

THE MANDATED WILL FOR GRANDSONS WHO HAVE NO LEGAL RIGHT IN THE INHERITANCE: ITS TRUTH AND LEGAL PROVISIONS¹

O TESTAMENTO OBRIGATÓRIO PARA NETOS QUE NÃO TÊM DIREITO LEGAL À HERANÇA: SUA VERDADE E DISPOSIÇÕES LEGAIS

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Abstract: The present study aims to examine the legal problems resulting from the mandated will written by a grandfather or grandmother for his/her grandsons or granddaughters after the death of their father during his lifetime. The problem of the study is that sometimes grandfather leaves behind a big inheritance and his son dies before his death; therefore, the sons and daughters of the decayed father have no legal right to share the inheritance of their grandfather under the principles of the Islamic sharia law. Therefore, the present study aims to provide an answer to the following questions: Does the grandfather have the right to write a will that grants his grandsons their father's share in inheritance as if the dead father is still alive? Can such a type of will be classified as obligatory? Or is it commendable as per the Islamic sharia? What are the conditions that make this will obligatory? To answer these questions, the present study draws on the descriptive methodology, which is the study

of the cases that underwent the conditions of the father's death before the death of the grandfather, leaving behind sons who are not entitled to inherit because of the Islamic sharia law. The most important finding of this study is that will is commendable rather than obligatory and it can be obligatory if the governor gives order to make it obligatory.

Keywords: Commendable Will, Inheritance, Islamic sharia, Law of inheritance, Mandated Will.

Resumo: O presente estudo tem como objetivo examinar os problemas jurídicos decorrentes do testamento mandatado redigido por um avô ou avó para seus netos ou netas após a morte do pai em vida. O problema do estudo é que às vezes o avô deixa uma grande herança e o filho morre antes de morrer; portanto, os filhos e filhas do pai decaído não têm o direito legal de partilhar a herança do seu avô sob os princípios da lei islâmica sharia. Portanto, o presente estudo visa responder às seguintes questões: O avô tem o direito de redigir testamento que conceda aos netos a parte paterna na herança como se o pai falecido ainda estivesse vivo? Esse tipo de testamento pode ser classificado como obrigatório? Ou é louvável de acordo com a sharia islâmica? Quais são as condições que tornam este testamento obrigatório? Para responder a essas questões, o presente estudo recorre à metodologia descritiva, que é o estudo dos casos que passaram pelas condições de morte do pai antes da morte do avô, deixando para trás filhos que não têm direito a herdar por causa da sharia islâmica. lei. A conclusão mais importante deste estudo é que o testamento é louvável e não obrigatório e pode ser obrigatório se o governador der ordem para torná-lo obrigatório.

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Palavras-chave: Testamento louvável, herança, sharia islâmica, lei de herança, testamento obrigatório.

1. Introduction

The mandated will be approved by the legal systems in many countries in the Arab and Muslim countries is derived mainly from Islamic sharia. The will has been frequently mentioned in the Quran and Sunna. Sharia law has urged Muslims to use will. Islamic Sharia has outlined the content of will and organized it as well. Therefore, the present study is mainly interested in studying the mandated will from an Islamic perspective, as it focuses on its legal provisions and their validity.

The present study is mainly interested in examining the legal problems arising from the mandated will written by a grandfather or grandmother for his/her grandsons or granddaughters after the death of their inheritor. The problem being addressed in the current study is that sometimes grandfather leaves behind a big inheritance and his son dies before the death of his father; therefore, the sons and daughters of the decayed father have no legal right to share the inheritance of their grandfather. The inquiry arising in such a context is this: Does the grandfather have the right to write a will that grants his grandsons their father's share in inheritance as if the dead father is alive and the grandfather is dead?

There are frequent complaints from the families who have lost their fathers during the life of their grandfather because the father dies and may leave behind his children poor and needy. Then, after the death of their grandfather, the children have no right to the inheritance; however, their uncles take over all the inheritance. The sons of the decayed father remain poor and needy while the sons of their uncles enjoy the wealth of their grandfather. To solve such a problem, the mandated will has been applied in a number of Islamic countries like Egypt, Morocco, and Jordan, but it is still inapplicable in Saudi Arabia. As such, this issue requires further investigation and legal and religious research.

1.1. The objectives of the study

The present study aims to achieve several important objectives:

1-Muslims should feel the principles of cooperation and brotherhood in their family system.

2- Approving the mandated will by the grandfather at the death of the father before the father protects the grandsons and granddaughters from poverty.

3-Muslims should realize that Islamic sharia is keen on protecting the members of the Muslim family.

4-Everyone should know that Islamic sharia is valid for all times and spaces, as the legal provisions change over time and space.

5-Muslims should know that Islamic sharia is flexible and tolerant and always prevents conflict and disputes from falling among the members of the Muslim family.

1.2. The Significance of the Study

The significance of the study is as follows:

1-The study is related to the rights of the relatives and their need for the will that enables them to obtain their legal rights from their inheritance.

2-The mandated will protect people's fortunes.

3-People's lack of knowledge and their need to learn about the mandated will.

4-Several countries have approved the mandated will.

2. Methodology

The present study draws on the descriptive methodology, which is the study of the cases which have undergone the conditions of the father's death before the death of the grandfather, leaving behind poor and needy sons. The study also focuses on their financial conditions and the cases that lead to family conflict due to the lack of the mandated will. The study prepares an accurate description of these cases. It also analyses them from legal and religious perspectives. The sharia evidence of the will has been considered including the opinions of the jurists, and scholars.

3. Results and Discussion

Definitions and Terminology

Al-bahwati (1968) defines will as a legal document that states a testator's wishes and instructions for managing and distributing his estate after death (p.335). Ibn Rushd (1995) defines it, as a testator's endowment given to someone after his death (p.410). It is also defined as a kind of donation with an additional right to be released after the death of the testator (Al-

kwhji, 1982, p.71). A different definition states that will is a contract that grants the third of the property and it will be in effect after the death of the testator. Considering these definitions, one can reach a finding that the most accurate definition is that will come to be legally effective and binding after the testator's death and this definition is applicable to all types of will, like obligatory will and commendable will. Legally speaking, Abu Zahra (2005) defines it as the deferred additional management of inheritance after the death of the testator. Al-jezzery(2003) states that the absolute mandate will lead to giving rights to their owners, i.e. the will to refund deposits, and unknown debts that have no legal document proven them. Therefore, the testator would have written a will for refunding them; otherwise, he would be a sinner. The mandated will is obligatory particularly when it relates to refunding a debt. The jurists have agreed that is a due trust that is related to the testator's conscience if he dies. Almighty God said in the Quran: "Verily! Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice"(Anissa, 58). However, the current study is mainly interested in the mandated will for relatives, and grandsons, who have no legal right in the inheritance, which represents a controversial issue among researchers.

Ibn Hazm, A. (2013) argues that the mandated will for relatives includes the will of the relatives who do not obtain their share of inheritance due to an objection or an obstacle.

From a legal perspective, Alzalmi.(2015) remarks that the mandated will entail the grandfather allocate his wealth equally among the inheritor; therefore, the sons of the decayed father shall be given the same share of the inheritance, given in the normal conditions, in case of the death of the father during the life of the grandson providing that their share in the inheritance may not exceed the third (241).

Dawood (2015) argued that the mandated will be enforced by law is made by the free choice of the testator and executed by the power and the force of law because it is in compliance with the legal systems that imposed it, and if it was not implemented by the testator, it would have been obligatory by the force of law.

The Wisdom of the mandated will

The reason why there are some systems and laws that have enforced the mandated will is that they found that the death of a person during the life of his parents may prevent his children from getting their legal rights in his inheritance. Therefore, they might become poor and needy although their uncles lead a luxurious life. In addition, the decayed father might have largely contributed to making his father's fortune.

The Sharia origin of the Will

The origin of sharia is that it is legally derived from the Quran and Sunnah and the unanimous agreement.

1-Holy Quran: Almighty God said: "It is prescribed for you, when death approaches any of you, if he leaves wealth, that he makes a bequest to parents and next of kin, according to reasonable manners. (This is) a duty upon Al-Muttaqin (the pious) (Anissa, 12).

2-Prophet's Hadith: Allah's Messenger (ﷺ) said: "It is not permissible for a Muslim person, who has something he wants to give as a bequest, to have it for two nights without having his will regarding it written and kept ready with him." [Albukhary, 2738]. This hadith expresses irrevocably the significance of will and its necessity.

3- Unanimous agreement: The jurists agreed that will is necessary and commendable and it is acceptable as long as it does not exceed one-third of the inheritance.

4-Reason highlights the necessity of writing a will because it is highly rewarded by God, and compensates the sins the one committed during his lifetime.

The Mandated will in the laws of Islamic countries

Several Islamic countries have imposed the law of mandated will for non-inheritors grandsons. Among the countries are Egypt, Kuwait, Jordan, Syria, Iraq, Tunisia, Morocco, Algeria, and so on. I will focus on the application of this law in both Jordan and Egypt.

The Jordanian Law

The Jordanian law provided the mandated will in 1976 as follows:

"If someone passes away and he has a son, and this son has died before the father's death or at the same time, the grandsons shall take the third of his inheritance depending on the will and the following conditions:

1-The mandated will for the grandsons be equal to the share of the decayed father in the inheritance, as if he is still alive, providing that it never exceeds a third of the inheritance.

2-The grandsons do not deserve a will if they are inheritors of their grandfather or grandmother, and he/she gave them during his lifetime their share of inheritance provided in the mandated will. If his will gives them less than their legal right, they must be granted what is equal to the third of the inheritance. However, if his will gives them more than the third, it has become an optional will.

3-The heirs mandated by Islamic law are to inherit all estate, the distribution of which shall be bound by the rule that the male shall inherit twice the share of the female.

4-The mandated will nullify the optional will in taking a third of the estate.

The Egyptian Law

In article No. 79-76, the Egyptian law provided the mandated will for the category of people deprived of their right to inheritance such as grandsons, whose fathers die during the lifetime of their grandfather or grandmother or whose fathers die at the same time as the death of their fathers including all cases of death like crematory and drowning and it is also applied to those who dies with their fathers or their mothers in a car accident and it cannot be proven who dies first. The Egyptian law stipulates two conditions for the law enforcement of the will:

1-The grandson has not received any inheritance from his dead father and if he inherits anything from him, even if their share of inheritance is little, the mandated will is not going to be applied to the grandsons, as there is no will for an heir as provided by the sound Hadith.

2-The dead person should not have given the grandson what is equal to his share enforced by the mandated will without compensation through other methods like a gift and or a will. If he gives him his share in the virtue of such a type of will, the mandated will be invalid and if he gives him less than his legal right during his lifetime, the grandson shall complete his missing share pursuant to the mandated will. And if he gives some of the inheritors and deprives the others, the deprived people shall take their share pursuant to their legal share stated in the will. (Al-rahili, 2011, p. 124).

The Conflict among jurists in the mandated will and its evidence

The public of jurists have different opinions regarding the will, and its provisions, and their opinions can subsumed under the following items:

The First opinion

The will is preferable and commendable, but it is not obligatory. The will shall be obligatory if the person is a debtor or is liable for duties and he fears death before fulfilling his duties, and this opinion belongs to Hanfyia, Malakyiah, Alshafyiah, and Hanblism (Al-Sarkhasy, 2020, p. 142). Ibn Qudam(1969) argued that a will is obligatory for those who have debt or have a deposit or have an obligation, so they make a will to fulfill their trust.

Ibn Al-munzar (2005) said: "The will shall be permissible for the parents who have not received their share of the inheritance and the relatives who have not inherited" (p.72). They have supported their opinion with some evidence:

The first evidence: Almighty God said: "Written for any of you when death arrives, if he leaves behind goods, is the will for his parents and relatives with kindness. This is a duty incumbent on the cautious" (Cow, 180).

Interpretation of the Evidence

The verse states that will is obligatory for the family members who have not received their share of the inheritance, as their right to the inheritance has become mandatory (Ibn Hazm, p.352).

The Discussion of the Evidence

The verse stating that the will is obligatory had been abrogated by the verses of inheritors, as Allah gives everyone who has a right in the inheritance his right and the will is commendable for those who have no right in the inheritance.

The second piece of evidence is the Messenger of Allah (ﷺ) saying: It is the duty of a Muslim man who has something which is to be given as a bequest not to have it for two nights without having his will written regarding it. (Sunan Abi Dawud 2862)

The discussion of the evidence

We can debunk this evidence by highlighting the idea that the hadith is crystal-clear evidence that will shall be obligatory if the testator is indebted to someone.

The Third Evidence

The obligatory duty stems from the Quran and Sunnah and both of them entail the obligatory nature of the will. (Ibn Hazm, p. 352) The verse mentioned in the first evidence and the second evidence in the hadith is crystal-clear evidence that will is obligatory.

The Discussion of the Evidence

We can debunk this evidence by highlighting the opinions discussed in the two previous pieces of evidence stating that the obligation is related to what is given to others.

The Third Opinion

The will is obligatory for the relatives who have inherited big fortunes, and this narration is approved by Hanalblah, Abu Baker Abdulaziz from Alashab, and by Al-malkyia, Sheikh Ibn Sa'di, and Ibn Othymain.

The first evidence

Almighty God said; "Written for any of you when death arrives, if he leaves behind goods, is the will for his parents and relatives with kindness. This is a duty incumbent on the cautious". (180, Cow)

Discussion of the evidence from two perspectives

The verse is abrogated by the verse descended in the inheritance (Al-Sarkhasy, p.142), which is "for men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an obligatory share. (Anissa, 7). (Al-Sarkhasy (2020) argued that the verse was revealed to the Prophet before the revelation of the inheritance verses which have abrogated it. Ibn Algawzi (1422H) argued that scholars agreed on the abrogation of the will for parents and relatives who inherit and they are different for the relatives who never inherit; Does will apply to them? They are divided into two opinions; the most valid opinion is that it is not applied to either of them.

2- Al-Qurtbi (1964) argued that if the will was mandatory for them, it would not have been subjected to the will of the testator; however, it would have been binding to him.

Comment on the Discussion

3-Those who claimed that will is mandatory account their opinion for the idea that the abrogation is mainly concerned with parents and relatives who inherit; however, those who never inherit are not mentioned in the verse and nothing has been mentioned in the interpretation of Ibn Abbas might highlight the abrogation.

The second Evidence

The Messenger of Allah (ﷺ) says: It is the duty of a Muslim man who has something which is to be given as bequest not to have it for two nights without having his will written regarding it. (Sunan Abi Dawud 2862).

The Discussion of the Evidence

The evidence is discussed from three perspectives:

1-The prophet's use of the lexical item "duty" refers to seriousness, initiative, and precaution because one might die suddenly without writing his will, and a true believer ought to be ready for death.

2- Linguistically speaking, the lexical item "duty" in Arabic refers to a fixed entity and it is also evidence supporting the rules, The fixed rule is rather comprehensive to be obligatory or optional, and it might be also a commendable rule. Therefore, it is rather optional than mandatory.

3-The Hadith is mainly concerned with those who are indebted to someone else and he fears that he may lose the rights of the other if he does not write a will like deposit and debt.

The Sharia law

Alsuity (1983) argued that the governor of the Muslims has the power to enforce commendable issues if his enforcement may result in a public interest (p.121). Once the governor gives his order, he shall be obeyed. Alzuhili (1430 H) argues that if the governor gives an order, his order shall turn into a legal rule (p.128). Al-Qurtbi (1964) argues that if someone imposes on the money owner to make a will for his sons or his relatives who do not inherit him, his will cannot be valid. Then, why is it invalid?

It is said that the following verse, "written for any of you when death arrives, if he leaves behind goods, is the will for his parents and relatives with kindness. This is a duty incumbent on the cautious" indicates that the divine order is both dictated and imposed; that is similar to the verse saying that "fasting is written for any you. All scholars agree on the rule that if a Muslim is capable of fasting but he does not fast, he breaches God's duties. Similarly, when a testator does not leave a will behind for his parents and relatives, he breaches God's orders. However, another category of scholars said the will of parents and relatives is abrogated by the verses of the inheritance. A different category of scholars disagreed with them, claiming that the verse is fundamental, and is not abrogated. If the issue of whether the verse is abrogated or not is not settled by scholars, we cannot take for granted that it is abrogated without having a strong evidence. Al-jasas (1405) remarked that the following verse: "written for any of you when death arrives if he leaves behind goods, is the will for his parents and relatives with kindness. This is a duty incumbent on the cautious," is obligatory because its execution signifies one's own

fear and obedience of God's orders. However, Ibn Sa'di (2020) remarked that the majority of the Quran's interpreters believe that this verse is abrogated by the verse of the inheritors. Others think it is applicable only to the parents and relatives who do not inherit. Therefore, the most reasonable opinion is that one should say that this will is applicable to parents and relatives and Allah makes its application subject to the prevalent customs and traditions. Almighty God assigns the will for the inherited parents and other relatives as per the verses of the inheritors. However, the decision regarding those who are forbidden to inherit from their parents is that the grandfather is required to make a will for those relatives in order to enable them to get their share in the inheritance after his death. This decision is agreed by the majority of the scholars. That is to say, the objectives of the verse of the mandated will and of those of the inheritance verses are sound and valid, and these verses complete each other and never contradict each other. Ibn Othymín (2012) argued that the mandated will concern those who left great wealth and their relatives are legally prohibited from getting their share in the inheritance. He also adds that the verse is fundamental and therefore, the will is obligatory for the non-inheritors relatives. Ibn Almunzar (2008) remarked that the scholars agreed that will is commendable for the non-inheritors parents and the non-inheritors relatives.

However, Ibn Abdulbar (1387 H) remarks that the majority of Muslim scholars have agreed that will is not obligatory unless the testator is indebted to someone else or keeps a deposit or trust, so he would write a will that protects the right of other in case of his death. Similarly, Alhafiz Ibn Hajr argues that a will is only mandatory when the testator is committed to a legal right that he fears that his owner may lose it if he does not make a will for it as a deposit or a debt for God or a human being.

According to Abu-Zahra (2005) the rules of the mandatory will aim to realize the inheritance law, as the law makes the mandatory will legally effective. In other words, the law has enforced the inheritance right for the son whose father dies during the lifetime of his grandfather providing that his inherited share per the will does not exceed the third of the inheritance. All the rules of the law intend to put the will inheritance into force and become binding for all parties to implement it by the power of the law. Therefore, it is mandatory without obligation and if it is mandated, it becomes obligatory and effective, and in this way, it becomes similar to the natural right of the inheritance.

The acceptable opinion

Considering the previous opinions and their evidence, it has become clear that the will for the relatives who do not inherit is not obligatory, but it is commendable, and this can be accounted for several reasons, the most important of which is as follows:

1-The will is commendable and there is no evidence showing that it is obligatory because it was abrogated by the verses of inheritances approved by Muslim scholars from different sects, excluding a few scholars. The only exception for such a case is when the governor makes it obligatory, as it is applicable in many Islamic countries.

The Impact of the Obligatory Will on the non-inheritors Grandsons

The obligatory will has a number of effects on the non-inheritor's grandsons:

1-The mandated will precede the optional will and this is evident in the works of a number of scholars like Ibn Mifleh (2003) as he said: whoever makes a will for nonrelatives and his non-inheritors are needy, his will shall be obligatory. He adds, "The non-inheritor relative shall have also a third of the inheritance. Al-tahway said that whoever writes a will for nonrelatives, his deed is sealed by a sin."

2-The will for the non-inheritor grandsons is mandatory once the grandfather dies, even if he does not write a will for them. This is the distribution of wealth by the force of law based on justice and logic. The mandated will resemble the inheritance, as the male's share is twice the female's share.

3-A number of laws have enforced the will and made it obligatory based on regulations and conditions different from country to country.

4-The governor or his representative has the legal power to allocate a part of the inheritance by force and by the power of law if the inheritors refuse to pay this mandated will. It is based on the law of obligatory zakat, taxation, and fees imposed by the governors on the subjects, and based on the distribution of the inheritance among the inheritors.

4. Conclusion

1-The scholars have provided different definitions for the will, and the most acceptable definition is that an effective order of distributing the wealth at the death of the testator and legally speaking, it is defined as handling the wealth after death.

2-The mandated will is a will written for the parents and relatives who do not inherit due to an objection or obstacle, and legally speaking, it is defined as the grandfather or grandmother's

responsibility of writing a will for their grandsons if the father or mother dies before the death of grandfather or grandmother providing that their share never exceeds a third of the inheritance.

3-The wisdom behind the mandated will is that the scholars in law found that the man who dies during the lifetime of his father or his mother, his sons may be deprived of an inheritance that he might get if he is still alive after the death of any of his parents. Therefore, they may be poor and needy although their uncles lead prosperous lives which may shake the balance in the same family.

4-The rule of the will is that it is legitimate and its legitimacy is approved by the Quran and Sunnah.

5-A number of Islamic and Arab countries have empowered the law of the mandated will for the non-inheritors grandsons.

6-The jurists have different opinions regarding the nature of the will, as their opinion is divided between two categories; the first is commendable and preferable and the second is obligatory. It is only obligatory for the person who has a debt or keeps a deposit, and this opinion is accepted by the public of the jurists. It is also said that will is obligatory for everyone who leaves wealth behind. Therefore, the will is commendable unless the governor makes it obligatory.

Recommendations

1-Organizing the different types of wills with stipulating organizing and executive regulation concerned with wills and their application.

2-The mandated will require further studies to highlight the provisions relating to it and whenever it is obligatory.

3-Priortizing the mandated will to all other types of will and rights as long as it is mandated by the law.

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