A Comparison of *Majalla*'s *Kitab al-Buyu'* and the French Civil Code

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Abstract
This article will first examine the views preferred by the Majalla Commission to the main fatwā in order for Kitab al-Buyu to be regulated with the provisions in accordance with the needs of the century. Then the sales theory of the French Civil Code will be mentioned. The concept of goods, conditions, rights of option, sales of rights, wholesales and production orders will be our focus. Then, the minutes documenting the Majalla amendments of the law-making commissions will be examined from a comparative perspective. Thus, we will come to a conclusion on whether the amended articles match up with the French Civil Code. During the enactment of Majalla, the intellectual movement defending the quotation of the French Civil Code was not successful. However, we can say that the French Civil Code's theory of sale found a suitable door to influence Majalla, even the Islamic Law of Obligations, through amendments, since the Ottoman jurists of the period largely adopted the Western conception of French civil law, especially the principle of freedom of contract and liability.

Keywords
History of Islamic Law, Majalla, French Civil Code, Sales Contract, Condition, Right of Option, Production Order Contract, Wholesales.

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Mecelle'nin *Kitabü'l-Buyu*'u ve Fransız Medeni Kanunu Bağlamında Bir Mukayese

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Öz

Bu makale öncelikle Mecelle'nin Kitabü'l-Buyu'unda "maslahat-ı asra evfak nasa erfak" hüküm tesis edebilmek için, Mecelle Cemiyeti'nin fetvaya esas görüşten ayrılmayı gerekli gördüğü meseleleri tetkik edecek, ardından Fransız Medeni Kanunu esas alınarak, satım akdi teorisine değinilecektir. Odağımızda mal kavramı, şartlar, muhayyerlikler, hakların satışı, toptan satışlar ve üretim siparişleri (ıstısna') bulunmaktadır. Ardından kanun yapıcı komisyonların Mecelle tadilatını belgeleyen tutanaklar, karşılaştırmalı bir perspektifle incelenecektir. Böylece tadile uğrayan maddelerin Fransız Medeni Kanunu'yla ne kadar örtüştüğüne dair sonuca varmaya çalışacağız. Mecelle'nin yürürlüğü esnasında Fransız Medeni Kanunu'nun iktibasını savunan fikri hareket başarılı olamasa da dönemin hukukçuları Batılı medeni kanun tasavvurunu, özellikle de mukavele serbestliği ve mesuliyet ilkesini büyük ölçüde benimsedikleri için, Code Civil'in satım teorisi, tadilatlar aracılığıyla Mecelle'yi hatta İslam Borçlar hukukunu etkilemeye elverişli bir zemin bulmuştur, diyebiliriz.

Anahtar Kelimeler

İslam Hukuk Tarihi, Mecelle, Fransız Medeni Kanunu, Satım Sözleşmesi, Şart, Muhayyerlik, Üretim Sipariş Sözleşmesi, Toptan Satış

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Introduction

Majalla was designed to be the main law of the Ottoman court system, like the French Civil Code, but limited to fiscal matters. Fiscal issues that are not regulated in the Commercial Code are the subject of *Majalla*. As a matter of fact, the Commercial Code is the first foreign text to be included in domestic law with a partial adaptation. For example, commercial issues such as commercial paper and brokerage were solved according to Commercial Code, while issues such as surety and power of attorney were solved according to *Majalla.*[1] In the French legal model, commercial law including exceptions to the French Civil Code is applied first for commercial transactions. Matters for which there is no special provision in the commercial law are subject to the French Civil Code, which is designed as the main law. Standard fiscal transactions are settled in civil courts with the provisions of the Civil Code.[2] The legal structure of the reform period was designed according to this model.[3]

The intellectual movement advocating the citation of the French Civil Code instead of the *Majalla* to complete the Commercial Code, which was quoted from the French law,[4] caused debates that flared up from time to time during the implementation of the *Majalla*. Mandelstam, the Russian Embassy Translator of the period, is one of the influential figures among those who imposed this idea. He described *Majalla* as a text that could not meet the needs of the century, was too traditional to provide guarantees for commercial transactions, and was far from economic tendencies.[5] Kucuk Ḥamdī, on the other hand, argued that *Majalla* should be amended by using the *fatwās* of four *fiqh madhhabs* if needed and that French Civil Code was not needed. Otherwise, a legal ground suitable for colonization would have been formed.[6] However, some of the legal scholars of the period shared Mandelstam's opinions. Abdurrahman Adil Bey openly expresses his opinion that *Majalla* failed just because it insisted on the *Ḥanafī* school. According to Yanko Vitinos, a legal scholar of Greek descent, *Majalla* prevented Ottoman Sultanate from a hundred years of development.[7] Throughout the modern period, *Majalla* continued to be criticized for not straying beyond the *Ḥanafī* school, keeping the provisions of property and interest in a very narrow framework, and not approving the sale of rights and receivables.[8] Onar, stated that *Majalla* cannot be accepted as a law due to its nature, it is a "scientific work," but it was used instead of civil law for a period.[9] According to Velidedeoglu, *Majalla* was advanced compared to its time, but it was an undeveloped law since it could not get out of the boundaries of the *Ḥanafī* school. Instead of regulating *Majalla*, the French Civil Code should have been preferred.[10]

Some of the literature on *Majalla* deals with the amendments and evaluates them within their reasons and historical context.[11] Kılınç and Karakaya express that the Western States are extremely uncomfortable with the implementation of the *Majalla* in addition to the Commercial Code in the mixed commercial courts and that they press for a direct application to the French Civil

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1 İbrahim Ihsan, "Ticaret Kanunnamemiz", *Istishāra* 19 (21 Kanunisani 1324), 865; Aḥmad Ziyā, *Uṣūl-i Muḥākeme-i Ḥukūkiye Kānūnu Sharḥi* (Dār al-Khilāfat al-ʿĀliyya: Karābet Maṭbaʿası, 1322), 7-8; M. Macit Kenanoğlu, *Ticaret Kanunnâmesi Ve Mecelle Işığında Osmanli Ticaret Hukuku* (Ankara: Lotus, 2005), 132-139; Avi Rubin, "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification", *Journal of the Economic and Social History of the Orient* 59/5 (2016), 843.

2 Mishon Vanṭura, *Mukāyasa-i Qawānin-i Madaniyya* (Dersaadet: Kanāʿat Maṭbaʿası, 1330), 8.

3 Avi Rubin, "Legal borrowing and its impact on Ottoman legal culture in the late nineteenth century", *Continuity and Change* 22/2 (2007), 279.

4 Rubin, "Legal Borrowing and its impact on Ottoman Legal Culture in the late nineteenth century", 283.

5 Mahmad Ārif, "Hukūmat-i Ajnabiya ila Munāsabatta Maḥākim-i Osmāniye", *ʿIlm-i Ḥukūk ve Mukāyasa-i Qawānīn Mecmūʿasi* 1/2 (İstanbul: Hilāl Maṭbaʿasi, 1325), 180-185.

6 For Kucuk Ḥamdī and his arguments: Abdullah Kahraman, "Elmalı M. Hamdi Yazır'ın Mecelle Müdafaası", *Elmalılı M. Hamdi Yazır Symposium: Akdeniz University Faculty of Theology (November 2-4, 2012)*, ed. Ahmet Ögke, Rıfat Atay (Ankara: TDV, 2015), 231-264.

7 See "Mecelle Hakkında", *Sabīl al-Rashād* 23/577 (20 Teşrinisani 1329/20 Rebiülahir 1342), 77-78; Abdurrahman Adil. "Mecelle mi? Kod Napolyon mu?", *Hādisāt-ı Hukūkiyya* 2/13 (İstanbul: Ikdām Maṭbaʿası, Kanunievvel 1339/1923), 184.

8 For some criticisms of Majalla, see. M. Âkif Aydın, "Mecelle-i Ahkâm-ı Adliyye", *TDV İslam Ansiklopedisi* 28 (Ankara: TDV Yay., 2003), 234; Mehmet Gayretli, "Tanzimat Sonrasından Cumhuriyete Kadar Olan Dönemde Kanunlaştırma Çalışmaları" (İstanbul: Marmara University, Phd. Thesis, 2008), 220; S. Örsten Esirgen, "Osmanlı Devleti'nde Medeni Kanun Tartışmaları: Mecelle mi, Fransız Medeni Kanunu mu?", *OTAM* 29 (2011), 41.

9 Sıddık Sami Onar, "Osmanlı İmparatorluğunda İslam Hukukunun Bir Kısmının Codification'u", *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 20/1-4 (1954), 64.

10 Hıfzı Veldet Velidedeoğlu, "Kanunlaştırma Hareketleri ve Tanzimat", *Tanzimat-I* (İstanbul: Maarif, 1940), 187-196.

11 Sami Erdem, "Mecelle Tadil Tartışmaları Bağlamında II. Meşrutiyet'ten Cumhuriyet'e Din, Hukuk ve Modernleşme", *100. Yılında II. Meşrutiyet: Gelenek ve Değişim Ekseninde Türk Modernleşmesi Uluslararası Sempozyumu Bildiriler (20-24 Ekim 2008)* (Marmara University, 2009), 249-261; Ahmet Akgündüz, "1920-1924 yılları Arasında Yapılan Mecelle Tadilleri ve Mezheplerarası Mukayese Uygulaması", *Uluslararası Mecelle Sempozyumu: International Majalla Symposium Book*, ed. Fethullah Soyubelli (Bursa: Bursa Kültür A.Ş., 2021), 25-84; Talha Yıldız, "Kanunlaştırma Hareketlerini Tetikleyen Sebepler Açısından Mecelle İle Code Civil'ın Mukayesesi", *Uluslararası Mecelle Sempozyumu: International Majalla Symposium Book*, ed. Fethullah Soyubelli (Bursa: Bursa Kültür A.Ş., 2021), 455-464.

Code. Kılınç ve Karakaya associate the amending works of *Majalla* with these pressures. Provisions of *Majalla* such as savings and damage liability before delivery and not counting benefits as property, are the focused problems of these pressures.[12] Çoban handled the *Majalla* articles discussed by the amendment commissions in terms of Islamic law.[13] Yıldırımer evaluated the definition of *Majalla* as an unsuccessful and incomplete civil code by referring to its ideological background. However, it does not examine the provisions of the *Majalla*.[14] There is almost no one who compares *Majalla* and the French Civil Code in studies addressing the criticisms of *Majalla*. In this sense, Esirgen is one of the first studies that criticizes Majalla and Civil Law in terms of power of attorney contract. However, the legal context of the French Civil Code has not been adequately examined, and no reference has been made to the *Majalla* annotations in the analysis of the *Majalla* provisions.[15] Küçüksu touches upon *Jalal Nuri*, *Mustafa Āsim* and *Sayyid Nasīb*'s criticisms of the *Majalla*, and states that the views emphasizing the need to amend the *Majalla*, especially due to the voidable of conditional sales contract, may have been influenced by the French Civil Code. However, he did not work directly on the French Civil Code and the *Majalla* text.[16] In this study, the contract of sale provisions of *Majalla* and the French Civil Code will be compared in terms of their legal contexts in a limited framework.

Majalla Commission committed to gather the provisions of theory of Obligations *Ḥanafī*, which meet the needs of the age with preferences that are "more appropriate to society and the age" at the very beginning of the process.[17] Fiscal issues were resolved in *Sharī'a* courts throughout the classical period with the *fatwās* of the *Ḥanafī* fiqh, and after the Edict, became divided step by step.[18] *Majalla* was used mostly in the fiscal field, which is separated from the *Sharī'a* system. The provisions and principles contained in it were arranged in accordance with the *Ḥanafī fiqh*. However, the implementation of the *Majalla* together with other legislation in new judicial units made it difficult to apply the classical doctrine, and the fiscal field entered a dynamic process under the pressure of these new conditions. *Fatwā* preferences were based on the views obtained from within the school first and then from other schools by referring to the needs of people.[19] According to the Ottoman jurists, as stated in the *Majalla* mandate,[20] the new needs and neceesities of the period had to be taken into account while amending the *Majalla.*[21] In this article, we will first analyze the *fatwā* preferences in the *Kitāb al-Buyūʿ* of *Majalla* that provide solutions to the needs and problems of the age by benefitting from the mandate and *Majalla* commentaries. Then, Civil Code's approach to the sales contract will be discussed, and finally, we will analyse a connection between *Majalla* and French Civil Code over the amended articles.

Sales Contract in *Kitāb al-Buyūʿ*

Majalla brought together the legal provisions on fiscal transactions with 16 books and 1851 articles. The general principles were arranged in the introduction. The book regulating the sales contract consisted of 7 chapters and 403 articles. The terms related to the sales contract are described in 66 articles of the introduction. Then, the establishment of the contract, the goods as a subject of the sales contract, the sale price, disposal on the goods and the price, the delivery and receipt of the goods, the rights of option and the types of sales are mentioned.[22]

The property was defined in *Majalla* as something that a person owns (art. 125), that human nature tends to, that can be accumulated (art. 126). Things such as a free person, carrion, a grain of wheat remain outside the description of property. Since the benefits cannot be accumulated and stored, they are not accepted as goods. This is because accumulation is related to material existence, and things that do not originally exist cannot be accumulated. Benefits are interests emerging from the use

12 Ahmet Kılınç-Harun Karakaya, "Batılı Devletlerin Karma Ticaret Mahkemelerinde Mecelle'nin Uygulanmasına Yönelik Eleştirilerinin Değerlendirilmesi", *Kırıkkale Hukuk Mecmuası* 2 (2002), 59-89.

13 Ayşegül Çoban, "Mecelle'nin Tadil Edilen Maddelerinin İslam Hukuku Açısından Değerlendirilmesi" (Konya: Selçuk University, Master Thesis, 2008), 71-72.

14 Şahban Yıldırımer, Mecelle'ye Yöneltilen Tenkitler ve Bu Tenkitlerin Değerlendirilmesi", *Cumhuriyet Üniversitesi İlahiyat Fakültesi Dergisi* 16/2 (2012), 417-445.

15 Seda Örsten Esirgen, "Mecelle ve Fransız Medeni Kanunu Çerçevesinde Vekalet Sözleşmesi", *Ankara Barosu Dergisi* 1 (2013) 167-184.

16 See Selman Küçüksu, *Mehmed Said Bey'in Ahkâmu'l-Bey' Bi'l-Vefâ İsimli Risalesi Çerçevesinde Son Dönem Osmanlısında Hukuki Tartışmalar* (İstanbul: İstanbul University, Master Thesis, Sosyal Blimler Enstitüsü, 2020), 66-67.

17 See "Mecelle Hakkında", 78.

18 Ziyā, *Uṣūl-i Muḥākeme-i Ḥukūkiye Kānūnu Sharḥi*, 8.

19 For the dynamics of this process leading to modern nassism, see Mürteza Bedir, "Kur'an ve Sünnet Söylemi, Fıkıh Usulü ve İçtihat: Modern Nassçılığın Doğuşuna İlişkin bir İzah Denemesi", *Modernleşme Protestanlaşma ve Selefileşme: Modern İslam Düşüncesinde Nassın Araçsallaştırılması*, ed. Mürteza Bedir, Necmettin Kızılkaya, Merve Özaykal (İstanbul: İSAR, 2019), 19-60.

20 For a copy of the mandate, see ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām* (İstanbul: Alem Maṭbaʿası, 1313), 1-8.

21 The amendment process has been initiated with 'Iḥḍār-ı Qawānīn' due to the accessibility of the minutes. See "Iḥḍār-ı Qawānīn Komisyonları", *Cerīde-i ʿAdliye* 149 (Ağustos 1332), 65-68. Gedikli refers to an earlier period based on documents aimed at its re-establishment after the abolition of the Majalla Commission. See Fethi Gedikli, "İkinci Meşrutiyetten Sonra Mecelle Cemiyetinin Tekrar Kurulma Süreci", *Uluslararası Mecelle Sempozyumu: International Majalla Symposium Book*, ed. Fethullah Soyubelli (Bursa: Bursa Kültür A.Ş., 2021), 419-426.

22 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām Sharh Majallat al-Aḥkām* (Dersaadet: Mahmūd Bey Maṭbaʿası, 1310), 1-29.

of property that has material existence (art. 159). They are attributes, not originals.[23] *Majalla* follows the sales contract theory of the *Ḥanafī* school: Sales is exchanging a property with a property (art. 105). Subject of the contract is the property designated in the contract, it is the original purpose of the contract (art. 151). The price is given in exchange of the goods bought (art. 152).[24] The contract is completed with proposal and acceptance (art. 167), and this may be done verbally or through correspondence; however, the document is only a means of proof (art. 173).[25] After the contract, the ownership of the goods passes to the buyer, the ownership of the price to the seller (art. 369). Invalid contract does not take effect. Even if the customer takes the goods, they just hold the goods temporarily (art. 370). In voidable (*fāsid*) contracts, the customer takes the possession of the goods only with the permission of seller (art. 371).[26]

Majalla largely built the conditions that the property should have on the preferred *fatwās* of the *Ḥanafī* school. The property must be available (art. 197), allowable (art. 199) and possible to deliver (art. 198). The provisions related to property that do not meet these conditions have been regulated separately: Sale of the property which is impossible to deliver is invalid (art. 209). Something that is not property cannot be sold or exchanged (art. 210).[27] If the qualifications of the property are not known enough, the contract is voidable (art. 213). Sale of the property that does not exist during the contract is invalid (art. 205). Next this rule, as a matter of custom and necessity, the authorization *fatwā* was regulated: the existing parts and the unseen parts of the vegetable-fruit that appears in parts, such as roses and artichokes, were approved on the basis of the opinion of Imām Muḥammad (art. 207). The *Majalla* Commission strives to open the way to authorization as much as possible in the works that people cannot give up, to consider customs and traditions.[28]

Kitāb al-Buyūʿ in Terms of Meeting Modern Needs

Conditional Sales and Rights of Option

Conditional sales are an effective example of how the economic, commercial, and legal developments of the time suppress the classical practice and follow the *Majalla* Commission's method of ensuring the compliance between jurisprudence and time. Most of the conditions put forward in the trades of the period are invalid according to the *Ḥanafī* school. Therefore, the *Majalla* Commission emphasizes in the mandate that the most important issue of *Kitāb al-Buyūʿ* is the conditions. In the mandate, first of all, different views on the issue of conditions have been considered. Conditions related to the duration may be put forward in the *Mālikī* school, and to the benefit in favor of the seller in *Ḥanbalī* school. However, they are not preferred only because they are operated in favor of the seller. Ibn Abī Laylā and Ibn Shubruma had opposite opinions. Ibn Abī Laylā defends the invalidity of both contract and condition, while Ibn Shubruma defends the authorization of contract and condition. Both of them have been criticized because the *Majalla* Commission believes that the problem cannot be solved with an absolute authorization or invalidity.[29] Then the *Ḥanafī* condition theory is evaluated. The conditions are examined in three categories as "permissible (*jāiz*)", "voidable (*fāsid*)" and "abolition (*laghw*)". If a condition that is not beneficial for the parties is put forward in the contract, it is invalid. Conditions that are not necessary for the sales contract or that do not support it but contain benefits for one of the parties are voidable and make the contract voidable. Sales contract aims the exchange of property and price. Neither the customer should have to endure an extra effort and hassle for the goods they buy nor the seller for the price. Such conditions are often voidable because they cause conflict.[30] Since the conditions that have become known in society and have become established by custom will not create conflict, they should be excluded from the provision of voidability. In the *Ḥanafī madhhab*, conditions involving unilateral benefits are associated with *ribā*, which means "unpaid surplus," as well as causing disagreements between the parties. However, no concerns regarding *ribā* were mentioned in the *Majalla* mandate, and it was preferred that they be excluded from the voidable category, since there would be no possibility of conflict if the benefit condition was settled in custom.[31]

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23 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 355.

24 Gold and silver are always accepted as payment. Copper coins and banknotes can be used as payment as long as they are in circulation on the market (art. 130). See ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 358, 372.

25 Jamāladdīn, "Mukāyese-i Kavānīn-i Medeniyye: Majalla-i Aḥkām-ı ʿAdliye-Fransa Kānūn-i Medenīsi", *ʿIlm-i Ḥukūk ve Mukāyasa-i Qawānīn Mecmūʿası* 1/1 (31 Mart 1325), 23; ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 407-410.

26 Jamāladdīn, Mukāyese-i Kavānīn-i Medeniyye", 24.

27 The sale of such things as the fruit of a tree that has not yet formed, the milk that is still in the breast of a sheep, grapes that will grow in a vineyard, the internal fat of a live sheep, the seeds of an uncut watermelon are invalid. See ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 494.

28 ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām*, 7.

29 ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām,* 5-6.

30 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 361.

31 ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām*, 6.

According to the *Majalla* Commission, classical practice causes difficulties in fiscal transactions of the time, especially in trade, so the classical theory was stretched by approving the customary conditions. However, what the voidable conditions consist of is not explained in a separate article in *Majalla*, it is almost kept silent. The Commission's approach is expressed as follows in the mandate: commercial transactions would be exempt from *Majalla* anyway, mostly these transactions were carried out according to the commercial practices known and applied among the merchants. Existing regulation on voidable conditions would not pose a problem for these transactions. Conditional transactions, which have no place in the custom, unknown and exorbitant benefit, would remain voidable in this arrangement. Due to the belief that the regulation would be sufficient, it was contented with the explanation of the conditions that do not harm the sales contract in the *Ḥanafī* school. Although the results are explained in *Majalla*, not explaning voidable conditions independently can be considered as a method aiming to expand the legal practice regarding the conditions as the custom changes. Since commercial contracts are subject to exception clauses from *Majalla*, and are often carried out on customary terms, the Commission's solution would not create problems. In any case, excluding the unknown, unorthodox conditions from the invalidity would not be of any significant benefit in order to facilitate fiscal transactions. It can be said that the Commission wanted to support the customary/to be customary conditions in commercial and fiscal markets and became largely successful.[32]

Sayyid Nasīb, professor of Civil Law at *Dār al-Funūn*, extremely criticized the *Majalla* Commission for its stance on conditional sales. He tried to prove that the explanations regarding the conditions of the *Majalla* Commission in the mandate were superficial and of uncertain origin. In his assessment, he referred to Sarakhsī's *al-Mabsūt*, Ibn Humām's *Fatḥ al-Qadīr* and Sayyid Murtaḍa *Ukūd al-Jawāhir*. In fact, he tried to prove that conditions and contracts were invalid according to Abū Ḥanīfa, valid according to Ibn Shubruma, according to Ibn Abi Leyla, contract is valid, and condition is invalid.[33] He continues his assessment: conditions other than the freeing of slaves are voidable in the eyes of *Shāfiʿī*s, both the contract and the condition are invalid. *Mālikī*s add a few more exceptions to the condition of freeing slaves, and do not generally approve of the conditional sale. According to Imam Ahmet, if there is only one condition in the contract, it is valid, if there is more than one, it will be voidable.[34] According to Ibn Abī Laylā, the contract is valid, the condition is void, and Abū Ḥanīfa, both the condition and the contract are invalid. Ibn Shubruma, on the other hand, is of the opinion of the validity of the condition and the contract. Sayyid Nasīb states that, contrary to what is stated in the mandate, Abū Ḥanīfa and Ibn Shubruma are of opposite views, but Ibn Abī Laylā's view is between the two.[35] Sayyid Nasīb complains that customs and needs are not taken into account, especially in the issue of conditional sales, although it is stated in the mandate that the *Majalla* will be arranged according to customary and modern needs. Sayyid Nasīb strongly criticizes the theoretical stance of the *Ḥanafī* school on conditions. In particular, he is against associating conditions with unilateral benefits with *ribā*. He does not consider it sufficient for the *Majalla* Commission to accept the customary unilateral benefit conditions without associating them with *ribā*, and thinks that the opinion of Ibn Shubruma should be preferred. According to him, *Majalla* should open the widest possible area for conditional sales, and accept agreements concluded with mutual consent as valid in principle.[36] But in reality, the *Majalla* Commission stretched the classical theory, which did not approve of the conditions, by adding the trader's custom of the time, and made room for the conditions provided that they compromised with the custom. *Majalla* accepts custom as a valid reason for changing the *fatwā* in most cases. There are articles supporting custom in the *Majalla*, and even references are made to the fact that the provision can change with the change of time.[37]

Now we can consider the provisions of the conditions in a holistic manner. There are two rules about conditions in *Majalla*: if the validity of a condition is established, the validity of anything dependent thereon must also be established (art. 82), the conditions must be abided by as much as possible (art. 83). A condition that cannot be realized in the contract cannot be put forward, conditions that do not provide any benefit to the parties are not respected. These conditions are invalid.[38] A matter that is bound by a valid and legitimate condition in a contract becomes final when that condition is fulfilled. The matter subject to the condition does not accrue until the condition is fulfilled. What is not legitimate cannot be conditioned (art. 82).[39] As with

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32 ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām*, 6.

33 Sayyid Nasīb, "Mecelle'nin Islahına Doğru", *Darülfünun Hukuk Fakültesi Mecmuası* 1/4 (Eylül 1332), 410-414.

34 Sayyid Nasīb, "Mecelle'nin Islahına Doğru", 410; Abū Muḥammad Muwaffaq al-Dīn ʿAbdullah b. ʿAhmad b. Muḥammad b. Qudama Jammāʿīlī Maqdisī Ibn Qudama (620/1223), *al-Mughnī*, thk. ʿAbdullah b. ʿAbdulmuḥsin et-Turkī, ʿAbd al-Fattāḥ Muḥammad al-Hulw (Riyadh: Dār al-ʿĀlam al-Kutub, 1999/1419), 6/321-326.

35 Sayyid Nasīb, "Mecelle'nin Islahına Doğru", 414.

36 Sayyid Nasīb, "Mecelle'nin Islahına Doğru", 408, 419-423.

37 See articles 39, 43, 44, 45, Majalla.

38 Jamāladdīn, "Mukāyese-i Kavānīn-i Medeniyye", 27-28.

39 ʿAlī Khaydār, Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām, 322-325.

the condition of withholding the property until the price is paid, the conditions supporting the requirements of the contract are binding (art. 186). Conditions such as pledge or requesting a surety to confirm the payment are valid (art. 187). The next article clearly states that the conditions that have become customary and known in society are valid (art. 188). Conditions such as stretching the tenter, nailing the lock to its place, and patching up a torn dress are given as examples. It is legitimate for the customer to buy fruit, some of which is ripe, some of which is waiting to ripen, provided that it stays on the tree for a while.[40] Conditions that are not beneficiary or harmful to the parties are invalid (art. 189). Conditions such as not to sell the property to someone else, not to grant, not to ride, not to wear are invalid. What is not beneficiary to anyone, but is harmful, must not be conditioned.[41] To summarize, articles 186-188 explain the permissible conditions, and article 189 explains the abolition conditions. However, there is no article related to the conditions that invalidate the contract. Jamāladdīn Efendi, one of the *Majalla* teachers from Ottoman Law School, defines voidable conditions as " *conditions that are contrary to the results of the contract and do not have a place in custom have the potential to create conflict because they provide benefit to one of the parties and contain uncertainty*". Accordingly, the conditions for deception, which may lead the parties to conflict because they are not customary, damage and impair the contract.[42] ʿAlī Khaydār Efendi, one of the commentators of the *Majalla*, explains voidable conditions as the conditions of illegitimate benefits such as the customer returning the property as a gift, charity or loan, the owner living in it until the owner dies, and the customer looking after the seller.[43] *Majalla* explains the conclusion of the voidable contract regarding the property as follows: In voidable sales, ownership is established when the customer receives the goods. When the customer takes the property with the permission of the seller, then they can own it (art. 371), and can have disposition on property (art. 366).[44] In a valid contract, ownership is established at the time of approval and acceptance. In invalid sales, ownership does not occur before or after the delivery.[45] According to the other article explaining the result of the voidable contract, the parties have the right to terminate the sale. Termination may take place before or after the delivery of the property. If the goods purchased under a voidable contract are sold to a third party, the possibility of termination disappears. (art. 372).[46] In other words, sales in which there are unknown-foreign conditions to the custom of society are voidable, they are open to termination at any time, in regard of *Majalla*. The Majalla Commission must have reached this conclusion with a conscious attitude in terms of the benefit of society.[47]

The other aspect of the condition matter is the sales made with the conditional option. The parties may come to an agreement to terminate or fulfil the contract within the period they have appointed according to *Majalla*. *Majalla* did not set a maximum limit for the duration (art. 300). According to Abū Ḥanīfa, the period of right of option should not exceed three days. Imām Muḥammad and Abū Yūsuf, on the other hand, argued that there is no time limit, the determination of the time is sufficient. The Majalla Commission preferred to accept this opinion (art. 300).[48] Owner of the right of option terminates or finalizes the contract within the period (art. 301).[49] The right of option is not transferred to the heirs; the contract becomes final when the party who acquires the right of option dies (art. 306).[50] The right of option condition prevents the establishment of ownership at the time of contract.. It was accepted as permissible because of the needs of people. The duration of the right of option should be determined so that it does not turn into a means of deception. Otherwise, the sale will be invalid.[51]

According to *Majalla*, the sales made on the condition that the sale does not take place if the price is not paid within a certain period of time are valid *(art. 313).*[52] The *Majalla* Commission preferred the view of Imām Muḥammad, who did not set limits on the duration, provided that the parties determine a duration for the right of option themselves.[53] If the customer does not pay the price of the property within the period specified in the contract, the contract becomes invalid. It is in the will of the customer to make the contract binding or void by paying the price or by avoiding payment. The cash option does not pass to the heirs by

40 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 454.

41 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 455-458.

42 Jamāladdīn, "Mukāyese-i Kavānīn-i Medeniyye", 28-29.

43 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 459.

44 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 964.

45 Jamāladdīn, "Mukāyese-i Kavānīn-i Medeniyye", 24-25; ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 968-974.

46 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 975

47 ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām*, 6.

48 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 743-744; *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām*, 7.

49 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 749-751.

50 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 764.

51 Jamāladdīn, "Mukāyese-i Kavānīn-i Medeniyye", 30.

52 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 789-791.

53 ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām*, 8.

death, so the sale becomes invalid (art. 315).[54]

According to *Majalla*, the customer is free to terminate or accept the contract when they see the property that they purchased without seeing (art. 320). This authorization is not connected with the fact that the property carries the qualities described at the time of sale.[55] Relatively different results are achieved in property purchased by seeing the sample, it is enough to see the sample to make the sale certain (art. 324). When the goods are qualitatively inferior to the sample seen, the customer is free to accept or terminate the contract (art. 325). The binding nature of the contract in the real estate purchased without seeing depends on seeing all rooms (art. 326). While it was enough to see a room in the classical doctrine, the scholars (*ʿulamā)* of the period decided on the continuation of the right of option until all the rooms were seen, in accordance with the changing custom. The Majalla Commission established the relevant article on this *fatwā*.[56] In the mandate, the connection between the changing custom and *fatwā* preference is pointed out, and it is stated that some provisions may change according to custom provided that the goods are known enough not to cause a dispute between the parties: the main principle in the sales contract is to sufficiently know the goods. This rule never changes. With the change of time, it may be necessary to change the auxiliary provisions based on this rule. However, it is very difficult and important to distinguish the secondary provisions that can be changed from the original ones.[57]

Majalla considered the difficulties and needs arising in fiscal transactions when arranging the sales contract; however, in order not to turn the contract into a tool of deception, unfair gain and exploitation, it tried to protect the principles of *Sharīʿa* based on the interpretation of the *Ḥanafī* school. Kucuk Ḥamdī insisted on associating *Majalla* with these principles, implying that Mandelstam targeted *Majalla* because of its provisions preventing the rich and powerful from exploiting the society.[58] Mandelstam claimed that termination provisions arising from the right of option about seeing (art. 320) causes contracts to be terminated with vile excuses and that this poses a great problem for trade contracts involving remote goods orders.[59]

Production Orders (Exceptional Contract for Work)

The exception is the contract of sale with the craftsman for the production of something (art. 124), although it was the sale of a property that did not exist during the contract, it was considered legitimate. The price and characteristics of the property are described and proposed to be produced, and with the acceptance of the manufacturer, the contract becomes binding.[60] *Majalla* gives examples of these exceptions that have become widespread in the commercial life of the age, such as ships, boats, needle rifles. The responsibility of production and material belongs to the manufacturer in the exceptional contract. Therefore, the subject of the contract is not the work of the manufacturer, but the property produced upon order (art. 388).[61] Most of the *Ḥanafī*s evaluate the exception as "agreement" and some of them as "promise". And promises are not binding.[62] The *Majalla* Commission made an arrangement that reinforced the bindingness of the Exception Contract with the will of the solution in accordance with the conditions of the period. According to the classical doctrine, the customer who had to purchase a property that they did not see with the exceptional contract, they have opportunity to terminate the contract using the right of option (*cognizance*) when they see the produced product. Even if the product is produced in accordance with the described qualities, the customer may terminate the contract. This opinion, which belongs to Abū Ḥanīfa and Imām Muḥammad, was accepted as a basis for *fatwā* and applied until the period when *Majalla* was written. However, the *Majalla* Commission adopted Abū Yūsuf's view that the *product produced in accordance with the description cannot be rejected* (art. 392) and did not provide the customer the right to terminate the contract unless the product differs from the described qualifications. The customer's right of option is of a qualified or shameful nature (art. 310).[63] The qualities and properties of the product must be described in the exceptional contract in such a way that they do not cause conflict between the parties (art. 390).[64] Although *Majalla* confirmed the binding nature of the exceptional contract, it stated that the contract would remain inconclusive in the event of death of one of the

54 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām* 794.

55 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 813-815.

56 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 827-841.

57 ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām*, 3.

58 See Kucuk Ḥamdī, "Majalla-i Aḥkām-ı ʿAdliyyamiza Ravā Gorulan Muāhazayi Mudāfaa", *Bayān al-Ḥaqq* 2/61 (14 Cemaziyelevvel 1328/1 Mayıs 1326), 1227.

59 See Mahmad Ārif, "Hukūmat-i Ajnabiya ila Munāsabatta Maḥākim-i Osmāniye", 182-183.

60 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 1034-1035.

61 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 1035.

62 See Hamza Aktan, "İstisnâ'" Türkiye Diyanet Vakfı İslam Ansiklopedisi 23 (İstanbul: TDV Yay., 2001), 394.

63 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām,* 781-787, 1039; Kucuk Ḥamdī, "Majalla-i Aḥkām-ı ʿAdliyyamiza Ravā Gorulan Muāhazayi Mudāfaa", Bayān al-Ḥaqq 2/54 (23 Rebiülevvel 1328/22 Mart 1326), 1115.

64 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 1037.

parties. In this regard, it is similar to the *lease contract*.[65]

The statements of the *Majalla* Commission about bindingness preference summarize the balance wished to be established between the needs of the age and *fatwā* preference. The sale of goods requiring a large capital and factory production such as cannons, rifles, steamships whose trade became extremely important across the world was now carried out with contracts based on order. Therefore, the provisions of the exceptional contract should form the basis for the large-scale contracts. In the classical doctrine, giving the customer a right of preference about the termination or execution may cause many large-scaled works and orders to remain inconclusive in the trade life. Both the manufacturers and the trade will suffer from this. Therefore, *Majalla* Commission considered the bindingness of the exceptional contract as a need and necessity for trade. According to the *Majalla* Commission, there is no problem in terms of procedure for this preference to be based on custom. Because the exceptional contract, like *salam* contract, is legitimate because of custom and necessity. Nevertheless, the Commission did not accept the customs and needs alone as a reference for the binding provision, did not seek any *fatwā* other than the *Ḥanafī* school, and was contented with the opinion of Abū Yūsuf, which was considered more appropriate for the time.[66]

Returning to Mandelstam's claim that all unseen orders are subject to a danger of termination at any time because of *Majalla*, it turns out that the production orders are excluded from this accusation. There is no possibility of termination with the right of option about seeing in the *salam* sale, the other part of order contracts.[67] What remains is the purchases that are usually made by merchants and brokers, who take place by ordering goods at a distance. This is like ordering wheat from another city. This kind of orders are placed in three ways: seeing a sample, declaring the qualifications and the amount, and not describing any qualifications. The customer may terminate the contract only if the goods are inferior from the sample in terms of qualification in the orders placed by seeing the sample, and there is no right of seeing option. However, in the other two types of orders placed without seeing a sample, the customer has the right of option in accordance with *Majalla*. In fact, in the orders placed by describing the qualifications, the right of quality option is added to the right of seeing. If the order was placed without specifying the qualification, the customer may terminate the contract only by the right of seeing option. Kucuk Ḥamdī insisted that the right of option is needed for commercial orders and that there was no problem about termination in the commercial relations of the time in contrary to by Mandelstam. It is necessary for the healthiness of the trade that the customer can use this opportunity for termination when they see the product especially in the orders placed without describing the qualifications. Kucuk Ḥamdī accepts that adding the right of quality option to the seeing option in the orders given by describing the qualifications may pose a problem from a commercial point of view. Thus, he recommends to the amendment commissions to prefer the opinion of the *Mālikī* school, only the right of quality option, in the order of qualified goods, and to continue to apply the right of seeing option in other orders.[68]

Servitude Rights (Right of Taking Water (*shirb),* Right of Way *(murūr)* and Right of Flow (*masīl)*)

Servitude rights in Islamic law are "real rights that are established on a revenue for the benefit of another revenue belonging to someone else and that provide a limited benefit to the right-owner".[69] According to the classical *Ḥanafī* doctrine, servitude rights cannot be subject to the payment contracts independently from the property they are attached to, because the contract contains threat and obscurity.[70] *Majalla* maintains the opinion of the *Ḥanafī* school on this issue based on a *fatwā*. The relevant article stipulated that right of way, the right of taking water and the right of flow may only be sold together with the land they are connected and subject to the channel through which the water passes (art. 216).[71] There is a *fatwā* in the *Ḥanafī* school that allows for the separate sale of servitude rights, but it is not a subject in classical doctrine.[72] There was a difference of opinion between the *Majalla* Commission and the *Encuman-i Makhṣūṣa* on this issue, which is essentially based on the concept of property.[73] While preparing the draft of *Kitāb al-Buyūʿ*, the *Majalla* Commission amended the relevant article by preferring the *fatwā* allowing the independent sale of rights due to the needs and necessities of the time. However, during the negotiations in

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65 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 1039.

66 ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām*, 8.

67 See art. 230, Majalla; ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām* 1026.

68 See Kucuk Ḥamdī, "Majalla-i Aḥkām-ı ʿAdliyyamiza Ravā Gorulan Muāhazayi Mudāfaa", 54/1115.

69 See Hasan Hacak, "İrtifak", *Türkiye Diyanet Vakfı İslam Ansiklopedisi* (İstanbul: TDV, 2000), 22/460-464, 460.

70 Hacak, "İrtifak", 463.

71 Two articles among the general regulation of *Majalla* explain the theoretical approach based on the preference in this article. See art. 48, 54, Majalla; ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām*, 206, 222. See for right of taking water, right of way and right of flow, art. 142, 143, 144, 1262, *Majalla.*

72 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām* s. 519; Hacı Reşid, *Rūḥ al-Majalla: Sharḥ Kitabü'l-Buyuʿ* (Dār al-Khilāfat al-ʿĀliyye: Tercuman-ı Ḥakīkāt Maṭbaʿası, 1327), 85; Ātif Bey, *Majalla-i Aḥkām-ı ʿAdliyya: Sharḥ Kitāb al-Buyūʿ* (Dersaadet: Mahmūd Bey Maṭbaʿası, 1318), 58.

73 Ebu'lulâ Mardin, *Medeni Hukuk Cephesinden Ahmed Cevdet Paşa* (Ankara: TDV, 2009), 67.

Encuman-i Makhṣūṣa, the opinion that the classical practice is sufficient for ongoing transactions in society and that there is no necessity for separation was the dominant view. The draft of the article was amended to confirm the classical doctrine.[74]

Wholesale

The property must be obvious, and its quantity must be certain (art. 213). The exorbitant obscurity on the property invalidates the contract, because obscurity and uncertainty create a conflict between the parties. The obscurity too insignificant to create a conflict is not a cause of invalidity.[75] Accordingly, *Majalla* allows the sale of goods whose quantity is not known exactly, by determining the unit price (art. 220). Abū Ḥanīfa argues that the contract is binding only for a unit in the example of selling a stack of wheat wholesale without knowing the net amount by declaring the unit price. According to Imām Muḥammad and Abū Yūsuf, on the other hand, the sale of all of them is valid. The *Majalla* Commission preferred this opinion based on the principle of easing people's work.[76] In this kind of sale, the customer has no right of option by saying, "if it is less or more than my guess, I will terminate the contract." The contract is binding for the whole of the purchased goods, the entire resulting price is paid after the amount is clarified.[77]

Wholesale takes place in four ways: Wholesale of goods whose unit price is determined, but the net amount is unknown; wholesale without determining the unit price with a declaration of net quantity and price; wholesale by determining the unit price and net quantity; lump sum sale.[78] Sales in the first group are valid and binding for all of the goods (art. 220). Sales in the second and third group are the subject of article 223. If the goods are available to be divided into unit prices, the sale with the amount and price specified in the contract, although the unit price is not mentioned, is valid. If the goods are missing, this reflects to the price in the unit price measure. However, the customer does not have to accept the missing goods, they can use the option of termination if they wish. The excess part belongs to the seller.[79] *Majalla* allows the goods in question to be sold in a lump sum, that is, in a container or in bulk - without knowing the net amount and unit price - only with a statement of the wholesale price. In the sales in this group, wheat can be sold in a pile, brick in a heap, items in the box without knowing the exact amount (art. 217). The seller cannot cancel the sale if the goods are less or more than estimated. The customer has an idea of an estimated amount when purchasing the product in wholesale and the sale made on this estimate is valid (art. 218).[80]

The sale of goods that are not available for separation by unit price has relatively different results. Unit price cannot be mentioned for the example of diamond stone that was declared to be five carats and sold for twenty thousand cents. Regardless of whether such goods are deficient or superior, the price specified in the contract is paid in full. If the goods are of superior quality, the contract becomes final, and the goods belong to the customer. For instance, if the diamond is four and a half carats, this deficiency is considered a shame and the customer becomes free to terminate or accept the contract. Because the superiority or deficiency in such a sale has no share in the sale price.[81] In the case of a barbecue which is declared to be five kilos each kilo of which is sold for forty cents, the customer acquires the right of option if the weight is less or more. Because the deficiency and excess are reflected in the price. In this example, qualification/weight is associated with the price when the contract is made (art. 225).[82]

Sales Contract in the French Civil Code

It is stated that the idea of regulating civil law by law began with the French Revolution. The French Civil Code, which was prepared by a jurist commission by order of Napoleon, entered into force in France on March 21, 1804. The regulations shaped civil law on a secular basis, far from the teachings of the church, and aimed to support liberalism, in other words, wealth accumulation.[83]

Until the French Civil Code came into force, different legislation was being implemented in each province in France. When the French Civil Code came into force, it was made to apply equally to everyone in its jurisdiction. Its jurisdiction was gradually

74 Ebü'lulâ, *Medeni Hukuk Cephesinden Ahmed Cevdet Paşa*, 67.

75 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām* 507-508.

76 ʿAlī Khaydār, *Sharḥ al-Qawāid al-Kulliya Min Durar al-Ḥukkām*, 7; *Kitāb al-Buyū Min Durar al-Ḥukkām* 532.

77 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām* 530-533.

78 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 530.

79 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 536-543.

80 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 522-526.

81 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 543-546.

82 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 546-548.

83 Esirgen, "Osmanlı Devleti'nde Medeni Kanun Tartışmaları", 36; Maurice Amos, "The Code Napoléon and the Modern World", *Journal of Comparative Legislation and International Law* 4/4 (1928), 223

expanded, and it was adopted in many places, including other European countries.[84] The French Civil Code sought to strengthen the individual and property rights without referring to religious values.[85] The three most important features of the French Civil Code are that it supports a person to use his property as he wishes, to make the contracts he wants and to be responsible for his own mistakes.[86]

The French Civil Code explains the general principles of contracts in a separate section. It accepts contracts drawn up by mutual consent at the level of law for the parties and must be implemented. It states that the individual is responsible for the commitments that he has not fulfilled due to his own fault or negligence, and that he will take responsibility for the damage. Agreements can be made on any subject, provided that it is not prohibited by law and is not contrary to general morality. It aims to prevent a contract concluded with the element of consent from being deemed invalid due to any considerations, unless specified in the law. The natural limits of the contracts are almost non-existent, they are considered valid, and their performance is legally guaranteed. A contract can be made on anything that is suitable for trade, and a fiscal price can be demanded in return. For example, a claim for monetary compensation can be made in return for moral damage.[87]

We can now examine the French Civil Code more closely in the context of the issues we have dealt with. In Civil Code, the sales contract is a contract based on the delivery of the goods and the payment of their price, which is valid in a written contract. Unlike *Majalla*, contracts became final with official or promissory notes (art. 1582). The customer's right of ownership over the goods is formed after the contract is completed, even if the goods have not been delivered, even if the price has not been paid (art. 1583).[88] French Civil Code sets forth four conditions for the health of the contract: the consent of the obligant, the competency of the parties, the knowledge of the goods and the fact that the contract is based on a legitimate reason (art. 1108). A contract can be made on all goods suitable for commercial transactions (art. 1128). Everything that is not prohibited for sale by special regulations and suitable for trade can be the subject of sale (art. 1598). The right to usufruct or exercise on a property, just like the goods in kind, can be subject to separate contracts (art. 1127). The material assets of a property and the exercise rights may be subject to separate ownerships (art. 543). Usufruct rights can be transferred through sale, lease, or transfer (art. 595). A right, receivable, or cause of action is transferred by giving its bill to the customer (art. 1689). The type of goods should be known by the parties. If it is suitable for later determination, the goods can also be sold without the exact amount being known (art. 1129). The amount and characteristics of the price must be determined during the contract (art. 1591). Delivery of the goods is the responsibility of the seller. If the goods are not delivered within the period specified in the contract or if the delivery is delayed, the customer may terminate the contract or request the immediate delivery of the goods (art. 1610). In any case, the seller compensates for the damage that the customer will suffer during the remaining time after the delivery period (art. 1611). On the other hand, the customer has the responsibility to make the payment within the period specified in the contract (art. 1650). In the cash price sales, the seller may withhold the goods and delay the delivery until the payment is made (art. 1612). If the customer does not make the payment in time, the seller may request the termination of the contract (art. 1654). In sales transactions, a contract may be issued on the condition that "if payment is not paid on time, the contract is terminated". In this case, if the subject of the sale is a real estate property, the seller initiates the termination procedure with a warning. If the goods is moveable, the seller may terminate the contract without the need for a warning if the payment is not made in time. In other words, French Civil Code accepted the failure to pay on time as a justified reason to initiate the termination procedure (art. 1656-1657). Contracts made with reasons that are illegal, contrary to the general rules of etiquette and of a nature to disrupt public order are illegitimate (art. 1133). In the case of goods sold by measuring, weighing, or counting, the sale is not completed until the net amount of the goods is revealed (art. 1585). However, if these goods are sold in lump sum, the contract becomes binding immediately even if the net amount is unknown (Code Civil, art. 1586).[89]

The Civil Code notes that the sales contract can be absolute or conditional, that the sale can be made to choose one of two or more things (art. 1584). The conditions known customarily, even if they are not mentioned in the contract, are accepted and applied (art. 1160). Provisions related to the conditions are regulated in articles 1168-1185. The conditions that bind the contract to the possibility of an event occurring or not occurring, or a case that is likely to occur in the future are considered as

84 Roscoe Pound, "The French Civil Code and the spirit of nineteenth century law", Boston University Law Review 35/1 (1955), 77.

85 Roger Hoin, "Reform of the French Civil Code and the Code of Commerce", *The American Journal of Comparative Law* 4/4 (Autumn, 1955), 489.

86 James Gordley, "Myths of the French Civil Code", *The American Journal of Comparative Law* 42/3 (Summer, 1994), 459.

87 Vanṭura, *Mukāyasa-i Qawānin-i Madaniyya*, 10-11, 69-70, 138-141, 148-151.

88 See, for English text of French Civil Code, The Napoleon Series, "The Civil Code", (Access 13 April 23). For Ottoman translation of the French Civil Code. See *Kod Sivil Yani Fransa Kānūn-i Medenīsi Yahut Hukūk-i ʿAdliye Kānūnnāmesi, ter. Nuzret Hilmi (İstanbul: Dikran Karabtiyan Maṭbaʿası, 1303)*, 425.

89 See The Napoleon Series, "The Civil Code"; Jamāladdīn, "Mukāyese-i Kavānīn-i Medeniyye: Majalla-i Aḥkām-ı ʿAdliye-Fransa Kānūn-i Medenīsi", *ʿIlm-i Ḥukūk ve Mukāyasa-i Qawānīn Mecmūʿası*, 1/4 (30 Haziran 1325), 241.

commitment condition (art. 1168). Conditions that depend on coincidence and are not in the power of the parties to arise are coincidental conditions (art. 1169). If the realization of the condition is something that is in the power of the parties, it is a discretionary condition (art. 1170). The condition that an impossible act is not performed does not invalidate the contract, but if it is required to be performed, the contract is invalid (art. 1173). If the bindingness of the contract requires the consent of a third person, this is composite condition (art. 1171). These four types of conditions that can be put forward in any contract are valid in the Civil Code. Only the conditions that are impossible, contrary to the general rules of morality and legally prohibited were excluded from the validity.[90] In addition, the conditions depending on the will of the contracting party who commits to these three exceptional cases are included (art. 1174).[91]

According to Jamāladdīn Efendi, one of the *Majalla* teachers of the Maktab-i Hukūk, the French Civil Code approves the binding of the contract to events unrelated to the will of the parties, such as rain. The consent of a third party may be required for the consent of one party in the contract. It is also valid that the validity of the contract is tied to a possible event in the future. The Civil Code does not set a time limit for the validity of the terms. The type of contract has nothing to do with the validity of the condition.[92] According to the French Civil Code, the contractor may put the termination condition in the contract and may bind the termination authority to the condition of the occurrence of an event. In case of termination of the contract with such condition, the property will return to its pre-contract condition. The stipulation in *Majalla* corresponds to the termination condition in the Civil Code (art. 1183-1184). The Civil Code considers failure to fulfill a commitment as a natural termination condition for the other party and brings up the option of termination right, even if such termination condition is not put forward in bilateral contracts. The Civil Code considers valid the contract made by the contractor to finalize the contract by selecting one of two or more goods. The determination of the time limit for this condition is not mandatory according to the Civil Code (art. 1189, 1196). The sale of a maximum of three goods is allowed in this way in *Majalla*. The customer or the seller may stipulate for option of appointment (art. 316). The sale is valid provided that the option period and the cost of the goods are determined (art. 317). Option of appointment may be transferred to the successor according to *Majalla* (art. 319). The Civil Code does not set any time limits for the validity of conditions, but it necessitates to comply with the time limit if a period of time is determined. Otherwise, the contract will be invalid (art. 1176 ve 1177). The rights arising from the condition that the Civil Code considers binding are transferred to the successors in the event of death of the right-owner (art. 1179). Conditions precedent that depend on an unknown event that will occur in the future or on an event that is still occurring but is unknown to the parties are valid in the Civil Code. However, the contract enters into force when the condition is realized (art. 1181).[93] Civil Code explains the results of conditions about the termination as follows:

When the obligation has been contracted under a condition suspensive, the thing which forms the matter of the agreement remains at the risk of the debtor, who is not bound to deliver it except in case of the event of the condition.

If the thing have perished entirely without the fault of the debtor, the obligation is extinguished.

If the thing be deteriorated without the fault of the debtor, the creditor has the choice either to dissolve the obligation, or to demand the thing in the state in which it shall be found, without diminution of price.

If the thing be deteriorated by the fault of the debtor, the creditor has a right either to dissolve the obligation, or to demand the thing in the state in which it shall be found, with damages (art. 1182, Code Civil).[94]

As a requirement of a contract that depends on something that may happen in the future, the seller may postpone the delivery until that condition is fulfilled. If the goods are damaged in the hands of the seller after postponing the delivery, the contract is void. This is an exceptional case, the main rule in the Civil Code is that the responsibility for damage before delivery belongs to the customer in sales contracts. In case of partial damage, the customer has the right to terminate the contract or accept the property. If the goods are damaged due to the seller's defect, the customer may also request compensation for damage and loss. The Civil Code provides the customer the right of option in case of damage to the goods at the hands of the seller.[95] According to the Civil Code, there is no right of option as in *Majalla* for the goods customer purchased without seeing; the customer may

[90] See Art. 1172, "every condition of a thing impossible, or contrary to good morals, or prohibited by the law, is null, and renders null the agreement which depends thereon", The Napoleon Series, "The Civil Code"; *Kod Sivil Yani Fransa Kānūn-i Medenīsi Yahut Hukūk-i ʿAdliye Kānūnnāmesi*, 306.

[91] See, The Napoleon Series, "The Civil Code"; Jamāladdīn, "Mukāyese-i Kavānīn-i Medeniyye", 26.

[92] See Jamāladdīn, "Mukāyese-i Kavānīn-i Medeniyye", 27.

[93] See, The Napoleon Series, "The Civil Code"; Jamāladdīn, "Mukāyese-i Kavānīn-i Medeniyye", 26-31; *Kod Sivil Yani Fransa Kānūn-i Medenīsi Yahut Hukūk-i ʿAdliye Kānūnnāmesi*, 306-310.

[94] See, The Napoleon Series, "The Civil Code".

[95] *Kod Sivil Yani Fransa Kānūn-i Medenīsi Yahut Hukūk-i ʿAdliye Kānūnnāmesi*, 308-309.

terminate the contract only when the goods are not of the quality described in the contract.[96] The contract of sale can be delayed by promise, the parties agree on the goods and the price to finalize the contract on a certain date. In a promised sale, the customer pays the seller a certain amount upfront, in advance. If the customer returns from the contract, this price will belong to the seller. If the seller returns, he will return double to the customer. This type of sales is described as the sale of *pey/urbūn* in Ottoman sources (art. 1590).[97]

Production order contracts regulated under the name 'exceptional contracts' in *Majalla*'s *Kitāb al-Buyūʿ* are regulated in the contract of hiring chapter of the Civil Code.[98] For the performance of a job or the production of a good, a contract for performing a service or art can be made with the manufacturer. The manufacturer can supply the material himself/herself according to the contract (art. 1787). Civil Code discusses the contract in contract hiring section in both cases. *Majalla*, on the other hand, evaluates the condition that the material is supplied by the manufacturer as a sales contract, and the condition that it is supplied by the ordering party as a lease contract. In *Majalla*, it is stipulated that if the tailor supplies the fabric in the order given for sewing a dress, this will be an exceptional contract, and if the customer does, it will be leasing (art. 421).[99] Civil Code stipulates that a product supplied by the manufacturer and produced upon order is under the responsibility of the manufacturer until the moment of delivery. The manufacturer is solely responsible for the loss of the goods, unless the goods cannot be delivered due to a reason caused by the customer (art. 1788). If the material belongs to the customer, the manufacturer is not responsible for the loss of the goods before delivery (art. 1789). Civil Code explains the binding nature of the order contracts, that is, its attitude regarding the termination of the contract, in the general provisions on contracts. The termination of the contract can only be based on mutual consent and an official reason defined in the law since a contract arranged in accordance with the legal provisions is valid and legitimate; otherwise, the contract will be executed with all its provisions (art. 1134). Therefore, the contracts are binding according to the Civil Code, and they cannot be terminated unilaterally.[100]

The Civil Code has explained the provisions regarding the surplus that can not be separated in the goods, in the Delivery section.[101] If the excess in the goods is not separable, it is delivered to the customer together with the goods.[102] When a real estate is sold by measuring, determining the unit price, and declaring the exact amount, the seller is obliged to deliver the goods according to the amount in the contract. If the delivery of the missing part to the customer is not possible or the customer does not request its completion, the share of the missing part is deducted from the price (art. 1617). The customer can own the excess in the real estate by paying the price. If the excess part is more than 1/20 of the goods, the customer makes a choice about the termination of the contract or purchase the excess part as well (art. 1618). When a measurable good or a piece of land is sold without declaring the unit price, by determining the amount or deciding to be determined later, it is delivered to the customer as it is. If the cost of the deficiency or excess does not exceed 1/20 of the price, it is not reflected in the price (art. 1619). If the surplus reaches 1/20, the customer can accept or terminate the contract by paying the price of the excess in question (art. 1620).[103]

Amendment to *Kitāb al-Buyūʿ*: Conditional Sales, Rights of Option, Production Orders, Servitude Rights, and Wholesales

It was often stated in the *Iḥḍar-ı Qawānīn* Commissions that the *Majalla*, as a civil code, should be amended to serve as a legal basis that will support economic development and wealth growth and increase the momentum of fiscal transactions. In his speech addressed to *Iḥḍar-ı Qawānīn* Commissions, Khalīl Bey, contemporary Vice Minister of Courthouse, defined the law as the

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96 Kucuk Ḥamdī, "Majalla-i Aḥkām-ı ʿAdliyyamiza Ravā Gorulan Muāhazayi Mudāfaa", *Bayān al-Ḥaqq* 2/55 (30 Rebiülevvel 1328/29 Mart 1326), 1131; "Vacibat Komisyonu Zabıtnamesi: Vacibat Komisyonu İkinci İctima", *Dār al-Funūn Hukūk Fakultesi Mecmūʿası* 15 (1343), 441.

97 See, "If the promise to sell have been made with earnest, each of the contracting parties is at liberty to depart therefrom; He who has given it, on losing it; He who has received it, by restoring double", The Napoleon Series, "The Civil Code"; *Kod Sivil Yani Fransa Kānūn-i Medenīsi Yahut Hukūk-i ʿAdliye Kānūnnāmesi*, 426.

98 *Kod Sivil Yani Fransa Kānūn-i Medenīsi Yahut Hukūk-i ʿAdliye Kānūnnāmesi*, 474.

99 ʿAlī Khaydār, *Kitāb al-Buyū Min Durar al-Ḥukkām*, 1035; *Sharḥ al-Kitāb al-Sāni ʿan al-Ijāra Min Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām* (İstanbul: Maḥmūd Bey Maṭbaʿası, 1311), 1081.

100 *Kod Sivil Yani Fransa Kānūn-i Medenīsi Yahut Hukūk-i ʿAdliye Kānūnnāmesi*, 298; James Gordley, "Myths of the French Civil Code", *The American Journal of Comparative Law* 42/3 (Summer, 1994), 469.

101 Art. 1614, "The article must be delivered in the state in which it is at the moment of sale. After that day all the fruits belong to the purchaser", The Napoleon Series, "The Civil Code"; *Kod Sivil Yani Fransa Kānūn-i Medenīsi Yahut Hukūk-i ʿAdliye Kānūnnāmesi*, 431.

102 Art. 1615, "The obligation to deliver the article comprises its appurtenances, and everything which has been designed for its perpetual use", The Napoleon Series, "The Civil Code"; *Kod Sivil Yani Fransa Kānūn-i Medenīsi Yahut Hukūk-i ʿAdliye Kānūnnāmesi*, 431-432.

103 Art 1620, "In the case in which, according to the preceding article, there is ground for augmenting the price on account of excess of measure, the purchaser has the election either to recede from the contract, or to furnish the additional price, and this with interest if he have kept the immoveable", The Napoleon Series, "The Civil Code"; *Kod Sivil Yani Fransa Kānūn-i Medenīsi Yahut Hukūk-i ʿAdliye Kānūnnāmesi*, 432-433.

most effective tool in economic development and emphasized that this effectiveness can be realized with law texts that support economic development, encompass the needs, customs, and economic trends of the time.[104] Khalīl Bey's view refers to the articles of *Majalla* that support customs and traditions, that accepts that judgement can change with the change of time as a principle. He attributed the responsibility on these commissions to update the *Majalla* and other laws surrounding it with new provisions appropriate to the needs of the time. Khalīl Bey especially reminds that the civil code should be regulated in such a way as to reinforce the principle of responsibility - noting that responsibility is emphasized by economic authors as a vital principle for development and enrichment. *Majalla* articles are deficient in this regard according to him. The responsibility principle is the most important component of the liberty principle. Khalīl Bey criticizes the state's attitude that limited the property rights during the classical period and wants the new laws to be regulated in such a way as to support property rights and wealth accumulation. Khalīl Bey thinks that the fact that *Majalla* categorizes most of the conditions as invalid or null causes many contracts to lack legal protection and that the contracts are faced with the danger of termination.[105] Commissions will consider the needs of time and the economic development of the country and will be able to benefit from the laws of Western civilizations if it is necessary.[106]

Amendment Commissions discussed the fact that *Majalla* does not allow the sale of receivables and rights as a problem and tried to expand the concept of goods. The Commission of 1332 (AH) has unanimously accepted that the rights to receivable can be subject to sale like other goods (main 11).[107] The issue of selling the rights independently of the goods they are attached to was discussed in the Commission, and as a result, it was decided to issue an article that allows the sale of the rights that have become a custom in the markets.[108] We can see the final result of these discussions in the report about the amendment to *Kitāb al-Buyūʿ*. Firstly, *Majalla*'s article 125 which devotes the concept of goods to non-cash assets and interests was amended, and it was confirmed by adding the concept of *duyūn* that the receivables may be the subject of ownership.[109] Then, article 126, which highlights the human tendency and the ability to accumulate for cost, was amended. This decision was associated with the existence of many examples of goods that disgust people or that cannot be included in the category of goods because they cannot be accumulated. In this regard, the Commission shows the exception and *salam* contracts, which are in the nature of the sale of non-existent goods, as examples. The Commission changed the definition of goods in article 126 to 'something one would strive for and be willing to pay for'. In connection with this amendment, it was decided to exclude article 127, which describes the legitimate property (*al-Māl al-Mutaqawwim*), from the text of *Majalla*. In fact, as the Code of Procedure (art. 64) expanded the scope of the concept of legitimate property, it is no longer possible to maintain the limitations of the classical *Ḥanafī* doctrine in *Majalla*.[110] The concept of *"mabī"* which devotes the sales contract only to non-cash/material assets was amended (art. 151) as "what is sold" and was expanded to cover receivables and rights. It was decided to exclude the article that considers the sale and the purchase of illegitimate property from the text (art. 211, 212). Since everything that has value is considered a property according to the Commission, the classification of illegitimate has no meaning.[111] The sale of rights was confirmed directly by the amendment of article 216, and the independent sale of rights was allowed by amending the relevant article (art. 216). The Commission relies upon the principle of 'making decisions for the health of transactions is better than invalidity'.[112]

Since *Majalla* evaluates the conditions as permissible, voidable and abolition, it accepted contracts that contain conditions for the benefit of one of the parties as voidable but did not issue a separate article related to it. However, it is a problem for the courts to rule on the corruption of conditional sales based on the explanations in the report.[113] Since Iḥḍar-ı Qawānīn Commissions adopted the principle of freedom and liability in the contract, they discussed the conditional sale issue in this context. They believed that freedom of contract was necessary for the increase of commercial transactions, economic development and industrial development, so there should be no problem in terms of Islamic law in accepting the conditions

104 "Iḥḍār-ı Qawānīn Komisyonları", *Cerīde-i ʿAdliye* 149 (Ağustos 1332), 65-67.

105 See "Iḥḍār-ı Qawānīn Komisyonları", 65-67.

106 See "Kavānīn Lāyiḥalarını İḥḍāra Meʾmūr Komisyonların Usūl-i Mesāisine, Makām-ı Nezāretle Münāsebetine ve Rüʾesāʾ ve ʿĀzāsına İʿtā Edilecek Mebāliğe Dāir Tālimātnāmedir", *Cerīde-i ʿAdliye* 149 (Ağustos 1332), 67.

107 See *Cerīde-i ʿAdliye Annex 13-14-15 (1339)*, 7.

108 See *Cerīde-i ʿAdliye Annex 13-14-15 (1339),* 128.

109 See "Mecelle Taʿdīlāt Komisyonu Tarafından Kitābu'l-Buyūʿ Tadilatına Dair Tanzīm Edilen Rapor", *Cerīde-i ʿAdliye* 25 (1340), 894.

110 See *Cerīde-i ʿAdliye* 25 (1340), 894-895.

111 See "*...her kıymeti olan şeyin mal telakki olunmasına nazaran, ayrıca mal gayr-i mütekavvim bulunamayacağından...*", *Cerīde-i ʿAdliye* 25 (1340), 895.

112 See *Cerīde-i ʿAdliye* 25 (1340), 895-896. The addition of an article responding to the sale of the upper floor (tealli) and beam installation (vadʻ-ı haşeb) rights to *Majalla* has been negotiated in the Commissions, but there is no reference to these articles in the final report. See for negotiations "Mecelle Encumani'nin Kitābu'l-Buyūʿa Ait Tetkīkātı", *Dār al-Funūn Hukūk Fakultesi Mecmūʿası* 11 (1341), 167.

113 See *Cerīde-i ʿAdliye* 25 (1340), 901.

considered voidable in classical doctrine by associating them with the needs of the century.[114] *Majalla*'s attitude of limiting the conditions has become dysfunctional with the Code of Procedure (*Uṣūl-i Muḥākama-i Hukūkiya Kānūnu*), which creates the legal framework for freedom of contract (art. 64). It was reflected in the records that the conditional contracts could not be taken under sufficient legal protection because the code of procedure approved the terms with vague expressions, but its main purpose was to amend *Majalla*. In other words, voidable conditions that provide a benefit to one of the parties are considered valid within the scope of the code of procedure if they meet certain conditions.[115] Nevertheless, *'Iḥḍar-ı Qawānīn'* Commissions, on the other hand, desire that the civil code explicitly approves the conditional contracts. The records in which the articles in need of modification are examined contain very valuable data at this point. The addition of an article amending the contracts containing benefit conditions in favor of one of the parties to *Majalla* was accepted by making references from the sources of the *Ḥanbalī* school to be in accordance with the age.[116] This decision was attributed to the fact that the conditions that provide unilateral benefit are so widespread in the society that they do not drag the parties into conflict.[117] The condition that the contract be tied to a possible event in the future was not approved in principle, but down payment sales (*urbūn*), which were increasingly common in society, were approved.[118] This is because sales with forfeit money became known in society. But since there is no clear provision on this issue, the courts are making different decisions on the same issue, causing legal confusion.[119]

Another of the amendment principles agreed upon by the *Iḥḍar-ı Qawānīn* Commissions is related to seeing option: there is no need for seeing option unless it is suggested in the contract as a condition, qualification is sufficient in the sale of things sold with samples, other articles related to rights of option should be amended.[120] Compared to *Majalla*, sales concluded without seeing the goods may be terminated by citing seeing option, even if they appear to be in accordance with the qualifications described. Customers were trying to cancel sales due to sudden changes in the market price, and the provisions of seeing option were being abused.[121] As a result, the Commission responsible for the amendment decided to remove the articles 320, 321, 322, 323, 326, 327, 328, 332, 333, 334 regulating seeing option from *Majalla*. We can summarize the justification of the decision as follows: there are three legal opinions related to the sale of goods that are not available in the contracting assembly. According to the first, since the goods are not ready in the assembly, their sale is not legitimate even if their qualities are described. According to the second opinion, such sales are legitimate, and the customer can terminate or accept the contract when he/she sees the goods. The mention of their qualities does not change the verdict. *Majalla* adopts this view (art. 320-335). According to the third opinion, the sale of the unseen goods sold by describing their qualities is legitimate, but the customer has the right to examine its quality instead of a seeing option. The customer may cancel the sale only if the goods do not meet the described qualifications. The amendment Commission emphasizes the rightness of the third opinion for the solution of this problem, which is claimed to create many problems in commercial transactions.[122] The Commission did not touch the articles 324-325 regulating the right of shame provided to the customer in the event that the goods sold with the sample turn out to be bad in quality from the sample seen.[123] The cash option was also discussed in the amendment commissions. The Commission defined it as a problem that *Majalla* regulates cash option as a right that is used only in favor of the customer and not transferred to the heir. It was decided to amend the cash option in a way that allows it to be used by both the customer and the seller and to be transferred to the successor.[124]

In the case of wholesale of goods that are not suitable for separation, the Commission considered it unfair for the seller that the excess in the goods is not reflected in the price and that the right to execute or terminate the contract is left only to the customer. Compared to the amended article, if a good that cannot be divided and separated, but is sold at a wholesale price, is missing from what is specified in the contract, the customer will still consider the termination of the contract or the acceptance

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114 See Main 4, "kanunen men edilmemek, intizam-ı amme ve ahlak-ı umumiyeye münafi bulunmamak, ahval ve ehliyet-i şahsiyeye müteallık veya ammenin veyahut eşhas-ı salisenin temin-i hukuku mülahazasıyla mevzu-u ahkâm ile emval-i gayr-i menkulenin suret-i tasarrufuna mütedair ahkâm-ı kanuniyeye mugayir olmamak şartlarıyla ale'l-umum ukud ve muamelatta ve bi'l-cümle taahhüdat ve mukavelatta serbesti esası kabul edilmiştir", "'Adliye Vekāleti Celîlesinin Emir ve Talimātıyla Teşekkül Edip 3 Mayıs 339 Tarihinde İlk Celsesini Akdeden (Kānun-i Medenī ʿUkūd ve Vācibāt) Komisyonunun Tarih-i Mezkūrdan İtibaren 30 Haziran 339 Tarihine Kadar Sebkeden Mesāisini Mübeyyin Rapordur", *Cerîde-i ʿAdliye* Annex 13-14-15 (1339), 4.

115 See "Otuzuncu İctima", *Cerîde-i ʿAdliye* Annex 13-14-15 (1339), 27; "Otuzdokuzuncu İctima", *Cerîde-i ʿAdliye* Annex 13-14-15 (1339), 111.

116 *Dār al-Funūn Hukūk Fakultesi Mecmūʿası* 11 (1341), 162-164.

117 *Cerîde-i ʿAdliye* 25 (1340), 901.

118 *Dār al-Funūn Hukūk Fakultesi Mecmūʿası* 11 (1341), 162-165.

119 *Cerîde-i ʿAdliye* 25 (1340), 901

120 *Cerîde-i ʿAdliye* Annex 13-14-15 (1339), 8.

121 *Cerîde-i ʿAdliye* Annex 13-14-15 (1339), 8-9.

122 *Cerîde-i ʿAdliye* 25 (1340), 898-899.

123 *Cerîde-i ʿAdliye* 25 (1340), 899.

124 See art. 313, art. 314, art. 315, *Dār al-Funūn Hukūk Fakultesi Mecmūʿası* 11 (1341), 84-87. However, there is no reference to cash option in the final report agreed upon by the renovation commissions. See *Cerîde-i ʿAdliye* 25 (1340), 894-902.

of the goods, but if the customer accepts the goods in this way, he/she will be able to deduct the share of the deficiency from the price. However, the customer's discount of the price depends on the consent of the seller.[125] In case of excess, the goods will be returned to the seller. *Majalla*, on the other hand, was ruling on the ownership of the excess in question to the customer.[126]

Conclusion

Majalla aims to surround the fiscal problems of the time while it is still in the copyright stage. If we look at its implementation for a long time in the new courts in accordance with other legislation, it will be understood that it is a reformist text, not a traditional one. Nevertheless, *Majalla*'s theory of sales, in particular, was forced to be amended by severe criticism. At the center of these amendments were *Majalla*'s approach to the concept of goods and the provisions that are its extension. Some articles were amended, some were cancelled, and it was asked to approve the individual sale of receivables and rights. The Commissions decided to internalize the freedom of contract as an economic acceptance through the civil code. French Civil Code also clearly supports the freedom of contract. The results of this support are that the French Civil Code does not limit the conditions, approves the sale of receivables and rights, and puts all kinds of contracts under legal protection, provided that they are not prohibited by law and are not contrary to general moral rules. Hence, the acceptance of the freedom of contract in the *Iḥḍar-ı Qawānīn* Commissions was reflected in the establishment of similar provisions to *Majalla*. The limits drawn by *Majalla* for conditional sales were exceeded. It was considered that seeing option gave the customer the opportunity to terminate the contract in bad faith. The amendment Commission did not feel the need to exclude the ordered goods whose qualifications were not described from this decision. Because ensuring legal security for all fiscal transactions and contracts is the result of contractual responsibility, which is another important principle focused on by the Commission. The fact that the exceptional contract is extremely important for the commercial and fiscal transactions of the era, in which cases the parties may be given the opportunity to terminate the contract and the issue of compensation for damages that will occur in the event of termination are among the issues of interest to the Commission. However, in the final report of the *Kitāb al-Buyūʿ* amendments, there is no direct reference to the articles regulating the exceptional contract. This means that *Majalla*'s exception solutions do not create an urgent problem, or the exception provisions are not yet perceived as a priority source of problem in legal practice. The articles of *Majalla*, which require that the shortage or excess of goods sold at wholesale prices and quantities, should not be reflected in the price have been changed. As a result, the provisions of *Majalla* and French Civil Code on delivery became even more similar.

We can say that, unlike *Majalla*, the French Civil Code encourages sales transactions without limiting the subject of the contract, makes the unilateral termination of the sale very difficult -especially for the customer-, does not give the option of termination to the customer even if it is purchased without being seen, and accepts all conditions put forward during the sale as valid. Undoubtedly, this may provide the seller with the opportunity to make more favorable contracts in terms of his own benefits, especially in transactions between the merchant and the civilians. *Majalla*, on the other hand, protects the interests of the customer against the merchant more than the French Civil Code. We can claim that the traces of liberal economic thought were found in the texts amending *Majalla*, as in the French Civil Code.

Instead of quoting the French Civil Code, we can see the struggle for *Majalla* as an effort to regulate the law in a consistent and measured way with the principles of fiqh instead of pure liberalism principles. However, in all the examples of amendments we have focused on, the provisions of *Majalla* selected from the *Ḥanafī* theory of contract of sale were revised by benefiting from the *fatwā* pool of other fiqh madhhabs with the discourse of needs of the age, and at the end of the day, *Majalla* text became similar to French Civil Code through amendments. Most regulations, such as the cancellation of seeing option, the possibility of rights and receivables being the subject of sales, the approval of conditional sales by identifying with the freedom of contract, are directly related to French Civil Code. The Commissions amended the *Majalla* by comparing it with the Western laws, but opening the way for permissiveness from the *fatwās* of the four madhhabs. French Civil Code is the most recognized within the western civil laws. In addition, the fiscal law model created after the Reforms is like an adaptation of the French model. Nevertheless, we do not know exactly how much of the amendments we mentioned had a really problematic basis in society, how much was the result of the adoption of the Western legal concept. The legal processes in the courts and the juridical-legal writings constitute the social aspect of the issue.

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125 For the amendment of article 224, see "teb'izinde zarar olan mevzunattan bir mecmuun miktarı beyan ve yalnız ol mecmuun bahası zikrolunarak satıldıkta lede't-teslim tamam çıkarsa bey' lazım olur, nakıs çıkarsa müşteri muhayyer olup dilerse bey'i fesheder dilerse semen-i müsemmadan hissesiyle kabul eyler bu takdirde bayiin rızası şarttır ve zait çıkarsa ziyade bayiindir. Bu surette gerek bayii ve gerek müşteri muhayyer olur şu kadar ki bayii ziyadeyi meccanen müşteriye terk ederse müşterinin muhayyerliği sakıt olur ve ziyade mukabelesinde bir ıvaz itasıyla bey'in takririnde tarafeyn ittifak ederlerce caiz olur", See *Cerīde-i ʿAdliye* 25 (1340), 896-897.

126 *Cerīde-i ʿAdliye* 25 (1340), 897; *Dār al-Funūn Hukūk Fakultesi Mecmūʿası* 11 (1341), 62.

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