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The Theory of the Obligatory Bequest in Islamic Fiqh and Arab Laws: (A Comparative Critical Analysis)

نظرية الوصية الواجبة في الفقه الإسلامي والقوانين العربية (دراسة نقدية مقارنة)

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ملخص:

مثلت مسألة الأحفاد الذين حجبوا من الميراث وحرموا من التركة نظرا لموت والدهم قبل جدهم صاحب التركة من المسائل التي اعتبرتها أغلب التشريعات العربية إجحافا بحقهم ممّا دفع المشرع المصري سنة 1946 لاستنباط نظرية الوصية الواجبة التي ستأخذ بها أغلب المجلات القانونية العربية، ضمانا لحق هؤلاء الأحفاد.

وتسعى هذه الورقة البحثية للتعريف بالوصية الواجبة وتبيان شروطها وأحكامها في القوانين العربية وأهم ما طرحته من تداعيات وذلك ضمن إشكالية مركزية: ما هي خلفيات نظرية الوصية الواجبة وأبرز ما وجه لها من انتقادات؟ وقد خلصت هذه الورقة إلى مجموعة من النتائج أبرزها أنّ الوصية الواجبة اجتهاد حديث من داخل النص الإسلامي حاول حل مشكلة الأحفاد الذين لا يرثون ولكنه لم يحظ بإجماع مطلق وطرح أكثر من تساءل.

كلمات مفتاحية: الوصية الواجبة، المواريث، الأحوال الشخصية، الفقه الإسلامي، القوانين.

Abstract:

This research paper aims to define the obligatory bequest, clarify its conditions and provisions in Arab laws, and highlight the main issues it has raised, centering on the following question: What are the backgrounds of the obligatory bequest theory and the major criticisms directed against it.

The paper concludes with several key findings, most notably that the obligatory bequest is a modern interpretation within the Islamic legal framework, attempting to address the problem of disinherited grandchildren. However, it has not achieved absolute consensus and has raised numerous questions.

Keywords:

Obligatory Bequest; Islamic Inheritance Law; Arab Legal Systems; Fiqh; Islam.

Introduction:

The science of inheritance in Islam is the divine mechanism for dividing estates after the death of their owners, based on God's will and a philosophical-doctrinal vision that considers wealth as belonging to God, with humans as stewards. The distribution is governed by the principle that the closest relative to the deceased in degree and kinship has the priority and greater share in inheritance. To foster values of solidarity and social cohesion, Islam encourages making bequests to close relatives and others. This practice continued for centuries.

However, with profound transformations in Islamic society, this optional bequest evolved into an obligatory bequest by law. In 1946, the Egyptian legislator introduced the mandatory application of the obligatory bequest to enable grandchildren to receive their father's share of the inheritance, as they were previously excluded due to their father's death before their grandfather (the estate owner). This exclusion resulted from the traditional inheritance laws governed by the mechanism of deprivation (hijb).

Despite attempts by Sharia scholars and legal experts to justify this mandatory formula, it continues to spark considerable debate and discussion due to the issues it raises.

Research Problem:

This research paper aims to provide a comparative study of the obligatory bequest (al-wasiyyah al-wajibah) in various Arab laws that have adopted it. It examines its conditions, Sharia foundations, and the main criticisms and issues it raises, centering on the following question: What are the backgrounds of the obligatory bequest theory and the major criticisms directed against it? This central issue raises several subsidiary questions:

What are the reasons for the emergence of the obligatory bequest theory?

What are the Sharia and legal foundations for the appearance of the obligatory bequest theory?

What are the implications of adopting the obligatory bequest?

Reasons for Choosing This Research:

Its connection to inheritance laws, which are among the most important provisions in family fiqh and law.

Its comparative nature, analyzing how Arab legislations address the issue of the obligatory bequest.

Its application of the rules of the obligatory bequest and its conditions within Islamic fiqh.

Its analysis of legal texts in this matter, aiming to align them with Sharia principles.

Providing comprehensive answers to the key issues and questions raised by this research topic for a deeper understanding of these important foundational matters.

Responding to objections and criticisms raised by detractors of Islam regarding such issues.

Research Methodology:

The nature of this research paper required the use of the following methodologies:

Descriptive Method: Defining the obligatory bequest, describing its cases, and outlining its conditions.

Analytical Method: Analyzing legal provisions related to this topic in some Arab legislations.

Comparative Method: Comparing various fiqh opinions within Islamic law, then comparing different Arab legislations, and finally comparing Islamic fiqh with Arab legal codes.

Previous Studies:

Relevant previous studies include:

-Study: "The Obligatory Bequest in Algerian Family Law and Some Arab Legislations - A Comparative Study with Islamic Fiqh" by Algerian researcher Khaled Daw, published in the Journal of Legal and Political Research, Volume 07, Issue 01, June 2022.

-Study: "The Obligatory Bequest in Arab Legislations and the Necessity of Amending Article 169 of the Algerian Family Code" by researchers Dalila Trikki and Ait Chaouch, published in the Critical Journal of Law and Political Sciences, Faculty of Law and Political Sciences, University of Tizi Ouzou, Volume 16, Issue 04, 2021.

Study: "The Implementation of the Obligatory Bequest: Its Rules and Legal Controls - A Comparative Study in Islamic Fiqh and Algerian Comparative Law, Supported by the Jurisprudence of the Supreme Court" by researcher Abdelkader Rjal.

Objectives of the Study:

This study aims to:

Define the obligatory bequest and outline the conditions for its application in Arab legislations.

Analyze the legal provisions governing it in some Arab legislations and identify their gaps.

Demonstrate the Sharia and legal foundations of the obligatory bequest and its importance in contemporary family laws.

Highlight the main criticisms directed at the theory of the obligatory bequest for improvement and development.

Research Outline:

The nature of the research necessitated its division into an introduction, two main sections, and a conclusion.

Introduction: Discusses the importance of the topic, reasons for its selection, previous studies, and the research plan.

Section 1: The Foundations of the Obligatory Bequest Theory

Subsection 1.1: Definitions

Subsection 1.2: The Emergence of the Obligatory Bequest Theory

Subsection 1.3: The Foundations of the Obligatory Bequest Theory

Section 2: A Critical Comparative Reading of the Obligatory Bequest Theory
Subsection 2.1: The Obligatory Bequest in Arab Legislations
Subsection 2.2: A Critical Analysis of the Obligatory Bequest Theory
Conclusion: Summarizes the main findings, recommendations, and outcomes of this research paper.

Section 1: The Foundations of the Obligatory Bequest Theory

Subsection 1.1: Definitions

a)Definition of Bequest (Al-Wasiyyah):

Linguistically: The term "wasiyyah" carries several meanings:

- Connection: From the verb "wasā" (وصى), meaning to connect something to another. For example, "waṣaytu al-shayʾ bi-al-shayʾ" (وصيت الشيء بالشيء) means connecting one thing to another. (Abu Mansoor al-Azharī al-Harawi, p. 181)
- Covenant or Command: Derived from "ʿahd" (عهد), meaning to entrust someone with a task. For instance, "waṣāhu" (وصاه) means he entrusted him.

Appeal for Compassion: For example, "awṣaytu fulānān bi-waladihi" (أوصيت فلانًا بولده) means I appealed to him for compassion toward his child.

- Order: For example, "awṣaytu-hu bi-al-ṣalāh" (أوصيته بالصلاة) means I ordered him to pray. This is reflected in the Quranic verse: "Allah recommends you

concerning your children" (﴿يوصيكم الله في أولادكم﴾[An-Nisa: 11]), which means He commands you.

- The Bequested Object: Sometimes "wasiyyah" refers to the object of the bequest (Muhammad Ali al-Thanawi, 1996, p. 1794). It is called "wasiyyah" because the deceased, by making a bequest, connects his life's affairs to what follows his death. (al-Harawi, p. 252)

Juristically: According to al-Jurjānī in Al-Taʿrīfāt: "Al-Wasiyyah is the transfer of ownership added to what occurs after death." (al-Harawi, p. 1)

The Malikis defined it as:"A contract that obligates a right in one-third of the contractor's estate, binding upon his death or as a deputy after his death." (Al-Rassāʿ, 1993,)

Thus, Ibn Rushd stated:"Al-Wasiyyah is a man's gift of his property to another person or persons after his death." (Al-Qurtubi, 1995, p. 2042)

In Legal Terminology: The Egyptian law defines it in Article 1 of the Bequest Law as:"A disposition of the estate added to what occurs after death." (Egyptian Law, 1946, p. 1)

Tunisian law defines it as:"The transfer of ownership added to what occurs after death by way of donation, whether it be an object or a benefit." (Code, 1956, p. 171)

b) **Definition of the Obligatory Bequest** (Al-Wasiyyah al-Wājibah):

The obligatory bequest is a type of bequest that is legally binding, imposed by law to ensure that grandchildren whose parent (the deceased's child) died before the grandparent receive a portion of the inheritance. It is considered a mandatory allocation, often limited to one-third of the share the deceased child would have received if alive.

Definition of the Obligatory Bequest (Al-Wasiyyah al-Wājibah) According to Sayyid Sabiq:"The obligatory bequest is the imposition of a portion of the deceased's estate to the descendants of his child who died during his lifetime or simultaneously with him, even if hypothetically. This portion is equivalent to what the deceased child would have inherited if alive, limited to one-third of the estate. This applies provided that the descendants are not heirs themselves and that the deceased had not given them an equivalent amount without compensation before his death." (Sabiq, 1977, p. 55)

In Arab laws, the definition does not differ significantly from the Sharia definition. The obligatory bequest is:"A ruling issued by the force of law, granting certain relatives the right to participate in the inheritance, even if they were previously deprived. Its application is mandatory, whether the deceased recommended it or not, and it does not depend on the approval of the heirs. The extraction of this bequest takes precedence over the division of the estate." (Sama Saʿid, : 2020)

Most Arab legislations have adopted the provisions of the obligatory bequest in family and personal status laws. However, they differ in determining the eligible grandchildren:Egyptian, Kuwaiti, Tunisian, Emirati, and Moroccan laws define

eligible beneficiaries as the descendants of a child who died during the life of their parent, whether the child was a son or daughter.

Syrian and Jordanian laws restrict eligibility to the children of a deceased male child only.

The conditions for this bequest are summarized as follows:

- Death of the grandparent (the testator) during the lifetime of the inheritor (grandfather or grandmother).
- The grandchildren must not have inherited anything, even if it is less than their parent's share.
- The testator (grandparent) must not have bequeathed or gifted the grandchildren during their lifetime an amount equivalent to their share.
- The grandchildren must not have inherited from their parent an amount equal to or greater than their parent's share in the testator's estate.
- Absence of inheritance barriers for the grandchildren's parent in the testator's estate.

This definition and conditions reflect the legal and Sharia foundations of the obligatory bequest, aiming to ensure fairness for grandchildren who would otherwise be excluded from inheritance.

Subsection 2.2: The Emergence of the Obligatory Bequest Theory

It is well-established among Islamic scholars that bequests (al-wasiyyah) are optional and recommended, not obligatory. As stated by Abu Walid al-Bajji, a Maliki scholar: "In general, a bequest for someone who has no debt or obligation to another is not mandatory, although it is recommended for those who are affluent. This is the consensus of jurists." (al-Walid, 1999, p. 76)

Despite this, some scholars, like Ibn Hazm al-Andalusi, argued for its obligation:"Bequests are mandatory for anyone who leaves wealth, based on the hadith narrated by Malik, where Ibn Umar said: 'I never spent a night without having my will ready after hearing the Prophet say that.' This view was shared by Abdullah ibn Abi Awfa, Talhah ibn Mutarrif, Tawus, al-Sha'bi, and others, as well as Abu Sulayman and all our companions." (Ibn Hazm al-Andalusi, 1422H, p. 193)

However, the majority of scholars (the mainstream view) did not adopt this opinion. Ibn Rushd countered those who argued for its obligation, stating: "The conditional nature of bequests on the testator's will explicitly negates their obligation." (al-Walid I. R., 1988, p. 111)

Thus, compelling anyone through legislative authority to allocate a portion of their wealth to non-heirs raises significant issues, as bequests are fundamentally acts of choice.

The obligatory bequest applied today in Arab laws is a legal imposition that allocates a share of the inheritance to the grandchildren whose parent (the deceased's child) died before the grandparent. This share is equivalent to what the deceased child would have inherited if alive, capped at one-third of the estate. Notably, this concept

has no basis in classical Islamic jurisprudence, which focused on optional bequests for non-inheriting relatives, as the Prophet Muhammad said, "No bequest for an heir." (Abu Dawud and Al-Tirmidhi, H2596)

Ibn al-Mundhir stated: "There is consensus among scholars that bequests to non-inheriting parents and relatives are permissible." (Ibn al-Mundhir, 1985, p. 37)

The question arises: Where did this legal and jurisprudential stance originate?

The Egyptian legislator is considered the founder of the obligatory bequest theory in Arab countries. In 1946, Egypt enacted the Obligatory Bequest Law, defining it as follows: "If the deceased did not bequeath to the descendants of his child who died during his lifetime or simultaneously (even hypothetically) a share equivalent to what the child would have inherited if alive, an obligatory bequest is due to the descendants in the estate, equal to this share, up to one-third." (Egyptian Law, 1946, p. 171)

This law introduced a novel concept, making the bequest mandatory by law, without requiring the testator's intent or the beneficiary's acceptance. Prior to this, Egypt followed the Hanafi school, which did not recognize bequests except for those with rightful claims. Under traditional inheritance rules, grandchildren whose parent predeceased the grandparent were excluded from inheritance due to deprivation (hijb).

The explanatory memorandum of the Egyptian Bequest Law highlights the rationale behind its enactment, addressing complaints from citizens who were disinherited due to their parent's death before the grandparent. It states: "Grandchildren whose parents died during the grandparent's lifetime, or simultaneously (e.g., in disasters), rarely inherit due to deprivation, even though their parents may have contributed to the grandparent's wealth. The grandparent would likely have wished to bequeath them a portion, but death or circumstances prevented it." (Nasir Farid Muhammad Wasil, 2001, p. 128)

The obligatory bequest, in this context, is a modern jurisprudential innovation with no precedent in classical Islamic fiqh. It was introduced to address a contemporary issue in Egyptian society and later adopted by other Arab countries. To legitimize it, scholars relied on subsidiary rulings from various schools, not supported by the majority, and invoked the principle that the ruler may mandate permissible acts (mubāḥ) for the public good. According to some jurists, the ruler's command creates a Sharia ruling.

The Egyptian legislator aimed to assist grandchildren whose parent died before the grandparent by granting them a share equivalent to their parent's portion, under specific conditions. Article 76 of the 1946 Bequest Law (Law No. 71) states:

"If the deceased did not bequeath to the descendants of his child who died during his lifetime or simultaneously a share equivalent to what the child would have inherited if alive, an obligatory bequest is due to the descendants in the estate, equal to this share, up to one-third, provided they are not heirs and the deceased did not give them an equivalent amount without compensation through another disposition. If the

amount given is less, an obligatory bequest is due for the difference." (Egyptian Law, 1946, p. 171)

The law restricts eligible grandchildren to the first generation of the deceased child's offspring, including descendants of sons and daughters.

Subsection 3.3: The Sharia Foundations of the Obligatory Bequest Theory

When examining the 1946 Egyptian Bequest Law (as the founding legislation for the obligatory bequest theory in modern Arab laws), particularly its explanatory memorandum, three key Sharia foundations emerge as the basis for this new theory in inheritance laws:

a) Sharia Policy (Siyasa Sharʿiyyah):

The Egyptian legislator justified this new ruling under the framework of Sharia policy, which grants the state (or the ruler) the authority to intervene to prevent harm and promote public welfare. The case of grandchildren excluded from inheritance due to their parent's death before the grandparent was considered an injustice and a harm to them. Thus, the legislator sought a jurisprudential solution to address this issue.

Since Sharia policy is a critical domain that bridges Islamic fiqh with practical reality, aiming to achieve public interests and prevent harm within the framework of Sharia, it is the right and duty of the ruler (or state) to command permissible acts (mubāḥ) and enact binding legislation to serve the public good.

This authority is based on several Sharia principles:

- Achieving Benefits and Warding Off Harms (Taḥqīq al-Maṣāliḥ wa Darʾ al-Mafāsid): Sharia aims to promote good and prevent harm. If a permissible act leads to harm or neglects a benefit, it may be restricted. Evidence includes the Quranic verse: ﴿وَلَا تُلْقُوا بِأَيْدِيكُمْ إِلَى التَّهْلُكَةِ﴾[Al-Baqarah: 195].
- Blocking Means to Sin (Sadd al-Dharaʾiʿ):If a permissible act becomes a means to something prohibited, it must be restricted or prohibited. Evidence includes the Prophet’s saying:"Actions are by intentions, and each person will have what they intended."
- The Authority of the Ruler (Wilāyat Wālī al-Amr):The ruler has the authority to organize public affairs and enforce binding laws. Evidence includes the Quranic verse:

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ﴾[An-Nisa: 59].

The principle of "the ruler's authority to command permissible acts or restrict them" is an effective tool in Sharia policy, providing the flexibility needed to regulate societal affairs and protect public interests. However, the ruler must adhere to Sharia constraints to ensure justice and prevent abuse of power.

b) Fiqh Opinions Advocating the Obligation of Bequests in General:

Some fiqh schools and scholars, such as the Zahirites (led by Ibn Hazm) and some Hanafi scholars (like Ibn Abi Layla and Ibn Shubruma), argued that bequests are obligatory for needy relatives, based on the Quranic verse:
﴿كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِن تَرَكَ خَيْرًا الْوَصِيَّةُ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ﴾ [Al-Baqarah: 180].

This view was also held by several Tabi'in scholars, such as Sa'id ibn al-Musayyab, al-Hasan al-Basri, Tawus, and al-Tabari.

The Egyptian legislator relied on this fiqh opinion to justify the obligatory bequest, although the majority of scholars, including the four major schools, consider bequests recommended, not obligatory.

c) Foundational Texts Supporting the Obligatory Bequest:

Proponents of the obligatory bequest theory relied on the following textual evidence:The Bequest Verse (Al-Wasiyyah Ayah):
﴿كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِن تَرَكَ خَيْرًا الْوَصِيَّةُ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ﴾ [Al-Baqarah: 180].

They argued that this verse mandates bequests for non-inheriting parents and relatives. Imam al-Tabari stated: "It is obligatory for a wealthy person to bequeath to their parents and close relatives who do not inherit. Neglecting this is considered a failure to fulfill a divine obligation." (al-Tabari, 2000, p. 284)

When the majority countered that this verse was abrogated by inheritance verses in Surat An-Nisa, proponents argued that it remains valid and not abrogated, as both rulings can coexist without contradiction.

Prophetic Hadiths: Hadith of Ibn Umar:The Prophet said: "It is not permissible for a Muslim who has something to will to stay for two nights without having his will written down beside him." Al-Razi commented: " (Bukhari, H2738)Since bequests to non-relatives are not obligatory, this hadith must refer to bequests for relatives, reinforcing the Quranic mandate." (al-Razi, 1981, p. 68)

- Hadith of Abu Hurayrah:

A man asked the Prophet about his father who died without making a bequest. The Prophet replied: "Yes, donate on his behalf." (Muslim, H1630)

- Hadith of Aisha:

A man asked about his mother who died without making a bequest. The Prophet said: "Donate on her behalf."Ibn Hazm argued: "These hadiths indicate the obligation of bequests, as neglecting them requires atonement through donation, implying that it is a duty." (Bukhari, H2738)

In conclusion, the obligatory bequest theory in Arab legislations is a modern jurisprudential innovation based on Sharia policy, minority fiqh opinions, and textual evidence. While it aims to address the exclusion of grandchildren from inheritance, it remains a subject of debate and criticism due to its departure from the majority view in classical Islamic fiqh.

Section 2: A Comparative Critical Analysis of the Theory of the Obligatory Bequest

Subsection 2.1: The Obligatory Bequest in Arab Legislations

Most Arab legislations have adopted the obligatory bequest although with some variations and differences:

1. Egyptian Law:

The framework for the obligatory bequest was established by Law No. 71 of 1946, which defines it as follows: "If the deceased did not bequeath to the descendants of his child who died during his lifetime or simultaneously (even hypothetically) a share equivalent to what the child would have inherited if alive, an obligatory bequest is due to the descendants in the estate, equal to this share, up to one-third." (Egyptian Law, 1946)

Conditions:

- The share must not exceed one-third of the estate.
- The descendants must not be heirs themselves.
- The deceased must not have given them an equivalent amount without compensation during their lifetime.
- The bequest is restricted to the first generation of the deceased child's offspring.
- Each descendant receives a share equivalent to what their parent would have inherited.

2. Tunisian Law:

The Personal Status Code (1956) defines the obligatory bequest as:"If a person dies leaving grandchildren whose parent (son or daughter) died before them or simultaneously, an obligatory bequest is due to these grandchildren, equivalent to the share their parent would have inherited from the deceased, up to one-third of the estate." (Code, 1956)

Conditions:

- The bequest is limited to the first generation of grandchildren.
- It is distributed according to Islamic inheritance rules (male receives twice the share of a female).
- The grandchildren must not be heirs themselves.
- The deceased must not have bequeathed or given them an equivalent amount during their lifetime

3. Algerian Law:

The Family Law (1984, Article 169) states: "If a person dies leaving grandchildren whose parent died before them or simultaneously, the grandchildren are entitled to a share equivalent to what their parent would have inherited, up to one-third of the estate." (Law., Article169)

Conditions:

- The term "grandchildren" is broadly defined, leading to varying judicial interpretations.
- The share must not exceed one-third of the estate.
- The grandchildren must not be heirs themselves.
- The deceased must not have bequeathed or given them an equivalent amount during their lifetime.

4. Syrian Law:

The Personal Status Law (1953, amended in 2019, Article 257) defines the obligatory bequest as:"If a person dies leaving grandchildren whose parent (son or daughter) died before them or simultaneously, an obligatory bequest is due to these grandchildren in one-third of the estate, equivalent to what their parent would have inherited." (Law. S. P., article257)

Conditions:

- The share must not exceed one-third of the estate.
- The grandchildren must not be heirs themselves.
- The deceased must not have bequeathed or given them an equivalent amount during their lifetime.
- The bequest is restricted to the first generation of grandchildren

5. Moroccan Law:

The Family Law (Article 369) states: "If a person dies leaving grandchildren whose parent (son or daughter) died before them or simultaneously, an obligatory bequest is due to these grandchildren in one-third of the estate, equivalent to what their parent would have inherited." (Law. M. F., Article 369) (Iraqi Personal Status Law)

Conditions:

- The share must not exceed one-third of the estate.
- The grandchildren must not be heirs themselves.
- The deceased must not have bequeathed or given them an equivalent amount during their lifetime.
- The bequest is restricted to the first generation of grandchildren (for daughters' children) and extends to all descendants of sons.

6. Iraqi Law:

The Personal Status Law (1959, Article 74) states: "If a child dies before their parent, they are considered hypothetically alive at the time of the parent's death, and their inheritance share is transferred to their children as an obligatory bequest, up to one-third of the estate." (Status, Article 74)

Conditions:

- The bequest is restricted to the first generation of grandchildren.
- The share must not exceed one-third of the estate.

- The grandchildren must not be heirs themselves.

7. Jordanian Law:

The Personal Status Law (2019, Article 279) states: "If a person dies leaving grandchildren whose parent (son) died before them or simultaneously, an obligatory bequest is due to these grandchildren in one-third of the estate, equivalent to what their parent would have inherited." (Law. J. P., Article 279)

Conditions:

- The share must not exceed one-third of the estate.
- The grandchildren must not be heirs themselves, unless the estate is fully consumed by residual shares.
- The deceased must not have bequeathed or given them an equivalent amount during their lifetime.
- The bequest is restricted to the descendants of a deceased son, extending to all generations.

These legislations reflect a common approach to the obligatory bequest, with variations in details such as eligible beneficiaries, share limits, and conditions. The underlying goal is to ensure fairness for grandchildren who would otherwise be excluded from inheritance due to their parent's death before the grandparent.

Subsection 2.2: Critical Analysis of the Obligatory Bequest Theory

The Arab legislations that adopted the obligatory bequest for grandchildren whose parent died before the grandparent relied on several Sharia bases, primarily Quranic verse 180 of Surah Al-Baqarah: {كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِنْ تَرَكَ خَيْرًا الْوَصِيَّةُ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ}

"It is prescribed for you, when death approaches one of you, if he leaves behind wealth, to make a bequest for parents and close relatives in a just manner as a duty upon the pious."

However, this reliance is not entirely sound, as the majority of scholars and interpreters consider this verse abrogated (mansūkh) by the inheritance verses in Surah An-Nisa, which provide detailed rules for inheritance. This was clarified by the Prophet Muhammad (peace be upon him), who said:"Allah has given every rightful heir their due, so there is no bequest for an heir." (Abu Dawud and Al-Tirmidhi, H2596)

This statement establishes that inheritance and bequests cannot coexist, making the inheritance verses the authoritative reference. This view is supported by scholars such as Tawus, Qatada, Al-Hasan, Muslim ibn Yasar, Al-Ala ibn Ziyad, Al-Rabi', and Ibn Zayd.

Some scholars argued: "Rather, all of that was abrogated by the inheritance laws, so this verse is abrogated, and no bequest is obligatory for anyone, whether close or distant. If one makes a bequest, it is commendable, but if not, there is no

obligation." This is the view of Ali, Ibn Umar, Aisha, and ʿIkrimah (may Allah be pleased with them), as well as Mujahid and Al-Suddī. (al-Thaʿlabi, 2002, p. 56)
Ibn Abbas (may Allah be pleased with him) narrated: "The wealth was for the children, and the bequest was for the parents. Allah abrogated what He wished from that, making the share of the male twice that of the female, and granting each parent one-sixth, the wife one-eighth or one-quarter, and the husband one-half or one-quarter." (Bukhari, H2738)

Accordingly, the majority of scholars, including the four Imams, consider bequests (al-wasiyyah) permissible but not obligatory. Abu Ubayd stated: "This is the consensus of scholars from the Hijaz, Tohama, Iraq, Syria, Egypt, and others, including Malik, Sufyan al-Thawri, Al-Awza'i, Al-Layth, and all adherents to both tradition and reasoning."

We do not deny that some of the early scholars considered the bequest verse (Quran 2:180) non-abrogated (muhkamah), but they are a minority compared to the majority of interpreters who affirmed its abrogation. Even those who deemed it non-abrogated did not assert that grandchildren inherit as if their parents were alive, as proponents of the obligatory bequest claim. At most, they suggested that parents may allocate a portion of the estate to them, not exceeding one-third, but this is not mandatory. What if the grandparent does not allocate such a portion? There is no evidence that grandchildren are entitled to their parents' share by imposition.

This highlights the strength of the majority view and the lack of basis for the obligatory bequest theory in classical Islamic jurisprudence.
Here, the preponderance of the majority view becomes evident. As Ibn Abd al-Barr stated: "They unanimously agreed that bequests are not obligatory, except for those who have rights without evidence or trusts without attestation, except for a few who deviated and mandated them." Those who argued for the obligation of bequests applied it generally to non-inheriting relatives, not specifically to the grandchildren of the deceased, as the Egyptian Bequest Law does.

In truth, the early scholars did not restrict bequests to grandchildren or determine their share based on what their parent would have inherited if alive
Regarding the bequest verse (Quran 2:180), although it is considered abrogated, scholars agree that a grandparent may bequeath up to one-third of their estate to their grandchildren, especially if they are wealthy. Some scholars considered this obligatory, while many others deemed it recommended. However, there is no fixed amount specified for such a bequest; it is left to the discretion of the testator. To claim that grandchildren inherit as if their parent were alive is a position unsupported by any classical scholar. Those who advocate for this among contemporary scholars must provide Sharia evidence.

Subsection 2.2: The Implications of the Obligatory Bequest

The implementation of the obligatory bequest in Arab legislations marked a significant shift from the traditional inheritance system that had prevailed for centuries. Under the old system, grandchildren were excluded (mahjūbūn) from

inheritance by their uncles. However, with the new legislation, grandchildren are entitled to one-third of the estate. After decades of application, critical voices have emerged, particularly as the negative consequences of this law on other heirs became apparent. While the law aimed to be fair to grandchildren, it inadvertently disadvantaged the original heirs, creating anomalous situations that contradict the general principles of inheritance law and the higher objectives of Sharia.

This raises a serious question about the implications of this new legislation, especially given that the inheritance system is intricately interconnected, where any change in the distribution of the estate necessarily affects the shares of all heirs.

Based on the above, it can be argued that Arab legislations have overemphasized the obligatory bequest, particularly the term "obligatory." It is unreasonable for the beneficiary of the obligatory bequest to receive a share greater than that of the original heirs. For example, if a person dies leaving behind two daughters, a granddaughter (whose father died before the grandfather), and a full sister, the granddaughter would receive one-third of the estate, while each of the two daughters would receive one-third of the remainder, and the remaining portion would go to the full sister. This results in the granddaughter receiving a larger share than the original daughters, which is inconsistent with the principles of fairness and equity in inheritance.

Such outcomes highlight the need for a critical reevaluation of the obligatory bequest law to ensure it aligns with the broader objectives of Sharia and the principles of inheritance law.

9	9	Heirs / الورثة	
2	4	Daughter / بنت	2/3
2		Daughter / بنت	
1	2	Sister from the / اخت شقيقة Full Sister/ Same Parents	
1		Sister from the / اخت شقيقة Full Sister/ Same Parents	
3	3	Daughter of a Son/ بنت ابن	1/3

The application of this law results in anomalous situations that are unacceptable, as they contradict the justice of Islamic inheritance laws and create instances of injustice for rightful heirs. Examples include:

a) A granddaughter (daughter of a daughter) may inherit more than a granddaughter (daughter of a son).

For instance, if a person dies leaving behind a daughter, a granddaughter (daughter of a daughter), and a granddaughter (daughter of a son), the obligatory bequest for the granddaughter (daughter of a daughter) would be one-third of the estate (equivalent to her mother's share if she were alive). The remaining estate would be divided between the daughter and the granddaughter (daughter of a son) according to residual shares (radd), resulting in the granddaughter (daughter of a son) receiving only one-sixth, which is half of what the granddaughter (daughter of a daughter) receives.

This outcome highlights the inconsistencies and injustices that can arise from the application of the obligatory bequest law.

12	3	الورثة / Heirs	
6	2	بنت / Daughter	2/3
2		بنت ابن/ Daughter of a Son	
4	1	بنت بنت / (Daughter of a Daughter)	1/3

b) A granddaughter (daughter of a son) may inherit more than a direct daughter.

For example, if a person dies leaving behind two daughters, a granddaughter (daughter of a son), and a full sister, the obligatory bequest for the granddaughter (daughter of a son) would be one-third of the estate. The remaining two-thirds would be divided among the two daughters and the full sister. The two daughters would receive two-thirds of the remainder, and the full sister would receive the rest.

In this scenario, the granddaughter (daughter of a son) receives a larger share than each of the direct daughters, highlighting the inequities that can arise from the application of the obligatory bequest law.

18	18	18	3	الورثة / Heirs	
4	8	12	2	بنت / Daughter	2/3
4				بنت / Daughter	
4	ع			اخت شقيقة/ Sister from the Same Parents /Full Sister	
6	6	6	1	بنت ابن/ Daughter of a Son	1/3

This anomaly and discrepancy are evidence of human limitation and the fallibility of human thought, validating the divine wisdom of the Quranic verse: ﴿وَلَوْ كَانَ مِنْ عِنْدِ غَيْرِ اللَّهِ لَوَجَدُوا فِيهِ اخْتِلَافًا كَثِيرًا﴾[An-Nisa: 82]. Allah Himself has undertaken the division of inheritance, as He is most knowledgeable about His creation and what is best for them. Therefore, it is imperative to adhere strictly to these divine provisions. The majority view of scholars is undoubtedly correct, and the obligatory bequest law

deviates from this consensus, as well as from the opinions of those who mandated bequests for non-inheriting relatives.

While we do not deny the importance of caring for needy relatives, especially grandchildren who do not inherit, the obligatory bequest as implemented in Arab laws remains problematic. To ensure its alignment with Sharia principles, the following must be considered:

Expanding the Scope of the Bequest:

- The law should extend to all non-inheriting relatives, not just grandchildren, as the Quranic verse ﴿الْوَصِيَّةُ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ﴾[Al-Baqarah: 180] refers to all close relatives, not just grandchildren.

Including All Grandchildren:

- If the law is to be applied to grandchildren, it should not discriminate between the descendants of sons and daughters, as all are equally related.

Conditional Need:

- The bequest should be contingent on the relative's need being greater than that of the rightful heirs. It is unjust to deprive legal heirs of their share to benefit someone who may be wealthier.

In conclusion, while the intention behind the obligatory bequest is commendable, its implementation must be carefully revised to ensure consistency with Islamic inheritance principles and fairness to all parties involved.

Conclusion

1. Findings:

The obligatory bequest (al-wasiyyah al-wajibah) is a legal provision that allocates a portion of the deceased's estate to their grandchildren whose parent (the deceased's child) died before them. This share is equivalent to what the deceased child would have inherited if alive, capped at one-third of the estate. Most Arab legislations have adopted the obligatory bequest, agreeing on certain conditions such as:

- The share must not exceed one-third of the estate.
- The beneficiaries must be the descendants of a child who predeceased the grandparent.
- The grandchildren must not be heirs themselves.
- The deceased must not have given them an equivalent amount during their lifetime.

Arab legislations based the obligatory bequest on the views of some jurists who mandated bequests for non-inheriting relatives, relying on Quranic verses such as ﴿الْوَصِيَّةُ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ﴾[Al-Baqarah: 180]. However, this interpretation is not universally accepted, as the majority of scholars consider the bequest verse abrogated by inheritance verses in Surah An-Nisa. Additionally, the legislations restrict the bequest to grandchildren, whereas classical fiqh opinions apply it more broadly to all non-inheriting relatives.

The legislations' emphasis on the obligatory nature of the bequest and its restriction to grandchildren represent an overreach, as the majority of scholars view bequests as recommended, not mandatory. This has led to criticisms of the law for potentially infringing on the rights of rightful heirs.

2. Recommendations:

- Reevaluate the provisions of the obligatory bequest in Arab legislations, making it optional (as per the majority view) and expanding its scope to include all non-inheriting relatives, not just grandchildren.
- Impose stricter conditions for the application of the obligatory bequest to ensure legal certainty and protect the rights of rightful heirs
- Promote Sharia and legal awareness through various media to encourage voluntary bequests for needy relatives, fostering a culture of generosity without legal coercion.

This approach would align the law more closely with Islamic principles while addressing contemporary needs and ensuring fairness in inheritance practices.

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