

# Force Majeure in Islamic Law of Transaction: A Comparative Study of the Civil Codes of Islamic Countries

Mhd. Syahnan\*

Fakultas Syari'ah & Program Pascasarjana IAIN Sumatera Utara  
E-mail: syahnan\_m@yahoo.com

## Abstract

This paper attempts to shed lights on the performance of the obligations to a valid contract that can be frustrated by events beyond human control. Such events may have considerable impact on various designated legal principles and rules which is widely known as *force majeure*. The doctrine of unforeseen circumstances in contemporary legislation, on the main, is expressed in the same term which understandably as result of the origin derivation of the French law *le theorie de l'imprevision*. Although it is true that there is no such general principle of *force majeure* in classical Islamic law, the author argues that significant efforts have been made in synthesizing both the Islamic and Western law concepts. Accordingly, despite the fact that the traditional Islamic legal system has its own mechanism to deal with such events at the time of contract, to a certain extent, it has influenced its contemporary form of the concept of intervening contingencies (*naẓariyyat al-jawā'ih*) as reflected in the Civil Codes of the Arab states. In addition, in response to the exigencies of the ever-increasing problems of modern life which brings with it alien concept, *force majeure* does not contradict with the provisions of the Shari'ah since the views of Islamic jurists (*fuqahā*) can justifiably be referred to.

Tulisan ini berupaya mempertegas status pelaksanaan perikatan dari suatu perjanjian yang sah bisa terkendala oleh terjadinya peristiwa yang diluar kontrol manusia. Peristiwa tersebut dapat memengaruhi berbagai prinsip dan aturan hukum tertentu yang lebih dikenal dengan *force majeure*. Doktrin 'peristiwa tak terduga' pada perundangan kontemporer, secara umum tergambar dari terma yang sama dengan konsep asal hukum Prancis *le theorie de l'imprevision*. Sekalipun

---

\* Fakultas Syariah, IAIN Sumatera Utara, Medan. Telpon (061) 6615683

Islam tidak memiliki konsep *force majeure*, penulis berargumen bahwa pelbagai upaya penting telah dilakukan untuk mensensiskan konsep hukum Barat dengan hukum Islam. Dengan demikian, karena sistem Hukum Islam memiliki mekanisme tersendiri untuk menyelesaikan peristiwa tersebut pada saat melangsungkan kontrak, pada tataran tertentu sistem Islam memengaruhi konsep ‘peristiwa tak terduga’ (*naẓariyyat al-jawā’ih*) perundangan dunia kontemporer sebagai tergambar pada Kode Sipil Negara-negara Arab. Lebih jauh lagi, dalam menyahuti tuntutan problematika kehidupan modern yang semakin meningkat yang juga memunculkan konsep asing, *force majeure* tidak bertentangan dengan aturan syariah karena pendapat para fuqaha dapat dirujuk dan dijadikan landasan secara meyakinkan.

**Keywords:** *transaction, contract law, force majeure, naẓariyyat al-jawā’ih, Arab Civil Codes*

## Introduction

The issue of intervening events which are beyond the boundaries of human control as earthquake, tsunami, eruption, state of war, has been one of the most heated debates in relation to the social dealings and civil transaction. In every legal system, and the Middle Eastern countries are not excluded- the performance of the obligations to a valid contract can be frustrated by events beyond their control. These events are juridical facts, which may have, under certain conditions, considerable impact on various designated legal principles and rules. Each legal system normally treats the change of circumstances in wider scope of legal doctrines with different concepts. Roman lawyers had a concept of *casus* or supervening impossibility of performance which excuses performance and a concept of *vis maior* or supervening overpowering cause. The common and the French law developed the concept of *Frustration* and *theorie de l’Imprévision* respectively. In addition, the pre-eminent civil law, the German law has developed concepts of *Unmöglichkeit* which literally means impossibility, and *Wegfall der Geschäftsgrundlage* or disappearance of the contracts’ foundation.<sup>1</sup>

---

<sup>1</sup>To have a more detail overview on *force majeure*, see Jeffrey Lehman and Shirelle Phelps (eds.) *West’s Encyclopedia of American Law* (2<sup>nd</sup> ed.) vol 4 (USA: Thomson Gale, 2005), 454; and on *frustration* is also to be found in the same Encyclopedia, vol. 5, 12;

In Islamic law the concept of changes of circumstances, as found in the exposition of *Maşâdir al-haqq*, is treated in *nazariyyat al-Hawâdits al-dhâri'ah*.<sup>2</sup> This paper tries to shed lights on the performance of the obligations to a valid contract that can be frustrated by events beyond human control that may have considerable impact on various designated legal principles and rules which is widely known as *force majeure*.

### Overview of the Concepts of Changing Circumstance

As a basis for making comparison of the changing circumstances in Western and Islamic law, it is necessary at the outset to analyze its various concepts in respective legal systems. *Frustration* in the law of contracts in Common law designates as "the destruction of the value of the performance that has been bargained for by the promisor as a result of a supervening event." It is worthy of note that there are some points to be considered in frustrated obligations. First, a contract isn't frustrated just because it becomes difficult or expensive to perform. That is a risk that you take when you enter into a contract and what is looked for is some sort of physical impossibility. Second, the supervening event must be beyond the control of both parties. Third, the event must be unforeseeable by both parties. The legal effects of frustration is that the contract is automatically brought to an end at the time of the frustrated event, which is based on the principles of the common law that when frustration occurs in general it discharges the parties from performing their contractual duties *in future*.<sup>3</sup>

---

alternatively see also, Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances," *Journal of International Law* 3, (1987), 47.

<sup>2</sup> Abd al-Razzaq Ahmad al-Sanhuri, *Maşâdir al-haqq fi al-Fiqh al-Islâmî, Dirâsah Muqâranah bi al-Fiqh al-Gharbî* (Cairo: 1954-59), vol, 6, 95-118; and see also his *Nazariyyat al-'Aqd* (Np., n.d.); For a wider scope of discussion on the issue of frustration see Parviz Owsia, "Silence, Efficacy in Contract Formation: A Comparative Review of French and English Law." *International and Comparative Law Review* 40 (1991), 784-806; and also by the same author, "The Notion and Function of Offer and Acceptance under French and English law." *Tulane Law Review* 66 (1991-1992), 871-918; *Formation of Contract: A Comparative Study under English, French, Islamic and Iranian Law*. London: Graham and Trotman, 1994.

<sup>3</sup> See Jeffrey Lehman and Shirelle Phelps (eds.) *West's Encyclopedia of American Law* (2<sup>nd</sup> ed.) vol. 5, 12; Cf. Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances," *Journal of International Law* 3 (1987), 47.

Another concept worth considering is *Imprévision*<sup>4</sup> which in the German concept is known as *Unmöglichkeit*. This concept is much more than *frustration* in the common law sense, because in contrast to the common law doctrine of *frustration*, it covers all cases of impossibility of performance of a party's contractual obligations, even if the performance is impossible because of negligence, fault or negligence of employees. *Frustration* is thus just one part of the German doctrine of *Unmöglichkeit*. The consequences of excused performance by *Unmöglichkeit* and *Frustration* are the same: the parties are in general discharged from performing their contractual duties.

The other concept is *Wegfall der Geschäftsgrundlage*. This notion is essentially one of charged circumstances, and is a good example of the use of equitable principles in the German Law. The approach of the German Courts this doctrine is certainly more flexible than the approach of the Common Law courts under *frustration* and *force Majeure*. The court firstly readapts the contract to the changed circumstances. The judge is allowed to complete the contract and he can also change the terms or terminate it. The system is thus flexible and the consequences are quite different from those at the Common Law.

In the context of the discussion is concerned, Sanhuri treats the issue under two main headings of rescission of contract first because of excuse and second rescission of contract due to change of circumstances.

In Islamic law *nazariyyah al-ḥawâdits al-dhâri'ah* is defined as circumstances which radically disturb the equilibrium of a contractual obligation, making the performance excessively onerous for one of the contracting parties. This definition is very similar to that of the French administrative law concept of *imprévision*.<sup>5</sup>

---

<sup>4</sup>In France it was again the administrative judiciary, *Conseil d'Etat*, which intervened, and applied this doctrine to French administrative law. This legal precedent was known as the *Gas Company of Bordeaux* case and its influence on French law in general was remarkable, although the *Code Civil* itself was not altered. The old Egyptian *Ahli* and Mixed courts had rejected this doctrine as well, prior to the promulgation of the New Code.

<sup>5</sup>For detail on the issue in comparative perspective see *inter alia* Smit, "Frustration of Contract: A Comparative Attempt at Consolidation," *Columbia Law Review* 58 (1958), 286-315; Dawson, "Judicial Revisions of Frustrated Contracts: Germany," *Boston University Law Review* 63 (1983), 1039-1098.

In analyzing the historical development of intervening circumstances, Sanhuri traces it in the confine of the principles of *force majeure* or *cas fortuit* within the shari'a meaning. Although these two principles would affect the performance of the contracts in varying degree, the Shari'a does not distinguish circumstances to be categorized as *force majeure* and *cas fortuits*. Despite the fact that the theory of necessity, on the main, applies in the area of ritual religious obligations, some modern jurists use the generic meaning of 'udhr or excuse and *al-jawâih* or under the theory of necessity (*ḍarûrah*).

However, due to the different connotation of the term in each legal system, care should be taken not to make generalization and rather discusses particular cases with each characteristic. It is noteworthy that although there is a general tendency to speak of the change in circumstances as a principle of law, it would be more accurate to treat such changed circumstances as a cause giving rise to an effect and not as a legal principle in the strict sense.

One of the difficulty in discussing the change of circumstances (*nazariyyah al-ḥawâdits al-dhâri'ah*) in Islamic legal system is that it does not have a coherent theory similar to that developed in the contemporary western law. The underlying reason for this may be explained in at least in two arguments as follow:<sup>6</sup>

First, while an absence of a general theory of change of circumstances would be expected in view of the fact that Islamic law has no general theory of contract. As has been previously mentioned the lack of a general theory of contract and the separate and individual treatment of each contract by the jurists may lead one to the conclusion that Islamic law, like Roman law and others, is one of contracts rather than contract. This is in the sense that in order to qualify as a contract, a transaction must fit in one of the recognized contracts.

Second, that Western law necessitate to lay down a general theory of intervening contingencies (*al-ḥawâdits al-dhâri'ah*) since the force of the binding contract has mounted to the extent that it appeal for the expedient of reduction/reductionist therein in accordance with the exigency of justice which arise from both the influence of school of individualism, and the reductionist which is affected by the shool of social security.<sup>7</sup>

---

<sup>6</sup>Abd al-Razzaq Ahmad al-Sanhuri, *Maṣâdir al-ḥaqq fî al-Fiqh al-Islâmî, Dirâsah Muqâranah bi al-Fiqh al-Gharbî*, vol. VI, 95-6.

<sup>7</sup> *Ibid*, 96.

In Islamic law however, since the requirement of justice is permanently predominant when it contradicts with the binding force of the contract, and thus, in the light of this requirement it makes it possible to open different breaches for the binding force of the contract instead of the Islamic jurists calling for laying down a theory that can be referred to in justifying such requirement. This is in view that as long as the exigency which interpolate to which custom in this justification.

Although Islamic legal system does not develop a general theory for change of circumstances for the two reasons mentioned above, this does not preclude the fact that it recognizes a variety of practical examples for this theory in many of different cases. In his effort to analyze the historical development of the doctrine of change in circumstances, Sanhuri delves into the Islamic law theory of *al-darûrah al-syar'iyah* (legal necessity) and treat exclusively two instances which falls under the headings of excuse (*'uzhr*) in the contract of leases and contracts of services, natural disaster (*al-jawâ'ih*) in contracts for the sale of crops and fruit on trees.<sup>8</sup>

### **Opinion of Schools on Rescission of Lease for Excuses (*a'dhâr*)**

The four main schools of Islamic law have a divergent point of view of rescission (*faskh*) of a contract of lease due to excuses (*a'dhâr*). Generally speaking, the Hanafi's take a wide view, whereas the other three schools, Maliki's, Syafi'i's and Hanbali's incline to a somewhat narrower view of change of circumstances.

#### **1. Hanafi's view**

The Hanafi school was the only school that principally recognized the notion of *a'dhâr* in classical Islamic law and applied it to leases and contracts services in particular. Sanhuri maintains that according to this school a contract of hire may be terminated as a result of excuse which may fall into one of the three categories recognized in this school namely, first excuse that arises on the part of the lessee (*musta'jir*), for example his bankruptcy or change of profession; the second is that which might affect the lessor (*mu'ajjir*) i.e. incurring debts facing him to sell the leased property to free himself; the third, is that which might affect the leased object.<sup>9</sup>

---

<sup>8</sup> *Ibid*, 96-7.

<sup>9</sup> *Ibid*, 97-8.

To clarify the case in point it is necessary to analyze the provisions of the Hanafi-inspired *Majallat al-Aḥkâm* regarding the concept of *a'dhâr*.<sup>10</sup> According to this codification, in a situation whereby the performance of a given contract becomes impossible due to circumstances or events which give reasonable ground to the extent that such contract cannot be concluded, and thus legally its termination is preferred.<sup>11</sup> However, it appears that this is very much akin to the English law concept of 'frustration',<sup>12</sup> rather than to the Modern Arab contract law doctrine of intervening contingencies. And it is into the notion of this intervening events that the discussion will briefly procede.

## 2. Modern Arab Contract Law

It is interesting to note that a number of the civil codes of the Arab countries give rooms for the application of the concept of *'udhr* to lease contracts. The most notable of this is as regulated in the Jordanian Civil Code. According to this code, each party to the contract is given option to request for abrogating the contract should there arises excuses (*a'dhâr*) that may prevent the contract either from being performed or its performance from being completed.<sup>13</sup> With regard to the derivation of the doctrine of the rule, by analyzing the *The Egyptian Explanatory Memorandum of the Civil Code* it may be argued that it is based on the tenets of Islamic law principles as an application of the concept of intervening contingencies or disastrous

---

<sup>10</sup> *Majallat al-Aḥkâm*, art. 443 provides that: "If any event happens whereby the reason for the conclusion of the contract disappears, so that the contract cannot be performed, such a contract is terminated."

<sup>11</sup> *Majallat al-Aḥkâm* provides the following example: first, a cook is hired for a wedding party, but one of the spouses dies, and so the contract of hire is terminated; second, a person suffering from toothache makes a contract with a dentist to remove his tooth for a certain fee. The contract of hire is terminated in view that it cannot be categorized as a contract of hire *per se*.

<sup>12</sup> For discussion on the concept of 'frustration' in English law, see Noel J. Coulson, *Commercial Law in the Gulf States* (London: Graham & Trotman, 1984), 82. Coulson defines 'Frustration' as "a situation in which a contracting party, through the arising novel and unanticipated circumstances outside his control, finds the performance of his contractual obligations either to be impossible or to entail an unforeseen burden in the way of extra work or expenditure."

<sup>13</sup> Article 801 of the Jordanian Civil Code reads: "If any excuse (*'udhr*) arises preventing the performance of the contract or the completion of the the performance thereof, either of the contracting parties may request that the contract be abrogated as the case may be."



events found in Western law.<sup>14</sup> In addition, the adoption of the doctrine by the civil codes is deeply rooted in sound philosophical argument to avoid overstatement and stringency in the interpretation of contracts, *ḥusn al-niyyah*/good faith, and equality the final objective of which is to enhance the binding and legal effect of a given contract and make it fairer.<sup>15</sup> More over, the Syrian Court of Cassation ruled that the sanctity of a contract should be subject to consideration of justice, particularly when certain exceptional and unforeseen events materialize.<sup>16</sup>

In addition, the Iraqi Court of Cassation explained that, “the main purpose of the theory of intervening contingencies is to help the aggrieved contracting party to continue performing his contractual obligation; also to minimize the hardship inflicted upon him by the supervening event. It is important however, the aggrieved party should have been and still is , performing his obligations according to terms of the contract and his good faith.”<sup>17</sup>

In sum, based on close reading to various legislation of the Modern Arab states it becomes apparent that the rationale underlying the intervening contingencies adopted in the codes spins around preserving justice and good faith. ‘*Uzhr* than may be invoked in case of contingency which renders continuing performance of a contract harmful for one of the contracting parties.

### The Rescission of Lease Contract for Excuse

From the previous discussion, it is evident that excuse or *a’dhâr* is circumstances which have not happened at the time of the contract of lease concluded. This case resembles that to the doctrine of intervening contingencies found in Western law. However, in contrast

---

<sup>14</sup> See *The Egyptian Explanatory Memorandum of the Civil Code*, commenting on a similar provision of the Egyptian Civil Code (Art. 608), asserts that this rule has been derived from Islamic law and that it is an application of the doctrine of intervening contingencies, Vol. IV, 598.

<sup>15</sup> The *Egyptian Explanatory Memorandum of the Civil Code* explicitly states that “the reason behind the adoption of this doctrine is to avoid exaggeration and rigidity in the interpretation of contracts; good faith, equitable considerations and the customary requirement of honesty in business transactions are factors that modify the binding effect of a contract and make it more just.” Vol. II, 370.

<sup>16</sup> See reproduced version of the case in Tu’mah, *Al-Taqnîn al-Madanî al-Surif* (1992), vol. 1, 643.

<sup>17</sup> For details see The Explanation of the Iraqi Court of Cassation in *Majallat al-Qadâ al-Muqârin* 2 (1968), 218, 222.



to the intervening contingencies, something that are possible to control, so a mere excuse may be benefit for either one of the contracting parties, in cases such as that it is clear that a party's travel for fulfillment of right for booty is sufficient to rescind the lease which arise from excuse. Whereas in Islamic law, *a'dhâr* or excuse, like in Western law, does not make the performance impossible, but rather overburden it. The legal consequence of excuse that it can either rescinds the contract lease or revokes it automatically. The intervening contingency in Western law, however, derives the overburdened obligation to reasonable limits.<sup>18</sup>

The notion that constitutes excuse in Hanafi law does not necessarily mean intervening occurrence per se, and the impossibility to resist it, but rather excuse that would be inflicted on one of its parties, and which was not envisaged in the lease contract. Thus, in case where a party to a contract fails to perform his obligation due to harm which is beyond his calculation at the time of lease was concluded, this party is not forced to enter into the contract and he is entitled to right of rescission.

With this wide meaning of *a'dhâr* in the realm of contract lease that this contract is concluded based on benefit gradually. For any single benefit is to be found new contract, and the benefits in lease contract are not acquired at one time but rather step by step, and thus the objection due to excuse therein by the degree of fault of defect happens prior to delivery. More over, occurring defect prior to delivery in chapters of sale logically give right for rescission for a party to the contract.<sup>19</sup>

#### Disastrous Events (*al-jawâ'ih*)

Another related concept pertaining to intervening exigencies in Islamic law is that of *al-jawâ'ih*. In his discussion on this respect, Sanhuri groups together the Sunni school of thoughts into two main categories, namely those who recognize the doctrine and those who marginalize it. The former group represents the Maliki and Hanbali who recognize the relevance of natural disaster or *al-jawâ'ih* to contracts for the sale of crops and fruits on trees, whereas the latter group represent the Hanafi and Syafi'i who do not subscribe to such

<sup>18</sup> Abd al-Razzaq Ahmad al-Sanhuri, *Macâdir al-haqq*, vol. VI, 101-102.

<sup>19</sup> *Ibid*, 101-102.

a theory which basically arise from the fact that they do not validate those type of contract sale.

Sanhuri defines *al-jâihah* (pl. *al-jawâ'ih*) as a situation in which fruit suffers from misfortune from heaven such as cold, or from plant disease like rotten and drought are considered irresistible events without controversy of views among the jurists.<sup>20</sup>

A great majority of Maliki jurists maintain that *al-jawâ'ih* is circumstance that is beyond human control. According to this school, it is an irresistible character of the events such as cold, drought, plant disease and locust, each of which may devastate either the market value of the sold crops or fruit prior to its harvest.<sup>21</sup> However, they have divergent opinion pertaining to whether human action such as an army at war might qualify as disastrous event to which they hold to the positive inclination, in the sense that they could be considered as intervening event.

In addition, similar to the Maliki, in the Hanbali school the underlying criterion of *al-jawâ'ih* is the irresistible character which also designated as an epidemic like high winds, drought and other acts of God. This, in turn, eliminates the case of theft, in view that it can be avoided by displaying a certain degree of caution.

Accordingly, The views within the two schools also varies as to the application of this theory considering first, the nature of the damaged objects either in crops, fruits or others, and second the time the disaster occurred. The Maliki holds that the doctrine of *al-jâ'ihah* is to be applied only when at least one third of the fruits or crops was damaged, the case of which would validate the buyer's right to claim for a proportionate reduction in price. In somewhat different to this view, the majority of Hanbali jurists maintains that any amount of effect of *al-jâ'ihah* would entail the buyer right to claim for a reduction of the value of the objects (crops and fruits) damaged by occurrence beyond the contemplation of the parties at the time the agreement was made. Likewise, in case in which the crops were entirely destroyed, both schools holds the opinion to terminate such contract sale.<sup>22</sup>

<sup>20</sup> *Ibid*, 110.

<sup>21</sup> *Ibid*, 111.

<sup>22</sup> Muwaffaq al-Dîn Muhammad bin 'Abdillah bin Muhammad Ibn Qudâmah, *Al-Mughnî*, (1972 ed.), vol. IV, 216 as quoted in Abd al-Razzaq Ahmad al-Sanhuri, *Macâdir al-haqq*, vol. 6, 115-116. Herein after Ibn Qudâmah, *Al-Mughnî*.

In the case where there occurs a general apprehension which prevents the dwellers of that place wherein the thing hired is situated, or there is some impediment in the area to access to the land leased for agriculture, etc.; this gives the lessee the right to avoid (the contract), because it is a preponderating matter which precludes the lessee from benefitting from the use of the thing; this option is treated as deprivation of the thing. As if he hired a beast to be ridden, or to carry a load to an appointed place and the road is cut by fear of some event, or he intends to go to Mecca and the people did not go on the pilgrimage that year by that road – in each of these cases the hiring is avoided.<sup>23</sup>

If (the hirer) likes to leave the matter until the use of the thing can be enjoyed, he may do so, because the right belongs to both (i.e. hirer and hirer), is not against them; so that if the fear is peculiar to the hirer, as, for example, that he alone fears the nearness of his enemies to the place leased, or their presence on the road, then he has no right to avoid (the contract) because this is an excuse peculiar to him, which does not prevent enjoyment of the use totally or in very general sense of the word.

An example is his illness: if he is confined or ill or loses his money or his goods are damaged, this does not give the right to avoid the hiring, because he has abandoned the enjoyment of the use of the thing for a reason peculiar to him, which does not absolve him from the necessity of paying the hire, just as if he had abandoned the same voluntarily.<sup>24</sup>

If the agricultural holding is flooded or perishes by fire or locusts or frost or other cause, then the hirer is not liable in damages nor is there any option in the hirer – this was provided by Ahmad Ibn Şanbal and we know of no dispute there in, it is also according to the school of Syafi'i. Because the damage is outside the contract, and the property of the hirer is damaged thereby, it is as if one hires a shop and his goods catch fire therein. However, if one is precluded from cultivating the land or the water is cut off therefrom, then the hirer has the option because this is of the thing (hired) itself and if the water is so deficient as not to suffice for the cultivation, then he

<sup>23</sup> Abd al-Razzaq Ahmad al-Sanhuri, *Mashâdir al-haqq*, vol. VI, 115.

<sup>24</sup> Ibn Qudâmah, *Al-Mughnî*, vol. 5, 418, quoted by Abd al-Razzaq Ahmad al-Sanhuri, *Macâdir al-haqq*, vol. 6, 109.

has the right to avoid, because this is a defect.<sup>25</sup>

The foregoing short extracts illustrate that the principles of the Hanbali school approximate more to those of *imprévision* in Western civil and administrative law. In order to analyze the issue at hand further, it is worthy of pursuing the instances of the sale of fruits on the tree. A variety of literature in Islamic law are available pertaining to the occurrence of *al-jawâih* in which damage occurring to the fruits by such as rot, storm, etc. prior to harvest time.

Both the Maliki's and the Hanbali's take wide view of *al-jawâ'ih*; the other two schools have not established the theory as such. According to them if the fruit has been sold or on the tree and thereafter perishes, the risk is on the buyer. The Hambali's and Maliki's take the contrary view – the risk of *al-jawâih* remains with the seller; however, where appropriate there is a reduction in the price and here again we find the emphasis upon the buyer. Thus, it can be argued that mere permission to handle does not confer liability of receipt (of the goods), as the benefits (*manâfi'*) of hire, where dealing in the thing hired is granted to the hirer and if it is damaged that is then the risk of the hirer.<sup>26</sup>

Where the damage is due to the acts of third parties then according to the Hanbali school the buyer has the option to rescind the contract and ask the seller to return the price; or stay with the contract and demand the value from the faulty party. In *al-jawâ'ih* at Hambali law if the fruits perish completely then the price may be demanded back from the seller and so on pro rata to the loss.

## Conclusion

Based on the foregoing discussion one might come to the conclusion that despite the fact that the traditional Islamic legal system has its own mechanism to deal with events or circumstances unforeseen at the time of contract, it would be logically interesting to determine the extent to which the concept of intervening contingencies (*nazariyyat al-jawâ'ih*) influence its contemporary form.

---

<sup>25</sup> For further discussion on this issue, see Abd al-Razzaq Ahmad al-Sanhuri, *Maşâdir al-Haqq*, vol. VI, 110.

<sup>26</sup> See Ibn Qudâmah, *al-Mughnî*, vol. IV, 216; Cf. Abd al-Razzaq Ahmad al-Sanhuri, *Mashâdir al-Haqq fî al-Fiqh al-Islâmî, Dirâsah Muqâranah bi al-Fiqh al-Gharbî*, (Cairo: 1954-59), vol. 6, 95-118; and see generally his *Nazariyyat al-'Aqd* (Np., n.d.).

The doctrine of unforeseen circumstances in contemporary legislation of Arab countries, on the main, is expressed in the same term which understandably as result of the origin derivation of the French law le theorie de l'imprévision.<sup>27</sup> Article 146 (2) of the Iraqi Civil Code says that " Where there arise unforeseen circumstances which are due to 'exceptional events which have a widespread and general effect' and which result inability to perform a contractual obligation as originally envisaged 'even though performance is not intrinsically impossible,' and the contracting party shows that performance will involve 'enormous loss,' then the court may 'after weighing in the balance the interests of both parties, adjust the obligation to reasonable limits if justice so requires.

Although it is true that there is no such general principle of classical Islamic law, it would be interesting to assert that what Sanhuri's effort in synthesizing both the Islamic and Western law in the *Maṣādir al-Ḥaqq* is of utmost important. What's more, it is conceivable that in response to the exigencies of the ever-increasing problems of modern life which brings with it alien concept, does not contradict with the provisions of the Shari'ah since the views of any of the schools of Islamic legal thought can justifiably be referred to. []

## Bibliography

- Arabi, Oussama. "Al-Sanhuri's Recunstruction of the Islamic Law of Contract Defects." *Journal of Islamic Studies* 6(2) (1995).
- Aznan, Hasan. "A Comparative Study of Islamic Legal Maxims in Majallat al-Ahkam al-'Adliyyah, Jordanian Civil Code and United Arab Emirates law of Civil Transaction." *The Islamic Quarterly* 48(1) (2004).
- Badr, Gamal Moursi. "The Agent's Contract with Himself: With Special Reference to Islamic Law." *The American Journal of Comparative Law* 30 (1982)
- Ballantyne, W.B. *Commercial Law in the Arab Middle East: The Gulf States*. (London: Lloyd of London Press, 1986).
- \_\_\_\_\_. "The Constitutions of the Gulf States a Comparative Study." *Arab Law Quarterly* 1(2) (1986).

---

<sup>27</sup> Article 146 (2) of the Iraqi Civil Code.

- Coulson, Noel J., *Commercial Law in the Gulf States*, (London: Graham & Trotman, 1984).
- Dawson, "Judicial Revisions of Frustrated Contracts: Germany," *Boston University Law Review* 63 (1983).
- The Egyptian Explanatory Memorandum of the Civil Code* Vol. IV; Vol. II.
- Ibn Qudâmah, Muwaffaq al-Dîn Abî Muhammad bin 'Abdillah bin Muhammad, *Al-Mughnî*, (1972 ed.), vol. IV. *The Jordanian Civil Code*.
- Lehman, Jeffrey and Shirelle Phelps (eds.) *West's Encyclopedia of American Law* (2<sup>nd</sup> ed.) vol. 4 (USA: Thomson Gale, 2005).
- Liebesny, Herbert J., "Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institution." *The American Journal of Comparative Law* 20 (1972).
- \_\_\_\_\_. *The Law of the Near and Middle East: Readings, Cases and Materials*. Albany, (New York: SUNI Press, 1975).
- Owsia, Parviz, "Silence, Efficacy in Contract Formation: A Comparative Review of French and English Law." *International and Comparative Law Review* 40 (1991).
- \_\_\_\_\_. "The Notion and Function of Offer and Acceptance under French and English law." *Tulane Law Review* 66 (1991-1992).
- \_\_\_\_\_. *Formation of Contract: A Comparative Study under English, French, Islamic and Iranian Law*. (London: Graham and Trotman, 1994).
- Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances," *Journal of International Law* 3, (1987).
- al-Sanhûrî, 'Abd al-Razzâq Ahmad, *Masâdir al-Haqq fî al-Fiqh al-Islâmî, Dirâsah Muqâranah bi al-Fiqh al-Gharbî*, Cairo, 1954-59., 6 vols.
- \_\_\_\_\_. "Le Droit musulman comme element de refonte du Code Civil Egyptien." in *Introduction a l'Etude du Droit Compare*. (Paris: Librairie Generale de Droit et de Jurisprudence, 1938).
- \_\_\_\_\_. *Nazariyyat al-'Aqd* (Np., n.d.).
- Smit, "Frustration of Contract: A Comparative Attempt at Consolidation," *Columbia Law Review* 58 (1958).