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Exploiting Legal Fictions in Circumventing Legitimate Rights in Marital Property

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Abstract--The Marriage is the norm of life and living in the family's embrace under the shade of affection and tranquility is a goal that everyone who takes this step seeks, and the happiness and balance of the family can only be achieved by obtaining what can be achieved from the requirements of a decent life. But not everything that a person wishes to realize, some have intervened Factors and inconveniences make married life impossible to continue, and the most important of these factors, according to a scientific study, is money According to our Islamic law, the offspring must be legitimate, and this will not happen except through legal marriage, and in the verse it is associated. Money with children because it has a strong influence and a close link to married life, which in turn is considered a partnership between two parties. The spouses may not be successful in completing this partnership, and the matter ends in divorce, and often the woman is forced to demand her legal and material rights. In this research, I will discuss, in particular, the tricks that some lawyers use to make things difficult, or to prevent the divorced woman from having her rights, especially material ones.

Keywords--circumventing, exploiting, legal fictions, legitimate, marital property.

Introduction

Marriage is a natural way of life and living within a family shaded by affection and tranquility is an objective for whoever takes this marital step. Besides, a family's happiness and balance are fulfilled only through acquiring the means to a decent life. And since not all that one wishes for is attainable, marital life is sometimes

disturbed in a way that renders persistence of such bond impossible. On top of such disturbances is the financial issue, a fact sustained by research studies. Here, Almighty Allah says, “Wealth and children are [but] adornment of the worldly life. But the enduring good deeds are better to your Lord for reward and better for [one's] hope” (Al-Kahf 46).

According to our Islamic Shari‘ah, reproduction should take place through legal means, and this is accessible only through valid marriage. In the above verse, wealth and children are combined due to their forceful impact as a firm bond sustaining marital life, which is in turn a sort of partnership between two parties. However, the couple may not be successful in keeping this partnership and thus end up with divorce. Mostly in these cases, a woman at times has to claim her legal and financial rights, in case amicable dissolution of the relationship is not attainable, and thus the case is referred to the court. Hence, this divorced couple’s legal issues are entrusted to authorized attorneys of each party. So, in this article, I will address the legal fiction exploited by some lawyers to make things difficult for the divorced woman and prevent her from attaining her rights, especially financial rights (Nugraha et al., 2020; Eshonkulov, 2021).

Concept of Shar‘i and legal fiction

Legal fiction is of two types, one that leads to observance of an action prescribed by Allah or avoidance of a forbidden action, extracting rights from undue possessors, and delivering the oppressed. The other type, however, is that which involves dropping duties, legalizing forbidden actions, wasting the rights of the oppressed, and turning truth into falsehood and falsehood into truth (“Legal Fiction”, Wayback Machine copy) (Kansa & Hon, 2000; Gérin-Lajoie et al., 2008).

An example of permissible legal fiction is the case in which a man incurs a thousand dirhams debt to another, and the creditor has in possession a security against this amount and yet he fears that if he states that he has the security, the debtor will argue that he owes nothing to the creditor and that the property that the creditor holds and claims to be a security is rather a loan or a trust. In this way, the creditor’s right is dropped, and the debtor seizes the thousand dirhams by way of trickery. So, to secure his right, the creditor can do the following: he should claim the thousand-dirham debt; when the judge examines the debtor, the latter will either acknowledge the debt or deny it. In case the debtor acknowledges the debt and the security, he should then pay the thousand dirhams to retrieve his security, or else the security is sold in fulfilment of the debt. Yet, if he denies the debt and claims the security (be it a house or an animal), the creditor then asks the judge to examine the debtor if this item is not a security. Then, when the judge asks the debtor about it, if the debtor claims that it is not a security but rather a loan or a trust from him to the creditor, the creditor can take an oath that this claim is not valid, and his oath will be acknowledged. However, if the debtor acknowledges that it is a security, the creditor will request the judge to ask the debtor about the amount of the debt against which the security has been taken, if the debtor admits the true amount, the creditor acknowledges that the security does belong to the debtor and demands his money. Yet, if the debtor denies all or part of the money, the creditor is then required to take an oath

sustaining his denial of the debtor's statement and then his claim will be acknowledged (*Ighāthat Al-Lahfān Min Maṣayid Ash-Shayṭān*).

Legal fiction exploited by the respondent's attorney to drop the divorced woman's Shari'i and legal rights

The pleading sessions in the courts witness a lot of tension between the litigants and even between the lawyers themselves, and each party tries to benefit from the mistakes of the other that appear before the judge. Yet, there are tricks that the parties to the conflict exploit in an unfair manner against the lawyers themselves, which can affect them and make them lose the case ([Portero et al., 2011](#); [Quah, 1994](#)).

Vague answers

The opposing attorney may resort to prolonging the case by stating vague answers, requesting an unimportant procedure, or changing the agent at each session ([Lizza, 2018](#); [Deakin et al., 2017](#)).

Reading skills

The attorney must alert the judge to prevent procrastination, and when confronting an opponent, that attorney should not accept the opponent's criticism of the former's own documents. For this is the beginning of losing the case. An attorney should trust their own abilities and invest them for success. They should also learn fast-reading skills that increase your reading speed from 200 words per minute to 800 words. In this case, work does not pile up; also the lawyer will be able to decide, right in the session, whether to request adjournment or not ([McKenna et al., 2012](#); [Besnard & Arief, 2004](#)).

Lawyer's idealism

The lawyer should be an exemplary person, with uncompromising principles. They do not stop at their troubled present, but rather look forward to a successful future in which they overcome all obstacles. Therefore, when reading the opponent's memorandum, a lawyer must be alert that some opponents avoid responding to the claims presented and try to dispel doubts about truth. The role of the lawyer is thus to alert the judge to the opponent's evasiveness ([Weisberger, 1986](#); [Varley, 2007](#)).

Information is a weapon

Having sufficient information and thorough researching about the case spares the lawyer any feeling of awe or confusion during the pleading. The respective rule is that knowledge dispels fear, and a successful lawyer does not market themselves with photos, but rather with their achievements. They attain their status through toil and labor. Hence, the most difficult moment during pleading is when the spans of the sessions extend, and the lawyer loses readiness and their enthusiasm fades. Yet, they must remember that honesty to their mission

requires them to remain on track until they reach the finish line (Bacolod-Iglesia et al., 2021; Incio et al., 2021).

A lawyer's care for their cases requires

- Attentive follow up
- Avoidance of hasty action
- Firm discipline
- Choice of optimum methods
- Alertness to tricks

Ploys employed by dishonest lawyers

- Constantly interrupting opponents
- Distracting opponent's attention
- Adopting subtlety and ambiguity
- Showing powerful relations and disconcerting the opponent

As indicated above, the lawyer should search for gaps to win the case, knowing that some legal fictions may be used, which include the following:

- Legal Shar'i fictions
 - The nature of the lawsuit

A lawyer considers the nature of the lawsuit, whether it falls within the jurisdiction of the court to which it is filed. If not, and he knows that he may not win the case, then he can challenge the jurisdiction of the court as a trick or means to obstruct or delay the proceeding of the case.
 - The form of the lawsuit

A lawsuit has certain forms that must be respected. If such form is not respected by the party who filed it, whether it is part of the judiciary, such as the Public Prosecution, or one of the litigants, such as the one who filed it, the lawyer can use that to find an outlet or exit to successfully win the case or at least come out with the slightest damage.
 - Subject matter of the case

The way of claiming the rights must be proper and legitimate according to the provisions of the law. A lawyer thus should consider the loopholes that exist in his folds of the case and exploit them in his favor. These loopholes exist either due to the negligence of the judge or to a defect in the legislation (legal legislation). Hence, a lawyer should take advantage of all these points.

As for the serious issue of unlawful legal fictions, they include the following:

- Use of perjury or false statement

This occurs whether in documents, in testimony, in experts' reports, or in reporting. A respective example lies in reporting which happens in Morocco a lot. For example a man who wanted to divorce his wife went to a lawyer and suggested that they file a divorce case against her for discord, while in fact the wife would be living well with him in his home, and when the

process server comes to inform her of the summons, the husband bribes them not to serve her the notice.

- Use of bribery
Abu Hurairah (may Allah be pleased with him) was reported to have said, “The Messenger of Allah (peace be upon him) cursed the briber and the bribee.” (Narrated by the Five Compilers of Hadith, and it was classed as Hasan (sound) by at-Tirmidhī.) Here, a process server would indicate in the summons that the wife had been notified and refused to sign the document, and he may even sign instead of her, so that it would seem as if she were notified and yet refused to appear before court.
- Use of forgery
In this case, the husband divorces his wife on the basis that she has been notified and did not comply with the order of the court. Then, the wife finds herself in front of the de facto situation where she is divorced. Some lawyers in misdemeanor or criminal cases forge medical evidence as well. The use of these unlawful methods can be established in the court and on the grounds of that the case can be appealed. Still, a more serious and despicable method is that in which magic is employed.
- The use of magic in court
Witchcraft is clearly difficult to prove in court, but it cannot be denied that its use in court causes the opponent to fail to speak or prove the case in court. Magical spells can be transmitted through food, wind, clothing, or any other physical and mental disorder. The state of witchcraft can disturb not only the plaintiff but also anyone involved in the handling of the court case. There can be sorcerous harassment of judges, lawyers, or parties of opposing interest.

The signs indicating that magical charms are targeting the judge or any other person include sudden pain, constant anxiety, sudden loss of mind when filing a lawsuit, and prolonged pain that makes it impossible to do the work or attend a court hearing. Ultimately, such a person can be considered suffering from a mental problem or even lose life. The existence and use of magic are undeniable, since it does exist. Yet, it is very difficult to prove its effect. In Malaysia, proof of the use of witchcraft in court is still admissible. This refers to cases that have occurred in Malaysian courts such as the case of *Mustafa Batcha v. Habeeba Abd. Rahman* [1410] JH 41 and *B v P* [1998] 5 MLJ 787.

So, what happens and can be considered a trick or ploy for dropping the case in court is looking into the effects that happen to the person targeted by witchcraft to disable him/her from proving his/her case or to thwart the case. We all know this through Surat Al-Baqarah (verse 3), which deals with belief in the supernatural as a sign of belief. It is also stated in the Hadith reported by A-Bukhari and Muslim from ‘A’ishah (may Allah be pleased with her) that the Prophet (peace be upon him) was affected by magic until he doubted whether certain things happened. (Al-Bukharī, Sahīh, Chapter on Hudūd, section 44, hadīth no. 33) (Zun, 2020; Rinārtha et al., 2018).

Side effects of depriving a divorced woman of her Shar'ī and legal rights

- Lacking sources of livelihood
Divorced women suffer from a disproportionate decrease in family income and standard of living, which may make them vulnerable to poverty. Besides, women are often granted custody of children after divorce, which contributes to making professional decisions centered on childcare by choosing more flexible jobs with lower wages to be able to stay longer with children. Added to this is bearing many of the expenses associated with raising children, which may create financial deterioration, especially since the compensation (alimony) paid (if paid) to her is usually not sufficient. This matter may negatively affect the children and their general standard of living.
- Contracting psychological and physical diseases
Divorce coupled with the deprivation of material rights causes the loss of absolute trust of the divorced woman in all those surrounding her, causing her insecurity, negative changes in lifestyle, work, and home, or fear of what the future holds. She keeps thinking about facing the world without a partner in a way that induces a great deal of anxiety in her and that may lead to her depression. On the other hand, divorce may cause changes in the divorced woman's diet, through either overfeeding or underfeeding, which may affect her health. She may also suffer anxiety, depression, sadness, loneliness, despair, frustration, anger, and sleep disorders. She may even suffer nagging nightmares, or insomnia that accompanies depression, which represent a serious side effect of divorce. Studies indicate that divorced women are more susceptible to cardiovascular diseases than married women. And in light of lack of money or difficulty in obtaining it, it is difficult for a divorced woman to go to health centers, and this negatively affects the way she treats her children.

Conclusion

Women must receive proper guidance before embarking on marriage. They need to be certain that marriage is a company that begins with two parties (husband and wife) who are the founders of this partnership, and it is natural for this partnership to be exposed to success or loss. They also need to know that potential loss may be greater in the presence of children. I believe that the Family Code in Moroccan equitably preserves the divorced woman's right to own a document of agreement between her and her marital life partner. In this document, she guarantees her material rights in the event of dissolution of this marital partnership according to the proportions agreed upon in advance.

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