THE REQUISITES OF A VALID WILL

(A comparative study of Shariah & Law)

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Introduction:

The concept of will is not new. This concept was very much present in the pre-Islamic civilizations and religions. We do find it in the customs and usages of pre-Islamic Arabs and Rabbinical Law; but the purpose behind making the will was not a good one. It is mentioned in the Rabbinical Law that the jewish tribes used to make a will in favour of strangers; the purpose of which was to deprive the legal heirs from inheritance. In the Arab tribes also there was a custom to make a will in favour of strangers out of pride, leaving the legal heirs in a state of poverty and need(1) .

When Islam came it gave it a new spirit and shape; the purpose of which was not the cruelty and pride but it was based on justice and sacrifice. So it is made obligatory on the owner of property to make a will. The Quran expressly sanctions the power of making a will and it prescribes the formalities, conditions and limitations to which it is subjected. When the Ayah concerning the inheritance was revealed in Surah Al-Nisa(2) the conditions regarding the will were prescribed by Sunnah.

A will according to Islamic point of view is a divine institution as it is sanctioned and regulated by the Quran and Sunnah of the Messenger of Allah; the purpose of which is to correct to a certain extent the law of inheritance on the one hand and to accommodate some of the relatives who are excluded from inheritance, to obtain a share in property. In this way Islam not only rectifies the laws of will prevailing in the pre-Islamic civilizations and religions, but it recognizes it as a right of strangers alongwith protecting the rights of legal heirs.

As the present treatise is on "The Requisites of a Valid Will" therefore, we would like to confine our discussion on the said topic, under the headings given below:

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Essentials of a valid will

Regarding the essentials of a valid will there is divergence of opinion among the jurists of Islam. The views of the jurists in this regard may be stated as below under the following headings:

A. Hanafi's views

The Hanafi jurists they themselves differ in this regard. Their point of difference may be discussed as follows:

i) Views of Imam Zufar

According to Imam Zufar, a Hanafi jurist there is only one element of a will and it is Al-Ijab (الايجاب) i.e. an offer from the testator side and the acceptance is just a condition of will and a proof of the ownership of the legatee. The reason behind this may be that the basic thing required for a will is the intention of testator. Therefore, it may be taken as valid under the circumstances without acceptance. It may happen under some situations that an acceptance may not be possible, for example, in case of unspecified legatees, as in the case of will made for a Masjid or a hospital or for the poor and needy of a town or a city. Under these circumstances, acceptance is not possible but the will will be considered as valid and enforceable(3).

ii) **Views of The Majority Of The HanafI jurists**.

According to the views of majority of Hanafi jurists, the elements of will like all other contracts such as Hiba and sale etc. are two and they are the offer and acceptance (الايجاب والقبول). According to this view ownership of a legatee is not proved unless it is accepted by him(4).

B. Views of Jamhoor (i.e. majority of jurists)

According to the views of the majority the of jurists i,e the Malikis,Shafeis and Hanabala there are four elements of a will and they are:

1) Sigah (صيغة)
   i.e. the offer and acceptance
2) Testator (الموصى)
3) Legatee (الموصى له)
4) Legace (الموصه به)(5)

Now we would like to discuss all these essentials separately, in some detail:

Sigah – offer and acceptance (الایجاب والقبول)

In the Fiqhi terminology the term sigah (صیغة) is used and applied both for offer and acceptance. As it has already been mentioned that according to the views of Imam Zufar there is only one element of a will and it is Al-Ijab whereas the rest of the Hanafi jurists are of the view that there are two elements of a valid will and they are Al-Ijab and Al-Qabool.

Regarding offer there is consensus of all the jurists that it is an essential element of a will. No will can be validly constituted without this element of offer(6).

Concerning the formation of will by offer and acceptance no specific mode is required. It may be express or implied i.e. it may be made by spoken words or in writing or it may be made by the conduct of the parties. All the jurists of Islam they agree on this point(7).

A valid will may be constituted by using the word will or by using any other word which conveys the same sense and meaning of a will.

An acceptance is valid only if it is made by the legatee after the death of the testator and only by this the ownership of the legatee is proved and established over the property of the testator; irrespective of it either he gets a possession of it or not. But if the testator dies before acceptance or rejection by the legatee, no property will be transferred to him and it will be considered as the property of heirs of the deceased. Moreover, his acceptance or rejection will be having no effect if it is made during the life time of the testator, as only that acceptance or rejection is considered as valid which is made after the death of the testator(8).

Regarding the time of acceptance or rejection of a will, no time period is prescribed for it. It depends at the discretion of the legatee either to accept it immediately after the death of the testator or delays it for a longer period of time(9). There is consensus of the jurists on this point; however, alongwith this agreement Imam Shafi'e(10) is of the view that it is the right of legal heirs to demand its acceptance by the legatee. If the legatee does not accept it, it will stand as rejection from the legatee side. The Hanbali(11) also agree on this issue with Imam Shafi'e. If a situation arises under which the legatee accepts half of the will rejecting another half as if a testator make a will of a house and of some land and the legatee accepts the house rejecting the land or vice-versa; then the will will be enforceable to the extent of what he has accepted and will be considered as void to the extent what he has rejected.If a will is made in favour of a group of people or a class and some of the people belonging to that class they accept it, while the others reject it; then the will will be

considered enforceable in favour of those who have accepted it and be treated as void in favour of those who have rejected it; as the rejection of some does not effect the rights of those who have accepted it. But if a will is made with the condition of its indivisibility then the condition of the testator will be considered as binding(11 (a)). In case if a will is rejected by the legatee after acceptance, then according to Hanafia(12). this rejection will be considered as valid. Whereas, Shafi'a(13) and Hanabala(14) are of the view that any rejection after acceptance is in effective, as the ownership is proved and established with acceptance and enforced with possession. No rejection therefore, will be effective after acceptance.

In case if the legatee dies after the death of testator but before any acceptance or rejection by the legatee, then according to the views of Hanafia this will be enforceable on equitable ground and the death of the legatee will be considered as an implied acceptance by him(15). However, in the views of majority of the jurists the right of acceptance or rejection will be shifted to the Legal heirs under the circumstances(16). They base their view on the following sayings of the Messenger of Allah:

…….

من ترك حقا أو مالا فلورثته

"He who leaves a right or property it is for his legal heirs." (17)

The law favours the views of Hanafia as it has been decided by the Court in one of its case stating as:

> "Consent need not be express but could be inferred from the conduct of the heirs"(18).

This implies that if the legal heirs of the deceased do not object on the transfer of property to the legatee then their silence will be considered as and implied acceptance. As it has been decided by the Court of law that … "under the Mohammadan Law the consent of the heirs to a will may be express or implied. A will in which the legal heirs of the testator had not questioned the will for three quarters of a century and the legatee had drawn allowances under the will month after month for that period then it was impossible to come to another conclusion but that the heirs consented to the will(19).

This decision of the Court also favours the Hanafi view, rather the Law goes a step further by stating that if one of the heirs have consented to a will it will be considered as valid and none of the heirs can challenge it subsequently(20).

It is also essential for the validity of a will that an acceptance must completely corresponds to offer.In case if it does not correspond to offer no valid will will be constituted.

The law favours and recognises this point of view of shariah. It prescribes that for the validity of the acceptance it is necessary that it must be equivocal, unconditional and without any variance of any sort between acceptance and the proposal (offer). A binding contract can only occur when the offer made is met by an acceptance which corresponds with the offer made in every particular(Section 7 of the Contract Act).

Testator and his competence

The essential requirements for the capacity of a testator alongwith the views of jurists on the issue may be mentioned as below:

1. Every Muslim of a sound mind either male or female is competent to make a will and there is consensus of the Muslim jurists on the point. A will, therefore, made by an insane, lunatic or idiot person can not be considered as valid(21):

According to Fatawa Alamgiri a will made by a person who is incompetent to perform a gratuitous act is void but if a will is made by a lunatic during his lucid interval it is valid(22).

The same is the position in law which treats a will made by a lunatic as void but if it is made during his lucid interval is valid(23)

Regarding the age of majority as an essential ingredient for the capacity of the testator the divergence between the Schools is very great. Some jurists they take the age of majority as an essential ingredient for the competency of a testator. Therefore, according to their view a will made by a minor is void(24).

While some others are of the view that a will made by a minor may be considered as valid. Those who consider a will made by a minor as valid they themselves have divergence of opinion regarding the age of the minor and state of his understanding, the detail of which may be mentioned as below:

The majority of the Maliki jurists they generally do not regard a will made by a minor as valid. However, some of the Maliki jurists they regard the will of a minor as valid if it is made for a pious purpose while others are of the opinion that it should not be restricted to these purposes alone. They give the absolute right to a minor who can comprehend his act to make a will for any purpose recognized by Shariah(25). The Shafeis and Shias they also agree generally with the Malikis(26).

The Hanafis on the other hand, they do not consider a will made by a minor as valid excepting few who consider it valid if it is made by a minor who is approaching to his puberty or if it is made concerning his funeral arrangements . It is expressed in Fataw-i-Alamgiri that "a will made by a person under puberty whether he is Murahik (one approaching puberty) or not is unlawful according to us"(27).

The same view is expressed in Radd-ul-Mukhtar that "a will of minor either he can comprehend his act or not is void".
So a will made by a minor either mummayiz or ghair mummayiz is invalid according to the majority of the jurists, as they take the age of majority of the testator as an essential ingredient for his competence to make a valid will. The Shafeis(29) they also agree with the views of Hanafia on this issue.
The law favours the views of Hanafis and Shafeis and does not recognize the will a minor irrespective of it either he can comprehend his act or not. In law any person under 18 years of age is considered as minor and transactions made by him during his minority will be considered as invalid(30).

3. As regard the capacity of a person who is condemned to death for an offence there is no provision both in Shariah & Law to deprive him of making a valid will.

4. As regard the difference of religions of the testator and legatee, a will made by the testator will be considered as valid according to the majority of the jurists(31) except Shafia(32) who do not consider it as valid.

5. Alongwith this agreement of the majority of jurists there is divergence of opinion among them on the issues mentioned below:

a) If a Zimmi makes a will of one third of his property to mourners or singers or to erect a church it will be void and if he makes a will to send certain muslims on Hajj or to construct a Masjid for the muslims then it will be valid only if the persons are specified but in case they are not specified it is void. This is the view of Imam Abu Yousaf and Muhammad but according to Imam Abu Hanifah it is absolutely valid under all circumstances(33).

b) When an alien mustamin makes a will to a muslim or a zimmi for the whole of his property it will be valid unless his legal heirs are residing in Dar-ul-Islam. Then in this case it will be valid only to the extent of one third of his property and the excess will pass on

to his heirs but if he has no heirs then it will be valid in the whole of his property(34).

c) If a Christian or a Jew makes a will to built Church or Synagogue and dies, then such building would descend to the legal heirs of the testator, as according to Abu Hanifa's view the erection of this nature of will be equivalent to Waqf or for a pious purpose and will be treated as valid. However, according to the disciple's views all such erections are sinful in their nature and therefore, are not valid(35).

d) A will made in favour of a murderer who has intentionally caused the death of testator is not valid and there is consensus of the jurists of this point. However, the difference does lie among the jurists in case of unintentional murder and it has a detail which may be mentioned as follows:

    i) According to Imam Abu Hanifah if the cause of death is unintentional or by mistake it will be void. Unless it is caused by a minor or insane person(36).

    ii) According to Shia law it is absolutely void (37).

e) If a will is made by an apostate who has converted his faith to Christianity, Judaism or any other religion than Islam,it is void according to Imam Abu Hanifah but valid in the views of Abu Yousaf and Muhammad. However in case of a female apostate it is valid according to the views of all Hanifi jurists as according to their views she is not liable to put to death for her apostasy(38).

f) The will of a person who commits suicide is valid according to the Hanifi doctrine(39) whereas it is invalid under the Shia Law(40)

g) In law it is considered to be valid if it is made before the Commission of suicide but if it is made after doing any act towards the Commission of suicide it is void. As it has been held in the case of Mazhar Hussain Vs. Bodha Bibi that "the will made by the deceased who made the will first and afterwards took poison is valid"(41)

Essentials of Legatee or Devisee (The Musa Lahu)

In principle any person who is capable of holding property may be a valid legatee under a will and there is a consensus of the Muslim jurists on the point(42). However, the divergence among the jurists on the issue may be discussed as follows:

i) According to the Hanafi doctrine the legatee must be in existence at the time of making the will and if he is not alive at the time of making the will, it will not be valid; as it is stated in Fatawai Alamgiri(43)that "there is no will for a non -existent or a dead".- under the Shia Law(44) it is not necessary that the legatee must be in existence at the time of making the will however he should come into existence before the testator's death.

ii) According to the majority of jurists(45) a will in favour of non-Muslim is valid and their views are based on the tradition that the Messenger of the Allah sent various gifts to Abu Sufyan Ibn-e-Harb and Sufyan bin Ibn-e-Ummayyah for the purpose of distributing them among the poors of Makkah and this was the time when they had not yet embraced Islam. On the basis of this Hadith the Hanafi jurists(46) are of the view that gifts and will can be made both to the muslims and non-muslims. However, Shafeis(47) are of the view that no will can be made in favour of non-muslim absolutely.

iii) No will can be made to an apostate (a person who has renounced Islam), and on this issue there is consensus(48) of all the schools; however, in case of a women apostate there is divergence of opinion. Some of the jurists they hold that she will be treated like a male apostate and a will made in her favour will also be invalid. While others they hold a different view and are of the opinion that in case of a women apostate it is valid.

iv) A will in favour of a child in the mother's womb is valid according to Hanafi doctrine(49) provided he is born within six months of the will. They are of the opinion that if a child is born within six months of the date of making the will he will be treated as a legatee in existence and is competent to take the will. According to Shiah(50) and Maliki(51) doctrines there is no limitation as to time when the child should born. All that is necessary is that the legatee must be in existence before the death of the testator(s).

The law favours and recognizes the position of Hanafi doctrine(52) on this issue, as it has been decided by the Lahore High Court in one of it's case titled chano bibi vs Mohammad Riaz(53) that for

the validity of a will the legatee must be in existence at the time of making the will or should be born with in six months of the death of the testator

v) A will can be made for any legal, pious or charitable purpose. It can be made in favour of poor generally or in favour of a particular body of them. According to the Hanafi doctrine(54) it is lawful to make a will in favour of poor christians as there is no sin contrary to constructing a church for which there is a sin and therefore it is illegal and this principle applies to the poor of all religions and faiths in their views. However, according to Shia(55) a will can only be made in favour of muslim poor.

vi) It is lawful to make a will in favour of a Masjid but according to Imam Abu Hanifah no will can be made to make a graveyard or for constructing inns for the passers-by. However, according to his two disciples it can be validly made for all such purposes.

vii) A will can also be made either to an identified individual or in favour of a class for example a will in favour of someone by name or by description as a will in favour of certain students, patients, a family or a group or for the construction of a certain houses or institutions or hospitals for a particular purpose. According to the Hanafi doctrine(56) a will can also be made in favour of unspecified class or a group of people.

Subject of Will (Legace) and its Validity

Any property moveable or immovable which is capable of being transferred and which exists at the time of the testator's death can be the subject of a will. It is also necessary for the validity of legace that it must be owned and possessed by someone in his individual capacity. In other words, we can say that the following conditions are necessary for the validity of legace to make a valid will:

a) The property must be capable of being transferred.
b) The testator must be the owner of the property.
c) The property must be in existence at the time of testator's death.

It is not necessary, however, that the subject of will must be an existence at the time of making the will as in the case of Bai-us-Salam and there is consensus of the jurists on this issue, alongwith some difference in some minor matters(57).

d) A will can also be made in rights of Easements which can be capable of transfer e.g. right of way, right of water, light etc. and there is consensus of the jurists on this issue(58)

e) Although the Quran does not impose any restriction on the extent of the disposition of the property, however, there is complete unanimity of jurists both Sunni and Shia that a will can only be made to the extent of one third of the total property belonging to the testator and this limitation is based on the address made by the Messenger of Allah at the time of Hajjah-tul-Wadah which states as follows:

…….

"O people, verily Allah has specified the shares of each heirs in the property of the deceased, it is not permissible to make a will in favour of heirs nor should it exceed to one third(59).

The law also recognizes this position of Shariah(60)

A will can however, be made beyond one third of the total property to legatee with the consent of all legal heirs and there is consensus of jurists(61) on this issue. The law recognizes this point of Shariah as it has been held in the cases cited below that a will to an heir beyond one third of the property is not valid except with the consent of all other heirs(62). However, under the Shia law(63) a testator can make a will in favour of legatee even without the consent of other heirs only to the extent of one third but when it exceeds one third it is not valid without their consent and on this issue the law(64) favours the Shia views.

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