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Analyzing the concept of wills under different schools of Muslim Personal Law: A detailed study

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Abstract
In a country like India where the Constitution enunciates some very progressive values for the development of Indian society, it also provides a plethora amount of rights to the religious sects to follow their certain customs, rituals and practices. Amongst those practices there happens to be leverage given to the Muslim community to follow their own Sharia law pertaining to testamentary successions. There exist a lot of conditions that are required to be followed while executing the will and that is the only aim of this paper. This paper aims to analyze those conditions with special reference to the difference between the Sunni and Shia schools of will.

Keywords: wills, Sunni, Shia, consent, Muslim, sharia

Introduction

In Hindu law and in Islamic law, there are a plethora of ways of disposing of a property. A Muslim may dispose of his property by donation, gift, establishing a wakf, or accessing his testamentary forces, i.e. by creating a Will, under Islamic law. A Will or Testament or Wasiyat has been described as a method by which an individual makes his property available to take effect after his death.

A Will's distinguishing characteristic is that it becomes valid after the testator's death and is revocable. Unlike every other condition (e.g. selling or gift), until he is alive, the testator maintains complete power over the property left: the legatee or beneficiary under the Will cannot intervene in any way with the authority of the legator to enjoy the property, including its disposition or transfer (in that case, the Will is revoked).

In Islamic law, there is a strict rule regulating the validity of a will. According to this rule, a Muslim can only make a will for anyone, to the extent of one-third of his total property. If the will is made above one-third of the land, no matter in whose favour the will is made, the consent of the legal heirs is necessary.

There are some conditions that make a Will apt and capable of taking place if we speak about the legal validity of a Will under Muslim law. The following criteria that are addressed must also be met:

- In order to generate a will, the legator must be qualified.
- The legatee must be deserving of obtaining such an inheritance.
- A bequeathable property must be the property endowed by the legator.
- The legator's and the legatee's free consent.
- Testamentary rights over the properties must be retained by the legator.

Schools under Muslim Law:

Broadly, there exist only two schools that provide different perspectives concerning certain aspects of Islam and they are; a) Sunni Schools; and b) Shia Schools.

Sunni school is divided further into 4 major schools and those are as follows

1. Hanafi School:

This school is considered to be one of the most popular schools under the Muslim law, it is also known as the Koofa School i.e. named after a city *Koofa* in Iraq, it was later renamed as Hanafi because of having Abu Hanafi as its founder. This school basically derives its education from the customs and certain decisions of the Muslim community under the Prophet. It basically recognizes the precedents that were prevalent during that time. It is also observed that the followers of this school are found in almost every country be it India, Pakistan, Syria, Iraq, Turkey, etc. The majority of Muslims in India are the followers of the Hanafi School.

2. Maliki School

This school finds its roots from the name of Malik-bin-Anas, this person was the mufti of the Madeena and this person discovered around 8000 traditions of the Prophet, disgorged around 6000 traditions and compiled 2000 traditions. This school basically didn't get much importance because the person challenged the sovereignty of the Khaleefa. It is observed that while Marriage laws in India were determined during the Independence days for Indian Muslims then some provisions of the Maliki School were taken into account because the provisions in the Hanafi School procrastinated some essentials of marriage.

3. Shaffi School

This school has got its name from Muhammad Idris Shaffi, this person was a student of the Imam Malik of Madeena. It is also observed that this person worked in collaboration with Abu Haneefa. Therefore, the ideas of this school provide a mixture of Hanafi and Maliki School. This school provides some very important essentials of Islamic Jurisprudence like Personal reasoning, consensus, disagreement, etc. The followers of this school are generally found in Egypt, South-east Asia, Indonesia, Southern Arabia, etc.

4. Hanbali School

The founder of this school is Ahmad Bin Hanbal, this person supports the Hadiths and is also considered as a disciple of the Imam Shaffi. The main purpose of this school is to analyze certain theories of Sunni and Hadiths and get the answers to certain important questions. Followers of this school are generally found in Syria, Palestine, Saudi Arabia, etc.

Shia Schools are further divided into 3 parts

1. Ithna-Ashris School

This class of Shia Muslims is found in a majority in India, the origin of this sect has taken place in Iran and Iraq. These are basically considered to be political quietists.

2. Ismailis School

In India there happens to be two groups i.e. the *Khojas & Boharas*. These people basically represent the community of Aga Khan, who happened to be the 49th Imam in the line of Prophet and it is generally observed that the follower of this school possess some special wisdom regarding religious doctrines.

3. Zaidi School.

The presence of this community is found heavily in Yemen and South Arabia. These people are considered to be one of the most dominant political activists and it is observed that they reject some ideas of the philosophers under the Shia School.

Some other schools are

1. Ahmadiya School

The followers of this school don't believe in the philosophies of Prophet Mohammed and that is the main reason for them being not accepted by the Muslim Governments as the government's claim that their practices are against the belief of Muslims. They follow a person named *Ahmad* whose birth took place in Punjab. The basic difference between the followers of this group and the Shia/Sunni Muslims are that these people continue to believe that God communicates with its followers even after the Prophet. It is their claim that before Prophet, there were other messengers like Buddha, Krishna, Ramchandra, etc.

2. Ibadi School

The followers of this sect are originated from the 4th Khaleefa Ali, the followers of this sect give more preference to the *Holy Quran* and not the Sunna. The followers are generally found in Oman.

What can be the nature of the Will

The Will generally gives the legator a chance to do something that might prove to be helpful for someone, even to the one who is not entitled to inherit from the very legator. Both under Sunni and Shia laws the Wills can be oral and written and therefore the important aspect that comes here in the intention of the testator, that is necessary to be unambiguous and clear so that the Will becomes executable after the death of the testator. Written Wills are generally unambiguous and clear whereas sometimes there is observed that oral wills requires certain conditions to be fulfilled and those are: a) the intention of the testator or the legator should be proved beyond reasonable doubt; b) there exist no bar on the numbers of witness regarding the validity of the Will: c) the exactness and the terms of the oral Will should be proved.

Who is capable of making a Will

1. Person should be Muslim:

Under Islamic law, a will produced only by a Muslim is regarded as an authentic will. At the moment of execution of the Will, if a legator is Muslim, then only the Will is regulated by the Muslim Personal Law.

In a situation where a Muslim is married under the Special Marriage Act of 1954, then the terms of the Indian Succession Act of 1925 will apply and not the Muslim Personal Law on such a Will made by such a Muslim.

A circumstance may arise where the legator at the time of executing a Will was a Muslim but subsequently renounced Islam and is therefore recognized at the moment of death as a non-Muslim. Under Muslim law, a will formed by such a Muslim is treated as a right Will.

2. The person should be of sound mind:

The legator must be sane while the Will is being made. Under Muslim law, at the time of execution of a Will, it was quoted that a legator must have a complete 'disposing mind'. In other words, a legator must be capable of recognizing his acts and the legal ramifications of what he does not only for the specific period of time when the Will is made but also of preserving the same until his death.

It is also pertinent to note here that if a legator is of sound mind when the Will is declared and subsequently turns insane and remains the same till death then, the Will made by such legator becomes void. On the other hand, if a legator executed a Will while he is insane then also the Will is considered null and void even if he recovers the insanity afterward and remains the same till death.

3. What is the age of majority?

For a Will to be valid and justifiable, a person must attain the age of majority, and that age of majority is governed by the Indian Majority Act 1875, which also provides us the certain exceptions regarding marriage, divorce, etc. Under the Indian Majority Act, in ordinary cases, the age of majority is defined as 18 years and 21 years if the person is under the supervision of the Courts of Wards. Any will executed by a minor is deemed void. The legitimacy of such will is deferred until the balance is reached by the legator. Therefore, a legator should be 18 years, or 21 years, as the case may be, in order to establish a legitimate Will. It is also pertinent to note that a Will by a minor gets legitimate as soon as the legator converts into a major and ratifies the Will.

4. What if there's an attempt of suicide by the legator?

There's a unique provision under the Shia Law and that is if a Will is made by a person who has attempted to commit suicide then such kind of Will would be considered as void under the Shia Law and the reasoning given behind this provision that the person who attempts to commit suicide cannot be termed as a normal or sane person and the person is considered as unstable and insane. But this is not the same under the Sunni Law, there afore kind of wills are considered as valid.

Eligibility for receiving a property

1. That person should be a living person

A legatee is competent to accept a will on condition that he must live at the time of the legator's death. This is because a Will comes into force only after the legator's death and not

before the legator makes it. A Will that is in support or favour of a non-Muslim, minor or insane person, can also be executed. A charitable or religious organization is, therefore, a competent legatee and it has the legal right that any person can execute any Will in favour of it.

2. An Unborn Child or A child who is there in a mother's womb

An infant in the womb of a mother is considered as a living person and is, thus, under two conditions, a qualified legatee under Islamic law. The first condition is whereas the one, at the time of the declaration of the Will, must be alive in the womb of the mother. The second condition is that under the Sunni Law the birth of the child has to take place within 6 months from the date of execution of the Will. Whereas under the Shia Law it should be within 10 months.

3. What happens when a legatee kills legator?

A Will shall come into force only after the death of the legator. Thus, in order to acquire the property as soon as possible, there is a risk that an uncaring and impatient legatee could cause the legator's death. It is pertinent to note here that under the Sunni Law if a legatee causes the death of the legator intentionally or unintentionally, then he/she becomes disentitled from the will but the scenario is different when it comes to Shia law, here if a legator's death in caused unintentionally or negligently or accidentally by the legatee, still he will be entitled to take the property as stated in the Will.

4. Whether consent is required of the legatee?

It is to be kept in mind that the consent of the legatee is necessary under the Will, basically to know that whether he/she wants such property or not and it is also pertinent to note that the legatee possesses the right to disregard the Will and when this happens then the bequeathed property is considered to be void and if he/she accepts it then the expression may be conveyed to the legator either impliedly or expressly.

What can be the subject matter of the property?

Any form of property that has the power to be transferred, whether immovable or movable, corporeal or incorporeal, may be the subject of a Will Transaction under Muslim law, it may be possible for a testator to grant property to any one person and the right to use it to another without harming him. The Legator is obliged only to bequeath down the property that he owns. The property must remain at the time of the legator's death.

These may be of different kinds, such as:

1. Conditional Bequest.
2. Bequest of Life Estate.
3. Testamentary Capacity.
4. Alternative Bequest.
5. Contingent Bequest.

It is also pertinent to note that if a Muslim keeping in mind the Shia and the Sunni law, wants to execute a Will then he would be able to do till the extent of 1/3rd of the total property that is ascertained after the completion of the payment of the death & funeral expenses and debts. It is pertinent to note that in the case of *Rijia Bibi V. Md. Abdul Kachem* [1], the Guwahati High Court held that if a will is not consented by the legatees then it shall not have a valid effect meaning thereby that it shall be void. Where the rightful claims of the heirs cannot be disturbed keeping in mind the certain hadiths, The exceptions to the one-third rule are basically; A person having no heirs can bequest the whole property and the second is when the heirs themselves give their consent to bequest more than the 1/3rd rule.

The concept and the importance of consent under the Muslim Law of Will

As stated in the aforementioned paragraph under the Sunni Law a person cannot bequest more than 1/3rd of the total property without the consent of the legatees and there exist 2 exceptions that I stated earlier. Whereas in the Shia Law can be considered to be valid provided that it doesn't exceed the bequeathable 1/3rd limit and if it is getting exceeded then the consent of that legatee or heir will have to be taken whose share is likely to get affected and an interesting point here is that under the Shia law of Wills the aforesaid consent can be given before or after the death of the legator but under the Sunni law this consent has to be given only after the death of the legator and once the consent is given then it cannot be annulled and the legatees have to be bound by that.

Certain rule(s) of reduction or abatement under the Muslim Law

The Rule of Rateable Proportion is a unique concept under the Sunni Law where if there exists one or more legatee and if the share that is given to them exceeds the limit of 1/3rd proportion then the same exceeding amount would be reduced to the limit of normalcy and equity proportionately. Abatement refers to 'deducting' or 'having less'. Rateable means 'reasonable'. This means that, without the consent of the testator's/legator's heirs, the assets allocated to each legatee shall be reduced in proportion to the share allocated to him in such a way that the sum of the assets allocated to all of them shall not exceed one-third of the bequeathable assets. The deduction in the ratio of what they have earned under the Will is rendered from the share of each legatee. It is interesting to note that the spouse of the deceased is left or is given a reasonable exception of being entitled to the whole property of the deceased if they possess no heir. It is a matter of good conscience where the principles applied under the very rule provides a good amount of equality and representation to all the heirs but it certainly leaves the interest of the one who might've provided a greater amount of care to the testator

Under the Shia Law, another rule is applied for bequeathing and that is the Rule of Chronological Priority also known as preferential distribution, where the legatee whose name appears first in the list is given his share of the 1/3rd property, then accordingly the other heirs but it is pertinent to note here that if the share amount gets over after the distribution to the second legatee and then if there comes a third legatee then the third legatee would not be entitled to anything and that is something where I have an objection to because if it is stated that the divine law should not do unjust enrichment then there should be justice done to the third legatee which the rule of chronological priority fails to address.

Registration of will

It is not mandatory for a Will to get registered but the Law recognizes the registered Will and the Will has to be

[1] AIR 2013 Gau 34.

registered in accordance with sections 40 and 41 of the Registrations Act. Certain conditions are to be fulfilled for registration and those are:

1. That the Will should be executed by the authority of the Legator:
2. That the legator is now dead.
3. That the person who is presenting the Will is entitled to share under the will.

Sometimes when there are amendments to the Will the Codicil instrument can be used for enunciating or altering some points that can be later considered to be a part of the Will and it is pertinent to note that the appointment of the executor shall be a must. There are certain important conditions that are to be kept in mind prior to the execution of will and after the death of the legator and those are: a) The payments regarding the funeral expenses shall be done; and b) There should exist no debts unpaid of the legator. Only after these 2 acts, the execution of a Will can take place.

Revocation of will

It is pertinent to note that a testator is free to revoke the very Will at any time before his death expressly by words or by implied acts. In other words, a Will may be revoked by a testator at any time during his life. The revocation may either be of the whole bequest or only of a part of it. The example of express revocation would be when a legator bequeaths the same portion of the property to another then the Will stands revoked and the example of the implied act would be that where the legator sells the very property or build an endowment in it then it would be construed that the will stands revoked.

So just to summarize for the reader, let us revise the generic differences between Sunni and Shia Law:

- Under the Sunni law, a bequest to a particular legator without the consent of other legators shall be held as invalid whereas, under the Shia Law, it is considered to be valid up to the share of 1/3rd of the total property.
- Under the Sunni law, if any bequest is made to an unborn child then the child should be born within 6 months of the making of the will. Whereas under the Shia law it is 10 months.
- Under the Sunni law, any legatee who causes the death of the legator even accidentally then the legatee is not entitled to any share of the will. Whereas this is not the case in Shia Law.
- Under the Sunni law, any bequest that is more than 1/3rd and that is made to a non-heir then the consent regarding the same shall be taken from the heirs after the death of the legator. Whereas under the Shia Law the consent can be taken before the death of the legator.
- Under the Sunni law, a Will made by a person committing suicide is held to be valid but it is considered to be invalid under the Shia law.
- Under the Sunni law, the rule of rateable proportion is applied. Whereas in Shia law, the rule of preferential distribution is applied.
- Under the Sunni law, if any legatee dies before the death of the legator then the legacy that is made by the legator lapses and the share goes back to the legator. Whereas under the Shia Law the legacy created lapses only when the legator dies without leaving any heir.
- Under the Sunni law, the legacy has to be accepted by the legatee only after the death of the legator and under the Shia law, a legatee can even accept the legacy before the death of the legator.

2 Important Cases

1. Huseni Begam vs Syed Mohammad Mehdi [2]:

In this case, an appeal was made by a Muslim woman, against the decree passed by the sub-ordinate court that dismissed her petition for possession of the property. Here her nephew Mohammed Mehdi was in possession and the contention made by the plaintiff was that she was entitled to the property bequeathed to her by her mother and her sister but the property has been denied to her. The Allahabad High Court iterated that under the Shia Law the testator can leave a legacy to a heir as long as it doesn't exceed 1/3rd of his estate and such legacy is valid even without the consent of other heirs but where it exceeds the 1/3rd portion then the consent of the heirs is important. Therefore, in the instant case, the power used by the mother of the plaintiff was the same that the court iterated in the aforementioned lines and the revocation prayed by the plaintiff in the instant case was insufficient and improbable. Hence the Court said that the Will is valid, cannot be revoked and the petitioner is not entitled to the property. Therefore, the appeal was dismissed.

2. Abdul Hameed vs Mohammed Yoonus And Ors [3]:

In the instant case, Abdul Hameed was the son of Hajee Ismail Sait, who was a renowned Cutchi Muslim. Hajee Ismail Sait died in April 1934 and was survived by a widow, five sons, and a daughter, and had 16 grandchildren. Hajee Ismail Sait left a Will and with that, he provided education of his grandsons and for some, he made special provisions. When the person was in sanitorium their he decided to fix allowances to his sons and daughter and therefore instructed his solicitors to draft a codicil and by clause 14 of the Will the legator provided for maintenance and education of the five sons of the respondent. As the legator is a Cutchi Memon, so the provisions of the Muslim Law will apply. The Court iterated the validity of the Codicil and held that the instructions of the legator that is given written on a plain paper or in the form of a letter and that in clear terms provide for the distribution of his property after his death would constitute a valid will. Hence the appeal was allowed by the High Court.

Conclusion

The concept of Muslim Will is majorly based on the divine law of Jurisprudence where we read about the morally or ethically just or unjust nature. It is also pertinent to note here that amongst the concept of an oral and written Will, the concept of oral will appeared to be subjective in nature and that there should exist the concept of Written Will only because the conditions, as well as requirements for the oral, differs a lot i.e. the number of witnesses, the intention or exactness as these things can be influenced easily whereas, in the written Will, the conditions that are stated appears to be prima facie valid when compared with the oral form of Will. The Muslim concept of Will i.e. *Wasiyat*, where it generates curiosity in the mind of the reader about the concept of One-third distribution as traced in the Hadis. It is pertinent to note that under both schools the significance is

[2] AIR 1927 All 340.
[3] AIR 1940 Mad 153.

given to the intention of the testator with regard to his property. The concept of one-third proportion is not legitimate and is somewhat ambiguous whereas the concept enshrined in the Indian Succession Act appears to be a bit clear regarding the 100% testamentary disposition of the property.

References

1. Ameer Ali: Mohammedan Law, Vol. I.
2. Asaf AA Fyzee. Outlines of Muhammadan Law (Fourth Edition), 1974.
3. Family Law II, A.K. Jain.
4. http://www.legalserviceindia.com/legal/article-251-concept-of-will-under-muslim-law.html
5. https://blog.ipleaders.in/islamic-law-will/. (last accessed on 2nd Oct 2020)
6. https://blog.ipleaders.in/schools-of-muslim-law/. (last accessed on 1st Oct 2020)
7. https://www.lkouniv.ac.in/site/writereaddata/siteContent/20200402193036516 0rksingh_Law%20of%20Will.pdf. (last accessed on 4th Oct 2020)
8. https://www.willjini.com/assets/img/Laws%20related%20to%20Will%20by%20a%20Muslim.pdf. (last accessed on 2nd Oct 2020)
9. M.A Qureshi, Principles of Muhammadan Law, (Ninth Edition), 2005.
10. Tyabji, Muslim Law, ed. IV.
11. Yawar Qazelbash, Principles of Muslim Law, (Fifth Edition), 2005.