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DEFINITION AND SCOPE OF THE ISLAMIC CONCEPT OF SALE OF GOODS

Mahdi Zahraa and Shafaai M Mahmor***

The contract of sale of goods plays an important role in Islamic legal theory both as a facilitator of commercial and non-commercial transactions and as a normative basis for the development of other legal institutions.¹ In the former sense the contract of sale is by far the most common type of transaction and perhaps the most significant contract in our daily life. As the contract of sale has features similar to other contracts and also has its own unique features, its definition and scope are problematic in the sense that both have to be exhaustive and exclusive. Two approaches address the scope of the contract of sale of goods in Islamic legal theory. The classical approach assigns to the concept of sale a very wide scope, whereas the post-classical and modern approach tends to narrow down its scope to specific types of transactions.² This article intends to address the two approaches and discuss and critically assess the arguments developed in support of each. The article will start by addressing the problematic scope and definition of the concept of sale of goods in Islamic law and its various elements. It will later address other aspects that have an effect on the scope of the contract of sale of goods in Islamic law.

SCOPE OF THE CONTRACT OF SALE IN ISLAMIC LAW

During the early development of Islamic law Muslim scholars tended to adopt a comprehensive approach that includes all types of contracts that have similar

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¹ Because of its strong legal ground the contract of sale has been used as a norm, based on which other aspects of law can be deduced. For instance, by applying an analogy with the contract of sale, the Hanafis maintain that a woman may enter into a marriage contract without the consent of her guardian. According to them, as long as a woman may conclude a contract of sale, she may also conclude the marriage by herself. See Al-San'ānī, *Subul al-Salām*, Vol. 3, p. 250; see also, Al-Zarqā', Muṣṭafā, *Al-fiqh Al-Islāmī fī Thawbihi Al-Jadīd. Al-Madkhal Al-Fiqhi Al-ām*, Damascus, Dār Al-Fikr, 1967, Vol. 1, para. 269, pp. 539–40.

² See, for instance, Al-Masri, Rafīq Younis, *Al-Jām i' fī Usūl Al-Ribā*, Damascus, Dar Al-Qalam, 1991, p. 306.

aspects. Being one of the nominate contracts, the contract of sale is viewed by classical scholars as having a wide scope that is capable of embracing many types of contracts such as *salam* sale, *muqāyadah* (commodity exchange), *Ṣarf* (Money exchange), *istisnā'* (contract of manufacture) and *al-wafā'* sale (sale with the right of redemption).³ A comprehensive examination of Islamic legal literature shows that classical Muslim scholars have included under their discussion on sale at least 13 types of sale as can be shown in Table 1 below. However, with special reference to the exchanged countervalues, the concept of sale has been classified into the following three main categories:⁴

- (1) Sale of commodity for commodity, known as barter trading (*muqāyadah*);
- (2) Sale of commodity for money or vice versa;⁵
- (3) Sale of money for money or money exchange (*ṣarf*).⁶

This denotes that classical Muslim scholars have dealt with the concept of sale in its wider scope, which was, perhaps, because of the prevailing socio-economic factors during their age or because of problematic aspects of their adopted definition. Although this article does not intend to discuss the socio-economic factors that might have influenced the scope of sale of goods, the discussion on the definitional problem reveals that Muslim scholars have, in fact, tried their best to avoid being entrapped within their contemporary circumstances by providing a comprehensive analysis of the various sale possibilities.

PROBLEMATIC DEFINITION OF BAY' (SALE) IN ISLAMIC LAW

The meaning of *bay'* (sale) in the usage of the Arabic language is the exchange of *māl* (property) for *māl* (property).⁷ Linguistically the word *bay'* could mean either sale or purchase.⁸ As for the technical definition of sale, most classical scholars

³ Al-Zarqā', Muṣṭafā, *op. cit.*, Vol. 1, para. 269, pp. 539–40. *Al-wafā'* is a sale concluded with the condition that both parties retain their rights in their original countervalues and therefore both can claim back their original properties as before the conclusion of the contract; i.e. the seller can regain what he sold and the buyer can regain the price he paid. Al-Zarqā', therefore, objects that *Al-wafā'* transaction is not really a contract of sale, nor is it a contract of pledge. It, in fact, has the characteristics of both contracts – sale and pledge – but it is more inclined towards pledge than towards sale. See Al-Zarqā', Muṣṭafā, *ibid.*, paras. 269 and 274, pp. 539–40 and 544–47. See also the Kuwaiti Civil Code of 1980, Art. 508.

⁴ Al-Kāsānī, *Budā'i' al-Ṣanā'i'*, Vol. 5, p. 134.

⁵ Sale of commodity for money is well known whereas sale of money for commodity in Islamic law is known as *salam* sale.

⁶ In Islamic classical treatises, although money exchanged is regarded as a part of sale, however, most of the scholars discuss it independently under the contract of *ṣarf*.

⁷ Ibn Manẓūr, *Lisān al-'Arab*, see entry *ba-ya-'a*. The closest English meaning of the word *māl* is property. However, as will be seen later in this article the word *māl* has been used to denote a special legal term. Therefore, although the word property is used as an alternative word to *māl* for the benefit of English speaking readers, the meaning of *māl* rather than the meaning of property is intended in this article.

⁸ Al-Zarqā', Muṣṭafā, *op. cit.*, Vol. 1, para. 269, pp. 539–40.

Table 1. Types of the Contract of Sale that the Scholars Have Covered in Their Writings

Type of Sale	Subject Matter	Price	Mode of Exchange
Barter (<i>Muqāyadah</i>)	Corporeal	Corporeal	Simultaneous trading
<i>Mua'jjal</i> sale	Corporeal	Corporeal	Price is delayed
<i>Mua'jjal</i> sale	Corporeal	Corporeal	Object is delayed
Barter but falls under the category of <i>bay' al-kāli' bi al-kāli'</i>			
Sale	Corporeal	Corporeal	Both are delayed
<i>Mua'jjal</i> sale	Corporeal	Money	Simultaneous trading
<i>Salam</i> sale	Corporeal	Money	Price is delayed
<i>Salam</i> sale	Corporeal	Money	Object is delayed
<i>Bay' al-kāli' bi al-kāli'</i>	Corporeal	Money	Both are delayed
<i>Ṣarf</i>	Money ⁹	Money	Simultaneous trading
<i>Ribā al-nasī'ah</i>	Money	Money	Delay in one of the exchanged countervalues
<i>Ribā al-nasī'ah</i>	Money	Money	Both are delayed
Sale of debt for cash	Debt ¹⁰	Money	Immediate payment
<i>Bay' al-kāli' bi al-kāli'</i>	Debt	Debt	Deferred

have reproduced the literal meaning of sale in their definition, whereby *bay'* is defined as the “exchange of *māl* for *māl*¹¹ in a distinctive way”.¹² As such the concept of *māl* came to occupy a good deal of discussion especially as to its meaning and scope. It is, therefore, quite important to discuss the concept of *māl* in Islamic legal terminology. It should be noted that it is not our aim to provide a comprehensive analysis of the concept of *māl* in Islamic law, but only to provide a brief discussion that will enable us to see its impact on the scope of the concept of sale.

The concept of *māl* in Islamic law

It is perhaps no exaggeration to say that no other term in Islamic law has caused

⁹ In money exchange, most scholars maintain that there would be no subject matter. Both the exchange countervalues are considered “price”. Al-Nawawī, *Abī Zakariyyā al-Majmū'*, Beirut, Dār al-Fikr (n.d.), Vol. 9, p. 273.

¹⁰ For a detailed discussion on debt that may be the subject matter of a sale contract see under the heading *The sale of debts* below. See also, Ibn Taymiyyah, *Naẓariyyat al-'aqd*, Cairo, Markaz Al-Kitab Lil-Nasher, (n.d.) pp. 144–145.

¹¹ Ibn Nujaym adds the word “*biltarādī*”, which means with mutual consent, see Ibn Nujaym, Zain al-Dīn, *al-Baḥr al-Rūiq*, 2nd edn, Beirut, Dār al-Ma'rifah, 1993, Vol. 5, 277; Ibn Qudāmāh, *al-Mughnī*, Vol. 4, p. 2; Ibn Qudāmāh, *al-Muqni'*, Vol. 2, p. 3; Al-Bahūti, *Kashshāf al-Qinā'*, Vol. 3, p. 146. It should be noted that Ibn Qudāmāh adds the word “*tamallukan*” which means “by the transfer of ownership”. In this way although the use of this term is intended to correctly restrict the scope of sale, the usage of the term *māl* in the definition can still create confusion as can be seen in this article.

¹² Al-Sharbīnī, *Mughnī al-Muḥtāj*, Vol. 2, p. 2; see also Article 105 of the Mejlle.

such highly controversial views than the concept of *māl*. The main concerns of the controversy over its meaning have been regarding its quantitative and qualitative aspects and the relationship between *māl* and concepts such as ownership, corporeal and usufruct property.

Literally, *māl* refers to everything that someone can own.¹³ According to Ibn Al-Athīr the meaning of the term *māl* originally referred to gold and silver but this term was later changed to refer to everything that can be acquired and owned.¹⁴ In the search for appropriate criteria based on which the meaning of the concept of *māl* can be established, the Muslim scholars differ in opinion. For the Hanafis *māl* is “what is normally desired and can be stored up for the time of need”.¹⁵ This definition denotes that the two key criteria for defining *māl* in the Hanafis’ view are “desirability” and “storability”.¹⁶ The first criterion clearly links *māl* to its linguistic root *mayl*, which means inclination or desire. Therefore, by virtue of this criterion, things that are not desired, such as some medicines cannot be included under the purview of the concept of *māl*.¹⁷ This results in a deficiency in the definition because it restricts *māl* in such a way as to exclude objects that can be owned despite their undesirability. Furthermore, the test of desirability is, by its very nature, a subjective test that can lead to disparity in application: what is desired by someone might not be desired, or might be detested, by another. The second criterion – storability – also shows deficiency in two ways. Firstly, many types of property that normally cannot be stored, such as fresh vegetables and fruits, will be excluded from purview of the definition of *māl*.¹⁸ Secondly, the storability criterion denotes that the Hanafis confine property to things that have a physical existence, i.e. corporeal, and subsequently results in disregarding non-corporeal property, such as usufruct (*manāfiʿ*),¹⁹ which, because of their non-physical existence, are incapable of being stored.²⁰ Therefore, it seems that the two

¹³ Ibn Manẓūr, Muḥammad, *Lisān al-ʿArab*, Beirut, Dār Ihyāʾ al-Turāth al-ʿArabī, 1995, under entry “*mim-wau-lam*”.

¹⁴ *Ibid.*

¹⁵ Ibn ʿĀbidīn, Muḥammad Amīn, *Hashiah Ibn ʿĀbidīn*, Beirut, Dār al-Fikr, 1979, Vol. 4, p. 501; and Vol. 5, p. 51.

¹⁶ Cf., Wohidul Islam, Muḥammad, “Al-Mal: The Concept of Property in Islamic Legal Thought”, [1999] ALQ 361 at 362–64. It is important to note that Wohidul Islam has mistakenly interpreted the condition that the thing must be “naturally desired by man” to mean “it must have a commercial value” “in modern terminology”. See *ibid.*, p. 365.

¹⁷ Abū Zahrah, Muḥammad, *al-Milkiyyah wa Naẓariyyat al-ʿAql fī al-Sharīʿat al-Islamiyyah*, Cairo, Dār al-Fikr al-ʿArabī, 1996, p. 47; Al-Zuhailī, Wahbah, *al-Fiqh al-Islāmī wa Adillatuh*, Beirut: Dār al-Fikr, 1989, Vol. 4, p. 41.

¹⁸ *Ibid.*; see also, Al-Ṣābūnī, ʿabd Al-Raḥmān, *Al-Madkhal Lidirasat Al-Tashriʿ Al-Islāmī*, Damascus, Al-Matbaʿah Al-Jadidah, 1978, p. 84; ʿAlam Al-Dīn, Muḥīī Al-Dīn, *Al-Amwāl Wa Al-Mawāriṭh Wa Al-Waṣiyyah*, Al-Rabat, Matbaʿat Al-Sahīl (n.d.), p. 24.

¹⁹ In fact, the refusal to regard usufruct as property is a peculiarity of the Hanafis’ school. Perhaps the reason for their view is that they consider usufruct as merely the fact of benefit, which is immaterial and cannot exist on its own. See, Ibn Nujaym, Zain al-Dīn, *Al-Ashbāh wa Al-Naẓāʾir*, Beirut, Dār al-Kutub Al-ʿilmiyyah, 1985, pp. 346–54; Al-Sarkhasī, Shamsuddīn, *al-Mabsūt*, Beirut, Dār al-Maʿrifah, 1993, Vol. 12, *Kitāb al-Buyūʿ*, pp. 196–97; Al-Zarqāʾ, Muṣṭafā, *op. cit.*, Vol. 1, para. 113, p. 260, Al-Ṣābūnī, ʿabd Al-Raḥmān, *op. cit.*, pp. 91–93.

²⁰ *Ibid.*; Anderson D, “Islamic Law and Structural Variations in Property Law”, *International Encyclopaedia of Comparative Law*, Part 2, 1975, p. 196.

Hanafis' criteria – “desirability” and “storability” – cannot be reliable criteria for the purpose of defining the concept of *māl*.

In his attempt to define the concept of *māl*, Ibn Qudāmah, a Hanbali scholar, has chosen the “beneficial nature” of the object as a key criterion. In his *al-Muqni'*, he defines *māl* as anything that has a beneficial nature which is permissible by *Sharī'a*, provided that such permission does not come under the circumstances of necessity (*al-darūrah*).²¹ This definition seems to denote a wider meaning than that of the Hanafis, in that the criterion “beneficial nature” seems to cover any benefit that might be gained from property including usufruct. However, the inclusion of the condition that it must be permissible by *Sharī'a* restricts the scope of the definition and renders objects that are prohibited by *Sharī'a*, such as wine and pork, not to be considered as property.²²

Al-Shāfi'ī states that “the word *māl* is not used except to refer to a thing that has a *material value*, with which it can be sold”.²³ This definition, which denotes the “material valuability” criterion, seems to provide a very good basis for the definition of the concept of *māl* that can overcome the deficiencies inherent in the Hanafis and Hanbalis criteria above. The “material valuability” criterion is sufficiently general to include in the definition corporeal properties as well as usufruct (*manfa'ah*); and is sufficiently objective to include all types of properties that are valued by the contractors. However, as al-Shāfi'ī adds to his definition the phrase “*with which it can be sold*”,²⁴ his criterion is automatically restricted to items that can be the subject matter in a contract of sale; and, as will be seen later, the focus of the subject matter of the sale contract is confined to corporeal, special rights and some debts only.

Having examined the general definition of *māl* according to some schools of law, it is important to test the scholars views against the meaning of *māl* in the primary sources of *Sharī'a*. Of particular interest here is the Qur'ānic verse based on which a husband has to give his wife a gift (dowry) from his *māl* (property) upon the conclusion of the marriage contract.²⁵ In a marriage case (that was reported during the Prophet's time) between *Khaulah* and an *Ansār* man²⁶ the Prophet (pbuh) ruled that the *Ansār* man, who happened to own no property, should teach the bride some Qur'ānic verses that he memorised as a fulfilment of the requirement of gift (dowry) provided in the said verse. By the virtue of this case, it is clear that the Prophet (pbuh) explicitly recognised something intellectual as *māl* (property). As

²¹ Ibn Qudāmah, Abū Muḥammad, *al-Muqni' fi al-Fiqh*, Qatar al-Waṭaniyyah, Qatar (n.d.), Vol. 2, p. 5.

²² This might entail impractical results especially when both contractors are non-muslims (dhimīs) living in Islamic territories.

²³ Al-Sayūṭī, *al-Ashbāh wa al-Naẓā'ir*, p. 258.

²⁴ *Ibid.* The full statement of Al-Shāfi'ī is, “The word property is not used except to refer to a thing that has a material value, which may become the subject matter of sale”.

²⁵ The Quran, 4:24; the Qur'ānic verse translates: “Also (prohibited are) women already married, except those whom your right hands possess [i.e., captives]: Thus has Allah ordained (prohibitions) against you: Except for these, all others are lawful, provided you seek (them in marriage) with gifts from your [property] desiring chastity, not fornication”. [Emphasis added]

²⁶ Al-Shawkānī, *Nayl al-Awṭār*, Vol. 6, pp. 314–317.

such, neither the Qur'ān nor the prophetic traditions restricts the scope of *māl* to corporeal or material property. Therefore, in the course of their comprehensive analysis of various nominate contracts, the majority of scholars classify the concept of *māl* into three main types, namely, '*ain* (corporeal), *manfa'ah* (usufruct) and *ḥaqq* (right).²⁷ The '*ain* refers to a property that has a physical existence,²⁸ whereas the *manfa'ah* refers to some kind of benefit that may be utilised in a special way,²⁹ such as dwelling in a house.³⁰ As for the *ḥaqq* (right), it denotes a special right over a particular property, such as the right over a passageway (*ḥaqq al-mamarr*).³¹

Some modern Muslim scholars address the concept of *māl* in a vague fashion similar to classical scholars. Al-Zarqā', for instance, defines *māl* as "a material concept that addresses existing things which have benefit".³² In this definition reference to material existing things and benefit denote that Al-Zarqā' has adopted both the Hanafis' and Hanbalis' views respectively. It also denotes that Al-Zarqā' favours the narrower definition of *māl*. Furthermore, as he alludes to the classical scholars' views, Al-Zarqā' differentiates between two different concepts: *māl* according to his definition above and *mulk* (ownership) which is different from the concept of *māl* and more concerned with an exclusive relationship that is established by a human being over an object or usufruct.³³

Having tried to summarise the various schools, Al-Khafī³⁴ and Al-Ṣabūnī³⁵ seem to finally adopt two criteria for the definition of *māl*. The first is that the object must be capable of being obtained and possessed; and the second is that it must usually be beneficial. As both, Al-Khafī and Al-Ṣabūnī later agreed with the majority of scholars that usufruct can be considered *māl* their two criteria seem to favour the wider approach of the concept of *māl*.³⁶

The conflict between the concept of *māl* and the concept of sale of goods

As has been discussed above the general concept of *māl* includes corporeal, usufruct and special rights. If we apply this concept to the definition of contract of sale stated above – exchange of *māl* for *māl* – the range of the contract of sale will be so wide as to cover every contractual aspect dealing with all types of property, whether it is corporeal, usufruct or special right. In this case many types of

²⁷ Al-Sharbīnī, *Mughnī al-Muṭāj*, Vol. 2, p. 2.

²⁸ Al-Qal'ajī, *Mu'jam Luġhat al-Fuqāhā'*, p. 326.

²⁹ Ibn 'Ābidīn, *Hāshiah Ibn 'Abidīn*, Vol. 4, p. 502.

³⁰ Ibn Qudāmah, *al-Muqni'*, p. 196.

³¹ Al-Sharbīnī, *Mughnī al-Muṭāj*, Vol. 2, pp. 2–3.

³² Al-Zarqā', *Mustafā*, *op. cit.*, Vol. 1, para. 101, pp. 240–42.

³³ Al-Zarqā', *Mustafā*, *ibid.*, Vol. 1, para. 113, and footnote 1 in p. 240, and Vol. 3, paras. 69–73, pp. 114–120.

³⁴ Al-Khafī, 'ali, *Aḥkām Al-Mu'amalāt Al-Shar'iyah*, Cairo, Dār al-Fikr al-'Arabī (n.d.), pp. 25–26.

³⁵ Al-Ṣabūnī, 'abd Al-Ramān, *op. cit.*, pp. 85–86.

³⁶ *Ibid.*, pp. 91–93; Al-Khafī, 'ali, *op. cit.*, pp. 26–30.

contracts including the contract of hire³⁷ and *Ṣarf* (money exchange) can be considered types of sale. If that were the case, we would be addressing “The Islamic Law of Exchange of Property” rather than “The Islamic Law of Sale of Goods”. Obviously, this is neither the intention of the classical scholars nor our discussion in this article. The problem here is inherent in the usage of a generic term, such as the word *māl*, which is all embracing, meanwhile it is intended to denote a specific meaning which is restricted to specific types of property. That is to say, the classical definition of sale is somewhat confused and shattered between an unintended wide connotation and an intended but poorly defined narrow conception that makes it quite difficult to draw a line of demarcation between a sale contract and another kind of contract such as the contract of hire.³⁸ Therefore, it is essential either to refine the meaning of the term *māl* (property) in such a way as to suit the contract of sale, or to redefine the concept of sale. As will be seen later, the second solution seems to be the preferred solution, because the first solution has already proved futile. This can be seen in the post classical scholars’ writing, which seems to denote that they intend a specific type of *māl* which narrows down and delimits the scope of sale in such a way that can exclude other cognate transactions from sale. The Hanafis’ approach is very straightforward, in that the usage of the term *māl* in relation to the contract of sale is confined to corporeal and some property in the form of a debt.³⁹ This is due to the fact that, as has been discussed above, they disregard usufruct from being included under the term *māl*.⁴⁰ Although scholars from other schools have defined *māl* in a much wider sense, they agree with the Hanafis that the meaning of the term *māl* in relation to the contract of sale should not include usufruct.⁴¹ They are, therefore, in agreement that the term *māl* (property) as occurs in their definition should be interpreted specifically to cover the corporeal, some types of debt and pecuniary right.⁴² Perhaps the best attempt to eliminate this terminological confusion is the one suggested by Ibn ‘Arafah, who clearly stipulates that “the subject matter of the

³⁷ The definition of sale as “exchange of *māl* for *māl*” can be a valid definition for a hire contract since both the exchanged countervalues in the contract of hire – usufruct and rent – are *māl* (property). This might result in confusion that the contract of hire is included in, or perhaps one type of, the contract of sale, which cannot be a valid hypothesis. This is because despite the stated similarity between the two contracts, the principal difference between them is that, whereas the contract of hire is concerned with the usufruct of a particular property that the hirer is entitled to enjoy for a limited period of time, the contract of sale denotes a total and permanent transfer of ownership of the property to the purchaser. That is why none of the scholars is of the view that “sale” includes or assimilates “hire”.

³⁸ However, distinction can, for instance, be made between a sale contract and a non-profit contract such as one concerned with a gift. A gift is a transfer of property without any consideration and as such, it is not a “transfer of *māl* (property) for *māl* (property)”. As such, there is, normally, no difficulty in distinguishing between a sale and a gift.

³⁹ Al-Kāsānī, *Badā’i’ al-Sanā’i*, Vol. 5, p. 134.

⁴⁰ Although the Hanafis view is in line with the narrow approach of Sale of Goods, it is still problematic because the term *māl* will always be confusing, taking into account that with the exception of the Hanafis, the vast majority of Muslim scholars consider usufruct *māl* (property). See also *supra*, note 19.

⁴¹ Al-Bahūti, *Kashshf al-Qinā’*, Vol. 3, p. 146; Al-Sharbīnī, *Mughnī al-Muḥtāj*, Vol. 2, p. 2.

⁴² *Ibid.*

contract of sale shall not be usufruct (*manfa'ah*)".⁴³ It is interesting to note that Ibn 'Arafah has avoided the usage of the term *'ain* (corporeal) or *sil'ah* (commodity) so as to avoid any confusion that debt and proprietary right is not included under the notion of sale.

THE CONCEPT OF SALE OF GOODS IN MODERN MIDDLE EASTERN LAWS

It is worth noting that not only has classical law been trapped in a confusing concept of sale, but also some modern laws face similar difficulty. For instance, the UAE Civil Code defines sale as "the exchange of non-money *māl* for *māl* in money".⁴⁴ The deficiency in this definition is that it fails to exclude usufruct from the notion of sale, because the clause "non-money *māl*" can clearly still include usufruct; i.e., it still creates confusion between the contract of sale and the contract of hire. However, the definition in the UAE Civil Code seems to be successful in two ways. Firstly, it gives a narrower scope to sale, of which one of the countervalues must be money. Secondly, it excludes money exchange from the scope of the contract of sale.

Other Middle Eastern laws have managed to avoid this confusion by avoiding the use of a generic term like *māl* and providing a clearer definition. For instance, the Egyptian Civil Code defines sale as "a contract whereby the vendor binds himself to transfer to the purchaser the ownership of a thing or any other [sic] proprietary right in consideration of a price in money".⁴⁵ The Syrian Civil Code,⁴⁶ the Libyan Civil Code⁴⁷ and the Algerian Civil Code⁴⁸ also adopt the same definition. What is evident in this definition is that the subject matter of the contract of sale is referred to as "a thing or other proprietary right". Although one could be tempted to suggest that the term "thing" could be replaced by "goods", it seems that the term "thing" is a much general and wider term than "goods" and it is therefore much more preferable. The term "proprietary right" denotes that the definition clearly recognises the sale of, for example, the right of passageway (*ḥaqq al-mamarr*),⁴⁹ and sale of air space,⁵⁰ which, in fact, have been recognised by most Muslim scholars as valid subject matters of sale. That is to say, the above definition can be a good starting point in accordance with which reformation of the Islamic definition of the contract of sale of goods can be effected. However, the main problem with the Middle Eastern Civil law definition of sale is that it cannot

⁴³ Al-Dusūqī, *Hāshiah al-Dusūqī*, Vol. 3, p. 2.

⁴⁴ The UAE Civil Code (1985), Art. 489.

⁴⁵ The Egyptian Civil Code of 1948, Art. 418; translation is taken from, Keesee, Allen PK, *Commercial Laws of the Middle East*, London, Oceana Publication, Vol. IV, June 1981 issue.

⁴⁶ The Syrian Civil Code of 1949 and its amendments, Art. 386.

⁴⁷ The Libyan Civil Code of 1953, Art. 407.

⁴⁸ The Algerian Civil Code of 1975 and its amendments, Art. 351.

⁴⁹ Al-Sharbīnī, *Mughni al-Muḥtāj*, Vol. 2, p. 2.

⁵⁰ Al-Dusūqī, *Hāshiah*, Vol. 3, p. 14; See *infra*, under the heading, *The sale of airspace*.

be applied to *muqāyadah* (commodity exchange), which, according to Al-Zarqā', is supposed to be included in the definition of sale.⁵¹ Al-Zarqā' further says that *muqāyadah* (commodity exchange) does not only squarely fall within the central meaning of sale but also forms the historical origin, from which the concept of sale altogether originates.⁵² That is why the above stated Civil Codes have to provide special provision stating that "the provisions governing sale apply to [commodity] exchange as far as the nature of the [commodity] exchange allows. Each one of the exchanging parties is deemed to be the vendor of the thing given by him in exchange and the purchaser of the thing received in exchange".⁵³

DIFFICULTIES ASSOCIATED WITH THE SUBJECT MATTER

Although classical Muslim scholars have not defined *bidha'ah* (goods) relying on its common conception, they have provided quite comprehensive discussions on things that may be valid subject matters of sale. The current discussion aims to investigate things that may be traded as "goods" in the contract of sale.

Money as goods

Although most scholars have barred money from being bought and sold as "goods",⁵⁴ their argument centred on whether, for instance, copper coins (*fulūs*) can be sold as goods. Traditionally, in some countries there were many coins in use in addition to the main currency that was normally in circulation.⁵⁵ Some scholars maintain that if copper coins (*fulūs*) are traded in the form of currency exchange, they should be treated as "money" but not as goods. If, however, they are exchanged amongst themselves with a significant disparity, they are regarded as goods.⁵⁶ Some other scholars maintain that copper coins should be treated as money in all forms of transactions.⁵⁷ Although this argument may seem to be only relevant to the classical period, its importance in modern society is to avert the sale of coins in a convenient contract of sale that hides an element of usury in it.⁵⁸

⁵¹ Al-Zarqā', Muṣṭafā, *Sharḥ Al-Qānūn Al-Madani Al-Sūri*, *Al-'uqūd Al-Musammāh*, 'aqd Al-Bay' wa Al-Muqāyadah, 6th edn, Damascus, Matābi 'Fatā Al-'Arab, 1965, pp. 44–47.

⁵² *Ibid.*

⁵³ The Syrian Civil Code of 1949 and its amendments, Art. 453, see also 450–453. Translation taken from Keese, Allen PK, *op. cit.*, Vol. IX, June 1992 issue, Release 92–1. The Egyptian Civil Code of 1948, Art. 485, see also 482–484; The Algerian Civil Code of 1975 and its amendments, Art. 415, see also 413–414.

⁵⁴ Al-Kāsānī, *Badāi' al-Sanāi'*, Vol. 5, p. 234; Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, p. 273.

⁵⁵ *Fulūs* is plural of *fals* and its value equivalent to one sixth of *dirham*. See Qal'ajī, *Mu'jam Lughat al-Fuqahā'*, p. 350.

⁵⁶ Al-Kāsānī, *Badāi' al-Sanāi'*, Vol. 5, p. 234.

⁵⁷ *Ibid.*

⁵⁸ Al-Sanhūrī, 'Abd Al-Razzāq, *Maṣādir al-Ḥaqq fī Al-Fiqh Al-Islamī*, Beirut, Dār Iḥiā' Al-Turāth Al-'Arabi, 1953, Vol. 3, pp. 215–17.

However, as this aspect is not directly relevant to the main theme of this article, it will not be discussed any further.

The sale of debts

In modern time the word debt has a straightforward meaning, denoting “a sum of money due from one person to another”.⁵⁹ It may also be defined as a “mere right to demand payment of money at a stipulated time”.⁶⁰ In Islamic legal terminology, the term *dayn* is used to denote debt. Although *dayn* in some sense is defined as *māl* (property) that someone owes to another,⁶¹ it is sometimes used in a much wider sense as a reference to an abstract or religious liability that is established against a person.⁶² However, for the purpose of the study of the sale of goods, the discussion on debt in this article will be confined to its property-related meaning. In this latter sense *dayn* can be established in two ways. First, it can be established through contractual transactions such as the obligation to pay the deferred price or to pay back the loan. And second, it can be established through non-contractual dealings such as compensation or damages as a result of destroying others’ property.⁶³

Taking into account that the key term in defining the term *dayn* is *māl*, and also taking into account the wide meaning of *māl* discussed above, it is clear that debt may be transacted in the form of money as well as non-money property.⁶⁴ However, unlike the confusion caused by the use of the term *māl* in the definition of the concept of sale, the use of this term in the definition of *dayn* seem to play a positive role. This positive role manifests itself in two ways:

- (1) It enables the concept of *dayn* to have a wider preferable scope, which includes all types of property whether they are money-related or other material and immaterial property; and
- (2) It restricts the scope of *dayn* to property-related objects or rights to the exclusion of abstract or religious liability.

⁵⁹ *Osborn’s Concise Law Dictionary*, p. 108.

⁶⁰ Wilson, *The Scottish Law of Debt*, p. 1.

⁶¹ Qal’ajī, *Mu’jam Lughat al-Fuqahā’*, p. 212.

⁶² Al-Sanhūrī, ‘Abd Al-Razzāq, *op. cit.*, Vol. 1, p. 15; Al-Zarqā’, Mustafā, *op. cit.*, Vol. 3, paras. 114–116, pp. 167–180; Al-Zuhailī, Wahbah, *op. cit.*, Vol. 4, p. 432; *Al-Mawsū’ah al-Fiqhiyyah* at <http://feqh.al-islam.com>; Article 158 of the Mejlle provides that “a debt is the thing which is proved to be owing”. This may include a property-related liability and non property-related liability such as a prayer, almsgiving (*zakūh*) or fasting that one has missed and is owed to be performed as soon as possible.

⁶³ Al-Nawawī, Abī Zakariyyā, *al-Majmū’*, *op. cit.*, Vol. 9, pp. 273–274.

⁶⁴ In order to clarify the scope of the term *dayn* some scholars list the following types of debts: (1) The price in a deferred payment sale (sale by credit); (2) Goods to be delivered by the seller in a *salam* (forward) sale (*muslam fih*); (3) A sum of money due to a person as a result of a loan of money; (4) The equivalent substitute that one has to return in the case of loan of fungible goods (*badal al-qard*); (5) A compensation that one has to pay for destroying someone’s property (*gharamat al-mulaf*). This is similar to damages in case of negligence or delict or tort in modern time. This list is only illustrative and should not be interpreted as exhaustive. This is because debt may also be established in many other forms such as a rent and a dower that has to be settled.

Muslim scholars differentiate between two types of sale of *dayn*, namely, instant sale of *dayn* and the sale of a *dayn* with another *dayn* whereby performance is delayed for a future date. This latter form, which is known as *Bay' al-kāli' bi al-kāli'* (the sale of debt for a debt), is categorically prohibited by all schools of law based on a Prophetic *ḥadīth* which prohibits this type of sale.⁶⁵ The scholars, however, differ in opinion regarding the former type – instant sale of *dayn*. To begin with, the Hanafis disallow this type of sale of debts except if the buyer was the debtor himself.⁶⁶ The Zahiris disallow this type of sale to whomsoever it is because it involves *gharar* (uncertainty) regarding the object of sale.⁶⁷ The Malikis provide five conditions that can enable the instant sale of *dayn* to be valid. These conditions are:

- (1) The sale should not lead to prohibited transactions such as usury or *gharar* (uncertainty) sale. In this case the types of goods sold as *dayn* must be different from the goods constituting the price; if they are of the same type they must be equal in order to avoid any usurious transaction;
- (2) The sold *dayn* must not be foodstuff;
- (3) It is almost certain that the debtor is present in the place where the contract is concluded;
- (4) The debtor must have already acknowledged the *dayn*; i.e., the *dayn* must not be the subject of a dispute; and
- (5) There should be no sign of animosity between the debtor and the buyer.⁶⁸

The Shafi'is differentiate between *dayn mustaqirr* (standing debt) and *dayn ghayr mustaqirr* (non-standing debt). According to them the former may lawfully be the object of a contract of sale like any other type of goods because the object of sale seems to be capable of delivery.⁶⁹ The latter – *dayn ghayr mustaqirr* (non-standing debt) – may possibly be a subject matter of sale,⁷⁰ provided it is not a *dayn* in a *salam* (forward) sale in which delivery is not yet due. This is because there is a

⁶⁵ Ibn Ḥazm, *al-Muḥallā bi al-Athar*, Beirut, Dar Al-Kutub Al-'Ilmiyyah (n.d.), Vol. 7, pp. 486–87; Ibn Qudāmah, *al-Muqni'*, Qatar, Qatar al-Waṭaniyyah, n.d., *Kitāb al-Buyū'*; Ibn Rushd, *al-Muqaddimāt al-Mumahhidāt*, Vol. 3, pp. 526–27; Al-Rāfi'ī, *Fath al-'Aẓīz Sharḥ al-Wajīz* (published together with *al-Majmū'*), Vol. 8, pp. 437–438; *al-Majmū'*, Vol. 9, p. 275; Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 2, p. 186; Ibn Nujaym, Zain al-Dīn, *al-Baḥr al-Rāiq*, *op. cit.*, Vol. 5, p. 281; For the *ḥadīth* see, Al-Darqutnī, *Sunan*, Beirut, Dār al-Ma'rifah, 1966, Vol. 3, *Kitāb al-Buyū'*, Nos. 260 and 270; Al-Ṣan'anī, *Subul al-Salām*, Vol. 3 (*Kitāb al-Buyū'*), No. 797/17. Al-Zuhailī, however, noted that this *ḥadīth* is a weak *ḥadīth*, see Al-Zuhailī, *Wahbah*, *op. cit.*, Vol. 4, p. 432.

⁶⁶ Ibn Nujaym, Zain al-Dīn, *al-Baḥr al-Rāiq*, *op. cit.*, Vol. 5, *Kitāb al-Bay'*; Ibn Nujaym, Zain al-Dīn, *Al-Ashbāh wa Al-Naẓā'ir*, *op. cit.*, pp. 354–362; see also Al-Zarqā', *Mustafā*, *op. cit.*, Vol. 3, paras. 34–35 and 114–116, pp. 67–69 and 167–180.

⁶⁷ Ibn Ḥazm, *al-Muḥallā bi al-Athar*, *op. cit.*, Vol. 7, pp. 486–87.

⁶⁸ Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 2, pp. 157–202; Ibn Juzay, *al-Qawānīn al-Fiqhīyyah*, Beirut, Al-Maktabah Al-Thaqafīyyah (n.d.), pp. 169–72 and 210; *Cf.*, Al-Zuhailī, *Wahbah*, *op. cit.*, Vol. 4, pp. 434–35.

⁶⁹ Al-Rāfi'ī, *Fath al-'Aẓīz Sharḥ al-Wajīz* (published together with *al-Majmū'*) Vol. 8, pp. 437–438; Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, p. 272.

⁷⁰ Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, pp. 272–274.

clear provision on the prohibition of sale prior to taking delivery.⁷¹ Although they advocate a distinction between *dayn mustaqirr* and *dayn ghayr mustaqirr*, neither Al-Shīrādhī,⁷² nor Al-Nawawī,⁷³ (the commentator on Al-Shīrādhī's work) nor Al-Rāfi'ī (the commentator on both Al-Shīrādhī's and Al-Nawawī's work),⁷⁴ provide clear definition of these two categories of debt. Al-Shīrādhī, however, refers to liability that a person owes to another as an example of a "standing debt". This may be seen in the form of compensation over destroyed property. Al-Shīrādhī, also refers to a future obligation that a person has to fulfil, such as the delivery of the subject matter of a *salam* sale (*muslam fih*) as an example of non-standing debt.⁷⁵ A close look at these two examples shows that two criteria are implied in Al-Shīrādhī's examples above, namely, the legal basis and stability of the obligation. Liability for damaged property, as an example of "standing debt", is usually based on legal obligation independent of the will of the parties, whereas the obligation to deliver the subject matter of a *salam* sale, as an example of "non-standing debt", is based on contractual or consensual legal basis. If we apply the second criterion – stability of the obligation – we will find that liability for damaged property is final and conclusive and cannot be opted out by the defender unilaterally, whereas the obligation to deliver the subject matter in a *salam* sale can be subject to unilateral termination – if, for instance, the other party did not fulfil his obligations or if performance becomes impossible. If we test these two criteria in some other cases, such as a replacement for loan of fungible commodities (*badal al-qard*), we can clearly see that the borrower does not have the ability to terminate his liability unilaterally, similar to the case of compensation above. Again, if we test the two criteria on the dowry that the husband is liable for as a result of cohabitation,⁷⁶ we can clearly see that the husband cannot unilaterally terminate such liability. Therefore it could be concluded that "standing debt" in the present context is "a final and conclusive liability over which the creditor has indisputable ownership and which is incapable of unilateral termination".⁷⁷ A "non-standing debt", however, can be defined as "a debt that has the potential of termination or lapse".

The sale of animals and their remains

As a general rule, whereas the Hanafis⁷⁸ require that the sale of living animals is always governed by the fact that they must be beneficial by their nature, the majority of scholars require in addition to the beneficial nature a further element

⁷¹ *Ibid.*; see also *supra*, note 6; for the *ḥadīth* see Al-Tirmidhī, Abū 'Isā Muḥammad, *Jāmi' al-Tirmidhī ma'a Tuḥfaḥ al-Aḥūdhī*, Beirut, Dār al-Kutub al-'Ilmiyyah (n.d.), Vol. 4, *Kitāb al-Buyū'*, *ḥadīth* no. 1242.

⁷² Al-Shīrādhī, *al-Muḥadhdhab*, published together with *al-Majmū'*, *op. cit.*, Vol. 9, p. 272.

⁷³ Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, pp. 272–274.

⁷⁴ Al-Rāfi'ī, *Fuṭḥ al-Azīz Sharḥ al-Wajīz*, published together with *al-Majmū'*, *op. cit.*, Vol. 8, pp. 437–438.

⁷⁵ Al-Shīrādhī, *al-Muḥadhdhab*, *op. cit.*, Vol. 9, p. 272.

⁷⁶ See the Qur'ān, 4: 20; Ibn Rushd, *Bidāyat al-Mujtahid*, Vol. 2, p. 17.

⁷⁷ Al-Zuhailī, Wahbah, *op. cit.*, Vol. 4, pp. 434–35.

⁷⁸ Nazām, *al-Futūwā al-Hindiyyah*, Vol. 3, p. 114.

that living animals must be *ṭāhir* (pure).⁷⁹ The Muslim scholars, however, differ in opinion on the sale of certain animals, such as dogs.⁸⁰ According to some scholars, small animals that are by their very nature non-beneficial, are not qualified to be *māl mutaqaawwim* (a valuable property) and, therefore, cannot be valid “goods”.⁸¹ Wild animals, however, which are obtained or owned by lawful means may be bought and sold and can be valid “goods”, provided that they must be beneficial by their nature.⁸² Dead animals, which have not been slaughtered in accordance with the *Sharī‘a* regulations, cannot be valid “goods”.⁸³ However, this rule is not applied to aquatic animals that habitually live in water.⁸⁴ The validity of selling animal remains, such as bones, hair and skin, is very much dependant upon whether they are pure or not.⁸⁵ As for their skin (leather), the majority of scholars maintain that all animals’ skin, excluding pigs and dogs, may be “goods” provided that they are tanned prior to sale.⁸⁶ The Hanafis, however, only exclude pigs’ skin from being valid “goods”,⁸⁷ whereas the Zahiris see no restriction to both provided that they are tanned prior to sale.⁸⁸ Table 2 illustrates the status of animals according to some schools of law.

The sale al-Mushā‘ (joint ownership)

Al-Nawawī states that a share interest in an object, such as one-half interest in a house, land or animal, may be valid “goods” on the ground that *ijmā‘* (consensus) has materialised on the validity of its sale.⁸⁹ However, the sale of *al-mushā‘* (joint ownership) is subject to the conditions that if the object is not yet divided between the shareholders the vendor must not make a specific indication to a particular part

⁷⁹ Ibn Qudāmah, *al-Mughnī*, Vol. 4, p. 300; Al-Nawawī, Abī Zakariyyā, *al-Majmū‘*, *op. cit.*, Vol. 9, p. 229.

⁸⁰ Al-Kāsānī, *Badā‘i al-Sanā‘i*, Vol. 5, p. 143; Ibn Qudāmah, *ibid.*; Al-Zurqānī, *Sharḥ al-Zurqānī*, Vol. 3, p. 305; Al-Nawawī, Abī Zakariyyā, *al-Majmū‘*, *op. cit.*, Vol. 9, p. 228. See also Table 2 below.

⁸¹ *Ibid.* It should be noted that if we apply the criteria of beneficial nature to modern circumstances numerous types of dogs, such as guide dogs and sniffing dogs, can be a valid subject of sale, because they become beneficial after they are trained.

⁸² Naẓām, *al-Fatāwā al-Hindīah*, Vol. 3, p. 114; Ibn Qudāmah, *al-Mughnī*, Vol. 4, pp. 9–10; Al-Dusūqī, *Hāshīyah*, Vol. 3, p. 11; Al-Ramlī, *Nihāyah al-Muhtāj*, Vol. 3, pp. 395–396. See also Table 2 below.

⁸³ See *ḥadīth* Jābir, *Subul al-Salam*, Vol. 3, pp. 10–11; Jābir ibn ‘Abdullah reported Allah’s Messenger as saying in the Year of Victory while he was in Makkah: “Verily Allah and His Messenger have forbidden the sale of wine, carcass, pig and idol”. It was said: “Allah’s Messenger, you see that the fat of the carcass is used for coating the boats and varnishing the hides and people use it for lighting purposes”, whereupon he said: “May Allah destroy the Jews; when Allah forbade the use of fat of the carcass for them, they melted it, and then sold it and made use of its price”.

⁸⁴ Al-Ṣan‘ānī, *Subul al-Salam*, Vol. 1, pp. 35–36.

⁸⁵ Al-Kāsānī, *Badā‘i*, Vol. 5, p. 142; Al-Maqdisī, *al-Sharḥ al-Kabīr*, Vol. 4, p. 13; Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 1, p. 56. See also Table 2 below.

⁸⁶ Al-Nawawī, Abī Zakariyyā, *al-Majmū‘*, *op. cit.*, Vol. 9, p. 231; Ibn Rushd, *op. cit.*, Vol. 1, p. 57.

⁸⁷ Al-Kāsānī, *Badā‘i al-Sanā‘i*, Vol. 1, p. 270.

⁸⁸ Ibn Hazm, *al-Muḥallā bi al-Athar*, *op. cit.*, Vol. 7, pp. 525–26.

⁸⁹ Al-Nawawī, Abī Zakariyyā, *al-Majmū‘*, *op. cit.*, Vol. 9, pp. 256, 281, 287 and 317; Al-Bahūtī, *Kashshāf al-Qinā‘*, Vol. 3, p. 156.

Table 2. The Validity of the Sale of Selected Items and Their Reasons According to Some Schools of Law⁹⁰

Item	Hanafis		Hanbalis		Malikis		Shafiis	
	Validity	Reason	Validity	Reason	Validity	Reason	Validity	Reason
Animal waste ⁹¹	✓	Beneficial	✗	Impure (<i>Najis</i>)	✓	Necessity <i>Dharīrah</i>	✗	Impure (<i>Najis</i>)
Trained dog	✓	Beneficial	✗	Itemised in provision/ impure	✗	Itemised in provision/ impure	✗	Itemised in provision /impure
Wild animal capable of being trained	✓	Beneficial	✓	Beneficial	✓	Beneficial	✓	Beneficial
Insect/ bug/ snake ⁹²	✗	Non-beneficial	✗	Non-beneficial	✗	Non-beneficial	✗	Non- beneficial
Substances of carcass other than its skin such as bones and hair	✓	Pure (<i>Tāhir</i>)	✗	Impure (<i>Najis</i>)	✗	Bone of carcass is regarded as impure Hair of carcass is regarded as pure	✗	Impure (<i>Najis</i>)

⁹⁰ The views stated in the Table represent the most authoritative view in that particular school of law.

⁹¹ Al-Kasānī, *Baḍā'ī al-Sanā'ī*, Vol. 5, p. 144; Ibn Qudāmah, *al-Mughnī*, Vol. 4, p. 14; Al-Dustuqī, *Alfashihah*, Vol. 3, p. 10; Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, p. 230.

⁹² Al-Kasānī, *ibid.*; Naẓām, *al-Fatāwa*, Vol. 3, p. 114; Al-Bahūṭī, *Kashshāf al-Qinā'*, Vol. 3, p. 155; Al-Qarāfī, *al-Furūq*, Vol. 4, p. 239; Al-Sharḥīnī, *Mughnī al-Mulḥīrāj*, Vol. 2, pp. 11-12.

of the object,⁹³ unless it is agreed by all other shareholders. The Zahiris validate the sale of a share in house or land if the share was well defined, otherwise it is prohibited because it can be considered as selling an unknown object.⁹⁴

The sale of water and minerals

A distinction should be made between running water (*al-mā' al-jārī*) and standing water (*al-mā' al-mustaqirr*). All main sources of water on the ground are considered as running water⁹⁵ and the vast majority of scholars confirm their status as semi-common heritage of all people.⁹⁶ It should be borne in mind that water in a well, although it may appear to be "standing",⁹⁷ is regarded by most scholars as running water because it flows under the ground.⁹⁸ The sources of water only become standing (*mustaqirr*) when they are isolated and detained by some means. According to the majority of scholars, standing water in the latter sense can be the subject of sale.⁹⁹ However, the Zahiris invalidate the sale of water altogether unless it is sold as part of a well or stream on private land.¹⁰⁰ Concerning the status of water in a well that is situated on private land, the majority of scholars maintain that as long as such water is not reduced into private ownership, it maintains its status as semi-common heritage of all people.¹⁰¹ Those scholars further argue that mere ownership of the land is not a sufficient reason on its own to effect ownership of the well, unless the owner of the land, by some legal means, reduces it into his acquisition (*al-ihrāz*).¹⁰²

As for minerals, classical scholars classify them into two types: surface deposit (*al-ma'ādin al-ẓāhirah*), such as salt, sulphur, kohl and gypsum, and, deep-seated deposit (*al-ma'ādin al-bātinah*), such as gold, silver and copper.¹⁰³ It is important

⁹³ *Ibid.*

⁹⁴ Ibn Hazm, *al-Muḥallā bi al-Athar*, *op. cit.*, Vol. 7, p. 508.

⁹⁵ Al-Maqdisī, *al-Sharḥ al-Kabīr*, Vol. 4, p. 21.

⁹⁶ This is based on the Prophetic *ḥadīth* that "people are partners in three things: *al-kalā'*, water and fire.", see *infra*, note 114. The use of the term "semi-common heritage of all people" is chosen because the status of water is neither *res nullius* in the sense that it is freely open to private acquisition, nor common property of all people in the sense that it is totally incapable of private acquisition. In fact, it is semi-common property which is open to restricted type of private acquisition according to the vast majority of Muslim scholars. See, Al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, Vol. 5, p. 146; Al-Shirādhī, *al-Muḥadḍḥab*, Vol. 15, p. 205; Al-Subkī, *Takmilat al-Majmū'*, Vol. 11, p. 288; Ibn Qudāmah, *al-Mughni*, Vol. 4, p. 200; Al-Maqdisī, *ibid.*; Ibn Hazm, *al-Muḥallā bi al-Athar*, *op. cit.*, Vol. 7, p. 488; Al-Zuhailī states that the Hanafis classify water into four categories: sea water, great river waters, public water owned by the whole community in a village, and water detained in special containers. Only the last type may be subject to ownership, see Al-Zuhailī, *Wahbah*, *op. cit.*, Vol. 4, pp. 450–51.

⁹⁷ Different legal systems might give to water in a well a different classification. In Scotland, for example, water in a well is regarded as standing. See Reid, Kenneth GC, *The Law of Property in Scotland*, Edinburgh, The Society of Scotland, 1996.

⁹⁸ Ibn Qudāmah, *al-Mughni*, Vol. 4, p. 200.

⁹⁹ Ibn Qudāmah, *op. cit.*, Vol. 4, p. 201.

¹⁰⁰ Ibn Hazm, *al-Muḥallā bi al-Athar*, *op. cit.*, Vol. 7, pp. 488–90.

¹⁰¹ *Ibid.*; Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 11, p. 282.

¹⁰² Ibn 'Abidīn, *Ḥaṣḥīh Ibn 'Abidīn*, Vol. 5, p. 67; Al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, Vol. 5, p. 146; Al-Bahūtī, *Kaṣḥaf al-Qinā'*, Vol. 3, p. 160; Niẓām, *al-Fatāwā al-Hindīyah*, Vol. 3, p. 121.

¹⁰³ Al-Shirādhī, *al-Muḥadḍḥab*, Vol. 15, pp. 222 and 224.

to note that geologically speaking, most examples stated by the scholars as surface deposit might also be found as a deep-seated deposit.¹⁰⁴ Therefore, it is submitted that the scholars' classification of minerals is only intended for the purpose of legal discussion. This has been supported by some scholars who explain that surface deposit minerals are those which can be exploited without much cost of labour participation,¹⁰⁵ while deep-seated minerals are those which can be exploited with extensive labour participation.¹⁰⁶ Hence, the scholars' definition of the mineral deposits very much depends on the circumstances in which minerals are found and the circumstances in which they are acquired. The common view is that minerals are capable of being bought and sold as goods, provided that they must be clearly severed from soil,¹⁰⁷ and if they are originally *res nullius*,¹⁰⁸ they must be reduced into private ownership.¹⁰⁹ The same principles that are applied to water are also applied to surface deposit minerals such as asphalt, salt¹¹⁰ and kohl.¹¹¹ The main disagreement between the Malikis and the majority of scholars is that the former consider the discovered minerals even underneath private land belong to the State and the government has a prior right of ownership,¹¹² whereas the latter consider minerals found in and underneath private land belong to the owner of the land.¹¹³

The sale of crops

Muslim scholars distinguish between *al-kalā'*, which denotes the naturally grown plants without human interference (similar to the concept of *fructus naturales*), such as grass and timber, and *al-zar'* which denotes fruits or crops produced by labour (similar to the concept of *fructus industriales*). In principle *al-kalā'* is regarded as a semi-common heritage for all people by virtue of the saying of the Prophet that "people are partners in three things: *al-kalā'*, water and fire".¹¹⁴ They may, however, become "goods" if they are reduced into private acquisition (*ihrāz*).¹¹⁵ According to the majority of scholars, *al-kalā'* that grows in a land privately owned will maintain its status as semi-common heritage property as long

¹⁰⁴ Barnes, J W, *Ores and Minerals: An Introduction to the Economic Aspects of Geology*, England, Open University Press, 1998.

¹⁰⁵ *Ibid.*, Vol. 15, p. 220.

¹⁰⁶ *Ibid.*, p. 224.

¹⁰⁷ Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, p. 307.

¹⁰⁸ A thing which has no owner, *Osborn's Concise Law Dictionary*, p. 289. The equivalent term referred to in classical treatises is "ghayr mamlūk". See, for example, Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 11, p. 288.

¹⁰⁹ Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, p. 255.

¹¹⁰ Ibn Qudāmah, *al-Mughnī*, Vol. 4, p. 200; Al-Rāfi'ī, *Fath al-'Azīz*, Vol. 9, p. 34.

¹¹¹ Fine powder of antimony used to darken the eyelids. See Cassel, *Concise English Dictionary*, p. 755; see also Barnes, J W, *op. cit.*, p. 1; see also Al-Bahūtī, *Kashshūf al-Qinā'*, Vol. 4, p. 188.

¹¹² Al-'ik, Khālīd 'abd Al-Rahmān, *op. cit.*, Vol. 5, pp. 191-92.

¹¹³ *Supra*, notes 107-111.

¹¹⁴ Abū Dawūd, *Sunan, Kitāb al-Buyū'*; Al-Ṣan'ānī, *Subul al-Salam*, Vol. 3, p. 182.

¹¹⁵ Al-Kāsānī, *op. cit.*, Vol. 5, p. 146; Al-Maqdisī, *op. cit.*, Vol. 4, p. 21.

as they are not reduced into private ownership.¹¹⁶ Those scholars argue that mere ownership of the land is not a sufficient legal reason to transfer them into private ownership; i.e., they cannot be an object of sale. If the owner of the land reduces *al-kalā'* into his private acquisition by legal means, then it loses its status as semi-common heritage property and becomes part of private ownership, and, therefore, will be able to be a valid object of sale.¹¹⁷ However, Ibn Ḥazm opposes the majority's view and maintains that the sale of *al-kalā'* on private land is considered valid because it is owned by the owner of the land, and, therefore its sale is always lawful.¹¹⁸ Obviously the difference between the majority's opinion and that of Ibn Ḥazm is that the latter considers the private ownership of the land as stronger legal ground than reducing *al-kalā'* into private acquisition.

With regard to *al-zar'* (plants produced by labour) the issue of its sale very much depends on the legal nature of the agricultural products. Fruits, for example, may, generally speaking, be traded as "goods" provided that their signs of readiness (*badu al-ṣalāḥ*) are shown.¹¹⁹ This rule is governed by, *inter alia*, the *ḥadīth* that "the Prophet (pbuh) has forbidden the sale of palm-trees (i.e. their fruits) until the dates begin to ripen and ears of corn until they are white and are safe from blight".¹²⁰ Based on the explicit injunction of this *ḥadīth* fruits that have not yet attained the stage of signs of readiness cannot be regarded as valid "goods" in a contract of sale. With regard to *al-zar'* that are cultivated for their root, such as carrot, garlic, onion and radish, in addition to the requirement of the appearance of signs of readiness, some scholars maintain that these crops must be severed from the soil before they can be validly traded as "goods".¹²¹ Other scholars including the Hanafis,¹²² Malikis,¹²³ Zahiris,¹²⁴ Ibn Taymiyyah¹²⁵ and Ibn Qayyim¹²⁶ maintain that those agricultural products can be considered "goods" even though they have not been severed from the soil yet, so long as their over-ground part has

¹¹⁶ *Ibid.*

¹¹⁷ Ibn 'Abidīn, *Ḥashīyah Ibn 'Abidīn*, Vol. 5, p. 67; Al-Kāsānī, *Budā'i' al-Ṣanā'i'*, Vol. 5, p. 146; Al-Bahūṭī, *Kashāf al-Qinā'*, Vol. 3, p. 160.

¹¹⁸ Ibn Ḥazm, *al-Muḥallā bi al-Athar*, *op. cit.*, Vol. 7, pp. 557-558.

¹¹⁹ *Subul al-Salam*, Vol. 3, p. 89; Al-Subkī' in his *Takmilat al-Majmū'*, Vol. 11, pp. 341-342 has provided a comprehensive explanation on the meaning of "sign of readiness". He gives eight examples to show that the sign of readiness may vary according to the nature of a plant itself. According to him, the sign of readiness might be shown by changes of colour, taste, length, size, the state of ripeness, the state where the calyxes become full, such as wheat, the state where the calyxes of plants begin to break, such as cotton, and, finally, the blooming stage, such as roses.

¹²⁰ Muslim, *Ṣaḥīḥ Muslim*, Kitāb al-Buyū'. See also the following provision that "the Prophet (pbuh) forbade the sale of grapes till they become black and the sale of grain till it becomes hard (i.e. becomes ripe in its spike)". See *Subul al-Salam*, Vol. 3, p. 92.

¹²¹ Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, p. 308.

¹²² Ibn Nujaym, Zain al-Dīn, *al-Baḥr al-Rāiq*, *op. cit.*, Vol. 5, p. 326.

¹²³ Al-Dusūqī, *Ḥashīyah al-Dusūqī*, Vol. 3, p. 186; Al-'ik, Khālid 'abd Al-Raḥmān, *Mausū'at al-Fiqh al-Mālikī*, Damascus, Dār Al-Hikmah, 1993, Vol. 2, pp. 252-53.

¹²⁴ Ibn Ḥazm, *al-Muḥallā bi al-Athar*, *op. cit.*, Vol. 7, pp. 280, 286-87 and 298; *Cf.*, Al-Zuhāili, *Whbah, Al-Fiqh Al-Islāmi wa Adillatuhu*, *op. cit.*, Vol. 4, p. 464.

¹²⁵ Ibn Taymiyyah, *Majmū'at Fatāwā*, *Kitāb al-Bay'*.

¹²⁶ Ibn Qayyim, *Zād al-Mu'ad*, Cairo, al-Maṭba'ah Al-Maṣriyyah, Vol. 4, p. 267.

grown enough to show the quality of their underground part.¹²⁷ The Malikis further require the fulfilment of three conditions failing which those agricultural products cannot be valid goods for sale. These conditions are:¹²⁸

- (1) The buyer must be able to examine the external appearance of the crops;
- (2) A sample of the crops must be severed from the soil so that the buyer can examine them and have a rough idea about the description and quality of the rest of the crops;
- (3) The crops must be roughly estimated before sale.

The sale of airspace

The Malikis seem to agree that airspace can be treated as “goods” capable of being bought and sold.¹²⁹ Al-Dusūqī expresses the Malikis’ view by stating that “it is permissible to sell airspace, as in a case where a person says to the owner of the land sell me the airspace from a height of six metres above your land so that I can build on it”.¹³⁰ Ibn Ḥazm, however, has criticised this view and said that the airspace cannot be a subject of sale. He further states that the sale of airspace amounts to, *inter alia*, the sale of something that does not exist.¹³¹ In fact, Ibn Ḥazm’s scepticism seems to be the product of the socio-economic factors prevalent during his time during which multi-storey buildings were rare. As modern time has changed this reality into the widespread availability of multi-storey buildings, which has become the norm nowadays, Ibn Ḥazm’s opinion cannot maintain its credibility. That is why the law in the UAE, for instance, seems to have adopted the Malikis view in relation to the sale of space.¹³²

The sale of human remains and parts of the body

Generally speaking, scholars unanimously uphold that human beings and the human body is highly honoured based on the Qur’ānic verse which assures that: “We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of Our creation”.¹³³

¹²⁷ See also, Ibn Qudāmah, *al-Mughnī*, Vol. 4, p. 208.

¹²⁸ Al-Dusūqī, *Ḥashiah al-Dusūqī*, Vol. 3, p. 186.

¹²⁹ Al-Dusūqī, *op. cit.*, Vol. 3, p. 14.

¹³⁰ *Ibid.*

¹³¹ Ibn Hazm, *al-Muḥallā bi al-Athar*, *op. cit.*, Vol. 7, p. 506.

¹³² The UAE Civil Code 1985, Article 580 states: “It shall be permissible to sell space for building in it in any of the following circumstances: (1) Sale of space above land, and the permissibility thereof shall not be dependent upon description of what is to be built; (2) Sale of space above a building on condition that the building which is to be placed upon it is described; and (3) Sale of space above space on condition that both the lower and upper buildings are described. In the event of any of the three types of sale aforesaid, the purchaser shall become the owner of the whole of the limits of what he has purchased out of such space, but he shall not have the right to build more than was agreed save with the consent of the owner or the owner of the lower building.

¹³³ The Qur’ān, al-Isrā’: 70 (17: 70).

For this reason the majority of Muslim scholars maintain that Islamic law recognises no right of property in the human body or any part thereof.¹³⁴ Human remains, therefore, cannot be considered “goods” capable of being bought and sold.¹³⁵ However, Ibn Qudāmah argues that the sale of human breast milk is valid. As he elaborates a general statement by Al-Kharqī (an earlier Hanbali jurist), Ibn Qudāmah opines that human breast milk can be valid goods because it has benefit and also because a wet-nurse is allowed to take money in return for her breast milk when she is hired for this purpose.¹³⁶ Ibn Qudāmah, therefore, concludes that human parts may be considered a valid object of sale if such a part is beneficial.¹³⁷ This latter point may be confusing especially if one considers that Ibn Qudāmah himself, a few sentences later, reports that any part that is severed from the human body cannot be a valid object of sale because once it is severed it loses its benefit.¹³⁸ Commenting on Ibn Qudāmah’s opinion, Redhā,¹³⁹ writing in the 1920s, elaborates that parts of the human body can be the subject of sale if that part is beneficial, “this, [the sale of human parts] is very similar to our [his] modern time where part of the [human] skin is cut off and used to repair another part of the body”.¹⁴⁰ This explains Ibn Qudāmah’s contradictory remarks into a meaningful ruling on the validity of the sale of human parts even if they are severed from the human body. This is based on the fact that their beneficial nature will always depend on the contingencies of the available technology and its ability to preserve human parts for future use. However, it should be noted that it would be unfair to stretch Redhā’s statement and say that this ruling is still valid in our modern time. Had Redhā lived to see the misuse and abuse of the sale of human parts during the last two decades he would not have left such a ruling unrestricted. It is, therefore, submitted that the sale of human parts may only be valid in cases of the utmost necessity, such as being used to save human life, and totally invalid if it is based on desire or inclination.

The sale of land and the status of objects situated on or in the land

In general it is indisputable that private land can be a subject matter of sale. The difference of opinion, however, concentrates on the legal status of objects that are attached or affixed to the land, specifically as to whether they are considered part of the land or not. The problem arises most obviously in relation to three types of objects including:

¹³⁴ Al-Bukhārī, *Kitāb al-Buyūʿ*; see also, Al-Zubaidī, *Mukhtaṣar Saḥīḥ al-Bukhārī*, p. 488.

¹³⁵ Al-Kāsānī, *Badāʾiʿ al-Sanāʾiʿ*, Vol. 5, p. 140; Naẓām, *al-Fatāwā al-Hindiyyah*, Vol. 3, p. 116; Al-Bahūṭī, *Kashshāf al-Qināʿ*, Vol. 3, p. 157.

¹³⁶ Ibn Qudāmah, *al-Mughnī*, together with *al-Sharḥ al-Kabīr* by Al-Maqdisī, *op. cit.*, vol. 4, p. 304.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Redhā M Rashīd, is the compiler of Ibn Qudāmah’s *al-Mughnī*, together with *al-Sharḥ al-Kabīr*, by Al-Maqdisī, *ibid.*

¹⁴⁰ Ibn Qudāmah, *al-Mughnī*, together with *al-Sharḥ al-Kabīr* by Al-Maqdisī, *op. cit.*, Vol. 4, p. 304, side-note 2.

- (1) Trees and crops;
- (2) Buildings and other constructions on land; and
- (3) Minerals and water.

Realising the difficulty in establishing general criteria or formulae for the purpose of clarifying the legal status of these objects, Muslim scholars have focused their discussion in the form of explaining each item separately. However, from their discussion one can see that, generally, all items that are specifically mentioned in the contract of sale of a land is considered in law as forming part of the sale agreement if they are clearly intended to be so.¹⁴¹ If there is no clear indication in the contract of sale as to the legal status of such objects then their status requires further discussion depending on the three categories stated above.

Trees and crops

As far as the contract of sale¹⁴² is concerned, most scholars agree that trees will automatically be included as part of the private land in case of its sale.¹⁴³ Al-Dusūqī, further makes an additional observation, saying that if the land contains non-fecundated trees, there will be no problem in applying the above rule and concluding that the trees belong to the buyer. However, if the land has fecundated trees, Al-Dusūqī is concerned with whether or not the expected fruits of the trees will automatically belong to the buyer as a consequence of the contract of sale? In such a case, he suggests applying the rule that “if anyone buys a palm tree after it has been fecundated, the fruits belong to the seller who has sold them unless the buyer makes a condition” to the contrary.¹⁴⁴ In this case the expected fruits should, as a general rule, belong to the seller and not the buyer unless the contract specifically stated that they belong to the buyer.¹⁴⁵ With regard to other types of crops (*al-zarʿ*), the outcome will depend on their nature. If they are of the type that is harvested only once, such as wheat, they are, generally, not included as parts of the object of sale.¹⁴⁶ Crops that can normally be harvested several times, such as aubergine and tomato, are automatically considered part of the deal but the produce that is ready but has not been harvested yet should belong to the seller unless the contract provides otherwise.¹⁴⁷

As far as modern legislation is concerned, the UAE Civil Code, for instance,

¹⁴¹ Al-Nawawī, *Minhāj* [published together with *Mughnī al-Muhtāj*], Vol. 2, p. 80; Al-Ramlī, *Nihāyah al-Muhtāj*, Vol. 4, p. 119; Al-Bahūtī, *Kashshāf al-Qināʾ*, Vol. 3, p. 275; Al-Dusūqī, *Hāshiah al-Dusūqī*, Vol. 3, p. 170.

¹⁴² In the contract of pledge (*rahn*), this rule does not apply; Al-Rāfiʿī, *ibid*; Al-Maqdisī, *ibid*.

¹⁴³ Nizām, *al-Fatāwā al-Hindiyyah*, Vol. 3, p. 33; Khalīl, *Mukhtaṣar Khafī*, Vol. 3, p. 171; Al-Rāfiʿī, *Fath al-ʿAzīz*, Vol. 9, p. 18; Al-Maqdisī, *al-Sharḥ al-Kabīr*, Vol. 4, p. 188.

¹⁴⁴ Al-Bukhārī, *Saḥīḥ al-Bukhārī*, Kitāb al-Musāqāh; Muslim, *Saḥīḥ Muslim*, Kitāb al-Buyūʿ; *Subul al-Salām*, Vol. 3, p. 94.

¹⁴⁵ Al-Dusūqī, *Hāshiah al-Dusūqī*, Vol. 3, p. 171.

¹⁴⁶ Al-Rāfiʿī, *op. cit.*, Vol. 9, p. 20; Ibn Qudāmah, *al-Mughnī*, Vol. 4, p. 197.

¹⁴⁷ Al-Rāfiʿī, *ibid*, p. 21; Ibn Qudāmah, *al-Muqniʿ*, Vol. 2, p. 79; see also principle suggested by al-Dusūqī above.

provides that “the sale of land shall not include crops growing on it in the absence of a provision or custom to the contrary”.¹⁴⁸ In relation to the sale of trees, the Code provides that “the sale of trees, whether directly or by way of appurtenance to the land, shall include the fruits on them which have not been pollinated or have not budded as to the whole or greater part thereof, but if they have been pollinated or have budded as to the whole or greater part thereof, the fruit shall not be included in the sale unless there is a provision or custom that they shall form part of the subject matter of the sale.”¹⁴⁹ As for the status of *al-zar‘*, the UAE Civil Code provides answers also similar to the Islamic views stated above.¹⁵⁰

Fixtures

The majority of scholars confirm that unless the contract of sale contains provisions to the contrary, all fixtures will be regarded as part of the land.¹⁵¹ Al-Dardīr, a Maliki scholar, provides an additional observation that in such a case, i.e. a sale of land without conditions, a reference should be made to the customary practice.¹⁵² In fact, Al-Dardīr’s proposal seems to have a strong ground in the principle of Islamic jurisprudence which considers custom that is not contrary to the principle of *Sharī‘a* authoritative source of law and must be observed and upheld by courts.¹⁵³ In modern times it is quite important to take into account a few criteria. These are:

- (1) The material value of the fixture in comparison with the value of the land;
- (2) How essential to the land the fixture is; and
- (3) Local and general custom.

These criteria have been taken into account by most modern Middle Eastern Laws such as the Egyptian Civil Code,¹⁵⁴ the Syrian Civil Code¹⁵⁵ and the Libyan

¹⁴⁸ The United Arab Emirates Civil Code 1985, Article 519.

¹⁴⁹ *Ibid.*, Article 520.

¹⁵⁰ *Ibid.*, Articles 588 and 589. These two articles are as follows. Article 588 states: (1) If land sold contains crops which are harvested only once a year, they shall vest in the seller until the time for harvesting, unless the purchaser stipulates that they shall belong to him. (2) If the land sold contains crops which may be repeatedly harvested or which continually fruit, the roots shall belong to the purchaser and the available harvest then apparent shall belong to the seller and he must pick the crop immediately. And Article 589 states: (1) If sown land is sold and the seeds are such that their plants thereon are harvested only once a year, both the seeds and the plants shall belong to the seller, but if the purchaser does not know that there are seeds in the land at the time of the contract, he shall have the option either to cancel or affirm the contract, without liability. (2) If the seeds are such that their plants may be cropped several times a year or the fruits thereof appear continuously, or if the roots remain, the same shall belong to the purchaser.

¹⁵¹ Khalīl, *Mukhtaṣar Khalīl*, Vol. 3, p. 170; Al-Subkī, *Takmilat al-Majmū‘*, Vol. 11, p. 249; Ibn Qudāmah, *al-Mughnī*, Vol. 4, p. 198.

¹⁵² Al-Dardīr, *al-Sharḥ al-Kabīr*, Vol. 3, p. 171.

¹⁵³ This has been emphasised in Article 36 of the Ottoman *Majallah* as it provides that custom, whether general or specific, is enforceable and constitutes a basis of juridical decisions.

¹⁵⁴ The Egyptian Civil Code of 1948, Art. 432.

¹⁵⁵ The Syrian Civil Code of 1949 and its amendments, Art. 400. It reads: “Delivery includes delivery of the accessories of the thing sold and of everything which, according to the nature of things, local custom and the intention of the parties, was appropriated permanently for the use of the thing”, translation taken from Keese, Allen P K, *op. cit.*, Vol. IX, June 1992 issue, Release 92–1.

Civil Code.¹⁵⁶ Clarifying the position in the Syrian Civil Code, Al-Zarqā' identifies five categories of items that should be included in the sale.¹⁵⁷ These are:

- (1) The sale includes all items that, as far as the nature of the object denotes, are considered part of the sold object;¹⁵⁸
- (2) The sale includes all items that are necessary for the sold object as far as the purpose of the purchase denotes; i.e., all items that without which the purchaser will not be able to get the required benefit from the object sold;
- (3) The sale includes all items that are permanently affixed to the object sold;
- (4) The sale includes all items that, according to the custom, are normally included in the sale of the object sold; and
- (5) The sale includes all items that are usually included in the general terminology, such as proprietary right, if such terminology are mentioned in the contract of sale.

These five categories will be applicable to all objects sold whether they are real or corporeal objects.

Water and minerals

To begin with the status of water in private land is as discussed above. As for the status of minerals, the vast majority of scholars agree that deep-seated minerals will automatically be included in the sale of land because they are, in fact, part of the *corpus* of the land itself.¹⁵⁹ Regarding the surface deposit minerals and whether or not they are included as part of the land, their status is the same as the status of water as discussed above. The Malikis, however, seem to disagree with the majority's opinion in that the minerals wherever they are situated should belong to the State and the government has prior right in exploiting them.¹⁶⁰ Therefore, it is up to the government to grant the right of exploitation conditionally or unconditionally to the owner of the private land. In this case it seems that, according to the Malikis, the minerals will not be included in the sale of land unless the owner of the land has already acquired the required permission from the government and also agreed to transfer this permission to the purchaser.

¹⁵⁶ The Libyan Civil Code of 1953, Art. 421.

¹⁵⁷ Al-Zarqā', Muṣṭafā, *Sharḥ Al-Qūnūn Al-Madani Al-Sūrī, Al-ʿuqūd Al-Musammāh, 'aqd Al-Bay' wa Al-Muqāyadah*, *op. cit.*, pp. 116–127.

¹⁵⁸ Al-Zarqā' explains this saying that the sale of a house [for instance] includes the kitchen, the rooms, the stairs, the roof and walls, etc. And in the sale of an olive garden or a lemon garden the olive and lemon trees as well as the fence and the buildings will be automatically included, otherwise they will not be called olive garden or lemon garden. See *ibid.*, p. 118.

¹⁵⁹ Al-Shīrādhī, *al-Muhadhdhab*, Vol. 11, p. 290; Al-Dardīr, *al-Sharḥ al-Kabīr*, Vol. 3, p. 171; Al-Maqdisī, *al-Mughni*, Vol. 4, p. 187.

¹⁶⁰ Al-'ik, Khālīd 'abd Al-Raḥmān, *op. cit.*, Vol. 5, pp. 191–92.

THE PRICE

In theory, classical Muslim scholars have no difficulty in considering that the price in a sale contract does not necessarily have to be money.¹⁶¹ This means that anything that can be a subject matter of sale can also be a price. Perhaps, this was due to the nature of transaction in classical time when the use of money as a medium of exchange was not as widespread as in modern time. However, taking into account that the scope of the contract of sale in the classical sense is wide enough to cover barter trading and money exchange,¹⁶² some scholars realise that there is an urgent need to distinguish between the object of sale and the price in order to avoid any legal confusion. This is due to the fact that although the object of sale and the price might share the same rules and principles in some respects, they, however, might differ in some others. While discussing the difference between the subject matter and the price, Ibn Nujaym's sets two major differences. The first is that "it is essential to have effective control over the goods (*al-mabī'*) but not over the price (*al-thaman*)"; and the second is that, "the sale contract is open to termination if the goods perish but not so if it is the price (*al-thaman*) that perishes".¹⁶³

In an endeavour to differentiate between the goods (*al-mabī'*) and the price (*al-thaman*), Al-Qaffāl uses the preposition "*bi*" (for) as a distinguishing criterion between the two terms. According to him, articles that are stated in the contract after the preposition "*bi*" (for) are regarded as the price.¹⁶⁴ For example, if the seller says, "I sell to you X for Y", X is considered the "object of sale" and Y is the "price", because the latter comes after the preposition "for". This criterion falls short of a good basis for defining the object of sale and the price because it fails to achieve its objective being to restrict the scope of the concept of sale. This can be proven by using the said criteria to test some hypothetical classical sales. If a person sells a quantity of *dirhams* (silver coins) and says to the buyer: "I sell to you these *dirhams* for these garments", then according to the above criteria, the garments are the price because the word "garments" comes after the preposition "for". Again, in the contract of *ṣarf* (money exchange), if the vendor says "I sell to you these *dirhams* for these *dinars*", the latter will be the price, although, in reality, both exchanged countervalues in *ṣarf* are of money type.¹⁶⁵ This may also lead to the problem that the use of statement of sale in the latter example will result in confusing the legal nature of the *ṣarf* contract as to whether it is sale or *ṣarf*. It will also result in the confusion that the scope of sale includes *ṣarf* transactions, a concept that is contrary to the common understanding of this term as has been discussed above.

To avoid the above confusion, another scholar has submitted that money (*naqd*)

¹⁶¹ See Table 1 above.

¹⁶² See Table 2 above.

¹⁶³ Ibn Nujaym, *al-Bahr Râiq*, *op. cit.*, Vol. 5, p. 278.

¹⁶⁴ Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, p. 273.

¹⁶⁵ Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, p. 273.

should be the price all the time¹⁶⁶ and the use of the said preposition should not affect the status of money from being the price. In commodity exchange where money is not used as part of the sale, i.e., both countervalues are non-money *objects*, then the distinction between the object and price can be established by Al-Qaffāl's formula stated above.¹⁶⁷ This seems to be a more practical approach and at the same time overcomes the deficiency in Al-Qaffāl's proposal.

As far as modern law is concerned, it seems that most civil codes of Arab countries have restricted the contract of sale to those contracts in which the object of sale is always a non-money thing or goods and the price is always in money.¹⁶⁸ Hence, it seems that by confining the price in a sale contract to consideration in money modern Middle Eastern laws have managed to overcome the classical problems of identifying which of the exchanged countervalues is the price. As such modern Middle Eastern laws have also managed to delimit the scope of the contract of sale and eliminate other cognate contracts, such as money exchange transactions, from falling within its ambit.

CONCLUSION

Despite their intention to restrict the scope of the concept of sale to sale of goods proper classical Muslim scholars have dealt with the concept of sale in its wider scope. Although historical socio-economic factors might seem to have impacted on the adoption of a wider approach to the contract of sale of goods, the discussion in this article reveals that Muslim scholars have, in fact, tried hard to free themselves from the impact of such factors by providing as general a definition as possible. The choice of a general definition came to play a negative role in confusing its scope. The problematic definition of the concept of sale has been the driving force that has caused the confusion between the wider and narrower approaches of the concept of sale. The indefinite scope of the concept of sale in Islamic law was also influenced by the use of some imprecise criteria for defining its essential elements such as the criteria for defining the concept of *māl* and the criteria for the differentiation between the subject matter and the price. Modern Arab civil law systems have managed to avoid these problems by providing a more precise definition of the concept of sale. However, some legal systems, such as the UAE civil law, still suffer from such confusion. It is quite difficult to judge which approach is correct especially if one takes into account that the precise definition of the majority of modern Arab laws is quite narrow that it excludes the concept of commodity exchange from its purview, whereas the UAE law is too wide and able to create a confusion between the concept of sale and other cognate contracts.

¹⁶⁶ Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, *op. cit.*, Vol. 5, p. 234; Al-Nawawī, Abī Zakariyyā, *al-Majmū'*, *op. cit.*, Vol. 9, p. 273.

¹⁶⁷ Al-Nawawī, Abī Zakariyyā, *ibid.*

¹⁶⁸ This can clearly be seen in Article 418 of the Egyptian Civil Code and Article 489 of the United Arab Emirates Civil Code. The Syrian Civil Code of 1949 and its amendments, Art. 386; The Libyan Civil Code of 1953, Art. 407; The Algerian Civil Code of 1975 and its amendments, Art. 351.