ABSTRACT

This research paper tries to explore the law of legacy as well as waiver of legacy and its impact on the validity of marriage contract. The objective of this study is to know whether waiver of legacy is acceptable in Islamic Law and to how extent it could affect the validity of the marriage contract. Deductive qualitative data analysis of verses of Al-Quran and of texts of Hadith was employed to answer two research questions: do husband and wife have the right to waive their right of legacy before signing the contract? What is the impact of this condition on the validity of the contract of marriage? Finding showed that husband and wife do not have the right to waive legacy of each other and the condition of waiver of legacy is invalid but the marriage contract is valid.

Key words: Legacy, Duty, Hajb, waiver, jurists, Islam.

Introduction

Legacy is one of the provisions set forth in Islam and the Islamic Law determined its values and methods of distribution among people based on criteria including engagement in marriage bond. Sometimes, one spouse conditions that the other spouse waives his right in legacy of one another for any given reason before signing the contract. It is well known that this right is not a private right for the husband and wife; rather, it is shared by the right of the Almighty Allah since it is one of the duties. This research tries to answer the following questions: do husband and wife have the right to waive their right of legacy before signing the contract? What is the impact of this condition on the validity of the contract of marriage?

Legacy Definition:

Linguistic Meaning:

Legacy means the origin and it means the old thing passed down by generations; it is also defined as the rest of ever thing. The dictionary of Lesan El-Arab included the example “I inherited someone of someone; i.e. I made his legacy for him and “the dead inherited the money of his inheritor which means he left the money for his inheritor”. Legacy was defined as the appropriation of the money from the dead. Legacy is usually related to money (Ibn Manzoor, 1414AH).

Legacy as Idiom:

The terminology of legacy is not so different from the linguistic definition except that legacy as an idiom is more accurate and limited in terms of for whom it is eligible. One definition of legacy in Islamic terminology is a science determines who is eligible to inherit and who is not as well as the amount and value of legacy for each inheritor. It is related to inheritance and heritage and it aims to give every eligible one his or her right in legacy (Al-Qurafe, 1994). This kind of Jurisprudence is called “religious duties” because it is estimated shares proven by conclusive evidence. It is given this name as it is called by Almighty Allah (Al-Sarkhsi, 1993).

Legacy Jurisprudence is defined as understanding issues of legacy division and arithmetic. Its subject is legacies and its objective is to know who deserves what and how much of the legacies while legacy is what is
left behind somebody of money or property after his death (Al Shafe’e, 1990). Legacy is a science identifies the rights of the legacies of the living persons whether pecuniary or incorporeal which is directly transferred to the heirs from the inherited or the dead ones as shares accurately determined and identified by Islamic Law based on conclusive evidences.

Waiver of Legacy as Duty:

Legacy is considered as duty in Al-Quran and Sunnah. Explanations of opinions of interpreters and jurists in this issue are given below.

Legacy is duty based on Al-Quran:

There are many verses of Al-Quran described legacy as duty exactly as prayers, fasting and Zakah. Interpretations of verses are included to explain how legacy is considered as duty in Al-Quran.

Verse1:

“There is a share for men and a share for women from what is left by parents and those nearest related, whether, the property be small or large - a legal share” (Quran, 4:7).

This verse means that male children and relatives of the dead have portions of his legacy and female children and relatives have portions as well whatever small or big the legacy is as a known obligatory duty. This verse was interpreted as legacy is a gift from Almighty Allah at the first place where good and bad people are equal in the matter of legacy as well as the case of faith. The verse implies that if the heir waives his legacy, the duty will not be dropped. This verse was also interpreted as nobody has the right to divide the legacy on other way than the way of Islamic Law provided for in Al-Quran (Al-Qurtubi, 1967).

Verse2:

“In that which Your wives Leave, Your share is a half if they have no child; but if they leave a child, You get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which You Leave, their (your wives) share is a fourth if You leave no child; but if You leave a child, they get an eighth of that which You leave after payment of legacies that You may have bequeathed or debts” (Quran, 4:12).

This verse means that the husband has half of legacy in case the wife has no children or grandchildren either males or females. In case the wife has children or grandchildren, the husband has the fourth of his wife’s legacy after cutting the value of bequest or debt. If the husband dies, his wife takes the fourth in case of no children and grandchildren; in case there are children and grandchildren, she gets the eighth. In case the husband has more than one wife, all wives gets the fourth in case of no children and grandchildren and all of wives take the eighth in case of the existence of children and grandchildren (Al-Qurtubi, 1967).

Legacy is duty according to Sunnah:

Legacy is perceived as duty in Sunnah as well; the Sahaba (friends) of Prophet Mohammad (peace be upon him) mentioned legacy as duty as explained below.

Hadith 1:

Abdullah Bin Amr Bin El-Aas reported Prophet Mohammad’s saying that “science is three; otherwise it is a virtue: a verse that states for law, proven Sunnah and a just duty” (Abu Daoud, 1998).

Hadith 2:

Abdullah Bin Masoud said “the Prophet Mohammad (peace be upon him) said to me: learn Al-Quran and teach it to people, learn duties and teach them to people, learn science and teach it to people; I am a man who will be grasped and science will be grasped; Fitnah (disputes) will spread to the extent that two persons disagree on duties and do not find who judges them. (Addarqutni, 2004)
Hadith 3:

Bin Abbas (May Allah be pleased with both of them) said money is for children and will for parents. A male child takes two portions while the female takes one portion. Each parent has the sixth; the wife takes the eighth in case she has children or the fourth in case of no children; and the husband takes the half in case he has no children or the fourth if he has children of his dead wife (Al bokhari, 1422AH).

First and second Hadiths indicate the necessity and importance of learning and teaching duties. They urged for learning duties and the just duty in the first Hadith means justice in division of shares provided for in Al-Quran and Sunnah. The third Hadith interprets the division of Legacy as mentioned in the Holy Quran. Omar Bin Al-Khattab (may Allah be pleased with him) also said “learn duties; it is of our religion” (Al-Bayhaqi, 1989) which indicates the importance of legacy knowledge as well.

Duty and its Impact on Waiver of Legacy:

Given that legacy is duty, husband and wife are not allowed to waive their right in legacy for the following reasons. First: legacy is duty as Islamic Jurists explained in the sense of being proven with necessity in demand which means no one has the right to waive it or to cancel it because it is imposed by Almighty Allah as duty on Muslims that require their obligation and commitment to it. Second: legacy is considered as the rest of “Ibadat” (worships) like prayer and fasting; however, duties are determined in its values and shares. Third: legacy is a known compulsory portion and a gift from Allah which nobody has the right to divide it or determine its value as it is determined by only the Almighty Allah (Al-Sarkhasi, 1993). Given that, legacy cannot be waived because it is simply like prayer and fasting in the sense that no Muslim has the right to drop it or avoid working by it.

Hajb (deprivation of legacy) and its Impact on Waiver of Legacy Right:

Some hairs are deprived of legacy either of all value of legacy or of part of it. Islamic Jurists refer to Hajb as partial or complete deprivation of legacy. For example, the husband takes the fourth instead of the half in case of the existence of children who have right in legacy. Another example is in the case of more than one wife (Ibn Qudama, 1968).

The Impact of Waiver of Legacy on Validity of the Marriage Contract:

Some Islamic Jurists said the contract would be invalid in case of the waiver; however, most Jurists of the four doctrines (Mazhab) opine that the condition is invalid but the contract is still valid.

The Contract is Valid but the Condition is Not:

Most Jurists including Hanafi, Malik, Shafi and Hanbali doctrines believe that the contract remains valid but the condition is not because not all conditions are acceptable in the Islamic Law and the waiver of legacy is one of them (Al-Shafe’e, 1990).

The Contract is not valid:

Jurists following the Malik Mazhab opine that the contract is invalid in case the condition of the waiver occurred before sexual intercourse (Al-Qurafe, 1994). I believe in the first point of view which says the contract is valid while the condition is invalid since cancelation of the condition does not cancel any of marriage pillars. Contemporary Jurists believe that legacy is legal and proven by Quran verses, Sunnah and agreement of most Jurists who consider legacy just like prayer and Zakah which is duty imposed on individuals and no one has the right to change or drop it as it considers the interest of individuals as well as the interest of the public which is for the benefit of people.

Conclusion:

This research paper came up with two main findings which are: first, husband and wife do not have the right to waive legacy of each other and second, condition of waiver of legacy is invalid but the marriage contract is valid.

To conclude based on most jurists, a true valid marriage contract cannot be canceled by an invalid condition. Given that, neither husband nor wife has the right to waive legacy in the first place and in case of conditioning waiver of legacy, this would be considered as infringement on Allah’s Judgment as Almighty
Allah says: “It is not for a believer, man or woman, when Allah and His Messenger have decreed a matter that they should have any option in their decision. And whoever disobeys Allah and His Messenger; He has indeed strayed in a plain error” (Quran, 33:36).

References

Sunnah of the Prophet.
The Holey Qur’an.