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The Obligatory Bequest in Algerian Family Law

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Abstract :

The topic of the obligatory bequest has long been a subject of intense interest for researchers in the Arab world, due to its importance within the family and its significant impact on it. This research is a modest contribution aimed at shedding light on the concept of this bequest, clarifying the conditions for its validity, and outlining the procedures for granting it under Algerian law, occasionally referencing other relevant laws.

Keywords: succession; grandchildren; inheritance; Obligatory bequest

Introduction:

Wealth is one of God's blessings upon His servants, made a means and a trust in human hands to fulfill their interests and give what is due. God Almighty said: "Believe in Allah and His Messenger and spend out of that in which He has made you successors. For those who have believed among you and spent, there will be a great reward" (Surah Al-Hadid, 57:7). The first to benefit from a person's wealth after them are their closest relatives, their heirs, foremost among them being their children and their children's children. However, it may happen that one of the children dies before their parent, leaving behind needy children who are then excluded (blocked) from inheritance by their uncles. To address this situation, what is known as the "obligatory bequest" emerged some time ago. This is a legal construct *par excellence*, with no true basis in our classical jurisprudential heritage. The Algerian legislator adopted it and stipulated it in the Family Law since 1984, with the aim of ensuring care for grandchildren whose father has died.

This research aims to contribute to clarifying the reality of the obligatory bequest, its ruling in Islamic law and positive law, and the beneficiaries entitled to this bequest and its amount, through two main sections:

First Section: The Concept of the Obligatory Bequest

Second Section: Provisions of the Obligatory Bequest

To elucidate this, the descriptive method was used to clarify the concept of this bequest, and the analytical method was used to analyze the legal texts regulating it.

FIRST SECTION

The Concept of the Obligatory Bequest

The will is a concept that has been known to mankind since ancient times, then regulated by laws, and recently what is known as the compulsory will has emerged. In this discussion, we will address the concept of the compulsory will in two sections as follows:

First Requirement: Definition of the Obligatory Bequest

The term "bequest" (Al-Wasiyyah) has a linguistic meaning that points to it, and this meaning often has a strong relationship with its terminological meaning, whether in law, Islamic jurisprudence, or other sciences. Therefore, researching the definition of a bequest requires us to first address it linguistically and then terminologically through the following sub-sections.

First Sub-section: Definition of Bequest Linguistically

"Al-Wasiyyah" in language is a singular noun; its plural is *Wasaya*, like *Atiyyah* (gift) and *Matiyyah* (mount). It is a polysemous word with several key meanings:

1. **Connection/Joining (Al-Iisal):** It is said "awsaytu al-shay'a bil-shay'" meaning I connected one thing to another. "Ard wasiya" means land with continuous vegetation.¹ "Wasiytu al-shay'a bil-shay'i asihi" (from the paradigm of *wa'ada*) means I connected it. "Wassaytu ila fulan tawsiyatan" and "awsaytu ilayhi isa'an" (I appointed him as executor). The noun is *al-wisayah* (with kasra) and *al-wasayah* (with fatha) is a dialect. "Wasiyun" (executor) is on the pattern *fa'il* in the sense of *maf'ul* (one who is appointed), and the plural is *al-awsiya'*. "Awsaytu ilayhi bi mal" means I made the property for him. "Awsaytuhu bi waladihi" means I sought to incline his affection towards them. This meaning does not imply obligation. "Awsaytuhu bi al-salat" means I commanded him to perform it, as in His Almighty saying: **"This He has enjoined upon you that you may use reason"** (Surah Al-An'am, 6:153) and His saying: **"Allah instructs you concerning your children"** (Surah An-Nisa, 4:11), meaning He commands you.
2. **Covenant/Charge/Obligation (Al-'Ahd wa al-Taklif wa al-Ilzam):** It is said "awsa al-rajul" and "awsahu," meaning he made a covenant with him. "Tawasa al-qawm bi al-haqq" meaning they enjoined one another to follow

it. God Almighty said: **"Then for them is one-fourth of what you leave, after any bequest you may have made or debt"** (Surah An-Nisa, 4:12), and His saying: **"Allah instructs you concerning your children: for the male, what is equal to the share of two females"** (Surah An-Nisa, 4:11).²

3. **Giving (Al-I'ta')**: It is said "awsaytu ila fulan bi mablagh kadha" and "awsaytu ilayhi bi kadha" meaning I made it for him. From this is His Almighty saying: **"Then whoever alters it after he has heard it – the sin is only upon those who have altered it. Indeed, Allah is Hearing and Knowing."** (Surah Al-Baqarah, 2:181).³

Second Sub-section: Definition of Bequest Terminologically

There is hardly a book of Islamic jurisprudence covering all branches of fiqh that does not address the bequest, define it, and mention everything related to it. Similarly, most legal codes have defined it, even though they usually avoid definitions. Among its jurisprudential definitions is that it is: "A contract that establishes a right in one-third of the contracting party's estate, effective upon their death, or a delegation of authority after them."⁴

The Algerian legislator defined it in Article 184 of the Family Law as: "Transfer of ownership (Tamlik) contingent upon death, by way of donation (*tabarru'*)."

The Egyptian legislator defined it as: "A disposition (*tasarruf*) in the estate, contingent upon death."

The Egyptian legislator's definition using the term "disposition" (*tasarruf*) is considered comprehensive and inclusive of all forms and types of bequests, including transfers of ownership, relinquishments (*isqatat*) such as remission of debts, those pertaining to usufruct, and those pertaining to tangible assets. This contrasts with the Algerian legislator's definition, which restricts the bequest solely to what constitutes a transfer of ownership (*tamlik*), excluding relinquishments (*isqatat*).

Third Sub-section: Definition of the Obligatory Bequest

The obligatory bequest in its current form was not known among the classical scholars of Islamic Sharia, nor is there any parallel for it in their works. Therefore, when they define the obligatory bequest, they mean a meaning different from what is currently known in the legal sphere.

For them, it refers to a person's bequest to fulfill, from their estate after death, any obligations owed to God Almighty or to fellow humans. Examples include returning deposits, paying established debts, or bequeathing missed Zakat or expiations (*kaffarat*). It becomes obligatory for a person to make such a bequest for fear that these obligations might be lost after death, as they would remain a liability on their conscience, for which they will be questioned on the Day of Judgment. "The obligatory bequest is the bequest concerning any deposits or known debts one has; it is obligatory for them to bequeath regarding them, even if not ill, so that people's rights are not lost upon their sudden death."⁵

As for its modern concept, it has been defined in several ways, varying according to its nature in the view of the proponents. Among these definitions are:

1. Sheikh Muhammad Abu Zahra defined it as: "The bequest that is obligatory by virtue of law and is executed by virtue of law, whether the testator wished it or not. It is for the descendants of one who dies during the lifetime of their parent, literally or constructively (like a missing person), or who die simultaneously (like those drowned, buried under rubble, etc.)."⁶
2. Badran Abu Al-Aynayn Badran defined it as: "A bequest for a specific category of relatives who are deprived of inheritance due to the presence of those who block them, under special conditions and in a specified amount. It is made obligatory for the descendants of one who dies during the lifetime of one of their parents, from their grandfather or grandmother, deriving its force from the law..."⁷
3. Dr. Al-Arabi Belhaj defined it as: "Placing a person's grandchildren in the position of their parent in the estate of the grandfather or grandmother."⁸

From the above definitions, it becomes clear to us that:

- The obligatory bequest is established for grandchildren in the estate of their paternal grandfather or paternal grandmother, if their mother or father died during the lifetime of their father or mother.
- The obligatory bequest, known as "At-Tanzil" (substitution/subrogation) in the Algerian Family Law, is a legal obligation whose existence is presumed by law.
- The judge is obliged to execute this bequest, whether the deceased made a bequest or not.

The second requirement: The nature of the obligatory bequest and the position of Sharia scholars on it:

We stated earlier that the obligatory bequest in its modern concept was unknown in classical jurisprudence. Those who spoke of an "obligatory bequest" in the past did not mean what modern legal scholars mean by it, even if their names are the same. As for contemporary scholars, they have expressed their opinions on it. In this requirement, we will address the position of Sharia scholars on it and determine its nature in two sub-sections.

First Sub-section: The Position of Sharia Scholars on the Obligatory Bequest

Scholars agree that at the beginning of its legislation, the bequest was obligatory for parents and close relatives, based on the evidence of God Almighty's saying: **"Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable – a duty upon the righteous."** (Surah Al-Baqarah, 2:180).

They differed, however, regarding its obligation after that – whether this obligation remained or was abrogated for heirs after the revelation of the inheritance verses specifying the share of each heir – according to two schools of thought:

The First: The Majority School (Jumhoor): Including the four Imams, they hold that it is not obligatory but rather recommended (*mustahabbah*) under certain conditions. It is not obligatory for a person unless there is a right attached to their liability, such as the right of Zakat, Hajj, or expiation (*kaffarah*), or a right of fellow humans, like a debt, a deposit, or similar. In such cases, the bequest becomes obligatory as a means to clear one's liability. Consequently, grandchildren are not entitled to anything from the inheritance of the grandfather or grandmother if their uncles or aunts are alive, because they block them from inheritance completely (exclusion by *hajib hirman*).⁹

The Second: The School of a Group of Scholars: Among them are Sa'id ibn al-Musayyib, Al-Hasan al-Basri, Dawud al-Zahiri, Ibn Hazm, al-Tabari, and some contemporaries, including the scholar Muhammad Mustafa Shalabi.¹⁰ While agreeing on the obligation, these scholars differed regarding who it is obligatory for. Some hold that it is obligatory

for parents and close relatives who are not heirs. Others hold its obligation generally, and for parents and close relatives specifically. They then differed on whether, if a person upon whom it was obligatory failed to make a bequest, it becomes obligatory for others to fulfill it or not, with the deceased being sinful. Ibn Hazm said: "It is a duty upon every Muslim to bequeath to their relatives who do not inherit – whether due to being a slave, due to disbelief, because there are those who block them from inheritance, or because they simply do not inherit – bequeathing to them whatever their soul deems fit, with no fixed limit. If they do not do so, they [the relatives] must be given, without fail, whatever the heirs or executor see fit. If they bequeath to three of their aforementioned relatives, it suffices. The relatives are those who meet the deceased in the father by whom one is known when tracing lineage. Similarly, on the mother's side, they are those who meet the mother in the father by whom one is known in relation to her. Because these, in the language, are relatives, and it is not permissible to apply the name 'relatives' to others without proof."¹¹

This group argued with God Almighty's saying: **"Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable – a duty upon the righteous. Then whoever alters it after he has heard it – the sin is only upon those who have altered it. Indeed, Allah is Hearing and Knowing."** (Surah Al-Baqarah, 2:180, 181).

Ibn Hazm said: "This is a duty, as you hear. Parents and close relatives who are heirs are excluded from it, and those who do not inherit remain subject to this duty."¹²

Al-Tabari said in his interpretation of the verse: "It is prescribed for you, i.e., enjoined upon you, O believers, the bequest, when death approaches any one of you, if he leaves *khayran* (wealth) – the bequest for the parents and near relatives who do not inherit him, according to what is acceptable (*bil-ma'ruf*): which is what God has permitted and sanctioned in a bequest, not exceeding one-third, and without the testator intentionally wronging his heirs – a duty upon the righteous. This means: He has prescribed this and made it obligatory upon you, and made it a duty incumbent upon whoever fears God and obeys Him to act upon it. If someone asks, 'Is it a duty for a wealthy man to bequeath to his parents and close relatives who do not inherit him?' The answer is: Yes."¹³

They also argued with the saying of the Prophet (peace be upon him): **"It is the duty of a Muslim who has something to bequeath not to spend two nights without having his written will with him."** (Reported by Bukhari and Muslim).

And what was reported by Abu Hurairah (may God be pleased with him) that a man asked the Prophet (peace be upon him): "My father died and left wealth but did not make a will; will it expiate for him if I give charity on his behalf?" He replied: **"Yes."** (Reported by Ibn Majah).

The majority responded to the arguments of those who advocate the obligatory bequest as follows:

1. Regarding the verse **"Prescribed for you... a bequest for the parents..."**, it is abrogated (*mansukha*) by the inheritance verses. Al-Baghawi said: "God's saying: 'Prescribed for you' means enjoined upon you, when death approaches one of you, i.e., the causes and signs of death like illnesses, if he leaves *khayran* (wealth) – a bequest for the parents and near relatives. The bequest was an initial obligation in early Islam for parents and near relatives upon the death of one who had wealth. Then it was abrogated by the inheritance verses."¹⁴
2. The phrase in the verse **"a duty upon the righteous"** indicates that the bequest is not obligatory but rather recommended (*manduba*). If it were obligatory, it would be a duty upon all Muslims. By specifying it for the righteous, it indicates that the obligation to perform it is not binding. Al-Jassas said: "'Upon the righteous' – and not everyone is necessarily among the righteous. Thirdly, specifying it for the righteous, whereas obligatory duties are not differentiated between the righteous and others."¹⁵
3. The obligatory bequest is fraught with many flaws. For example, if a man has a son who died during his lifetime, and he [the son] has a daughter, and the [grandfather] man dies leaving a wife, two daughters, and a full sister. The amount of the obligatory bequest would be one-third because if the deceased son were assumed alive at the time of his father's death, he would not inherit more than one-third (due to the presence of sisters). Therefore, his branch (the granddaughter) is not given his entire share; the obligatory bequest is one-third, which his daughter takes. Consequently, the one-third taken by this granddaughter is one-third of the entire estate, making her share larger than that of the direct (surviving) daughters of the grandfather. Thus, the granddaughter would have harmed the direct daughter and been favored over her, which contradicts the rules of inheritance.¹⁶

On the other hand, this bequest harms and reduces the share of the direct children, which constitutes an infringement upon the rights God has ordained for His servants. It has been reported that the Prophet (peace be upon him) said: **"Indeed, God has given every rightful person their right, so no bequest is permissible for an heir."** (Reported by Ibn Majah). And also his saying: **"Give the prescribed shares (Fara'id) to those entitled to them, and whatever remains is for the nearest male relative."** (Reported by Al-Tirmidhi).

The doctrine of those who advocate the obligatory bequest is the one upon which the law relied in introducing the system of the obligatory bequest for grandchildren. This is especially pertinent as they may be in poverty and need, while their uncles or aunts are wealthy and prosperous, and perhaps their father contributed significantly to building the grandfather's wealth, while others did not. To address this problem and in line with the spirit of Islamic legislation in distributing wealth on the basis of justice and need, the proponents of this bequest also relied on a Sharia principle stating that **the ruler (Wali al-Amr) may mandate what is permissible (Mubah) if he sees a public interest (Maslaha) in doing so.**¹⁷ The first to codify this bequest was Egyptian Law No. 71 of 1946 on bequests. It was followed by the Syrian Personal Status Law in 1953, then Jordanian and Libyan law. After that, the idea spread to other Arab countries: Kuwait, Yemen, Sudan, Morocco, Algeria, Tunisia, Iraq, and the UAE.

Second Sub-section: The Nature of the Obligatory Bequest

Although the name is "obligatory bequest," some Arab legislations have stipulated this bequest within the section on inheritance. For example, the Algerian Family Law calls it *At-Tanzil* (substitution). Other laws, like the Egyptian law, stipulate it within the provisions of bequests. This leads us to question: Is the obligatory bequest classified as inheritance, or is it a type of bequest with its own rules?

In reality, a debate arose among scholars regarding its nature. Some considered it inheritance, and others considered it a bequest, each with their justifications. However, the more preponderant view, in my opinion, is that it is a bequest, for the following considerations:

1. Although the legislator stipulated its provisions in the section on inheritance, he called it *At-Tanzil*, which only applies when a person is not an heir.

2. Article 171 of the Algerian Family Law specifies that grandchildren are entitled to *At-Tanzil* on the condition that they are not heirs, and a bequest is only valid for a non-heir.¹⁸

The conclusion is that although this bequest contains some aspects of inheritance, this does not definitively prove it is inheritance, as it also differs from inheritance in other matters. On this basis, it is not a pure bequest, nor is it truly inheritance in reality. As Sheikh Muhammad Mustafa Shalabi says, "It is a quasi-inheritance with some characteristics of a bequest, combining to produce what is termed in legal parlance as the obligatory bequest."¹⁹

SECOND SECTION

Provisions of the Obligatory Bequest

The obligatory bequest, like the ordinary bequest, has a set of provisions which we summarize in the following requirements.

First Requirement: The Amount of the Obligatory Bequest and Conditions for Entitlement

Those who advocate the obligatory bequest have specified a maximum amount for it and laid down conditions for its validity that must be met; otherwise, it is not considered as such. This is what we will explore in the following two sub-sections.

First Sub-section: The Amount of the Obligatory Bequest

The scholars who advocate the obligatory bequest for close relatives, like Ibn Hazm, did not specify a fixed amount for it but left it to the individual's discretion, bequeathing whatever their soul deems fit, meaning no fixed limit.

As for modern laws, they have varied, expanding or restricting the scope. For example, Egyptian law set it as equivalent to the share the parent would have inherited from the estate if they were alive, provided it does not exceed one-third of the estate.²⁰ Syrian law followed suit,²¹ as did Tunisian law, which stipulates in Article 191 of the Personal Status Code: "If a person dies leaving children of a son or daughter (grandchildren) whose father or mother died before or simultaneously with the testator, these children are entitled to a bequest equivalent to the share their father

or mother would have inherited from the testator's estate, assuming their death occurred after the death of the said testator, provided it does not exceed one-third of the estate."

As for Algerian law, the legislator specified the amount of the obligatory bequest in Article 170 of the Family Law, stating: "The shares of the grandchildren shall be equivalent to the share of their parent had they remained alive, provided that this does not exceed one-third of the estate."

This article means that if the bequest exceeds one-third, its validity depends on the approval of the heirs.

In summary, the legislations concur regarding the obligatory bequest on the following points:

1. The obligatory bequest must not, under any circumstances, exceed one-third of the estate.
2. If a person, before their death, bequeaths to those entitled to this bequest more than the amount prescribed by the obligatory bequest rules, this excess is considered part of a voluntary bequest, and the heirs have the right to accept or reject it. If they bequeath less than the prescribed amount, it is supplemented to reach that limit.
3. If there is a single grandchild, they take the entire bequest; if there are multiple, they divide it according to their inheritance shares (male: female 2:1).
4. If no bequest was made, the obligatory bequest becomes due to its beneficiaries equivalent to the share of their parent, as long as it remains within the one-third limit, by operation of law.

Second Sub-section: Conditions for Entitlement to the Obligatory Bequest

The Algerian legislator specified the conditions for entitlement to the obligatory bequest in Articles 169 to 172 of the Family Law. They are:

1. **The grandchildren must not be heirs:** Meaning they must be excluded (*mahjoubeen*) from inheritance. If they inherit, even a small amount, they are not entitled to this bequest. Also, the deceased must not have given them, during their lifetime without consideration, an amount equivalent to the obligatory bequest through another means, such as a gift (*hiba*). If they were given such an amount, they are not entitled to the bequest. If they were

given less, they are entitled to the amount that completes the obligatory bequest. If the deceased bequeathed more, the excess is subject to the heirs' approval. If the deceased bequeathed only to some of them, the deprived grandchild is entitled to the obligatory bequest up to their full share.²² This is clarified by Article 171 of the Family Law: "These grandchildren are not entitled to *At-Tanzil* if they are heirs of the ancestor, grandfather or grandmother, or if the ancestor bequeathed to them or gave them during their lifetime without consideration an amount equivalent to what they would receive under this bequest. If the ancestor bequeathed to them or to one of them less than that, *At-Tanzil* is obligatory to the extent that completes their share or the share of one of them from the estate." However, if the grandchildren are heirs but nothing remains of the estate for them – for example, a man dies leaving a mother, a father, three daughters, and two sons of a son (grandsons) whose father had died before their grandfather. In this case, the father inherits 1/6, the mother inherits 1/6, and the three daughters inherit 2/3. The estate is fully consumed, leaving nothing for the two grandsons. Are they entitled to the obligatory bequest? The articles regulating this bequest do not provide an answer.

2. **Their father must have died during the lifetime of their grandfather or simultaneously with him:** If their father dies after the grandfather, they have no bequest, whether they are heirs of the grandfather or not. This is stipulated in Article 169 of the Family Law: "Whoever dies leaving grandchildren whose parent (testator) died before or with him, their substitution (*Tanzil*) for their parent in the estate is obligatory, under the following conditions..."
3. **The grandchildren must not have inherited from their father or mother an amount equal to or greater than what they would receive from their grandfather/mother:** If they inherited from their parents an amount equivalent to what one of them would have inherited from their father or mother if they had died before them, they are not entitled to the obligatory bequest. This is indicated by the legislator in Article 172 of the Family Law: "That the grandchildren have not inherited from their father or mother an amount not less than the share of their parent from his/her father or mother. This substitution (*Tanzil*) shall be for the male the share of two females."
4. **The obligatory bequest must not exceed one-third:** If it exceeds one-third, it is reduced to that limit, and the excess is void unless approved by

the heirs, in which case it becomes a charitable gift (*sadaqa*) or donation (*hiba*) from them. This condition is not specific to the obligatory bequest but applies to all bequests, based on the Prophet's saying: **"Indeed, God has given every rightful person their right, so no bequest is permissible for an heir."** (Reported by Ahmad, Abu Dawud, and Al-Tirmidhi who classified it as Hasan, and Ibn Majah). This condition is stipulated by all Arab legislations that have adopted the obligatory bequest. The Algerian legislator stipulated it in Article 170 of the Family Law: "The shares of the grandchildren shall be equivalent to the share of their parent had they remained alive, provided that this does not exceed one-third of the estate."

Second Requirement: The Beneficiaries of the Obligatory Bequest and How to Calculate Their Share

Are the beneficiaries of the obligatory bequest all relatives who do not inherit, or is it restricted to a specific group? And how is it extracted from the estate? In this requirement, we will address the beneficiaries of the obligatory bequest and the method of calculating this bequest in two successive sub-sections.

First Sub-section: The Beneficiaries of the Obligatory Bequest

From the preceding discussion, we know that the beneficiaries of the obligatory bequest are the grandchildren (*al-hafadah*). However, the legislator did not specify in Article 169 of the Family Law who exactly these grandchildren are. Are they only the children of a son, or do they also include the children of a daughter? Should the children of a grandson, however low, also be included? Whether they are one or many, taking shares with the male receiving twice the female's share? And does each ancestor block their own branch, with each branch only taking the share of their immediate parent?²³ As a result of this ambiguity, opinions differed in determining who the intended grandchildren (*al-hafadah*) are:

First Opinion: Proponents of this view hold that grandchildren (*al-hafadah*) are exclusively the descendants through males, i.e., the children of sons and their sons. Among those who held this view is Dr. Al-Arabi Belhaj, who stated in his commentary on Article 169 of the Family Law: "It is clear from the text of this article that *At-Tanzil* is restricted to the children of the deceased's male children, excluding the children of the deceased's female children."²⁴

Second Opinion: The grandchildren entitled to the obligatory bequest are the first generation of children of sons and children of daughters. Among those who held this view is Fatiha Bouchour, who stated in discussing Article 169: "The correct view, however, is that the children and grandchildren of daughters, no matter how low, do not benefit from *At-Tanzil*, but only those of the first generation..."²⁵

Third Opinion: The beneficiaries of the obligatory bequest are grandchildren from both the male and female lines equally. Among those who held this view is Dr. Dghiche Ahmed, who stated in his commentary on Article 169: "From the text, it is abundantly clear that the children of daughters are included within the term grandchildren (*al-hafadah*)."²⁶

Supporting this third opinion are some rulings of the Supreme Court, including Ruling No. 258898 of the Personal Status Chamber dated 21/02/2001: "The Arabic language addresses a group using the masculine form, and if there are females within the group, we do not obligate the legislator to use another form such as 'al-ahfad' and 'al-hafidat'." Also, Ruling No. 1040102 dated 04-01-2017, which stated: "Whereas, indeed, referring to the appealed ruling and the judgment it upheld, it appears that the trial judges considered *At-Tanzil* to include the children of a son and not the children of a daughter. In so ruling, they did not correctly apply the law and the jurisprudence of the Supreme Court, which does not differentiate between the children of a son and the children of a daughter. This makes the raised ground well-founded and entails the cassation of the appealed ruling."

The most preponderant opinion, in my view, assuming the validity of the obligatory bequest, is the first opinion: that the grandchildren entitled to the obligatory bequest are exclusively the descendants through males, i.e., the children of sons and their sons – in other words, the offspring of a male child who died a real or constructive death during the lifetime of their father or mother, or who died simultaneously with their parent without it being known who died first.

Second Sub-section: How to Calculate the Obligatory Bequest

The method of calculating the obligatory bequest differs according to its legal nature – whether it is inheritance or a bequest. We have previously stated that it is classified as a bequest in Algerian law. On this basis, the

method of calculating it and determining its amount is subject to the rules for calculating bequests:

1. Before dividing the estate, we assume the deceased son or daughter is alive and perform a theoretical calculation based on this assumption to determine the share this child would have received if alive.
2. We check whether the grandfather made a bequest for this purpose or not. If they did, we compare the amount bequeathed with one-third of the inheritance and the assumed share of the deceased child. If all three are equal (a rare occurrence), the matter is clear. If they differ, we compare the one-third with the share of the deceased child we assumed to be alive and issue the bequest in the amount of that child's share, provided it does not exceed one-third. If it exceeds, we reduce it to one-third.
3. If the grandfather did not make a bequest, the law deems it to exist as an obligatory bequest. This is done by comparing one-third of the inheritance with the assumed share of the deceased child and issuing the bequest in the amount of that child's share, provided it does not exceed one-third. If it exceeds, we reduce it to one-third.
4. We deduct the amount of the bequest, as calculated, from the inheritance *before* dividing it among the heirs and give it to the grandchildren, because bequests are paid out before distribution. If there are other bequests, this one takes precedence over them.
5. The remaining estate is then divided among the other heirs (excluding the deceased child) according to their respective shares.

Conclusion:

From the above discussion of the subject of compulsory bequests in Algerian family law, we can draw the following conclusions:

- 1- The majority of Islamic jurists, including the four imams, agree that the general ruling on bequests is that they are recommended and are not obligatory except for those who have debts, deposits, or a legal obligation to pay them off. Some scholars, including Ibn Hazm al-Zahiri, may God have mercy on him, disagreed with this and said that bequests are obligatory in all cases. This opinion is the basis for those who argue that bequests are obligatory among legal scholars.

2. The obligatory will as it is applied today is a recent innovation for which there is no explicit evidence in the Holy Qur'an or the noble Sunnah, and none of the well-known jurists and schools of thought of the past have mentioned it.
3. If there are competing wills, the obligatory will takes precedence over the other wills because it is obligatory.
4. The obligatory bequest is enforced by law if the deceased did not establish it, and it is divided among its beneficiaries in the same manner as inheritance, even if the testator stipulated that it be divided in another manner that he deemed better.
- 5- The legislator's aim in enacting the mandatory bequest is to protect the interests of grandchildren who are excluded or non-heirs whose father died before their grandfather.
- 6- Mandatory bequests are executed by court order, with the family court judge monitoring compliance with the legal requirements.
- 7- The amount of the mandatory bequest is taken from the entire estate before it is divided, so that the shares of some heirs are not affected more than others, and it is stipulated that it shall not exceed one-third.

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