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ʿAqd al-Nikāḥ: Explaining the Nexus Between Marriage and Contract in Islamic Law*

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Abstract
The combination of marriage and contract (*ʿaqd al-nikāḥ*) has been one of the interesting subjects for the scholars to be discuss and elaborate. The focus of this attention has been on analysis and understanding of the contractual component of the marriage reflecting a similarity with economic contracts. Recent studies endeavored to explain this nexus; however, they have also neglected to include how contract as a concept operates in Islamic law and beyond, and the discussions between the schools on the metaphoric aspect of the marriage contract. Classical legal scholars elaborated how marriage is represented by contract model, its relation to other economic contracts, and how the contractual aspect of the marriage is articulated. In particular, the argument that the contractual aspect of *nikāḥ* is partly related to metaphor offers another dimension in exploring the nature of the marriage contract. This study aims to analyse the nexus by including both the discussions on the metaphoric aspect of the marriage contract and the shortcomings in explanations of the contractual component of the marriage contract.

Keywords: *ʿAqd al-Nikāḥ*, *Majāz*, *Milk al-Mutʿa*, Metaphor, *ʿAqd,* Ownership.

Nikah Akdi: İslam Hukukunda Evlilik ile Akit Arasındaki İlişkinin Açıklanması
Öz
Çağdaş akademik literatürde nikah akdinin ticari akitlerle olan benzerliği araştırmacıların ilgisini çekmiş ve bu ilgi nikahın akdi boyutunu inceleme ve çözümleme ihtiyacını doğurmuştur. Nikah akdinin ne tür bir akit olduğu, ticari akitlerle olan ilişkisi ve evlilik için şer'an önemli bir araç olan akdin mahiyeti fakihler tarafından tartışılmıştır. Ḥanefî ve Şafiʿî mezhebi arasında nikahın akit boyutunun hakikat mi yoksa mecaz mı olduğu sorusu bu tartışmanın somut tezahürü olarak karşımıza çıkar. Çağdaş batı literatürü nikahın akdi boyutunu çözümlemeye çalışırken İslam geleneğinde akit kavramını, akit nazariyesi ve akdin mecazla ilişkisine dair tartışmalar üzerinde durmaz ve nihayetinde bir takım tartışmalı neticelere ulaşır. Bu çalışmanın amacı çağdaş çalışmaları da içerecek şekilde, Ḥanefî mezhebinin nikah akdinde mecazla kurduğu ilişki üzerinden nikah akdi ve ticari akdin irtibatı ve bu irtibattan doğan sorunları ele almaktır.

Anahtar Kelimeler: Nikah Akdi, Mecaz, Akit, Metafor, *Milk'ul-Mutʿa*, Temlik.

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Introduction

In recent years, there has been a renewed interest in exploring the contractual component of marriage in Islamic family law. The point of this interest is how legal scholars explained the nexus of marriage and contract (*ʿaqd al-nikāḥ*). The schools of Islamic law achieved a consensus that marriage should be conducted in the form of a contract. The puzzle emerges at this point where the standard legal model which is a variant of an economic contract model, is appointed as the legal means for legitimising marital relations. This particular model emerged from contractual agreement *per se* and embodies the transactional terminology, concept and devices. This familiarity between the marriage contract and standard model of contract might lead to the misconception that marriage contract should be considered part of economic contracts. To call the attention to this nexus, this study deals with the complexities arising from the relationship between economic contract and marriage contract, and how Muslim legal scholars explained the usage of contractual devices and doctrines regulating *ʿaqd al-nikāḥ* (marriage contract).

Incorporating the form of a contract and marital relationship, and by this drawing a legal model to legitimate marriage brought along some pitfalls, such as adopting a particular categorization, framework, and terminology of contract for a marriage. The arising complexity has to do with potential influence of the generic contract model on marriage, which is predominantly based on commercial transactions and to a considerable extent occupied by economic terms and concepts. The influence of the contractual devices and terminology is evident in the language of legal texts; such as determining and naming the subject matter of marriage contract, which in some cases transgresses the limits of the marriage and leads to discussions on what/who can be considered the subject of a marriage contract or leading to ponder how to describe the function of *mahr* (dowry) in the Islamic marriage contract. Besides the complexities arising from the contractual component of marriage, there is a need for further discussion regarding how legal scholars theorize the contract, for which purpose the model of contract is used, and why it is used for regulating marital relationship.

To open up the discussion, in Islamic law, there is a generic model used for all types of legal agreements. This is *ʿaqd al-bayʿ* (the sales contract). *ʿAqd al-bayʿ* serves as the main model. *ʿAqd al-nikāḥ* is formally shaped by this

main model's devices, terminology and discourse[1]. In particular, due to its gravity (*maṣlaḥat al-nikāḥ*), the legal schools consider the marriage contract as non-transactional- albeit the marriage contract visibly involves economic terms, devices and discourse. It is in my opinion that the debate between the *Ḥanafī* and *Shafiʿī* legal schools on whether the contractual facet of the marriage contract is metaphoric or not enables us to analyse this facet and to understand the transactional legal discourse. Here, I seek to discuss the *ʿaqd al-nikāḥ* from the perspective of the *Ḥanafī* approach that introduces the use of commercial terms in *nikāḥ* in relation to *milk al-mutʿa* (a type of ownership) and *majāz* (figurative thought). By looking at this particular subject, I try to explore the nexus between marriage (spousal relationship) and contract not only from the point of view of contract theory but also from the point of the theory of *majāz* that comes into play when legal jurists expound the nature of the marriage contract. I will use the theory of *majāz* to assess this nexus in order to see by which means the association between marriage and contract is formed.

Present discussions on the contractual component of the marriage contract fail to delve into how the *Ḥanafī* elucidate and justify the use of the commercial terms closely related *milk* (ownership), i.e. *milk al-mutʿa* (a type of ownership referring to a lawful cohabitation) in marriage contract. *Milk al-mutʿa* is the key concept that represents legal aim of marriage and enables the use of economic terms. Though it is a theoretical and very abstract content, this particular concept (*milk al-mutʿa*) paves the way to exploration how the means of *ʿaqd* (a contract) functions for marriage, and to what extent the economic contractual devices and doctrines have influenced the marriage contract. Here first, I present a brief background summary of what contract is and how it functions both in Islamic contract law and beyond Islamic law. Then, I discuss the contractual model prescribed by the legal scholars to legitimize and regulate spousal relation of the couples. Although the vast majority of this study is based on the classical legal sources, I also discuss how *milk al-mutʿa* in the Islamic classical marriage contract is addressed in contemporary scholarly literature. Contemporary discussions view as the transactional feature should be taken either literally or as a

* This article based on the author's PhD thesis. Hakime Reyyan Yaşar, "Marriage, Metaphor, And Law: Exploring Wives' Anomalous Legal Status In The Classical Islamic Medieval Marriage Contract." Heythrop College, School of Advanced Studies, University of London, London, 2018.

[1] Barber Johansen, "The Valorisation of the Body in Muslim Sunni Law," 72-74.

symbolic transaction.[2] These points of view will be also be presented in this article.

In this study, I chose to discuss this topic almost entirely from the standpoint of the *Ḥanafī* school that identifies *ʿaqd al-nikāḥ* in relation to *milk al-mutʿa*. It should be emphasized that other legal schools do not share this view. In addition, I also use the accepted linguistics devices in the realm of *Ḥanafī uṣūl al-fiqh* (legal methodology). The *Ḥanafī* legal theorists prefer to use both *majāz* and *istiʿāra* interchangeably.[3] Usually, *majāz* is translated as "tropes" into English, and the equivalent of a metaphor is the term *istiʿāra*. In this study, I do not aim to delve into explaining the linguistic differences of *majāz* and *istiʿāra*; therefore I adopt the *Ḥanafī* legal theorists' attitude towards using the word *majāz*. I am well aware that this article is a preliminary study about this nexus. However, I believe this nexus will add towards new perspectives and an approach to understanding a marriage contract and theory of contract in Islamic law. There has not been much research conducted that specifically looks into the relation between the Islamic marriage contract (*nikāḥ al-ʿaqd)* and Islamic contract theory (*naẓariyyāt al-ʿaqd*);[4] therefore I will start with a brief introduction to the Islamic contract theory.

1. The Concept of *ʿAqd* (The Contract) in Islamic Law

Commercial and civil acts in the Islamic legal sources fall under the thematic category named *muʿāmalāt*. In addition to *muʿāmalāt*, there are other two thematic categories named *ʿibādāt*, involving acts regulating ones relationship to God, such as *ṭahāra*/purification, *ṣalāt*/prayer, and *ṣiyām*/fasting etc., and *ʿuqūbāt*/dealing with a penal code/crime. Among these categorizations, *muʿāmalāt* is the one that covers diverse and seemingly paradoxical legal acts, the acts dealing with interactions between people or property or exchange, such as sales, sureties, marriage, divorce, and oaths. This wide range coverage of legal acts both generates richness and flexibility within the section *muʿāmalāt*, and also poses an important dilemma: a dilemma on which identified common ground was the economic and civil acts put in the same category, or on what "table", according to on what grid of similitudes and analogy, could these legal acts be gathered.

[2] Johansen, "The Valorisation of the Body," 71-112.
[3] Ibn al-Malak, *Sharḥ al-Manār wa Ḥawashīhi min ʿIlm al-Uṣūl*, 399.
[4] Azizah Y. al-Hibri, "The Nature of Islamic Marriage Contract: Sacramental, Covenantal, or Contractual?," 185-186.

Embodying both economic and social acts in one category brings some complexities and paradoxical results. This paradoxical fabric is concretized in the legal scholars' dissent on whether marriage/*munākaḥāt* and divorce/*mufāraqāt* should be localized in *muʿāmalāt* or not. The concept of *ʿaqd* is the shared solid ground for economic and social acts that paves the way to put them in the same category.

Marriage in Islamic law is carried out by the means of *ʿaqd*/contract. This shared ground ensures the mainframe for the *muʿāmalāt* section. Though shared similarities in the type on the ground of *ʿaqd*, the legal scholars are aware of that marriage and divorce do not exactly belong to economic acts; indeed, they are contrasting in terms of their nature and aims; thus, should be put into a category of its own. Nevertheless, this awareness did not manage to avoid discussions if the marriage and divorce section should be under the *muʿāmalāt* or *ʿibādāt*.[5] Therefore, an attentive eye might notice that each Sunni school of law, and even each legal scholar in his legal school differs in presenting the socio-economic contracts in a certain order in this section.[6] For instance, in some legal sources the chapters on marriage and divorce are paired with economic acts and others consider the chapters on marriage and divorce separate from the economic contracts closer to *ʿibādāt* section.[7]

ʿAqd is where the nexus comes into the light in this complex structure or if it would be not assertive to say, *ʿaqd* is the nexus itself. In this respect, Azizah al-Hibri too calls the reader's attention to understand the Islamic contract theory before leading detailed research on Islamic marriage contract, for two reasons. One of them is to approach the Islamic marriage contract from a holistic view. She argues that understanding the theory of contract in Islamic law is necessary to evaluate the contractual aspect of marriage. Her other point is that reading the Islamic marriage contract from the perspective of a modern Western capitalist view can easily cause to mischaracterise the nature of the Islamic marriage contract to avoid this misconceptualization a thoroughly examination of Islamic contract theory is necessary.[8] As well, to uncover the nexus between the marriage contract and

[5] Abū Bakr ibn ʿAlī al-Ḥaddād al-Zabīdī, *al-Jawharatu'l-Nayriyya*, 1:431.
[6] Bilal Aybakan, "Fürû' Fıkıh Sistematiği Üzerine," 5-32.
[7] Abū Bakr al-Ḥaddād (d. 800/1397), one of the commentators to *al-Hidāya*, explains why al-Qudūrī gave place to the chapter of sales instead of marriage. According to him, although marriage is a kind of ibadah, due to the extensity, inclusionary and beneficiary function of sale, the chapter of sale is prioritised to the chapter of marriage. (al-Ḥaddād, *al-Jawharatu'l-Nayriyya*, 1:224-25.)
[8] al-Hibri, "The Nature of Islamic Marriage Contract," 187.

other economic contracts, we have to immerse ourselves in the concept of *ʿaqd* without reducing the investigation solely to the legal context or economic contracts. Understanding the Islamic contract system is not only important for comprehending commercial contracts and the nexus, but also for comprehending the discussion regarding the metaphoric feature in the marriage contract. Therefore, I advocate starting with focusing on what *ʿaqd* is in general terms and how it is conceptualized out of the legal context.

1.1. The Definition of *ʿAqd*

Firstly, I would like to begin with defining *ʿaqd*. *ʿAqd* means "to bind, to tie up, to fasten, resolution, firm belief and to attach"[9] or *shadda* "to become firm, to fast, to solid". The literal meaning of the word is used for concrete acts, such as binding a line (*ka-ʿaqd al-ḥabl*), or tying a knot,[10] or bringing two sides together by binding them (*jumiʿa aḥad ṭarafayh ʿalā ākhar wa rubiṭa baynahuma*).[11] As a legal term, there are various definitions offered for a contract. One of the proposed definitions is as follows: that which is "employed to describe all manifestations of the will which tie their author to the obligations arising there from."[12] Meanwhile, the definition of *ʿaqd* reflects a model for binding agreement between two parties about a particular subject. This model enables governance of rights and duties of the parties in a comprehensive way; so that one may encounter with ʿ*aqd* in non-economic contexts such as theology, exegesis or literary expressions.[13]

Rāghib al-Iṣfahānī (d. 502/1108) unveils the multidimensional use of *ʿaqd.* He argues that within the legal framework, *ʿaqd* functions as *istiʿāra* (metaphor).[14] The literal use of *ʿaqd* can be extended beyond a physical fastening or tying of objects. Conceptually, at least two parties are legally bonded by a verbal commitment in a contract. That is to say, *ʿaqd* refers to an abstract tie, which is an intangible and symbolic "fastening a word by another

[9] S. E. Rayner, *The Theory of Contracts in Islamic Law: a Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and the United Arab Emirates*, 87-8; Ala'eddin Kharofa, *The Loan Contract in Islamic Shariʿah and Man-Made Law Roman-French-Egyptian A Comparative Study,* 3; Ismāʿīl ibn Ḥammād al-Jawharī, *al-Ṣiḥāḥ Tāj al-Lugha wa Ṣiḥāḥ al-ʿArabiyya,* 2:510.
[10] Abū Manṣūr ibn Aḥmad al-Azharī, *Tadhhīb al-Lugha,* 1:186-87; Muḥammad ibn Aḥmad al-Qurṭūbī, *al-Jāmiʿ li-Aḥkām al-Qur'an*, 6:32.
[11] ʿAbd al-ʿazīz al-Bukhārī, *Kashf al-Asrār ʿan Uṣūl li Fakhr al-Islām al-Bazdawī*, 85; *al-Mawsūʿah al-Fiqhīyyah,* 30:198.
[12] Rayner, *The Theory of Contracts,* 87-88.
[13] Hakime Reyyan Yaşar, "Marriage, Metaphor, And Law: Exploring Wives' Anomalous Legal Status in the Classical Islamic Medieval Marriage Contract," 85-87.
[14] al-Bukhārī, *Kashf al-Asrār*, 85; Rāghib Ḥusayn ibn Muḥammad al-Iṣfahānī, *al-Mufradāt fī Gharīb al-Qur'an*, 353.

word" (*ismun li rabṭ kalām bi al-kalām*),[15] or a cogitated chain or fastening between two persons or an object and a person,[16] or putting a person under an obligation (e.g. by giving an oath). This feature enables *ʿaqd* to function in diversified theoretical contexts and concepts. In particular, with the use of the metaphoric form, it covers a wide range of legal acts and obligations, for instance, commerce, marriage, divorce, *yamīn* (oath), prayers, *ḥudūd* (punishments), and *muʿāmalāt* (pecuniary transactions). Relying on *al-Iṣfahānī*'s categorization of *ʿaqd*, it is possible to elaborate the contract through the theocentric dimension and the legal dimension.

1.2. The Theocentric Use of *ʿAqd*

ʿAqd is mentioned in the first *āyah* of surah *al-Mā'idah* "fulfil your obligations/*al-ʿuqūd* (5/al-Mā'idah:1)." The term is presented both in relation to a theological dimension referring to the covenant between human being and God (2/al-Baqarah:63, 83, 84, 94), and to a legal dimension. The legal dimension covers the convention or agreement among human beings, i.e., it includes transactional practices, religious acts and non-commercial agreements.[17] Besides the word *ʿaqd*, we can see that the economic terminology and expressions are metaphorically used for theological and moral conceptions in the Qur'an to explain human being's relationship with God. For instance, reckoning (*ḥisāb*) (13/al-Raʿd:40), the unbelievers are the loser (*khāsirūn*) (2/al-Baqarah:121), every soul is held for security (*rahīn*) for its debts (74/al-Muddaththir:38).[18] So, the economic conception of *ʿaqd,* and the terminology belonging to it are also metaphorically used to indicate various levels of one's relationship with God. Again, in Sufi or in the literary context, the relationship between the lover and the beloved is illustrated by commercial concepts.[19]

In addition to *ʿaqd*, there are other words in the Qur'an describing the covenant between God and human being: these are "*al-mīthāq* and *al-ʿahd.*" *Al-mīthāq,* with its all-derivative forms, is used in a semantic framework pertaining to the theological concept in the meaning of faith in God, full submission to God and covenant. The majority of the Muslim scholars

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[15] Ḥusām al-dīn Ḥusayn ibn ʿAlī ibn Ḥajjāj al-Sighnākī, *al-Kāfī al-Sharḥ al-Bazdawī*, 817.
[16] ʿAbd al-Hādī al-Ḥakīm, *ʿAqd al-Fuḍūlī fī al-Fiqh al-Islāmī*, 40.
[17] Aḥmad ibn ʿAlī al-Jaṣṣāṣ, *Uṣūl al-Fiqh al-Musammā bi al-Fuṣūl fī al-Uṣūl*, 3:286; al-Qurṭubī, *al-Jāmiʿ li-Aḥkām al-Qur'an,* 6:31-33; Fakhr al-Dīn Muḥammad ibn ʿUmar al-Rāzī, *Tafsīr al-Fakhr al-Rāzī: al-Tafsīr al-Kabīr wa-Mafātiḥ al-Ghayb*, 11:123-124.
[18] Charles C. Torrey, *The Commercial-Theological Terms in the Koran*, 1-6.
[19] Margaret Malamud, "Gender and Spiritual Self-Fashioning: The Master-Disciple Relationship in Classical Sufism," 102, 103, 109; Madeline C. Zilfi, *Women and Slavery in the Late Ottoman Empire*, 14.

(including *mujtahids*, *mufassirs,* and *mutakallims*) rely on the verse 7/al-Aʿrāf:172-173, and hence predominantly read and interpret this term within the context of faith.[20] Due to the theological indications, in the legal context, *mīthāq* is not mentioned as a model or as a form of a contract - albeit it is mentioned related to marriage as a solemn covenant (*mīthāqan ghalīẓan)* (4/an-Nisāʾ:21). With respect to marriage, the Qur'an does not specifically designate marriage to have contractual foundation. What I mean is; one cannot find the required elements that a marriage contract consists of, or other details discussed by the legal scholars. Nevertheless, the schools of Islamic law acknowledge that some usages of the word *nikāḥ* (marriage) in the Qur'an and its derivatives refer to *ʿaqd*.[21] The purpose of the contractual component is to provide a legal framework for legitimizing marital relations without affecting the spirit and purposes of marriage described in the Qur'an and Sunna. In other words, according to the legal scholars the contractual component is a means for sealing the agreement between the parties or binding them on the terms of marriage.

1.3. *ʿAqd* in the Legal Context

The jurists implied the separation of the theocentric aspect and the legal use of the *ʿaqd* by focusing only on the legal function of the term. They considered economic and non-economic contracts in the same category of the *common locus* of *ʿaqd* and put aside the theological aspect. As the legal sources are not specifically and thematically outlined in categories, but sorted in headings, and each type of economic and civil acts are individually exhibited; it is fair to say that the categorization of contracts in Islamic law has its own stylistic features of presenting the contracts. For instance, the transactional contracts such as sale (*al-bayʿ*), exchange (*al-ṣarf*) or leasing contracts (*al-ijāra*) take individually place under the chapter of *ʿaqd al-bayʿ*, *al-ṣarf* and *al-ijāra*. Theoretically, the difference between the types of contracts is identified with relevant contractual verbs, expressions, its aim, and the nature of the subject matter in the contract.[22] Among the contract models, *ʿaqd al-bayʿ* (sale contract), by being assigned as the generic and standard model, is at the centre of other economic and non-economic acts. The Qur'an both mentions *al-bayʿ* as a specific type of exchange contract, and as the generic model covering the types of economic contract models, as well as the metaphoric use in theological framework explained above. In other

[20] Salime Leyla Gürkan, "Misâk," *DİA,* 30:171.
[21] Fahrettin Atar, "Nikāh," *DİA,* 33:112-13; al-Hibri, "The Nature of Islamic Marriage Contract," 198.
[22] Weal B. Hallaq, *Sharīʿā Theory, Practice, Transformations*, 239-240.

words, the concept *ʿaqd* (both in legal and theological framework) is represented through the sale contract's elements and fabric. Strikingly, this generic model enables putting all legal agreements in the same category. But how does this categorization process work?

1.3.1. What Does it Mean to be in the Same Category?

Categorization is one of basic cognitive abilities that human has. Categorizations help us speak and think about things the existing in the world without getting bothered by naming and remembering of any and every entity. Hence, at a basic level human mind classifies the world as we experience it in terms of prototypes and not theoretical terms or features. While we speak about categorization, we also accept an established ground, an analogy that enables us to speak about and relate to a more abstract group. In the categorisation process, a generic model containing the unique sets of essential features is assigned as the superordinate category.

The generic model is, in other words, the superordinate category that creates a hierarchical structure among the other sub-categories. Thus, a relationship is established between the superordinate category and the sub-categories, where the sub-category contains in some cases the all-essential features of the superordinate category, and in some cases relatively few. For example, small or big fish, such as salmon or sharks and so on are prototypically categorised as fish. Also, starfish, ink fish, jellyfish are considered to be types of fish, but they do not belong to the actual central category in terms of sharing the fundament features of a regular fish. When sub-categorical species are closely considered, the differences in their features, contents or forms become visible. So, one may easily say that there is not much *common locus* between a starfish and a salmon. However, there are some other sub-categories that do share to a considerable extent a *common locus*; for instance, shark or snakefish. Even if each of them has distinctive differences, we speak about them by using the same language and by the terms and conception of the superordinate category.[23] We can say that for both cases, a common ground (based on concrete or abstract conception) is established with the prototypical fish and subcategories that make us to hold all other spices together in the same category and even draw an analogy between them.[24]

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[23] Elin K. Jacob, "Classification and Categorization: A Difference that Makes a Difference," 520-522.
[24] George Lakoff & Mark Johnson, *Metaphors We Live by With a New Afterword*, 71.

A similar categorical process exists among the contracts in Islamic law. As *al-Iṣfahānī* stated, the *ʿaqd* in Islamic tradition is indeed an abstract concept. By relying on the shared common ground, which is binding two component parties on a subject, the jurists categorised most of the commercial and non-commercial legal practiced as *ʿaqd* as the generic model. The form of a sale contract is chosen as the generic model to put the abstract concept (*ʿaqd*) into a tangible and legal structure. In this particular categorisation, all sub-categories are shaped and conceptualised by the superordinate category, which is also named the generic model. Structurally related, except the generic model, socio and economic acts in legal and literary context are analogized to the *ʿaqd al-bayʿ* and explained in relation to the ownership. Whether the analogy is metaphorical (*majāz*) or juristically (*qiyās*) is an interesting point on which I will briefly elaborate later. The differences or distinctions among the social and economic contract models are pointed in the process of discussing each individual contract model. As a preliminary elaboration, I would like to demonstrate the generic model and its relation to the marriage contract.

2. The Generic Model for Contracts: *ʿAqd al-Bayʿ* (The Sale Contract)

The concept of *ʿaqd al-bayʿ* is fundamental to an understanding of contractual practices in Islamic law and also of metaphoric discourse based on it. *ʿAqd al-bayʿ* is prescribed as the generic model for socio-economic contracts. There are primary elements within the notion of *ʿaqd al-bayʿ* that are assigned as the *common locus*; thus allow one to apply the form to various types of acts. These are also named as the constituent elements of *ʿaqd al-bayʿ* (or *arkān*, "pillars") as follows: the contracting parties, the form (*sīgha*) of offer and acceptance (*ījāb* and *qabūl*), and the subject-matter, i.e. the subject of the agreement.[25]

Socio-economic contract models predominantly are analogised to this model; thus, they share the above-mentioned essential elements and conceptualization of the generic model. The *Ḥanafī* jurists divide the analogy into two types; analogy used in metaphors (*majāz*), for instance, marriage contract, and juristic analogy (*qiyās*) for economic contracts. To distinguish between these types of contracts the jurists methodologically take into consideration three points: the semantic and pragmatic content of utterance used for offer and acceptance while concluding the contract, the feature and

[25] Hallaq, *Sharīʿā Theory,* 239.

qualification of the subject matter of the contract, and the purpose of the contract.

Due to the special function of the expressions used in the concluding contractual process, the jurists do not draw a formal and structural distinction among the various contractual models. The word, the intention of the parties uttering the words and contextual indications are effective in shaping and classifying the form of the contract, and in validating it. Hence, the jurists extensively analysed the semantic, pragmatic, and customary limits of the meaning of verbs and phrases that are used for non-commercial or commercial legal agreements.[26]

The characteristic of the article/subject matter of the contract is also operational in distinguishing contracts from each other. Principally, the subject matter should have value in the Islamic legal context. That is *mutaqawwim* -a term used for objects that are legally accepted as *māl* (commodity, assets, including physical goods and symbolic goods as usufruct). Non-legal articles (such as pork, wine) cannot be part of a valid contract, as they are not considered legally *māl*. Along with the separation of articles as *māl mutaqawwim* and *māl ghayr mutaqawwim*, legal scholars make another distinction in the perception of the articles in contracts as *ʿayn* (defined by Ömer Nasuhi Bilmen as a thing that exists in the physical world, determined and concrete).[27] *ʿAyn* can be expressed in two forms as the subject of a contract: by itself and by the use and advantages of the property (usufruct/*manfaʿah)*. *Manfaʿah* is not defined as property but a legal right to benefit from the article temporarily. So, the exchange enables to own the article or to own the right of usufruct (*intifāʿ*/*manfaʿah*). The distinction in the article qualifies also as "the contracts concerning the exchange of articles of trade (*ʿuqūd māliyya*) and contracts with a subject-matter that is not considered as an article of trade."[28] Contracts covering the latter type of article are not treated as pure commercial exchange practices.[29]

With respect to *ʿaqd al-nikāḥ*, the marriage contract indeed is an exceptional case, as marriage does not fit clearly into commercial contracts in terms of its aim and nature. Explaining the incompatible aspects of this categorisation while drawing the lines between marriage and economic contracts were challenging tasks to be accomplished. To avoid any confusion

[26] Johansen, "The Valorisation of the Body," 83.
[27] Ömer Nasuhi Bilmen, *Hukukı İslâmiyye ve Istılahatı Fıkhiyye Kamusu,* 6:11.
[28] Johansen, "The Valorisation of the Body," 82.
[29] Saʿīd ibn Nāṣir ibn ʿAbd al-ʿAzīz al-Shatrī, *al-ʿUqūd al-Mudāfatu ilā Mithlihā*, 269.

between conventional economic contracts and a marriage contract, legal scholars put an effort to elucidate the nature of a marriage contract. Although, the categorisation process can clarify to some extent the intersection of marriage and commercial exchange, there are still some undisclosed points in this particular categorisation. Namely, after assigning the commercial exchange contract as the generic model for all other forms of contract, the jurists bring two distinct concepts together. This combination causes a paradox in the discourse and in the legal interpretation. One of these is a paradox of what is assigned as the subject-matter of the contract? An example for this paradox in the juristic discourse can be given from *al-Kāsānī* (d. 587/ 1191): "Marriage is an exchange [*muʿāwaḍa*] by which a non-property [*laysa bi māl*] is changed in return for property [*al-māl*]."[30]

The *Ḥanafī* scholar, *al-Kāsānī* states that a non-property is exchanged in return for a property. But what means non-property? In Islamic law principally and ethically a free man or woman cannot be the subject of a contract, in other words, cannot be the subject of an exchange. Previously I have mentioned that the usufruct, as a symbolic and abstract asset, can be assigned as the subject matter. To reduce the paradox, the *Ḥanafī* scholars highlighted that the subject of the marriage contract is *intifāʿ*; technically defined by *Ḥanafī* school as *milk al-mutʿa* referring to a type of ownership based on the claim that it is the ownership of usufruct.

3. *ʿAqd al-Nikāḥ*: The Combination of Marriage and Contract

Taken literally, *nikāḥ* is a form of the verb *n-k-h,* which means *dhamm, waṭʾ* or *jamʿ* (gathering or sexual intercourse), and in legal terminology *nikāḥ* refers to a permission for intercourse and lawful procreation obtained via contract. The *Ḥanafī* school argues that the use of *nikāḥ* in the Qur'an refers to an intercourse.[31] By pointing to the customary and conventional use by the community, the *Ḥanafī* scholars reason that the meaning of *nikāḥ* is intercourse since this is the primary meaning which is still in use.[32] Therefore, the meaning of the intercourse should be prioritized over the

[30] Abū Bakr ibn Masʿūd al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾi*, 3:503. In this paper, the translations of the classical legal texts are quoted from Hakime Reyyan Yaşar, "Marriage, Metaphor, And Law: Exploring Wives' Anomalous Legal Status in The Classical Islamic Medieval Marriage Contract."

[31] al-Jaṣṣāṣ, *Uṣūl al-Fiqh* 1:48 (n.2); Abū Zayd Abdullāh ibn Muḥammad ibn ʿUmar ibn ʿĪsā al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, 120; al-Sighnāqī, *al-Kāfī,* 791, 797.

[32] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 3:307 (n.1); Muḥammad ibn Abū Sahl Aḥmad al-Sarakhsī, *Kitāb al-Mabsūṭ*, 4:193; al-Mawṣilī, Majd al-Dīn ʿAbdullāh ibn Maḥmūd ibn Mawdūd, *al-Ikhtiyār li-Taʿlīl al-Mukhtār*, 3:109-110; Muḥammad Amīn al-Shahīr Ibn ʿĀbidīn, *Ḥāshiyat ibn ʿĀbidīn: Radd al-Muḥtār ʿalā al-Durr al-Mukhtār li-Muḥammad Amīn ibn ʿUmar al-Shahīr bi-Ibn ʿĀbidīn*, 4:57-58.

meaning of the contract. Together with the idea that marriage is a contract, the *Ḥanafī's* also claim that marriage is also linked to metaphor.[33]

> Know that [the word] *nikāḥ* lexically means intercourse, it's is then figuratively borrowed [*yustaʿāru*] [in relation to] the contract either because the contract is a legal means [*sababun sharʿiyyun*] by which intercourse is reached. [34]

In other words, a contract is a legal form or a tool by which the right for lawful intercourse (*waṭʾ*) is obtained,[35] and this concept is formulated via *milk al-mutʿa.* The *Ḥanafī's* present the root of this formulation by a relational interpretation between *milk al-raqaba* (ownership of female slave) and *milk al-mutʿa*: "The vocable assigned for ownership of slaves [*milk al-raqaba*] allows to borrow them *[yajūz an yustaʿār]* to prescribe *milk al-mutʿa."*[36]

This relation is based on a link or association (*ittiṣāl*) in *majāz-* which will be open later. There is also an alternative view that the conventional use of the word *nikāḥ* indicates both intercourse and contract, and that those can be considered synonymous (*mushtarak*).[37] By contrast to the *Ḥanafīs*, the majority of *Shāfiʿīs* clearly disagree with this opinion, as they emphasize that *nikāḥ* primarily refers to a contract (*ḥaqīqa*), and the sub-meaning or the metaphoric indication (*majāz*) is intercourse.[38]

al-Shāfiʿī says: "It [marriage] is literally a contract [*ḥaqīqatun fī al-ʿaqd*] [and] metaphorically [*majāzun*] [refers to] intercourse." [39]

Most of the *Shāfiʿīs* claim that though the essence of the *nikāḥ* indicates an intercourse, due to the constant use of the terminological meaning and the legal usage; *nikāḥ* should be understood as a contract by its linguistics community (*sprachgemeinschaft*). Dissimilar than the *Ḥanafīs,* the *Shāfiʿīs* do not give place to the concept of *milk al-mutʿa* in the marriage contract.

Of course, the legal scholars do not simply reduce marriage to its contractual components. For them, distinguishing all contract forms from

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[33] al-Jaṣṣāṣ, *Ahkām al-Qur'an*, 2:113; al-Jaṣṣāṣ, *Uṣūl al-Fiqh,* 1:48, 369.
[34] al-Sarakhsī, *Kitāb al-Mabsūṭ,* 4:213.
[35] Hallaq, *Sharīʿā Theory,* 271-272.
[36] *"Al-lafẓ al-mawḍū li ījāb milk al-raqaba yajūz an yustaʿār li ījāb milk al-mutʿa"* (al-Sarakhsī, *al-Uṣūl,* 2:182).
[37] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 3:307; Ibn ʿĀbidīn, *Hāshiyat ibn ʿĀbidīn*, 4:57.
[38] Ḥujjat al-Islām Abū Ḥāmid Muḥammad ibn Muḥammad ibn Muḥammad ibn Aḥmad al-Ghazālī, *al-Wasīṭ fī al-Madhhab*, 5:45-46; al-Mawārdī, ʿAlī ibn Muḥammad, *al-Ḥāwī al-Kabīr*, 9:14-6; al-Mawṣilī, *al-Ikhtiyār,* 3:109.
[39] al-Ghazālī, *al-Wasīṭ ,* 5:3.

each other, and in particular identifying the marriage contract, is critical.[40] The contractual framework is considered as the legal means for marriage, yet there are other major benefits and wisdom accompanying marriage as well; such as marriage as a source of mutual affection and cooperation, a means for licit intercourse, procreation, an essential part of leading a good and moral life, moral and spiritual factors and a basic building block of society (30/ar-Rūm:21; 2/al-Baqarah:187). The reason provided by the Muslim jurists is reflected through the concept of *maṣlaḥa*, or more precisely *maṣāliḥ al-nikāḥ*.[41] For instance, al-Sarakhsī (d. 483/1090) details what *maṣāliḥ al-nikāḥ* is, and the social and psychological benefits of marriage.[42] Nonetheless, the legal scholars do not explicitly refer to *maṣāliḥ al-nikāḥ* while dealing with the theoretical dimension of the marriage contract. Instead, this aspect is kept in the background and emerges from obscurity when the contractual aspect is overemphasized.

After stating that marriage falls into the category of contracts, the generic model's features come to surface. Accordingly, Islamic marriage contracts not only share primary elements of a commercial contract, but also the term "*milk/ownership*" used for economic contracts. The *Ḥanafī* School in this sense presents the most concrete example of the economic language used in the marriage contract. The *Ḥanafīs* qualifies how *milk* functions in marriage by introducing *milk al-mutʿa/milk al-nikāḥ*; a type of ownership based on the ownership of usufruct that enables a licit intercourse for the couple. In this formulation, the key notion is ownership. To say that marriage is *milk al-nikāḥ* means that a certain commercial property is attributed to the marriage contract and its subject matter.[43]

Neither the casuistic feature of the legal sources, nor the focus of the chapter of *nikāḥ*, or the subtitles pave the way for the reader to easily find out why the *Ḥanafī* scholars allow the use of the commercial terminology in the marriage contract and how the relationship between marriage and ownership (*milk*) is built. Intriguingly, the chapter of *majāz* in the *Ḥanafī* legal theory provides some of the theoretical account. The *Ḥanafī* legal theorists expound what they mean by *milk*/ownership and how they come to the conclusion that the core of marriage contract is *milk al-mutʿa*.

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[40] "*Wa al-nikāḥ laysa min al-tijāra bi dalīl anna al-maʿdhūna lā tuzawwij nafsahā wa law kāna al-nikāḥ tijāratan la malakat li anna al-tijāra muʿāwaḍatu al-māl bi al-māl, wa al-nikāḥ muʿāwaḍatu al-buḍʿi bi al-māl.*" (al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 3:366).
[41] al-Sighnāqī, *al-Kāfī,* 788; Judtih E. Tucker, *Women, Family, and Gender in Islamic Law*, 41.
[42] al-Sarakhsī, *Kitāb al-Mabsūṭ,* 4: 215,16.
[43] "*Al-nikāḥ mūjibun milk al-mutʿa*" (al-Sarakhsī, *al-Uṣūl,* 1:180).

The concept of *milk al-nikāḥ* is a critical formulation that allows easily relate marriage to a transaction. The *Ḥanafī* jurists openly state that the idea of the ownership in the *ʿaqd al-nikāḥ* is not the ownership of an asset but the ownership of usufruct (an abstract concept). Therefore, the *Ḥanafī* scholars qualified the property they attributed and relational interpretation between commercial ownership and ownership in marriage. The critical position of *milk al-nikāḥ* additionally motivated the *Ḥanafī* school develop a rationale for their proposed definition and to analyse the rational and textual roots for it, and in enhancing and elevating the theory of *majāz* to an operational level in legal theory.

3.1. The Metaphorical Aspect of the Marriage Contract

Majāz in the legal theory is one of the intriguing subjects that should be taken individually into consideration. Here, however I will only point out the intersection that explains the relationship between marriage and metaphor. In the knowledge of 'science' (in the sense of *Wissenschaft*) of Arabic *(ʿilm al-ʿarabiyya*), *majāz* represents a broader linguistic concept, which is translated as "tropes" in English. *Istiʿāra* (metaphor), on the other hand, is one of the subcategories of *majāz*. *Majāz* means "to go beyond something." It is a verbal noun formed from *jāza*; *al-kalimatu al-jāʾizatu ay al-mutaʿaddiyatu makānahā al-ʿaliyya*, "a word that goes beyond its original place (i.e. its literal meaning in the language system)."[44]

Why does Islamic law give place to the theory of *majāz*? Some Qur'anic verses involve metaphoric expressions (see 4/al-Nisāʾ:43). Also, conventionalized, or daily language includes to a considerable extent tropes and metaphors beyond literary or aesthetic purposes. The metaphoric expressions in the Qur'an and in the conventionalized language (used in the contracts, oaths, or statements) opens the path to address *majāz* in the legal theory. The reason why metaphors exist in a language is for the *Ḥanafī* legal scholars two. Firstly, metaphoric expressions are used to facilitate semantic expansion and eloquence; secondly, figurative language is used due to the need to alleviate the deficiencies of literal meanings. On certain occasions using *majāz* is more eloquent, semantically flexible and superior to literal expressions/*ḥaqīqa*.[45] Here, the reason of evaluating metaphors is not to explore the aesthetic and eloquence of language, rather to find the means for deducting rules.

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[44] Udo Simon, "Majāz," 3:116.
[45] al-Sarakhsī, *al-Uṣūl*, 1:172; al-Bukhārī, *Kashf al-Asrār,* 42; Ibn Malak, *Sharh al-Manār,* 400, 410.

Concerning marriage, the *Ḥanafī* jurists allow the use of the figurative language for marriage not only because it was part of the conventionalised language, but also because the metaphor functions to fill the lexical and semantic gaps in the language. The semantic gap is predominantly explained as the semantic gap in words and terms; however, we see that *majāz* is used not only as words and phrases, but also for conceptualizing broader abstract concepts; for instance, faith and marriage. Given this situation, it is important to see how *majāz* is related to the marriage contract, and ultimately to raise the issue of how *majāz* contributes to understanding of the nexus.

To look closer, it is better to start with how *majāz* is defined by the *Ḥanafī* scholars. al-Jaṣṣāṣ (d. 370/981) states that *lafẓ* (vocable) involves two *maʿnā* (the meaning for which the vocable is used); one is *ḥaqīqa* and the other *majāz*.[46] After this clarification, he continues by defining this dichotomy:

> *Ḥaqīqa* is a vocable that is used with its primordial meaning [*mawḍūʿihu*] assigned [*mawḍūʿ lah*] in the lexical code [*lugha*]. [47]

Later, al-Sarakhsī described as "each vocable that is borrowed (*mustaʿār*) for a thing [a meaning] in order to [be used] beyond its primordial assigned meaning."[48] Al-Sarakhsī added another explanatory definition: "*ṭarīq al-istiʿāra ʿinda al-ʿarab al-ittiṣāl* (according to the Arabs the means for [constructing] metaphor is the link/*al-ittiṣāl).*[49] This link/*al-ittiṣāl* is also the means which leads the *Ḥanafīs* to reach *milk al-mutʿa*.[50]

> Owning female slave *[milk al-raqaba]* causes *[sababun] milk al-mutʿa* from this aspect, there is a link between them [wife and female slave]… the vocable assigned for owning female slave are borrowed to necessitate *milk al-mutʿa [an yustaʿāra li ījābi milk al-mutʿa].*[51]

According to this quotation, the key element of a contract (e.i. *ʿaqd al-bayʿ*) is transmitted to the marriage contract by a figurative process. This explication is where the *Ḥanafīs* expound the roots of *milk al-mutʿa* and how they qualify the idea of ownership. It is noteworthy to mention that the use of *milk al-mutʿa* and other terms related to it is not acknowledged by other schools of law. Now, I would like to introduce how the *Ḥanafī* scholars expound their use of *milk al-mutʿa*.

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[46] al-Jaṣṣāṣ, *Uṣūl al-Fiqh,* 1:46.
[47] al-Jaṣṣāṣ, *Uṣūl al-Fiqh*, 1:46.
[48] al-Sarakhsī, *al-Uṣūl,* 1:170.
[49] al-Sarakhsī, *al-Uṣūl,* 1:178.
[50] al-Dabūsī, *Taqwīm al-Adilla*, 120.
[51] al-Sarakhsī, *al-Uṣūl,* 1:182

3.1.1. The Intricacy Resulting from the Nexus Between Marriage and Contract

As stated before, the marriage contract is shaped by the principle of the generic contract and categorised with economic contracts. This categorization has been effective in many ways. For example, all types of categorised items placed in that category must possess that category's essential attributes. The essential elements of a commercial contract are the parties, the form of offer and acceptance (*ījāb-qabūl*), and the subject of the contract, and marriage contracts embody all those elements. This similarity raises the questions of who the parties are, which words are used in the contract, and what the subject of the contract is. In the marriage contract, the bride and the groom are considered to be the two parties. The Islamic law adds the guardian (*walī*), or proxy of the bride. Furthermore, this contractual process also includes *mahr* (dowry). In this contract model, to what this *mahr* corresponds has been one of the challenging questions.

In terms of nature and purposes of marriage, the marriage contract is rather different than the economic contracts. For it to be excluded from this category, it must demonstrate diametrically opposing or distinct qualities. As this is not the case, the shared common attributes between these two contracts may cause perplexation in a reader's mind, in particular in the idea of ownership/*milk*.

Milk al-Mutʿa

Defining the marriage in relation by a link between *milk al-mutʿa* and *milk al-raqaba* opens the way for the legal scholars to allow the employment of economic terms that semantically include the meaning of *milk*. For instance, the metaphoric use of economic terms, such as *bayʿ* (sale), *tamlīk* (acquisition), or *hiba* (donation) are accepted as legally valid in the marriage contract.[52] That is to say, all individual words used in the marriage contract should share the common feature, or should be part of the same semantic basin (which in this case is the meaning of "ownership") in order to become members of the same category and to be become valid.

To distinguish the marriage contract from other economic contracts, the *Ḥanafīs* state that the use of the terms indicating unrestricted ownership (*muṭlaq*) is used as *istiʿāra* in relation to *milk al-mutʿa*.[53] In addition to the

[52] al-Sarakhsī, *Kitāb al-Mabsūt,* 5:57-58; al-Sarakhsī, *al-Uṣūl,* 1:179-81.
[53] al-Dabūsī, *Taqwīm al-Adilla*, 120; al-Sarakhsī, *al-Uṣūl,* 1:180-182; Ibn Malak, *Sharh al-Manār*, 400, 410.

metaphoric evaluation, the legal scholars, also draw attention to the fact that the concept of *milk* in the marriage contract differs from the one in the commercial contracts and in that a free person is capable to own goods and a free woman is also who owns:

> *Milk al-mutʿa* is not like other types of ownership [*sāʾiri anwāʿi al-milk*]; because, other types of ownership are imputed for beings to be owned by human beings. [Whereas] this type of ownership [in marriage] is appointed for a free woman, who is created to be owners [*yathbutu ʿalā ḥurratin hiya makhlūqāt li takūna mālikatan*]. [54]

After clarifying the root of *milk al-mutʿa* and qualifying the boarders of the ownership, for the *Ḥanafīs,* a further issue comes fore to be solved; this is how functions the dowry (*mahr*) in this contract and the concept of *milk al-mutʿa.*

Mahr

Another issue for the legal scholars has been identifying *mahr*'s nature and function. Due to the structural similarity between marriage and transactional contracts; determining the nature of *mahr* and the property that has been exchanged are one of the struggles for the jurists. Specifically, the discussions on for what is *mahr* is paid in the contract heavily embodies commercial conceptualisation, terminology and language, and of course, ethical discussions on the nature of *mahr.* Ibn Rushd (d. 520/1126) admits indirectly that reaching a clear conclusion about *mahr*'s nature is a challenge:

> There are two reasons for the dispute [among the legal schools] on the determination [of the minimum amount of the dowry]: One of them is that they oscillate between dower [that] is one of the consideration [*ʿiwaḍ*] types based on reciprocal consent over the minimum or maximum [amount of dowry] like in sale contracts, and the other, dower [that] is [part of] time bound religious duties [*yakūna ʿibādatan fa yakūna muwaqqatan*]. Therefore, it is from one aspect similar to consideration in terms of owning woman's interest [sexual capacity], and from another aspect it is similar to religious duties as reducing [the minimum amount] is not permissible even if it is by reciprocal consent." [55]

While *Ibn Rushd* points out the challenge, al-Jaṣṣāṣ suggests that *mahr* is a kind of a gift given to wife:

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[54] al-Sarakhsī, *al-Uṣūl*, 1:182.
[55] al-Qurtubī, Abū al-Walīd Muḥammad b. Aḥmad al-Andalusī al-Ḥafīd Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muḳtaṣid,* 2:15-16.

> Some of the people of knowledge say that dowry is indeed a gift [*niḥla*]. The gift in its essence is/[means] a grant and donation in some ways. [This is] because, the husband does not own anything in return [for the dowry] as the woman owns her private part [sexual capacity]... [*li anna al-zawj lā yamliku badalahu shayʾan li anna al-buḍaʿ milk al-marʾa...*][56]

In the Qur'an, *mahr* is presented as the right of a wife, and therefore this right should be protected (2/al-Baqarah:229, 237; 4/al-Nisāʾ:4, 20, 21, 24, 25; 33/al-Aḥzāb:50). Among the schools of law, whether the determination of *mahr* is an obligation or not, is debated and Ibn Rushd illuminates this oscillation of the legal schools. al-Jaṣṣāṣ states, "[s]ome of the people of knowledge (*ahl al-ʿilm*) know that the nature of *mahr* is a grant like donation (*hiba*) or gift (*ʿatiyya*)," and not the value (*al-badal*).[57] This means, within this legal model, that sexual capacity of a woman becomes a kind of an object, but not a real object. Therewithal, there is a consensus regarding the principle that a free human (whether a man or a woman, a Muslim or a non-Muslim) cannot be treated as an asset under any condition. These small fractions from the classical legal sources demonstrate the struggle to separate *mahr* from the concept of payment and marriage contract from economic contracts.

Another struggle that the *Ḥanafīs* face is whether the relation between marriage and economic contracts is drawn from *qiyās* (juristic analogy). Due to the sharing the quality of comparison, an exchange of terminology from *qiyās* to *majāz* occurs, such as *ʿilla*, *maʿlūl*, *aṣl*, and *comparison* between *qiyās* and *majāz*,[58] the *Ḥanafī* School is accused of applying *qiyās* between free woman and female slave.[59] Analogy is a basic activity of the human mind in terms of reflecting a cognitive process of creating likeness or association between two things. This is the identical aspect that both metaphoric analogy and juristic analogy share.[60] In al-Sighnāqī's (d. 714/1314) words:

> The instance of metaphor [*al-majāz*][deriving] from literal [*al-ḥaqīqa*] meaning is like the instance of analogy [derived] from the text [*al-qiyās min al-naṣṣ*]. [61]

Being a cognitive activity and sharing fundamental terminology obstructs an individual evaluation of the metaphoric and juristic analogy. However, technically both are also distinguished from each other in terms of

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[56] al-Jaṣṣāṣ *Ahkām al-Qur'an*, 2:350.
[57] al-Jaṣṣāṣ, *Ahkām al-Qur'an*, 2:350.
[58] Ibn Malak, *Sharh al-Manār*, 380.
[59] Kecia Ali, *Marriage and Slavery in Early Islam*, 16.
[60] al-Sighnāqī, *al-Kāfī,* 255; M.G. Carter, "Analogical and Syllogistic Reasoning in Grammar and Law," 104-107.
[61] al-Sighnāqī, *al-Kāfī,* 255.

the purpose that is served and its legal consequences. We know that both metaphoric and juristic analogy are used for extension; but metaphoric analogy is used for linguistic extension that serves as a means for language production, including figurative thought; whereas juristic analogy serves for legal extension—i.e. to produce legal rulings. To expand on this, juristic analogy is a means of developing the law by finding solutions for new cases that do not exist in the Qur'an, Sunna, and *ijmāʿ*.[62] It is the transfer (*taʿdiyya*) of the ruling in the Qur'an or hadith to another case.[63] In the account of *majāz,* on the other hand, the word is transferred to another meaning (*maʿnā*) in order to be used. So, linguistic analogy helps fill semantic gaps and express abstract concepts.[64] In the context of marriage, analogy based on semantic property does not only function to fill the gaps but also to a certain extent to pave the way for juristic decision-making. This dual function can easily cause a mischaracterization of analogy based on semantic property.

Categorization, the creation of a metaphor and juristic decision-making are based on analogical process. Finding a likeness or assigning a similarity between the compared entities dominates this process. The legal scholars highlight the theoretical demarcations that distinguish juristic analogy and analogy based on semantic property from each other. Due to the functional similarities and shared terminology (i.e., constructing similarities for extension), the legal scholars explain that linguistic and juristic analogy signifies the same process but have diametrical conclusions. One may fail to notice this particularity and claim that to include the process of analogy and extension is enough to consider the analogy as juristic analogy. Relying on diametrical feature of legal and linguistic analogy, in his *uṣūl,* al-Sarakhsī argues that the economic terms in the marriage contract are indeed metaphoric expressions:

> We know that among the linguists the way to obtain *istiʿāra* is not [used for] establishing the legal ruling [*ḥukm al-sharʿ*]. By linguistic analysis, it is not possible to know this type of *qiyās*, which establishes the legal rule… Thus, dealing with juristic analogy in order to establish the vocable [indicating] metaphoric ownership for marriage would be a pointless preoccupation [*Wa inna mā al-ishtighāl bi al-qiyās li ithbāt al-*

[62] Muhammad Hashim Kamali, *Foundations of Islam Shariah Law An Introduction*, 180; Ahmed Hasan, *Analogical Reasoning in Islamic Jurisprudence: A Study of the Juridical Principle of Qiyas*, 15.
[63] al-Sarakhsī, *al-Uṣūl,* 1:189.
[64] Hanadi Dayyeh, "Ittisāʿ in Sībawayhi's Kitāb: A Semantic ʿilla for Disorders in Meaning and Form," 67.

istiʿāra fī alfāẓ al-tamlīk li al-nikāḥ yakūnu ishtighālan bi mā lā maʿnā lahu]." [65]

al-Sarakshī points to the pitfalls of confusing the analogy based on semantic property in establishing *milk* with juristic analogy. Metaphor involves the embodiment of human intentionality and creativity where the paradoxical structure becomes known. Metaphor is embedded in paradoxical characteristics, whereas legal reasoning aims to reach the utmost certainty of premises. This also means that, theoretically, there is no place for obscurity in meaning, or human intentionality, or any semantic derivations in the juristic analogy. For instance, when the intoxication is assigned as the basis of the rule (*ʿillah*) to forbid some liquids, this basis is applied to all kind of intoxicating liquids; whereas the idea of ownership in marriage and commercial contracts providing complete ownership differs from each other.[66] Furthermore, juristic analogy principally has to rely on legal grounds (*sharʿī)* on which legal rulings are built and not on lexical grounds.[67] The outcome of the juristic analogy should not contradict with any of the legal principle. This means, a free person cannot be the real article of a contractual process. The complexities in comprehending this metaphoric use in marriage contract still cause to question why this particular nexus exist and how we should understand it.

3.2. The Struggle in Explaining the Nexus Between Marriage and Contract in the Contemporary Studies

The interest to understand the nature of Islamic marriage contract and to analyse the contractual component has persevered till modern times. The structural and conceptual familiarity of the marriage contract and the economic contract has been examined from various angles. Those approaches made a substantial contribution to the analysis of the Islamic marriage contract by calling the reader to begin with the understanding the conceptualization. We can summarise the contemporary approaches analysing the contractual component of marriage in three theoretical patterns. One of these approaches understands the discourse in the classical legal texts and the debate literally:[68]

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[65] al-Sarakshī, *al-Uṣūl,* 2:158.

[66] One may argue that the idea of ownership can be compared to one in leasing contract. But, the *Ḥanafī* scholars consider the use of leasing in marriage contract inappropriate and legally not binding; as leasing is time-bound contract and marriage not (al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 3:322.)

[67] Hasan, *Analogical Reasoning*, 21,123.

[68] Colin Imber, "Women, Marriage, and Property: Mahr in the Behcetü'l Fetâvâ of Yenişehirli ABDULLAH," 81-82.

> Through the payment of *mahr*, the husband acquires, quite literally, the ownership (*milk*) of his wife's sexual organs, and it is in fact this ownership that distinguishes intercourse in marriage from fornication.[69]

In this quotation, the elaboration and the debates regarding the nature of the Islamic marriage contract and the responses of the *Ḥanafī* School are not thoroughly examined, and thus an under-developed comparison follows. For the legal scholars the concept of milk is not important for only distinguishing intercourse from fornication but also woman from concubinage, in other words marriage from a property transaction. To accentuate, some *Ḥanafī* scholars, such as al-Bukhārī, feel the need to enunciate that *milk al-nikāḥ* is not a legal subject matter or an actual property.[70] Despite the challenge of describing the function of *mahr* in the marriage contract, the linguistic parallels and the practical similarity between *mahr* and a payment do not necessarily result in an identical structure. The Qur'an portrays *mahr* as an obligation for a husband (*farīḍa,* 2/al-Baqarah:236, 237) and a right, more a rightful demand for women. The legal scholars are aware of the picture that is drawn by the Qur'an; therefore, they endeavour to find a place for *mahr* in the contract congruously with the Qur'anic representation of *mahr*. That is why, Ziba Mir-Hosseini explains the legal scholar's effort to avoid the misconception of the marriage contract:

> By saying that the contracts of marriage and sale share a similar legal structure, I do not mean to suggest that *fiqh* does conceptualize marriage as a sale. Classical jurists show themselves aware of possible misunderstanding and are careful to stress that marriage resembles sale only in form, not in spirit.[71]

An important contribution to this discussion is made by Kecia Ali who published an important piece of work discussing and providing an insight to the Islamic marriage contract by further elaborating on the terms *milk, milk al-nikāḥ* and *milk al-mutʿa*. Ali proposes to begin with understanding the relational interpretation between marriage and economic contracts through the concept of slavery. She argues that slavery, as an economic transaction, had an impact on the contractual component of marriage. The idea of exchanging a human in return to goods is transmitted to marriage contract. Despite her major contribution, there are certain underdeveloped points in

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[69] Imber, "Women, Marriage, and Property," 87.
[70] al-Bukhārī, *Kashf al-Asrār,* 179-180.
[71] Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought and Strategies for Reform," 6.

her examination. She misses the theoretical explanation of the *Ḥanafīs* why they bridge marriage with slavery and why the economic terminology that can be related to slavery is employed. Another point to be examined is her claim that the relationship between marriage and slavery, i.e., contractual component is based of juristic analogy:

> Analogy, *qiyās*, plays a central role in formative-period legal thought… It is one of my core contentions that the use of analogy, in particular the analogy between marriage and slavery, is key to understanding Muslim marriage law.[72]

Ali neglects to mention the debate among the school of laws regarding the whether the marriage is predominantly a contract or a means legally confirming the spousal relationship and the explanation of the *Ḥanafī* scholars that the relational interpretation between *milk al-nikāḥ* and *milk al-mutʿa* belongs the sphere of metaphor. While discussing this particular nexus, the qualification of the terms *qiyās* and the analogy based on semantic property is needed. This qualification is significant in that *qiyās*, a key jurisprudential term, affects the claim for this conceptualization's legal authenticity and the questionability. The analogy for metaphor is also used for legal rulings, but the jurists elaborate the analogy for *qiyās* and metaphoric analogy for semantic and lexical extension[73] as separate technical notions belonging to the same cognitive processes. This theoretical difference is one of the baselines that the legal scholars use to differentiate marriage contracts from economic contracts, as well as slavery. Because of this, one needs to engage with the theory of *majāz* in the Islamic methodology to thoroughly examine this nexus.

Within the existing literature, Barber Johansen seems to articulate an alternative approach by relying on Chafik Chehata's classification of subject matters in contracts as "article of trade" and "non-article of trade" (i.e., symbolic). He points out the idea that the commercial sub-cultural system has an impact on describing marital relationships. According to this classification, marriage is a symbolic form of exchange – in his words a kind of "symbolic non-commercial exchange," or in other words a social and symbolic transaction. In this symbolic non-commercial exchange model, the woman (a non-article of trade) is transferred to her husband's lineage.[74]

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[72] Ali, *Marriage and Slavery,* 16.
[73] Mohamed Mohamed Yunis Ali, *Medieval Islamic Pragmatics Sunni Legal Theorists' Models of Textual Communication*, 19, 23.
[74] Barber Johansen, "Commercial Exchange and social order in Hanafite Law," 1-44; Johansen, "The Valorisation of the Body," 71-100.

Though the transfer and the symbolic exchange help to clarify the contractual aspect, there are still some points remaining that need to be explained, such as the function of *mahr* and the terminology used in the contract. The transfer of lineage does not sufficiently explain the economic component of marriage and poorly contributes to expound why the *Ḥanafī* scholars insist on the metaphoric aspect of the contract.

The relational interpretation between marriage and slavery and the idea of the symbolic non-commercial exchange has provided important means for understanding the nexus between marriage and contract. The theory of *majāz* is not the fundamental theory that would help us to solve all the complexities arising from this nexus. However, I assume that engaging in the debate among the school of laws where the *Ḥanafī* scholars detail their justifications and explain the metaphoric conceptualization, the semantic and pragmatic analyses of metaphoric and literal usages of the legal terminology, and the paradoxical structure of the marriage contract will provide a major contribution to understand this nexus.

Conclusion

This paper has pointed some of the complexities arising from the nexus between marriage and contract and the paradoxical paradigm resulting from the relation between marriage (non-economic contract) and *ʿaqd al-bayʿ*. *ʿAqd* (contract) in the Islamic tradition is a concept illustrating theological, economic and linguistic aspects. Despite the attempt to demarcate the contract models from each other, the potential hazard of failing to notice the demarcation between economic and civil acts (especially marriage) remains. Analysing the marriage contract from the multi-dimensional scope of *ʿaqd* helps explore the delicate point of assigning a transactional legal model for a marital relationship that is intrinsically non-transactional from many ways.

As stated before, due to the contractual component, the marriage contract is classified together with other contract models. The consequences of the classification and analogy are more complicated than the process of simply categorizing contracts. Although this clarified the purpose, today the connection between commercial contracts and the marriage contract in terms of sharing the same elements and devices leads to some remarkably interesting discussions. Due to the structural similarity of the marriage contract and economic contracts, we are predisposed to think that the Islamic marriage contract is categorised along with the economic contracts because it is considered part of the commercial contracts. Thus, it is easy to

undermine how *ʿaqd* in legal framework functions, and why it is discussed along with *majāz*.

The legal scholars do not particularly propose marriage to be considered to mean exchange contract. The jurists are aware of the fact that ethically marriage cannot be related to a commercial practice on any account. However, they also do not introduce a particular individual model for marriage contract either. Neither do they distinguish marriage from the economic contract very evidently. Instead, the jurists construct a hybrid form via analogy and conceptualization to find a middle ground between the two distinctive concepts- which is *milk al-mutʿa*. As a result of this analogy, one comes across a complex language indicating structural and terminological parallels between the marriage contract and the commercial contract enabling to own slaves at the structural level, and a metaphoric conceptualization at semantic level. However, the hazard using the notions "marriage, economic contract and symbolic ownership" together in line with the legal concept of marriage does still remain.

The *Ḥanafī* scholars usually assure the reader that the structural and terminological parallels between the marriage contract and the commercial contract are indeed part of a link/*ittiṣāl* between free woman and female slave on the grounds of *istiʿāra*. As a result, it can be alleged that this metaphoric conceptualization creates a unity of linguistic usage and structural basis by employing the key term *milk*. Due to these features that distinguish the linguistic analogy from the juristic analogy, I have argued that the contractual component and the semantic sphere of *milk al-nikāḥ* is metaphoric, and which type of the analogy is drawn in the marriage contract should be carefully investigated.

Majāz in this paradigm as well reveals the type of the association between the marriage contract and the commercial contracts. There is a preponderance of evidence from the legal sources that this particular nexus, and the idea of *majāz* should be embraced from a wider perspective. Compared to other economic contract models, the legal scholars do not notably endeavour to explore the metaphoric aspect of economic contracts, nor do they theoretically relate them to *majāz*. In this regard, the marriage contract is placed in a unique position as being precisely related to *majāz*.

This study is only a preliminary endeavour to prompt further discussion in understanding this nexus since there is so little published in this area of the Islamic law that specifically focuses on this nexus. Therefore, contract

theory, categorization, and the theory of *majāz* promise further refinements on how we understand the nexus and also the metaphoric aspect of marriage contract.

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