The Salam contract: Law and Capital Formation in the Abbasid Empire (11th and 12th Centuries)*

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(p. 863) From the eighth century until the beginning of the eleventh, the Abbasid empire (750-1258) witnessed the rise of a textile industry, the chief centers of which were located in Andalusia, Egypt, Syria, Iraq, Iran, and Transoxiana.[1] The diffusion of styles and of the trade in fabrics, along with the etiquette involved, the migrations of individuals, dynasties, and peoples, and the spread of new techniques and sites of production – all these factors contributed to introducing a taste for foreign textiles in the Muslim world in the ninth and tenth centuries. What, in the eighth century, was considered a typical product of a region, such as the fabrics of Merv or of Bagdad, was imitated and reproduced in hundreds of workshops dispersed as far as the outermost regions.[2] Of course, the caliphs and, beginning in the tenth century, the princes of the local dynasties, strongly influenced the *Ṭirāz*, the workshops in which the luxury fabrics were produced. But, starting in the ninth century at the latest, a growing number of private investors participated in the commercialization of textiles, as well as of other manufactured and agricultural products, by virtue of placing orders for them directly with artisans and farmers. The *fiqh,* the system of legal and ethical norms which, from the

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[1] ROBERT B. SERJEANT, *Islamic Textiles Material for a History up to the Mongol Conquest*, Beyrouth, Librairie du Liban, 1972 ; MAURICE LOMBARD, *Les textiles dans le monde musulman du VIIe au XIIe siècle*, Paris, éditions de l'EHESS, « Les ré-impressions » [1978] 2002 ; JAMES C.Y.WATT et ANNE E. WARDWELL, *When Silk was Gold: Central Asian and Chinese Textiles*, New York, The Metropolitan Museum of Art, 1997. Pour la période mongole, voir THOMAS T. ALLSEN, *Commodity and exchange in the Mongol empire: A cultural history of Islamic textiles*, Cambridge, Cambridge University Press, 1997. Sur l'influence des textiles sur les formes de l'art islamique, voir RICHARD ETTINGHAUSEN, OLEG GRABAR et MARILYN JENKINS-MADINA, *Islamic Art and Architecture 650-1250*, New Haven, Yale University Press, [1987] 2001, pp. 20, 43, 47, 50-51, 72-73, 97, 125-127 et 281-282.

[2] M. LOMBARD, *Les textiles, op. cit.*, pp. 12, 43, 50, 54, 90, 92,93, 238, 241 et 241 ; R. B. SERJEANT, *Islamic Textiles, op. cit.*, pp. 89, 92 et 99 ; T. T. ALLSEN, *Commodity and exchange, op.cit.*, pp. 29-45 et 71-98. Pour la diffusion jusqu'en Europe des techniques de production des textiles musulmans, voir R. ETTINGHAUSEN, O. GRABAR, M. JENKINS-MADINA, *Islamic Art, op. cit.*, p.243, et ROSAMOND MACK, *Bazar to Piazza. Islamic Trade and Italian Art, 1300-1600*, Berkeley, University of California Press, 2002.

eighth century on, spread throughout the Muslim empire, reacted to this challenge in its contract law. In the eleventh and twelfth centuries, specialists in the *fiqh,* when dealing with the *salam* – an investment contract – analyzed the theoretical and practical problems which emerged from the relationship between the standardized production of goods, their commercialization, and the concept of personal obligation. Their debates concerning these questions were without (p. 864) precedent, even if the legal matters they treated could already be found in the texts of the *fiqh* of the eighth and ninth centuries. It was the systematic coherence with which they were able to conceive the norms which distinguished the jurists and experts of the *fiqh* of the tenth through twelfth centuries from their predecessors, and which made those centuries, in the words of Chafik Chehata, the "classic period" of Muslim law.[3]

The *salam* : the structure of the contract and historical dcoumentation

In the *salam* an "investor" advances a certain amount of "capital" to a "seller," who, by accepting it, obliges himself to deliver to the former, at a date fixed by contract, a certain good which is the "object of the investment." In other words, at the moment the contract is concluded, the investor buys an object in the form of a personal obligation. The object of this obligation can only be delivered in the future; actual fulfillment of the obligation is put off until a later time, whereas the personal obligation is the object of the *salam* contract[4]

The contract is concluded by the exchange of the investor's offer and the seller's acceptance of it and it remains valid if the investor hands over the capital to the seller before the two parties of the contract separate. Through this transfer of possession, the capital is transformed into an individual thing because it has been delivered *in specie*

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[3] CHAFIK CHEHATA, *Etudes de Droit Musulman*, Paris, PUF, [1971] 1973, vol. I, pp. 21-24.

[4] MUḤAMMAD ibn ABĪ SAHL AL- SARAḪSĪ, *Kitāb al-Mabsūṭ* (première édition Le Caire, 1324 h.) 30 t., 15 vol., réimpression photo-mécanique de la première édition cairote, Beyrouth, Dār al-maʿrifa, 1398 h./1978 (désormais SARAḪSĪ, *Mabsūṭ*), t. XII, pp 121, 126 et 135-6, voir aussi pp. 124 et 150 ; ABŪ BAKR IBN MASʿŪD AL-KĀSĀNĪ, *Kitâb badāʾiʿ al-ṣanāʾiʿ fī tartīb al-šarāʾiʿ*, Beyrouth, Dār al-kutub al-ʿilmiyya, [1910] s. d., (désormais KĀSĀNĪ, *Badāʾiʿ),* vol. V, pp. 203 et 214 ; 'ALĀ' AL-DĪN AL-SAMARQANDĪ, *Tuḥfat al-fuqahāʾ*, Beyrouth, dār al-kutub al-ʿilmiyya, 2e édition 1414 h./1993 (désormais SAMARQANDĪ, *Tuḥfa),* vol. II, p. 7.

indicates that it is matter of a financial transaction aimed at increasing the sum advanced. 2. The terminology employed by the jurists shows that the capital advanced determines the status of the participants and of the objects. The investor is the "payer of the advance" (*muslim ou rabb al-salam*); the seller is "the one who has received the advance" (*al-muslam ilayhi*); and the object to be delivered is "the good for which the advance was given" (*al-muslam fDhi*). The advance itself is denoted by the term "capital" (*ra's al-māl*).[9] The investor has no right to substitute anything else in place of the capital fixed by the contract.[10] He must hand over this capital during the meeting in which the contract is being negotiated or after it, but before the partners separate. The money (p. 865) or the fungibles that he pays as capital become, by the fact of their being handed over to the seller, "individual things." 3. The *salam* contract, unlike the contract for a simple or "absolute" sale, is therefore not completed following the exchange of declarations by the buyer and the seller. It requires, to become effective, a material provision on the part of the buyer which must be handed over to the seller during or immediately after the meeting in which the contract is negotiated.[11] 4. The economic functions of the contract go far beyond those that Joseph Schacht and David Santillana attribute to it. J. Schacht, one of the rare authors to discuss the economic significance of the term "capital" in the texts of classical Muslim law, states that "the term *ra's al-māl*, 'capital,' which is used to designate the price in this contract, underscores the economic aspect of the transaction: the financing of the business of a small merchant or of an artisan by his own clients."[12] Let us keep in mind that the term "capital" refers to the financing of business activities. According to D. Santillana, the *salam* originated in the need felt by poor farmers, in the period before the harvest, to borrow in order to satisfy their immediate needs.[13] However,

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[9] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 124-27, 129, 130, 132, 135 et 139 ; KĀSĀNĪ, *Badā'iʿ, op. cit.*, vol. V, p. 201-202.

[10] SARAḪSĪ, *Mabsūṭ , op. cit.*, t. XII, pp.146, 147 ; KĀSĀNĪ, *Badā'iʿ, op. cit.*, vol. V, pp. 214 ; SAMARQANDĪ, *Tuḥfa, op. cit.*, vol. II, p.17.

[11] SARAḪSĪ, *Mabsūṭ, , op. cit.*, t. XII, pp. 125-27, 130, et 143-144 ; KĀSĀNĪ, *Badā'iʿ, op. cit.*, vol. V, pp. 202-204 ; D. SANTILLANA, *Istituzioni*, *op.cit.*, vol. II, pp. 168-169. The idea seems to be identical to the legal maxim quoted in Black's *Law Dictionary*: Traditio loqui facit chartam. Delivery makes a deed speak. Delivery gives effect to the words of a deed. Black's Law Dictionary. Centennial Edition (1891-1991), St. Paul: West Publishing, 1990, p. 1495. For *traditio* in Roman Law, see W. W. Buckland, *Text-Book of Roman Law From Augustus to Justinian*, Cambridge 1921, Reprint WM.W. Gaunt & Sons, Holmes Beach Florida, pp. 228-32.

[12] J. SCHACHT, *Introduction, op. cit.*, p. 130.

[13] D. SANTILLANA, *Istituzioni, op. cit.*, vol. II, p. 169.

the research done by Beshara Doumani shows that in the 18th and 19th centuries, in Palestine, the big merchants and the manufacturers employed this contract to build up stocks of merchandise, to influence, on a regional scale, the choice of agricultural products cultivated, and to offer monetary credit at rates favorable to the lenders.[14] The legal sources from the 10th to the 15th centuries stress the role of the *salam* as a tool of investment in commerce and manufacturing, as well as in the lending of money.

It is this role of the *salam* that obliges the jurists, at the beginning of the 10th century at the latest, to analyze the factors which determine the exchange value of the goods involved in the contract (transformation of the material, production techniques, usage, demand, and scarcity of the goods on offer). Among these factors, the time that has elapsed between the payment of the capital and the delivery of the thing sold is an element of primary importance; for it transforms the buyer into a creditor and the seller into a debtor. It turns the payment of the capital into an investment in future deliveries of the goods in question. Through his investment, the investor purchases the personal obligation of the seller to furnish the thing agreed upon in the contract. The *salam* is thus, at least in Hanafi law, the only contract in Muslim law which has as its object [al-maʿqūd ʿalayhi] the seller's personal obligation. The personal obligation of the *salam*, like that of the contract for a simple sale, has been created by the exchange of declarations by the two partners of the contract, but, in contradistinction to the obligation of the simple sale, it remains valid solely because the capital has been paid in advance. For all these reasons, in this paper we will define the *salam* as an investment contract.

(p. 867) The discussion of the contract necessarily involves a cognitive dimension. The object of the *salam* is constituted by the obligation of the seller to deliver, at a future date, a good that he must buy or produce. At the time the contract is concluded, this good is neither in his possession nor at his disposition. It is known only by its description. It is on the basis of the latter that the two partners are able to estimate its value. For this reason,

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[14] BESHARA DOUMANI, *Rediscovering Palestine. Merchants and Peasants in Jabal Nablus, 1700-1900*, Berkeley, University of California Press, 1995, pp. 14, 135-36, 138, 180, 186-87, 236-37 et 240; KENNETH M. CUNO, *The Pasha's Peasants. Land, Society and Economy in Lower Egypt, 1740-1858*, Cambridge, Cambridge University Press, 1992, p. 58, ajoute à cette liste le stockage des denrées alimentaires pour les besoins des familles aisées.

the jurists raised the question of knowing which conditions are required to render words capable of reproducing the essential qualities of a thing in a manner that makes its value calculable. In other words, what relationship exists between the categories of the description, the qualities of the thing, and its value? The material of which a good is composed, as well as its weight and measure, have always served jurists as criteria permitting the contracting parties to calculate its value and therefore as categories that necessarily enter into its description. The texts of the 11th and 12th centuries appear to suggest that the importance of textile production fed a legal debate in which the descriptive categories of the products became increasingly focused on the techniques of their production and less on their basic material. As for calculating the value of the goods, the knowledge of the basic material becomes, in this period, less important than the methods and techniques by which the products are made – on the condition that these methods are standardized and are known to the investors and their clients. The descriptive categories must therefore refer to the standardized production techniques of the goods in question in order to enable the partners of the *salam* to estimate their value.

Identifying goods by reference to the techniques of their production allowed the jurists to go beyond the concept of the regional economy as the framework of the *salam* and to justify, by the very categories used to describe the goods, extending that framework to the entire empire, with its far-flung centers of textile production. The universalist conception of the jurists reflected and facilitated the historical process of the diffusion of the techniques of textile production in the Muslim world, and their argumentation recalls many aspects of the 20th-century debate on the globalization of the forms of production and trade.

The existing historical and legal documentation on the *salam*, though certainly far from complete, is nevertheless ample enough for us to affirm its commercial importance and to justify the theoretical interest that the jurists took in it. Nine papyri contain contracts of this type, concluded between Egyptian merchants and weavers in 864-878.[15] Letters of

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[15] YUSUF RAGIB, *Marchands d'Etoffes du Fayyoum au IIIe-IXe siècle d'après leurs archives (Actes et lettres)*, I. Les actes des Banu 'Abd al-Mu'min, Le Caire, Institut français d'archéologie orientale,1982, pp. 6-29.

Jewish merchants of Fustat from the 11th century evoke the risks which, in a rural context, the conclusion of such a contract presented to merchants coming from the cities.[16] The private archives of the great families of the city of Nablus, which have been magisterially analyzed by Beshara Doumani, show the importance of this contract as a commercial instrument {p. 868} of the urban and rural elites in Palestine between the 18th and the 20th centuries.[17] The works of Kenneth Cuno on the economy of the Egyptian peasants between 1740 and 1858, and of Eugene Rogan on the money-lenders in Transjordan and in Syria, toward the end of the 19th century,[18] help us to understand better the role this contract played in the modernization of agriculture and of manufacturing in the countries of the Fertile Crescent. Legal mechanisms allowing this contract to be integrated into various strategies, both public and private, were already in place in the writings of the Hanafi jurists of Transoxiana in the 11th and 12th centuries. The writings of Sarakhsī (d. 1097), more than thirty volumes of commentaries and glosses on the Hanafi debates, constitute the most important testimony of that school's doctrine concerning ownership in 11th century Iraq and Transoxiana. In the 12th century, the commentary in seven volumes by Kāsānī (d.1192) on the work of ʿAlāʾ al-Dīn al-Samarqandī (d. 1144) provides the most systematized form of the Hanafi doctrine of the classical period.[19] To fill out the picture, one should consult the works of the Transoxianan authors, such as Marghīnānī, whose *Hidāya* has been the subject of many commentaries by Near Eastern jurists of the Mamluke (1250-1517) and Ottoman (1281-1924) periods,[20] as well as works of their Iraqi and Egyptian commentators of the 14th and 15th centuries, in order to grasp the full extent of the influence of the Transoxianan doctrine on the debates of the post-classical period in the Near East.

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[16] ABRAHAM L. UDOVITCH, *Société rurale et commerce international dans l'Islam médiéval. Lettres de marchands égyptiens du XIe siècle*, Paris, Collège de France, mai 1991, lettre 2, p. 7.

[17] B. DOUMANI, *Rediscovering Palestine*, *op. cit.*, pp. 14, 135-36, 180, 186-87, 236 et 240.

[18] K.M. CUNO, *The Pasha's peasants, op. cit.* ; EUGENE ROGAN, « Moneylending and Capital Flows from Nablus, Damascus and Jerusalem to Qada' al-Salt in the last decades of Ottoman Rule », *in* THOMAS PHILIPP (dir.), *The Syrian Land in the 18th and 19th Century,* Wiesbaden, Franz Steiner, 1992, pp. 239-260.

[19] Sur la doctrine de Saraḫsī sur la propriété, voir C. CHEHATA, *Etudes...*, *op. cit.*, vol. II, 139 ff. ; quant à Kāsānī et Samarqandī, voir note 4.

[20] MARĠĪNĀNĪ, *Hidāya/Fatḥ al-qadīr*, *op. cit.* Une version anglaise de ce texte, basée sur une traduction perse du texte arabe, a été publié au XVIIIe siècle sous le titre de *The Hedaya. Comments on the Islamic Law,* trad. par Charles Hamilton, Londres, Bensley, 1791 (reprint Kitab Bhavan, New Delhi, 1985) (désormais MARĠĪNĀNĪ, *The Hedaya*).

Recently, Hiroyuki Yanagihashi has undertaken an analysis of the historical rise of the Hanafi and Maliki norms in this domain.[21] The jurists who in the 1930s and 1940s prepared the Egyptian civil code of 1948 very often cited the 11th and 12th century Hanafi sources of Transoxiana as authorities on the classical doctrine of that school. We will have occasion to look, in particular, at the interpretation of these sources by Abd al-Razzāq al-Sanhūrī, the *spiritus rector* of the Egyptian civil code of 1948, and by C. Chehata, who was a professor at the Sorbonne in the 1960s and 1970s.[22] These two authors studied Muslim law in the light of the methods and theories of modern comparative law, and their books contain valuable analyses of the views of personal obligation that were developed in the Hanafi doctrine of the classical period.

The juridical construction of synallagmatic contracts: the principle of equality

Muslim jurists regulate the exchange of goods within the framework of a system of legal categories centered on the notion of equality. Starting in the 11th century they made an effort to group together, under broadly inclusive categories, contracts which shared common characteristics. Among the different schools of the *fiqh*, which can be distinguished by their specific approaches to this topic, we are interested here in the Hanafi school, which originated in Iraq in the 8th century. Having already become dominant in the regions of Central Asia and in India, beginning in the 8th and 9th centuries it struggled against the Shafi'i school (named after Muḥammad ibn Idrīs al-Shāfiʿī, who died in Egypt in 820), for juridical and ideological hegemony in Iran and Khurasan until the Mongol conquest of Iraq in the 13th century. Later, beginning in the 14th century, the

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[21] HIROYUKI YANAGIHASHI, *A History of the Early Islamic Law of Property. Reconstructing the Legal Development, 7th-9th Centuries,* Leyde, E. J. Brill, 2004, écrit dans une perspective assez différente de la mienne. Pour un compte-rendu détaillé, voir Johannes Christian Wichard dans *Islamic Law and Society*, vol. 13, no 2, 2006, pp.277-85.

[22] ʿABD AL-RAZZĀQ AL-SANHŪRĪ, *Maṣādir al-ḥaqq fī al-fiqh al-islāmī*, 6 t., 2 vol., Beyrouth, s. d. (la pagination de cette édition n'est pas identique à celle du Caire de 1954) (désormais SANHŪRĪ, *Maṣādir*) ; C. CHEHATA, *Etudes…, op. cit.* ; *ID., Théorie Générale de l'obligation en droit musulman hanéfite. Les sujets de l'obligation*, Paris, Sirey, 1969 (réimpression avec une préface de Ibrahim Fadlallah, Paris 2005). C. CHEHATA, *Précis de Droit Musulman. Applications au Proche-Orient*, Paris, Dalloz, 1970.

Hanafis became the dominant school of Muslim jurisprudence (*fiqh*) in the Ottoman Empire.

The notion of a sale, as a general category, included, among the Hanafis, all the contracts by which one exchanged objects of pecuniary value (*mubādalat al-māl bi l-māl*), such as the simple sale (*bayʿ*), the exchange of monies (*ṣarf*), barter (*muqāyaḍa*), and the *salam* [23]. These four types of sale contracts constitute part of a larger category: that of synallagmatic contracts related to assets with a pecuniary value (m*uʿāwaḍāt māliyya*). These bilateral contracts serve to exchange one pecuniary value for another and are based on the equality of the two parties to the contract. The assumption is that the precise execution of all their clauses will preserve this equality and enable them to calculate the profits accruing to them from this transaction. For this reason, the four sale contracts are given a narrow and strict interpretation,[24] in contrast to contracts of marriage or of emancipation, which, according to the jurists, (p. 870) have as their purpose the establishment of social relationships and not pecuniary gain.

Illegal enrichment

The equality of the contracting parties that is assumed in the synallagmatic contracts covers the conclusion of the contract, the transfer of the ownership of the goods exchanged, and their material tradition to the parties of the contract.[25] The Koranic

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[23] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp.169-70 et 199 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, pp.134 et 237 ; SAMARQANDĪ, *Tuḥfa*, *op. cit.*, vol. II, p. 7 ; IBN AL-HUMĀM, *Fatḥ al-qadīr*, *op. cit.*, vol. VI, p. 229 ; BĀBARTĪ, *ʿInāya*, *op. cit.*, vol. VI, pp. 230-31. Pour un tableau des contrats de vente organisés d'après leurs prix, voir SUSAN E. RAYNER, *The Theory of contracts in Islamic law*, London, Graham and Trotman, 1991, p. 104.

[24] Pour les contrats soumis à l'interprétation stricte, voir KĀSĀNĪ, *Badāʾiʿ*, *op. cit.*, vol. V, pp. 179, 224 ; SARAḪSĪ, *Mabsūṭ, op. cit.*, vol. XII, p. 126 ; C. CHEHATA, *Théorie Générale…, op. cit.,* p. 138, numéro 183; *ID.*, *Etudes…, op. cit.,* vol. II, p. 148. Pour les contrats basés sur le principe de générosité, voir SARAḪSĪ, *Mabsūṭ,, op. cit.*, t. XII, pp. 133 et 210, t. XIII, pp. 82, 86, t. XIV, p. 137 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.,* vol. V, pp. 175, 179, 181, 209 et 224 ; BABER JOHANSEN, « Commercial exchange and social order in Hanafite law », *in* CHRISTOPHER TOLL et JAKOB SKOVGAARD-PETERSEN (dir.), *Law and the Islamic world. Past and present,* Copenhague, The Royal Danish Academy of Sciences and Letters, 1995, pp. 86-93 ; ID., « The valorization of the human body in Muslim Sunni Law », *Law and society in Islam*, Princeton, Markus Wiener , 1996, pp.71-112, ici pp. 73 et101, n. 9 et 10.

[25] SARAḪSĪ, *Mabsūṭ, op. cit.,* tome XII, p. 126, parle de « l'égalisation des contractants en ce qui concerne le transfert de la propriété et la tradition [de la chose vendue et du prix] ». Pour d'autres aspects de cette égalisation, voir BABER JOHANSEN, « Ğchange commercial et hiérarchies sociales en droit musulman »,

interdiction against unjustified enrichment (*ribā*) is presumed to guarantee this equality of the partners by declaring illicit all forms of exchange which violate it.

The jurists distinguish two forms of forbidden enrichment, one based on the simultaneous exchange of unequal quantities of fungible goods of the same kind, the other on the deferred exchange of fungible goods in any form or manner. This second interdiction is justified by the fact that the lapse of time between the first and the second tradition of the exchanged goods creates a difference in value between them. The two forms of forbidden enrichment constitute violations of the obligatory principle of equality between the parties of the contract because they create advantages for one of the parties at the expense of the other.

The first of the two forms of illegal enrichment consists in appropriating a surplus without adequate consideration (*ribā al-faḍl*) by the simultaneous exchange of unequal quantities of fungible goods of the same kind. Weight and measure are considered to be quantitative measures established by law.[26] For this reason, when goods that are weighed or measured, and are of the same kind of good, are exchanged simultaneously, they must be exchanged in equal quantities.[27] In contrast, the simultaneous exchange of one kind of fungible good for another kind, for example the sale of wheat for barley, can be carried out in unequal quantities without constituting "appropriation of a surplus without adequate consideration".[28] Those things whose quantities are calculable (a number of eggs, for example) are considered fungibles in the synallagmatic contracts, but their exchange is not subject to the rules concerning "uncompensated enrichment." Numbers, according to the Hanafi jurists, are only human conventions (*iṣṭilāḥ*), replaceable by others and therefore cannot be considered (p. 871) as the *ratio legis* of a prohibition

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in HERVĞ BLEUCHOT (dir.), *Les institutions traditionnelles dans le monde arabe* [désormais JOHANSEN, « Echange commercial »], Paris, Karthala, 1996, pp. 19-28, ici p. 24, n. 14 et 25-27.

[26] ABŪ AL-LAYṮ NAṢR IBN MUḤAMMAD AL-SAMARQANDĪ, *Fatāwā al-nawāzil*, Haidarabad, maṭbaʿat šams al-islām, 1355 h., pp. 267-68 (désormais ABŪ AL-LAYṮ, *Fatāwā*) ; QUDŪRĪ, *Kitāb*, *op. cit.*, t. II, pp. 38-40 (désormais QUDŪRĪ, *Kitāb) ;* SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 116, 142 et 183 ; SAMARQANDĪ, *Tuḥfa, op. cit.*, vol. II, p. 25 ; KĀSĀNĪ, *Badāʾiʿ*, *op. cit.*, vol. V, p. 208 ; IBN AL-HUMĀM, *Fatḥ al-qadīr, op. cit.,* vol. VII, pp. 13-14 et 77.

[27] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 113, 115, 118 et 159 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, pp. 183, 184 et 185; Saleh, *Unlawful gain..., op. cit.*, p. 19.

[28] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 176-77 et 185 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, p. 185.

exchanged. It is this identity of the kind of things exchanged which obliges the parties to

The equality of ownership in the simple sale: classification and circulation of goods

The analysis of synallagmatic contracts therefore presupposes an acquaintance with the jurists' classification of goods. It is based on the difference between fungibles and "individual" or "specified" goods. When the jurists speak of the material qualities of generic goods they call them "fungible goods" (*mithliyyāt).* This expression indicates that their quantity is determined by weight, measure, or number and that they can be replaced, in case of loss, by another good of the same kind (*mithl*), same form and same value because all these represent, in principle, the same value. But "when this fungible good becomes the object of an obligation, it will be called *dayn.*"[36] The term *dayn* denotes both the debt in its form of personal obligation and the fungibles which constitute its object. The personal obligation (*dayn*) – a relationship between the debtor and his creditor – is merged in a single category along with its object, the fungible good [37]. If the debtor does not honor (p. 873) his obligation, the latter continues to exist as long as the legal personality (*dhimma*) of the debtor exists, that is to say, as long as the debtor is alive.[38] The legal personality, C. Chehata writes,

> is the capacity to be a subject of the law; it is, in fact, the basis of obligations concerning debt relations. Every person possesses this "virtuality" of obligating him- or herself. And it ceases only with his or her death. Then the deceased's estate alone is responsible for satisfying these debts. But, as long as the person is alive, property and *dhimma* merge.[39]

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[36] C. CHEHATA, *Etudes, op. cit....*, vol. II, p. 120 ; voir aussi ID., *Théorie générale..., op. cit.*, p. 169, numéro 259.

[37] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 139, 161 et 163, t. XIII, p. 197, t. XIV, pp. 2,-3 sur l'obli. gation *(dayn)* dans le contexte des contrats à titre onéreux. Le *dayn* dans les actes du culte couvre aussi l'obligation de s'acquitter des actes du culte manqués, tels le jeûne et le pèlerinage, pour remplir ainsi ses obligations envers Dieu, voir SARAḪSĪ, *Mabsūṭ, op. cit.*, t. III, pp. 63, 75, 81 et 85, t. IV, p. 166. A l'origine, le *dayn* semble donc être une obligation de faire.

[38] SANHŪRĪ, *Maṣādir, op. cit.*, vol. I, t. I, pp. 20-21.

[39] C. CHEHATA, *Théorie générale*, *op. cit.*, p. 171, numéro 263 ; voir aussi, dans le même sens, SANHŪRĪ, *Maṣâdir, op. cit.,* vol. I, t. I, p. 20.

> The estate represents the legal personality of the deceased debtor. If it is not sufficiently large to pay his debts, then the latter remain unpaid. They are not transmissible to the debtor's inheritors, but, instead, are extinguished along with his legal personality.[40]

On all these points, the obligation to deliver a specific individual good (*ʿayn)* is distinguished from that of delivering fungibles. The loss of a specific individual good by its vendor annuls the contract of which it was the object. And if the specific good is destroyed by a third party, the latter must reimburse its value (*qīma*) because he cannot replace the individual good by another one of the same kind.

Through the contract of a simple sale, the jurists assert, one sells a specific individual good in return for a personal obligation (*ʿayn bi-dayn*).[41] The essential element (*rukn*) of the contract consists in the exchange of two declarations: the seller's offer and the buyer's acceptance. The immediate effect (*ḥukm*) of the contract is the transfer of the ownership of the thing sold to the buyer and that of the price to seller. The thing sold must be a physical object possessing a pecuniary value (*māl*), and also be a kind of merchandise (*māl mutaqawwim*) the use of which is licit.[42] The seller must be the owner

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[40] SANHŪRĪ, *Maṣādir, op. cit.*, vol. II, t. V, pp. 77-78 et 85.

[41] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, p. 214 ; SAMARQANDĪ, *Tuḥfa, op. cit.*, vol. II, p. 7 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, pp. 183, 184 et 299 ; IBN AL-HUMĀM, *Fatḥ al-qadīr*, *op. cit.*, vol. VI, p. 229. Pour d'autres formules exprimant le même concept, voir SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIV, p. 59 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, pp. 134, 183, 234 et 299.

[42] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 123, 193 et 194, t. XIII, pp. 25, 69 et 71 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, pp. 138-139 ; C. CHEHATA, *Etudes, op. cit.*, vol. II, pp. 122 et 154-55 ; *ID., Précis de Droit Musulman, op. cit.*, p. 139, numéro 192. Le *mâl mutaqawwim* est un bien qui représente une valeur patrimoniale. Pour la traduction de *mâl* comme *res in commercio,* voir J. SCHACHT, *Introduction, op. cit.*, pp. 115, 129 et 169 ; pour *mâl mutaqawwim,* voir S. E. RAYNER, *Theory, op. cit.*, pp. 105, 131 et 153 ; SANHŪRĪ, *Maṣādir, op. cit.*, vol. I, t. 1, p. 54, t. III, pp. 93-96 ; BABER JOHANSEN, *The Islamic law on land tax and rent*, Londres, Croom Helm, 1988, *passim*. Pour la qualification de la chose vendue comme marchandise, voir SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 108-09, 116 et 193. Pour l'emploi licite comme qualité de toute marchandise (*mâl mutaqawwim*), voir SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 193-95, t. XIII, p. 25, et KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, p. 141-45 et 165-66. Cette terminologie fondamentale reste souvent mal comprise des chercheurs occidentaux, voir l'exemple cité par B. JOHANSEN, « Commercial exchange », *op. cit.*, p. 89, n. 33 et 37.

of it and able to furnish it (p. 874) to the buyer.[43] The direct effect and, with it, the first step of the contract, is completed at this stage.[44]

According to Hanafi doctrine, which differs on this point from that of the other Sunni schools of legal thought, only physical things possess an exchange value.[45] Personal obligation is only an incorporeal good,[46] "a name for that which is obligatory."[47] "In principle, [the object of] personal obligation is not a good as long as it has not been handed over."[48] It is, rather, "a good in the form of a claim [which exists only] on the legal personality of the debtor" (*măl ḥukmī*) *fi l-dhimma*.[49] It is only the subjective right of the creditor to require (*muOAlaba*) from the debtor payment of his debt.[50] According to the Hanafis, the ownership of a physical thing is stronger and more complete than the ownership of a personal obligation. The ownership of the seller and that of the buyer are therefore of unequal value, and this difference of value violates the principle of equality which governs synallagmatic contracts.

The second step of the contract consists, for this reason, in the equalization of the two forms of ownership. The buyer is expected to pay the price at the start in order that the

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[43] Sur le vendeur comme propriétaire : SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 197 et 199, t. XIV, p. 14 ; KĀSĀNĪ, *Badā'i', op. cit.*, vol. V, pp.146-47 et 243. Sur la capacité du vendeur de remettre la chose vendue à l'acheteur, SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIII, pp. 11-12 ; KĀSĀNĪ, *Badā'i', op. cit.*, vol. V, p. 147.

[44] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIII, pp. 198-199 ; SANHŪRĪ, *Maṣādir, op. cit.*, vol. II, t. VI, pp. 52-55, et 60-64.

[45] ʻAlī al-Ḫafīf, *Milkiyya, op. cit.*, vol. I, pp. 6-7 et 71.

[46] C. CHEHATA, *Etudes..., op. cit.*, vol. II, pp. 183-84 ; ID, *Théorie générale...*, p. 170, n. 261.

[47] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIX, p. 68.

[48] KĀSĀNĪ, *Badā'i', op. cit.*, vol. V, p. 234 ; voir aussi C. CHEHATA, *Théorie générale, op.cit.*, pp. 242-46, numéro 319 qui cite une série de textes classiques donnant la même signification, et ʻALĪ AL-ḪAFĪF, *Milkiyya, op. cit.*, vol. I, p. 13, n. 1, et p. 71.

[49] C. CHEHATA, *Théorie générale, op. cit.*, p. 176, numéro 278, soutient la thèse que « le *dayn* est un bien comme les autres » ; SANHŪRĪ, *Maṣādir, op. cit.*, vol. I, t. I, pp. 24-26, n. 1, critique cette position de C. Chehata et insiste sur le caractère personnel du lien obligatoire : le créancier n'a accès à l'objet de la créance qu'en exigeant sa remise au débiteur. La même position est prise par ʻALĪ AL-ḪAFĪF, *Milkiyya, op. cit.*, vol. I, pp. 16-18.

[50] C. CHEHATA, *Théorie générale, op. cit.*, p. 176, numéro 278, soutient la thèse que « le *dayn* est un bien comme les autres » ; SANHŪRĪ, *Maṣādir, op. cit.*, vol. I, t. I, pp. 24-26, n. 1, critique cette position de C. Chehata et insiste sur le caractère personnel du lien obligatoire : le créancier n'a accès à l'objet de la créance qu'en exigeant sa remise au débiteur. La même position est prise par ʻALĪ AL-ḪAFĪF, *Milkiyya, op. cit.*, vol. I, pp. 16-18.

seller may also have ownership of a physical object.[51] This obligation on the part of the buyer is one of the secondary effects resulting from the relations between the two forms of ownership established by the sale.[52] The seller is not obliged to hand over the thing sold to the buyer before having received the price for it. The right to retain the object is not an effect of the contract. It is the result of the inequality of the two forms of ownership. It exists only as long as the seller keeps the thing (p. 875) sold in order to be sure that the buyer, in paying the price, gives him the ownership of a physical object. This right ceases to exist if the seller hands over the thing sold to the buyer before having been paid.[53] The second step of the sale contract consists, thus, in the handing over of the things which constitute the price and of the thing being sold. The distinction between the two steps of the contract is explained by the difference between the value of physical things and that of personal obligations, a difference which violates the principle of the equality of the parties. The personal obligation is then transformed, by the handing over of the goods which constitute its object, into a physical and individualized thing.

According to Hanafi doctrine, physical goods are divided into three classes: specific individual things, fungibles and money. The "individual things" ('ayn) always constitute the thing being sold (*mabī'*), the object of the contract (*al-maʿqūd ʿalayhi*). If they are exchanged for fungibles, the latter constitute the price or "the instrument" of the contract (*al-maʿqūd bihi*). If the fungibles are exchanged for money, the latter represents the price and the fungible things the sold object. In this case, the contract is presumed to transform the fungibles into individual things, thereby giving them the status of the object of the contract.[54] If fungible things are exchanged for other fungibles, the linguistic form of the contract attributes to one group the status of the price and to the other the status of the

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[51] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIII, pp. 192 et 199 ; KĀSĀNĪ, *Badā'iʿ, op. cit.*, vol. V, pp. 237 et 249, et MARĠĪNĀNĪ, *Hidāya/Fatḥ al-qadīr, op. cit.*, vol.VI, pp. 273-74 ; IBN AL-HUMĀM, *Fatḥ al-qadīr, op. cit.*, vol. VI, pp. 273-74 ; BĀBARTĪ, *'Inâya, op. cit.*, vol. VI, pp. 274-75 ; SANHŪRĪ, *Maṣādir, op. cit.*, vol. II, t. VI, pp. 79, 217-18 et 235.
[52] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIX, pp. 32-34, t. XII, p. 198 ; KĀSĀNĪ, *Badā'iʿ, op. cit.*, vol. V, pp. 216 et 243.
[53] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIII, pp. 192-99 ; KĀSĀNĪ, *Badā'iʿ, op. cit.*, vol. V, pp. 233-238 ; IBN AL-HUMĀM, *Fatḥ al-qadīr, op. cit.*, vol. VI, p. 273 ; voir SANHŪRĪ, *Maṣādir, op. cit.*, vol. II, t. VI, pp. 218 et 235.
[54] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIV, pp. 2-3, 15-17 et 25 ; voir t. XII, p. 127 et 193 et aussi t. XIII, pp. 68-70 et 105; ; KĀSĀNĪ, *Badā'iʿ, op. cit.*, vol. V, pp. 232, 236 et 237.

thing being sold.[55] Sarakhsi thus characterizes the fungibles as being "on the one hand the price, and the thing being sold, on the other."[56]

In contrast, monies in the form of gold or silver can never be individualized by the contract. They are considered to be things which, on account of their material constitution, can serve only as instruments of exchange and standards of value.[57] The jurists apply the term "absolute prices" to monies in cases where the contracting parties mention only the character of the pieces of gold or silver but not the specific kinds. These "absolute prices" serve to designate the general and abstract functions of the instrument of exchange, of the standard of value, and of the means of payment.[58]

Two procedures allow the contracting parties to inquire about the performances owed under their contract. The gesture by which the seller designates the thing being sold is sufficient to provide information about the nature of the material thing. The indication *de visu* makes the physical object of the contract evident. If it is not present at the moment of the conclusion of the (p. 876) contract, the seller must name it and describe it. The tradition of merchandise which does not conform to the description of the contractual object renders the contract null and void: the object of the contract is non-existent.[59] In principle, the same rules apply to the price. If, at the moment of the conclusion of the contract, the price to be paid is not in the possession of the buyer, he must describe it in order to specify it. However, if the buyer shows the coins or the fungible goods to be paid as the price of the thing to be sold, he is not obliged to pay with these specific coins or these very same things. His gesture is considered as a form of naming the genus, the species, the quantity, and the quality of the money that he wishes to pay with.[60] Since monies are not individualized by the contracts, the buyer always has the possibility of

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[55] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIV, p. 2 ; SAMARQANDĪ, *Tuḥfa, op. cit.*, vol. II, pp. 38-39.
[56] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIV, p. 2.
[57] *Ibid.*, t. XII, pp. 111 et 127. L'auteur explique (*Ibid.*, t. XII, pp. 137 et 200) ce fait par leur « constitution originale » (*aṣl al-ḫilqa*). Voir aussi KĀSĀNĪ, *Badāʾiʿ*, *op. cit.*, vol. V, pp. 218 et 233-34.
[58] KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, p. 234; SAMARQANDĪ, *Tuḥfa, op. cit.*, vol. II, p. 7 et 11 ; BĀBARTĪ, *ʿInāya, op. cit.*, vol. VI, p. 242-43 ; IBN AL-HUMĀM, *Fatḥ al-qadīr*, *op. cit.*, vol. VI, p. 241.
[59] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIII, p. 12 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, pp. 139-40.
[60] KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, pp. 233-234.

replacing the objects which indicate the price to be paid by other objects of the same type and of the same value.

> *The goal of the contract [Sarakhsī states] is profit. It is attained by the quantity of pieces of money and not by their individuality. The goal is not the specific body* (ʿayn) *of the pieces of silver or gold. The exclusive goal [of their acquisition] is the exchange value* [*innama l-maqṣūdu l-māliyya]. As for the rest, there are no differences between monies and stones. [Their] exchange value [is established] as a function of their circulation in the markets. In view of this function (maʿnā), their material individuality (ʿayn) is not different from [that] of pieces homologous to them.*[61]

The thing to be sold always constitutes the object of the contract. The contract is automatically void if that thing is lost, since its object has disappeared. Property is an attribute of the thing.[62] The thing's loss or destruction, by the seller, entails, for the seller, the loss of his right to the ownership of it. The transfer of ownership by means of the contract becomes impossible. The seller's obligation to hand it over to the buyer disappears along with the object of the contract.[63] The seller, in this case, can in no way be obliged to hand over some other thing to the buyer, nor to provide some sort of compensation in place of the thing that has been lost. The obligation to deliver a specific good is never linked to the legal personality of the obligated party. This obligation, as Sanhūrī strongly emphasizes,[64] is closer to a real right (right *in rem*) than to a personal obligation.

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[61] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIV, p. 16. Le texte arabe de l'édition contient plusieurs fautes qui en défigurent le sens : le mot *ribḥ (*gain), est édité une fois comme *rīḥ* (vent), et une autre fois comme *rubʿ(* quart) ; *ʿayn al-darāhim*, l'individualité des dirhams, est éditée comme *ġayr al-darāhim*, « autre chose que les dirhams », ce qui en inverse le sens et rend l'argument incompréhensible. Le même argument se retrouve, édité de manière moins tordue, *op. cit.*, t. XIV, p. 28 et t. XXIV, p. 165.

[62] Voir BABER JOHANSEN, « La mise en scène du vol par les juristes musulmans », *in* MARIA-PIA DI BELLA (dir.), *Vols et sanctions en Méditerranée*, Amsterdam, Ǒditions des Archives Contemporaines, 1998, pp. 49-54, pour l'influence de cette conception de la propriété sur le délit d'usurpation.

[63] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 158 et 169, t. XIII, pp. 2-3, 48-49 et 69 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, p. 151.

[64] SANHŪRĪ, *Maṣādir, op. cit.*, vol. I, t. I, pp. 24-26, n. 1, pp. 34-36 et 38.

the debtor] remains the same after the insolvency as it was before: a substrate capable of accepting obligations."[72]

Concerning the conclusion of the contract, the jurists attribute two functions to the price: 1) that of an instrument of exchange which allows the transfer of ownership of the thing being sold from the vendor to the buyer; and 2) that of a standard for the value of the thing being sold. Even if the price is never paid, its existence as an object of personal obligation renders the contract valid and allows the transfer of ownership of the thing to be sold to the buyer. In other words, the function of the price as instrument of exchange and as standard of value is more important than that of instrument (p. 878) of payment.

From their analyses of synallagmatic contracts, the Egyptian jurists of the twentieth century have drawn some broad conclusions. Chafik Chehata emphasizes the weakness of an ownership of which the object is a personal obligation.[73] According to him, in Hanafi law the contract "is a phenomenon linked to an object. It is not set up with a view to creating obligations" but with a view to changing the status of the thing being sold. He stresses this point: "Nothing, moreover, in the classic definition of the Muslim contract evokes the idea of obligation. In it the conjunction of the two declarations has always been considered as necessarily creating a new state of things [illegible]."

the status of the object of a contract.[75] For this reason he ranks ownership of a personal obligation on a lower level than ownership of a physical object.[76]

The *salam* contract: personal obligation as object of the contract

The *salam* contract inverts the relationship between personal obligation and individual goods that governs the contract of a simple sale. In the contract session, the description of the merchandise which the vendor has to deliver constitutes the only information about the value of the things sold that is available to the investor and the seller. Their calculation of the value of the things to be delivered is entirely based on this description. The jurists hold that this calculation is possible if the description refers to the genus, the species, the quantity, and the quality[77] of the goods. Fungible goods, as well as merchandise produced according to standardized procedures, satisfy this criterion. These goods are accepted by the jurists as objects of the vendor's personal obligation. The *salam* constitutes a deferred exchange of two performances: the immediate payment of the capital and the delayed delivery of the goods bought. The (p. 879) parties to the contract must therefore avoid doing anything which might fall under the second form of illegal enrichment: the exchange, in equal or unequal quantities, of goods belonging to the same kind or to the class of things that are weighed or measured with the same weights or measures. Therefore, the capital and the things being sold must not belong to the same kind of goods nor be measured or weighed by the same measures or weights.

As in the simple sale, individual things can in no case become an object of personal debt: the individual bodies represent unequal values and cannot be substituted for one another as objects of personal obligation. On the other hand, they can, in the *salam*, constitute the capital. They then become part of the price. The loss or the destruction of the price, as we have seen, does not annul synallagmatic contracts; for this reason, in the *salam* the loss of

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[75] SANHŪRĪ, *Maṣādir, op. cit.*, vol. I, t. I, pp. 77 et 79-80, vol. II, t. VI, p. 232.
[76] *Ibid.*, vol. I, t. I, p. 35.
[77] SARAKHSĪ, MabsÙÔ, op. cit. , t. III, pp. 124-125, 142 et 155

a specific individual thing does not at all have the same legal consequences as in the simple sale.[78]

As in the simple sale, monies in the form of silver or gold cannot constitute the object of the contract, the thing being sold. They necessarily form part of the capital. It is the latter, in fact, which fulfils the functions of means of exchange, standard of value and of means of payment; in short, it functions as the price. Because of its being handed over to the buyer during the contract session, the capital is conceived as a specific good, an individual thing.[79] The notion of price in the *salam* is therefore clearly distinct from that in the case of the simple sale: the capital has by law to be paid in advance, its tradition transforms it into a specific good, and once the contract is validly concluded it no longer constitutes a personal obligation. Whereas the contract of the simple sale is conceived as being the purchase of a specific good by means of a personal obligation, the *salam* contract is defined as the purchase of a personal obligation by means of a certain good.

All Muslim jurists accept as objects of the vendor's personal obligation not only fungible things but also all things that can be described by reference to their material and their production techniques in a way that allows one to understand their specific use and to calculate their exchange value. This includes measured things such as pieces of wood -- as long as they can be cut in a manner that allows one to measure their height, their length, and their width, and as long as the date and place of delivery is known --,[80] as well as textiles and other products manufactured according to standardized techniques.

According to the Hanafis, who, on this point, differ from other schools of the *fiqh,* living beings cannot constitute objects of the *salam*, because one cannot calculate their value on the basis of their description. Sarakhsī explains this as follows:

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[78] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 158 et 169-70 ; KĀSĀNĪ, *Badā'i', op. cit.*, vol. V, p. 214.
[79] SARAḪSĪ, *Mabsūṭ*, vol. XII, pp. 27, 143, 144 et 159 ; MARĠĪNĀNĪ, *Hidaya, op. cit.*, vol. VII, p. 92 ; IBN AL—HUMĀM, *Fatḥ al-qadīr, op. cit.*, vol. VII, p. 92 ; BĀBARTĪ, *'Ināya, op. cit.*, vol. VII, p. 92.
[80] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 131 et 138 ; SAMARQANDĪ, *Tuḥfa, op. cit.*, vol. II, p. 14.

> *Just as the individual thing constitutes the goal (maqṣūd) of the contract, so too the exchange value (māliyya) [is a goal of the contract]. It is even more so. The goal of the contract is (p. 880) profit, and the profit will be attained by the exchange value. By the enumeration of its attributes, an animal will not be counted among the fungible goods with respect to the exchange value. We therefore say that the salam is not admissible for [the purchase] of animals. The case of textiles is different. They are the product of the work of men (fa'innahā maṣnūʿ banī Ādam). Textiles that have been woven according to the same model and in the same form (fī minwālin wāḥidin ʿalā hayʾatin wāḥida) differ very little in their exchange value, and this degree is not pertinent; it is like the difference in the exchange value between wheat of good and of bad quality. But an animal is the product of God. It will be as God wishes it to be. It perhaps will not have an equal (naẓīr). Even if [the investor] took the greatest pains to enumerate all its attributes in an exhaustive manner, it would perhaps still be without equal. All [the jurists] agree that an object [as incalculable as that] is not admissible in the salam.*[81]

Human beings are unable to calculate the value of things unless they have produced them or measured their quantity. The production of living beings belongs only to God. For this reason the value of animals and slaves cannot be established by the descriptions that the seller could give of them. On the other hand, the value of a product of human labor is only partially determined by the material from which it has been made; and the models or patterns and procedures of its production are more important than the material as criteria of kind. According to the Hanafis of Transoxiana of the 11th century, a type of merchandise can be defined by its material, but it can be even better defined by the model

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[81] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, p. 133. Voir aussi MARĠĪNĀNĪ, *Hedaya/Hamilton, op. cit.*, vol. II, p. 519 et le texte arabe, plus précis, cité chez IBN AL-HUMĀM, *Fatḥ al-qadīr, op. cit.*, vol. VII, p. 72-74, ainsi que le commentaire de celui-ci, vol. VII, pp. 73-76 qui confronte, comme Saraḫsī, l'animal a la production humaine. Voir aussi ʿAYNĪ, *Bināya, op. cit.*, vol. VII, p. 524.

> common material constitutes a single type or [as if] taking into consideration the similarity in use, one made the fabrics of Herat and of Merv into a [single] type. The same thing is reported concerning wheat and barley, [i.e] that they belong to the same type because they serve similar purposes.[85]

The Hanafis, while accepting the idea that the use for which a good has been fabricated (*maqṣūd*) is one of the factors which determine its type, emphasize that it is not a general use, such as nourishment or clothing the body which defines it. The key points are rather the specific uses made of the various kinds of merchandise, which depend on the way they were made.[86] On the other hand, the Hanafis do not accept the idea that the type a good belongs to can be determined solely by its material basis. Sarakhsī underscores this point:

> *The product (maṣnūʿ) fashioned from a material does not belong to this kind of material, as [for example] the cloths and cotton. It belongs even less to the*

employed in the production of various merchandise, a kind of merchandising *avant la lettre*. Everything is taken into account: textiles, mats of papyrus and reeds, wood and leather, tiles, glass instruments, packaging, milk products, dried and salted fish, little pearls sold by weight, metal products, and many other things as well. Thus, the great treatises on the *salam* read at times like merchandise catalogues offering information on the production processes of the goods described.

However, the Iraqi doctrine of the 8th and 9th centuries did not attribute to all forms of work the capacity to transform the same material into different types. Shaybānī (died in 804), one of the three Iraqi founders of the Hanafi doctrine, refused to recognize slaughtering as a form of production and meat as a kind of thing different from the unslaughtered animal. He justifies this refusal in the following manner:

> Meat is not produced by slaughtering (*wa l-laḥmu lā yuḥdaṯu bi l-ḏabḥ*) [....] Slaughtering [causes] a pure flaw, as if one slashed a cloth. It extinguishes life and destroys the power of reproduction. It is analogous to boiling wheat, which also destroys the wheat's capacity to bud. As it is established that the meat existed before the slaughter, it is not allowed to sell it [for a living animal], except in a process which guarantees the equality of the quantities exchanged (*biṭarīqi l-iʿtibār*).[88]

The Hanafi authorities of Transoxiana considered slaughtering a productive work which creates new kinds of produce. But they used the kind of reasoning that Shaybānī applied

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[88] *Ibid.*, p. 180.

to the slaughtering of sheep to the transformation of wheat and other agricultural products. For these jurists, the meal and the fine flour are already contained in the wheat and merely represent, in fact, wheat that has been milled. The three things thus constitute, despite their different forms, the same kind with regard to their content (*biʿtibār mā fi l-ḍimn*). The meal and the fine flour, Sarakhsi states, certainly lose some important attributes of wheat; for example, neither the meal nor the fine flour can be utilized as seed grains. Similarly, cooking the wheat does not create a new type. "This transformation can be summed up in the fact that the fine flour loses several functions, and that does not constitute a difference of type."[89].

On the other hand, if the transformation of the agricultural products adds new elements to the original product – in cases like the elaboration of vinegars, oils, and unguents enriched by other products – it is considered an operation which transforms the object's type.[90] Labor which alters the products, putting them into metrological classes different from those which applied to their original material, counts as transformative work: the milk from which cheese is produced can serve as capital in a *salam* which has as its object the delivery of this cheese.[91]

At the center of this legal debate lay the standardized procedures for the production of manufactured goods. Compared to the Hanafi doctrine of 11th century Transoxiana in this

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[89] *Ibid.*, p. 179. Pour les détails de l'argument, voir *Ibid.*, pp. 177-80 et 186 ; KĀSĀNĪ, *Badā'iʿ, op. cit.*, vol. V, pp. 187-188.

[90] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 176-177.

[91] MUḤAMMAD IBN AL-ḤASAN AL-ŠAYBĀNĪ, *Kitāb al- Aṣl*, édition de C. CHEHATA du *kitāb al-buyū' wa l-salam*, Le Caire, 1954, p. 28, n. 90 ; SARAḪSĪ, *Mabsūṭ, op. cit.*, tome XII, pp. 140-41 et 182-183 ; Al-ḤUSAYN AL-ŪZǦANDĪ AL-FARĠĀNĪ QĀḌĪḪĀN, *Kitāb al-fatāwā al-ḫāniyya*, Le Caire : Matba'at Muhammad Shahin,1282 h./1865 (désormais QĀḌĪḪĀN, *fatāwā*), vol. II, p. 99.

matter, that of the Iraqis of the 8th and 9th centuries seems quite limited. It ties the manufactured products to their geographical origins, pointing to the fact that the jurists, in the 8th century at the latest, conceived of the *salam* as an economic instrument on the regional scale. According to their doctrine the types of goods which constitute the objects of a *salam* must be – up through the time of their delivery date - in circulation in the region in which the parties concluded the contract. It is not necessary that they circulate at the place where the *salam* is concluded. One can always, according to Sarakhsī, transport them from nearby towns and cities to the place of delivery. The fact that they do not circulate in all the cities of the region does not signify that (p. 883) their stocks have been exhausted. If the goods circulate constantly on the markets of the region between the moment the contract is made and the date of delivery, the contract is valid even if the same goods can no longer be found there after that date. If the seller, in such a case, has not bought or produced the objects of the contract before they disappear from the markets, the investor has the choice of either canceling the contract or maintaining it. He may either request the restitution of his capital or put off the delivery date until the moment when the goods are circulating again in the region. This option is open to him, states Sarakhsi, because the object of the contract is a personal obligation which exists even in the absence of the goods which constitute its objects.[92] By maintaining the contract, the investor preserves his right to the acquisition of the merchandise; by cancelling it, he uses it as a loan of capital to the borrower, who must pay him back.

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[92] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 135-36 ; pour la circulation régionale, voir ŠAYBĀNĪ, *Aṣl, op. cit.*, p. 6, numéro 20 ; KĀSĀNĪ, *Badā'iʿ, op. cit.*, vol. V, p. 211.

Goods cannot be sold through the *salam* unless they are regularly produced in sufficient quantities to supply the markets. Therefore, it is not permitted to invest capital in the production of a single plantation or of a single village.[93] The quantities of wheat produced by these small units would not be capable of supplying an entire region. Only wheat produced at the scale of a region like Iraq, Khorasan, or Ferghana, and not only in and around the major cities, is allowed as an object of the *salam*, because, say the jurists, it is extremely rare that the entire harvest of a region is destroyed by a natural catastrophe. In normal times, the wheat coming from these regions is assumed to be deliverable.[94]

Shaybānī had rejected, as an object of the *salam*, the wheat of Herat, a great city in the northwestern part of what is now Afghanistan, stating that the quantity of wheat produced by this city was not sufficient to assure a guaranteed circulation.[95] On the other hand, he had accepted the textiles of this same city as objects of investment, making the assumption that they were defined by their regional origin. The cloths of Herat, Bukhara or Merv could not be considered authentic types, according to this doctrine, unless they were produced in the cities that give them their names. "The Herati robe," states Shaybānī, "is produced only at that place. That is its name. No one can give it another name."[96]

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[93] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 130, 174 et 175 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol V, p. 211 ; ŠAYBĀNĪ, *Aṣl, op. cit.*, p. 48, numéro 137.

[94] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, p. 175 ; ŠAYBĀNĪ, *Aṣl, op. cit.*, p. 48, n. 137 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, p. 211.

[95] Sur les villes comme unités de production de blé, voir *ibid.*, ŠAYBĀNĪ, *Aṣl, op. cit.*, p. 50, numéro 144 ; cette doctrine est encore défendue au XIIe siècle par QĀḌĪḪĀN, *Fatāwā, op. cit.*, vol. II, p. 101.

[96] ŠAYBĀNĪ, *Aṣl, op. cit.*, p. 50, numéro 145.

The arguments used by the Hanafis of Transoxiana to defend the cereal production of the great cities of Central Asia as an object of investment display a development in their doctrine between the 8th and11th centuries. The Transoxianan jurists assert, in the first place, that Shaybānī would not have been speaking of the city of Herat {p. 884} but rather of an Iraqi village bearing the same name. Then, they distinguish the products of the artisans and manufacturers of Herat, which are always permitted as objects of the *salam*, from the grain production imputed to the city. One can consider it certain that the "business activity of Heart" (*ḥarakat*) would never cease there and that one would always find its textiles and cloths on the markets. "Herati wheat," on the contrary, might disappear from the markets because of natural catastrophes or for other reasons. Sarakhsī judges this a "weak" argument. He states that the jurists of Bukhara give another interpretation to the attribution of wheat to a city or region. According to them, such denominations do not mean that the wheat grows there, but instead refers to a type of wheat.[97] In other words, "Herat wheat" might just as well be grown in Iraq or elsewhere. The name is merely an indication of the type to which the merchandise belongs.

Nevertheless, according to the Iraqi Shaybānī, a garment produced in Damascus cannot legally be sold as a "Herati robe." He admits, however, that the "Herati robes," unlike the wheat which is said to come from that city, are acceptable as object of the *salam*. The Hanafis of Transoxiana propose several explanations in order to justify this difference in

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[97] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, p.175 ; KĀSĀNĪ, *Badā'i', op. cit.*, vol. V, p. 211-12. Cette doctrine est toujours défendue au XIXe siècle par le hanéfite damascain IBN 'ĀBIDĪN, *Radd al-muḥtār 'alā al-durr al-muḫtār*, Le Caire, Al-Maṭba'a al-maymaniyya, s. d. (1307 h.), *op. cit.*, vol. IV, p. 227. Par le choix de ses exemples, Ibn 'Ābidīn renvoie clairement à une tradition transoxianienne.

> *process. It will be named thus even if it is produced in places other than Herat.*[100]

For Kāsānī, too, the attribution of the robe to Herat

> *is an account based on type and not a specification of the robe in terms of the place mentioned. The proof: if the seller delivers a robe that has not been woven in Herat but on the model (ṣifa) of the robes of Herat, the investor is*

of the siqlāṭūn [106] *and of the black shawl, it is a matter of two types, even if their basic material is the same (wa'in ittaḥada l-aṣlu): silk.*[107]

A product's type is determined by the identity of the techniques of its production, and by the type of intended use, as well as by its denomination, which indicates its inherent characteristics. Its basic material determines its type only to the degree to which these three properties that identify it need a material basis in order to exist.[108] It is, therefore, the identity attributed to an object by its producers and {p. 887} its consumers that determines its type, which is [illegible]

Unequal exchange

The legal debate on the respective values of the capital and the objects of the *salam* is governed by the following principle: the capital and the things are not exchanged simultaneously but at different moments, separated by a lapse of time established by the contract. The capital's immediate delivery represents a greater value than the delayed delivery of the things sold under the contract. Until the delivery of the goods bought under the contract has taken place, the things sold exist only in the form of a personal obligation.[109] The physical object that is present always possesses a value superior to that of the personal obligation. The capital has been paid in advance and the delivery of the objects of the *salam* will take place in the future. Consequently, the property of the investor and that of the seller do not represent the same value. The former is the owner of a personal obligation, the latter, of a specific individual good. The inequality appears to be inherent in the position of the performances exchanged in the contract. The prices of the goods which exist only as objects of a personal obligation are lower than those that one could obtain, for the same merchandise, if one sold them with no delay on the market in a simple sale contract.[110] The jurists thus take for granted the under-evaluation of the objects of the *salam*.

The same inequality occurs in the exchange of information concerning the thing sold and the capital. The merchandise is not present at the time the contract is concluded. The investor must therefore specify the type, the species, the quality and the quantity of the object of the contract, as well as the date and place of delivery.[111] On the other hand, the information about the capital is rather summary. If the capital consists of a robe or of another individual good, all the Hanafi authorities agree that the simple gesture which indicates the capital provides the seller with sufficient information about it.

For two of the three Hanafi authorities of the 8th century, Shaybānī and Abū Yūsuf, the same rule applies if the capital consists of several kinds of money or merchandise. In contrast, Abū Ḥanīfa obliges the investor, in this case, to inform the (p. 888) seller of the type, the species, the quality, and the quantity of the capital. He justifies this obligation by the fact that among the monies paid in capital there are always coins of inferior alloy that the seller has the right to return to the investor. If the latter has not declared the quantity of the capital, the seller does not know by what amount the capital offered is reduced by this return of the coins of lower value. He therefore cannot calculate his remaining debt to the investor.[112].

If the thing to be sold consists of two or more objects, the investor, according to Abū Ḥanīfa, must specify the parts of the capital which correspond to each of the objects of the contract. Only such a specification allows the seller to calculate the relationship of the

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[111] SARAḪSĪ, *Mabsūṭ, op. cit.,* t. XII, pp. 124-25 et 127 ; KĀSĀNĪ, *Badā'i', op. cit.,* vol. V, pp. 207 et 213.
[112] Pour la position d'Abū Ḥanīfa concernant l' informations sur le capital, voir ŠAYBĀNĪ, Aṣl,*(ed. Chehata) op. cit.*, p.62 (numéro 183) ; SARAḪSĪ, *Mabsūṭ, op. cit.,* t. XII, pp 129, 143, 149 et 188-89; KĀSĀNĪ, *Badā'i', op. cit.,* vol. V, p. 202. Pour la position d'Abū Yūsuf et de Shaybānī voir ŠAYBĀNĪ, *AṢL, op. cit (ed. Chehata).*, pp. 13 (numéro 43), 18 (numéro 56) et 30 (numéro 97) ; SARAḪSĪ, *Mabsūṭ, op. cit.*, vol. XII, pp. 129, 143, 149 et 188 ; KĀSĀNĪ, *Badā'i', op. cit.*, vol. V, p. 202.

value between the capital and the object of the *salam*.[113] The calculation becomes complicated when the vendor delivers several things and the investor seeks to resell them individually. The modalities of the sale discussed by Abū Ḥanīfa are those of a "sale with declared profit" (*murābaḥa*), in which the seller must declare at what price he bought the merchandise. In such a contract, the profit requested by the seller is calculated in fractions of the amount of the first price paid by the vendor. In this case, the investor of the *salam* must carry out two operations. As long as the merchandise exists only as objects of the seller's personal obligation, it is sufficient to divide the capital by the number of these objects in order to establish the price of each of them. As objects of a personal obligation, nothing distinguishes them from one another. They are only concepts, abstract obligations. But from the moment when these objects, by being handed over to the investor, become individualized things, it is their materiality that determines the value of each of them. By delivering the objects of his obligation, the seller transforms the object of the contract from a personal obligation into a number of physical things. Abū Ḥanīfa conceives this transformation as a legal fiction (*taqdīr*) according to which the two parties of the contract have renewed their contract at the moment when the goods were handed over. It is this renewal which would have allowed the things in question to be treated as if they, and not the personal obligation, were the object of the contract. This concept of calculation is, according to Sarakhsi, the original Hanafi doctrine of the *salam*. It depends on the model of the two-stage contract that we discussed above for the simple sale contract. By contrast, in the *salam*, the calculation of the prices, according to Abū Ḥanīfa, changes with the transition of the object-as-concept into the

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[113] ŠAYBĀNĪ, *Aṣl, op. cit.*, p. 17, n° 55 ; SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 149-51 ; KĀSĀNĪ, *Badā'iʿ, op. cit.*, vol. V, p. 202.

object-as-thing. Abū Yūsuf and Shaybānī do not follow these rules. In their opinion, even after their delivery to the investor the price of the individual objects of the contract is established by the simple division of the capital by the number of objects in the contract.[114]

These differences should not obscure the common foundations of the Hanafi doctrine. All the 8th century Iraqi Hanafi authorities, like the Hanafis of Transoxiana later on, endorse the idea that the personal obligation to deliver (p. 889) goods is created by the contract, and validated by the handing over of the capital, and that the contract transfers the ownership of this obligation to the investor.[115] The property under discussion here is neither the attribute of the thing nor the ownership of a personal obligation which might be thought to function as a price, as an instrument of the contract (*al-maʿqūd bihi*). It is, rather, a matter of a right which has as its object a personal obligation, an obligation which is the object of the contract and which will continue to exist as long as the seller is alive. The payment of the capital gives the investor the right to request the delivery of the objects of the personal obligation at a time fixed by the contract; but it is the taking possession (*qabḍ*), the handing over of physical things, which effects the transfer of ownership of the goods to the investor. This mechanism is underlined by the fact that fungible things the value of which is determined by measure or weight have, to be measured or weighed by the vendor and the investor at the moment when they are

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[114] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 149-151. Cf. KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, p. 221.
[115] SARAḪSĪ, *Mabsūṭ.*, t. XII, pp. 126-127 ; 130 et 150-51 ; KĀSĀNĪ, *Badāʾiʿ, op. cit.*, vol. V, pp. 201-203; IBN AL-HUMĀM, *Fatḥ al-qadīr, op. cit.*, vol. VII, p. 66; MARĠĪNĀNĪ, *Hidāya/Fatḥ al-qadīr , op. cit.*, vol. VII, p. 99 ; BĀBARTĪ, *ʿInāya, op. cit.*, vol. VII, p. 98.

The complete cancellation of the *salam* greatly reduces the investor's sphere of action. Under a valid and binding *salam*, the investor can use this type of contract as an instrument for lending money, for stocking up on merchandise, for preparing a strategy for selling it, or for exercising an influence on the diffusion of agricultural products and techniques in his region. The *salam* is of interest because it allows the investor to impose on the vendor a price (p. 890) below that of the market. On the other hand, the complete cancellation of the contract leaves the *salam* with only the function of providing a monetary loan, an important function, of course, for the investors' business activities, but

> therefore cancels only a part of the contract with his partner, thus following the advice of [of the Prophet]. He thus obtains a portion of the objects of the contract, allowing him to attain his goal of making a profit. This solution takes into consideration the interests of both parties, and that is "recognized, good and charitable."[120]

The partial cancellation of the contract protects the interests of the investor by assuring his profit and his capital, and it is meant to protect the seller by partially freeing him from a business deal in which he is losing money. The jurists justify the *salam* by the merchants' need to dispose of an investment contract which gives to the investors the opportunity to let their capital grow, and to the sellers the means of buying or producing

profit from the *salam* because they buy the merchandise below its value. "There is no doubt that the thing is sold below its value and that the buyer profits in this manner."[126] The same argument appears in a work of another Iraqi author of the 14th century, Bābartī:

> In spite of their great capacity for reasoning (ma'a wufur ʿuqūlihim) and although they may be extremely prudent in seeking to avoid suffering damage through sales, and notwithstanding their strong desire for lucrative business deals (kat̲rat raġbatihim fi l-tijārati l-rābiḥa), men take on the risk [of concluding] *salam* contracts, even if, at the moment of the contract's conclusion, they have no need of the thing being sold. This is clear proof that the object of the *salam*, even if it is of poor quality, surpasses [the value of the capital].[127]

The two authors refer, in the same context, to the insolvency of the seller,[128] for that is thing that has been acquired, must deliver it to the investor, for a derisory price, in order to acquit himself of his debt to him.

Diminishing the risks of unequal exchange

Concluding business transactions with insolvent partners obviously meant taking risks. In Palestine, before 1840, bankruptcies of investors do not appear to have been rare. B. Doumani explains them in terms of institutional deficiencies: neither the political system nor the courts engaged in the legal recovery of debts before that year. Consequently, investors sought to diminish their risk by forming partnerships with urban merchants, village notables, and political dignitaries. Well-to-do farmers and village notables also acted as authorized agents or mandataries for investors or as sureties for sellers.[130].

The Hanafi doctrine –like that of the other schools – provided legal roles which could fulfill these functions. The law of partnerships allowed several investors to conclude a *salam* with one or several sellers and thus to distribute the risk among several individuals.[131] The mandate served the same function for the investor. According to the Hanafi jurists, the mandatary is bound by the orders of his mandator,[132] who orders him to conclude a *salam* contract, but it is the mandatary who concludes the contract through his own personal capacity and in his own name. He alone, therefore, is authorized to

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[130] B. DOUMANI, *Rediscovering Palestine, op. cit.*, pp. 67, 68, 71, 77, 86-87, 90-93 et 146-47 ; K.M. CUNO, *The Pasha's Peasants, op. cit.*, p. 59 ; E. ROGAN, « Moneylending », *art. cit.*, pp. 250-52, et *ID.*, *Frontiers of the State in the Late Ottoman Empire : Transjordan, 1850-1921,* Cambridge, Cambridge University Press, 1999, pp. 99-100.

[131] L'importance du partenariat pour des relations de crédit est analysée en détail par A.L. UDOVITCH, *Partnership and Profit, op. cit., passim.*

[132] SARAḪSĪ, *Mabsūṭ,, op. cit.*, tome XII, pp. 208-10.

manage and carry out the provisions of the contract. If the mandatary is charged with concluding a *salam*, the seller is not entitled to ask the mandator to pay him the capital; instead, he must turn to the mandatary. The latter must advance the capital in the place of the investor, and it is he who manages the relations with the sellers, without the intervention of his mandator. In principle, the mandatary alone is authorized (p. 893) to require the handing over of the salam object.[133] He may require some form of collateral, or a surety or guarantee for the thing being sold. He also has the right to be satisfied with an object which is of lesser value than that agreed upon in the contract. He may postpone the due date of the object of the contract, and, if he compensates his mandator, he may even renounce collecting payment of the debt.[134] At the moment when the seller hands over the object of the contract to the mandatary, he has fulfilled his obligations towards the investor who created the mandate,[135] and, at the same time, the ownership of the thing handed over to the mandatary becomes, by right, the property of the mandator or original investor.[136]

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[133] *Ibid.*, t. XII, pp. 203-204, 211, 212 et 218. Mais voir *ibid.* pp. 211-212 pour la solution par équité qui permet au mandant de collecter directement les objets du *salam* d'un vendeur qui a conclu le contrat avec son mandataire. Ce texte montre, cependant, que si le mandant exige du vendeur la remise des objets dû par le *salam*, le vendeur n'est pas obligé de les lui remettre parce qu'il ne les doit qu'au partenaire investisseur du contractant. Seulement celui-ci a le droit d'exiger la remise des objets de la dette. La solution par équité demande donc l'accord du vendeur. H. YANAGIHASHI, *Property, op. cit.*, pp.175-75, cite Saraḫsī (vol. XII, p. 209) pour prouver que l'investisseur aurait le droit de collecter les objets du contrat directement du vendeur. Il ne voit pas qu'il s'agit d'un cas dans lequel le mandataire a violé le mandat et que, pour cette raison, l'investisseur annule le contrat s'il reprend le capital directement du vendeur. Il ne s'agit pas, dans ce cas, de l'exécution des clauses d'un contrat.

[134] Ibid., vol. XII, pp. 151, 205, 207, 208. SAMARQANDĪ, *Tuḥfa,, op. cit.*, vol. III, pp. 235-36. Si le mandataire ajourne l'échéance de l'objet du contrat, il est responsable à l'investisseur pour l'objet du *salam*. S'il renonce au paiement de la dette, il doit dédommager son mandant. Sur les deux points il y a dissentiment entre les Hanéfites, voir SARAḪSĪ, *Mabsūṭ,,, op. cit.*, vol. XXI, p. 50.

[135] SARAḪSĪ, *Mabsūṭ,, op. cit.*, t. XII, p. 218-19 ; KĀSĀNĪ, *Badā'i, op. cit.*, vol. VI, p. 23 ; SAMARQANDĪ, *Tuḥfa, op. cit.*, vol. III, p. 230.

[136] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 203-204, 211-212 et 217 ; SAMARQANDĪ, *Tuḥfa, op. cit.*, vol. III, p. 230.

As long as the mandatary acts within the framework of his mandate, chooses partners who are not family members or part of his household, and makes deals at price levels which do not damage the interests of this mandator,[137] no one has the right to interfere with his management of the business transactions. In commercial practice, the role of the mandatary is filled by an urban merchant or a well-off village notable who represents the interests of one or of several investors and finds them partners with whom he concludes the *salam* and for whom he is the sole contracting party. His knowledge of the state of solvency of people in his area is very probably one of the criteria he uses in choosing partners for the *salam.* If he advances the capital for his mandators, he acts both as their banker and their mandatary. That is why a relationship of trust between the investor and the mandatary is essential for the smooth functioning of this institution and the reason why the right of the mandatary to name other mandateries in his place is extremely restricted.[138]

The mandate, in commercial practice, therefore serves to mobilize the resources of a wealthy merchant, who likely has a good grasp of the regional commerce, of its products and its actors, and (p. 894) thus helps to diminish the risk to potential investors. By contrast, the seller's capacity to name a mandatary is reduced to his obtaining the capital during the contract session and as long as the two contracting parties have not yet separated.[139] But the seller is not entitled, for example, to give to a third person the mandate to find an investor for the wheat that he intends to sell in four weeks or three

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[137] Pour ce qui est de la lésion, voir SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XII, pp. 208 et 214-15, et, sur les contrats du mandataire avec les membres de sa propre maisonnée, p. 218.

[138] *Ibid.*, t. XII, pp. 208, 216, 218 ; SAMARQANDĪ, *Tuḥfa, op. cit.*, vol. III, pp. 235.

[139] SAMARQANDĪ, *Tuḥfa op. cit.*, vol. III, p. 230, souligne le fait qu'un tel mandat n'est pas valable hors de la séance du contrat et sans la présence du mandant ; voir aussi KĀSĀNĪ, *Badā'i, op. cit.*, vol. VI, p. 23.

months: "The acceptance of the *salam*," writes Sarakhsī, "is part of the way the insolvents do business (*min ṣanīʿ al-mafālīs*) and the mandate for that is as null as [the mandate] to beg."[140]

On the other hand, the seller's suretyship contract (*kafāla*) is admissible. In the first place, this surety bond serves to diminish the investor's risk. It can, accordingly, be established without the debtor's agreement. Such a solution, however, has the disadvantage that the person who stands surety, i.e., the guarantor, has neither the right to require of the debtor the reimbursement of his expenses nor the payment of his claims stemming from obligatory rights. These rights with respect to the debtor arise only if the latter agrees to them.[141] The jurists thus try to compensate the guarantor's risk by allowing him to make a profit at the expense of the creditor or of the debtor.

Several forms of reasoning are used to justify the gain derived by the surety or guaranty. The principal argument analyzes the surety as a separation of the debt (*debitum, Schuld*) from the obligation to pay (*lien obligatoire, Haftung*). Sarakhsī formulates this doctrine as follows

> The contract is called suretyship because it joins the legal personality of the guarantor to that of the debtor, in a way that consolidates [the latter]. One of the two [methods to justify this concept is to think that] the addition [of the

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[140] SARAḪSĪ, *Mabsūṭ, op. cit.,* tome XII, p. 209 ; à comparer à C. CHEHATA, *Théorie générale, op. cit.,* p. 145, numéro 197 ; YANAGIHASHI, *Property...op. cit.*, pp. 174-175,ne mentionne pas le fait que Saraḫsī refuse au vendeur le droit de se faire représenter dans la recherche d'un capital avant la séance du contrat.

[141] SAMARQANDĪ, tuḥfa, op. cit., vol. III, p.339 ; MARĠĪNĀNĪ, *Hedaya*, *op. cit.*, vol. II, p. 578 et 584-8, et KĀSĀNĪ, *Badāʾi, op. cit.*, vol. VI, pp. 11, et 13-14.

legal personality of the guarantor to that of the debtor] concerns only the request (*muṭālaba*) for the payment of the sum due to the exclusion of the principal debt. The debt remains as such tied to the legal personality of the debtor. Payment is required from the guarantor as well as from the debtor. Concerning the person who has the right to require payment, it is possible, from the start, to separate the debt owed from the right to require payment: in a sale contract the mandatary is entitled to require the [payment] of the price whereas the [title to the ownership of the] price is assigned to the mandator (*mandant*). In the same way, it is allowed to separate [the right of] requiring the payment [of the sum owed] from the principal debt with respect to the obligor, so that, after the suretyship, the payment of the amount due is asked of the guarantor while the principal debt remains a personal obligation of the [original] debtor. Similarly, the establishment of a delay [for the payment] separates the right to require (p. 895) the payment of the sum owed from the principal debt by suppressing the right to require payment [until the date established]. The obligation arising from the suretyship contract has the same effect. To require the payment of the sum due has the same relationship to the debt as the right to dispose of a thing compared to the [absolute] ownership of the thing itself. It is licit to separate the power of disposition over a thing from the [absolute] ownership of the thing itself as far as the request for payment is concerned. It is also licit, concerning the pledgor, to separate the right of control over a thing from the [absolute] ownership of the thing itself.[142] In the same way it is admissible to separate the obligation to accept

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[142] SARAḪSĪ, *Mabsūṭ, op.cit.*, t. XIX, p. 161 ; [the editors of the volume have misread *milk al-ġayr instead*

> the request for payment that arises from the suretyship contract from the obligation [to satisfy all claims] concerning the principal of the debt.

The guarantor does not share the debtor's debt. He guarantees only that the latter will honor his obligations. He is not obliged to take any action unless the creditor requires him to, whereas the debtor is obliged to pay his debts even he is not asked to.[143] Based on this separation between the principal debt and the obligation arising from the suretyship contract, the doctrine envisages the following consequences: the creditor can require repayment of his loan from the principal debtor, from the person standing surety for him, or from both of them.[144] If the debtor fulfills his obligation or if the creditor makes a gift of his debt to the debtor, the guarantor is legally freed from all his obligations.[145] However, if the guarantor settles with the creditor by paying him the sum that is due, or if the creditor discharges him from his obligations, the debtor is in no way exonerated from his debt. The guarantor thereby acquires the right of demanding it from him.[146] The profit

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of milk al-ʿay. Their reading makes absolutely no sense in this context. It just shows that they did not follow Sarakhsi's argument. I reinstalled the *milk al-ʿayn*, the property of the thing itself. See also *ibid.*, t. XX, pp. 30-31, 91-93, 96 où Saraḫsī tire les conséquences de cette approche ; cf. aussi KĀSĀNĪ, *Badāʾi, op. cit.*, vol. VI, p. 10 et pp. 11-12. MARĠĪNĀNĪ, *Hedaya op. cit.*, vol. II, p. 583, résume la différence de manière succincte : « Un garant est responsable pour ce qui est exigé et non pour ce qui est dû » ; pour la séparation entre la chose dû (le *debitum*), et l'obligation de payer (l'*obligatio*) dans le cadre du cautionnement, voir C. CHEHATA, *Théorie générale, op. cit.*, pp. 170-71, numéro 262. Contrairement à ce que dit C. Chehata, cette distinction me semble avoir une importance pratique : elle est la base des bénéfices que la caution peut effectuer aux frais du débiteur ou du créancier.

[143] MARĠĪNĀNĪ, *The Hedaya/Hamilton, op. cit.*, vol. II, p. 580 ; sur d'autres conséquences pratiques de la séparation entre dette et *obligatio* voir SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XX, p. 85.

[144] *Ibid.*, t. XX, pp. 28-29 voir aussi *Ibid.*, t. XIX, p. 163 ; KĀSĀNĪ, *Badāʾi op. cit.*, vol. VI, pp. 10 et 14 ; MARĠĪNĀNĪ, *Hedaya/Hamilton, op. cit.*, vol. II, pp. 567-77 [*Hidāya/Fath al-qadir, op. cit.*, vol. VII, p. 176], BĀBARTĪ, *ʿInāya, op. cit.*, vol. VII, p. 181. Pour la les difficultés des auteurs post-classiques à comprendre la séparation entre lien obligatoire et dette, voir IBN AL_HUMĀM, *Fath al-Qadīr, op. cit.*, vol. VII, pp. 154-55.

[145] SARAḪSĪ, *Mabsūṭ, op. cit.*, t. XIX, p. 163 et tome XX, p. 3 ; KĀSĀNĪ, *Badāʾi, op. cit.*, vol. VI, pp. 11, 13; MARĠĪNĀNĪ, *Hidāya/Fatḥ al-qadīr, op. cit.*, vol. VII, pp. 180-81.

[146] SARAḪSĪ, *Mabsūṭ, op. cit.*, vol. XX, pp. 58-59 ; KĀSĀNĪ, *Badāʾi, op. cit.*, vol. VI, pp. 10-11 ; MARĠĪNĀNĪ, *The Hedaya/Hamilton, op. cit.*, vol. II, pp. 576, 580, 583, 589. Pour les marges d'action que cette construction ouvre à la caution, voir SARAḪSĪ, *Mabsūṭ, op. cit.*, tome XX, p. 58.

that the guarantor can derive from his position between the creditor and the debtor depends on the way in which he settles with the creditor: by making a settlement with him he acquires the right to demand that the debtor pay him his debt: "The surety {*caution*} becomes the owner of the debt, having given a compensation for it."[147] If the guarantor pays the sum due to the creditor with his own means, he can then make an arrangement with the debtor regarding objects of his choice. Since his relationships with the debtor is not governed by the *salam* contract, but by that of suretyship (*cautionnement)*, he is, likewise, not constrained by the content of the *salam* concluded between the creditor and the debtor.[148]

(p. 896) The guarantor's ability to reap the benefits of his position as intermediary between creditor and debtor presupposes that the creditor who is not able to cover the obligations arising from his debt, is at least willing to reach a compromise. If this condition is not fulfilled, the surety must have recourse to his social rank or to his political power in order to succeed. The examples cited by B. Doumani of wealthy farmers who acted as sureties and lost property on account of uncooperative debtors clearly show that wealth alone did not ensure success. The urban merchants, in Egypt as well as in Palestine, therefore sought to involve the village notables in a network of guarantors for the farmers' debts. For these notables, agreements with the debtors were

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[147] "The surety becomes proprietor of the debt in virtue of his having given a consideration for it", MARĠĪNĀNĪ, *Hedaya/Hamilton, op. cit.*, vol. II, p. 581 ; voir aussi BĀBARTĪ, *'Ināya, op. cit.*, vol. VII, pp. 179-80 ; IBN AL-HUMĀM, *Fatḥ al-qadīr, op. cit.*, vol. VII, p. 178 ; SARAḪSĪ, *Mabsūṭ, op. cit.*, tome XX, pp. 58- 60.

[148] ŠAYBĀNĪ, *Aṣl, op. cit.*, p. 45, n° 126. Sur l'appropriation de la dette par la caution, voir MARĠĪNĀNĪ, *Hedaya/Hamilton, op. cit.*, vol. II, p. 580; SARAḪSĪ, *Mabsūṭ, op. cit.*, tome XII, p. 147, tome XX, p. 29 ; KĀSĀNĪ, *Badā'i, op. cit.*, vol. VI, pp. 11-13 et 15 ; BĀBARTĪ, *'Ināya, op. cit.*, vol. VII, pp. 182-83.

integrated into a promising strategy with other partners that made it possible to transform the insolvency of the debtors into a source yielding access to economic and social gains.

Conclusion

In their elaboration of the rules concerning the *salam*, the Hanafi jurists sought to establish a compatibility between the justice of exchange and the justice of contracts, on the one hand, and the question of licit profit, on the other. The justice of exchange is defined by the relationship between things; that of contracts, by the equality of the partners. Interpreting profit and things in terms of exchange value (*māliyya*), the jurists introduced the logic of value into legal reasoning and used it as a means to integrate into the legal doctrine the new technological and commercial situation of the Muslim world during the first centuries of the Abbasid empire (750-1258). They offered to the merchants an instrument for the investment of capital into agricultural production and manufacturing through accepting the personal obligation of the seller as the licit access to future goods.

The Hanafi texts on the *salam* discuss the commercial value of the objects of investment. They focus on the calculation of the profit (*istirbah, ribh*) made by the investors. If the investor is to make a profit, he must be able to calculate the value of the goods that are exchanged. The exchange value (*maliyya*), according to the jurists, is a quality common to all commercial goods, and they came up with a succinct formula for it: the exchange value is the type or genus common to all merchandise. Sarakhsī explains why the pledgee who destroys the thing pledged to him realizes, by this very act, his claim to the outstanding debt: "He executes [his right to] his outstanding debt only with respect to its exchange value. With regard to the attribute of the exchange value, all merchandise belongs to a single type or genus,"[149] In other words: even if the original debt concerned a textile and the pledge is constituted by hides tanned and cut, the destruction of the hides extinguishes the debt stemming from the textiles. For that reason, any given pecuniary value can serve to pay any given debt: "With regard to the function of the exchange value, all goods are a single genus (wa l-amwālu kulluhā fī maʿna l-māliyya jinsun wāḥid) » says Kāsānī, explaining why the buyer is free to replace the agreed-upon price by other things having the same value.[150]

A good is determined by the categories of genus, species, quantity, and quality. In everything concerning enrichment without adequate consideration (*ribā*) by means of a simultaneous exchange the quality of goods is not taken into account. On the other hand, in everything concerning exchange value, quality is always taken into account; it is one of the factors which determine exchange value. The Hanafi doctrine thus distinguishes between the equivalence and the quantitative equality of goods.

Exchange value is a category common to all kinds of merchandise, but, in the *salam*, the Hanafis accept as objects of investment only those goods that can be described by genus, species, quantity, and quality, because this is the only way by which the investors can calculate the value of goods that they are going to see only in the future. The categories

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[149] SARAḪSĪ, *Mabsūṭ, op. cit.*, tome XII, p. 152.

[150] KĀSĀNĪ, *Badāʾi, op. cit.*, vol. V, p. 234. Kāsānī utilise (vol. II, pp. 20-21) la même formule pour justifier le fait que le contribuable doit payer les impôts pour ses biens en or ou en argent et non en nature.

value, according to the Hanafi doctrine, exists only for physical things. The relationship between the physical object, the capital, and the personal obligation, in which it is invested and which is always an incorporeal good, is determined by the inequality of their exchange values. At the same time, investment in the purchase of future goods can be made only through the personal obligation of the seller: nothing can replace it. For this reason, it is considered to be the object of the contract. The *salam* serves precisely to create, first, this type of personal obligation and, second, its inequality relative to the capital involved; it thus establishes a personal relationship between the creditor and the debtor. The invocation of the justice of synallagmatic contracts serves to justify the inequality inherent in this exchange.

The legal doctrine, of course, is not reducible to the economic functions that it regulates. It organizes a vision of economic activities in the light of a system of legal thought. It determines the categories which define the goods, the content of the verbal acts which create the personal obligations, and their ties to the physical handing over of the goods, at the same time harmonizing them with or restricting them in relation to the other spheres of law (such as marriage and household relations). It regulates the exchange of goods by the exchange of declarations and of things, as well as by defining the functions of the linguistic symbols which are part of the process. By means of the definition of these terms, the jurists circumscribe the legal roles of the investor and of the seller, as well as the relations of force between them. Personal obligation thus becomes the indestructible object of the contract, because the seller has no way of liberating himself unilaterally from the contract. It is the only means which gives the investor access to the goods that will be delivered to him in the future. The effects of the relationship between two forms of unequal ownership determine the relationship between the contracting parties.

The jurists' ability to determine the legal roles of the contracting parties through the terminology of the law and the definition of its terms is not at all remarkable in itself. What is remarkable, however, is the way in which the jurists constructed their terminology as a technical language using terms taken from everyday forms of speech, developing their own theory of speech acts, and giving new and distinctive meanings to the terms used as elements of legal discourse. Through this technical legal idiom they created for the contracting partners legal roles well suited to supporting the needs and interests of the investors. This way of speaking and of acting displays an understanding of the relationships between, on the one hand, the production, the description, and the commercialization of goods and, on the other, the personal obligation of the insolvent seller – an understanding that this was the only way of providing the investor access to future goods. Their grasp of the situation allowed the jurists to integrate present investments and future performances in a model of unequal exchange oriented around the notion of exchange value. The fact that for a period of more than a thousand years, in many regions and under differing circumstances, the *salam* provided the legal framework for this unequal exchange shows the great adaptability of this legal construction of the creditor-debtor relationship – linked to the production and acquisition of merchandise – to the social and economic conditions in which investors and insolvent sellers were entering into contracts. Twentieth-century research on the 18th and 19th centuries reveals that the *salam* was an effective instrument employed by the new economic and political elites to create a modern agriculture. Studies of Egypt, Palestine, and Transjordan, as well as – from a different point of view – of Tunisia,[151] confirm the practicability of the propositions of the Hanafi jurists in this matter. B. Doumani observes that starting in the middle of the 19th century, the majority of trials coming before the courts of Nablus were concerned with conflicts between investors and sellers over the terms of a *salam*; and he also emphasizes that by separating the price of the *salam* from the market price, the merchants used the *salam* contracts as a means of putting pressure on prices. The more the sellers' debts increased, the more the price of the *salam* decreased.[152] This relationship between the volume and duration of the debts, on the one side, and of the price level of the *salam*, on the other, makes it easier to understand the patience of investors with regard to their insolvent debtors. E. Rogan and B. Doumani explain it by the advantage for the investors in maintaining business relationships with partners who had to accept the conditions that they imposed on them.[153]

The *salam* allowed the new economic and political elites, in Egypt and Palestine, to establish with the farmers relations of dependence which were indispensable for the rise of the new notables. K. Cuno has concluded from this that, in Egypt, this contract, emerging from the Islamic legal tradition, facilitated the transition of agriculture toward a

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[151] Mohamed-Hédi CHERIF, *Pouvoir et société dans la Tunisie de H'usayn Bin 'Ali (1705-1740),* Tunis, Publications de l'Université de Tunis, 1984, vol. I, pp. 198-200 et 357-59 ; vol. II, pp. 13, 88-90, 119, 185, 195 et 212 ; LUCETTE VALENSI, *Fellahs tunisiens. L'économie rurale et la vie des campagnes aux 18e et 19e siècles,* Paris-La Haye, Mouton, 1977, pp. 342-44 et 357, voir aussi pp. 350 et 354.

[152] B. DOUMANI, *Rediscovering Palestine, op. cit.,* pp. 135-38 ; pour la pression sur les prix, voir *Ibid.*, pp. 89, 147, 151 et 161, et E. ROGAN, *Frontiers of the State in the Late Ottoman Empire, Transjordan, 1850-1921,* Cambridge, Cambridge University Press, p. 104 [désormais ROGAN, *Frontiers]*

[153] B. DOUMANI, *Rediscovering Palestine, op. cit.,* pp. 109, 150-51 et 161 ; ROGAN, « Moneylending », *op. cit.*, pp. 252-53 et *idem, Frontiers, op. cit.*, pp. 105, 107.

capitalist mode of functioning.[154] B. Doumani, for his part, shows that in Palestine in the 19th century, the *salam* made possible the concentration of capital and of all the stages of the production process of soap, which, before that time were controlled by a variety of groups, in the hands of a single group of notables. This concentration occurred without a change in the mode of production or the organization of work. The concentration of capital was thus not accompanied by a modernization of the forms of work and of the tools of production.[155].

Thus, the indispensable condition of this exchange is the ability of the seller to bind himself by his verbal acts. The debtor must be capable of carrying out legal acts, be free to contract debts, in short, be his own master. If the debtors had been slaves, authorized to engage in commerce, or salaried employees subject to the orders of their employers, their capacity to take on debt would have been greatly limited. In order for the *salam* to be used to its full potential and on a large scale, it was necessary that the debtor be capable, free, and formally independent in terms of his economic situation. It was only under these conditions that he was able to form contractual relationships which turned his personal obligation into a practically unlimited object of investment. The formal economic independence of the debtor was, for these reasons, indispensable for the proper functioning of the *salam*. Thus, while the structure of this contract constituted a hindrance for the capitalist organization of salaried work and production, it was no barrier at all to the concentration of capital or to the ability of a small group of entrepreneurs to dominate an industry.

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[154] K. M. CUNO, *The Pasha's Peasants, op. cit.*, pp. 4, 9-11, 14 et 62-63.
[155] B. DOUMANI, *Rediscovering Palestine, op. cit.*, pp. 188 et 252.

Historically, the forms of the *salam* described in the texts of the 11th and 12th centuries turned out to be closely linked to contemporary developments in techniques and in manufacturing, and to a new comprehension of the relationships between things and verbal acts, between the production of goods and the modes of their description, between their geographical origins and their coming to be produced on a universal scale, and, finally, between investment and personal obligation. The Hanafi construction of the *salam* constituted an important step towards the rationalization of synallagmatic contracts and towards the extension, in space and time, of their influence on the production and exchange of goods. Like other processes of rationalization, the elaboration of the *salam* occurred at the price of an increased inequality among the actors involved, who, while formally independent, were linked to each other in the production and exchange of goods through the bond of credit and debt.

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