

The Doctrine of Mush'a in Islamic Law: Legal Implications and Challenges in Modern Property Transactions

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ABSTRACT

The doctrine of Mush'a, which has its roots in Islamic law, is about the transfer of undivided properties as gifts, or the requirements of understanding and ownership that are compatible with the general Islamic Jurisprudence. How does the doctrine of Mush'a affect the authenticity of gifts in property transactions, especially by Sunni and Shia interpretations? The purpose of this research is to examine the legal implications of the doctrine of Mush'a in modern property transactions and the examine judicial adaptations of this theory considering current commercial interests and property transactions. A comparative legal analysis of case law and scholarly interpretations by both Sunni and Shia perceptive have been examined to ass's variations in the treatment of Mush'a under different circumstances. Studies show that although traditional uses of Mush'a often cancel gifts without ownership, some Islamic societies have adopted this approach to avoid commercial and urban factors. To align the concept of Mush'a with modern legal and commercial requirements, there is a need to refine Islamic principles and meet the employment needs in the purchase of existing products.

Keywords: *Mush'a, Gift, Hiba, Islamic Law, Common Law, Ownership, Waqf.*

Contents

ABSTRACT	1028
Introduction.....	1030
1.DOCTRINE OF WAQF	1030
a)History of Concept of Waqf	1030
2.OPINIONS OF DIFFERENT SCHOOL OF THOUGHT.....	1030
a)Waqf Under Sunni Law	1030
b)Waqf Under Shia law	1030
3.DOCTRINE OF MUSH'A	1031
a)Literal and technical meaning of Mush'a	1031
b)Opinion of Hanafi School of Thought.....	1031
c)Under Shia law	1031
4.BASIS OF PROHIBITION	1031
a)The Statement That Gift of Mush'a Property Is to be Treated as an Irregular (FASID) Gift is Incorrect.....	1032
4.1 Gift of Mush'a Where Property Indivisible.....	1032
4.2 Gift of Mush'a; Where Property Divisible	1032
4.3 Exceptions.....	1032
b)Doctrine of Mush'a unadopted to a progressive states of society	1033
Reference from case law.....	1033
c)Device to get over doctrine of Mush'a	1033
5.COMPARATIVE ANALYSIS WITH OTHER LEGAL SYSTEMS.....	1033
6.SIMILARITIES AND DIFFERENCES	1034
CONCLUSION	1035
BIBLIOGRAPHY	1036

Introduction

The doctrine of Mush'a derives from Islamic law, which regulates the gift of shares of undivided property, traditionally emphasizing the clear ownership of the recipient through physical property. Developed to provide clarity in ownership and reduce conflict, this theory has historically been used in contexts where partition and occupation were simple. However, as property ownership becomes increasingly complex in today's densely populated and commercial environment, the strict use of cats poses practical challenges, especially in areas where complete physical separation is not possible. Understanding the role of this ideology in the gift and possession of property is essential for Muslim societies that meet the demands of modern property transactions. The study examines how Sunni and Shia schools interpret Mush'a and consider modern judicial devices for establishing communal or commercial property in Muslim-majority jurisdictions. By examining these legal intersections, this study sheds light on the ways in which traditional Islamic principles can be reconciled with contemporary economic needs.

1. DOCTRINE OF WAQF

a) History of Concept of Waqf

The concept of waqf was formulated in accordance with Islamic law. Before the advent of Islam, there was no concept of waqf in Arab. Although waqf is not mentioned as such in the Qur'an, such Qur'anic rulings concerning charitable organizations are the root cause of the development and expansion of waqf.

Ameer Ali describes the law of Waqf as:

“The most important branch of Muslim Law, for it is interwoven with the entire religious life and social economy of Muslims Waqf in its literal sense means detention or stoppage¹.”

If we look at the word ‘Waqf’, in its literal sense it is referred to as ‘detention’, ‘stoppage’ or ‘tying up’. According to the legal definition it means:

“*a dedication of some property for a pious purpose in perpetuity*”.²

The property so segregated should be available for religious or charitable purposes. This type of property is forever attached and becomes non-transferable. In *Muhammad Kazim vs Asghar Ali*³, it was held that waqf in its legal sense is the creation of a specific property for the fulfillment of a sacred purpose or religious purpose.

2. OPINIONS OF DIFFERENT SCHOOL OF THOUGHT

a) Waqf Under Sunni Law

The essential conditions of a valid waqf, according to the **Hanafi Law (Sunni Law)** are:

1. A permanent dedication to any property.
2. The dedicator (waqif) should be a person professing the Mussalman faith and of sound mind and not a minor or lunatic.
3. The dedication should be for a purpose recognized by the Mussalman law as religious, pious or charitable.⁴

b) Waqf Under Shia law

The essential conditions for creating a valid Waqf according to Shia Law are:

¹ Dinshah Fardunji Mullah, *Principles of Mahomedan Law*, Bombay: Thacker & Company, 1905, Wakafs, Page 116. Retrieved from [https://hostnezt.com/cssfiles/muslimlaw/Principles%20of%20Mahomedan%20law%20By%20D.F%20Mulla%20\(Full\).pdf](https://hostnezt.com/cssfiles/muslimlaw/Principles%20of%20Mahomedan%20law%20By%20D.F%20Mulla%20(Full).pdf) Assessed on 15/11/2024

² Manzar Saeed, *Commentary on Muslim Law in India*, (Orient Publishing Company. 2011, New Delhi)

³ *Syed Shah Muhammad Kazim vs Syed Abi Saghir And Ors. (Patna High Court)* on 6 July, 1931, Equivalent citations: 136IND. CAS.417, AIR 1932 PATNA 33, Retrieved from

<https://indiankanoon.org/doc/1082321/> assessed on 15/11/2024

⁴ I.B. MULLA, *Commentary on Mohammedan Law*, (2nd Ed, Dwivedi Law Agency, 2009, Allahabad)

1. It must be perpetual.
2. It must be absolute and unconditional.
3. Possession of the thing appropriated must be given.
4. The waqf property should be entirely taken out of waqf.

3. DOCTRINE OF MUSH'A

a) Literal and technical meaning of Mush'a

Mush'a is an Arabic word which means "undivided share in wealth". It comes from the word "shuyum.". Such property can be movable or immovable. The gift of an incomplete piece in a product can present a challenge about its validity.

Gift of undivided property (Mush'a) is not allowed in things that can be divided or partitioned. It is allowed in undivided property that is not subject to division or partition, like a horse, a vase and other such things.

➤ According to the case of *Faqirullah Khan and Muhammad Arif*⁵, the joint undivided property was used under the rights of many individuals. The purpose of the Mush'a rule is not to cause inconvenience or distress to the donor when he is an undivided part of the property. If a person who is in trouble or in pain does not feel it, then there is no doubt that the gift on this basis is invalid. Therefore, it was considered necessary to have an undivided share in the property in the form of a gift. Gift from one participant to another. The argument is that the transfer of possession in the form of torch gifts was not necessary and the transfer of possession was an important component of the gifts.

➤ **According to Imam-Al-Shafi it is allowed in both cases.**

b) Opinion of Hanafi School of Thought

According to Hanafi law, if the property being gifted is capable of division and a gift is made of a property which is capable of division without firstly dividing the same, it is always treated as invalid though not altogether void, as it can be rendered valid by subsequent partition and delivery. However, in these cases a gift of Mush'a in a property capable of division is also treated as valid;

- gift by one heir to another, and
- gift of shares in a company.

On the other hand, where gifted property is incapable of division, the gift is always valid.

c) Under Shia law

Under Shia law the gift of Mush'a is valid in each case, provided the donor gives to the donee possession of property by vacating and permitting him to exercise his control over it.⁶

4. BASIS OF PROHIBITION

The prohibition is based on tradition and the fact that the essential conditions of ownership cannot be met to complement the concept of gifts. In non-divisible matters, permission is based on necessity (darurah), but there is no necessity in which something can be divided or shared. Furthermore, if it is allowed in such a case, ownership will be transferred to Donee, and the nature of the gift will change to one of the liability agreements (daman) since Donee will demand distribution, and if the property is destroyed during the distribution, Donee will be entitled to claim compensation, in cases that are not subject to division this issue does not arise.⁷

⁵ *Faqirullah Khan v. Muhammad Arif* PLD 1985 Azad J&K.

⁶ Prof. I.A. KAN, *Mohammedan Law*, (23rd Ed, Central law agency, 2010 Allahabad)

⁷ <https://www.lawctopus.com/academike/concept-waqf-muslim-law/>

a) The Statement That Gift of Mush'a Property Is to be Treated as an Irregular (FASID) Gift is Incorrect

Laws enacted during the British period in India stipulate that a gift of Mush'a property must be treated as an illegal gift until the property is distributed and transferred, after which it will be considered valid. This statement is false because it ignores the basis of the fasid contract.

Ownership is an important element of the gift, and when the member loses, the contract is canceled. These contracts cannot be repaired later. The correct position is that the gift (Mush'a) is pending until the moment of delivery of the property. In case of suspension, the gift is incomplete, that is, ownership is not transferred to the recipient until the property is provided.

4.1 Gift of Mush'a Where Property Indivisible

A valid gift may be made of an undivided share in property which is not capable of partition.

Illustration

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 staircase, though it is a gift of Mush'a, is valid, for a staircase is not capable of division.⁸

A gift of a share in the business of a Turkish bath is valid, for the Hamman is not capable of division and would be ruined if it were divided by metes and bounds.⁹

4.2 Gift of Mush'a; Where Property Divisible

The gift of an undivided share in property which is capable of division is irregular (fasid), but not void (batil). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him, If possession is once taken the gift is validated.

4.3 Exceptions

A gift of an undivided share, though it be a share in property capable of division, is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases:

1. Where the gift is made by one co-heir to another (**Kaniz fatima v Jai Narain**; a case of gift by mother to daughter of two annas share in lands, the daughter having taken joint possession)

2. Where the gift is of a share in a zemindari to Taluka

3. Where the gift is of a share in freehold property in a large commercial town

4. Where the gift is of shares in a land company

a. A makes a gift of her undivided share in certain lands to B. The share is not divided off at the time of gift, but it is subsequently separated and possession is thereof delivered to B. The gift, though irregular in its inception, is validated by subsequent delivery of possession.

A gift of an undivided share of the banks of a tankif regarded as property capable of division is validated by admission of the donee to possession.¹⁰

b. A Muslim female 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.¹¹

⁸ *Kasim Hussain v Sharif un nisa* 1883

⁹ *Fayyaz ud din v kutab ud din* 1929. A gift of an undivided share of the banks of a tank is valid if the banks are regarded as indivisible.

¹⁰ *Ala baksa v Mahabat Ali* 1935, LJ 209, 159 IC 678

¹¹ *Mahamed Bukh v Husseini Bibi* 1888, 684, 701; 15 LA 81

- c. A, B and C are co-sharers in a certain Zemindari. Each share is separately assessed by the government and has a separate number in the collectors' books and the proprietary of each share is entitled to collect a definite share of rents from the rents. It makes a gift of his share to Z without a partition of the Zemindari. The gift is valid for it is not a gift strictly of a Mush'a, the share being definite and marked off from the rest of the property.
- d. A, who owns a house in rangun, makes a gift of a third of the house to B. The gift is valid, the property being situated in a large commercial town.
- e. A partner in a firm makes a gift of his shares of the partnership assets to B. The gift is not valid unless the share is divided off and handed over to B.

Where the share of the donor in the assets of the partnership of the date of gift was not insufficient to support the gift of the donated an amount the debit entry in the account of the donor partner and the credit entries in the accounts of the donee partners were a sufficient declaration of the gift by the donor, a sufficient acceptance of the gift by the donee and the delivery of such possession as the subject of the gift was susceptible of .

b) Doctrine of Mush'a unadopted to a progressive states of society

Reference from case law

➤ In **Muhammad Mumtaz vs Zubaida Jan** upon which illustration is based, their lordship of the privy council said the doctrine relating to the invalidity of gifts of a Mush'a is wholly unadopted to progressive state of society, and ought to be confined within the strictest rules. This principle was applied by their lordship of privy council. It was also applied by the Allahabad high court in a case where a sister made a gift to her husband of her share in six houses and three fields by a registered deed of gift. The property was divisible, but the gift was held to be valid as the donor had only constructive positions had done all she put the donee position.

➤ In **Allah bakhsh v Mohabbat Ali**, the same principle was applied, 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 doctrine of Mush'a should not be applied to properties in large commercial cities, or to gift of share in Zemindari.

c) Device to get over doctrine of Mush'a

It has been held by the High Court of Allahabad that though a valid gift can not be made of an undivided share (Mush'a) in property which is capable of division, the difficulty may be overcome by the donor selling the undivided share at a fixed price to the person to whom the gift is intended to be made, and then releasing that person from payment of the debt representing the price.¹²If this decision were correct, delivery of possession in the case of a gift could be dispensed within every case by the donor making a pretense of a sale to the donee and afterwards releasing the donee from the obligation to pay the price.

5. COMPARATIVE ANALYSIS WITH OTHER LEGAL SYSTEMS

The Mush'a doctrine, which is about giving undistributed property under Islamic law, has a unique view of property rights and inheritance. The study compared the distribution of undisclosed assets related to Islamic law to the way laws and human rights structures were applied, highlighting similarities, differences, and complementary areas. In Islamic jurisprudence, especially in Hanafi schools, the Mush'a schools allow the allocation of an undivided portion of the owner's debt. However, if the property is not visible, the gift should be given before the gift to avoid confusion over the property. This concept has its roots in

¹² *Mullas Muhammadsan Law, Mr Fyzee, 2016*

the Qur'an and Hadith, which emphasize truth and justice in the distribution of property. In response, Shia law accepted the approval of non-divisional divisions, without the need to advance the division, as the subject spread to the executive.^{13, 14}

The specialty of Islamic inheritance legislation is that there are strict laws regarding the distribution of property among heirs. Male heirs typically get twice as much as female heirs, reflecting the traditional gender role in the family structure. The Qur'an defines shares specific to different relatives, providing a systematic approach to inheritance that respects family relationships.¹⁵

In common law jurisdictions such as the United States and the United Kingdom, property rights are governed by principles that prioritize individual ownership and contractual contracts. The concept of joint tenancy allows multiple parties to acquire equal shares in the property with the right to live. If one party wants to transfer his interest in the property, he can do so without the need for a division. However, it can lead to disputes if it is not clearly stated in legal agreements.

Common law systems also recognize ordinary rent, in which each owner has a separate share, which can be freely transferred. Unlike Islamic law's emphasis on family relations and legitimate shares, common law provides greater flexibility in the order of ownership and does not allow gender-based discrimination in inheritance.

The civil law systems that exist in many European countries (e.g. France and Germany) operate under the same regulatory laws that govern property rights and inheritance law. In these jurisdictions, the principle of compulsory inheritance requires the transfer of a portion of property to specific heirs (usually children and spouses), as in Islamic inheritance laws. However, civil law generally does not enforce gender-based inequalities in inheritance shares.

Civil law systems also provide co-ownership mechanisms through the co-ownership mechanism. Property owners may transfer their interests without the need to hold the common property jointly or individually unless otherwise stated in the contracts.

6. SIMILARITIES AND DIFFERENCES

Aspect	Islamic Law	Common Law	Civil Law
Ownership Structure	Mush'a allows gifting undivided shares but requires partition for divisible properties (Hanafi); Shia allows gifts without partitioning ^{16, 17} .	Joint tenancy allows equal shares; tenancy in common permits independent transfer ¹⁸ .	Co-ownership arrangements allow shared management; independent transfer is possible ³ .
Inheritance Rules	Strict rules based on Quranic injunctions; male heirs receive	No gender-based distinctions; inheritance follows	Forced heirship applies; no gender bias in share distribution ²² .

¹³ <https://musheer.com/blog/islamic-law-of-gift-hiba/>

¹⁴ <https://www.ezylegal.in/blogs/understanding-property-division-between-brothers-and-sisters-in-islam>

¹⁵ <https://joshandmakinternational.com/the-division-of-islamic-inheritance-shares-understanding-the-principles-and-distribution/>

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²² [https://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/islamic%20Law%20of%20Inheritance%20\(1\).docx](https://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/islamic%20Law%20of%20Inheritance%20(1).docx)

	double female shares ^{19, 20} .	contractual agreements ²¹ .	
Flexibility	Limited flexibility due to strict adherence to religious texts; exceptions exist for certain gifts ²³ .	High flexibility with contractual freedom; disputes often arise from unclear agreements ²⁴ .	Moderate flexibility within codified laws; clarity provided through statutes ²⁵ .

CONCLUSION

The doctrine of the Mush'a remains a vital but complex component of Islamic property law, balancing modern traditions and demands. While traditional rules emphasize physical tenure and division to validate gifts, contemporary realities call for modifications that respect Islamic principles without hindering commercial growth. Judicial reforms in progressive Muslim societies suggest that the doctrine of the distorted can be effectively updated, allowing the granting of undivided property when physical division is impractical. This study concludes that adapting faith within Islamic legal frameworks can bridge the gap between religious mandates and contemporary economic needs, fostering a more holistic and realistic approach to real estate transactions in today's interconnected society.

¹⁹<https://joshandmakinternational.com/the-division-of-islamic-inheritance-shares-understanding-the-principles-and-distribution/>

²⁰ <https://www.graana.com/blog/islamic-law-for-property-distribution/>

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²⁵ [https://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Islamic%20Law%20of%20Inheritance%20\(1\).docx](https://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Islamic%20Law%20of%20Inheritance%20(1).docx)

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