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Comparative study of will and inheritance in low of Iran and Shafi'i jurisprudence

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Abstract: In legal system of all countries the will is greatly addressed and emphasized. In Iran legal system the will has jurisprudential origin as many other laws. From long time the legal situation of will was the matter of disagreement among jurisprudents and lawyers and Iran civil law has not specified a clear position similar to other disagreement matters. Iranian legislator by following holy lawgiver divided the will into two parts of directive and possessory will. And in the article 826 of civil law has explained the two terms. Meanwhile most of jurisprudents of Sunnite religion believe that the will takes place by compliance of testator and acceptance of the legatee unless the matter of the well would be bequeathed. In this direction this study is engaged in examination and comparative study of the will and inheritance at Iran law and Shafi'i jurisprudence. Meanwhile this study examines the approach of Shafi'i jurisprudence and Iran and addresses the question whether the will and inheritance fall into contracts or should be considered as an unilateral obligation and inheritance as well as specifying the extent to which the testator cam make decision about its own properties after its death.

Key words: Will; Testament; Testator; Shafi'i jurisprudence; Shafi'i fiqh; Conclusion; Legatee

1. Introduction

The will or testament like other institution in Iran law system has jurisprudential origin. Recommending to providing the will in various verses and narrations is a honest evidence on the position of this element in Islamic law (Toussi). This leads the legislator to assign some articles of civil law to expressing types of will and its sentences. With death of the natural person two important problems is posed about the legal status. The first problem includes existence or lack of the will and the second problem is setting forth the inheritance. In fact the will is a kind of decision making by natural person about financial or non-financial affairs after its death, for the same reason it can be considered as a legal recommendation to its heirs (Toussi). The characteristic of will is that it should be in accordance with the common sense and the Sharia (Islamic law) and a reasonable man would accept it. Therefore it is necessary to respect the will that accords with these conditions and if someone make the smallest change in the will has committed a huge sin (Shirazi, 2003).

From viewpoint of Iranian lawyers the will is writing something Thai belong to the time after the death of who write this, whether this issue is free and direct possession of property or dividing the property or removing its authority or right from heir for performing financial obligations (Katuzian, 2002) . Someone who makes the will is termed as testator and someone who the will is in its benefit is termed as legatee.

The legislator definition for directive and possessory will has left the will contractual situation in ambiguity and does not encompass all aspects of the will (Zanani and Karimi, 2009). For example if someone testate that its debtors would be exempted neither fall in directive will because it does not include any commitment after its death, nor falls in possessory will because no ownership transferences would take place after the decease (Taleb Ahmadi, 2011).

From long time ago the position of the will was matter of disagreement among jurisprudents and lawyers and the civil law of Iran as other disagreement issues has not specified position toward it. Iranian legislator by following the holy lawgiver divided the will into directive and possessory will and in the article 826 of civil law has explained the two mentioned terms.

Directive will is that the person commissions one or more persons for accomplishing some tasks. For example it appoints someone to pay its debts after its death. In directive will the person who according to the will is commissioned to do its works is termed as executor of a will (Emami, 1997).

Possessory will is someone make someone else owner of the object or benefit from its property for free for after its death. By this type of will the person can determine the situation of its properties to some extent such as consuming it in charity. In possessory will someone who makes the will is termed as testator and someone who receives an ownership is legatee (Haeri, 1997). In possessory will the

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possession takes place by acceptance of legatee after the death of the testator. Therefore its acceptance before the death of testator is not effective. The testator can return from its will even if the legatee has accepted the matter of will (Toussi).

Examining legal situation of directive will be useful in various aspects. By determining legal situation of directive will its rules can be understood. If its contractual situation is accepted, the possessory will should be considered in the same manner as other contracts, and it follows general regulations of contracts. Also in interpreting the ruling regulation on it the contractual regulations such as bequest can be used as criteria. But if possessory will is considered as unilateral obligation is excluded from regulation of contract and it should be addressed as exceptional issues of unilateral obligations. According the article 795 of civil law the bequest is a contract that leads in a person make someone else the owner of some property for free (Shirazi,2003) . In this contract there is three parties: bestower, donee and the matter of bequest. The bestower bequeaths its property, the donee receives the ownership of the property and the matter of bequest is the property that is bequeathed (Katuzian, 2002).

Bequest includes preventing transference to others whether by sale wither by bestow and its benefits obtaining from it is placed in God way that encompasses the way of service to people and solving their problem and organizing their regular and cultural situations.

Article 55 of civil law states: the bequest is that the property is prevented from transference and its benefits are directed to God way, the purpose by preventing is that the property is refrained to be transferred because the purpose of bequest is to grant benefit from the property to people who received it forever and for the same reason it is called *vaqf* (it means to prevent). The purpose by direction to God way is appointing its benefit into charity and social affairs (Haeri, 1997).

Some consideration should be taken into account for criteria of distinguishing between general contracts and unilateral obligations (Najafi, 1981).

The common ground of both directive and possessory will is postponing the matter of will after death of testator and reversibility of the will. The difference of these two wills is property ownership after death and freeness of the ownership (Najafi, 1981). Although there is disagreement in legal situation of types of wills between lawyers and jurisprudents but the mentioned disagreement is more extensive in possessory will (Najafi, 1981). In this regard the Iranian legislator by following jurisprudence considered the possessory will implicitly as contract. Because according to content of article 827 of civil law realization of this type of the will is dependent to two conditions including death of testator and acceptance of legatee.

In civil law of Iran the will legal situation is not specified clearly and it is not specified clearly that the will belongs two legal actions that requires the intervention of both parties as a contract or it is just a unilateral obligation.

Furthermore the topic of the will is inserted separately from other contract and is inserted in inheritance topic. And inserting these topics separate from contract topic lead in ambiguity whether the separation of the will from other contract has certain purpose and it equals to the fact that the will could considered as contract.

According to general rules of contracts the necessary and sufficient condition for considering an legal act as contract is the satisfaction and acceptance of both parties. Therefore if we considered the acceptance as necessary condition for realization of the will doubtlessly it should be considered as sufficient too. For two reasons: firstly according to contract satisfaction principle any contract essentially takes place agreement, then every contract takes place by satisfaction and acceptance of both parties. Therefore the contract is certainly by satisfaction and claiming contrary to the principle requires wording, whether legal or jurisprudential wording. So if we concluded that the acceptance is necessary in the will we should be sure that it is contract, while this issue appears in article 837 of civil law about possessory will.

In civil law there is no definition for inheritance but the article 140 of the same law considered the inheritance as the fourth reason for ownership. Therefore according that article the inheritance can be defined in legal terminology as:" enforced transference of deceased right and properties to its heirs". The heirs of deceased inherits in addition to property some other things that could be inherited equally such as the right of dissolving some contracts or life insurance, that can be inherited equally and there is no difference between sons and daughters. Therefore alongside with noted material we intend to examine by comparative study the will and inheritance in Iran law and Shafi'i jurisprudence.

2. Research literature

(Taleb Ahmadi, 2011) in 2011 has presented an article with title "the legal situation of possessory will in jurisprudence and Iran law". Though the criteria of distinguishing contracts from unilateral obligations is clear. But commenting about situation of some legal acts is difficult due to some similarities to both of them. Possessory will is among acts that there is great disagreement in determining its legal situation. Some experts have admitted contractual situation of possessory will and some other admitted its unilateral obligation situation. Some people could not prefer one of these two viewpoints and considered it as dilemmatic situation. In other viewpoint, the will is introduced as an article that can be legally making decision about it and its legal situation is depending on the decision. With view to the fact that in possessory will a property falls under ownership of someone else for free suspended to testator death, it seems that it should have

contractual situation similar to bequest that includes possession of a property for free during life time.

(Sobhani, 2008) Has presented the "The will for heir". The author in this article examined viewpoints of Shiite and Sunnite jurisprudents about will for heir. He after stating both religions jurisprudents verdicts clarified and argued it by Quranic reasons. Then he considered Shiite jurisprudents verdicts as authentic for the reason of text of testament verse and correct narrations from Ahl-al-bayt that is based on the permission of the will for their equal to one third of property and reject the Sunnite jurisprudents view in support of permission of will for heir and reject their claims about assigning testament verse to inheritance verse and the Prophet narrations due to lack of connection between two verses and weakness in argument and documentary.

(Zanani and Karimi, 2009) Has studied legal situation of the will. In this article it studies whether the will is a unilateral legal act and it realizes by testator compliance, or for its realization it necessitates other compliance except testator compliance? In other word, is the will a bilateral legal act? The findings suggests that regardless to directive will that its unilateral obligation is in consensus but about possessory will it is considered as an interval between contract concept and unilateral obligation concept (Bandarchi, 2001).

Examined the will condition from viewpoint of seven Islamic religion (Imami-Hanafi-Maleki-Hanbali-Shafi'i - Zaydi-Zaheria). In this study the discussed condition for the will included as: maturity, sound mind, Islam, justice, sufficiently, freedom, sight, masculinity. But all sects and scholars were not in consensus about these conditions and it can be said just three condition of maturity, sound mind and Islam was the consensus condition among all Islamic sects. They necessitate the maturity for testator person. But some believe that if a mature person is annexed to the immature person the immature person testament would be correct. About the soundness of mind there is a consensus among Islamic scholars and the only problem that have disagreement is cyclic insanity that most of them consider the will of insane person (whether periodic or constant) as void. About justice it can be said that there is disagreement about its definition, however there is no doubt that it's necessary. Other conditions that have been mentioned are those that there is dramatic disagreement about them. In such manner that some of them does not necessitate sufficiency, freedom or sight or masculinity at all and some other considered these as necessary for the will. However regarding noted discussion in this reticle and the conclusions this discussion will demonstrate the splendid and strong position of Imamiah jurisprudence properly and its superiority over other Islamic religions. It presents comprehensive solutions in any subject with access to abundant narrations from innocent Imams and on the basis of legal strong rules.

3. General situation of the will in Iran law

From long time ago legal situation of the will was the matter of disagreement among jurisprudents and lawyers, and Iran civil law in the same way such other disagreement matters didn't specify clear position and the legislator divided the will in civil law into two groups of possessory and directive will and define each one by certain descriptions and conditions (Katuzian, 2002). but common description in each type of the will and different states that each one may have is that in all of them the realization of the will suspended to the decease of the testator, therefore it seems that if we consider this as the basis of well definition we can have a definition for the well that includes some individuals as well as excludes others (Emami, 1997).

In Iran civil law legal situation of the well is not specified clearly and it is not clearly determined that whether the will is among legal acts that requires compliance of both side, in other word is it contract or unilateral obligation (Katuzian, 2003). Furthermore the topic of the will is inserted separately from other contracts and is inserted in inheritance topics. It is inserted in article 827 of civil law that:

"The ownership wouldn't be realized by the will unless by acceptance of legatee after decease of testator".

In this article though the legislator considered the acceptance as the condition of realization of possessory will but all problems lies within the meaning of "condition of realization". This term has different meaning because if the acceptance in the article 827 equals with a simple acceptance from kind of acceptance in rent and sale contract then there was no need to enacting article 833 , because thus the heirs would have the right that before declaring the acceptance from legatee have the right to make any decision about matter of the will because the compliance singly does not bring about commitment (Katuzian, 2003).

4. Sentences of inheritance of apostate in Shafi'i fiqh (jurisprudence)

Shafi'i state about apostate and its inheritance manner as fallow:

Usama bin Zayd cited from the Prophet as:

The Muslim does not inherit from unbeliever and unbeliever from Muslim too.

Thus we believe that everyone opposes the Islam whether be people of the book or idle worshiper, if one of them after coming to Islam would return from Islam, a Muslim person would not inherit from this person. This sentence is based on the Prophet remark and the God has disconnected the friendship between Muslims and pagans (Rowshan, 2010).

Some are in consensus about types of unbelievers but some make the apostate an exception and believe in inheritance of its Muslim heirs. Therefore in response to them we say that whether you include the apostate to sentences of unbelievers or Muslims?

If they answer that the apostate is similar to Muslims in some sentences, in response to them we

say is it possible that an unbeliever to be considered as righteous person? Certainly no. so an apostate cannot be considered as Muslim and is unbeliever.

We say a sentence is not permissible for you unless it can be permissible for someone similar to you.

He says that we encounter properly to a narration from Ali Ibn Abitalib that is narrated in such way that he has killed the apostate and the inheritance assigned to its Muslim heirs.

We respond that some narration scholars reckoned in such manner but it is not a proper interpretation. While we prove it for you, is sentence of apostate about something except the inheritance should be carried out as a pagan or a Muslim. You say as sentence for an unbeliever. You say if you imprison an apostate until he would be killed or forced to repentance and meanwhile his Muslim son dies, is he takes the inheritance from his son?

You say no.

We say did you see ever a case that a person does not inherit from his son, unless he was his murderer. The God assigned from fathers inheritance from offspring. While the friendship of Muslims is disconnected from pagans and the Prophet assigned his tradition that the Muslim does not inherit from the unbeliever as well as the unbeliever from the Muslim.

Thus if the apostate falls among pagans as stubborn to God and Prophet sentence, as Ali Ibn Abitalib didn't prevent offspring's inheritance from him, even though the person is deceased. If son of apostate inherits from him it is opportune that he inherits from its son too and in this case its sentence is separate from other pagan sentences. Now if it is possible that someone inherit form apostate, but the apostate cannot inherit form its offspring it is the same meaning that Muawiah Ibn Abi Sufian and his followers sentenced to it.

Ibn Qudama says in this regard: if apostate goes to non-Islamic lands, his property is protected so that if he returned to the Islam his property is given back to him and if he decease in apostasy his property would be distributed as Bayt-ulmal (finance house) among people.

Sheikh Muhammad Khatib Sharbini states such: the property of the apostate whether he is killed or deceased is belonged to Muslims society and is delivered to Muslims financial house (bayt-ulmal) as tax (Feah) because for the reason of apostasy the relation of friendship and kindness between him and its relative is disappeared. In this sentence there is no difference between the properties that is obtained in apostasy time or during its Islam.

5. Conclusion

As a conclusion of this study it can be said that in general the will must be written in such manner that be authentic in terms of jurisprudence (fiqh) as well as law and in case of emergence of any problem it can be proved by legal reasons. According article 276 of non-litigious law in regular conditions maybe the will can be written in three forms including self-written, official and confidential so that be acceptable ipso facto in official authorities in emergency times such as war time or urgent death danger(flood and fire and so on) and epidemic and lethal disease (plague and cholera and so on) travel by see where the relationship generally can be disconnected ,thus the will is not accepted in official institutions unless like ordinary will (whether written or oral) the beneficiary parties confess to its correctness. The self-written will is that the testator has written all of this by its own handwriting and includes date of day, month and the year. The official will is that the testator has attended in official documents bureau and provide the will according to regulations of regulating and registering official documents. Confidential will is whether is written by its own handwriting or by someone else, and whether it has the date or not but it has signed by the testator and is deposited according regulation for depositing document in bureau (article 75 of registration law) or at another place that is determined by department of justice.

According to article 843 of civil law the will is valid up to one third of legacy. Therefore anyone is permissible to testate its properties in determined or common or general manner and if it testate surplus of one third if individuals that may benefit from legacy fail to confirm it the will is void for the surplus part. For example someone that has 300000 Rials his will is valid for 100000 Rials whether the matter of will is determined or common and whether in one time or in several times . Such will are called as complementary wills. If the testator commission to person or persons individually or collectively to bequest the same one third of legacy or assign for costs of some university or hospital or take charge of an orphan child it would be directive well. By consensus of jurisprudents and deducted from article 191 to 194 civil law and part one from fourth section of civil law on writing the will, it is not necessary to use some special terms and the will can be written by any language that convey the meaning therefore in possessory will it is just necessary to insert that after the testator's decease some amount of the property should be given to someone and in directive will it is enough to say that after my decease carry out some task. Regarding what noted above in the definition of the will one can say the will is an official or ordinary text in which natural person in its lifetime determine and register the legal manner for deciding for its own assets.

The point that is worthy to mention is that the will is stated prevalently in our jurisprudence and is examined in different books and sources from side of scholars. Our law is executed regarding adjusted jurisprudential problems. Though some jurisprudential problems are fairly different from the law but in general principles are form the same origin and source.

From obtained investigations one can conclude that there is no reason for considering the will as other contracts and its state of unilateral obligation

is more according to regulations and more acceptable, because by imperfection of presented argues the validity of the will is dependent to its acceptance, in other word all available sources attributed the will action to the testator and never halt its realization to any other condition. The rejection of the will by legatee prevents the will realization or rather we can consider the acceptance as the condition of unilateral obligation realization but we never can consider the acceptance as a part of the will action while the sources attributed the action directly to the testator and it seems that collective arguments that is presented by some jurisprudence does not encompass anything more.

As a result of comparing Iran law and Shafi'i jurisprudence one can point out that the Shafi'i jurisprudence consider the will as unilateral obligation and explain that in possessory will the rejection of matter of the will prevents transference of the matter of the will to the legatee and in directive will the acceptance is the condition of correctness. The Shafi'i jurisprudence states the testator conditions as: majority, Muslim and just (fair).

Based on obtained results all five religions of Islam believes that the unbeliever does not inherit from Muslim and profanity is one of preventives of inheritance

6. Suggestions

In line with the subject of the research that included comparative study of will and inheritance within Iranian law and Shafi'i jurisprudence we present following suggestions.

- It is suggested that future researches would examine laws of will and inheritance in other religions such as Judaism and Christianity and their comparison with Iran legal system.
- It is suggested that the laws of the will and inheritance and their legal situation in Iran would be examined and analyzed more accurately.

It is proposed that the laws of the will and inheritance in Iran would be compared with other Islamic countries laws.

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