GIFTS, FAMILY WAQFS AND PRE-EMPTION UNDER ISLAMIC LAW : SOME OBSERVATIONS

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THERE IS hardly any branch of Islamic personal law applicable in this country which has not been developed or modified—whichever of these two terms one considers more aptly applicable to what has happened—either by means of judicial pronouncements or by legislation. It is fascinating to study how the Islamic laws relating to gift, *waqf* and pre-emption have been thus developed or affected otherwise in our country. The purpose of this paper is to make just a few remarks on these subjects.

Life-estates

In *Nawazish Ali Khan* v. *Ali Raza Khan*[1] the Judicial Committee of the Privy Council had criticised the Oudh Chief Court for introducing, by relying upon *Bai Motivahoo* v. *Mamoobal*,[2] "into Muslim law legal terms and conceptions of ownership wholly foreign to the law of Islam." The Privy Council had said:

> In their Lordships' opinion this view of the matter introduces into Muslim law legal terms and conceptions of ownership familiar enough in English law, but wholly alien to Muslim law. In general, Muslim law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim law, whether the *Hidāya* or Baillie or more modern works, and no decision of this court which affirm that Muslim law recognizes the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in tail, for life, or in remainder.

1. A.I.R. 1948 P.C. 134.
2. 24 I.A. 93.

In the course of judgment, the judges referred to an earlier Privy Council decision where, upon the construction of a deed of gift, it was held that "a life interest could take effect as a gift of the use of the property and not as part of the property itself". The difference, therefore, between what the Oudh Chief Court had upheld as successive life tenancies and what the Privy Council, dismissing an appeal from the judgment of the Chief Court, described and declared valid as gifts of the usufruct for life, seemed to be more of form and terminology than of substance. It did not affect the ultimate result in that particular case.

There are, however, cases in which the distinction mentioned above cannot be overlooked as it may affect the validity of the donation. Thus where usufruct is given to successive generations of beneficiaries by means of a *waqf ala'l aulād* under the Mussalman Wakf Validating Act 1913, and the "corpus" is vested in God Almighty, in the eyes of law, the *mutawallī* is not the "legal owner" as a trustee is under the English law. There are many cases where *mutawallīs* and those dealing with them forget this. In a Bench decision of the Allahabad High Court it was held that the *mutawallī* in a private *waqf* was "practically an owner"[3]. But, recently, a Full Bench of the Allahabad High Court has overruled this view.[4]

Family waqfs

The trouble with *waqfs ala'l aulād* is that they tend to be looked upon by *mutawallīs* in management as though they were *waqfs* for their own benefit only. The rights and interests of other beneficiaries tend to be completely ignored. Sometimes the latter themselves become disinterested due to excessive splitting up of their shares. Often they do not consider it worth while to litigate about their rights, even if, they have time and capacity to do so.

Some progressive Muslim lawyers have rightly lamented over the fact that Muslims did not appreciate the rationale of the rule against perpetuities applied by the Privy Council, in *Abdul Fata Mahomed* v. *Russomoy Dhur*,[5] to a scheme of *waqf* under which successive life estates in favour of descendants were created. Such a *waqf* for the "aggrandizement of the family" in which the gift to charity was illusory was, in that case, held to be invalid. As a result of dissatisfaction with this decision among the Muslims, the Mussalman Wakf Validating Act was enacted in 1913 and given a retrospective effect in 1930. It has been said by some observers that this was really due to a desire to find an institution akin to that of coparcenary property of a Hindu joint family.

3. *Mohammad Qamar Shah Khan* v. *Muhammad Salamat Ali Khan*, A.I.R. 193 All. 407.
4. *Mothar Raza & others* v. *Joint Director of Consolidation, U.P. & others*, 1969 A.L.J. 1148.
5. (1894) 22 I.A. 76.

It has been held by Chagla, J. in *Abdul Karim Adenwala* v. *Rahimabai*[6] that a settlor could not validly give himself and then to successive generations of descendants life interests in an income which could be utilised by the beneficiaries absolutely for any purpose they liked. It was held that the Mussalman Wakf Validating Act 1913, enabled a *waqf ala'l aulād* to be created only for the "maintenance and support" of the descendants. His view was accepted by one of two judges of the Allahabad High Court in *Faquir Mohd.* v. *Abda Khatoon*,[7] although both the judges agreed that the *waqf* considered by them was void because of uncertainty of the ultimate benefaction.

It has not yet been decided whether gifts to future beneficiaries or charitable objects would be accelerated where the gift to one or more intervening beneficiaries or objects is invalid but others are good. There seems to be no reason why on principle, the whole *waqf* and not merely the invalid terms should fail. In this regard courts should be given powers, as they have under the Bihar Waqfs Act 1947, to reframe scheme of the *waqf*.

One may also mention here Kamila Tyabji's valuable suggestion that *waqfs* of limited duration should also be recognized under Islamic law.[8]

Family *waqfs*, in their present state, call for more legislative interence and regulation on the pattern of that extended to public *waqfs* under the statute law.

Pre-emption

Legislative and judicial reforms into the law of pre-emption—customary and statutory—introduced in India during the recent years show that at least some parts of the law of pre-emption are not considered, either by courts or by legislatures, to be in conformity with the present day constitutional norms or requirements of justice. It has been argued that these trends can be reconciled with the Muslim religious law of pre-emption.[9] However, whether any part of the law does or does not satisfy either constitutional norms or requirements of justice, equity and good conscience, seems to be a question which has to be decided quite apart from religion. The law of pre-emption appears to have sprung from the need of the Arab tribal organisation and modes of residence. It was a part of Arab customary law. The view of Mahmood, J. in *Gobind Dayal* v. *Inayatullah*[10] that the law as to pre-emption was "a religious usage or institution" within the meaning of the Bengal Civil Courts Act 1876, is open to criticism, unless every aspect of life is part of religion.

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6. A.I.R. 1946 Bom. 342.
7. A.I.R. 1952 All. 127.
8. Kamila Tyabji, *Limited Interests in Muslim Law*, 3, 7, 139 (1949).
9. See Tahir Mahmood, 'Supreme Court Decisions on Pre-emption : Reconciliation with Muslim Law', *S.C.J.* 92-94 (1965).
10. (1885) 7 I.L.R. 775.

Religion and personal law

Although the connotation of the term religion, derived from *religis* (to bind together), could be so broadened as to take all facets of life, social or individual, within its sweep, it seems that if we use it in this sense the utilitarian principles of secularism would also be part of one's religion. And, if this could not be the correct view (in support of which, I am sure, Muslim theologians could find many weighty arguments), any changes in our law, dictated by needs of social welfare, would be part of our religion. Although, it should be our endeavour to harmonize religion with law, yet it seems necessary to keep their principles and spheres of operation apart, if we are not to be so overwhelmed by confusion as to make both ineffective and incapable of serving their true ends.

It appears to me to be a grave error to look upon Muslim law as a part of Muslim religion which cannot be touched or improved so that its imperfections may be removed. Those parts of it which require to be brought in line with the needs of today and with our changed notions of justice, as they have been reformed in the countries whose populations are predominantly Muslim, can be and should be changed. A study of Muslim jurisprudence and personal law reveals that its principles are akin to rules of *jus gentium* embodied in the most advanced Roman law of the *Corpus Juris*. It will be a mistake to think that its spirit or principles are opposed to change or adaptation to new needs. The *Majalla*[11] correctly summarised its spirit when it stated :

> It is an accepted axiom that the terms of law vary with change in the times.[12]

11. *al-Majallat al-Akhām al-'Adlīya* 1876 now repealed, was the civil code promulgated by the Turkish Empire.
12. Art. 39.