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## MARRIAGE

The third section of the Moslem Law concerns transaction, (Arabic: *Mu'âmalât*).

Transactions are subdivided into marriage; inheritance; contracts; sale; barter and agency.

Marriage is enjoined by the Prophet upon every Moslem, while celibacy is frequently condemned by him. It is related in the traditions that the Prophet said: *"When the servant of God marries, he perfects half of his religion, let him then strive to perfect the other half by leading a righteous life."*

The following are some of the saying of the Prophet on the subject of marriage:-

*"The best wedding is that upon which the least trouble and expense are bestowed."*

*"The worst of feasts are marriage feasts to which the rich are invited and the poor are left out, but he who is invited should accept the invitation however."*

*"Matrimonial alliances (between two families or tribes) increase friendship more than anything else."*

*"Marry women who love their husbands and be very prolific, for I wish you to be more numerous than any other people' ..."*

*"When anyone demands your daughter in marriage, and you are pleased with his disposition and his faith, then give her to him."*

*"A woman may be married either for her wealth, her reputation, her beauty or her religion then look out for a religious woman."*

*"All young men who have arrived at the age of puberty should marry, for marriage protect them against intemperance."*

*"When a Moslem marries he perfects half of his religion, and he should practise righteousness to secure the remaining half."*

*"Beware, make not large settlements dowry upon women, because if great settlements were a cause of greatness in the world of righteousness before God, surely it would be most proper for the Prophet of God make them."*

*"When any of you wishes to demand a woman in marriage, if he can arrange it, let him see her first."*

*“A woman ripe in year shall have her consent asked marriage, and if she remains silent (when asked) her silence is her consent, and if she refuses she shall not be married by force.”*

*“A widow shall not be married until she be consulted, nor shall a virgin be married until her consent be asked.” The companions said: ‘In what manner is the permission of a virgin’ He replied, “Her consent is by her silence”.*

From the above-mentioned teachings of the Prophet, it is clear that Islam encourages marriage and condemns celibacy. Men and women must marry, not once in their lives, but so long as they have the strength and can afford to support each other.

In the early days of Islam, women belonging to the most respectable families in Mecca married several times after becoming widows or – contrary to the attitude of Church Christianity – after having been divorced by their husbands.

During the pre-Islamic period of the Arabs, there was no limit to the number of wives a man could take. But Islam limited the number to one, with permission to marry, if necessary, two or three or even four., *provided that* one can treat them with justice and equality in one’s relation with them as husband, which is extremely difficult. Hence the tendency of Islamic Law is towards monogamy, though it does not definitely bind a man to take only one wife. In other words, monogamy is the rule, and polygamy is an exception, it being a remedial course to be resorted to in certain cases and under certain conditions. For the circumstances and exigencies ruling polygamy, the reader is referred to Chapter on “The Status of Women in Islam”. In Vol. I of this work.

At present the concession of marrying more than one wife is enjoyed by very few, as the economic conditions and the practical difficulties involved in bringing up a large family are rather against polygamy. In the early days of Islam, the circumstances were quite different owing largely to the then prevailing social and political conditions. Wars of conquests ended in the capture of a large number of women, some of whom were supported by the conquerors. Polygamy then became a necessity and offered a ready solution to social problems. A certain latitude in those days was necessary. The same solution might be resorted to if similar social conditions would suggest themselves. A number of the faithful followers of the Prophet were being killed in religious warfare. Public policy and morals required that their widows and grown-up daughters should be adequately provided for and given protecting shelter. It was, therefore, in a spirit of self-sacrifice on the part of Moslem men that within the limit of *four wives* prescribed by the law, the believers took in wedlock the widows and daughters of their friends, who had sacrificed themselves in the cause of their religion. The greatest sacrifice in this respect was made by the Prophet himself, whose additional object in having as many as nine wives – all of whom (except ‘A’isha) were elderly women – was to propagate the teachings of Islam through them among the women of Arabia. It was through the Prophet’s wives that the Arab women, who embraced Islam, came to know what the institutions of the new religion – as envisaged by the daily life of the Prophet – really were.

## Marriage – A Civil Contract

In Islam, marriage is a civil contract made by mutual consent between man and woman. What is necessary among the *sunni* or orthodox Moslems to conclude a match is the presence of two male or one male and two female witnesses and a dower. A woman who has reached the age of puberty is free to choose, to accept, or to refuse an offer, although such a conduct may be against the declared wishes of her parents or guardian.

If a girl is married in her infancy, she may renounce and dissolve the contract, if she wills, on reaching her majority. Although the parents are recommended to find a suitable match for their daughter, they cannot legally force her to agree to it. Her consent in any case is necessary, she can make her own terms before the marriage, as to the amount of dower to be paid to her, the dissolution of marriage in case her husband leaves the locality and goes to some other country, or in regard to any other matter such as the husband taking another wife, etc.. All terms, conditions and stipulations agreed to mutually must be recorded in the contract of marriage by the registrar and would be binding to the husband.

In the case of impotence, insanity or extreme poverty which renders it impossible for the husband to support his wife, or should he be imprisoned for such a length of time that the wife should suffer lack of sustenance, she has the right to divorce him by a verdict of the judge.

A man may see the face of his bride, nay he is encouraged by the law to do so before the consummation of marriage, though in practice this legal concession is not utilized in certain eastern countries, where future husbands receive information about their spouses through their women relation who arrange the marriage.

A man may divorce and re-marry the divorced wife, but if he pronounces divorce on three occasions, she cannot return to him, unless after having married another man and lived with him as his wife for a length of time. She may be divorced by the second husband, and then she may be re-married to the first. This, however, happens only in extreme cases. The object of this law is that the husband who has divorced his wife should feel ashamed and disgraced to take her back after she has re-married and lived as wife of another man. Thereupon, in practice only, a few people take advantage of the right to divorce their wives on the slightest sinful act. Divorce is condemned by the Prophet and is not to be resorted to except in unavoidable circumstances, such as infidelity of the wife, or other similar serious causes.

## Kinds of Divorce

Divorce in Islam is of two kinds:

Revocable, and Irrevocable.

A husband has the right to divorce his wife; but this right is not effective until the period of *'iddat*, i.e. probation is over. This period is three menstrual courses or three months, and during this time the right of the husband to revoke the divorce is available.

Should the wife survive her husband, the period of *'i'adat* or probation is prolonged to four months and ten days; before this period is ended, the widow cannot legally get married to a new husband.

If a woman is pregnant and divorce has to be resorted to, the *'iddat* period continues until the delivery takes place. In this case, the wife has the right to reside in her husband's house and be maintained by him.

A child born six months after the marriage is considered the child of the married husband; but if the child is born earlier than six months after the marriage, it is not considered legitimate.

## Different Forms of Divorce

The following are the different forms of divorce current among the *Sunnis*:

Besides impotence on the part of the husband, a verdict of divorce may be pronounced by the competent judge on the demand of the wife in the following cases:

1. Unequality of status of man and woman.
2. Insufficient dower.
3. If the Moslem husband embraces any religion other than Islam.
4. If a husband charges his wife with adultery, even though she swears that she is innocent and the former insists that she is not.
5. If the husband is imprisoned for such a length of time that she suffers from want of living.
6. *Khul'* divorce, which means a result of continuous disagreement between husband and wife, when the latter is willing to forego some of her own privileges or make a certain ransom to free herself from her husband.

## Prohibited Marriages

One of the fundamental principles of Islam is that neither a Moslem can marry an idolatress nor a Moslem woman can marry an idolater.

The direct result of such prohibited marriages would be to introduce no idolatry in Islam, which it had strenuously striven to eradicate. Otherwise, Islam is quite liberal in this respect, as it permits Moslem men to marry virtuous women among the Christians or the Jews. However, the Islamic Law, for reasons closely connected with policy, does not allow a Moslem woman to marry a Christian or a Jew.

## Suggested Reconciliation

In case there is fear of breach between wife and husband, reconciliation is recommended to be sought through the medium of two arbitrators: one chose from the family of the husband and the other from the wife's family; if they are desirous of agreement, maybe God through His Mercy effects a reconciliation between them.

## Prohibited Marriage Relations In Islam

These prohibitions are detailed in verses 22, 23 and 24, Chapter 4, of the Quran, which are interpreted as follows:

*“And marry not women whom your fathers have married: for this is a shame, and hateful and an evil way – though what is passed may be forgiven”* <sup>(111)</sup>.

*“Forbidden to you are your mothers, and your daughters and your sisters, and your aunts, both on the father's and mother's sides, and your foster mothers and your foster sisters, and the mothers of your wives, and your step-daughters who are your wards, born of your wives to whom you have gone in (but if you have not gone in unto them, it shall be no sin in you to marry them), and the wives of your sons who proceed out of your loins; and you are forbidden to marry two sisters at a time.”*

*“You are also forbidden to marry any married woman”.*

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<sup>1)11</sup> This exception refers to what had taken place in the time of ignorance, previous to the revelation of the Quran.

## RELIGIOUS CEREMONY

### ON THE OCCASION OF MARRIAGE

The Islamic Law appoints no specific religious ceremony, nor any religious rites necessary for the contraction of a valid marriage.

Legally a marriage contracted between two persons and binding, if entered into by mutual consent in the presence of witnesses. In all cases, the religious ceremony is left entirely to the discretion of the qualified registrar known as the *ma'zn*, that is the representative of the court, parties.

Below is given, in *extenso*, the nuptial sermon, universally preached on the occasion of marriage, in imitation of the Prophet:

*“O ye believers, fear God as He deserved to be feared, and die not Without having become true Moslems. O men, fear your Lord Who hath created you of one progenitor, and of the same species He created his wife and from these twain hath spread abroad so many men and women. And fear ye God, in whose name ye ask mutual favour, and reverence the wombs that bore you. Verily God is watching over you. O believers, fear God and speak with well-guided speech, that God may bless your doings for you and forgive you your sins. And whosoever obeys God and His Apostle with great bliss he surely shall be blessed.”*

The sermon is a collection of Quranic verses and their repetition at each and every wedding is meant to remind the Moslem men and women of their duties and obligations. It opens with a commandment to fear God, and the selfsame commandment is repeated quite a number of times in the course of the ceremony, showing that the whole of the ceremony is to be carried through with fear of God, so that from beginning to end it may be a pure, moral binding and that no selfish equivocation or hypocritical prevarication may mar the sanctity of the sacred rite.

The registrar – having recited the above verses with certain sayings of the Prophet bearing on the benefits of marriage, and the bridegroom and the bride’s attorney (usually the father, uncle or elder brother) and the witnesses having assembled in some convenient place (commonly the bride’s domicile) and arrangements having previously been made as to the amount of dower payable to the bride—begins to request the bridegroom to ask God forgiveness for his sine and to declare his belief in the unity of God and the Prophethood of His Apostle Muhammad. The registrar then asks the bridegroom whether he accepts to be wedded to ... (mentioning the name of the bride) against such and such a dower payable to her and on the law principles stated in the Quran and in the sayings of the Prophet. The bridegroom answering in the affirmative, the registrar announces the consummation of the marriage contract. The ceremony being over, the bridegroom shakes hands with the friends and those of the relatives who happen to be present and receives their congratulations.

## Marriage Festivals

Marriage is preceded and followed by festive rejoicings which have been variously described by Oriental religious ceremonies.

The bridegroom is entitled to see his fiancée before the contract of marriage is entered into, though this custom is not usually exercised in many Moslem countries.

## INEQUALITY OF THE TWO SEXES REGARDING DIVORCE

Marriage being regarded as a civil contract and as such not indissoluble, the Islamic Law naturally recognizes the right of both parties to dissolve the contract under certain given circumstances. Divorce, then, is a naturally corollary to the conception of marriage as a contract, and it is regrettable that it may have furnished European critics with a handle for attack. They seem to entertain the view that the Islamic Law permits a man to repudiate his wife “even on the slightest disgust.” Whether the law permits or favours repudiation on the slightest disgust, we shall presently see. But there is another point raised by these critics, namely the inequality of the two sexes in regard to the right of obtaining a divorce, which inequality is in fact more seeming than real. The theory of marriage, no doubt, points to a subordination of the wife to her husband, because of her comparative inferiority in discretionary powers; but in practice the hands of the husband are fettered in more ways than one. The theoretical discretion must not be understood as given a tacit sanction to the excesses of a brutal husband; on the other hand, it is intended to guard against the possible dangers of an imperfect judgment. The relation between the members of the opposite sex which marriage legalizes are, however, so subtle and delicate and require such constant adjustment, involving the fate and well-being of the future generations, that in their regulation the law considers it expedient to allow the voice of one partner, more or less, predominance over that of the other.

Perhaps it is here worthy of notice that in Europe the two sexes are not placed on the equal footing in respect of the right of divorce. Lord Helier, P.C., K.C.B., who was president of the Probate, Divorce and Admiralty Division of the High Court of Justice, 1892-1905, observes on this point thus: “Much comment has been made on the different grounds, on which divorce is allowed to a husband and to a wife – it being necessary to prove infidelity in both cases, but a wife being compelled to show either an aggravation of that offence or addition to it. Opinions probably will always differ whether the two sexes should be placed *on an equality in this respect*, abstract justice being invoked, and the idea of marriage as a mere contract, pointing in one direction, and social consideration in the other. But the reason of the legislature for making the distinction is clear. It is that the wife is entitled to an absolute divorce only if her reconciliation with

her husband is neither to be expected nor desired. This was no doubt the view taken by the House of Lords”<sup>(2[2])</sup>

### Limitation of Divorce

A Moslem is not free to exercise the right divorce on “the slightest disgust.” The law has put many limitations upon the exercise of this power. Then again the example and precepts of the Prophet in this particular have rendered divorce most repellent to the Moslem mind. A Moslem is permitted to have recourse to divorce, provided that there is ample justification for such an extreme measure. The Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remain faithful and obedient to him in matters recommended by the law:

*“If women obey you (i.e. in lawful matters), then do not seek a way against them,”* that is seek not a pretext for separation.

The law gives man, primarily, the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy, but in the absence of serious reasons, no Moslem can justify a divorce either in the eyes of religion or the law. If he abandons his wife or puts her away from simple caprice, he draws upon himself the divine anger, for “*the curse of God.*” Said the Prophet, “*rests on him who repudiates his wife capriciously.*”

In the Quran, there is most edifying verse which is generally overlooked by the critics of Islam: “*Associate with your wives,*” so runs the verse, “*with goodness; and if ye dislike them, it may be that ye dislike a thing and God may put abundant good in it.*” Thus the Quran enjoins forbearance, even with a wife the husband does not like. One really wonders at the boldness of the critic is who presume that the Islamic Law permits divorce on “even the slightest disgust.”

Many and various are the sayings of the Prophet of Islam that teach love, untiring patience, forgiving disposition and, above all, fear of God in the treatment of women. “*The man who bears the ill-manners of his wife,*” said the Prophet, “*shall receive from God rewards equivalent to what the Lord gave to Sob, when he suffered his affliction. And to the woman who bears the ill-manners of her husband, God granteth rewards equivalent to what He granted to Assiyah, the righteous wife of Pharaoh.*”

“It is to be rightly observed that divorce in Islam is allowable only when the object is not to trouble the wife by divorcing her without just grounds, such as refractory or unseemly behaviour on her part, or extreme necessity on the part of the husband.

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<sup>2[2]</sup> Cp. Review of Religions, April 1913.

Islam discourages divorce in principle, and permits it only when it has become altogether impossible for the parties to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and, thus, to accommodate themselves more comfortably in their new homes.

For, under Islam, a divorced woman, like the husband who divorces her, acquires the right of marrying any person she likes, the moment the separation is recognized by the law<sup>(3[3])</sup>.

Fully recognizing the evils that arise from divorce, the Prophet of Islam took very cautious steps in framing the law; and the ruling idea seems to be that divorce is justified only when marriage fails in its effects and the parties cease to fulfil the duties that spring from the marriage relations. There is, in fact, no justification for permanently yoking together two hostile souls, who might make themselves quite comfortable in new homes, if they were permitted to effect a separation. To compel them to live together in pursuance of a most vexatious law under a yoke of the heaviest slavery – for such is marriage without love – would be a hardship more cruel than any divorce whatever. God, therefore, gave laws of divorce, in their proper use, most equitable and human.

If a woman is chaste and mindful of her duties as wife, the Islamic Law makes it obligatory upon the husband to associate with her on the best terms, and with kindness and courtesy. But if she proves refractory in her behaviours, the law confers on the husband the power of correction if exercised in moderation.<sup>(4[4])</sup>

Finally, it is to be remembered that the abuse likely to arise from the laxity of the laws, may conveniently be contracted by other lawful impositions. The wife or her guardian or attorney may stipulate, at the time of marriage, against the arbitrary exercise of the power of divorce by the husband. The right of dissolution of the marriage contract, which is in all cases a civil contract, may be stipulated to be with the wife, instead of with the husband, if necessary. The same object may also be achieved indirectly, by fixing the dowry at a large sum payable to the wife in case of a divorce by the husband, such as may be beyond the means of the husband to liquidate. The wife may also, by stipulation,

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3[3] <sup>9</sup> With Christians the case is different; “Whosoever shall put away his wife, save for the cause of fornication, causes her to commit adultery; and whosoever shall marry her that is divorced commits adultery” (Matt. V: 32).

4[4] <sup>0</sup> The law of England similarly vested in the husband the right of chastising his wife for levity of conduct (vide Holland’s Jurisprudence, p. 240).

reserve to herself the power of dissolving the marriage under certain legitimate circumstances, for example, if the husband marries a second wife.

Again, in the event of a divorce, the Islamic Law is very particular in providing for the protection of the wife's property against the avarice of the husband: if the divorce is due to a cause imputable to the husband, he has to make over to her all her property, and pay off the dower that had been settled upon her. If, however, the divorce has been resorted to at the instance of the wife, without any justifiable cause, she has simply to abandon her claim to the dower. The wife thus occupies a decidedly more advantageous position than the husband.

The Islamic Law institutes also a procedure known as *tafriq*, which legally means dissolution of the status of marriage by a judicial verdict. Here are some causes for which the wife can demand a divorce by authority of the court: -

- (a) Habitual ill-treatment of the wife.
- (b) Non-fulfilment of the terms of marriage contract.
- (c) Insanity.
- (d) Incurable Incompetency.
- (e) Quitting the conjugal domicile without making provision for the wife.
- (f) Any other causes which in the opinion of the court would justify a divorce.

#### Islamic Legal Status of a Married Woman

To sum up, the Islamic legal status of a married woman is decidedly superior to that of a European woman. The former enjoys social immunities which allow the fullest exercise on her part of the powers and privileges given to her by the law. She acts, if *sui-juris*, in all matters which relate to herself and to her property, in her own individual right, without the intervention of husband or father. She never loses her own identity on becoming wedded, by remaining related to her father's family. She appoints her own attorney, and delegates to him all the powers she herself possesses. She enters into valid contracts with her husband and her made relations on a footing of equality. If she is ill-treated, she has the right to have the marriage tie dissolved. She is entitled to pledge the credit of her husband for the maintenance of herself and her children. She is able, even if holding a creed different to that of her husband, to claim the free and unfettered exercise of her own religious observance. To enjoy all her right of action, she requires no intermediaries, trustees or next of kin. When she is aggrieved by her husband she has the right to sue him in her own capacity.

It is both interesting and instructive to compare the above summary with another, from the writing of J.S. Mill, which gives us an idea of the corresponding position of women under the usages of Church Christianity: -

“We are continually told”, says he, “that civilisation and Christianity have restored to woman her just rights. Meanwhile, the wife is the actual bond-servant of her husband; no less so, as far as legal obligation goes, than slave commonly so-called. She vows a life-long obedience to him at the altar, and is hold to it all through her life by law. It may be said that the obligation of obedience stops short of participation in crime, but it certainly extends to everything else. She cannot act whatever but by his permission, at least tacit. She can acquire no property but for him; the instant it becomes hers even if by inheritance, it becomes *ipso facto* his. In this respect the wife’s position, even under the common law of England, is worse than that of slaves in the laws of olden day in other countries. By the Roman Law, for example, a slave might have peculium which, to a certain extent, the law guaranteed him for his exclusive use.”<sup>(5[5])</sup>

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5[5] () “ The Review of Religions, “May 1913, states: Evidently J.S. Mill wrote this prior to the present Married Women’s Property Act; but the same position of married women as illustrated by him is still prevalent to this day under the usages of the Catholic and other Christian churches.

## INHERITANCE

The law of inheritance is called '*Ilmil-farâyied, or Ilmil-mirâth*' – i.e. science of obligations of inheritance. The verses in the Quran upon which the law of inheritance is founded begin at the 11<sup>th</sup> verse of Chapter 4 of the Quran. They are rendered as follows: -

*“With regard to your children, God commands you to give the male the portion of two females, and if they be females more than two, then they shall have two-thirds of that which their father hath left: but if she be an only daughter, she shall have the half; and the father and mother of the deceased shall each of them have a sixth part of what he hath left, if he has a child; but if he has no child, and his parents be his heirs, then his mother shall have the third; and if he has brethren, his mother shall have the sixth, after paying the bequests he shall have bequeathed and his debts. As to your fathers or your children, ye know not which of them is the most advantageous to you. This is the law of God. Verily God is Knowing and Wise.”*

*“Half of what your wives leave shall be yours if they have no issue; but if they have issue, then a fourth of what they have shall be yours, after paying the bequests and debts.”*

*“And your wives shall have a fourth part of what ye leave if ye have no issue, but if ye have issue, then they shall have an eighth part of what ye leave, after paying the bequests and debts, if any.”*

*“If a man or woman makes a distant relation their heir, and he or she has a brother or a sister each of these two shall have a sixth : but if there are more than this, then shall they be sharers in a third after payment of the bequests and debts.”*

*“Without loss to any one. This is the ordinance of God, and God is Knowing and Gracious.”*

The foregoing general rules of inheritance are detailed in the following<sup>(6[1])</sup>

The property of a deceased Moslem is applicable, in the first place, to the payment of his funeral expenses; secondly to the discharge of his debts; and thirdly, to the payment of legacies as far as one-third of the residue. The remaining two-thirds with so much of the one-third as is not absorbed by legacies are the patrimony of the heirs. A Moslem is, therefore, disabled from disposing of more than one-third of his property by will. <sup>(1)</sup>

The clear residue of the state descends to the heirs; and among these the first are persons for whom the law has provided certain specific shares or portions and who are thence denominated the sharers or *Za-wul-farûd* in Arabic.

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[6[1] (1) “Al-Sirajiyah” by Sirajud-din Mohammad, based on the Traditions of the Prophet on the subject, as collected by Zaid ibn Thabit, one of the earliest companions.

In most cases, there must be a residue after the shares have been satisfied; and this passes to another class of persons who, under that circumstance, are termed residuaries or '*asaba* in Arabic.

It can seldom happen that the deceased should have no individual connected with him who would fall under these two classes; but to guard against this possible contingency, the law had provided another class of persons who, by reason of their remote position with respect to the inheritance, have been denominated "distant kindred" *Zawul Arhâm* in Arabic.

### Gifts And Donations

During his lifetime a Moslem has absolute power over his property. He may dispose of it in whatever way he likes. But such dispositions, in order to be valid and effective, are required to have operation given to them during the lifetime of the owner. If a gift be made, the subject of the gift must be made over to the donee during the lifetime of the donor; he must, in fact, divest himself of all proprietary rights in it and place the donee in possession. To make the operation of the gift dependent upon the donor's death would invalidate the donations. So also in the case of endowments for charitable or religious purposes. A disposition in favour of a charity, in order to be valid, should be accompanied by the complete divestment of all proprietary right. As regards testamentary dispositions, the power is limited to one-third of the property, provided that it is not in favour of one who is entitled to share in the inheritance. For example, the proprietor may devise by will one-third of his property to a stranger; should the device, however, relate to more than one-third, or should it be in favour of a legal heir, it would be invalid.

### Points of Contact

A Moslem upon his death may leave behind him a numerous body of relations. In the absence of certain determinate rules, it would be extremely difficult to distinguish between the inheriting and the non-inheriting relations. In order to obviate this difficulty and to render it easy to distinguish between the two classes, it is the general rule and one capable of universal application, that when a deceased Moslem leaves behind him two relations, one of whom is connected with him through the other, the former shall not succeed while the intermediate person is alive. For example, if a person on his death leaves behind him a son son's son, this latter will not succeed to his grandfather's estate while his father is alive. Again if a person dies leaving behind him a brother's son and a brother's grandson and his own daughter's son, the brother's son, being a male agnate and nearer to the deceased than the brother's grandson, takes the inheritance in preference to the others.

The law of inheritance is a science acknowledged even by Moslem doctors to be an exceedingly difficult object of study.

Although it is not easy to follow it out in all its intricacies, a carefully drawn table on the *Sunni* law of inheritance is given hereinafter: -

#### A. – LEGAL HEIRS AND SHARERS

##### 1. Father

As mere sharer, when there is a son or a son's son, how low soever, he takes  $\frac{1}{6}$ . As mere residuary, when no successor but himself, he takes the whole: or with a sharer, not a child or son's child, how low soever, he takes what is left by such sharer. As sharer and residuary, as when there are daughters and son's daughter but no son or son's son, he, as sharer, takes  $\frac{1}{6}$ ; daughter takes  $\frac{1}{2}$ , or two or more daughters  $\frac{2}{3}$ ; son's daughter  $\frac{1}{6}$ ; and father the remainder.

##### 2. True Grandfather

Father's father, his father and so forth, into whose line of relationship to the deceased no mother enters, is excluded by father and excludes brothers and sisters; he comes into father's place when no father; but does not, like father, reduce mother's share to  $\frac{1}{3}$  of residue, nor entirely exclude paternal grandmother.

##### 3. Half Brothers by Same Mother

They take, in the absence of children or son's descendants and father and true grandfather one  $\frac{1}{6}$ , two or more between them  $\frac{1}{3}$ , being those who benefit by the "return".

##### 4. Daughters

When there are no sons, daughters take on  $\frac{1}{2}$  two or more  $\frac{2}{3}$  between them; with sons they become residuaries and take each half a son's share, being in this case of those who benefit by the "return".

##### 5. Son's Daughters

They take as daughters when there is no child; take nothing when there is a son or more daughters than one; take  $\frac{1}{6}$  when only one daughters; they are made residuaries of male cousin, how low soever.

##### 6. Mother

The mother takes  $\frac{1}{6}$  when there is a child or son's child, how low soever, or two more brothers or sisters of whole or half blood; she takes  $\frac{1}{3}$  when none of these: when husband or wife and both parents, she takes  $\frac{1}{3}$  of the remainder after deducing their shares, the residue going to father: if no father but grandfather, she takes  $\frac{1}{3}$  of the whole.

#### 7. True Grandmother

Father's or mother's mother, how high soever; when no mother, she takes  $\frac{1}{6}$ ; ! if more than one,  $\frac{1}{6}$  between them. Paternal grandmother is excluded by both father and mother; maternal grandmother by mother only.

#### 8. Full Sisters

These take as daughters when no children, son's children how low soever, father, true grandfather or full brother; with full brother, they take half share of male; when daughters or son's daughters, how low soever, but neither sons, nor brothers, the full sisters take as residuaries what remains after daughter or son's daughter has had her share.

#### 9. Half Sisters by Same Father

They take as full sisters, when there are none; with one full sister they take  $\frac{1}{6}$ ; when two full sisters, they take nothing, unless they have a brother who make them residuaries and then they take half a male's share.

#### 10. Half Sisters by Mother only

When there are no children or son's children, how low soever, or father or true grandfather, they take one  $\frac{1}{6}$ ; two or more  $\frac{1}{3}$  between them.

#### 11. Husband

If no child or son's child, how low soever, he takes  $\frac{1}{2}$ ; otherwise  $\frac{1}{4}$ .

#### 12. Wife

If no child or son's child how low soever, she takes  $\frac{1}{4}$ ; if otherwise,  $\frac{1}{8}$ . Several widows share equally.

#### Corollary

All brothers and sisters are excluded by son, son's son, how low soever, father or true grandfather. Half brothers and sisters on father's side are excluded by these and also by full brother. Half brothers and sisters on mother's side are excluded by any child or son's child, by father and true grandfather.

B. RESIDUARIES

I – *Residuaries* in their own right, being *males* into whose line of relationship to the deceased no *female enters* : -

(a) Descendants : -

1. Son.
2. Son's son.
3. Son's son's son.
4. Son of No. 3.

(4a) Son of No. 4.

(4b) And so on how low soever.

(b) Ascendants : -

5. Father.
6. Father's father.
7. Father of No. 6.
8. Father of No. 7.

(8a) Father of No. 8.

(8b) And so on how high soever.

(a) Collaterals : -

9. Full.
10. Half brother by father.
11. Son of No. 9.
12. Son of No. 10.

(11a) Son of No. 11.

(11a) Son of No. 12.

(11b) Son of No.11e.

(12b) Son of No.12a.

*and so on how low soever.*

13. Full paternal uncle by father.

14. Half maternal uncle by father.

15. Son of No. 13.

16. Son of No. 14.

(15a) Son of No.15.

(16a) Son of No.16.

17. Father's full paternal uncle by father's side.

18. Father's half paternal uncle by father's side.

19. Son of No. 17.

20. Son of No. 18.

(19a) Son of No.19.

(20a) Son of No.20.

21. Grandfather's full paternal uncle by father's side.

22. Grandfather's half paternal uncle by father's side.

23. Son of No. 21.

24. Son of No. 22.

(19a) Son of No.23.

(20a) Son of No.24.

and so on, how low soever.

Notes: -

- (a) a nearer residuary in the above table is preferred to and excludes a more remote residuary.
- (b) Where several residuaries are in the same degree, they take *per capita* not *per stripes*, i.e. they share equally. The whole blood is preferred to and excludes the half blood at each stage.

II – *Residuaries in another's right*, being certain females, who are made residuaries by males parallel to them; but who, in the absence of such males, are only entitled to legal shares. These female residuaries take each half as much as the parallel male who makes them residuaries. The following four persons are made residuaries: -

- (a) Daughters made residuary by son.
- (b) Son's daughter made residuary by full brother.
- (c) Full sister made residuary by full brother.
- (d) Half sister by father made residuary by her brother.

III – *Residuaries in their own right*, being *males* into whose line of relationship to the deceased no *female enters* : -

IV – Residuaries with another, being certain females who become residuaries with other females. These are: -

- (a) Full sisters with daughters or daughter's sons.
- (b) Half sisters with father.

Notes: -

When there are several residuaries of different or classes, e.g. residuaries in their own right and residuaries with another, propinquity to deceased gives a preference, so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first.

If there be residuaries and no sharers, the residuaries take all the property.

If there be sharers and no residuaries, the sharers take all the property by the doctrine of the "return." Seven persons are entitled to the "return." 1<sup>st</sup>. mother; 2<sup>nd</sup>, grandmother;

3<sup>rd</sup>, daughter; 4<sup>th</sup>, son's daughter; 5<sup>th</sup>, full sister; 6<sup>th</sup>, half sister by father; 7<sup>th</sup>, half brother or sister by mother.

A posthumous child inherits. There is no presumption as to commorients, who are supposed to die at the same time unless there be proof otherwise.

If there be neither sharers nor residuaries, the property will go to the following class (distant kindred):

#### C. DISTANT KINDRED

(ALL Relatives who are neither Sharers nor Residuaries)

##### CLASS 1.

Descendants : Children of daughters and son's daughters:

1. Daughter's son.
2. Daughter's daughter.
3. Son of No. 1.
4. Daughter's of No. 1.
5. Son of No. 2.
6. Daughter's of No. 2 and so how low soever, and whether male or female.
7. Son's Daughter's son.
8. Son's Daughter's daughter.
9. Son of No. 7.
10. Daughter's of No. 7.
11. Son of No. 8.
12. Daughter's of No. 8, and so on how low soever and whether male or female.

Notes: -

- (a) Distant kindred of Class 1 take according to proximity of degree; but when equal in this respect, those who claim through an heir, *i.e.* sharer or residuary, have a preference over those who claim through one who is not an heir.

- (b) When the sexes of their ancestors differ, distribution is made having regard to such difference of sex, *e.g.* daughter of daughter's son gets a portion double that of son of daughter's daughter, and when the claimants are equal in degree but different in sex, males take twice as much as females.

## CLASS 2.

Ascendants : False grandfathers and false grandmothers.

13. Maternal grandfather.

14. Father of No. 13, father of No. 14 and so on as high soever (*i.e.* all false grandfathers).

15. Maternal grandfather's mother.

16. Mother of No. 15 and so on how high soever (*i.e.* all false grandmothers).

Notes:

Rules (a) and (b), applicable to Class 1, apply also to Class 2.

Furthermore, when the sides of relation differ, the claimant by the *paternal* sides gets twice as much as the claimant by the maternal.

## CLASS 3.

Parents Descendants :

17. Full brother's daughter and her descendants.

18. Full sister's son.

19. Full sister's daughters and their descendants, how low soever.

20. Daughter of half brother by father, and her descendants.

21. Son of half sister of father.

22. Daughter of half sister by father, and her descendants, how low soever.

23. Son of half brother by mother.

24. Daughter of half brother by mother, and her descendants, how low soever.

25. Son of half sister by mother.

26. Daughter of half sister by mother, and their descendants, how low soever.

Note: - Rules (a) and (b), applicable to Class 1, apply also to Class 3.

Furthermore, when two claimants are equal in respect of proximity, one who claims through a residuary is preferred to one who cannot so claim.

#### CLASS 4.

Descendants of the two grandfathers and the two grandmothers.

27. Full paternal aunt and her descendants, male or female, and how low soever.

28. Half paternal aunt and her descendants, male or female, how low soever.

29. Father's half brother by mother and his descendants, male or female, how low soever.

30. Father's half sister by mother and her descendants, male or female, how low soever.

Note: - The sides of relations being equal, uncles and aunts of the whole blood are preferred to those of the half, and those connected by the same father only, whether males or females, are preferred to those connected by the same mother only. Where sides of relation differ, the claimant by paternal relation gets twice as much as the claimant by maternal relation. Where sides and strength of relation are equal, the male gets twice as much as the female.

General Rule. – Each of these classes as above mentioned excludes the  
next following class.

Note: - In cases where there are no sharers, residuaries, or distant kindred to claim inheritance, the whole property of the deceased shall be gone over to the Public Treasury, i.e. The State.

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## SALE AND USURY

Sale in the language of the Moslem Law signifies an exchange of property with the mutual consent of the parties. In its ordinary acceptance, sale is a transfer of property in consideration of a price in money. The word has a comprehensive meaning in the law, and is applied to every exchange of property for property with mutual consent. It, therefore, includes barter as well as sale and also loan, when the articles lent are intended to be consumed and replaced to the lender by a similar quantity of the same kind. This transaction which is truly an exchange of property for property is termed as *qard* in the law, *i.e.* loan.

According to the Moslem Laws of contracted trans action of sale and barter, etc., things are divided into (a) Similar; and (b) Dissimilar:

Similar things are those which are sold by weighing and measuring; and dissimilar things which are different in quality but sold in exchange, such as wheat for its price in coin. In the case of similar things as wheat for rice, when sold after being measured or weighed delivery should take place at once. When these are sold unconditionally, the buyer has no right to choose the best part of it from the whole, unless the seller consents and desires to please him. Things sold or exchanged cannot remain undelivered or unadjusted on the mere responsibility of the parties. But if a thing is sold against its value in money, time is allowed in receiving money. Among similar things, there are similars of capacity weight and sale. The seller must express clearly the quantity and quality of the thing exactly as it is, so that any doubt or misunderstanding may not arise in regard to it later on. He must fix the price and say that he is willing to sell to so and so such a thing of so much value and on such terms and conditions (if there be any); the buyer must accept the offer in clear language. If the seller himself cannot do this, he must appoint an agent, with sufficient authority to dispose of his goods. If a contract takes place through a broker, it must be ratified by the actual buyer. Option is allowed to the buyer and seller for three days (in case a thing is not removed from the seller's premises) to avoid the transaction. If a thing is purchased without inspection or examination and afterwards a difference is found in the quantity or the quality specified by the seller, or asked for by the purchaser the latter may refuse to take delivery of it. Of the various kinds of recognized kinds of sale, the following are the most important:

1. Sale of a specific thing for a price or by way of barter.
2. Sale of silver for silver or gold for gold or banking in which the exchange of coins, either silver or gold, must be exact in weight or quality, so that there may be no chance of resorting to usury.
3. Sale in advance when the price is deposited before taking delivery of goods.
4. Loan, etc.

The quality of the thing, when lent, is specified and the thing to be given back should be of the same quality.

One can mortgage his property, but here also usury is avoided. The theologians have permitted only such bargains in which a lender of money can be benefited without transgressing the law, e.g. by the use of a thing or property which has been mortgaged; or make a condition precedent that if, with a specified time, the money is not repaid, delivery of possession of the property mortgaged will be given to the lender, etc. *Riba* or usury is strictly prohibited under Islamic Law. It means taking advantage of an individual in distress by giving him momentary relief, with the intention of bringing more misery upon him. One is forced to distress by giving him momentary relief, with the intention of bringing more misery upon him. One is forced to ask for a loan on the condition that it would be repaid, as agreed, to the lender; often much more has to be paid to the lender than he has actually paid. In some cases it may be deemed harmless, but often it brings ruin to whole families, of which the lender is conscious. Such exaction is against the spirit of Islam. The lender may intentionally lend money to possess the property of one who may, owing to hard circumstances, be forced to seek his help. Islam inculcates moderate socialism and with it prescribes a rational and just mode of dealing as between members of the Moslem community. Each individual has the right to possess what is his own property and to enjoy what is his own wealth, but only to the extent that by that he does not injure others' happiness or interests. He may amass wealth, but the surplus wealth, of which he is not in need of immediate use, must be used for helping those who are badly in need thereof. Usury as practised in the time of the Prophet was against such principles and was, therefore, prohibited. It is difficult to say whether the modern method of banking and charging of interest on amounts lent out is based upon the doctrine of mutuality, service and mutuality of benefit between lender and borrower. If the benefits are deemed to be one sided, it cannot be said to be permitted by the Islamic Law. If, on the other hand, there is mutuality of service, it would, in the judgment of Moslem theologians, be permissible as it would be held by them to be a kind of transaction.

## USURY

Usury, as an illegal transaction, is occasioned, by *rate*, united with *species*, and it includes all gain upon loans, whether from the loan of money, or goods or property of any kind.

The teaching of the Quran on the subject is given in Chapter 2, verse 275 of which the following is a translation:

*“those who swallow down usury shall arise in the last day as he arises whom Satan has infected by his touch. This for that they say “Trading is nothing but the like of usury,” and yet God hath allowed trading and forbidden usury; and whosoever receives this admonition from his Lord, and abstains from it, shall have pardon for the past and his lot shall be with God. But they who return to usury shall be given over to the Fire – therein to abide.”*

The Prophet is related to have said:

*“Cursed be the taker of usury, the giver of usury, the writer of usury, and the witness of usury, for they are all equal.”* , *“Verily the wealth that is gained in usury, although it be great, is of small advantage”* (711) .

Riba, i.e. usury, in the language of the law, signifies “an excess,” according to a legal standard of *measurement* or *weight* in one of two *homogeneous* articles (of weight or measurement of capacity) opposed to each in a contract of exchange, and in which such excess is stipulated as an obligatory condition on one of the parties, without any return, i.e. without anything being opposed to it. The sale, therefore, of two loads of barley, for instance, in exchange for one load of wheat does not constitute usury, since these articles are not *homogeneous*; and, on the other hand, the sale of ten yards of cloth in exchange for five yards of another cloth is not usury, since although these articles be homogeneous, they are not estimable by *weight, or measurement* of capacity.

Usury, then, as an illegal transaction is occasioned (according to most distinguished doctors) by *rate* united with *species*, where, however, it must be observed that *rate*, in the law of Islam, applies only to articles of weight and measurement of capacity, and *not* to articles of *longitudinal* measurement, such as cloth, etc., or of tale such as eggs, dates, walnuts, etc., when exchanged from hand to hand. Where the quality of being weighable or measurable by capacity, and correspondence of species (being the causes of usury) *both* exist, the stipulation of *inequality* or suspension of payment to a future period, are both usurious. Thus it is usurious to sell either one measure of wheat in exchange for two measures, or one measure of wheat for one measure deliverable at a future period. If, on the contrary, *neither* of these circumstances exists (as in the sale of wheat for money), it is lawful, either to stipulate a superiority of rate or the payment at a future period. If, on the other hand, *one* of these circumstances only exists (as in the sale of wheat for barley), then a superiority of the rate may legally be stipulated, but not a suspension in the payment. Thus one measure of wheat may lawfully be sold for two measures of barley; but it is not lawful to sell one measure of wheat for one measure of barley, payable at a future period.

Similar of weight and capacity are distinguished from all other description of property in a very remarkable way. When one article of weight or one of measure is sold or exchanged for another of measure, the delivery of both must be immediate from hand to hand, and any delay of delivery in one of them is unlawful and prohibited. Where again, the articles exchanged are also of the same kind, as when wheat is sold for wheat, or silver for silver, there must not only be reciprocal and immediate delivery of both before the separation of the parties, but also absolute equality of weight or measure, according as to whether the articles are weighable or measurable; any excess of either side is also unlawful and prohibited. These two prohibitions constitute in brief the doctrine of *riba* (usury), which is a marked characteristic of the Islamic Law of sale. The word *riba* (in

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7[1] () “Sahihu Muslim,” Chapter on “Riba” (usury).

Arabic) properly signifies “excess,” and there are no terms in the Islamic Law which correspond to the words “interest” and “usury” in the sense attached to them in the English language; but it was expressly prohibited by the Prophet to his followers to derive any advantage from loans, and that particular kind of advantage which is called by Westerners “interest” and which consists in the receiving back from the borrower a quantity larger than is actually lent to him, was effectually prevented by the two rules above mentioned.

## LAWFUL TRANSACTIONS

Similar of weight and capacity have a common feature of commodities, and marks with further peculiarity their treatment in the Islamic Law. There are aggregates of minute parts, which are either exactly alike or so nearly resemble each other, that the difference between them may be safely disregarded. For this reason they are usually dealt with in bulk, regard being had only to the whole of a stipulated quantity, and not to the individual parts of which it is composed. When sold in this manner, they are said to be indeterminate. They may, however, be rendered specific in several ways. Actual delivery, or production with distinct reference at the time of contract, is sufficient for that purpose in all cases. But something short of this would suffice for all similars, excepting money. Thus flour, or any kind of grain, may be rendered specific by being enclosed in a sack, or oil, or any liquid, by being put into casks or jars; and though the vessels are not actually produced at the time of contract, their contents may be sufficiently particularized by description of the vessels and their locality. Money is not susceptible of being thus particularized. Hence, money is said to be always indeterminate. Other similars, including similars of tale (number), are sometimes specific and sometimes indeterminate. Dissimilars, including those of tale, are always specific.

When similars are sold indeterminately, the purchaser has no right to any specific portion of them until it be separated from a general mass, and marked and identified as the subject of the contract. From the moment of offer till actual delivery, he has nothing to rely upon but the seller’s obligation, which may, therefore, be considered the direct subject of the contract. Similars taken indeterminately are accordingly termed *dayn* or obligation in the Islamic Law. When taken specifically, they are classed with dissimilars under the general term of ‘*ayn*. The literal meaning of this term is “substance or thing”; but when opposed to *dayn* it means something determinate or specific. The subject or traffic may thus be divided into two classes: specific and indeterminate; or if we substitute for the latter the word “obligation” and omit the word “specific” as unnecessary when not opposed to “indeterminate,” these classes may according to the view of Islamic lawyers, be described as thing and obligation.

It is a general principle of the Islamic Law of sale that credit cannot be opposed to credit, namely that both the things exchanged cannot be allowed to remain on the responsibility of the parties. Hence it is only with regard to one of them that any stipulation for delay in delivery is lawful. Price admits of being left on responsibility, and accordingly a stipulation for delay in the payment of the price is quit lawful and valid. It follows that a stipulation for delay in the delivery of the things sold cannot be lawful.

And this is the case, with the exception of a particular kind of sale, hereafter to be noticed, in which the things to be sold is always indeterminate, and the price is made in advance. It may, therefore, be said of all specific things when it is a subject of sale, that a stipulation for delay in their delivery is illegal, and would invalidate a sale. The object of this rule may have been to prevent any change of the thing sold before delivery, and the disputes which may in consequence arise between the parties.

There is kind of sale known as *salam* in the Islamic Law. This word literally means an “advance”; and in a *salam* sale the price is immediately advanced for the goods to be delivered at a future fixed time. It is only things of the class of similars that can be sold in this way, and as they most necessarily be indeterminate, the proper subject of sale is an obligation, while, on the other hand, as the price must be actually paid or delivered at the time of the contract, before the separation of the parties, and must, therefore, even in the case of its being money, be produced, and in consequence be particularized or specified; a *salam* sale is strictly and properly the sale of an obligation for a thing, as defined before. Until actual payment or delivery of the price, however, it retains its character of an obligation, and for this reason the price and the goods are both termed “debts,” and are adduced as examples of the principles that the sale of a debt, *i.e.* of the money or goods which a person is under engagement to pay or deliver before possession, is invalid.

There is another transaction which comes within the definition of sale; it is that which is called *qard* in Arabic and “loan” in English. The borrower acquires an absolute right of property in the things lent; and comes under an engagement to return an equal quantity of things of the same kind. The transaction is, therefore, necessarily limited to similars, whether of weight, capacity, or tale, and the things lent and repaid being of the same kind, the two rules mentioned for the prevention of *riba* or usury must be strictly observed. Hence it follows that any stipulation on the part of the borrower for delay or forbearance by the lender, or any stipulation by the latter for interest to be paid by the former are alike unlawful.

Not-with-standing the stringency of the rules for preventing usury, or the taking of any interest on the loan of money, methods were found for evading them, while still keeping within the letter of the law. It had always been considered lawful to take a pledge to secure the repayment of a debt. Pledges were ordinarily of movable property; when given as security for a debt, and the pledge happened to perish in the hands of the pawnee, the debt was held to be released to the extent of the value of the pledge. Land, though scarcely liable to this incident, was sometimes made the subject of pledge, and devices were adopted for enabling the lender to derive some advantage from its possessions while in the state of pledge. If repayments were made at the assigned term, the lender was obliged to recovery; but if not, the property would remain his own, and the difference between its value and the price of sum lent might have been made an ample compensation for the loss of interest. This form of sale which is called *bay-ulwafa'i*, in Arabic, a term given to a sale of something that may be reconveyed by the seller on repayment at a fixed period of the price or sum given. This form of sale seems to be strictly legal according to the most approved authorities, though held to be what the law calls abominable, as a device for obtaining what it prohibits.

In constituting sale, there is no material different between the Islamic and other system of law. The offer and acceptance which are expressed or implied in a cases, must be so connected as to obviate any doubt in one being intended to apply to the other. For the purpose, the Islamic Law requires that both shall be interchanged at the same meeting of the parties, and that no other business shall be suffered to intervene between an offer and its acceptance. A very slight interruption is sufficient to break the continuity of a negotiation, and to terminate the meeting in a technical sense, the parties should still remain in personal communication. An acceptance after the interruption of an offer made before it would be insufficient to constitute a sale.

As personal communication may be inconvenient in some cases, and impossible in other, the integrity of the meeting is held to be sufficiently preserved when a party who receives an offer by message or letter declares his acceptance of it on receiving the communication and apprehending its contents.

When a sale is lawfully contracted, the property of the things exchanged passes immediately from and to the parties respectively.

In a legal sense, delivery and possession are not necessary for this purpose. Until possession is taken, however, the purchaser is not liable for accidental loss, and the seller has a lien for the price on the thing sold. Delivery by one party is in general tantamount to possession taken by the other. It is, therefore, sometimes of great importance to ascertain when there is a sufficient delivery; and many cases real or imaginary, on the subject, are inserted in the books of detailed theology<sup>(8[2]9[31])</sup>. It sometimes happens that a person purchases a thing of which he is already in possession, and it then becomes important to determine in what cases his previous possession is convertible into a possession under the purchase. Unless so converted, it would be held that there is no delivery under the sale, and the seller would of course retain his lien and remain liable for accidental loss.

Though possession is not necessary to complete the transfer of property under a legal sale, the case is different where the contract is illegal; for here property does not pass till possession is taken. The sale, however, though so far effectual, is still invalid, and liable to be set aside by a judge, at the instance to the fact of the person complaining being able to come before him with what in legal phraseology is termed "clean hands." A Moslem judge law itself, or, as it is more solemnly termed, for the sake of the law itself, or, as it is more solemnly termed, for the right of God, which is the duty of the judge to vindicate, though by so doing he may afford assistance to a party who personally may have no just claim to his interference.

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8[2](8[2]) Fatawa-al-maghiri."

(9[3]) VIDE Yaj-el-'Arus Arabic Lexicon.

## Quran Enjoinments Relating to Trade and Usury

*“They (the unbelievers) say that trading is just like usury, (tell them that) God allows trade and forbids usury.”*

*“God does not bless usury but He blessed charity and makes it fruitful.”*

*“When ye contract a debt for a fixed time record it in writing; let a scribe record it between you (two parties) in term of equity. But if a debte is a minor, weak (in brain) or unable to dictates call two men to witness; if not, one man and two women .... Do not be averse in writing the contract whether small or great and record the term.”*

*“If a debtor is in a strained condition, postpone claim for payment until he finds it easy pay back the debt, or, better still, if you can remit the debt as almsgiving.”*  
(1[1])

<sup>(1)</sup> Fatawa-al-maghiri.”

*(This in case of extreme poverty and inability on the part of a debtor who instead of persecution and imprisonment deserves sympathy and help).*

*“If ye are on journey and cannot find a scribe a pledge with possession may serve the purpose and if one of you deposits a thing on trust with another; let the trustee faithfully discharge his trust.”*

*“When measuring, make the measure perfect and weigh with a right balance.”*

*“Keep up the balance with equity and never make the measure deficient.”*

*“Woe to the defrauders who when they take they demand in full measure, but when they give they measure less.”*

## OWNERSHIP

### KINDS AND DIVISIONS OF PROPERTY OWNERSHIP

Termed *milkkiya*, in Arabic, is of two kinds:

1. Things in common or joint use, such as public roads, gardens, water, pasture, light and fire lighted in a desert to which any man has a right of warming himself.

2. Private concerns, limited to the ownership of an individual. These may be classified under the following headings:

- (a) *Milkul-raqaba*, in Arabic, which literally means “possession of the neck,” or right of the proprietor to a thing.
- (b) *Milkul-yadd* or right of being in possession .
- (c) *Milkul-tasarruf* or right of disposition.

Property is divided into:

1. Movable property, which is subdivided into the following:
  - (a) That which is *measured*, such as rice, etc.
  - (b) That which is *weighed*, such as silver, etc.
  - (c) That which is measured by a linear measure, such as cloth, etc.
  - (d) That which may be counted, such as animals, etc.
  - (e) Articles of furniture and miscellaneous things.
2. *Immovable* property, such as buildings, land. etc..

A man may not be the owner of a property, but may have a share in its income, through hard labour, or skill, in which case, he is not concerned with the loss. But a full owner or a member of a company is affected both in the loss and the profit. As part owners in property, each part-owner-is co-owner and bears the responsibility of sharing in the responsibility of maintaining it, repairing it, etc.. At the same time, each co-owner enjoys the right of demanding his or her share and resolving to separate his or her own share of it from the joint ownership.

There are partial or temporary right, such as the right of *murur* or passing through another’s land, and the right of *shufe* or pre-emption, which means that a co-partner in a certain property must be given preference in the matter of its purchase before the property is sought to be sold to a stranger, and next to him to a neighbour (if the property is immovable, such as a building or land). If there are more partners than one, the preference is to be given according to the proportion of the share, or of the need, as between the parties, or on other considerations. But if the sharer or sharers do not assert

their claim at the proper time, their claim lapses. Therefore, when the judge announces the sale of such property, he fixes a timer for the exercise of the right. Waste land belonging to the State may become private property by cultivation after permission from the authorities concerned. Land belonging to an individual cannot, however, be acquired through cultivation or effecting other improvements on it. The Islamic Law prevents an individual from becoming a nuisance or a source of annoyance to others in exercising one's own right of ownership. For instance, a man may not build his house so close to his neighbour's as to prevent the access of light and air to them; nor can he discharge rain or waste water on his neighbour's property, etc.

Possession is transferred by '*aqd*, which means a "tie," by the original possessor proposing its transfer on certain terms or unconditionally and the receiver accepting the same. This is called – in the law – *ijab* (proposal), and *qabul* (acceptance). Offers and acceptance of transfers of this kind are classified as follows:

1. *Hiba* or gift – a transfer of property without any exchange. This is effected by a decree of the court (judge).
2. *Ba-y'* or sale, which is a transfer of property in exchange of something else. This may be effected by: (a) payment of cash; (b) barter; (c) banking, in which the transaction is cash for cash; (d) sale by payment in advance, so that the goods sought to be bought may be delivered on a future date; and (e) sale in advance, which occurs when goods are made only on receiving an order, its value being paid, in whole or in part, in advance.
3. Mortgage.
4. Rent.
5. Bequest of property which takes effect after the death of its owner. The testator has the full right of bequest in one-third of his or her property for private and charitable purposes, after paying the debts (if any) and funeral expenses incurred, the remaining two-thirds being distributed according to the law among his heirs. If he or she desires to bequest more than one-third of his or her property for charitable purposes, he or she must take the consent of the future heirs. A testator must not be insolvent at the time he or she bequeathes the property in question or in debt to an extent exceeding the value of the property. He or she must be adult at the time the bequest is made. The bequest can be made in writing or verbally in the presence of two males or one male and two female witnesses. An executor after accepting the responsibility cannot decline to discharge it. He must administer the property in case the heirs are minors and distribute the property among them according to the will on their attaining majority. He may sell, pledge, or let the land or house for absolute advantage or for meeting a necessity. But he cannot trade with it unless specifically permitted by the will. A bequest made must be accepted by the legatee. It may be in favour of one or more persons of his own family or to outsiders, who may be Moslems or non-Moslems.

#### Duties of an Executor

Besides generally administering the property, the duties of an executor are:

- (a) Paying the funeral expenses.
- (b) Discharging all debts due, if any.
- (c) Collecting all dues and debts owing to the testator.
- (d) Acting according to the intention of the testator.

A bequest may be revoked during the lifetime of the testator, and all changes he desires may be effected by him in regard to it.

6. *Waqf* or endowments. *Waqf*, literally means suspension or standing. It is a word used in the sense of transferring an individual's property and its income for some charitable purpose. Endowments among Moslems are made for the erection and maintenance of the following:

- (a) *Mosques.*
- (b) *Hospitals.*
- (c) *Free schools.*
- (d) *Benefit of the poor.*
- (e) *Maintaining reservoirs, waterworks, etc.*
- (f) *Carrying out caravans services, hostels, cemeteries.*
- (g) *Supporting a family (whole or poorer members).*

The idea of public charity of this kind began as early as the time of the Prophet; but it developed and took a definite and legal form about the end of the first or the beginning of the second century of the *Hijra*. Its motive from the very start was the promotion of charity and encouragement of learning, particularly religious learning. Accordingly, the Islamic Law forbids such endowments for purposes opposed to Islamic teachings.

A non-Moslem is permitted to make endowments under the same conditions as a Moslem can. The donor of *waqf* must be in full possession of the property. He must be '*aqil*, a possessor of understanding, *i.e.* sane; *baligh*, of age; *hurr*, free, and of good health at the time he makes the endowment. He must not be in debt for an amount affecting too much the value of his property. The object of the endowment must be of a permanent nature and the property must yield some profit, *i.e.* it must be productive or beneficial in some other way, as for instance, endowment of a library by presenting number of books, which though they may not yield a income, may be studied for a very long time.

Endowments may take the form of immovable property, such as land, buildings, etc., but certain kinds of movable property may also be accepted, such as animals for the milk they may yield.

*Waqfs* may be divided into:

1. *Khayri*, *i.e.* charitable such as for the benefit of mosques, hospitals, etc.
2. *Ahli*, that is intended to support a family in which the object aimed at is the perpetuation of a family in good circumstances, by affording it the support of an income of an estate.

A *waqf* needs not necessarily be executed in writing, but in case it is not writing the donor must expressly declare it before witnesses, *i.e.* state specifically before them:

- (a) His intention to make the endowment.
- (b) Description of the nature of the endowment, its income, etc.
- (c) He must provide for its coming into force immediately the declaration is made.

A *waqf* can be made of one-third part of the donor's property, the remaining two-thirds being left to his heirs, but the donor may increase the quantity by making a gift during his lifetime. Once a *waqf* is properly made and comes into force, it cannot be revoked even by the donor.

In case a mosque is erected, it becomes public property as soon as any man makes his prayer in it. A *Waqf* is administered, according to the terms of its endowment, by one or more trustees. A single person supervising the administration is called *Nazir*, *i.e.* manager or administrator, he is paid for his services from the income of the estate to the extent of one tenth of the net income. The founder himself can become the *Nazir* during his lifetime, if he so provided, and be succeeded by one of his family. But in case another is appointed under the terms of the endowment, the founder or his descendants cannot interfere with the management, so long as it is administered according to the terms and conditions laid down in the endowment. If a *Nazir* fails to carry out his duties honestly, or if he is proved incompetent, it is left to the magistrate (*qadi*) to dismiss him and to appoint a competent man. If an endowment is not utilized for the intended purpose, it becomes the property of the donor or his heirs.

The endowed property must be free from the claim of creditors. A man cannot make an endowment of his property in favour or of his children if he is in heavy debt, and if his object is to escape payment of his lawful debts.