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Role of Ijtihad in Islamic Law of Succession: Wasiyyat Wajibah as A Case Study

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ABSTRACT

Ijtihād , which is the utilization of a Muslim jurist's sense of reasoning to determine the legal status of an action under the Shari'ah, has played a major role in widening the scope of Islamic law and in making it responsive to the unending human problems and needs. The aspect of succession in Islam has been a discipline, which common Muslims have always believed that its content has been fully addressed by the texts in exclusion of juristic polemics. Hence, the current study aims to assert the role of Ijtihād in the subject, using waṣiyyat wājibah (compulsory will) as a case study. The study adopts a qualitative method in reaching its submissions. It discovers that Ijtihād has played a major role in the development of mirath across ages. It also asserts that waṣiyyat wājibah is a product of both neo-Ijtihād and collective Ijtihād which is prone to further assessment of its validation, particularly in regions which do not share same experience with the Arabo-Muslim nations where it is legislated. The study recommends further research into how Ijtihād has developed the contents of mirath.

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Introduction

Shari'ah embraces all the Islamic rulings pertaining to Muslims in all ramifications, including creeds, applied rulings and moral virtues. The provisions in Shari'ah differ in terms of the legal weight they carry, and they also vary in terms of the degree of legitimacy. The variation as mentioned above usually emanates from the sources of Shari'ah, which have been classified into textual and rationalist sources. The textual sources comprise the Qur'an and Prophetic tradition, while the reason-based sources include the Ijmā' (consensus), Qiyās (analogy), Maṣlaḥah (public interest), Istiṣhāb (presumption of continuity), 'Urf (custom), Sadd adh-Dhari'ah (blocking the means to evils), etc. (Kamali, 1991). From the aforementioned classification, it is obvious that there is a wide area for human rationalization of Shari'ah contents than textualization. Even the areas with fair provision of texts are not also free of rationalization because there is need for contextualization of the texts before their application. Hence, Ijtihād which is the term used by

Muslim jurists for the contextualization and rationalization process has been from immemorial time the bedrock upon which the survival and sustainability of Shari'ah rely.

According to 'Alawani (1993), "Ijtihād is not only an absolute necessity for the preservation of Shari'ah's higher objectives, it is only through it will Muslims be able to construct a new specific infrastructure capable of addressing the crisis of Islamic thought and many problems of the contemporary time". Vikor (1995) attributes the significance of Ijtihād to the "possibility it may give to steer a new course for Islam and Islamic Law, a course that stays within the boundary of Islamic tradition, but at the same time avoids the blindness of simply imitating earlier scholars, without consideration of the changing conditions of society. In other words, both for modernists and Islamists, Ijtihād is a prerequisite for the survival of Islam in a modern world".

The Islamic Law of Succession enjoys much sacredness among Muslims. The sacredness emanates from the popular notion that Allah in exclusion of human interpretation has conclusively addressed the shares of every heir (Arikewuyo, 2022). In addition, the highest population of Muslims not only believe, through unauthentic traditions, that Inheritance Law is the best discipline in Islam, but they also await the time when specialists in the field would become infinitesimal (Arikewuyo & Jawondo, 2021). Despite this popular belief, the content of the Islamic Law of Succession is replete with instances of scholastic rationalization, which have even remained the foundation of distribution among Muslims across the globe.

A typical contemporary issue in Islamic law of succession that has been subjected to the case of Ijtihād is waṣiyyah wājibah (compulsory will). It is a concept that entails giving a grandchild whose father has died in the lifetime of his grandfather the share entitled to by his father, who is the biological child of the grandfather (Abu Zahrah, 2012). This concept has been taken as an exception to the unanimity of Muslim jurists, which requires that a grandchild is not qualified to inherit his grandfather if there is a biological son (either as his father or not) in the case (Ibn 'Uthaymin, n.d).

Against this backdrop, this study attempts to examine the role played by Ijtihād in the legitimization of waṣiyyat wājibah, which has even become a legislative law in many Muslim countries including Egypt, Jordan, Syria etc. The objective of the study is to investigate whether the opinion that legitimizes waṣiyyah wājibah has fulfilled the methodological processing of verdict formulation in Islamic jurisprudence.

Discussion

Previous studies have addressed the significance of Ijtihād in contemporary time and its need in preserving the dynamism of Shari'ah in the face of endless developments and changes. Fauzi (2015) discusses the guidelines of Ijtihād in modern time and classifies the degree of the level of

legal conclusions by a mujtahid into three. The alleged closure of Ijtihād in the previous ages has been addressed by Vikor (1995) who submits that, "the door was never fully closed, the expression was only used as a majority view among Islamic scholars. There was also always a minority that claimed that the closing of the door is wrong, and a properly qualified scholar must have the right to perform Ijtihād , at all times, not only up until the four schools of law were defined." 'Alawani (1993) traces the development of Ijtihād to the Prophet and his companion. The concept of neo-Ijtihād has been fully addressed by Ajetunmobi (1988) and Azeem (n.d) who submits that the alleged closure of Ijtihād was only referring to independent one (mutlaq) and not ordinary Ijtihād which is the focus of the new sets of Ijtihād .

Collective Ijtihād is another aspect that has attracted the attention of previous researchers. Aznan (2020) traces the adoption of this type of Ijtihād in the modern era to Rashid Rida, Sanhuri and Shalabi. Qaradawi (1994) on his part proposes collective Ijtihād as a replacement for consensus of Muslim jurists. The relationship between Ijtihād and tajdid (renewal) is the focus of Shabbar (2017) who submits that the former is a tool for achieving the latter.

As for the Islamic law of succession and its link with Ijtihād tools, Mohamad (2010) focuses on the applicability of Istishāb in selected cases of mirath. Arikewuyo (2023) addresses the surface of literalist and rationalist tendencies in Islamic inheritance with a submission that, "Muslims across the globe have maintained-as far as inheritance is concerned- the implementation of rationalist-based verdicts." Salamah, Daus and Juwayhan (2017) have focused on the application of waṣiyyat wājibah in Jordan, while Rahman and Monawer (2020) establish how waṣiyyat wājibah conforms to the Maqāsid ash-Shari'ah (higher objectives of Shari'ah). Azziz (2022) ventures into the modern medical developments and their implications on inheritance.

From the previous literature review, it is apparent that the lacuna open for investigation is the role played by Ijtihād in the formulation of waṣiyyat wājibah in contemporary times. For the sake of this, the paper is segmented into an introduction, conceptual analysis of Ijtihād, development of Islamic law of succession and the role of Ijtihād, waṣiyyat wājibah and Ijtihād, and a conclusion.

Conceptual Analysis of Ijtihād

The trilateral root j-h-d, vocalised either as jahada or jahuda, denotes the action of expending effort. Most lexicons, among them Lisan al-'Arab, distinguish between jahada and jahuda, with jahada referring simply to the expenditure of effort, and jahuda denoting the same process, but with an added element of hardship and difficulty (Shabbar, 2017, 2). Technically, according to 'Alawani (1993), Ijtihād can be described as a creative but disciplined intellectual effort to derive legal rulings from those sources while taking into consideration the variables imposed by the fluctuating circumstances of Muslim society. Qaradawi (1996) quoted Shawkāni defining Ijtihād as exertion of juristic efforts at reaching the legal status of an applied Shari'ah injunction through

the means of interpretation.

The general scope of Ijtihād is to identify the Shariah's objective and intent from speculative sets of evidences or bring up the Shari'ah's position on a new case that is not found in the classical works. Based on this, it is a taboo for a jurist to exercise Ijtihād on issues where there are definitive textual provisions or consensus of past Muslim scholars. It is understood from the above assertion that many issues even with existence of textual provisions on them are still open for Ijtihād because the largest percentage of the texts is speculative in meaning and authenticity. This assertion accounts for the reason why Muslim jurists have only agreed in a number of issues.

There are sets of evidence supporting the exercise of deducing religious injunctions through human efforts, later known as Ijtihād . The Qur'an in Chapter 29 verse 69 provides: "And those who strive for Us -We will surely guide them to Our ways. And indeed, Allah is with the doers of good." (Al-Muntada Al-Islami, 1997). While making comment on the verse, Qurtubi (1964) narrates that the verse was revealed even before the commencement of armed conflict; he further reports some Salaf comprehending the verse as a general commendation for strivers in the cause of Allah, including those searching for a religious verdict for the sake of its implementation. As for the Hadith literature, it points to specific legal aspects of Ijtihād. When speaking of the circumstances surrounding the beginning of the Prophet's reception of revelation, for example, Aishah is reported to have quoted him as saying, "So he [Gabriel] took me and pressed me until all my energy was spent." (Bukhari, 2006, no.3). Another example is found in a statement attributed to Amr ibn al-Ās who said, "If a ruler issues a judgment based on an effort to arrive at the truth, and if his judgment is correct, he will receive two rewards. If, on the other hand, his judgment is incorrect, he will receive one reward." (Bukhari, 2006, no. 7352).

Commenting on the above statement Khattabi (2018) wrote, "The ruler whose judgment is mistaken is still rewarded, because his effort to arrive at truth is a form of worship. He is not rewarded for the mistake, but neither does he incur any guilt on account of it." If someone pronounces a judgment concerning something about which he is not qualified to speak, he will receive no reward whether his judgment was mistaken or correct. In fact, he will incur guilt for so doing. If, by contrast, a learned individual who is qualified to speak on a given topic pronounces a judgment on said topic, he will receive a reward even if his judgment is mistaken, since the interpretative effort he expended – his Ijtihād – in a search for truth is viewed as a kind of worship. Ignorance and a lack of competence are most likely to lead an individual into error, whereas knowledge and competence are most likely to lead to a correct judgment. Needless to say, scholars are in agreement that judgment should be entrusted to those most likely to rule correctly, not to those who would judge correctly only in rare or exceptional situations (Shabbar, 2017).

Al-Tirmidhi recorded an account in which, when the Prophet sent Muadh ibn Jabal to Yemen

to serve as a judge there, he asked Muadh how he would rule on situations brought before him. Muadh replied, "I will rule based on what is written in the Book of God." The Prophet then asked Muadh how he would rule if the situation in question was not dealt with in the Book of God. To this Muadh replied, "Then I will base it on the sunnah (example) of the Messenger of God." How, then, would he rule if the situation in question was not addressed by the example of the Prophet? Here Muadh responded, "I will endeavor to form my own opinion (ajtahidu ra'yÏ)." Upon hearing this, the Prophet exclaimed, "Praise be to God, who has granted success to the messenger of the Messenger of God!" (Abu Daud, 2004, no. 3592).

From the definition and authoritative evidences for Ijtihād, it is not farfetched to see its significance and necessity in preserving the application of Islamic law throughout the ages. It is a manifestation that has characterized every era in Islamic history. 'Alawani (1993) traces the evolution of Ijtihād in the Muslim ummah to the time of the Prophet who exercised it in the absence of revealed texts and also approved same for a number of his companions. He lamented about the setback that visited the noble exercise during the Umayyad regime upward consequent upon the separation between power and scholarship and the persecution meted out against the scholars who refused to bow to the dictates of political opportunists. The existence of the four schools of law with their different methodological approaches to textual interpretation is a testimony to the role played by Ijtihād in expanding the tentacles of Islamic jurisprudence. According to Philips (2006), the virtues possessed by the four Imams which triggered them to exercise Ijtihād later faded out from subsequent followers who over-relied on the texts of the works by their teachers. Hence, this setback gave birth to two different tendencies namely, laying down strict requirements for the exercise of Ijtihād and later the allegation of the closure of Ijtihād.

Some of the conditions required of a Mujtahid- which are meant to expose the quacks- include mastery of the verses related to legal rulings in the Qur'an, mastery of the Sunnah, a strong comprehension of Arabic language, exposure to the issues where scholars have formed a consensus, mastery of fundamentals of fiqh, mastery of Maqāsid ash-Shari'ah, the knowledge about the customs of one's audience, piety and courtesy, having a good creed, etc (Qaradawi, 1996). It is worthy of note that the aforementioned conditions are detailed in the classical works, such that each condition has a wide branches and varieties with a strong probability that a quack will be afraid to risk the claim of becoming a Mujtahid.

The scarcity of Muslim scholars who could meet up with the laid down requirements, particularly in the subsequent centuries highly characterized by decline in intellectuality and productivity, gave birth to a campaign for the closure of Ijtihād . This campaign was based on the fiction that the classical works have addressed all issues begging for religious verdict and the incompetence of majority of the living scholars. Vikor (1995) submits that, "the door was never

fully closed, the expression was only used as a majority view among Islamic scholars. There was also always a minority that claimed that the closing of the door is wrong, and a properly qualified scholar must have the right to perform Ijtihād, at all times, not only up until the four schools of law were defined." Azeem (n.d) submits that the alleged closure of Ijtihād was only referring to independent one (mutlaq) and not ordinary Ijtihād which is the focus of the new sets of Ijtihād. The campaign outlived many centuries with a voiceless reaction of its opponents until the modern time when it was challenged to a defeat. The defeat of the campaign was actualized by another campaign for neo-Ijtihād, fronted by modernists such as Abduh and Iqbal (Noel, 2006).

The neo-Ijtihād is defined by Doi (1990) as an intellectual re-interpretation of various issues. Ajetunmobi (1989) submits that neo-Ijtihād is an offshoot of an early Ijtihād of the earlier generation of Muslims which is now reinterpreted so as to bring out new legal rulings according to culture and custom of a particular society. The scope of the neo-Ijtihād has been classified into two namely, Intiqāi (selective) which entails a systematic selection among the existing views what best suits the contemporary peculiarity and Inshāi (creative) which requires the modern jurists to bring up new rulings for new cases (Qaradawi, 1994). However, as noted by Arikewuyo (2016), some modernists in the course of pursuing neo-Ijtihād have gone extremes. It is observed that some liberal scholars in a bid to please the Westerners are deliberately gearing Islam towards conforming totally to the Western life style. Qaradawi (1994) mentioned six lackadaisical attitudes being displayed by advocates of neo-Ijtihād , which are in contrast to the rules of the business as follows: ignoring textual provision, misconception of texts, ignoring a clear consensus, misapplication of analogy, over-consideration of public interest at the expense of clear texts.

In a bid to save the Muslim ummah from the unregulated exercise of individual Ijtihād in modern time, some scholars have identified Ijtihād Jama'I (collective Ijtihād) as a lasting solution to the problem. The collapse of the closure theory, according to Aznan (2020) has given a new dimension to applying Islamic law in the modern world. Both modernists and Islamists accept that collective Ijtihād will provide Islamic law with fresh interpretations that are suitable for the modern world. The success of this concept in retaining an attractive place in modern works is attributed to his propounders, notably among them are Rashid Rida, Sanhuri and Muhammad Shalabi (Aznan, 2020).

Role of Ijtihād in the Development of Islamic Law of Succession

Apart from the explicit Qur'ānic verses on Mīrāth, there are sayings and judgments of the Prophet which constitute the major literature on the subject during the Prophetic era. Some of the contributions of Prophet Muhammad to the subject are the categorization of heirs to fixed and residual shares beneficiaries, preventing a Muslim from inheriting a non-Muslim and vice-versa, distribution formulae for the cAṣabah Mac al-Ghayr, lumping two grandmothers for one-sixth

share, etc.

Mīrāth during the eras of the Companions and their successors became widened as a result of matters that generated juristic controversy among the scholars in that era. The outcome of such disagreement later constituted additional literature and a ground for Ijtihād in the subject. The inheritance matters that attracted the exercise of Ijtihād by scholars at that stage include the inheritance of a Muslim from a non-Muslim. There is unanimity among the scholars that a non-Muslim cannot inherit a Muslim. However, as for a Muslim inheriting a non-Muslim, some scholars among the companions and their successors have contended that it is legitimate (Aṣ-Ṣan'āni, 2006). Some of the scholars are Mucāz bin Jabal, Mucāwiyah bin Abī Sufyān, Ibn al-Musayyab, Masrūq, etc. The evidence relied upon by these scholars is the tradition reported by Abū Dāud (2006) that the Apostle of Allāh said: 'Islām increases and does not decrease". A prominent Muslim judge during the first century of Islām, Yaḥya bin Yacmar (d. 686) has given a judgment in favor of a Muslim and the mentioned tradition was his authority. (Dāra Quṭnī, 1966). The view was given state authority during the regime of Mucāwiyah (d. 680) who ordered all the judges under him including the prominent Shurayḥ (d.697) to adopt it. (Albazm 2018).

The majority of Muslim jurists of the day rejected what they described as an illegitimate and unjustifiable specification of the generalization in the Prophetic statement. (Ibn Ḥajar, 2004, 12/50). Be it as it may, the controversy generated by the matter added weight to the literature on Mīrāth during the stage under review.

Another controversial matter that evolved in the era of the Ṣaḥābah was the case of making the full brothers and sisters or paternal brothers and sisters eligible to inherit in the presence of the legitimate grandfather. It is well established by the provision of the Qur'ān that the father of the deceased would always prevent all kinds of brothers and sisters from inheriting.

The rationale behind this is to prevent what seems to be a duplication of estate allocation. The brothers and sisters of the deceased are also the direct children of his father. Hence, any portion of the estate given to the father is tantamount to giving them as well, since they remain the major beneficiaries of it when the father passes on. However, in a simple principle, the grandfather ought to substitute the father in this role. This is because the grandfather steps into the shoe of the father when the latter is absent. The silence of the Qur'ān and Sunnah on the matter has fanned the ember of the disagreement among the companions and their successors.

Abū Bakr Ṣiddīq, Ibn Abbās, Ibn Umar, Huzaifa bin al-Yamān, Abū Mūsa al- Ashacri, cĀishat, Hasan al-Baṣri, Ibn Sīrīn, etc. have held that the grandfather would prevent the Ikhwah from inheriting. (Az-Zuhayli, 2016, 205). In sharp contrast, cAli, Ibn Mascūd, Zayd bn Thābit, etc. opined that the Ikhwah can inherit in the presence of the grandfather. The Egyptian and Syrian laws have adopted this view. It is worthy of note that the supporters of Ikhwah inheritance with the

grandfather have also differed among themselves regarding the formula to be used in sharing the estate.

Another matter that dominated the literature of Mīrāth during the time of the companions and their successors was the case in which the estate estimation surpasses the accumulated portions of all the heirs. The fate of the leftover technically known as Ar-Radd is a subject of disagreement among the companions and Zayd bin Thābit. According to the former, the leftover would be shared among the heirs using the inheritance formula, while the latter insisted that it should be returned to the state treasury. (Albazm, 2018, 104).

Other cases that constitute a ground for Ijtihād are the cases of al-Akdariyyah and Musharrakah. It is obvious from the foregoing that in the first century of Islām, the major contents of the literature of Mīrāth are the Qur'ān, Prophetic traditions, and polemics among the companions and their successors. The aforementioned discussion shows that Ijtihād has played the role of interpreting the existing textual provisions in inheritance matters as well as creating new ruling for matters that have not been addressed by the texts.

Waṣiyyat wājibah: An Overview

As a verbal noun waṣiyyah refers to the action of the person who makes the will (mūṣi) as the Quran mentions "o ye who believe, when death approaches any of you, take witnesses among yourselves when making bequests" (5:106). Waṣiyyah also refers to the item given through it (Mūṣa bihi) as the Quran states "after the payment of legacies and debts" (4:11). Thus, in the literal sense, waṣiyyah means to determine, to command, to recommend, to connect and so forth (Rahman and Monawer, 2020). Technically, waṣiyyah is a gift, which may be in the form of cash, claim of debt, or any other benefit in which the transfer from the benefactor (mūṣi) to the beneficiary (mūṣa lahu) becomes effective only after the death of the testator (Ambali, 2020, 3). It covers any instructions/orders/desires of a person (testator) that certain obligations in respect of certain outstanding duties against him, which he failed to carry out before he died, be carried out (Ambali, 2020).

Waṣiyyah is verified by the Quran, Sunnah, and scholarly consensus. The Quran states 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 Allah-fearing (2:180). Before the ruling of inheritance making a will for the parents and next of kin was obligatory. However, after the ruling of inheritance, the obligation of waṣiyyah is removed, but it remains lawful and recommended subject to some conditions. Waṣiyyah is prescribed before the settlement of the debt as the Quran mentions 'the distribution of inheritance is after the settlement of the will and debt' (4:11, 12).

Besides, it is recommended to take witnesses upon making waṣiyyah as the Quran mentions'

"o ye who believe, when death approaches any of you, take witnesses among yourselves when making bequests" (5:106). The validity of making waṣiyyah is inferred explicitly from the command of taking witnesses to that. The Prophet (PBUH) says 'it is not right for any Muslim who has anything to bequeath that he may pass even two nights without having his will written' (Bukhari, 2006, no. 2768). This narration encourages making the will by everyone who has capacity for that. The Prophet (PBUH) also mentions 'he who dies with a will, has died in the way of Allah and the Sunnah, and fear of Allah and martyrdom, and dies while his sins are forgiven' (Ibn Majah). When the companion Sad ibn Abi Waqqas R. intended to make waṣiyyah for two thirds or half of his properties, the Prophet (PBUH) stopped him. It made the waṣiyyah valid for up to one third (Bukhari, Muslim). Thus, the Sunnah also validates the waṣiyyah . The validity of waṣiyyah is also verified by unanimous agreement of the scholars. All Muslim jurists unanimously agree that making a will for anyone except the heirs up to one third is valid and lawful (Rahman and Monawer, 2020).

Wasiyyat wajibat (obligatory bequest) is a new concept that evolved precisely in 1946 at Egypt. It moved from being a contemporary juristic concept to becoming a legislative law in many Arabia countries. Sultan (2006) defines waṣiyyah wajibah as a fraction of property that the grandchild of the deceased deserves when his father dies in the lifetime of his grandfather. After that, he takes the portion of his father the same as he lives, which shall not exceed one third, and the law requires that. Khalifah (2009) defines waṣiyyah wajibah as the obligatory waṣiyyah in one-third of the legacy for the child of the deceased's son. The latter died in deceased's lifetime or died with him through legally. So, waṣiyyah wajibah is something required by the law for the next of kin who does not inherit like the grandchild from son and daughter within the ambit of one-third of the legacy. To execute this waṣiyyah , no initiation is required. If the deceased initiates it by his free will, it would be executed, and if he ignores it, the law will take his course. (Rahman and Monawer, 2020). Waṣiyyah wajibah is enacted by Egyptian law in 1946, followed by the Syrian Family law in 1953, Tunisian Family law in 1956, Moroccan Family law in 1958, Palestinian law in 1962, Kuwaiti law in 1971, Jordanian law in 1976 and so forth (Rahman and Monawer, 2020).

The implication of wasiyyat wajibat is the forfeiture of the consensus formulated by previous jurist over a grandchild being prevented from inheriting his grandfather when the deceased is succeeded by direct biological sons. Hence, the concept has attracted condemnation from some jurists, prominent among them are the Saudi's Hanābilah scholars who see it as a clear contravention of an established rule in Islamic law of succession. Ibn Uthaymin (n.d) submits that waṣiyyat wājibah contravenes the basic principle of inheritance, which requires a grandchild to be prevented from inheriting when the deceased is succeeded by his direct sons. However, the

majority of Muslim judges and jurists, most especially those who are entrusted with coining Islamic codes in Muslim world have adopted waṣiyyat wājibah as a neo-Ijtihād manifestation necessitated by the urge to protect the interest of the grandchildren (Qaradawi, 1994).

Proponents of waṣiyyah wajibah try to relate it with the legal (shar'i) evidence. In terms of being obligatory, they rely on the verse of waṣiyyah . Also, they rely on the opinion of Ibn Hajm as well as some views of the companions and their followers who opine that making waṣiyyah is obligatory for the next of kin who does not inherit. Moreover, waṣiyyah wajibah is underpinned by Islamic legal maxims and noble objectives of the shariah. The Quran mentions '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 Allah-fearing' (2:180). This verse clearly states that making waṣiyyah is obligatory for the parents and next of kin. This 4 obligation has been rescinded by the verse of inheritance for the parents and next of kin who inherit from the deceased. However, the obligation of making waṣiyyah still remains for the parents and next of kin who do not inherit from the deceased (Rahman and Monawer, 2020).

The law stipulates numerous conditions for the entitlement of waṣiyyah wajibah. There are some conditions related to the descendent that deserves waṣiyyah wajibah while some other conditions are related to the child who is dead. The conditions related to the descendent that deserves Waṣiyyah Wajibah are as follows:

i: To be entitled to waṣiyyah wajibah one should be the descendent of the deceased.

ii: The descendent who deserves waṣiyyah wajibah shall not inherit from the grandfather. If he inherits whether being the Quranic heir like the daughter of the son or being the agnates like the son of the son, such descendent shall not be entitled to waṣiyyah wajibah. This is irrespective of whether the portion of inheritance is little or much. Waṣiyyah wajibah is legalized to compensate what the descendent misses up from inheritance. Since the descendent entitles to bequest and becomes the inheritor, then no point exists for the law to give him anything beyond inheritance (Abu Zuhrah, 1988; Qasim, 1987; Barraj, 1999).

iii: The deceased grandfather shall not grant anything in his lifetime to the descendent without compensation that equals to the waṣiyyah wajibah. For example, he makes a waṣiyyah for his grandchild equal to the portion of his father, or donates him from the inheritance that equals to the portion of waṣiyyah wajibah, or makes waqf for him, or sells to him with a token price something that equals to the waṣiyyah wajibah. In all these cases waṣiyyah wajibah will not be applicable for the grandchild whose father died during the lifetime of grandfather. However, if the grandfather grants him less than what he supposes to get from the inheritance, the balance can be taken from waṣiyyah wajibah. But, if the grandfather donates him more than what assumes to get from waṣiyyah wajibah, then the additional portion would be considered voluntary waṣiyyah and

accordingly the provisions of voluntary waṣiyyah would be applicable thereof.

iv: The descendent that deserves waṣiyyah wajibah shall be alive upon the demise of the donor (musi).

v: The descendent that deserves waṣiyyah wajibah shall not be blocked by his principal, i.e. someone closer than him to the deceased.

vi: The descendent that deserves waṣiyyah wajibah shall not be banned from the inheritance per se. If he is banned from the inheritance due to being a killer or different in faith, he will not be entitled to waṣiyyah wajibah. Waṣiyyah wajibah is a compensation for the missing portion of the inheritance, and in the case of being banned from an inheritance, there will be nothing to be compensated.

vii: The waṣiyyah wajibah for the grandchildren shall be equal to the portion of their father in inheritance if he is alive if it does not exceed one-third of the inheritance(Rahman and Monawer, 2020).

The conditions related to the deceased child are mentioned below:

i: The deceased child (i.e. father of grandchildren) shall die in the lifetime of the (muwarrith) benefactor (i.e. grandfather) really or legally or shall die with him. Since he is dead upon the demise of the grandfather, he shall not be entitled to bequest, and accordingly, his children also will be deprived of the legacy of their grandfather. Hence, they will not be entitled to waṣiyyah wajibah. But, if the deceased child (father of grandchildren) dies after his father (i.e. grandfather of grandchildren), he will be entitled to the legacy of his father, and accordingly, his children will be entitled to his legacy. Thus, they will not be entitled to waṣiyyah wajibah.

ii: Assuming to be alive, the deceased child (i.e. father of grandchildren) shall be entitled to inheritance in the lifetime of his father. Thus, there should not be any hindrance that prevents him from being inherited from his father. If he is prevented from the inheritance of grandfather due to homicide or difference in faith, his children will not be entitled to waṣiyyah wajibah. Waṣiyyah wajibah is legalized to compensate what the grandchildren miss from the inheritance due to the demise of their father. Since their father does not have any portion from inheritance to be compensated, they will not be entitled to waṣiyyah wajibah (Rahman and Monawer, 2020, 3-4).

The conditions related to the amount of Waṣiyyah Wajibah are discussed below: The law stipulates that the amount of waṣiyyah wajibah will be determined according to the portion of the principal (father of grandchildren) in inheritance, assuming that he is alive, provided that such amount shall not exceed one-third of the inheritance. However, some legal system confines waṣiyyah wajibah to the grandchildren from the son only, not from the daughter. So, if the benefactor makes waṣiyyah wajibah with more than one third, then the additional portion will be considered the voluntary waṣiyyah and will be subject to the approval of the heirs. If the heirs

allow waṣiyyah in more than one third, it will be executed, and if they do not allow it will be invalid in the additional amount. In a case where some heirs allow, and some others disallow then waṣiyyah will be executed in the portion of those who permit so. If waṣiyyah wajibah is made in less than what they deserve from their benefactor, then they shall be fully paid what they deserve. If no waṣiyyah wajibah is made for them then essentially, they will be given that within the limit of one third. So, waṣiyyah wajibah will be determined with what is smaller between the inheritance that the descendent receives should he live and the one third. If the inheritance is smaller than waṣiyyah wajibah will be measured with that; otherwise, it will be limited up to one third if it is smaller than the inheritance of the deceased (Rahman and Monawer, 2020, 4-6).

The Egyptian and Kuwaiti laws specify that the beneficiary of waṣiyyah wajibah is the descendant of the child who dies in the lifetime of his father or mother, irrespective of whether this child is son or daughter. So, the descendent of the sons will be entitled to waṣiyyah wajibah, regardless of whatever level they are. But, the children of daughter get waṣiyyah wajibah only if they are of the first level. On the other hand, the Syrian, Moroccan and Jordanian laws confine waṣiyyah wajibah to descendent of the son only. So, the grandchildren from the son, grandchildren from the grandson and so on will be entitled to waṣiyyah wajibah, provided that each principal blocks his descendent and does not block the other descendent. Every descendent deserves the portion of his principal only. But, the descendent of the daughter who died before her father or mother will not be entitled to waṣiyyah wajibah (Rahman and Monawer, 2020).

Waṣiyyat wājibah: An Overview

Proponents of waṣiyyat wājibah admit that it did not exist in the previous eras of Islamic history. It is worthy of note that the concept possesses two peculiar features namely, neo-Ijtihād and collective Ijtihād . It belongs to the category of neo-Ijtihād because such rule has never existed in the classical works and it is collective because it is a product of large number of mujtahidun who are all convinced with its formulation. As previously mentioned, neo-Ijtihād can either be creative or selective. Waṣiyyat wājibah, to many contemporary jurists, is a creative matter, while Qaradawi (1994) submits that it is a mixture of creative and selective Ijtihād . It is selective because its proponents chose to follow the view of some ancient scholars who opine that a will can be compulsory at times, while it is creative because restricting the obligation of making a will to the grandchildren is unprecedented (Qaradawi, 1994).

It is well-known among students of Islamic jurisprudence that an Ijtihād must have a basis and the basis is prone to assessment of other jurists who may end up supporting or opposing the view of the Ijtihād . The major basis of waṣiyyat wājibah, according to his proponents, is attaining a public interest that affects many grandchildren who become wretched because of the death of their grandfathers who have stepped into the shoe of their deceased fathers without having a

guaranteed share from their estate. Public interest otherwise known as al-Maslahat al-Mursalah is the consideration of "unstated" public interests which may not be explicitly identified or stated in any text in the Qur'an or Sunnah but which are generally agreed upon based on circumstances which arise in human society (Da'wah Institute of Nigeria, 2019, 81). In its constructive application, the principle is a tool of legal reasoning whereby unprecedented rulings are legislated to secure the best interest of individuals or societies that are without textual precedent (Da'wah Institute of Nigeria, 2019, 82).

Basing an Ijtihād on a public interest is not sufficient for legitimization. There is a need for the assessment of the situation on ground whether it conforms to the conditions of a valid public interest. Kamali (1991) mentions the conditions a Maṣlaḥah should fulfil before its recognition: it should be genuine and not imaginary; it must be general (kulliyyah) in that it secures benefit, or prevents harm, to the people as a whole and not to a particular person or group of persons. This means that enacting a hukm on grounds of istislah must contemplate a benefit yielded to the largest possible number of people. Also, the Maṣlaḥah must not be in conflict with a principle or value which is upheld by the nass or ijma (Kamali, 1991, 240-241). Arising from the above conditions, waṣiyyat wājibah as construed by the Muslim legal experts in contemporary time has met up with all the conditions of Maṣlaḥah . It is my observation that regarding waṣiyyah wajibah as a means to cater for the grandchildren is built upon the assumption that the grandfathers are financially capable. This assumption may not apply to a large number of developing nations where poverty is the order of the day. In such nations waṣiyyat wājibah will not definitely serve its purpose. Hence, the concept is yet to attract any attention from the Muslim judges in Nigeria, Ghana and other west-Africa sub-region.

Of the three conditions of Maṣlaḥah, the opponents of waṣiyyat wājibah have always emphasized on its being in conflict with the text. The text according to them is the consensus formulated by Muslim scholars over the prevention of a grandchild from inheriting his grandfather that has direct children. This condemnation cannot hold water because the proponents of waṣiyyat wājibah never claimed it is a revisit to the conclusive matter of consensus. Rather, they have expressed with much clarity that the concept belongs to the category of will, and not inheritance sharing formula. Hence, discussing waṣiyyat wājibah under the chapter of inheritance-as done by Sabiq (n.d)- is not accurate. The majority of contemporary authorities in the field of mirath, such as Badran (2006) and Abu Zahrah (1988) have restricted it to the discourse on bequest and will.

Meanwhile, Rahman and Monawer (2020) have postulated another basis for the validation of waṣiyyah wajibah, which is its conformity to the maqasid shari'ah. According to them, waṣiyyah wajibah implements maqasid shariah as it protects of lives of grandchildren and ensures their continuous survival by providing for them a fraction from the inheritance not exceeding one-third

of it. The lawfulness of waṣiyyah wajibah brings justice, solidarity and brotherhood in the society. Waṣiyyah wajibah would be a great means to ensure the wellbeing of such who are by virtue not entitled to get any fraction from the inheritance and removes hardship from them and such waṣiyyah wajibah achieves maqasid shariah in human society. The submission of the two scholars is in tandem with the new trend of expanding the scope of maqasid to embrace values and virtues which are central to the uniqueness of modern world (Da'wah Institute of Nigeria, 2019).

Conclusion

The paper from the foregoing has been able to showcase the role played by Ijtihad in the development of Islamic law of succession. Ijtihād has played the role of interpreting the existing textual provisions in inheritance matters as well as creating new rulings for matters that have not been addressed by the texts. Wasiyyat wajibat (obligatory bequest) is a new concept that evolved precisely in 1946 in Egypt. It moved from being a contemporary juristic concept to becoming a legislative law in many Arabian countries. Waṣiyyah wajibah was enacted by Egyptian law in 1946, followed by the Syrian Family law in 1953, Tunisian Family law in 1956, Moroccan Family law in 1958, Palestinian law in 1962, Kuwaiti law in 1971, Jordanian law in 1976, and so forth. The implication of wasiyyat wajibat is the forfeiture of the consensus formulated by previous jurists over a grandchild being prevented from inheriting his grandfather when the deceased is succeeded by direct biological sons. Hence, the concept has attracted condemnation from some jurists, prominent among them are the Saudi's Hanābilah scholars who see it as a clear contravention of an established rule in Islamic law of succession.

The paper submits that the enactment of wasiyyat wajibat by modern Muslim legal experts has fulfilled the conditions of Maslahah, which is their strongest basis in this discourse. However, considering the divergence between what constitutes public interest from one region to another, the paper concludes that the interest may not apply to a large number of developing nations where poverty is the order of the day. In such nations, waṣiyyat wājibah will not serve its purpose. Hence, the concept is yet to attract any attention from the Muslim judges in Nigeria, Ghana and other west-Africa sub-regions. The paper recommends further study into how ijtihad has or can develop the subject of mirath in contemporary time.

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