

Dr. Wahbah Al - Zuhayli

(Islamic Jurisprudence and its Proofs)

لِتَفْقَهُوا  
فِي الدِّينِ

**Financial Transactions  
in  
Islamic Jurisprudence**

**Volume 1**

Translated by Mahmoud A El - Gamal ,Ph.d

Revised by : Muhammad S.Eissa,Ph.D



آفاق معرفة متجددة  
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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In The Name of Allah, The Most Gracious, The Merciful

**Financial Transactions  
in  
Islamic Jurisprudence  
Volume 1**

**Financial Transactions In Islamic Jurisprudence /  
Wahbah Al-Zuhayli; Translated By Mahmoud A.  
El-Gamal; Revised By Muhammad S. Eissa. -  
Damascus: Dar Al-Fikr, 2003.-20; 24 cm.**

**ISBN: 1- 59239 - 072 - 2.**

**1-217 Z U H F**

**2- Title.**

**3- AL-Zuhayli**

**4- EL-Gamal.**

Dr. Wahbah Al-Zuhayli's  
*Al-Fiqh Al-'Islāmī wa 'Adillatuh*  
(Islamic Jurisprudence and Its Proofs)

Translated by  
Mahmoud A. El-Gamal, Ph.D  
Revised by  
Muhammad S. Eissa, Ph.d

# Financial Transactions in Islamic Jurisprudence Volume 1

Dar al-Fikr  
Damascus - Syria



PUSTAKA PERDANA



1012312

Dar al-Fikr al-Mouaser  
Beirut - Lebanon



**Sym. No.:** 1623.011-1

**ISBN Series:**1-59239-071-4

**ISBN Episode:**1-59239-072-2

**Sub. No.:** 250

**Topic:** Islamic Jurisprudence and its

**Title:** Financial Transactions in Islamic  
Jurisprudence, vol. I

**By:** Dr. Muhammad Sa'īd Ramadan

**Tr.:** Mahmoud A. El-Gamal, Ph.D

**Rev.:** Muhammad S. Eissa, Ph.D

**Printing Performance:** Dar Al-Fikr

**Page No:** 728

**Page Size:** 17 x 24 cm

**Copy No.:** 1000

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**Dar al Fikr in Damascus.**

Baramekah, Opposite the Unified Travel  
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P.O. Box 962, Damascus, Syria

Ph: 2239717, 2211166 - Fax: 2239716

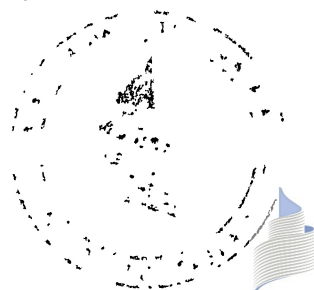
<http://www.fikr.com/>

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**Second Edition**

**Muharram  
1428 A.H.  
February  
2007 A.D.**



332.091767

WAH

## Acknowledgments

I wish to thank Sheikh Mohamed Binzagr and Sheikh Khalid Abdul Hadi Taher for their generous financial support that made this translation project possible. I also wish to thank Sheikh Hussein Al-Banawi for his support of the study of Islamic Economics, Finance, and Management at Rice University.

Last, but not least, I wish to thank Dr. Muhammad Eissa for carefully reviewing my translation. It is impossible to have any publication, let alone a translation, without mistakes. His efforts to minimize the number of remaining errors are greatly appreciated.

May Allāh reward all our efforts and good intentions.

Mahmoud A. El-Gamal  
Houston, TX  
July 2002



# Translator's Preface

This volume is an English translation of Volume 5 of Dr. Wahbah Al-Zuhaylī's *Al-Fiqh Al-'Islāmī wa 'Adillatuh*, Damascus: Dār Al-Fikr, Fourth edition, 1997 (ISBN: 1-57547-370-4). My goal in providing this translation was to give non-Arabic readers access to the rich Islamic juristic literature on financial transactions. A Translation of Volume 6 is forthcoming shortly, Allāh willing.

I should caution the uninitiated reader that this English translation is no more accessible than the Arabic original. Islamic jurisprudence is a highly technical field, and jurists have somewhat unorthodox writing styles. In this sense, juristic writings are no more accessible to new readers than any other set of technical writings (in law, science, etc.). Moreover, Islamic jurists, especially in the area of comparative jurisprudence, tend to write in a highly “non-linear” style. By “non-linear”, I mean that the reader is required to take multiple passes through any particular passage before the logic of the text becomes apparent. For example, the author may first mention the opinion of one jurist, then mention an opposing opinion by other jurists, then mention the proof of the latter group followed by a proof of the former. The text may then continue to go back-and-forth with discussions of the juristic principles upon which the varying opinions are based. This zigzagging may continue for a number of passages, requiring the reader to try to “keep-up” with the author. Whenever possible, I tried to “linearize” the author's line of thought. However, in most cases, I maintained the order of the text to avoid departing significantly from its structure.

In some instances, the author gave numerous examples of a ruling, where a few of them would illustrate the point. For instance, when he mentions homogeneous goods measured by number, he may enumerate five or six different fruits as examples. In such instances, I only translated a few of the most relevant examples to save the reader some time and space.

I must also warn the reader that the references given in the Arabic text, as well as this translation, are far from perfect. In some cases, the author did not give full citations for his references, in which case I simply translated his partial citation. In other instances, the author gave the fullest possible citation, but the format and information provided therein was insufficient to identify the edition, publisher, etc. Many of the references are out of print, and lack proper citation of place of publication, publisher, and year. This makes it very difficult for a reader who wishes to consult the original text that is cited by the author, and

the volume and page numbers provided here are therefore of very little use. In a partial attempt to standardize citations of those references for which the author provided partial information, I included a standard author and year citation in the text, with a bibliography at the end of the volume. For the benefit of the reader, I also included in the citations an indication of the juristic school within which that text is classified.

Mahmoud A. El-Gamal  
Houston, TX  
August 2001

# Abbreviations and Transliteration

## 0.1 List of abbreviations

Abbreviation	Full phrase	Corresponding Arabic
pbuh	peace be upon him	صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ ṣallā Allāhu ʿalayhi wa sallam
mAbpwh	may Allāh be please with him(her)	رَضِيَ اللهُ عَنْهُ (عَنْهَا) raḍiya Allāhu ʿanhu (ʿanhā)
mAbpwt	may Allāh be please with them	رَضِيَ اللهُ عَنْهُمْ (عَنْهُمْ) raḍiya Allāhu ʿanhum (ʿanhumā)

## 0.2 Transliteration table

Transliteration	Arabic letter	letter name
Short vowels illustrated with consonant "b"		
ba, bi, bu	ب، ب، ب	fathat, kasrat, dammat
Long vowels illustrated with consonant "b"		
bā, bī, bū	(بَا، بِي، بُو)	'alef, yā', wāw
Consonants		
'a, 'i, 'u	أ، إ، أُ	hamza
b	ب	bā'
t	ت، ة	tā', tā' marbūṭa
th	ث	thā'
j	ج	jīm
ḥ	ح	ḥā'
kh	خ	khā'
d	د	dāl
dh	ذ	dhāl
r	ر	rā'
z	ز	zāy
s	س	sīn
sh	ش	shīn
ṣ	ص	ṣād
ḍ	ض	ḍād
ṭ	ط	ṭā'
ẓ	ظ	ẓā'
ʿ	ع	ʿayn
gh	غ	ghayn
f	ف	fā'
q	ق	qāf
k	ك	kāf
l	ل	lām
m	م	mīm
n	ن	nūn
h	ه	hā'
w	و	wāw
y	ي	yā'

## 0.3 Glossary of transliterated technical terms

Transliteration	Translation	Arabic
Sharḥ; Shariḥa	Islamic Law	شَرْح؛ شَرِيْعَة
Qur'ān	The Revealed Scripture	قُرْآن
Ḥadīth	Prophetic Tradition	حَدِيث
Sunnah	Prophetic Actions and Traditions	سُنَّة
faqīh, fuqahā'	jurist, jurists	فَقِيْه، فُقَهَاء
madhhab (pl. madhāhib)	school(s) of jurisprudence	مَذْهَب (ج. مَذَاهِب)
fatwā (pl. fatawā)	Islamic legal opinion(s)	فَتْوَى (ج. فِتَاوَى)
'ijmāc	consensus	إِجْتِمَاع
'ijtihād	juristic inference	إِجْتِهَاد
qiyās	juristic analogy	قِيَاس
'istihsān	juristic approbation	إِسْتِحْسَان
tarjīh	juristic preference	تَرْجِيْح
jumhūr	majority (of jurists)	جُمْهُور
ḥalāl	permissible	حَلَال
ḥarām	prohibited	حَرَام
makrūh	disliked; reprehensible	مَكْرُوْه
mandūb; mustaḥabb	recommended; encouraged	مَنْدُوْب؛ مُسْتَحَبَّت
farḍ	obligation	فَرَض
'aqd	contract	عَقْد
.safqah	contract/deal	صَفَقَة
ṣīghah	language	صِيْغَة
rukṅ (pl. 'arkān)	cornerstone(s)	رُكْن (ج. أَرْكَان)
sharṭ (pl. shurūṭ)	condition(s)	شَرْط (ج. شُرُوْط)
rushd	discernment	رُشْد
'ijāb	offer	إِجْبَاب
qabūl	acceptance	قَبُوْل

Transliteration	Translation	Arabic
ḥukm al- <sup>c</sup> aqd	legal status of the contract	حُكْم الْعَقْد
ḥaqq (pl. ḥuqūq)	legal right(s)	حَقَّ (ج. حُقُوق)
khiyār	option	خِيَار
mawqūf	suspended	مَوْقُوف
ṣaḥīḥ	valid	صَحِيح
nāfidh	executable	نَافِذ
lāzim	binding	لَازِم
bāṭil	invalid	بَاطِل
fāsid	defective	فَاسِد
bay <sup>c</sup>	sale	بَيْع
māl (mutaqawwam)	(valued) property	مَال (مَمْتَقَوْم)
qabḍ; tasallum	receipt	قَبْض؛ تَسَلُّم
mithlī; dayn	fungible	مِثْلِي؛ دَيْن
qīmī; <sup>c</sup> ayn	non-fungible	قِيَمِي؛ عَيْن
dayn	debt or liability	دَيْن
ṭhāman	price	ثَمَن
qīmah	value	قِيَمَة
ṣarf	currency exchange	صَرَف
murābaḥa	cost-plus sale	مُرَابَاحَة
tawliya	sale at cost	تَوَلِيَة
waḍī <sup>c</sup> a	sale at a loss	وَضِيْعَة
juzāf	gross-sale	جِرَاف
ḥiwālah	Bill of exchange	حِوَالَة
ḥiwālah	transfer of liability	حِوَالَة
kafālah	guarantee	كِفَالَة
kafīl	guarantor	كَفِيل
'iqālah	revocation	إِقَالَة
khul <sup>c</sup>	divorce at the instance of the wife	خُلْع

Transliteration	Translation	Arabic
mu <sup>ʿ</sup> āṭāh; murāwadah	hand-to-hand sale	مُعَاوَاة؛ مَرَاوَاة
salam	Islamic forward contract	سَلَم
'istiṣnā <sup>c</sup>	commission to manufacture	إِسْتِصْنَاع
muḍārabah	silent partnership	مُضَارَبَة
sharikah; mushārahah	partnership or corporation	مُشَارَكَة؛ شَرِكَة
'ijār; 'ijārah	lease; hiring	إِيجَارَة؛ إِيجَار
qarḍ	loan	قَرْض
'i <sup>ʿ</sup> ārah	simple loan	إِعَارَة
ji <sup>ʿ</sup> alah	promise of reward	جِعَالَة
hibah	gift	هِبَة
'idā <sup>c</sup> ; wadī <sup>c</sup> ah	deposit	إِيدَاع؛ وَدِيعَة
wakīl; wakālah	agent; agency	وَكِيل؛ وَكَالَة
simsār; samsarah	broker; brokerage	بِسْمَار؛ سَمْسَرَة
fuḍūlī	uncommissioned agent	فُضُولِي
rahn	pawning	رَهْن
ḍamān	guaranty	ضَمَان
'amānah	trust	أَمَانَة
ribā	usury	رِبَا
jahālah	ignorance	جَهَالَة
gharar	risk and uncertainty	غَرَر
ghubn (fāḥish)	(excessive) inequity	غُبْن (فَاحِش)
tadlīs; ghishsh	cheating	تَدْلِيس؛ غِش



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Part I

The Sales Contract (*<sup>c</sup>Aqd  
Al-Bay<sup>c</sup>*)



### Author's plan:

This part consists of six chapters:

1. Constituents of sale.
2. Conditions of sale.
3. Status of sale, its object, and price.
4. Invalid (*bāṭil*) and defective (*fāsid*) sales.
5. Options (*khūyārāt*).
6. Types of sale:
  - (a) Forward sale (*salam*).
  - (b) Commission to manufacture (*'istiṣnā'*).
  - (c) Currency exchange (*ṣarf*).
  - (d) Gross-Sale (*jizāf*).
  - (e) Usury (*ribā*).
  - (f) Trust sales: cost-plus sale, sale at cost, and sale at a loss (*murābaḥa*, *tawliya*, *wadī'a*).
  - (g) Revocation (*'iqāla*).



# Chapter 1

## Constituents of Sale

This chapter will consist of two sections:

1. The definition of a sale contract, its conditions, and ethical considerations.
2. The cornerstones of a sale, and how it proceeds.

### 1.1 Definition, legitimacy, and ethics

#### Definition of sale

A sale (*bayʿ*) is an exchange of one item for another. The Arabic term *bayʿ* refers both to the activities of buying and selling (c.f. Qurʿān [12:20] and [2:102]).

The Arabic term *bayʿ* is derived from the term *bāʿ* (for arm) because one extends one's arm to give or take. Another explanation for this derivation is the likely possibility of extending one's arm to the other to shake hands at the completion of a sale; hence the other Arabic term for a sale agreement *ṣafqa* (literally, a hand-shake).

- For the Ḥanafīs, it means the exchange of an owned commodity (*māl*) for another in a specified manner; or the exchange of an owned commodity for another in a beneficial and special manner. This excludes unbeneficial exchanges (e.g. the exchange of one coin for an identical one), or the exchange of bads (i.e. items of no worth, e.g. dead animals, or dust).<sup>1</sup>
- Al-Nawawī defined sale as “the exchange of an owned commodity for another with the exchange of ownership”.<sup>2</sup> Ibn Qudāmah defined it similarly, emphasizing both the exchange of ownership, and taking possession by the new owner.<sup>3</sup>

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<sup>1</sup>Al-Kāsānī ((Ḥanafī), vol. 5, p. 133), Ibn Al-Humām ((Ḥanafī), vol. 5, p. 73), Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.3 onwards).

<sup>2</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol. 2, p. 2).

<sup>3</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol. 3, p. 559).

For the Ḥanafīs, a commodity defined as property (*māl*) must be desirable and possible to save for later use. The commodification and ownership of an object for them can be established by its satisfying those requirements for some or all of the people. Professor Al-Zarqā' criticized this definition and replaced it with the following: "An owned commodity is any identifiable object with a material value for the people".<sup>4</sup> Therefore, services and mere rights are not considered commodities for the Ḥanafīs. However, the majority of jurists (*fuqahā'*) consider them potentially owned commodities, because what is desirable in a physical object is its usufruct. In all of the above, a sale always means a contract consisting of an offer (*'ijāb*) and an acceptance (*qabūl*).

### Legitimacy of sale

Sales are permissible, with supporting evidence from the Qur'ān, the *Sunnah* (tradition and sayings of the Prophet pbuh), and *'ijmā'* (consensus of the jurists).

In the Qur'ān: "But Allāh has permitted trade" [2:275], "But take witnesses whenever you make a commercial contract" [2:282], "But let there be among you traffic and trade by mutual good will" [4:29], and "It is no crime for you to seek the bounty of your Lord" [2:198].

In the *Sunnah*: The Prophet (pbuh) was asked: "Which are the best forms of income generation?". He replied: "A man's labor, and every legitimate sale",<sup>5</sup> i.e. devoid of cheating or treason. Another saying of the Prophet (pbuh) is: "A sale must be by mutual consent".<sup>6</sup> Moreover, the Messenger (pbuh) was sent to mankind while people traded among themselves, and he accepted that practice. He said: "The truthful and honest trader is among the prophets, the righteous, and the martyrs" (Al-Tirmidhī classified it as a *Ḥadīth ḥasan*).

*'Ijmā'*: Muslims have agreed that sales are permissible, and this only stands to good sense as it allows each individual to meet his needs in cooperation

<sup>4</sup>See the introduction of his *Nazariyya Al-'Itizām Al-ʿAmmah fī Al-Fiqh Al-'Islāmī* (pp.114-118).

<sup>5</sup>Related by Al-Bazzār and verified by Al-Ḥākim on the authority of Rifāʿa ibn Rāfiʿ, and mentioned by 'Ibn Ḥajar in *Al-Talkhīṣ Al-Ḥabīr* on the authority of Rāfiʿ ibn Khudayj, who attributed it to 'Aḥmad, and mentioned by Al-Ṣuyūṭī in his *Al-Jāmiʿ Al-Ṣaḡhīr*, on the authority of Rāfiʿ Al-Ṣanʿānī (2nd printing, vo. 3, p. 4).

<sup>6</sup>This is a long *Ḥadīth*, related by Al-Bayhaqī and 'Ibn Mājah, and verified by 'Ibn Ḥibbān on the authority of 'Abū Saʿīd Al-Khudriy that the Messenger of Allāh (pbuh) said: "I shall meet Allāh before I give anyone something owned by another without his consent, for a sale requires mutual consent", and related by ʿAbd Al-Razzāq in *Al-Jāmiʿ* on the authority of ʿAbd Allāh ibn Abī 'Awfā as follows: "A sale is by mutual consent, and options are implemented after mutual agreement" Al-Suyūṭī (a, vol.1, p. 102), *Kanz Al-Daqā'iq* (vol. 2, p. 212), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfiʿī), vol. 9, p. 158). Also, Al-Tirmidhī and 'Abū Dāwūd related on the authority of 'Abū Hurayra a *Ḥadīth* meaning: "No two [should] depart (after a sale) except with mutual agreement", 'Ibn Al-'Athīr Al-Jazarī (, vol. 2, p. 9) and Al-Haythamī (, vol.4, p. 100).

with others trying to meet their own. Therefore, the general rule in sales (*al-buyʿ*) is permissibility.

Al-'Imam Al-Ṣhāfi'ī ruled: "The general rule for all sales is permissibility as long as they are concluded by consenting capable decision makers, except for what the Messenger of Allāh (pbuh) has forbidden, or what is sufficiently similar to that which the Messenger of Allāh (pbuh) has forbidden; and anything different from those is permissible following the permissibility of sales stated in the book of Allāh Almighty" (meaning the verses [2:275], [2:282], [4:29], and [2:198] cited above).

### Ethics of sales

There are many ethical considerations in sales, including:

1. **The avoidance of excessive profits:** All religions prohibit excessive taking of advantage of buyers as forms of cheating. However, a moderate degree of such taking of advantage is admissible because otherwise, all trade would cease. However, if one side takes too much advantage of the other, the sale may be deemed void. The Mālikī scholars defined excessive disadvantage as a profit of one third or more, since that corresponds to the rules of limited will.<sup>7</sup> Therefore, a profit rate of one third or less is considered acceptable.
2. **Truthful and complete disclosure of information:** The seller must give full and truthful information about the product, including its type, origin, and cost. Al-Tirmidhī reported the following *Ḥadīth* on the authority of Rifā'a : "All merchants are resurrected on the day of judgments as sinners, except for those who feared Allāh, treated their customers well, and were truthful".
3. **Ease of conduct:** the seller and the buyer should not be too harsh in their conditions or insist on prices too high or too low. Al-Bukhārī related on the authority of Jābir the following *Ḥadīth*: "Allāh is merciful to the man who is easy when he sells, when he buys, and when he collects his loans".
4. **Avoidance of swearing, even if truthful:** It is recommended not to swear in the name of Allāh in any sale, since it is disrespectful and unworthy of the name of Allāh, and Allāh has forbidden in the Qur'ān using his name to swear that you will be good to people and fearful of Him. Al-Bukhārī and Muslim narrated on the authority of 'Abū Hurayra the following *Ḥadīth*: "Swearing destroys the goods, and wipes out their blessings". Swearing by the name of Allāh is criticized thus in the Qur'ān: "And make not Allāh's name an excuse in your oaths against doing good or acting rightly or making peace between persons" [2:224].

<sup>7</sup>Ibn 'Arabī, *Aḥkām Al-Qur'ān* (vol. 4, p. 1804).

5. **Frequent paying of charity:** It is recommended that a merchant pays charity often to atone for whatever swearing, cheating, hiding of information, poor conduct, or excessive profits he may have committed. Al-Tirmidhī, 'Abū Dāwūd, and 'Ibn Mājah reported on the authority of Qays ibn 'Abī Ghurza the following *Hadīth*: "O merchants, the devil and sins are present at each sale, so purify your sales with charity".
6. **Documentation and witnessing of all debts:** It is desirable that all contracts and loans be written, and that witnesses sign for all delayed sales and debts, as Allāh has prescribed in the Qur'ān [2:282].

## 1.2 Cornerstones of sale contracts

The primary cornerstone (*rukn*) of a sale for the Ḥanafīs is the offer and acceptance – or other mechanisms – that signify an exchange.<sup>8</sup> In other words, the cornerstone for completion of a sale is the action or statement signifying the acceptance of the exchange of owned properties. This is how they define a sale contract.<sup>9</sup>

For the majority of *fuqahā'*, there are four cornerstones (*'arkān*) for a sale: the seller, the buyer, the language of the contract, and its object. Those are also parallel to the cornerstones of all contracts. For the majority of jurists other than the Ḥanafīs, the cornerstones of sale are either three or four:<sup>10</sup> parties to the contract (buyer and seller), object of contract (price and what is priced), and language of the contract (offer and acceptance).

The Ḥanafīs view an offer as an action of one of the two parties indicating willingness to engage in a transaction. The offer thus may originate from the buyer or the seller, and acceptance is indicated by the second party. Thus, the offer is defined as the primary action, and the acceptance as the secondary one, regardless of whether they originate with the buyer or the seller.

However, the majority (*jumhūr*) of jurists ruled that an offer originates with the seller, and acceptance originates with the buyer, regardless of who initiates the transaction.<sup>11</sup>

The discussion of offer and acceptance will cover two issues:

1. The language (*ṣiġha*) of offer and acceptance.
2. The nature (*ṣifa*) of offer and acceptance.

<sup>8</sup>A cornerstone (*rukn*) for the Ḥanafīs is a necessary part upon which the existence of something depends. For the majority (*jumhūr*), it is a necessary condition for the existence or mental conception of something (not necessarily a part of it, but associated with it). A condition, on the other hand, is necessary for the existence of something without being part of it.

<sup>9</sup>Ibn Al-Humām ((Ḥanafī), vol. 5, p. 74), Al-Kāsānī ((Ḥanafī), vol.5 p. 133), and 'Ibn cĀbidīn ((Ḥanafī), vol.4, p.5 and what follows).

<sup>10</sup>*Sharḥ Al-Minhāj* for Shaykh Zakariyyā Al-'Anṣārī (vol.2, p.180 onwards), and Al-Buhūtī (3rd printing (Ḥanbaḥī), vol.2, p.3).

<sup>11</sup>Al-Buhūtī (3rd printing (Ḥanbaḥī), vol. 2, o. 3).

### 1.2.1 Language of offer and acceptance

The form of a contract is the language used for the offer and acceptance if the contract is binding upon two parties, or offer only if it is binding on one alone.

All religions have agreed that the precondition for the existence of a contract and its conclusion is the expression of consent by both parties to have a binding agreement. This is what jurists call “the language of the contract” (*ṣiġhat al-‘aqq*), and lawyers call “expression of intent or will”. It is necessary in the language of the contract that it be standardized and approved by the legislator.

The Ḥanafīs agree that the language of request such as “sell to me” or “buy from me” does not constitute an offer or an acceptance; while language in the present or past tense such as “I sold you” or “I sell you”, etc. would constitute an offer or an acceptance.

#### Some differences between sales and marriage

In this regard, a sale contract is different from a marriage contract, since the latter is valid with request statements such as “marry me”, which gives the other party the right to conclude the contract by accepting this proposal. In this way, one party is concluding the marriage contract by representing both sides following that request. In contrast, a sale may not be concluded by one party except in special cases (e.g. a father selling or buying property to or from his son, or a legal guardian transferring properties between himself and the person under his guardianship). A second difference between the marriage and sale contracts is the lack of bargaining in the former. However, in the sale contract, since bargaining is possible, a precise language is needed to specify what is being offered, at what price, etc. before the nature of the contract becomes clear.

In summary, the language of the contract for the Ḥanafīs can be by two expressions without specifying intent (i.e. in the past tense, as in “I sold ...” or “I bought ...”). This usage of the verb in its past tense is conventionally accepted to signify an offer in the present, and convention supersedes the rules of grammar. Alternatively, the offer and acceptance can be by two verbs in the present tense, indicating intention (since the present tense allows either immediate or future implementation in the Arabic language). In this sense, the offer in the present tense is binding for future actions. A third possibility is using three expressions, via an inquiry by one party (e.g. “would you buy this from me”) or a request/command (e.g. “buy this from me”). In those cases, a third expression is necessary, with the second and third using the present or past tenses to complete the language of the contract. In this respect, the trade may not take place with the expression of a request or order (e.g. “buy this from me for so much”), regardless of intent. Similarly, the use of future tense (e.g. “I shall sell you, etc.”) cannot conclude the contract, since the use of “shall” contradicts a present intention.<sup>12</sup>

<sup>12</sup> Al-Kāsānī ((Ḥanafī), vol.5, p. 133 onwards), Ibn Al-Humām ((Ḥanafī), vol.5, p.75 onwards), Ibn ‘Ābidīn ((Ḥanafī), vol.4, p.9 onwards).

In contrast, the Mālikīs, the majority of the Shāfi'īs, and the Ḥanbalīs have all agreed that the language of the contract – be it a sale or a marriage contract – may be in the form of a request from one party (e.g. “sell to me”) and an acceptance from the other (e.g. “I have sold to you”).<sup>13</sup>

### The physical exchange sale

This form of sale (*bay' al-mu'āṭāh*) or (*murāwāḍa*) is concluded when a buyer and a seller agree on the object of the sale and its price, and exchange the object for the price without explicit verbal offer and acceptance. An example is when a buyer simply takes the object and gives the seller its price without any words or signals. Jurists disagreed on this contract.

Most of the Ḥanafīs, Mālikīs and Ḥanbalīs have agreed that this form of sale is admissible as long as it is customary and interpreted by the parties to imply mutual agreement. The logic of this admissibility is that the essence of a sale is mutual agreement, which may be obtained in a variety of ways considered customary in any markets.<sup>14</sup>

The most accepted opinion of the Shāfi'īs is that it is necessary for the conclusion of a contract that explicit or implicit words be used to imply offer and acceptance, thus nullifying this form of sale. The logic used by those jurists is based on the Messenger (pbuh)'s *Ḥadīth*: “A sale is but concluded by mutual agreement”.<sup>15</sup> Since agreement or acceptance is a hidden matter, the use of words is necessary to make it possible for witnesses to testify that agreement indeed took place. However, some of the Shāfi'īs, including Al-Nawawī, Al-Baghawī and Al-Mutawallī have deemed this type of sale acceptable, since an acceptance does not necessarily have to be verbal in their opinion. Al-Nawawī found this the best *fatwā*, while some of the other Shāfi'īs, including 'Ibn Surayj and Al-Rūyānī allowed physical sale only for less expensive items (e.g. a pound of bread, etc.) to the exclusion of more expensive ones.

It is important to note, however, that there is a consensus among all the jurists that a marriage contract cannot be implemented simply through the actions of its parties, but that the verbal communication of offer and acceptance (to those capable of speaking) is necessary due to the importance of this contract.

## 1.2.2 Nature of offer and acceptance:

### A discussion of *khiyār al-majlis*

Neither the offer nor the acceptance is binding until both have been expressed. Therefore, each party to the contract has the option to withdraw their part as long as the other has not been extended. The question remains, however,

<sup>13</sup> 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p. 168), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.4), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p. 136).

<sup>14</sup> Al-Kāsānī ((Ḥanafī), vol. 5, p. 134), 'Ibn Al-Humām ((Ḥanafī), vol. 5, p. 77), 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol. 2, p. 161), 'Ibn Qudāmah (, vol. 3, p. 561).

<sup>15</sup> Verified by 'Ibn Ḥibbān.

whether a party may rescind their offer or acceptance after the other party has extended their part. Jurists differed in opinion on this possibility – called *khiyār al-majlis*, or “the option of withdrawal before parting”, whereby an offer or acceptance may be withdrawn as long as both parties are still present.

The Ḥanafīs, the Mālikīs, and the seven jurists of the Madīnah<sup>16</sup> have concluded that a contract is binding once the offer and acceptance have been extended, since a sale is an exchange contract that is binding with the conclusion of the expression of offer and acceptance. Therefore, to them, a sale does not allow for “the option of withdrawal before parting”, as ‘Umar (mAbph) said: “A sale is either a contract, or an option”.

Those jurists understand the *Ḥadīth*: “The two parties to a sale still have the option as long as they have not parted” by interpreting “the two parties” as those who are still in the process of bargaining, and “parted” as a reference to parting before both offer and acceptance have been expressed. They find this interpretation more satisfactory, especially in light of the fact that the apparent meaning disagrees with the verse: “But let there be among you traffic and trade by mutual good will” [4:29], and the verse “O you who believe, fulfill (all) obligations” [5:1]. Some of them even ruled that the *Ḥadīth* is thus abrogated. Therefore, they equate the “option” (*khiyār*) that is admissible here to the “option of acceptance” (*khiyār al-qabūl* or *khiyār al-rujū‘*) that is valid prior to the conclusion of the contract.<sup>17</sup>

On the other hand, the Shāfi‘īs, the Ḥanbalīs, Sufyān Al-Thawrī and ‘Ishāq ruled: “If the sale is finalized by the satisfaction of offer and acceptance, the contract becomes possible but not binding as long as the two parties to the contract have not parted”. Therefore, each of the two parties would have the option to break the contract as long as they have not parted, and “parting” is defined by convention: that they leave the place where they concluded the sale.<sup>18</sup>

Therefore, “parting” refers to the physical separation of the parties to the contract. This is what makes the mention of “parting” meaningful in the *Ḥadīth*, since it is obvious that each of the parties has the option if they have not expressed an offer or an acceptance.

This is the *khiyār al-majlis* that is known in various trades, according to the strong *Ḥadīth* narrated by the two Shaykhs<sup>19</sup> that the Prophet (pbuh) said:

<sup>16</sup> The seven *fuqahā’* of the Madinah are: Sa‘īd ibn Al-Mosīb (d.94H), ‘Urwah ibn Al-Zubayr (d.94H), Al-Qāsim ibn Muḥammad (d.106H), ‘Abū Bakr ibn ‘Abd Al-Raḥman ibn Al-Ḥārith ibn HiShām (d.94H), ‘Ubayd Allāh ibn ‘Utbah ibn Mas‘ūd (d.98H), Sulaymān ibn Yasār (d.107H), and Khārīja ibn Zayd ibn Thābit (d.99H).

<sup>17</sup> Al-Kāsānī ((Ḥanafī), vol. 5, p. 134), ‘Ibn Al-Humām ((Ḥanafī), vol.5, p.78), ‘Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.169 and thereafter), Ibn-Rushd Al-Qurṭubī ((Mālikī), vol.5, p.55), ‘Ibn Juzayy ((Mālikī), p.274), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.187).

<sup>18</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.43,45), ‘Ibn Qudāmah (, vol.3, p.563). Some Ḥanbalīs ruled that the conventional definition of parting differs for different forms of sale (e.g. in a large market, parting is established by walking away until one does not hear the other’s common talk; and on a ship by going to different levels, and in a house by one leaving, etc. However, if they sleep in the same place or walk together, they have not parted), Mar‘ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.30).

<sup>19</sup> Al-Shaykhān in this context are ‘Abū Ḥanīfa and ‘Abū Yūsuf, [tr.]

ISBN 1-59239-072-2



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