IX

Wakf

1. Importance

The doctrine of *wakf* which is "interwoven with the entire religious life and social economy of Muslims"[1] has laid down the foundations of one of the most important institutions of the community. In India alone, "there are more than a lakh *wakfs* valued at more than a hundred crores of rupees".[2] Considering their number and resources, *wakf* can become a strong instrument not only for the preservation of religious, charitable and philanthropic institutions, but also for the educational and economic development of a community which is fast falling behind in both these spheres.

2. Constitutional position

The subject *wakf* is relatable to Entries No. 10, "Trust and trustees" and No. 28, "Charities and charitable institutions, charitable endowments and religious institutions" in the Concurrent List attached to the 7th Schedule to the Constitution of India. Supervision over the administration of *wakfs* is, therefore, the responsibility of both the Central and State Governments.

Article 26 of the Constitution gives freedom to every religious denomination to establish and maintain its religious and charitable institutions subject to public order, morality and health. They are also allowed the right to administer the properties of these institutions in accordance with law. It means that the State can regulate the administration of trusts and *wakfs* by means of validly enacted laws.

Article 26(*c*) confers on religious denominations a fundamental right to own and acquire property. In view of the nature and objects of religious denominations the framers of the Constitution showed a great foresight in separately investing these juristic persons with the institutional property right

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1. Ameer Ali, Vol. I at p. 193.
2. *Vide*, speech of Prof Humayun Kabir, the then Minister of Scientific Research and Cultural Affairs and *Wakfs*, in a meeting of Muslim Members of Parliament, held on 9-9-1963, in New Delhi to consider matters relating to *Wakf*. *See*, Mimeographed copy of circular issued by the *Wakf* Section, Ministry of S.R. and C.A., September 1963.

independently of the citizen's personal property right under Article 19(1)(*f*) (now extinct). The need for finances to run a religious denominational institution can hardly be overemphasised. The religious freedom of a denomination can be quickly eviscerated indirectly by stripping it of its property and finances. The court had cautioned against such misuse of acquisition power by the State under Article 31 as would destroy a denomination's right under Article 26(*a*) ever for its survival. Property rights of the public religious denominations under clauses (*c*) and (*d*) of Article 26 are subject to the public trust laws regulating religious and charitable endowments. The motive of these laws is to see that the property is utilised for the objects determined by the founder donor, also for the spiritual benefit of the devotee public. The courts have held the right under clause (*c*) amenable to State power of acquisition and control, and various religious institutions have been divested of their vast lands and buildings. There is a generic difference between personal property right and denominational property right; the latter serves larger social interests of at least a section of the society, and that too not at the cost of any other segment. A tight control on the religious trust properties is most welcome in the light of the experiences of unabashed avarice of many pontiffs; however, State laws should not only not make the survival of denominations difficult, but, as a Welfare State, facilitate the legitimate expansion of their religio-philanthropic activities. Towards this end lesser nibbling at ownership, contra managership, is necessary.

Clause (*d*) of Article 26 confers a separate fundamental right on denominations to administer their property according to law. The Mussulman *Wakf* Validating Act, 1913 is one example of such law. The courts have held that in the ultimate analysis the law should not divest the denomination of this right. The head of the institution where a denomination is concerned, like a *dargah*, the *dai* or *mutawalli*—is the human repository of this denominational right (to administer property). He has, however, absolutely no monopoly over the trust management. He must manage it in coordination with the State appointed authorities called Boards, Committees, etc. In case of defalcation of trust funds he is liable to eviction. To safeguard religious autonomy of the denomination, the trust body must necessarily comprise only the members of the denomination. The State body is under obligation to respect the traditions of the denomination, and the religious head can dictate, on basis of tenets which rites, ceremonies and functions involving expenditure must be performed.[3]

The *Wakf* Act, 1995 provides a scheme for composition of the *Wakf* Board. It has to comprise MPs, MLAs, lawyers and one *Mutawalli*, besides some Government officers, and also one Shia [*see*, Section 16 (*infra*)]. The petitioners

3. *See*, V.P. Bharatiya, *Religion—State Relationship and Constitutional Rights in India* (Deep & Deep 1987) at pp. 299-301.

in *Syed Shah Mohammed Al Hussaini* v. *Union of India*[4], charged the scheme of the Act as violating the freedom of conscience and denominational rights of the Muslims. It was contended that the religious *wakf* was being turned into irreligious in the name of secularism. Thus, the Act violates Articles 25 and 26 of the Constitution. Rejecting these arguments the Karnataka High Court held that under clause (*d*) of Article 26 a religious denomination has a right to own, acquire and administer the property for the purposes to which it was dedicated but only in accordance with law which means that the State can regulate the administration of trust properties by means of law. The clause ensures that the administration remains with the religious institution though it may be regulated by law. Interference with matters essentially religious is prohibited. Quashing of the scheme of *Wakf* Board would defeat the very purpose of the Act, viz, preventing mismanagement of *wakf* property. The law thus protects the very purpose of the religious *wakf*.

In short, while exercising the power to regulate the administration of trust and *wakf* properties, the legislature cannot interfere with matters of religion.

3. Origin of *wakf*

The institution of *wakf* has developed with Islam. There were no *wakfs* or any such parallel institutions in Arabia before the advent of Islam. Credit must be given to the Muslim jurists for having developed the legal theory of *wakf*.[5]

There is no mention of *wakf* in Koran. However, such Koranic injunctions which deal with charity are at the root of the development and extension of *wakfs*. Two of such Koranic verses are:

> "And in their wealth the begger and outcaste had due share" (Koran, 26 : 19).
>
> "Ye shall never attain to goodness till ye give alms of that which ye love, and whatever ye give, of a truth God knoweth" (Koran, 3 : 86).

A tradition on which jurists lay great stress and which may be assumed as the basis of *wakf*, is that at the time of partition of Khyber, Caliph Omar acquired some lands which were very valuable to him and asked the Prophet whether he should give them away as *sadaqa*. The Prophet replied: "Retain the thing itself and devote its fruits (usufruct) to pious purposes" (*Habis asle wa sabbil samarat*). Omar did this with the provision that the land should neither be sold nor bequeathed. He reserved it for the poor, needy relatives, slaves, wanderers, guests, and for the propagation of the faith (*fi sabil Allah*).[6]

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4. AIR 1999 Kant 112. For other point of this case *see also infra*, S. 16.
5. L.M.E. at p. 205.
6. Heffening in *Ency. of Islam*, Vol. II at p. 1097.

4. Development and foreign influence

The institution of *wakf* came into its own after the death of the Prophet, in the course of first century A.H. and assumed rigid legal forms in the second century. Writing on *wakfs* in the *Encyclopaedia of Islam*, Heffening doubts that some foreign influence might have worked on the development of this institution. He observes that after the spread of Islam in various parts of the world,

> "...the Arabs found in the conquered lands foundations for the public benefit, for churches, monasteries, orphanages and poor-houses (*piac causac*) and may have adopted this form for the practice of charity recommended by their religion. These endowments of Byzentine period were inalienable, and managed by 'administrators', and were under the supervision of Bishops..."[7]

But this view is not acceptable to all. Very recently, a prominent authority on *wakf* refuted this contention by observing that "the institution of *wakf* has developed with Islam and ...there is no evidence that such a complex system of appropriating usufruct as a life interest to varying and successive classes of beneficiaries existed prior to Islam".[8]

5. Meaning and definition of *wakf*

The word *wakf* literally means 'detention' and connotes tying up of property in perpetuity.

According to Abu Yusuf, *wakf* is the detention of a thing in the implied ownership of Almighty God, in such a way that its profits may be applied for the benefit of human beings, and the detention when once made, is absolute, so that the thing dedicated can neither be sold, nor given, nor inherited.

Imam Muhammad does not subscribe to this view. He thinks that the right of the *wakif* does not cease in the property until he has appointed a *mutawalli* and delivered its possession into his hands.

Imam Abu Hanifa's view is entirely and basically different from the views of his above two disciples. For him, *wakf is the tying up of the substance of property in the ownership of the wakif* (founder of *wakf*). The ownership of *wakif* is not extinguished unless the *kazi* pronounces an order to this effect. He fortified his view by reference to a Tradition of the Prophet for the validity of sale of a *wakf* property, and that no spiritual benefit could be derived unless the *wakif* remained the owner of the *wakf* property. According to him, the *wakf* property reverts back to its owner (*wakif*) or his heirs in case the object fails. Moreover, Abu Hanifa's thesis is that *wakif's* right could not come to an end without the

7. *Ibid*, at p. 1098.
8. L.M.E. at p. 205.

ownership being transferred to some other person, for the law does not admit the idea of a thing during its existence going out of the ownership of one owner without falling into the ownership of another person.

In India, the view of Abu Yusuf is accepted. In some of the cases like *Kassimiah Charities* v. *Secy., Madras State Wakf Board*[9] and *Moti Shah* v. *Abdul Ghaffar Khan*[10], it has been held that *wakf* means detention of the corpus in the ownership of God in such a manner that its profits may be applied for the benefit of His servants. The objects of dedication must be religious or charitable.

Delivering the judgment of the Privy Council in the famous case of *Vidya Varuthi* v. *Balusami Ayyar*[11], Mr Justice Ameer Ali said:

> "(Muslim Law relating to *wakfs*) owes its origin to a rule laid down by the Prophet of Islam; and means 'the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings'. When once it is declared that a particular property is *wakf*, or any such expression is used as implies *wakf*, or the tenor of the document shows, as in *Jiwan Doss Sahu* v. *Shah Kubeeruddin*[12], that a dedication to pious or charitable purposes is meant, the right of the *wakif* is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit."

The Mussulman *Wakf* Validating Act, 1913 defines *wakf* in Section 2 thus—'*Wakf* means the permanent dedication by a person professing the Mussulman faith of any property for any purpose recognised by the Mussulman Law as religious, pious or charitable'. (This definition has been held by the Privy Council to be a definition for the purposes of the Act and not necessarily exhaustive—see, *Ma Mi* v. *Kallander Ammal*[13]).

From the above it may be derived that the dominant characteristics of *wakf* are:

(1) *Religious or pious motive.*—As should be clear from the words of Section 2, the purpose of the *wakf* must be religious, pious or charitable according to the tenets of Islam; the test, as Fyzee puts it, must be the Shariat; any religious purpose would not do. For example, construction of a church or temple, maintenance of a crematorium would be void objects, so also a merely secular motive. Gajendragadkar, J. explained this point in *Zain Yar Jung* v. *Director of Endowments*[14]: "It is thus clear that the purpose for which *wakf* can be created must be one which is recognised by Muslim Law as pious, religious or

9. AIR 1964 Mad 18.
10. AIR 1956 Nag 38.
11. (1921) 48 IA 302.
12. (1840) 2 MIA 390.
13. (1927) 54 IA 23.
14. AIR 1963 SC 985.

charitable, and the objects of public utility which may constitute benefits under the *wakf* must be objects for the benefit of the Muslim community. The Muslim character of the *wakf* is also brought out emphatically by certain other provisions of the Act. For instance the Board has to keep in mind the usage or custom of the *wakf* sanctioned by Muslim Law. The Secretary of the Board shall be a Muslim, so also the members. There is no prohibition against the creation of a secular trust of public and religious character. Usually followers of Islam would naturally prefer to dedicate their property to the Almighty and create a *wakf* in the conventional Muhammadan sense. Tyabji writes in his *Muslim Law* (4th Edn., p. 546) that a *wakf* and a trust have of course many things in common, but they may be distinct in one respect—a *wakf* requires a religious motive, necessity for such motive is all but forgotten by the Indian courts in giving decisions upon a *wakf* case."

In *Karnataka State Board of Wakfs* v. *Mohd. Nazeer Ahmad*[15], the facts were—one Fatima Bi dedicated her house by will for use of all travellers irrespective of their caste, creed or religion and whether they were rich or poor. On these facts it was held—under Muslim Law a *wakf* should have a religious motive and it should be only for the benefit of the Muslim community. If it is secular, the charity should be to the poor alone. The Muhammadan Law recognises the dedication the ultimate benefit of which is expressly or impliedly reserved for the poor or for any other purpose recognised by Muslim Law as religious, pious or charitable.

The dedication need not specifically be in favour of a place of worship, Khankah, dargah, cemetery, etc. It is enough if the dedication is made for the purpose recognised by Muslim Law as pious, charitable or religious.[16] Service *inam* granted to individuals burdened with service for purposes which are pious, religious or charitable, answers description of all ingredients of *wakf*.[17] Grant of *patta* to service inamdars does not in any manner change the character of *wakf*. The holder does not acquire title of that property.

(2) *Permanent nature.*—A pious dedication which is not permanent may be *sadaqa* but cannot in law be termed as *wakf*. A dedication must not be bound by time period in order to be a *wakf*; thus if it is limited to say, 50 years it will not be a *wakf*. It should also not be conditional; thus if the *wakf* deed contains a condition that if the properties are mismanaged, these should be divided among the descendants of the *wakif*, the *wakf* would not be complete.[18] According to *Fatawa-i-Alamgiri* even if it is not expressly mentioned that the dedication is

15. AIR 1982 Kant 309.
16. *A.P. Wakf Board* v. *Syed Ali Mulla*, AIR 1985 AP 127.
17. *Ibid.*
18. *Habib* v. *Syed Wajihuddin*, 1936 Oudh 222.

permanent, it will be presumed once the word '*wakf*' is used. However, express condition or time limit should not be there.

The dedication of property should be specifically provided by clinching evidence. In the absence of any documentary evidence, an overall view of the evidence on record is to be taken to establish that there is permanent dedication of the property as a *wakf*.[19] If the nature of the dedication of the property does not constitute a *wakf* within the meaning of the provisions of the Act, it must be proved that it became a *wakf* by reason of long user. An admission of a party must be clear and explicit in case where an inference is required to be drawn.[20]

One crucial point of distinction between *sadaqa* and *wakf* is the treatment of the subject-matter. When the subject-matter of the gift, i.e. the corpus, is itself to be consumed, it is a *sadaqa*. Thus, *A* gifts rupees ten thousand for purchasing copies of Koran to be distributed free to the poor, it is a *sadaqa*; because, here the corpus is to be consumed. On the other hand, *A* deposits rupees ten thousand in a fixed deposit forever and provides that the interest is to be used every year for purchasing copies of Koran to be distributed to the poor, it is a *wakf*; because, the corpus will remain unconsumed, only the usufruct, the income will be consumed or utilised. In both, the purpose is the same, but the treatment of the corpus differs. *Wakf* differs from *hiba* (gift) also on the same count. In *hiba* the corpus itself is transferred to the donee, who may do anything with it—keep it or consume it or further transfer it. In *wakf* the corpus is immobilised or fixed, only the usufruct is useable.

(3) *Ownership of the Property vests in God.*—In *wakf* the property is dedicated to God, therefore, its ownership is transferred from the donor to God.

It is the special characteristic of a *wakf* that the ownership is tied up in God and the profits are devoted for the benefit of human beings. According to Abu Yusuf a *wakf* signifies the extinction of transferor's ownership in the thing dedicated and the detention of the corpus in the implied ownership of God in such a manner that its profits may revert to the benefit of mankind. The Supreme Court has observed in *Mohd. Ismail* v. *Sabir Ali*[21], that even in a *wakf-alal-aulad* (i.e family *wakf*) which is governed by the Mussalman *Wakf* Validating Act, 1913 the corpus is transferred to God and the property vests in Him; it does not vest in the *mutawalli* or the beneficiary. An interesting case arose in this regard: What happens to the *wakf* lands when zamindari rights are abolished and the land rights vested in the cultivator? The *wakif* had created a *wakf* of his zamindari lands in 1918. The U.P. Zamindari Abolition and Land Reforms Act, 1951 abolished zamindari and stipulated that the zamindari rights would be vested in the cultivators. The Allahabad High Court held on these facts that when the *wakf*

19. *Mohd. Riazuddin* v. *Govt. of A.P.*, (2000) 6 ALD 756 at p. 777.
20. *M.P. Wakf Board v. Subhan Shah*, (2006) 10 SCC 696: (2007) 1 An LD 86 SC.
21. AIR 1962 SC 1722.

was created in 1918, the proprietary rights in the lands were vested in God and He became Zamindar. On abolition of zamindari God became an intermediary. One of the conditions under the Act [Section 18 (1)(*a*)] for favourable accrual of bhumidhari rights in the land was, the intermediary must be a khudkasht. The court held that if the *mutawalli* was cultivating the land, then it would be deemed to be the cultivation on behalf of God; and on that basis, the bhumidhari rights could be conferred on God.[22] This legal fiction must apply to both—public as well as private *wakf* without any distinction for one very cogent reason. If it is held that in a *wakf* for *alal-aulad* (i.e. a family or private *wakf*) the properties vest in the *mutawalli* or the beneficiary, it will create a legally heritable and transferable estate in his hands. Then he cannot be divested of this property. In that case the permanency of the dedication which is the fundamental feature of a *wakf* could not be ensured. Therefore the legal fiction that the *wakf* property vests in God must be adhered.

(4) *The usufruct is utilised for the benefit of mankind.*—That is, the corpus is tied up in the name of God and the income accruing from that capital is the thing which is spent for the realisation of the object for which that *wakf* was created. Thus, the property remains fixed and its outcome is in flow.

The definition of *wakf* by Shias does not make it clear as to whom the corpus belongs, that is, whether the ownership vests in God or in some one else. Tyabji, however, says that according to Shiite authorities. the corpus belongs to the beneficiaries.[23]

6. Kinds of *wakf*

Broadly, *wakf*s are of two kinds: public and private. But the most accepted is its threefold classification—public, *quasi*-public and private.

(*i*) **Public *wakfs*.**—Those which are dedicated to the public at large having no restriction of any kind regarding its use: for example, bridges, wells, roads, etc.

(*ii*) **Quasi-public *wakfs*.**—Those which are partly public and partly to provide for the benefit of a particular individual or class of individuals which may be the settlor's family.

(*iii*) **Private *wakfs*.**—Those which are for the benefit of private individuals, including the settlor's family or relations. Such a *wakf* is termed as *wakf-alal-aulad*.

Muslim Law gives equal recognition to public and private *wakf*s. Both are subject to the rules of divine property whence the rights of *wakif* are extinguished and it becomes the property of God. Both of these are created in

22. *Moatter Raza* v. *Jt. Director, Consolidation*, AIR 1970 All 509.
23. Fyzee, at p. 279 *citing* Tyabji, S. 538, n. 15.

perpetuity and the property becomes inalienable. Like a public *wakf*, a private *wakf* can under no circumstances fail and when the line of descent becomes extinct, the entire corpus goes to charity.

A very clear definition and distinction is given by the Supreme court in the latest judgment in *Fuaad Musvee* v. *M. Shuaib Musvee*[24]: 'In case of Public *wakf* corpus as well as usufruct vests in God since usufruct becomes immediately applicable to specified holy purpose. In case of Private *wakf* only corpus of property vests in God immediately and enjoyment of usufruct (for pious purpose) is postponed till extinction of *wakif*, his family and descendants. Public *wakf* is one for religious, pious and charitable purpose, whereas private *wakf* is one for benefit of settlor's family, descendants. A Private *wakf* to be valid shall reserve ultimate benefit for a purpose recognised by Muslim Law as religious, pious and charitable. Private *wakf* is not invalid, merely because ultimate benefit reserved for religious, pious and charitable purpose is postponed until after extinction of family/descendants of the *wakif*.'

Note, that 'if under the *wakf* deed, a portion of the income from *wakf* property is to be spent for the family apart from pious etc. purposes, it satisfies the character of Private *wakf* i.e. *Wakf-alal-aulad*.[25]

In *Abdul Satar* v. *Advocate General*[26], Beumont, C.J. observed: "It is impossible to contemplate property transferred to Almighty God subject to condition enforceable in the temporal courts for recovering that property for benefit of the settlor." However, the rule of irrevocability does not apply to the following conditions—*wakif* reserving power to alter the beneficiaries, add to their names, exclude some names, change the *mutawalli*, change the procedure and rules, modify instructions for its management.

But we must distinguish between an *inter vivos wakf* and a testamentary *wakf*. The latter is technically only a bequest—a will, and comes into operation after the death of the *wakif*. The settlor can change or revoke it before his death. He may provide that the testamentary *wakf* will not come into force if he begets a child.

7. Legal incidents of *wakf*

There are three legal incidents of *wakf*: irrevocability, perpetuity and inalienability.

(*i*) **Irrevocability.**—According to Abu Hanifa, a *wakf* can be revoked by its founder unless the declaration has been confirmed by a Court decree. However, Abu Yusuf took a contrary view and held that a declaration of *wakf* is,

24. (2008) 4 CTC 59 (Mad).
25. *T. N. Wakf Board* v. *Larabsha Darga*, (2007) 13 SCC 416.
26. AIR 1933 Bom 87.

in its nature, irrevocable. That is, a *wakf* cannot be revoked after the declaration has been made, nor can the power to revoke be validly reserved. It is the opinion of Abu Yusuf which prevails in India.

The Supreme Court once more declared that once a wakf is created it continues to retain such character which cannot be extinguished by any act of the *Mutawalli* or anyone claiming through him. A *wakf* was created by one *M* of his entire properties in 1926 and registered under the U.P. Muslim Wakfs Act and also notified in Official Gazette. *M* appointed his son *P* as *Mutawalli*. 32 years later the *wakif* filed a collusive suit which was decreed on compromise; immediately *M* and *P* transferred the disputed plots to the present appellant. When these facts came to the notice of the Shia Central Board of Wakf, Lucknow, it requested the Deputy Commissioner to direct the appellant to hand over the plots to the Secretary of the Board. In the legal battle the appellant lost in the High Court and the Supreme Court also. The Supreme Court held that *wakif* stands diverted of his title of the properties which after creation of the *wakf* vest in the Almighty.

The Supreme Court also said that the creation of a *wakf* may be questioned if it is shown that the *wakif* had no intention to create a *wakf* but had done so to avoid a liability.[27]

(ii) **Perpetuity.**—*Wakf* must be perpetual. If it is for a limited period, or for a temporary purpose, it is void. According to *Fatawa-i-Alamgiri*, "Perpetuity is also among the conditions of *wakf* according to all opinions, though according to Abu Yusuf the mention of it is not a condition, and this is correct".[28] Thus, if a man says 'I make this dedication, on my children' and adds nothing further, it is a valid *wakf*. Wherever the term *wakf* is used, permanence will be presumed as a matter of law. The rule against perpetuities does not apply over *wakfs*.

The perpetuity of *wakf* does not imply perpetuity of its object. Thus, if a *wakf* is created for purposes which may fail or which are not perpetual, the view of Abu Yusuf is that the *wakf* is valid, and that its benefits will accrue to the poor after the named objects cease. About the implied permanency of a *wakf* there were two schools of opinion. One school, that of the followers of Abu Hanifa, maintained that to impart permanency, it must be expressly mentioned that the ultimate benefit was reserved for the poor. Abu Yusuf, on the other hand was of the view that permanence was implied in the use of the word *wakf* by the settlor. His view was followed by Ameer Ali and accepted by the Madras High Court in *Syed Ahmed* v. *Julaiha Bivi*[29]. Bombay High Court preferred Hanifa's view. Now the controversy is settled in favour of Yusuf's view with the use of the expression 'expressly or impliedly reserved for the poor or any other purpose

27. *Chhedi Lal Misra* v. *Civil Judge*, (2007) 4 SCC 632.
28. *Fatawa-i-Alamgiri*, Vol. II at p. 459 cited by Ameer Ali, Vol. I at p. 187.
29. 1947 Mad 480.

recognised by Mussulman Law as religious, pious or charitable purpose of a permanent character' in Section 3 of the Mussalman Wakf Validating Act, 1913.

(*iii*) **Inalienability.**—As the *wakf* property belongs to God, no human being can alienate it for his own purposes. Consequently, *wakf* property cannot be the subject of sale, mortgage, gift, inheritance or any alienation whatsoever. This general rule has two exceptions: *wakf* property may be exchanged for an equivalent property, or sold, subject to compulsory reinvestment of the price in another property. The power of exchange and sale is subject to the permission of the Court. These exceptions to the rule of inalienability are, therefore, more apparent than real, since a new corpus is substituted for the old one and the continuity of *wakf* is maintained.

What is emphasised is the authorisation to the *mutawalli*. Legally his position is that of a manager only; he is not an owner of the *wakf* property. Therefore he cannot alienate the *wakf* property without express authorisation by either the settlor or the court. Thus in *Mohd. Yusuf* v. *Mohd. Sadiq*[30] the *wakf* deed directed the *mutawalli* to sell the *wakf* property and construct a rest house at Mecca from the sale proceeds. The court upheld this authorisation. The court can also grant him permission, and with such prior sanction he can transfer the property by way of sale or mortgage, etc. Any alienation without the prior sanction is not void *ab initio*, but voidable on challenge by any beneficiary. A lease of the *wakf* land for more than three years if agricultural land and for more than one year for other land also requires prior permission of the court or authorisation by the settlor.

'Any lease of immovable property of *wakf* exceeding 3 years is *void ab initio*; grant of lease for 11 months with intention to continue as permanent base is unsustainable. *Mutawallis* who are hereditarily holding office are entitled to give on lease jointly — lease deed executed only by one *Mutawalli* is therefore not valid.'[31]

8. Creation of *wakf*

Is any formality necessary?—No. There is no essential formality or the use of any express phrase or term requisite for the constitution of *wakf*. The law looks at the intention of the donor, in whatever language it may be expressed or in whatever term the wish may be formulated.

In one case[32], decided by the Supreme Court it was held that—

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30. AIR 1933 Lah 501.

31. *H. Idayathulla* v. *Larabsha Dharga*, (2007) 2 MLJ 1034. Also *Mohd. Mazhar Shaheed* v. *Distt. Collector, Mahboobnagar*, (2005) 2 An LT 234.

32. *Garib Das* v. *M.A. Hamid*, AIR 1970 SC 1035.

"A *wakf inter vivos* is completed by a mere declaration of endowment by the owner...this view has been adopted by the High Courts of Calcutta, Rangoon, Patna, Lahore, Madras, Bombay, Oudh Chief Court and recently by the Allahabad High Court and the Nagpur High Court. Further, the founder of a *wakf* may constitute himself the first *mutawalli* and when the founder and the *mutawalli* are the same person, no transfer of physical possession is necessary. Nor is it necessary that the property should be transferred from the name of the donor as owner into his name as *mutawalli*. An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the *wakf* was not intended to be acted upon."

It is not necessary that a *wakf* should be made in writing. All that is necessary in constituting a *wakf* is that some sort of declaration, either oral or in writing must be made. Although oral *wakf* is permitted, yet when the terms of a *wakf* are reduced to writing, no evidence except the document itself would be sufficient to prove it.

Ordinarily, no registration is required for a *wakf* deed. Yet when it relates to an immovable property worth more than Rs 100, registration is essential.

The Uttar Pradesh Muslim *Wakfs* Act, 1960 provided that every *wakf*, not registered under the Muslim *Wakfs* Act, 1936, whether created before or after the commencement of the U.P. Act, shall be registered at the office of the Board of the sect to which the *wakf* belongs. The *mutawalli* had to submit the application for registration in 3 months of his entering into possession of the *wakf* property. The consequences of his failure were certain amount of penalty to be paid by him. The "registration" required under the U.P. Act was not a registration under the provisions of the Indian Registration Act. It cannot be pleaded that non-registration of the *wakf* within the period as provided by the U.P. Act will cancel the *wakf* or prevent the Courts from recognising it.

It was repeatedly held by the Privy Council and the various High Courts of India that neither the use of the word *wakf* nor express dedication of the property to the ownership of God is essential for the creation of *wakf*. Any implied expression is enough for this purpose. Thus, if a man says, "This my land is dedicated, consecrated, not to be sold, inherited or given by gift", all these words would create a valid *wakf*.

Wakf is also created by 'long user'. In cases where there is no evidence to show how and when the alleged *wakf* was created, the *wakf* may be established by evidence of long user. In another case[33] it was held by the Supreme Court that a land adjacent to a *Mosque* would become *wakf* by user if it had been used by the public for religious purposes along with the mosque.

33. *Mohd. Shah* v. *Fasihuddin Ansari*, AIR 1956 SC 713.

Whether delivery of possession and appointment of *mutawalli* are necessary for the valid creation of *wakf*?—According to Abu Yusuf, a dedication of *wakf* is complete by mere declaration. Neither delivery of possession nor appointment of *mutawalli* is necessary. But where no details of oral gift are disclosed nor the date on which "gift" was given, subsequent conduct of the parties also negating such "gift", name of the "donor" was shown as owner in the relevant records and properties were also not transferred in the name of the "donee" — the 'oral gift' was held as not proved and the plaintiff was allowed possession.[34]

The view of Imam Muhammad, however, is that a *wakf* is not complete unless there is declaration, coupled with—

(*i*) Appointment of *mutawalli*, and

(*ii*) Delivery of possession to him.

In India, the view of Abu Yusuf is law for Hanafis. Under Shia Law, no doubt, delivery of possession to the first person in whose favour the *wakf* has been created is essential. And in public *wakf*, a *mutawalli* has to be appointed to take possession.

9. Who can create *wakf*

A major person of sound mind can validly create a *wakf*, provided there is no fraud, undue influence or coercion, and he should not be suffering from death-illness (*maraz-ul-maut*), whereas he cannot dedicate more than one-third of his estate unless heirs give their consent. Muslim Law recognises *maraz-ul-maut* gifts (*infra*) and also *maraz-ul-maut wakfs*. When a person suffering from such illness as culminates in his death creates a *wakf* on his deathbed and dies, it is called *maraz-ul-maut wakf*. Such *wakf* takes effect as a bequest and only one-third of the property gifted is treated as given in *wakf*. However if his heirs consent, the whole property is covered by the *wakf*. So also if he survives his illness. If some of his heirs consent while others do not, then the *wakf* is valid in proportion to the shares of the consenting heirs. The *wakif* (who creates the *wakf*) can be Muslim or a non-Muslim. The only restriction is that the object of *wakf* should not be opposed to the creed of dedicator. Thus, a Muslim cannot dedicate in favour of an idol or temple, and a Hindu or Christian in favour of a mosque. In this connection, it is interesting here to mention that a problem has been asked in a University examination that whether a *wakf* created by a Muslim in favour of the Banaras Hindu University would be valid. It is submitted that such a *wakf* shall be valid, because, the Hindu University is simply an educational institution, though established mainly for Hindus but its doors are open to Muslim students too, and hence, Hindus, Muslims and others all derive benefit from it. Such

34. *A.M.K. Mariam Bibi* v. *M.A. Abdul Rahim*, 2000 AIHC 661.

propagation of secular knowledge is in keeping with the spirit of Islam. Similarly, a *wakf* by a Hindu in favour of the Aligarh Muslim University shall be perfectly valid.

The *wakif* should be the owner of the property he is dedicating.

There is some conflict as to the validity of *wakf* created by an apostate. Few jurists hold that such *wakfs* are valid, if created for poors and for pious purposes and not for individuals. Whereas others say that *wakfs* by apostates are void in all cases. According to Ameer Ali, the former view is generally preferred.[35] The Andhra Pradesh High Court had held that a non-Muslim could also create a *wakf* for any purpose recognised by the Muslim Law provided it was lawful according to his own religion.[36] But these views have no utility now in the context of the 1913 and 1954 *wakf* statutes which define *wakf* as a dedication by a Muslim.

Where the *wakif* is a *pardanashin* lady, it is presumed that she does not understand the full implications flowing from the act of her creating a *wakf*, and hence, if she later on denies saying that she did not intend to create *wakf*, it will be rendered void. In *Delroos Banoo Begam* v. *Nawab Asngar Ali*[37], it was held by the Calcutta High Court that Delroos Banoo "has been examined and she swears positively that she did not understand the meaning of the deed which she executed. ...It is, moreover, hardly likely that Delroos Banoo Begam had known what was the real effect of making a *wakf*...". It was thus held that the *tauliatnamah* executed by her did not create a *wakf*.

10. What can be made as *wakf*

According to Abu Hanifa and Abu Yusuf, only immovable property can be made *wakf*. The only exception which Abu Yusuf allows is for the beasts of burden and weapons of war, which according to him can be made *wakf*. Imam Muhammad, however, holds that all articles or movables that can be subjected to the dealings and transactions of men, may lawfully be dedicated as *wakf*. This opinion of Imam Muhammad is followed in India. Thus, *wakfs* of the following movables are valid:

(*i*) Koran for reading in mosques, etc.;

(*ii*) Working cattles and instruments of husbandry;

(*iii*) War horses, camels and other animals;

(*iv*) Swords;

(*v*) Chest of money for loans to the poors;

(*vi*) Shares in companies;

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35. Ameer Ali, Vol. I (2nd Edn.) at p. 161.
36. *Mundaria* v. *Shyam Sunder*, AIR 1963 AP 98.
37. 15 Beng LR 167.

(*vii*) Securities, etc., etc.

The *Wakf* Validating Act, 1913 has permitted a *wakf* of "any property". This broad term naturally includes movable property.

As to the validity of *wakf* of *mushaa* or undivided shares in a property which is capable of division, Imam Muhammad holds that *wakf* of *mushaa* is unlawful, while according to Abu Yusuf, it is valid. In India, the view of Abu Yusuf is followed. But about *wakf* of *mushaa* for a mosque or burial ground, he has declared that it is invalid. He gives two reasons one of which is that the continuance of a participation in anything is repugnant to its becoming the exclusive right of God. However, it has been held by the Calcutta and Allahabad High Courts that a *wakf* of *mushaa* for the *maintenance* of a mosque is valid.[38]

11. In whose favour can *wakf* be made

Muslim Law does not insist that a man must necessarily be poor to have benefit of a *wakf*. All persons, whether rich or poor, may be beneficiaries. But, when the objects of *wakf* become impossible or extinct, the inherent ultimate purpose of every *wakf* is, no doubt, the relief of the poor and destitute.

Following may be the beneficiaries:

(*i*) The *wakif* himself (only in Hanafi Law);

(*ii*) The family and descendants of *wakif*; and

(*iii*) General public.

(*i*) ***Wakif* himself.**—This is recognised in Hanafi Law alone. The Shia Law does not approve of it. The Shia authorities and also Imam Muhammad argue that the *wakif*, having once relinquished his proprietary rights in favour of God, cannot take any benefit from such property.[39] While Imam Abu Hanifa argues that the *wakif's* interest in the dedicated properties continues even after the creation of *wakf*; hence, there is no difficulty in allowing him to share with others the usufruct of the *wakf* property.

In India, it is the opinion of Abu Hanifa that is followed in regard to Hanafis. Thus, a Hanafi Muslim may validly reserve the whole of the usufruct for his own life or for a lesser period, or pay his debts out of *wakf* income. Thus, a Hanafi female conveys her house to her husband upon trust to pay the income of the house to her for her life, and from and after her death to devote the whole of it to certain charitable purposes. This is a valid *wakf*, though the charitable trust is not to come into effect until after the founder's death.[40] (Such a *wakf* is not valid

38. *Mohd. Ayub Ali* v. *Amir Khan*, (1939) 43 CWN 118; *Peeran* v. *Hafiz Mohd.*, AIR 1966 All 201.

39. Fyzee, at p. 301.

40. *See*, Mulla's *Principles of Mohamedan Law* (18th Edn.) by Hidayatullah, Tripathi, Bom. at p 209 and the cases cited there.

under Shia Law.) According to Shia Law a *wakf* is not valid unless the settlor divests himself of the ownership of the property and of everything in the nature of usufruct from the moment the *wakf* is created. Hence the settlor cannot reserve for himself a life-interest in the income or any portion thereof. But a Shia may provide for the expenses of *Roza*, *Namaz*, *Haj*, *Ziarat*, etc. to be performed after his death for his spiritual benefit.[41]

(*ii*) ***Wakif's* family and descendants.**—Before 1913, *wakfs* created substantially or exclusively for *wakif's* family and descendants were treated as invalid. But after the passing of the Mussalman *Wakf* Validating Act, 1913, *wakfs* for the benefit of family are valid.

The term "family" has been liberally interpreted by the courts, and has never been confined to persons dependent for maintenance on the *wakif*. In one case[42] the Allahabad High Court observed:

> "The word 'family' in Section 3(*a*) (of the *Wakf* Validating Act, 1913) has to be given a wide and not a restricted meaning and a person may belong to a 'family' if either he is from a common progenitor or if he is living under the same roof and is being supported and maintained by the settlor. As long as one of these two conditions are satisfied, the beneficiary would be a member of the family within the meaning of the Act."

(*iii*) **General public.**— There is universal recognition of such *wakfs* which are created for the public in general. This is in keeping with the spirit of Islam and the teachings of the Prophet.

12. Objects of *wakfs*

Wakf may be for the benefit of persons or for any object of piety and charity. The term "charity" includes every purpose which is recognised as "good" or 'pious'. Every good purpose which God approves, or by which approach (*Kurbat*) is attained to Him, is a fitting purpose for a valid and lawful *wakf*.[43]

Objects of a *wakf* may be religious, charitable or private.

(*i*) **Religious and charitable objects.**—Religious and charitable objects of *wakf* are so intimately connected with each other that sometimes it may not be possible to make a distinction between them.

It is well settled that the object of *wakf* should not be in conflict with the general religious policy of Islam. Religious purposes, however, do not include such dedications as "solely to the worship of God", which is "an unmeaning

41. *See*, Mulla's *Principles of Mohamedan Law* (18th Edn.) by Hidayatullah, Tripathi, Bom. at p. 211.
42. *Abdul Qavi* v. *Asaf Ali*, AIR 1962 All 364.
43. Ameer Ali, Vol. I (3rd Edn.) at p. 216.

phrase in Islam", says Ameer Ali, commenting on a Bombay High Court decision.[44]

Charitable objects include giving to one's own family and descendants, and such things in which rich and poor may be equally interested, for example—Mosque; *Imambara*; *Durgah*; *Khanqah*, College and School; Hospital; Reservoir; Roads; Bridges, etc.

Section 2(1) of the Wakf Act, 1913 permits *wakf* for any purpose recognised by Muslim Law as religious, pious or charitable. Section 3(*a*) recognises *wakfs* for maintenance and support, wholly or partly of the settlor's family, children or descendants. Some illustrations are—dedication of property to support mosque, feed travellers and educate poor students; remaining profits towards defraying the expenses of the marriages, burials and circumcisions of the members of the family of the person named as first manager of the endowment. Also, to provide for supporting the needy relatives of the grantor, and the surplus of the income of the property towards religious purposes. Also, the income of the shops to be spent on the maintenance of the *Mosque* and the residue, if any to be paid to the *mutawalli* as remuneration. On the other hand, the *wakfnama* would be unsupportable if it allowed the *mutawalli* to appropriate, in the first instance whatever amount he liked and to apply the remainder, if any, for the purposes of the mosque.[45]

(*ii*) **Private *wakfs*.**—*Wakfs* in favour of one's own family may be termed as private *wakfs*. They may be:

(*a*) exclusively for the family, or

(*b*) substantially for the family with some provision for charity, or

(*c*) substantially for charity with some provision for the family.

(*a*) **Exclusively for family.**—Delivering the judgment in *Bikani Mia* v. *Shuk Lal Poddar*[46], Justice Ameer Ali observed that a *wakf* exclusively for the benefit of *wakif's* family without any provision for charity, was valid. But this view was disapproved by the Privy Council which held that *wakfs* exclusively for one's family was no *wakf*. This view still holds good. The Mussalman *Wakf* Validating Act, 1913 does not validate such *wakfs* which have no provision reserving ultimate benefit to charity. Thus, for example, where a Muslim creates a *wakf* in favour of his two wives, of his daughters by those wives, and for their respective descendants, saying nothing as to the ultimate disposal of the property on total failure of those descendants, the *wakf* is altogether invalid.

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44. Ameer Ali, Vol. I at p. 217, commenting on *Abdul Gani Kasim* v. *Hussan Miya*, 10 Bom HCR 10.

45. *See*, Aquil Ahmad, at pp. 235-36, and the cases cited therein.

46. ILR (1893) 20 Cal 116.

(*b*) **Substantially for family with some provision for charity: The law before 1913.**—In *Abul Fata Mahommed Ishak* v. *Russomoy Dhur Chowdry*[47], Their Lordships of the Judicial Committee, while dealing with *wakf* which was mainly for the family with an ultimate benefit to charity, observed:

> "A gift to the poor might be illusory from the smallness of its amount, or from its uncertainty or remoteness; and that the period when this gift was to take effect was so uncertain, and probably so remote, that the gift was illusory. Therefore, according to Muhammadan Law, it did not establish a *wakf*."

The Privy Council had thus held that as the gift to charity in *wakf-alal-aulad* was illusory and that the object of the settlor was to create a family settlement in perpetuity, the *wakf* was invalid. This decision was based on a faulty appreciation of the principles of Muslim Law and led to great uproar in India. Muslim public opinion was totally against it. The Government was compelled and convinced to enact a special legislation—Mussalman *Wakf* Validating Act, 1913—to validate such *wakfs* which stood invalidated by virtue of the Privy Council's decision, and all such future *wakfs*.

The Law after 1913.—The *Wakf* Validating Act, 1913 laid down that all private *wakfs* which are substantially for family with some provision to charity may even be impliedly made, and it will be inferred from the terms of the deed and the circumstances of the case. Section 3 of the Act provides a Hanafi may create a *wakf* for his own maintenance and support during his lifetime or for the payment of debts out of the rents and profits of the property dedicated. (This clause does not apply to Shias). The ultimate benefit may be postponed until after the extinction of the family or descendants of the creator (Section 4) and now it is not necessary that there should be a concurrent gift to charity. The ultimate gift need not be express, it may be only an implied gift [proviso, Section 3(1)(*b*)]. Section 5 further exempts from the provisions of the Act any local custom prevalent among any class or sect of the Muslims.

(*c*) **Substantially for charity.**—The decision of the Privy Council in *Mohd. Ahsanulla Chowdhry Amarchand Kundu*[48], shows that before the passing of *Wakf* Validating Act, 1913, such *wakfs* were considered valid. And they are so even today.

Wakf for Benefit of Humanity at large without reference to Religion

When the Supreme Court observed in *Nawab Zain Yar Jung*[49] that the beneficiary must be a member of the Muslim community, the law in force was the pre-amendment 1954 Act, Section 3(*a*) of which defined a beneficiary as a

47. (1894-95) 22 IA 76.
48. ILR (1890) 17 Cal 498 (PC).
49. *Zain Yar Jung* v. *Director of Endowments*, AIR 1963 SC 985.

person or object for whose benefit a *Wakf* is created and includes religious, pious and charitable object and any other object of public utility "established for the benefit of Muslim Community".

However, Section 3(*a*) was amended in 1964 by substituting words "sanctioned by Muslim Law" in place of "established for the benefit of Muslim Community". One of the issues in *Kachchh Wakf Board* v. *Kachchh Memon Jamat*[50] was : can a grant for "Dharmashala" providing shelter to any visitor without distinction of caste or creed amount to creating a valid *wakf*? The contention was that if beneficiary of an amenity included anybody other than a Muslim it can be anything but a Muslim *wakf*; it may be a public charity or a public trust, but beneficiary if includes non-Muslim it becomes a secular character which is not envisaged object of a Muslim *wakf*. The Maharao (Ruler) of the State of Kuchchh (erstwhile) had granted land to a Muslim in 1874 for construction of Dharmashala for the use and benefit of public by and large without any reservation of any caste, creed or colour. Thereafter, whether the grantee had in fact dedicated the building so as to vest it in the Almighty or he simply discharged his obligation to construct the building was to be decided by the lower court and the High Court directed so. It was in this background that the High Court made certain observation regarding the beneficiaries of a *wakf*.

Quoting from J. Ameer Ali's judgment in the famous *Vidya Varuthi case*[51], that "devotion of the profits for the benefit of human beings" is *wakf* and *wakf* is "a dedication to any good purpose", and "the donor may name any meritorious object as the recipient of benefit"—Justice Balia of Gujarat High Court comes to the conclusion that charitable *wakfs* can be for the benefit of humanity, and where so, the beneficiary need not be confined to a particular community. Likewise, alms to the poor has been recognised to be a pious and charitable purpose. Now, prima facie, there does not appear to be any authority to support the view that a property dedicated for distributing its income as alms to poor can be construed as *wakf* only if alms is distributed to members of Muslim community only. On the other hand, settling a trust to help *all religious institutions*, irrespective of whether it is a temple or mosque, though may be charitable and of a public utility, since idolatry is prohibited by Muslim Law, such secular charity being opposed to Muslim tenets cannot be construed a *Wakf*, as was the case in *Nawab Zain Yar Jung case*. In this light, a *musafirkhana*, if its dedication is for religious purpose like providing shelter to those who are performing religious ceremonies sanctioned by Muslim Law, may perhaps have as its beneficiaries only Muslims. But if on the other hand, a property is dedicated as an amenity of general public utility use of such amenity by all may not militate against its being a Muslim *wakf*. [Note: These, the learned Judge

50. (1998) 2 GCD 1310 (Guj).
51. AIR 1922 PC 122.

said, were his "prima facie views". These were his observations only, preceding the actual finding by the lower court regarding the fact of the nature of the grant by the ex-ruler.]

We are respectfully in agreement with the views of the learned Judge. Now more and more people, individually and also jointly are coming forward in providing free and lasting facilities to the poor or needy or even just any user. People are donating generously for establishing specialised treatment units in public hospitals, like cancer unit, burn unit, etc., opening hospitals and hostels, installing drinking water plants at railway stations and public places, distributing food and fruits in hospitals and schools, offering scholarship to intelligent students, constructing residential colonies in earthquake affected areas, etc. In such enthusiastic public participation in general public welfare activities, the Muslims, themselves a major class of beneficiaries, should not lag behind, in playing positive role, on account of pedantic interpretation of their *wakf* law.

Mulla gives a list of valid and invalid objects of *wakfs*, on the authority of judicial decisions. Some of such typical objects are as follows:

A. VALID OBJECTS

(*i*) Distribution of alms to poor persons, and assistance to the poor to enable them to perform the pilgrimage to Mecca.

(*ii*) Celebrating the birth of Ali Murtaza

(*iii*) Keeping *tazias* in the month of Muharram.

(*iv*) Celebrating the death anniversaries of the settlor and of the members of his family.

(*v*) Burning lamps in a mosque.

(*vi*) Performance of annual *fatehah* (for the welfare of the soul of the deceased person) of the settlor and of the members of his family.

(*vii*) Construction of a *robat* or free boarding house for pilgrims at Mecca, (the fulfilment of such objects, however, are difficult nowadays in view of the restrictions on foreign exchange, etc.)

(*viii*) Maintenance of poor relations and relatives.

Wakfs for certain Muslim religious institutions

Mosque.—"If a building has been set apart as a mosque, it is enough to make it *wakf*, if public prayers are made there with the permission of the owner. Both a mosque and a saint's tomb become *wakf* by user. If mosque has stood for long time and worship has been performed therein, the Court will infer that it does not stand by leave and licence of the owner of the site but that land is dedicated property and no longer belongs to the original owner," so held Kerala

High Court in *Meethian* v. *Kerala Wakf Board*[52]. Fazle Ali, J. lays down following conditions for a valid dedication for a public *mosque*—(*a*) Founder's intention to dedicate property, either declared or inferred from his conduct. (*b*) Founder divesting himself of the property, either by delivering possession to the Imam or mutawalli, or by permitting the public to offer prayers therein. (*c*) The founder must provide a separate entrance to the *mosque* for the entry by the devotees.[53] Any adjuncts to the mosque building, money for its repairs, etc. are part of the *wakf*. Any Muslim of any sect may pray in the mosque. This is his legal right complete with legal remedy. It is doubtful if the donor can dedicate a mosque to a particular sect exclusively, and even if done, no Muslim can be denied admission to say prayers. But there can be a private mosque wherein 'outsiders' may be denied entry; Muslim Law allows a *wakf* for a private mosque. According to the Lahore High Court, a mosque is a juristic person, but not so according to the Rajasthan High Court.[54]

Qabristan (graveyard).—A *wakf* may be created by dedicating property for a graveyard. A *qabristan* may also be private or public. A land, by long user, may be established to be a public graveyard under *wakf*.[49]

Similarly property given for use for the purposes of *fateha* also constitutes a *wakf*. The Supreme Court held so in *Wali Mohammed* v. *Rahmat Bee*[55]. The question was whether property given for use to conduct *fateha* would create a *wakf*. It was held by the Supreme Court that directions for the conduct of *fateha* at the graveyard and to use the adjacent house for those purposes are certainly valid objects of a *wakf*. In this case, offerings of prayers were not confined at the tomb of the grantor or his family members. The grant was by the head of the order and related to prayers at number of tombs in the graveyard.

Durgah.—It is a tomb or a shrine of a Muslim saint. Under the classical Muslim Law *durgah* is not mentioned as one of the objects of *wakf*. The Prophet was against the erection of an elaborate tomb. But in India by tradition tombs of saints are held in reverence and it has come to be established that a dedication of property can be made to a *durgah* and a *wakf* constituted.[56] The *pir* in the *durgah* is worshipped with great ostentations in India, though this is opposed to the basic tenets of Islam. The *durgah* is managed by *mujawar*, i.e. the servant or sweeper of the shrine. Sometimes a large *durgah* is headed by a *Sajjadanashin*. According to Fyzee, the office of a *mujawar* as an integral part of the *durgah* is not known to Muslim Law. The famous *durgah* of Khwaja Chishti at Ajmer is

52. (2001) 1 KLT 475.
53. *Syed Labbai* v. *Mohd. Hanifa*, (1976) 4 SCC 780: AIR 1976 SC 1569.
54. *Shafuddin* v. *Chaturbhuj*, (1958) Raj LW 461. *See also*, Mulla, at pp. 246-48; Paras Diwan, at pp. 242-45.
55. (1999) 3 SCC 145: AIR 1999 SC 1136.
56. *Futtoo Bibee* v. *Bhurrai Lal*, (1868) 10 WR 299.

governed by separate law (the Durgah Khwaja Saheb Acts, 1955-64) and the *Wakf* Acts, 1955-64 do not apply to it.[57]

Takia.—Literally it means a resting place. Its connotations include—a burial ground, a platform for prayers in a *qabristan* an abode of a *Fakir* in the *qabristan.* A *fakir's* abode, a *takia* becomes a *khanqah* when a large number of his disciples reside there and a *khanqah* becomes a *durgah* when he is buried there. *Takia* is recognised by law as a religious institution and endowment to it is a valid *wakf*, or a public trust for a religious purpose.

Khankah or Khanqah.—It is a place where religious instructions are imparted, a Muslim monastery where *darvesh* and other seekers after truth congregate for spiritual lessons. By long usage it becomes a *wakf.* The Multan shrine of Mia Pak Daman is an example. The head of the *Khanqah* is known as the *Sajjadanashin.* He is a manager of the *durgah.* By practice, it is a hereditary office. He is entitled to a share in the offerings made at the *durgah.*

Imambara.—It is a Shia religious institution where an apartment is set aside to perform certain ceremonies in Muharram. It is essentially a private *wakf*, but by long usage, may also be established as a public *wakf.*

B. INVALID OBJECTS

(*i*) Objects prohibited by Islam, for example, constructing or maintaining a church or a temple.

(*ii*) A *wakf* in favour of utter strangers, though there was an immediate and substantial gift to charity.

(*iii*) A provision for the repair of the *wakif's* secular property is invalid according to the Shiite law.

(*iv*) Feeding Kutchi Memons every year on the anniversary of the settlor's death.

13. *Wakf* with uncertain objects

The objects of *wakf* are not always indicated with reasonable certainty. There is a conflict of opinion as to the validity of such *wakfs.* Following *Morice* v. *Bishop of Durham*[58], the Privy Council in *Runchordas* v. *Parvatibai*[59], held that an endowment with uncertain object was invalid. Mulla and Wilson also hold the same view.

Ameer Ali and Tyabji, on the other hand, contend that the principle of *Morice* v. *Bishop of Durham,*[58] was not applicable to *wakf.*

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57. *See*, Paras Diwan, at p. 247.
58. (1805) 10 Vessy 522.
59. (1899) 26 IA 7.

"In these circumstances9", observes Fyzee, "a conflict of decisions was inevitable and some curious results of juristic interpretation may be found in the Indian Law Reports".[60]

He further adds that despite the conflict of opinion on the subject, the latest tendency appears to be to agree with the views of Ameer Ali and Tyabji and to hold that—once it is clear that there is *bona fide* intention of the *wakif* to create *wakf*, a good *wakf* is created.

According to Madras High Court "when a *wakf* deed, trust deed or a will is interpreted by a court of law the expressions or the words used in such documents should be understood as if the author of such documents expresses his intention or speaks from his grave. As far as possible only in extraordinary and exceptional cases should there be any deviation from his intention, and that too after taking great care and caution."[61]

To say that *wakfs* are void for uncertainty, is to make a classical statement. There are many exceptions to the rule. Reasonable certainty is expected, but it is not necessary that the objects must be named or the sum to be spent on each of the specified objects must be named. Some of the examples of *wakfs* held void or valid on account of the test of certainty as given by Mulla are as follows: A bequest by a Khoja Mohammadan for *dharam, khairat, vaghaira* 'etc.'; for such charitable objects as the trustees should think proper; for charitable purposes highly commendable according to Hanafi Law—all were held void for uncertainty. On the other hand, *wakf* for *fatiha* and *amr-i-khair* and maintenance of poor relations and dependants, for *mazhabi* and *khairati kam* even without specification of objects; for ultimate gift to proper acts of charity; for occasions of rejoicings and mournings (construed to mean provision of a building for the accommodation for marriage and funeral parties); a bequest by a Khoja of a fund 'to be disposed of in charity as my executor shall think fit'—all were held to be valid.[62]

A valid *wakf* may thus be constituted:

(*i*) Where the objects are not specified at all, or

(*ii*) Where the objects fail as impracticable, and

(*iii*) Where the objects are partly valid and partly invalid.

In cases (*i*) and (*ii*), *Cy pres* doctrine will be applied, and in case (*iii*), the valid objects may be accepted by the court and the others rejected.[63] The portion of the property relating to invalid objects will revert back to the *wakif*. Mulla and

60. Fyzee, at p. 297.

61. *M.M.S. Abdul Wahab* v. *A.P. Abdul Hamid*, 1999 AIHC 4037.

62. Mulla, at pp. 196-98.

63. Fyzee, at p. 298.

Wilson are, however, of the view that a *wakf* would be void unless its objects are indicated with reasonable certainty.

Cy pres doctrine.—If the specified objects of a *wakf* fail, the *wakf* will not be allowed to fail, but the income will be applied for the benefit of the poor or to objects as near as possible, to the objects which failed.[64] It must, however, be remembered that a *wakf* that is void for uncertainty cannot be validated by the application of this doctrine.[65]

Mere vagueness or uncertainty will not lead to the failure of a *wakf*, for under such circumstances, the law itself would cure the defect by supplying the objects of dedication. In case the object is not specified at all, the *wakf* will be for the support of the poor. When the *wakf* is for a religious or charitable institution which in course of time ceases to exist, the *wakf* property will not revert to the *wakif* or his descendants, but would be applied to some other similar religious institution or to any other object by which human beings may be benefited. The main care that has to be taken in those cases is that the *wakf* income should be applied to objects as similar in character as the objects named by the *wakif*.[66]

Moreover, the discretion given to the courts to apply the *Cy pres* doctrine does not mean that where the donor's intentions can be given effect to, the court may exercise the power of applying the *wakf* property or its income to other purposes, simply because it considered them to be more expedient or more beneficial than that the settlor had directed.[67]

Under Shia Law, this doctrine is extended a little further. It authorises the utilisation of *wakf* income for "good purposes generally", preferring an object as near as possible to the original object.

Wakf with uncertain object initially may later on be regularised by the *wakif*, and it will not be void because of uncertainty. In *Garib Das* v. *M.A. Hamid*[68], the facts before the Supreme Court were that the *wakif* created a *wakf* for the "*mosque* and *madrasa* (school) at Mohalla Nathnagar". There were two mosques in the Mohalla, so initially it was not certain which mosque had to take the benefit. Later on, the *wakif* executed a document in which he specified the mosque that had to take the benefit. The Supreme Court observed:

> "As the donor was the best person to know which *mosque* and *madrasa* he had in mind and he had identified the same... We see no reason to take a

64. Mulla, at p. 198.
65. Vide *Punjab Sindh Bank* v. *Anjuman Himayat Islam*, (1935) 158 IC 937.
66. Saksena, at p. 556.
67. Mukherjea, J. in *Rati Lal* v. *State of Bombay*, AIR 1954 SC 388.
68. AIR 1970 SC 1036.

view different from the High Court (which has validated the *wakf*) or hold the deed void for uncertainty."

14. Contingent or conditional *wakfs*

When the creation and validity of a *wakf* are subjected to a contingency, it becomes void. For example, if the *wakf* is made contingent on the death of a person without leaving children, it will be void. Similarly, if a Muhammadan lady creates a *wakf* for herself and her children, and provides that the children should take possession of property on attaining majority; and in the event of her death without leaving children, the *wakf* income should be devoted to certain religious usages, it was held that the *wakf* was void, as it depends upon a contingency, namely, the event of her death without leaving children.[69]

The *wakf* should also not be conditional. Thus, if a condition is imposed that when the property dedicated is mismanaged, it should be divided among the heirs of the *wakif*, or that the *wakif* has a right to revoke the *wakf* in future, such *wakfs* would be invalid. But a direction to pay debts, or to pay for improving, repairing and or expanding the *wakf* property, or conditions relating to the appointment of *mutawalli*, etc. would not invalidate the *wakf*.

In case of a conditional *wakf*, it entirely depends on the *wakif* to revoke the condition, if it is illegal, and to make the *wakf* valid, otherwise it would remain invalid.

15. Essentials of a valid *wakf*

From whatever has been discussed so far, the essentials of a valid *wakf* may be briefly summarised as follows:

(*i*) There must be a clear intention on the part of *wakif* to create the *wakf*.

(*ii*) *Wakif* must declare his intention, either orally or in writing.

(*iii*) *Wakif* must be the owner of the property to be dedicated as *wakf*.

(*iv*) The *wakf* must be perpetual; although, no express mention of perpetuity of *wakf* is essential and it is presumed, nevertheless if *wakfnama* says that the *wakf* is for, say, 50 years, it is invalid.

(*v*) The objects of *wakf* should not be in conflict with the Islamic principles.

(*vi*) The *wakif* must be of sound mind and major, and a Muslim. However, *wakfs* by non-Muslims are recognised under certain conditions.

(*vii*) *Wakf* must not be contingent or conditional.

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69. Mulla, at p. 208.

16. Administration of *wakfs*

When a *wakf* is validly constituted, there arises the question of its management and administration for which a *mutawalli* is generally appointed by the *wakif* or the Court. And in order to have a check and supervision on these *mutawallis*, there exist certain statutes. Thus, the administration of *wakfs* may be non-statutory (that is, through *mutawallis*, *sajjadanashins*, (etc.) and statutory.

A. NON-STATUTORY ADMINISTRATION

Mutawalli.—*Wakf* property does not vest in the *mutawalli* but in God. He is only a manager or superintendent of the property.

'*Mutawalli* of a *wakf* is merely a manager of the *wakf* property. He neither has any proprietary right nor any beneficial interest of any kind in the property, being nothing more than a servant of the founder of the *wakf*'. Held by Allahabad High Court in *Adab Ali* v. *Distt. Judge*.[70]

(*i*) **Competence.**—Anyone, of any faith, female or male, who is competent to administer property may become *mutawalli*. But where religious duties are involved, a person of another religion or a woman may be disqualified. Nevertheless, a woman may be allowed to hold this office provided her duties could be separated from the religious duties and the latter could be performed by a substitute. But, for example, where the duties of *mutawalli* include *imamat* (leading the prayers), a woman is wholly disqualified from this office.

It is well settled that the following may act as *mutawalli*:

(*a*) *Wakif* himself and his descendants.

(*b*) Females.

(*c*) Non-Muslims.

(*d*) Sunni in a Shia *wakf* and vice versa.

(*ii*) **Appointment of mutawalli.**—A *mutawalli* may be appointed by:

(*a*) the *wakif* himself;

(*b*) his executor;

(*c*) the *mutawalli*; and

(*d*) the court.

(*a*) *By the wakif himself.*—It was held in *Advocate General* v. *Fatima Begam*[71], that the *wakif* has a right to reserve superintendence of *wakf* to himself, and to appoint a *mutawalli* during his lifetime, whenever he likes.

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70. (2008) 70 All LR 75.

71. 9 Bom HCR 19.

Generally, in cases of private *wakfs*, the *wakif* has absolute rights to appoint a *mutawalli*, but in case of public charitable or religious *wakfs*, this power may be subject to the approval of Court. That is, in some cases, the Court may appoint a *mutawalli* over and above the *wakif*, provided it is in the interest of *wakf*.

(*b*) *By his executor.*—The power of appointing the *mutawalli* primarily rests with the *wakif*, and in his absence, it rests with his executor.

(*c*) *By the mutawalli.*—A *mutawalli* can appoint his successor under very restricted conditions, which are as follows:

Wakif and his executor are both dead;

Wakf deed is silent on the point of succession of *mutawalliship*;

There is no positive custom regarding such devolution;

The *mutawalli* is on the deathbed, or incapacitated from discharging his duties.

Note: Under the principles of Muhammadan Law, a *mutawalli* on the deathbed illness can appoint a *mutawalli* only for the "time being" [meaning thereby the Board constituted under an Act (here the U.P. Muslim *Wakfs* Act, 1960) has a right to appoint a *mutawalli* permanently]. When on deathbed illness a *mutawalli* cannot appoint his successor as *mutawalli* permanently, then how can he appoint a permanent *mutawalli* while in state of sound health? *Mutawalli* under Muhammadan Law is like a Manager or Superintendent and such person is not possessed with any power to appoint another person as his successor. As the office of *mutawalli* is not transferrable as mentioned by all the Jurists on Muhammadan Law, a contrary view will lead to absurdity. Moreover, there is a rationale for a *mutawalli* on deathbed to appoint a successor, namely, the superintendence or the management of the *wakf* may not suffer, the corpus of the *wakf* may not be alienated and destroyed by illness and that may be saved. As perpetuity is the primary rule of *wakf*, this provision assumes importance[72]; or

The *wakf* deed authorises him to this effect.

(*d*) *By the court.*—It was held by the various High Courts that when a vacancy occurs and there is none to take the office, or when the *mutawalliship* devolves upon a minor, the court has the power to appoint a *mutawalli*.

(*iii*) **Mutawalliship whether hereditary.**—The office of *mutawalli* is not hereditary. If, however, there is a custom to the contrary, hereditary succession would be allowed, but the custom has to be proved strictly. Moreover, a *mutawalli* could neither sell nor transfer his office.

(*iv*) **Removal of mutawalli.**—(*a*) *By the court*—Neglect of duties and breach. The authority of a court of law in matters of removal is first and final.

72. *Syed Ali Asahar* v. *Shia Central Board of Wakfs*, 1996 AIHC 3166.

The court can remove even the *wakif* himself if he happens to be the *mutawalli* and guilty of some offence.

(*b*) *By the Wakf Board.*—Please *see* statutory administration of *wakfs infra, Section B.*

(*c*) *By the Wakif.*—Abu Yusuf says that even if the *wakif* has not reserved a right to remove the *mutawalli* in the *wakf* deed he can, nevertheless, remove him. Imam Muhammad, however, says that unless there is such a reservation, the *wakif* cannot do so. This latter view has been adopted in the *Fatawa-i-Alamgiri* and is approved generally in India.

(*v*) **Limitations of power of mutawalli.**—A *mutawalli* can do everything that is *reasonable* and *necessary* for the protection and administration of the *wakf.* He has the power of management and administration of *wakf* properties. 'The administration of *wakf* predominantly vests with the *mutawalli*, appointed through succession or otherwise. No committee can be appointed (for administration) as long as the *mutawalli* functions for a *wakf.* The appointment of a committee arises only when the *wakf* does not have a *mutawalli* — Andhra Pradesh HC in *Mohd. Saleem Ur Rahman* v. *A.P. State Wakf Board, Hyderabad*[73]. He can sue for possession of the *wakf* properties where so required. He can spend the properties or utilise them towards the achievement of the objects of the *wakf.* He can manage and supervise the *wakf* properties. He can grant lease, subject to the conditions already mentioned above. His power of filing a suit has been taken over now by the *Wakf* Board under the *Wakf* Act, 1954. But his powers are subject to certain important limitations, which are as follows:

—he cannot sell, mortgage or alienate *wakf* property, without the permission of the Court or the *Wakf* Board;

—he cannot transfer his duties, functions and powers to anybody else and make him the trustee, unless authorised by the *wakf* deed, or any positive custom;

Note: Mulla in *Principles of Mohammedan Law*, 19th Edn. p. 195, says: "A *mutawalli* has no power to transfer the office to another, unless such power is expressly conferred upon him by the founder. But he may appoint a deputy to assist him in management of the endowed property". Thus, as per the law, there cannot be any transfer of *mutawallishiip.*[74]

—he cannot borrow money for spending it on beneficiaries, but can do so only for necessities, such as repairs, etc.;

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73. (2007) 4 An LD 527.

74. *Badagara JPD Commtt.* v. *Ummerkutty Haji*, (2001) 4 CCC 264 (Ker); *Mustamand Ali Khan* v. *Surjit Bhatia*, 153 (2008) DLT 24 Del HC.

—he cannot grant a lease of *wakf* property for more than a year, in case of non-agricultural land, and for more than three years, in case of agricultural lands, unless the Court gives sanction;

—he cannot spend on mere improvements of *wakf* properties.

B. STATUTORY SUPERVISION

Prior to enactment of *Wakf* Act, 1995, the following enactments dealt with the administration and supervision of *wakfs*:

(*i*) *Wakf* Act, 1954;

(*ii*) U.P. *Wakf* Act, 1950;

(*iii*) Bengal *Wakf* Act, 1934;

(*iv*) Bihar *Wakf* Act, 1947;

(*v*) Bombay Public Trusts Act, 1950;

(*vi*) Durgah Khwaja Saheb Act, 1955; and

(*vii*) Section 92 of the Code of Civil Procedure.

The *Wakf* Act, 1954, was in force in all States except Bihar, West Bengal and U.P. which had their own corresponding enactments. The Bombay Public Trusts Act, 1950, which applies equally to endowments of every community is in force in Maharashtra (excluding its Marathwada area) and Gujarat (excluding its Kutch area). Section 112 of the *Wakf* Act of 1995 has repealed not only the *Wakf* Act 1954 but also the State enactments having law corresponding to the 1995 Act. The Durgah Khwaja Saheb Act, 1955 provides for supervision and administration of the endowments of the Durgah of Ajmer.

The *Wakf* Act, 1995 provides[75] for the establishment of a Board of *Wakfs* for each State. The Board for a State and the Union Territory of Delhi consists mostly of non-official members, some of whom are elected by certain electoral colleges. Other members of the Board are nominated by the State Government. An officer of the State Government not below the rank of Deputy Secretary is also included in the Board. In the case of the Union Territory other than Delhi the Board consists of appointees of the Central Government. The members of the Board elect the Chairperson.

The members of the Board are appointed by the State Government keeping in view the expectations of various sections amongst the classes eligible for appointment and the courts do not consider a judicial scrutiny as permissible or desirable.[76] The Act contemplates representation to any one or more of following categories : (*a*) MLAs and MPs, (*b*) Persons having knowledge of Muslim Law and representing State Jamait and Shia conference (*c*) Persons having knowledge

75. *See*, S. 14.

76. *Yusuf Qureshi* v. *Moulana Mohd. Jamaluddin*, AIR 1996 AP 187.

of administration, finance or law, and (*d*) *Mutawallis* of *wakfs* situate in the State.

The petitioner in *Syed Shah Mohammed Al Hussaini* v. *Union of India*[77] contended that this "scheme of the Act makes the purpose of *wakf* irreligious in the name of secularism, jeopardises and destroys the religiosity of the *wakf* and administration of the *wakf* properties, and the Act violates Articles 25 and 26 of the Constitution". The Karnataka High Court rejected these allegations stating that the Act only provides for the better administration of the *wakf* and connected or incidental matters and does not either restrict or control the *wakf* or its properties.

According to the scheme of the new Act, *Wakf* Boards for the States and for the Union Territory of Delhi shall have not less than 7 and not more than 13 members of which the majority is to comprise Muslim MPs, Muslim MLAs, Muslim lawyers and *mutawallis* of *wakfs*. Nominated members are to be taken from Muslim organisations, Muslim theologists and State Government representatives. To guard Shia interests, one of the members has to be a Shia Muslim where Shia *wakf* is in existence.

The petitioner contended that "since these members are to be elected by the whole section of the society including non-Muslims, such an elected person cannot really represent the interests of the Muslims or protect the community or preaching of Islam". The High Court rejected this argument saying that "the elected members have been sought to be included in the Board upon consideration of their obligation and responsibility to the people in general and Muslims in particular, they are suited to 'provide better administration of *wakfs*".

The State Government has power to fill vacancy caused by death of an elected member of State *Wakf* Board by making nomination, on the condition that the Government must be satisfied for reasons to be recorded in writing that it is not practicable to constitute appropriate electoral college to elect new member. Further, such nomination is subject to the limitation that such nomination should not result in exceeding the strength of the nominated members over that of the elected ones. Disregard of any of these conditions will render the nomination invalid.[78]

Delegation of powers by the Board.—the Board may by orders in writing, delegate to the Chairperson or member or Secretary or any officer or servant of the Board or any area committee, subject to limitations specified in that order, such of its powers and duties under the Act as may be deemed necessary. But this power of delegation under Section 27 does not contemplate total delegation of powers of the Board to other persons to sit by itself quiet and watch the fun of

77. AIR 1999 Kant 112.

78. *Khasim Sab Bapu Sab Sirguppi* v. *State of Karnataka*, (2003) 6 Kant LJ 382.

the consequences. Vague, too ambiguous and too general delegation is beyond the meaning of delegation of power of a statutory authority. The Board is a statutory authority, it cannot totally disassociate itself from the management of the Committee.[79]

The Boards are bodies corporate having perpetual succession and a common seal with power to acquire, hold and transfer property and can sue and be sued.[80] The general superintendence of all *wakfs* in the State vests in the Board.[81] The Board can appoint and remove *mutawallis* in accordance with the provisions of the Act.[82]

There is no prohibition for a woman as *mutawalli* of the *wakf*. Quoting from A.A.A. Fyzee (*Outlines of Mohammedan Law* (3rd Edn., 1964) at p. 304), Mulla (*Principles of Mohammedan Law*, (18th Edn. 1977) at p. 228), Tyabji, (*Muslim Law*, 4th Edn., p. 580), K.P. Saksena (*Muslim Law*, 1963), the Madras High Court held that a woman can be appointed a *mutawalli*, except where the duties are such as cannot be performed by a female, which are: *Sajjadanashin*, *Mujawar*, *Imam* or *Khatib*; so do the above authorities state.[83]

At the same time it must be remembered that under normal circumstances a *mutawalli* is named and appointed by the *wakif* in the *wakf* deed itself. It is only when there is a vacancy and there is no one to be appointed under the terms of the *wakf* deed, and where there is any dispute regarding any person's right to act as a *mutawalli*, that the Act empowers the Board to appoint one, and that too "temporarily". The appointment shall be made for those period and on those conditions as the Board may think fit; this is indicative of the fact that it is not a regular appointment that is contemplated by Section 42 of the *Wakf* Act. If there is a successor named in the *wakf* deed, the Act nowhere provides for appointing a *mutawalli* by the Board.[84]

The *Wakf* Act, 1995 places numerous checks on *mutawallis*. For example, the Act makes it obligatory on *mutawallis* to let the *wakf* property and its accounts be audited by auditors appointed by the Board and at the discretion of the State Government, also by the State Examiner of Local Funds or any other officer designated for that purpose by the State Government,[85] to furnish reports, returns and other documents to the Board[86], to obey the directions given by the

79. *M.A. Aziz* v. *A.P. State Wakf Board*, AIR 1998 AP 61.
80. *See*, S. 13(3).
81. *See*, S. 32.
82. *See*, S. 57(2)(*g*).
83. *Mohd. Sheik* v. *Mohd. F. Yousuff*, (2000) 4 CLT 485.
84. *Mohd. Sulaiman* v. *A.P. Wakf Board*, AIR 1997 AP 387.
85. *See*, Ss. 46 and 47.
86. *See*, Ss. 32(2)(*l*) & (*m*) and 50(*b*) & (*c*).

Board[87] and to prepare and submit annual budget to the Board and the Board can given such directions for making alterations, omissions or additions in the budget as it deems fit consistent with the objects of the *wakf* and the provisions of the Act.[88] As defined under Section 3 of the Act the *mutawalli* is merely a manager of the *wakf*. There is nothing in the Act which empowers a *mutawalli* to institute and defend a suit and proceedings in a court of law relating to *wakf* on his own. The power is vested in the Board, which is a corporate body which must sue and be sued in its own name.[89]

Where the property is *wakf* property and since the management of property by mutawalli is not heritable, the decision of the *Wakf* Board to remove the management and to bring the property under the direct control of the Board is quite consistent with the provisions of the Act.[90]

Mutawallis are barred from compromising any suit or proceeding in any court relating to title to wakf property without the sanction of the Board.[91] Under Section 61, the *mutawalli* may be penalised for failure to do the acts specified therein. Under Section 64 the *mutawalli* can be removed from his office. The said provisions read as follows:

"61. *Penalties.*—(1) If a *mutawalli* fails to—

(*a*) apply for the registration of a *wakf*;

(*b*) furnish statements of particulars or accounts or returns as required under this Act;

(*c*) supply information or particulars as required by the Board;

(*d*) allow inspection of *wakf* properties, accounts, records or deeds and documents relating thereto;

(*e*) deliver possession of any *wakf* property, if ordered by the Board or Tribunal;

(*f*) carry out the directions of the Board;

(*g*) discharge any public dues; or

(*h*) do any other act which he is lawfully required to do by or under this Act,

he shall, unless he satisfies the court or the Tribunal that there was reasonable cause for his failure, be punishable with fine which may extend to eight thousand rupees.

(2) Notwithstanding anything contained in sub-section (1), if—

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87. *See*, Ss. 32(2)(*c*) and 50(*a*).

88. *See*, Ss. 44(1) & (3).

89. *Sheokumari Devi* v. *Jamia Ashharfia College, New Bhojpur*, (1998) 3 BLJR 1772 Pat HC.

90. *Sk. Habiuddin* v. *Orissa Board of Wakf*, 1998 AIHC 4833.

91. *See*, S. 93.

(*a*) a *mutawalli* omits or fails, with a view to concealing the existence of a *wakf*, to apply for its registration under this Act,—

(*i*) in the case of a *wakf* created before the commencement of this Act, in the period specified therefor in sub-section (8) of Section 36;

(*ii*) in the case of any *wakf* created after such commencement, in three months from the date of the creation of the *wakf*; or

(*b*) a *mutawalli* furnishes any statement, return or information to the Board, which he knows or has reason to believe to be false, misleading, untrue or incorrect in any material particular,

he shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to fifteen thousand rupees.

(3) No court shall take cognisance of an offence punishable under this Act save upon complaint made by the Board or an officer duly authorised by the Board in this behalf.

(4) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the fine imposed under sub-section (1), when realised, shall be credited to the *Wakf* Fund.

(6) In every case where offender is convicted after the commencement of this Act, of an offence punishable under sub-section (1) and sentenced to a fine, the court shall also impose such term of imprisonment in default of payment of fine as is authorised by law for such default.

64. *Removal of Mutawalli.*—(1) Notwithstanding anything contained in any other law or the deed of *wakf*, the Board may remove a *mutawalli* from his office if such *mutawalli*—

(*a*) has been convicted more than once of an offence punishable under Section 61; or

(*b*) has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude, and such conviction has not been reversed and he has not been granted full pardon with respect to such offence; or

(*c*) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a *mutawalli*; or

(*d*) is an undischarged insolvent; or

(*e*) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or

(*f*) is employed as a paid legal practitioner on behalf of, or against, the *wakf*; or

(*g*) has failed, without reasonable excuse, to maintain regular accounts for two consecutive years or has failed to submit, in two consecutive years, the yearly statement of accounts, as required by sub-section (2) of Section 46; or

(*h*) is interested, directly or indirectly, in a subsisting lease in respect of any *wakf* property, or in any contract made with, or any work being done for, the *wakf* or is in arrears in respect of any sum due by him to such *wakf*; or

(*i*) continuously neglects his duties or commits any misfeasance, malfeasance, misapplication of funds or breach of trust in relation to the *wakf* or in respect of any money or other *wakf* property; or

(*j*) wilfully and persistently disobeys the lawful orders made by the Central Government, State Government, Board under any provision of this Act or rule or order made thereunder;

(*k*) misappropriates or fradulently deals with the property of the *wakf*.

(2) The removal of a person from the office of the *mutawalli* shall not affect his personal rights, if any, in respect of the *wakf* property either as a beneficiary or in any other capacity or his right, if any, as a *Sajjadanashin*.

(3) No action shall be taken by the Board under sub-section (1), unless it has held an inquiry into the matter in a prescribed manner and the decision has been taken by a majority of not less than two-thirds of the members of the Board.[92]

(4) A *mutawalli* who is aggrieved by an order passed under any of the clauses (*c*) to (*i*) of sub-section (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final.

(5) Where any inquiry under sub-section (3) is proposed, or commenced, against any *mutawalli*, the Board may, if it is of opinion that it is necessary so to do in the interest of the *wakf*, by an order suspend such *mutawalli* until the conclusion of the inquiry:

Provided that no suspension for a period exceeding ten days shall be made except after giving the *mutawalli* a reasonable opportunity of being heard against the proposed action.

(6) Where any appeal is filed by the mutawalli to the Tribunal under sub-section (4), the Board may make an application to the Tribunal for the appointment of a receiver to manage the *wakf* pending the decision of the appeal, and where such an application is made, the Tribunal shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), appoint a suitable person as receiver to manage the *wakf* and direct the receiver so

92. *Mohd. Minhajuddin* v. *State of Maharashtra*, (2006) 2 Bom CR 172.

appointed to ensure that the customary or religious rights of the *mutawalli* and of the *wakf* are safeguarded.

(7) Where a *mutawalli* has been removed from his office under sub-section (1), the Board may, by order, direct the *mutawalli* to deliver possession of the *wakf* property to the Board or any officer duly authorised in this behalf or to any person or committee appointed to act as the *mutawalli* of the *wakf* property.

(8) A *mutawalli* of a *wakf* removed from his office under this section shall not be eligible for reappointment as a *mutawalli* of that *wakf* for a period of five years from the date of such removal."

Board's Power of Direct Management

Section 65 of the *Wakf* Act, 1995 stipulates that where no suitable person is available for appointment as Mutawalli, or where the Board is satisfied that filling the vacancy will be prejudicial to the interests of the *Wakf*, the Board may assume direct management of the *Wakf* for a maximum period of 5 years. The Board must record the reasons in the order for its decision. Such recording of precise reasons is a must and failure constitutes violation of the requirements of the section. In that case the Board's order will be set aside.[93]

Section 18 of the Act empowers the Board to establish a Committee to supervise a *wakf*. It may be for general or particular purpose, and for the specified area. The constitution, function and duties of the committee is to be determined by the Board. Section 27 empowers the Board to delegate powers to such committee as the Board may deem necessary. Section 67 empowers the Board to supersede the committee on ground that it is not functioning satisfactorily, or mismanaging, or otherwise necessary so to do. The Board has to record the reasons. The committee may appeal to the Tribunal against the order. On such valid supersession the Board will constitute another committee simultaneously. In the absence of recorded reasons in the order, the supersession will not be valid, and therefore constitution of a new committee will also be ineffective.[94] Where such a committee appointed by the Board has, due to internal fight between its members ceased to serve the interests of the *wakf* frustrating the very purpose of its appointment, the Board can dissolve it even before the expiry of its term of 5 years.[95]

It is not Government but only *Wakf* Board which has jurisdiction to accord necessary permission for purpose of alienation of *Wakf* property. Central or State Government has only to issue directions on question of policy.[96]

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93. *Asthan-e-Khadri Trust, Bangalore* v. *Karnataka State Board of Wakfs*, (2001) 2 Kant LJ 509.
94. *Managing Committee, Masjid-e-Idgah, Mysore* v. *State of Karnataka*, (1997) 4 Kant LJ 599.
95. *Janab Shastri Khaja Hussain* v. *Karnataka Board of Wakfs*, (1997) 4 Kant LJ 393.
96. *Mohammedia Coop. Ltd.* v. *Lakshmi Srinivasa Ltd.*, (2007) 3 ALD 282 AP HC.

Wakf Tribunal

Section 83 of the *Wakf* Act, 1995 provides for the constitution of the *Wakf* Tribunal. It says that the State Government shall constitute as many tribunals as it may think fit for determination of any dispute relating to a *wakf* or its property within the defined local limits. A *mutawalli* or any person interested in the *wakf* may make an application to the Tribunal for determination of any dispute. This Tribunal is a one-man Tribunal with a District Sessions or Civil Judge Class I as its member. The Tribunal has been vested with the status of a deemed civil court with the powers of a civil court while trying a suit or executing a decree or order.[97] The Tribunal's decision shall be final and binding on the parties and no appeal shall lie against it, except the supervisory power of the High Court conferred by the Constitution.

The jurisdiction of the *Wakf* Tribunal is not restricted to determine the nature of the *wakf* property alone, it can determine whether the *wakf* property has been rightly leased or wrongly, or any other questions relating to *wakf* property.[98] All disputes relating to *wakf* property are to be decided by the Tribunal, civil court's jurisdiction is barred.[99] Contention of the petitioner that unless preliminary survey of *wakfs* is conducted, list of *wakfs* is published and *wakf* property registered it cannot be treated as *wakf* property is not tenable.[100]

The jurisdiction of the Tribunal is an original jurisdiction. It cannot be contended that the Tribunal is clothed with the jurisdiction only when an order is passed by the *Wakf* Board.[101]

However, the Act is not applicable to pending suits or proceedings or appeals or revisions which commenced prior to 1st January 1996 i.e. coming into force of the *Wakf* Act, 1995. The Act was made prospective and cannot operate retrospectively.[102]

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97. See *Mahboob Khan* v. *Md. Khaja*, (2005) 2 An LT 308 and *T.M. Muhammed Sahib* v. *Arakkal Mohammed Ibrahim*, (2007) 2 KLT 56.
98. *M. Bikshapathi* v. *Govt. of A.P.*, (2002) 2 An LT 530 AP HC.
99. Jurisdiction of Tribunal is not limited to determining nature of *Wakf* property alone, Tribunal can determine whether *wakf* property has been rightly or wrongly leased or any questions relating to *wakf property-M*º *Bikshapathi* v. *Govt. of A.P.*, (2005) 2 ALT 271 AP HC. Any person aggrieved by the order of the Board can approach only the Tribunal – jurisdiction of the civil court is ousted in such matters—*Hisamuddin Papa Saheb (Dr.)* v. *E. Niyamathulla*, (2007) 2 MLJ 1069.
100. *Jai Bharat Coop. Housing Society* v. *A.P. State Wakf Board*, (2000) 5 ALT 389 AP.
101. *Aliyathammada Beethathebiyyapura Pookoya Haji* v. *Pattakal Cheriyakuya*, AIR 1999 Ker 289.
102. *Sardar Khan* v. *Syed Najmul Hasan*, (2007) 2 CLT 259 (SC).

17. Application of the income of *wakf*

The income of the *wakf* must be applied for the following purposes in the order they are mentioned below[103]:

(*i*) for the preservation and protection of *wakf* property;

(*ii*) for carrying out the objects of the *wakf* as laid down by the *wakif*;

(*iii*) for doing what is essential for the general purposes of the specified objects; and

(*iv*) (where it is not possible to apply the income for the purposes specified by the *wakif*) for objects as near as possible to those intended by the *wakif*.

18. Remuneration to *Imams*

All India Imam Organisation v. *Union of India*.[104] Facts: By the instant petition under Article 32 of the Constitution of India the *Imams* of the mosques sought direction to the Central and State *Wakf* Boards to treat them as employees and to pay them basic wages. The *Wakf* Boards disputed the manner of their appointments, the right to receive payment and asserted absence of master and servant relationship.

The Delhi *Wakf* Board pointed out that mosques can be categorised in five categories: (1) Mosques which are under direct control or management of the Government such as the Mecca Masjid or mosques situated in public gardens which are not governed or regulated by the Muslim *Wakf* Boards. (2) Mosques which are under direct management of the *Wakf* Boards. (3) Mosques which are under control of *Mutawallis* under various *wakfs* according to the wishes of the *Wakif* as the creator of the *Wakf*. (4) Mosques not registered with *Wakf* Board and managed by local inhabitants. (5) Mosques which are not managed by *mutawallis* or the Muslims of the locality. It was claimed that the Imams of the fourth and fifth categories were not regular features and any Muslim could lead the prayers, whereas the third category mosques were having regular *Imams*.

Some *Wakf* Boards contended that the *Imams* or *Muazzins* were appointed by *Mutawallis*, and the *Wakf* Boards had nothing to do either with their appointment or working and that under Islamic religious practice they were not entitled to any emoluments as a matter of right, as the Islamic Law ordained the *Imams* to offer voluntary service. According to the Karnataka *Wakf* Board Immamat in mosques was not considered to be an employment. Some *Wakf* Boards raised the plea of financial difficulty as well. The petition was opposed by the Union of India also. It stated that the Islam did not recognise the concept of priesthood. The Supreme Court rejected the contention of the respondents.

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103. Verma, at p. 500.

104. (1993) 3 SCC 584.

The Supreme Court held—In Muslim countries mosques are subsidised by the State, in non-Muslim countries by the individuals. They are administered by their founder or by special funds. In India the *Wakf* Act, 1954 was passed for better administration and supervision of *Wakfs*; even financial power vests in the Board. One of its primary duties is to ensure that the income from the *wakf* is spent on carrying out the purposes of the *wakf*. Mosques are *Wakfs* and are required to be registered under the Act over which the Board exercised control. According to the Board the *Imams* are appointed by the *mutawallis* and therefore any payment by the Board was out of question. Prima facie it is not correct as the letters of appointment issued in some States are from the Board. Right to life enshrined in Article 21 means right to live with human dignity. It is too late in the day to claim or urge that since Imams perform religious duties they are not entitled to any emoluments. Whatever may have been the ancient concept but it has undergone a change and even in Muslim countries mosques are subsidised and the Imams are paid their remuneration. The Court refused to accept the grounds of absence of statutory provision for emoluments, or financial difficulties or large number of mosques would entail heavy expenditure as sufficient to deny them the emoluments. If the Boards have been entrusted with the responsibility of supervising and administering the *Wakf* then it is their duty to harness resources to pay those persons who perform the most important duty, namely, leading community prayer in a Mosque, the very purpose for which it is created.

In the circumstances, the Court said the petition was allowed and following directions issued:

(*i*) The Union of India and the Central *Wakf* Board will prepare a scheme within a period of six months in respect of different types of Mosques some detail of which has been furnished in the counter-affidavit filed by the Delhi *Wakf* Board.

(*ii*) Mosques which are under control of the Government shall not be governed by this order. But if their Imams are not paid any remuneration and they have no independent income the Government may fix their emoluments on the basis as the Central *Wakf* Board may do for other mosques in pursuance of our order.

(*iii*) For other mosques, except those which are not registered with the Board of their respective States or which are not manned by members of Islamic faith the Scheme shall provide for payment of remuneration to such *Imams* taking guidance from the scale of pay prevalent in the State of Punjab and Haryana.

(*iv*) The State Boards shall ascertain income of each mosque and the number and nature of *Imams* required by it namely full time or part time.

(*v*) For the full time, Punjab *Wakf* Board may be treated as a guideline. That shall also furnish guideline for payment to part-time *Imam*.

(*vi*) In all those mosques where full-time *Imams* are working they shall be paid the remuneration determined in pursuance of this order.

(*vii*) Part-time and honorary Imam shall be paid such remuneration and allowance as is determined under the scheme.

(*viii*) The scheme shall also take into account those *Mosques* which are small or are in the rural area or are such as mentioned in the affidavit of Pondicherry Board and have no source of income and find out ways and means to raise their income.

(*ix*) The exercise should be completed and the scheme be enforced within six months.

(*x*) Our order for payment to Imams shall come into operation from 1st December 1993. In case the scheme is not prepared within the time allowed then it shall operate retrospectively from 1st December 1993.

(*xi*) The scheme framed by the Central *Wakf* Board shall be implemented by every State Board.

19. *Wakf* and Trust distinguished

The leading case on this point is *Vidya Varuthi* v. *Balusami Ayyar*[105], in which the Privy Council has laid down elaborate tests of distinguishing *wakf* from trusts. These distinctions, along with others, may be formulated in a tabular form as follows:[106]

Trust		*Wakf*	
1.	No particular motive is necessary.	1.	It is generally made with a pious, religious or charitable motive.
2.	The founder may himself be a beneficiary.	2.	The *wakif* cannot reserve any right to benefit for himself, except to some extent under Hanafi Law.
3.	It may be for any lawful object.	3.	The objects must be recognised by Muslim Law as pious, religious and charitable and in case of family settlement, the ultimate object must be some benefit to mankind.
4.	The property vests in the trustee.	4.	The property vests in God.

105. (1921) 48 IA 302.

106. The table borrowed from Verma, *Mohammadan Law* (3rd. Edn.) at pp 472-73.

	Trust		*Wakf*
5.	A trustee has got a larger power than a *mutawalli*.	5.	A *mutawalli* is only a manager or superintendent.
6.	It is not necessary that a trust may be perpetual, irrevocable or inalienable.	6.	A *wakf* is perpetual, irrevocable and inalienable.
7.	It is valid for any object which is not in contravention to law or morality.	7.	Apart from these requisites, it must be for objects recognised as valid by Muhammadan Law.
8.	It results for the benefit of the founder when it is incapable of execution and the property has not been exhausted.	8.	The *Cy pres* doctrine is applied and the property may be applied to some other objects.

20. Position of family *wakfs* in India.—Probably no other branch of Muslim Law has been the subject of so sustained a controversy as *wakf-alal-aulad*. For the last seventy-five years the Privy Council regards it as a concealed means for the "aggrandisement of a family"[107], while others criticise it on the grounds—

(*i*) that it prevents the alienation, economic exploitation and improvement of the *wakf* property,

(*ii*) that the descendants of the *wakif* are apt to multiply with the passage of time, with the result that after some generations, the income would have to be distributed in ever diminishing shares among scores of beneficiaries, and[108]

(*iii*) that charitable aid often keeps people away from industry, and lethargy breeds degeneration.[109]

The protagonists of *wakf-alal-aulad*, on the other hand, contend that *wakf-alal-aulad*, helps many families to survive the vicissitudes of fortune, and its dissolution could have a serious impact upon real estates resulting into grave financial difficulties and complications.[110] Moreover, this is a sure way of saving property from wasting hands of squandering descendants. Furthermore, the concept of charity in Islam is wide enough to include the act of giving to one's own family. In India, Privy Council's doubts regarding the validity of such *wakfs* were statutorily removed with the passing of the Mussalman *Wakf* Validating

107. *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdry*, (1894-95) 22 IA 76.

108. *See*, Henry Cattan, "Law of Wakf", in *Law in the Middle East*, Vol. I, edited by Majid Khaduri and Liebensy at p. 217 (Washington D.C. 1955).

109. Fyzee, *Outlines of Muhammedan Law* at p. 277.

110. These are the observations of the Committee charged with considering the revision of the law of wakf, appointed by the Egyptian Parliament around 1946. *Supra*, n. 2, at 182; See also, Syed Sulaiman Nadvi, *Hayat-e-Shibli* at p. 536 (Azamgarh 1943).

Act, 1913, but elsewhere, the Council still refused to overrule its decision in *Abul Fata case*[111] "in spite of the fact that this has been recognised by all competent persons as wholly mistaken interpretation of the Islamic Law".[112] This prompted Hamilton, J., of Kenya to say:

> "A study of the question shows that while the Muhammadan Law, uninfluenced from outside sources, permitted perpetuities and the erection of *wakfs* for family aggrandisement solely, the influence of English Judges and of the Privy Council has gradually encroached on this position."[113]

Today, in India, family *wakfs* (*wakf-alal-aulad*) are faced with many problems. Neither is their number in the country known nor is there any effective administrative supervision over them. The callous indifference of beneficiaries and *mutawallis* towards the maintenance and improvement of such *wakfs* has thrown them into a pitiable condition. What really discourages Muslims to create family *wakfs* is the growing awareness of the disadvantages of tying up property in perpetuity where succeeding generations obtain smaller fractions of the income, part of which is often squandered in vexatious and frivolous litigation and duly 'absorbed' by unscrupulous lawyers.[114]

The adverse effects of the laws of estate duty, income tax and land reforms, etc., are crippling the institution of family *wakfs*. It is high time that Muslims of India make a choice between this fast decaying institution and something more useful. It may not be advisable to abolish altogether the institution which finds strong religious and public support and has successfully salvaged many families and properties from ruin, but its tenure and texture may be changed. A possible substitute may be a limited kind of family *wakf* created for a specified time, say, for a period of two generations, at the end of which it may be reconstituted provided the beneficiaries agree to do so.[115]

This view is taken after careful thinking, and is prompted by the following words of Sir Joseph Jekyll:

"The law does abhor what is called a perpetuity—the reason of which is the mischief that would arise to the public from estates remaining forever or for a long time inalienable or untransferable from one hand to another, being a damp to industry and a prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered."[116]

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111. *Abul Fata Mahomad Ishak* v. *Russomoy Dhur Chowdhary*, (1894-95) 22 IA 76.

112. J.N.D. Anderson, "Islamic Law in Africa: Problems of Today and Tomorrow", in *Changing Law in Developing Countries* (London 1963) at p. 177.

113. Hamilton, J. in *Talibu bin Mwijaka* v. *Executors of Siwa Haji*, (1907) 2 EALR 33.

114. Fyzee, at p. 278.

115. *See*, S.A. Majid, "Wakf as Family Settlement among the Muhammadans", IX *Journal of the Society of Comparative Legislation* at p. 138.

116. *Stanley* v. *Leigh*, (1732) All ER 917 at p. 918.

Daniel Latifi has also pleaded for rethinking on the subject in these words:

"Modern Muslim jurists tend to view that the 1913 Act was a psychic victory for the Muslims. Its social consequences were devastating. It blocked any initiative by the Muslim upper class in the direction of industry. It perpetuated a pathetic class of pensioners devoid of economic initiative...a drag on the community. Distressed by these evils modern jurists favour repeal of the Act of 1913 restoring thereby the law as it stood declared by the Privy Council in *Abul Fata case*. The said decision is the law of the Muslims in Kenya. It is submitted that in view of the recent amendments introduced into the law of family *wakfs* in Egypt, Syria, Tunisia and Lebanon, the Muslims should review their attitude and adopt a realistic approach.[117]

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117. "Law of family Wakf; Need for Reconsideration", *Islamic Law in Modern India* at pp. 229-30.

X

Gift

(Hiba)

1. Introduction

"The policy of the M[u]hammadan Law appears to be," observed the Privy Council, "to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it appears that a holder of property may, to a certain extent, defeat the policy of law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms."[1]

Thus, whereas Muslim Law allows testamentary disposition in the limit of one-third, a gift *inter vivos* (from one living person to another living person) may be made without any restriction; Muslim Law allows a man to give away the whole of his property during his lifetime.[2]

2. Definitions

ABDUR RAHIM: "A transfer of a determinate property (*mal*) without an exchange. Juristically it is treated as consisting of proposal or offer on part of the donor to give a thing and of acceptance of it by the donee. Until acceptance, the gift has no operation."[3]

MULLA: "Gift is a transfer of property, made immediately, and without any exchange, by one person to another, and accepted by or on behalf of the latter."[4]

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1. *Ranee Khujooroonissa* v. *Roushun Jehan*, (1876) 3 IA 291: (1876) 2 Cai 184 at 307.
2. Fyzee, at p. 217.
3. Abdur Rahim, at p. 297.
4. Mulla, at p. 150.

FYZEE: "*Hiba* is the immediate and unqualified transfer of the corpus of the property without any return."[5]

BAILLIE: "The conferring of a right in something specific without an exchange."

The concept of contract underscores the concept of *Hiba* also; it is a contract consisting of proposal or offer on the part of the donor to give a thing and the acceptance of the thing by the donee; the element of consideration only is absent; and that distinguishes it from sale. The law of gift being regarded as a part of the law of contract, following elements are prescribed for *Hiba* by the Muslim Law: *Ijab*—tender, *Qabul*—acceptance, and *Qabza*—(delivery of) possession.

3. Essentials of a valid gift

Writing and registration[6] are not necessary for the validity of a gift. It may be oral or in writing. In one case,[7] the validity of the oral gift has been upheld. It was observed that the Muslim Law "permits an oral gift, but to make a gift valid the following three essentials must co-exist:"

(*i*) a declaration of gift by the donor,

(*ii*) acceptance of the gift express or implied, by or on behalf of the donee, and

(*iii*) delivery of possession of the subject of the gift by the donor to the donee. Delivery of possession need not in all cases be actual. It should be delivery of such possession as the subject of the gift is susceptible."

However, this case has been distinguished by the same (Patna) High Court later in *Madhurani Singh* v. *Subhas Chandra Ghosh*.[8] In this case the case of the opposite party was not whether any oral *Hiba* was made in favour of the petitioner or not. In case of oral *Hiba* registration may not be required, but if there is a deed executed for giving any immovable property in gift to someone, then it can only be by registered document inasmuch as, an oral *Hiba* has to be followed by delivery of possession, which alone can constitute valid transfer under Muhammadan Law, and as such, *where the claim of gift is based on execution of a deed, then in the absence* of anything on record to show that it was followed by delivery of possession, the same cannot effect transfer of any immovable property. (In other words, if the only proof of the existence of *Hiba*, a gift of immovable property, is claimed to be a transfer deed executed (written

5. Fyzee, at p. 218.
6. When gift is created by a written instrument, and it relates to immovable property situate in a place where any of the Acts relating to registration is in force, registration of such gift deed is essential. But it is not so if the writing merely recites the fact of a *prior gift*. *See*, Fyzee, at pp. 219-20: Tyabji, at p. 350.
7. *Syed Mohd. Salim Hashmi* v. *Syed Abdul Fateh*, AIR 1972 Pat 279.
8. (1998) 1 BLJR 552.

document), then, unless that deed is registered, its entity is zero, and so, the *Hiba* again becomes unproved). Because, Section 49 of the Registration Act says that a document required by Section 17 of the Transfer of Property Act is ineffective unless it is registered. That is, an oral *Hiba* is alright if it can be proved independently, but if its existence is claimed on the basis of an executed deed (written document), then that deed has to be a registered deed if immovable property is involved). Because, said the Court, what the Section 129 of the TPA saves is an oral *Hiba*, and not a *Hibanama* (Deed) executed.[9]

In Muslim Law oral gift can validly be made.[10] A written gift deed *Hibanama* need not be executed. If the oral gift fulfils the requisite conditions (as discussed next just below), viz. declaration, acceptance and delivery, the gift is complete. This declaration can be in writing and can be produced to prove the factum of a completed gift. Such declaration need not be registered. The Kerala High Court in *M. Rawther* v. *Charayil*[11] held:

> "A deed of gift executed by a Muslim recording a gift made according to the three conditions laid down by Muslim Law is merely evidence of a completed gift and as such is not compulsorily registrable and is admissible in evidence notwithstanding Sections 17 and 49."

An example of such an oral gift and a written declaration can be found in *G. Mujeer Ahmed* v. *Mohd. Zafrulla*[12]: a declaration for having gifted a property by *A* to *B* on date reads as follows:

> "That on *date* the donor declared his intention to give a gift of scheduled property and made such declaration and ... there was acceptance by the donee on the same day and delivery of possession was also made on same date and consequently under Muslim Law the said gift was validated and completed on same date."

Therefore, it was held that the document (declaration) could be understood as a declaration of the gift and it is not a document requiring to be registered.

Thus, the three essentials of a gift are:

(*i*) *declaration* of the gift by the donor;

(*ii*) acceptance of the gift, expressly or impliedly, by or on behalf of the donee; and

(*iii*) delivery of possession of the subject-matter of the gift to the donee.

See, for example, the facts in *Abdur Rahman* v. *Athifa Begum*[13]. *A* made a deed only stating that she had transferred the scheduled property by way of

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9. *Madhurani Singh* v. *Subhas Chandra Ghosh*, (1998) 1 BLJR 552.
10. *G. Mujeer Ahmed* v. *Mohd. Zafrulla*, (2000) 5 Kant LJ 94.
11. AIR 1972 Ker 27.
12. (2000) 5 Kant LJ 94. *See*, further S. 4: Registration and S. 5: Constitutional Validity of Oral Gifts (*infra*).
13. AIR 1998 Kant 39.

settlement deed upon the beneficiary *B* to hold it forever, subject to the condition that *A* shall during her lifetime be entitled to the usufruct ('fruits' of the property, i.e. income, etc. from it), and also right to reside in it. *A* did not make over the possession of the property to *B*, not even symbolic, even the documents of the title were not given, and the deed did not also recite that the gift was accepted by the donee.

In these conditions the Karnataka High Court held the deed was not a valid gift.

'Oral gifts made by Muslims are as legal and enforceable as gifts through registered documents. If an earlier oral gift in proved is respect of its *factum*, it will certainly have precedence over a subsequent written gift, even if registered.' But the former must be proved, and if not, it is no gift at all. Thus, in *Shaik Avula Mastan* v. *Shaik Abid*, *A* claimed that certain agricultural land was gifted to him by *X* in 1967. *B*, on the other hand pleaded that the same piece of land was in fact gifted to him by *X* by a gift deed (i.e. a written gift document – *hibanama*) in 1979. *A* submitted no evidence to prove the fact of the oral gift having been made; *B*, on the other hand proved the gift by documentary evidence. Therefore *A*'s claim was rejected and *B*'s claim upheld.[14]

Where the settlement deed created only a life interest in favour of the defendant and the executant did not say that he divested himself of the ownership over the property, it was held the document was not a gift deed.[15]

If any of the above conditions is missing, the gift is not complete.

Here we must note that there is a distinction between a simple *Hiba* and *Hiba-bil-ewaz*. As observed by the Kerala High Court recently:

> "The consensus of the judicial opinion is that *Hiba-bil-ewaz* in India is not a gift but is a transaction in the nature of sale, and if it relates to immovable property of the value of Rs 100 or onwards it can only be by a registered instrument as provided under Section 54 of the Transfer of Property Act."[16]

(*i*) Declaration.—Declaration does not mean simply an announcement of the gift but it also entails that the donor should have a real intention of making the gift. Tyabji says: "Where there is no real and bona fide intention to transfer the ownership of the subject of gift, an alleged gift may be of no effect."[17] Gifts without intention may be *sham* gifts, colourable or *benami* transactions, etc. A gift made with intent to defraud the creditors of the donor is voidable at the

14. (2007) 1 ALD 793; A.P. HC.
15. *Chandma Bibi* v. *Sk. Mohd. Sahib*, 1997 Mad LJR 631 Mad HC.
16. *Imbichimoideenkutty* v. *Pathumunni Umma*, AIR 1989 Ker 148 at p. 151.
17. Tyabji, at p. 347.

option of the creditors. Such intention however cannot be inferred from the mere fact that the donor owed some debts at the time of the gift.[18]

(*ii*) **Acceptance.**—The donee must accept the gift. This acceptance may be express or implied (that is, by conduct). But the gift of a debt to a debtor or his heir is valid without acceptance and is not invalidated by his rejection. For example, *A* owes Rs 100 to *B*. *B* makes a gift of this debt of Rs 100 to *A*, which *A* does not accept and insists on paying the money to *B*. The gift shall, however, be valid and effective even on *A*'s refusal to accept it. Also, no acceptance is required when gift is to a son or ward by the father or guardian. [19]

The acceptance of the gift must be by a person competent to accept. Till the gift in favour of the minor is accepted by a person competent to accept the gift, it cannot become valid. Thus, where the father and grandparents executed gift deed in favour of minor children and one of the donees who was a minor at the time of the gift, accepted the gift on behalf of her younger brothers and sisters, it was held she was not competent to accept the gift on behalf of other minors, and the gift was invalid.[20]

(*iii*) **Delivery of possession.**—When the donor makes a declaration of a gift and the donee accepts, then the possession of the thing gifted should also be given to the donee. Such delivery of possession may be actual or constructive.

Normally, the question as to whether possession has been delivered to make the gift complete is considered relevant only when such an issue is raised between the donor on the one hand and those claiming under him on the other. Once the donee accepts the gift and was also specifically found to have been, even on the date of the gift deed, in possession of the property, it is not given to persons other than the donor, who was alive, to challenge the validity of the gift on the ground of want of delivery of possession.[21]

If there are more donees than one, possession by one co-sharer is presumed to be in the name and on behalf of other co-sharers. If the co-sharer does not admit claim of a person believing that the real co-sharer is someone else, *then he cannot be held* to put up an adverse claim to the whole of the gift property, excluding the claim of any other co-sharer. He should be considered as only expressing his doubt about the title of a particular co-sharer.[22]

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18. *See*, Mulla, at p. 150. And where a gift was claimed to have been made by a gift deed but not known to any of the heirs of the donor, he died, the claiming son could not explain how that *hiba* remained a secret from every member for 30 years, it was held the gift cannot be termed as valid — *Mohd. Ibrahim Khan* v. *Azad Rasul & Co.*, AIR 2008 Raj 187 (NOC).
19. *Alibai* v. *Bai Asi*, AIR 1934 Bom 21.
20. *Abdul Gafoor* v. *Abdul Samadh*, 1998 AIHC 2907.
21. *Syed Mustan* v. *Syed Mubarak*, 1997 Mad LJR 92.
22. *Sabura Ammal* v. *Ali Mohd.*, AIR 1970 Mad 411.

Registration of gift deed could not in any way do away with the need of the delivery of possession. Thus, for example, where *A* makes a gift of a house belonging to him in favour of *B*, through a registered deed, but does not deliver the possession to *B*, the gift is incomplete, and therefore void.[23]

The delivery of possession does not mean that the donor must have physical possession of the property and must hand over that physical possession to the donee. It is enough if he has got legal possession as the matter is susceptible of.[24]

Thus, if *A* makes a gift of the corpus of a property to *B*, but reserves the usufruct to himself and continues in physical possession of the property, the payment by *B* of Government revenue after the date of the gift in respect of the property, amounts to constructive possession of the property by *B*, and the gift is complete and valid.[25]

Or, if *A* makes a gift to *B* of his landlord rights over lands in the occupation of tenants, the gift is complete as soon as the tenants, by direction of *A*, have paid, or undertaken to pay, rents to *B*.[26]

Or, where *A* makes a gift to *B* of a promissory note which becomes payable on delivery and endorsement, the gift is complete as soon as the note has been endorsed and delivered to the donee.[27]

Or, *A*, having a deposit account at a bank, hands over to *B* the bank's receipt for the same, saying, "After taking a bath I will go to the bank and transfer the papers to your name." *A* dies before accomplishing his promise. This is not a valid gift of *A*'s claim upon the bank, and *B* takes nothing by it.[28]

A gift of immovable property of which the donee is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession.[29]

A gift of immovable property which is in the occupation of tenants may be completed by a request of the donor to the tenants to attorn to the donee, or by delivery of the title deed, or by mutation in the Revenue Register.

In case of an equity of redemption, a gift of the equity may be made validly by the mortgagor giving to the mortgagee a proper notice that the ownership in the property has been transferred to the donee, subject to the rights of the

23. Mulla, at p. 158.
24. Fyzee, at p. 237, citing *Kairum Bi* v. *Mariam Bi*, AIR 1960 Mad 447.
25. Mulla, at p. 158.
26. Wilson, at p. 344.
27. *Ibid.*
28. *Ibid.*
29. Mulla, at p. 161. But *see*, Exception (*a*) *infra*.

mortgagee. In such a case, physical possession need not, because it cannot, be transferred.[30]

In one case[31] the Court held:

> "A distinction has to be made between a gift of the entire property and a gift of a parcel of it. A property which is made the subject of a usufructuary mortgage is split up into two parcels: the equity of redemption and the mortgagee's rights. The equity of redemption is as much property as mortgagee's rights in the mortgage and there is no bar to a person owning only the equity of redemption, making a valid gift of the same...
>
> (Thus) where the property gifted is subject to a usufructuary mortgage, what is gifted is merely the equity of redemption and not the physical possession of the property itself. The equity of redemption is not capable of being physically delivered and the donee cannot be put in actual possession. Authorising the donee to redeem the mortgage and take possession of the property, by incorporating a declaration to that effect in the gift deed, it could be spelled out that such possession as the property was capable of was delivered and, therefore, there was a valid gift of the property."

Exceptions to this general rule.—There are certain cases in which delivery of possession is not necessary at all. These exceptions are as follows:[32]

(*a*) Donor and donee reside in the same house.—In such a case, the donor can complete the gift without physical transfer of possession.

A Muslim lady, who had brought up her nephew as her son, executed a deed of gift, in favour of the nephew, of a house in which they were both residing at the time of the gift. The lady never departed from the house physically, nor was the house formally given to the nephew, but the property was transferred, and the rents were recovered, in his name. It was held that the gift was valid, although there was no physical delivery of possession.

The Madras High Court in *Ibrahim Bivi* v. *Pakkir Mohideen*[33] held "that where the property gifted is a house and the settlor and the settlee reside in that house, it is not necessary for the settlor formally to depart from the house in order to indicate that the settlee has been given possession of the property gifted." This view has been taken because of the clear pronouncement of the Privy Council to the same effect in *Musa Miya* v. *Kadar Bax*[34] and that of the Supreme Court in *Katheessa Umma* v. *Narayanath Kunhamu*[35].

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30. Fyzee, at p. 232.
31. *S. Khatoon* v. *Amir Ali*, AIR 1972 AP 243.
32. Fyzee, at pp. 232-237.
33. AIR 1970 Mad 19.
34. AIR 1928 PC 108.
35. AIR 1964 SC 275.

But mere living together does not always mean that delivery of possession is not necessary.

For instance, a Muslim lived in the house of his sister and made a gift of his estate to the sister's son. There was no delivery of possession of the estate and it was held that the gift was invalid. Here it must be noted that the subject-matter of gift was not the house in which the man and his sister lived but some other property.

Similarly, a Muslim lady executed a deed of gift in favour of her nephew of a house in which they both resided. The deed contained no mention that possession was given to the nephew. The gift deed was also not delivered to the nephew, and the lady continued to pay Municipal taxes. In these circumstances, it was held that the gift was invalid.

P and *D* were sons of deceased *X*. *D* claimed to be owner of suit property-a certain house, on basis of gift deed executed by his deceased father in his favour. *D* was not living in that house, in fact it was rented out to tenants by *X*. There was no evidence to show that the tenants had attorned *D* to collect rent in respect of that house ('attorned' means to acknowledge him as landlord and self as his tenant and consider him as authorised to collect rent as owner). So, *D* has failed to prove delivery of possession, gift deed was not valid.[36]

Similarly, even where donor and donee are living together (in the same house), though actual physical possession may not be given by donor to donee, some overt act in furtherance to *hiba* was essential to complete the gift[37].

In *Pocker* v. *Kathiya*,[38] the Kerala High Court has held that a Muhammadan gift will not be complete unless there is delivery of possession of the property gifted. Even if the donor and donee reside together, separate parting away of the property is essential. Where the donee has taken actual physical possession of the house after execution of the gift deed, the gift deed will not become invalid on the ground that the donor continued to live in the suit house.[39]

(*b*) Husband to wife.—Where a married couple lives in a house which belongs to the husband, the husband may make a gift of the house to the wife, without physical delivery of possession. In *Amina Bibi* v. *Khatija Bibi*[40] a husband had made a gift of his house to his wife. He had given the keys of the house to the wife, left the house for a few days, but had returned afterwards and lived with her till his death. It was held that the gift was valid.[41]

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36. *Sk. Abdul Zabar* v. *Sk. Abdul Razak, Orissa HC*, (2008) AIHC 3448.
37. *Mohd. Ibrahim Khan* v. *Azad Rasul*, (2008) 1 CCC 201 Raj HC.
38. (2000) 1 KLT 430.
39. *Chanda Bai* v. *Shaida Jan*, 1996 AIHC 3586 All.
40. (1864) 1 Bom HCR 157.
41. The other leading case on the subject is *Ma Mi* v. *Kallander Ammal*, (1927) 54 IA 23. The same rule is applicable in the case of wife making a gift to the husband (Fyzee, at p. 234).

When donor and donee are husband and wife and reside in the same property, gift can be completed by some overt act by the donor and donee. When the deed recites that possession has been handed over, the burden to prove to the contrary is on the person who disputes that claim. The husband executed gift deed in favour of his wife; it was stated therein that the possession was transferred to the wife. The donor and donee were residing in the same property. Held it was not necessary for the husband to physically depart from the house, nor was formal entry in the name of the donee essential. The reason being they were husband and wife. Moreover, the gift deed mentions transfer of possession. The gift deed executed in the wife's favour was held to be a valid gift under Muslim Law.[42]

Cases mentioned in (*a*) above are also applicable here.

In *Mohd. Sadiq* v. *Fakra Jahan*[43] the husband wrote a gift deed in favour of his wife declaring that he had gifted and delivered the possession of his property to her. The gift deed was delivered to her but the mutation was not done. The court held that as the donor and the donee were husband and wife, delivery of possession was not necessary. There was evidence of his intention to gift the property and this was manifested by the delivery of the gift deed which declared that delivery of possession was done. Even the mutation was not indispensable. The gift was held to be effective.

On similar facts, where the donor created a gift *inter vivos* in favour of his wife and minor children who were residing with him in the same house, the High Court held that considering relationship between donor and donees actual or physical delivery of property by donor and acceptance of same by donees was non-called for. In this case the mother had accepted the gift for herself and her minor children; held a valid acceptance.[44]

Now consider the following facts and offer your solution before consulting the citation. The donor was the husband and donee the wife. The donor through a registered deed declared gift of the property to his wife and through her to her minor children. Acceptance by her was also contained in that deed. Delivery of possession was also declared. She was entitled to get the property muted in the name of the donees. Both parties were residing together. The donor reserved right to reside and manage the property and collect rents and change tenants. In these circumstances was it a valid gift?[45]

In another case the husband gifted his immovable property to his wife and got the mutation done in the public records in her name. He, however, continued

42. *Pathumma* v. *Pokku*, AIR 1998 Ker 134.
43. (1932) 59 IA 1.
44. *K. Abdul Hameed* v. *Sabira Begum*, (2006) 7 AIR Kant R 289 Kant (DB).
45. *Halimbibi* v. *Abdul Raheman Abdul Rahim Gopipura, Surat*, 1998 AIHC 1553 Guj HC.

to live in that house and kept realising the rents. It was held that the donor and donee were husband and wife and so could continue to live with her in that house. The act of collecting the rents was deemed to have been done on her behalf.[46] Even the delivery of the registered gift deed by the husband to the mother of the minor wife and the mother's acceptance were held to constitute a complete gift. Both the husband and the wife were living in the house of the wife's mother, and the wife had no father or grandfather alive, nor any executor. The delivery of the gift deed to her mother instead of the minor wife herself did not invalidate the gift, as the intention was well established.[47]

(c) Father to child: Mother to son: Guardian to ward.—No transfer of possession is necessary where a father or mother makes a gift of immovable property to their minor child. The same is the rule between guardian and ward.

The rationale of this principle is that it would be absurd if the owner of the property (that is, parent) hands over possession to himself as guardian of the child.

But if a gift is made to a minor by a person other than the father or guardian, delivery of possession to the father or guardian is necessary.

Fyzee says that since the real basis of the exception is that delivery of possession is excused only when legal guardianship of the minor vests in the donor, thus, a gift by a person other than the father or guardian is complete only by the seisin[48] of the father or guardian. Thus a mother, who is not a legal guardian, cannot accept a gift on behalf of her minor child, if a legal guardian exists.

However, the following observations of the Court in *Ibrahim Bivi* v. *Pakkir Mohideen*[49] have also to be kept in mind:

> "It is not necessary that in all cases, the donor should hand over possession to the natural guardian of the minor donee. In *proper circumstances* the donor can either constitute himself as the guardian or indicate some person, other than the natural guardian of the minor, as the guardian of the minor's property and hand over possession to such guardian if circumstances are such as to justify such a course of action."

Where the donee is residing in the suit property along with the donor *as his son*, and is a major, no interference of a guardian is required. The facts of the case were as follows: The donor had no issue of his own. He had accepted the donee as his son. The donee was residing with donor since the age of six months till the death of the donor. The donor orally gifted suit property to the donee,

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46. *Ahima* v. *Khatija*, (1864) 1 Bom HCR 157.
47. *Kabisa Umma* v. *Pathakla Narainath*, AIR 1964 SC 275.
48. Seisin-taking possession.
49. AIR 1970 Mad 17.

handed over possession to him. The gift was recorded in a memorandum. The donor continued to stay with the donee and had agreed to pay rent for the same. The Gujarat High Court held the gift as a complete gift according to Muslim Law and as such it was excluded from registration and stamp duty.[50] [This case can also fit into sub-head (*a*) (*supra*).]

Daughter, her husband and their two minor sons were living in the house of the daughter's father. He gifted his landed property to the two grandsons, but neither effected mutation of the property nor handed over possession to the father of the two sons in the capacity of their legal guardian, and also continued to manage the property. On these facts the Privy Council held that the gift was not complete because the father, not the grandfather, was the legal guardian of the sons and there was no reason to relax the requirement of delivery of possession. The mere fact that the grandfather was bringing up the children did not justify an exemption from the rule.[51] By 'legal guardian' what is denoted in this context is the legal guardian of the property. Father, his executor, father's father and his executor—are the legal guardians of a minor's property—in that order. So long as any of the above four are alive and capable, delivery of possession must be given to one of these in that order, even if the gift is made by grandfather—paternal or maternal. Mother is not legal guardian if the father is alive, so even she has to deliver possession to the father of the minor if she gifts property to her minor sons; but not so if none of the legal guardians is alive.

(*d*) **Gift to donee in possession.**—Where the subject of the gift is already in the possession of the donee, the gift is complete by declaration and acceptance, without formal delivery of possession.

A piece of cloth is deposited with *R*, who says to the owner, 'Give it to me'. The owner says, 'I have given it to thee'. The gift is complete, as the donee is already in possession of the thing gifted.[52]

A makes a gift, without delivery of possession, of a house to a servant in his employ for the collection of rents. The gift is void, for a servant who only collects rents cannot be said to be in possession of the house of which he collects the rents.[53]

4. Registration

A gift may be oral or written. A written document may be only a statement of the fact of a prior gift or it may be an instrument by which the gift is effected. The former needs no registration, the latter must be registered. So only an instrument of gift needs registration. The Indian Registration Act, 1908 (relevant

50. *Pathan Talibkhan Abdul* v. *Pathan Huseukhan Abdul*, 2001 AIHC 1400.
51. *Musamian* v. *Kader Bux*, AIR 1928 PC 108.
52. Tyabji, at p. 418.
53. Mulla, at p. 169.

Sections 16 and 49) does not prescribe a registered instrument for a valid gift, it only requires that if the gift is effected by a written instrument, then it must also be registered. Attestation is not essential. So an oral gift is not ruled out by the Registration Act, and is recognised by the Muslim Law. In *Kamarunnissa Bibi* v. *Hussaini Bibi*[54] a verbal gift of landed property followed by transfer of possession was considered valid. Sections 122-129 of the Transfer of Property Act, 1882 deal with gifts. By Section 123 it is provided that a gift of immovable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses, and that a gift of movable property may be effected either by a registered instrument signed as aforesaid or by delivery. But Section 129 exempts Muhammadan gifts from the application of Section 123. The rule that a Muhammadan can make an oral gift is a general rule, it must therefore give way to any special rules relating to any gift of any particular kind of property. Thus where the Bihar Tenancy Act required that gift of occupancy holding must be effected by registration, that being a special Act, the exemption under Section 129 was not available.[55] Again, a *Hiba-bil-ewaz* being regarded as a transaction in the nature of sale and not a gift in the general opinion of the courts, it could only be effected by a registered instrument under Section 54 of the Transfer of Property Act if it related to an immovable property worth Rs 100 or more.[56]

The Andhra Pradesh High Court makes out very clear the distinction between an oral gift reaffirmed by — or placed in memory by a written document and a gift by written deed. It says: If unregistered document is one which merely refers to a previous oral gift, it can be acted upon, notwithstanding the fact that it was not registered. However, if gift is made *through* such unregistered document itself, registration becomes compulsory[57]. Further, the High Court clinches the finality of an oral gift in another case by saying that 'oral gift on a particular date if proved to be true will take precedence over a written gift deed for the same property dated subsequent of the above oral gift even if it is through a registered gift deed written down[58]. Because a Muhammadan gift becomes complete when it is made orally and then the same property cannot be gifted again even by writing.

5. Constitutional validity of oral gifts

In a judgment delivered by Mr Justice V.R. Krishna Iyer in *Makku Rawther* v. *Manahapara Charayil*[59] it was held that oral gifts of "secular" as

54. ILR (1880) 3 All 266 (PC).
55. *Bibi Sharifan* v. *Sk. Salahuddin*, AIR 1960 Pat 297.
56. *Imbichimoideenkutty* v. *Pathumunni Umma*, AIR 1989 Ker 148.
57. *Chand Bee* v. *Hameedunnissa*, (2007) 1 An LD 810.
58. *Sk. Avula Mastan* v. *Sk. Abid*, (2007) 1 An LD 793.
59. AIR 1972 Ker 27.

distinguished from gifts of "religious" nature should conform with the requirements of writing, attestation and registration as laid down in Section 123 of the Transfer of Property Act, 1882, in order to survive the scrutiny of Article 14 of the Constitution. By classifying gifts into religious and secular categories, this judgment imports into the fabric of Islamic Law something which was hitherto unknown. It therefore requires a close consideration.

Section 129 of the Transfer of Property Act provides that "Nothing in this Chapter (which deals with gifts)...shall be deemed to affect any rule of Mohammadan Law."

Section 123 lays down the manner in which a gift has to be effected and prescribes the need for a registered instrument signed by the donor and attested by at least two witnesses if the subject-matter is immovable property.

Now, according to Krishna Iyer, J., the Muslim jurists, though evolving the three ingredients of declaration, acceptance and vesting of possession, do not give any "hint anywhere of any taboo of a Mussulman reducing a gift to writing, to get it attested or to get it registered by any public authority." He then goes on to assert that "there is absolutely no conflict between Section 123 and the rules of Muslim Law except, may be where religious or charitable gifts are made." Seen in this context, it is not justifiable to classify various communities for purposes of documentation, attestation and registration of purely secular gifts.

> "The position may be basically different in *wakfs*, trusts and gifts of a religious or pious or charitable nature like *sadaqa*. Indian humanity is not secular enough to obliterate religious sentiment. Article 25 protects the right to religious practice and Article 15 does not proscribe religious grouping altogether. So much so, gifts prompted by piety or possessed of a sacred savour may be classified on a religious differentia; not so, purely secular transfers. A gift by a Muslim paramour to a heathen mistress cannot claim immunity from Section 123 on godly grounds. To hold that any gift, be it of the most mundane and profane category or not, is absolved from the reasonable prescriptions of Section 123 of the Act by the mere incantation of a particular religion is to make a shambles of Articles 14 and 15(1) and simulacrum of Article 44. The old laws must be tuned up to the new law of the Constitution and the spirit of the times. Religious and charitable transfers stand on different footing."

According to Krishna Iyer, J., such a reading of the Muslim Law of gift will not go counter to Section 2 of the Shariat Act, 1937, because—

> "the application of Muslim Personal Law to gift precludes the application of other laws which do not run counter to the rules of Muslim Law... Moreover, the expression 'gifts' in Section 2 along with trusts and trust properties and *wakfs* takes colour from the society of these words."

"It is therefore right as a matter of construction to limit the scope of the expression 'gift' in Section 129 of the Act to that category of gifts which have a religious import or charitable motivation. ...Purely secular gifts cannot get the protection of Section 129 if that provision is read down to vindicate a reasonable classification."

"Whatever might have been the content of the word 'gift' in Section 129 when it was originally enacted, its meaning has to be gathered today in the constitutional perspective of Articles 14, 15, 25 and 44. As years go on, meaning of words change and the changing circumstances illuminate the new import of that meaning...when interpreting the provisions of law, susceptible to different meanings, a judge has to pay due regard, though to a limited extent, 'to the policies which he believes to represent the sober second thought of the community that framed it and are suited to its inarticulate needs'."

With great respect to the learned judge it is submitted that the thesis propounded by him creates more problems than it solves. *First*, it is impossible to differentiate between religious and secular gifts in all cases, because, to repeat the oft quoted dictum of Mahmood, J., "It is to be remembered that Hindu and Muhammadan Laws are so intimately connected with religion that they cannot readily be dissevered from it." *Second*, the argument of the learned Judge that "a gift by a Muslim paramour to a heathen mistress cannot claim immunity from Section 123 on godly grounds" is a sword that cuts both ways. If the "Muslim paramour" says that the gift to the, "heathen mistress" is *sadaqa*, to compensate her for the many "difficulties" that she had undergone; there is hardly any ground to reject his contention, nor there is anything in Islam prohibiting such a woman to be the recipient of such a *sadaqa*.

As is well known, the concept of charity in Islam is very wide. An act which ordinarily may not look charitable is really so under Islam. Thus, a gift to one's own descendants or relations will be charitable. In majority of the cases, therefore, the distinction between religious or charitable and non-religious or non-charitable may become extremely difficult. To entrust this delicate and nearly impossible task to a Judge is to give him unbridled power leading either to miscarriage of justice or confusion.

Third, regarding the contention of Justice Iyer that the old laws must be tuned up to the new law of the Constitution, it is submitted that where a person was having some right by virtue of his personal law, it was not truncated upon by the Constitution. Provisions of Muslim Law relating to polygamy, unilateral power of divorce by husband, the rule of inheritance whereby male takes double than a female, the apostacy and its effect on marriage and maintenance, are only a few examples where equality before law is affected either on the ground of religion or sex, and still Article 14 is of no help.

Fourth, Justice Iyer's contention that "the expression 'gifts', in Section 2 (of the Shariat Act) along with trusts and trust properties and *wakfs* takes colour from the society of these words" is hardly convincing. He completely ignores the fact that in case of trusts and *wakfs* there is no express exemption from registration and attestation as in the case of gift by virtue of Section 129, which could not be impeached merely on the ground that it will come in clash with Article 14 of the Constitution in case it includes secular gifts. If religious object of a gift could save it from the requirements of registration, etc., as Justice Iyer contends, trusts and *wakfs* having religious objects must also be so exempt. But they are not. Because there is no statutory exemption in their case as in gifts.

Fifth, in view of the established principles of Muslim Law, Justice Iyer's classification of Muslim gifts into religious and secular groups, granting one the privilege of being orally made, goes against the norms of interpreting Muslim Law. Because, "if one finds a question well thrashed out and in later centuries a particular interpretation adopted by the leading doctors and textbook writers, it would not be proper for us in the twentieth century to go behind such a consensus of opinion and decide a point contrary to that opinion. ...That a course of action would unsettle the Muhammadan Law". Although these observations of Sir Shah Sulaiman, C.J., in *Anis Begam* v. *Mohd. Istafa*[60] were expressed in another context, yet they hold good in the present case.

There is another side of the matter which also deserves consideration. Registration of a gift deed is not an anti-religious or sacrilegious act. It does not interfere with the observance of religious rites. It ensures a proper authentic record of the property transaction which is ultimately beneficial to the parties themselves. As the Muslim jurists have themselves acknowledged in their definitions, *hiba* is regarded as a part of the law of contract, the concept of contract underscores the concept of *hiba*. Just as other sales and contracts by Muslims are subject to the civil laws of the country, there is nothing unusual in covering these transactions also under the ordinary civil laws. The only grudge can be on account of the requirement of registration fees, but no Muhammadan jurist has claimed or justified immunity from the secular taxation. An exemption from some legal formalities should be claimed in such areas where it is essential to keep intact religious rites, ceremonies or observances of essentially religious character. Too much insistence on immunities from general laws of the land breeds separatist tendencies. Instead of advancing hairsplitting arguments to claim an immunity, the Muslim society should willingly come forward to claim maximum integration with the general legal system of the country.[61]

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60. ILR 1933 All 743.

61. Muslims derive benefit from the provisions of the Insurance Act—*See infra*, at p. 229—'Insurance policy'.

Nonetheless, oral gifts of every kind can still be made in all the states, except Kerala.

6. Who can make gifts

Every Muslim male or female who is major and sane may make a gift, provided he or she is not subject to any force or fraud. A married Muslim female can also make a gift.

Where the female is a *pardanashin* lady, she is presumed to be ignorant of the result of her acts. Thus, where a *pardanashin* lady signed a gift deed believing that it was to take effect only after her death, it was held that the transaction was not voluntary, and the deed was void.[62]

Ordinarily when a competent person makes a gift but later claims to have done it under undue influence, etc., has to prove that alleged fact. In exceptional cases like those of a *pardanashin* lady, the onus of proof may shift to the person claiming the benefit of the gift. There is no hard and fast rule in this regard. In several cases where it appeared that the donor did not fully understand the implications of the gift made by him or her, the courts have regarded the transaction as wholly ineffective. Otherwise, where the understanding could clearly be established, the courts have refused to presume the existence of undue influence.[63]

If the donor is suffering from the death-illness, or *maraz-ul-maut*, such a gift is a called *donatis mortis causa*. Strictly, it is neither exactly a gift, nor exactly a legacy (will), but a mixture of both.

In order to constitute the death-illness, it is essential that—

(*i*) the illness must cause the death of the ill person;

(*ii*) the illness must cause apprehension of death in the mind of the deceased[64]; and

(*iii*) there must be some external symptoms of a serious illness.

A gift made during *maraz-ul-maut* cannot take effect beyond one-third estate of the donor, after paying funeral expenses and debts, unless the heirs give their consent, after the donor's death. Nor such a gift can take effect, if made in favour of an heir, unless the other heirs give their consent, after the donor's death.[65]

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62. Fyzee, at pp. 224-25.
63. *Mahboob Khan* v. *Abdul Rahim*, AIR 1964 Raj 250.
64. Where on basis of facts the Court comes to the conclusion that a person suffering from TB for last two-to-three years and making an oral gift and then death ensuing one month later-there was no apprehension of death in his mind, the gift would not be treated as marj-ul-maut gift. — *Sk. Nurbi* v. *Pathan Mastanbi*, (2004) 3 CLT 364 (AP).
65. Mulla, at p. 147.

A gift in death-illness takes place only when the donor dies. Such a gift is subject to all the conditions necessary for the validity of a simple gift, including delivery of possession by the donor to the donee.

An insolvent may also make a *hiba* with bona fide intention; but a gift to defraud the creditors is voidable at their option. The mere fact that the maker of the *hiba* owed some debts does not raise a presumption that the *hiba* was made to defraud the creditors. Thus *rushd* (sanity), *bulugh* (majority), *maliki* (ownership) and free mind or no undue influence—are the ingredients of capacity to make *hiba*.

7. In whose favour (donee)

A gift may be made in favour of the following:[66]

(*i*) **Any living person who is capable of holding property.**—Thus, strictly speaking, a gift to an unborn person is invalid. Take the example of *A*, who makes a gift to *B*, and after *B*'s death, to his male heirs. *B* has got no male heirs at the time of the gift. The gift is invalid.

(*ii*) **Child in the womb.**—A gift to an unborn person may be made provided the child is born within six months from the date of the gift, because, in that case, it is presumed that the child was actually existing as a distinct entity in the womb.

(*iii*) **Unborn person.**—A gift of a limited interest in the usufruct to property (*ariat*) may be made to an unborn person provided that the person is in existence when the interest opens out for him. Thus, if a life interest is granted to *A* and thereafter to *B* it is sufficient if *B* is in existence at the death of *A*; notwithstanding the fact that at the time of making the gift, *B* was non-existent.

(*iv*) **Juristic persons.**—Gifts may be made validly to such juristic persons as mosques,[67] *durgahs*, and charitable institutions like schools.

(*v*) **Non-Muslims.**—A gift may be made to a non-Muslim. The gift property will be subject to the personal law of the donee, once he gets possession of it.

(*vi*) **Two or more persons.**—Where a gift is made to two or more donees without dividing the property, its validity is governed by the provisions of the doctrine of *mushaa* (discussed later on in this Chapter).

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66. Verma, at pp. 535-36.
67. Mulla however has doubted whether a mosque has been unexceptionally accepted as a juristic person. *Citing* this doubt of Mulla the Gauhati High Court in *Mst Sahida Khatun* v. *Secy., Tezpur Hindustani Muslim Panchayat*, (2001) 2 GLR 93 has held that a mosque is not a juristic person; suits cannot be brought by or against mosques as artificial person.

8. What may be given in gift

All *mal* or forms of property over which control may be exercised are proper subjects of gift. These include all *mal*, whether ancestral or self-acquired, movable, or immovable, corporeal or incorporeal.

A corporeal thing means that which exists in material form, for example, money, house, land, etc. whereas incorporeal property means that which does not exist in material form, for example, debts, *choses in action*, a right to receive a specified share that may be made by pilgrims at a shrine, an insurance policy notwithstanding the fact that the money is not existing and is to be realised in future, equity of redemption, Government promissory notes, negotiable instruments, etc. It is useful to examine in detail the validity of gifts of some of the above incorporeal properties. Since delivery of possession is an essential ingredient of *hiba*, one view is that *hiba* of incorporeal objects is not possible since their physical possession is not possible. However, this is not so, *hiba* of incorporeal property can also be made. When a gift of actionable claim is made by an instrument in writing, the Gujarat High Court holds the view that the acceptance of the gift by the donee is essential.[68] Mulla says—'The donor must so far as it is possible for him, transfer to the donee that which he gives, namely, such right as he himself has; but this does not imply that where a right to property forms a subject of gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely, the corpus of the property. He must evidence the reality of the gift by divesting himself so far as he can, of the whole of what he gives.'[69]

(*a*) **Equity of redemption.**—A Muslim mortgagor can make a valid gift of his equity of redemption even if the mortgagee is at the time in possession.[70] Thus, for example, where *A* owns six immovable properties and mortgages three with possession to *M*, and then makes a gift of all the six properties to *D* and puts him in possession of the three properties not mortgaged to *M*, it has been held that the gift is valid.

(*b*) **Insurance policy.**—The Insurance Act of 1938 makes a statutory provision whereby any person can, in certain circumstances, assign his policy, his personal law notwithstanding. Section 38 deals with assignment and transfer of insurance policies. By way of one very common illustration—a Muslim husband (*H*) insures himself and assigns his policy to his wife (*W*), with the condition that if *W* predeceases *H*, the assignment will be inoperative and the interest in it will revert to *H*. This transaction may be considered as creating a valid contractual obligation between the insurer and the assured. Tyabji argues

68. *Iqbal* v. *CED*, AIR 1964 Guj 452.
69. *See*, Mulla (1977) at p. 166.
70. Fyzee, at p. 227.

that the matter is outside the pale of Muhammadan Law and such transactions are valid. Or else it may be regarded as a gift by a Muslim vitiated by a contingency and therefore invalid under Muhammadan Law. Or it may also be argued that it is a valid gift with a condition annexed, hence the condition is void and the gift valid. To do away with all these difficulties, Section 38(7) of the Insurance Act lays down that notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the lifetime of the person whose life is insured, and an assignment in favour of the survivor or survivors of a number of persons, shall be valid.[71] Thus, a husband may assign his insurance policy to his wife by a valid endorsement that on the condition that in the event wife predeceases him, this assignment shall become null and void. It was held that the gift was valid.

Or, *X* may assign his policy to *Y*, on the condition that if *X* dies in *Y*'s lifetime, the interest in the policy shall go to *Z* or, *X* may validly assign his policy to *A*, *B*, *C* and *D*, or the survivor or survivors of them in equal shares.

(*c*) **Property held adversely to donor.**—Where a donor has a property which is in adverse possession of another person, then the donor cannot make a gift of this property unless he obtains and delivers its possession to the donee.

A executes a deed of gift in favour of *B*, conferring on him the proprietary right to certain lands then in possession of *Z*, and claimed by *Z* adversely to *A*. *A* dies without acquiring possession of the lands. After *A*'s death *B* sues *Z* to recover possession from him. The suit must fail, for the gift was not completed by delivery of possession to *B*.[72]

But, if the donor cannot regain actual possession from the adverse possessor, he shall do all that he can to complete the gift so as to put it in the power of the donee to obtain possession.

X makes a gift of immovable property in favour of *Y*. At the time of the gift property is in the possession of *Z* who claims it adversely to *X*. *Y* sues *Z* to recover possession joining *X* as a part defendant. *X* by his written statement admits *Y*'s claim. *Z* contends that the gift is void, for at the time of the gift *Z* was in possession and no possession was ever given to *Y*. The gift was held to be complete and valid, for the donor has done everything in his power to complete the gift.[73]

(*d*) **Gift of corpus (ayn) and usufruct (manafi).**—The corpus may be given as gift (*hiba*) but where only the usufruct is given, it is not *hiba* but *ariya*.

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71. Fyzee, at pp. 222-23.
72. Mulla, at p. 137.
73. Fyzee, at p. 228 *citing* Mulla.

However, it does not mean that Muslim Law does not allow gifts that do not transfer full ownership. Life interests are considered valid; so also the following gifts: (*a*) the right to collect a specified share of the rent of undivided property, (*b*) rights in Zamindari lands, etc.

In the leading case on the subject[74] the Privy Council made a distinction between the gift of the *corpus* and *usufruct* and observed that over the corpus of the property the Muslim Law recognises only absolute dominion, heritable, and unrestricted in point of time; but where a gift of the *corpus* seeks to impose a condition inconsistent with such absolute dominion, the condition is rejected as repugnant. However, interests limited in point of time can be created in the usufruct of the property and the dominion over the *corpus* takes effect subject to any such limited interests. This distinction runs all through the Muslim Law of gifts of the *usufruct* (*ariyat*) and usufructuary bequests.

Applying this principle the Andhra Pradesh High Court held that where the donor had given absolute rights to the appellant and what had been retained was the limited right of maintenance to enjoy the income out of the property and that too even without the right of alienation, it cannot be contended that the gift was incomplete for want of delivery of possession. The intention of the donor while executing the gift deed is very clear that she intended to deliver the entire domain of this property with absolute rights in favour of the appellant/plaintiff, but however only retaining the right to enjoy the income without the right of alienation during her lifetime. This comes within the purview of the exception mentioned (above) by the Privy Council. The gift deed was held valid — *Bepari Shaik Peeran* v. *Kamalapuram Mahaboob Bi*[75].

Ariya.—Thus, *ariya* is to transfer the right to enjoy the use or profits without any return (Fyzee). The grant of a licence, resumable at the grantor's option, to take and enjoy the usufruct of a thing is called *areeat* (Mulla). According to the *Durr-ul-Mukhtar*, 'to make a person the owner of the substance of a thing without consideration is a *hiba* (gift), while to make him the owner of the profits only, without consideration is an *ariya* or *com-modatum*'. According to Hidaya a *hiba* is a transfer of ownership without consideration. A *hiba-bil-ewaz* is a transfer of ownership for a consideration. An *areeat* (Mulla adopts this spelling, while Fyzee spells it as *Ariya*) is not a transfer of *ownership*, but a temporary licence to enjoy the profits so long as the grantor pleases. A *hiba* is revocable except in certain cases. A *hiba-bil-ewaz* is not revocable in any case. An ariyat is revocable in every case. Fyzee says 'the law of *ariya* has been somewhat neglected in India, but since the passing of the Shariat Act, 1937, it is likely to assume greater importance.[76]

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74. *Sardar Nawazish Ali Khan* v. *Sardar Ali Raza Khan*, (1948) 75 IA 62.
75. (2003) 1 CLT 207 (AP).
76. Fyzee, at p. 267.

It is important here to understand fully the distinctions between *Hiba* and *ariya*.[77]

	Hiba		*Ariya*
1.	The donor must be a person who has attained majority.	1.	Majority not essential.
2.	Ownership of the property shall be transferred.	2.	It is the transfer of the use or *usufruct* only and not the ownership.
3.	It must not be conditional or limited in time.	3.	It may be subject to conditions limiting the duration of use.
4.	It must be immediate and not contingent.	4.	It may be in *futuro*.
5.	Gift of *mushaa* cannot be made, except in few cases.	5.	Doctrine of *mushaa* does not apply.
6.	Acceptance is necessary for its completion.	6.	Acceptance is not a condition.

(e) Gift of mushaa.—*Mushaa* has been defined as an undivided share in an immovable or movable property.

As delivery of possession is one of the essentials of a valid gift, thus the possession to be delivered must be separate and exclusive. Hence, gift of an undivided share (*mushaa*) in a thing capable of division is void, according to Hanafi Law. According to Shafii and Shiite view, however, the gift of *mushaa* is valid, provided that the donor, after withdrawing his control from the subject-matter of gift, delivers it to the donee.

Mushaa (literal meaning: confusion) in law denotes the mixing up of the proprietary rights of more than one person in a thing (as in joint ownership), where each co-owner has a right until partition of the property.

Mushaa may be of two types: those joint properties which are indivisible, and those divisible.

Where property is indivisible.—A gift may be validly made of an undivided share (*mushaa*) in a property which is incapable of being divided; or where the property can be used to better advantage in an undivided condition.

Such indivisible things may be a staircase, small house or small bath. Thus, *A*, who owns a house, makes a gift to *B* of the house and of the right to use a staircase used by him jointly with the owner of an adjoining house. The gift of *A*'s undivided share in the use of the staircase is not capable of division; therefore it is valid.[78] And a gift of a share in the business of a Turkish bath is

77. Verma, at pp. 532-33.

78. Wilson, at p. 352 citing *Kasim Husain* v. *Sharif-un-Nissa*, ILR (1883) 5 All 285, adopted by Fyzee 239 and Mulla 169.

valid, for the bath is not capable of division and would be ruined if it were divided by metes and bounds.[79]

Where property is divisible.—The gift of *mushaa* of a property which is capable of being divided is irregular but not void. Subsequent division and delivery of possession renders the gift as valid.

A, a partner in a firm, makes a gift of his share of the partnership assets to *B*. The gift is not valid unless the share is divided off and handed over to *B*.[80]

There are six exceptions to this general rule.[81]

Exception I.—Where the gift is made by one co-heir to another.—For example, a Muslim woman dies leaving a mother, a son and a daughter as her only heirs. The mother may make a valid gift of her undivided share in the inheritance to the son, or to the daughter, or jointly to the son and daughter.

Exception II.—Where the gift is of a share in a Zamindari or taluka.—For instance, *A*, *B* and *C* are co-sharers in a certain Zamindari. Each share is separately assessed by the Government. and has a separate number in the Collector's book, and the proprietor of each share is entitled to collect a definite share of rents from the Zamindari. *A* makes a gift of his share to *Z* *without* a partition of the Zamindari. The gift is valid, for it is not a gift strictly of *mushaa*, the share being definite and marked off from the rest of the property.

Exception III.—When the gift is to two or more persons.—*X* makes a gift of a house to *A* and *B* in equal shares as tenants in common. The property is not divided off although their shares are clearly defined, possession of their specific shares is not given to *A* and *B*. The gift is valid.[82]

Exception IV.—Where the gift is of a share in freehold property in a large commercial town.—Thus, where *A*, who owns a house in Bombay makes a gift of a third of the house to *B*, the gift is valid, because the property is situated in a large commercial town.

Exception V.—Where the gift is of shares in a Land Company.

Exception VI.—Where a property is gifted out absolutely to a person with a condition that he shall make certain periodical payments out of the recurring income of the property, such payments are not governed by the doctrine of mushaa.

Devices against doctrine of mushaa.—Where the divisible property is not divided the gift of such property is rendered only *fasid* (irregular) but not *batil* (void) by the application of the doctrine of *mushaa*. Therefore it is possible to

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79. Mulla, at p. 169.
80. Mulla, at p. 171.
81. *Ibid*, at pp. 170-171, Fyzee, at pp. 241-243.
82. Why? (For ans., *see*, the para under sub-head 'Where Property is divisible.')

employ a device in order to get over the defect. The donor may first sell the property to the donee at a fixed price and then absolve him of the debt, that is the price.[83]

Is the doctrine of *mushaa* unadapted to progressive society?—Delivering the judgment in *Mohd. Mumtaz* v. *Zubaida Jan*[84] their Lordships of the Privy Council said: "The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules." It was considered that the gift of an undivided share is valid in anything which can be used to better advantage in an undivided condition. The rigour of the rule has, therefore, been considerably relaxed and courts have from time to time made efforts to adapt the rule to its new surroundings, and to interpret it in a way as to make it consistent with the principles of justice, equity and good conscience. This accounts for the above six exceptions to the rule.[85]

9. Conditional, contingent and future gifts

The conditional gifts may be of two types: (*i*) conditional gifts, and (*ii*) gifts with conditions.

(*i*) Conditional gifts.—Conditional gifts or gifts that are suspended on a condition are invalid, unless the condition is such that it can be fulfilled immediately, in which case it constitutes the acceptance. Thus, if the donor says, "when tomorrow comes, then thou art discharged from my debt," the gift is invalid in Hanafi Law. If however the creditor says to his debtor, "If I die, you will be absolved from my debt," it is valid, as constituting a legacy.

"A condition which is capable of immediate fulfilment becomes the acceptance if it is performed and the gift is valid. Thus, when a person says to another: "If you owe me money you are absolved from it," or, "This slave is yours if you set him free," then existence of the debt or the emancipation would constitute acceptance on the part of another.[86]

(*ii*) Gifts with conditions.—If a gift is made *subject to a condition which hampers in the way of full ownership* of the gifted property, the gift is valid, but the condition is void.

Illustrations

(*i*) A house is given on condition that it shall not be sold. The restraint on alienation is void, and the house belongs absolutely to the donee.[87]

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83. Fyzee, at p. 267.
84. (1889) 16 IA 205.
85. Verma, at p. 541; Mulla, at p. 172.
86. Kamila Tyabji, at pp. 28, 29.
87. Wilson, at p. 354.

(*ii*) A house is given to a person for life, on condition that it shall return to the donor, or his heirs, as the case may be, on the death of the donee. The donee takes an absolute interest, notwithstanding the condition (Wilson).

(*iii*) If a Sunni Muslim says, "this mansion is to *thee ommree* (for thy life), and when thou art dead, it reverts to me", the gift is lawful, and the condition is void.[88]

(*iv*) *A* makes a gift of a house to *B* on condition that he shall not sell it, or that he shall sell it to a particular individual. The condition is void, and *B* takes an absolute interest in the house (Mulla).

(*v*) *A* makes a gift of certain property to *B*. It is provided by the deed of gift that *B* shall not transfer the property. The restraint against alienation is void, and *B* takes the property absolutely (Mulla).

(*vi*) *A* says to *B* "If you help me in this affair, I shall give you my house". Since the validity of gift depends on *B* rendering help, the gift is void. Here it must be noted that *A* never gives possession of the house to *B*; he merely gives a promise; hence, it does not come under the case where there is transference of ownership with certain restraints, which are regarded as void, while upholding the validity of the gift. Thus, the important thing to be seen in gift with condition is, whether the donor first transfers full ownership to the donee and then places some restriction, or whether he places a condition and its fulfilment first and then the transfer of ownership. In the former case, gift is valid and condition void, while in the latter, the whole gift is void.[89]

Contingent gift.—A gift cannot be made to take effect on the happening of a contingency, i.e., a future uncertain event. A classical example of a contingent gift is *ruqba*. *D* says: 'My mansion is thy *ruqba*' that is, 'If you die, it is mine; if I die, it is yours.' It is void.[90] Similarly, the gift by *A* to *B* for life, and *in the event of the death of B* without leaving male issue, to *C*, is as regards *C* a contingent gift, and therefore void (Mulla). Gifts of insurance policy, though of contingent nature may be effectively made by virtue of Section 38(7) of the Insurance Act, 1938, as noted *supra*. Further Section 39(5) provides that in the case of the death of the nominee before the maturity of the policy, the amount of the policy is payable to the holder. To illustrate, *S*, a Shia muslim, took an insurance policy on his life and assigned it to *N*, his wife, with the condition that

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88. Mulla, at p. 176.

89. If the condition does not operate on the *corpus* of gift, it would not make it void. Thus, where a gift is made on the condition that the donee shall pay all the debts of the donor, the condition would be valid.

The transfers for consideration stand on different footing from gift. Whereas any partial or absolute condition in a gift would be void, in the case of transfer for consideration, condition of partial restraint on transfer would be valid. Verma, at pp. 591-92.

90. Fyzee, at pp. 222.

if *N* died before the policy matured for payment, or if *S* survived on the day of maturity, the gift would be revoked and the assignment rendered ineffective. *N* died before the policy matured. *N*'s heir and *S* both made a claim to the amount of the policy. The court upheld the claim of *S* on the basis of Section 39(5) of the Act in *Sadiq Ali* v. *Zaheeda Begum*[91].

Gift in futuro.[92]—A gift cannot be made so as to take effect at any future time, whether such time is definite or indefinite. The following illustrations will make it clear.

Illustrations

(*i*) *A* makes a gift to *B* of "the fruit that may be produced by his palm tree this year". The gift is void as being a gift of future property.

(*ii*) *A* Jagirdar executes a deed of gift in favour of his wife purporting to give to the wife and her heirs in perpetuity Rs 4000 every year out of the income of certain villages. The gift is void, as being a gift of the future revenue of the villages.

(*iii*) *A* executes a deed of gift in favour of *B*, containing the words "so long as I live, I shall enjoy and possess the properties, and I shall not sell or make gift to anyone, but after my death, you will be the owner". The gift is void, for it is not accompanied by delivery of possession and it is not to operate until after the death of *A*.

(*iv*) *A* is entitled to receive offerings at a shrine. He makes a gift of this right to receive all future offerings. The gift is valid, because, the thing gifted is the right of the donor to receive offerings. This right is a determinate thing and is not subject to any fluctuations; hence, a fit subject of gift.

10. Gifts in the form of trust

The basic concept of gift in Islam is that the donor should transfer the whole bundle of rights (ownership) which he possesses over the corpus to the donee; delivery of possession is therefore essential. But if the donor transfers the corpus with a simple condition (which the donee accepts) to receive the recurring income of the corpus during his life, the gift and the condition are both valid.[93]

A transfers and endorses Government promissory notes into the name of his son *B*, and delivers them to *B* as a gift, with a condition that *B* should pay the income thereof to *A* during his life. Both the gift and the condition are valid, and *B* is bound to pay the income to *A* during *A*'s life (Mulla).

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91. ILR (1939) 61 All 957.
92. Mulla, at p. 174; Verma, at pp. 600-601.
93. *Nawab Umjad Aly* v. *Mohumdee Begum*, (1867) 11 MIA 517.

Such stipulation is not void, as it does not provide for a return of any part of the corpus. The stipulation may also be enforced as an agreement raising a trust and constituting a valid obligation to make a return of the proceeds during the time stipulated.

Illustrations

(*i*) A Muslim lady makes a gift of certain properties to her nephew on the condition that he should pay her Rs 900 every year for her maintenance. The gift is not valid, for the payment of Rs 900 is not made dependent upon the profits of the *corpus* being sufficient to meet it (Mulla).

(*ii*) *X* makes a gift to *Y* of his property on condition that *Y* shall pay *X*'s debts. The gift is valid, and also the condition provided debts are not more than the gifted property (Mulla).

(*iii*) A Muslim lady executes a trust deed in favour of her sons with a condition that she was to remain in possession so long as she lived, with power to deal with the rents and profits and that the legal estate was to pass to her sons after her death. Here the conditions are invalid as the donor reserves the legal and beneficial interest; the gift is also invalid as possession is not given to sons and also because it is a gift *in futuro* (Mulla).

The principle described and illustrated above has been extended by the Courts in India to cases where a gift is made subject to the condition that the donee shall pay the income to a person nominated by the donor during the life of such person.[94]

Illustrations

(*i*) A Muslim makes a gift of his house to his son with a condition that the son should give the 1/3rd income of the house to a person during his life. Both the gift and the condition are valid.

(*ii*) *A* makes a gift of certain property to her son *B*, with a condition that *B* should pay out of the income thereof Rs 40 every year to *C* during *C*'s lifetime. Both the gift and condition are valid and *B* is bound to pay Rs 40 per year to *C*.

11. Revocation of gift

According to Muslim Law, all voluntary transactions are revocable; hence, gifts may also be revoked. There is, however, a difference between completed and incompleted gifts; i.e. after or before the delivery of possession.

Before delivery.—A gift may be revoked by the donor at any time before delivery of possession. The reason is that the gift is no gift before delivery of possession, and hence, the rules relating to gifts do not apply over it.

94. Mulla, at p. 177.

In *Bibi Riajan Khatoon* v. *Sadrul Alam*[95] the Patna High Court held that revocation of gift is permissible if the donor has not relinquished his control over the property and the donee has not been put in possession of the same.

After delivery.—When a gift is made and the subject-matter of the gift is duly transferred to the possession of the donee, its revocation is only possible (*a*) by the intervention of the court of law, or (*b*) by the consent of the donee; a mere declaration on the part of the donor is not enough.

Illustration

A makes a gift of a house to *B* and *B* accepts it; but before the delivery of possession *A* changes his mind; this is an incomplete gift; and if no further steps are taken by *A* in pursuance of his original intention, the gift does not take effect. It is best not to call this a revocation at all, because the gift never materialised. The situation would have been entirely different if *A*'s change of mind would have come after delivering possession of the house to *B*. In that case, *A* could have never revoked the gift unless *B* himself agreed to it or a court of law had permitted it.[96]

Only the donor has the right to revoke a gift, not his heirs after his death. It is the donor whose law will apply to revocation and not that of the donee. Mulla observes: Where a settlor reserves to himself the power of revocation, the question arises whether gift made through the medium of trust is valid, and, if valid whether the settlor is entitled to exercise the power of revocation. Beuman, J., was of the opinion that the reservation of the power of revocation detracted from the completeness of the gift. In such a case the donor could not be said to have parted with all control over the subject of the gift and therefore there was no valid gift.[97]

The following completed gift cannot be revoked even with the consent of the donee, or intervention of the Court:[98]

(*i*) where it is made by the husband to his wife, or vice versa;[99]

(*ii*) where the donor and donee are related to one another within the prohibited degrees by consanguinity;

(*iii*) where the donor or donee dies;

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95. AIR 1996 Pat 156. Also Gau HC in *Anwar Ali* v. *Mozibul Hoque*, (2005) 1 Gau LR at p. 127.
96. Largely based on Fyzee, at p. 265. The explanation is by the author.
97. *Cassamally Jaibajbhai Peerbhai* v. *Currimbhoy Ebrahim*, ILR (1911) 36 Bom 214: 12 IC 225 at pp. 248-249, *cited* by Mulla, 181.
98. Wilson, at pp. 356-357; Mulla, at p. 179.
99. *Mumtaz Begum* v. *Ahmed Khan*, (1996) 3 ALD 490:
The Andhra Pradesh High Court held that a gift cannot be revoked when the donor is husband or wife of the donee. "Tyabji says that the Shiite authorities are agreed that to revoke such a gift is abominable, and some hold it unlawful, but the better opinion is that it is unlawful."

(*iv*) where the thing given is destroyed or lost;

(*v*) where the thing given has passed out of the donee's possession by sale, gift or otherwise;

(*vi*) where the thing given has been increased in value;

(*vii*) where the thing given is so changed that it cannot be identified (for example, when wheat is grinded into flour);

(*viii*) where the donor has received a return (*ewaz*) for the gift;

(*ix*) where the motive of the gift is religious or spiritual, for in this case the gift amounts to *sadaqa*.

The Shia Law differs from the Hanafi Law in the following particulars:

(*a*) a gift to any blood relation, whether *within the prohibited degrees or not*, is irrevocable after delivery of possession;

(*b*) a gift by a husband to his wife, or by a wife to her husband, is according to better opinion, revocable;[100]

(*c*) a gift may be revoked *by a mere declaration* on the part of the donor without any proceedings in court.[101]

12. Gifts involving return (ewaz)

(1) Hiba-bil-ewaz.—After the gift has been made, the donee may offer to make a reciprocal gift, to the person making the primary gift,[102] then the reciprocal gift is called the *ewaz* or return for the primary gift. If this return gift is accepted then it is *Hiba-bil-ewaz* (or gift with return).[103]

Illustrations

(*i*) *D* makes a gift to *R* of a horse. *R* then makes a gift of a camel to *D*, and states that the gift of the camel is a return for the primary gift of the horse, *D* accepts. Here, the gift of the camel is the return or *ewaz* for the primary gift of the horse, and it is *Hiba-bil-ewaz*.[104]

(*ii*) A Muslim died, leaving as his heirs his widow, and his brother. His estate was kept joint, and managed by his brother, who made annual payments to the widow. Later, he gave away certain property in her favour. Two days after, she presented to him her share in her husband's estate. It is a case of *Hiba-bil-ewaz* (Tyabji).

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100. Baillie, Vol. II at pp. 205-206.

101. *Someshwar* v. *Barkat Ullah*, AIR 1963 All 469 cited in Baillie, Vol. II at p. 205.

102. The adequacy of consideration is not material; anything or any amount may be given out. What is important is the actual and bona fide payment of consideration.

103. Tyabji, at p. 443.

104. Tyabji, at p. 444.

(*iii*) *A* makes a gift to his cousin *B*, saying, "It is in consideration of your being my cousin." It is not *Hiba-bil-ewaz*; it is simply a gift.

(*iv*) *A* had fallen ill; *B* had given him great comfort during illness. After recovering from the illness, *A* makes certain gift to *B* "for having with cordial affection and love rendered service to me, and maintained and treated me with kindness, and shown all sorts of favour to me". It cannot be *Hiba-bil-ewaz*. It may be a *Hiba*, provided *A* delivers possession of the gifted thing to *B*.

(*a*) *Indian form of Hiba-bil-ewaz*.—There is an Indian form of *Hiba-bil-ewaz*, as distinguished from the classical concept described above, where (*i*) delivery of possession is not necessary, and (*ii*) an undivided share in property capable of division (*mushaa*), may be transferred. Although this goes counter to the classical concept, nevertheless the anomaly is now so well established in India that the Indian Courts generally give recognition to them. Mulla explains the peculiarities of the Indian law thus: *Hiba-bil-ewaz* is in reality a sale, and has all the incidents of a contract of sale. Accordingly, possession is not required to complete the transfer and *mushaa* may be lawfully transferred by it. It was a device for effecting *mushaa*. Two essential requirements are (1) actual payment of *ewaz* by the donee, and (2) donor's bona fide intention to part with the property *in praesenti*. As to the first, adequacy of consideration is not material; 'even a gift of a ring may be a sufficient consideration' (Privy Council in *Khujooroonissa* v. *Roushan Jehan*[105]); even a copy of the Koran is a good consideration; but mere promise to pay is not; nor is 'love and affection' or 'relationship' [(*iii*) and (*iv*) above] as they cannot be valued in terms of money. As to the second, when property was transferred to the *donee* subject to a reservation of the possession and enjoyment to the donor and his wife during their lives, the Privy Council held that there was no intention on the part of the donor to divest himself *in praesenti* of the property and the transaction could not be upheld as a *Hiba-bil-ewaz*.[106]

The High Courts of Calcutta, Madras, Lahore, Allahabad, Patna and Nagpur have held that a transaction of this character is nothing but a sale, therefore, where the property is immovable and worth Rs 100 and above, it must be effected by a registered instrument vide Section 54 TPA. As a sale it also gives rise to a right of pre-emption. The Privy Council also considered it as a sale.

Bye Mukasa (*bay'al-muqasal*).— Fyzee notes one more 'curious form of *Hiba-bil-ewaz* in India called *bye mukasa*. This is a transfer of property by the husband to the wife in lieu of *mahr*, and an agreement by the wife not to claim dower. It is in Indian law a sale and the formalities of the law of gift, like

105. (1876) 2 Cal 184 at p. 197: 3 IA 291 at p. 308, *cited* by Mulla.

106. *Chaudhri Mehdi Hasan* v. *Mohd. Hasan*, (1906) 28 All 439 at p. 453: 33 IA 68 *cited* in Mulla, at pp. 181-185.

possession, need not be followed strictly; but registration is necessary where immovable property is concerned, and such a gift cannot be made orally.[107]

Illustrations

(*i*) *A* and *B*, two Muslim brothers, were owners of certain villages held by them as tenants-in-common. *A* died leaving him surviving his brother *B* and a widow *W*. Some time after *A*'s death, *B* executed a deed whereby he granted two of the villages to *W*. Two days after the grant, but as part of The same transaction *W* executed a writing whereby in consideration of the grant to her of the two villages she gave up her claim to her husband's estate in favour of *B*. The transaction is a *hiba-bil-ewaz*, and it is valid, though possession may not have been delivered.[108]

(*ii*) A Muslim executes a deed in favour of his wife whereby he grants certain immovable property to her *in lieu* of her dower. Possession of the property is not delivered to the wife. The transaction is valid, and it is *hiba-bil-ewaz*.[109]

(*iii*) A Muslim lady, who owns an undivided share (*mushaa*) in an immovable property which is capable of division, executes a deed whereby she transfers her share in the property by way of gift to her two nephews in consideration of the nephews paying Rs 999 to her every year. The transaction is *hiba-bil-ewaz* and is valid in spite of it being a transfer of *mushaa*.[110]

(*b*) *Why Indian form is recognised?*—At the time when the rules relating to *hiba-bil-ewaz* (and *hiba-ba-shart-ul-ewaz*) arose in Islamic countries it seems to have been more common than it is nowadays for persons to enter into transactions that can be best described as lying midway between gifts strictly so called, and barter. The notion underlying a *hiba-bil-ewaz* was something of the following nature: *D* makes a gift to *R*, and *R* spontaneously (out of the feeling of gratitude) makes a gift to *D*, saying that his gift is a return for the gift that *D* had made him. In modern society *R* would probably desist from making such a gift, and would defer his gift till some suitable occasion arose, supplying a pretext for the gift. Mutual gifts of our own times are in essence the same as the *hiba-bil-ewaz* of the Muslim lawyers. A person who receives a present feels himself under a social obligation to give a present in return, though as a matter of delicacy he disguises the reciprocity of his gift by waiting for a suitable occasion.[111]

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107. Fyzee, at p. 272.
108. Fyzee; Mulla.
109. Mulla.
110. Mulla.
111. Tyabji, at p. 446.

(2) Hiba-ba-shart-ul-ewaz.—When a gift is made with a stipulation (*shart*) for a return (*ewaz*), it is called *hiba-ba-shart-ul-ewaz*. The distinctions between a *hiba-bil-ewaz* and *hiba-ba-shart-ul-ewaz* are (*a*) that in former the intention to make an *ewaz* is an afterthought; (*b*) while in the latter the two go hand in hand; (*c*) the return is contemplated by both parties in the *hiba-ba-shart-ul-ewaz*. In the *hiba-bil-ewaz*, it is the donee under the primary gift who of his own accord thinks of making a return, and offers it to the primary donor, while in *hiba-ba-shart-ul-ewaz*, there is stipulation for a return before making the gift.[112]

Where a *hiba-ba-shart-ul-ewaz* is made, and the stipulation is unlawful both the gift and the stipulation are void. For instance, the donor says: 'I give this to you, and make a condition that you should not sell it, and you should not make a gift of it to others'—in such a case, the stipulation and gift are both invalid. (Tyabji)

After the gift and the return have been completed by delivery of possession, neither of them can be revoked.

D makes a gift of a house to *S* and puts him in possession. Thereafter *S* gives *D* a camel as an *ewaz* and *D* accepts it. Later, *D* purports to sell the house to *T*. The sale has no effect.[113]

The return gift must be made with all the formalities necessary for *hiba*, i.e., offer, acceptance and delivery of possession.

13. Life estate and Life interest

(*a*) Distinction between life estate and life interest.—Tyabji[114] explains the difference between life estate and life interest through the following dialogue (condensed by the author) between a layman and an Arab lawyer, whom he consults regarding the disposition of his property consisting of an orchard and camel:

> *Client.*—"I want to give my orchard and camel to *A* for life. I want to make him owner for life."
>
> *Arab lawyer.*—I feel great difficulty in understanding your requirements. If you want to make *A* owner, it means that the property will be under the absolute control of *A* and after his death it will devolve upon *A*'s heirs; as the notion of ownership implies that the owner has absolute right of unlimited duration over it. So, do you wish *A* to be the owner, or do you wish to give him rights short of ownership.

112. *Ibid*, at p. 447.
113. Fyzee, at p. 272 *citing* Tyabji, at p. 460.
114. Tyabji, at p. 491.

Client.— "My desire is that *A* should be life owner; only his rights should be so limited that after his death he should have no claim on the orchard and camel."

Arab lawyer.—"I see what you want to give to *A*. You want to give him right to hold orchard and camel in his possession, and to get their profit and use. You will serve your purpose if you give *A* the usufruct for *A*'s life. In this way alone, *A* will not be made owner, which you do not want him to become, of the orchard and camel. And as he will not be the owner, he will not be able to transfer orchard or sell or kill camel. And since his usufruct is limited to his own life, his heirs cannot inherit the orchard or camel."

In the above example, if the client could lawfully have made *A* the owner of the properties for life, it would have been life estate. But since it is unknown to Muslim Law, the Arab lawyer had great difficulty even in understanding this notion, quite foreign to him. The advice which he gives to his client is to create a life interest, which alone is recognised in Muslim Law. This example holds good in India.

Fyzee explains with clarity thus—'Estate' is a term of art in English Law and has a definite meaning in its technical sense. A 'life estate' implies the transfer of the corpus of the property to a certain person with certain limitations as to its use and alienations. In this technical sense of the term, a life estate was declared by the Privy Council in *Sardar Nawazish Ali Khan* case (infra) to be unknown to Muhammadan Law as administered in India, but life interests were well known and would be created. Before coming to that subject, we may revise the difference between corpus (*ayn*) and usufruct (*manafi*); both can be subjects of gift.

The *ayn* is the substance of a thing, e.g. a plot of land, a house, a camel or a book. *Manafi* (singular, *manafaa*) is literally the profits or produce. It means, not the thing itself, but its use, benefit produce or profits; e.g., the right to reside in a house, the right to fish in the pond, the right to take the produce, fruits of a garden, the recurring income of partnership, dividends on shares, interests on government loans or stock.

The right to take the produce is intimately connected with the notion of time, or duration; therefore, you may transfer the *manafi* (usufruct) for a specific duration, time. But the notion of time-limit does not govern the transfer of corpus, *ayn*; the notion is that it is the absolute transfer of ownership, and is therefore for an indeterminate duration, in simple words—forever.

Now *hiba* is a transfer of the corpus; hence the rule that *hiba* cannot be cut down by a repugnant condition of time-limit. Therefore according to Muhammadan Law as received in India, you can make gift of the corpus, *ayn*. Or you may make gift of the usufruct, *ariya*, *wasiyat-bil-manafi*, *tawrith*, etc., these

are the ways of making gift of usufruct. A life interest may therefore be considered as a transfer of the usufruct for a well-defined period.[115]

There is a full discussion of the law on this subject in the judgment of Sir Wazir Hasan as reported in *Amjad Khan* v. *Ashraf Khan*[116]. That case challenged the doctrine accepted by Hanafi lawyers that a gift to *A* for life conferred an absolute interest on *A*; a doctrine based on a saying of the Prophet.[117] An *amree* of life grant is lawful to the grantee during his life and descends to his heirs. The meaning of *amree* is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death. An *amree* is nothing but a gift and a condition and the condition is invalid: 'but a gift is not rendered null by involving an invalid condition.' Sir Wazir Hasan in his judgment examined the appropriate texts and all the relevant decisions of the Privy Council. He pointed out the distinction in Muslim Law between the *corpus* and the *usufruct*, between the thing itself and the use of the thing. On the construction of the deed which was in question in the case before him, he came to the conclusion that the donor intended to confer on his wife not the corpus, but a life interest only, that such life interest could take effect as gift of the use of the property and not as part of the property itself, and that there was nothing in Muslim Law which compelled him to hold that the intended gift of a life estate conferred an absolute interest on the donee. This case was taken in appeal to the Privy Council.[118] The Board agreed with Sir Wazir Hasan on the construction of the deed in question that only a life interest, it came to an end on her death, and the appellant, who was her heir, took nothing and if the life interest was bad the wife took no interest at all and the appellant was in no better case.

Limited interests have long been recognised under Shia Law. There is no difference between the several schools of Muslim Law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the schools. In dealing with a gift under Muslim Law, the first duty of the Court is to construe the gift. If it is a gift of the *corpus*, then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant; but if on construction the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the *corpus* unaffected except to the limited interest.

(b) Life interest.[119]—In Muslim Law, therefore, both the *corpus* (ayn) and usufruct (*manafi*) of a property can be the subjects of gift. A gift of the usufruct

115. Fyzee, at pp. 244-247.
116. AIR 1925 Oudh 568: ILR (1929) 4 Luck 305: AIR 1929 PC 149.
117. Hedaya, Bk. III at p. 309.
118. *Amjad Khan* v. *Ashraf*, (1929) LR 65 IA 213.
119. Fyzee, at pp. 244-264.

for a definite period is called life interest. Life interest may be created in the following ways:

(*i*) By family *wakfs*;

(*ii*) By will;

(*iii*) By the rule in *Umjad Ali Khan case*:

(*iv*) By the rule in *Ashraf Khan case*;

(*v*) By *Nawazish Ali Khan case*; and

(*vi*) By family settlements.

(*i*) *By family wakfs.*—*A* makes a *wakf* of his property for the benefit of his children and descendants, and on the extinction of the line of his lineal descendants, to a school. The children and the descendants will have life interest in the property generation after generation.

(*ii*) *By will.*—A life interest can be created by will. Thus, if a life interest is given by will to *A* for life, and thereafter to *B*, the life interest in favour of *A* is valid.

In a Calcutta decision[120], it was held that a Muslim cannot, under cover of law relating to life-grants, dispose of more than one-third of his estate. A bequest of the entire property for a certain period to the exclusion of other heirs cannot be valid unless the heirs have consented to it. Such consent is to be given after the death of the testator, or is not revoked after testator's death, if it is given before testator's death.

(*iii*) *By the rule in Umjad Ali Khan case.*[121]—The point in issue in this case was: whether a real transfer of property by a donor in his lifetime under the Muslim Law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the corpus, but simply stipulating for and obtaining a right to the recurring produce during his lifetime, is an incomplete gift by the Muslim Law?

Their Lordships of the Privy Council held both the gift and the condition as valid. This is a recognition of life interest.

(*iv*) *By the rule in Ashraf Khan case.*—The decision of the Privy *Council in Hameeda* v. *Budlun*[122], and *Abdul Gafur* v. *Nizamuddin*[123], and some of the High Courts in India have expressed the opinion that life interest was nothing more than a gift with condition. If the condition was repugnant to the gift, the condition was void and the gift was valid. Thus, it was held that if *A* gave to *B* a life interest in a certain property, *B* took it absolutely.

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120. *Anarali Taratdar* v. *Omar Ali*, AIR 1951 Cal 7.
121. *Nawab Umjad Aly* v. *Mohumdee Begum*, (1867) 11 MIA 517.
122. (1872) 17 WR 525.
123. (1892) 19 IA 170.

But this view is not correct. Delivering the judgment in *Amjad Khan* v. *Ashraf Khan*[124], Mr Wazir Hasan, Additional Judicial Commissioner, arrived at various conclusions:

(*a*) Giving an interest in a certain property is different from and is not the same thing as, the gift of the corpus.

(*b*) Where the intention of the donor is to give the *corpus* of and the absolute interest in the property gifted to one person and that gift is accompanied with a reservation of a limited estate in the same property in favour of another, both the gift and the reservation, are valid.

(*c*) When the donor merely creates a life interest in the donee and reserves the reversion of the property to his heirs, the donee of the life interest cannot take the property absolutely.

This case went to the Privy Council, which approved the view of Mr Wazir Hasan, A.J.C., and laid down two propositions:

(*i*) that a life interest cannot be enlarged into an absolute interest, and

(*ii*) that the validity of a life interest by the law of gifts was an open question.

Following this case, the modern tendency is to favour the validity of life interests.

(*v*) *By Nawazish Ali Khan case.*[125]—The propositions of law laid down by the Privy Council in this case are:

(*a*) That Muslim Law makes no distinction between real and personal property; nor does it recognise the splitting up of ownership of land into estates;

(*b*) That there is a clear distinction between the *corpus* of the property and its usufruct;

(*c*) That interests for a limited duration can therefore be lawfully made.

The judgment also says that if a Muslim, executes a deed and attempts to limit the succession to male heirs only by creating successive life interests, and thus to create a line of succession unknown to Muslim Law, he cannot do so. Also known as gift over, it was held to be void in Shia Law also.

Another important case on life-grants is *Anjuman Ara Begum* v. *Nawab Asif Kader*[126]. The High Court observed:

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124. AIR 1925 Oudh 568: ILR (1929) 4 Luck 305: AIR 1929 PC 149.

125. *Nawazish Ali Khan* v. *Ali Raza Khan*, (1948) 75 IA 62: AIR 1948 PC 134.

126. (1955) 2 Cal 109.

The true approach when a Muslim grant calls for consideration is first to construe the deed as a whole. If the grant is found to be an absolute grant, no further question arises. If, however, the grant is found to be a limited grant, the direct or the immediate subject-matter of the gift has to be ascertained. If it is the *corpus* any restrictive condition, affecting the same, will be invalid. If subject-matter of the grant is the limited interest and not the corpus, the grant takes effect as a valid grant.

(*vi*) *By family settlements.*—An agreement settling disputes between the parties of a family, and which also involves a transaction for a consideration, is called "family settlement". Life interest may be created by such agreements.

For example, a Muslim wife agreed not to claim her inheritance if husband executed *wakf* of the whole property. The husband created such a *wakf*. After the death of her husband she could not claim inheritance on any thing. Similarly, a wife sues husband for her *dower*. A compromise has been made whereby the wife accepts life estate in a portion of property in lieu of dower. The husband accepts life-estate in other property. Both husband and wife renounced inheritance. The settlement was held to be valid (Tyabji).

14. Shiite law of life interests

The scope of life interest is somewhat broader in Shiite law, which recognises its following three forms·

(*i*) *Umra*, the grant of usufruct for life;

(*ii*) *Sukna*, the right to reside in a house for life;

(*iii*) *Rukba*, the right to take usufruct for a fixed period.

Following are the essentials of a life interest in Shiite law:

(*a*) Delivery of possession to the life-tenant;

(*b*) Existence of the grantee. When there are many grantees; succeeding grantees should be in existence at the time when their interests begin;

(*c*) The subject-matter of life interest should be such as may be used without being consumed in the process.

The grantor is free to revoke a life grant at any time before his death, except where it is for a religious purpose, or for an indeterminate period.

XI

Pre-emption

(Shufa)

1. Meaning, origin and development

Shufa means conjunction, here it denotes the right of the owner of a property which is in conjunction—that is adjacent—to another property. *Haq* means right. So, *haq-shufa* means right to subsequent purchase of a property adjacent to own from another fresh purchaser. In practice it means a right to dislodge a fresh purchaser and step in his shoes in respect of an adjacent property. It is a right to dislodge stranger from entering into ones neighbourhood. These simplified statements are subject to legal technicalities as would be unfolded in the following discussion. The Roman legal system also recognised such system, but with certain difference. There the vendor was obliged to sell his immovable property to a determined person if he (the latter) offered to purchase it on the same conditions as the intended vendee had offered. This was based on terms of contract and also of positive law. It was a relationship governing the vendor and the determined person; if the property was already sold to a vendee, the determined person had no right to disturb the former. In India, on the other hand, it is not confined to a 'perspective purchaser' only; in fact it originates *after* the sale is complete and affects the fresh purchaser and runs up to the passing of the decree in the suit for the right. It is a sort of acquisition by compulsory purchase.

The origin of pre-emption is embedded in the sayings of the Prophet. A number of these Traditions are given in *Hedaya* (p. 548):

> "A neighbour has a right, superior to that of stranger, in the lands adjacent to his own."
>
> "The right of *shufa* holds in a partner who has not divided off and taken separately his share."
>
> "The neighbour of a house, and the neighbour of land has a superior right to those lands and if he be absent, the seller must wait his return: Provided, however, that they both participate in the same road."

Muslim jurists, however, differed in their interpretation of these traditions. Thus, for example, they put forward different categories of persons having the right of pre-emption.

Hanafi Law recognises three categories: (*i*) a co-sharer in the property sold, (*ii*) a participator in the amenities and appendages of the property, and (*iii*) a neighbour owning an adjoining immovable property Shia Law restricts pre-emption to co-owners in the undivided property and that too when their number is two. Shafii Law recognises pre-emption only among co-sharers.

Both Shia and Shafii Law do not recognise pre-emption on the ground of vicinage or on the ground of participation in appendages.

2. Advent of *shufa* in India

Pre-emption in village communities in India had its origin in the Muslim Law, and was apparently unknown in India before the time of the Mughal rulers. In time customs of pre-emption grew up and were adopted among village communities. The law of pre-emption was mainly introduced and given effect to by the Muslim judges who were bound to administer Muslim Law during the Mughal period. Under their administration it became, and remained for centuries, the common law of the country, and was applied universally both to Muslims and Hindus, because in this respect the Muslim Law makes no distinction between persons of different races and creeds. In British India, rights to pre-emption had in some provinces been given effect to by various Acts, and by contract between the sharers in a village. But in all cases the object was, and still is, to prevent strangers to a village from becoming sharers in a village, or in a property, where such intrusion by a stranger may be injurious to that society.[1]

3. Definitions

MULLA: "The right of *shufa* or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person."[2]

MAHMOOD, J.: "...a right which the owner of certain immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as those on which such latter immovable property is sold to another person."[3]

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1. See, *Digambar Singh* v. *Ahmad Said Khan*, (1914) 42 All 10; *Gobind Dayal* v. *Inayatullah*, ILR (1885) 7 All 775.
2. Mulla, at p. 255.
3. *Per* Mahmood, J., in *Gobind Dayal* v. *Inayatullah*, ILR (1885) 7 All 775.

4. Nature of the right of pre-emption

The leading case on the law of pre-emption is *Gobind Dayal* v. *Inayatullah*[4]. The observations of Mahmood, J., in this case are still regarded as authority on the subject. But before this decision came, the leading case on pre-emption was *Sk. Kudratullah* v. *Mohini Mohan Saha*[5]. Certain curious propositions were laid down in this case by Mitter, J., which were, it is submitted, erroneous. He propounded, for example:

(*i*) The right of pre-emption does not exist *before actual sale*, because, on the one hand, the pre-emptor has no right of prohibiting the sale, and on the other hand, the vendor is not bound to offer the property for purchase to the pre-emptor before selling it to a stranger.

(*ii*) The sale, in respect of which pre-emption might be claimed, passed full ownership to the vendee, and did not involve any defect of title, because, it could not be regarded as an infringement of a pre-existing pre-emptive right.

From the above two propositions, the learned Judges of the Calcutta High Court concluded that right of pre-emption is nothing but *mere right of repurchase*.

Mahmood, J., forcefully countered this view by observing that he is astonished to see that Mitter, J., and others hold that there is nothing whatever in the Muslim Law which imposes on any one the obligation of making the first offer to his neighbour, nor is there anything to show that the right of pre-emption is based on any such obligation, the non-fulfilment of which would prevent the stranger from acquiring a complete and valid title to the property by virtue of his purchase.

Refuting these allegations, Mahmood, J., observes that Muslim Law originates from Koran and the sayings of the Prophet; and law and religion in Islam are so intimately connected that they cannot readily be dissevered from each other. He then cites a Tradition of the Prophet, that:

> "It is not lawful for any one to sell till he informs his coparcener (neighbour) who may take or leave it as he wishes; and if he has sold without such information, the coparcener has a preferential right to the share" (*Aini*).
>
> "Pre-emption exists in all joint properties, whether land, or house, or grove. It is not proper for him (owner) to sell till he has offered it to his coparcener, who may take it or reject it; and if the vendor fails to do this, his coparcener has the preferential right to it until he is informed" (*Muslim*).

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4. ILR (1885) 7 All 775.
5. (1869) 4 Beng LR 134.

It is perfectly clear from the above traditions that the very concept of pre-emption necessarily involves the existence of the right before the sale.

Thus, the law of pre-emption creates a legal servitude running with the land. Sale is not the real cause of pre-emption. The real cause is the situation of the properties in question. The right comes into being after the sale, which clearly shows the intention to dispose of the property. The right exists, therefore, independently of and antecedent to the sale.

The right of pre-emption is not a right to repurchase, but it is a right of substitution, entitling the pre-emptor to stand in the shoes of the purchaser. This view has recently been adopted by the Supreme Court of India in *Bishan Singh* v. *Khazan Singh*[6], where Subba Rao, J., summarised the rules of pre-emption thus:

(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right.

(2) The pre-emptor has a secondary right or a remedial right to follow the thing sold.

(3) It is a right of substitution but not of repurchase, i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee.

(4) It is a right to acquire the whole of the property sold and not a share of the property sold

(5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place.

(6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.

The statement that 'it is not a right to repurchase' must be understood in its context. It means it is not a case of any repurchase, but a particular subsequent purchase under certain circumstances which compel the fresh buyer to resell. The requisites are:

(*i*) the pre-emptor must be the owner of immovable property in the neighbourhood of the property sold;

(*ii*) there must be a sale of certain property not his own;

(*iii*) the pre-emptor must stand in certain relationship to the vendor in respect of the property sold.

Discussing the nature of the right, Mahmood, J. in *Gobind Dayal* (supra) shows on the basis of *Hedaya* that sale is not the cause of pre-emption, it is the

6. AIR 1958 SC 838, The Supreme Court cited with approval several portions of the judgment of Mahmood, J., in *Gobind Dayal* v. *Inayatullah*, ILR (1885) 7 All 775.

situation of the properties in question; at the same time, the right to enforce the pre-emptor's right comes into being after the sale. This means that neither the sale of every property nor the sale to every other person would give rise to the right. As explained later, the right arises only in certain situations. Any action by pre-emptor before actual sale is premature.

About the nature of this right as to whether it is a personal right or an incident of property, there was divergence of views between some High Courts. According to Calcutta and Bombay High Courts it was a right to repurchase from the buyer, while Allahabad High Court held it to be an incident of property. The Supreme Court has accepted the latter interpretation—it is an incident annexed to the property.[7] Although it is essentially a right *in rem*, from the time it arises up to the time of decree, it is restricted as a personal right, which is neither heritable nor transferable.[8]

According to Mulla (Section 231) the following 3 classes of persons and no others, are entitled to claim pre-emption:

(1) A co-sharer in the property (*Shafi-i-Sharik*).

A mukarraridar (lessee in perpetuity) holding under co-sharer has no right to pre-empt as against another co-sharer.

(2) A participator in immunities and appendages, such as a right of way or a right to discharge water (*Shafi-i-khalit*), and

(3) Owners of adjoining immovable property (*Shafi-i-Jar*), but not their tenants, nor persons in possession of such property without any lawful title. A *wakif* or *mutawalli* is not entitled to pre-empt, as the wakf property does not vest in him.

The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal share of the property in respect of which the right is claimed.

So in *Abdulaziz Mohammad Kothiwale* v. *Ismailbeg Kashimbeg Miraz*[9] where the plaintiff was a tenant of his wife who was a mortgagee of the suit property from the first defendant, the former's claim to pre-empt was negatived. The second defendant was the adjoining owner; his right of pre-emption was upheld; the agreement of sale was executed by the first defendant in favour of the plaintiff, this agreement, it was held, could not defeat the very right of pre-emption of the second defendant. The sale agreement therefore could not be enforced, it was decided.

Describing the utility of the right of pre-emption, Mahmood, J., further observed that this right, no doubt, operates as a restriction to the free sale of

7. See, *Mohd. Ismail* v. *Abdul Rashid*, (1956) 1 All 143.
8. See, *Audh Bihari Singh* v. *Gajadhar*, AIR 1954 SC 417.
9. 2004 AIR Kant HCR 710.

property, thus diminishing its market value, but its utility outweighs its drawbacks. Even in countries like Germany a similar right (*retractrecht*) was enforceable. And if this was the case in a country where distinction of caste and creed do not exist, it seems that this right must not be lightly dealt within a country like India, where difference of caste, religion, etc., presents quite the opposite state of things. This discussion brings us to an inevitable question: Whether the law of pre-emption infringes the fundamental right to hold and dispose of property, guaranteed under Article 19(1)(*f*) of the Constitution?

5. Constitutionality of pre-emption

The High Courts of Rajasthan, Madhya Bharat and Hyderabad had held that pre-emption on the ground of vicinage (ownership of adjoining immovable property) was void after the advent of the Constitution, being an unreasonable restriction on the right to acquire and dispose of property under Article 19(1)(*f*), but pre-emption as between co-sharers (*shafi-i-shareek*) or owners of dominant and servient tenements (*shafi-i-khalit*) was saved by the reasonable restriction of Clause (5) of the Article.[10] Then came two decisions of the Supreme Court upholding the above view. In *Bhau Ram* v. *Baij Nath*[11] the Supreme Court held the custom of pre-emption by vicinage, though a liability attached to property, operated as a restriction on the right to dispose of property; not being in public interest, this restriction was not reasonable. moreover. it divided society on the basis of caste and religion, which was prohibited by Article 15 of the Constitution. The same view was maintained in *Sant Ram* v. *Labh Singh*[12]. The decisions affected only the vicinage type, the co-sharer type custom was unaffected; it had been already recognised in *Audh Bihari case* (supra). "However", as correctly pointed out by Paras Diwan, "in this case the constitutional validity of the law of pre-emption was not challenged before the Supreme Court. In fact, the constitutional validity could not have been challenged in this case, as it was a pre-constitutional case, where the leave to appeal had already been granted by the Privy Council. After the coming into force of the Constitution of India the appeal was heard by the Supreme Court. Thus, from this case, no inference can be drawn that the Supreme Court had upheld the constitutional validity of the law of pre-emption based on co-ownership."[13]

By the Constitution (Forty-fourth Amendment) Act, 1978, the fundamental right to property enshrined in Article 19(1)(*f*), as well as Article 31 has been

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10. *Punch Guja* v. *Amar Singh*, AIR 1954 Raj 100; *Babulal* v. *Gowardhandas*, AIR 1956 MB 1; *Moti Bai* v. *Kandkari*, AIR 1954 Hyd 161.
11. AIR 1962 SC 1476.
12. AIR 1965 SC 314.
13. *Muslim Law in Modern India* (3rd Edn.) at p. 220.

Pre-emption has become the customary law even among the Hindus. Thus, customary right to pre-emption exists among the Hindus of Bihar; (This entire discussion should be taken as regulated by the latest decision of the Supreme Court.) Sylhat, parts of Maharashtra and Gujarat, such as Surat, Godhra and Ahmedabad; parts of U.P., such as Banaras, Muzaffarnagar, and Saharanpur; Delhi and Bengal [19] However, the right of pre-emption is extended to Hindus only after being established.

The burden of proving a custom lies on the person who establishes it. Where, however, its existence is generally known and judicially recognised, it need not be proved afresh. A custom to be judicially recognised must be ancient and invariable.

(*iii*) By statute, the law of pre-emption is applied in the following regions:

PUNJAB	The Punjab Pre-emption Act, 1913
OUDH	The Oudh Laws Act, 1876
AGRA	The Agra Pre-emption Act, 1922
C.P.	C.P. Land Revenue Act (Section 151)
BERAR	Berar Revenue Code (Sections 176 to 178)
HYDERABAD	*Zabta Shikmidaran* (Paras 12 and 14)

(*iv*) Right of pre-emption may also arise in certain cases by contract between sharers in certain villages.

Contracts of pre-emption are found noted in the *wajib-ul-arzz* of various villages, especially in Uttar Pradesh. The pre-emption in such cases is governed by the terms of the contract. If the contract is limited to the period of settlement, for example, the right would not be enforceable after the expiry of that period. It is immaterial whether the terms of the contract are in consonance with the provisions of Muslim Law of pre-emption. The terms of the contract will have overriding effect.

7. The pre-emptor

The following classes of persons are entitled in Hanafi Law to pre-empt:

(*i*) *Shafi-i-Shareek*: a co-sharer in the property.

A co-sharer is a person who has an undivided share in the property subject-matter of sale. *Shareek* means co-sharer. There must be full ownership in the land pre-empted, so when merely leasehold interest is sold, the right to pre-empt does not arise. To illustrate—*A* and *B* are joint owners of a house; if *A* sells it to *P*, *B* can pre-empt; but if *A* only leases it to *P*, *B* cannot claim any right of pre-emption.

19. Verma, at pp. 783-84.

taken away from Part III of the Constitution and reduced to a simple constitutional right subject to 'law' under Article 300-A. In this changed status, it is only of academic value to discuss the pros and cons of the decisions referred to above. However, the moot point that may still be raised is—can a State agency like the judiciary be used to implement a customary rule (of pre-emption by vicinage) that requires discrimination on the ground of caste or religion emphatically prohibited by Article 15(1)? Our answer is in the negative. With the heralding of the 21st century, we have surely arrived at a point of time when the Supreme Court's pronouncement relating to pre-emption can be said to be perfectly compatible with the mood of the society.

However, the above discussion has lost much of its relevance now; in *A. Razzaque Bagwan* v. *Ibrahim Haji Mohd. Husain*[14] the right of pre-emption was claimed on the ground of being *shafi-i-jar* and *shafi-i-shareek*, having property adjoining to the suit house. The Supreme Court held that the law of pre-emption based on vicinage was void, unconstitutional. The claim was disallowed.

6. Application of the law of pre-emption

The 'application' depends upon four factors:[15]

(*i*) The law of pre-emption is applied to Muslims throughout India as a matter of justice, equity and good conscience, except in the State of Madras. There the Court[16] refused to apply it on the ground that it imposed unwarranted restrictions upon the liberty to transfer property. In Bombay too, it was held that pre-emption placed a clog upon the freedom of sale, under the Transfer of Property Act and the Indian Contract Act.[17]

(*ii*) By custom, the law of pre-emption is applied also to Hindus in certain localities, like Bihar.

If the custom is in variance with Muslim Law of pre-emption, the custom would prevail. Thus, where a custom does not require strict compliance with the formality of *talab-i-ish-had*, it would not be obligatory on the pre-emptor to observe it as a condition precedent to the enforcement of such a right.[18]

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14. (1998) 8 SCC 83: AIR 1999 SC 2043. Once more pre-emption was claimed in *Kumar Gonsusab* v. *Mohd. Miyan*, (2008) 10 SCC 153: (2008) 73 All LR 496 (SC) but the Apex Court did not deem it relevant to go into the question of the validity of this right because the claim of the right of pre-emption was based by the respondents merely on the basis of 'agreement for sale', whereas the right can arise only when there is a proper 'contract of sale'. The Supreme Court did remark that the right of pre-emption is a weak right and is not looked upon with favour by courts.
15. Fyzee, at p. 339.
16. *Ibrahim Saib* v. *Muni-Mi-ud-din Saib*, (1870) 6 MHCR 26.
17. *Mohd. Beg* v. *Narayan Meghaji Patil*, ILR (1915) 40 Bom 358.
18. *Zamir Husain* v. *Daulat Ram*, ILR (1833) 5 All 110.

Under Shafii (Sunni sect) Law, only a co-owner or a co-sharer is entitled to claim pre-emption right. Under Shia Law the right is available only when the number of co-sharers is two, not more than two. According to the Punjab High Court the objects of this right are to avoid disharmony between neighbours, to protect the integrity of the village community, to avoid fragmentation of land holdings, to reduce the chances of litigation and to promote domestic comfort.[20]

A person would not be a co-sharer for the purposes of pre-emption merely because there is some common burial ground or *chaupal*, or some common road or watercourse, or some property is left in joint occupation for convenience. Persons jointly liable for the payment of revenue, even though the property has been partitioned, would however be co-sharers.[21]

(*ii*) *Shafi-i-khalit*: a participator in immunities and appendages, such as a right of way.

However, a person would not become *shafi-i-khalit* merely because branches of a tree in his house projected over the land sold, or he is only entitled to a right of support from a wall standing on the property sold, or because he and the vendor are both entitled to draw water from a Government watercourse.

There are three ways in which a person may be considered to be a *shafi-i-khalit*:[22]

(*i*) He may be the owner of a dominant heritage;

(*ii*) He may be the owner of a servient heritage;

(*iii*) The property sold as also the property of the pre-emptor may be a dominant heritage to a third person's property.

Dominant and servient heritage.—*A* owns a house which he sells to *B*. *M* owns a house towards the north of *A*'s house, and is entitled to a right of way, through that house. *N* owns a house towards the south of *A*'s house, separated from *A*'s house by a partition wall, and having a right of support from that wall. Both *M* and *N* claim pre-emption of the house to *B*. Here *M* is a participator in the appendages, while *N* is merely a neighbour, for the right of collateral support is not an appendage. *M* is therefore entitled to pre-emption in preference to *N*. It is immaterial that *M*'s right of way has not been perfected by prescription under the Easements Act.

In the above example, the house owned by *M* is a dominant heritage, and the pre-empted house is a servient heritage, for *M* has a right of way through it. *M* would still remain a "participator" in the appendages, if the pre-empted property was the dominant heritage and his property was the servient heritage.[23]

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20. *Uttam Singh* v. *Kartar Singh*, AIR 1954 Punj 55.
21. Verma, at p. 550.
22. Mulla, at pp. 212-13.
23. Mulla, at p. 259.

In the *Bhau Ram* and *Sant Ram cases* (supra), the Supreme Court has held the right of pre-emption valid when based on certain appendages like common staircases, common entrance, etc.

(*iii*) *Shafi-i-jar*: The owner or neighbour of adjoining immovable property. (This, however, must now be read subject to the decision of the Supreme Court in *Bhau Ram case*[24] holding pre-emption on the ground of vicinage as unconstitutional).

The right of pre-emption on the ground of the vicinage does not extend to estate of large magnitude, but is confined to houses, gardens, and small pieces of land.

If there are more than one pre-emptor belonging to different categories, the first category or class excludes the second, and the second excludes the third. [*See*, illustration (*a*) below]. But if the claim be made by two or more persons belonging to the same class, they are entitled to equal shares of the pre-empted property on tendering their respective quotas of the purchase money.[25]

Illustration

A mansion is situated in a street which is not a public thoroughfare, and belongs to two persons, one of whom sells his share. The right of pre-emption belongs in the first place to the other partner in the mansion. If he surrenders his right, it belongs to the inhabitants of the street equally, without any distinction between those who are contiguous and those who are not so. If they all surrender the right, it belongs to the owner of any house immediately contiguous to the house in question, even though not abutting on the private street.[26]

Exceptions.—There may be cases in which one person is considered to be co-sharer with the vendor in a closer and more intimate sense than another, and is on that ground allowed precedence [*See*, illustration (*a*) below]. There may also be cases in which a person who shares with the vendor the whole of a certain easement may have priority over one whose participation is less complete [*See*, illustration (*b*) below].[27]

Illustrations

(*a*) A group of houses belonging to different owners are situated on a street. In the same group of houses, there is a house belonging to two persons, one of whom sells his share in it. The right of pre-emption belongs first to the partner in the house, then to the owners of the group of the houses, and then to the people in the street, who are all alike. If all these give up their right, it belongs to the

24. (1954) 1 All LJ 151-56.
25. Wilson, at p. 401.
26. Baillie, at p. 402.
27. Baillie, at p. 402.

neighbour behind the mansion, who has a door opening into another street, and who is therefore simply a neighbour, and not a participator in the appendages (Wilson).

(*b*) If, in the above illustration, there be another private street leading from the first-mentioned street, and a house in it is sold, the right of pre-emption belongs to the inhabitants of this inner street, because they are more specially intermixed with it than the people of other street. But if a house in the outer street is sold, the right of pre-emption belongs to the people of inner, as well as to those of the outer street, for the intermixture of both in the right of way is equal (Wilson).

(*c*) If there be two houses on opposite sides of a public street, and one of them is sold, there is no pre-emption except for the adjoining neighbour (Wilson).

(*d*) If there is a small channel or canal from which several gardens are watered, and some of them are sold, the owners of all the gardens are pre-emptors, without any distinction between those who are and those who are not adjoining (Wilson).

(*e*) *A* is the owner of a land, just adjoining to which is the land of *B*: After *B*'s plot of land, there is a *kutcha* road, on the other side of which is the plot of land belonging to *C*. The *kutcha* road is a public thoroughfare. *B* and *C* sell their lands to *D*. Here *A* is entitled to whole of the land belonging to *B* and *C*, and not merely the portion on his side of the road.[28]

(*f*) *A*, who owns a piece of land, grants a building lease of the land to *B*. *B* builds a house on the land, and sells it to *C*. *A* is not entitled to pre-emption of the house, for he is not a co-sharer, nor a participator in the appendages of the house, nor an owner of adjoining property. His mere ownership of the land on which the house has been built, gives no right of pre-emption (Mulla).

Benami transactions.—A secret purchase of shares in a village in the name of another (*benami*) does not constitute the real purchaser co-sharer for the purpose of pre-emption, so as to enable him to defeat an otherwise bona fide purchaser, who has no notice of the previous secret sale.[29]

8. Characteristics of sale giving rise to pre-emption

The right of pre-emption does not arise out of gift, charity, inheritance, or bequest. It must be a sale where:

(*i*) there must be an exchange of immovable property for money or property; and

28. Mulla, at p. 260.
29. Wilson, at p. 407.

(*ii*) there must be an actual transfer of ownership from the vendor to the vendee.

The right of pre-emption does not arise in the following cases:

(*i*) A contract to sell at a future time;

(*ii*) A sale with reservation (to either vendor or vendee) of an option of repudiation;

(*iii*) A lease, even in perpetuity.[30]

As sale alone gives rise to the right of pre-emption, it is important that the exact point of time, when the sale is said to be complete, is known.

According to an Allahabad decision of 1894,[31] sale is complete where the price is paid, and possession is delivered. It is immaterial that it does not amount to sale under the Transfer of Property Act.

The Privy Council, however, held in *Sitaram Baurao* v. *Jiaul Hasan*[32], that the intention of parties must be considered in each case to decide which system of law is to be applied. This view has been rejected by the Supreme Court in *Ram Saran* v. *Domini Kuer*[33]. The facts of the case were these—*P* executed a sale deed of a house on 31st January 1946, in favour of *D*, and presented it for registration on the same day. On hearing of the sale, *RS* made a *talab-e-muwathaba* (the first demand) on 2nd February1946. The deed was copied out in the Registrar's books on 9th February 1946. RS filed a suit for pre-emption. *D* resisted the suit on the ground that the sale was completed only on 9th February 1946, and not earlier. Therefore, the demand was made prematurely. The Supreme Court (by 3 to 2) held that the demand was made prematurely and must fail.[34] Thus the requirements of the Transfer of Property Act, Sections 54 and 61, must be completed where so required. Earlier also in *Radhakishan Laxminarayan* v. *Shridhar*[35] the Supreme Court had held that a transfer of property had to be in compliance with the TP Act only where so required by it and Muhammadan Law or any other personal law of transfer of property could not override the statute. "The right of pre-emption is a weak right the courts would not go out of their way to help the pre-emptor. It is neither illegal nor fraudulent for parties to a transfer to avoid and defeat a claim for pre-emption by all legitimate means."

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30. Wilson, at p. 407.
31. *Begam* v. *Mohd. Yakub*, ILR (1894) 16 All 344. See also, *Janki* v. *Girjadat*, ILR (1885) 7 All 482 (FB).
32. (1921) 48 IA 475.
33. AIR 1961 SC 1747: (1962) 2 SCR 474.
34. Fyzee has criticised this judgment as harsh and technical, seemingly based on the prevailing view that pre-emption was unconstitutional and therefore should be discouraged, (4th Edn.) at pp. 344-45.
35. AIR 1960 SC 1368.

Whether transfer in lieu of dower is sale?—In *Fida Ali* v. *Muzaffar Ali*[36], the Allahabad High Court held that such a transfer is sale, provided it is in *satisfaction of a previous obligation.*

Later on, in *Ghulam Abbas* v. *Razia Begum*[37], a Full Bench of the Allahabad High Court took the view that transfer *in lieu* of dower amounts to sale. This view would now prevail in Oudh too.

On the other hand, the Oudh Chief Court held it to be a *hiba-bil-ewaz.*

Fyzee opines that the Oudh view "appears to be more in consonance with justice".[38]

No right of pre-emption in other transfers.—The right does not accrue in the following types of alienations of property:

1. Gifts
2. Sadaqa
3. Wakf
4. Inheritance
5. Bequest
6. Lease, even though in perpetuity
7. Mortgage, and
8. Conditional sale.[39]

The *wakif* has no right of pre-emption on behalf of the *wakf* property; nor can God, as the ultimate sovereign and owner of property, claim pre-emption on behalf of the foundation. The conception of God being impleaded as a party in a claim before a *Kazi* is so foreign to Muslim religion and Muslim jurisprudence that Muslim jurists have nowhere discussed whether a suit can be filed on behalf of God Almighty.[40]

Sale of leasehold interest in the land does not give rise to the right of pre-emption as held by the Supreme Court in *Munnilal* v. *Bishwanath Prasad*[41]. There must be full ownership in the land pre-empted, and the pre-emptor also must have full ownership to maintain a suit for pre-emption, because reciprocity is the basis of the Muhammadan Law of pre-emption.

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36. ILR (1882) 5 All 65.
37. AIR 1951 All 86 (FB).
38. Fyzee, at p. 345.
39. Aquil Ahmad, *Mohammedan Law* (1987) at p. 273.
40. *Giriraj Kunwar* v. *Irfan Ali*, AIR 1952 All 686.
41. AIR 1968 SC 450.

9. Difference of religion or sect

Difference in religion of buyer, seller and pre-emptor.—If all parties are Muslims, there is no problem and the law of pre-emption will be applicable. But it cannot be applied in the following cases (consequently, no pre-emption):

(*i*) If all parties are Hindus, and there is absence of a relevant custom;

(*ii*) If the vendor and the vendee are Hindus, but the pre-emptor is a Muslim;

(*iii*) If the pre-emptor is a Hindu, and the vendor and the vendee are Muslims;

(*iv*) If the vendee is a Muslim, and the pre-emptor and the vendor are Hindus;

(*v*) If the vendor is a Muslim, and the pre-emptor and the vendee are Hindus;

This is so because Muslim Law is a personal law, and not the common law of the land, and the rights and obligations must be reciprocal;[42]

(*vi*) What will be the position, if the pre-emptor and the vendor are Muslims, but the vendee is a Hindu?

The above statements about the religions of the three parties may be tabled as follows to better appreciate the position for approaching the answer—

Vendor	*Vendee*	*Pre-emptor*	*Right to Pre-empt*
Muslim	Muslim	Muslim	Yes
Hindu	Hindu	Hindu	Depends upon local custom
Hindu	Hindu	Muslim	No
Muslim	Muslim	Hindu	No
Hindu	Muslim	Hindu	No
Muslim	Hindu	Hindu	No
Muslim	Hindu	Muslim	?

As to the last question, there are two views propounded by different High Courts. According to the Calcutta High Court, if the vendee is a Hindu, a Muhammadan pre-emptor cannot enforce his right of pre-emption. "We cannot...in justice, equity and good conscience, decide that a Hindu purchaser in a district in which the custom of pre-emption does not prevail as amongst Hindus, is bound by the Muhammadan Law, which is not his law, to give up what he has purchased to a Muhammadan pre-emptor."[43] The Allahabad High Court, on the other hand holds that the right is enforceable by a Muslim pre-emptor even against a Hindu purchaser, because the Muhammadan owner of

42. Fyzee, at p. 337, citing *Gobind Dayal* v. *Inayatullah*, ILR (1885) 7 All 775.

43. *Sk. Kudratullah* v. *Mahini Mohan Saha*, (1869) 4 Beng LR 134.

property is under an obligation imposed by the Muhammadan Law to offer the property to his Muhammadan neighbours or partners before he can sell it to a stranger, and this is an incident of his property which attaches to it whether the vendee be a Muhammadan or non-Muhammadan.[44] While the Patna High Court[45] holds similar view, the Bombay High Court[46] agreed with the Calcutta High Court. Fyzee comments that the Calcutta and Bombay High Courts had based their verdicts on the premise that the right of pre-emption was a right of repurchase from buyer, however, the view of Mahmood, J. that pre-emption was a right of substitution and, therefore, an incident of property, likening it to a servitude running with the land[47] has been adopted by the Supreme Court[48], and therefore the question is no longer open to doubt.[49]

Since there is no direct verdict of the Supreme Court on this specific question, it is still open to consider the pros and cons of this conclusion. The strongest point in favour of a positive answer is the *raison d'etre* of the custom, namely, in the words of Mahmood, J. "The intrusion of a stranger as a co-sharer must not only give rise to inconvenience, but disturb domestic comfort if not, as in some cases, lead to breach of the public peace." And, 'if such a law of inheritance (i.e. Muhammadan Law) were not mitigated by the law of pre-emption, the result would be serious inconvenience, and possibly even disturbance more particularly on account of Zenana system, which prohibits invasion of privacy.'[50] With this premise it may be argued that the Hindu religion of the vendee makes him still more a stranger, an intruder, and strengthens the claim of the Muslim pre-emptor.

On the other hand, the positive answer entails certain consequences in the nature of constitutional incompatibility, and also raises certain ethical questions. Can a person be compelled to bear an obligation without a corresponding right? Fyzee himself approves the principle of reciprocity in connection with the rights of Shia-Sunni duo under the head 'Conflict of Laws—Religion of Buyer, Seller and Pre-emptor' thus—"In India, all religions are treated with equality, and, therefore, in this branch of the law *the principle of reciprocity* should be logically applied. Hence, on general principles, it would be unfair to apply the law of pre-emption and to create rights in favour of persons who would not be subject to corresponding obligations."[51] Applying this principle to a Shia vendor and Sunni pre-emptor, and also *vice versa*, the claim of pre-emption fails. In this

44. *Govind Dayal* v. *Inayatullah*, ILR (1885) 7 All 775.
45. *Achutananda Pasait* v. *Biki Bibi*, ILR (1922) 1 Pat 578.
46. *Hamedmiya Badamiya Saheb* v. *Dr. Joseph Benjamin*, ILR (1928) 53 Bom 525.
47. *Sk. Kudratulla* v. *Mahini Mohan Shaha*, (1869) 4 Beng LR 134.
48. *Bishan Singh* v. *Khazan Singh*, AIR 1958 SC 838.
49. Fyzee, *Outlines of Mohammadan Law* (4th Edn.) at p. 339.
50. *Govind Dayal* v. *Inayatullah*, ILR (1885) 7 All 775.
51. Fyzee, *op. cit.*, at pp. 345-46.

connection he discusses in detail the case of *Pasha Begum* v. *Syed Shabbar Hasan*[52] and concludes: "It will be recalled that this reasoning (viz. 'applying the principle of reciprocity') is the one put forward by Mahmood, J. in the leading case of *Govind Dayal* v. *Inayatullah*, and the majority (in *Pasha Begum*) cited it with approval and adopted the principle of reciprocity as being in consonance with justice and equity."[53] As 'right in favour of a person not subject to corresponding obligation' is 'unfair', *mutatis mutandis*, obligations without corresponding right would also be unfair. If this is true in case of a vendor, it is equitably true in case of a vendee. In fact, from ethical point of view, vendee is the party which deserves the protection the most, for it is the only party that bears the brunt of the transactions.

As the 5th line in the above table shows, if a Hindu sells his property to a Muslim purchaser, a Hindu pre-emptor cannot enforce his claim. If this is so because pre-emption is a rule of Muslim Personal Law, then the question arises why should a Hindu be *forced* to submit his property for the implementation of a rule of Muslim Personal Law? And for what reciprocal right? The Hindu vendee owes no obligation towards the Muslim vendor or the Muslim pre-emptor. To say that the right of pre-emption is a servitude on the property is only to restate a particular rule of Muslim Personal Law, and not a general law. So far as the application of personal law is confined to followers of that religion, there may be a case of reasonable classification, but when two parties are distinguished in their reciprocal rights, inter se rights—on the ground of religion *only*, it is a case of violation of the equality clause under Article 14 and the non-discrimination clause under Article 15(1). Are the grounds like 'inconvenience' 'domestic discomfort', 'disturbance of privacy', 'likely breach of public peace' truly religious concepts or secular social concepts? After the advent of the Constitution, these 'justifications' are jarringly incompatible with the ideal enshrined in Article 51-A(*e*).[54]

Now that the Supreme Court has held right to pre-emption on the ground of vicinage claimed by *Shafi-i-Shareek* and *Shafi-i-Jar* both unconstitutional in *A. Razzaque Bagwan* v. *Ibrahim Haji Mohd. Husain*[55]. There is no justification now in a positive answer to any of the lines in the table. The above discussion was to point out the unconstitutionality involved in the discrimination on the ground of religion. This "feeble right" becomes still feebler in the zone of constitutional law and should be derecognised. In fact, in our opinion, any implementation of pre-emption will be void.

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52. AIR 1956 Hyd 1.
53. Fyzee, at p. 347.
54. It shall be the duty of every citizen of India—'to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious...diversities...'.
55. (1998) 8 SCC 83: AIR 1999 SC 2043.

Difference of school.—(*i*) If both the parties belong to one and the same school, the rules of that particular school apply.

(*ii*) If the vendor is a Shiite and the pre-emptor a Sunnite, then Shia Law shall apply according to the Allahabad High Court, and Sunni Law according to the Calcutta High Court.

(*iii*) If the vendor is Sunni and pre-emptor Shia, Shia Law will apply. This is so because the right of pre-emption must have a reciprocal duty towards the vendor, i.e., if in future the present pre-emptor sells the property, the present vendor may opt to pre-empt—at that time he must be entitled to do so. Now, since with Shia vendor Shia Law applies, the Sunni pre-emptor in the above example, will lose; thus there is absence of reciprocity. (Reciprocity means *A* should be allowed to pre-empt the sale by *B* only if *B* could also pre-empt the sale by *A*.)

Illustrations

(*a*) *A*, a Sunni sells his land to *B*, a Sunni. His neighbour *C*, a Shia, sues for pre-emption on the ground of vicinage. Pre-emption will not be allowed. Shia Law which is applicable in this case does not recognise pre-emption on the ground of vicinage.

(*b*) *A*, a Shia, sells his land to *B*. *C*, a Sunni neighbour claims pre-emption on the ground of vicinage. In this case, pre-emption should not be allowed according to the Allahabad High Court view, which recognises Shia School in this case. Pre-emption will be allowed by the Calcutta High Court, but this view does not hold good now after the Supreme Court verdict, striking down pre-emption on the basis of vicinage as unconstitutional.

(*c*) A house is owned by *A*, *B*, *C*, and *D*. *A* and *B* are Sunnis, *C* is a Shia and *D* is a Christian. *A* sells his share of the house to *D*. Both *B* and *C* make the prescribed demand (*talab*) and bring a joint suit for pre-emption. Who will succeed?

Answer—*D*, the vendee is a Christian—a non-Muslim. According to the Allahabad and Patna High Courts the right of pre-emption can be claimed because it is not necessary that the vendee should also be a Muslim. According to the Bombay and Calcutta High Courts, no right can be claimed.

Now the vendor *A* is Sunni and the pre-emptor *C* is Shia. Between them the Shia Law of pre-emption should be applied (on the ground of reciprocity). According to Shia Law, the law of pre-emption does not apply if there are more than two co-sharers. Here there are four co-shares (*A*, *B*, *C*, *D*). Hence *C*, a Shia, cannot be entitled to pre-empt.

Now about *B*—a Sunni. The rule is that making a non-entitled person a co-plaintiff frustrates a suit. *C* is a non-entitled person (as seen above). *B* makes him

a co-plaintiff. So *B*'s suit fails. Had he sued independently, he would have succeeded, as he is a Sunni and Sunni Law would have applied.[56]

10. Formalities to be observed

"No person is entitled to pre-empt unless he takes the proper steps at the proper time, and conforms strictly to the necessary formalities."[57]

There are three necessary formalities known as the three demands.

(*i*) **The first demand (Talab-i-Mowasibat).**—On receiving the information of the sale, the pre-emptor must immediately declare his intention to assert his right, (*mowasiba* literally means 'to jump'. The idea is of a person jumping from his seat, as though startled by news of the sale).

The haste in which this demand is to be made is highlighted by the *Hedaya* where it says that if a pre-emptor receives the information of a sale by letter, and the information is contained in the beginning of the letter, and he reads on to the end without making his demand, the right is lost. (This, however, must not be taken literally, it is only an example). The law simply requires extreme promptness.

A delay of 12 hours was held in an Allahabad case to be too long. So also delay of 24 hours was considered too long by the Nagpur High Court. A Calcutta case is typical: the pre-emptor, on hearing of the sale, entered his house, opened a chest and took out a sum of money (to pay to the buyer), and then made the first demand, he was denied the right to pre-empt, because of delay.

No witnesses are necessary, nor any particular language or form, for making this demand.

The pre-emptor cannot make a delay by taking the plea that he had reason to believe the real price should be much lower than that notified to him.

Being a feeble right, 'as it is the de-seizing of another of his property merely in order to prevent apprehended inconveniences'[58], the formalities must be strictly observed.[59] The Allahabad High Court has held that it being a weak right, any legitimate device is sufficient to defeat it. The law is that the demand should be made in a reasonable time. What time is reasonable, is a question which is to be answered on facts of each case.[60] The requirements of *talab* were abolished by a Government notification of 1927 in the former Jaipur State.[61]

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56. Aquil Ahmad, at p. 279.
57. Fyzee. Strict observance of formalities is necessary because "the right of pre-emption is but a feeble right, as it is the de-seizing of another of his property merely in order to prevent apprehended inconveniences".
58. *Hedaya*, at p. 550.
59. Mulla, at p. 274.
60. *Rajendra Kumar* v. *Rameshwar Das Mittal*, AIR 1981 All 391.
61. *Radha Ballabh Haldiya* v. *Pusha Lal Agarwal*, AIR 1986 Raj 88.

(*ii*) **The second demand (Talab-i-ish-had).**—The pre-emptor must, with the least practicable delay, make a second demand, either personally or through an agent. He must (*a*) refer to his first demand; (*b*) do so in the presence of two witnesses; and (*c*) do so in the presence of either the vendor (if he is in possession), or the purchaser, or on the premises.[62]

There is no definite form for making this demand. The pre-emptor may very well say, "such a person has bought such a house of which I am the pre-emptor; I have already claimed my privilege of *shufa* and now again claim it: be you therefore witness thereof."

It is permissible to combine the first two demands, provided the pre-emptor assembles two witnesses, and makes the demands in the presence of the vendor or vendee, or on the premises. *Talab-i-ish-had* may be made by letter also.

(*iii*) **The third demand (Talab-i-Tamlik).**—The third demand, or speaking more precisely, a legal action, is only necessary when the first two demands fail. Such a suit must be filed within one year of the purchaser taking possession of the property, if it is corporeal; or within one year of the registration of the instrument of sale, if incorporeal.[63]

The legal suit claiming pre-emption should be in regard to the whole of property; a claim to a part of the estate sold is not sufficient.

11. Subject-matter of pre-emption

Ordinarily only immovable property can be a subject-matter of pre-emption. The Prophet had limited it to only a mansion and a garden, whence the law expanded the rule to embrace houses and landed property. Pre-emption must be claimed of the whole of the estate, because otherwise by breaking up the bargain, the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee.[64] The rule would apply to those transactions which, while contained in one deed cannot be broken up or separated. However, if several distinct properties are sold by one contract, it is not necessary that he should claim all of them, in such a case he may choose one and leave others. So also where the pre-emptor is one of many, he may claim his saleable share and tender the price. Fixtures and trees are appendages of the land, and therefore immovables. Some Shia authorities permit pre-emption right over moveables like apparel, utensils, animals, etc. Shafii law disallows pre-emption right on indivisible property.

62. Fyzee, at p. 349.
63. Limitation Act, Art. 10.
64. *Sheobharos Rai* v. *Jiach Rai*, ILR (1886) 8 All 462.

12. Legal effects of pre-emption[65]

(*i*) When the claim of pre-emption is complete, the pre-emptor steps in the shoes of buyer.

(*ii*) If the sale has been completed when the claim to the right of pre-emption is enforced, the original buyer becomes the new seller, and the pre-emptor as the new buyer.

(*iii*) The pre-emptor does not become liable for any contingent charges incurred by the buyer, such as brokerage or agency.

(*iv*) The buyer is entitled to receive or retain the rents and profits of the land during the interval between the date of its sale to himself, and its transfer to the pre-emptor.

(*v*) As the pre-emptor takes the property from the buyer, and not the seller, the buyer must always be a party to the suit. But after the pre-emptor has taken possession of the land, there is no need of seller.

13. Loss of the right of pre-emption

The right of pre-emption is lost in the following three ways:

(*i*) omission to claim, or waiver;

(*ii*) death of pre-emptor before enforcement; and

(*iii*) forfeiture of right.

(*i*) **Omission to claim, or waiver.**—A person entitled to pre-empt loses this right if he expressly or impliedly waives it (e.g., if he says, "I have made void the *shufa*", or, "have caused it to drop"), or omits to assert immediately his right.

(*ii*) **Death of pre-emptor.**—Under Hanafi Law, the right of pre-emption is extinguished where the pre-emptor dies before enforcing it by suit, even if he made the two demands.

Under Shafii and Shiite law, however the right to pre-empt devolves upon pre-emptor's heirs, in the proportion of their right of inheritance.[66]

(*iii*) **Forfeiture of right.**—The right of pre-emption is forfeited if:

(*a*) the pre-emptor releases it for a consideration;

(*b*) the pre-emptor tries to dispose of the subject of pre-emption to a stranger;

(*c*) partition is made of a property in respect of which the right of pre-emption can only be claimed by coparceners; or

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65. Tyabji, at pp. 718-20.
66. Tyabji, at pp. 696-97.

(*d*) there is some statutory disability with the pre-emptor as regards purchase of land in question. For example, the pre-emptor was not a member of the agricultural tribe within the meaning of the Bundelkhand Alienation Act, 1903. There was no provision in the Act, entitling an intending purchaser to get the sanction of the Collector to bring a suit for pre-emption. It was held that the claimant could not pre-empt, as the Act provides the property should not be sold to the pre-emptor.[67]

14. How pre-emption is evaded

Modern writers[68] maintain that there may be only one feasible way of evading pre-emption. That is, when the pre-emption right of a neighbour may be defeated by the vendor reserving to himself a strip, however narrow, of the land or house, immediately bordering on the neighbour's property.

Such an evasion, however, is no more required, as the Supreme Court's verdict invalidating pre-emption on the ground of vicinage itself deprives the neighbour of his 'right' to pre-empt.

Although Tyabji mentions a number of other devices of evasion, yet Fyzee feels the modern Court would be very much hesitant to accept any device which interferes with the right of pre-emption. "It will be found that no 'tricks or artifices' can defeat the pre-emptive right in our Court." (Mahmood, J.) The fact, however, is that the modern judicial opinion is against this right.

15. Sunni Law and Shia Law of pre-emption—Comparison[69]

Topic		*Sunni Law*		*Shia Law*
1.	Property	Indivisible property may be pre-empted.		No. Only divisible property may be pre-empted.
2.	Pre-emptor	Three types of pre-emptors—		Only one type — a co-sharer; and only if they are
		(*i*)	Co-sharer: any nos;	two in number, not if more.
		(*ii*)	participator in; Immunities and appendages;	
		(*iii*)	Owners of adjoining property (vicinage, neighbour).	

67. Tyabji, at p. 700.

68. For example, Wilson, at p. 420; Mulla, at p. 280; Fyzee, at p. 354.

69. *See*, K.P. Sharma, at pp. 305-06; M.P. Tandon, *Muslim Law in India* (9th Edn. All) at p. 218.

	Topic	*Sunni Law*	*Shia Law*
3.	Right to sue	Only in lifetime of the claimant pre-emptor; right extinguishes if his death occurs when suit is pending.	The heirs of the claimant pre-emptor inherit the right to proceed with the suit.
4.	Formalities of demand	The first and the second demands must be distinctly made, and delay not condonable.	The distinction not so essential; only insistence on quick demand; and delay on reasonable ground may be condoned.
5.	Reduction of price	The pre-emptor is entitled to the benefit of the reduction of price by the vendor after completion of contract.	No. Pre-emptor has to take the property from the vendee at the contract price only.
6.	Improvements on the property	Improvements on the property by the vendee post-sale may be optionally taken by pre-emptor on payments for these.	The first option is with the vendee to remove the improvements.[70]

70. K.P. Sharma, at pp. 305-06. M.P. Tandon, *Muslim Law in India* (9th Edn. All) at p. 218.

XII

Will

(Wasiyat)

1. Concept and meaning

A pre-Islamic Arab's capacity to dispose of his property by will was as full as his power to deal with it by acts *inter vivos*. He was free to make will in favour of any one he chose, and there was nothing to prevent him from giving away his entire property to some rich stranger, leaving his own children, parents and kindred in want. He was also at liberty to give preference to one heir to the exclusion of others.[1]

After the advent of Islam, when Koran laid down specific rules for the distribution of inheritance, it was thought undesirable to allow him to tamper with the course of devolution of property through unrestricted rights of making wills. Islam placed a restriction on the testator's power, so that he was not allowed to bequeath more than one-third of his estate.

This limit of one-third is not laid down in the Koran, but is based on the following tradition:

> "Sa'd ibn Abi Waqqas said: I was ill in the year of the conquests of Mecca, and was near dying, and the Prophet came to see me, and I said: 'Oh Messenger of God, verily I have much property, and no heir except my daughter, may I then make a will, leaving all my wealth for religious and charitable purposes?' He said, 'No'. I said, 'May I do so with 2/3rd of it?' He said, 'No'. I said, 'Shall I with 1/2 of it?' He said, 'No'. I said, 'May I with 1/3rd of it?' His Highness said, 'Make a will disposing of 1/3rd in that manner; for 1/3rd is a great deal, particularly of this great wealth which you possess, for verily if you die and leave your heirs rich, it is better than leaving them poor to beg; for verily the money which you expend for God's

1. Abdur Rahim, at p. 15.

pleasure, you will be rewarded for, even to the mouthful which you lift up to your wife's mouth."[2]

Another version of the same Tradition runs as follows:

"Sa'd ibn Abi Waqqas said: 'His Highness came to see me when I was sick, and said, 'Have you made your will leaving anything to be expended in the way of God, and for charitable purposes?' I said, 'Yes, I intended to do so'. He said, 'In what proportion of your wealth have you intended so doing?' I said, 'All my wealth is for the road of God'. The Prophet of God said, 'Then what have you left your children?' I said, 'There is no necessity for my leaving anything to them, for they are rich.' His Majesty said, 'Make your will leaving 1/10th in the road of God'. And I continued repeating my desire to leave more, till at last the Prophet said, 'Then make your will leaving 1/3rd for that purpose, and 1/3rd is a great deal."[3]

In the above tradition, the Prophet's answer might very well have been taken as applying only to that particular case, which was that of a man leaving *one daughter and no other heirs*; but it appears, in fact, to have been treated by lawyers of all Schools, both Shia and Sunni, as guarding the rights of all inheritors however remote, and as permitting bequests to the extent of one-third, even when these are sons as well as daughter.[4]

A will offers to the testator the means of correcting to a certain extent the law of succession, and enabling some of those relatives who are excluded from inheritance to obtain a share in his property, and of recognising the services rendered to him by a stranger. At the same time the Prophet has declared that the power should not be exercised to the injury of the lawful heirs, and restricted the testator from bequeathing more than one-third of his estate. It is difficult to explain why this limit of one-third has been fixed; probably Roman Law might have influenced this fixation.[5]

The rule of one-third was recognised by our Courts as early as 1806, and later on in *Ekin Bibee case*[6], *Jumunoodeen Ahmad case*[7], *Baboojan case*[8] and *Sukoomat Bibee case*[9].

The word *wasiyat* also means a moral exhortation, in our context it means a declaration in compliance with moral duty of every Mussulman to make

2. *Mischat-ul-Masabih*, XII, xx at p. 1.
3. *Mischat-ul-Masabih*, XII, xx at p. 2.
4. Wilson, at p. 299.
5. Fyzee, at pp. 356-57, *citing* Ameer Ali, i at p. 569, and Ameer Ali, *Muslim Law* (Abridged Edn., 1938) at p. 366.
6. (1864) 1 WR 152.
7. (1865) 2 WR Me's 69.
8. (1868) 10 WR 375.
9. (1874) 22 WR 400.

arrangements for the distribution of his property. Thus, the Muslim Law of wills presents a compromise between two opposite tendencies—namely, one, not to disturb or interfere with the divine law of distribution of property after death, and two, the supposed moral duty of every Muslim to make arrangements for the distribution of his property within the prescribed limits.[10] According to Fyzee the Muhammadan sentiment is in most cases opposed to the disposition of property by will, and yet it is a moral exhortation, it is thus a reconciliation between the dual insistence on moral exhortation as well as legal rectitude.[11]

The will of a Muslim is governed in India subject to the provisions of the Indian Succession Act, 1925, by the Muhammadan Law (Tyabji).

2. Definitions

DURRUL MUKHTAR:	"Will is an assignment of property to take effect after one's death."[12]
HEDAYA:	"Wasiyat means an endowment with the property of anything after death—as if one person should say to another, give this article of mine, after my death, to a particular person."[13]
TYABJI:	"The legal declaration of the intentions of a Muslim with respect to his property, which he desires to be carried into effect after his death."[14]

3. Form of will

It may be made orally or in writing. Convenience, however, demands that it should be in writing. If the will is in writing it need not be signed; and if signed, it need not be attested. The only requisite is that the intention of the testator should be clear; thus, a dumb person, or a person who is unable to speak due to illness, may make valid wills through gestures. For instance, a sick man is unable to speak from weakness. Another man addresses him and says, "Do you give away one-third of your estate to *Z*?" If the sick person gives a clear nod with his head, the will is complete.

If the intention is clearly expressed, a will takes effect as a will even if it is described as *tamliknama*, or is in any other form. The term *tamlik* is one of general import and may be applied to a gift, to a sale or to a will. Where a man

10. Paras Diwan, at p. 209.
11. Fyzee, at p. 356.
12. Durrul Mukhtar (1st Edn., 1913) at p. 402.
13. *Hedaya*, at p. 670.
14. Based on the definition given in the Indian Succession Act (39 of 1925), S. 2.

leaves one testamentary writing or several testamentary writings it is the aggregate or the net result that constitutes his will. A document in the nature of instructions by the deceased to his legal advisors or to his relative as to the instructions to be given to the legal advisor as to the disposition of his property would operate as a valid will and may be admitted to probate. But if the intention is not clear, it will not take effect as a will.[15] But a document with following words, "I have no son, and I have adopted my nephew to succeed to my property and title," was held not to constitute a will. The onus of establishing an oral will is always very heavy; it must be proved with utmost precision, the contents and intention must be implicit from the circumstances. So, the formalities are not material, the essentials are:

(*i*) the testator must be competent;

(*ii*) the bona fide intention must be clearly expressed;

(*iii*) it must be intended to operate after his death;

(*iv*) the quantitative limits of the property must be observed;

(*v*) the qualitative requisites of the subject-matter of the will—the property—are satisfied; and

(*vi*) the legatee must be competent to take the benefit. We shall discuss these topics below.

4. Who can make wills

A Muslim who is of sound mind and is major can make a will. Although according to Muslim Law majority is dependent on the age of puberty, which is supposed to be reached at 15 years of age, yet the Indian Majority Act recognises only the age of 18 years as a requisite for the purposes of will.

But if a guardian of his person or property has been appointed by Court or his property has come in charge of the Court of Wards, he will attain majority on completion of 21 years.

Apostacy.—According to Hanafi School, apostacy does not invalidate a will if it is otherwise lawful. A will by a female apostate is lawful according to the sect to which she apostatises. However, all these customary rules are otiose after the coming into force of the Caste Disabilities Removal Act 1850, under which apostacy is no more a disqualification.

Unsound mind.—If a will is made by an insane person, it would remain void even if he subsequently recovers and remains sane till death. Conversely a will made by a person of sound mind becomes void if subsequently he becomes insane and remains so till death. A will by an insane made during lucid interval shall remain valid only if the insanity does not last longer than 6 months.

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15. B.R. Verma, *Mohammedan Law* (6th Edn., 1991) at p. 508.

Insolvancy.—Debts have priority over legacy. If the testator is in debt to the full amount of his property, the bequest would not be lawful unless the creditors relinquish their claims.

A person condemned to death may also make a will.

A *purdahnasheen* lady is also competent to make a will. The Court would scrutinise more carefully the element of free consent in such a case.

A will by a person under coercion, undue influence or fraud is disallowed.

A will made by a person after he has taken poison or has done any other act towards the commission of suicide, is not valid. The Shia Law, however, says that if the person made the will and then committed suicide, the bequest would be valid.[16]

A minor may make a will, but its validity would be postponed to the event when, after attaining majority, he ratifies it. Such a will is very weak, as it is open to attacks on the grounds that it has been made under force, coercion or undue influence.

For wills made by persons suffering with death-illness, *see*, Section 5(2) below.

The law of onus.—The person who propounds a will (i.e. claims the existence of a valid will) is under greater obligation to prove by clear evidence that the will was executed by the testator and at the time of the execution he was a free agent and possessed of a sound and disposing state of mind. However, in the case of a settlement as well as a will, so long as the execution of the document is proved, the onus is on the person who asserts that the document had been obtained by undue influence. In case other than a will, at any rate the person who alleges, has to prove that the executant did not have the mental capacity to comprehend the nature of the transaction.[17]

5. What and how much can be bequeathed

Subject of will.—It is not necessary that the property bequeathed by will must be in existence at the time of the making of the will. It may, or may not be; but it must be so at the time of the death of the testator; for, the will takes effect from the point of the time the maker of the will dies. This is the vital point of difference between a will and a gift. Thus, *A* writes a will 'I give to *B* the plot *X* that I shall purchase at Jodhpur'. If this plot is purchased by *A* later, on *A*'s death, *B* will get it as a legatee. But if *A* fails to purchase it, and dies, *B* cannot say that the plot should be purchased from the testator's property and given to *B* in compliance with *A*'s 'will'—for there is no 'will' in that case.

16. Mulla, at p. 136.
17. B.R. Verma, at p. 509.

Anything, movable or immovable, over which the right of property may be exercised or which may form the subject of exchange or barter, or a fractional share thereof, or the usufruct of a thing, may be lawfully disposed of by will. A bequest remains valid and operative, though subsequent to the making of the will the testator makes any changes or improvements over the property subject to such changes as imply a revocation by the testator. Thus, *A* bequeaths a house to *B* and later modernises it, *B* will get the improved building. *A* gives a plot to *B* by will, and later builds a house over it, *B* will get the plot and *A*'s heir will get the house. But if *A* bequeaths a house to *B*, and later pulls down the house, *B* gets nothing.[18]

(1) What?—The subject-matter of will may be:

(*i*) the *corpus* of a property, which must be in existence at the time *of testator's death*, and could be non-existent at the time of making the will;

(*ii*) the *usufruct* of an existing property for a limited time or for lifetime of the legatee. The position of the legatee is the same as that of a beneficiary under a *wakf*. It is permissible that the *corpus* may be given to one person and the usufruct of the same property to another;

(*iii*) the *vested remainder*. Suppose *A* bequeaths the usufruct of a property to *B*, for *B*'s lifetime, and then the whole of property to *C*. *C* has vested remainder in the property.

Thus the Muslim Law differentiates between the *corpus* of the property and the usufruct of the property. The *corpus* means the body, the physical form of the property, such as a house means the construction. Usufruct means the fruits, the benefits, the uses, i.e., the intangible rights flowing from the property. Thus, in regard to the house, the usufruct means the right to live in it, rental income from it, etc. The bequest must vest in the legatee the absolute ownership over the *corpus*, and the *corpus* must physically exist at the time of death. The usufruct may on the other hand be given for a limited period, when this period relates to the lifetime of the legatee, it is called life interests. For example *A* bequeaths to *B* the right to live in the house of *A* till he (*b*) dies. It is permissible to give the *corpus* to one person and the usufruct to another over the same property at the same time. Thus *A*'s bequest may say—*B* will live in the house till *B*'s death and thereafter *C* will get the house. As to such position, there was a controversy earlier; now the position as made clear by the Privy Council, stands thus[19]: In *Amjad Khan* v. *Ashraf Khan*[20] the facts were—*H* made a gift of his property to *W* subject to the conditions—(*a*) *W* would remain in possession during her lifetime, (*b*) after her death the entire property would revert to *C*. The questions,

18. Ameer Ali, at p. 631.
19. *See*, Verma, at p. 594-95.
20. AIR 1925 Oudh 568: ILR (1929) 4 Luck 305: AIR 1929 PC 149.

were—(*i*) was this an absolute gift with void conditions, and (*ii*) would the gift of a life interest be valid under Muhammadan Law? On the first point the Privy Council decided that as the intention to grant only a life interest (and not full rights of ownership) was clearly expressed, it would be only a life interest and would not be enlarged into an absolute estate. On the second point no opinion was considered necessary (but *see* another case *infra*). This decision made one thing clear, that if nothing more than limited interest for life is intended to be transferred by gift, it would not be enlarged into an absolute interest. As a result of this decision, the High Courts (of Oudh, Nagpur, Bombay and Calcutta) held that grants of life-interests were valid *both by way of gift of inter vivos or by will*, and they would not be enlarged into absolute ownership.

The law developed further in *Nawazish Ali Khan* v. *Ali Raza Khan*[21]. Where the use of a house was given to a man for his life, he may be termed as a tenant for life; the owner in waiting, may be said to possess a vested remainder. If the gift (*also bequest*) is found to be of limited interest the gift can take effect *out of the usufruct* leaving the *corpus* unaffected, except to the extent to which its enjoyment is postponed to the duration of the limited interest. The Privy Council also held that there was no difference between several schools on this point and limited interest took effect under Shia and Sunni Laws both. The settled position now stands thus—(*a*) a gift or bequest of limited interest in the usufruct may be validly made under Shia or Sunni schools. (*b*) The term 'life-estate' under both laws means an interest in the usufruct only. *Corpus* cannot be given by will or gift for a limited period, unlike 'life-estates' under English law. (*c*) A will must be read as a whole and the language must be given its natural meaning.

The law, therefore, is now clear that a testator may make a bequest of limited rights dealing only with the usufruct (*ghallat*) of the property without bequeathing the *corpus*. All such rights as rent, income, profits, produce, use or occupancy of a house, the fruits of a garden—rights by which the *corpus* is not consumed are usufruct of the property. The intention of the testator should be gathered from the terms of the bequest. It is permissible to make a bequest of the thing itself in favour of one person and of its produce or use to another.[22] Bequest of the usufruct may be for a limited period or 'forever'. The expression 'for ever' will give the legatee a right to the use for his own lifetime only. At the expiration of the limited period or at the death of the legatee, the thing will immediately revert to the heirs of the testator. The legatee of usufruct cannot alienate the property.

(2) How much?—No Muslim can bequeath more than one-third of his estate. This one-third is calculated after deducting any debts, and funeral expenses. For example, *A* dies leaving Rs 10,500. His funeral costs Rs 500 and

21. (1948) 75 IA 62: AIR 1948 PC 134. See also, *Rahumath Ammal* v. *Mohd. Mydeen*, (1978) 1 MLJ 499.

22. Verma, at pp. 510-11.

his debts amount to Rs 1000; the balance is Rs 9000. Hence the bequeathable third amounts to Rs 3000, and *A* cannot dispose of more than this amount.[23]

But suppose *A* bequeaths Rs 4000, then the bequest would not take effect unless the heirs of *A* give their consent, *after the death of A* (under Hanafi Law) or *before or after the death of A* (under Shia Law).

Abatement of Legacies

But if the heirs do not give consent, the Hanafi Law provides that the bequests be rateably reduced or abated. The principle is called the "abatement of legacies". The *Ithna Ashari* (Shia) Law, however, does not recognise the principle of "abatement of legacies". Shia Law says that if several bequests are made through a will, priority would be determined by the order in which they are mentioned. The first bequest, takes effect first and thereafter the subsequent bequests, unless the bequeathable third is exhausted. For example, a testator leaves 1/12 of his estate to *A*, 1/4 to *B* and 1/6 to *C* and the heirs refuse their consent to these bequests. then *A* would take 1/12, and *B* would take 1/4, but *C* who is mentioned last would get nothing, as the one third (1/12+1/4=1/3) is exhausted between *A* and *B*. There was however, a curious exception to this rule; if in the above example, *A* and *B* are both to take 1/3 each the later bequest prevails; so *B* will have preference over *A* who will get nothing.[24]

If bequests are for religious or pious purposes but exceed the legal limit of one-third then, the priority would be determined in the following order:

(*a*) bequest for faraiz (i.e. those duties which are expressly ordained in the Koran, for instance, performance of *haj*);

(*b*) bequest for *wajibat* (i.e. those acts that are recommended by the Koran, but are not obligatory, for instance, charity on day of breaking the fast); and

(*c*) bequest for *nawafil* (i.e. voluntary but pious acts which are not even recommended, for instance, building a bridge or an inn).

Bequest of the first class takes precedence over that of second; and bequest of the second class takes precedence over that of the third.[25]

To illustrate: A Hanafi testator bequeaths Rs 3000 to *A* and *B* jointly; he also bequeaths Rs 3000 to named pious purposes. The 1/3rd limit permits him to give total Rs 4000 only. Now, the rule of rateable abatement will work like this—the excess amount of Rs 2000 will be disregarded, and only Rs 4000 will be deemed as part of the will. Out of this, the legatees and the pious purposes—both will share equally as a group. So Rs 2000 will go to *A* and *B* equally—i.e. Rs 1000

23. Fyzee, at p. 360.
24. Mulla, at p. 143; Fyzee, at p. 362.
25. Verma, at pp. 522-23; Fyzee, at p. 362.

each. As to the sum of Rs 2000 for the pious purposes regard shall be had to the rules above, and bequests for faraiz will take precedence over, and may even exclude, those for *wajibat*; and bequests for wajibat will likewise have priority over those for *nawafil*.[26]

A Muslim cannot dispose of more than 1/3rd of his estate by will; but if he registers his existing marriage under the provisions of the Special Marriages Act, 1954, he has all the powers of a testator under the Indian Succession Act, 1925.

Thus, the Bombay High Court held in *Sayeeda* v. *Sajid*[27] that the Muslim married under Special Marriage Act, was entitled to bequeath his entire property; but at the same time all rigours of Indian Succession Act are applicable to him; so will made by him will have to be probated and the claimant under it will have to establish his right only after obtaining probate of will of the deceased. (The persons married under Special Marriage Act, 1954 are governed by the Indian Succession Act, 1925 and not Muslim Personal Law.)

Wills during *maraz-ul-maut*

A gift without consideration made in *maraz-ul-maut* (death-illness) takes effect as a will. Under Hanafi Law, it takes effect to the extent of bequeathable third, *if it is not in favour of the heirs*, and the possession has been taken by the donees. Under *Ithna Ashari* (Shia) Law, it takes effect to the extent of 1/3, even *if it is in favour of heirs*, provided possession is transferred.[28] According to Fyzee, a *donatio mortis causa* may be described as a gift of an amphibious character, not exactly a gift, nor exactly a legacy, but partaking of the nature of both; for in Muhammadan Law such a gift is governed by rules deduced from a combination of two branches of law—the law of gifts and the law of wills.[29] To constitute *marz-ul-maut*, (Fyzee) or *maraz-ul-maut* (Mulla), there must be (1) proximate danger of death, (2) apprehension in the mind of the sick, and (3) some external indicia, like inability to attend to routine work, etc.[30] But nothing is conclusive; it is a question of fact. The question of apprehension is of extreme importance; it is essential that the gift should be made under pressure of the sense of the imminence of death. According to the Bombay High Court the crucial test of *maraz-ul-maut* is the subjective apprehension of death in the mind of the donor; and this is to be distinguished from the apprehension caused in the minds of others.[31] The Fatimid authorities lay down the salutary rule that for healthy man it is prudent to make a will; but, for a man who is ill, it is obligatory.[32]

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26. Fyzee, at p. 362.
27. *Sayeeda Shakur Khan* v. *Sajid Phaniband*, (2006) 4 CLT 192.
28. Tyabji, at p. 817.
29. *Ibid*, at p. 370.
30. Mulla, at p. 148.
31. *Safia Begum* v. *Abdul Rajak*, (1944) 47 Bom LR 381.
32. *See*, Fyzee, at p. 371.

A gift made during *maraz-ul-maut* is subject to all the conditions and formalities prescribed in Muslim Law for gifts *inter vivos*. Thus, transfer of possession is a must, otherwise the 'gift' fails. Similarly, a gift by way of will during death-illness, must comply with the two conditions—the limit of one-third, and if made to an heir—the requirement of the consent of other heirs. Further, the peculiarities of the Shia and Sunni Laws also apply.[33] In *Commr. of Gift Tax, Ernakulam* v. *Abdul Karim Mohammed*[34], the facts were—a Muslim executed a document styled as "settlement will" gifting certain movables to the assessee. The gift was made when the donor was seriously ill and apprehending his death. Possession was delivered to the donee before death. The donor died within six weeks of executing the document. *The assessee claimed that this was a gift during maraz-ul-maut* and as such exempt from gift tax under Section 5(1)(*xi*) of the Gift Tax Act. The Supreme Court held that in view of the serious illness of the donor and his state of mind at the time of making the gift—the gift was in contemplation of death. It rejected the commissioner's contention that it was a gift *inter vivos simpliciter*.

Reasons for limits on the testamentary power

As said above, there are two limits on a Muslim's power to bequeath—one, as to persons—he cannot bequeath to an heir, and two, as to property—he cannot bequeath more than one-third of his property.[35] The reason for this rule is the policy of the Muhammadan Law, viz., to prevent a testator from interfering by will with the course of devolution of property among his heirs according to law. It safeguards against a breach of the ties of the kindred, practice of favouritism and prejudice, and violation of the Koranic principles of inheritance. The object also includes the concern to see that no heir is left destitute.

This has been repeatedly confirmed by judicial verdicts. For example, for recent cases, see, *Asma Beevi* v. *M. Ameer Ali*[36], where it was held 'a Mohammedan cannot by will dispose of more than 1/3rd of surplus of his estate after payment of funeral expenses and debts, unless consent is obtained from the legal heirs, after the death of the testator. This consent of other legal heirs[37] need not be express and it may be signified by conduct showing unequivocal intention'.

The ban against bequest to stranger (i.e. a non-heir) in excess of one-third is subject to following exceptions, that is, may be relaxed in the following cases:

(1) where, subject to the provisions of any law for the time being in force, such excess is permitted by a valid custom;

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33. *Ibid*, at p. 372.
34. (1991) 3 SCC 520.
35. For exceptions, *see infra*.
36. (2008) 6 MLJ 92.
37. *See* point 6. For whom . . . *infra*.

(2) where there are no heirs of the testator;

(3) where the heirs existing at the time of the testator's death, consent to such bequest after his death;

(4) where the only heir is the husband or the wife and the bequest of such excess does not affect his or her share.[38] To illustrate this:

(*i*) A bequeaths his entire property to a stranger and dies leaving his widow as his only heir. The widow does not consent. The will is valid to the extent of five-sixth (i.e. in excess of one-third). *Because*—The bequest is valid up to 1/3rd without her consent. Out of the remaining 2/3rd, she is entitled to inherit 1/4th, i.e. 1/6th of the whole. Therefore, the will is effective upto 5/6th.

(*ii*) A bequeaths her entire property to a stranger and dies leaving her husband as her only heir. The husband does not consent. The will is valid upto 2/3rd. *Because*—The will is valid to the extent of 1/3rd. The husband inherits half the 2/3rd (i.e. 1/3rd of the whole) as heir. The will is valid to the extent of 2/3rd.

The share of the husband or wife is not affected in the above cases and the will is valid in respect of more than one-third of the property.[39]

A critique of the one-third rule[40]

As is well known, a Muslim testator may not make bequests which, in aggregate, exceed one-third of his net estate unless, at least, heirs consent thereto after his death (or, in the Shia view, also during his lifetime). This is in most cases eminently reasonable. But a Sunni Muslim is also precluded from making any bequest whatever to one who is entitled to a share in his estate as an heir unless, again, the other heirs consent thereto after his death. This rule is intended to prevent him from altering in any way the division of his estate between different heirs, as prescribed under the law of inheritance. Again, moreover, this is perfectly reasonable as a general rule; but circumstances often arise in which there may be excellent reasons for making special provision for a disabled child, for example, one who has been deprived of the educational or financial opportunities enjoyed by the other members of the family. The Shia Law has always allowed this; and such freedom of bequest, within the bequeathable third, would seem to be the natural implication of some of the verses of inheritance in the Koran. So, recent reforms in Egypt[41], the Sudan[42] and Iraq[43] have made this

38. Verma, at p. 517.
39. Verma, at p. 522.
40. *See*, J.N.D. Anderson, "Islamic Law of Testate and Intestate Succession and the Administration of Deceased Persons' Assets", in *The Islamic Law in Modern India* (1972) at p. 204.
41. The Law of Bequests, 1946, Art. 37.
42. Judicial Circular No. 53 of 1945, Art. 1.

lawful for all Muslims. It is obvious, moreover, how much the relaxation of the rule previously accepted by Sunnis in this matter would benefit widows since their husbands could then leave them a bequest to augment their pitiably inadequate share on intestacy.

6. For whom the bequest can be made

(*i*) *Any person* who is capable of holding property, whether male or female, Muslim or non-Muslim, may validly avail the benefit of a bequest. Section 133 of the Mulla states that it is not necessary that the executor of the will of a Muhammadan should be a Muhammadan. A Muhammadan may appoint a Christian, a Hindu, or a non-Muhammadan to be his executor. Muhammadan Law does not prohibit a will by a Muhammadan in favour of non-Muhammadan. — *In the matter of : Estate of Late Sri Muslim Siddiqui, Bhai Lal Shukla*[44]. (However this point was of no avail to Bhailal, as the will was not proved. The observation therefore is purely academic truth in the context of this citation.)

(*ii*) *Unborn person* cannot be a legatee. However, if the legatee is in the womb and the birth takes place within six months from the date of making the will, he can be a lawful legatee. Shia Law recognises a legatee born within 10 months from the date of will.

(*iii*) *Heirs* cannot be the legatees, that is, no bequest to heirs, who are entitled to inherit. This rule is relaxed only in cases, where other heirs give their consent (after testator's death, in Hanafi Law; before or after testator's death, in Shia Law). By giving consent, an heir can bind only his own share but not of others.

Mulla says in determining whether a person is or is not an heir, regard is to be had, not to the time of the execution of the will but to the time of the testator's death.

A bequest to an heir is not valid unless other heirs consent to it. For example in one case, *Bhullan* v. *Ehsan Elahi*[45] the petitioner claimed right to certain property on the basis of a will by her father. The Delhi High Court found that the other heirs—her brothers—had not consented to the bequest. "The findings of the trial court were affirmed by first appellate court and it had been clearly held that the appellant had not been able to prove on record that her brothers had accepted the will of their father." *Held* by the High Court : Therefore the appellant could not be held to be entitled to the property willed in her favour.

It is essential that the heir must be in existence at the time of testator's death.

Consent may be inferred from the conduct of heirs.

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43. The Law of Personal Status, 1959, Art. 73, read with the Iraqi Civil Code, 1951, Art. 408.
44. (2007) 1 All LJ 567.
45. 1996 AIHC 1205 Del.

Illustrations[46] *for* (*iii*)

(*a*) A Muslim dies leaving him surviving a son, a father and a paternal grandfather. Here the grandfather is not an "heir", and a bequest to him will be valid without the assent of the son and the father.

(*b*) A Muslim dies leaving a son, a widow and a grandson by a predeceased son. The grandson is not an heir and a bequest to him is valid to the extent of one-third without the consent of other heirs, i.e. son and widow.

(*c*) *A*, by his will, bequeaths certain property to his brother. The only relatives of the testator living at the time of the will are a daughter and the brother. After the date of the will, a son is born to *A*. The son, the daughter and the brother all survive the testator. The bequest to the brother is valid, for though the brother was an expectant heir *at the date of the will*, he is not an "heir" *at the death of the testator*, for he is excluded from inheritance by the son, and thus becomes a non-heir at the time of the will.

(*d*) A Muslim leaves him surviving a son and a daughter. To the son he bequeaths three-fourth of his property, and to the daughter one-fourth. If the daughter does not consent to the disposition, she is entitled to claim a third of the property as her share of the inheritance.

(*iv*) *An apostate* may be a legatee. A bequest to non-Muslims is valid according to all schools except Shafii School. But in India, this rule of Shafii Law does not apply owing to Act 21 of 1850. In the Shafii view, a bequest in favour of an apostate is, according to better opinion, valid.[47]

(*v*) *Manslayer* is one who kills another person, from whom he intends to take a legacy. Hanafi Law prohibits him to take any interest in the bequest. In *Ithna Ashari* (Shia) Law, however, the more logical view is taken and only intentional homicide leads to exclusion.[48]

(*vi*) *Institutions*, whether religious or charitable, can be valid legatees.

(*vii*) *Joint Legatees*—When bequest is made in favour of two or more persons in the same will it is called a joint legacy. If the legacy fails in respect of any one or more of these, who would be entitled to the legacy? In such cases, (*a*) if a particular legatee was incompetent *ab initio*, the entire property subject-matter of the will, goes to the remaining legatee or legatees. Thus—*A* makes a bequest of 1/3rd jointly in favour of *B* and *C* (i.e. 1/6th each). *B* was dead at the time of the bequest, whether *A* knew or not. *C* would get the entire 1/3rd. (*b*) If the legatee becomes disqualified afterwards due to failure of some condition, etc., the remaining legatees would get only his/their share as marked in the will,

46. Mulla, at p. 137.
47. Verma, at p. 512.
48. Fyzee, at p. 367; *citing* Tyabji, Wilson and Fitzgerald.

and the remaining property would be considered as outside the will; i.e. only his share would lapse. Thus—A makes a bequest of 1/3rd for *B* and *C*, if they be poor at the time of *A*'s death. *C* is rich at that time. *B* would be entitled to only 1/6th. (*c*) If definite share is marked for *B* and *C* each, and *C* fails to qualify, *B* would get the share marked for him. Thus, if *A* bequests Rs 200 for *B* and 400 for *C*, and *C* disqualifies, *B* would get Rs 200 only.

(*viii*) *Bequest to a class.*—A class of persons ("all the poor of this town") may be made a legatee. It would jointly rank as a single legatee. According to Abu Hanifa and Abu Yusuf, the amount may be spent on one poor person and according to Muhammadan on at least two persons. A class may be a special class also.[49]

Consent of legatee necessary.—The express or implied assent of the legatee after the death of the testator is necessary to complete the legatee's title to the bequest. The legatee has a right to disclaim. Under Shia Law, a legatee may validly accept part of the bequest, and disclaim the remainder.[50] Acceptance or rejection during the lifetime of the testator has no effect; even if the legatee had rejected the bequest during the lifetime of its author, he can accept it after his death, and that would be valid. If however, the legatee survives the testator and dies without assenting to the will, the assent is presumed. Under Shafii Law the right of acceptance passes to his heirs. The law favours the positive side, hence the implied assent. And if the legatee has derived any benefits from the will, the assent is presumed. Similarly the assent of a child or a child in embryo is presumed. Also when a class ('poor') is the legatee, the acceptance is presumed and the will becomes irrevocable by the death of the testator[44]. If the heir has knowledge of the bequest and still remains inactive for a long period (in this case 23 years) and then challenges that bequest, it was held by Karnataka High Court that it would indicate that the heir had signified consent by his conduct.[51]

Death of legatee.—If the legatee predeceases the testator, the legacy in Hanafi Law lapses; but in Shia Law, it passes to the heirs, if any, of the legatee. Under this law, a will may be accepted or rejected during the lifetime of the testator.

7. Bequests which are not absolute

"As to future, conditional and contingent bequest, the law treats them on a footing of equality with gifts, and unless there is special provision the rules applicable are similar. It is to be observed that the usufructuary wills must have

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49. Verma, at pp. 512-13.
50. Tyabji, at p. 804.
51. *Allbux Khajasab Lakkadahare* v. *Smt Allabi*, 2006 AIHC 517 (Kant).

been fairly common in early times, for the *Fatawa-i-Alamgiri* devotes a special chapter to the subject."[52]

(*i*) **Conditional bequest.**—If a bequest of the *corpus* of any property is made with a condition which derogates from the completeness of the bequest, such condition is void and the legatee will get the property, as if no conditions were attached to it.

For example, a Muslim made a bequest to an heir subject to the condition that the legatee (that is, heir) should not alienate the property bequeathed. The other heirs gave their consent to the bequest. The legatee would take the property absolutely since the condition is void as being repugnant to the Muslim Law.

Similarly, where bequest is made to an heir subject to the condition that in the event of his death the property shall go to *X*, and the other heirs assent to the bequest, the condition is void and the heir will take the property absolutely.

A bequest of *usufruct*, however, can be made for a limited time; thus, bequest of life-interest is valid.

(*ii*) **Contingent bequest.**—The bequest which has to take effect on the happening of a contingency is void, unless permitted by a lawful custom.

(*iii*) **Future bequest.**—A bequest *in futuro* of the *corpus* of any property is void. But bequests of usufruct *in futuro* for a limited period are valid.

(*iv*) **Alternative bequest.**—An alternative bequest is valid.

Illustration[53]

A Katchi Memon, who had no son at the date of will, bequeathed his property as follows: "Should I have a son, and if such son be alive at my death, my executors shall hand over the residue of my property to him; but if such a son dies in my lifetime leaving a son, and the latter is alive at my death, then my executors shall hand over the property to him. But if there be no son or grandson alive at my death, my executor shall apply the residue to charity". The testator died without having ever had a son. It was held that the gift was not conditioned *in futuro*, but it was an absolute gift in the alternative and that the residue would go to charity.

8. Revocation of will[54]

A bequest may be revoked by the testator either expressly or impliedly, or by a subsequent will.

52. Fyzee, at p. 363.
53. Mulla, at p. 144.
54. Mulla, at p. 144.

Express revocation is one where the testator revokes the bequest in express terms either orally or in writing. But a mere denial by the testator that he did not make a will does not act as revocation of an otherwise valid will.

Implied revocation is one where the testator does an act from which revocation may be inferred. For example, bequest of a piece of land is revoked, if the testator subsequently builds a house upon it. Similarly, a bequest of piece of copper is revoked, if the testator subsequently converts it into a vessel.

A bequest to a person is revoked by a bequest in a subsequent will of the same property to another person.[55]

Illustrations[56]

(*i*) *A* bequeaths a house to *B*. Subsequently *A* says: "The house that I gave to *B*, is for *C*". This is an express revocation. If *C* is dead at the time of the second bequest, the first bequest remains unaltered.

(*ii*) *A* bequeaths a piece of silver to *B*, and then fashions it into a ring. According to Abu Hanifa, this is not a revocation, but Abu Yusuf and Imam Muhammad hold it as revocation, and this is correct.

9. Interpretation of wills

"A Muslim will must be construed," says Fyzee, "primarily in accordance with the rules laid down in the Mohammadan law, bearing in mind the social conditions that prevail, the language employed and the surrounding circumstances."[57]

A will speak from the date of the testator's death. In construing wills, the Court gives effect to the intention of the testator.

If the language or meaning of a will is so ambiguous that it cannot be interpreted, the heirs have to explain it, as they think proper. For instance, if *X* says in his will "a small portion of my land should be given to *Y*", it entirely depends upon the heirs of *X* to give *Y* whatever they like.[58]

The description of property contained in a will shall be deemed to refer to and comprise of the property answering that description at the death of the testator. For example, a poor person bequeaths to another a third of his estate, valuing Rs 5000. Afterwards he became rich and the value of his estate rose to

55. It must, however, be clearly noted that if the same property is bequeathed to two different persons in the same will, both persons take equal shares of the property. Thus, here, the prior bequest is not revoked by the subsequent one.

56. Tyabji, at p. 816.

57. Fyzee, at p. 368.

58. Tyabji, at p. 813.

Rs 30,000. Then he died. The other person is entitled to bequeathed estates worth Rs 10,000. The same rule applies if the testator should afterwards become poor.[59]

Failure of prior bequest may accelerate or avoid later bequest. For example, *A* bequeaths certain property to *B* for life and after *B*'s death, to *C*. Now, if *A* revokes the bequest to *B* the bequest to *C* will be accelerated. On the other hand, if *A* bequeaths life interest in more than 1/3rd of his estate to an heir and after heir's death to charity, then if *A*'s heirs refuse to give their consent to such a disposition, both the bequests fail.[60]

If a testator bequeaths some articles without identifying any particular article as the object of the bequest, and it turns out that he had no such article at the time of his death, the Court must determine whether or not it was his intention that such an article should be purchased out of his general assets and given to the legatee. For example, a person bequeaths "a goat of my property". Unless a contrary intention appears from the context, this will be understood to mean "a goat to be provided out of my property, whether or not I happen to possess any goats at the time of my death".[61]

In case of a bequest of a fraction of testator's stock of certain articles, the legatee will be entitled to the number which constituted that fraction *at the time of the bequest.* Thus, for example, a testator is having forty goats *at the time of bequeathing* "a fourth of my goats," but dies, having only twenty goats, the legatee is entitled to ten goats, provided the entire value of the testator's net assets is at least three times that of ten goats.[62]

But there is a different rule for bequests of a fraction of testator's stock where the articles are not homogeneous. For instance, a testator bequeaths "a fourth of my clothes". If the clothes are of different kinds, and some of them are destroyed or disposed of after the date of the bequest, the legatee will only have a fourth of those that remain in the possession of the testator *at the time of his death* (and not at the time of bequest, as in the case above).[63]

Where (*i*) a Muslim leaves to a stranger by will a house exceeding in value 1/3rd of his property, and the heirs do not consent; or (*ii*) a *Hanafi* or a *Daudi Bohra* makes a bequest to an heir and other heirs do not consent; or (*iii*) a Muslim makes a bequest to benefit an object opposed to Islam as a religion, such as for building a Hindu temple, or a Jewish synagogue or a Christian church, the bequest would be void.[64]

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59. Wilson, at p. 334.
60. Fyzee, at p. 369, *citing* Tyabji, at p. 813.
61. Wilson, at p. 335.
62. *Ibid*, at p. 336.
63. Wilson, at p. 337.
64. Fyzee, at p. 360.

10. Gift and will compared[65]

Gift	*Will*
1. Existence of property — must; at the time of gift	1. Not essential at the time of making the will, but must at the time of death of the testator.
2. Transfer of possession of property— must, at the time of gift.	2. Not done; property devolves on the legatee after death.
3. Transfer of property becomes effective instantly.	3. Becomes effective after the testator's death.
4. Doctrine of *mushaa* applies.	4. No.
5. No limit as to quantum or beneficiary.	5. Two limits—Not more than 1/3rd and not to heir (subject to the exemption of consent by heirs).
6. No revocation of a completed gift	6. May be revoked before death.

11. Sunni Law and Shia Law compared

Shia	*Shia Law*
1. *Suicide*—Bequest by one who commits the act for suicide before or after making the will is valid (the act means,, e.g. taking poison).	1. Bequest is valid only if the act for committing suicide was done after making the will. Not if the act was done first and then the will made.
2. *Child in the womb*—Bequest for unborn person valid if the child is born within 6 months of the making of the will.	2. Valid if the child is born within 10 months of the making of the will.
3. *Consent of heirs* (*a*) for bequest in favour of stranger up to 1/3rd property —not required	3. *Consent of heirs* (*a*) Same
(*b*) for bequest in favour of heir (even 1/3rd) consent of other heirs necessary.	(*b*) For bequest in favour of heir (1/3rd) consent Not necessary. For more than (1/3rd) necessary.
4. Consent of the legatee presumed if he dies before consenting.	4. No presumption; but the consent of his heirs must be obtained.
5. Time of Consent—After death of the testator. Consent before death is not sufficient.	5. Before or after death, both sufficient.

65. K.P. Sharma, *Muslim Vidhi* at pp. 383-386.

6. Bequest for one who has caused the death of the testator is not valid in any case.	6. If the legatee intentionally caused the death of the testator—the bequest is not valid. But if the death was caused unintentionally, it is valid.
7. Pious bequests—Priorities in this order: first—Farz, second—Wajibaat, third — Nawafil.	7. Priorities—(*i*) Farz; (*ii*) for others—proportionate abatement.
8. Secular Bequests—rule of proportionate abatement.	8. Rule of proportionate abatement Not recognised.
9. Lapsing of the bequest—the legacy lapses if the legatee predeceases the legator.	9. No, the legacy devolves on the heirs of the legatee. But if no heirs, it does lapse back to the legator.

XIII

Administration of Estates and Payment of Debts

A. ADMINISTRATION OF THE ESTATE

'Administration of estates' means management of the property of the deceased for a temporary period.' Suppose a Muhammadan dies leaving behind some property. He had taken some loan, some others had taken loan from him, some had mortgaged their property with him, he had mortgaged his property with others; he had bequeathed some property by will, incurred some expenses; is survived by a specific number of heirs of different categories. Now all the debts will have to be paid, the legatees and heirs will have to be given their shares after deducting their portion of the charges on the property. If some heirs are minor, their property will have to be managed. The dues from others will have to be realised. Performing all these functions means administering the property. The person who will do it is the administrator of the property, the representative of the estate, or the agent of the deceased. In the early days the *Kazi* did all this work; now it is done by the administrator, appointed under the Indian Succession Act, 1925, which has replaced the Probate and Administration Act, 1881. If the deceased had appointed an executor, the above functions would be conducted by him.

Commenting upon the principles governing "administration of estates" of a Muslim in India, Wilson observes[1]:

> "This topic belongs partly to the substantive law of succession, and partly to the department of adjective or procedural law. Consequently we might expect to find, as we do find in fact, that in British India it is partly regulated by Muhammadan Law, and partly by statutory enactments. The question, what becomes of a man's rights and obligations at the moment of his death, is a question of substantive, and therefore (for Muhammadans in British India) of Muhammadan Law. But such questions as, whose duty is it to give orders to the undertaker, to whom should the creditors of the dead man send in their bills, from whom will his debtors be safe in taking a

1. Wilson, (5th Edn.) at p. 212.

receipt? who is entitled to take immediate charge of the property? and, above all, what may, and what may not be done without the intervention of a public officer? are questions of adjective law, the answers to which are not to be sought, in British India, from the Muhammadan Law sources, but from the Anglo-Indian codes or the practice of the Courts. Unfortunately the ancient Muhammadan textwriters could not foresee this curious dismemberment of their system by a non-Muhammadan Legislature, and saw no special reason for drawing a sharp line between substantive and adjective law in their expositions. Even in England the lawyer in search of a rule of substantive law is sometimes driven to infer it from some old decision on a point of procedure; and there is therefore nothing surprising in the fact that the Muhammadan answer to the first of the above questions has to be gathered mainly from passages dealing professedly with the duties of the *kazi*."

The duty of administering an estate, according to the law of Islam, rests on the State, acting through the *kazi*. Hence it is correct to say that administration as understood in modern law, involving necessarily the recognition of an executor or the appointment of an administrator, was unknown to Islamic jurisprudence.[2]

> "Administration was introduced into the fabric of Muhammadan Law by the reception of the English concept of administration and later by the enabling provisions of the Probate and Administration Act, 1881."[3]

According to the Muslim legal theory, the property of a deceased Muslim vests in his heirs immediately after his death. But it is subject to the injunction that the heirs are entitled to take only that residue which is left after the payment of a legacy or debt. Since the payment of debts and legacies necessarily involves the administration of the estate, such administration may be said to be implied in the very spirit of Muslim Law itself.[4]

Muslim Law recognises four distinct purposes to which the estate of the deceased is successively applicable:

(1) his funeral expenses;

(2) his debts;

(3) his legacies; and

(4) the claim of his heirs.

But Muslim Law is replaced by the Indian Succession Act, (39 of 1925), which lays down the following scheme of the order of priority in which the payments are to be made:

(1) Funeral expenses and deathbed charges;

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2. Fyzee, at p. 375.
3. *Ibid*, at p. 375-76.
4. See, *Mahbub Alam* v. *Razia Begum*, AIR 1950 Lah 12, 19, *cited* by Fyzee, at p. 378.

(2) Expenses of obtaining probate or letters of administration;

(3) Wages for services rendered to the deceased by a labourer or servant within three months of his death;

(4) Debts, according to their own priorities (discussed later on in this chapter);

(5) Legacies, not exceeding one-third of what has been left after payments of items mentioned in (1) to (4) above.[5]

This brings us to the consideration of an important question: whether vesting of the estate in the heirs takes place immediately on the death of the propositus or is dependent on the payment of debts.

Vesting of estate.—Delivering his famous judgment in *Jafri Begam* v. *Amir Mohd. Khan*[6], Mr Justice Mahmood observed:

"It is well known that the Muhammadan Law of Inheritance is based on a passage in the fourth chapter of the Koran, which in Sale's translation is thus rendered: God hath thus commanded you concerning your children: A male shall have as much as the share of two females, but if they be females only, and above two in number, they shall have two-thirds part of what the deceased shall leave; and if there be but one, she shall have the half. And the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part. And if he have brethren, his mother shall have a sixth part, *after the legacies which he shall bequeath and his debts be paid.*"

"In reading this passage, I have emphasised the words *after the legacies which he shall bequeath and his debts be paid.* This phrase gave rise to two difficulties in the minds of the Muhammadan jurists. The *first* was, whether the circumstance that *legacies* were mentioned before debts gave the former precedence over the latter in the administration of the estate of deceased persons; and the *second* was, whether the word *after* related to the devolution of inheritance, or to the ascertainment of the extent of the shares to be allotted to the various heirs. The explanation of *Baizawi*, one of the greatest commentators on the Koran, whose views have been universally adopted by Muhammadan jurists, says that the word *after*, as used in the Koran, simply refers to the balance of the estate after the payment of debts and legacies, but does not affect the question of devolution. That this is the interpretation accepted by the Muhammadan jurists in general is best known by a passage in *Al Sirajiyyah*, a treatise of the highest authority on the Muhammadan Law of inheritance, which Sir William Jones translated about a century ago; and in citing the passage I cannot do better than adopt his

5. Fyzee, at pp. 379-80.
6. ILR (1885) 7 All 822 (FB).

words: 'Our learned in the law to whom God be merciful say: There belong to the property of a person deceased four successive duties to be performed by the Magistrate—*first*, his funeral ceremony and burial, without superfluity of expense yet without deficiency; next, the discharge of his just debts from the whole of his remaining effects; then the payment of his legacies out of a third of what remains after his debts are paid; and lastly, the distribution of the residue among his successors according to the Divine Book, to the Traditions, and to the Assent of the Learned[7].' I have quoted this passage to show the priority possessed by the three charges to which the estate is subject when inherited by heirs. This order of priority is, as is obvious from the passage, merely a direction as to the administration of the estate, and has no bearing on the question of the exact point of time when inheritance *devolves* on the heirs. When they inherit the property, they take it, of course, subject to these three prior charges, as they would subject to mortgages—the difference being (as pointed out by the Privy Council in the case which I have already cited) that an encumbrance by way of mortgage follows the property even in the hands of bona fide purchaser for value, with or without notice of the prior encumbrance; whilst the three charges on the estate of deceased Muhammadan as described in *Al Sirajiyyah* cannot do so. It is one thing to say that these three charges take precedence of the inheritance, in the administration of the estate and its distribution among heirs, and it is another thing to say that the inheritance itself does not open up until those charges are satisfied. And it is obvious that all the arguments adopted by Markby, J., as to debts, would, according to his hypothesis, necessarily apply also to funeral expenses and legacies, which, like debts of the deceased, are charges upon his estate. But I am unaware of any rule of Muhammadan Law which would render such charges, or even mortgages, an impediment to the *devolution* of property on the heirs by inheritance. Funeral expenses, debts, and legacies, or any one or more of them, may indeed absorb the estate of the deceased, defeating every succeeding charge; and it is obvious that if nothing is left for the heirs they can take nothing. But this is a proposition widely different from saying that the devolution of inheritance is suspended till the various charges are satisfied. Indeed, on this point, the books of Muhammadan jurisprudence leave no doubt. I have no doubt in my mind that the devolution of inheritance takes place *immediately* on the death of the ancestor from whom the property is inherited."

It is, therefore, clear that immediately after the death of a Muslim his property devolves on his legal representatives—executor, administrator and heirs— in that order as given in para 1 below. The absence of the administrator does not postpone the vesting of the property or its devolution on the heirs. The reason being that the devolution is the result of the operation of the Muslim Law

7. Jones's Works, Vol. III at p. 517.

which is the substantive law. According to the general principles of Islamic jurisprudence, there was no administration, but a mere distribution of the estate, by the state if not by the heirs themselves, in accordance with the principles laid down in the *Sirajiyyah*. The estate did not vest in the *Kazi*, it vested, subject to certain obligations, in the heirs, the physical distribution taking place much later than the apportionment in the eye of the law. A simile is drawn by Fyzee in these words:

> "It is as though the estate were a round cake which from a distance seems entire, but as each heir approaches the table, the cake is found to be carefully cut up and divided proportionately, and all that remains to be done is to hand over to him his particular piece.[8]"

The portion of the property that devolves on the executor is to the extent covered by the valid will; the rest will devolve on the administrator, and if no administrator has been nominated this 'rest' of the portion will devolve on the heirs. The existence of the debts will not postpone this devolution, nor suspend the right of the heirs to distribute the estate at any time. The devolution will be proportionate to the respective shares under the Muhammadan Law of inheritance and the heirs will take as co-heirs or tenants in common of their specific shares.

1. Legal representatives of a deceased Muslim

(*i*) *In case the deceased leaves a will—his executor* (*wasi*), to the extent to which the 'will' is valid;

(*ii*) *If he dies intestate* (*i.e. there is no will*)—(*a*) the administrator, to whom the Court has granted the letters of administration; failing whom—

(*b*) the *heirs*[9].

In first case, according to the ancient texts a non-Muslim could not be appointed an executor of the will of a Muslim; but the courts in India have held that religion is no bar and a Muslim may appoint a non-Muslim as an executor.[10] According to Mulla 'it is not necessary that the executor of the will of a Muhammadan should be a Muhammadan. A Muhammadan may appoint a Christian, a Hindu or any non-Muhammadan to be his executor'.[11] But he must be a major and of sound mind. The executor is an active trustee of the property bequeathed, which must not exceed 1/3rd of the deceased's estate; for the rest of the 2/3rd, he is a bare trustee, being the representative of the testator in whom the deceased had reposed confidence for the execution of the will. The executor is

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8. Fyzee, at p. 376.
9. Verma, at pp. 368-69.
10. Verma, at p. 372.
11. Mulla, at p. 146.

entitled to remuneration if a provision is made in the will, but if he is also an heir, the consent of other heirs is necessary. If an executor dies before completing the task of administration in his lifetime, his successor, if pointed by him, will carry out the work. Hanafi Law permits him to appoint his successor, but the Shia authorities deny such power unless the testator had authorised him to do so. Where such successor was or could not be appointed, the Court will appoint one. Where there are more than one executor, the survivors will act. It seems under Shia Law, the Court cannot appoint an executor so long as there is any surviving executor.[12]

The second representative—the administrator is an English concept statutorily introduced into the fabric of Muhammadan Law by the Probate and Administration Act, now replaced by the Indian Succession Act. Under Section 2(*a*) of the latter, an administrator is a person appointed by a competent authority to administer the estate of a deceased person when there is no executor. Under Section 236, letters of administration may be granted to a person who is a major and of sound mind. The Court (a District Court is the competent authority) has discretion to reject for reasons recorded, any application for letters of administration. Under Section 218 letters of administration may be granted to any person who is entitled to the whole or any part of the property of the deceased, but where there are more than one claimants, the Court may grant to any one or more of them; and where there is no such applicant to a creditor of the deceased. As already noted, an administrator is to be appointed in the absence of an executor.

The third named legal representative is the legal heir of the deceased to whom ultimately the property belongs and for whose interest the court operates the law of administration. If no one applies for letters of administration, the heirs themselves will be entitled to administer the estate. An heir of a deceased Muhammadan may bring a suit for administration of the estate. Section 211 of the Indian Succession Act does not debar a single heir from filing it. Each heir can demand administration of the estate so as to demark the property that falls to his share. He is not bound to bring a suit for partition. Administration is normally a better course for adjustment of debts, priority of claims, etc. There is no bar to bring a suit for administration in respect of the assets of more than one person. Under Section 9 of the Civil Procedure Code, it is a civil suit, and the courts are not barred to take its cognisance. In a suit by an heir for recovery of his share, the other co-heirs are proper parties but are not necessary parties and the suit cannot be dismissed if some co-heirs are not impleaded. The administration suit is governed by the Limitation Act.[13]

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12. Paras Diwan, at p. 162.
13. Verma, at pp. 376-77.

2. The Requirement of Probate & Letters of Administration

It is not necessary for the heirs or administrator of a deceased Muslim to obtain letters of administration or for his executor to obtain a probate of will, if they are doing anything *except* the realisation of debts.

The legal representatives cannot obtain a decree or execute a decree for the recovery of debts[14] due to the deceased, unless they obtain:

(*i*) a probate of will (if there is a will) or, letters of administration (if there is no will), or

(*ii*) a certificate under any of the following Acts, or Regulations, namely:

(*a*) Administrator General's Act, 1913;

(*b*) Indian Succession Act, 1925;

(*c*) Bombay Regulation, 7 of 1827.[15]

A probate is a certified copy of the will issued by the Court under its seal to the executor of the will. It is the authentic version of the will. A letter of administration is a letter of appointment appointing a person the administrator of the property of the deceased. It is issued by a district court.

The Indian Succession Act prescribes the requirement of obtaining a probate in case of testamentary death and the letter of administration in case of intestacy. Otherwise no right as executor or legatee can be established in a court, or in case of intestacy, no right to any part of the property may be established. But these provisions (Sections 212-213) are not binding on Muhammadans. As we have seen, even without these documents, the property of the deceased will vest in the legatee or executor or heir by the force of the Muslim Law on his death. The rights of the heirs etc. will remain unaffected. Thus these certificates are optional for the Muhammadans. And a court is not precluded to issue such certificates to a Muhammadan when he applies. The effect of their absence is that a Muhammadan will not be able to recover debts through the courts; a decree for debts will not be granted. It is not actually necessary to obtain them before the institution of a suit, but they are must before obtaining the decree.

3. Functions of legal representatives

All the properties of a deceased Muslim vest in his legal representative as such. It is his duty to collect the assets, discharge the debts, pay the legacies and distribute the estate amongst the heirs. In case of an executor, his powers granted by will extend to the bequeathable third only, while the rest two-third of the estate he holds as a trustee for the heirs. While in case of an administrator, his

14. Here, the term 'debt' does not include rent, revenue or profits payable in respect of land used for agricultural purposes.

15. Verma, at p. 369.

functions extend to the collection of property and debts *due to the deceased*, and paying his funeral expenses and debts *due by him*. The rest of the estate vests in him as a bare trustee for the heirs.[16]

As already noted, the estate of the deceased Muhammadan is to be applied successively in payment of the 5 heads (mentioned earlier) as required by Sections 320-323 and 325 of the Indian Succession Act. The residue is to be distributed among heirs of the deceased according to the law of the sect to which he belonged at the time of his death, and the heir has a right of contribution against his co-heirs, if, after making remittances to the creditors, he was left with less than his proper share of the net estate of the deceased, that is, compel his co-heirs to compensate him up to their share of the debts already paid by him.[17] The executor will obtain the probate of the will and distribute their shares to the legatees according to Muslim Law, he will also distribute the residue to the heirs. Both, the executor and the administrator have to submit the account of the property, expenses, debts and credits to the court. He possesses the same legal capacity as the deceased in respect of payment of debts, recovery of dues, to sue and to be sued. But he being a trustee of the property, his powers of alienation are subject to the restrictions imposed by Section 307(2) of the Indian Succession Act in the interest of the heirs. He cannot purchase the property under his administration, or apply it to a purpose other than the specified, or to the disadvantage of the heirs. If he purchases any part of the property under his care, any heir or any person having interest in it may get it declared void. If he misapplies the estate of the deceased and causes loss or damage to it, he is liable to make it good. Similarly if he occasions a loss to the estate by neglecting to recover any part of the property, he has to make good that amount. In all other matters not mentioned, the relevant provisions of the Indian Succession Act, 1925, the Administrator General's Act, 1913 and the Bombay Regulation (8 of 1827) apply.

4. Recovery of credits to the property of the deceased

It is the duty of the executor or administrator to take steps to recover debts due to the deceased. For this purpose the executor or the administrator may file a suit against the debtors; for this he must have obtained the probate of the will or the letters of administration, respectively. An heir may also file such suit, but he, or in absence of a probate, the executor can file such suit only if a certificate under Section 31 or Section 32 of the Administrator General's Act, or a succession certificate under Part X of the Succession Act has been obtained. However, a debtor can validly pay the amount of debt to the executor or heir who has not obtained the abovementioned certificates. That is, the certificates are

16. Tyabji, at pp. 733-734.
17. Mulla, at p. 33.

required for filing a suit, not for receiving the amount when offered by the debtor without the intervention of the court. But if the debtor makes payment to one or some heirs only, he is not discharged of his debts due in respect of the shares of other heirs. The reason being that when a Muslim dies, his credits devolve on his heirs in proportion to the shares of each and therefore, each heir has individual right to receive it and discharge the debtor separately.[18]

B. PAYMENT OF DEBTS

This part deals with the debts and liabilities on the property of the deceased. It is not dependent on the existence or non-existence of the executor or administrator. The ultimate liability is on the successors to the property. A creditor of the deceased may sue the executor or administrator of the estate, and if there is none, the heirs for the recovery of his debts. The payment of the debts of the deceased takes precedence over the legacies and inheritance. A decree-holder may proceed against the legatees even if there is other property sufficient for the debts.[19] It is true that on the death of a Muhammadan, the property devolves immediately on the executor or administrator or heir without waiting for the discharge of the debt. The debts do not suspend the right of the heirs to distribute the estate at any time. But this does not mean that the debts are forgotten. The property is received by each heir subject to his proportionate share of the debt. The debt of the deceased will get priority over his personal debt.

Extent of liability of heirs for debts

This liability is bound by two limits: (*a*) The total liability of all the heirs together shall not exceed the total quantum of the property; and (*b*) the net liability of each heir shall not exceed his net share in the property. The heirs are not personally liable for the debts. So if the deceased left no assets, the debts would remain unredeemed; and if he left insufficient assets, the payment would be limited to the amount of the assets. Each heir succeeds to a specified share in the property according to the Muhammadan Law of Succession. The heirs may be living together, but there is no 'joint family property', or 'undivided family'. There is no Karta or no notion of representativeship. There may be no partition, yet there is no coparcenership or no doctrine of partial partition. The share of each heir is specific and known before the death of the ancestor. As a result his liability is also linked with his share in the property. Since they are tenants in common and the share of each is predetermined, anyone can at any time demand partition of the estate. For this purpose getting an administrator appointed is one of the convenient methods, because then the questions of the exact debts of the deceased, expenses incurred on treatment during illness, dower debts, debts acknowledged on death bed, priority of claims, etc. can be better adjusted.

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18. *Ahinsa Bibi* v. *Abdul Kader Saheb*, ILR (1901) 25 Mad 26.
19. Verma, at p. 378.

(*See*, further next chapter for more cases on 'joint family'.)

In *Jafri Begam* v. *Amir Mohd. Khan*[20] Mahmood, J., laid down three propositions regarding the payment of debts.

Proposition I.—When a Muslim dies leaving debts unpaid, his estate devolves immediately on his heirs, and such devolution is not suspended till or contingent upon the payment of debts.

Proposition II.—A decree for a debt passed against such of the heirs as are in possession of the estate does not bind the other heirs.

Proposition III.—If one of the heirs, who was out of possession and who was not a party to the proceeding brings a suit against the decree-holder for the recovery of his share of the estate, he must pay his proportionate share of the debt before recovering possession of his share of the inheritance.

Proposition I came under judicial scrutiny in *Abdul Majeeth* v. *Krishnamachariyar*[21]. Mr Justice Abdur Rahim (author of the famous *Muhammadan Jurisprudence*), approved it and observed:

> "It is not correct to say that the devolution of the estate on the heirs does not take place or is postponed until the funeral expenses and the debts and legacies have been paid. This is evident from the following facts: if an heir designated by the law dies after the death of the propositus, his share descends on his own heirs and does not lapse to the general estate. Each heir is entitled to the income that has accrued since the testator's death, in proportion to his share, and he can transfer his share by sale or gift, subject, it may be, as to the latter form of disposition to such restrictions as are imposed by the doctrine of *Mushaa*.
>
> As far back as 1878, the Judicial Committee (of the Privy Council) in *Bazayet Hossein* v. *Dooli Chund*[22], held that an heir-at-law was entitled to alienate his share in spite of the fact that there were debts of the deceased still outstanding, and it would not have been possible to hold this if the inheritance did not devolve on the heir on the death of the propositus. Mr Justice Mahmood in *Jafri Begam* v. *Amir Mohd. Khan*[23], has fully discussed the question and I do not think it would be of any use to add anything more to his reasoning."

Debts acknowledged during death-illness.—Where the only proof of a debt is its acknowledgment by the debtor on his deathbed, the following rules are prescribed by the Muhammadan Law—(*a*) is not acceptable if it is in favour of an heir—i.e. a person who is an heir at the time of acknowledgment. This does

20. ILR (1885) 7 All 822 (FB).
21. ILR (1917) 40 Mad 243.
22. ILR (1879) 4 Cal 402 (PC).
23. ILR (1885) 7 All 822 (FB).

not cover a person who becomes an heir afterwards; (*b*) The above exclusion is subject to one exception—if other heirs consent to it, it shall be valid; (*c*) It shall also be valid when in favour of a wife who was given triple talaks. Her share will be equal to her presumed share in the estate or the actual amount, whichever is less; (*d*) Such debts will be paid only after other debts are satisfied.[24]

5. Alienation before payment of debt

(*i*) Any heir may, even before distribution of the estate, transfer his own share, and pass a good title to a bona fide transferee for value, notwithstanding any debts that might be due from the deceased.

Illustration

A Muslim dies leaving several heirs. After his death the whole body of heirs sell the whole of his estate without paying his debts. *After the sale*, a creditor of the deceased obtains a decree against the heirs for the debt, and applies for execution of the decree by an attachment and sale of the property in the hands of the purchaser. He is not entitled to do so. The reason is that a creditor of a deceased Muslim cannot follow his estate into the hands of a bona fide purchaser for value (Mulla).

The Muslim Law does not absolve the heir of his liability for the debt, but protects the rights of the transferee who takes the property in good faith without notice of the claim of the creditors and for value. Debt due by one co-sharer cannot be enforced against the property so purchased by the third party—the allianee. A creditor cannot attach the property.

(*ii*) A sale of the share of an heir in execution of a decree amounts to a "transfer", and will pass a good title to the purchaser.

Illustration

A Muslim dies leaving two sisters as his only heirs. After his death, *C* a creditor of the deceased, obtains a decree against the sisters for his debt. Subsequently, a creditor *of the sisters* obtains a decree against them for his debt, and the property of the deceased which came to the sisters' hands is sold in execution of the decree to *P*. In this case *C* is not entitled to attach the property in the hands of *P* in execution of his decree.

(*iii*) If the share transferred by an heir is a share in immovable property, and the transfer is made *during the pendency of a suit* in which a decree is passed creating a "charge" on the estate, the transferee will take share of the heir *subject to* the charge.

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24. Verma, at pp. 836-37.

Illustration

A Muslim died leaving a widow and a son. The widow sued the son, who was in possession of the deceased's properties, for the payment of her dower debt. The Court passed a decree in favour of the widow. The decree created a charge on the immovable properties of the estate. But during the pendency of the execution of the decree, the son mortgaged his share to *M*, who later on sued the son and obtained a decree for sale of the shares mortgaged to him. The share was sold and was purchased by *P*, who had notice of decree. In these circumstances, *P* will take the share *subject to the decree* in favour of the widow, whose right to claim unpaid dower cannot be so defeated. However, if a simple money decree is passed ultimately in favour of the widow, the transferee will get a good title. But if the decree creates a charge on the estate, he will take the share subject to the charge. The case will be affected by the doctrine of *lis pendens*.[25] Where a charge is created in favour of an heir in an administration suit on the share of another heir and the latter transfers his share *pendente lite* (pending the suit), the transferee will take the share subject to the charge.[26]

6. Alienations by co-sharer before partition

When the heirs jointly hold the property of the deceased pending partition, they are tenants in common. In Muslim Law the concept of co-sharer or co-proprietor is applicable to Muslim family. When the members of a Muhammadan family live in commensality, they do not form a joint family in the sense in which that expression is used in Hindu Law.[27] But during the continuance of the family the properties of the family are possessed by all the members jointly. Co-heir and "co-sharer" are the terms which are emphasised to highlight that the specific shares are allocable. The concept of Muhammadan joint family cannot be treated as a legal unit. But where male members of a family live in union so as to have jointness in mess, business and property, there can be little difficulty in tracing their relations among themselves to an implied agreement which clothes each with a representative capacity in reference to his co-sharers. Accordingly, any acquisition made by any one member should be considered to have been made by all. The co-heirs or co-sharers are tenants in common. Accordingly, it was held in *Dhuma Khan* v. *Commr. of Consolidation*[28] that the brother and sister enjoying the property jointly are co-sharers/co-owners/co-proprietors.

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25. Verma, at p. 386.
26. *Khatun Bibi* v. *Abdul Wahab*, AIR 1939 Mad 306.
27. The contention that since the appellants are members an undivided Muslim family therefore they also be deemed to be 'agriculturists' — was rejected by the Bombay High Court in *Abdul Rahim Afzalsha Kazi* v. *Abbas Alamsha Kazi*, (2005) 1 Mah LJ 108.
28. 1997 AIHC 3048 Ori HC.

Any one or more of them may alienate his or their undivided portion by mortgaging it. When he does, the other heirs may enforce a partition and thereby demarcate the portion falling to the lot of each of them. Suppose *A* had mortgaged a part of the house in which *B* was also a shareholder as heir. On demand by *B* partition is effected and the portion mortgaged by *A* to *C* falls to the lot of *B*. *B* will take it free of the encumbrances created by *A*; the security taken by *C* is subject to this right of *B*—to enforce partition and take the allotted share free of any charge when every thing is being done in good faith. Now the mortgagee can file a suit against *A* in respect of the share allotted to *A* in substitution of the earlier portion.[29]

A co-owner has a right under Muhammadan Law to sell his undivided share in the estate which he succeeds as an heir.[30] Thus, if *A* and *B* are co-sharers of a house, *A* may, before partition also, sell a part of the house not exceeding his share in the property. In that case, the purchaser *C* will stand in the shoes of *A*. In order to get possession of his part in the house, he can claim a general partition of the property, just as *A* could do. He can also plead that *A* may be allotted the same portion of the house as was sold by him to *C*, so that he could get its possession. If such allotment causes no injustice to the other heir, the court may accept his plea.[31]

On the other hand, if there was earlier partition, then the possession of each co-sharer would in the absence of evidence to the contrary be referable to his title. There is no presumption in Muhammadan Law, as it is, in favour of jointness under the Hindu Law and therefore the general principle of attributing possession to a lawful title will apply. So, where, in reference to the facts of the case, the evidence on record and the circumstances proved at the trial established that the heirs of the deceased had partitioned the estate left behind by him and each one of them separately enjoyed what fell to his share, and where all of them lived separately, carried on business separately, collected rent separately and enjoyed without interference by others what might have fallen to their shares, and were in separate possession of the properties which fell to their shares on partition, it could not be held that they were in joint possession of the suit properties as tenants in common.[32]

Family partition or family settlement could be done by oral agreement. In law, it is permissible that a family partition or family settlement could be done by an oral agreement, even if it is evidenced by any memorandum only as a record of past event, it would not require registration. However, for a legal valid allotment of properties either in a partition or family settlement, the parties to the

29. *Mohd. Afzal* v. *Abdul Rahman*, (1932) 59 IA 45.
30. *Buta Rana* v. *Mahmood Alam*, 2005 AIHC 1826 (Jhar).
31. *Tikam Chand* v. *Rahim Khan*, AIR 1971 MP 23.
32. *Husna Ara Begum* v. *Kishori Devi*, (1998) 3 BLJR 1649 Pat HC.

transaction should have pre-existing rights in the said properties and should have antecedent title. In family settlement, it is also possible to allot the property to a person who may not have a clear pre-existing right or antecedent title. However, if there is bona fide disputed claim for the purpose of bringing about harmonious settlement in the family, there can be valid allotment by settlement. Otherwise, in case of a self-acquired property, there cannot be an allotment of the property by family partition or family settlement amongst others who have no joint title or pre-existing right and also when there is no bona fide disputed claim.[33]

7. Suit by the creditor against heirs

When a Muhammadan dies leaving behind the burden of debts on the property, the remedy for the creditor is to sue the executor or the administrator and if none, the heir or heirs of the deceased. He has the option to sue one or some or all the heirs, but he must remember, in his own interest two cardinal principles of Muhammadan Law—one, an heir, is liable to discharge the debt proportionate to his share in the whole property and second, a decree obtained by the creditor will bind only the share of the particular heir against whom the decree is obtained, not other heirs. The first point may be illustrated thus—A Muslim, who is under a debt of Rs 3200 dies, leaving a widow (*W*) a son (*S*) and two daughters (*D1*, *D2*). They divided the estate without paying the debt; *W* taking 1/8, *S* taking 7/16, *D1* 7/32 and *D2* 7/32. The creditor sues *W* and *S* for the whole of the debt (Rs 3200). What would be the liability of *W* and *S*? = *W* is liable to pay only (1/8 x 3200 = 400) Rs 400, and *S* (7/16 x 3200 = 1400) Rs 1400. They are not liable for the whole amount of debt.

The second point represents only one situation. There can be three situations, with different results:

(*i*) *Suit against all the heirs in joint possession.*—If the estate has not been distributed, the creditor can obtain a decree which can be executed against the property as a whole without interfering with the extent of the liability of the heirs inter se. Amongst the heirs themselves, each will get his share in the estate minus his share in the debt, at the time of distribution or allotment. If any one is left with less than his share, he will be entitled to contribution from the rest.[34]

(*ii*) *Suit against all the heirs when the estate has been distributed among all the heirs.*—In this case the decree will mention the proportionate share of the liability of each heir. (*See*, the illustration in the previous para above).

(*iii*) *Suit against some of the heirs.*—When the estate has been allotted to each heir according to his share and the creditor prefers to sue only some of them, decree will be passed against the heirs who are a party to suit, and will be

33. *Modinsaheb Peer Saheb Peerjade* v. *Meerabi*, (2001) 2 CLT 63 Kant HC.
34. *Mohd. Kasam Ali* v. *Sadiq Ali*, AIR 1938 PC 169.

binding against them only. The others will not be affected. Even the heirs who remitted the debt under the decree will not be entitled to compel the other heirs to contribute their shares. Similarly, when *all* of them are in *joint possession* and allotment of shares has not been done, if the creditor brings a suit and obtains a decree against *some* of the heirs only, they alone will pay the debt, and the shares (in future) of the others will not be affected. But here, the former will have a remedy—when partition is done and an heir who did not join in the alienation for the payment of the debt sues for possession by setting aside the alienation, he may be required to pay his share before he can be allowed to get possession. This is a remedy inter se the heirs.

The third possibility is that only *some* of the heirs are in possession of the property and the creditors bring a decree against these *some* heirs only. Will a decree against them in respect of the property in their possession bind the other heirs also? To illustrate—*A* dies leaving behind *B* and *C* as heirs. *A* was indebted to *D*. The whole of the property was in possession of *B* only. *D* brings a suit against *B* only and obtains a decree for the recovery of the debt. He puts the estate of *A* to sale in execution of the decree and the property is sold. Will the purchaser be entitled to recover possession over the shares of both *B* and *C* or of *B* alone? Will there be any difference if *B* was in possession of only *part* of the property? Conflicting decisions had been delivered by the different High Courts.

Calcutta.—According to the earlier decisions of the Calcutta High Court, any creditor of the deceased may sue any one of the heirs who is in possession of the *whole or any part* of the estate, without joining the other heirs as defendants, to recover the *entire* debt. The Court was of the view that a creditor's suit was an administration suit, and any heir in possession of the estate represented the estate for the purpose of the suit.[35]

Later on, the same High Court changed its view and held that the above view cannot be taken if the heir who was sued was in possession of the estate on behalf of the other heirs.[36]

Bombay.—The High Court of Bombay took the same view in some cases as that of the earlier decisions of the Calcutta High Court.[37] But later on it changed its view and held that a sale in execution of a decree passed against an heir in possession does not pass to the purchaser the interest of those heirs who were not parties to the suit even if the heir against whom the decree was passed was in possession of the whole estate[38] (This is in conformity with Allahabad's view).

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35. *Muttyjan* v. *Ahmad Ali*, ILR (1881) 8 Cal 370.
36. *Abbas Naskar* v. *Chairman, Distt. Board, 24 Parganas*, ILR (1932) 59 Cal 691.
37. *Khursheibibi* v. *Keso Vinayek*, ILR (1887) 12 Bom 101.
38. *Bhagirathibai* v. *Roshanbi*, ILR (1919) 43 Bom 412.

Madras.—In its earlier decisions, the High Court of Madras followed the earlier rulings of Bombay, but later on adopted the view taken by Allahabad.[39]

Allahabad.—It was held by the Allahabad High Court that a decree relating to debts of a deceased Muslim passed against his heirs, binds each heir who is in possession, to the extent of their share in the estate. But such a decree does not bind other heirs who are not in possession. This is because each heir in the law of Islam inherits a separate and well-defined share. The share of one has no connection with the share of another. Thus, an heir cannot be said to represent the estate that has devolved upon the other heirs.[40]

Nagpur and Oudh.—These Courts have taken the same view as that of Allahabad High Court.

This controversy was resolved by the Supreme Court in *Mohd. Sulaiman* v. *Mohd. Ismail*[41]. The background to this ratio was provided by a decision delivered one year earlier in *Daya Ram* v. *Shyam Sundari*[42], where the Supreme Court held that where the petitioner makes certain persons party to a suit for decree, and after diligent and bona fide inquiry he genuinely comes to the conclusion that the persons impleaded are the only heirs of the deceased and no other heir was left out in the suit, the decree issued will be binding on the entire estate. This is an exception to the general rule that persons not impleaded are not bound by the decree. The above exception will also not apply to the non-impleaded heirs where there was a fraud or collusion between the creditor and the heirs. The next case—*Mohd. Sulaiman* (supra) involved Muslim parties on both sides. The facts of the case were as follows: Certain property was mortgaged by three Muslims (*A*, *B*, *C*) to one *N*, Reddy, (*R*). *A* died. *R* finding that *B*, *C*, 3 widows of *A* and one daughter of *A* were in possession of the mortgaged property, obtained a decree on his mortgage against them and in execution sale thereof, purchased the property himself with the permission of the Court. It was also found that *R* had made bona fide enquiry and had not come to know about the existence of any other heirs. *R* further sold it to one P.C. Reddy (*P*), and the latter further sold it to others. Mohd. Sulaiman, the plaintiff claimed to be a son of the deceased *A*. The main objection was against the decree *R* had obtained. *R* resisted this appeal on the ground that he was a bona fide purchaser and had obtained the decree after suing for debt all the heirs in possession that he could know of after bona fide enquiry. The Supreme Court accepted his defence and dismissed the appeal. *Held*—that the principle of representation of the estate by the heirs who were joined as parties applied to the case and the decree was

39. *Pathummabi* v. *Vittil*, ILR (1902) 26 Mad 734, and *Abdul Majeeth* v. *Krishnamachariyar*, ILR (1917) 40 Mad 243.

40. *Manni Gir* v. *Amar Joti*, ILR (1936) 58 All 594.

41. AIR 1966 SC 792

42. AIR 1965 SC 1049.

binding on persons who claimed to be sons of the deceased mortgagor and who sued for a declaration that the mortgage decree was not binding on them. The creditor may sue all the heirs, and where the estate has not been allotted to the heirs, he may execute the decree against the property as whole without regard to the extent of the liability of the heirs among themselves. The creditor is not required to sue all the heirs, he may sue some of the heirs and obtain a decree against them. The decree may be enforced against individual heirs in proportion to their shares in the estate. Where the creditor after diligent and bona fide enquiry impleads some, but not all, as legal representatives, the heirs so impleaded represent the estate of the deceased, and a decree obtained against them binds the entire estate, including those not joined in the decree. In holding this the Supreme Court relied on the *Daya Ram case* (supra).

8. Alienation for payment of debts

If there is only one heir of a deceased Muslim, the heir could validly alienate the whole of the estate he inherits to satisfy any debt of the deceased. But if there are several heirs of the deceased and the whole estate of the deceased is in possession of only one heir, he has no power to alienate the shares of other heirs, even for discharging debts of the deceased. Such an alienation, if made, would not be binding on the other heirs, and could be set aside. The transfer will take effect only in respect of the share of the transferor. This view has the approval of the Privy Council.[43]

In an earlier case the question before the Court was:

> "When one of the co-heirs of a deceased Muhammadan, in possession of the whole estate of the deceased or of any part of it, sells property in his possession forming part of the estate for discharging the debts of the deceased, is such sale binding on the other co-heirs or creditors of the deceased."

The Court answered this question in the negative. Delivering the judgement, Abdur Rahim, J., observed[44]:

> "The heirs of a deceased Muhammadan take their shares in severalty, their rights being analogous to those of tenants-in-common, and not of members of a Hindu Joint Family.[45]
>
> There cannot be the slightest doubt therefore upon the principles of Muhammadan Law and also on the authorities that one heir has no right to deal with the shares of the other heirs".

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43. *Jan Mohammad* v. *R.B. Karm Chand*, AIR 1947 PC 99.
44. *Abdul Majeed* v. *Krishnamachariyar*, (1916) 40 Mad 243.
45. See, *Abdul Khader* v. *Chidambaram Chettiyar*, ILR (1909) 32 Mad 276.

If one of the heirs sells the property in excess of his own share for payment of debt, the other co-heirs may sue for a declaration that the sale is not binding on them. They may pray for getting the sale set aside. In such cases, the court reserves the power to do equity and justice by requiring the heirs who seek to recover possession to pay their proportionate share in the debt. Alternately the vendee may be allowed to retain the portion of the other heir validly sold to him.[46]

The debts of the deceased are given priority over the personal debts of the heirs.[47]

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46. Verma, at p. 385.
47. *Ibid.*

XIV

Inheritance

1. Excellence of Muslim Law of Inheritance[1]

Nearly all the modern writers have admired the Muslim system of Inheritance for its utility and formal excellence. The views of only a few of them are given here:

SIR WILLIAM JONES: "I am strongly disposed to believe that no possible question could occur on the Muslim Law of Succession which might not be rapidly and correctly answered."

RUMSEY: "The Muhammadan Law of Inheritance comprises beyond question the most refined and elaborate system of rules for the devolution of property that is known to the civilised world."

FITZGERALD: "To Muslims the Sharia Law of Inheritance is ideally perfect; founded on the sure rock of divine revelation and worked out in the utmost detail by that mental ingenuity which God gave man for the purpose of understanding revelation. The logical strength of the system is beyond question..."

MACNAGHTEN: "... it is difficult to conceive any system containing rules more strictly just and equitable."

TYABJI: "The Muslim Law of Inheritance has always been admired for its completeness and the success with which it has achieved the ambitious aim of providing not merely for the selection of a single individual or homogeneous group of individuals, on whom the estate of the deceased should devolve by universal succession, but for adjusting the competitive claims of all the nearest relations."

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1. The Prophet is reported to have said: Learn the laws of inheritance, and teach them to the people; for they are one half of useful knowledge (*Sirajiyah*).

ANDERSON: "There is no aspect of the (Muslim) Law in which the logical and technical excellencies of the Islamic system are more advantageously displayed than in the law of inheritance. Indeed, there is a famous dictum attributed to the Prophet that a knowledge of the shares allotted to the various heirs under this system constitutes the equivalent of one-half of all human knowledge."

2. Dual basis of Muslim Law of Inheritance

The Muslim Law of Inheritance is based on:

(*i*) the rules relating thereto laid down in the Koran or in the traditions; and

(*ii*) the customs and usages prevailing amongst the Arabs insofar as they have not been altered or abrogated by the Koranic injunctions or traditions.[2]

Before examining the reforms introduced by Islam, let us first examine pre-Islamic customs regarding succession.

Importance of pre-Islamic customs.—"(I)t would not be correct", says Abdur Rahim, "to suppose that Islam professed to repeal the entire costomary law of Arabia, and to replace it with a code of altogether new laws. The fact is, the groundwork of the Muhammadan legal system, like that of other legal systems, is to be found in the customs and usages of the people amoung whom it grew and developed."[3]

The pre-Islamic customs relating to succession alone can explain the reason why different classes of rights are given, for example, to the different classes of heirs, and why some who might be supposed to be entitled to similar rights, are placed on different footings. Thus, in the first group of heirs—the Sharers—no place is given to sons, though daughters, son's daughters, and even sisters are included in it. This might seem bewildering, unless it is realised that the Sharers consist of those who were not entitled to succeed under the customary law. Similarly, the debris of customary law are found throughout the Law of Succession, and often simplifies its seeming complexity.

The Koran did not sweep away the existing customs of succession, but made a great number of amendments.[4]

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2. Tyabji, at p. 820.
3. Abdur Rahim, at p. 1.
4. Tyabji, at pp. 821-825.

Pre-Islamic rules of succession.—(*i*) The nearest male agnates succeeded to the entire estate of the deceased;

(*ii*) females and cognates were excluded;

(*iii*) descendants were preferred to ascendants and ascendants to collaterals;

(*iv*) where agnates were equally distant to the deceased, they together shared the estate *per capita*.[5]

Improvements introduced by Islam.—(*i*) The husband and wife were made heirs;

(*ii*) Females and cognates were made competent to inherit;

(*iii*) Parents and ascendants were given the right to inherit even when there were male descendants;

(*iv*) As a general rule, a female was given one-half the share of a male; this is because of her lesser responsibilities and obligations in comparison with males.[6]

All the newly created heirs were assigned specific fraction of estate, called *Sahm* (share), and were called Koranic heirs or simply 'sharers'. Moreover, the newly created heirs were mostly females.

3. Some objections: Their answers

Objection I.—"The widow receives very inadequate treatment, for her maximum share is 1/4th of her husband's estate and that too is reduced to 1/8th by the survival of any child of the deceased" (Anderson).

Answer.—The principles of Muslim Law are primarily based on the Koran. He Koran sometimes lays down general rules whose observance much depends on interpretation; but if there is some specific and clear injunction in the Koran, it has to be followed literally without any question.

The Koran lays down the following rule:

> "And unto them (your wives) belongeth 1/4th part of what which ye leaves, if ye have no issue; but if ye have issue, then they shall have one 1/8th part of what ye leave" (Koran, 4 : 11).

The above verse of the Koran is clear enough to need any explanation.

The position of widow would cease to look bad after we also consider the following mitigating factors:

(*i*) The amount of deferred dower which she gets on her husband's death;

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5. Tyabji, at p. 829.
6. *Ibid*, at p. 830; Fyzee, at p. 390.

(*ii*) Obligation of children to maintain her;

(*iii*) Her fewer obligations.

(*i*) After the death of her husband, the widow gets the amount of dower, which is apart from her share in inheritance. Generally the amount of dower is quite a fat sum.

(*ii*) The presence of children, which makes her to get only 1/8th part of the estate, also provides her with an alternative to compensate the loss. It is one of the cardinal principles of Muslim Law that a person in easy circumstances is bound to maintain his poor parents. Therefore, what her son gets, for example, from the inheritance, he has to spend it gradually on her maintenance. Seen in this context, the reduction of her share to 1/8th does not look harsh.

(*iii*) The social and family obligations of females, particularly in India, are not very serious as that of a male. Her own maintenance is the only serious problem before her, and it is amply guaranteed by the provisions described above in (*i*) and (*ii*).

In spite of the above provisions, if a husband feels that his children would not support their mother, or the dower amount, or her share in inheritance is small, he may very well make a gift (or a will, provided his heirs give their consent to it after his death)[7] to her. He can thus provide ample means to his wife to support herself during 'rainy days'.

Objection II.—The most controversial problem in the Muslim Law of inheritance in India is posed by the fact that the Islamic Law of Intestate Succession gives a son twice the share of a daughter, and a brother of the full or consanguine blood twice that a corresponding sister (and, indeed, a widower twice a widow's share, and a father, in certain circumstances, twice that of a mother) (Anderson).

Answer.—Replying this self posed question, Professor Anderson recently made some very importance observations that deserve our full attention. He said:[8]

> "To change all this would be to upset the whole structure of the Islamic Law of Inheritance, which is as complex, finely balanced and mathematically precise as any system in the world, and which rests more directly on the explicit injunctions of the Koran than any other part of the *Shariah*. The argument most frequently heard in India in favour of such change is based on the Fundamental Rights enshrined in the Indian

7. It is interesting to note that the Egyptian law allows a bequest to an heir up to the ceiling of one-third without any consent of heirs.

8. J.N.D. Anderson, "Muslim Personal Law of India", in the *Islamic Law in Modern India* (1972) at pp. 42-43.

> Constitution, which provide that "The State shall not deny to any person equality before the law'[9]... and that 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them'.[10] But it is vital to note that these injunctions are addressed to State action, not to the existing personal laws."

Even so, the question may well be debated whether the principle of "double share to the male" (which pervades much though not all, of the Islamic Law of Inheritance) does not in fact constitute a discrimination against daughters, sisters, etc. "on grounds only of sex". At first sight this might certainly appear to be the case; but I think it is distinctly arguable that this is not so. It must be remembered that celibacy is extremely rare among the Muslims of India, where the overwhelming majority of Muslim women are married; that it is a fundamental principle of Islamic Law that a husband must provide his wife with a dower, while the provision of a dowry by the wife's father has no place in the Islamic system; that it is incumbent on a Muslim husband to provide his wife with maintenance and housing, however, poor he may be and however affluent may be her own circumstances; and that the duty to support the children of a marriage is invariably placed, primarily at least, on the father. In view of these manifold obligations I think it is distinctly arguable that the greater share normally given to males in the Islamic Law of Inheritance does not in fact, constitute a discrimination which can be said to be based on sex alone—particularly in view of the fact that there is no question whatever of the exclusion from inheritance of a daughter, sister, mother or wife in the *Sharia*, common though that often is in the customary law of different parts of the subcontinent.

It is true that when the right to inherit passes beyond the "inner" family (*i.e.* parents, grandparents, children, grandchildren, brothers, sisters and spouses) the Sunni system gives a right of inheritance to the agnates alone, to the complete exclusion of any relative—female or even male—who is not related to the deceased through the male line. But it is significant that the Shia' have never followed this principle. On the contrary they treat cognates on a complete equality with agnates, and when they grant inheritance to a male relative, however distant, they invariably allow a female in the same degree of relationship to take her share as well. A female who is closer in degree to the deceased will, indeed, completely exclude a more remote male. But even among the Shia's the distribution, as between sons and daughters, brothers and sisters, etc. gives a double share to the male.

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9. Art. 14.
10. Art. 15(*i*).

4. Some general rules of inheritance

Property—movable and immovable not distinguished.—The Muslim Law makes no distinction between movable and immovable property for the purposes of inheritance. Only one distinction recognised by the Shia Law is that a childless widow is not entitled to a share in the *land* belonging to her husband. Land does not include buildings or trees standing on it; she is entitled to a share in the value of such buildings etc.

Ancestral and self-acquired property—no distinction.—There is no 'joint family property' or 'separate' property. Heirship does not necessarily go with membership of the family. A 'member' of the family may not be an heir, and vice versa. The institution of joint family is a foreign concept in Muslim Law. It is not contrary to law, however, for a Muslim adult male to hold assets and carry on business on behalf of other members of the family. Such practice is common in Andhra Pradesh. Such a case will be an instance of partnership (express or implied) and the adult will stand in fiduciary relationship to other members. Thus, when it was found that two brothers had used for themselves the goodwill of their father's firm after his death and also the shares of other members under their control entirely to their own advantage, it was held that they stood in fiduciary relationship to the other members and the provisions (Sections 23 and 28) of the Trusts Act applied to the two.[11]

In *Rukaiya Begum* v. *O.V. Fazlur Rahman*[12], the Patna High Court held that although there is no presumption of jointness and joint family business in Muhammadans, but in certain circumstances the court may uphold such eventuality. There is nothing contrary to law in Muhammadan adult members of a family carrying on family business for the benefit of all members of family including minors and females, and the court may uphold it and such legal consequences as follow from it, although the court will not impart all the legal consequences as in case of Hindu joint family or a lawful partnership. (*See also*, last chapter under Section 6 for jointness of family).

Joint family property not being recognised, the principle of survivorship is also not known to Muslim Law. The heirs of the deceased take their shares as tenant in common, and not as joint tenants with rights of survivorship. They are separate co-sharers. Acquisitions by one member are not thrown in a common purse, nor debts incurred by one are to be shared by others. In case of a joint business, the rules of partnership will apply and the partnership would terminate on the death of one of the partners, unless there is evidence to the contrary.

No limited interest.—Muslim Law recognises a distinction between *ayn* (corpus) and usufruct in the property (*manafi*). Over the corpus the law

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11. *Mohd. Abdul Rahim* v. *Mohd. Abdul Hakim*, AIR 1931 Mad 553.
12. AIR 1998 Pat 1.

recognises only absolute dominion, heritable and unrestricted in point of time. The *manafi* may be of limited duration and limited interest, and through this *manafi* the dominion over the corpus may take effect subject to any such limited interest; but over the corpus as such, the Muslim Law recognises no limited interest.

No rule of primogeniture.—Muslim Law does not recognise the law of primogeniture; the eldest son has no special privileges. But Verma has noted some exceptions to this rule. The eldest son is entitled to succeed exclusively to the wearing apparel, Koran, sword and ring (collectively called *habua*) of the father. In Oudh the Estates Act recognises the family custom of primogeniture succession governing *talukdari* property; the daughters are excluded. Bombay Watan Act also recognises this custom.[13]

The rule of primogeniture also rules the succession of the Gaddi of Rampur State. "The rule of succession over the Gaddi of Rampur State and properties as pertaining thereto, has all along been the rule of male lineal primogeniture, according to which the eldest male heir of the last ruler inherited both the Gaddi and the properties, had an impartible character,"—ruled the Allahabad High Court in *Talat Fatima Hasan* v. *Nawab Syed Murtaza Ali Khan*[14]. The history of succession to the throne of the State of Rampur right from its inception about 200 years ago established that the inheritance to the Gaddi was based on male lineal primogeniture. On the merger of the State with the Dominion of India by means of the instrument of merger dated 15th May 1949 the said position remained unaffected and the late Nawab held the properties as part of the Gaddi of Rampur State. Both the Gaddi of Rampur State and the properties owned by the said Ruler thus continued to be governed by the rule of primogeniture and the principle of impartibility which did not come to an end with the lapse of paramountcy and the integration of the State. The defendant, eldest son of the late Nawab thus, in accordance with the rule of inheritance, succeeded to the Gaddi of Rampur and the entire property then owned by the late ruler. The said property in the matter of succession was not governed by the Muslim Personal Law and the descendant of the late Nawab, had no right to inherit the same or share in it. The position in this regard did not change on the abolition of privy purses and cessation of recognition as ruler as a result of 1971 Amendment.

On the legal position of the rule of primogeniture, the Court held:

> "The rule of primogeniture, and impartibility, is as much applicable to the Muslims as the Hindus. Second, the customs of these nature have all along been treated as law and not merely a practice. Consequently, there neither could be a bar to plead the same, in view of Section 37 of the Bengal, Agra, Assam Civil Courts Act, nor would be treated as abrogated because of

13. Verma, at pp. 389 and 398.
14. AIR 1997 All 122.

> Section 2 of the Shariat Act. What the Shariat Act prohibits or repeals, is the custom in respect of the matters enumerated in Section 2 of the said Act and not anything beyond it. It only excludes a custom contrary to the Muslim Law of Succession etc., but there is nothing in it to indicate that it also has the effect of overriding any law to the contrary. The rule of impartibility and primogeniture are laws in the meaning of Section 292 of the Government of India Act, 1935, and Article 372 of the Constitution of India. Consequently, this can be negated only by a specific legislation repealing the same.[15]

This legal position was recognised not only by the Privy Council in cases relating to Ruler States of Punjab and Awadh, but also by the Supreme Court in the case of *Pratap Singh* v. *Sarojini Devi*[16]. The Supreme Court in the matter of the princely State of Nabha, reiterated the time honoured legal position and principle that, though impartibility and primogeniture in relation to Zamindari Estates or other impartible estates are to be established by custom, in a sovereign ruler they are presumed to exist and further held that the rule of primogeniture applied not only to the rulership (Gaddi) but also to the entire property owned by the ruler, and it did not come to an end with the lapse of paramountcy and the integration of the princely States. This rule continued even after 1947-1948. Under Article 372 the Law of Succession relating to primogeniture continued until it is repealed.[17]

Birthright not recognised.—The right of inheritance or succession arises only after the death of the ancestor or propositus. Until then the heir-apparent does not have any entitlement of the property that would devolve on him on the death of the ancestor. His right to succeed is nothing more than a mere *spes successionis*; that is a mere chance of succession. His 'right' may be defeated in a number of ways—the owner may transfer it in his lifetime. The principle *nemo est heirs viventis* (a living person has no heir) applies to Muhammadans.

Illustration.—*A* has a son *B*. *A* gift his property to *C*. *B* alleges that the gift was procured by undue influence and so sues *C* in *A*'s lifetime on the strength of his right to succeed to *A*'s property on *A*'s death. The suit must be dismissed, for *B* has no cause of action against *C*, for he is not entitled to any interest in *A*'s property during *A*'s lifetime. *B* can bring such a suit only after *A*'s death.

An heir apparent as such, cannot make any claim. For example, a Muslim lady has a son; he dies, then the lady dies. Can the wife of the son claim any share in the property of the lady as representative of the predeceased son? Answer is 'no'. 'It is well settled that only that relative can be an heir of the deceased who is alive at the moment of the latter's death. A person who died before the deceased cannot be his heir. The survivors of such a person can in

15. AIR 1997 All 122, paras at pp. 54, 55 and 71.
16. 1994 Supp (1) SCC 734, *cited* in the above case.
17. *Cited* by All HC *supra*, n. 14.

same cases inherit direct from the propositus, but not in place of or in the right of the said person who died before the propositus. And a daughter-in-law who is a widow is excluded from claiming any share in properties of her mother-in-law.' — See, *Ashabi* v. *Faziyabi*[18]. Similarly, where the daughter of consanguine brother predeceased her father, her children cannot claim her father's share since she cannot get any share in his property[19]. He cannot release his chance of succession, or transfer it without consideration. He cannot make as valid gift of the contingent right, the Transfer of Property Act and the Muhammadan Law prohibit it. But if the expectant heir goes further and receives consideration and so conducts himself as to mislead an owner into not making disposition of his property *inter vivos* the expectant heir could be debarred from setting up his right when it does unquestionably vest in him. This principle of equitable estoppel is in consonance with the Muslim Law.[20] According to Fyzee also, the relinquishment of a contingent right of inheritance by a Muslim heir is generally void in Muhammadan Law; but if it is supported by good, and not necessarily valuable consideration, and forms part of a valid family settlement, it is perfectly valid.[21]

Vesting of Inheritance (*Moona Sukhut*).—Immediately on the death of the propositus the heir are vested with the right of inheritance according to their allotted shares. This vesting of the right is not dependent on actual distribution of their shares, it does not wait for a moment. So even if such heir dies before the distribution, his right remains intact and immediately passes to his own heirs. Thus—*A* dies leaving two sons *B* and *C* as his heirs. Before the estate is divided or even possession is taken, *B* dies leaving a son *D*. The share of *B* will pass on to his son *D*. This is so because what passes on death is the *right* of inheritance, the corpus is only the result of the right.

We repeat for consolidation.—'In Muslim Law there is no right by birth, right of heirs comes into existence on death of the person of whom he is an heir (the former is called propositus). It is not lost by death of the heir before distribution of property; however the heir who has predeceased the owner cannot have right of inheritance'[22].

Devolution of separate shares.—On the death of the ancestor, each heir gets his share in separate form as assigned to him or her according to the Muslim Law. Joint family or Joint property concept is foreign to Muslim Law. For example *A* has three sons, *B*, *C* and *D*. On *A*'s death, there will be three distinct properties—of *B*, *C* and *D*. Even if they live and mess together, the property of

18. 2004 AIR Kant HCR 2886.
19. *Mohd. Aliuddin Farooqui* v. *Mohd. Karamath Hussain*, 2003AIHC 3538 (AP).
20. Verma, at pp. 393-94 and *Gulam Abbas* v. *Haji Kayyam Ali*, (1973) 1 SCC 1: AIR 1973 SC 554.
21. Fyzee, at p. 391.
22. *Nazirkhan Mohammed* v. *Damodhar M. Patre*, 2003 AIHC 3297 (Bom).

each will be distinct and separate. They may hold it as tenants in common. Even if they conduct a joint business, the parties will be governed by the ordinary rules of partnership.

Missing propositus.—The right to inherit the property of a missing person would arise only on the date on which he would be presumed to have died, and heirs would be determined on that date and not on the date on which he disappeared.[23] This period ranged between 70 years to 120 years from the date of birth according to different authorities in Muhammadan Law. Now it will be governed by Sections 107-108 of the Evidence Act.[24] If the person reappears, his property will be returned to him.

Missing heirs.—If at the time of the death of the ancestor any of his heirs is missing his share will be reserved until he reappears or is proved to be dead. The others will be given their shares. If he reappears, he will be given his share. But if he does not return, and is declared dead, the share reserved will devolve on the heirs of the deceased ancestor and not on his (the missing person's) heirs. The presumption of death will be governed by Sections 107-108 of the Evidence Act.

Illegitimate person.—*Walad-uz-Zina*—A bastard is considered to be the son of his mother only. He has no father; as such neither he inherits from 'father' (the husband of his mother) nor the 'father' inherits from him. The reciprocal right of inheritance exists between him and his maternal relations and his mother. They are also his residuary heirs. Of course his other descendants are his/her spouse, and his descendants, except his father and the latter's relations. Thus if an illegitimate person leaves a mother, a daughter and father, the daughter would get 1/2 and the mother 1/6th; the remainder would revert to them by return. The father would be excluded. Similarly an illegitimate brother and illegitimate uncle are not entitled to inherit. But a twin brother will inherit as uterine brother.

Child of a woman divorced by *lian*.—The son or daughter of a woman who imprecated and therefore divorced by her husband by the method of *lian* (*Walad-ul-Mula'inah*) is treated for the purposes of inheritance on the same footing as the illegitimate son or daughter. That is, he inherits from the mother but not from the 'father' (i.e. the woman's husband) or even the imprecator. The only difference is that if such child has a twin brother, they inherit as full brother, unlike as uterine brother, because the source is common and is known.

Under Shia Law the illegitimate child does not inherit even through the mother. However, the child of an imprecated mother does inherit from the mother and vice versa.

A child in the womb.—For the purpose of safeguarding property interest a child in the womb (an unborn child) is deemed to be born on the date of his

23. Verma, at p. 391.

24. *Rakhi Bibi* v. *Rahat Bibi*, 7 NWP 191. *See*, Verma, *Ibid.*

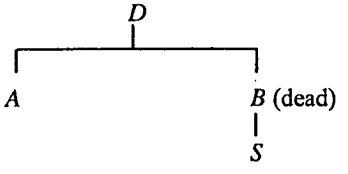
conception. And thus he is treated as in existence on the date the propositus dies and the succession opens out. The other heirs would be entitled to distribute the estate among themselves only after reserving the share of the unborn. As to the amount of the share to be reserved, the accepted view is that of Abu Yusuf, who holds that the share of one son or one daughter, whichever is greater, should be reserved, subject to the taking of proper security. Under Shia Law the share of two sons should be reserved as a measure of precaution.[25]

Death in common calamity.—Where more than one person dies in a common calamity, like an earthquake, and it is not proved as to who died first, the property of each of them would be inherited by his heirs, and there would be no mutual rights of inheritance between them. That is, the property would be distributed among the surviving heirs as if the intermediate heirs who died at the same time with the original proprietor had never existed.[26]

5. Doctrine of representation

Fyzee says that the word 'representation' has several meanings in law. For instance, we may speak of representation to the estate of a deceased man, and in this context we speak of 'personal representatives' i.e., executors or administrators. The second meaning is the process whereby one person is said to 'represent' the share receivable by him through another person, who was himself an heir. Here, we are concerned with this second meaning.

Take the example of *D*, the deceased, having two sons *A* and *B*. The second son *B* dies in the lifetime of *D*, and leaves a son, *S*.



Now, according to the second meaning of representation described above, *S* will seek to get the share his father would have taken if living. *But*, neither the Shia Law nor Sunni Law recognises this principle. Both the schools agree that *A* will exclude *S*, on the principle: nearer in degree excludes more remote. Also, the link *B* which joined *S* with *D* is broken.

Thus, the principle of representation could not be applied for the purposes of deciding who are entitled to inherit.

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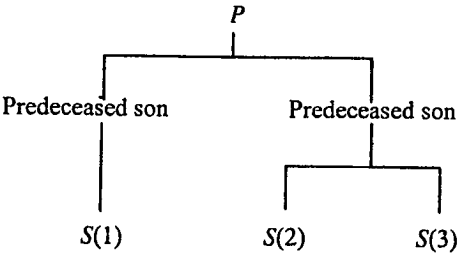
25. Verma, at pp. 408-10.
26. *Ibid*, at p. 411.

The doctrine of representation (or, more properly of Stirpital Succession), however, could be used in a limited way; that is, for deciding the quantum of the share of any given person, if he is entitled to inherit.

For example, *P* dies leaving three grandsons; *S*(1) by a predeceased, son, and *S*(2) and *S*(3) by another predeceased son. Here all the grandsons are heirs.



Here, for the limited purpose of calculating the share of each heir, Shia Law accepts the principle of representation as a cardinal principle throughout. Accordingly, the descendants (or ascendants) of a predeceased and in that sense represent the son (The same principle applies to the descendants of daughter, brother, sister or aunt).[27]

In Sunni Law, even this limited meaning of the term 'representation' is not accepted. The grandsons (in the above example) would each take the same share ascertained to them without recourse to the principle of representation. The division among them would be per capita and not *per stripes*.

Recently, J.N.D. Anderson, in his book *Islamic Law in the Modern World*, has criticised the rule against representations as causing much hardship. He says that this rule is of pre-Koranic origin. The reason why this rule was not overruled by the Prophet was that he himself was debarred from succeeding to his grandfather. Thus, in order that he might not be suspected of personal bias or motives, he did not change the rule. This argument of Professor Anderson is not, however, convincing. There were many things which the Prophet did, even at the cost of being assumed biased, provided he once became guided or convinced that the thing was for the good.

In fact, the more plausible reason behind the survival of the rule against representation seems to be the fact that the Law of Inheritance in Islam is very much connected with the provisions of wills and gifts, and a defect in one may be corrected by another. Thus, a person who has been adversely affected by this rule may be compensated by a gift or bequest.

But there may arise situations in which the execution of a gift or will may not be possible. In such cases, the rule against representation may really cause

27. Mulla, at p. 116.

hardship. Take the example of a grandfather who dies suddenly as a result of heart collapse, so common these days, and could not find time to make a gift or bequest in favour of a son of his predeceased son. According to Muslim Law, on the son of a predeceased son gets nothing of his grandfather's estate. Now, the grandson is wholly dependent on the mercy of other relatives who have inherited. If they chose to ignore him, the grandson could do nothing. In such cases there is a need of reform.

In recent years, several Islamic countries have made provisions to mitigate hardships of the son of a predeceased son. Those provisions were enacted by Egypt, then by Syria, followed by Morroco and Pakistan. The first three mentioned countries evolved a system of "Obligatory Bequests". Under this heading, the "Egyptian Law of Testamentary Disposition", for example, provides that a grandparent *must* make a bequest to grandchildren of their predeceased children. This bequest should be of what the predeceased child would have inherited, on intestacy, had he survived. It has been provided that such "Obligatory Bequests" should not exceed the bequeathable third. If the grandparent fails to make such a bequest, its existence would be presume by the Court. The "Obligatory Bequests" have a priority over the regular bequests.

In Morroco, such "Obligatory Bequests" operate only in favour of the children of a predeceased son, and not of daughter.

In Pakistan, Section 4 of the Muslim Family Laws Ordinance, 1961 provides:

> "In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall *per stripes* receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive."

Professor Anderson observes that though this certainly protects the interests of orphaned grandchildren both simply and effectively, but it does so at the expense of radically distorting the Islamic system of Inheritance. Of this a single instance must suffice. Should *A* die survived by a daughter and the daughter of a predeceased son, *A*'s estate would be divided between them, in Sunni Law, initially in the ratio of half to the daughter and one-sixth to the son's daughter (and then if there were no other heir, three-quarters and one-quarter respectively), whereas the position would be turned upside down according to the law in Pakistan, where the daughter would take only one-third while the son's daughter would receive two-thirds.

The other way in which this problem has been tackled is the system of obligatory bequests that can find a considerable degree of support in the Islamic

texts; and it has the merit of meeting the needs of the orphaned grandchildren without in any way upsetting the structure of the law of intestate succession.[28]

It is high time that in India too such a reform in the Muslim Family Law may be discussed and its merits and demerits may be explored. It should be better that instead o proceeding arbitrarily, the Government may appoint a Committee of representative Ulema, who may first consider the desirability and form of such a change, and then recommend it to the Government to transform it into law.

6. Rules of total and partial exclusion

Both under Shia and Sunni systems, every person is entitled to inherit, unless there is something to exclude him. A child in the womb is regarded as a living person provided he is born alive.

Both the Shia and Sunni systems recognised two types of exclusions:

(*i*) partial or imperfects exclusion; and

(*ii*) total or perfect exclusion.

(*i*) **Partial or imperfect exclusion.**—It may come in two ways:

(*a*) Exclusion from one share and admission to another. For example, daughter in the presence of son is excluded as a 'Sharer' and becomes 'Residuary'.

(*b*) Partial reduction of the specific share because of the presence of certain heirs. For example, the share of wife is either 1/4th or 1/8th according to the absence or presence of a child or child of a son, how low soever. Similar is the case of husband, whose share is either 1/2 or 1/4th.

(*ii*) **Total or perfect exclusion.**—The term 'total exclusion' applies to cases when although a person, related to the propositus and otherwise entitled to inherit, is excluded by some 'legal cause'.

• Both in Shia and Sunni systems this type of exclusion is based on three principles:

Principle I.—"Nearer in degree excludes more remote." (e.g. son excludes son's son; father excludes grandfather).

Principle II.—"A person who is related to the deceased through another is exclude by the presence of latter." (e.g. father excludes brother).

Exception.—Mother does not exclude brother or sister.

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28. J.N.D. Anderson, "Islamic Law of Testate and Intestate Succession and the Administration of Deceased Person's Assets," in the *Islamic Law in Modern India* (1972) at p. 203.

Principle III.—"Full blood excludes half blood." (e.g. full sister excludes consanguine sister).

Exception.—Uterine relations are not excluded on this ground.

The most important of total exclusions under Muslim Law are on the following grounds:

(*a*) **Religion.**—According to Islamic Law, a non-Muslim cannot inherit from a Muslim. Thus, if a Muslim apositises, he is excluded from inheritance. In India, however, this rule does not apply after the passing of the Caste Disabilities Removal Act, 1850. But a Hindu, who is converted to Islam and dies a Muslim, is governed by Muslim Law, and after his death, his Hindu relatives could not claim a share in inheritance by virtue of the Caste Disabilities Romoval Act.

(*b*) **Homicide.**—On this point, there is a slight difference of opinion among Shias and Sunnis.

Hanafis say that one who causes the death of another *either intentionally or unintentionally*, cannot inherit from the deceased.

However, an act committed by an infant or insane person which causes death of another person, does not exclude such infant or insane from inheritance. Moreover, the act causing the death should be of direct nature; for example, when a person has dug a well into which another falls, or placed a stone on the road against which another stumbles and is killed in consequence are not sufficient causes for total exclusion.

Further, if a teacher or father causes death as a result of beating given by way of admonition, or if he has caused the death in performance of legal duty. The bar of homicide is only personal, others who claim through him are not barred. *Illustration*—*A* dies leaving his son *B*, *B*'s son *C* and brother *D*. *B* had caused *A*'s death. *B* cannot succeed, but *C* (*B*'s own son who claims through *B*) will succeed as being nearer in preference to *D*.[29]

Several Muslim countries having been dissatisfied with the Hanafi Law on this point have adopted *Maliki* principle, that one who intentionally kills or causes the death of another, directly or indirectly, will be precluded from any right to inherit from him, while one who kills another by accident, even by a direct act, such as shooting a pistol or flinging a bomb, will not suffer any such deprivation.

Shias say that the homicide must be intentional, but the absence of intention should be clearly proved.

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29. Verma. at pp. 397-98.

(*c*) **Slavery.**—Both under the Shia and Sunni Laws, the status of slavery is a bar to succession. This branch of Muslim Law, however, is obsolete in India, as the Act 5 of 1843 has abolished the system of slavery.

(*d*) **Illegitimacy.**—A bastard, in Hanafi Law, cannot inherit from the father; he could, however, do so from the side of mother.

In Shia Law, on the other hand, illegitimacy acts as factor for total exclusion, and a bastard is not allowed to inherit either from mother or father. A distinction is, however, drawn between a child of fornication and a child whose parentage has been disallowed by the father, that is, a child of imprecation. In case of fornication, the child is excluded from inheritance; while a child of imprecation, is allowed to inherit from the side of mother. Sunni Law does not recognise this distinction. The child of fornication and imprecation are both regarded as illegitimate, and inherit from mother's side.

(*e*) **Exclusion of daughter by custom or by statute.**—There are two statutes of limited application which excluded from inheritance. These statutes are:

The Watan Act (Bombay), 1886; and

The Oudh Estates Act, 1869.

But now their importance is reducing. A custom prevails amongst the Gujars and Bakkarwals of Kashmir by which a male descendent of grandfather excludes the daughters from inheritance.[30] Whenever such custom is pleaded, the Court examines the claims of those customs with great strictness. In *Mohmedbhai Rasulbhai Malek* v. *Amirbhai Rahimbhai Malek*[31] the claim was that a particular custom excluded the daughters from inheritance, and widows take only a life estate. It was claimed that such a custom prevailed among the Malek caste of Anti village in Gujarat. The High Court of Gujarat examined the claim and held that oral testimony, seeking to prove that there was a custom in particular community excluding females from inheritance of property, was not trustworthy; documentary proof was necessary. In this case, in juxtaposition, there was documentary evidence proving that agricultural lands belonging to deceased landholder were mutated in the name of his widow and daughter, which established that there was no such custom as alleged. Besides Section 2 of the Shariat Act, 1937 abrogated all such customs (subject to certain exceptions) as exclude a widow and daughters from right to succession.

In another case an unsuccessful attempt of exclusion of daughter on basis of custom was made by a Government Department. The Mutating Officer of the State of Jammu and Kashmir excluded the daughter of the deceased from

30. Aqil Ahmed, *Muslim Vidhi* at p. 263; *Ajiz Dar* v. *Fazli*, AIR 1960 J&K 53, *cited* there.
31. AIR 2001 Guj 37.

inheritance on the ground that she was married outside her parental home. It was alleged that there was a custom in the village by which a daughter married outside her parental home was excluded from inheritance. This plea of custom was not proved by any evidence. It was held that any modification of personal law should be specifically pleaded and evidence in support of it should be strictly construed. To supersede personal law custom is to be established as ancient, uniform and unambiguous. In the absence of such plea being proved, her exclusion was held invalid.[32]

(*f*) **Relinquishment in inheritance rights.**—In one case the Supreme Court held that relinquishment of future possible right of inheritance by an heir may debar him from inheriting.

X, a Muslim died leaving behind five sons and a daughter and his widow as his heirs. During has lifetime *X* incurred debts so heavily that all his property would have been sold in their satisfaction. Under these circumstances, three of his sons, who had prospered, came to his rescue so that property may be saved. But, apparently, they paid up the debts only in order to get the properties for themselves to the exclusion of other two sons, who executed deeds acknowledging receipt of some cash and movable properties as consideration for not claiming any rights in future in the properties mentioned in the deeds in which they gave up their possible rights in future.

During the father's lifetime, when all chance or expectation of inheritance by either of the two sons could be destroyed by disposition of property, neither of these two raised his little finger to object. Accordingly, the question before the Supreme Court was whether the two sons are estopped by their declaration and conduct of silence from claiming their shares in the properties covered by deeds. The Court answered it by observing:

> "A bare renunciation of an expectation to inherit cannot bind the expectant heirs' conduct in future. But, if the expectant heir goes further and receives consideration and so conducts himself as to mislead an owner into not making dispositions of his property *inter vivos*, the executant heir could be debarred from setting up his right when it does unquestionably vest in him."

The Court further observed that Islamic jurisprudence classifies human actions into three categories: bad, good or neutral, and attaches varying degrees of approval and disapproval to them.

> "The renunciation of a supposed right based on an expectancy, could not, by any test found there be considered 'prohibited' (or bad). The binding force in future of such a renunciation would depend on the attendant circumstances and the whole course of conduct which it forms a part. In

32. *Ab. Ahad Akhoon* v. *Financial Commr.*, 2004 AIHC 871 (J&K).

other words the principle of an equitable estoppel, far from being opposed to any principle of Muslim Law will be found, on investigation, to be completely in consonance with it."[33]

Recently, in *Modin Saheb Peersaheb Peerzade* v. *Meerabi*[34], a plea was taken in the written statement that during the lifetime of her father the plaintiff Meerabi relinquished share in the properties by taking jewellery worth Rs 20,000. But the Karnataka High Court found that the requisite factual details of the transaction were not pleaded. The only fact established was that when the plaintiff's (Meerabi's) mother was ill and bedridden before her death, the former was given 10 tolas of gold; however, nothing was said about the theory of relinquishment; therefore the Court found that on facts the defendants miserably failed to prove the relinquishment of rights in the suit properties. However, following the above decision of the Supreme Court, the High Court reiterated that relinquishment in family settlement or family arrangement is recognised and permissible; the heir apparent may do so in oral or written form, provided the plea of relinquishment is pleaded with factual details of transaction and supported with evidence. Then it will be recognised, not otherwise, as in this case.

Need for modifications.—Some of the rules of exclusion described above suffer with certain defects and need modifications. For example, the exclusion on the basis of homicide, in Hanafi Law should be restricted to intentional homicide; and the statutes which exclude daughters from inheritance and thus defeat a most cardinal principle of Muslim Law, should be repealed.

7. Explanation of important terms used[35]

With a clear understanding of the various terms used in this chapter, the Law of Inheritance would be easy to understand. It is recommended that the students should first remember the meaning of these terms:

(*i*) *Deceased or propositus.*—The person whose relations are sought to be ascertained to inherit his estate according to the Laws of Inheritance.

(*ii*) *Lineal descendant or Lineal ascendant.*—The person who has descended or ascended in a direct line from the other. For example, a man, his father, grandfather, great grandfather, and so upwards, are all lineal ascendants of the first man.

(*iii*) *Collateral.*—A person having a common ancestor with the deceased, but who is neither a descendant nor an ascendant of the deceased; for example, the brother or sister of the deceased.

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33. *Gulam Abbas* v. *Haji Kayyam Ali*, (1973) 1 SCC 1: AIR 1973 SC 554.
34. (2000) 6 Kant LJ 616 Kant HC (DB).
35. Tyabji, at pp. 833-38.

(*iv*) *Paternal and Maternal relations.*—Claimants related through the father (e.g. brother, sister, grandfather) are called 'paternal relations'. Claimants related through the mother (e.g. uterine brothers and sisters; grandmother) are called 'maternal relations'.

(*v*) *Agnate.*—A person whose relation to the deceased can be traced without the intervention of female links, e.g. a sons' daughter, sons' son, father's mother are agnates.

(*vi*) *Cognate.*—A person related to the deceased through one or more female links (the position does not change if a male link intervenes), e.g., daughter's son, daughter's daughter, son's daughter's son.

(*vii*) *True Grandfather.*—The agnatic grandfather between whom and the deceased no female link intervenes; e.g. father's father and so on. 'False Grandfather'—The grandfather between whom and the deceased one or more female links intervene.

(*viii*) *True Grandmother.*—A female ancestor between whom and the deceased no false grandfather intervenes. If a false grandfather intervenes, she is 'false' grandmother.

(*ix*) *Consanguine (half) sisters and brothers.*—The children of the same father, but by different mothers.

(*x*) *Uterine (half) sisters and brother.*—The children of the same mother but by different fathers.

8. Classes of heirs

A. HANAFI LAW OF INHERITANCE

Islam introduced some reforms in the pre-Islamic system, as we saw in the beginning of this chapter. The newly recognised heirs had to be allotted a position in the order of succession and their shares determined. This inevitably led to the formulation of a complicated system of inheritance; and the divergence of opinion among the Sunnis and Shias resulted in the creation of two systems of inheritance. The Hanafis (Sunni) did not disturb the pre-Islamic rules, except to the minimum necessary to accommodate the new heirs. The course adopted was as follows: (*i*) first, shares were allotted to the nearest heirs as required by the Koran and were called sharers; (*ii*) next, the body of agnates who were heirs under the pre-Islamic Law was maintained intact and were called 'residuaries', except that the few females had to be introduced. Finally, all other heirs who were newly introduced (i.e. other females and cognates) were relegated to the last and were described as distant kindred. Thus, agnate succession was maintained and they retained priority. True grandfather (how high soever—

h.h.s.) and son's daughter (how low soever—h.l.s.) were the surplus additions among sharers as compared to Shia system.[36]

Hanafi jurists divide heirs into seven classes, the three principal and the four subsidiary classes.[37]

Principal classes.—(*i*) Koranic Heirs *dhawul-furud* (Shares);

(*ii*) Agnatic Heirs *asabat* (Residuaries);

(*iii*) Uterine Heirs *dhawul-arham* (Distant Kindred).

Subsidiary classes.—(*iv*) The successor by contract;

(*v*) The Acknowledged kinsman;

(*vi*) The Sole Legatee;

(*vii*) The State, by Escheat.

The first step in the distribution of the estate of a deceased Muslim, after payment of his funeral expenses, debts and legacies, is to allot their respective shares to the Koranic heirs. If any residue is left, it is to be divided among Agnatic heirs (Residuaries). If there be neither Sharers nor Residuaries, the estate will be distributed among Distant Kindred. *The Distant Kindred are not entitled to succeed so long as there is any heir belonging to the class of Sharers or Residuaries.* But there is one case in which the Distant Kindred will inherit with a Sharer, and that is when the Sharer is the wife or husband of the deceased.[38]

In the absence of a member of the three principal classes (i.e. Koranic, Agnatic and Uterine heirs) the right of inheritance devolves upon subsidiary heirs, *among whom each class excludes the next.*

Successor by contract is a person whose right of inheritance is based on a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom. Fyzee says that it is merely of antiquarian interest, because compensation for criminal offences is not payable in India.[39]

Acknowledged kinsman is a person of unknown descent in whose favour the deceased has made an acknowledgment of Kinship, not through himself, but through another. Consequently, a man may acknowledge another as his brother (descendant of father), or uncle (descendant of grandfather), but not as his son.[40]

Universal legatee.—In the absence of three classes of Principal heirs and the above described classes of two Subsidiary heirs, a person is entitled to

36. Verma, at pp. 416-17.
37. Fyzee, at p. 397.
38. Mulla, at p. 84.
39. Fyzee, at p. 401.
40. *Ibid*, at p. 401.

bequeath the whole of his estate to any person, who is called the Universal legatee.

The State, by escheat.—In the absence of either Principal or Subsidiary heirs, and a will, the whole of a estate of a deceased would escheat to the Government.

(*i*) SHARERS.—Students are advised to remember the shares of each of the sharers in the following table. The division of inheritance much depends on it.

TABLE OF SHARERS[41]

Sharers	*Share*	*Conditions under which the share is inherited*	*Whether excluded or converted into a residuary*
1. Husband	1/4	When there is a child or child of a son h.l.s.	Excluded by none.
	1/2	When there is no child or child of a son h.l.s.	
2. Wife (one or more)	1/8[42]	When there is a child or son's child h.l.s.	Excluded by none.
	1/4	When no child or son's child.	
3. Daughter	1/2	If one } When there	Excluded by none.
	2/3	If two } is no son.	
		or more	
	Residue		Converted into a residuary if there is a son or two or more sons.
4. Son's daughter	1/2	If one } When there is no son, or son's son	Excluded by (*i*) son or son's son of higher grade,
	2/3	If two or more } Or one or more daughters or higher son's daughter.	(*ii*) two or more daughters or by two or more son's daughters of higher grade,
			(*iii*) Or by one daughter together with two
	1/6	When there is a daughter or higher son's daughter.	or more son's daughters of higher grade.
	Residue		Converted into a residuary by son's son of equal or even lower grade.
5. Father	1/6	When there is a son or son's son (h.l.s.)	Excluded by none.

41. Jung, at p. 197.

42. When more than one, all together will get 1/8, to be divided equally amongst them.

Sharers	*Share*	*Conditions under which the share is inherited*	*Whether excluded or converted into a residuary*
	1/6 plus Residue	When there are one or more daughters, son's daughters and there is no son nor son's son.	In this case the father is a sharer and also a residuary.
	Residue	When no child nor son's child h.l.s.	Converted into residuary in the absence of any child.
6. Mother	1/6	When there is a child or son's child (h.l.s.) or two or more brothers or sisters whether full blood or half and whether they inherit or are excluded or there is a brother and sister and the father.	
	1/3	When there is no child nor son's child and not more than one brother and sister.	
	1/3 of Residue	When there is a wife or husband and the father.	Converted into a residuary by the father.
7. True grandfather	1/6	When there is a child or son's child (h.l.s.) and no father or nearer true grandfather.	Excluded by the father or nearer true grandfather.
	1/6+ Residue	When with daughters or only son's daughters.	
	Residue	When no child nor son's child.	Converted into a residuary if there is no descendant sharer or residuary.
8. True grandmother	1/6	When no mother and no nearer true grandmother.	Paternal true grandmother excluded by father or by a true grandfather. Any true grandmother is excluded by mother or by nearer true grandmother, whether paternal or maternal. Not a residuary.
9. Full sister	1/2	If one } When no child or son's child	Excluded by son or son's son (h.l.s.) father or true grandfather. Also excluded as sharer by one or more daughters or son's
	2/3	If two or more } When no child or son's child	

Sharers	*Share*	*Conditions under which the share is inherited*	*Whether excluded or converted into a residuary*
		(h.l.s.) or father or brother.	daughters.
		Residue	Converted into residuary by full brother, that is when with one or more full brothers subject to not being excluded or when with one or more daughters or son's daughters and no excluder, the full sisters one or more become residuaries with daughter i.e., they take the residue after deducting the shares of daughters.
10. Consanguine sister	1/2 2/3	If one If two or more When no child or son's child (h.l.s.) father or brother or full sister.	Excluded by son or son's son, father or true grandfather or by full brother or by full sister when she is a residuary
	1/6	When with one full sister only, (the sister takes 1/2 and consanguine sister takes (2/3 - 1/2 = 1/6).	Also excluded by one or more daughters or son's daughters or by two or more full sisters.
	Residue		Converted into residuary by a consanguine brother. When there are one or more daughters, or son's daughters and no excluder.
11. Uterine	1/6	If one When no	Excluded by son or son's
12. Brother or sister	1/3	If two or more child or son's child (h.l.s.) or father, (h.h.s.)	son, father or true grandfather, or daughter or son's daughter. Never converted into a residuary.

Illustrations[43] *(sharers)*

(*a*)	Father	.. ..	1/6	(as sharer, because there are daughters).
	Father's Father	.. ..		(excluded by father).
	Mother	.. ..	1/6	(because there are daughters).
	mother's mother	.. ..		(excluded by mother).
	Two daughters	.. ..	2/3	
	Son's daughter	.. ..		(excluded by daughters).
(*b*)	Four widows	.. ..	1/4	(each taking 1/16).
	Father	.. ..	3/4	(as residuary).
(*c*)	Mother	.. ..	1/6	(because there are two sisters).
	Two sisters	.. ..		(excluded by father).
	Father	.. ..	5/6	(as residuary).
(*d*)	Mother	.. ..	1/6	(because there is a brother and also a sister).
	Brother	.. ..		(excluded by father).
	Sister	.. ..		(excluded by father).
	Father	.. ..	5/6	(as residuary).
(*e*)	Father's mother	.. ..		(excluded by father).
	Mother's mother's mother	.. ..		(excluded by father's mother who is a nearer true grandmother).
	Father	.. ..		(takes the whole as residuary).

Note.—In the illustrations (*c*), (*d*) and (*e*) above, the position of mother is affected by other heirs. This is because of the rule that *a person, though excluded from inheritance, may exclude others wholly or partially.* In illustrations (*c*) and (*d*), the exclusion of mother is only partial, but in (*e*), it is total. In illustration (*d*), the brother and sister, though they are excluded from inheritance by the father, prevent the mother from taking the larger share 1/3. Similarly, in illustration (*e*), the father's mother, though she is excluded by the father, excludes the mother's mother's mother.

(*f*)	Husband	.. ..	1/2	
	Mother	.. ..	1/6	(1/3 of 1/2).
	Father	.. ..	1/3	(as residuary).

Note.—In the absence of husband and father, the mother would have taken 1/3, as there are neither children nor brothers nor sisters. Here, the husband's share is 1/2, and what remains is 1/2, and out of this 1/2, mother takes 1/3, hence, 1/3 of 1/2 = 1/6.

43. Mulla, at p. 67.

(*g*)	Widow	.. ..	1/4
	Mother	.. ..	1/4 (1/3 of 3/4).
	Father	.. ..	1/2 (as residuary).

Note.—Here, the mother is entitled only to 1/3 of the remainder after deducting the widow's share. The widow's share is 1/4, the remainder is 3/4, and the mother's share is 1/3 of 3/4 = 1/4.

(*h*)	Father's mother	.. ..	1/6	
	Mother's mother's mother			(excluded by father's mother who is a nearer true grandmother).
	Father's father	..	5/6	(as residuary).
(*i*)	Father	.. ..	1/6	(as sharer).
	Mother	.. ..	1/6	
	3 Son's daughters	..	2/3	(each taking 2/9).

Note.—In the above illustration, if one of the daughters is from one son, and two from other son, the position will remain the same. The son's daughters take per capita and not *per stripes*.

(*j*)	Father	.. ..	1/6
	Mother	.. ..	1/6
	2 Son's daughters	..	2/3
	Son's son's daughter	..	(excluded by son's daughters).
(*k*)	Father	.. ..	1/6
	Mother	.. ..	1/6
	Son's daughter	..	1/2
	Son's son's daughter	..	1/6

Note.—Illustrations (*j*) and (*k*) are similar except that in (*k*) there is only one son's daughter, coexisting with the son's son's daughter. Here the former does not exclude the latter. But they are regarded as two son's daughters. As the share of one son's daughter is fixed as 1/2, she takes this much. Now, as the combined share of two son's daughters is 2/3, and as 1/2 has been taken out from it by the son's daughter, hence, 1/6 remains (2/3 — 1/2=1/6), which is taken by son's son's daughter. This is a typical case and must be carefully remembered.

(*l*)	Mother	.. ..	16
	2 full sisters	..	2/3 (each taking 1/3).
	Consanguine sister	..	(excluded by full sister).
	Uterine brother	..	1/6

(*m*)	Full sister	.. ..	1/2
	2 Consanguine sisters		1/6 (each taking 1/12).
	Uterine brother Uterine sister	..	1/3 (each taking 1/6).

Note.—The consanguine sisters are not excluded because the full sister is only one. The allotment of shares is based on the same principle as discussed in the note to illustration (*k*) above.

(*n*) A Muslim dies leaving behind 2 wives, 3 daughters and son of full brother: Two widows would get collectively 1/8th share of the property of their husband i.e. each wife would get 1/16th share. Three daughters would collectively get 2/3rd share. Son of full brother of the owner of the property was a residuary; he would get whole of the residue after deducting shares of wives and daughters who were sharer—thus son of full brother would get 5/24th share.

In the above example if one of the widows remarried within 2 years after the death of the husband (owner of the property), will that fact change the position?: No. Under Muslim Law, the estate immediately devolves after the death of the propositus. Subsequent marriage by the widow after 2 years does not affect the position at the moment of his death. The share of the widow already devolved upon her at the moment of his death. That remarriage will not abrogate that share.

When the suit for possession against co-heirs was filed in the above case, one of the co-heirs was omitted to be impleaded. Will this omission become a ground to dismiss the suit?: No. Interests acquired by heirs of a deceased Muslim in his property are always definite, distinct and ascertained. Absence of one of the co-heirs from the suit cannot be a ground to dismiss the suit.[44] The Allahabad High Court had also taken the view that where a Muhammadan heir who is out of possession brings a suit for possession against his co-heirs and omits to implead one of the co-heirs, there is no reason why he should not be granted a decree for so much of his share as is in possession of the heirs who are made parties to the suit[45]. The Rajasthan High Court is also of the same view that a suit by a Muhammadan heir for partition of share is maintainable even without impleading other heirs who are not in possession. The reason is that the shares of Muhammadan heirs are definite and specified.[46]

Doctrine of Aul or Increase.—It is pretty clear that in the Muslim Law of inheritance which allots a number or fractional parts of unity to various heirs, it may happen that the fractions when added together may sometimes be (*i*) equal

44. *Ibrahim* v. *Jamrood Bee*, 2002 AIHC 1963.
45. *Zabaishi Begam* v. *Naziruddin Khan*, AIR 1935 All 110.
46. *Mohd. Subhan* v. *Dr. Misbahuddin Ahmad*, AIR 1971 Raj 274.

to unity, (*ii*) more than unity, or (*iii*) less than unity. When the sum of fractions is equal to unity, there is no problem. But if it is more or less than unity, the shares of respective heirs are reduced or increased respectively. The process whereby the shares are reduced is called the Doctrine of Increase (Aul); and the process whereby the shares are increased is called the Doctrine of Return (Radd).

Increase or 'aul' is effected in the following manner:

> "If the total of fractional shares allotted to sharers exceeds unity, the share of each sharer is proportionately diminished by '*reducing the fractional share, to a common denominator; and increasing the denominator so as to make it equal to the sum of the numerators.*"

Illustrations[47]

(*a*)	Husband	1/2	
	2 full sisters ..	2/3	

Since the total of 1/2 and 2/3 = 7/6 which is more than unity, doctrine of '*increase*' will apply in this case.

First step.—'Reduce fractional shares to a common denominator.'

Thus, 1/2+2/3 = 3/6+4/6 (here 6 is the common denominator).

Second step.—'*Increase the denominator* to make it equal to the sum of numerators, and allow the individual numerators to remain'.

Thus, 3/6+4/6 becomes 3/7+4/7. (Here 7 is the sum of numerators 3 and 4). The shares are thus proportionately reduced and the sum of fractions comes equal to unity (3/7+4/7 = 7/7=1).

(*b*)	Husband	1/2=	3/6	reduced to	3/8.
	2 full sisters	2/3 =	4/6	reduced to	4/8.
	Mother	1/6 =	1/6	reduced to	1/8.
			8/6		8/8
(*c*)	Widow	1/4 =	3/12	reduced to	3/15.
	2 full sisters	2/3 =	8/12	reduced to	8/15.
	Uterine sister	1/6 =	2/12	reduced to	2/15.
	Mother	1/6 =	2/12	reduced to	2/15.
			15/12		15/15
(*d*)	Wife	1/8 =	3/24	reduced to	3/27.
	2 daughters	2/3	16/24	reduced to	16/27.
	Mother	1/6=	4/24	reduced to	4/27.
	Father	1/6=	4/24	reduced to	4/27.
			27/24		27/27

47. Fyzee, at p. 416, Wilson, at p. 292.

Doctrine of return or Radd.—If the sum total of fractions allotted to sharers is less than unity (that is, something is left behind after satisfying the claims of each sharer) and there is no residuary to take the residue, *the residue reverts back to the sharers in proportion of their shares.*

***Exception.**—In the presence of any heir*, neither the wife nor husband is entitled to the 'Return'.

Illustrations[48]

(*a*) Mother . . . . 1/6.
Daughter . . . . 1/2.

As the total of 1/6 and 1/2 is 2/3, thus 1/3 remains to be distributed. The doctrine of return would apply.

First step.—'Reduce the fractional shares to a common denominator'.

Thus, 1/6+1/2 = 1/6+3/6 (here 6 is the common denominator).

Second step.—'Decrease the denominator to make it equal to the sum of the numerators, and allow the individual numerators to remain.'

Thus, 1/6+3/6 becomes 1/4+3/4 (here 4 is the sum of numerators 1 and 3). The shares are thus proportionately increased, so that their sum becomes equal to unity (1/4 + 3/4 = 4/4 = 1).

(*b*)	Husband	1/2	
	Mother	1/2 (1/3 as sharer and 1/6 by Return).	
(*c*)	Wife	1/4	
	Sister (*f* or *c*) . .	3/4 (1/2 as sharer and 1/4 by Return).	
(*d*)	Mother	1/6 increased to 1/5.	
	Full sisters	1/2 = 3/6 increased to 3/5.	
	U. brother	1/6 increased to 1/5.	
		5/6 5/5	
(*e*)	Husband	1/4	4/16.
	Mother	1/6 increased to 1/4 of 3/4	= 3/16.
	Daughter	1/2 = 3/6 increased to	
		3/4 of 3/4	= 9/16.
		11/12	= 16/16.
(*f*)	Mother	1/6 increased to	1/5.
	Daughter	1/2 = 3/6 increased to	3/5.
	Son's daughter	1/6 increased to	1/5.
		5/6	5/5.

48. Mulla, at pp 81-82.

(*g*)	Wife	1/8 (gets no Return)	5/40.
	Mother	1/6 increased to 1/5 of 7/8 =	7/40.
	2 son's daughters ..	2/3 = 4/6 increased to 4/5 of 7/8 =	28/40.
		23/24	40/40.
(*h*)	Wife	1/4	4/16.
	Full sister	1/2 = 3/6 increased to 3/4 of 3/4 =9/16.	
	C. sister	1/6 increased to 1/4 of 3/4 =	3/16.
		11/12	16/16.
(*i*)	Father's mother Mother's mother	1/6 increased to	1/5
	Full sister	1/2—3/6 increased to	3/5.
	C. sister	1/6 increased to	1/5.
		5/6	5/5.
(*j*)	Father's mother ..	1/6 increased to	1/5
	Mother's mother ..		
	Son's daughter ..	2/3 = 4/6 increased to	4/5
		5/6	5/5.
(*k*)	Husband	1/2	
	Daughter's son ..	1/2.	

Note. In the presence of an heir, whether he be of the class of 'distant kindred' as daughter's son, the husband is not entitled to get any 'return'. The surplus will, therefore, go to the daughter's son.

(*ii*) RESIDUARIES.—If there is no sharer, or if there is something left after giving them their shares, the inheritance devolves upon residuaries in the order specified in the following table.

TABLE OF RESIDUARIES[49]

I. DESCENDANTS

1. *Son.*—Daughter takes as a residuary with the son, the son taking a double portion.

49. Mulla, at pp. 73-77.

2. *Son's son h.l.s.*—The nearer in degree excluding the more remote. Two or more son's sons inherit in equal shares. Son's daughter h.l.s. takes as a residuary with an equal son's son. If there be no equal son's son, but there is a lower son's son, she takes as residuary with him, provided she cannot inherit as a sharer. In either case, each son's son h.l.s. takes double the share of each son's daughter h.l.s.

Note.—When the son's daughter h.l.s. becomes a residuary with a lower son's son, and there are son's daughters h.l.s. equal in degree with the lower son's son she shares equally with them, as if they were all of the same grade.

II. ASCENDANTS

3. *Father.*

4. *True grandfather h.h.s.*—The nearer in degree excluding the more remote.

III. DESCENDANTS OF FATHER

5. *Full brother.*—Full sister takes as a residuary with full brother, the brother taking a double portion.

6. *Full sister.*—In default of full brother and the other residuaries above named, the full sister takes the residue, if any, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h.l.s., or even if there be (3) one daughter and a son's daughter or daughters h.l.s.

7. *Consanguine brothers.*—Consanguine sister takes as a residuary with consanguine brother, the brother taking a double portion.

8. *Consanguine sister.*—In default of consanguine brother and the other residuaries above-named, the consanguine sister takes the residue, if any, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h.l.s. or even if there be (3) one daughter and son's daughter or daughters h.l.s.

9. *Full brother's son.*

10. *Consanguine brother's son.*

11. *Full brother's son's son.*

12. *Consanguine brother's son's son.*

Then come remoter male descendants of No. 11 and No. 12, that is, the son of No. 11, then the son of No. 12, then the son's son of No. 11, then the son's son of No. 12 and so on in like order.

IV. DESCENDANTS OF TRUE GRANDFATHER H.H.S.

13. *Full paternal uncle.*

14. *Consanguine paternal uncle.*

15. *Full paternal uncle's son.*

16. *Consanguine paternal uncle's son.*

17. *Full paternal uncle's son's son.*

18. *Consanguine paternal uncle's son's son.*

Then come remoter male descendants of Nos. 17 and 18, in like order and manner as descendants of Nos. 11 and 12.

Male descendants of more remote true grandfathers come in like order and manner as the deceased's paternal uncles and their sons and son's sons.

Note.—Each class excludes the next class.

Note on residuaries.—It may be noted that all Residuaries are related to the deceased through a male.

Residuaries are of three types[50]:

(*a*) Residuaries *in their own right* (these are all males listed in the table of residuaries above).

(*b*) Residuaries *in the right of another*: (these are four female residuaries: daughter as residuary in the right of the son, the son's daughter h.l.s. as a residuary in the right of the son's son h.l.s., the full sister in the right of the full brother, and the consanguine sister in the right of the consanguine brother).

(*c*) Residuaries *with others* (they are full sister and consanguine sister, when they inherit as residuaries with daughters and son's daughters h.l.s.)

Sharers who become residuaries.—There are six sharers who under certain circumstances inherit as residuaries. They are:

(*i*) Father;

(*ii*) True grandfather h.h.s.;

(*iii*) Daughter;

(*iv*) Son's daughter h.l.s.;

(*v*) Full sister; and

(*vi*) Consanguine sister.

Out of these, only father and true grandfather could inherit in the *double capacity, i.e.* both as a sharer and a residuary. The other four, who are all females, inherit either as sharer or residuary. "The curious reader may ask why it is that the said four female relations are precluded from inheriting as sharers when they exist with males of parallel grade. The answer appears to be this, that if they were allowed to inherit as sharers under those circumstances, it might be that no residue would remain for the corresponding males (all of whom are

50. Mulla, at pp. 73-77.

residuaries only), that is to say, though the females would have a share of the inheritance, the corresponding males, though of an equal grade, might have no share of the inheritance at all".[51]

Illustrations

(The illustrations given here are taken from Mulla, which is a very useful book).

(*a*) Son .. .. 2/3 (as residuary).
Daughter .. .. 1/3 (as residuary).

Note.— In the presence of son, daughter cannot inherit as a sharer. The reason why 2/3 has been given to son and 1/3 to the daughter is that because son takes double of what a daughter gets. Since there is unity to be distributed, hence, two portions of it go to the son and one portion to daughter, (1=1/3+1/3+1/3 = 2/3+1/3=1).

(*b*) 2 Sons .. .. 4/7 (as residuaries, each son taking 2/7).
3 Daughters .. .. 3/7 (as residuaries, each daughter taking 1/7).

Note.—Students shall develop an instinct to divide unity into as many fractions as may be in accord with the rule "son takes double to daughter". In the above example, suppose you have given *one each*, to every of 3 daughters, then the sons shall have *two each*, that is, four as a whole is required for both the sons. Now, 4 is given to sons and 3 to daughters; its total comes to 7. Hence if we divide unity into 7 equal shares, we can assign one each to 3 daughters and 2 each to 2 sons, (1=1/7+1/7+1/7+1/7+1/7+1/7+ 1/7=4/7+3/7=1).

(*c*) Husband .. .. 1/4 (as sharer).
Mother .. .. 1/6 (as sharer).
Son .. .. 2/3 of 7/12= 7/18
Daughter .. .. 1/3 of 7/12 = 7/36 (as residuary).

Note.—The residue in the above case is what is left behind after assigning shares to husband and mother, that is—(1/4+1/6)=7/12. If there are 2 sons and 3 daughters each son would take 2/7 of 7/12 = 1/6, and each daughter 1/7 of 7/12 = 1/12.

(*d*) 2 Daughters .. .. 2/3 (as sharers).
Son's son .. .. 1/3 (as residuary).
Son's son's son .. .. (excluded by son's son).
Son's son's daughter .. .. (excluded both by daughters and son's son).

(*e*) Son's daughter .. .. 1/2 (as shares).
Son's son's son .. .. 1/2 (as residuary).

51. Mulla, at p. 78.

Note.—The only case in which son's daughter inherits as a residuary with the son's son (who is a *lower* son's son) is where she is precluded from succeeding as a sharer, as shown in Illustration (*f*) below.

(*f*)	2 Daughters	.. ..	2/3 (as sharer).
	Son's daughter	.. ..	1/3 of 1/3 = 1/9 } as residuaries.
	Son's son's son	.. ..	2/3 of 1/3 = 2/9 }

Note.—Since there are two daughters, the son's daughter is precluded from inheriting as sharer. She therefore inherits as a residuary with the son's son (who is a lower son's son). Please *see*, Illustration (*g*).

(*g*)	2 Daughters	.. ..	2/3 (as sharers).
	Son's son's son	.. ..	2/4 of 1/3 = 1/6
	Son's daughter	.. ..	1/4 of 1/3 = 1/12 } as residuaries.
	Son's son's daughter	.. ..	1/4 of 1/3 = 1/12 }

Note.—The son's son's daughter is entitled to inherit as residuary with the son's son, because both are equal in degrees. This illustration presents two peculiar features: (*i*) the son's son's daughter, though remoter in degree, shares with son's daughter; and (*ii*) the son's daughter, though a sharer, succeeds as a residuary with a lower son's son.

(*h*)	Father	.. ..	1/6 (as sharer).
	Son (or son's son h.l.s.)	..	5/6 (as residuary).
(*i*)	Daughter	.. ..	1/2 (as sharer).
	Father	.. ..	1/6 (as sharer) + 1/3 (as residuary)=1/2
(*j*)	Husband	.. ..	1/2 (as sharer).
	Mother	.. ..	1/6 (as sharer).
	Brother 2/3 of 1/3 = 2/9 }		(as residuaries).
	Sister 1/3 of 1/3 = 1/9 }		

Note.—In the presence of brother, the sister becomes residuary and takes half of what brother gets, on the principle that male gets double to female.

(*k*)	Daughter	.. ..	1/2 (as sharer).
	Full sister	.. ..	1/2 (as residuary).
	Brother's son	.. ..	(excluded by full sister).

Note.—Here, the sister cannot inherit as a sharer, because of the daughter. She is regarded a residuary because of the presence of daughter, for there is no residuary nearer in degree. (Please refresh your memory of the Table of Sharers and the circumstances under which each gets a share or becomes residuary. Unless the Tables of Sharers, Residuaries and Distant Kindreds are memorised thoroughly, the Law of Inheritance cannot be learnt).

(*l*)	2 Daughters	.. ..	2/3 (as sharers).
	Husband	.. ..	1/4 (as sharer).
	Full sister	.. ..	1/12 (as residuary).
	Father's paternal uncle's son	.. ..	(excluded by full sister who is a nearer residuary).

[52]Classes of heirs: held—A predeceasing father, leaving behind a son, Father would get 1/6 in the estate of A.

(*m*)	Daughter	.. ..	1/2 (as sharer).
	Son's daughter	.. ..	1/6 (as sharer).
	Mother	.. ..	1/6 (as sharer).
	Full sister	.. ..	1/6 (as residuary).
(*n*)	Daughter	.. ..	1/2 (as sharer)= 6/12 reduced to 6/13.
	Son's daughter	.. ..	1/6 (as sharer)= 2/12 reduced to 2/13.
	Husband	.. ..	1/4 (as sharer)= 3/12 reduced to 3/13.
	Full sister	.. ..	(excluded) 13/12. 13/13.
(*o*)	Widow	.. ..	1/4 (as sharer).
	Mother	.. ..	1/3 (as sharer).
	Paternal uncle	.. ..	5/12 (as residuary).

(*iii*) **Distant kindred**[53].—The following is the list of distant kindreds, which are grouped into four classes as that in case of residuaries:

I. *Descendants of the deceased.*—(1) Daughter's children and their descendants.

(2) Children of son's daughters h.l.s. and their descendants.

II. *Ascendants of the deceased.*—(1) False grandfathers h.h.s.

(2) False grandmothers h.h.s.

III. *Descendants of parents.*—(1) Full brother's daughters and their descendants.

(2) Consanguine brother's daughters and their descendants.

(3) Uterine brother's children and their descendants.

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52. A widow dies leaving behind only 2 daughters and 1 full sister. Held by the Supreme Court in *Newannes* v. *Shaikh Mohamad*, AIR 1966 SC 702, each daughter would get 1/3 share in the estate of the widow; remaining 1/3 share would be taken by full sister as residuary.

53. Mulla, at pp. 84-87, Fyzee, at p. 428 sqq.

(4) Daughters of full brother's sons h.l.s. and their descendants.

(5) Daughters of consanguine brother's sons h.l.s. and their descendants.

(6) Sister's (full, consanguine or uterine) children and their descendants.

IV. *Descendants of immediate grandparents (true or false).*—(1) Full paternal uncles' daughters and their descendants.

(2) Consanguine paternal uncles' daughters and their descendants.

(3) Uterine paternal uncles and their children and their descendants.

(4) Daughters of full paternal uncles' sons h.l.s. and their descendants.

(5) Daughters of consanguine paternal uncles' sons h.l.s. and their descendants.

(6) Paternal aunts (full, consanguine or uterine) and their children and their descendants.

(7) Maternal uncles and aunts and their children and their descendants.

and

Descendants of remoter ancestors h.h.s. (true or false).

CLASS I OF DISTANT KINDRED

Principles of distribution and exclusion

Rule I.—(*a*) Members belonging to the class of distant kindred inherit only in the absence of sharers and residuaries.

(*b*) Among the distant kindred themselves, Class I (Descendants) exclude Class II (Ascendants), which in turn exclude Class III (Descendants of parents), which in turn exclude Class IV (Descendants of grandparents).

Rule II.—Nearer in degree excludes more remote.

Rule III.—Where the degrees are equal, the children of sharers and residuaries are preferred to those of distant kindred.

Order of succession.—(1) Daughter's children.

(2) Son's daughter.

(3) Daughter's grandchildren.

(4) Son's son's daughter's children and remoter heirs.

(*of the above, each entirely excludes the one who follows*).

Allotment of shares.—After determining on the above principles who the heirs are, let us proceed further and allot the shares to each. The following simple rules must be carefully remembered.

Rule I.—If the intermediate ancestors *do not differ* in their sexes, the estate is to be divided among the claimants per capita, the male taking a double share.

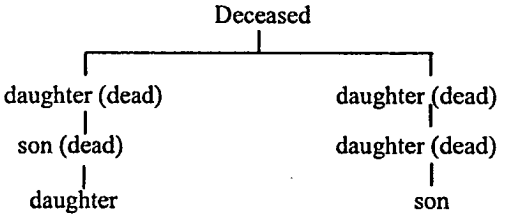
Illustrations

(*a*) 2 sons of daughter (Fatima) — 4/5 (each taking 2/5).
1 daughter of daughter (Kulsum) — 1/5.

(*b*) 2 sons of daughter's daughter (A) 4/6 (each taking 2/6).
2 daughters of a daughter's daughter (B) — 2/6 (each taking 1/6).

Rule II.—If the intermediate ancestors differ in their sexes, the distribution will take effect according to the following sub-rules:

Sub-rule (i): Two claimants, two lines of descent.—According to Mulla, the simplest case is where there are only two claimants, the one claiming through one line of ancestors, and the other claiming through another line, as shown below:

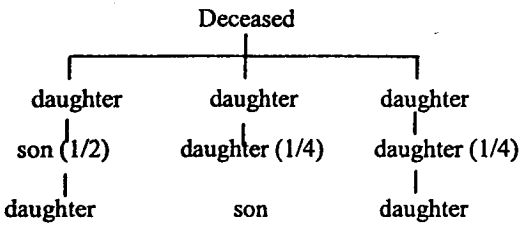


According to Abu Yusuf.—The sex of the intermediate ancestors is to be disregarded, and the sex of present heirs counts. The allocation of share will be: male and female taking in the proportion of two to one. Thus, in the above example, daughter takes 1/3 and son 2/3.

But, unfortunately, this simple rule is not followed in India, and the complex rule of Imam Muhammad is preferred.

According to Imam Muhammad.—This method of distribution is to pause at each degree where the sexes differ. In the above example, the sexes do not differ in the first generation (both are daughters); but in the second generation (one is a son and the other is a daughter). Here, applying the principle that male takes double to female, dead son gets two shares and dead daughter gets one share. These shares devolve upon the two present living heirs. Thus, the son gets one share and the daughter two shares.

Sub-rule (ii): Three claimants, three lines of descent.—Take the example of a Muslim who dies leaving a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown below:



The first step is to stop at the first line in which the sexes of the intermediate ancestors differs, and to assign to each male ancestor a double portion. Thus—

daughter's son = 1/2
daughter's daughter = 1/4
daughter's daughter = 1/4 } Collective share of females = 1/2

The second step is governed by the rule that the individual share of each ancestor does not descend on his or her descendants as in the preceding case, but the collective share of each male ancestors is to be divided among all the descendants claiming through them, and the collective share of all the female ancestors is to be divided among their descendants. Male is given double share.

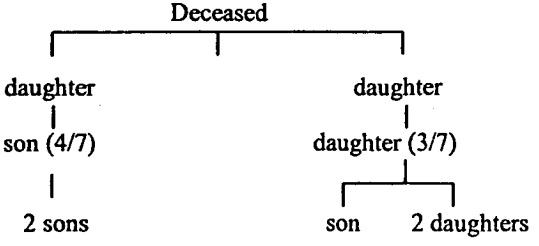
Now, applying this principle to the above problem, the daughter's son stands alone and his share descend to his daughter; but the collective share of the two daughter's daughter is to be distributed among their descendants, on the principle: double share to male. Thus:

daughter's daughter's son—2/3 of 1/2 = 1/3
daughter's daughter's daughter—1/3 of 1/2 = 1/6

Hence, the full answer to the problem is:

dsd = 1/2
dds = 1/3
ddd = 1/6

Sub-rule (iii): More than two claimants, two lines.—When there are two or more claimants through the same intermediate ancestor, there is a further rule to be applied. Count for each such ancestor, if male, as many males as there are claimants claiming through him, and, if female, as many females as there are claimants claiming through her, irrespective of the sexes of the claimants. Take this example:



Here, daughter's son (in the second degree) will count two males because he has two surviving heirs, and the daughter's daughter will count as *three females* because three of her descendants are among the surviving heirs. Thus we have:

daughter's son = 4/7

daughter's daughter = 3/7

The 4/7 of daughter's son will go to his two sons equally, each taking 2/7.

The 3/7 of daughter's daughter will go to her son and two daughters, the son taking twice the share of the daughter. Thus—

daughter's daughter's son—2/4 of 3/7=6/28.

(each) daughter's daughter's daughter—1/4 of 3/7=3/28. Thus, the final shares will be:

dss = 8/28

dss = 8/28

dds = 6/28

ddd = 3/28

ddd = 3/28

CLASS II OF DISTANT KINDRED

Rules of distribution.—(*i*) The nearer in degree excludes more remote.

(*ii*) Among claimants in the same degree, those connected with the deceased through sharers (Koranic heirs) are preferred to those connected through distant kindred.

(*iii*) Where there are claimants both on the paternal side and on the maternal side, 2/3 is assigned to the paternal side and 1/3 to the maternal side. The portion assigned to the paternal side is then divided among the ancestors of the father, and the portion assigned to the maternal side among the ancestors of the mother.

CLASS III OF DISTANT KINDRED

[54]**Rule (1).**—The nearer in degree excludes the more remote. Thus, the children of brothers and sisters exclude their grandchildren; the sister's son excludes the brother's son's daughter.

Rule (2).—Among the claimants in the same degree of relationship, the children of residuaries are preferred to those of distant kindred. Thus a full brother's son's daughter, being a child of a residuary (full brother's son), is preferred to full sister's daughter's son who is the child of a distant kins woman (full sister's daughter).

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54. Mulla, at pp. 94-96.

Rule (3).—In the same degree of relationship, subject to rule (2) above, the descendants of full brothers exclude those of consanguine brothers and sisters. But the descendants of full sisters do not exclude the descendants of consanguine brothers and sisters, and the latter take the residue, if any, after allotting shares to the descendants of full sisters and of uterine brothers and sisters. The descendants of uterine brothers and sisters are not excluded by descendants of either full or consanguine brothers or sisters, but they inherit with them.

Order of succession.[55]—(1) Full brother's daughters, f.s.'s son and d., u.b.'s and u.s.'s son and d.

(2) F.s.'s son and d, u.b.'s son and d, u.s.'s son and d, con b's d's and con s's children, the consanguine group taking the residue.

(3) Con. b's d.s., con.s's children, u.b.'s and u.s.'s children.

(4) F.b.'s son's d.s (children of residuaries).

(5) Con. b.'s son's d.s (-do-)

(6) F.b's d's children, f.s.'s grandchildren, and u.b. and s's grandchildren.

(7) F.s.'s g. children, g. children of u.b.s and s.s, children of con b's d., g. children of con.s. (con—group taking residue).

(8) Con. b's d's children, con. s's g. children, u.b. and s's g. children.

(9) Remoter descendants of brothers and sisters in like order.

Of the above groups each in turn must be exhausted before any member of the next group can succeed.[56]

CLASS IV OF DISTANT KINDRED

[57]**Order of succession.**—(*a*) P. (paternal) and M. (maternal) uncles and aunts *of the deceased*, other than his f. and con. p. uncles who are residuaries.

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55. **Notes**—
f.=full
Con.=consanguine
s.=sister
s.s=sisters
b.=brother
b.s=brothers
u.=uterine
d.=daugther
d.s=daughters
g.children=grandchildren
p.=paternal
m.=maternal
h.l.s.=how low soever
h.h.s.= how high soever

56. For allotment of shares, *see*, Mulla, at pp. 96-101.

57. *Ibid*, at p. 101.

(*b*) The descendants of the above h.l.s., other than sons h.l.s. of his (deceased's) f. and con. P. uncles (they are residuaries) the nearer excluding the more remote.

(*c*) P. and M. uncles and aunts *of the parents*, other than the f. and con. uncles of the father (they are residuaries).

(*d*) The descendants h.l.s. of all P. and M. uncles and aunts of the parents, other than sons h.l.s. of the f. and con. paternal uncles of the father (who are residuaries).

(*e*) P. and M. uncles and aunts *of the grandparents*, other than the full and consanguine paternal uncles of the father's father who are residuaries.

(*f*) The descendants h.l.s. of all the P. and M. uncles and aunts of the grandparents, other than sons h.l.s. of the f. and con. P. uncles of the father's father (they being residuaries), the nearer excluding the more remote.

(*g*) Remoter uncles and aunts and their descendants in like manner and order.

Of the above groups each in turn must be exhausted before any member of the next groups can succeed.[58]

These classes consist of collaterals. According to Fyzee, cases relating to these classes "arise but rarely....it has been thought advisable not to increase the student's burden by a full treatment of the subject". I gratefully adopt this observation. The curious reader, "intent upon delving into the mysteries of this vast and complicated class, are referred to the standard works of Wilson, Tyabji and Mulla...."

B. SHIA LAW OF INHERITANCE[59]

The Shias changed the pre-Islamic Law by altogether abolishing the differences between the agnates and cognates as also males and females. The Shia system (unlike the Hanafi) shuffled all the heirs, cognates and agnates, males and females, and then classified them for order of succession. According to Sunni, the daughter's son (being cognate) was relegated to the last class of heirs distant kindred. The Shias belonged to the party of Ali. He being son-in-law of Muhammad, the daughter's sons were entitled to a much higher position. So the departure from the pre-Islamic agnatic predominance system.

The heirs then naturally fell into the following classes:

(1) Descendants h.l.s. whether through males or females.

(2) Ascendants—(*a*) immediate (=parents) and (*b*) higher (=g.parents h.h.s.)

58. For further details as to shares, *see*, Mulla, at pp. 102-107.

59. *See*, Mulla, at pp. 110-134; Fyzee, at pp. 441-464.

(3) Collaterals—(*a*) brothers and sisters (*b*) uncles and aunts or their descendants.

The heirs were classified on following principles for determining the order of succession:

(1) The descendants (males or females) were given primary position. Only parents succeeded with them—The first group.

(2) Higher ascendants succeeded with nearest collateral (=brothers and sisters).—The second group. The rest of the collaterals were in the last class of heirs—The third group.

(3) The rule of proximity was observed within each class.[60]

According to the Shia Law, there are only two groups of heirs:

(1) Heirs by consanguinity (blood relations); and

(2) Heirs by marriage (husband and wife).

(1) Heirs by consanguinity are further divided into three classes:

Class I.—(*i*) Parents;

(*ii*) Children and other lineal descendants h.l.s.

Class II.—(*i*) Grandparents h.h.s. (true and false).

(*ii*) Brothers and sisters and their descendants h.l.s.

Class III.—(*i*) Paternal, and

(*ii*) Maternal, uncles and aunts of the deceased, and of his parents and grandparents h.h.s. and their descendants h.l.s.

The Class I excludes Class II, and Class II excludes Class III. But the heirs of each class, whether they are of sub-class (*i*) or (*ii*), inherit together, the nearer in degree excluding more remote.

(2) Heirs by marriage.—Under no circumstances the husband or wife may be excluded. They inherit together with the nearest consanguine heirs.

Sharers and residuaries in Shia Law.—Shias divide heirs into two classes, namely sharers and residuaries; there is no class corresponding to the "distant kindred" of Sunni Law.

The division of heirs into the above two classes is for the purposes of determining the shares of individual heirs.

There are nine sharers who take specific shares as shown in the table below. The descendants (h.l.s.) of sharers are also sharers.

Those heirs who are not included in the class of sharers are all residuaries. The descendants (h.l.s.) of residuaries are also residuaries.

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60. Verma, at p. 417.

TABLE OF SHARERS (SHIA LAW)

(Mulla, p. 103)

Sharers	*Normal share*		*Conditions under which the share is inherited*	*Share as varied by special circumstances*
	of one	*of two or more collectively*		
1. Husband	1/4	..	When there is a lineal descendant.	1/2 when no such descendant.
2. Wife	1/8	1/8	When there is a lineal descendant.	1/4 when no such descendant.
3. Father	1/6	..	When there is a lineal descendant.	(If there be no lineal descendent the father inherits as a residuary.)
4. Mother	1/6	..	(*a*) When there is a lineal descendant; or	
			(*b*) When there are two or more full or consanguine brothers, or one such brother and two such sisters, or four such sisters, with the father.	1/3 in other cases.
5. Daughter	1/2	2/3	When no son.	(With the son she takes as a residuary.)
6. Uterine brother or sister	1/6	1/3	When no parent, or lineal descendant.	..
7. Uterine brother or sister				

Sharers	*Normal share*		*Conditions under which the share is inherited*	*Share as varied by special circumstances*
	of one	*of two or more collectively*		
8. Full sister	1/2	2/3	When no parent, or lineal descendant, or full brother, or father's father.	(The full sister takes as a residuary with the full brother and also with the father's father.)
9. Consanguine sister	1/2	2/3	When no parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father.	(The consanguine sister takes as a residuary with the consanguine brother and also with the father's father.)

Note:—*The descendants h.l.s. of sharers are also sharers.*

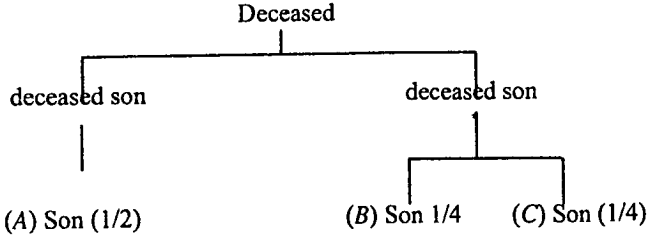
Principles of distribution of property.—(*i*) If the deceased leaves only one heir, the whole of property goes to him. (The older view was that if the sole heir was wife, she would take her normal share and the rest would escheat to the *Imam*. But this view is not now followed in Indian Courts; wife is equally entitled to inherit the whole of property).

(*ii*) If the deceased leaves more than one heir, then the first step is to assign shares to the heirs belonging to sharer class.

The following two rules are applied in order to determine the heirs and their shares:

(*a*) **The nearer in degree excludes more remote.**—(For example, *A* dies leaving a son *B* and a grandson *C* from a predeceased son. Here *B* will exclude *C*.)

(*b*) **Stirpital succession.**—Succession among descendants in each of the three classes of heirs (*i.e.* the three classes of heirs by consanguinity) is *per stripes*, and not per capita. Thus, for example, if *A* dies leaving behind three grandsons, of whom one is from one predeceased son, and two are from another predeceased son:



then *A* will get a share equal to that of what his father, if alive, would have got, i.e., 1/2; while *B* and *C* will equally share the portion which their father would have inherited if alive (i.e. 1/2).

Rules of succession among heirs of Class I.—The persons who are first entitled to succeed to the estate of a deceased Shia Muslim are the heirs of Class I along with the husband or wife, if present. Among the heirs of Class I, nearer in degree will exclude more remote.

In case the heirs of Class I include grandchildren of predeceased children, then—

—the children of each son take the portion which their father, if living, would have taken.

—the children of each daughter take the portion which their mother, if living, would have taken.

(The same rule applies for remoter lineal descendants).

MODE OF DISTRIBUTION

Step I.— Assign share to the husband or wife.

Step II.— Assign shares to those who can inherit as sharer only (i.e. mother and uterine brother or sister).

Step III.— Divide the residue, if any, among the residuaries.

Step IV.— When there is no residuary, and the sum total of shares is *less than unity*, apply Doctrine of Return, and if it is *greater than unity*, apply Doctrine of Increase.

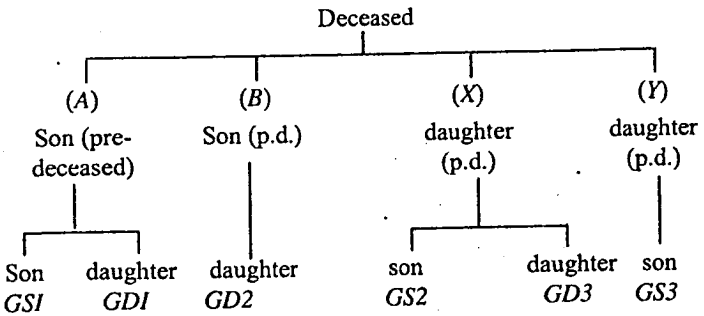
Illustrations

(*a*) Husband .. .. 1/2 (as sharer).
Mother .. .. 1/3 (as sharer).
Father .. .. 1/6 (as residuary).

(*b*) Wife .. .. 1/4 (as sharer).
Mother .. .. 1/3 (as sharer).
Father .. .. 5/12 (as residuary).

(*c*) Father .. .. 1/6 (as sharer, because there are daughters).
Mother .. .. 1/6 (as sharer).
2 Daughters .. .. 2/3 (as sharer).

(*d*) Take the example of the following genealogical tree:



Here, the two daughters, *X* and *Y*, if living would have taken as residuaries with the two sons *A* and *B* according to the rule of the double share to the male, so that *A* and *B* would each have taken 2/6 and *X* and *Y* would each have taken 1/6.

A's shares 2/6 will pass on to his son and daughter according to the rule of the double share to the male, so that *GS1* will take 2/3 of 2/6 = 2/9, and *GD1* will take 1/3 of 2/6 = 1/9.

B's share 2/6 will pass on to his daughter *GD2*.

The share of *X* is 1/6. It will be divided between her son and her daughter according to the rule of double share to male: so that *GS2* will take 2/3 of 1/6 = 1/9, and *GD3* will take 1/3 of 1/6=1/18.

Y's share 1/6 will pass on to her son *GS3*.

The shares will thus be 2/9+1/9+2/6+1/9+1/18+1/6=1

Rules of succession among heirs of Class II.—If there are no heirs of Class I, the estate will devolve upon the heirs of Class II after deducting the share of husband or wife, if any. The rules of succession among the heirs of Class II are different according as to the surviving relations are:

(1) Ascendants, without collaterals;

(2) Collaterals, without ascendants;

(3) Both ascendants and collaterals.

1. Ascendants, without collaterals.—After assigning the share of the husband and wife, divide the residue according to the following rules:

(*i*) Assign 1/3 of the estate to the maternal side, and the residue to the paternal side.

(*ii*) *Maternal side.*—The maternal grandparents take their portion, the 1/3, and divide it between themselves, male and female sharing equally.

(*iii*) *Paternal side.*—Then take the paternal side; the residue is to be divided according to the rule double share to the male.

Illustrations

Father's father	..	..	2/3 of 2/3 = 4/9 = 8/18.
Father's mother	(2/3)	..	1/3 of 2/3 = 2/9 = 1/18.
Mother's father	..	..	1/2 of 1/3 = 1/6 = 3/18.
Mother's mother	(1/3) ..	..	1/2 of 1/3 = 1/6 = 3/18.

2. Collateral, without ascendants.—(*a*) Assign the share of husband and wife, if any;

(*b*) Divide the residue according to these rules:

(*i*) brothers and sisters of the full blood exclude consanguine brothers and sisters:

(*ii*) uterine brothers and sisters are not excluded by full or consanguine brothers and sisters; they take 1/6 or 1/3 according to their number;

(*iii*) full, and in their absence, consanguine brothers take the residue;

(*iv*) full sisters (without full brothers); or, failing them, consanguine sisters (without consanguine brothers) take the Koranic share of 1/2 or 2/3 according to their number;

(*v*) the full or consanguine brother takes double the share of the sister, the uterine brothers and sisters take equally, brother and sister sharing alike.

Illustrations

(1) One full brother (or in his absence, consanguine brother), there being no other claimant, takes the whole estate.

(2) Two such brothers divide the estate equally.

(3) Two full sisters and one full brother. Estate divided into four shares—fb.=1/2, fss = 1/4 each.

(4) One single sister, full or consanguine. 1/2 as Koranic heir, 1/2 by return.

Descendants of brothers and sisters only.—If there are no brothers or sisters or ancestors, assign the share of husband or wife and divide the residue as follows:

(*i*) The principle of *stirpital succession* must be followed. The share of a full or consanguine brother is allotted to his descendants, and is divided according to the rule of double share to the male.

(*ii*) The share of each uterine brother or sister must be allotted to his or her descendants, and is divided so that male and female share alike.

(*iii*) If there are no children of brothers or sisters, remote descendants take according to the above principles (*y*).

Illustrations

(1) Husband	=	1/2, Koranic heir.
(2) Uterine brother's daughter	=	1/6, Koranic share of her father.
(3) Full brother's daughter	=	1/3, residual portion of the father.
(4) Consanguine brother's son	=	Excluded by full brother's daughter.

3. Ancestors plus collaterals.—If the deceased leaves grandparents, in addition to brothers and sisters or their descendants, first, assign the share of the husband or wife, if any, and then divide the residue in the following manner:

(*i*) A paternal grandfather counts as a full or consanguine brother; and a paternal grandmother as a full or consanguine sister.

(*ii*) A maternal grandfather counts as a uterine brother; and a maternal grandmother as a uterine sister.

On failure of the grandparents, remoter ascendants inherit on the same principles; and on the failure of brothers and sisters, their decendants take *per stripes* and inherit on similar principles (*a*).

Illustrations

(1) Paternal grandfather (=Full brother) Full sister } = 2/3 = 1/3

(2) Uterine brother Maternal grandmother =1/3 Koranic share, each takes 1/6.
(=Uterine sister) 2 Full sisters } = 2/3 Koranic share.

(3) Mother's father (=ub.)1/6=3/18
Mother's mother (=us.)1/6=3/18 } 1/3 as Koranic heirs.

Rules of succession among heirs of Class III.—If there are no heirs of the first or second class, the estate (minus the share of the husband or wife, if any) devolves on the heirs of the third class in the order given below:

(1) Paternal and maternal uncles and aunts of the deceased;

(2) Their descendants h.l.s., the nearer in degree excluding the more remote;

(3) Paternal and maternal uncles and aunts of the parents;

(4) Their descendants h.l.s., the nearer in degree excluding the more remote;

(5) Paternal and maternal uncles and aunts of the grandparents;

(6) Their decendants h.l.s., the nearer in degree excluding the more remote;

(7) Remoter uncles and aunts and their descendants in like order.

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Exception.—If the only claimants be the son of a full paternal uncle and a consanguine paternal uncle, the former, though he belongs to group (2), excludes the latter who is nearer and belongs to group (1).

Principles of distribution.—The most important rules are—

(*i*) to assign 2/3 of the estate to the paternal side and 1/3 to the maternal side;

(*ii*) to divide the paternal 2/3 among paternal uncles and aunts, as if they were brothers and sisters, that is:

(*a*) to assign 1/3 or 1/6 among the uterine uncles and aunts, male and female taking in equal proportions;

(*b*) to assign the remainder (2/3 or 5/6) among the full paternal uncles and aunts; or failing them to the consanguine paternal uncles and aunts. In both these cases, the distribution is according to the double share to the male;

(*iii*) to divide the maternal 1/3 among the maternal uncles and aunts in the following manner:

(*a*) assign to the uterine uncles and aunts 1/3 of the maternal portion, if there be more than two, or 1/6 if there be only one; and

(*b*) divide the remainder (2/3 of the maternal portion) among full maternal uncles and aunts, and failing them, among the consanguine maternal uncles and aunts.

In case (*iii*), (*a*) and (*b*), males and females take equally.

(*iv*) If there be no uncle or aunt on the maternal side, the paternal side takes the whole of the estate; and similarly, where there are no claimants of the paternal side, the maternal side takes the inheritance exclusively.

Illustrations

2/3 { Full paternal uncle — 5/6 x 2/3 = 5/9
Consanguine paternal uncle — excluded by full paternal uncle.
Uterine paternal uncle — 1/6 x 2/3 = 1/9

1/3 { Full maternal uncle — 5/6 x 1/3 = 5/18.
Consanguine maternal uncle—excluded by full maternal uncle.
Uterine maternal uncle — 1/6 x 1/3 = 1/18.

Doctrine of "return" in Shia Law.—If there is a residue left after satisfying the claims of sharers, *and there are no blood relations in the class to which the sharers (Koranic heirs) belong*, the residue reverts to the sharers proportionately (This rule is subject to three exceptions).

Illustrations

(*a*)	Uterine Sister	.. ..	1/6 increased to 1/4.
	Consanguine sister	.. ..	1/2 = 3/6 increased to 3/4.
(*b*)	Mother	.. ..	1/6 increased to 1/4.
	Daughter	.. ..	1/2 = 3/6 increased to 3/4.
	Brother	.. ..	(excluded, as being an heir of the second class).

Exception I : Spouse.—Neither the husband nor the wife is entitled to the 'return', if there is any other heir.

Illustrations

Husband	.. ..	1/4.
Father	.. ..	1/6 increased to 1/4 of 3/4 = 3/16.
Daughter	.. ..	1/2 = 3/6 increased to 3/4 of 3/4 = 9/16.

Exception II : Mother.—If the deceased leaves his mother, father and one daughter, and also—

(*i*) two or more full or consanguine brothers; or

(*ii*) one such brother and two such sisters, or

(*iii*) four such sisters,

the brothers and sisters, though themselves excluded from inheritance as being heirs of Class II, prevent the mother from participating in the return, and the surplus reverts to the father and the daughter proportionately to their respective shares.

Illustrations

Mother	.. ..	1/6.
Father	.. ..	1/6 increased to 1/4 of 5/6 = 5/24.
Daughter	.. ..	1/2 = 3/6 increased to 3/4 of 5/6 = 15/24.
2 full brothers	.. ..	(excluded).

Exception III: Uterine brother and sister.—Where uterine brothers and sisters survive with full sisters, the uterine brothers and sisters do not participate in Return (This rule does not apply to consanguine sisters).

Illustrations

(*a*)	Uterine brother	.. ..	1/6.
	Full sisters	.. ..	1/2 (as sharer) + 1/3 (by Return) = 5/6.
(*b*)	Wife	.. ..	1/4 = 3/12.
	Uterine sister	.. ..	1/6 = 2/12.
	Full sister	.. ..	1/2 (as sharer) + 1/12 (by Return) = 7/12.

Doctrine of Increase in Shia Law.—Shia Law does not recognise Hanafi doctrine of Increase (*Aul*). Shia Law says that if the sum total of the shares exceeds unity, the fraction in excess of the unity is deducted invariably from the share of—

(*i*) the daughter or daughters;

(*ii*) the full or consanguine sister or sisters.

Illustrations

(*a*)	Daughter	.. ..	1/2 = 6/12 reduced to (6/12—1/12)	=5/12.
	Father	.. ..	1/6 = 2/12	2/12.
	Husband	.. ..	1/4 = 3/12	3/12.
	Mother	.. ..	1/6 = 2/12	2/12.
			13/12	12/12.
(*b*)	Full sister	.. ..	1/2 reduced to (1/2—1/6) = 1/3.	
	Husband	.. ..	1/2.	
	Uterine brother	.. ..	1/6.	

DISTINCTIONS BETWEEN SHIA AND SUNNI LAW OF INHERITANCE

"The starting point of both (the systems) is the fixed and immutable text of the Koran—for the devout Muslim, the word and voice of God Himself. How and why have these differences arisen? What are the causes—historical, political, economic and social—which have led to this puzzling result?"[61]

61. Fyzee, at p. 464.

There can be no doubt that the basic reason for the differences between the two systems was political rather than juristic. According to J.N.D. Anderson, it was Shias' allegiance to the descendants of the Prophet through his daughter Fatima that prompted them to deny any priority of agnates over cognates. This denial in itself involved the building of a new system quite distinct from the pre-Islamic system, which has its influence on the Hanafi system.

This political tinge may be found in the special case where full uncle's son co-exists with a consanguine uncle. Shias give precedence to the full uncle's son, directly contrary to the general rule that preference of full blood over half blood is necessary only when the claimants are equal in degree. This solitary exception can be explained only in terms of their allegiance to Ali (the Prophet's full uncle's son) in preference to Abbas (his consanguine uncle).

Moreover, Shias disregard the details of Sunni system that rest on the decisions of the first three Caliphs, Abu Bakr, Umar and Usman.

According to Tyabji,[62] historically, the basis of both the systems is the customary law of pre-Islamic Arabs. Both systems alter the customary law in accordance with the Koranic injunctions. But, whereas the Hanafis interpret the Koran strictly, keeping the substratum of the customary law intact, and superimposing thereon the provisions of the Koran, the Shias interpret the Koran in a wider sense: they interpret it as altering the old principles themselves, and as giving rise to a new set of principles.

Each case mentioned in the Koran is taken by the Hanafis as a specific amendment of that particular incident of the customary law; by the Shia it is interpreted as an instance, which has to be generalized and applied universally wherever same or similar circumstances arise.

In his book *Conflicts and Tensions in Islamic Jurisprudence*[63] Noel J. Coulson beautifully sums up the above difference by observing thus:

> "In the contemplation of Sunnis, where the Koran did not expressly reject a customary rule, it tacitly ratified it The result of this approach was—that the Sunni Law of Succession, gave pride of place to the tribal heirs of the deceased. The women to whom the Koran gave rights of inheritance for the first time are entitled, in appropriate circumstances, to the fractional portion of the estate which the Koran allots to them. But where a male agnate relative of the deceased survives, this will be the limit of their entitlement. The male agnate, however distant a relative he might be, will step in and claim the residue of the estate; for the female, however close a relative she might be, she does not have the status to exclude him from succession. Hence, if a Sunni Muslim dies intestate, survived by a daughter

62. Tyabji, at p. 827.
63. University of Chicago Press 1969.

and a distant male agnatic cousin, the daughter will be restricted to a portion of one-half of her father's estate, and the cousin will inherit the remaining one-half as residuary heir.

For the Shia, however, the Koranic legislation was far from being merely a series of piecemeal reforms. They maintained that the Koran laid down the basic elements of an entirely novel legal system, including a system of succession. It obliterated completely the pre-existing customary law. Any rule of the customary law which was not expressly ratified by the Koran was tacitly rejected. And, therefore, because the Koran nowhere expressly ratifies the pre-eminent claims of the male agnates, as such to inheritance, they have no privileged position in the Shii scheme of succession. One of the Shia leaders is supposed to have expressed this principle in no uncertain terms. 'As for the male agnates,' he declared, 'dust in their teeth'. On this basis Shia Law marshals all relatives, male and female, agnate and otherwise, into a single comprehensive scheme of priorities based exclusively upon the nearness of their relationship with the deceased. Within this scheme any descendant of the deceased, male or female, has absolute priority over any collateral; so that the daughter of a deceased Shia Muslim will totally exclude his brother, and, *a fortiori*, any more distant male agnate such as a cousin, from succession and will inherit the whole of her father's estate."[64]

The basic points of difference are as follows[65]:

(1) Principle of agnacy.—Hanafis recognised the pre-Islamic custom of giving preference to male over female. The text of Koran was not taken to alter or affect the basic conception existing in Arabia regarding proximity in kinship. The *asabat* (agnatic heirs) remained the most important heirs.

Shias.—The Shiites completely destroyed this principle of agnacy. "As for the asabat, dust in their jaws," Imam Jafar-as-Sadiq is reported to have said. Unlike the Sunnis, the general provisions of the Koran with reference to inheritance were interpreted to place both agnates and cognates on equal footing.

(2) Classification of heirs.—Hanafis—Three classes:

(1) Koranic heirs;

(2) Agnatic heirs;

(3) Uterine heirs.

This division of heirs into three classes was due to the fact that Hanafis leave the pre-existing rights of the "asaba"—who were the customary heirs—intact, and giving rights to those mentioned in Koran.

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64. N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (1969) at pp. 32-33.
65. Fyzee, at pp. 464-467.

Shias.—The Shias do not leave the old rules of law as they were, but replace them by a set of rules consisting of a fusion of the customary law and the Islamic reforms and thus, among Shias, the classification of heirs becomes important only when we have to deal with the question of the *quantum of shares*, and not for the purposes of considering which persons are entitled to succeed.

(3) Stirpital succession—*Shias.*—The verse that a male shall have twice as much as a female is interpreted by the Shias as changing the entire principle of distribution prevailing in the pre-Islamic times, and introducing a system of distribution on the basis of *per stripes* instead of per capita. The *Shiite theory of Immate* is based on the principle that excellence is due to heredity and a noble *pedigeree.* Circumstances like the *tragedy of Karbala* tended to deepen the feeling and thus we see the theory of law that the daughter's children stand in the shoes of daughter, and the sister's children inherit in the right of the sister; and this principle was systematically applied in every case.

(4) Females however remote inherit on the analogy of the daughter or sister.—The Koranic provision that the daughter is entitled to succeed with the son is interpreted by the Shiites *as applicable to all female heirs.* The Shiite jurists take the provision of the Koran as *not restricted to the individual instances of the daughter or sister*, as establishing a new principle for the benefit of females.

(5) The verse *about the relative proximity of parents and children* and the provision that two ought to succeed concurrently, has received slightly different verbal interpretations by the two schools, but the results are very far-reaching.

Under Sunni system, the meaning of the Koran was taken more literally, whereas Shias extract a principle from the particular instance. Shias' method is characteristic and throws light on their whole system.

Shias reason that if *F* (Father) is entitled to succeed with his own grandchildren, h.l.s., then *FF* should also inherit with his grandchildren (i.e., with Brother and Sister of the deceased, because, they are no one else but the grandchildren of the *FF*). But under Sunni Law, *FF* excludes Brother and Sister (i.e. his own grandchildren) [refer to Table of Residuaries]. Therefore, in Shia system, *FF* inherits with Brother and Sister and does not exclude them.

(6) Other miscellaneous points of difference.—(*i*) Under Sunni Law, the distant kindred are *postponed* in favour of sharers and residuaries—while under Shia Law, they inherit along with sharers and residuaries.

(*ii*) The *doctrine of increase* is applied to all sharers alike under the Sunni Law, whereas under the Shia Law it operates against daughter and sister only.

(*iii*) The *doctrine of return*, under Sunni Law, does not apply to wife and husband in the presence of any other heirs. However, if there are no sharers, then

both of them get by return. Under Shia Law, the wife can never get through 'return'. *In India, however, the Sunni Law of return is applied to the wife also.*

(*iv*) The Sunnis apply the principle *nearer in degree excludes more remote* only to the agnatic heirs but the Shias apply it to all cases without distinction of sex.

(*v*) The Sunnis do not make any distinction between *real and personal properties*; the Shias, however, observe such a distinction in the case of a *childless widow* who is not permitted to take any share in her husband's immovable property.

(*vi*) The Sunnis do not recognise any right of *primogeniture* (elder son getting preference over younger ones); Shias recognise it to some extent (eldest son is entitled to his deceased father's word, wearing apparel, and the Koran).

(*vii*) Principle of representation: (*See*, Section 5 of this Chapter).

(7) Conclusion.—In the last, it ought to be emphasised that it is not known exactly, how and why these differences had arisen? What were the causes—historical, political, economic and social—which lead to this puzzling result? Fyzee hopes "that someone with ability and experience will take an early opportunity to proceed on a voyage of discovery".