Academic Journal of Nawroz University (AJNU), Vol.1, No.1, 2023

https://doi.org/10.25007/ajnu.v1n1a1958

The Uncertainty in the Islamic Jurisprudence/ An Analytical Comparative study with both the Iraqi and French Civil Codes

Younis Salahuddin Ali

Assistant Professor of the Private Law, College of Law and International and Diplomatic Relations, Cihan Private University, Kurdistan Region, Iraq

ABSTRACT

The concept of the uncertainty is well-known in the Islamic jurisprudence. This jurisprudence knows also the concept of the excessive ignorance, and distinguishes clearly between it and the uncertainty. The majority of the Islamic jurisprudence considers the sale of non-existent subject-matter of the contract null and void due to the uncertainty. But there is a reasonable opinion in this jurisprudence considers that every non-existent subject-matter of the contract which is uncertain to exist in the future, is prohibited from being sold, and the contract of sale is null and void. And every non-existent subject-matter which is certain to exist in the future can be sold validly, and the contract of sale is valid, in spite of the non-existence of the subject-matter at the time when the contract is concluded. The cause of the prohibition is not the non-existence of the subject-matter itself, but the uncertainty vitiating this non-existence. The Iraqi civil law No. (40) of 1951 adopts both the concepts of uncertainty and excessive ignorance. and the French civil code of 1804 does not mention the uncertainty in its texts, but requires that the content of the contract be certain and licit, in order for the contract to be valid.

KEYWORDS: Uncertainty, excessive ignorance, Utter indefiniteness, Deception, doubtfulness.

1. Introduction

1.1 The Introductory Preface to the Topic

The Islamic jurisprudence knows well the concept of the uncertainty, which has a wide-range of meanings in this jurisprudence, both linguistically and terminologically. This jurisprudence also adopts three attitudes towards the definition of uncertainty, Islamic jurists know also the concept of the excessive ignorance (Utter indefiniteness), and distinguish clearly between it and the uncertainty. It is worth-bearing in mind that the majority of the Islamic jurisprudence considers the sale of non-existent subject-matter of the contract null and void due to the uncertainty. But there is a reasonable opinion in this jurisprudence considers that every non-existent subject-matter of the contract which is uncertain to exist in the future, is prohibited from being sold, and the contract of sale is null and void. And every non-existent subject-matter which is certain to exist in the future can be sold validly, and the contract of sale is valid, in spite of the non-existence of the subject-matter at the time when the contract is concluded. The cause of the prohibition is not the non-existence of the subject-matter itself, but the uncertainty vitiating this non-existence. Whereas the Iraqi civil law No. (40) of 1951 adopts both the concepts of uncertainty and excessive ignorance. and the French civil code does not mention the uncertainty in its text, but requires that the content of the contract be certain and licit, in order for the contract to be valid.

1.2 The importance of the research

The importance of this piece of research is the wide-variety of meanings of the uncertainty in the Islamic jurisprudence. And it is necessary for the Iraqi civil law to adopt them.

1.3 The problem of the research

The problem of this research is focused on the question that: can the Iraqi civil law make use of and benefit from the wide-variety of meanings of the

uncertainty adopted by the Islamic jurisprudence, in spite of being highly and closely affected by this jurisprudence? Considering that this law provides for the uncertainty vaguely and in an ambiguous manner and does not utilize its extensive and far-flung meanings.

1.4 The methodology of the research

This research has followed the analytical comparative methodology of legal research, by studying the uncertainty and excessive ignorance in the Islamic jurisprudence, compared with their counterparts in both the Iraqi and French civil codes.

1.5 The plan of the research

This research has been divided into two sections. The first discusses the concept of the Uncertainty in the Islamic jurisprudence and comparative law, whereas the second section is concerned with the effects arising from the uncertainty and excessive ignorance (indefiniteness) in the Islamic jurisprudence and comparative law and as follows:

2. First Section: The concept of the Uncertainty in the Islamic jurisprudence and comparative law

The Islamic jurisprudence which is featured by the flexibility of its sources and characteristics (Abdul salam Al-Tirmanini. 1982. p.27), and the accuracy of their terms and definitions, has been profoundly focused on the terms of the uncertainty and excessive ignorance (indefiniteness). Therefore we should study the definition of these two terms and compare between them in the Islamic jurisprudence in the following two sub-sections:

2.1 First sub-Section: The Definition of the uncertainty

Simply put, the uncertainty in the Islamic jurisprudence has a wide-spectrum of meanings both linguistically and terminologically.

Linguistically speaking, it can encompasses a lot of meanings, one of them it means the deception or delusion (Mustapha Ahmed Al-Zarqa. 2004. p.744), therefore we can say someone deceives, cheats or deludes another. And the past participle of this word is "deceived". It means also the doubtfulness, that is to say the probability of existence or occurrence is equal to the probability of non-existence or non-occurrence (Ibn Abidin, Muhammad Amin. 1252 A.H. p.147). It also contains the meaning of the danger or jeopardy (Wahba Al-Zuhaili. 1985. p.437).

Whereas terminologically or according to the Islamic jurisprudence terminology, that is to say, in conformity with the juristic viewpoint, the uncertainty may have also a good deal of meanings. It can refer to the ignorance, particularly the excessive ignorance, also known as (Gross, Grave or Utter ignorance), or even indefiniteness (Al-jurjani Ali Bin Mohammad. 2004. P.208). It refers also to something with concealed consequences (Al-Darir, Siddiq Mohammad Al-Amin. 1993. p.194), when the consequences of something are concealed, this means that it is encompasses with excessive ignorance or utter indefiniteness. The uncertainty refers also to the risk , jeopardy, danger or hazard. To endanger, jeopardize or imperil something means to make it uncertain. That is to say, it becomes endangered, jeopardized or imperiled (Wahba Al-Zuhaili. op. Cit . p.437). The reference is also made to the meaning of doubtfulness of the occurrence of something (Ibn Nujaim Al-Hanafi , Zain Al-deen. 1997. p.119), this means that someone will not know definitely whether something will occur or not.

As far as the directions of the Islamic jurisprudence towards the terminology of the uncertainty is concerned, the Islamic jurists adopted three attitudes as follows:

First: According to this attitude the uncertainty is restricted to the doubtfulness about the presence of something, this means that someone can doubt whether something will occur or not, because it is unknown whether it will be present or not (Ibn

Abidin Muhammad Amin. op. Cit. p.147). Or whether the subject-matter of the contract will be present or not (Ibn Taymiyyah Shaykh Al-Islam Taqi Addin Ahmad. 2005. p.21). Therefore the uncertainty in conformity with this attitude is represented by the unreliability of the presence of the subject-matter of the contract after contracting. this means that one of the contracting parties may be deceived, deluded or cheated by unreliable presence of the subject-matter of the contract.

Second: in accordance with this attitude the uncertainty is confined to the ignorance, especially the excessive ignorance, or utter indefiniteness of the subject-matter of the contract (Ibn Hazm Al-Andalusi Al-Zahri. 2009, p.1222). This will be realized when the subject-matter of the contract is completely unknown (Al-Babarty. 1315 A.H, p.324). Therefore, the uncertainty may be materialized when both the magnitude or the characteristics of the subject-matter are vitiated by excessive ignorance or utter indefiniteness (Muhammad Al-Zuhaili. 1996. p.102).

Third: As far as this attitude is concerned, the concept of uncertainty may include both the doubtfulness and the excessive ignorance, or utter indefiniteness as to the subject-matter of the contract. Therefore, the concept of uncertainty gathers together both the uncertain presence and uncertain description of the subject-matter of the contract (Al-Sarkhasi Shams Al-ddin. 1989. p.194).

As far as the Iraqi civil law No. (40) of 1951 is concerned, it mentions both the uncertainty and the excessive ignorance both in the first paragraph of the article (129), and the second paragraph of the article (514). Because of being highly affected by Islamic jurisprudence, particularly the Mejelle of juristic rules of 1869, which is considered as a European-style Ottoman codification of Islamic law of the hanafite school (Dan E. Stigall.2006. P.7), from which it borrows most of its rules. As well as being affected by the Egyptian civil law No.131 of 1948. But the most considerable notices which can be deduced from the two afore-mentioned texts are the following three notices: First: the Iraqi civil law does not define the uncertainty, but it only mentions it. Second: it distinguishes between uncertainty and the excessive ignorance or utter indefiniteness of the subject-matter of the contract. Third: it considers them two distinct and independent elements. While most jurists of the Iraqi civil law do not define the uncertainty, only one of them (Abdul Majeed Al Hakim. 1967. P.365) defines it as something with pleasant appearance, but unpleasant essence. It is also to be noted also that because the Iraqi civil law is affected and influenced by the Islamic jurisprudence, some of Iraqi jurists (Adnan Ibrahim Al-Sarhan and Noori Hamad Khatter. 2009. p.168) define the negation of uncertainty as the identification or the determination negating excessive ignorance, or utter indefiniteness of the subject-matter of the contract. They also define (Adnan Ibrahim Al-Sarhan and Dr. Noori Hamad Khatter. ibid. p.175) the excessive ignorance as the indefiniteness leading to the dispute or conflict. Whereas the little or permissible ignorance as the indefiniteness which does not lead to nullity of the contract. Because the custom used to permit it. Whereas the French civil code of 1804, amended by the ordinance n° 2016-131 dated February 10, 2016. Does not mention the uncertainty in its text, but requires that the content of the contract be certain and licit, in order for the contract to be valid.

2.2 Second sub-Section: The Comparison between the uncertainty and excessive ignorance (Utter indefiniteness)

As we have seen earlier the attitudes adopted by of the Islamic jurisprudence are different concerning the concept of the uncertainty. Although one of them considers that the uncertainty is restricted to the excessive ignorance, or utter indefiniteness, and both

of them are similar and equivalent, but the other attitude does not equalize between them, and considers them as independent concepts. Therefore, we should compare between the uncertainty and the excessive ignorance, by indicating the similarities and differences between them as follows:

First: The similarities between the uncertainty and the excessive ignorance: From one hand there are at least three similarities between both of them and as follows:

- The uncertainty is similar to the excessive ignorance, in that each one of them has the same essence of the other, and both of them are independent of the doubtfulness. And sometimes Islamic Jurists may use both of these two terms simultaneously as synonyms. Because the uncertainty can be realized or materialized when the subject-matter of the contract is excessively ignored, or being in excessive or utter ignorance (Wahba Al-Zuhaili. op. Cit . p.437).
- There are such common things between the uncertainty and the excessive ignorance as gender, kind, magnitude, identification and constancy.
- Both the uncertainty and the ignorance are similar in that both of them can be sub-categorized into two types: the uncertainty can be classified into or influential and non-influential, permissible and non-permissible (Al-Darir, Siddiq Mohammad Al-Amin, op. Cit , p.194). The influential uncertainty is the type of uncertainty with a big magnitude that must be impermissible, on the contrary to the permissible certainty

Second: The differences: notwithstanding, the afore-mentioned similarities, there are , on the other hand , the following two differences between them:

- The uncertainty includes not knowing certainly whether something will happen or not, whereas the excessive ignorance includes knowing the occurrence of something, but not knowing definitely its features and characteristics.
- The uncertainty can exist without accompanying the excessive ignorance, such as the in the case of the sale of the a fugitive slave well-known or identified before fugitiveness. whereas the excessive ignorance can exist without the uncertainty in the cases where someone buys a precious stone without knowing its kind. The stone is certainly present, but its kind is being ignored (Abdul Razaq Al Sanhouri. 1998. p.49).

3. Second Section: The Effects arising from the uncertainty and excessive ignorance (indefiniteness) in the Islamic jurisprudence and comparative law

To begin with we can say that many effects may arise from both the uncertainty and excessive ignorance in the Islamic jurisprudence, the same is true for the comparative law represented by both the Iraqi civil law and the French civil code.

Therefore we should discuss these effects in the Islamic jurisprudence, compared to the comparative law in this study, in conformity with the provisions and texts of the Iraqi civil law and the French civil code in the following two sub-sections as follows:

3.1 First sub-Section: The Effects arising from the uncertainty and excessive ignorance (indefiniteness) in the Islamic jurisprudence

It should be noted that the most considerable type of the uncertainty in Islamic jurisprudence is the uncertainty arising from contracting on the non-existing thing, in other words, the non-existent subject-matter of the contract, at the time when

concluding it. If the subject-matter of the contract is non-existent when the contracting parties are concerned with concluding it. The contract particularly, the contract of sale will be null and void. According to the consensus or unanimous opinion prevalent in the Islamic jurisprudence (Al-Sarkhasi Shams Al-ddin. op. Cit. 1989, p. 92. And Ibn Qudama Al-Makdisi. 1998. P.298). Because the prophet Mohammad (Peace be upon him) prohibited and prevented the uncertainty sale. Therefore, the Islamic jurists unanimously adopted the opinion that the sale of non-existent subject-matter of the contract is null and void. Whereas if the subject-matter of the contract is still non-existent, but it is certain because of the possibility of being present in the future, and not hidden, such as the sale of the non-existent things at the time of the conclusion of the contract, but they are certain to exist in the future, such as the sale of (Salam) (Al-Darir, Siddiq Mohammad Al-Amin, op. Cit , p.28). It is also worth-bearing in mind that although the general principle in the Islamic jurisprudence is that the sale of non-existent subject-matter of the contract is null and void unanimously, but there is a reasonable opinion (Ibn Al-qayyim Al-Jawziyyah.1423 A.H, p.206) in this jurisprudence runs contrary to the consensus of opinions, and thinks that no piece of evidence is available that sale of non-existent subject-matter of the contract is null and void, neither in the holly Quran nor in the tradition of prophet Mohammad (Peace be upon him), that prohibits this type of sales. The cause of this prohibition is not the non-existence of the subject-matter itself, but the uncertainty vitiating this non-existence (Ibn Al-qayyim Al-Jawziyyah. ibid, p.207). To put it simply it can be said that every non-existent subject-matter which is uncertain to exist in the future, is prohibited from being sold. And every non-existent subject-matter which is certain to exist in the future can be sold validly.

3.2 Second sub-Section: The Effects arising from the uncertainty and excessive ignorance (indefiniteness) in the comparative law

As far as the legal effects arising from the uncertainty and excessive ignorance in the comparative law are concerned, we should discuss the situation in the Iraqi civil law, then in French civil code as follows:

First: The situation of the Iraqi civil law as to the uncertainty and excessive ignorance: the Iraqi civil law permits the bargaining with the future thing, as the non-existent subject-matter of the contract, at the time when the contract is concluded. But it can exist in the future. According to the first paragraph of the article (129) of the afore-mentioned law, which provides that (the object (subject-matter) of the obligation may be non-existent at the time of contracting if it is obtainable in future and has been expressly identified and determined in such a manner negating excessive ignorance and uncertainty). It is obvious that the general rule in the Iraqi civil law is that it permits the subject-matter of the contract to be non-existent at the time of the conclusion of the contract, but its existence is possible in the future (Munther Al-Fadhel. 2006. p.158), provided that it has been expressly identified and determined in such a manner that negates excessive ignorance (utter indefiniteness) and uncertainty (Adnan Ibrahim Al-Sarhan and Dr. Noori Hamad Khatter. op. Cit. p.168). This means that the attitude adopted by this law runs contrary to the attitude prevalent in the Islamic jurisprudence that the sale of non-existent subject-matter of the contract is null and void. Even though that the existence of the subject-matter or object is possible in the future or even actual (Abdul Majeed Al Hakim. 1963, P.165). Therefore, the Iraqi civil law permits the contracting parties to bargain with non-existent subject-matter of the contract at the time when the contract is concluded, if it is possible to

exist in the future, and is identified and determined in such a manner negating excessive ignorance (utter indefiniteness) and uncertainty (Dara'a Hammad. 2016. p.155). Two remarks can be noticed or concluded from the text of the first paragraph of the article (129): the first is that the Iraqi legislator distinguishes and does not equalize between uncertainty and excessive ignorance. The second remark is that even though the attitude adopted by the Iraqi civil law is opposed to that prevalent in the Islamic jurisprudence from one hand, but on the other hand it is highly affected by the opinion taken by the jurist Ibn Al-qayyim Al-Jawziyyah, summarized by the idea that the cause of the prohibition of the sale of non-existent subject-matter of the contract is not the non-existence of the subject-matter itself, but the uncertainty vitiating this non-existence (Hasan Ali Al-Thannon and Mohammad saeed Al-Rahho. 2002. P.127). Therefore the Iraqi legislator restricts the possibility of selling the non-existent subject-matter of the contract with a restricting stipulation that the subject-matter of the contract should be expressly identified and determined in such a manner that negates excessive ignorance (utter indefiniteness) and uncertainty (Ismat Abdul Majeed Baker. 2011. P.266). It is to be noted that applying this general rule, the second paragraph of the article (514) of the Iraqi civil law permits the sale of the non-existent subject-matter of the contract and considers it valid, if it is expressly identified and determined in such a manner that negates excessive ignorance and uncertainty, and provides that (It would be valid to sell future things and rights, if they have been described adequately, determined and identified expressly in such manner which negates ignorance and uncertainty). After the first paragraph of the article (514) had embodied the general rule that requires that the subject-matter of the sale be expressly identified and determined in such a manner that negates excessive ignorance, and provides that (The object (subject-matter) of the sale must be designated, expressly identified and determined in a manner which negates excessive ignorance (indefiniteness)). But the transaction with the succession (estate) of a living person is prohibited from being agreed upon and is considered null and void (Ahmed Salaman Shuhaib Al-Sa'adawi and Jawad Kadhum Jawad Sumaisem. 2017, P.126), in accordance with the second paragraph of the article (129) of the Iraqi civil law which provides that (An agreement and transaction with regard to the succession (estate) of a living person is null and void). The nullity includes all the legal transactions (disposals) whether they are emanating from the heir or the deceased (de cujus) (Abdul Razaq Al Sanhouri.2004. p.312). If they emanates from the deceased (de cujus), they will be null and void, because of being contrary to the public order. And if they emanates from the heir, they will be null and void, owing to their contrariness to the public morality (Samir Abd Al-Sayyed Tanaghou. 2009. P. 7). It should be mentioned that the reason why the legislator prohibits and nullify this type of transactions, is to fight against gambling on the estate of the living person (Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, 1980. P.96).

Second: The situation of the French civil code as for the uncertainty and excessive ignorance: the French legislator made a fundamental amendment on the French civil code of 1804, in conformity with the ordinance n° 2016-131 dated February 10, 2016, concerning the law of contracts and the general regime and the proof of the obligations. And changed the basic elements of the contract, by abolishing the basic element of the cause with its outdated concept, and merged it with the basic element of the object. In order to form a new basic element known as the content of the contract. According to the new article

(1128) of the French civil code which provides that (it is necessary for the validity of the contract: 1-the consent of the parties. 2-the capacity to contract. 3-the licit and certain content of the contract). One of the French jurists (Stephanie Porchy-Simon. 2018. p.115) defines the content of the contract as the object of the obligation or the object of the contract, as well as contractual stipulations which must be licit and certain. It is to be noted that the content of the contract is represented mainly by both the object of the obligation or the object of the contract (Boris starck, Henri Roland et Laurent Boyer.1993. P.211). What is important and essential in this study is that the content of the contract must be certain. This certainty can only be realized by the determination of the object of the obligation, or even the object of the contract, that is to say the subject-matter of the contract. In accordance with the article (1163) of the French civil code which provides that (The obligation has for its object a thing which is present or future. The object must be possible, determined or determinable. The object is determinable when it may be deduced from the contract, or by reference to customs, or by previous relations of the parties, and any new agreement of the parties should be necessary). Therefore in order for the contract to be valid, the content of the contract, represented by both the object of the obligation and the object of the contract, must be certain by being determined or at least determinable. Otherwise the contract should be considered null and void. This means that the content of the contract will not be certain, unless being determined or at least determinable. Not only should the object of the obligation be determined or determinable, but also the object of the contract must be determined or determinable, because it represents the subject-matter of the contract (Francois Collart Dutilleul et Philippe Delebecque. 2002. P.29). We can mention five remarks concerning both the article (1128) and (1163) of the French civil code. First: the French civil code requires that the content of the contract be licit and certain in order for the contract to be valid. Second: it considers the certainty as an essential condition necessary for the validity of contract. Third: the certainty condition can only be realized by either the determination or the determinability of the content of the contract. Fourth: neither does the French civil code define the uncertainty in its texts and provisions, nor even mention it, but requires that the content of the contract be certain and licit, in order for the contract to be valid. Fifth: as opposed to the Iraqi civil law, highly affected by the Islamic jurisprudence. The French civil code does not use both the terms of the uncertainty and excessive ignorance (utter indefiniteness). After discussing the situation of both the Iraqi and French civil codes regarding the uncertainty, we can compare between these two situations. To begin with we shall indicate the similarities between them: The first paragraph of the article (129) of the Iraqi civil law requires that the object (subject-matter) of the obligation be expressly identified and determined in such a manner that negates excessive ignorance (utter indefiniteness) and uncertainty. Even though this object (subject-matter) is non-existent at the time of contracting and the conclusion of the contract, if it is obtainable in future, and its existence is possible in the future. The same is true for the French civil law. In that the article (1163) requires also that the object of the obligation be possible, determined or determinable. Its determinability may be deduced from the contract, or by reference to customs, or by previous relations of the parties, and any new agreement of the parties should be necessary. Now let us turn to the differences between the situations of these two laws: the main point of distinction can be made between them regarding the fundamental and dramatic

change in the French civil law concerning the basic elements of the contract. This law renounces the traditional attitude towards sub-dividing these elements into the three elements of the consent, object (subject-matter) and cause. And adopts a new attitude of sub-categorizing them into the consent of the parties, the capacity to contract and the licit and certain content of the contract according to the new article (1128) of the French civil law. Whereas the basic elements of the contract in the Iraqi civil law are still as they are, that is to say, the consent, object (subject-matter) and cause.

4. Conclusions

The conclusion is made up of both the findings and recommendations and as follows:

First: Findings: The study has reached the following findings:

- The uncertainty may have many Linguistic meanings, in the Islamic jurisprudence, the most important of which are the following three: it refers to the deception or delusion. It refers also to the doubtfulness concerning the existence of the subject-matter of the contract. It contains also the meaning of the danger or jeopardy lest something should not exist.
- The Islamic jurisprudence adopted three attitudes as to the terminological meaning of the uncertainty: First: the doubtfulness about the presence of something. Second: it refers to the excessive ignorance, or utter indefiniteness of the subject-matter of the contract. Third: the concept of uncertainty may include both the meaning of doubtfulness and the excessive ignorance of the subject-matter of the contract.
- The Iraqi civil law No. (40) of 1951 mentioned both the uncertainty and the excessive ignorance, but it did not define both of them. it distinguished between them, and considered them as two distinct and independent elements.
- The French civil code did not mention the uncertainty in its texts and provisions, but required that the content of the contract be certain and licit, in order for the contract to be valid.
- Although the terms of the uncertainty and the excessive ignorance are being used sometimes simultaneously and synonymously, but still many differences can exist between them.
- As a general principle in the Islamic jurisprudence, the effect arising from the uncertainty is the nullity of the sale of non-existent subject-matter of the contract. But the exclusion to this principle is the opinion that distinguishes between the mere non-existence of the subject-matter of the contract, without being surrounded by uncertainty, and the non-existence of the subject-matter of the contract, surrounded or vitiated by the uncertainty.
- Therefore, every non-existent subject-matter of the contract which is uncertain to exist in the future, is prohibited from being sold, and the contract of sale is null and void. And every non-existent subject-matter which is certain to exist in the future can be sold validly, and the contract of sale is valid, in spite of the non-existence of the subject-matter at the time when the contract is concluded.
- As far as the legal effects arising from the uncertainty in the Iraqi civil law, the first paragraph of the article (129) permits the bargaining with the future thing, as the non-existent subject-matter of the contract, at the time when the contract is concluded. But it can exist in the future. And the second paragraph of the article (514) permits the sale of the non-existent subject-matter of the contract and considers it valid, if it is expressly identified and determined in such a manner that negates excessive ignorance

and uncertainty, after the first paragraph of the article (514) had required that the subject-matter of the sale be expressly identified and determined in such a manner that negates excessive ignorance.

- in order for the contract to be valid in the French civil code, the content of the contract, represented by both the object of the obligation and the object of the contract, must be certain by being determined or at least determinable, according both the articles article (1128) and (1163) of this code.

Second: Recommendations: After displaying these findings, the researcher suggests the following recommendations:

- The researcher recommends that the Iraqi legislator make use of and benefit from the wide-variety of meanings of the uncertainty in the Islamic jurisprudence and adopt them, therefore we suggest the following text to be added to the Iraqi civil law: (Both the object of the obligation and the subject-matter of the contract should be expressly identified and determined in such a manner that negates excessive ignorance and uncertainty. The uncertainty can be realized if there is doubtfulness concerning them, one of the contracting parties is deceived or being jeopardized by the uncertain object of the obligation and the subject-matter of the contract).
- The researcher recommends that the Iraqi legislator takes into account and adopts the concept of the content of the contract, introduced by the amendment of the French civil code, according to the ordinance n° 2016-131 dated February 10, 2016. And this content should be identified and determined in order to eliminate both the excessive ignorance and uncertainty. therefore we suggest the following text: (The contract is concluded by the consent of its parties and the content which should be expressly identified and determined in such a way that negates excessive ignorance and uncertainty).

5. References

5.1 Books of Islamic jurisprudence

1. Al-Babarty. Sharh Fath-Al-Qadir. Part Five, Egypt. 1315 A.H.
2. Al-Darir, Siddiq Mohammad Al-Amin, Al-Gharar in Contracts and its Effects on Contemporary Transactions and Applications, The Islamic Institute for research and training, jeddah, 1993.
3. Al-jurjani Ali Bin Mohammad, Al-Ta'arifat (in Arabic) The definitions, Dar Al-kitab Al-Arabi Publishing house Beirut, 2004.
4. Al-Sarkhasi Shams Al-ddin. Al-Mabsut. 12th Part. First Edition. Dar Al-Ma'arifa Beirut. 1989.
5. Ibn Abidin, Muhammad Amin, Radd Al-Muhtar Ala Al-Durr Al-Mukhtar, Part Four, Bulaq Press Cairo, 1252 A.H.
6. Ibn Al-qayyim Al-Jawziyyah. . Aalam Al-Muwaqieen An Rabb Al-Alameen. , Volume -3- , First Edition, Dar Ibn Al-Jawzi for publication and distribution, Saudi Arabia,1423 A.H.
7. Ibn Hazm Al-Andalusi Al-Zahri. Al-Muhalla bi-al-Athar. Bait Al-Afkar Al-dawliyyah Publishing House. 2009.
8. Ibn Nujaim Al-Hanafi , Zain Al-deen, Al-Bahr Al-Ra'iq, Sharh Kanz Al-Daqa'iq, (in Arabic), Part Six, First Edition ,Dar Al-kutub Al-Ilmi'ah Publishing house. (Scientific Books Press) Beirut, 1997.
9. Ibn Qudama Al-Makdisi, Al-Mughni Wa Yalihe Al-Sharh Al-Kabir. Part Six. Third Edition. Dar Al-Kutob for publishing and distribution. Al-Riyyadh. 1998.
10. Ibn Taymiyyah Shaykh Al-Islam Taqi Addin Ahmad. 29th Part. Third Edition. Majmu' Al-Fatawa, Dar Al-Wafa for Publication and Distribution. 2005.
11. Muhammad Al-Zuhaili. Al-Muhadb Fi Fiqh Al-Imam Al-Shafie'y Li Abi Ishaq Al-Shirazi. Part Three. First Edition. Dar Al-qalam. Damascus. 1996.
12. Mustapha Ahmed Al-Zarqa. The General (Legal) Juristic Entrance. Part One. Second Edition. Dar Al-qalam. Damascus. 2004.
13. Wahba Al-Zuhaili. The Islamic jurisprudence and its sources, the comprehensive textbook on the legal sources and doctrinal opinions and the most important jurisprudential theories, as well as verifying and referencing the prophetic tradition, and the alphabetic indexing of topics and the most important jurisprudential subject-matters. Part Four, Second Edition. Dar Al-Fikr Publishing house for Printing, Publication and Distribution. Damascus. 1985.

5.2 Second: The Legal Books in Arabic

1. Abdul Majeed Al Hakim. The concise of the explanation of the general theory of obligations. Part

one, sources of Obligations. a comparison with Islamic Jurisprudence. Baghdad. 1963.
2. Abdul Majeed Al Hakim. The Medium Commentary on the theory of contract, with the comparison and balancing between the theories of the western jurisprudence and their equivalent theories in the Islamic Jurisprudence and the Iraqi civil law. . Part one. Conclusion of the contract. Al-Ahliyyah company for printing and publishing. Baghdad. 1967.
3. Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, The concise of the general theory of obligations in the Iraqi civil law. Part one, the source of Obligations, Ministry of Higher Education and Scientific research. Baghdad University, 1980.
4. Abdul Razaq Al Sanhouri. The Medium Commentary on the elucidation of the New Civil Code (Al Wasit in the Explanation of New Civil Law). part One. The theory of obligations in general. Sources of obligations. Contract-illegal act-Unjust enrichment-law. Al-Ma'arif Publishing house. Alexandria.2004.
5. Abdul Razaq Al Sanhouri. The sources of the rights in the Islamic jurisprudence a comparative study with the western jurisprudence . the subject-matter of the contract. Part Three. Al-halabi Juridique Publishing house. Beirut. 1998.
6. Abdul salam Al-Tirmanini. The Comparative Law, The major legal curricula. Kuwait University Publishing. Second Edition. 1982.
7. Adnan Ibrahim Al-Sarhan and Dr. Noori Hamad Khatter. The Explanation of the Civil Law, Sources of Legal Rights A Comparative Study. First Edition . Dar Al-Thaqafa for publishing and distributing. Amman Jordan. 2009.
8. Ahmed Salaman Shuhaib Al-Sa'adawi and Jawad Kadhum Jawad Sumaisem. The sources of Obligations, A comparative study with civil laws and Islamic jurisprudence. Second Edition. Zein juridique library. Beirut. 2017.
9. Dara'a Hammad, The general theory of obligations, Part one, sources of Obligations, Al-sanhouri Publishing house, Beirut, 2016.
10. Hasan Ali Al-Thannon and Mohammad saeed Al-Rahho.The nutshell in the general theory of the obligation. Part one, the sources of obligations, A comparative study with the Islamic and comparative Jurisprudence. First Edition. Dar Wael for printing and publishing. 2002.
11. Ismat Abdul Majeed Baker. The general theory of obligations. Part one. in Arab civil laws. Al-Thakira Publishing house. Baghdad. 2011.
12. Munther Al-Fadhel, The Medium Commentary on the explanation of the civil law, A comparative study between Islamic Jurisprudence and Arab and foreign laws, A study reinforced by opinions of both the jurisprudence and judiciary. Aras Publishing house, Erbil, 2006.
13. Samir Abd Al-Sayyed Tanaghou. Sources of obligations, Contract, Unilateral Will, Illegal Act, Enrichment without Cause, law and Two New Sources of obligations: Judgment and Administrative Decision. First Edition. Al-Wafa'a Legal Bookshop for Publishing Alexandria. 2009.

5.3 The Legal Books in French

1. Boris starck, Henri Roland et Laurent Boyer. Obligations 2. Contrat. Quatrième edition. Litec, Libraire de la cour de cassation. Paris.1993.
2. Francois Collart Dutilleul et Philippe Delebecque. Contrats Civils et Commerciaux . 6e edition. Dalloz. 2002.
3. Stephanie Porchy-Simon. Droit Civil. 2e anée .Les Obligations. Hypercours & Travaux dirigés. Dalloz. 2018.

5.4 The Laws

1. The Egyptian civil law No 131 of 1948.
2. The French civil code of 1804, amended by the ordinance n° 2016-131 dated February 10, 2016.
3. The Iraqi civil law No 40 of 1951.

5.5 The Legal Studies& Reports

1. Dan E. Stigall. Iraqi Civil Law: Its Sources, Substance, and Sundering. Journal of Transnational Law & Policy. Volume 16. Number 1.2006.