98018 - Ruling on the so-called binding will (wasiyah waajibah)

the question

There is what is called the obligatory will in the system of heritage in some countries. Does it have any basics in the Islamic law? Is the portion of money taken through this system law halal?.

Detailed answer

Praise be to Allah.

In some Muslim countries the courts follow this law, which deducts a part of the estate and gives it to the grandchildren in the name of the “binding will” (wasiyah waajibah).

In brief, this law states that the will must be given to members of the first level of daughters’ children and sons’ children so long as there is no female between him and the deceased, a will like that which their father would be entitled to of his father’s estate if he were alive at the time of the grandfather’s death, subject to the following conditions:

1-It should not exceed one-third; if it exceeds one-third then the grandchildren should take one-third only.

2-The grandson should not be an heir.

3-The deceased grandfather should not have given him the equivalent of what he is entitled to by means of a bequest, gift or other means.

The shar’i basis of this will:

The memo explaining the shar’i basis of this will stated the following: The view that it is obligatory to leave a will to relatives who are not heirs was narrated from many of the fuqaha’ of the Taabi’een and imams of fiqh and hadeeth who came after them, including: Sa’eed ibn al-Musayyab, al-Hasan al-Basri, Tawoos, Imam Ahmad, Dawood, al-Tabari, Ishaaq ibn Raahawayh and

Ibn Hazm. The basis of that is the verse in which Allaah says (interpretation of the meaning):

“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-Muttaqoon (the pious)”

[al-Baqarah 2:180]

The view that some of the wealth of the deceased should be given to relatives who are not heirs on the basis that it is a will that is binding upon his wealth if he did not bequeath anything is the view of Ibn Hazm, which was based on the views of some of the Taabi’een, and it was narrated in one report from Imam Ahmad. End quote.

This text implies the following:

1 – Obligation of the will

The verse indicates that the will is obligatory for two reasons:

(i)The word kutiba (it is prescribed), which means it is enjoined.

(ii)The phrase haqqan ‘ala al-muttaqeen “a duty upon Al-Muttaqoon (the pious)” which is a phrase which indicates that it is obligatory.

2 – If he did not leave a bequest, then the will should be executed even though he did not bequest it, in accordance with the state law. They attributed this view to Ibn Hazm (may Allaah have mercy on him), but we shall see below that Ibn Hazm did not discuss it in this manner which is mentioned in the state law.

The scholars differed concerning this verse: is it abrogated or not?

The majority (including the four Imams, Abu Haneefah, Maalik, al-Shaafa’i and Ahmad – may Allaah have mercy on them) are of the view that it is abrogated. They quoted a number of matters as evidence for that:

(i)Among the companions of the Prophet (peace and blessings of Allaah be upon him) are those from whom there is no report that they left wills (wasiyah) and there is no report that anyone denounced that. If it had been obligatory then they would not have failed to do it and it would have been narrated from them in a clear text that they acted upon it.

(ii)The will (wasiyah) is a gift, and a gift is not binding during a person's lifetime, so it cannot become binding after his death.

(iii)A will given to an heir is abrogated by the verses on inheritance, according to the majority (of scholars), or it is abrogated by the hadeeth "There is no bequest (wasiyah) for an heir" according to some scholars. So this verse has been abrogated in both its meanings and its rulings, one of which is a bequest to an heir.

Ibn 'Abd al-Barr (may Allaah have mercy on him) said: They are unanimously agreed that it is not obligatory to make a will, apart from a group who held the odd view that it is obligatory to do so. End quote from al-Tamheed (14/292).

Abu Dawood (2869) narrated that Ibn 'Abbaas (may Allaah be pleased with him) said: The best of the bequest to the parents and relatives. The will remained like that until it was abrogated by the verse on inheritance. Classed as saheeh by al-Albaani in Saheeh Abi Dawood.

Some of the salaf were of the view (which is also mentioned by Ibn 'Abbaas – may Allaah be pleased with him – according to one of the two reports narrated from him) that the verse is not abrogated, rather the relatives who are heirs were excluded from it, but the obligation remains in effect with regard to non-heirs.

So this verse is to be understood in the light of the verses on inheritance or the hadeeth "There is no bequest for an heir."

See: al-Mughni (8/391) and al-Muhalla (9/312)

Compliance with this will that is dictated by state laws:

1 – Although they call it a wasiyah (bequest, will), it is in fact a meeraath (inheritance).

Hence Shaykh Muhammad Abu Zahrah said in his book Sharh Qanoon al-Wasiyah (p. 239), after mentioning the rulings on wills in state laws: This is a summary of the rulings on the binding will (wasiyah wajibah). … The aim, purpose and motive behind these rulings are the same as those behind the rulings on the division of the estate. So in the light of this binding will, the state law grants this share of the estate to the children of the one who died before his parents as an obligatory inheritance, which is what he would have been entitled to if he had outlived his parents, so long as it is no more than one-third. As that is the aim of the state law, all the rulings lead to making this binding will like a fixed share of the estate, thus becoming binding with no reason to make it binding, hence it is executed automatically every time, and thus it becomes confused with the division of the estate as prescribed in sharee'ah. End quote.

Once it becomes confused with the division of the estate as prescribed in sharee'ah, then it is definitely invalid, because Allaah, may He be exalted, has allocated the shares of inheritance Himself, and He has explained them in detail in His Book. Then He says (interpretation of the meaning):

"These are the limits (set by) Allaah (or ordainments as regards laws of inheritance), and whosoever obeys Allaah and His Messenger (Muhammad صلى الله عليه وسلم) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success.

14. And whosoever disobeys Allaah and His Messenger (Muhammad صلى الله عليه وسلم), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment"

[al-Nisa' 4:13-14]

This binding will (wasiyah waajibah) implies altering the ruling of Allaah, may He be exalted, and that is sufficient sin and obvious misguidance, for no one is better in judgement than Allaah, may He be glorified and exalted.

“Do they then seek the judgement of (the days of) Ignorance? And who is better in judgement than Allaah for a people who have firm Faith”

[al-Maa’idah 5:50]

2 –As for the verse [al-Baqarah 2:180] that they quote as evidence for this binding will being prescribed, they go against it in three ways:

(i)Allaah says “if he leaves wealth (khayran)”. This is a restriction on the command to make a will; no one is enjoined to make a will except the one who has khayran, which means a great deal of wealth. This was stated by ‘Ali and Ibn ‘Abbaas (may Allaah be pleased with them), but the scholars differed as to its amount. Ibn Qudaamah (may Allaah have mercy on him) favoured the view that what is meant is a large amount of wealth such that there is something left over after the heirs are made independent of means, because the Prophet (peace and blessings of Allaah be upon him) gave a reason for not allowing a bequest of more than one-third (of one’s wealth), when he said: “If you leave your heirs independent of means, that is better for them than leaving them dependent and asking from people.” Narrated by al-Bukhaari (1296) and Muslim (1628). See al-Mughni (8/391).

This restriction (“if he leaves wealth (khayran = a lot of wealth)”) is a condition of it being obligatory, as is clear. But the state law ignores this condition, and gives them a share of the estate whether the deceased left behind a large amount of wealth or not.

(ii)The word of Allaah wa’l-aqrabeen (translated here as “and next of kin”) is general in meaning and includes all relatives, so it includes grandchildren as well as siblings and their children, paternal uncles and maternal uncles and their children, and other relatives. Limiting it to grandchildren is another way in which this law goes against this verse.

(iii)The verse does not allocate a specific amount to the binding will or define the share of the father or anyone else. If a man bequeaths, say, one-sixth to his grandson, then he has obeyed the command mentioned in the verse, but the state law does not regard that as sufficient, rather it gives him the complete share which his father would have got if he were alive, so long as it does

not exceed one-third. This is a third way in which this law goes against this verse.

3 – The reason why this state law was introduced, according to the memo, was repeated complaints about cases where a father died before his parents, and his young children were left poor and needy, then the grandfather died and their paternal uncles took the entire inheritance, leaving these grandchildren poor when if their father had been alive, he would have had a share of the inheritance.

If this is the reason why this law was introduced, then why did the law give the grandchildren a share of the estate without stipulating that they should be poor? Rather it gives them this share even if they are well off, but it should have limited it to cases of need.

Shaykh Muhammad Abu Zahrah (may Allaah have mercy on him) said (p. 244): In fact if we accept this obligation (binding will), we must take into account whether people are in need, because wills or bequests come under the same heading as charity, so it must be given to the poor. And because the binding will takes precedence over anything else, the definition of next-of-kin should be broader. End quote.

4 – The state law restricts the relatives who are entitled to this bequest and binding will to the grandchildren only, and gives them their father's share. It may be understood from the law that this is the view of Ibn Hazm (may Allaah have mercy on him), but this is not his view. Ibn Hazm (may Allaah have mercy on him) did not single out the grandchildren for this bequest, rather it should be for all the relatives apart from the heirs, and the person should have bequeathed something to at least three of his relatives, because this is the minimum plural. Moreover, Ibn Hazm did not set a specific amount for the portion of the wealth that is bequeathed, rather it may be whatever the deceased wished. If he did not bequeath anything then the heirs are the ones who should determine the amount of wealth they want to give to the relatives.

Ibn Hazm (may Allaah have mercy on him) said: If a person dies without leaving a will, then charity must be given from it of whatever amount is possible, and that is a must, because bequeathing something is obligatory, as we have narrated, therefore it is obligatory to give away something of

his wealth after his death. And because the deceased no longer has any control over his wealth, the heirs should give away some of the wealth, and there is no limit to that except what the heirs or executor of the will see fit, without being unfair to the heirs. It is obligatory for every Muslim to bequeath something to those of his relatives who do not inherit, either because they are slaves or kaafirs, or because there is someone who prevents them from inheriting, or because they will not inherit, then he may bequeath whatever he wants to them, and there is no limit to that. But if he does not do that, they should be given what the heirs or executor of the will see fit. End quote.

Al-Muhalla (8/351).

Thus Ibn Hazm clearly stated that there is no limit to this bequest.

5 – This binding will or bequest which is dictated by state law was not suggested by any scholar throughout fourteen centuries of history, which is sufficient to indicate that this law is invalid, because the Prophet (peace and blessings of Allaah be upon him) said: “Allaah will not cause my ummah to agree on misguidance.” Narrated by al-Tirmidhi (2167) and classed as saheeh by al-Albaani in Saheeh al-Tirmidhi.

If this binding will or bequest in this form were correct, why would the entire ummah have failed to act upon it until these latter-day legislators came and tried to correct the injustice and unfairness perpetrated by the imams, scholars and Muslims for fourteen centuries?!

6 – There are many cases in which, if a fair-minded person thinks about it, he will realize that this law is invalid. For example:

(a)

The grandchildren may be well off and their paternal uncles (the sons of the deceased) may be poor, but in this case too the law would give the grandchildren a share of the inheritance in the name of the binding will, even though their paternal uncles are more entitled to this money than they are, because they are closer to the deceased than them, and are in need of it.

(b)

Why does the state law care about the grandchildren and not about the grandfathers and grandmothers who do not inherit, even though in most cases they are in greater need and may be sick and unable to work, and in need of medical treatment and maintenance?

Why does the law give something to the daughter's daughter, and not to the father's mother, for example?

(c)

The daughter's daughter may take more than the son's daughter takes. If someone dies and leaves behind a daughter and a daughter of a daughter who is deceased, and a daughter of a son, and he leaves behind 30 feddans for example, then according to the binding will, the daughter's daughter in this case gets one third of the estate or 10 feddans, which would have been her mother's share if she was alive.

And the daughter and son's daughter get the rest at a ratio of 1:3, so the son's daughter gets five feddans, or half of what the daughter's daughter gets!

Even though the son's daughter is more entitled to it. Hence the scholars were unanimously agreed that the son's daughter should inherit, and that the daughter's daughter does not inherit, so how can a non-heir be given more than an heir, even though their relationship (to the deceased) is of the same degree?

(d)

The son's daughter may take more than the daughter, because if a person dies and leaves behind two daughters, the daughter of a deceased son, and a sister, and he leaves behind 18 feddans for example, the amount that the son's daughter gets is one-third of the estate, which is 6 feddans, and the rest is divided among the two daughters and the sister, with the two daughters getting two-thirds, or 8 feddans, four each, and the sister getting the remainder, which is four feddans!

This irregularity and contradiction points to human imperfection and confirms the words of Allaah (interpretation of the meaning): "Had it been from other than Allaah, they would surely, have

found therein many a contradiction” [al-Nisa’ 4:82].

The strongest objection to this state law is that it has in fact become a kind of inheritance, hence the grandchildren take this share even if the deceased did not bequeath anything to them, and they take it regardless of whether he left a lot of money or a little, whether they are poor or well off. All of this indicates that it has become like an inheritance, and this is a rejection and change of the ruling of Allaah, may He be exalted.

Secondly:

As for cases where they claim that they have introduced this law as a remedy for poverty of the grandchildren, that may be solved in ways that do not conflict with sharee’ah.

The best way is by teaching the rich that it is obligatory or at least mustahabb for them to bequeath some of their wealth to their poor relatives.

The second way, if he does not bequeath anything, is for the heirs, if they are well off, to give the grandchildren or other poor relatives some of this wealth, which will be an act of charity and upholding ties of kinship on their part.

By means of these two methods, this problem may be solved without going against sharee’ah.

Thirdly:

With regard to taking money by means of this binding will and bequest, it is haraam, because Allaah says (interpretation of the meaning):

“O you who believe! Eat not up your property among yourselves unjustly”

[al-Nisa’ 4:29]

Consuming people’s wealth unjustly means taking it by means other than those which are prescribed and make it permissible.

The Prophet (peace and blessings of Allaah be upon him) said: “Your blood, your wealth and your honour are sacred to you, as sacred as this day of yours, in this month of yours, in this land of yours.” Narrated by al-Bukhaari (67) and Muslim (1679).

We ask Allaah to bring the Muslim back to their religion.

And Allaah knows best.