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Shufcah: Origins and Modern Doctrine

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SHUFᶜAH: ORIGINS AND MODERN DOCTRINE

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An interesting institution of Islamic law is *shufᶜah*, or real property preemption, which may be defined as the right of a person to substitute himself for the purchaser in a complete sale of real property. By virtue of an interest he has as a co-owner, a sharer in right of way, or an adjoining neighbor, he would acquire ownership of such property under certain conditions. Linguistically, *shufᶜah* is derived from the root *sh f c* which can signify either one of two meanings: (1) to intercede on behalf of someone, or (2) to render double, to couple two things together, or to add one thing or action to another. The two meanings are found in the Koran, for example, "Who is he that intercedeth (*yashfaᶜ*) with Him save by His leave?" (Koran 2:255), and "By . . . the Even (*shafᶜ*) and the Odd" (Koran 89:3). Characteristically, because intercession is accomplished by a request or entreaty, some philologists think that *shufᶜah* is derived from *shafāᶜah* (intercession) because it involves a request. However, they could not ignore the other meaning of adding one thing to another. This led Bustāni in *Quṭr al Muḥiṭ*[1] to say, "*Shufᶜah* is to intercede (*tashfaᶜ*) in that which you request, so that you add it to what you have; you thus (*tashfaᶜuhu*), i.e. increase it." Lane,[2] on the other hand, correctly chooses the latter meaning. He quotes from his authorities, which say that *al-shafᶜ* "signifies the adjoining of a thing to its like" and *shufiᶜa al-milk* signifies "the possession was coupled by purchase with another possession."

Two of the early schools of law, the Māliki and the Shāfiᶜi, restrict the right to exercise *shufᶜah* to the co-owner, while a third school, the Ḥanafi, also gives it to an adjoining neighbor and to the sharer in a private road that services his property and the property sold. Likewise, by extension, the Ḥanafi would give this right to the sharer in a course of water that irrigates both his property and that of an adjoining neighbor. The question arises as to whether the more extensive doctrine was the original common doctrine of the early Muslims which was later restricted by the Māliki and Shāfiᶜi schools to the co-owner, or whether the original com-

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[1] B. BUSTĀNI, QUṬR AL-MUḤIṬ, entry sh-f-c (Beirut 1869).

[2] E. LANE, AN ARABIC-ENGLISH LEXICON, entry sh-f-c (London 1872).

mon doctrine was the restrictive one which was later extended by the Ḥanafis because of special circumstances in Iraq. Professor Joseph Schacht seems to think that the common starting point of the Medinese and Iraqian doctrines (later, Māliki and Ḥanafi) was a formula that "the right of pre-emption goes by gates, and the person whose gate is nearest has the best right to pre-emption", but that the final Medinese doctrine became more restrictive and limited the right to the co-owner.[3] The preponderance of evidence points to an original doctrine that allowed the co-owner or co-sharer to exercise preemption. However, this doctrine was enlarged by the Iraqis to include others, due to special circumstances in Iraq where the Ḥanafi school developed.

Jurists say the very basis of *shufʿah* is, of course, the avoidance of injury that might result from having a stranger as a co-sharer or a neighbor.[4] In Medina, where the Māliki school developed, the householders and landowners were Arabs who descended from the known clans or from the Meccan emigrants. Each of the original clans had its own quarter in the city. Outsiders consisted of either slaves or traders. Hence, there was not a pressing need for a developed system of *shufʿah* to keep strangers out of a neighborhood. All that was necessary to protect a co-sharer from being injured by the possibility of having a co-sharer in his own property that he may thoroughly detest, was the right to exercise *shufʿah* should his co-sharer sell his share. In any case, co-sharers were usually members of the same family who inherited the property from a common ancestor since nothing is more natural than to strive to keep the property within the family. An interesting parallel might be the French principle of family joint ownership which was adopted by the Egyptian Civil Code of 1949. According to article 853 of that code, no co-owner can dispose of his share in favor of a person who is not a member of the family without the consent of all the co-owners.

Mālik insists that only a co-sharer can exercise *shufʿah*, and reiterates that such was the practice in Medina. He quotes a *ḥadīth*[5] on the authority of Abu Salamah saying: "The Messenger of God adjudged *shufʿah* to be operative in (property) which has not been divided among the co-sharers; if the boundaries get established among them, then there can be no *shufʿah*." Malik then says, "This is the practice (*sunnah*) concerning which there is no difference of opinion among us."[6]

In Iraq, on the other hand, the circumstances were quite different. The Arabian tribes that settled in the two camp cities of Basrah and Kūfah were joined with many non-Arab converts to Islam. The admixture of populations with varying linguistic and ethnic backgrounds produced a

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[3] J. SCHACHT, ORIGINS OF MUHAMMADAN JURISPRUDENCE 219 (1950).

[4] *See, e.g.*, 13 AL-SARAKHSI, AL-MABSŪṬ 93 (1324 A.H.).

[5] A *ḥadīth* is a report of a saying, an action, or a tacit approval by the Prophet Muḥammad.

[6] MĀLIK IBN ANAS, AL-MUWAṬṬA' 103 (Cairo 1951).

situation in which distinctions among the various classes of people were reflected in some legal norms. It has been pointed out elsewhere[7] that this situation had produced a complicated system of *Kafā'ah* or "equality" in the law of marriage, designating which men could "measure up" to which women for the purpose of marriage, thereby reflecting social stratification in that society, although the doctrine might have originated in Arabia in a rather simple form.[8] It is not strange, therefore, that a complicated and systematic doctrine of *shufʿah*, which obviously aims at keeping undesirables out of a neighborhood, should have developed in Iraq. Furthermore, Iraq was an heir to some of the legal traditions or concepts of Roman law, and although that law did not have a full-fledged institution of preemption, it did possess some regulations which produced similar effects. For example, by a law issued by the Senate in the time of Marcus Aurelius,[9] a co-owner of a house could acquire the share of the other co-owner if the latter did not pay his share of the repair expenses within four months of the repair.[10] Later, in the period of the Byzantine emperor Justinian,[11] when the institution of emphyteusis, or long lease of lands, was reformed, it was stipulated that the lessee who wished to sell his right to the lease should give notice to the owner of the land. The owner would then have the choice, within two months, of taking the land himself for the offered sale price of the lease, or of concurring with the sale in return for 2% of the sale price.[12]

Prior to the full development of the doctrine by Abu Ḥanîfah and his students, various attempts to enlarge the circle of persons who could exercise *shufʿah* are discernable. In one such attempt, the statement that "the right of preemption goes by gates, and the person whose gate is nearest has the best right of preemption," was attributed to Shurayḥ, the legendary judge of the first century. Shurayḥ, was said to have been appointed to Kūfah by the Caliph ʿUmar and who presumably died before the year 80 A.H. Al-Sarakhsi, who quotes this statement, is careful to say that he and his fellow Ḥanafis do not subscribe to this view, as only an adjoining neighbor is entitled to *shufʿah* by neighborliness, not a neighbor across the street.[13] This indicates that the attempt to enlarge the circle of persons who could exercise *shufʿah* was not completely successful.

A statement of Shurayḥ, however, cannot be as authoritative as a saying of the Prophet if establishing a legal doctrine enlarging the circle of

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[7] Ziadeh, *Equality (Kafā'ah) in the Muslim Law of Marriage*, 6 AM. J. COMP. L. 503-17 (1957).

[8] *Id.*

[9] 161-180 A.D.

[10] P.F. Girard, *Manuel Étémentaire de Droit Romain* 339 (1929), *quoted in* 'UMAR M. MUṢṬAFA, AL-QĀNŪN AL RŪMĀNI 347 (1966).

[11] 527-565 A.D.

[12] UMAR M. MUṢṬAFA, AL-QĀNŪN AL-RŪMĀMI 402 (1966).

[13] *See supra* note 4, at 93.

persons who can exercise *shufᶜah* is desired. Accordingly, two traditions were "discovered" which would support such a doctrine. One goes back to the Companion Abu Rāfiᶜ who heard the Prophet say, "A neighbor is more entitled to his proximity (*saqab*)." The other, with which the Basrians armed themselves, goes back to the Companion Jābir who quoted the Prophet as saying, "A neighbor is more entitled to his *shufᶜah*—it awaits him if he is absent—if the road (to both properties) be the same."[14] This being so, the stage is set for Abu Ḥanîfah to consolidate the doctrine in Iraq by giving the right of *shufᶜah* first to the co-owner of the property sold, then to the co-owner of a right attaching to the property sold, and then to the adjoining neighbor.[15]

However, the doctrine that the neighbor can exercise *shufᶜah* did not go unchallenged. Attacks emanated from governmental as well as juristic quarters and all indications were that it was an innovation that had not yet taken root. There is evidence that two caliphs, one Umayyad and one ᶜAbbasid, fought it. ᶜUmar ibn ᶜAbd al-ᶜAzîz, who ruled from 99-101 A.H., wrote to ᶜIyāḍ ibn ᶜUbaydallah, the chief judge of Egypt, saying,

> You wrote saying that your judges are now adjudging *shufᶜah* to be for the neighbors successively. We say that we used to hear that *shufᶜah* belongs to the co-owner and to nobody else . . . . If *shufᶜah* were to be exercised by a neighbor . . . then no sooner would a person (buy) a piece of land than it devolves to his neighbor until a stop is put to all development.[16]

Abu al-ᶜAbbās, who ruled from 132-136 A.H., was the first ᶜAbbāsid caliph. He ordered the Iraqi judge Ibn Abi Layala, who held the same opinions as that of Abu Ḥanîfa on *shufᶜah*, not to grant *shufᶜah* except to a co-owner who had not partitioned his share. Al-Shāfiᶜi, who related this story, said that this was also the opinion of the people of Hejaz, and that the companions ᶜAli and Ibn ᶜAbbās were of the same opinion as well.[17] It is interesting to note, however, that Ḥanafi judges continued to grant *shufᶜah* to a neighbor. One such judge was Bakkār ibn Qutaybah, who was appointed to office in Egypt in 246 A.H. under Aḥmad ibn Ṭūlūn, the ᶜAbbāsid governor. In the court of this judge a man sued another, a Shāfiᶜite concerning *shufᶜah* by neighborliness. The defendant denied the claim. When Bakkār knew that the defendant was a *ᶜālim*, or scholar in religious sciences, he asked the plaintiff, "Do you have witnesses?" "No," he said. The judge said to the defendant, "Will you swear (that he has no

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[14] See the discussion of these two traditions by al-Shāfiᶜi in his KITĀB IKHTILĀF AL-ḤADĪTH on the margin of 1 AL-UMM 218-65 (1968).

[15] All Ḥanafi works give this order of priority. *See, e.g., supra* note 4, at 94.

[16] MUḤAMMAD AL-KINDI, KITĀB AL-WULĀT WA KITĀB AL-QUDĀT, 334-35 (R. Guest ed. 1912). We read the word *ashaᶜa* in the text as *ibtaᶜ* "to buy."

[17] AL-SHĀFIᶜI, 7 AL-UMM 99 (1968).

claim against you?)" The latter replied, "Yes." The judge added to the oath the statement: "not even according to the doctrine of those who grant *shufᶜah* by neighborliness?", whereupon the defendant refrained from giving the oath. Accordingly, Bakkār ruled that the plaintiff was entitled to his *shufᶜah*. When the defendant informed the famous Shāfiᶜite jurist al-Muzani of the case, the latter observed, "You have chanced upon a learned judge."[18]

The most systematic attack against *shufᶜah*, other than through joint ownership, was made by al-Shāfiᶜi in his inimitable dialectical style. He insisted that the *sunnah*, or the practice of the community, can only be established by traditions from the Prophet, making it necessary for him to distinguish the two traditions on which his opponents had depended. The first tradition, that the neighbor is more entitled to his neighborliness, was made subject to another tradition which limited *shufᶜah* to a co-owner so that only a neighbor who had not partitioned his share away from his co-owner could exercise *shufᶜah*.

Al-Shāfiᶜi follows two courses in setting aside the tradition that a neighbor can exercise *shufᶜah* if the road leading to the two properties be jointly owned; one by dialectics and the other by casting aspersion on its authenticity. This first argument states:

> One of the Basrians says, "*Shufᶜah* can only be granted to a co-owner, but the two—if they be co-owners of the road after having divided up the dwelling—are still co-owners". It can be then put to him, "Are they co-owners of the dwelling or of the road?" If he says, "of the road, not the dwelling," it can be asked, "Why, then did you apply *shufᶜah* to the dwelling in which they are not co-owners . . . . It behooves you to say that if the road is sold—and roads can be sold and divided—then *shufᶜah* should apply to it, but not to what has already been partitioned of the dwelling."[19]

Of his second course, casting aspersion on the authenticity of the tradition, al-Shāfiᶜi said, "We heard a scholar of traditions say: 'We fear that his tradition is not upheld (*maḥfūẓan*)'."[20]

The Ḥanafis, of course, disagree with this reasoning. Not only do they assert the centricity of the traditions that give *shufᶜah* to the co-owner of a road leading to the two properties and to the adjoining neighbor, they also seem to regard neighborliness the determining factor in decreeing *shufᶜah*. Al-Sarakhsi, who compiled a digest of the works of al-Shaybāni in his book *al-Mabsūṭ*, says:

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[18] IBN ḤAJAR AL-ᶜASQALĀNI, RAFᶜ AL-IṢR ᶜAN QUḌĀT MIṢR, appended to M. AL-KINDI, *supra* note 16, at 153.

[19] *See supra* note 14, at 265.

[20] *Id.*

> The entitlement for *shufʿah* is by neighborliness, not co-ownership. For co-ownership occurs in movables also, but *shufʿah* is limited only to immovables. There must be, therefore, a reason for this difference (between movables and immovables). The reason is not but the fact that co-ownership in an immovable leads to neighborliness when the co-owners partition the property, whereas co-ownership of movables does not lead to neighborliness . . . . Thus neighborliness is more preferable (as a factor), because the aim is to avoid an injury to a person on account of a continuous bad neighborliness . . . and not on account of the trouble (a co-owner) might go through in partitioning the property.[21]

Al-Sarakhsi concedes, though, that co-ownership will give preference to one neighbor over another; he exemplifies this by providing the example of a jointly-owned house in a courtyard branching off from a blind alley. If one of the two co-owners sells his share, his co-owner is entitled to *shufʿah*. If the latter concedes, the co-owners of the courtyard have preference over the co-owners of the alley. If these owners concede successively, then the adjoining neighbor, whose house rests on top of the jointly-owned house with its doorway leading to another alley, gets the right to *shufʿah*.[22]

As can be readily perceived, the protagonists of each school were actually using traditions, logic, or simply opinion to justify what Schacht has dubbed their "living tradition" or living practice. Aside from the question of their authenticity, these traditions were either limited, interpreted, or declared questionable in order to fit a predetermined position on *shufʿah* that had taken a concrete form due to social or economic considerations. As Taḥāwi points out, there were three positions at the beginning of the third century A.H. The first was that of Mālik and al-Shāfiʿi which granted *shufʿah* only to the co-owner who did not partition his share. The second was that of the Basrians who extended the right to include the previous co-owner who is a co-owner of the road leading to the two properties. The third was that of Abu Ḥanīfah and his students who additionally gave the right to the adjoining neighbor.[23] The Basrian doctrine did not continue independently, but was absorbed into the Ḥanafi doctrine; hence only two positions survived. Ṭahāwi, who composed his work on legal formularies in the second half of the third century, was careful, as a Ḥanafi, to include a form for the exercise of *shufʿah* by an adjoining neighbor.[24]

Due to the absence of legal reporting in the centuries that followed, it is not known how this legal institution fared. What is known is that by the

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[21] 14 AL-MABSŪṬ 95.

[22] *Id.* at 96.

[23] AḤMAD AL-ṬAḤĀWI, KITĀB AL-SHUFʿAH MIN AL-JĀMIʿ AL-KABĪR FI AL-SHURŪṬ (Joseph Schacht ed.), in 20 HEIDELBERGER AKADEMIE DER WISSENSCHAFTEN 3 (1929-30).

[24] *Id.* at 58.

time the Ottomans, who had adopted the Ḥanafi rite as the official rite of their state, extended their sway over most of the Near East and North Africa, Ḥanafi jurisprudence, including the institution of *shufᶜah*, was given a wider scope. Ḥanafi works elaborated the doctrine until it was codified in the *Ottoman Mejelle* in 1869. The Ottoman Empire's successor states in the Near East adopted varying positions *vis-à-vis* this doctrine, a subject that will presently be addressed.

Prior to the promulgation of modern codes in Egypt, preemption was applied by the courts according to the doctrines of Islamic law. With the promulgation of the Mixed Code, applied by the Mixed Courts which were created in 1876, and the National Code, applied by the National Courts which came into existence in 1883, preemption began to be regulated by statute. The two codes, however, differed with regard to some incidents of preemption. The resulting confusion in the courts moved the Egyptian government to issue two laws, one dated March 26, 1900 for the Mixed Courts, and the other dated March 23, 1901 for the National Courts. These laws regulated preemption and superseded the provision of the codes governing that subject. The new Egyptian Civil Code of 1949 based itself on those two laws relative to preemption, and the subject once again became a part of the Civil Code. Before its incorporation in the Civil Code, preemption was subject to controversy in the various committees studying its codification. The major argument against preemption was that it restrains freedom of contract, and in any case, was no longer necessary in the modern world. This is particularly true in the case of preemption by a neighbor who substitutes himself for a purchaser to keep that purchaser out of the neighborhood. Ultimately, the doctrine was retained for historical reasons and certain beneficial effects such as grouping together the elements of the right of ownership when the right of usufruct is joined to the bare right of ownership by exercising the right of preemption. However, the doctrine was severely restricted as to substance and procedure.

The right of preemption belongs to the following in the order given: (a) to the bare owner, in the case of a sale of all or part of the usufruct, (b) to the co-owner in common, in the case of a sale to a third party of a part of common property, (c) to the usufructuary, in the case of a sale of all or part of the bare property, (d) in the case of *ḥikr* (long lease of *waqf*, or even private lands), to the bare owner if the sale relates to the right of *ḥikr*, and to the beneficiary of the *ḥikr* if the sale relates to the bare property, and (e) to the neighboring owner in the following cases: (i) in the case of buildings or building land whether situated in a town or in a village, (ii) if the land enjoys a right of servitude over the land of a neighbor, or if a right of servitude exists in favor of the land of a neighbor over the land sold, and (iii) if the land of a neighbor adjoins the land sold on two sides and the value is at least half of the value of the land sold. If several persons of the same degree exercise the right of preemption, a proportionate right of preemption will belong to each one of them, unless one of them

is the purchaser. In that case, the purchaser takes precedence over others of the same or lower degrees.[25]

Compared to the *sharī'ah* or previous legislation, the number of persons given the right of preemption by neighborliness has been reduced. The exercise of preemption is also prevented in the following cases: (a) if the sale is made by public auction, (b) if the sale is made between ascendants and descendants, between spouses, between relatives to the fourth degree, or between relatives by marriage to the second degree, and (c) if the property sold is destined for religious purposes, or to be annexed to property already used for such purposes. A *waqf*,[26] however, cannot exercise the right of preemption.[27]

The *sharī'ah* has always considered preemption as a weak right which lapses absent strict adherence to the conditions laid down for its exercise. The Code, therefore, contains specific provisions as to notification by the preemptor to both the vendor and the purchaser of his intention to preempt following his being served with a notice giving full description of the property sold, and the parties to the sale,[28] and as to the initiation of process within a strict time limit.[29] An innovation of the new code, which further restricts the right of preemption, is the requirement that the actual sale price must be deposited in full at the treasury of the district court in which the property is situated before the introduction of the preemption action.[30] This provision was designed to discourage actions in which the main purpose was to extort money from the parties to a sale by threatening to initiate an action for preemption.

Another aspect of the maxim that the right of preemption is weak is the assertion by jurists that this right is attached to the person of the preemptor.[31] The original version of the code article that defined preemption[32] contained a provision stating that the right of preemption could not be transferred by assignment or inheritance. This provision was deleted during the final consideration of the article by a Senate committee, and the matter "was left to the interpretation of the judiciary."[33] Al-Sanhuri, the main architect of the Code, asserts that several results flow from the "personal" nature of the preemptor's right: (1) the creditors of the preemptor cannot exercise the right of preemption by substituting themselves for the preemptor, (2) preemption cannot be assigned by the preemptor to another person, (3) the preemptor can renounce his right

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[25] Egyptian Civil Code, arts. 936-37 (1949).
[26] An Islamic charitable trust created by an endowment.
[27] Egyptian Civil Code, art. 939.
[28] *Id.*, arts. 940-41.
[29] *Id.*, art. 943.
[30] *Id.*, art. 942.
[31] *See* A. AL-SANHŪRI, 9 AL-WASIṬ 452-72 (1970).
[32] Egyptian Civil Code, art. 935.
[33] *Id.*

after, and even before, its cause has arisen,[34] and (4) the right of preemption does not descend by inheritance to the heirs if the preemptor dies before declaring his intention to preempt. On this last point, however, a conflict of opinion exists, as some jurists, supported by certain court decision, assert that the right is heritable.[35] Be that as it may, there is no doubt that the new code looked askance at the doctrine of preemption, limiting it even more severely than previous legislation had done.[36] Modern reformers think that preemption restricts freedom of contract, introduces an element of instability in real estate dealings, and fails to be consonant with modern ideas of equal treatment by the law.

In Syria, preemption was formerly regulated by the French Mandatory Government's Decree No. 3339 of 1930, which is still in force in Lebanon, and which shall be called the Lebanese Property Law.[37] Preemption in Lebanon according to this law will be dealt with presently. In Syria, the Civil Code of 1949 abolished this institution completely because, as the Explanatory Memorandum put it, "it is, in fact, a weak right and the social and economic life in Syria does not necessitate its adoption."[38]

The Lebanese Property Law dealt with preemption in articles 238-54, but the institution was extensively amended by the Law of February 5, 1948. It should be noted that preemption in Lebanon has a wider connotation than that in Egypt. In Lebanon it applies not only to sale of ownership, usufruct, and *ḥikr*, but to the sale of several other real rights. It may be defined as the option available to some owners of real rights in compelling their acquisition of a real right that has devolved to others by a contract of sale or by gift with consideration.[39] The rights that can be thus acquired are ownership, possession (*taṣarruf*), usufruct, right of support (*saṭḥîyah*), right of *musāqāt* (contract to tend trees or crops of another person for share of crops), *ijāratayn* (a perpetual lease of *waqf* property), and long lease (*muqāṭaᶜah*). Since *taṣarruf* applies to *mîri* lands,[40] preemption in Lebanon also embraces these lands. In other countries, these lands are subject to a right similar but distinct from preemption called the right of preference (*ḥaqq al-awlawîyah wa al-rujḥān*).

In Lebanon the right of preemption belongs to the following persons in the following order: (1) the owners of the fee simple concerning the right of usufruct, (2) the owner in common if a share or more in the property held in common is sold to an outsider, (3) the holder of the right of usufruct concerning the fee simple of the property, (4) the owner of the fee simple concerning a *ḥikr*, right of support (*saṭḥîyah*), *ijāratayn*, long lease

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[34] *Id.*, art. 948.

[35] See *id.* for the arguments of both parties.

[36] For example, a neighbor no longer has an automatic right of preemption.

[37] Syria and Lebanon used to be administered jointly by the French.

[38] THE SYRIAN REPUBLIC: MINISTRY OF JUSTICE, AL-QĀNŪN AL-MADANI 10 (1949).

[39] E. TYAN, AL-NIẒĀM AL-ᶜAQĀRI FI LUBŇAN 85 (1954).

[40] Government lands whose possession is held by individuals.

(*muqāṭaᶜah*), and the right to *musāqāt*, (5) the adjoining neighbor if the property subject to preemption has a servitude over his property, or if his property has a servitude over the property subject to preemption, or if both property owners share in the ownership of a private road or a dividing wall or a special right of watering, (6) the owner of a floor in a building concerning the other floors. If persons of equal rank compete for the right of preemption, in the first four ranks, above, the entitlement of each one of them in the right of preemption is proportionate to his share in the original right entitled to preemption. In the fifth rank the person benefiting from preemption would be given preference. In the case that several owners of floors compete, the owner of the ground floor is given preference.[41]

Restrictions on the right of preemption in Lebanon provide that the right cannot be exercised if the sale takes place between spouses, descendents and ascendents, or brothers and sisters. Also, if the right is to be exercised, it must be exercised *in toto*. In addition, the right is personal, like that in Egypt, and therefore cannot be sold. However, contrary to Islamic law and the dominant opinion in Egypt, the right to preemption in Lebanon descends to the heirs by inheritance exactly like other rights and properties.[42]

The Libyan provisions on the subject were derived from the Egyptian Code; therefore the differences between the two codes are few and pertain primarily to the persons having the right of preemption. The persons having the right of preemption are: (1) the owner of the fee simple in the sale of the right of usufruct, (2) the owner in common in the sale of a share in the property, and (3) the owner of the right to usufruct in the sale of the bare ownership.[43]

In Iraq, the law on the subject resembles that of Egypt in all its essentials except that the persons having the right of preemption are: (1) the owner in common in the sale of a share in the property, (2) the co-owner of a servitude in favor of the property being sold, and (3) the adjoining neighbor in the event that both properties are for habitation or being prepared for habitation, or one of the properties has a servitude over the other. Other situations in which the right of preemption is mentioned in the Egyptian Code and are not mentioned in the Iraqi Code pertain to *mîri* and *waqf* properties in Iraq. These are not subject to preemption, but subject to a right similar to preemption known as the right of preference (*ḥaqq al-awlawîyah wa al-rujḥān*).[44] This right, hereafter *awlaîyah*, first regulated by articles 41-45 of the Ottoman Land Code[45] and later incorpo-

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[41] Lebanese Property Law, arts. 239-40.

[42] *See* E. TYAN, *supra* note 39, at 85-87.

[43] Libyan Code, art. 940.

[44] Priorities in this right are different from those in preemption.

[45] R.C. TUTE, THE OTTOMAN LAND LAWS (1927).

rated in the Iraqi Civil Code,[46] departed from preemption in that it did not recognize a neighbor among the persons entitled to exercise it, and it allowed its exercise even in cases where no consideration was provided for in the original contract of sale. The code stipulated that if the *mutaṣarrif* (possessor of *mîri* land) transfers his land for a consideration or no consideration, the following persons, in the order given, can take the land upon demand by paying its true price (*badal al-mithl*): (1) the co-sharer in the land transferred, (2) the co-sharer in a servitude in favor of the land transferred, (3) the owner of trees and buildings standing on the land transferred, and (4) he who has a need for land from among the people of the village where the land is situated.[47] Except for the foregoing, the rules pertaining to preemption apply to *awlawîyah* and, in particular, to the rules relating to competition among persons of the same rank to take the property.[48]

In Jordan the rules of preemption and *awlawîyah* differ little from those in Iraq.[49] The same persons are entitled to both rights in the two countries except that in Jordan there are no qualifications placed upon the adjoining neighbor to exercise preemption.[50] There are differences in some of the situations where a claim for preemption can be barred.[51] Claims are barred in the following situations:

> 1. If the sale takes place by means of a public auction prescribed by law. (Both codes agree). 2. If the sale is between spouses, or between descendents and ascendents, or between near relatives up to the fourth degree. (Both codes agree, but the Jordanian Code adds to the list relatives by marriage up to the second degree.) 3. If the property sold is to be used as a place of worship or to be joined to a place of worship. (A provision found only in the Iraqi code.) 4. If the preemptor declines his right either expressly or by implication. (Both codes agree.) 5. If the property by means of which preemption is to be exercised is *waqf*. (Both codes agree, but the Jordanian Code also would bar preemption in case a *waqf* property is being sold.) 6. If six months have elapsed since the completion of the sale, even though the holder of the right of preemption is either interdicted or is absent and is, therefore, unable to exercise his rights. (A provision found only in the Iraqi Code).

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[46] Iraqi Civil Case, arts. 1216-17.
[47] *Id.* at 1216.
[48] *Id.* MUṢṬAFA, 2 AL-MILKĪYAH AL-ᶜAQĀRĪYAH FI AL-ᶜIRĀQ 115-17 (1964).
[49] Jordanian Code, arts. 1150-70.
[50] *Id.* art. 1151.
[51] Iraqi Civil Code, art. 1134; Jordanian Code, arts. 1159-61.

Shufah is an excellent example of the continuity of an Islamic institution and of the capacity of that institution for change. Although it is not, strictly speaking, a part of personal status law, which is said to be the only part of Islamic law that is being applied in Islamic countries, it has survived in a recognizable form.

Islamic countries, in their attempts at law reform, have effected little change in the traditional law of personal states, only after heated discussions and controversy.[52] On the other hand, profound changes were introduced into the traditional law of preemption with little controversy. The difference in the attitude of law reformers to change in these two areas might be attributable to the fact that rights in personal status law were considered by the jurists the very heart of Islamic law and, therefore, sacrosanct, while the right to preemption was considered a "weak right" and, therefore, more amenable to change.

[52] *See* N. ANDERSON, LAW REFORM IN THE MUSLIM WORLD (1976).