ZR&I – Zeitschrift für Recht und Islam / Journal of Law & Islam 10 (2018), S. 73–94

Some Characteristics of Money in English and Islamic Law

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Introduction[1]

The law does not define money, leaving this to the discipline of economics. Therefore this analysis of the legal treatment of money perforce begins with the dismal science. Economics defines money as a unit of account, a medium of exchange and a store of value.[2] Commodity money is money which has a purpose additional to these; it has therefore an intrinsic value, not merely the instrumental value (in exchange) possessed of all monies. Metals including iron, copper, gold and silver have served as money but they may simultaneously serve other human needs should they be fashioned into pots, pipes, adornments or jewellery.[3] Commodity-backed money is money without instrumental value which is convertible into goods that do possess instrumental value. Paper notes are commodity-backed money when the notes are freely exchangeable for a commodity – gold in the case of currencies on the gold standard; the government treasury is obliged to perform the conversion from notes to gold or *vice versa*.[4]

Fiat money is "[m]oney whose value derives entirely from its official status as a means of exchange."[5] It exists by government imprimatur alone. It is denominated in a currency, the legal tender of a country. Money in its de-materialised form, as debits or credits in a ledger or in electronic book entries, lacks intrinsic value, being reducible to writing or to negligible pulses of electricity. The principle current crypto-currency, Bitcoin, is a hybrid. It has no official status as its issuer's notional capital, Mt. Gox, is capital of no country. However Bitcoin and the blockchain of which it is formed highlights an important attribute of national fiat currencies.

The supply of Bitcoins is (purportedly) finite and limited, whereas other fiat monies have no quantitative limit. They may be increased indefinitely at the discretion of a monetary authority. Paper notes in circulation in modern economies have no instrumental purpose although they could be put to use as origami or as (admittedly diminutive) note paper; they have no intrinsic value other than the ink, paper, watermarks, metal threads and holographs out of which they are fashioned.

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[1] The author would like to thank Dr. Ahmad Ghouri (University of Sussex Law School), Professor J. S. Bell (University of Cambridge, Faculty of Law) and Mr. Norman H. D. Foster (SOAS University of London, School of Law) for their comments on draft versions of this article.

[2] Robin Wells / Paul Krugman: *Economics*, Macmillan 2013, p. 844. This definition originates with Aristotle's *Politics*, ed. and transl. by C. D. C. Reeve, Hackett 1998, I 8–10 1257a15–30.

[3] In *Wealth of Nations* (originally published 1776), Adam Smith observes that "iron was the common instrument of commerce among the ancient Spartans" and "copper among the ancient Romans", Penguin 1986, books I–III, p. 128. Other commodity currencies in history include silk (China), butter (Norway), whale teeth (Fiji) and salt (Venice), see Stephen G. Cecchetti / Kermit L. Schoenholtz: *Money, Banking and Financial Markets*, McGraw Hill 2015.

[4] In 1717, the United Kingdom converted from a silver to a gold standard, suspending the latter in 1914 (due to the exigencies of war), restoring it from 1925 until a fatal run on pound sterling effectively ended the gold standard and the era of commodity backed money in Britain in 1931. Telegraph: A History of Sterling (8 October 2001), www.telegraph.co.uk/news/1399693/A-history-of-sterling.html (last access 14. 08. 2019).

[5] Wells/Krugman (fn. 2), p. 847.

The law presupposes the economic definition of money. It neither adds to nor subtracts from it. However the law, not economics, decides what may or may not be done with or by means of money. This article concerns a single type of transaction involving money: the exchange of money for money. This single transaction type however has two legal expressions: sale or lease.[6] Since money is not a specific good, lease (borrowing and lending) does not imply return of the same money but rather the money's worth; the repayment of the nominal value of the money, in addition to which adjustments (for inflation or currency fluctuation) may be made and in addition to which a premium may be payable. The legal analysis and ruling on that premium is the subject of this article. That premium is known to English law as interest.

Excluding this introduction this article has five sections. Section A considers the treatment of the time value of money by English and Islamic law. Section B re-states the primary Islamic legal sources Qurʾān and Sunna, and section C those primary sources as elaborated and interpreted by Islamic legal scholars. Section D elaborates selected contributions of behavioural economics regarding bounded human rationality and decision-making under conditions of uncertainty or incomplete information. Section E concludes with observations on the English and Islamic legal analyses of money, deducing some insights that can inform economic policy, banking law and regulations and consumer protection. The value of the insights furnished by Islamic commercial law (and shared with it by modern behavioural economics) is independent of any authority which may or may not be accorded to Islamic law – viewed as one of the world's oldest systems of law, and as the law of a world religion.

A Interest, Usury and the Time Value of Money

I Disinterest in Interest

The borrower–lender contractual relationship is readily recognisable, and abundant in the laws and legal systems of every jurisdiction in the modern world. With few exceptions – limited to the realms of charity and philanthropy – loans of capital are made for lender's profit. Taking or paying interest is so ubiquitous as to elicit little reflection or comment from consumers, companies, businesses, scholars or legal professionals. As a result where there is a felt need for justification it is to justify not the earning of interest but rather its denial: the limitation or the prohibition of interest – as imposed by Islamic commercial law and the contemporary movement towards its observance. Inverting this, the order of things, part II of this section introduces the legal analyses of interest in the common law, followed in part III by that of the Islamic legal position.

II English Law: 'Time is Money'

There is no statutory definition of interest.[7] The legality of interest-based lending in English law

[6] In Islamic law the contract of sale is the contract upon which all other contracts are based, see Jeanette A. Wakin: *The Function of Documents in Islamic Law: The Chapters on Sales from Tahawī's Kitab al-Shurut al-Kabir*, SUNY Press 1972, p. 1.

[7] 504 Halsbury's Laws: *Income Taxation* (2014), 58, [1]–[1017]; 58A, [1018]–[1760]; 59, [1761]–[2332], p. 6. Savings and Investment Income (1) Interest. *The Oxford English Dictionary* (2002): "1. The fact or practice of lending money at interest; esp. in later usage the practice of charging, taking, or contracting to receive, excessive or illegal rates of interest for money on loan". "2. Premium or interest (on money or goods) given or received on loan; gain made by lending money. Now arch". "4. Increase, augmentation; advantage".

is long unquestioned.[8] The common law defines and justifies the payment of loan interest as compensation to the creditor for a delay in payment;[9] for loss of use of the money;[10] as consideration moving from the debtor for the use of the creditor's money;[11] and as "a creditor's share of profits a debtor is presumed or believed to make from the use of the creditor's money."[12] In the House of Lords *Westminster Bank Limited v Riches* Lord Wright said:

> [T]he essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely the loss he suffered because he had not had that use. The general idea is that he is entitled to compensation for the deprivation.[13]

Interest is "a payment of money for money"[14] predicated upon the passage of time. Interest-bearing bank accounts require no additional analysis beyond that accorded interest on loans because the relationship of banker and customer is that of debtor-creditor.[15] The character of the relationship is the same but the respective positions occupied by the parties simply reverses in case of an overdraft. The fundamental theme of the common law, formulated in more economistic language, is that of opportunity cost. Interest is compensation for the loss of opportunities and the profit that might have been the creditor's should the outward transfer not have taken place. The flip side of the coin as it were is time value. Contracts to monetise the time value of money are indisputably lawful at English law. Its legality extends to the premium payable on a loan – commonly called interest.

III Islamic Law: The Meaning of *ribā*

In apparently diametric opposition to English law, Islam the religion and the law flowing therefrom have categorically and continuously maintained the illegality of paying or receiving interest.[16] To state the law is not to state empirical or historical compliance with it, however.

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[8] A historical treatment on Christian theological and doctrinal evolution regarding interest and its legacy in contemporary religious institutions and ethical statements in Britain is beyond the scope of this article. However there is some evidence in the scriptural sources of both Judaism and Christianity that usury was condemned. The key Biblical verses are Deuteronomy 23:19–20 and 22:45–25; and Leviticus 25:35–37. See Benjamin Nelson: *The Idea of Usury*, Chicago 1969, pp. 3–28; Vincent J. Cornell: In the Shadow of Deuteronomy: Approaches to Interest and Usury in Judaism and Christianity, in: *Interest in Islamic Economics: Understanding riba*, ed. by Abdulkader Thomas, Routledge 2006, pp. 13–25. In Dante's *Divine Comedy* canto 17 usurers occupy the seventh circle of hell.

[9] *Bond v Barrow Haematite Steel Co [1902] 1 Ch 353 [363] (Farwell J).*

[10] *Schulze v Bensted (Surveyor of Taxes) 1915 SC 188 at 191, 7 TC 30 [33] (Ct of Sess) (Lord Strathclyde).*

[11] *Bennett v Ogston (Inspector of Taxes) (1930) 15 TC 374 [379] (Rowlatt J).*

[12] *Schulze v Bensted, n 10 [33]; Riches v Westminster Bank Ltd [1947] AC 390, 28 TC 159 (HL).*

[13] [1945] Ch 381. HMRC offers analysis at: SAIM 2060 – Interest: Case Law on the Meaning of Interest, www.hmrc.gov.uk/manuals/saimmanual/saim2060.htm (last access 14. 08. 2019).

[14] *Re Euro Hotel (Belgravia) Ltd [1975] 3 All ER 1075 [1084] (Megarry J).*

[15] *Foley v Hill [1848] 2 HLC 28, 9 ER 1002*. US SC: "The relations of bank and depositor is that of debtor and creditor, founded upon contract." *Bank of Marin v England [1966] 385 US 99, 101 (1966)*. There are some differences based on business necessity – and deviations from debtor creditor law – *Joachimson v Swiss Bank Corporation [1921] 3 KB 110 (CA)*, and *Bhogal v Punjab National Bank [1988] 2 All ER 296 (CA)*. See Ross Cranston: *Principles of Banking Law*, OUP 2002, p. 132.

[16] There were influential and divergent opinions in the twentieth century. Most important and persuasively argued among these were the views of ʿAbd ar-Razzāq Aḥmad as-Sanhūrī Sanhuri, author of the civil codes of

There are abundant examples in Muslim societies past and present where the prohibition was routinely breached.[17] In twentieth and twenty-first century Muslim-majority societies the supply of financial services that traffic in interest remains the norm. This is true even in those states purporting to be Islamic states, and those the constitutions of which contain a *šarīʿa* clause.[18]

In fact the frequently uttered phrase that 'Islam(-ic law) bans interest' greatly simplifies reality. There is no counterpart for 'interest' in Arabic – the legal and scriptural language of Islam. Instead the legal categorisation of mutual exchanges of money turns upon the meaning of the word *ribā* (*ribawī* is the adjectival form). 'Usury' is a closer approximation to this word although it is also inexact and for this reason this article prefers the Arabic. *Ribā* does, like usury, interdict the exchange of money for money. However it also blocks the exchange of certain commodities that are not used as legal tender. Given the exceptionalism of Islam among the Abrahamic religions and extant legal systems in relation to its position on usury, and the potentially far-reaching consequences (for commerce and for consumers) of the Islamic rules governing *ribawī* exchanges, it is no surprise that much ink has been spilt on the subject. In relation to this literature in Islamic law and legal studies, this article makes two claims: one critical and corrective, and the other constructive. The first claim is that existing analyses of the principle underlying the *ribā* rules are incorrect. Specifically the article aims to refute two such principles. These are, the illegality of: 1) the commoditization of money, and 2) according a time value to money. Having eliminated these two principles from the possible justifications for the *ribā* rules, the second and the constructive

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Egypt, Iraq, Syria and the commercial code of Kuwait. He maintained that simple (but not compound) interest was compatible with Islamic law in capitalist countries; Enid Hill: Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ʿAbd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar 1895–1971, Part II, in: *Arab Law Quarterly* 3 (1988), pp. 182, 202. Rašīd Riḍā states that only *ribā al-faḍl* (to be explained below) was prohibited, as in: *The Fatwas of Imam Muḥammad Rashid Rida* II, Cairo 1970, p. 608. More recently, and very controversially the religious leader of al-Azhar, the highest Islamic religious centre in Egypt, Sayyid Tantāwī, opined in 1989 that interest is not unlawful. See Chibli Mallat: Ṭanṭāwī on Banking Operations in Egypt, in: *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. by M. Masud, B. Messick and D. Powers, Harvard 1996, pp. 286, 296. Maha-Hanaan Balala contends that the main issue concerns not interest but deception, and disapproval of "obsession with monetary gains", *Islamic Finance and Law: Theory and Practice in a Globalized World*, Tauris 2011, p. 25.

[17] Usury was a frequent occurrence in the Ottoman Empire. Şevket Pamuk: Finance in the Ottoman Empire 1453–1854, in: *Handbook of Key Financial Markets Institutions and Infrastructure*, ed. by Gerard Caprio, Elsevier 2013, and his article 'The Evolution of Financial Institutions in the Ottoman Empire', in: *Financial History Review* 11.1 (2004), p. 7. Ebusuud Efendi, Mufti of Istanbul (1545–1574 CE) and latterly the Šaiḫ of Islam of the Ottoman Empire, defended interest-taking as a matter of necessity (*ḍarūra*); M. Rev. MacColl (1881): Are Reforms Possible Under Mussulman Rule? (*mimeo*), as cited in Mahmoud A. El-Gamal: 'Interest' and the Paradox of Islamic Law and Finance, in: *Fordham International Law Journal* 27.1 (2003), pp. 108 f.

[18] Such as Egypt's article 2: "The principles of the Islamic sharī'a are the chief source of Egyptian legislation"; Afghanistan (article 3); Iran (articles 2–4); Pakistan (article 227); Qatar (article e 1); Yemen (article 3); and Saudi Arabia (the *Basic Law and Royal Decree* No. A/90 Article 1 CB). These are cited in Clark B. Lombardi: Constitutional Provisions Making Sharia 'A' or 'The' Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?, in: *American University International Law Review* 28.3 (2013), p. 733. Also relevant is Lombardi's book *State Law as Islamic Law in Modern Egypt*, Brill 2006.

aim of this article's intervention into Islamic law is the formulation and defence of an alternative explanation, one which it is suggested provides insight and instruction beyond Islamic states and societies – extending into the world of financial institutions and markets, and the regulation of credit, debt and interest.

B The Primary Islamic Texts

I The Relationship of *ribā* and Usury

Whilst *ribā* encompasses money interest, as that is understood – whether expressly or impliedly – in English law, it also encompasses exchanges where one or both items in an exchange are not monetary, provided that one or both of the items exchanged fall into the subset of those commodities that Islamic law deems *ribawī*. Therefore it is a mistranslation although a convenient one to reduce *ribā* to usury.[19] For this reason the Arabic term will be retained in what follows, until the conclusion when the broader term usury will reappear. Ascertaining the meaning of *ribā* requires a review of all sources of Islamic law. The sources of Islamic law are divisible into primary (treated in section B, parts III–V) and secondary (treated in section C).

II *Šarīʿa* and *fiqh*: a Neglected but Crucial Distinction

This article treats the terms '*šarīʿa*' and 'Islamic law' as synonymous.[20] *Šarīʿa* contains divine commands: *aḥkām* (sg. *ḥukm*).[21] With regard to the commanding or imperative nature of the *aḥkām* and the Islamic philosophy or a comparison with a Hobbesian or an Austinian command theory is apposite. In the case of Sunni Islam the entirety of the primary sources of *šarīʿa* are exhausted by Qurʾān and *ḥadīṯ*. Muslims believe the Qurʾān to be the direct speech of God, recited by the founding Prophet Muḥammad (570–632 CE). This explains the primacy of Arabic in Islamic legal writings and ritual and religious praxis. The *ḥadīṯ* are the express or implied statements of Muḥammad or his companions, as reported and transmitted by witnesses. For present purposes the entirety of the *ḥadīṯ* are synonymous with the Sunna, the normative example that leads and guides Muslim pious practice, morality and ethics, and ritual observance.

Qurʾān and *ḥadīṯ* are the primary sources of Islamic law. The usual distinction between primary and secondary textual sources is that the latter are a scholarly treatment of, or a commentary upon, the former. That aspect of the distinction applies. However there is a further addition.

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[19] Although it does little to advance the legal analysis, the authoritative Arabic dictionary *Lisān al-ʿArab* provides the following etymology: "The root means increase from the money raba (past simple): increased and raised […] In the canonical law of Islam, *riba* is the increase on the original amount of money without a sales contract." Translated by Ruba Alfattouh, Abdulkader Thomas and Najwa Abdel Hadi: Riba in Lisan al Arab, in: Thomas (fn. 8), p. 10. For analysis of the absent sales contract in this definition see the section on the *murābaḥa* contract below.

[20] However there are differences not material to this article. "The English term 'Islamic law' serves as translation of both *šarīʿa* ('the revealed, or canonical, law of Islam') and *fiqh* ('jurisprudence in Islam'). It therefore covers a wider range of meanings than those attributed to 'law' in the modern Western context in that it includes such matters as worship, personal morality, family relations, and public welfare." Yvonne Yazbeck Haddad / Barbara Freyer Stowasser: Introduction 'Islamic Law and the Challenge of Modernity', in: *Islamic Law and the Challenges of Modernity*, ed. by Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, Alta Mira 2004, p. 4.

[21] Qurʾān 6:57: 'The command (*ḥukm*) is that of God alone' – 'إِنِ الْحُكْمُ إِلَّا لِلَّهِ' (author's translation).

Muslims believe that the primary sources are revealed, meaning they are authored by God and disclosed to humanity, via prophecy – *nubūwa*. The secondary sources are the result of human thought, rather than manifestations of the mind of God. They are sometimes for this reason said to be 'derived'. The Arabic term for the secondary sources is *fiqh*, which literally means 'understanding', 'comprehension', 'insight' or 'knowledge.'[22] Most often translated as jurisprudence, *fiqh* is actually broader than the English denotation of jurisprudence as it includes all those operations and techniques that may be applied to *šarīʿa* in order to render it comprehensible to humans.[23] Using the words *šarīʿa* and *fiqh* interchangeably, as is often done, neglects this crucial distinction.[24]

Although the explicit statements about *ribā* are among the most clear of the legal provisos in both Qurʾān and Sunna, *ribā* is never defined in the Qurʾān; its meaning remains far from obvious even after considering all pertinent *ḥadīṯ* as well. For this reason *fiqhī* (the adjectival form of *fiqh*) writings on *ribā* are highly necessary. They are the subject of section C below.

III *Qurʾān*

The word *ribā* appears in four of the 144 chapters of the Qurʾān. The following translated excerpts are provided with the caveat that no translation of the Qurʾān is fully adequate or authoritative, for the reasons stated at B II above. It should be borne in mind that the selected translations like most adopt the most widespread English rendering of *ribā*, as usury. The most extensive reference to *ribā* appears in the second chapter of the Qurʾān. The following verse distinguishes *ribā* and trade and portrays quite graphically the gravity of the penalty for repeat offenders:

> Those who live on usury will not rise (on Doomsday), but like a man possessed of the devil and demented. This because they say that trading is like usury. But trade has been sanctioned and usury forbidden by God.
>
> Those who are warned by their Lord and desist will keep (what they have taken of interest) already, and the matter will rest with God. But those who revert to it again are the residents of Hell where they will abide forever. God takes away gain from (usury), but adds (profit) to charity; and God does not love the ungrateful and sinners.[25]

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[22] Hans Wehr (ed.): *Arabic-English Dictionary* (Spoken Language Services 1994). "Fiqh ('understanding') connotes the efforts and activities, largely on the part of qualified scholars, to discover and give expression to the many facets of Qur'an- and Sunna-derived principles of shari'a." *Fiqh* is "an intellectual, literary tradition and/or the sophisticated product of centuries of Islamic high legal culture." N. Calder: Law, in: *Oxford Encyclopedia of the Modern Islamic World*, ed. by J. J. Esposito et al., OUP 1995, p. 452.

[23] On the subdivision of *fiqh* into roots (*uṣūl al-fiqh*) and branches (*furūʿ al-fiqh*) and the types of legal materials where these are found – including elaborating texts and analyses (in *mabsūṭ*) and simplified statements of the rules similar to a primer (*muḫtaṣar*), see the introduction by the editors Oussama Arabi, David S. Powers and Susan A. Spectorsky: *Islamic Legal Thought: A Compendium of Muslim Jurists*, Brill 2013, p. 3.

[24] Rudolph Peters and Peri Bearman provide a lucid explanation in 'Introduction: The Nature of the Sharia' in *The Ashgate Research Companion to Islamic Law*, ed. by Rudolph Peters and Peri Bearman, Ashgate 2014, p. 1.

[25] 2:275–276,

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَٰلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَن جَاءَهُ مَوْعِظَةٌ مِّن رَّبِّهِ فَانتَهَىٰ فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَٰئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ (275)

يَمْحَقُ اللَّهُ الرِّبَا وَيُرْبِي الصَّدَقَاتِ وَاللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَثِيمٍ (276)

in Ahmed Ali: *Al-Qur'ān: A Contemporary Translation*, Princeton 1993. Unless otherwise noted all references to the Qurʾān are to this translation.

Like this verse two other verses are evidence of the existence of usury during the lifetime of Muḥammad: "O believers, fear God and forego the interest that is owing, if you really believe."[26] And "O you who believe, do not practice usury, charging doubled and redoubled (interest); but have fear of God: you may well attain your goal."[27] Trade and commerce without unjustified or unfair increases in fees and prices are here depicted as lawful alternative routes to prosperity and success. There is also a related Qurʾānic emphasis on philanthropy and charity.[28]

In conclusion several possible meanings emerge from these, the entirety of the Qurʾānic verses that contain the word *ribā*: The illegality and immorality of high interest rates (doubling and re-doubling), the expectation of a punitive response (in the hereafter), and the existence of positive, preferred alternatives – trading, charity and benevolence. In case it is not already apparent, it should be observed that the Qurʾān is in countless ways different to a statute – notwithstanding political attempts to treat it as such.[29]

Although compared with other words possessing legal meaning in the Qurʾān *ribā* is explained relatively extensively, nevertheless no precise and unambiguous definition of *ribā* emerges.[30]

For insight into the meaning of the key terms *ribā* and *ribawī* resort must now be made to the Sunna.

IV *Ḥadīṯ*

There are five or six thousand *ḥadīṯ*. The imprecision of this estimate is a preliminary indication that the Arabic content of the Qurʾān is more unanimously accepted as certain, than is the case with the *ḥadīṯ*.[31] In contrast with the Qurʾān where any disputes about the text are at best marginal, there is latitude to challenge or impeach the authority of a given *ḥadīṯ* when two or more *ḥadīṯ* appear to be contradictory.[32] Each *ḥadīṯ* is accompanied by the chain of transmission (*isnād*), that is by the names of the initial witnesses and those transmitters linking the eye- and ear-witness(es) to the time when the *ḥadīṯ* was

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[26] Ibid., 2:278:
يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنتُم مُّؤْمِنِينَ

[27] Ibid., 3:130:
يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا الرِّبَا أَضْعَافًا مُّضَاعَفَةً ۖ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُفْلِحُونَ

[28] Ibid., 30:39:
وَمَا آتَيْتُم مِّن رِّبًا لِّيَرْبُوَ فِي أَمْوَالِ النَّاسِ فَلَا يَرْبُو عِندَ اللَّهِ ۖ وَمَا آتَيْتُم مِّن زَكَاةٍ تُرِيدُونَ وَجْهَ اللَّهِ فَأُولَٰئِكَ هُمُ الْمُضْعِفُونَ

[29] In terms of consolidated states, the Kingdom of Saudi Arabia: article 1 of the 1992 Basic Law states that 'God's book' (i. e. the Qurʾān) is the constitution (also see fn. 18). The *Muslim Brothers* have since its foundation in 1928 by Hasan al-Banna maintained the Qurʾān as constitution; on the organisation: Richard P. Mitchell: *The Society of the Muslim Brothers*, OUP 1993.

[30] For example Z. Ahmad: The Qur'anic Theory of Riba, in: *Islamic Law Quarterly* 20.3 (1978), pp. 3 f., which claims that the meaning of *ribā* was known at the time of the revelation of the Qurʾān, which is why no definition was needed at that time.

[31] The number of Qurʾānic verses is 6326, comparable to the number of *ḥadīṯ*; however there is only accepted compilation of the Qurʾān whereas there are six compilations of *ḥadīṯ*, and as will become apparent in this section it is much more common to debate the authenticity of a given *ḥadīṯ* than that of a given verse of the Qurʾān. The Qurʾānic structure does not guarantee this result as it is largely non-narrative in form so the reason for its cohesion arises instead from the history of its codification not from its content.

[32] This issue should be distinguished from the scholarly debate as to whether the *ḥadīṯ* accurately reported Prophetic behaviour. Schacht's *Origins of Muhammadan Jurisprudence*, Oxford 1950 – drawing on the works of the German Orientalist Ignaz Goldziher – argued few, if any, could be considered authentic accounts of prophetic behaviour. See M. M. Azami: *On the Origins of Muhammadan Jurisprudence*, Wiley 1985; there is a summary of the debate in David S. Powers: *Studies in Qur'an and Hadith*, University of California Press 1986; and in Harald Motzki: The Musannaf of ʿAbd al-Razaq San'anī as a Source of Authentic Ahadīth of the First Century, AH, in: *Journal of Near Eastern Studies* 50 (1991), p. 1.

first uttered, performed or reduced to writing. The *isnād* provides a reason for the Islamic legal practitioner to prefer one *ḥadīṯ* over another; some witnesses are esteemed as more reliable (due to their known honesty, prodigious memories, demonstrated accuracy, and so forth) than others. Due to the number of compilations and disputes about the respective strength of *ḥadīṯ* an exact number concerning *ribā* is unascertainable. Restricting for present purposes the count to those *ḥadīṯ* expressly mentioning *ribā*, there are between ten and twenty. The most instructive of these are excerpted in this section.

As an example of a truncated *isnād*, consider the following *ḥadīṯ*: "Ibn Masʿūd (may Allāh be pleased with him) relates, 'The Messenger of Allāh (peace and blessings of Allāh be upon him)' cursed the devourer of *riba*, his constituent, the one who acts as a witness to it, and one who acts as a notary to it."[33] This *ḥadīṯ* is more severe than any Qurʾānic reference. The net is cast more widely to catch not only accomplices but innocent third parties who might accidentally witness the transacting of *ribā*. There are no second chances. Some *ḥadīṯ* expressly back-refer to the Qurʾān, and (as in the following *ḥadīṯ*) the order in which Qurʾānic verses were revealed.[34] "The last verse revealed to the Prophet was the verse dealing with usury (i. e. *ribā*)."[35] Whilst this *ḥadīṯ* is emphatic, of greater legal significance are the *ḥadīṯ* concerning blocked exchanges: "The Prophet forbade exchange of the same commodities of different qualities."[36] Spot exchange of money in different currencies is lawful, or so the following aphorism has been understood to mean: "There is no Riba (in money exchange) except when it is not done from hand to hand (i. e. when there is delay in payment)."[37] Two commodities serving as money in Islamic history were gold and silver. These could be exchanged at spot but only in (rather improbably) equal quantities:

> The bartering of gold for silver is Riba, except if it is from hand to hand and equal in amount, and wheat grain for wheat grain is usury except if it is from hand to hand and equal in amount, and dates for dates is usury except if it is from hand to hand and equal in amount, and barley for barley is usury except if it is from hand to hand and equal in amount.[38]

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[33] Wahba az-Zuḥailī in Iman Abdul Rahim / Abdulkader Thomas (translators): The Juridical Meaning of riba, in: Thomas (fn. 8), pp. 26 f. *Isnād* are usually longer than a single person, but not necessarily reproduced in whole or even at all when a *ḥadīṯ* is quoted. Similarly emphatic *ḥadīṯ* on the evil of *ribā* are at Buḫārī: *Saḥīḥ*, book 8, vol. 82, *ḥadīṯ* 840, where *ribā* is classed as one of the seven great sins. Another *ḥadīṯ* states that the prohibition on *ribā* was declared by the Prophet at the same time as that on the ban of intoxicants: book 3, vol. 34, and *ḥadīṯ* 299.

[34] The chapters of the Qurʾān are not ordered chronologically but grouped into Meccan and Medinan chapters to correspond with the location of the Prophet Muḥammad and with it the condition and degree of consolidation of the Muslim community. Muḥammad's experience in Mecca is not accepted by all observers as significant. "The fact that the principal passages against interest belong to the Medina period and that the Jews are reproached with breaking the prohibition, suggest that the Muslim prohibition of *ribā* owes less to the conditions in Mekka than to the Prophet's closer acquaintance with Jewish doctrine and practice in Medina." J. Schacht: Riba, in: *Encyclopedia of Islam*, Brill 1987, p. 1148.

[35] Book 6, vol. 60, *ḥadīṯ* 67 (fn. 33). As above there is more than one verse dealing with *ribā* but it is likely that this *ḥadīṯ* is a reference to the longest chapter, and verses 2:275 f. and 2:278.

[36] Continuing: "[B]ut with the change that Isḥāq and Ibn al-Muṭannā used the word Zabn in place of Riba and Ibn Abu 'Umar used the word Riba (interest)." Muslim: *Saḥīḥ*, book 10, *ḥadīṯ* 3689, variation on the theme at 3687.

[37] Book 3, vol. 34, *ḥadīṯ* 386 (fn. 33); "hand to hand" (*yadan bi-yadin*) is the literal rendering of spot transaction.

[38] Book 3, vol. 34, *aḥādīṯ* 344, 379, 382 and as follows 499 (fn. 33): "The selling of gold for gold is *ribā* (usury) except if the exchange is from hand to hand and equal in

This account would be incomplete without the addition of two *aḥādīṯ* that do not explicitly mention *ribā*. The first is one in which there is a broader conflation of unjustified price inflation and dishonesty.[39] The second emphasises the duty to pay debts when able: 'Procrastination in paying debts by a wealthy man is injustice.'[40] As the position on penalties or fees for late payment is at least under some suspicion in Islamic law, timely satisfaction of debts becomes essentially a matter of honour and moral obligation. However this *ḥadīṯ* has no necessary implications for *ribā* as it may deal only with a payment of principal on an interest-free loan (*qarḍ ḥasan*), a recognised method of Islamic philanthropy.

V The Elusive Character of the Primary Sources

Although among the most often repeated legal provisions having commercial import in the Qurʾān and *ḥadīṯ*, the meaning of *ribā* and therefore the implications of its condemnation remains far from clear even after an exhaustive review of express provisions in the primary materials. The textual *šarīʿa* leaves wide latitude for definition and interpretation. When the evolution of law, society, economics and the modern trading and financial infrastructure are contemplated it quickly becomes apparent that this latitude yawns open into a chasm. It provides a compelling demonstration of the distance the Islamic lawyer (or for that matter any individual Muslim) must travel from *šarīʿa* to its application (*taṭbīq*) in a contemporary setting.

C Islamic Legal Opinion: Identifying *ribawī* Property and Contracts

What follows in this section is a schematic description of a consensus emerging from classical Islamic legal writings and opinions on *ribā*. There are minor doctrinal differences between legal schools of thought (*maḏhab*; pl. *maḏāhib*) but these are almost entirely omitted as they are immaterial here. There are two types of *ribā*, and they are partially overlapping: credit *ribā* (*ribā an-nasīʾa*) and surplus *ribā* (*ribā al-faḍl*). Together these two types exhaust what will hereinafter be called 'the *ribā* rules.'

I Credit *ribā* (*ribā an-nasīʾa*)

This is the genus of *ribā* known in pre-Islamic Arabia and during the life-time of the Prophet Muḥammad. It is most likely the type featured in the Qurʾān.[41] In the Islamic legal literature it is also described as the *ribā* of ignorance: *ribā al-ǧāhilīya*. Rather than referring to an absence of knowledge, ignorance here refers to pre-Islamic

amount, and similarly, the selling of wheat for wheat is *ribā* (usury) unless it is from hand to hand and equal in amount, and the selling of barley for barley is usury unless it is from hand to hand and equal in amount, and dates for dates, is usury unless it is from hand to hand and equal in amount)".

[39] Narrated by ʿAbdullāh bin Abī ʿAufa: "A man displayed some goods in the market and took a false oath that he had been offered so much for them though he was not offered that amount. Then the following Divine Verse was revealed: Verily! Those who purchase a little gain at the cost of Allāh's covenant and their oaths … Will get painful punishment." (3:77) Ibn Abu ʿAufa added: 'Such person as described above is a treacherous *ribā* -eater (i. e. eater of usury)'. Book 3, vol. 48, *ḥadīṯ* 841 (fn. 33).

[40] Book 37, vol. 3, *ḥadīṯ* 486 (fn. 33).

[41] Zuḥailī (fn. 33), p. 27: "Credit *ribā*, which was the only type known by the pre-Islamic Arabs. This type is taken against a delay in settlement of a due debt, regardless whether the debt be that of a goods sold or a loan".

Arabia.[42] In credit *ribā* the amount of goods or money payable is altered in exchange for an alteration of the due date: increased for a postponement or decreased for an earlier return date.[43] The alteration of the amount payable can occur before or after the original return date; these situations are comparable to pre-payment, or to an early form of financing respectively.

II Surplus *ribā* (*ribā al-faḍl*)

This type of *ribā* governs the exchange commodities, excluding money. A commodity by definition is a non-specific good, as that is expressed in English contract law. The same quantity of the same grade of commodity is interchangeable with any other. In Islamic law a commodity is a good which is measured by weight or volume, which by a different means implies that commodities are interchangeable, provided that they are of the same quality or grade. In other words these goods are fungible (*miṯlī*).[44]

Surplus *ribā* interdicts two types of transaction. First, it blocks the exchange of the same commodity of different grades; for example, the exchange of a greater amount of low-grade wheat for a lesser amount of high-grade wheat. Second, it blocks the exchange of the same or disparate amounts of different commodities; for example, the exchange of salt for barley. Gold and silver are included among the commodities expressly regulated by the *ribā al-faḍl* rule. The other five expressly named commodities are not precious metals, but low-value consumables: wheat, barley, salt, raisins and dry dates.[45] A minority view, that of the Ẓāhirīs – following a characteristically literalist interpretation – treats the list of seven items as exhaustive.[46] This interpretation implies that fiat money would be exempt from the *ribā* rules. However the dominant view, that of the four major Sunni legal schools, is that the rule applies to other commodities which are analogous to the seven named *ribawī* goods. Such reasoning by analogy (*qiyās*) is a common technique for extending the law to apply to novel facts, and to facts or circumstances not expressly envisaged by the primary sources. Analogical reasoning entails a two-stage procedure. First, which characteristic(s) do the seven *ribawī* goods share? Second, which characteristic(s) must another good display in order to be deemed, like them, *ribawī*? The selected comparators are the *ʿillāt al-ḥukum* (plural); or the *ʿilla* (singular).[47] The material question is whether fiat money is *ribawī* property – in Arabic, *māl ribawī*. Gold and silver were used at and after the time of Islamic revelation as a unit of account, a medium of exchange, and a store of value – as fiat money is now ubiquitously deployed. By operation of *qiyās* then it is evident that fiat money – that is cash, denominated as national currency – is *māl ribawī*.[48] Identical reasoning clearly applies to money in its de-materialised forms and to crypto-currencies and blockchain.

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[42] Some pre-Islamic custom (*ʿurf*) and conventions (*ādāt*) are a source drawn upon by both Qurʾān and *ḥadīṯ*, whilst other such practices extant at the time of the arrival of Islam (including *ribā* and female infanticide) are forbidden.

[43] Zuḥailī (fn. 33), p. 43.

[44] Logically it is apparent that non-specific goods are a larger category as they could include, for example, new cars or appliances, etc.; there were some but relatively few such manufactured artefacts in early Muslim societies.

[45] Zuḥailī (fn. 33), p. 27.

[46] Emad H. Khalil: An Overview of the Shari'a Prohibition of riba, in: Thomas (fn. 8), pp. 55 and 65.

[47] For an accessible explanation see Nabil Saleh: *Unlawful Gain and Legitimate Profit in Islamic Law*, CUP 1986, pp. 14 and 17.

[48] W. M. Ballantyne: *Commercial Law in the Arab Middle East*, London 1986, p. 123.

III The Commodification of Money in English and Islamic Law

It is self-evident that in English law money can be bought and sold as a commodity. Hence the institutions of the money market or the capital market. The names speak for themselves. In a highly regarded work by Frank Vogel and Samuel L. Hayes III, the authors state that in Islamic law by contrast "[m]oney is not treated as a commodity, as in the West."[49] However since as argued in the section immediately above money is analogous to gold and silver, and gold and silver are two of the seven expressly *ribawī* commodities, it follows that Islamic law does permit treating money as a commodity. There is no legal bar to doing so. Since the positions of English and Islamic law are identical in relation to the commodification of money, the position on this matter cannot explain the Islamic law against charging a money premium on the sale or purchase, or the lending or borrowing, of money.

IV Reprise: the Time Value of Money

In Islamic economic history a barter economy gave way to commodity money (gold and silver) which in turn gave way to the mint and to the artefacts it manufactured: fiat money, most often denominated as dinars or dirhams.[50] Therefore Islamic law has evolved together with the development of fiat money. As already established fiat money is *māl ribawī* which accordingly falls to be regulated by the *ribā* rules. Having dismissed commodification as an explanation, another possible justification for the *ribā* rules is that Islamic law unlike English law does not permit the ascription of time value to money. The *locus classicus* of this position is to be found in the writing of two scholars: Sayyid Abū al-Aʿlā Maudūdī and Muḥammad Bāqir aṣ-Ṣadr.[51] Unfortunately this explanation also founders as it is clear that Islamic law permits according time value to money. However the monetisation of the time value of money is achieved not by means of interest as at English law, but by means of partnerships and 'cost-plus-profit' credit sales (*murābaḥa*).

As in England (as evidenced by the Law of Partnership Act 1890 and subsequent company law statutes) partnerships were long the dominant business structure in Muslim societies; Islamic legal scholars only latterly and informally accepted the doctrine of separate legal personality and the company[52] limited by shares or guarantee. In Islamic law the law of partnership consists in joint partnerships (*mušāraka*) and sleeping partnerships (*mudāraba*).[53] Each of these effectively imputes a time value to money. This is particularly clear in the case of the *muḍāraba*

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[49] Frank E. Vogel / Samuel L. Hayes III: *Islamic Law and Finance*, Kluwer Law International 1998, pp. 2 f.

[50] Which remains the names of the currencies in the UAE, Iraq, Qatar, Jordan, Algeria, Bahrain, Kuwait and Libya among others.

[51] *Ar-ribā, Mausūʿat ar-Risāla* s.d., pp. 20 f. and the *magnum opus* of the most famous proponent of an Islamic economics, Muḥammad aṣ-Ṣadr: *Iqtiṣādunā* [*Our Economics*], Dār at-Taʾrūf s.d., p. 639.

[52] Timur Kuran: The Absence of the Corporation in Islamic Law: Origins and Persistence, in: *The American Journal of Comparative Law* 53.4 (2005), pp. 785, 797 f., 816–819, 831–834. The closest equivalent is that of the charitable trust (*waqf*). For source material on the *waqf* see Scott Morrison: The Social and Legislative History of the Islamic Trust (waqf) in Mauritius, in: *Commonwealth Law Bulletin* 45.1 (2015), pp. 1–4. The *waqf* differs from the company in that it is not for profit. And it differs from the English trust in that it is necessarily perpetual (contra the English rule against perpetuities), at least until the assets are exhausted and it may be wound up in a procedure similar to *cy prés*.

[53] *Meğelle*, 10th Book, Preface-Definitions and Chapters I–VII; see also Chapter VIII re other partnerships not discussed here. Written in Ottoman Turkish and translated into Arabic (*al-Maǧallat al-Aḥkām al-ʿAdlīya* – literally: *The Journal of Judicial Rules*) is available in English as *The Mejelle*, The Other Press 2007. On its significance past and present, see Chibli Mallat: *Introduction to Middle Eastern Law*, OUP 2009, p. 245.

where the investor of capital (*rabb al-māl*) earns a return without any personal labour or any mandated entrepreneurial or managerial engagement with the business enterprise. In contrast to a fixed income security, however, in a partnership the return on the investment can be neither guaranteed nor profit amounts fixed in advance, and the investor stands to lose his or her entire capital contribution – as with an equity or a share. A partnership is not a debt relationship,[54] and there can be no contractual duty to re-pay as there would be for a borrower. However should the enterprise be profitable, the investor is contractually entitled to a share of the profits, and to be compensated for the loss of their access to the money; in the interim, in other words, the partner or investor is compensated for the time value of their money and for the opportunity costs thereby incurred.

A second example of the time value of money in trite Islamic law is the *murābaḥa* contract. It is, simply, a credit sale of goods. A premium is charged (relative to the spot price) for a delayed payment arrangement; that is, as compensation for the loss of the use of money for a period of time. In its modern instantiation a bank purchases a product at the request of a customer. Upon taking possession, the bank sells the product on to the customer on deferred or instalment payment terms. The bank does not act as a money-lender. Instead, the bank acts as a trader, charging a mark-up relative to cost. The presence of a non-monetary asset renders the transaction lawful; if the subject matter of the sale were money or receivables it would breach the credit *ribā* rule. In terms of accounting the excess payable is characterised as profit rather than interest; although benchmarks are used (sometimes problematically) in Islamic finance and retail banking there is no necessary reliance on an interest rate (i. e. the wholesale rate at which the bank itself can borrow money) as there would be in case of a loan or a bond spread. Setting aside recurrent arguments about whether the modern deployments of *mušāraka*, *muḍāraba* and *murābaḥa* contracts rise to the level of sham transactions, or rely on objectionable legal fictions, it is evident in any event that there is an implied sanction of money's time value. Islamic law then does not differ in this respect to English law.[55] The position on treating money as a commodity is also, as already established, common ground. Therefore it is necessary to look elsewhere in order to explain the divergence of English and Islamic law regarding the legality of usury, and the reason for the *ribā* rules.

V Two Alternative Explanations

Ribā blocks some transactions that would be regarded in all national jurisdictions[56] as dealing in interest. Regarding the relationship of the two types of *ribā*, "surplus *ribā* implies credit *ribā*".[57] However surplus *ribā* also interdicts other, additional transactions – as seen in section C part II. Therefore it is necessary to explain surplus *ribā*.

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[54] Vogel/Hayes (fn. 49), pp. 2 f.: 'If investors finance the acquisition of tangible goods by sale or lease, they may legitimately compensate themselves for foregone opportunities. Profits deriving from lease payments or from credit sale may reflect, even explicitly, a time factor.'

[55] *Westminster Bank* (fn. 13); *Re Euro Hotel* (fn. 14), para. 1084. See also Martin Heckel: Wie islamisch ist Islamic Finance? – ein Beitrag zum Trust als Rückgrat islamischer Zertifikate (Ṣukūk), in: *Islamisches Recht in Wissenschaft und Praxis: Festschrift zu Ehren von Hans-Georg Ebert*, ed by Hatem Elliesie, Beate Anam and Thoralf Hanstein, Berlin 2018, pp. 371–394 (376).

[56] According to the English court at least Islamic law is non-national: *Beximco Pharmaceuticals Ltd and Ors v Shamil Bank of Bahrain EWCA Civ* 19, [40], [43], [48].

[57] For example if "a person sells gold, for example, on credit, then pays back in silver more than the equivalent of what he had taken in gold." Zuḥailī (fn. 33), p. 27.

Having done so the reasoning underpinning credit *ribā* will become apparent. This section reports the justifications that two Islamic legal scholars have advanced for the rule on surplus *ribā*. These two accounts, emanating from within Islamic intellectual traditions, form the skeleton to which a critical and more contemporary analysis will add body and flesh in section D.

1 Ibn Qaiyim: Economic and Commercial Utility

In the fourteenth century an Arab jurist Ibn Qaiyim (1292–1350 CE) advanced an argument based on economic necessity. He claimed that property must be priced as a condition precedent to sale. It must not be bartered on terms that are unequal, whether the inequality of the trade should be with respect to the quality or quantity of the property. He assumed that the value of money in which goods are priced must be fixed. The results are the same whether his theory is construed to require pricing in either commodity money (gold and silver) or fiat money.

> Dirhams and dinars are the prices of articles sold and the price is the standard by which the evaluation of property is recognized. It must therefore be fixed and regulated so that it does not go up or down, since were the price to go up or down like commodities, we would not have a price with which to value the articles sold. Indeed, everything is a commodity and the people's need for a price by which to value the articles sold is a general and compelling one.[58]

'Commodity' here is evidently used to include fungible and non-fungible goods, and in fact to apply to any property – which is to say anything capable of being owned or sold: all property, real and personal, in the language of English law. He continues, explaining fixed prices as a requisite for commensurability:

> Such valuing is not possible save on the basis of a rate by which to know value. This requires a price on the basis of which things are assessed, which continues upon one state of affairs, and which is not (itself) assessed by reference to anything else. If it becomes a commodity which goes up and down, then the transactions of the people will be impaired.[59]

The argument against barter and in favour of pricing by means of money is a utilitarian or functional argument in that pricing (and therefore money) are presented as necessary in order to facilitate trade and exchange. A further *ḥadīṯ* which lends support to Ibn Qaiyim's interpretation is as follows:

> Once Bilāl brought Barni [a high grade, sweet date] to the Prophet and the Prophet asked him, "From where have you brought these?" Bilāl replied, "I had some inferior type of dates and exchanged two Sas [a unit of measure] of it for one Sa of Barni dates in order to give it to the Prophet; to eat." Thereupon the Prophet said, "Beware! Beware! This is definitely Riba […] Don't do so, but if you want to buy (a superior kind of dates) sell the inferior dates for money and then buy the superior kind of dates with that money.[60]

The *ḥadīṯ* does not articulate the reason for attaching a monetary value to goods but is emphatic that the failure to do so for an exchange of dates of differing qualities breaches the *ribā* rules. Ibn Qaiyim calls such an exchange covert or hidden *ribā* – and condemns it as a pretext to committing forbidden acts, impliedly credit *ribā*.[61] However since surplus *ribā* includes five

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[58] Quoted in Ballantyne (fn. 48), p. 123.

[59] Ibid.

[60] Book 3, vol. 38, *ḥadīṯ* 506 (fn. 33).

[61] Zuḥailī (fn. 33), p. 27, as stated in the *ḥadīṯ*: "Do not sell one dirham for two, for I fear for you that you fall into *ribā*", which suggests the equation of interest and *ribā* is not as obvious as it is now commonly thought.

edible commodities that did not and do not function as money, it is not apparent that surplus *ribā* adds anything essential if the aim were to interdict credit *ribā* alone.

2 Ibn Rušd: Transactional Justice

Earlier, in the twelfth century, Muslim philosopher Ibn Rušd (1126–1198 CE)[62] offered an analysis of surplus *ribā*. The intentions of the law, and the motive of justice and of avoiding harm are foremost in his account – as against Ibn Qaiyim's analysis, which privileged commerce and utility over more directly humanistic concerns:

> It is clear from the *šarīʿa* that the intention behind the impermissibility of riba is the enormous amount of unjust harm which accrues therefrom, since justice in financial transactions occurs when commodities are exchanged for an exact equivalent. However, since exactly equal exchange is a rare thing when trading commodities which are of different essences, the dinar and dirham are used in order to evaluate their value. Furthermore, justice and equality in trading commodities of different essences [qualities] occur when their value is proportionate to one another, meaning that the proportionate value of one of the two counter-values in relation to its kind is equal to the proportionate value of the other counter-value in relation to its kind. Hence commutative transactions of countable commodities necessitate a difference of the products one to another when sold; while justice in those objects measured by volume or weight is by equality of amount in the volume or weight.[63]

Ibn Rušd here echoes (and may well have been influenced by) Aristotle's remarks on absolute and proportionate equality.[64] His is fundamentally a normative argument predicated on a substantive conception of justice. He states that trades of identical goods are just, even as he acknowledges the non-commerciality of such an exchange; the purpose of this tautology is likely to emphasise the value of equality and proportionality, as matters of fairness, rather than to prescribe specific kinds of transactions. Where there can be no doubt about the equality of the goods exchanged there can be no injustice or harm. Conversely where there is subjectivity, as when quantities and grades do not match and judgments must be made, there is a high probability of errors or of other mistake, deceit, fraud, unfairness or exploitation. As with Ibn Qaiyim's prescriptions, attaching a value measured in money allows each party to reduce these dangers. An intermediate step is made as compared with direct barter: goods are converted to money which can then be converted back to goods. The following section expands upon the insights of Ibn Qaiyim and Ibn Rušd to develop a fuller account of the justification and effects of the *ribā* rules.

D Reading the *ribā* Rules through Economics and Psychology

I Ibn Qaiyim, Ibn Rušd and Modern Economic Theory

Ibn Qaiyim's analysis of fixed prices and currencies is now anachronistic given the existence of a large and highly developed foreign exchange market. Any currency and by extension all money's worth can very easily be measured in another currency – as it is at high speeds and

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62 Known in Europe, historically, as Averroës.

63 Ibn Rušd: *al-Muqaddimāt al-Mumahhidāt* [*The Introductions and the Prefaces*], Matbaʿat as-Saʿāda s. d., p. 42. The inspiration for the treatments of Ibn Rušd and Ibn Qaiyim was Mahmoud A. El-Gamal: An Attempt to Understand the Economic Wisdom (*ḥikma*) in the Prohibition of ribā, in: Thomas (fn. 8), p. 112.

64 In both *Nicomachean Ethics*, Hackett 1999; and *Politics* (fn. 2).

with great frequency on a daily basis. The rate of exchange of most currencies floats, while some others are fixed. Forex affects capital controls, cross-border contracts and commercial parties obligated under them, company and consumer purchasing power parity, and national trade balances. However the type of economic impairment that Ibn Qaiyim warns against is simple to imagine even if it is not fully articulated: less trade due to uncertainty and the fear (or more probably the reality) of exploitation, extortionate or (effectively) monopolistic pricing, unjust enrichment or otherwise unconscionable bargains. Modern economics presumes a money economy and the foreign exchange market. In a normative register it holds that competition is in general salubrious and should be promoted as it extracts gains from comparative advantage and the division of labour; it leads to higher productivity, efficiency and growth; higher production values; lower prices and better quality and value for consumers; and generates employment and profits. Since *ceteris paribus* more trade is better than less, any uncertainty or reduction in consumer activity or confidence, such as that borne of inconsistent or nonexistent pricing has deleterious consequences which should be mitigated.

Whilst Ibn Qaiyīm makes an economic or utilitarian argument in which prices serve an instrumental purpose, Ibn Rušd's analysis of *ribā* amounts to an argument from justice. Ibn Rušd invokes pricing and its incidental effects: fairness, protection of vulnerable parties and more just outcomes. Both Ibn Qaiyīm and Ibn Rušd call for marking to market – that is, allowing price to be determined by supply and demand in an open market where price information is freely available under competitive conditions.

II Economic Actors, Models, and Markets

This article has revealed the congruity of Islamic and English law regarding two characteristics of money: time value and the treatment of money as commodity. It then set out the additional rules to which money is subject in Islamic law. This section draws upon psychological insights in order to unpack the analyses of Ibn Qaiyim and Ibn Rušd, and to further explore possible justifications for, and the consequences of, the *ribā* rules.

Every economic model either tacitly or explicitly makes assumptions about the fundamental unit of analysis: the economic actor. Every model imputes characteristics to the economic actor, seeking at once to explain and to predict actions, outcomes and the distribution or allocation of resources: goods and services. The economic model that is commonly considered the 'standard' model presupposes that economic actors (whether legal or natural persons) are rational and self-interested. This model has however been challenged over the last three or four decades.[65] Contra the standard model, *behavioural* economics queries whether economic actors actually do act consistently and rationally, and in particular whether they do so under conditions of uncertainty and imperfect information – that is, under those conditions encountered pervasively in actual economic life. Traditional economics constructs models that deliberately simplify reality in order to subject empirical events to rigorous study and analysis and to make predictions about future events. This is a valuable exercise and such simplifying assumptions are indispensable for many purposes, including the development and implementation of micro- and macro-economic policy. The standard model and the methods refined by its application may however be improved by carefully incorporating insights from behavioural economics.

[65] Edward Cartwright: *Behavioural Economics*, Routledge 2011, p. 3. However Cartwright considers the antecedent to be Adam Smith's 1759 book *Theory of Moral Sentiments* (p. 5).

Empirical and experimental results have revealed biases that appear to be hard-wired into the human mind, proclivities which produce what are (when compared with the standard model's presumed economic actors) errors. These irrational decisions of individuals interact and aggregate to produce sub-optimal economic distributions and equilibria. Each of these foibles, or their expression in economic life, is predicated upon or facilitated by the circulation of money. In each money is both a contributing cause and simultaneously a partial solution to the flawed rationality and other weaknesses in thought, attitude and action which economic actors (including both legal and natural persons) exhibit. Therefore what follows are not intrinsic characteristics of money but characteristics of money imbued into it by the human relationship with, and responsiveness to, money. These characteristics are essential to understand in order to critically analyse the legal regulation of money, and what the law should or should not allow people to do with money.

Market interactions of the simple sort contemplated by Islamic commercial and contract law[66] in its early years and well into its classical age were bilateral agreements concluded in person; or face to face by means of agents, as Islamic law includes a law of agency and makes provision for principal-agent relationships. The actions of potentially contracting parties depend not only on their own interests but also on what they anticipate their counter-party will do.[67] The relationship and the thought processes animating the parties then are strategic. The same is true of many psychological experiments in behavioural economics, which together with economics and other social sciences has adopted formal modelling and game theory.[68] Viewing negotiation, contracting and trading as games necessitates articulating assumptions about player motivation. It is probably true to say, on casual observation, that the primary Islamic texts broadly expect more honesty, altruism and benevolence of *Homo Islamicus*[69] than standard economic theory does of *Homo Economicus*. Without developing a full-scale representation of human nature in Islam – which would be well outside the purview of this article – suffice it to say that Islam does not depart in any material fashion in its understanding of human motivations in arms-length commercial transactions. If after all humans were angels (to borrow a phrase from another time and place),

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[66] A concise account of contract in Islamic law is available in David Nethercott and Craig Eisenberg: *Islamic Finance: Law and Practice*, OUP 2012.

[67] In situations of interdependence, those where "one person's behavior affects another person's well-being positively or negatively. Such situations are called strategic settings because, in order for a person to decide how to behave, he must consider how others around him choose their actions." Joel Watson: *Strategy: An Introduction to Game Theory*, Norton & Co. 2013, p. 1.

[68] Erik Angner: *A Course in Behavioural Economics*, Palgrave Macmillan (2012), p. 176: "[Y]ou are playing a game whenever you face a decision problem in which the final outcome depends not just on your action, and on whatever state of the world obtains, but also on the actions of at least one other agent." See also Avinash Dixit / Susan Skeath / David Reiley: *Games of Strategy*, Norton & Co. 2009, p. 3. Game theory began with the analyses of James Waldegrave of card games, in 1713; in the 1800s game theorists Antoine Augustin Cournot and Francis Ysidro Edgeworth used game theory to analyse conditions of oligopoly; in 1913 Ernest Zermelo developed a formal theory in relation to chess. John von Neumann and Oskar Morgenstern produced the seminal *Theory of Games and Economic Behavior*, Princeton 1944, which sought to represent games in a precisely mathematical form. Later John Nash made the crucial distinction between cooperative and non-cooperative games. On the history and accomplishments of game theoretic analysis, see Watson (fn. 67), pp. 1 f.

[69] See *ḥadīṯ* (fn. 39 f.).

there would be no need to outlaw *ribā*. What follows in this section states three of the central insights from behavioural economic theory in order to demonstrate that these insights help to account for the *ribā* rules. Stating the same proposition in historical, chronological order, the claim that this section supports is that Islamic law recognised and made allowances for insights later empirically tested by behavioural economists. The three insights as evidenced and elaborated by modern behavioural economics are: adverse selection 1, framing effects, which encompass both the endowment effect and loss aversion 2, and temporal discounting 3.

1 Adverse Selection

In a contractual negotiation where the parties lack equal knowledge or expertise regarding the subject matter or consideration, either the offeror or the offeree possesses an informational advantage over the other party. A situation where the offeror possesses the informational advantage typifies adverse selection as theorised in the modern economics literature. However section D II 1 b below extrapolates from that application of the concept of adverse selection to consider circumstances where the advantage is the offeree's.

a) Offeror's Advantage

Adverse selection occurs when one party has greater information about a good or service being offered. The informationally advantaged party will trade selectively, to maximise their advantage, doing so to the detriment of their counterparty. This is straightforwardly a zero-sum game – one party's loss is the other party's gain. In the classic article on adverse selection[70] the example of 'lemons' (poor-quality or defective used cars) appears. Since used car buyers cannot readily (or at all) distinguish between high-quality and low-quality cars, buyers are always willing to pay less than they would were they confident in their ability to be more discerning. As a result owners of high-quality used cars are discouraged from selling, as they will obtain a lower price than they would if information were equally available to both prospective parties. As a further consequence the quality of used cars in the market predictably declines. The economic consequence of this state of affairs is deadweight loss: lost efficiency and foregone trades that would have been mutually advantageous. As Akerlof states:

> There are many markets in which buyers use some market statistic to judge the quality of prospective purchases. In this case there is incentive for sellers to market poor quality merchandise, since the returns for good quality accrue mainly to the entire group whose statistic is affected rather than to the individual seller. As a result there tends to be a reduction in the average quality of goods and also in the size of the market.[71]

Adverse selection is a problem which marking to market does not eliminate. However it reduces it, as compared to a situation where the parties barter without offering the good on an open market; the effect of the market is that a greater (although depending upon the size of the market possibly still an imperfect and asymmetric) degree of information about the quality and value of the product becomes available to prospective buyers. The situation envisaged in Islamic legal

[70] George A. Akerlof: The Market for 'Lemons': Quality Uncertainty and the Market Mechanism, in: *Quarterly Journal of Economics* 84.3 (1970), p. 488. Together with colleagues Akerlof received the Nobel Prize in 2001 for analysing markets characterised by asymmetric information.

[71] Ibid.

texts in which the exchange of commodities of different grades is far worse than the problem of adverse selection identified by Akerlof as there is effectively no market and therefore no 'market statistic'. Consequently the requirement of marking to market as prescribed by the *ribā* rules represents incremental progress: it reduces adverse selection and the sub-optimal outcomes envisaged by the 'lemon' problem. This problem may but need not be framed in terms of the unilateral exploitation of the buyer since the seller and the larger economy may also suffer from adverse selection. To be sure, additional remedies such as warranties or certifications by independent third parties (for instance in the case of used cars) is necessary in order to reduce reliance on interpersonal trust, or to reduce deficits in trust and to remedy the problem of adverse selection with respect to any particular product and market.

b) Offeree's Advantage

Although not the situation envisaged by Akerlof, the informational advantage may be reversed: the offeree may possess skills or expertise that the offeror lacks. To give some simple examples: Selling family heirlooms, antiques, or pawning almost anything virtually guarantees that the prospective offeree who is acting in the course of their business (where the offeror is not, and is a relative amateur) will have negotiating leverage created among other things by a knowledge of the relevant market(s), value, price and probable price movements. Just as in D II 1 a, marking to market does not fully protect the offeror. However it reduces the probability that the seller will receive less than the market value and sustain an unfair and avoidable loss. Taking the good to market means that there is no obligation to sell to any particular person, further protecting the seller. A well-known *ḥadīṯ* encapsulates the themes of information asymmetry and market functions: "Let not a city-dweller sell on behalf of an incoming Bedouin. Leave the people so that Allāh may make them benefit one another."[72] Here the seller, the Bedouin freshly arrived from the desert is at an informational disadvantage, ripe for exploitation. The *ḥadīṯ* proposes the market as a protective device, one that will maximise mutual advantage, or at least avoid the exploitation of one party's ignorance. That is not to say that the existence of a market guarantees better results for the new arrival as he may meet deception and treachery in town; however having access to the market represents an incremental, relative improvement from the position of unequal leverage and information sure to obtain on the outskirts of the city. From a systemic perspective, marking to market as indicated by the *ribā* rules reduces informational asymmetries, and the uncertainties and risks borne by one or both parties; it increases efficiency, frequency of trade, and the probability of achieving and maintaining Pareto optimality.[73]

2 Framing Effects: The Endowment Effect and Loss Aversion

A framing effect is one where a person's preferences depend on how the options are presented to him or her.[74] It is a significant irrationality because there is no necessary correspondence between how options are presented or framed, and the benefit (or in economic terms, the utility) of the respective options. The perfectly rational economic actor is immune to framing effects and would consistently disregard appearances created by means of presentation. However empirical evidence demonstrates a high incidence of framing effects, two of which will be explained here.

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[72] Narrated by Muslim, quoted in Gamal (fn. 63), p. 118.

[73] Pareto optimality is the situation where goods or other resources are distributed in such a way that any redistribution will cause at least one person to become worse off.

[74] Angner (fn. 68), p. 45.

Possession of a good by itself tends to cause the possessor to overvalue the good. This is known as the endowment effect. In colloquial terms we cherish what we have, simply because it is ours. A variety of psychological explanations can be given but for present purposes it is enough to note that this characteristic overvaluing of property entails a tendency (when offering a possession for sale) to demand an inflated price.[75] There need be no allegation of extortionate behaviour or unfairness here, since the endowment effect operates at the level of affective preference rather than strategic calculation. Translating goods or other property possessed into money's worth is a form of reality-testing, effectively the debunking of the endowment effect when the offeror settles for an equilibrium price imposed by the market – how much (or how little) the market will bear.

Logically speaking an entailment of the endowment effect is another effect: aversion to loss. The experimental finding is "the apparent fact that people dislike losses more than they like commensurate gains. Loss aversion is reflected in the fact that many people are more upset when they lose something than pleased when they find the same thing."[76] People accord less importance to gains than to losses, which in economic terms is expressed as the proposition that they discount gains more than they discount losses. Such negative discounting of loss is one form of dynamic inconsistency.[77] Arithmetically losses and gains of equal magnitude are the same (a pound incoming is equal in value to a pound outgoing). Therefore logically there should be no discount. Generalised risk aversion is one of the side-effects of the negative discounting of loss.

Whether a good is bartered or sold for money, the endowment effect and loss aversion reduces the number of mutually advantageous exchanges that take place. Exposure to a market as opposed to exposure to a single buyer, however, is likely to diminish each of these two effects and therefore to increase the number of mutually beneficial trades. In relation to the endowment effect if many parties (as in a large market) have rejected an offered price, as opposed to only a single buyer (or to a small number in a series of one-on-one attempted barter transactions), the reduction in the endowment effect is likely to be correspondingly greater.

In relation to loss aversion, the larger the market exposure and the greater the information that is factored into the price, the greater assurance the buyer has that selling represents an appreciable gain rather than a loss. And the perceived likelihood that they are cheated or treated unfairly correspondingly diminishes. By requiring marking to market the *ribā* rules require market exposure, which is as or more important for redressing the irrational endowment effect and loss aversion as is the conversion of perceived value into a monetary price.

3 Temporal Discounting

A second form of dynamic inconsistency is when preferences are inconsistent over time. The actual value of two options does not change simply because time elapses.[78] However the tendency to discount an option that is further in the future is a marked human tendency, even when the discounting is so great as to make it irrational.[79] The

[75] Ibid.: The "manner in which people assess various options might depend on a reference point – in this case, their current endowment".

[76] Ibid.

[77] R. Thaler: Some Empirical Evidence on Dynamic Inconsistency, in: *Economic Letters* 8 (1981), p. 201.

[78] Angner (fn. 68), p. 159. However, a sufficiently distant time horizon arguably does justify discounting, for example if extended out after a person's anticipated date of death.

[79] "Thus, events deferred one year in the immediate future is discounted much more heavily than ones deferred

experimental findings however suggest that people tend to postpone loss for immediate gain,[80] which is irrational and a further manifestation of loss aversion. Future discounting is also, to put the point simply, a form of impatience and an inability to delay gratification – even when it is known that such delay will be rewarded with an increased pay-off. Impulsivity, self-control problems, and weakness of will conspire to make the execution of plans difficult or impossible, depending upon the continence and temperance of the individual in question.[81] As a result of these tendencies people are liable to take on debt in order to enable immediate consumption; [82] postpone pain for pleasure; and to 'mortgage' their financial futures. The credit *ribā* rule addresses these behaviours of temporal discounting. If credit is not readily available it will be impossible to indulge these tendencies. People are forced to live within their means; they are also compelled to increase their rate of saving. Easy credit has the opposite motivational effect. It feeds rather than retards inconsistent time preferences and framing effects.

E Conclusion: Some Characteristics of Money in English and Islamic Law

The purpose of this article is to juxtapose two normative frameworks and the law developing out of them, having regard to the operative economic definition of money, and to the legal regulation and control of the uses of money. The law adds nothing to the economic definition of money. This article restated that tripartite definition in the Introduction. This article then traced the world historical evolution from the barter system to the creation of commodity money, and finally to the manufacture of paper or electronic fiat money denominated in currency. Notwithstanding the law's reliance on economics for the definition of money, the law alone decides what may or may not be done with money. Broadly both English and Islamic law presuppose the value of trade and the existence of market capitalism. Each permits according time value to money and the commoditization of money. This article set itself the aim of explaining why then Islamic law alone (among the world's legal systems, national and non-national) condemns usury.

The common law adopts what could be characterised as a *laissez-faire* approach to interest and debt. It is clear that neither the standard economic nor the behavioural economic model have impinged upon or altered this approach. Characteristically and probably wisely the courts have largely left money and business to the professional people of banking and business – to managers, boards, and entrepreneurs.[83]

With regard to Islamic commercial law, this article has surveyed the primary and secondary sources, selecting two theories from Islamic legal-intellectual traditions for further scrutiny. Based on psychological traits hypothesized by behavioural economists regarding human attitudes towards property, and the effects of markets and monetisation, this article claims that an overriding imperative drives the *ribā* rules: reducing the

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one year in the distant future. This is the common difference effect." Gamal (fn. 63), p. 120.

[80] Angner (fn. 68), p. 159.

[81] Compare Harry Frankfurt on second order desires; Freedom of the Will and the Concept of a Person, in: *The Journal of Philosophy* 68.1 (1971), p. 5.

[82] Thaler (fn. 77), ibid.

[83] On the reticence of the English courts to intervene in management: *Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 (PC) [835]*. There is however greater scope for intervention by statute, with the Companies Act 2006 and within it director's duties (chapter 2 concerning the general duties) being substantial examples.

losses and risks individuals incur by acting on incomplete information and predictably biased beliefs. The article contends that this fuller cognisance of some characteristics of money and demonstrable human proclivities have given rise to and to some extent continue to justify prohibitions that English law does not impose.

It is not the purpose of this article to defend or to advocate English, Islamic or any other attempt to regulate money or monetary transactions by means of law. However having at least tacitly intimated that the *ribā* rules are based on a more complete analysis of human nature and the mischiefs to which money may act as an accessory, it is worth concluding by briefly entertaining some possible rejoinders to the claims made, namely that the *ribā* rules are: (a) paternalistic, (b) moralising, and (c) impracticable.

Regarding (a), there is no doubt that the abolition of credit would be both paternalistic and draconian. However this is not the position at Islamic law, which has devised means of financing that supply credit and liquidity, even as they restrain lending as such by requiring the presence of an asset (as contrasted with a pure debt obligation) or joint exposure to loss and risk in pursuit of profits (as in partnerships). Islamic finance restrains leverage and limits the quantum of liabilities with the requirement of an asset, as is also the case with asset-based finance pledging no fealty to Islamic law. In addition this article has demonstrated that Islamic law permits according a time value to money, contrary to what an unqualified equation of *ribā* and interest would suggest.

Regarding (b), it is certainly true that the *ribā* rules interdict transactions, reducing the freedom to contract, as well as the ease with which resources can be mobilised – even for the best motives and most worthy objectives. As the organic development of English contract law readily demonstrates party autonomy is not an absolute value, but one that is tempered by policy and a continuing accretion of terms implied by statute. Freedom of contract is nowhere of infinite weight in the scales of justice.[84] Different states and societies can and should strike the balance in different ways.[85] Calling one attempt at completing this balancing exercise moralising and another liberating would be quite arbitrary and senseless.

(C) amplifies both (a) and (b). The impracticability of the *ribā* rules is the most serious objection that can be made regarding the application of Islamic commercial law in modern times, and a challenge that the nascent Islamic banking industry seeks to meet, with varying levels of success.[86] Even if Islamic law does not abolish the provision of finance facilities, it still proposes a drastic curtailment of the status quo. It is the proverbial sledge hammer cracking a walnut. The world is through and through inter-penetrated by debt and debt-like obligations; loans are the very lifeblood of governments, companies and households. Efforts to 'Islamize' entire economies have failed miserably, for a host of reasons. At the same time a diatribe against debt (which this article is not) would likely meet with a receptive audience in many quarters, not least because of the latest global economic crisis fomented by the

[84] It might be thought that freedom of contract is primary in English law, whereas it is secondary in Islamic law where some notion of justice is primary. However this generalisation is hardly tenable considering statutory interventions in English, European Union and international law, with which Islamic law has not kept up due to its status as non-national law: for example, Unfair Contract Terms Act 1977, the Sale of Goods Act 1979, a host of European directives, UNIDROIT, and other efforts to harmonise contract law.

[85] Compare Charles de Secondat Baron de Montesquieu: *The Spirit of Laws*, transl. by Thomas Nugent, Bell & Sons 1914.

[86] On the significance of Islamic finance and its impact on *šarīʿa:* Jonathan Ercanbrack: *The Transformation of Islamic Law in Global Financial Markets*, CUP 2015.

following factors, among others: indiscriminate lending, excessive consumer borrowing, insufficient national saving, the fettered judgment or negligence of rating agencies, excessive leveraging of banks, and the trading of derivatives detached from real assets. In short, a recognisable pattern of human failings writ large.

As a concluding assessment this article suggests that Islamic law to a greater degree than English law appears to incorporate several sound insights regarding bounded and imperfect rationality; judgment that is clouded by framing effects; inconsistent dynamic preferences across loss and gain, and unwarranted future discounting. A diagnosis is not a cure. However a diagnosis further elaborated under modern-day conditions by means of rigorous social scientific methods may clarify likely effects of adopting in modified, partial form the *ribā* rules. In the alternative, those rules serve as a reminder of the role of markets as mechanisms for equalising information, and monetisation as a means of increasing efficiency, fairness and mutually beneficial exchanges. The Islamic understanding of debt and interest, and the verification of that understanding by empirical research occasions – in an indicative list – a revaluation of possible: Parliamentary interventions promulgating some sensible form of usury statute; regulatory controls on credit card interest rates; banking disclosure rules; public financial and accounting education; mandatory borrowing and due diligence requirements for lenders; and adequate prudential requirements for financial institutions. The story of Islamic economics, banking and finance is a story whose ending is not yet known. However that story might unfold, perhaps the *ribā* rules are best understood as a provocative antithesis to the routine, contemporary provision of banking services and financing. An antithesis preceding a synthesis that may yet arrive and may come to rest at some as yet unimagined equilibrium.

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