The Division of Properties and Common Interests in Islamic Jurisprudence

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ABSTRACT
Division (Taghsim) literally means to differentiate and to divide. Legally speaking many jurists has various interpretations for division (Taghsim). Some consider it as selling (Bey) and other judiciary scholars call it right contradistinction. However some jurists call it reconciliation or distinction based on interaction and exchange. Anyway, Taghsim is of different kinds from among which the Mahayat (the partition of usufruct). Mahayat is also divided into time and place. During the present paper, the researcher tried to explain the nature of division and enumerate the various kinds along with the related conditions.

Keywords: Division of Property, Common interests, Islamic Jurisprudence

Introduction

1.1 What is division (Taghsim)?
Literally division (Taghsim) means to differentiate the share of any person from other.

1.2 The nature of division (Taghsim)
The Islamic jurists and jurisconsults have different ideas regarding the nature of division (Taghsim). The Sunni jurists believe that division (Taghsim) is bey (selling). To them, the term division (Taghsim) is carried out when one party of the contract in general fail to fulfill his/her commitment. In that case a specific portion of the property is devoted to the sharer for an independent possession. This bargain resembles a kind of divided share (Mosha) or a specific portion of that division as bey (selling).

Henry Captain, the famous jurist believes in the exchange of division. He wrote: the division of common property has a nature of exchange. It means each sharer disregards some portion of the common property against the putative in as so much found from the common share. Shahid Sani considers division as a kind of exchange. He argues that before any joint division, each sharer has interest in any portion of the common property. But after the division, each party has the right to division. It would not be substantiated without any exchange of rights or some form of exchange (Mirza Muhammad Ashtiani, Ketabolghaza, Vol. 2, p.292).

Division (taghsim) in the view of many Imamieh jurists even in the division of rejection is recognition of right. Even Sahib Javaher claims that there seem to be no objection to this idea (Najafi,M.Hassan, Javaher-O-Al-Kalam Fi Sharhe Sharaye-Al-Islam, Vol.26). The common property belongs to the all sharers before any joint division and it would be differentiated after the division of the shares. The division of shares does not necessarily mean the exchange between the parties. Some consider division as the right to the discrimination of the right of exchange. This is due to the fact that the right distributed in the whole will turn into an independent right in part which is the primary right. Therefore, the recognition of right is not the only thing dealt with in division but the joint right is changed to putative. For this reason, if the subject of the contract is irremovable it should be registered and recorded in an official notary public. In other words to fulfill the demands of the sharers and right recognition is in related to the compromise of the parties. However, in some cases the judge takes the place of one or some parties in a transaction (Katuzian,P.56). Another scholar believes that the parties willing to a contract do not have any exchange formally but change the quality of their possession which is in the form of Eshae. This transformation can not be called exchange. This compromise can be called the agreement (M.J.Jafar Langroodi, the Encyclopedia of Islam, Vol.2, P.66).

1.3 Different types of division
A. The division of property. It is the division of a common property between two or more people like the division of a piece of land between the spouses.
B. The division of debt. It is the division of a debt like the division of the debt of heritage which is common. This debt is divided as property.
C. The division of Mahayat (the partition of usufruct). It is the division of common interests (Naser Katuzian, P.75).
1.4 Why is Mahayat (the partition of usufruct) allowable?

A. The Holy Quran. According to Holy Quran (Verse 155, Shaara) the prophet Salih asked Allah to create a camel out of rock for the sake of his followers. Allah did so. Then, the prophet Salih said to his people: this is the camel you asked and he has his portion of water and you have your own portion of water daily. From this verse it can be understood that the division of property is allowable.

B. Sunnat (tradition). The holy Prophet Muhammad (PBUH) divided seven camels among his three followers.

C. Ijma (Consensus). The Islamic jurists allow the (Mahayat) partition of usufruct (Shahid Sani, Vol.3. P.166).

D. Wisdom. If Mahayat is not allowable, the properties that are created for benefit can not be transferred since the disagreement of some sharers on using the common property leads to the cancellation of the profit. This is supported by the verse:

1.5 What is Mahayat?

Mahayat is a partition of usufruct. It is actually the language of the law and signifies the partition of usufruct; and it is allowed; because it is frequently impossible for all the partners to enjoy together, and at one time, the use of thing held in partnership. Mahayat, therefore, resembles the partition of property (whence it is that the judge may enforce it in the same manner) with this difference, however, that in the partition of property each partner enjoys the use of his respective share at the same time, whereas in the partition of usufruct each most frequently enjoys the use of the thing held in partnership only when it comes to his turn, by rotation partition of property is therefore more effectual than partition of usufruct in accomplishing the enjoyment of the use; for which reason, if one partner apply for a partition of property, and another for a partition of usufruct, the judge must grant the request of the format; and if a partition of usufruct should have' taken place with respect to a thing capable of a partition of property such as a house or a piece of ground), and afterwards one of the partners apply for a partition of property, the judge must grant a partition of property and annul the partition of usufruct. And is not annulled by the decease of the parties. A partition of usufruct is not annulled by the death of one of two partners, nor even by the death of both, for if it were annulled, it must (most probably) be renewed (since the heirs of the deceased may lawfully demand a partition of usufruct), and therefore it would be to no purpose to annul it. Partners may nuke it by allotting to each the use of a particular part of the joint concern. If two partners, by a mutual contract, make a partition of usufruct respecting a house, to this effect, that one of them shall inhabit one part of it and the other another, or, that one shall inhabit the upper floor and the other the under, such contract is valid; for as a partition of property executed in this manner is lawful, so likewise is a partition of usufruct. It is proper to remark, that a partition of usufruct, when thus executed, is in reality a separation, that is, a division of the whole of the shirks of usufruct of one partner from those of another partner, and a concentration or both into one place: but the contract does not comprehend an exchange, whence it is that a limitation of time is not required in it ; for if it comprehended an exchange, a limitation of time would have been requisite because of its being (in that case) a lease. It is lawful for each partner to let out on rent that part of which the usufruct has fallen to him. and he may appropriate to himself the rent accruing there from, whether it be a condition in the agreement of partition of usufruct or not; for every use which accrues from that part becomes (in consequence of the partition of usufruct) his property and the rent which he receives is nothing more than a comprehension given him in lieu of the use accrue from it.

1.6 ‘Different types of Mahayat (the partition of usufruct)

Mahayat is divided into two types: Time Mahayat, and place Mahayet. In time Mahayat, the sharers agree to use the common property in turn and alternatively. For example, the division of driving a car for a period of six months. In place Mahayat, the two parties agree, for instance, to divide the agriculture of a common piece of land. Sometimes two people inherit a common apartment and they agree to live in that place together.

2. Conclusion

Division literally means differentiation of things but jurists have different ideas with regard to its nature. Some call it selling, exchange, the recognition of right, reconciliation, and the recognition based on exchange. Anyway division has various forms from among them Mahayat (the partition of usufruct) is of major importance. Mahayat has some conditions and enjoys the four reasons (Adeleye Arbæ).
References


