DIFFERENCES AMONG SHIA AND SUNNIS IN THE LAW OF WILLS

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I. ABSTRACT

This paper will try to understand the difference between shia law and sunni law as well as the comparison between the Muslim law and the Hindu law and the procedure followed under law of wills in Muslim law. At a later stage this paper will focus on difference among shia and sunni with respect to law of wills with respect to the following points : Bequests to an Heir, Consent of Heir ,Consent in Case of Bequest to a Non-Heir, Lapsing of Legacy, Life-Estates, Will of a Person Committing Suicide, Bequests to Testator's Murderer, Abatement of Bequests:

II. SCOPE AND OBJECTIVE OF THE STUDY

The object of the study is to analyses and to gain a fair idea about the reasons of differentiation between the shia and sunni law with respect to law of wills and to conduct a comparison between Muslim law and Hindu law.

III. RESEARCH METHODOLOGY

The methodology adopted is largely analytical and descriptive. Reliance has been placed largely on secondary sources like books and articles.

IV. CHAPTERIZATION

This project has been divided in four chapters. It consists of following chapters, Introduction (Chapter I), difference between the shia law and sunni law (Chapter II), comparison between Muslim law and Hindu law with respect to law of wills (Chapter III), and Conclusion (Chapter IV).

V. RESEARCH QUESTIONS

- Analyze the difference between the shia law and sunni law with respect to law of wills.

- Comparison between the Muslim law and Hindu law with respect to law of wills.

VI. HYPOTHESIS

Will is the Anglo Mohammedan word for Wasiyat. Generally, Wasiyat means will, but also has other meanings. It may signify a moral exhortation, a specific legacy, or the capacity of the executor. In general, a will means a document containing the desire, regarding how a person wants to utilize or divide his property, after he is dead. According to section 2(h) of Indian Succession Act 1925, Will is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. For a Muslim, Wasiyat is a divine institution because it is regulated by Quran. It offers to the testator a means to change the course of inheritance to certain extent and to recognize the value of those relatives who are excluded from inheritance or strangers who might have helped him in life or in last moments. Prophet Mohammad has declared that this power is not unrestricted and should not be exercised to the injury of the lawful heirs.

VII. MODE OF CITATION

A uniform system of citation is followed throughout in the contents.

VIII. INTRODUCTION

A will also know as testament is a legal document by which a person, the testator, expresses his or her wishes as to how his or her property is to be distributed after his death, and names one or more nominees, the executor who will manage the property until its final distribution. For the devolution of property not disposed of by will.[1]

Though it has at times been thought that a "will" was historically limited to real property while "testament" applies only to dispositions of personal property (thus giving rise to the popular title of the document as "Last Will and Testament"), the historical records show that the terms have

[1]Estate Planning Components, Map. Measure. Mentor. Wealth.com

been used interchangeably. Thus, the word "will" validly apply to both personal and real property. A will may also create a testamentary trust that is effective only after the death of the testator.

A person must be mentally alert when he or she makes and signs a Will . Age or physical condition is not a sign of incompetence. A person should also be free from undue influence, persuasion or force while making the Will.[2] The law only requires that two witnesses, who must not be related to you by blood or marriage or to any of your devisee(s), to watch you sign & date the will and that they know you have said it is your Will.[3]

To prove a Will, it has to be shown that – (1) The Will is the legal declaration of testators intention (2) The testator was of sound, disposing mind during execution (3) The testator executed it of his own free will. Two essential characteristics of a Will are: (1) It takes effect after the death of the testator; and (2) It is revocable during the life time of the Testator.

The law of inheritance in relation to Christians, Parsis and Jews in India is primarily governed by the Indian Succession Act, 1925. The law of inheritance in relation to Hindus, Buddhists, Sikhs and Jains is governed by the Hindu Succession Act, 1956. The Hindu Succession Act, 1956 also allows Hindus, Buddhists, Sikhs and Jains to execute a Will as per the Indian Succession Act, 1925. Thus, the Indian Succession Act, 1925 is the major legislation in India concerning Wills made by persons other than Muslims. The provisions of the Indian Succession Act, 1925 do not apply where customary law is applicable. Wills made by Muslims are governed by Muhammad Law. However, certain provisions relating to probate and Letters of Administration[4].

There is no codified law for Wills for Muslims. It is made as per their religious texts. The Muslim law of Wills is not uniform for all of the sections. There are many differences amongst the Shias and the Sunnis. The Muslim law of succession is a codification of the four sources of Islamic law, which are (1) The Koran, (2) The Sunna or Tradition, (3) Ijmaa or consensus of opinion, and (4) Qiyas or analogical deductions. The leading authority on the subject law of Wills is the Hedaya (basically containing Hanafi doctrines), the Fatwa Alamgiri (which has been accepted by the Courts in India as well as by the Privy Council as of greater authority than the Hedaya and again propounding primarily Hanafi law) and Baillie's Digest of Mahomedan law[5]. The leading work on

[2]The legal dictionary , by Farlex, http://legal-dictionary.thefreedictionary.com/Incompetency
[3] Seatleu Law education , http://law.seattleu.edu/Documents/indian-institute/DOIIndianWills.pdf
[4]Letter of Administration is a formal document appointing and authorizing a specified person to take over, administer and dispose off an estate where there is no executor to carry out the testators will
[5]Laws related to Will by a Muslim. , WillJini.com

Shia law is also known as Sharaya-ul-Islam. Muslim testamentary succession is entirely governed by the Muslim Personal Law under section 2 & 3 which covers the powers to make the Will, the nature of the Will, the execution procedure, conditions of validity etc. The term Wasiyat means an endowment with the property of anything after death. The document containing the Will is the "Wasiyat-Nama". The making of a Wasiyat is not subject to any formalities. A Wasiyat can be made orally and no writing is required under law.[6] When this is the case, the beneficiary is required to prove beyond doubt the intention to make the Will by the testator, [7] and the terms of the Will,[8] and to prove the same with utmost precision.[9]If the Will is a written one, the writing need not be described as a Will but the intention should be decisive,[10] and it need not be formally signed by the testator,[11] and further it is not required to be attested[12] or registered[13]. All the properties that belong to the testator are transferrable can be disposed of by the help of a Will. The aggregate of assets and liabilities is known as the estate of the deceased. Except the Wills made by Muslims, it is compulsory for all other religions to make their Wills in writing and that should be duly executed. Registration of a Will is optional but desirable. The will can be registered by testator during his lifetime or by the executor[14]

A Will takes effect as a Will if the intention is clearly expressed even if it is referred as a Tamliknama[1516] The intention of the testator must not be declared by gathering information's from one document only, but by reading all the documents together.[17]It is not necessary that the executor of the Will of a Mohammedan should be a Mohammedan. A Mohammedan may appoint a Christian, a Hindu or any non Mohammedan to be his executor.[18]A document in the nature of instructions by the deceased to his legal advisors or relatives containing instructions to be given to

[6] Kulsum Bibi V. Shiam Sunder, A.I.R. 1936 All. 600 at p. 605: 164 I.C. 515
[7] Izhar Fatima v. Ansar Bibi, A.I.R. 1939 All. 348
[8] Mahabir v. Mustafa, A.I.R. 1937 P.C. 1974
[9] Venkatrao v. Nandev, A.I.R. 1931 P.C. 283
[10] Abdul Hameed v Mohammed Yoonus A.I.R. 1940 Mad. 153
[11] Aulia Bibi v. Allaudin, I.L.R. 28 All. 715
[12] Abdul Hamid v. Abdul Ghani, A.I.R. 1934 Oudh 163 at p. 165: 148 I.C. 801
[13] Khalil Ullah v. Ewaz Ali, A.I.R. 1923 Oudh 214 at p. 215: 64 I.C. 390
[14]An executor is an individual appointed to administrate the estate of a deceased person and who's duty it is to carry out the instructions and wishes of the deceased] or legatee after the testator's death. Amendments, Revocations and Subsequent Wills also be got registered.
[15] Gift Deed transferring right of ownership of a property
[16] Saiad Kasum v. Shaista Bibi (1975) 7 N.W.P 313
[17] Ahoronee Shemail v. Ahmad Omer, A.I.R. 1931 Bom. 533 at p. 536: 33 Bom. L.R. 1056
[18] Moohummud Ameemoodeen v. Moohummud Kubeeroodeen (1825) 4 S.D.A. [Beng.] 49, 55;

the legal advisor regarding disposition of his property would operate as a valid Will and may be admitted to probate.[1920] A Will in order to be valid must be made with free consent. A Will made under compulsion or mistake is invalid.[21] The provisions of the Contract Act, 1872 are also be applied in order to determine whether the consent if free. The testator must be sane at the time of making the Will. A Will made by an insane person will not be valid even if the testator recovers after that. The estate of the deceased Mohammedan is to be applied successively in payment of (1) His funeral expenses and deathbed charges; (2) expenses of obtaining probate, letters of administration or succession certificate; (3) Wages due for services rendered to the deceased within three months preceding his death by any labourer, artisan or domestic servant; (4) Other debts of the deceased according to their respective priorities ; and (5) legacies not exceeding one-third of what remains after all the above payments have been made. The residue is to be distributed among the heirs of the deceased according to the law of the sect to which he belonged at the time of his death[22] If a testator is in debt to the full amount of his property, the bequest would not be lawful unless the creditors relinquish their claims.[23]

If the marriage between Muslims is registered under the Special Marriage Act, 1954 then the provisions of Indian Succession Act would apply and they may make a Will bequeathing their property to any person in any manner and absolutely no restrictions are placed. Section 59[24] of the Indian Succession Act provides that any sane person but not a minor may dispose of his properties by Will. Thus, the one third rule shall not apply and the persons shall continue to be governed by the Muslim law in respect of all other matters except succession or Wills. While he continues to be a Muslim governed by his personal law yet for the limited purpose of preparation of Will the provisions of the Indian Succession Act would apply.

IX. DIFFERENCE BETWEEN SHIA LAW AND SUNNI LAW

- **I. INTRODUCTION**

[19] The act or process of proving a Will, where a copy of the Will is certified under the seal of a Court of competent jurisdiction which is conclusive proof of its authenticity and validity.
[20] Sarabai Amibai v. Mohd. Cassum, I.L.R. 43 Bom. 641
[21] Baillie's Digest of Mahomedan Law. (Bail.) I, 627
[22] Hayat-un-Nissa v. Mohammad (1890) 12 All. 290, 17 I.A. 73
[23] Baillie's Digest of Mahomedan Law. (Bail.), Hedaya (Hed). 673
[24]Person capable of making Wills

SUNNI LAW.

Sunni Muslims are the largest denomination of Islam.[25]The word Sunni is derived from the word Sunnah,which refers to the exemplary behavior of the Islamic prophet Muhammad or in literal meaning the teachings and actions or examples of the Islamic prophet, Muhammad. Therefore, the term "Sunni" refers to those who follow or maintain the sunnah of Muhammad. The differences between Sunni and Shia Muslims arose from a disagreement over the choice of Muhammad's successor and subsequently acquired broader political significance, as well as theological and juridical dimensions. .

Sunni Islam is also the world's largest religious denomination, and thereafter followed by Catholicism. In Arabic its adherents are referred to as ahl as-sunnah wal-jamāʿah ("the people of the sunnah and the community") or ahl as-sunnah in short. In English, its doctrines and practices are sometimes called Sunnism, while adherents are known as Sunni Muslims, Sunnis, Sunnites and Ahlus Sunnah. Sunni Muslims are also referred to as "orthodox Islam".

Sunni , also commonly referred to as Sunniism, is a term derived from sunnah meaning "habit", "usual practice", "custom", "tradition". The Muslim use this term which refers to the sayings and living habits of the prophet Muhammad. In Arabic, this branch of Islam is referred to as "the people of the sunnah and the community", which is commonly shortened to ahl as-sunnah .

SHIA LAW.

Shia is the second-largest denomination of Islam, comprising 10-13% of the total Muslim population in the world.[26] Shia is a branch of Islam which holds that the Islamic prophet Muhammad designated Ali ibn Abi Talib as his successor (Imam)[27]. Shia Muslims primarily contrasts with Sunni Muslims, whose adherents believe that Muhammad did not appoint a successor. Instead they consider Abu Bakr (who was appointed Caliph through a Shura, i.e. consensus) to be the correct Caliph.

Shia Muslims believe in authority of Quran and the message of Muhammad attested in hadith, and on hadith taught by their Imams. Shia considers Ali to have been divinely appointed as the

[25] Islam:sunni sect , Jewish Virtual Library , A Project of AICE

[26] Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population".October 7, 2009

[27] Sects in Islam: Sunnis and Shias,Emad Khalili , International Academic Institute for Science and Technology,International Academic Journal of Humanities Vol. 3, No. 4, 2016, pp. 41-47. ISSN 2454-2245

successor to Muhammad, and as the first Imam.[28] The Shia also extend this "Imami" doctrine to Muhammad's family, the Ahl al-Bayt ("the People of the House"), and some individuals among his descendants, known as Imams, who they believe possess special spiritual and political authority over the community, infallibility, and other divinely-ordained traits.[29]

Sunni Islam and Shia Islam are the two major denominations of Islam. Their division traces back to a Sunni–Shia schism following the death of the Islamic prophet Muhammad in the year 632[30]. A dispute over succession to Muhammad as a caliph of the Islamic community spread across various parts of the world, which led to the Battle of Jamal and Battle of Siffin but a good approximation is that 85–90% of the world's Muslims are Sunni and, with most Shias belonging to the twelver tradition and the rest divided between many other groups[31] . Sunnis are a majority in most Muslim communities: in Southeast Asia, China, South Asia, Africa, and most of the Arab world. Shia makes up the majority of the citizen population in Iraq, Bahrain, Iran and Azerbaijan[32] Indonesia has the largest number of Sunni Muslims, while Iran has the largest number of Shia Muslims in the world. Pakistan has the second-largest Sunni as well as the second-largest Shia Muslim population in the world[33].

- **II.COMPARISION ON BASIS OF LAWS OF WILL**

As Muslim law is an uncodified law. It is derived from their religious texts. Further the Muslim law of Wills is not uniform for all of the sections. There are many differences amongst the Shias and the Sunnis.

Bequests to an Heir

In sunni law –

Bequest to an heir without consent of other heirs is invalid. Bequest to an heir is invalid unless consent of heirs is obtained after death of testator.

In shia law –

[28]Tabatabaei (1979), pp. 41–44
[29]Corbin (1993), pp. 45–51
[30]Sunni Islam and Shia Islam- Two major denominations of Islam LAP Lambert Academic Publishing (2017-01-30)
[31] THE TRUTH BEHIND THE SUNNI AND SHIA MUSLIM DIVIDE,Al Khair foundation UG. 27 September 2014
[32] ibid
[33] ibid

Bequest up to 1/3[34] of the property is valid even without consent.Muslims can bequest one-third of their estate without consent of heirs. Consent of heirs is required if bequest exceeds one third of estate. Mohammedan law does not allow him to show any undue preference towards any particular heirs and a bequest to some of his heirs without the consent of the other heirs will be altogether invalid[35]

The Court in the case of Damodar Kashinath Rasane v. Shahajsdibi And Ors[36]**.** observed that the Sunni Schools agrees in holding that a bequest in favor of an heir is invalid but, according to the Shia law it would seem that a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one-third of his estate, and that such a legacy would be valid without the consent of the other heirs and if the legacy exceeds one-third of the estate, it will not be valid to any extent unless the consent of all the heirs, given after and not before the death of the testators, had been obtained.

Bequest to an unborn person

Sunni law-

Bequest to unborn child is valid if the child is born within 6 months of making the will. The bequest to an unborn person is void, unless a child in womb is born within 6 months of the will.

Shia law-

Valid if the child is born within 10 months of making the will.If the child in the womb is born within 10 lunar months, it is valid.

The beneficiary must be in existence at the time of the testators death. A bequest in favor of an unborn person is void[37] unless such person was a child "en ventre sa mere"[38] at the time of the Will and is actually born within six months of that date. Under the Shia law also a bequest in favour of an unborn child is invalid but if the legatee was in the womb at the time of the Will, the bequest will be valid (that is, if he is born more than six months after the date of the Will but within the longest period of gestation from the date of the Will but within the longest period of gestation from the date of the bequest). A bequest can be made to an unborn person and a Will in favor of a

[34] A third of the estate of the testator as is left after the payment of the funeral expenses, debts of the testator and other charges.
[35] Subhanullah v. Mohammad Junaid, 1980 All. C.J. 482 at p. 484
[36]AIR 1989 Bom 1
[37] Abdul Cadur v. Turner, I.L.R. 9 Bom. 158.
[38] fetus in the womb

child who is born, within six months of the date of making the Will can be a beneficiary. But according to Shia Law, a bequest to a child in the womb is valid, even if the child is in the longest period of gestation i.e., ten lunar months.

Consent in Case of Bequest to a Non-Heir

Sunni law

For a bequest of more than 1/3 to a non-heir, the consent of heir must be obtained after the death of testator

Shia law

Heir's consent may be obtained before or after death

In both the sects consent of the heir is required before bequesting it to a non-heir, but the only difference is in sunni law the consent of the heir can be obtained only after the death of the testator and in shia law the consent of the heir can be obtained before or after the death of the testator.

Bequest to murderer

Sunni law

Legatee who causes death even by accident is incapable of receiving.

Shia law

Legatee who causes death by accident is capable.

In Shia Law if death is not caused intentionally, then only it is valid, the person can bequest the property. But Under Sunni law bequest to murderer is void. Mohammedan law does not make any exception as to the competency to receive a bequest except in the case of an apostate and a murderer of the testator.[39]

Bequest in case of suicide

Sunni law

Will of a person committing suicide is valid

Shia law

Valid only if the will is made before the person does any act towards committing suicide

[39]Laws related to Will by a Muslim. , WillJini.com

In case of suicide the Sunni law recognizes the will of a person who has committed suicide as valid but in case of the Shia law the will is valid only if it was made before the person did any act towards committing suicide.

Lapse of Legacy

Sunni law

If the legatee dies before testator, the legacy lapses and goes back to the testator.

Shia law

The legacy lapses only if the legatee dies without heirs otherwise, it goes to legatee's heirs.

Under Shia law, in case the beneficiary does not survive the testator, the bequest would pass to the heirs of the beneficiary unless it is revoked by the testator. If the beneficiary dies without leaving any heirs, the bequest ill pass to the heirs of the testator[40] but in Sunni law if the legatee dies before testator, the legacy lapses and goes back to the testator**.**

X.

XI. COMPARISION BETWEEN HINDU AND MUSLIM LAW ON THE BASIS OF LAW OF WILL

Hindu and Muslim are two of the important religions of the world, although having various diversities and differences among them; they never set rules for any of the follower which would present a bad impact on one's life. In this context, we will come across vivid views on the Hindu and Muslim laws on the basis of the law of wills.

Critical analysis of the difference between Hindu and Muslim law:

1. Governing law:

Hindusare governed under the Indian Succession Act, 1925. Which includes the form of wills , formalities, capacity, subject matter of wills, and revocation to every other related matter of wills in a codified manner. Whereas in Muslims are governed by their customs and their personal law.

2. Perpetuity:

A Hindu cannot make his will for an indefinite period or for time immemorial, every Hindu will made under due process of law has to be of a definite period of time.Whereas a Muslim can make a will for an indefinite period in the form of wakfs or in the name of charity, using the usufructs for the benefit of his own family.

[40] Husaini Begum V. Muhammad Mehdi (1927) A.L.J. 504

3. Restriction on devolution of property:

A Hindu testator or specifically a coparcener has full rights of giving out his entire property in the form of wills to any one of the legal heirs as well as to any stranger.

But in Muslim law the testator can only give out one third of his property to a stranger and rest has to give to the family. No one can give out more than one third of his property without the consent of his legal heirs.

4. Quantum of share:

In Hindu law wife and mother inherit an equal share. But In Muslim law it's done according to the quantum of interest in the testamentary property provided in Quran. It even includes property given to more than one wife.

A Hindu joint family property is distributed equally between the males and females. Male heirs get an equal share as compared to females. More precisely after 2005 amendment in the Hindu succession act 1956 where daughters get an equal share as that of a son and thus share equal rights and liabilities in a coparcenary system of Hindu joint family.

In Muslim law Male heirs' gets double the share as compared to the female heirs, according to the amount provided for devolution of interest in the property.

5. Death Bed Gift:

In Hindu law the concept of "Marz Ul Maut" does not exist. Though a similar concept of death bed gifts happens to be in existence know as "Donation Mortis Causa".

In Muslim law the concept of "Marz Ul Maut" exists; it is form of death bed gift. When person has real apprehension of death due to a particular illness he can gift out 1/3rd property to any one of the family members or even a stranger. Also know as gift of amphibious nature. Re beaumont .

6. Formalities:

Sec.63 of the Indian Succession Act 1925 provides for proper formalities to be performed for formation of a valid will.

In Muslim Law, as for official formation of will there is no need of any particular formalities but mere bonafide intention to make a will would suffice. Even absence of signature of the testator would not affect the validity of the will.

7. Probate:

In a Hindu, will the executor is bound to take out the probate to show his authority to execute the will.

In Muslim lawin a wassiyat the executor is not bound to show the probate for executing a will.

8. History of law:

The concept of making a will or wassiyat was unknown to the original Hindu law or the personal law of Hindus.

The conceptof making of a wassiyat is an age old process in Muslim law as it has been described in Quran; moreover Hedaya contains a detailed description of Muslim wills or wassiyat.

XII. CONCLUSION

In this matter, we have put light on the basic difference between Shia law and Sunni law in the concept of law of wills. A Shia Muslim is regulated by his/her sects personal law, and the power to bequeath by Will have certain restrictions. He/she, being 18 years or over in age, after payment of funeral expenses and debts, can bequeath up to one-third of his/her assets by Will to any person may be a heir or a stranger who is capable of holding property and bequests can be made to a non-Muslim, an institution, and for charitable purposes. A bequest can even be made in favour of a child in the womb, even if the child is in the longest period of gestation i.e., ten lunar months. The remaining two-thirds will be divided to the heirs of the deceased, which comprise of blood relations and spouses. The heirs have to impliedly or expressly indicate acceptance of their shares or bequests. A bequest by Will, in excess of one-third will not be valid without the heirs consenting to such a bequest. If, however, a testator makes a bequest to some of the heirs so as to exclude others entirely from succession, the bequest would be altogether invalid and the property would devolve on all the heirs. Such a bequest to some of the heirs will not be valid even to the extent of one-third. The heirs may give consent either before or after the death of the testator. Coming forth upon the distinct views of the laws of Hindu and Muslim we have concluded that both the laws support the laws of wills in proper manner, which are worthy in both aspects as they present a clear view of the person who makes the will, on which way the will would provide service.