OPERATING PRINCIPLES FOR CONTRACTS IN ISLAMIC LAW: CONSENT (*RIḌĀ*) IN ḤANAFĪ JURISPRUDENCE

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Received on: 11-05-21 Accepted on: 20-06-22

Abstract

The principle of "freedom of contract" formed the basis of modern Western contract law and historically allowed jurists to break away from formal requirements and allow for almost any type of contract to be accepted. Alternatively, observers often characterize Islamic law as formalistic, without a general principle permitting parties the freedom to enter contracts beyond the boundaries of a specific form. This article analyzes a concept in the Islamic legal tradition, that of *riḍā* (consent). Focusing on the Ḥanafī school and using the textual analysis method to place significant texts from the school in chronological order, it traces how *riḍā* developed beginning with its initial appearance in *The Holy Qur'ān* and the works of early jurists through Ottoman and modern Egyptian approaches to contracts. The article argues that, during the post-classical period, *riḍā* became an operating principle that Ḥanafī jurists used to challenge the formalism that dominated legal discussions during the formative and classical periods, paving the way for modern contract law in the Muslim World. The article concludes that, within contemporary legal systems, *riḍā* can be understood as a useful general concept for the construction of contracts, so long as it is firmly placed within the moral limits of the *Sharīʿah*. Modern legal systems should take advantage of this principle, using it to move beyond bureaucracy to create a more flexible law of contracts.

Keywords: *Islamic law, Contract Law, Riḍā, Ḥanafī Law, Operating Principles*

1. Introduction

At the end of the eighteenth century, common law jurists began to construct a general theory of contracts based on the principle of "freedom of contract," or the idea that individuals should be able to consent to a contractual obligation with little interference from the state. Tied to the rise of individualism, capitalism, and the political sociology

of nineteenth-century British and American societies, freedom of contract became the principle through which contract law could be developed beyond formal constructions.[1]

In Islamic law, freedom of contract has been a controversial topic.[2] Observers of Islamic law have often criticized Muslim jurists for never developing a similar principle. As mentioned in the literature review below, some have even gone so far to suggest that the lack of such principles led to the failure of the Muslim world to experience economic development in the modern period. However, when writing about the Islamic system of contracts, the twentieth-century Egyptian legal reformer ʻAbd al-Razzāq al-Sanhūrī noted that Islamic law contains a principle that allowed contract law to mature beyond that of Europe before the modern period:

> "There is a fundamental rule established by legal scholars: offer and acceptance alone are enough to establish a contract. It is strange that this simple rule, which acts as one of the basics of modern law, did not reach such a fundamental position in Roman Law despite the advanced stage it reached. Perhaps the secret of how Islamic law achieved this principle was the immense impact religious teachings had on establishing principles both in methodology and rulings. To prove this point, it is enough to say that contracts in European law did not become based upon consent until the impact of several factors, including Christianity and the Church's laws. These laws encouraged fulfilling contracts, and people became tied to their word in line with the moral system established by religion."[3]

Although meant to cover areas of the law beyond contracts, *riḍā* came to dominate legal discussions in the classical period and was used by jurists in contract law to break away from formalistic requirements and influence the development of the law.

This article, therefore, explores the use of the concept of consent (*riḍā*) in contract law chronologically from its origins in the *Holy Qur'ān* to its use in the Ḥanafī school. It argues that contract law developed from a collection of rules constructed to respond to practical needs towards a conceptualization centered on the general principle of *riḍā.* Particularly in the post-classical period, jurists used *riḍā* to combat formalism and modify legal rules to legalize new forms of contracts. *Riḍā* then became critical to reformers in the nineteenth and twentieth centuries who applied it to fit new concepts arriving from Europe within an Islamic framework, paving the way for the modern contractual systems in use today.

2. Research Methodology and Questions

This article uses the analytical method to approach texts within the Ḥanafī school, namely:

1. *al-Aṣl* by Muḥammad b. al-Ḥassan al-Shaybānī (d. 189/805),[4]
2. *al-Mukhtaṣar* by Abi Ja'far Aḥmad b. Muḥammad al-Ṭaḥāwī (d. 321/935),[5]
3. *al-Mukhtaṣar* by Aḥmad b. Muḥammad al-Qudūrī (d. 428/1036),[6]
4. *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* by Abi Bakr b. Mas'ūd al-Kāsānī (d. 587/1191),[7]
5. *al-Hidāya Sharḥ Bidāyat al-Mubtadī* by ʿAlī b. Abi Bakr al-Marghīnānī (d. 593 /1197),[8]
6. *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq* by Zayn al-Dīn b. Ibrāhīm b. Nujaym (d. 969-970/1561-62),[9] and
7. *Radd al-Muḥtār 'ala al-Durr al-Mukhtār* by Muḥammad Amīn b. 'Ābidīn (d. 1252/1836)[10]

The first two texts were composed during the formative period in Iraq and Egypt, while the next three represent the classical period when principles and rules became established. The last two works exemplify the developments during the Ottoman period and lead into the 13th/19th century when states replaced classical *fiqh* writing with modern legal codes. In addition to the works mentioned above, this article will examine three texts of modern law: the Ottoman *Mejelle* of 1877, a draft of an Egyptian code inspired by the *Mejelle* entitled *Murshid al-Ḥayrān*, and the explanation of the Egyptian Civil Code of 1949 by 'Abd al-Razzāq al-Sanhūrī. When studied in chronological order, an analysis of these texts aims to answer the following questions:

1. What is the origin of *riḍā* in the revealed sources of Islamic law?
2. How did Ḥanafī jurists in each historical period employ *riḍā* to develop the law of contracts?
3. How has *riḍā* been used as the foundation of legal systems in the Muslim World in the nineteenth and twentieth centuries?

3. Literature Review

As mentioned above, most observers described the Islamic system of contracts as rigid and formalistic. For example, Joseph Schacht noted that Islamic rules required formal verbal and physical actions to be valid. In his view, Islamic law had no freedom of contract because "liberty of a contract would be incompatible with the ethical control of legal transactions."[11] According to Brinkley Messick, formalism was a response to the problem of establishing intent, and traditional jurists resorted to outward physical verification of consent as an attempt "to know that which is defined as essential and yet, by its understood nature,

inward and inaccessible."[12] Indeed, according to Timur Kuran, the legal rigidity and the strict criteria required to validate a contract caused economic development in the Muslim world to fall behind its European counterparts, opening the door to domination by a more advanced European system.[13]

Studying Islamic contracts and the development of consent (*riḍā*) helps observers of Islamic legal history better understand how the Islamic legal system developed. Contrary to earlier ideas that argued, "The notion of historical process in law was wholly alien to classical Islamic jurisprudence," this article argues that contract law, through *riḍā*, was able to challenge the formalism of the classical period and allow the Islamic system to evolve.[14] Like all stable law systems, no radical shifts could occur. Scholars worked within the existing system to add nuance, modify stipulations, and eventually open the door for further changes.

Additionally, describing contract law as an evolution of the concept of *riḍā* reveals the underlying methodology of how traditional scholars approached Islamic law. Traditionally, this involves a discussion of either the foundations of jurisprudence (*uṣūl al-fiqh*) or substantive maxims (*al-qawā'id al-fiqhiyya*). In criminal law, Intisar Rabb focused on the latter and the maxim "Avoid proscribed punishments in cases of doubt." In her view, the concept of doubt (*shubha*) became "canonized, textualized, and generalized" to become a central facet of Islamic criminal law, allowing for the expansion of the law while at the same time "maintaining fidelity to the will of the divine Lawgiver."[15]

In contract law, the most cited maxim is "The foundation of contracts and their conditions is permissibility and validity (*al-aṣl fi'l-'uqūd wa'l-shurūṭ al-jawāz wa'l-siḥḥah*)." As is the case with many maxims, it is not universally agreed-upon, with most scholars stating that it should be read in the exact opposite way, or that "The foundation of contracts is prohibition (*al-aṣl fi'l-'uqūd al-ḥaẓr*)."[16] Underlying either interpretation of this maxim is that contracts may never be understood as valid if they are lacking in the consent (*riḍā*) of the parties. The purpose of the current study is to suggest that, just like in criminal law, *riḍā* was used as time progressed and the need arose within Muslim societies to allow for a broader range of contracts and move beyond formalism. Therefore, *riḍā* can be understood as a form of "operating principle" around which contract law was constructed and the method through which it evolved.

Finally, this article allows observers to comprehend the changes that occurred in the modern period and argue that operating principles like *riḍā*, as expounded and developed by the jurists, functioned as bridges to modern legal concepts. For Ahmed Cevdet Pasha and those who worked on the Ottoman *Mejelle*, it was a desire to return the law to

one more in line with the textual sources and the formalism of the pre-classical period. However, twentieth-century scholars like al-Sanhūrī chose another path and focused on the operating principles behind the law, even though their legal philosophy of Western Europe heavily influenced them. These scholars found no contradiction between their legal codes and the discussion of contracts in the traditional schools of Islamic law. Modern legal codes constituted a natural evolution of the law, at least in the eyes of reformers like al-Sanhūrī, and represented a continuation of the methodology developed in the past.

Studying the principles of Islamic Law is not new to Western scholarship, and numerous studies have elaborated on how the rules of Islamic law developed around general principles. Marion Katz explored the development of ritual rules of prayer and ablution built around the principle of purity (*ṭahārah*).[17] More recently, in family law, Ahmed Fekry Ibrahim argued that the concept of the best interest of the child acts as "the main overriding principle for the rules of jurists on custody."[18]

In Arabic, the most important work on Islamic contract law to date – other than the observations of al-Sanhūrī – is that of Shafīq Shiḥāta, *The General Theory of Obligations in Islamic Law*, initially published by the Cairo University Law School in 1936. In it, Shiḥāta argued, "jurists focused their efforts on specific solutions and did not attempt to establish general principles."[19] However, he believed that general principles of contractual obligation could be extracted from the underlying juristic discourse. He placed the will of the parties (*la volonté* or *al-irāda*), a concept known in French law, as one of the primary methods of establishing contractual obligation.[20] In the final section of this article, the principle of *irāda* as understood by al-Sanhūrī will be examined in more detail. Shiḥāta, although acknowledging that the role of *riḍā* in contract law as an expression of individual will, did not observe the impact that *riḍā* had on the development of the law, particularly in the modern period. This article, therefore, seeks to add to Shiḥāta's discussion by arguing that *riḍā* was the primary vehicle through which the law of contracts evolved, and acted as the primary operating principle in transactions (*mu'āmalāt*).

4. Discussion

4.1. Consent *(Riḍā)* in the Holy Qur'ān and Ḥadīth

The general principle of consent (*riḍā*) first appears in the Quranic verse: "O you who believe, do not devour each other's property by false means unless it is trade conducted with your *mutual consent* (*tarādin*). Do not kill one another. Indeed, Allah Almighty has been Very-Merciful to you."[21] This verse established the basic principle of contract

in Islamic law and became essential for jurists. The language of the verse is in the style typical of many legal verses in *the Holy Qur'ān*: an initial principle is established, and then exceptions and conditions are added. In this particular case, all of an individual's wealth and financial assets are forbidden to others. According to al-Qurṭubī (d. 671/1273), "This includes gambling, deception, usurpation, denial of rights, that which is not acceptable to the owner of the property, or that which is explicitly prohibited by law."[22]

The only way to conduct business lawfully and avoid unjust wealth consumption is through consent, indicated by the Arabic root *R Ḍ Y* used in the verse. Ibn Manẓūr (d. 711/1312) defined this root as "The opposite of discontent (*sakhaṭ*)….These two terms are characteristics of the heart."[23] The form is reflexive (*tarāḍin*) in the verse, indicating that such consent needs to be mutual. Alongside this verse which establishes the general principle, two other verses outline specific requirements for contracts, the longest being in *Sūrat al-Baqarah* (Chapter 2), which focuses on the specifics of a contract of delayed payment or debt, outlining that such contracts must be written and the requirements of witnesses and scribes.[24] The second verse regarding contracts is found earlier in the same chapter:

> *Those who take ribā (usury or interest) will not stand but as stands the one whom the demon has driven crazy by his touch. That is because they have said: 'Sale is but like ribā," while Allah Almighty has permitted sale, and prohibited ribā. So, whoever receives an advice from his Lord and desists (from indulging in ribā), then what has passed is allowed for him, and his matter is up to Allah Almighty. As for the ones who revert back, those are the people of Fire. There they will remain forever*.[25]

In the Ḥadīth collections, most Prophetic statements regarding contracts are related to the specifics of individual contracts such as sales, gifts, and loans and the prohibition of *ribā* and other forms of usury or uncertainty. Contracts, according to the Ḥadīth, also contain a vital moral element, with one particular Ḥadīth stating "…And if [the buyer and seller] are truthful and forthcoming [in their sale], then [the transaction is] blessed for them. And if they are silent and untruthful, then the blessing of their sale is wiped away."[26]

Therefore, the concept of *riḍā* was not elaborated upon in either *the Holy Qur'ān* or the Ḥadīth beyond the main verse regarding *riḍā*, and much was left to the work of later legal scholars. This article will now turn to an observation of that work, following how *the Holy Qur'ān* and Ḥadīth were integrated into the different stages of the development of the Ḥanafi school.

4.2. The Ḥanafi School: Early Stages of Development

In the first significant text of the Ḥanafii school, al-Shaybānī's *al-Aṣl*, the opening section on sales began with a general Ḥadīth regarding *ribā*,[27] followed by a list of "what if" scenarios starting with the question of delayed purchases (*salām*). Absent from al-Shaybanī's discussion of contracts was any mention of *riḍā*, which could indicate that he and other Islamic scholars did not use the Quranic verse in their construction of the law. However, at roughly the same time as al-Shaybanī, his contemporary Muḥammad b. Idrīs al-Shāfi'ī (d. 204/820) made *riḍā* central to his writing on contracts. In his major work of jurisprudence *al-'Umm*, the section on contracts opened with the verse on *riḍā* and then stated the following:

"Firstly: Allah Almighty has referenced sale in several instances, which indicates that Allah Almighty has made permissible all sale contracts in which there is mutual consent from the buyer and the seller.

Secondly: Allah Almighty made sale permissible if it is not something that the Prophet *Ṣal Allah-u-'alaihe wa sallam* forbade, as the Prophet *Ṣal Allah-u-'alaihe wa sallam* clarifies that which Allah Almighty has intended in His statements. Therefore, the foundation of sale contracts is that they are all religiously permissible if they are concluded with the consent (*riḍā*) of the two parties."[28]

The absence of *riḍā* in the work of al-Shaybanī can be explained because of his early placement in the development of Islamic law. He seems to have had little interest in theoretical development and instead focused on practical situations derived from cases brought to him. From these cases, a few general notions appeared:

1. Contracts contain at least two parties: a seller (*bā'i'*) and a purchaser (*mushtarī*)
2. These two parties must agree on the item (*'ayn / mābī'*) and the price (*thamān*)
3. These agreements are verbal and occur in the past tense (*bi'tu*, *ishtarāytu*)

In al-Shaybānī's work, therefore, the foundations of a contract were outlined. Legal terms were set, and rules were established that ensured parties could clearly enter contracts. Regarding the overall framework, it is the practice of the Prophet Muḥammad *Rasūlullah Khātam un Nabiyyīn Ṣallallahu 'alaihi wa 'alā Ālihi wa Aṣḥābihi wa Ṣallam* that acted as the legal standard, with individual cases used to apply the Prophetic model. What is unique for al-Shaybānī is that contracts banned elements forbidden by *the Holy Qur'ān* and Ḥadīth,

such as *ribā* and uncertainty, and thereby made to fit within a new Islamic system.

Writing in Egypt roughly one century after al-Shaybānī, al-Ṭaḥāwī composed an abbreviation of the rules of the Ḥanafi school, *al-Mukhtaṣar*.[29] According to secondary studies, al-Ṭaḥāwī represented the point at which Ḥanafi doctrine "assumes its classical form."[30] Through a brief reading of the text, it immediately becomes clear a more theoretical discussion appeared:

> "Suppose two people enter a valid contract of sale without any option of return stipulated by the parties. In that case, it is not permissible for one party to void [the contract] whether they have physically separated from the place where the sale was conducted. The option [to return] from the *Sunnah* of the Prophet *(Ṣal Allah-u-ʿalaihe wa sallam)* is [in the temporal space] between the statement of the seller 'I have sold this to you' and his subsequent statement 'I accepted this [offer] from you.' The person spoken to about the sale can retract [the offer] before its acceptance from the seller, [and the seller] can accept that statement if they have not physically separated. If they have physically separated, he does not have the right to issue his acceptance. He can, however, accept [the offer] from the seller if he has not engaged in other unrelated action or speech."[31]

Here, several critical developments have taken place beyond the work of al-Shaybānī. First, contracts establish a legal obligation, and once terms are agreed upon, it obtains the full force of the law. This obligation was not absolute, and al-Ṭaḥāwī dedicated an entire section later in his chapter to the concept of how to deal with corrupt contracts (*fāṣid*).[32]

Second, there was a clear distinction of contract form, in which there are now three phases. When a party offers to sell something, a second party presents a response accepting or rejecting that offer, and the initial party must confirm that offer. These statements are made in the past tense (*biʿtuka, qabaltu minka*), and the seller holds the ultimate power of acceptance.

Thirdly, al-Ṭaḥāwī introduced new concepts not found in the work of al-Shaybānī and inserted them into the Ḥanafi discourse, namely the physical separation of the contracting parties. This concept stemmed from a debate as to when the negotiation of a contract ceased, and al-Ṭaḥāwī believed that contracts became binding only when the two parties separated physically or when one of the parties changed the subject.[33]

In the work of al-Ṭaḥāwī, there was no explicit discussion of contract principles, yet al-Ṭaḥāwī took a significant step forward in the organization of contract law. Contracts of sale also became the ideal form,

and all others (gifts, loans, delayed purchases, etc.) were modifications of this standard.

In the following century in Iraq, the heartland of the Ḥanafi tradition, the next stage in the development of contract law appeared in the *Mukhtaṣar* of al-Qudūrī, with a clear representation of contracts outlined:

> "Sale contracts occur with offer and acceptance if both are in the past tense. If one of the contracting parties makes an offer, the other has the option [to respond]. He may either accept it during the session (majlis) or reject it if he so desires. If either of them stands up from the session before the acceptance, the offer is voided. If both the offer and acceptance are achieved, the sale becomes obligatory. There is no further option for either of them [to reject the sale] unless there is a fault [in the product] or it has not been seen (when the item sold is not present during the negotiation)…It is permissible to conduct a sale immediately or delayed, as long as the delay is for a known period."[34]

al-Qudūrī synthesized the contributions made by previous Ḥanafi jurists, including those of al-Shaybānī and al-Ṭaḥāwī. The basic elements of contracts were clearly expressed: the presence of offer and acceptance, the use of the past tense, and the obligatory nature of contracts once the first two elements were established. al-Qudūrī also set to rest the issues introduced by al-Ṭaḥāwī, taking a clear side by only accepting physical separation for the obligation of contracts, not entering other actions or changing the subject. Additionally, al-Shaybānī's difference with his master Abū Ḥanīfa regarding the delayed execution of the contract (*salām*) was mentioned later in the details of the chapter, with al-Qudūrī siding with al-Shaybānī in stating that contracts may be conducted immediately or with a later set date.

So far, the Ḥanafi school moved through several initial formative stages. With al-Shaybānī, the Ḥanafis were not heavily interested in principles but instead focused on adopting the norms of the existing system and making only slight, practical shifts. A general conceptualization began to appear in the following century, but with it came a new set of problems. There was a shift towards a more rigid, physical understanding of the law with al-Ṭaḥāwī. The focus on outward, physical confirmation of the validity of a contract would remain the standard discourse of the Ḥanafi school for roughly the next century until the operating principle of *riḍā* took center stage in the works of al-Kāsānī and al-Marghinānī. When it did so, it began to free the Ḥanafis from their physical predicament.

4.3. The Rise of the Use of *Riḍā*

Writing slightly more than a century later than al-Qudūrī, al-Kāsānī (d. 587/1191) began his discussion of contracts by stating, "The cornerstone of sales is the exchange of something desired that is done either by statement or action. For statements, this is what jurists refer to as offer and acceptance."[35] He also expanded upon al-Qudūrī's definition of contract form, adding the acceptance of the present tense:

Offer and acceptance can be in the past and the present tense. As for the past tense, it is fulfilled when the seller says 'I have sold' (*bi'tu*) and the purchaser says 'I have purchased' (*ishtarāytu*)…As for the present tense, it is fulfilled when the seller says to the purchaser, 'I sell you this object for such and such a price,' and he intends an offer. The purchaser then says, 'I have purchased' or 'I purchase from you this thing for such and such a price,' and he intends acceptance…However, we have considered intent here.[36]

The core of al-Kāsānī's discussion came in the newly introduced idea of contracts carried out by "action (*fi'l*)." These were types of contracts in which no words are spoken, and two items were exchanged, referred to in Arabic as *ta'āṭī*. Much debate existed on their permissibility in Islamic Law, much of which took place during the period of al-Kāsānī. For example, for the Shāfi'ī School contracts of *ta'āṭī* were invalid, as they did not contain the statements of offer and acceptance presented in a recognizable form (*ṣīgha*).[37]

When al-Kāsānī approached the same topic, he began by stating the Shāfi'ī objection and remarked that al-Qudūrī considered such contracts as valid but with the condition that it should be carried out only in things that are of low value (*khasīs*). al-Kāsānī stated that the correct view would be to allow such contracts without any formal requirements, as in his words, "…sale in both language and the law refers to an exchange, or the exchange of something wanted for something else wanted. The true nature of exchange without verbal form is that of 'give and take,' of which the words 'sell' and 'buy' are indicators."[38]

He then presented his justification for assessing such a shift, citing several Quranic verses, but beginning with 4:29, the verse mentioned in the introduction to this article. This was the first time an explicit reference to *riḍā* in Ḥanafi discussions was made. However, it becomes immediately apparent that al-Kāsānī was not interested in using *riḍā* as a confirmation of contracts without form, and he continued to cite the other verses such as 2:16 to discuss the general concept of trade (*tijārah*). He concluded that if exchange without verbal form was taking and giving and an acceptable form of trade, this should be acceptable for all items regardless of their value.[39]

At roughly the same time as al-Kāsānī, al-Marghīnānī produced another work that would become fundamental for the Ḥanafi school. In his introduction to contracts, he hewed much closer to al-Qudūrī and avoided al-Kāsānī's definition of exchange:

Sale is contracted with an offer and acceptance if both are expressed in the past tense, like if one were to say 'I sold' and the other 'I purchased' because a sale is the establishment of a legal act. The establishment can only be known through lawful means (*al-Shar'*), and the subject of announcing [that legal action] has been exercised through [the past tense], and therefore the contract is made valid through it.[40]

al-Marghīnānī ignored al-Kāsānī's discussions about the present tense and instead chose to make a general statement that "contracts are to be considered by their meaning." He then echoed al-Kāsānī's opinion about formless contracts in items of all values but made a slightly different justification. Rather than focusing on determining the linguistic roots of sale, al-Marghīnānī stated that formless contracts were allowed because they were one method of establishing mutual consent *(tarāḍin)*, using the same form in Arabic as the Quranic verse.

Therefore, by the end of the twelfth century CE, *riḍā* was firmly established as the central operating principle of Ḥanafi contract law. The old debates of linguistic form were diffused, and underlying intent became the standard. But while *riḍā* began to solve one major issue of form, it had so far not been used to engage the issue of physical separation. That would occur a few centuries later during the rise of the Ottoman Empire, where a new generation of jurists would take yet another creative step in the understanding of *riḍā* and move it closer to modern views of the law.

4.4. Expanding Contract Freedom During the Ottoman Period

During the Ottoman expansion into the Arab world in the sixteenth century, Ibn Nujaym (d. 969-970/1561-62) composed his commentary on an earlier text by al-Nasafī (d. 710/1310). In his section on sales, he quoted al-Nasafī's base text that contracts were "an exchange of assets for assets with mutual consent."[41] Alongside this standard definition first established by al-Kāsānī, Ibn Nujaym was also interested in placing the operating principle of *riḍā* at the apex of contract law and relegated other debates underneath it. For example, the argument on the use of tenses was not present in Ibn Nujaym's work, and he explained contract form with the following statement: "The foundation [of a contract] is the offer and acceptance that indicate an exchange, or what may take its place in non-verbal contracts. The foundation of an indicative action of consent (*riḍā*) by exchange occurs either in statement

or action. These actions have four conditions: establishment, correctness, applicability, and obligatory nature."[42]

For this study, the most relevant aspect of Ibn Nujaym's work is how he dealt with the concept of the physical separation of parties as an indicator that negotiations have ceased, first introduced by al-Ṭaḥāwī and the idea of the setting (*majlis*). For Ibn Nujaym, the stipulation of physical separation became a problem. The operational principle of mutual consent (*riḍā*) was the standard in defining a contract, and the occurrence of physical separation seemed to contradict that principle. If two parties agreed, or at least on the road to such an agreement, why would one person simply standing up change that? To solve this problem, Ibn Nujaym attempted to reconstruct the definition of physical separation and why it invalidated a contract:

> Original Text of al-Nasafī: "If one party stands from the meeting before the acceptance is given, the offer is invalid."
>
> Ibn Nujaym's Commentary: "Because [standing] prohibits the completion of [a contract] but does not invalidate it. This is because the offer is one half of the reason [for the contract's validity]. If a ruling is dependent on both parts, the first is a reason (*sabab*), and the second establishes the rule (*ḥukm*). This is because the act of standing is an indication of *opposition*, and therefore it acts as an invalidation."[43]

Ibn Nujaym was searching for a justification of a concept introduced in the early period of the school. He could not escape it because it had been confirmed in other texts and, unlike the requirements of the past tense, scholars to this point had avoided challenging the idea of physical separation. Perhaps this was because the concept of physical separation was mentioned in a narration of the Companion Ibn 'Umar and cited in major Ḥadīth collections.[44] Ibn Nujaym, therefore, was one of the first to challenge this concept, applying the operating principle of *riḍā* as a starting point and defining physical separation as an indication of opposition to the acceptance.

In the late Ottoman Period, Ibn 'Ābidīn (d. 1252/1836) made further development in the understanding of *riḍā* to solve this issue. His work, *Radd al-Muḥtār,* is a second-level gloss following an initial text by Muḥammad ibn 'Abd Allāh al-Timurtāshī (d. 1004/1595) and the first-level commentary by Muḥammad ibn 'Ali al-Ḥaṣkafī (d. 1088/1677). In it, Ibn 'Ābidīn reworked the concept of the contract setting (*majlis*) by altering the definition of the setting to one of a union of the two

contracting parties (*ittiḥād*). When that union is broken, the contract receives legal force:

> al-Ḥaṣkafī: "[The contract is intact] as long as one party has not gone from the setting in the majority opinion."
>
> Ibn ʻĀbidīn: "It is said that [the *union*] is intact as long as he remains in his place. It is broken when he rises, regardless of whether it was an expression of opposition or not."

By changing the definition of contract setting to one of a union, Ibn ʻĀbidīn removed the physical nature of the term *majlis* and opened the discussion for other types of settings, such as those based on time. In addition, Ibn ʻĀbidīn also modified the term *riḍā* to mean an expression of a person's will (*irādah*) that a contract is carried out. He explained this element in detail in the section regarding joking about contracts (*hazl*):

> al-Ḥaṣkafī: And contracts are not considered valid with joking due to the lack of *riḍā* and its necessary rulings.
>
> Ibn ʻĀbidīn: A joker speaks with the form of the contract through his own choice and consent (*riḍā*). However, he does not choose for the ruling [of that contract] to be established, nor does he accept it. 'Choosing' in this sense means purposefully doing a thing and willing it [to happen]. 'Consent' is having a preference or desire for something. Someone forced into a contract chooses to do so but does not accept it, and from here, it is said [by other jurists]: 'Sinning and bad acts are the will of Allah Almighty that he does not accept. Indeed Allah Almighty does not accept non-belief from his servants.'[45]

According to the legal definition of *riḍā*, it was no longer sufficient that a contract was solely based on an indication that the two parties accepted the contract's terms. It was also necessary to express a more profound meaning reflecting a person's feelings or desires. This change in definition represented an advancement in Ḥanafi contract law and had important implications when applied in other areas. For example, for Ibn ʻĀbidīn, offer and acceptance were no longer attached to a particular party of the contract:

> The offer is mentioned first in speech from one of the two contracting parties, while acceptance is mentioned second, whether it is 'I sold' or 'I bought,' indicating mutual consent.[46]

The order of who began a contract, long considered standardized by the Ḥanafi school and part of contract form, was loosened using the new definition of *riḍā*. Now, any party with the will to contract may begin negotiations, and the indicator of whether the process was followed was their "mutual consent," or *riḍā*.

Therefore, there were several significant developments in the Ottoman Period. The concept of *riḍā*, established by al-Kāsānī and al-Marghīnānī, has now become the primary vehicle through which change in contract law takes place. Physical separation and the contract setting have now been reworked under this principle to represent an implicit opposition to the contract's terms. Later, Ibn ʻĀbidīn took the discussion a step further, changing the definition of *riḍā* to be more in line with an expression of individual will. No longer was the setting a physical meeting (*majlis*); it was a union (*ittiḥād*), a coming together of the contracting parties. This was a crucial semantic shift in the definition of a contract setting, but this "coming together" still maintained its physical characteristics.

Although Ibn ʻĀbidīn failed to completely change the requirements of the *majlis*, his ability to shift the definition to one of a union between contracting parties as well as *riḍā* to an expression of will opened the door for future scholars. In the modern period, jurists would take the most recent step in the evolution of contracts: expanding contract freedom while remaining faithful to Islamic legal discourse.

4.5. The Modern Period: Between Traditionalism and Modernism

Outside traditional Islamic texts, it is essential now to look at three modern legal codes: the Ottoman *Mejelle* of 1877, a similar draft code from Egypt entitled the *Murshid al-Ḥayrān,* and al-Sanhūrī's Egyptian Civil Code of 1949. The *Mejelle* began with a list of 99 general principles that drove the rest of the established rules. For this article, it is important to note two:

Article 2: Actions are judged by their intentions.

Article 3: Contracts are judged according to intent and meaning, not by their words and linguistic construction.

Although leaving out an explicit mention of *riḍā*, the underlying definition of an expression of will as constructed by Ibn ʻĀbidīn was present. However, upon viewing the details of contracts, the principle that played such a central role in earlier Ottoman debates disappeared, and a more rigid interpretation of the contract appeared. For example, Articles 169-172 of the code focused on the tense of the verb "to sell," accepting the past tense unconditionally, allowing the use of the present tense and

the imperative if the intent to sell was immediate and rejecting the future tense altogether.[47]

The debate of the setting of the contract (*majlis*) also returned. For example, Article 181 stated that, "The setting of a contract is the meeting in which the contract takes place." Article 182 then elaborated: "the two parties of the contract have the option to return the purchase until the end of the setting…" Finally, Article 183 included a modification of the concept of standing from the setting by stating, "If one of the contracting parties, after the offer but before the acceptance, does or says something that indicates opposition, the offer is invalidated. No consideration is given to an acceptance that occurs afterward."[48]

The contract setting in this section was not defined exclusively as a physical location. Instead, it was much closer to the concept of a union (*ittiḥād*) as elaborated by Ibn ʻĀbidīn. There was also a reference to the idea of opposition. However, it was not directly connected to Ibn Nujaym's justification of standing up. Even in the *Mejelle*, the contract setting still represented a problem for legal scholars. Although its authors were able to move beyond the concept of standing up, physicality and a connection to a place still reigned supreme.

The Egyptian draft code inspired by the *Mejelle*, the *Murshid al-Ḥayrān*, composed by Muḥammad Qadrī Bāshā (1237-1306/1821-1888), echoed similar sentiments.[49] In this code, the definition of *riḍā* was limited, and, like the *Mejelle*, a description of *riḍā* is not found in the general principles. Its first appearance was under the second section on contracts entitled "On the acceptance of the contracting parties and what eliminates that acceptance:"

> Article 191: For contracts regarding assets themselves or the benefits derived therefrom to be legally sound, there is the condition of both parties' mutual consent, without coercion or force.

Here, *riḍā* has fallen from the core definition of the contract as found in the work of earlier Ḥanafi scholars and is now a counterweight to coercion. The *Murshid al-Ḥayrān* did differ from the *Mejelle* in its approach to language. There was no single article in the Egyptian code referring to linguistic constructions. Instead, only one article was given at the end of the section on contract form, stating, "Consideration in contracts is to intent and meaning, not to words and linguistic constructs."[50] This was a verbatim copy from Article 3 of the *Mejelle*. However, unlike its Turkish inspiration, the *Murshid al-Ḥayrān* did not elaborate further to limit contract form to specific verbal tenses and confirmed all types of contracts regardless of their form.[51]

It was directly in response to the issue of form in the *Mejelle* and the *Murshid al-Ḥayrān* that this study now returns to al-Sanhūrī.

Although, as mentioned in the introduction, al-Sanhūrī praised the Islamic system's ability to develop a fundamental concept of consent from an early stage, jurists over time became embroiled in what he described as the "objective trend" in Islamic law. The legal discourse was too focused on tying together offer and acceptance, ignoring their established obligations. This trend for al-Sanhūrī was deeply entrenched in Islamic law's principles and rulings and led to a constant search for an external, physical expression of consent to a contract. This was in stark contrast to what he would call the "self-based trend" of law that sought internal acceptance and was in his mind the correct approach.

This criticism was most clearly seen in his approach to the concept of the *majlis*. While some schools were able to move into a more abstract concept of the contract setting, the Ḥanafis, according to al-Sanhūrī, did not. After presenting a collection of different juristic quotations on the issue, he concluded by saying,

> "It appears from reading these sources that the Ḥanafis drowned in their depiction of the contract setting as a physical, material place. For example, the setting could be changed through walking around because the offer took place in one location while the acceptance took place in another. Because the parties have moved just one step from their initial position, this single step has penetrated the offer's validity and acceptance."[52]

He then suggested that jurists could have easily saved themselves from this predicament by editing their definition of the contract setting and understanding it in time and not in place.[53]

al-Sanhūrī wished to avoid this "objective trend" in his interpretations of civil law in the Arab World. In the Egyptian Civil Code of 1949, al-Sanhūrī avoided making any mention of the traditional Islamic definition of contracts and introduced a concept from the French system: the *autonomie de la volonté* (*sulṭān al-irādah*), or the supremacy of free will. He described this concept as connected to a theory of natural law,

> "The supporters of this concept (*autonomie de la volonté*) believe that will holds the ultimate power in creating contracts and the legal results that come from them. This applies not only to contracts but also to all other legal ties.
>
> They believe that the social system is based on the individual. He is the goal, and the group exists to serve him. The individual character is not complete without freedom, and the outward expression of that freedom is independent free will. Philosophers

> made thought the sign of the individual from their point of view, while jurists who support this principle made will the sign of the individual. When an individual lives in society and the primary goal of that society is to respect his freedom and free will, it becomes necessary that his connections with others be based upon free will. He cannot be subject to any obligation unless he chooses it and accepts it. The foundation of every legal obligation is consent (*riḍā*) and choice (*ikhtīyār*) that follow the natural law because it is based on individual freedom and necessary respect."[54]

al-Sanhūrī's definitions were not radically removed from those of Ibn 'Ābidīn. As has already been mentioned, Ibn 'Ābidīn attempted to re-define *riḍā* as free will and choice. Where he could not enact change, however, was within the standard Ḥanafi discourse that had taken an "objective" approach and stuck to the idea of tying together offer and acceptance from its earliest stages.

As a result, the modern period of Islamic legal reform was torn between two differing ideals. On the one hand, strict formalism dominated in the late formative and classical periods of the law. These discussions were attached to textualism and the Ḥadīth and left principles in the background. On the other was a more open interpretation based upon the operating principle of *riḍā*, used by later Ḥanafi scholars in the Ottoman Period to expand upon the law and introduce new types of contracts. As the twentieth century continued, however, the latter approach won out, and most legal codes in the Muslim world today closely mirror the understanding of al-Sanhūrī and not that of the *Mejelle*.

5. Conclusion

In conclusion, when representative texts in the Ḥanafi school are placed in chronological order, several important results appear regarding contract form. Apparent shifts can be seen in the developmental stages of the law, beginning with a formative period in which *the Holy Qur'ān* and Sunnah acted as the main framework, and individual cases were used to develop new rules. These rules were not intended to fundamentally change the legal system's operation but to incorporate previous practices and make slight adjustments to fit Islamic legal norms regarding matters such as usury and delayed contracts. Principles were not discussed in *fiqh* texts during this early period. However, they were clearly understood by jurists and acted as a backdrop upon which their system worked and others – particularly al-Shāfi'ī - were fully aware of the concept of *riḍā*. In the next few centuries, theoretical discussions appeared that became crystalized sometime around the 11th century CE. This period is

characterized by a focus on formalism, for example, whether contracts were issued using the past tense and what physical actions were required to break the contract setting (*majlis*).

By the 12th century CE, Islamic contract law had shifted, placing the Quranic concept of consent (*riḍā*) at its core. In subsequent centuries, jurists would use *riḍā* to develop and expand the law beyond the formalism that it had once become entangled in, opening the door to include new types such as non-verbal contracts or contracts with no specific form.

When Muslim reformers in the modern period approached contracts, they found themselves trapped between the conflicting understandings of formalism and freedom as governed by *riḍā*. Some chose to follow formalism, while others used *riḍā* to create a bridge into a new interpretation of the law, one that would allow the Islamic conceptualization of contracts to continue to exist in the twentieth century in a period characterized by codification and European influence.

The development of contract law from rules to principles is similar to that of the common law system. According to Patrick Atiyah, "The emergence of the general principles of contract law saw the shift in emphasis from property law to contract; and within the realm of contract…the shift from particular relationships, or particular types of contract, to general principles of contract, and the shift from executed to executor contracts."[55] However, while it took the common law until the end of the 18th century to begin the extraction of contract theory, Islamic law had laid the groundwork for theoretical discussions through the use of *riḍā* more than 600 years prior.

6. Recommendations: A Future for *Riḍā*?

As was seen during the modern period, scholars such as al-Sanhūrī tapped into the traditional Islamic understanding of *riḍā* to form the basis of his civil code. As a result, most of the Muslim world's legal systems have continued to use a version of *riḍā* in their modern legal systems. However, can the concept of *riḍā,* which factors so highly in commercial law, be extended beyond the realm of contracts and retain its value? In other words, can we understand *riḍā* as a general and unrestricted principle?

One major limitation must be considered: the ethical constraints to consent. An expression of individual will or consent cannot be regarded as valid if it expresses a desire to enter into an expressly forbidden agreement in the Islamic legal tradition. For example, marriage contracts, in which both parties must express their consent to marry, cannot be carried out between siblings or with a woman who has previously been married to the groom's father.[56] Even within the realm

of contract law, two other schools within the Sunni tradition (Shāfiʻī and Ḥanbali) prohibit buying and selling items that contain pork, alcohol, or dogs, as each is considered ritualistically impure (*najis*) and therefore has no monetary value.[57] Thus, *riḍā* should always be placed within a larger Islamic context of morality and ethics and not an absolute principle that overrides all other considerations.

Beyond these ethical restrictions, *riḍā* can continue to act as a tool for lawmakers seeking to ease the flow of commerce and resolve contract disputes between parties. Economic systems in the Muslim World, bound mainly by bureaucracy and red tape, should seek to re-align their legal systems away from the specific form rules. Just as traditional Muslim scholars used *riḍā* before the introduction of new legal systems to break away from understandings of form, contemporary legislators should see *riḍā* as a tool that can both widen the validity of contracts and lessen conflict, while at the same time ensuring that their rules continue to operate with the legitimacy of the Islamic system.

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