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Evaluating the Concept of Donatio Mortis Causa and Marz-Ul-Maut

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ABSTRACT

Donatio Mortis Causa and Marz-Ul-Maut are two concepts under the property law and family law which have often been intertwined in their interpretation as well as their application. Even though both these concepts are similar in nature and their application, there are some fundamental differences between them. One of the major differences is that a gift under DMC automatically stands revoked if the donor recovers from his illness, whereas a gift made under MuM continues to operate as a normal gift despite the donor's recovery. The first half of the paper will be a tracing the historical developments of both DMC and MuM and their application in India. The second part will focus on doing a comparative analysis of both DMC and MuM. This paper attempts to make a case as to why the automatic revocation of a gift under DMC is a much more equitable and reasonable view than the gift made during MuM. The paper shall examine MuM from the perspective of a contract as well as a gift made in a special state of mind and will try to make a case as to why the practice of transforming MuM to Hiba is manifestly arbitrary and unjust.

Keywords: *Donatio Mortis Causa, Marz-Ul-Maut, Family Law, Gift, Will, Gift made in contemplation of death*

I. INTRODUCTION

Donatio Mortis Causa (herein after DMC) and *Marz-Ul-Maut* (hereinafter MuM), are two niche concepts under the law of gifts whose origins go back centuries. Both these concepts concern gifts which are made in contemplation of death. The originated as an amalgamation between a will and a legacy. While DMC finds its origins in roman civil law, MuM is applied as a part of Mohammedan Law. Both these concepts are closely related and have been often invoked together by the Courts in India. Both these concepts originated in order to meet the unforeseen circumstances of the times, when a mere infection or wound could lead to death. These principles of law enabled a man to meet such uncertainties and dispose of his properties as per his wishes. However, since both these concepts are part of personal property law, there

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are certain essential differences between them. Under Mohammedan Law, a Muslim is only permitted to dispose off 1/3rd of his property through will, and this restriction also extends to MuM as it's nature also resembles a will. Another. The recovery of the donor also presents an important point of difference between the two concepts. While DMC allows for automatic revocation, Muslim Law dictates, that recovery of the donor shall transform a gift under MuM to Hiba or an ordinary gift. The paper shall attempt to show why such transformation of MuM to Hiba is not only unjust but also manifestly arbitrary and requires fresh consideration at this often ignored concept of family law.

II. DONATIO MORTIS CAUSA

Black's Law Dictionary defines DMC as "a gift made in contemplation of the donor's imminent death."² Donatio Mortis Causa finds its origins in Roman civil Law. It was first codified under the reign of Emperor Justinian I and was stated in Justinian's Institutes.³ While the original text was in Latin, the English translation can be found in Halsbury's Laws of England:

*"Donatio Mortis Causa must be made in contemplation, though not necessarily in expectation of the death of the donor, in circumstances which show that it is to take effect only in that event, and so as to be recoverable by the donor if that event does not occur, and void if the donee dies before it occurs."*⁴

Under Roman Law, DMC evolved as an amalgamation of the concept of Legacy and gift *inter vivos*. DMC was absorbed into English law through the ecclesiastical jurisdiction.⁵ It first appeared in English Law in Bracton's *On the Laws and Customs of England (1204)* where he defined DMC as a form of conditional gift since it was only perfected on the death of the donor.⁶ Over the years it *has often been confused with 'legacy' since both have certain characteristics which overlap*. A legacy is usually given only through written wills, duly signed, and attested by the donor, and the title and possession of the property concerned remains with the testator till he dies. A DMC on the other hand does not need to be in writing and the possession of the property concerned is given absolutely to the donee even before the death of the donor.⁷ A gift mortis causa has in effect the nature of a legacy and is only a gift on

² Black's Law Dictionary "Donatio Mortis Causa" (11th ed. 2018)

³ Justinian's *Institutes* Book II Title VII

⁴ *Halsbury's Laws of England* (5th edn, 2010) vol 52 para 271

⁵ Bob Hughes, 'The Exception is the Rule: Donatio Mortis Causa' [2003] 7 JSPL 12.

⁶ H Bracton (trs Thorne), *On the Law and Customs of England* (Cambridge UP, 1968-76), vol 2 178

⁷ Thornton W. W., *Treatise on the Law Relating to Gifts and Advancements* (Philadelphia, 1893), 22

survivorship.⁸

The rationale behind the idea of DMC is that when a man is taken with surprised sickness and is in extremity and as a result of which he is unable to make a will, he should be authorised to make such arrangements in the form of gifts which would operate after he dies.⁹ Thus, DMC has been called a gift of an ‘amphibious nature’ by Buckley J.¹⁰, not exactly a gift, nor exactly a legacy, but partaking of the nature of both. *Over the seventeenth and eighteenth century, the English judges adopted the concept of DMC into Common Law.*¹¹

It was thus, this concept of law which finds its origins in the Roman Civil Law, was picked up by English Jurists and enshrined in the Section 178 of the Succession Act of 1865. When the Act was updated, the concept of DMC was covered by Section 191¹² in the 1925 Act under a separate (Chapter XXIII – Gifts made in Contemplation of Death). The Supreme Court of India has laid down these *conditions must be satisfied for DMC to be applicable*:

- (a) the gift be in contemplation of (though not necessarily in expectation of death by suicide).
- (b) the gift must be made upon the condition that it is to be absolute and complete only on the donor's death and is to be revocable during his life. (Death need not, however, occur from the very cause contemplated by the donor).
- (c) The subject-matter of the gift must be delivered to the donee.¹³

It must be noted that Section 191 does not apply to Hindus in India because the law applicable to Hindus related to gifts is covered under Section 122¹⁴ of the Transfer of Property Act, 1882. Gifts under Hindu Law do not differentiate between gifts *inter vivos* and gifts made in contemplation of death. Thus, section 191 is fundamentally different from Section 122, as the former combines the features of both wills and gifts.¹⁵

One of the most distinctive features of DMC that emerge are that it is a conditional gift that is only perfected upon the death of the donor. If the donor recovers from his illness, it is inherent that the gift stands revoked. This is an essential feature as it is understood that the mental state in which the gift was made, also comes to an end if the donor survives the illness. The transaction is said to be revocable at any time before the death by the testator and that it fails if

⁸ *Halsbury's Laws of England* (n 3)

⁹ Law Commission of India, *Indian Succession Act, 1925* (Law Com 110, 1985) 177

¹⁰ *Re Beaumont; Beaumont v Ewbank* [1902] 1 Ch 889

¹¹ see *Sen v Headley* [1991] EWCA Civ 13 [639]

¹² Indian Succession Act 1925, s 191

¹³ *Commissioner of Gift Tax, Ernakulam v Abdul Karim Mohd.* [1991] AIR SC 1847 [6]

¹⁴ Transfer of Property Act 1882, s 122

¹⁵ Paruck, *Indian Succession Act 1925* (Lexis Nexis, 12th edn 2019) 722

the death of the testator does not occur soon after it is made

III. MARZ-UL-MAUT

‘Marz’ means illness, disease or malady and ‘maut’ means death. Thus, ‘Marz-ul-Maut’ means an illness that results in death.¹⁶ The practice of MuM is prevalent in all Islamic Law based countries. The English translations of The Al-Majallah, which was the civil code of the Ottoman Empire, describes MuM as “*a death-illness from which death is to be apprehended in most cases, and which disables the patient from looking after his affairs.*”¹⁷ Justice Abdul Rahim, also used the Al-Majallah to lay down the principles of MuM in his book Principles of Muhammadan Jurisprudence.¹⁸ However, when the malady is of long continuance, and there is no immediate apprehension of death or when its progress is so imperceptible as to cause no fear to the sufferer, the disease does not come within the category of MuM.¹⁹

Baillie’s Digest of Moohummudan Law which was based on Emperor Aurangzeb’s Fatawa-e-Alamgiri defines MuM as,

*“A gift by a sick person is not a legacy, but a gift of contract... (and) being a gift of contract, it is necessarily subject to all the conditions of the gift, among which is included the taking of possession before the death of the giver.”*²⁰

Thus, we can see that MuM is regarded in the nature of a Contract and certain restrictions are applied namely, a gift made during MuM cannot take beyond a third of one’s estate after payment of funeral expenses and debts unless the heirs give their consent.²¹ The Quran mandates that a Muslim cannot bequeath more than 1/3rd of his share by way of a will, so as to not interfere with the rights of lawful heirs. The Hedaya (1197 CE) also states that a Muslim on his death bed, cannot gift more than 1/3rd of his property.²² The rationale being that since MuM is in nature of both will and gift, the restrictions applicable to wills, should also apply on gifts made during MuM.

There are certain distinctions in the law on MuM as it is applicable to Sunni and Shia Muslims. Under the Sunni Law, a gift made in MuM, can take effect to the extent of a bequeathable

¹⁶ Poonam Pradhan Saxena, *Family Law Lectures: Family Law II*, (Lexis Nexis, 9th ed., 2019) 501

¹⁷ *Al-Majalla Al Ahkam Al Adaliyyah* (The Ottoman Courts Manual (Hanafi)), Book VII Section II English translation: <[http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20\(Civil%20Law\).pdf](http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf)> accessed 7 June 2021

¹⁸ See, Abdul Rahim, *Principles of Muhammadan Jurisprudence* (London, Luzac & Co, 1911) 254-255

¹⁹ Syed Ameer Ali, *Student Handbook Mahomedan Law* (Calcutta, 6th ed., 1912) 105

²⁰ Neil B.E. Baillie, *Digest of Moohummudan Law*, (London, Smith Elder & Co, 1875) 542

²¹ Mulla, *Principles of Mahomedan Law*, (Lexis Nexis, 22nd edn, 2017) 274

²² Charles Hamilton (trs), *The Hedaya Commentary on Islamic Laws* (1791) 685 <<https://archive.org/details/TheHedayaCommentaryOnIslamicLawsByShyakhBurhanuddinAbuBakrAlMarghinani/page/n677/mode/2up>> accessed on 8 June 2021

third, in so far as it is not in favour of the heirs. Whereas, under the Shia Law it takes effect to the extent of the bequeathable third, though it is in favour of heirs provided possession is transferred.²³

MuM is applied by the Courts in India as a part of personal law under the Shariat Application Act.²⁴ Fayzee in his book has said that a malady that lasts longer than a year is of long continuance and should not be regarded as MuM, however, there is no hard and fast rule, and every case has to be judged upon the facts of the case.²⁵ The Supreme Court, in the landmark case of *Commissioner of Gift Tax, Ernakulam v Abdul Karim Mohd.*²⁶, upholding a Calcutta High Court decision,²⁷ laid down three tests to determine whether illness is to be regarded as MuM:

1. Proximate danger of death.
2. Some degree of subjective apprehension of death in the mind of the sick person; and
3. some external indicia chief among which would be the inability to attend to ordinary avocations.²⁸

Another attribute that makes MuM unique is that, if the donor of the gift recovers from the illness, it would not be called a gift made during MuM, however, it would still operate as an ordinary gift.²⁹ In such a case, the restriction of one-third property will also not apply to the gift.

IV. COMPARING DONATIO MORTIS CAUSA AND MARZ-UL-MAUT

After going through the origins and application of both DMC and MuM in India, we find that both the concepts are quite similar and have often been compared by the Courts in India in their application.³⁰ However, both these concepts do have some minute differences which set them apart. First, the DMC permits the transfer of only moveable property while the subject matter of gifts made during MuM covers both moveable and immovable property. Secondly, in DMC, there is no impediment to the powers of the donor to make a gift with respect to the extent of property or even the class of donees. The entire property can be gifted, and it can be given to anyone including the heirs. Lastly, in case of DMC, if the donor recovers from the

²³ Faiz Badruddin Tyabji, *Muhammadan Law, The Personal Law of Muslims*, (Bombay, 3rd edn, 1940) 817

²⁴ The Muslim Personal Law (Shariat) Application Act 1937, s 2

²⁵ Asaf A.A. Fayzee, *Outlines of Muhammadan Law*, (Bombay 3rd edn, 1948) 374

²⁶ [1991] AIR SC 1847

²⁷ *Fatima Bibee v Ahmad Baksh* [1904] I.L.R. 31 Cal. 319

²⁸ *ibid* 16.

²⁹ Poonam Pradhan Saxena, *Family Law Lectures: Family Law II*, (Lexis Nexis, 9th ed., 2019) 503

³⁰ *Commissioner of Gift Tax, Ernakulam v Abdul Karim Mohd* [1991] AIR SC 1847 [9]

illness and escapes death, the gift fails in its entirety. The donor regains possession of the subject-matter of the gift, but a gift made during MuM is subject to different rules. If the donor recovers from the illness and comes out of the apprehension of imminent death, the gift is called an ordinary gift or hiba and would take effect validly.³¹

V. MARZ-UL-MAUT AS A CONTINGENT CONTRACT

At the very outset, it is important to note that Gifts and Contracts are fundamentally different concepts, however, the analogy to contracts has been used by scholars of both Muslim Law and British Common Law³² to explain the concept better.

If we consider MuM as a contingent contract, then it is only logical that it must satisfy the essential elements of a contract. Section 31³³ of the Contract Act, defines contingent contracts as those contracts under which the performance depends upon the happening of a certain event. Thus, if gifts made in contemplation of death are contingent upon the death of the donor, (even though possession of the subject matter must transfer) there must be an understanding that the gift will be taken back if the donor survives the illness. We see that the British concept of DMC does follow this basic requirement whereas under MuM, even if the donor recovers from illness, the gift continues to operate as an ordinary gift. However, this position seems to be contrary to the basic law on contracts and if Muslim scholars themselves evoked the comparison with contracts, it must be held that the practice of a MuM operating as an ordinary gift must be said to be erroneous.

VI. MARZ-UL-MAUT THROUGH THE LENS OF MENTAL CAPACITY

The most distinguishing feature of a gift made in contemplation of death is the state of mind of the donor. The whole object of gift made in contemplation of death is to give the donor who is under apprehension of death, a chance to dispose of his property as per his wishes. Thus, these gifts are executed with a sense of urgency or haste and are not a result of well contemplated actions of a reasonable man. The Supreme Court of Pakistan has also said that the gift under MuM is made 'under the pressure of the sense of imminence of death'.³⁴ Thus, we see that when a gift is made under MuM, the distinguishing feature is that the donor was in a particular state of mind. thus, it should follow that if the donor recovers from his/her illness, the state of anxiety which had gripped him will also come to an end and the gift should automatically stand

³¹ Poonam Pradhan Saxena, *Family Law Lectures: Family Law II*, (Lexis Nexis, 9th ed., 2019) 505

³² see Neil B.E. Baillie, , *Digest of Moohummudan Law*, (London, Smith Elder & Co, 1875) 542; H Bracton (trs Thorne), *On the Law and Customs of England* (Cambridge UP, 1968-76), vol 2 1788.

³³ The Indian Contract Act 1872, s.31

³⁴ *Shamshad Ali Shah v. Saved Hasan Shah* [1964] All PLD43 (Kaikaus J.)

revoked. However, we see that Muslim law permits a gift made under MuM to operate as an ordinary gift or Hiba even when the donor recovers from his illness and is out of any apprehension of his/her imminent death. The Bombay High Court in *Abdul Hafiz Beg v Sahebbi*³⁵ said the proximate danger of death affects the rational capacities of a person himself. In such scenarios, the conversion of a gift under MuM to a Hiba is even more detrimental to the donor as revocation under Muslim Law is very difficult if the possession has already been delivered. As per Mulla,

*“Once a valid gift is brought into existence, the gift becomes irrevocable and nothing short of a decree of Court would revoke the gift. Therefore, mere cancellation of the deed of gift by the donor would not operate as a revocation of the gift.”*³⁶

The Supreme Court in *Abdul Rahim v Abdul Zabbar*³⁷ has also reiterated that if by reason of a valid gift, the thing gifted has gone out of the donee's ownership, the same cannot be revoked. Thus, we see that if the donor makes a gift under MuM, not only will that gift be treated as a normal gift, but if the property has passed onto the donee, mere declaration on part of donor will not suffice. Given, the fact, that the gift was already made under the conditions of duress, the practise of treating the MuM as Hiba is manifestly unjust and contrary to the principles of equity itself. A gift under DMC on the other hand, automatically gets revoked if the donor recovers from his illness because it is recognised that once the donor recovers from his illness, he also overcomes the particular state of mind under which the gift was made, and it would be unjust to enforce a gift made under such duress.

The principle of Contract Laws also lay emphasis on the state of mind of a party when a contract is made, as free consent is foundational to a Contract. If a party makes a contract when it is of unsound mind, the contract is said to be void.³⁸ The English law goes one step ahead and also recognises duress as a ground for vitiating a contract. When a gift is made by a person on his death bed, it is not difficult to contemplate, that the donor may lose his free will, his spiritual dictates and may hasten even against the need of his clear obligations and interests to do the things which he might not have normally or in times of health. In the author's opinion, the better alternative than enforcing a gift under MuM would be for the gift to be automatically revoked if the donor recovers from his illness. If the donor does wish to make a gift to a donee

³⁵ [1975] AIR Bom 165 [8]

³⁶ Mulla, *Principles of Mahomedan Law*, (Lexis Nexis, 22nd edn, 2017) 274

³⁷ [2009] M.L.J 1075 [10]

³⁸ The Indian Contract Act 1872, s.12

after his recovery, the donor would be competent to make an ordinary gift.

Illustration: Suppose Mr. X, a Muslim is in a hospital after a sudden heart attack and apprehends his death. He is under extreme duress and wishes to dispose of his property as soon as possible. He gives 1/3rd of his property to his Doctor Y (there is constructive delivery of possession), who was treating him to show his gratitude. X, however, makes a recovery and does not die. But as per Muslim Law, X cannot revoke his gift by mere declaration and his gift made under MuM operates as a Hiba. The only way left to X is to apply for a decree in Court and incur legal expenses just, so that he can get 1/3rd of his property back.

The above illustration elucidates why the rules under Mahommeden Law concerning MuM are irrational and unjust. In the above illustration, if the rule had been that the gift would automatically stand revoked in case of donor's recovery, Mr. X wouldn't have to go to great lengths to get his gift revoked. The situation becomes much more dire, when one realises that MuM allows the donation of both moveable and immovable property as compared to the DMC. Thus, there should be even a greater onus to prevent the Donor from being a victim of his special mental state, however that is not the case.

VII. CONCLUSION

This paper has made a small attempt to make a case why the Mahommedan Law dealing with MuM needs to be upgraded and be more on the lines of DMC. Mahommedan Law allows the corpus of the gift to be from both moveable and immovable property, and thus, there is even a greater need to ensure that the donor of the gift in case of recovery should not actually suffer from a decision that was made under a very difficult state of mind and under conditions of extreme stress and duress. Automatic revocation of gifts made under MuM not only respects the true intentions of the donor but is also much more in lines with the principles of natural justice and equity. The Court in India have always given certain leeway to personal law however, recently the Courts have started ensuring that personal law also meets the criteria of reasonableness and is not manifestly arbitrary.³⁹ The Constitution has also placed a duty on the State to ensure that reform of personal law is carried out, and as such, there is a need by both the State as well as Muslim Scholars to examine this niche of Muslim Personal Law which has remained unexamined but has an underbelly which in the author's opinion is manifestly unjust and violates the principles of equity and good consciousness.

³⁹ see *Shayara Bano v. Union of India* (2017) 9 SCC 1

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