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A Critical Appraisal of Obligatory Bequest as Prevalent in Muslim Countries

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Abstract

The obligatory bequest has been adopted by legal force in several Muslim states. The basic purpose of this adoption is to overcome the economic grievances of orphaned grandchildren. This reform seems to be justified from an Islamic perspective because it does not radically interfere with the Islamic law of inheritance. Orphaned grandchildren who are excluded under the traditional law of inheritance are its beneficiaries. These grandchildren inherit the share of their predeceased parent within the bequeathable limit of one-third of their grandparent's estate. However, if the grandparent does not make any bequest in their favour, the court will assume that the grandparent has made the bequest and enforce it. Pakistani courts have preferred obligatory bequest over Section 4 of the Muslim Family Laws Ordinance, 1961. However, obligatory bequest is not an ideal solution; it has restricted its benefit to grandchildren only and no provision is made for spouses and surviving parents. Additionally, both these reforms of obligatory bequest and Section 4 suffer from similar anomalies of representational succession. However, the state is the ultimate guardian of all deprived and needy classes. Therefore, the most appropriate way to tackle the economic necessities of orphaned grandchildren is through the welfare and development programmes of Muslim states. This article thoroughly analyses the obligatory bequest and discusses the different models applicable to Muslim countries. Moreover, the article probes the arguments for and against obligatory bequest and examines their implications.

Keywords

obligatory bequest, orphaned grandchildren, inheritance, predeceased child, Islamic law, representational succession.

1. Introduction

Classical Islamic law of inheritance is a source of pride for Muslims.[1] It is a definitive and predetermined law. It is based upon Qur'ānic verses and

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[1] J. N. D. Anderson, "Recent Reforms in the Islamic Law of Inheritance," *The International and Comparative Law Quarterly* 14, no. 2 (1965): 349.

Prophetic traditions.[2] It has described the list of heirs and their respective shares with meticulous precision.[3] According to traditional Islamic law, sharers first receive their shares from the estate and then the residue is inherited by the residuaries.[4] This distribution of shares among heirs is regulated by the following principle of inheritance: The nearer in degree excludes the remoter relations.[5] Moreover in classical Islamic law, only those legal heirs who have survived the deceased person are entitled to inherit from the estate.[6] Therefore, the predeceased son and daughter cannot inherit any share from the estate of their deceased parent. Consequently, children of these predeceased sons and daughters will also not inherit any share in the presence of the son of propositus.[7] However, in primitive tribal life, these rules were justified,[8] but nowadays, the socio-economic structures of present Muslim families have undergone unavoidable changes.[9] Moreover, urban Muslim families are more focused on immediate family relations[10] for the protection of their interests. Extended tribal relations have gradually become weaker and even disappeared in some places.[11]

However, modern *ijtihād* reforms were introduced in several Muslim countries to strengthen the immediate family.[12] Resultantly, Egypt made the bequest obligatory by legal sanction for the economic well-being of orphaned grandchildren.[13] When a grandparent has not actually made a

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[2] Zakiul Fuady Muhammad Daud and Raihanah Azahari, "The Wajibah Will: Alternative Wealth Transition for Individuals who are Prevented from Attaining their Inheritance," *International Journal of Ethics and Systems* 38, no. 1 (2022): 15, accessed May 25, 2024, https://www.emerald.com/insight/2514-9369.htm.

[3] Anderson, "Recent Reforms," 349.

[4] D. F. Mulla, *Principles of Mahomedan Law*, ed. M. A. Manan (Lahore: PLD Publishers, 2015), 74.

[5] Inaam Ullah, "Muslim Family Law Ordinance Section 4, Inheritance of Grandson in the Light of Islamic Teachings," *Islamabad Islamicus* 1, no. 1 (2018): 85.

[6] Shahbaz Ahmad Cheema, *Islamic Law of Inheritance: Practices in Pakistan* (Islamabad: Shariah Academy, 2017), 38.

[7] Nabeel Ahmad, "A Research Review of Orphan Grandson's Inheritance in the Light of Sharia and Pakistani Law," *Al-Absar* 1, no. 1 (2022): 73.

[8] Anderson "Recent Reforms," 350.

[9] Kemal Faruki, "Orphaned Grandchildren in Islamic Succession Law: A Comparison of Modern Muslim Solutions," *Islamic Studies* 4, no. 3 (1965): 254.

[10] This immediate family includes parents and lineal descendants. N. J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 135.

[11] Ibid.

[12] Ibid., 138.

[13] Faruki, "Orphaned Grandchildren," 257.

bequest to grandchildren, the court shall assume that it had indeed been made.[14] Later on, various other Muslim countries legally adopted the obligatory bequest.[15]

According to the Ḥanafī school, bequest implies a "means of transference of right of a certain property to someone else through charity after the demise of the owner."[16] The most important benefit of obligatory bequest is that it is adopted as a valuable tool that gives the testators flexibility in bequeathing their assets to those they consider deserving. Moreover, it protects the rights of close relatives who are entitled to their shares under the *sharīʿah* from being disinherited.[17] *Waṣiyyah* is a legal agreement expressing the testator's wishes to distribute his/her wealth after his/her death.[18] Obligatory bequest is a way to manage the distribution of inheritance to orphaned grandchildren who have lost their parent during the lifetime of their grandparent.[19]

Technically, obligatory bequest is an innovation of modern scholars in Muslim family law.[20] It is made obligatory by legal sanction. Under classical Islamic law, it is executed in favour of a particular group of individuals who do not inherit.[21] This obligatory bequest should be divided among grandchildren on the rule of inheritance, which is a double share to males.[22] Obligatory bequest reduces grandchildren's poverty and helps equalize their status with their solvent cousins. It also

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[14] Anderson "Recent Reforms," 358.

[15] Hamid Khan, *The Islamic Law of Inheritance* (Karachi: Oxford University Press, 2007), 180.

[16] Jamiu Muhammad Busari, "Al-Waṣiyyah (Bequest) according to the Four Sūnni Schools: A Concise Analysis," *IOSR Journal of Humanities and Social Science* 23, no. 2 (2018): 52-61, at 55.

[17] Ibid., 54.

[18] Mohd Shukri Jusoh et al., "*Wasiyyah Wajibah* Law in Malaysia—Concept, Application and Practices," in *Islamic Development Management*, ed. Noor Zahirah Mohd Sidek, Roshima Said, and Wan Norhaniza Wan Hasan (Singapore: Springer Nature, 2019), 263-76, at 265, accessed May 30, 2024, https://link.springer.com/chapter/10.1007/978-981-13-7584-2_21.

[19] All-Muizz Abas, Noor Lizza Mohamed Said, and Mohd Zamro Muda, "A Comparative Study on Legislative Provisions for Obligatory Bequest in Egypt and Malaysia," *International Journal of Academic Research in Business and Social Sciences* 13, no. 5 (2023): 1961-74, at 1962-63.

[20] Md. Habibur Rahman, Abu Talib Mohammad Monawer, and Noor Mohammad Osmani, "Wasiyyah Wajibah in Islamic Estate Planning: An Analysis," *Journal Islam dan Masyarakat Kontemporari* 21, no. 3 (2020): 76.

[21] Ibid., 77.

[22] Anderson, "Recent Reforms," 358.

maintains a balanced distribution of wealth among family members and promotes social justice and solidarity in society.[23]

Interestingly, the Commission on Marriage and Family Laws, constituted by the Pakistani government in 1955, also considered this matter of adopting obligatory bequest. However, the Commission was influenced by the practices of "representation" that prevailed in Pakistan's (then) Western province. Such practices were based upon their customary law. The predeceased son was represented by his son, the predeceased husband by his sonless widow, and the predeceased brother by his own son. Contrarily, the practice of making a will was absent in their customary law.[24] The Commission preferred the principle of representation over the concept of obligatory bequest.[25]

The Commission explained its preference by giving an illustration where a man had five sons and four predeceased him, leaving behind many grandchildren.[26] So, if the concept of obligatory bequest is applied, the sole surviving son would inherit two-thirds of the estate of the propositus and many grandchildren would inherit only one-third estate, and such a scheme "does not do full justice to the orphans."[27] However, if the principle of representation is applied, the estate of the propositus would be equally distributed between a single surviving son and four predeceased sons, the latter taking their nominal shares.[28] The Pakistani government, according to the recommendations of the Commission, enacted Section 4 of the Muslim Family Laws Ordinance 1961 (hereinafter MFLO) instead of adopting the obligatory bequest. Additionally, under Pakistani reform, grandchildren may inherit more than one-third of the estate (the maximum limit for granting a share to orphaned grandchildren under obligatory bequest is one-third).[29]

2. Debate on Obligatory Bequest for Grandchildren

Obligatory bequest is a new form of bequest made obligatory by law. It is the law which executes it and not the religion. It is made obligatory in

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[23] Habibur Rahman, Monawer, and Osmani, "Wasiyyah Wajibah," 78.

[24] Lucy Carroll, "The Pakistan Federal Shariat Court, Section 4 of the Muslim Family Laws Ordinance, and the Orphaned Grandchild," *Islamic Law and Society* 9, no. 1 (2002): 72.

[25] Although when the Commission was constituted, obligatory bequest was prevalent in Egypt and Syria.

[26] Khurshid Ahmad, *Marriage Commission Report X-Rayed* (Karachi: Charagh-e-Rah Publications, 1959), 33-97, 80.

[27] Ibid.

[28] Carroll, "Federal Shariat Court," 73.

[29] Daud and Azahari, "Wajibah Will," 6.

the favour of those relatives who are expressly mentioned in the legal provision and who are excluded from inheritance due to the presence of heirs having superior rights.[30] For the implementation of obligatory bequest, no initiation is required. If it is made by the free will of a deceased grandparent, it will be executed and if he does not, it will be executed by a legal judgment.[31]

Obligatory bequest preserves familial ties as it secures shares for disinherited relatives in the estate of the deceased.[32] The preservation of progeny is one of the fundamental objectives of Islamic law.[33] Orphaned grandchildren are shielded from receiving any share of the estate due to the presence of uncles and aunts. Moreover, in certain circumstances, one intends to make a bequest in favour of grandchildren but due to sudden death, he is prevented from doing so. In these cases, an obligatory bequest is crucial for doing justice and protecting economic necessities.[34]

Originally, in Malaysia, the children of the predeceased son were the beneficiaries of obligatory bequest. However, later on, two Malaysian states namely Selangor and Pahang, by amendments in their Muslim Wills Enactments, extended the benefit to the children of the predeceased daughter also.[35] Obligatory bequest in Malaysia is restricted to the grandchildren only and does not extend to the great-grandchildren.[36]

According to Article 209 of the Compilation of Islamic Law (KHI) in Indonesia, a will is obligatory in favour of adopted children and adopted parents. The institution of obligatory bequest guarantees the adopted child and adoptive parents receive a share of each other's inheritance. As both develop feelings of love and protect each other, it appears unfair to not give them any share of each other's inheritance.[37]

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[30] Md. Habibur Rahman and Abu Talib Mohammad Monawer, "The Legality of Wasiyyah Wajibah in Achieving Maqasid al-Shariah," *Fourth International Online Conference on Zakat, Waqf and Islamic Philanthropy*, September 17, 2020, 2, accessed May 30, 2024, https://eprints.unisza.edu.my/1813/.

[31] Ibid.

[32] Abas, Said, and Muda, "Comparative Study," 1964.

[33] Ibid.

[34] Ibid., 1966.

[35] Ibid., 1966-67.

[36] Ibid., 1970.

[37] Ismail, "Wills of 'Wajibah' and Renewal Thoughts of Islamic Inheritance Law in Indonesia," *Innovatio: Journal for Religious-Innovation Studies* 21, no. 2 (2021): 122-33, at 128.

Obligatory bequest is in reality an application of the principles of inheritance. The Council of Islamic Ideology in Pakistan is a constitutional institution that is duty-bound to advise the government of Pakistan in bringing laws in conformity with the injunctions of Islam. It held a meeting on February 13, 1983, and declared that it was not essential to compel anyone to make a will at any stage of their life. It is erroneous to oblige a person to make a will concerning his property.[38]

3. Arguments in Favour of Obligatory Bequest

Juristic justification for this beneficial expedient is the verse of bequest:[39] "It is prescribed when death approaches any of you if he leaves any goods that he makes a bequest to parents and next of kin according to reasonable usage; this is due from the God-fearing."[40] It is abrogated only with respect to those relatives to whom specific shares are granted in the verse of inheritance. Thus, a bequest is still obligatory in favour of those relatives who do not inherit.[41] Proponents of obligatory bequest argue that it has derived its authority from the verse of bequest[42] of the Qur'ān.[43] The verses of inheritance have abrogated the verse of bequest with respect to heirs. At this point, there is a consensus among all Sunni schools along with the majority of Shī'ī schools except Ithnā 'Asharī, on the rule: "There is no bequest to an heir."[44]

However, a respectable minority including al-Shāfi'ī (d. 204 CE) believes that the verse of bequest is not wholly abrogated. This verse is partially repealed in favour of those parents and relatives who have received their shares under inheritance. However, the verse applies to other relatives who do not receive any share in the inheritance.[45]

The Ithnā 'Asharī school of Shī'ī community holds that bequest to an heir is allowed within the limit of one-third, even without obtaining the consent of other heirs.[46] This school further argues that the earlier verse

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[38] Council of Islamic Ideology, "Report on Muslim Family Laws," 2nd ed. (Islamabad: Government of Pakistan, 1993), 81-86.

[39] Daud and Azahari, "Wajibah Will," 6.

[40] Qur'ān, 2:180.

[41] Anderson, "Recent Reforms," 359.

[42] Qur'ān, 2:180.

[43] Coulson, *Succession*, 145.

[44] Faruki, "Orphaned Grandchildren," 258; Carroll, "Federal Shariat Court," 72.

[45] Majid Khadduri, trans., al-Imām Muḥammad b. Idrīs al-Shāfi'ī's *al-Risālah fī Uṣūl al-Fiqh*, 2nd ed. (Cambridge: Islamic Text Society, 1961), 144.

[46] Al-Ṣadūq Abū Ja'far Muḥammad b. 'Alī, *Man lā Yaḥḍuruhu 'l-Faqīh* (Urdu), trans. Sayyid Ḥasan Imdād, 2nd ed. (Karachi: Al-Kasa Publishers, 1996), 4:164, https://hubeali.com/manla-yah-zurul-faqih/.

of bequest cannot be abrogated by the later verses of inheritance. Furthermore, it opines that the rationale behind the earlier revelation was to make a will within the limit of one-third of the net estate in favour of the heirs in special need, and hardship and inheritance alone do not reduce their sufferings.[47]

Ibn Ḥazm (d. 1064 CE) asserts that the verse of bequest imposed a legal obligation upon Muslims to make a will in favour of non-heir close relatives. Furthermore, if anyone fails to perform this obligation, it could be enforced through court.[48]

According to Abū Muslim al-Iṣfahānī (d. 934 CE), there are many justifications to prove that the verse of inheritance did not revoke the verse of bequest. First, the verse of bequest does not contradict the verse of inheritance. Second, inheritance does not forbid the bequest among the kinsfolk as the former is a blessing from Allah while the latter is a gift from the testator. Third, the verses of inheritance have clarified the verse of bequest. As the verse of bequest establishes the entitlement of family members while the verses of inheritance specify the exact share of certain family members.[49] Thus, other family members who are not specifically mentioned in the verse of inheritance will benefit under the verse of bequest. Therefore, to keep the family ties in harmony bequest is encouraged in favour of them. However, a bequest is not encouraged in favour of an heir.[50]

Both the verse of bequest and that of inheritance are to be read in harmony. It is incorrect to suggest that the verse of bequest has been revoked by the verses of inheritance, Prophetic traditions, consensus, or analogy.[51]

According to Ismail, a mandatory will is a new form of *ijtihād*. This concept evolved from the reinterpretation of the verses of bequest and inheritance. This reinterpretation was made in the context of present-day social life and its benefits *al-maṣāliḥ al-mursalah*.[52] The juristic basis for an obligatory bequest in Indonesia is *al-maṣāliḥ al-mursalah*. Things not found in the Qur'ān and *sunnah* "can be justified and accepted as an

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[47] Khan, *Islamic Law of Inheritance*, 183.

[48] Coulson, *Succession*, 146.

[49] Abū Muslim al-Iṣfahānī, *Majmū'ah-i Tafāsīr*, trans. Sayyid Naṣīr Shāh and Rafī' Allāh (Lahore: Institute of Islamic Culture 1964), 53, https://www.rekhta.org/ebooks/majmua-e-tafseer-abu-muslim-asfahani-ebooks.

[50] Jusoh et al., "Wasiyyah Wajibah," 269.

[51] Ibid.

[52] Ismail, "Wills of 'Wajibah,'" 122.

Islamic rule for certain benefit with all its requirements."[53] It is obligatory to take out some part of the property of the person who is died intestate. It gets support from a Prophetic tradition narrated by Mālik b. Anas (d. 795 CE).[54]

The Obligatory bequest is also supported by the objectives of the *sharīʿah* (*maqāṣid al-sharīʿah*).[55] These *maqāṣid* aim to protect five things: faith, life, progeny, wealth, and intellect.[56] The fourth objective of the *sharīʿah* is the maintenance of wealth. Divine law promotes all lawful means for its acquisition and disposition. The obligatory bequest is justified under the objectives of the *sharīʿah* as it grants a share to the deprived and underprivileged grandchildren. It eases the economic hardship and promotes social justice.[57]

The obligatory bequest does not alter the classical law of inheritance.[58] It is valid under Islamic law because it follows the general principles of Islamic law.'[59] Furthermore, it is the discretionary judgment (*ijtihād*) of the contemporary scholars.[60] Reformers employ *ijtihād* for fresh interpretations of the Qur'ān and *sunnah* based on current social circumstances.

Moreover, the maxims of Islamic law empower the ruler to restrict permissible actions in the public interest. This restriction shall be the command of the ruler and it must be followed. Likewise, it is permissible for a ruler to specify the next of kin as to the category of grandchildren of propositus and grant him the share of his father.[61]

As a matter of principle, authority can make a permissible law obligatory to settle serious issues based on the *fiqh*'s method of *al-maṣlaḥah*. Therefore, Muslims are not allowed to question the legality of

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[53] Ibid., 131.

[54] 'Ā'ishah, the wife of the Prophet (peace be on him), narrated that a man said to the Messenger of Allah (peace be on him), "My mother died suddenly and I think that if she had spoken, she would have given '*ṣadaqah*.' Shall I give '*ṣadaqah*' for her?" The Messenger of Allah (peace be on him) said, "Yes." Mālik Ibn Anas, *al-Muwaṭṭā'*, trans. Aisha Abdurrahman Bewley, 3rd ed. (UK: Diwan Press. 2014), 564, https://ia903201.us.archive.org/22/items/al-muwatta-of-imam-malik/Al-Muwatta%20of%20Imam%20Malik.pdf.

[55] Habibur Rahman and Monawer, "Legality of Wasiyyah," 2.

[56] Ibid., 1.

[57] Ibid., 7.

[58] Anderson, "Recent Reforms," 358.

[59] Habibur Rahman, Monawer, and Osmani, "Wasiyyah Wajibah," 84.

[60] Ibid., 77.

[61] Ibid.

the law, which is determined by authorities to serve the interest of the public.[62]

Under the prevailing situation, the state seems to be the most appropriate authority to determine the beneficiaries of obligatory bequest. Furthermore, the state can determine who falls under the category of close relatives. The selection of orphaned grandchildren being the only beneficiary of said reform justifies the action of the state in the public interest.[63]

4. Conditions for Obligatory Bequest

Two conditions are attached to the obligatory bequest. One is related to the beneficiary of obligatory bequest. The second is concerned with the predeceased child of propositus.[64]

(1) Conditions related to the beneficiary of obligatory bequest:

1) The intended beneficiary shall be the grandchild of the deceased.
2) The grandchild is excluded under the traditional law of inheritance. This is because an obligatory bequest only compensates for what a person misses in inheritance.
3) The grandchild must be alive upon the demise of a grandparent.
4) The grandchild will inherit the share which if his/her predeceased parent survives the propositus and receives within the maximum limit of one-third.
5) The grandchild was not deprived of inheritance, being a non-Muslim or a killer of the propositus.
6) The propositus, during his lifetime, must not grant his property by way of *hibah*, *waqf*, or voluntary bequest equal to the share of the predeceased parent of a grandchild. In all these cases, obligatory bequest shall not take effect. However, if the grandfather grants property to the grandchild that is less than the share of his/her predeceased parent then the grandchild can recover the balance under obligatory bequest within the limit of one-third. However, if the grandparent in his lifetime grants property to the grandchild that is more than what he would receive under an obligatory bequest, such excess share would be considered a voluntary bequest. It will only be executed with the consent of legal heirs.

(2) Conditions related to the predeceased son/daughter of the propositus:[65]

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[62] Jusoh et al., "Wasiyyah Wajibah," 270.

[63] Anderson, "Recent Reforms," 359-360.

[64] Habibur Rahman, Monawer, and Osmani, "Wasiyyah Wajibah," 78-79.

1) Predeceased son/daughter must die during the lifetime of propositus.
2) He/she must not be a killer of the propositus or a non-Muslim.

5. Different Models of Obligatory Bequest

Egypt was the first country to make enactments covering the obligatory bequest.[66] Subsequently, various Arab countries such as Syria, Morocco, Algeria, Yemen, Tunisia, Sudan, Emirates, etc., and non-Arab countries such as Malaysia, Singapore, and so on also passed legislation on it.[67] The basic purpose of these enactments was to improve the economic condition of orphaned grandchildren.[68] Following is the list of countries that followed the Egyptian Model with minute differences in their application:

1) Egypt (the Law of Intestate Succession, 1943, and the Law of Testamentary Disposition, 1946)
2) Syria (the Law of Personal Status, 1953)
3) Tunisia (Tunisian Law of Personal Status, 1956)
4) Morocco (Moroccan Code of Personal Status, 1958)[69]

5.1 Egyptian and Tunisian Model

In Egypt and Tunisia, children of the predeceased son or daughter are entitled to inherit from the estate of their deceased grandparents.[70] Children of the predeceased daughter are in a more advantageous position under the obligatory bequest. They are distant kindred and are often excluded under traditional law. Now, they will routinely get the benefit of reform. Whereas, children of the predeceased son who are either sharer or residuary under Islamic law, will seldom get the advantage of reform. Moreover, in Egyptian reform, the benefit of obligatory bequest is restricted to the children of the predeceased daughter and not extended to her grandchildren and great-grandchildren, how low so ever. Grandchildren are entitled to this

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[65] Ibid., 80.

[66] Khan, *Islamic Law of Inheritance*, 180.

[67] Habibur Rahman, Monawer, and Osmani, "Wasiyyah Wajibah," 73.

[68] M. Habibur Rahman, "Problems for Orphaned Grandchildren in Succession: A Study of Suggestions," *Islamic Studies* 25, no. 2 (1986): 218-19.

[69] Khan, *Islamic Law of Inheritance*, 178.

[70] In Egypt and Tunisia, the children of a predeceased son or daughter, who would be excluded from succession under the traditional law, are entitled to the share their parent would have received had he or she survived the propositus, within the maximum limit of one-third of the net estate. In Egypt, but not in Tunisia, the children of an agnatic grandson or granddaughter, how low so ever, benefit from the same rule. Coulson, *Succession*, 145.

reform only when they are otherwise excluded under the traditional law of inheritance.[71]

In Tunisia, the entitlement of obligatory bequest is restricted only to the children of the predeceased son and daughter and not to their grandchildren and great-grandchildren.[72] Tunisian law is unique in that it has granted a share to the children of a predeceased daughter, even though it has followed Mālikī law. Under Mālikī laws, distant kindred are not a separate category and are excluded in all circumstances.[73] In these reforms, the succession of an orphaned grandchild is limited to the extent of his/her predeceased parent's share, within the maximum limit of one-third. For instance, propositus dies and leaves three sons and one paternal grandson behind. Now, the question arises whether the grandson is entitled to one-third of the net estate or one-fourth share equal to the share of his predeceased father. The answer is one-fourth share.[74] However, he cannot be barred from claiming more shares within the maximum limit of one-third.[75]

5.2 Syrian and Moroccan Model

Similarly, in Syria and Morocco, legislation was made for grandchildren.[76] However, in Syrian and Moroccan provisions, the children of the predeceased son (son's son, son's daughter) and the grandchildren of the predeceased son (son's son's son and the son's son's daughter) can be the claimants of the obligatory bequest.[77] Relief is not extended to the great-grandchildren of the predeceased son, how low so ever.[78] Furthermore, no provision is made for maternal grandchildren and great-grandchildren, how low so ever.[79] Presumably, because they are distant kindred under the classical law of inheritance and are only entitled to inherit in the absence of quota-sharers and agnates.[80]

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[71] Ibid.

[72] Habibur Rahman, "Problems for Orphaned," 213.

[73] Anderson, "Recent Reforms," 359.

[74] Habibur Rahman, "Problems for Orphaned," 213-14.

[75] Ibid.

[76] In Syria and Morocco, the children of a predeceased son or agnatic grandson, who would be excluded from succession under the traditional law, are now entitled to either the share of the inheritance their father would have received had he survived the propositus or the one-third of the net estate, whichever is less. No provision is made for the children of the deceased's daughter. Coulson, *Succession*, 144-45.

[77] Habibur Rahman, "Problems for Orphaned," 213.

[78] Coulson, *Succession*, 144-45.

[79] Habibur Rahman, "Problems for Orphaned," 213.

[80] Anderson, "Recent Reforms," 359.

For instance, propositus leaves behind a daughter, a son's daughter, and a daughter's son. The Syrian and Moroccan law does not apply to the above proposition for two reasons: First, the children of the predeceased daughter are not beneficiaries of this reform and second, the son's daughter is otherwise entitled under the classical law of inheritance. Hence, shares will be distributed according to traditional law of inheritance and the daughter will get 3/4 and the son's daughter one-fourth.[81]

In the Syrian and Moroccan provisions, the share of orphaned grandchildren is equal to that of their predeceased parent or one-third, whichever is less. For instance, propositus dies and leaves behind two sons, a son's son (from one predeceased son) and a son's daughter (from another predeceased son). Each grandson and granddaughter will inherit 1/4 as a share of their predeceased fathers. But collectively, 1/4 + 1/4= 1/2, which exceeds the maximum limit of 1/3. Hence, when two or more predeceased sons leave behind children, then the limit of one-third applies to their collective entitlement, which is 1/2 in the present proposition and not 1/4. Now, the share of grandson and granddaughter will be reduced up to 1/3.[82]

5.3 Pakistani Reform of Representational Succession under Section 4

Pakistani reform, under Section 4 of the Muslim Family Law Ordinance 1961, is originally reproduced below:

> In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive. [83]

The plain reading of the above provision envisages orphaned grandchildren stepping into the shoes of their predeceased parents and inheriting shares equivalent to their shares. Though this provision appears unambiguous, it is subjected to various and sometimes conflicting interpretations. The first time the provision's literal interpretation was offered in the *Mst. Zarina Jan v. Mst. Akbar Jan* case. [84] In this case, the court granted the entire share of a predeceased son to his daughter. However, in the *Muhammad Fikree v. Fikree Development* case,[85]

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[81] Habibur Rahman, "Problems for Orphaned," 215.

[82] Ibid., 214.

[83] *Muslim Family Laws Ordinance 1961*.

[84] Mst. Zarina Jan v. Mst. Akbar Jan PLD 1975 Peshawar 252.

[85] Muhammad Fikree v. Fikree Development Corporation Ltd. PLD 1988 Karachi 446.

this provision was very loosely interpreted by the court. In this case, propositus was succeeded by his four daughters, and two children of his predeceased son (a grandson and a granddaughter). The court held that Section 4 was not attracted to the present case and is only applied in those cases where grandchildren would have been excluded from inheritance because of the presence of other male legal heirs. However, in the present case, grandchildren are already entitled to inherit under classical Islamic law being residuary. Therefore, there is no need to attract Section 4. It was clear from the preamble of the Ordinance that it came into force to give effect to the recommendations of the Commission. The Commission was not intended to deviate from the *sharīʿah*. It was only wanted to redress the sufferings of grandchildren in those circumstances where they were deprived of inheritance.

Section 4 was loosely interpreted by the court in the *Mst. Zainab v. Kamal Khan* case.[86] The court held that upon the demise of propositus Sufaid Khan his succession opened and his predeceased son Raju would be assumed alive and notionally receive his share. After that, he would be considered dead and his share would be distributed among his legal heirs according to Muslim personal law. It is because Section 4 is to be read in harmony with Section 2 of the Shariat Application Act, 1962. Hence, Ms Zainab being the only daughter of the predeceased son would inherit one-half share from his estate. The remaining one-half would be inherited by the collaterals and other legal heirs that is Kamal Khan. A grandchild is only entitled to inherit the share which he/she could inherit under Islamic law from the estate of his/her predeceased parent (if the latter himself/herself is alive at the opening of a succession of the propositus).

In the above-mentioned cases, the superior courts have given varied interpretations of Section 4. However, the loose interpretation of Section 4 is followed by courts in several subsequent cases.

Pakistani reform under Section 4 of MFLO violates the fundamental principles of Islamic law of inheritance. Under Islamic law of inheritance, only those legal heirs who survived at the time of death of a person are entitled to inherit from his estate but under Section 4 share is granted to the predeceased child. There is no concept of twice death in Islam; once a person dies, he dies forever, but under Section 4 of MFLO, the predeceased child is assumed alive at the time of the opening of succession and inherits his/her share and after that, he is considered dead. This concept of twice death is unknown in Islam. When a

[86] Mst. Zainab v. Kamal Khan PLD 1990 SC 1050.

predeceased child inherits his/her share at that time, he/she reduces or even excludes the other entitled heirs.

The rule of priority is also violated here, as the children of the daughter are distant kindred and can only inherit in the absence of sharers and residuaries but under Section 4 they inherit along with sharers and residuaries. For instance, the propositus dies and leaves behind a mother, a widow, a son, and a daughter's daughter. The mother will inherit the one-sixth share, the widow will get the one-eighth share, and according to Section 4, the predeceased daughter will be considered alive and inherit her share along with the son as residuary and then die and her share will be transferred to her daughter. Interestingly, in the *Allah Rakha v. Federation of Pakistan* case,[87] the Federal Shariat Court (FSC) of Pakistan preferred the option of obligatory bequest over Section 4. Moreover, the court rejected the recommendation of the Council of Islamic Ideology. The Council recommended that it is the responsibility of uncles and aunts to take care of the orphaned nephews and nieces and if they neglect or fail to perform their duty towards the latter, legal obligation could be imposed upon them. The court observed that such a solution would be beneficial in a society where standards of piety are quite high. But this solution is not suitable for Pakistani society, where uncles and aunts take care of their nephews and nieces not as duty but rather as charity and the receiver of such treatment also suffers from an inferiority complex. Therefore, a better solution is to make will mandatory through legislation, a view also supported by the Qur'ān.[88]

However, while suggesting a solution in the form of an obligatory bequest, the FSC did not examine the consequences of the new reform. If the decision of the FSC is upheld in appeal and the legislator enacts obligatory bequest accordingly, there is no guarantee that the new reform will not be challenged. It will be vehemently challenged on three grounds. The first ground is the very basis of obligatory bequest. The second ground is the inclusion/exclusion of maternal grandchildren. The third ground is the precedence of obligatory bequest over voluntary bequest.[89] The FSC did not discuss the position of the children of the predeceased daughter under obligatory bequest, who being distant kindred will routinely get the benefit of bequest. However, the children

[87] Allah Rakha v. Federation of Pakistan PLD 2000 FSC 01.

[88] "It is prescribed when death approaches any of you if he leaves any goods that he makes a bequest to parents and next of kin according to reasonable usage; this is due from the God-fearing." Qur'ān, 2:180.

[89] Carroll, "Federal Shariat Court," 79.

of the predeceased son in the presence of daughters will be heirs and ineligible to benefit from the obligatory bequest.[90]

5.4 Is Any Model Suitable for the Pakistani Legal System?

If the obligatory bequest is legally adopted in Pakistan, the question arises: Which model of obligatory bequest is more suitable for the Pakistani legal system? The answer is that no model presents a satisfactory solution to the anomalies of representational succession in Pakistan. The Syrian and Moroccan model only benefits the children of the predeceased son/grandson. Meanwhile, it is detrimental to the children of the predeceased daughter. Pakistani reform seems to be in a better position as it grants relief to paternal and maternal grandchildren.

The Egyptian model moves one step further, it grants relief not only to the children of the predeceased son and daughter but also to the children of the paternal grandson and granddaughter how low so ever. Consequently, it has benefited the distant kindred to a much lower degree such as son's son's daughter's son, son's son's daughter's daughter, and so on.[91] This model is discriminatory; it does not extend the same benefit to the children of maternal grandson and granddaughter.

The Tunisian model is similar to Pakistani reform to some extent. Both systems grant the share to the children of the predeceased son and daughter. Meanwhile, both systems refuse to extend the benefit to great-grandchildren (paternal/maternal) how low so ever. However, the Tunisian model appears to be more in conformity with the Islamic law of inheritance. It grants relief under the system of obligatory bequest.[92] Such relief is restricted to those grandchildren who are otherwise excluded under the traditional law of inheritance, meaning thereby who are non-heirs. It fulfils the rule "There is no bequest to an heir" and being non-heirs they are eligible for the benefit of the bequest. However, this model is also not foolproof.[93] Nevertheless, to remove the allegation of un-Islamic character from the face of Pakistani reform, the Tunisian

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[90] Obligatory bequest benefits those grandchildren who are otherwise excluded under classical Islamic law. Paternal grandchildren are sharers/residuaries under Islamic law and maternal grandchildren being distant kindred usually excluded. Ibid., 80.

[91] Habibur Rahman, "Problems for Orphaned," 213.

[92] The share of grandchildren is equivalent to the share of their predeceased parent within the maximum limit of one-third.

[93] First, the very notion of obligatory bequest is questionable, second, why is the benefit of this reform limited to orphaned grandchildren only? Third, why is the relief not extended to great-grandchildren (paternal/maternal)? Fourth, it is unclear whether the basis of reform is need or nearness to a deceased grandparent.

model seems more appropriate to replace Section 4. Both are serving the interests of paternal and maternal grandchildren, but Pakistani reform is declared wholly un-Islamic,[94] while Tunisian reform is, to some extent, Islamic.

6. Application of Obligatory Bequest

Obligatory bequest shall be executed as a bequest and not as inheritance. Thus, the one-third share will be extracted from the shares of all legal heirs without excluding anyone.[95] Nevertheless, scholars have proposed the following three methods for applying obligatory bequest.

6.1 First Method

The first method is described as the Court's Method because it is applied by the courts of first instance in Egypt.[96] According to this method, at the time of the opening of succession, the predeceased son/daughter of a deceased person would be assumed alive. He/she would inherit his/her share from the estate of propositus and then his/her share would be passed on to his/her children. Though this method seems to be the simplest one, it is complicated in its application.[97]

This method adversely affects the position of other legal heirs. For instance, if a woman dies and leaves behind the following legal heirs; her husband, mother, a son of the predeceased daughter, and two uterine brothers. According to this method, the predeceased daughter would be assumed alive, and she would inherit her share and, meanwhile, exclude the uterine brothers.[98] Similarly, when a man is succeeded by his widow, mother, father, daughter, son, and daughter of the predeceased son, all legal heirs will receive their respective shares except son and daughter. Under obligatory bequest, upon assuming the predeceased son is alive, the shares of the son and daughter will be reduced.[99]

This method is understandable only when a predeceased child is succeeded by his/her son(s) or son and daughter as they consume the whole share. However, the situation becomes complex when the predeceased child is succeeded by daughter(s) only. In these cases, the question arises whether the daughter(s) will get their fixed proportionate share and residue will go to the collaterals or against the classical law of inheritance, they will inherit the entire share of their

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[94] Allah Rakha v. Federation of Pakistan PLD 2000 FSC 01.

[95] Habibur Rahman, Monawer, and Osmani, "Wasiyyah Wajibah," 82.

[96] Faruki "Orphaned Grandchildren," 265.

[97] Khan, *Islamic Law of Inheritance,* 188-89.

[98] Ibid.

[99] Anderson, "Recent Reforms," 360.

predeceased parent. Moreover, neither any provision was made for the share of the widow/widower of the predeceased child nor any specification was made regarding the share of the surviving parent of the predeceased child.[100]

It seems that the first method is devised for the benefit of the immediate family at the expense of tribal heirs. For instance, a man is succeeded by his daughter, son/daughter of a predeceased daughter, and a son of a full brother. Under this method, the daughter will inherit 1/2 share, the grandchild will get the one-third share as the legatee of obligatory bequest and the son of full brother will get the one-sixth share. The son of the full brother is in a detrimental position because under classical law he would get either one-half (as one daughter is predeceased, therefore one-half would be inherited by the surviving daughter and the other one-half by the son of the full brother) or one-third (if the predeceased daughter is assumed alive, the two-third share would be inherited by the both surviving daughters and the one-third share would be inherited by the son of the full brother).[101]

6.2 Second Method

The second method is called "Muftī's Method" because the Muftī of Egypt gave his opinion in its favour.[102] Under this method of bequest, grandchildren will get the share equivalent to the share of the son or daughter of propositus, according to the gender of the predeceased parent.[103] The Egyptian scholar Abū Zahrah (d. 1974) gave the following example of it, where a woman is succeeded by her husband, son, daughter, and granddaughter from a predeceased son. Under this method, the husband will get the one-fourth share, the son will get the two-fourth share, and the daughter will get the one-fourth share. Moreover, if the obligatory bequest is considered equivalent to the share of the predeceased son (his share is 2/4, which is calculated by considering it equivalent to the share of the surviving son which is 2/4), the share of the granddaughter will be 2/4 and the denominator will increase from 4 to 6 and granddaughter will get two-sixth share. However, if the predeceased son was alive at the time of the opening of succession, he would get a 6/20 share.[104] Such a way of distribution of shares is against the Islamic law of inheritance.

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[100] Khan, *Islamic Law of Inheritance*, 189.

[101] Anderson, "Recent Reforms," 189.

[102] Faruki, "Orphaned Grandchildren," 266.

[103] Coulson, *Succession*, 148.

[104] Anderson, "Recent Reforms," 361.

This method also suffers from anomalies similar to the first method. Similarly, in this method, no provision is made for other legal heirs of the predeceased child. This method seems to be a mathematical fiction.[105] Coulson has criticised it in the following terms: "The bequest to grandchild envisaged by the law is not 'a bequest equivalent to the share of my surviving son or daughter,' but 'a bequest of the share of my deceased son or daughter would have received.'" Both are different concepts.[106]

6.3 Third Method

The third method is called "Abū Zahra's Method" because it was proposed by Abū Zahrah.[107] It appears to be the most convincing method.[108] It has three steps. The first step is to calculate the share of the predeceased son/daughter by assuming he/she is alive and then allot this share or bequeathable one-third whichever is less to his/her children. The second step is to separate this share as a bequest from the whole of the estate. The third step is to distribute the remainder of the estate among legal heirs without giving any share to the predeceased child by considering him/her dead.[109] This method ensures that grandchildren inherit a share equivalent to the share of their predeceased parent, within the bequeathable limit of one-third. Moreover, the rights of other legal heirs remain intact.[110] For instance, the propositus dies and leaves behind a husband, one full sister, one uterine sister, and one daughter's daughter.

First Step

The share of the predeceased daughter (she shall be assumed alive and inherit her share) = 1/2

The share of Husband = 1/4

The share of full sister = residuary

Uterine sister = She is excluded by the daughter at the first step.

Second Step

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[105] Khan, *Islamic Law of Inheritance*, 190.

[106] Coulson, *Succession*, 148.

[107] Faruki, "Orphaned Grandchildren," 266.

[108] This method was adopted by the family laws of certain Arab countries like Egypt (1946, Article 71-78), Jordan (1976, Article 182), and Kuwait (1971, Article 5). It requires the execution of the obligatory bequest on the pattern of inheritance. Habibur Rahman, Monawer, and Osmani, "Wasiyyah Wajibah," 82.

[109] Anderson, "Recent Reforms," 361; Habibur Rahman, Monawer, and Osmani, "Wasiyyah Wajibah," 83.

[110] Coulson, *Succession*, 149.

An orphaned granddaughter is entitled to the share of her predeceased mother or the one-third whichever is less. Since the one-third is less than 1/2, the former will be granted to her and subtracted from the rest of the estate.

Third Step

After subtraction of the one-third share from the estate of the deceased, the remaining 2/3 will be distributed among the actual heirs without considering the predeceased daughter alive. Now, according to traditional Islamic law, the legal heirs will inherit the following shares:

Husband = 1/2

Full sister = 1/2 (At this step, the predeceased daughter is deemed dead; therefore, the full sister inherits as a sharer)

Uterine sister = 1/6 (At this step, the predeceased daughter is considered dead; therefore, the uterine sister inherits as a sharer)

After calculation:

Husband = 3/6

Full sister = 3/6

Uterine sister = 1/6

Total shares = 7/6 as the numerator exceeds the denominator, so by applying the principle of *'awl*,[111] the shares become

Husband = 3/7

Full sister = 3/7

Uterine sister = 1/7

Total shares = 7/7

Now, finally, these shares will be calculated from the overall 2/3 estate of the deceased.

Husband = 3/7 x 2/3 = 6/21

Full sister = 3/7 x 2/3 = 6/21

Uterine sister = 1/7 x 2/3 = 2/21

Total shares = 14/21 (2/3) will be distributed among the surviving heirs of the deceased, while the 7/21 (1/3) has already been subtracted in the first and second steps for the granddaughter.

[111] *'Awl* is one of the basic principles of the Sunni law of inheritance. The meaning of *'awl*, which is more relevant to our purpose, is excess or surplus. This method is applied in those situations, in which the calculated shares of sharers increase from the supposed shares of the estate. Hence, for the purpose of giving each sharer his/her prescribed share, the supposed shares are increased in number so that they should correspond with the calculated shares. Cheema, *Islamic Law of Inheritance,* 99. Here the calculated shares are in the numerator and supposed shares are in the denominator.

However, this method has the same weaknesses as the first two. There is no clarity regarding the shares of spouse relict, parent, and daughter(s) and collaterals from the share of the predeceased child.

If the above three methods are carefully analysed, it becomes evident that no method is fully correct. However, Abū Zahrah's method seems more appropriate than other methods as it limits the share of grandchildren to the shares of their predeceased parents or the one-third whichever is less. Furthermore, it ensures the shares of inheritance of other entitled heirs from the estate of the deceased. The anomalies of this method can be compensated by making a provision for other heirs of the predeceased child.

7. Proposed Solutions of Obligatory Bequest

All these three methods suffer from inherent ambiguities.[112] It is not certain how to correctly apply the obligatory bequest. It is itself an index of the weaknesses of the system. Not a single method is foolproof. Application of these methods involves the violation of one or more principles of inheritance.[113]

7.1 Solution Proposed by Coulson

When surviving grandchildren are legal heirs under classical law, they should be treated as potential legatees under obligatory bequest. These grandchildren shall receive such additional share which will make their entitlement notionally equivalent to the share of their predeceased parent, within the maximum limit of one-third. If, at the same time, other grandchildren are also present who are non-heir under Islamic law and are entitled to obligatory bequest then the collective share of both types of grandchildren shall be redistributed among them. Under such distribution, they will receive their share notionally equivalent to the share of their predeceased parent. Furthermore, the share of a male shall be double that of a female.[114] For instance, the propositus is succeeded by a daughter, a son's daughter and a full sister. Now the son's daughter is entitled to the one-sixth share under classical law but can be considered a legatee within the limit of one-third to make her entitlement equivalent to the share of her predeceased parent. However, if, in the present scenario, the daughter's daughter is also present, she will also be considered a legatee within the limit of one-third along with the son's daughter.

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[112] Faruki, "Orphaned Grandchildren," 265.

[113] Khan, *Islamic Law of Inheritance*, 191.

[114] Coulson, *Succession*, 155.

7.2 Solution Proposed by Habibur Rahman

Habibur Rahman, however, has suggested a solution for the application of obligatory bequest in the following terms:[115]

> First Suggestion
>
> It has the following steps:
>
> i) The benefit of reform should be restricted to only those children of the predeceased son/daughter, how low so ever, who are excluded under the traditional law of inheritance.
>
> ii) The share of these children should be determined either by the share of their predeceased parent (if he/she had survived the propositus and received the share) or by the bequeathable one-third, whichever is less.
>
> iii) The determined share of the predeceased son/daughter must not be directly devolved on their children. Rather such share is devolved on and retained by the predeceased son/daughter.
>
> iv) This determined share should be distributed among all legal heirs of the predeceased son/daughter and not only to their children.
>
> Through the amendment above suggestions may be added to the statutes of Egypt, Tunisia, Morocco, Syria, and Pakistan.[116]
>
> Second Suggestion
>
> When a child, who is at equal degree with other children, is excluded under traditional law then he should receive the share of his/her predeceased parent or one-third of the net estate, whichever is less.[117]

The second suggestion is an innovation. It applies when the son's daughter and the daughter's son compete. Under traditional law, the son's daughter gets the one-half share whereas the daughter's son is excluded. On application of the second suggestion, the daughter's son will receive the share of his mother or the one-third. In this case, he will get one-third of the net estate and 2/3 will pass to the son's daughter.[118]

7.3 Solution Proposed by Hamid Khan

A renowned Pakistani jurist Hamid Khan (b. 1945) also proposed a possible method for the application of obligatory bequest. This method consists of two or three stages, as the case may be. At the first stage, it will be assumed that the predeceased child/children of propositus were alive and inherited their share along with other legal heirs of the propositus. If an overall share of the predeceased child/children is more than one-third of the net estate of the propositus, the second stage will

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[115] Habibur Rahman, "Problems for Orphaned," 224.

[116] Ibid., 226.

[117] Ibid., 225.

[118] Ibid., 226.

come into existence. In the second stage, this excess share will go back to the propositus and only be distributed among his/her living heirs. At this stage, the predeceased child is supposed to be extinct and no share will be granted to him. It is because if any share is awarded to him, it will be more than the one-third share, will be reverted to the propositus, and again will be distributed among legal heirs including the predeceased child. Once again the share of predeceased son will exceed one-third and there will be no end and the process of distribution of shares will continue for an infinite time. Therefore, to avoid this complexity, no share will be awarded to a predeceased child at the second stage. Moreover, if the share of the predeceased child/children is one-third or less than one-third, the second stage is unnecessary and the third stage will directly come. However, if the share of predeceased child/children is more than one-third, the third stage will come after the distribution of the surplus share. The third stage is further comprised of two steps: the first step is to assume that the propositus dies before the predeceased child and the second step is to distribute the share of the predeceased child among his/her all legal heirs. Some legal heirs will only receive their shares at one stage while others will inherit at all three stages. Therefore, for the final determination of shares, the shares inherited by all legal heirs at all or different stages will be added up to unity.[119]

Nevertheless, this method is also confusing, complicated, and lengthy. From a practical standpoint, this method is of least utility. However, Khan has justified this possible solution, saying that finding a simple solution that fulfils the following two conditions is very difficult: first, to overcome the distress of orphaned grandchildren within the structure of the law of inheritance, and second, to ensure that the shares of other legal heirs are not disturbed.[120]

8. Arguments Against Obligatory Bequest

8.1 No Juristic Basis

No explicit text of the Qur'ān and *sunnah* supports obligatory bequest. However, the proponents of obligatory bequest try to bring the evidence of voluntary bequest in favour of it. No classical scholar has supported such obligatory bequest, which is practised nowadays.[121] Moreover, the only past legal concept on which it can be founded is the legal fiction

[119] Khan, *Islamic Law of Inheritance*, 192.

[120] Ibid., 194.

[121] Habibur Rahman, Monawer, and Osmani, "Wasiyyah Wajibah," 77.

(*ḥīlah*). Whereby the objects not allowed by law are achieved by pretending that the original law has not been changed.[122]

8.2 Restriction on the Liberty of Testator

Carroll remarks, "In Islamic law . . . , a bequest is a voluntary post-mortem gift, freely undertaken." Introducing an element of compulsion in bequest and assuming that propositus made a bequest when in fact he did not make it "is an innovation no less dramatic than the approach preferred by the reformers in Pakistan."[123] A bequest is a voluntary disposition by a testator. But, the phrase "obligatory bequest" is a contradiction in terms.[124] Making a will obligatory is against the notion of a person's free will and liberty.[125] However, making a voluntary action obligatory through the state's action is replacing the wishes of the testator with those of the state's wishes.[126] It is executed irrespective of whether the deceased voluntarily makes it and the legatee accepts it.[127] Contrastingly, this testamentary liberty of the testator remains unaffected under the reform of representational succession in Pakistan.[128]

8.3 Only Beneficial to Grandchildren

Generally, the "orphaned grandchildren are the unquestioned authority of the bequest."[129] Even though in the verse of bequest parents are mentioned before the next of kin.[130] Like Section 4, obligatory bequest is also restricted to orphaned grandchildren only.[131] No benefit is extended to other legal heirs that are surviving parent, spouse relict, orphaned nephews/nieces of the predeceased child.[132] Obligatory bequest apparently derives its authority from the verse of bequest, in which the word kinsman is used which not only includes the grandchildren but also other relatives.[133]

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[122] Faruki, "Orphaned Grandchildren," 262.

[123] Carroll, "Federal Shariat Court," 76.

[124] Faruki, "Orphaned Grandchildren," 259.

[125] Muhammad Munir, "The Share of Orphaned Grandchildren under Islamic Law and Pakistani Legal System: A Re-evaluation of Representational Succession in Section 4 and Its (Mis)interpretation by Courts," *The Asian Yearbook of Human Rights and Humanitarian Law* 2 (2018): 114.

[126] Khan, *Islamic Law of Inheritance*, 185.

[127] Habibur Rahman, Monawer, and Osmani, "Wasiyyah Wajibah," 77.

[128] Coulson, *Succession*, 156.

[129] Habibur Rahman, "Problems for Orphaned," 219.

[130] Habibur Rahman, Monawer, and Osmani, "Wasiyyah Wajibah," 74.

[131] Carroll, "Federal Shariat Court," 77-78.

[132] Habibur Rahman, "Problems for Orphaned," 219.

[133] Munir, "Share of Orphaned Grandchildren under Islamic Law," 113.

8.4 Characteristics of Testate Succession

An obligatory bequest is a unique legal device with characteristics of both testate and intestate dispositions. It is a testamentary disposition because it could not exceed the bequeathable limit of one-third of the net estate. It is similar to intestate succession for the following reasons: First, it does not matter whether the propositus desires to give his estate to his grandchildren. Second, children of the predeceased son/daughter are not required to explicitly accept the bequest. Third, at the time of distribution of shares under obligatory bequest the share of the male heir is double that of the female heir. Fourth, grandchildren receive the share of their predeceased parent within the limit of one-third of the net estate. These arguments show that obligatory bequest is more in harmony with intestate succession than testamentary disposition.[134] In fact, "obligatory bequest is a concealed form of inheritance."[135]

8.5 Disruption of the Structure of Classical Islamic Law of Inheritance

There is no consensus/certainty as to which method is to be employed for the distribution of shares to orphaned grandchildren under obligatory bequest. The provision of obligatory bequest in the enactments of almost all Muslim countries provides that orphaned grandchildren will inherit the share of his/her predeceased parent or one-third whichever is less. To determine the share of a predeceased parent, he/she would be considered alive and the concept of twice death will be employed here. When a predeceased parent inherits his/her share, he/she reduces or excludes the shares of some other entitled heirs from the estate of a deceased person.

This method of application of obligatory bequest is a representational succession, not a bequest.[136] In this way, the application of obligatory bequest disturbs the whole structure of the traditional law of inheritance. For instance, the propositus is succeeded by the daughters, the full sister, and the daughter of a predeceased son. According to classical law, daughters will inherit two/third share, the full sister is residuary and the granddaughter will be excluded. However, under obligatory bequest, the son will be considered alive and inherit his one-third share, this share will pass to the granddaughter and the full sister will be excluded by the son.

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[134] Khan, *Islamic Law of Inheritance*, 182.

[135] Faruki, "Orphaned Grandchildren," 262.

[136] Khan, *Islamic Law of Inheritance*, 185.

8.6 Financial Condition of Grandchildren

Another criticism of obligatory bequest is, that it equates the rich and poor grandchildren. For entitlement under obligatory bequest, an orphaned grandchild must not be an intestate heir. Even when he inherits a small estate that bars his entitlement under obligatory bequest. It reflects that a grandchild's overall financial position is not considered even when he is in fact in need.[137] For instance, the propositus is succeeded by a daughter, a son's daughter, and a full sister. Under classical Islamic law, the daughter will get 1/2, the son's daughter will inherit 1/6, and the full sister is a residuary. If the obligatory bequest is applied, the son's daughter will get at least one-third of the share, which is more than one-sixth share under the classical Islamic law of inheritance. However, in the present scenario, the son's daughter being a sharer is not entitled to an obligatory bequest.

8.7 Ambiguous Basis of Obligatory Bequest

Voluntary transactions can be made obligatory in the public interest. However, it is necessary to make something the basis of such transformation. Such base may be the need of a person or his blood relationship with the deceased combined with need. Kemal Faruki says, "The test for a justifiable legacy is primarily needed and not the strength of the blood-relationship."[138] He gives an illustration where the propositus dies and leaves behind one son, a well-established grandson from his predeceased son, and a crippled grandnephew. In this scenario, it is better that the propositus should make a bequest in favour of the needy grandnephew instead of the grandson.[139]

However, Khan criticises the above argument of Faruki. According to him, it is an exceptional condition and cannot obstruct the reform that is adopted for the general public good including needy and destitute grandsons. Faruki's contention that need has preference over blood strength is not an appealing argument in light of Islamic teachings. As Islam teaches us, "charity begins at home" and near relatives are preferred over distant relatives. Hence, the need to combine with blood relationship with the deceased provides a justifiable reason for legacy.[140]

8.8 Grandchildren Close Relatives or Distant Relatives?

The obligatory bequest system does not answer why only orphaned grandchildren are provided for under it. Whether they are close relatives

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[137] Carroll, "Federal Shariat Court," 78.

[138] Faruki, "Orphaned Grandchildren," 259.

[139] Ibid.

[140] Khan, *Islamic Law of Inheritance,* 186.

of the propositus and should not be deprived of his/her estate or whether they are distant relatives and on a compassionate basis entitled to it. Anyhow, whatever the base of this system is, it would raise difficulties.[141] According to Faruki, distant relatives are most probably entitled to the benefit of obligatory bequest. He asserts that the word "relatives" is connected with "parents" in the verse of bequest implies close relatives. Moreover, when this verse is read in harmony with verse (4:7),[142] it confirms that 'the same group of relatives are intended in both cases." Additionally, if it is argued that orphaned grandchildren are among the close relatives, "it constitutes an admission that the rules of inheritance as laid down in the fourth *Surah* so painstakingly precise for all the other immediate family members, contain an inexplicable omission concerning orphaned grandchildren."[143] Contrastingly, if grandchildren are among distant relatives, no juristic basis could justify the benefit of obligatory bequest to them alone by excluding other relatives who might be in more need.[144]

However, Khan has answered the above criticism of Faruki as follows: It is more appropriate to state that a bequest could be made in favour of any person whether he is a close relative or distant relative. Such entitlement is subjected to one condition: he is not an heir and has not actually received any share under inheritance. In the Islamic law of the testament, the nearness and remoteness of the legatee with the testator do not matter. However, rules of proximity are of vital importance in the case of inheritance laws. Probably, it is the reason that legislators of different Muslim countries do not try to answer the question of whether orphaned grandchildren are close relatives or distant relatives. Moreover, the "verse of bequest" has ordained to make a will in favour of those close relatives who do not receive their share under the classical law of inheritance.[145]

8.9 Precedence of Obligatory Bequest

The propositus may have made a voluntary will before his death because certain kinds of bequests are encouraged in Islam, for instance, legacy as an expiation for missing fast or for missing prayers, for the construction of a mosque, or in favour of poor and empty-handed people. Moreover,

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[141] Faruki, "Orphaned Grandchildren," 261.

[142] "From what is left by parents and those nearest related there is a share for men and a share for women whether the property be small or large a determinate share." Qur'ān, 4:7.

[143] Faruki, "Orphaned Grandchildren," 258.

[144] Ibid.

[145] Khan, *Islamic Law of Inheritance*, 184.

the obligatory bequest is also adopted through state legislation. Now, the question arises: which form of bequest should be preferred over the other? It can be answered that the purpose behind a voluntary will is charitable. Similarly, the purpose behind obligatory bequest is also charitable. Therefore, the obligatory bequest should be preferred over all other bequests. It is based upon two principles: first charity should begin at home, and second "where need is a common factor, the nearness in a relationship should be the determining factor."[146]

If the grandparent had made other voluntary bequests, the obligatory bequest in favour of grandchildren shall take priority over any other dispositions, within the limit of one-third.[147] When a grandparent during his lifetime has made a bequest or other gratuitous dispositions in favour of grandchildren which is of smaller value, the court shall make up the sum up to the share of their predeceased parent or one-third whichever is less.[148]

However, there are several differences between voluntary bequest and obligatory bequest. A voluntary bequest is created by the free consent of the deceased. Whereas in obligatory bequest free will of the testator does not matter; rather, it is created by legal force. Anyone can be a beneficiary of a voluntary bequest whereas an obligatory bequest is limited to orphaned grandchildren (paternal/maternal). Moreover, a legatee can refuse a voluntary bequest whereas an obligatory bequest cannot be refused. Additionally, a voluntary bequest is executed according to the discretion of the deceased while obligatory bequest is distributed on the pattern of inheritance.[149]

9. Conclusion

In light of the above-mentioned arguments, it can be concluded that obligatory bequest is an innovation in *ijtihād* by modern scholars. It is adopted to redress the socio-economic sufferings of the orphaned grandchildren in today's Muslim societies. It is executed by the force of law irrespective of the discretion of the grandparent. However, obligatory bequest as prevalent in most of the Muslim countries is an amalgamated concept of testate and intestate succession. According to testate succession, it is restricted up to the limit of one-third of the estate of the deceased grandparent while under intestate succession, it grants a double share to the male grandchild. Moreover, it uses the principle of representation while determining the share of children of

[146] Ibid., 186-87.

[147] Anderson, "Recent Reforms," 358.

[148] Ibid.

[149] Ibid.

the predeceased son and daughter.[150] The predeceased child is supposed alive at the opening of succession of the estate of the deceased parent and inherit his/her share within the bequeathable limit of one-third and after that, he/she is supposed dead. And his/her share is further distributed among his/her children. Consequently, this reform suffered from the same anomalies as Section 4 of MFLO. Furthermore, this share is only distributed among grandchildren without granting anything to other heirs of the predeceased child.

Coulson and Hamid Khan have proposed solutions for the anomalies of obligatory bequest. However, the solution proposed by Habibur Rahman seems more appropriate because he extends the benefit of obligatory bequest to all legal heirs of the predeceased child. However, even before actuating the solution of the obligatory bequest proposed by Habibur Rahman, it is the responsibility of legislators of the Muslim states to answer the following questions: Is the purpose of representational succession under Section 4 of MFLO and the obligatory bequest to provide financial assistance? Why is this relief restricted to orphaned grandchildren only and why is it not extended to other orphan children and destitute relatives? Is the relief limited to orphans who are below the age of eighteen years? When grandchildren are in a better financial position then what will be the logic behind the application of the above reforms? Why is only the grandparent burdened for the maintenance of orphaned grandchildren? Without answering these questions the status of obligatory bequest remains controversial. Hence, an obligatory bequest is not an ideal solution for reducing the economic sufferings of orphaned grandchildren.

Finally, the only possible alternative for redressing the grievances of a grandchild is the responsibility of the state.[151] A decision of the Pakistani court can guide state functionaries in formulating schemes for the protection and economic welfare of orphaned grandchildren.[152] This solution seems valid from an Islamic standpoint because it does not affect the classical structure of inheritance and the testamentary power of the deceased also remains intact.

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[150] Faruki, "Orphaned Grandchildren," 265.

[151] Munir, "Share of Orphaned Grandchildren under Islamic Law," 116.

[152] The whole framework of state responsibility is excellently discussed in the light of legal provisions in *Abdul Majeed v. Additional District Judge, Faisalabad* PLD 2012 Lahore 445. Though this judgment is particularly pronounced in the suit for recovery of maintenance, it can provide a guideline to the state for redressing the miseries of not only grandchildren but also for other destitute people.