to elongation of proceeding in judicial courts. Therefore, effort to collect different jurisprudential issues and separate them from each other is necessary. One of the subjects which have such problems is option of fraud because the major issues relating to it i.e. the word fraud causes option of fraud, conditions for realization of fraud, effects and waivers of its option in jurisprudential texts have not been studied separately. In this paper, options of fraud, its concept from jurisprudential and legal linguistic perspective and conditions for realization of option of fraud have been studied. There are some rules which are particular for each option. For example, there is option of meeting place until they have not been separated from each other but there are some rules which are common among all options. Considering time and power of the researcher, they have been studied and general study and sanction of laws are required to make these rules more applicable. Fraud has taken different definitions and fundamentals in different legal systems of the country and their comparative study requires some common elements and links in these legal systems.

Key words: Fraud; Legal linguistics; Conditions of fraud

1. Introduction

Fraud is one of the controversial issues of contract law. In law of Iran, fraud is defined as deception of the contracting party in the main motivation or one of the aspects of the mutual consent. In our law, fraud is not regarded as defect of will because defect of will (consent) is exclusive to duress and mistake. In Islamic jurisprudence, misrepresentation of fact to the opposing party is regarded as fraud and considering the sanction which they have considered for fraud (option of cancellation), fraud has not been regarded as fault of consent and conclusion of contract is based on the jurisprudential rules such as no loss rule.

Fraud is the legal term which expresses deception, deceit and trickery during contract or transaction. This term expresses the law such as option of fraud for the person who has been deceived in the process of transaction. In some statutes, criminal punishments have been stipulated for the fraudulent against the fraudulent action which he performs.

Fraud has taken different definitions and fundamentals in different legal systems of the country and their comparative study requires some

common elements and links in these legal systems. Common elements of fraud in domestic and international legal system can be divided into spiritual and material elements. In case of realization and emergence, it causes option of fraud and cancellation of contract for the aggrieved party. In general, one can mention instances of fraud such as lie, bribery, duress, silence and scene making which cause cancellation of contract in international law.

In domestic law, fraud can cause cancellation of contract in case it is detected by the aggrieved party because no good faith of the fraudulent party leads to deception of the party who has concluded the contract based on the same deception. But in international law, it causes cancellation of contract when effects of cancellation of the contract don't endanger interests of international community.

Main subject of the present paper –concept of fraud –is one of the interesting and controversial issues of contract law which is regarded as an independent and detailed part in all great contemporary legal systems. main importance of the comparative studies is that the researchers will be notified that his national legal information is not enough for awareness with solution of the problems which are raised in other countries and legal systems and the principles which are legal in a country as legal certainties in a country need not have such

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condition in other countries and different legal systems.

In this paper, the word "fraud", cause of option of fraud, conditions of fraud, effects and waivers of its option have been literally, jurisprudentially and legally studied in jurisprudential texts and its place will be explained in legal system.

In the following writing, fraud is first studied in Islamic law and then is reviewed in case laws of Iran which are derived from Islamic law. Fraud has been studied in domestic French law as symbol of Roman-German law and then studied in domestic law of England as symbol of common law and finally this subject has been studied in international law and in the field of international treaties and invalidity of treaties is analyzed in case of fraud. In order to look at some instances of fraud and deception, vote and election fraud based are summarized based on a paper with the same title written by two American lawyers, which has been published in Harward Law Review.

The following writing studies constituent elements of fraud in domestic and international law and analyzes invalidity of treaty or contract.

2. Lexicology

Fraud is a term which has been mentioned in Islamic jurisprudence, narration and laws. Tadlis (Fraud) has been derived from roots "dels" and "delseh" meaning darkness and literary means concealment (Adapted from Wikipedia site, 2014).

Fraud is upon the rhythm of "tafil", the infinitive of and conveys the meaning of deception and concealment of fault.

It is said that some words with three-letter root of "d l s" have been constructed in other Semitic languages and mean deception and fraud. Some researchers have regarded the word tadlis synonymous to the Latin word "dolus" (Langroodi, 1997).

the definition of fraud which has been given in the book "Terminology of Law" is as follows: the actions which deceives the transacting party (article 438 of civil law), for example, practical deception such as forged coinage (article 153 of Islamic Punishment Law) (Langroodi, 2007).

Professor Schacht in a book "an Introduction of Islamic Law" (Schacht, 1964) writes that the word dolus has entered Arabic language in Islam period through commercial relations and has not been applied in the primary stages of Islamic law as a legal term. He believes that the said word has been studied after Islamic discussions and the subject has been expanded by the Shiite and Sunnite jurists.

3. Fraud in Islamic law

Fraud was defined as deception and concealment of fault. Holy Quran as the main source of Islam hasn't used this word directly but its instances have

been mentioned in some verses which are mentioned as follows:

Deception of Josef's brothers in separation of child and father (Holy Quran, 2014)

Deception of the Egyptian ruler (Holy Quran, 2014)

Forbidding repeated divorce and referring to woman to hurt them (Holy Quran, 2014)

Forbidding deceiving divorced women (Holy Quran, 2014)

In the narrations which have been quoted from the innocent imams, the fraudulent person or deceiver has been admonished:

A person who harms a believer or plays tricks to him will be admonished (Islam prophet)

Playing tricks to anyone who has trusted in you is heresy (Imam Ali).

By referring to the jurisprudential texts of the Shiites and Sunnites, some cases of fraud are found by referring to it directly. At the beginning of Islam, there are some instances of fraud among companions of the prophet and their quotations. In the old and ancient texts of the Sunnite, delseh means deception and fraud in transaction and the applications show relationship with the word "zariah" which literary means hunting ground of lurker.

Among the Shiite jurists, Shahid Thani has justified jurisprudential relationship between fraud and its etymological meaning: the fraudulent person conceals the defective subject and misrepresents reality and intends to show unreal fact to the opposing party. Shahid Thani refers to some documents in his writings about fraud by referring to its record in works of the companions and followers of the prophet about marriage and goods sale contract and points out that fraud has been documented in some rules such as loss rule as one of the means of liability in imamate jurisprudence. Restoration of right through perjury has not been permitted in case of fraud based on narration of Imam Sadeh (PBUH) (Bokhnooh, 2007).

Imamate jurists have discussed fraud in marriage contract and sale contract in different cases and have stipulated rules for it. According to the jurists, if a person deceives another person to have some traits or conceal facts in case of marriage and marriage is formed based on it, there will be option of fraud after detecting reality for a person who has been deceived and he can cancel the marriage contract.

It should be mentioned that one can hardly give definition of fraud in Islamic law due to dispersion of fraud and deception. In most writings of the jurists whether Shiite or Sunnite, fraud gets close to option of deception and sometimes to option of loss and sometimes lacks sanction but fraud and option of fraud can be found in case of marriage in some works of Imamate jurists (Ayatollahi, 2008).

4. Fraud in case law of Iran

Islamic law is the basis and origin of case law of Iran. The fourth principle of Constitutional Law of Islamic Republic of Iran emphasizes on adaptation of civil, criminal, financial, economic, administrative, cultural, military, political and other laws to Islamic rules.

Civil law of Iran gives general definition of fraud in article 438: the operations which lead to deception of the transacting party. Article 396 mentions option of fraud among the options when options are discussed.

By looking at the definition mentioned in article 438 of civil law, it is inferred that the given definition of fraud is defective because it doesn't clarify what operations and also rule of fraud mean.

By looking at view of the legal scientists, it should be mentioned in completion of the definition of fraud that a person who commits fraud in transaction seems to obscure the case for the opposing party and conceals the fact. The opposing party can cancel the transaction in case of proof which is called option of fraud.

5. Conditions of option of fraud

To realize option of fraud, two conditions are required: performing the fraudulent act and deception of the contracting party. The fraudulent act may be committed verbally or practically and the resulting fraud is called verbal or practical fraud. In some cases, silence of the transacting party about hidden faults of the object of sale or the contracting party can realize fraud. According to the lawyers and also jurists, any fraudulent action doesn't cause fraud. Many charming manifestations and usual pretensions in trade don't cause option of fraud like decoration of goods or makeup of the party of marriage contract as far as it is appropriate according to the wise people. In addition, the contracting party must perform charming and deceitful action and fraud of the third party is not effective. In order to realize fraud, there should be two material and spiritual elements that is the deceiver should intend to deceive and act deceitfully. Committing deceiving action causes option when it is effective on another contracting party and forces him to conclude it.

In law of Iran, fraud is not only limited to sale contract and insurance contract is believed by the lawyers to be one of the common cases of fraud (Katoozian, 2008).

The term fraud is applied in law of Iran in contracts and specifically in sale and marriage. In civil law, articles 438 to 440 have studied the subject of fraud. In marriage contract, the instances of fraud are as follows:

- 1-Fraud in defects which causes cancelation of marriage.
- 2-Deception in physical defects
- 3-Deception in descriptions
- 4-Deception in misrepresentation or concealment of defect

5- Deception in chastity of wife and concealment of sexual intercourse before marriage

6- Deception in family position

7- Mistake in social position (Ayatollahi, 2008).

The presence of option of fraud in marriage can be inferred from article 1128 of civil law. This article says that in case either party should have a special trait as condition and it is evident after contract that the said party lacks the intention, the opposing party will be entitled to cancel the contract whether the said trait has been stipulated in the contract or the contract has occurred inconsistently (Safaei and Emami, 2007).

Fraud and violation of condition about description are close to each other and they are difficult to separate. These two have been mixed in book of the imamate jurists. Nevertheless, some cases can be assumed that violation of condition about description is true but fraud is not true : it may be conditioned without bad faith and with intention to deceive a description in one of the spouses and it is later evident that the intended description is not available at time of conclusion. In Islamic jurisprudence, fraud is not regarded as fault of consent. In law of Iran, based on article 396 of civil law, fraud is regarded as option and fraud in settlement causes option of cancelation in article 764 of the same law. It seems that civil law method is objectionable. By virtue of article 10 and article 183 of civil law, legislator wants to found general theory of contract and waives the term which is found in Islamic jurisprudence for conclusion of contracts by following civil law of France and regards intention and consent as the main element of contract and on the other hand, regards fraud as one of the options.

Therefore, it should be noted that despite some contradictions in law of Iran, fraud is regarded as fault of consent. The case which seems not to be mentioned in civil law is that waiver of all or part of the options can be conditioned in contract based on article 448 of civil law. Validity of this article is challenged for fraud and legislators should have mentioned option of fraud out of this paragraph.

Based on article 439 of civil law, fraud has been mentioned in sale and both customer and seller can have title of fraudulent person and causes option of fraud. Article 440 of civil law also regards option of fraud as immediate after knowing it. In other words, if a time is elapsed from this science and discovery of fraud and the fraudulent person doesn't use his option, option of fraud will be waived from him.

In addition to civil sanction for the fraud which was mentioned above, legislator has stipulated criminal sanction in the field of fraud in marriage. Article 647 of Islamic Punishment Law enacted in 1996 stipulates that in case either spouse deceives the opposing party to chimerical affairs such as higher education, financial ability, social position , job and special position , singleness and the like and contract is concluded based on each of them , the perpetrator will be sentenced to prison from 6 months to 2 years.

6. Fraud in law of France

In law of France, issue of fraud has been described in detail. Article 1196 of civil law of France says that one of the parties shall maneuver to realize fraud of one of the parties. The word "maneuvers" which has been applied in this article means the actions or operations which are interpreted as fraud or deception. In fact, this interpretation of the article indicates realization of material element of fraud. In Roman law, fraud was offense and had criminal punishments. Law of France has included this issue in its law and has stipulated criminal aspect in some cases. Courts of France have applied expansive interpretation for the word "maneuvers". Although the performed action in fraud has criminal aspect, legislator of France has applied expansive theoretical fraud in civil section and it can be said that actions including silence and lie are performed at many times.

In law of France, concealment of defect in legal writings is not regarded as fraud because other rules support the aggrieved party with other methods in other legal issues such as concealed defect liability in sale and lease. Fraud is regarded as fault of consent while liability of concealed defect doesn't depend on consent of contract and results from independent rule of law.

Although the present fraud has been referred in article 1196 of civil law of France, legal interpreters have also emphasized on verbal fraud. In other words, if telling die leads to conclusion of a contract, option of fraud will be created.

By looking at law of France, it cannot be interpreted that silence is certainly one of the instances of fraud. In case silence results from concealment of a fault and another party didn't want to conclude the contract in case of disclosure, it can be regarded as fraud.

In law of France, psychological element of fraud has not been expressed in the law but judicial interpretations and procedures indicate that law of France has validated psychological element as one of the constituent elements of fraud. If the action is not accompanied by psychological bad faith in case of mistake, the concluded contract will not be regarded as fraud.

This question sometimes arises if definition of goods or commodity by seller is regarded as fraud. The answer is that law of France pays attention to custom. If the common social morality forbids the subject and condemns it, it should be regarded as fraud. In law of Iran, there is no rule in this regard. Dr. Hassan Emami has referred to it in his writing and has mentioned that if the action deceives customer, it will be regarded as fraud.

By relying on article 1196 of civil law of France, action will be regarded as fraud when it has been performed by one of the contracting parties. With this description, fraud of the third party will be ineffective.

Finally, fraud causes nullity in law of France after being detected by the aggrieved party. This nullity

will be regarded as relative in most cases. Of course, concept of nullity in law of France is closer to concept of cancelation in law of Iran and the aggrieved party can render the contract null and void.

7. Fraud in law of England

Fraud in law of England has broader meaning. Contract in law of England lacks aspect of consent unlike law of Iran and France and since this law has passed special way due to historical record even in the field of contracts and caused the contractual issues to be raised differently from other legal systems, it can be said that fraud is not regarded as fault of consent in law of England. Fraud in law of England means misrepresentation that is one of the contracting parties mentions some characteristics for it before concluding contract which is not real and are not realized without implicit or explicit condition while it direct the party to conclude the contract. Misrepresentation may be fraudulent or innocent. Innocent misrepresentation has no equivalent and instance in law of Iran and France but fraudulent misrepresentation can have instances differently.

Fraud in law of England is regarded as incorporeal misrepresentation which has been under rule of ethical duress in law of France and is included in duress. There is no comprehensive definition of fraud in law of England and is similar to Islamic law in this regard.

In England, fraud has no important instances in terms of action but it is based on incorrect speech. In other words, the person acts with speech or misbehavior such that it deceives another party and leads him to conclude contract. Concealment of defect and reality also can lead to fraud. To realize misrepresentation in law of England, only silence doesn't cause fraud. But English judge acts so strictly against silence that he separates winking or smiling from silence and regards it as fraud. Good faith principle in law of France is interpreted as principle of trust in contract in English law. It means that the contracting party shall mention all characteristics under transaction to another transacting party. An evident example which can be given for it and is applicable in law of Iran is insurance contract and the insurer shall present all conditions to the insured.

The important cases which are found in law of England are that disclosure of the cases relating to subject of the contract shall be performed at time of conclusion and elapse of time damages expression of fraud. It should be mentioned that the only presence of material element is not sufficient in this legal system but psychological element should be formed. However, psychological element is not the one which is raised in other legal systems. In this system, psychological element is discussed as principle of equity. This theory is mentioned as undue influence which is one of the indices of common law indices.

Based on this theory, no one should be able to misuse another person.

In law of England, the agent who intends to conclude contracts plays different role from law of Iran and France and its effect on conclusion is very limited and is applied to differentiate between ethical differences and binding differences. In this legal system, they put delicate difference between intention of deception for lack of sincere belief and this intention which the party acts according to what has been represented. For this case, an example can be given. A person who tells life with intention of deception will be regarded as fraudulent in law of England and not fraudulent in law of France. For this reason, fraud has broader meaning in law of England.

In law of England, there are ordinary praises for selling object of sale as misrepresentation which sometimes causes fraud. Fraud of the third party is not effective in this system. Fraud in law of England nullifies contract and this nullity may be directly executed by the aggrieved party or the said person may refer to the country and requests the court for nullity of the contract. Fraud has no aspect of consent in this system, it has direct relationship with mistake and the judge should separate them.

8. Fraud in international law

In international law, fraud can invalidate treaties like fault of consent. Fraud nullifies treaty provided that effects of nullity of the treaty don't endanger benefits of the international community because the treaty is usually real regulator of international life and is an important means for stability and enforcement of regulations (Falsafi, 2004).

As mentioned before, constituent elements of fraud include spiritual and psychological elements or bad faith and material element or fraudulent act. Fraudulent act is any action or behavior which a transacting party performs not to confuse another party such as bribing delegates of government, prevarication, telling lie, rhetorical question or even silence of one of the parties are the fraudulent acts which damage will of the transacting party (Falsafi, 2004).

Of course, duress can be included in this class. Article 51 of Vienna convention 1969 mentions duress that consent of each state to join the convention will have no legal effect in case it results from duress and through actions or threats against delegate of that state (Falsafi, 2004). In international law, when fraud is made evident, the aggrieved party will have right to cancel the contract which leads to nullity of treaty. This nullity is relative nullity. Absolute nullity of legal action is effective when legal action has violated very important legal rules but relative nullity has the characteristics, for example, any aggrieved party whose will is defective can request for nullity of the contract and claims of the relative nullity will be liable to rules of limitation and if this contract was not effective, it will be assumed

that the contract has been null and void from the beginning.

Therefore, it can be said that invalidity of the treaty results from the causes one of which is fraud and fraud causes relative nullity of treaties in international law (Falsafi, 2004). Deception will be regarded as fraud when it has material and spiritual elements. In international law, any deception cannot be called fraud because a contract should be concluded under freedom of will of the parties. But a new approach to some instances can be found in legal system which has material and spiritual elements of deception though it is not regarded as fraud.

Fraud from the viewpoint of legal linguistics

One of the controversial issues which has been converted into a specialized branch in universities and is applicable in judicial issues is scientific study of language by saying, hearing and writing which is raised in courts as legal dispute such as forgery, perjury, frauds which are committed due to telling lie and the similar cases which are studied and legally investigated by the specialists in this scientific branch. In fact, specialists of this branch apply findings of two sciences of linguistics and forensic medicine for detection of lingual crimes. Therefore, in case application of language in any form causes loss to the complainant or complainants, it will be put forward in the court.

Language is studied from two perspectives: firstly, language as a tool which reflects human mental function and should be studied with raw method and without relation with other external linguistic factors and secondly, the language which is applied as communication means and environmental and social factors are effective on it and change it. Communicative language is a behavioral habit in which people of a society share. The authorities who study special fields of social damage believe that many social problems are caused by unreasonable use of language or other forms of communication. Human is able to hide their thoughts and intentions and tell lie through language. Human has divided lingual lies into two acceptable and unacceptable groups due to social life. Acceptable lies can include figures of speech, metaphor, satire, eulogy, marketing and advertisement, exaggeration and the like and unacceptable lies include fraud, forgery, accusation, abusive language, and the like which are regarded as fraud and are regarded as violation in some positions in case another party sustains loss. In civil law, this legal violation is regarded as crime and has been regarded as fraud.

Article 438 of civil law: fraud means the operations which deceive the transacting party.

Article 439 of civil law: if seller has deceived, customer will have right to cancel sale and in case the customer has deceived, the seller will have right to receive price. Definition of fraud in article 438 of civil law shows that: 1- some operations should be performed, 2- this action deceives the transacting party. Fraud means deception and concealment of reality. Then, in case a seller attributes an unreal

trait to his goods or conceals a fault in it, he has resorted to deception in transaction. There is a type of deception and hypocrisy in fraud and the fraudulent person abuses trust of another transacting party irrespective of the job dignity and conventional honesty. On this basis, telling lie or inappropriate comment creates right of cancellation of contract or transaction and the liar shall compensate for damage by the transacting party. For this reason, fraud in transaction is close to deception.

In case fraudulent act leads to desecration or loss and retaliation, fraud will be legally prosecuted as crime and the violator will be sentenced to prison for 6 months to 5 years in addition to compensation for damage. In this section, there is special bad faith in goal and intention of the perpetrator to achieve result.

It is worth noting that any fraudulent act doesn't cause fraud according to jurists and lawyers. Many of usual representations in trade such as decoration of goods which are conventionally reasonable don't cause loss and damage. Marketing and commercial exaggeration are not fraud because aim of the seller is not to deceive the buyer. Deceitful acts will cause loss when they have undesirable effect on another contracting party and lead him to conclude it. In fact, marketing is the class of commercial activities and performances which facilitate exchange of goods and services between seller and buyer and demand and request of customer are met due to performance of marketer. Advertisement is one of the special activities in trade which affect proportion of cultural and social conditions in the addressee's society. In this discussion, language is a means of exchange of information and guidance.

In summary, advertisement means set of verbal, writing, behavioral and illustrative actions which is organized to influence and affect thoughts, beliefs and feelings of the addressees and takes identity to orient them toward specified goal and intention.

Human compared with other living creatures which are able to use communication means is a creature which can use its communicative language to meet goals and intentions based on its will and creativity and skill.

Human is able to create new concepts with language and sequence of signs and symbols. The more the effect of communicative language between humans on personal and professional relations and life of human, the more the goal to acquire skill in application of language based on personal and professional benefit of people. For this reason, it is better to consider training of lingual skills seriously in educational system to use language properly. The authorities who study special fields of social damages believe that many social problems are caused by unreasonable use of language or other forms and the reverse condition can be imaginable. There are some cases that the person will gain high benefit due to effect of language on thoughts of addressees.

9. Conclusion

There are two constituent elements in fraud including spiritual element or psychological bad faith and material element or deceitful action. Fraud is included in subject of the contract and indicates that the fraudulent person deceives another person with bad faith and by describing unreal fact or concealing fault and leads him to conclude contract.

Fraud in law of Islam has no comprehensive definition despite semantic load and its sanction is more ethical and heavenly. Jurists have referred to constituent elements of fraud in their books and some have mentioned its instances.

Fraud has been given in law of Iran and civil law for sale contract and marriage contract and it causes option of fraud for the aggrieved party. In law of Iran, criminal sanction has been considered for fraud particularly in marriage contract.

In law of France, fraud has broad meaning and has consisted of dual material and spiritual elements. Law of France has introduced material action of fraud as maneuver which has broad meaning and implies criminal punishments as well.

In law of England, fraud has no comprehensive definition and is regarded as material action called misrepresentation and verbal fraud is more emphasized. In this system, fraud is not regarded as fault of consent and broad concept of material element gives more different nature to it than system of Iran and France. Fraud of the third party is not effective in other legal systems. The aggrieved party can cancel the contract personally or through judge.

In international law, fraud invalidates treaty and creates relative nullity. Instances of fraud in international law include bribery, duress, silence, prevarication and misrepresentation.

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